Rhode Island Bar Journal

Rhode Island Bar Association Volume 63. Number 2. September/October 2014

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Bringing Universal Health Care to Rhode Island

An Extraordinary Life in the Law

Drunk Driving and Warrantless Blood Tests

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Front Cover Photograph – by Brian McDonald

UPPER NARRAGANSETT BAY FROM THE HEADQUARTERS BUILDING OF SAVE THE BAY

Save The Bay protects, restores and improves the ecological health of the Narragansett Bay region, including its watershed and adjacent coastal waters, through an ecosystem-based approach to environmental action; defends the right of the public to use and enjoy the Bay and its surrounding waters; and fosters an ethic of environmental stewardship among people who live in or visit the Narragansett Bay region.

RHODE ISLAND Bar Association
1898

RHODE ISLAND BAR ASSOCIATION LAWYER'S PLEDGE

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

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

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No News Isn't Good News

Bruce W. McIntyre, Esq.
President
Rhode Island Bar Association

The anxiety our legal clients feel when we don't communicate well leads them to assume things that are probably not true. And that is where trouble can begin.

When I entered my doctor's examining room for the first time more than 20 years ago, I turned to hang my jacket on the hook behind the door, and I saw the sign that read: "No news isn't good news. It is just no news."

I turned to ask my physician about it. She smiled and said, "Patients are anxious about laboratory test results. They make assumptions about the results if they do not hear back. That is when the system can fail badly. I encourage them to pick up the phone and call me."

I never forgot this exchange because it is applicable in so many areas of our life. The anxiety our legal clients feel when we don't communicate well leads them to assume things that are probably not true. And that is where trouble can begin.

More than 20 years as medical board disciplinary counsel taught me straightforward communication with patients forms the foundation of patient satisfaction with the care delivery experience.

It is the same with attorneys.

The 39th Annual Report of the Disciplinary Board of the Supreme Court of the State of Rhode Island underscores this problem. There are two tracts for resolution: Formal Complaints opened for Investigation; and informal intervention of staff attorneys who spend a lot of time speaking with complainants and the attorneys who are subject of the complaints. Underlying the vast majority of these complaints is poor communication. The clients just do not understand what is going on with their cases.

It isn't always easy. In this era of texting, email, and social media, clients can be too demanding. The demands are often at unrealistic times such as 2:00 a.m. Setting boundaries with clients is an important balance. It is critically important for clients to have a copy of documents and dates of key events. This is especially true when attorneys are billing against retainers.

New practitioners (and experienced attorneys may also benefit) can gain insights on the *minimal standards* for acceptable client communication by reading the Disciplinary Rules of Professional Conduct: Section and Comment on the Lawyer/Client Relationship Rule 1.4 *Communication*.

Managing a practice is not easy. The difficulty is compounded when clients are not kept reasonably informed of the case status and work performed.

I am reminded of a banner my former Health Director had in her office. It read: "Information is a resource, not a possession." Clearly, lawyers and clients can benefit if we all treat our communications accordingly. ❖

Slip Sliding Away: Environmental and Energy Law Committee on the Coast

All hands on deck – John Langlois, Marisa Desautel, Susan Forcier, Elliot Taubman, Jennifer Taubman, Nancy Davis, Wendy Waller, Travis McDermott, Jennifer Cervenka, Natasha King, Caroline Karp, Greg Schultz, and Margaret Bradley.

This June, at the Ocean Mist in Matunuck, one of RI's more visible examples of climate change and coastal erosion, over 30 attorneys attended the Bar's Environmental and Energy Law Committee's, *Planning for Another Sandy – Science and Law*, a free, 3-credit, CLE Seminar covering issues related to the effects of climate change, adaptation strategies, existing and proposed state standards for construction and reconstruction in coastal and other at risk areas, FEMA and insurance impacts, local zoning and planning, and taxes. Seminar speakers from state agencies, universities, and local government included: Executive Director of RI Coastal Resources Management Council Grover Fugate; RI Emergency Management Agency Representative Michelle Burnette; Environmental Advocate for the RI Attorney General's Office Gregory Schultz; RI State Geologist and URI Professor Emeritus Jon Boothroyd; and Professor of Environmental Science at Brown University Caroline Karp. To take advantage of excellent seminars and similar events, please consider joining the Bar's Environmental and Energy Law (EEL) Committee through the Members Only portal on the Bar's website.

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:
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telephone: **401-421-5740**

Not a Take-Home Exam: Changing Deposition Testimony Under Rule 30

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By insisting on compliance with Rule 30(e), with particular emphasis on the sufficiency of reasons given for each desired change, we can keep deposition transcripts candid, thereby reducing gamesmanship and, perhaps, even the duration of some cases.

We've all wished we could have do-overs in life – decisions made, things said – that we'd just as soon expunge from our personal record and pretend never happened. Depositions are no different. Often a witness, given sufficient time for reflection and consultation with counsel, wishes she or he could claw back an answer and take a legal mulligan. That's when Superior Court Rule of Civil Procedure 30(e) comes into play. It's the rule that allows a witness to read and sign her or his transcript, making changes as appropriate. The case law interpreting Rule 30, however, reveals depositions can be far less forgiving than weekend golf buddies.

What type of changes may be made to the transcript by the witness? How long afterward? And what justification must be offered? These are all addressed by Rule 30, the rule governing *post facto* tinkering with sworn deposition testimony. The rule states:

> [T]he deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them.[1]

Rule 30's basic tenet is that a deposition is intended as an extemporaneous and candid engine of truth-finding. As opposed to a carefully-crafted statement of counsel (read: interrogatory answers),[2] the cases uniformly read that even if a change is allowed, the witness's original answer remains part of the record from which she or he may be cross-examined at trial.[3] The ability to revise one's testimony under Rule 30 is not, however, unlimited, and is constrained by both time and content.

As to time, an errata sheet with the witness's desired changes must be filed within thirty days of the transcript's first availability from the stenographer. The thirty-day rule, added to federal Rule 30 in 1970,[4] is strictly construed. The clock begins to run from the date the transcript is available, not when it arrives in the mail.[5] Failure of the witness to make corrections within this thirty-day window results in a waiver of that right.[6]

But, is the witness limited to merely correcting transcription errors, or may she or he make substantive changes in her or his testimony? The answer is both the rule and case law permit changes in form *and substance*. Thus, theoretically at least, Rule 30 allows a witness to change an unequivocal yes answer to a no answer, or a traffic light's color from red to green. Subject, of course, to cross-examination at trial and possible resumption of the deposition to explore the witness's change of recollection.[7]

Even if the thirty-day correction window is satisfied, the rule requires each desired change is specified, *along with the reason for each change*. Several federal cases hold that errata to a deposition which change testimony without explanation are simply excludable.[8]

The question arises whether *any* reason offered is sufficient to justify changes. While some courts have determined the rule places no limitation on changes once some reason is proffered, the better rule – one apparently adopted in Rhode Island – is that unsatisfactory or conclusory reasons are not permitted to alter substantive testimony. As explained in Kent, Simpson, Flanders, Wallin, *Rhode Island Civil Procedure* § 30:10:

> In reviewing the transcript, the deponent may make changes in "form or substance" as provided in Rule 30(e). However, the deponent is required to sign a statement reciting the changes and the reasons for making them.… *Mere conclusions are not sufficient to justify changes*. The reasons given must be complete and must explain the necessity for the changes. The penalty for failure to provide *adequate* reason is having the changes disregarded. [emphasis added]

Presumably, "I thought of a better answer," is not deemed a sufficient reason. More likely, the courts will be looking for a credible assertion that the witness misheard or misunderstood the question. Not that the mere claim of witness confusion will carry the day. As explained by the Third Circuit Court of Appeals in **Martin v. Merrell Dow Pharmaceuticals, Inc.**, 851 F.2d 703, 706 (3d Cir. 1988), "We did not purport

to allow in all cases the simple expedient of claiming confusion to legitimate a proposed change. Indeed, we stated that the affiant must provide a *satisfactory* explanation for the later contradiction." [emphasis added]

Courts look with particular disfavor upon the use of fanciful errata to attempt to stave off summary judgment by creating a question of material fact. By analogy to sham affidavit analysis (whereby affidavits which flatly contradict deposition testimony—in the absence of confusion or some legitimate reason for having misspoken at the deposition—are held insufficient to create a *genuine* issue of material fact),[9] those decisions stress, "As a general proposition, a party may not generate from whole cloth a genuine issue of material fact (or eliminate the same) simply by re-tailoring sworn deposition testimony to his or her satisfaction."[10] As explained by the Third Circuit in **EBC, Inc. v. Clark Building Systems, Inc.**, 618 F.3d 253, 268 (3d Cir. 2010), "Preservation of the original testimony for impeachment at trial serves as cold comfort to the party that should have prevailed at summary judgment."

In recent experience, it appears that counsel have become more emboldened in having witnesses change their deposition testimony through errata sheets. I had occasion to test this in a medical malpractice case in which the defendant physician made a particularly poor showing at deposition, admitting much of plaintiff's *prima facie* case. His counsel neglected to request that his client read and sign during the deposition, but his request for this courtesy, conveyed to me days after the deposition, was not denied. In due course, I received the witness's signed errata sheet with several key answers changed from correct to incorrect and several explanations clearly rewritten or amplified after consultation with medical literature. Significantly, *no* reason was proffered for any change.

After waiting for the thirty-day window to unquestionably pass, we moved to strike and exclude all attempted transcript changes on the ground that all changes *and the reasons for making them* were not filed within Rule 30's permissible time period. The Superior Court motion judge denied my motion without prejudice, allowing the witness to file purported reasons for each desired change and observing, "Let's see what

they come up with and then you can renew your motion, if you want."

