

Paralegal Focus

INSIDE

PAGE 2

EDITOR'S MESSAGE

A New Year = A New Issue

PAGE 4

PACE POSTING

One-Time Amnesty Period

PAGE 8-12

NON-PROFITS

Fiduciary Responsibility

PAGE 14-15

UNDERSTANDING THE SYSTEM

Workers' Compensation System in Vermont

PLEASE SUPPORT OUR ADVERTISERS!

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).

Vermont Paralegal Organization
P.O. Box 5755
Burlington, VT 05402-5755
vermont@paralegals.org
www.vtparalegal.org

Newsletter Design By
www.i4vidcovt.com

President's Message

By Diane L. Brown

Happy New Year! The VPO is moving full steam ahead in 2009 with many exciting projects consistent with the VPO goals and objectives. Below are a few projects that the VPO is currently working on.

Active Membership Drive:

Kim Pritchard, VPO Membership Chairperson, is continuing to work hard on the membership renewals. Due to the economic situation, the VPO is experiencing a drop in membership, and we are trying to accommodate our members by contacting individuals that have not renewed to see if we can offer a resolution for membership renewal. Please feel free to contact Kim about any membership concerns you may have. Your membership is critical to your professional career and your involvement in the VPO.

Board Retreat – Bylaws and Policies and Procedures Manual:

The VPO Board held a board retreat on Friday, January 16, 2009 at my home with eight attendees consisting of board members and committee chairpersons. After our potluck feast, the group gathered to discuss the topics of membership renewals, membership fee structure and categories, the 2009 VPO Annual Meeting location and agenda, fiduciary duties and responsibilities of non-profits, revising the VPO Amended and Restated Bylaws, and recreating VPO Policies and Procedures Manual to delineate board and chairperson responsibilities.

2009 VPO Annual Meeting:

Mark your calendars! It is official; we have committed to a date and location for the upcoming 2009 VPO Annual Meeting. This year's annual meeting will be held on Thursday, May 28, 2009 at the Middlebury Inn in Middlebury, Vermont. Sponsorship Chair Carie Tarte will be promoting the new Sponsorship Program to potential sponsors for this upcoming annual meeting. You will find more details on the upcoming annual meeting in this newsletter.

As President of the VPO, I am so very proud of the VPO Board and Committees for their fantastic dedication and work that they have put forth for this organization. Our team continues to work hard toward providing our members with the best connection to the paralegal profession and legal community via the VPO.

Thank you for your continuing support of the VPO. Please do not hesitate to contact the VPO Board if you should have any questions, concerns or comments.



VERMONT
PARALEGAL
ORGANIZATION

Editor's Message

By Louise Reese

This is our first issue in 2009, and it contains information important to various areas of practice for paralegals. For those of us who are often buried in document production, note the new Federal Rule of Evidence 502 addressing waivers of attorney-client privilege and work product protection. We also have an article by John Valente, Esq. on Workers Compensation. I encourage you to take an interest in the article by Patricia Gagnon, RP and Patricia Chouinard, two paralegals from Connecticut, on officers and directors of non-profit corporations. Some of our members are on various boards, including condominium associations, and this article outlines the duties of board members. Please also note the article on PACE, especially for our current RP's, and an update on NFPA's Strategic Plan.

Please note the announcement below on our 2009 Annual Meeting and Conference.

As always, if you would like to submit an article for the Paralegal Focus, or just a tidbit for the Did You Know? column, please contact me at lreese@dinse.com.

2009 ANNUAL MEETING AND CONFERENCE

MARK YOUR CALENDARS! The VPO's 2009 Annual Meeting and Conference will take place on **Thursday, May 28, 2009** at the Middlebury Inn. Presentation topics include Criminal Law, Environmental Law, Insurance 101 by Liberty Mutual, and Large Case Management and Document Production. Don't miss the opportunity to hear our NFPA Region V Rep Cheryl Corning speak at the luncheon. Stay tuned for the details.

It is also an election year, and we encourage all voting members to participate in the process. See you in Middlebury!

Membership News



Congratulations to Julie Mercier who is now working for Zallinger, Cameron & Lambek PC. Good Luck, Julie!

Membership Renewals

Thank you to everyone who has sent in their membership renewals. We understand that we are in tough economic times, and this is the time that membership is even more important. *You just never know . . .* I have heard on more than one occasion that relationships built through membership with the VPO have helped members get jobs or move between law firms. That's not to mention the valuable information passed along through our quarterly newsletter and NFPA's bi-monthly publication.

We don't want you to miss out. If you have not already sent in your membership renewal, please do so at your earliest convenience. Please e-mail me, Kim Pritchard, at kimbr1994@comcast.net so I know the renewal is on the way, and I won't suspend your benefits in the meantime.

