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The World's First 'Robot Lawyer' Short-Circuited by Prosecutors, Now Faces Class Action Lawsuit

By Tom Jarvis

In recent years, artificial intelligence (AI) has been swiftly permeating the legal world. Legal research tools like Westlaw and LexisNexis have used a type of AI called Natural Language Processing (NLP) for more than a decade, and now ChatGPT has passed the bar exam (for more on that, see Misty Griffith's article on this page). But when I first heard the term "robot lawyer," I just had to find out what that was all about. Enter DoNotPay, a New York-based tech company that dubbed itself the "world's first robot lawyer."

As a child of the '80s – when I heard about a possible robot lawyer – I recalled several science fiction films that featured "futuristic" technology like self-driving cars, video calls, and military drones, which have all come true. This line of thought inevitably brought to mind the film, *The Terminator,* and its tech corporation, *Cyberdyne Systems*, which was responsible for the development of *Skynet*, a self-aware AI bent on eradicating humanity. I envisioned an Arnold Schwarzenegger lookalike wearing a suit bursting through the courtroom doors, which called to mind some questions: Would his titanium alloy endoskeleton set off the metal detectors? When court breaks for recess, will he say, "I'll be back?"

However, after a bit of research, I learned that DoNotPay's robot lawyer is just a legal service chatbot (aka lawbot) app, and its creator pulled a publicity stunt on Twitter.

DoNotPay CEO and founder, Joshua Browder, created the company in 2015 as a web-based software to help consumers contest parking tickets. It later became an app which adopted the use of the GPT-3 platform – which has become a hot topic as of late with OpenAI's use of the platform with ChatGPT – and expanded to include other legal services, such as generating demand letters and tracking down money from unclaimed inheritances and forgotten refunds.

The landing page of the DoNotPay website boasts they can help consumers "fight corporations, beat bureaucracy, find hidden money, and sue anyone."

In January 2023, Browder announced that on February 22, DoNotPay's "robot lawyer" would represent a defendant fighting a parking ticket in an actual courtroom. Through the use of Apple AirPods in the defendant's ears, the AI would listen to the case and provide real-time advice to its client.

A few days later, Browder took to Twitter to raise the stakes with the following statement:

"DoNotPay will pay any lawyer or person $1,000,000 with an upcoming case in front of the United States Supreme Court to wear AirPods and let our robot lawyer argue the case by repeating exactly what it says. We have upcoming cases in municipal (traffic) court next month. But the haters will say 'traffic court is too simple for GPT.' So, we are making this serious offer, contingent on us coming to a formal agreement and all rules being followed. Please contact me if interested!"

Browder's plans never came to fruition, though. In late January, he Tweeted that he was pulling the plug after receiving "threats" from "State Bar prosecutors." He claimed one of the prosecutors told him that if he proceeded, he could face six months of jail time for the unauthorized practice of law. He later told the Twitterverse that the company is "postponing our court case and sticking to consumer rights."

Attorney John Weaver, who wrote a book called, *Robots Are People Too: How Siri, Google Car, and Artificial Intelligence Will Force Us to Change Our Laws*, says he doesn't think robot lawyers will become a thing anytime soon. Weaver is on the Board of Editors for *RAIL: The Journal of Robotics, Artificial Intelligence & Law* and writes a column, "Everything Is Not Terminator."

ROBOT LAWYERS *continued on page 20*

Jack the facility dog sitting on Judge Erin McIntyre's bench at Hillsborough Circuit Court. Photo by Tom Jarvis

Paw and Order: Meet Jack, New Hampshire's Newest Canine Professional

By Tom Jarvis

De-escalating heightened emotions and providing comfort in the courtroom rests on the capable and furry shoulders of Jack, an eight-month-old Yellow Labrador training to become a facility dog. Jack was chosen as a standout from a litter of seven because he instantly showed all the characteristics of temperament needed for this kind of work. As far as I could uncover, Jack is the first dog in the Granite State to work inside the courtroom.

As I wrote in my January 2022 Bar News article, *Canine Companions in the Courtroom: Facility Dogs in*

PAW AND ORDER *continued on page 20*

The Future Is Now: Language-Based, Generative AI and the Legal Profession

By Misty Griffith

The evolution of language-based, generative artificial intelligence (AI) is as rapid as the generation of text on the screen by ChatGPT, possibly the most well-known AI of this kind. My *Bar News* colleagues, Tom Jarvis, Donna Parker, and I watched in awe as ChatGPT, created a succinct and intelligible response to Tom's prompt, "Can you write a short article about using ChatGPT to write legal briefs?" Words flew across the screen producing a one-page response in less than a minute. The result is repetitious, over-simplified, and lacks eloquence; yet it is simultaneously amazing. (Read ChatGPT's unedited answer in the sidebar on page 21 and judge for yourself.)

As I commenced writing this article, it was a cautionary tale about the shortcomings of ChatGPT 3.5 (GPT-3.5). Subsequent developments, most notably the launch of the new and significantly improved ChatGPT 4.0, rendered my research out of date. New developments have occurred weekly, and sometimes daily, as I have worked on this article. Now, the cautionary tale is that noteworthy developments may have occurred subsequent to the submission of this article.

OpenAI unveiled the GPT-3.5 platform for public use

CHAT GPT *continued on page 21*

IN EVERY ISSUE

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INSIDE

A Recent Visit to our Nation's Capital Featured Cherry Blossoms and So Much More

By Jonathan M. Eck

President's Perspective

By Jonathan M. Eck

Orr & Reno
Concord, NH

In late March, I had the opportunity to make a short visit to Washington, DC. While I have been there before during the spring, this visit marked my first when the cherry blossoms were in bloom. Seeing the cherry blossoms in person was a true pleasure. I always enjoy seeing the many attractions in our nation's capital, especially this time of year, when spring is not yet quite in the air here in New Hampshire. But the opportunity to admire the abundant cherry blossoms was a special treat.

New Hampshire Bar Association Executive Director George Moore, our ABA State Delegate Jennifer Parent, and I were in Washington, DC to participate in ABA Day. ABA Day provides an annual opportunity to meet with our congressional delegation and/or some of their senior staff members in our nation's capital.

On ABA Day, state lawyer representatives from across the country meet with their elected officials to discuss matters of importance both in the perspective of the American Bar Association, which organizes ABA Day for legal professionals across the country, and, most critically, from the standpoint of their respective states. Meeting with our elected officials in DC also gives the NHBA's representatives a valuable opportunity to form or build relationships with the dedicated public servants who represent us and our state at the national level.

For the 2023 ABA Day, the ABA asked participants to advocate for Legal Services Corporation (LSC) funding. LSC is a publicly funded 501(c)(3) non-profit corporation established by the United States Congress. LSC was founded nearly 50 years ago, in 1974. Its purpose is to provide funding for civil legal aid organizations in an effort to ensure equal access to justice under the law for all Americans. Each year, LSC is funded through the congressional appropriations process. Presently, here in New Hampshire, LSC principally provides funding for 603 Legal Aid, which provides free civil legal advice and representation to low-income New Hampshire individuals and families.

603 Legal Aid functions as a private, non-profit law firm that renders legal services through staff attorneys and paralegals, and also with the strong support of volunteer attorneys. In addition to taking on cases, 603 Legal Aid hosts a central call center that fields questions from callers seeking civil legal advice and performs intake services for New Hampshire Legal Assistance and for cases that are ultimately assigned through 603 Legal Aid to volunteer attorneys.

The types of legal services that are funded through LSC include representation in housing and eviction cases, domestic violence matters, divorce and family law litigation, debt collection and related consumer finance complaints, matters concerning veterans' benefits, and other areas of the law. The legal services funded through LSC help address the justice gap that so many low-income Americans experience. Increased funding for the services helps meet some of the most basic and essential needs for Americans with limited financial resources. The aim of LSC funding is to try to ensure that the legal needs of all Americans, including low-income Americans, can be met. At all times, our nation faces competing budgetary needs and priorities. Addressing the justice gap and supporting the legal needs of vulnerable, low-income Americans remains an important initiative that requires and deserves attention.

One of the highlights from my visit to the District was a reception I attended at the United States Supreme Court that was held in the Great Hall. I have had the privilege of visiting that building twice before, to attend oral arguments. It is al-

PERSPECTIVE *continued on page 18*

The NHBA Welcomes Two New Staff Members

The New Hampshire Bar Association is pleased to announce the addition of two new staff members, Kimberly Saucier and Jennifer Hartshorn.

Kimberly Saucier joined the NHBA as a Controller and is responsible for the oversight of annual license renewal, member records, and financial reporting. She holds a bachelor's degree in accounting and an associates degree in computer information systems. Prior to joining the NHBA, Saucier worked at the law firm of Wadleigh, Starr & Peters as a Business Administrator. She has over 30 years of accounting, human resources, and business management experience.

"I am very pleased to return to the nonprofit sector and I look forward to working with everyone here at the Bar," Saucier says. "I feel my career has come full circle and am grateful to have the opportunity to work with such hard-working and dedicated individuals that are mission-driven."

Jennifer Hartshorn is the NHBA's new NHMCLE Coordinator. She received her Master of Library and Information Science degree from the University of Southern Mississippi. Throughout her 20-year career in libraries, she has supported and worked with various boards, maintained and mined databases, and provided superior customer service to patrons of the Seabrook Library, District of Columbia Public Library System, Chichester Central School, and GOBI/EBSCO.

"I am excited to be embarking on a new adventure with the NH Bar Association," Hartshorn says. "I have always loved learning new skills and I am looking forward to putting my library skills to new uses."

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EDITOR
Tom Jarvis
(603) 715-3212
tjarvis@nhbar.org

SALES AND TECHNICAL EDITOR
Donna J. Parker
(603) 715-3263
dparker@nhbar.org

BAR PRESIDENT
Jonathan M. Eck, Esq.
jeck@orr-reno.com

EXECUTIVE DIRECTOR
George R. Moore, Esq.
gmoore@nhbar.org

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

COMMUNICATIONS COORDINATOR
Vera Vaitones
(603) 715-3219
vvaitones@nhbar.org

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

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John Kacavas: Safeguarding the People of New Hampshire

By Kathie Ragsdale

John P. Kacavas has put away child predators like the school bus driver who videotaped himself assaulting autistic children, has won convictions of several Mexican cartel drug lords, and has earned the praises of no less than former US Attorney Eric H. Holder, Jr.

But the lifelong Manchester resident and former state Attorney General and state US Attorney says he has only been trying to make his city and state better – and safer – places.

"This is an important place for me and why I came back after law school and some experience in [Washington] DC," says Kacavas, who was awarded his juris doctor by Boston College in 1990. A Manchester Central High School graduate, he also earned a bachelor's degree from St. Michael's College and a master's from the American University School of International Service.

The child of Greek parents, Kacavas spent his early schooling speaking with a Greek accent and remembers being mocked for the moussaka his mother would pack him for lunch.

"All I wanted was a Wonder Bread peanut butter and jelly sandwich," he recalls with a laugh.

But his parents – Betty, a secretary and homemaker, and Nicholas, a printer at the Union Leader – also placed a premium on education and were proud when Kacavas became the first in his family to graduate from college.

He began his legal career at a private firm, Wiggin & Nourie, in his hometown of Manchester before becoming a prosecutor with the NH Attorney General's Office in 1993.

"One of the reasons I became a lawyer was to pursue justice for people who have been harmed or treated unjustly and victims of crime are the quintessential definition of people who have been treated unjustly," Kacavas says. "Working at the Attorney General's Office was just a real goal, the best place to work as a trial lawyer in the state of New Hampshire. It was the best job I ever had."

Over his six years with the AG's office, he served as Assistant Attorney General, Senior Assistant Attorney General, and chief of the Homicide Unit.

One of his high-profile murder cases involved the 1996 death of Vicki Bader, whose body was found in a shallow grave in Maine months after she had been subject to a series of atrocities that included finding her pet parakeets roasted in her oven and discovering a pipe bomb in her mailbox. With fellow prosecutor Joseph Laplante, now a US District Court Judge, Kacavas won a conviction against her ex-husband, Seth Bader, then a Stratham attorney. He was sentenced to life.

Laplante and Kacavas had been summer associates and then actual associates at Wiggin & Nourie and started work at the NH Attorney General's office the same day. Laplante has fond and sometimes humorous memories of their work together.

"In the mid-90s, we were fortunate to be co-counsel on the first murder trial ever held at the then-brand-new Rockingham County Superior Courthouse in Brentwood," Laplante recalls. "At one of the early hearings in the litigation, Judge [Kenneth] McHugh asked, 'Which one of you is lead counsel in this case?' In unison, we both responded, 'I am.' Everybody got a good laugh. Both the answers and the laughter pretty much summed up the relationship."

The two also later worked together at the US Department of Justice in Washington, DC. Years later, when Kacavas became US Attorney, Laplante recused himself from any of Kacavas' cases. Kacavas is also on Laplante's recusal list, and always has been, "so I'll likely never see him work in a courtroom again," Laplante says.

After his tenure at the AG's office and a year in Washington working at the Justice Department, Kacavas returned to New Hampshire to start his own firm, Kacavas, Ramsdell & Howard, before being tapped by the Obama administration to become US Attorney in 2009.

He became renowned for his work on child predators and internet crimes against children, and personally prosecuted John Allen Wright, a school bus driver who recorded himself sexually assaulting autistic boys and who was sentenced to 160 years in prison.

"I remember that sentencing hearing like it was yesterday," Kacavas says. "You go into a courtroom asking a judge to impose 160 years on someone. You do that warily. While it was beyond his capacity to serve that duration of a sentence, it was beyond our capacity to get justice for his victims. The statutory maximum was the only appropriate punishment."

He also won a conviction against David Kwiatkowski, an Exeter Hospital radiologic technician who infected 45 patients in several states with hepatis C. He got 39 years.

In addition, Kacavas successfully led the prosecution of several drug dealers who were members of the infamous Sinaloa drug cartel, headed by "Chapo" Guzman.

Kacavas served on several national policy-making committees and was appointed by US Attorney Eric Holder to serve on the National Commission on Forensic Science and served on the Child Exploitation and Obscenity Working Group.

He left his US Attorney position after six years.

"I stepped down because I felt like it's not a lifelong job," Kacavas says. "It's meant to be a time-limited job and I felt like my time was running out. I felt like I had probably been as effective as I was going to be."

His legacy drew praise from Holder, who said at the time that Kacavas had "safeguarded the people of New Hampshire and left an indelible mark on the nation."

Kacavas went on to serve as chief legal counsel and general counsel for the Dartmouth Health System, working "to ensure that revenue was coming in so the hospital could continue to provide its services…I felt like I contributed to sustainability."

Daniel P. Jantzen, Dartmouth Health System Chief Financial Officer, says it was clear from Kacavas' first day that "seeking justice for his clients was incredibly important to him."

John Kacavas (left) and Judge Joseph Laplante (center) pictured with security detail in 2010, when Kacavas and Laplante were in Baghdad for 10 days on a Rule of Law mission sponsored by the US State and Justice departments. Courtesy Photo

"He transformed our organization by transforming our Office of General Counsel and vigorously defending our mission," Jantzen adds. "His skills as a trained litigator are among the best that I have ever seen, his understanding and ability to apply the law second to none, his character above reproach, and his loyalty to those he is entrusted to protect and defend, unmatched. While it is easy to say that someone is irreplaceable, in this case, I have to say that it's true. There is only one John Kacavas in the state of New Hampshire."

From that position, Kacavas moved to the firm of Hinckley Allen, where he is counsel to the firm's Corporate & Business Group.

He still lives in Manchester with his wife, Mindy. The couple has three children.

Kacavas is chair-elect of the Business and Industry Association Board and sits on both the Manchester Chamber of Commerce Board and the Friends of New Hampshire Drug Courts. He is a 1996 recipient of the New Hampshire Bar Association's Robert E. Kirby Award, presented to "an attorney 35 years old or younger who demonstrates the traits of civility, courtesy, perspective, and excellent advocacy."

An occasional golfer, Kacavas confesses to having few hobbies.

"My bucket list is to get a bucket list," he says with a laugh.

A former member of the Manchester Board of School Committee and a Democratic state representative from 2000 to 2002, he says he has no desire to return to elected office.

"I very much enjoy being a lawyer and coming here to Hinckley Allen, where I want to finish my career," Kacavas says. "Fighting for justice doesn't change because you're not a prosecutor. It's about justice; what's the right thing to do."

"I wanted to live and work and help improve my community," he says of his career, "and that's what I hope I've had a small part in doing." ■

Committee Corner

Maureen Raiche Manning: Always a Part of the Conversation About Gender Equality in NH

By Meredith M. Lasna

The New Hampshire Bar Association's Gender Equality Committee established the Philip S. Hollman Award for Gender Equality when Judge Hollman retired from the Superior Court in 2003. The award is designed to honor his efforts as a stalwart advocate for gender equality in the legal system.


Manning

The NHBA Gender Equality Committee (GEC) has chosen an award recipient each year since 2004. A Hollman award recipient is someone dedicated to promoting respect and fair treatment toward all members of the judicial system. This recipient acts as a leader, educator, and role model on such issues.

The GEC is interviewing some of the Philip S. Hollman Award Recipients to further highlight their success in gender equality and to see what has changed (or stayed the same) since they received the award.

One cannot talk about work toward gender equality in the practice of law in New Hampshire without Maureen Raiche Manning being part of the conversation. As a founding member of the New Hampshire Women's Bar Association, presenting the second Hollman Award to Maureen in 2005 was a fitting tribute. I had the privilege of speaking to Attorney Manning about her work on gender equality in the practice of law in New Hampshire.

A life-long New Hampshire resident, Maureen is a graduate of the University of New Hampshire and Franklin Pierce Law Center. During her first 10 years of practice as a trial lawyer in the state, Maureen observed that women attorneys had their own needs and existing organizations did not meet those needs. She observed that county and state-wide bar associations were places for men to gather and network. She felt strongly that women should have a place where they could come together and have a voice regarding equity and inequity in the practice of law. She wanted to create an opportunity for women to work, network, and be supported by other women.

Maureen was not alone in her feeling that New Hampshire needed an organization to address the unique needs of women practicing law in the state. In 1991, Maureen invited women practicing in Hillsborough County to a reception to gauge interest in a women's bar association. The response was overwhelming, and the Hillsborough County Women's Bar Association was formed with more than 200 members. Maureen served as the first president of this county bar and in May 1998, was one of the incorporators when a statewide women's bar was formed. From 1998 to 2000, she served as the NHWBA's first president and helped the organization flourish. The NHWBA now provides its 335 members throughout New Hampshire with opportunities for professional development, leadership, and growth. To Maureen, it is empowering to women to provide them with opportunities to network and assume leadership roles.

Maureen remains committed to the association that she helped establish and to addressing equality and inequality in the practice of law in New Hampshire. She is still an active member of the NHWBA and, more recently, a member of the GEC. She sees her work serving on committees, participating in programs, and working on gender and pay equity surveys as important to promoting and advocating for gender equality in the legal system.

In addition to her work behind the scenes to suggest speakers and put together programs, she has served as a panelist providing her insight and experience. She highlighted specifically that her participation in the GEC's negotiation program stems from her recognition of how empowering role-playing opportunities can be. People benefit from learning by doing. Because of her valuable feedback, GEC asks her to return year-after-year as a panelist.

Maureen recognizes that a key area where there can be more work toward gender equality is for there to be more women judges in the state. She would like to see more women consider it as a career path. She supports programs that help women navigate the process and put themselves "out there," so they are in the position for consideration. Again, giving women attorneys the tools to succeed is why both the NHWBA and the GEC are still as important today as they were when they were formed.

On a more personal level, in addition to her work to support and encourage women in the practice of law throughout the state, Maureen mentors attorneys, particularly female attorneys. Her experience as a woman, an attorney with 35-years of experience, a wife, and a mother of three, gives her a point of reference and a commonality with the women she mentors.

Since receiving the Hollman Award, Maureen has seen significant changes in gender equality. There are more women practicing law, on the bench, serving in leadership roles, and leading law firms. She has observed that women-owned and women-run law firms like hers, Manning, Zimmerman & Oliveira, are doing as well if not better than their counterparts. As she puts it, these firms are "killing it." While she notes that we "are not there yet equality-wise," there has been progress.

Maureen encourages people concerned with gender equality to get involved by joining the NHWBA and the GEC, and to get the word out about the work of these groups. People from across the legal community should be involved, including those from big and small firms, solo practices, and the public sector.

Maureen loves that almost 20 years later, the Philip S. Hollman Award for Gender Equality continues to recognize people who are working hard toward change and equality in the practice of law. ■

Meredith Lasna is an attorney at Pastori | Krans and focuses her practice on civil litigation and employment law.

Committee Corner

Practice Before the NH State Courts? Share Your Support for Court Funding

By Derek D. Lick

If you practice before the New Hampshire courts and want to support efforts to ensure the courts have sufficient resources to docket your cases and schedule your hearings more quickly, now is the time to voice your support for the Judicial Branch budget under consideration in the state Legislature. It's important.

This year's bi-annual budget request is particularly important because it is driven by an evidence-based "Weighted Caseload Study" undertaken for the New Hampshire Judicial Branch by the National Center for State Courts (NCSC). The study – the first workload assessment since 2005 – found that the courts needed more than 80 additional judicial officers and court staff to manage the caseload effectively and efficiently. That included 17 additional judges in the Circuit Court, which handled an average 126,811 new cases each year, and 3.5 more judges in the Superior Court, which handled an average of 17,825 new cases filed each year.

Understanding the practical realities of budgeting in New Hampshire, the Judicial Branch has only requested funding for seven additional Circuit Court judges (compared to 17 recommended by the NCSC) and one new Superior Court judge (compared to three recommended) and 35 new clerical staff.

Study Recommendations for key positions (rounded):

	Current Level	Needed for Caseload	Shortfall	Requested
Circuit Court				
Judicial Officers	48	65	17	7
Clerical/Info. Center	278	333*	55	31
Superior Court				
Judicial Officers	22	25.5	3.5	1
Clerical Staff	100	112	12	4

* Includes full-time equivalents needed to both meet case needs and allow top level clerks to focus on their managerial duties instead of administrative tasks.

We urge you to express your support for the Judicial Branch budget request to your state representatives and senators and share with them the need for more judges and staff. As you know, a sufficiently resourced and efficient court system is vitally important, not just to lawyers, defendants, and litigants, but to everyone who values the safety and stability of our communities. That's what our courts represent. Thank you for your effort. ■

Derek Lick is the Chairperson of the NHBA Committee of Cooperation with the Courts.

Kaitlin Rocca: A Future Lawyer in the Making

By Tom Jarvis

For 18-year-old University of New Hampshire freshman Kaitlin Rocca, becoming a lawyer is a no-brainer. A dual major in political science and justice studies, she plans to attend law school after college with an eye on becoming a constitutional lawyer and eventually a Supreme Court Justice.

"I'm kind of on my own mini pre-law track," Rocca says. "I think I was around nine when I decided to become a lawyer. I would just look at the world around me and felt there were things I wanted to change. So, I asked my mom how I could do that. She suggested hiring a lawyer, but I decided I would become one instead. I know I'm on a good path because whenever I have had to prepare for a debate, I love the process. I feel almost euphoric when I find a piece of evidence to bring it all together and present a strong case. It's like putting together an extremely interesting puzzle."

While not hard at work on her studies, Rocca maintains three part-time jobs. In addition, she interns for the Administrative Office of the Courts (AOC), where she helped to organize the first-ever National Judicial Outreach Week (NJOW) in New Hampshire.

The inaugural NJOW event took place during her Intro to Justice Studies class at UNH in Durham on March 1. When Judge Ellen Christo and Attorney Lyndsay Robinson opened the floor for questions from the class, Rocca assisted by walking the floor with a microphone for each inquiring student.

"I thought it went really well," Rocca remarks. "I feel like Judge Christo and Attorney Robinson were able to add a personal element to the judiciary. Sometimes it's kind of hard to get a reality of what you want to get into, so it really helped people understand what the day-to-day of being a judge or a lawyer would look like."

Rocca says their professor, Attorney Kirk Trombley, asked the students the following day how they felt about the event.

"They felt like it was super informative," Rocca recalls. "It helped them understand more about the judiciary and helped them clear up some questions they had about the rule of law and judicial independence. They all said it was an overall wonderful experience, and recommended it happen again in the following years."

In high school, Rocca was heavily involved in civics. She was a member of the NH Civics Learning Coalition (NHCLC) and testified at a Senate hearing on SB 216, a bill written by the NHCLC and the Education Committee to change the requirements for civics education in schools.

Rocca also completed her Girl Scout Gold Award during her senior year with 100 hours of civics-related service. As part of that, she created an educational website and a YouTube channel with videos explaining what civics is, along with the different civics skills. (Although the website is now defunct, the videos can still be found on her YouTube channel, *Sincerely Kaitlin*.) During this campaign, she coined the phrase PASUGI, which stands for Pay Attention, Speak Up, Get Involved.

She also wrote an opinion article for the *Concord Monitor* raising awareness of civics and encouraging people of all ages to be involved in their communities. That same year, she spoke to fifth graders about civics, the constitution, and why it is relevant.

"On Constitution Day, I went to my local elementary school and talked to them about why it's important to be involved in your communities and what the constitution is," Rocca says. "I tried to bring the education forward in a manner that is age-appropriate. It really is amazing how many hands were raised to ask questions. The teachers emailed me after and said that's all the kids could talk about for the rest of the day. I hope they can take a little of it later on in their lives and maybe implement it and give back to their community at some point, and understand their obligations and rights as citizens."

Rocca even wrote an article for the *Bar News* in November 2022, about the Civics 603 Program from NH Civics, which offers an inside look at the state's judicial system for kids in grades 5-12.

A screen capture of one of Kaitlin Rocca's instructional videos about civics from her YouTube channel, ***Sincerely Kaitlin***, that she created senior year of high school for her Girl Scout Gold Award. In this video, she mentions the acronym she coined: PASUGI (Pay Attention, Speak Up, Get Involved).

Kaitlin Rocca standing in one of the many aisles of books at the Dimond Library before class at UNH in Durham. Photo by Tom Jarvis

"The NH Civics Coalition Program put me in touch with Martha Madsen, the Executive Director of NH Civics," Rocca says. "She asked me if I'd be willing to write the article about Civics 603, and I was happy to."

Prior to starting her internship at the AOC, Rocca has also interned for both Federal Magistrate Judge Andrea Johnstone and NH Senator Ruth Ward.

Each person I spoke to about her used the same adjective: impressive.

"I first became aware of Kaitlin last year because she reached out to Chief Justice MacDonald – which is highly unusual for a high school kid to take that initiative – indicating that she was really interested in civics and would love to help the court with its efforts," AOC Mental Health and Wellness Coordinator Anne Zinkin says. "I was impressed right off the bat that she would have the courage to do that. The Chief Justice met with her and was so impressed that he asked me to get in touch with her to see how we could get her into what we were doing in the Branch around civics education."

Zinkin says Rocca helped on several projects in connection with NJOW and was the one who formatted the survey that was used for participants.

"She is very responsible, poised, professional, and mature beyond her years," Zinkin says. "She has expressed plans to become a lawyer, and I think she's one of those kids that no matter what she does, she will be amazing at it."

Attorney Kirk Trombley, the Assistant Clinical Professor of Justice Studies at UNH, used her Senate testimony supporting SB 216 as an example in the classroom.

"We were studying the legislative process in Intro to Justice Studies, and one of the things we talked about was when people promote a bill, what is the process for becoming a statute," Trombley says. "We talked about how people will testify, and I knew that she'd testified in Concord, so with her permission, I pulled up her testimony from the Committee and put it up on the board. I was able to tell the students, 'One of your colleagues in the class, Ms. Rocca, went to Concord and testified on a civics bill,' and they got to see how she participated in this governmental process. Then she said a couple words about it, and she was delightful."

With a few years of civics education and participation already under her belt, multiple internships at the courts, and dual majors, Rocca's trajectory toward law school shows no signs of slowing. Trombley agrees.

"Out of a class of over 100 students, Kaitlin has been a standout from the beginning of the class," Trombley says. "She is very attentive and is one of the more active participants in the class. I have no question that if she continues, she will be a valuable member of the legal profession." ■

New Hampshire Judicial Council Seeks Passionate Advocate for Executive Director Position

By Tom Jarvis

In December 2022, New Hampshire Judicial Council (NHJC) Executive Director Sarah Blodgett accepted a position in the Judicial Branch as a Circuit Court Administrator. In the interim, NHJC Vice Chair Richard Samdperil took a leave of absence from his practice to serve as the Acting Executive Director. The NHJC is currently seeking applicants from attorneys interested in receiving an appointment to serve as its executive director.

Like the New Hampshire Bar Association, the NHJC is two things with the same name. As you know, the NHBA is a professional association of thousands of lawyers licensed in Granite State, but it is also a trade organization, with 34 staff, that supports its members. In that same vein, the NHJC is a 24-member board established to provide assistance and information about the state's courts and justice system, but it is also a state agency, with a staff of three, that oversees and administers funding to legal services organizations.

The board side of the NHJC (the Council) consists of 11 statutory appointments, five members appointed by the New Hampshire Supreme Court, and eight appointed by the Governor and the Council. It was created by statute in 1946 as an institutional forum for the disinterested consideration of issues affecting the administration of justice.

The agency side of the NHJC (the Agency) carries out the mission of the Council. It has a staff of three: the executive director, an administrative assistant, and an accounting technician. One of the greater responsibilities of the Agency is overseeing and administering the delivery of state-funded indigent defense services.

"Since the Judicial Council was founded, it's duties have expanded," Acting Executive Director Richard Samdperil says. "Most notably, following the US Supreme Court's decision in *Gideon v. Wainwright* – which had its 60th anniversary on March 18 – the Judicial Council agency became responsible for indigent defense services, which is one of its major roles today."

Richard Samdperil standing on the steps of Judicial Council building on Capitol Street in Concord. Photo by Tom Jarvis

Samdperil says the Indigent Defense Fund is a three-tiered system (consisting of the Public Defender Program, contract counsel, and assigned counsel) for finding lawyers for people in indigent defense cases.

"The Public Defender has historically taken about 85 percent of the indigent cases in the state, but in recent years it has not been able to handle that same percentage of cases," Samdperil says. "If they can't take the case due to conflict of interest or some other reason, then it goes to contract counsel. The third tier are assigned counsel. They used to represent about one percent of the indigent caseload, but in the last several years, that's grown significantly."

The Agency also works in partnership with – and administers funding to – New Hampshire Legal Assistance (NHLA) to provide civil legal services to Granite Staters with low income, as well as Court Appointed Special Advocates of New Hampshire (CASA-NH) to provide guardian ad litem services in child protection cases.

"The Council, as it's constructed, really does lend itself to be an incredibly cross-sectioned place for a discussion of issues," NHJC Chair Nina Gardner says. "We have court personnel, legislative people, lawyers who have practiced for years, and we have public members. The AG sits on the Council, the President Elect of the Bar sits on the Council – we are a really diverse group that can serve a very interesting function in terms of advancing opinion. We can offer perspective that comes with being an institutional forum."

Gardner served as the NHJC Executive Director from 1988 to 2012. After she retired, the NH Supreme Court appointed her as Council Chair.

"Being executive director of the Judicial Council was a rewarding position," Gardner says. "I fell in love with the legislative process. I really enjoy it. You work in the Executive Branch, you interact heavily with the Legislative Branch, and you get invited to meetings with the Court people. It's fundamentally satisfying."

Richard Samdperil says the vacant executive director position is mission-driven and for someone who has a strong commitment to providing legal services to those without resources.

"It's really an opportunity to be a voice and an advocate for a population receiving legal services that often does not have access to those in a position to fund and help," Samdperil says. "So, somebody in this role has to be passionate about advocating for those without resources and for children and adults who need guardians."

The posting for the NHJC Executive Director position can be found on the Council's website, **judicialcouncil.nh.gov**. A cover letter and resume should be sent via email to the attention of Richard E. Samdperil, Acting Executive Director, at **richard.e.samdperil@jc.nh.gov**. The same email can be used to request information regarding salary and benefits. The deadline for submission is April 28, 2023. ■

Judge Susan Carbon's Remarks on Winning the Hollman Award at Midyear Meeting

At the annual Gender Equality Committee Breakfast at this year's Midyear Meeting on February 17, 2023, the Honorable Susan B. Carbon received the Philip S. Hollman Award. The Hollman Award is given each year to someone who is dedicated to promoting respect and fair treatment toward all members of the judicial system. This person acts as a leader, educator, and role model on such issues.