The reasons for each change eventually filed by the witness were that, in essence, the new answer was more accurate than the old one. In some cases, the reason consisted of yet further amplification of the original answer. In no case did the proffered reason explain the *necessity* for the change, such as misunderstanding the question or transcription error. At bottom, the reason for each change was little more than that the witness had come up with a better answer. Not surprisingly, where answers were absolutely reversed, for example, correct to incorrect, the motion judge granted our motion to strike and exclude, leaving the doctor with his original, honest answer.

Perhaps the pithiest explanation for why post-deposition changes should be disallowed absent compelling reasons, comes from the United States District Court for the Western District of Louisiana, which instructed:

> The rule cannot be interpreted to allow one to alter what was said under oath. If that were the case, one could merely answer the questions with no thought at all [and] then return home and plan artful responses. *Depositions differ from interrogatories in that regard. A deposition is not a take-home examination.* **Greenway v. International Paper Co.**, 144 F.R.D. 322, 325 (W.D. La. 1992) [emphasis added]

Witnesses will always want do-overs, and lawyers will always wish that they, rather than their clients, could answer certain difficult deposition questions. However, by insisting on compliance with Rule 30(e), with particular emphasis on the sufficiency of reasons given for each desired change, we can keep deposition transcripts candid, thereby reducing gamesmanship and, perhaps, even the duration of some cases.

ENDNOTES

1 *Superior Court Rule of Civil Procedure 30(e). The Superior Court rule tracks Federal Rule of Civil Procedure 30(e) in all material respects.*

2 ***Greenway v. Int'l Paper Co.**, 144 F.R.D. 322, 325 (W.D. La. 1992) ("Depositions differ from interrogatories…. A deposition is not a take home examination.").*

3 ***Reilly v. TXU Corp.**, 230 F.R.D. 486, 490-91 (N.D. Tex. 2005); **Foutz v. Town of Vinton**, 211 F.R.D. 293, 295 (W.D. Va. 2002); **Elwell v. Conair, Inc.** 145 F.Supp.2d 79, 87 (D.Me. 2001).*

4 *Committee Note to 1970 amendment of Fed.R.Civ. P. 30(e), 48 F.R.D 515.*

5 ***Parkland Venture, LLC v. City of Muskego***, *270 F.R.D. 439 (E.D. Wis. 2010)(Court reporter made transcript available for review in her office; rule does not require mailing of transcript).*
6 ***Griswold v. Fresenius USA, Inc.***, *978 F.Supp. 718 (N.D. Ohio 1997);* ***Rios v. Bigler,*** *67 F.3d 1543, 1552-1553, 33 Fed. R.Serv.3d, 216 (10th Cir. 1995).*
7 ***Willco Kuwait (Trading) v. DeSavery,*** *638 F.Supp. 846 (D.R.I. 1986), judgment aff'd in part, 843 F.2d 618 (1st Cir. 1988);* ***Erstad v. Curtis Bay Towing Co.,*** *28 F.R.D. 583 (D.Md. 1961);* ***Turchan v. Bailey Meter Co.,*** *21 F.R.D. 232 (D.Del. 1957);* ***Colin v. Thompson,*** *11 F.R.D. 194 (W.D. Mo. 1954);* ***DeSeversky v. Republic Aviation Corp.,*** *2 F.R.D. 113 (E.D.N.Y. 1941).*
8 ***Treat v. Tom Kelley Buick Pontiac GMC, Inc.,*** *710 F.Supp.2d (N.D. Ind. 2010), aff'd, 646 F.3d 487 (7th Cir. 2011);* ***Wyeth v. Lupin, Ltd.,*** *252 F.R.D.295 (D. Md. 2008);* ***Holland v. Cedar Creek Mining, Inc.,*** *198 F.R.D. 651 (S.D. W. Va. 2001);* ***Duff v. Lobdell-Emery Mfg. Co.,*** *926 F.Supp. 799 (N.D. Ind. 1996);* ***Architectural League of New York v. Bartos,*** *404 F. Supp. 304 (S.D.N.Y. 1975).*
9 ***Jiminiz v. All American Rathskeller, Inc.,*** *503 F.3d 247, 253 (3d Cir. 2007);* ***Martin v. Merrell Dow Pharmaceuticals, Inc.,*** *851 F.2d 703, 705-06 (3d Cir. 1988).*
10 ***EBC v. Clark Building Systems, Inc.,*** *618 F.3d 253, 268 (3d Cir. 2010), citing* ***Hambleton Bros. Lumber Co. v. Balkin Enterprises, Inc.*** *397 F.3d 1217, 1225 (9th Cir. 2005);* ***Combs v. Rockwell Int'l. Corp.*** *927 F.2d 486, 488-89 (9th Cir. 1991);* ***Garcia v. Pueblo Country Club,*** *299 F.3d 1233, 1242 n. 5 (10th Cir. 2002);* ***Thorn v. Sundstrand Aerospace Corp.,*** *207 F.3d 383, 389 (7th Cir. 2000).* ❖

Volunteer Lawyer Program Recognition Event Lauds Members' *Pro Bono* Service

Bar President J. Robert Weisberger applauded the work of the Bar's Volunteer Lawyer Program members and thanked the contributors who donated funds in memory of the late Attorney Steven Famiglietti.

Inspired by what they heard, event attendees and new Bar members Allison C. Belknap, Esq. and L. Gregory Abilheira, Esq. of Abilheira Law, LLC in Warren, signed on as members of, respectively, the Volunteer Lawyer Program and the U.S. Armed Forces Services Project.

On May 15th, Rhode Island Bar Association President J. Robert Weisberger welcomed members of the Bar's *pro bono* publico programs and other distinguished guests to the Bar's Volunteer Lawyer Program (VLP) Recognition event held at the Bar headquarters in Providence. The event recognized the excellent work of Bar members who provide their time and expertise to the Bar's public services programs and acknowledged and thanked Attorney Susan Famiglietti, her family, and friends, and the Batchelor Foundation for their generous contributions to the Volunteer Lawyer Program received in memory of the late Attorney Steven Famiglietti.

President Weisberger noted, "We greatly appreciate our volunteer attorneys' work providing clients in need of legal assistance through our Bar's Volunteer Lawyer Program, *Pro Bono* Program for the Elderly and our U.S. Armed Forces Legal Services Project. We are proud of our Bar Association's long history of public service and *pro bono* contributions. Our administration of the Bar's Volunteer Lawyer Program began in 1986, and it has grown exponentially from then until now. This growth is aided by our Bar staff, our longstanding collaboration with Rhode Island Legal Services, and our excellent working relationship with dedicated Legal Services attorneys and staff. Over the past 28 years, thousands of citizens have received legal assistance through the Bar's Volunteer Lawyer Program. Just since January, over 200 *pro bono* cases were placed due to our volunteer attorneys' generosity and dedication. Our Association is grateful for their public service commitment and ongoing support of the delivery of legal assistance to hundreds of citizens every year. Our volunteers provide justice and hope for so many who have nowhere else to turn."

Bar members who are not yet volunteering for the Bar's Public Services programs, are invited and encouraged to sign-up today. While the Bar has many great volunteers, the need is great, and demand still exceeds the supply of those who are currently serving in the Bar's outstanding *pro bono* programs. Members may receive more information and sign-up online in the Members Only section on the Bar's website or contact Public Services Director Susan Fontaine by telephone: (401) 421-5740 x 101 or email: sfontaine@ribar.com.

Susan J. Famiglietti, Esq. addressed the group of volunteer attorneys and state and federal judiciary members who attended the event.

Elizabeth W. Segovis, Esq. and Janet Gilligan, Esq. of Rhode Island Legal Services were among the many VLP volunteers and supporters celebrating.

Pull Together as a Team with OAR!

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

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

Choose your OAR option:

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

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

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

Newest Lively Experiment: Bringing Universal Health Care to Rhode Island

Samuel D. Zurier, Esq.
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Through its implementation of the Affordable Care Act, Rhode Island faces the challenges of funding the program when Federal subsidies run out, ensuring young healthy adults will enroll, and the opportunity to apply federal subsidies to public employee health benefit obligations.

The goal of universal health care in the US has been discussed for more than a century, during which time it has become an international norm. In 2010, Congress enacted the Patient Protection and Affordable Care Act (ACA)[1] in pursuit of that goal; however, the actual program it established will not be universal or uniform. Instead, each state will serve as a "laboratory of democracy,"[2] placing its own stamp on the ACA ranging from full support to determined opposition. Rhode Island has chosen to support the ACA, and has gotten off to a fast start through its successful introduction of the HealthSource RI exchange.

This article describes how the ACA has become an ongoing experiment in federalism, shaped principally by strategies some states have adopted to oppose the program. It then describes the opportunities Rhode Island has to make its health care program more affordable for both citizens and the State, and the way it can produce savings for other significant governmental obligations.

I. The Federalist Structure of the Affordable Care Act

As enacted by Congress, the ACA creates a path to universal health care combining private insurance and public assistance through insurance market reforms, federal subsidies and an individual mandate.

