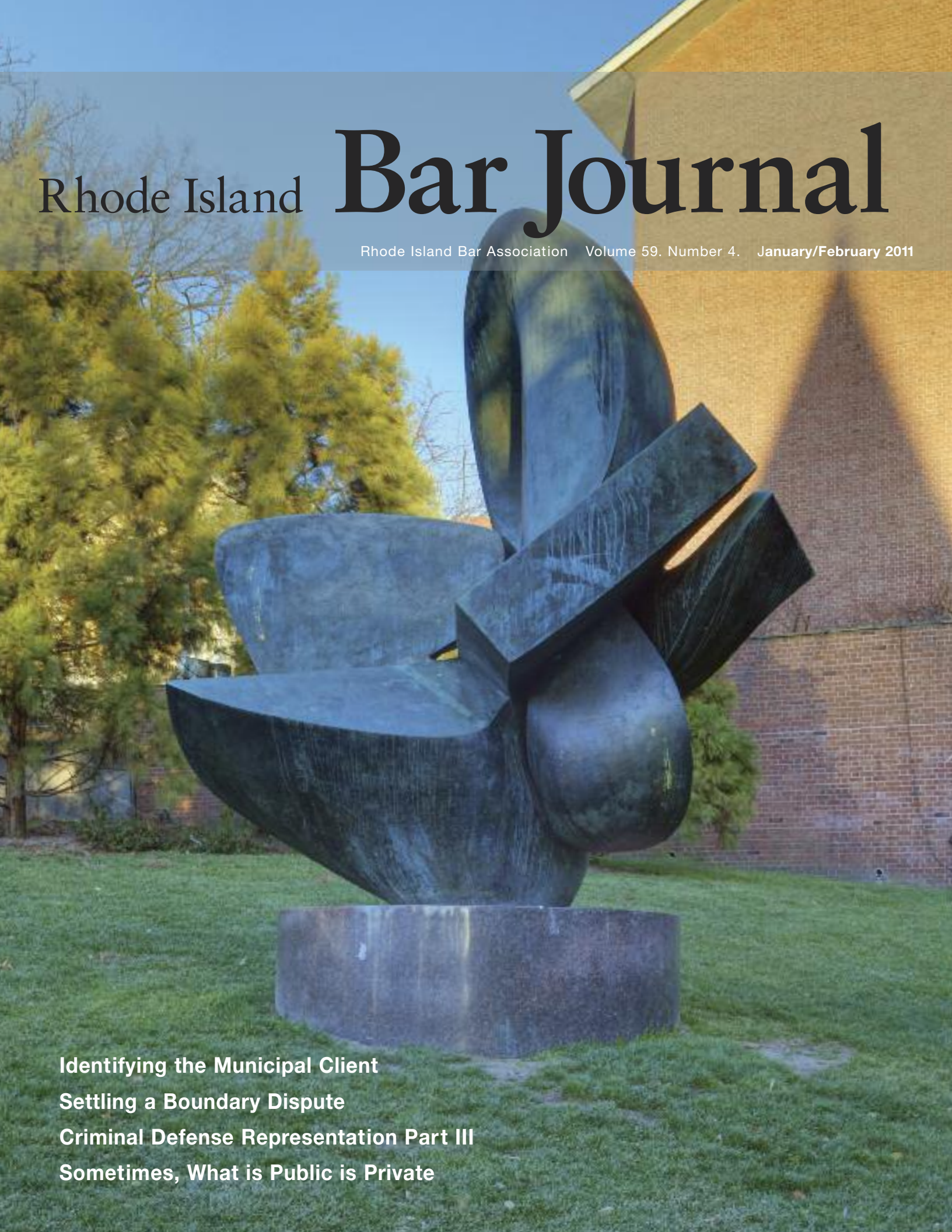


Rhode Island Bar Journal

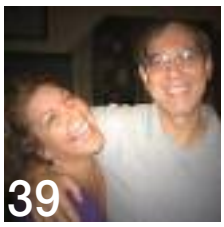
Rhode Island Bar Association Volume 59. Number 4. January/February 2011

