

## Ahead of the Curve: A 150-Year Retrospective on the Unique Daniel Webster Scholar Honors Program

By Tom Jarvis

New Hampshire is full of history and firsts in the nation. Some of these firsts are well-known: It was the first state to declare its independence from England in 1775, Samuel Shelburne of Portsmouth became the first Attorney General of the United States in 1789, and the first-ever meeting of the Republican Party took place in Exeter in 1853.

Some New Hampshire firsts are lesser known: The first potato ever planted in America was in Londonderry in 1719, the first alarm clock was invented in Concord in 1787, and the nation's first women's strike took place in Dover in 1828.

One of the most unique and recent firsts in the Granite State was the implementation of the UNH Franklin Pierce School of Law's (UNH Law) Daniel Webster Scholar (DWS) Honors Program – the first bar alternative program in the nation – in 2005.

The DWS program was named after Daniel Webster, one of the most prominent American lawyers of the 19th century, arguing over 200 cases before the United States Supreme Court, who later served as the 14th and 19th US Secretary of State.



On May 19, 2023, 18 Daniel Webster Scholars were sworn in at the US District Court. From left to right: Tayla George, Christian Merheb, Kylie Butler, Alex Fernald, Teddy Miele, Joe Dumais, Rebecca Dowd, Julianne Plourde, Autumn Klick, Coda Campbell, Amanda Metell, DWS Director Courtney Brooks, Courtney Duffy, Jacob Watts, Emma Mann, James Rudolph, Elizabeth Trautz, Ryan Garrette, and Brittany Reeves. Courtesy Photo

A collaborative effort of the New Hampshire Supreme Court (NHSC), the New Hampshire Bar Association (NHBA), the New Hampshire Board of Bar Examiners, and UNH Law, the program was designed to provide a comprehensive, client-ready legal education to close the gap

between legal education and legal practice, consisting of robust simulations, regular assessments, and hands-on practical training from volunteer lawyers, judges, and court staff. Instead of being tested in a room for a finite period, lawyers are tested over the course of two years.

With 18 new graduates in May 2023, the DWS program has graduated 313 new lawyers without requiring them to take the traditional two-day bar exam.

"It's the first and still the only competency-based bar admission program," DWS program director Courtney Brooks says. "It's the only program like it in the country that couples practice-readiness training with bar admission. Students gain practical skills and simulations for essentially a two-year bar exam, and along the way, their skills are assessed by bar examiners. At the end, they are admitted to the bar."

The idea for the program began with retired NHSC Chief Justice Linda Dalianis in 1995. The American Bar Association's Task Force on Law Schools and the Professional Development had just released a report – which came to be known as the MacCrate report, named after task force chair, Robert MacCrate – on what the ABA felt were shortcomings in the training of new lawyers. Dalianis, who was on the Superior Court at the time, agreed with the report's findings.

"I had been involved in some bar ad-

DWS Program continued on page 18

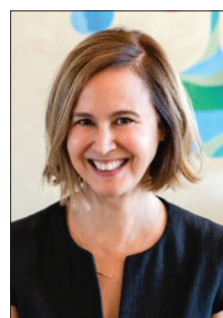
## The Children's Law Center is Dedicated to Young People at Risk

By Melissa Russell

Several years ago, when attorney Stephanie Hausman and her husband became foster parents, they experienced firsthand the intricacies of the New Hampshire juvenile system. The nine-year-old whom they later adopted had a team of dedicated professionals on her side, all very active and attentive to her needs, but Hausman saw deficiencies.

"There were so many people interacting with her. She had to gear up emotionally, and she knew she was expected to say everything was fine," Hausman says. "What she needed was a therapeutic relationship that was just for her, someone she could tell anything to, and it would be okay. It became really important to look at all the systems from her perspective."

This personal experience was a rev-



Wolford

elation for Hausman, a former public defender. It led her to the Children's Law Center of New Hampshire in Portsmouth, where executive director Lisa Wolford hired her to serve as the Center's first litigation

director. Formed in July 2022, the CLC, conceived of, created, and founded by Wolford, provides legal representation and social services advocacy to children growing up in poverty who are at the center of Children in Need of Services (CHINS),

LAW CENTER continued on page 16

## Practitioner Profile

### Miniatures and Motions: Andrew Piela's Vocation and Avocation Both Involve Strategy

By Kathie Ragsdale

Andrew Piela credits dinner-table conversations with his father for helping to shape both his career choice and his favorite hobby.

An engineer with a deep interest in history, Piela's father, Jack, would regale his family at mealtime with anecdotes he'd read about the Civil War or World War II, supplementing the tales by taking his two sons to visit institutions like the Bradley Air Museum, the Battleship Massachusetts, and the former Higgins Armory, which had displays of medieval armor.

Piela's maternal grandfather, Don Bryfonski, had served in World War II,



and the few occasions when he would talk about his experiences or share his wartime photographs only deepened the military interest Piela's father had fostered in him.

"The more I learned, the more interested I became in the military history of the world," Piela says.

Fast-forward a few decades, and Piela is now a veteran attorney with a focus

PIELA continued on page 19

## IN EVERY ISSUE

NHBA News.....	2-19	Practice Area Section.....	22-30
Opinions.....	4	NH Court News.....	31-35
NHBA•CLE.....	20-21	Classifieds.....	36-39

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## INSIDE

**President's Perspective.** Reflections After a Year as NHBA President. **PAGE 2**

**NHBA Welcomes New Staff.** New Editorial and Marketing Coordinator Grace Yurish. **PAGE 2**

**From the Editor.** The importance of levity. **PAGE 3**

**603 Legal Aid.** Taylor Flagg is new DOVE Project Coordinator. **PAGE 3**

**50-Year Member Luncheon.** **PAGE 5**

**Fictional Lawyers.** **PAGE 6**

**Wellness Corner.** **PAGE 7**

**An Update on the \$100 Million YDC Claims Fund.** **PAGE 8**

**Flying Solo.** **PAGE 9**

**Ethics Corner.** Identifying the Client in Estate Planning Matters. **PAGE 10**

**NHBA's New Mobile App.** **PAGE 11**

## Intellectual Property and Municipal & Governmental Law Sections

Articles with important information and updates regarding both areas of law. **PAGES 22-30**

**NH Judicial Branch** "Mental Health Summit" on June 21. **PAGE 31**

**Practice Information and Tips from the Federal District Court Clerk.** **PAGE 31**

**NH Supreme Court At-A-Glance.** Summaries of recent NHSC cases. **PAGES 31-35**

# Reflections After a Year as NHBA President

As this Bar year comes to a close, I have had occasion to reflect on just how short these past 12 months have felt. In between Association events, conferences, and a wide range of NHBA-related commitments, most Bar presidents juggle a full caseload and a busy practice. As a product of that, I suspect most of my predecessors would agree that the year was over before they knew it. While the months have flown by far faster than I hoped they would (the year is ending before I could undertake certain projects and initiatives that would have been wonderful to tackle if time allowed), I enjoyed attending county bar events, leading the Board of Governors at our monthly meetings, assisting with planning our events, and interacting with Judicial Branch leadership on myriad issues. It has been a pleasure serving as your Bar President this year.

In New Hampshire, we are fortunate to have a professional bar association that prides itself on prioritizing, first and foremost, member service. An outsider would not know the many different ways that the Bar Association serves its members and helps all of us in this profession. Through my years of bar service, I have come to appreciate that the Association strives to meet the needs of all its members, in virtually every aspect of the practice of law. This includes practice management tools, ethical guidance, providing client meeting space and a presently under-construction member lounge and shared working area, and a broad array of discounted and care-

## President's Perspective



By Jonathan M. Eck

Orr & Reno  
Concord, NH

fully curated professional member services that are available at either no or reduced fees. The Association and its staff work hard to help each of us thrive in our practices and to maximize the success and enjoyment we earn through our hard work in this profession.

For the casual observer who comes to the Midyear Meeting and enjoys the top-flight CLE programming and prominent speakers – coupled with the nearly unparalleled networking opportunities and an efficient awards program that on an annual basis celebrates practitioners' high achievements and their demonstrated commitment to carrying out the ideals of our profession – the production seems to come together almost automatically and seamlessly. Having served in Bar leadership, and particularly in this past year as Bar President, I can attest to the countless hours that Bar leadership, staff persons, and an array of volunteers commit to making that event the annual suc-

cess that it perennially is.

The same goes for our Annual Meeting, which every year is a celebration of our profession, certain accomplished members of our profession who are bestowed with the special Annual Meeting awards, and the great work that our Board of Governors does on behalf of the Association over the course of the bar year. Frequently hosted at one of our state's grand resorts, the Annual Meeting is arguably our Association's preeminent event each year. As with the Midyear Meeting, many months of planning, coordinating of logistics, and scheduling of programming and social opportunities is required to make the program the success that it is each year. Without fail, year after year, the staff at the Bar Association deliver and put on a program that is a source of pride and great enjoyment for many of our members.

As my year serving as NHBA President winds down, I have more pride than ever before for the quality of the experience that our members have practicing law here in New Hampshire. The devoted volunteer attorneys, our active Judicial Branch, and the capable and professional NHBA staff all help us effectively and skillfully serve our clients. One of the opportunities that the NHBA President has each year is welcoming newly admitted lawyers at the swearing-in ceremonies. During the swearing-in ceremonies, it is common for a few of the speakers to recognize the "New Hampshire Advantage" that exists in the practice of law here in this great state. We are fortunate to practice in a state where sharp practices do not typically occur, and in general there is a high degree of civility and professionalism that persists, even between adversaries.

While my service as Bar President will soon end, I intend to remain active within the Bar and plan to continue to contribute to the strength of our Association by attending Bar Association events, contributing to committee and Bar section work, reading and writing for the *Bar News*, and attending NHBA CLE programs, among several other ways. I encourage all of you to do the same, by participating in the Bar Association in your own ways. There is a high level of engagement within the New Hampshire Bar. Our members like to know and work with

PERSPECTIVE continued on page 15

## NHBA Welcomes New Editorial and Marketing Coordinator

The New Hampshire Bar Association is pleased to announce the addition of Grace Yurish as the new Editorial and Marketing Coordinator. In her role, Yurish will write articles and proofread for the *Bar News*, put together the weekly *E-Bulletin*, and coordinate our social media.



Yurish possesses a bachelor's degree in advertising and public relations from Pennsylvania State University's Donald P. Bellis-

ario College of Communications. She worked as a marketing assistant for almost four years, where she developed strategic marketing, advertising, and social media campaigns.

"I'm thrilled to be working with such a great team and I'm looking forward to applying my skills to augment the already exceptional *Bar News*, while also gaining new diverse skills in a variety of areas," Yurish says. ■

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

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

EDITORIAL AND MARKETING  
COORDINATOR  
Grace Yurish  
(603) 715-3214  
gyurish@nhbar.org

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

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

DIRECTOR OF MARKETING,  
COMMUNICATIONS & MEMBER OUTREACH  
Caitlin Dow  
(603) 715-3250  
cdow@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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I am a huge proponent of levity. It has helped me through the worst times in my life and has augmented the best times. And, in my not-so-humble opinion, levity in the workplace is vital. Although this staunch advocacy of lightheartedness and humor has earned me the reputation as a goofball at times, I happily accept that. If I make at least one person per day smile, laugh, or even quickly blow some air out of their nose while they read, I'm happy.

You just did it, didn't you?

Some studies show that cultivating levity is good for your health. It can certainly help to reduce stress and open pathways to creativity. According to Emiliana Simon-Thomas, the science director of the Greater Good Science Center at the University of California Berkeley, "Levity is our primary vehicle for restoring a relaxed state."

Since I've worked on the *Bar News*, my number two goal has been to add some

sort of levity to this publication. Of course, my first goal is to make the *Bar News* the best, most informative, and most entertaining publication in the entire universe. Besides Pluto. You can't masquerade as a full-sized planet for hundreds of years without consequence, Pluto.

Anyway, the law and journalism can be heavy and dry at times, so a bit of lightheartedness can break up the publication and make it easier to consume. After all, as I've said on many occasions and have also heard some of our members say: lawyers are people, too.

But how do you balance levity or humor in a publication with keeping things professional and giving the content its due reverence?

In some of my articles, I've added puns that, at worst, make readers roll their eyes and, at best, make them exclaim, "ha!" I have also added a monthly column, *Fictional Lawyers*, now appearing in its



seventh issue (see page six), that explores who our members' favorite TV, book, or movie lawyers are and why. As a side note, I am happy to report that I still receive an enormous amount of positive feedback on this column, as well as a continuous stream of responses.

Our new NHBA Director of Marketing, Communications, and Member Outreach, Caitlin Dow, even came up with the excellent idea of dedicating one of the upcoming columns to the worst, most cringeworthy fictional lawyers. Stay tuned for more on that. Want to send yours in? Please do!

All that leads to an important announcement: Beginning this month, the *Bar News* is pleased to include the cartoon, "Jest is For All," which is drawn by Massachusetts attorney Arnie Glick.

(Talk about burying the lead!)

A long-running legal cartoon, "Jest is For All" previously appeared in the *Bar News* from 2006 to 2008. It has also appeared in many other bar association publi-

cations, including the *Maine Bar Journal*, *Virginia Lawyer*, *Washington (DC) Lawyer*, and the *Oregon State Bar Bulletin*; and it recently reached its 20-year anniversary as a regular feature in the *Tennessee Bar Journal*.

Each month, we will feature one of Glick's cartoons somewhere in our pages (see this issue's cartoon on page 11). In some issues, the cartoon may even relate to the featured practice area.

Whether you are a fan of levity or not, I sincerely hope you have been enjoying the past few issues of *Bar News*. As always, if you have any feedback, suggestions, ideas, or even a good ole letter to the editor, please do not hesitate to contact me. I can be reached at [tjarvis@nhbar.org](mailto:tjarvis@nhbar.org) or (603) 715-3212.

And if you have high praise for me, definitely email me. I can print it out and show it to my mom. ■

### Correction to *Bar News* Vol. 33, No. 12

In last month's issue, in the article, *150-Year Retrospective: Preserving New Hampshire's Legal History Throughout the Years*, Gregory Smith was quoted to say that the work being done on the Oral History Project is with the support of the New Hampshire Civics Institute. The support comes from the New Hampshire Supreme Court Society and the New Hampshire Bar Foundation.

## Taylor Flagg Assumes Role as DOVE Project Coordinator at 603 Legal Aid

By Grace Yurish and Tom Jarvis

On May 18, 603 Legal Aid appointed Taylor Flagg as the new Domestic Violence Emergency (DOVE) Project Coordinator. Flagg brings a strong academic background and extensive experience in victim advocacy and support to the DOVE Project.

Flagg's predecessor, Pamela Dodge, announced her upcoming retirement on June 30, 2023, after 23 years with the program.

A double-major undergraduate of the University of New Hampshire, Flagg obtained her bachelor's degrees in both history and justice studies. She then continued to pursue her education at UNH by earning her master's degree in justice studies in 2017.

Prior to joining 603 Legal Aid, Flagg served as a perinatal social work case manager at Amoskeag Health, where she engaged in comprehensive case management for the perinatal population. Before that, she worked as a victim witness advocate at the Hillsborough County Attorney's Office, where she offered essential support to survivors of domestic violence. Flagg's dedication to the cause is additionally shown through her time in the research field of domestic and sexual violence. She has previously worked on several grant-funded projects and publications focused



on domestic and sexual violence, as well as stalking.

"I'm absolutely excited to get back into the realm of victim advocacy and support," Flagg says. "I took a little time away from it when I worked at Amoskeag Health,

but I found that that passion never left me."

As Flagg returns to work in victim advocacy, she is eager to make a difference not only in the lives of victims and survivors but also on a broader scale by enhancing existing processes.

"If I could have written up my dream job, this would have been it," Flagg says. "I'm incredibly excited about the opportunity. I already feel in my element and I'm learning a ton and I'm so excited to move forward with the position."

With Taylor Flagg at the wheel, 603 Legal Aid's DOVE Project will continue to assist victims of domestic violence and stalking. Her passion, experience, and commitment to the cause will undoubtedly have a positive impact on the lives of survivors and the community.

To learn more about the DOVE Project, visit [603legalaids.org/dove](http://603legalaids.org/dove). ■

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## Semicolons and Legitimacy

Legitimacy fuels the judicial machine. Without it, courts don't work. Right now, the United States Supreme Court's legitimacy is a guttering spark. The US Supreme Court, like all courts, is the only branch of government that functions based on a perception of legitimacy. While former presidents and current legislators make a mockery of legitimacy in the elected branches of government, they have the right to rule because they won elections. The US Supreme Court rules because they appear to be legitimate. The moment they cease appearing legitimate is the beginning of the end for their function in our democracy.

Polls show that end is coming. In 2023, a Gallup poll revealed stunningly bad numbers regarding the public's faith in the Supreme Court. Twenty-five percent of adults in the US have a great deal or a lot of confidence in the Supreme Court. In the late 80s, that number twice approached 60 percent. More telling, the divide is strongly partisan: 39 percent of Republicans, 25 percent of independents, and only 13 percent of Democrats had a great deal or a lot of confidence in the Supreme Court.

Interestingly, there is precedent for supreme courts failing because of a lack of legitimacy. In the 1860s, Texas's Supreme Court issued a ruling on a voting crime matter that rendered an entire election void (based on the placement of a semicolon in a statute, hence the epithet the "Semicolon Court"). They did so to

favor one candidate for governor over the other, their favored candidate being ushered into power by an armed insurrection. To this day, Texas lawyers and Texas courts routinely argue that decisions from this Supreme Court cannot impact *stare decisis* analysis.

For example, in *Masters v. State*, 653 SW2d 944 (Tx. 1983), a concurring opinion noted that the majority's decision was partially faulty because it was based on a case decided by the Semicolon Court and thus could not be used in the *stare decisis* calculus.

As Justice Powers put it: "That decision was made by the Semicolon Court, a court established by a State Constitution...which was the product of military occupation and the disenfranchisement of most of the state's inhabitants, circumstances which deprive that court's decision of *stare decisis* effect." *Id.* at 947.

The Semicolon Court is a real, historical example of what happens when a court loses legitimacy. Right now, the US Supreme Court faces three distinct threats to its legitimacy, and, unfortunately for all Americans, it has decided to do nothing about them. These threats aren't based on decisions they issued that people disagree with, but instead on scandals about how the Court is staffed and run.

### Crisis 1: A Seat Stolen

Antonin Scalia, stalwart of the Leonard Leo-controlled Federalist Society, died on February 16, 2016. His replace-

ment was not sworn in until October 6, 2018. That is a total of 963 days. It is, by far, the longest period of time between functional judges on the US Supreme Court in US history. The second longest is an 841 day stretch to replace Justice Henry Baldwin in 1844. The longest stretch since the telephone was invented was the Abe Fortas nomination that took a comparatively paltry 391 days.

Of course, the reason for the stretch was the unprecedented and purely partisan delay caused by then Senate Majority Leader Mitch McConnell. Even though the presidential election was almost a year away, McConnell refused to let Senators even meet with Obama's selection Merritt Garland. He claimed it was so the "people would have a voice" in the selection process, but this is both an obvious lie and a dereliction of the Senate's constitutional function. McConnell's gambit worked, politically delivering three justice picks in four years to one of the most controversial presidents of all time.

But the hypocrisy and rank political maneuvering of McConnell's decision became clear when Amy Coney Barrett became a Supreme Court justice overnight, despite her appointment coming just 38 days before a presidential election. Apparently, the only people whose voices count are Republicans.

### Crisis 2: The Leak

Problems with the Court, aside from its decisions, continued when *Dobbs v. Jackson Women's Health*, the most consequential and anticipated opinion in generations, was leaked before it was officially published. The Court's deliberation process and the secrecy that surrounds it is supposed to ensure that the Court is beyond influence. By leaking the opinion, the Court pierces that secrecy and opens itself up to questions of influence, which is bad, but it laid bare two other problems.

First, given the makeup of the Court, there doesn't appear to be much need for deliberations. Justice Alito's leaked opinion was virtually identical to the official one. Why bother compromising or making responsible decisions when you have the votes to issue a partisan screed? Second, the leak demonstrates that the Supreme Court cannot control or investigate its own people. It's only a matter of time before the nine justices again lose control of their staff (and the technology used) in a way that fundamentally compromises

the judicial decision-making process.

### Crisis 3: Failed Financial Disclosures

The crisis of legitimacy, however, entered a new phase thanks to the justice that ushered in the modern era of high stakes politicization of the Supreme Court—Clarence Thomas. Setting aside the possible conflict-of-interest claims with his wife, Ginni Thomas, the real problems come from what Pro Publica has reported about Thomas accepting truly over-the-top gifts from real estate developer and staunch, politically active conservative, Harlan Crow.

According to Pro Publica, Crow's gifts include stunning vacations around the world on Crow's massive superyacht (a contrast from Thomas's stated preference for vacationing in campers parked in the Wal-Mart parking lot) and Crow's purchase of a house for Thomas's elderly mother. Even the greenest IL could tell you that these sorts of gifts should be disclosed on financial documents. But Thomas didn't do so. Both of Thomas's options—failure to understand the rules and ignorance of them—do not fit with his stature as a Supreme Court justice.

The Court's legitimacy is waning because of these scandals. Yet they do nothing to shore up the little legitimacy they have left. They have not created a set of ethics rules for themselves, and Chief Justice Roberts even refused to attend Congressional hearings on the subject. Instead, they seem to hope that they can white knuckle through the problem, keeping their heads down and working until this blows over.

The white-knuckle approach, however, will not work. Our country is both deeply divided and addicted to courts to resolve problems created by those divisions. That means ignoring the problem will not suffice given today's political climate. The US Supreme Court needs to do something soon. Otherwise, future lawyers may refer to the Roberts Court with the same derision Texas lawyers and judges reserve for the Semicolon Court. The US Supreme Court needs to reverse course and publicly address the naked failures of the institution. The country depends on it.

Anthony Sculimbrenne  
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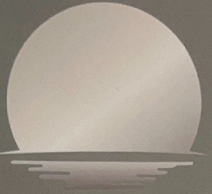
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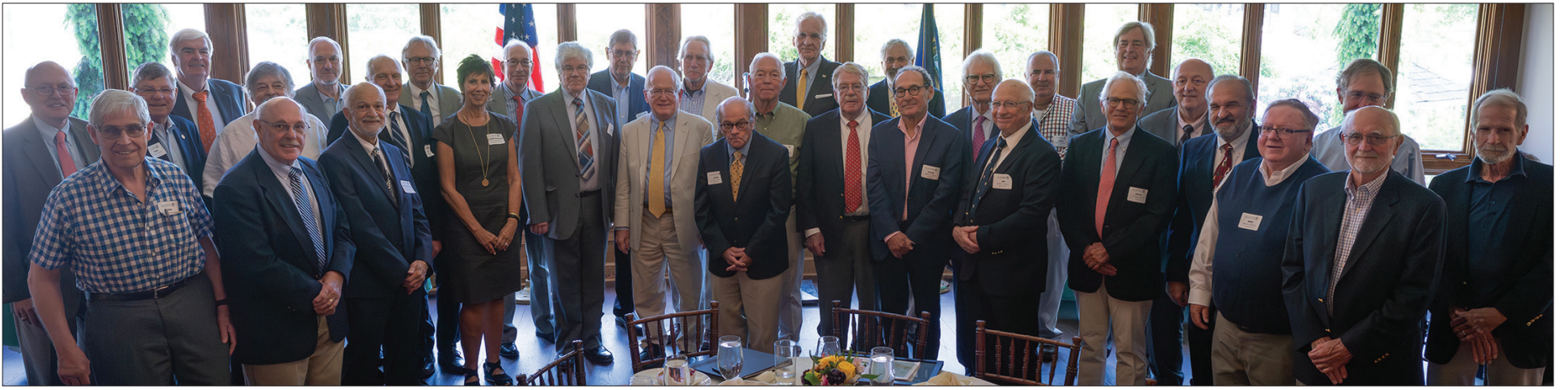
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# A High-Spirited Turnout for NHBA's First Annual 50-Year Member Luncheon



33 of the 73 current NHBA members celebrating their 50<sup>th</sup> year of law practice at the first annual 50-Year Member Luncheon. Photo by Rob Zielinski

By Tom Jarvis

More than 100 lawyers, judges, and their family members attended the New Hampshire Bar Association's first annual 50-Year Member Luncheon on Thursday, June 1, at the Bedford Village Inn in Bedford. Of the 73 current members who entered the practice of law in 1973, there were 33 in attendance.

Each year, the NHBA recognizes members who have been in the practice of law for 50 years. The recognition previously took place at the Annual Meeting, but it was decided it would be prudent to create a standalone event. The change is partly due to exponential growth in membership in recent decades coupled with more members practicing longer, but mostly because of the NHBA's desire to better honor this momentous milestone and produce a more accessible event with decreased travel times and no overnight stay.

