Rhode Island Bar Journal

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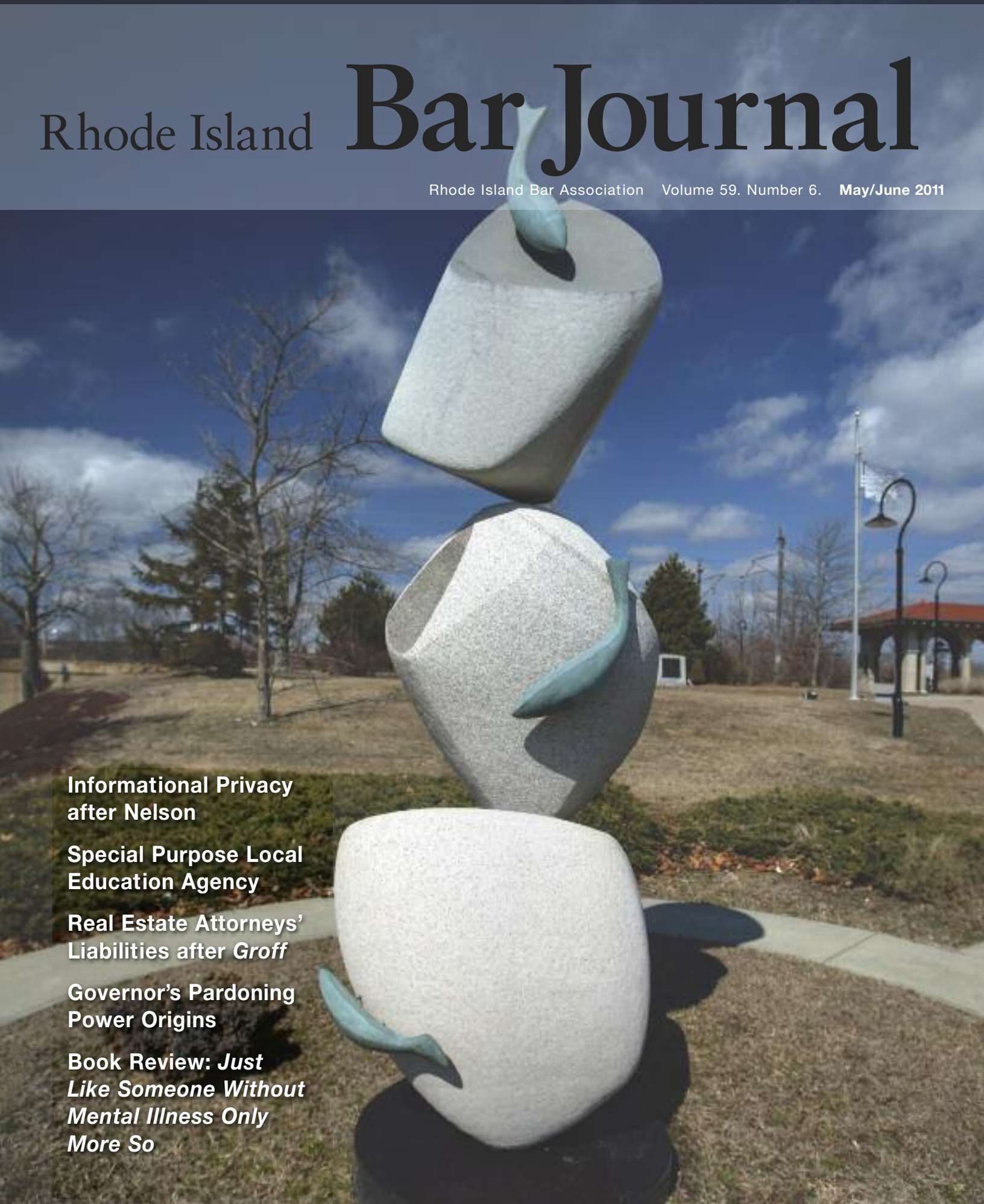

Informational Privacy after Nelson

Special Purpose Local Education Agency

Real Estate Attorneys' Liabilities after *Groff*

Governor's Pardoning Power Origins

Book Review: *Just Like Someone Without Mental Illness Only More So*

Articles

Features

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.

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Misquamicut, sculpture by Kameron Chaffari, Westerly, by Brian McDonald

A Fantastic Finish to a Wonderful Year!

Lise M. Iwon, Esq.
President
Rhode Island Bar Association

Thank you all for the opportunity to serve you as President, and thank you for your support. I am proud of what we have accomplished, and I look forward to even greater things for our Association going forward.

I look forward to seeing you at our 2011 Annual Meeting. Our Annual Meeting always provides an outstanding opportunity to learn, to improve your practice, and to socialize with your colleagues. This year will be particularly exciting. The Plenary Session speaker is legendary civil rights activist Morris Dees, co-founder of the Southern Poverty Law Center, a non-profit organization dedicated to seeking justice. Through the Center, Attorney Dees uses the law like a sword in his battle against prejudice.

Other distinguished speakers include Brown Medical School Professor, practicing psychiatrist and best-selling author of six books including *Listening to Prozac* and *Against Depression*, Dr. Peter L. Kramer who argues that depression is a woefully undertreated, serious disease with significant consequences, not only for the individual, but society. Popular legal technology speaker, Ross L. Kodner will present three programs over the two days. A frequent faculty member on CLE programs throughout the country, he has received six awards from the Technolawyer Community and served four years as Chair of the ABA Law Practice Management Section's Computer and Technology Division.

At this year's Meeting, we are also offering a Free Wellness Center in the Convention Center Rotunda featuring a range of free, interesting, healthful and educational activities including: blood pressure, cholesterol, and glucose screenings; chair massage stations offering relaxing shoulder and upper back massages, and much more!

On Thursday night, the festivities begin with a lively cocktail reception, followed by dinner, our Annual Bar Awards, for outstanding achievements, new officer elections, and an address by our new Bar President, William J. Delaney. During our Annual Awards Luncheon on Friday, we are honoring our colleagues for their exceptional community service and contributions to our Bar Journal. Additionally, we will have the pleasure of remarks by our Chief Justice Paul A. Suttell.

This has been a busy and fulfilling year at the Bar Association. I would just like to highlight a few of our many programs and services:

Report on SOLACE program: We established a program called SOLACE – Support of Lawyers All Concern Encouraged, and we have nearly 300 members signed up. Through the development of a list serve, the state's legal community is able to reach out in small, but meaningful and compassionate ways to judges, lawyers, court personnel, paralegals and their families who experience a crisis, death or catastrophic illness, from the smallest problem to the largest. Following a National Conference of Bar President's Program, we began soliciting volunteers of our truly honorable profession. Members will let the SOLACE program know of any member of the legal community or members of their family who might have a need. SOLACE will then circulate the request to the people who have joined the program and, hopefully, we will get results.

Continuing Legal Education: In addition to the Annual Meeting, our CLE program is aimed at ensuring professional excellence and competence for our members. During the last fiscal year, we had 68 seminars with a total of 5,166 registrations. Most of our programming is held at the Rhode Island Law Center, so we continue to offer high quality programming at the lowest possible cost to our members. In addition, there are many On-line CLE offerings, and we are beginning to offer broadcast simulcasts of live seminars at the Law Center. Highlights this year included the Commercial Law seminar featuring two nationally-recognized experts, a foreclosure program with experts from the federal government, and a DWI seminar, negotiating and evidence. Food for Thoughts covered bankruptcy, the mental health court, collecting consumer debt, long term care insurance, social media, estate-planning in uncertain times, estate-planning for snowbirds, arbitration and warning signs of fraud. Our second live webcast with Suffolk Law School was presented on cloud computing.

Risk Management Program: The free, risk management program sponsored by Aon Affinity was another success story. The program: "An Ethical Lawyer Meets the Internet" had 1,570 members registered and was offered on five different occasions in August and September.

New Lawyers Committee Activities 2010-2011: The New Lawyers Committee was very active this past year. The Committee held a fun

and informative evening of interactive networking with Bar Committee Chairs and the Bar's Public Services representatives. The Committee offered a free, CLE seminar for new Bar members titled "View From the Bench: The Superior Court Motion Calendar," and hosted a seminar, "The 60-Second Elevator Speech," on how to develop a profession-based, short description of their strengths. The Committee hosted guest speaker, Cranston Mayor and Bar member Alan Fung, at a presentation designed to help new Bar members understand their professional career option. Committee members also volunteered help on the development of the Introduction to Practice and Practical Skills seminars. And, Bar staff are now working on a Committee-inspired Online Attorney Information Resource Center designed to connect Bar members seeking practice information with experienced volunteers.

Law Related Education – The Association has a goal to increase public understanding of and respect for the Law. The Bar Association's website's Law Related Education (LRE) section features a comprehensive online curriculum library and an outline of the many LRE programs the Association offers including Lawyers in the Classroom, offering volunteer lawyers as resources and speakers to Rhode Island teachers; Speakers Bureau offering volunteer lawyers as speakers for Rhode Island, adult-based, nonprofit groups and organizations; and the Rhode Island Law Day Classroom Program and Essay Contest. In response to our invitation to participate in Rhode Island Law Day 2011 classroom programs sent to all upper and middle school teachers in all Rhode Island public, private and independent schools, to date, we had 36 schools requesting 60 presentations. This year, the Bar invited members to complete and return LRE volunteer information forms noting their interests in participating in the Bar LRE programs including iCivics, an online LRE and civics-based learning game program for middle school students initiated by retired US Supreme Court Justice Sandra Day O'Connor and the Rhode Island Mock Trial program. The names of those volunteers indicating an interest in iCivics and/or Mock Trial were forwarded to the respective program administrators.

Public Services Programs – With your assistance, we made great strides in keeping justice accessible for our poorest citizens. Your care for and involvement with the neediest through the Bar's Volunteer Lawyer Program, the Elderly Pro Bono Program and the US Armed Forces Legal Services Project provided vital services to those in desperate need of legal assistance.

Unmet Legal Needs of Veterans and Families – This new program is filling the need for attorneys to directly represent military personnel by accepting pro bono cases. Volunteer opportunities are in a variety of civil law areas including, family law, probate issues, landlord/tenant, real estate, contracts, consumer, bankruptcy, collections, employment (USERRA), immigration/naturalization, torts, income tax, and other areas. The Association was recently notified by the Board of Trustees of the American College of Trial Lawyers Foundation that we have received a grant of $20,000.00 for our U.S. Armed Forces Legal Services Project. Part of the grant will be devoted to publicizing the project and offering assistance to other bar associations across the country in developing similar programs.

The Volunteer Lawyer Program (VLP) has been administered by the Bar Association since 1986. This program provides low income Rhode Island residents with pro bono legal assistance from private practitioners interested in the needs of the community. The VLP provides legal assistance to those who cannot obtain legal representation on their own or through other existing agencies. The Volunteer Lawyer Program collaborates with the Rhode Island Coalition for Homeless, assisting with volunteer attorney recruitment for their Homeless Legal Clinic project. VLP attorneys staff legal clinics for the homeless and accept direct representation requests. Other Public Service Programs include a continuing series of Collection Clinics on an ongoing basis at the Rhode Island Law Center and volunteer attorneys' offices. In addition, clinics are provided in the areas of Bankruptcy and Family Law. A free seminar, "Custody and Support Issues in Relocation Cases" was held in February, and, as a result, many pro bono family law cases were placed. Attorneys agree to accept a case from either of these programs in exchange for free attendance. Watch for our newsletter about the Public Services programs, *Public Service Matters*, which is emailed on a regular basis.

Strategic Planning: The newly-drafted Rhode Island Bar Association Strategic Plan for 2011-2015 was circulated and approved by the House of Delegates in April. The Strategic Planning Committee was charged with reviewing and revising the Rhode Island Bar Association goals and objectives to ensure we are doing the best we can to meet or exceed member expectations. After a series of meetings and discussions and using a survey designed to assist us in assessing the Association's priorities, the Committee concluded its work and developed a mission statement and a five year strategic plan for the Association. The 2015 Vision of the Rhode Island Bar Association is: *Building on our deep traditions of professionalism, advocacy and service, the Rhode Island Bar Association is the preeminent leader on behalf of the profession. By being innovative and foresighted in serving the needs of practitioners, the community, and the administration of justice, our members are proud to be Rhode Island lawyers.*

Strategic Plan Goals:

1 Provide members with valuable, relevant services that promote professional competence.
2 Be indispensable to new/young lawyers.
3 Be a positive public voice on behalf of lawyers and the judicial system.
4 Facilitate access to justice.
5 Foster the relationship between the bench and the bar to our mutual benefit.
6 Maintain an infrastructure that supports us in fulfilling our vision.

Thank you all for the opportunity to serve you as President, and thank you for your support. I am proud of what we have accomplished, and I look forward to even greater things for our Association going forward. As you are reading this, I am bowing down in full queen-like regalia, in thanks to the Bar staff who are amazing, competent and wonderful and who make the best unified Bar on the planet! I am proud of our profession and proud of our Bar Association! ❖

None of Your Damn Business: Informational Privacy after *Nelson*

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

Any matter, not privileged, relevant to the subject matter of the pending action, is discoverable, even if it would be inadmissible at trial.

How often has opposing counsel posed a question at a deposition or in an interrogatory and you just wanted to tell your client, "Don't answer that, it's none of his damn business."? My guess is, more often than you'd like. What can you do in those circumstances? Maybe more than you think.

Any matter, not privileged, relevant to the subject matter of the pending action, is discoverable, even if it would be inadmissible at trial.[1] Our Supreme Court has stated in no uncertain terms:

> The only instance, we repeat, the only instance in which an attorney is justified in instructing a deponent not to answer is when the question calls for information that is privileged.[2]

Thus, we must ask, what is privileged?[3] A recently-published guide to discovery practice in Rhode Island[4] finds over forty privileges recognized by statute and case law, ranging from reports of the inspector of apiaries[5] (who may, after all, have a bee in his bonnet) through confidential tax information.[6] Recently, however, the United States Supreme Court has decided a case, **National Aeronautics and Space Administration, et al v. Nelson, et al.**, that alludes to the existence of a constitutionally-derived right to informational privacy.[7] If such a right were to exist, it might give rise to a corresponding privilege against being compelled to divulge such information. For example, the right to instruct your client that the information sought is none of the other side's business. This article explores that issue.

