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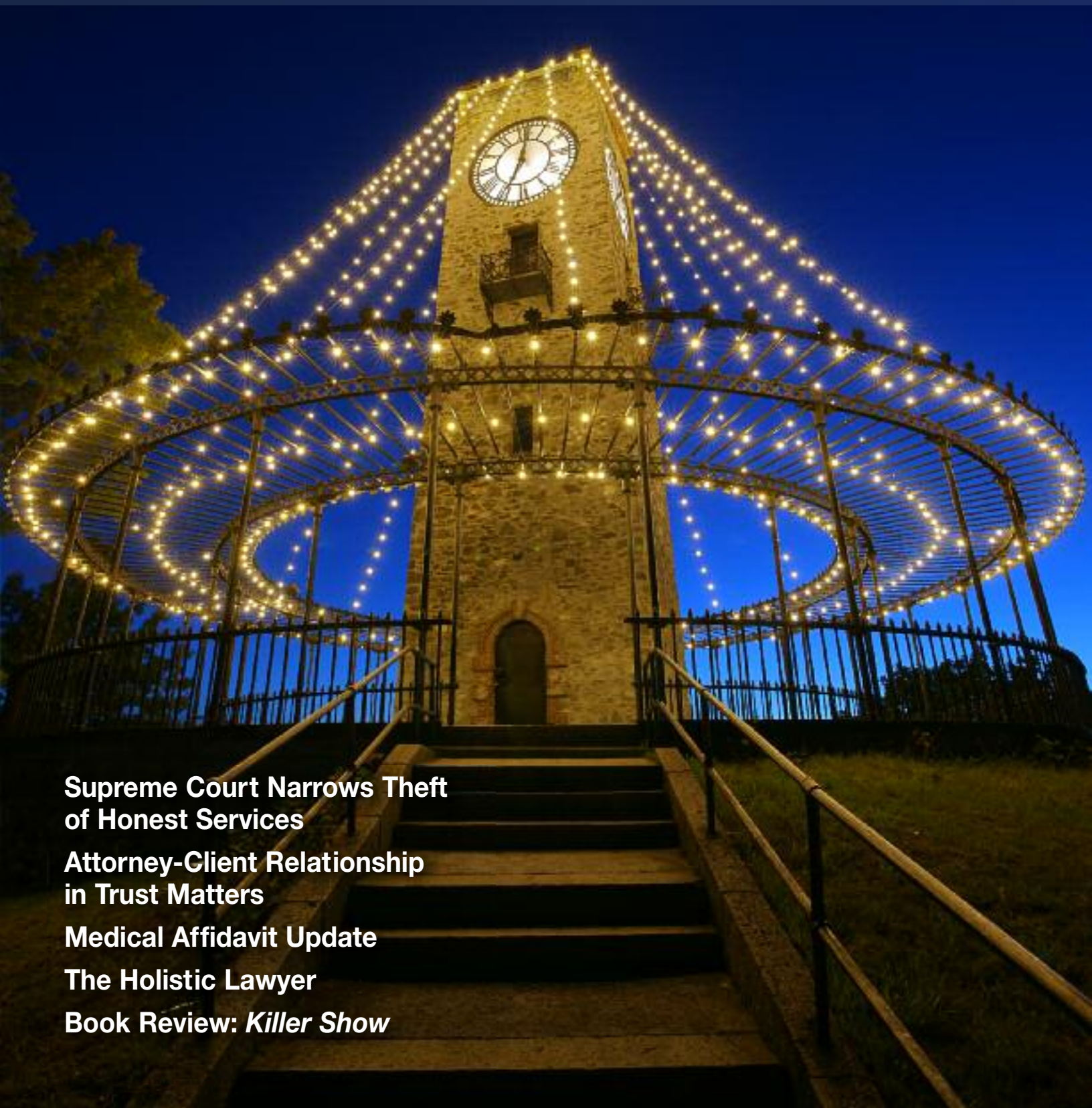

## Supreme Court Narrows Theft of Honest Services

## Attorney-Client Relationship in Trust Matters

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## The Holistic Lawyer

## Book Review: *Killer Show*

ANDREA HANSON PHOTOGRAPHY

Rhode Island Bar Association President Michael R. McElroy met with U.S. Supreme Court Associate Justice Samuel A. Alito, Jr. during Justice Alito's visit to the Roger Williams University School of Law.

# Articles



# Features




RHODE ISLAND Bar Association
1898


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**Front Cover Photograph**
**Cogswell Tower in Jenks Park, Central Falls, by Brian McDonald**

# The Tragedy of Wrongful Convictions

**Michael R. McElroy, Esq.**
President
Rhode Island Bar Association

*Better that ten guilty persons escape than that one innocent suffer.*

English Jurist
William Blackstone,
*Commentaries on the Laws of England* (1765-1769)

*Injustice anywhere is a threat to justice everywhere.*

Dr. Martin Luther King,
*Letter from a Birmingham Jail* (1963)

We expect our justice system will not convict innocent people. But it does. And this is a terrible tragedy. The horror of being wrongfully convicted and jailed is an embarrassing indictment of our imperfect criminal justice system. The lives of those convicted and their families are ruined.

A movie that has stayed with me for almost 40 years is *Titicut Follies*. This documentary was made in 1967 by a lawyer-filmaker from Boston. It portrays the patient-inmates at the Bridgewater State Hospital for the criminally insane in Massachusetts. Some of the occupants were held in unlit cells, were virtually catatonic, and were continually abused in unspeakable ways.

In 1968, the Massachusetts Superior Court ordered all copies of the film destroyed. In 1969, the Supreme Judicial Court allowed it to be shown, but only to doctors, lawyers, judges, health care professionals, social workers, and students in these fields. As a law student at Boston University, I viewed it in 1975.

In 1991, the film was finally allowed to be released to the public. If you have the opportunity to see it, I strongly encourage you to do so.

I first saw the movie *After Innocence* at the Cable Car Cinema in Providence shortly after it was made in 2005. This is a film about men who were exonerated after wrongful murder convictions, including Scott Hornoff from Rhode Island. After the screening, a number of those in the film, including Scott Hornoff, had the courage to speak to the audience about their harrowing experiences. This is a powerful film for those who believe in justice.

Another film about a wrongful murder conviction is the movie *Conviction*. It has a strong Rhode Island connection. Betty Anne Waters went to school for years, including the Roger Williams University School of Law, so she could help free her brother from jail. Working with attorney Barry Scheck's Innocence Project, Betty Anne persisted and was eventually successful in getting her brother freed based on DNA evidence proving her brother had been wrongfully convicted. This is a moving and compelling story of a lawyer's persistence and a broken criminal justice system.

Like the *Titicut Follies*, the book *One Day in the Life of Ivan Denisovich*, by Alexander Solzhenitsyn, has stayed with me since my first reading. The story is set in a Soviet Gulag and describes one day in the life of an innocent prisoner. It is an incredible story of human suffering and injustice. It is based on Alexander Solzhenitsyn's first-hand experience, as he was imprisoned in the Gulag from 1945 to 1953 for writing derogatory comments about Joseph Stalin. Solzhenitsyn won the Nobel Prize in Literature in 1970.

According to the National Registry of Exonerations, there have been 891 exonerations in the U.S. since 1989. Since 2000, an average of one person a week has been exonerated. In addition, 1,170 convictions were dismissed in 13 group exonerations following the discovery of major police scandals. Therefore, there have been over 2,000 exonerations since 1989.

As a group, the average sentence served by those exonerated is over 11 years. Of the individual exonerations studied, 418 were homicides and 101 innocent people had been sentenced to death. This is America. We need to do better than that!

Unfortunately, a *Washington Post* report published in April disclosed that hundreds of defendants are in prison or on parole for crimes in which FBI hair and fiber experts may have wrongly identified them as suspects. The Justice Department is joining with the FBI to review these cases to determine whether flawed hair and fiber evidence tainted the convictions.

According to the National Registry of Exonerations, the most common causes of wrongful convictions are perjury/false accusation, mistaken eye witness identification, official misconduct, false or misleading evidence, and false confessions. For the 1,170 exonerations due to the 13 major police scandals, officers fabricated crimes, usually by planting drugs or guns on innocent defendants.

I admire and respect the police, prosecutors and the defense lawyers who work hard every day in this difficult area. But, I also admire those who have exposed the tragedies of the criminal justice system.

I don't know the solution to this problem but, in my opinion, the best place to start is to support adequate funding of our court system. As the American Bar Association has stated in its fight to obtain adequate funding for courts throughout the country, "No Courts – No Justice – No Freedom." To quote Dr. King, we need to "let freedom ring," so all those who have been wrongfully convicted will be "free at last." ❖

## LETTER TO THE EDITOR

# *President McElroy's Approach to Law School Reform*

I would like to comment on this month's [*Rhode Island Bar Journal*, September/October 2012] article by President Michael McElroy entitled, *First Thing We Do, Let's Kill All the Law Schools*. I thought that the article was well-written and well thought out, and I am wondering what the bar can do to move forward the ideas mentioned in Mr. McElroy's article. Thank you and Mr. McElroy for such quality content in the *Bar Journal*.

**David L. Yavner, Esq.**




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.

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- 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.
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- 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.

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# U.S. Supreme Court Narrows Theft of Honest Services Crimes

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*The federal theft of honest services statute fueled the white collar prosecutions bringing down Rhode Island state senator John Celona and Roger Williams Hospital chief Robert Urciuoli.*

**Honest Services Unravels**

Rhode Islanders who follow our state's endemic corruption have certainly heard of the federal "theft of honest services" statute, 18 USC Ss1346. It fueled the white collar prosecutions bringing down state senator John Celona[1] and later, with him, Roger Williams Hospital chief Robert Urciuoli.[2] The federal statute was also part of deposing Democratic House Majority Leader Gerard Martineau.[3] At the federal level, the law was famously used to convict corporate and public officials. On June 24, 2010, in three cases decided simultaneously, the U.S. Supreme Court severely limited the law and overturned convictions. Two famous criminal defendants from corporate America, Jeffrey Skilling of Enron and the publisher Conrad Black, won reversal of the theft of honest services pieces of their convictions.[4] The Court also vacated an honest services judgment against Alaska state legislator Bruce Weyhrauch.[5]

A long tortured legal history already characterized the honest services doctrine by 2010.[6] Originally part of the federal mail fraud statute, prohibiting the use of the mails "to advance any scheme or artifice to defraud,"[7] it expanded in 1909 to include "obtaining money or property by means of false or fraudulent pretense, representations or promises." Then, in 1941, in **Shushan v. United States**, the Fifth Circuit first applied the statute to intangible rights, holding that a bribed public official participated in a scheme to defraud the public.[8] Even though the betrayed city in **Shusan** suffered no money or property loss, actionable harm lay in the denial of the municipality's intangible right to the offender's honest services.

While most prosecutions involved public employees, in **U.S. v. Procter and Gamble Co.**, 1942, a federal district court extended the crime to the private sector, defining it as breach of the duty of an employee to an employer, to be honest and loyal to the employer's interest. By 1982, all the federal circuits embraced the honest services theory of intangible fraud.[9] But then, in **McNally v. U.S.**, the Supreme Court exploded the intangible rights doctrine.[10] In **McNally**, in 1987, the Court overturned a Kentucky conviction where a state official took a kickback in an insurance deal,[11] denying citizens their rights to honestly conducted public business.[12] The Supreme Court refused to save the statute by either setting disclosure standards or limiting it to protection of property rights.[13] If the Congress wanted this crime, it would have to legislate it.

Congress accordingly proceeded the next year to do just that, specifically stating that l8 USC 1346 "includes a scheme or artifice to deprive another of the intangible right of honest services."[14] Skilling challenged this language for "vagueness" and the Supreme Court agreed, in a 6-3 vote with an Opinion for the Court by Justice Ginsburg, holding that ordinary people must be able to understand what behavior is prohibited. The law cannot encourage arbitrary or discriminatory enforcement.

