Rhode Island Bar Journal

Rhode Island Bar Association Volume 62. Number 4. March/April 2014

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RHODE ISLAND BAR ASSOCIATION LAWYER'S PLEDGE

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

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Frank Hall Boat Yard, Westerly

Educating the Electorate: With a Little Help From My Friends

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

Please join me in volunteering just a few hours of time in 2014 to a law related education program and strengthen civics education in Rhode Island classrooms.

On the day I sat down to pen this message, I reflected on the fact that I only had six more months to serve as President of the Rhode Island Bar Association. What an honor and privilege it has been thus far to serve as president. I am also cognizant of the tremendous responsibility with which I have been entrusted. Therefore, with only two messages remaining, I want to use this bully pulpit to advance an important cause and request your help.

Our democracy is so fragile, yet we all take it for granted. Being a member of the baby boomer generation, I am a product of what has been coined the greatest generation. I want to do my part to help sustain the democracy for which our forefathers fought and gave their lives, and I want you to do it with me by volunteering just a few hours of your time in 2014 to a law related education program. There are many important things we do for society as lawyers. Teaching civics should be one of them!

Our democracy is not self-sustaining. It requires education, understanding and participation. There has been so much emphasis in the education system in this country on core curriculum and away from civics, that the results are staggering. For example, according to a 2011 report from the American Bar Association, nearly half (45 percent) of Americans are unable to correctly identify the three branches of government, more than half (57 percent) of Americans couldn't name a single current justice on the U.S. Supreme Court, and, out of 14,000 college students, 71 percent of those Americans failed a basic civics test. Based on my own non-scientific research, naturalized citizens have a greater knowledge of our government than do most citizens who were born here. Good for them, but shame on us!

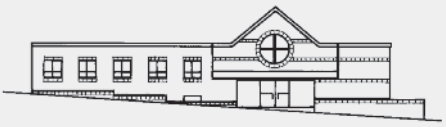
In a previous message, I wrote about the importance of teaching civics in our classrooms. Now, I want to ask you to join me in volunteering for one or more of our Bar Association's law related education programs including: our Bar's annual partnership with the Rhode Island Judiciary and the other members of the Rhode Island Law Day Committee which puts teams of lawyers and judges together for the Rhode Island Law Day classroom presentations and also sponsors the Rhode Island Law Day Essay Contest; our Adult Speaker's Bureau providing volunteer attorneys, offering legal knowledge on a range of subjects, to non-profit groups and organizations; and our Lawyers in the Classroom program connecting volunteer lawyers to teachers and students throughout the year. I would also like you to consider volunteering for one or more of the law related education programs we support including the Rhode Island Legal/Educational Partnership's Mock Trial Program, the Rhode Island Judiciary's *iCivics* program, and Generation Citizen.

Specifically, I recently received a new request for volunteers from Generation Citizen, a program dedicated to the teaching of civics right here in Rhode Island, as well as in other states. Generation Citizen needs volunteers to donate just one classroom period to working with students on a civics project. They are an excellent organization already making a difference, and they have reached out to you, through me, for your help!

For more information and to volunteer for our Bar's Law Related Education programs and Generation Citizen, visit our Bar's website at **www.ribar.com**, go the upper left menu and click on FOR ATTORNEYS, on the dropdown, click on LAW RELATED EDUCATION and browse that area to find out more about our programs and those we support.

If you think this effort is as important as I do, please let me know your ideas for getting the message out to our state's political and education leaders to strengthen our civics education in our classrooms, not diminish it. Let's take up the fight to maintain our democracy against the tyranny of an invisible dictator; the tyranny of our own apathy. Please help in this effort, before it is too late. Do it for our forefathers, for our children and our children's children.

If you want to be a part of the solution, please contact me directly or through the Bar Association. Together, we can make a serious difference through law related education programs! ❖



Rhode Island Bar Foundation

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

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

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RHODE ISLAND BAR JOURNAL

Editorial Statement

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

Article Selection Criteria

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

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

Implementing Practical Risk Management: A Guide for 501(c)(3) Nonprofits[1]

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The consequences of ignoring potential liabilities can be devastating for nonprofits.

Nonprofits are proliferating at a significant rate across the country. Rhode Island is no exception.[2] Unfortunately, nonprofit organizations, like their for-profit counterparts, are exposed to a multitude of risks. While nonprofits do not measure their success in terms of shareholder value, as most for-profits do, their ability to accomplish their mission and purpose is heavily dependent on their financial and organizational health. Thus, they can ill-afford to suffer losses or liabilities (e.g., loss of tax-exempt status[3]) occasioned by adverse legal and related events, especially because many nonprofits already are operating with limited resources. Indeed, recent statistics reveal that nearly one-fifth of Rhode Island nonprofits have annual budgets and assets exceeding $1M.[4]

This article provides guidance to nonprofit organizations and their boards on how to manage legal and related risks more efficiently and cost effectively to reduce their liability exposure by practicing sound risk-management strategies. As one notable treatise succinctly states, "…risk management is one of the board's primary oversight functions."[5] A nonprofit's anticipation of risk coupled with a prudent risk-management strategy to eliminate or, at least, mitigate risk can directly support its ability to accomplish its mission.

The proposed risk-management strategy consists of a three step review process designed to quickly identify potential problems fairly quickly and focused on practical, cost-effective solutions. For high-risk organizations in particular, an outside lawyer under privilege is recommended to conduct the review. The review process is also designed for use by non-lawyers as well, subject to certain important considerations.

Step one entails a review of the organization's activities and board to determine material areas of potential risk. This assessment's objective is to identify the critical risks the organization and its board face. This assessment can be accomplished fairly quickly using a simple, yet robust, checklist listing the major areas most nonprofits encounter, such as: the nature and recipients of provided services; the number of employees; the size of the organization's budgets and financial holdings; and its sources of income.[6] The results of the initial risk assessment may require a more detailed review of those identified areas, leading to step two. If high-risk areas are identified, a more detailed review to determine if potential problems exist may be warranted.

Step two focuses in detail on the identified major risks. In this phase, once the reviewer identifies the organization's general exposure, the reviewer uses a highly-detailed and developed checklist laying out a function-by-function review process for those areas and situations requiring remediation or improvement. At this point, the reviewer is moving from a macro-level analysis to a more detailed or granular analysis.

In step three, the reviewer communicates the results of the review process to the board of directors. This may consist of simply identifying the high-risk areas or suggesting potential actions for addressing the risks. Either option allows the board to conduct an informed cost benefit analysis to determine its overall risk exposure to implement or refine its risk-management strategy. If policies and procedures are part of the solution, there are sample protocols available that can be tailored to the organization's business and needs, which, in itself, will save the organization money.

We do not intend to unduly alarm nonprofit organizations. Nor is it our intention to denigrate the highly laudable work Rhode Island's nonprofits do for our communities. Nonprofits are an important part of the Rhode Island community, and those involved in these honorable enterprises are motivated by the purest intentions. We are aware of the imperative of maintaining the unique cultural aspects of nonprofits, particularly charitable organizations. The individual culture of nonprofits, their mission, constituents and scope of services, represent the lifeblood of these organizations and the very essence of their strength and commitment. Care must be taken by lawyers to avoid, or at least minimize, harm to that important culture. That said, it is the authors' intention to raise awareness that Rhode Island nonprofits face unforeseen legal risks, which they may not be

equipped to handle given their limited budgets and staffs.

Many nonprofits operate for many years without any major legal setbacks or related losses. While this may be true, this mindset can lead to cognitive dissonance, (i.e., the belief that, because nothing bad has happened before, bad things will never happen.) Often accompanying this mindset is the belief that charitable organizations are immune from the civil justice system. Often, many nonprofits are simply unaware of looming legal problems due to a general lack of understanding and expertise regarding legal requirements[7] and related risks. Further, without the internal expertise or budgets to sustain resulting losses, many nonprofits are ill-prepared and vulnerable when legal problems arise. Even if the organization is sufficiently equipped to deal with legal problems on a case-by-case basis, constantly being on the defensive is not a productive strategy. At a minimum, legal problems can disrupt a nonprofit's operations, which, in turn, can lead to unnecessary losses in productivity, further undermining the organization's ability to pursue its mission. At worst, the organization becomes unable to carry on.

In the authors' experience, most legal problems afflicting nonprofits are foreseeable and avoidable, provided the board employs reasonable risk-management strategies. Good risk-management starts and ends with the board's oversight and responsible governance. Unfortunately, because nonprofits rely on volunteer boards, volunteer members, and even volunteer professionals, many boards, including sophisticated ones, inadvertently overlook the legal and operating risks they face and, as a result, cannot prudently manage those risks. By engaging in preventative action to identify and promptly correct potential risks before they mature into liabilities, boards can protect their organizations from avoidable losses. Responsible governance ensures that the organization obviates unnecessary risk. Risky behavior can adversely impact the organization's reputation and crucial public confidence. The very public confidence that often plays a critical role in much of a nonprofit's revenue stream. Further, any damage to an organization's brand or reputation often leads to reductions in fundraising capabilities.

