



Rhode Island Bar Journal

Rhode Island Bar Association Volume 67. Number 4. January/February 2019

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Replevin as a Possible Remedy**

Holistic Representation to End Poverty

**Book Review: *The Schoolhouse Gate:
Public Education, the Supreme Court,
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Front Cover Photograph by Brian McDonald

Sachuest Beach (Second Beach) Middletown, RI Sachuest Beach, locally known as Second Beach, is a south-facing, mile-long beach located on Sachuest Point Road in Middletown.



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Resolutions for Your Practice



Carolyn R. Barone, Esq.
President
Rhode Island Bar Association

Without detracting from the need for all of us to put into action what we have learned during the past year on health and wellness and the need to stay on this track, I am shifting gears and focusing on the health of our law practices.

Happy New Year! How are you doing with the resolutions you made on this past New Year's Eve? Join the gym club, yet? Stopped smoking? Spending more time with the family? Drinking more vitamin water and less adult beverages? The beginning of the New Year is the perfect time to take stock in ourselves and our law practices.

My immediate predecessor, Linda Rekas Sloan, focused her year of Bar presidency on lawyer health and well-being. Her President's Messages addressed the necessity of lawyers taking care of their bodies and minds. She provided us with reminders of the Association's outreach programs including Lawyers Helping Lawyers, a premier program providing confidential and personal guidance before life and practice issues become

critical, and where to turn in the crush of turmoil and crisis. Linda was the catalyst for engaging a professional wellness coach to write about how we can stay healthy and still enjoy life. A couple of months after I took office, Aon presented its cost-free seminar to our membership. The guest speaker wasted no time and minced no words when warning us about the prevalence of mental illness and substance abuse in the legal profession. We have been

bombarded, and rightfully so, with the warning signs of how our best legal practices buckle and collapse under the weight of a distressed mind and body.

I recently reviewed the American Bar Association's Report of its National Task Force on Lawyer Well-Being.¹ I urge all Bar members to read this Report. Digest its import on our profession. Without exception, our emotional and physical well-being has a direct impact on the well-being and profitability of our practices. Without detracting from the need for all of us to put into action what we have learned during the past year on health and wellness and the need to stay on this track, I am shifting gears and focusing on the health of our law practices. Are your billable hours getting billed? Are you paying your office staff before paying yourself? Do you fall asleep at night wondering if tomorrow will be the day that you break the cold streak and potential clients start contact-

ing you? If you answered any of these questions in the affirmative, then resolve to take advantage of the Bar Association committees and sponsored programs that can assist you with designing and creating a successful practice. Following are three examples of how the Association provides care and treatment for your law office's management and profitability.

We are all familiar with the adage, "Time is Money." Do you keep track of your time? How do you keep track of your time? What time do you report? Is the time you are devoting to your clients earning you a profit? Are you even measuring your profitability? With the reasonable cost of time and billing software, there is no excuse for sole practitioners and small firms not to follow "Big Law" and invest in a time/billing system. Being faithful to a program provides three measurable benefits: first, you will get an immediate idea of how much time you waste in any given day doing anything but law work (for example, perusing your FB page, reading the latest twitter feeds, doing the Jumble puzzle); second, your bills will be accurate and complete and you will know when your initial retainer or fee advance is about to be or has been exhausted (repeat after me: "retainer, refresher, remainder"); and, third, you will have no excuse not to send out bills in a timely fashion.

Need help with selecting a billing package that meets your needs or maximizes an existing package but have nowhere to turn? The Bar Association has immediate relief for you. Take advantage of your membership benefit and contact Red Cave Consulting. (What's a "membership benefit?" A FREE benefit.) Red Cave has over ten years of law firm business management consulting experience and has advised over 3,000 law firms. Red Cave can assist you with issues surrounding law office technology, marketing, financial management, and more. The Bar's website also features regular tips from the company related to practice management, including client relations, data management, revenue goals, marketing, using social media and disaster prevention and recovery.

Join the Bar Association's Lawyer Referral Service. This service is a great source for increasing your clientele. Through the Bar, you will receive referrals only in practice areas you select

and from persons who may have the financial ability to pay for services, as well as obtaining referrals on contingency fee matters. Don't discount the benefits received from accepting case referrals through the Association's reduced fee programs. Expand your thought-process and consider that clients who retain your services through both the LRS and reduced fee programs often come to your office with a close friend or relative in tow. This presents you with the opportunity to make a positive impression on additional persons who may need your services in the future or pass your name on to their friends and other family members.

Last, but not least, resolve to become involved within the Association. If you have never joined one of the Bar Committees, do so. If you have been contributing your time and efforts on a committee or two, then consider strengthening your commitment and become a member of the House of Delegates. Resolve, now, to participate in two, upcoming major events, Law Day in May and the two-day Annual Meeting in June. If you have any doubts about the benefits of being an active participant in these events, then give me a telephone call. If you have any doubts about the good works the Association is doing for you,

then let's have a nice chat; and, when we do, ask me about "billing by the inch."

ENDNOTE

¹ See ABA website, NATIONAL TASK FORCE ON LAWYER WELL-BEING; August 14, 2017. ♦

Are you looking for answers to practice-related questions?

Try the Bar's dynamic List Serve!



Since its inception under the sponsorship of Past Bar President Michael McElroy, our Bar's List Serve has grown exponentially in participating members and in a wide range of answered questions. From nuances of the Rhode Island Courts e-filing system to requests for local and out-of-state referrals, List Serve members are providing each other with timely answers. List Serve topics encompass a wide range of practice areas including consultants, traffic violations, medical marijuana, landlord/tenant, divorce, *pro hac vice*, immigration and more!

Free and available for all actively practicing Rhode Island attorney members, the Bar's List Serve gives you immediate, 24/7, open-door access to the knowledge and experience of hundreds of Rhode Island lawyers. If you have a question about matters relating to your practice of law, you post the question on the List Serve, and it is emailed to all list serve members. Any attorney who wishes to provide advice or guidance will quickly respond.

If you have not yet joined the List Serve, please consider doing so today. To access this free member benefit go to the Bar's website: ribar.com, click on the **MEMBERS ONLY** link, login using your Bar identification number and password, click on the **List Serve** link, read the terms and conditions, and email the contact at the bottom of the rules. It's that easy!

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 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 Kathleen Bridge
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Rhode Island Code of Regulations



Mary-Rose W. Pellegrino, Esq.
Rhode Island Department of
Administration

The amendments to the APA have introduced several new resources and procedures to the Rhode Island regulatory world, already seen in other states and on the federal level.

Until recently, Rhode Island was part of a minority of states that had yet to adopt a uniform code of administrative rules. Without uniformity, agencies throughout the State used different methods for drafting, styling and citing rules.¹ This inconsistency resulted in a statewide regulatory scheme that was difficult to navigate from a legal standpoint and from a business perspective. The lack of uniformity made legal research inefficient and challenging.

In 2016, the sections of the Rhode Island Administrative Procedures Act (APA) that control the administrative rulemaking process were amended.² The amendments required the implementation of a new uniform code structure for all administrative rules and modernized the rule promulgation process. The amendments were based on the Revised Model State Administrative Procedures Act (Model Act). The Model Act was published by the Uniform Law Commission, a non-partisan organization founded in 1892 that drafts model codes “to promote uniformity in law among the states.”³ In developing the Model Act, the Uniform Law Commission researched “best practices in states” with the goal of developing a body of law that promoted “fairness, efficiency, and ensur[ed] public access to agency information.”⁴

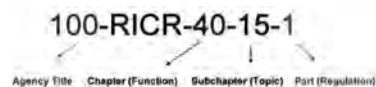
A New Uniform Code

The 2016 amendments to the APA required that agencies review, reformat, and publish all State regulations in a comprehensive and uniform administrative code by December 31, 2018.⁵ The Rhode Island Department of State was tasked with organizing the code structure.⁶ This new administrative code is called the Rhode Island Code of Regulations (RICR).

The structure of the RICR is similar to the Code of Federal Regulations. Each Title is followed by a Chapter, Subchapter and Part. Each “Part” is the rule in its entirety.

< The Table of Contents page of the Rhode Island Code of Regulations (RICR).

The amendments to the APA also required the Department of State to assign an official administrative code number to each rule.⁷ Previously, each time a rule was amended, the Department of State issued a new identifier called an Electronic Rule Location Identifier (ERLID). Since the ERLID number changed with every new promulgation, it further complicated tracking a rule’s history. In the new RICR, each rule has a unique identifier that stays with the rule throughout its existence. The identifying code number indicates the agency Title, Chapter, Subchapter and Part number.



^ Each rule has its own unique identifying code number, that stays with the rule throughout its existence.

Since February 2015, the Office of Regulatory Reform (ORR) within the Rhode Island Department of Administration (DOA) has been responsible for the centralized review of most executive branch rules.⁸ ORR reviews regulations both before and after the public-comment period to ensure that rules are “clearly written, relevant, and up-to-date.”⁹ Building upon ORR’s ongoing task of reviewing rules, the APA amendments required ORR “to coordinate and direct agencies in the effort to develop [the RICR].”¹⁰

ORR developed a phased approach to the work, requiring each agency to review and reformat each agency rule. Agencies then submitted each rule for ORR review. ORR worked closely with the executive branch agencies over the course of two years, ultimately reviewing more than twenty-five thousand pages of regulation. “In July 2016, we were staring down tens of thousands of pages of regulatory material and it felt like an impossible task. Our success is due to the hard work and support of staff at every regulatory agency and a dedicated team of analysts in ORR who never wavered from this ambitious goal,” said DOA Chief of Staff Amanda Clarke. Approximately eight thousand pages of antiquated, redundant or non-regulatory provisions were repealed. Rules that remain on the books have been updated to increase clarity and efficacy, while also reducing

Agency Title	Chapter (Function)	Subchapter (Topic)	Part (Regulation)
100	RICR		
216	Department of Health		
218	Department of Human Services		
220	Department of Administration		
10	Management and Budget		
20	Accounts and Control		
30	Purchases		
40	Human Resources		
50	Legal Services		
05	General		
10	Administrative Adjudication		
1	Rules Governing Declaratory Rulings and Petitions (220-RICR-50-10-1)		
2	Rules of Procedure for Administrative Hearings (220-RICR-60-10-2)		

Letters to the Editor

In response to *Fifty Years: My Life as a Lawyer and Beyond*, by Philip M. Weinstein

Dear Editor:

I enjoyed reading the article by Philip Weinstein, Esq., on the anniversary of his fifty years. I was especially pleased that he only remembered one of the many cases we tried. I often wondered what had happened to Phil. I heard the rumors that he had joined the peace corps, one that he had become a Buddhist monk in Myanmar and even one that he was in the jungles of Panama trying to retrieve Imelda Marcos' lost shoes.

It was good to hear that none of the rumors were true and that he finally became president of the homeowners association in Guanacaste.

On a more serious note, Phil served as an assistant attorney general at a time when a few of the prosecutors engaged in nefarious trial practices, such as holding back exculpatory evidence, coaching witnesses to say things that were not true and the like.

Throughout all that, Philip M. Weinstein stood out as a symbol of integrity and fair play.

That is the thing I remember most about Phil, and that was his greatest contribution to the law.

John F. Cicilline, Esq.

The Unseen Harm in Fake Service Animals

People coming to the RI Hospitality Association's office will oftentimes be met at the door by my small, 10-year-old rescue dog, Aiden. He spends most of his day sitting on a chair, occasionally taking a tour around our pet-friendly office to visit my coworkers. However, as well behaved and beloved as Aiden is, he is not a service dog, nor do I misrepresent that he is anything but a much-loved, very spoiled companion.

Unfortunately, there is a growing number of people who are misrepresenting their family pet or emotional support animal as a service animal to gain access to public places. This has severe unintended consequences for businesses AND people with legitimate service animals.

The Americans with Disabilities Act requires all places open to the public, such as businesses, government agencies and entertainment venues, to give access to service animals and their owners. This is an essential tool for people with disabilities to be able to navigate public spaces.

The ADA doesn't require service animals to be registered, carry any type of certification or wear a special uniform. Only dogs and miniature ponies are considered service animals. Emotional support animals, although playing an important role in many people's lives, are not covered under the ADA and can legally be denied access to public places.

Given all of these complexities, it's understandable that someone might not understand the damage they are doing when they misrepresent their beloved dog as a service animal, however, the damage cannot be understated.

It compromises the ability of real service animals to do their job – placing the safety of the animal and the person depending on the animal at risk. A service animal is trained

to be in public, under the control of their handlers, and intense training ensures that the animal is focused on their job and is unobtrusive as possible. They won't bark (unless required as part of their job), won't jump on people or other dogs, beg for food or display other behaviors that many pets (including my dog Aiden) might do.

It also compromises the legitimacy of the program, because it causes confusion and frustration in the public about what a real service animal is and the important job they do. The RI Food Code bans live animals (other than service animals) in a food establishment. If a non-service dog is in a restaurant or hotel, the company could get in trouble with the Department of Health.

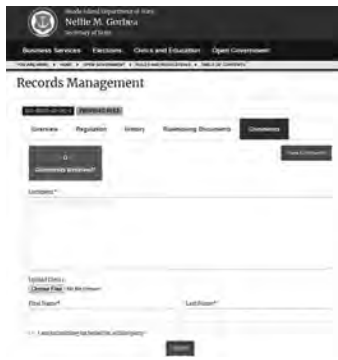
Last year, a bill was introduced in the RI General Assembly that would prohibit people from misrepresenting an untrained dog as a service animal. We expect that this legislation will be introduced again in 2019. Nineteen other states have already passed similar legislation. We hope Rhode Island soon joins the list of states that are working to protect the rights of Rhode Islanders and their service animals.

Sarah Bratko, Esq., RI Hospitality Association

regulatory burden.

Executive Order 15-07, signed by Governor Gina M. Raimondo, charges ORR with the ongoing responsibility of regulatory review and coordinating the process of interagency review.¹¹ Through interagency review, ORR serves as a liaison among state agencies to ensure that there is communication when multiple agencies have been granted legislative authority to regulate on a single topic or single policy area. This communication forestalls conflicting regulatory language that could lead to confusion and loopholes.