When asked about the decision to move the celebration from the Annual Meeting to its own event, New Hampshire Supreme Court Senior Associate Justice Gary Hicks, who spoke at the event and bestowed certificates, said it was a great idea and completely well-deserved.

"There were some absolutely brilliant lawyers there and it was wonderful to see them all collected in one place," Justice Hicks says. "I was overwhelmed by the amount of talent that had been around practicing law in New Hampshire for 50 years. It was quite an honor to be able to preside over the event. It left me smiling."

NHBA Executive Director George Moore says, "this was a wonderful event that has the personal touch of the New Hampshire Bar, and it allowed lifetime acquaintances to reconnect and share their experiences of a half century as members



NHBA President Jonathan Eck gave opening remarks to the luncheon attendees about the progress the Bar has made over the last 50 years. Photo by Rob Zielinski

of the Bar."

Before lunch was served, NHBA president Jonathan Eck opened the festivities by talking about how much has changed in the last 50 years.

"The Bar Association looks very different than it did 50 years ago," Eck said to the attendees. "I hope all of you join me in celebrating the enhanced diversity we have in our membership, in every sense. The Bar is much more inclusive and representative of society in general than it was once upon a time, and that's a sign of the progress we've made over the last 50 years."

After congratulating the members on reaching this milestone, Eck encouraged members who are continuing to practice to volunteer for those who cannot afford legal services and asked members winding down or retiring to consider mentoring younger lawyers.

"My wife and I found the event to be exceptional. It was just a real treat," 50-year member and former judge Albert Cirone, Jr. says. "The three speakers, Jonathan, Gary, and George did wonderful

jobs in the three areas they touched on. I also talked with George about the change to a standalone event. He gave me the reasons and I think it was the correct decision. Half a century is a long time in any profession and it's noteworthy."

Brad Cook, who not only celebrated his 50 years practicing law but also 50 years at Sheehan and Phinney, agrees with Cirone.

"I thought it was nice to separate it from the Annual Meeting in the sense that it focused on the 50-year member group," Cook says. "It was very well done. One of the nice things about it is that it wasn't just the people who took the New Hampshire bar in 1973, it was also people who are members of the New Hampshire Bar now who have been lawyers for 50 years, so it brought in a group who have joined us from other states."

Following lunch, Justice Hicks and George Moore spoke to the crowd before presenting certificates to each 50-year member. Moore noted that when honorees were admitted in 1973, the Bar Association was celebrating its 100<sup>th</sup> anniversary



The luncheon attendees all had a laugh when New Hampshire Supreme Court Senior Associate Justice Gary Hicks asked, "do you remember when a chat was just a polite conversation?" Photo by Rob Zeilinski

and had only 920 members – of which just 19 were women. In contrast, today there are 8,678 total members, including 3,419 women.

Former New Hampshire Attorney General and 50-year member Gregory Smith highlighted the joy of celebrating the event with his family.

"It was an opportunity to see quite a few people I haven't seen in a long time, and to introduce my son, Geoffrey Smith, who is a partner at Mintz Levin, to many of them," Smith says. "I thought it was well-run and very enjoyable."

"All the details – location, food, program, etc. – were of a quality equal to such a gathering," 50-year member Richard Wiebusch says. "It was a nice opportunity to see old friends and to think for a bit about all that has happened in the 50 years since we were admitted to the Bar. Justice Hicks and George Moore did a fine job of calling to mind the quality, simplicity, and decency of the practice of law as I first knew it in New Hampshire." ■

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## Who is Your Favorite Fictional Lawyer? The Daniel Webster Scholars Edition

By Tom Jarvis

In light of one of our feature articles in this issue being a historical look back on the unique Daniel Webster Scholar (DWS) Honors Program, this month's column consists of answers from some graduates of the 2023 class, along with the director of the program, Courtney Brooks. Congratulations, Daniel Webster Scholars!

**Courtney Brooks, DWS Director**

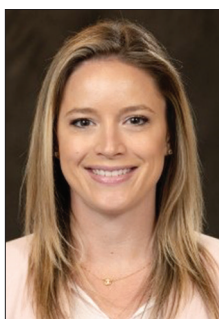
"Kim Wexler from *Better Call Saul*. Setting aside her sometimes questionable legal ethics and participation in Jimmy McGill's/Saul Goodman's schemes, the show's depiction of Kim, as a young woman attorney, was something I had never seen before. Kim



is confident, competent, professional, and always prepared. She has exceptional courtroom skills and the respect of the bench and the bar. She also has compassion and is dedicated to helping people without regard to the value of their case. Rhea Seehorn played her beautifully. Assuming she complies with the Rules of Professional Conduct, Kim would be a welcome addition in New Hampshire as she would likely willingly take pro bono and contract criminal cases."

**Coda Campbell, 2023 DWS**

"Katrina Bennett from *Suits*. As a woman, it can be difficult to find the perfect balance between likeability and professionalism. I think the writers at *Suits* got it right with Katrina. Everyone judges her, initially, by her appearance. She's intimidating and fiercely competitive at first. But as time went on, and her friendship with Louis [Litt] developed, we saw that she has layers and is a fun-loving oddball underneath her hardened exterior shell. She was a skilled and intelligent attorney, but also caring, compassionate, driven, determined, ethical, loyal, and quirky. I think she would do very well in our small bar. She knew how to read her environment and adapt quickly. Her caring and compassionate nature would help her excel here and would be very valuable in representing underserved populations."



stood the importance of fighting for justice even in the face of long odds and public criticism and did so with empathy. [In New Hampshire, he would fare] pretty well; Atticus Finch is truthful and plays within the rules. However, he may need to curtail his use of fanciful language for a modern New Hampshire jury and try to be more relatable to people of the twenty-first century!"

**Ryan Garrette, 2023 DWS**

"Louis Litt, from the TV show *Suits*, is my favorite character because the show's most powerful lessons are told through his struggles, and he is always unapologetically himself. Despite his undisputed financial expertise and record billables, Louis is constantly overlooked as someone who can't handle the big moments. As he attempts to prove his colleagues wrong, we share in his victories, laugh when he makes unreasonable decisions, and enjoy his passionate diversions about the ballet, mudding, and cats. Louis often reacts



emotionally and fails to read the room, which could be fatal in a New Hampshire courtroom – but, if he's able to keep his cool and let his expertise shine – he's unbeatable."

**Autumn Klick, 2023 DWS**

"Elle Woods from *Legally Blonde* because of how unashamedly feminine and genuine she was. Elle Woods showed me that lawyers can wear pink while winning cases in court. She was frequently underestimated by her peers, but she used that to her advantage. Elle always fought for what she believed in and had a strong moral compass. I think Elle Woods would do well in a New Hampshire courtroom! That is, as long as she left Bruiser at home. Although we never saw her interact with opposing counsel, I think she would be courteous and respectful."

**Elizabeth Trautz, 2023 DWS**

"My favorite fictional lawyer is *Futurama's* Hyper Chicken, a simple alien chicken from a backwoods asteroid who frequently 'ba-CAWKs' at his



## THE BEST LAWYERS – YEAR AFTER YEAR

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**NICK ABRAMSON**

Medical Malpractice Law - Plaintiffs – Personal Injury litigation – Plaintiffs

**EVA H. BLEICH**

Medical Malpractice Law - Plaintiffs

**KEVIN F. DUGAN**

Medical Malpractice Law - Plaintiffs – Personal Injury litigation – Plaintiffs

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witnesses. In the words of Hyper Chicken, ‘Your Honor, that’s something we cannot... a-doodle-doo.’ I grew up watching *Futurama* with my father. Sci-Fi Comedy continues to be my favorite genre of movies and television. Hyper Chicken is undoubtedly the best interplanetary lawyer! I imagine Hyper Chicken would quickly be disbarred for incompetence. Judges would despise him for making a mockery of the legal profession, but juries would adore him!”

**Jacob Watts, 2023 DWS**

“Sandy Cohen from the TV show *The O.C.* He is my favorite for a few reasons. First, he spent much of his career as a public defender, doing his best work in that role. He is also, for the most part, a good father. He has a lot of empathy for his clients, even adopting a teenage client in need of a stable home. I’m also somewhat envious of his ability to surf each morning before work. I believe he’d likely fare well in a New Hampshire courtroom, given that he has a lot of trial experience. However, the show does not really focus on his legal career or abilities, so I don’t have much to base this on other than his experience and the fact that other attorneys in the show seem to respect him.” ■

*Want to tell us your favorite? Please contact NHBA Publications Editor Tom Jarvis at [tjarvis@nhbar.org](mailto: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.*



**Wellness Corner**

**The Benefits of Laughing at Yourself**

**By Laurel Boivin**

“That’s ridiculous,” he said with a chuckle the moment he saw the photo. A slight chuckle.

I, on the other hand, was laughing out loud. In fact, I hadn’t stopped laughing since I created the dueling mustache photo of the two of us. A much-needed modification to a photo that I didn’t think was good enough to share, until I gave myself a mustache.

Me with a mustache to match his, now that’s funny. Silly, playful, fun. And oh, so funny.

“Don’t you think it’s funny? Come on, admit it. It is funny.” I insisted.

“What’s funny is how funny you think you are. You really get a kick out of yourself,” he said with a grin.

He’s right. I do get a kick out of myself. I often find humor in my actions, behaviors, and even my fears. I have the ability to laugh at myself. It is especially helpful when I am unnecessarily critical of myself.

It was not always the case. For years, I took myself too seriously without even realizing it. I had adult responsibilities and big aspirations. I was busy trying to prove myself and striving for perfection. So busy that I didn’t see the humor in my own humanness.

Perhaps, similar to wisdom, learning to laugh at yourself comes with age.

Self-laughter, except when it is self-defeating, is good for you and can have



cent blog post, *How Laughing at Yourself Can Be Good for Your Well-Being*, “If we have good ego strength, finding humor in who we are or what we do not only reminds us of our humanness, but also promotes positive interpersonal interactions and relationships. It’s good for our well-being.”

Self-laughter is also beneficial in the workplace. A 2013 study by researchers Colette Hopton (Seattle University), Julian Barling (Queen’s University), and Nick Turner (University of Manitoba) found that business leaders who strike the right balance, laughing at themselves but not their colleagues, may be seen as more likable, trustworthy, and caring.

Tell me, do you have the ability to laugh at yourself? What inspires you to do so?

If you need inspiration, I highly recommend finding a less-than-ideal photo of yourself and giving yourself a mustache. ■

a positive impact on your life. It causes a release of endorphins, healthy neurotransmitters that boost happiness and fight emotional and physical pain. It promotes a sense of self-acceptance and increases confidence and resilience. It also provides perspective about what is important and what is not.

According to Shoba Sreenivasan, Ph.D., and Linda E. Weinberger, Ph.D., psychology professors at the Keck School of Medicine at USC and authors of a re-

*Laurel Boivin is the CEO and founder of Flux+Flow Coaching. She is a leadership and life coach, and a speaker with experience in both the public sector and private sector in legal services, government relations, municipal and community relations, corporate communications, and the electric utility industry. A former paralegal, she’s worked in environmental permitting and compliance, environmental litigation, insurance defense, and real estate.*

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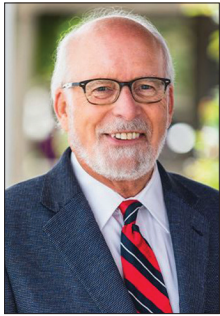
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# An Update on the \$100 Million Youth Development Center Claims Fund

By Chuck Douglas and  
Samantha Heuring



Douglas



Heuring

Last year, Governor Sununu signed a law creating a \$100 million dollar relief fund to compensate hundreds of victims who suffered horrific sexual and physical abuse as children detained at the Youth Development Center (YDC), Sununu Youth Services Center (SYSC), State Industrial School, Philbrook School, and Tobey Special Education School.

## Why a fund?

The YDC Claims Fund is like many mass tort settlement funds, such as the World Trade Center and the Boy Scouts, which were set up to provide a simple and efficient way of resolving legal claims instead of going through years and years of court proceedings and appeals.

## Do I have to file a claim with the YDC Claims Fund?

Victims of YDC abuse can choose to file a claim with the YDC Claims Fund, or

they can choose to file a lawsuit in State Court. This is a personal decision that should be made based on the personal goals of each victim and with the guidance of an experienced attorney.

Although the YDC Claims Fund is not the best option for every victim, it provides advantages that are not available in a traditional lawsuit in court.

While trials in court are generally open to the public, the YDC Claims Fund is not. Instead, it is a private and confidential process. Additionally, a victim has the right to waive this confidentiality if they choose to do so.

The YDC Claims Fund provides victims with a resolution of their case far faster than the New Hampshire court system can. Some may be willing to wait years for the hundreds of trials standing between them and their day in court and thus might not choose the fund process. Last June, the judge assigned to the YDC lawsuits said it could take 35 years for all trials to be held. Since that time, however, hundreds of additional lawsuits have been filed, thereby delaying victims' access to justice even further.

While the amount of compensation that a jury might award, if any, is a gamble, the YDC Claims Fund provides more certainty. Victims who experienced physical abuse are eligible for compensation up to \$150,000. Victims who experienced sexual abuse are eligible for compensation up to \$1.5 million. Additionally, the precise amount of compensation that a victim is entitled to through the YDC Claims Fund can be calculated, before ever filing a claim, by carefully analyzing the facts giv-

ing rise to the claim.

Anthony Carr of Shaheen & Gordon has well-stated client concerns about the funds that we all experience:

"My clients were at YDC because they were some of the state's most vulnerable kids and most in need of rehabilitation and guidance," Carr says. "Instead of being rehabilitated, they were sexually and/or physically abused. As a result, the overwhelming majority of my clients have carried with them a deep mistrust of the State and authority figures for many years.

That has proven to be quite the issue because participating in the YDC fund requires a bit of a leap of faith."

## When can claims be filed?

Any former resident of the YDC who experienced sexual and/or physical abuse may file a claim on or before December 31, 2024.

## What is happening with the YDC Claims Fund right now?

Former Chief Justice John Broderick was chosen by the State Supreme Court to serve as the administrator of the YDC Claims Fund. Administrator Broderick issued his first quarterly report on April 14, 2023. He reported a total of 38 claims have been filed, with sexual abuse the subject of 11 claims, five of physical abuse, and 22 involving both. At that time, the total amount sought by the filed claims was \$31,869,375.

Some claims have already been approved and settled, including claims for \$170,000 and \$1.5 million, the latter of which was achieved by our office.

Attorneys who represent claimants will be limited to a one-third (33 and 1/3 percent) contingent fee on the amount recovered.

## Challenges for plaintiffs' counsel

Several documents must be completed to file a claim with the YDC Claims Fund. The claim documents and associated rules are approximately 85 pages long and contain complex calculations and definitions that determine the amount of compensation a victim is entitled to. With that much paper and complexity, many claimants

have turned to us for assistance.

Furthermore, there are millions of pages of State-produced documents to be reviewed before an attorney files a claim for a client, and finding the documents that support an individual victim's claim and requested compensation is akin to searching for a needle in a haystack. Nevertheless, the State maintains that plaintiffs' attorneys must submit these supporting documents with a claim before the State will either settle the claim at all or settle it for the amount of compensation requested.

The clients that come to us usually have not told anyone else about what happened to them at YDC. Many have gone on to prison due to anger at authority figures.

Attorney Carr describes well the special nature of these men and women and their low self-esteem.

"They were told they deserved the abuse, and that they did not have any reason to think that anyone would believe them even if they did say anything," Carr says. "When the survivors tell me their stories and open up about the most painful and private moments of their life, they are doing so with the hope that it will lead to justice and accountability. With that, comes an expectation that they will be believed. However, the fund allows the State to conduct certain investigative functions related to the claim, so long as the administrator approves the request. For many survivors, when the State requests an investigation or additional information, it is perceived as an attack on their credibility. They made the difficult decision to share the details of their abuse, and that wasn't enough to the State. That is a very difficult thing for a survivor to process, and I cannot pretend to be able to put myself in their shoes."

## Conclusion

While the YDC Claims Fund is not a perfect solution, the State owes victims the opportunity to timely and fairly resolve their claims.

We look forward to recoveries from the YDC Claims Fund for our other clients, and we will not apologize for fighting for victims who feel that justice requires closure and compensation *now*. We believe in giving our clients *results*, not promises. ■

"(T)he overwhelming majority of my clients have carried with them a deep mistrust of the State and authority figures for many years." –  
Anthony Carr

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## Words of Wisdom from Solo Practitioners

By Misty Griffith

Opening one's own law firm can be a rewarding experience for attorneys with an entrepreneurial spirit. This series profiles New Hampshire 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. Solo practitioners who would like to share your advice and experience, please contact NHBA Member Services Supervisor Misty Griffith at [mgriffith@nhbar.org](mailto:mgriffith@nhbar.org).

### Scott Hogan, The Law Office of Scott E. Hogan

29 years in practice, 18 years as a solo

#### What inspired you to become a solo?

When I applied and then attended law school back in 1991, I wasn't sure that I wanted to be a lawyer at all. I knew that I wanted the academic knowledge, and the training and experience that I admired in the lawyers I interacted with in my young pre-law school life, but I wasn't sure whether I'd go on to actually practice law or pursue some other profession.

I met and made a good friend in law



school who had similar interests, and we decided that we'd open our own firm right after law school, if we both passed the Bar Exam. (We both did).

Sometime after starting our own firm as brand-new members of the Bar, we were approached by one, then another of our adjunct professors from law school, looking to join us in a new small firm, where I practiced until 2005.

I've always had an independent view of legal practice, and the business aspects of supporting traditional firms, and so I have always understood that I would be self-employed. After my first ten years of self-employed practice with others, I left my firm, and my daily hour-each-way commute, so that I could become a sole practitioner, and raise my two daughters, and be a presence in their daily lives (and their many sports, and activities, projects, etc.), and make my own vision of legal practice.

#### Best things about solo practice:

The ability to set your own schedule (to the extent that your clients' legal mandates/schedules/deadlines allow), and to participate in daily family life. The ability to choose your clientele, your manner of practice, and your business and ethical morals.

#### Hardest things about solo practice:

Having the sole responsibility to represent and advise your clients, while opposing parties almost always have rep-

resentation from medium-to-large-sized firms, with broad legal and administrative support. Managing times of medical or family emergencies, or other unexpected life events.

#### Memorable Solo Experience:

After COVID, and the new electronic filing litigation protocols of the pandemic, it was time-consuming and frustrating dealing with the new electronic court systems. A notable option in the new regime was that electronic filing deadlines became midnight on the date of the filing deadline. Often in sole practice when you're managing clients, and other attorneys, and court issues, you don't have the luxury of time, so while learning the new system and rules was time-consuming, it was much more efficient in terms of litigating matters as a sole practitioner. That said, in a particular case, with an electronic filing deadline of midnight fast approaching for a new Superior Court action, my primary computer refused to continue working at such an hour. I ran to another computer and made my filing at 11:59 pm and 32 seconds. I have many other positive 'memorable' sole practice experiences, but I still recount that one in my dreams sometimes.

#### Advice for new solo:

Have a well-developed network of attorneys, both in your own field, and all other fields. In my very specialized land-use practice I have many brothers and sis-

ters in the Bar who I can call and generally discuss current issues or fact patterns in a collegial way, and they do the same with me. I also have a network of attorneys outside of my practice field who I can call to discuss my own clients' issues beyond my area of practice, and so can refer my clients to others for issues of tax or estate planning or transactional real estate or personal injury or criminal defense or broader issues of civil litigation, etc.

Also have a plan in place for unexpected issues dealing with medical or other unplanned exigencies.

Explain to new/potential clients the differences between retaining a sole practitioner and retaining a larger law firm, and otherwise how best to establish that relationship, and communicate in real time.

#### Would you advise anyone else to go it alone?

In my 29 years of practice, I think that solo practitioners represent some of the most thoughtful, dedicated attorneys I've met. Legal practice is not for the faint of heart. Solo practice is not for the faint of heart, among those not faint of heart.

I would advise anyone who has a specific vision of their own legal practice, and a strong, broad support system to pursue sole practice, as it's uniquely rewarding, in ways beyond just financial, while often being maddening in unique and challenging ways. ■

## #1 in Verdicts and Settlements



Boston magazine's "Top Lawyers" (l to r): Kryisia J. Syska, Adam R. Satin, Robert M. Higgins, Nicholas D. Cappiello, Andrew C. Meyer Jr., William J. Thompson and Julie A. Davis (inset).

LUBIN & MEYER again dominates Boston magazine's "Top Lawyers" list as the firm with the most attorneys recognized in areas of personal injury and plaintiffs medical malpractice law.

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Laboratory error settlement	\$14,000,000.00
Maternal death settlement	\$12,000,000.00
Radiology error verdict	\$11,500,000.00
Post-surgical infection verdict	\$10,700,000.00
Product liability settlement	\$8,900,000.00
Birth injury settlement	\$7,500,000.00
Construction accident settlement	\$7,000,000.00
Surgical error settlement	\$5,100,000.00
Prostate cancer settlement	\$4,500,000.00

\* Verdict settled on appeal





# NEW HAMPSHIRE BAR FOUNDATION NEWS

## Bar Foundation Awards \$1.3 Million in IOLTA Grants

The New Hampshire Bar Foundation is pleased to announce the IOLTA Program grant awards for FY2024. The total award amount granted this year is \$1,300,000. IOLTA grant awards are funded through interest received on lawyers' pooled trust accounts.

The awards are granted annually to the four largest civil legal aid organizations in New Hampshire, as well as the NHBF Law School Loan Assistance Program. These organizations rely on the unrestricted grant funds to supplement their government and private grants where needed.

In 1982, New Hampshire was the second state to establish a mandatory IOLTA program through New Hampshire Supreme Court (NHSC) Rule 50.

Today, IOLTA programs exist in every state in the United States, and throughout Canada.

Since its inception, the New Hampshire IOLTA program has awarded over \$39 million in grants to provide free or reduced-fee civil legal services to disadvantaged residents.

This year's total grant award is the largest in 14 years. The large increase in

IOLTA income over the past year is due to the rising interest rate environment and the hard work of the Bar Foundation's IOLTA Enhancement Committee, chaired over the last year by Lisa Wolford.

Last spring, the NHBF Board of Directors voted based on the Committee's recommendation to contract a consultant to help revamp the IOLTA Leadership Institution Program, and to establish a compliance process for IOLTA interest rates based on NHSC Rule 50's requirement of interest rate comparability. This work, along with Leadership Institution recruitment efforts, has resulted in revenue this fiscal year of almost double the previous year.

While almost every bank operating in the state participates in the IOLTA program, we are especially proud of our Leadership partners. These institutions have committed to maintaining an interest rate of 65 percent of the Federal Funds Target Rate, even with the constant Fed rate hikes, and account for more than 50 percent of total IOLTA revenue.

A list of Leadership Institutions can be found on the NHBF website. ■

## FY 2023-2024 IOLTA Grant Awards Total Awarded: \$1,300,000

**Disability Rights Center- NH** **\$93,000**

Stephanie Patrick, Executive Director  
*Use of Funds: to support operational expenses.*

**603 Legal Aid** **\$359,250**

Steven Scudder, Interim Executive Director  
*Use of Funds: to support basic operational expenses.*

**NHBA Lawyer Referral Service - Modest Means** **\$25,000**

Caitlin Dow, Director of Marketing, Communications, and Member Outreach  
*Use of Funds: to support basic operational expenses.*

**NH Bar Foundation Law School Loan Assistance Program** **\$84,750**

*Use of Funds: Loan forgiveness program for staff attorneys at four NH non-profit agencies.*

**New Hampshire Legal Assistance** **\$738,000**

Sarah Mattson Dustin, Executive Director  
*Use of Funds: to support basic operational expenses.*

## Powering Justice, Propelling Change: The NHBF Annual Dinner

One hundred and thirty people attended this year's New Hampshire Bar Foundation (NHBF) Annual Dinner, held on May 11, 2023, at the Manchester Country Club in Bedford.

The event began with a welcome by NHBF Chair, Scott Harris, who noted the accomplishments of the Bar Foundation over the last year, including its support of 603 Legal Aid's Multicultural Outreach Project, its partnership with the New Hampshire Judicial Branch to launch National Judicial Outreach Week, and its work to substantially increase IOLTA revenue.

A keynote speech followed on the history of election law by Larry Schwartztol, Professor of Practice at Harvard Law School, and former White House Counsel under the Biden Administration.

The Frank Rowe Kenison Award was

presented by New Hampshire Supreme Court Chief Justice Gordon MacDonald to New Hampshire Supreme Court Senior Associate Justice Gary Hicks, whose remarks included highlights from his career and encouragement toward mentoring and pro bono work.

The Robert E. Kirby Award was presented by Judge Susan Ashley to Lyndsay Robinson of Shaheen & Gordon. During her acceptance speech, Robinson shared her lifelong journey into the practice of law, and thanked all those who helped her along the way.

The event raised money through sponsorships and donations. Money raised by the NHBF helps to support a variety of legal services programs in the state.