The **Nelson** plaintiffs were employees of the California Institute of Technology (Cal Tech) working at the Jet Propulsion Laboratory, a research lab run jointly by Cal Tech and NASA.[8] All plaintiffs were designated as low risk based on their relative lack of access to national security or classified information or projects. Many of them were long time employees who had undergone background checks upon their hiring by Cal Tech. However, unlike civil service employees of the government, these contractors had never been forced to undergo a governmental investigation of their backgrounds.

Following 9/11, the federal government decided to impose the same requirements on contractors as had previously been applied to employees.[9] As a condition of keeping their jobs at Cal Tech, these employees were forced to sign waivers allowing access to landlords, references, acquaintances, and the like for open-ended inquiries about a broad range of topics. The intended use of this information was not specifically revealed, but the plaintiffs obtained a document, called a "suitability matrix," that purported to identify disqualifying factors regarding approval for clearance and came to believe the investigation was designed to delve into these factors.[10]

As set forth on a web site set up by the plaintiffs regarding this suit,[11] the government, as suggested by this matrix, would look at the following:

It mentions "carnal knowledge," "attitude," "sodomy," "keeping house of ill repute," "bestiality," "displaying of obscene material" as disqualifying factors. "Cohabitation, adultery, illegitimate children" could also be disqualifying.

The plaintiffs filed suit, seeking declaratory and injunctive relief on the basis that the probes violated their Fourth and Fifth Amendment rights, as well as violating their constitutional right to privacy. The district court denied the request and an appeal ensued to the Court of Appeals which reversed the lower court and enjoined the investigations pending a hearing on the merits.[12] The injunction was based entirely on a constitutional right to informational privacy previously recognized in the 9th Circuit and elsewhere. NASA moved for a re-hearing en banc, and the court denied that request, over a dissent.[13] The dissent highlighted the fragmented nature of the jurisprudence on the issue of a right to informational privacy. Judge Kozinski wrote:

> Is there a constitutional right to informational privacy? Thirty-two terms ago, the Supreme Court hinted that there might be and has never said another word about it. *See* **Whalen v. Roe**, 429 U.S. 589, 599, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977) (alluding to "the individual interest in avoiding disclo-

Bar's Annual Meeting Speaker Legendary Civil Rights Activist Morris Dees

Morris Dees, Co-Founder of the Southern Poverty Law Center

At this year's Annual Meeting, June 16th and 17th, the Rhode Island Bar Association is pleased to present legendary civil rights activist Morris Seligman Dees, Jr., Esq., as the plenary speaker. Born in Shorter, Alabama, the son of farmers, after a successful career in book publishing, in 1971, he and his Montgomery, Alabama law partner Joseph J. Levin, Jr. and civil rights activist Julian Bond founded the Southern Poverty Law Center, a non-profit organization dedicated to seeking justice. Through the Southern Poverty Law Center, Dees uses the law like a sword in his battle against prejudice and hatred. In the 1980s and '90s, he bankrupted the Ku Klux Klan and neo-Nazi groups with a series of historic lawsuits. Today, he focuses his attention on anti-government militias. In his book, *Gathering Storm: America's Militia Threat*, Dees explains the dangers these groups represent. He is also author of *A Lawyer's Journey*, an autobiography, and *Hate on Trial: The Case Against America's Most Dangerous Neo-Nazi*.

The subject of the television movie *Line of Fire* and portrayed in the feature film *Ghosts of the Mississippi*, Dees has received numerous awards in conjunction with his work at the Center. Trial Lawyers for Public Justice named him Trial Lawyer of the Year in 1987, and he received the Martin Luther King Jr. Memorial Award from the National Education Association in 1990. The American Bar Association gave him its Young Lawyers Distinguished Service Award, and the American Civil Liberties Union honored Dees with its Roger Baldwin Award. Colleges and universities have recognized his accomplishments with honorary degrees, and the University of Alabama gave Dees its Humanitarian Award in 1993. In 2001, the National Education Association selected Dees as recipient of its Friend of Education Award, its highest award, for his "exemplary contributions to education, tolerance and civil rights."

In addition to this distinguished guest speaker, the Rhode Island Bar Association's 2011 Annual Meeting features a wide range of exceptional Continuing Legal Education seminars, the Bar's Annual Award winners, a diverse group of law-related product and service providers, and many opportunities to connect with your colleagues. Please watch your mail and the Bar's website for your invitation to attend this excellent event.

RHODE ISLAND BAR JOURNAL

Editorial Statement

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

Article Selection Criteria

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

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

sure of personal matters"), and **Nixon v. Administrator of General Services**, 433 U.S. 425, 457, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977) (quoting the above phrase from **Whalen**). With no Supreme Court guidance except this opaque fragment, the courts of appeals have been left to develop the contours of this free-floating privacy guarantee on their own. It's a bit like building a dinosaur from a jawbone or a skull fragment, and the result looks more like a turducken. We have a grab-bag of cases on specific issues, but no theory as to what this right (if it exists) is all about. The result in each case seems to turn more on instinct than on any overarching principle.[14]

To the extent that this dissent was viewed by Judge Kozinski as an invitation to the Supreme Court to review this doctrine,[15] and, upon review clarify it, that invitation has only been accepted in part. While the Supreme Court accepted the invitation to look at the case, there was not much clearing of the thicket. Here is the opening of Justice Alito's majority opinion:

> In two cases decided more than 30 years ago, this Court referred broadly to a constitutional privacy "interest in avoiding disclosure of personal matters." **Whalen v. Roe**, 429 U.S. 589, 599-600 (1977); **Nixon v. Administrator of General Services**, 433 U.S. 425, 457 (1977). Respondents in this case, federal contract employees at a Government laboratory, claim that two parts of a standard employment background investigation violate their rights under **Whalen** and **Nixon**. Respondents challenge a section of a form questionnaire that asks employees about treatment or counseling for recent illegal-drug use. They also object to certain open-ended questions on a form sent to employees' designated references.
>
> We assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in **Whalen** and **Nixon**. We hold, however, that the challenged portions of the Government's background check do not violate this right in the present case.[16]

The case goes on to hold that the safeguards against disclosure of the information thus gathered, and the reasonable need to gather such information, satisfy

World-Renowned Author and Psychiatrist Dr. Peter Kramer Featured at Annual Meeting Seminar

Dr. Peter Kramer will join Rhode Island Bar Association President Lise Iwon and the Bar's Lawyers Helping Lawyers Committee Chair Nicholas Long in a discussion about legal ethics and depression at the Bar Association's Annual Meeting. The seminar is on Thursday, June 16th, from 10:45 until 12:00, with 1.5 ethics CLE credits.

Lawyers suffer from depression at much higher rates than the general public. While depression obviously harms the individual lawyer who is suffering from it, the disease also produces considerable fallout, affecting partners, clients, and family members. Although depression is a medical condition like cancer, with physiological as well as emotional impacts, Dr. Kramer believes that both the medical profession and society as a whole often fail to take depression seriously and even romanticize it. As a result, he argues, millions of people are suffering unnecessarily. At the seminar, Dr. Kramer will discuss lawyers' ethical responsibilities to themselves, their clients regarding depression-related issues, and how to promote timely diagnosis and treatment of the disease.

A best-selling author of six books, many scientific papers, short fiction, essays, and a blog on *Psychology Today*, Dr. Kramer is also a practicing psychiatrist in Providence and a professor at Brown University Medical School. He was formerly the host of the public radio program *The Infinite Mind*. Perhaps his most celebrated book is *Against Depression*, about which the novelist Joyce Carol Oates wrote: "Peter Kramer is an analyst of exceptional sensitivity and insight. To read his prose on virtually any subject is to be provoked, enthralled, and illuminated."

O, The Oprah Magazine noted, "By turns poetic and academic, and always deeply felt, [Kramer's] book is a polemic against a society that accepts depression as a fact of life."

This Annual Meeting seminar is brought to you by the Bar's Lawyers Helping Lawyers Committee.

the demands of any such right to informational privacy as *might* exist, and that judicial modesty argues against deciding the constitutional question needlessly.

That modesty was met with a rebuke, in the form of a strongly-worded concurrence by Justice Scalia, in which Justice Thomas joined, saying that the Court should have reached the question and answered it negatively. With a fitting (dis)regard to what had recently been derided as "empathy,"[17] Justice Scalia derides what he calls:

> [T]he farcical nature of a contention that a right deeply rooted in our history and tradition bars the Government from ensuring that the Hubble Telescope is not used by recovering drug addicts.[18]

So, the most we can say is that the Court declined to declare unequivocally that such a right exists, and avoided eliminating the right definitively.[19] Several circuits have well-established lines of cases supporting the existence of a constitutional right of informational privacy.[20] The law in the First Circuit is less clear, as there are relatively few cases here that discuss such a right. It certainly seems clear that there is not the robust support for this concept as is found in some other parts of the country.

The First Circuit reviewed the field, in the context of a claim for qualified immunity in a § 1983 case, in **Borucki v. Ryan**,[21] where the court found there was no "clearly established" right to informational privacy such as would remove the cloak of qualified immunity. That decision, in turn, mentions an earlier decision by Judge Pettine[22] that alludes, in a footnote, to growing support for a right of informational privacy. Neither decision expressly finds such a right, nor do they foreclose its existence. The circuit court was somewhat stronger in **Vega-Rodriguez v. Puerto Rico Telephone Company**,[23] involving video, but not audio, surveillance of an open area of a workplace.

The employees sued, alleging, *inter alia*, a violation of their right to privacy. The district court dismissed the complaint, and the appeals court affirmed. While affirming the trial court, the appeals court nevertheless recognized the existence of a constitutional right of privacy, albeit a narrowly circumscribed one. The court distinguished between a privacy right as it relates to personal autonomy in making certain personal decisions, and another right relating to confidentiality of private matters. The court found that neither of these rights was implicated in video surveillance of public areas in a workplace. Importantly, though, the court's recognition of "ensuring the confidentiality of personal matters,"[24] citing **Whalen** and **Borucki**, was not in any way hedged as being hypothetical or assumed for the sake of judicial modesty. In fact, the First Circuit, in a later case, cited **Vega-Rodriguez** approvingly in support of a narrowly drawn right "prohibiting profligate disclosure of medical, financial, and other intimately personal data."[25]

The Rhode Island Supreme Court appears not to have directly addressed the existence of a constitutional right to informational privacy,[26] though there has been some law regarding Rhode Island's statutory right to privacy, as well as reference to a more general right of privacy.[27] The Court has explicitly held there is no tort-based common law right of privacy, and any such right needs to be created by the legislature.[28] The Court *has* recog-

nized a privacy interest, in terms of discovery, in certain confidential information, particularly financial information.[29]

It is not axiomatic that a constitutional right (if indeed there is one here) must give rise to a correlative evidentiary privilege. The United States Supreme Court has held, for example, that the First Amendment right to a free press does not give rise to an evidentiary privilege that would shield discovery regarding editorial decision-making.[30] Of course, the difference here is that the informational privilege, if it exists, protects precisely the revelation of that which is sought to be uncovered, as compared with the editorial privilege, which would have protected pre-publication discussions about potential stories, a matter which is distinct from the right to freely publish stories about public figures. Thus, there is a strong argument for a finding of privilege for informational privacy should this issue be litigated here.

The point is that courts often, and rightly, focus on the right of the inquiring party to obtain information,[31] sometimes to the point of asking counsel for those who resist the inquiry what basis there is for withholding that which is being sought. This article contends there ought to be some consistent balancing of that right against a person's right not to disclose that which is private. Those rights are not surrendered simply through being a party to a lawsuit, and those rights are widely recognized as having a constitutional dimension.

Discovery is sometimes derided as a mere fishing expedition where counsel probes at will for, it sometimes seems, the mere pleasure of the chase (or sometimes, perhaps, hoping to gain advantage from the discomfit thus inflicted). The better view may be that discovery *ought to be a fishing expedition* in that a wronged party needs to thoroughly explore the adverse party's records and recollections to uncover evidence in support of the claim of wrong, as well as allowing one accused of such wrong latitude to assess the validity and severity of the claim. It might be better to say that courts, and skillful advocacy, require that you only drop your net where you have reason to think the fish are.[32]

ENDNOTES

1 *Super. R. Civ. P. 26(b)(1)*

2 ***Kelvey v. Coughlin**, 625 A.2d 775 (R.I. 1993)*

3 *In fact, Super. R. Civ. 30(d)(1) offers three occasions when counsel may instruct a witness not to answer: (a) to preserve a privilege; (b) to enforce a court-ordered limitation on evidence, or; (c) to present a motion for a protective order.*

4 *"A Practical Guide to Discovery & Depositions in Rhode Island" MCLE, Inc. 2010, § 9.3, p.9-9 to 9-11*

5 *R.I. Gen. Laws § 4-12-13*

6 *R.I. Gen. Laws § 44-11-21*

7 ***National Aeronautics and Space Administration, et al v. Nelson**, et al., 562 U.S. ____ (2011) decided January 19, 2011, (Alito, J.)*

8 *This recitation of facts is derived largely from the Ninth Circuit's opinion in **Nelson v. National Aeronautics and Space Administration**, et al, 530 F.3d 865 (9th Cir. 2008). ("Nelson II")*

9 *2004 Homeland Security Presidential Directive #12*

10 *According to footnote 5 in the majority opinion, the Acting Solicitor General asserted at oral argument that the government would make no use of the suitability matrix in making contractor credentialing decisions.*

11 *http://hspd12jpl.org/*

12 ***Nelson v. National Aeronautics and Space Administration**, et al, 506 F.3d 713 (9th Cir. 2007) ("Nelson I")*

13 ***Nelson v. National Aeronautics and Space Administration**, et al, 568 F.3d 1028 (9TH Cir. 2009) ("Nelson III")*

14 *Nelson III at 1052*

continued on page 40

Bar's Public Services Receives $20,000 Grant in Support of US Armed Forces Service Project

Michael A. Cooper, President of the Board of Trustees of the American College of Trial Lawyers Foundation, announced the award of $20,000 to the Rhode Island Bar Association's United States Armed Forces Legal Services Project. Brought to the Foundation's attention by the College's Emil Gumpert Award Committee, the Foundation determined that although the Project, one of only three finalists for the Gumpert Award, did not win the Gumpert, it is deserving of Foundation recognition and financial support. The Bar will use the $20,000 grant to further the goals of the Project and publicize the Project to other states.