Identifying the Municipal Client

Settling a Boundary Dispute

Criminal Defense Representation Part III

Sometimes, What is Public is Private



Articles

5 Families – Rhode Island Bar Foundation President's Message
John A. Tarantino, Esq.

11 Identifying the Municipal Client: *Some Shelter from the Storm*
Anthony F. Cottone, Esq.

19 The Third, and Best, Way to Settle a Boundary Dispute
Roland F. Chase, Esq.

27 Attorney Practice Guide: Criminal Defense Representation Part III* – The Post-Verdict Phase
George M. Muksian, Esq.

33 Sometimes, What is Public is Private
Robert Ellis Smith, Esq.

Features

3 Justice Delayed is Justice Denied

4 Bar President Lise M. Iwon Honored with Julie Pell Award

7 SOLACE – Helping Bar Members in Times of Need

8 New Attorneys Bar Committee Networking Event Draws Record Attendance

17 New Annual Bar Awards Nomination Schedule

18 Past Bar President Victoria M. Almeida Neil J. Houston Memorial Award Recipient

21 Bar and Law School Divorce Mediation Clinic Provides Pro Bono Assistance

25 Continuing Legal Education

31 Rhode Island Bar Association House of Delegates Letters of Interest Due February 21, 2011

31 Counting to Ten Really Does Work

35 Bar's Public Service Department Provides Assistance at Resource Fair

39 Beyond the Bar
Para-kin: Defining Our Relationships

41 2011 Rhode Island Law Day Program

47 Soliciting Bar Member Response to Proposed Animal Law Committee

48 In Memoriam

49 You ought to be in pictures!

49 Publish and Prosper in the *Rhode Island Bar Journal*

49 Membership Benefit Update
LRS: The Biggest Bang for Your Buck!

50 Lawyers on the Move

50 Advertiser Index

51 Rhode Island Bar Association Staff & Responsibilities

CORRECTIONS

Anastasia A. Dubrovsky, Esq., co-author of "Harnessing Your Client's Wind Power Rights" which appeared in the November/December 2010 issue of the *Rhode Island Bar Journal* works for the law firm of Scott & Bush, Ltd., Providence.

Please note:* the cover photograph for *Rhode Island Bar Journal* November/December 2011 issue was misidentified. The correct identification is: *Anne Mimi Sammis' Dance of Peace sculpture, Narragansett, RI by Brian McDonald.

RHODE ISLAND Bar Association
1898

RHODE ISLAND BAR ASSOCIATION LAWYER'S PLEDGE

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

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Henry Moore Sculpture
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by Brian McDonald

Justice Delayed is Justice Denied

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

As officers of the Court, we must fight for fair, adequate and impartial justice and work together with the other branches of government to determine the best way to adequately fund and operate our courts.

Our country is struggling with the most difficult set of economic conditions since the Great Depression. The demands placed on our justice system are growing and growing. Declines in our economic health have been followed by an increase in court filings, and that trend is proving more pronounced than ever.

The justice system in states across the country has traditionally suffered from a lack of adequate and balanced funding. It now accounts for only four percent of all government expenditures nationwide, with similar allocations from state budgets. In addition to the courts themselves, this system encompasses law enforcement, prosecution, indigent defense, and corrections. A survey of state court trial judges recently released by the American Bar Association's (ABA) Coalition for Justice confirms that increasing numbers are looking to the courts for help solving their economic problems. Judges report a rise in filings related to foreclosures, domestic relations and consumer issues such as debt and housing. While dockets nationwide experience unprecedented caseloads, funds available to state judiciaries have decreased significantly. This threatens to deny equal justice under the law to everyone.

Eight states have resorted to closing courts on certain days each month, and nineteen states have instituted furloughs. In Vermont, judges and all court staff are furloughed one day per month with no pay. In New Hampshire, the former Supreme Court Chief Justice announced that Superior Court jury trials will be reduced by one-third. He noted that since preference must be given to criminal trials under our Constitution, civil jury trials will be rare over the next twelve months. Five plaintiffs filed suit in Merrimack Superior Court seeking to force the state to restore $4 million in judicial branch budget cuts. The lawsuit seeks not only the restoration of the funding cuts made this year, but also an order that the state adequately fund the branch in the future. California, meanwhile, has implemented a statewide court closure program, shutting down courtrooms one day each month.

The consequences of inadequate judicial funding extend beyond American courthouses into our jails, police departments and social services, including domestic violence service centers. The results also include reduced public safety, inadequate security in the courts, prison overcrowding, and a lack of support systems for families and children in times of crisis.

America's federal courts are also under stress. Despite an enormous upswing in the number of federal filings, Congress declined a request from the Judicial Conference of the United States to create 69 new federal judgeships. Bankruptcy petitions are at their highest level since 2006, totaling 1.5 million for the 12-month period ending March 31st of this year, a 27% increase from the same period ending in 2009.

In a time of severe recession and unprecedented deficits, our lawmakers must value the judicial branch as more than a line item in a budget, but as a constitutionally equal branch of government. It is time to ensure that in America – a country founded on the rule of law and the principle of access to justice – our judicial branch does not falter under a financial burden. The Rhode Island State Constitution states: "Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which may be received in one's person, property, or character. Every person ought to obtain right and justice freely, and without purchase, completely and without denial; promptly and without delay; conformably to the laws." It also reads: "No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied equal protection of the laws."

The efforts of state and local bars, along with groups on the national level like the ABA and the National Center for State Courts, underscore the importance of judicial funding and the dire circumstances confronting many courts. As officers of the Court, we must fight for fair, adequate and impartial justice and work together with the other branches of government to determine the best way to adequately fund and operate our courts. We must educate lawmakers and the public about the need for an effective judiciary. It is essential for access to justice for the public and for the future of the rule of law. ❖

Bar President Lise M. Iwon Honored with Julie Pell Award

Julie Pell Award recipients l to r: Congressman Barney Frank, Rhode Island Bar Association President Lise M. Iwon, Peter Hocking, Jenn Steinfeld, and Steven Brown (accepting on behalf of the Rhode Island ACLU).

