

# Paralegal Focus

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Paralegal Focus is the quarterly newsletter of the Vermont Paralegal Organization.

Vermont Paralegal Organization is a Member of the National Federation of Paralegal Associations (NFPA).

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## President's Message

*By Carie Tarte*

It is hard to believe another summer has come and gone. Speaking of summer, if you missed it, we held our Summer Social at Halvorson's on Thursday, August 15. We appreciate Pam Keats and Monica LaRose for making the trek out to join us on the 15th. A special thank you goes to Logan Provost for waking early from his nap, lighting up the table with his shy smile, and making an attempt to eat lemons (Logan is Kristin Mattes' 8-month-old son).

At the Summer Social, we talked about the various committees needed to prepare for the 2016 NFPA Convention in Vermont. You will find the committee descriptions in this issue. You do not have to be a voting member of the VPO to join a convention committee. In fact, you do not have to be a VPO member to serve and assist on a convention committee. Each committee will have a chairperson who will report to the VPO Board, and that individual should be a VPO member; but the other members of the committee need not be a VPO member. We need all the assistance we can get to pull off a successful convention, so if you or someone you know would be a perfect fit for some of these committees, please contact me to sign up.

Louise and I have started work on a half-day seminar for late fall. We are brainstorming topics and contacting presenters, and we may have it all in place by the time you read this issue. We are also hoping to coordinate a couple of "Lunch 'n Learns" on document-management systems, specifically, Casemap and iPro's Eclipse software, so be on the lookout for announcements regarding those seminars.



VERMONT  
PARALEGAL  
ORGANIZATION

## Editor's Message

*By Louise Reese*

I appreciate the membership contributions in this issue. We have a Member Spotlight on Pamelyn Borden, an update on PACE from Corinne Deering, RP<sup>®</sup>, an awesome announcement from Melissa Young, an interesting article on social media brought to my attention by Corinne Deering, RP<sup>®</sup>, information on the committees needed to prepare for the 2016 NFPA Convention in our fine state, and lots of information in the Did You Know column that I obtained from various sources.

We hope you will find the information in this issue helpful and interesting, and realize that you, too, have something to offer the rest of the membership. Please contact me if you want to share your experiences in the *Paralegal Focus*.

To any student members, I say work hard, study hard, but know when you need to take a break. Being a member of the VPO gives you access to networking with paralegals who have been in the business for many years. Please consider attending a future VPO event or seminar.



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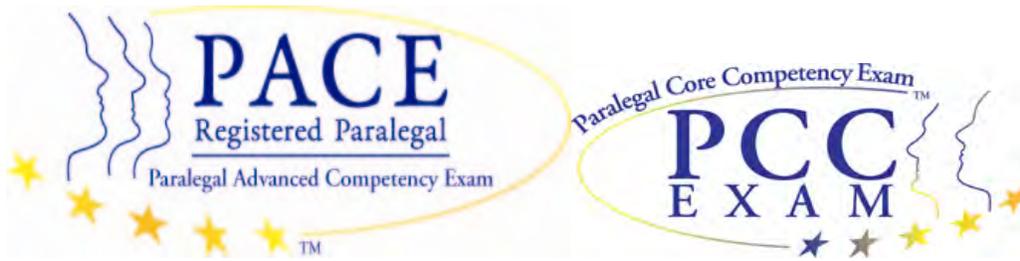
## Q&A

# Pamelyn Borden

## Member Spotlight

<b><i>How old are you?</i></b>	Forty
<b><i>Describe your family.</i></b>	In 2002, my husband and I adopted a little boy from Seoul, South Korea. Gregory is now a sixth grader at Albert D. Lawton Intermediate School in Essex Junction, and plays hockey for Essex Sting.
<b><i>Town in which you live.</i></b>	We live in Essex Junction.
<b><i>What is your favorite food?</i></b>	Anything I don't have to cook! My favorite lunch-menu item is the Grilled Ham & Cheddar at Halvorson's Upstreet Café on Church Street in Burlington.
<b><i>Do have any pets? If so, what are they, and what are their names?</i></b>	Our 14-year-old dachshund, Winston, passed away last year.
<b><i>What kind of hobbies do you have?</i></b>	I am an active fundraiser for the American Cancer Society and a yearly participant and team captain in the Chittenden County Relay for Life. I enjoy hiking, running, cycling, and, of course, watching my son play hockey.
<b><i>How do you unwind at the end of a long work week?</i></b>	Going out to dinner or to the movies is a great way to unwind. If the weather cooperates, a run or bike ride is nice, too. Six months out of the year, I sit at a hockey rink three nights a week and on the weekends.
<b><i>What is your educational background?</i></b>	I obtained my Certificate in Paralegal Studies in 2008 from National Paralegal College and graduated with a 4.0 GPA.
<b><i>Where do you work?</i></b>	Lisman Leckerling, P.C.
<b><i>When did you first become a paralegal?</i></b>	Prior to joining Lisman Leckerling, P.C. in 2008, I worked as a paralegal/legal assistant at the Burlington law firm of Roesler Whittlesey Skiff. I started working primarily with Bill Skiff in 2002.
<b><i>What area of law do you work in?</i></b>	I provide paralegal support to the firm's litigation practice, focusing primarily on medical malpractice, wrongful death, personal injury, and construction claims.