Judge Carbon graciously provided her remarks from the breakfast for print in the Bar News. See her remarks to the 70 breakfast attendees below:

Thank you so much for the honor of joining the long list of distinguished recipients who have preceded me. And for those of you who know Judge Hollman, he was a judge's judge. Receiving an award in his name is a gift. I would especially like to thank Lyndsay Robinson for nominating me, and for all those who wrote such kind and generous letters of support. I am so grateful.

When I got the call from Lyndsay to tell me I had been chosen, I had an immediate flashback to 1987 when I got a *different* call, this one from Steve Tober, asking if I'd be willing to chair the first Task Force on Women in the Bar. Phil Waystack was President of the Bar (Steve was in-coming). George Moore was also on the task force. We were among the first in the country to take on the issue of gender bias in the legal profession – so we were really cutting this out of whole cloth. A year later, following scores of interviews and surveys with a 71 percent response rate, we were confident in our findings that we had a problem.

After we published the report, we created a video – "The Full Measure of Freedom" – to share our findings, the barriers we uncovered, and recommendations for improvement. As I look back, I think I deserve a naïve judge of the year award. I remember Judge Brock (our Chief Justice) saying he hoped this would all be resolved in 10, maybe 15, years. I remember being horrified that he thought this would take so long. And here we are in 2023 – 35 years later – progress for sure, but still a long way to go.

Consider this. The most recent survey, completed in 2017, found that two-thirds of respondents still feel there is an "Old Boy Network" that benefits men more than women. What's worse is that almost half of all respondents, and a majority of the women, have observed or experienced sexist jokes, inappropriate use of titles or terms of endearment, condescending treatment, or inappropriate comments about apparel or appearance to female attorneys. This isn't a whole lot better than 35 years ago. If I were dead, I'd be rolling over in my grave. But I'm not – so we're going to work on this!

I have been very lucky in my career. But that luck has been punctuated by privilege. Other than being a man, I think I have the whole panoply of privilege: I am white, middle class, educated, and married to an amazing husband for 45 years. I've never had to wonder where I'd sleep and the only food insecurity I've ever experienced is wondering if there was ice cream in the freezer. I have not suffered poverty or any number of other forms of discrimination that my Chinese sister-in-law has, or my Colombian niece, or my Black and Chinese nephews and niece.

Judge Carbon speaking to GEC Breakfast attendees at Midyear Meeting 2023. Photo by Rob Zielinski

And this privilege has been punctuated by opportunity. My law firm (Wescott, Millham & Dyer) took a chance – never having hired a woman before. My bosses – Ed Kelly and John Broderick – gave me countless opportunities and supported me along the way, not just professionally, but personally, over a very painful time in my life. They had my back. Even now – my "new" bosses, David King and the Chief [Gordon MacDonald], have given me so many opportunities, including the chance to co-chair the Court's Diversity and Inclusion Initiative with Judge David Ruoff.

If you're catching a theme here, it's that I have been fortunate to have men – allies – support me in supporting women. They, too, recognize the value of diversity – of expanding and growing the representation of women in the Bar.

But numbers alone are only part of the gender equality equation. We do have more women, but women are not all the same. Diversity includes what's visible and what's not. Beyond gender, there's race and ethnicity, religion, who we choose to love, mobility, and age. A recent forum at Dartmouth-Hitchcock talked about DEIB (Diversity, Equity, Inclusion, and Belonging). Diversity is numbers – composition. Equity is policies and practices that support diversity. Inclusion gives everyone opportunities to engage. But in their view, and I agree, the most important is belonging – creating a culture and environment where everyone, with all our diverse characteristics and forms of identity, feel like they belong. We need to make sure we are embracing ALL women as we advance in the profession.

To their credit, the Women's Bar has done an extraordinary job of instilling in women a sense of belonging. Their newsletters, their charitable activities, and their team-building projects are truly remarkable.

But "we" have work yet to do. The NH Women's Foundation had a forum of women judges at the law school last summer. One purpose was to highlight the disparities in numbers, in addition to talking about our pathways to the bench. While 48 percent of the Bar is female, only 38 percent of the judges are female. And only one is a woman of color.

One way to address this is to look at the selection process.

REMARKS *continued on page 22*

Who is Your Favorite Fictional Lawyer? The Bar President Edition, Part One*

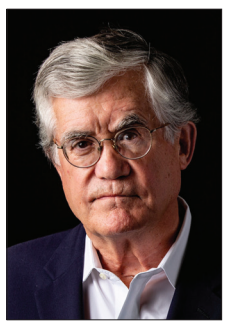
By Tom Jarvis

In light of the New Hampshire Bar Association's 150th anniversary year, this month's Fictional Lawyers column* is centered around past NHBA presidents. In 150 years, the Bar has had many presidents, 38 of which are currently living. Being president of the Bar Association is an important job and it is the highest role of leadership that the NHBA has to offer. A Bar president is the chief volunteer and spokesperson for the Association.

Three past presidents have already given their responses in previous Fictional Lawyers columns (Ed Philpot and Peter Hutchins in the November 2022 issue, and Jack Middleton in the March 2023 issue), but here is what five other past presidents had to say about their favorites:

Hon. John T. Broderick, Jr., Chief Justice (Ret), NH Supreme Court

NHBA President from 1990 to 1991



"Showing my age, I confess that I watched the Perry Mason TV program almost every week when I was young. I was fascinated by jury trials, the preparation needed to succeed in court, and by the power and simple genius of the trial process itself. It was mesmerizing to me. It probably didn't hurt that Perry Mason won every trial he had, either. But because of my exposure to that show (I had no lawyers in my family or in my world), I decided while in the 7th grade to become a trial lawyer, and I never wavered from that goal. It was the best decision I ever made. During her confirmation hearing Justice Sotomayor was asked how she became interested in the law as a career. She mentioned watching Perry Mason when she was young, too. I felt in pretty good company. It certainly didn't hurt her. Perry Mason was tireless, principled, patient, civil, and fiercely skilled in cross examining witnesses and connecting to juries. He seemed the perfect lawyer.

I think Perry Mason would do just fine in a New Hampshire courtroom today. Bombast, theatrics, and cutting corners have never been the calling card of the best lawyers here, so his style and preparation would play well before New Hampshire trial judges and juries, and he would have been a feared but respected opponent for any member of the bar. My guess is that he would not have been a big fan of technology, however, because unless it is used well it would interfere with his uncanny ability to personally connect to juries."

Bruce W. Felmly, McLane Middleton

NHBA President from 1995 to 1996

"There are several movie lawyers on my mind, but the best single scene, perhaps the best closing argument ever in the movies, is Jake Brigance's closing to the jury in the racially charged murder trial in *A Time to Kill*. Matthew McConaughey's request to the southern jury, '…now I want all of you to close your eyes,' as he graphically describes the gang rape and attempted murder of the black defendant's young daughter is powerful. And he ends the closing to the jurors, all eyes still closed, with, 'Can you see her? Can you see her? Now, imagine that little girl is white.' It is a brilliant portrayal of combatting implicit bias and empowerment of a jury.

Few trial lawyers have the circumstances to build or generate such suspense, but the closing teaches strong lessons of pace, timing, and even drama which can illuminate an argument. And such drama does sometimes really happen in jury trials. And how would Matthew's daring approach be received in a NH courtroom? It might vary a bit lawyer to lawyer, juror to juror, but I would hope someone would recognize the scene and the actor and give back his trademark response: 'Alright, Alright, Alright.'"

Richard Y. Uchida, Colby College

NHBA President from 2005 to 2006

"Anthony Petrocelli on the show *Petrocelli*. He was one of the first lawyers portrayed as the unconventional, gritty little guy fighting against the system and its injustices. Until then, most lawyers were portrayed on TV and movies as very polished – suits (usually only in trial for him), ties (his was always loose), driving expensive cars (he drove a beat-up pickup truck), living in beautiful homes (he and his wife lived in a trailer), practicing in big cities (he was Harvard-educated, from Boston, and practiced in the fictional town of San Remo, Arizona), and were part of the upper crust of society. They never looked like the type that rolled up their sleeves and fought the good fight for people who had been marginalized for one reason or another. He didn't look like a lawyer, he didn't act like a lawyer (as we thought of them then), and he didn't talk like a lawyer - and one came to realize there was no fixed stereotype for lawyers who successfully champion the cause of equal justice for all.

Based on him, I became convinced there was a place in the legal profession for someone who didn't otherwise look the part. In NH, he would do better than most. I think he would be admired for his devotion to the cause of equal justice, his strong sense of ethics and moral responsibility, his admiration of the law, and his down-to-earth style of practicing law."

Eleanor Wm. Dahar, Dahar Law Firm

NHBA President from 2007 to 2008

"Atticus Finch, from *To Kill a Mockingbird*. He is my favorite because, like Atticus, as an attorney, you often have a client with a difficult/challenging issue(s) in need of representation by an attorney. Atticus would fare well in court today since our justice system, whether through jury or bench trial, is intact and is fair and blind; however, I am not sure how he would handle trial by Webex or Zoom."

David W. McGrath, Sheehan, Phinney, Bass & Green

NHBA President from 2018 to 2019

"I really like Paul Newman's portrayal of lawyer Frank Galvin in *The Verdict*. There is something compelling about Galvin's innate talent obscured by years of neglect; his pursuit of justice and redemption; and his triumph on behalf of his client despite long odds. Although the courtroom scenes are mostly unrealistic (Galvin mentions not a single piece of evidence in his closing), they are riveting because he is genuine and relatable. The same could be said for Viola Davis' brilliant portrayal of fictional lawyer Annalise Keating in *How to Get Away with Murder*. Like Galvin, Keating is unrealistically light on evidence and heavy on humanity in her closing, but she connects with the jury, reminding us that little is as universally appealing as humility and empathy."

If you'd like to share your favorite fictional lawyer in this column, contact NHBA Publications Editor Tom Jarvis at **tjarvis@nhbar.org**. Please include your favorite fictional lawyer, why they are your favorite, and your opinion on how they would fare in a present-day New Hampshire courtroom. ■

**Editor's Note: I received so many responses from past presidents – thank you all so much – that I decided to split this into to two parts (this issue and next issue). Next month will feature five more past NHBA presidents and their favorite fictional lawyers.*

Law Day: If You Do One Visit, You Will Want to Do More

By Honorable Landya McCafferty

Law Day is set aside each year in May for judges and lawyers to visit schools. As a member of the Bar's Law Related Education Committee, I am writing to encourage judges and lawyers to visit a school on *any* day during the year. If you do so, please let NHBA Law Related Education Coordinator Robin E. Knippers (**reknippers@nhbar.org**, 603-715-3259) know as we are tracking these visits and encouraging more of the same throughout the year. I make this promise: if you do one visit, you will want to do more. Here is some advice to help you get started.

Finding a school. If you do not know a teacher to help you get into a classroom, contact Robin E. Knippers. She will help pair you with a school.

Preparing a lesson plan. The NH Bar has a one-stop shopping experience for you: **nhbar.org/civics-education/law-day**. You can explore the Law Related Education webpages to find resources/materials that will work for you as either an attorney or judge. The federal judiciary also has materials for lesson plans prepared by Rebecca Fanning, the National Outreach Manager for the federal judiciary. These are designed to be quick and easy. Ms. Fanning has given me permission to make lesson plans available to our Bar at the aforementioned link under the heading "You be the Judge." While the exercises by the federal judiciary are drafted for judges, they are adaptable for a lawyer to use them, as well.

Whatever you decide to use, I recommend you get the students engaged and debating with each other. So long as you have a fact-based scenario prepared ahead of time that presents a legal issue that students can debate, you can divide the class up into different "sides" of the debate and begin asking them questions. Pick a lesson from the materials and then make it your own; tweak it to be an exercise with which you are comfortable. The students never cease to amaze me. I am a better judge for making these school visits a regular part of my job.

Two pieces of advice for lawyers and judges. First, use scenarios based on *real* cases (e.g., *Tinker v. Des Moines*). Stay away from hypothetical scenarios that involve "hot-button" issues or for judges, any dispute that may come before you. Second, every question is a teachable moment—even those that make you feel awkward. If the students ask me about a particular case, I teach them about judicial ethics and why it is so important for judges not to discuss their cases (i.e., appearance of impartiality). If they ask a political question, I explain the same. For attorneys, you can discuss the importance of confidentiality.

If you have questions or want to brainstorm your lesson plan, feel free to contact me directly at the court at (603) 225-1493.

New Episode of the Bar Discourse Podcast Now Streaming: Amy Cann of McLane Middleton Talks About Pay Transparency

A new episode of The Bar Discourse is now available to stream on Soundcloud at **soundcloud.com/thebardiscourse**. Join host Tom Jarvis as he talks with attorney Amy Cann about a new trend in employment law: pay transparency.

The Bar Discourse is a podcast produced by the NHBA that focuses on legal issues, ideas, and news that shape the Granite State and beyond. For more information, or to inquire about being a guest, contact NHBA Publications Editor Tom Jarvis at **tjarvis@nhbar.org**.

NEW HAMPSHIRE
BAR FOUNDATION NEWS

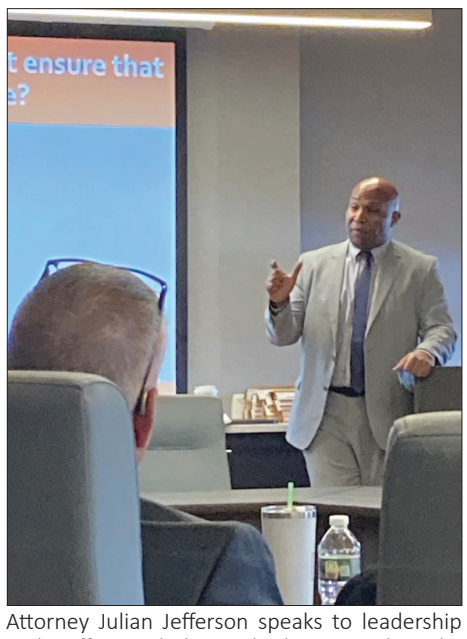
NHBF and NHWBA Partner to Celebrate the International Day of Women Judges

By Mysty Shappy

On March 10, the New Hampshire Bar Foundation partnered with the NH Women's Bar Association to host the state's first International Day of Women Judges Reception at the LaBelle Winery in Derry. With more than 40 people in attendance, the event was a celebration of how far women have come in the legal community, as well as a recognition of the obstacles that women judges still face.

The program for the evening was a panel discussion on the experience of women judges, particularly those fleeing Afghanistan after the takeover of the country by the Taliban in 2021. The panel included author Attorney Lauren Stiller Rikleen, whose book, *Her Honor: Stories of Challenge and Triumph from Women Judges*, was released on March 1. The book details stories of 25 women judges and was available for purchase and signing at the event. The panel discussion was led by Judge Ellen Christo and included information on the efforts by retired Vermont Judge Patricia Whalen and many others in the legal community to help evacuate and resettle Afghan women judges and their families since August 2021. Afghan judge Lida Kharooti Sayeed recounted details of her own family's experience escaping Afghanistan and resettling in the DC metro area.

Judge Ellen Christo poses a question to the panel at the International Day of Women Judges Reception. Photo by Mysty Shappy



Attorney Julian Jefferson speaks to leadership and staff at Catholic Medical Center. Photo by Mysty Shappy

"The Judiciary is doing its part to highlight the role of women judges around the world," said Judge Christo. "We wanted to create an event that celebrates the UN Resolution, recognizing the unique talents, perspective, and life experiences that women bring to their roles on the bench. And we also wanted to highlight the danger and difficulty that some women judges face, in countries around the world, as they fearlessly attempt to uphold the rule of law – particularly our sister judges who are either still trapped in Afghanistan or who were able to evacuate, but are now surviving with their families in refugee camps. Our panelists put a very human face to that struggle."

Proceeds from the event will be dedicated to the resettlement of Afghan women judges and their families in the United States.

"The New Hampshire Women's Bar Association was honored to be a part of the International Day of Women Judges panel," said Attorney Katie Mosher of the NHWBA. "Although the efforts to resettle judges and other Afghani refugees may be nascent in the Granite State, the power of community and our collective passion fuels our dedication to make a difference in the lives of those who fled their homeland, including women judges like Judge Kharooti Sayeed. We cannot wait to continue to be part of these efforts in future programming, events, and advocacy."

The International Day of Women Judges Reception concluded New Hampshire's first National Judicial Outreach Week. Since my article in the March issue of *Bar News*, three more outreach events were held. On March 7, US District Court Judge Joseph LaPlante and Attorney Julian Jefferson spoke to leadership and board members at Catholic Medical Center, and NH Superior Court Judge John Kissinger and Attorney Catherine Flinchbaugh spoke at the Merrimack County Superior Courthouse to a small group of individuals. The last outreach event of the week occurred March 9, at the New Hampshire Institute of Politics at Saint Anselm College, with Judge Charles Temple and Attorney Michael Iacopino speaking to a group including students from the college and some members of the public. New Hampshire's participation in NJOW was a success and is expected to be an annual event. ■

LawLine

The NH Bar Association would like to give well-earned thank-yous to Alfano Law and Parnell, Michels and McKay for a successful LawLine event held on March 8, 2023. More than 45 calls were handled from all over New Hampshire on various topics including landlord/tenant matters, family law, probate law, civil disputes, and workers' compensation. Thank you again to all our volunteers for participating once again in this valuable public service. Your example is an inspiration to others seeking to serve.

LawLine is a free public hotline, hosted by volunteer attorneys, on the second Wednesday of each month from 6:00 pm to 8:00 pm. Assemble a handful of colleagues in your office to take calls, and we will forward the phone calls anonymously from the public. You can still volunteer and make a difference this year. We need volunteers for the following 2023 dates: May 10, July 12, August 9, November 8, and December 13.

For more information, please contact NHBA LawLine Coordinator, Anna Winiarz, at **awiniarz@nhbar.org**.

Staff from Alfano Law after successfully assisting LawLine callers. From left to right: Ashley McLeod, Jillisa Solomon, Ariana McQuarrie, Paul Alfano, John Hayes, Caroline Dolan, and James Lombardi. Participated but not pictured: David Howard and Jason Curtis. Courtesy photo

Parnell, Michels, and McKay staff answering calls for LawLine. Clockwise from the top left: David Stamatis, Rory Parnell, Cathy McKay, and James Hawthorne. Courtesy photos

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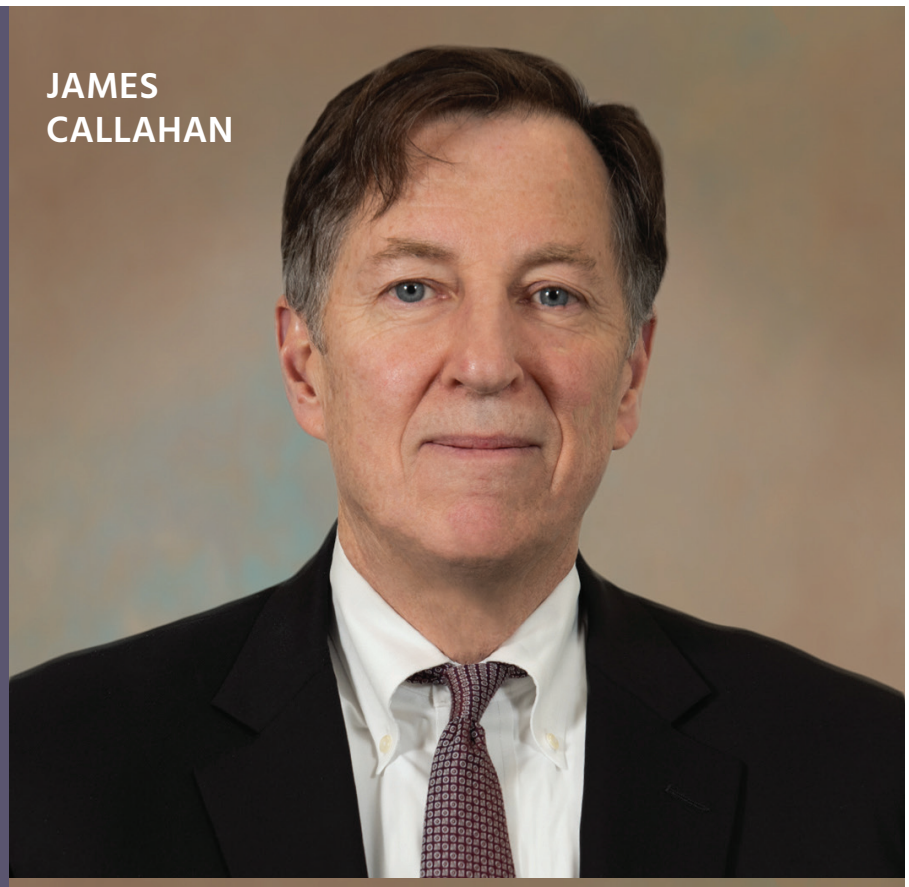

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Flying Solo – Words of Wisdom from Solo Practitioners

By Misty Griffith

For attorneys with an entrepreneurial spirit, opening their own law firm can be a rewarding experience. Most solo practitioners find the benefits of being their own boss outweighs the headaches of running their own business. This series profiles some of the numerous NH lawyers who have embraced the challenge of solo practice. It is our hope that their experiences may inspire other attorneys who are considering flying solo.

Thank you to this month's featured practitioners for taking the time to share your words of wisdom. We look forward to sharing advice from others in the coming months.

Joshua Gordon, Law Office of Joshua Gordon

Concord, NH, 30 years in practice, 28 years as a solo

What inspired you to become a solo? I'm not so good with bosses.

Best thing about solo practice: No boss. I say NO! to cases that don't interest me, and YES! to those that do. I take pro bono cases when the cause or client moves me. No intra-firm pressures regarding hours, earnings, management, sharing resources, etc. I can leave the office in the middle of the day when the weather is nice to bike, ski, walk, chop wood, or whatever I like.

I started my firm the same year my first child was born, and when they were young, I conducted my lawyering errands while pushing a baby carriage. As they grew, being a solo allowed me the flexibility to be an involved dad, available to my children. My family and I built (with our own hands) an off-grid house (with an office) at the same time I was building my law practice. Being a solo allowed me to do these things simultaneously. I built my desk, which is fully customized for my practice area and my work style. It is hard to describe how well it functions for me, but it is very important to my work and my comfort. I don't think that would have been possible in an institutional environment. Similarly, I use hardware and software technology that works for me, with no concern for anyone else's idiosyncrasies. My office is quiet and studious, I usually don't have to dress up for work, I have no commute, and I am able to maintain a good work/life balance.

Hardest thing about solo practice: Maintaining collegial connections and support. If I don't do it, it doesn't get done. No safety net. If I don't create the business and collect the money, there's no paycheck. Health insurance.

Memorable solo experience: Connections with my colleagues, other professionals, and clients. In order to be successful as a solo, it is important to define a niche in which a solo can compete and excel, which matches your abilities and interests, and for which there is a market and a network of potential referrals. There are probably many ways a solo can be successful. When I started, "appellate ligation" was not a recognized practice area outside of a handful of firms in Washington who practice at the United States Supreme Court, and a few lawyers in big states such as Texas and California. Appellate litigation is not a profit center for most law firms. I figured it could blossom, however, but only as a solo.

Advice for new solo: You have to want to be an entrepreneur. Running a small business entails attention to marketing, accounting, technology, and a thousand other things that have nothing to do with attention to clients. If you want to do lawyer work only, being a solo is not for you.

Would you advise anyone else to go it alone? YES! But working in an organization at the start of your career is invaluable.

Keziah Colleton, Launchbird Legal

Portsmouth, NH and Willimantic, CT (June 2023), two years in practice, two years as a solo

What inspired you to become a solo? Going solo right away was not my original plan. After taking and passing the bar during the COVID-19 pandemic, there were more layoffs than hiring going on. Solo practice was an option that presented itself to me out of necessity. However, I've always been entrepreneurial and toyed with the idea of opening my own firm four or five years after being in practice. The pandemic just sped those plans up!

Best thing about solo practice: I can create my own schedule and curate the culture that I want to see in my firm as it grows, as well as the systems and processes that will keep it running optimally.

Hardest thing about solo practice: The hardest thing about solo practice is being solo. When you have a question and don't have a work bestie immediately across the hall to go and bounce ideas off, it can feel isolating sometimes. It can become easy to work in a silo because you are the only person responsible for everything in your business. As a solo, you hold every position from CEO to Marketing Director. Wearing so many hats can be overwhelming at times, because if something goes wrong it's an inward reflection and retrospective on your own actions (or inaction) rather than someone else.

Memorable Solo Experience: Getting my first client is my most memorable experience as a solo to date.

Advice for new solo: Find one or several mentors. It helps a lot if they are also in solo or small firm practice. Build a network of other attorneys in your same practice area who are also solo or small firm practitioners. Trust yourself. A good friend and fellow attorney once told me: "Don't be afraid to help people." It can be scary starting out on your own, especially if it's a new practice area for you or if you're just starting out practicing law. Remember that there's someone out there who needs your help and don't let your fear of being a newer attorney (or one with less experience in a practice area) stop you from trying to help. This is where you utilize the help of your mentors, colleagues, and co-counsel if necessary.

Would you advise anyone else to go it alone? Yes! So long as they understand the responsibility that comes with being a solo. You are responsible for bringing in business AND lawyering. So, if rainmaking makes you uncomfortable, and you'd prefer to just do the lawyering aspect, solo practice might not be for you.

Neil Nicholson, Nicholson Law Firm, PLLC

Headquartered in Concord, NH and licensed in NH, MA, and VT, 16 years in practice, three years as a solo

What inspired you to become a solo? The opportunity to provide legal services to people within my field of passion.

Best thing about solo practice: No long meetings to decide trivial matters, like whether to send out holiday cards electronically or by mail.

Hardest thing about solo practice: Scheduling conflicts.

Memorable solo experience: Maxing out 401k contributions for my staff.

Advice for new solo: Tap into a network of reliable lawyers to whom you can ask practice related questions.

Would you advise anyone else to go it alone? Yes, although my experience with a large law firm was phenomenal and there are many trade-offs to consider. I'm very fortunate to have an incredible support team as a solo practitioner. ■

Attorney Wellness Workshop Will Offer Ways to Reduce Stress and Increase Work-Life Balance

By Misty Griffith

May is Mental Health Awareness Month. In his message to members of the New Hampshire Bar in the Feb. 15, 2023 *Wellness Supplement to the New Hampshire Bar News,* Chief Justice Gordon J. Mac Donald wrote, "[t]he legal profession, slowly and over time, has come to recognize that struggles with mental health must be acknowledged, that lawyers need to feel safe sharing their concerns with their colleagues, and that the profession itself needs to offer support."

An integral part of the mission of the NHBA is "[t]o serve the members by connecting them with services, programs, and resources necessary to function effectively as members of the profession." Over the coming months, the NHBA plans to introduce more programs and services that foster the well-being of our members. Wellness initiatives will help members function more effectively, as well as to protect them from burnout, increasing their overall professional and personal satisfaction.

On May 16, the NHBA is offering a wellness workshop, "Lessening Personal Stress by Learning How to Balance Work and Family, Setting Boundaries, and Prioritizing Self-Care," presented by Susan McKeown, APRN, CPS. This free workshop will be presented virtually on Tuesday, May 16, from 12:00 pm to 1:00 pm. Registration is available online at **nhbar.org**.

In describing the workshop, Susan shares, "[s]uccess at work is highly dependent on an individual's well-being. When employees know their own needs and how to articulate those needs, they will be more content at home and more productive at work. This interactive workshop will explore these issues and ways to address them."

The workshop will introduce participants to tools which they can incorporate into their daily practice to help alleviate stress and achieve better work-life balance.

Stress is inherent to the legal profession, but there are tools and strategies that can help manage the stress so that it does not become overwhelming. Self-care is an important aspect of well-being. Each of us can better serve those around us when we are functioning at our best. It is important to recognize that self-care is not selfish, it is necessary.

Susan McKeown is a graduate of St. Anselm College with a BS in Nursing, and Northeastern University's Pediatric Nurse Practitioner Program. She worked with families as a nurse practitioner for over 40 years. Susan is a Certified Prevention Specialist, educating and advocating on issues of mental health and substance misuse. For the past 20 years she has co-facilitated a weekly support group for adults whose loved ones have substance misuse issues. She currently conducts workshops for businesses to help employees deal with stress at home so they can better focus on the demands at work. Additionally, she has published two books, *Beyond the First Dance-A Guide for Couples to Think Beyond their Wedding Day* and *Beyond the Tango- A Guide for a Thriving Marriage While Juggling Careers, Kids and Chaos.*

Lawyer well-being emerged as an important initiative at the 2016 ABA Annual Conference. Two national studies indicated high rates of depression, anxiety, and alcohol abuse amongst attorneys and law students. Concern about this problem was the catalyst for the creation of the National Task Force for Lawyer Well-Being. In 2017, the task force published *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change,* which contains 44 recommendations. Subsequently, the ABA and the Conference of Chief Justices passed resolutions which strongly encouraged all states to review and consider the recommendations of the report.

The NHBA has increased wellness offerings during the last several years. The Wellness Corner is a regular feature of *Bar News* and the annual "Wellness Supplements" to the *Bar News* are available online at **nhbar.org/publications**. There are also some wonderful wellness CLE's available in the NHBA CLE catalog online. Additionally, our upcoming Annual Meeting, on June 23 in Portsmouth, will include wellness activities.

To learn more about the upcoming Susan McKeown workshop or other great NHBA member benefits and services visit nhbar.org or contact NHBA Member Services Supervisor Misty Griffith for more details. Email **mgriffith@nhbar.org** or call (603) 715-3227. ■

New Members of the NH Bar Association

We extend a warm welcome to the attorneys who were recently admitted to the New Hampshire Bar. Congratulations! We wish you the best with your practice and look forward to meeting you at future NHBA events.

March 14, 2023

Sally N. Baraka, Laurie D. Baron, Camden D. Bisson, Angela R. Corey, Dana Q. Eads, Christopher J. Gavrielidis, Ross B. Greenstein, Victoria l. Hirsch, Ragner E. Jaeger, Jennifer L. Joubert, Anna Z. Krasinski, Branden S. Ladebush, Joseph M. Lento, Kelly Anne Mederos, Margot Pera, Darlene M. Randone, Christopher A. Titus, Christopher J. Walsh, Kevin A. White, Riley B. Williams, Amanda Wright

March 31, 2023

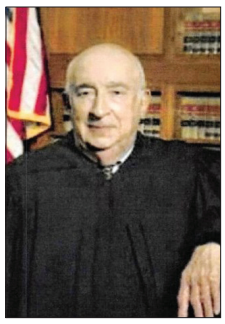
Seth M. Adams, II, Brittany Anne Bergeron, Katherine A. Brustowicz, Lauren M. Bucci, Kathryn Clerici-Hermandinger, Steven M. Friedman, Kevin J. Goscila, Amy Beth Hackett, Michael B. Hershberg, Debra A. Joyce, Andrew T. Lechner, Erin K. Naylor, Joseph Haven Shagoury, Brianna Reilly Sullivan, Christos Tsiamis

In Memoriam

Hon. Norman H. Stahl

The Honorable Norman H. Stahl died at 92 on April 8, 2023.

In 2007, Boston police arrested a drug dealer named Brima Wurie, retrieving an address on Wurie's phone that led to his conviction. Wurie appealed to the First Circuit Court of Appeals – which, in 2014, overturned the conviction, arguing police had overstepped their bounds. The opinion, written by Judge Norman H. Stahl and unanimously upheld by the US Supreme Court, marked a key juncture in the digital era: moving forward, the Fourth Amendment, which bars "unreasonable searches and seizures," would apply to your cellphone. In this way, Stahl helped define the constitutional contours of the internet age, making it clear that even as technology was rapidly evolving your civil liberties remained intact.



His perspective on issues was grounded in 35 years of corporate practice and was no doubt one of the reasons he was often asked to serve the judiciary in other capacities, most notably as chairman of the Committee on Judicial Security. In that role, he was responsible for presenting the budget to Congress and appearing before the relevant authorizing and appropriating committees in the House and Senate. He also served on the Committee on Information Technology and the Committee on the Budget.