A. Insurance Market Reforms

Prior to the enactment of the ACA, many Americans could not obtain affordable insurance (or any insurance at all) because of restrictive underwriting practices by insurance companies. The ACA eliminated a number of these barriers through, among other things, the following national mandates:

- All individuals have the right to purchase any insurance policy, regardless of previous illness or current medical condition.[3]
- Insurers can differentiate rates only on the basis of age and smoking status, with cap on the variation of rates within these groups.[4]
- All insurance policies will include a set of federally-mandated "essential health benefits," supplemented by state mandates.[5]
- Insurers will rate all insurance plans in four categories, Bronze, Silver, Gold and Platinum, based on the amount of expected medical costs is covered in each policy.[6]
- Consumers will have access to a single outlet (or exchange), where they will have a choice of medical insurance policies that provide a wide range of available options including at least one each of Bronze, Silver, Gold and Platinum.[7] The exchanges will provide information about the scope of coverage, available subsidies, the cost of plans and an opportunity to enroll in the plans.[8]

B. Subsidies and Supports

The ACA as enacted contained the following two key subsidies to extend affordable federal health insurance to all Americans:

- For Americans near the poverty line, the ACA, as enacted by Congress, required state programs to provide Medicaid coverage to adults with incomes up to 133 percent of the federal poverty level, whereas many states now cover adults with children only if their income is considerably lower, and do not cover childless adults at all.[9]
- For Americans who do not qualify for free care, but whose incomes are up to 400% of the federal poverty threshold, the ACA provides a sliding scale of subsidies based on the cost of insurance and the individual's ability to pay.[10]

C. Mandated Coverage

The ACA requires all people who meet income criteria purchase a health insurance policy with specified minimum levels of coverage.[11] Taxpayers who can afford insurance but choose not to purchase pay a tax penalty.[12]

The individual mandate is critical to the viability of the ACA. When states have tried to regulate the private insurance market without requiring people to join, it can collapse under the principle of adverse selection. For example, New Jersey tried to regulate the direct purchase insurance market in 1993 by guaranteeing

access to all and requiring community rating, but without imposing a mandate.[13] Only those most in need of insurance joined, causing insurers to pay out recoveries in excess of premiums collected. Premiums rose by 155% from 1996-2000 for standard plans and by 48% for less expensive health maintenance organization plans. Enrollment declined by 41%, causing a death spiral of increasing premiums and declining enrollments.[14] Massachusetts faced the same issue when it instituted its health care program in 2006. During the first year, the enrolling population was especially old and prone to illness. Massachusetts imposed an individual mandate, which caused the risk pool to become more diverse and protected insurance rates from precipitous increases.[15]

II. Fragmenting the Vision: The Supreme Court Decision and State-Level Resistance

The ACA faced intense resistance in Congress, passing over the opposition of every Republican Party member of the House of Representatives[16] and the United States Senate.[17] Since its passage, the ACA's national program has been fragmented, first by the Supreme Court and then by resistance from individual states.

A. The Supreme Court Case

Once the President signed the ACA into law, 26 states filed or joined lawsuits to challenge its constitutionality.[18] In 2012, the Supreme Court's decision, **National Federation of Independent Business v. Sebelius**,[19] reviewed challenges to two essential components of the program, namely the individual mandate and the Medicaid expansion. Without undertaking a complete analysis of the decision,[20] two key features of the holding limited the ACA's national scope.

The Supreme Court upheld the ACA's individual mandate on the basis of Congressional power to tax, rather than as regulation under the Commerce Clause.[21] This decision to uphold the mandate was critical to ACA's survival, although its narrow view of Commerce Clause authority could doom future Congressional initiatives.

The Supreme Court also struck down the ACA's provision requiring states to expand Medicaid coverage to new classes to retain funding for existing Medicaid programs. According to the Court majority, Congress had authority under the Spending Clause to offer states the option of participating in new Medicaid programs; however, Congress could not coerce states into agreeing to pay for new programs (in this case expanding Medicaid) by removing federal funding for existing programs for states that chose not to expand.

The Supreme Court's Medicaid ruling opens a serious potential gap in the ACA's coverage. The ACA's private insurance subsidies will make health insurance affordable only for Americans with incomes at or above 133% of the federal poverty threshold. For non-disabled Americans with incomes at or below this threshold, existing Medicaid provides coverage principally only for the children and pregnant women, leaving adults in poverty without access to affordable health insurance.[22] As a result, the decision left in each state's hands the prerogative to opt out of universal coverage for a significant population.

B. Individual States' Shaping of the ACA

Since the Supreme Court decision, many of the 26 states that challenged the

law in court have carried out passive and active resistance to its implementation within their borders. Other states have modified its application to suit their priorities, and Vermont seeks to surpass the ACA's goals by enacting a single payer system.

1. Passive Resistance: Health Care Exchanges

As of July, 2013, sixteen states and the District of Columbia accepted federal grants to operate state-level insurance exchanges.[23] Eight other states are operating exchanges with varying levels of federal involvement, while 26 states – many of which filed lawsuits against the ACA – elected to have the federal government assume responsibility for the exchange.[24] For the most part, the state-run exchanges have met or exceeded participation and enrollment targets set by the federal government.[25] In contrast, the federal exchanges have encountered technical problems reducing enrollments to a trickle.[26] As a result, this decision has contributed to the delay of introduction of the ACA in many states.

2. Active Resistance, Part 1: Refusing Medicaid Expansion

As of August, 2013, 22 states agreed to the complete ACA expansion of Medicaid, and four others agreed to a partial expansion.[27] Four states have not made a decision, while 20 states have rejected Medicaid expansion entirely, many from the states that sued to block the ACA and/or refused to establish state-level exchanges.[28]

3. Active Resistance, Part 2: Legislation and Litigation to Undermine the ACA

After the Supreme Court decision, legislators in Ohio and Missouri introduced similar bills entitled the *Health Care Freedom Act 2.0* which seek to suspend the license of any insurance company accepting insurance subsidies for residents who cannot afford private insurance, claiming this follows from a loophole in the ACA's language.[29] In another case now on appeal after being dismissed, litigants claim the ACA is invalid because the Supreme Court described it as tax legislation, and, as such, should have originated in the House of Representatives, not the United States Senate.[30]

4. Shaping ACA Coverage Within a State

The ACA allows states to pass laws banning abortion coverage in any exchange established in the state.[31] As of November, 2013, 23 states have enacted such laws.[32] Many other states have mandated coverage exceeding those in the ACA's minimum benefits package. The Secretary of Health and Human Services has issued regulations defining each state's combination of the federal baseline and state-level state mandates.[33] These mandates have created a diverse range of extra benefits by state depending on each state's policy.[34]

5. Advancing Beyond the ACA to Single Payer

While other states maintain that the ACA went too far, Vermont took the opposite position. In 2011, the Vermont Legislature enacted a public option program to take effect in 2017, effectively providing government-maintained insurance for all.[35]

III. Challenges and Opportunities for Rhode Island

Through its implementation of the ACA, Rhode Island faces the challenges of funding the program when Federal subsidies run out and ensuring young healthy adults will enroll, as well as the opportunity to apply federal subsidies to

public employee health benefit obligations.

A. The Funding Challenge

Healthsource RI has enjoyed a "smashing success" in gaining Medicaid and private insurance enrollments during its first month of operation.[36] At the same time, the operators estimate its annual cost of operating the exchange to going forward at $26 million after Federal subsidies expire in 2014.[37] The State is considering a tax on everyone's health insurance premiums to pay this cost, a controversial option.[38]

B. The Enrollment Challenge

This summer, the Rhode Island Center for Freedom and Prosperity published two reports suggesting the ACA's goal of universal coverage will fail because many citizens will find it cheaper to pay the tax penalty than to purchase insurance.[39] For example, the reports estimate that once the 2016 penalties take effect, a 24-year old earning $40,215 can save $1,111 by paying the penalty rather than purchasing insurance coverage. The reports estimate thousands of Rhode Islanders, such as young invincibles, or healthy people under the age of 35, will pay the penalty rather than purchase insurance, thereby compromising the risk pool, driving up insurance rates and increasing the risk of adverse selection.[40]

The reports understate this risk, because they are based on the penalty levels set for 2016, when the ACA is fully implemented.[41] In fact, the ACA's penalties will be significantly lower for 2014 and 2015 as the Act is phased in. In the case of the 24-year old earning $40,115, the 2014 penalty will be $285, the 2015 penalty will be $570 and the 2016 penalty will be $760.[42]

C. Using a State Mandate to Address the Funding and Enrollment Issues

Fortunately for Rhode Island, the Massachusetts experience suggests the individual mandate stick can increase coverage dramatically when combined with the carrot of subsidies. In a 2010 paper, three researchers estimated the population of uninsured Bay State young adults, aged 19-26, declined from 21.1% to 8.2% over the program's first two years in 2006-08.[43] Over the same two years, the Massachusetts Department of Revenue collected $18 million and $16.4 million in penalties from taxpayers who

did not comply with the health insurance mandate.[44] In this way, Massachusetts used its tax policy to strengthen the insurance risk pool and to collect revenues to finance the program. For example, a 24-year old earning $40,115 in Massachusetts in 2014 would have the choice of either purchasing insurance or paying a state tax penalty of $1,008, significantly higher than the ACA penalty of $285.[45]

When Massachusetts introduced its mandate, opponents filed a court challenge on numerous constitutional grounds.[46] The Superior Court dismissed the case, upholding the statute as a valid exercise of the state's police power which the appellate court affirmed in a 2010 decision.[47] The Court's ruling provides an additional basis (taxation power) on which to justify a state mandate. Were a litigant to argue that the ACA preempts a state mandate, that challenge likely will fail, because the ACA's preemption clause is especially deferential, stating, "[n]othing in this title shall be construed to preempt any State law that does not prevent the application of the provisions of this title."[48] Also, there are many examples of the federal and state governments operating parallel taxation programs, such as for income and gasoline.

If enacted, a state mandate could be simple to implement, adding a few lines to the Rhode Island income tax return to pick up the corresponding information from the federal return. Over the next two years, Rhode Island could just require State taxpayers to pay a State penalty equal to the difference between the 2016 full price federal penalty and the 2014 phase-in. Alternatively, Rhode Island could follow the lead of Massachusetts, which has a separate schedule of penalties more generous to lower-income taxpayers and tougher on higher-income ones. Rhode Island can minimize interstate flight concerns by keeping its penalty at or below the Massachusetts level. While other states plot ways to undermine the ACA, Rhode Island can join Massachusetts in becoming a national leader.

