Rhode Island Bar Journal

Rhode Island Bar Association Volume 62. Number 3. January/February 2014

Rhode Island's "Farce and Mockery" Standard

RWU Law: Twenty Years of Enhancing Rhode Island's Culture

Patient Protection and Affordable Care Act

Understanding Special Needs Trusts

Articles

Features

Front Cover Photograph by Brian McDonald
IYRS School of Technology & Trades, Newport

Sailing yacht Coronet, *built in 1885 and now in the process of restoration by IYRS craftspeople.* Coronet *is a trans-Atlantic race winner and circumnavigated the globe in luxurious comfort and style. The IYRS mission is to: teach the skills, history, art, and science of building, restoring and maintaining; preserve the knowledge and history of craftsmanship in America's rich heritage of making; and show that honest work, integrity, and mastery of craft—whether hands-on or through technology—are among life's great achievements.*

RHODE ISLAND Bar Association
1898

RHODE ISLAND BAR ASSOCIATION LAWYER'S PLEDGE

As a member of the Rhode Island Bar Association, I pledge to conduct myself in a manner that will reflect honor upon the legal profession. I will treat all participants in the legal process with civility. In every aspect of my practice, I will be honest, courteous and fair.

Direct advertising inquiries to the Editor, Frederick D. Massie, Rhode Island Bar Journal, 115 Cedar Street, Providence, RI 02903, (401) 421-5740.

USPS (464-680) ISSN 1079-9230
Rhode Island Bar Journal is published bimonthly by the Rhode Island Bar Association, 115 Cedar Street, Providence, RI 02903.
PERIODICALS POSTAGE PAID AT PROVIDENCE, RI

Subscription: $30 per year

Postmaster
Send Address Correction to Rhode Island Bar Journal, 115 Cedar Street, Providence, RI 02903

www.ribar.com

Riding the Wave of Rhode Island's New Court Technology

J. Robert Weisberger, Jr. Esq.
President
Rhode Island Bar Association

The Rhode Island Judiciary's new case management and electronic filing system is expected to make our courts' record-keeping more efficient, more accessible and more responsive to the needs of our citizens.

As many of you know, the Rhode Island Judiciary is currently developing a new case management system (CMS) and electronic filing (e-filing) system. These systems will dramatically change how case files are handled in the courts, and how lawyers, law offices and self-represented litigants will interact with the courts.

The system is scheduled for a March 2014 introduction at the Workers' Compensation Court (WCC). That court was chosen for the initial phase due to its relatively small size and the limited number of attorneys who practice there. It will provide an outstanding opportunity to test software, data entry and procedures. Within three years, Rhode Island's six courts will convert to the new CMS and e-filing, and the Traffic Tribunal will have updated online payment capabilities by the end of this year.

This is a huge undertaking, involving extensive training for staff, attorneys and the public, but the expected benefits are proportionate to the implementation efforts. This new system is expected to make our courts' record-keeping more efficient, more accessible and more responsive to the needs of our citizens.

According to State Court Administrator J. Joseph Baxter, Jr., "As this project rolls out, we will be doing everything we can, as early as we can, to make this a success at the Workers' Compensation Court. We will not bite off more than we can chew. The training for the court staff and the members of the Bar needs to be over the top to provide a level of comfort as we approach the start date next March."

Training for WCC court employees is already underway at the Judicial Technology Center in Providence, with a mock courtroom and clerical area. Free training for WCC attorneys and law-office staff is expected to begin in January with multiple sessions offering free CLE credit. Training and instructions will also be made available on the Internet.

The Judiciary is aiming to use our Bar's 2014 Annual Meeting, on June 19th and 20th, to acquaint attorneys in other areas of practice with the e-filing system. By then, the e-filing system will have been operating at Workers' Compensation Court for several months, and the plan is to share the early successes with lawyers who practice in civil, family, criminal and appellate law.

By October 2014, the CMS and e-filing systems are expected to be online for civil matters in the Superior, Family and District Courts, and by May 2015 for the Traffic Tribunal. This will be followed by a new CMS and e-filing system for Superior and District criminal cases and Supreme Court cases by May 2016.

The CMS is known as Odyssey, while the e-filing system's name is File & Serve. Both systems are provided by the Courts and Justice Division of Tyler Technologies of Plano, Texas, through a $5.9 million contract with the Rhode Island Judiciary. Other statewide judicial systems using Odyssey include New Hampshire, Indiana, Minnesota, North Dakota, South Dakota, Oregon and New Mexico, while Maryland, Idaho and Washington are in various stages of implementation. Tyler is also in select counties across the United States including Nevada's Clark County and Miami-Dade in Florida.

File & Serve provides attorneys with the ability and convenience to file cases from anywhere they have Internet access, any day and any time. The public portal also provides users with greater access to court files.

These new systems include features such as judge assignment, mass docketing, case file tracking, time standards, scheduling and forms generation. They provide clerical employees with a single application in which to capture, maintain and access all electronic content including pleadings, notices, motions, orders, exhibits, briefs, judgments, writs of execution, and other papers typically filed with a court.

These systems allow individual document scanning or batch scanning using bar-coded instructions to route the filings to appropriate work queues. Documents can be filed from outside courthouses via the Internet, and court clerks have the ability to review filings and accept them immediately, instantly building a case file. Odyssey also includes a financial component that manages the entire transaction audit trail.

Of particular note, the Administrative Office

of Rhode Island State Courts is also taking a close look at options to best educate the *pro se* or self-represented litigants on use of the new systems.

The Rhode Island Supreme Court is expected to adopt provisional rules governing e-filing. These rules will provide all the courts with an outline as to how certain processes will work with the new e-filing system. Each court will be required to amend its own procedural rules in preparation for the transition to e-filing. Rules for self-represented litigants, confidentiality and the level of public viewing access are also to be determined.

Three options are under consideration for adding old documents in existing paper case files to the new system. In the first option, cases filed after electronic filing is implemented will be paperless. Cases initiated prior to implementation would remain as paper files. Through the second option, a case filed before electronic implementation could become a hybrid. Any new filings would be electronic, while the old filings would remain on paper. In the third option, for existing active cases, any new filings would be electronic and any paper documents in the file would be scanned by court employees into the CMS, creating an electronic record. Each court may elect different options to best meet its unique needs and capabilities.

We are just now entering the curl of this new wave of court technology. And, I am confident that, working together for the good of all, the Rhode Island Judiciary and the Rhode Island Bar Association will successfully ride this wave into the future.

Note: I thank Rhode Island State Court Administrator J. Joseph Baxter, Jr. and Rhode Island Supreme Court Assistant Administrator of Community Outreach and Public Relations Craig N. Berke for their assistance with this Message. ❖

Rhode Island Judiciary E-Filing and Case Management Timeline

The Rhode Island Judiciary's new e-filing and case management process is designed for phased implementation in specific Rhode Island courts, over a 39-month period. Attorney training on the e-filing systems for each court will begin approximately six weeks before the actual implementation. And, attorneys will be allowed and encouraged to take part in as many training sessions as they want within the training period.

Phased Process	Projected Implementation	Attorney Training Sessions
*Workers' Compensation Court	March 2014	January-February 2014
Superior & District Courts – Civil Family Court – Domestic	October 2014	August-September 2014
Rhode Island Traffic Tribunal	May 2015	March-April 2015
Family Court – Criminal Superior & District Courts – Criminal Supreme Court	June 2016	April-May 2016

*Rhode Island Traffic Tribunal online payments are projected for implementation in March 2014

RHODE ISLAND BAR JOURNAL

Editorial Statement

The Rhode Island Bar Journal is the Rhode Island Bar Association's official magazine for Rhode Island attorneys, judges and others interested in Rhode Island law. The *Bar Journal* is a paid, subscription magazine published bi-monthly, six times annually and sent to, among others, all practicing attorneys and sitting judges, in Rhode Island. This constitutes an audience of over 6,000 individuals. Covering issues of relevance and providing updates on events, programs and meetings, the *Rhode Island Bar Journal* is a magazine that is read on arrival and, most often, kept for future reference. The *Bar Journal* publishes scholarly discourses, commentary on the law and Bar activities, and articles on the administration of justice. While the *Journal* is a serious magazine, our articles are not dull or somber. We strive to publish a topical, thought-provoking magazine that addresses issues of interest to significant segments of the Bar. We aim to publish a magazine that is read, quoted and retained. The *Bar Journal* encourages the free expression of ideas by Rhode Island Bar members. The *Bar Journal* assumes no responsibility for opinions, statements and facts in signed articles, except to the extent that, by publication, the subject matter merits attention. The opinions expressed in editorials represent the views of at least two-thirds of the Editorial Board, and they are not the official view of the Rhode Island Bar Association. Letters to the Editors are welcome.

Article Selection Criteria

- The *Rhode Island Bar Journal* gives primary preference to original articles, written expressly for first publication in the *Bar Journal*, by members of the Rhode Island Bar Association. The *Bar Journal* does not accept unsolicited articles from individuals who are not members of the Rhode Island Bar Association. Articles previously appearing in other publications are not accepted.
- All submitted articles are subject to the Journal's editors' approval, and they reserve the right to edit or reject any articles and article titles submitted for publication.
- Selection for publication is based on the article's relevance to our readers, determined by content and timeliness. Articles appealing to the widest range of interests are particularly appreciated. However, commentaries dealing with more specific areas of law are given equally serious consideration.
- Preferred format includes: a clearly presented statement of purpose and/or thesis in the introduction; supporting evidence or arguments in the body; and a summary conclusion.
- Citations conform to the Uniform System of Citation
- Maximum article size is approximately 3,500 words. However, shorter articles are preferred.
- While authors may be asked to edit articles themselves, the editors reserve the right to edit pieces for legal size, presentation and grammar.
- Articles are accepted for review on a rolling basis. Meeting the criteria noted above does not guarantee publication. Articles are selected and published at the discretion of the editors.
- Submissions are preferred in a Microsoft Word format emailed as an attachment or on disc. Hard copy is acceptable, but not recommended.
- Authors are asked to include an identification of their current legal position and a photograph, (headshot) preferably in a jpg file of, at least, 350 d.p.i., with their article submission.

Direct inquiries and send articles and author's photographs for publication consideration to:
Rhode Island Bar Journal Editor Frederick D. Massie
email: **fmassie@ribar.com**
telephone: **401-421-5740**

Rhode Island's "Farce and Mockery" Standard for Ineffective Assistance of Counsel Claims: A Misleading, Incorrect, and Unconstitutional Anachronism

Thomas R. Bender, Esq.
Attorney in Providence

*When the former, outdated, pre-**Strickland** Due Process "farce and mockery" standard is commingled with the subsequent Sixth Amendment **Strickland** standard, it unconstitutionally diminishes the defendant's Sixth Amendment right to the effective assistance of counsel.*

"The effective assistance of counsel is a defendant's most fundamental right 'for it affects his ability to assert any other right he may have.'" That right arises under the Sixth Amendment to the federal constitution, as applied to the states through the Fourteenth Amendment,[1] and under Article I, Section 10 of the state constitution. The Rhode Island Supreme Court has stated that, in evaluating an application for post-conviction relief based on a claim of ineffective assistance of counsel, it 'adheres to the standard set forth by the United States Supreme Court in **Strickland v. Washington**, 466 U.S. 668 * * * (1984)."[2]

Of course, for a claim made under the Sixth Amendment, it must adhere to that standard. The true import of that statement is with respect to an ineffectiveness claim brought under Article I, Section 10. It means the Court has adopted the federal constitutional standard as the state constitutional standard, and, thus, the state constitutional standard for determining the effectiveness of counsel in a state prosecution is the same as for determining the constitutional effectiveness for counsel under **Strickland** in a federal prosecution. Under the federal standard as set forth in **Strickland**, a new trial is warranted if "there is a reasonable possibility that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[3] The petitioner need not prove that it is "more likely than not" the outcome would be different, but only that counsel's unprofessional errors "*had some conceivable effect on the outcome of the proceedings*."[4]

But in the years subsequent to **Strickland** – 1999 to be precise – a distinct and more burdensome standard slipped into Rhode Island's ineffective assistance of counsel jurisprudence. Counsel's errors at trial were not constitutionally ineffective unless they resulted in a trial that was "a farce and a mockery of justice." That is not, however, a Sixth Amendment standard under **Strickland** and its progeny. Instead, it is a pre-**Strickland** Due Process Clause "fair trial" standard that was applied to counsel's performance at trial before the Sixth Amendment right to counsel was recognized to include a constitutional right to the *effective* assistance of counsel. It has long since been deceased, and is not now, and has never been, part of **Strickland's** Sixth Amendment ineffectiveness of counsel analysis.

Yet, despite the fact that it is not part of the Sixth Amendment analysis our state courts are bound to follow, and represents a distinctly greater burden to demonstrate constitutionally ineffective assistance than required by the Sixth Amendment, the "farce and mockery of justice" language has frequently appeared in state Supreme and Superior Court decisions since 1999, and has continued to appear in Rhode Island state court decisions as of the time of this writing. The hope author's hope is to persuade the state courts to abandon that language, and the standard it implies, and follow the correct constitutional path.