Please note that we will accept two payments for membership renewals: One upon submittal of the renewal and the second due July 1st. If you will not be renewing, please drop me an e-mail. In an effort to be sure we are serving our membership, I would like to hear from you. If you have any questions, please do not hesitate to contact me. Thanks!

Here is a Snapshot of the Benefits of NFPA Membership:

- PACE program.
- Networking with paralegals in other states.
- Annual conferences, such as Regulation Conference, Pro Bono Conference, PACE Ambassadors Conference and Leadership Training Conference, and the Annual Convention.
- Tech Institute.
- Subscription to NFPA's bi-monthly publication, *National Paralegal Reporter*.
- Discounts from various vendors and organizations, such as car rentals and hotels, CaseSoft programs, and others.
- Website at www.paralegals.org.
- And more! See the website for more details about your benefits.

THE PACE POSTING

*By Corinne Deering, RP
PACE Coordinator*

I know that I promised this issue of The PACE Posting would be a discussion of study materials for PACE; however, I am still working on the list and another more time-sensitive matter involving PACE has come to the forefront. So, I will be posting this information in this issue, and will continue to work on the study materials for the next issue.



One-Time Amnesty Period:

The PACE Standards Committee has approved a one-time amnesty period **effective immediately through the end of April, 2009**. During this period, any former RP who has not timely renewed can submit a renewal application without having to petition the PACE Standards Committee for a waiver. Expired RPs who wish to take advantage of the amnesty period must meet the following criteria:

1. **Renewal Form & Fees:** Submit a renewal form to NFPA Headquarters and pay the required renewal fee of \$25. The former RP will also be responsible for payment of the late fee penalty of \$25 and the renewal fee(s) for any renewal periods during which they should have, but did not renew. The renewal form can be downloaded from the NFPA website at http://www.paralegals.org/associations/2270/files/PACE_Affidavit_of_Continuing_Education.pdf. See the example below for a fee calculation.

2. **Continuing Legal Education Requirements:** Any expired RP wishing to take advantage of this opportunity must also include Continuing Legal Education (CLE) credits for all missing renewals along with the renewal application. The amount of CLEs required to renew within this amnesty period will be dependent on how many renewal periods the expired RP missed. See the example below for a calculation of the CLE hours requirement.

NFPA approved CLEs will be accepted provided they were taken any time between the time of the last renewal and April 30, 2009.

Please note that all CLEs submitted must have been provided by an NFPA-approved provider or have an approval that has been obtained from the NFPA CLE Coordinator. The NFPA PACE Coordinator for Renewals cannot approve your CLE requests!

3. **Expiration Date:** The renewal period will extend for two years from the date of the last scheduled (but missed) renewal. The amnesty will put the RP back on the original renewal schedule with the renewal. See the example below.

4. **All requests for RP reinstatement under this Amnesty Period must be postmarked on or before April 30, 2009.**

Any former RP who has not timely renewed after this period will have to provide a compelling reason why he or she failed to timely renew.

Example: Assume that you are an RP who last renewed in 2004 but did not renew in 2006 or 2008 – your credential is now expired and you may not use the RP or PACE Registered Paralegal title. To become current, all you need to do during this amnesty period is pay \$75 (\$25 for the late fee, and \$25 for each renewal missed – 2006 and 2008), provide evidence of 24 hours of CLE (with 2 hours of that in Ethics) (12 hours each two year period with at least one hour in Ethics each renewal period), and complete a renewal application. Your renewal would bring your registration current with an expiration date of your PACE Anniversary date in 2010.

If you are not sure of your RP status, please contact NFPA Headquarters to find out your current status and the number of missed renewals. You can also check your wallet-sized RP card to determine the date of your next renewal. If you have specific questions about the amnesty period, or how many CLEs are necessary, and the fee that you will owe to bring your RP status current, please contact Ann Price, RP at vpdp@paralegals.org.

NOTE: This is a rare, one-time opportunity for lapsed RPs to become current. This also has implications for those who are no longer practicing paralegals who might have let their credential lapse. These people might otherwise be eligible for RP Emeritus status but in order to become an RP Emeritus, a paralegal must be an RP in good standing at the time the request is made.

PACE Credential Renewal Chart

For those of you who ARE current with your RP credential, the following is a chart to assist you with determining in which month your renewal application is actually due:

<u>Anniversary Month</u>	<u>Month Renewal is Due</u>
January	November
February	December
March	January
April	February
May	March
June	April
July	May
August	June
September	July
October	August
November	September
December	October

If you have CLE that requires approval by the NFPA CLE Coordinator, that approval request must be submitted to NFPA **before** the month your RP credential renewal is due. Please do not submit CLE approval requests along with your RP credential renewal. If you are not sure whether or not a seminar or other CLE requires NFPA approval in order to be acceptable for your RP renewal, please contact Suellen Honeychuck, RP shoneychuck@shoun.com for clarification.