Rhode Island Bar Association President Lise M. Iwon was honored with a Julie Pell Empowerment Award for Social Change and Civic Engagement by Rhode Island-based Equity Action. Other honorees include Rhode Island affiliate of the American Civil Liberties Union (ACLU), artist-educator-activist Peter Hocking, and Marriage Equality Rhode Island founder Jenn Steinfeld.

U.S. Rep. Barney Frank, the only non-Rhode Islander among the first recipients of the Julie Pell Awards, was the keynote speaker at the awards ceremony held at an Equity Action fundraiser at the Rhode Island Convention Center.

Julie Pell, who passed away in 2006 at age 52, was the daughter of Nuala Pell and the late U.S. Sen. Claiborne Pell. Julie fought discrimination as a lobbyist at the State House, as president of the Rhode Island Alliance for Lesbian and Gay Civil Rights, and as co-founder of Equity Action, to which she made the first bequest.

Lise and Margaret A. Laurence recently celebrated their 30th anniversary as life partners. They also share a law practice in Wakefield.

RHODE ISLAND BAR JOURNAL

Editorial Statement

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

Article Selection Criteria

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

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

Families

Rhode Island Bar Foundation President's Message

John A. Tarantino, Esq.
Rhode Island Bar Foundation
President

Family gives us purpose, direction and grounding. In my own life, I've had different kinds of families.

We all have families, and, in most cases, that's a very good thing. Families provide support, sustenance and solace. In my view, they are not only the roots of society, but of happiness. And, again in my view, without family, we are lost.

What a family is and who its members are can vary depending on circumstance, choice and chance. But what true family does for us, irrespective of its makeup (biological or otherwise), is the same: Family gives us purpose, direction and grounding. In my own life, I've had different kinds of families. First, I have my original family, the one in which I was raised. Second, I now have my own family and its extensions, a wife, three adult children, a son-in-law and a grandchild. But, I've had other families as well.

My law firm has been my family for almost 30 years. I love my firm and its lawyers and staff. They are my legal colleagues and friends. I believe we are grounded in purpose, and we strive to work together toward a common goal of providing service to our clients.

The Bar Association and the Bar Foundation have been other types of families to me. From the very beginning of my legal career, I've not only been involved with the Bar, but have been welcomed there as a family member. I've had the pleasure and honor to serve the Bar and its members for many years in different capacities as: a Bar committee member; a committee chair; the President of the Bar Association in 1997-1998; and, for the past five years, as Bar Foundation President. I don't view Bar leadership, as some do, as being the Bar's CEO. To me, it's more like being the head of a large legal family. In fact, I'm always a bit put-off when I hear that "the law is a business." Certainly, the practice of law has important elements of business to it and business principles should be applied, where appropriate, to make the practice (whether it's large or small) successful. But we, as lawyers, don't make widgets. We serve clients. And we are accountable to our clients, to our brothers and sisters at the Bar, and to ourselves, as well as to society as a whole. We serve an important role in the justice system. Don't ever forget that. And, also don't ever forget that there are consequences in serving that important role.

Charles Barkley, the former NBA star, made headlines several years ago when he proclaimed: "I'm no role model. Just because I can dunk a basketball doesn't mean I should raise your kids." Now, while Charles is bright and entertaining, and was a very talented basketball player, I wouldn't consider him a role model (and I certainly wouldn't want him raising my kids). And, while I've heard analogies (and at times even used a few myself) that trial lawyers are like athletes in competition, I do believe that lawyers are and should be role models (even if they can't dunk a basketball). This doesn't mean that we should necessarily be raising anyone else's kids (and I know that I've had more than enough to handle raising my own).

Unlike NBA players, lawyers take an oath to support and defend the Constitution. Think about that: We support and defend the Constitution of our state and of the United States of America. That's pretty heavy stuff. And if someone who supports and defends the Constitution is not a role model, then I don't know who is or should be one. So, what does this mean? It means that we, as lawyers, need to recognize, accept and fulfill our responsibilities – one of which is to be a role model for our different kinds of families. We can't be petty, malicious, uncivil and unkind. For malicious, uncivil and unkind conduct is nothing short of misconduct, and it not only violates the Rules of Professional Conduct, but also the basic rules of human decency. It's conduct that's beneath – far beneath – someone who takes an oath to support and defend the Constitution. It's beneath – far beneath – what society should expect from us as counselors, advocates and champions of justice. And, finally, it's beneath – far beneath – what we should expect of ourselves. We are all much better than that. I would bet on it. In fact, not only would I bet on it, I have done so. For almost 30 years I have bet on the law and on lawyers. I have made the law my career. I chose to be a lawyer. No one forced me to be one. I voluntarily took my oath, and I do my best to honor my oath each day. The vast majority of lawyers I know do so, too. I'm proud of them. They are my role models.

continued on page 7

SOLACE

Helping Bar Members in Times of Need

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

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

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

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

Families

continued from page 5

Finally, if there's one thing I've learned in life it's this: Family members aren't perfect. In fact, they are far from it. But that's not surprising because families are comprised of people, and people are flawed. No matter how hard we try, there are accidents. We make mistakes. So we forgive our family members' accidents and mistakes, and we hope they won't be repeated. I hope that you will treat me as a family member, at least in this regard.