The Sixth Amendment "Objectively Unreasonable" Standard

Both the Sixth Amendment to the United States Constitution, and Article 1, Section 10 of the Rhode Island Constitution, provide that, in all criminal prosecutions, the accused shall enjoy the right to assistance of counsel in his or her defense.[5] Under **Strickland**, the constitutional right to counsel exists in order to protect the fundamental right to a fair trial, and accord defendants "ample opportunity to meet the case of the prosecution."[6] Both the Rhode Island Supreme Court and the United States Supreme Court have recognized that, under their respective constitutions, "the right to counsel is the right to *effective assistance* of counsel."[7]

In the 1984 **Strickland** decision, the United States Supreme Court set forth a standard for evaluating whether the defendant's counsel's assistance was constitutionally "effective" under the Sixth Amendment,[8] and the Rhode Island Supreme Court has repeated that standard for an ineffective assistance of counsel claim under Article 1, Section 10 as well.[9] The **Strickland** standard consists of two prongs.

For the first prong, the Sixth Amendment standard requires the petitioner claiming ineffective assistance of counsel to "show that his attorney's representation was objectively unreasonable under prevailing professional norms

and cannot be reconciled with sound strategy."[10] The second prong requires the defendant to demonstrate "that the deficient performance prejudiced the defense."[11] In this context, prejudice means "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[12] But reasonable probability simply means "a *probability sufficient to undermine confidence in the outcome" of the proceeding*, and not necessarily that "counsel's deficient conduct *more likely than not altered the outcome of the case*."[13]

Stated more compactly, the inquiry is whether, given counsel's performance, the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence[,]" and the error or errors committed by counsel need only create a reasonable possibility that the verdict is suspect, and "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome."[14]

The "Farce and Mockery of Justice" Standard

But the decisions of the Rhode Island Supreme Court, and consequently the decisions of the state Superior Courts, have frequently articulated a distinct and more demanding standard for a defendant claiming ineffective assistance when they are represented by privately-retained counsel, as opposed to court-appointed counsel. The Court has noted that "rarely does a defendant who has been represented by private counsel succeed in later questioning, in post-conviction proceedings, the effectiveness of the trial counsel that the defendant chose to represent him or her at trial."[15] In the Court's view, "when a person selects his or her own attorney; any alleged deficiencies seldom amount to an infringement of one's constitutional rights."[16] Rather than simply showing that the error "undermine[d] confidence in the outcome of the criminal proceeding" – the standard established by **Strickland**,[17] – the Rhode Island Supreme Court has frequently added the requirement that, to prevail on an ineffective assistance of counsel claim, where the petitioner was represented at trial by privately-retained counsel, he or she must demonstrate that counsel's errors were so egregious that "the trial had become a *farce and a mockery of justice*."[18] On occasion, however, the Court has even repeated the "farce and mockery of justice" standard without specifically limiting its application to privately retained counsel.[19]

But a "farce and mockery of justice," standard, and a distinction between privately retained or court appointed counsel, have never been part of, or relevant to, Sixth Amendment analysis concerning the Sixth Amendment right to the effective assistance of counsel. Neither the "farce and a mockery of justice" standard, nor whether the defendant is represented by privately retained or court-appointed counsel, have any place in the analysis of a state defendant's ineffective assistance claim under the Sixth Amendment, or, for that matter, under Article I, Section 10.[20]

The Origin of the "Farce and Mockery" Standard

The Rhode Island Supreme Court first articulated the "farce and mockery" standard in 1999 in a footnote in **State v. Dunn**, quoting an Annotation compiled in 1960:

> The "incompetency" (or one of its many synonyms) of private counsel for the defendant in a criminal prosecution is neither a denial of due process under the Fourteenth Amendment, nor an infringement of the right

to counsel under either the federal or state constitution, unless the attorney's representation is ***so lacking that the trial has become a farce and a mockery of justice***, in which case the judgment, violating either the Fifth, Sixth, or Fourteenth Amendment to the Federal Constitution, or a provision of a state constitution, is void." Annotation, *Incompetency of Counsel*, 74 A.L.R.2d 1390, 1397 (1960).[21]

But the "farce and mockery" standard, which, since 1999, has been frequently articulated in Rhode Island Supreme Court and Superior Court decisions alongside **Strickland's**, "sufficient to undermine confidence in the outcome" standard, is a long-discarded federal constitutional standard for judging an attorney's representation that pre-dated the recognition of the constitutional right to the effective assistance of counsel under the Sixth Amendment, and because of **Strickland**, is now a mere historical anachronism.

The "farce and mockery" standard was first articulated in 1945 in **Diggs v. Welsh**.[22] Thirty-seven years before **Strickland**, the **Diggs** court held the Sixth Amendment guaranteed only the assistance of counsel, not the *effective* assistance of counsel.[23] Therefore, the court treated the "incompetence of counsel" claim before it as one arising under the Due Process Clause's guarantee of a fair trial.[24] At that time, all the Sixth Amendment required was for the defendant to have legal counsel. It was not until **Strickland** that the United States Supreme Court recognized a Sixth Amendment right to *effective* counsel, and that a Sixth Amendment deprivation could be based upon errors committed by counsel at trial.

Consequently, prior to **Strickland**, ineffectiveness claims were decided under the Due Process Clause's guarantee of a fair trial, and the standard was whether the defendant had been deprived of a fair trial because of counsel's errors. To constitute a deprivation of the right to a fair trial, counsel's incompetence had to be so severe that the entire proceeding was rendered "a farce and a mockery of justice."[25] "Thus the 'farce and mockery' test originated when the right to effective assistance of counsel was thought to rest on the [Due] [P]rocess [C]lause[,]"[26] – not the Sixth Amendment.

While the due process approach to ineffective assistance claims and the "farce and mockery" standard were still extant in 1960 at the time the Annotation relied on by the Rhode Island Supreme Court was written, they were extinct by the time of the **Strickland** decision in 1982,[27] and certainly by the time of the 1999 decision in **State v. Dunn**. Even before **Strickland**, "every [Circuit Court of Appeals] had abandoned the 'farce and mockery' standard based upon the Due Process Clause and had adopted a Sixth Amendment based approach to evaluating counsel's effectiveness."[28] *Id.* Those courts followed a line of Supreme Court decisions undercutting the notion that the Sixth Amendment was satisfied merely by the assistance of counsel – finding the right also necessarily included the right to *effective* assistance.[29] By 1978, it was generally accepted by lower federal courts "that the [S]ixth [A]mendment guarantees the right to effective assistance of counsel."[30]

Thus the "farce and mockery" standard has not played a role in evaluating ineffective assistance of counsel claims for decades, and it is not a Sixth Amendment standard or part of the **Strickland** analysis, nor has the distinction between privately-retained counsel and court-appointed counsel. **Strickland** itself, rec-

House of Delegate Letters of Interest - Due February 21, 2014

Involvement in the activities of our Bar Association is a richly rewarding experience. One way to become familiar with Bar Association activities is by serving as a member of the House of Delegates. For those interested in becoming a member of the Bar's Executive Committee and an eventual Bar officer, House of Delegates' membership is a necessary first step. To learn more about Rhode Island Bar Association governance, please visit the Bar's website at: **www.ribar.com**.

The Nominating Committee will meet soon to prepare a slate of officers and members of the 2014-2015 Rhode Island Bar Association House of Delegates. The term of office is July 1, 2014 – June 30, 2015. If you have not already done so, to be considered for appointment to the House of Delegates, please send a letter of interest no later than **February 21, 2014**.

Letters of interest should include the member's length of service to the Rhode Island Bar Association (i.e., participation in Committees and positions held in those Committees; community service to the Bar Association and outside the Bar Association, and positions held outside the Bar Association). Testimonials and letters of recommendation are neither required nor encouraged. Direct and indirect informal contact by candidates or those wishing to address candidates' qualifications to members of the Nominating Committee is prohibited. Please send letters of interest to:

HOD Nominating Committee Chairperson
Rhode Island Bar Association
115 Cedar Street
Providence, RI 02903

Or, you may send your letter of interest to Helen Desmond McDonald, Executive Director by fax: 401-421-2703, or email: **hmcdonald@ribar.com**.

There will be an Open Forum at the Bar Headquarters at a date in February or March to be determined at which candidates for the House of Delegates and for Officer Position(s) may, but are not required to, appear before the Nominating Committee and further explain their candidacy. Candidates for officer positions and candidates for the House at large will be given up to ten minutes each to speak (or as determined by the Chair). Candidates who elect to address the Nominating Committee are encouraged to present their vision of how they would advance the mission of the Bar through their service in the office.

Any member planning to make a presentation at the Open Forum must inform Executive Director Helen McDonald, prior to the Forum via email: **hmcdonald@ribar.com** or telephone: 401-421-5740.

ognized that if the assistance of counsel is constitutionally deficient, it constitutes a violation of the Sixth Amendment – "[a]n accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair[,]"[31] and post-**Strickland**, the Court reiterated that "the constitutional guarantee of effective assistance of counsel at trial applies to every criminal prosecution, without regard to whether counsel is retained or appointed."[32] To include the "farce and a mockery of justice" standard, and to apply separate standards for privately retained and court-appointed counsel, in describing the standard for adjudging an ineffectiveness of counsel claim distorts the defendant's right under the Sixth Amendment and the constitutional analysis the Sixth Amendment requires Rhode Island courts to undertake when a defendant makes an ineffective assistance claim. They simply are not standards applicable to a defendant's Sixth Amendment right to the effective assistance of counsel. And, with respect to the "farce and a mockery of justice" standard, it is not just a question of semantics. Words have meaning, and the words "farce" and "mockery" convey a significantly more burdensome standard, and set a distinctly different tone, for evaluating the errors of counsel than the actual Sixth Amendment standard that evaluates whether the errors were "sufficient to undermine confidence in the outcome" of the trial. When the former, outdated, pre-**Strickland** Due Process "farce and mockery" standard is commingled with the subsequent Sixth Amendment **Strickland** standard, it unconstitutionally diminishes the defendant's Sixth Amendment right to the effective assistance of counsel.

The "farce and mockery of justice" standard apparently slipped into Rhode Island jurisprudence without the necessary understanding of its origins, or how it relates (or does not relate) to the Sixth Amendment. Through repetition, it has mistakenly, and unconstitutionally, become part of the analysis of a Sixth Amendment ineffectiveness of counsel claim, as that standard has been articulated by Rhode Island state courts. It's time to acknowledge the original error, excise it from the state's jurisprudence, and ensure criminal defendants are afforded their full constitutional rights under the Sixth Amendment.

ENDNOTES

1 ***Evitts v. Lucey***, *469 U.S. 387, 392 (1985);* ***Gideon v. Wainwright***, *335,344 (1965).*

2 ***Chapdelaine v. State***, *32 A.3d 937, 941 (R.I. 2011).*

3 *466 U.S. at 694.*

4 ***Id.*** *at 693 (emphasis added).*

5 ***State v. Brown***, *964 A.2d 516, 526 (R.I. 2009).*

6 *466 U.S. at 684, 685 (1984) (internal quotations and citations omitted).*

7 ***Heath v. Vose***, *747 A.2d 475, 477-78 (R.I. 2000) (internal citations omitted) (emphasis added).*

8 *466 U.S. at 687.*

9 ***See, e.g., Brown***, *964 A.2d 526-27.*

10 ***Prou v. United States***, *199 F.3d 37, 48 (1st Cir. 1999) (citing* ***Strickland***, *466 U.S. at 688-91);* ***see also Brown***, *964 A.2d at 527 ("a showing that counsel's representation fell below an objective standard of reasonableness.") (internal citation omitted).*

11 *466 U.S. at 687.*

12 *466 U.S. at 674.*

13 *466 U.S. at 693 (emphasis added).*

14 ***Strickland***, *466 U.S. at 693, 694.*

15 ***Brown***, *964 A.2d at 527 n.15.*

16 ***Hasset v. State***, *899 A.2d 403, 434 n.3 (R.I. 2006).*

17 *466 U.S. at 694.*

18 ***Brown***, *964 A.2d at 527 n.15;* ***see also Chalk v. State***, *949 A.2d 395, 398 (R.I. 2008) ("[a] claim of ineffective assistance of counsel against a privately retained counsel likely will fail unless the attorney's representation [was] so lacking that the trial had become a farce and a mockery of justice.");* ***Burke v. State***, *925 A.2d 890, 893 (R.I. 2007) (same);* ***Hampton v. State***, *786 A.2d 375, 381 (R.I. 2001) (same);* ***Vorgvongsa v. State***, *785 A.2d 542, 548 (R.I. 2001) (same);* ***Heath***, *747 A.2d at 477 n.1 (same) (emphasis added).*

19 ***See, e.g., Pelletier v. State***, *966 A.2d 1237, 1241 (R.I. 2009);* ***Moniz v. State***, *933 A.2d 691, 696-97 (R.I, 2007);* ***Ferrell v. Wall***, *889 A.2d 177, 193 (R.I. 2005).*

20 ***See Chapdelaine***, *32 A.3d at 941.*

21 *726 A.2d 1142, 1146 n. 4 (R.I. 1999) (emphasis added).*

22 *148 F.2d 667 (D.C. Cir.), cert. denied, 325 U.S. 889, 65 S.Ct. 1576, 89 L.Ed.2d 2002 (1945);* ***see United States v. Bosch***, *584 F.2d 1113, 1120 (1st Cir. 1978); Sanjay K. Chhablani, Disentangling the Right to Effective Assistance of Counsel, 60 Syracuse L. Rev. 1, 13 (2009) (hereinafter "Disentangling").*

23 ***Id.*** *(emphasis added).*

24 *584 F.2d at 1120-21 (citing 148 F.2d at 669).*

25 ***Id.***

26 ***Cooper v. Fitzharris***, *586 F.2d 1325, 1329 (9th Cir. 1978).*

27 ***See Disentangling***, ***supra***, *at 21.*

28 ***Id.***

29 ***Cooper***, *586 F.2d at 1329.*

30 ***Bosch***, *584 F.2d at 1121.*

31 *466 U.S. at 685.*

32 ***Evitts***, *469 at 395.* ❖

Now Accepting 2014 Nominations

Ralph P. Semonoff Award for Professionalism

Florence K. Murray Award

Victoria M. Almeida Servant Leader Award

All 2014 Award Nominations Are Due March 5, 2014.