Unique to Rhode Island, initiated by Past Bar President Victoria M. Almeida, and launched in late 2009, the US Armed Forces Legal Services Project, an effort of the Rhode Island Bar Associations Public Services Department, is specifically-designed to provide those serving in the military and their families with legal assistance. Coordinated with the Attorney-Advisor at the Office of the Staff Judge Advocate, volunteer attorneys directly represent military personnel by accepting civil law cases including family law, probate issues, landlord/tenant, real estate, contracts, consumer, bankruptcy, collections, employment, immigration/ naturalization, and income tax issues.

Bar's US Armed Forces Legal Services Project Program Statistics

Volunteer attorneys to-date: **55**
First case placed: **August 18, 2009**
Cases placed: **141**

Case types
Veterans Benefits – 8
Consumer – 36
Family Law – 58
Probate – 19
Other – 20

Cases per military branch
Army – 16
RI Guard – 73
Navy – 17
Marines – 7
Air Force – 4
Coast Guard – 5
War Veterans – 19

US Armed Forces Legal Services Project

The following Bar members have generously volunteered their time and legal expertise to the Bar's nationally-recognized US Armed Forces Legal Services Project:

Alan M. Barnes, Esq.
Armando E. Batastini, Esq.
David N. Bazar, Esq.
Renee M. Bevilacqua, Esq.
Andrew R. Bilodeau, Esq.
John L. Calcagni, III, Esq.
Jennifer L. Caputi, Esq.
Patrick Carroll, Esq.
Joseph P. Casale, Esq.
Robert V. Chisholm, Esq.
Gerard P. Cobleigh, Esq.
Peter P. D'Amico, Esq.
Susan L.B. Darnell, Esq.
William J. Delaney, Esq.
Gerald C. DeMaria, Esq.
Priscilla Facha DiMaio, Esq.
Stefanie DiMaio-Larivee, Esq.
Kathleen G. DiMuro, Esq.
Christine J. Engustian, Esq.
Patrick A. Fayle, Esq.
William E. George, Esq.
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Jane B. Gurzenda, Esq.
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We Want You

For The Armed Forces Legal Services Project!

The Rhode Island Bar Association's United States Legal Services Project needs volunteers to answer the call. To join, please contact the Bar's Public Services Director Susan Fontaine by telephone: 401-421-7722 or email: sfontaine@ribar.com.

Bar Member and National Guard Captain's Praise for Armed Services Legal Project

Vicky and friends,

Thank you so much for the support and kind words. Know that they help me tremendously as I prepare to leave my family, friends, and community for my year-long deployment. Admittedly, though, I am looking forward to the opportunity to serve our Nation in a challenging environment. I am going with a very experienced unit and some terrific training by our U.S. Army Judge Advocate General's Corps.

I also want to thank you and the Bar for your continued support of the Rhode Island military community through the US Armed Forces Legal Services Project. Just for some perspective, while our state has one of the smallest Army National Guards in the country (no surprise) with 2,200 troops, we have and still do deploy more often (per capita) than almost every other state. Right now, 483 Soldiers are currently mobilized in Southwest Asia and another 374 are going out the door in the next few months (including me in a couple of weeks!). And we are in the 10th year of operations. For my unit (the 43d Military Police Brigade), this is our third deployment (but my first) since 9/11.

With this kind of operational tempo, the legal services you provide truly assist us in our mission. Resolving legal issues before heading into harm's way provides soldiers with peace of mind so they can focus on what they have to do to come home safe. Similarly, the services you provide when our troops are back home help with the transition and lifts a burden as they prepare for the next mobilization. Please know that our leadership is fully aware of what you are doing to support us and are very thankful for it. Your efforts are not going unnoticed, I promise you that!

Keep doing what you are doing. It means so much to us. I look forward to rejoining you in 2012!

Michael P. Jolin
CPT, JA
Trial Counsel
43d Military Police Brigade
Warwick Armory

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In February, the Rhode Island Bar Association's Public Services and Continuing Legal Education Programs sponsored "Custody and Support Issues In Relocation Cases: Doesn't anybody stay in one place anymore?" This CLE was offered, free of charge, to 46 attorneys from the Bar's Volunteer Lawyer Program and the US Armed Forces Legal Services Project, who accepted a pro bono family law case. Seminar speakers (l-r): Peter Sangiovanni, Jr., Esq.; Hon. Stephen J. Capineri; Lt. Col. Vivian Caruolo; Janet Gilligan, Esq.; Deborah M. Tate, Esq.; and Kevin D. Tighe, Esq.

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Oh, Atlanta!

American Bar Association Delegate Report: ABA Mid-Year Meeting

Robert D. Oster, Esq.
ABA Delegate and Past
Rhode Island Bar
Association President

…reminders were particularly appropriate in Atlanta, the home of the Martin Luther King Center, the Jimmy Carter Center, Sherman's March during the Civil War and a one-time bastion of segregation and the Confederacy.

The American Bar Association (ABA) Mid-year Meeting in Atlanta, Georgia was eventful and enjoyable. The two-day event was filled with many programs and included the House of Delegates deliberations. We were addressed by the ABA's first Hispanic-American President, Steve Zack, a member of the Florida Bar who, at a young age, was a Cuban émigré. Zack recalled being held in a Miami immigration detention center and his gratitude for a new life in the United States, a land of immigrants. Attorney Zack is particularly well suited to lead the ABA at a time when immigration reform and enforcement are at the top of federal, state and local agendas.

The House of Delegates was addressed by Congressman John Lewis, the son of sharecroppers and a leader in the Civil Rights movement who recalled his over 40 incarcerations for civil disobedience to racist laws. He inspired us all by his life story and exhorted us to remember we are all of "one house" regardless of our many differences. Later in the evening, he traveled back to Washington, D.C. to receive the Presidential Freedom Medal at the White House.

Chief Justice Wallace Jefferson, of Texas, the President of the Conference of Chief Justices, told the House of his familys' inability to find a hotel that would accept an African American family in Texas in the 1950s, even though his father was a member of the armed forces.

All of these addresses above brought tears and chills to me, as they are stories of inspiration to succeed in the law despite walls of hatred and bigotry based on race or ethnicity. These reminders were particularly appropriate in Atlanta, the home of the Martin Luther King Center, the Jimmy Carter Center, Sherman's March during the Civil War and a one-time bastion of segregation and the Confederacy.

The Delegates were treated to a sneak preview of the latest Robert Redford film, *The Conspirator*, soon to be publically-released. I encourage Bar members to see a great actor's and film director's take on the Lincoln assassination story. Any of us who has represented an unpopular defendant in a criminal proceeding will identify with the attorney who represented an alleged co-conspirator of John Wilkes Booth. The film has particular relevance today in light of the government's war on terror and how civil liberties can be abridged in a time of war.

While there is little free time at these meetings, I always try and fit in a volunteer opportunity to mentor young lawyers or law students either by participating as a judge in national mediation or advocacy competitions held in conjunction with the ABA's meetings. This year, I was able to assist young law students from the ABA's Law Student Division. I consider giving back to these students a duty and a pleasure.

The Delegates were called upon to vote on a variety of issues which directly affect the practice of law. First, a resolution was passed opposing proposed cuts in funding for the Legal Services Corporation. Low income individuals seeking access to justice are more numerous than available services. As Interim President of Rhode Island Legal Services (RILS) Board of Directors, I attest to those needs. On a related note, I succeeded Judge Walter Stone whose many years of work and dedication as RILS Board President is worthy of the Rhode Island Bar Association's and the community's admiration.

Several resolutions of interest to the criminal bar were on the agenda, particularly the obligation to comply with discovery under **Brady v. Maryland**, 373 U.S. 83 (1963), concerning federal guidelines regarding sentencing of white collar defendants and pretrial detention orders.

The Family Law Section proposed a resolution on bullying, both cyberbullying and youth-to-youth sexual and physical harassment and supporting education programs to assist in reducing this antisocial behavior.

A perennial favorite, a collaborative law resolution, reviewed in my November/December 2010 Bar Journal ABA Report, was withdrawn to be refined and resubmitted at a later date.

A resolution passed requiring civic education in lower, middle and upper public schools. A myriad of other resolutions dealing with gun control, uniform state laws, patent law and other areas of specialized practice were proposed.

As always, I am honored to serve as the Rhode Island Bar Association's ABA Delegate, and I welcome Bar members comments or suggestions regarding my representation. ❖

Just a Wingman? Rhode Island's Special Purpose Local Education Agency

Bryan W. Hudson, Esq.
Rhode Island Bar Association Member

… school districts in Rhode Island have found it difficult to determine responsibility for the provision of educational services to resident children.

Though it may be somewhat of a surprise to many who do not practice education law, school districts in Rhode Island have found it difficult to determine responsibility for the provision of educational services to resident children. This difficulty exists even though Rhode Island law provides that the city or town where a child resides must make special education services available to that child.[1] In fact, and most likely due to the current economic environment, the growing trend within the State is for districts to renounce provision of educational services to children educated at the Rhode Island School for the Deaf (RISD). In doing so, the districts relied on Rhode Island General laws § 16-26-3.1(2) that provides RISD "[shall] be operated as a local education agency (LEA)."[2] In relying on this portion of the law, the districts argue that the language effectively absolves them of responsibility for a child enrolled at RISD because it is an equal LEA[3] under federal and state law.

Regrettably, other provisions found within state law and the Individuals with Disabilities Education Act (IDEA) as well as the Rhode Island Regulations of the Board of Regents Governing the Education of Children with Disabilities (R.I. Regulations) eclectically complicate the otherwise straightforward analysis. Moreover, the Rhode Island Department of Education (RIDE) recently offered an opinion concerning RISD – as an atypical concomitant LEA – in **K.K. v. Rhode Island School for the Deaf.**[4]

RISD operated as as a LEA

As mentioned above, Rhode Island law provides that RISD "[shall] be operated as a [LEA] and shall be governed by a board of trustees."[5] In addition, RISD's "[board] of trustees shall have the powers and duties of a school committee."[6] This language appears unequivocal, yet two questions remain. First, taking into consideration the statutory construction, does RISD's "operation as" a LEA mean that it is a LEA? And second, does "[having] the power and duties of a school committee" mean that RISD's "board of trustees" is a "school committee"?[7]

In Rhode Island, "It is well settled that when the language of a statute is clear and unambiguous, [it] must [interpreted]…literally and…the words of the statute [should be given their] plain and ordinary meanings."[8] If the language is unambiguous on its face, the analysis should not go any farther to discern legislative intent.[9] It is an equally well-settled principle that "statutes relating to the same subject matter should be considered together so that they will harmonize with each other and be consistent" with their general objective scope.[10] Essentially, Rhode Island statutory construction involves a "practice of construing and applying apparently inconsistent statutory provisions in such a manner so as to avoid the inconsistency."[11]

With Rhode Island's method of statutory interpretation in mind, and given that the language does not appear ambiguous, the plain or literal meaning should be given to the terms of § 16-26-3.1(2). The language of the statute reads RISD's "[board] of trustees shall have the powers and duties of a school committee."[12] The term "have" in this particular statute appears to mean: "possess or be provided with (a quality, characteristic or feature)."[13] By implication, the RISD's board of trustees would not "possess" the powers or duties of a school committee but for the language of the statute provided by the General Assembly. As this is the case, it appears that the legislative intent was to provide RISD's board of trustees with the distinctive "quality, characteristics or features" of a school committee.

However, RISD's board of trustees merely having the "qualities, characteristic or features" of a school committee does not necessarily mean that it is a school committee. At first glance, it appears that had the General Assembly meant to legislatively turn RISD's board of trustees into a school committee, it would have utilized more definitive language rather than merely provide the board of trustees with characteristics or features of a school committee. This will become evident when other statutes are read in conjunction with this language because, as discussed below, if the General Assembly had intended that RISD's board of trustees actually was a school committee, it seems plausible that

it would not have withheld many of the powers that school committees possess in the State.[14]

As for RISD's "[operation] as a [LEA],"[15] the language in and of itself appears to be unambiguous as well. Again, application of the plain meaning to the language of the statute gives us the same conclusion as above. The General Assembly chose to include the language "operate as" instead of other readily available and definitive language. So, it appears that RISD is "managed or run" as an LEA rather than it being an LEA.[16]

What is the Rhode Island School for the Deaf?