<b><i>What do you enjoy about working in that area of law?</i></b>	I enjoy the challenges brought to me daily and the problem-solving facet of my position. Each day is another opportunity to apply knowledge, facts, techniques, and rules in a different way to unique situations.
<b><i>If you could work in any other area of law, what would it be?</i></b>	I am completely in love with what I do.
<b><i>What is the one thing about being a paralegal you would change if you could?</i></b>	I would like to see the courtroom more. I have been fortunate enough to attend a few trials, but courtroom interaction is very rewarding. It is a great feeling to see how your diligence since the inception of a case pays off, especially when you win!
<b><i>How or why did you first enter the paralegal field?</i></b>	In 1997, I was selected to serve as a juror at Chittenden Superior Court. At the time, I was working up to 72 hours a week managing a jewelry store. It was then that I fell in love with the law. In 1998, I clerked at Chittenden Family Court and ultimately decided to cross over to the "other side."
<b><i>Did you hold other positions, or have a different career, prior to becoming a paralegal, and if so, what was it?</i></b>	I started working as the office manager at Belden Jewelers in 1991. I obtained my certification in Gemology and began managing the store in 1993. I absolutely loved jewelry sales, but the hours were long and the turnover was quite high. It was time for a change.
<b><i>What do you love about the paralegal profession?</i></b>	I am very passionate about my work. I have had the opportunity to help many people in ways I could never have imagined. I love being an integral part of a team.
<b><i>What things about the profession do you dislike?</i></b>	At times, deadlines can really cause a fair amount of stress. For me, stress creates motivation and motivation gets the job done. Success!
<b><i>How long have you been a member of the VPO?</i></b>	I have been a member of the Vermont Paralegal Organization since 2008.
<b><i>Tell me about the skills or traits you possess that you find most useful in your position?</i></b>	Being organized helps tremendously. I have never been afraid to ask questions, make phone calls when necessary, or access the Internet and research various topics.
<b><i>What character oddities or personality traits do you find at odds with your career?</i></b>	I am a great listener. This can, at times, make a brief client interview run very long. This trait coupled with my enthusiasm and being "too nice" can decrease my productivity. I lack the skill to politely shorten a conversation.
<b><i>What brief advice or friendly tip would you offer to someone just entering the paralegal field?</i></b>	Join the Vermont Paralegal Organization. The VPO has experienced members who can answer questions and provide you with guidance and support. You should be flexible and have a willingness to learn. Find an area of law that really interests you. Come to terms with the likelihood that your calendar will become your new best friend.



## THE PCCE™ / PACE® POSTING

*By Corinne Deering, RP®  
Paralegal Certification Ambassador*

It seems like summer is coming to a screeching halt. Where does the time go? I hope everyone had a wonderful summer and was able to enjoy some vacation time.

A “little birdie” told me that we have two members who are finishing up their last weeks of the Advanced Paralegal Institute (API) PACE Online Review Course. I hope to have good news in the next PACE/PCCE Posting announcing two new Vermont PACE Registered Paralegals® (RPs). We wish these members good luck!

For the rest of the Vermont RPs, this is a general reminder that next year is an even-numbered year, which means all of us have to renew our credentials. Be sure to keep up on your CLE credits and ethics credits. Amazingly, all of the current Vermont RPs passed their exams in even-numbered years. Do you suppose that is just a coincidence? I hope so!

### PACE sample test question:

The phrase “indemnify and hold harmless” refers to a(n):

- A. Commitment by one party to the other party to repay in the event of a specified loss.
- B. Obligor’s responsibility to bear all losses in a contract dispute.
- C. Injured party’s ability to recover one-half of its losses from each party to the contract.
- D. Injured party’s ability to recover all losses in unequal shares from both parties to the contract.

Answer – A: This PACE sample is another fairly straightforward type of question typically found on the PACE exam. The phrase is often used in contracts. It means that one party will repay the other in the event of any type of loss. The other options could be eliminated. Option D refers to a “jointly and severally liable” clause, not to a “hold harmless” clause. Option B would be eliminated because it does not mean that one party will bear all losses. Option C is not correct because a “hold harmless” clause can refer to more than two parties. It essentially makes the other party whole again, as though no losses occurred, and does something different than pay half the loss.

The only correct answer is A.

## **A MESSAGE FROM THE VPO'S PROFESSIONAL LIAISON**

*By Melissa L. Young*

I am pleased to announce that the VBA Board has approved the VPO Board's Paralegal Section Proposal. The VPO Board and others worked hard to make this happen, but it would not have been possible without the guidance and support of Bob Paolini, Executive Director of the VBA.

The following details the VPO Board's intended purpose in creating a Paralegal Section within the VBA:

1. To establish and maintain communication between the VBA and VPO regarding professional issues affecting both paralegals and the legal profession in general, e.g., the potential stratification of the legal profession, paralegal licensure/certification, ethical considerations, legislative changes and pro bono services.
2. To maximize paralegal utilization for improved support to attorneys resulting in both increased productivity and profitability.
3. To work cooperatively toward resolving common issues and concerns that arise due to the complexities of the attorney/paralegal dynamic.
4. To encourage collaboration between the VBA and VPO regarding CLE opportunities/events, marketing, networking, social events, and member benefits.
5. To increase active paralegal membership and participation in both the VPO and VBA; to establish a single set of criteria for paralegals seeking membership status in both organizations.
6. To work toward the common goal of providing high-quality, efficient and cost-effective legal services to consumers.

We look forward to a positive alliance between the VBA and VPO and increased participation by paralegals in both organizations.

## 2016 CONVENTION COMMITTEES

### **COMMITTEE NAME: SEMINAR**

**BRIEF DESCRIPTION:** Brainstorm topics (not Vermont specific) and identify speakers for CLE sessions throughout the first full day of convention.

### **COMMITTEE NAME: SOCIAL**

**BRIEF DESCRIPTION:** At each convention, the host organization holds a Wednesday evening social event and a Friday evening social event. We need a committee to brainstorm and plan out the details for those two events, including transportation. Possible ideas include a Spirit of Ethan Allen dinner cruise, a visit to Echo Aquarium, the haunted tour of Burlington, or the Magic Hat brewery tour.