2014 Ralph P. Semonoff Award For Professionalism

The Rhode Island Bar Association *2014 Ralph P. Semonoff Award for Professionalism* is named for past Rhode Island Bar Association President Ralph P. Semonoff who championed the law as a high calling, justice as a defendable right, and public service as the beacon of a life's work. This award is presented at the Bar's Annual Meeting in June to an attorney who has, by his or her ethical and personal conduct, commitment and activities exemplified, for fellow Rhode Island attorneys, the epitome of professionalism in the law, advancing the calling of professional practice through leadership, high standards of integrity, commitment and dedication. The Award Committee is particularly interested in attorney actions most closely reflecting those of the award's namesake as detailed in the nomination criteria and award entry form accessed on the Bar Association website at **www.ribar.com**, under the **NEWS AND EVENTS** tab on the left side of the Home page. All nominations are due no later than March 5, 2014. Postal mail or email nominations and/or direct questions to:

2014 Ralph P. Semonoff Award for Professionalism Committee
c/o Frederick Massie
Rhode Island Bar Association
115 Cedar Street
Providence, RI 02903
telephone: 401-421-5740
email: fmassie@ribar.com

2014 Florence K. Murray Award

The *Florence K. Murray Award* is presented annually to a person who by example or otherwise has influenced women to pursue legal careers, opened doors for women attorneys, or advanced opportunities for women within the legal profession. The Award is named in honor of the first recipient, Hon. Florence K. Murray, who in a distinguished 56 years at the bar, pioneered the causes of women in the law as the first woman attorney elected to the Rhode Island Senate, the first woman Justice on the Superior Court, the first woman Presiding Justice of the Superior Court, and the first woman on the Rhode Island Supreme Court. The Award Committee is particularly interested in attorney actions most closely reflecting those of the award's namesake as detailed in the nomination criteria and award entry form accessed on the Bar Association website at **www.ribar.com**, under the **NEWS AND EVENTS** tab on the left side of the Home page. All nominations are due no later than March 5, 2014. Postal mail or email nominations and/or direct questions to:

2014 Florence K. Murray Award Committee
c/o Frederick Massie
Rhode Island Bar Association
115 Cedar Street
Providence, RI 02903
telephone: 401-421-5740
email: fmassie@ribar.com

2014 Victoria M. Almeida Servant Leader Award

Named for its first recipient, Victoria M. Almeida, this Rhode Island Bar Association award is presented to an individual who demonstrates the principles and values of Servant Leadership and who is a beacon of light and hope to others by illuminating the path to Greater Justice for All. Servant Leadership seeks to encourage others in achieving the goals of the Rhode Island Bar Association while remaining faithful to the mission and values of the organization and preserving its integrity. The Award Committee is particularly interested in attorney actions most closely reflecting those of the award's namesake as detailed in the nomination criteria and award entry form accessed on the Bar Association website at **www.ribar.com**, under the **NEWS AND EVENTS** tab on the left side of the Home page. All nominations are due no later than March 5, 2014. Postal mail or email nominations and/or direct questions to:

2014 Victoria M. Almeida Servant Leader Award Committee
c/o Frederick Massie
Rhode Island Bar Association
115 Cedar Street
Providence, RI 02903
telephone: 401-421-5740
email: fmassie@ribar.com

Roger Williams University School of Law: Twenty Years of Enhancing Rhode Island's Culture

Michael W. Field, Esq.*
Rhode Island Department of the Attorney General

The mission of a law school is not just to educate persons who wish to become members of the bar, but also to contribute to and enhance the legal culture of every jurisdiction which the law school touches.

CHIEF JUSTICE
JOSEPH R. WEISBERGER

Few can doubt Rhode Island's rich legal history. Three hundred and fifty years ago, England granted the colony a charter premised on a then-novel rule of religious freedom and the separation between church and state. A little more than one hundred years later, in 1786, the Superior Court of Judicature, Court of Assize and General Gaol Delivery (now the Rhode Island Supreme Court), issued its opinion in **Trevett v. Weeden**, wherein the Justices declined to enforce a statute enacted by the General Assembly that required all persons within the state to accept paper money in exchange for debt relief, merchandise, or services.[1] By declining to enforce a statute passed by the General Assembly, it was later said the Court may well have concluded the paper money statute passed by the General Assembly was in violation of the Charter issued by King Charles II requiring all laws to conform with the common law of England.[2] Because of this conflict between the Charter and a statute, **Trevett** is generally recognized as one of the first, if not the first, cases where a state court declared an act of its legislature unconstitutional – preceding Chief Justice Marshall's opinion in **Marbury v. Madison**[3] by seventeen years.[4]

While certainly not on par with the granting of the Charter or the legal principle enunciated in **Trevett**, this year marks the 20th Anniversary of the opening of the Roger Williams University School of Law. In the inaugural edition of the *Roger Williams University Law Review*, Chief Justice Joseph R. Weisberger, who later served as the first Chairman of the Roger Williams University School of Law Board of Directors, wrote that "[t]he mission of a law school is not just to educate persons who wish to become members of the bar, but also to contribute to and enhance the legal culture of every jurisdiction which the law school touches."[5] Since its inception, the law school has delivered on the Chief Justice's vision.

The law school has served as a forum for some of the most important issues facing Rhode Island during the past two decades. The first article in the inaugural law review was, *Appointments by the Legislature Under the Rhode Island Separation of Powers Doctrine: The Hazards of the Road Less Traveled*, written by then-United States Attorney Sheldon Whitehouse.[6] A little more than a year later, the Law School convened a symposium, "Separation of Powers in State Constitutional Law," where constitutional experts from across the country debated Rhode Island's governance structure.[7] While no definitive outcome resulted from these discussions, and although different people may have arrived at divergent viewpoints, there is little question that, in the words of Chief Justice Weisberger, these contributions "enhance[d] the legal culture" that eventually led to the 2004 constitutional amendment.[8]

The School of Law and its law review have featured other important discussions concerning prominent and topical legal and social issues. Lieutenant Governor Elizabeth Roberts and now-Federal District Court Magistrate Judge Patricia A. Sullivan, among others, penned articles concerning the national health care debate.[9] Attorneys involved in **State of Rhode Island v. Lead Industries Association** critiqued the first lawsuit in the country where a state sued the former manufacturers of lead pigment in paint under a public nuisance theory.[10] During the pendency of this decade-long case, the law school hosted a full-day symposium dedicated to the topic of tort reform, bringing law professors throughout the country to Rhode Island to discuss this important, yet controversial, topic.[11] Other prominent issues addressed through writings, symposiums, and speaking programs have included: same-sex marriage;[12] the war on terrorism balanced with civil liberties;[13] legal ethics;[14] climate change and the BP Oil Spill; and critiques of United States and Rhode Island Supreme Court opinions.[15] Moreover, the law review's articles and other faculty publications are cited as authority by countless other law reviews,[16] by court decisions throughout the country, including by the Supreme Courts of the United States[17] and Rhode Island,[18] and by the United States Court of Appeals.[19]

Speakers offered through the law school have further enriched our legal community and indeed our State. Four of the current members

of the United States Supreme Court – Justices Scalia, Kennedy, Breyer, and Alito – visited the law school to speak or teach students constitutional law. Retired United States Supreme Court Justice Sandra Day O'Connor also visited the law school during its 20th Anniversary, and no one who attended Justice Elena Kagan's sold-out appearance at Trinity Repertory, co-sponsored by the law school, in August 2013, could challenge that this event "enhance[d] the legal culture" in Rhode Island. A month after the Justice Kagan event, David Coombs, a School of Law adjunct faculty member and the lead defense counsel for PFC Bradley (Chelsea) Manning, addressed the law school community concerning Manning's recently completed court-martial for leaking classified information. Other prominent members of the Rhode Island bench and bar have also enhanced the legal culture and the students' learning experience, by teaching courses at the law school. They include retired Chief Justice Williams, former Justice Flanders, Judges Selya and Smith, Justices Flaherty and Procaccini, Senate President Paiva-Weed, Senator Whitehouse, Professor Robert Kent, and current Roger Williams University School of Law Board of Directors' Chairman Mark Mandell, to name just a few. Our present Chief Justice has also annually welcomed new students, not only to the law school, but also to the profession of law.

When Chief Justice Weisberger wrote in the inaugural edition of the law review that among the missions of a law school is "to contribute to and enhance the legal culture of every jurisdiction which the law school touches,"[20] it is difficult to imagine that he was not considering the types of programs the law school offers to students, the legal community, and all Rhode Islanders. Among the earlier programs was the Thurgood Marshall Memorial Lecture series, which began in 2001 with a lecture offered by then-former United States Deputy Attorney General Eric Holder. As part of this Memorial Lecture series, Rhode Island has been privileged to host Justice Marshall's widow, Ms. Cecilia Marshall, who advanced not only our State's culture, but also made anyone within earshot a better citizen with her first-hand accounts of the challenges she and her husband faced during his extraordinary life.

While these contributions have stimulated civil and intelligent debates,

arguably one of the greatest daily contributions offered by the law school are its clinical programs and its recently renamed Feinstein Center for *Pro Bono* and Experiential Education. The *Pro Bono* Collaborative, a signature program in the Center, matches law students, attorneys/law firms, and community organizations that serve low-income persons in need of *pro bono* legal services and is recognized across the country as a model for *pro bono* collaboration. A small sampling of the contributions offered by law firms in conjunction with law students includes: providing legal assistance to immigrant victims of domestic violence (Edwards Wildman Palmer LLP); assisting The Transcending Through Education Foundation in providing resources and support for incarcerated individuals to obtain a higher education (Hinckley Allen LLP); attending legal clinics and educational workshops on expungements (Nixon Peabody LLC and Ratcliffe Burke Harten & Galamaga LLP); and tendering business and legal advice to non-profit local community groups (Pannone Lopes Devereaux & West LLC).[21] These *pro bono* efforts offer a classic win-win-win situation where attorneys and law firms provide *pro bono* services to the community, law students gain valuable legal experiences, and non-profit organizations and individuals in need of *pro bono* services have their legal interests advanced.

While these services advanced the legal culture in Rhode Island, in the last decade, law students also began a grassroots Alternative Spring Break program where, during their week away from classes, students travel to other communities to lend legal assistance. What began in 2005 with law students visiting New Orleans, providing legal aid to Hurricane Katrina victims, has quickly grown to where last year Alternative Spring Break students participated in ten different projects covering eight states and included working on death penalty cases in Georgia, working alongside public defenders in the Bronx and Brooklyn, assisting the victims of Hurricane Sandy in New Jersey, as well as attending to other legal projects in Rhode Island and Massachusetts. Considering the high value placed on advancing community interests, it is not surprising that the law school requires its students to contribute fifty or more hours to *pro bono* work as a condition to graduation.

The law school's clinical experiences, including Immigration, Mediation, Criminal Defense, and Judicial Externship, provide similar real life supervised learning experiences for students while also serving the needs of the community. Indeed, during the Rhode Island Supreme Court's last term, a Roger Williams University School of Law third-year student, participating in the Criminal Defense clinic, gained invaluable experience when she argued a case before the Rhode Island Supreme Court before graduating from law school.[22] While many law schools and other organizations are curtailing programs due to the economic downturn, on September 17, 2013, the law school opened its newest clinic, the Community Economic Development Clinic, aimed at developing students' transactional skills and assisting budding entrepreneurs by providing free legal services. In this respect, not only do these clinics serve the needs of the community, these experiences also serve law students, and their future employers, well by preparing students to enter the legal field. Moreover, the Marine Affairs Institute, in partnership with the Rhode Island Sea Grant and the University of Rhode Island, provides one of the few programs in the country offering a concentration in marine law, policy, and coastal issues. Considering our location and reference as the Ocean State, it was logical, and maybe expected, that Rhode Island and the School of Law would establish a nationally-recognized expertise in this field.

Although the community-based efforts fulfill Chief Justice Weisberger's vision, at its core, a law school's mission is to provide a forum for legal discussion and the advancement of the rule of law. Both the First Circuit Court of Appeals and the Rhode Island Supreme Court have convened to hold oral arguments at the law school.[23] And the Justices of the Rhode Island Supreme Court have regularly judged the student finals of the Esther Clark Moot Court Competition in Bristol. While throughout its twenty year history, law students were annually grilled by seasoned attorneys and jurists during moot competitions, in 2001 the roles reversed when then-Attorney General Whitehouse faced a moot court of attorneys and law professors as he prepared to enter oral arguments before the United States Supreme Court in **Palazzolo v. Rhode Island**.[24] The law school has also hosted

Gubernatorial and Attorney General debates, and our present Attorney General represents the first law school graduate elected as a Rhode Island general officer.