For the past five years, I've tried my best to serve you as Bar Foundation President, but I know that I haven't been perfect. In fact, I've been far from it. As my term as your President eventually comes to a close in June, I hope my Bar family members will forgive my shortcomings and flaws. And, if I have caused any harm, or if you've taken any offense, I can assure you that my mistakes have been accidental, not intended. Please accept my apology for any and all of them. And I know in my heart that you, my Bar family members, will do so. For as a very wise and perceptive man once recognized, "Accidents will occur even in the best-regulated families." (Charles Dickens, *David Copperfield*). ❖

New Attorneys Bar Committee Networking Event Draws Record Attendance

Co-sponsored by the Bar's Executive Committee and New Attorney Advancement Task Force, the Bar Committee Networking Event garnered over 60 event registrations and featured 22 participating Bar committees, introducing new lawyers (those admitted to practice in Rhode Island within the last ten years) to our Bar committees and the Bar's Public Service department. Additionally, some 2010 graduates of the Roger Williams University School of Law and third-year law students selected by the Law School's Director of Career Services, also attended.

The event, which combined both professional and social networking in a relaxed and convivial environment, provided opportunities for new lawyers to talk with committee chairs and/or representatives for timed periods, allowing each participant to visit with as many as six committees. Committee chairs followed up with interested new lawyers, inviting them to attend their next committee meeting. Many new lawyers also signed up for the Bar's Volunteer Lawyer Program and Lawyer Referral Service programs.

New Attorney Advancement Task Force Chair Rebecca Dupras (l) and Bar President Lise Iwon (r) welcoming new lawyers and Bar committee representatives to the event.

Supreme Court Bench/Bar Chair John Tarantino enjoying the night's interaction.

Technology in the Practice member Howard Walker (l) talking with potential new committee colleagues.

View of the networking event from the Continuing Legal Education table.

District Court Bench/Bar Co-Chair Joseph Hall noting the benefits of committee membership.

New lawyers in a discussion with Title Standards and Practices Chair Albert Antonio (r) and Committee member Hugh Barry (l).

Environmental and Energy Law Co-Chair Seth Handy (c) reviewing his committee's many opportunities.

Gay Lesbian Bisexual Transgender (GLBT) Co-Chair Michael Grabo (c) in an animated discussion with new Bar members.

Lawyers Helping Lawyers Chair Nicholas Trott Long describing the Bar's excellent member assistance services.

Government Lawyers Co-Chair Katherine D'Arezzo explaining the opportunities afforded by her committee.

Public Service Involvement member Dave Reilly (r) welcoming a new attorney to the wonderful world of the Bar's public services.

Business Organizations Chair Jim Hahn taking care of his committee's business.

Federal Court Bench/Bar Co-Chair Pat Rocha engaging new attorneys in a committee-related discussion.

Superior Court Bench/Bar Co-Chair Melissa Darigan describing her committee's functions.

Continuing Legal Education Chair Richard Peirce (l) and member Tom Plunkett (r) discussing their committee's vital role in the Bar's CLE programming.

Ethics and Professionalism Co-Chair Steve Linder reviewing his committee's deliberations.

Family Court Bench/Bar Chair Jane Howlett (l) and member Jill Votta (r) in a lively discussion.

Rhode Island Bar Journal Editor In Chief David Bazar (l) talking about the professional benefits of Editorial Board involvement.

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Identifying the Municipal Client: *Some Shelter from the Storm*

Anthony F. Cottone, Esq.
Sole practitioner, Providence, Providence Deputy City Solicitor and Chief of Litigation

To properly identify his or her client, the government attorney must carefully evaluate his or her own legal authority, as well as that of the relevant government actors, and then clarify the nature of the interests which are, or may be, in conflict.

The Official Commentary to Rule 1.13 of the Rhode Island Rules of Professional Conduct, entitled "Organization as Client," expressly provides that "the duty defined in this Rule applies to government organizations." *Id.* In the very next sentence, however, the author of the Commentary concedes that "defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules." *Id.*

Unlike in-house counsel to a private corporation, a city solicitor may confer and take direction on a particular issue not only from a chief executive, but also from members of a legislative body and its committee heads, the heads of various municipal departments, boards and commissions, as well as administrators and members of the public, and he or she may do so in widely differing settings, ranging from a private meeting in the mayor's office to a public hearing. Properly identifying the client amidst this cacophony of conflicting municipal interests and possible clients is almost always more difficult than doing so in the private sector, but it is no less critical. Whether in the public or private sector, the identity of the client defines the role of the attorney-advocate as well as the contours of the attorney-client privilege and the work product doctrine. To properly identify his or her client, the government attorney must carefully evaluate his or her own legal authority, as well as that of the relevant government actors, and then clarify the nature of the interests which are, or may be, in conflict.

Despite its critical nature, the task of client identification often does not receive the attention it deserves from the typically underpaid and overworked municipal practitioner, and even when it does receive adequate attention, applying the rules pertinent to the lawyer-client relationship in the government context is a little like riding a bicycle, or trying a case for that matter. Theory seems to fly out the window as soon as you are actually sitting in the bicycle seat, or occupying first chair at a trial. Maybe that is why legal ethics, like ethics generally, is a topic most usefully discussed with reference to specific facts, at least when not a function of self-explanatory, bright-line rules. Thus, in addition to addressing some pertinent case law and commentary, this article considers a few specific cases reflecting the author's experience representing the City of Providence.