### **COMMITTEE NAME: VENDOR**

**BRIEF DESCRIPTION:** NFPA brings in national vendors to promote their products and services at convention; however, the local association must identify some local vendors who will pay for booths to sell their product and services. The vendors do not have to be legal in nature, and some possibilities include court reporters, transcribers, mediators, copy services, couriers, maple producers, jewelry makers, or restaurants.

### **COMMITTEE NAME: SPONSORSHIP**

**BRIEF DESCRIPTION:** Having luncheons, breakfast, and snacks at the convention for attendees can be expensive. The host association is tasked with finding local individuals, firms, corporations, or other organizations to be sponsors of meals or other events. For example, the committee could ask Ben & Jerry's to sponsor an afternoon snack! The committee would also be tasked with obtaining sponsors for portions of the Wednesday and Friday evening social events.

### **COMMITTEE NAME: KEYNOTE SPEAKER**

**BRIEF DESCRIPTION:** During one of the luncheon portions of convention, the host association needs to find a local celebrity, political figure, author, or someone else, to deliver to the group a keynote speech. Some ideas include Sen. Patrick Leahy, VT Supreme Court Judge Beth Robinson, or writer Chris Bohjalian.

### **COMMITTEE NAME: PUBLICITY/MARKETING**

**BRIEF DESCRIPTION:** Prior to convention, there needs to be a lot of publicity for the event, including press releases in the Burlington Free Press and other newspapers, and in NFPA publications. In addition, this committee will be charged with creating a logo and catchy phrase for the convention and producing the convention brochure. Hint: If you are creative, this is the committee for you!

**COMMITTEE NAME:  
WELCOME**

**BRIEF DESCRIPTION:** We need a group of people whose job it is to be on site as a point of reference for directions, and to help with room issues, transportation, and recommendations for activities during downtime. These people need to be fairly familiar with downtown Burlington. The Welcome Committee also comes up with the “welcome bag” for attendees and handles all aspects of purchasing the bags, getting the logo on the bags, and getting contents for the bags.

**COMMITTEE NAME:  
STUDENT LIAISON/  
STUDENT EVENTS**

**BRIEF DESCRIPTION:** We will need a committee to coordinate with Burlington College and Champlain College to formulate an event during convention specifically designed for students. This means figuring out the best time for the event for maximum attendance, and determining the kind of event that would be most beneficial for students (i.e., job-interview techniques session, or a social event to match up students with legal vendors).

**COMMITTEE NAME: CHARITY/CHARITABLE CONTRIBUTIONS**

**BRIEF DESCRIPTION:** At each convention, the local association selects a charity that will receive certain proceeds from the convention. There is typically a casual day when attendees pay to wear jeans and a T-shirt. Those contributions are donated to the charity designated by the host association. Generally, the host association needs to come up with three or more potential charities, and NFPA makes the final decision.

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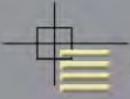



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## **FILING BRIEFS IN THE VERMONT SUPREME COURT SUMMARY OF PRESENTATION BY CATHY GATTONE, VT SUPREME COURT CLERK**

*By Cathy Foutz*

At the VPO's Annual Meeting, I attended Cathy Gattone's informal, and very helpful, seminar session at the May 8, 2013, VPO's Annual Meeting on filing documents with the Vermont Supreme Court. She provided attendees with "Instructions for Appealing Your Case to the Supreme Court" and current versions of various Vermont Rules of Appellate Procedure (VRAP):

VRAP Rule 3:	Appeal as of Right – How Taken
VRAP Rule 4:	Appeal as of Right – When Taken
VRAP Rule 10:	The Record on Appeal
VRAP Rule 25:	Filing and Service
VRAP Rule 28:	Briefs
VRAP Rule 30:	Printed Case
VRAP Rule 30.1:	Printed Case References in Videotape Proceedings
VRAP Rule 31:	Filing and Service of Briefs; Disqualification
VRAP Rule 32:	Form of Briefs, the Printed Case, and Other Papers

For those who have not recently filed in the Supreme Court, the most important piece of information that Cathy provided was her telephone number: 802-828-4774. Veteran filers likely know that she is an excellent telephone reference. She noted that she guides numerous pro se litigants on a regular basis, so she is accustomed to a wide variety of questions.

NOTE: Since the May 8, 2013 seminar, the Vermont Supreme Court issued *Emergency Amendments, effective July 1, 2013*, to VRAP 30 (and other rules). Those changes will be noted below in *italics*.

Cathy did not specifically cite to VRAP in much of her presentation, but rather gave a practical guide to filing procedures and court practices. For this reason, rule citations are not cited here, and the VRAP should be consulted before any reliance on this summary. Below are key points from her presentation:

- The Notice of Appeal must be filed in the trial (lower) court within 30 days of the date of the final judgment, with a copy to all parties and to the Supreme Court, and a check in the amount of \$262.50 sent to the trial court but made payable to the Vermont Supreme Court.
- Within 10 days of the filing of the Notice of Appeal, the Appellant files a Docketing Statement with the Supreme Court. (*Per the 7/1/13 emergency amendments, the Docketing Statement found within VRAP 3 is no longer part of the Rule, but can be found on the VT Judiciary website.*) If the Appellant already has trial transcripts, the Docketing Statement should

include the note “Transcripts in our possession.” The Court will request them from the Appellant if they are not provided.