Rhode Island corporate law affords

certain protections (e.g., Limited Immunity[8]) to uncompensated directors and officers for conduct arising from their duties. However, Rhode Island, like most states, does not extend similar immunity or protection to the nonprofit organization itself.[9] Further, legal and related exposure may inure to directors in their individual capacities or, separately, to the organization or, in some cases, both. Apart from the legal liability resulting from a failure to comply with certain federal and state laws and regulations, nonprofit organizations can be sued and held liable for a wide array of actions ranging from torts to breach of contract allegations. The consequences of ignoring potential liabilities can be devastating for nonprofits. Specifically, the assets of the organization are at risk in certain situations.[10] A nonprofit organization also risks the loss of its tax exempt status as a consequence of unpermitted activities such as engaging in prohibited political campaigning or significant lobbying, or even a substantial divergence from its purpose.

While an uncompensated director is afforded broad protection from individual personal liability under Rhode Island law, this does not mean he or she is completely immune from a lawsuit, regardless of its merits. Obviously, compensated directors and officers do not have the same protection from personal liability afforded their uncompensated counterparts. Moreover, whatever protection directors might have from personal liability under Rhode Island law does not immunize them from lawsuits if they, in their individual capacity, or their organization fail to comply with certain federal and state statutes. For example, the Internal Revenue Service (IRS) can impose personal liability on directors failing to pay employee withholding taxes or approving excess benefits for key directors and employees (disqualified persons).[11] Directors also face liability for other actions in which the organization acts contrary to its by-laws or applicable Rhode Island law such as the Uniform Prudent Management of Institutional Funds Act.[12] Further, directors are also subject to derivative actions by members of their organizations or fellow directors for breach of their fiduciary duties to the organization.[13]

Many boards do not fully appreciate their legal obligations and responsibilities to their organizations under Rhode Island

law. Specifically, the fiduciary duties of care and loyalty require directors act in good faith and make informed, deliberate decisions concerning the major activities of their organizations. Under Rhode Island law, the board is responsible for the oversight and management of its organization, as well as certain day-to-day responsibilities. If directors fail to understand the scope of their obligations, as well as the operations of their organization, this raises the risk of actions leading to organizational and even director liability. An uneducated board can be a major risk factor to the organization in and of itself.

We purposely have avoided referring to this review process as an audit. Apart from engendering negative connotations, audits often trigger certain legal requirements and other imperatives, unnecessarily complicating a review process. Audits may create artificial barriers to the free flow of information by curtailing dialogue critical to identifying and correcting actual or potential issues. As a valuable alternative, the review process engages a high degree of trust between the organization and the reviewer, which is the key to an effective and successful review. Of course, the review process itself can be adapted for auditing purposes, if the board so chooses.

We strongly recommend, especially to high-risk nonprofits, to conduct the review process through an attorney, under privilege, to protect against disclosure to third parties. For example, if the review reveals an organization may be acting contrary to an applicable Rhode Island or Federal statute, this finding could be used against the organization in a legal proceeding, irrespective of whether there is, in fact, a violation. To reduce the likelihood of potential legal exposure, it is beneficial to have the protection of privilege while the organization decides how best to address problems that come to light. However, this is not to suggest organizations cannot use this risk-management review process as a tool for self-assessment without the benefit of counsel. In so doing, however, organizations should be aware that documents or other information generated in this process, especially those involving actual or potential legal liability, may be subject to discovery in litigation or related proceedings.

In sum, the review process is intended to be a practical and flexible tool, assisting the organization in eliminating or

materially reducing material risks before they become problems. Some nonprofit organizations will have risk exposure and management issues in areas that other organizations will not. Nonprofits with employees, personal and real property assets, endorsements, grant compliance obligations, tax exemptions, related foundations, or those that provide services to the public will all benefit from reviewing their risks and management procedures in those applicable areas.

For the sake of brevity, we have excluded extensive risk-assessment and review checklists. The risk-assessment phase starts with identifying the major functional areas, including corporate governance, common to most nonprofits. A fairly simple checklist can facilitate this task. For example, determining up front that a nonprofit has employees and volunteers may trigger taking a closer look at the practices and procedures in that area. Similarly, if an organization engages in political lobbying activity permitted within limits, there may be a need to review in more detail how the organization conducts itself in that area to see if it is in compliance with the law.

The stage two review checklist is more involved. It identifies the functional areas most nonprofits are involved with and then breaks them down into subparts with corresponding federal and state statutory and regulatory references or best practices.

The final step, presenting the findings and possible corrective action to the board, is a relatively straightforward process, but must be done with care and tact. In keeping with the theme of flexibility, which underlines the review process, the report may be oral or written depending upon the situation and the board's needs, with the caveat that any findings are factually supported and suggested corrective actions clearly set forth. To provide a better understanding of what this process might look like, sample excerpts from the risk-assessment checklist and the review checklist follow.

[Step One] Areas to assess (excerpt):

A. High Risk Activities
   1. Sports
   2. Adventure
   3. Health Services
   4. Construction
   5. Travel
   6. Other: _____

B. High Risk Constituents
   1. Children
   2. Elderly
   3. Disabled
   4. Language Differences
   5. Health Risks
   6. Other: _____

C. High Risk Venues
   1. Waterfront/Water
   2. Urban/blighted
   3. International
   4. Travel
   5. Other: _____

[Step 2] Risk and Governance Review (excerpt)

Review Table of Contents

1. Mission
2. Governance and Organizational Structure
3. Board of Directors
4. Corporate Compliance
5. Bylaws
6. Officers
7. Taxes
8. Foundation/Endowment
9. Corporate Separateness
10. Gift Acceptance
11. Grants Program
12. Fundraising/Solicitation
13. Insurance
14. Claim Process
15. Employees
16. Volunteers
17. Compliance Program/Manual
18. Third-Party Agreements
19. Safety/Security Program
20. Political Activity
21. Charity Care
22. Reporting/Board Investigation

Note: This list is not exhaustive and merely provides an example of the review sequence and will need to be supplemented depending on the nature of the organization or as issues arise during the review itself.

1. Mission
   a. Is there a single overall mission statement?
   b. Has Board periodically reviewed its mission statement?
      (A) Members of organization [R.I. Gen. Laws § 7-6-15]
         (i) criteria?
         (ii) annual meeting? [R.I. Gen. Laws § 7-6-18]
         (iii) special meeting? [R.I. Gen. Laws § 7-6-18]

(iv) voting/quorum? [R.I. Gen. Laws § 7-6-20, 21]
(v) organization meetings? [R.I. Gen. Laws § 7-6-37]

*Action by incorporators, members, or directors without a meeting [R.I. Gen. Laws § 7-6-104]

2. Governance and Organizational Structure
   a. Is the organization incorporated?
   b. What state?
   c. Does it conduct activities in multiple states?
   d. Is there a current list of regulatory [including statutes] and industry reports, filings, etc., with due dates?
   e. Is there a list of all organizational documents, policies/procedures, etc.?
      1. Maintained in a central location easily accessed?
      2. Compliant with relevant record retention requirements/policy?
   f. Is there a procedure by which the Board is promptly made aware of important matters, issues, problems, etc.?
   g. Is Board knowledgeable concerning its duties and responsibilities [R.I. Gen. Laws § 7-6-22] and potential liabilities?

Next, are the mechanics of the review process. In step one, the reviewer identifies areas of potential legal risk and the corresponding governance responsibilities. If the reviewer identifies high-risk areas, a more in-depth review of those discrete areas is appropriate. However, before the review begins, the outside reviewer should meet with the board president and the executive director (or his or her equivalent) to discuss the overall process. Together, they should identify any specific areas of concern, as well as agree on protocols and certain other arrangements, such as what the timing of the review process looks like.

More importantly, the reviewer should also meet with the board to gain an understanding of the board's level of legal sophistication, business sense, and the rationale for its current approach to risk management, or lack thereof. It is

continued on page 34

Stoddard v. Martin: A Rhode Island Tale

Peter J. Comerford, Esq.
Coia & Lepore, Providence

The test for voidness of a contract set forth in the opinion is whether the contract has a tendency to "mischievous consequence." In other words, actual mischief need not be a tendency toward mischief.

Within the last year, I was drafting a brief, including an argument that contracts, with an illegal object or purpose, are unenforceable. The deal being proffered by the adverse party did not pass the smell test and authority was required to allow the court to decline to enforce it. Research led to the very first reported decision of the Rhode Island Supreme Court, **Stoddard v. Martin**, 1 R.I. 1 (1828). The Court cited that case in ruling for my client. The Court's use of that case offered several lessons. That **Stoddard v. Martin** con-tinues to be cited[1] is not only evidence of the power of its original insight, but also of how of legal system works and grows.