Thank you to all attendees, award presenters and recipients, sponsors, and donors for making this a successful event. ■



130 lawyers, judges, and family members attended the New Hampshire Bar Foundation's Annual Dinner on May 11, 2023, at the Manchester Country Club. Photo by Rob Zielinski



Chief Justice Gordon MacDonald presents the Frank Rowe Kenison Award to his friend and colleague, Justice Gary E. Hicks. Photo by Rob Zielinski



Lyndsay Robinson (center) with her brother John and her mother Beverly, after receiving the Robert E. Kirby Award. Photo by Rob Zielinski



Keynote Speaker Larry Schwartztol delivers remarks concerning election law. Photo by Rob Zielinski

# Welcome New Admittees

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.

## May 17, 2023

Raygan E. Cristello, Carmenelisa Perez-Kudzma, John A. Viscido, Daniel Webster Scholars – May 19, 2023

Kylie Irene Butler, Coda Dawn Campbell, Rebecca Knight Dowd, Courtney Lynn Duffy, Joseph Jeffrey Dumais, Alex Charles Fernald, Ryan Preston Garrette, Tayla Amanda George, Autumn Dawn Klick, Emma Clare Mann, Christian Eli Merheb, Amanda Rose Metell, Theodore Gary Miele, Julianne Marie Plourde, Brittany Anne Reeves, James Knight Rudolph, Elizabeth Catherine Trautz, and Jacob Rose Watts.

## May 25, 2023

Jonathan Dustin Burgess, Monica Elizabeth Cooper, Madison Taylor Corcoran, Clinton Gabriel Crosbie, Rowan David Ferrier, Bailey Adam Goldberg, Katelynne Tess Goodchild, Emily Elizabeth Johnson, Michael Ellis Matuson, Katherine Jane Grace Mail, Lauren Samantha Shapiro, Willow

Ruch Smith, and Louise Dean Williams.

## June 7, 2023

Ryan Laurence Abel, Stephen Ronald Agnatovech, III, David Mark Aleksic, Elizabeth Alden, Pooja Arora, Eric Kenneth Bachman, Denae E. Barton, Elizabeth Limbert Bancroft, Rebecca Elizabeth Beauregard, Victoria Stockton Breese, Gregory John Comeau, Justin Albert Cote, Michael Jeffrey Crouse, Kimberly W. Daniel, Lynn A. Donohue, Hugh F. Ferguson, Grace Kathleen Ferranto, Jacqueline Chen Gaitan, Patrick Rene Gamelin, Julia Lorraine Griffith, Daniel Lloyd Hutchinson, Sr., Adrian Grall Johnson, Connor Edward Keefe, Christopher Bedell Kelly, Ashley Camille Krezmien, Jason David MacKeen, Matthew Raymond Manuszak, Matthew D. Medoff, Kaitlin Elizabeth Morel, James John Morrissey, John George Nossiff, Anthony Louis Papoulias, Anna C. Pierattini, Alexander Winston Read, Timothy Joseph Roberts, Colin Fraser Robertson, Thomas Michael Rose, Richard Jeremy Schoepke, Brendan Matthew Sharp, Alejandra Louisa Patton Spruill, Tiffany Troy, Matthew Paul Vicinanza, Althea Brugman Volper, Stacy A. Wardle, Collin A. Weiss, Harvey Joel Wolkoff, and Allison Rebecca Wood.

## Section Connection

### Intellectual Property Section

Formed in 1996, this section aims to create a lively dialogue among its members on all things IP (e.g., patent, trademark, copyright, licensing, trade secrets, and other technology-related law). The section's objectives include providing a forum for idea exchanges among members on emerg-

ing IP law issues, contributing articles to NHBA publications, becoming a resource on IP-related topics, and for advancing the practice of IP law in New Hampshire by providing regular meetings at various locations around the state and online and a variety of IP-related CLE offerings. Please join us and get involved! ■

## LawLine



Smith-Weiss, Shepard, Kanakis & Spony volunteers from left to right: Jillian Walsh, Jennifer Barrett, Brittney White, and Nicholas Kanakis. Courtesy photo

The New Hampshire Bar Association would like to recognize John Driscoll, and the firms of Smith-Weiss, Shepard, Kanakis & Spony and Bouchard, Kleinman & Wright for a wonderfully successful LawLine event held on May 10, 2023. More than 55 calls were handled from counties all over the state on various topics.

Thank you again to all our volunteers for participating in this valuable public service.

You can still volunteer and make a difference this year, as we are still in need for our LawLine event on August 9, 2023. For more information, please contact NHBA Lawline Coordinator Anna Winiarz at [awiniarz@nhbar.org](mailto:awiniarz@nhbar.org). ■



Nick Wright, Bouchard, Kleinman & Wright

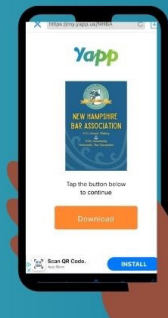


Paul Kleinman, Bouchard, Kleinman & Wright



Sabin Maxwell, Bouchard, Kleinman & Wright

## NEW HAMPSHIRE BAR ASSOCIATION HAS A MOBILE APP!



## Introducing NHBA's New Mobile App

By Megg Aquilano

The New Hampshire Bar Association is pleased to announce a "soft release" of a mobile application for our members. The app was created through the self-service app creator, Yapp, and can be found by scanning the QR code above.

NHBA Director of Professional Development Megg Aquilano drew from her technology background and researched what it would take to build an app for the Bar. Recognizing that an app was used for the 2020 Midyear Meeting, there was no doubt that it was time to offer our members the convenience and accessibility on a 24/7 basis.

Researching and participating in demos with numerous vendors, there were strengths and weaknesses that had to be weighed, in addition to the cost. Aquilano

kept her focus on the importance of being relevant and how improving relationships through technology are valuable assets in and of themselves.

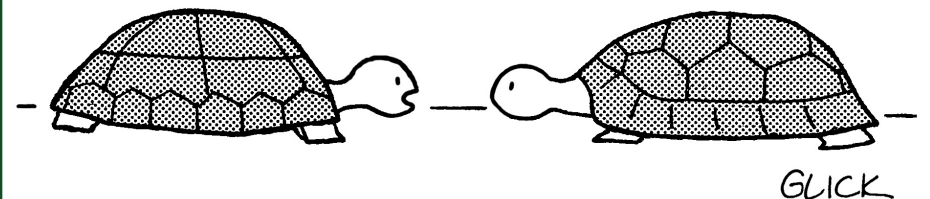
Currently, the NHBA's mobile app is dedicated to the upcoming 2023 Annual Meeting and 150<sup>th</sup> Anniversary Celebration on June 23 in Portsmouth. After the Annual Meeting, there will be another phase of building the app, which will flesh out the many facets of the Bar Association.

To download and install the app, follow these easy steps:

- Scan the QR code and tap the orange download button.
- Download the Yapp app.
- Tap "add an existing Yapp."
- Tap on the New Hampshire Bar Association picture. ■

### Jest Is For All

by Arnie Glick



*"Don't you just hate it when a contract includes a 'time is of the essence' clause?"*

Editor's Note: As I mentioned in my From the Editor column on page two, the legal cartoon, "Jest is For All," drawn by Massachusetts attorney Arnie Glick, will now be featured each month in the *Bar News*. Jest is For All was a part of our publication from 2006 to 2008 and I am happy to bring it back for our members to enjoy. Glick's humor is on point and just what the lawyer ordered.

Glick, a graduate of Georgetown Law, says that there are similarities between creating an effective cartoon caption and writing a cogent legal argument: "In both you need to carefully focus on the precise message that you want to communicate, so that the reader will react in the way that you've intended." Glick says. "Of course, the trick is to make sure that, of the two, it's the cartoon that gets the laugh."

### New Episode of the Bar Discourse

Now Streaming

### Catch the Conversation on Title IX in the New Episode of the Bar Discourse

In this episode, NHBA Publications Editor Tom Jarvis talks with Meghan Glynn from Drummond Woodsum and Tony Sculimbene from Gill & Sculimbene about Title IX. The lively conversation delves into the history of Title IX, its changes and controversies over

the years, notable cases, and the Biden administration's new rollout incorporating transgender protections.

The Bar Discourse is a podcast produced by the NHBA that focuses on the legal community and the practice of law in the Granite State. ■

# Identifying the Client in Estate Planning Matters

Dear Ethics Committee:

I am an estate planning attorney. Last year three adult children came to my office. They reported their father's health was failing and they wanted to discuss options for his estate planning. We discussed their father's assets, the benefits of establishing a trust for his assets, as well as a living will, and advanced directives. We discussed among other things potential disposition of the father's assets. I took notes of the discussion, which lasted for approximately 45 minutes. I never communicated with the father. I was not formally retained by the siblings and received no money from any of them. No engagement letter was presented at the meeting. I heard nothing from the father or siblings until recently, when I was contacted by one of the siblings, who explained she had fallen out with her other two siblings regarding their father's estate planning. She demanded a copy of my notes from the meeting and insisted I not provide them to her other siblings. What are my ethical obligations under these circumstances?

This scenario illustrates the fundamental importance of clearly determining whether an attorney-client relationship has been formed and delineating who is the client or prospective client.

The first step is to identify the client or prospective client under these circumstances. See Rule 1.7, 2004 ABA Model Rule cmt. 2 ("[r]esolution of a conflict-of-interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients...."). An attorney-client relationship is created when a person seeks advice or assistance from an attorney, the advice or assistance sought pertains to matters within the attorney's professional competence, and the attorney expressly or impliedly agrees to give or actually gives the requested advice or assistance. *McCabe v. Arcidy*, 138 N.H. 20, 25 (1993); see *Restatement (Third) of the Law Governing Lawyers*, § 14 (2000). Consultation between an attorney and another person, with the intent to seek legal advice, constitutes the fundamental basis of an attorney-client relationship. *Id.* The burden of establishing the existence of the relationship rests upon the party who claims it exists. *McCabe*, 138 N.H. at 25.

An attorney-client relationship may have been formed between the attorney and the three siblings collectively because they jointly sought advice or assistance from the attorney, on a matter within the attorney's professional competence, and the attorney gave the requested advice or assistance. Payment or the promise of payment is not required to establish the relationship, although payment may comprise evidence that the relationship was formed. See *Restatement (Third) of the Law Governing Lawyers* § 14, cmt. a and § 38, cmt. c (2000). Because the siblings met with the attorney together, there appears to be no reasonable basis for any one of them to claim the attorney represents their individual interests to the exclusion of the others. Without direct communication with the father, it is unclear whether the siblings are acting as their father's agent such that the father is either *the* or *a* prospective client.

If an attorney-client relationship was formed, then the attorney must consider their obligations under N.H. R. Prof. Conduct 1.7 and N.H. R. Prof. Conduct 1.9. The Committee's opinion 2014/15-10 on Joint Representation of Clients in Estate Planning makes clear that information must be shared



between joint clients. The circumstances presented above suggest that the interests of the sibling who requested the attorney's notes are directly adverse to the interests of the other siblings. See N.H. R. Prof. Conduct 1.7(a)(1). Even if there is insufficient evidence of direct adversity, there appears to be a significant risk that the representation of the requesting sibling would be materially limited by the lawyer's responsibilities to the other siblings, regardless of whether the other siblings are considered current or former clients. See N.H. R. Prof. Conduct 1.7(a)(2).

The Committee notes there is no definitive New Hampshire Supreme Court case determining whether attorney notes are part of the client file that must be produced to the client (or prospective client) upon request. This issue is discussed in the Committee's Opinion 2015-16/05 on *Client File Retention*, in an Ethics Corner published on May 18, 2012, and in *Averill v. Cox*, 145 N.H. 328, 339 (2000). The Court in *Averill* noted that some jurisdictions distinguish between "end product," which is the client's property, and "work product," which is the attorney's property, but declined to delineate between such documents. See 145 N.H. at 339. The Committee regards it as a best practice for attorneys to consider their notes as part of the client file. The Committee believes this is consistent with *Averill v. Cox* and its Opinion 2015-16/05.

If no attorney-client relationship was formed, then the attorney's obligations to the children would be defined by N.H. R. Prof. Conduct 1.18. Under that rule, the attorney would be obligated to keep confidential their communications with the children, Rule 1.18(b), and avoid future conflicts of interest. See N.H. R. Prof. Conduct 1.18(c) and (d). N.H. R. Prof. Conduct 1.18 does not expressly address whether an attorney's notes of discussions with a prospective client must be provided to the prospective client upon demand.

ABA Comment to Model Rules, Cmt. 1 to N.H. R. Prof. Conduct Rule 1.18 states that "prospective clients should receive some but not all of the protection afforded clients." If the prospective client entrusts valuable information or papers to the lawyer, the lawyer may be obligated to safeguard it pursuant to N.H. R. Prof. Conduct Rule 1.15(a) and return it to the client upon request. However, at least one jurisdiction has found that its version of Rule 1.15 does not apply to notes, legal research, or information obtained by the attorney through subsequent investigation. *Ethical Obligations Regarding Prospective Client Information*, Ethics Op. 374 (D.C. Bar Assoc.) (April 2018):

Where a prospective client elects not to retain a lawyer's services, or the lawyer is either unwilling or unable to represent the prospective client, the D.C. Rules impose no obligation on the lawyer to preserve information learned in or related to the prospective client consultation in which a prospective client has no property interest. Similarly, a lawyer has no obligation under the D.C. Rules to turn over to a prospective client, either at the time that the lawyer and/or prospective client decide not to form a client-lawyer relationship or thereafter, information learned in or related to a

prospective client consultation.

*Id.* There are differences between the New Hampshire and District of Columbia versions of Rule 1.18, but those differences are not material to the analysis of the issue whether the attorney is obligated to produce her notes to a prospective client.

The question raises issues regarding whether an attorney-client relationship was formed and the identity of the client or potential client. A best practice in this circumstance is to communicate directly with the potential client, either through a phone call, letter, or by arranging an in-person meeting (through the siblings, if necessary), to confirm the potential client's capacity and intentions. If the potential client decides to retain the attorney, the attorney should consider an engagement letter as a best practice.

*This Ethics Corner Article was submitted for publication review to the NHBA Board of Governors at its meeting on May 18, 2023. The Ethics Committee provides general guidance on the New Hampshire Rules of Professional Conduct and publishes brief commentaries in the Bar News and other NHBA media outlets. New Hampshire lawyers may contact the Committee for confidential and informal guidance on their own prospective conduct or to suggest topics for Ethics Corner commentaries by emailing: Robin E. Knippers at [reknippers@nhbar.org](mailto:reknippers@nhbar.org).*

## Professional Announcements

# Welcome

Sheehan Phinney welcomes  
Noy S. Kruvi to the firm.



**Noy Kruvi**  
Associate  
603.627.8346  
[nkruvi@sheehan.com](mailto:nkruvi@sheehan.com)

Employment Litigation

Before joining the firm, Noy received the Academic Excellence Award in Employment Law from Vermont Law & Graduate School, and was the Managing Editor of the Vermont Law Review. He was also a legal division intern at the Vermont Department of Financial Regulation.

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## Ransmeier & Spellman P.C.

Attorneys at Law

*Ransmeier & Spellman is pleased to announce  
the addition of Rebecca K. Dowd to the firm!*



Rebecca K. Dowd  
Associate

Rebecca is a recent graduate of the University of New Hampshire Franklin Pierce School of Law, where she graduated from the Daniel Webster Scholar Honors Program. Before joining Ransmeier & Spellman, Rebecca was a supply chain executive with several multinational companies. Rebecca's practice will primarily focus on assisting clients in the areas of trusts and estates, real estate, and business formation and commercial transactions.

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# Perspectives on Artificial Intelligence for Lawyers, Bar Associations, and Courts

By John Weaver and Andrew Sutton



Weaver



Sutton

The *New Hampshire Bar News* recently published articles by Tom Jarvis and Misty Griffith that considered the adoption of generative “artificial intelligence” (AI) tools into the legal profession. As Jarvis and Griffith noted, data-driven generative AI tools such as Open AI’s ChatGPT, Google’s Bard, Casetext’s Co-Counsel, and the like, have prompted some concern in the legal field that such tools might replace human lawyers.

In our view, the technology does not pose that danger yet, but Jarvis and Griffith rightly pointed out some of the concerns the technology poses for the legal profession: unauthorized practice of law by in-court AI assistants, ABA resolutions addressing accountability and transparency, etc. Our goal in this article is to provide some further guidance to courts and bar associations as they consider AI in the practice of law.

Generative AI applications enable users to augment existing workflows with a high degree of automation and digital assistance. Need a letter written? ChatGPT can do that. Need research done? Bard can help with that. Such platforms are powerful, readily available, and provide significant incentives for adoption, with a low cost of entry due to user-friendly plain language interactivity and affordable use options. Incentives for the adoption of AI technologies are clear: do more, with less, faster.

But there are tradeoffs that limit the utility of these tools to the legal profession. Generative AI applications can draft documents, but attorneys are in danger of violating their obligation to confidentiality, unless the client provides informed consent. Microsoft and Google are behind or partnered with the two most popular natural language generators, ChatGPT and Bard, and their access to data entered into those applications is a potential problem.

Although both companies are exploring ways to address this concern, it is far from certain that their efforts will result in a product lawyers can safely use. Additionally, generative AI can conduct legal research and provide a synopsis, but that research may be unreliable if not checked by a human attorney. A New York attorney recently discovered this when the court and opposing counsel could not find many of the decisions and quotations in a brief he had drafted relying on ChatGPT for legal research.

So, attorneys, bar associations, and courts are justifiably cautious in their consideration of AI. Having said that, a categorical response to AI due to the emergence of a new technology is akin to a categorical response to “transportation” because of the emergence of roller skates. While a pair of roller skates and an airplane can both transport a person from one place to another, the critical linkage between the two modes of transport is not the movement of humans, but rather the unique function of each to humans.

Similarly, bar associations and courts should not make categorical declarations about AI because each AI technology is unique. Additionally, as a practical matter, attorneys will not be able to avoid such technologies in the practice of law. Developers will upgrade critical legal applications to include AI into their functionalities, legal matters involving the use of AI technology will become more prevalent, and clients will develop expectations in accordance with business standards grown from widespread adoption of AI tools.

For example, the DoNotPay dispute that Jarvis wrote about featured a tech startup offering an earpiece to a *pro se* litigant, who would supposedly receive real-time input from the company’s AI application in court. For obvious reasons, this prompted allegations that the company was engaging in the unauthorized practice of law. However, courts should avoid taking a categorical approach.

Rather, they should take notice of this development, as it speaks to a demand among some litigants for a lower-cost alternative to retaining an actual attorney in court and raises a legitimate question: In the same way that courts have published form documents to assist *pro se* litigants, is there a way for courts to govern AI applications to assist *pro se* litigants? Could a list of vetted, pre-approved applications enhance access to justice without engaging in the unauthorized practice of law? It is an open question now, but future AI technologies may provide answers. Courts should

be both vigilant and open-minded as such technologies enter the market.

Similarly, public AI applications like ChatGPT and Bard potentially threaten client confidentiality and a lawyer’s duty of reasonable care. But future applications might be more conducive to client representation. Imagine a private generative AI application that lives on a firm’s server. It has access to the firm’s database of documents and its Westlaw account; it does not report the data it accesses to an outside party. Requests to that application for research and document production would still require oversight by an attorney but could also maintain client confidentiality and produce more reliable

first drafts than current applications. This is a possible future tool for lawyers.

Bar associations should avoid making categorical rules about AI and should instead provide resources and guidelines to help attorneys responsibly adopt AI applications that assist them to provide better representation to clients.

Consistent with our thoughts here, both Jarvis and Griffith mention using AI tools to augment the practice of law and address unmet civil legal needs. We hope that New Hampshire courts and the New Hampshire Bar Association develop an active interest in AI tools that can help both *pro se* litigants access the court system and lawyers provide superior counsel to their clients. Human lawyers are not going anywhere any time soon, but they will need guidance on how to adapt to and adopt these new generative technologies. ■

*John Weaver is a director and chair of McLane Middleton’s Real Estate Practice Group, chair of the firm’s Artificial Intelligence Practice, and a member of the Cybersecurity and Privacy Group.*

*Andrew Sutton is an associate and member of McLane Middleton’s Real Estate Practice Group and Cybersecurity and Privacy Group.*

**Generative AI applications can draft documents, but attorneys are in danger of violating their obligation to confidentiality, unless the client provides informed consent.**

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each other. That commitment to collaboration, bettering our profession, and forming meaningful personal relationships all helps promote the aforementioned New Hampshire Advantage that extends into the practice of law here, and that so many of us so frequently celebrate. While our lives are busy and we are all constantly tugged in multiple different directions by professional, personal, and familial demands, the benefits of continuing to invest in each other and in this profession here in New Hampshire are real and important.

I wish you all success and happiness in your legal careers and personal lives. Thank you all for allowing me to have so many rewarding professional experiences during the 2022-2023 Bar year. It has been a privilege to serve in this role. ■

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By Alex Attilli

According to the Law School Survey of Student Engagement, only 29 percent of law students are first-generation students, meaning that their parents or guardians have no college degree. They often lack the same resources or knowledge as their peers whose parents or guardians attended college.

For example, as rising 2L and first-generation student Emalee Peterson stated, “There weren’t really resources [for first-generation students] in either the undergraduate or law school admissions process. It was a bit isolating. I relied heavily on my high school counselor in finding [undergraduate] schools. With law school, it was overwhelming, but I was at least able to share knowledge with a friend who was applying at the same time.”

Peterson mentioned that one frustrating aspect about being a first-generation student is not knowing key information until it is too late. She mentioned that she had no idea that it was common practice to negotiate for higher scholarships until she was at university. She also mentioned that she picked up on a lot of “unspoken behavior” while in college and in law school.

“I think some people don’t realize how much they’ve subconsciously learned how



to behave, speak, and dress,” Peterson says. “My parents and grandparents never wore suits and ties or even went to the dry cleaners. I learned this mostly from the internet and television!”

Peterson shared that, as a first-generation student, she struggles with imposter syndrome. “I have had to consciously remind myself that I deserve to be here,” she says.

She shares that she, along with many other first-generation students, puts a lot of pressure on herself to perform well in school.

“I was originally planning on getting a PhD,” she says. “I think these intense goals of mine come from being a first-gen student. I really want to make my family proud and do something with all the sacrifices they’ve made and support they’ve given me.”

Peterson strongly emphasized that if she could give one piece of advice to other first-generation students, it would be to find mentors.

“I am always looking for people I want to learn from,” she says. “It can be scary, but people actually love talking to you about their job. I’ve made some wonderful connections by being open to conversation or by simply sending an email. Even if they aren’t in the legal field, they can still have great life advice—my previous boss, who told me to go to law school, is a scientist.”

On a final note, Peterson also wanted to recognize that being a first-generation student gives her so much appreciation for all her accomplishments.

“Previous generations of my family



First-generation law student Emalee Peterson, 2L, reading up on civil procedure in the library at UNH Franklin Pierce School of Law. Photo by Tom Jarvis

didn’t get the chance to go to college or graduate school—being in law school means so much more to me with this in mind,” she says. “I don’t feel entitled to be here, I’m here because my family gave me as much support as they could possibly give, and I couldn’t be more thankful for that.”

Peterson is currently interning with the New Hampshire Insurance Department. She ultimately wants to work in health law, potentially working with biotech. ■

### Endnote

1. Melissa A. Hale, *The Importance of Supporting First-Generation Law Students*, LSSSE, <https://lsse.indiana.edu/tag/first-generation>.



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delinquency, and abuse and neglect matters; who have special education needs; or who are otherwise at risk. It is the only nonprofit organization providing comprehensive advocacy and legal services for children in the state.

According to the New Hampshire Department of Health and Human Services, approximately 900 children are served in state foster care in any given year. The New Hampshire Fiscal Policy Institute reports the child poverty rate increased between 2019 and 2021, rising from about seven percent in 2019 to more than nine percent in 2021. About 23,000 Granite Staters under the age of 18 lived in poverty during those years.

Poverty, violence, abuse or neglect at home, or growing up in a household where there are substance use or mental health problems or parental separation can undermine a child's sense of safety, stability, and bonding, according to the Centers for Disease Control and Prevention-Kaiser Permanente study on adverse childhood experiences, known as ACEs.

Lisa Wolford said because court-involved and other at-risk children face a wide range of legal and social services challenges, the Center provides comprehensive advocacy across all areas.

Wolford worked with the state's Attorney General's Office overseeing an investigation of child abuse-related crimes at the youth detention facility in Manchester. That was when she realized the child welfare and delinquency systems were "broken."

"It made me really sad and angry that our state hadn't figured out a way to do better by children, especially the most

vulnerable children who are poor kids without a lot of support in their lives. I decided I was going to do something that produced better outcomes for children," Wolford says.

Hausman says the system is "driven by the goal of keeping a child alive. It overlooks the importance of maintaining relationships with the family, schools, siblings, and other important relationships."