As Rhode Island commemorates the School of Law's 20th Anniversary, many accomplishments will be recognized and remembered, and it should not be lost on anyone that all these accomplishments, and the ones to come, result from the efforts of many students, alumni, faculty, lawyers, jurists, and other community leaders, some who are widely known and others who prefer less recognition for their efforts. While all these accomplishments are individually significant, perhaps the greatest collective accomplishment is the one envisioned by Chief Justice Weisberger in the inaugural law review. While not every attorney or person may endorse all the ideas espoused during every program, in every article, or by every speaker offered by the law school during the last two decades, there is little question these contributions and discussions enhance Rhode Island's legal culture and environment. After all, it is the mere fact that we are able to debate these important issues amongst ourselves and contribute to our community in a civil and intelligent manner that leads to an "enhance[d] legal culture."[25]

**The author was a member of the second class admitted to Roger Williams University School of Law, graduated in 1997, and presently serves on the Roger Williams University School of Law Board of Directors. This article would not have been possible without the contributions of Melinda Diffily and Casey O'Brien, both of whom are presently in their second year at Roger Williams University School of Law.*

ENDNOTES

1 *Joseph R. Weisberger, Forward, 1 Roger Williams U. L. Rev. vii (1996).*

2 ***Id.***

3 *5 U.S. (1 Chanch) 137 (1803).*

4 *Weisberger,* ***supra*** *footnote 1, at vii;* ***see also*** *Charles Warren, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA, 66 (New York Lewis Publishing Company 1902).*

5 ***See supra*** *footnote 1, at ix.*

6 *Sheldon Whitehouse, APPOINTMENTS BY THE LEGISLATURE UNDER THE RHODE ISLAND SEPARATION OF POWERS DOCTRINE: THE HAZARDS OF THE ROAD LESS TRAVELED, 1 Roger Williams U. L. Rev. 1 (1996). Even after the Separation of Powers referendum passed in 2004, the topic still garnered attention.* ***See*** *Thomas R. Bender, LEGISLATIVE CONTROL OVER THE COASTAL RESOURCES MANAGEMENT COUNCIL AFTER SEPARATION OF POWERS: GRASPING AT THIN AIR (LAND AND WATER), 12 Roger Williams U. L. Rev. 314 (2007).*

7 ***See*** *4 Roger Williams U. L. Rev. 1 (1998).*

8 *In 2004, voters overwhelming approved the Separation of Powers constitutional amendment with 257,308 in favor and 71,236 opposed. The majority of voters in each city and town approved the referendum.* ***See*** *State of Rhode Island Board of Elections, Statewide Referenda, www.elections.ri.gov/elections/results/2004/generalelection/ref.php.*

9 *Elizabeth Roberts et. al., Three Perspectives on Health Care Reform: National Health Care Reform, Health Care Reforms in Other States, and Implications for Health Care Reform in Rhode Island, 15 Roger Williams U. L. Rev. 1 (2010); Patricia A. Sullivan, et. al., The Health Care Debate: If Lack of Tort Reform is Part of the Problem, Federalized Protection for Peer Review Needs to be Part of the Solution, 15 Roger Williams U. L. Rev. 41 (2010).*

10 *Aileen Sprague et. al., Getting the Lead Out: How Public Nuisance Law Protects Rhode Island's Children, 11 Roger Williams U. L. Rev. 603 (2006); Fidelma Fitzpatrick, Painting Over Long-Standing Precedent: How the Rhode Island Supreme Court Misapplied Public Nuisance Law in State v. Lead Industries Association, 15 Roger Williams U. L. Rev. 437 (2010).*

11 ***See*** *13 Roger Williams U. L. Rev. 1 (2008).*

12 *Joan Catherine Bohl, Gay Marriage in Rhode Island, A Big Issue in a Small State, 12 Roger Williams U. L. Rev. 291 (2007); Jared B. Arader, Note, Chambers v. Ormiston: The Harmful and Discriminatory Avoidance of the Laws of Comity and Public Policy for Valid Same-Sex Marriages, 15 Roger Williams. U. L. Rev. 187 (2010); Sarah K. Mazzochi, The Great Debate: Lessons to be Learned from an International Comparative Analysis on Same-Sex Marriage, 16 Roger Williams U. L. Rev. 577 (2011).*

13 *Frank J. Williams et. al., Still a Frightening Unknown: Achieving a Constitutional Balance between Civil Liberties and National Security during the War on Terror, 12 Roger Williams U. L. Rev. 675 (2007); Jon Shelburne, Military Justice in the United States Marine Corps After 9/11: Does the War on Terror Change How Justice is Defined or Whether Justice Can Ever Be Achieved? 16 Roger Williams U. L. Rev. 608 (2011). The law review's Spring 2008 edition was also dedicated to a symposium on issues relating to the war on terror and civil liberties. See 13 Roger Williams U. L. Rev. 342 (2008).*

14 ***See*** *5 Roger Williams U. L. Rev. 19 (1999).*

15 ***See e.g.*** *Heather E. Marsden, State v. Hopkins: The Stripping of Rhode Island Rule of Evidence 404(b) Protections from Accused Sexual Offenders, 3 Roger Williams U. L. Rev. 333 (1998); Michael P. Robinson, A Question of Prejudice: Rule 16 and Pre-Trial Dismissal in State v. DiPrete, 4 Roger Williams U. L. Rev. 487 (1999); Vicki J. Bejma, Protective Cruelty: State v. Yanez and Strict Liability as to Age in Statutory Rape, 5 Roger Williams U. L. Rev. 499 (2000); Joshua Dunn, Justice for All (The Wrong Reasons): The Flaws and Fallout of Berman v. Sitrin, 16 Roger Williams U. L. Rev. 305 (2011).*

16 *The Roger Williams University Law Review has been cited by law reviews across the country.* ***See e.g.*** *Carolyn Sutherland, The Exclusive Quest*

for Simplicity: Measuring and Assessing the Readability of Enterprise Agreements, 1993 to 2011, 35 Sydney L. Rev. 349 (2013); Frank J. Williams, Military Trials of Terrorists: From the Lincoln Conspirators to the Guantanamo Inmates, 39 N. Ky. L. Rev 609 (2012); Jason P. Nance, Results From A National Study, 71 Alb. L. Rev. 565 (2008); Ronen Perry, LLD., The Relative Value of American Law Reviews: Refinement and Implementation, 39 Conn. L. Rev. 1 (2006); Frank J. Williams, Abraham Lincoln and Civil Liberties: Then & Now – The Southern Rebellion and September 11, 60 N.Y.U. Ann. Surv. Am. L. 463 (2004); David Kader, The Supreme Court of Arizona: Its 2002-2003 Decisions, 35 Ariz. St. L.J. 1105 (2003); Andrew Lynch, Dissent: The Rewards and Risks of Judicial Disagreement in High Court of Australia, 27 Melb. U. L. Rev. 724 (2003).

17 ***See Town of Castle Rock v. Gonzales**, 545 U.S. 748 (2005) (Justice Stevens cited Professor Emily Sack's article The Struggle for the Future of Domestic Violence); **McDonald v. City Chicago**, 130 S. Ct. 3020 (2010) (Justice Stevens cited Carl T. Bogus' article Gun Control and America's Cities: Public Policy and Politics).*

18 ***See In re** Proposed Town of New Shoreham Project, 25 A.3d 482 (R.I. 2010); **In re** Harrison, 992 A.2d 990 (R.I. 2010); **Viveiros v. Town of Middletown**, 973 A.2d 607 (R.I. 2009); **State v. Lead Industries, Ass'n, Inc.** 951 A.2d 428 (R.I. 2008); **Riley v. Rhode Island Dept. of Environmental Management**, 941 A.2d 198 (R.I. 2008); **State v. Day**, 911 A.2d 1042 (R.I. 2006); **Dellagrotta v. Dellagrotta**, 873 A.2d 101 (R.I. 2005); **Gem Plumbing & Heating Co., Inc. v. Rossi**, 867 A.2d 796 (R.I. 2005); **Mosby v. Devine**, 851 A.2d 1031 (R.I. 2004); **In re** Advisory Opinion to the Governor, 732 A.2d 55 (R.I. 1999); **State v. Dunn**, 726 A.2d 1142 (R.I. 1999).*

19 ***See U.S. v. Fuchs**, 635 F.3d 929 (7th Cir. 2011).*

20 *Weisberger, **supra** footnote 1, at vii.*

21 ***See** RWU Law Feinstein Institute for Legal Service, Projects, http://law.rwu.edu/pbc/projects (last visited Sept. 1, 2013).*

22 ***See State v. Poulin**, 66 A.3d 419 (R.I. 2013).*

23 *Roger Williams University School of Law has hosted oral arguments for both the First Circuit Court of Appeals and the Rhode Island Supreme Court. The Supreme Court has on at least three occasions used the moot courtroom at the law school to hear oral arguments. The first time was in the Spring of 1994 when the Supreme Court convened in Bristol for the first time in a century. The United States Court of Appeals for the First Circuit visited the law school on four separate occasions to hear cases from the Court's regular docket, April 7, 1999, April 3, 2001, April 6, 2005, and October 6, 2010.*

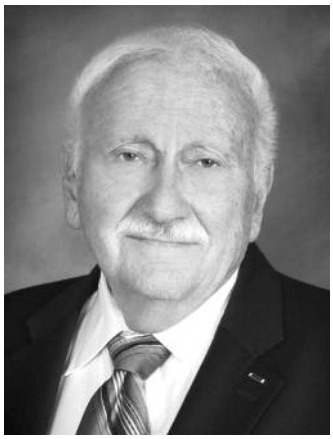
24 *533 U.S. 606 (2001).*

25 ***See** Weisberger, **supra** footnote 1, at vii.* ❖

Lunch with Legends:
Trailblazers, Trendsetters and Treasures of the Rhode Island Bar

Matthew R. Plain, Esq. **Elizabeth R. Merritt, Esq.**
Barton Gilman LLP, Providence

Amedeo C. Merolla was born on April 24, 1929, in the Federal Hill section of Providence. He attended Providence public schools, and graduated from Mount Pleasant High School in 1947. From there, he went on to study International Relations and play varsity football at Brown University. Mr. Merolla graduated from Brown in 1951, and began Harvard Law School the following Fall. He graduated from Harvard in 1954, gained admission to the Massachusetts bar that same year, and then came back to his native Providence to begin private practice. Mr. Merolla gained admission to the Rhode Island bar in 1955, and spent the first seven years working with Jack Temkin before forming a partnership with Martin Temkin and Melvin Zurier in the early 1960s. He formed a subsequent partnership with Harry Asquith before establishing Merolla & Accetturo, where he currently serves as managing partner, and practices alongside his daughter, Katherine, and his son, Stephen. He served as General Counsel to the Rhode Island Secretary of State, Legal Counsel to Congressman James R. Langevin, General Counsel for the Rhode Island Public Buildings Authority, General Counsel to the Rhode Island Department of Administration, Assistant Solicitor for the City the Providence, and the Judge Advocate General for the State of Rhode Island. He also served in the United States Marine Corps and the Rhode Island Army National Guard, most recently as the Deputy Commanding General of the Rhode Island Army National Guard. Mr. Merolla is a past Chairman of the Warwick School Committee and the past President and Co-Founder of the Warwick Boys and Girls Clubs. We had the opportunity to speak with this near sixty-year veteran of the bar. Excerpts from our conversation follow.



Amedeo C. Merolla

What has been the single biggest change in the legal profession/ practicing law since you first started practicing law?
When I began my law practice, we had essentially two items to assist us: manual typewriters and a telephone. Today, we have computers, software, Internet, email, copiers, printers, cell phones, and more, and the presence of women as excellent lawyers, including my daughter Kathy.

What is your most memorable experience from your law practice?
Walter Reynolds, then the Mayor of Providence, asked me to assist in an investigation and prosecution of a conspiracy which was very successful, defrauding Providence of hundreds of thousands of dollars. The criminals discovered an easy way to have Providence checks distributed to non-existent people. During the prosecution, I had to carry a snub-nosed .32, deal with 120 detectives, and become familiar with the bad guys' wiretaps in my home and office.

What was your most inventive or creative legal argument?
I went to Washington, D.C. on a case to determine why the company which manufactured a pistol did not manufacture weapons with a slight modification indicating if a weapon was loaded. I found they had started a procedure to make a safer weapon. Unfortunately, they stopped the procedure shortly before World War II. They correctly assumed they would not have time to prepare their factories for a change as they knew they would lose future sales during the retooling process. I used that information to win the case on a negligence theory.

What was your biggest challenge in your professional career?
When I became a lawyer, Rhode Island was one of two states which still had common law pleadings in the litigation system. I became active in the movement to change the pleading system to the current one which is essentially based on federal pleadings. The late Judge Frank Licht did a remarkable job in teaching members of the bar, when they came before him, on the utilization of the new system.

What is the best advice that you ever received?
Be courteous and friendly to members of the public and your fellow members of the bar, and help them when they ask. Most important, develop your listening skills.

What advice would you give to new lawyers?
The law is a jealous mistress. Don't let it push aside the time you should spend with your family.

