Rhode Island Bar Journal

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Front Cover Photograph by Brian McDonald

Block Island Wind Farm, New Shoreham, RI The Block Island Wind Farm, a project of Deepwater Wind, is located about 3.3 nautical miles southeast of Block Island, and is the first offshore wind farm in the United States. It features five GE Haliade 150-6MW offshore wind turbines, capable of producing enough energy to power 17,000 homes.

Correction: In *Rhode Island Bar Journal* Volume 67 Number 1 July/August 2018, in the book review for *Nino and Me: My Unusual Friendship with Justice Antonin Scalia*, seventh paragraph, second sentence, the word "anecdotes" should have been used instead of "antidotes." The editors apologize to the author for missing the error during editorial revision.

RHODE ISLAND Bar Association 1898

Editor In Chief, Mark B. Morse, Esq.

Editor, Kathleen M. Bridge

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

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Watch, Listen and Learn

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

It started with clouds. I was 10 years old, on summer vacation, laying on warm, thick blades of fescue, eyes upward and watching white puffy clouds become animals and rocket ships and Disney characters until they morphed into unrecognizable shapes and then disappeared. I would be content and lost in time until I would hear a maternal voice say, "Carolyn, stop day-dreaming and start setting the table for supper," or a different command to take on some other chore that I knew in my heart of hearts was best suited for completion by my older brother or sister. With age came a change of perspective and cloud-watching became people-watching, something that is best done while sitting on a bench in Newport, waiting to board a plane at Green Airport, or attending WaterFire. When the spirit moves, I study peoples' outfits, hairstyles, body hardware, body art, and watch handholders and other lovers. Catching bits and pieces of conversations spoken by the passers-by, I complete their dialogue by making up little stories about their lives and personalities. Unbeknown to them, they are either living lives of grandeur or desperation.

Rebuttal was part of their preparation and not an incoherent after-thought. They had no use for bluster. They had no need to draw attention to themselves. Rather, the audience, of which I was a part, was drawn to them.

When I entered a courtroom for the first time with a case file and yellow pad in hand, I knew I was on fertile ground for people-watching. Something, however, was amiss. Very few people were smiling. Some were bordering on tears. Snippets of conversations were laced with expletives. It would have been cruel and inhumane for me to impose my imagination on them. They were already in the midst of their own desperation and I saw no place for grandeur. Turning away, I focused on my colleagues. I studied the gait of attorneys as they walked into the courtroom. Did they enter with confidence, preoccupation or dread? Were they dressed to address the court on their third-party complaint or did they appear to be coming from an all-night party? Were their case files in disarray? If so, were their legal arguments far behind?

As my time in the courtroom continued and I became aware of who the "players" (in the best sense of the word) were, I noticed a recurring theme. The attorneys who had the reputation for being the "best," and who commanded the respect of their colleagues and judges, entered the courtroom with a quiet determination.[1] When they opened their briefcases and case files, there was a place for everything and everything was in its place. Whether they were neat-freaks or obsessive is of no moment. It was all about being disciplined, organized and leaving nothing to chance. They were not going to be distracted by frantically searching through papers and other objects loosely scattered and strewn about. These attorneys were focused on the task at hand and their skills were at the ready. Their arguments were cogently presented to the Court. Rebuttal was part of their preparation and not an incoherent after-thought. They had no use for bluster. They had no need to draw attention to themselves. Rather, the audience, of which I was a part, was drawn to them.

Continuing to observe these attorneys, I realized that a great deal of their success was embedded in their sense of civility and collegiality. They taught me that demeaning opposing counsel, whether in private, in the courtroom or its hallways, is not only a sure-fire way to prevent a negotiated settlement and create a sure-path to litigation, but it is also an indicator of an attorney's uncertainty in both the strength of his or her client's case and in his or her legal skills. *Ad hominem* attacks on opposing counsel in audible tones while in the hallways of the courthouse are perhaps the most egregious form of disrespect one can cast upon a colleague. These attacks create a blemish on our profession. They serve no purpose other than to garner stares and negative shakes of heads from all persons who are watching and listening. The courthouse corridors are full of people-watchers.

We continually strive to be the best lawyers we can be. The self-imposed pressure to succeed on behalf of our clients is profound. It is impossible for us not to get caught up in our own zealousness and allow our passions and emotions to take control. I am certain it happened to the best lawyers I had the good fortune to observe. I am also certain that some people reading this message have contrary stories to tell about their observations of lawyers who also have been held in high regard. We are all human.

So, I leave you with the following message. Do

not think for one moment that treating your colleagues with respect diminishes your abilities to be a zealous advocate. Civility and collegiality are the *sine qua non* of professionalism. I know this to be a fact. I learned this from the best.

ENDNOTES

1 *My message is not in the abstract. Over the years, I have been fortunate to observe a bevy of outstanding litigators, including Tom Angelone; Gerry DeMaria; Alan Dworkin; the late Ed Gnys; Judge Howard Lipsey (Ret.); and the late John Walsh. These lawyers come to mind because not only did I have the benefit of observing them from a distance, I also had the benefit of watching them up close and personal because they were my opposing counsel on a handful of cases. Observing how these attorneys represented their clients and conducted themselves throughout the lawyering process taught me more than any course in trial practice could have.* ◊

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

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Rhode Island Bar Journal

Editorial Statement

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

Article Selection Criteria

> The *Rhode Island Bar Journal* gives primary preference to original articles, written expressly for first publication in the *Bar Journal*, by members of the Rhode Island Bar Association. The *Bar Journal* does not accept unsolicited articles from individuals who are not members of the Rhode Island Bar Association. Articles previously appearing in other publications are not accepted.

> All submitted articles are subject to the *Journal*'s editors' approval, and they reserve the right to edit or reject any articles and article titles submitted for publication.

> Selection for publication is based on the article's relevance to our readers, determined by content and timeliness. Articles appealing to the widest range of interests are particularly appreciated. However, commentaries dealing with more specific areas of law are given equally serious consideration.

> Preferred format includes: a clearly presented statement of purpose and/or thesis in the introduction; supporting evidence or arguments in the body; and a summary conclusion.

> Citations conform to the Uniform System of Citation

> Maximum article size is approximately 3,500 words. However, shorter articles are preferred.

> While authors may be asked to edit articles themselves, the editors reserve the right to edit pieces for legal size, presentation and grammar.

> Articles are accepted for review on a rolling basis. Meeting the criteria noted above does not guarantee publication. Articles are selected and published at the discretion of the editors.

> Submissions are preferred in a Microsoft Word format emailed as an attachment or on disc. Hard copy is acceptable, but not recommended.

> Authors are asked to include an identification of their current legal position and a photograph, (headshot) preferably in a jpg file of, at least, 350 d.p.i., with their article submission.

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

Married, But Not Certified: An Overview of the Rhode Island MBE/WBE Certification Process and Its Application to Married Women

Gary R. Pannone, Esq.
Managing Principal
Pannone, Lopes, Devereaux & O'Gara, LLC
Johnston

Samantha M. Vasques, Esq.
Associate
Pannone, Lopes, Devereaux & O'Gara, LLC
Johnston

But what precisely is the line between an MBE that is improperly dependent on a non-minority business, and one that has benefitted from sponsorship and training, and is now ready for an independent venture?

Rhode Island's Minority Business Enterprise program offers important opportunities to minority and women-owned business enterprises (MBEs[1]) to participate in state-funded public construction programs and projects, as well as in state purchases of goods and services.[2] Undoubtedly, the program's goal is a laudable one. And to achieve it, careful attention must be paid to whether an MBE is truly owned and controlled by a minority or woman, rather than merely in name only. A line of cases from the courts of this state highlights a countervailing policy concern: potential interference with the ability of new business owners to obtain MBE certification where they have received substantial support, mentorship, and experience from individuals who are not women or minorities. That is not to say that all such mentorship is problematic or affects a business's ability to obtain MBE certification. However, in at least one context, the difficulty of balancing these concerns—sham ownership versus support and sponsorship—is readily apparent: that of married women striking out on their own and seeking women's business enterprise (WBE) certification.

Before tackling that line of cases, it is helpful to understand the context of the MBE program. The program began with a 1983 executive order by then-Governor J. Joseph Garrahy,[3] followed by legislation enacted by the General Assembly in 1986 that built the program's statutory framework.[4] The law declared as its purpose "to carry out the state's policy of supporting the fullest possible participation of firms owned and controlled by minorities and women (MBEs) in state-funded and state-directed public construction programs and projects and in state purchases of goods and services."[5] In other words, the program would create opportunities for minority and women-owned businesses to become meaningfully involved in state procurements.