Wolford says she did not wish to denigrate those who serve within the juvenile system but said it could serve children in better ways. She indicates the child welfare system blames children for behavior that is the product of trauma, even when they have experienced abuse and neglect. Removing children from their home and community takes care of public safety concerns, but eventually they will age out and "rocket straight into the adult criminal justice system."

"We don't tend to think of children in delinquency context as victims," Wolford says. "What we tend to do is blame children for behavior that is the product of trauma. We wind up paying to prosecute them, defend them, house them in institutions, and then pay to prosecute and defend them as adults and house them in jails and prisons."

Wolford says data determining the effectiveness of outplacements is nonexistent.

"Research isn't great about how institutions serve children and prepare them for productive, happy lives where they can be



Hausman

productive members of society, where we worry less about paying for mental, medical, and substance abuse costs," she says.

The Children's Law Center currently focuses on children in the age range of 11 to 15, who will soon age out of the system and have the capacity to communicate in their own interests. They have histories of trauma and tend to be part of dysfunctional, often chaotic families with their own histories in the child welfare system. Some have been homeless, and some have experienced food insecurity.

At present, the two attorneys are providing legal representation for a small pool of children while developing policies, creating a board of directors, hiring an accountant, and otherwise getting a solid infrastructure in place.

"We have spent a lot of time investigating the law, incorporating social science on ACEs and childhood trauma, and developing ways of advocating for children with trauma histories that harms them less,"

Wolford says. "Court systems by their nature can be traumatic for children. Removing a child from their home is traumatic whether or not it is the best course of action. A lot of our work has been presenting arguments to the court that there are ways of serving children that are less harmful than, for example, institutionalization."

Wolford says their next hire will be a social worker.

New Hampshire Supreme Court Justice Gary Hicks called the creation of the Law Center "absolutely wonderful," and said the attorneys are "destined to succeed."

"They are both very remarkable lawyers who come to the stage with instant credibility, and there is a lot of buzz about what they're doing among the legal community," Justice Hicks says. "One thing that is fairly clear to everyone, is the system needs more resources, and not just monetary. We see it happening with some decisions coming out of our courts – everyone knows it needs to be better." ■



### The Pamela Smart Trial In the Next Episode, the Bar Discourse Recalls the First-Ever Televised Murder Trial in the Country

In honor of July being our 150th anniversary as a Bar Association, the next episode of the Bar Discourse will be a conversation about one of the biggest, most publicized trials in New Hampshire history: the Pamela Smart trial. Smart's defense attorney Mark

Sisti and former prosecutor Paul Maggionto will talk about their experience with the dramatic trial, how it affected them, and even their thoughts about the movie, *Murder in New Hampshire: The Pamela Smart Story*. More details to come! ■

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Pay Invoices  
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the due date of  
**July 1.**

New Hampshire Supreme Court assesses delinquency fees on **August 1.**

### TRUST ACCOUNT COMPLIANCE (TAC)

Any attorney having  
"ACTIVE" status  
***for even one day***  
between  
June 1- May 31  
**must** file the TAC form.

File TAC form  
on or before  
the due date of  
**July 1.**

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than six months between  
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NHMCLE credit minutes  
between June 1 - May 31.

Any attorney who must  
complete NHMCLE credit  
minutes must file the  
NHMCLE Affidavit on or  
before the due date of  
**July 1.**

The NHBA and NHMCLE Boards are required to report to the New Hampshire Supreme Court the name of any attorney who has not completed all annual licensing renewal requirements as of **September 1.** Upon receiving this report, the Court may initiate a proceeding to suspend the lawyer from practicing law in NH.

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missions and was told that more than 50 percent of the new lawyers each year were opening their own practices just as solos, and that concerned me because these folks really didn't have much in the way of support systems," Dalianis says. "In my opinion, most people in those days didn't have enough of the practical skills that they needed to be able to represent people right away without people to turn to in the same office, so to speak. I knew from my experience that getting good mentorship was kind of haphazard. I happened to be one of the fortunate ones who benefitted from good mentorship and I hate to think what I would have done without that, but it was a topic of consideration."

Dalianis talked with then chair of the New Hampshire Board of Bar Examiners, Frederick Coolbroth, Sr., about creating a six-week summer boot camp for new lawyers that could be a requirement for bar admission. Along with key people from Maine and Vermont, they put together a group called the Northern New England Task Force of Bar Admissions to explore the idea.

"At the end of the day, it was too ambitious, it was too complicated, and the state supreme courts, including ours, were very hesitant to invest any budgetary funds in creating such a program," Dalianis says. "Ultimately, after more than five years of work, the whole thing kind of fell apart. Maine and Vermont backed out and New Hampshire was the only one left standing. But now that I was on the Supreme Court, I had a little more leverage and I was not willing to let the idea die."

She then formed a new committee of only in-state people to come up with ideas to bring her vision to life. This committee, later named the Daniel Webster Scholar Advisory Committee, was chaired by Dalianis and included Fred Coolbroth, UNH Law Professor Sophie Sparrow, NHSC Justice James Duggan, Bruce Felmly, Larry Vogelmann, then NHBA president Martha Van Oot, and then UNH Law Dean John Hudson.

"We essentially tailored whatever we did to New Hampshire and ensured that the law school offered enough practical, on-the-ground curriculum to make sure that the graduates were, in fact, client-ready when they finished law school – or at least more client-ready than they had previously been," Dalianis says.

Coolbroth says that by 2004, the committee had firmed up the program.

"A very important part of this in terms of the Board of Bar Examiners going along with it was, number one, it was a pilot program, and number two, it was an honors program," Coolbroth says. "Some folks thought we were trying to come up with a way to get a diploma privilege to practice, but that was certainly nothing I was interested in embracing."

After persuading the law school faculty to try the program and getting enough votes on the NHSC to change the rules, the committee was ready to launch the program as a three-year pilot. But they realized the law school needed to create a position for someone to run the program, so it was decided that UNH Law professor John Garvey would be the DWS Program's first director.

"They had an idea of what they wanted to accomplish, but they hired me to do the developmental part of it," Garvey says. "I went through an entire year of figuring out what it would look like before we started bringing students into it. I looked at what was already available because I don't believe in wasting resources, especially when you're on a shoestring budget."



The first graduating class of the Daniel Webster Scholars Program in 2008 at the New Hampshire Supreme Court. From left to right: Former DWS director John Garvey, Anthony Galdieri, Milin Patel, Crystal Maldonado, Justin Maleson, Ashley Hulse, Jennifer Gibson, Lauren Crisera, Sabin Maxwell, Rebecca Cotterell, Conrad Cascadden, Melinda Siranian, Josh Wyatt, Cynthia Mousseau, and former UNH Law Dean John Hutson. Courtesy Photo

Once news of the program began to spread and they started the process of selecting students, Garvey and the committee heard some skepticism from the legal community.

"If you're going to create a program that's going to be ground-breaking, particularly in the legal field, there is always going to be skepticism," Garvey says. "One of the first things I did when I became director was to put on my mediator's hat to step out of the fray and look at where people might be coming from. I thought to myself, 'some of this [skepticism] is well-founded. We shouldn't just accept that there's going to be a new program and that it will be valid.' I immediately tried to bring in as many people as possible instead of just being the leader. I would call people and ask them if they'd be willing to volunteer, and that included judges. We just kept building it and improving it."

Garvey then approached the judges at the federal court about listening to the students' arguments since they would be simulating litigation of a federal case. The judges agreed.

"Then we got court reporters involved and started getting transcripts. They would come to the conference room at the law school where we were doing the depositions and they would show the students what a real-time deposition is," Garvey says. "Eventually, we had a very robust simulation with court reporters for the transcripts and depositions, with actors who come in and play the roles, and then briefs that get filed with the clerk of court, which we could do on the internet."

Garvey continues: "It was a win-win for the volunteers. For example, why would court reporters want to do it? First of all, they were excited at the idea of being able to teach these young lawyers and give them real experience, but just like lawyers, they have a CLE requirement – they have a pro bono requirement – and it satisfied that requirement to do this program. So, they were getting something from it and the students were also getting something from it. Also, if you practice in New Hampshire, when you get out of school, who are you going to call the first time you need a deposition? There are a lot of other examples, but that gives a sense of why it was successful. It was a community effort."

Garvey acknowledges that the people who were in the first class were really taking a chance.

"They were willing to go into a program that was a three-year pilot program that had no track record and no graduates. They were willing to then go out and look for jobs with people who might well be cynical," Garvey says. "They were pioneers and they should get a lot of credit for that."

Garvey retired from the program in May 2020 and was succeeded as director by Courtney Brooks.

NHBA Board of Governors Strafford County Governor Joshua Wyatt was among the 13 graduates of the first class of Webster Scholars in 2008.

"It was a bit of a gamble," Wyatt says. "Everything we did was being done for the first time. There was a lot of anxiety from everyone, including the people who were building the program, about how it will work and how it will be perceived – will graduates be viewed as unqualified because they didn't sit for the written bar exam? There was also a lot of national attention as a new model that was replacing the written bar examination, which was relied on to basically screen qualified versus non-qualified people, and this program was going to bypass that."

Wyatt says the DWS Program was a big factor in his decision to attend UNH Law. "It seemed like a good idea to have some training on practical skills, which was the stated intent of the program, to graduate with the equivalent of essentially two years of practicing law experience."

"The only thing I tell people who are weighing whether to try it is to be prepared to work hard," Wyatt says. "You don't have a lot of freedom to choose the classes, you're going to get put in the hard classes, and you're going to have to make the grade to stay in the program. It's not an easy ride through school, but it seems like you're kind of ahead of the curve when you graduate. A lot of my friends were off doing fun things and I didn't get to take advantage of that, but in the end, it paid off. It made me better at this job on the back end."

In 2015, the Educating Tomorrow's Lawyers Initiative of the Institute for the Advancement of the American Legal System (IAALS) at the University of Denver independently evaluated the effectiveness of the DWS Program and published its

findings in *Ahead of the Curve: Turning Law Students into Lawyers: A Study of the Daniel Webster Scholar Honors Program at the University of New Hampshire School of Law*.

According to their report, the IAALS believes that the DWS program "is ahead of the curve in graduating new lawyers ready to venture into the profession – and others can learn from its success."

Emily Peterson, a 2022 graduate of the program, says it was really helpful to learn by doing, as she is a hands-on learner.

"People sometimes have this attitude that you're potentially less of a real lawyer if you haven't taken the bar exam, but I feel like the bar exam is an exercise in memory – you study for it for a certain period of time and then it's over," Peterson says. "The DWS program is basically like a two-year-long bar examination. You have someone who's working with you through the process, who is evaluating not only the work that you're doing, but your overall performance as a student at the law school and making sure that you are putting forth quality work. I think that ensures a more well-rounded individual upon graduation."

Peterson continues: "A lot of firms in New Hampshire recruit specifically from the DWS program. Wadleigh, Starr & Peters is one of those. I was a summer associate here in 2021, and received my job offer in August of the same year. So, I had a job waiting for me when I graduated. About 95 percent of the people in my class already had jobs by the time we were graduating."

In August 2023, Courtney Brooks and NHSC Chief Justice Gordon MacDonald will conduct a panel discussion titled *Examining Bar Admissions* at the 2023 Conference of Chief Justices and the Conference of State Court Administrators Annual Meeting in New York City.

"In preparation for this conference, and for our own purposes, we will be gathering data on the number of DWS graduates who sat for another bar examination, along with the pass rates of those graduates," Brooks says. "We know that from 2008 to 2015, 46 percent took at least one other bar, and 96 percent of those students passed on the first try. We know anecdotally that the DWS program helps recruit students to the law school, and that many out-of-state students stay in New Hampshire after graduating, like Josh Wyatt and Lyndsay Robinson."

On June 8, Brooks, Coolbroth, and Chief Justice MacDonald met with members of South Dakota's law school and bar association to discuss the program as they strongly want to implement something similar in their state, since they also have only one law school.

"We exceeded pretty much everybody's expectations [in the early days]. I was very proud," Dalianis says. "It's a functioning program unlike any other. These graduates are essentially two years ahead of their cohorts who didn't go through such a program. And even better than that, they get to start work the day they graduate. Right after the program started graduating lawyers, the US News standings – which are rather controversial right now but at the time that was how you measured where you wanted to go to law school – jumped 35 points in a single year."

Garvey echoes the sentiment.

"My personal hope was that it would become a brand – that instead of taking a chance on the Webster Scholars, they would be seeking them out. Now, it's one of the jewels of the New Hampshire Bar and I'm pleased to have been a part of it," Garvey says. "There are a lot of success stories [for the DWS program]; just open up the *Bar News* on any given day and its full of Webster Scholars." ■

## ■ Piela from page 1

on family law, civil litigation, and appellate work, and a painter of tiny, historically accurate soldiers, which he uses to reenact famous battles with like-minded friends. He sees his vocation and avocation as related.

“The law is governed by rules – rules of procedure, case law, statutes – and they pretty much set the framework in which we operate as lawyers,” Piela explains. “These military tabletop games I play also have rules of various complexity. Then it’s a matter of, how do I marshal my resources? Which, in the law, is the legal arguments and your time and your client’s money, in a way that benefits your client. Playing these games kind of helps me think and plan out how I litigate a case.”

A native of Vernon, Connecticut, Piela attended Boston College, with a major in political science and a minor in Russian history, before going on to Boston College Law School.

Upon graduation, he was a New Hampshire Superior Court law clerk for two years, then worked for four small law firms, including Hamblett & Kerrigan in Nashua, where he served for 17 years, most of them as a director. He joined Shaheen & Gordon last year, practicing in the firm’s Nashua office.



A penny sits in front of miniature figurines of the Phoenician Infantry, showing their size. Courtesy Photo

Much of his work has centered around family law, which he enjoys because “no case is the same,” Piela says. “You always come to work with something new and different.”

Other cases have involved boundary disputes, personal injury, tax abatement and appellate work.

Through it all, he has kept up the military interest he discovered as a boy, and in the war games whose history dates back hundreds of years. From Renaissance-era generals who mapped out strategy using sand topography and blocks of wood for soldiers, to the Prussians’ *Kriegsspiel* training games, to modern-day tabletop wars, the genre has been used for both serious battle preparation and entertainment.

Piela’s shop contains more than 1,000 soldiers he has painted, each about 15 millimeters high – not much bigger than a thumbnail. That does not include the many miniatures he has given away to friends.

A single figure can take two hours to paint, and Piela sometimes paints in batches, starting with one color.

“Sometimes it’s just good for a half-hour or an hour after work,” he says. “That’s my form of relaxation, my left brain.”

To prepare for a game, he looks for an era that interests him – Hannibal’s invasion of Rome, for example – then searches online for the figures and “rule sets” that guide players in permissible moves.

Once the figures are ready, “we’ll meet at somebody’s house and pick a battle we want to replay,” Piela says. “One person will paint up the Carthaginian forces and another the Roman legion, or vice-versa, then you reenact the battle.”

“Usually when we play it’s for a few hours at a time in one of our basements,” says John Versteeg, a fellow player and a teacher who met Piela when Piela’s daughter was one of his students. “The models are small enough to conduct everything on a table. Andrew loves to pick real historical ancient or medieval units and recreate the actual battles. It’s a lot of fun and he is a great sport whether winning or losing.”

Piela’s favorite historical battle is a relatively unknown one – the conflict at Plancenoit, Belgium, which Piela calls “the unknown story of Waterloo.” The Prussians outwitted Napoleon by retreating in an unexpected direction, then launched a successful attack on Napoleon’s flank, collapsing his forces.

“I played that entire scenario, with probably 1,000 soldiers on each side,” Piela says. “It took a couple of days to do it.”

One of his favorite legal cases likewise has an unexpected twist. He was working with a retired state police colonel who had been contacted by a Colorado woman whose former husband had taken their infant son and driven cross-country to New Hampshire. She had obtained an emergency order in Colorado to get the child back, and Piela’s team succeeded in getting the order domesticated to New Hampshire. As they were about to get the child, who was eight months old, one officer stopped



A Roman legion. Each figure is about 15 millimeters high – not much bigger than a thumbnail. Courtesy Photo

the proceedings, noting they couldn’t pick up an eight-month-old without a car seat. Happily, one investigator had borrowed his daughter’s vehicle, which had a car seat, and the child was retrieved without incident.

Another case, one of a dozen or so Piela has argued before the New Hampshire Supreme Court, involved a divorcing couple who had two teenage daughters. The wife moved to Germany, and the husband – who had multiple life insurance policies and IRAs – changed the beneficiaries on all of them to his daughters, then hung himself. Both the wife and the daughters claimed the money should be theirs. The court ruled that an expectancy interest cannot be considered property and, since no property was involved in changing the beneficiary, the marital restraining order was not violated.

Piela’s legal skills have won the admiration of fellow practitioners like Lyndsay

N. Robinson, who has known him since she started practicing law in Nashua and now works with him at Shaheen & Gordon.

“Andrew is one of the smartest lawyers that I have ever met,” Robinson says. “You tell him a legal issue and he can not only respond with the case name but the year the decision was issued, as well as the volume and reporter. He goes above and beyond for his clients to ensure that all their legal needs are met. He is not only an excellent advocate, but he has a very large heart.”

After practicing for almost three decades, Piela says he still enjoys “the courtroom aspect, the give and take, the intellectual challenges, and the people I’ve met – the lawyers, judges, and clients – have been great to get to know. It’s been an amazing career and I look forward to continuing it into the near future.” ■

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# CONTINUING LEGAL EDUCATION GUIDE

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

### JUNE 2023

**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 NHCLE min.

**FRI-SAT, JUN 23-24**  
Annual Meeting 2023  
Change Makers: 150 years of Navigating Uncharted Waters  
• 150 NHCLE min., incl. 30 ethics/prof.  
• 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 NHCLE min.

### JULY 2023

**THU, JUL 20 – 8:00 a.m. – 5:15 p.m.**  
CLE by the Sea: NE Solo & Small Firm Conference  
• Up to 380 NHCLE min.  
• Newburyport, MA – Blue Ocean Event Ctr.

### SEPTEMBER 2023

**THU, SEP 14 – Time TBD**  
Where Business & Your Practice Collide  
• 180 NHCLE min.  
• Concord – UNH Franklin Pierce School of Law

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All registrations must be made online at  
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**THU, SEP 21 – 9:00 a.m. – 4:30 p.m.**  
22nd Annual Labor & Employment Law Update  
• 360 NHCLE min./ethics TBD  
• Concord – NHBA Seminar Room/Webcast

### OCTOBER 2023

**MON, OCT 16 – 12:00 p.m. – 1:00 p.m.**  
8 Reasons Movie Lawyers Would be Disciplined  
• Webcast; 60 NHCLE min.

**WED, OCT 18 – 12:00 p.m. – 1:00 p.m.**  
2023 Patent Law Update: Key Developments in Patent Litigation and Patent Prosecution  
• Webcast; 60 NHCLE min.

**MON, OCT 23 – 12:00 p.m. – 1:00 p.m.**  
Tik Tok, Twitter, Tech, and Ethics  
• Webcast; 60 NHCLE min.

**FRI, OCT 27 – 9:00 a.m. – 4:30 p.m.**  
Developments in the Law 2023  
• 360 NHCLE min., incl. 60 ethics/prof.  
• Manchester – DoubleTree by Hilton Downtown

**MON, OCT 30 – 12:00 p.m. – 1:00 p.m.**  
From Bonnie and Clyde, to Bernie Madoff – What the Biggest Thieves in History Teach About Attorney Ethics  
• Webcast; 60 NHCLE min.

### NOVEMBER 2023

**MON, NOV 6 – 12:00 p.m. – 1:00 p.m.**  
What my Facebook Posts Teach about Lawyer Mental Health  
• Webcast; 60 NHCLE min.

## Contract Drafting with Lenne Espenchied – Webcast only

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 NHCLE min.

Fast Track Memo Writing for  
New Deal Lawyers

June 29, 2023 – 12:00 - 1:00 p.m.  
60 NHCLE min.

## SAVE THE DATE 22nd Labor & Employment Law Update Sept. 21, 2023



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## Sixth Annual CLE by the Sea NH Solo and Small Law Firm Conference

Thursday  
**July 20**  
8:00 a.m. – 5:15 p.m.  
Up to 380 NHCLE min.



Blue Ocean Event Center, Salisbury Beach, Salisbury, Massachusetts

Topics will include (with faculty from Maine, New Hampshire and Massachusetts):

- Teens in the Digital World – What You Need to Know
- Wire Fraud Prevention Tactics for Your Office
- Alcohol Use Disorder in Family Law Cases
- Evolving Judicial Attitudes Toward Racial Stereotypes
- A Deeper Dive into the Income and Market Approach of Valuation: What Attorneys Need to Know
- Ethical Issues Arising from Lawyers and the Internet: Marketing or Mistake?
- Pitfalls in Real Estate Title Practice
- Trauma Informed Lawyering
- Unconscious Bias & The Importance of Diversity & Inclusion
- Navigating the Intersection of Family & Immigration Law

For more information and to register: <https://gnba.ticketbud.com/sixth-annual-cle-by-the-sea-ne-conference-for-solos-and-small-law-firms>

## Monday “Fun-days” with Stuart Teicher

**Don’t miss Monday “Fun-days”  
with Stuart Teicher –  
the “CLE Performer” –  
and have a laugh at lunch!**



### 8 Reasons Movie Lawyers Would be Disciplined

October 16, 2023 – 12:00 – 1:00 p.m.  
60 NHCLE ethics min.

### Tik Tok, Twitter, Tech, and Ethics

October 23, 2023 – 12:00 – 1:00 p.m.  
60 NHCLE ethics min.

### From Bonnie and Clyde to Bernie Madoff – What the Biggest Thieves in History Teach About Attorney Ethics

October 30, 2023 – 12:00 – 1:00 p.m.  
60 NHCLE ethics min.

### What my Facebook Posts Teach about Lawyer Mental Health

November 6, 2023 – 12:00 – 1:00 p.m.  
60 NHCLE min.

## 2023 Patent Law Update: Key Developments in Patent Litigation and Patent Prosecution

Wednesday  
**Oct. 18**  
12:00 p.m. – 1:00 p.m.  
60 NHCLE min.



The presentation will cover recent developments in patent law including the latest trends in patent litigation, new USPTO filing procedures, and important patent cases pending with the U.S. Supreme Court as well as Federal Circuit Court decisions. This presentation will also share insight on:

- Best practices for patent litigation, including venue changes
- Practical prosecution advice
- Recent trends and developments in Patent Trial and Appeals Board proceedings

### Faculty

**Lisa N. Thompson**, CLE Committee Member, Sanborn Head Associates, Inc., Concord

**Peter A. Nieves**, Dunbarton, NH

**Kimberly A. Peaslee**, KPIP, PLLC, Concord



## Developments in the Law 2023

Friday  
**Oct. 27**  
9:00 a.m. – 4:30 p.m.  
360 NHCLE min.  
incl. 60 ethics/prof. min.



Manchester – DoubleTree by Hilton Downtown

This annual CLE seminar is a must for all practicing New Hampshire attorneys. This program offers a complete survey of important legal developments affecting NH practice.

### Faculty

**Corey M. Belobrow**, Friedman & Feeney, PLLC (of counsel), Concord

**Simon R. Brown**, Preti Flaherty Beliveau & Pachios PLLP, Concord

**Thomas M. Closson**, Jackson Lewis, PC, Portsmouth

**Tracey G. Cote**, Shaheen & Gordon, PA, Concord

**Alyssa Graham Garrigan**, Ansell & Anderson, PA, Bedford

**Thomas J. Pappas**, Primmer Piper Eggleston & Cramer, PC, Manchester

**Laura Spector-Morgan**, Mitchell Municipal Group, PA, Laconia

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

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### Real Estate 101

Original Program Date: May 15, 2023 – 385 NHCLE min.

### Statutory Interpretation

Original Program Date: May 17, 2023 – 360 NHCLE min.

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

# Intellectual Property Law

## Exploring Copyright Issues in Connection with Generative AI

By Catherine Yao

Although artificial intelligence (AI) has been assimilated into most of our lives in one way or another for many years, the recent increase in visibility of “generative AI” systems and other AI platforms, such as Open Art, Stable Diffusion, Deep Dream, Chat-GPT, and DALL-E has catapulted (or recatapulted) AI into the forefront of public curiosity and legal commentary. Reactions ranging from excitement, trepidation, and awe are churning amidst questions surrounding the potential ramifications that such technology may have on education and many creative and professional fields. From an intellectual property law perspective, this has revived long-standing debates and is likely to spark fresh questions around the ownership, protection, and enforcement of intellectual property rights, as relevant technology continues to develop and spread in application.

Turning specifically to copyright, the form of intellectual property protecting original works of authorship (i.e., literary, musical, dramatic, and artistic works), this is certainly not the first time that questions regarding the ability to protect and own the work of non-human contributors has come before the US Copyright Office or courts.