The Department of State created the new online interface to house the RICR, which can be accessed at <https://rules.sos.ri.gov/organizations>. The database is searchable by agency or keyword and has an easy-to-use, interactive Table of Contents page. The search feature returns results for all rules relating to the word or phrase entered, including currently effective rules, proposed rules, emergency rules, and inactive rules. Members of the public can now easily subscribe for e-mail notifications when an agency takes any rulemaking action or when there are proposed changes to an individual rule. The new interface also makes the public-comment period more accessible and transparent, allowing users to make comments directly through the website, which then displays the number of comments submitted for that proposed rule through the application. Notably, for all rules filed from August 14, 2018 onward, the official version of the rule is now the electronic copy found on the Department of State's database.



^ The new RICR interface allows members of the public to comment on a rule directly through the website.

on one, user-friendly page...[t]he application also allows users to have digital access to supporting documentation and aims to increase accessibility by making rulemaking documents fully searchable and translatable.”¹²

Closer to home, Rhode Island attorneys have already been utilizing the new code and website since its 2018 launch. “Rhode Island’s new administrative code is yet another step toward helping make Rhode Island a friendlier place to do business,” said Attorney Nicole Benjamin, a shareholder in the litigation practice group at Adler Pollock & Sheehan, “Having Rhode Island’s regulations organized in one uniform Code of Regulations makes it possible to easily search regulations across all agencies, allowing lawyers to streamline their research. This new tool allows us to be better informed and to more efficiently serve our clients.”

The RICR website has already garnered national attention. The Administrative Codes and Registers section of the National Association of Secretaries of State awarded the Rhode Island Code of Regulations the 2018 Robert J. Colborn, Jr. Innovation Award. In bestowing this honor, the Association noted that “[t]he RICR features up-to-the-minute rulemaking data, includes an online public comment module, and displays complete version histories for each rule

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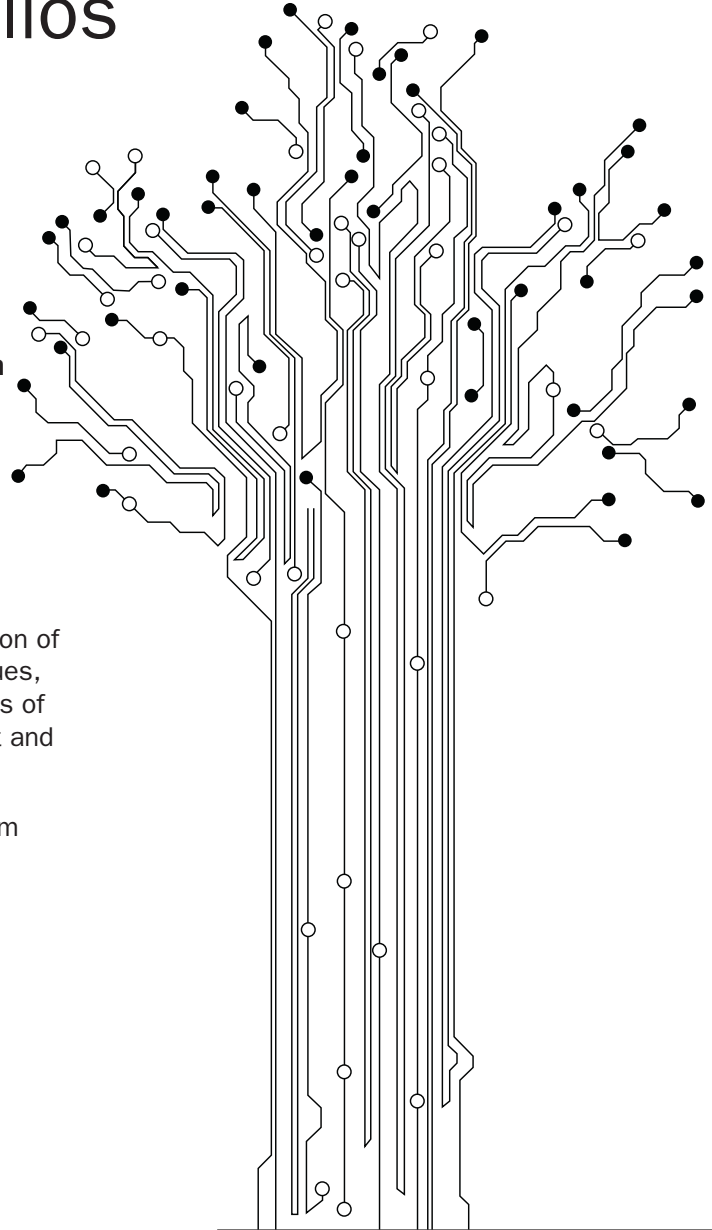
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New Resources and Procedures

The amendments to the APA have introduced several new resources and procedures to the Rhode Island regulatory world, already seen in other states and on the federal level. For example, R.I. Gen. Laws § 42-35-2.12 codified the use of “guidance documents.”¹³ Guidance documents can be drafted by an agency to assist the public in complying with a regulation. Guidance documents do not have the force of law; rather, they are helpful tools allowing the public to gain a firmer understanding of the agency’s current approach to, or interpretation of, the law or how and when the agency will exercise discretionary functions.¹⁴ Guidance documents “encourage an agency to advise the public of its current opinions, approaches, and likely courses of action...The public needs to know the agency’s opinion about the meaning of the law and rules that it administers. Increasing public knowledge and understanding reduces unintentional violations and lowers transaction costs.”¹⁵ All guidance documents will be published on agency websites and full guidance document indices will be published by each agency to the Department of State’s RICR application.

Another example of a new resource and procedure codified by the amendments to the APA is the process of “advance notice of proposed rulemaking” (ANPRM).¹⁶ Not to be confused with a “notice of proposed rulemaking” (a mandatory notice that initiates the formal rulemaking process), ANPRM is an optional process during which an agency may gather information and solicit comments from the public before publishing a proposed rule. The ANPRM process is “commonly used in federal administrative law” and is “designed to encourage gathering of information” from the community.¹⁷ This type of discourse is an invaluable tool that allows an agency to hear from various viewpoints and collect data from the public while drafting the proposed rule. An ANPRM must be published in the Rhode Island Government Register and on the agency’s website and must indicate “where, when, and how persons may comment before the rulemaking process begins.”¹⁸

A new promulgation process called “direct final rulemaking” was also authorized in the amendments to the APA.¹⁹ When an agency expects a rulemaking to be non-controversial, it may elect to utilize direct final rulemaking. Just like in normal rulemaking, an agency must still publish its “notice of proposed rulemaking” and the rule will be open for public comment for a minimum of thirty days.²⁰ Unlike normal rulemaking, the proposed direct final rule takes effect immediately upon the close of the public-comment period if no objection is received.²¹ If an objection to the proposed rule is received, then the rule will not become effective and the agency must put the rule through the normal rulemaking procedures. This process eliminates unnecessary procedural hurdles when an agency wishes to make an innocuous change to a rule and provides the public with a simple mechanism to trigger formal rulemaking, if necessary.

ENDNOTES

1 The term “rule” is synonymous with the term “regulation.” R.I. GEN. LAWS § 42-35-1(a)(19).

2 R.I. GEN. LAWS, LAWS §§ 42-35-1 through 42-35-8.

3 <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC>; <http://www.uniformlaws.org/Narrative.aspx?title=ULC%20Drafting%20Process>

4 REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT, at 2-3 (Unif. Law Comm’n 2010).

5 R.I. GEN. LAWS § 42-35-5(b).

6 *Id.*

7 R.I. GEN. LAWS § 42-35-5(a).

8 R.I. Exec. Order No. 15-07, §§ 3-4.

9 R.I. Exec. Order No. 15-07, § 2. (ORR’s review process also involves assisting agencies in adhering to best practices in rulemaking such as: “rules shall only be adopted when required by federal or state law or when deemed necessary by the agency to serve the public interest...rules shall not impose an undue burden upon those persons or entities who must comply with the rules...rules shall be based on sound, reasonably available scientific, technical, economic and other relevant information...rules shall avoid duplication of regulatory control from other state agencies or local governments...rules shall be designed to achieve their regulatory objective in a cost-effective and timely manner...rules shall avoid negative business, employment, and overall economic impact...”)

10 R.I. GEN. LAWS § 42-35-5(b).

11 R.I. Exec. Order No. 15-07, § 3.

12 <https://www.nass.org/node/1489>

13 Guidance documents have been used by agencies in Rhode Island in the past, but the practice is now codified in statute.

14 See R.I. GEN. LAWS § 42-35-1(a)(9).

15 REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 311 cmt. (Unif. Law Comm’n 2010).

16 R.I. GEN. LAWS § 42-35-2.5.

17 REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 303 cmt. (Unif. Law Comm’n 2010), citing William Funk, “Public Participation and Transparency in Administrative Law – Three Examples and an Object Lesson,” 61 Admin. L. Rev. 171, 191-197 (2009).

18 R.I. GEN. LAWS § 42-35-2.5(a).

19 R.I. GEN. LAWS § 42-35-2.11.

20 *Id.*

21 *Id.*; R.I. GEN. LAWS § 42-35-4(e)(3). ◊

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Bar's VLP-Sponsored Seminar Series Helps to Place 50 Pro Bono Cases

The Bar's Volunteer Lawyer Program (VLP), in collaboration with the Public Service Involvement Committee, sponsored a three-part Continuing Legal Education series offered free to all members of the Bar's pro bono programs who agreed to accept a case prior to attending. The series, *Call Your First Witness*, gave attendees the opportunity to witness seasoned members of the bar portray the essential aspects of a contested custody hearing, including the direct and cross exam of the plaintiff, defendant, and expert witness.

Each session featured the trial for the first hour followed by a discussion with the audience regarding the panel's methods and tactics. The VLP was able to place more than fifty pro bono family law cases as a result of the program. The Bar Association thanks the panelists for their time and expertise. If you would like to learn about joining the Bar's VLP, please contact Public Services Director Susan A. Fontaine at 401-421-5740 or sfontaine@ribar.com.



Barbara L. Margolis, Esq., Veronica Assalone, Esq., Hon. John E. McCann III, Victoria S. Lombardi, Esq., and Bar President Carolyn R. Barone, Esq. kicked off the series with *Direct & Cross Examination of the Plaintiff*.



Christopher M. Lefebvre, Esq., Cristine L. McBurney, Esq., Hon. Feidlim E. Gill, Elizabeth W. Segovis, Esq., and David N. Bazar, Esq. put on a lively presentation during session two: *Direct & Cross Examination of the Defendant*.



Janet Gilligan, Esq., William J. Balkun, Esq., Dr. Peter Kosseff, PhD, Melissa R. Dubose, Esq., and Hon. Karen Lynch Bernard finished the series with *Direct & Cross Examination of the Clinical Psychologist Expert Witness*.

Through a request sent to our Honorary Members of the Rhode Island Bar Association, we are able to present to our readers the remembrances of our most august Bar members. These colleagues, enjoying 50 years or more as a Bar member, share some of their noteworthy accomplishments that enhanced the practice of law and improved the system of justice in Rhode Island.



Thomas G. Hetherington, Esq.


I believe I have had two favorable Supreme Court decisions that have improved the practice of law or enhanced the system of justice in a small way.

In 1989 there was little or no law controlling the Rhode Island bank accounts that were designated “in Trust for” (so-called Totten Trust). At that time, I represented a defendant who was named on several bank accounts “in Trust for,” and the designation was challenged. That case, which

was Judge Ronald Gagnon’s first Superior Court trial, found for my client and the decision was appealed. The resulting case of “**Green v. Green**, 559 A.2nd 1047 (1989)” established the Rhode Island “Law of Totten Trusts” that is still the law today. I might add that the facts of this case appeared in the 1990 RI Bar Exam as an essay question.

In 1985, in Family Court, only the prevailing party could obtain “Final Decree.” In the Family Court case of Angelina **Alix v. Jean Alix**, (1973) the Court entered an Interlocutory Decree and Property Settlement Agreement. For ten (10) years alimony was paid, and the parties met all of the terms of the Interlocutory Decree/Property Settlement Agreement, but no final decree was entered by the plaintiff. Only Angelina Alix had the power to enter the final decree. Jean Alix died in 1980, and Angelina Alix took the position that, at the death of Jean Alix, she was still married. She then attempted to exercise her spousal statutory life interest in the real property. That property had been bequeathed to my client Ronald Alix, son of the late Jean Alix. In the case of **Alix v. Alix** 497 A.2nd 18 (1985) the Court found that, although Angelina Alix was married, she was “estopped” from exercising her statutory life interest.


Either by design or coincidence, following that case, the Family Court rule changed to permit either party in a divorce to enter the final decree. That is still the rule today.




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My Ex Took My Pet! – Now What?

Replevin as a Possible Remedy



Keith G. Langer, Esq.
Wrentham, MA

Other than finding and serving the absconding party, the challenge in such cases is proof of ownership. This is particularly true if the other party claims the pet was a gift.

Practitioners of animal law have likely received the call from a frantic pet owner, upset over not just the departure of a significant other, but far more by the fact the departed also took their pet. This is often an issue on legal assistance sites, such as Avvo, as well. The question is always, “How do I get my pet back?”

Pets are still, in the eyes of the law, mere property. While some states are moving to recognize the increased emotional importance of companion animals, particularly if that animal is injured or killed, Rhode Island still treats animals as chattel property. This determines the remedy available when that animal is taken.

If the couple was married, the matter would be decided as part of the separation agreement. If the animal were particularly valuable, it would properly be listed as an asset on the DR-6 Financial Statement. While the issues that affect all property in a divorce, whether it was a pre-marital asset, a gift, etc., come into play with pets, the pet’s ownership can also be allocated by agreement of the court with those other assets.