Citing Skilling's brief,[15] the Court refused to read back into the statute various pre-**McNally** holdings, characterized as "a hodgepodge of oft-conflicting holdings, statements, and dicta."[16] Skilling argued the prior decisions created a multitude of vague and inconsistent standards, listing some two pages of decisions setting forth the "made-up crime" of honest services fraud.[17] Particularly confusing were what standards courts and defendants should rely upon: whether an employee should contemplate economic harm to his employer; whether the standards for public sector and private sector cases were the same; whether honest-services duties extended only to persons who were taking "official action"; and whether a fiduciary position was a necessary element.[18] Skilling demonstrated that federal prosecutors used different rules for different cases.[19]

Defendant Skilling perplexed many. There was no claim that he shifted or used company funds for his own purposes. His risky transactions and business decisions were lawful. His risks were reviewed by outside advisors and the Enron Board and disclosed to investors. There was no claim of self dealing or criminal intent. Taking undue risks and misstating the Company's situation to obtain short term stock price benefits constituted the crime.[20]

The Supreme Court majority saved the statute by finding a continuing and concrete "core." (The three dissenting justices would have voided it in its entirety.)[21] This core con-

sisted of bribery or kickback schemes. The Court specifically rejected the government's plea to extend Ss1346 to undisclosed self-dealing by a public official or private employee for taking official action that advanced undisclosed financial interests while purporting to act for those to whom the fiduciary duty was owed.[22] The Court vacated the honest services part of Skilling's conviction because his conduct in misleadingly hyping Enron stock was not part of a bribery or kickback scheme.[23]

The decisions in the two related cases relied upon **Skilling.**[24] **Black** was an appeal by the newspaper mogul Conrad M. Black from his federal conviction on theft of honest services. The jury convicted Black only on two of numerous charges, honest services and obstruction. The honest services offense consisted in characterizing management fees as non-compete agreements in some complicated sales of newspaper assets and thereby diverting millions to himself. The government claimed this action, which allowed Black to avoid some Canadian taxes, violated a duty of loyalty to his company's Delaware parent corporation.[25] The Court held that since **Skilling** limited the statute to bribes and kickbacks, the **Black** jury instructions were incorrect. It vacated the conviction on that count.[26]

Alaska state legislator Bruce Weyhrauch, convicted as part of the investigation net in the Senator Ted Stevens case, failed to disclose a potential conflict of interest. He solicited employment from private companies with direct business before the legislature. The legal theory was that, even though he violated no state disclosure statutes and nothing material changed hands, he violated the language of Ss1346 and an unwritten federal common law duty to disclose. The Ninth Circuit upheld the conviction. Its decision took honest services about as far as it had ever gone.[27] The Supreme Court vacated *per curium*,[28] and remanded, in one sentence, citing **Skilling**.

### Update and Comment

Pre-**Skilling**, Justice Scalia, in an unusual written dissent from a denial of *cert.*[29] in 2009, clearly nailed the whole problem with honest services crimes: "Ss1346 criminalizes conduct ranging from a mayor using his influence to get a restaurant table without a reservation to a public servant recommending an unqualified friend for a public contract." He added it included any self-dealing by

a corporate officer, as well as a salaried employee phoning in sick to go to a ball game.[30] Some wags on the web suggest using Facebook at work would qualify. Post-**Skilling**, law review commentators take various views, but at least one maintained the decision did not go far enough. Boston attorney Harvey A. Silverglate argues that the law is still too vague and does not take into account state and local customs. He favors the **Skilling** three person dissent, which would let the whole statute die.[31] Other law review authors take a more analytical view: what will happen to existing convictions and new prosecutions under the now limited "core"?[32]

**Skilling** set off a flurry of efforts to set aside or mitigate honest services convictions, including by many prominent public officials, a veritable "who's who" of white-collar felons.[33] In Rhode Island, Robert Urciuoli unsuccessfully invoked **Skilling** to try to persuade the First Circuit to reverse his second, final, conviction.[34] Scholarly opinion seems to predict that federal fraud prosecutions will continue to be successful even without the honest services peg because the avenues of bribes and kickbacks provide plenty of running room.[35] In Washington, Senator Sheldon Whitehouse co-sponsored the Honest Services Restoration Act,[36] which sits inert in the Judiciary Committee. However, Judge Pamela Murphy, in her authorial capacity, believes Congress will eventually act to restore some of the acts that were previously criminalized as honest services violations.[37] However, I agree that the language of the old Ss1346 did not give enough warning of what people could not do. It was subject to the views and whims of prosecutors, who could make it up as they went along. The Supreme Court in **Skilling** saved the defensible part.

*ENDNOTES*

1 ***See*** *Mark Reynolds, "Celona Heads to ACI from U.S. Custody," PROVIDENCE JOURNAL, March 28, 2009, p2.*

2 ***See*** *Katie Mulvaney, "Urciuoli Appeal Won't Be Heard," PROVIDENCE JOURNAL, November 16, 2010, p. 6. Urciuoli was originally convicted, had that conviction overturned by the first circuit, convicted again on retrial, and rejected on appeal, and then denied certiorari by the Supreme Court.* ***See: U.S. v. Urciuoli****, 470 F. Supp. 2d 109 (2007);* ***U.S. v. Urciuoli****, 513 F. 3d 290(lst Cir. R.I. 2008);* ***U.S. v. Urciuoli****, 613 F. 3d 11 (1st Cir. R.I. 2010) and* ***Urciuoli v. U.S.****, 138 S. Ct. 612 (2010) (cert. denied.)*

3 ***See*** *Katie Mulvaney, "Federal Judge Rejects Martineau's Release Pleas," PROVIDENCE JOURNAL, June 3, 2010, p. 9.*

4 ***Skilling v. U.S.***, *130 S. Ct. 2896 (2010) and* ***Black v. U.S.***, *130 S. Ct. 2963 (2010).*
5 ***Weyhrauch v. U.S.***, *130 S. Ct. 2971 (20100.*
6 ***Skilling***, *op. cit. at 2926.*
7 ***Id.***
8 *117 F. 2d 110, 115.*
9 *47 F. Supp., 676, 678 (Mass. 1942).*
10 ***Skilling***, *op. cit. at 2927.*
11 *483 U.S. 350 (1987).*
12 ***Id.*** *at 353.*
13 ***Id.*** *at 360.*
14 ***Skilling***, *op. cit. at 2928.*
15 ***Id.*** *at 2930.*
16 ***Skilling***, *Petitioner's Brief at 39.*
17 ***Id.*** *at 40-42.*
18 ***Id.***
19 ***Id.*** *at 43.*
20 ***Id.*** *at 3.*
21 ***Skilling***, *op. cit. at 2931.*
22 ***Id.*** *at 2934.*
23 *While waiting for a resentencing decision, Skilling was allowed to petition for a new trial on discovery abuse grounds. He remains in prison. See Ashley Post, "Judge OKs Skilling's pursuit for new trial," Inside Counsel, May 2012, no page number.*
24 ***Black v. U.S.*** *op. cit.*
25 ***Black***, *Brief of Petitioner, "Statement," at pp. 2-16.*
26 *After* ***Skilling****, the trial court released Black on bail pending his appeal of the other count. After a lively year out of prison, he was sent back, for the second time, to finish his sentence and was released after eight more months.* ***See:*** *Mark Sweeney and Ed Pikington, "Black freed from US jail after three years," THE GUARDIAN, May 5, 2012, p. 27.*
27 ***Weyhrauch***, *Brief of Petitioner., "Statement," at pp. 7-18.*
28 ***Weyhrauch***, *op. cit.*
29 ***Sorich v. U.S.***, *129 S. Ct. 1308 (2009)*
30 ***Id.*** *at 1308.*
31 *Harvey A. Silverglate and Monica P. Shal, "Federal Power." The Degradation of the "Void for Vagueness" Doctrine: Reversing Convictions While Saving the Unfathomable "Honest Services Fraud Statute." 2009-2010* **Cato** *SUP. CT REV. 201.*
32 ***See****, for example, Lisa A. Casey, "Twenty-Eight Words: Enforcing Corporate Fiduciary Duties Through Criminal Prosecutions of Honest Services Fraud," 35* **Del. J. Corp. L.** *1 (2010); Margaret Ryznar, "The Honest Services Doctrine in White-Collar Criminal Law," 34 HAMLINE L. REV. 83 (2010-2011); and Brette M. Tanenbaum, "Note: Reframing the Right: Using Theories of Intangible Property to Target Honest Services Fraud After* ***Skilling****," 112 COLUM. L. REV. 359 (March 2012).*
33 *Prominent figures seeking redress include former Alabama Governor Don Siegelman, health executive Richard Scrushy, U.S. Representative William Jefferson, impeached U.S. District Judge Thomas Porteous, New York State Senate Majority Leader Joseph L. Bruno, Representative David Stout, and Illinois Governor George Ryan.* ***See:*** *Pamela Murphy, "Honest Services Fraud After* ***Skilling****," 42 ST. MARY'S L.J. 645, 693, ftnt. 234. (2012)*
34 ***U.S. v. Urciuoli***, *613 F. 3d 11, op.cit. The Court held that the exchanges with Senator Celona constituted a bribe, putting them within Skilling's saved version of the statute as "core."*
35 ***See*** *Laurie L. Levenson, "Criminal fraud cases survive* ***Skilling*** *decision,"33 NLJ 1, (January 3, 2011), 7.*
36 *S. 3854 (111th Congress).*
37 *Murphy, op. cit., 718-9.* ❖

# Establishing and Protecting the Attorney-Client Relationship in Trust Matters

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*There is a surprising level of misunderstanding of the ethical rules and law related to client representation in trust matters, confusion that can result in potential liability and ethical violations.*

When handling trust matters in Rhode Island, it is sometimes unclear whether the lawyer represents the grantor, the trustee, the beneficiaries, or one or more of the above. Many times, the lines of client representation are blurred because the various individuals/entities involved, each with distinct legal interests, appear (at least for the moment) to be coexisting in harmony. The determination of the actual client, and the extent of the attorney's obligations to the non-clients, depends largely on the given facts and circumstances. There is no set guidance for the trust attorney to follow, instead he or she must rely on the applicable Rules of Professional Responsibility and relevant case law, which, in a given circumstance, can be either vague or contradictory.

This article provides a summary of the ethical rules and law related to client representation in trust matters. There is a surprising level of misunderstanding of this topic by practicing attorneys, confusion that, if acted upon, can result in potential liability and ethical violations.

**While the Grantor is Living and Competent**

Established principles governing attorney-client relations are clear that when an individual hires an attorney to prepare an estate plan, including a trust, that individual is the attorney's sole client. While the trust is being drafted, other parties, including intended trustees and intended beneficiaries, are not in privity with the attorney and do not have any form of an attorney-client relationship.[1]

Likewise, after the trust is created, the attorney-client relationship, and all related duties, continues with the grantor-client. However, once the estate plan is completed, the attorney's ongoing relationship with the grantor-client is best characterized as dormant. According to the Commentary to Rule 1.4 "Communications," to the Model Rules of Professional Conduct, promulgated by the America College of Trust and Estate Council, "The execution of estate planning documents and the completion of related matters, such as changes to beneficiary designations and the transfer of assets to the trustee of a trust, normally ends the period during which the estate planning lawyer actively represents an estate planning client."[2] The Commentary continues, "As a service the lawyer may communicate periodically with the client regarding the desirability of reviewing his or her estate planning documents [or] send the client an individual letter or a form letter, pamphlet, or brochure regarding changes in the law that might affect the client."[3] Nevertheless, there is no affirmative obligation for the attorney to contact the client regarding such issues or changes.

Although after the execution and funding of the trust, while the grantor is living and competent, the grantor remains the attorney's sole client. Thus, the attorney may not be completely insulated from liability to third parties. For instance, if, as part of the establishment of the trust, the attorney advises or assists the grantor with funding the trust (such as by preparing a deed or asset transfer paperwork), potential liability exists for any incorrect advice or deficiency in service that ultimately frustrates the intent of the grantor and negatively effects the beneficial interests of others.[4]

**Attorney Retained by a Trustee**

If an attorney is retained by a trustee at the time of the grantor's death or incapacity to continue to advise the trust, or if an attorney is simply hired by a trustee with no preexisting relationship to the trust, the trustee is the attorney's primary client. However, as noted in Commentary 11 to Rule 1.2, "Scope of Representation," of the Rhode Island Rules of Professional Responsibility, "Where the client is a fiduciary, the lawyer may be charged with special obligations in dealing with a beneficiary."[5] The extent of this secondary duty to the trust beneficiaries varies from state to state.

The majority of states, including Massachusetts and Florida, have a straightforward rule that, in all respects, an attorney hired by a trustee owes a fiduciary duty to the trustee alone. However, in a few states, including Rhode Island, the question of whether an attorney may be found to owe some level of care to the trust beneficiaries is somewhat less clear.

The Rules of Professional Responsibility are not particularly helpful in resolving this issue, stating only that "In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary, under another view the client is the estate or trust, including its beneficiaries."[6] The answer to whether a trustee's attorney has any obligations to the trust beneficiaries depends largely upon the nature of the attorney's representation. More specifically, a court will examine whether the attorney was hired by the trustee to assist with litigation, or simply general trust administration.