Both the Copyright Office and courts have taken the position that copyright can protect only material or content created by a human being. The term “author,” used in the Constitution as well as the Copyright Act, is found to exclude “non-humans.” In its “Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence” dated March 16, 2023, the Copyright Office refers back to the Supreme Court’s leading case on authorship, *Burrow-Giles Lithographic Co. vs. Sarony*, which held that photographs are permitted to be subject to copyright, despite the argument that they are not created by a human but by a camera, focusing instead on the extent to which photographs



are representative of the author’s “original intellectual conceptions.” The Copyright Office’s guidance also briefly touched on the Ninth Circuit decision regarding the now-famous “monkey selfie,” and that the wording of the Copyright Act refers to terms that “imply humanity and necessarily excludes animals.”

Ultimately, the question of the extent to which the use of AI or other tools may impact authorship is a fact-specific inquiry, perhaps roughly summarized as an evaluation of the determination and execution of the traditional elements of authorship (such as the author’s original mental conception and exercise of creative control) and whether such elements are carried out by a human or machine/non-human system. For example, where many generative AI systems effectively produce content based on prompts input by a human, such prompts are likened to instructions given to an artist in the commissioning of a work. In each case, the AI system and commissioned artist are likely the determiners of how the instructions are actually implemented into the resulting material and the person giving the prompt or instructions is not exercising creative control.

That being said, the mere inclusion of some AI-generated content does not preclude copyright protection as to a work in its entirety. In some cases, there may be sufficient human authorship to support a copyright claim; however, copyright pro-

tection is limited to the human-authored aspects and any protectability of such aspects does not impact the copyright status of AI-generated material. In applying to register works created using AI technology, applicants may claim copyright protection as to their own contributions to such work. Any AI-generated material included in or incorporated into such work should be disclosed and, likely, expressly excluded from the application and claim for protection. Applicants must carefully assess the amount and scope of human authorship in a work, as failure to properly and accurately claim authorship may place a registration and the ability to take action against others for infringement at risk.

Outside of seeking copyright protection, those looking to use AI in preparing or developing materials should exercise caution in turning to generative AI. Aside from the potential for uncertainty as to the ability to exclusively or even sufficiently own, control, or protect content generated by an AI system, a plethora of issues may arise in connection with the content that was input into or otherwise used by an AI system to generate the content produced, including as to the accuracy, comprehensiveness, and third-party ownership of the same.

As artists are finding that their works are being “scraped” from the internet or possibly targeted more specifically to be copied or imitated by AI, questions regard-

ing the legality and ethics of how generative AI systems are “trained” continue to be raised. Earlier this year, Getty Images filed suit against Stability AI, alleging that the tech company behind Stable Diffusion committed copyright infringement in its copying and processing of images owned or represented by Getty Images without an appropriate license. In response to such claims, many companies developing the types of AI technology in question are likely to assert “fair use” under US copyright law.

The determination of fair use is highly fact-specific and weighs multiple factors, including the purpose and nature of the use (including use for educational versus commercial purposes), degree of transformation, and impact on the market for the original work. How persuasive the argument for fair use is, if made, could differ significantly between the process of training AI or machine learning programs and the process of producing output content, where the input copyrighted works may remain discernable. Even so, AI companies may take the position that uses of the copyrighted works are sufficiently transformative and represent new creations, which would need to be considered in balance with the other fair use factors.

As AI technology develops and integrates in ways that may or may not be obvious, we can expect that it will have significant implications and generate new considerations across all manner of industries. It remains to be seen how copyright and other areas of law may evolve alongside the continued growth of generative AI and machine learning technology. ■

*Catherine Yao is an associate in McLane Middleton’s Intellectual Property Practice Group, where she advises and assists clients with protection and enforcement of their intellectual property rights. Her practice spans a wide range of intellectual property-related issues, with particular experience around patents, trademarks, copyrights, licensing, ownership and transfer of rights, and domain name and other intellectual property disputes. She can be reached at [catherine.yao@mclane.com](mailto:catherine.yao@mclane.com).*

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## Lowering the Standard for “Generic” Refusals at the USPTO

By Chelsea Steadman

In 2022, the United States Patent and Trademark Office (USPTO) released a new examination guide titled *Examination Guide 1-22: Clarification of Examination Evidentiary Standard for Marks Refused as Generic*



(May 2022). The USPTO announced this guide “clarifies” long-standing Federal Circuit case law by identifying the evidentiary standard for refusing a trademark on the grounds of genericness as being based on the preponderance of the evidence.

On the other hand, the past 40 years of Federal Circuit case law on the issue states that the standard for genericness refusals for *ex parte* reviews is the clear evidence standard (equivalent to the clear and convincing evidence standard). Yet, the Examination Guide states that it is not reversing the standard, that the standard has always been the preponderance of the evidence, and it is only meant to “clear up confusion.” The Guide claimed its authority to issue such clarification was because the Federal Circuit case law originally cited the USPTO’s own Trademark Manual of Examining Procedure (TMEP) to invoke the evidentiary standard.



Why does it matter? A trademark that is merely descriptive can be registered with a showing of acquired distinctiveness over years of use or registered on the Supplemental Register. A trademark that is generic can never be registered with the USPTO. A reduced evidentiary standard for genericness refusals, therefore, means that we should expect more genericness refusals with a lower success rate in overcoming such refusals for marks that may have been considered merely descriptive (and therefore registrable) under the clear evidence standard.

Whether or not the USPTO has the authority to overrule Federal Circuit precedent has yet to be addressed as the Trademark Trial and Appeal Board (TTAB) has

only recently issued a refusal under this new standard.

In February 2023, the TTAB issued its first precedential ruling applying this “preponderance of the evidence” standard. *In re Uman Diagnostics AB*, 2023 U.S.P.Q.2d 191 (T.T.A.B. 2023). The proposed trademark NF-LIGHT was refused registration for “specimen analysis kits containing reagents and assays for detecting neurological biomarkers in biological samples, serum, blood, plasma, saliva, and cerebrospinal fluid in human and animal samples used by medical and clinical researchers in labs and institutions.”

NF being an acronym for neurofilaments and the applied-for goods being testing kits that are meant to quantify neuro-

filament lights in cerebrospinal fluid, this proposed trademark is indeed lacking any inherently distinctive element you would expect in a trademark. The evidence of record also included substantial examples of third-party use of the terms NF and NF light in a generic manner such that I believe this trademark would have also been refused under the prior “clear evidence” standard regardless of Exam Guide 1-22. The heft of evidence here may be why the TTAB chose this case to be its first precedential decision under the new standard.

Historically speaking, if an examiner argues a trademark is generic but there is a lack of third-party generic use in the marketplace, an applicant could argue that the mark is instead only merely descriptive, and the lack of this evidence showing third-party use supports its claim that they have developed exclusive rights to the terms as a source identifier. The applicant could then argue that the matter is best resolved between the interested parties. Once an application is published for opposition, competitors can still object to the application if they believe the term is generic or so merely descriptive that it should not be owned by any one entity.

Under the preponderance of the evidence standard, the lack of third-party use may not be enough to sway an examiner who has determined they have sufficient evidence to meet this lower requirement

REFUSALS continued on page 26

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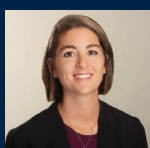
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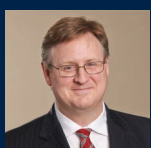
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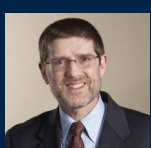
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## Unitary Patents Arrive in Europe

By Jonathan Whitcomb and  
Karen Stevens



Whitcomb



Stevens

Many United States inventors seek patent protection both inside and outside the country. In 2022, over 193,000 patent applications were filed at the European Patent Office (EPO). Over the past five years, about 25 percent of EPO applications originated from a US inventor or applicant.<sup>1</sup> This year, certain European countries implemented significant changes affecting where a European patent may be protected and how and where patent disputes are addressed.

The EPO began over 50 years ago, originally with 16 countries signing the European Patent Convention (EPC). The EPO is an autonomous legal system that reviews patent applications, and where appropriate, grants European patents.<sup>2</sup> In practice however, there is no such thing as a “European patent,” because a granted European patent does not give a patentee



coverage in all EPC contracting states. After grant, the patentee selects enforcement on a country-by-country basis via “validation:” paying individual fees to each country, providing translations, and/or Powers of Authority and other formalities. The accumulated validation costs often lead patentees to only seek validation in a small number of EPC member states.

On June 1, 2023, the Agreement on a Unified Patent Court (UPCA) came into force. The primary changes brought about by the UPCA to the European patent landscape are that 1) the UPCA creates a Unitary Patent (UP), which provides a single, indivisible right across the European Union (EU) member states that have signed onto

the UPCA, and 2) the UPCA creates a Unitary Patent Court (UPC), a central court system that will address patent disputes across the member states. Unlike the outgoing system where a European patent could be thought of as a collection of national patents enforced in national courts, applicants can now request the EPO issue a granted European patent as a Unitary Patent. When selecting a UP, patentees have a single, indivisible patent in a number of European countries.

However, not all European countries are party to the UPCA, and not all parties to the UPCA have completely signed onto the Unitary Patent system. As of this writing, a Unitary Patent presently covers 17

of the 27 EU countries: seven EU countries have signed but not ratified the UPCA,<sup>3</sup> and three EU countries (Spain, Poland, and Croatia) have not signed the UPCA at all. (The UK, not part of the EU, is a party to the EPC.) Under the new Unitary Patent system, a patentee may want both a UP (covering the UPCA member states), as well as a “classic” European patent (validated in any number of the countries that are not party to the UPCA).

By default, disputes concerning any granted European patent that is validated in any of the UPCA contracting states are now decided in the UPC, even patents that were granted before June 1, 2023. The UPC has jurisdiction over both Unitary Patents and all “classic” European patents; they may be enforced and attacked in one central system. A decision made in the UPC is enforceable in all the UPCA contracting states.

During a transition period (currently until May 31, 2030), holders of classic European patents may opt out of the UPC on a patent-by-patent basis. By opting out, patents will only be subject to the national courts of the countries in which they are validated (as before). Issued patents that are not opted out of the UPC can be challenged or enforced both in the UPC and in the national courts during the transition period. After the transition period, the UPC will have exclusive jurisdiction over all European patent rights (UPs or classic Eu-

PATENTS continued on page 26

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# Expungement and Reexamination Proceedings: The USPTO's Newest Defense Against Fraudulent Trademarks

By Sarah Leighton

As anyone who has dealt with trademarks is aware, the United States Patent and Trademark Office (USPTO) has been plagued by fraudulent filings for trademark applications for years. This problem only got worse during the COVID-19 pandemic and continues to grow. Over the past three years, there has been a 40 percent increase in the number of US trademark applications, which in turn has increased the pendency for first action by the USPTO on an application from 2.5 months to over nearly 10 months from the application's filing date. Many of these recent applicants engage in fraudulent behavior, from falsely asserting use of the mark to applying in the name of an entirely fake registrant. These applications and registrations not only compromise the integrity of the Federal Trademark Register, but they also present barriers to registration of legitimate trademarks.

The USPTO has implemented an assortment of steps to attempt to combat this activity, with varying results. The most recent step in its fight is the Trademark Modernization Act of 2020 (TMA), which created two new statutory causes of action: expungement proceedings and reexamina-



tion proceedings. These proceedings are unique in that they don't rely solely on the USPTO to identify, prevent, and remove fraudulently obtained trademarks. Instead, parties may undertake action themselves to clear a path to registration of their trademarks.

Prior to the TMA, the Lanham Act (15 U.S.C. § 1051 et seq.) already allowed parties to file a Petition to Cancel a trademark registration based on fraud. So, what's the difference?

Expungement and reexamination proceedings are infinitely easier on the petitioner in terms of both time and money. A Petition for Expungement or Reexamination is an *ex parte* request that the USPTO reassess the validity of a registration based on an as-

sertion that the registered trademark was either not in use as of the relevant date, or that it was never used at all. These petitions may be filed by any party regardless of their standing. Once filed, the petitioner does not touch the proceeding a second time. Rather, the USPTO examines the subject registration's validity in light of the evidence submitted. This is vastly different than a Petition to Cancel based on fraud, which is an adversarial process before the Trademark Trial and Appeal Board (TTAB).

Moreover, these proceedings impose a significantly lower evidentiary burden on the petitioner. To assert fraud in a cancellation proceeding, a plaintiff needs to demonstrate that a registrant *intended* to deceive the USPTO; a very high standard to meet.

In contrast, the petitioner in an expungement or reexamination need only prove its case based on a reasonable investigation and good faith.

A reexamination proceeding is only available if a registration was filed based on use in commerce in the US, i.e., a 1(a) or 1(b) filing basis, within five years from registration. A petitioner must prove that they are unable to find use of the trademark in connection with the claimed goods as of either (i) the date the application was filed for a 1(a) filing basis or (ii) the date an amendment to allege use was filed for a 1(b) filing basis.

An expungement proceeding requires slightly more evidence – a petitioner must provide evidence that the mark has never been in use in commerce. This proceeding is available for any registration regardless of its filing basis if filed within three to ten years from registration.

Once the expungement or reexamination proceeding has been instituted and USPTO has reviewed the submitted proceeding and determined that the petitioner has established a reasonable predicate of nonuse, the USPTO will issue to the registrant a Combined Notice of Institution and Nonfinal Office Action. This informs the registrant that the proceeding has commenced, and that the registrant has three months to either delete the affected goods from their registration or provide sufficient proof of use of their trademark in connec-

TRADEMARKS continued on page 26



Photos: Cathy Stadecker, Kate Foley, Morgan Heller, Tom Kohler, Peter Kunin, Kevin McGrath, William Morris and Jennifer Drake

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## Refusals from page 23

through evidence such as dictionary definitions. If an examiner finds genericness on the preponderance of the evidence, then such trademark would never be registrable.

The practical effect moving forward will be a greater burden on any applicant to have supporting evidence on hand to actively disprove genericness. Surveys can take months to run and are incredibly expensive. Moreover, the USPTO in December also decreased applicant response times for refusals from six months to three months. Therefore, should an applicant believe their trademark may be considered merely descriptive, they should consider pre-emptively securing survey evidence and additional documentation in support of registration *before filing*.

Assuming this new standard remains unchallenged, the most affected parties will be the average American business, i.e., those who are not interested in an obscure brand name and without large filing budgets to pre-emptively disprove genericness. If the cost of securing a federal trademark registration then becomes so cost-prohibitive for the average business, we could see an overall regression in federal filings. ■

*Chelsea Steadman is an intellectual property attorney at Grossman Tucker Perreault & Pfleger, PLLC, specializing in trademarks and copyrights.*

## Trademarks from page 25

tion with the affected goods.

If a registrant decides to file proof of use, this proof must be more than any previous proof of use which may have been provided to the USPTO. The USPTO does not take this use at face value but reviews it critically to determine if there is actually bona fide use of the mark, or whether the use was manufactured merely for the maintenance of the registration. Like a trademark prosecution proceeding, if the USPTO deems the provided use is insufficient it will give a registrant a second bite at the apple and issue a Final Office Action.

The only drawback of an expungement or reexamination proceeding is that the determination of use or nonuse after a proceeding has been instituted is final and non-appealable for the petitioner.

Since the TMA was implemented, 1,151 petitions for expungement and for reexamination have been filed. How effective these proceedings are in clearing the trademark register of fraudulent is yet to be determined. Regardless, trademark owners and their attorneys should keep these options in mind when faced with questionable barriers to registration. ■

*Sarah Leighton is an attorney at Saunders & Silverstein, LLP, practicing trademark and copyright law. Sarah earned her JD, her Franklin Pierce Intellectual Property Law Certificate, and her Entertainment Law Certificate from the University of New Hampshire Franklin Pierce School of Law.*

## Patents from page 24

European patents) in the UPCA contracting states, with the exception of classic European patents that were properly opted out during the transition period.

While classic European patents are now effectively subject to dual jurisdiction, the UPC has exclusive jurisdiction over UPs. After the EPO has granted a patent, if the patentee selects a Unitary patent, the UPC will handle any dispute arising in the countries that ratified the UPCA as of the date the European patent was granted. Once a patentee has selected a Unitary Patent there is no way to opt out of the UPC for that patent.

Moving forward, patentees may wish to review their existing European IP portfolios and decide whether to opt out of the UPC's jurisdiction (on a patent-by-patent basis) and remain under the jurisdiction of the individual validated states. The opt out decision is reversible: the patentee may opt back in during the transition if they wish to utilize the Unitary Patent Court.<sup>4</sup>

Naturally, some may be wary of litigating their patent in the fledgling UPC. Advantageously, the UPC system offers a simpler and potentially less-expensive avenue for asserting patent rights in multiple

European countries with a single consolidated litigation. On the other hand, since the UPC is new and untested, procedures may be unfamiliar and outcomes less predictable. Further, under the UPC it may be easier and less expensive for an adversary to mount a single challenge that could weaken or destroy a patent in all the contracting UPCA countries.

Despite its initial complexity and non-universal implementation, ideally the UP/UPC will simplify the existing European patent systems, paving the way for a streamlined, widespread, and reliable experience. ■

**While classic European patents are now effectively subject to dual jurisdiction, the UPC has exclusive jurisdiction over UPs.**

### Endnotes

1. [epo.org/about-us/annual-reports-statistics/statistics/2022/statistics/patent-applications.html](https://epo.org/about-us/annual-reports-statistics/statistics/2022/statistics/patent-applications.html)
2. [epo.org/about-us/timeline.html](https://epo.org/about-us/timeline.html)
3. The EU countries that have signed but not ratified the UPCA may ratify it at any time, and a UP will cover all countries that have ratified the UPCA at the time the UP is requested.
4. You can only opt out, and opt back in, one time.

*Jonathan Whitcomb is a shareholder at Sheehan Phinney in their Intellectual Property Group and Karen Stevens is a Registered Paralegal in Sheehan Phinney's Intellectual Property Group.*



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# Municipal and Governmental Law

## New Hampshire's Zoning Atlas – A Powerful New Tool for Land Use Analysis

By Benjamin Frost and Max Latona



Frost



Latona

New Hampshire's current housing crisis has captured the attention of business leaders and policy makers at all levels of government. It is a crisis of supply that reflects many years of development permitting and construction at levels that are insufficient to meet demand. While there are many causes of this supply/demand imbalance, local regulations are widely recognized as an important factor – and one that is within our power to change.

Last month, New Hampshire became the third state to publish a statewide “zoning atlas.” The New Hampshire Zoning Atlas is a comprehensive database and interactive online map cataloging and portraying district-level land use regulations affecting housing development

throughout New Hampshire. It presents a significant new analytical tool for attorneys, developers, planners, journalists, and anyone else with an interest in land use regulation in New Hampshire.

The Atlas is a collaborative effort of the Center for Ethics in Society at Saint Anselm College, New Hampshire Housing, and the Office of Planning and Development in the New Hampshire Department of Business and Economic Affairs. Its development over 15 months included a dedicated team of student data analysts, zoning experts, and experienced GIS (geographic information systems) professionals, as well as community funding and guidance from the National Zoning Atlas project. This team reviewed 23,000 pages of local regulatory text and assembled a database with over 400,000 entries. While the database works in the background of the interactive mapping tool, it is also available for researchers to download for independent analyses.

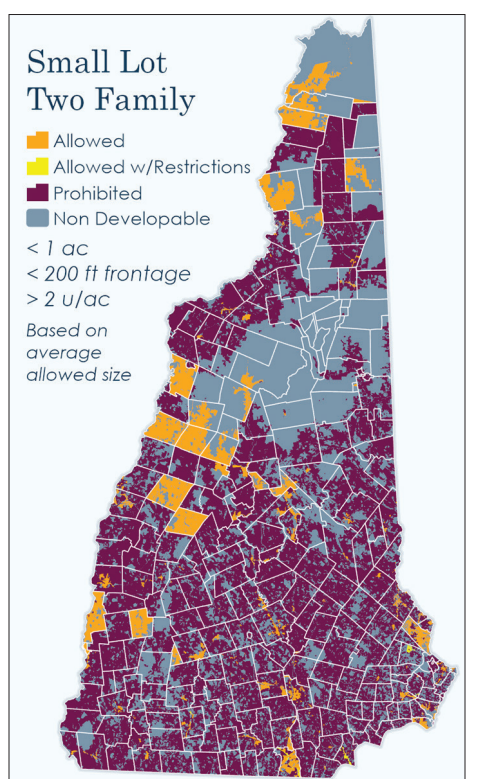
The utility of the Atlas is shown by a consideration of the New Hampshire Supreme Court's landmark 1991 decision in *Britton v. Town of Chester* (134 N.H. 434), in which the court held that any municipality that used the power of the state's zoning enabling legislation to regulate land use had an obligation to provide opportunities for the development of

affordable housing that were realistic and reasonable.

The *Britton* trial was steeped in factual analysis of zoning's impact on housing development. It was conducted by a master, who found that only 1.73 percent of the town's area was zoned for multi-family housing. On appeal, this important fact was embraced by the Supreme Court, which also held that the town was not accommodating its fair share of affordable housing and awarded the “builder's remedy,” allowing the plaintiff to proceed with its development.

The plaintiffs' mathematical zoning analysis was critical to the success of their argument, but it was also time-consuming. A quick review of the Atlas entries for the Town of Chester reveals the zoning ordinance now allows “affordable housing” developments in 76 percent of the town's developable area. It is true that because of the generalizations of the Atlas and the complexity of Chester's zoning ordinance (a trait held by much local zoning), the user must also read the pertinent section of the ordinance to fully understand its implications. Still, the Atlas is an excellent starting point, and provides direct links to local ordinances in each jurisdiction.

ATLAS continued on page 30



In New Hampshire, there is less area zoned for small-lot two-family homes than there is for any other type of housing. Based on average soil and infrastructure conditions, only 11 percent of the state's buildable area allows for duplexes.

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## Recent Supreme Court Rulings on STRs Highlight Need to Review Zoning Ordinances for Clarity

By Natch Greyes

There is a reason that no model zoning ordinance exists. Zoning is inherently local and what works in one community may or may not work in another community. That thread runs through two recent New Hampshire Supreme Court decisions: *Conway v. Kudrick*, No. 2022-0098 (May 3, 2023) and *Working Stiff Partners v. Portsmouth*, 172 N.H. 611 (2019).



Both cases dealt with substantially the same issue: Are short-term rentals (STRs) allowed in a particular area of the municipality? In both cases, the Court relied extensively on the terms used in the municipality's zoning ordinance and any definitions provided in that ordinance for those terms to make determinations that are, basically, confined to those two municipalities alone.

In each case, the Court wrestled with terms that were not defined by their respective zoning ordinances. In *Kudrick*, what does "living as a household" mean? In *Working Stiff Partners*, what does "transient" mean in the context of "occupancies?" In both cases, the Court had to rely on the dictionary for an answer rather than the definitions section of the municipality's respective ordinances.



There is no question that the rise of online booking platforms for short-term rentals has changed the landscape for such occupancies. No longer are short stays confined to those homes alongside tourist attractions or larger complexes catering to such stays. Instead, the archetypical "summer people" have slowly expanded their reach as owners further and further from the pleasures of the lakefront and have recognized a financial incentive to make their own homes available for a weekend, week, month, or even a whole season.

Yet, as both *Kudrick* and *Working Stiff* illustrate, even as the landscape has changed, zoning ordinances have not. Both, however, serve as a stark reminder of the importance of regular review and, if nec-

essary, amendment of municipal zoning ordinances to reflect those changes. Zoning must be tailored to the municipality to be effective. Zoning ordinances that maximize buildability, where buildability is appropriate, and promote the best use of land throughout the whole of the municipality require constant adjustment based on the local, regional, and, even, national changes to use of land over time. What rules may have been appropriate to accommodate a textile mill in the 1800s (if zoning had existed then), may not be appropriate to accommodate the conversion of that building to apartments, mixed-use, or another type of commercial use.

As far as how the amendments should be written, particularly with regard to dif-

ficult and divisive uses such as STRs, the concurring opinion in *Kudrick* offers some familiar advice: "land use regulations require clarity to inform landowners of uses that are permitted and not permitted, just as criminal codes must adequately advise citizens of prohibited, criminalized conduct." As Judge Learned Hand summarized many years ago, "[t]he language of law must not be foreign to the ears of those who are to obey it."

To that end, ordinances need to use plain and easily understood words that give a person of common intelligence a reasonable opportunity to understand whether his or her conduct is or is not permitted. *Working Stiff Partners* at 10. Definitions that differentiate between common uses and clearly articulate how those uses are defined are necessary if municipalities wish to avoid having their ordinances interpreted by the courts in a manner that is different than is commonly understood by their local enforcement authorities.

As the legislature looks at potential reforms of land use laws in response to the housing shortage and advocates for housing point toward local zoning ordinances as a barrier to increasing housing availability, cases like *Kudrick* and *Working Stiff Partners* illustrate the need to advise clients of the importance of routinely reviewing their zoning ordinances for clarity. ■

Natch Greyes is Government Affairs Counsel for the New Hampshire Municipal Association in Concord, NH.