NFPA NEWS

By Heather Moreau, VPO Primary Representative

NFPA's Strategic Plan

The NFPA board and various delegates from local organizations met in New Orleans on January 30 to use the information collected from NFPA's membership survey to update their strategic plan, which was last revised over five years ago. Paul Meyer of Tecker & Associates provided guidance and assistance. Anita Haworth, Immediate Past President and Board Advisor, Beth King, Strategic Planning Committee Chair, and Georgette Lovelace, President, described the meeting as "very productive."

NFPA's future plans are important. As a national leader in the paralegal field, their actions are likely to impact and shape our profession. Further, since the VPO pays NFPA \$25 per year for each of our voting members, the beliefs of the majority of the VPO membership should align with the national long-term goals.

Many of you may recall the NFPA membership survey that was circulated to you via e-mail several months ago. NFPA reported that they had a response rate from individuals from member associations of about 20 percent. Members reported that in order to advance their careers, they wanted more information on technology and e-discovery as well as more opportunities for education, including online CLE. Members also wanted NFPA to continue to improve communication with members, other associations, and paralegals in states where no NFPA presence exists. Regulation was supported by a large number of respondents.

After computation of the membership survey results and much hard work at the New Orleans strategic planning meeting, the following proposed goals and objectives have been proposed:

Goal Area: Financial Security

Goal Statement: Achieve financial security.

Objectives:

- Increase revenue.
- Develop efficiencies to control expenses.
- Increase financial viability of PACE.

Goal Area: Professional Development

Goal Statement: Achieve individual excellence in the paralegal profession.

Objectives:

- Increase educational opportunities.
- Increase individual responsibility for professional development and education.
- Increase access to technological resources.

Goal Area: Regulation

Goal Statement: Regulation standards for the paralegal profession are achieved through the advocacy efforts of NFPA.

Objectives:

- Increase regulation efforts through strategic alliances.
- Increase member associations' support of NFPA's position on regulation of the profession.
- Increase participation and awareness of NFPA and its members regarding legislative issues affecting the paralegal profession.

Goal Area: Transparency in Communication

Goal Statement: The organization is more transparent through the free flow of information between NFPA leadership, local association leadership and the membership.

Objectives:

- Increase use of NFPA's website for exchanging information.
- Increase member feedback through interactive discussions.
- Increase use of alternative methods/channels of communication to foster member dialogue.

Goal Area: Membership

Goal Statement: To achieve a larger, more inclusive membership.

Objectives:

- Increase opportunities for interaction between members through effective uses of technology.
- Increase membership in key market areas.
- Improve "the member experience."

Before the strategic plan can be adopted and implemented, it must be approved by the local organizations. As Primary Representative, I will be casting a vote on the VPO's behalf. If you want to support or oppose the proposed goals and objectives of the NFPA Strategic Plan, please email hmoreau@pfclaw.com or call (802) 658-2311.

OFFICERS AND DIRECTORS OF A NONPROFIT CORPORATION - FIDUCIARY OR WINDOW DRESSING?

By Patricia C. Gagnon, RP and Patricia B. Chouinard



Board members are crucial participants in the activities of nonprofit corporations or associations. Unlike their for-profit counterparts, board members of nonprofit corporations are usually volunteers who donate their time to the corporation because they believe in the corporation's mission. Without them, the corporation's purpose does not get carried out. This applies to paralegal associations or any other nonprofit organizations. Because board members of a paralegal association may not have been part of the association for a long period of time, or may not have a background in corporate law, many directors do not understand the responsibilities they accept when they agree to serve on the board of that nonprofit organization. This can result in a board with directors who do not direct. Nonprofit directors and officers must be aware that they are susceptible to actions for breach of fiduciary duty and may be held personally accountable to their nonprofit organization.

Fiduciary Duties

State statutes mandate that board members of a nonprofit corporation have a fiduciary duty to the members of their corporation. According to Black's Law Dictionary, 7th Edition, fiduciary duty means:

“A duty of utmost good faith, trust, confidence and candor owed by a fiduciary (such as a lawyer or corporate officer) to the beneficiary (such as a lawyer's client or a shareholder); a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person (such as the duty that one partner owes to another).”

Therefore, all actions of the board members should be in the best interests of the nonprofit corporation and consistent with its mission.

