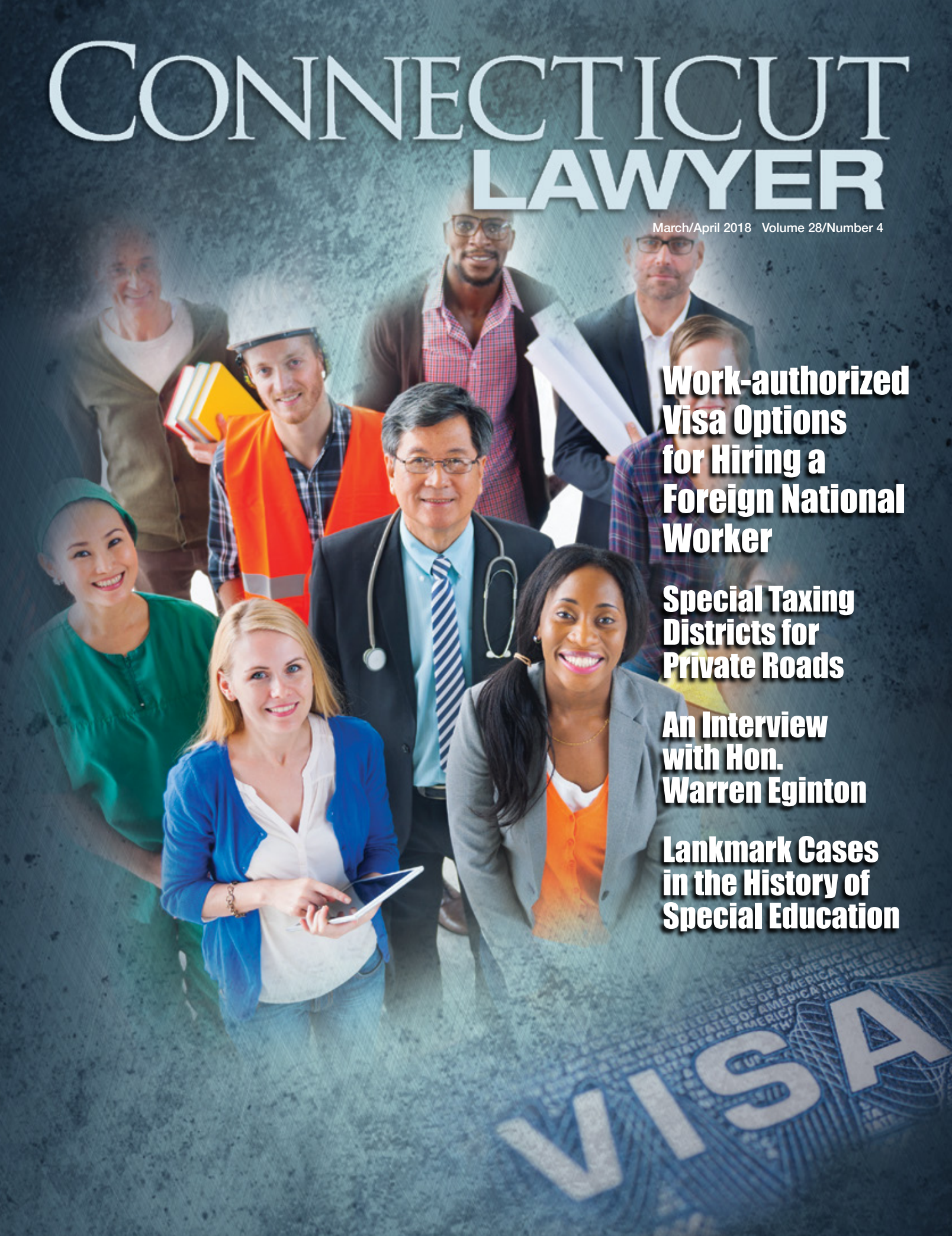
CONNECTICUT LAWYER

March/April 2018 Volume 28/Number 4



Work-authorized Visa Options for Hiring a Foreign National Worker

Special Taxing Districts for Private Roads

An Interview with Hon. Warren Eginton

Lankmark Cases in the History of Special Education

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5 Things Every Lawyer Should Know about the Connecticut MCLE Rule

1. You Must Earn 12 Credits

- All attorneys* must complete 12 hours of continuing legal education (CLE).
- Of those 12 credits, two must be in ethics.
- If you earn more than the required 12, you may carry over two credits into the following year.

2. How to Earn Credits

- In-person CLE programs: The most common way of earning credits. Visit ctbar.org/calendar for a full list of seminars.
- On-demand: Access a wide variety of video and audio CLE products in the comfort of your home or office through our Education Portal at ctbar.org/EducationPortal.
- Alternative ways to earn: Teach a CLE seminar, write articles for publications like *Connecticut Lawyer* magazine, or teach courses at an ABA accredited law school.

3. Tracking Your Credits

- The CBA offers a free CLE Credit Tracker for all members.
- Courses completed through the CBA, whether through an in-person program or an on-demand product, are automatically added to the tracker.
- You may also add any self-study credits manually.
- To access your CLE Credit Tracker, visit ctbar.org/CLETracker.

4. How to Report Your MCLE Credits

- There is no requirement to send in written proof of your MCLE compliance—the program is a self-reporting system. The CBA does not report any credits to the judicial branch and is not affiliated with Connecticut Judicial Branch.
- Each attorney must keep track of their courses and hours accumulated, and must maintain these records for seven years. Check your CLE Credit Tracker to view the courses you have taken!

5. MCLE is Easy with the CBA!

- After earning your 12 credits, all you need to do is indicate that you have complied with the rule on your annual attorney registration form filed with the judicial branch.

For the full MCLE rule, visit the Connecticut Judicial Branch website at jud.ct.gov/MCLE

MCLE Anywhere, Anytime

Visit ctbar.org/CLEOnDemand for our full course catalog.

Connecticut Bar Association
CLE on-demand

*Except those exempt by the MCLE rule. To read the rule, visit jud.ct.gov/MCLE.

CONNECTICUT LEGAL CONFERENCE

Presented by

Connecticut Bar Association

Earn All 12 of Your MCLE Credits with the Connecticut Legal Conference*

Monday, June 12
Connecticut Convention Center, Hartford

Be a part of the largest annual gathering of legal professionals in Connecticut!

Connect and collaborate with the leaders of our community at networking breakfasts, the annual meeting luncheon, and the President's Reception.

*Full-day member registrants can earn six CLE credits at the conference, and will receive access to on-demand versions of more than 15 conference seminars for full CLE credit.

Don't Miss:

Annual Reviews of Case Law and Legislation in:

- Appellate Advocacy
- Commercial Law and Bankruptcy
- Construction Law
- Family Law
- Real Property
- Workers' Compensation Law

Legal Tech and Law Practice Management Training

Barron Henley, Affinity Consulting, Columbus, OH
- Mastering Word for the Law Office
- 60 Legal Tech Tips, Tricks, Gadgets, and Websites in 60 Minutes
- Office 365 in a Law Firm
- Productivity Tools: Practice Management Software and Outlook

Full Track in Ethics, Including: *Shifting Landscapes: Adapting Your Firm to Emerging Threats*

Attend this seminar and earn up to 7.5 percent premium credit off two years on professional liability insurance offered through the CBA endorsed program underwritten by CNA

Luncheon Keynote Speaker: *Beyond* Making a Murderer*: Bridging the Gap Between Law and Jornalism*

Aaron Keller, JD, Law & Crime Network, Abrams Media, New York, NY
Keller's reporting on the Wisconsin Steven Avery case was featured in the hit Netflix docuseries *Making a Murderer*

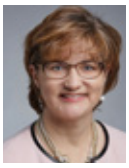
Over 40 Practical CLE Seminar Including:

What is Blockchain, and Why Should I Care?

Dena M. Castricone, Murtha Cullina LLP, New Haven

Scott L. Kaufman, Sullivan & Worcester, New York, NY

Peter Van Valkenburgh, JD, Research Director, Coin Center, Washington, DC



Suzanne Brown Walsh, Murtha Cullina LLP, Hartford

The Fearless Cross-Examiner: Win the Witness, Win the Case

Patrick Malone, Patrick Malone & Associates PC, Washington, DC

ABA TechShow Speakers

Heidi Alexander, Massachusetts Law Office Management Assistance Program, Boston, MA

Robert J. Ambrogi, Law Office of Robert J. Ambrogi, Rockport, MA

Why "One Size Fits All" Efforts Fail: Tackling the Biases that Still Frustrate Meaningful Racial and Ethnic Diversity and Inclusion

Justice Maria Araujo Kahn, Connecticut Supreme Court

Karen DeMeola, President, Connecticut Bar Association; UConn School of Law, Hartford

Fred Lee, Assistant Professor of Political Science and Asian American Studies, University of Connecticut

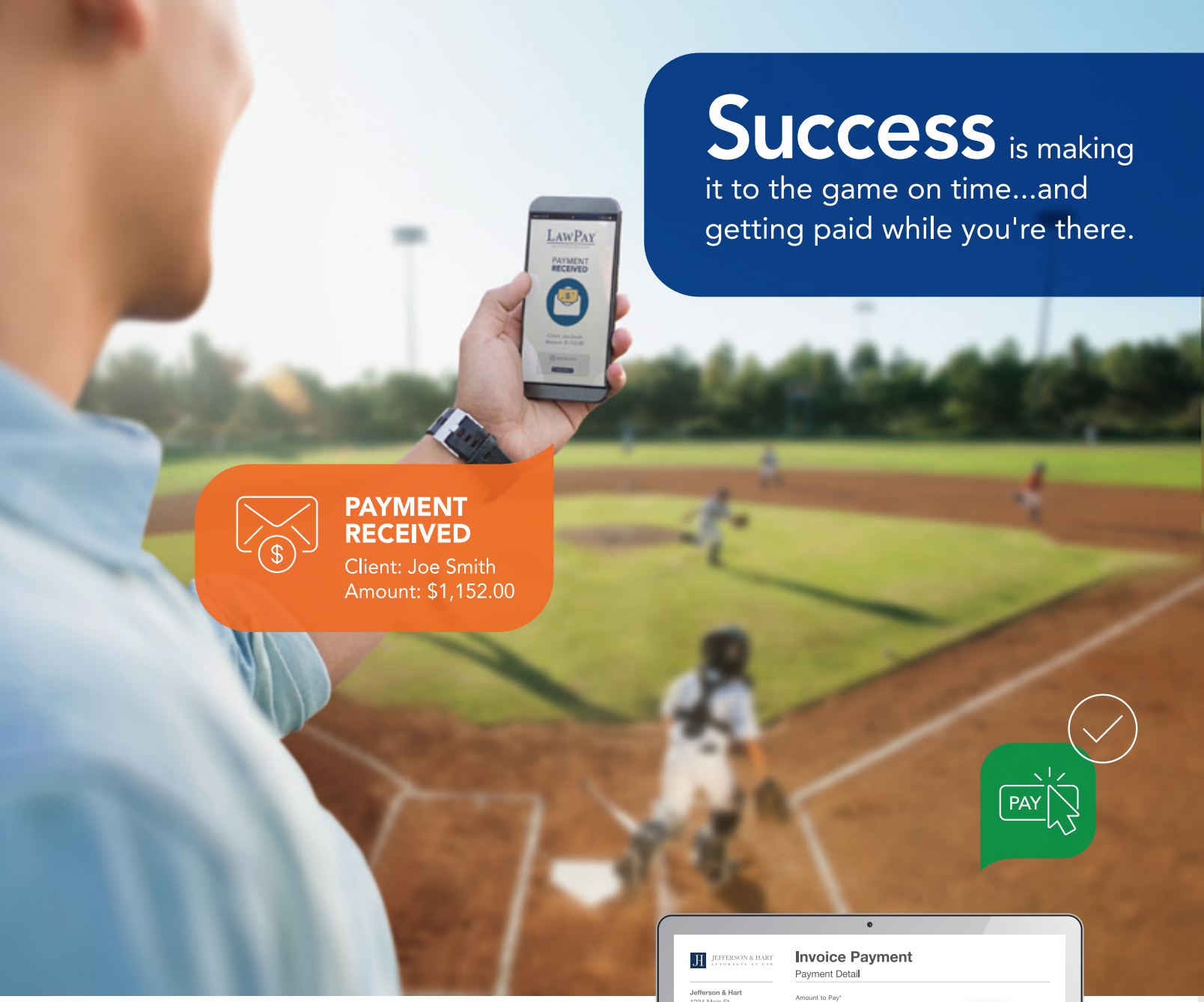
James G. Leipold, Executive Director, National Association for Law Placement, Washington, DC

Michelle L. Querijero, Co-chair, Education Initiative of the CBA Diversity and Inclusion Committee, Allied World Insurance Company, Farmington

Asker Saeed, Director of Diversity and Inclusion, Fried Frank Harris Shriver & Jacobson LLP, New York, NY

Neeta M. Vatti, Co-Chair, Education Initiative of the CBA Diversity and Inclusion Committee, Quinnipiac University School of Law

Register at ctlegalconference.com



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CONNECTICUT LAWYER

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Have an idea for an article? Contact editor@ctbar.org. All suggestions are welcome.

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FEATURES

COLUMNS

DEPARTMENTS

Karen DeMeola is the 94th president of the CBA. She is the assistant dean of student life at UConn School of Law, where she plans, manages, and oversees programs and services for the student body, including career planning, disability services, and student services. She advises students confronted with a variety of issues, including academic advising, personal matters, and wellness challenges such as addiction and mental health concerns. In addition, Dean DeMeola is charged with implementing and managing diversity programming as well as professional and community development activities.

Blind Spots

By Karen DeMeola

We all have blind spots—those spaces where we fail to see clearly. In these shadows, our biases and preconceived notions of people and experiences exist, threatening our ability to create diverse and inclusive communities; lead effective teams; and make our organizations more impactful, innovative, and successful. Some of our blind spots are self-reflected and self-directed. We cannot see ourselves because of the ways in which the media, legal system, profession, and others see us. The history of our country and our profession, our families, life experiences, and media have all played a role in the creation of these blind spots.

With continued attention on diversifying the bar and the bench, many have added their voice and resources to the conversation. Many people working in this space have different versions of what that progress looks like personally and professionally. Whether the rationale for engaging is about numbers, the bottom line, client satisfaction, the right thing to do, or to create more effective and successful organizations, we are all working toward a more diverse and inclusive profession. We have a long way to go.

Change does not occur overnight as those of us working on diversity and inclusion can attest; the glacial pace is frustrating but there has been incremental progress. There are currently 31 signatories to the CBA Diversity & Inclusion Pledge & Plan.[1] Signatories not only attend the annual Diversity & Inclusion Summit, but also continue to examine ways to create and maintain diverse and inclusive organizations. Many organizations locally and nationally have committed to diversity and inclusion by developing policies and pipeline programs aimed at increasing diversity in the profession. The National Association for Law Placement's (NALP) *Report on Diversity in U.S. Law Firms* highlights that though white men comprise the largest demographic at all levels in law firms, there have been small gains in the associate demographics.[2] Such shifts likely reflect pipeline programs and the intentional shift toward diversity in the profession.

The shift to a more diverse profession cannot happen unless and until we look at the ways in which individual and institutional biases contribute to the problem.

Check Your Own Biases

Our brains allow us to take mental shortcuts to help interpret the volume of information that comes at us daily. Though this is an amazing tool, in particular for attorneys and others in high stress positions, it also leads to making decisions based on biases. One way to test bias is to take an Implicit Association Test (IAT).[3] The IAT presents computerized tests to determine whether a person has hidden or unconscious biases along identity lines. The results are sometimes shocking, and other times unsurprising. The test reveals a bias; it does not mean that one is a racist, misogynist, or anti-Christian, for example.