The MBE statute also provided for the establishment of rules and regulations to set "standards which shall determine whether a construction project is covered by this chapter, compliance formulas, procedures for implementation, and procedures for enforcement" consistent with parallel federal regulations for MBEs.[6] Those rules and regulations, known as the Rules, Regulations, Procedures and Criteria Governing Certification and Decertification of MBE Enterprises (Rules), outline the criteria for a business to become certified as an MBE.[7] The process for certification is fairly straightforward on its face: Once an application for MBE certification is submitted, it is reviewed and evaluated by a Department of Administration (DOA) staff member, who may conduct a site visit in reviewing the application.[8] Then, the DOA staff member will prepare a report on the application to the Assistant Administrator of the Minority Business Enterprise Compliance Office (MBECO) and the Associate Director of the Office of Diversity, Equity, and Opportunity (ODEO) of the DOA.[9] Together, the Assistant Administrator and Associate Director will decide whether to certify the applicant as an MBE. If their decision is that the applicant does not meet the criteria (or their decision is not unanimous), the applicant may seek review by way of a hearing before the Certification Review Committee (CRC).[10] At the hearing, the applicant may present evidence in support of its application, and afterward, the CRC notifies the applicant by certified mail of its decision, which includes findings of fact and conclusions of law and is administratively final.[11]

But what criteria are used throughout this process by the DOA staff members, the Assistant Administrator and Associate Director, and ultimately, the CRC? The answer lies in the statutory definition of an MBE, as set forth in the program's enabling legislation. An MBE is a "small business concern … owned and controlled by one or more minorities or women," meaning that the business is at least fifty-one (51%) owned by minorities or women, and that the management and daily business operations are controlled by one or more minorities or women.[12] In other words, ownership and control of a business by minorities or by women are two of the key requirements that must be fulfilled before a business can have any hope of becoming certified as an MBE. Substantial investment, discussed later, is the third requirement.

A better understanding of these criteria is necessary to assess their application in the context of married women starting businesses and later seek-

ing WBE certification. Beginning with "ownership," the meaning of this requirement is readily apparent from the statute, though the Rules provide a finer gloss, including the prohibition on any agreements that could result in less than fifty-one percent (51%) ownership of the business by minorities or women, and the demand that minority and/or women owners "substantially share in all the risks assumed" by the business.[13] Similarly, whether there is "control" is better understood by reference to the Rules. To demonstrate that they have control over the day-to-day management of the business, and the policy-making mechanisms of the business, minority and female owners applying for MBE certification must establish that they meet all six of the following criteria, specifically that they:

"a. Have the power to direct or cause the directions of the purchase of goods, equipment, business inventory and services needed in the day-to-day operation of the business;
b. Have the authority to hire and fire employees, including those to whom management authority is delegated;
c. Are an authorized signatory on all corporate accounts – checking, savings, and other financial accounts;
d. Have a thorough knowledge of the financial structure of the business and authority to determine all financial affairs;
e. Have the capability, knowledge and experience required to make decisions regarding the particular type of work engaged in by the MBE; and
f. Have displayed independence and initiative in seeking and negotiating contracts, accepting and rejecting bids and in conducting all major aspects of the business."[14]

At the same time, the following conditions create an irrefutable presumption that the minority or women owners do *not* have control of the business seeking MBE certification (the MBE applicant): where the owners of the business are current employees of a non-minority business which has a significant ownership interest in the MBE applicant; the directors/management of the MBE applicant are substantially the same as an affiliated non-minority firm; the MBE applicant is a wholly-owned subsidiary of a non-minority firm; or the MBE applicant has an extremely dependent relationship on a non-minority firm or individual.[15]

Last, the Rules layer on a third criterion: that women or minorities invest a substantial amount of money, capital, equipment, or property in the business.[16] Importantly, contributing personal or professional services is not enough, though the Rules note such contributions will "receive consideration" in the certification process, "in conjunction with other tangible forms of investment."[17] Likewise, where a significant portion of the MBE applicant's equity is financed by a loan or gift from a non-minority business with a significant interest in the MBE applicant, there is an irrefutable presumption that the minority or women owners have not made a substantial investment in the business.

Taken together, the requirements of ownership, control, and investment are the keys to obtaining MBE certification. From reviewing the extensive showing that minority and women business owners must make to meet those requirements, it is apparent that the MBE program is designed to avoid situations of sham ownership, where the MBE-certified company is controlled behind the scenes by a non-minority business. As noted in one

of the Rhode Island Superior Court decisions discussed below, "[t]he concern for an alleged MBE/WBE company's dependency on a non-minority business is that the non-minority business is essentially using the potential minority status of the dependent company to capitalize on the benefits of the MBE/WBE program.[18]

But what precisely is the line between an MBE that is improperly dependent on a non-minority business, and one that has benefitted from sponsorship and training, and is now ready for an independent venture? Although the Rhode Island Supreme Court has yet to directly address this issue, several Rhode Island Superior Court cases have successfully navigated this tricky balancing act in the context of married women running business ventures and seeking WBE certification.

The first case to be decided on the subject was **Marshe Constr. Co. v. Paolino**.[19] In that case, the WBE applicant was Marshe Construction Company, a concrete construction firm established in 1984 by a married woman named Martha Shean.[20] Before owning Marshe, Ms. Shean worked for nine years as a secretary for a company called Shean Associates.[21] That company, a general contractor, was owned and operated by Ms. Shean's husband, George Shean, but was later dissolved due to bankruptcy.[22]

In 1991, Ms. Shean sought WBE certification from the Office of Minority Business Assistance (OMBA)[23] for Marshe.[24] The OMBA conducted a certification review of the applicant company and recommended that certification be denied.[25] It highlighted the background and technical expertise of Ms. Shean's husband, including his "many years of experience in the construction field," and his responsibility for "critical areas of the firm's operations."[26] The CRC then held a hearing on Marshe's application, and Ms. Shean provided testimony.[27] However, the CRC ultimately denied certification, agreeing with OMBA's assessment that Ms. Shean lacked the "superior background and technical expertise to control the affairs of the firm" that her husband possessed.[28]

In reviewing the CRC's decision, the Superior Court agreed that there was sufficient evidence that Marshe was actually controlled by Ms. Shean's husband, not Ms. Shean.[29] The court focused on testimony and documentary evidence presented to the CRC, including that Shean Associates—now dissolved—had conducted business in the very same office as Marshe.[30] The court also observed that Ms. Shean's husband was employed by Marshe, though he did not draw a salary.[31] Moreover, the court noted that Ms. Shean had admitted her husband had "greater technical and construction expertise" and could not answer a technical question posed to her at the CRC hearing.[32]

Still, the court recognized that Ms. Shean was the sole record shareholder of the company, spent about half of her time actually supervising in the field, and had taken several courses in construction in an attempt to gain expertise.[33] Acknowledging that the evidence before the CRC was "mainly circumstantial," and that it was a "close case," the court concluded that weighing the facts and assessing the credibility of Ms. Shean was the CRC's task, not the court's, and that the CRC's determination would stand.[34]

Years later, in **P.C.M., Inc. v. Minority Bus. Enterprise Comm'n**,[35] the Superior Court reached a similar conclusion. That case involved a construction company, P.C.M., Inc., that applied for WBE certification through its president and trea-

surer, Regina C. Parry.[36] After a visit by a Contract Compliance Officer[37] of the CRC, it was recommended that P.C.M.'s application be denied, a decision that was upheld at a subsequent CRC hearing.[38] In turn, the Superior Court agreed with CRC's findings that Ms. Parry lacked the capability and technical knowledge necessary to control the operational aspects of P.C.M. without heavy reliance on her husband, and that she lacked "independence and initiative in seeking out and negotiating contracts."[39] Therefore, although the court acknowledged Ms. Parry managed financial decisions for the firm, negotiated bonds and insurance, hired and fired employees, and shared signatory authority for business accounts as well as marketing and sales responsibilities with her husband,[40] it found that "[e]very area of the business that should have been conducted by [Ms. Parry] to meet the control requirement was carried on by her husband."[41] The court also found noteworthy Ms. Parry's lack of experience in construction management and her previous work exclusively in the travel industry.[42] Again and again, the court highlighted Ms. Parry's dependence on her husband, and in the end it affirmed the CRC's denial of P.C.M.'s certification application.[43]

Last, the most recent decision of **Ace Concrete Cutting, LLC v. R.I. Dep't of Admin.**,[44] involved Ace Concrete Cutting, LLC, an asphalt and concrete cutting company owned by Debra Stowik.[45] Ms. Stowik formed Ace in 2006; years before, her husband, Stanley Stowik, had formed a different concrete cutting operation known as Advanced Concrete Cutting, LLC.[46] For years, Ms. Stowik worked for her husband's company, Advanced, and later, when she formed Ace, she requested a loan from her husband, which ultimately came from Advanced's accounts.[47] Ms. Stowik's initial employees at Ace were also former Advanced employees.[48] She worked out of a home office for both Ace and Advanced, dividing her day between the two companies, which shared an email address but had separate phone numbers.[49]

A few years after Ms. Stowik formed Ace, her husband gifted her ownership of Advanced, remaining on the payroll for the company but primarily focused on maintaining equipment.[50] Ms. Stowik later submitted a WBE application for both Ace and Advanced.[51] The initial investigation by an MBECO employee culminated in a recommendation that the matter be set down for a hearing before the CRC to discuss issues of "ownership, control, and dependency on a non-minority individual."[52] The CRC conducted the hearing and took testimony from Ms. Stowik, but remained concerned that Ms. Stowik's husband was still involved in the operation of Ace and the blurred lines between Ace and Advanced.[53] In the end, the CRC voted to deny applications for WBE certification for both companies, taking issue with tax returns that had listed Ms. Stowik's husband as the owner of Ace, the start-up funding from Advanced, Ms. Stowik's use of a home office in the house shared with her husband, and Ms. Stowik's lack of "sufficient construction-related experience to control a concrete cutting business independently."[54] The CRC declared that Ace in particular was, "at best, a family owned and operated business enterprise, rather than a WBE."[55] Ms. Stowik appealed, but only as to Ace.