CLE Publications Order Form

NAME

FIRM or AGENCY

MAILING ADDRESS *(Cannot be a P.O. Box)*

CITY & STATE

ZIP PHONE

EMAIL ADDRESS

BAR ID #

☐ Check enclosed (made payable to RIBA/CLE)
Please do not staple checks.

☐ MasterCard ☐ VISA ☐ AMEX ☐ Discover

Exp. Date _____

Card No. _____

Signature _____

Mail entire page to: CLE Publications
Rhode Island Bar Association
115 Cedar Street
Providence, RI 02903

OFFICE USE ONLY

Check No. _____

Date Rec'd _____

Amount _____

Date Sent _____

Title	Book #	Price	*Choose* Book	USB	Qty.	Total
Business						
Commercial Law 2013: Update on Recent Developments	13-03	$40				
Creditors/Debtors						
Collections Practice in RI	13-04	$35				
Avoiding Foreclosure/Loan Modifications	10-14	$40				
Family Law						
QDRO Practice in RI from A-Z	09-13	$40				
Law Practice Management						
Billing Clients	13-02	$25				
Establishing a Law Firm in RI	09-19	$25				
Planning Ahead	09-14	$39.95				
Practical Skills						
Workers' Compensation Practice in Rhode Island	12-11	$45				
Planning for and Administering an Estate	12-09	$45				
Residential Closings	12-07	$70				
Domestic Relations Practice	12-06	$70				
Civil Practice in Superior Court	12-03	$45				
Basic Commercial & Real Estate Loan Documentation	12-02	$70				
Civil Practice in District Court	12-01	$45				
Organizing a Rhode Island Business	11-18	$55				
Criminal Law Practice in RI	11-16	$55				
Probate/Elder Law						
Portability	13-05	$35				
Medicaid Forms and Regulations	11-15	$35				
Administrative Local Rules	PR-13	$65				
Real Estate						
The Ins & Outs of Landlord Tenant Law	11-11	$15				
RI Title Standards Handbook (through 4/13)	TS-13	$35				
Trial Practice						
Auto Accident Reconstruction	13-01	$35				
Recent Developments in the Law 2013	RD-13	$55				
DUI Update 2012	12-04	$35				
Soft Tissue Injuries Explained	11-12	$35				
Social Host Law	09-11	$25				
Model Civil Jury Instructions	03-02	$49.95				
RI Law of Workers' Compensation	WC-12	$40				

Publication Total	Shipping and Handling Cost
Up to $45	$6
$45.01 - $75	$9
$75.01 - $100	$12
$100.01+	$15

Please allow 2-3 weeks for delivery. All books are sent by FedEx Ground.

Books $ _____

Shipping/Handling $ _____

Sub-Total $ _____

7% R.I. Sales Tax $ _____

Total $ _____

Detach Here

RI Bar Association Continuing Legal Education Seminars

Register online at the Bar's website www.ribar.com and click on CONTINUING LEGAL EDUCATION in the left side menu or telephone 401-421-5740. All dates and times are subject to change.

January 15
Wednesday
Bridge the Gap
RI Law Center, Providence
8:30 a.m. – 4:00 p.m.
Also available ***ON DEMAND***

January 16
Thursday
Food for Thought
Construction Contracts – The Basics
RI Law Center, Providence
12:45 p.m. – 1:45 p.m., 1.0 credit

January 21
Tuesday
Food for Thought
Construction Contracts – The Basics
Phil's Main St. Grille, Wakefield
12:45 p.m. – 1:45 p.m., 1.0 credit

January 23
Thursday
Employment Law: Risk Reduction for Start-ups and Corporate Attorneys
RI Law Center, Providence
2:00 p.m. – 4:00 p.m., 2.0 credits

January 30
Thursday
Food for Thought
Court Annexed Arbitration – New Rules
RI Law Center, Providence
12:45 p.m. – 1:45 p.m., 1.0 credit
Also available as a ***LIVE WEBCAST***

February 4
Tuesday
E-Billing – The Process From Start to Finish
RI Law Center, Providence
12:00 p.m. – 2:00 p.m., 2.0 credits

February 6
Thursday
Food for Thought
Demystifying Student Loans
RI Law Center, Providence
12:45 p.m. – 1:45 p.m., 1.0 credit

February 12
Wednesday
Food for Thought
Demystifying Student Loans
Holiday Inn Express, Middletown
12:45 p.m. – 1:45 p.m., 1.0 credit

February 13
Thursday
Food for Thought
Real Estate Liens – A Field Guide
RI Law Center, Providence
12:45 p.m. – 1:45 p.m., 1.0 credit
Also available as a ***LIVE WEBCAST***

February 26
Wednesday
30 (b) (6) Depositions
RI Law Center, Providence
2:00 p.m. – 4:00 p.m., 2.0 credits

Times and dates subject to change.
For updated information go to www.ribar.com

NOTE: You must register on-line for live webcasts.

— SAVE THE DATE —

Rhode Island Bar Association

ANNUAL MEETING

June 19 & 20, 2014
Providence

Reminder: Bar members may complete three credits through participation in online CLE seminars. To register for an online seminar, go to the Bar's website: **www.ribar.com** and click on CONTINUING LEGAL EDUCATION in the left side menu.

The Attorneys Advantage online application process offers a convenient way for small firms to get a professional liability coverage quote –

Quick. Easy. Online!

We don't think all the extra work required to secure professional liability coverage should keep you from addressing your clients' pressing needs. That's why we streamlined our application process. Simply log on to **www.attorneys-advantage.com/online**.

Depending on the size and location of your firm, you may qualify to obtain a real-time quote and the option to purchase online; or you'll be able to submit an application online for further review. Either way, we think you'll find our streamlined online application process more convenient than ever.

It's As Simple As: QUOTE. CLICK. DONE.

At **www.attorneys-advantage.com/online** you'll find immediate access to dependable coverage plus useful tools and information to help you manage your firm's risk and reduce the chance of claims. And, while visiting the site, you can also register your email address to receive additional information about the program.

Liberty Mutual INSURANCE | **Now available Auto & Home Insurance Program for Rhode Island Bar Members**

Apply online today! Visit **www.attorneys-advantage.com/online**

The Attorneys Advantage Professional Liability Program is Sponsored By

RHODE ISLAND BAR ASSOCIATION 1898

AON

Attorneys Advantage online process is brought to you by Affinity Insurance Services, Inc., in association with Liberty Insurance Underwriters Inc. (a member company of Liberty Mutual Group). Affinity Insurance Services, Inc. is the program administrator of the Attorneys Advantage program.

A Tale of Litigation Past, Present, and Future: The Patient Protection and Affordable Care Act

Ronald M. LaRocca, Esq.
Pierce Atwood LLP,
Providence*

Because payments for refusing health insurance may reasonably be characterized as a tax, and not a penalty with the characteristics of regulation and punishment, the Constitution permits such as a tax.

I. Background

The Patient Protection and Affordable Care Act (ACA) became law on March 30, 2010, dramatically altering health care in the United States and causing an avalanche of litigation. Understanding the course of this litigation is not only an interesting academic exercise, it can have a practical benefit for attorneys. The law regulates insurance coverage disputes, mandates taxes for certain individuals, imposing assessable payments for certain employers. Further, in its efforts to increase (or force, depending on your perspective) health care access, Congress did not ignore the usefulness of the judiciary. Included within the ACA is an expanded enforcement mechanism grounded in already-existing federal remedies. This article outlines the past, present, and likely future of ACA-related litigation.

II. Litigation Past & Present

The ACA has three primary focuses: 1) regulation of existing health insurance plans, 2) expansion of the health insurance marketplace, and 3) implementation of changes to health care delivery. By design, Congress did not mandate immediate implementation. Rather, the ACA's provisions come into effect gradually, beginning with the expansion of existing health insurance coverage and culminating with sweeping changes to the marketplace and delivery of health care, like the individual mandate beginning in January 2014 and the employer mandate beginning in January 2015.

The law caused an immediate flood of litigation despite its gradual implementation. Many of these suits centered on its most controversial provisions: a) the individual mandate; b) Medicaid expansion; and c) the employer mandate. The controversy culminated in the United States Supreme Court case of **National Federation of Independent Business v. Sebelius**, 132 S. Ct. 2566 (2012), which addressed the constitutionality of the individual mandate and Medicaid expansion.

A. The Individual Mandate

The ACA mandates that every individual purchase a health insurance policy beginning on January 1, 2014. To facilitate health insurance purchases, the statute envisioned exchanges which are web-based platforms allowing an individual to choose between competing private insurance plans offering a range of qualifying coverage. These exchanges, and the costs associated with each competing plan, debuted to mixed reviews and controversy in October 2013.

Failure to obtain coverage does not carry criminal penalties. Instead, the ACA provides a sliding scale of financial penalties based upon an individual's income and family-status, payable through individual tax returns.[1] It is here where the primary challenge began.

On June 28, 2012, in **National Federation of Independent Business**, the Supreme Court affirmed the constitutionality of the individual mandate. The Court initially rejected the argument that the Commerce Clause provided Congress the ability to force health insurance purchases, holding that "[t]he Framers gave Congress the power to regulate commerce, not to compel it, and for over 200 years both our decisions and Congress's actions have reflected this understanding."[2] The Court commented that the "individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to 'regulate Commerce.'"[3]

Instead, the Supreme Court legitimized the individual mandate through Congress's power to lay and collect taxes. It reasoned that the individual mandate is not a "legal command to buy insurance."[4] Rather, "it makes going without insurance just another thing the Government taxes, like buying gasoline or earning income."[5] While acknowledging the payment of a tax will affect individual conduct, the Court held "this is nothing new," and cited examples including taxes on cigarettes to discourage smoking and tax incentives that encourage people to purchase homes and professional educations.[6] Because payments for refusing health insurance "may reasonably be characterized as a tax" and not a penalty "with the characteristics of regulation and punishment," the Constitution permits such

* ***EDITOR'S NOTE:*** *Author Ronald M. LaRocca is also a Navy Reservist currently mobilized in support of Operation Enduring Freedom in East Africa*

as a tax.[7] Consequently, the individual mandate survived.

B. Medicaid Expansion

Alas, the ACA's victory was not complete. The law's multi-pronged approach to increasing health care access included measures designed to make health care affordable for low income individuals unable to afford private health insurance on the exchange. A critical component of this effort was to expand Medicaid to incorporate a greater number of the nation's poor. Prior to the ACA's enactment, the Medicaid program required States to cover certain categories of needy individuals including pregnant women, children, very low income families, the blind, the elderly, and the disabled through a combination of federal and state funds.[8] The ACA dramatically expanded the eligibility pool, requiring states to cover *all* individuals with incomes below 133 percent of the federal poverty line, with the federal government initially covering the entire cost.[9] A state's failure to expand Medicaid would result in a forfeit of the state's *entire* Medicaid funding allotment.

Many States did not take kindly to the federal directive to expand Medicaid and brought suit against the federal government (Rhode Island did not participate in this effort). They argued that Congress's Medicaid mandate exceeded its lawful power to encourage State regulation under the Spending Clause.[10] Encouragement, via the threat of withdrawing all Medicaid funding, the states contended, is an example of when "pressure turns into compulsion."[11] The Supreme Court agreed. Chief Justice Roberts wrote that:

> Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer. The States are given no such choice in this case: They must either accept a basic change in the nature of Medicaid, or risk losing all Medicaid funding. The remedy for that constitutional violation is to preclude the Federal Government from imposing such a sanction.[12]

C. Employer Mandate

Equally controversial is the employer mandate going into effect on January 1, 2015. The controversy focuses on the mandate's impact on the bottom lines of employers. The ACA imposes an assess-

able payment on employers who: 1) employ at least 50 full-time employees (employees who work more than 30 hours per week); 2) offer no health coverage benefits, inadequate coverage benefits, or coverage that is unaffordable to full-time employees; and 3) have at least one full-time employee who receives a premium tax credit or cost-sharing reduction (i.e., receives governmental assistance to obtain health insurance outside of their employer).[13] Calculating the assessable payment is no simple matter. The ACA determines the payment's size based on whether the employer offers health insurance and how many employees obtain government assistance for health insurance. Congress designed the assessable payments to be higher in instances where the employer does not offer health insurance.

The Supreme Court has yet to address the question of whether Congress retains the power to impose assessable payments on employers. In **Liberty University, Inc. v. Geithner**, the Fourth Circuit refused to address the merits of the employer mandate's constitutionality. It held that the Anti-Injunction Act, which prohibits courts from entertaining lawsuits seeking to restrain the assessment or collection of a tax before the assessment and collection of the tax, prohibited the Court from addressing the constitutionality of the assessable payments.[14] The Supreme Court initially refused *certiorari* in the **Liberty University** case. However, following its **National Federation of Independent Business** opinion, it reversed its certiorari denial, granted *certiorari*, and then remanded the case back to the 4th Circuit in light of **National Federation of Independent Business**.[15]

In July 2013, the 4th Circuit affirmed the employer mandate pursuant to Congress's commerce clause power and its taxing and spending power. Unlike the individual mandate, the Court held in **Liberty University II** that the employer mandate is "simply another example of Congress's longstanding authority to regulate employee compensation offered and paid for by employers in interstate commerce." Rather than "create commerce in order to regulate it" as in the case of the individual mandate, employers are "by their very nature, engaged in economic activity." Further, the Court affirmed the employer mandate as a constitutional tax and rejected the argument that it amounts to an unconstitutional penalty.