For non-married couples, there is no such recourse. The dissolution of those relationships, having no formal status, has no formal allocation of the couple’s assets.

The first issue is usually locating the pet in question. That itself may be problematic; the departed partner’s location may not be known, and/or they may have hidden the animal. In such cases, an online database search, or even a private investigator may be required to even locate the party and the pet.

If found, a criminal complaint will almost always be rejected because of the domestic relationship of the parties. Where there is a remotely colorable claim of ownership by the other party, the matter will be declared civil in nature, and the police will not act.

An action for damages may be brought against the other party, if and when located, but the people seeking assistance want their pet back, not money. Therefore, small claims and district court actions for damages provide no remedy.

The recourse which applies is the ancient writ of replevin: the return of the actual goods purloined. This remedy exists in both Rhode Island

and Federal law:

Section 34-21-2 District court jurisdiction.

– The district court may issue writs of replevin where the goods and chattels to be replevied are valued at five thousand dollars (\$5,000) or less, and venue of the action may be in any division of the district court where they were taken, attached or detained. The court may also try the same and award execution therein, adhering in its proceedings, as near as may be, to the forms herein prescribed.

District court actions are brought under District Court Rule 64. Note the dollar limit.

Section 34-21-1 Property repleviable on superior court writ.

– Whenever any goods or chattels of more than five thousand dollars (\$5,000) value shall be unlawfully taken or unlawfully detained from the owner or from the person entitled to the possession thereof, and whenever any goods or chattels of that value, which are attached on mesne process or execution or warrant of distress, are claimed by any person other than the defendant in the suit or process in which they are attached, the owner or other person may cause the same to be replevied by writ of replevin issuing from the superior court.

Federal District Courts also hear replevin cases under Federal Civil Procedure Rule 64, applying state law:

Fed.R.Civ.P. 64 makes replevin available in federal court. **Murphy v. Foster**, 518 F. Supp. 2d 292 (D.Me.2007). Pursuant to Rule 64, replevin is available “under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought...” Replevin is “available to persons claiming possession of goods or chatties either wrongfully taken or wrongfully detained. Nothing more than the right of present possession, founded upon a general or special ownership of the goods or chattels, is necessary to enable a plaintiff to maintain the action.”¹

To bring a replevin action, the plaintiff must provide the following:

1. A precise description of the property; i.e, the pet(s) in question;
2. A stated value of the pet(s);



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3. The presumed location of the pet(s);
 4. A statement that the plaintiff is the lawful owner of the pet(s);
 5. That the pets were taken unlawfully, i.e., without the plaintiff's consent; and
 6. Defendant is in wrongful possession of the said pet(s).
- If those three requirements are met, the issues are:
1. The value of pet(s), which determines if it is District or Superior Court;
 2. Venue; and
 3. Service, which requires knowing where the other party decamped to.

Rhode Island Gen. Law § 31-21-9 sets forth the Form of Writ of Return and Restoration; the Superior Court includes Writ of Replevin in its fillable forms library.

Other than finding and serving the absconding party, the challenge in such cases is proof of ownership. This is particularly true if the other party claims the pet was a gift.

Likely indicia of ownership are:

1. Adoption papers from the shelter;
2. Purchase and bloodline documents from the breeder;
3. Veterinarian records for the animal;
4. Town records for dogs, cats, and ferrets, showing proof of rabies shots; and
5. Correspondence, usually emails or texts, between the parties.

There may also be credit card statements from pet supply stores, etc., but these lack the credibility of documents from where the animal was obtained, the vet who treated the animal, or the municipal records showing ownership.

If your client failed to have their dog, cat, or ferret duly inoculated against rabies, there is a problem greater than not having a municipal record of ownership. That failure constitutes a misdemeanor under Rhode Island law.² Violators may be:

...charged with a misdemeanor and fined not less than two hundred dollars (\$200) nor more than five hundred dollars (\$500) for each offense or be imprisoned for not less than ten (10) days nor more than thirty (30) days and/or be subject to confiscation of the animal(s) which is/are the basis of the violation.

If your client failed to comply with this statute, there will be no municipal record to support the claim of ownership. It is also likely that such a client failed to even take the pet to a vet, meaning that source of documentation is also unavailable.

The jurisdictional and evidentiary issues are those common to most litigation, particularly breach of contract. The real challenge to such lawsuits is that obstacle to most such litigation: cost. There is no provision in the replevin statutes for recovery of costs, still less legal fees. Unless the animal in question is of show/breeding stock, the free-market value is minimal.

The real value of the animal is its emotional worth to the putative owner. This is highly variable. I represented a client in an international replevin case, a dog "rescued" from Aruba. The legal fees and direct trial expenses went into five figures, including an appeal. That does not include the airfare and related expenses for the two trips from Aruba.

Very few people are prepared to spend even a tenth of that on a replevin action, particularly if the absconding party is outside the jurisdiction – if found at all. This is why one rarely hears of such cases being brought. As with veterinary malprac-



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tice actions, the low value of the pet, being mere chattel property, makes them economically unfeasible.

ENDNOTES

¹ *The Dr. and Mrs. Stern Foundation, et al v. Maria-Louise Bissonnette and Estates Unlimited, Inc.*; 529 F. Supp. 2d 300, 306 (R.I.) (2007).

² See R.I. GEN. LAWS § 4-13-31, rabies vaccinations required; and § 4-13-29.1, municipal responsibility for enforcement. ◇

New Rhode Island Bar Association Membership Benefit: Virtual Consulting Service

Your Bar Association is pleased to announce a new and valuable member benefit! We have partnered with Red Cave Law Firm Consulting to provide our members with virtual consulting services (telephone/video/email/chat) free of charge.

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Don't forget to check our Law Practice Management page regularly for tips and tricks from Red Cave Consulting!

Rhode Island Bar Foundation Seeks Law School Scholarship Applicants

The Bar Foundation intends to award two scholarships of \$20,000 each to Rhode Island residents who enroll as first-year students in an American Bar Association accredited law school for the academic year beginning September 2019. The scholarship is for the first year of law school only and non-renewable. Each Scholarship award is made on the basis of demonstrated financial need, superior academic performance, community and public service, and demonstrated contacts with and commitment to the State of Rhode Island. The Scholarship Committee seeks applications from candidates without regard to race, color, religion, country of ancestral origin, handicap, age, sex, or sexual orientation.

The Rhode Island Bar Foundation Scholarship application deadline is March 29, 2019. More information and application forms are available on the Rhode Island Bar Association website: ribar.com in the Rhode Island Bar Foundation section.

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Nora Salomon, Esq.
Holistic Legal Assistance
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Arguably, the most important part of RILS' holistic practice is continued and consistent follow-up. As issue-focused lawyers, we are accustomed to closing our case files as soon as a legal issue is resolved. However, we must recognize that the resolution of one legal issue does not mean that our clients will have a forever safe and secure life.

Rhode Island Legal Services (RILS) has provided civil legal assistance to low-income Rhode Islanders for nearly fifty years. Our clients come to us with a variety of legal issues, ranging from housing problems to domestic violence to public benefit terminations. The one thing that the majority of our clients have in common is poverty. The definition of poverty, however, is more complex than a simple lack of monetary funds. As Edgar S. and Jean C. Cahn wrote in the July 1964 issue of the *Yale Law Journal*, "...poverty in America is not just a lack of material goods, education and jobs; it is also a sense of helplessness, a defeatism, a lack of dignity and self-respect."¹

Since its inception, RILS has struggled with how to reduce the overwhelming poverty, both economic and social, faced by some Rhode Island residents. In the last five years, Rhode Island Legal Services (RILS) has implemented a unique project known as the Holistic Legal Assistance Network (HLAN), which we believe is key in addressing that poverty. Most legal aid organizations and law firms today employ some sort of holistic approach, even if that approach is limited to informal inter-departmental brainstorming sessions regarding the fate of a mutual client. RILS' HLAN seeks to take that approach to a new level by screening all prospective clients for possible holistic services. This article will provide a description of the HLAN, how and why it works, and will conclude with a case study.

Vision

RILS created its HLAN in 2013 with funding provided by the Kresge Foundation. The overall vision of the program was to address not simply the problem presented by the client, but the underlying legal and social problems that destabilize that client and his or her family. The representation was designed to assist motivated clients who either had more than one legal issue or who had a legal issue and a social issue. These particular individuals were targeted for representation because they were believed to have more barriers

to achieving housing, family, employment and financial stability.

Holistic Structure

RILS' Holistic Legal Assistance Network is just that – a *network* designed to assist clients through coordinated efforts made by various attorneys and social service advocates. The premise of this work is that a coordinated approach will provide greater results than individual efforts provided piecemeal. The HLAN consists of an internal working team staffed by RILS employees and an external working team consisting of a variety of interdisciplinary partners.

Internal Working Team

The HLAN's internal working team consists of a holistic attorney, a financial stability attorney, and a social worker, all supervised by a managing attorney with knowledge of each area of law practiced within the organization. The holistic attorney's role is to conduct a comprehensive intake with each prospective client, not only to better understand that person's primary legal concern, but to identify ancillary concerns that may be inhibiting that person's ultimate success and stability. The goal of the holistic attorney's interview is to learn who the client is as a whole person – to better understand each individual's unique goals and values so that services are better targeted and more meaningful. The holistic attorney must serve as a liaison to other attorneys and advocates within the organization, and must be able to make (and accept) referrals for legal assistance to other working units.

The role of the financial stability attorney is to ensure that a client has all the tools necessary for financial success both in terms of outstanding debt and in terms of income potential. The majority of clients who seek services at Rhode Island Legal Services are living at or near the poverty level, and have therefore accumulated varying amounts of debt. Part of achieving financial stability is understanding how to prioritize that debt, and filing for bankruptcy if the debt is truly insurmountable. The second part of financial stability involves obtaining a steady income so that outstanding debts might be paid. Many people have been effectively

barred from the workforce due to criminal records, professional license revocations, and driver's license suspensions. RILS' financial stability attorney addresses these issues by filing motions to expunge and seal, and by working with the professional licensing boards and the Department of Motor Vehicles.

The role of the social worker is to identify social barriers to success, and to help clients obtain services through various community organizations. One of the main goals of the social worker is to encourage PROactivity instead of REactivity. As mentioned previously, poverty is not just about money. Poverty-stricken people often feel marginalized and disenfranchised. The cycle of repeated evictions, instances of violence, and lack of food and other services can leave an individual feeling hopeless and unable to take the affirmative steps necessary to bring about a change.

External Working Team

Despite the variety of expertise housed within RILS, there are still certain services that cannot be provided in-house. For that reason, RILS has established formal and informal partnerships with a variety of interdisciplinary community organizations. In choosing these partners, RILS reviewed its client database to determine what types of services were most important to our core client base. For that reason, RILS' formal partners include Dorcas International Institute of Rhode Island (adult education and immigration assistance), Capital Good Fund (financial literacy training and small loans), Rhode Island Coalition Against Domestic Violence (support services for victims of domestic violence), the Rhode Island Public Defender (assistance with warrants and other criminal concerns) and the Volunteer

Lawyer Program (issues outside the priorities of RILS). HLAN advocates have provided training sessions at each partner organization, offered on-site intake sessions, and have implemented expedited referral procedures to be used by staff when making (and accepting) referrals.

Holistic Representation

HLAN advocates screen prospective clients for program participation on a daily basis. The ideal client is an individual who wants additional assistance, is willing to take action steps, is capable of taking those action steps, and has the ability to sustain continued communication with HLAN staff.

To that end, advocates within RILS generally consider the following questions either during the intake process or during court representation:

1. Does the client have more than one legal issue that can be handled by RILS advocates?
2. Does the client have a social issue (financial management concerns, safety planning needs, adult education requirements, etc.) that might be addressed by a community partner?
3. Is the client willing to take part in a more comprehensive screening process?

Any client who answers "yes" to any one of the aforementioned three questions is referred to the Holistic Legal Assistance Network for further analysis.

Community-based organizations generally consider the following, similar questions:

1. Does the client have a legal issue that is inhibiting success



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in the work that is being done with the community organization?

2. Is the client willing to take part in a comprehensive legal screening?

Community organizations may refer clients directly to the HLAN for additional screening and assistance.

Following the identification of a prospective client, HLAN advocates conduct a comprehensive screening process. The goal of this intake is to identify any problems that are hampering a client's ability to work, impacting a client's food security, reducing a client's income, jeopardizing a client's safety and/or threatening a client's living situation. Just as important, this intake is an opportunity to develop a rapport with the client that goes beyond a simple conveyance of facts. We want our clients to feel comfortable opening up to us about issues that go more in depth than the self-identified concern that initially brought them to RILS or to a community organization. We cannot expect clients to provide this type of sensitive information without developing a relationship with a foundation of trust.

Following that intake, most clients meet with the social worker as a way to identify any barriers to taking the steps necessary to achieving legal success. A key part of this meeting is identifying a client's support structure and targeting the people who will help the individual meet his or her goals. As attorneys, it can be frustrating when a client does not follow our advice. However, there are often very good reasons for lack of follow-through, which can be identified and resolved with the intervention of a social worker. For example, it is easy for a lawyer to tell a client to apply for food stamps, but it may not be easy for

the client to actually make the application. It is the role of the social worker to help the client determine how he or she will access the internet necessary to complete the application, or who will provide the ride to the DHS office to drop off a paper application, or lend a phone for a DHS interview.

Both the attorney and the social worker work together to identify community organizations that may be able to assist our clients with necessary social supports. Whenever possible, "warm" hand-offs are made, in which the client, upon signing a release, is formally introduced to the community partner.

Arguably, the most important part of RILS' holistic practice is continued and consistent follow-up. As issue-focused lawyers, we are accustomed to closing our case files as soon as a legal issue is resolved. However, we must recognize that the resolution of one legal issue does not mean that our clients will have a forever safe and secure life. Many clients later face new, both related and unrelated, legal and social concerns after their initial cases have been completed. Still, other clients have unanticipated problems following the advice or instruction that we have already given.