### Trustee's Attorney Hired to Assist in Dispute with Beneficiary

Clearly, if a trustee becomes involved in a dispute with a beneficiary, and at the onset of hostilities between the parties, the trustee hires an attorney to advise him or her in the matter, the lawyer represents the trustee only. In Rhode Island, there are no published decisions regarding whether an attorney representing a trustee in litigation with a beneficiary owes a fiduciary duty to the beneficiary.[7]

However, it is well-settled law in other jurisdictions that any communications between the trustee and his lawyer after the onset of hostilities are protected by the attorney-client privilege.[8] For instance, in one Florida case, it was held that an attorney retained by the trustee as his personal lawyer to advise him on matters such as how to defend an action for breach of trust did not owe a duty to the beneficiary. In **First Nat'l Bank of Florida**, the beneficiary sought to compel discovery of communications between the bank trustee and its attorney, in a case in which the beneficiary alleged that the trustee had mismanaged trust assets, resulting in foreclosure proceedings against trust-owned property. The beneficiary argued that it was her understanding the trustee's lawyer was hired to represent the interests of the trust as a whole, and that an attorney-client relationship was thereby established, not only with the trustee, but also with the beneficiary.[9]

Reviewing the matter, the Court determined, "Factual questions in these types of cases are never easily resolved. Although it seems fairly clear that the trustee hired counsel because of the foreclosure proceedings and problems with

the trust, the respondent beneficiary and her attorney testified that they had been led to believe by (the attorney) that the trustee had retained him for the benefit of the trust and beneficiaries. However, the respondent beneficiary had already retained her own counsel . . . and was questioning the trustee's conduct before the trustee retained (the attorney) for legal advice." Because there was already a controversy between the trustee and beneficiary, an attorney-client relationship could not have also existed between the trustee's attorney and beneficiary. As such, the court denied discovery on those grounds.[10]

A finding otherwise by a Rhode Island court would violate the principles set out in Rhode Island Rules of Professional Responsibility Rule 1.7(a) that "A lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: 1) the representation of one client will be directly adverse to another client; or 2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer."[11]

**Trustee's Attorney Prior to Dispute with Beneficiary**

While the law is clear that once a conflict arises the attorney's only client is the trustee, the courts are divided as to whether the same is true prior to the start of a dispute. Most courts, including those in Massachusetts, have held that the trustee is at all times the only client of his attorney, and that to suggest that the beneficiaries are also clients is inconsistent with the law of trusts.[12]

The trust in **Spinner** consisted primarily of stock in a newspaper company. The trustees received an offer for the purchase of the entirety of the stock and declined to accept the offer. Subsequently, the value of the stock dropped sharply, and the unhappy beneficiaries sued the trustees' attorneys arguing that their advice to the trustees regarding the proposed purchase resulted in the trustees taking actions to the harm of the beneficiaries. Rather than suing the trustees for breach of fiduciary duty, the beneficiaries instead brought the action against the attorneys, alleging: 1) breach of contract; 2) aiding and abetting the trustees' breach

of fiduciary duty; and 3) standing to bring the suit of the trust because the trustees themselves had refused.[13]

The Massachusetts Supreme Judicial Court rejected the beneficiaries' contentions, finding that "In the course of administering a trust, a trustee may be required to make difficult decisions with regard to his or her duties to the beneficiaries. A trustee's attorney guides the trustee in the decision-making process. That the interests of the trustee and the interests of the beneficiaries may at times conflict cannot seriously be disputed. Should we decide that a trustee's attorney owes a duty not only to the trustee but also to the trust beneficiaries, conflicting loyalties could impermissibly interfere with the attorney's task of advising the trustee."[14]

The Court affirmed the lower court decision, establishing a clear rule in Massachusetts that, under no circumstances can a trustee's attorney be held directly liable to a trust beneficiary. As the Court concluded, "(The trustees' attorneys) owed a duty only to the trustees. The trustees alone can pursue an action against them. It bears repeating that this result does not leave the beneficiaries without recourse; *they can pursue an action directly against the trustees if they can show a breach of their fiduciary duties* [emphasis added]."[15]

In comparison, in a sole Rhode Island Superior Court decision, the Court adopted the alternative position used in some jurisdictions that "a trustee's attorney owes a duty of care to trust beneficiaries."[16] In **American Kennel,** the trust attorneys had advised the co-trustees of a trust in making several administrative decisions that eventually resulted in the trust's remainder beneficiary bringing a lawsuit against the co-trustees for breach of fiduciary duty.[17] That lawsuit was settled with a judgment against the co-trustees, and, subsequently, the remainder beneficiary and a co-trustee brought a separate action against the attorneys for breach of fiduciary duty and legal malpractice because of their poor legal advice.[18] The attorneys, in their defense, argued to the Superior Court that it should adopt the law accepted in many other jurisdictions, such as Massachusetts and Florida, and find that an attorney advising a trustee does not owe a fiduciary duty to the trust's beneficiaries at anytime. Entering into a lengthy analysis,

the Superior Court instead adopted the position held in some jurisdictions that a trustee's attorney does owe a level of a duty of care to the trust beneficiaries, finding this stance consistent with an earlier order issued by the Court that a trustee's attorney is required to produce, "'[a]ll documents relating to any legal advice obtained and paid by the trustee in connection with the administration of the trust… [and] all billings, statements, invoices, and any other documents showing the amount of money paid by the trustees for legal advice in connection with the administration of the trust.'"[19]

It is important to note the duty of care found in the **American Kennel** decision existed only prior to the onset of hostility between the parties. The facts of the case involved attorneys' representation before, not during, litigation. The question before the Court was whether a duty exists when a attorney advises a trustee during the general administration of a trust.[20] Moreover, many of the decisions relied upon in the **American Kennel** case have since been disregarded or given negative treatment by courts in the same states of the original cases.[21]

Regarding whether a duty of care exists during litigation, there is no published Rhode Island case law that derivates from the widely-recognized rule that the duty of care extinguishes at the time a conflict begins between a trustee and beneficiary. Furthermore, implementing such a rule would remove from a trustee involved in litigation with a beneficiary the protection of the attorney-client privilege, as the trustee's attorney would at all times also be accountable to the other party in the action.

If a duty is found to be owed by a trustee's attorney to the beneficiaries, "The nature and extent of the lawyer's duties may vary according to the circumstances, including the nature and extent of the representation and the terms of any understanding or agreement among the parties (the lawyer, the fiduciary, and the beneficiaries)."[22] Perhaps best characterized as secondary clients, the lawyer may not withhold or exploit information to the detriment of the beneficiaries. According to the Restatement (Third) of Trusts, "Legal consultations and advice obtained in the trustee's fiduciary capacity concerning decisions or actions to be

*Continued on page 35*

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## BOOK REVIEW

# *Killer Show*

**Anthony F. Cottone, Esq.**
Sole practitioner in
Providence

*The author's skillful recitation of the pertinent facts underscores that in contrast to the epic scope of the tragedy, it was caused, not by oversized malevolence, but by the petty venality and negligence of small town (and home-grown) businessmen and public officials.*

One freezing cold February night almost a decade ago, Hell was visited upon nearly 500 innocent people crammed into The Station nightclub in West Warwick, Rhode Island, a place where, as one radio station executive noted, "good bands go to die."[1] Regrettably, the loss of life that night was not limited to guitarist Ty Longley, the one member of the heavy metal band Great White who perished in the flaming nightclub. Longley was joined by precisely 99 others who were unable to exit the premises in the ninety seconds required to survive, and who thus lost their lives in the conflagration, or soon thereafter. The nightmare, and subsequent legal proceedings, is the subject of a thoughtful and compelling new book, *Killer Show*, by John P. Barylick, one of the lead attorneys in the Superior Court-appointed Plaintiffs' Steering Committee which was responsible for the $176 million civil settlement made on behalf of the victims and their families.[2]

As none of us who lived in Rhode Island can forget, the horrific scene was videotaped by a WPRI-TV (Channel 12) videographer, taping at the request of Jeffrey Derderian, who owned the nightclub with his brother, Michael. By day, Jeffrey was a reporter for Channel 12 and, ironically, had requested the videotaping to obtain generic footage for a piece he was preparing on nightclub safety, a piece prompted by another tragedy just three days earlier when twenty-one patrons were stampeded and killed in an overcrowded nightclub on Chicago's South Side.[3]

The videotape makes clear that on the evening of February 20, 2003, Great White and its leader, Jack Russell, a self-described "surfer stoner guy from Whittier, California" whose musical career had peaked in 1989,[4] took the stage at 11:05 p.m., prompting the band's manager, Daniel Biechele, to set off a pyrotechnics display consisting of four pre-arranged "gerbs," i.e., cardboard tubes which produce a dense plume of "cool sparks."[5] The intended effect "was a fan of sparks fifteen feet high and thirty feet wide, lasting fifteen seconds." Yet, as Barylick notes, the "actual effect would be much longer lasting."

Since that terrible night, many have tried to make sense of the tragedy, searching for answers and just as intensely, for scapegoats. One of the most admirable aspects of *Killer Show*, and there is much to admire about Barylick's excellent new book, is that the author resisted the temptation to turn those jointly responsible for the disaster into oversized comic book villains, or to sensationalize the plight of the many victims (notwithstanding the book's rather tasteless title and the Ralph Nader quote on its cover touting it as "more authentically suspenseful than a John Grisham novel").[6]

For the most part, Barylick lets the facts speak for themselves in crisp, clear prose, without excessive sermonizing, while displaying a mastery of the relevant legal, medical, and other technical details. The author has an eye for interesting detail and a knack for describing people in an engaging style. Because it is so effectively organized and paced, *Killer Show* is hard to put down.

Although Barylick is not a professional writer, *Killer Show* is reminiscent of journalist Jonathan Harr's National Book Award-winning *A Civil Action*, based on the civil suit brought by attorney Jonathan Schlichtman, seeking redress for the effects of widespread industrial pollution in Woburn, Massachusetts. Although *Killer Show* may not win a National Book Award, it is a book, like *A Civil Action*, that I would urge every civil trial attorney, and anyone thinking about becoming a civil trial attorney, to read.

As recounted in *Killer Show*, the Plaintiffs' Committee collectively advanced nearly $2 million in "evidence gathering, preservation, and expert fees" to secure the $176 million civil settlement.[7] Roughly a third of the settlement came from various manufacturers of the polyurethane (PU) and polyethlylene (PE) foam that lined the The Station's walls, marketed as "sound foam" without any flammability warnings.[8]

As Barylick explains, promotional material for the foam often made reference to an entirely discredited flammability test, the "Steiner tunnel test," devised prior to the invention of PU foam and which produced wildly inaccurate results by orienting testing samples horizontally rather than vertically.[9] In fact, the industry

entered into a consent decree with the FTC in 1974 expressly repudiating the Steiner tunnel test and acknowledging that under certain common conditions, PU foam may "'produce rapid flame spread, quick flashover, toxic or flammable gas, dense smoke and intense and immediate heat.'"[10] Despite the consent decree and that numerous fires had been linked to the foam, the industry continued to reference the discredited test and to market the product without flammability warnings.[11]

Nonetheless, from the outset, experts studying The Station fire could not understand what caused the "roaring blaze" seen on video to rage so quickly and so intensely, which seemed without precedent. As Barylick recounts, "sure, the PU foam caught fire quickly, almost like flash paper, but [the experts concluded that] it would have expended its energy and burned out just as quickly."[12] Thus, Barylick describes in some detail his last-minute efforts to locate and test samples of the PE foam installed in the nightclub years earlier, which was under the PU foam which lined the club's walls.

Indeed, after a suitable sample of the PE foam was located and tested at the Western Fire Center in Kelso, Washington, it turned out that PE foam under the PU foam was the culprit, causing experts at the Center to conclude that "the PU/PE sandwich had produced the most dramatic… test they'd ever experienced."[13] As Barylick notes, the video of the test was "nothing short of spectacular. Within twenty two seconds, flames and smoke can be seen roaring from the door opening."[14] The end result was a $25 million settlement with Sealed Air Corporation, the PE foam manufacturer.

Barylick recounts his role settling the claim against Channel 12 and its videographer, who arguably blocked some patron egress while videotaping the fire (after some mediation, WPRI was the first defendant to settle, also for $25 million), and recounts the presentation he made before the West Warwick Town Council, which included a video demonstration of a PU "match flame test," a test which should have been conducted during any routine fire inspection. The author reports he "marveled at the bored, almost aloof, expressions of several council members" as they watched "flames rac[ing] up the sample of gray egg-crate foam, dripping blazing plastic."[15]

Although Barylick often refers to the work of the ten-member Plaintiffs' Committee,[16] he never once mentions any of the other individual attorneys working on the case, whether plaintiffs' or defense counsel, by name. In any event, he consistently tells the story from the vantage point of the victims and is never unduly self-aggrandizing.[17]

Despite Barylick's description of his presentation to the Town Council, I remain somewhat surprised at the willingness of the Town and State to contribute a collective $20 million towards the settlement. Under the applicable Rhode Island immunity statute, liability is precluded against either governmental entity if their agent acted in good faith.[18] And, former Attorney General Patrick Lynch's decision not to prosecute Dennis Larocque, the deputy state fire marshal and city battalion chief responsible for inspecting the nightclub and enforcing the state fire code, suggests that, unlike the town and state, the AG concluded Larocque had acted in good faith, or at least concluded a criminal jury would have so found, thus triggering the immunity statute and precluding a conviction.