The Superior Court carefully assessed the CRC's decisions and found no evidence in the record to support the CRC's finding that Ms. Stowik did "not appear to have any direct construction related and/or saw cutting experience."[56] To the contrary, the court noted that Ms. Stowik's testimony indicated she had

field experience in the concrete cutting business, testified about technical details of concrete cutting, used the vernacular of the saw cutting business, and possessed over ten years of experience as an office manager for Advanced.[57]

Yet this was only one of several findings that the CRC relied upon in support of its decision, and as such, the court went on to consider the other factors, particularly Ace's relationship with Advanced and Mr. Stowik's involvement with Ace.[58] As to the former, the court found that the CRC was well within its authority when it concluded Ace maintained an "ongoing relationship and dependency on Advance," based in part on the start-up loan from Advanced to Ace, certain ongoing "inter-company transactions," and the shared employees and office space between Advanced and Ace.[59] This dependency created an irrefutable presumption that Ms. Stowik lacked control of Ace.[60] Likewise, the court found support for the CRC's finding that where Ms. Stowik's husband still performed maintenance for the company, earned an inflated salary, managed the garage property that the company leased, and owned the home housing the company office, the CRC was within its authority to find that Ace was dependent on Mr. Stowik as well, another non-minority.[61]

Reflecting on the fact-intensive and detailed analyses of **Marshe, P.C.M.**, and **Ace**, there is no doubt that the courts of this state have done their best to fulfill the purpose of the MBE program while guarding against non-minority businesses attempting to usurp the benefits of the program. Yet despite the careful and thoughtful decisions in those cases, it is difficult not to come away with the impression that married women face challenges in building a business with the support of their spouses.

It was difficult, for example, for Ms. Stowik to disentangle the years of financial support from her husband through his former company, Advanced, and her use of a home office in their shared residence, from her ownership and control of Ace.[62] Nor could Ms. Parry's financial savvy and involvement in company management outweigh her reliance on her husband's technical expertise, nor could her assistance in soliciting contracts and accepting or rejecting bids cause the court to find she exhibited "independence and initiative" in preparing and negotiating contracts.[63] Even Ms. Shean, who the court acknowledged presented a "close call," given her time spent supervising in the field and her efforts at becoming more educated in the relevant industry, could not obtain the WBE certification for her company.[64]

Why does it matter that these women were not able to stake out their independent success as business owners and obtain WBE certification for their companies? After all, the courts' careful analyses and attention to detail suggest that had the facts been slightly different, perhaps the conclusions would have been as well—the court in Ace even overturned one of the CRC's findings regarding a woman's technical expertise in a given industry after parsing through the testimony and evidence presented at the hearing.[65]

In short, it matters because when Ms. Shean, Ms. Parry, and Ms. Stowik broke into the construction industries and concrete cutting industries, some of the best resources available to them included their associations with men in those industries—their spouses—and the support and experience those associations could provide. The practical realities of achieving success in

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What a Rhode Island Lawyer Should Know About Handling an OUI in Massachusetts

Michael A. DelSignore, Esq.
DelSignore Law Offices

You have an OUI case in Massachusetts; you have a Massachusetts license but practice mostly in Rhode Island. What do you need to know to handle the case successfully?

Breathalyzer test results are not currently being used in Massachusetts

As of the date of this writing, the breathalyzer test is not currently being used in Massachusetts. This is the result of a discovery violation that occurred during the consolidated litigation challenging the reliability of the breathalyzer test source code. The litigation involved a number of issues, including whether the source code of the breathalyzer test was accurate, whether the 2100 to 1 partition ratio was scientifically reliable, and whether the Alcotest was specific enough for alcohol.[1]

Ultimately, Judge Brennan ruled against the defense on all of the technical challenges to the accuracy of the breathalyzer test; however, he found that the Office of Alcohol Testing did not have a reliable way to annually certify the breathalyzer test machine prior to September 2014. This was an important ruling because the judge held that the Office of Alcohol Testing must have a procedure to certify the breathalyzer test machine. Prior to September 2014, the Office of Alcohol Testing in Massachusetts had no written procedure when conducting its annual certification. This resulted in breathalyzer test results being excluded from evidence prior to September 14, 2014.

Following that litigation, further discovery motions were filed which revealed that the Office of Alcohol Testing did not provide all the required documents during discovery in the breathalyzer test litigation. This was uncovered as a result of public records requests filed by Thomas Workman, an expert retained by the defense. As of the date of this writing, as a result of the litigation, the breathalyzer test has not come into evidence in Massachusetts. If your case is in Bristol County, you should write on the pretrial conference report that the Commonwealth will be proceeding under an impairment theory only to lock in that the breathalyzer test is not going to be admissible should the Commonwealth seek to introduce the results at a later date.

In Massachusetts, a motorist cannot obtain a hardship license while the case is pending. However, the client can get a hardship license by accepting a plea and enrolling in the 24D program.

Explain to your client the license implications

If your client took a breathalyzer test, request a quick trial as it is uncertain when the tests will be used again in court. Also, advise your client that their license is only suspended for 30 days in Massachusetts as a result of the breathalyzer test being over .08. After the 30 days, the client can get their full license back with the payment of a $500 reinstatement fee.

If your client refused a breathalyzer test, the license suspension is governed by the number of prior OUI offenses that the individual has in their lifetime. The suspension length will be as follows:

No prior conviction or under 21: three years
Two prior convictions: five years
Three prior convictions: lifetime[2]

The client can appeal this suspension to the Registry of Motor Vehicles in Boston but must appear within 15 days, including weekends and holidays. The hearing officer will typically deny the request for reinstatement; the client can then appeal to the district court where the OUI charge is pending within 30 days. There are two arguments that have been successful at these hearings. First, Massachusetts OUI law states that the officer before whom the refusal was made must prepare a report of refusal under the pains and penalties of perjury.[3] This report of refusal is typically given to the motorist at the initial hearing. The form is a preprinted form with no signature. Some judges have reinstated the license on the grounds that a form prepared under the pains and penalties of perjury must have a signature. Another argument that has been successful is that, since the breathalyzer test is currently not being used in court, the Registry of Motor Vehicles should not suspend a motorist for refusing a test that is not being offered in court as reliable. Unlike in Rhode Island, refusal appeals in Massachusetts are done based on the documents, and there is typically not live testimony on the issue of a breathalyzer test refusal.

Understanding what a CWOF is in Massachusetts

In Massachusetts, a client has two options: to fight the case to trial or accept a plea. It is rare for

the prosecutor to agree to reduce a charge to negligent operation in exchange for a dismissal of the OUI charge. It happens in very few counties. For an OUI drugs charge, prosecutors can agree to dismiss the OUI drugs in exchange for a plea on the negligent operation, though this is not a common occurrence. There is very little to negotiate on an OUI offense. Prosecutors can reduce an OUI 3rd offense so that the client avoids mandatory jail time; in Bristol County, this involves preparing a letter requesting a reduction to the First Assistant District Attorney who will make the decision on whether to reduce the charge.

On a first-time OUI, if the client elects to accept a plea of a continuance without a finding CWOF, the prosecutor will typically dismiss the remaining charges. Generally, a CWOF on an OUI first offense would involve the following: the client would have to complete a 24D alcohol education program, pay probation fees, and incur a 45-day license loss for a first-time offense.

A CWOF is technically not a conviction, though it does count as a first OUI offense if the client ever has a second offense in Massachusetts. With the reduction in the time period to seal a criminal record reduced from five years to three years,[4] the benefit of a CWOF is somewhat reduced.

In Massachusetts, most judges will not penalize a client for going to trial even if there is a guilty verdict after the trial. Typically, the sentence will be the same as if the client took the CWOF, with the exception that a guilty verdict is a conviction whereas a CWOF is technically not a conviction in Massachusetts.

Hardship license after an OUI conviction

In Massachusetts, a motorist cannot obtain a hardship license while the case is pending. However, the client can get a hardship license by accepting a plea and enrolling in the 24D program. If the client resolves a case with a breathalyzer test result, and the client elects to plea within 30 days, the 30 and 45-day suspension will run concurrently. This is the only time that any license suspension in Massachusetts will run concurrently. In other words, if the client accepts a plea prior to the 30 days expiring, the 45 days will start from the date of the plea. A client that resolves the case quickly saves time on the license suspension and is eligible for a hardship license. If the client refuses, once the case is resolved, the client is eligible for a hardship license on the balance of the six-month suspension plus the 45 days suspension as a result of the OUI conviction.