As Oliver Wendell Holmes noted long ago, the life of the law has not been logic, it has been experience.[2] On one level, this means rulings have to be grounded in a realistic understanding of how people live. More deeply, it means the unfolding of ruling upon ruling allows experience to refine, or even overturn, the principles from prior cases.[3] In other words, the law is an unfolding story.[4]

It is much as Sam Gamgee and Frodo Baggins discuss as they reach the edge of Mordor, in *The Two Towers*, the second book of the Lord of the Rings trilogy. Sam and Frodo, having braved numerous adventures that we Tolkien mavens know well, and that would bore others to tears, are sitting chatting about old tales out of history.

Sam says, "Why, to think of it, we're in the same tale still! It's going on. Don't the great tales never end?" "No, they never end as tales," said Frodo. "But the people in them come, and go when their part's ended. Our part will end later, or sooner."[5]

Our present tale begins in 1825, when James DeWolf of Bristol, Rhode Island resigned his position as a United States Senator. A uniquely colorful figure, DeWolf was a privateer in the War of 1812 who went on to make a fortune in the slave trade, and, at one point, owned three sugar plantations in Cuba, a textile mill in Rhode Island and many other ventures. He was the Speaker of the Rhode Island House of Representatives, but gave that position up to seek national office. However, he stepped down without finishing his term. He later was re-elected to the Rhode Island House of Representatives.[6] Little is known of his reasoning in resigning the Senate seat (though some think it had to do with his involvement in the slave trade and the rising support for abolition among his constituents), but one account offers this speculation:

> But the slow progress of congressional legislation was distasteful to his active brain, his own ever-increasing business demanded more and more of his time, and he resigned his seat before his term had expired. Until his death he continued to represent Bristol in the Rhode Island Legislature.[7]

Whatever the reason, an election was held to pick his replacement. Asher Robbins ran against Elisha R. Potter and won, forty-three to thirty-six. Senate elections in those days, prior to the enactment of the 17th amendment in 1913, were conducted by the legislatures of the several states. In Rhode Island, that meant the bicameral legislature sitting jointly as the Grand Committee.[8] Robbins was a member of the Adams party, whereas Potter was a Federalist. This is all worth remembering today, not least because this election led to the decision of the Rhode Island Supreme Court in **Stoddard v. Martin**, which is a tale about the intersection of money and politics.

Evidently, Martin Stoddard and Wheeler Martin made a fifty dollar wager on whether Robbins or Potter would win. Both men wrote out checks for fifty dollars, payable to the other, and these checks were given to a stakeholder. Bear in mind, by some measures, the economic status of fifty dollars from 1825 would be $32,000 in current terms.[9] Robbins won the election, and Stoddard won the bet. He proceeded to Eagle Bank with his check and the cashier refused to pay on it. The decision does not reveal the basis of the cashier's refusal. Stoddard then made demand upon Martin and, not getting his satisfaction, sued on the bet. The case was tried before the Supreme Court, sitting with a jury. Rhode Island did not create what is now known as the Superior Court until 1905. The jury ruled that Stoddard had won the bet,

but the legal issue of the enforceability of the bet fell to the Court.

Neither Stoddard nor Martin were members of the legislature, and thus could not directly affect the outcome, though both were men of substance and, no doubt, influence in the community of that time. Wheeler Martin had been a justice of the Rhode Island Supreme Court during the period from 1819 to 1827.[10] He was chosen for the position by the Grand Committee, showing the level of influence he must have had with that body. Stoddard was a successful auctioneer and a brigadier general in command of the 2nd Brigade of the Rhode Island Militia.[11]

At that time, Rhode Island was still governed by the Colonial Charter of 1663, a system that held sway until the state first adopted a Constitution in 1843. Under that charter, only landowners with estates worth more than $134 were able to vote, the equivalent of almost $94,000 today.[12] Given those limitations on suffrage, both men would likely have known most, if not all, the members of the General Assembly. One gets a sense of that connectedness from the fact that Asher Robbins was for a time a partner with James DeWolf (yes, that James DeWolf) in the Arkwright Mill textile factory in Coventry, Rhode Island.[13]

The power of the General Assembly at that time was extraordinary. From the time of our independence from Britain through to the Constitution of 1843, the Rhode Island legislature held all the powers of both crown and parliament. It functioned as the judiciary, as well as the executive. The Governor was the titular head of government, but lacked any veto power.[14]

Interestingly, the dispute over the senatorial aspirations of Asher Robbins did not end with the litigation over the wager. How that played out sheds further light on the volatile nature of electoral politics in nineteenth century Rhode Island and the problems with direct election of senators.

In 1833, Robbins was re-elected by the legislature and then-Governor Lemuel Arnold issued him the appropriate credentials. A new Rhode Island legislature was elected before Robbins took his seat, and they claimed to void the Robbins election, and elected Elisha Potter. The new governor, John Brown Francis, issued a separate set of credentials to Potter. Both men

presented their credentials to the United States Senate, which ultimately adjudicated the dispute in favor of Robbins, though the Senate voted to pay Potter a modest *per diem* for his traveling expenses.[15] The dispute centered on whether an 1832 legislative attempt to amend the Royal Charter, allowing officials to remain in office until new officials take over even if that kept them in for more than one year, was valid. The Senate found it to be valid. Robbins remained in the Senate until 1839 and later became the postmaster of Newport, Rhode Island. Potter returned to the Rhode Island legislature, where he served until his death in 1835.[16]

Before even looking at our Supreme Court's first decision itself, the fact of its publication is in itself noteworthy. In 1827, the year before this decision was rendered, Rhode Island enacted a major reform of the judiciary. The number of Supreme Court justices was reduced from five to three, and their salaries more than doubled, in the hope of attracting jurists with legal training and significant experience. Chief Justice Samuel Eddy, the author of the opinion in **Stoddard v. Martin**, was a former Congressman, former clerk to the Supreme Court and distinguished advocate whose selection flowed from the new reform. He replaced Isaac Wilbour, a farmer and politician.[17] The opinion is noteworthy as well, in this context, for the reliance upon and citation of prior legal decisions. Before 1827, and even for some time thereafter, decisions generally lacked citations.[18] Indeed, the first volume of Rhode Island Reports did not appear until 1847, after the state finally adopted a Constitution in 1843. So, even finding decisions upon which to rely would have been difficult.[19]

The Court begins its decision by regretting that there are some wagers considered legal and enforceable under common law. Accepting that some are legal, the Court held that it declined to enforce particular wagers if they are against public policy due to their subject matter, are of immoral tendency, affecting the feelings, interest or character of a third party, or disturb the peace of society.[20] The Court went on to observe that the wager before it gave the parties a pecuniary interest in achieving or preventing the election of a particular candidate. The opinion focuses, at this point, specifically on whether that pecuniary interest created any "hazard" that that

Bar and RWU Law Mediation Clinic and VLP Lawyer Provide Successful Client Outcome

Volunteer Lawyer Program member Deborah Gonzalez, Esq. helped bring client Raydeana Roderick-Akinbola to a peaceful and successful divorce settlement.

Raydeana Roderick-Akinbola contacted the Volunteer Lawyer Program (VLP) for assistance. She was also interested in attending the fall 2013 Mediation Clinic offered in conjunction with the Roger Williams University School of Law. Given her willingness to contact her spouse to participate in mediation, this couple successfully reached an agreement. Raydeana was then placed with VLP Attorney Deborah Gonzalez of Gonzalez Law Offices, Inc., in East Providence to finalize her family law matter. Raydeana was very pleased with the mediation process and representation noting, "The mediators and my attorney made a tough situation much less stressful, and I hope that you will let all involved in these programs know of my appreciation." To learn more about the rewarding opportunities offered through the Bar's Public Services, including the Lawyer Referral Service and the Volunteer Lawyer Program, please contact Susan Fontaine at 401-421-7799 or email sfontaine@ribar.com.

individual interest would result in a neglect of the common good or, as the Court phrased it, "the moral duties which bind man to man."[21]

The test for voidness of a contract set forth in the opinion is whether the contract has a *tendency* (the court itself italicized the word) to "mischievous consequence."[22] In other words, actual mischief need not be shown, but simply a tendency toward mischief. Such a potential or tendency was found by the court in two distinct forms.

First, the parties themselves will be presumed to have a strong incentive to exert improper influence on the members of the legislature to produce the desired outcome. Recall that only a few votes separated the winner and loser. The fact that the parties were not themselves legislators is explicitly dismissed as a factor that might legitimize the wager. Instead, the Court alludes to the power and influence of the parties and finds that denying their ability to influence the outcome of the election is "false," "absurd," and "what a moment's reflection must convince every one is not and cannot be true."[23] Stated otherwise, the bet is unenforceable because it would tend to cause Stoddard and Martin to act immorally, and this effect on them, personally, is a reason to void the bet, or at least to decline to use the power of the Court to enforce it. The Court has absolutely no doubt, as seen in its strong language, that the parties both could and would try to influence the outcome, and that such an attempt corrupts the men exerting the influence.