Admittedly, the AG's conclusion is not

readily apparent from the facts set forth in *Killer Show*, where Barylick notes Larocque:

> (1) agreed in December of 1999 to increase the maximum occupancy permissible at The Station from 258 to 317, and then just over two months later, as the Derderians were purchasing the nightclub, he agreed at the request of Michael Derderian to raise the limit to 404. In order to reach an arguably minimally acceptable standing room per standee figure, Larocque designated the entire building as "standing room," which Barylick concludes was in express derogation of state law limiting such designation to "'only that part of a building directly accessible to doors for hasty exit;'"[19] and
>
> (2) "overlooked nine hundred square feet of highly flammable polyurethane foam covering the entire west end of the club during multiple inspections over three years." As Barylick adds, the only violation cited by Larocque during any of these inspections involved the presence of an inward-opening door at one of the exits, and "Larcoque would have had to reach *through a hole in the foam* in order to open that door."[20]

Barylick is highly critical of the decision not to prosecute either Larocque or Great White band leader Russell. Barylick speculates the decision not to prosecute Larocque was due not only to the risk of loss posed by the immunity statute, but also because "some prosecutors just find it hard to charge a 'uniform' with a crime."[21] Barylick recounts that:

> Six years after the fire, the attorney general began his own run for governor. Responding to criticism over not indicting Larocque, the AG brayed, 'Don't you think that politically it would have been better for me to indict Larocque? But constitutionally? Ethically? Morally? All grossly inappropriate.' As to what 'constitutional, ethical or moral' dilemmas Lynch grappled with in deciding not to seek Larocque's indictment, he failed to explain. In reading how protective Lynch's prosecutors were of Larocque before the grand jury, however, it appears that the decision was made early on.[22]

As to why band leader Russell was not charged with a crime, Barylick concludes "even less is known."[23] As Barylick notes, the basis of Biechele's conviction was Title 11, Chapter 13, Section 1 of the Rhode Island General Laws, which makes it a misdemeanor for anyone to "possess or …use" fireworks of the sort used in Great White's display without a permit. It was Biechele who actually fired the pyro, but, as Barylick points out, the band's contract makes clear that it was band leader Russell who had the legal right to "control the manner, means, and details of the performance. . ."[24] Barylick concludes that "if there was any principled reason why Jack Russell was not charged criminally in this matter, it was never publicly discussed by Rhode Island's attorney general."[25]

Unlike Larocque and Russell, Biechele and the Derderians were all charged with one hundred counts of involuntary manslaughter and one hundred counts of misdemeanor manslaughter. Biechele pled guilty to the misdemeanor manslaughter charges and according to Barylick, made an apology at sentencing that was "heartfelt and devoid of any pretense that it could, or should, engender forgiveness on the part of fire victims."[26] He received a sentence of "4 years to serve" and was paroled after serving sixteen months.[27]

The Derderians, on the other hand, pled *nolo contendere*. Both, like Biechele, received "4 years to serve," but unlike Biechele, Jeffrey Derderian's entire prison sentence was suspended, and he was ordered instead to perform five hundred hours of community service, despite the fact that both Derderians were, in Barylick's words, "only obliquely apologetic" at their sentencing.[28] Michael Derderian served twenty-seven months before being paroled.[29]

Whatever one may think of the prosecutorial discretion exercised by the AG, *Killer Show* makes clear the victims of the tragedy deserved more from their public officials, both before and after the tragedy. As Barylick notes, "the public wanted answers…How could a club with highly flammable foam on its walls pass fire inspections? Was the club overcrowded that night? Just what was the club's permitted capacity?" Yet regrettably, as recounted in the book:

- "West Warwick fire chief Charles Hall told a reporter for the *Providence Journal* that The Station's permitted occupancy was '300.' (He was only off by 104)…and 'strongly denied' to reporters for the *Boston Herald* that there had been more than 300 patrons at the time of the fire. (Confirmatory interviews and body counts after the fire showed that this statement by Hall was low by a mere 162)";[30]
- Fire chief and fire marshal Larocque denied that the Town had ever received complaints about overcrowding at The Station, yet a mere month before he increased the nightclub's capacity to 404 at the request of Michael Derderian, Larocque's own boss wrote to the Town Council referring to the "ongoing problem of overcrowding which occurs at [The Station];"[31]
- The West Warwick Town Solicitor, in what Barylick characterizes as "a tour de force of inaccuracy and obfuscation," erroneously referred to a "change of use or occupancy" no less than five times to justify the increased minimum capacity numbers (despite the fact that there was no such change), and misstated the minimum per square foot space provided per standee;[32] and
- The Town Manager defended the increased minimum capacity figure by referring to "very concrete and sound principles," without ever explaining what these principles were, and when asked how the Town could have overlooked nine hundred square feet of highly flammable PU foam, simply repeated that "our inspector missed nothing."[33]

*Killer Show*, however, is more than a recitation of corporate and government malfeasance. What lingers is not the perfect storm of greed and malfeasance which proximately caused the fire, but the incredible individual stories. Including the description of Shamus Horan, a twenty-seven year old pipefitter, pulling victim after victim out of the blaze, or Linda Fisher, who underwent multiple surgeries and whose arms bear deep burn scars but whose smile, which beams from the color photo included in the book, attests to the hard-fought new life she won. And, it should be emphasized that not all public servants are portrayed in dereliction of their duties. In fact, many of the public servants in *Killer Show* are described as courageous and tireless public advocates, such as Peter Ginaitt, a registered nurse and former member of the General Assembly who co-directed the successful triage of victims on the night

*Continued on page 36*

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RI Society of CPAs
45 Royal Little Drive, Providence
8:30 a.m. – 10:30 a.m., 2.0 credits

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**How to Handle a Misdemeanor**
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# *Lunch with Legends:*
## Trailblazers, Trendsetters and Treasures of the Rhode Island Bar

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

For Joe McGair, being a lawyer runs in the family. With a father and four of his seven siblings also attorneys, he jokingly describes his calling to the profession as a "congenital defect." Joe grew up in the Edgewood section of Cranston, attended LaSalle Academy, Providence College, and Suffolk University Law School before his admission to the bar in 1971. After a brief stint at his father's firm, Armstrong Gibbons Black & Lodge, he partnered up with Lou Petrarca, forming Petrarca & McGair, in West Warwick, where he has practiced ever since.

Joseph J. McGair

While a young practitioner, Joe also served as a Warwick City Solicitor. He handled matters for every Warwick governmental agency, prosecuted crimes, and tried over 1,000 cases in a four-year period. He stepped down from the solicitor's office in 1976 to run for Warwick City Council, won, and served eight years. As a councilman, Joe spearheaded efforts to make Rhode Island's beloved Rocky Point Park, and Oakland Beach safer for residents and visitors. Joe also served four years as a State Senator, rising to First Deputy Majority Leader during his last two years of office. From the outset of his term in the State Senate, Joe refused the legislative pension, encouraged colleagues to do the same, and eventually helped eliminate the legislative pension altogether. He also played a leading role implementing judicial reform. Joe served in these roles all while maintaining his private practice. Excerpts from our conversation follow.

***If you had to hire a lawyer today to represent you, who would it be?*** You mean other than Joe Kelly? Probably a guy who does everything, John Tarantino.

***Can you share with us one of your most memorable experiences during the course of your law practice?*** I was trying a case and while the judge was giving his decision he quoted my expert. I said, "Judge, I don't want to interrupt you, but my expert never said that." The judge replied, "You shouldn't be interrupting me." I responded, "But, Your Honor, justice demands. That's not what he said." So he called the expert back up and asked, "Did you say that?" The expert answered, "No, I didn't." The judge then said, "Not guilty." So, I told my client, "Get the hell out of here." He ran out the door. The prosecutor was going nuts, and he said, "Your Honor, you can't do that." The Judge said, "Yes, I can." The prosecutor replied, "No you can't. We want an order to put McGair's client on the stand now." So, the Judge asked me, "McGair, where is your client?" I said, "He's gone already. I told him to leave, Your Honor." So, it was over.

***Over the course of your career, who has been your most formidable legal opponent?*** John Lynch. He and I had some classic battles in the Family Court. But, you know, after it's all over, I'll buy him a beer.

***What skills or characteristics can you attribute to your success as a professional?*** I think a sense of humor is most important. I'm not saying being a clown, but you have to have a sense of humor. You have to. And, putting in the hours. You have to be determined, which comes from passion. Then, of course, there's the other side of it. Knowing when you're wrong. There are times you get involved in a case, and, in the end, you find out that you're wrong. And you've got to do something about it, because you don't want to waste your time, and you don't want to waste the hopes and the aspirations of your client.

***Since you started practicing, what has been the biggest change in the legal profession?*** I think the biggest thing is that, back then, all the lawyers knew each other.

***What challenges do you foresee for newer members of the bar?*** Trying cases. They're just not there. I mean, I respectfully disagree with all of the mediation, arbitration. I think it's a disservice to the Bar in general.

***Would you do it all again?*** When I was a little guy, I couldn't wait for the Perry Mason show to come on at eight o'clock on a Saturday night. You know? The whole thing thrilled me. It still does. I can't imagine being anything else.

Joe McGair's exuberance for the profession is evident. His humor and passion combine to inspire many of us, and make him one of the treasures of our Bar.

# Medical Affidavit Update

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

*They must often change who would be constant in happiness or wisdom.*

Confucius (551-479 BC)
*Analects*

This year the legislature enacted a significant amendment to the medical affidavit statute, R.I. Gen Laws § 9-19-27.[1] The amendment's purpose is to make it easier to get medical affidavits into evidence and solve certain practical difficulties that sometimes arose under the prior statute.[2] The prior statute had a fairly well-developed jurisprudence,[3] and efforts were made to accommodate that jurisprudence in the drafting of the amendment.[4] The full implications of these modifications will have to await judicial gloss on the new language and concepts.

The first of these concepts is in the purpose clause, a new feature added in the amendment. That clause instructs the trial courts to construe the statute liberally to admit "what is presumptively reliable medical evidence" presented by way of a statutory affidavit. Thus, within the lead-off sentence, we are confronted with at least two issues of interpretation.

The initial issue is the effect of the instruction to the trial court to construe the statute liberally. The Rhode Island Supreme Court held that it is the function of the courts to determine and effectuate the legislature's intent in enacting a statute, and courts will use the stated purpose set forth in the statute as a guide to such determination.[5] The stated purpose here is to make clear under the statute that a medical affidavit is more than a mechanism for authentication of documents that, having been authenticated, need to stand completely on their own. But, it is rather a means of supplementing and contextualizing those records and a source of evidence on its own.[6] Thus, the affidavit may now set forth a narrative to supplement and clarify the contents of the appended records. While narrative affidavits were often admitted into evidence under the prior statute, the issue should now be even clearer for trial courts.

The second challenge is the phrase "presumptively reliable medical evidence," as used in the purpose clause. There seems to be some fear (and, indeed, some hope) that this means courts will be required to admit medical affidavits unless the opponent of such evidence can overcome this newly created "presumption." Please note the amendment does not say presumptively admissible, but "presumptively reliable." Stronger and clearer language would be needed to find an intention of burden shifting, particularly within a purpose clause which would not typically carry such substantive weight. The language strengthens the notion that trial courts ought to err on the side of letting affidavits in rather than excluding them, in part, because of the inherent reliability that comes with a medical record.[7] The language does not support a stronger interpretation.

The next substantive change is to allow incorporation within the records attached to the affidavit of "written statements made by the physician or dentist whether contemporaneous with the treatment or not." This is a departure from one of the traditional requirements for the admission of a business record as an exception to the hearsay rule, specifically Rule 803, (A) "the record was made *at or near the time* by — or from information transmitted by — someone with knowledge." [emphasis added]

The new language anticipates the situation where the doctor (often, though not always, a primary care doctor) makes hand-written notes of each visit, but the notes are full of abbreviations and poorly legible entries. Sometime later, the attorney will ask the doctor to provide a written narrative clarifying the notes and explicitly connecting the injury with the accident at hand. Another, similar, situation arises when a patient has multiple injuries to the same body part or area and notes from the same doctor. The doctor may then provide a narrative differentiating the conditions that are or are not related to the accident at hand, or the aggravation thereof by the accident at hand. Because these narratives are not contemporaneous with the treatment being rendered (as they are not usually written until the issue comes up in the course of litigation), they have been subject to objection based upon the theory that they are not technically medical records, but an artifact of the litigation process. That objection will now be baseless under the newly revised statute, though the opposing party will still have the right of cross examination.