Assuming you are open to processing the information, it can assist in taking an introspective approach to determine whether, or if, any of your biases are impacting your decision-making as it relates to your recruitment and retention efforts, or your ability to create an inclusive workplace.

Ask Who Is Missing and Why

As you look around your organization, who is missing? You might be surprised. Look at your organization's demographics and ask, "Who makes up our organization, and who is missing at each level?"

There are reasons people are missing. Reasons that have to do with systems of oppression that shaped access to housing, education, and employment. The colleges we attended or the profession we chose were similarly impacted by regulatory or legal prohibitions on attendance and bias of the gatekeepers at every stage throughout. Similarly, institutional frameworks continue to exist within our practice that dictate recruitment and retention in our organizations. You cannot alone cure the national systems in place that allow the status quo to continue but you can challenge your belief system around meritocracy and your own bias, and ask how your organization continues to impede your ability to have a diverse organization.

Use the Power of the Narrative

There is great power in storytelling. The narrative form has been effective in bringing people together, in creating cultural competence, and can help challenge and eliminate biases. When entering a room, we look for people we know, and barring none, we look for those with whom we might have some commonality. Too often, that commonality begins and ends on race and gender—even in a room full of lawyers. Talking and sharing our stories is so important to moving the conversation around diversity and inclusion forward; yet many times, we disengage. Our biases, our anxiety, and our lack of time get in the way of getting to know our colleagues. Without that relationship building, we might never learn the ways in which our organizations are and are not inclusive.

Get Uncomfortable

Challenge yourself and your organization to look at all of the ways in which your policies and practices, your behaviors, your biases, impact or could impact diversity and inclusion in your organization. This list is not exhaustive but can spark necessary conversations:

- Are you contributing to the conversation around diversity and inclusion?
- Why can't you move diversity and inclusion forward?
- What biases exist?
- Who is missing and why?
- Who is being mentored or, more importantly, for some organizations, sponsored?
- What are the unspoken rules in your organization, and to whom and how is information about said rules shared?
- Who is silenced in your organization?
- Why are your policies in place and who is impacted by those policies?
- Is there a better way to approach recruitment that might allow for a more complete, narrative, approach to evaluating a candidate?
- Why are you losing talent?

Diversity and inclusion takes intentional and strategic actions by all of us. Change begins at the top and must be championed by those with the most power in the organization. It is difficult to make changes personally. It can be more difficult for some of us to make changes to systems and practices that we played a role in creating. However, making those changes can transform our organizations and our profession for the better. **CL**

Notes

1. For more information about the CBA's Diversity and Inclusion Policy, Pledge, and Plan, visit ctbar.org/?Diversity.
2. See National Association for Law Placement (NALP) 2017 Report on Diversity in Law Firms, found here: nalp.org/diversity2.
3. Visit projectimplicit.org to learn more.

Upcoming Education Calendar

Conferences

Connecticut Legal Conference

June 11
Connecticut Legal Conference

Seminars

April 20
75 is the New 65: The Aging Workforce and Its Impact on Workers' Compensation Practice

April 25
Will and Trust Drafting Essentials

April 26
Medical Insurance Essentials for Advising the Elderly, Disabled, and Impoverished

April 30
Rethinking Sexual Harassment Prevention

May 8
The Anatomy of a Medicaid Application

May 11
Title IX, Sexual Harassment and Violence in Schools: The Current State of the Law

Law Practice Management

Law Practice Management Center

April 18
Building your Practice by Handling Consumer Matters

April 27
HR 101

May 2
The Grit Project: How to Develop the Secret Skills of America's Top Women Attorneys

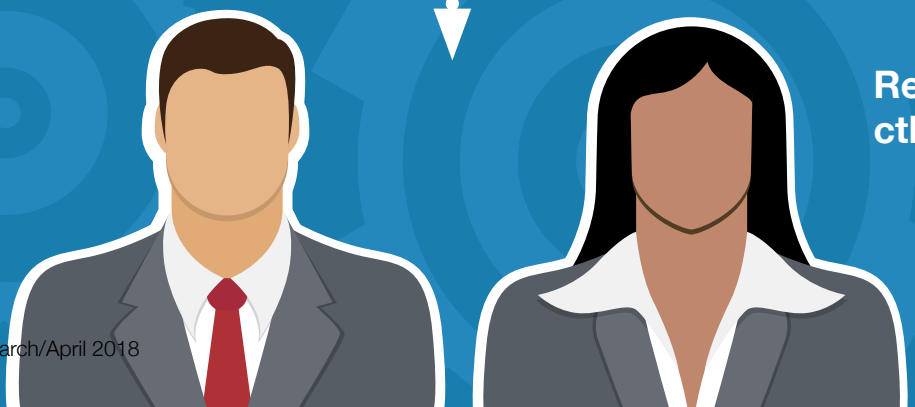
Ethics

Ethics

April 24
Handling Thorny Ethical Issues in Commercial Litigation

May 4
Modest Means Representation and Unbundled Legal Services

Connecticut Law Tribune BEST OF 2017 WINNER
CLE PROVIDER-ONLINE
CONNECTICUT BAR ASSOCIATION



Register at ctbar.org/CLE

Author and Moth Speaker Presents at Litigation Section Meeting

At a recent Litigation Section meeting, attendees learned how litigators can better tell their stories and capture the attention of a judge and jury from four time best-selling author **Matthew Dicks.** Matthew's talk was informed by not only authoring four novels, but also by his experience speaking on the nationally syndicated Moth *Radio Hour*, and personally wading into the legal system. He has previously lectured on storytelling at UConn Law, Yale, and Purdue. CL

Best-selling author and professional storyteller Matthew Dicks with Litigation Section Chair William J. O' Sullivan.

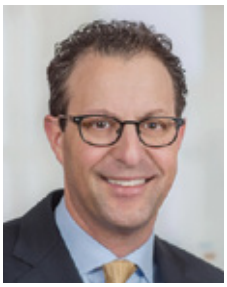
Washington, DC Expert on the Tax Cuts and Jobs Act Speaks at Section Meeting

Seth Hanlon, senior fellow at the Center for American Progress in Washington, DC and expert on the Tax Cuts and Jobs Act of 2017, spoke at a joint Tax and Business Law Section meeting on the recent federal tax changes. His presentation provided attendees with an update regarding the 2017 Federal Tax Reform Legislation, including changes to corporate and business taxes, income tax and deduction changes, payroll and withholding changes, and more.

Seth is a former special assistant to the president for economic policy at the White House National Economic Council, where he coordinated the Obama administration's tax policy. He has also served as senior tax counsel under Representative Chris Van Hollen, tax counsel for Senator Debbie Stabenow, and his work has been cited in *The New York Times* and *The Washington Post*. CL

Seth Hanlon, senior fellow at the Center for American Progress in Washington, DC, with Tax Section Chair Luke Tashjian.

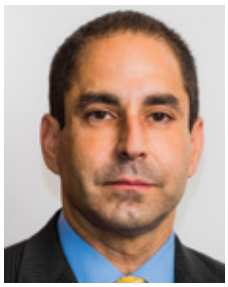
Day Pitney LLP Partner Helps Raise over $1,000,000 for Charity



Joshua W. Cohen, partner in Day Pitney LLP's New Haven office, ran seven marathons in seven days on seven continents as part of the World Marathon Challenge. Attorney Cohen and his team, Team Hold the Plane, raised over $1,000,000 for 11 organizations, including the ALS Association, Stand Up to Cancer, the Multiple Sclerosis Foundation, Boys & Girls Clubs of America, and the Michael J. Fox Foundation.

The World Marathon Challenge began in Antarctica and ended in Miami, FL. The 55 athletes who participated in the challenge ran marathons in Antarctica, Africa, Australia, Asia, Europe, South America, and North America. CL

Governor Malloy Nominates CBA Member for Commissioner of DVA



Governor Malloy announced that he is nominating **Thomas J. Saadi** to serve as the commissioner of the Connecticut Department of Veterans Affairs (DVA). The mission of the DVA is to provide care for the approximately 200,000 veterans living in Connecticut and their dependents.

Prior to joining the DVA in 2015 as its general counsel and eventually becoming chief of staff, Attorney Saadi served as an assistant attorney general and special prosecutor, in which he litigated numerous cases and supervised investigations to stop false and deceptive practices recover funds for the State of Connecticut. Attorney Saadi is also a Major in the US Army Reserve, serving with the 411th Civil Affairs Battalion. CL

In Memoriam

Shelagh Heffernan O'Neill passed away at the age of 87 this January. Following years of civic engagement and political involvement, Attorney O'Neill graduated from UConn School of Law in 1976. Shortly after graduating law school she co-founded Leete O'Neill & Kosto, the first all-female law firm in Connecticut. Her prior CBA involvement included membership in the real property and the estates and probate sections.

On January 30, 2018, **Patrick H. Bowen** passed away at the age of 78. Prior to opening his solo practice, the Law Office of Patrick H. Bowen, he served several roles with Kennecott Copper and was general counsel for Allied Stores. Attorney Bowen received his BA from Marietta College, his JD from Duke University School of Law, and his MBA from Columbia University Business School. CL

Sudha Setty Named Next Dean of Law School

Western New England University School of Law Professor **Sudha Setty** has been named the next dean of the law school. She joined the faculty in 2006 and currently serves as professor of law and associate dean for the faculty development and intellectual life.

Professor Setty has received numerous awards for her work, including the 2017 Connecticut Bar Association Tapping Reeve Legal Educator Award, and two Western New England University School of Law Professor of the Year honors. Prior to entering academia, she served as a litigator with a focus on antitrust and securities regulation matters. She earned her JD from Columbia Law School and her AB from Stanford University. CL

CBA Selects New Executive Director

The Connecticut Bar Association is pleased to announce its addition of Attorney Keith J. Soressi as the new executive director of the association on February 26, 2018.

"Keith's extensive bar association experience and innovative approach to the future of the profession makes him a great fit for the CBA. I look forward to working with him," stated CBA President Karen DeMeola.

Attorney Soressi comes to us from one of the largest suburban bar associations in the country, the Nassau County Bar Association, where he served as executive director since 2012. Prior to his time there, he was the associate executive director of the New York State Bar Association.

In these positions, he directed bar operations and implemented policies, objectives, and programs, as well as oversaw the operations of finance, membership, CLE, and more. He received his BA in political science from University of California, Berkeley, his JD from the University of San Francisco, and has held positions at the District of Columbia Bar and the State Bar of California.

"I look forward to leading an organization that has made the advancement of diversity and inclusion and adjusting to the changing methods of delivering legal services and client expectations an integral part of its mission," said Soressi. **CL**

CBA Hosts Member Appreciation Week with Events across the State

Connecticut Bar Association
MEMBER! APPRECIATION WEEK
March 5-9, 2018

Judges Kevin C. Doyle, Kimberly A. Knox, Gerald L. Harmon, and Barry Armata shared their path to the bench at a luncheon at the CBA Law Center.

During the week of March 5, the Membership Committee celebrated Member Appreciation Week by hosting free events across the state to thank members for their continued support and membership.

On Monday, members from the eastern Connecticut area enjoyed breakfast at the Lake of Isles in North Stonington. That evening, attorneys with more than 20 years of practice gathered in Bridgeport for a reception. During a luncheon at the CBA Law Center on Wednesday, Judges Barry Armata, Kevin C. Doyle, Gerald L. Harmon, and Kimberly A. Knox shared their stories of their path to the bench. Thursday evening, new members met and networked with CBA leadership at a reception at BAR in New Haven. On Friday, members shredded their old files, enjoyed ice cream from Ben & Jerry's, and had the opportunity to meet the new executive director, Keith J. Soressi, at the CBA Law Center. Throughout the week, members who stopped into the CBA Law Center enjoyed some practical and sweet treats.

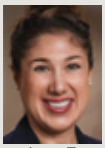
New members and CBA leaders at the New Member Reception at BAR.

"It is clear that the success of the Connecticut Bar Association lies within our membership. For that reason, we were pleased to provide a week-long appreciation to those collective individuals dedicated to our legal community," said Garlinck Dumont, chair of the Membership Committee. "In its first year revived, we believe the Member Appreciation Week to have been a great success that will only get better with time! We look forward to seeing you next year!" **CL**

Peers & Cheers

E-mail editor @ctbar.org with submissions for the Peers & Cheers section.

Attorney Announcements


Jane E. Ballerini

Jane E. Ballerini of **Neubert Pepe & Monteith PC** has been named partner of the firm. Attorney Ballerini practices in the areas of commercial real estate law, commercial finance, and general commercial and business law.


Livia DeFilippis Barndollar

Pullman & Comley LLC welcomes past CBA president (2008-2009) **Livia DeFilippis Barndollar** to their firm. Attorney Barndollar focuses her practice on family law litigation matters involving dissolution of marchage, and post judgement and appellate proceedings.


Patricia L. Boye-Williams

Patricia L. Boye-Williams of **Murtha Cullina LLP** was elected to the Town Council of Farmington, representing the 2nd District. She is a member of the firm's environmental and renewable energy practice groups, and is a former assistant attorney general.

Nicholas Caiafa recently joined **McCarter & English LLP**'s Stamford office as an associate in the intellectual property/information technology practice group.


Britt-Marie K. Cole-Johnson

Robinson+Cole attorney **Britt-Marie K. Cole-Johnson** was appointed to the advisory board of Teach for America–Connecticut, a national corps of leaders committed to teaching low-income schools and confronting educational inequity.


Catherine A. Cuggino

Murtha Cullina LLP welcomes **Catherine A. Cuggino** as an associate in the firm's business and finance department. She is also a member of the real estate practice group.


Peter Knight

Peter Knight of **Robinson+Cole** was appointed to Connecticut Legal Services' (CLS) board of directors. CLS is dedicated to helping low-income families and individuals meet their basic needs and to be assured equal access to opportunities and justice.

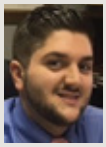

Lorey R. Leddy

Murtha Cullina LLP welcomed **Lorey R. Leddy** as counsel in their litigation department. Attorney Leddy has extensive trial and appellate experience in corporate and individual client matters pending before both the state and federal courts.

Jeffery Matrullo, associate in the Hartford office of **McCarter & English LLP,** was re-elected to the Board of Education in Cromwell.


Thomas D. Colin

Retired superior court judge, **Thomas D. Colin**, has rejoined **Schoonmaker George & Blomberg PC**. The firm, now known as Schoonmaker George Colin & Blomberg PC, provides legal representation in matrimonial and family law matters.


Steven D. Morelli

Steven D. Morelli has joined **The Law Offices of Mark E. Salomone & Morelli**. Prior to joining the firm, Attorney Morelli completed a one-year appointment as a law clerk for the judges of the Hartford Superior Court.

Basam Nabulsi, partner in the Stamford office of **McCarter & English LLP**, was elected to the Planning and Zoning Commission in Wilton.


Tracy A. Saxe

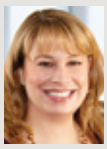
Managing partner of **Saxe Doernberger & Vita PC**'s Trumbull office, **Tracy A. Saxe**, was awarded with the Words of Wisdom Award at the 37th IRMI Construction Risk Conference. This award recognizes one speaker who has made an outstanding contribution to the construction risk management community.

Firm/Organization Announcements

Halloran & Sage LLP attorneys and staff gave back in a firm-wide donation drive to the New Haven Community Soup Kitchen, Family & Children's Agency of Norwalk, and Hands On Hartford, donating Halloween candy and fruit, toiletries, and winter accessories and basic necessities.

People's United Bank and **Pullman & Comley LLC** hosted the fifth annual Celebrating Diversity in the Greater Bridgeport Business Community event reception. The event highlighted the work of local women and minority-owned businesses.