The Public Interest v. the Ethical Approach

Two distinct approaches to the task of identifying the government client have evolved over the years: the "public interest" approach and the "ethical" approach.[1] The public interest approach is probably most famously illustrated by **Kay v. Board of Higher Education**.[2]

Kay involved a challenge to the appointment of Bertrand Russell, the famous philosopher and mathematician (who also apparently enjoyed a reputation in some circles as a dessicated, divorced, and decadent advocate of sexual promiscuity), to a chair at The City College of New York. New York City's Corporation Counsel refused to appeal a lower court's ruling which would have had the effect of disqualifying Russell from the position, despite the fact that the City's Board of Higher Education had formally requested that the City's attorney file an appeal. Mayor Fiorello A. LaGuardia, acting in direct opposition to the Board of Higher Education, had removed Russell's position from the city budget while the action was pending.[3]

The appellate court in **Kay**, completely ignoring the conflict between the interests of the Mayor and those of the Board of Higher Education, concluded that since the New York City Charter provided the Corporation Counsel with the authority to conduct the law business of the city and its agencies, "the Corporation Counsel [was] the sole judge as to the conduct of litigation and other law matters," and his decision not to file an appeal was held to be binding.[4]

The contrary ethical approach can be illustrated by **Krahmer v. McClafferty**,[5] where the court held that the city council was entitled to separate legal counsel in an action involving a taxpayer's challenge to the legality of certain appropriation ordinances. The solicitor in **McClafferty** challenged the need for independent counsel even though the mayor, who had

appointed him, had gone on record supporting the taxpayer's challenge.[6] The court noted that "when conflict exists and regardless of the Charter provisions, the better reasoned legal authorities clearly hold that both parties are entitled to their own representation, in this case independent counsel representing the defendants." *Id.* at 633 (citations omitted).[7] Thus, under the ethical approach, a solicitor's client is never some amorphous entity known as "the City" or "the People," but instead is the specific individual or entity legally empowered to act for the municipality in any given situation.

Rule 1.13 – The Organization as Client in Rhode Island

In Rhode Island, it seems clear the Rules of Professional Conduct apply in the governmental context, any ambiguity in the Official Commentary to Rule 1.13 notwithstanding.[8] Thus, the starting point for identifying the client in a government, as well as a privately-owned organization, in Rhode Island is Rule 1.13, which, reflecting the ethical approach, provides that: "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." *Id.*[9]

The Solicitor and the Mayor-Council Form of Government

Like many municipalities throughout the state, Providence is governed on a day-to-day basis pursuant to a so-called "Mayor-Council" model.[10] The Providence Home Rule Charter divides most powers between its elected officials, i.e., the mayor, who is vested with executive and administrative powers, which include the power to "supervise, direct and control the activities of all departments and agencies of city government" as well as to "prepare and implement the city budget;"[11] and the city council," which has legislative and investigatory powers, including the power to enact ordinances "necessary to insure the welfare and good order of the city," as well as to adopt the annual city budget ordinance and to levy taxes.[12]

Unlike City departments, a third group of entities referenced in the Charter, boards and commissions, are not made subject to the direction and control of the mayor when carrying out their duties.[13] Since City boards and commissions are not separate corporate entities, but crea-

tures of the Charter, they are subject to the legislative power of the city council.[14] Yet, as a practical matter, boards and commissions have sufficient day-to-day authority such as to make the City's model of government perhaps more appropriately described as the "Mayor-Council-Board" model.[15]

In Providence, the solicitor's powers and duties under the Charter may, for present purposes at least, be grouped into four main categories, to: 1) act as "chief legal advisor and attorney" for the city and all departments, boards, commissions, bureaus and officers thereof;" 2) prosecute or defend, as the case may be, all suits or cases to which the city or any agency of city government is a party; 3) "perform such other legal duties as the city council may by resolution or ordinance require;" and 4) on his own initiative, "stop any activity prohibited by this Charter, or compel the performance of any officer or employee of the City who fails to perform any duty, discharge any responsibility, or make any disclosure required by the terms of this Charter or by law."[16] Thus, when exercising these powers and duties, the solicitor's client (unless he or she is acting pursuant to an independent duty), is either: 1) the mayor (or an individual who is under the control, and serves at the pleasure of, the mayor); 2) the city council (or an individual who is under the control, and serves at the pleasure of, the council); or 3) an independent board or commission.

Rule 1.7 - Conflicts of Interest

Rhode Island's Rules of Professional Conduct are explicit in noting that "[a] lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7 governing conflict of interest."[17] However, it is imperative that a lawyer attempting to defend both a government entity and an individually-named government employee provide the employee with a joint representation letter advising the employee as to his or her right to obtain separate counsel and informing the employee that if a conflict of interest were to develop, the lawyer would likely continue to represent the entity rather than the employee, or withdraw from the case.[18]

The plain text of Rule 1.7 draws a distinction between cases where the compet-

ing interests are "directly adverse," and those where a lawyer's dual representation will be "materially limited by the lawyer's responsibilities to another client."[19] The courts, however, tend to blur the distinction between the two subsections, requiring an "actual," as opposed to a merely "possible," conflict in order to trigger the Rule's prohibition;[20] making the proper navigation of actual and/or potential conflicts more difficult, especially in the government context.