D. The Religious Debate

The battle over contraceptive coverage has been no less intense. Because the ACA listed contraception as an essential health benefit, health plans must provide contraceptives at no charge. An employer's failure to comply with this mandate may result in a substantial fine of $100 per day for each "individual to whom such failure relates."[16] Therefore, businesses with hundreds or thousands of employees face enormous fines for refusing to provide contraceptive coverage.

Although exempting religious employers such as religious groups, institutions of higher education and hospitals, the contraception mandate applies to private employer group health plans covered by the Employee Retirement Income Security Act (ERISA). Not surprisingly, this requirement set off a firestorm of lawsuits amounting to dozens of challenges throughout the United States.[17] In fact, according to one study, twenty-one companies have received injunctive relief in federal district courts that prohibit ACA fines for failure to offer contraceptive coverage in their health plans.[18] The 10th Circuit recently outlined its position on the issue, providing a signal to other circuits that may or may not be heeded.

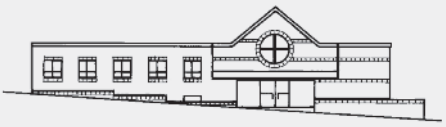
In **Hobby Lobby Stores, Inc. v. Sebelius**, two corporate entities with 13,000 full-time employees and 500 stores faced a $44 million dollar fine for their refusal to offer contraceptive coverage. The entities argued the ACA's contraceptive mandate violated the Religious Freedom Restoration Act (RFRA) of the small family that controls the entities. The RFRA prevents the government from substantially burdening a person's religious exercise absent a "compelling interest" that is enforced in the least restrictive manner.[19] Ruling in June 2013, the 10th Circuit held that the corporate plaintiffs had standing to challenge the ACA and the law likely violated the RFRA.[20] Hence, an employer located in the 10th Circuit with a sincere religious belief may refuse contraceptive coverage in their health plans without fear of an ACA fine. The Third and Sixth Circuit, however, rejected similar arguments and refused to grant injunctive relief to prohibit the ACA's contraception mandate.[21]

III. Future Litigation: Why Attorneys Should Pay Attention

Past and current ACA litigation provides an interesting backdrop to the ACA's current form and reach. Together it shows the Supreme Court's recognition of Congress's intent to expand health insurance coverage. It also shows how courts have molded the ACA into its current form. With that in mind, it is possible to assess the role litigation will play in health care and the possible impact on individuals and businesses large and small.

One likely area of future litigation relates to discrimination in individual coverage. ACA § 1557 provides that an individual shall not "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance…"[22] Congress rooted the grounds for unlawful ACA discrimination in Title VI of the Civil Rights Act of 1964 (Title VI), Title IX of the Education Amendments of 1972 (Title IX), the Age Discrimination Act of 1975 (Age Discrimination Act), § 504 of the Rehabilitation Act of 1973 (§ 504), or § 794 of Title 29 (§ 794).[23] This means that that ACA § 1557 prohibits discrimination in health care programs on the basis of race, color, national origin, sex, disability or age.

If an applicable entity discriminates against an individual in a health program or activity, the individual may pursue whatever rights are available under the already-established legislation For example, if an entity excludes an individual from a health program on the basis of age, then the Age Discrimination Act will outline that person's rights and remedies. To be sure, some of this is not new. These already-enacted laws may have already prohibited health care-related discrimination on the basis of race, color, national origin, sex, age or disability for entities receiving federal financial assistance. But § 1557 expands the reach of these acts, however, by enlarging the pool of potential defendants. First, entities receiving "federal financial assistance" now contemplates entities receiving "credits, subsidies, or contracts of insurance."[24] Second, ACA § 1557 includes federal agencies "administered by an Executive Agency," and federal health plans. Third, "any entity established" by the ACA Title I is subject to ACA § 1557, including



Rhode Island Bar Foundation

Founded in 1958, the Rhode Island Bar Foundation is the non-profit philanthropic arm of the state's legal profession. Its mission is to foster and maintain the honor and integrity of the legal profession and to study, improve and facilitate the administration of justice. The Foundation receives support from members of the Bar, other foundations, and from honorary and memorial contributions.

Today, more than ever, the Foundation faces great challenges in funding its good works, particularly those that help low-income and disadvantaged people achieve justice. Given this, the Foundation needs your support and invites you to complete and mail this form, with your contribution to the Rhode Island Bar Foundation.

Help Our Bar Foundation
Help Others

RHODE ISLAND BAR FOUNDATION GIFT

PLEASE PRINT

My enclosed gift in the amount of $ _____

Please accept this gift in my name

or

In Memory of _____

or

In Honor of _____

Your Name(s) _____

Address _____

City/State/Zip _____

Phone (in case of questions) _____

Email: _____

Please mail this form and your contribution to:

Rhode Island Bar Foundation

115 Cedar Street

Providence, RI 02903

Questions? Please contact Virginia Caldwell at 421-6541

or gcaldwell@ribar.com

member-run insurers designed to increase competition in the exchanges called Consumer Operated and Oriented Plans. Consequently, state or federally-administered health exchanges[25] can be targets of discrimination based suit or administrative enforcement actions.

Notably, the ACA also expands the reach of sex discrimination. Prior to the ACA's enactment, Title IX only applied to sex discrimination in educational institutions and programs, not necessarily reaching health care. The expansion of the prohibition against sex discrimination in health care has already led to an enforcement action against five, large employers brought by the National Women's Law Center with the Department of Health and Human Services Office of Civil Rights, including a large research and development entity, a hospital system, and universities.[26] The action alleges that the five employers discriminated against women by excluding pregnancy health insurance benefits for dependent children.[27]

The ACA also expanded the reach of another federal discrimination law. Indeed, Congress expressly subjected ERISA to the ACA, providing the potential for ERISA discrimination suits in health care. ERISA § 510 (29 U.S.C. § 1140) prohibits employers from discriminating against employees participating in an employee benefit plan "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan…" Because Courts have interpreted discrimination to mean adverse actions, ERISA liability may result from efforts to disqualify employees from health coverage, such as unjustified reductions in hours.

IV. Conclusion

The ACA is an unprecedented law. It will, in all likelihood, have unpredictable and unanticipated results. What is certain is that members of the bar will continue to be at the forefront of its implementation, scope and reach. Understanding what it is, what it does and how it evolved is critical for practitioners who face clients with health care concerns. Even more so, knowing the ACA permits practitioners to spot ACA-related issues so they can proactively identify issues before they become problems for their clients.

ENDNOTES

1 *ACA §§ 1501, 1502 and 10106 adding §§ 5000A and 6055 to the Internal Revenue Code; § 1002 of the ACA reconciliation bill.*

2 *132 S.Ct. at 2549.*

3 ***Id.** at 2591. The Court also struck down the Government's "necessary and proper" clause argument pursuant to Art. I, § 8, cl. 18, which provides Congress the right to make all laws "necessary and proper" for carrying into execution Congress's enumerated powers. It held that if the Court sustained the individual mandate based the "necessary and proper" clause, the Court would greatly expand Congress's reach beyond the Framer's intent and "undermine the structure of government established in the Constitution." **Id.** at 2591-93.*

4 ***Id.** at 2594.*

5 ***Id.***

6 ***Id.** at 2596-99.*

7 ***Id.***

8 ***Id.** at 2601.*

9 *ACA § 1396a(a)(10)(A)(i)(VIII) & § 1396d(y)(1).*

10 *The spending clause states that Congress has the power to "pay the Debts and provide for the … general Welfare of the United States." U.S. Const., Art, I, § 8, cl. 1.*

11 ***National Federation of Independent Business**, 132 S.Ct. at 2601.*

12 ***Id.** at 2608.*

13 ***See gen.**, Internal Revenue Code § 4980H.*

14 ***Id.** at 401, 414-15.*

15 ***Liberty Univ. v. Geithner**, 133 S. Ct. 60 (2012) reh'g granted, order vacated, 133 S. Ct. 679, 184 L. Ed. 2d 452 (U.S. 2012).*

16 *26 U.S.C. § 4980D.*

17 *Sarah Kliff, Dozens of Obamacare lawsuits are still pending, Wash. Post (June 28, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/28/dozens-of-obamacare-lawsuits-are-still-pending/.*

18 ***Id.***

19 ***Hobby Lobby Stores, Inc. v. Sebelius**, 723 F.3d 1114, 1125-26 (10th Cir. 2013).*

20 ***Id.** at 1148.*

21 ***Autocam Corp. v. Sebelius**, 12-2673, 2013 WL 5182544 (6th Cir. Sept. 17, 2013); **Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.**, 724 F.3d 377, 417 (3d Cir. 2013).*

22 *42 U.S.C. § 18116 (ACA § 1557).*

23 ***Id.***

24 *ACA § 1557(a).*

25 *If States fail to create and operate a health care exchange, the Secretary of Health and Human Services will do so for that state. Rhode Island has opted to create and operate a health care exchange. For more information, see http://www.ltgov.ri.gov/rihrc/exchange.php.*

26 *http://www.nwlc.org/press-release/nwlc-files-complaints-against-five-institutions-sex-discrimination-health-care-coverag.*

27 *http://www.nwlc.org/resource/nwlc-section-1557-complaint-sex-discrimination-complaints-against-five-institutions.* ❖

Understanding Special Needs Trusts

Chad E. Nelson, Esq.
The Law Offices of Jeremy W. Howe, Ltd.

Improper use of the trust funds, or distribution of the funds directly to the disabled beneficiary, will likely result in disqualification of the individual's government benefits.

Special needs trusts are essential planning vehicles, not only for disabled persons, but also for their family members and caretakers. This article explains the basics of how and why special needs trusts are utilized, both for the practitioner and the client. In addition to reviewing the different types of special needs trusts and their unique functions, we will also look at some of the dangers of improper estate planning stemming from the absence of special needs trusts, as well as some of the pitfalls involved in the erroneous creation and use of special needs trusts.

Why create a special needs trust?

From a life-planning standpoint, special needs trusts afford parents and other family members of disabled persons the opportunity to provide the desired level of control over financial assets or other property held for the benefit of the disabled person. The trustee of a special needs trust is given a limited amount of discretion regarding how the trust assets are administered for the disabled individual's benefit in accordance with the wishes of the person creating the trust, generally a parent, grandparent or sibling. Instead of lifetime gifting or leaving property upon death to a disabled individual, the trust becomes the proper receptacle for all such property transfers. Designating the trust as the owner of such property also helps to avoid any potential creditor issues the disabled person might have exposure to, eliminating possible spendthrift concerns.

From an estate planning standpoint, special needs trusts serve as a valuable protector of the benefits received from means-tested government programs the disabled person currently receives or may be eligible for in the future. Leaving money and/or property outright to a disabled person is likely to disqualify the individual from such programs or risks preventing the individual from qualifying for such programs in the future. By designating the individual's special needs trust as the recipient of property intended for the disabled individual, these assets are removed from the individual's countable asset tally. Assets held in a special needs trust are limited to use for the supplemental needs of the disabled person, meaning they are only to be used for those purposes not currently provided by any government program. In other words, the trust holds assets for the benefit of the disabled person to provide him or her with the extras in life, not to supplant already existing services received via a government program.

Choosing the right kind of special needs trust.

It is important to note the distinction between the two main types of special needs trusts on an individual planning basis: 1) the D4A Trust (also known as the First Party Trust, or the Medicaid Payback Trust); and 2) the Supplemental Needs Trust (also known as the Third Party Trust). Throughout the article, the two types of special needs trusts are referred to using these various terms interchangeably. For the practitioner, it is important to read and hear the varying terms, and make the appropriate distinctions. While both trusts serve the same purposes, they differ in several important respects.

The D4A Trust

The D4A Trust, which derives its name from the federal statute authorizing it (42 USC 1396p(d)(4)(A)), is used to hold assets already belonging to the disabled individual, or assets to which the disabled individual is already legally entitled. For instance, a bank account held in the name of the disabled person, or an inheritance previously received by the same individual, would both be held by the D4A. In essence, if the asset is already in the disabled individual's name, proper planning necessitates it is held by a D4A Trust, and not a Supplemental, or Third Party, Special Needs Trust.

D4A trusts are also created to hold personal injury or medical malpractice awards received by disabled individuals. Because these individuals are often already recipients of means-tested programs like Medicaid or Supplemental Security Income (SSI), or will become recipients of such programs as a result of their injury, a substantial monetary award could very well dis-

Reaching Out:

Learning the Signs of Depression and Suicide Risk

A depressed friend or colleague who talks about "ending it all" is not being secretive about the desire to commit suicide, but would you notice more subtle signs of suicidal risk in a friend who wasn't as open about thoughts and feelings or who felt it was a sign of weakness to ask for help?

Untreated depression is the most common cause of suicide, so the more you know about it, the easier it is to spot. You don't have to be a mental health professional to understand signs of depression. You need to know only what the signs are to have an edge in knowing whether to ask your friend if he or she is feeling suicidal. (Never shy away from this question. Clinicians agree that simply asking can be a valuable tool to help prevent suicide).

The National Institute of Mental Health has easily accessible information about depression and suicide at the following URLs: **http://tinyurl.com/7fc5okn**, (signs and symptoms of depression) and **http://tinyurl.com/849gqgb**, (warning signs of suicide).