- Also within that 10 day period, the Appellant must order any transcripts not in his/her possession. Transcripts may be ordered online, or by telephone from one of two transcript vendors. The Appellant should be sure to check “ON APPEAL” on the ordering forms. The vendors will then contact the Supreme Court. The Court will call the transcript companies if the requested transcripts have not arrived within 30 days; the parties are not obligated to place this call.
- A case may be dismissed if there is noncompliance with the above procedure. If that occurs, a party may file a request to re-open, and the party should file the above required materials with that request.
- The Appellee then has 10 days to respond to the Docketing Statement (although Cathy stated that about 90% of Appellees do not file their own Docketing Statements). The Appellee can request transcripts not noted by the Appellant in the Docketing Statement (the Appellee may file an Objection to Designation on Appeal). The Appellee may also order transcripts, and if he/she does, the Appellant is not permitted to use or cite to transcripts separately ordered by the Appellee.
- Once the Supreme Court has received the transcripts, it deems the record “complete.” The Court does not wait for the lower court to forward the file.
- If no transcripts are ordered, the record is deemed complete upon receipt of the Docketing Statements. *The July 1, 2013, emergency amendments removed the requirement (Rule 12(b)(1) and (2)) that the Supreme Court Clerk receive the record before notifying the parties that the record is complete where no transcript is ordered.*
- Within 30 days from when the record is deemed complete, the Appellant must file his/her Brief and Printed Case.
- The Appellant may file a stipulation to extend that deadline; no related order by the Court is issued as long as all parties have agreed to the extension. Only one such stipulated extension is allowed per party. If a further extension is sought by the Appellant, he/she must do so by motion. Motions to extend time must be filed at least seven business days (not calendar days) prior to the deadline; an original and one copy of the motion must be submitted. Cathy said that the first motion for extension filed by a party is almost always granted, but parties should not ask for more than a 30-day extension.
- The cover to the Brief of the Appellant must be blue; an original (signed) and seven copies must be filed, as well as the electronic version. The Brief must contain a cover page,

Table of Contents, Table of Authorities, Statement of the Case (what happened in the Trial court), the Issues/Arguments (why the lower court erred), and Conclusion. The Brief must be accompanied by a Certificate of Word Count, with a maximum of 9,000 words. There is no longer a page count, but 9,000 words equals about 30 pages. Words in the headings, Tables, signature blocks, etc., are not included in the Word Count. A certificate that a virus-protection process was used prior to filing electronically must also be included. A Certificate of Service is “nice” per Cathy. If the Brief and Printed Case are served on the parties electronically, the filer need not also provide a paper copy (except to the Court).

- *See* Rule 32 as to font size, margins, etc. A single staple is preferred for a Brief so the document will be reasonably flat when open. A Brief must be single-sided, but Printed Cases may be double-sided. Eight paper copies of each Brief must be filed with the Court, as well as an electronic version.
- Printed Cases must have white covers. *The recent emergency amendment to Rules 30(b)(d) and (f) changed the requirement of only one copy to **eight paper copies** to be filed with the Court, plus electronically (noting that the one copy under the earlier temporary rule was found to be insufficient for the needs of the Court, in cases without an electronic case file.) The emergency amendment also requires the sequential numbering of the printed case, beginning with the cover sheet.*
- The Printed Case should include the lower court’s docket entries (the Court needs to see all the judges who were involved in the lower court proceeding), the Notice of Appeal, and the Decision being appealed. The Decision must also be attached to the Docketing Statement. In addition to these materials, the parties should include any other record documents they want the Court to consider. If a source is cited in the Brief, it should be in the Printed Case.
- Supplemental Printed Cases to accompany the Appellant’s Brief are acceptable.
- The only filings to the Supreme Court that are accepted electronically are Briefs and Printed Cases. No faxes are allowed, and all motions and Docketing Statements must be filed by mail in paper form.
- The Appellee has 21 days from the date of filing of the Appellant’s Brief, to file his/her Brief. The cover must be red. The same rules apply to an Appellant’s Brief. If there is a Cross-Appeal, the Brief may be 12,000 words.
- The Appellant may file a Reply Brief with 14 days of the date the Appellee’s Brief was filed. The cover must be gray, and the word count is 4,500.

- Parties can file for extensions on word counts; approval may be based on the complexity of the issues of a case.
- Cathy noted that each Justice has an assigned area of the State. I later clarified that she was referring to Appellate Administrative Order 14, and these responsibilities are only as to substantive motions in an appeal originating from those counties. (As of December 12, 2005, Justice Dooley handles Area I; Justice Skoglund, Area II; Justice Johnson, Area III, and Justice Burgess, Area IV.) The Justices rotate the decision making on routine scheduling and logistical motions. The responsibility for issuing the decisions is random in assignment; Cathy said they are “assigned upstairs,” and it does not depend on the emanating county or even the subject matter of the case.
- Once the Appellee’s Brief is filed, even before any Reply Brief, the Supreme Court staff attorneys begin assessment of case materials, particularly as to how a hearing will be handled. The full court hears cases nine times each year, with 30-minute hearings (15 minutes per side). Hearings on cases which proceed on their “Rocket Docket” are 10 minutes (5 minutes per side) before a three-judge panel. That panel meets once a month, except in July and August, and decisions are usually rendered within approximately 48 hours.
- Cases can be heard on the Rocket Docket, and the Court could then decide they need a full court review after that short hearing. Parties would be notified within 48 hours.
- The Court tries to issue decisions on all cases within 90 days, but they can take up to three years, depending on the issues of the case.
- Full court decisions are posted quickly after issuance; Rocket Docket decisions can take up to two weeks to be posted. Cathy was uncertain on the distinction between published and unpublished decisions, but said that published ones are likely *precedential* rulings.
- After a decision is rendered, the parties have 14 days to file for reconsideration. Prevailing parties can file for costs (production of briefs, filing fee, transcript costs). If there is no reconsideration filing, the file is returned to the trial court 21 days after the date of the decision. The Supreme Court retains only one copy of each Brief and the Printed Case.
- Cathy reminded us of logistical requirements and added some suggestions. It is preferred that Briefs be stapled; Printed Cases can be bound in any manner (binders are still permitted). Printed cases do not have to open flat, as Briefs do. If a Printed Case is too large to email easily, it can be presented on a flash-drive or a disk. If the Court’s website email is not sufficient for a larger Printed Case, filers can call Cathy, and she can provide her personal email account. Drop-box systems can work as well, although those sometimes have an expiration period.