The consequences to particular individuals, as important as those consequences are, are deemed far less significant and ominous than the impact of such wagers, and the attendant conduct, on society at large. The possible nefarious actions open to Stoddard and Martin have a "pernicious bearing on our free institutions."[24] In fact, that tendency was noted to be especially pertinent in the Rhode Island of that day "where all our officers, judicial as well as others, are of annual appointment."[25]

The crescendo of these several pages of impassioned jurisprudence on the impropriety of such a wager is here:

> The strong hold of freedom in our country, is in the freedom of our elections. Destroy this, and our freedom is at an end. Whatever tends to this destruction, in the remotest degree, ought to be resisted here, with a determination that admits of no compromise. Wagers on elections, whether by the people or the general assembly, have this tendency directly. And this tendency in a given case, is in proportion to the interest at stake, and the influence of the parties to the wager. To say that a wager can have no influence in such a case, is to say, either that man has ceased to regard his own interest, or that interest has ceased to influence man's conduct. This interest and influence may result in the grossest corruption. It is enough for the decision of this case to show, that a wager on an election has this tendency. Can it be necessary to ask, whether in a free country, a contract which has a tendency to destroy freedom of elections, and produce corruption, is consistent with sound policy?[26]

Our law and our politics have evolved since this first decision, though many will see consistent threads that still appear in the fabric of Rhode Island today. The lesson that the law is, in a sense, a living organism that grows and changes yet draws strength from its roots, is worth

pondering. Certainly it is a counterpoint to the notion that the law is a dead letter and not only cannot evolve but should not.[27] Helping to craft that change is one of the rewards of our profession, and a responsibility of which we ought to be mindful.

ENDNOTES

1 ***See, e.g., Vogel v. Catala**, 63 A.3d 519 (R.I. 2013), fn. 1, **Flagg v. Gilpin**, 19 A. 1084 (R.I. 1890). Zurier, Samuel D.*, Will a Rhode Island Common Law Court Enforce a Gambling Contract? How Much Do You Want to Bet? *R.I. Bar Journal, Sept./Oct. 06:21(55)*

2 *Holmes, Jr., Oliver Wendell*, The Common Law, *1881, p.5*

3 *Cf., Cardozo, Benjamin*, The Nature of the Judicial Process, *Yale 1921.*

4 ***See**, for example, the historical analysis in **Williamson v. General Finance Corp.**, 210 A.2d 61, 63 (R.I. 1965) to establish that pleadings cannot be in Latin, relying on 4 George II, chap. 26, made a part of the law of this state by virtue of G.L. 1956, § 43-3-1, which provides that: 'In all cases in which provision is not made herein, such English statutes, introduced before the Declaration of Independence, which have continued to be practiced under as in force in this state, shall be deemed and taken as a part of the common law thereof, and remain in force until otherwise specially provided.'*

5 *Tolkien, J.R.R.*, The Two Towers, *p. 379.*

6 *Biographical Directory of the United States Congress: http://bioguide.congress.gov/scripts/biodisplay.pl?index=D000295.*

7 *Munro, Wilfred H.*, The History of Bristol, Rhode Island: The story of the Mount Hope lands from the visit of the Northmen to the present time. *Providence, 1880.*

8 *R.I. Gen. Laws § 22-5-1.*

9 *http://www.measuringworth.com/uscompare/relativevalue.php.*

10 *Nor would he be the last judge to bet on an election. Cf., Davies, Ross E.*, Wager of Justice: The Betting Commission and the 1984 Campaign, *14 Green Bag 2d 89 (Autumn 2010) regarding Chief Justice Rehnquist's enthusiasm for small bets, including on elections, and the need for recusal thereafter.*

11 *Stoddard, Francis Russell Jr.*, The Stoddard Family *(Trow Press 1912), p. 73.*

12 *http://www.measuringworth.com/uscompare/relativevalue.php.*

13 *Coventry.patch.com/groups/around-town/p/Coventry-roots-arkwright.*

14 ***In re** Advisory Opinion to the Governor, 732 A.2d 55 (R.I. 1999).*

15 *www.senate.gov/artandhistory/history/common/contested_elections/014Potter_Robbins.htm.*

16 *The passions raised by the issue of suffrage, and the denial of suffrage to an increasing portion of the rapidly industrializing state, led to the Dorr Rebellion in 1841, and the purported adoption of a People's Constitution that proffered far broader suffrage. Cf., **Luther v. Borden**, 48 U.S. 1 (1848).*

17 *Conley, Patrick T., editor*, Liberty and Justice: A History of Law and Lawyers in Rhode Island, 1636-1998 *(Rhode Island Publications Society 1998), p. 295*

18 ***See** Conley, op. cit., p. 296*

19 ***Ibid.***

20 ***Id.** at 2.*

21 ***Id.** at 4.*

22 ***Id.** at 4.*

23 ***Id.** at 4.*

24 ***Id.** at 4.*

25 ***Id.** at 7.*

26 ***Id.** at 6.*

27 *Cf.*, e.g., *Justice Thomas's dissent in **Brown v. Entertainment Merchants Association**, 564 U.S. – (2011) to the effect that minors do not have First Amendment rights because they didn't have them in the 18th century.* ❖

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COMMENTARY

Separation in Rhode Island: Church from State and Fact from Fiction

Patrick T. Conley, Esq.
Historian Laureate of Rhode Island

…separation, not to free civil society from religious influences and expressions of religious faith, but to present the state, as it did elsewhere and nearly everywhere, from interfering with a person's private religious belief.

Nearly everyone believes Rhode Island's famed colonial charter, whose 350th anniversary we celebrated in 2013, proclaimed religious liberty for the inhabitants of our micro-paradise and completely separated the church from the state. That belief is only a half-truth. Freedom of worship, or "soul liberty," as Roger Williams called it, and "full liberty in religious concernments" as Dr. John Clarke wrote it, has never been denied to Rhode Islanders by government. Nor was there ever an established (i.e., tax supported) religious sect herein, an inequality afflicting our sister colonies. These facts are great achievements to celebrate. They are Rhode Island's gifts to America and, indeed, the world.

However, strict separation of church and state, or religion and government, is a different story. During the controversy over the Cranston West prayer banner, the Woonsocket military memorial, and the cross exhorting God to bless America placed on the median of Providence's Pleasant Valley Parkway, opponents claimed such religious displays are unique departures from Rhode Island's unbroken 350-year tradition of separation. Such assertions are not only wrong, they are ironic when one considers the following facts.

Roger Williams and Dr. John Clarke sought separation, not to free civil society from religious influences and expressions of religious faith, but to present the state, as it did elsewhere and nearly everywhere, from interfering with a person's private religious belief. In secular America this intention has been disregarded and reversed over the past three generations.

Indicative of how strongly Williams felt about state domination of the church, this polemical theologian asserted in one burst of vituperation that such a condition would render the church, "the garden and spouse of Christ, a filthy dunghill and whore-house of rotten and stinking whores and hypocrites." Williams's pungent prose was referring to those contemporary rulers who imposed religious conformity on their subjects. For Williams, "forced worship stinks in God's nostrils" because it is productive of persecution and religious wars. Obviously, he did not take the issue of separation lightly!

Have Rhode Islanders adhered to the teachings of their founders by keeping religion out of politics? Have they avoided what present-day jurists call entanglement? The simple answer is no. Most of the debates and the balloting resulting in Rhode Island's ratification of the federal Constitution, with its consequent admission to the Union as the 13th state, took place in Newport's Second Baptist Church, because the Colony House could not accommodate both the delegates to the ratifying convention and the interested citizenry. The ratification of Rhode Island's first, operative, written Constitution, produced in the aftermath of the Dorr Rebellion, that governed the state from 1843 to 1986, occurred in East Greenwich, inside that town's Methodist church, because the Kent County Statehouse could not accommodate the participants and spectators. Thus, two of the three most significant political events in Rhode Island history, the ratification of the Declaration of Independence in Newport's Colony House on July 19, 1776 being the third, took place in churches.

A history of East Greenwich, where a religious roadside memorial caused some stir a few years back, reveals its county statehouse and courthouse (Rhode Island had five capitals until 1854) hosted religious services for local Baptists and Methodists before those sects built their churches. So, in November, 1842, the Methodists merely returned the favor by hosting the state constitutional convention. Religious services and sermons were also delivered in many, if not all, of Rhode Island's local townhouses. During the 1830s, Providence city authorities generously allowed Catholics the use of the municipal Town House, at what is now the corner of Benefit and College Streets, for masses and lectures. In fact, Rhode Island's first public mass was celebrated for French troops in Newport's Colony House in 1780 while our French allies occupied that town during the American Revolution.

Another rebuke to the notion of complete separation is the Rhode Island state flag and the state motto, "Hope." The inspiration for both is the Bible. In St. Paul's *Epistle to the Hebrews*, 6:18-19 we find the phrase, "Which

hope we have as an anchor of the soul." In displaying both the anchor and our motto, the official state flag flies in the face of separation.