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## New Process to Resolve RTK Complaints

By Cordell Johnston

In 2022, after several years of effort and debate, the New Hampshire legislature passed, and the governor signed, HB 481 (2022 N.H. Laws Chapter 250), establishing the Office of the Right-to-Know



Ombudsman. The office is administratively attached to the Department of State, and the ombudsman is appointed by the governor with the approval of the executive council. The ombudsman is charged with hearing and resolving complaints under RSA 91-A, the "Right-to-Know Law," which requires that meetings of public bodies be open to the public and that governmental records be available for public inspection.

The office of the ombudsman was created in response to concerns that filing an action in superior court—previously the only option for pursuing a complaint under the Right-to-Know Law—is too costly and time-consuming. The goal of the new law is to provide a more efficient and less formal process for resolving complaints.

It is too early to know how well this will work. Although the law took effect almost a year ago, the ombudsman,



Thomas Kehr, was not appointed and sworn in until January 27 of this year.

Under the new law, anyone claiming a violation of the Right-to-Know Law may file a complaint with the ombudsman. The cost to file a complaint is \$25 (as opposed to \$280 in superior court).

The ombudsman has indicated that there will be a standard complaint form. With the complaint, the claimant must file a copy of the request for records made to the public body or agency (if the complaint involves a request for records) and a copy of the response received, if any.

When the ombudsman receives a complaint, he will deliver a copy to the public entity involved. Within 20 days,

the entity must file an answer, including reference to the applicable law and a justification for any refusal or delay in producing the requested governmental records or failure to provide access to meetings.

The law gives the ombudsman essentially the same authority as the superior court to conduct hearings, compel compliance, and impose penalties for violations, but it is contemplated that the process will be less formal. At least in theory, the idea is that a less formal process will be less intimidating and may enable citizens to bring claims without the assistance of legal counsel.

The law creating the ombudsman position (RSA 91-A:7-a through :7-d)

established only very skeletal procedural requirements, leaving it to the ombudsman himself to adopt rules of procedure. The rule-making process takes many months—there are notice requirements, public comment periods, hearings, and approval by a legislative committee before the rules can take effect. The ombudsman has begun this process, but there is a long way to go before final rules are adopted.

Despite the absence of final rules, cases are being scheduled for hearings. In a March 17 procedural order, the ombudsman announced that until final rules are adopted, hearings will follow the requirements of the statute and the existing model rules for administrative hearings used by the Department of Justice, known as Jus 800, with adjustments as necessary. (A link to the ombudsman's website, where the order is posted, can be found on the Secretary of State's website, [sos.nh.gov](https://sos.nh.gov), under the "Administration" tab.)

Among the important procedural questions to be answered by the final rules are whether the rules of evidence will apply (under the Jus 800 rules they do not), and whether affected non-parties will have the right to intervene (under the Jus 800 rules they do). In *Provenza v. Town of Canaan*, 175 N.H. 121 (2022), the Supreme Court discussed, without de-

COMPLAINTS continued on page 30

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## Atlas from page 27

Perhaps the best use of the Atlas is for larger-scale analyses of entire municipalities, comparisons among municipalities, and insight into statewide trends. Several statewide “findings” have in fact already been released with the Atlas, providing greater detail about how local regulations aggregate to restrict housing supply statewide. One overarching aggregate effect stands out: in the current regulatory environment, it is difficult to build anything other than large-lot single family homes almost anywhere in New Hampshire.

The Atlas data reveals that typical starter homes for many individuals and families, especially small-lot single family homes, duplexes, and manufactured homes, are stringently regulated. Using a generous definition of “small lot” (less than one acre and less than 200 feet of frontage), the Atlas shows that only 16 percent of the state’s buildable area permits small-lot single-family homes, with even less area for small-lot two-family homes (11 percent). Further, only 9.9 percent of the developable area allows for manufactured homes on both individual lots and in manufactured housing parks.

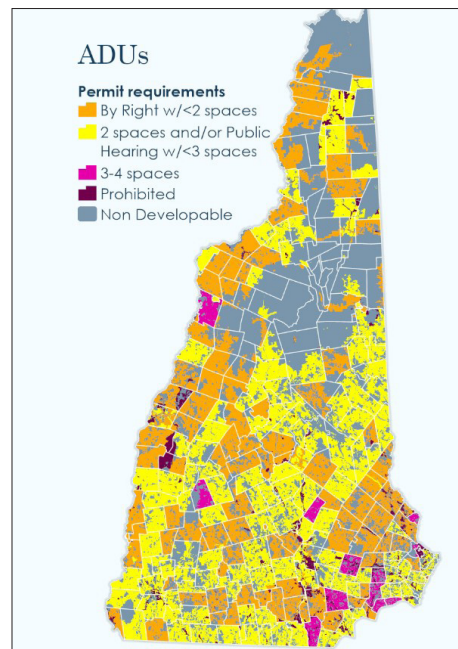
Other statewide findings from the Atlas demonstrate that in addition to duplex rentals, almost all smaller, more affordable rental units are widely restricted. For example (and despite any aspirations behind the 2008 Workforce Housing Law),

only 21 percent of the state’s buildable area permits five-plus family housing on lots of less than two and one-half acres, with a density of more than two units per acre. In other words, many of New Hampshire’s communities, including those close to job markets, require larger lots for multifamily housing, thereby driving up the cost of these units for developers and residents.

Even accessory dwelling units (ADUs) are heavily regulated. Although approximately 95 percent of the state’s buildable area now permits ADUs (thanks to NH RSA 674), many communities restrict their development in other ways, often by prohibiting detached units, or by requiring several parking spaces and/or public hearings. Only 42 percent of the state’s available land permits attached ADUs with less than two parking spaces.

These and other findings are carefully qualified by the Atlas. Because minimum lot-size, setback requirements, and other dimensional regulations often vary depending on the availability of public water and sewer and actual soil conditions, and because such information cannot always be secured publicly or in advance, the Atlas’ dataset offers both a best-case and worst-case value for most of the applicable regulations. And the interactive mapping tool averages the two datapoints to create a single visual feature. This averaging underscores the necessity of ultimately consulting the ordinance itself, once on-the-ground conditions are ascertained.

The Atlas itself is policy-neutral, but



On 42 percent of buildable area statewide, attached accessory dwelling units are allowed by right with under two minimum parking spaces. But additional requirements elsewhere, like parking, make ADU development practically infeasible.

these findings demonstrate that there is much that New Hampshire can do to adjust local zoning to make it more conducive to housing development. This in turn will help our communities to flourish and assist our state and its cities and towns to attract and retain young people, growing families, aging seniors, and a workforce for our economy.

The New Hampshire Zoning Atlas can be accessed at [nhzoningatlas.org](http://nhzoningatlas.org), which also includes a Visual Summary (“story map”), downloadable assets, and the interactive mapping tool. ■

*Ben Frost, AICP, is the Deputy Executive Director and Chief Legal Officer for New Hampshire Housing, where he manages external relations, legislative initiatives, and strategic planning, and provides legal guidance on program implementation.*

*Max Latona, Ph.D., is a Professor of Philosophy at Saint Anselm College and is the Executive Director of the College’s Center for Ethics in Society, where his work is guided by the belief that our organizations and communities are desperately in need of opportunities for education, reflection, civil dialogue, and collaboration on the ethical issues and challenges that we face.*

## Complaints from page 29

ciding, whether a third party may intervene in a right-to-know case in Superior Court to oppose disclosure of records on the ground that disclosure would violate that person’s privacy. Because of the procedural history of that case, the Supreme Court did not reach the issue. It will be interesting to see whether the ombudsman’s rules allow intervention in such a case.

To be clear, the new law does not eliminate the old law—claims under the Right-to-Know Law may still be brought in superior court. The plaintiff has a choice—superior court or the ombudsman. However, decisions by the ombudsman may be appealed, by either party, to the superior court. On appeal, the court “shall treat all factual findings of the ombudsman as *prima facie* lawful and reasonable, and shall not set them aside, absent errors of law, unless it is persuaded by a balance of probabilities on the evidence before it that the ombudsman’s decision is unreasonable.”

This author is not aware of any rulings yet by the ombudsman, but at this writing there are a few hearings scheduled for June, and no doubt many more will follow. (Hearing notices are posted on the ombudsman’s website.) It remains to be seen whether the ombudsman will replace the superior court as the forum of choice for right-to-know complaints, but it does seem likely that ordinary citizens will find it more inviting.

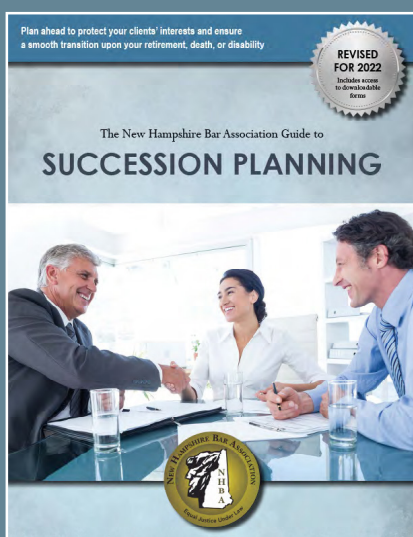
For municipalities, there may be some good and some bad in the new process. If it is easier to file a complaint, there may be more complaints filed, some of which undoubtedly will be meritless; but a faster and less expensive process should benefit everyone. Whether this will be a net benefit or detriment is anyone’s guess.

The legislature itself hedged its bets when it created the ombudsman’s office, by including a sunset date: the law will be repealed automatically in 2025, unless it is re-enacted. Municipalities and their legal counsel will be following developments over the next two years with an eye toward deciding whether they should support a continuation of the law. ■

*Cordell Johnston is a solo practitioner in Henniker, New Hampshire, whose practice is limited to representing towns, cities, and village districts.*

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## The New Hampshire Bar Association Guide to SUCCESSION PLANNING



This Guide is intended to provide general guidance to attorneys as to steps to take to protect your clients’ interest, as well as preserve the assets of your practice. While situations will be different, the concept of having a plan in place that everyone knows about and agrees with is vital. We’ve also included several customizable forms to facilitate the process.



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# A Day of Conversation About Improvement and Change: The NH Judicial Branch's "Mental Health Summit" on June 21

By Laura Kiernan

Every day across the country, the relentless impact of mental illness is painfully evident in the justice system. Judges and court staff are routinely faced with individuals whose conduct was likely the product of mental illness. Courtrooms are the "entry point" for too many individuals in need of treatment and services.

Three years ago, the Conference of Chief Justices and the Conference of State Court Administrators convened a task force to address mental illness in our justice system. Last fall, the task force issued a sweeping report on improving how state courts respond to mental illness. Three years of work grounded on those facts and research made it clear from the outset that court leaders are not going to solve America's mental health crisis. But, the report said, state court judges can—and should—take the lead in a collaborative effort to examine how the justice system responds to mental illness and devise strategies to improve the outcomes. (*Editor's Note: You can view the task force's report at [sji.gov/mental-health-task-force-mhtf](https://sji.gov/mental-health-task-force-mhtf).*)

The New Hampshire Judicial Branch is now one of 45 state court systems that have joined in the effort, armed with a blueprint of initiatives and leadership guidelines laid out by the task force. A "Mental Health Summit" led by New Hampshire Supreme Court Chief Justice Gordon J. MacDonald and Director of the Administrative Office of the Courts Dianne Martin, is scheduled for June 21 in Concord.

"Here in New Hampshire, we want to come together—the court system, community stakeholders, and government leaders—to improve our collective response to those

with mental health needs, and create action plans for change," they said in inviting a far-reaching list of participants—from judges and law enforcement to individuals living with mental illness—to attend a "day-long conversation" aimed at developing improvements and solutions through partnerships and collaboration.

In its report, the task force cited the "need and responsibility" of state courts to take charge of the effort to make systemic changes in the way the courts respond to mental illness.

"While the statistics can be overwhelming and the challenges immense, a national focus on problems has created a momentum for change," the task force's final report said.

Members of the task force included chief justices, top court administrators, behavioral health professionals, law enforcement and corrections jail officials, community members, and individuals who had been through the court system.

"We see how the justice system can become a never-ending highway of pain as it maneuvers people on a needless journey, with no off ramp, often to ineffective support and treatment," task force member Oregon Circuit Judge Nan Waller said when the final report was released.

According to the report, the impact of mental illnesses on the administration of justice reaches beyond the criminal courts—to



civil commitment cases, guardianships involving adults and juveniles, and family law. The Conference of State Court Administrators has urged their colleagues around the country to examine the mental health crisis and its impact on "fair justice."

"Judges and court personnel are in a unique position to describe to policymakers what they see in their courtrooms every day – a broken system, leading to compromised public safety, excessive incarceration, and dam-

aged lives," the court administrators wrote. Their blunt assessment of the need for change – in a 2016 policy paper – led to the formation of the National Judicial Task Force, endorsed by the Conference of Chief Justices, and supported by the National Center for State Courts and the State Justice Institute.

Last year, a team from New Hampshire, led by Chief Justice MacDonald and AOC Director Martin, attended a regional summit in Vermont—one of five held throughout the country—which focused on collaboration among state courts, community leaders, and behavioral health providers on key issues affecting their state.

In April 2023, the Chief Justice MacDonald and Martin announced the launch of a statewide initiative to conduct sequential intercept mapping (SIM), beginning with a pilot project in Merrimack County. The goal of SIM is to identify where the justice sys-

tem, corrections, health and human services, community stakeholders, and mental health professionals can effectively intervene as individuals with mental illness make their way through the court process. The objective is to keep those individuals in their communities, with treatment resources and support, and out of jail. More than 70 criminal justice, corrections, mental health, substance abuse, and social service professionals attended, as well as individuals and families who have experience with the justice system and mental health issues.

"Every one of us is touched in some way by mental illness; in a friend, a family member, a colleague, or ourselves," Martin said to the gathering. "Those working in the court system are touched by individuals experiencing mental illness, people in crisis, and people experiencing trauma, who come into our courts every day. We all recognize we need to do better for them. But we cannot do it alone. This change requires education, training, access to treatment and most importantly, collaboration across the state."

The June 21 Mental Health Summit is supported by a grant from the State Justice Institute. The Summit planning team members, in addition to Chief Justice MacDonald and Martin, are Commissioner of New Hampshire Department of Corrections Helen Hanks, Director of New Hampshire Department of Health and Human Services Division for Behavioral Health Katja Fox, New Hampshire State Police Mental Health and Wellness Coordinator Russell Conte, Former NAMI-NH Executive Director Ken Norton, New Hampshire Judicial Branch Mental Health and Wellness Coordinator Anne Zinkin, and Patti Tobias and John Bello from the National Center for State Courts. ■

## Committee on Cooperation With the Courts

### Practice Information and Tips from the Federal District Court Clerk's Office

*Editor's Note: The Bar News will now include a periodic column from the Committee on Cooperation with the Courts on practical tips for practitioners concerning issues the Committee is addressing. The Committee is made up of practitioners, judges, and court administrators, and seeks to enhance communications between the Bench and Bar. The following article is the first in this series.*

By Daniel J. Lynch and Tracy A. Uhrin

In an effort to provide attorneys with more practical practice guidance and advice, the Committee on Cooperation with the Courts is having members write a Side Bar article with information and practice tips from the different court types across the state. Below is some general information about clerk's office operations as well as practical tips from the clerk's office on practicing in the United States District Court in the District of New Hampshire.

#### Clerk's Office Structure

In the District of New Hampshire, the Clerk of Court (Dan Lynch) and Chief Deputy Clerk (Tracy Uhrin) oversee five departments: Operations (i.e., Case Man-

agement), Court Reporters, Petit/Grand Jury, Administration (i.e., CJA and restitution payments/registry fund deposits and payments/attorney admissions and bar certificates), and Information Technology. The direct dial telephone number and court email address for all staff members in these departments is available to practitioners and the public on the court's website at [nhd.uscourts.gov](https://nhd.uscourts.gov). To access this contact information, hover over "Contact Information" on the menu bar and select the "Court Information" link.

#### Practical Tips

**Case Information and Case Filing Questions:** Lawyers and the public most frequently interact with the court's Operations department. For example, new cases are reviewed and randomly assigned to a judge by our Intake Department. Once a case is assigned to a judge, a designated case manager for the assigned judge manages the docket/case filings and courtroom proceedings for that judge. Case managers are assigned to cases based on the judge and the case number's terminal digit. Thus, if you have a question regarding a specific case, including e-filing questions, the case manager assigned to the case is the person with

the most knowledge about the case and is most likely the best person to answer your question. Again, direct contact information for the intake team and the case managers is available on the Contact Information flyout on the Court Information menu bar option.

**Court Transcripts:** If an attorney would like to obtain a transcript of a trial or hearing, they should request it directly from the court reporter. The minute entry for the proceeding will identify the court reporter who took the record. The Transcript Request section under the Case Management menu bar option on the court's website lists the names and e-mail addresses of the court reporters and outlines the ordinary transcript rate as well as the rate for expedited, daily, and hourly transcripts.

**Website Resources:** Taking some time to tour the resources on the court's website will greatly benefit those who plan to practice in federal court. In addition to the resources referenced above, attorneys may benefit from the following information on the website:

**Subscription Service for Court Decisions/Information:** Those practitioners who want to obtain both published and unpublished District of New Hampshire

opinions, as well as summaries of First Circuit decisions, can sign up to receive them by e-mail through the court's Subscription Service link under the Quick Links section on the home page.

**Searching for Unpublished/Published Opinions:** The Opinions Search feature under the Quick Links section of the home page allows practitioners to conduct subject matter searches for both published and many unpublished opinions issued by the judges in this district.

**Jury Trial/Selection Information and Jury Verdicts:** By accessing the Jury & Bench Trials section from the Case Management option on the menu bar, attorneys can obtain the jury trial periods for each judge for the next two years. This page also contains information on the jury selection process in this district. Finally, jury verdicts since 2003 are also available on the Public Outreach link under Statistics & Reports menu bar option.

**Rules Information and Standing Orders:** In addition to links to the Federal Rules of Evidence as well as to the Federal Civil and Criminal Rules of Procedure, the Rules & Orders section under

COURT TIPS continued on page 32

the Case Management menu bar option also provides a downloadable version of the Local Rules and a summary of the most recent amendments to the Local Rules. This section of the court's website also lists the current local standing orders dating back to 1997.

**Frequently Used Forms:** The Forms section under the Case Management menu bar option includes a number of commonly used forms, many of which are in fillable PDF format, which practitioners can complete and then submit as electronic pleadings using CM/ECF.

**Federal Practice Opportunities:** Attorneys can gain federal practice experience by serving on the federal court's pro bono panel. Members of the pro bono panel may be asked to accept one case per year, and all appointments are voluntary. Attorneys are given an opportunity to review case documents before they accept an appointment. Many firms use this opportunity to help their associates develop litigation experience through oral argument, evidentiary hearings, and depositions. Attorneys can contact the Chief Deputy Clerk, Tracy Uhrin, to be added to the pro bono panel.

**Courtroom Technology:** The District of New Hampshire has some of the most technologically advanced courtrooms in the country. The Courtroom Technology section under the Case Management menu bar option of the court's website provides detailed information on the available courtroom IT systems/equipment with best practice suggestions for users. Also, practitioners should note that Local Rule 83.15 requires attorneys who plan to use courtroom audio or video equipment to, among other things, make arrangements with the clerk's office to familiarize themselves with the court's technology systems no later than five days prior to trial/hearing. Please call the case manager assigned to the case to make those arrangements.

**Sealed Documents:** In the District of New Hampshire, attorneys may not file sealed documents in the court's electronic filing system and, instead, must file those documents in paper format. However, by a temporary standing order entered during the COVID-19 pandemic, and continued post-pandemic, attorneys may also file sealed documents by email as outlined in Standing Order 23-10. In addition to closely following the procedures set forth in that standing order, practitioners filing sealed documents should also review Local Rule 83.12, which provides detailed specifics on sealed filing and redaction requirements.

**Bar Admission and Bar Cards:** To become a member of the District of New Hampshire's bar, an attorney must be an active member in good standing of the bar of the Supreme Court of New Hampshire. Attorneys can obtain more information on the application process, and apply on-line, by going to the Attorney Information tab on the menu bar and then clicking on Bar Admissions. Active members of the district's bar may apply for a building access/photo identification card (Bar Card). The Bar Card allows active members of the court's bar to receive an "expedited" security screening when entering the Rudman Courthouse. For more information on the Bar Card, and to access the application for a card, go to the court's website, select the Attorney Information menu offering, and click on Bar Card.

**Due Diligence on Legal/Procedural**

**Questions:** The management team and staff in the District of New Hampshire clerk's office take great pride in providing personal access and outstanding service to the bar and public. That is why we provide our full names and contact information on the court's website and why we are always amenable to meet in-person with people who travel to the clerk's office for assistance. That said, as new lawyers, we were also taught to perform some preliminary good faith legal research before contacting the clerk's office with a procedural or filing question. This discipline not only preserves and enhances an attorney's reputation within the courthouse, but also is appreciated by clerk's office staff.

**Federal Practice Suggestions:** Attorneys should feel free to send any practice or local rule suggestions to the Clerk of Court, Dan Lynch, the Chief Deputy Clerk, Tracy Uhrin, or to any member of the Federal Court Advisory Committee (FCAC). Information on the mandate and membership of the FCAC may be found on the court's website by going to Attorney Information on the menu bar and selecting Advisory Committee.

**Common Errors**  
**Filings Requesting Immediate Relief and Sensitive Filing Errors:** Attorneys sometime assume that because electronically filed documents are instantaneously added to the court's docket, that court staff will immediately review the filing and route it to a judge for ruling if immediate relief is sought. This is not always that case, especially for documents filed later in the workday. A best practice is to contact the appropriate court staffer (intake deputy or case manager) by telephone or email prior to filing any document seeking an immediate ruling. If filed after hours or on a weekend, please call or email Dan Lynch or Tracy Uhrin, who monitor phone messages and emails during non-work hours. Similarly, if the court or an attorney erroneously files a sensitive document, such as a document that should have been sealed, please call or email the appropriate court staff member immediately or, if after hours, contact Dan or Tracy.

**Marking Exhibits:** A more recent recurring error is the submission of trial or hearing exhibits in a manner not conforming to the court's local rules and practice, requiring counsel to spend precious time remarking and resubmitting exhibits. To avoid this issue, prior to preparing exhibits for submission to the court, counsel should closely review Local Rule 83.14, as well as the exhibit information sheet on the court's website by going to the Case Management option on the menu bar, selecting the Jury & Bench Trial flyout, and then clicking the Marking Exhibits link.

**Local Counsel:** Based on recent experience, it is worth emphasizing the roles, responsibilities and expectations of persons serving as local counsel for attorneys who are not members of the district's bar. Local Rule 83.2(b) requires local counsel remain "actively associated" in the case and "shall sign all filings submitted to the court and ... attend[ ] ... all proceedings, unless excused by the court." By signing pleadings, local counsel should be aware that they are also certifying to the representations listed in Fed. R. Civ. P. 11(b). ■

*Daniel J. Lynch is the Clerk of Court, and Tracy A. Uhrin is the Chief Deputy Clerk, of the United States District Court in the District of New Hampshire.*

## NH Supreme Court At-a-Glance

MAY 2023

### ADMINISTRATIVE LAW

**Granite State Trade School v. New Hampshire Mechanical Licensing Board et al.**  
**No. 2022-0087**  
**May 2, 2023**  
**Affirmed**

- Whether the regulations promulgated by the defendant were arbitrary and capricious and whether the regulations were applicable to licensed educational programs that had been approved prior to the enactment of the amended rules.

The defendant Licensing Board was established pursuant to RSA chapter 152 and authorized to develop rules that would govern the licensure of all educational programs dealing with gas fitting training and licensing examinations. The defendant, pursuant to its statutory mandate, promulgated N.H. Admin. R., Saf-Mec 610, which required educational programs to submit "specified information" every two years to maintain their licenses, and Saf-Mec 308 which dealt with requirement for new training programs.

In 2020, the defendant directed the plaintiff to submit to an audit pursuant to its regulatory authority under these two provisions. The plaintiff, which had been approved as a gas training school prior to the adoption of these regulations, sought a declaration from the trial court that it was exempt from the audit request because its programs predated the regulations. The plaintiff also asked the trial court to find that the regulations were arbitrary and capricious because they failed to protect the plaintiff's proprietary materials and issue an injunction against enforcement of the audit request.

The trial court granted the defendant's motion to dismiss, finding the plaintiff was not relieved of its obligation to comply with the regulations and that its right to protect its proprietary materials from the defendant was outweighed by the public benefit of the audit requirement. The plaintiff raised five issues on appeal: (1) that it was exempt from the audit requirement because it was licensed before the rules were promulgated (2) that the rules were arbitrary and capricious (3) that it was the defendant could not discontinue the plaintiff's ability to operate because it had never been required to submit to an audit request (4) that the audit requirements were "overly burdensome" and (5) that the defendant's possession of confidential materials warranted injunctive relief.