There are many signs, not just sadness. Changes in eating, sleeping, or working habits; severe weight loss or gain; changes in mood or self-image; or excessively talking about guilt or other negative feelings and thoughts are all symptoms of depression. Having a greater knowledge of these symptoms will help you gauge your concern, so you can urge your friend or colleague to consult with a mental health professional.

If you have any questions you may contact Judith Hoffman at Coastline EAP, 800-445-1195, **www.coastlineeap.com**. Coastline EAP is a totally confidential free service for Rhode Island Bar Association members and their families. You may also contact any member of the Bar Association's Lawyers Helping Lawyers (LHL) Committee. Please see page 36 for a listing of LHL members and their contact telephone numbers. All communications are confidential as a matter of law.

qualify them from the receipt of such benefits. Although the disabled individual is technically not in possession of a personal injury award prior to finalization of the judgment or settlement, he or she is nonetheless the only bona fide legal recipient of the award, so the D4A Trust is the appropriate recipient of such an award.

Because the D4A Trust is a statutory creature, several important guidelines must be followed when creating the trust. According to 42 USC 1396P(d)(4)(a), such a trust must: 1) contain the assets of an individual under age 65; 2) be for the benefit of an individual who is disabled as defined by the regulations; 3) be established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court (and not the beneficiary himself); and 4) contain language mandating the State will receive reimbursement for sums paid out to the disabled beneficiary during his or her lifetime.

Perhaps the most important of these statutory dictates is number four. The D4A Trust is subject to a state payback provision. Hence the moniker, Medicaid Payback Trust. Upon the disabled person's death, any funds remaining in the trust must be used to reimburse the state for services rendered during the individual's lifetime. As a result, a beneficiary who receives significant benefits from the State and utilizes the D4A Trust over an extended period of time, may well have his or her entire remainder of trust funds, if any exist, wiped out upon death. Alternatively, if government benefits received by the individual during his or her lifetime were insubstantial, or if the individual did not survive very far into the tenure of the trust, there will likely be a remainder sum. Where a remainder amount exists after reimbursement to the State, it can be distributed to other private beneficiaries named under the trust, just like any other trust instrument.

The payback provision is the all-important feature of the D4A trust. Failure to include the appropriate payback language can be catastrophic. Such a failure will likely result in the disqualification of the individual from his or her government benefits, as the trust will be considered invalid under the statute, and the trust assets deemed available to the beneficiary. Also, commingling of funds already owned by the disabled beneficiary with third party funds, if lumped into the

D4A trust, will result in the availability of the third party funds for state payback upon the beneficiary's death. Third party funds are not otherwise available for State payback under an estate plan that properly incorporates special needs provisions.

The Supplemental Needs Trust

The Supplemental Needs Trust, or Third Party Trust, in contrast to the D4A Trust, serves as the holder of monetary or non-monetary assets others wish to gift and/or leave to the disabled person, either during the donor's life or upon the donor's death. For example, if an aunt or uncle wishes to gift money or leave an inheritance via his or her last will and testament to a disabled niece or nephew, they would do so by designating a bank account held by the Supplemental Needs Trust as the recipient. Such a designation allows the disabled individual to remain qualified for any program he or she is currently receiving benefits from, at the same time allowing the individual to reap the benefit of the gifted assets. From a document drafting standpoint, a parent desiring to make a $20,000 bequest to a disabled child upon the parent's death should do so by including a provision in his or her will stating, "I give and bequeath the sum of $20,000 to the Trustee of the John Smith Supplemental Needs Trust, to be administered in accordance with its terms." As such, prior to the creation of the parent's will, the Third Party Trust would need to be created. Otherwise, leaving this amount outright to John Smith would disqualify John from programs like Medicaid or SSI immediately upon John's receipt of the funds.

Fund drives organized for the benefit of a disabled individual should also earmark proceeds for a third-party trust account. In contrast to the D4A Trust, the Supplemental Needs Trust has no State payback provision, which means assets remaining in trust at the individual's death may pass according to the wishes of either the individual or his or her family members, or as designated in the will of the disabled beneficiary.

Given the payback distinction between these two types of special needs trusts, one can see why utilizing and spending down the assets held in a D4A Trust, where the individual has both kinds of trusts, prior to using the assets held in a Third Party Trust, makes sense. Also

Bar's Volunteer Lawyer Program and RWU Law Partner for Mediation Clinic

A partnership between the Bar's Volunteer Lawyer Program (VLP) and the Roger Willimas University School of Law's (RWULS) Mediation Clinic provided *pro bono* legal assistance to couples at a divorce mediation clinic held at the Bar on Saturday, November 16th. Participants included front row, l-r: RWULS Mediation Clinic Administrator Margie Caranci; and RWULS students Allyson Entz, Jennifer Sherman, Leila Bajunaid, Amanda Lawton, Natasha Ludwig; and rear row, l-r: Bar VLP attorney Neville J. Bedford, Esq.; RWULS students Ashley Brinkmann, Lesley Jackson, David Plavnick, Diana Robbins; and RWULS Professor of Law and Mediation Clinic Director Bruce Kogan.

Pull Together as a Team with OAR!

The Rhode Island Bar Association's unique, **Online Attorney Resources (OAR)** is exclusively designed to help Bar members receive and offer timely and direct assistance with practice-related questions. **OAR** provides new and more seasoned Bar members with the names, contact information and Bar admission date of volunteer attorneys who answer questions concerning particular practice areas based on their professional knowledge and experience. Questions handled by **OAR** volunteers may range from specific court procedures and expectations to current and future opportunities within the following **OAR** practice areas:

Domestic/Family Law Practice
Civil Practice in RI District Court: Collections Law & Evictions
Civil Practice in RI Superior Court: Plaintiff's Personal Injury Practice
Criminal Law Practice
Commercial Real Estate Transactions
Organizing a Business
Probate and Estate Planning
Residential Real Estate Closings
Workers' Compensation Practice
Creditors' and Debtors' Rights
Federal Court Practice
Administrative Law

Choose your OAR option:

1) **Bar members with questions about a particular area of the law.**
2) **Bar members willing to volunteer as information resources.**

To review the names and contact information of Bar members serving as **OAR** volunteers, or to sign-up as a volunteer resource, please go to the Bar's website at **www.ribar.com**, login to the **MEMBERS ONLY** section and click on the **OAR** link.

OAR TERMS OF USE Since everyone's time is a limited and precious commodity, all Bar members contacting OAR volunteers must formulate their questions concisely prior to contact, ensuring initial contact takes no longer than 3 to 5 minutes unless mutually-agreed upon by both parties. OAR is *not* a forum for Bar members to engage other Bar members as unofficial co-counsel in an on-going case. And, as the Rhode Island Bar Association does not and cannot certify attorney expertise in a given practice area, the Bar does not verify any information or advice provided by OAR volunteers.

noteworthy is the Third Party Trust need not meet the age or parent/guardian/court establishment requirements.

Use of trust assets for the individual's supplemental needs.

One common bond shared by the D4A Trust and the Third Party Trust is the requirement that each trust must hold assets limited to use for the supplemental needs of the beneficiary. Improper use of the trust funds, or distribution of the funds directly to the disabled beneficiary, will likely result in disqualification of the individual's government benefits. The term, supplemental needs encompasses those not already provided for by state programs. Thus, use of special needs trust funds, whether from the D4A Trust or the Third Party Trust, must be for items like vacations, occasional meals out, schooling or other educational programs, entertainment, and the like. These purposes and activities are not supported by programs like Medicaid or SSI, and corresponding distributions will not displace any government services.

While there are no hard and fast lists or rules governing exactly what constitutes a supplemental need of a disabled special needs trust beneficiary, the above uses illustrate the kinds of distributions a trustee should consider. The primary question the trustee should ask before making a distribution is, "Does the beneficiary already receive similar support from his or her government program(s)?" When in doubt, the trustee is well-served by contacting the attorney who originally created the special needs trust for clarification.

The Social Security Administration's regulations and Program Operations Manual System (POMS) provide some clarity on appropriate special needs trust distributions. Distributions for food and shelter needs, and their equivalents, are generally considered in-kind income to the beneficiary and considered disqualifying distributions. While there are some exceptions to this general standard, the overarching public policy theme envisioned by the regulations is that government programs aim to fulfill basic needs, such as food and shelter, while special needs trusts are allowed to provide for the beneficiary's enhanced quality of life. As a result, while a weekly trust distribution for a disabled beneficiary's groceries may be considered in-kind income, a distribution for a birthday meal at a

SOLACE

Helping Bar Members in Times of Need

SOLACE, an acronym for Support of Lawyers, All Concern Encouraged, is a new Rhode Island Bar Association program allowing Bar members to reach out, in a meaningful and compassionate way, to their colleagues. SOLACE communications are through voluntary participation in an email-based network through which Bar members may ask for help, or volunteer to assist others, with medical or other matters.

Issues addressed through SOLACE may range from a need for information about, and assistance with, major medical problems, to recovery from an office fire and from the need for temporary professional space, to help for an out-of-state family member.

The program is quite simple, but the effects are significant. Bar members notify the Bar Association when they need help, or learn of another Bar member with a need, or if they have something to share or donate. Requests for, or offers of, help are screened and then directed through the SOLACE volunteer email network where members may then respond. On a related note, members using SOLACE may request, and be assured of, anonymity for any requests for, or offers of, help.

To sign-up for SOLACE, please go to the Bar's website at **www.ribar.com**, login to the **Members Only** section, scroll down the menu, click on the **SOLACE Program Sign-Up**, and follow the prompts. Signing up includes your name and email address on the Bar's SOLACE network. As our network grows, there will be increased opportunities to help and be helped by your colleagues. And, the SOLACE email list also keeps you informed of what Rhode Island Bar Association members are doing for each other in times of need. These communications provide a reminder that if you have a need, help is only an email away. If you need help, or know another Bar member who does, please contact Executive Director Helen McDonald at hmcdonald@ribar.com or 401.421.5740.

Do you or your family need help with any personal challenges?

We provide free, confidential assistance to Bar members and their families.

Confidential and free help, information, assessment and referral for personal challenges are available **now** for Rhode Island Bar Association members and their families. This no-cost assistance is available through the Bar's contract with **Coastline Employee Assistance Program (EAP)** and through the members of the Bar Association's Lawyers Helping Lawyers (LHL) Committee. To discuss your concerns, or those you may have about a colleague, you may contact a LHL member, or go directly to professionals at Coastline EAP who provide confidential consultation for a wide range of personal concerns including but not limited to: balancing work and family, depression, anxiety, domestic violence, childcare, eldercare, grief, career satisfaction, alcohol and substance abuse, and problem gambling.

When contacting Coastline EAP, please identify yourself as a Rhode Island Bar Association member or family member. A Coastline EAP Consultant will briefly discuss your concerns to determine if your situation needs immediate attention. If not, initial appointments are made within 24 to 48 hours at a location convenient to you. Please contact Coastline EAP by telephone: 401-732-9444 or toll-free: 1-800-445-1195.

Lawyers Helping Lawyers Committee members choose this volunteer assignment because they understand the issues and want to help you find answers and appropriate courses of action. Committee members listen to your concerns, share their experiences, offer advice and support, and keep all information completely confidential.

Please contact us for strictly confidential, free, peer and professional assistance with any personal challenges.

Brian Adae, Esq.	831-3150
Neville J. Bedford, Esq.	348-6723
Henry V. Boezi III, Esq.	861-8080
David M. Campanella, Esq.	273-0200
John P. Capaldi, Esq.	523-9500
Sonja L. Deyoe, Esq.	864-3244
Christy B. Durant, Esq.	421-7400
Brian D. Fogarty, Esq.	821-9945
Jeffrey L. Koval, Esq.	885-8116
Nicholas Trott Long, Esq. (Chairperson)	351-5070
John Nathan Mansella, Esq.	437-6750
Genevieve M. Martin, Esq.	274-4400
Daniel P. McKiernan, Esq.	223-1400
Joseph R. Miller, Esq.	454-5000
Henry S. Monti, Esq.	467-2300
Arthur M. Read II, Esq.	739-2020
Roger C. Ross, Esq.	723-1122
Adrienne G. Southgate, Esq.	301-7823
Deborah M. Tate, Esq.	351-7700
Judith G. Hoffman, LICSW, CEAP, Coastline EAP	732-9444 or 800-445-1195

Lawyers Helping Lawyers Committee Members Protect Your Privacy

restaurant, would not. Until recently, distributions for clothing needs of the disabled individual were also considered disqualifying, but that restriction no longer exists.

The POMS provisions governing in-kind support and maintenance list only a handful of items constituting food and shelter equivalents, such as food, mortgage, property insurance, taxes, rent, heating fuel, gas, electricity, water, sewer and garbage removal payments, so anything akin to these items is of questionable legitimacy. At any point the trustee begins to question whether a distribution is appropriate, legal counsel should be sought.

The trustee must also be careful not to distribute funds directly to the individual, even if the distribution is intended for a legitimate purpose. Such a direct distribution to the individual necessarily entails the disabled beneficiary receiving income and/or assets, which are counted against him or her for program qualification purposes. Instead, the trustee wishing to provide these extras for the beneficiary should directly reimburse vendors, or find alternative arrangements that do not include the beneficiary receiving direct cash distributions.

The sole benefit rule.