Despite more than three hundred years of non-controversial and relatively innocuous contact by religion with the state, over the past half century, Rhode Island has been in the thick of the developing church-state thicket.

There is a tinge of irony to the fact that Rhode Island, the state that pioneered religious liberty and church-state separation in America, has become a leading source of major U.S. Supreme Court decisions relative to the Establishment Clause of the First Amendment. A fundamental reason for this seeming anomaly is that the state's predominantly Catholic population and certain evangelical sects have fostered an interpretation of establishment at variance with the prevailing Supreme Court view. The high court has generally supported a wall of strict separation between church and state, prohibiting any direct governmental assistance to any religion. The Catholic view accepts government aid if it is evenhanded and does not support or advance any religious sect at the expense of another. Curiously, one of the most persuasive, succinct historical defenses of that position has been written by a Rhode Islander about a Rhode Islander.

Professor Mark DeWolfe Howe, late professor of law at Harvard, secretary to Justice Oliver Wendell Holmes, and author of *Cases on Church and State in the United States*, wrote a book entitled *The Garden and the Wilderness: Religion and Government in American Constitutional History* (1965), a title derived from a metaphor of Roger Williams. Here Howe, a scholar of Bristol ancestry, demonstrated that the "wall of separation" phrase employed by the modern Supreme Court originated not with Jefferson, but with Williams. However, said Howe, "when the imagination of Roger Williams built the wall of separation, it was not because he was fearful that without such a barrier the arm of the church would extend its reach. It was, rather, the dread of worldly corruptions which might consume the churches if sturdy fences against the wilderness were not maintained." Howe contended that "there is a theological theory of disestablishment traceable to Roger Williams," and "the Court, in its role as

historian, has erred in disregarding the theological roots of the American principle of separation" in favor of Jefferson's secular view.

Professor Howe further stated the First Amendment's prohibitions at the time of their promulgation "were generally understood to be more the expression of Roger Williams' philosophy than that of Jefferson's." The conclusion Howe reaches is that the First Amendment was designed to prevent government interference with religion and not to prevent "government advancement" of religion generally. If Howe is correct, then the posture assumed by Rhode Island in the three major establishment cases that it has sent to the Supreme Court since 1971 does no violence to Williams' position on the relation of church and state.

During the tumultuous and ideologically divisive 1960s, the liberal Warren Court rendered several rulings on the relationship between religion and education that ran counter to the "government advancement" view described by Howe. In Rhode Island, most legislative efforts to aid the state's financially-troubled Catholic schools were thwarted by this Court's new and expansive view of the First Amendment's Establishment clause. In 1969, the state legislature passed an act to supplement the salaries of teachers in parochial elementary schools. After an American Civil Liberties Union (ACLU) challenge, the U.S. Supreme Court, in the landmark case of **DiCenso v. Robinson** (1971), struck down the measure because it provided "substantial support for a religious enterprise" causing "an excessive governmental entanglement with religion." Shortly thereafter, the federal District Court for Rhode Island invalidated a state school-bus law requiring towns to bus private-school pupils beyond town boundaries if necessary. This decision prompted the resourceful legislature to create regional bus districts to circumvent the Court's ruling.

The next church-state issue to pierce the thin veil of local ecumenism involved the use of public funds for religious displays. Here Rhode Island produced another nationally significant case in **Lynch v. Donnelly**, 465 U.S. 668 (1984). In this confrontation, the ACLU challenged the City of Pawtucket's inclusion of a Nativity scene in its Christmas display. In a 5-to-4 decision, Chief Justice Warren Burger, speaking for the majority,

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dismissed the complaint in part because "it has never been thought either possible or desirable to enforce a regime of total separation" of church and state. The Court majority felt that in the predominantly secular context of Pawtucket's display and the primary purpose and effect of the Nativity scene were not to promote religion, but only to acknowledge the spirit of the holiday season. The decision continues to generate interest and has prompted a book-length analysis entitled *The Christ Child Goes to Court* by Wayne R. Swanson, professor and chairman of the Government Department at Connecticut College.

The final major establishment case, **Lee v. Weisman**, 505 U.S. 577 (1992), developed from a graduation ceremony at Nathan Bishop Middle School in Providence at which a student, Weisman, objected to school principal Lee's invitation to clergymen, one of whom was Rabbi Leslie Gutterman, to give the invocation and benediction. The Supreme Court ruled, in a 5-to-4 decision, that a school requirement that a student stand and remain silent during a "nonsectarian" prayer at the graduation exercise in a public school violated the Establishment Clause, even though attendance at the ceremony was completely voluntary. The student, said the Court, should not be required to give up her attendance at the graduation, "an important event in her life, in order to avoid unwanted exposure to religion."

Those who deny the existence of God and wish to eradicate religion and its symbols from civil society are free, as Americans, to make the attempt. Godspeed to their efforts. But they cannot use history to validate their position.

Clio, the muse of History and daughter of Zeus, was a goddess held in high esteem by the Greeks. Like Williams and Clarke, she would be offended to be misinterpreted and used, like the drunk uses a lamppost, more for support than for light. As the English poet Alexander Pope said, "A little learning is a dangerous thing; drink deep or taste not of the Pierian spring." Fortunately, Pope also had an antidote for historical mistakes. He proclaimed it in his brilliant *Essay on Criticism*: "To err is human, to forgive divine." ❖

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BOOK REVIEW

The Smartest Kids in the World
by Amanda Ripley

Anthony F. Cottone, Esq.
Sole Practitioner & R.I. Department of Education Legal Counsel[1]

Why were the public schools in Sallisaw not meeting the needs, not only of kids like Kim, but of so many other students, while public schools in other countries were doing so much better?

When I was a kid, and the conversation around the dinner table got heated, my Irish-Catholic grandmother used to repeat the old adage that politics and religion, the usual focus of meal time acrimony, were not fit topics for polite society. If Gram were alive today, she no doubt would add public education to her list, now a thoroughly politicized topic, and, at least in my recent experience, far more likely to generate heat, if no more light, than religion.

Amanda Ripley, an education reporter for *Time* and other magazines, must have had an Irish grandmother. In *The Smartest Kids in the World* (Simon & Schuster 2013), Ripley nicely side-steps the familiar debates roiling public education in the United States, debates which have become, in her words, "so nasty, provincial, and redundant that they no longer led anywhere worth going,"[2] and deftly shifts the focus to actual students. She tells the story of three American foreign-exchange students in three different countries, Finland, Korea and Poland, which, while dissimilar in most respects, have one thing in common: students who vastly outperform their American counterparts.

The international rankings deconstructed by Ripley are the results of a test designed by the Program for International Assessment (PISA). The first PISA test was given in 2000 to a third of a million teenagers across forty-three countries. The amount of participating countries has increased, but, over the years, Finland has remained number one. The United States, on the other hand, has remained "somewhere above Greece and below Canada, a middling performance," at least in Ripley's opinion.[3]

Riley tells the stories of three students, including Kim, a high-school freshman from Sallisaw, Oklahoma, a rural town of 9,000, still reeling from the 2008 financial downturn. Despite her academic success, Kim, like the Joad family in *The Grapes of Wrath* (also from Sallisaw), was not comfortable in her hometown. So, after lobbying Mom and raising much of the money ($10,000) herself, she arranged through American Field Service to spend her junior year of high school in Finland, which, in Kim's imagination, was a "a snow-castle country with white knights and strong coffee," where the people "liked heavy metal music and had a dry sense of humor," and where she could find "the smartest kids in the world."[4]

The reader is left to ponder why the public schools in Oklahoma so utterly failed to engage an intellectually curious student like Kim. After all, as Ripley observes, "the schools in Sallisaw were considered just fine, not the best, nor the worst."[5] Indeed, "Oklahoma, like the rest of America, had been trying to fix its schools for a long time," lowering the student-teacher ratio by hiring thousands of new teachers and teachers' aides, and in the process, more than doubling the amount of money it spent per student from 1969 to 2007.[6] In fact, as Ripley reports, "by 2011, over half the state budget went to education."[7]

Despite the money spent, "most of Oklahoma's kids still could not demonstrate competency in math, and as Ripley notes, in Sallisaw, nearly one in four students failed to graduate high school within four years, and of those who did and went to college, half "were promptly placed into remedial classes…paying good money for college, often in the form of student loans, [without] getting college credit."[8]

Why the profound disconnect? Why were the public schools in Sallisaw not meeting the needs, not only of kids like Kim, but of so many other students, while public schools in other countries were doing so much better? One of the answers may lie in testing.