It is easy to believe that our clients should simply call us when these issues arise; after all, they managed to reach us once before. We can't, however, use this rationale to justify the elimination of future contact. If it were true, we would not have clients coming to us repeatedly for the same concerns. Calling a law office for additional assistance can be humiliating, especially when you are already marginalized, which many of our clients, by virtue of living in poverty, are. We should not be placing this burden on our already overwhelmed clients, as it simply perpetuates the cycle of poverty.



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The Legend of Judge Michael A. Silverstein

On September 28th, Rhode Island Superior Court Judge Michael A. Silverstein both celebrated his 85th birthday and retired from the bench, where he served since 1994. He has been the only judge overseeing the busy Business Calendar since its creation in 2001. For those of us who have practiced business litigation in the last quarter century, Judge Silverstein was a living legend. He possessed the greatest qualities of a judge – consummate fairness, impartiality and adherence to precedent, all while displaying respect and collegiality to every attorney and witness who appeared before him. As a bonus, he was a good-humored judge who always enjoyed a lighthearted legal story.

He is the only judge, perhaps in Rhode Island history, to have his own extensive body of oft-cited case law. Through the last quarter century, he authored many hundreds of legal decisions on a vast array of business law issues, most of which were never appealed. In almost every case before him, attorneys would cite not only potentially relevant Supreme Court cases, but also Silverstein's own extensive body of precedent. At times, both sides would argue that the very same Silverstein decision supported their case. This could prompt the famous Silverstein smirk, and a chuckle, along with the comment to both sides, "I know what that case stands for. I wrote it."

Through the years, I was privileged to appear before the judge, many times representing the Governor and state agencies, and at other times representing major out-of-state corporations in numerous high stakes battles against the State. Without exception, I would advise both State and private clients that Judge Silverstein would not tilt the scales of justice either way.

It was a great comfort to out-of-state companies to know that in Rhode Island, they would not be subjected to a "home job" as might happen in other states. At the same time, the State knew that it had a judge who could quickly understand the most complex legal matters, and would never be wowed by high priced private litigators from other states.

He was as evenhanded as a judge could be, letting the law and the facts decide every matter before him.

While the judge laments a major case where he was overturned by the Supreme Court (lead paint), I fondly remember a major case where Judge Silverstein effectively reversed the Rhode Island Supreme Court. The year was 1999 and I represented Governor Almond in a "separation of powers" challenge to the legislature's appointment of six of its sitting legislators to the nine-member lottery commission. Judge Silverstein ruled these appointments unconstitutional, but the Supreme Court (despite a heroic dissent by Justice Robert Flanders) reversed.

In 2004, however, Rhode Island voters sided with Judge Silverstein and passed a constitutional amendment enshrining the separation of governmental powers doctrine in our Constitution, thereby making illegal all legislative appointments to any executive board, including the lottery commission.

Judge Silverstein could have retired long ago with a maximum pension, but instead chose to remain on duty to serve the State. In so doing, he not only ensured that we had an extraordinary judge continuing to handle business cases, but also that over a million taxpayer dollars would be saved in avoided pension costs. No Rhode Island Superior Court jurist has left a legacy like that of Judge Silverstein. As Thomas Jefferson once remarked when asked how it felt to be replacing Ben Franklin as envoy to France – "He cannot be replaced, only succeeded."

Joseph S. Larisa, Jr., Esq., Larisa Law

Representation Comparison

This above description of holistic services is not to say that there is no value in the traditional delivery of legal assistance. Rather, holistic representation can enhance the traditional representation that we continue to deliver. Both service models – traditional and holistic – start with a client (or a social service organization working on behalf of the client) who has identified a legal issue and has asked for assistance. That client is interviewed for information related to the immediate crisis. The interview may or may not include a discussion of ancillary issues. The immediate legal issue is addressed and the case is closed.

Holistic representation, however, takes things further and can provide real and concrete benefits. With holistic representation, that same client is interviewed again to determine whether there are any additional legal issues, including issues related to financial stability, that are contributing to the self-identified issue. The client also has the opportunity to meet with a social worker to identify social barriers to success and to make referrals to appropriate interdisciplinary agencies within the community. Continued follow-up by both the attorneys and the social workers can increase the possibility of identifying future legal and social issues early, when they are easier to resolve and before they become crises.

Despite the potential of holistic representation, there are still some clients who prefer traditional, targeted legal representation. Providing so much information about yourself can be time-consuming and emotionally draining. At its heart, holistic representation must be client-centered, where the client is treated as a whole person, and not as a series of legal issues. For that reason, it is important not to impose this type of representation on a client who is not interested in participating.

Representation In Action: A Case Study

Jane was referred to our office by the Family Court due to various ongoing family problems. Although Jane was in the process of completing various services, she had some housing and financial instabilities that concerned her attorney. As such, the case was assigned to the HLAN advocate for a holistic intake.

During the holistic intake, it became clear that Jane had suffered a loss of income which had caused her to become behind in her rent, leading to the filing of an eviction action. When the HLAN advocate reviewed Jane's income in more detail to determine whether she could afford her rent in the future, it became clear that she was not getting her full disability award.

The holistic attorney agreed to represent Jane in an eviction action, and was able to negotiate with the landlord for some time for Jane to move out. The holistic attorney then referred Jane to a specialist in public benefits who was able to identify the overpayment that was responsible for Jane's check reduction. That attorney helped Jane to apply for a waiver from repayment. Within a week, the Social Security Administration had agreed to provide Jane with a retroactive check for all deducted money and agreed to increase her monthly benefit to the full award. With this retroactive money in hand, the holistic attorney was then able to return to Jane's landlord and renegotiate the terms of the stipulation so that Jane could remain in her apartment indefinitely. During both of these actions – the eviction and the disability payment review – the social worker provided support and assistance in the background, empowering Jane to continue to work towards reunification with her children

despite the financial difficulties that she was facing.

This additional representation provided by the HLAN will have a positive impact on the outcome of Jane's primary concern: family stability. However, these additional issues may never have come to light had there not been an advocate available to speak to Jane about her whole situation, or if Jane had been unwilling to focus on issues outside of her primary concern. Even had these issues come to light, they would likely not have come to light in a timely manner without affirmative intervention from a general advocate who has the ability to review a person and their history in their entirety.

If It Works So Well, Why Doesn't Everyone Do It?

Holistic representation can help clients to become more stable in many aspects of their lives. However, there are a few reasons why some organizations are resistant to practicing in this manner.

Holistic Representation Requires A Different Way Of Thinking

As attorneys representing clients in specific areas, we often spend a lot of time focusing our clients to the issues at hand. This is particularly true in court practice, when the attorney is tasked with making sure that clients only introduce relevant information. Holistic representation requires the exact opposite strategy: we are trying to draw our client's attention away from the legal issue of which we are already aware, and instead are trying to identify other, seemingly unrelated issues. We are trying to establish a level of trust and comfort that cannot be established in a time-bound conversation that is focus-driven.

In addition, as attorneys complying with an ethical code of confidentiality, we generally do not discuss our cases with outside organizations. However, in holistic practice, we ask our clients to sign releases specifically so that we can interface with external organizations to get access to services that cannot be provided in-house. Working with interdisciplinary partners can be difficult; these organizations are generally not staffed by lawyers and personnel are generally not well-versed in issue spotting. However, providing that social component is essential to the provision of holistic services. We cannot serve the whole person if we leave out the social needs.

Holistic Representation Takes Time

When compared to traditional representation, holistic representation takes more time and requires the involvement of additional lawyers and advocates. We spend more time speaking to the client, and we don't close the cases quickly. We spend more time speaking to outside organizations and fielding questions from personnel who are not trained in the law. We identify more issues that require more legal involvement to resolve. Time and personnel are two resources that are always in high demand.

After practicing in this manner for five years, we have developed systems to streamline the holistic process. For example, we have prepared scripts and checklists to make sure that we cover each area that might be of concern for our clients in a single phone call. We have established a resource bank so that research done in the name of one client might be applied to others. Advocates have worked hard to establish relationships both inside and outside of the organization, to cultivate reciprocal trust and

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This award recognizes Rhode Island attorneys who donate their time and legal expertise for charitable work. It is given to those whose efforts most closely reflect those of Rhode Island attorney Dorothy Lohmann. Ms. Lohmann devoted her entire professional life working to help the poor, volunteering her services at many human service organizations and advocating for laws and policies to relieve the suffering of the poor and disenfranchised. The Lohmann Award Committee is particularly interested in candidate 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 ribar.com, under the **NEWS AND BAR JOURNAL** tab on the left side of the home page. All nominations are due no later than March 15, 2019.

Please Note: Lohmann Award nominations are *only* accepted from representatives of organizations where Rhode Island attorneys have devoted a significant amount of their time and efforts on a strictly voluntary, non-paid basis. Postal mail or email nominations and/or direct questions to:

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This award honors individuals who, like Attorney Joseph T. Houlihan, have, during their careers, consistently demonstrated an extraordinary commitment to successful mentoring in the Rhode Island legal community. The award recognizes an attorney who serves as a role model to other lawyers in Rhode Island, who has significantly contributed to the profession and/or the community and who, with their excellent counsel, has excelled as a mentor and contributed to the ideals of ethics, civility, professionalism and legal skills. The Houlihan Award Committee is particularly interested in candidate 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 ribar.com, under

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This award, named in honor of its first recipient the late Chief Justice Joseph R. Weisberger, is presented to a judge of the Rhode Island State Courts or Federal District Court for exemplifying and encouraging the highest level of competence, integrity, judicial temperament, ethical conduct and professionalism. The Weisberger Award Committee is particularly interested in candidates whose actions most closely reflect those of the award's namesake as detailed in the nomination criteria accessed on the Bar Association website at ribar.com, under the **NEWS AND BAR JOURNAL** tab on the left side of the home page. All nominations are due no later than March 15, 2019. Postal mail or email nominations and/or

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BOOK REVIEW

The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind by Justin Driver



Anthony F. Cottone, Esq.
Solo practitioner in Providence
Hearing officer and counsel for
RI Department of Education¹

“...most, if not all, of the decisions considered in *Schoolhouse* concern societal issues that still resonate, and contain some of the Court’s most persuasive and eloquent writing on many of the core principles and values upon which our nation was founded.”

In the Introduction to *The Schoolhouse Gate: Public Education, the Supreme Court and the Battle for the American Mind* (Pantheon Books, 2018), Justin Driver notes that “[o]n any given weekday, during school hours, at least one-sixth of the U.S. population can be found in a public school;”¹ and quoting Justice John Paul Stevens, Driver adds that “the schoolroom is the first opportunity most citizens have to experience the power of government... [t]he values they learn there they take with them in life.”² Indeed, Driver argues that the public school, which occupies a “central place in the nation’s cultural imagination,” has “served as the single most significant site of constitutional interpretation within the nation’s history.”³

After thus underscoring the importance of his subject, the author promises to present what he suggests is the “first effort” to describe the narrative surrounding the development of this body of constitutional law in its “full range.”⁴ And Driver, a Brown alumnus whose qualifications are guaranteed to give anyone an inferiority complex,⁵ does exactly that in 429 impeccably-written pages, with an additional one hundred pages of notes.

The book is divided by topic into seven chapters covering Supreme Court cases involving: (1) race, culture, religion and patriotism; (2) freedom of expression; (3) student discipline; (4) students’ right to privacy; (5) racial segregation; (6) school funding, gender and immigration; and (7) religion. In each chapter, the author succinctly summarizes the significant cases, provides portraits of involved students and their families, describes relevant and often unknown or underreported details about the justices and applicable political dynamics, and then compares contemporaneous reactions to the cases from the media and academia with the current consensus (or lack thereof). And while Driver’s own usually conventionally liberal opinions are interjected throughout the narrative, the author also fairly and thoroughly represents opposing points of view.

The author’s treatment of Justice Robert Jackson’s opinion in *West Virginia State Board of Education v. Barnette*,⁶ which declared that

it was unconstitutional to expel public school students for refusing to recite the Pledge of Allegiance, and of the pair of decisions collectively referred to as *Brown v. Board of Education*⁷ – which, as every school child knows, declared that regulations prohibiting students of color from attending public schools with white children were unconstitutional – are alone worth the price of the book. In fact, most, if not all, of the decisions considered in *Schoolhouse* concern societal issues that still resonate, and contain some of the Court’s most persuasive and eloquent writing on many of the core principles and values upon which our nation was founded. Revisiting these cases is especially instructive today when so many of these core principles and values are either being ignored, or many times brazenly violated.

West Virginia State Board of Education v. Barnette

Barnette is the story of the only two Jehovah’s Witnesses attending Slip Hill Grade School in Charleston, West Virginia in 1942. The two sisters refused to say the Pledge of Allegiance at the start of school due to their religious convictions surrounding idolatry. Under a resolution adopted by the West Virginia Board of Education, their refusal subjected them to expulsion from school while, at the same time, subjected their parents to prosecution for child neglect as a result of the children’s “unlawful absence.”⁸ The challenged resolution tracked the language in the Court’s decision two years prior in *Minersville School Dist. v. Gobitis*,⁹ where Justice Felix Frankfurter authored the majority opinion upholding flag-saluting requirements in schools.¹⁰

Gobitis, however, was met with much criticism, especially from law professors, and according to the Justice Department there was a direct causal link between the decision and surging violence against Jehovah’s Witnesses.¹¹ Yet, as one might expect, the author of the majority opinion in *Gobitis* did not agree with the Court’s rapid turnaround in *Barnette*, and in what Driver characterized as “an intensely personal, highly acerbic, dissent;” Justice Frankfurter mounted an impassioned and eloquent argument for judicial restraint, a doctrine that has had particular resonance in the context of public schools, which the Supreme Court has

¹The views expressed in this article are solely those of the author.