Judge Stahl was a New Hampshire native, spending all but his later life in Manchester and Bedford. Born on January 30, 1931, he was the son of Dr. Samuel and Sadie Stahl. Growing up in Manchester with older brothers David and Robert, an early memory was how the three boys roamed the streets, marveling at all the downed trees around their Linden Street home after the 1938 hurricane.

Judge Stahl graduated from Manchester public schools, Tufts College (1952) and then Harvard Law School (1955). After law school, he served as a law clerk for Justice John V. Spaulding on the Massachusetts Supreme Court. In 1956 he returned to Manchester, joined the law firm of Devine, Millimet, and remained an attorney at that firm, later called Devine, Millimet, Stahl & Branch, until joining the bench.

He served as acting city solicitor in Manchester for six months to help reorganize the office, and he was involved in the expansion of the Manchester Airport. He served as a member and chairman of both the Judicial Council and the Board of Bar Examiners. He was active in community service as well. He was a board member of the Manchester Historic Society and the Manchester Institute of Arts, a director of the Elliot Hospital, a member of the Board of Governors of Tufts Medical Center, and a member of Temple Adath Yeshurun.

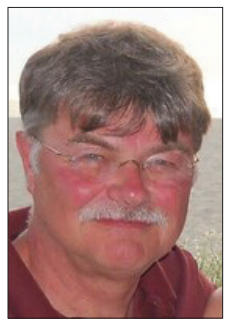
Always interested in politics, he assisted elected officials in both parties and co-chaired Senator Robert Dole's 1988 presidential campaign in NH. In 1972, politics and his love of sports cars humorously converged when Paul Newman, campaigning for Congressman McCloskey, took a short respite at the residence in Bedford. Seeing the orange 1972 Datsun 240Z in the garage, Newman, still in his suit, got down on his knees to confirm the car had Koni shocks.

His judicial career began in 1990, when President George H.W. Bush nominated him to serve on the United States District Court for the District of New Hampshire. Then in 1992, President Bush nominated him to fill the seat of Justice David H. Souter on the United States Court of Appeals for the First Circuit - where he served until his retirement in 2020.

Judge Stahl is survived by his wife, Sue (Heimerdinger) Stahl; their son Peter Stahl and daughter Ellen Stahl, as well as Peter's wife, Jill Weisz. He was predeceased by his brothers, David and Robert Stahl. In lieu of flowers, the family asks that contributions be sent in memory of Norman H. Stahl to: Magen David Adon (**mdais.org**), or Jewish National Fund (**jnf.org**) or a charity of your choice. To leave a message of condolence, please go to **lambertfuneralhome.com**.

John E. Dabuliewicz

John Dabuliewicz, of Warner, NH, passed away on April 8, 2023, in the comfort of his home, surrounded by loved ones.



John was born on March 6, 1948, and spent his childhood in Gardner, MA. He was an incredibly bright boy who at a very young age had convictions and passions that would follow him through life.

After attending Boston University, John went home to Gardner. His love of loud rock and roll music led him to a concert (at the dump), where he met his future wife Susan, who would from then on be a steadfast companion who was by his side every step of the way as they built a life that would bring them much joy. When John went into the service, he was stationed in Germany, and John and Susan lived together there for two years and were married in Basel, Switzerland. Upon returning home, John went to law school and eventually became an attorney for the State of New Hampshire.

John always had a passion for politics, at all levels. He helped with campaigns, was always in the know and never missed a town meeting. John sat on many committees for the town of Warner, including serving as a selectman for three years.

One of John's greatest joys in life was being a father. He spent countless hours playing with his children, Ben and Rachel. John will be missed by his wife Susan, daughter Rachel Harrington and her husband Brendan, sister, Christian Haines, cousins Sandra, Susan and her partner Sterling, Scott and his wife Ann, and Dana and his wife Kelly, his daughter-in-law, Amy Mitchell, and grandchildren, Joshua, Joey, Lucas, and Molly, who will love their Gramps forever.

John will also be missed by his father-in-law, Lawrence Benoit, brother-in-law, Richard Benoit and wife Cathy, sister-in-law, Nancy Benoit-Melanson and husband Phil, and nieces and nephews, Joshua Clifford and his family Blair and Draven, Liz, Stanley and her family Jeremiah and Les, and Ryan Benoit and his family, Danielle and Grady. John was predeceased by his beloved son Ben, his mother, Dorothea Haines Dabuliewicz, his father Joseph Dabuliewicz, and his mother-in-law, Dean Benoit.

In lieu of flowers, donations can be made in John's name to the Ausbon Sargent Land Preservation Trust, PO Box 2040, New London, NH 03257 at **ausbonsargent.org/donate**.

Scott Wanner

Attorney Scott Wanner died April 6, 2023, from pancreatic cancer at the age of 51.

Scott began practicing law in 2000, in Illinois, before moving to the Northeast to enjoy life on the seacoast and practice law in Maine and New Hampshire. His clients have ranged from victims of injury and wrongful death to owners with boundary disputes; to businesses seeking to incorporate or license their intellectual property. In addition to extensive private law practice experience, Attorney Wanner served as in-house counsel for a technology company for seven years until he helped sell it. He has litigated on behalf of plaintiffs and defendants before numerous state, federal, and appellate courts.

He worked at Maine law firms, then Normand|Higham Law both as associate, and later Of Counsel on special projects after he moved to Massachusetts. He recently married his longtime companion, Dr. Eva Maria Ratai, an Associate Professor of Radiology at Harvard Medical School. They squeezed a lot of travel, adventure, and love into their time together.

Attorney Wanner attended the University of Illinois College of Law as a Harno Scholar. Before studying law, he earned a master's degree in philosophy as a James Scholar and a bachelor's degree in the History of Science as a Chancellor Scholar all at the University of Illinois.

When he was not practicing law, Attorney Wanner enjoyed playing chess and was an amateur artist. He enjoyed teaching and has conducted college courses on logic, critical reasoning, ethics, philosophy, rhetoric, and writing. He also enjoyed writing and has contributed articles to the legal field.

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

*To submit an obituary for publication, **email news@nhbar.org**. Obituaries may be edited for length and clarity.*

Coaching: A Powerful Tool for Well-Being

By Penelope Perri

If there is a silver lining to be found in the disruption of recent years, it may be the heightened awareness of the importance of well-being and the recognition that mental health plays a critical role in our overall health. The cultural conversation has opened to the fact that no one is immune to psychological distress. More than ever, there is an interest in proactively cultivating well-being across multiple facets of our lives. In this pursuit, coaching has emerged as an effective tool.

Coaching is not therapy, and therefore not treatment for psychological disorders or active addictions impairing daily functioning. Human functioning exists on a continuum, and there is plenty of room for growth beyond baseline. To move from basic functioning in our work and our relationships to a place of thriving and well-being – there's a lot of ground to be covered, skills to be learned and integrated.

The prevailing myth in our culture is that growth and development are relegated to the first quarter of our lifespan. There is an expectation that by the time we reach our mid-twenties, we will have completed our cognitive, emotional and relational growth. While we may have acquired the skills and knowledge to start a career by this age, the process of knowing and understanding ourselves and the world has only just begun. Throughout our lives change is constant: We are in the process of change, always. To evolve and grow through change requires attention, intention and awareness. Coaching creates a vehicle in which we can be more deliberate in this growth and evolvement.

No matter what our resume or Instagram feed indicates about our level of functioning, we all have pockets of struggle and suffering. Life happens to us despite our attempts to control it. We feel stuck between knowing what we should do and actually doing it. We see the gap between who we want to be in a given situation and how we actually show up. We default to our negative habit loops and reactive tendencies. We have places where we can't get out of our own way.

Meanwhile, we are navigating a VUCA world with a human brain. VUCA, the acronym coined by military leaders in the '80s to describe the rapidly changing landscape of the late twentieth century, rings all the truer in 2023. Our world is more "Volatile, Uncertain, Complex and Ambiguous" than ever. Much of the human brain's evolution occurred in a harsh world of physical danger: Its ability to scan the environment for threats was paramount. The human brain in our current reality, left to its own devices, can become ensnared in a never-ending cycle of stress, worry, and reactivity. We often attempt to escape this cycle through numbing agents such as food, alcohol, shopping, and online activities. Never in human history have there been more opportunities to escape negative emotions, and ironically, by buffering against our emotions, we feel worse than ever.

To disengage from this negative cycle and create what we truly want in our lives, we need tools and skills. We may know intellectually that yelling at our teenager isn't effective, or we may have memorized the tactical steps to losing the last ten pounds, but until we are able to manage our own minds, we can't make progress. This sense of failure often ushers in a stream of self-criticism, which is also not effective in creating what we want.

Coaching creates a space and perspective for us to step out of our default modes and examine our patterns. There are many frameworks and methods of coaching. Because it is an unregulated field, anyone can call themselves a coach; vetting and research is important before engaging in this work. The framework in which I was trained is grounded in cognitive behavioral theory and positive psychology research, distilling these disciplines into concrete, pragmatic tools. While therapy may often be past-focused, coaching centers on the present and the future, where current thoughts and emotions fuel behavior. Just as it is hard to count the coins in your pocket, it can be difficult for us to get enough distance from our own mind to see our thoughts as separate from us, to see our own consciousness as distinct from reality.

Coaching is a conversation that allows this perspective, a space of heightened awareness from which we can examine the belief systems holding us back, the fears sabotaging our best intentions, and the inflection points to shift patterns no longer serving us.

Coaching can be helpful in navigating any kind of change, whether we are proactively pursuing a goal, changing career paths, or transitioning to a different phase of life. Our human brains have not evolved to embrace change. In any transition, coaching can help us focus on creating more of what we envision, value, and aspire to, rather than getting stuck in resistance or reactivity.

The mind is a formidable machine, one that requires maintenance and upkeep. The wear-and-tear of chronic stress takes its toll, and patterns of thinking and working that served us well earlier in life can calcify into an overdrive that we can no longer regulate. Burnout is a classic example. The mental toughness and admirable work ethic that elevates us to a certain point in our careers may eventually become a maladaptive cycle leading to exhaustion, cynicism and disempowerment. Coaching can be an ideal tool for unwinding from burnout, or any negative cycle – perfectionism, people pleasing, risk aversion, procrastination, and low-grade anxiety.

Our habitual patterns create, little by little, the lives we lead: Nothing could be more worthy of our attention. There are a wide variety of supports to assist in managing your mind, and coaching is one of many tools. Whatever tool you employ, taking charge of your own well-being is perhaps the most powerful thing you will ever do. ■

Penelope Perri, MSW, CEAP, is a certified Life Coach with a practice in Concord. For the past fifteen years she was a counselor and Director of the Employee Assistance Program at Concord Hospital. Penni helps individuals with life transitions and has created a program to help professionals overcome burnout. To learn more, visit ***penelopeperri.com****.*

UNH Law Students Walk Out Over 'Transphobic' Messages by Campus Group

More than 100 students and faculty gathered outside the University of New Hampshire Franklin Pierce School of Law in Concord on Wednesday, March 29, 2023, to protest what they said was anti-trans messaging from two student groups and an insufficient response from administrators. Photo by Paul Cuno-Booth/NHPR

By Paul Cuno-Booth
New Hampshire Public Radio

Students at the University of New Hampshire Franklin Pierce School of Law walked out of class on March 29 to protest what they called the administration's failure to act on complaints about two campus groups they say are spreading anti-trans hate.

The afternoon rally outside the law school drew more than 100 faculty and students, many holding signs and chanting, "UNH! Stand against hate!"

The walkout was sparked by an email that a student group, the Christian Legal Society, sent to the student body the day before about the deadly shooting at a private Christian school in Nashville on March 27.

"Tragically, this incident comes after a barrage of rhetoric demonizing Christians and anyone perceived to oppose the ontological premises of transgenderism," the email states, adding that activists, journalists and others have "fueled this hate and paranoia" against "anyone who opposes the trans agenda."

Speakers at the rally said the email was just the latest example of what they described as anti-trans messaging by the Christian Legal Society and another campus group, the Free Exercise Coalition. They said the groups' activities are making LGBTQ people feel less safe on campus.

Law student AhLana Ames, who helped organize the event, said no one had a problem with CLS organizing a vigil. But "the email then spirals down a rabbit hole of dangerous and offensive transphobic rhetoric," she said.

In a statement, Erika Mantz, UNH's executive director for media relations, said the university is "stridently committed to the free and open exchange of ideas."

"Every member of our community has the right to hold and vigorously defend and promote their opinions," she said. "The exercise of this right may result in members of the community being exposed to ideas that they consider unorthodox, uncomfortable, controversial or even repugnant."

Mantz added that UNH is committed to ensuring "the safety and well-being of every member of our community while upholding the right to free speech."

"We mourn for the lives of six innocent victims in Nashville and we stand by and support members of the LGBTQIA+ community who have been maligned during a national conversation about this tragic event," she said. ■

This article is being shared by partners in The Granite State News Collaborative. For more information, visit collaboratenh.org.

Perspective from page 2

ways a privilege and honor to set foot in that important historic building. When I was there, I admired the gorgeous interior, with its raised ceiling, abundant marble, and beautiful adornments and artwork. The doors into the Court Chamber were also open, allowing reception attendees a chance to peer into that dignified forum and the site of countless hours of brilliant arguments on complicated legal issues. As I took in the beauty of the entire building, I thought not just about the arguments that have occurred there over the course of the past 88 years. I also considered the justice gap and the difficulty so many Americans have in navigating the legal system and seeking out and procuring legal services in the pursuit of justice.

A trip to our nation's capital, particularly at this time of year, can be a breath of fresh air. It is magical to witness the beauty of the Capitol and the Washington Monument when walking in the evening. It is energizing to watch families and the throngs of schoolchildren visiting the Smithsonian museums surrounding the Mall during daylight hours. It was a privilege to be one of your representatives for ABA Day this year. While there are many challenges in life that seem insurmountable, there are many dedicated, hard-working people who are doing their very best to make society better for all of us. This most recent visit to Washington, DC served as a valuable reminder for me of the many blessings that I have for the excellent education I have received, the great opportunities and privileges I continue to benefit from, and the good fortune I have to be an American. ■

Information Technology

Practice Law Anywhere, Anytime: Top Remote Working Tools for Lawyers

By Nicole Black

One of the most challenging parts about being a small-firm lawyer is that your work is never done. Even when you're out of the office or working from home, emergencies arise which require your immediate attention.

Fortunately, affordable technology is readily available that allows you to quickly and easily access your case files and communicate with clients and colleagues, regardless of where you happen to be. The key is to incorporate the right technology tools into your law practice. That way, you can address issues as they arise, whether you're in the office, in court, on the road, or taking a well-deserved vacation.

No matter your needs, there are tools you can incorporate into your firm's workflows that will ensure your firm runs smoothly and efficiently even when you're working remotely.

Take Advantage of Cloud-Based Software

One surefire way for your law firm data to be easily accessible is when it's stored in the cloud. When your firm takes advantage of cloud-based software, you'll have immediate, 24/7 access to client files and related data from any internet-enabled device.

There are many types of cloud computing software, but for a robust, all-in-one solution, many firms rely on cloud-based law practice management software. All data relevant to your law practice can be stored in most law practice management software systems, including contact and calendar information; documents; billing data, invoices, time tracking, and payment information; client communications; and much more. With your firm's data stored securely in the cloud, no matter what type of emergency arises, you'll have all the information needed to address it, right at your fingertips.

Use Online Portals for Case-Related Communication

Web-based client portals are another remote working tool that allows lawyers to be responsive to their clients' needs. Confidential client communication is essential, and client portals offer a convenient and secure, encrypted way to communicate with clients from any location.

The encryption features are all-the-more important in light of recent ethical guidance, including ABA **Formal Opinion 477R**, Pennsylvania Bar Association **Formal Opinion 2020-300**, and Michigan State Bar **Opinion RI-381**, wherein the ethics committees concluded that unencrypted email may not always be sufficient for client communication and suggested client portals as a secure alternative.

Not only are client portals secure, they're also an efficient and convenient way to communicate with clients. All discussions related to a case are grouped together and easily accessible using any internet-enabled device, 24/7, day or night. With the click of a button, you can receive and respond to messages from clients, allowing you to be a responsive lawyer – even when you're out of town.

Online Billing and Payment Tools

Next are online legal billing features. Efficient and accurate legal billing is essential, even when you're working remotely. After all, if you don't invoice your clients, you won't get paid.

Online legal billing and payment processing tools make it easy to invoice clients automatically by generating digital, editable invoices. The invoices can then be paid by clients using online payment processing software. When your firm offers built-in payment flexibility by accepting e-check or credit card payments online and offers payment plans and legal fee loans, your firm will get paid faster and more often.

Video Conferencing and VOIP Phone Systems

Finally, video conferencing and VOIP phone systems need to be in place for your law firm to operate remotely. Using these tools, you can remotely communicate with clients in multiple formats. With video conferencing tools, you can hold face-to-face video meetings with clients, work colleagues, and co-counsel. Similarly, VoIP (voice over internet protocol) phone systems route calls over internet protocol networks. The days of being tethered to the office will be long gone, and you'll be able to conduct conference calls, receive (and store) messages in different formats, transfer calls remotely, and much more.

With the help of remote working software, it has never been easier to work from anywhere. From video conferencing to document management, these tools provide lawyers with the flexibility, security, and efficiency needed to serve their clients effectively, regardless of their location. ■

*Nicole Black is a New York attorney, author, journalist, and Senior Director, SME and External Education, at **MyCase** and **LawPay**, both AffiniPay companies. She is the nationally recognized author of "Cloud Computing for Lawyers" (2012) and co-authors "Social Media for Lawyers: The Next Frontier" (2010), both published by the American Bar Association. She also was the co-author of "Criminal Law in New York," a Thomson Reuters treatise for over a decade. She is an ABA Legal Rebel, and is listed on the Fastcase 50 and ABA LTRC Women in Legal Tech. She can be contacted at **niki.black@mycase.com**.*

Public Prosecutors and Referral Fees
Ethics Committee Opinion #2022-23/02

ABSTRACT:

A New Hampshire public prosecutor may not enter into a referral fee agreement with an active New Hampshire lawyer for matters that arose from the prosecutor's work as a prosecutor.

ANNOTATIONS:

A referral fee agreement benefitting a prosecutor creates a significant risk of a concurrent conflict of interest arising from the prosecutor's personal interests in the potential referral fee. This personal interest materially limits the prosecutor's ability to make fair and impartial decisions regarding the disposition of the matter that is connected to the referral fee agreement. It may also violate a number of statutes regulating gifts and compensation paid to public officials and public servants.

OPINION:

At the onset of the analysis, there are statutory prohibitions that limit most New Hampshire prosecutors from engaging in the private practice of law or accepting fees or emoluments for providing legal services. NH RSA 7:6-d prohibits "[t]he attorney general, deputy attorney general, assistant attorneys general and all attorneys employed by the department of justice" from "directly or indirectly engag[ing] in the private practice of law, nor shall they accept any fees or emoluments other than their official salaries for any legal services." There are similar prohibitions on the Rockingham County Attorney, Cheshire County Attorney, Belknap County Attorney, Sullivan County Attorney, Strafford County Attorney, Carroll County Attorney, and Coos County Attorney. *See* RSA 7:34-a et seq. 7:34-g. As of the drafting of this opinion, there are no statutory prohibitions barring the Merrimack County Attorney, Grafton County Attorney, or Hillsborough County Attorney from engaging in the private practice of law. While the statutes prohibiting the seven County Attorneys from engaging in the private practice of law do not explicitly reference assistant county attorneys, those County Attorneys may have office policies that prohibit the assistant county attorneys from engaging in the private practice of law or accepting fees or emoluments.

Aside from the statutes governing the Attorney General's Office and the County Attorney's discussed *supra*, there are other laws prohibiting public employees from benefitting financially from their employment. For example, executive branch public officials and employees are prohibited from accepting gifts or improper compensation. *See* NH RSA 15-B:3 (prohibiting gifts to public officials); NH RSA 15-B:1 (defining public official). Additionally, NH RSA 640:4 prohibits "public servants" from "accept[ing] or agree[ing] to accept any pecuniary benefit in return for having given a decision, opinion, recommendation, nomination, vote, otherwise exercised his discretion, or for having violated his duty…" It is very possible that a referral fee would be captured by NH RSA 640:4 as a "pecuniary benefit." Additionally, most political subdivisions—counties, cities, towns, and school boards—have adopted such prohibitions as matters of employee policy or more specifically as rules governing public sector attorney conflicts of interest.

Additionally, as the assistant county attorney's authority derives from the County Attorney and Attorney General, it is possible that the assistant county attorney may not do that which the County Attorney is prohibited from doing. But even for those prosecutors that are not statutorily barred from engaging in the private practice of law, they must still examine whether the Rules of Professional Conduct permit them to enter into a referral fee agreement with an active New Hampshire lawyer for matters that arose from the prosecutor's work as a public prosecutor.

NH RPC R. 1.11(d)(1) subjects lawyers currently serving as a public officer or employee to the conflict of interest rules, NH RPC R. 1.7, unless there is a law expressly exempting the public attorney from those conflict rules. The Committee is unaware of any New Hampshire law exempting prosecutors from the conflict rules.

In turn, NH RPC R. 1.7 governs conflicts of interest and prohibits a lawyer from a representation if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." NH RPC R. 1.7(a)(2). In the present hypothetical, the concurrent conflict arises from the public prosecutor's responsibility to his client, the State of New Hampshire. As a prosecutor, the lawyer has the "the responsibility of a minister of justice…" and "to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Comment 1 to NH RPC R. 3.8.

A conflict also flows from the second part of NH RPC R. 1.7(a)(2), which states that a concurrent conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited… by a personal interest of the lawyer." Here that personal interest would be the referral fee agreement and the resulting referral fee. The prosecutor's interest in the referral fee materially limits the prosecutor's ability to fulfill her obligations as a minister of justice.

Waiving the conflict of interest under NH RPC R. 1.7(b) is also problematic. A concurrent conflict of interest may be waivable, if (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing. NH RPC R. 1.7(b).

In the present scenario, it is not clear to the Committee, as a legal matter, who would be authorized to execute "informed consent, confirmed in writing." While a prosecutor may be employed as a town or city employee, county employee, state employee, or private attorney under contract, a prosecutor represents the State of New Hampshire in a criminal prosecution. The Committee offers no opinion on who would be authorized to make such a decision on behalf of the State of New Hampshire but believes that such a conflict would only be waivable, if at all, in rare and extraordinary circumstances. The present scenario certainly does not qualify as such a circumstance. Additionally, each referral would need its own waiver due to the unique issues presented by every criminal prosecution. But referral fees in this scenario constitute, in the Committee's opinion, such a pernicious practice that the conflict should be unwaivable due to the prosecutor's unique role as a minister of justice.

For the foregoing reasons, the Committee concludes that a prosecutor is not likely to be able to ethically receive a referral fee arising from a matter in which the prosecutor participated in the criminal prosecution.

NH RULES OF PROFESSIONAL CONDUCT:
Rule 1.7
Rule 3.8
Rule 1.11(d)(1)
Rule 1.7(a)(2) and (b)(2)

NH ETHICS COMMITTEE OPINIONS AND ARTICLES:

Conflict of Interest: "Member of a Firm Appearing Before Governmental Board When Another Member of the Same Firm is a Member of the Board" Formal Opinion #1997-98/1 (1998)

This opinion is the most recent of a series of opinions addressing New Hampshire Rule 1.11A, and making that rule inapplicable, because that rule relates to attorneys in private practice, not public attorneys.

SUBJECTS:
Public Officials
Public Sector Attorneys
Conflict of Interest
Referral Fees

By the NHBA Ethics Committee
This opinion was submitted for publication to the NHBA Board of Governors at its Thursday, March 23, 2023 meeting.

Paw and Order from page 1

Court May Soon Become Common Practice, facility dogs are assistance dogs, like guide dogs or emotional support dogs, that are specifically trained to work alongside professionals to assist others, such as child victims. In addition to the courthouse, they work in child advocacy centers and city or county attorney offices. When not at work, a facility dog is a loving pet to one of their primary handlers.

After all, paws-session is nine-tenths of the law.

Jack's handler, Daniel Kinson, is a Juvenile Probation and Parole Officer (JPPO) assigned to the DHHS Juvenile Justice Services' Keene District Office. He works primarily in the Jaffrey Peterborough Family Division and the Hillsborough Circuit Court, but sometimes covers court proceedings in other locations, such as the Circuit Court in Keene.

Jack without his vest, enjoying a bone for a job well done after posing for pictures. Daniel Kinson says when the vest goes on, it signals Jack that he is working. Photo by Tom Jarvis

Kinson works to help rehabilitate troubled youths and to provide timely interventions to ultimately avoid patterns of behavior leading to adult charges and further problems. He says that having Jack has already made a big difference with kids he works with.

"Youths come into a courtroom, and a lot of times, they don't understand what's going on," Kinson says. "It's a high-stress environment. Decisions are being made for them. I see Jack making a daily impact – and it's not even just kids on my caseload. I interface a lot at schools, hospitals, and residential placements, and he makes such a difference. It's been amazing to be a part of that and see it evolve."

Although Jack is still in training and new to working in the courtroom, Kinson says he is already making a difference. Just this past week, Jack was able to assist Kinson with a child that was refusing to get out of the car for a hearing. After Kinson brought Jack over to the car, she came out to pet him and then proceeded into the building without further issue.

"A lot of times, the anxiety builds before you even get into the courtroom," Kinson says. "The juvenile is usually at a different table, but I can put Jack in the down-stay and have the youth hold his leash so Jack is next to them and can pet him. It's also stressful for the parents, and Jack can help to calm them, as well. So, he has a lot of impact before, during, and after the hearings. And I do all the training outside my work hours because it's something I truly believe in. I've seen the difference it makes for kids."

Jack was donated to Kinson by Cold Springs Healing Paws (CSHP), a non-profit organization in New Ipswich specializing in canine breeding and training. Kinson and his wife, a schoolteacher, had been training their dog Lucy at CSHP to work at the school to assist the children. As part of her training, Lucy would accompany Kinson to work on some days.

Jack with his handler Daniel Kinson (left), Judge David Forrest (center), Melissa Saari, and Canyon at the facility dog presentation to Keene Circuit Court staff on April 5. Canyon is a six-year-old therapy dog trained by Saari at Cold Springs Healing Paws. Photo by Tom Jarvis

"When we were at Cold Springs for Lucy's training, we were talking about the impact dogs can have for people," Kinson recalls. "I shared a story where I was in a court hearing, and there was a juvenile who was ordered to go into placement – it's one of the most upsetting things for families – and the youth was having a hard time and began throwing chairs around the conference room. We tried calming him and it wasn't working. Normally, the bailiffs and I would have to place the kid into custody, and they would be detained. But I had Lucy with me that day and I told the youth, 'If you can calm down a bit, we can go outside, and you can play with my dog for a little bit.' He played with Lucy for 10 minutes and was able to calm down, give his parents a hug, and get in the transport vehicle without further issue. It was two divergent paths. What really helped the youth take the path of least resistance was having a dog available to lower his stress levels to the point where he was able to make a more coherent decision."

When CSHP Executive Director Melissa Saari heard the story, she told Kinson, "You need a dog," and subsequently donated Jack, his training, and his insurance.

Saari indicates once Jack is fully trained, he will be able to sense cortisol (a steroid hormone the adrenal glands release into the bloodstream when a person is stressed or anxious) levels in a person's body, and to be drawn to them and apply the things he's learned to provide comfort.

"It's a game changer for high-stress environments," Saari says. "It not only helps people dealing with the stress, but the people working in those environments, too."

According to Saari, Jack will certify at 15-16 months old, and will have close to 1,000 hours of training and know about 100 words by then.

"Facility dogs are held to the same standards that service dogs are held accountable to," Saari says. "The difference is that a service dog is taught to focus 100 percent of their time on their person. A facility dog like Jack is taught to mingle with everyone. He needs to be prepared to interact at a school that has like 400 students, and they all want to touch him."

Saari says CSHP's public access test consists of 30 elements, whereas a typical dog that visits the elderly in nursing homes takes a test with only 10 elements.

"I intentionally made it harder because I feel like, especially in Jack's situation, the children he's interacting with have had it rough. So, we want to make sure he's completely prepared," Saari says. "I think there should be dogs in every court and youth services situation, and Jack and Dan are the perfect team to showcase that."

When Kinson brings Jack to court, he always asks the judge's permission.

"By the time we get into the hearing, I've explained to everyone involved what Jack does, and I make sure they understand that if the kids have a hard time and want Jack next to them, he's available to them. So far, every judge has been very supportive," Kinson says.

Keene Circuit Court Judge David Forrest had Jack in his court on one occasion and was so impressed that he invited Kinson to bring Jack back, along with Melissa Saari, to give a presentation to the court staff.

"I saw it as a great opportunity for the staff in the court, as they are dealing with people who are emotionally charged," Judge Forrest says. "I found it fascinating when Dan was telling me about how Jack can de-escalate kids who otherwise may have to be put in restraints, and how the dog has an amazing calming influence. I really applaud him for his willingness to think outside the box by finding ways to integrate Jack into his work with kids – that he would think of bringing Jack rather than using a heavy-handed approach – it's a step in the right direction. If having the dog in court means having less outbursts, that's what we want. I think it's great and hopefully we see more of it."

Judge Erin McIntyre, who splits her time between the Hillsborough Circuit Court and the Manchester Family Court, says she has seen Jack in the courtroom a few times in cases involving kids, and it's a good tension breaker.

Jack hanging out at the Hillsborough Circuit Court with Judge Erin McIntyre, who keeps treats on the bench for him in case he comes in. She and Jack are paws-itively friends fur-ever. Photo by Tom Jarvis

"Jack definitely lightens the mood in the courtroom and helps balance some of the emotions that were going on before or after we had cases," Judge McIntyre says. She also indicated that Jack doesn't just help the kids and families that come into her courtroom, but her staff, as well.

"We've had days where everybody in the court has been having a rough day because of some of the things that we've seen, and Jack comes in and hangs out with us for a few minutes and the whole mood changes," Judge McIntyre says. "It's proof that having him here definitely changes the atmosphere and helps put your emotions back on track. I encourage every court to have one. It makes a big difference." ■

Robot Lawyers from page 1

"People are overestimating what it [AI software] can do in the next two years and underestimating what it can do in the next ten," Weaver says. "But I suspect that leap from using technology as an assistant in court to actually licensing attorneys that are not human beings is going to be a bridge too far for the foreseeable future."

Weaver

Weaver says there are a lot of ways using software like DoNotPay for legal services could go wrong.

"Chef's kiss as a publicity stunt – very well done," Weaver says of DoNotPay's robot lawyer scheme. "But I would say there's a word of caution – lessons from this story for two groups. One, for bar associations and courts, there's a certain population where these services and products are appealing. Courts and bar associations should think about how they want to respond to that. The other cautionary tale is for the consumers that use these to think carefully about the quality of the service or representation they are receiving. What data is being used to train it? Do the parties behind these services and applications have ulterior motives? Are they really in the business of providing legal services or are the legal services they claim to provide just a loss leader to fund and support their actual business model?"

On March 3, Chicago-based law firm, Edelson PC, filed a complaint against DoNotPay in San Francisco Superior Court, seeking a class action lawsuit. The complaint, filed on behalf of former DoNotPay customer, Jonathan Faridian, alleges the company is practicing law without a license and that it misleads the public with respect to its services.

In the complaint, Attorney Jay Edelson says, "Unfortunately for its customers, DoNotPay is not actually a robot, a lawyer, nor a law firm. DoNotPay does not have a law degree, is not barred in any jurisdiction, and is not supervised by any lawyer."

Browder denies any wrongdoing and says he will vigorously fight the lawsuit. He subsequently took to Twitter once again saying Faridian's claims have "no merit," and that DoNotPay is "not going to be bullied by America's richest class action lawyer."

Simoneau

"This is just a guy playing PT Barnum with something, and it sounds like it backfired on him," Attorney Kirk Simoneau says. "I don't think we are close to Skynet."

Simoneau is all for AI that helps with more immediate access to information, such as Westlaw with its NLP, but for certain practice areas like his own that involve persuasion and being in court, he believes the effectiveness of AI starts to wane.

"Here's a really good example,"

ROBOT LAWYERS *continued on page 21*

Robot Lawyers from page 20

Simoneau says. "I was at the law school this morning with the Webster Scholars. We do a training every year on the DOVE Project and today was the day the students presented their cases. They had a pretend trial, pretend witnesses, the whole shooting match. All those students had the exact same information. They were all given the same intelligence – if you will – the same law, the same statutes, the same exact fact pattern, the same cases. Every single one of those students presented it differently and with different levels of effectiveness.