Prior to delving into the statutory language that confounds § 16-26-3.1(2), a discussion about RIDE and RISD's governance is appropriate. The Board of Regents is constituted under the General Laws as a "public corporation."[17] The State of Rhode Island statutorily "entrusted [it with] control of elementary and secondary education institutions and functions" as well as"[invested it] with the legal title (in trust for the state) to all property, real and personal, now owned by and/or under the control or in the custody of the board of regents for education for the use of the department of elementary and secondary education."[18] The Board of Regents is also successor to "[all] powers, rights, duties, and privileges pertaining to elementary and secondary education.[19] And, the Board of Regents cannot "engage in the operation or administration of any subordinate committee, local school district, school, school service, or school program, except its own department of elementary and secondary education, and except as specifically authorized by an act of the general assembly."[20] In addition, the Board of Regents "[maintains] a department of elementary and secondary education, [provides] for its staffing and organization and [appoints] a commissioner of elementary and secondary education pursuant to § 16-60-6 who shall serve at its pleasure.[21] Furthermore, the Regents have the power to:

> "establish other educational agencies or subcommittees necessary or desirable for the conduct of any or all aspects of elementary and secondary education and to determine all powers, functions, and composition of any agencies or subcommittees and to dis-

solve them when their purpose shall have been fulfilled; provided that nothing contained in this subdivision shall be construed to grant the regents the power to establish subcommittees or agencies performing the duties and functions of local school committees except as provided in § 16-1-10."[22]

Though the RISD's board of trustees has many of the powers of a school committee, many powers are "[reserved to] the commissioner of elementary and secondary education, and the board of regents for elementary and secondary education…."[23] For instance, the Board of Regents and the Commissioner provide parameters for RISD's budget requests, recommends a budget, and participates in budget development.[24] The Board of Regents does not have similar school committee budgetary authority in the several towns and cities throughout the State. Instead, the Board of Regents specifically cannot "engage in the operation or administration" of local school districts without an act of the General Assembly.[25] But, the Regents do have the explicit authority to "[carry] out the provisions of [§ 16-26]" and to "[make] any rules and regulations governing the operation of [RISD] that may be required."[26] In fact, the General Assembly expressly delegated the Board of Regents more powers and duties than enumerated elsewhere in the General Laws in conjunction with RISD.[27]

Even though the Regents have broad rule and regulation authority when it comes to the governance of RISD, the Regents cannot provide RISD's Board of Trustees with "the duties and functions" of a school committee.[28] While "school committees" have the "entire care, control and management" of public school interests of its city or town, the legislature specifically withheld certain duties and powers from RISD's Board of Trustees.[29] For instance, the Board of Regents, not RISD, establishes strategic directions for the education of deaf and hard of hearing children in the state of Rhode Island.[30] And, "school committee" members are typically elected either annually or biennially,[31] while members of RISD's Board of Trustees are appointed by the Board of Regents.[32]

In sum, a careful review of Rhode Island law illustrates a public corporate structure that provides that RISD is neither wholly a LEA nor is its board of

trustees wholly a school committee. Essentially, RISD is a conundrum. It appears that it is a political subdivision of the Board of Regents with the characteristics of a LEA that the General Assembly expressly allows the Regents to administer and control.[33]

Let us (possibly) complicate this discussion further

To further complicate the analysis, RISD may also be considered an educational placement and/or an education service agency (ESA) under federal law. Though educational placement is not defined in IDEA, the United States Department of Education has commented. Specifically, a placement refers to the "provision of special education and related services rather than a specific place."[34] Essentially, students have their Individual Education Program's (IEP) developed by a LEA and then are placed at a location to implement provision of the enumerated special education and related services.

This analysis becomes important when it is viewed in light of RISD not being a mandatory educational setting – students are not required to attend under Rhode Island law. The language of Title 16 Chapter 26 provides that if a child's impairments make it impracticable for the student to make progress toward his or her educational goals in a public school, he or she "may attend" RISD "without charge."[35] This is contrary to the Rhode Island compulsory attendance laws which provide that children "shall regularly attend" a public school in the city or town where the child resides.[36] In other words, LEAs send children to RISD for an education in lieu of providing the services themselves.

Though "placement" has no IDEA definition, LEA is defined. LEA is defined as:

> "a public board of education or other public authority legally constituted within [Rhode Island] for either administrative control or direction of, or to perform service function for, public or secondary schools in a city, county, township, school district or other political subdivision of the State or a combination of school districts or counties as are recognized in the State as an administrative agency for its public elementary or secondary schools.[37]

LEA includes: "educational service

agencies" and "any other public institution or agency having administrative control and direction of a public elementary or secondary school, including public non-profit charter school that is established as an LEA under State law."[38] An ESA is defined as a regional public multiservice agency, authorized by state law to develop, manage and provide services or programs to LEAs, and recognized as an administrative agency for purposes of the provision of special education and related services provided within public elementary and secondary schools of the state.[39] The term ESA includes "any public institution or agency having administrative control and direction over a public elementary school.[40]

Under the first part of the definition of LEA, based on the analysis above, RISD appears to fall short as an LEA. Specifically, RISD does not have "control or direction of, or performs service functions for,…public or secondary schools in a city, county, township, school district or other political subdivision of the State…"[41] RISD, as mentioned above, appears to be, in an off itself, a political subdivision of an administrative agency of the State managed as a LEA. Therefore, RISD is not "recognized," legally or otherwise, as an administrative agency and falls short of the second half of the definition.

However, the definition of LEA also includes ESA and "other public institutions or agencies."[42] These ESAs are considered to "[have] full responsibilities and right as LEAs."[43] When RISD is viewed in light of the ESA definition, a much more convoluted analysis evolves. First, there can be little argument that RISD is public, as it receives public financing through RIDE and the Board of Regents and under both the purview of the Board of Regents and RIDE. Second, it is evident that RISD does have "administrative control and direction over a public elementary school."[44] Whether RISD is also an institution, however, requires analysis of the term.

Institution is not defined under the IDEA or the RI Regulations, and therefore should be given its plain meaning. Institution is defined as "a society or organization founded for religious, educational, social or similar purpose" or "an organization providing residential

continued on page 42

Who Represents You in a Rhode Island Real Estate Closing?

Real Estate Attorneys' Liabilities after *Groff*

David M. Dolbashian, Esq.
Law Office of David M. Dolbashian, Esq. P.C., Providence

Historically, most closing attorneys considered the lender their client. In short, the lender appeared to control the attorney. Or so we once thought.

Disciplinary counsel inquired, "Dave, exactly who are you representing in this closing?"

Without hesitation, I responded, "Well, the bank (of course)."

"Not so fast, counselor…I think you need to read Groff before you can say that…"

My breathing stopped for a few seconds upon hearing that statement.

Perhaps I should back up a bit…

The **Groff** decision (**Credit Union Central Falls v. Groff**, 2009 RI 966 A.2d 1262 (RI Sup Ct, 2009)) was decided February, in 2009. The essential holding of **Groff** is that a settlement attorney actually represents the borrower in a bank-financed, real estate closing *and* possibly owes duties to other non-client parties as well.[1] Those other parties, such as a lender, are now considered "third party beneficiaries" to the contractual agreement between the borrower and closing attorney.[2] It is a shift of the commonly-held understanding that will sweep through the bar of Rhode Island real estate attorneys.

In my situation, what appeared to be a normal, garden-variety closing developed into a problem when the lender failed to wire the settlement proceeds to my account in a timely manner. The situation was considerably tighter due to the fact that the prior lien to be paid was for an Federal Housing Administration (FHA) loan which required an additional month's worth of interest (and not a standard per diem interest amount) if the payoff were to be received after the first day of the next month. The borrower could not (and should not have had to) produce any such an additional amount. The lack of funds from the lender severely threatened my office's ability to assure a fully paid lien. My concern was that, without full payment, the borrower would still have an active amount on the loan, accumulating interest, and the new bank would not be in first position as the title policy I issued would have guaranteed. After the exchange of strained and demanding emails back and forth between the lender and my office, the funds finally arrived, but not before I had made a call to Disciplinary Counsel to ask about my next possible course of action. Disciplinary Counsel's inquiry (see above) as to whom I represent deeply concerned me. It was not for the matter at hand, but, rather, how I would operate going forward. What had appeared to be a quarrel between client and attorney (the lender and myself), now placed me at odds instead with the borrower, and all the implications that it conjures.

What is it about **Groff** that should make a real estate attorney worry? Historically, most closing attorneys considered the lender their client. The lender traditionally dictated the actions of the attorney, and the instructions delivered with most closing packages had directives followed without deviation. In short, the lender appeared to control the attorney. Or so we once thought.

After **Groff**, it is now the borrower whom the attorney represents. The difference may appear to be a nuance, but the fiduciary duties that such a shift places upon a closing attorney can wreak havoc with how one approaches title issues, questions from borrowers, dealings with lenders, and, most importantly, disbursements of monies from these closings.

The travel of **Groff** initially appears complicated, but it is not. Attorney Lawrence Groff acted as a settlement agent for a number of loans from Credit Union Central Falls (CUCF), now known as Navigant Credit Union. Allegations were leveled against Attorney Groff by two borrowers in two separate closings. Allegedly, Groff did not pay previously encumbered liens for those individual borrower's properties which were to be paid via the proceeds of the new loans (as identified in the settlement statements of the loans). The title insurer, Mortgage Guarantee, as a result of the title policies written by Groff, were obliged to provide the payoffs to assure the insured lender, CUCF, they would be in first position. Mortgage Guarantee then filed suit against their former agent, Groff, for reimbursement. CUCF also sued Attorney Groff for malpractice. As a result, Attorney Groff's escrow account was

frozen by court order. Mortgage Guarantee's claim was that the amounts in Groff's fund should be granted to them since they had made CUCF whole. Mortgage Guarantee's claim was based upon the fact that they had placed CUCF in first position by paying the liens left open by Attorney Groff. Ergo, they claimed the proceeds in Groff's escrow rightfully belonged to them.

The complication of this case developed with an action commenced by another client of Groff. That client was utilizing Attorney Groff in a probate matter, and she alleged she had furnished a large amount of money to Groff under false pretense and wanted her money returned. Since the court had placed a hold upon Groff's escrow, the probate client chose to intervene in the real estate suit so that her assets in that escrow account could be protected.

In discovery, the probate client sought to elicit communications between Groff and CUCF and also between Groff and the borrowers. Groff claimed those communications were protected by the attorney-client privilege and not subject to discovery. The case eventually found its way to the Rhode Island Supreme Court, seeking to clarify exactly who Attorney Groff represented, and subsequent to that determination, what, if any, of those communications were truly protected. However, the resulting decision was somewhat broader than that narrow question.

In **Groff**, the Court wrestled with a number of factors, including the relationship Groff had with CUCF, being one of a select few attorneys permitted to close their loans, as well as the written directions from CUCF that Groff was required to follow.[3] Another factor the Court considered was the client's ability to choose who may be used as the Title Attorney for the transaction.[4] What the Court finally appeared to have settled on is, quite simply, who paid the bills for the legal work and whether the borrowers accepted the specific attorney.[5] The Court pointed to the fact that since the borrower would be responsible for paying for the attorney fees, title examination, and the lender's title insurance (even though the title insurance would be only a benefit to the lender), the Court found the attorney-client relationship was formed between the borrower and attorney.[6]

How then was a bank such as CUCF, now without an attorney-client relation-

ship, able to sue Groff for malpractice if they were not his client? The Court stated that the bank was a "third party beneficiary" to the contractual agreement of the borrower and attorney. The rationalization was that the borrower required a loan from the bank and the bank required a number of legal actions performed to assure security. The attorney, acting for the borrower, would assure that those actions were done to satisfy the lender in order to induce them to loan the money.[7]

What appears missing from the facts, as it probably is in most real estate transactions, was any sort of retainer agreement. The documents signed by the borrowers indicated that, even though the borrowers could have chosen their own title attorney, they chose to allow the bank to choose one for them.[8] The Court is silent as to what the result would have been had the borrowers chosen an attorney not approved by CUCF. However, the result is unlikely altered by that variation. If the rationale is that the attorney is acting for the ultimate benefit of the client borrower, the approval of a bank may not preclude the attorney's duties to both the client (the borrower) and the third party beneficiary (the bank). It is likely that the third party beneficiary theory would apply to any attorney based upon the direct benefit derived by the transaction, even if that attorney was not an approved or preferred attorney of the lender.

The Court's decision may have a far-reaching effect outside of the scope of real estate. The decision may open attorneys to new liabilities to potential third party beneficiaries in other matters if, as the Court highlighted, those benefits were a direct result of the transaction.[9] In other fields of practice, such as estate planning, the potential liability of an attorney may now be heightened. However, there is little doubt that this decision certainly places a burden upon the real estate practitioner in very real and specific ways.

If the Court's ruling is a blanket statement that the client is the borrower, what happens next? Assume a borrower is sitting at a table alone with an attorney, signing paper work for a refinance, and asks a bit of legal advice about the loan. In the past, attorneys often rested on the comfort of not owing a duty to a non-client. Many, uneasy about expressing

any opinion (and possibly angering their perceived client, the bank), could easily say (as they believed) that they were representing the lender and avoid expressing any legal opinion. Now, that may have to change. What if a closing occurs that subsequently devolves into a contentious matter between the lender and the borrower? What position, if any, will the closing attorney have to take if the attorney was, and had always been, the representative of the borrower? Additionally, how muddy will the waters now be since the attorney may also owe a fiduciary duty to the lender?

After **Groff** was decided in Rhode Island, other states began to address dual representations in the context of real estate closings (*see* **Marsh v. Wallace** from the Mississippi Federal Court, citing that attorneys need to clearly indicate whom they represent to all parties in real estate closings per their Rules of Professional Conduct[10]). Since the Court in **Groff** did not address what effect a pre-emptive disclosure by an attorney may have, it still may be murky as to whether a disclosure that would counter the assumption of representation that **Groff** imposes would clarify the situation. Additionally, the recent problems surrounding errors in foreclosure actions in other states should give Rhode Island attorneys pause as to their true or perceived role at any real estate closing. Since a third party beneficiary now places additional liabilities upon the attorney, the answer may hold many more problems for the practitioner, especially ones who do not address the actual representation issue up-front.

Groff may now impact situations that involve potentially confidential communications. What if the borrower asks advice or reveals a fact about a potential title problem on the property in the middle of, before, or after the closing? Revealing that defect to the bank could violate the attorney-client privilege. Not revealing a known defect could place the attorney subject to problems with the third party beneficiary, the bank. Lastly, what duties does a closing attorney have toward a *pro se* seller in a conveyance closing? What if a deed is prepared to facilitate the conveyance and an error is made? Does the attorney have duties to *both* buyer and seller? **Groff** can easily extend to mean that now the sellers are also third party beneficiaries.

…Not so fast, counselor. Those old assumptions may no longer apply.