Section 8.01 of the Revised Model Nonprofit Corporation Act states that “all corporate powers shall be exercised by or under the authority of, and the affairs of the corporation managed under the direction of, its board.” Directors and officers who serve on the board are held to three primary fiduciary duties: (i) the duty of care, (ii) the duty of loyalty, and (iii) the duty of obedience to the law.

Duty of Care

To exercise the proper duty of care, every board member should become familiar with the articles or certificate of incorporation of the nonprofit association and its current bylaws. All directors should be aware of the purpose of the corporation set forth in its organization documents, and each decision they make should advance it. A nonprofit corporation should develop a job description for each board member; without a job description, how can they determine their responsibilities? The board members should review and understand the responsibilities assigned to them. They cannot carry out their fiduciary duty if they don't know what role they play in the corporation's governance and are not familiar with the rules of the corporation or its mission statement.

Duty of care standards require a director to exercise independent judgment, be reasonably informed, participate in decisions affecting the corporation's mission, act in good faith and with the care of a prudent person, and in a manner the director reasonably believes to be in the corporation's best interests. If a claim is made against an officer or director, most courts will review officers' and directors' actions in accordance with the business judgment rule. "Basically the rule requires that decisions be made: (i) in good faith and without a conflict of interest; (ii) on a reasonably informed basis; and (iii) with a rational belief (connoting broad discretion and wide latitude) that the business judgment is in the best interests of the corporation."¹

To fulfill the duty of care standards imposed by statute or by common law, a director should

- actively participate in the association's management;
- prepare for and attend board meetings, requesting sufficient information in advance of the meeting to become informed and be prepared to discuss and vote on any actions to be taken;
- review the minutes of the board and committee meetings to ensure that they accurately reflect those proceedings;
- scrutinize the accounting records or financial statements;
- ensure that there are proper internal controls over the association's accounts, and regular audits by an independent certified public accountant;
- review the performance of the officers, employees or agents; and
- investigate and take action if any warning signs appear.

Persons who do not have the time to actively participate in the corporation's governance should not agree to serve on the board.

¹ Goldschmid, Harvey, "The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems, and Proposed Reforms," The Journal of Corporation Law, 23 Iowa J. Corp. L. 631, Summer, 1998.

Duty of Loyalty

All board members owe a duty of loyalty to the corporation. The duty of loyalty obligates the directors to refrain from using their positions to further their personal interests rather than the corporation's interests. Board members must put consideration of the corporation first, before any secondary issues. If a board member or any member of their family would benefit in any way, either personally or professionally, by a decision of the corporation's board, then that board member should abstain from discussions and voting on the potential action.

Courts have not looked favorably on self-dealing by board members of nonprofit corporations. "Courts subject these transactions to 'vigorous scrutiny,' obligating the officers or directors to prove two elements: first, that the officer or director acted in good faith with respect to the transaction; and, second, that the transaction is inherently fair from the corporation's point of view. . . . [. . .] The former element requires a corporate officer to fully and honestly disclose any information relevant to the transaction, thereby permitting a disinterested decision maker to exercise informed judgment. See , e.g. , *Dynan v. Fritz* , 508 N.E.2d 1371, 1378 (Mass. 1987); *Cooke v. Lynn Sand & Stone Co.* , 640 N.E.2d 786, 791 (Mass. App. Ct. 1994)."²

Corporations should have a formal conflict of interest policy in place which requires board members to (1) notify other board members of any financial or personal interest in any matter discussed; (2) provide adequate information concerning the matter; (3) leave the meeting when the matter is discussed; and (4) abstain from voting on the matter. The best defense to a claim of self-dealing by board members is to adhere to the corporation's written conflict of interest policy.

Duty of Obedience

As noted previously, the first thing every board member should do is become familiar with the corporation's purpose, or its "mission." The duty of obedience requires that directors of a nonprofit corporation are faithful to the organization's purpose, that all actions on behalf of the corporation serve to fulfill that mission, and that they comply with all laws affecting the corporation.

Every decision made by the nonprofit's board should be reviewed to ensure compliance with applicable nonprofit tax laws. Some corporate activities are prohibited or limited by those laws, such as lobbying, campaigning in support of a political candidate for public office, or engaging in operations outside the corporation's purpose and recognizing unrelated business taxable income.

To adhere to the duty of obedience, directors should ensure that the association complies with corporate statutes governing board and membership meeting formalities, files its tax returns and pays its taxes, fulfills any contractual obligations, and does not engage in activities that would jeopardize its nonprofit status.

² *Boston Children's Heart Foundation v. Nadal-Ginard*, No. 95-1136, US Court of Appeals for the First Circuit, 73 F.3d 429; 1996 U.S. App. LEXIS 414, January 12, 1996

Breach of Duty

Failure to carry out the basic functions of a director could make the director vulnerable under duty of care standards. Few courts have addressed duty of care issues, but the trend is to hold nonprofit directors and officers to a standard of conduct comparable to their for-profit counterparts. Negligence or inattention to one's responsibilities could lead to the director or officer being held personally liable for lack of action in managing the organization.