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historically considered to be properly of local concern.¹² Not to be outdone, Justice Jackson, who is generally recognized as “the single finest writer in the Court’s history,”¹³ penned what Judge Richard Posner claims “may be the most eloquent majority opinion in the history of the Supreme Court.”¹⁴ According to Driver, the **Barnette** Court “upended the traditional idea that local authority over education was, from a constitutional perspective, necessarily a virtue.”¹⁵ And the Court rejected the notion that compelling the recitation of the Pledge of Allegiance was justified on the ground that, in the words of the challenged resolution, “national unity is the basis of national security;”¹⁶ and, in words that seem particularly evocative today, opined that:

[S]truggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be.¹⁷

The public schools, according to the Court, were “educating the young for citizenship” which alone was “reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount the important principles of our government as mere platitudes.”¹⁸ Significantly, the Court recognized in **Barnette** that the education received by the young often was more effectively transmitted by example than by compulsion. The notion that a primary purpose of the public schools is to educate “the young for citizenship” seems almost quaint today, when so many of the leaders in the field, especially in our under-resourced inner-city schools, take their cue (and marching orders) from politicians and their corporate donors who mistakenly equate public education with job training. It seems to me that the obsession with science, technology, engineering, and mathematics (“STEM”), which is by no means limited to inner-city schools, has exacted a societal price and will continue to do so if, as seems to be the case, it is accompanied by a corresponding lack of emphasis on “educating the young for citizenship,” and more broadly speaking, on the humanities.¹⁹ We may improve our middling to poor Program for International Student Assessment (“PISA”) rankings,²⁰ but if the price is an even less informed and aware citizenry, where is the gain?

The ability of public schools to impart basic civic values also has been diminished by a resurgence in homeschooling in recent years, especially among evangelical Christians. According to data from the Department of Education, in 2012 some 1.8 million children, or 3.4 percent of the school-age population, were home-schooled. And although this resurgence has reduced the number of Establishment Clause challenges brought before the Court,²¹ the impact upon the body politic as a whole has not been as benign. It should not be overly surprising that children who are taught creationism and female subservience at home, and who spend more time parsing the Book of Revelations than the Constitution, do not display an understanding of democratic values as adults, or appreciate the critical role that the rule of law plays in our republic.

Yet, the political institutions that have made our country the envy of the world in so many respects depend upon an informed and engaged citizenry for their continued health. As noted in a recent book that has been getting a lot of attention these days:

[i]nstitutions alone are not enough to rein in elected autocrats. Constitutions must be defended – by political parties and organized citizens but also by democratic norms. Without robust norms, constitutional checks and balances do not serve as the bulwarks of democracy we imagine them to be. Institutions become political weapons, wielded forcefully by those who control them against those who do not.²²

If, as Justice Thurgood Marshall believes, the public schools are “the dominant factor affecting political consciousness and participation,”²³ their role takes on added significance during this time of ever-increasing income inequality, when the slogan “national unity is national security” seems particularly relevant and when, as Pulitzer Prize-winning novelist and essayist Marilyn Robinson has observed, “traditional centers of influence – churches, unions, relevant professionals – have lost their place in public life.”²⁴ Re-reading Justice Jackson’s decision in *Barnette* and Driver’s analysis of the decision brings home the truth of this fact, and current events drive home its significance on a near-daily basis.

Brown v. Board of Education

Driver claims that *Brown* “stands alone as the most revered judicial opinion of the twentieth century.”²⁵ At the same time, he does not even try to make the case that it has been effective, noting that twenty years after *Brown* as the Court was poised to consider a trio of cases concerning forced busing in the 70s, data collected by the federal government evidenced that:

the percentage of black students who attended schools where the student body was greater than 80 percent black stood at staggeringly high levels...including 90 percent in St. Louis, Missouri; 91 percent in Cleveland, Ohio; 91 percent in Newark, New Jersey; 96 percent in Gary, Indiana; and 98 percent in Compton California. In Chicago, nearly half of the city’s elementary schools reported greater than 90 percent black student bodies, and more than one in four reported 100 percent black student bodies.²⁶

And a recent study by the Brookings Institute concluded that whatever recent progress in achieving racial diversity had been made was “largely a product of a significant expansion of the Hispanic school age population, while the segregation of white from black students has endured.”²⁷ According to one writer’s analysis of data from the National Center on Education Statistics:

the number of segregated schools (defined in this analysis as those schools where less than 40 percent of students are white), has approximately doubled between 1996 and 2016. In that same span, the percentage of children of color attending such a school rose from 59 to 66 percent. For black students, the percentage in segregated schools rose even faster, from 59 to 71 percent.²⁸

And tellingly, Driver notes that today, well over a half century after *Brown*, a mere “seventy school districts around the country employ various methods of increasing racial integration in their schools.”²⁹

In a news conference following his victory in *Brown*, Thurgood Marshall, then a young attorney representing the

House of Delegates Letters of Interest – Due February 15, 2019

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 go to the Bar’s website.

The Nominating Committee will meet soon to prepare a slate of officers and members of the 2019-2020 Rhode Island Bar Association House of Delegates. The term of office is July 1, 2019 - June 30, 2020. 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 15, 2019.

PLEASE NOTE: Current members of the Bar’s House of Delegates who wish to be considered for reappointment must also send a letter of interest by this date.

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:

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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.

NAACP, predicted that it would take “at most five years for school segregation to vanish from the nation.”³⁰ The story of how Attorney Marshall’s feeling that he was “the smartest lawyer in the world” in the wake of the decision turned into Justice Marshall’s feeling some twenty years later that he had been “the dumbest Negro in the United States,”³¹ is too long to tell here, and indeed Driver only has the space to consider some of its most significant aspects in the fifty or so pages he devotes to the topic.

Suffice it to say that Driver does not blame **Brown** for the lack of progress. While conceding that we have not reached the desired destination of school desegregation, he contends that **Brown** “represented a major milestone on that journey,” and “provided the moral vision and the constitutional clarity to a subject that had previously appeared bathed in myopia, and thus performed essential work guiding the nation’s ensuing strides toward racial equality.”³² Driver argues that it was not so much the oft-criticized “all deliberate speed” formulation of **Brown II** that was the chief stumbling block³³ as much as it was: (1) the Court’s “adandon[ment] of any effort to develop a meaningful desegregation jurisprudence for well over a decade” after deciding **Brown**;³⁴ (2) Chief Justice Burger’s leadership in the issuance of three busing-related decisions in the 70s that “made it extremely difficult to achieve desegregation in non-Jim Crow jurisdictions;”³⁵ and (3) the successful effort of conservative opponents of desegregation “to convert the opinion into a principle requiring constitutional colorblindness,” an effort which included several opinions by the Rehnquist Court in the 1990s³⁶ which perhaps reached its pinnacle in **Parents Involved**

in **Community Schools v. Seattle School District No. 1**,³⁷ where the Court invalidated voluntary integration programs in Louisville and Seattle. Chief Justice John Roberts, writing for the majority, delivered what Driver calls “the most memorable line that he has ever written” when he declared that: “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”³⁸ Yet, as Driver points out, the same conservative jurists – including Justices Rehnquist and Thomas – who were ardent advocates of “colorblind constitutionalism” and almost invariably opposed race-based classifications when nullifying affirmative action in the context of employment and higher education – had no problem stressing racial considerations when defending the private voucher programs that were upheld in **Zelman v. Simmons-Harris**.³⁹

Conclusion

After reading **Schoolhouse**, I could not help but ponder the roads not taken, and wonder, for example, whether one of our major civil rights groups today would be named **Black Lives Matter** if the Court had not effectively abandoned the goal of racial desegregation that it had announced well over a half century ago. Indeed, as Driver suggests, had the question of school financing reached the Supreme Court a few years before **San Antonio Independent School District v. Rodriguez**,⁴⁰ where the Burger Court held that there was no fundamental constitutional right to education while upholding a Texas school funding formula, “it seems probable that a majority would have voted to invalidate the measure”⁴¹ rather than continuing, in the words of Justice Marshall’s dissent, to allow “the quality of the



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educational opportunity offered by any particular district [to be] largely determined by the amount of taxable property located in the district.”⁴²

One also cannot help but be struck by how many of the more recent decisions involving public education were decided by five to four votes. Thus, it hardly seems likely that the recent addition of Justice Brett M. Kavanaugh will change what Driver characterizes as the Court’s “severely deformed public school jurisprudence involving the Fourth Amendment’s prohibition on unreasonable searches,”⁴³ nor will his addition increase the odds that the Court will revisit *Ingraham v. Wright*⁴⁴ and join the other 128 countries around the world that prohibit corporal punishment in schools.⁴⁵ Indeed, the addition of a fifth Federalist Society devotee likely will serve as a catalyst both to activists seeking to make law in areas where the Court has yet to speak definitively – such as with respect to the state regulation of home schooling and transgender rights – as well as those seeking to change the law in areas where the Court has spoken, such as with respect to prayer in school, or the right of undocumented immigrants to attend public schools. After all, the Roberts Court has not exhibited any particular reverence for *stare decisis*.⁴⁶

Thus, although compelling students to recite the Pledge of Allegiance was, as noted, prohibited in 1943 in *Barnette*, *supra*, and prayer in school was outlawed in 1962 in *Engel v. Vitale*,⁴⁷ it was only the plaintiff’s lack of standing that prevented the Court from considering an Establishment Clause challenge to the Pledge of Allegiance in 2004 that could have disturbed what Driver claims has been a “quiet détente over religion and educa-

tion” in recent years.⁴⁸ And although undocumented immigrants have had the right to attend public schools since the Court’s 1982 decision in *Plyler v. Doe*⁴⁹ – which struck down a Texas law mandating that such immigrants pay one thousand dollars annually for the privilege of attending public school – as Driver noted:

a young lawyer working in the Regan administration named John Roberts...viewed *Plyer* as a missed opportunity. In his capacity as special assistant to Attorney General William French Smith, Roberts co-authored a memorandum in 1982 bemoaning the Department of Justice’s failure to file an amicus brief in the case supporting Texas’s position because he speculated doing so might have prompted the Court to uphold the measure.⁵⁰

ENDNOTES

1 *Id.* at 9.

2 *Id.* at 11 (quoting Justice Stevens in *New Jersey v. T.L.O.*, 469 U.S. 325, 385-86 (1985) (Stevens, J., concurring in part and dissenting in part)).

3 *Id.* at 9.

4 *Id.* at 14.

5 From *Brown*, Driver went on to become a Marshall Scholar at Oxford, a former editor of the *Harvard Law Review* and a clerk for Judge Merrick B. Garland as well as for Supreme Court Justices Stephen Breyer and Sandra O’Connor. He is now the Harry N. Wyatt Professor of Law at the University of Chicago Law School.

6 319 U.S. 624 (1943).

7 See *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (“*Brown I*”) and *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955) (“*Brown II*”).

continued on page 39

Casemaker Tip: Narrow by Circuit



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Your Bar Association supports law related education (LRE) for Rhode Island children and adults through three, longstanding programs: *Lawyers in the Classroom* and *Rhode Island Law Day* for upper and middle school teachers and students, and the *Speakers Bureau* for adult organizations. Responding to LRE requests, Bar volunteers are contacted – based on their geographic location and noted areas of legal interest – to determine their interest and availability.

If you are interested in serving as a LRE volunteer, please go to the Bar's website at ribar.com, click on **FOR ATTORNEYS**, click on **LAW RELATED EDUCATION**, click on **ATTORNEY ONLY LRE APPLICATION**. All Bar members interested in serving as LRE volunteers, now and in the future, must sign-up this year, as we are refreshing our database.

Questions? Please contact: Kathleen M. Bridge, Director of Communications or Erin Bracken, Member Services Coordinator at: **(401) 421-5740**.



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The Rhode Island Bar Association applauds the following attorneys for their outstanding pro bono service through the Bar's Volunteer Lawyer Program, Elderly Pro Bono Program, US Armed Forces Legal Services Project, Foreclosure Prevention Project, and Legal Clinics during October 2018 and November 2018.

OCTOBER 2018

Volunteer Lawyer Program

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David N. Bazar, Esq., *Bazar & Associates, P.C.*
Neville J. Bedford, Esq., *East Providence*
Mark T. Boivin, Esq., *Sayer, Regan & Thayer, LLP*
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Alberto Aponte Cardona, Esq., *Alberto Aponte Cardona, Esq.*
Angie E. Cardona-Perez, Esq., *Cardona & Perez Law Offices, LLC*
Michael A. Castner, Esq., *Jamestown*
Augustus Charos, Jr., Esq., *Cranston*
William J. Connell, Esq., *Forestdale*
Frederick A. Costello, Esq., *Warwick*
Elizabeth A. Elmasian, Esq., *Providence*
Paul A. Fontaine, Esq., *Fontaine & Croll*
Edward J. Gomes, Esq., *Law Office of Edward J. Gomes*
Lois Iannone, Esq., *Cranston*
Phillip C. Koutsogiane, Esq., *Law Offices of Phillip Koutsogiane*
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H. Jefferson Melish, Esq., *Law Office of H. Jefferson Melish*
Adam G. Northup, Esq., *Law Office of Adam G. Northup*
Thomas B. Orr, Esq., *Law Office of Thomas B. Orr*
Monique M. Paquin Duarte, Esq., *Kristine S. Trocki, Attorney and Counsellor at Law, LLC*
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Robert A. Arabian, Esq., *Arabian Law Offices*
David N. Bazar, Esq., *Bazar & Associates, P.C.*
John Boyajian, Esq., *Providence*
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James P. Creighton, Esq., *Johnston*
Charles Greenwood, Esq., *Providence*
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Samantha McCarthy, Esq., *Warwick*
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US Armed Forces Legal Services Project

Armando E. Batastini, Esq., *Nixon Peabody, LLP*
Bernard P. Healy, Esq., *Law Office of Bernard P. Healy*
Stephanie P. McConkey, Esq., *Sinapi Law Associates, Ltd.*

NOVEMBER 2018

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Robert A. Mitson, Esq., *Mitson Law Associates*
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Monique M. Paquin Duarte, Esq., *Kristine S. Trocki, Attorney and Counsellor at Law, LLC*
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John Cappello, Esq., *Law Office of John Cappello*
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Michael A. Devane, Esq., *Devane & Devane Law Offices*
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US Armed Forces Legal Services Project

Gregory P. Sorbello, Esq., *Peter M. Iascone & Associates, LTD.*

The Bar also thanks the following volunteers for taking cases for the Foreclosure Prevention Project and for participating in Legal Clinic events during October and November.