- Cathy discussed a number of exceptions to these standard rules and procedures:
  - With Interlocutory Appeals, if the trial court grants the request motion, it is then sent to the Supreme Court for review and acceptance. If accepted, an entry order is issued which triggers the regular briefing schedule. If a request is denied by the trial court, the moving party can file directly within 10 days, a motion to the Supreme Court for an Interlocutory Appeal. Acceptance by the Supreme Court is still discretionary.
  - Juvenile cases are handled differently from regular appeals by an expedited process. Those cases are usually considered on briefs alone, unless oral argument is specifically requested.
  - Foreclosures are also handled a bit differently, and usually opened upon a motion. The Court has discretion on whether to accept the appeal.
  - Probate appeals are handled differently as well (not detailed here).
  - Traffic Court appeals are rarely accepted by the Supreme Court.
  - Small Claims Court cases are discretionary as well. There is no filing fee, but the Supreme Court accepts only about one in 50 requested appeals. (*See* Small Claims Rule 10.)

## Tools of the Trade

### Top 10 Tips - Procedure and Tactics for Requesting and Obtaining Evidence

guest author: *Ryan M. Springer*

Social network sites [SNS] have hundreds of millions of users. Billions of photographs are uploaded and hosted on these sites. For personal injury lawyers and their staff, it is no longer a matter of whether or not to include SNS in case preparation and discovery, it is a matter of how to do it.

Here are some practical tips for requesting and obtaining evidence:

#### 1. Don't Commit A Crime.

- a. Electronic Communications Privacy Act, 18 U.S.C. § 2510 *et seq.*

"Electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include (A) any wire or oral communication; (B) any communication made through a tone-only paging device; (C) any communication from a tracking device (as defined in section 3117 of this title); or (D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds. 18 U.S.C. § 2510(12)

- b. Stored Wire and Electronic Communications Act, 18 U.S.C. § 2701, *et seq.*

If you are unfamiliar with this law, Facebook will tell you all about it once it receives your subpoena. It governs voluntary and compelled disclosure of "stored wire and electronic communications and transactional records." It prohibits the unauthorized access of internet communications. See *Pietrylo v. Hillstone Restaurant Group*, 2009 WL 3128420 (D.N.J., 2009) (unpublished slip op.) (holding that defendants, the plaintiff's employment managers, impermissibly accessed an internet chat group and the plaintiff's social networking sites).

For a more comprehensive discussion of these laws and their application to social media discovery, see Ryan A. Ward, *Discovering Facebook: Social Network Subpoenas and the Stored Communications Act*, 24 Harv. J.L. & Tech 563 (2011) (available online at <http://olt.law.harvard.edu/articles/pdf/v24/24HarvJLTech563.pdf>)

#### 2. Don't Commit A Tort or Ethical Violation.

- a. Invasion of Privacy ("Unreasonable Intrusion Upon the Seclusion of Another"): See *Pietrylo v. Hillstone Restaurant Group*, 2009 WL 3128420 (D.N.J., 2009) (unpublished slip op.).
- b. Follow the "No Contact" Rule. See Rule 4.2 ABA Model Rules of Professional Conduct:

"In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

It is likely a bad idea to send phony friend or contact requests from "sock" accounts. Don't let your employees or agents do it either. See Rules 4.1, 5.1, and 5.3, ABA Model Rules of Professional Conduct.

3. **Don't Reinvent the Wheel: It's Still Discovery.** The Federal Rules of Civil Procedure, as well as most state rules, require that discovery be limited to that which is "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). That is the guiding principle for all discovery, including SNS Discovery. As the court explained in *EEOC v. Simply Storage Mgmt.*, 270 F.R.D. 430 (S.D. Ind. May 11, 2010):

- a. Discovery of [social networking sites ("SNS")] requires the application of basic discovery principles in a novel context. And despite the popularity of SNS and the frequency with which this issue might be expected to arise, remarkably few published decisions provide guidance on the issues presented here. At bottom, though, the main challenge in this case is not one unique to electronically stored information generally or to social networking sites in particular. Rather, the challenge is to define appropriately broad limits - but limits nevertheless - on the discoverability of social communications in light of a subject as amorphous as emotional and mental health, and to do so in a way that provides meaningful direction to the parties....  
*Id.* at 434.

#### 4. Find a "Doe" Party.

- a. In *DFSB Kollektive Co. Ltd. v. Jenpoo*, 2011 WL 2314161 (N.D. Cal., 2011), the plaintiffs in a copyright violation action sued a defendant named "Michael Jenpoo," which they believed to be an alias. The plaintiffs were granted leave to conduct early discovery to ascertain the true identity of Michael Jenpoo by serving subpoenas on various social media sites including Facebook MySpace and Twitter.
5. Identify Screen Names, Pseudonyms, Avatars, Aliases, or other Online Identities.
- a. Include formal written requests for online aliases in your interrogatories; simply add this to other requests for personal identification.
6. Preserve the Evidence.
- a. Send letters to social media sites identifying accounts and online content and request preservation of those files online or as caches or backups during the pendency of litigation.
- i. Facebook: Preservation Letters and Subpoenas (Facebook will accept service in person or by fax or mail, but only accepts California subpoenas; see your state's interstate discovery rules and/or the Uniform Interstate Depositions and Discovery Act).
- Facebook  
1601 S. California Avenue  
Palo Alto, CA 94304  
Attn: Security Department  
Fax Number (650) 644-3229
- ii. Twitter (Twitter will accept service in person or by fax or mail).
- Twitter, Inc.  
Attn: Trust & Safety  
795 Folsom Street  
Suite 600  
San Francisco, CA 94107  
Fax Number (415) 222-9958
- iii. MySpace (MySpace only accepts personal service).
- MySpace  
Attn: Custodian of Records  
2121 Avenue of the Stars, Suite 700  
Los Angeles, CA 90067
- iv. Provide as much of the following information as is available on the following:
- Your full contact information
  - Response due date (allow 2-4 weeks)
  - Full name of user
  - Full URL to user's SNS profile
  - School or other networks
  - Birth date
  - Any known email addresses
  - Period of activity
7. "Informal" Discovery - "Web Snooping"
- a. Preserves the Element of Surprise
- b. The Sooner the Better
- c. Many users still keep their profiles public - you can see everything. Make screen captures and SAVE IT ALL.
- d. Bookmark the site and go back regularly - new information is added daily.
8. Establish a Factual Predicate to Compel Discovery.
- a. Legitimate Discovery vs. "Fishing Expeditions"