Directors of for-profit corporations are accountable to the corporation's shareholders. Nonprofit directors act for the benefit of others. If the corporation has members, the directors owe their fiduciary duties to those members. Members have certain rights, including the right to inspect the corporate records, vote on significant corporate actions, and to vote for the directors. A member of the organization may bring an action against a director for breach of fiduciary duty. If a nonprofit corporation has no members, then its directors owe their fiduciary duty to the public constituents served by the organization.

Directors of the corporation are also accountable to the appropriate government agencies. The state attorney general is usually charged with overseeing nonprofit corporations and with enforcing a nonprofit director's fiduciary duties. Many state attorneys general have taken their responsibilities very seriously, and have gone after directors who have not.³

The corporation's nonprofit status also invites scrutiny by the Internal Revenue Service or the state taxing authority, which could impose penalties or enforce any laws which hold officers or directors liable for the corporation's failure to file tax returns or pay taxes owed.

Limitations on Liability

There are some laws protecting board members from liability. A majority of states have enacted indemnification provisions for nonprofit corporations based on the 1968 Model Business Corporation Act or on the state's business corporation laws. For example, Delaware has a mandatory indemnification provision which requires a corporation to indemnify its directors or officers for expenses (including attorneys' fees) incurred in defense of any action, suit, or proceeding related to his/her activities in connection with his/her corporate position if he/she has been successful on the merits or otherwise. Most state statutes also permit indemnification for directors and officers as long as (i) specific provisions are set forth in the corporation's charter or bylaws and (ii) the director or officer acted in good faith and in the corporation's best interests.

³ Runquist, Lisa A., "A Job Description for Directors," *Business Law Today*, Nov/Dec 1994.

In addition, nearly all states have enacted statutes limiting the liability of directors and officers of non-profit organizations. However, many of those statutes provide immunity only to directors and officers who serve without compensation, or only for their simple negligence. In fact, some statutes require that the director or officer have acted in good faith and with care in order to receive immunity under the statute. Furthermore, those statutes generally only protect the individuals serving the nonprofit corporation, but do not affect the liability of the corporation itself for acts of individuals. As a result, a director may be immune from personal liability for his/her actions, but the organization may still be liable for the director's actions.

Besides the liability-limiting statutes, nearly every state has enacted a provision limiting the liability of nonprofit "volunteers." These laws only provide protection for volunteers performing services for charitable organizations or unpaid directors and officers. Every state volunteer protection statute has exceptions which limit its protection. For example, these statutes may not apply to actions brought by the attorney general for breach of a fiduciary duty as a director.⁴

Window Dressing or Fiduciary – You Decide

It is not uncommon for people to join the board of a nonprofit organization without realizing what that commitment involves. Non-performing or apathetic board members can hinder the activities of an association and prevent issues from being resolved in a positive or timely manner, and may open up the possibility of liability issues for themselves or other board members and for the organization. On the other end of the spectrum, impulsive, overzealous board members can also cause problems for a nonprofit corporation. Decisions reached hastily, without consulting the bylaws and/or the corporation's history, can potentially be detrimental to the corporation. Anyone who agrees to serve on the board of a nonprofit organization should weigh their decision carefully, be aware of the responsibilities that come with such a position, and remain committed to the organization's mission for their entire term of office. Otherwise, the volunteer's best intentions may do more harm than good.

Patricia C. Gagnon, RP and Patricia B. Chouinard are paralegals in the Business Law Department of Shipman & Goodwin LLP in Hartford, Connecticut. Both have been practicing for close to 20 years, in the areas of intellectual property, bankruptcy, commercial transactions, venture capital financings, and securities. They can be reached at pgagnon@goodwin.com or pchouinard@goodwin.com.

⁴ Pitrof, Elizabeth A., Esq. and Buys, Cunera M., Esq., "Liability Exposures and Protections for Nonprofit Organizations and Their Directors and Officers," October 1997, prepared for ALTRU, Inc



Save on Your Car and Home Insurance!



You're part of an exclusive group that has partnered with Liberty Mutual to save you money. And the best part — you receive knowledgeable support, immediate claims assistance and the latest information to help keep you and your family safe.

Savings you can count on.

As a member of Vermont Paralegal Organization, you could save hundreds of dollars a year on car and home insurance with Liberty Mutual.

Here's how:¹

- Get an exclusive group discount off our already competitive rates.
- Add extra savings on your home insurance when you insure both your car and home.
- Obtain additional discounts, based on your driving experience, car and home safety features, and more.