In the late 1980's, Oklahoma passed a law requiring students to take a test to graduate from high school, the kind of test that, Ripley notes, was "standard in countries that performed at the top of the world on the PISA test."[9] In fact, Ripley reports that "teenagers from countries with these kinds of tests performed over sixteen points higher on the PISA than those countries without them."[10] Although students in the U.S. "take plenty of tests," Ripley contends that "for most of the kids [in the U.S.], standardized tests were frequent, unsophisticated, and utterly irrelevant to their lives."[11] On the other hand, Ripley claims that "matriculation exams like Finland's helped inject drive into

education systems—creating a bright finish line for kids and schools to work toward."[12]

Many rank and file educators in the U.S. don't see the lack of matriculation exams as a problem. According to Scott Farmer, Sallisaw's $100,000 per year superintendent of schools, Sallisaw's High School's biggest challenge was "parental involvement."[13] Yet, the statistics do not appear to support the hypothesis. If anything, parents seemed more involved in recent years.[14] In fact, according to Ripley, recent data has revealed "a mysterious dynamic: *volunteering in children's schools and attending school events seemed to have little effect on how much the kids learned*."[15] (emphasis added). As Ripley notes, although American parents, "dutifully sold cupcakes at the bake sales and helped coach the soccer teams," and "doled out praise and trophies at a rate unmatched in other countries,"[16] they were less likely to read to their children weekly or daily, discuss ideas at the dinner table, or even read for pleasure themselves at home, activities which are proven to improve a child's academic performance.[17]

Ernie Martens, Sallisaw's High School principal for over a decade, claimed that the real problem was the unrealistically high expectations of "politicians and so-called reformers."[18] According to Martens, "it was all well and good to talk about high expectations in political speeches, but he lived in the real world, where "some mothers thought breakfast was a bag of potato chips, and some fathers hid methamphetamines in the backyard barbecue."[19] Ripley makes the point that although Superintendent Farmer and Principal Martens had different narratives to explain the cause of the problem, "they were both looking in the same direction. Neither saw education itself as the primary problem *or the main solution*."[20] (emphasis added)

Compare the approach of the educators in Sallisaw with that of a Finnish teacher in a school just outside Helsinki, where a typical classroom included students from a variety of countries, many recent immigrants struggling to scratch out a living. When asked about his students, the Finnish teacher "proudly reported that he had kids from nine different countries that year, including China, Somalia, Russia, and Kosovo. Most had single parents. Beyond that, he was reluc-

tant to speculate."[21] "'I don't want to think about their backgrounds too much," he said.[22] Ripley observed, "he seemed acutely aware of the effect that expectations could have on his teaching. Empathy for kids' home lives could strip rigor from his classroom."[23]

There were other ways Finland's approach to education differed from the approach in the U.S., and it turns out many of these differences were shared by other high-performing countries. For example, in Finland, sports was something one did away from school, unlike the "unholy alliance between school and sports" in the U.S., which, Ripley contends, "sent a message that what mattered, what really led to greatness, had little to do with what happened in the classroom."[24] The biggest difference, however, may be in the quality of the teachers. Although Kim's teachers in both Finland and the U.S. were members of labor unions which "held a lot of power,"[25] and teachers "rarely got fired,"[26] that's where the similarities ended. In Finland, all education schools were extremely selective, "on the order of MIT," and once they were accepted, teacher training was extremely rigorous.[27] As a result of all this selectivity and rigor, "Finnish teachers were held in extremely high regard, not only by their students, but by the public at large."[28]

In the United States, on the other hand, "we do not expect our teachers to be the best and brightest of their generation. We told them so in a thousand different ways, and the messaging started the day they went to college."[29] "In other words," as Ripley notes, "to educate our children, we invited anyone, no matter how poorly educated they were, to give it a try."[30]

Significantly, Finland's teachers weren't always so well-trained. As Ripley notes, "Finland's landscape used to be littered with small teaching colleges of varying quality, just like in the United States,"[31] adding that "the first phase of reforms were painful, top-down, accountability-based measures."[32] As Ripley notes, "Finland, it turns out, had its own No-Child-Left-Behind moment,"[33] but, as a result, in the 1980's and 1990's, something magnificent happened. Finland evolved to an entirely new state, unrealized in almost any country in the world. It happened slowly, partly by accident, but it explained more about Finland's success than almost anything else. With the new higher standards and more rigor-

Kent County Bar Association Annual Meeting

At the Kent County Bar Association's (KCBA) Annual Meeting, three individuals were honored with awards. l-r: Gregory S. Inman, Esq., KCBA President; Peter D. Nolan, Esq., KCBA Lawyer Lifetime Achievement Award winner; Erin P. Lynch, Esq., KCBA Lawyer of the Year Award winner; Ed Salabert, KCBA Court Employee of the Year Award winner; Kerry I. Rafanelli, Esq., Santa Claus; and Patrick J. Sullivan, Esq., KCBA Board Member.

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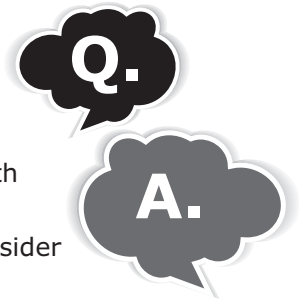

Your Bar Association's new, voluntary, free list serve is now available for all actively practicing Rhode Island attorney members. To date, the list serve has over 375 members, with new sign-ups every day. With this momentum, and active participation on the rise, please consider joining today!

Having a Bar-wide list serve gives you immediate, 24/7, open-door access to the knowledge and experience of hundreds of Rhode Island lawyers, whether you are a solo practitioner or in a firm. If you have a question about matters relating to your practice of law, you can post the question on the List Serve, and it will be emailed to all list serve members. Any attorney who wishes to provide advice or guidance can (and hopefully will) quickly respond.

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ous teacher training in place, Finland's top-down, No-Child-Left-Behind-style mandates became unnecessary. More than that, they were a burden.[34]

Ripley can't answer "why that evolution never happened in the United States or in most other countries," or why so few had even tried? She does not mention many educational leaders by name, but singles out Rhode Island Education Commissioner Deborah Gist as one who had tried to raise teacher education standards.[35] Ripley reports that as the new education commissioner in Rhode Island, one of Deborah Gists's first acts was to raise the minimum test scores for teachers-to-be in 2009. At the time, Rhode Island allowed lower scores for teachers than almost any state in the nation. Gist was immediately attacked as elitist as were the reformers in Finland in the 1970's, and discriminatory, and the claim was made that she was going to cause a teacher shortage.[36] As it turns out, Gist did not back down, there was no teacher shortage, and Ripley reports that "three years after the changes went into effect, the percentage of minority students studying to be teachers actually increased.[37]

Conclusion

A recent reviewer of *Smartest Kids* makes the point that on occasion, Ripley "succeeds in making our own culture and our own choices seem alien," and suggests that "for all our griping about American education…we've got the schools we want."[38] The point seems lost on those who view change through an ideological prism, and falsely equate all efforts at reform with deregulation and privatization.

It certainly is true that change always involves risk. *Smartest Kids*, however, underscores a less obvious truism: standing still can be even riskier, especially when the world has moved on without you.

Seventy-five years ago, John Dewey made the point that reformers "should think in terms of Education itself, rather than in terms of some 'ism about education, even such an 'ism as progressivism."[39] *Smartest Kids* reminds us that it is possible to believe that charter schools have a role to play, while also agreeing with the late Tony Judt that "inequality is corrosive,"[40] and to see the need for some standardized testing, while at the same time sharing Maxine Greene's vision of education as "a carrier of dreams."[41]

ENDNOTES

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

2 ***Id.*** *at 201. Regrettably, the topic of public education—like health care, the economy, and so many other vital public policy issues—has been hijacked by ideologues who, while defying traditional political alignments, routinely cherry pick data and grossly distort each other's positions. Both sides tend to cynically frame the issues solely with reference to special interests. Thus, depending upon their ideological bias, the leading commentators either assume: (i) that anyone who favors any use of standardized testing and/or charter schools —in whatever context and no matter how limited their role—is an Ayn Rand acolyte seeking to profit from wide-spread privatization.* ***See, e.g.,*** *Diane Ravitch,* REIGN OF ERROR: THE HOAX OF THE PRIVATIZATION MOVEMENT AND THE DANGER TO AMERICA'S PUBLIC SCHOOLS *("The Hoax") (Knopf, 2013) and Pauline Lipman,* THE NEW POLITICAL ECONOMY OF URBAN EDUCATION: NEOLIBERALISM, RACE AND THE RIGHT TO THE CITY *(Routledge, 2011); or (ii) that all teachers are in lock-step with their labor unions and only care about keeping their jobs and ensuring that seniority controls all decisions affecting their compensation and job placement.* ***See, e.g.,*** *Terry M. Roe,* SPECIAL INTEREST: TEACHERS' UNIONS AND AMERICA'S PUBLIC SCHOOLS *(Brookings Institution Press, 2011) and Steven Brill,* CLASS WARFARE: INSIDE THE FIGHT TO FIX AMERICA'S SCHOOLS *("Class Warfare") (Simon & Schuster, 2011). Class Warfare and an earlier book by Ravitch—*THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM *(Basic Books, 2010)—have been reviewed by the author.* ***See*** *R.I.* BAR JOURNAL *(Mar./Apr., 2012) at 25.*