For example, in **Town of Johnston v. Santilli**, 892 A.2d 123 (R.I. 2006), the school committee attempted to hire a private attorney to defend it against a claim brought by the Johnston Federation of Teachers. The union objected to the retention of outside counsel on the ground that the Town Charter expressly provided that the town solicitor was to be the attorney for all town "departments," and the solicitor moved to intervene in support of the union's position. *Id.* at 125-26. While acknowledging that there may be situations where the solicitor would be ethically prohibited from representing both the town and the school committee, such as if the school committee were to sue the town for inadequate school funding under R.I. Gen. Laws § 16-2-21.4(b), *see id.* at 131, the court nonetheless held that neither the Code of Ethics nor the Rules of Professional Conduct served as an absolute bar to joint representation. *See id.* at 132-33.[21]

In Providence, although the council must pass an ordinance or resolution to require the solicitor to perform a specific legal duty,[22] this is not the case when a duly-enacted City ordinance has been legally challenged. In such cases, the solicitor is duty bound to defend the ordinance. But what if the ordinance became law without the mayor's signature,[23] or what if the mayor strenuously objected to the measure or, worse yet, it was enacted over his veto?

Whether a mayoral veto, or even the passage of an ordinance in the face of a strong mayoral objection, mandates recusal by the solicitor and the appointment of separate counsel to defend the ordinance depends upon whether the specific facts suggest that the competing interests are "directly adverse," or would "materially limit" the solicitor's ability to defend the ordinance within the meaning of Rule 1.7, or would impair the solicitor's ability to represent the mayor in

other matters.[24] And, of course, a solicitor might have to retain separate representation for the council if, for example, the council were to ignore the advice of the solicitor and approved an ordinance which violated the Charter. In which case, the solicitor would be compelled under the Charter to commence action against the legislative body.[25]

Conflicts also can arise between the city council and a municipal board or agency, as was the case in **City of Providence v. Retirement Board of the City of Providence**,[26] which presents a useful, if procedurally complex, illustration of the need to carefully define the authority of the municipal actor and identify pertinent conflicts. In **Retirement Board**, the City, as party plaintiff, commenced suit to challenge the validity of certain cost of living adjustments (COLAs) passed by the Retirement Board. The action was commenced pursuant to a resolution of the City Council, and, because the Retirement Board and the City Treasurer were named as defendants, the Council retained private counsel to represent "the City."[27]

Judge Gibney upheld the validity of the COLAs, and the parties were ordered to submit a judgment. However, instead of preparing a judgment reflecting Judge Gibney's decision, the parties: the City Treasurer, represented by the City Solicitor; the City, represented by a private attorney: the Retirement Board, represented by another private attorney; and the City's Director of Administration, unrepresented negotiated a settlement resulting in the entry of a consent decree mandating payment of the COLAs.[28] A year and a half later, the City Council, attempting to avoid payment of the COLAs, passed a resolution directing the Solicitor to: "apply for injunctive and any other appropriate relief to prevent any further enforcement of the COLA."[29] The solicitor at the time, who evidently did not receive contrary orders from the executive branch, followed the Council's directive and commenced suit, arguing that the consent decree was not binding upon the City.

Hindsight, of course, is always, 20/20, but, in retrospect, it does seem that some of the confusion in **Retirement Board**, *supra*, could have been avoided had the solicitor at the time taken a harder look

continued on page 40

The 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. The Foundation invites you to join in meeting the challenges ahead by contributing to the Foundation's Tribute Program. The Foundation's Tribute Program honors the memory, accomplishments, or special occasion of an attorney, a friend, a loved one, his or her spouse, or another family member. Those wishing to honor a colleague, friend, or family member may do so by filling out the form and mailing it, with their contribution, to the Rhode Island Bar Foundation, 115 Cedar Street, Providence, RI 02903. You may also request a form by contacting the Rhode Island Bar Foundation at 401-421-6541. All gifts will be acknowledged to the family.

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All gifts are acknowledged in the Foundation's annual report.

New Annual Bar Awards Nomination Schedule

With an increase in Rhode Island Bar Association annual awards, the Bar's Executive Committee determined to provide improved and appropriate recognition for award winners. As a result, major Bar Association awards will be open for nomination on an every other year basis.

2011 Bar Awards

This year, for 2011, the Bar is accepting Bar member nominations for the following awards: 1) *Joseph T. Houlihan Lifetime Mentor Award*; 2) *Chief Justice Joseph R. Weisberger Judicial Excellence Award*. Award nomination information both appears below and can be found at www.ribar.com.

The Bar's Executive Committee will also select a recipient for the *Award of Merit* and an appointed Bar committee will accept and review non-profit organization nominations for the *Dorothy Lohmann Community Service Award*.