Kathleen E. Dion


Lisa C. Riccio


Evan J. Seeman


Lauren M. Sigg


Jonathan E. Small

Robinson+Cole promoted the following associates to counsel in their Hartford office: **Kathleen E. Dion, Lisa C. Riccio, Evan J. Seeman, Lauren M. Sigg, Jonathan E. Small,** and **Sorell E. Negro**, who works primarily in the firm's Miami office.

Seiger Gfeller Laurie LLP has opened an additional office in Boston, MA. The firm now has a total of four offices throughout the northeast region, including Connecticut, New York, and New Jersey. CL

BUILDING EXPERTISE MAKING CONNECTIONS ADVANCING CAREERS

Lisamaria Proscino
Human Rights and Social Justice LLM Student

"The Human Rights and Social Justice LLM has given me a broader understanding of the law and how it impacts all people. It's given me, as a prosecutor, a deeper insight into what I do on a daily basis and how I can promote positive change."

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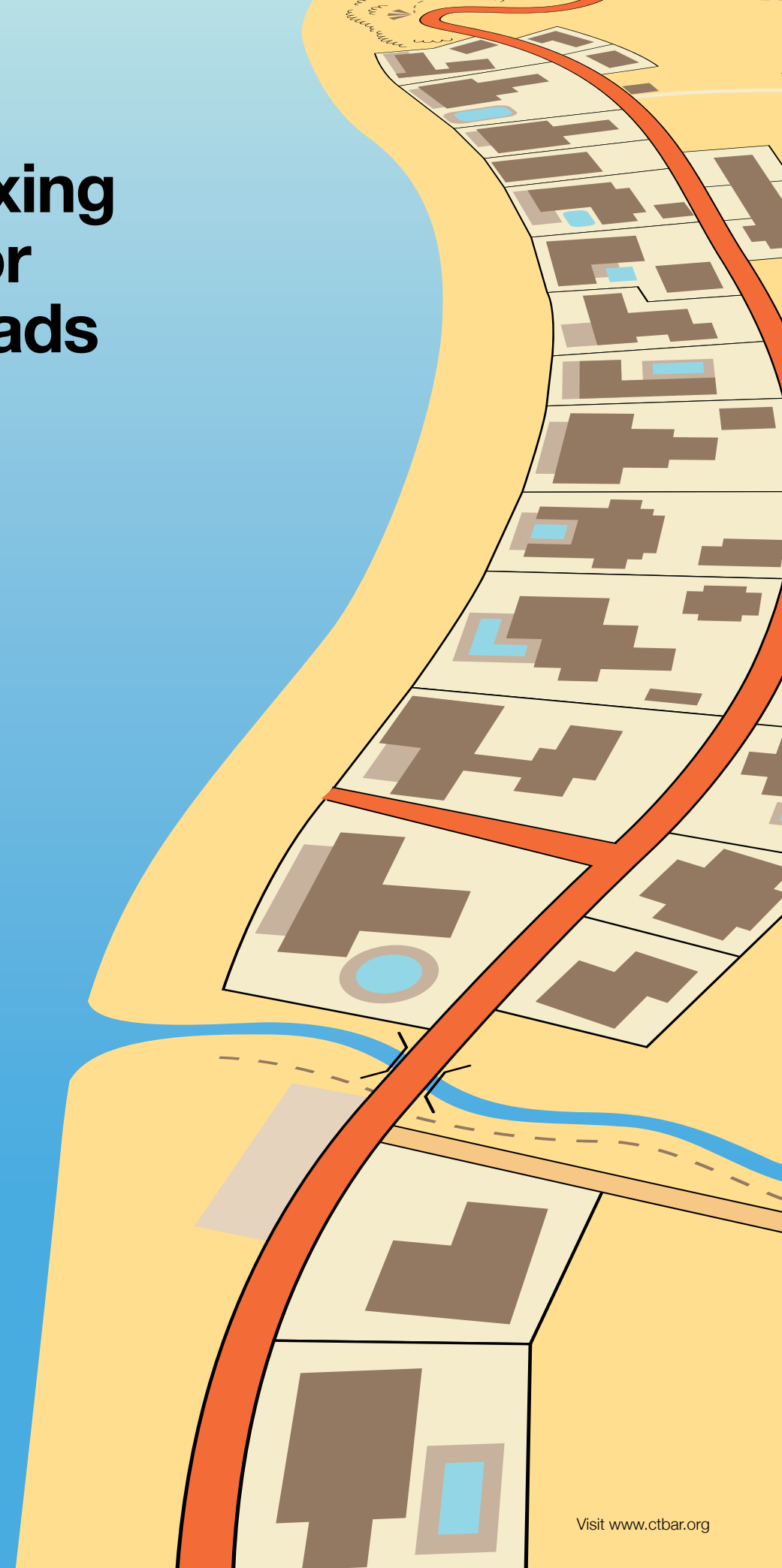
Special Taxing Districts for Private Roads

By Eugene E. Cederbaum



Background

In 2014, the Connecticut General Assembly passed a law, Public Act 14-67, providing that all owners of residential property having easements or rights-of-way for access over property owned by another, are each responsible for the cost of maintaining them. Examples of "access" easements or rights-of-way include the right pass over another's property to a public road or a public beach as well as for the use of driveways. The act contemplates that such property owners will enter into written agreements setting forth the financial obligation of each owner for maintenance and repair. In the absence of such an agreement, the law states that costs are to be shared "in proportion to the benefit received by each such property." Unfortunately, no guidance is given for determining proportional benefits.

To access a public road from a private road, owners require an easement or right-of-way over those portions of the road owned by others. Therefore, Public Act 14-67 applies and partially addresses the obligation to pay for the costs of maintenance and repair. However, this is only one of the problems faced by property owners on private roads, as the act alone is inadequate.

In addition to payment for maintenance and repair, issues that arise on private roads include the following: governance, voting by rights of property owners, effective tax collection, capital improvements, damage caused by "teardowns" followed by the construction of "McMansions," road safety, signage, storm drains construction and/or maintenance, and even refuse collection.[1]

In view of the limitations of Public Act 14-67, it's even more important for property owners to understand and address the above issues in a comprehensive manner.

Enter the Special Taxing District[2]

Formation of a special taxing district is relatively simple and can be accomplished within three months or so. If the statutory scheme is followed, boards of selectmen or city councils *must* approve formation. Once formed, district members meet annually to pass budgets for the upcoming year. (The first budget covers the period from the date of formation to the following June 30th). In the same manner as municipal taxes are determined, once the budget is passed, a mill rate is determined with reference to the district's "grand list" and multiplied by the assessed value of each property. Tax bills are then prepared and delivered.

The formation process is begun by the submission of a petition to the municipality. The petition describes the proposed geographic boundaries and purposes of the proposed district. It must be signed by at least 15 registered voters residing within the proposed district. If the petition is properly filed, the board or council must schedule a meeting to consider the petition within 30 days. At the scheduled meeting, a minimum of 15 registered voters residing within the proposed district must be in attendance. At least two-thirds of those actually in attendance must vote in favor of formation. As previously noted, if all of the foregoing prerequisites are met, the board or council must approve formation.

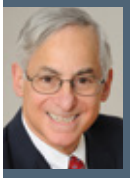
Once formed, the district meets to elect officers, sets a date for annual meetings, passes formation ordinances, and adopts an interim budget. District taxes are determined in the same manner as municipal taxes. Should payment not be received in a timely manner, a lien may be filed automatically without the need to commence legal proceedings. Interest on unpaid district taxes accrues at the rate of 18 percent per annum. In sharp contrast, other forms of private road governance require a court order authorizing the lien. District taxpayers are thus clearly motivated to pay taxes when due to avoid the filing of a lien, the accrual of interest, and possible foreclosure.

The district should also address the possibility of liability faced by individual property owners and/or the district. This writer recommends that each property owner insure against personal injury and other claims either by obtaining coverage under homeowner policies or through an umbrella policy, or both. Districts should also obtain a general liability insurance policy in its own name. Lastly, the officers and directors should also be indemnified for claims against them through appropriate insurance coverage.

Almost as icing on the cake, there are at least three additional benefits unique to special taxing districts:

1. Taxes paid to a district are *deductible on income tax returns* to the extent permitted by law. It should be noted, however, that the IRS periodically and critically reviews the tax deductibility of district taxes.
2. Some years ago, Connecticut passed a law *exempting special taxing districts from paying sales tax.* Given that the costs associated with maintenance and repair, particularly repaving, has grown significantly, the sales tax exemption is significant.
3. *Unanimous votes are not required* to pass annual budgets, assess taxes, or take other actions.

There is no "downside" to forming a special taxing district. Connecticut has simply passed legislation that levels the playing field for road maintenance and repair on both public and private roads. **CL**



Eugene E. Cederbaum practices law in Westport with a focus on taxing districts. He is a former president of the Westport Bar Association, and has served on the Westport Representative Town Meeting

Notes

1. Conn. Gen Stat. § 7-326 contains a comprehensivelist of purposes for which districts may be formed. Note, only those purposes set forth in the petition for formation apply to any particular district.
2. *See,* generally, Conn. Gen. Stat. § 7-324, *et seq.*

In Conversation: The Honorable Warren W. Eginton

By Noah Jon Kores

The Honorable Warren W. Eginton is a senior judge on the bench for the United States District Court in the District of Connecticut. He was appointed in 1979 and, at the time, was one of seven federal judges in Connecticut. He was born in 1924 in Brooklyn, NY. Judge Eginton went to Princeton University, took a break to fight in World War II where he was stationed in the Pacific and, when he returned, he finished college and went on to graduate from Yale Law School in 1951. He began his practice at the New York City firm of Davis Polk but shortly moved to Cummings & Lockwood LLC, where he stayed until he competed with, and prevailed over, T. Clark Hull to obtain an appointment to the federal bench in 1979 by US Senator Lowell Weicker.

Judge Eginton has tried cases since 1951 and with 66 years of experience, we sought his advice on some of the big topics.

Any tips for attorneys in the area of trial work? Let's start with motions practice: Any comments on the process?

There is a lot of discussions among judges on this. The common thread in our discussions is how do you make this less expensive? The way you start is with motions practice. I feel very strongly that 26(f) is the answer to discovery expense. To get a Rule 30 conference costs money and you get into discovery issues that should be handled from the very beginning. Within the first three months after the case is filed and the pleas are closed or a motion is filed to dismiss, the idea is to get the attorneys together and a 26(f) conference does that.

What's your preference in selecting juries and the attorneys' role in that process?

In federal court, we do it as a panel, and I've felt in my long time on the federal bench that our practice is very good at getting a fair jury. We are pleased with what the juries do and I think the juries are pleased. We get a lot of nice comments about their experience on the juries.

I've developed my own thoughts over the years—I've tried cases in Arizona and New Mexico—and when I went there for a month or two at a time, I came to appreciate their method of selecting juries, which is to let the attorneys participate. I did that myself down there. I brought it back here and thought the attorneys ought to participate.

We have an attorney questionnaire that the law clerks modify for cases, as we need it, and it solves most of the questions. We first ask the array of 80 to 90 people, "Who is going to be away?" and get it winnowed down to 40 to 50 people and you give them the questionnaire and they answer it. At that time, there isn't much left for me to ask, but I ask the questions the lawyers want me to ask. I then turn it over to the lawyers; I have the lawyers introduce themselves, their clients, their witnesses, and so on.

Then, I have them ask any questions they want to ask. I've been doing that about the last eight years. I've never had it abused. I tell the lawyers I want them to ask specific questions of specific jurors, not all of them like a blunderbuss approach to the whole array. They discipline themselves. They bring out information that might not otherwise have been brought up if they hadn't asked the questions. I find it good practice to let those lawyers participate. I think we get better juries as a result.

How long does it take you to pick a jury?

We do it in the morning. We start early—about 8 o'clock—and we get the array in by 9 or 9:30. We are finished with the array by about 11 or 11:30. We then pick the jury and we get them out of there before lunch. I'd say the longest I've gone is 8:00 a.m. to 1:00 p.m., but I do a lot in about three hours. Most of the cases you get done by lunchtime.

Moving on to the next part of the trial process, anything you find to be effective in terms of opening statements?

I always advise lawyers, and I do this frequently in pretrial conferences: don't read. In other words, if you are going to make a presentation, do it with your wife or mother or sister or children until you are satisfied that you've got it down. Then, don't read it. Put a note on your cuff if you want as to topics, subject matter, and orientation as to where you're going. Talk. Talk to the jury, talk to the judge. Don't read, because the recipient feels that you don't know what you're talking about and that you have to read it to persuade yourself that you ought to be saying it. It's much better if you look directly at the jury and talk to them. Most of the attorneys—the good ones, in any event—heed my advice because they were doing it anyway. They know you have to talk to the jury, not read to the jury. I always tell them don't make it too long.

Jury is the best discipline factor to the lawyers because if they turn the jury off, they are going to lose the case. If they give too long or repetitious a summation, they are going to hurt their case.

There are two or three things that I tell them with my own experience, when you are putting the witness through the paces on the stand, don't make objections unless you have to. There are only two times you have to make an objection: one is when you know that the judge is as mad about it as you are and is going to support you very strongly in his or her ruling based upon the objection because they know your objection is sound and the opposing lawyer should not have done what the opposing lawyer did; and the judge is hoping you're going to make an objection and will sustain you. That's the time you want to make the objection.

The other time is when you know that the judge is wrong and the judge is not going to reverse himself or herself but the judge is wrong and it's a critical aspect of the case. You've got to object; you've got to protect the record. The judge is not going to get mad at you; they know you've got to protect the record. We really welcome the objection because it gives us the chance to think about what we did and we change it. The objection makes sense to us and we change it. That doesn't happen very often.

When a lawyer (young lawyers usually, inexperienced lawyers) objects to every little thing, that's bad to do that. You should restrain yourself.

Any advice as to direct and cross-examination?

Direct examination is inexcusable if you haven't trained or educated or "brainwashed," if you want to call it that, the witness. If you do what the attorneys do very often in the workplace discrimination cases, they call the opposition to the stand as their first witness. They cross-examine that witness and very often that's the way the case begins. In this case, my advice is to make sure you're being effective because if you open any doors, you could be in trouble. Don't open any doors you don't want to open. Make sure you pin the witness down with documentation and use everything you've got to cross-examine that witness. If you haven't got anything to cross examine that witness, you have to make a decision as to how important the witnesses [are]. If it's an important witness, you've got to do everything to discredit the witness.

If you've got a plaintiff's case and you're the plaintiff's lawyer and you put on an important witness, make sure they are really prepared. Warn them that they are going to get the question 'Did you meet with so and so and prepare to testify?' The witness should tell the jury that he did and don't worry about the effect of it because the jury expects you to be prepared and meet with the lawyer. The witness's lawyer should prepare him thoroughly and make the witness feel comfortable on the witness stand. The thing a jury picks up is repetition. You've got your point; make it; nail it down. Do it once and not more than once as you examine the witness on direct.

On cross of a hostile witness, for example, you take him or her on with documentation. You've got to have documentation to impeach these witnesses or else you're going to just make it a matter of credibility so you need to be careful and make sure you use it effectively. Using it effectively means having documentation that makes a liar out of the witness. You need to shake the credibility of the witnesses.

What about closing arguments? Anything particularly effective or ineffective?

Some judges limit openings and closings; I hate that. I hated that when I was in the pit trying cases. I've never done that on the bench. I'm going to let the jury be the disciplining factor. If counsel turn the jury off by being long-winded and repetitious, it's going to affect their case. I think what you ought to do, especially for young lawyers, depends on whose bag you're carrying. If you work for a good lawyer, go to court and watch. You should learn by watching a good lawyer in court. He should not be repetitive. He should go for the jugular. Start with the important stuff. It's the way to handle a summation.

What would you say is the biggest problem affecting the courts?