Simoneau adds, "AI can be super helpful in the legal profession to quickly search through every case that's out there for the relevant precedence. But then what do I do with it? I don't think machine learning and AI are going to be able to take over the 'what you do with it' part very effectively."

In the personal injury field, people have been using AI for decades with a system called Colossus. The program uses algorithms to look for prior verdicts and uses them to place a value on the injury.

"The computer program says, 'well, your client has a broken arm? Here is what the broken arm is worth – we are going to pay you based on what the medical costs are across the country.' It's all AI-driven," Simoneau says. "But what does the computer do when you say, 'well, wait a minute. My client with a broken arm is deaf, and they use their arm to communicate using sign language.' The computer program doesn't know what to do with that."

As for me, I'm just happy that the robot lawyer is not programmed for terminations, so humanity is safe…for now. ■

Chat GPT from page 1

on November 30, 2022. However, usage really took off on February 7, 2023, when Microsoft Bing integrated ChatGPT into their search engine. GPT-3.5 showed potential as a time-saver but produced far-from-reliable results for legal research. GPT-3.5 failed the bar exam, but more problematic, it would sometimes reference nonexistent laws or cases.

On March 14, 2023, OpenAI debuted ChatGPT 4.0 (GPT-4), which is exponentially more advanced than its predecessor.

Notably, GPT-4 passed the Uniform Bar Exam (UBE) with flying colors. The chatbot's score of 297 was in the 90th percentile, ranking it among the top 10 percent of exam takers. While it is not error-free, neither are the humans. GPT-4 got 75.7 percent of the multiple-choice questions correct compared to the human test takers average of 68 percent.

While passing the bar exam is an impressive feat, bar passage is a minimum requirement for practicing law. GPT-4 and other similar generative AI platforms do not possess the creativity, strategic thinking, empathy, and passion of a good attorney. Likewise, while GPT-4 can generate text, its writing lacks sophistication and nuance.

The enhanced capabilities of GPT-4 have sparked concerns that AI technology may eventually replace human lawyers. A March 16, 2023 survey of 4,180 respondents (including 1,176 attorneys, 1,239 law students, and 1,765 consumers) conducted by LexisNexis Legal and Professional, found that 39 percent of attorneys, 46 percent of law students, and 45 percent of consumers believe that generative AI tools will significantly transform the practice of law.

Attorney John Weaver, chair of the Artificial Intelligence Practice at McLane Middleton and a member of the Cybersecurity and Privacy Group says, "I think one of the reasons ChatGPT is getting so much attention right now is both because it seems pretty revolutionary, and is in many ways, but also because it's coming for white collar workers. The fact that there's now the possibility of software that can generate a lot of their work product, a lot of the things that they work on, is unnerving to a lot of people that consider these things, write about them, or might have thought that their jobs were safe." Weaver, a prominent voice in the field of artificial intelligence law, is on the Board of Editors for *RAIL: The Journal of Robotics, Artificial Intelligence & Law.*

Also in March, Casetext, a legal technology company, introduced Co-Counsel, the first AI legal assistant. Powered by GPT-4, Co-Counsel is a tool designed to automate and streamline legal research and drafting of legal documents. Utilizing AI for research and first drafts can save a significant amount of time. While lawyers might use AI technology as a starting point for research or drafts, it is imperative that they verify any information generated.

The ChatGPT website includes the following warnings about its limitations: "May occasionally generate incorrect information. May occasionally produce harmful instructions or biased content. Limited knowledge of the world and events after 2021."

A major caveat for anyone doing legal research is that AI may quote a dissent in a case without indicating that the quote is from a dissenting opinion. Additionally, it may cite cases which have been overturned. AI-generated research may be a starting point, but it is not a reliable ending point.

The use of ChatGPT, Co-Counsel, Google Bard, or other generative AI creates ethical concerns which will need to be addressed. Attribution of work is an obvious concern, and the legal community will need to grapple with implications relating to attorney-client privilege if disclosing confidential client information to an AI chatbot. Though AI is not sentient, at some level there is human oversight which raises privacy concerns for information shared. Rule of Professional Conduct 1.6 regarding confidentiality of information should come into play and would seem to necessitate a client's informed consent if an attorney plans to utilize generative AI on a specific client matter.

At the 2023 ABA Midyear Meeting in February, the House of Delegates adopted a resolution addressing attorney accountability and transparency regarding AI. Resolution 604 sets forth these guidelines:

- *Developers of AI should ensure their products, services, systems, and capabilities are subject to human authority, oversight, and control.*
- *Organizations should be accountable for consequences related to their use of AI, including any legally cognizable injury or harm caused by their actions, unless they have taken reasonable steps to prevent harm or injury.*
- *Developers should ensure the transparency and traceability of their AI and protect related intellectual property by documenting key decisions made regarding the design and risk of data sets, procedures and outcomes underlying their AI.*

While there are legitimate concerns about appropriate use of AI in the legal field, if used appropriately, there are ways in which AI could increase access to justice. In his timely article, *The Implications of Chat GPT for Legal Services and Society*, Andrew Perlman, Dean and Professor of Law at Suffolk University Law School opines, "Less complex legal matters may see an even more dramatic shift, with AI tools helping to address the public's enormous unmet civil legal needs. Technology offers a promising way to address those needs, both through self-help resources and by enabling lawyers to reach far more clients than is currently possible."[1] Dean Perlman is a leading proponent for teaching law students to engage with and utilize AI tools responsibly.

The genie is out of the bottle. It is now the responsibility of legal professionals to carefully consider how to harness the power and potential of AI ethically, and in ways that may enhance the future of the legal profession. ■

Endnote

1. "The Implications of Chat GPT for Legal Services and Society" Andrew Perlman, Dec. 5, 2022, published online at Social Science Research Network ssrn.com and Harvard Law School Center on the Legal Profession **clp.law.harvard.edu**.

Using ChatGPT to Write Legal Briefs

by ChatGPT

In recent years, there has been an increasing trend among lawyers to use artificial intelligence (AI) tools like ChatGPT to help them write legal briefs. AI tools like ChatGPT use natural language processing algorithms to analyze vast amounts of data and generate text that mimics human writing. This technology has the potential to save lawyers a significant amount of time and improve the quality of their legal briefs.

Legal briefs are written documents that present arguments and legal analysis in support of a particular position. They are an essential tool for lawyers, as they provide a way to persuade judges and other legal professionals to accept a particular legal argument. Writing a legal brief can be a time-consuming and challenging process, requiring lawyers to analyze complex legal issues and craft arguments that are both persuasive and legally sound.

This is where AI tools like ChatGPT can help. By using natural language processing algorithms, ChatGPT can analyze vast amounts of legal data and generate text that mimics human writing. This technology can help lawyers to save time by automating the process of drafting legal briefs. Lawyers can use ChatGPT to generate drafts of legal briefs, which they can then edit and refine to ensure that the final product meets their specific needs.

One of the significant advantages of using ChatGPT is that it can analyze a vast amount of data in a short amount of time. This technology can quickly analyze legal cases, statutes, and other legal documents to identify relevant legal arguments and precedents. This analysis can help lawyers to craft arguments that are both persuasive and legally sound.

However, there are also some potential drawbacks to using AI tools like ChatGPT. While these tools can save lawyers a significant amount of time, they cannot replace human judgment and expertise. Lawyers must still review and edit the legal briefs generated by ChatGPT to ensure that they are accurate and relevant to the specific case.

In conclusion, the use of AI tools like ChatGPT to write legal briefs is a growing trend in the legal profession. These tools can help lawyers to save time and improve the quality of their legal briefs. However, it is important to recognize that these tools cannot replace human judgment and expertise. Lawyers must still review and edit the legal briefs generated by AI tools to ensure that they are accurate and relevant to the specific case.

Membership Status Changes

Presented to the Board of Governors March 16, 2023

Active to INACTIVE:
Fazi, Michael, Nashville, TN (Feb. 7)
Weatherhead, Steven, Swampscott, MA (Feb. 9)
DiCroce, Camille, Fremont, NH (Feb. 8)

Active to INACTIVE RETIRED:
DeMato, Louis, Manchester, NH (Feb. 16)

Active to RESIGNED:
Nofsinger, Jennifer, Portland, ME (Feb. 9)

Active to SUSPENDED:
Fuller, Steven, West Palm Beach, FL (Feb. 10)
Carroll, H. Paul, Newburyport, MA (Feb. 10)
Wellman-Ally, Lisa, Claremont, NH (Feb. 21)

Active to DECEASED:
LeBrun, John, Henniker, NH (Jan. 29)
Koziell, Paul, Scarborough, ME (Oct. 5, 2022)

Inactive to ACTIVE:
Pham, Katherine, Northborough, MA (Feb. 27)

Inactive to DECEASED:
Reardon, Judy, Manchester, NH (Dec. 16, 2022)

Inactive Retired to DECEASED:
Rotman, Shari, Bow, NH (Feb, 7, 2023)

Suspended to DECEASED:
Brighton, Jo Ann, Huntersville, NC (March 5, 2020)

Suspended to RESIGNED:
Miller, Casey, Warner, NH (Feb. 9)

Military Active to ACTIVE:
Webster, Luke, Lebanon, NH (Feb. 28)

The Case for Commercial Dog Daycare Regulation in New Hampshire

By Charles D. Boddy, Jr.

Working from home allowed many two-income families which lacked time to acclimate and train a puppy or new dog to adopt. Many new dog owners are choosing to leave their pooches at commercial dog daycare providers. Increased demand has increased the number of facilities, increased dog-to-dog contact, and warrants review of regulatory standards.

Existing New Hampshire animal care laws did not stem the August 2022 outbreak of respiratory infections in New Hampshire dog daycares. Infections began with a cough, runny nose, then difficulty breathing, and quickly resulted in animal hospitalization and deaths. While the illness is often described as a sort of canine pneumonia, veterinarians still lack an exact diagnosis or identified cause. The single commonality is that infected animals shared space with other dogs in daycares.

Dog daycare regulation is often a confusing network of laws described by some as a "set of patchwork regulations" and by others as "no regulation at all." New Hampshire prescribes humane treatment and sanitary conditions for kennels but provides few objective standards for evaluation and enforcement. While the Administrative Code (Section Agr 17404.04) prescribes structurally sound and well-maintained primary animal enclosures and access to clean food and water, it does not specify what such minimum requirements should be. It *does*, however, provide an objective formula prescribing the minimum area of an animal enclosure based upon its size.

Such criterion is often overlooked in statutes and regulations leaving an inspector to apply a more ambiguous "reasonable for comfort" standard. In this regard, New Hampshire warrants high marks! While RSA 644:8 prohibits cruelty to animals by depriving animals of necessary care, sustenance, or shelter, the problem with such criminal prohibitions is that they are necessarily reactive, not proactive. Sanctions alone are of little benefit to the abused animal at hand, leaving an unfulfilled need to promote animal health and safety before abuse or death occurs.

Massachusetts considered revising its commercial kennel regulations every year since 2017. It has not yet found the balance of regulation both protective of family pets and satisfying to commercial breeders. Massachusetts' attempts to regulate dog daycare facilities are inextricably intertwined with the tragic story of Ollie, a labradoodle puppy from Longmeadow, Massachusetts. Ollie was dropped off at a dog daycare in East Longmeadow. An hour and a half later, his owner received a text that Ollie was cut and needed to go to a veterinarian. When his owner arrived, Ollie had broken legs and couldn't stand up after being mauled by a pack of unsupervised boarded dogs. Even though there was a veterinary hospital next door, Ollie wasn't taken there because the daycare didn't have emergency protocols. Staff members weren't sure what to do. Ollie was in and out of the hospital for eight weeks, and went through three surgeries, before dying two months later. His veterinary expenses were $25,000. Statutorily required ownership, vaccination, and attendance records for the attacking dogs could not be obtained for days. When finally received, they were incomplete.

Meanwhile, there have been 16 Massachusetts dog daycare deaths since Ollie, including that of Mikah, a Border Collie who was picked up from daycare in Salisbury unconscious, unresponsive, and limp, having been left without water during last summer's brutal heat.

New Hampshire grants broad discretion to cities and towns to implement animal regulation. In the absence of strong state standards, many Massachusetts localities developed local daycare regulations which provide guidance as to the direction in which daycare regulation must head, and what it should look like when it gets there.

Local regulations can set standards for temperature, ventilation, tethering, access to shade and light, emergency medical training of staff, video monitoring, record keeping, isolation of aggressive and ill dogs, care for puppies and dogs of different ages, breeds, or dispositions, separation of sexually intact males and females, requirements for potable water and feeding, the sterilization or cleaning of cages and bedding between occupants, staffing ratios, insurance requirements, kennel construction materials, fencing, square footage minimums for housing, food supply storage, disease isolation, removal and disposal of waste schedules and expectations, washrooms, grooming areas, repair requirements, insects, parasites, and rodent control, soap and towel requirements, accessibility to first aid kits and emergency veterinary care, administration of medication, emergency disaster contingency plans, drainage and moisture requirements, sanitary waste disposal, warnings for heat stroke and hypothermia, adequately secured kennels, outside predator protection, minimum space requirements to permit dogs to stand, sit, turn, and lie down freely and comfortably, minimum exercise requirements, cleaning and sanitizing of feeding pans, daily cage sanitation and cleaning, vaccination requirements, and public notification requirements for animals injured while being boarded.

Specific, objective, and uniform standards are needed to support inspections and to reduce opportunities for forum shopping by daycare operators. Disparity of local regulations defeats the objective of protecting the animals, since regulatory compliance is avoidable. Second, differing standards creates opportunities for protracted litigation over whether local regulations are well conceived and reasonably related to the objective sought to be achieved by the regulation. A comprehensive regulatory scheme applicable throughout the state has no greater cost for enforcement, promotes uniformity and fairness, while avoiding anticipated obstacles to enforcement. A state-wide plan will avoid loopholes and will enhance policy/legislative objectives.

Unregulated, daycares with higher staff to animal ratios, more intense safety and sanitization protocols, more restrictions on feeding and segregation of breeds, juvenile, adult, and mature animals, have observational intakes, better medicine controls, veterinarian staff associations, and larger holding areas per animal may be able to accept fewer clients and may have increased fixed costs. Thus, quality care costs may be passed on to the consumer. Higher costs may make it harder for quality daycares to compete in an unregulated market. The cheaper boarding fees at substandard daycares may cause consumers to patronize the cheaper facilities, not knowing or understanding the difference in quality of care. Accordingly, lesser quality daycares may prosper and expand. Contrary to desired policy results, financial incentives may reduce the quality of care.

Thus, New Hampshire's passage of an "Ollie's Law," or similar commercial daycare regulation, may be a first step in reducing unnecessary commercial daycare deaths and promoting animal health and safety. Local regulation would remain viable until such time as the state legislation encompasses all areas encompassed by local regulations. To that end, initial state legislation might not supersede local regulation except to the point where the two actually conflict.

Once a regulatory framework is adopted, enforcement authority could remain with local community officials who are more likely to witness day to day daycare, be familiar with community "gossip," be more responsive within their communities, and may reduce bureaucratic confusion as to who has enforcement authority. ■

Charles Boddy, Jr. is a lawyer practicing municipal law, advising public clients, and representing cities and towns in administrative and regulatory matters.

Remarks from page 7

In our state, of course, governors are responsible for nominating judges, but it's the Executive Council that confirms, and without their approval, a candidate will not be successful. (We've seen that in recent years.) Governors are unfettered in the selection process. Since Governor Shaheen, they have voluntarily utilized a judicial selection commission, but because it is all voluntary, different from governor to governor, there are no guardrails in place to ensure women are given an equal opportunity to be considered. The percent of women appointed has ranged from 20 percent to 48 percent. (Up and down.)

We should consider:

- Who serves on the commission?
- Whether the commission recruits or relies on who applies.
- What criteria are used – and how weighted?
- Who is interviewed (what percent of applicants interviewed are men and women)?
- Who is sent to the governor, and what percent are men and women?.
- Does the governor always choose from the list?
- Who does the Executive Council confirm?

Many provisions could be instituted that would make for a more balanced and transparent selection process while protecting the confidentiality of applicants. It's an area worth exploring.

Let me leave you with a few other recommendations for what we could all do to help promote gender equality:

1. Pay attention to the numbers from year to year. Ask yourself if you are seeing progress and, if not, speak out. Don't wait to roll over in your grave.
2. Speak up when you see or hear sexist, racist, homophobic, or other offensive and unacceptable comments that have no place in our society, let alone Bar. There is no justice if there is discrimination.
3. Be a mentor. It is one of the most valuable contributions to the development of the Bar you can make. Help promote women's success. Help them make connections and support their growth. I have had the most amazing group of young women (and men) as interns – many of whom are now practicing law. Watching them flourish is inspiring. I know the future of our Bar is in good hands.
4. Be an ally. Provide opportunities and support to those who don't have as much privilege as you.

Let me close by saying that in my efforts at practicing the art of retirement, I've been doing a lot of reading and came across a lovely word – *Ubuntu*. It's a Zulu word that means we don't exist on our own, and we're never alone because we're part of a bigger, connected world of humanity. Gender bias is a threat to justice. Until we in the legal profession are reflective of who we are in the general population – women, women of color, women of all backgrounds, that we practice DEIB, we will not yet have gender *equality*. We owe it to each other to continue this effort – until we have achieved "the full measure of freedom."

Thank you for this extraordinary honor. I will cherish it always. ■

CONTINUING LEGAL EDUCATION GUIDE

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

Have an idea for a CLE? Reach out to the Professional Development team or a member of the CLE Committee.

APRIL 2023

THU, APR 20 – 12:00 p.m. – 1:00 p.m.
Corporate Transparency Act
- Webcast; 60 NHMCLE min.

MAY 2023

WED, MAY 3 – 8:30 a.m. – 1:00 p.m.
Truly Fundamentals of Estate Planning for NH Practitioners
- 240 NHMCLE min., incl. 30 ethics/prof.
- Concord • NHBA Seminar Room/Webcast

THU, MAY 4 – 12:00 p.m. – 1:00 p.m.
The Sneaky Dozen: 12 Subtle Grammar & Writing Errors w/Lenne Espenchied
- Webcast; 60 NHMCLE min.

THU, MAY 11 – 9:00 a.m. – 4:30 p.m.
Medical Malpractice Cases in New Hampshire
- 360 NHMCLE min., incl. 30 ethics/prof.
- Concord • NHBA Seminar Room/Webcast

MON, MAY 15 – 9:00 a.m. – 4:30 p.m.
Real Estate 101
- 360 NHMCLE min.
- Concord • NHBA Seminar Room/Webcast

WED, MAY 17 – 9:00 a.m. – 4:30 p.m.
Statutory Interpretation
- 360 NHMCLE min.
- Concord • NHBA Seminar Room/Webcast

THU, MAY 18 – 12:00 p.m. – 1:00 p.m.
Illogic & Ethics w/Lenne Espenchied
- Webcast; 60 NHMCLE ethics min.

MON, MAY 22 – 9:00 a.m. – 4:30 p.m.
Bankruptcy Litigation
- Webcast; 360 NHMCLE min., incl. 60 ethics/prof.

WED, MAY 24 – 9:00 a.m. – 4:30 p.m.
Navigating the Healthcare World
- 365 NHMCLE min.
- Concord • NHBA Seminar Room/Webcast

THU, MAY 25 – 8:30 a.m. – 10:30 a.m.
17th Annual Ethics CLE
- 120 NHMCLE ethics min.
- Concord • NHBA Seminar Room/Webcast

JUNE 2023

THU, JUN 8 – 12:00 p.m. – 2:00 p.m.
Survey Says: The Top 5 Drafting Errors in Ambiguous Contract Cases w/Lenne Espenchied
- Webcast; 120 NHMCLE min.

WED, JUN 14 – 8:30 a.m. – 4:45 p.m.
Practical Skills for New Admittees-Day 1
- 360 NHMCLE min., incl. 120 ethics/prof.
- Concord - Grappone Conf. Center

THU, JUN 15 – 8:30 a.m. – 12:00 p.m.
Practical Skills for New Admittees-Day 2
- 180 NHMCLE min.
- Concord - Grappone Conf. Center

TUE, JUN 20 – 12:00 p.m. – 1:00 p.m.
7 Questionable Associations that Cause Contract Litigation and How to Avoid Them
- Webcast; 60 NHMCLE min.

WED, JUN 21 – 9:00 a.m. – 2:40 p.m.
Liability for Directors & Owners
- 280 NHMCLE min., incl. 30 ethics/prof.
- Concord • NHBA Seminar Room/Webcast

THU, JUN 22 – 12:00 p.m. – 1:00 p.m.
Quick Start Guide: 10 Drafting Dos & Don'ts Every Lawyer Should Know about Drafting Contracts w/Lenne Espenchied
- Webcast; 60 NHMCLE min.

FRI-SAT, JUN 23-24
Annual Meeting 2023
- Portsmouth • AC Marriott

THU, JUN 29 – 12:00 p.m. – 1:00 p.m.
Fast Track Memo Writing for New Deal Lawyers w/Lenne Espenchied
- Webcast; 60 NHMCLE min.

Breakfast Forum

17th Annual Ethics CLE

Thursday, May 25, 2023
8:30 a.m. – 10:30 a.m.
120 NHMCLE ethics/prof. min

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

Topics to be covered include:
- Common Ethical Issues in Litigation
- Updates on Recent Ethics Committee Opinions
- Refresher on Trust Account Obligations
- Ethics and Pro Bono Legal Services

Faculty

Hon. Andrew R. Schulman, New Hampshire Superior Court, Concord

Stephanie K. Burnham, Burnham Legal PLLC, Manchester

Mark P. Cornell, NH Supreme Court Attorney Discipline Office, Concord

Elizabeth M. Murphy, NH Supreme Court Attorney Discipline Office, Concord

Emma M. Sisti, 603 Legal Aid, Concord

Richard Guerriero, Program Chair, Lothstein & Guerriero, Keene

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How to Register

All registrations must be made online at https://nhbar.inreachce.com/
(if you missed any of the previously held programs, they are now available ON-DEMAND)

Learn@ Lunch Webcast

Corporate Transparency Act

April 20, 2023 – 12:00 – 1:00 p.m.
60 NHMCLE min.

Join a discussion of the Corporate Transparency Act and learn how you can get ready for the changes coming on January 1, 2024.

Faculty

Dennis J. Haley, Jr., Program Chair/CLE Committee Member, McLane Middleton, PA, Manchester

Patrick C. Closson, McLane Middleton, PA, Manchester

Anthony Delyani, McLane Middleton, PA, Manchester

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Contract Drafting with Lenne Espenchied – Webcast only

The Sneaky Dozen: 12 Subtle Grammar and Writing Errors
May 4, 2023 – 12:00 - 1:00 p.m.
60 NHMCLE min.

Illogic and Ethics
May 18, 2023 – 12:00 - 1:00 p.m.
60 NHMCLE ethics min.

Survey Says: The Top 5 Drafting Errors in Ambiguous Contract Cases
June 8, 2023 – 12:00 - 2:00 p.m.
120 NHMCLE min.

7 Questionable Associations that Cause Contract Litigation, and How to Avoid Them
June 20, 2023 – 12:00 - 1:00 p.m.
60 NHMCLE min.

Quick Start Guide: 10 Drafting Dos and Don'ts Every Lawyer Should Know about Drafting Contracts
June 22, 2023 – 12:00 - 1:00 p.m.
60 NHMCLE min.

Fast Track Memo Writing for New Deal Lawyers
June 29, 2023 – 12:00 - 1:00 p.m.
60 NHMCLE min.

Truly Fundamentals of Estate Planning for NH Practitioners

Wednesday
May 3

8:30 a.m. - 1:00 p.m.
240 NHMCLE min.
incl. 30 ethics/prof. min.

NHBA Seminar Room/Live Webcast

This program is designed to be a truly fundamental program for attorneys and paralegals who prepare estate planning documents but who have not had much experience in the field. It will cover everything from the initial meeting, advance directives, wills, trusts, basic tax considerations, potential conflict assessments as well as Medicaid issues.

Faculty

Robert A. Wells, Program Chair/CLE Committee Member, McLane Middleton Professional Association, Manchester

Alyssa Graham Garrigan, Anderson & Ansell, PA, Bedford

Jennifer R. Rivett, Devine, Millimet & Branch, PA, Manchester

Timothy A. Sorenson, Sulloway & Hollis, PLLC, Concord

Joshua R. Weijer, McLane Middleton, Professional Association, Manchester

Medical Malpractice Cases in New Hampshire

Thursday
May 11

9:00 a.m. - 4:30 p.m.
360 NHMCLE min.
incl. 30 ethics/prof. min.

NHBA Seminar Room/Live Webcast

This program features some of the most experienced NH practitioners in the area of medical injury and malpractice cases. The full day program will cover the handling of medical malpractice cases from start to finish, including presentations on selecting and commencing a claim, insurance policies and coverage, retaining and examining expert witnesses, the standard of care, special challenges in mediation, physician licensing and the Board of Medicine, pros and cons of screening panels, and proving causation and damages in medical injury cases. The program will also touch on ethical issues confronting counsel handling these cases.

Faculty

Peter E. Hutchins, Program Chair/CLE Committee Member, Law Offices of Peter E. Hutchins, Manchester

Heather M. Burns, Upton & Hatfield, LLP, Concord

Nicholas D. Cappiello, Lubin & Meyer, PC, Boston, MA

Lindsey B. Courtney, NH Office of Professional Licensure & Certification, Concord

Todd J. Hathaway, Wadleigh, Starr & Peters, PLLC, Manchester

Bradley D. Holt, Sulloway & Hollis, PLLC, Concord

Kimberly Kirkland, Reis & Kirkland, PLLC, Manchester

Jonathan A. Lax, Gallagher, Callahan & Gartrell, PC, Concord

Michael S. McGrath, Upton & Hatfield, LLP, Concord

Randy J. Reis, Reis & Kirkland, PLLC, Manchester

R. Peter Taylor, Hoefle, Phoenix, Gormley & Roberts, PLLC, Portsmouth

Real Estate 101

Monday
May 15

9:00 a.m. – 4:30 p.m.
360 NHMCLE min.

NHBA Seminar Room/Live Webcast

This comprehensive CLE will cover the basics of real estate practice: real estate contracts; deeds and leases; surveys; title, title insurance, and title searches; residential and commercial closings; choice of entity; mortgages and foreclosure; revenue stamps and forms; adverse possession, quiet title, and partition; liens; and condominiums. Presented by an experienced and lively panel of New Hampshire lawyers.

Faculty

Amy Manzelli, Program Chair/CLE Committee Member, BCM Environmental & Land Law, PLLC, Concord

Suzanne Brunelle, Devine, Millimet & Branch, PA, Manchester

Kate C. Catalano, Catalano Law Offices, PLLC, Portsmouth

Lisa A. Mindlin, Summit Title Services Corporation, Manchester

Martha L. Prizio, First American Title Insurance, Concord

Roy W. Tilsley, Bernstein Shur Sawyer & Nelson, PA, Manchester

For more information or to register, visit https://nhbar.inreachce.com

Statutory Interpretation

Wednesday
May 17

9:00 a.m. - 4:30 p.m.
360 NHMCLE min.

NHBA Seminar Room/Live Webcast

This CLE course will cover the basics, as well as a few advanced topics, in the field of statutory interpretation: how courts determine what statues mean in hard cases. It will cover the foundational concepts that underlie the techniques courts utilize to determine what statutes mean, such as statutory text, legislative intent, and statutory purpose. It will also explain basic doctrinal techniques such as textual canons, substantive canons, the sometimes-controversial question of legislative history, and the proper and effective use of dictionaries, both legal and standard. The faculty will also address more cutting edge issues and techniques in the field, such as corpus linguistics.

Faculty

Jack P. Crisp, Jr., Program Chair/CLE Committee Chair, The Crisp Law Firm, Concord

Hon. N. William Delker, NH Superior Court, Concord

Hon. Anna Barbara Hantz Marconi, NH Supreme Court, Concord

James Heilpern, Brigham Young University, Provo, UT

Hon. Joseph N. Laplante, Chief Judge, US District Court-NH

Bankruptcy Litigation

Monday
May 22

9:00 a.m. - 4:30 p.m.
360 NHMCLE min.
incl. 60 ethics/prof. min.

Live Webcast

Today's commercial transactions face their most grueling tests in the crucible of the bankruptcy court. This seminar will explore the most common bankruptcy tests of commercial transactions: motions for relief, avoidance powers, fraudulent conveyances and claims to discharge. The faculty will also discuss the substantive procedural, ethical, and constitutional aspects of the most common and feared bankruptcy litigation.

Faculty

Edmond J. Ford, Program Chair/CLE Committee Member, Ford, McDonald, McPartlin & Borden, PA, Portsmouth

Kimberly Bacher, Office of the US Trustee, Concord

Ryan M. Borden, Ford, McDonald, McPartlin & Borden, PA, Portsmouth

Hon. Peter G. Cary, US Bankruptcy Court-District of Maine, Portland, ME

Eleanor Wm. Dahar, Dahar Law Firm, Manchester

Joseph A. Foster, McLane Middleton, Professional Association, Manchester

William S. Gannon, Attorney at Law, Manchester

Jonathan M. Horne, Murtha Cullina, LLP, Boston, MA

James S. LaMontagne, Sheehan Phinney Bass & Green, PA, Portsmouth

Navigating the Health Care World

Wednesday
May 24

9:00 a.m. - 3:30 p.m.
365 NHMCLE min.

NHBA Seminar Room/Live Webcast

This full day seminar will address cutting edge developments in the health system focusing on recent changes that impact access to and delivery of care for both insured and uninsured patients. The program is geared toward the non-healthcare lawyer who needs to understand and navigate the health care system to advocate for themselves, their families, and their clients.

Faculty

Debra Dyleski-Najjar, CLE Committee Member/Program Chair, Najjar Employment Law Group, PC, Andover, MA

Judith F. Albright, Rath, Young & Pignatelli, PC, Concord

Kenneth C. Bartholomew, Rath, Young & Pignatelli, PC, Concord

David R. Craig, David R. Craig & Associates, New Boston

Andrew B. Eills, Sheehan Phinney Bass & Green, PA, Manchester

Mary Goreham, US Department of Labor, Boston, MA

Lucy C. Hodder, UNH Franklin Pierce School of Law, Concord

Melissa E. Najjar, McDermott, Will & Emery, LLP, Boston, MA

Maria M. Proulx, Anthem Blue Cross & Blue Shield of NH, Manchester

Christine Tang-Chin, US Department of Labor, Boston, MA

Lawrence W. Vernaglia, Foley & Lardner, LLP, Boston, MA

Thomas Wright, Turning 65 Workshop, Portland, ME

Liability for Officers, Directors & Owners of Limited Liability Companies & Closely-Held Corporations

Wednesday
June 21

9:00 a.m. - 2:40 p.m.
280 NHMCLE min.
incl. 30 ethics/prof. min.

NHBA Seminar Room/Live Webcast

This CLE will address legal exposure for individuals in a corporate and limited liability company setting. This will include potential liability for officers, directors and shareholders.

Faculty

Arnie Rosenblatt, Program Chair/CLE Committee Member, Hinckley, Allen & Snyder, LLP, Manchester

Peter G. Callaghan, Preti Flaherty Beliveau & Pachios, PLLP, Concord

Nicole Fontaine Dooley, Welts, White & Fontaine, PC, Nashua

Kathleen M. Mahan, Hinckley, Allen & Snyder, LLP, Manchester

Jennifer S. Moeckel, Sheehan Phinney Bass & Green, Manchester

Edward J. Sackman, Bernstein, Shur, Sawyer & Nelson, PA, Manchester

Michael B. Tule, McLane Middleton, Professional Association, Manchester

For more information or to register, visit https://nhbar.inreachce.com

Common Law Wrongful Termination - New Hampshire Once Led the Way

By Nancy Richards-Stower and Debra Weiss Ford


Richards-Stower


Ford

This is the 21st (!) *Bar News* "debate" over the last 17 years between employment lawyers Nancy Richards-Stower (employee advocate) and Debra Weiss Ford (employer advocate). Here, they discuss New Hampshire's history of common law wrongful termination, and the NH Supreme Court opinion issued this fall: *Donovan v. Southern New Hampshire University*.