Although SNS content is generally neither privileged nor protected by any right of privacy, "[a] request for discovery must still be tailored . . . so that it 'appears reasonably calculated to lead to the discovery of admissible evidence.'" "Otherwise, the Defendant would be allowed to engage in the proverbial fishing expedition, in the hope that there might be something of relevance in Plaintiff's [SNS] account[s]." *Davenport v. State Farm Mut. Auto. Ins. Co.*, 2012 WL 555759 (M.D. Fla., 2012) (slip copy) (citing *Tompkins v. Detroit Metropolitan Airport*, 2012 WL 179320, at \*2 (E.D. Mich. Jan. 18, 2012)).

In *Tapp v. New York State Urban Dev. Corp.*, 102 A.D.3d 620, --- N.Y.S.2d ---- (N.Y.A.D. 1 Dept., 2013), the court upheld the denial of a defendant's request for access to post-incident Facebook postings, as well as a request for *in camera* inspection of such postings. The court held:

[T]hat plaintiff's mere possession and utilization of a Facebook account is an insufficient basis to compel plaintiff to provide access to the account or to have the court conduct an in camera inspection of the account's usage. To warrant discovery, defendants must establish a factual predicate for their request by identifying relevant information in plaintiff's Facebook account - that is, information that "contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims."

Defendants' argument that plaintiff's Facebook postings "may reveal daily activities that contradict or conflict with" plaintiff's claim of a disability amounts to nothing more than a request for permission to conduct a "fishing expedition."

*Id.* at \*1 (quoting *Patterson v. Turner Constr. Co.*, 88 A.D.3d 617, 618, N.Y.S.2d 311 [1st Dept. 2011] and *McCann v. Harleysville Ins. Co. of N.Y.*, 78 A.D.3d 1524, 910 N.Y.S.2d 614 [4th Dept. 2010]; see also *Kregg v. Maldonado*, 98 A.D.3d 1289, 1290, 951 N.Y.S.2d 301 [4th Dept. 2012].

A Montana court adopted a similar approach to SNS discovery:

The content of social networking sites is not protected from discovery merely because a party deems the content "private." See *E.E.O.C. v. Simply Storage Management, LLC*, 270 F.R.D. 430, 434 (S.D.Ins.2010); *Glazer v. Fireman's Fund. Ins. Co.*, 2012 WL 1197167 (S.D.N.Y. Apr. 5, 2012). But other courts, like the court in *Romano*, have charged a course that allows discovery of a plaintiff's social networking site content where the defendant makes a threshold showing that publicly available information on those sites undermines the plaintiff's claims. See e.g., *Thompson v. Autoliv ASP, Inc.*, 2012 WL 2342928 \*4 (D. Nev. June 20, 2012) (allowing discovery where material obtained by defendant from plaintiff's public Facebook account negated her allegations that her social networking site accounts were irrelevant); *Tompkins v. Detroit Metropolitan Airport*, 278 F.R.D. 387, 388-89 (E.D.Mich.2012) (denying discovery as overly broad where publicly available information was not inconsistent with the plaintiff's claims); *McMillen v. Hummingbird Speedway, Inc.*, 2010 WL 4403285 (Pa.Com.Pl. Sept. 9, 2010); *Zimmerman v. Weis Markets, Inc.*, 2011 WL 2065410 (Pa.Com.Pl. May 19, 2011). Courts requiring such a showing do so, at least in part, to guard against the "proverbial fishing expedition." *Tompkins*, 278 F.R.D. at 388. As the *Tompkins* court explained it, a "[d]efendant does not have a generalized right to rummage at will through information that [p]laintiff has limited from public view." *Tompkins*, 278 F.R.D. at 388. Absent some "threshold showing that the requested information is reasonably calculated to lead to the discovery of admissible evidence," a "[d]efendant would be allowed to engage in the proverbial fishing expedition, in the hope that there *might* be something of relevance in [p]laintiff's Facebook account." *Tomkins*, 278 F.R.D. at 388. The Court agrees with this circumspect approach to the discovery of social networking site content.

*Keller v. National Farmers Union Property & Cas. Co.* 2013 WL 27731, \*4 (D.Mont. 2013) (unpublished slip op.).

In *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650 (N.Y.Sup., 2010), the court permitted disclosure of information the plaintiff in a personal injury action posted to social networking sites that was "material and necessary" for defendant's defense. The court explained:

Plaintiffs who place their physical condition in controversy, may not shield from disclosure material which is necessary to the defense of the action. Accordingly, in an action seeking damages for personal injuries, discovery is generally permitted with respect to materials that may be relevant both to the issue of damages and the extent of a plaintiff's injury."

*Id.* at 652-53 (noting that "injury" includes claims for loss of enjoyment of life) (internal citations omitted).