There are two major problems facing us. One of which is the expense of federal litigation. We are trying, especially through

26(f), to get the discovery less expensive than it is. Some law firms are better than others in doing that. The other problem is pro se parties. I have a lot of cases, usually employment discrimination cases. I get a call from the clerk's office and I get on the phone to a partner in some big law firm. I have them send a junior associate to the courthouse to help the person get started with filing the pleadings. I've had two or three cases where the lawyer, by the time he finishes helping, thinks maybe this is a good case after all and wants to try the case. That's one way we handle the pro se.

The other way is we have master lists of attorneys and we say 'Please come in and try the case for us' and they will do it but then they say 'We have problems with this, don't overload us with these cases.'

The increase in pro se litigants is going to be a continuing challenge for the younger judges. We do worry about it and where it's going and the cost of federal litigation is one of the factors that leads to increasing numbers of pro se parties.

What about the criminal courts?

Criminal docket is not overloading the courts with work. The reason is because the drug situation is getting under control. We have two ways to deal with this. They have support court. We also have reentry court. That is difficult though. We are not realizing as much success as we would like to in helping these criminal offenders get back into society. There's a stigma there. We lecture businesses on this. We get a lot of reaction that we get too many people that worry about hiring former convicts. They want to hire people who have no criminal record. It's tough. We keep honestly trying to educate the corporations onto the importance of this with limited success.

What's the biggest difference in the practice of law now versus when you started?

It's become a much different world with the computers. When I went on the bench, we had a typewriter then a word processing machine. One night, I was doing a brief and we did about 40 pages of the brief on the word processor and then in the middle of the night, it disappeared off the machine and we had to start from scratch. My view of word processers became very dim. Now we have computers. I rely on my clerks to help me work the computers. That's a big change in how the lawyers operate. I remember when I started out practicing law, we Shepardized everything. It was a laborious process. I used to have a desk full of open books when I was writing a brief. Now, everything is done automatically on the computer. I'd say that's the biggest change. **CL**

Noah Jon Kores is an attorney in Bridgeport, practicing in the areas of criminal defense, personal injury and workers' compensation.

US Employers: Work-authorized Visa Options for Hiring a Foreign National Worker

By Joshua S. Mirer and Jennifer L. Shanley

Employers in the United States increasingly seek to hire foreign nationals, as they possess unique perspectives and diverse backgrounds, also often having international experience, making them uniquely qualified for a particular position. The hiring process for foreign nationals, however, is different than the hiring process for US citizens. Hiring a foreign national can require company sponsorship in a related work-authorized category and an understanding of various factors that affect the chosen category. A brief overview of some of the most widely used categories, as well as the timing and other implications of those categories, are discussed in this article.

Foreign Nationals Entering the United States for Business Activities

The Most Widely Used Temporary Work Authorization Categories for Foreign Nationals in the United States.

There are many work-authorized visa categories for foreign nationals. This article focuses only on some of the most widely used categories by companies in the United States,[1] including the following: H-1B/H-1B1, TN, L-1, E-1/E-2, and O-1.[2]

H-1B/H-1B1: Work in a Specialty Occupation

An H-1B (or H-1B1 for nationals of Chile and Singapore)[3] visa category is one of the most well-known work-authorized categories for

employers sponsoring foreign nationals for work authorization. A majority of these petitions are filed by a US employer on behalf of a foreign national whose job normally requires a minimum of a bachelor's degree in a specific occupational specialty. To qualify for H-1B status, the foreign national must possess either a university degree, or a combination of education and experience equivalent to a US degree, in a field related to the offered job. While a position may qualify for H-1B status by proving that the specific duties are so specialized and complex that the knowledge required to perform the duties are usually associated with the attainment of a bachelor's degree or higher, it is a difficult standard to prove if the degree is not directly related or if the role appears to be too administrative and not always successful.

TN: NAFTA Professionals

The North American Free Trade Agreement (NAFTA) created special economic and trade relationships between the United States, Canada, and Mexico. The Treaty NAFTA (TN) nonimmigrant classification permits qualified Canadian (TN-1) and Mexican (TN-2) citizens to seek temporary entry into the United States to engage in business activities at a professional level. To qualify for TN status, the Canadian or Mexican nationals must be employed in certain specified TN occupational categories, possess the minimum qualifications for that position/occupation (generally, a relevant bachelor's degree, although there are notable exceptions), and retain strong ties to their home country. The NAFTA categories include professions such as computer systems analysts, economists, engineers, biologists, and chemists, among others.[4]

L-1: Intracompany Transferees

The L-1 visa category is for multinational companies with intracompany transferees that, within the preceding three years from the date of the petition application, have worked at a company related to the US employer abroad[5] (for example, a parent company) for at least one year.

There are two distinct L-1 categories: the L-1A, for managers and executives, and the L-1B, for individuals with specialized knowledge. To qualify for an L-1A, an individual must have worked at a company related to the US employer abroad for at least one year in a managerial or executive position and must be coming to work in the United States in a managerial or executive position. For managers, there are two ways to qualify—either as a personnel manager or a functional manager. Personnel managers must primarily supervise and control the work of other supervisory, professional, or managerial employees, whereas function managers must primarily manage an essential function within the organization.

To qualify for an L-1B, individuals must have worked for a related company abroad for at least one year in a position where they have gained specialized knowledge about the company's processes, methods, and procedures, and must be coming to the United States to use the specialized knowledge gained abroad to perform work in the country.

Individual L-1 petitions are filed with the US Citizenship and Immigration Services (USCIS). A company may also file a blanket petition with the USCIS seeking ongoing approval of itself, its parent, branches, subsidiaries, and affiliates as a qualifying organization.[6] There are many advantages to a company that has an approved L Blanket. Primarily, L-1A and L-1B petitions filed under the company's blanket petition (at a US consulate or embassy abroad) dramatically reduce costs, as well as processing times, thereby allowing companies to transfer employees to the United States quicker and/or with short-term notice.[7]

E-1 and E-2: Treaty Traders and Treaty Investors

The E-1 and E-2 nonimmigrant visa categories comprise treaty traders and treaty investors entitled to be in the United States under a bilateral treaty of commerce and navigation between the United States and the country of which the treaty trader or investor is a citizen or national. The E-1 classification is for a foreign national coming to the United States solely to engage in trade of a substantial nature, principally between the United States and the foreign national's country. The trade involved must be the international exchange of items of trade between the United States and a treaty country.

The E-2 classification is authorized for a foreign national coming to the United States solely to direct and develop the operations of an enterprise in which the individual has invested, or is actively involved in the process of investing a substantial amount of capital. Certain employees of qualifying E-2 organizations may also be eligible for this classification if they are coming to the United States to serve as an executive in a supervisory position or possess skills essential to the firm's operations in the country. For example, a French national coming to the United States to serve in a managerial role with a US company ultimately owned by French nationals can apply for an E-2 visa directly at the US Consulate in Paris (assuming the US company is registered).

O-1: Individuals of Extraordinary Ability

The O-1 nonimmigrant visa category applies when an individual possesses extraordinary ability in science, art, education, business, or athletics. To qualify for an O-1 visa in science, education, or business, the individual must demonstrate extraordinary ability by having sustained national or international acclaim. To do so, individuals must demonstrate that they meet at least three of eight stated criteria[8] (including receipt of national/international awards and authorship of scholarly articles, among others), showing that they are one of the small percentage who has risen to the very top of the field and continue to work in the area of extraordinary ability.

Short-term Work Authorization for Foreign Nationals in the United States

The B-1, in lieu of H-1B, is a specialty occupation category for short-term assignments of six months or less. To qualify for a B-1 in lieu of an H-1B visa, the foreign national must hold the equivalent of a US bachelor's degree, perform H-1B–caliber work (that is, the work in the United States

meets the definition of "specialty occupation" previously discussed), and be paid only by a foreign employer/company, except for travel cost reimbursement such as housing. The employee must not receive any salary from a United States source and only perform work in the country that can be accomplished in a short period of time.

Temporary Business Activities for Foreign Nationals in the United States

The B-1 "business" visa and the Visa Waiver Program can be used by foreign nationals who possess only a temporary intent to remain in the United States for short-term visits where they do not undertake any activities that benefit the US entity and/or engage in productive employment in the country. Some permissible activities for those entering in B-1 status are negotiating a contract; attending training, workshops, and trade shows/expositions; meeting with clients/customers or business colleagues; conducting data gathering and data mining; and reviewing files. An individual entering in B status or under the Visa Waiver Program cannot receive payment for services performed in the United States by a US company.

Individuals entering the United States in B status can be granted up to a one year stay, with the possibility of securing a six-month extension. Generally, however, B status is issued to allow just enough time for visitors to engage in their stated business in the country. For B-1 "business visitors," the applicant could be given less than three months. Citizens of the Visa Waiver Program countries[9] can travel to the United States for tourism or business visits without a visa, however, the maximum period of stay in the country under the Visa Waiver Program is up to 90 days, and once in the United States, the individual cannot extend or change status.

Timing and Availability of Some of the Most Widely Used Work-authorized Categories for Foreign Nationals

Time Limitations

Assuming a foreign national is qualified for a position and qualified for a work-authorized category, a US employer may want to consider the time limitations and availability for certain work-authorized categories.

H-1B status can be granted to a foreign worker initially for three years, and extensions can be obtained for up to a total of six years. Further, if the individual reaches certain stages in the green card process, additional extensions may be possible.

L-1A status is granted for an initial period of three years, but the US company can apply for two extensions in two-year increments for a total of seven years. Alternatively, L-1B status is granted for an initial period of three years, but the US company can apply for one two-year extension for a total of five years.

O-1 status is granted for an initial period of three years and can be extended in one-year increments.

TN status is granted for a three-year period of stay and can be extended in three-year increments. E-1/E-2 status is granted for a maximum initial stay of two years, and requests for extension of stay may be granted in increments of up to two years each. A company can extend individuals' TN status or E-1/E-2 status as long as the individuals can demonstrate a nonimmigrant intent (that is, intent to return to their home country). In fact, every time foreign nationals enter in E-2 status, their status will be extended an additional two years during the validity of the E visa.

Limits on Availability

Some work-authorized categories are limited by the USCIS. The H-1B, one of the most popular categories used by US employers, is one of those categories. Specifically, the current annual cap, as set by Congress, is 65,000. An additional 20,000 petitions filed on behalf of foreign nationals with a US master's degree or higher are exempt from the cap. In addition, H-1B workers who are petitioned for or employed at an institution of higher education (or its affiliated or related nonprofit entities), a nonprofit research organization, or a government research organization are not subject to this numerical cap. Further, up to 6,800 visas are set aside from the 65,000 each fiscal year for the H-1B1 program under the terms of the legislation implementing the United States-Chile and United States-Singapore free trade agreements.

The H-1B cap can be, and has been, reached extremely quickly.[10] If more H-1B petitions are filed than that allotted, the USCIS uses a computer-generated random selection process, or lottery, to select enough petitions to meet the 65,000 general-category cap and the 20,000 cap under the advanced degree exemption. Further, because the US government's fiscal year starts on October 1 and H-1B petitions can be filed up to six months prior to an employee's start date, H-1B cap petitions should be filed on or within the first few days of April 1 for an October 1 start date.

For the other work-authorized categories previously discussed—the L-1, O-1, E-1/E-2, and TN—there is no limit on the number of petitions that can be filed and/or approved each year.[11]

Other Considerations When Sponsoring a Foreign National for Work Authorization in the United States

USCIS's Review

Under the current administration, USCIS scrutiny of all petitions has increased greatly. When reviewing a particular petition, the USCIS can issue a request for evidence, requesting additional information with regard to the qualifications for the work-authorized category or a Notice of Intent to Deny, explaining the reasons that the USCIS will likely deny the petition if certain information/supporting documents are not provided. If the USCIS is satisfied with the company's response, it will approve the petition. If the USCIS does not believe the company provided sufficient information, it will deny the petition.

In fiscal years 2017 through 2018, H-1B petitions have been subject to extremely strict scrutiny, and the USCIS has issued a large number of Requests for Evidence, generally in two main areas: first, the USCIS has requested evidence that a particular position is, in fact, a specialty occupation, and second, it has requested evidence that a particular entry level position is deserving of a

level 1 wage (the lowest wage level). Overcoming these requests for evidence can be cumbersome, requiring the company to provide more detailed information about a particular job, about the company's organizational structure, and about its employment practices.

L-1B petitions in particular have always been subject to intense scrutiny. In fiscal year 2014, there was a 35 percent denial rate, which has only increased in the following years. Along with the increase in L-1B petition denials, the number of Requests for Evidence is also high, reaching 45 percent of L-1B petitions filed during fiscal year 2014.

The USCIS has recently focused on L-1A petitions as well, requiring that companies demonstrate detailed job duties and associated tasks, along with a weekly percentage breakdown for each duty. The USCIS has also required evidence, including organizational charts, job descriptions and pay statements, for all subordinates of the sponsored manager/executive.

Recordkeeping

For H-1B (as well as H-1B1 and E-3) petitions, a company must retain a Public Access File that is available for public inspection. As part of this file, a company must retain a copy of the completed Labor Condition Application; documentation proving the wage paid to the H-1B worker, which includes an explanation of the system the employer used to set the actual wage; the system the employer used to set the prevailing wage and satisfy the employee notification; and a summary statement of benefits offered to US workers and H-1B workers.

Deemed Export Control

The deemed export rules are administered by the US Department of Commerce (DOC). The Export Administration Regulations (EAR) are administered by the Bureau of Industry and Security (BIS). An export is defined as a transmission of items subject to the EAR outside the United States or a release of technology or software subject to the EAR to a foreign national in the United States.

According to the BIS, EAR are "designed to restrict access to dual use items by countries or persons that might apply such items to uses inimical to US interests. The EAR also include some export controls to protect the United States from the adverse impact of the unrestricted export of commodities in short supply." Discussions with a foreign national in the United States are deemed to constitute an "export" if they reveal technical information regarding export-controlled technology.

For purposes of EAR, US citizens, green card holders, and asylee/refugees are US persons not subject to controls. However, if the technology is classified, as well as controlled, permanent residents are deemed foreign nationals and subject to controls. Foreign nationals in the United States on nonimmigrant visas are generally covered by the rules.

To make a determination regarding export control, the company will have to answer what form of access a worker will have to controlled technology, whether the worker will be exposed to internal company research materials, and whether the worker will participate in meetings and conference calls regarding such technology, etc. If an export license is required, the US company can still hire the foreign national, but it will need to prevent access to the controlled technology or technical data by the foreign national until the company has received the required license or other authorization.

For H-1B/H-1B1, L-1, and O-1 petitions, the US employer will then need to complete an attestation that confirms it has reviewed the Export Administration Regulations and the International Traffic in Arms Regulations and has determined whether a license is required to release controlled technology or technical data to the sponsored worker to file the petition.

If a Nonimmigrant Petition is Approved, a Foreign National Must Secure a Visa at a US Embassy/Consulate Abroad before Entering the Country

To enter the United States in a work-authorized category, an individual must obtain a visa at a US Consulate or Embassy outside of the country (a Canadian national is not required to secure a visa before entering the United States).[12]

To obtain a visa, a foreign national first needs to complete the DS-160, the online Nonimmigrant Visa Application, and make an appointment with a US Consulate or Embassy outside the country. At the visa appointment, the foreign national should present the approval notice (Form I-797) if the petition was filed with the USCIS,[13] a letter from the US employer confirming employment, a copy of the nonimmigrant petition filed by the US employer, and any other documentation specified by the US Department of State and/or its consular posts.