3 ***Id.*** *at 17. Nearly as distressing as the U.S. performance on the PISA test is the inability of leading commentators to agree on even the most basic conclusions to be gleaned from the pertinent data. Ravitch, for one, concludes that the claim that we are falling behind other nations, is "an old lament," which was "not true then" and "not true now."* ***See*** THE HOAX, *note 2,* ***supra,*** *at 64. Ravitch argues that the rankings do not accurately assess the effect of poverty, and that when one compares apples to apples, our students are "ahead of Finland!"* ***See*** SMARTEST KIDS *at 256, n. 4 (quoting Ravitch). Ripley calls the claim "nonsense," noting that although "PISA does not collect data on parental income per se," it does effectively account for poverty by what is referred to as the index of students' economic, social and cultural status ("ESCS").* ***Id.*** *According to Ripley, the PISA index "reveals that American kids who rank in the top quartile on the ESCS ranked eighteenth in math in 2009 compared to kids in the top quartile around the world."* ***Id.*** *She also notes that "in 2003, when math was the primary focus of the PISA test (which has a different subject-matter emphasis every three years), America's most advantaged kids ranked twenty-first."* ***Id.; see also*** CLASS WARFARE, *note 2,* ***supra*** *at 27 ("we're not just behind—way behind—countries like China, South Korea, and Japan, whose educated masses our media typically depict as threatening out competitiveness. We're also behind Estonia, Slovenia, Poland, Norway, New Zealand, Canada, and the Netherlands").*

4 ***Id.*** *at 39.*

5 ***Id.*** *at 27.*

6 ***Id.*** *at 33.*

7 ***Id.*** *at 33.*

8 ***Id.*** *at 36-37.*

9 *Id. at 33.*
10 *Id. at 156.*
11 *Id. at 57.*
12 *Id. at 155.*
13 *Id. at 35.*
14 *Id. at 36.*
15 *Id. at 108.*
16 *Id. at 110.*
17 *Id. at 110-12.*
18 *Id. at 36.*
19 *Id.*
20 *Id. at 36.*
21 *Id. at 162.*
22 *Id.*
23 *Id.*
24 *Id. at 119.*
25 *Id. at 84.*
26 *Id.*
27 *Id. at 85.*
28 *Id. at 85-86.*
29 *Id. at 93.*
30 *Id.*
31 *Id. at 88.*
32 *Id.*
33 *Id. at 89.*
34 *Id. at 89.*
35 *A glimpse at the index to* Smartest Kids *shows that Gist is mentioned with the same frequency as Michele Rhee, the former Superintendent of the Washington D,C. public school system, present head of StudentsFirst, and poster child for "school reform." **See generally** Michelle Rhee,* Radical: Fighting to Put Students First *(Harper 2013). In a recent piece in* The New York Review of Books*, Andrew Delbanco, Levi Professor in the Humanities at Columbia and the author, most recently, of* College: What it Was, Is, and Should Be *(Princeton University Press, 2012), considered Rhee's and Ravitch's recent books. **See** The New York Review of Books, Volume LX, No. 15, October 10, 2013 at 4. Delbanco concluded that "to read Rhee and Ravitch in sequence is like hearing a too-good-to-be true sales pitch [Rhee] followed by the report of an auditor [Ravitch] who discloses mistakes and outright falsehoods in the accounts of the firm that's trying to make the sale." **Id.** at 4. It is disappointing that a scholar of Delbanco's deservedly stellar reputation would unquestioningly buy-in to Ravitch's conclusions. **See, e.g.**, notes 4 and 9, **supra**. If nothing else, the invective leaking from Ravitch's prose and her sweeping, **ad hominem**, attacks should have tipped Delbanco off that he was in the hands of someone who was not nearly as disinterested as an auditor. Moreover, equating Rhee's book, which was more self-serving memoir than policy statement, with Ravitch's, which she wrote for the express purpose of responding to critics who found her to be "long on criticism but short on answers," The Hoax note 2, **supra**, at xii, was entirely unfair, as Delbanco should know.*
36 *Id.*
37 *Id. at 92.*
38 ***See** Annie Murphy Paul,* Likely to Succeed, The New York Times Book Review, *August 25, 2013 at 22.*
39 ***See** John Dewey,* Experience & Education, *Preface to, at 6 (Touchstone 1938).*
40 ***See** Tony Judt,* Ill Fares the Land *(Penguin Books, 2010) at 1, 21.*
41 ***See** Maxine Greene,* The Public and the Private Vision: A Search for America in Education and Literature *(New Press, 1965) at 162.* ❖

Lawyers on the Move

Richard P. D'Addario, Esq. was appointed Portsmouth, Rhode Island's first Municipal Court Judge. Richard also practices at the **Law Offices of Richard P. D'Addario**, 1 Courthouse Square, Newport, RI 02840.
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Patrick T. Conley, Esq. was recognized by the Rhode Island Senior Olympics as Outstanding Masters' Field Event Thrower of 2013 for earning All-American honors in the masters' javelin event, for men aged between 75 and 79, from the USA Track and Field Association.

Patricia M. French, Esq. is now Partner/Shareholder in the national Energy Practice Group of the law firm of **Bernstein Shur**, 100 Middle Street, Portland, ME 04101.
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Practical Risk Management

continued from page 11

imperative the reviewer maintain a good working relationship with the board throughout the process because, ultimately, the board will be responsible for implementing the recommended risk-management course of action. It can often be challenging to convince a board to take certain actions, particularly if the issue involves a legal nuance requiring spending money from an already strained budget.

Ideally, prior to the reviewer's initial meeting with the organization, the organization should provide a number of key documents to the reviewer including: articles of incorporation; bylaws; the most recent IRS 990 and Form 1023; foundation/endowment documentation; all policies and procedure manuals including the internal controls policy, investment policy, conflicts-of-interest policy, compensation policy, and gifts policy; claims/litigation history; insurance policies; material third-party contracts; audit reports; public filings; the governing documents from an umbrella organization, such as that organization's constitution or charter; and association membership agreements. A review of these documents allows the reviewer to obtain a basic understanding of the organization to make the most of the initial meeting and the review itself.

Operating much like a menu of options, this review process can be tailored to meet the needs of any nonprofit organization. In prioritizing the potential risk areas, some organizations may decide that all or most of the functional areas require review. Others may decide to focus on a discrete number of operations based on the risk of potential exposure.

Further, risk areas and concerns should be prioritized based on their potential scope (e.g., liability, loss, and cost), as well as their probability of occurrence or reoccurrence. For example, if the organization has several new board members, it is advisable to assess their knowledge concerning the scope of their responsibilities and obligations. Or, if the organization manages an endowment, it may be necessary to review the investment policy and related matters. Similarly, if an organization has employees, there may be a need to review the various relevant policies and procedures including the employee handbook, if there is one, and, if

not, assess whether there should be one.

The number and scope of people interviewed and the documents reviewed will vary from organization to organization. However, the review process will be beneficial only if the reviewer has a reasonable understanding of the organization, its policies, practices, and personnel. Additionally, this process may be as formal or as informal, as necessary. Likewise, status reports on the progress made in identifying and resolving areas of risk may be written or oral. It is prudent to limit written confirmations of identified and implemented risk mitigation measures. The best practice is to factually state the findings and identify relevant best practices, or other references or observations, for the organization's consideration. If requested, the reviewer can provide training or related assistance for flagged/vulnerable areas or identify other persons or organizations that can provide such training.

The risk assessment and review phases are also excellent education and training opportunities. Indeed, during the course of the review, the organization may be able to make quick fixes to a particular policy or practice, thereby avoiding future problems.

Finally, depending upon the scope of the risk assessment, once areas for improvement are identified with the assistance of the reviewer, the organization should consider preparing a corrective action plan. This plan should appropriately identify those responsible for its implementation, as well as the projected date of its enactment. This is especially helpful where board oversight is necessary for the corrective action. If the organization concludes it needs to take corrective action, especially if a plan is then prepared to that effect, it is imperative to implement the corrective action. It is one thing to have legal problems the board is unaware of. It is significantly more problematic, especially from a liability standpoint, if the board recognizes a problem and then fails to correct it.

Conclusion

Risk management is important for both nonprofit and for-profit organizations. It is essential that boards and their organizations adopt sound risk-management strategies to ensure the viability of their businesses. Nonprofits are especially vulnerable to legal and related risks which

can put their boards and organizations in jeopardy. Moreover, the laws governing nonprofits are often unclear and convoluted, especially as interpreted by non-legal professionals. To effectively identify, eliminate, or at least minimize risks, the organization should consider conducting a review process. This review process can be tailored to a particular organization's needs and accomplished relatively quickly and inexpensively. In short, employing a step-by-step process to proactively identify high risk areas and respective solutions can pay huge dividends in terms of cost avoidance for nonprofits.