Another characteristic both special needs trusts share is that trust assets may only be used for the benefit of the disabled beneficiary. While this rule seems straightforward enough, problems arise when trustees of special needs trusts consider making distributions for the benefit of family members or caretakers who experience physical, mental or financial hardship in caring for the disabled individual. The sole benefit rule, like many other guidelines surrounding special needs trusts, is often blurred. For example, a trust distribution for the caretaker-mother of a disabled individual, to provide her with a solo vacation, would run afoul of the sole benefit rule. If, however, the distribution were made so the mother and son both went on the vacation, hotel accommodations, meals out and entertainment for both individuals would probably be permissible.

Likewise, home improvements enabling the disabled individual better or easier access to the home, such as a wheelchair ramp or elevator, are appropriate trust expenditures, regardless of

Proposed Title Standard 3.12 Open for Bar Member Review and Comment

The Rhode Island Bar Association's Title Standards and Practices Committee, chaired by Michael B. Mellion, Esq., at their meeting on November 21, 2013, voted unanimously to submit the following Proposed Title Standard to the Rhode Island Bar Association's Executive Committee for its consideration. Bar members are invited to comment on these proposed changes, no later than February 15, 2014, by contacting Rhode Island Bar Association Executive Director Helen Desmond McDonald by postal mail: 115 Cedar Street, Providence, RI 02903 or email: hmcdonald@ribar.com.

Introduction

Prior to the enactment of RI Gen. Laws § 34-4-27, which took effect on January 1, 1995, accepted conveyancing practice required a trustee of a trust to record a copy of the declaration of trust in the land evidence records when the trustee conveyed title to an interest in real estate. After the enactment of that statute, the requirement for the recordation of the declaration of trust was eliminated. Instead, an affidavit or memorandum of trust including the information required by subsection (a) the statute was relied upon as evidence of the trustee's authority to convey title. Occasionally, situations have arisen where neither a declaration of trust nor an affidavit or memorandum of trust has been recorded, or the affidavit or memorandum of trust does not include all of the information mandated by the statute. In the judgment of the Title Standards and Practices Committee, if no challenge to the authority of a trustee to convey has occurred within five years of the recording of the conveyance, the likelihood of a challenge is quite remote. Rather than impose upon the parties an obligation to seek a judgment quieting title, or obtaining a corrected affidavit or memorandum of trust to fix technical deficiencies, the Title Standards and Practices Committee proposes the enactment of Title Standard 3.12. This proposed standard would establish the marketability of title to real estate affected by this situation provided that five years has passed since the conveyance was recorded, and there is no record evidence of a challenge to its validity.

SECTION VII CONTINUED

STANDARD 3.12

EFFECT OF UNRECORDED DECLARATION OF TRUST, OR DEFECTIVE OR UNRECORDED MEMORANDUM OF TRUST, ON VALIDITY OF CONVEYANCE BY TRUSTEE

The validity of a conveyance of an interest in real estate executed by a trustee of a trust for which neither a Declaration of Trust nor an Affidavit or Memorandum of Trust has been recorded, or for which an Affidavit or Memorandum of Trust which does not satisfy the requirements of RI Gen. Laws § 34-4-27 has been recorded, is not for that reason impaired. The interest thereby conveyed shall be considered as effective and as marketable as if a Declaration of Trust or an acceptable Affidavit or Memorandum of Trust had been recorded, provided that (a) five (5) years have elapsed since the conveyance was recorded, and (b) there is no record evidence of a challenge to the validity of the conveyance.

COMMENTS:

(1) This standard is intended to apply to conveyances that are already on record. An attorney involved in a current transaction who has been asked to record a conveyance by a trustee, including, but not limited to, a deed or a mortgage, should always insist that an Affidavit or Memorandum of Trust meeting the requirements of RI Gen. Laws § 34-4-27 be produced and recorded.

(2) See Title Standard 7.11 adopted April 28, 2009 regarding the absence of a recorded Affidavit or Memorandum of Trust for a deed executed by a financial institution holding a mortgage as a "trustee."

whether the disabled individual or his trust is the actual owner of the house. A multitude of cases exist, however, detailing home improvements that were not clearly for the sole benefit of the disabled individual. If the renovation could in any way be interpreted as benefitting someone other than the disabled individual, it should not be undertaken.

Special needs trusts in the larger estate planning context

Given this broad overview of special needs trusts and the various issues surrounding them, the practitioner can see what may initially appear to be a routine estate planning client may well be a complex matter worthy of a more in-depth investigation. Often, clients are wholly unaware that having a disabled child or relative completely changes the face of their estate plan. Practitioners cannot and should not count on lay persons unfamiliar with these intricate legal concepts to divulge all of the necessary information. In taking on an estate planning client, the attorney must conduct a thorough review of all of the client's family members and intended beneficiaries.

In addition to the regulations and case law surrounding the proper setup and administration of special needs trusts, there is a diverse catalog of case law and disciplinary decisions governing legal malpractice committed by attorneys who failed to appropriately think through the issues reviewed in this article. Even a slight mistake, such as a missed payback provision or an incorrect recommendation regarding a trust distribution, can potentially cost a client thousands, or even tens of thousands of dollars.

So, while we can take comfort in knowing tools exist to help disabled individuals and their families plan for their financial future without jeopardizing other available resources, all parties involved, including attorney and client, must be cognizant of the many issues and diligent when drafting, shaping and administering these complex legal instruments. ❖

Lawyers on the Move

David N. Bazar, Esq., **Jacqueline M. Grasso, Esq.**, **Samuel C. Bazar, Esq.**, and **Nancy R. Neis, Esq.** of **Bazar & Grasso P.C.** moved their law offices to 197 Taunton Avenue, East Providence, RI 02914.
401-437-4450 dbazar@bazargrassolaw.com
jgrasso@bazargrasso.com sbazar@bazargrasso.com
nneis@bazargrassolaw.com

A. Larry Berren, Esq. moved **The Berren Law Firm** to 197 Taunton Avenue, East Providence, RI 02914.
401-437-4450 alberren@berrenlaw.com

Rebecca C. Cox, Esq. is now title counsel in the East Providence office of CATIC, 450 Veterans Memorial Parkway, Suite 7B, East Providence, RI 02914.
401-885-0030 rcox@catic.com www.catic.com

Misty G. Delgado, Esq. is now an Associate at the law firm of **Pannone Lopes Devereaux & West LLC**, 317 Iron Horse Way, Suite 301, Providence, RI 02908.
401-824-5100 Mdelgado@pldw.com www.pldw.com

Kathryn A. Fyans, Esq. is a new associate with **McLaughlin & Quinn, LLC**, 148 West River Street, Suite 1E, Providence, RI 02904.
401-421-5115 kfyans@mclaughlinquinn.com
www.mclaughlinquinn.com

Edward L. Gnys, Esq. moved **Gnys Law Associates, LLC** to 197 Taunton Avenue, East Providence, RI 02914.
401-437- 4450 Ed@gnyslaw.com

Edward R. McCormick, III, Esq. moved his law office to 1319 Cranston Street, Cranston, RI 02920.
401-351-3441 ed@ermlaw.necoxmail.com

William F. Miller, Esq. is now Partner at the law firm of **Pannone Lopes Devereaux & West LLC**, 317 Iron Horse Way, Suite 301, Providence, RI 02908.
401-824-5100 Wmiller@pldw.com www.pldw.com

Chad E. Nelson, Esq. is now with **The Law Offices of Jeremy W. Howe, Ltd.**, 55 Memorial Boulevard, #5, Newport, RI 02840.
401-841-5700 cnelson@Counsel1st.com www.Counsel1st.com

Nicholas A Solitro, Esq. joined **Robert E. Craven & Associates**, 7405 Post Road, North Kingstown, RI 02852.
401-453-2700 or 401-295-9050

Marie Theriault, Esq. is now an associate broker with RE/MAX Flagship, 140 Point Judith Road, Suite 23, Narragansett, RI 02882.
401-789-2255 ext. 329 MarieT@rihomesearch.com

Kathryn S. Windsor, Esq. is a new associate with **McLaughlin & Quinn, LLC**, 148 West River Street, Suite 1E, Providence, RI 02904.
401-421-5115 kwindsor@mclaughlinquinn.com
www.mclaughlinquinn.com

For a free listing, please send information to: Frederick D. Massie, Rhode Island Bar Journal Managing Editor, via email at: fmassie@ribar.com.

In Memoriam

Herbert F. DeSimone, Esq.

Herbert F. DeSimone, 84, passed away on November 27, 2013. Mr. DeSimone was born in Providence, the only child of Florie DeSimone and Lena Capuano DeSimone, and he was married to Sally Reynolds DeSimone for 58 years. Mr. DeSimone graduated from La Salle Academy and Brown University. He was a star defensive tackle for two of Rhode Island's most successful football teams; the 1945 LaSalle Maroon Juggernaut team that tied Holy Cross New Orleans in the National Catholic HS championship game and the 1949 Brown team that was inducted into the Brown University Hall of Fame. Mr. DeSimone graduated from Columbia University Law School in 1954 and was admitted to the Rhode Island Bar Association that year. He served as United States Assistant Secretary of Transportation for the Environment and Urban System and as Rhode Island Attorney General. Mr. DeSimone was the Republican candidate for Governor twice. He maintained a private law practice for over 50 years, and served as Director of the Providence Industrial Development Corporation, Director of the Rhode Island Department of Transportation, General Counsel for the Rhode Island Housing and Finance Corporation, General Counsel for the Narragansett Bay Commission, and served on the Rhode Island Parole Board. Mr. DeSimone's awards included: the Neil J. Houston Award for contributions to the Criminal Justice systems and Public Interest; Man of the Year by Engineering News Record; and Man of the Year by the Italo-American Club of Rhode Island. Herbert DeSimone is survived by his wife, Sally Reynolds DeSimone; his children, Herbert and his wife Margaret of East Greenwich, Douglas and his wife Victoria of Narragansett, Deborah and her husband Mark of Manhattan.

Joseph Palmieri, Esq.

Joseph Palmieri, 90, of Greenville, passed away on November 22, 2013. He was the husband of Maria Kattke Palmieri for 27 years. Born in Providence, he was the son of the late Carmine and Carolina Aceto Palmieri. In 1943, at the end of Mr. Palmieri's freshman year at Providence College, he enlisted in the US Navy and was assigned to the US Navel Amphibious Forces. He participated in the invasion of Normandy on D-Day and later was assigned to the North Atlantic Submarine Patrol aboard a British Corvette. In 1949, he graduated from Boston University School of Law where he became a member of the Alpha Phi Delta Fraternity Sigma Chapter. That same year he was admitted to the Rhode Island Bar Association. Mr. Palmieri maintained a law office in Providence as a sole practitioner until his death. He dedicated his life to the practice of law, and in his later years devoted his time to his senior citizen clients on a *pro bono* basis. Mr. Palmieri had a strong work ethic and went to his office everyday prior to his recent hospitalization. Besides his wife he is survived by a son, Joseph A. Palmieri; a daughter, Donna Palumbo and her husband Richard; a daughter-in-law, Lisa Palmieri; a brother, Anthony Palmieri and a sister, Carol Bello.

Advertiser Index

You may ask yourself...

How does the Rhode Island Bar Association help me?

THE RHODE ISLAND BAR ASSOCIATION is much more than a name. Your Bar consists of people and programs dedicated to enriching and enhancing your practice and your life. Through the thoughtful, caring leadership of volunteer attorneys, the Bar develops offerings designed specifically for Rhode Island lawyers. And, with the excellent assistance of the Bar's friendly and professional staff, your Bar creates and delivers a wide range of programs and services tailored to meet your needs.

Your Bar helps you **professionally** through…

- Fully interactive Bar website connecting you to your free law library, latest news, seminar information and registration, committee meeting schedules and more at www.ribar.com
- Superb Continuing Legal Education (CLE) seminars offered live and online throughout the year
- Free, 24-hours-a-day, 7-days-a-week, online law library services with Casemaker
- Terrific avenues for working with other members of the Bar and the Bench on a wide range of Bar Committee efforts
- Outstanding Lawyer Referral Service (LRS) connections to clients in search of representation
- Myriad membership benefits offering preferential products and services negotiated for you by your Bar leaders
- Respected forums for sharing your knowledge and opinions in every issue of the *Rhode Island Bar Journal*
- Informed answers to legal questions through the Bar's Online Attorney Resource (OAR) center's volunteer attorneys.
- Wonderful Annual Meeting offerings ranging from excellent CLE seminars to profession-oriented product and service providers and more
- Powerful presence in legislative matters affecting the practice of law
- Instant client and colleague connections through the Bar website's Attorney Directory

Your Bar helps you **personally** through…

- Opportunities for pro bono service to those who need it the most, coupled with free training and mentoring in important practice areas
- Lawyers Helping Lawyer Committee programs including the Bar's partnership with Coastline Employee Assistance Program (Coastline EAP) offering free-to-members services for confidential help, information, assessment and referral for a wide range of personal concerns
- SOLACE (Support of Lawyers, All Concern Encouraged) allows Bar members to offer or ask for aid and assistance to or from their colleagues
- Law Related Education (LRE) volunteer opportunities to visit classrooms with judges on Law Day and assist educators throughout the year

Same as it ever was...

...Only better

Take advantage of these benefits today through the Bar's website at www.ribar.com, or telephone the Bar today at 401-421-5740