D. The OPEB Opportunity

While there has been much recent discussion in Rhode Island about unfunded public employee pension liabilities, there

continued on page 34

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

Matthew R. Plain, Esq.
Barton Gilman LLP
Providence

Gerald C. DeMaria was in born in Providence, Rhode Island on May 5, 1942. He grew up in Smith Hill, where his father owned and operated LaSalle Bakery. Mr. DeMaria graduated from LaSalle Academy in 1960, and Providence College, where he majored in Political Science, in 1964. Upon graduation, he was commissioned as an officer in the United States Army, and deferred active duty while he attended Suffolk University Law School. Mr. DeMaria graduated from law school in 1967, gained admission to the Bar in the fall of 1967, and began his military service in January of 1968. He was stationed, among other places, in Korat, Thailand, where he tried criminal cases until the completion of his service in January 1970. Mr. DeMaria returned to Rhode Island to practice at Higgins, Cavanagh, & Cooney, alongside his initial mentors, Joseph Cavanagh, Sr. and Ken Borden. He also counts legendary lawyer, Joe Kelly, among his mentors, and deems him "the chronicler of the common law." Forty-four years later, Mr. DeMaria still practices at Higgins, Cavanagh, & Cooney, and he is considered by many as one of the state's most accomplished trial attorneys in the product liability arena. Excerpts from my conversation with this longstanding Rhode Island Bar veteran follow.

Gerald C. DeMaria

What has been your most memorable experience over the course of your legal career? All things considered, it was being a lawyer in the lead paint case, the lead paint public nuisance case the Attorney General brought against six lead pigment manufacturers, which lasted ten years and entailed two trials, ultimately resulting in the Supreme Court rendering a decision for the defendants ten years after the start of the lawsuit. It was about ten years of a real hard-fought litigation. My client was Glidden Paint Manufacturing. I was trial counsel with them here in Rhode Island.

Over the course of your legal career, who has been your most formidable opponent? My most formidable opponents have been Len Decof and his son, Mark, both of whom are also dear friends, but very formidable.

What was your biggest challenge over the course of your legal profession? Balancing a family with the obligations you have as a lawyer to your client, to devote that amount of time, no matter how much and no matter at what time during the week or year, the obligation to the client for that particular period of time must come first.

What skills or qualities do you attribute to some of your successes in your legal career? Bull work only. Just hard work. There's nothing but constant professional labor in knowing and mastering your facts and knowing and applying the law. In connection with knowing and applying the law, I've always considered myself a constant student of the law, so I read the law constantly, even up to this day. So you have to read the law to know the latest law in an area, and then do your work in connection with knowing and mastering the facts.

What has been the single biggest change in the legal profession since you started practicing? The greater role that arbitration and, more than that, mediation of cases now play in the two systems we have here, state and federal. I see mediation is now the rule rather than the exception, even more than arbitration. Those cases that may be sent to arbitration by a court often result in the process of mediation. And many times mediation assists in the resolution of a matter.

What challenges do you foresee for newer members of the bar? I think it's economic. The economic pressures put on new lawyers are almost intolerable. The competition among lawyers today is staggering, evidenced by the necessity they feel for public advertising and things of that nature. Because of the number of lawyers and the small state we are in, both geographically and demographically in terms of the numbers of people we have in the state, for a young lawyer to come out today and remain honest and faithful to the work that he or she has to do in the best interest of the client, the economic challenges and the business aspect of the law sometimes overpowers them.

Would you do it all over again? I'm a fool. I would probably do it over again.

Indeed, this author hopes you would, as your contributions to the bar are immeasurable. Thank you, Mr. DeMaria, for all you have done.

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Drunk Driving and Warrantless Blood Tests

Robert H. Humphrey, Esq.
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Kimberly A. Petta, Esq.
Law Offices of Robert H. Humphrey, Tiverton

Rhode Island's law states an officer may only compel a motorist to submit to a chemical test in serious DUI cases after first obtaining a search warrant.

In its April 17, 2013 decision in **Missouri v. McNeely,**[1] the United States Supreme Court affirmed the decision of the Missouri Supreme Court which upheld the trial court's suppression of warrantless blood test results. In **McNeely,** the suspect was stopped by a Missouri police officer for traffic violations. Thereafter, McNeely declined "to take a blood test to measure his blood alcohol concentration (BAC), he was arrested and taken to a nearby hospital for blood testing. The officer never attempted to secure a search warrant. McNeely refused to consent to the blood test, but the officer directed a lab technician to take a sample. McNeely's BAC tested well above the legal limit, and he was charged with driving while intoxicated (DWI)."[2] The blood test results were suppressed by the trial court because the warrantless extraction of his blood was in violation of the 4th Amendment.[3]

The Missouri Supreme Court affirmed the trial court's decision based on the holding in **Schmerber v. California**[4] allowing a warrantless blood test of a DUI suspect when the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'"[5] However, in contrast, in **McNeely,** the Missouri Supreme Court ruled that this was "a routine DWI investigation where no factors other than the natural dissipation of blood alcohol suggested that there was an emergency, and, thus, the nonconsensual warrantless test violated McNeely's right to be free from unreasonable searches of his person."[6]

The Court's opinion was delivered by Justice Sotomayor with respects to Parts I, II-A, II-B, and IV, in which she was joined by Justices Scalia, Kennedy, Ginsburg, and Kagan and an opinion with respects to Parts II-C and III, in which Justices Scalia, Ginsburg, and Kagan joined and Justice Kennedy filed an opinion concurring in part. Chief Justice Roberts filed an opinion concurring in part and dissenting in part in which Justices Breyer and Alito joined and Justice Thomas filed a dissenting opinion.

Of interest in Justice Sotomayor's opinion is the following:

> "[I]n drunk driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant."[7]
>
> "This Court looks to the totality of circumstances in determining whether an exigency exists. Applying this approach in **Schmerber,** the Court found a warrantless blood test reasonable after considering all of the facts and circumstances of that case and carefully basing its holding on those specific facts, including that alcohol levels decline after drinking stops and that testing was delayed while officers transported the injured suspect to the hospital and in investigating the accident scene."[8]
>
> When officers in drunk driving investigations "can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so."[9]
>
> "In short, while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in **Schmerber,** it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of circumstances."[10]

The Supreme Court's holding in **McNeely** is consistent with Rhode Island law. Rhode Island is an implied consent state, which means by virtue of operating a motor vehicle in Rhode Island a motorist has consented to a chemical test if the motorist is lawfully requested to do so by a police officer. Pursuant to R.I. Gen. Laws 31-27-2.1(a): "Any person who operates a motor vehicle within this state shall be deemed to have given his or her consent to chemical tests of his or her breath, blood, and/or urine for the purpose of determining the chemical content of his or her body fluids or

breath. No more than two (2) complete tests, one for the presence of intoxicating liquor and one for the presence of toluene or any controlled substance, as defined in § 21-28-1.02(7), shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving a motor vehicle within this state while under the influence of intoxicating liquor, toluene, or any controlled substance, as defined in chapter 28 of title 21, or any combination of these."

If a motorist who has lawfully been requested to submit to a chemical test withdraws his or her consent then that motorist will be charged with refusal to submit to a chemical test in violation of R.I. Gen. Laws 31-27-2.1. Prior to 2009, police officers could not compel a motorist to submit to a chemical test if the motorist refused. However, in 2009, a law was enacted allowing the police to obtain a search warrant for chemical test results if a motorist has refused the chemical test. The new law is limited to circumstances involving serious injury or death. Pursuant to R.I. Gen. Laws 31-27-2.9(a): "Notwithstanding any provision of § 31-27-2.1, if an individual refuses to consent to a chemical test as provided in § 31-27-2.1, and a peace officer, as defined in § 12-7-21, has *probable cause* to believe that the individual has violated one or more of the following sections: 31-27-1, [driving to endanger – resulting in death], 31-27-1.1, [driving to endanger – resulting in serious injury], 31-27-2.2, [driving under the influence – resulting in death], or 31-27-2.6 [driving under the influence – resulting in serious injury] and that the individual was operating a motor vehicle under the influence of any intoxicating liquor, toluene or any controlled substance as defined in chapter 21-28, or any combination thereof, a chemical test may be administered *without the consent of that individual* provided *that the peace officer first obtains a search warrant authorizing administration of the chemical test*. The chemical test shall determine the amount of the alcohol or the presence of a controlled substance in that person's blood or breath." (emphasis added)

The law was first utilized in February of 2010, when Daniel Gilcreast, a driver involved in a tragic accident, killed one pedestrian and seriously injured another. At the scene of the accident, Mr. Gilcreast refused the breath test offered by the

police officer. However, the police were able to obtain a search warrant for his blood. The blood test results revealed readings of .220, nearly three times the legal limit. Mr. Gilcreast entered pleas of *nolo contendere* to charges of driving under the influence – resulting in death and driving under the influence – resulting in serious injury and is currently incarcerated at the Rhode Island Adult Correctional Institution.[11]

In connection with serious drunk driving cases, a warrant may be issued to search for and seize any of the following:

> Samples of blood or breath that may yield evidence of the presence of alcohol or a controlled substance when subjected to a chemical test, as contemplated in § 31-27-2. When any of the foregoing samples are seized for purposes of performing the aforementioned chemical test, the seizure shall be conducted in accordance with the regulations of the department of health that apply to the consensual collection of such a sample for purposes of the chemical test contemplated by Rhode Island general laws § 31-27-2.[12]

The Supreme Court's recent decision in **McNeely** supports Rhode Island's law that an officer may only compel a motorist to submit to a chemical test in serious DUI cases after first obtaining a search warrant. In the preeminent case of **Pimental v. DOT,**[13] the Rhode Island Supreme Court held that drunk driving roadblocks violate Article I, Section 6 of the Rhode Island Constitution. In **Pimental** the Court held the following:

> "We have previously noted that Rhode Island citizens hold 'a double barreled source of protection which safeguards their privacy from unauthorized and unwarranted intrusions: the [F]ourth [A]mendment of the Federal Constitution and the Declaration of Rights which is specified in the *Rhode Island Constitution*.'"[14]
>
> "The Supreme Court, however, has recognized the right and power of state courts as final interpreters of state law 'to impose higher standards on searches and seizures [under state constitutions] than required by the *Federal Constitution*.' This greater protection may be afforded to citizens under a state constitution even if the federal and state language is similar.