Foreclosure Prevention Project

Steven J. Boyajian, Esq., *Robinson & Cole, LLP*
John Cappello, Esq., *Law Office of John Cappello*

Legal Clinic

Brian D. Fogarty, Esq., *Law Office of Devane, Fogarty & Ribezzo*
Kermin Liu, Esq., *Law Office of Kermin Liu*
David F. Reilly, Esq., *Law Office of David Reilly*

For information and to join a Bar pro bono program, please contact the Bar's **Public Services Director Susan Fontaine** at: sfontaine@ribar.com or **401-421-7758**. For your convenience, Public Services program applications may be accessed on the Bar's website at ribar.com and completed online.

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RI Bar Association Continuing Legal Education Seminars

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

January 15
Tuesday
**Yelp, I've Fallen for Social Media and I Can't
LinkedOut: The Ethical Pitfalls of Social Media**
1:00 – 2:00 p.m., 1.0 ethics
LIVE WEBCAST ONLY

January 17
Thursday
Top Ethics Complaints: How to Avoid Them
Rhode Island Law Center, Cranston
12:45 – 1:45 p.m., 1.0 ethics
Also available as a LIVE WEBCAST!

January 19
Saturday
The 2019 Ethy Awards
12:00 – 2:00 p.m., 2.0 ethics
LIVE WEBCAST ONLY

January 23
Wednesday
Employment Law Refresher
Rhode Island Law Center, Cranston
12:00 – 2:00 p.m., 2.0 credits
Also available as a LIVE WEBCAST!

January 31
Thursday
Fair Housing Issues in Rhode Island
Rhode Island Law Center, Cranston
12:45 – 1:45 p.m., 1.0 credit
Also available as a LIVE WEBCAST!

February 5
Tuesday
**It's Not the Fruit, It's the Root: Getting to the
Bottom of Our Ethical Ills**
1:00 – 2:00 p.m., 1.0 ethics
LIVE WEBCAST ONLY

February 14
Thursday
**Expungement & Sealing: A Comprehensive
Approach to Effective Alleviation of Collateral
Consequences**
Rhode Island Law Center, Cranston
12:45 – 1:45 p.m., 1.0 credit
Also available as a LIVE WEBCAST!

March 12
Tuesday
**Trust Us: Key Drafting Considerations and Ideas
for Modern Wills and Trusts**
Rhode Island Law Center, Cranston
5:00 – 7:00 p.m., 1.5 credits + 0.5 ethics
Also available as a LIVE WEBCAST!

March 28
Thursday
2019 DUI Laws and Hardship Licenses
Rhode Island Law Center, Cranston
1:00 – 3:00 p.m., 1.5 credits + 0.5 ethics
Also available as a LIVE WEBCAST!

April 4
Thursday
**Defeating Summary Judgement Motions or,
Just the Facts!**
Rhode Island Law Center, Cranston
12:45 – 1:45 p.m., 1.0 credit
Also available as a LIVE WEBCAST!

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

NOTE: You must register online for live webcasts.

RHODE ISLAND LAW CENTER LOCATION
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Continuing Legal Education Telephone:
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Reminder: Bar members may complete six credits through participation in online CLE seminars. To register for an online seminar, go to the Bar's website: ribar.com and click on CONTINUING LEGAL EDUCATION on the left side menu.

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Attorney **Kermin Liu**, a Lawyer Referral Service member, enthusiastically supports LRS. *Over the years I've enjoyed working with the outstanding staff of the RI Bar. They've reaffirmed my faith as a member of the legal profession by providing another avenue through which I can assist the public.*

Membership in the Rhode Island Bar Association's Lawyer Referral Service (LRS) is an excellent and inexpensive way to increase your client base and visibility within the community while expanding public access to legal representation. Optional special LRS projects include: **Ask A Lawyer** providing live, television studio lawyer panels in partnership with Channel 10; **Senior Citizen Center Clinics** throughout the year and the state; **Reduced Fee Program** offered to qualifying clients; and the **Arts Panel** for local artists' legal needs all offer unique opportunities for increasing your business while you provide an important public service to your community.

Applications and more detailed program information and qualifications may be found on our website ribar.com in the Members Only section. You may also request information by contacting Public Services Director Susan Fontaine at 401-421-7799 or email sfontaine@ribar.com.

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New IRS Private Letter Ruling Provides for 401(k) Student Loan Repayment



Marc J. Soss, Esq.
Practices in Florida

On August 17, 2018, at the request of a 401(k) plan sponsor concerned with violating the “contingent benefit” prohibition of section of the Internal Revenue Code, the IRS issued private letter ruling 201833012 (the Ruling). The Ruling was requested with the intent of assisting individuals, currently around forty-four (44) million Americans with student loan debt totaling more than \$1.3 trillion dollars. The Ruling provides a method for employers, under certain circumstances, to provide a student loan repayment benefit as part of their 401(k) plans and link the amount of employer contributions made on an employee’s behalf to the amount of student loan repayments made by the employee outside the plan.

The Ruling permits an employer to make a non-elective contribution to its 401(k) plan, where the amount of the non-elective contribution would be based on an employee’s total student loan repayments and would be contributed to the plan in lieu of the matching contributions that would otherwise be made to the plan had the employee made pre-tax, Roth 401(k) and/or after-tax contributions. Key features of the Ruling include: (i) voluntary participation in the student loan repayment benefit program and ability to opt out, subject to plan restrictions; (ii) the student loan repayment benefit will replace the employer matching contribution; (iii) the repayment benefit is subject to coverage and nondiscrimination testing; and (iv) is predicated on the plan sponsor not extending any student loans to employees that will

be eligible for the program.

The student loan repayment non-elective contributions are conditioned on the employee making a student loan repayment during a pay period, employment with the plan sponsor on the last day of the plan year (except in the case of termination of employment due to death or disability), are subject to the same vesting schedule as regular employer matching contributions, and are subject to all applicable plan qualification requirements, including eligibility, vesting, and distribution rules, contribution limits, and coverage and nondiscrimination testing. However, the student loan repayment non-elective contribution will not be treated as a matching contribution for purposes of any testing.

It is important to note that employees are not eligible to receive any more in total contributions under the 401(k) plan than they could otherwise be entitled to receive in regular matching contributions. The employer contribution offsets any matching contribution an employee would otherwise be eligible to receive under the plan.

An employer looking to add this benefit to an existing retirement plan may require a custom plan document. A third-party provider may also be required to administer the student loan program (make sure that dollars get to the right place and verify loans). The addition of this option to an employer 401(k) plan can be a great recruitment tool for qualified applicants with significant student debt.

Bar’s Government Lawyers Committee Offering Free, 1-Credit CLE

CLE The Rhode Island Bar Association’s Government Lawyers Committee is sponsoring a free-to-Bar-members, one-credit, Committee CLE seminar. On **Thursday, February 7th, from 12:30 – 1:30 pm** at Rhode Island Bar Association headquarters, 41 Sharpe Drive in Cranston, Deputy Disciplinary Counsel Barbara Margolis, Esq. and Staff Attorney/Education Coordinator for the Rhode Island Ethics Commission Lynne Radiches, Esq. will present *Ethics and Discipline for Government Attorneys and Colleagues of the Bar*. The seminar will focus on issues under the jurisdiction of the RI Office of Disciplinary Counsel and the RI Ethics Commission and help to clarify the distinctions between the two offices. Counsel from each office will

cover the structure of their respective offices, the complaint handling process, the controlling statutes and regulations, and the top three issues for government lawyer practice. This seminar will provide general information helpful to all practicing attorneys as well as target some issues specific to government lawyer practice.

To register, and for additional information, please contact Department of Business Regulations Legal Assistant Amy Morales: amy.morales@dbr.ri.gov.

Thanks to Our CLE Speakers

The success of the Rhode Island Bar Association's Continuing Legal Education (CLE) programming relies on dedicated Bar members who volunteer hundreds of hours to prepare and present seminars every year. Their generous efforts and willingness to share their experience and expertise helps to make CLE programming relevant and practical for our Bar members. We recognize the professionalism and dedication of all CLE speakers and thank them for their contributions.



Below is a list of the Rhode Island Bar members who have participated in CLE seminars during the months of November and December.

William J. Balkun, Esq.

Law Office of William J. Balkun

Carolyn R. Barone, Esq.

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Miriam A. Ross, Esq.

Law Offices of Miriam A. Ross

Suzanne Harrington-Steppen, Esq.

Roger Williams University School of Law

Kristen Whittle, Esq.

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Jennifer Wood, Esq.

Rhode Island Center for Justice

Lawyers on the Move

Angelo A. Frattarelli, Esq. is now Chief of the Southern Civil Trial Section of the US Department of Justice's Tax Division.

202-307-6612 Angelo.A.Frattarelli2@usdoj.gov

Deborah A. George is now counsel at **Robinson+Cole**, One Financial Plaza, Suite 1430, Providence, RI 02903.

401-709-3363 dgeorge@rc.com rc.com

Adrianna Hughes, Esq. is now an associate at **Higgins, Cavanagh & Cooney, LLP**, 10 Dorrance Street, Suite 400, Providence, RI 02903.

401-272-3500 ahughes@hcc-law.com hcc-law.com

Elizabeth O. Manchester, Esq. is now counsel at **Partridge Snow & Hahn LLP**, 40 Westminster Street, Suite 100, Providence, RI 02903.

401-861-8200 eom@psh.com psh.com

Peter J. Miniati, Esq., CFP, is now Managing Director of Wealth Planning at **Napatree Capital LLC**, 275 Promenade Street, Suite 122, Providence, RI 02908.

401-437-4716 pminiati@napatreecapital.com napatreecapital.com

Hannah Rose Pfeiffer, Esq. is now an associate at **Miller Scott Holbrook & Jackson**, 122 Touro Street, Newport, RI 02840.

401-847-7500 hpfeiffer@millerscott.com

Kurt A. Rocha, Esq. is now an associate at **Higgins, Cavanagh & Cooney, LLP**, 10 Dorrance Street, Suite 400, Providence, RI 02903.

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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:

Administrative Law	Business Law
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Federal Court	Probate and Estates
Real Estate	Workers' Compensation

TO CHOOSE YOUR OAR OPTION:

- Bar members with questions about a particular area of the law.
- Bar members willing to volunteer as information resources.

Go to the Bar's website at ribar.com, login to the **MEMBERS ONLY**, and click on the **OAR** link.

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Seminar Offers Perspective on Startup Strategies



(l to r) Avi Nevel, Baruch Perl, Esq. and Miriam A. Ross, Esq.

The November 9th seminar, *Startups: Successful Legal Strategies and Experiences from Israel, the Startup Nation*, reviewed some of the key lessons of the Israeli innovation ecosystem and its success, including structuring the business venture; preventing and/or mitigating conflict and friction between founders; management of relationships with investors, employees and others; common mistakes in early stages; and identifying and protecting critical assets (including IP). The speakers shared Israel's experience and some of the most common issues that arise when counseling a startup client, as well as unique opportunities for collaboration between Rhode Island and Israeli startups and entrepreneurs. Israel, a country just slightly larger than Rhode Island, has one of the highest concentrations of startups in the world – highly successful enterprises that are attracting attention of global investors and companies. The seminar is available on demand through the Bar's website under Online CLE Seminars.

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The *Rhode Island Bar Journal* is one of the Bar Association's **best means of sharing your knowledge and experience with your colleagues**. Every year, attorney authors offer information and wisdom, through scholarly articles, commentaries, book reviews, and profiles, to over 6,000 subscribers in Rhode Island and around the United States. In addition to sharing valuable insights, **authors are recognized by readers as authorities in their field and, in many cases, receive Continuing Legal Education (CLE) credit for their published pieces**. The *Bar Journal's* Article Selection Criteria appear on page 4 of every Bar Journal and on the Bar's website at ribar.com.

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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. Or, visit our website at coastlineeap.com (company name login is "RIBAR"). Please contact Coastline EAP by telephone: 401-732-9444 or toll-free: 1-800-445-1195.

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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

SOLACE Helping Bar Members in Times of Need

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 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.

Holistic Representation to End Poverty

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to make the internal and external referral process faster and easier. Finally, various training and cross-training programs have been developed to assist advocates both within and outside of the organization to understand and utilize the holistic process.

However, despite these efforts, holistic representation will inevitably, by its very nature, take more time. We believe that this investment of time is justified by the results seen by our clients. The only way to combat these issues is to change the culture within legal offices. Putting in the effort to provide holistic representation can't happen without buy-in from managing attorneys. The only way to get that buy-in is to show results.

So Does It Work?

Given the increased investment in time that is required by holistic representation, it is necessary to question whether the effort is worthwhile. For that reason, RILS hired Dr. Ken Smith, of the Resource for Great Programs, Inc., to evaluate the first twenty-two months of the program. Dr. Smith's evaluation consisted of interviews with staff of both RILS and the interdisciplinary partners, along with focus groups conducted with clients. In addition, Dr. Smith analyzed data including the number of clients served, the services provided, client satisfaction with those services, and the outcomes achieved. Finally, Dr. Smith analyzed cases from ten sample clients.

Dr. Smith found that the HLAN work was having a "profound human impact," and that the "investment in holistic legal and social services can change the lives of clients and their families in ways that likely will last for many years into the future." He hypothesized that the key to the positive results was the "integration of legal and non-legal support and the continuity that HLAN provides in that support." The monthly coaching provided by HLAN personnel allowed advocates "to address the underlying causes of a client's situation rather than just treating the symptoms."

Conclusion

Many centuries ago, Aristotle taught us that "the whole is greater than the sum of its parts." This tenet applies to many facets of our lives, including our practice of law. Law school has trained us to issue-spot, and to target resolutions for each individual problem presented by a client. It is time that we change that practice and begin looking at our clients, particularly our low-income clients, as whole people with complicated inter-related concerns that, when resolved together through a holistic approach, afford greater and longer-lasting results.