Nancy: I used to brag that NH provided the earliest common law wrongful termination case, *Monge v. Beebe Rubber* (1977). Olga Monge refused to date her married boss, was fired, and sued for breach of contract. Our Supreme Court created an exception to the "employment at will" doctrine, holding that a termination based on retaliation, bad faith, or malice broke the "oral employment contract," because all contracts carry a covenant of good faith.

Deb: Back then, cheating with someone's spouse was a crime (adultery) and the employer couldn't force an employee to commit a crime to keep her job. Ms. Monge didn't bring a sex discrimination claim, probably because it wasn't until 1986, in *Meritor Savings Bank v. Vinson,* that the US Supreme Court recognized sexual harassment as sex discrimination.

Nancy: Next came *Howard v. Dorr Woolen Co.* (1980). The NH Supreme Court ruled that illness, age, bad faith, and malice alleged as wrongful termination by Howard's widow failed, because status wasn't enough. The employee had to do some act reflecting public policy. Public policy had to encourage the act performed or condemn the act the worker refused.

Deb: Next came *Tice v. Thompson* (1980). The Supreme Court held that wrongful termination didn't exist for a member of the governor's staff, the Coordinator for Drug Abuse. There were pleading deficiencies and the matter became moot after the next governor (Gov. Gallen) abolished the position.

Nancy: Then came *Cloutier v. Great Atlantic & Pac. Tea Co*. (1981), where the court first characterized wrongful termination as a "tort," and ruled that the public policy underlying the tort need not be clear, nor strong, nor reflected in a statute.

Deb: Cloutier was fired after 36 years at his job because his store safe, full of cash, was burglarized on his day off. A&P had ended $3 police escorts, and Cloutier wouldn't order his subordinates, fearful of robbery, to transport money to the bank. The bad faith? A&P had authorized using the safe, Cloutier was fired in a five-minute meeting, and held responsible for the robbery occurring on his first day off after working seven days. The public policy? Public policy supported the safety of his employees (even without relying on OSHA), and it was unfair to hold him responsible for something that happened on his regularly scheduled day off (even without relying on the state's day of rest statute).

Nancy: Most importantly, *Cloutier* ruled that the jury would decide what was public policy, because its determination "*... calls for the type of multifaceted balancing process that is properly left to the jury in most instances...*"

Deb: But not all the time. *Cloutier* authorized courts to take the issue from the jury when the public policy "*...was so clear as to be established or not established as a matter of law...*"

Nancy: Then came *Cilley v. N.H. Ball Bearings* (1986). The trial court granted summary judgment to the employer because it found no public policy.

Deb: But the Supreme Court did, even though the employee's misconduct more than justified his termination (including using subordinate employees' labor at his home, charging the employer with overtime pay). Cilley claimed the real reason for his firing was his supervisor's revenge, because Cilley had outproduced him and refused to lie to the company president for the supervisor.

Nancy: The public policy implicated? The policy in support of truthfulness.

Deb: Of interest is Justice Souter's decision in *Richardson v. Chevrefils* (1988).

Nancy: Because the employee landed (temporarily) on the State's child abuse offender list, he lost his job with a private employer. Richardson argued (in part) that his rights should be assessed in the context of public policy, as in wrongful termination. The court slammed that door: "*[Plaintiff] argues that he had a property interest in his job subject to due process protection because firing him without hearing would violate due process. This is circularity, pure and simple, and it will never get the plaintiff to a source of entitlement in State law... The only reason alleged or suggested for the State's action against the plaintiff was his admitted act of French-kissing the juvenile for whom he had responsibility as a social worker. However, that act may be described, no one could reasonably treat it as an act that public policy approves.*"

Deb: Next came *Short v. SAU 16* (1992), a half-million-dollar verdict reversed by the Court. Here, a public teacher's contract was not renewed, and he raised as public policy his refusal to criticize his superintendent. The Court said, "*Short cannot assert a public policy in favor of refusing to criticize his supervisor...when such criticism [would support] the ... management objectives of his employer. Further, an employee's expression of disagreement with a management decision is not an act protected by public policy... Secondly, we find the SAU's decision not to renew Short's employment to be just the sort of political decision it was elected to perform, and thus in no way against public policy...Presumably the voters elected them because they agreed with the candidates' philosophies...*"

Nancy: Thankfully, since then, public employees' freedom of expression under amended RSA 98-E protects such plaintiffs. Otherwise, this decision could supercharge the extremists landing on school and library boards, threatening the jobs of teachers and librarians for speaking in support of teaching actual history.

Deb: Next came *Karch v. Baybank FSB* (2002), overloaded with issues, but for our purposes, its important holding is that wrongful termination can occur by constructive discharge.

Nancy: Next? *Porter v. City of Manchester* (*Porter I*) (2002), holding that the workers compensation act does not bar wrongful termination claims. Now the comp statute carries a clear option for the employee (RSA 281-A:8, III).

Deb: It is possible for employees to have both claims: a comp claim for emotional illness for occurrences up until the moment of termination, and after that moment, a wrongful termination claim for all harm flowing from the termination. *Porter I* confirmed that wrongful termination is a tort.

Nancy: In 2009, *Mackenzie v. Linehanm* upheld a JNOV that dissolved another half-million-dollar verdict in favor of an off-duty police officer fired following an altercation with an unbalanced citizen outside a bar. The employee argued that because he refused to concede that his off-duty conduct violated his work rules, his termination implicated the public policy favoring truthfulness. The trial court ruled that *"no rational trier of fact could have ruled in the plaintiff's favor, considering the evidence and all reasonable inferences..."*

Deb: Well, when telling the truth is a confession of a rule violation, it is more likely than not, you get fired for the rule violation and not your acknowledgement of it. Next came *Leeds v. BAE Sys.* (2013). The employee, previously disciplined for yelling and swearing at a subordinate, was fired following a road rage incident in the BAE parking lot. Summary judgment was upheld despite Leed's protests that (1) his actions were in self-defense and (2) that a jury should decide if swatting away from his face a cell phone held by the other driver was in furtherance of the public policy of self-defense (especially because he thought it might be a weapon). The other driver had followed Leeds into the BAE parking lot after a near collision. The court explained that even if Leeds' acts were legal under the criminal law, and the other driver was the primary aggressor, Leeds' other conduct (30 seconds in a shouting match filled with obscenities) tanked his claim.

Nancy: Then, in *Clark v. N.H. Dep't of Emp't Sec* (2019), the Supreme Court "went rigid," refusing to expand the philosophy of wrongful termination to include a new tort,

TERMINATION *continued on page 37*

Severance Agreements: Key Components for Employers and Employees

By Kathleen Davidson and Beth Deragon


Davidson


Deragon

In the first instance, employers are not required to offer severance to departing employees, unless contractually obligated to do so. Employers typically consider offering severance when the terminating employee is a long-term employee, the circumstances of the termination were not the fault of either party, or when there is legal risk associated with the employee's termination. Employers are often hesitant to offer severance, as they see it as compensating an employee who may not "deserve" it or worry it will set a precedent and other employees will come to expect it. Severance, however, is an important tool that employers can use to mitigate their risk of being sued and to reaffirm other agreements such as non-solicitation, non-competition, trade secret, and confidentiality agreements.

When an employer offers severance, they can, and should, have the employee waive any potential claims they have against the company via a release contained in the severance agreement. If the employee is over 40 years old, the ADEA requires that specific language be contained in the agreement to validly waive claims under that act and that that the employee be given up to 21 days to consider it and seven days to revoke it.

Severance agreements also give the employer an opportunity to have an employee reaffirm their obligations under non-solicit or non-compete agreements. This is important because if a prior non-compete agreement did not comply with the law (for example, if it was not presented to the employee prior to the employee accepting the job) then the severance payment can be the consideration that makes the non-compete agreement enforceable.

Businesses can also use severance agreements to prevent an employee from disparaging the company or disclosing confidential information. Often, the risk of having to pay back a severance will entice an otherwise disgruntled employee from retaliatory actions that he or she was otherwise considering taking. Employers need to be cautious, however, with broad non-disparagement clauses and requirements that the employee keep the agreement confidential. On February 21, 2023, the NLRB ruled that such clauses impermissibly attempt to deter employees from engaging in protected concerted activity.

There are some claims that cannot be released in settlement agreements or severance agreements, but creative language in a severance agreement can still protect an employer. For example, the employer can have the employee affirm that they have been paid all wages to date and that they are not aware of any unreported workplace injuries. If a former employee later tries to claim that they are due wages, the employer can use this affirmation to impeach the employee and to show that as of that date, the employee considered themselves paid in full.

Likewise, while an employer cannot prevent an employee from cooperating with an EEOC or HRC investigation, a severance can prevent an employee from receiving any monetary award from the results of said investigation, thus, usually disincentivizing the employee from pursuing such a claim.

If an employer has a protracted negotiation with an employee over the severance amount, the employer should be sure to determine whether the employee received unemployment in the interim, determine whether any overpayment is due to the New Hampshire Department of Employment Security, and as part of the severance offer, include repayment of that overpayment from the severance.

While employers' main objective in presenting severance agreements to employees is to protect it from liability, for employees receiving the severance agreement the main objective is to receive a fair amount relative to the value of the claims being waived and ensure that they will be receiving all amount owed pursuant to contractual terms and policies and practices. Employees can also use a severance negotiation to try to receive an employer-paid continuation of benefits such as healthcare.

Before signing a severance agreement, employees should review all relevant employment documents such as offer letters, employment contracts, handbooks, and any other company policies and procedures related to the terms and conditions of employment. For at-will employees, offer letters should provide the terms of conditions of employment, including bonus or commission information and payout of time off policies. While employees cannot waive wage and hour claims in a release, employers will insert language in the agreement stating that the individual agrees that all owed wages have been paid.

Often, employers believe erroneously that amounts otherwise due to a departing employee (e.g., wages, bonus, commission, vacation time) are included in the severance amount offered. This is not the case. The severance is consideration for the employee waiving claims and does not include amounts that otherwise would have been paid to the employee at termination of employment.

Employees with employment contracts face more complicated issues because they and their employer agreed to employ them for a stated period of time unless certain contingencies occurred, and they might be entitled to additional severance if the employer is ending their employment for a reason that is not proscribed under the contract. Furthermore, the employment contract might contain severance provisions that must be ad-

SEVERANCE *continued on page 37*

But the Algorithm Did It: Understanding the Use of AI in Employment Decisions

By Brian Bouchard

The Artificial Intelligence (AI) wars have begun, and the technology is dazzling. I could easily have had technology like ChatGPT write the first draft of this article (seriously), but nostalgia for the sound of backlit laptop keys overcame me—call me old-fashioned. Many companies are embracing the new technology and are relying on automated and machine learning processes, including AI, to facilitate key employment decisions from hiring to termination. In doing so, they have created what the Equal Employment Opportunity Commission (EEOC) calls the "new frontier of discrimination issues."

Employer Use of AI

Employer use of AI has focused primarily on recruiting and hiring. Still, the capabilities of this burgeoning technology extend into evaluating job performance and even into recommending employees for termination by way of replacement or job elimination. A recent Society for Human Resource Management survey estimated that 79 percent of US employers use AI in their hiring processes, and 38 percent use AI in employment management. Use of AI ranges from predictive hiring, to interview scheduling, to having chatbots ask threshold interview questions. For many applicants, there is a good chance their application never sees a human before being rejected.

Perils of Using AI for Employment Decisions

While the promise of AI is evident, its perils are less so. While the technology is not sentient, it can synthesize (not just analyze) truly unbelievable amounts of data, including language models and text. The problem is that the data being analyzed came from us—little more need be said about the flaws there. While software engineers can exclude our cruelest inputs, the potential for discrimination, even unintended discrimination, is widespread.

One of the most significant concerns is correlation bias. This occurs when a data point yields a "strong correlation" to a desirable (or undesirable) performance metric. But the strong correlation can sometimes be a proxy for a protected trait. For example, a response to an interview question may exhibit a strong correlation with employee retention, but the correlation may also screen out women of a childbearing age.

Seemingly innocuous data points like zip codes—which many employers likely would not consider in the hiring process—may exclude qualified candidates because of a supposedly strong correlation with an undesirable performance metric. The result is that AI may reject an application from a qualified candidate because of a protected trait.

The intersection between AI and disability rights is particularly perilous. So much so that the EEOC issued a technical assistance manual on the subject last May (2022). AI may, for example, screen out employees with long resume gaps. But if the gap is due to a disability, the exclusion could be viewed as discriminatory. Also, AI may not appreciate an employer's obligation to provide a reasonable accommodation; worse yet, it may engage in the interactive process itself and conclude that providing an accommodation imposes an undue hardship.

Use of AI in employment management is not all bad, however. Studies have shown that AI, when appropriately used, can reduce unlawful discrimination by removing human prejudice and unconscious bias from employment decisions. It removes human subjectivity. The challenge with AI is understanding *why* it made certain decisions.

But the Algorithm Did It

Algorithmic discrimination is discrimination. And the EEOC has taken notice. In January 2023, the EEOC published a Strategic Enforcement Plan (SEP) in the federal registry and held public hearings on the new civil rights frontier of combating employment discrimination in automation and AI systems. The SEP states that combatting algorithmic discrimination is one of the EEOC's highest priorities for fiscal years 2023-2027.

The EEOC has stated that employers are not insulated from legal liability by having AI either make or contribute to employment decisions. This means employers using an AI vendor to screen applicants will bear responsibility for any biased, discriminatory, or unlawful decision the technology makes. In other words, the "algorithm did it" is not a defense.

Proving Discrimination against a "Black Box"

Despite its clear stance against algorithmic discrimination, the EEOC has thus far struggled to provide comprehensive guidance to employers and employees on AI use. Two principal reasons explain why.

First, algorithms are protected from disclosure under state and federal law. This means that the EEOC is limited to regulating the observable effects of AI and not the underlying processes. Second, due to the black box phenomenon, computer scientists may not fully understand *why* complex AI models decide the way they do. We may not know, for example, why AI accepted one resume and rejected the other.

For anyone familiar with *McDonnell Douglas* burden-shifting, that last part is particularly consequential. It could limit an employer's ability to proffer a legitimate business reason for an adverse action and the complainant's ability to prove that the legitimate business reason is a pretext. The EEOC and employment lawyers are wrestling with technology that has the potential to create new, unnoticed barriers to fair employment.

ALGORITHM *continued on page 35*

Love on Lockdown: Sexual Harassment Issues

By Julie Moore

Sexual harassment and workplace romance are terms that seemingly are mutually exclusive, but sometimes the line is blurred. Sexual harassment is unwelcome conduct that is sexual or gender-based in nature, and that is so severe or pervasive that it creates a hostile work environment. A consensual personal relationship between two individuals that is romantic in nature is (usually) welcomed. Add the dynamic of love between co-workers, and now you have what's called workplace romance, which can be tricky, even perilous, to navigate.

Research done by the Society for Human Resource Management (SHRM) in 2022 reveals that about 33 percent of US workers have been on a date, are currently romantically involved, or have been involved with a co-worker. Three-quarters of those did not disclose the relationship to their employer. Interestingly, the number of workplace romances has increased since the pandemic, up six percentage points.

The frequency of workplace romance should not be surprising, as the reality is that people work a lot, and that allows for people to get to know each other well. That knowing can turn to like and sometimes to love. The SHRM study also shows that only 16 percent of employees stated they would not respect colleagues being in a relationship. In other words, most employees don't want such relationships to be banned.

Employees should be free to make choices about their private lives and choice of partners, right? In reality, it's not so easy. Things can change rapidly, when trouble in paradise erupts for the once-happy couple and it now may become a work-related issue for HR and employment counsel to contend with. This may lead to an investigation and consequences, such as reassignment to a different department. It could also trigger the need for remedial or corrective action, such as termination, depending on the circumstances.

Over two decades ago, I was involved in a case where a company received an anonymous letter about an alleged affair between a manager and supervisor who worked for him, where employees complained about favorable treatment and secret rendezvous they say happened on the clock. It's not unusual for rumor or gossip to permeate the workplace and speculation about who moves up the ladder because of a personal relationship. Relationships can also ignite talk and moral judgments, which can negatively impact productivity and morale, often disproportionately for women. It can pit some employees against each other, taking sides. Conflicts of interest and inequities also can be at play.

Workplace romances between individuals at different ends of the power spectrum can be viewed as sexual harassment claims waiting to happen, inviting unwanted liability. Maybe that's a cynical view, but it may also be a reasonable one and something for an employer to carefully consider. Power often invites abuse, and romance can lead to broken hearts, revenge, and a new narrative. Think about a jilted lover who sends racy photos of his colleague/former romantic partner to co-workers, and it's easy to recognize the inherent risks in knowingly permitting such romances to occur. With a power differential, questions often arise as to the existence of pressure, coercion, and intimidation. As *Meritor Savings Bank v. Vinson,* 477 U.S. 57, taught us in 1986, the proper inquiry is "welcomeness" and not whether participation in the sexual relations was "voluntary."

On the recommendation of their employment counsel, employers should consider how to mitigate such risks and explore the use of non-fraternization policies. These are akin to nepotism policies, addressing familial relationships. Such a policy is not a one-size-fits-all approach. On one end of the spectrum, such a policy may permit relationships with no boundaries, while another can call for an outright ban of all relationships between colleagues at any level. In between, some employers may choose to restrict relationships between supervisors and subordinates only or to extend the restriction to those in finance, human resources, administration, and other areas who have access to confidential information – a tempting weapon in the hands of a rejected paramour. This is not a legal issue, as employers are free to promulgate policies on this topic to fit their culture.

As with any policy, the language should be well-drafted, clear, and unambiguous. For example, the definition of a "relationship" should be carefully considered, as words matter. The policy can leave room for flexibility, if desired. Importantly, the policy should reflect the practical dynamics of the workplace and legitimate business needs. Very likely, a small family business will have a different policy than a company with 75 employees. An overly restrictive policy may well foster a culture of deception, where romances are forced underground.

Another effective approach is to use so-called "love contracts," where the employer asks the two involved in a personal relationship to attest to the consensual nature of it, agree to abide by the sexual harassment policy, and report promptly anything that reflects any adverse change in the relationship.

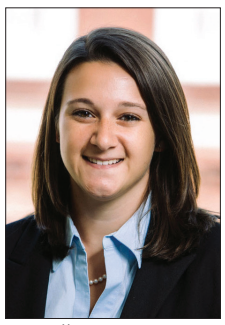
If employers utilize non-fraternization policies, communication is key. Such a policy should be included in any employee handbook or code of conduct, should be addressed in onboarding, and should be reviewed as part of sexual harassment prevention training. Such a policy should be uniformly enforced, without regard to

ISSUES *continued on page 36*

The Future (Or Lack Thereof) of Non-Competes

By Grayson Shephard and Alexandria Russell


Shephard


Russell

"Non-compete agreements" are relatively common provisions in employment contracts. Estimates of the US Federal Trade Commission provide that approximately 30 million individuals are subject to such an agreement.[1] They are more pervasive in certain roles/industries, including health care, tech, and sales (just as a few examples),[2] but they can be found across the employment landscape.

Traditional NH View of Non-Competes

Generally, non-compete agreements prohibit an employee from competing against the employer during employment and for a period of time after the employment relationship ends. Due to their restrictive nature, courts in New Hampshire and other jurisdictions disfavor restrictive covenants, including non-compete agreements. However, in New Hampshire, a non-compete may be upheld if supported by consideration and if the restraint is reasonable.

The reasonableness of the restraint is viewed through a three-pronged test: (1) whether the restriction is greater than necessary to protect the legitimate interests of the employer; (2) whether the restriction imposes an undue hardship upon the employee; and (3) whether the restriction is injurious to the public interest.[3]

In reviewing the reasonableness of a restrictive covenant, New Hampshire courts take into consideration the scope, duration, and geography of a noncompete and review these factors as to individual employees to ensure that any restraints are reasonable as applied to that individual. Even if a particular restraint is found to be unreasonable or overbroad, a court may modify the restraint rather than finding it invalid altogether if the employer acted in good faith in the execution of the agreement. It should also be noted that New Hampshire has additional statutory requirements for certain types of employees, as well as the requirement that any non-compete agreement be presented to the potential employee, in full, prior to acceptance of the offer of employment. *See* RSA 275:70.

FTC Proposed Rule

However, state specific law and rules that validate non-competes in certain contexts may all be for naught. The US Federal Trade Commission (FTC) recently proffered a proposed rule that would ban the use of non-compete agreements nationwide. On January 5, 2023, the Federal Trade Commission published a proposed rule that would ban (and importantly, nullify existing) non-compete agreements with limited exceptions.

Under the proposed rule, a "non-compete clause" includes any "contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer." This broad language could also impact contractual terms that are not traditionally understood as express "non-compete" agreements. The proposed rule includes a "functional test for whether a contractual term is a non-compete clause." Under the "functional test," the clause would be evaluated to determine whether it "has the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer."

After receiving over 7,000 comments, the public comment period for this proposed rule was extended until April 19, 2023. The rule would go into effect 60-days after it becomes final, and employers would have 180 days after publication of the final rule to comply. Employers would have to notify all current and former employees individually within 45 days that those prior agreements are cancelled and ineffective.

The FTC provided a set of model or proposed communications the FTC deems effective in complying with the new rule. The model communications require an employer to express the invalidity of the existing noncompete, advise the employee that they may accept a job with another person/company, and that the employee may compete with the employer.

If an employer continues to use and enforce non-compete clauses in violation of the rule, the employer will open itself up to issues of unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. From there, a cascade of potential pitfalls could arise, including an FTC enforcement action with penalties available to the FTC in its enforcement actions, including substantial fines for violations, the imposition of injunctions, and other forms of relief. The employer could also open itself up to liability from current or former employees.

All told, the current guidance and environment for employers who utilize these types of provisions in their employment agreements, is one of uncertainty regardless of if/how the final rule is adopted by the FTC. A thorough review of any noncompete language, or any other restrictive provision, contained in employment agreements would be wise to prevent exposure to government or private action. ■

Grayson Shephard and Alexandria Russell are Senior Associate attorneys at Rath, Young, and Pignatelli. They are both mem-

FTC *continued on page 35*

The Supreme Court at the 50-Yard Line: Personal Prayer and Public Employment

By Jon Meyer

From Texas high school football to constitutional fireworks, the majority decision in *Kennedy v. Bremerton School District*, 597 U.S. ___, 2022 WL 2295034, 2022 LEXIS 3218 (2022), marks the culmination (at least for now) of the Court's journey toward revamping Establishment Clause jurisprudence in the context of an appeal by a high school football coach that he was illegally fired for praying on the field following each game. The plaintiff coach argued that because of his religious beliefs, he felt "compelled" to offer a "post-game personal prayer" of thanks at midfield. The school district's position was that if he prayed where he could be observed by students while he was on duty, that could be perceived as the school district's endorsement of religion. The Court's decision in favor of the coach not only reinterprets the Establishment Clause but provides guidance for future Free Speech and Exercise Clause cases brought by public employees.

In a case of evolving facts and competing principles, the six-person majority decided that firing a high school football coach for engaging in "quiet prayer" on the field following each game violated his Free Speech and Free Exercise rights. In rejecting the school district's Establishment Clause defense, it also rejected its own controversial Establishment Clause "*Lemon*" test, which takes into account the law's purpose, effect, and potential for church/state entanglement (*Lemon v. Kurtzman*, 403 U.S. 602, (1971), as well as its more recent offshoot endorsement test – whether a reasonable onlooker would regard the activity as being an endorsement of religion. It concluded that there was no conflict between Established and Free Exercise Clauses; only a "mere shadow" based on prior erroneous decisions.

It ruled that Establishment Clause cases should be interpreted by "reference to historical practices and understandings." In more concrete terms, this appears to mean that religious practices in the public sector are permissible so long as individuals are not "coerced" into participation or become a captive audience. As the conflicting majority and minority opinions demonstrate, the meaning of "coercion," as well as the applicability of "indirect coercion," in the church-state context remains subject to much interpretation and dispute.

Prior to the case going to court, there was ongoing negotiation between the coach and the school district, which had resulted in substantial dilution of the original practice of the coach leading his team in prayer, to the coach praying by himself, with others choosing to join him, at midfield after the game. The majority's analysis was limited to the practice of individual prayer, whereas the minority insisted that the practice for which the coach was fired could only be evaluated in the context of the coach's prior prayer activity. What the majority opinion referred to as a "brief, quiet, personal religious observance," the three-justice minority asserted was the incorporation of a "public communicative display of the employee's personal religious beliefs into a school event."

In evaluating the coach's Free Speech and Exercise Clause rights, the majority applied the *Garcetti* distinction between speech as a citizen which, under some circumstances, is protected by the First Amendment versus speech as an employee which is not. *Garcetti v. Ceballus*, 547 U.S. 410 (2006). Its analysis sheds light on how this distinction should be analyzed. The Court noted that in *Lane v. Franks*, 573 U.S. 228 (2014), the fact that the employee was speaking about subjects relating to work did not make it employee speech.

The critical issue is whether the employee's job duties encompassed making communications of the type in question. It warned against a "blinkered focus on the terms of some formal and capacious written job descriptions" so as to permit a public employer to use "excessively broad job descriptions to subvert the Constitution's protection." Thus, the fact that part of the coach's job description may have included being a role model was not enough since saying a prayer was not "ordinarily within the scope of his duties as a coach." Although the coach described his prayer as a personal one, the majority assumes that prayer satisfies or is equivalent to speaking on a subject of public concern which is the other prerequisite of protected speech identified in *Garcetti*.

In concluding that the coach had engaged in employee speech, the 9th Circuit below asserted that the publicly accessible prayer expressed during working hours fell within the coach's duties as a role model to students. The Court rejected this conclusion stating that it "commits the error of positing an excessively broad job description by treating everything teachers and coaches say in the workplace as government speech subject to government control."

The other criteria for distinguishing between citizen and government speech is time and place. The three-justice minority emphasized that the prayer took place at a time when the coach was still on duty with supervisory responsibility. The majority, however, notes that coaches were permitted immediately after games to visit with friends, take personal phone calls, etc. It concluded that because other members of the coaching staff were given the opportunity to engage in private activities, the coach's prayer should not be attributed to his work, even though he was doing it on the football field, which was his place of work.

The school district's principal justification for firing the coach was that permitting his prayer would be a violation of the Establishment Clause by creating the perception

PRAYER *continued on page 36*

The PWFA, the PUMP Act, and New Hampshire Practical Implications

By Anne Jenness and Katie A. Mosher


Jenness


Mosher

In December 2022, President Biden signed into law the Pregnant Workers Fairness Act (PWFA) (HR 1065) and the Providing Urgent Maternal Protections for Nursing Mothers Act (the PUMP Act) (HR 3110) as part of the Consolidated Appropriations Act, the omnibus spending bill (HR 2617). While the PUMP Act was effective upon signing, its enforcement provisions become effective on April 28, 2023, whereas the PWFA is effective on June 27, 2023.

Maternal workplace protections have been part of landmark discrimination and worker protection legislation, such as Title VII of the Civil Rights Act (Title VII), the Pregnancy Discrimination Act of 1978 (PDA), the Americans with Disabilities Act (ADA), and the Family and Medical Leave Act of 1993 (FMLA), among others. The PUMP Act and PWFA clarify and expand upon these prior laws.

The PUMP Act: Granting Protections to More Employees

In 2010, the Break Time for Nursing Mothers (the Nursing Mothers) law, a provision of the Patient Protection and Affordable Care Act, amended Section 7 of the Fair Labor Standards Act (FLSA). This provision gave employees with a need to express breast milk certain rights, including: (1) a private, clean space to pump at work that is not a bathroom and (2) reasonable break time to do so for up to one year after a child's birth. Given its placement within the FLSA, the Nursing Mothers law did not reach all employees (i.e., exempt employees).

The new PUMP Act formally extends protections to exempt workers excluded from coverage under the 2010 provision. However, small employers (those with less than 50 employees) are not subject to the PUMP Act, "if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business." HR 3110, Sec. 18D (c). Notably, the PUMP Act gives aggrieved employees a private right of action against their employer for violations, but also requires the employee inform the employer of their failure to comply with the Act and allow them ten days to come into compliance. *See* HR 3110, Sec. 18D (g)(1). Contrary to some reporting, the PUMP Act does not extend the applicable coverage period to express breast milk at work to two years. Rather, the PUMP Act maintains a similar one-year coverage period as the Nursing Mothers law. *See* HR 2617, Sec. 18D(a)(1).

The PWFA: Awaiting Regulatory Clarification

The PWFA prohibits covered employers, including those with 15 or more employees and some public sector employers, from certain employment practices that impact qualified employees affected by pregnancy, childbirth, or related medical conditions. Qualified employees are those employees or applicants "who, with or without reasonable accommodation, can perform the essential functions of their position," with limited exceptions. The Equal Employment Opportunity Commission (EEOC) will issue regulations to carry out the Act, with the same remedies and procedures as those available for causes of action under Title VII. *See* HR 1065, Sec. 3 (a)(1). The House Committee on Education and Labor indicated that PWFA would mirror the ADA in many ways. However, the language of the PWFA is different from the ADA in ways that bear review, particularly with regard to reasonable accommodations and the interactive process. *See generally* HR Rep. No. 117-27, pt. 1, at 26–31 (2021).

Of note, the PWFA prohibits an employer from requiring a qualified employee to accept reasonable accommodations other than those that the employer and employee "have arrived at through an interactive process." *See* HR 1065, Sec. 2 (2). Under the ADA, employers are well advised to attempt the interactive process as a matter of course when considering potential accommodations. However, as the First Circuit recognized in *Echevarria v. AstraZeneca Pharm. LP*, 856 F.3d 119, 133 (1st Cir. 2017), if an employee does not meet the burden of demonstrating that a reasonable accommodation exists, then the employee cannot independently maintain a claim for failure to engage in an interactive process under the ADA.

Based on other text within the PWFA and the related House Committee Report, it seems unlikely that lawmakers intended to create liability for failure to engage in the interactive process under the PWFA as a stand-alone claim (or, more specifically, where the employee cannot demonstrate that a reasonable accommodation existed). *See generally* HR Rep. No. 117-27, pt. 1, at 26–30 (2021). Nonetheless, this is an interesting difference between the PWFA and ADA, and future EEOC guidance may clarify its practical impact.

The PWFA also expressly prohibits an employer from imposing leave on a pregnant worker, if another reasonable accommodation is available. This express prohibition adds to the potential pitfalls of imposing leave when another accommodation exists. Many attorneys may be familiar with New Hampshire's RSA 354-A:7 (VI)(b), which focuses on providing leave for pregnancy, childbirth, or related medical conditions. As reflected in the PWFA, employers should avoid any temptation to

IMPLICATIONS *continued on page 36*

NLRB Decision Declares that Non-Disparagement and Confidentiality Provisions in Severance Agreements Violate Employees' Section 7 Rights

By: Alexander E. Najjar

On February 21, 2023, the National Labor Relations Board (NLRB) issued its decision in *McLaren Macomb*, 372 NLRB No. 58 (Case 07–CA–26304), which overturned the Trump-era NLRB precedent established in 2020 in the *Baylor University Medical Center and IGT d/b/a International Game Technology* rulings. *McLaren* held that provisions in a severance agreement, including confidentiality and non-disparagement provisions, that have a "reasonable tendency" to interfere with, restrain, or coerce the exercise of employee rights under Section 7 of the NLRA are unlawful.

McLaren applies to all private sector workplaces, union or non-union, with respect to the protection of Section 7 rights of employees to "engage in mutual aid and protection." Under *McLaren*, "the mere proffer" of such provisions in a severance agreement violates the NLRA for both the separating employee and for those who remain working. Further, the protections extend to former employees. In General Counsel Memorandum GC 23-05 issued on March 22, 2023, the General Counsel signaled the NLRB's intent to further expand limitations on employer restrictions of employee rights to other workplace policies and agreements.

In *McLaren*, 11 nurses were terminated and given severance agreements that broadly prohibited disparagement of the hospital, their employer, and required the agreement to be kept confidential. In finding the severance agreement to be unlawful, the NLRB returned to its pre-*Baylor* test which questioned whether the employer engaged in conduct which, "may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." The *Baylor* test, by contrast, had required the Board to show: (1) that the employer unlawfully dismissed the employee under the NLRA; and (2) that employer animus towards the exercise of Section 7 rights was a relevant component of an allegation that provisions of a severance agreement violated Section 8(a)(1) of the Act.