Alternatively, if foreign nationals are applying for L-1 status and the company has a blanket L petition, they may apply and secure a visa at a US Consulate or Embassy abroad. Similarly, foreign nationals applying for E-1, E-2, or E-3 status may apply by providing the US Consulate or Embassy with a support package detailing how the company/individual qualifies for the status.[14]

Consider Sponsoring the Foreign National for a Green Card

US employers may decide to sponsor the foreign national to work for the company on a permanent basis. The most common employment-sponsored route is Form ETA 9089, Application for Permanent Employment Certification (Labor Certification and or PERM) based green card, which requires the company to recruit for the position to determine whether there are any minimally qualified/willing/able US workers. There are some instances where a PERM is not needed to move forward with a green card, for example, in the case of Outstanding Researchers, Individuals of Extraordinary Ability, Managers/Executives who worked for a related company abroad, and National Interest Waivers.

Despite the many benefits, there are a few drawbacks, including tax consequences. A foreign national may wish to speak with a tax advisor before starting the green card process. **CL**

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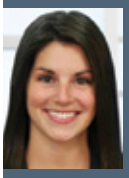


Jennifer L. Shanley is an associate in the Immigration Practice Group at Robinson+Cole, where her practice encompasses all business-related nonimmigrant and immigrant petitions. Attorney Shanley frequently handles multinational intracompany transfers, transfers for individuals with specialized knowledge, and petitions for outstanding researchers and individuals with extraordinary ability. She has helped secure immigration approvals for hundreds of employees, helping business clients attract and secure top talented individuals across a range of industries.

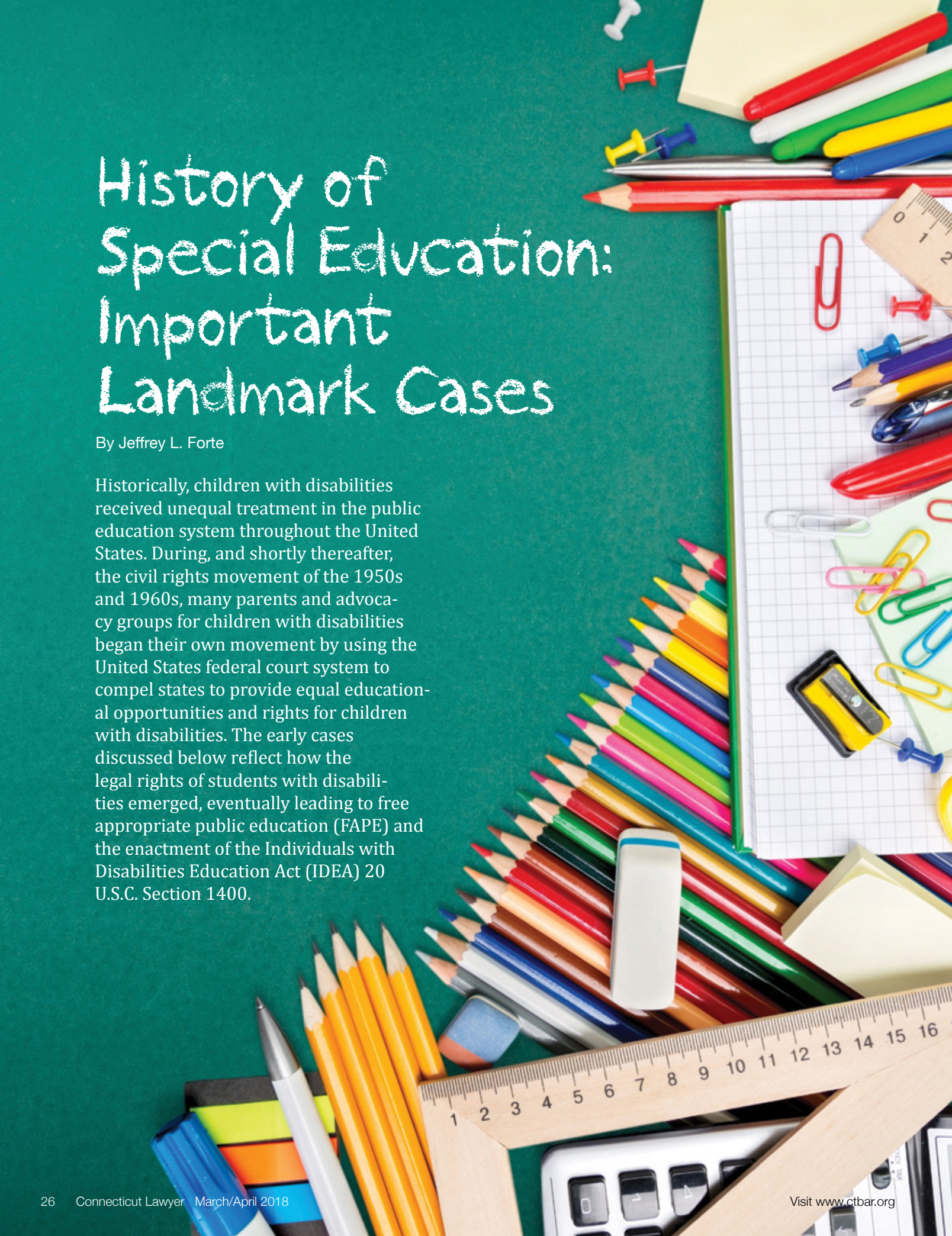
Notes

1. The authors of this article do not purport to provide any legal advice. The article merely focuses on a very simplistic overview of issues that U.S. employers may face when hiring foreign national workers. Readers are cautioned not to attempt to resolve issues on the basis of information contained herein and are strongly advised to seek advice from an experienced immigration attorney regarding specific case situations.
2. There are alternate ways an individual can work for a particular company in the U.S. outside of being sponsored for a work authorized status. Many foreign nationals who are enrolled in a college/university in the U.S. are in F-1 status. Eligible students can apply for Curricular Practical Training (CPT), which is temporary employment authorization while the student is enrolled in a college-level degree program. Eligible students can also apply to receive up to 12 months of OPT employment authorization before completing their academic studies (precompletion) and/or after completing their academic studies (post-completion). In addition, a company can host a J-1 trainee or intern (assuming they meet the requirements). A foreign national may also apply for a J-1 Research Scholar position with a particular college/university and, through that program, can work for a particular company. Lastly, some individuals are sponsored by contracting companies who have already sponsored that individual for an H-1B petition to work at off-site location (i.e., at a client's worksite).
3. There is also an E-3 category that applies only to nationals of Australia, which has the same criteria as that of the H-1B/H-1B1.
4. As of the date of this writing, the NAFTA agreement is still in effect and has not been changed by the current Administration.
5. A company related to the U.S. entity means the company is one of the following: (1) Parent—A firm, corporation, or other legal entity that has subsidiaries; (2) Branch—An operating division or office of the same organization houses in a different location; (3) Affiliate—One of at two subsidiaries which are both owned and controlled by the same parent; or (4) Subsidiary—A firm, corporation or other legal entity in which (1) a parent owns (directly or indirectly) more than half of the entity and controls the entity or owns half of the entity and controls the entity; (2) owns 50% of a 50-50 joint venture and has equal control and veto power over the entity; or (3) owns less than half of the entity but controls the entity.
6. A company can file a blanket petition if the company and its parent, branches, subsidiaries and affiliates entities are engaged in commercial trade/services, the company has an office in the U.S. that has been doing business for at least one year, the company has three or more domestic and foreign branches, subsidiaries, affiliates, and the company (1) has obtained approval of at least 10 L-1A/L-1B petitions during the previous 12 months, (2) the company has U.S. subsidiaries/affiliates with combined annual sales of at least $25 million, or (3) the company has a U.S. workforce of at least 1,000 employees.
7. One potential hurdle in using a company's approved L Blanket is that, for L-1B petitions, the U.S. position must require, and an individual must possess, at least the equivalent of a U.S. bachelor's degree in order to apply at a U.S. Consulate or Embassy. If the company does not require at least a bachelor's degree for the position or if an individual does not possess at least the equivalent of a U.S. bachelor's degree, the company must file an individual L-1B petition with the USCIS.
8. The USCIS requires that an individual demonstrate evidence of at least three of the following criteria: Receipt of nationally or internationally recognized prizes/awards; Membership in associations that require outstanding achievements; Published material in professional or major trade publications, newspapers or other major media about the individual; Original scientific, scholarly, or business-related contributions of major significance; Authorship of scholarly articles in professional journals or other major media; A high salary or other remuneration for services; Serve as a judge of the work of others in the field; Employment in a critical or essential capacity for organizations that have a distinguished reputation.
9. Please see https://travel.state.gov/content/visas/en/visit/visa-waiver-program.html for a list of countries that participate in the Visa Waiver Program.
10. Most recently, the H-1B lottery was triggered on the following dates: April 7, 2017 (FY 2018), April 7, 2016 (FY 2017), April 7, 2015 (FY 2016), April 7, 2014 (FY 2015), April 5, 2013 (FY 2014).
11. There is also an annual cap of 10,500 that limits the number of E-3 visas that can be approved each year.
12. Canadian nationals can apply for TN status or L-1 status at the Canadian border or an International Airport.
13. While not required as the U.S. Consulate or Embassy will have access to Petition Information Management Service (PIMS), a computer database that confirms approval of petitions, it is generally recommended that a foreign national bring the approval notice to the visa appointment.
14. The application procedure for E-1/E-2 visa applications differ depending on the country.

History of Special Education: Important Landmark Cases

By Jeffrey L. Forte

Historically, children with disabilities received unequal treatment in the public education system throughout the United States. During, and shortly thereafter, the civil rights movement of the 1950s and 1960s, many parents and advocacy groups for children with disabilities began their own movement by using the United States federal court system to compel states to provide equal educational opportunities and rights for children with disabilities. The early cases discussed below reflect how the legal rights of students with disabilities emerged, eventually leading to free appropriate public education (FAPE) and the enactment of the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. Section 1400.



Constitutional Right to Education: A Misnomer

To most Americans, there is a common misconception that providing a child with the right to a public education is guaranteed by the Constitution of the United States of America. This is incorrect. Education is the responsibility of the states.

"The Tenth Amendment of the US Constitution implies that education is the responsibility of the state government. That education is a state—not federal matter—was seen as essential by the founders of this country. This was because state governments were seen as being closer and more connected to the needs of the people."[1]

Despite the lack of an inherent federal right to public education, the United States Supreme Court in the early disability cases, applied the due process and equal protection clause of the 14th Amendment to compel states to not "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." US Constitution, Amendment 14.

Exclusion Was the Rule

Prior to the foundational disability rights cases being decided, exclusion of students with disabilities was the rule across the United States. One of the earliest reported cases that supported the philosophy of excluding students with disabilities was decided in 1893, where the Massachusetts Supreme Court upheld the "expulsion of a student solely due to poor academic ability" on the ground that the student was too "weak minded" to profit from instruction.[2]

Nearly 30 years later, in 1919, the Wisconsin Supreme Court, in ordering the exclusion of a child from public school, held that "the very sight of a child with cerebral palsy will produce a depressing and nauseating effect" upon others.[3] Even the Supreme Court of the United States, on the issue of involuntary sterilization, ruled that "[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind…Three generations of imbeciles are enough." Justice Oliver Wendell Holmes—*Buck v. Bell,* 274 U.S. 200 (1927). Throughout US history, states consistently and routinely enacted state statutes and regulations that allowed school officials and administrators to exclude children with disabilities from receiving public education. All of this changed with the landmark 1954 United States Supreme Court decision, *Brown v. Board of Education,* 347 U.S. 483.

Brown v. Board of Education

"In these days, it is doubtful that any child may be reasonably expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right that must be made available to all on equal terms."

– Chief Justice Earl Warren, writing for the unanimous United States Supreme Court, Brown v. Board of Education, 347 U.S. 483, 493 (1954)

Decided in 1954, the *Brown* decision ruled that segregation within public schools was illegal, thereby ending as a matter of law segregation based on race. The case determined that the "separate but equal" doctrine established by the Court in *Plessy v. Ferguson,* in providing "separate education facilities" based on race was, in fact, inherently unequal and violated the equal opportunity and due process clause of the 14th Amendment.

As relating to education rights, the *Brown* court held that "education is perhaps the most important function of state and local governments….It is the very foundation of good citizenship" and "such an opportunity where the state has undertaken to provide it, is a right that must be made available to all on equal terms."[4]

Notably, immediately after the *Brown* decision in 1954, the executive director of the present day The Arc (then-named National Association for Retarded Children), Dr. Gunnar Dybwad, drew attention to the Supreme Court's decision with parents and disability advocacy groups, suggesting that this historical case had huge potential and opportunities for children with special needs.[5]

Based on the *Brown* decision, one of the first and early pieces of federal legislation that was established to provide federal aid to assist Local Education Agencies (LEA) in meeting the needs of "educationally deprived" children, was the 1965 Elementary and Secondary Education Act[6] (ESEA). Authorized for one year, the ESEA authorized federal funding to states to establish sponsoring institutions and centers for "children with handicaps." ESEA was amended and improved over nearly the next two decades until it was renamed the Education of Individuals with Disabilities Act (IDEA) in 1990, and then reauthorized in 2004.

Extending *Brown* to Children with Disabilities: P.A.R.C. and Mills

There are two cases from the early 1970s—*P.A.R.C. v. Pennsylvania* and *Mills v. Board of Education of the District of Columbia*—that used the *Brown* decision to specifically address the issue of education for children with disabilities. At this point in American history, unlike today, there were millions of children with disabilities that were either denied enrollment in public schools, insufficiently served by public schools, or alternatively sent to institutions of deplorable conditions. In both of these cases, the courts applied the *Brown* decision by using the due process clause of the 14th Amendment to provide parents of children with disabilities specific rights to challenge and strike down state law that denied their child from the right to a public education.

P.A.R.C. v. Pennsylvania

In *P.A.R.C.,* the Commonwealth of Pennsylvania argued that the exclusions of "retarded children" complained of are based upon four state statutes. The first state section provided, in part, that the state board of education is relieved from providing a public education to any child that a psychologist determines is "uneducable and untrainable." The second section allowed the state to indefinitely "postpone" the admission to public school any child who has not attained the "mental age of five years." The language of the third and fourth sections provided additional unreasonable excuses for the state board of education to deny

disabled children the right to a public education.

Thomas Gilhool is the attorney that represented P.A.R.C., the Pennsylvania Association for Retarded Children. Attorney Gilhool relied on the *Brown* case to bring forth a class action for P.A.R.C. on behalf of 14 children with developmental disabilities. He argued that under Pennsylvania state law, these children were denied access to public education based on these four state sections. The plaintiffs argued that, under *Brown,* their rights were violated under the equal protection clause and due process clause of the 14th Amendment.

The parties entered into a consent agreement, which was then approved by the District Court for the Eastern District of Pennsylvania. The court entered the consent agreement. Much of the language used by the court and the parties in this case laid the framework for the rights that are now provided to children with disabilities within federal and state statutes under the IDEA. For example, in clause two of the consent agreement, we find the framework language to what is now referred to as an Individualized Education Program (IEP) meeting, as well as due process: "No child of school age who is mentally retarded or who is thought by any school official…or by his parents…to be mentally retarded, shall be subjected to a change in educational status without first being accorded notice and the opportunity of a due process hearing…" Clause three also provides court-made language that laid the groundwork for an IEP meeting. Most importantly, the consent agreement stated, "expert testimony in this action indicates that all mentally retarded persons are capable of benefitting from a program of education and training…It is the Commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity." This is, in part, the framework for FAPE and the IDEA.

Mills v. Board of Education of the District of Columbia

As *P.A.R.C.* was being decided in Pennsylvania, *Mills v. Board of Education of the District of Columbia* was also being decided. This case expanded the ruling of *P.A.R.C.* beyond children with developmental disabilities, to children with behavioral, mental, hyperactive, and emotional disabilities from being denied placement in a public education.