Prepare a motion to preserve evidence immediately

Many cases involving a Rhode Island driver may involve a town over the border. Some of these towns have booking videos, including Seekonk, Attleboro, North Attleboro and Fall River, to name some of the towns near the border. It is important to do a motion to preserve the booking video immediately, as often, the videos will be recorded over or disposed of quickly. One of our cases is currently on appeal to the Massachusetts Court of Appeals as a result of a judge dismissing the case after the video was destroyed following a motion to preserve evidence that was allowed by the court. In most cases, the video will show that your client appeared to have good balance and the ability to follow instructions, and also seemed to respond to the officer's requests. If you get a video, you can edit out the part where the client either takes or refuses the breathalyzer test. This will leave an approximately ten-minute video showing the following: your client walks into the station, takes things out of their pock-

ets, stands and sits a few times, follows instructions, and stands next to the officer during the fingerprint process for about six minutes. When you have a video of your client standing next to the officer, and he/she does not appear to have difficulty the balance, it is powerful evidence to argue to the jury that the behavior on the video is inconsistent with someone under the influence of alcohol.

An OUI trial in Massachusetts would be in front of a jury of six. Recently, Massachusetts changed its rules to allow greater participation of attorneys during the *voir dire* process. The Standing Order states that *voir dire* questions should be submitted to the Court five days prior to trial.[5] The process has worked with the judge allowing attorneys to ask additional questions at the sidebar. Questions that have been effective include asking the juror about whether they would go out and have two drinks and drive, what they would look for in assessing whether someone is under the influence of alcohol, and do they understand what it means to presume someone innocent of a crime. The more open-ended the questions the better, as it allows you to assess the juror's views on alcohol. In your written questions to the court, make sure you include this question: does the juror believe it is wrong to consume any amount of alcohol and drive? This question gets many positive responses; judges will typically not ask this question unless specifically requested.

Should the trial be heard before a judge or jury?

Many cases in Massachusetts can be tried before a judge. It is important to know the tendencies of the particular judge, but there are several judges in bordering counties whom I would typically recommend a bench trial within the right case. If the client elects a bench trial, the judge will require the client to fill out a jury waiver form. In some courts, like Fall River, the judge in the trial session may not be the judge hearing the case. It is important to know who is likely to hear the trial before committing to a bench trial. Often, the judge in the trial session will send the case to another courtroom for trial. On the day of the trial, ask the court officers or clerk who may hear any request for a bench trial.

Evidence at trial

Massachusetts law permits you to submit medical records to the court in the form of a Medical Affidavit pursuant to Massachusetts General Laws Chapter 233 Section 79G.[6] Under the rule, you are required to send the records to the district attorney by certified mail, return receipt requested, within 10 days prior to the trial. If your client claims to have a knee or leg injury that impacts balance, these records allow that issue to be put before the jury without requiring the client to testify. You can also present this type of evidence by having the client testify to a prior injury or have someone that knows the client testify to any physical limitation. The medical affidavit statute allows the defense to present this evidence by way of medical documents without calling a witness to the stand.

Clients with military service

If your client has military service, they may be eligible for a diversionary treatment under the Valor Act; the recently passed crime bill calls into question whether this diversion can still be imposed. The new crime bill has appeared to remove the option of a dismissal of an OUI for someone in the military.[7] This issue

is likely to be litigated so I would still attempt to pursue a dismissal under the Valor Act; however, your client would have to want to pursue an appeal if the request was denied.

Massachusetts jury instructions in operating under the influence of alcohol

During the trial, the jury will be read jury instructions that define what it means to be under the influence of alcohol. Part of that jury instruction tells the jury what they can consider. The instruction states[8]:

> "if the driver's alertness, judgment and ability to respond promptly have been lessened by alcohol. This would include someone who is drunk, but it would also include anyone who has consumed enough alcohol to reduce their mental clarity, self-control and reflexes."

The instruction goes on to state that the jury may consider:

> "All the believable evidence about the defendant's appearance, condition and behavior at the time."

At your trial, try to find examples of your client responding promptly, appearing alert. There are three places I typically find these examples. I ask the officer the following to draw out this response on cross-examination:

Question: You asked the defendant for his license and registration?
Answer: It was provided safely, immediately and without issue.
Question: When you got it immediately?
Answer: Yes.
Question: He responded promptly to your request?

I would also elicit this testimony when the client was asked to step from the car.

Question: You asked the defendant to get out of the car?
Answer: He got out of the car immediately.
Question: He responded promptly to your instruction?
Answer: Yes.
Question: He did not lean on the car or use it for balance getting out?

You can find other examples of responding promptly in how the client answers booking questions and other questions of the officer. Look for about three or four examples so as not to overdo this line of questioning with the jury. In closing argument, you can explain your purpose in asking these questions so the judge will instruct the jury, when assessing whether someone is under the influence of alcohol, to consider whether someone responds promptly.

Other jury instructions that can be elicited during cross-examination include having the officer admit that the client was alert. At the end of the cross-examination, when asking about the booking questions, many officers will acknowledge that your client provided all the basic background information, mother's maiden name, father's name, and occupation. Often, the officer will agree that your client was polite, cooperative and respectful, answered all questions immediately, and was alert and coherent. Depending on your officer, you may be able to get these admissions that mirror the model jury instructions.

The jury will also be told that they can consider the person's appearance, behavior and demeanor at the time of the incident. When your client is polite and cooperative, you can argue in

closing that there was nothing about the appearance, behavior or demeanor that reflected someone under the influence of alcohol.

Inadmissible evidence at trial

Prior to trial, the following evidence is typically inadmissible in Massachusetts. Your client's refusal to take a breathalyzer test[9] cannot come into evidence, and refusal to take field sobriety tests[10] and the HGN almost never comes in as the Commonwealth is required to have expert testimony under **Commonwealth v. Sands**.[11]

As part of your motion *in limine* prior to the trial, request that the Commonwealth ask the officer not to mention or make reference to the breathalyzer test, or even training on the breathalyzer test, during the trial. Additionally, most judges will only allow the officer to testify to their observations on the field sobriety tests, rather than any opinion on pass or failure. You may try to preclude the officer from referring to them as tests, but as assessment or exercises; however, most judges will deny that request.

Keep an eye out for the following testimony during the trial. The Commonwealth must prove operation, public way, and under the influence during the trial. Further, there must be an in-court identification of your client. Be alert to an objection if the officer tries to testify to an opinion that your client was under the influence of alcohol. That issue is for the jury. If an objection is made, the question should be rephrased to ask if the officer formed an opinion as to your client's sobriety, as often the answer will be that he was drunk or intoxicated. Depending on the case, you may prefer the improper answer as the officer may rephrase the answer to be more powerful than under the influence of alcohol.

Challenging field sobriety tests at trial

When preparing for the trial, you will want to get a copy of the officer's training manual on field sobriety tests. For an officer that is local, not a state trooper, that is done through sending a letter to the Massachusetts Training Council.[12] The director will send a letter with the manual number that the officer used to train on field sobriety tests. To request the manual for a state trooper, you can prepare a motion or have the district attorney ask the officer for the graduation dates and manual number. You want to have this manual to be able to impeach the officer if the officer performs the field sobriety tests incorrectly. Here are some common points the manual can be used to establish.

Nine step walk and turn and one leg-stand

Most officers want to testify that the feet literally have to touch. According to all of the training manuals, there can be a space of half an inch from heel to toe. Section VIII-10 of the 2006 manual at letter D informs the officer that touching heel to toe means a space of not more than one-half inch. This is the standard in all of the manuals. Also, it is much more difficult to walk with your feet essentially on top of one other versus fairly close together as the manual instructs. At a recent trial, the judge allowed me to demonstrate the difference in front of the jury and it showed that the incorrect instructions may have contributed to the defendant's difficulty with balance.