The *McLaren* case found that the *Baylor* and *IGT* decisions offered no justification for the two-part test, nor for the "severely constricted view" of workers' organizing rights. In returning to pre-*Baylor* precedent, the NLRB stated that it was returning to "nearly a century of settled law," which held that workers cannot broadly waive their rights under the NLRA. Under *McLaren*, merely presenting a severance agreement that includes language limiting an employee's Section 7 rights, such as a confidentiality or non-disparagement clause, is considered unlawful by the NLRB. It is irrelevant whether the employee accepts the agreement.

The relevant provisions in the *McLaren* severance agreement were rather typical for severance and other confidentiality agreements. The language found facially unlawful by the Board was:

> "The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.
>
> At all times hereafter, the Employee promises and agrees not to disclose information, knowledge, or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives."

By reverting to pre-*Baylor* precedent, however, merely offering a severance agreement including such terms will be construed by the Board as an unlawful act under the NLRA.

On March 22, 2023, the NLRB General Counsel, Jennifer A. Abruzzo, issued a Memorandum GC 23-05 outlining her guidance to the Regional Directors regarding the scope of the decision. While stating that severance agreements are not now "banned," she said that they cannot include overly broad provisions which limit employees' rights to engage with one another to "improve their lot as employees," including the right to extend their efforts through accessing the Board, judicial, legislative, and administrative forums, the media, and other third parties.

The Memorandum, in question-and-answer format, advises that "narrowly tailored" confidentiality clauses which restrict dissemination of proprietary or trade secrets may be considered lawful. Further, she states that non-disparagement provisions may be found lawful, if narrowly tailored meeting the definition of "defamation" (that is, maliciously untrue, such that they are made with knowledge of their falsity or reckless disregard for their truth or falsity).

The GC also advises that savings clauses or disclaimers, such as the language she proposed in her Stericycle brief to the Board, which affirmatively and specifically set out employee statutory rights may be useful in resolving ambiguity over vague terms but

RIGHTS *continued on page 36*

Understanding Hair Discrimination and the CROWN Act

By Amy Cann

Dreadlocks, afros, waves, braids, natural, long, straight, or curly, applicants and employees appear for interviews and work with any number of hairstyles and textures. Employers – through grooming policies or otherwise – frequently seek to control, influence, or restrict their employees to conform to Eurocentric hair standards. When an applicant or employee fails to follow the expected standards, they may lose a job offer or promotion, suffer discipline or termination, or experience distain from co-workers, customers, students, or others.

In 2019, California became the first state to address the risk of discrimination against Black and brown individuals based on characteristics such as hair texture and styles. The law, known as the Creating a Respectful and Open Workplace for Natural Hair (CROWN) Act, amends the definition of race in state anti-discrimination statutes to include traits historically associated with race, including hair, texture, and protective hairstyles, including but not limited to "braids, locs, and twists." Since 2019, 18 states have adopted this legislation as well as many localities. Employers should be aware of this growing body of law.

Background Facts that Led to Passage of Laws

In an effort to comply with workplace expectations, many Black women use a variety of products, including hair relaxers, pressing combs, hair oils, moisturizers, lotions, leave-in conditioners, and gels. A 2020 Harvard University study concluded some of these hair products contain parabens, phthalates, and other chemicals that are known to be endocrine disruptors that interfere with hormones. This disruption is linked to serious health issues, including diabetes, metabolic syndrome, cardiovascular disease, and pregnancy-related complications.

A 2022 National Institutes of Health study reported a higher risk of uterine cancer with women who reported using chemical hair-straightening products compared to those who did not use these products. Aside from the serious side effects, natural or protective hairstyles (e.g., braids, locs, twists) preserve hair health. Protective styles shield hair from damage resulting from harsh weather and excessive manipulation. Essentially, a protective style keeps the ends of hair tucked away and encourages length retention, reduces tangles and knots, and provides hair relief from constant pulling and combing that causes hair breakage.

The pressure to conform to Eurocentric hairstyling standards in American society is a genuine problem for Black people, especially Black women. A recent Michigan State University study found that 80 percent of Black women felt the need to straighten their hair to fit in at work. The CROWN Coalition reported two-thirds of Black women feel obligated to straighten their hair before a job interview.

Hair-based discrimination is also prevalent in schools. In Mont Belvieu, Texas, a high school student named DeAndre Arnold, who had attended the same school since seventh grade, found his locs in sudden violation of a school policy that, "Male students hair must not extend below the top of a t-shirt collar or be gathered or worn in a style that would allow the hair to extend below the top of a t-shirt collar, below the eyebrows, or below the ear lobes when let down."

For years, DeAndre used clips and rubber bands to comply, but the school changed its rule and stopped allowing students to pin up their hair. He was subsequently suspended from school including his prom and high school graduation. Closer to home in Boston, Massachusetts, twin sisters Mya and Deanna Cook made national headlines after their school punished them with detention and banned them from extracurricular activities and school events.

In a work-related incident, a recent LinkedIn post from a Black job candidate described how at the start of a job interview on Zoom, the recruiter unapologetically told him, "Your dreadlocks would not work for my client," and terminated the interview. A LinkedIn search using hashtag #hairdiscrimination reveals more personal workplace experiences of employees or job candidates being adversely treated simply due to the hairstyles they choose to wear.

The evidence consistently demonstrates that hair-based discrimination is essentially race-based and creates substantial societal and economic harm to Black people who choose not to conform to an employer's grooming standards, regardless of the health risk, costs, and inherent unfairness of this standard.

Efforts to Pass Federal CROWN Act Legislation

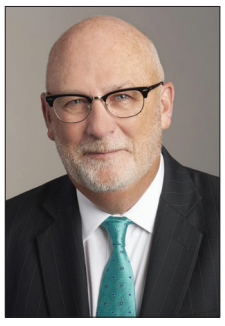
Federal courts have varied in their holdings as to whether discrimination based on an individual's natural hairstyle is illegal under the current federal anti-discrimination laws, such as Title VII. That is because federal Civil Rights laws only focus on a person's immutable – or unchangeable – characteristics, not appearance. In 2017, the 11th Circuit Court of Appeals found, "banning dreadlocks in the workplace under a race-neutral grooming policy—without more—does not constitute intentional race-based discrimination." The ABA addressed the matter in two separate articles: *Is Hair Discrimination Race Discrimination*? and *Good Hair/Bad Hair: A Discussion about the CROWN Act and Discrimination*, which also includes a recorded webinar on the subject.

Congress is slowly working on the issue. In 2022, the House of Representatives passed HR 2116 (Creating a Respectful and Open World for Natural Hair (CROWN) Act of 2022), prohibiting racial discrimination based on hairstyle or hair texture in employment and educational settings. Currently, the bill is assigned to the Senate's Judiciary Committee

HAIR *continued on page 36*

Are Employers in it for the Long COVID Haul? Accommodation Challenges for Employers When Employees Suffer from Long COVID

By Jim Reidy and Noy Kruvi


Reidy


Kruvi

The COVID-19 public health emergency in the US is finally coming to an end. Moving on from the pandemic's emergency phase is a cause for celebration, but the virus and its active variants continue to present challenges. According to the CDC, as of February 1, 2023, a total of 102,447,438 people in the US tested positive for COVID-19, and approximately 60 percent of those who tested positive reported additional COVID-related infections. While subsequent infections are significant, the CDC has reported that many of those who were infected have since disclosed lasting physical and mental complications attributable to the virus – this is what is known as "Long COVID."

While these potentially long-term health issues are still being studied by the CDC and HHS, what is known at this point is that Long COVID affects several bodily systems, sometimes all at once. Those long-lasting and chronic physical symptoms include fatigue, shortness of breath, muscle aches, sporadic fevers, headaches, dizziness, heart palpitations, cough and chest pain, fever, and loss of taste and smell.[1] Long COVID could also cause or amplify mental impairments, which include brain fog (concentration issues), anxiety, and depression. The CDC reports that the duration of these mental and physical symptoms vary from person to person, with some cases only lasting days and others continuing for months.

Long COVID-related impairments could be devastating to the workforce. The Census Bureau's June to July 2022 HPS survey found that 16.3 million people (around 8 percent of US workers) reportedly had Long COVID, and as many as four million employees are projected to be out of work due to Long COVID in 2023. This could present many challenges for employers who are still recovering from the economic challenges of the pandemic.[2]

The FMLA covers impairments when the individual is hospitalized or when the individual is under the care of a healthcare professional. Long-term or chronic conditions likely require continuing care with a health care professional. In contrast, FMLA regulations clarify that the law was not intended to cover ordinary, everyday conditions such as the common cold, which is how some people with Long COVID experience symptoms.

The FMLA's initial implications in this context are more straightforward than when an employee's need for leave or reduced hours exceeds the FMLA's 12-week-per-year limit — that is when the Americans with Disabilities Act (ADA) comes into play, and the issue can become more complicated. At this juncture, the issue is how long should an employer continue to accommodate the employee beyond the FMLA period. Prior to the pandemic, a few courts addressed this issue and found that additional time off after FMLA leave is exhausted may be a reasonable accommodation, but there are limits.

The ADA's reasonable accommodation analysis involves a few critical stages for those covered by the Act's definition of "disability." The guidance from the CDC, HHS, and EEOC on Long COVID and the ADA suggest that many of the manifestations of Long COVID could satisfy the ADA's definition of a disability. However, the analysis does not end there — even if the condition satisfies that threshold definition. The next question is if the person is a qualified individual with a disability (i.e., can the person with that disability perform all the essential duties of the job, with or without a reasonable accommodation).

In the case of Long COVID-related accommodations, there may become a point where such accommodations, depending on the specific circumstances, job duties, scope, and duration of the proposed accommodation, create an undue hardship on the employer. One relevant example of accommodations that might create an undue hardship is a need for indefinite or permanent accommodations.[3]

Some Long COVID-related accommodations could very well be indefinite and with that not create any undue hardships for the employer. Those could include remote work, reduced schedules, or transfer to another position, depending on the circumstances. Extended leaves have also been found to be legitimate in some cases.[4] But employers generally cannot be expected to provide *indefinite* leaves, especially not well beyond FMLA leave exhaustion, since this would nearly always create an undue hardship on the employer.

As the 7th Circuit stated in one case, "The ADA is an anti-discrimination statute, not a medical-leave entitlement."[5] It therefore makes no difference as to whether the indefinite leave is requested due to Long COVID or another serious health condition. It does not follow, however, that employers are therefore insulated from engaging in the ADA's interactive process when confronted with Long COVID accommodation requests — it is just that indefinite or long-term accommodations may, under the circumstances, constitute an undue hardship. Again, these decisions are on a case-by-case basis. It is also important to point out that this 7th Circuit case pre-dated COVID-19. Given the potential for wide-spread Long COVID cases, it could be extended, or even indefinite accommodations requests are more commonplace. Stay tuned! ■

Attorney Jim Reidy is a shareholder and co-chair of Sheehan Phinney's Labor and Employment Group. Noy Kruvi is a law clerk and member of Sheehan Phinney's Labor and Employment Group.

Endnotes

1. https://covid.cdc.gov/covid-data-tracker/#datatracker-home
2. https://www.fastcompany.com/90777619/long-covid-is-still-draining-many-workers-heres-how-it-affects-productivity
3. https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/lengthy-ada-leave-undue-hardship.aspx
4. https://cdn.ca9.uscourts.gov/datastore/memoranda/2020/06/08/19-16251.pdf
5. https://www.lawandtheworkplace.com/wp-content/uploads/sites/29/2017/09/Severson.pdf

FTC from 30

bers of the firm's Labor and Employment Practice Group.

Endnotes

1. *See* FTC Press Release, F.T.C. Proposed Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2023) available at **FTC Proposes Rule to Ban Non-compete Clauses, Which Hurt Workers and Harm Competition | Federal Trade Commission.**
2. New Hampshire passed a law in 2019, NH RSA § 329:31-a, prohibiting any restriction on a physician's right to practice medicine in any geographic area for any period of time after the termination of any partnership, employment, or professional relationship.
3. *Merrimack Valley Wood Products, Inc. v. Near*, 152 N.H. 192 (2005).

Algorithm from 28

The Road from Here

AI technology is deploying rapidly. Employers will continue to use AI to automate HR processes and increase productivity, particularly during hiring booms and deep recessions. Employers using automation or AI to facilitate any employee management function should, at a minimum:

- Ask their AI vendor for audit reports on algorithmic bias and request audits unique to the employer's business.
- Monitor data inputs to ensure the AI is being trained on relevant, nonbiased data points only.
- Periodically review AI results for discriminatory outcomes.
- Negotiate indemnification from AI vendors.
- Provide information to applicants and employees about the AI and how it works.
- Provide a mechanism for "screened out" employees to report perceived bias or to request accommodations.

AI is indeed the new frontier, but employers must use it cautiously as the regulatory side plays catch up. ■

Brian Bouchard is a litigator at Sheehan, Phinney, Bass & Green, focused on labor and employment, land use, and construction issues.

Hair from page 34

and awaiting reintroduction into the 2023 legislative session.

The CROWN Coalition and State Action

The CROWN Coalition leads the Official Campaign of the CROWN Act and was founded by Dove, the National Urban League, Color of Change, and the Western Center for Law & Poverty. This coalition is a significant driver in influencing state and local governments to extend current statutes to protect hair texture and protective styles in the workplace and public schools. Many states and municipalities across the United States either have pending legislation or have already passed their own protections, including the following jurisdictions with new CROWN Act state and local laws (according to **thecrownact.com**):

- **On the West Coast**: Alaska, California, Colorado, New Mexico, Nevada, Oregon and Washington, and large cities in Arizona
- **In the Midwest**: Illinois, Minnesota and Nebraska, and large cities in Michigan and Wisconsin.
- **On the East Coast**: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Jersey, New York, and large cities in Pennsylvania.
- **In the South**: Louisiana, Tennessee, Virginia and many large cities in Florida, Georgia, Kentucky, North Carolina, Texas, and West Virginia.

There are currently no related bills pending in the New Hampshire Legislature this session.

Recommendations for Employers

Review your handbook critically for an inadvertent bias in your grooming policies and discuss recruiting practices to prevent hair bias. Employers located in states with CROWN Acts, or with employees working from such states, should also review and update their employee handbooks to reflect the proper definition of "race" to include the hair-based protections. Be proactive and work hard to make sure everyone feels welcome in your organization.

This topic provides another opportunity to promote the importance of diversity and cultural sensitivity in the workplace. By providing educational opportunities, guidance, and leadership to your front-line managers and supervisors, you can help them understand the impact of discrimination and how to avoid it. Everyone should know your expectations for a workplace free from discrimination. ■

Amy Cann is a member of the Litigation Department and the Employment Law and Cybersecurity Practice Groups at McLane Middleton.

Prayer from page 31

of government endorsement of religious activity. Given the Court's rejection of the endorsement test, this was a defense doomed to fail. The minority opinion emphasized instead the creation of disruption, which is part of the balancing test outlined in *Garcetti*. It observed that the coach had gone out of his way during his back and forth with the school district to involve the media, and that by the end of the football season, he had become a religious cause célèbre, with media surrounding the individuals engaged in prayer. This argument, which was not communicated by the school district when it terminated the coach, was not addressed by the majority.

Under *Garcetti*, even citizen speech by public employees is subject to suppression if its First Amendment value is outweighed by the disruption that it causes. The Free Exercise clause standard of requiring a compelling government purpose to justify a non-neutral restriction on an employee's religious practice is more employee friendly. The Court did not decide which standard is applicable here because it held that coach would win under both.

The majority opinion noted that religious speech was "doubly protected" in the First Amendment by both the Free Speech and Free Exercise Clauses. In earlier cases, that speech was also restricted by the Establishment Clause. As that Clause has been diluted by more recent decisions, it raises the fundamental question whether the right to pray in the public employment context is now entitled to more protection than other speech. Had the coach engaged in political discourse after the game on the field against the directive of the school district, would he have been similarly protected? As stated in Justice Thomas' concurrence, "a government employee's burden therefore might differ depending on which First Amendment guarantee a public employee invokes."

The *Kennedy* decision stands for the proposition that religious speech by public employees is entitled to at least as much protection as speech on matters of public secular concern. Whether it is entitled to more will await future cases. Another question for future consideration is whether this potentially enhanced protection will influence the analysis of the employer's obligation under Title VII not to discriminate based on religion, and to reasonably accommodate religious practices in the workplace. ■

Jon Meyer is a partner at Backus, Meyer & Branch, focusing on employment law, education law, civil rights law, and personal injury. He can be reached at ***jmeyer@backusmeyer.com****.*

Rights from page 33

would not cure overly broad provisions. The GC Memo also warns that other provisions in severance agreements, as well as in other employment agreements and handbook policies, may also violate Section 7 rights, referencing non-compete clauses, no solicitation clauses, no poaching clauses, broad liability releases and covenants not to sue.

Until the courts weigh in on any challenges to *McLaren* or its scope, employers should examine language in their severance and other agreements to assess whether the language can "reasonably be said" to tend to interfere with Section 7 rights. Section 7 protects rank and file employees of both unionized and non-union employers, and according to *McLaren*, also protects former employees.

However, supervisors, as defined under the NLRA, generally are not protected by Section 7 of the NLRA, unless disciplined in retaliation for refusing to commit an unfair labor practice or refusing to violate the NLRA. The GC Memo suggests that, to avoid an unfair labor practice, employers should advise employees who already signed agreements containing prohibited clauses that such provisions will not be enforced. Employers should seek labor counsel to assess whether to delete such provisions, include disclaimers regarding no intent to interfere with Section 7 rights, or stay the course until the courts weigh in regarding impact of the NLRB's invalidation of such language outside the scope of Section 7. ■

Alex Najjar practices labor and employment law at Najjar Employment Law Group, PC, and is admitted to practice in the state and federal courts of New Hampshire and Massachusetts as well as the federal First Circuit Court of Appeals. He is the Past Chair of the NHBA Labor and Employment Law Section, served on the NHBA Committee on Cooperation with the Courts, and currently serves on the NHBA Finance Committee. Alex is also a graduate of the NHBA's Leadership Academy.

Implications from page 32

focus *exclusively* on leave as a reasonable accommodation.

Practical Implications for Employment Attorneys and Employers: Potential Approaches

The passage of the PWFA and PUMP Act appear to signal continued political and legal interest in providing support for pregnant and breastfeeding employees. Similar provisions to the PUMP Act have been part of federal law since 2010. However, given that New Hampshire does not have a state law specifically addressing breastfeeding in the workplace, the change to federal law may be more impactful for New Hampshire employers. Attorneys should review the PUMP Act with the understanding that it applies to more employees in more industries than the Nursing Mothers law. Attorneys should also be aware of differences and similarities among the PWFA, ADA, NH RSA 354-A:7, and related laws, and should watch for EEOC regulations and guidance related to the PWFA.

Together, these Acts should prompt employers (and those who advise them) to consider reviewing and updating employee handbooks and relevant policies. Perhaps most importantly, both Acts highlight the need for appropriate communication between employers and their employees, especially after an employer may become aware of an employee or applicant who faces "known limitations related to pregnancy, childbirth, or related medical conditions." ■

Anne Jenness is a Shareholder/Director of Gallagher, Callahan & Gartrell, PC, focusing her practice on employment advice and counsel, employment litigation, and workplace investigations.

Katie A. Mosher is an Associate Attorney and a member of the Gallagher, Callahan & Gartrell, PC litigation team. Katie's practice focuses on state and federal litigation, including employment law, municipal law, healthcare, medical malpractice defense, civil rights litigation, and land use or property disputes.

Issues from page 29

whether the gender of those involved in the relationship, or that is a discrimination suit waiting to happen. That is, it is irrelevant whether the relationship is between male and female employees or employees who identify as LGBTQ.

Employment lawyers know that the law requires employers to take all reasonable measures to prevent and remediate sexual harassment. Office romances are fraught with potential problems for personal and professional reasons, but that risk is amplified immensely when a power imbalance is at play. Employers are on notice of this potential and proactively should address and implement appropriate policies. ■

Julie Moore of Employment Practices Group focuses her employment law practice on investigations, training, counseling, and providing expert witness testimony. She is a former Chair of the Bar's Labor and Employment Section, a Fellow in the College of Labor and Employment Attorneys, and publishes and speaks frequently on workplace topics. ***EmploymentPG.com****.*

Termination from page 26

"wrongful demotion."

Deb: Which brings us to *Donovan v. Southern New Hampshire University.*

Nancy: Another case where the court snatched public policy from the jury.

Deb: *Donovan* holds that after a private college sets its guidelines for student grades, it can require its professors to implement them.

Nancy: Well, it frosts me that an Associate Dean lost her constructive termination claim, because she declined to alter grades.

Deb: The Associate Dean and Senior Associate Dean together had reviewed the course design for a math course and discovered that different instructors used different grading criteria, without communicating that difference to the students. The senior Dean concluded that two students who had failed, should be passed; but the plaintiff wouldn't change the grades.

Nancy: Donovan argued that the grade change requests were unethical and violated the school's grading policy, and she invoked the university's Whistleblower Policy (adopted to encourage faculty to raise concerns about "ethical conduct or violations of the University's policies"), to no avail. The employer changed the grades. The plaintiff claimed she was retaliated against by a resulting hostile work environment and her placement on a performance improvement plan (PIP) (albeit void of reference to the grade changes). Then she quit.

Deb: The trial court granted summary judgment, because the plaintiff, "*failed to establish the existence of a public policy that would support her refusal to alter grades in this case,"* [because] "*the determination of what grading policy to implement in a class, and whether exceptions to that policy should be made on a case-by-case basis, are matters of academic judgment that the Court will not second guess. Further, although the plaintiff believed SNHU's decision to be unethical, the court concluded that "it remained an internal policy determination of a private university.*"

Nancy: It seems to me that the Court created an exception to wrongful termination based on its own politics.

Deb: The Court explained, *"the plaintiff appears to maintain that public policy protects her refusal to comply with her supervisor's directive because she acted in accordance with the university's internal grading and whistleblower policies;"* and that *"because she complied with one internal policy - SNHU's Whistleblowers Policy - her refusal to comply with another internal policy - SNHU's alleged departure from its grading policy - constitutes an act protected by public policy."* The court found this argument to be *"circular and insufficient as a matter of law to sustain a wrongful termination claim. Put simply, whether the plaintiff complied with the university's Whistleblower Policy has no bearing on whether public policy supports her conduct."*

Nancy: What? The court just broadcast to all private school teachers: "*Do what you are told and change Johnny's grade, regardless of if it is deserved*!" Why? Because under *Donovan*, any ethical opposition *"would subject the internal grading decisions of a private university to the ethical considerations of a jury and contravene the well-established principle disfavoring judicial intervention in disputes involving academic standards."*

Deb: *Short v SAU 16* set public policy at whatever an elected school board said it was; and *Donovan v. SNHU* removes from public policy whatever a private institution decides.

Nancy: I don't brag about New Hampshire common law anymore. ■

Nancy Richards-Stower advocates for NH and MA employees, "has gone totally remote" at ***jobsandjustice.com****, and invented/owns/operates* ***Trytosettle.com®*** *online settlement service. Debra Weiss Ford is the Managing Principal at the Portsmouth, NH offices of Jackson Lewis, PC,* ***jacksonlewis.com****.*

Severance from page 27

hered to, along with requirements for other benefits such as bonuses, commissions, stock options, and restrictive covenants.

When negotiating the severance amount with the employer, employees should consider the value of the claims they will be waiving. For example, if an employee has a disability and has been harassed by the employer and/or believes that the employer is terminating their employment for a reason related to their disability, the employee could present those arguments to the employer to support their demand for increased severance. When determining the value of the claim waived, employees should look beyond just regular compensation and consider the high value of certain benefits, such as health insurance.

While non-competition agreements are disfavored in New Hampshire, employees may have signed restrictive covenants at some point in their employment. The terms of the restrictive covenant could also be negotiated during the review of the severance agreement. This is another reason to make sure that the employee understands the scope of the employment related documents that are at issue.

Severance is a valuable tool in an employer's tool belt and can be helpful to employees in their transition to new employment, but like with most legal issues, employers and employees should consult competent employment counsel prior to offering an employee severance and before signing a severance agreement. ■

Kathleen Davidson and Beth Deragon are counsel at the law firm of Pastori | Krans, PLLC. Kathleen advises both businesses and individuals, conducts employment investigations, and also practices family law and business litigation. Beth focuses her practice on counseling and training businesses on sound employment practices and defending businesses in employment litigation. They can be reached at ***kdavidson@pastorikrans.com*** *and* ***bderagon@pastorikrans.com****.*

Update on Supreme Court Advisory Committee on Rules

By Justice Patrick E. Donovan

Many practitioners complain that proposed court rules and amendments to existing court rules are not sufficiently publicized to allow a member of the Bar or public to weigh in on proposals that affect their practice or a particular case.

This column and many other efforts by the Supreme Court and its Advisory Committee, are intended to address this concern. Indeed, the stated purposes of the Committee are, among other things, to ensure the minimal disruption to court practice, to provide an orderly, transparent, and uniform process for the adoption and amendment of court rules, and to provide members of the bench, Bar, and public with sufficient notice and an opportunity to comment on proposed rules and rule amendments. *See* Sup. Ct. R. 51(a). To that end, it is worth reminding members of the Bar and public that all Advisory Committee meetings are open to the public, and each year the Committee holds public hearings at which interested parties can directly address the Committee with their ideas, concerns, or proposals.

The Advisory Committee convened its quarterly meeting on March 10 to address and consider a number of proposed rule amendments. The Committee is seeking public comment on each proposal and will hold a public hearing on three of the five proposals that it reviewed at its March 10 meeting.

Comments can be submitted to the Supreme Court by reference to the specific docket number and will be posted on the Rules Committee's webpage that can be found on the Supreme Court's website. The public hearing on the following three proposals has been scheduled for June 2, 2023, at the NH Supreme Court. The Supreme Court issued an order on March 17 and posted to the Committee's web page establishing a May 16 deadline for submission of any written comments on the following proposals.

Docket No. 2022-001 Supreme Court Rule 37(20)—Attorney Discipline:

This proposal was initially submitted to the Committee by the Attorney Discipline Office (ADO) and was subsequently vetted by a subcommittee formed by the Rules Committee. The subcommittee supported the proposal and reported that, in general, the proposed amendments would increase public access to the ADO's public file by making it available for inspection and copying at the expense of any member of the public who wishes to obtain a copy of the file. The subcommittee reported that this amendment will increase transparency and access in a manner that mirrors the public access afforded to non-confidential court records. The amendments also exclude from the public file "confidential information" relating to an attorney's clients when the grievance against the respondent attorney is initiated by a non-client, such as an opposing party or a judicial referral. The Rules Committee voted to establish a public comment period of 60 days and placed it on its public hearing agenda for its June 2 meeting.

Docket No. 2022-013 Supreme Court Rule 51 – Rulemaking:

Supreme Court Rule 51 regulates the Committee's rulemaking process and defines the Rules Committee's membership and tenure. The amendments were proposed by a subcommittee in an effort to clarify and streamline the rulemaking process and eliminate redundant language and outdated requirements. The subcommittee reported that the amendments are also intended to make Rule 51 internally consistent and reduce the administrative burdens relating to certain reporting requirements in light of the current practice of posting rule proposals, amendments, and comments on the Supreme Court website. The Rules Committee voted to establish a 60-day public comment period for this proposal. The Committee will consider whether to recommend the adoption of the proposal to the Supreme Court at the Committee's June 2 meeting.

Docket No. 2022-015 Supreme Court Rule 42 (XIII)(a) Practical Skills requirement for inactive members:

Supreme Court Rule 42 (XIII)(a) requires new Bar members to attend and complete the Bar's practical skills course within two years of the member's admission to the bar. This proposal, which was submitted by a recently admitted bar member, would exclude inactive bar members from meeting this requirement unless and until the member applies for active status. The Committee voted to establish a 60-day public comment period for this proposal and will consider whether to recommend its adoption to the Supreme Court at the Committee's June 2 meeting.

Docket No. 2023-004 New Hampshire Rule of Evidence 1101(b) – Exempting probable cause hearings in involuntary admission cases from Rules of Evidence:

Circuit Court Administrative Judge David King submitted this proposal which would explicitly exempt probable cause hearings in involuntary emergency admission (IEA) cases from the Rules of Evidence. The proposed amendments to the Rules of Evidence are intended to clarify that the Rules of Evidence do not apply to IEA hearings, placing these hearings on a par with other preliminary hearings and probable cause determinations, such as bail hearings, juvenile certification hearings, and criminal probable cause hearings. The Committee voted to establish a 60-day public comment period for this proposal and to place the proposal on the Committee's public hearing agenda for its June 2 meeting.

Docket No. 2023-005 --New Hampshire Rule of Evidence 804(b): Hearsay exception when declarant is unavailable as witness:

Judge King also submitted a proposed amendment to Rule of Evidence 804(b) which would restore the exception to the hearsay rule for statements made by deceased persons in actions by or against representatives of the deceased declarant. The proposed exception would require that the trial court first find that the statement was made by the decedent, that it was made in good faith, and that the statement was made on the decedent's personal knowledge and under circumstances indicating that the statement is trustworthy. The Committee voted to establish a 60-day public comment period for this proposal and to place it on the Committee's public hearing agenda for its June 2 meeting.■

This article was submitted by Justice Patrick E. Donovan in his capacity as the Chair of the Supreme Court Advisory Committee on Rules.

NH Supreme Court At-a-Glance

Constitutional Law

***Petition of Pamela Smart*, No. 2022-0198**
March 29, 2023
Petition Dismissed

- Whether the Petitioner is entitled to a writ of mandamus ordering the Executive Council to reconsider her Petition for Commutation.

The Petitioner requested the Court to issue a writ of mandamus ordering the Governor and Executive Council to reconsider whether to grant a hearing on the substance of her Petition for Commutation.

The Petitioner is currently serving a life-without-parole sentence for a conviction as an accomplice to first degree murder. The Petitioner requested a hearing before the Executive Council and for the Governor to remove the "without-parole" condition and commute her sentence to time served. The Petition was part of the agenda for the March 23, 2022 meeting of the Governor and Executive Council. At the Meeting, they voted to deny her request.

The State argued that the Court should dismiss the Petitioner's request here because the matter is a nonjusticiable political question. The Court agreed. In agreeing, the Court cited and quoted to its earlier decision in *Richard v. Speaker of the House of Representatives* (2022), stating: "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government…is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."

The Court found that, in this case, there are no mandated procedures defining how the executive branch exercises discretion to invoke clemency power. The Petitioner argued that earlier cases established a constitutional right to have the Governor and Executive Council review "engage in good faith discussion." The Court disagreed and found that in the context of the executive branch's discretionary exercise of its clemency power, the Petitioner does not have a legally protected interest in obtaining a commutation hearing that would implicate due process rights. The Court therefore found that the Petitioner was seeking a ruling on a political, nonjusticiable question and the petition is dismissed for lack of jurisdiction.

Sisti Law Offices (Mark Sisti on the brief and orally) for the petitioner. John M. Formella, Attorney General, and Anthony J. Galdieri, Solicitor General (Laura E. B. Lombardi on the brief and orally) for the State.

At-a-Glance Contributor

Susanne L. Gilliam*
Gilliam Legal
Sudbury, MA

*with edits from Sam Harkinson

Criminal Law

***The State of New Hampshire v. David J. Tufano*, No. 2021-0429**
March 30, 2023
Reversed and Remanded

- Whether the Superior Court erred when it denied a defendant's motions *in limine* seeking admission to prohibit a defendant's prior statements pursuant to NH R. Evid. 404(b) and seeking to admit impeachment evidence of a witness pursuant to NH R. Evid. 609.

The Defendant was found guilty of misdemeanor cruelty to animals after a jury trial in Superior Court. The charge stemmed from an incident in May 2019, when the Defendant's neighbor was working in his yard and heard a "low moaning sound" coming from another yard. The Defendant was in his own yard with a hose in his hand. The witness saw that the Defendant was spraying water on a cat confined in a trap. After being confronted by the witness, the Defendant released the cat. The witness did not report the incident until later, after another neighbor told him that she had previously confronted the Defendant about a similar instance.

Defendant filed a motion *in limine* pursuant to NH R. Evid. 404(b) to prohibit the admission of any of the alleged statements by the witness's neighbor made regarding the Defendant's cat trapping. The State argued the evidence was "relevant to the defendant's intent and plan when he trapped the cat on this occasion." The Superior Court denied the Defendant's motion as well as a motion for reconsideration. The Defendant also filed a motion *in limine* to allow him to impeach the witness's neighbor with a prior conviction under NH R. Evid. 609. This motion was also denied.