Similar to *P.A.R.C.,* the school system in *Mills* agreed that it had a legal obligation "to provide a publically supported education to each resident of the District of Columbia who is capable of benefiting from such instruction." However, unlike *P.A.R.C.,* the school system argued that it was incapable to do so because of lack of financial resources.

The court held that no child may be denied a public education because of "mental, behavioral, physical or emotional handicaps or deficiencies." The court further provided that the defendant's school system's failure to provide an education could not be excused by claiming insufficient funds, specifically stating, "if sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system, then the available funds must be expended equitable in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom."

Subsequent to *P.A.R.C.* and *Mills,* 27 other federal courts followed these two decisions, which eventually lead to the federal legislature passing federal laws in which to guarantee a free appropriate public education for all children with disabilities. One of the federal laws that emerged from these decisions was the 1975 Education for all Handicapped Children Act, now called the Individuals with Disabilities Education Act (IDEA).

Under the IDEA, all public schools that accept federal funding must provide a free appropriate public education for children with disabilities. The IDEA also requires that each child with a disability have an "individualized education program" (IEP) that must be implemented in the "least restrictive environment" (LRE). One of the very first cases that addresses the term "appropriate" is *Board of Education v. Rowley,* 458 U.S. 176 (982).

Board of Education v. Rowley

In *Board of Education v. Rowley,* the Court further elaborated on what is deemed appropriate under FAPE. Amy Rowley was a deaf child that performed better than the typical child in her mainstream classroom, and was easily advancing from grade to grade in LRE with the use of a Frequency Modulation (FM) hearing aid. During an IEP meeting, Amy's parents requested the school district provide her with a qualified sign-language interpreter in all of her classes, asserting that under the IDEA, such measures were deemed "appropriate." After losing at due process and the review levels, the Rowleys appealed to the United States District Court and won. The school district then appealed and the United States Court of Appeals for the Second Circuit affirmed the district court's decision whereby the school district then appealed to the United States Supreme Court.

The issue before the United States Supreme Court in *Rowley* is what is meant by the IDEA requirement to a free "appropriate" public education. After reviewing the legislative history and intent of the IDEA, the Court held, "the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education….We conclude that the 'basic floor of opportunity' provided by the act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the child." Thus, the *Rowley* decision clarified that children with disabilities were entitled to "access" to an education that provided an "educational benefit." A school district does not have to "maximize" each disabled child's potential.

The *Rowley* decision also held that the "procedural safeguards" of the IDEA are equally as important as the substantive program offered to the disabled child. Therefore, a court's inquiry under the IDEA has two parts: 1) whether the state complied with the procedural safeguard of the act.; and 2) whether the child's IEP is reasonably calculated to enable the child to benefit from his educational plan. The Court also held that under the IDEA, the burden of proof is

a preponderance of the evidence standard.

Honig v. Doe

The *Honig v. Doe* decision is a landmark case in which the United States Supreme Court dealt with the issue of expelling a disabled child based on actions arising out of that child's disability. In this case, the Court ruled that a school district may not unilaterally exclude or expel a disabled child from the classroom setting for dangerous or disruptive conduct growing out of their disabilities.

The child in this case, John Doe, was a 17-year-old boy with significant challenges in his ability to control his behavior, impulsivity, and anger toward others. His grandparents argued that a child with a disability, who is disciplined based on actions arising out of that child's disability, may not be subjected to school disciplinary actions, including expulsion, without the right to due process under the IDEA. The Court emphasized the importance of a school district following the procedural safeguards contained with the IDEA, which includes the right to due process and an IEP meeting.

The *Honig* case is a landmark decision because the Court created what is now known as the "ten day rule," which allows a school to only suspend a child for up to ten days without parental consent or court intervention. Moreover, the Court ruled that a student could not be removed from school if the inappropriate behavior is a result of their disability. Now, under the IDEA, a child may be expelled for up to ten days for disciplinary infractions and up to 45 days for dangerous behavior involving weapons or drugs. However, if a school is seeking a change of placement, suspension, or expulsion of a child in excess of ten days, an IEP meeting must be held to review the causal relationship between the child's misconduct and his disability. This specific meeting has become known as a "manifestation determination" review. From a clinical prospective, the *Honig* decision also gave rise to the need of board certified behavioral analysts conducting what is known as a "functional behavioral assessment" or an FBA.

Timothy W. v. Rochester, New Hampshire, School District

The last landmark case in the context in special education law is *Timothy W. v. Rochester, New Hampshire, School District*. In this case, the plaintiff-appellant Timothy W., appealed an order from the district court that held that a child that is profoundly handicapped is not eligible for special education if he cannot benefit from such education.

The first circuit reversed the district court's decision and stated that the purpose of the Education for All Handicapped Children Act is "to assure all handicapped children have available to them…a free appropriate public education which emphasizes special education and related services designed to meet their unique needs…."

In this case, Timothy W.'s disabilities were severe. The school district argued that they were so severe, that he was unable to benefit from any provided education. The court held that the act provides for a zero-reject policy and that under it, such severely disabled children are in fact given the highest priority and protection under the act itself. Related services were also defined as equally important as special education needs. Thus, related services, such as occupational therapy, physical therapy, speech-language pathology, AT, socialization, eating, dressing, and daily living skills are all encompassed under related services within the act.

Conclusion

It is up to the legal community to help further expand and define these rulings to continue to improve and build upon our client's rights to FAPE. **CL**

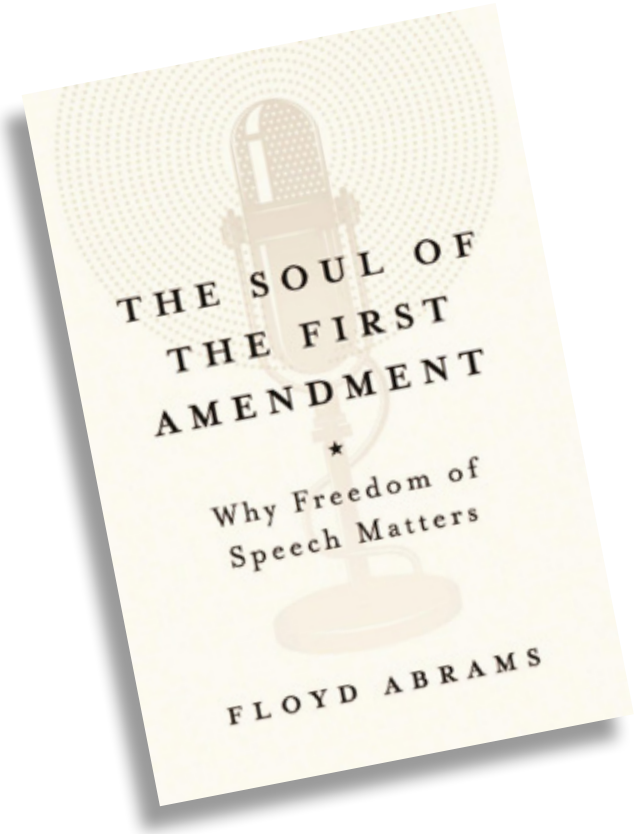
Jeffrey L. Forte practices education law and child advocacy. He is the founding member of Forte Law Group LLC where he exclusively represents families and children with special needs. Forte Law Group LLC has offices in Westport and Shelton.

Notes

1. Yell, M. L., Rogers, D. & Rogers, E. L. (1998); see also The legal history of special education: What a long strange trip it has been, *Remedial and Special Education*, 19, 219-228.
2. *Watson v. City of Cambridge* (1893); see also Principal Web Exclusive, "The Evolution of Special Education," Keli J. Esteves and Shaila Rao, November/December 2008, pg 1.
3. *Beattie v. Board of Ed. of Antigo,* 169 Wis 231, 232, 172 N.W. 153 (1919); see generally, Wrightslaw.com.
4. *Id.*, at page 493.
5. *See*, http://www.disabilityjustice.org/right-to-education.
6. Public Law 89-10

Book Review: The Soul of the First Amendment

By James E. Wildes



Free speech in America is being tested almost daily. Floyd Abrams's new book, *The Soul of the First Amendment,* offers timely ruminations on the meaning of the First Amendment and its application in current affairs. Abrams, a First Amendment litigator, author, and lecturer, brings his experience and insights to the discussion. The book is not a scholarly exposition or a survey of First Amendment law; rather, it is better described as a series of essays on topics ranging from the ratification of the Constitution as originally drafted, absent the First Amendment or any other part of the Bill of Rights, to observations concerning Edward Snowden, Julian Assange, and the response by members of the journalist community.

Abrams begins by noting that the delegates to the Constitutional Convention did not believe that a bill of rights was necessary. Critics of the new Constitution, including Thomas Jefferson, questioned the lack of a bill of rights to circumscribe the power of the national government. James Madison, who originally saw no need for a bill of rights, came around and created the first draft of a bill. Abrams explains that the introductory words to the First Amendment, "Congress shall make no law," has led the Supreme Court to rule that the First Amendment prohibited governmental, not private, suppression of speech. Abrams is firm in his opinion that the central purpose of the First Amendment is to impose limits on governmental authority over religion, speech, and press. In support of his argument, Abrams cites to several Supreme Court decisions that have protected loathsome speech: *Synder v. Phelps*[1] shielded church members from tort liability for demonstrations denouncing dead American soldiers on the days of their funerals; *United States v. Stevens*[2] struck down an act of Congress that criminalized the filming of animals being tortured and killed; and *Ashcroft v. Free Speech Coalition*[3] found unconstitutional a federal statute banning virtual child pornography on the internet.

Abrams takes issue with liberal jurists, in particular, Justice Stephen Breyer, who in his thoughtful book, *Active Liberty,* draws a distinction between what he describes as "active liberty" and "civil liberty." Active liberty involves a citizen's active participation in government, and includes the right to deliberate in the public place, the right to vote for war or peace, and the right to make treaties and enact laws. On the other hand, civil liberty involves freedom from government and the right of a citizen to pursue his or her own interests free of improper government interference. Justice Breyer maintains that the First Amendment should be understood to protect active liberty and to facilitate a conversation among ordinary citizens that will encourage their informed participation in the electoral process. Abrams disagrees with Justice Breyer's argument. Although Abrams acknowledges that a benefit of the First Amendment is that it generally results in a better-informed public and a more representative government, he believes that the First Amendment, first and foremost, seeks to safeguard against government intrusion into freedom of religion, speech, and press.

One of the more interesting chapters in the book compares free speech laws in other countries to the protections offered by the First Amendment. For instance, the Supreme Court of Canada rejected a free speech defense of a defendant who had been convicted of hate speech. The defendant, a religious zealot, had placed flyers containing hateful speech in mailboxes after he learned that high schools in Sas-

katchewan were about to include homosexuality as a subject. Citing *Synder v. Phelps,* Abrams states that American law could not be more different. In another example, a person in England was convicted for carrying a poster that showed the World Trade Center on fire with the caption, "Islam out of Britain—Protect the British People." The conviction was upheld by the European Court of Human Rights, which found that the poster constituted a public attack on all Muslims in the United Kingdom. Abrams contrasts the British case with assertions made by Donald Trump about people of Mexican descent and about banning all Muslims from entering the United States for a period of time. Abrams observes that much criticism was directed at the statements of Donald Trump, but no one suggested that such statements could have formed the basis of criminal liability in America. Germany, as well as other nations, have adopted laws criminalizing Holocaust denial. Abrams is measured in his discussion of these laws, recognizing that some nations have responded to its past calamities by adopting limitations on hateful speech. However, in Abrams's opinion the United States Constitution, which imposes limitations on this type of legislation, has served this country well.

With respect to libel law, Abrams explains that England has become a legal paradise for plaintiffs bringing libel suits with success rates of over 90 percent. In England, defamatory statements are presumed false and the defendant must affirmatively prove their truth. Of interest is that Cambridge University Press declined to publish a book accusing Vladimir Putin of having connections to gangsters. Cambridge explained that it could not risk a libel suit. The book was never published in England; it was published in the United States and no litigation ensued. Abrams reasons that there would be little concern of a libel suit in the United States because the Supreme Court in *New York Times Company v. Sullivan*[4] held that in order for a public official to prevail he or she must prove by clear and convincing proof that the false statement was made with actual knowledge of falsity or actual malice. According to Abrams, the gulf between English and American defamation law is so large that as a result of a law signed by President Barack Obama in 2010, English libel judgments are generally not enforceable in the United States. At the end of the chapter, Abrams recounts troubling examples of how free speech at times has been tested throughout American history: the Sedition Act of 1798 made criminal much of the criticism directed at President John Adams and other government officials; the jailing of socialists and anarchists by the Wilson administration for their speech during World War I; and the victims of the House Un-American Activities Committee under Senator Joseph McCarthy.

Another difference between American and European free speech jurisprudence highlighted by Abrams is the legally enforceable "right to be forgotten" adopted in the European Union. Abrams explains that the source of the right was a 2014 decision of the European Court of Justice that determined that Google and other search engines must remove links to content initially published in newspapers or elsewhere that discloses information that is later determined to be inadequate or irrelevant. Truth and accuracy are not determinative factors in deciding what needs to be removed. More than 95 percent of the requests for removal are from ordinary members of the public, as opposed to high profile individuals, such as politicians or criminals. Google, according to Abrams, considers the public interest in its search results in responding to the requests for removal; if for instance, the matter related to criminal convictions, matters of financial dishonesty, professional negligence, or the conduct of public officials. It is Abrams' view that Americans can feel confident that no American court could issue an order similar to the European "right to be forgotten," which would be consistent with the First Amendment.

Abrams defends the decision of *Citizens United v. Federal Election Commission,*[5] a case that he has great familiarity with because he represented Senator Mitch McConnell in the litigation. He reminds the reader that *Buckley v. Valeo*[6] held that individuals can speak in support of candidates for public office and they can also spend whatever amounts they decide to buy the advertisements that contain that speech. According to Abrams, *Citizens United* extended the same right to corporations. Abrams, in response to the warnings and predictions that *Citizens United* would result in cash flowing into elections by corporations, refers to the fact that, as of February 2016, of the $87 million or $1 million-plus contributors to super PACS only eight were from corporations. Abrams further adds that *Citizens United* upheld as constitutional the disclosure requirements of campaign finance laws. Indeed, Abrams seems to advocate for greater disclosure about the amount of contributions and the identity of contributors. Abrams also notes that only a small percentage of money spent on federal races came from secret or "dark money."

Abrams observes that having broad First Amendment rights does not answer the important questions of when and what to publish. In what became known as the *Pentagon Papers Cases,* the majority of the Supreme Court in *New York Times v. United States*[7] found that prior restraints could be issued under only extraordinary circumstances and, accordingly, affirmed the refusal of the lower courts to enjoin *The New York Times* and *The Washington Post* from publishing classified information showing that the United States government had engaged in widespread public deception about the nations involvement in the Vietnam war. Abrams recalls that as an attorney for *The New York Times* he was criticized for being unpatriotic. He continues the discussion by offering his views on Julian Assange and Edward Snowden. Assange defends publishing classified information on WikiLeaks; specifically, he contends that his job is to pass the "whistleblowers" message onto the public and not to inject his own beliefs. Abrams finds Assange's defense unconvincing since it does not consider the impact of the disclosed information, including the identities and locations of informants on the Taliban. WikiLeaks has additionally, without compelling justification, disclosed personal identifying information of Democratic Party donors. Snowden, in Abrams' opinion, deserves credit for exposing the fact that the government engaged in

surveillance of Americans. However, other Snowden revelations may have also compromised critical foreign intelligence collections sources. Abrams notes that the editors of *The New York Times* made decisions to publish some portions of the Pentagon Papers, but also made decisions not to publish other documents due to their sensitive nature.