In *Bass ex rel. Bass v. Miss Porter's School*, 2009 WL 3724968 (D. Conn., 2009), the defendant in a personal injury action narrowly tailored its discovery requests seeking text messages and Facebook posts that were "related to [Plaintiff's] alleged teasing and taunting," as well as "all documents representing or relating to communications...related to the allegations in" the complaint. *Id.* at \*1. Based on the relevancy of the requests, the court ordered production.

But in *McCann v. Harleysville Ins. Co. of N.Y.*, 78 A.D.3d 1524, 2010 NY Slip Op 08181, a court denied the defendant's request to access the plaintiff's Facebook account. The defendant argued that it was entitled to access to discover "whether [the] plaintiff sustained a serious injury in the accident." The court held that in making the discovery

request, the defendant "failed to establish a factual predicate with respect to the relevancy of the evidence," but reversed the lower court's decision precluding the defendant from seeking access in the future.

- b. The "Two Pronged" Approach: *Fawcett v. Altieri*, 2013 WL 150247 (N.Y.Sup. 2013) (unpublished slip op.):

A survey of cases dealing with the production of social media accounts, in both the criminal and civil contexts, reveal a two prong analysis before courts compel the production of the contents of social media accounts. This inquiry requires a determination by the court as to whether the content contained on/in a social media account is "material and necessary;" and then a balancing test as to whether the production of this content would result in a violation of the account holder's privacy rights.

*Id.* at \*1.

- c. **In Camera** Inspection: In *Offenback v. L.M.Bowman, Inc.*, 2011 WL 2491371 (M.D. Pa. 2011) (unpublished slip op.), the defendant in a personal injury action sought access to the plaintiff's MySpace and Facebook accounts. Originally, the defendant requested unrestricted access, which the plaintiff refused. Subsequently, the court ordered an *in camera* inspection, prior to which both parties wrote letters to the court. The court reviewed the pleadings, including the plaintiff's claims that he experienced anxiety in traffic situations and other physical limitations. The court was given access to the plaintiff's Facebook account (the MySpace account was no longer accessible) where it discovered photographs of the plaintiff riding a motorcycle, planning motorcycle trips, and other activities relevant to the nature and extent of his injuries. The court ordered that these photographs be disclosed to the defendant.

In *Barnes v. CUS Nashville, LLC*, 2010 WL 2265688 (M.D. Tenn., 2010) (unpublished slip op.), the magistrate judge created a Facebook account in order to gain access to the plaintiff's profile "for the sole purpose of reviewing photographs and related comments *in camera*."

*Id.* at \* 1.

In both *Offenback* and *Barnes*, the court admonished the parties for not simply cooperating about the disclosure of relevant materials. As the court in *Barnes* stated:

Cooperation on the part of both parties could have prevented this delay. The Defendant's mishandling of the Facebook subpoena was the cause of a major delay. Plaintiff's counsel could have helped resolve the matter by clearing up the issue of the various witnesses, who are friends of the Plaintiff, to produce the various photos on Facebook. Their resistance does raise the specter with the defendant that there is something there they want to hide. Clearly the issue of who took the pictures of the Plaintiff and her friends dancing on the bar is highly relevant, and Plaintiff is in the best position to quickly resolve this. The failure to cooperate by both counsel has lead [sic] to this unfortunate delay. The Magistrate Judge strongly suggests that the parties avoid additional prolonged disputes over Facebook materials....

*Id.* at \*1.

Some courts are resistant to permitting *in camera* review, however:

[A]sking courts to review hundreds of transmissions 'in camera' should not be the all purpose solution to protect the rights of litigants. Courts do not have the time or resources to be the researchers for advocates seeking some tidbit of information that *may* be relevant in a tort claim. While several courts have frequently assigned the 'in camera' review to 'special masters,' the fees to be paid to those special masters should be paid by the party seeking such discovery in a tort case, but which may be shared by the parties in a commercial or matrimonial matter.

*Fawcett v. Altieri*, 2013 WL 150247, \*4, (N.Y.Sup. 2013) (unpublished slip op.).

## 9. "Print Screen" is Your Best Friend

- a. Print Screen for Windows PC

You can use your computer's print screen function capture the image of your screen. There are two types of screen captures you can take: the entire screen, or just the active window. For example, if you have three programs open at the same time, you might want a screen capture of only the active window. To copy the entire screen, press the PRINT SCREEN key (PRTSC or PRTSCN on some keyboards). To copy only an active window, press Alt + PRINT SCREEN. You can then paste (Ctrl +V) into a document, e-mail message, or other file.

- b. Print Screen for Mac

There is no "Print Screen" key on Mac keyboards. Instead, hold down the Apple/Command + Shift + 3. This takes a screenshot of the full screen; you can save the image as a separate file. Apple/Command + Shift + 4 allows you to

select an area of screen to capture. Apple/Command + Shift + 4, then hitting the space bar, then clicking a window will capture the contents of the window in a screenshot.

10. Get it Admitted - Authenticate the Evidence.
  - a. Obtain admissions in deposition or by written discovery.
  - b. This is tricky where the username is a pseudonym. Get the witness to admit that he or she posts under the pseudonym. See *B.M. v. D.M.*, 2011 WL 1420917 (N.Y. Sup. 2011). You may need to hire an information technologist or other forensic expert to help you authenticate the information.

**Ryan M. Springer** is an attorney with G. Eric Nielson & Associates in Salt Lake City, Utah. He graduated with honors from the University of Utah and earned his J.D. degree from Brigham Young University. Mr. Springer's professional practice focuses on catastrophic personal injury cases and medical malpractice. He has been repeatedly recognized as a Super Lawyer and one of Utah's Legal Elite. Mr. Springer has successfully recovered millions of dollars on behalf of victims of careless acts and omissions, and has experience in state and federal courts at both trial and appellate levels. He also has presented to both attorneys and various professional groups on subjects including Utah State Constitution, tort law and policy, and professional standards of care.

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## DID YOU KNOW?