> The Federal Constitution only establishes a minimum level of protection. We have departed from these minimum standards only when we have determined that our guarantee against unreasonable searches and seizures requires greater protection."[15]
>
> "[W]e reiterated that we interpret article I, section 6, to 'reflect the intent of the framers [of our constitution] to declare all warrantless searches and seizures unreasonable.'"[16]
>
> "In reaching this conclusion, we agree that the state has a compelling interest in detecting drunk drivers. It is well beyond dispute that drunk drivers are a grave menace to the public and that stronger measures are needed to cope with this problem….However, it would shock and offend the framers of the Rhode Island Constitution if we were to hold that the guarantees against unreasonable and warrantless searches and seizures should be subordinated to the interest of efficient law enforcement. Once this barrier is breached in the interest of apprehending drivers who violate sobriety laws, the tide of law enforcement interest could overwhelm the right to privacy."[17]
>
> "The founders of this colony, and later this state, valued freedom and liberty above all other interests of society. It is in that tradition of freedom and liberty that we decline to dilute the guarantees of the Rhode Island Constitution."[18]

Despite the holdings in **McNeely** and **Pimental**, Rhode Island's bright line rule may be challenged in the future as the national battle continues to rage regarding what facts constitute sufficient exigent circumstances to compel warrantless blood tests. With Rhode Island's long history of valuing "freedom and liberty above all other interests of society,"[19] it will be interesting to see if Rhode Island will continue to stand as a stalwart barrier against the tide of governmental intrusion for the purpose of efficient law enforcement or if Rhode Island will trade less privacy for more safety and security.[20]

ENDNOTES

1 ***Missouri v. McNeely**, 569 U.S. ___ (2013).*
2 ***McNeely** at 1.*
3 ***Id.***
4 ***Schmerber v. California**, 384 U.S. 757 (1966).*
5 ***Schmerber** at 770.*
6 ***McNeely** at 1.*

7 ***McNeely** at 23.*
8 ***McNeely** at 2. (citations omitted)*
9 ***McNeely** at 9. **See McDonald v. United States**, 335 U.S. 451,456 (1948).*
10 ***McNeely** at 13.*
11 *Department of Attorney General Press Release, http://www.ri.gov/press/view/13722 (last visited Aug. 2, 2013).*
12 *R.I. GEN. LAWS 12-5-2(6).*
13 ***Pimental v. DOT**, 561 A.2d. 1348 (R.I. 1989).*
14 ***Pimental** at 1350. (citations omitted)*
15 ***Id.** (citations omitted)*
16 ***Id.** at 1351-52. (citations omitted)*
17 ***Id.** at 1352. (citations omitted)*
18 ***Id.** at 1353.*
19 ***Id.***
20 *The authors express their appreciation for the assistance of Kathleen Child and Jodi Van Sprang in the preparation of this article.* ❖

50th Annual Meeting of ACLEA

At the 50th Annual Meeting of the Association for Continuing Legal Education (ACLEA), this August, in Boston, Past Rhode Island Bar Association Bar President Thomas W. Lyons was among the members of the American Bar Association (ABA) Task Force on the Future of Legal Education and a CLE international provider who reviewed and commented on the ABA Task Force's report at a well-attended Plenary Session titled, "The Future of Legal Education and What That Means For Continuing Legal Education."

front: Alan Treleaven, Law Society of British Columbia, Russell Hilliard, Upton & Hatfield, LLP and Past President of New Hampshire Bar Association and Una Doyle, Law Society of New South Wales, Australia.
back: Teddy Reese, Georgia Appleseed Center for Law & Justice and Thomas Lyons, Strauss, Factor, Laing, & Lyons and Past President of the Rhode Island Bar Association.

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2:00 p.m. – 5:00 p.m., 3.0 ethics credits

September 18
Thursday
Ethics Chess 2014 – Problems and Strategies for the Virtuous Lawyer
Annual Risk Management Seminar
Rhodes-on-the-Pawtuxet, Cranston
9:00 a.m. – 12:00 p.m., 3.0 ethics credits

September 22
Monday
2014 Commercial Law Update
Rhode Island Law Center, Providence
9:00 a.m. – 1:00 p.m., 4.0 credits +.5 ethics

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12:45 p.m. – 1:45 p.m., 1.0 credit
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Tuesday
Introduction to Guardianship
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October 15
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Food For Thought
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Holiday Inn Express, Middletown
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Friday
Special Issues In Foreclosure: Mediation & Litigation
Sponsored by the Rhode Island Bar Association & Rhode Island Legal Services, Inc. Foreclosure Prevention Project
Rhode Island Law Center, Providence
12:00 p.m. – 3:00 p.m., 3.0 credits

October 23
Thursday
Recent Developments 2014
Crowne Plaza Hotel, Warwick
9:00 a.m. – 4:00 p.m., 6.0 credits + 1.0 ethics

October 30
Thursday
Food For Thought
Mediation – Choosing the Right Cases
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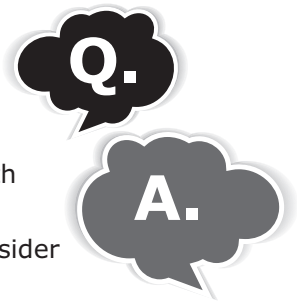

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COMMENTARY

Now You Know

Michael R. McElroy, Esq.
Schacht & McElroy

Participation in Bar leadership offers many opportunities. I experienced a number of other wonderful moments for which I thank all of you.

As I was wrapping up my term as your President at our Annual Meeting in June, 2013, I experienced one of the most satisfying moments of my legal career, in fact, of my life. I was rushing to the Friday luncheon because the seminar I had just attended on the future of legal education had exceeded its allotted time. I was scheduled as Master of Ceremonies at the Friday awards luncheon and delivering a tribute to the late, great Chief Justice Joseph R. Weisberger at the luncheon.

As I hustled through the Convention Center, an attorney rushed up beside me. He thanked me for the President's Message I had written bringing attention to the services available through the Bar Association for lawyers, their families, and staff who are challenged by alcoholism, addiction, and other similar problems. I thanked him and explained I had delved into personal details of my early family life (my father was an alcoholic) hoping someone who needed help might read the Message and take the opportunity to get help through one of the Bar Association-sponsored assistance programs. I told the attorney that because the programs the Bar Association offers are confidential, I would unfortunately never know whether my Message had encouraged anyone who needed help to take advantage of any of the programs. As we hurried along, the attorney suddenly put his hand on my shoulder and stopped me in my tracks. He looked me squarely in the eye, and said "Well, now you know." I was stunned and moved that he felt comfortable sharing this with me. Although I had to immediately run off to the luncheon, this encounter was the proudest moment of my presidency.

Participation in Bar leadership offers many opportunities. I experienced a number of other wonderful moments for which I thank all of you. They included:

- Attending a luncheon at Roger Williams School of Law with United States Supreme Court Associate Justice Samuel Alito and having an opportunity to speak one-on-one with him.
- Traveling to the National Conference of Bar Presidents Convention in New Orleans the week before Mardi Gras and experiencing the sights and joyful musical sounds of a vibrant, almost fully recovered city.
- Welcoming the 1st year law students entering Roger Williams School of Law with Chief Justice Suttell and Dean Logan.
- Working with Chief Justice Suttell on many matters throughout my presidency, including a partnered law day presentation he and I presented to Warwick High School students.
- Representing the Rhode Island Bar Association at legal conferences in Chicago, Toronto, and Vermont.
- Reaching out to all of you in my President's Messages in the Bar Journal and the surprising number of attorneys who took the time to write notes, letters, and emails in response to those messages.
- Delivering a tribute on behalf of the Bar Association to the late Chief Justice Weisberger in the presence of his son, J. Robert Weisberger, Jr., who served so proudly as our immediate past Bar President.
- Setting up a new ListServ for all Bar members allowing all of you to reach out to each other for advice.
- Writing a letter to the Governor on behalf of the Association that quickly resulted in the filling of a number of judgeships that were sitting vacant for as long as 2 years.
- Welcoming, at the Supreme Court, new members of the Bar, and presenting them with quill pens as a sign of their connection to lawyers of the past, a tradition embraced by the U.S. Supreme Court, our Supreme Court, and our Bar Association.
- Meeting with the President and President-Elect of the American Bar Association.
- Presenting various awards, especially the *pro bono* service awards, to deserving members of our Association.
- Honoring the Francis J. Darigan Law Day Essay Award winner in the Supreme Court with Governor Chafee, Chief Justice Suttell, Associate Justice Indeglia, Judge Darigan, the head of the Rhode Island Police Chiefs Association, and others.
- Accepting, on behalf of our Association, a well-deserved award given to our Volunteer Lawyer Program.

If any of you reading this are at all interested in becoming involved in Bar Association leadership, I strongly encourage you to do so. Work on a committee; run for the House of Delegates; apply to move into leadership. It can be a lot of work, but it is extremely rewarding.

Now you know!