Abrams explains in the beginning of his book that the soul of the First Amendment is freedom of speech. If a book is measured by whether the author accomplished what the author attempted to do, then Abrams succeeds. Abrams raises important freedom of speech questions at the beginning of his book and throughout the book he explores the issues through his analytic lens. A reader who is only generally familiar with the First Amendment will broaden his or her knowledge of free speech. A reader who is informed about the First Amendment is likely to come away with a deeper understanding of free speech. To his credit, Abrams does not pretend that he knows all of the answers. He states that the American press has significant latitude in deciding what to publish. However, as Abrams stresses, the First Amendment does not answer the question of what should be printed. Abrams importantly acknowledges the limits of the written words of a constitution. Indeed, continued respect by the American public of the First Amendment, as with all constitutions or laws, will depend on whether it is deemed a core value to Americans. Judge Learned Hand in his often anthologized speech, *The Spirit of Liberty,* captured the essence of the soul of any law that endures.

> I often wonder whether we do not rest our hopes too much on constitutions, upon laws, upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it....While it lies there it needs no constitution, no law, no court to save it.[8]

Abrams is an important voice that should be listened to as the limits of free speech continue to be debated. **CL**

James E. Wildes has been a litigator for more than 29 years and has served as an arbitrator and an attorney trial referee of the superior Court since 2003. He has also been an instructor/facilitator for courses on advanced direct and cross-examination of experts and on advanced deposition techniques. Attorney Wildes is a former editor-in-chief and managing editor of the Connecticut Bar Journal.

Notes

1. 562 U.S. 443 (2011).
2. 559 U.S. 460 (2010).
3. 535 U.S. 234 (2002).
4. 376 U.S. 254, 276 (1964).
5. 558 U.S. 310 (2010).
6. 424 U.S. 936 (1976).
7. 403 U.S. 713 (1971).
8. Diane Ravitch, The American Reader, 287-88

The Bankruptcy Bench and Bar Collaborate to Increase Pro Bono Bankruptcy Services

Jessica Grossarth Kennedy

By Jessica Grossarth Kennedy

Jessica Grossarth Kennedy is a member of Pullman & Comley LLC and chair of the Commercial Law and Bankruptcy Section of the Connecticut Bar Association.

Over the years, the Connecticut Bar Association Commercial Law and Bankruptcy Section has worked with the judges of the United States Bankruptcy Court, District of Connecticut to provide pro bono bankruptcy services to the community. Given the continuous and growing need for volunteers to assist with filing bankruptcy cases for the indigent, the bankruptcy judges and the bar are always searching for creative solutions to further pro bono bankruptcy assistance in Connecticut.

In June 2016, Chief Bankruptcy Judge Julie A. Manning alerted the section's officers to the American College of Bankruptcy Foundation's grant offering for pro bono bankruptcy programs. Eager to collaborate with the bankruptcy bench on pro bono efforts, the officers submitted an application to the foundation for a $3,000 grant for projects that would train and supervise attorneys who volunteer or represent indigent debtors without charge, and encourage and promote legal assistance to the poor in the State of Connecticut; the application was approved.

Section members Tom Gugliotti, Bonnie Mangan, and Susan Williams explored the possibility of utilizing the grant funds in connection with the Connecticut Community Law Center (CCLC), which is an incubator initiative of UConn School of Law and the Hartford County Bar Association. The incubator opened in February 2017 in William F. Starr Hall on the UConn Law campus in Hartford, and aims to help people who have traditionally been underserved by the justice system: low and moderate income clients who don't qualify for legal aid, but can't afford standard legal fees. The law school provides office space and support for up to six new lawyers who receive training and experience to assist them in opening solo practices, and to encourage them to deliver pro bono legal services or services at an affordable cost.

Since bankruptcy services and training had not previously been offered at the incubator, the grant funds were utilized to purchase bankruptcy software essential to prepare and file a bankruptcy case properly. Additionally, the funds were used to purchase research tools including the Bankruptcy Code, Federal Rules of Bankruptcy Procedure, Federal Rules of Evidence, and materials from the National Consumer Law Center. Attorneys Mangan and Williams are actively volunteering their time to train the incubator attorneys on the software. The goal of the bankruptcy software training is twofold: to provide instruction to lawyers on the software using pro bono cases referred by legal aid, and to introduce the bankruptcy practice to new attorneys who wouldn't have otherwise been exposed to that area of law, thereby increasing the number of volunteers who provide pro bono bankruptcy services in Connecticut.

Bankruptcy attorneys who are willing to mentor and donate their time to the program should contact section members Bonnie Mangan at bonnie.mangan@manganlaw.com and Susan Williams at susan@williams-law.com. The incubator program is receiving the pro bono bankruptcy referrals through the Statewide Legal Services of Connecticut, Pro Bono Network. In the event you encounter a potential client that you believe would qualify for pro bono representation, a referral to the Statewide Legal Services would ensure that the case be directed to the incubator program or other qualified attorneys that participate and offer pro bono services.

As a result of the concern and initiative of Chief Judge Manning and the superb leadership and diligence of a few motivated section members, a bankruptcy pro bono mechanism was born! **CL**

Byrne v. Avery Center for Obstetrics and Gynecology, P.C., 327 Conn. 540 (2018): Yes, You Can Sue Your Health Care Provider If It Discloses Your Medical Records to Your Ex

By Charles D. Ray and Matthew A. Weiner

Charles D. Ray is a partner at McCarter & English LLP, in Hartford. He clerked for Justice David M. Shea during the Supreme Court's 1989-1990 term and appears before the Court on a regular basis. Matthew A. Weiner is Assistant State's Attorney in the Appellate Bureau of the Office of the Chief State's Attorney. ASA Weiner clerked for Justice Richard N. Palmer during the Supreme Court's 2006–2007 term and litigates appellate matters on behalf of the State.

Any views expressed herein are the personal views of DASA Weiner and do not necessarily reflect the views of the Office of the Chief State's Attorney and/or the Division of Criminal Justice.

Given the all-too-common reports of data breaches, you may have wondered what recourse you have if you are one of the unlucky souls whose confidential information becomes public. The Connecticut Supreme Court explored this issue as it relates to improper disclosures by health care providers in *Byrne v. Avery Center for Obstetrics and Gynecology, P.C.,* 327 Conn. 540 (2018).

The substantive facts of *Byrne* are pretty straightforward. During the time the plaintiff lived in Connecticut, she had a doctor-patient relationship with the defendant. As part of that relationship, the defendant provided the plaintiff with notice of its privacy policy regarding confidential health information and promised that it would not disclose the plaintiff's information without her authorization.

While a patient of the defendant, the plaintiff had a personal relationship with Andro Mendoza. The plaintiff instructed the defendant not to release her medical records to Mendoza. Eventually, the plaintiff moved to Vermont.

A few months after the plaintiff moved, Mendoza filed paternity actions against her in Vermont and Connecticut. Shortly thereafter, the defendant received a subpoena instructing it to appear at the New Haven Regional Children's Probate Court and to produce "all medical records" regarding the plaintiff. Rather than file a motion to quash the subpoena, appear in court, or even notify the plaintiff, the defendant simply mailed a copy of the plaintiff's medical file to the court. A few months later, Mendoza informed the plaintiff that he had reviewed her medical records in the court file. Mendoza also "utilized the information contained within [the plaintiff's medical] records to file numerous civil actions, including paternity and visitation actions, against the plaintiff, her attorney, her father, and her father's employer, and to threaten her with criminal charges."

Byrne's procedural facts are a little more complicated. In 2007, the plaintiff sued the defendant alleging numerous causes of action. The complaint included one count of negligence and one count of negligent infliction of emotional distress. The trial court granted summary judgment in favor of the defendant on these claims because it concluded that the Health Insurance Portability and Accountability Act of 1996 (HIPAA), which sets forth fines and imprisonment as sanctions for the improper disclosure of medical information by health care providers, preempts any cause of action that addresses the privacy of medical information. In a 2014 ruling, the Connecticut Supreme Court reversed the trial court judgement after concluding that the plaintiff's claims were not preempted by HIPPA. The Supreme Court, however, reserved judgment on whether Connecticut common law provides a remedy for a health care provider's disclosure of confidential patient records. It then remanded the matter to the trial court. *Byrne v. Avery Center for Obstetrics and Gynecology, P.C,* 314 Conn. 433 (2014).

On remand, the defendant again moved for summary judgment, this time arguing, among other things, that Connecticut does not recognize a cause of action against a health care provider for breach of its duty of confidentiality. After determining that no Connecticut court previously had recognized a common law duty of confidenti-

ality regarding patient-physician communications, the trial court agreed with the defendant and granted its motion for summary judgment. The plaintiff once again appealed.

The Supreme Court, in an opinion authored by Justice Eveleigh and joined by Chief Justice Rogers and Justices Palmer, McDonald, Robinson, and D'Auria, agreed with the plaintiff that "a duty of confidentiality arises from the physician-patient relationship and that unauthorized disclosure of confidential information obtained in the course of that relationship for the purpose of treatment gives rise to a cause of action sounding in tort against the health care provider, unless the disclosure is otherwise allowed by law." In reaching this conclusion, the court began by explaining that one of the primary factors that the court uses when deciding whether to adopt a new common law cause of action is "whether existing [judicial] remedies are sufficient to compensate those who seek the recognition of a new cause of action...." Regarding the disclosure of medical records, no such remedy exists pursuant to statute, although the General Assembly recognized the importance of confidentiality in the doctor-patient relationship by enacting General Statutes § 52-146o, which creates an evidentiary privilege arising from that relationship. Similarly, no remedy exists pursuant to federal law, although by enacting HIPPA, Congress recognized the importance of the confidentiality of medical information. In fact, the *Byrne* Court viewed HIPPA—notwithstanding its failure to set forth a means for victim compensation—as supporting the adoption of a common law cause of action because doing so would support HIPPA's goals "by establishing another disincentive to wrongfully disclose a patient's health care record."

Having concluded that existing judicial remedies did not offer sufficient protection, the court next examined how sister states have resolved the issue. The court concluded that this research also supported the adoption of the plaintiff's proposed common law rule as a majority of jurisdictions to address the issue—including New York and Massachusetts—have recognized a common law cause of action for breach of the duty of confidentiality of medical records by a health care provider. Based on state, federal, and sister state law, the court decided that a patient should have a civil remedy against a health care provider for the unauthorized disclosure of confidential information "unless the disclosure is otherwise allowed by law."

But what about the fact that the defendant in this case had disclosed the plaintiff's records in response to a subpoena? Shouldn't that at least fall within the "otherwise allowed by law" exception? Not under the facts of this case. Although General Statutes § 52-146o(b) provide that a patient's consent is not required for disclosure "pursuant to any statute or regulation...or the rules of court," a subpoena, without a court order, is not a "rule of court." Moreover, the court pointed out that the defendant, by simply mailing the plaintiff's confidential medical records to the court, "did not even comply with the face of the subpoena, which required the custodian of records for the defendant to appear in person before the attorney who issued the subpoena." Nor had the defendant complied with regulations promulgated under HIPPA, which permit the disclosure of records pursuant to a subpoena but "only if the patient has received adequate notice of the request or a qualified protective order has been sought." Because there existed a genuine issue of material fact regarding whether the defendant had violated the duty of confidentiality it owed the plaintiff, the court again remanded the case to the trial court.

Although he joined in the majority opinion, Justice Robinson filed a separate concurrence. In it, he referred to another recent decision in which the court had recognized a new common law cause of action: *Campos v. Coleman,* 319 Conn. 36 (2015) (adopting common law cause of action for minor child's loss of parental consortium). In *Campos,* a four member majority of the court overruled *Mendillo v. Board of Education,* 246 Conn. 456 (1998)—a 17-year-old decision in which the court had concluded that it was up to the legislature, and not the court, to recognize a parental loss of consortium cause of action. Justice Robinson, who had joined Justice Zarella's dissenting opinion in *Campos,* explained that, although he agreed that "a duty of confidentiality arises from the physician-patient relationship and that unauthorized disclosure of confidential information...gives rise to a cause of action sounding in tort," he thought it important to "emphasize [his] continuing reticence to recognize new causes of action under Connecticut's common law insofar as it is not the duty of this court to make law." Justice Robinson explained that the cause of action at issue in *Byrne,* however, was different in several material respects from that at issue in *Campos,* including: (1) there was no contrary precedent on point, which meant that the court's recognition of the cause of action would "not disturb the settled expectations" of those potentially affected by it; (2) permitting the claim "complement[ed]" both federal (HIPPA) and state (General Statutes § 52-146o) law; and (3) there exists "extremely broad support" among Connecticut's sister states for recognition of the cause of action at issue in *Byrne.*

So what do we think? It's hard to argue that a person whose doctor improperly disclosed her medical records to her ex-boyfriend should not have her day in court. Indeed, that an administrative agency might impose a fine provides little solace for the victim of such an egregious breach of trust, and the lack of a "real" remedy could have a chilling effect on patients' willingness to disclose critical health care information to their providers. And though we certainly were skeptical of the majority opinion in *Campos;* see "*Campos v. Coleman,* 319 Conn. 36 (2015): Defining the Court's Role," *Connecticut Lawyer*, Vol. 26, No. 4 (Dec. 2015/Jan. 2016), pp. 30–31, 36; we agree with Justice Robinson that the fact that the *Byrne* Court was writing on a blank slate is a critical difference. **CL**

The following highlights are provided by the publishers of the *Connecticut Law Reporter*. For copies of these opinions or information about the reporting service, call (203)458-8000. All citations are to the weekly edition of the *Connecticut Law Reporter*.

Highlights from Recent Superior Court Decisions

Arbitration

Brubaker v. Ranciato, 65 CLR 400 (Wilson, Robin L., J.), holds that fraudulent inducement to enter into an agreement does not preclude the enforcement of an arbitration clause contained within the fraudulently induced agreement. That is, an arbitration clause remains enforceable even if it is a sub-agreement contained within a fraudulently induced primary agreement, unless the fraudulent conduct was specifically directed at the arbitration "sub-agreement." The opinion also holds that the provision of the Arbitration Act that limits judicial enforcement of arbitration agreements to "*written*" agreements, Conn. Gen. Stat. § 52-409, does not require that an arbitration agreement be signed; rather, it is only necessary that the parties' agreement to arbitrate be established by written evidence.

A clause of a home construction contract requiring that "any dispute, conflict or claim arising from this agreement, *except with respect to any collection action,*" shall be settled by arbitration, requires arbitration of all claims if even one non-collection dispute is submitted. The opinion applies the "positive assurance test" to conclude that all claims, even collection claims, must be joined in any arbitration based on even one non-collection matter. *A.P. Savino, LLC v. Csak,* 64 CLR 877 (Povodator, Kenneth B., J.).

Contracts

V&M Construction, Inc. v. Coelho, 65 CLR 227 (Nazzaro, John J., J.), holds that a homeowner's knowledge at signing that a home improvement contract was unenforceable by the contractor because of noncompliance with the Home Improvement Act, and therefore that the contract could be unilaterally repudiated at any time, constitutes sufficient bad faith by the homeowner to allow the contractor to recover on equitable grounds for services provided in reliance on the contract. The opinion denies a motion to strike a contractor's complaint in which such conduct by the defendant/homeowner was alleged. The defendant unsuccessfully argued that knowledge of unenforceability alone is insufficient to bar a homeowner from relying on the Act to defeat a contractor's claim.

A mechanic's lien applies only to amounts payable pursuant to an agreement and therefore not to a contractor's claim for extra work not covered by an original or supplemental agreement. *Wegrzyniak v. Hanley Construction, LLC,* 65 CLR 293 (Moukawsher, Thomas G., J.).