The other situation implicated in these

changes is that the underlying reports may refer to the incident in question but not use the words "reasonable degree of medical certainty" as qualifying a finding of a connection between the incident and the injury. The reports (lacking that phrase) and the affidavit (containing it) will thus appear dissonant in this regard. These non-contemporaneous narratives can help bridge that gap.

After all, the phrase "reasonable degree of medical certainty" is not natively a part of the medical lexicon. To the extent doctors use this phrase at all, it is because they are advised by lawyers it is a helpful phrase to use. Doctors in specialties who do not often deal with patients making claims for their injuries use it much less often. Making such connections is not usually a part of the process of diagnosis and treatment, especially once we depart from the obvious cases such as a broken wrist from a fall onto a hard surface. Beyond such obvious cases, doctors are often uncomfortable with stating anything with certainty.[8] The case law makes clear that one need not invoke "magic words" or "precisely constructed talismanic incantations," but simply must convey some degree of positiveness, and that it does not matter what words are used.[9] Thus, an affidavit under the new law has several ways to save a report not clearly available under the old law.

Another new feature is that medical affidavits may refer to and include other records or writings relied upon by the affiant in reaching her or his opinion, if those writings are "of a type reasonably and customarily relied upon by such providers." That qualifying language is deliberately copied from Rule 703 governing proper bases for expert opinions.[10] The intention in copying that language is to provide a ready-made jurisprudence in support of analyzing what can or cannot come into evidence this way. The point is that medical affidavits are typically signed by representatives of each provider, many of whom would not normally have any way of knowing whether a given condition is related to the accident at hand or not. In the ordinary unfolding of the course of medical treatment, a given patient starts out at a hospital emergency room, undergoes diagnostic testing at another facility, and then comes under the care of a specialist such as a neurosurgeon or orthopedic surgeon. That specialist will then refer to patient to other providers for MRIs or physical therapy.

Under prior law, each provider would have a separate medical affidavit, even though the records custodian of the emergency room, or even the radiologist reading a film, may have no way of really knowing what caused the condition being treated.[11] Under the new law, the surgeon could sign an affidavit saying she or he read and relied on the prior records, as well as the records of treatment from sources referred by her or him (such as MRIs) in concluding a given condition was proximately caused by the accident at hand. All these other records can be attached to that affidavit and come in that way, if the affiant provides the Rule 703 foundation within the affidavit.

In a belt and suspenders approach to this problem, the amendment allows the "authorized agent" of a health care facility to be deemed the proper affiant of an affidavit in support of records from that facility. As a practical matter, hospital records, for example, are never supported by an affidavit signed by the emergency room physician. They are virtually always signed by a records clerk. This signature is now enough, at least from the standpoint of authenticating the records, even though it will allow the clerk to seem to give an opinion she or he would not otherwise be allowed to.[12]

The new language expands the categories of health care professionals allowed to offer opinions in this manner to include "paramedics or rescue or emergency medical service personnel or ambulating services and other medical, mental health care or social work personnel licensed to practice under title 5 or under the laws of the jurisdiction within which the services were rendered." This change overrules prior case law regarding the competence of certain mental health professionals, particularly social workers, to offer what might be considered medical opinions.[13]

Social workers who are licensed under title 5 (and not all are) are defined by statute[14] as capable of "the diagnosis, assessment, and treatment of cognitive, affective, and behavioral disorders arising from physical, environmental, or emotional conditions." Their exclusion up to this point is thus anachronistic from a licensure standpoint. Most states recognize by statute that licensed clinical social workers have the competence to make diagnoses, and the clear emerging trend is to allow them to testify as expert witnesses.[15]

The United States Supreme Court, in recognizing a testimonial privilege for communications to social workers, saw the growing importance of social workers in providing mental health care:

> Today, social workers provide a significant amount of mental health treatment. Their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist, but whose counseling sessions serve the same public goals.[16]

Ironically, it may now be easier to get medical evidence from a social worker by affidavit than it would be through live testimony. One hopes that trial judges, who are vested with broad discretion in the admission of expert testimony,[17] will recognize this emerging trend and seize upon this amendment to allow licensed clinical social workers to testify in an appropriate case.

The inclusion of rescue personnel is less significant, from a policy standpoint, than the addition of mental health professionals. In the ordinary case, rescue personnel provide a limited, albeit critical, role in patient care. The typical rescue report records the initial complaints of pain and visible signs of injury. The greatest significance is often showing a continuity or discontinuity in the identification of affected areas of the body, i.e., "why didn't you tell the EMT that your knee hurt?" In order to allow a complete picture of the complaints made by, and care rendered to, the patient, rescue personnel need to be deemed competent as a result of their licensure to record such complaints and observations, and to sign an affidavit authenticating their reports.

Another new twist, requiring a lengthier exploration, involves deposing the affiant for purposes of cross-examination. The statute, as it existed up to this point, noted that it should not be construed to limit the right of a party to depose the affiant "at his or her own expense." For some time now, that right has been governed by the Supreme Court's ruling in **Gerstein v. Scotti**, 626 A.2d 236 (R.I. 1993).

In **Gerstein**, the defendant's counsel had the plaintiff examined by an orthopedic surgeon pursuant to Super. R. Civ. Pro. Rule 35. To guard against the doctor's potential unavailability at trial, a medical affidavit was prepared and filed attaching the report of that Rule 35 examination. The plaintiff's counsel thereafter issued a subpoena to the doctor, scheduling his deposition. The doctor wanted to get paid for his time, and plaintiff's counsel declined to pay him. A motion for protective order was filed, arguing that the phrase "at his or her own expense" meant the party seeking the deposition was obliged to pay the expert witness fee.

The trial court denied the motion, but limited the cross examination to questions regarding facts, not opinions. A petition for *certiorari* was filed, along with a motion to stay the trial pending the outcome of appellate review. Both the petition and motion were granted, and the matter proceeded to oral argument. At oral argument, Chief Justice Weisberger asked Gerstein's lawyer how long it takes to cross examine an expert.[18] "About an hour," came the reply. Thus was born the rule that the proponent of the affidavit must pay for the first hour of the affiant's time, the deposing attorney must pay for any time over that, and the deposition ought to take place at the doctor's office at a time convenient to him or her.

That rule has evolved over time, and evidently the Workers' Compensation Court has a well-recognized procedure called the **Gerstein** motion, whereby an impecunious employee can shift the cost of the expert fee to the carrier.[19] There is a parallel, but less well known, avenue on the Superior Court side. In **Raymond Sylvia, et al. v. Anthony DuPont, III**,[20] the Supreme Court on March 27, 1996 issued an order denying a petition for *certiorari* in a case wherein the trial court granted a protective order shifting the expert witness costs of deposing plaintiff's doctors to the defendant, subject to recoupment from any verdict in favor of the plaintiff, or to be imposed on plaintiff as costs in the event of a defense verdict. The Court found that the trial judge wisely exercised his discretion in so ruling and denied the petition.

The amendment to the statute attempts to codify both the holding in **Gerstein** and the order in **Sylvia**, along with the Workers' Compensation Court procedures. Likewise, the drafters were mindful that some treating doctors are beyond the court's subpoena power, and there was no intent to displace the balancing test adopted in **Martinez v. Kurdziel**[21] regarding out-of-state doctors.

In **Martinez**, the trial court granted a motion in *limine* excluding certain med-

ical affidavits, holding that § 9-19-27 was unconstitutional. The plaintiff in that case was a resident of Charlestown, Rhode Island injured when she slipped and fell in a parking lot in Westerly, Rhode Island. She had serious injuries from that fall and got most of her medical care from doctors and hospitals in Connecticut. Medical affidavits from these providers were offered pursuant to § 9-19-27 as evidence of the injuries, the treatment, and the resulting bills.

Defense counsel moved to exclude the affidavits on the basis that the defendants' had a constitutional right to cross examine the affiants, either eliminated or unduly burdened by the fact that the affiants were beyond the immediate subpoena power of the Rhode Island courts. The Supreme Court reversed, holding that there is no constitutional right to cross examination in a civil case, though recognizing the importance and value of such cross examination. The result was the requirement of a balancing test. The trial court must determine: the reason for seeking out-of-state care; the burden imposed on the defendant in having to travel out of state for a deposition; and the burden on a plaintiff of being precluded from introducing evidence of his or her medical care due to the happenstance of the location of his or her doctor.

Another feature of the recent amendment is a new section specifically addressing concerns in criminal cases. This section provides that § 9-19-27 should not be construed to limit the right of the accused in a criminal case to confront and cross examine witnesses. The United States Supreme Court has a line of cases expanding the right of confrontation beyond what had been understood to be the case.[22] Presenting certified copies of lab results identifying a substance as cocaine, in lieu of live testimony, is now held to violate the right of the accused to confront and cross examine the person who conducted the testing. The statute now makes explicit that affidavits offered pursuant to § 9-19-27 cannot be used to circumvent such constitutional guarantees.

It is also worth noting that the new version of the statute does not apply in medical negligence cases. Instead, the legislature created a new section, § 9-19-27.2, whereby the old statute was transplanted *in toto* into the new section, which will only apply in medical negligence cases. In other words, the procedure in those cases will remain precisely what it was under prior law.

These amendments are a paradigm shift regarding the rules for the admission of medical evidence in a personal injury case. Many negligence and other personal injury cases involve injuries that are both straight-forward and less than catastrophic. To have a doctor testify live in court is not only expensive, but difficult to arrange. Without a date certain, it is often arduous to arrange the availability of a doctor. Even if the arrangements can be made, the doctor's schedule is often beyond his or her control.

In my very first jury trial, I had arranged to have a doctor available to testify on a given afternoon. I put on my case to lead up to his testimony at just that point. That day, during the lunch break, I got a call from the doctor's office telling me that he had to perform emergency surgery and would not be available to testify. The trial judge would not allow

a recess for the afternoon, and I had no other witnesses. Perhaps sensing that the court was handing me what could well be reversible error, opposing counsel allowed me to put the doctor's report into evidence, even though I had not filed a medical affidavit. Had I prepared such an affidavit ahead of time, I would not have been at the mercy of needing his courtesy.

While the new language retains abundant safeguards, especially by drawing in established lines of case law, the amendment still offers a broader and clearer path for getting all relevant and probative evidence before a jury and avoiding exclusion of such evidence based on lack of finances or the caprice of scheduling demands. As the Supreme Court said in **Gallucci v. Humbyrd:**

> The modern rules of evidence are intended to facilitate and to preserve the integrity of the fact-finding process, not to create a labyrinth in which judge and jury lose the thread of proffered testimony instead of arriving at fair and accurate determinations of the ultimate facts in issue. It would be the most unfortunate of ironies if the very rules that were designed to correct the "empty rhetoric" and "odd verbal circumlocutions" of an earlier era were to become the framework for a similarly obfuscatory jurisprudence.[23]

*ENDNOTES*

1 *The House version of the amendment that passed was House Bill No. 7559 Sub A as amended, and it was passed by the House on June 6, 2012. On June 13, 2012 the Senate passed it, and it was transmitted to the Governor on June 15, 2012. Governor Chafee signed it into law on June 21, 2012. The act took effect upon passage.*

2 *The first paragraph of the amended statute states: This section is enacted primarily to relieve physicians and the other medical professionals defined herein who are associated with hospitals and other health care facilities from the hardship and inconvenience of attending court as witnesses, therefore in interpreting this section and the medical records exception to the hearsay rules of evidence in court or other related proceedings, the trial courts of this state shall liberally construe this section to admit what is presumptively reliable medical evidence presented by way of this statutory process without the necessity of calling numerous medical personnel as witnesses.*

3 ***See, e.g.**, the cases and analysis cited in "MEDICAL AFFIDAVITS IN RHODE ISLAND," Comerford, Peter J., February 1993 RHODE ISLAND BAR JOURNAL.*

4 *The author was among the attorneys who examined and took part in proposing the changes embodied in the amendment.*

5 ***Hanley v. State**, 837 A.2d 707 (R.I. 2003), interpreting the recreational use statute.*

6 ***Parrillo v. Woolworth**, 518 A.2d 354 (R.I. 1986) already held that the contents of the affidavit, as distinct from the appended reports, are a form of testimony, but trial courts sometimes honor this ruling in the breach.*