2012 Bar Awards

Next year, for 2012, the Bar will accept Bar member nominations for the following awards: 1) *Ralph P. Semonoff Award for Professionalism*; 2) *Florence K. Murray Award* and 3) *Victoria M. Almeida Servant Leader Award*. Additionally, the Bar will determine recipients for the *Volunteer Lawyer Program Continuing Service Award*.

The Bar will continue to award the *Rhode Island Bar Journal Lauren E. Jones Writing Award*, the *Volunteer Lawyer & Pro Bono Program for the Elderly Award*s, and will recognize the *50 Year Members* on an annual basis.

2011 Joseph T. Houlihan Lifetime Mentor Award Nominations

The Rhode Island Bar Association's J*oseph T. Houlihan Lifetime Mentor Award*, named for the late Joseph T. Houlihan who was known for his generosity of spirit and legal expertise in and out of the courtroom, honors individuals who, during their careers, have consistently demonstrated an extraordinary commitment to successfully mentoring in the Rhode Island legal community. The Award recognizes an attorney who: serves as a role model to other lawyers in Rhode Island; has significantly contributed to the profession and/or the community; with their excellent counsel have excelled as mentors and contributed to the ideals of ethics, civility, professionalism and legal skills. Award nominations, including a written report detailing how the nominee meets the criteria, are due no later than **MARCH 4, 2011** and must be addressed to:

Rhode Island Bar Association
Executive Committee
2011 Houlihan Award
115 Cedar Street
Providence, RI 02903

Anthony J. Montalbano, Esq. received the 2010 Joseph T. Houlihan Lifetime Mentor Award.

2011 Chief Justice Joseph R. Weisberger Judicial Excellence Award Nominations

The Rhode Island Bar Association's, *Chief Justice Joseph R. Weisberger Judicial Excellence Award*, named in honor of its first recipient, retired Chief Justice Joseph R. Weisberger, is presented to a judge of the Rhode Island State Courts or Federal District Court for exemplifying and encouraging the highest level of competence, integrity, judicial temperament, ethical conduct and professionalism. The nominee is selected by a Bar committee appointed by the President of the Rhode Island Bar Association. The Committee invites suggestions for nominations. To nominate a member of the Rhode Island Judiciary please send a letter of nomination, with any supporting documents, no later than **MARCH 4, 2011**, to:

Chairperson
2011 Chief Justice Joseph R. Weisberger Judicial Excellence Award
Rhode Island Bar Association
115 Cedar Street
Providence, RI 02903

Hon. Michael A. Silverstein, Associate Justice of the Rhode Island Superior Court was honored with the 2010 Chief Justice Joseph R. Weisberger Judicial Excellence Award.

2011 Dorothy Lohmann Community Service Award

The Rhode Island Bar Association is seeking nominations from non-profit organizations for the 2011 Dorothy Lohmann Community Service Award. This award recognizes and honors attorneys who generously donate their time and legal expertise for charitable work. Nominations are accepted from, and only from, non-profit organizations where Rhode Island attorneys have devoted a significant amount of their time and effort on a strictly voluntary, non-paid basis. Bar members are asked to contact non-profits where their colleagues have made significant contributions and encourage nominations. The Awards Committee is particularly interested in attorney actions most closely reflecting those of the Award's namesake. Nomination criteria may be obtained from the Bar's Frederick D. Massie by telephone: 401-421-5740 or email: fmassie@ribar.com.

All nominations are due no later than **MARCH 4, 2011**. Postal mail, email, or fax nominations and/or direct questions to:

2011 Lohmann Awards Committee
c/o Frederick D. Massie
Director of Communications
Rhode Island Bar Association
115 Cedar Street
Providence, RI 02903
fax: 401-421-2703
phone: 401-421-5740
email: fmassie@ribar.com ❖

Past Bar President Victoria M. Almeida Neil J. Houston Memorial Award Recipient

2010 Justice Assistance award honorees Elia Germani, Esq., Hon. Bruce M. Selya, Hon. Elaine T. Bucci, Hon. Robert J. Flanders, and Victoria M. Almeida, Esq.

Rhode Island Bar Association Past President and Rhode Island Parole Board Vice Chair Victoria M. Almeida received a 2010 Justice Assistance, *Neil J. Houston, Jr. Memorial Award*. The annual Houston Award honors individuals who have demonstrated dedication, service, and citizen contributions to the criminal justice profession and the public interest. Other Houston Award winners include: Rhode Island District Court Associate Judge Elaine T. Bucci; former Rhode Island Supreme Court Associate Justice and current Rhode Island Board of Regents Chair Robert G. Flanders, Jr.; Rhode Island Public Utilities Chair Elia Germani; Warwick Police Chief Stephen M. McCartney; and Sister Ann Keefe of St. Michael's Ministry. Justice Assistance also presented the *Edward V. Healey, Jr. Lifetime Achievement Award* to United States Court of Appeals for the First Circuit Senior Judge Bruce M. Selya.

According to Justice Assistance Executive Director Jonathan J. Houston, "We are impressed each and every day with the diligence and dedication with which these honorees approach their duties. They do their jobs not only as administrators of justice, but as thoughtful, reasoned and compassionate members of our community. Eleanor Roosevelt said 'Justice cannot be for one side alone, but must be for both.' And each of these individuals embraces this ideal and works toward a positive end for our victims, our ex-offenders and our community as a whole."