¹Discounts and savings are available where state laws and regulations allow, and may vary by state. Certain discounts apply to specific coverages only. To the extent permitted by law, applicants are individually underwritten; not all applicants may qualify.

²Coverage not available in all states. The descriptions of coverage are necessarily brief and are subject to policy provisions, limitations and exclusions that can only be expressed in the policy itself. For a complete explanation of coverages, please consult a sales representative.

**Start Saving Today!
Contact me to learn
more and receive a
FREE no-obligation
quote.**

Jennifer Goeke
(802) 747-0600 x 52652
jennifer.goeke@libertymutual.com
www.libertymutual.com/lm/jennifergoeke

435 West Street
Rutland, VT 05701
Client 114704

Service and support when and where you need it.

- **Cost-saving features** such as New Car Replacement and New Customer Accident Forgiveness on your car policy and a Loss Forgiveness Program on your home policy²
- **24/7 support** including claims service, emergency roadside assistance and home repair
- **Service convenient for you** by phone, at one of our local sales offices or online
- **Your choice of payment options**, including direct billing, checking account withdrawal or online payment

Need additional coverage? Our representatives explain your options in clear terms and recommend the best match for you—whether you need to protect your **car, home, watercraft or motorcycle**. You can also obtain **personal liability (umbrella), flood, renters and identity theft** insurance.

Coverage provided and underwritten by Liberty Mutual Insurance Company and its affiliates, 175 Berkeley Street, Boston, MA. ©2008 Liberty Mutual Insurance Company. All rights reserved.

AFF 17 AP 2008/06





Understanding the Workers' Compensation System In Vermont

By John Valente and Glenn Morgan
Ryan Smith & Carbine, Ltd.
Rutland, Vermont 05701

Since the industrial revolution, workplace injuries have become commonplace in our modern society. Almost everyone knows someone who has been injured at work.

For the majority of these people, the process works smoothly, without a hitch. For others it does not work so well. The claim itself, or certain benefits associated with the claim, are denied and litigation arises. There is no question that in the workers' compensation system disputes sometimes exist and it becomes important to understand the system and how it is meant to work.

In Vermont, pursuant to the statute contained in 21 V.S.A. § 601 and beyond, if an injury arises out of and in the course of a person's employment, then as a general rule, it does not matter whose fault the injury is, the injured worker may be entitled to certain benefits. The system has no basis in common law but is governed by statutes enacted by the legislature over the years. The Vermont statute creates a legal liability for the employer through its insurance carrier to pay wage-replacement benefits, medical bills according to a fee schedule, benefits for any permanent impairment as determined by the AMA Guides to the Evaluation of Permanent Impairment and other benefits (vocational rehabilitation to assist the worker in returning to work, benefits to dependents and/or spouse in the event of death) due to work related injuries.

The Vermont Department of Labor has jurisdiction over workers' compensation disputes between the employer and the employee. The Department is run by the Commissioner, who oversees the many divisions of the Department. One of those divisions is the Division of Workers' Compensation.

The Vermont Workers' Compensation Act provides that the procedure for workers' compensation claims shall be "as summary and simple as reasonably may be." 21 V.S.A. § 602. There are also rules developed by the Department of Labor governing workers' compensation procedure. The Department of Labor procedure in contested matters starts with an informal process without an evidentiary hearing which may or may not result in a temporary award of benefits which may be followed by a formal process, including a hearing during which testimony is heard by a hearing officer, after which the Commissioner issues a formal written decision.

During the informal conference, the parties discuss and outline their positions on any disputed legal or factual issues. Before the informal conference the parties exchange medical records and other relevant documents. The parties may also use the conference as an informal discovery conference, exchanging information or requesting the exchange of information or documents.

Any time before, during or following the informal conference, if the evidence produced does not reasonably support a denial of compensation, the Director may order the employer to pay benefits. In Vermont, it is not uncommon for Interim Orders to be issued. Payments made under an Interim Order are credited against any subsequent decision entitling the claimant to further compensation. If the employer fails to comply with an Interim Order, the Commissioner can order the employer to pay interest on the unpaid amount as a sanction. If the parties are unable to reach a compromise during the informal process, or if a party is aggrieved by an Interim Order during the informal process, a Notice and Application for Hearing may be filed and the formal hearing process may begin.

The formal hearing procedure consists of two steps: 1) a pre-trial conference and 2) a formal hearing. At the pre-trial conference, the parties determine the specific claims and issues in the case. While the usual practice is that for each hearing there is one pre-trial conference, depending on the complexity of the issues to be addressed, there may be more than one pre-trial conference in any given case. The “formal” hearing involves presentation of evidence to a hearing officer who will make factual and legal findings. The *Vermont Rules of Evidence* apply, but they are applied flexibly to maintain the informal nature of the hearing. The *Vermont Rules of Civil Procedure* also apply when a matter is heard by the Department. Once the hearing officer has heard all the evidence and determines the facts and the law to be applied, the hearing officer submits her findings to the Commissioner who actually signs the decision.