ENDNOTE

¹ *Edgar S. and Jean C. Cahn, "The War on Poverty: Civilian Perspective," YALE LAW JOURNAL 73 no. 8 (July 1964): 1317-1352, 1321. ◇*

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In Memoriam

Hon. Thomas J. Caldarone, Jr.

Associate Justice (ret.) of the Rhode Island Superior Court Thomas J. Caldarone, 91, of Providence, died on November 5, 2018. He was the son of the late Captain (P.F.D.) Thomas J. Caldarone and Margaret (Segrella) Caldarone. He was educated in the Providence School System, having graduated as an honor student from Hope High School. He was a Navy veteran of World War II, having served in the Atlantic Theater of Operations. Upon his discharge from the U.S. Navy in 1946, he attended the University of Rhode Island and graduated with a Bachelor of Science degree in industrial engineering. After a brief career in engineering, he attended Boston University Law School, graduating with a Doctorate degree of law in 1957. In that same year, he became a member of the Rhode Island Bar and was admitted to practice in the United States District Court for Rhode Island. He was a member of the local, state and national committees of the Democratic Political Party. His many political activities included being elected President of the Providence Fourth Ward Democratic Club and as President of the Young Democratic Club of Rhode Island. He served as Rhode Island National Finance Committeeman during the Presidential campaign of the late President John F. Kennedy. His first public service appointment occurred in 1959 when he was appointed Legal Counsel to the Director of Public Assistance of the City of Providence. In 1960, he was appointed Legal Counsel for the State Department of Social Welfare and in 1961, he was appointed Chief of Legal Services of this same Department. Thereafter, he became engaged in the full-time practice of law with the law firm of Ragosta & Caldarone. In 1965, he was appointed to the Rhode Island Selective Service Board by the late President Lyndon B. Johnson. In 1968, he was appointed as a Governor's representative of the Rhode Island Consumers Council. His many community activities included the election to the office of State Judge Advocate of the American Veterans of World War II (AMVETS) for fifteen years and the election to the position of National Judge Advocate of the National Department of AMVETS for two terms. Judge Caldarone was a lifetime member of the Grand Lodge of Rhode Island Order of the Sons of Italy in America. He held the office of President of his Local Community Lodge currently chartered as the Renaissance-Alliance Lodge and the office of Grand Trustee, Grand Orator and Vice President of the State Grand Lodge of this organization. He was a charter member of the Verrazano Day Observance Committee. He was selected as the Man of the Year in 1980 by the Grand Lodge of the Order of The Sons of Italy of Rhode Island. He was elected to the Board of Directors and Treasurer of the Rhode Island International Institute. He served as a member of the Board of Directors and as President of the Rhode Island Opera Guild. In the year 1980, he was awarded the rank of Cavalier in the Order of Merit by the President of the Republic of Italy in recognition of his many cultural, charitable and civic contributions to the Rhode Island community. In 1975, he was appointed Chief Administrative Officer and Deputy Attorney General of the Department of Attorney General by the then Rhode Island Attorney General Julius Michaelson. Following his tenure with the Attorney General's Department, Governor Garrahy appointed him as director of the State Department of Business Regulation, a position he held for seven years. In his capacity as director, he became a member of the National Association of Insurance Commissioners and was elected by that group of State Insurance Commissioners to chair the Zone I (Eastern States) executive body. While director of this state department, he was elected chairman of the Rhode Island Board of Bank Incorporation, a state body which has the authority to grant State licenses to all state chartered financial depository institutions. In the year 1984, he was appointed Associate Justice of the Rhode Island Superior Court by Governor Garrahy. He retired in the year 1994. Following his retirement from the Court, he served as a member of the Board of Directors of the DaVinci Center for Community Projects; as a board member of the Management Committee and past president of the Oak Crest Village Condominium Association; as a member of the Catholic Diocese of

Providence Social Ministry; as a member of the Steering Committee of the Rhode Island Christian Men's Breakfast Group, and as a Eucharistic Minister at the St. Peter and Paul Cathedral in Providence. In April of 2016, Judge Caldarone received the Papal Honor of Knight of Saint Gregory the Great. The Knighthood was bestowed upon him by Bishop Thomas Tobin at an investment ceremony at the Cathedral of Saints Peter and Paul. He was a member of the Rhode Island Bar Association for over fifty-five years prior to his death. He was a member of the Aurora Civic Association and the Metacomet Country Club. He served as a Member of the University of Rhode Island Scholarship Foundation; a Member of University of Rhode Island's 1892 Presidential Society and a Member of the Boston University Scholarship Foundation. He was the brother of the late Theresa (Caldarone) Gianfrancesco and Louis A. Caldarone, and the brother-in-law of the late Joseph J. Gianfrancesco. He is survived by his sister-in-law, Kay (Nadeau) Caldarone, his nephew, Louis Allen Caldarone and his wife Rachael, his niece, Marguerite Caldarone Burgess, two grandnieces and a grandnephew, and two great-grandnieces.

Vincent J. Chisholm, Esq.

Vincent J. Chisholm, 89, of Barrington, died on October 22, 2018. He was the husband of the late Edith J. Chisholm. Born in Providence, he was the son of the late Catherine McGarty Chisholm and William T. Chisholm. Mr. Chisholm was a graduate of the Blessed Sacrament grammar school and attended the University of Rhode Island for two years, with honors. He served in the United States Army from September of 1946 until July of 1949, during which time he was stationed in Alaska and the Aleutian Islands. He graduated from Boston University School of Law in 1954. A career trial lawyer in RI, he often represented disabled and injured individuals. From 1973 to 1985, Vincent served as a representative member of the John Donley Rehabilitation Center, and he was awarded the Order of Commendation from the Rhode Island Supreme Court in 1980. In 2008, Vincent was awarded the Ralph P. Semonoff Award for Professionalism, the highest distinction bestowed on a member of the Rhode Island Bar. Vincent remained active as a mentor in the law firm of Chisholm Chisholm & Kilpatrick LTD. Vincent was a member of the Rhode Island Bar (1954); U.S. District Court of Rhode Island (1956); U.S. Court of Appeals for the 1st Circuit (1957); and the U.S. Supreme Court (1976). He was a Superior Court mediator; a member of the American Bar Association, the American Association for Justice, and the Rhode Island Association for Justice; a past-president of the Warren/Barrington Rotary Club; and a member of the Barrington School Building Committee and the Rhode Island Workers' Compensation Committee. He is survived by daughter Christine, son Daniel and his wife Lynne, son Robert and his wife Ellen Polansky, and son William and his husband Billy Powers. He is also survived by six wonderful grandchildren. He was the brother of the late Veronica Platt, William M. Chisholm, and Donald Chisholm. He was the uncle of Kathleen Davis who lived with him for many years.

Vincent A. DeCesare, Esq.

Vincent A. DeCesare, 75, of South Kingstown, died on October 19, 2018. He was the husband of Diane (Musumeci) DeCesare. Born in Providence, he was the son of Antonetta (Bevilaqua) DeCesare and the late Armando DeCesare. A graduate of Providence College, Vincent began his career as a middle school social studies teacher. Vincent balanced his teaching career with studying law at night at Suffolk University. With his law degree in hand, Vincent formed his own firm and practiced in Rhode Island for 47 years. He was a long-standing sponsor of St. Jude Children's Research Hospital, where he also often volunteered. Vincent was involved in Project Goal, South County Youth Soccer Club, and Liga de Softball. In addition to his wife Diane and his mother Antonetta, Vincent is survived by his three children, Vincent DeCesare, Alexandra DeCesare and Jayma Coghlin and her husband John; his sister, Michele Serrecchia and her husband Raymond; two granddaugh-

The Schoolhouse Gate

continued from page 27

8 See *id.* at 62.

9 310 U.S. 586 (1940).

10 See *id.* at 599-600.

11 See *Schoolhouse* at 63-64.

12 Thus, forty-two years after *Barnette*, Chief Justice Warren Burger declared that “[t]he Constitution does not provide a cure for every social ill, nor does it vest judges with a mandate to try to remedy every social problem.” See *Pyle v. Doe*, 457 U.S. 202, 253 (1982) (Burger, C.J., dissenting).

13 See *Schoolhouse* at 65.

14 See *id.* Driver goes even further opining that “whatever Supreme Court majority opinion might claim the runner-up spot in eloquence lags so far behind *Barnette* as to render the event no contest at all.” *Id.*

15 See *id.* at 66.

16 See 319 U.S. at 626, n.2.

17 See *id.* at 640-641.

18 See *id.* at 637.

19 See generally, William Deresiewicz, EXCELLENT SHEEP, THE MISEDUCATION OF THE AMERICAN ELITE AND THE WAY TO A MEANINGFUL LIFE (Free Press, 2014) (reviewed at 64-Oct. R.I. B.J. 29).

20 PISA is a worldwide study by the Organization for Economic Cooperation and Development of 15-year-old students’ scholastic performance on mathematics, science and reading in 70 nations. In 2015-16, the combined average score of the U.S. ranked thirty first, just behind the Czech Republic, Spain and Russia. See <http://factsmaps.com/pisa-worldwide-ranking-average-score-of-math-science-reading/>.

21 For example, Driver notes that it has been over thirty years since the Court has reviewed a state law that seeks to promote creationism as a scientific theory. See *Schoolhouse* at 403.

22 See Steven Levitsky and Daniel Ziblatt, HOW DEMOCRACIES DIE (Crown, 2018) at 7.

23 See *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 113 (1973) (Marshall, J., dissenting).

24 See Marilynne Robinson, WHAT ARE WE DOING HERE? (Farrar, Strauss & Giroux, 2018) at 84; see also generally Robert D. Putnam’s BOWLING ALONE (Simon & Schuster, 2000) and OUR KIDS: THE AMERICAN DREAM IN CRISIS (Simon & Schuster, 2015).

25 See *Schoolhouse* at 242

26 See *id.* at 282.

27 See Whitehurst, NEW EVIDENCE ON SCHOOL CHOICE AND RACIALLY SEGREGATED SCHOOLS (Brookings, December 14, 2017), <https://www.brookings.edu/research/new-evidence-on-school-choice-and-racially-segregated-schools/>. Thus, Whitehurst claims that “the average white student’s public school had a black enrollment of about 10 percent in 2010, about the same degree of white exposure to blacks as in 1980;” whereas “[t]he average black student’s public school actually afforded less exposure to white students in 2010 than was the case in 1980.” *Id.*

28 See Stancil, SCHOOL SEGREGATION IS NOT A MYTH: SKEPTICS CLAIM THAT CONCERNS OVER RACIALLY DIVIDED SCHOOLS ARE FALSE ALARMS—BUT THEY’RE MISSING THE FULL PICTURE (THE ATLANTIC, Mar. 14, 2018).

29 See *Schoolhouse* at 304-05.

30 See *id.* at 248.

31 See *id.* at 258.

32 See *id.* at 313.

33 Driver suggests that some of the Court’s caution in *Brown II* may have been related to President Eisenhower’s non-endorsement of *Brown I*, and claimed that prior to the decision, Chief Justice Warren had “powerful reasons” to believe that President Eisenhower supported Jim Crow. He relates that after the oral argument in the case Ike invited the Chief Justice to a small dinner party at the White House which included Attorney John W. Davis, who had just argued the case on behalf of the South Carolina school district being challenged. Driver recounts that the Chief Justice was seated next to Attorney Davis and quoted the President as stating: “These are not bad people,” speaking of white southerners, “All they are concerned about is to see that their sweet little girls are not required to sit in school alongside some big black bucks.” *Id.* at 259, citing Bernard Schwartz in SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT - A JUDICIAL BIOGRAPHY (New York University Press, 1983).

34 See *id.* at 243.

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In Memoriam (continued)

ters, Marisa and Juliana Coghlin; and many nieces and nephews. He was the brother of the late Jacqueline Lombardi.

Robert Deschene, Esq.

Robert Deschene, 62, of North Attleboro, died on Monday, Aug. 13, 2018. Rob was born in Fall River and was a son of the late Julian and Winifred (Padden) Deschene. Rob grew up in Tiverton, and received his bachelor of arts degree magna cum laude from Brown University in 1978. After graduation, he worked several years in the private banking sector and then obtained his law degree magna cum laude from the University of Maine School of Law in 1990. After law school, he worked as a judicial law clerk at the Maine Supreme Judicial Court in Portland and followed with a federal court clerkship at the United States Court of Appeals for the First Circuit in Boston. He has been a resident of North Attleboro since 1991 where he has operated his own private law practice for many years. He was a devoted communicant of St. Mary's Church in North Attleboro and was a cantor and member of the church choir. He was a member of the St. Vincent de Paul Society and served 12 years on the North Attleboro Cultural Council. Rob was a member of the state bar associations of MA, RI and ME. He is survived by his siblings: the Rev. James Deschene, Anne Deschene, Thomas and wife Anne Marie Deschene, and Daniel and wife Katherine Deschene; his sister-in-law Barbara Benedetti; four nieces and nephews and two great-nephews.

David W. Dumas, Esq.

David W. Dumas, 75, died on November 27, 2018. He was the husband of Elizabeth (Thelin) Dumas. David was born in Lowell, MA, son of Michael and Beatrice (Warner) Dumas. David was a graduate of Phillips Academy in Andover, Mass., Brown University (BA and MA) and the University of Virginia School of Law (JD). David represented the town of East Greenwich in the Rhode Island House of Representatives from 1983 to 1992 and served as minority leader from 1989 to 1992. He served as town moderator for the town of East Greenwich from 2004 to 2006. David was a member of the Society of the Cincinnati, Sons of the Colonial Wars, the Mayflower Society, and the Willowdell Beach Club. He is survived by his children Sam (Trixie), Amy (Mike) Engelsman, Priscilla (Damon) Kubas and Caroline Dumas, and many grandchildren. He was the stepfather of Scott and Andrew Deutsch and Sara Shaylor.