continued on page 32

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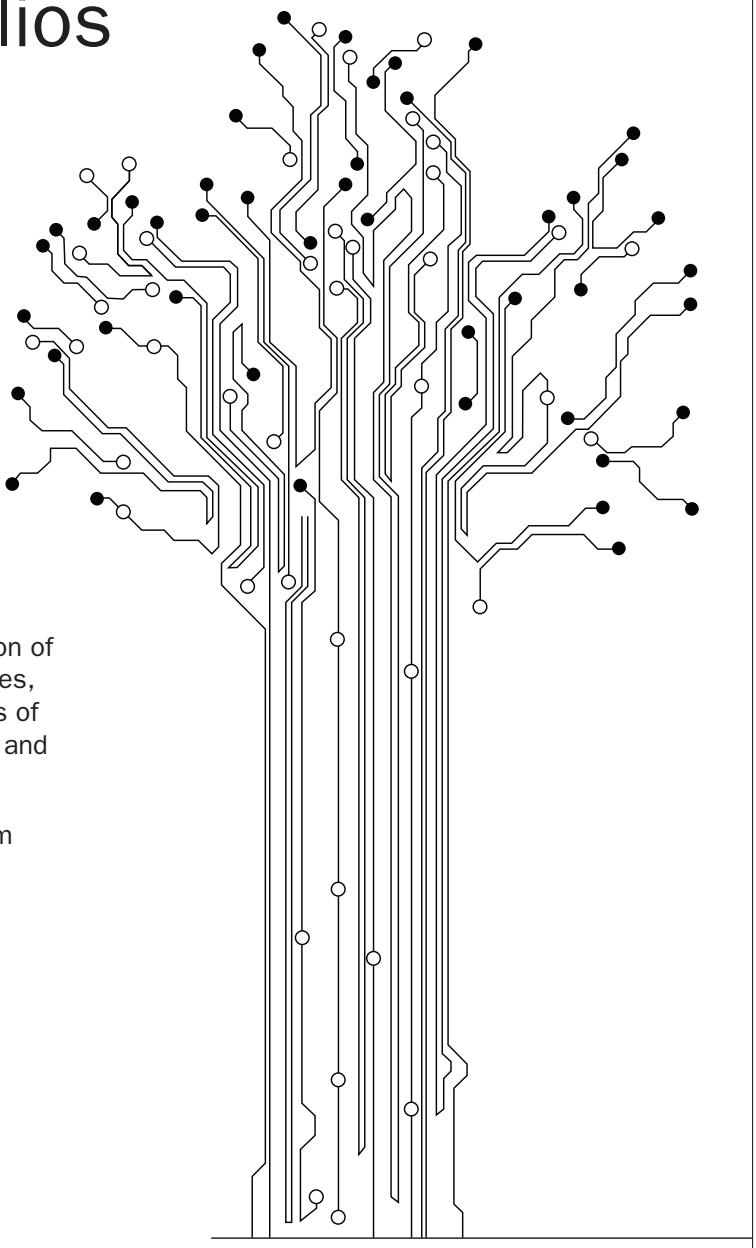

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Lunch with Legends:
Trailblazers, Trendsetters and Treasures of the Rhode Island Bar

Stephen Adams, Esq.
Barton Gilman LLP, Providence

Jenna Pingitore, Esq.

Joe Cavanagh grew up in Cranston, one of his parents' nine children. He graduated from Cranston East High School, where he excelled at hockey. At that time, all the high school teams played at Rhode Island Auditorium. The Rhode Island Reds generally played on Fridays and Sundays, so the high school teams played on Thursdays and Saturdays. Five thousand people would sometimes pack the Auditorium to see Cranston East take on its rivals. Joe credits his hockey talent with helping him get accepted to Harvard, from where he graduated after being named an All-American for three straight years. He then went to Boston College Law School, becoming a member of the Rhode Island Bar in 1974. He gravitated to trial work because of the influence of his father, the legendary Joe Cavanagh of Higgins, Cavanagh & Cooney. Joe credits his experiences in athletics with helping him achieve success in the law. We had the opportunity to speak with this veteran trial lawyer. Excerpts from our conversation follow.

Joseph V. Cavanagh, Jr., Esq.

How do the lessons from sports apply to being a trial lawyer?
I think learning to lose gracefully and to win gracefully, you learn that in sports; how to work with others; how to respect your opponent and never to be overconfident; how to have a long view; and the idea that it's not over until it's over helps you learn to live with the ups and downs of a case.

What was your most inventive or creative legal position or argument?
Well, I had a case where we won a dismissal of the case on its merits for fraud on the court. The case involved the plaintiffs' claims that the *Journal* had wrongfully associated the plaintiffs with organized crime figures. One of the plaintiffs claimed that he was too ill to attend trial. And we had the man under surveillance – turns out, the plaintiff got into a dispute at a racetrack and they barred him from the track over the weekend when our trial was going on. The Mass Racing Commission scheduled an emergency hearing at the track on whether they would allow him back into the track. We got tipped off and the private investigator hired a video man, who came in and set up right behind the chairman and videoed the entire hearing, which turned out to be a seven-hour hearing. And the plaintiff, who was claiming illness, not only testified and participated, but actually pushed aside his lawyer and cross-examined all the witnesses and made a final presentation to the board himself. So we're in the middle of the trial, I come back to the office after we wrap up for the day to watch the video. Bill Landry is in the office and sees me go by. He comes into the room and said there's a young lawyer here, he wanted to meet you. I said, okay, come on in. So I meet him. And I said, shut off the video. And the young lawyer said, "Hey, I know that guy, I've got a case against him right now. In fact, he was at a deposition this morning." So the plaintiff was at a deposition while we were in court trying a case where he got excused for being ill. I got the stenographer to do an emergency copy of the transcript for me over Columbus Day weekend – for $15,000. Meanwhile, in our trial, the plaintiffs finish their entire argument. And then we said, "We have one more piece of evidence, Your Honor, and we submit the deposition transcript from the plaintiff's other case." The judge took a 45-minute recess, he came out, and he dismissed the entire case.

What challenges do you see for people who are coming out of law school now that maybe weren't faced by people who came out when you did?
My advice to young lawyers who want to do litigation is to remind yourself that you're working for real people, with real problems, and they've come to you to try to help resolve those problems. And if we're going to do it, be prepared at all times to do what's necessary, but not to do what's unnecessary. We have to learn to be objective and direct with a client and tell the client when you think that they're off-base. Some people are afraid to do that.

The Revised Child Support Guidelines

Sharon A. Santilli, Esq.
RI Child Support Director

On August 17, 2017, Chief Judge of the Rhode Island Family Court Michael B. Forte signed Administrative Order 2017-01 entitled "Rhode Island Family Court Child Support Formula and Guidelines." The administrative order amends the schedule and guidelines of Administrative Order 2012-03. The schedule became effective September 1, 2017. On January 31, 2018, Chief Judge Forte signed Administrative Order 2018-01 addressing the calculation of a child support order for shared placement of the child or children. On February 5, 2018, Chief Judge Forte signed Administrative Order 2018-02 amending Administrative Order 2017-01. This amendment was necessary because, subsequent to the publication of the Schedule of Basic Support Obligations, the Guideline Task Force became aware of an error within the schedule made by the company which prepared the schedule, the Center for Policy Research. Both the Schedule of Basic Support Obligations and Gross to Net Income Conversion Table provide calculations for parents having up to $35,000 in combined monthly income. Administrative Order 2018-02 also provides examples of the new child care calculation.

Purpose Of Administrative Orders

Pursuant to 45 CFR 302.56.3, states must review and, if appropriate, revise the child support guidelines at least once every four years to ensure that their application of the guideline results in the determination of appropriate child support award amounts. As part of that review, states must consider economic data on the cost of raising children in their state. To conduct that review and study, the Department of Human Services, Office of Child Support Services, hires a company to conduct an economic study in Rhode Island and to recommend appropriate guideline amounts for specific income levels. The past three studies have been conducted by the Center for Policy Research (CPR) which lends continuity to the study. CPR also issues a report to explain the economic study and resulting schedule. The study is available on the child support website at www.cse.ri.gov. We are extremely fortunate in Rhode Island that legislative approval is not required for authority to conduct the study or for funding of the study. See, R.I. Gen. Law § 15-5-16.2(a) (providing for "a formula and guidelines adopted by an administrative order of the [F]amily [C]ourt"). The Chief Judge of the RI Family Court convenes a Child Support Guideline Task Force and appoints individuals to the task force to work with CPR, to review the guideline recommendations and address any other child support related issues that may affect the guideline calculations.

Task Force Recommendations

Update the Schedule – One recommendation of the Task Force was to update the schedule of basic child support obligations. The schedule is still based upon the income shares model. The philosophy behind that model is that the child is entitled to the same standard of care he/she would have enjoyed if the child were part of an intact family with the total gross income available. The same methodology of national child-rearing expenditures that has been consistently applied in the past was applied this time as well (Betson-Rothbart method of child-rearing expenditures). The schedule takes into consideration federal, state and FICA withholdings in 2017. The schedule incorporates a self-support reserve of $1,005 per month, which is the minimum amount a person needs to sustain him/her self. Although the schedule considers ordinary medical expenses of $250 per year per child, it excludes child care expenditures as well as the child's share of health insurance premiums. The schedule specifically takes into consideration the housing costs in Rhode Island and is based upon the most current 2017 prices. The report issued by CPR goes into much more detail regarding the above factors and, as already indicated, is available on the Child Support Agency's website at www.cse.ri.gov.

Modify Child Care Calculation – The task force modified the approach for calculating child care expenses after considering several example worksheets as guidance. Basically, the child care costs are now an "above the line" adjustment to the gross income, resulting in a more accurate determination of the actual net amount available for calculating the child support order. Accordingly, the guideline worksheet has been amended and is part of the administrative orders referred to above. Older versions of the worksheet should no

longer be used.