The prior pending action doctrine does not apply to two actions brought by a subcontractor against a general contractor's performance bond, one action asserting a direct claim against the general contractor and the other asserting a claim as assignee of a sub-subcontractor, even though both actions involve the same set of facts. *M. Brett Painting Co. v. Allied World Specialty Insurance Co.,* 65 CLR 304 (Noble, Cesar A., J.). The opinion does, however, order that the two actions be consolidated.

Criminal Law and Procedure

State v. Malone, 65 CLR 232 (Jongbloed, Barbara Bailey, J.), discusses whether, in light of the decriminalization of small amounts of marijuana, a police officer's detection of an odor of marijuana during a routine traffic stop can justify a warrantless search of the vehicle for criminal amounts of contraband. The opinion concludes that the warrantless search in this case was justified based on other, more significant evidence of illegal activity.

A criminal defendant is entitled to disclosure of the criminal history records of all prosecution witnesses. *State v. Wilson,* 65 CLR 239 (Dewey, Julia DiCocco, J.). The opinion rejects the prosecution's argument that such disclosure would violate the confidentiality provisions of the National Crime Prevention and Privacy Compact, on the grounds that it only regulates the release of criminal records for noncriminal purposes and has no application to the use of such information in criminal proceedings.

The opinion in *Fuller v. State,* 65 CLR 237 (Bellis, Barbara N., J.), discusses the rule that a tort claim cannot be prosecuted if a judgment in favor of the plaintiff would demonstrate the invalidity of an outstanding criminal prosecution against the plaintiff; such a claim is not ripe for adjudication unless and until the conviction is lifted pursuant to an appeal or a habeas corpus proceeding. The opinion holds that the rule does *not* apply to an action brought by a convicted criminal for an alleged assault inflicted by police officers to prevent the defendant from revealing police misconduct concerning the prosecution, because a judgment for damages in the assault case would not necessarily be inconsistent with the criminal conviction.

Employment Law

Stevens v. Vito's by the Water, LLC, 65 CLR 430 (Noble, Cesar A., J.), holds that the "good faith belief" exception to an employer's liability for double damages for a failure to comply with state minimum wage requirements is satisfied only by proof of an "honest intention" to ascertain and satisfy the requirements of the act; mere ignorance of the law is insufficient to qualify for relief from double damages. The opinion holds that a restaurant owner's claimed ignorance of the fact that the allowance against the minimum wage for wait staff employees is available only with respect to time spent

by an employee in serving tables, and not to time spent performing general functions not directly related to table service, does not constitute "good faith belief" and therefore the employer remains liable for double damages.

The provision of the Workers' Compensation Act that establishes that an employer that lends an employee to another employer is deemed to be the lent employee's sole employer for purposes of the Act, Conn. Gen. Stat. § 31-292, applies to statutory claims for wrongful termination in retaliation for exercising rights under the Act, Con. Gen. Stat. § 31-290a. This opinion holds that an employee provided by a manpower company to a customer cannot sue the customer under § 31-290a. *Tryon v. EBM-Papst, Inc.,* 65 CLR 434 (Morgan, Lisa K., J.).

Kwiatkiowski v. Beatty, 64 LCR 719 (Brazzel-Massaro, Barbara, J.), holds that an employer does not owe a special duty to protect minor employees from harm. The plaintiff unsuccessfully argued that the "loco parentis" doctrine, which imposes a heightened duty on third parties who assume temporary custody over minors, should be extended to the employer/employee relationship.

A claim for wrongful termination in violation of public policy may be based on a termination for a refusal to work with an intoxicated co-employee. *Algarin v. LB&O, LLC,* 64 CLR 938 (Kamp, Michael P., J.).

Family Law

Membrino v. Membrino, 65 CLR 308 (Taylor, Mark H., J.), holds that an appeal from the appointment of a conservator for the estate of an elderly family member, brought by another family member who claims that the appointment was obtained through fraud, is not rendered moot by the death of the conserved person, because an unchallenged appointment might provide the challenged conservator with the cloak of quasi-judicial immunity as a defense to any claims of wrongdoing.

Although the statute authorizing the voluntary appointment of a conservator of the person or estate is worded in a manner that suggests the probate court should "[explain] to the respondent that granting the petition will subject the respondent… to the authority of the conservator," Conn. Gen. Stat. § 45a-646, it is not necessary that an express explanation, or warning, be given. Rather, a voluntary appointment may be upheld on appeal if it is apparent from the record that the probate court asked sufficient questions to gauge whether the respondent understood the consequences of a conservatorship. *Heinemann v. Heinemann,* 65 CLR 266 (Domnarski, Edward S., J.).

A provision of a premarital agreement requiring that in the event of dissolution "each party shall be responsible for his or her attorney fees" does not bar an award of pendente lite attorney fees. *Clarke v. Clarke,* 65 CLR 327 (Colin, Thomas D., J.). However, each party remains ultimately responsible for its own fees so that any pendente lite payments must be offset against the recipient's final distribution of assets.

In a wrongful death action brought by the decedent's spouse individually and as executor of the decedent's estate, the surviving spouse cannot assert a claim for any liability imposed on the spouse individually for the decedent's antemortem medical expenses as authorized by the Spousal Support Act, Conn. Gen. Stat. § 46b-37, both because the Wrongful Death Act provides the sole remedy for *all* damages related to a death, and because the Spousal Support Act does not provide for the transfer of a spouse's support obligation to a third party, even a third-party tortfeasor. Antemortem damages may be recovered by the estate as an element of damages on the wrongful death claim, but not by the spouse on a direct claim under the Spousal Support Act. *Vaccaro v. Loscalzo,* 65 CLR 177 (Wilson, Robin L., J.).

The Wrongful Death Statute, Conn. Gen. Stat. § 52-555, authorizes tort actions on behalf of a fetus beginning with the point of development at which the fetus has "quickened" within the mother's womb. E*lderkin v. Mahoney,* 65 CLR 300 (Blue, Jon C., J.). The opinion rejects the defendants' claim that wrongful death actions on behalf of deceased fetuses should be allowed only if the fetus had become "viable."

Landlord and Tenant

Sen v. Tsiongas, 65 CLR 296 (Swienton, Cynthia K., J.), holds that in a premises liability action against a landlord for injuries inflicted by a tenant's dog knowledge of viciousness cannot be imputed based solely on the breed. The opinion holds that mere knowledge that a tenant's dog was a pit bull, and even knowledge that the dog was classified as a "bait" pit bull, does not provide sufficient evidence to impute knowledge to a landlord that the dog had a vicious propensity.

A tenant of commercial property owes a duty to warn visitors of dangerous conditions encountered in a common area when approaching the tenant's premises, even though the defects are outside of the area controlled by the tenant. *Conney-Grover v. Town Center of South Windsor, LLC,* 65 CLR 312 (Bright, William H., J.).

A commercial tenant's option to terminate a ten-year lease at the end of the fifth year, provided the tenant is "*in occupancy of the entire premises*" at that time, is defeated by the presence of a subtenancy granted over a portion of the premises. *Aircastle Advisor, LLC v. ESRT First Stamford Place SPE, LLC,* 65 CLR 258 (Jacobs, Irene P., J.). The opinion holds that a tenant's attempted termination was invalid because a portion of the leased premises had been sublet. The opinion reasons that the purpose of the clause was to assure that the landlord would have to deal only with a single tenant upon an early termination of the ten-year lease.

Law of Lawyering

Leth v. Halloran & Sage, LLP, 65 CLR 269 (Noble, Cesar A., J.), holds that while misconduct by an attorney designed to obtain a client may be relied on to establish a claim under the entrepreneurial exception to the general rule that CUTPA does not apply to claims arising out of an attorney's representation of a client, there is no authority establishing that misconduct designed to keep an existing client may be asserted to support a claim under the entrepreneurial exception.

The attorney/client privilege applies to communications between an attorney and a prospective client even if ultimately the attorney is not retained by the client. *Veli-*

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Planting the Seeds of Greatness

"We all carry the seeds of greatness within us, but we need an image as a point of focus in order that they may sprout."

By Aidan R. Welsh

Aidan R. Welsh is chair of the Connecticut Bar Association Young Lawyers Section for the 2017-2018 bar year. She is partner at Schoonmaker George Colin & Blomberg PC in Greenwich, where she handles complex divorce and family law actions involving significant assets and client custody issues. Attorney Welsh frequently speaks on issues related to family law for the CBA and has authored several publications in this field. She graduated with honors from UConn School of Law in 2006.

A few months back I received a beautiful notecard in the mail. The sender was one of my partners at the firm. I wasn't expecting a personal card from my partner given that our offices are only a few steps away from each other and we are constantly talking to and e-mailing with one another. However, I was surprised to receive one of the warmest and most touching cards I had ever received from a friend or colleague. My partner thanked me for being there for her professionally and personally and reminded me of my own attributes that that she admires. My partner has always been my mentor and a guiding force but now hearing her say that I am just as important to her as she is to me, I quickly realized that this is what a truly great mentor-mentee relationship is all about. A mentor is someone who guides you professionally, supports you, teaches you, inspires you, encourages you, and pushes you to be the best version of yourself.

I have been blessed during my career thus far to have had the benefit of several mentors. I must give a special thank you to Cynthia C. George, Jill H. Blomberg, the Honorable Thomas D. Colin, and many more. I can truly say that I would not be in the position I am today without these mentors. Now as I enter the next phase of my career and form my own relationships with mentees, I can only hope that I pass on what I have learned and make a difference to other young lawyers as my mentors have done for me.

As I transform into this new role as a mentor, I wanted to share some insights I have learned about the mentor-mentee relationship in the hopes that many young and experienced professionals will be fortunate to form such a bond during their careers.

Seek Out Mentorship

Our law firm was built on the model that young lawyers' careers are developed by the more experienced lawyers giving them opportunities to be involved in all aspects of cases under the guidance of the more experienced lawyer. If you find yourself in a similar firm or company, then learn everything you can from those who have paved the way before you. Ask questions, run scenarios with them, and actively listen as they advise clients and negotiate. Seek out opportunities to hone your new skills, even if you are nervous or anxious to do so. With a supportive mentor, they will not want you

to fail, so they will give you the ammunition necessary to succeed by teaching, encouraging, and building your confidence. Every young lawyer doubts themselves from time to time (and sometimes more often than not), but when you have someone who believes in you, take chances because you will succeed with their guidance. When you try your new skills, follow up with your mentor about how you did, improvements you can make, and ask for feedback on what you did well. Not all mentor-mentee relationships are the same, so build the relationship you want.

Not all firms provide opportunities for mentorship in the same manner. If that is the case for you, then seek out a mentor either within your company or at another similar company. There is always someone who loves what they do who would be more than willing to share with you tips about their experiences and teach you what they know. A good mentor will understand that the benefits to them are just as great as the benefits to you, so hopefully you can create this type of relationship with them. This leads me to my next point…

Give as Much as You Get

A solid and effective mentor-mentee relationship is a two-way street. The mentee receives the guidance, support, and direction from the mentor. However, the mentee can provide the mentor with significant benefits as well. By teaching skills to a mentee, the mentor can better hone their own skills and increase their own confidence. In addition, by giving back and helping someone else move forward in their career, a mentor can experience a growth in their own self-worth. By working hard and learning from your mentor, your mentor may be able to achieve goals they would not have otherwise achieved without your assistance and support. Many mentors are extremely busy and over-worked at times, but by providing mentorship to a younger colleague, that younger colleague can lighten the load and make the mentor more prepared and organized in their presentations to clients, courts, and other professionals. Give as much as you get. This will make you invaluable to your mentor and lead to further successes in your career.

Never Miss an Opportunity to Learn or to Teach

Every conversation with a client or opposing counsel, negotiation, mediation, and legal argument presents an opportunity to learn and teach. Sometimes, as lawyers, we are moving at a rapid pace and it is hard to catch up for a young lawyer. If you are the mentor, slow down and explain to your mentee *why* you are doing what you are doing. By explaining to your mentee the reasons behind your actions, you as the mentor are forced to slow down, strategize, and refocus your own thought process for the benefit of your mentee. As the mentee, running from project to project without understanding why you are being asked to perform certain tasks only stunts your learning process, so make sure you understand why you are doing each and every task. Ask if you need to, but make sure you know.

Don't let the Socratic Method die with law school—mentors ask your mentees questions in such a way to ensure that they understood the strategy of your case and the goals of the project they are working. The encouragement of independent thinking fosters growth and development for a young lawyer.

Your Mentor/Mentee Can Be Your Biggest Fan

Remember that your mentor and/or mentee can be your biggest fan. When you doubt yourself, have a bad day, or just need someone to pump you up—your mentor/mentee is just a phone call or e-mail away. When you had a stellar day in court, got a great deal for your client, or brought in a new big client, there is one person who will always be the first to recognize your accomplishments.

If you are a young lawyer and you do not have a professional in your career that you instantly thought about when reading this article, then I highly recommend seeking out a mentor right away. The benefits are limitless. If you are an experienced lawyer and a young professional did not come to mind as someone you mentor, offer your expertise to someone starting out. There is nothing more beneficial than forming a mentor-mentee relationship. Having someone say that their career would not be what it is without you in their life is such an amazing and worthwhile feeling, whether you are the mentor or the mentee. **CL**

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Highlights
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ju v. Tejeda, 65 CLR 411 (Lager, Linda K., J.). The opinion bases the existence of a privilege for communications with prospective clients on the common law, but notes that amendments have been recently proposed to the Connecticut Code of Evidence that would give additional recognition to the privilege under such circumstances.

An attorney prosecuting an action to collect a fee owed to the attorney is acting in a pro se capacity and therefore is subject to the general rule that attorney fees may not be awarded to pro se parties, including fees authorized by a contract. *Rosenthal Law Firm, LLC v. Cohen,* 65 CLR 319 (Shapiro, Robert B., J.).

Parisi v. Parisi, 64 CLR 381 (Sommer, Mary E., J.), disqualifies counsel in a post-dissolution proceeding in which a clause of a marriage separation agreement must be interpreted, because counsel's testimony as to the parties' intent at the time the agreement was executed is likely to be necessary at trial.

An attorney's maintenance of possession of a client's executed will does not create a continuing relationship that tolls the running of the statute of limitations for claims arising out of the drafting and execution of the will. *Cummings v. Reynolds,* 64 CLR 437 (Krumeich, Edward T., J.).

Pensions and Other Employee Benefit Plans

Retirement benefits are not part of a decedent's estate and therefore a dispute over an alleged intervivos agreement for a distribution of plan benefits is not subject to probate court jurisdiction. *Donato-Nash v. Nash,* 64 CLR 863 (Bates, Timothy D., J.).

Retired municipal employees suing their former employing municipality for breach of contract based on the municipality's adoption of a modified health plan that would impose a new deductible requirement, allegedly in violation of a contractual obligation to charge no more for coverage than was being charged at the time of each employee's retirement, are not entitled to a temporary injunction against the immediate adoption of the plan because there is no evidence that the retirees would suffer irreparable harm. *Torrington Retired Fire & Police Officers Association v. Torrington*, 65 CLR 174 (Schuman, Carl J., J.).

State and Local Government Law

Pedraza v. State, 65 CLR 211 (Dubay, Kevin G., J.), holds that the Accidental Failure of Suit Statute does not apply to applications to the claims commissioner for permission to sue the state. Therefore a civil action brought against the state which is dismissed on the grounds that the underlying application for permission to sue was untimely cannot be cured under the statute.

Sovereign immunity does not bar an action against a state employee for an intentional tort. *Torres v. Teague-Turner,* 64 CLR 830 (Wilson, Robin L., J.). The opinion reasons that such an action would not impose a fiscal burden on the state because the State Employee's Indemnification Act excludes claims against state employees based on "wanton, reckless, or malicious" conduct, and it not likely that the imposition of liability on a state employee for intentional wrongful conduct would impede the state's normal course of business. CL

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