SOLACE

Helping Bar Members in Times of Need

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

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

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

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

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

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

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

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

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

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

Brian Adae, Esq.	831-3150
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Henry V. Boezi III, Esq.	861-8080
David M. Campanella, Esq.	273-0200
Sonja L. Deyoe, Esq.	864-3244
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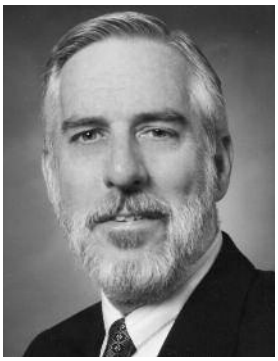
Joseph R. Miller, Esq.	454-5000
Henry S. Monti, Esq.	467-2300
Arthur M. Read II, Esq.	739-2020
Roger C. Ross, Esq.	723-1122
Adrienne G. Southgate, Esq.	301-7823
Judith G. Hoffman, LICSW, CEAP, Coastline EAP	732-9444 or 800-445-1195

Lawyers Helping Lawyers Committee Members Protect Your Privacy

An Extraordinary Life in the Law: Frederick Bernays Wiener, Esq.



Robert Ellis Smith, Esq.
Providence

Who is the only lawyer to have argued and lost a case before the U.S. Supreme Court and then persuaded the court to reconsider the case and reverse itself so that he won the case?

A notable lawyer who practiced in Rhode Island is the subject of a classic legal trivia question: "Who is the only lawyer to have argued and lost a case before the U.S. Supreme Court and then persuaded the court to reconsider the case and reverse itself so that he won the case?" He is Frederick Bernays Wiener, a noted military-justice lawyer who argued in the case of **Reid v. Covert**,[1] in 1956, that the Bill of Rights ought to protect an American citizen even on foreign soil. Five weeks later, by a 5-4 vote, the United States Supreme Court rejected his plea. In so doing, the Court's majority said that the U.S. Air Force could properly prosecute and convict Clarice Covert, a civilian spouse who, in 1953 on an air base in England, killed her husband, an Air Force sergeant. According to the Supreme Court, she was not entitled to the constitutional protections of due process including trial by jury, even though she was an American citizen.

Wiener argued forcefully for a rehearing. His task was to persuade at least one member of the majority when the Court announced its original opinion. He already had the dissenters on his side, Justice Hugo L. Black, who wrote a dissent in the original case; Chief Justice Earl Warren, and Justice William O. Douglas, and, probably, Felix Frankfurter, who in an extraordinary "reservation," had chosen not to express an opinion in the case because he wanted more time for "adequate study." Wiener had argued regularly in front of each of them.

The presentation by Wiener, according to Oyez, the Web site of the Chicago-Kent College of Law, "has attained legendary status and remains a preeminent exemplar in the art of persuasion and appellate advocacy."[2] On November 5, 1956, the Court broke precedent and granted the petition. It heard reargruments the following February.

One day short of a full year after its original denial of Wiener's case, the Court reversed itself and ruled for him and his client. Justice William J. Brennan, who had joined the Court in the interim, made the difference. He joined the four colleagues who had dissented the previous June. Justice Felix Frankfurter (joined by Justice John Marshall Harlan II) concurred, and one member of the court did not participate. The Court said this time, "We reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights.[3] This was known for years after as **Covert II**.

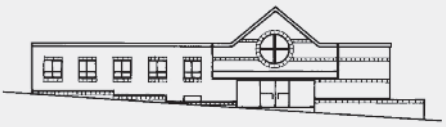
Kal Raustiala, professor of law and global studies at UCLA, summarized the significance of the new opinion in a 2007 article in *The Los Angeles Times*:[4] "The shield of the Constitution, the justices stated in reversing a centuries-old legacy, cannot be ignored by the executive branch simply because the accused happens to be abroad. The federal government was, the Court said, a creature of the Constitution; therefore, it had to act in accordance with the Constitution – wherever it acted. It does not matter if the prison or courtroom is leased from Cuba or located in South Carolina." Professor Raustiala affirmed this year that this remains good law.

According to the Oyez website, "A seasoned veteran of Supreme Court litigation, Colonel Wiener considered his triumph in **Reid v. Covert** to be among his greatest professional accomplishments." Never before and never since in American legal history had the Supreme Court reversed itself on rehearing. The opinion has taken on new significance in this decade as lawyers argue for the rights of terrorism suspects and others tried by the American government overseas since the terrorist attacks of 2001.

The crafty lawyer, "Fritz" Wiener, raised in New York City, graduated from Brown University in 1927 and from Harvard Law School in 1930. He stayed in Providence, as a bachelor, for three years and practiced law with the Providence law firm of Edwards & Angell. During those years, he wrote an article for the *Harvard Law Review*, "Notes on the Rhode Island Admiralty.[5]

At Harvard, he became a great admirer of Justice Oliver Wendell Holmes, Jr., and he is the presumed author of a resolution passed by the Rhode Island legislature in the 1930's congratulating the Justice on his ninetieth birthday. Right out of law school, he wrote a scholarly article on the R.I. Merchants and Sugar Act.

Wiener moved later to Washington. But, as



Rhode Island Bar Foundation

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

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

Help Our Bar Foundation
Help Others

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115 Cedar Street

Providence, RI 02903

Questions? Please contact Virginia Caldwell at 421-6541

or gcaldwell@ribar.com

late as 1946, a case before the U.S. Supreme Court listed him as residing in Providence. He appeared before the Supreme Court 38 times during his career. He wrote rules for the Court in 1954. He eventually married Doris Merchant, in 1949. They raised two sons who joined the military as careerists. After a full career as an army lawyer, a member of the U.S. Solicitor General's staff in the late Forties, and appellate genius in private practice, Fritz retired to Arizona with Doris in the 1980s.

Colonel Wiener was also noted for arguing for the victorious appellants in the 1972 racial discrimination case of **Moose Lodge No. 107 v. Irvis**.[6] The court ruled that the Moose Lodge was "a private social club in a private building," and thus not subject to the Equal Protection Clause. In limiting the reach of the state-action doctrine, the court ruled that the lodge in Harrisburg, Pa., was thus able to deny service to minority persons.

His book *Effective Appellate Advocacy*, published in 1950 and revised in 2004, is prized by appellate lawyers. One lawyer said the American Bar Association's reissue of this guidebook is "good to have because it is a book that gets taken from many lawyers' offices." In the revised edition, the author's colleague described Wiener as "a forceful distinctive personality, formidable scholar, a man who knew how to win on appeal."

That forceful personality was known around Washington, where he could be found with his correct military bearing draped in a double-breasted suit and topped by an incongruous cowboy hat. He often had a cigar in his mouth. In reviews of legal books, he was ecstatic about books he liked (it helped if Holmes were the author or the subject) and bold in his put-downs of books he disfavored. He once congratulated adversaries who he thought were inferior to him for helping refine his advocacy. Lawyers in Washington used to say that no other individuals knew the full set of Supreme Court decisions since the nation's founding as fully as Fritz Wiener.

Also an expert in the relocation of persons during wartime, he testified before a U.S. Senate Committee in the 1980s in opposition to legislation adopting recommendations of a Relocation Commission. "This bill… states in section 1(a)1 that the Commission's report

is both complete and accurate. Now, in actual fact, *the Commission's report is completely untrustworthy* and therefore if the bill were to be enacted in its present form, it would be, in the words of an outstanding 17th Century American, "a solemn public lie."[7] "My second point, it is the second bias flaw, is that the Commission was stacked," he added, "stacked in favor of Japanese-Americans, who experienced internment in World War II."

As he strutted around the capitol city and attended his share of social events, he carried an additional distinction: He was the great-nephew of Sigmund Freud. His definition of a perfect person? Someone who takes infinite pains himself and gives infinite pain to others.

Justice Frankfurter once told him that when he had been a prosecutor he would never do what Wiener alleged another prosecutor had done. Wiener responded, "Justice Frankfurter, there were giants in the land in those days."

Law Professor Paul R. Baier of Louisiana State University became a great admirer of the colonel. He delved into troves of his papers in Arizona, wrote a memoir of him, and sponsored an exhibit of his career in 1979 called "The Lawyer's Reason and the Soldier's Faith."

Frederick Bernays Wiener died in 1996. His bones rest not in Rhode Island but at the foot of Thunder Mountain, at Fort Huachuca, a U.S. Army Post, in Sierra Vista, Arizona. "He has a smile on his face," says Baier. Why does Professor Baier assume that? Because Fritz appeared in a one-act play at Brown entitled "To Die with a Smile."

ENDNOTES

1 *351 U.S. 487 (1956).*

2 *http://www.oyez.org/cases/1950-1959/1955/1955_701_2.*

3 *354 U.S. 1 (1957).*

4 *http://www.latimes.com/la-oe-raustiala9jun09,0,7753688.story#ixzz2qOxQtq22.*

5 *footnote 1 727- 1790," Harvard Law Review.*

6 *407 U.S. 163 (1972).*

7 *http://home.comcast.net/~eo9066/1984/IA181.html, Committee on Governmental Affairs of the United States Senate, 98th Congress, 2nd Session, S. Hrg. 98-1304 (August 16, 1984). "Testimony of Frederick B. Wiener." Recommendations of the Commission on Wartime Internment and Relocation of Citizens. Washington D.C.: U.S. Government Printing Office. pp. 264–299.* ❖

Lawyers on the Move

Karen Augeri Benson, Esq. announces, in addition to her 226 South Main Street, Fall River, MA office, she has opened a satellite **Law Office of Alan A. Amaral** at One Courthouse Square, Newport, RI 02804.
www.kabenson.com

Joseph R. Daigle, Esq. moved his law office location to 1177 Greenwich Avenue, Warwick, RI 02886.
401-256-1417
JRD@JDaigleLaw.com
www.JDaigleLaw.com

Robert A. D'Alfonso, III, Esq. and **Jonathan F. Whaley, Esq.** joined **O'Leary Law Associates**, 4060 Post Road, Warwick, RI 02886.
401-615-8584
www.oleary-law.net

Defense Counsel of Rhode Island new 2014-2015 officers: President **Faith A. LaSalle, Esq., LaSalle & Associates, P.C.**; President-Elect **John F. Kelleher, Esq., Higgins, Cavanagh & Cooney, LLP**; Vice President **Lauren D. Wilkins, Esq., Langlois, Wilkins, Furtado & Metcalf, P.C.**; Secretary **Rebecca McSweeney, Esq., Rebecca McSweeney, Esq.**; and Treasurer **Amy G. Beretta, Esq., Law Offices of Amy Beretta**.