ENDNOTES

1 *Credit Union Central Falls V. Groff, 2009 RI 966 A.2d 1262 (RI Sup Ct, 2009).*
2 *Groff, 1274-75*
3 *Groff, 1269-70*
4 *Groff, 1273*
5 *Groff, 1274*
6 *Groff, 1274*
7 *Groff, 1274*
8 *Groff, 1270*
9 *Groff, 1272-3*
10 *Marsh V. Wallace, 666 F.Supp.2d 651 (S.D.Miss. 2009).* ❖

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Practical Skills - Organizing a Rhode Island Business	10-15	$45		
Commercial Law 2010: Update on Recent Developments	10-12	$40		
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Responding to DEM & CRMC Enforcement Actions	09-17	$30		
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Practical Skills - Domestic Relations Practice	11-09	$50		
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LAW PRACTICE MANAGEMENT				
Legal Research in 2010	10-09	$25		
Establishing a Law Firm in RI	09-19	$25		
Planning Ahead	09-14	$39.95		
MISCELLANEOUS				
Negotiating Ethically and Professionally	11-08	TBA		
PROBATE/ELDER LAW				
Practical Skills - Planning for and Administering an Estate	11-06	$40		
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Administrative Local Rules	PR-10	$65		
REAL ESTATE				
The Ins & Outs of Landlord Tenant Law (available after 5/15/11)	11-11	$15		
Practical Skills - Residential Closings	11-07	$65		
RI Title Standards Handbook (through 10/09)	TS-09	$35		
RECENT DEVELOPMENTS				
Recent Developments in the Law 2010	RD-10	$55)		
TRIAL PRACTICE				
DWI Update	11-05	$35		
Practical Skills - Civil Practice in Superior Court	11-04	$40		
Practical Skills - Civil Practice in District Court	11-01	$40		
Practical Skills - Criminal Law Practice in RI	10-13	$50		
Social Host Law	09-11	$25		
The Elements of a Trial - The Expert Witness	07-13	$45		
HIPAA Explained	04-08	$35		
Model Civil Jury Instructions	03-02	$49.95		
WORKERS' COMPENSATION				
Practical Skills - Workers' Compensation Practice in Rhode Island (available after 6/3/11)	11-10	$40		

Books $ _____

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Detach Here

Continuing Legal Education Update

To register for CLE seminars, contact the Rhode Island Bar Association's CLE office by telephone: 401-421-5740, or register online at the Bar's website: www.ribar.com by clicking on CONTINUING LEGAL EDUCATION in the left side menu.
All dates and times are subject to change.

May 3
Tuesday
Practical Skills Seminar
Domestic Law Practice in RI
RI Law Center, Providence
9:00 a.m. – 3:00 p.m.
4.0 credits + 1.0 ethics

May 5
Thursday
Food for Thought
When the Bed Bugs Bite
RI Law Center, Providence
12:45 p.m. – 1:45 p.m.
1.0 credit

May 10
Tuesday
Food for Thought
When the Bed Bugs Bite
Casey's Restaurant, Wakefield
12:45 p.m. – 1:45 p.m.
1.0 credit

May 12
Thursday
Food for Thought
The Top Ten Client Complaints
RI Law Center, Providence
12:45 p.m. – 1:45 p.m.
1.0 ethics

May 18
Wednesday
Food for Thought
The Top Ten Client Complains
Holiday Inn Express, Middletown
12:45 p.m. – 1:45 p.m.
1.0 ethics

May 19
Thursday
Food for Thought
Withdrawing From Representation
RI Law Center, Providence
12:45 p.m. – 1:45 p.m.
1.0 ethics

May 20
Friday
A Primer on Bankruptcy Practice and Procedure
A VLP Seminar co-sponsored with the United States Bankruptcy Court
RI Law Center, Providence
1:00 p.m. – 4:30 p.m.
3.5 credits + .5 ethics

May 24
Tuesday
Food for Thought
Withdrawing From Representation
Casey's Restaurant, Wakefield
12:45 p.m. – 1:45 p.m.
1.0 ethics

May 26
Thursday
Food for Thought
The Warning Signs of Fraud
RI Law Center, Providence
12:45 p.m. – 1:45 p.m.
1.0 credit

June 3
Friday
Practical Skills Seminar
Workers' Compensation Practice in RI
RI Law Center, Providence
9:00 a.m. – 3:00 p.m.
4.0 credits +1.0 ethics

June 8
Wednesday
Food for Thought
The Warning Signs of Fraud
Holiday Inn Express, Middletown
12:45 p.m. – 1:45 p.m.
1.0 credit

SAVE THE DATES

Rhode Island
Bar Association

Annual Meeting
June 16 & 17, 2011

Featuring over 40 excellent CLE Seminars and more!

Rhode Island
Convention Center

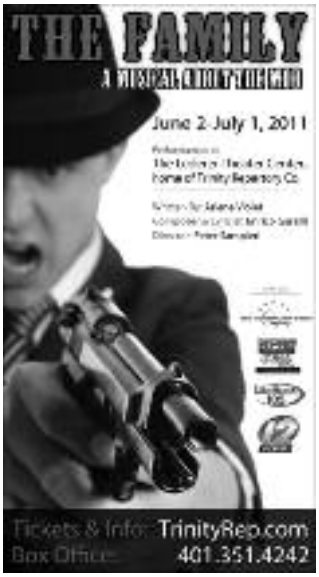
Reminder: Bar members may complete three credits through participation in online CLE seminars. To register for an online seminar, go to the Bar's website: **www.ribar.com** and click on CONTINUING LEGAL EDUCATION in the left side menu.

Beyond the Bar

All in *The Family*: Musical Musings on Mobsters

It's no secret that people are fascinated by criminal enterprises. Clearly, this has helped drive the success of television series like *The Sopranos*, *The Wire*, *Boardwalk Empire*, and the locally-filmed *Brotherhood*. While some characters are created by producers, others are inspired by real people, adding to the excitement.

The Family, a musical written by Rhode Island Bar Association member Arlene M. Violet, Esq. of Arlene Violet & Law Associates, in Barrington, collaborating with composer/lyricist Enrico Garzilli, gives us a glimpse into Rhode Island's own crime scene, and, in such a small state, the people the characters are based on may be hauntingly familiar to many of us.



Arlene was a Sister of Mercy for twenty-three years, and, for ten of those years, she doubled as a public interest attorney. "My interest in law grew during my service in the inner city. Folks used to tell me that certain things couldn't be done for poor families and elderly folks because the law was against it. I wanted to find out if this were true, and if so, how to change it." A Boston College Law School graduate, she was the first lawyer for the Conservation Law Foundation and also served as the lawyer for the Rhode Island Protection and Advocacy System.

However, to many, Arlene is known for her term as Rhode Island's Attorney General. While serving there, she addressed victim's rights and set up a victim's unit. She also tackled public corruption, focusing on abuses at Rhode Island Housing & Mortgage Finance Corporation (RIHMFC) and on entities like the now infamous Rhode Island Share & Deposit Indemnity Corporation (RISDIC). Arlene also investigated organized crime. "Organized crime was a joint federal and state focus. It was this experience of talking with so-called 'made men' and protected witnesses that led me to think that a story about them would clear up many of the misconceptions."

Arlene and Enrico started working on *The Family* in 2008. The musical's storyline contains familiar themes, particularly for those who have watched any of the aforementioned cable television shows. According to Arlene," the Godfather is worried about his succession since his son is reluctant to take over the Mob family, and there are signs that the Commission wants him replaced. The son wants to pursue his own interests and has his own family problems. One of the mob guys goes into witness protection, and his proposed testimony against the Godfather has ramifications for his own family. These respective family problems converge in the climax of the show." One thing that separates Arlene's story from similarly-themed shows is that the content is based on her own experiences as Attorney General. She notes, "for example, we have an induction scene of a made man that is verbatim from a wiretap of Raymond Patriarca's ceremony."

One thing that separates Arlene's story from similarly-themed shows is that the content is based on her own experiences as Attorney General. She notes, "for example, we have an induction scene of a made man that is verbatim from a wiretap of Raymond Patriarca's ceremony."

The Family isn't Arlene's first published account of her experiences as Attorney General. In 1988, Random House published her book, *Convictions*, and in 2010, she authored a second book, *The Mob and Me*, in collaboration with former US Marshal John Partington. Arlene hopes her play will move on to other places after its Providence run. She notes, "Producers who expressed an interest in the show will be invited to attend, since they wanted to see it on its legs." *The Family* runs this year from June 2nd until July 1st at Trinity Repertory Theatre in Providence. Tickets can be ordered on their website at www.trinityrep.com. ❖

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.

The Origins Of The Governor's Pardoning Power

Patrick T. Conley, Esq.
Rhode Island Bar Journal
Editorial Board

The convictions of John Gordon and Thomas Wilson Dorr inspired these same legislators to propose a constitutional mechanism for pardoning a person unjustly convicted of a crime.

The legislative request, sponsored by Newport representative Peter Martin, for Governor Lincoln Chafee to pardon John Gordon, an Irish-American immigrant, hanged in February 1845 for the murder of textile magnate Amasa Sprague, may attract state and national attention. There is a certain irony to this developing scenario, ignited by writer Ken Dooley's locally-produced play covering this issue, because the pardoning power now wielded by the governor in Article IX, Section 13 of the State Constitution was conferred upon him in 1854 by the same group of reformist legislators who abolished the death penalty in 1852. I contend that both actions, by so-called Dorr Democrats, were made with John Gordon's execution in mind. The memory of Gordon certainly was the foremost concern of those who voted for the death penalty ban. The convictions of John Gordon and Thomas Wilson Dorr inspired these same legislators to propose a constitutional mechanism for pardoning a person unjustly convicted of a crime.

Under the Royal Charter of 1663, the governor was a mere executive agent of the General Assembly. The charter was replaced in 1843 by the conservative Law and Order Constitution in the wake of the Dorr Rebellion. Drafted mainly by Whigs, who feared executive power (as did their English namesakes), the new constitution kept that branch of government in a weakened condition. However, the governor did receive the "power to grant reprieves, after conviction, in all cases, except those of impeachment, until the end of the next session of the General Assembly." That provision is Article IX, Section 4 of our present Constitution.

In February 1845, when Gordon was hanged after a conviction based upon conflicting and circumstantial evidence, in a trial marred by the anti-Irish Catholic animus of the press and the rulings and jury charge of a highly-prejudicial judge, Law and Order governor James Fenner refused the request for a reprieve presented to him by Gordon's lawyers (all of whom were associates and colleagues of Thomas Wilson Dorr). Of course, a reprieve is only a temporary postponement, and, in the immediate aftermath of the nativistic furor generated by the equal rights provisions of Dorr's aborted People's Constitution, this remedy would only have delayed the inevitable.

When Gordon was executed in the yard of the old state prison (where Providence Place Mall now stands), Thomas Dorr was an inmate, having been convicted of treason against the state in a Rhode Island Supreme Court trial and sentenced to life imprisonment "at hard labor in separate confinement" by Chief Justice Job Durfee, the same partisan judge who had condemned John Gordon to death. Fortunately for Dorr, a grassroots liberation movement resulted in his release, but not his pardon, after twenty months in prison.

In the Presidential election of 1844, national Democrats used the slogan "Polk, Dallas, and Dorr" to dramatize the liberation effort. In Rhode Island, Charles Jackson, great-grandson of an Irish Protestant immigrant from Kilkenny, led a Dorr Liberation slate to victory in the April 1845 annual state election. During this campaign, many vote-less Rhode Island women joined the cause. As a result of these combined efforts and a national outcry against Durfee's harsh sentence, Dorr was freed on June 27, 1845.

However, even with the liberation, the dominant Law and Order coalition of Whigs and rural Democrats maintained its control of state government during the late 1840s electing Providence Journal editor and arch-nativist Henry Bowen Anthony governor in 1849 and 1850. Then, as the Whig Party began to divide over the issue of slavery and some rural Rhode Island Democrats returned to the fold, Democratic reformers, led by Dorr's uncle Philip Allen, came to power in 1851 with Allen winning the governorship and. Dorr's closest friend, Walter S. Burges, securing the post of attorney general, chief legal advisor to the General Assembly.

The momentum of this victory prompted pro-Dorr legislators to enact the state's first secret ballot law for the prevention of voter intimidation and to pass a resolution restoring Dorr's political rights. Then, in 1852, they responded to a forty-three page report by South

Kingstown's Thomas Robinson Hazard and long-time Dorr ally Ariel Ballou of Cumberland and banned the death penalty. State representative Thomas Davis, a manufacturer and philanthropist, led the fight for that reform. A Dublin-born Irish Protestant immigrant, Davis later became a U.S. Congressman.

These early reform measures were passed with some Whig support. However, in the state elections of April 1853, Governor Allen emerged victorious, and his fellow Democrats gained a majority in both the House and the Senate for the first time since the 1830s. Emboldened by their victory, these reform Democrats twice called for the voters to authorize a constitutional convention to remedy what they considered to be glaring defects in the Law and Order Constitution. Ominously, these convention referenda were decisively rejected by the electorate.

Because the Dorrites could not achieve sweeping reform in a convention, they drafted and approved nine constitutional amendments. Their proposed amendment four gave the governor the power to pardon. Under the provisions of the inflexible Law and Order Constitution, an amendment to that basic law needed passage by two successive General Assemblies, with a general election intervening, before it could be sent to the electors for approval by a three-fifths vote.

Unfortunately, time ran out for the Dorr Democrats in the April 1854 annual state elections. Their alleged radicalism prompted rural Democratic voters to defect. By the end of the decade, these small town electors were firmly attached to the newly-formed and nativistic Republican Party. They responded to their urban wing's support of equal rights for Irish immigrants as Southern Democrats would respond to the push by the Northern wing of their party to obtain civil rights for Blacks a century later. They defected to the opposition party.

The other harbinger of defeat for the reformist Democrats was the emergence in 1854 of the Know-Nothing or nativistic American Party. This brief movement won the allegiance of many native-born workingmen who had previously supported political reform. In April 1854, the Democrats were ousted and relegated to a minority status they maintained until the so-called Bloodless Revolution of 1935. The first year since their 1854 defeat they were able to control the governorship

and both houses of the General Assembly.