The Court reviewed the Defendant's appeal under the "unsustainable exercise of discretion standard." The Court's opinion analyzed NH R. Evid. 404(b), and dis-

AT-A-GLANCE *continued on page 39*

cussed that evidence may be admissible for other purposes only if (1) it is relevant for a purpose other than proving character or disposition, (2) there is sufficient evidence that the other crimes or acts occurred, and (3) the probative value is not substantially outweighed by the danger of unfair prejudice. The Court found that because the State wanted the challenged evidence admitted for purposes that were either not relevant to an issue in dispute, or for reasons that were reliant on prohibited inferences, the trial court's denial was clearly untenable. The Court concluded that the evidence was prejudicial to the Defendant's case, requiring that the case be reversed and remanded for further hearings by the trial court.

Given the ruling on the 404(b) issue, the trial court's denial of the Rule 609 motion need not be addressed because it was particular to the evidence that should have been kept out of the trial. Reversed and Remanded.

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John M. Formella, Attorney General, and Anthony J. Galdieri, Solicitor General (Sam M. Gonyea on the brief and orally) for the State. Lothstein Guerriero (Theodore M. Lothstein on the brief and orally) for the Defendant.

***The State of New Hampshire v. John Cullen*, No. 2022-0058**
March 3, 2023
Affirmed

- Whether the evidence was sufficient to support the trial court's denial of a motion to dismiss the indictments at the conclusion of the State's case.

The Defendant was convicted after a jury trial on two counts of pattern aggravated felonious sexual assault and one count of sexual assault. The Defendant appealed the pattern convictions on the basis of claimed insufficiency of the State's evidence.

Under the indictment that alleged sexual contact, the State was required to prove that the Defendant committed more than one act of sexual contact upon the same victim over a period of two months or more within a period of five years, and the victim was less than 13 years of age. The Defendant concedes that the State presented sufficient evidence that there was more than one act of sexual assault upon the same victim and that the allegations occurred within a period of five years. But the Defendant argued the State failed to prove that the period was two months or more, and that the victim was less than 13 years old.

On appeal, the Defendant was required to show that that no rational trier of fact, viewing all the evidence and all reasonable inferences, in the light most favorable to the State, could have found the essential elements of the offense beyond a reasonable doubt.

In affirming the Defendant's convictions, the Court looked to the testimony provided by the victim in the case. The Court found that, given the victim's testimony about when the assaults occurred, and the types of assaults involved, a reasonable juror could have found that the defendant committed repeated acts of sexual penetration upon the victim over a period of two months or more.

For the State, John Formella, Attorney General, and Anthony Galdieri, Solicitor General (Sam Gonyea on the brief and orally). For the Defendant, Wadleigh, Starr & Peters (Donna Brown orally and on the brief, Michael Eaton on the brief).

***The State of New Hampshire v. Jeffrey Woodburn*, No. 2021-0360**
March 23, 2023
Reversed in part; Affirmed in part and Remanded

- Whether the trial court committed reversible error when it failed to instruct the jury on self-defense, and when it excluded certain evidence of prior aggressions of the victim.

The underlying charges relate to a

AT-A-GLANCE *continued on page 41*

NH Circuit Court Judicial Evaluation Notice

In accordance with Supreme Court Rule 56 and RSA 490:32, the New Hampshire Judicial Branch Circuit Court Administrative Judge routinely conducts judicial evaluations and invites you to participate in this process. The following Judges are presently being evaluated:

Judge Mark Derby – 9th Circuit Courts
Judge David Forrest – 8th Circuit Courts
Judge Suzanne Gorman – 9th Circuit Courts
Judge Todd Prevett – 9th Circuit Courts
Judge Patricia Quigley – 6th Circuit Courts
Judge Kerry Steckowych – 10th Circuit Courts

An evaluation may be completed online at www.courts.nh.gov. On the Judicial Branch website, look to the right side of the page under NHJB Quick Links and click on Judicial Performance Evaluations, then click on Current Circuit Court Evaluations and choose the Judge(s) you would like to evaluate. While responses will be shared with the Judges being evaluated, they are treated as confidential, and the identity of the respondent will remain anonymous.

If you do not have access to the Internet or would prefer a hard copy of the evaluation mailed to you, please e-mail the Circuit Court Administrative Office at **Lcammett@courts.state.nh.us** or call (603) 271-6418 and one will be mailed to you. Please include the name of the Judge(s) you would like to evaluate as well as your name and address. As stated above, while responses will be shared with the Judges being evaluated, they are treated as confidential, and the identity of the respondent will remain anonymous. In fact, if you request a hard copy of the evaluation form, we ask that you do not sign the completed evaluation.

All evaluations must be completed online or be returned no later than May 31, 2023.

New Hampshire Supreme Court Advisory Committee on Rules

PUBLIC HEARING NOTICE

The New Hampshire Supreme Court Advisory Committee on Rules will hold a PUBLIC HEARING at **12:30 p.m. on Friday, June 2, 2023** at the Supreme Court Building on Charles Doe Drive in Concord, to receive the views of any member of the public, the bench, or the bar as the Committee considers whether to recommend that the Supreme Court adopt proposed amendments to several court rules.

Written comments on any of the proposed amendments must be submitted to the secretary of the Committee no later than **May 16, 2023**. Comments may be emailed to the Committee on or before **May 16, 2023** at: **rulescomment@courts.state.nh.us.**

Comments may also be mailed or delivered to the Committee at the following address by **May 16, 2023**: N.H. Supreme Court, Advisory Committee on Rules, 1 Charles Doe Drive, Concord, NH 03301.

Any suggestions for rule amendments other than those set forth below may be submitted in writing to the secretary of the Committee for consideration by the Committee in the future.

ANY PERSON WHO WISHES TO ATTEND THE JUNE 2, 2023 PUBLIC HEARING REMOTELY SHOULD NOTIFY THE CLERK OF COURT AS FAR IN ADVANCE AS POSSIBLE SO THAT THE REQUIRED EQUIPMENT CAN BE AVAILABLE.

The amendments being considered concern the following rules:

I. 2022-001 Supreme Court Rule 37(20)

(This proposed amendment, submitted by the Attorney Discipline Office, addresses public access to Attorney Discipline Office files relating to grievances and referrals.)

Proposed Action: Amend Supreme Court Rule 37(20) as set forth in Appendix A.

II. 2023-004 New Hampshire Rule of Evidence 1101(b)

(This proposed amendment would exempt probable cause hearings in involuntary emergency admission (IEA) cases from the Rules of Evidence.)

Proposed Action: Amend New Hampshire Rule of Evidence 1101(b) as set forth in Appendix B.

III. 2023-005 New Hampshire Rule of Evidence 804(b)

(This proposed amendment would restore the exception to the hearsay rule that governs statements made by deceased persons in actions by or against representatives of the deceased person.)

Proposed Action: Amend New Hampshire Rule of Evidence 804(b) as set forth in Appendix C.

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

March 17, 2023

New Hampshire Supreme Court Advisory Committee on Rules

INVITATION FOR PUBLIC COMMENT

The New Hampshire Supreme Court Advisory Committee on Rules is considering amendments to Supreme Court Rule 42(XIII)(a) and Supreme Court Rule 51 as set forth in the attached appendices. Additional information may be found on the Committee's webpage:

https://www.courts.nh.gov/resources/committees/advisory-committee-rules

Comments on either of the proposals which the Committee is considering for possible recommendation to the Supreme Court may be submitted in writing to the secretary of the Committee at any time on or before **May 16, 2023**. Comments may be emailed to the Committee on or before **May 16, 2023** at:

rulescomment@courts.state.nh.us

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

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

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

March 17, 2023

Rules Advisory Committee Selected

For The United States Court Of Appeals For The First Circuit

BOSTON (April 3, 2023) — Chief Judge David J. Barron of the United States Court of Appeals for the First Circuit announced today that two new members were appointed to the Court's Rules Advisory Committee: Eamonn R. C. Hart (Maine); and Henry C. Quillen (New Hampshire). Attorneys Hart and Quillen will be replacing retiring members Seth Aframe of New Hampshire and Shamis Beckley of Massachusetts.

Pursuant to 28 U.S.C. § 2077, the new members were selected to the Committee to make recommendations regarding the rules of practice and internal operating procedures for the United States Court of Appeals for the First Circuit and the First Circuit Judicial Council. Chief Judge Barron thanked the retiring members for their commendable service and welcomed the new members.

In Case No. LD-2013-0010, *In the Matter of Andrew G. Bronson* (now Macchione), the court on March 16, 2023, issued the following order:

On October 22, 2013, the court adopted the recommendation of the Professional Conduct Committee (PCC) for the suspension of Attorney Andrew G. Bronson (now Macchione) from the practice of law for three years, with two years of the suspension potentially stayed on the condition that he comply with both a New Hampshire Lawyers Assistance Program monitoring agreement and a stipulation with the Attorney Discipline Office (ADO). On March 10, 2022, Attorney Macchione filed a petition for reinstatement, which he then supplemented on April 21, 2022.

On April 22, 2022, the court referred the reinstatement petition to the PCC in accordance with Supreme Court Rule 37(14)(b). On January 25, 2023, the PCC filed its recommendation that Attorney Macchione be reinstated to the practice of law. The PCC's recommendation was based upon a request for reinstatement, to which the ADO and Attorney Macchione both assented in November 2022, after the ADO had conducted interviews and other investigation leading to the ADO's assessment that Attorney Macchione has "the moral qualifications, competence, and learning in the law required for admission to practice law in this State and that the resumption of the practice of law will be neither detrimental to the integrity and standing of the bar or the administration of justice nor subversive to the public interest." Rule 37(14)(b)(5)(C). Because neither Attorney Macchione nor the ADO objects to the PCC's recommendation, the court may consider this matter without further notice and hearing.

Having reviewed the PCC's recommendation and its accompanying record, the court grants the petition for reinstatement. Accordingly, Attorney Andrew G. Bronson (now Macchione) is reinstated to the practice of law in New Hampshire, effective immediately.

MacDonald, C.J., and Hicks, Bassett, Hantz Marconi, and Donovan, JJ., concurred.

Timothy A. Gudas, Clerk

◆

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. Supreme Court Rule 53.1

(This amendment allows active status members of the New Hampshire Bar Association who volunteer for assigned pro bono cases through 603 Legal Aid, NH Legal Assistance, and the Disabilities Rights Center to earn up to 360 general minutes of CLE credit annually at a rate of sixty CLE credit minutes for every 300 billable-equivalent minutes of pro bono representation provided to a client. CLE Ethics credits cannot be earned from pro bono service.)

1. Amend Supreme Court Rule 53.1 as set forth in Appendix A.

II. Supreme Court Rule 53.2(A)(2)

(This amendment exempts from CLE requirements any lawyer who holds the position of judicial referee, and limits the existing exemption for lawyers who occupy the positions of full-time judge, full-time magistrate, full-time marital master, judicial referee, state reporter, full-time supreme, superior and circuit court clerks and deputy clerks to those who occupy those positions in the State of New Hampshire Judicial System for any time during the reporting year.)

1. Amend Supreme Court Rule 53.2(A)(2) as set forth in Appendix A.

III. Supreme Court Rule 53.2(A)(3)

(This amendment exempts from CLE requirements any lawyer who holds the position of part-time judge, part-time magistrate, part-time marital master, part-time judicial referee, part-time supreme, superior and circuit court clerks and deputy clerks who occupy those positions in the State of New Hampshire Judicial System for any time during the reporting year, unless such individual was in the active practice of law at any time during the reporting year.)

1. Amend Supreme Court Rule 53.2(A)(3) as set forth in Appendix A.

IV. Supreme Court Rule 53.2(A)(4)

(This amendment exempts from the CLE certification requirement NHBA Limited Active Status lawyers.)

1. Amend Supreme Court Rule 53.2(A)(4) as set forth in Appendix A.

V. Supreme Court Rule 53.2(A)(5)

(This amendment exempts from the certification requirement those lawyers who were first admitted to New Hampshire practice after December 1. Prior to this amendment, newly-admitted lawyers have been exempt from the CLE requirement only.)

1. Amend Supreme Court Rule 53.2(A)(5) as set forth in Appendix A.

VI. Supreme Court Rule 53.2(A)(6)

(This amendment exempts from the CLE certification requirement those lawyers who are on active duty for the United States Armed Forces for more than three months of the reporting year. Prior to this amendment, such lawyers have been exempt from the CLE requirement but not the certification requirement.)

1. Amend Supreme Court Rule 53.2(A)(6) as set forth in Appendix A.

VII. Supreme Court Rule 53.2(A)(7)

(This amendment exempts from the certification requirement those lawyers who change from any NHBA active membership status to any inactive membership status before December 1 of the reporting year. Prior to this amendment, such lawyers have been exempt from the CLE requirement but not the certification requirement.)

1. Amend Supreme Court Rule 53.2(A)(7) as set forth in Appendix A.

VIII. Supreme Court Rule 53.2(A)(8)

(This amendment exempts lawyers from the certification requirement who are elected State or Federal officials not engaged in the practice of law during a reporting year. Prior to this amendment, such lawyers have been exempt from the CLE requirement but not the certification requirement.)

1. Amend Supreme Court Rule 53.2(A)(8) as set forth in Appendix A.

IX. Supreme Court Rule 53.2(B)(1)

(This amendment updates the exemptions for meeting the minimum CLE requirements to be consistent with the amendments to Supreme Court Rule 53.2(A).)

1. Amend Supreme Court Rule 53.2(B)(1) as set forth in Appendix A.

X. Supreme Court Rule 53.2(B)(2); 53.2(B)(3); 53.2(B)(4); 53.2(B)(5)

(This amendment deletes these portions of the Rule, which exempt certain lawyers from the CLE requirement, because the deleted language is unnecessary as a result of the amendments to Supreme Court Rule 53.2(A).)

1. Amend Supreme Court Rule 53.2(B)(2); 53.2(B)(3); 53.2(B)(4); 53.2(B)(5) as set forth in Appendix A.

XI. Supreme Court Rule 53.3(A)

(This amendment updates the exemptions for filing a certification to be consistent with the amendments to Supreme Court Rule 53.2(A).)

1. Amend Supreme Court Rule 53.3(A) as set forth in Appendix A.

XII. Supreme Court Rule 53.4

(This amendment formalizes and aligns the NHMCLE waiver process for annual NHMCLE requirements with the current waiver process for annual Supreme Court fees and Trust Account Compliance filing.)

1. Amend Supreme Court Rule 53.4 as set forth in Appendix B.

XIII. Supreme Court Rule 48

(This technical amendment makes Supreme Court 48 consistent with Supreme Court Rule 48-A with respect to the compensability of travel time for meetings with an incapacitated or juvenile client.)

1. Amend Supreme Court Rule 48 as set forth in Appendix C.

Effective Date

The amendment to Supreme Court Rule 53.1 shall take effect on June 1, 2023, and shall apply to the 2023-2024 reporting year and subsequent reporting years, but not to the 2022-2023 reporting year. The amendments to Supreme Court Rules 53.2 and 53.3 shall take effect on June 1, 2023, and shall apply to the 2022-2023 reporting year and subsequent reporting years. The amendment to Supreme Court Rule 53.4 shall take effect on June 1, 2023. The amendment to Supreme Court Rule 48 shall take effect on June 1, 2023, for travel time occurring on or after that date.

Date: March 30, 2023
ATTEST: Timothy A. Gudas, Clerk
Supreme Court of New Hampshire

◆

LD-2023-0003, *In the Matter of Roxana Marchosky, Esquire*

On February 14, 2023, the Attorney Discipline Office (ADO) filed a petition for Attorney Roxana Marchosky's immediate suspension from the practice of law on the ground that she has contended, during the course of a disciplinary proceeding, that "she is suffering from a disability by reason of mental or physical infirmity or illness, . . . which makes it impossible for the respondent attorney to adequately defend . . . herself." Supreme Court Rule 37(10)(c). In the alternative, the ADO's petition requests that the court institute proceedings pursuant to Supreme Court Rule 37(10)(b) to determine whether Attorney Marchosky is incapacitated from continuing the practice of law by reason of mental or physical infirmity or illness.

On February 16, 2023, the court issued an order of notice, which directed Attorney Marchosky to file a response to the petition on or before March 8, 2023. On March 2, 2023, in response to Attorney Marchosky's motion, the court exempted her from the requirement of electronic filing (e-filing). On March 9, 2023, Attorney Marchosky filed a response through a document whose title identified itself as motion for exemption to paper file, motion for late entry, motion for extension of time in which to file a response, and motion for appointment of an attorney to represent her. On March 22, 2023, Attorney Marchosky filed the following separate documents: (1) motion for exemption to paper file; (2) motion for late entry; (3) motion for extension of time in which to file a response; and (4) motion for appointment of an attorney to represent her.

The court has already granted Attorney Marchosky an exemption from the requirement of e-filing. Her additional requests for such relief are therefore moot. The court has reviewed and considered Attorney Marchosky's March 9, 2023 response to the petition as though the response had been timely filed. Accordingly, her requests for late entry and for an extension of time in which to file a response are moot to that extent. To the extent that the March 22, 2023 motion for late entry and motion for extension of time seek to serve as supplements to the March 9, 2023 response, the motions are granted. Any additional relief that is requested in Attorney Marchosky's motions or in her response to the petition is denied.

Having reviewed and considered the ADO's petition, including appendix, and Attorney Marchosky's filings, the court concludes that Attorney Marchosky has contended, and is contending, that she is suffering from a disability by reason of mental or physical infirmity or illness, which makes it impossible for her to adequately defend herself in the disciplinary proceeding and in this matter. In this circumstance, Rule 37(10)(c) states that the court "shall enter an order immediately suspending the respondent attorney from continuing to practice law until a determination is made of the respondent attorney's capacity to continue to practice law in a proceeding instituted in accordance with the provisions of subsection (b) of this section."

Accordingly, the court orders that Attorney Roxana Marchosky is immediately suspended from the practice of law in New Hampshire pending further order of this court. The additional relief requested in the ADO's petition is granted in part and denied in part, as follows.

In her response to the ADO's petition, Attorney Marchosky represented to the court that: (1) she does not appear in any courts and has no litigation clients; (2) she does not have clients of any kind for any matter; (3) she has not taken on any new clients in the past fifteen years; (4) she represents only herself and handles funds only for herself; and (5) she has no funds, and handles no funds, for any client. Notwithstanding those representations, the court orders that Attorney Marchosky is enjoined from transferring, assigning, hypothecating, or in any manner disposing of or conveying any assets of any clients, whether real, personal, beneficial or mixed, and is further enjoined from any use of her IOLTA accounts.

Pursuant to Rule 37(17), the court appoints Attorney Laura B. Barletta to take immediate possession of any client files and trust and other fiduciary accounts of Attorney Marchosky, and to take the following actions:

(1) Attorney Barletta shall notify all banks and other entities where Attorney Marchosky has trust or fiduciary accounts and operating accounts of Attorney Marchosky's suspension from the practice of law and of Attorney Barletta's appointment by the court.

(2) Attorney Barletta shall notify the courts in which any hearings are scheduled in the near future of Attorney Marchosky's suspension.

(3) Attorney Barletta shall prepare an inventory of Attorney Marchosky's client files, if any, and shall file a copy of the inventory with the Supreme Court on or before May 10, 2023, together with a report of her actions taken under this order and recommendations

as to what further actions should be taken.

(4) If Attorney Marchosky was in possession of any client funds or property, Attorney Barletta may file an appropriate motion requesting authority to distribute them.

Attorney Marchosky is ordered to cooperate with Attorney Barletta in performing the tasks as directed by the court. Attorney Marchosky is further ordered to inform her clients in writing, on or before April 18, 2023, of her suspension from the practice of law and of her inability to act as an attorney, and shall advise them to seek other counsel. See Rule 37(13). On or before May 3, 2023, Attorney Marchosky shall file with this court an affidavit stating that she has complied with this Rule 37(13) requirement or that she had no clients to so inform and advise. A copy of the affidavit shall be sent to the ADO and to Attorney Barletta.

Attorney Marchosky's motion for the appointment of counsel is granted. See Rule 37(10)(b). Attorney Christopher D. Hawkins is hereby appointed to represent Attorney Marchosky in this court. The maximum fees for Attorney Hawkins's representation shall not exceed $5,000, unless the court makes an express, written finding of good cause and exceptional circumstances prior to the cap being exceeded.

The fees and expenses of Attorney Barletta and the fees and expenses of Attorney Hawkins shall be paid in the first instance from the funds of the judicial branch, but Attorney Marchosky shall be responsible for reimbursement. On or before May 3, 2023, Attorney Marchosky shall file a completed Affidavit of Assets and Liabilities with the court. An Affidavit of Assets and Liabilities form is being provided to Attorney Marchosky with this order

On or before May 3, 2023, Attorney Hawkins and counsel for the ADO shall confer and then file a joint statement (or, failing agreement, separate statements) addressing the following topics: (1) whether the court should order the examination of Attorney Marchosky by a qualified medical expert or experts, see Rule 37(10)(b); (2) names of suitable medical experts for such an examination or examinations; (3) the need for an evidentiary hearing in this court before a judicial referee or hearing panel; (4) proposed dates for such a hearing; and (5) any other matters, procedural or substantive, that they contend are relevant to the court's assessment as to whether Attorney Marchosky is incapacitated from continuing the practice of law. See Rule 37(10)(b).

The underlying disciplinary matter involving Attorney Marchosky shall be stayed pending further order of this court.

MacDonald, C.J., and Hicks, Bassett, Hantz Marconi, and Donovan, JJ., concurred.

DATE: April 3, 2023
ATTEST: Timothy A. Gudas, Clerk

At-A-Glance from page 39

conflict in December 2017. The victim was driving the Defendant when an argument ensued. The Defendant stated he wanted to get out of the car and call a friend. After they pulled over, there was a "tug of war" over the Defendant's cell phone. The Defendant bit the victim which made the victim release the phone. The Defendant was charged with one count of simple assault, one count of domestic violence, and two counts of criminal mischief.

The Defendant filed a notice that he intended to rely on the defense of self-defense but a jury instruction on self-defense was denied. Additionally, the trial court excluded evidence of the victim's alleged prior aggressive conduct towards the Defendant. The jury found the Defendant guilty on all charges.

The State asserted the Defendant was not entitled to a self-defense jury instruction because it was based on his "theory of the case" rather than on a "theory of defense." At trial, the trial court agreed with the State and denied the Defendant's request for the instruction. On appeal, the Court found that the Defendant was asserting a true theory of defense. In doing so the Court noted that the Defendant admitted the charged conduct but sought to justify his behavior by demonstrating that he was defending himself.

The Court found that, while it was not required to address the Defendant's argument that the trial court erred when it excluded testimony regarding the victim's prior aggressive acts against him, it would because this evidence is likely to arise on remand. The Defendant argued that the victim's prior aggressive acts against him were relevant to his state of mind under NH R. Evid. 404(b). The Court agreed and found that the Defendant established the necessary logical connection between the victim's prior acts and his state of mind at the time of the charged incident.

John M. Formella, Attorney General, and Anthony J. Galdieri, Solicitor General (Joshua L. Speicher, Assistant Attorney General on the brief and oral arguments), for the State. Jeffrey Woodburn as a self-represented party.

Tort/Civil Law

***Tycollo Graham v. Eurosim Construction & ProCon Inc.*, No. 2021-0213**
March 10, 2023
Reversed and Remanded

- Whether a case dismissed due to a violation of a court order or procedural rule that is silent as to prejudice will be deemed to be without prejudice for the purposes of *res judicata*.

In October 2017, the Plaintiff was working at a construction site when he was injured by falling glass panels. He filed suit in Grafton County Superior Court (*Graham I*) against the subcontractor, Eurosim Construction, and the general contractor, ProCon. He alleged negligence and a trial date was set. In October 2018, Plaintiff's counsel asked to withdraw. The trial court allowed the withdrawal but held that an appearance needed to be filed by November 2018. When no appearance was filed by the deadline, the trial court dismissed the case without specifying whether the dismissal was with or without prejudice.

A year later in November 2019, the Plaintiff filed a lawsuit in Merrimack County Superior Court (*Graham II*) that was essentially identical to the previous lawsuit. Both Defendants ultimately raised the affirmative defense of *res judicata* on the basis of *Graham I* and the trial court granted the motion to dismiss.

On appeal, the Plaintiff argued that the trial court in *Graham II* erred in dismissing on *res judicata* grounds because the order dismissing *Graham I* was not a final judgment on the merits. The Court agreed and found that it was error for the *Graham II* trial court to find the dismissal of *Graham I* was with prejudice.

The Court based its decision on the fact that, in New Hampshire, it is a fundamental principle that a party should not lose a case on a "procedural technicality." The Court found that the record for this case lacked any indication that the circumstances in *Graham I* warranted dismissal with prejudice as a sanction for the Plaintiff's failure to file an appearance.

The Court went further and exercised its supervisory role under NH RSA 490:4 and established a clear rule that: "a dismissal order resulting from a plaintiff's violation of a court order or a procedural rule that is silent as to prejudice will be deemed to be without prejudice; therefore, not 'on the merits' for the purposes of *res judicata* in both the superior and circuit courts."

For the Plaintiff, Keith F, Diaz of Bussiere & Bussiere on the brief and orally. For Defendant Eurosim Construction, David W. Johnston (on the joint brief) and Trevor J. Brown (on the joint brief and orally) of Sulloway & Hollis. For Defendant ProCon Inc., Peter J. Hamilton of O'Connor & Associates on the joint brief.

Kevin Brown v. Saint-Gobain Performance Plastics Corp., U.S. District Court
No. 2022-0132
March 21, 2023
Remanded

- Whether New Hampshire recognizes a claim for the costs of medical monitoring as a remedy or as a cause of action in the context of plaintiffs who were exposed to a toxic substance and, if it does, what are the requirements and elements of a remedy or cause of action for medical monitoring in New Hampshire.

This case was brought pursuant to NH Supreme Court R. 34, as questions from the Federal District Court for the District of New Hampshire.

The Plaintiffs are individuals from the Merrimack area where the Defendants' manufacturing facility used chemicals that included perfluorooctanoic acid (PFOA). The Plaintiffs say this chemical has contaminated the air, ground, and water and that it puts them at a increased risk of developing certain health problems. The Plaintiffs argue that the costs of medical monitoring for such illness is a cause of action under New Hampshire tort law even absent present physical injury.

In determining that the State of New Hampshire does not recognize a claim for the costs of medical monitoring, the Court found that it is well established by the precedents in New Hampshire that the "possibility [of injury] is insufficient to impose any liability or give rise to a cause of action." *White v. Schoebelen* (1941). The Court notes, as the District Court did, that the Plaintiffs conflate "injury" ("an instance of actionable harm") with "a claim for damages" ("a sum of money awarded to one who has suffered an injury"). The Court determined that the mere existence of an increased risk of future disease is not sufficient for the purpose of stating a claim for the costs of medical monitoring as a remedy or as a cause of action in this context. Having answered the first question in the negative, the Court did not need to reach the second question.

For the Plaintiffs, Hannon Law Firm (Kevin Hannon on the brief and orally), Gottesman & Hollis (Paul DeCarolis on the brief), and Moran & Morgan Complex Litigation Group (John Yanchunis and Kenneth Rumelt on the brief.) For the Defendants, McLane Middleton (Bruce Felmly on the brief and orally, and Jeremy Walker on the brief), Dechert LLP (Sheila Birnbaum, Mar Cheffo, Bert Wolff, Rachel Passaretti-Wu, and Lincoln Davis Wilson on the brief.)

March 2023

* Published

ARBITRATION; CONTRACTS; TCPA

3/22/23 *Daschbach v. Rocket Mortgage*
Case No. 23-cv-346-JL, Opinion No. 2023 DNH 028

In this putative class action alleging multiple violations of the Telephone Consumer Protection Act and state telemarketing laws, defendant Rocket Mortgage moved to compel the plaintiff's claims to arbitration and alternatively, to dismiss for failure to state a claim. Rocket Mortgage argued that by accessing and clicking through a website, and submitting his personal information to the website, the plaintiff agreed to terms and conditions that included mandatory arbitration of any claims against Rocket Mortgage. Plaintiff responded that the terms were not presented to him in a reasonably conspicuous manner and that he did not unambiguously manifest his assent to the terms, rendering the arbitration clause unenforceable. The court denied the defendant's motions. Based on the website's design and layout, it did not place a reasonably prudent internet user on notice of the arbitration clause. The court further found that the plaintiff alleged minimally sufficient facts in his operative complaint from which the court could reasonably infer Rocket Mortgage's liability for each asserted claim. 31 pages. Judge Joseph N. Laplante.

FIRST AMENDMENT

02/02/23 *Human Rights Defense Center v. Board of County Commissioners for Strafford County, New Hampshire, et al.*
Case no. 22-cv-091-LM, Opinion no. 2023 DNH 011*

Human Rights Defense Center ("HRDC"), a non-profit publisher of materials about prisons and prisoners' rights, brought suit against several defendants involved in the administration of the Strafford County House of Corrections ("the Jail"), alleging that the Jail's policy prohibiting all incoming non-legal paper mail (including HRDC's books and periodicals) violates HRDC's First and Fourteenth Amendment rights. HRDC requested a preliminary injunction against the Jail's enforcement of the policy against HRDC. The court denied the request, finding that HRDC had not shown a likelihood of success because (1) the alternative methods of communication provided by the Jail, which include offering HRDC's materials in the library and in electronic form on tablets, sufficiently protected HRDC's First Amendment rights and (2) the Jail's procedure for rejecting prohibited mail did not violate HRDC's Due Process rights. 26 Pages. Judge Landya McCafferty.

CLASS CERTIFICATION; UNJUST ENRICHMENT

2/10/23 *Ortiz v. Sig Sauer, Inc.*
Case No. 19-cv-1025-JL, Opinion No. 2023 DNH 015

This case centers on a purported design defect in the Sig Sauer P320 pistol, which makes it susceptible to "drop firing," or discharging after being dropped. The plaintiff, who purchased the P320 pistol in 2016, asserted fraudulent concealment and unjust enrichment claims against Sig Sauer, contending that the defendant knew of the drop defect and failed to disclose it, and the defendant unjustly secured a benefit by selling a defective pistol at the price of a defect-free pistol. In this motion, the plaintiff sought to certify a nationwide class of individuals who purchased the P320 pistol prior to August 8, 2017, or, alternatively, an unjust enrichment subclass and a fraudulent omission subclass, each of which limited its membership to P320 owners from specific states. The court denied the motion, largely based on Federal Rule of Civil Procedure 23(b)(3)'s predominance requirement, which bars certification when issues affecting individual members of the class predominate over issues that are common to the class. First, the court denied certification of the nationwide class as to the unjust enrichment claim because the threshold, choice-of-law analysis raised individual legal and factual inquiries, which predominated over common issues. Specifically, as part of the choice-of-law analysis, the court would need to identify 'actual conflicts,' or outcome-determinative differences, between New Hampshire law and the laws of 49 other interested states. This exercise would require the court to find distinctions between New Hampshire law and the foreign laws, and to adjudicate individual class members' claims under these different legal standards. Next, the court denied certification of the unjust enrichment subclass due to the predominance of individual, factual inquiries that go to the crux of the claim under applicable New Hampshire law—whether Sig Sauer's retention of the full sale price of the P320 would be unconscionable in each transaction. Finally, the fraudulent concealment claims could not be managed in a class format, for the nationwide class or the fraudulent omission subclass, because the claims would require individual proof of reliance on Sig Sauer's allegedly false representations regarding the drop safety of the P320. 48 pages. Judge Joseph N. Laplante.

EVIDENCE

3/2/23 *Keefe v. LendUs*
Case No. 20-cv-195-JL, Opinion No. 2023 DNH 022*

Keefe sued his former employer and the purchaser of his business, LendUS, alleging that LendUS failed to comply with the terms of their agreements to pay him certain bonuses. LendUS brought counterclaims, alleging that Keefe violated the terms of his non-competition agreement and breached his duty of loyalty to the company. LendUS moved in limine to preclude Keefe from presenting evidence about other employees' reasons for resigning from the company, evidence of the personal wealth of LendUS executives, character evidence about the company's CEO, and evidence about LendUS's current corporate status. LendUS also sought permission to treat certain witnesses as hostile witnesses on direct examination and to be permitted to introduce a memorandum from Keefe's expert witness. The court excluded some character evidence, excluded evidence about corporate status, and allowed LendUS to use the memo, but denied the motions on all other issues. 11 pages. Judge Joseph N. Laplante.