Richard S. Humphrey, Esq., of the **Law Offices of Richard S. Humphrey** in Tiverton, was appointed to the board of directors of the Rhode Island Turnpike and Bridge Authority.

Joseph E. O'Neil, Esq., of the Philadelphia law firm **Lavin, O'Neil, Cedrone & DiSipio**, was elected President-Elect of the International Association of Defense Counsel.

Do I Still Need Bypass Trust?

Mark J. Soss, Esq.
Florida and Providence

If your estate planning documents contain an involuntary Bypass Trust provision and your net worth is less than $10.68 million, you may want to revisit your estate plan.

The American Taxpayer Relief Act (ATRA) of 2012 extended and made permanent a number of important tax code provisions that impact estate planning. The two biggest tax provisions made permanent were the federal estate tax exemption (with inflation indexing) and portability of a deceased spouse's unused exclusion amount. As a result of these changes, married couples can shelter up to $10.68 million (in 2014) of net worth from the federal estate tax system. The exemptions not only reduce the number of individuals subject to the estate tax in the future, but portability will render most uses for the bypass trusts irrelevant.

To many practitioners the Bypass Trust is viewed as a relic of days past when the federal estate tax exemption (Federal Exemption) amount was less than $1 million. Prior to the enactment of ATRA, the Federal Exemption amount had risen from $600,000 in 1997 to $5 million in 2011, with many bumps in the road. Tax experts predicted that the Federal Exemption would be lowered, an easy way to raise federal tax revenue by taxing the wealthy. To combat the uncertainty with the Federal Exemption, wealthy couples utilized bypass trusts to set aside the deceased spouse's federal exemption amount to ensure it was fully utilized. This provided the surviving spouse with only an entitlement to an income stream and discretionary principal for their lifetimes from the trusts. But the Federal Exemption was preserved in case Congress decided to subsequently lower the amount.

After ATRA, the use of a Bypass Trust became an adverse tax strategy for many couples as a result of compressed trust income tax brackets and the loss of any step-up in basis at death. Today they are predominantly utilized to: 1) shelter future growth from taxation for very high net worth couples; 2) preserve the Generation Skipping Tax Exemption, 3) protect assets in the case of divorce or remarriage; 4) to minimize state estate taxes; and 5) spendthrift protection of the surviving spouse.

If your estate planning documents contain an involuntary Bypass Trust provision and your net worth is less than $10.68 million, you may want to revisit your estate plan with your attorney. Many estate planning practitioners today use a modified disclaimer, at the surviving spouse's election, to achieve the same benefit.

Universal Health Care

continued from page 15

are equally significant issues concerning retiree health benefits, known as other post-employment benefits (OPEB). As of 2012, the State estimated its unfunded OPEB liability to be $916.8 million.[49] In 2010, Rhode Island's cities and towns collectively had an OPEB liability of $3.56 billion, of which $27 million was funded for a ratio of 0.8%.[50] This represents a larger problem than the combined pension liabilities of these cities and towns, totaling $3.51 billion, of which $1.41 billion was funded for ratio of 40.3%.[51]

In this context, the ACA's health care subsidies could substantially reduce the state and local government's cost. For example, in November, 2013, the Healthsource RI exchange offered a Rhode Island couple, each aged 55 with a combined income of $60,000, the opportunity to purchase a health insurance plan with a base cost of $787.60 per month supported by a tax credit of $548.75, making a net cost of $238.85.[52] The tax credit amount varies with a retiree's income; however, the example demonstrates how a retiree with a mid-level pension may qualify for a federal tax credit of more than two-thirds the cost of insurance. In this way, the ACA can provide federal subsidies to help state and municipal governments to cover the majority of the OPEB deficit.

While this opportunity holds promise, public employers will have to account for the vested rights of retirees. In 2012, the City of Providence directed retirees to coordinate health benefits with Medicare as a condition of receiving City health care benefits. The retirees sued, and the Superior Court entered a preliminary injunction blocking the program.[53] The City and retirees resolved that case by agreement, and now retirees eligible for Medicare receive federal benefits first before making a claim from the City's program. The Providence Medicare settlement demonstrates how public employers and retirees can work together to access federal subsidies that support health benefits programs while holding retirees virtually harmless.

IV. Conclusion

Affordable health care is a national problem, and the Affordable Care Act was originally designed to present a

national solution. However, between the legislative process and the Supreme Court review, the ACA has created areas for wide variation among the states, and some states are continuing to challenge the program's existence within their borders.

Rhode Island chose to adopt the ACA's goal of universal health care. Given that decision, Rhode Island should maximize its ability to implement and pay for the program through a state-level mandate, and its cities and towns should work with retirees to access federal subsidies for health insurance.

ENDNOTES

1 *Pub.L. No. 111-148 (2010).*

2 ***See New State Ice Co. v. Liebmann**, 285 U.S. 262, 311, 52 S.Ct. 371, 386-87 (1932) (Brandeis, dissenting).*

3 *42 U.S.C. § 300gg.*

4 ***Id.***

5 *42 U.S.C. § 18022(d). For example, Rhode Island mandates pediatric preventive care. R.I. GEN. LAWS § 27-38.1-2.*

6 ***Id.***

7 *42 U.S.C. § 18022(d).*

8 *42 U.S.C. § 18031.*

9 ***See** 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII).*

10 *42 U.S.C. § 18071.*

11 *26 U.S.C. § 5000A.*

12 ***Id.***

13 *Direct purchase insurance refers to policies issued directly to individuals, in contrast to group plans available through the workplace.*

14 ***See** Tanden, Nina and Spiro, Topher,* The Case For The Individual Mandate In Health Care Reform *pp. 3-4 (Center for American Progress, 2012).*

15 ***Id.**, p. 7 (citing Amitabh Chandra, Jonathan Gruber and Robin McKnight,* The Importance of the Individual Mandate – Evidence from Massachusetts, *THE NEW ENGLAND JOURNAL OF MEDICINE 364(4): 293-95 (2011)).*

16 *U.S. House of Representatives, Final Vote Results For Roll Call No. 165 (H.R. 3590, March 21, 2010), **see** http://clerk.house.gov/evs/2010/roll165.xml.*

17 *United States Senate, Voting Record for H.R. 3590 (December 24, 2009), **see** http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00396#top.*

18 ***See National Federation of Independent Business v. Sebelius**, 132 S.Ct. 2566, 2580 (2012).*

19 *132 S.Ct. 2566 (2012).*

20 ***See, e.g.**, Karlan, Pamela S.,* The Supreme Court Foreword: Democracy and Disdain, *126 HARV. L. REV. 1 (2013).*

21 ***See** Opinion of the Court, **National Federation of Independent Business v. Sebelius**, n. 10, **supra**, 126 S.Ct. at 2566, 2584-2601.*

22 *42 U.S.C. §§ 1396 **et seq.***

23 *The Commonwealth Fund, "State Action to Establish Health Insurance Marketplaces," viewable at http://www.commonwealthfund.org/Maps-and-Data/State-Exchange-Map.aspx. These states are: California, Colorado, Connecticut, Hawaii, Idaho, Kentucky, Maryland, Massachusetts,*

Minnesota, Nevada, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont and Washington.

24 ***Id.***

25 ***See*** *New York Times*, Enrollment in the State Health Exchanges *(Nov. 12, 2013) at http://www.nytimes.com/interactive/2013/10/04/us/opening-week-of-health-exchanges.html?ref=us.*

26 ***See*** *New York Times*, Problems with Health Care Portal Also Stymie Medicaid Enrollment *(November 11, 2013) at http://www.nytimes.com/2013/11/12/us/problems-with-federal-health-portal-also-stymie-medicaid-enrollment.html?ref=us.*

27 ***See*** *Commonwealth Fund, Medicaid Expansion Map, viewable at http://www.commonwealthfund.org/Maps-and-Data/Medicaid-Expansion-Map.aspx?omnicid=20.*

28 ***Id.***

29 ***See*** *2013 Ohio Bill House Bill 91 at the LegiScan website at this address: http://legiscan.com/OH/bill/HB91* ***and*** *Missouri 2013 Senate Bill 473, viewable at the LegiScan website at http://legiscan.com/MO/bill/SB473/2013.* ***See*** *Cato Institute*, Ohio, Missouri Introduce Health Care Freedom Act 2.0 *at the Cato Institute's website, http://www.cato.org/blog/ohio-missouri-introduce-health-care-freedom-act-20.*

30 ***See Sissel v. Dept. of Health and Human Services****, C.A. 10-1263 (slip op.) (D.D.C. June 28, 2013).*

31 ***See*** *42 U.S.C. § 18023(a)(1).*

32 *October 25, 2013 Memorandum*, Affordable Care Act – Plans That Exclude Abortion Coverage, *St. Benedict's Blog, www.saintbenedicts.com.*

33 *42 U.S.C. § 18022(d).*

34 ***See*** *National Conference of State Legislatures*, State Health Insurance Mandates and the ACA Essential Health Benefits Provisions, *viewable at the NCSL's website at http://www.ncsl.org/research/health/state-ins-mandates-and-aca-essential-benefits.aspx.*