The Court agreed with the trial court, finding the plain meaning of Saf-Mec 308 did not exempt programs that had been approved prior to the adoption of the rules. The Court also agreed with the trial court that the rules were not arbitrary and capricious because the defendant has a legitimate interest in maintaining stringent industry standards which requires them to be able to review materials produced by programs.

On appeal, the plaintiff argued that because there was no statute or rule expressly exempting the materials from being subject to "the right to know" inspection, those records could be made public. The Court refused to make a determination on this matter, stating that although such questions could be decided exclusively by the courts, absent a request under RSA chapter 91-A, the question was not properly before it. The Court found the remaining issues lacked merit and did not warrant further consideration.

*McGrath Law Firm, of Concord (Daniel J. Corley on the brief and orally), for the plaintiff. John M. Formella, Attorney General, and Anthony J. Galdieri, Solicitor General (Nathan W. Kenison-Marvin, Assistant At-*

### At-a-Glance Contributor



**Kevin R. King**  
Tentindo, Kendall,  
Canniff & Keefe  
Boston, MA

*torney General, on the brief and orally), for the State.*

### CONSTITUTIONAL LAW

**State of New Hampshire v. Caleb Douglas Marquis**  
**No. 2021-0394**  
**May 4, 2023**  
**Affirmed in part, reversed in part, remanded**

- Whether the trial court erred in suppressing statements made by the Defendant during the third of three interviews with detectives.

In September 2020, police responded to a call involving an unconscious 16-month-old child who was injured in the shower. The child, whose mother was the defendant's girlfriend, was apparently under the care of the defendant at the time of the accident. At the scene, police asked if the defendant would be willing to accompany them to the police station for an interview. The defendant was told he was not under arrest and was driven to the station where he signed in as a visitor.

The defendant was interviewed by detectives twice the evening of the incident. The interviews were recorded and took place in a small room in the station. No Miranda rights were given. The defendant was told he was free to leave at any time. The next day, detectives called the defendant back for a third interview. Again, no Miranda rights were given, and the defendant was told he could leave at any time. The detectives told the defendant that they had received word from doctors that the defendant had not told the truth in the first two interviews. Detectives told the defendant that, based on the reports of doctors who had examined the child, it was clear the child had been held under scalding water. Eventually, the defendant admitted he had made a reckless mistake and was not paying attention while the child was exposed to the hot water.

Following the third interview, the defendant was arrested and charged with felonies stemming from the first- and second-degree burns the child had sustained. The defendant moved to suppress all statements made in the three interviews.

At hearing, the trial court denied the motion to suppress with respect to the first two interviews but ruled the third interview had to be suppressed because, based on the totality of the circumstance surrounding the interview, the defendant was in custody and therefore inadmissible.

In its order, the trial court found four factors which supported its determination that the defendant was in custody during the third interview: (1) the increasingly accusatory nature of the questions, (2) the size and layout of the interviewing room, which limited the defendant's freedom of movement, (3) the duration of the interview and the fact that two interviews were conducted the night before, and (4) the fact that the interview was held at the request of police. These factors were weighed against the fact that the defendant entered the station through the lobby, was

interviewed by unarmed detectives wearing plain clothes, was repeatedly told he could end the interview at any time, never asked to leave or end the interview, and had access to his cell phone the entire time.

The Court needed to determine whether the totality of the circumstances supported a finding that the interrogation was custodial in nature. The Court agreed with the trial court that the increasingly accusatory nature of the questioning was supported by the record, rejecting the State’s argument that the interview in this case was any different than that in *State v. McKenna* (2014) where police officer’s statements that “they believed [the defendant] to be guilty of sexual assault.” In both cases, the underlying message was the same, and was deemed custodial.

The Court also agreed with the trial court that there were factors which supported the State’s argument against suppression, however, it found these factors to be “neutralized by the accusatory tone of the interview.” The Court, citing *State v. Jennings* (2007) and *State v. Dedrick*, (1989), rejected the State’s argument that notifying the defendant he was free to leave in this case would have provided reasonable assurances that this was the case. The Court also rejected the State’s argument that the defendant’s arrival at the station on his own favored custody because the defendant only did so at the request of the detectives. The Court further determined, in conjunction with the trial court, that there being only two detectives conducting the interview did not weigh against custody because the size of the interview room made it difficult to move freely. The Court also rejected the State’s argument that the trial court’s failure to consider the defendant’s behavior while detectives were not in the room was error.

The Court did accept the State’s argument that the entirety of the interview did not need to be suppressed as the questioning was not accusatory at the beginning. The Court reversed the trial court’s ruling to the extent that it suppressed the questioning prior to the point at which the questioning became accusatory.

The Court did not discuss the Federal Constitution as it “offered no greater protection than does the State Constitution under these circumstances.” *State v. Sadchev*, (2018).

*John M. Formella, Attorney General, and Anthony J. Galdieri, Solicitor General (Elizabeth C. Woodstock, Senior Assistant Attorney General, on the brief and orally), for the State. Stephanie Hausman, Deputy Chief Appellate Defender on the brief and orally, for the defendant.*

CONTRACT LAW

**Schleicher and Stebbins Hotels et al v. Starr Surplus Lines Insurance Company et al.**  
**No. 2022-0155**  
**May 11, 2023**  
**Reversed and remanded**

- Whether, under the *Mellin* standard, the presence of the SARS-CoV-2 virus in hotels operated by plaintiffs constituted loss or damage under the applicable insurance policies.

The plaintiffs are hotel operators who had policies with defendant insurance companies. These policies, inter alia, insured “against risk of direct physical loss of or damage to property described.” In March 2020, when several state governors began enacting stay-at-home orders due to the COVID-19 pandemic, they also imposed restrictions on the plaintiffs’ ability to provide lodging so they could only provide services to “vulnerable populations and essential workers.” These restrictions were not lifted until June 2020 and naturally resulted in significant business losses for the plaintiffs.

In response to these state actions, plaintiffs submitted claims with their insurance providers to protect against these losses. These claims were investigated by defendants, who found the losses were not covered by their policies. On June 19, 2020, plaintiffs filed suit seeking declaratory judgment that they were “contractually entitled to insurance coverage for business interruption losses resulting from the COVID-19 pandemic.” They sought coverage under the business interruption loss and the extension of time element provisions of their respective policies. Extension of time element provisions insure against actual losses that occur at the premises of third parties.

The trial court, inter alia, found that under the Supreme Court’s *Mellin* standard, the presence of the SARS-CoV-2 virus with the plaintiff’s properties constituted a “direct physical loss of or damage to property.” In *Mellin v. Northern Security Insurance Co.*, (2015), the Court held that “physical loss may include . . . changes that are perceived by the sense of smell and that exist in the absence of structural damage . . . however, [such changes] must be distinct and demonstrable.” The defendants sought leave to file an interlocutory appeal which was granted by the trial court.

Three questions were ultimately presented on appeal: (1) under the *Mellin* standard, did the virus cause direct physical loss to plaintiff’s property (2) did the mold, mildew, and fungus cause and microorganisms exclusion of the policies preclude coverage for the plaintiff’s business losses and (3) did the pollutants and contaminants exclusion (which was only included in the AXIS policy) preclude coverage? The defendants argued that the trial court misapplied the *Mellin* standard in determining the presence of SARS-CoV-2 in the air or by fomites did not constitute direct physical loss or damage to property.

The parties did not dispute that the policies were “all-risk” policies, that covered any “risk of direct physical loss or damage that is not specifically excluded or limited.” The business interruption coverage provision provides coverage for loss of normal business operations that result from direct physical loss or damage to property. The plaintiffs argued that they were entitled to coverage if they could prove that the presence of SARS-CoV-2 was present in their hotels and caused damage to property in the sense that it prevented customers from being provided services. Under this theory, no “physical loss” would be required to trigger the coverage provisions. The Court rejected this argument, finding that the insurance policies required “physical loss or damage

to the property” as a requirement for each of the seven subparagraphs under the Extension of Time Element Coverage (ETEC) provisions.

The Court next turned to the application of the *Mellin* standard. The Court applied the “distinct and demonstrable alteration standard” and determined the presence of SARS-CoV-2 on surfaces did not constitute a distinct or demonstrable alteration because it did not require the “rebuilding, repairing or replacing of property.” The Court expressly indicated its determination was consistent with the *Mellin* standard.

After rejecting the plaintiff’s argument with regard to *Mellin*, the Court declined to answer the other two questions presented and the case was remanded.

*Rath Young and Pignatelli and Anderson Kill for the plaintiffs. Primmer, Piper, Eggleston & Cramer for all defendants. Zelle for defendant Everest Indemnity Insurance Company. Kennedys CMK and Cullen Colli-more for defendant AXIS Surplus Insurance Company. Paul Frank + Collins, Robinson & Cole, and Robins Kaplan for defendants Starr Surplus Lines Insurance Company and Certain Underwriters at Lloyd’s and London Companies. Sulloway & Hollis and Dickinson Wright for defendant Evanston Insurance Company. Morrison Mahoney and Clausen Miller for defendant Hallmark Specialty Insurance Company. Devine, Mil-limet & Branch and Phelps Dunbar for de-fendant Scottsdale Insurance Company. Vitt & Associates for defendant Mitsui Sumitomo Insurance Company of America.*

FAMILY LAW

**David Loik v. Gloria Loik**  
**No. 2022-0268**  
**May 3, 2023**  
**Vacated and remanded**

- Whether the plaintiff’s petition for partition of his marital home constituted a “related pending matter” with regard to a prior divorce decree and whether the circuit court or superior court had jurisdiction to rule on the petition for partition.

The plaintiff and defendant were divorced by final decree which was accepted by the circuit court in 2018. The decree stipulated both parties would continue to own their marital home “as joint tenant with rights of survivorship” and if they ever chose to sell, had to “equally divide any net proceeds from the sale of the house.” The defendant remained in the home while the plaintiff was responsible for paying the mortgage and paying the taxes.

In 2021, following several post-divorce disputes between the parties, the plaintiff filed a motion in the circuit court seeking a modification to the decree that would force the sale of the home. The circuit court de-

nied the motion, calling it an “impermissible modification.” The court directed the plaintiff to file a petition for partition in either the probate or superior courts. The plaintiff filed the petition in the superior court seeking a partition and preliminary injunctive relief due to the defendant’s engagement in waste of the property. The defendant moved to dismiss, arguing that because the petition was related to the divorce decree, the circuit court had exclusive jurisdiction. The defendant’s motion to dismiss was granted by the superior court, which held only that the plaintiff had waived his right to seek partition when he agreed to joint ownership of the property.

The Court took the appeal to determine whether the circuit court’s jurisdiction over the matter was exclusive. Under RSA chapter 547-C, both the superior and circuit courts have concurrent jurisdiction over the partition of real estate. Under RSA 547-C:2, “where there is a related pending matter in either court, jurisdiction for the related partition action shall lie with the court having jurisdiction over the underlying matter . . .”

The Court found that because the other post-divorce disputes pending in the circuit court constituted “related pending matter[s]”, the circuit court had jurisdiction over the partition. Because the superior court had no subject matter jurisdiction to rule on the partition, the decision of that court was vacated, and the petition was transferred to the circuit court to “consider the matter in the first instance.”

*Gallant & Ervin, of Chelmsford, MA (John F. Gallant on the brief and orally and Nancy A. Morency, on the brief), for the plaintiff. Law Office of Pamela J. Khoury, of Salem (Pamela J. Khoury on the memorandum of law and orally), for the defendant.*

ZONING LAW

**Juliana Lonergan et al. v. Town of Sanbornton**  
**No. 2022-0142**  
**May 31, 2023**  
**Vacated and remanded**

- Whether RSA 155-E:9 applied to plaintiff’s appeal from the Town’s Zoning Board of Adjustment’s approval of intervenor’s application for a special exception.

The intervenor owns a roughly 19-acre tract in the Town of Sanbornton’s General Agricultural District. This tract abuts property owned by the plaintiffs. In July 2020, the intervenor submitted an application to the Town Zoning Board of Adjustment (ZBA) seeking a special exception to operate a gravel pit excavation site on its property. After three public hearings, the ZBA

ATA-GLANCE continued on page 34

NH Supreme Court Professional Conduct Committee

Notice of Lynne A. Saben’s Request for Reinstatement To The New Hampshire Bar LD-2020-0011

The New Hampshire Supreme Court Professional Conduct Committee is considering Lynne A. Saben’s Request for Reinstatement to the New Hampshire Bar. Ms. Saben was suspended on December 9, 2020. Anyone who wishes to comment

on her request may do so in writing within twenty (20) days of the publication of this notice by sending said comments to:

Barbara Guay, Administrative Assistant  
New Hampshire Supreme Court Professional Conduct Committee  
4 Chenell Drive, Suite 102  
Concord, New Hampshire 03301  
[bguay@nhattysreg.org](mailto:bguay@nhattysreg.org)  
May 22, 2023

Need to schedule a Mediation?

FEBRUARY 2024

Su	Mo	Tu	We	Th	Fr	Sa
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21		23
24	25	26	27	28		

Fast-track scheduling at [www.NHMediators.org](http://www.NHMediators.org)

NEW HAMPSHIRE BAR NEWS

[www.nhbar.org](http://www.nhbar.org)

JUNE 21, 2023 33

voted on February 23, 2021, to approve the intervenor’s application. The plaintiffs filed an appeal of the ZBA decision on March 24, 2021 (twenty-nine days later), which the ZBA denied. The plaintiffs subsequently appealed to the superior court which upheld the ZBA’s decision. The plaintiffs appealed to the Supreme Court.

On appeal, the defendant and intervenor argued that the Court lacked subject matter jurisdiction over the appeal because the plaintiffs’ appeal from the ZBA determination was untimely under RSA 155-E:9. The Court agreed with the defendant and intervenor that, pursuant to RSA 155-E:9, the plaintiffs had ten days to appeal for rehearing with the ZBA, and by waiting twenty-nine days to file, their appeal was void and neither the ZBA nor the superior court had subject matter jurisdiction to hear the claim.

The Court analyzed RSA chapter 155-E and the Town’s Ordinance to make this determination, finding the ZBA determination also constituted an excavation permit under the statute and therefore 155-E:9 governed the procedural aspects of the proceeding. The Court’s determination was made in accordance with its prior decision in *K & B Rock Crushing v. Town of Auburn*, (2006), where it ruled the plaintiff’s failure to appeal for rehearing with the board waived its right to appeal. The plaintiffs argued K & B Rock did not apply to their appeal because the ZBA was not authorized as the Town’s regulator under RSA 155-E:1, and that the ZBA did not sufficiently notify plaintiffs that the excavation permit would be considered as part of the intervenor’s application, but this argument was rejected by the Court.

*Panciocco Law, of Bedford (Patricia M. Panciocco on the brief and orally) for the plaintiffs. Wadleigh, Starr & Peters, of Manchester (Stephen M. Bennett on the brief and orally) for the defendant. Seufert Law Office, of Franklin (Christopher C. Snook and Christopher J. Seufert on the brief and Christopher C. Snook orally), for the intervenor.*

**Richard Anthony et al. v. Town of Plaistow**  
**No. 2021-0410**  
**May 16, 2023**  
**Affirmed**

- Whether the superior court erred in finding (1) that it had no subject matter jurisdiction over either of the plaintiff’s 2 appeals before it (2) that the Town had complied with the regional impact determination under RSA 36:56 and (3) the Planning Board’s determination was otherwise lawful and reasonable.

In 2019, the intervenor, Milton Real Estate Properties of Massachusetts, sought permission from the Plaistow Planning Board (the Board) to consolidate two commercial lots to develop a construction equipment maintenance facility. The Town’s code enforcement officer approved of the use. The plaintiffs, whose property abuts the consolidated lot, disagreed but did not appeal the officer’s determination. The Board then reviewed the application, conducted four public hearings and sought four peer reviews of the project plan. The Board approved the plan and the plaintiffs appealed to the Town Zoning Board of Adjustment (ZBA) and the superior court simultaneously. The ZBA dismissed the appeal as untimely, and on appeal from the ZBA decision, the superior court also found that because the appeal was untimely, it lacked subject matter jurisdiction. The plaintiffs concede they did not appeal this decision, published in March 2021, which became a final judgment in May 2021.

On the direct appeal from the Board determination to the superior court, the plaintiffs argued that the Board’s decision violated the Town zoning ordinance, that the plan failed to provide a regional impact determination under RSA 36:56 and was otherwise unreasonable because it did not protect their rights as abutters. The superior court again found it had no subject matter jurisdiction to rule on the zoning ordinance issue because the ZBA appeal was untimely. The court also found the Board’s finding that there was no potential for regional impact complied with RSA 36:56. The superior court issued its ruling in July 2021.

The Court first addressed the jurisdictional component of the plaintiffs’ claim. Under RSA 677:15, the plaintiffs were able to appeal the Board determination directly to the superior court. Under RSA 676:5, III, they were also able to appeal to the ZBA, but only on matters related to a possible violation of zoning ordinance. The Court found that because the plaintiffs only appealed the July 2021 order of the superior court, it could not revisit the March 2021 order which came

from the ZBA appeal as it was not properly before the Court. It therefore could not review the plaintiffs’ claims regarding violation of the zoning ordinance.

With regard to the regional impact determination claims, the Court again agreed with the superior court. Under RSA 677:15, the trial court’s review of planning board’s decision is limited, and the board determinations can only be reversed if the court considers the decision unreasonable. The Court did not agree with the plaintiffs’ argument that the Board’s determination was void *ab initio* because it did not satisfy the notice requirements. The Court disagreed, finding, as did the trial court, that the board had “implicitly found that the project did not have a potential for regional impact.”

Finally, the Court rejected the plaintiffs’ argument that the Board’s determination was otherwise unlawful or unreasonable, finding the superior court “thoroughly considered the entire record submitted on appeal.”

*Law Offices of Kelly E. Dowd, of Keene (Kelly E. Dowd on the brief and orally), for the plaintiffs. Wadleigh, Starr & Peters, of Manchester (Charles F. Clearly on the brief and orally and William P. Reddington on the brief), for the defendant. Sulloway & Hollis, of Concord (Derek D. Lock on the brief and orally) for the intervenor.*

**Town of Conway v. Scott Kudrik**  
**No. 2022-0098**  
**May 2, 2023**  
**Affirmed**

- Whether the Town of Conway’s Zoning Ordinance permits non-owner-occupied short-term rentals within residentially zoned districts.

In 1980, the plaintiff adopted the Conway Zoning Ordinance (CZO). In 2019, the town established a committee to recommend amendments to the CZO in response to the uptick in short-term rentals (STRs) within its residential districts through platforms like Airbnb. The committee proposed amendments to the CZO intended to address STRs, but these were subsequently rejected by voters in 2021.

In June 2021, the plaintiff brought suit in the superior court seeking a declaratory judgment finding that the CZO prohibited STRs in residential districts. The defendant,

who owns several properties all within the residential districts of the town that he rents on a short-term basis, filed a motion for judgment on the pleadings which the superior court granted. The plaintiff appealed on the grounds that the superior court “erroneously interpreted” the CZO.

The CZO defines a “residential/dwelling unit” as a “single unit providing complete and independent living facilities for one or more persons living as a household, including provisions for living, sleeping, eating cooking, and sanitation.” CZO § 190-31. The terms “living as a household” and “household” are not defined in the CZO. The ordinances allow lodging houses, boardinghouses, tourist homes, and rooming houses to be in residential zones only if they are owner occupied, therefore the defendant’s non-owner-occupied STRs needed to be classified as a “residential/dwelling unit” in order to be situated in the residential districts.

The Court agreed with the defendant that, based on the plain meaning of “residential/dwelling unit” the CZO did not prohibit STRs in residential districts. The plaintiff argued that under the Court’s prior ruling in *Working Stiff Partners v. City of Portsmouth*, (2019), the superior court order should be reversed. The Court drew a distinction between the CZO and the Portsmouth Zoning Ordinance (PZO) because the PZO “expressly excluded ‘transient occupancies.’” Further, because the term “living as a household” was not defined by the CZO, its dictionary definition was used which the Court found did not impose any durational limitations.

The Court also rejected the plaintiff’s argument that the “CZO’s purpose” supported a finding that STRs were not residential dwellings. The Court again sided with the defendant because the division of properties into residential and commercial does not dictate how the properties are to be used.

*Justice Bassett issued a dissent finding that the term “living as a household” “incorporates a relational and durational component that the court’s construction disregards.”*

*Upton & Hatfield, of Portsmouth (Russell F. Hilliard on the brief and orally) and Hastings Law Office, of Fryeburg, ME (Jason B. Dennis on the brief) for the plaintiff. Devine, Millimet & Branch, of Manchester (Matthew R. Johnson on the brief and orally and Solal Wanstok on the brief), for the defendant.*

## NH Supreme Court Orders

Pursuant to its constitutional authority and powers of general superintendence over the New Hampshire Bar Association and its members, the Supreme Court assesses each member of the association as of June 1, 2023, as follows, for the purpose of funding the operations of the New Hampshire Supreme Court Attorney Discipline System.

Membership category	Assessment
Active (over three years)	\$245
Active (through third year of admission)	\$245
Inactive	\$ 10
Active Military and Active Honorary	\$ 0
Inactive Retired, Inactive Military and Inactive Honorary	\$ 0
Full-time Judicial	\$ 0
Part-time Judicial	\$ 0
Pro bono Active	\$ 0

These assessments are due and payable on or before July 1, 2023. The New Hampshire Bar Association shall collect the assessment for the account of the Administrative Office of the Courts, of which the Attorney Discipline Office is a division, and shall report to the court

on or before September 15, 2023, the names of members who have not fully paid. If the Board of Governors of the New Hampshire Bar Association grants a member’s request for abatement of bar dues, it may grant a waiver of this fee.

Issued: May 15, 2023  
ATTEST: Timothy A. Gudas, Clerk of Court  
Supreme Court of New Hampshire

Pursuant to its constitutional authority and powers of general superintendence over the New Hampshire Bar Association and its members, and pursuant to Supreme Court Rule 55, the New Hampshire Supreme Court assess each dues-paying member of the association as of June 1, 2023, as follows, for the purpose of funding the Public Protection Fund (PPF).

Membership category	PPF Assessment
Active over three years	\$30
Judicial	\$30
Part-time judicial	\$30
Active three years and under	\$30
Inactive	\$30

Inactive retired	\$ 5
Pro bono active	\$ 0

Pursuant to its constitutional authority and powers of general superintendence over the New Hampshire Bar Association and its members, and pursuant to Supreme Court Rule 58, the court assesses each dues-paying member of the association as of June 1, 2023, as follows, for the purpose of funding the Lawyers Assistance Program (LAP).

Membership category	LAP Assessment
Active over three years	\$30
Judicial	\$30
Part-time judicial	\$30
Active three years and under	\$30
Inactive	\$30
Inactive retired	\$15
Pro bono active	\$ 0

The members of the association exempted from the PPF assessment by order dated July 22, 1998, are exempted from the assessment for both the PPF and the LAP. These assessments are due and payable on or before July 1, 2023. If the Board of Governors of the New Hampshire Bar Association grants a member’s request for

abatement of bar dues, it may grant a waiver of one or both assessments.

The New Hampshire Bar Association shall collect the assessments for the account of the Public Protection Fund and the Lawyers Assistance Program and shall report to the court on or before September 15, 2023, the names of those members responsible for the assessments who have not fully paid.

Issued: May 15, 2023  
ATTEST: Timothy A. Gudas, Clerk of Court  
Supreme Court of New Ham

Pursuant to its constitutional authority and powers of general superintendence over the New Hampshire Bar Association and its members, and pursuant to Supreme Court Rule 53.3, the Supreme Court suspends the assessment of an annual fee to support the operations of the NHMCLE Board.

Issued: May 15, 2023  
ATTEST: Timothy A. Gudas, Clerk of Court  
Supreme Court of New Hampshire

◆

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

**I. Rule 1 of the Supplemental Rules of the Circuit Court of New Hampshire for Electronic Filing – Scope and Effective Date of Rules**

*(This amendment adds the person over whom nonemergency involuntary admission is sought or ordered to the category of persons who are exempt from electronic filing, unless the person chooses to register as an electronic filer.)*

1. Amend Rule 1 as set forth in Appendix A.

**II. Rule 11 of the Supplemental Rules of the Circuit Court of New Hampshire for Electronic Filing – Filing a Document Which is Entirely Confidential**

*(This amendment adds to the list of “confidential documents” those filed with or issued by the court in nonemergency involuntary admission cases under RSA 135-C.)*

1. Amend Rule 11 as set forth in Appendix B.

**III. Rule 19 of the New Hampshire Rules of Criminal Procedure – Transfer of Cases**

*(This amendment clarifies when criminal cases may be transferred from superior court to circuit court and from circuit court to superior court.)*

1. Amend Rule 19 as set forth in Appendix C.

**IV. Supreme Court Rule 48-B – Family Mediator Fees**

*(This amendment increases the mediation fee for divorce/parenting mediation from \$300 to \$450 for four hours of mediation service and one hour of administrative work, modifies the sliding scale to determine the fee for mediation beyond four hours, clarifies that an indigent party’s requirement to repay the mediation fee for cases involving dependent children is governed by RSA 461-A:7, and increases the amount of failure-to-appear fees.)*

1. Amend Rule 48-B as set forth in Appendix D.

**Effective Date**

The amendments to Rules 1 and 11 of the Supplemental Rules of the Circuit Court of New Hampshire for Electronic Filing shall take effect as of the date set forth in an administrative order issued by the administrative judge of the circuit court implementing e-filing in nonemergency involuntary admission cases in a particular circuit court location or locations. The remaining amendments shall take effect on July 1, 2023.