7 *Reliability in this sense is the same as for any business record under Rule 803 of the Rules of Evidence, what the Supreme Court has called "the circumstantial guarantee of trustworthiness in hospital records with respect to facts and circumstances relating to medical care." **Martinez v. Kurdziel**, 612 A.2d 669, 677 (R.I. 1992).*

8 *The more interesting question, of course, is the whole notion of certainty itself. The philosopher Bernard Lonergan, in his masterwork, INSIGHT: A STUDY OF HUMAN UNDERSTANDING (1957) explains that a certainty is what is grasped as virtually unconditioned, meaning that all conceivable doubts have been examined and resolved. **Id.** at p. 550. Aristotle, by contrast, speaks of moral certainty, a very high degree of probability, sufficient for action, but short of absolute or mathematical certainty. CF., NICOMACHEAN ETHICS, Bk. 6, Ch. 11. Some doctors appear to think that certainty in the legal sense is on this level, approaching if not reaching apodictic certainty, and thus virtually preclude ever reaching it. For our present purpose, all that is required is a degree of positiveness, and to speak in terms of probabilities rather than possibilities. **Sweet v. Hemingway Transport, Inc.**, 333 A.2d 411 (1975). In other words, that something is more likely than not, as that, if offered, one would more likely than not accept a fine Brunello.*

9 ***Morra v. Harrop**, 791 A.2d 472, 477 (R.I. 2002), citing **Gallucci v. Humbyrd**, 709 A.2d 1059, 1066 (R.I.1998)).*

10 *RULE 703. BASES OF AN EXPERT'S OPINION TESTIMONY*

> *An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.*

11 *Moreover, under prior case law, it was impermissible to read affidavits together with one another in order to find their meaning. **Cuddy v. Schiavonne**, 568 A.2d 1387 (R.I. 1990), citing **Parrillo v. F.W. Woolworth**, 518 A.2d 354 (R.I. 1986).*

12 *Nothing in the statute changes rules regarding the competence of the affiant. **See, e.g., Feinerman v. Natelson**, 106 R.I. 773 (1970). The agent is now deemed a competent affiant regarding authentication.*

13 ***See, e.g., Torrado v. Santilli**, 776 A.2d 1059 (R.I. 2001), citing **Vallinoto v. DiSandro**, 688 A.2d 830 (R.I.1997), holding that social workers are not competent to diagnose post-traumatic stress disorder.*

14 *R.I. GEN LAWS § 5-39.1-2.*

*Continued on page 38*

## Rhode Island Bar Foundation

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

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## In Memoriam

**Nathaniel S. Thayer, Esq.**

Nathaniel S. Thayer, 87, of Benefit Street passed away on February 6, 2012. Born in Minneapolis, MN, a son of the late Nathaniel S. and Doris Wentworth Thayer, he lived in Providence for the past 61 years. A practicing attorney for the past 60 years, Mr. Thayer began his career at the law firm of Tillinghast, Collins & Tanner in Providence. Several years later, he became a partner of the Pawtucket law firm of Blais, Cunningham, Thayer, Gagnon & Ross, now Blais Cunningham & Crowe Chester. He was a graduate of Amherst College, the Sorbonne, and Cornell University Law School. Mr. Thayer was a World War II Navy veteran. He is survived by a sister, Suvia Siekman of Islesboro, ME; a sister-in-law, Marion Thayer of Edina, MN; and a foster brother, George Hast of Tilton, NH.

# Commentary: The Holistic Lawyer

**Laura M. Krohn, Esq.**
Law Office of Laura M. Krohn

*Addressing legal and medical, social, financial, and family issues allows lawyers to advocate for the whole client.*

Holistic law is an evolving concept gaining in popularity as the needs of clients become more comprehensive. When asked what it means to be an elder law attorney, I usually say it is an area of the law where I address my client's perspective from a holistic viewpoint by addressing more than just the legal issues. Instead, I address the legal *and* the medical, social, financial, and family issues. By doing so, I am advocating for the *whole* client.

Being a holistic lawyer means understanding that clients want peace of mind, as well as advice. At all stages of representation, the holistic lawyer strives to provide positive reinforcement to clients by combining legal advice with emotional support. Would you rather have your lawyer, whom you just told the most intimate details of your life, give you a handshake or a hug? You may have hundreds, even thousands, of clients, but most of your clients only have one lawyer, and that is you!

You will benefit just as much as your clients. By practicing holistic law, it is imperative you remain healthy and positive in your own life. Take care of you first, and then you can put the client second. Just make sure you put the client, the individual, before the issue.

It is also important to create a positive and friendly office environment. That can start with a happy work force and go all the way to enough sunlight in the conference room. Hangings on the conference room walls should inspire inner strength, courage, hope, and kindness. You can still hang your sports collection, just ensure there is a balance between what is important to you and what is important to the clients you meet. You don't want your client to feel as though they are getting legal advice at Chili's Restaurant! Everything matters.

Education is an important part of the holistic approach to law. I never want my clients to say "I know the lawyer did something with the house, but I am not sure what." Your client should feel educated and be an active participant in his or her own long-term care planning. Your office should be filled with brochures and reference materials relevant to the area of law you practice in. For example, in my elder law office, there is an abundance of information on health care providers, living choices, services offered by the Alzheimer's Association of Rhode Island, how to deal with Alzheimer's Disease and other dementia-related diseases, topical books, and support group materials.

I believe most issues between individuals are not based on legal rights, they are based on human emotions. Knowing that, I proceed by integrating my holistic values into my legal practice, finding most adversaries do not want to litigate. They want to be heard and understood. For example, you can give your children, equally, pieces of an orange. However, they will still complain because one wanted the pulp for juice, and the other one wanted the rind for zest. The principles of forgiveness and understanding, when integrated with compassion and patience, can transform conflict.

I am told a consultation at my office is unlike any other attorney consultation. I ask everything from whether or not the children are healthy and/or happily married, to what medication are you taking? When is the last time you saw your doctor? How much money do you spend a week? Are you happy? It may sound like fluff, but how else can we serve a client unless we know as much as possible about them, their family dynamics, and their objectives?

In my office, I set the basis for a continuing relationship at the very first meeting. Picture the baby-blue walls, white conference room tables, and two dogs, lying in the window seat, catching the sun.

There is always comfort food and hot coffee. Clients are always greeted as they walk in, and they are given an opportunity to relax in the clinic area before we meet. Upon meeting me, clients are given a notebook to carry with them to all future meetings. This is where they write down tasks I give them and notes they are encouraged to take during our meetings. Clients are instructed to keep the notebook handy and to write down questions and concerns as they arise, so they will not forget to bring them up at our next meeting. Each new client is given a complementary Senior Resource Guide before they leave.

I make sure each client understands, from the beginning, they do not have to retain everything we discuss. Instead, I provide them with a follow up letter within a few days reviewing the meeting. If they still have questions, they are invited to call me. This makes the client relax a bit more, and they don't feel upset when they leave that they didn't understand everything.

A holistic approach forms naturally when you couple a desire to help people, with a commitment to stay true to yourself and enjoy what you do every day. Elder law encompasses so many different legal and non-legal issues that it would be impossible to practice successfully in the area without compassion and commitment.

The following situation is typical of what my clients are experiencing:

Mary and Tony have a fifty year-old daughter, Michelle, with advanced multiple sclerosis. There are no other children. Mary and Tony live in Rhode Island.

Michelle was living independently in Connecticut in her condominium until six months ago when her illness took hold of her. She went into the hospital and then into a nursing home for rehabilitation. It was unlikely she would return home. Michelle was severely depressed.

The legal issues range from financing Michelle's long-term care, to executing a durable power of attorney, and to procuring Social Security Disability Income. But what happens after that? What happens after we executed new estate planning documents and gain eligibility for government benefits? That is where the non-legal issues arise, and the holistic perspective is most beneficial to the client.

Mary and Tony are in their late eighties and worry about who will care for Michelle when they both are no longer here. It keeps them up at night. Remember, what the client wants most of all is peace of mind. It is important to respond to clients' needs by exploring solutions offering them more than advice, solutions tailored to unique client situations.

For Mary and Tony, that meant bringing Michelle back to Rhode Island and coordinating a care plan for her that will work on a long-term basis for the entire family, psychologically, financially and medically. It also meant providing support to Mary and Tony by connecting them with other individuals dealing with similar issues. It doesn't end there. We constantly strive to look ahead at new resources available to Michelle, which may serve her better than her current situation. Also, Mary and Tony are Michelle's main support system. As caregivers, they must learn how to care for themselves first.

To connect with caregiver clients, I became trained as a facilitator, and I offer weekly support group meetings. These include monthly guest speakers ranging from the Alzheimer's Association of Rhode Island, to administrators for assisted-living residences. The group grows each week. The members range from the wife caring for her sixty-two year old husband with early-onset, and rapidly-progressing Alzheimer's, to the daughter of a woman with dementia who was recently placed in a nursing home.

Every lawyer can implement these holistic habits and culture into their practice, whether it's a bankruptcy or a divorce case. This approach is not limited to elder law attorneys. For example, a family law practice is also a great place to have support group meetings and offer social services. This serves the non-legal needs to non-custodial parents, those in the middle of a bitter divorce, and grandparents who are missing their grandchildren.

It is easy if you remember that once a client's legal issues are resolved, the client will continue to need support and involvement with you. That is where continual communication, advocacy, communication, become the most important.

Each client relationship is just that, a relationship. Whatever the area of law, where there is an issue, there is a human need and an opportunity to be holistic. ❖

## Lawyers on the Move

**Dawn M. Cook, Esq.** has joined the firm of **Holt, Graziano and Heberg,**
1215 Reservoir Avenue, Cranston, Rhode Island 02920.
401-228-7790 dmc@hghlaw.net www.hghlaw.net

**Richard K. Corley, Esq.** has moved the law firm of **Corley & Associates** to
4060 Post Road, Warwick, Rhode Island 02886.
401-272-1700 rkcorley@corleyassociates.com

**Christine J. Engustian, Esq.** of the **Law Office of Christine J. Engustian** is now also General Counsel for the Rhode Island Builders Association.
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**Kristen L. Forbes, Esq.** is now an associate at the law firm of **DiOrio Law,**
144 Westminster Street, Suite 302, Providence, Rhode Island 02903.
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**Scott E. Orchard, Esq.** is now a Partner at the law firm of **Duffy & Sweeney,**
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**Curtis P. Patalano, Esq.** has relocated his law office and accounting practice to
137 School Street, Franklin, Massachusetts 02038-0254.
508-528-0003 cpatalano@patalano.com www.patalano.com

*For a free listing, please send information to: Frederick D. Massie, Rhode Island Bar Journal Managing Editor, via email at: fmassie@ribar.com, or by postal mail to his attention at: Lawyers on the Move, Rhode Island Bar Journal, 115 Cedar Street, Providence, RI 02903.*

# Chicago Style

## American Bar Association Delegate Report: ABA Annual Meeting

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

What do the London Olympics, Lollapalooza, Twitter, The Red Hot Chili Peppers (not the condiment), Morris Dees of the Southern Poverty Law Center, and Senator Lindsay Graham (R-SC) have in common? They were all somehow involved in the ABA Annual Meeting in Chicago on August 2nd through the 7th 2012. Lollapalooza (half Woodstock, half commercial rock concert), with its estimated 200,000 concertgoers, was packed into and, sometimes around, the same area as the ABA House of Delegates. A massive Midwest lightning storm kicked up in Grant Park at the concert venue, and the concertgoers were forced inside the ABA conference hotel for protection from the elements. It made a sometimes interesting mix of young people bent on a good time and lawyers of all kinds. I thought, when I saw the size of the crowd, what the ABA could do to attract 200,000 new lawyers with new innovative programs and services.

The Opening Assembly commenced with a Presentation of the Colors ceremony, and the Chicago Fire Department Color Guard led the flag, as we pledged allegiance to this great country we American lawyers are privileged to call our home. We bowed our heads in silence for the, then recent, victims of the Colorado movie theatre shooting, the Sikh Temple murders in nearby Wisconsin, and the senseless murder of the Israeli athletes at the Munich Olympics 40 years ago. Also, the Chief Legal Officer of each branch of the military service was presented with an Award by President William T. Robinson. In his opening remarks, South Carolina Senator Lindsey Graham, a lawyer and military reserve duty officer, lamented the fact Congress is not all that user-friendly to the judiciary and the rule of law. He urged us to be vigilant and ensure the current deadlock in Congress does not impact our activities as lawyers. The Assembly reception was at the amazing Chicago Art Institute and featured a Battle of the Lawyer Bands as an added attraction.