Four of the nine amendments proposed by the outgoing Democratic legislature were rejected by the next General Assembly. Of the five that did pass, the voters approved three. The first, dealing with the certification of voting lists; the second, vesting the pardoning power in the governor, with the advice and consent of the senate; and a third, providing for one annual session of the General Assembly at Newport with its adjournment to Providence. This amendment effectively deprived Bristol, East Greenwich, and South Kingstown of their status as state capitals.

The adoption of the amendment allowing the governor to pardon (which is not the legal equivalent of exonerate) had been deemed unlikely by the Dorr Democrats. So, in early 1854, before succumbing to the tidal wave of nativism, they passed an act reversing and annulling the judgment of the Rhode Island Supreme Court in Dorr's treason trial. The succeeding legislature promptly sought an advisory opinion from that court. Not surprisingly, it ruled that such an act was an unconstitutional infringement upon the judicial process.

During the brief ascendancy of the Dorr Democrats, Henry Anthony's Providence Journal warned against the dire consequences of removing the "safeguard" in the Law and Order Constitution that required naturalized citizens to own real estate in order to vote or hold office (a restriction not contained in the People's Constitution). Anthony's prediction – humorous now, but tragic then – was this: "Rhode Island will no longer be Rhode Island when that is done. It will become a province of Ireland: St. Patrick will take the place of Roger Williams, and the shamrock will replace the anchor and Hope!"

From such men as Anthony, Durfee, newly elected Know Nothing Governor William W. Hoppin, and those nativists who came to power in April 1854, neither John Gordon nor Thomas Dorr could expect either justice or mercy. The pardoning process set in motion by the Dorr Democrats – a gesture more symbolic than effectual in its application to Dorr and Gordo – has never been applied to either of its first intended recipients. Perhaps its time has finally arrived, because justice has no statute of limitations.

The Gordon Murder Trial is replete

with one-sided evidentiary rulings and prejudicial commentary by Chief Justice Job Durfee. However, history's evidentiary criteria are different from those employed in the courtroom. "We have a right as citizens…" stated famed attorney and legal scholar Alan Dershowitz, "…to reject the verdicts of the court" whether those are convictions (as in the case of John Gordon) or acquittals (as in the Fall River trial of Lizzie Borden) and decide the historical truth for ourselves. We must keep in mind, warns Dershowitz, of "the limited though important, role of the jury in Anglo-American law. Its verdict decides the case before it on the basis of the admissible evidence. But it does not decide the historical truth." The conviction of John Gordon is an excellent example of a divergence between the verdict of a jury and the verdict of history. The latter demands an exoneration of John Gordon as well as his symbolic pardon.

For further information on this topic see: Patrick T. Conley's article: Rhode Island's Crisis in Constitutionalism: The Dorr Rebellion and the Origins of the Present State Constitution, in the Rhode Island Bar Journal's October 1986 issue. ❖

Counting to Ten Really Does Work

Deep Breaths: Slow racing thoughts and relax knotted muscles by breathing deeply and slowly. Put one hand on your stomach. Breathe in deeply counting to five, hold your breath for a count of five, breath out for a count of five and repeat ten times. Breathe in through your nose and exhale through your mouth.

(Brought to you by the members of the Rhode Island Bar Association's Lawyers Helping Lawyers Committee)

BOOK REVIEW

Just Like Someone Without Mental Illness Only More So: A Memoir

by Mark Vonnegut, M.D.

Roger C. Ross, Esq.
Practices in Pawtucket and a member of the Bar's Lawyers Helping Lawyers Committee

His was a very long and troubled road from an early diagnosis of schizophrenia, shortly after graduating from Swarthmore College in 1969, to becoming a successful practicing physician.

Author Mark Vonnegut, is the son of Kurt Vonnegut, the noted novelist who gained prominence, and both critical and commercial success, with the publication of *Slaughterhouse Five* in 1969. In addition to the literary merits of *Slaughterhouse Five*, Vonnegut tapped into the national mood of disenchantment and anger over the nation's continued engagement in the Vietnam War. That novel and the author took on iconic dimensions in the late 1960s, particularly on college campuses, largely due to the novel's anti-war theme. Although Vonnegut was highly successful following the publication of *Slaughterhouse Five*, never again was his work to achieve the same level of critical or popular acclaim.

Mark Vonnegut is a practicing pediatrician in a Boston suburb who, in an informal poll of nurses, was once voted the best pediatrician in the area in *Boston* magazine. His was a very long and troubled road from an early diagnosis of schizophrenia, shortly after graduating from Swarthmore College in 1969, to becoming a successful practicing physician. Vonnegut was born and raised on Cape Cod. He writes that "craziness runs in the family" and he "can trace manic depression back several generations." From a very early age, Vonnegut felt he was out of step with his contemporaries. When he was in elementary school, rarely did a day pass when he did not get into a fight with a schoolmate. His father, who took a peculiar pride in his own avowed anti-social attitudes, was similarly proud that his son had no friends. At age 10, the author announced to his mother that he intended to kill himself. She dissuaded him by proclaiming that bright youngsters such as he were meant to save the world and that he, and other like-minded kids, should at least give that exalted objective a try before attempting something as permanent as suicide.

In 1958, when Mark was eleven, "the orphans" came. That is the author's term for three, young cousins who came to live with the Vonnegut family after the tragic deaths of their parents. Mark's Uncle Bill was one of forty-eight passengers who died when their commuter train ran several stop signals and dropped through an open draw bridge into Newark Bay. A day and a half later, Uncle Bill's wife died of cancer. The sudden appearance of the orphans had a salubrious effect upon young Mark. His cousin Steve was three months older. Steve was popular and, in time, became a three-sport captain in high school, as well as class president. Palling around with Steve gave Mark the confidence, for the first time, to play sports himself and to engage in social interaction with his contemporaries. Mark went through junior high, high school, and college "like an unremarkable person." The operative word in that phrase is *like*. He felt anything but unremarkable. He seems to have experienced his early life as a stranger in a strange land, never quite fitting in.

Vonnegut matriculated at Swarthmore College where he had a rather undistinguished academic record, marked mostly by attaining a 1.8 GPA in his math and science courses, singularly ironic given his ultimate career choice. During his undergraduate years, Vonnegut toyed with the vague notion of enrolling in divinity school and joining the Unitarian church as a minister. He later abandoned this idea.

After the Kent State tragedy in 1970, Vonnegut became disenchanted with contemporary society. He and a group of friends decided to abandon the modern world and set off for western Canada to establish a commune. They were going to make a paradise of their universe or learn the reasons why it could not be done. During this period, Vonnegut notes he "went crazy for the first time." Voices in his mind became louder and clearer. He suffered what was to be the first of three quickly-successive episodes resulting in his admission to a Vancouver psychiatric hospital with the unlikely name of Hollywood Hospital. While a patient, he was treated with the standard practices of the day, lithium and shock treatments, together with the peculiar favorite of one physician, mega-doses of vitamins. The last, alas, had little therapeutic or beneficial effect on the patient. When asked during treatment, "Is the radio or TV talking directly to you?", Vonnegut was relieved to learn that someone finally knew what was going on.

MEMBERSHIP BENEFIT UPDATE

Law Firm Retirement Solutions from the American Bar Association

One of the many benefits of your Rhode Island Bar Association membership is available through your Bar's partnership with the American Bar Association (ABA) Retirement Funds Program.

The ABA Retirement Funds Program (the Program) was established over 45 years ago by the American Bar Association to meet the unique retirement needs of law firms. The Program brings together nearly 4,000 law firms and $3.5 billion in assets to provide your firm a retirement solution that offers a fund lineup and services traditionally only available to the larger corporate plans.

This leverage allows the Program to provide the following services bundled for your firm at no out-of-pocket expense and include institutionally priced funds for your participants:

» Investment fiduciary trustee and custodial services from Northern Trust, a leading global asset manager that serves 44% of the top 100 corporate plans

» Client service and recordkeeping from ING, one of the largest financial services company in the world

Couple these benefits with the fiduciary oversight that the ABA Retirement Funds Board provides over the entire program, and you have a retirement solution that may help you to hire and retain quality employees, control expenses and manage your fiduciary responsibility.

To learn more about the Program and your many other Rhode Island Bar Association benefits. Please go to the Bar's web site at www.ribar.com, On the **HOME** page, click on **FOR ATTORNEYS** or **FOR MEMBERS ONLY**, then click on **MEMBERSHIP BENEFITS** and scroll down the listings. In addition to introductory copy, the Program and all other benefits listings feature web links providing Bar members with detailed information and contacts.

Request for RWU Law Review Articles: Rhode Island Bar Association attorneys and judges are invited to submit articles for publication consideration in the *Roger Williams University Law Review's Rhode Island Edition* focusing on current legal issues and developments within the state. Articles are generally 25-50 pages in length, using the Bluebook format for citations. Submissions are due no later than October 1, 2011. Please direct questions to Rhode Island Editor of the Law Review Mariana Ormonde by telephone: 401-419-6495 or email: mormonde950@g.rwu.edu.

While hospitalized, Vonnegut was diagnosed as suffering from schizophrenia, a catch-all diagnosis of the day encompassing all measure of illnesses. Much later, such a diagnosis was made more standard, requiring medical history elements that were absent in his case. What Vonnegut actually suffers from is now known as bipolar disorder.

After a month of hospitalization and intense treatment, Vonnegut began feeling reasonably well and was discharged. He returned to his communal friends. Within two weeks, he began hearing the voices again. He muses, "I really did not know I was supposed to continue taking that medicine." He was flown back to Vancouver and re-admitted to the hospital. When finally discharged, Vonnegut weighed 127 pounds and walked in a drug-induced shuffle. Yet somehow, he was feeling "normal."

Vonnegut returned to Massachusetts. He started working as a substitute teacher at a high school on the Cape. After a time, he decided he want to be a doctor. So, the 25 year old substitute high school teacher, with a recent history of psychiatric hospitalization, an undergraduate degree in Religion from a liberal arts college, and a 1.8 GPA in the hard sciences, enrolled in undergraduate math and science course at the University of Massachusetts – Boston. During this same period, Vonnegut wrote *The Eden Express*, his first book, recounting his communal experiences and initial breakdown. He also had several articles published in national magazines during this time.

After two and a half years at UMass, where he earned straight A's, Vonnegut applied to twenty medical schools. He was accepted by one, Harvard. In retrospect, Vonnegut is appropriately astounded that if only one medical school in twenty was to accept him it was Harvard.

By any objective measure, Vonnegut had a very successful early medical career. Upon finishing medical school, he was accepted for an internship at Massachusetts General Hospital where he had done some rotations during medical school. He later completed a residency there. After completion of his senior residency, Vonnegut entered a private pediatric practice in Boston. During this period, he became increasingly dependent on alcohol noting, "…maybe a few beers after work, half a bottle or less of wine

with dinner, maybe a shot of bourbon after dinner." He found nothing unusual about this quotidian consumption. "If I had a drinking problem, I would have hidden it, but I didn't so I didn't," he rationalized. Together with the direct effects of his drinking, the author's denial mechanism was operating in full gear.

After more than fourteen years, the voices returned and Vonnegut "went crazy for the last time." The internal dialogue picked up as if uninterrupted by the passage of time. Acting on the urgings of the voices, Vonnegut made a full-throated effort to launch himself through a closed window on the third floor of his home. As the glass and wood framing of the window fell harmlessly to the ground below, the author rebounded to the floor of the bedroom. His act was compelled by the certain knowledge that if he did not jump, his life would be viewed as a failure and at least one of his two sons would die.

Some time after his discharge from a psychiatric hospital, Vonnegut met with his partners and his psychiatrist to tentatively discuss his return to the practice. It was a slow process. Five years later, his tenuous marriage dissolved. He has reintegrated himself slowly as a social being and as a physician. Now, nearly twenty-five years from his last drink and his last episode of "going crazy," Vonnegut gained these essential insights: There was something wrong with him besides hearing voices and jumping through windows; and, besides suffering from bipolar disorder; besides drinking uncontrollably, "What was wrong with me was that I could not love or accept love." He also learned that as hard as addiction is, "it's always possible to change your perception of the world from one where you do drugs and just about nothing good is possible to one where you don't do drugs and good things can happen." Not too bad for an alcoholic, drug abusing, "crazy" person. ❖

Lawyers on the Move

Victoria M. Almeida, Esq., of **Adler Pollock & Sheehan P.C.**, and Past President of the Rhode Island Bar Association, received the Franciscan Friars of Holy Name Province's Francis Medal.

Kate Moran Carter, Esq. is now an Associate at **Brennan, Dain, Le Ray, Wiest, Torpy & Garner, P.C.**, 129 South Street, 3rd Floor, Boston, MA 02111.
617-542-4800 www.bdlwtg.com

R.J. Connelly III, Esq., principal attorney of **Connelly Law Offices**, was recently sworn in as the newest member of the Stonington Commission on Aging.

Heather F. Daglieri, Esq. is now Administrator of Licensing for the RI Department of Behavioral Healthcare, Developmental Disabilities, and Hospitals, 14 Harrington Road, Cranston, RI 02920.
401-462-0581 hdaglieri@bhddh.ri.gov

John K. Fulweiler, Esq., an Admiralty attorney, has opened his law practice, **Fulweiler llc**, 150 Airport Street, 2d Floor, Quonset Point, RI 02852.
401-667-0977 john@fulweilerlaw.com

Andrew M. Gilstein, Esq., **Kevin A. Hackman, Esq.** and **William J. Murphy, Esq.** were elected to the VNA of Care New England Board of Trustees.

Patrick A. Guida, Esq., of **Duffy & Sweeney, Ltd.**, 1800 Financial Plaza, Providence, RI 02903, was recently elected to the American College of Commercial Finance Lawyers.
401-455-0700 pguida@duffysweeney.com www.duffysweeney.com

Morphis A. Jamiel, Esq. was selected for the United States Department of the Army's Officer Candidate School Hall of Fame Class of 2011.