35 *18 V.S.A. §§ 9372, 9373.*

36 *"Medicaid gets most of new enrollments," Providence Journal, November 13, 2013, p. A4.*

37 ***See*** *"Pricey Portal," Providence Journal, November 10, 2013, p. F6.*

38 ***Id.***

39 ***See*** *Parnell, Sean, "Will Rhode Islanders Purchase Insurance Under Obamacare?," Rhode Island Center for Freedom and Prosperity (June 10, 2013), "Left Behind by Health Reform in Rhode Island," Rhode Island Center for Freedom and Prosperity (August 5, 2013) both posted at http://www.rifreedom.org/category/issues/health-care/.*

40 ***See*** *Parnell, "Will Rhode Islanders Purchase Insurance," n. 28,* ***supra****, p. 2.*

41 *The Center's Report projected that the price of a "Bronze" level insurance policy for a 24-year old would be $1,900.*

42 *For a single person, the penalties in 2014 range from $95 to $285, depending on income. They increase to $190 to $570 in 2015. 26 U.S.C. § 5000A(c). When calculating the penalty for a household, adults are assessed the full "flat dollar amount" and children are assessed half of that amount.*

43 ***See*** *Long, Sharon K., Yemane, Alshadye and Stockley, Karen, "Disentangling the effects of health reform in Massachusetts," American Economic Review 100(2): 297-302 (2010).*

44 *Massachusetts Department of Revenue:*

Individual Mandate 2008 Preliminary Data Analysis (December, 2009), p. 3, viewable at http://www.mass.gov/dor/docs/dor/news/pressreleases/2009/2008-health-care-report.pdf.

45 ***See*** *Community Resources Information website www.massresources.org. Massachusetts subsidizes insurance policies for residents 26 and younger, and reduces the tax penalty for this group.*

46 ***See Fountas v. Commissioner of the Department of Revenue****, Essex Superior Court, No 08-0121-B (2/6/09),* ***aff'd****, 76 Mass. App. Ct. 1116, 922 N.E. 2d 862 (2010).*

47 ***See*** *n. 35,* ***supra****.*

48 ***See*** *Pub.L. No. 111-148, § 1321(d) (2010).*

49 *State of Rhode Island, Comprehensive Annual Financial Report for Fiscal Year Ended June 30, 2012, p. 29.*

50 *Office of the Auditor General, Pension and OPEB Plans Administered by Rhode Island Municipalities September 2011 report to Joint Committee on Legislative Services, http://www.muni-info.ri.gov/documents/finances/Study_Commission_Pension /1_Pension _&_OPEB_Admin_by_RI_Munis_Sept_2011.pdf.*

51 ***Id.***

52 ***See*** *HealthSource RI website at www.healthsourceri.com.*

53 ***See Providence Retired Police and Firefighter's Association v. City of Providence****, C.A. No. PC-11-5853, Decision on Preliminary Injunction (filed January 30, 2012).* ❖

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In Memoriam

John J. Finan, III, Esq.
John J. Finan, III (Jake), of Wakefield, passed away on July 9, 2014. Mr. Finan was born in Arlington, Virginia, the son of John J. Finan, Jr., Esq. and Anita M. Genst Finan of Cumberland. Jake was a graduate of Providence College and Suffolk University Law School. He was a founding partner in the law firm of Finan and Grourke in 1990. Besides his parents Jake is survived by his daughters; Margaux K. Finan of Boston, Massachusetts and Shelby L. Finan of Millis, Massachusetts. He also leaves his brothers Michael T. Finan, Esq. and Jeffrey P. Finan both of South Kingston, and his friend Cindie Sokobin.

Joseph W. Parys, Esq.
Joseph W. Parys, 90, of Vero Beach, FL, passed away on July 3, 2014. He was the beloved husband for 67 years of Mary Kowalczuk Parys. Born in Providence, a son of the late Walclaw and Marta Kawlik Parys, he lived in Johnston for 65 years before moving to Vero Beach. A graduate of Providence College and Boston University Law School, he retired after 33 years from Travelers Insurance Company. A veteran of WWII, he served in the U.S. Navy with Fleet Air-Wing 7 in England. He served as an usher at St. Thomas Church, where he was a member of the Holy Name Society, served on the Finance Committee, and was past chairman of St. Thomas Boy Scouts Committee Troop 89. He was an usher at St. John of the Cross Church in Vero Beach, in charge of the Village Green Golf League at Dodge Town and at Island Pines Golf Course. Besides his wife, he is survived by his son Joseph H. Parys, Esq. and his wife Marie of Smithfield, RI, his daughter Carolyn J. Brandin of Boca Raton, FL and his son Paul G. Parys of Scituate, and his sister Helen Zabilski of Vista, CA.

John J. Pendergast, III, Esq.
John Joseph Pendergast, III, 78, passed away on June 12, 2014. He was born in Lewiston, ME to John J. Pendergast, II and Grace McCarty Pendergast. He was a graduate of Phillips Exeter Academy and Yale College where he was named an NCAA All American lacrosse player. He received his law degree from Yale Law School, and began his career with Providence law firm Hinckley, Allen & Snyder serving first as associate, then as full partner until 2002. He remained of counsel to the firm while teaching at Rogers Williams Law School and serving as an Arbitrator for labor-management disputes throughout the state. Jack served as: Trustee at St. Pius V Church; Rotary Club; Chair of Social Services Advisory Board & Member of External Personnel Adv. Board, Diocese of Providence; Smith Hill Center Board; Pres., Philips Exeter Academy Alumni Assoc. of RI & Yale Assoc. of RI; Providence Boys & Girls Club, Board of Directors; RI Legal Services. Jack is survived by his beloved wife Joan "Pixie" Shaw Cole Pendergast, his sons Terry and Michael, daughters Mary (husband Chris Suchmann) and Joan (husband Ray Cox) who live in Providence and South County, his sons John IV (wife Judene) and Tim (wife Paula) who reside in Connecticut and Los Angeles respectively, and his brother, George Pendergast.

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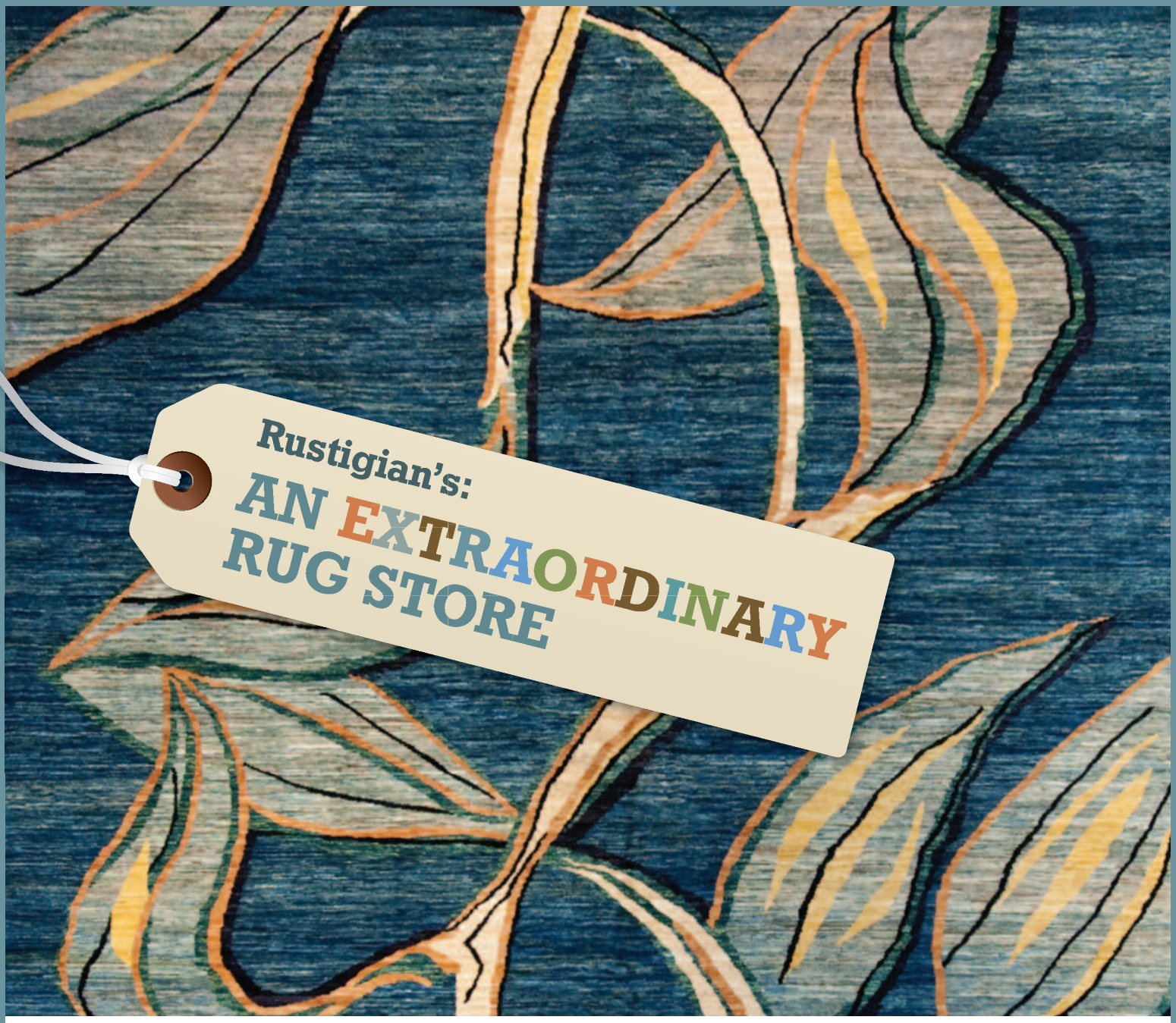

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