Date: May 16, 2023  
ATTEST: Timothy A. Gudas, Clerk  
Supreme Court of New Hampshire

◆

In accordance with RSA 679:2, the Supreme Court reappoints Elizabeth R. Fischer as a member of the Housing Appeals Board to serve a five-year term, commencing July 1, 2023, and expiring June 30, 2028. The Supreme Court designates her to continue serving as chair for the duration of that five-year term.

This order corrects and supersedes the order dated May 17, 2023, reappointing Elizabeth R. Fischer as a member of the Housing Appeals Board.

Issued: May 18, 2023  
ATTEST: Timothy A. Gudas, Clerk  
Supreme Court of New Hampshire

◆

In accordance with Rule 42(II)(a), the Supreme Court reappoints Attorney Rose M.

Culver, Mr. Thomas E. Blonski, and Dr. Susan Fischer Davis to the Committee on Character and Fitness, to serve three-year terms commencing June 1, 2023, and expiring May 31, 2026.

Issued: May 25, 2023  
ATTEST: Timothy A. Gudas, Clerk  
Supreme Court of New Hampshire

◆

In accordance with RSA 490:5-a and 5-b, the Supreme Court reappoints the following persons to the Court Accreditation Commission for three-year terms commencing June 8, 2023, and expiring June 7, 2026:

Honorable Gordon J. MacDonald, Chief Justice, to serve as the representative of the Supreme Court;

Honorable Tina L. Nadeau, Chief Justice, to serve as the representative of the Superior Court;

Honorable David D. King, Administrative Judge, to serve as the representative of the Circuit Court; and

Preston Hunter, of Bedford, to serve as the lay representative.

The Supreme Court designates Chief Justice MacDonald to continue to serve as chairperson of the commission.

Issued: May 25, 2023  
ATTEST: Timothy A. Gudas, Clerk of Court  
Supreme Court of New Hampshire

◆

The Supreme Court appoints Caitlin Dow to the Access to Justice Commission, which was established by Supreme Court order dated January 12, 2007. Caitlin Dow is appointed to serve the remainder of Attorney Lynne Sabean’s three-year term, which expires on December 31, 2023.

The Supreme Court has received notification that the following persons have resigned from membership on the Access to Justice Commission: Attorney Lynne Sabean; Attorney Nick E. Abramson; and Attorney Sonya G. Belenfant.

Issued: May 25, 2023  
ATTEST: Timothy A. Gudas, Clerk of Court  
Supreme Court of New Hampshire

◆

Pursuant to Supreme Court Rule 51(d)(1)(F), the Supreme Court appoints Timothy A. Gudas to serve as the secretary to the Advisory Committee on Rules. Timothy A. Gudas is appointed to replace Loretta S. Platt, who has resigned as secretary.

Issued: May 30, 2023  
ATTEST: Timothy A. Gudas, Clerk  
Supreme Court of New Hampshire

◆

**LD-2023-0006, In the Matter of Lisa A. Wellman-Ally, Esquire**

On April 27, 2023, the Professional Conduct Committee (PCC) filed a recommendation that Attorney Lisa A. Wellman-Ally be disbarred. The PCC’s recommendation was based on a PCC-approved “Stipulation to Disbarment” (Stipulation) signed by Attorney Wellman-Ally and Disciplinary Counsel, in which Attorney Wellman-Ally admitted that she had violated numerous Rules of Professional Conduct and conceded that disbarment was the appropriate sanction for her misconduct. In the Stipulation, Attorney Wellman-Ally expressly waived her procedural rights under Supreme Court Rules 37 and 37A, including the right under Rule 37(16) to be served with the PCC’s recommendation and to be heard on the recommendation prior to the imposition of discipline. Because the PCC’s recommendation was based on the Stipulation agreed to by both Attorney Wellman-Ally and Disciplinary

Counsel as to Attorney Wellman-Ally’s violations of the Rules of Professional Conduct and the appropriate discipline for the violations, and because Attorney Wellman-Ally has waived her rights under Rule 37(16), it is unnecessary to serve Attorney Wellman-Ally with the PCC’s recommendation or to provide an opportunity to be heard on the PCC’s recommendation prior to court action.

In the Stipulation, Attorney Wellman-Ally admitted the allegations set forth in an earlier petition for her summary suspension from the practice of law (case no. LD-2023-0004, *In the Matter of Lisa A. Wellman-Ally, Esquire*), including the following:

Ms. Wellman-Ally mishandled client funds in two client matters, as she was out of trust in the amount of \$13,831.36 for one client and \$5,790.19 for another client. She was dishonest regarding the amounts she held in trust for these clients with third parties who sought to intercede on these clients’ behalf, and could not write checks to these clients for funds due to them without first “replenishing” her IOLTA with personal funds (i.e. commingling).

Based on those and other allegations, the court summarily suspended Attorney Wellman-Ally on February 21, 2023. In the Stipulation, Attorney Wellman-Ally also admitted that, as borrower, she entered into a loan transaction with a third client, without having advised the client to seek independent counsel and without having obtained the client’s informed consent.

Attorney Wellman-Ally conceded in the Stipulation that the above-described misconduct violated the following Rules of Professional Conduct:

1. Rule 1.4, for failing to keep two clients reasonably informed of the status of their funds held in trust;

2. Rule 1.8, for entering into a business transaction with a client but failing to take the actions required by Rule 1.8(a) to protect the client from Attorney Wellman-Ally’s conflict of interest;

3. Rule 1.15 and Supreme Court Rule 50, for failing to maintain accurate IOLTA records, failing to perform monthly reconciliations, being out of trust in two client matters, and failing to promptly turn over funds to two clients upon their request;

4. Rule 3.3, for filing knowingly false trust accounting compliance certifications;

5. Rule 4.1, for knowingly making false statements of fact to third parties concerning the status of clients’ funds held in trust;

6. Rule 8.1, for knowingly failing to produce client ledgers for two clients to the Attorney Discipline Office (ADO) in response to the ADO’s investigatory demand; and

7. Rule 8.4(a) and (c), for violating the Rules of Professional Conduct and for engaging in dishonesty and misrepresentation when she misappropriated the funds of two clients by being out of trust in those matters.

The court has reviewed the Stipulation and the PCC’s recommendation that Attorney Wellman-Ally be disbarred. After considering the nature, seriousness, and extent of Attorney Wellman-Ally’s misconduct, the court concludes that disbarment is the appropriate sanction in this case.

THEREFORE, the court orders that Lisa A. Wellman-Ally be disbarred from the practice of law in New Hampshire. In accordance with her “Agreement to Pay Costs of Disciplinary Matter,” she is hereby assessed all expenses incurred by the PCC in the investigation and prosecution of this matter.

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

DATE: May 31, 2023  
ATTEST: Timothy A. Gudas, Clerk

◆

**LD-2023-0002, In the Matter of John T. Gosselin, Esquire**

On April 27, 2023, the Professional Conduct Committee submitted its recommendation, pursuant to Rule 37(11), that the court approve Attorney John T. Gosselin’s request to resign from the bar.

Having reviewed Attorney Gosselin’s affidavit and the recommendation of the Professional Conduct Committee, the court accepts and approves Attorney Gosselin’s resignation from the bar. See Rule 37(11).

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

DATE: May 31, 2023  
ATTEST: Timothy A. Gudas, Clerk

ADMINISTRATIVE ORDER 2023-05  
HOLIDAY SCHEDULE FOR CALENDAR YEAR 2024

Pursuant to its rule making authority and RSA 490:4, the Supreme Court promulgates the following holidays during calendar year 2024:

1. New Year’s Day	Monday	January 1, 2024
2. Martin Luther King, Jr. Civil Rights Day	Monday	January 15, 2024
3. Washington’s Birthday	Monday	February 19, 2024
4. Memorial Day	Monday	May 27, 2024
5. Juneteenth	Wednesday	June 19, 2024
6. Independence Day	Thursday	July 4, 2024
7. Labor Day	Monday	September 2, 2024
8. Columbus Day	Monday	October 14, 2024
9. Veterans Day	Monday	November 11, 2024
10. Thanksgiving Day	Thursday	November 28, 2024
11. Day after Thanksgiving	Friday	November 29, 2024
12. Christmas Day	Wednesday	December 25, 2024

Courts shall be open for the purpose of conducting arraignments, pursuant to RSA 594:20-a, and for the purpose of conducting Gerstein hearings, pursuant to District Court Administrative Order 91-01, on Friday, November 29, 2024.

Date: May 25, 2023  
Attest: Timothy A. Gudas, Clerk  
Supreme Court of New Hampshire

## FRANKLIN SAVINGS BANK IS SEEKING AN EXPERIENCED COMPLIANCE OFFICER

Please send cover letter and resume to:

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BSA, Risk Management, Security &  
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Sue.Paradis@fsbnh.bank,  
387 Central Street, Franklin 03235

or apply online at [fsbnh.bank/careers](https://fsbnh.bank/careers)

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\$85,000 - \$97,500  
Plus a competitive  
benefits package.



## 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](mailto:lroy@mckan.com).

## Orr&Reno Litigation Attorney

Orr & Reno, PA seeks a mid-level (3-5 years) litigation attorney to join our firm and work on a wide variety of disputes in state and federal courts, administrative tribunals, and private mediations and arbitrations.

Candidates should have a strong academic background, be admitted to the New Hampshire Bar with a minimum of three years' prior experience in a firm, have a sound understanding of litigation fundamentals, and a demonstrated desire to live, work, and participate in the greater New Hampshire community. This position offers an excellent opportunity for mentoring and practice development for younger attorneys with a desire to continue to learn as a relied upon and contributing member of a close-knit team.

Since 1946, Orr & Reno, PA has distinguished itself by providing clients with high-quality legal services, while offering market-competitive compensation and comprehensive benefits, a collegial and team-based approach to practice, excellent employee and attorney retention, and placing unique emphasis on fostering a fun, friendly, and positive work culture. Orr & Reno, PA is an equal opportunity employer. Remote, hybrid, and flexible working arrangements may be considered.

Please submit a cover letter, resume, transcript and writing sample to:

Orr & Reno, PA  
Attention: HR Coordinator  
PO Box 3550, Concord, NH 03302-3550  
Fax: (603) 223-9060  
Email: [resumes@orr-reno.com](mailto:resumes@orr-reno.com) (Word format)  
No phone calls or agencies  
EOE

## Classifieds

### POSITIONS AVAILABLE

**ASSOCIATE** – Brennan, Lenehan, Iacopino & Hickey seeks a full-time associate with 2-5 years of experience and a NH license to join its dynamic law practice, including criminal defense, family law, estate planning, personal injury and general litigation. Strong writing skills, interpersonal skills and an ability to work in a fast-paced environment required. Must be comfortable working in a team setting and providing pre-trial litigation support and second chair trial support to start. Competitive wages, health insurance, retirement and payment of Bar dues and CLE credits. Please email resume to [wquinn@brennanlenehan.com](mailto:wquinn@brennanlenehan.com).

**ASSOCIATE ATTORNEY WANTED** – Prefer admission to MA, NH & ME and prior courtroom experience as prosecutor or public defender; will consider recent graduates; fast paced trial practice concentrating on DUI Defense/Criminal Defense and Plaintiff's Personal Injury. 40-50 jury & bench trials each year in these areas; Excellent research/writing skills; Salary commensurate with experience; Email resume to [moira@bowserlaw.com](mailto:moira@bowserlaw.com).

**ATTORNEY** – You are a motivated, creative, and experienced attorney looking to take on a challenge with colleagues who will help you grow your career, all in a great place to work. You have the ability to articulate yourself in challenging situations, and you do the same with your writing. You are a Vermont-licensed attorney looking to provide advice and counsel on municipal, employment, business, environmental issues and able to litigate disputes in courts across the State of Vermont. This is an opportunity to join Monaghan Safar PLLC as an associate attorney in our Burlington, Vermont office. The firm offers a competitive salary, 401(k) with employer match, health, dental, and vision insurances, paid leave, and the opportunity for a flexible working arrangement, all in a modern working environment. Interested candidates should send a cover letter, resume, and two writing samples to Margie Cain at [mcain@msvtlaw.com](mailto:mcain@msvtlaw.com).

**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](mailto:sara.crisp@crisplaw.com).

**EXPERIENCED STAFF ATTORNEY.** The Disability Rights Center – New Hampshire (DRC-NH) seeks an experienced attorney, full time or part time, to join DRC-NH in protecting and promoting the civil rights of people with disabilities. Attorneys with more than three years of civil and/or criminal litigation experience are encouraged to apply. For a complete job description, visit <https://drcnh.org/get-involved>. Please send cover letter; resume; and a writing sample/brief (not to exceed 30 pages) to [hr@drcnh.org](mailto:hr@drcnh.org).

**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](http://www.nhpd.org).

**RECEPTIONIST** – Civil litigation law firm in Manchester seeks full-time receptionist. Candidate responsible for greeting clients, answering phones, intake, and general administrative office support. Proficiency in Microsoft 365 required. Law office experience preferred. Compensation commensurate with experience. Please forward resume to [jgibson@bkwlawyers.com](mailto:jgibson@bkwlawyers.com).

### OFFICE SPACE

**CHICHESTER** – Two 800 +/- office suites, each with parking, bathroom, kitchenette on busy Rte 4 in Chichester. Can be rented separately or together. Contact: [andrulinsky@gmail.com](mailto:andrulinsky@gmail.com).

**MANCHESTER:** Solo or satellite professional space, furnishings, parking, utilities. [rjj911@myfairpoint.net](mailto:rjj911@myfairpoint.net).

### ASSISTANT COUNTY ATTORNEY

**LOCATION:** Strafford County Attorney's Office at the Justice & Administration Building, 259 County Farm Road, Dover, NH 03820

**QUALIFICATIONS:** Juris Doctor from an accredited law school. Must be a member in good standing of the New Hampshire Bar Association.

#### JOB DESCRIPTION:

- Under the general direction of the County Attorney, the Assistant County Attorney will draft complaints and pleadings.
- Researching pertinent case law, decisions, and legislations.
- Conduct Bench trials and all required hearings related to the assigned caseload in the Circuit Courts.
- Responsible for prosecution of misdemeanor domestic violence and juvenile crimes in the Circuit and Family Court.
- Participate in Police Department trainings to keep police officers current on domestic violence case

law and protocol.

- Must be able to handle multiple tasks, meet deadlines, be organized, have communication skills, and able to negotiate. Must be an effective team member.
- Have a working knowledge of principles and rules of criminal law and the New Hampshire criminal justice system.
- Mandatory criminal record check is required for all new employees.
- Salary will commensurate with litigation experience

#### Benefits:

Medical, Dental, Life Insurance, Holiday & Sick time, Longevity Pay, Short Term Disability, NH Retirement System, Mileage Reimbursement, County issued cellphone

Please send cover letter, resume, and references to County Attorney **Tom Velardi** at [tvelardi@co.strafford.nh.us](mailto:tvelardi@co.strafford.nh.us)

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## NH Judicial Branch –Deputy Clerk – Administration NH Supreme Court (#23-99)

The New Hampshire Judicial Branch is accepting applications for a full-time Deputy Clerk – Administration at the NH Supreme Court in Concord, NH.

### JOB DESCRIPTION:

Under limited supervision, the deputy clerk – administration supervises and manages the day-to-day operations and functions of the Supreme Court Clerk's office and serves as the principal resource person for all Supreme Court staff and justices on technology needs and issues. Work is primarily managerial and includes responsibility for establishing and maintaining office and record-keeping procedures and practices; work requires thorough knowledge and substantial experience in effective use of technology in case processing and office administration. Work requires the exercise of independent judgment and initiative.

Employees in this position may be required to travel during the regular course of business, and are subject to transfer or reassignment at the discretion of the Supreme Court. May act as Clerk of the Supreme Court in the absence of the Clerk of the Supreme Court.

Visit <https://www.courts.nh.gov/careers> for a complete Job Description.

**SALARY RANGE:** \$69,673 - \$102,570

### DESIRABLE EDUCATION AND EXPERIENCE:

Bachelor's Degree in Business Administration, Justice Studies, or closely related field preferred; AND, five years of progressively responsible supervisory experience involving personnel management, caseload management, information systems or closely related responsibilities; Additional years of experience may be substituted for 2 years of the 4-year educational requirement if comparable knowledge, skills and abilities have been achieved; Additional years of education may be substituted for 1 year of the 5-year supervisory requirement if comparable skills and responsibilities have been achieved.

Show position number on application and cover letter. Applications are required.

### APPLICATION:

E-mail application to [applications@courts.state.nh.us](mailto:applications@courts.state.nh.us), fax application to (603) 513-5454 or mail application to Administrative Office of the Courts, One Granite Place, Suite N400 Concord, NH 03301. Application Deadline: June 28, 2023. The Application is located at <https://www.courts.nh.gov/sites/g/files/ehbemt471/files/documents/2021-04/nhjb-2099-dfps.pdf>.

Applicant must successfully pass a criminal record check.

Equal Opportunity Employer

## NH Judicial Branch – General Counsel (Position #23-75)

The New Hampshire Judicial Branch is accepting applications for a full-time General Counsel located at the Administrative Office of the Courts in Concord, NH.

### JOB DESCRIPTION

Highly responsible, confidential position serving as in-house legal counsel providing legal advice and representation for the Administrative Office of the Courts (AOC), which serves as the business component of the New Hampshire Judicial Branch (NHJB), and for the courts in matters of administration including but not limited to personnel matters, threatened civil actions against employees, administrative staff and judicial officers, and other matters not related to the adjudicative function of the courts. The individual in this position is expected to exercise a high degree of initiative and critical thinking. This position may have supervisory responsibility of one or more subordinate staff.

Employees in this position may be required to travel during the regular course of business and are subject to transfer or reassignment at the discretion of the Director of the Administrative Office of the Courts. The position is subject to sufficient and continued funding by the Legislature.

Visit <https://www.courts.nh.gov/careers> for a complete Job Description.

**SALARY RANGE:** \$86,697-\$127,686

### DESIRABLE EDUCATION AND EXPERIENCE

Juris Doctor, Seven (7) years as a practicing attorney or equivalent experience, preferably with significant experience representing governmental entities and prior experience with New Hampshire law or, any equivalent combination of training, education, and experience that provides the required skills, knowledge, and abilities.

Show position number on application and cover letter. Applications are required.

### APPLICATION

E-mail application to [applications@courts.state.nh.us](mailto:applications@courts.state.nh.us) or fax application to (603) 513-5454 or mail application to Administrative Office of the Courts, One Granite Place, Suite N400, Concord, NH 03301. This position will be open until filled. Application is located at <https://www.courts.nh.gov/sites/g/files/ehbemt471/files/documents/2021-04/nhjb-2099-dfps.pdf>

Please contact Dianne Martin, Director, Administrative Office of the Courts, Concord, NH via email at [dmartin@courts.state.nh.us](mailto:dmartin@courts.state.nh.us) with questions regarding this position. Applicant must successfully pass a criminal record check.

Applicant must successfully pass a criminal record check.

The NH Judicial Branch is an Equal Opportunity Employer



## ENERGY, ENVIRONMENTAL, AND TELECOMMUNICATIONS ATTORNEY

**Downs Rachlin Martin PLLC (DRM)** – one of Northern New England's largest law firms - is seeking an energy law / public utility attorney with at least two years' experience to join the firm's Energy, Environment, and Telecommunications Industry Group in its Burlington, Vermont office. The ideal candidate will have experience in permitting and regulatory compliance, commercial energy transactions, and public utility regulation, including practice before or in connection with the public utility commissions of Vermont and New Hampshire, the New Hampshire Site Evaluation Committee, and/or municipal planning and zoning entities in either state. Work will include siting support for renewable energy and storage facilities, involvement with major regulatory proceedings, and transactional work on behalf of project sponsors, investors, and lenders.

This is a unique opportunity to join our team of industry-leading energy law and public utility professionals based in our Burlington and Lebanon, New Hampshire offices. Consistently ranked among the best places to live in the U.S. by numerous publications, Burlington provides a vibrant cultural environment, a thriving downtown, and a welcoming community, with easy access to mountains and lakes.

DRM offers excellent mentorship and training, as well as leading technology, competitive salary, and a comprehensive benefits package, including paid parental leave and two generous retirement plans.

If these qualifications and skills match yours, we would like to hear from you.

### Requirements

Research, analyze and understand specific areas of law. Excellent writing and verbal communication skills. Assist group attorneys in regulatory and siting permitting.

### Minimum Qualifications

J.D. from an accredited law school.

### Desired Qualifications

Experience or advanced degrees in environmental, energy or telecommunications.

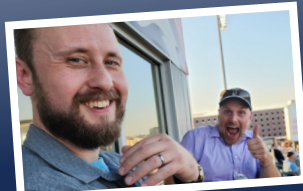
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### Trust and Estates Laterals

Hamblett & Kerrigan, P.A. seeks a partner-level lateral attorney to join its busy trust and estates department at its Nashua office. We are interested in an attorney who has the skill and experience to immediately handle complex estate matters and values being part of a collegial, tight-knit team. The professionals at Hamblett & Kerrigan enjoy a healthy work-life balance, work collaboratively on case and management tasks, and are committed to a long-term presence in the Greater Nashua and southern New Hampshire region. Hamblett & Kerrigan provides its attorneys with excellent 401(k), health and dental benefits, as well as flexibility regarding remote and onsite hours. Interested candidates should contact Kim Childs at [kchilds@hamker.com](mailto:kchilds@hamker.com)

### Laterals and Experienced Solos

Are you an experienced attorney who is unhappy with your current work environment? Are you an experienced solo practitioner in Greater Nashua who is tired of handling all administrative tasks associated with your practice? Hamblett & Kerrigan, P.A. in Nashua seeks talented laterals and partner-level attorneys who value a healthy work-life balance, have capacity to take on additional work, and are committed to a long-term, professional presence in the Greater Nashua and southern New Hampshire region. The professionals at Hamblett & Kerrigan enjoy a collegial and informal workplace and work collaboratively on case and management tasks. Hamblett & Kerrigan provides its attorneys with excellent 401(k), health and dental benefits, as well as flexibility regarding remote and onsite hours. Interested candidates should contact Kim Childs at [kchilds@hamker.com](mailto:kchilds@hamker.com)

[nashualaw.com](http://nashualaw.com)

## 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](mailto:deanna.baker@dhhs.nh.gov).

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### LEAD 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.
- Supervises and directs the work of the Assistant County Attorneys and the support staff within one of the catchment areas.
- Accounts for all aspects of investigations, preparations and prosecutions of matters within the statutory and common law jurisdiction of the County Attorney, as assigned.

#### REQUIRED EDUCATION AND EXPERIENCE

- Juris Doctor from accredited law school.
- 3 (three) to 5 (five) years of experience as a criminal attorney.

**Salary Range:** \$79,664.00 - \$111,550.40/year, 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 and drug testing for new hire. Criminal records check required.



### 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.

Prosecuting Attorney

The Lebanon Police Department is accepting applications for the position of Prosecuting Attorney.

2023 yearly salary range \$83,258.24-\$112,396.44. Comprehensive, flexible spending benefits package and enrollment in the New Hampshire Retirement System.

Minimum qualifications include: United States citizen, Juris Doctor (JD) degree; State of New Hampshire law license; member in good standing of the NH Bar Association. One (1) to three (3) years of experience in criminal prosecution; three (3) to five (5) years of experience in criminal prosecution preferred.

Apply at [Lebanonnh.gov/Employment-Opportunities](http://Lebanonnh.gov/Employment-Opportunities)

Police Department Prosecutor  
Town of Ossipee, NH

The Ossipee Police Department is seeking a skilled attorney to fill the part-time position of Police Prosecutor to manage criminal cases. The Prosecutor will handle all misdemeanor level charges for the Town of Ossipee to exclude domestic violence charges.

Salary Range: \$29,000(+) yearly for a max of 16 hours per week. The terms of payment may be negotiable. Submit cover letter and resume to:

Town of Ossipee  
ATTN: Sgt. Sean Mask  
PO BOX 307  
Ossipee, NH 03814  
Or via email to: [smask@ossipee-nh.gov](mailto:smask@ossipee-nh.gov)  
The position will remain open until filled.

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/>

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Oct. 18, 2023	Oct. 2, 2023	Oct. 9, 2023
Nov. 15, 2023	Oct. 30, 2023	Nov. 6, 2023
Dec. 20, 2023	Dec. 4, 2023	Dec. 11, 2023
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