Melissa Larsen, Esq. announced the opening of her law practice at the Meadows Office Park, Unit A - 103, 1130 Ten Rod Road, North Kingstown, RI 02852.
401-218-0862 larsenlawri@gmail.com www.larsenlawri.com

Louise Marcus, Esq. was admitted to the U.S. Supreme Court Bar on February 23, 2011. **Marcus Law Offices**, 33 College Hill Road, 15e, Warwick, RI 02886.
401-331-3300 LMarcus@cox.net MarcusLawOffices.com

William P. Rampone, Esq. relocated his law practice to 317 Iron Horse Way, Suite 203, Providence, RI 02908.
401-751-4400

Vincent Rinaldi, Esq. relocated his law office, **Rinaldi Law Offices, LLC**, to 2374 Post Road, Warwick, RI 02886.
401-244-7725 vin@rinaldilaw.net www.rinaldilaw.net

Jerome B. Spunt, Esq., now in his 55th year at the bar, continues his solo law practice at 20 Randall Street, Apt. 4K, Providence, RI 02904.
401-274-4044 jspuntlaw@verizon.net

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None of Your Damn Business

continued from page 9

15 *Liptak, Adam, The Turducken Approach to Privacy Law, The New York Times, December 8, 2009:*

> *The dissenter was Chief Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit, in San Francisco. He is a master of the dissent that might as well be a petition for Supreme Court review of the majority's decision. This one, protesting his court's refusal to rehear a case about the privacy rights of employees, said the law in that area had become a tangled thicket.*
>
> *"It's time to clear the brush," Judge Kozinski wrote. "We didn't undertake that chore today, but we'll have to sooner or later, unless" — nudge, nudge — "the Supreme Court should intervene."*

16 *Rescript at p.1*

17 *Recall the role "empathy" played in the recent confirmation hearings for Justice Sotomayor.* ***See, e.g.****, Liptak, Adam, Sotomayor Guides Court's Liberal Wing,* The New York Times, *December 27, 2010:*

> *At her confirmation hearings last year, Sonia Sotomayor spent a lot of time assuring senators that empathy would play no part in her work on the Supreme Court.*
>
> *That was a sort of rebuke to President Obama, who had said that empathy was precisely the quality that separated legal technicians like Chief Justice John G. Roberts Jr. from great justices.*

18 *Concurrence at p. 4.*

19 *The concurrences would have explicitly said that there is no constitutional right to informational privacy, and Justice Thomas would have declared that there is no general right of privacy under the constitution. It is beyond our present topic but worth noting that it is the general right of privacy that forms the basis of* ***Roe v. Wade****, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, (1973), which Justice Thomas says is a right that does not exist.*

20 *These are discussed at length in Nelson III,* ***supra****.*

21 *827 F.2d 836 (1st Cir. 1987)*

22 ***Natwig v. Webster****, 562 F.Supp. 225 (D.R.I. 1983)*

23 *110 F.3d 174 (1st Cir. 1997)*

24 ***Id.*** *at 183.*

25 ***Dickinson v. Chitwood****, 181 F.3d 79 (1st Cir. 1998)*

26 *R.I. Gen. Laws § 9-1-28.1*

27 ***See, In re*** *Advisory Opinion To The House Of Representatives Bill 85-H-7748., 519 A.2d 578 (R.I. 1987), holding that strict scrutiny must be applied to legislative enactments that limit or impinge "such implied constitutional guarantees as the right to privacy,* ***Roe v. Wade****, 410 U.S. 113, 152-53, 93 S.Ct. 705, 726-27, 35 L.Ed.2d 147, 176-77 (1973)." Id. at 581.*

28 ***Henry v. Cherry & Webb****, 73 A. 97 (R.I. 1909). This is a fascinating decision, a thorough discussion of which is far beyond the scope of the present topic. The court examined the assertion that the right to privacy was derived from natural*

law, in a way that would supercede common law or constitutional enactment. The court held that there is no enforceable effect of "natural law" and traces Rhode Island legal authority all the way to the founding of our nation and beyond, to the British parliament. The court held:

> *Since, therefore, except when expressly limited, the General Assembly exercises all of the legislative powers of sovereignty possessed by the British parliament, **which is all-powerful**, and since acts of that body are tested merely by the principles of the Constitution, and never by standard of transcendent rights alleged to have been reserved by the individual when he entered into society, there is no room in our constitutional theory for any transcendent right or instinct of nature except as guaranteed by that Constitution. Id. at 104. [Emphasis supplied]*

*The court goes on at length to distinguish between that which is required by morality and that which is imposed by law. Lest anyone think that this decision has become stale, it was cited approvingly in **Pontbriand v. Sundlun**, 699 A.2d 856 (R.I. 1997), in holding that a tort based privacy right is limited to that found in R.I. Gen. Laws § 9-1-28.1.*

[29] ***See, e.g., Palmisano v. Toth**, 624 A.2d 314 (R.I. 1993), holding that plaintiffs seeking punitive damages are not entitled to discovery regarding the defendant's financial condition until after the court determines, as the result of an evidentiary hearing, that there is a **prima facie** case meriting the recovery of punitive damages.*

[30] ***Herbert v. Lando**, 441 U.S. 153, 175 (1979): Evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances. The President, for example, does not have an absolute privilege against disclosure of materials subpoenaed for a judicial proceeding. **United States v. Nixon**, 418 U.S. 683 (1974). [Footnote omitted]*

[31] ***In Hickman v. Taylor**, 329 U.S. 495, 501 (1947), Justice Murphy wrote:*

> *Thus, civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial. [Footnote omitted].*

*But **see, Herbert v. Lando, supra**, Powell, J. concurring:*

> *At the 1946 Term, just a few years after adoption of the Federal Rules of Civil Procedure, this Court stated "that the deposition discovery rules are to be accorded a broad and liberal treatment." **Hickman v. Taylor**, 329 U.S. 495, 507 (1947). The bar and trial courts understandably responded affirmatively. As the years have passed, discovery techniques and tactics have become a highly developed litigation art — one not infrequently exploited to the disadvantage of justice. As the Court now recognizes, the situation has reached the point where there is serious "concern about undue and uncontrolled discovery." **Ante** at 176. In view of the evident attention given discovery by the District Judge in this case, it cannot be said that the process here was "uncontrolled." But it certainly was protracted, and undoubtedly was expensive for all concerned.*
>
> *Under present Rules, the initial inquiry in enforcement of any discovery request is one of relevance. Whatever standard may be appropriate in other types of cases, when a discovery demand arguably impinges on First Amendment rights, a district court should measure the degree of relevance required in light of both the private needs of the parties and the public concerns implicated. On the one hand, as this Court has repeatedly recognized, the solicitude for First Amendment rights evidenced in our opinions reflects concern for the important public interest in a free flow of news and commentary.*

441 U. S. at 179. [Footnotes omitted]

[32] *"A Practical Guide to Discovery & Depositions in Rhode Island" MCLE, Inc. 2010, § 10.3.2, p.10-12.* ❖

Just a wingman?

continued from page 19

care for people with special needs."[45] Organization, in turn, is defined as "an organized body of people with a particular purpose."[46] Under these definitions, RISD's Board of Trustees, which identifies the needs of deaf and hard of hearing and develops educational policies to meet those needs, appears to have been constituted as a "body of people with an educational purpose."[47] Moreover, RISD is identified as an "institution" under Rhode Island General Law.[48] Therefore, it is logical to conclude that RISD may be an ESA or "public institution" within the meaning of IDEA and the R.I. Regulations and thus has the "full responsibilities and rights"[49] of a LEA.

A bird in the hand's worth two in the bush: K.K. v. Rhode Island School for the Deaf

As can be seen from the above analysis, this particular issue in Rhode Island is confounding. RISD appears to not be a LEA under state law but could, quite possibly, be a LEA under federal law. "It depends" does appear to be a good answer, but, regrettably, this article will not end there. The reason for this is that neither federal nor state law has fathomed the possibility of a child having two LEAs at the same time. And, this particular scenario seems counterproductive. If a school district, as its own LEA, enrolls a child at RISD, which may be a LEA, would both LEAs retain responsibility for the child's education during the period of time in which the child is at RISD? It seems difficult from a policy perspective, as well as from the perspective of a child or parent, to have two co-equal LEAs responsible for a child's education, especially if a dispute arises between the LEAs as to the appropriate services, placement or responsibility for funding such services or placement.[50]

K.K. v. Rhode Island School for the Deaf presented RIDE with the opportunity to resolve this issue of first impression in Rhode Island.[51] RIDE had to resolve whether a child, legally entitled to an education in a city or town in which he or she resides, becomes the sole responsibility of RISD when the child is enrolled at RISD. It seems contrary to federal and state law, as well as the public interest, to absolve a city or town's school district's

state and federal responsibilities by merely enrolling a child at RISD. Consequently, the main question that this particular case set to resolve was the respective obligations of educating a child residing in one city or town but attending school at RISD.

It seems prudent that one of the LEAs should be identified as the responsible LEA for the purpose of educating a child. In conjunction with this theory, the district argued that K.K., despite being a resident of the Town of Coventry, became a "resident" of RISD for educational purposes. Essentially, RISD was a LEA, and its responsibility included financial obligations as well as any procedures that federal and state law required. In sum, the district argued, "[if] it walks like a duck, and squawks like a duck, it must be a duck."[52] However, as discussed above, the analysis is far from the freedom of certainty.

RIDE disagreed with the district's truism and, instead, had the district eating crow. RIDE concurred with K.K.'s argument that RISD was merely a placement and that the district retained its federal and state obligations. In doing so, RIDE relied on the residency requirements found in state education law. Specifically, Rhode Island General Laws § 16-24-1 and § 16-64-1 require that the school committee of the town in which a child resides provide a child with a free and appropriate education[53] (FAPE) including providing procedural protections. As the residency of K.K. was not in dispute, RIDE held that his district of residence was solely responsible for providing him with a FAPE, and RISD was merely a "special purpose LEA" placement. Essentially, RIDE found that two types of LEAs – or ducks[54] – exist in Rhode Island.

Accordingly, RIDE appears to have determined that a child cannot have two LEAs at the same time in Rhode Island. Instead, "special purpose LEAs" statutorily exist, one being RISD, but do not obfuscate the obligations of the LEA of residence. Instead, the **K.K.** opinion firmly provides that a child's LEA of residence is solely responsible for the provision of a FAPE to that child in Rhode Island.[55]

This particular analysis did not kill two birds with one stone though, as it left open the possibility that LEAs may have alternative means to redress their concerns. Specifically, RIDE's opinion does not subsume the potential that RISD

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Designed as a means to promote Bar member health and wellness, the Rhode Island Bar Association and the Bar's Lawyers Helping Lawyers Committee, in partnership with Blue Cross/Blue Shield of Rhode Island, are offering a free-to-Bar-members, Wellness Center at the Bar's Annual Meeting on June 16th and 17th, 2011, at the Rhode Island Convention Center in Providence.

Located in the Rotunda, the Center features a range of free, interesting, healthful and educational activities including:

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…and Lawyers Helping Lawyers Committee members and Resource International Employee Assistance Services staff are available for Bar member consultations on a range of physical and mental health issues.

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may have obligations under federal law. There is a distinct possibility that RISD is an ESA under IDEA. If this is true, a conflict between federal and state law is readily apparent. Also, the cogitative complications inherent with this matter allow for the terminology "special purpose LEA" to artfully enter this debate as it does not appear in state or federal law. The opinion also does not offer guidance as to whether a LEA may proceed against a "special purpose LEA" under state law if a dispute arises between them, though this is presumed.[56] What is certain, though, is that "special purpose LEAs" and LEAs will most likely not be flocking together with this particular issue any time soon.

ENDNOTES

1 ***See*** *R.I. Gen. Laws § 16-24-1.*

2 *R.I. Gen. Laws § 16-26-3.1(2).*

3 *In Rhode Island Local Education Agencies ("LEA") are akin to school districts. Under the Individuals with Disabilities Education Act and the Rhode Island Regulations of the Board of Regents Governing the Education of Children with Disabilities LEA is defined as: "[a] public board of education or other public authority legally constituted within [Rhode Island] for either administrative control or direction of, or to perform service function for, public or secondary schools in a city, county, township, school district or other political subdivision of the State or a combination of school districts or counties as are recognized in the State as an administrative agency for its public elementary or secondary schools. 20 U.S.C. § 1401(19); 34 C.F.R. § 300.28; R.I. Regulations § 300.28.*

4 ***K.K. v. Rhode Island School for the Deaf and the Coventry School Department****, Rhode Island Department of Education Commissioner of Education Decision, #09-007 (April 1, 2009).*

5 ***See Supra*** *note 2.*

6 ***See Supra*** *note 2.*

7 *In beginning the analysis, one is reminded of Circuit Judge Friendly's opinion in* ***Frigaliment Importing Co. v. B.N.S. International Sales Corp****, 190 F.Supp. 116 (S.D.N.Y. 1960), where the determination of "what is a chicken" depended on Holmes' assertion that the agreement of two external signs (i.e., that two parties said the same thing rather than meant the same thing) was most important when analyzing a contract. And, this assertion, though applied to contract interpretation, is appropriate for the analysis as RISD must be defined. Essentially, it must be determined whether the General Assembly "said the same thing."*

8 ***Such v. State****, 950 A.2d 1150, 1156 (R.I. 2008)(citing* ***Moore v. Ballard****, 914 A.2d 487, 490 (R.I. 2007).*

9 ***State v. Greenberg****, 951 A.2d 481, 489 (R.I. 2008) (citing* ***Henderson v. Henderson****, 818 A.2d 669, 673 (R.I.2003).*

10 ***Id.***

11 ***Id.***

12 ***Id.***

13 *Oxford American Dictionary, 1193 (2005).*

14 ***See*** *R.I. Gen. Laws § 16-26-3.1(2).*

15 ***See Supra*** *note 2.*

16 *"Operate" has several viable definitions including: "function in a specified manner"; "be in effect"; "manage and run"; or, "managed and run in a certain way." Oxford American Dictionary, 775.*