At the meeting, ABA President-Elect Laurel Bellows noted her priorities to take a stand against human trafficking and sex slavery in this country, to protect the practice of law from cyber security-related pitfalls, and to promote the integration of young lawyers in the practice of law. I was privileged to be appointed, by the new Chair of the House, Robert Carlson of Montana, to serve on the Select Committee of the House which reports on the meetings, the usefulness of committees, new lawyer programs and generally ensure the smooth progress of the meetings. Prior to this, I had the honor to serve on the House Special Committee on Delegate Involvement.

The 2012 ABA Medal was presented to Morris Dees, the co-founder of the Southern Poverty Law Center. Dees received the ABA's highest honor for his efforts to ensure access to justice for society's most vulnerable members. Not an eye was dry in the House as he told the story of his client who was asked for forgiveness by a Klansman who Dees had successfully civilly sued for the murder of her son, and the mother told the Klansman she had already forgiven him. His client's words of forgiveness showed love, understanding and mercy, reflecting a higher justice than the seven million dollar verdict returned by the jury.

We were addressed by John Levi, the son of a former Attorney General in the Carter Administration, who now heads the Legal Services Corporation. As the leader of the single largest provider of legal services to the poor and disadvantaged in our society, he lamented cuts in funds to social and legal service programs and noted an increasing need for these services. He urged us to continue to support these programs with vigor.

House Resolutions dealt with a variety of substantive areas, but the single largest part of the debate focused in on Ethics 20/20, the ABA's decennial review of the Model Rules of Professional Responsibility. The debate was important because it focused the group on the new responsibilities lawyers have in the technological age, and the importance of understanding cloud-computing, cybersecurity, retrieving and storing of confidential communications whether in an office file cabinet or in a cloud. Also addressed in Ethics 20/20 were the concerns of some lawyers, including me, about the

direct or indirect influence non-lawyers may have on the lawyers who practice within their firms, whether multijurisdictional or not, and the issues of fee-sharing with non-lawyers and ownership and control of legal enterprises by non-lawyers. Outsourcing legal work remains controversial and will be further addressed by the Ethics 20/20 Commission. Other substantive resolutions addressed: gun violence and the role lawyers play in reducing senseless gun murders; the use of Guidelines for Retaining Experts in client matters, immigration; intellectual property and international law; and Americans' under representation due to the economic constraints of practicing law in rural areas.

At each meeting, in addition to my committee work, I actively participate in the GP/Solo Section, the Family Law Section, the Commission on Women, the Minority Caucus, and in disability law meetings among others. I am honored and humbled to serve as your ABA Delegate. I am also honored to serve with newly-elected State Delegate Dick McAdams, and have been privileged to serve over the last several years with Joe Roszkowski, our outgoing State Delegate. Joe has served the Bar with distinction over the last several years. I owe a debt of gratitude to my fellow Bar members who still, after 33 years, make me proud to be a member of a rewarding profession in a great state, and who make the practice a mostly enjoyable but always interesting way to make a living. If I can help any member of the Bar with any questions or concerns, I am always happy to assist. By the way, if you want to know what Twitter has to do with the ABA meeting, the proceedings were reported by Twitter for the first time! ❖

## Attorney-Client Relationship

*Continued from page 13*

taken in the course of administering the trust… are subject to the general principle entitled the beneficiary to information that is reasonably necessary to the prevention or redress of a breach of trust or otherwise to the enforcement of the beneficiary's rights under the trust."[23]

### Conclusion

In the context of trust law, it is important for all parties to recognize who represents whom, and, in turn, who does not represent whom. Often, trust beneficiaries believe the trustee's attorney represents the trust itself and, as a result, conclude the trustee's attorney is also their attorney. This can be even more problematic if a conflict is brewing between a beneficiary and the trustee. To avoid this confusion, and potential liability, a trustee's attorney should make clear from the onset that he or she represents the trustee alone.[24] While a small minority of states, including Rhode Island, have found that a trustee's attorney has a secondary duty to the trust beneficiaries, the trustee's lawyer should act to diminish any inkling of such a relationship.

*ENDNOTES*

1 ***See, e.g., Peleg v. Spitz**, 2007 WL 4200611 (Ohio App. 8 Dist.).*

2 *ACTEC Commentaries on the Model Rules of Professional Conduct (ACTEC Foundation 3d ed. 1989) p. 93.*

3 ***Id.***

4 *Charles E. Rounds, Jr. and Charles E. Rounds, III, LORING AND ROUNDS: A TRUSTEE'S HANDBOOK § 8.8 (Aspen Publishers 2012) (1898).*

5 *Rhode Island Rules of Professional Responsibility, Rule 1.2, Commentary 11 "Scope of representation and allocation of authority between client and lawyer."*

6 *Rhode Island Rules of Professional Responsibility, Rule 1.7, Commentary 26 "Conflict of interest: Current clients."*

7 ***Audette v. Poulin**, et al., Newport Sup. Ct. C.A. No. 10-7589 (March 5, 2012) (one known, but unpublished Rule 12(b)(6) decision in which the Superior Court held a trustee's attorney, hired for litigation with a beneficiary, could not be found liable to the beneficiary).*

8 ***See, First Nat'l Bank of Florida v. Whitener**, 715 So. 2d 979, 982 (Fla. 1998); Restatement (Third) of Trusts § 82; **See also, Murphy v. Gorman**, 271 F.R.D. 296, 317 (D.N.M. 2010); **Jacob v. Barton**, 877 So. 2d 935,037 (Fla. App. 2004).*

9 ***First Nat'l Bank of Florida** at 982.*

10 ***Id.***

11 *Rhode Island Rules of Professional Responsibility, Rule 1.7(a), "Conflict of interest: Current clients."*

12 ***See, Spinner v. Nutt**, 631 N.E.2d 542 (1994); See also, **Wells Fargo Bank v. Superior Court**, 990 P.2d. 591, 598 (Cal. 2000); **Roberts v. Fearey**, 986 P.2d 690, 696 (Or. App. 1999); **Huie v. DeShazo**, 922 S.W.2d 920, 925 (Tex. 1996).*

13 ***Spinner** at 544.*

14 ***Id.** at 544-545.*

15 ***Id.** at 547.*

16 ***American Kennel Club Museum of the Dog et al. v. Edwards & Angell, LLP** et. al., Prov. Sup. Ct. C.A. No. 00-2683, 9 (July 26, 2001).*

17 ***Id.** at 1-3.*

18 ***Id.** at 4.*

19 ***Id.** at 7-9, quoting **Prince v. Whitehouse**, Prov. Sup. Ct. C.A. No. 99-5806 (April 22, 2002).*

20 ***Id.** at 1-4.*

21 ***See Wells Fargo Bank v. Superior Court**, 990 P.2d 591, 598 (Cal. 2000); **Johnson v. Superior Court**, 45 Cal. Rptr. 2d 312, 318 (Cal. App. 1995); **Spinner** at 553.*

22 *ACTEC Commentaries on the Model Rules of Professional Conduct p. 57.*

23 *Restatement (Third) of Trusts § 82.*

24 *Rhode Island Rules of Professional Responsibility, Rule 1.7, Commentary 26 "Conflict of interest: Current clients."* ❖



## *Killer Show*

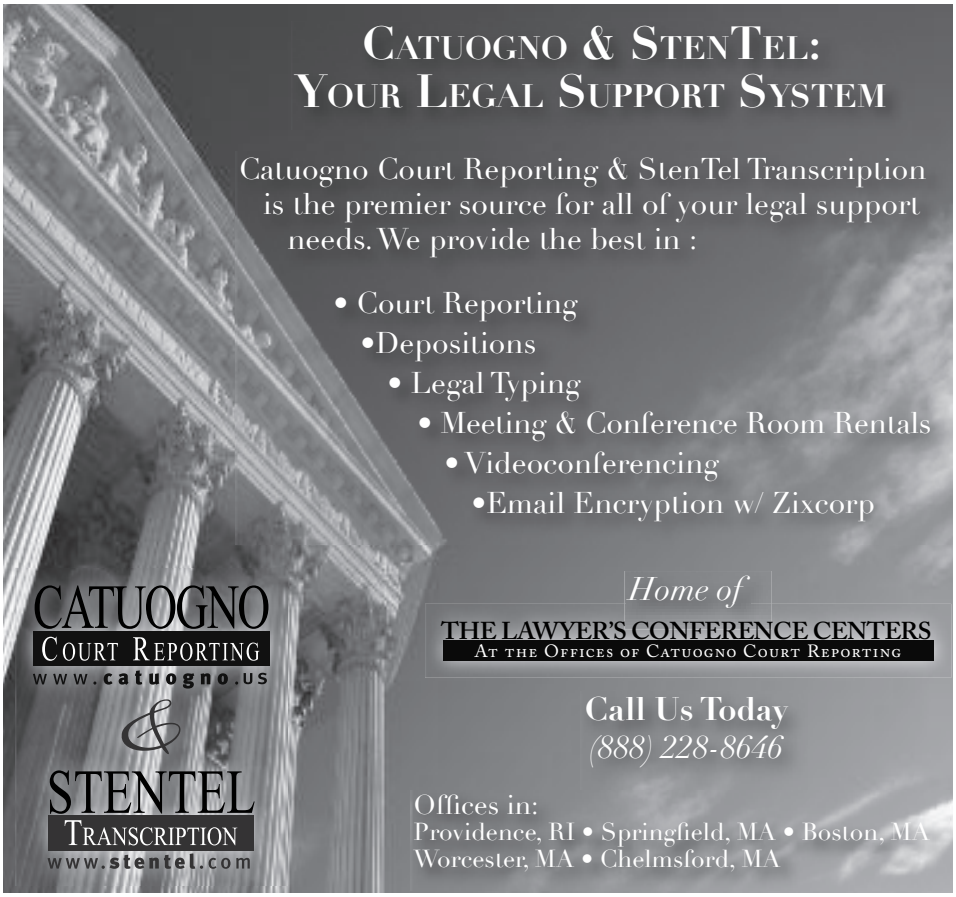
*Continued from page 19*

of the fire, or Jay Kingston, an investigator from the state Medical Examiner's Office who single-handedly undertook the gruesome task of identifying and cataloguing the human remains at the site.

### Conclusion

*Killer Show's* book jacket reminds us that the performance at The Station nightclub the evening of February 20, 2003, while only minutes long, was the "deadliest rock concert in U.S. history." Yet, the author's skillful recitation of the pertinent facts underscores that in contrast to the epic scope of the tragedy, it was caused, not by oversized malevolence, but by the petty venality and negligence of small town (and home-grown) businessmen and public officials. By sifting through the voluminous public records and telling the story, Barylick has provided some badly-needed clarity to The Station fire victims and their families. Perhaps as significantly, he has reminded us of the devastating consequences which can result from acts which, taken individually, one might shrug off as relatively inconsequential, especially in small communities like West Warwick (and, for that matter, small states like Rhode Island), where "going along to get along" not only is enabled, but all too often is a prerequisite to public service.