ENDNOTES

1 *The authors acknowledge the assistance provided by Jamie J. Bachant, Esq. and Kennell M. Sambour, Esq.*

2 *A recent study by the Rhode Island Foundation, relying on data from Guidestar, reported over 7,300 Rhode Island nonprofits as of 2011. This represented an almost 100% increase in ten years.* JILL PFITZENMAYER & NEIL STEINBERG, RHODE ISLAND NONPROFITS AT-A-GLANCE, *1 (2011).*

3 *Tax exempt status can be lost for any number of reasons: e.g., bylaws contain a purpose inconsistent with that stated in the articles, improper political activity, excessive compensation and benefits for directors and officers, excessive unrelated income, excessive fundraising costs and conflicts of interest among board members, to name a few. The IRS, in particular, has broad power to audit nonprofits which makes the 990 even more important in terms of ensuring accuracy and completeness. The Rhode Island Attorney General and the Department of Business Regulation have similar investigatory powers.*

4 PFITZENMAYER & STEINBERG, ***supra*** *note 2, at 8-13.*

5 NONPROFIT GOVERNANCE AND MANAGEMENT, *69 (Judith Cion et al. eds., 3d ed. 2011).*

6 *Based on the literature, and the authors' experience, the following are the major risk areas nonprofits face: accounting procedures, maintaining IRS exemption, political activity, fundraising, grant programs, excess compensation and benefits, corporate governance practices, insurance, employee relations and crisis management/business continuity planning. This is a pretty standard and obvious list given that it reflects the main functional and operational areas for many nonprofits.*

7 *The Rhode Island's Nonprofit Corporations Act contains the starting point for any understanding of the Rhode Island requirements for nonprofits,* R.I. GEN. LAWS §§ 7-6-1 to -108. *Related major state statutory requirements are* R.I. GEN. LAWS, §§ 5-53.1-1 to -18, Solicitation by Charitable Organizations *and* R.I. GEN. LAWS §§ 18-12.1-4, *which governs the expenditure or accumulation of endowment funds. In addition, the Department of Business Regulation and Secretary of State, which have varying responsibilities, issue regulations which further flesh out the basic statutory requirements. Interestingly, Rhode Island's nonprofit statute is not as elaborate as many other states (e.g., New York and Delaware). This is deceptive, however, because the myriad of federal, other Rhode Island state and local laws and regulations, which apply to nonprofits, create a bewildering*

regulatory environment, especially for smaller Rhode Island nonprofits.

8 *§ 7-6-9. Rhode Island affords uncompensated directors, officers, volunteer, etc., more expansive protection from personal liability than many states ("malicious, willful or wanton misconduct"), which no doubt explains the dearth of litigation in this area. The statute carves out certain exceptions including conduct relating to the ownership or operation of a motor vehicle, apparently for volunteers only, but the language is unclear in this regard.* ***See also*** *the Volunteer Protection Act, 42 U.S.C. §§ 14501-05, which affords additional protection, albeit in some respects more limited than Rhode Island's statute. Exactly how the two statutory schemes work together is a question for another time.*

9 ***Hodge v. Osteopathic Gen. Hosp.****, 265 A.2d. 733 (R.I. 1970);* ***Glavin v. R.I. Hosp.****, 12 R.I. 411 (1879).*

10 *A nonprofit's assets can be liable in a wide array of circumstances, from breaching essential obligations (e.g., failure to have appropriate insurance coverage or failing to report to the Rhode Island Secretary of State that it operates with employees), to seemingly innocuous oversights (e.g., failure to obtain waiver releases for certain sponsored events).*

11 ***See e.g.****, 26 U.S.C. § 4958.*

12 ***See generally*** *§§ 18-12.1-1 to -10.*

13 *The list of persons who can sue nonprofits and their boards for a myriad of reasons includes the Rhode Island Attorney General, the corporation itself, other directors and officers, members, and third parties such as injured persons or vendors claiming breach of contract.* ❖

In Memoriam

Hon. Robert F. Arrigan
Robert F. Arrigan of Cliff Drive, former Chief Justice of the Rhode Island Workers' Compensation Court, passed away on December 26, 2013. He was the beloved husband of Joan C. Selwyn Arrigan for 51 years. Born in Providence, he was the son of the late Leo E. and Antoinette M. O'Connell Arrigan, Sr., and the beloved father of the late Robert Paul Arrigan; loving brother of Frederick J. Arrigan and his wife Frances of Warwick. Bob was a graduate of LaSalle Academy, Providence College; attended Annapolis (United States Naval Academy); U.S. Army Air Defense School; was a U.S. Army Reserves Captain; and received his J.D. from Georgetown University Law. He was admitted to practice in 1961. He was a Providence Municipal Court Judge from 1975-1978. Judge Arrigan was appointed Commissioner of the Workers' Compensation Commission by Governor J. Joseph Garrahy in 1978, Vice-Chairman in 1984. He spearheaded the effort to transform the Commission to a Court and was appointed its first Chief Judge by Governor Bruce Sundlun in 1991 where he served until his retirement in 2002. During the course of his service as Chief, Judge Arrigan worked to transform the workers' compensation system into an international model of efficiency. He worked closely with now Senator Whitehouse, the General Assembly and Governor Sundlun to overhaul the entire workers' compensation system in Rhode Island to include changes in the law, court procedures and the administration of justice and implemented these changes. This included the creation and oversight of the Workers' Compensation Advisory Council and the Workers' Compensation Medical Advisory Board. Chief Judge Arrigan taught a course in workers' compensation at Roger Williams University serving as a foundation for workers' compensation professionals in Rhode Island. He was actively involved in the International Association of Industrial Accident and Commissions, serving in many leadership roles until becoming its president. All his roles included educational meetings where workers' compensation professionals from around the world shared ideas on how to better serve injured workers and protect the best interest of their employers. He was a trustee of the International Workers Compensation College. Upon retirement, Chief Judge Arrigan served on the Board of the International Workers' Compensation Foundation, continuing to advance the study of the efficient administration of workers' compensation benefits, eventually receiving its lifetime achievement award. He was a member of the Knights of Malta. He and his wife, Joan, co-chaired the Rhode Island Chapter of the Sovereign Order of the Knights and Dames of Malta. Bob was a member of the Sons of Irish Kings, Friendly Sons of St. Patrick, The University Club, Jonathan's Landing Golf Club, and was a member of the Georgetown University Alumni. He was inducted into the LaSalle Academy Hall of Fame. He was past president of International Association of Industrial Accident Boards and Commissions.

Stephen R. Famiglietti, Esq.
Stephen R. Famiglietti, 66, of Lincoln passed away on December 29, 2013. Stephen was the husband of Susan Marcotte Famiglietti, and the son of Angela Nardolillo and the late Vittorio Rocco Famiglietti. He was the brother of Marianne Ferraresi of Wellington, Florida.

Thomas J. Grady, Esq.
Thomas J. Grady passed away on February 1, 2014. Tom previously served in the Army National Guard. Tom attended high school at La Salle Academy where he played hockey. He continued his schooling and love for hockey at Providence College, completing his education at Boston College Law School. Tom was an attorney and Managing Partner of Lenihan, Grady & Steele Law Offices and practiced law in Rhode Island for more than fifty years. He was a devoted member of the Church of the Immaculate Conception in Westerly. Thomas was a loyal friend to Bill W. for more than 40 years. One of his loves included the beautiful scene at Enders Island of Mystic as well as the Rhode Island coastline where he spent a lot of his time until the final weeks of his life. He will be greatly missed by his children Kara Grady Boudreau of Chestnut Hill, Mass, Thomas Grady, Jr. of Acton, Mass, Michael Grady of Westerly, RI, Amy Grady Cronk of San Jose, Cal, and Christopher Grady of Groton, Conn.

William L. Gaudreau, Esq.
William L. Gaudreau, 78, of Lincoln passed away on November 12, 2013. He was the beloved husband of Janice L. Fuller Gaudreau. Born in Providence, he was a son of the late Alfred and Eliza Higgins Gaudreau. He was an attorney for the Veterans Administration, Providence for 30 years, following which he was the in-house attorney for the Property Advisory Group for 10 years. He was a graduate of Providence College and Boston University Law School. Besides his wife, he is survived by his daughter Jennifer Kumar and her husband Christopher, his son, William L. Gaudreau, Jr., all of Lincoln, and a brother, Robert R. Gaudreau of Cranston.

Stephen T. Voccola, Esq.
Stephen T. Voccola, 57, passed away on December 10, 2013. He was the husband of Rebecca Lomberto Voccola. Born in Providence, a son of Barbara Caputo Voccola and the late Edward E. Voccola, Mr. Voccola was a personal injury attorney. He was an avid racquetball player, and he loved to work out with a trainer and was a former member of the Alpine Country Club. He lived for his family as a very devoted and loving father and husband. Besides his wife and mother, he is survived by his daughter Danielle Lacourse, his six year-old son Stephen E. Voccola, two sisters, Patricia A. Forte and Barbara A. Voccola, and two brothers, Edward R. Voccola and Paul A. Voccola.

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