Implement Federal Regulations – In addition to the quadrennial review requirement, this year, the state was required to address certain issues pursuant to new federal regulations entitled "Flexibility, Efficiency and Modernization" Regulations, 45 CFR 302.56 as amended. Accordingly, the task force reviewed and recommended that:

- The administrative order clarify that the receipt of SSDI coupled with SSI shall be treated as SSI income and therefore not available for establishing or modifying a child support order.
- The administrative order provide guidance for imputing income as required by federal regulations. There is a list of criteria that the court should consider, within the court's discretion, when imputing income. The federal office was concerned that nationally, arbitrary child support orders were established without basis in fact. Consequently, this provision was included to prevent the straight application of the minimum wage order and attempts to prevent the establishment of an arbitrary default order, without a basis in fact, which inevitably results in unrealistic unpaid orders.
- The administrative order emphasizes the requirement to capture any deviations from the guideline amount per the schedule and provide the reason for the same. The guideline amount creates a rebuttable presumption of an appropriate guideline order amount. If that presumption is being rebutted, it should be reflected within the order and on the back of the guideline worksheet. The child support office will begin capturing that information and reporting both the amount and reason for the deviation to the federal government annually.
- Last, the administrative order per the federal regulations, state clearly that incarceration considered by itself, shall not be treated as voluntary unemployment for purposes of preventing someone from filing a motion to modify or denying a motion for modification. (See § 15-5-16.2 as amended in 2017 regarding incarceration).

Shared Placement – The Task Force spent a great deal of time discussing the various ways in which a child support order is calculated when shared placement is involved. As shared placement is becoming more prevalent in family law, it was recommended that a suggested formula be provided for more uniform and consistent outcomes. Chief Judge Forte considered the various approaches being used and decided to adopt the approach outlined in Administrative Order 2018-01 when the parent has at least a 49% share of the placement of one or more children. The administrative order specifically provides that nothing therein "shall prohibit a judicial officer from a guideline deviation." Thus, it is important to note that the judicial officer still has discretion when making any such award.

Summary

Please review the new child support guideline schedule carefully. It is highly probable that if your client is at the low end of the income spectrum from about $1200 to $2500 per month, his/her order may be eligible for a downward modification. Also, make sure you are using the correct guideline worksheet and calculating the child care expenditure correctly. Lastly, review the administrative order 2018-01 on shared placement and be prepared to present the guideline worksheet recommendation to the court. ◊

RHODE ISLAND BAR ASSOCIATION
2017-2018 LEGISLATIVE REPORT
William A. Farrell, Esq.
Rhode Island Bar Association Legislative Agent

During the course of the 2018 General Assembly session, over 2,300 legislative proposals were introduced and reviewed by RIBA's legislative counsel; 116 of those bills were deemed to impact the practice of law and were forwarded to the relevant RIBA committees.

In addition to the monitoring of legislative introductions, the RIBA adopted a very aggressive legislative agenda comprised of six legislative initiatives which are more fully described in the 2018 Amicus Notice.

Ultimately, the Bar Association was successful in urging the adoption of a proposal sponsored by Representative Carol McEntee and Senator Frank Lombardi which would clarify the elective share provisions of R.I. Gen. Laws section 33-28-1. The Bar Association was also successful in advocating for the passage of a proposal offered by the Creditors' and Debtors' Rights Committee which was sponsored by Representative Cale Keable and Senator Stephen Archambault. The legislation would amend Chapter 6-16 of the General Laws entitled "Uniform Fraudulent Transfer Act" by re-naming the title to be called the "Uniform Voidable Transaction Act" as well as adding certain substantive/procedural changes. Other legislation proposed by the Bar's Probate and Trust Committee involving the Rhode Island Estate Tax failed due to the impact the proposals would have on the state's budget as did the Committee's proposal to insulate certain Trustee action in Directed Trusts. Lastly, the Probate and Trust Committee's proposal involving access to digital assets failed, in part, due to the complexity of the issue.

In addition to the legislative agenda initially approved by the Executive Committee, two other legislative proposals were subsequently introduced and which required a response from the RIBA. The first issue involved legislation which would have required all members of the Bar to acquire and maintain $1,000,000 of malpractice insurance. The legislation was scheduled for a hearing and a memo outlining the Bar's concern was submitted at the hearing. A meeting with the sponsor and Senate leadership took place; ultimately the bill failed to pass. A second proposal relating to the Rhode Island Limited Liability Company Act prompted concern by the Business Organizations Committee. Upon meeting with the sponsor, the proposal failed to pass.

Senator Erin Lynch Prata, Chairwoman of the Senate Judiciary Committee, and Representative Cale Keable, Chairman of the House Judiciary Committee, due to the complexity of the RIBA Agenda, required supportive memoranda detailing the issues involved in each of the RIBA legislative proposals and scheduled 12 legislative hearings on the legislation. Representatives from both the RIBA Committees on Creditors' and Debtors' Rights and Probate and Trust, along with RIBA's legislative counsel, testified in support of the proposals and responded to questions from the respective Committees.

A special word of thanks to those RIBA member legislators and non-Bar member legislators who introduced the legislation on behalf of the RIBA and who managed the legislative package through the committees and on the floor of the Senate and House; namely, Senator Frank Lombardi/Representative Carol McEntee – Elective Shares; Representative Jason Knight/Senator Frank Lombardi – Uniform Fiduciary Access to Digital Assets; Representative Cale Keable/Senator Stephen Archambault – Uniform Voidable Transfer Act; Senator Frank Ciccone/Representative Alex Marszalkowski – Estate Tax Credit; Representative Michael Morin/Senator Paul Jabour – Portability; and Representative Robert Craven/Senator Stephen Archambault – Directed Trusts.

Throughout the 2018 session, the response of the House leadership team led by Speaker Nicholas Mattiello and Majority Leader K. Joseph Shekarchi, together with the Senate leadership team of Senate President Dominick Ruggerio and Majority Leader Michael McCaffrey, was truly appreciated and their support of the RIBA agenda was instrumental in the accomplishments achieved.

The specific detail of any of the RIBA-sponsored proposals or of any other proposal relating to the practice of law can be available upon request to the RIBA.

Rhode Island Bar Foundation

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

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

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

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

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

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

Animal Law Spans Many Legal Areas

Lenore M. Montanaro, Esq.
Animal Law Committee
Chairperson

As the newly-appointed Chair of the Rhode Island Bar Association's ad hoc Animal Law Committee, I am happy to write this first column in a series of Animal Law Committee columns for the *Bar Journal*. On behalf of the Animal Law Committee, I want to express my gratitude to the Rhode Island Bar Association for facilitating the formation of the Animal Law Committee. We are especially grateful to Linda Rekas Sloan and Mark Morse for their support of the Committee's formation and continued growth.

Animal law is a growing field and many attorneys want to know: What is the practice of animal law? A brief answer to this question is discussed below, but I write first to share with you how I entered the field of animal law:

I have always considered myself to be someone who loves animals, never realizing until recently what it means to genuinely love them, not for who they are *for* humans, but simply for who they are as beings. After losing my nineteen-year-old brother to leukemia during my junior year at the College of the Holy Cross, I began to think more about suffering and what it means to, as the Holy Cross Jesuits teach, "be someone for others." In my study of this topic, I immersed myself in literature within the realm of suffering, such as "Man's Search for Meaning" by Viktor Frankl, "Letters on Life" by Rainer Maria Rilke, and poetry such as "An Ode to Melancholy" by John Keats.

After graduating from Holy Cross with an English degree, I was determined to pursue a law degree, so that I could, as Emily Dickinson writes, "stop one heart from breaking." With a heart full of gratitude, I humbly received the Rhode Island Bar Foundation's Thomas F. Black, Jr. Memorial Scholarship, and entered law school hoping to make a positive impact for others. I had to "pay it forward." This sentiment was expressed in Linda Rekas Sloan's message in the September/October 2017 issue of the *Bar Journal*.

Following law school, I worked for the United States Navy in Newport and then for a civil litigation firm in Providence. During my evenings and weekends, however, I studied animal law, the main issues and the various ways that one could practice within this field. In August 2017, I was invited by an animal practice attorney to speak in Chicago for an International Animal Law Summit. I learned from other attorneys about the most pressing topics in animal law. From animal cruelty to the "best interests of the animal" standard in the family law context, I knew that this was an area of law that would allow me to make a positive difference for others.

Animal law connects me to my brother John: While alive and in active treatment for cancer, John raised funds for his high school "senior project" and donated the money to the Ocean State Veterinary Specialists, located in East Greenwich. He asked that the funds be directed to owners of sick animals who needed financial assistance.