*ENDNOTES*

1 **Cottone was an associate at Wistow & Barylick, Inc. at the time of The Station fire and along with his other responsibilities, performed limited, preliminary legal work on the case described in* ***Killer Show****. However, he had no personal financial interest in the case and did not work on the matter following his departure from the firm in May of 2004. John P. Barylick,* ***Killer Show*** *(University Press of New England 2012) at 12, quoting WHJY radio promotions executive Steven Scarpetti.*

2 *Although the Committee was appointed by Superior Court Chief Justice Alice Gibney, the case ended up in federal court (****see Gray et al. v. Derderian et al.****, C.A. No. 04-312-L (D.R.I. 2004)) thanks to the Multiparty, Multiforum Trial Jurisdiction Act of 2002, which confers federal jurisdiction in any case where "at least 75 persons have died" (regardless of diversity).* ***See*** *KILLER SHOW at 186. According to Barylick, the Act was passed by "a Republican-controlled" Congress which "dearly wanted to keep civil litigation arising from mass catastrophes out of state courts, which business-interest lobbyists saw as too plaintiff-friendly."* ***Id.***

3 *Derderian had worked as a reporter for WHDH, a Boston TV station, where he was known as "'talent' who could arrive on-site, glance at his producer-written story line, and do stand-up with minimum preparation."* ***Id.*** *at 20. As Barylick notes, one of the stories Derderian did for WHDH was about smoke detectors and was aired from the Massachusetts Firefighting Academy where, donned in "full firefighter's gear with breathing apparatus," Derderian closed with a "punchy admonition" about smoke detectors: "'They're cheap. Buy them. Install them. They work.'"* ***Id.*** *at 13-14. If only Derderian had followed his own advice and installed automated sprinklers at The Station, which would have cost him an estimated $39,000. Under the state building code in effect since 2003, sprinklers were required in all places of public assembly occupied by more than three hundred people. Unfortunately, the requirement did not apply to structures like The Station that had been constructed prior to 2003 unless they had undergone "a change in use or occupancy."* ***Id.*** *at 67. The General Assembly has since modified (but not completely removed) the grandfathering provision.*

4 *In 1989, Russell's Grammy Award-nominated single, "Once Bitten, Twice Shy," reached number five on the singles chart and the accompanying video was then a "staple" on MTV.* ***Id.*** *at 25.*

5 ***Id.*** *at 51.*

6 *The title was taken from a statement made by band leader Russell on the day of the performance: "It's gonna be a killer show."*

7 *The final Third Amended Master Complaint was 224 pages long and set forth 133 legal bases for claims by 467 plaintiffs against 87 separate defendants.* ***Id.*** *at 189. Although the figure does not appear in the book, the plaintiffs' attorneys received the standard one-third fee after expenses, for a collective grand total of $58,731,236 in fees.*

8 *According to Barylick, "over two billion pounds of the featherweight stuff enters the U.S. market every year. It is all around us, comforting our sleep*

*and softening the blows of everyday life. And if it catches fire, it burns like holy hell." **Id.** at 129. Major contributors to the settlement included (with related entities):*

*(a) American Foam Corp. ($6.3 million), General Foam Corp. ($11.25 million), Leggett & Platt Inc. (the successor to Gordon Manufacturing) ($18.2 million), Polar Industries, Inc. and Home Depot USA Inc. ($5 million), as well as Sealed Air Corp. ($25 million);*

*(b) High Tech Special Effects, Inc., the manufacturer of the pyrotechnics ($6 million);*

*(c) LIN Television Corp., i.e., WPRI TV (Channel 12) and its videographer, who arguably blocked the egress of patrons fleeing from the fire ($30 million);*

*(d) Clear Channel Broadcasting and WHJY Radio ($22 million), as well as Anheuser-Busch Inc. and its distributor, McLaughlin & Moran, Inc. ($5 million each), which all promoted the event in various ways and arguably should have known of the dangers posed;*

*(e) the Town of West Warwick and the State of Rhode Island, whose agents arguably did not inspect the premises in good faith ($10 million each); and*

*(f) Triton Realty Limited Partnership, the owners of the real property ($5 million).*

9 ***Id.** at 129-30.*

10 ***Id.** at 132, quoting **In the Matter of the Society of the Plastics Industry, Inc. et al.**, FTC Docket No. C-2596, 84 FTC 1253, 1974 FTC LEXIS 35, November 4, 1974. Sadly, Barylick reports that a "current Google search of 'soundproofing foam' yields several websites that still brag of their plastic foam's 'testing Class A-1, non-flammable, under ASTM E84' under the notorious Steiner tunnel test, which was the subject of the 1974 FTC Consent agreement…" **Id.** at 238.*

11 ***Id.** at 130 (discussing, **inter alia**, a 1969 fire in Clark County Missouri which claimed the lives of two children, age 8 and 4, and the appellate court's reference to the "unconscionable irresponsibility" of the defendant-manufacturer, who marketed the foam as "non-burning" and "self-extinguishing" based on the Steiner test).*

12 ***Id.** at 206.*

13 ***Id.** at 214.*

14 ***Id.***

15 ***Id.** at 201. In addition, Barylick describes his efforts to reform Rhode Island's outmoded version of the Uniform Contribution Among Joint Tortfeasors Act. See R.I. GEN. LAWS § 10-6-1, **et seq.** As he explains, most states have revised their Uniform Act (which was drafted in 1939) to ensure that a judgment obtained against a non-settling defendant is reduced, dollar for dollar, by any amounts paid by settling defendants prior to judgment. In Rhode Island, on the other hand, the original 1939 version of the Uniform Act remained in effect, and thus judgment amounts were reduced by the **greater** of either: (a) what the settling defendants have paid, or (ii) the settling defendants' proportion of fault as determined at trial. Needless to say, this outmoded provision complicates any plaintiff's effort to settle with multiple defendants, as anyone who has attempted to actually apply the above-stated rule can attest. After intense lobbying by Barylick and others, the General Assembly finally agreed to amend the Act, but only in cases in which "there are 25 or more deaths from a single occurrence." **See Killer Show** at 199.*

16 *He does list the Committee in his Acknowledgements section. In addition to Barylick, the Committee included attorneys (in alphabetical order): Stephen Breggia, Patrick Jones, Eva Mancuso, Mark Mandell, Steven Minicucci, Charles Redihan, Michael St. Pierre, Peter Schneider and Max Wistow. **See id.** at 244.*

17 *For example, Barylick goes out of his way to expose the exploitative nature of the so-called "litigation financing" industry, which preys upon cash-strapped personal injury plaintiffs awaiting settlements. As he notes, despite default rates lower than 5 percent, the industry, which is unregulated in almost all states, routinely changes annual interest rates "between 48 and 120 percent, depending upon whether minimum payment terms are enforced." **Id.** at 226-27.*

18 *See R.I. GEN. LAWS § 23-28.2-17 which provides in pertinent part that "any fire marshal, acting in good faith and without malice, shall be free from liability for acts performed under any of its provisions or by reason of any act or omission in the performance of his or her official duties in connection therewith."*

19 ***Killer Show** at 240.*

20 ***Id.** at 153, 240 (emphasis in original).*

21 ***Id.** at 171.*

22 ***Id.***

23 ***Id.***

24 ***Id.** at 172.*

25 ***Id.***

26 ***Id.** at 165.*

27 ***Id.** at 162, 166, 249.*

28 ***Id.** at 169-70.*

29 ***Id.** at 249.*

30 ***Id.** at 151.*

31 ***Id.** at 152.*

32 ***Id.** at 152-53.*

33 ***Id.** at 153.* ❖

## Medical Affidavit Update

*Continued from page 29*

15 ***See, e.g., In re Adoption/Guardianship*** *No.CCJ14746, 759 A.2d 755, 762 (Md. 2000). An* ***amicus*** *brief available online at http://www.abecsw.org/images/news/MunsonBrief.pdf* ***See, also, People v. R.R.*** *12 Misc. 3d 161 (Sup. Ct., N.Y. County, 2005) for a thoughtful analysis of the reasons to allow a licensed clinical social worker to testify to what might otherwise seem to be medical opinions.*

16 ***Jaffee v. Redmond****, 518 U.S. 1, 16 (1996) [citations omitted].*

17 ***See, e.g., Mangasarian v. Gould****, 537 A.2d 403 (R.I. 1988).*

18 *The attentive reader may already have intuited that the author was counsel to Scotti in this matter.*

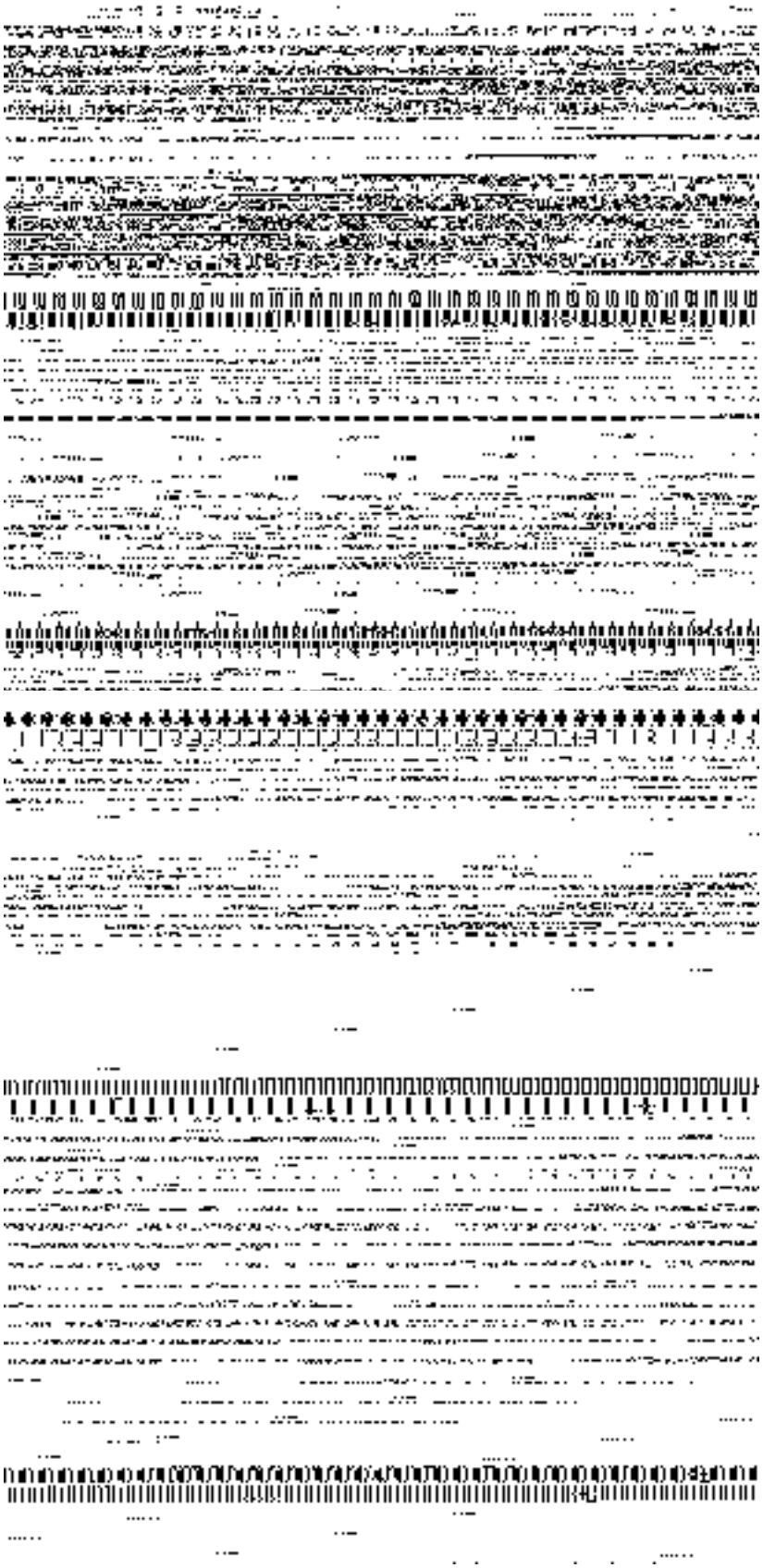
19 ***See, e.g., Ocean State Job Lot v. Roger Idarraga****, WCC 2009-05442, Olsson, J., March 2012, available on-line at http://www.courts.ri.gov/Courts/workerscompensationcourt/AppellateDivision/Decisions/09-05442(March2012).pdf.*

20 *No. 95-505 M.P. and No. 95-533 M.P.*

21 *612 A.2d 669 (R.I. 1992).*

22 *The first in this line was* ***Crawford v. Washington****, 541 U. S. 36 (2004), which forbade the admission in a criminal case of out of court testimonial statements despite a judicial determination of their reliability (****that word again!****) because that violated the right of the accused to confront the witnesses against him. The next stop was* ***Melendez-Diaz v. Massachusetts****, 557 U. S. ___ (2009), which held that a lab report identifying a given substance as cocaine was not admissible without the in-court testimony of the lab personnel who conducted the testing. The high water mark thus far was* ***Bullcoming v. New Mexico****, 131 S.Ct. 2705 (2011), which kept out lab reports where the state did not produce the specific lab tech who did the testing, even though they proffered another tech from that lab. Finally, on June 18, 2012, the Court handed down* ***Williams v. Illinois****, 567 U.S.____ (2012), which allowed the testimony of a lab tech regarding DNA samples, even though he was not competent to testify regarding the underlying science of DNA testing. On June 22, 2012, the Rhode Island Supreme Court took up the issue, apparently for the first time, in* ***State v. Lopez****, No. 2009-280-C.A., (Suttell, C.J.). In* ***Lopez****, our Supreme Court applied the recent confrontation clause rulings to allow a supervisor from Cellmark (the same DNA testing firm involved in* ***Williams****) to testify to his opinion even though he did not personally perform each step of the DNA testing, and even though he relied on a form that was generated mechanically in the testing process. They ruled that even though the data in the table were testimonial in character, i.e., introduced to prove the truth of their contents, the table could be admitted since the testifying expert created the document and could be cross examined. We may have gone beyond* ***Williams****, in that that case held that the Cellmark report was not testimonial but was only offered as a basis for the opinion of the testifying expert, who did not perform the described tests. Suffice it to say that medical affidavits are now clearly testimonial; combined with the newly inserted language, should provide ample basis for a confrontation clause objection.*

23 *709 A.2d 1059, 1066 (R.I. 1998) [citations omitted].* ❖



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