The party aggrieved by the Commissioner’s ruling may appeal the Commissioner’s decision to a Vermont Superior Court or to the Vermont Supreme Court. 21 V.S.A. § 672, 670. The Superior Court holds a trial “de novo” and the parties can introduce evidence and retry the case before a judge or a jury on the same issues that were presented to the Department. Usually, an appeal to the Supreme Court is not taken until after the retrial in Superior Court and is limited to the appeal of questions of law.

Workers’ compensation disputes involve an area of the law with specific nuances, laws and rules that affect the eligibility of who is entitled to receive what specific benefits. One of the best places to begin to learn more about these issues is the Vermont Department of Labor website which is <http://labor.vermont.gov>.

DID YOU KNOW?

Federal mileage rate effective January 1, 2009 is now \$0.55 per mile.

Jeffrey Eaton is the new Clerk of Court for United States District Court, District of Vermont, replacing Richard Wasko, who recently retired.

All state courts will be closed on the following days to save on costs: Friday, March 13; Tuesday, April 7; Tuesday, May 5; and Friday, June 5 (full days). See www.vermontjudiciary.org for more information on court closings.

The Administrative Office for the U.S. Courts (AO) has issued 56 new and restyled civil and criminal forms for national use. They are posted at <http://www.uscourts.gov/forms/uscforms.cfm?ShowAll=Yes>

A new Federal Rule of Evidence, 502, addresses waivers of attorney-client privilege and work product protection. This new rule went into effect on September 19, 2008, and can be reviewed in full text in the updated Federal Rules of Civil Procedure, also available on www.vtd.uscourts.gov.

LEGISLATIVE UPDATE

As of this writing, there are 317 bills proposed before the legislature. A list follows, showing a few of the relevant bills. The VPO Legislative Committee will provide members with updates as the bills move through the legislative process. We are also watching with interest the status of the budget as relates to our court system.

**The Vermont Legislature – Partial List of Bills Introduced
2009-2010 Legislative Session
By Katie Couture**

H.0008	An act relating to a notice of mortgage
H.0011	An act relating to the disposition of property upon death, transfer of interest in vehicle upon death, and homestead exemption
H.0028	An act relating to temporary wastewater system permits
H.0050	An act relating to uniform child custody jurisdiction and enforcement
H.0081	An act relating to compensability of mental injuries under workers' compensation
H.0109	An act relating to the Uniform Limited Cooperative Association Act
H.0121	An act relating to transfer of guardianship or adoption proceedings from probate to family court
H.0133	An act relating to distributing a deceased owner's unclaimed property
H.0137	An act relating to requiring criminal proceedings against minors to be commenced in family court
H.0150	An act relating to penalties for possession of marijuana
H.0171	An act relating to home mortgage protection for Vermonters
H.0181	An act relating to presumption of parentage
H.0191	An act relating to permitting evidence of prior bad acts in sexual abuse trials
H.0203	An act relating to a screening panel for medical injury claims
H.0210	An act relating to enforcement in the judicial bureau of environmental violations
H.0213	An act to provide fairness to tenants in cases of contested housing security deposit withholding
H.0217	An act relating to decreasing the penalties for possession of small amounts of marijuana
H.0245	An act relating to the administration of trusts
H.0246	An act relating to quitclaim deeds and adverse possession
S.0001	An act relating to access to medical records by a decedent's spouse
S.0010	An act relating to joint tenancy
S.0012	An act relating to not requiring the physical presence of a defendant or offender at certain court proceedings
S.0020	An act relating to termination of workers' compensation temporary disability benefits
S.0023	An act relating to screening panels for medical injury claims
S.0031	An act relating to exemptions to property transfer tax
S.0061	An act relating to wastewater permit requirements for the conversion of a seasonal residence
S.0071	An act relating to penalties for possession of marijuana
S.0086	An act relating to the administration of trusts

REAL ESTATE CORNER

Provided by Andrew D. Mikell
Vermont Attorneys Title Corporation

"This is the kind of case that makes the law look trivial, caught up in technicalities, and unable to bring a just result to a dispute that has no understandable purpose." Learned Hand? John Marshall? No, those are the words of Justice John Dooley in his recent dissent in Carlson v. Clark, 2009 Vt. 17 (filed 02/13/2009).