FOURTH AMENDMENT

2/23/23 *Doe v. Commissioner, NH DHHS*
Civil no. 18-cv-1039 Opinion No. 2023 DNH 020*

In a case involving challenges to the New Hampshire DHHS Commissioner's practice of boarding individuals experiencing mental health crises in hospital emergency rooms, the court granted intervenor hospitals' motion for summary judgment on their Fourth Amendment claim. The court found that the Commissioner failed to immediately transport patients admitted to New Hampshire's mental health services system from hospital emergency rooms to designated receiving facilities, a practice which constituted an unreasonable seizure of the hospitals' property and therefore violated their Fourth Amendment rights. The court entered a declaratory judgment and found that a permanent injunction was warranted. However, the court declined to presently enter a permanent injunction because the proposed injunction was insufficiently specific to put the Commissioner on notice of what conduct, policies, and practices were enjoined. 24 pages. Judge Landya McCafferty

03/03/23 *Joseph Crocco v. Richard Van Winkler, et al.*
Case no. 19-cv-882-LM, Opinion no. 2023 DNH 023 P

Joseph Crocco, a former inmate at the Cheshire County Department of Corrections ("the Jail"), brought suit against several Jail employees, alleging they violated his Eighth Amendment rights because they acted with deliberate indifference to his plan to die by suicide. The defendants argued that Crocco's claim was subject to dismissal because he failed to exhaust the Jail's available administrative remedies before bringing suit, as required by the Prison Litigation Reform Act ("PLRA"). The court found that the Jail had an administrative grievance procedure and that Crocco failed to exhaust it. The Jail, however, did not take reasonable steps to make Crocco aware of the procedure. Thus, the grievance procedure was not "available" to Crocco within the meaning of the PLRA, and the court denied defendants' motion to dismiss. 17 Pages. Judge Landya McCafferty

SOCIAL SECURITY

3/21/23 *Whitfield v. SSA*
Case No. 22-cv-280-JL, Opinion No. 2023 DNH 026

Whitfield appealed the Acting Commissioner's second decision denying her application for disability insurance benefits and supplemental security income after her case previously was reversed and remanded, resulting in the Appeals Council order that the ALJ obtain an opinion from a medical expert, among other things. In this appeal, Whitfield argued that the ALJ improperly rejected the opinions of her treating medical providers and the testifying medical expert, erred in the residual functional capacity assessment., and improperly relied on the opinion of the vocational expert who testified in the prior hearing. The court concluded that the case presented unusual circumstances in which the ALJ failed to comply with the Appeals Council's order, when the ALJ found the medical expert was unqualified but did not call a different medi-

cal expert despite holding a second hearing to correct a problem with the vocational expert's opinion. Reversed and remanded. 14 pages. Judge Joseph N. Laplante.

SUBJECT-MATTER JURISDICTION; RIPENESS

2/1/23 *Taranov v. Area Agency of Greater Nashua et al.*
Case No. 21-cv-995-PB, Opinion No. 2023 DNH 010

Plaintiff is a blind and cognitively disabled elderly woman enrolled in New Hampshire's Acquired Brain Disorders (ABD) Waiver program, a Medicaid program administered by the state's department of health and human services (DHHS). As part of the ABD Waiver program, DHHS contracts with private nonprofit "area agencies" to coordinate the provision of home and community-based care services to eligible individuals. Plaintiff has sued several DHHS officials, as well as Gateways Community Services Inc. (Gateways), the area agency that coordinates her ABD Waiver services, and its officials. The complaint alleges that defendants terminated a subset of the plaintiff's ABD Waiver services, the so-called adult foster care services, and in their place offered to cover a substitute set of services that she finds inadequate, in violation of her federal statutory and constitutional rights. The DHHS defendants moved to dismiss the claims against them on ripeness grounds. The court denied the motion. The court rejected the argument that the plaintiff's failure to exhaust administrative remedies before filing her § 1983 suit rendered the claims unripe. The court also concluded that the termination of the plaintiff's benefits was sufficiently final to ensure that judicial review is not premature and that the hardship prong of the ripeness test was satisfied. 13 pages. Judge Paul Barbadoro.

2/1/23 *Barron v. Benchmark Senior Living, LLC*
Case No. 22-cv-318-SE, Opinion No. 2023 DNH 013

After her parents died from COVID-19 while they were residents at the defendant's assisted living facility, the plaintiff brought suit, alleging several New Hampshire state law claims. The defendant moved to dismiss, arguing that the Public Readiness and Emergency Preparedness Act ("PREP Act"), 42 U.S.C. §§ 247d, et. seq., preempts or provides the defendant with immunity from liability for the plaintiff's claims. The defendant further argued in the alternative that RSA 21-P:42a provides it with immunity from liability for the claims. The court denied the motion to dismiss, holding that neither the PREP Act nor RSA 21-P:42a provides a defendant with immunity from liability for claims that allege that a defendant failed to use approved countermeasures in response to COVID-19. The court further held that the PREP Act does not preempt such claims. In addition, the court denied the plaintiff's motion to remand, holding that diversity jurisdiction exists. 19 pages. Judge Samantha Elliott.

TITLE IX

3/17/23 *Doe v. Franklin Pierce University*
Case No. 22-cv-188-PB, Opinion No. 2023 DNH 024

A Title IX Committee at Franklin Pierce University (FPU or University) determined after an investigation and hearing that a male student, plaintiff John Doe, had engaged in dating violence against a female student, Sally Smith. Doe alleges that the University violated Title IX of the Education Amendments of 1972 by discriminating against him on the basis of his sex. He also asserts state law claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and negligence. The University filed a motion to dismiss all of Doe's claims except his breach of contract claim. The court granted the motion as to the Title IX and negligence claims and denied it as to the implied covenant claim. With respect to the Title IX claim, the court held that Doe had failed to allege that sex bias was a motivating factor behind the University's actions. Doe's negligence claim failed because it was based on breaches of the promises that FPU allegedly made to him in their contract. The implied covenant claim, however, survived dismissal because it was not duplicative of Doe's breach of contract claim. 17 pages. Judge Paul Barbadoro.

MEDICAID ACT; DUE PROCESS CLAUSE

3/28/23 *Fitzmorris v. NHDHHS*
Case No. 21-cv-25-PB, Opinion No. 2023 DNH 025

Plaintiffs in this putative class action are disabled individuals who are enrolled in New Hampshire's Choices for Independence ("CFI") waiver program, a Medicaid program administered by the New Hampshire Department of Health and Human Services ("DHHS"). The CFI Waiver program provides home and community-based care services to adults who otherwise would be Medicaid-eligible for nursing home care. Plaintiffs allege that DHHS and its Commissioner have failed to remedy defects in the administration of the program, leading to significant gaps in plaintiffs' services. Plaintiffs filed a complaint on behalf of themselves and a putative class of similarly situated individuals alleging, among other things, that DHHS violates the Medicaid Act and the Fourteenth Amendment's Due Process Clause by failing to provide plaintiffs with notice and an opportunity for a hearing when they do not receive all the services they have been authorized to receive. Defendants moved for partial summary judgment, arguing that neither the Medicaid Act nor the Due Process Clause require such procedural protections. The court granted the motion. Regarding the Medicaid Act claim, the court rejected plaintiffs' argument that a state agency "denies" a claim for services whenever it fails to provide previously authorized services. The court reasoned that plaintiffs' contention assigns a meaning to the terms "denies" and "denied" that is contrary to the way in which these terms are used in the statute and its implementing regulations. Plaintiffs' alternative argument that they are entitled to notice and a hearing because defendants' failure to close their service gaps is an "action" under the implementing regulations also failed to persuade the court because the definition of that term recognized that an affirmative act on the part of the agency is required, which is not satisfied by defendants' alleged failure to close plaintiffs' service gaps. Finally, the court rejected plaintiffs' argument that notice and an opportunity for a hearing when service gaps arise is constitutionally required. The court reasoned that neither the holding nor the reasoning of *Goldberg v. Kelly*, 397 U.S. 254 (1970), mandates the procedural protections that plaintiffs seek. In addition, plaintiffs' due process claim failed under the balancing test developed in *Mathews v. Eldridge*, 424 U.S. 319 (1976), because of the minimal value of plaintiffs' requested procedures and the significant government burden in providing such procedures. 17 pages. Judge Paul Barbadoro.

PERSONAL JURISDICTION

3/21/23 *Cappello v. Restaurant Depot, LLC, et al.*
Case No. 21-cv-356-SE, Opinion No. 2023 DNH 027

The New Hampshire Plaintiff brought suit against several non-New Hampshire defendants after he ate a salad in New Jersey contaminated with E. coli and suffered significant injuries. Defendants moved to dismiss for lack of personal jurisdiction arguing, among other things, that Plaintiff's claims did not arise out of or relate to their contacts with New Hampshire. After conducting jurisdictional discovery, Plaintiff objected, arguing that Defendants' contacts with New Hampshire were extensive such that he could establish the relatedness prong of the specific jurisdiction analysis, relying on *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.,* 141 S. Ct. 1017 (2021). The court rejected Plaintiff's attempt to analogize the facts of the case to those in Ford, noting that, among other differences, the Supreme Court's relatedness analysis in that case was limited to when the plaintiff's injury occurred in the forum state. Because Plaintiff's injury occurred in New Jersey where he purchased and ate the contaminated lettuce, and because Defendants' contacts with New Hampshire were far more attenuated than the defendant's contacts with the forum state in Ford, the court held that Plaintiff had not carried his burden to establish the relatedness prong of the personal jurisdiction analysis for any of his claims and granted Defendants' motions and dismissed the case. 16 pages. Judge Samantha Elliott.

3/27/23 *TIG Ins. Co. v. National Indemnity Co.*
Case No. 21-cv-165-SE, Opinion No. 2023 DNH 029

Plaintiff brought a declaratory judgment action against the out-of-state Defendant seeking to determine the parties' rights and obligations to a reinsurance contract originally issued in 1973. Defendant moved to dismiss for lack of personal jurisdiction, arguing that it lacked sufficient minimum contacts with New Hampshire. Plaintiff conceded that the reinsurance contract was formed outside of New Hampshire and covered an insurance contract related to liability in another state. Nevertheless, Plaintiff argued that its claims were related to New Hampshire because Defendant had sent communications to Plaintiff in New Hampshire about the contract since 2018 and Defendant did significant business in New Hampshire. The court granted Defendant's motion to dismiss, holding that Plaintiff had failed to carry its burden to show that Defendant's communications to Plaintiff in New Hampshire were sufficient to satisfy the relatedness prong of the personal jurisdiction analysis, particularly because neither party had breached their contract at the time Plaintiff filed suit. In so holding, the court distinguished *Baskin-Robbins Franchising LLC v. Alpenrose Dairy, Inc*., 825 F.3d 28 (1st Cir. 2016), on which Plaintiff primarily relied, determining that the case's holding did not extend to allow the court to exercise personal jurisdiction over a defendant given the evidence Plaintiff adduced to support personal jurisdiction. 18 pages. Judge Samantha Elliott.

HOEFLE, PHOENIX, GORMLEY & ROBERTS, PLLC
ATTORNEYS AT LAW

Associate

Portsmouth – Seacoast law firm seeks associate attorney with 3-5 years of experience handling civil litigation and/ or business matters. Position requires business formation and transaction experience (real estate helpful), as well as experience in drafting pleadings, discovery and court appearances. Excellent interpersonal skills to develop client relationships, outstanding writing skills, attention to detail and ability to manage a busy and varied practice. New Hampshire Bar Admission required; Maine or Massachusetts admission a plus. Compensation commensurate with experience.

Please send resume via email to: Dan Hoefle (**dhoefle@hpgrlaw.com**) Hoefle, Phoenix, Gormley & Roberts, PLLC.

HOEFLE, PHOENIX, GORMLEY & ROBERTS, PLLC
ATTORNEYS AT LAW

Hoefle Phoenix Gormley & Roberts, PLLC is a general civil law practice located in Portsmouth, New Hampshire. We are seeking an on-site Legal Assistant/ Paralegal to support our corporate and litigation practices, real estate experience would be a plus. You will provide overall support to attorneys' business needs.

Responsibilities include: working with attorneys to form and maintain business entities; assisting with the drafting, filing and organizing of legal documents, contacting clients to complete tasks, as well as providing general office support including answering phones, filing, drafting correspondence and recordkeeping.

Qualifications include: previous experience as a legal assistant or paralegal, the ability to prioritize and multitask, excellent written and verbal communication skills, attention to details and deadlines. Benefits include health insurance, disability, AD&D and life insurance, 401k and profit sharing, paid time off and free parking. Email resume to **cwebster@hpgrlaw.com** or call 603-766-9109.

Salary commensurate with experience.

Classifieds

POSITIONS AVAILABLE

STAFF ATTORNEY – New Hampshire Legal Assistance (NHLA) seeks a Staff Attorney to work on our Domestic Violence Advocacy Project (DVAP) and Immigrant Justice Project (IJP). DVAP work will involve representation of survivors of domestic violence, stalking, sexual assault, and human trafficking in protective order and family law cases, with a special focus on representing immigrant survivors. The IJP work will emphasize Special Immigrant Juvenile proceedings. We seek to represent clients, who may present with multiple different civil legal issues, in a holistic and trauma informed manner. For details and application process please visit **https://www.nhla.org/support/jobs**.

ASSOCIATE ATTORNEY – The Crisp Law Firm. PLLC located in Concord is looking for an associate attorney with two to five years of experience. Our firm 's practice concentrates in the areas of family law, estate planning and probate, business representation, and professional licensing and certification. We offer a collegial atmosphere, benefits, and competitive salary. If you interested in learning more about this opportunity email Attorney Sara Crisp at **sara.crisp@crisplaw.com**.

STAFF ATTORNEY: New Hampshire Public Defender is seeking an experienced trial attorney. Applicants must have a commitment to indigent criminal defense and extensive practical 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 acceptable) to our Recruiting Coordinator through the Employment section on our website, **www.nhpd.org.**

VICTIM/WITNESS COORDINATOR – The Cheshire County Attorney's Office has an opening, with a start date to be determined, for the position of Victim/Witness Coordinator. This position works closely with prosecuting attorneys to ensure compliance with the Victim's Rights Act, and is responsible for providing services and information to victims and witnesses in criminal cases in both the 8th Circuit Court, Criminal Division – Keene, and the Cheshire County Superior Court. A Bachelor's degree and one to three years of related experience within the criminal justice system, or equivalent combination of education and experience is required. Salary commensurate with experience. Please submit a cover letter and resume to Chris McLaughlin, Cheshire County Attorney, ATTENTION Kim May, Human Resources Director, Cheshire County, 12 Court Street, Keene, NH 03431 or via email at **kmay@co.cheshire.nh.us.**

HEARINGS EXAMINER, ADMINISTRATIVE APPEALS UNIT – The NH Department of Health and Human Services is seeking a part-time temporary Hearings Examiner to preside over administrative hearings in appeals of Department decisions or actions involving the Department programs. Job duties include conducting hearings, scheduling prehearing conference, writing decisions and ruling on motions. Requirements: Juris Doctorate from a recognized law school, NH Bar membership in good standing, and five years' experience as an attorney doing legal work or as a professional in utility or administrative regulation. Travel as required to conduct hearings in locations throughout the State and to fulfill other requirements of position. Salary $34.62-$49.80/hr (29.5hrs/wk). For more information about this position and instructions on how to apply, go to **https://das.nh.gov/jobsearch/employment.aspx** and search for Job ID: 29816

LEGAL ASSISTANT needed for a full-time position at a busy personal injury, workers' comp and medical malpractice law firm. Applicant should have strong computer, typing and organizational skills. Some experience preferred, but will train the right candidate. We offer competitive compensation and benefits. Please forward your resume and letter to Liz at **lpinkos@mcdowell-morrissette.com.**

OFFICE SPACE

MANCHESTER: Solo or satellite professional space, furnishings, parking, utilities. **rjj911@myfairpoint.net**.

REQUEST FOR PROPOSALS

NOTICE TO LEGAL FIRMS – REQUEST FOR PROPOSALS – Somersworth Housing Authority (SHA) is seeking proposals from firms interested in performing legal services. Proposals will be accepted until May 31, 2023. Scope of Services may be obtained by calling 603-692-2864, ext. 300 or email: **dievans@somersworthhousing.org**. SHA reserves the right to reject any and all proposals received or accepts the proposal deemed to be in its best interest, not necessarily based upon the lowest price. SHA is an Equal Opportunity Employer and Housing Provider.

Hello, Litigation Lawyers.

We're hiring.

Bernstein Shur is seeking a partner/ shareholder-level attorney to join our prominent and growing team of attorneys in our Manchester, NH office.

The ideal candidate will be a member of the New Hampshire Bar with at least ten years of general litigation experience in state and federal matters and an excellent reputation. A portable book of business is preferred but not required.

Bernstein Shur has offices in Maine and New Hampshire and advises clients from across the U.S. and around the world. Our 125+ award-winning attorneys and professionals are driven and deliver results on behalf of our clients, while striving to achieve the highest level of professional excellence. Our office culture is collaborative, authentic, and respectful. In 2022, Bernstein Shur was named one of Maine's Best Places to Work for the 11th time. Bernstein Shur offers competitive compensation and excellent benefits, while making quality of life a priority. Visit bernsteinshur.com/who/careers for more information.

Please e-mail resume and references to Rebecca Asen, Director of Attorney Recruiting & Professional Development, at attorneyrecruiting@bernsteinshur.com

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Litigation/Construction Attorney

Preti Flaherty is a full-service law firm with more than 100 attorneys and offices in ME, NH, MA and D.C. We are seeking a mid-level or senior associate to work in our Construction and Litigation Practice Groups in either of the firm's Boston, MA or Concord, NH offices.

PretiFlaherty

The ideal candidate will have:
- Experience in a sophisticated litigation practice;
- An excellent academic record and exceptional written and oral communication skills;
- Construction litigation and/or experience in Massachusetts is desirable, but not required;
- Practical experience in construction and/or engineering is also desirable, but not required.

The position offers an excellent opportunity to assume significant responsibility and hands-on experience in a collaborative, sophisticated and team-oriented work environment. We are looking for someone who is highly motivated and has the ability to work both independently and as part of a larger team.

Preti Flaherty offers a competitive salary, incentive bonuses, a generous benefits package, and a collegial working environment. Please email cover letter and resume to Mary Johnston, Recruitment Coordinator at: **mjohnston@preti.com**.

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WE ARE HIRING

FAMILY LAW ATTORNEY

Admission to the NH Bar and 5+ years experience required

Devine Millimet offers competitive salaries, a formal bonus program for associates, attractive growth opportunities, a comprehensive benefits package, and flexibility for a hybrid work schedule.

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MORNEAU LAW

FAMILY LAW ATTORNEY

Morneau Law, a steadily growing Nashua firm, is seeking a family law attorney, ideally with 3-7 years' in practice, to join our team. The right candidate would have an interest in collaborative divorce and mediation training would be a plus. Someone who is dedicated to giving back to the community and a self-motivated team player would thrive in our position.

We are a community-focused and team-based firm with an emphasis on the work/life balance that includes the opportunity for a flexible schedule. We provide a collegial and upbeat work environment with many perks to be appreciated by a new member to our team. Salary is commensurate with experience and qualifications.

Please send your cover letter, resume and salary requirements to:
Employment @MorneauLaw.com

MORNEAU LAW

PROBATE, TRUSTS AND ESTATE PLANNING ATTORNEY

Morneau Law, a steadily growing Nashua firm, is seeking a probate, trusts, and estate planning attorney with 3-7 years' experience to join our team. Someone who is dedicated to giving back to the community and a self-motivated team player would thrive in our position.

We are a community-focused and team-based firm with an emphasis on the work/life balance that includes the opportunity for a flexible schedule and working remotely. We provide a collegial and upbeat work environment with many perks to be appreciated by a new member to our team. Salary is commensurate with experience and qualifications.

Please send your cover letter, resume and salary requirements to:
Employment @MorneauLaw.com

Schwartzberg Law

Unique Opportunity for an Attorney who Seeks a More Balanced Lifestyle

We are a small group of 6 delightful individuals.

Our attorneys love to practice law and earn a substantial income working 4 days a week.

An appropriate candidate could be: An experienced attorney who no longer wishes to run a business; A state employee looking for a challenge; or An employee of Big Law with too many billiables to count. We will also consider newly admitted attorneys.

Only attorneys, who wish to live in beautiful northern New Hampshire, need apply.

We are located in Plymouth NH. Contact Ora at **oralaw@gmail.com.**

REAL ESTATE PARALEGAL

We are seeking a highly organized and detail-oriented Real Estate Paralegal to join our team. The ideal candidate will have experience in all aspects of New Hampshire residential and commercial real estate transactions, including drafting purchase and sale agreements, deeds, promissory notes, conducting title searches, preparing closing documents,assist attorneys with complicated commercial closings. Must have extensive knowledge of NH real estate law, registries of deeds in NH, ME & VT, title searches, reviewing title abstracts, plans and reviewing/drawing legal descriptions. Knowledge of conveyances of properties from Estates & Trusts is helpful.

The ideal candidate will have 3-5 years of experience as a real estate paralegal, excellent communication skills, be well-organized and able to work independently, and will contribute to the continued growth of a very active practice group.

We offer competitive salaries commensurate with experience, an excellent benefits package, and a cohesive team atmosphere. Qualified applicants should submit resume and cover letter to: Jennifer Iacopino, Human Resources Manager: jiacopino@sulloway.com

Visit the career page on our website for a more complete job description and to apply: www.sulloway.com/careers

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McLane Middleton

CORPORATE ATTORNEY

McLane Middleton is seeking two Corporate Law Attorneys to join our growing corporate practice. Are you looking to take the next step in your professional career? This position will afford you the opportunity to take on new responsibilities, work with and learn from some of the region's leading corporate lawyers, work directly with clients, and be provided with the resources to develop your professional skills.

The ideal candidates should possess either 5-8 years' experience including experience leading and managing business transactions, or 4+ years' experience, including experience working on business transactions. Equally important is a strong desire and in-depth experience in representing and advising closely held businesses, including entity formation and structuring, corporate governance, and contract drafting and negotiating. The candidates should have a strong work ethic and the ability to interact with all levels of an organization on complex transactions as requested.

TRUSTS & ESTATES ATTORNEY

McLane Middleton is seeking a Trusts and Estates Attorney to join our active and expanding private client practice. This is a great opportunity to work alongside some of New Hampshire's most highly skilled Trusts and Estates attorneys.

Ideal candidate should possess a strong academic record and excellent written and oral communication skills, with 7-10 years' experience in estate planning, tax planning, and trust and estate administration. Experience in asset protection planning and charitable giving is a plus. Ideally, the candidate would have prior experience working directly with high net-worth individuals and families and their advisors on tax-efficient wealth transfer strategies. Equally important, is the ability to manage a preexisting volume practice while working alongside a team of skilled professionals.

REAL ESTATE ATTORNEY

McLane Middleton is seeking an entry-level Real Estate attorney with 1-3 years of relevant experience to join our team. General real estate knowledge and a strong interest in real estate law is preferred.

GENERAL LITIGATION / FAMILY LAW ATTORNEY

McLane Middleton is seeking a Litigation / Family Law Attorney to join our busy family law practice. This is a unique opportunity for someone looking to take on more responsibility and assist in the development of a rapidly growing practice group.

The ideal candidate should possess 2+ years of litigation experience, including experience working on family law matters. Equally important is experience and procedural knowledge of divorce and custody law in New Hampshire, prenuptial agreements, legal separations, as well as divorce and annulments. This individual should have the ability to manage multiple cases as well as superior time management and interpersonal skills. Other helpful experience includes familiarity of practicing before the family law and probate court.

Built on over 104 years' experience, McLane Middleton helps create a long-term career path to assist professionals in their pursuit of personal and professional achievement. We offer a collegial team environment, professional development and personal satisfaction in a fast-paced and motivating work environment. Successful candidate(s) must possess excellent academic credentials and communication and writing skills. All positions based out of the Manchester, New Hampshire office with meaningful flexibility for remote work. Competitive compensation and benefits package offered.

Qualified candidates should direct cover letter and resume to:

Jessica Boisvert
Manager of Professional Recruiting and Retention
jessica.boisvert@mclane.com

Regulatory Counsel
Unitil Service Corp., Hampton, NH

Position Purpose:
Advises and represents Unitil companies in electric and natural gas regulatory matters in New Hampshire, Massachusetts, and Maine. Recent matters include, but are not limited to, electric and natural gas rate regulation, integration of renewable resources, and modernization of the electric grid. Also reviews and negotiates business agreements, and advises on state and federal regulatory corporate laws and regulations. Advises the Unitil companies in connection with civil litigation, claims, enforcement, and compliance matters as necessary. Works with outside counsel and service providers as necessary to investigate, evaluate, and resolve claims and litigation.

Qualifications:
- A Juris Doctorate degree is required. Bar admission, or a willingness to seek bar admission, in New Hampshire is required. Bar admission in Massachusetts and /or Maine is also a plus.
- A minimum of five years experience in a position demonstrating strong supervisory, organizational, communication, investigative, writing, negotiation, and litigation skills. Strong written and oral advocacy skills are essential. Familiarity with natural gas and electric utility regulation, policy matters, and operating activities is a plus.

To apply for this position: **https://unitil.com/our-company/careers**

NEW HAMPSHIRE JUDICIAL COUNCIL
EXECUTIVE DIRECTOR

THE NEW HAMPSHIRE JUDICIAL COUNCIL seeks applications from attorneys interested in receiving an appointment to serve as its executive director. Since 1946, the Judicial Council has served as an institutional forum for the on-going and disinterested consideration of issues affecting the administration of justice (RSA 494:3). The executive director oversees an executive-branch agency responsible for managing the delivery of indigent defense services in criminal cases, guardian ad litem services in child protection cases, and effecting other statutory duties. The executive director also represents the agency before the legislature and executive branch on funding matters and other matters relating to the administration of justice, and serves on designated boards.

The complete position description can be found on the homepage of the Judicial Council's website, **www.judicialcouncil.nh.gov**, or by contacting the Council directly. For information regarding salary and benefits, please contact the Council's Acting Executive Director. A cover letter and resume should be delivered via email to the attention of:

Richard E. Samdperil, Acting Executive Director
New Hampshire Judicial Council
Richard.E.Samdperil@jc.nh.gov
603-271-3592
The deadline for submission is April 28, 2023.

ASSISTANT COUNTY ATTORNEY (COUNTY ATTORNEY'S OFFICE)

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 $68,993-$96,574
Grafton County offers an exceptional benefit package including NH Retirement System, Low Deductible Health Insurance plans, 13 Paid Holidays, Generous Earned Time Package and much more!

Please send resume and cover letter to:
For complete position details, visit our website and apply online:
www.co.grafton.nh.us/employment-opportunities, E-mail: **hr@graftoncountynh.gov**
Grafton County Human Resources
3855 Dartmouth College Hwy., Box 3 North Haverhill, NH 03774
E.O.E.

Assistant Corporation Counsel
City of Nashua

DEPARTMENT: Legal

HOURS WORKED: Monday - Friday (8:00am to 5:00pm)

AFFILIATION: Unaffiliated

SALARY & GRADE: Grade 18, Salary ranges between $80,000 - $95,000

PRIMARY DUTIES
This position will assist the Corporation Counsel in fulfillment of duties as the chief legal officer of the city. The position acts in place of Corporation Counsel when advising city officials or representing the city to outside persons and organizations. Responsible for the satisfactory performance of all the legal work of the city and must keep current with respect to all laws and regulations affecting the city; requires admission to the bar and to practice in all New Hampshire state and federal courts.

QUALIFICATIONS
Minimum of three(3) years relevant work experience; must be proficient with computers and all software necessary to do this job; Juris Doctorate; combination of experience and education will be considered.

APPLICATION PROCEDURE
Submit cover letter, application, and resume, three professional/academic references and a writing sample at: **http://applitrack.com/nashua/onlineapp/**

EQUAL OPPORTUNITY EMPLOYER
Recruiting practices shall be consistent with State and Federal Law (2/14/2023)

Career Opportunity

ASSOCIATE ATTORNEY with 3-5 years experience needed for 8 lawyer Portsmouth firm handling diverse cases with emphasis on litigation.

Excellent research, writing and communication skills required. Send resume, writing sample and references to: Deb Garland, Firm Administrator, 82 Court Street, Portsmouth, NH 03801 dgarland@nhlawfirm.com

Boynton Waldron
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Estate and Trust Administration Paralegal

McDonald & Kanyuk, PLLC, a boutique estate planning firm with offices in Concord, New Hampshire and Wellesley, Massachusetts, has an excellent opportunity for a full time estate and trust administration paralegal.

Ideal candidate must have a broad base of estate and trust administration experience, be able to work with multiple attorneys, and have experience working directly with clients. The position requires an understanding of estate and trust concepts, and experience administering estates and trusts. Knowledge of drafting estate planning documents and tax preparation experience would be a plus. Must be well-versed in Microsoft Office, particularly Word, Excel and Outlook. This is full time, in-office position for our Concord, New Hampshire office, and we would consider flexible working arrangements for the right candidate.

Please submit resume, cover letter and salary requirements to Lisa Roy, Office Manager at **lroy@mckan.com**.

ROCKINGHAM COUNTY

ASSISTANT COUNTY ATTORNEY

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

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

REQUIRED EDUCATION AND EXPERIENCE
- Juris Doctor from accredited law school.
- Must be admitted into the New Hampshire Bar Association.

Salary Range: $68,827.20 - $96,366.40, dependent on experience.
Status: Full Time/Exempt
Submission Requirements:
Employment application and resume required.
Apply Online:
https://www.governmentjobs.com/careers/rockinghamnh

Equal Employment Opportunity
Mandatory post offer physical, drug and alcohol testing for new hire. Criminal records check required.

The Division for Children, Youth and Families is seeking Child Protection Attorneys Statewide

The DCYF Legal Team is a dynamic group of experienced child protection attorneys and their legal assistants, stationed around the state, who seek judicial protection for children subjected to abuse or neglect. The focus of our work is on the immediate protection of the child and strengthening, whenever possible, families to eliminate abuse and neglect in the home. The DCYF Legal Team works in partnership with the New Hampshire Attorney General's office. We offer paid training, competitive salaries up to $84,844.50, and a comprehensive benefits package. **Benefits Summary (nh.gov)**

DCYF Attorney Duties include:

- Litigating multiple cases on behalf of DCYF to protect abused and neglected children and ensure children are provided safe, permanent homes.
- Conducting discovery, legal research and writing, preparing witnesses for trial, negotiating settlements, and presenting evidence and oral argument at court hearings and trials.
- Advising DCYF on its duties and responsibilities.

Requirements: J.D. from an accredited 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. **Recent graduates are encouraged to apply – an exception may be requested for years of experience.**

How to APPLY: Please go to the following website to submit your application electronically through NH First: **Candidate Space (nh.gov)**. Enter Attorney in the Job Title field and apply to the location of your choice. Positions will remain open until filled.

For questions about this position, please contact Attorney Deanna Baker, Legal Director at (603) 271-1220, **deanna.baker@dhhs.nh.gov**.

ASSISTANT CITY PROSECUTOR
CITY OF LACONIA, NH

The City of Laconia is seeking a highly skilled attorney to fill the position of Assistant City Prosecutor to manage criminal cases in the City Prosecutor's Office.

Salary Range: $80,329.60 - $93,100.80, plus a competitive benefits package (Starting salary based upon experience)
Submit cover letter and resume to:

Laconia Police Department
Attn: Executive Assistant Lori Marsh
126 New Salem St.
Laconia, NH 03246

The position will remain open until filled.

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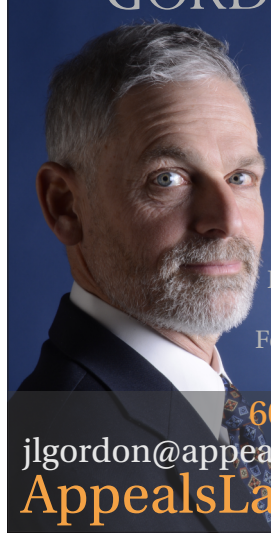

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