17 ***See*** *R.I. Gen. Laws § 16-60-1(a).*

18 ***See*** *R.I. Gen. Laws §§ 16-60-1(a) and (b).*

19 ***Id.***

20 *R.I. Gen. Laws § 16-60-4(3).*

21 ***Id.*** *at § 16-60-4(6).*

22 ***Id.*** *at § 16-60-4(7).*

23 ***See*** *R.I. Gen. Laws § 16-26-3.1(2).*

24 *R.I. Gen. Laws §§ 16-26-3.1(5) and (6).*

25 ***See Supra*** *note 20.*

26 *R.I. Gen. Laws § 16-26-11.*

27 ***See*** *R.I. Gen. Laws § 16-26-3.1(a).*

28 ***See*** *R.I. Gen. Laws § 16-60-47(7).*

29 ***See*** *R.I. Gen. Laws § 16-26-3.1(2).*

30 ***Id.*** *at § 16-26-3.1(4).*

31 ***See*** *R.I. Gen. Laws § 16-2-5.*

32 ***See*** *R.I. Gen. Laws § 16-26-3.1(c)(3).*

33 ***Compare*** *R.I. Gen. Laws § 16-26-2* ***with*** *§ 16-60-4(3).*

34 *"[Section] 300.116, consistent with section 612(a)(5) of the Act states that the determination of an educational placement of a child must be based on a child's Individualized Educational Program (IEP). The Department's position is that placement refers to the provision of special education and related services rather than a specific place." Fed. Reg. Vol. 71 No. 156, 44687 (August 14, 2006). In other words, educational placement is not location driven but rather defines the services to implement a student's IEP.* ***See Concerned Parents & Citizens for Continuing Education at Malcolm X v. New York City Board of Education****, 629 F.2d 751 (2d Cir. 1980)(stating educational placement refers to the general educational program of child);* ***Board of Educ. Fo. Cmty. High Sch. No. 218 v. Illinois State Bd. Of Educ.****, 103 F.3d 545, 548 (7th Cir. 1996);* ***Weil v. Board of Elementary & Secondary Education****, 931 F.2d 1069, 1072 (5th Cir. 1991)(collecting cases interpreting placement as general educational program);* ***Tilton v. Jefferson County Bd. Of Educ.****, 705 F.2d 800 (6th Cir. 1983).*

35 *R.I. Gen. Laws § 16-26-7(a).*

36 *R.I. Gen. Laws § 16-19-1(a).*

37 ***See Supra*** *note 3.*

38 ***See Supra*** *note 3.*

39 *20 U.S.C. § 1401(5); 34 C.F.R. § 300.12; R.I. Regulations § 300.12.*

40 ***Id.***

41 *20 U.S.C. § 1401(19); 34 C.F.R. § 300.28; R.I. Regulations § 300.28(a).*

42 ***See*** *20 U.S.C. 1401 (5)(2004); §§ 300.28(b)(1) and (2).*

43 *Fed. Reg. Vol. 71 No. 156, 46565 (August 14, 2006).*
44 ***See** R.I. Gen. Laws § 16-26-7.*
45 *Oxford American Dictionary, 874.*
46 ***Id.** at 1199.*
47 ***See** R.I. Gen. Laws §§ 16-26-3.1(e)(1) and (2).*
48 ***See** R.I. Gen. Laws §§ 16-26-1 ("The name of the institution previously existing under the provisions of this chapter as the Rhode Island Institute for the Deaf is changed to Rhode Island School for the Deaf, and shall be known as Rhode Island School for the Deaf.").*
49 *Fed. Reg. Vol. 71 No. 156, 46565 (August 14, 2006).*
50 *In contrast it does seem that this particular scenario may be productive if both RISD and the LEAs agree as to every aspect of a child's education. Unfortunately, as **K.K. v. Rhode Island School of the Deaf** implies this is not always the case.*
51 *As far as this author could determine Rhode Island's statutory framework provided that these issue are also ones of first impression in the country. It should be noted however, this statement reflects an analysis that is limited to case-law where a final judgment was rendered.*
52 ***See K.K. v. Rhode Island School for the Deaf and Coventry School District**, 09-007, 4 (April 1, 2009)("Coventry argues as follows: 'RISD is the LEA pursuant to Section 16-26-3.1(c)(2) of the R.I. Gen. Laws…As Judge Selya noted in the case of **Carroll v. Capalbo** (citation omitted), 'there is a fair amount of truth in the old barnyard aphorism: if it walks like a duck, and it squawks like a duck, it must be a duck.'").*
53 *To provide a Free and Appropriate Education ("FAPE"), a school must formulate an Individualized Education Program tailored to the disabled student's unique needs. **See** 20 U.S.C. § 1412(a); 34 C.F.R. 104.33(b); 34 C.F.R. §§ 300.324; RI Rules & Regulations § 300.346; **see also** 20 U.S.C. § 1400 (stating purpose of IDEA is "to provide special education and related services designed to meet [a child's] unique needs and prepare them for further education, employment, and independent living" and "to ensure that the rights of children with disabilities and parents of such children are protected.").*
54 ***See K.K. v. Rhode Island School for the Deaf** at 4-5 ("Ducks may be split into two main groups …. In our view a similar dichotomy exists, at least in an ontological sense, obtains with regards to LEAs. That is to say, that when it comes to special education, there are at least two sorts of LEAs in Rhode Island.").*
55 ***See also** R.I. Gen. Laws § 16-64-2 (If a child becomes a resident of another LEA the previous LEA is no longer responsible for the education unless the Commissioner of Elementary and Secondary Education orders otherwise).*
56 ***See** R.I. Gen. Laws § 16-39-1("Parties having any matter of dispute between them arising under any law relating to schools or education may appeal to the commissioner of elementary and secondary education who, after notice to the parties interested of the time and place of hearing, shall examine and decide the appeal without cost to the parties involved.").* ❖

In Memoriam

Albert Knight Antonio, Esq.

Albert Knight Antonio passed away on March 20, 2011. He was Vice President and Branch Manager of Commonwealth Land Title Insurance Company in Providence, RI, and admitted to practice in Rhode Island, Massachusetts and Florida. He was First Vice President of New England Land Title Association, a Lifetime Fellow in the Rhode Island Bar Association, and Chairperson for the Bar's Title Standards and Practices Committee. He previously worked for former US Attorney General Janet Reno as Legal Advisor for the Dade County Public Safety Department and had served as a police officer in Barrington, RI. Albert served on the Planning Board for the Town of Rehoboth, MA, as a member of the Board of Directors of Community & Teachers Federal Credit Union of East Providence, RI, and as a member of the Standing Committee at Trinitarian Congregational Church in Norton, MA. Albert was an avid runner and accomplished athlete. With his daughter Karen he formed the LandAmerica running and walking team. He coached baseball and basketball teams for numerous organizations including the Pawtucket Boys and Girls Club, the Newman YMCA, Dighton-Rehoboth Little League, the Rehoboth Congregational Church, and the Amateur Athletic Union. He was named YMCA Volunteer of the Year in 1995. Albert is survived by his wife, Karen Elaine Kuhn Antonio and his children and their partners: Karen Elaine DeQuattro and her fiancé Andrew Forber; Matthew Antonio; Michael Antonio and his wife Kristen Marie; Kristen Emily McDonough and her husband Dylan; Katherine Antonio and her fiancé Justin Pontes; Nicholas Knight Antonio; Kylie Noelle Antonio; and Lauren Pollard.

Paul E. Phillips, Sr., Esq.

Paul E. Phillips, Sr., 61, passed away on February 25, 2011. A lifelong Providence resident, he was a son of Ruth B. Phillips of Warwick and the late Milton Phillips. He was the former husband of JoAnn Marzocch Phillips. Paul was a noted Rhode Island musician for many years, having recorded for RCA records as a member of the Blue Jays and touring internationally with The Buddy Rich Band. Later in life he returned to school, graduating from Brown University and New England School of Law, and was an attorney at the Law Office of Paul E. Phillips, P.C. in Providence. Paul was a member of the Providence Federation of Musicians and a former member of Temple Beth-El. He was the devoted father of Paul E. Phillips, Jr. of Chelmsford, MA and Michael V. Phillips of Philadelphia, PA. and the brother of Gary J. Phillips of Buffalo, NY.

William H. Priestley, Esq.

William H. Priestley, 43, of East Greenwich, passed away on April 8, 2011 with his beloved wife of twelve years, Kinda Remick Priestley, by his side. Born in Providence, a son of the late Joseph A. and Beverly M. Priestley, he grew up in Barrington and Westerly. Bill was a graduate of St. Paul's School, a cum laude graduate of Colby College, and a cum laude graduate of Boston University School of Law. He worked at Edwards Angell Palmer & Dodge LLP in the Litigation Management Department. He was admitted to the Rhode Island and Massachusetts Bars and was a member of both state Bar Associations. He was as a member of the Colby Woodsmen's Team and Outing Club, on the golf course, and on the ski slopes, a recreational singer/songwriter and a mentor for Rhode Islanders Sponsoring Education mentor. In addition to his wife he is survived by his four children, Georgia, 7, twins Harry and Owen, 5, and Emma Remick Priestley, 20 months, his brother Joseph A. Priestley, Jr., and sister Carole A. Priestley, both of East Greenwich, and sister and brother-in-law, Pamela Priestley O'Connor and James F. O'Connor, Jr. of Wakefield.

S. Harold Skolnick, Esq.

S. Harold Skolnick, 95, passed away on November 25, 2010. He was born on June 17, 1915 to David and Elsie Skolnick in Woonsocket, RI. Harold had a private law practice in Miami, retiring in 1986. He graduated from Amherst College and Boston University Law School. During World War II, he served in the US Army Ordnance Department in Italy and Africa and retired as a Lt. Colonel. He was a benefactor of Massachusetts General Hospital in Boston, Technion and Amherst College. Harold belonged to the Shriners and Elks, and he was a 32nd degree Mason. He enjoyed going to American Bar Association meetings with his family each year. He is survived by his loving wife Shirley, and his children Judi Lapinsohn, Steve and Susan Lapinsohn, and Ilene and Bob Eber.

Please contact the Rhode Island Bar Association if a member you know passes away. We ask you to accompany your notification with an obituary notice for the Rhode Island Bar Journal. Please send member obituaries to the attention of Frederick D. Massie, Rhode Island Bar Journal Managing Editor, 115 Cedar Street, Providence, Rhode Island 02903. Email: fmassie@ribar.com, facsimile: 401-421-2703, telephone: 401-421-5740.

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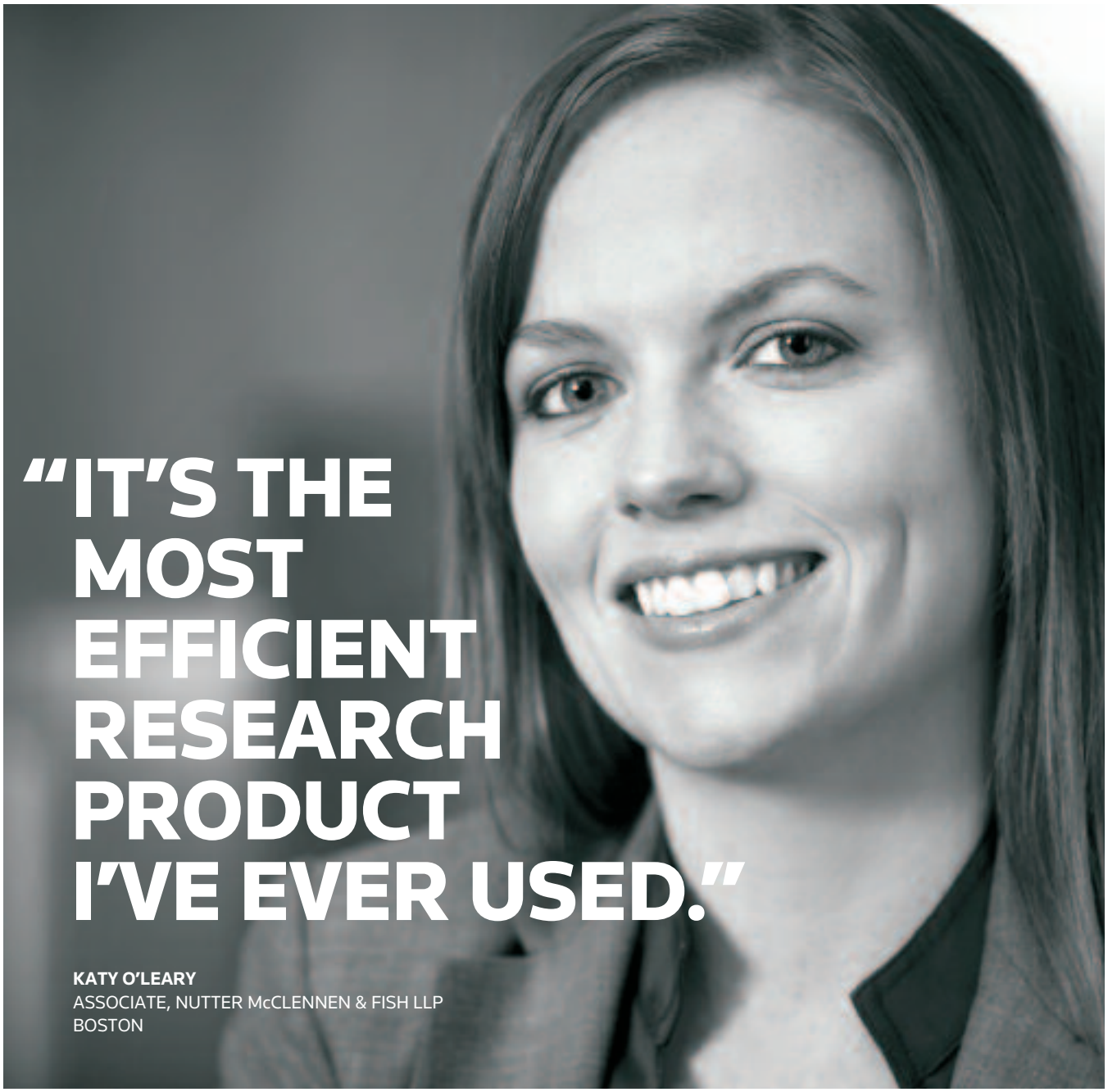

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