As attorneys, our first thought about animal law may rest within the civil litigation context, e.g., a dog bite case. Some of us may think about criminal animal cruelty as it affects companion animals. Consider the following animal law practice scenarios, all of which affect animals and humans:

1. **Products Liability**: A dog toy shatters into pieces resulting in an internal tear of an animal. The owner is now faced with veterinary bills.
2. **Veterinary Malpractice**: A veterinarian euthanizes an animal during what should have been a regular spay or neuter procedure.
3. **Trusts & Wills**: A client wants to ensure that his companion animal will be cared for, should the client pass away or lose mental capacity.
4. **Family**: A client seeks a divorce and both parties want custody of a dog.
5. **Criminal**: A client is criminally charged during an animal protection demonstration.
   Or, another client injures a human who tries to steal your client's companion animal and your client is charged.
6. **Disability**: A client is denied access to a public location for having a service animal. The client is unable to continue to live in her complex because her dog is a certain breed.
7. **Attacks**: A client's dog is attacked by another dog during a walk in the client's neighborhood.
8. **Creditor-Debtor**: A collection agency threatens to seize someone's dog to satisfy a judgment.
9. **Public Records**: You want to obtain federal or state records relating to animals.

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10. **Civil Rights:** A client's child is told that she will receive a failing mark in high school for refusing to dissect a cat in class.

When people discuss animals, I often hear them say "oh, it's just a dog." I believe that animals have an inherent soulful worth with the right to be free from "unnecessary suffering, torture, or cruelty."[1]

Rhode Island attorneys either are or have the potential to be champions for animals. In honor of my brother, I am reminded of the Ralph Waldo Emerson quote that "to know even one life has breathed easier because you have lived. This is to have succeeded."

ENDNOTES

1 *R.I. Gen. Laws § 4-1-3.* ◊

MBE/WBE Certification Process

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industries dominated by non-minorities often require substantial buy-in and support from those individuals.

Of course, that's not always the case—nor is it necessarily a desirable state of affairs—but it remains true that the advantage of an active mentor, a willing teacher, an enthusiastic investor, or an encouraging boss cannot be overstated, especially for a minority or woman working their way up in an industry dominated by non-minorities.[66] The problem may be that for some WBE applicants, that sponsor may also be a spouse, and disentangling one from the other is as difficult as extricating the female spouse's independent achievements and capabilities from those of her male counterpart. Would **Marshe, P.C.M.** or **Ace** have been decided differently if the applicants relied on unrelated male sponsors in the construction or concrete industries who were not their husbands? It's possible, but far from certain. What is certain, however, is that courts in this state will continue to have to navigate the fine line between the support and sponsorship that a non-minority can provide and the ongoing concern that non-minority business may unduly usurp the advantages of a program not intended for their benefit.

ENDNOTES

1 *This article will use the terms minority business enterprise (MBE) when speaking about both MBEs and women's business enterprises (WBEs) generally, and use the term WBEs when referring to women's business enterprises specifically.*

2 ***See*** *R.I. Gen. Laws 1956 § 37-14.1-1.*

3 *Executive Order No. 83-13 (December 30, 1983).*

4 ***See*** *R.I. Gen. Laws 1956 § 37-14.1-1 et seq.; see also "What is the MBE/WBE Program?" MBE/WBE/DBE Frequently Asked Questions, Minority Business Enterprise Compliance Office, State of Rhode Island Office of Diversity, Equity & Opportunity, Department of Administration, available at http://odeo.ri.gov/offices/mbeco/faq.php (last visited July 25, 2018).*

5 *R.I. Gen. Laws 1956 § 37-14.1-1.*

6 *R.I. Gen. Laws 1956 § 37-14.1-7.*

7 *Rules, Regulations, Procedures and Criteria Governing Certification and Decertification of MBE Enterprises by the State of Rhode Island, as amended August 2016, Rhode Island Department of Administration Office of Diversity, Equity and Opportunity (ODEO), Minority Business Enterprise Compliance Office (MBECO), available at http://odeo.ri.gov/documents/rules-regulations-procedures-criteria-governing-certification-decertification.pdf (last visited July 25, 2018) (hereinafter the "Rules").*

8 ***See*** *Rules at Section 5.00(A)-(D).*

9 *Rules, at Section 5.00(F), (H). The Minority Business Enterprise Compliance Office (MBECO) is one of several divisions of the Office of Diversity, Equity, and Opportunity (ODEO), which, by turn, is a division of the Department of Administration. See "ODEO Organizational Chart," About the Office, Minority Business Enterprise Compliance Office, State of Rhode Island Office of Diversity, Equity & Opportunity, Department of Administration, available at http://odeo.ri.gov/about/index.php#organizational-chart (last visited July 31, 2018).*

10 ***Id.*** *at Section 5.00(H).*

11 ***Id.*** *at Section 5.00(I), (J), (K).*

12 *R.I. Gen. Laws 1956 § 37-14.1-3(f);* ***see also*** *Rules at Section 3.02, 3.03.*

13 *R.I. Gen. Laws 1956 § 37-14.1-3(f); Rules, Section 3.02(E), (F).*

14 *Rules, Section 3.03(A)(a)-(f).*

15 ***See*** *Rules 3.03(B).*

18 ***Ace Concrete Cutting, LLC v. R.I. Dep't of Admin.****, No. PC-2014-3460, 2015 R.I. Super. LEXIS 114, at * 33 (R.I. Super. Ct. Sept. 9, 2015) (citing CS-360,* ***LLC v. U.S. Dep't of Veterans Affairs****, 101 F. Supp. 3d 29, 2015 U.S. Dist. LEXIS 55935, 2015 WL 1925666, at *4 (D.D.C. 2015)).*

19 *No. PC-1992-4475, 1994 R.I. Super. LEXIS 39 (R.I. Super Ct. Feb. 23, 1994).*

20 ***Id.*** *at *1.*

21 *Id.*
22 *Id.*
23 *The Office of Minority Business Assistance (OMBA) was succeeded by the Minority Business Enterprise Compliance Office (MBECO)*
24 *Id. at *2.*
25 *Id.*
27 *Id. at *3-4.*
28 *Id. at *4.*
29 *Id. at *6.*
30 *Id. at *2, 6-7.*
31 *Id. at *7.*
32 *Id.*
34 *Id. at *8-9.*
35 *No. PC-1998-963, 1999 R.I. Super. LEXIS 93 (R.I. Super. Ct. Jul. 28, 1999).*
36 *Id. at *1.*
37 *The Contract Compliance Officer who performed the site review visit and provided a recommendation on the MBE certification application, appears to be a predecessor to the DOA staff member who currently performs a substantially similar function. See supra, note 9.*
38 *Id.*
39 *Id. at *13-14.*
40 *Id. at *5.*
41 *Id. at *13.*
42 *Id.*
43 *Id. at *12-13.*
44 *No. PC-2014-3460, 2015 R.I. Super. LEXIS 114 (Sept. 9, 2015).*
45 *Id. at *2.*
46 *Id.*
47 *Id. at *3.*
48 *Id. at *4.*
49 *Id. at *5-6.*
50 *Id. at *4.*
51 *Id. at *4-5.*
52 *Id. at *8-9.*
53 *Id. at *11-12.*
54 *Id. at *11, *18.*
55 *Id. at *18 (internal quotation marks omitted).*
56 *Id. at *22-26.*
57 *Id. at *23-25.*
58 *Id. at *27-35.*
59 *Id. at *29-31.*
60 *Id. at *32.*
61 *Id. at *34-35.*
62 *Id. at *27-35.*
63 ***P.C.M., Inc.**, 1999 R.I. Super. LEXIS 93, at *13.*
64 ***Marshe**, 1994 R.I. Super. LEXIS 39, at *8.*
65 ***Ace**, 2015 R.I. Super. LEXIS 114 at *23-25.*
66 *A great example of this hits close to home in the legal industry. In a recent article that appeared in the ABA Journal that highlighted the problem of minority women leaving BigLaw, the author surveyed the problems that women of color face in reaching the partnership level and spoke to many attorneys about the issue. Liane Jackson, "Invisible then Gone: Minority women are disappearing from BigLaw—and here's why," ABA JOURNAL (March 2016), available at http://www.abajournal.com/magazine/article/minority_women_are_disappearing_from_biglaw_and_heres_why (last visited July 31, 2018). One bluntly stated, "I don't see women being placed into positions where they can become rainmakers. Unless you have a really good champion, a white male who will protect you in a certain way, it's a tough fight." Id.* ◊

Lawyers on the Move

Christine K. Bush, Esq., William R. Grimm, Esq., and **Craig M. Scott, Esq.**, of **Hinckley Allen, LLP**, have been recognized as "IP Stars" by Managing Intellectual Property for the fifth consecutive year.

Stephanie J. Cote, Esq. is now an associate at **Brennan, Recupero, Cascione, Scungio and McAllister, LLP**, 362 Broadway, Providence, RI 02909.
401-453-2300 scote@brcsm.com brcsm.com

Patrick A. Guida, Esq., partner at **Duffy & Sweeney, LTD**, has been elected to the Executive Committee of the American College of Commercial Finance Lawyers (ACCFL).