Hon. Ronald R. Gagnon

Associate Justice (ret.) of the Rhode Island Superior Court Ronald R. Gagnon, of Wakefield, died on Tuesday, November 6, 2018. He was the husband of Arlene S. (Audette) Gagnon. Born in Central Falls, he was the son of the late Joachim and Lydia (Pelland) Gagnon. Judge Gagnon graduated from Providence College in 1948. A member of the varsity basketball team for four years, Judge Gagnon also earned magna cum laude honors in political science. He entered Harvard Law School in 1952, and received his Juris Doctorate in 1955. Judge Gagnon also served with the US Army from 1955-1957 and the U.S. Army Reserves from 1957-1963. He was a former associate of the late Family Court Chief Judge William R. Goldberg in his early law practice and was an active member of the Pawtucket and Rhode Island Bar Associations throughout his career. Judge Gagnon also served as chair of the Rhode Island Personnel Appeals Board from 1965-1968, and clerk of the Tenth District Court of Rhode Island from 1968-1969. Before his appointment to the judiciary, he enjoyed the private practice of law for more than three decades. He was appointed Associate Judge of the Rhode Island Superior Court in February of 1988. He retired in 2003 from the bench. He served on local and state commissions and on boards in the Blackstone Valley area including the Visiting Nurse Services Association, the Jaycees, Central Falls Credit Union, and the Chamber of Commerce. He was also an incorporator of Pawtucket Memorial Hospital. Besides his wife, he is survived by his

daughter, Dyanne Clinton, and her husband Henry, his sons, Ronald Gagnon Jr., and Thomas Gagnon and his wife Elizabeth Wood. He is also survived by eight grandchildren. He was the brother of the late Raymond Gagnon.

Adam W. Kiracofe, Esq.

Adam W. Kiracofe, 40, died on November 9, 2018. Adam grew up on Mackinac Island, MI and in Door County, WI. He graduated from Luther College in Decorah, IA in 2000 and received his law degree from Boston University in 2004, where he graduated fifth in his class and served as editor in chief of the law review. After school, Adam clerked for an Iowa Supreme Court justice and worked as a trusts and estates lawyer until 2014. Adam was preceded in death by his younger sister, Victoria Ashley Kiracofe. He is survived by his wife, Jaclyn, his sons Riley and Jameson, parents Gary L. and Dawn S. Kiracofe, sister Elizabeth N. Cousineau (husband Chris), cousin Tricia L. Bennett (husband David and their daughter Lily), niece Clara, and nephew Owen.

Francis M. Lynch, Esq.

Francis M. Lynch died on July 12, 2017. He was born in New York City, the eldest child of Francis Thomas Lynch and Jeanne Marie Mooney Lynch. After graduating Barrington High School in 1974, he received a Bachelor of Arts degree in 1978 and a Juris Doctor degree in 1981 from Boston College and its College of Law. Frank led the Fulton Debating Society at BC for several years and was awarded the Fulton Medal as the outstanding debater at the College in 1976. Frank practiced law at three firms over 36 years, finishing his career as senior partner at Cetrulo LLP. His work earned him recognition as one of the Top Ten Lawyers of the Year by Massachusetts Lawyers Weekly in 1997 and designation as a Massachusetts Super Lawyer 2004-2016. He shared his commitment to public service with the Town of Scituate, serving for many years on the Board of Health and Zoning Board of Appeals. Frank was predeceased by his parents. He is survived by his sister, Barbara Lynch, her spouse Greg Sinay, and their daughters Zoe and Quinn Sinay as well as his brother Kevin Lynch, his wife Stephanie, and their children Olivia and Joseph.

Robert Ellis Smith, Esq.

Robert Ellis Smith, 77, died on July 25, 2018. Born in Providence, he was educated at Moses Brown, Harvard University, and Georgetown University Law Center. After graduation and a military stint, Bob was the editor and manager of the *Southern Courier*, a weekly newspaper based in Montgomery, AL, where he would go on to work with seminal leaders like Martin Luther King Jr. and Rosa Parks. He was a news reporter for and editor with the *Detroit Free Press*, *Trenton Times*, and *Newsday*. Since 1974, he published *Privacy Journal*, a monthly newsletter on privacy in a computer age, and is the author of several books, one of which was a finalist for the National Nonfiction Book of the Year Award. He was a frequent writer, speaker and congressional witness on privacy issues and was twice asked to write the definition of privacy by the World Book Encyclopedia. Additionally, he taught various courses at Brown University, University of Maryland, Harvard College, and Roger Williams University Law School. Smith served as the President of the Block Island Conservancy in the 1990s, a term as a member of the Town Council in the mid-2000s, and was a staple at the Farmer's Market, where he would sell his book, *Block Island Trivia*. He is survived by his sons Benjamin Elliott Smith, David Ellis Smith, and Marc Osgood Smith, his brother Ronald Smith, sister Georgia Regnault, and many nieces, nephews, and grandchildren. He was preceded in death by his son Gregor Evans Smith and his sister Jody Blish.

35 See *id.*

36 Thus, in 1992 Justice Antonin Scalia, in his typically sweeping and wholly conclusory fashion, cautioned that “we must acknowledge that it has become absurd to assume . . . that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon current operation of schools.” See *Schoolhouse* at 295, citing *Freeman v. Pitts*, 503 U.S. 467, 506 (1992) (Scalia, J., concurring). 37 551 U.S. 701 (2007).

38 See *Schoolhouse* at 297, quoting PARENTS INVOLVED, *supra*, 551 U.S. at 748. Driver points out that in fact, the line was “a Federalist Society mantra,” having first been uttered by Attorney Theodore Olsen, a Federalist Society mainstay who argued *Bush v. Gore*, and then by Judge Carlos Bea, one of the Circuit Court judges involved in PARENTS INVOLVED and another Federalist Society stalwart. Yet, as Driver notes, Chief Justice Roberts “assiduously resisted association with the Federalist Society prior to his confirmation.” See *Schoolhouse* at 297.

39 536 U.S. 639, 644 (2002); see also *id.* at 676 (Thomas J., concurring).

40 See note 23, *supra*.

41 See *id.* at 325.

42 See *Schoolhouse* at 321, 323, citing *Rodriguez, supra*, 411 U.S. at 127-28 (Marshall, J., dissenting). The lack of a fundamental right in the U.S. Constitution shifted the focus of battles over school finance reform to the various state constitutions.

43 See *id.* at 426.

44 430 U.S. 651 (1977).

45 See Elizabeth T. Gershoff, SCHOOL CORPORAL PUNISHMENT IN GLOBAL PERSPECTIVE: PREVALENCE, OUTCOMES, AND EFFORTS AT INTERVENTION, 22 *Psychology, Health & Medicine* 224, (2017), available at <https://www.tandfonline.com/doi/full/10.1080/13548506.2016.1271955>.

46 See, e.g., *Citizens United v. Federal Election Com’n*, 558 U.S. 310, 408 (2010) (Stevens, J., concurring in part and dissenting in part) (if the principle of stare decision “is to do any meaningful work in supporting the rule of law, it must at least demand a significant justification, beyond the preferences of five Justices, for overturning settled doctrine”).

47 430 U.S. 651 421 (1962).

48 See *Schoolhouse* at 420-21 discussing *Elk Grove Unified School District v. Nedow*, 542 U.S. 1 (2004).

49 See note 12, *supra*.

50 See *Schoolhouse* at 355. ◇

Justice Assistance Honors Six Rhode Islanders



Justice Assistance, a nonprofit criminal justice agency in Cranston, awarded the following individuals with Annual Neil J. Houston, Jr. Awards for their dedicated service and citizen contribution toward the criminal justice profession and the public interest: (l-r) Anthony M. Pesare, Esq., Michael A. DiLauro, Esq., A.T. Wall II, Esq., RI Superior Court Associate Justice (ret.) Judith C. Savage, William J. Murphy, Esq., and Joseph C. Cardin.

Representing Residents Injured in Nursing Homes



Anthony Leone

Past President of the Rhode Island Association for Justice

- Abuse and neglect
- Pressure and bed sores
- Resident falls
- Bed rail strangulation
- Dehydration and malnutrition related injuries
- Medication errors

Slip & Fall - Henry Monti



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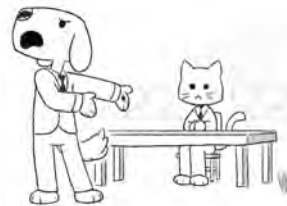
1345 Jefferson Boulevard, Warwick, Rhode Island 02886
Tel (401) 921-6684 info@leonelawllc.com

Caption This! Contest

We will post a cartoon in each issue of the *Rhode Island Bar Journal*, and you, the reader, can create the punchline.



Winning caption for
November/December



"I understand it sounds extreme, your honor, but if you'll hear me out I think you'll see why 9 life sentences is not only appropriate but necessary."

LEE GREENWOOD, ESQ.

How It Works: Readers are asked to consider what's happening in the cartoon above and submit clever, original captions. Editorial Board staff will review entries, and will post their top choices in the following issue of the *Journal*, along with a new cartoon to be captioned.

How to Enter: Submit the caption you think best fits the scene depicted in the cartoon above by sending an email to kbridge@ribar.com with "Caption Contest for January/February" in the subject line.

Deadline for entry: Contest entries must be submitted by February 1st, 2019.

By submitting a caption for consideration in the contest, the author grants the Rhode Island Bar Association the non-exclusive and perpetual right to license the caption to others and to publish the caption in its Journal, whether print or digital.

Updating Your Attorney Directory Photo Is a Snap!

The next time you are visiting the Rhode Island Law Center for a Continuing Legal Education program or committee meeting, be sure to ask about how easy it is to update your online attorney directory photograph. All you need to do is step into the lawyers' lounge, located at the Law Center, and a staff member will snap your photo, upload it to the directory, and, if you'd like, email you a copy for your own personal use. The directory is available for the convenience of Bar members, clients, and potential clients, so be sure to keep your listing up to date! Attorney Directory contact information may include the Bar member's name, photograph, law office name, postal address, email address, telephone number, and facsimile number. If you would rather send us your own photo, you may do so by emailing it to Erin Bracken at ebracken@ribar.com. Photographs must be provided in a jpg format of at least 300 dpi.

Rhode Island Probate Court Listing and Judicial Communications Survey on Bar's Website

The Rhode Island Bar Association regularly updates the Rhode Island Probate Court Listing to ensure posted information is correct. The Probate Court Listing is available on the Bar's website at ribar.com by clicking on **FOR ATTORNEYS** on the home page menu and then clicking on **PROBATE COURT INFORMATION** on the dropdown menu. The Listing is provided in a downloadable PDF format. Bar members may also increase the type size of the words on the listing by using the percentage feature at the top of the page. The Bar Association also posts a chart summarizing the preferences of Superior Court justices relating to direct communications from attorneys, and between attorneys and the justices' clerks which is updated yearly. The chart is available by clicking **MEMBERS ONLY** on the home page menu and then clicking **JUDICIAL COMMUNICATIONS**.

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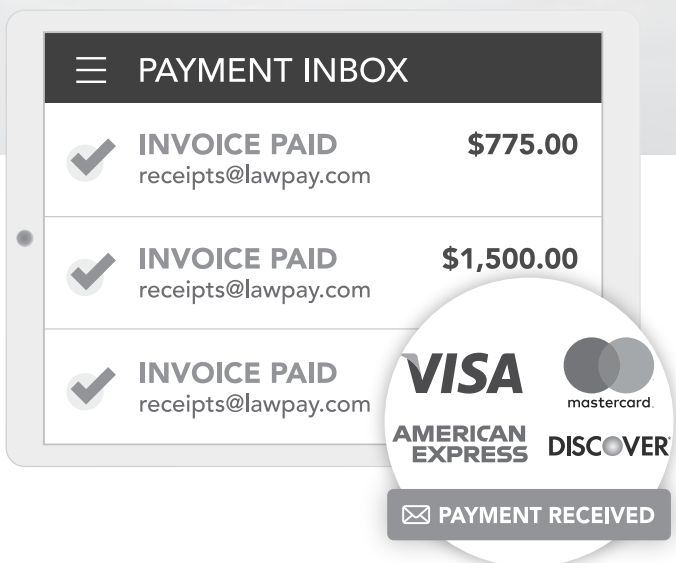


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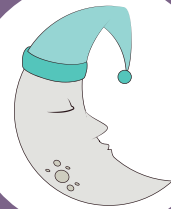
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5 Tips for

Winter Wellness!

1

Extra Sleep



Make Time for Sleep

With the shorter, cooler days and longer nights, our bodies naturally need more sleep. Try going to bed 30 minutes earlier in the winter months. A sleep deprived body is more susceptible to illness.

Eat Protein at Each Meal

Protein helps keep blood sugar levels stable and can reduce sugar cravings. During the winter, too much consumption of carbohydrates and sugar can compromise the immune system. Add protein to each meal to satisfy your appetite.



Eat Protein

2

3

Add Whole Grains



Embrace Whole Grains

Whole grains such as oatmeal, brown rice, and whole-grain bread are rich fiber sources. Adding these foods to your diet may help protect against heart disease, diabetes, digestive disorders, and some cancers.

Focus on Fruits & Vegetables

While supermarkets offer less produce this time of year and your garden is covered in snow, it's more important than ever during winter to eat a wide range of fruits and vegetables every day. Pack in the produce to help prevent disease, give you more energy and stop weight gain.



Fruits & Veggies

4

5

Stay Active



Get Outside & Exercise

It's important to remember to stay active during the winter months. Bundle up and take a walk. Even a 15-minute walk can make a difference. Exercise naturally supports a healthy mood and energy levels.

Lawyers Helping Lawyers

A Rhode Island Bar Association Member Benefit. For more information, visit our website at ribar.com, and the *Do You Need Confidential Help* Quick Link.

Also learn how to log in to Coastline EAP, a private non-profit consulting service contracted by the Association to assist you at no charge.