*By Louise C. Reese*

A member was told earlier this summer that the Court Administrator's office told county courts that jury questionnaires should no longer be mailed to counsel in preparation for jury draws, and all counties will now require counsel (or paralegals) to travel to the courthouse to review questionnaires. He or she cannot leave with copies of the forms, but the attorney or paralegal can leave with a copy of the jury pool list. At this time, we have not been able to confirm any formal order or notice, but we will provide an update using the listserv if additional information is learned.

For efficient use of your time, once a jury draw notice is received, I would suggest you first call the court clerk to ask whether travel is required. (Some already had this requirement.) I would also ask the court clerk if any other attorneys will be drawing juries on the same day, and whether there are any pretrial conferences scheduled for the day on which you plan to travel to the courthouse to review the questionnaires. The courthouses generally have only one copy of the questionnaires available, and it would be very challenging to complete your review within a few hours if you need to share the review of the contents with multiple people on the same day. For example, we recently scheduled a review at the same time as other pretrial conferences (unbeknownst to us), and the associate from our office was present with five other attorneys also wanting to review the jury questionnaires. He was not able to complete his review that day.

## PROMULGATED RULE AMENDMENTS

### *Order Promulgating Emergency Amendments to Rule 30 of the V.R.A.P.*

The emergency amendment to Rules 30(b), (d), and (f) provides that in cases without an electronic case file, a litigant must file eight paper copies and an electronic copy of the printed cases and exhibits. The temporary rule allowed the filing of only one paper copy of the printed case, and this proved to be insufficient for the needs of the Court.

The emergency amendment to Rule 30(a) requires the sequential numbering of the printed case to begin on the cover sheet. This will make the page references consistent with the electronic pagination. The emergency amendment to Rule 30(c) clarifies that in cases with an electronic file, litigants may file a printed case, but are not required to do so.

These emergency amendments were promulgated without resort to the notice and comment procedures set forth in A.O. 11 since the prior amendments to Rules 30(b), (d) and (f) are set to expire on June 30, 2013, and all of the amendments are necessary to the continued effective functioning of the Court.

This Order, promulgated on **June 11, 2013**, is effective **July 1, 2013**, and can be found on our website at the following address:

[http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDEMERGENCYVRAP30\\_June11%202013%20with%20dissent.pdf](http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDEMERGENCYVRAP30_June11%202013%20with%20dissent.pdf)

### *Order Promulgating Amendments to V.R.F.P. 1(b)(1)-(2), 2(b)(2), 4(b)(1)(A), and 8(g)*

The amendment to V.R.F.P. 1(b)(1) requires that the petition in a delinquency proceeding be supplemented by factual data concerning the race/ethnicity of the child who is the subject of the proceeding. The amendment provides that the facts to be presented are those contained in the Law Enforcement Juvenile Data Sheet, Form 101.

The amendment to V.R.F.P. 1(b)(2) and 2(b)(2) substitutes references to § 1079 of the Uniform Child Custody Jurisdiction and Enforcement Act for similar references to the Uniform Child Custody Jurisdiction Act which was repealed.

In light of the decision of the Supreme Court in *Samis v. Samis*, 2011 VT 21, ¶¶ 10-17, 189 Vt. 434, 22 A.3d 444, the amendment to V.R.F.P. 4(b)(1)(A) substitutes more specific language for the general language of the present rule that allows a divorce action to be brought by a “guardian, guardian ad litem, or next friend” for a plaintiff who is not “of sound mind and of the age of 16 years.”

The amendment to V.R.F.P. 8(g) eliminates the requirement that the provisions of V.R.A.P. 10-12 concerning notice of completion of the record apply in an appeal from a magistrate’s decision to the Family Division.

This Order, promulgated on **June 11, 2013**, and effective **August 12, 2013**, can be found on our website at the following address:

[http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDVRF1\(b\)\(1\)\\_2\(b\)\(2\)\\_4\(b\)\(1\)\(A\)\\_8\(g\).pdf](http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDVRF1(b)(1)_2(b)(2)_4(b)(1)(A)_8(g).pdf)

**Effective July 1, 2013**, buyers and sellers will no longer be required to provide written signatures on a Vermont Property Transfer Tax Return. Read more on the Department of Tax's website:  
[http://www.state.vt.us/tax/pdf.word excel/pvr/PTTR\\_Changes\\_20130701\\_Fact\\_Sheet.pdf](http://www.state.vt.us/tax/pdf.word excel/pvr/PTTR_Changes_20130701_Fact_Sheet.pdf)

**September 3, 2013**, marks the start of the judicial rotation for superior courts. Check out the judiciary website for more information:

[https://www.vermontjudiciary.org/JC/Shared%20Documents/Assignments2013-2014\\_FINAL.pdf](https://www.vermontjudiciary.org/JC/Shared%20Documents/Assignments2013-2014_FINAL.pdf)

## **DELIVERY OF COURT DOCUMENTS VIA EMAIL**

The Supreme Court will begin sending various types of court documents by email to attorneys pursuant to Administrative Order No. 45.

The applicable document types are listed in the Directive found at the below link. The start date is September 3, 2013.

[https://www.vermontjudiciary.org/MasterDocument/Administrative%20Directive%20\(Supreme%20Court\)%20PG-1.pdf](https://www.vermontjudiciary.org/MasterDocument/Administrative%20Directive%20(Supreme%20Court)%20PG-1.pdf)

If you have already registered your email addresses in eCabinet, you do not need to take further action. However, you may update your email addresses at any time by editing your eCabinet profile at <https://efiling.eservices.crt.state.vt.us/Default.aspx>. If you need assistance/training with editing your profile, you may contact the Judiciary Helpdesk at 1-802-828-4357 or [JUD-Helpdesk@state.vt.us](mailto:JUD-Helpdesk@state.vt.us).



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