Doris J. Licht, Esq. and **Paul A. Silver, Esq.**, of **Hinckley Allen, LLP**, 100 Westminster Street, Suite 1500, Providence, RI 02903, were named leading practitioners in advising high net worth clients for 2018 in Chambers USA.

Matthew M. Phillips, Esq. is now an associate at **Duffy & Sweeney, LTD**, 1800 Financial Plaza, Providence, RI 02903.
(401) 455-0700 mphillips@duffysweeney.com duffysweeney.com

RI Lawyer Handling an OUI in Massachusetts

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If the officer testifies that he does not recall how far your client's feet were, and says they did not touch, I ask the officer to admit that the client was not walking normally. This puts a frame of reference on it that whatever the space, it was very little. In some cases, the officer will misstate how high the person has to raise their foot on the one leg-stand. The officer will sometimes say that the instruction is six to eight inches. The manual states it is only six inches; your client may have tried to raise it higher to impress the officer, making the exercise more difficult to perform. The one leg-stand instructions are very specific; the officer should tell the person to raise their foot six inches up off of the ground. HS 178 R2/06, VIII-12.

One interesting point that can be made is that in the 1995 National Highway Traffic Safety Manual, it states that some people cannot perform the one leg-stand while sober. This was removed from this manual, but if you get an older officer, they may acknowledge this point or even a newer officer can be confronted with the prior manual.

Normal activities that your client did well, just as important as the field tests

Sometimes, you may want to use the manual to emphasize that providing the license and registration without difficulty, pulling over properly, and getting out of the car without using it for balance are all signs that the person was not under the influence of alcohol and could be signs of impairment, according to the officer's police training. Cross-examination is your chance to tell the jury everything that your client did right. On direct, the officer will typically omit or give short attention to anything that your client did right. But you want to bring out that it is significant and if your client had done anything wrong with respect to pulling over or providing the license, the officer would have said it shows impairment. You may want to argue that when performing these normal activities your client did not show signs of impairment; if the client did poorly on the field exercises, you can attribute the difference to the pressure of being tested.

Make it easy for the jury to remember, using numbers

One technique that works well at trial is to try to put numbers on things that our clients do correctly. Many clients will pull over properly, provide their license and registration without difficulty, and not have difficulty with balance getting out of the car. These are three things that the Field Sobriety Training Manual tells officers to pay attention to as possible signs of impairment. The officer will typically acknowledge that the client was ordered from the car in less than five minutes. In that five minute encounter, the officer will be forced to acknowledge that three of the major clues of impairment were not present prior to ordering the client out of the car. Try to get the officer to admit that these clues are major clues of impairment. Some officers will agree to this while others will debate the point. If the officer tries to minimize the significance of those clues, it shows that the client's behavior may have been inconsistent with the officer's opinion.

Putting numbers and labels on what your client did well makes it easier for the jury to remember. Many prosecutors will

argue in closing that an officer will never see all of the clues of impairment. But when you can point to a number of clues that are missing, you want to stress that this inconsistency in the evidence creates a reasonable doubt, and shows that the government cannot exclude every reasonable doubt. Juries in Massachusetts are instructed that even a strong probability is not enough to prove a charge beyond a reasonable doubt, which the Massachusetts Supreme Judicial Court has defined as the highest degree of certainty in the matter of human affairs.

For a Rhode Island license holder working in Massachusetts, they will need to file an appeal with the Board of Appeals in order to obtain a hardship to drive in Massachusetts. The Registry will not grant an out-of-state driver a hardship, though relief can be obtained from the Board of Appeals.

In sum, if you are trying an OUI in Massachusetts, keep these things in mind:

1. Make sure you understand when the client can get their license back; the refusal suspension varies based on the number of prior convictions.
2. Inform the client that the breathalyzer test is not currently being used as evidence.
3. Obtain any video evidence.
4. Go to the scene so you can potentially counter or provide good evidence as to driving.
5. Research the judges to determine if you need a jury trial or if you can have the judge hear the case with jury waived.
6. If you anticipate a bench trial, try to get the case to trial quickly.

ENDNOTES

1 ***Commonwealth v. Annias***, *Consolidated litigation before Judge Brennan heard in the Concord District Court.*
2 *M.G.L.A. 90 Section 24.*
3 *M.G.L.A. 90 Section 24.*
4 *Chapter 118 of the Act of 2018.*
5 *Standing order Voir Dire.*
6 *M.G.L.A. 279 Section 79G.*
7 *Chapter 69 of the Act of 2018.*
8 *Massachusetts Model Jury Instructions.*
9 *Opinion of the Justices, 412 Mass. 1201 (1992).*
10 ***Commonwealth v. McGrail***, *419 Mass. 774 (1995).*
11 *424 Mass 184 (1997).*
12 *https://www.mass.gov/forms/request-public-records-online-from-the-municipal-police-training-committee* ◊

Caption This! Contest

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

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

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

Deadline for entry: Contest entries must be submitted by October 1st, 2018.

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

Winning caption for July/August

"Maybe you'd prefer something that's not double-edged?"

ROLFE I. HUBLEY, ESQ.

In Memoriam

Paul A. Sassi, Esq.

Paul A. Sassi, 72, of Westerly, died June 9, 2018. Born in Providence to Maria and Amedeo Sassi, Paul earned a law degree from Suffolk University Law School in 1969, after completing undergraduate studies at Providence College. In 1970, Paul became partner in the Law Offices of Gelfuso and Sassi, where he practiced for 48 years with support from his dear friend Maria Paliotta Vigh. Paul is survived by his wife of 45 years, Gail Arcand Sassi, his son Joseph and wife Cristen Sassi of Westerly, RI, daughter Mary and husband Gage Furtado of Hickory, NC, his son John Sassi of Stoneham, ME, grandsons Owen Sassi, and Quinn and Max Furtado, and his sisters Grace Shabo and Eleanor Rubin and spouses, of North Kingstown.

Mark A. Spangler, Esq.

Mark A. Spangler, 71, of Wakefield, died May 25, 2018. Mark was the beloved husband of Mary A. Donnelly for 25 years. Born in Long Beach CA, he was the son of William S. Spangler of Santa Barbara CA, and the late Thalia J. (Harmany) Spangler. Mark graduated from Rogers High School and attended the University of Rhode Island, graduating in 1968. He received his law degree from the University of California Hastings College of the Law in 1973. After graduation, Mark returned to RI where he resided and practiced law until his death. Mark was a member of the RI and California State Bars. Mark served honorably with the U.S. Army Rangers as a Sergeant in Vietnam (1968-1970). He founded the legal clinic at Sympatico, formerly of Wakefield, and served as Town Solicitor of South Kingstown. He was a proud member of the Vietnam Veterans of America Chapter 325 for over 40 years, serving as Secretary and Treasurer. He also served as Secretary of the RI State Veterans Council. He was an architect behind the Vietnam Veterans Memorial garden at Dale Carlia Corner and for years spent his weekend mornings gardening and maintaining it for the benefit of all. Most recently he volunteered to help prepare and file taxes at the Johnnycake Center in Wakefield. Besides his wife and father, Mark is survived by his daughter Christine Hoerning and her husband Rainer and their three children, Anna Sophia, Lucas and Eric of Cham, Switzerland; his daughter Mary Eileen Taylor and her husband Daniel and their two children, Daniel James and Abby Mae Thalia of Wakefield; his brother Reed Spangler and his wife Yvonne of Santa Barbara CA, as well as many brothers and sisters in-law, loving nieces, nephews and extended family members and friends. Mark was predeceased by youngest brother, Neal Spangler.

Advertiser Index

Reset Your Sleep Cycle

Six Tips for a Better Night's Sleep

Mattress matters

Your bed plays an important role in determining how long and how well you sleep. Older mattresses do not provide the support you need for restful sleep; if your mattress is seven years or older, it's time to replace it.

Relax Your Mind

After a long day, you need to relax, reflect and decompress before trying to fall asleep. Take this time to turn off the "noise" of the day and read something calming, meditate, listen to quiet music, or take a warm bath. Many people who have a relaxing pre-sleep routine fall asleep faster and stay asleep longer.

Stick to a Sleep Schedule

Go to bed and get up at the same time every day. This helps to regulate your body's internal clock and could help you fall asleep and stay asleep for the night. Keep a consistent schedule for sleep and wake times and soon they will become just a part of your regular routine.

Exercise Regularly

Physical activity improves sleep quality and increases sleep duration. Timing your exercise can make a difference. A high-intensity cardio workout late in the day can disrupt sleep. Save your runs and step classes for the morning if you find that an intense workout interferes with your sleep.

Lighten Up on Evening Meals

Try to make dinnertime earlier in the evening, and avoid heavy, rich foods within two hours of bed. Your body isn't meant to be digesting while you sleep, so a big meal too close to bedtime may keep you up at night.

Avoid Screens before Bed

Dim the lights and turn off all your devices about an hour before bedtime. The blue light emitted by your phone, tablet, computer, or TV can negatively affect the way you sleep. Bright light triggers our brains that it's time to be awake and alert, start sending the opposite signal early to help you fall asleep faster.