At issue was a long standing dispute between neighbors over whether an easement could be unilaterally relocated by the owner of the servient estate, or whether any relocation required the consent of both the dominant and servient estate owners. The answer turned on whether the easement was a prescriptive easement or an easement by necessity.

Because the majority held that plaintiffs were barred by the doctrine of claim preclusion from asserting that they held an easement by necessity, the court never answered the question. The decision is potentially significant, however, as Justice Dooley in his nine-page dissent, provides insight into how a court might analyze the issue should it come before the court.

After restating the difference between the two types of easements, Dooley concluded (based on a prior ruling in the case) that the easement before the court WAS an easement by necessity. After identifying several factors that should be considered if a relocation is attempted, he argued that the case should be remanded to determine whether the easement could be relocated unilaterally by the servient estate such that it would "allow plaintiffs the opportunity to bring a just end to this dispute".

"While requiring mutual agreement to relocate makes sense in cases involving express easements, relocation of easements by necessity presents a different question ... Given these differences, the question is whether, and under what circumstances, the servient owner can relocate an easement by necessity without the consent of the dominant owner." (emphasis supplied).

Yes, we do ...

FULL COLOR COPYING

- Business Cards - full color!**
- Booklets**
- Carbonless Forms (NCR)**
- Flyers**
- Mailers**
- Manuals**
- Mouse Pads**
- Newsletters**
- Pamphlets**
- Postcards**
- Large Format Black & White**
- Large Format Color**
- Transparencies**

Plus

FINISHING

SELF SERVICE Copying

- Black & White**
- FULL COLOR**

We're DIGITAL!

We're FAST!

We're RELIABLE!

P.S. We also do black and white copies! Millions of 'em!

HARD COPY

Good Copies ☆ Great Prices!

And ...

- Cutting**
- Envelope Inserting**
- Folding**
- Laminating**
- Padding**
- Stapling**
- Tabbing**

BINDING

- Coil**
- Fastback**
- GBC Comb**
- Twin Loop**
- Velo**

FAXING

PICK UP / DELIVERY

30 Main St. , Gateway Sq. • Burlington, VT
 (802) 863-1200 Fax: (802) 863-1900
 Store Hours: 8:30 to 5:30 Mon-Fri
www.hardcopyvermont.com
 email: h.copyvt@verizon.net

Vermont Paralegal Organization

P.O Box 5755
Burlington, VT 05402-5755
vermont@paralegals.org

Board of Directors

		<u>Phone</u>	<u>Fax</u>	<u>E-mail</u>
President:	Diane Brown	859-6379	859-6279	diane.brown@ge.com
Vice President:	Carie Tarte	864-9891	864-6815	ctarte@sheehyvt.com
Secretary:	Lisa Laramée	864-0217	864-0137	llaramee@langrock.com
Treasurer:	Katie Couture	775-7141	775-6483	kac@vermontcounsel.com
NFPA Primary:	Heather Moreau	658-2311	658-0042	hmoreau@pfclaw.com
NFPA Secondary:	Sharon Lucia	655-8425	655-8419	lucia@greenmountainpower.biz
Past President:	Louise Reese	864-5751	864-1967	lreesc@dinse.com

Standing Committee Chairpersons

		<u>Phone</u>	<u>Fax</u>	<u>E-mail</u>
Membership:	Kimberly Pritchard	770-6232	770-6440	kpritchard@velco.com
Finance:	Diane Brown	859-6379	859-6279	diane.brown@ge.com
Professional Liaison:	B. Missy Woessner	860-4077	860-4087	mwoessner@sfglaw.com

Special Committee Chairpersons

		<u>Phone</u>	<u>Fax</u>	<u>E-mail</u>
Advertising:	Louise Reese	864-5751	864-1967	lreesc@dinse.com
Bylaws:	Diane Brown	859-6379	859-6279	diane.brown@ge.com
Continuing Legal:	Tina Wiles			wilesgang@comcast.net
Ethics:	B. Missy Woessner	860-4077	860-4087	mwoessner@sfglaw.com
Job Development:	Heather Rylant	658-2311	658-0042	hrylant@pfclaw.com
Legislative Affairs:	Katie Couture	775-7141	775-6483	kac@vermontcounsel.com
Newsletter:	Louise Reese	864-5751	864-1967	lreesc@dinse.com
Scholarship:	Carie Tarte	864-9891	864-6815	ctarte@sheehyvt.com
Website:	Diane Brown	859-6379	859-6279	diane.brown@ge.com
Pro Bono:	Lisa Laramée	864-0217	864-0137	llaramee@langrock.com
PACE Coordinator:	Corinne Deering	864-0217	864-0137	cdeering@langrock.com



Vermont Paralegal Organization
PO Box 5755
Burlington, VT 05402-5755