The Third, and Best, Way to Settle a Boundary Dispute

Roland F. Chase, Esq.
Of counsel at Miller Scott & Holbrook, Newport and author of the *Rhode Island Zoning Handbook*

The doctrine of acquiescence… holds that notwithstanding any deed language to the contrary, the true boundary between adjoining properties is an observable physical feature on the land recognized as the boundary by both landowners for at least ten years

The problem, as you see it, is that your next-door neighbor has taken over that thin stretch of land running between the row of arborvitae that you planted many years ago and the boundary between your properties. Your neighbor, however, maintains that the row of arborvitae *is* the boundary line. What is the best way to settle this dispute? The law offers three options:

1. Either of you can file an action to quiet title, relying on deed descriptions. This is probably not the best way to maintain friendly relations and keep those Christmas cards going back and forth every year.
2. Your neighbor can assiduously maintain the disputed area and use it as part of his yard against your wishes for at least ten years. Then, when you finally decide to assert your rights, you discover that he now owns that land under the doctrine of adverse possession. Again, no more cheery greetings when you see each other in the morning.
3. The two of you could talk about it and decide that since your neighbor has mowed the grass and trimmed the arborvitae for so long, and you really just want the arborvitae for privacy and cannot see that stretch of lawn anyway, you'll just work together to pound some stakes on his side of the arborvitae and make the line between the stakes the true boundary. That gives him the little lawn area and you the arborvitae.

Can you really do that, without getting a survey and hiring lawyers and signing a legally-binding agreement and going downtown to a law office to sign new deeds that will then be recorded in the land evidence records? The answer is yes, and it is completely legal, under the longstanding common law rule of acquiescence.[1] Furthermore, a boundary settlement by acquiescence seems, by its very nature, more likely to foster harmony in the neighborhood.

Definition and legal requirements

The doctrine of acquiescence, first recognized in Rhode Island in 1890,[2] holds that notwithstanding any deed language to the contrary, the true boundary between adjoining properties is an observable physical feature on the land recognized as the boundary by both landowners for at least ten years.[3]

Another way of stating the doctrine is that owners of adjoining estates are precluded from denying a boundary line recognized by both owners for a length of time equal to that prescribed by the statute of limitations barring a right of reentry.[4] In other words, if adjacent landowners recognize some kind of physical line – such as a fence or hedge – as the boundary line separating their properties, and continue to recognize it as such for at least ten years, then that line overrides any different boundary described in their deeds and becomes the legal boundary between their properties. In effect the acts of the parties and their predecessors serve as a substitute for the actual record title.[5]

The important thing for acquiescence is that the observable physical feature must be recognized and accepted as the boundary between the properties; even a fence near and parallel to the deeded boundary will not satisfy the doctrine of acquiescence if it is not recognized by the abutting owners as the boundary between their properties.[6]

When a boundary line is found to be established by acquiescence, the accuracy of any survey of the property is irrelevant.[7] In fact, in a boundary dispute, acquiescence may have the effect of substituting a crooked line for a nice straight line established by deeds.[8] A fence or other boundary marker that has been removed after ten years of acquiescence may be rebuilt at the same location even if a survey shows that it differs from with the boundary described in the deeds.[9]

On the other hand, if the claimed marker for a boundary line is not particularly obvious, then "clear calls" in the abutting neighbor's deed can refute acquiescence.[10] Similarly, even if the physical feature claimed to constitute the boundary is clearly visible and ancient, later surveys and deeds describing the boundary in measurements without mentioning the physical feature may defeat a claim of acquiescence,[11] although this is not always true.[12]

In addition to the utilitarian function of

determining when boundaries marked by physical objects will be given preference over boundary lines described in recorded titles, the doctrine of acquiescence serves the purpose of "quieting titles, and preventing the uncertainty and confusion, and consequent litigation which would be likely to result from the disturbance of boundary lines so long established."[13]

Distinction between acquiescence and adverse possession

The doctrines of acquiescence and adverse possession are similar in many respects, and the facts in boundary line disputes may support recovery for the claimant under either doctrine.[14]

These two legal doctrines are not identical, however. The main difference is that in adverse possession the actions of the claimant must have been adverse, or hostile,[15] to the record owner, whereas in acquiescence there must have been a mutual understanding or at least a tacit agreement on the location of the boundary.[16] The requirement of hostility means that permission by the record owner defeats a claim for adverse possession,[17] because by definition if the record owner of disputed land gives permission for another to occupy it, such occupation is not hostile to the owner's interests. However, permission of the record owner is not necessarily fatal to a claim of title by acquiescence, even if the owner continues to believe that the use is permissive.[18]

The other significant difference is that the possession of disputed land must be continuous for the ten-year period to constitute adverse possession,[19] whereas continuity – or even possession – is not necessarily required for acquiescence.[20]

Acquiescence by express oral agreement

Although the typical case of acquiescence involves tacit recognition of a boundary between lots created through mistaken or disputed use of land over a long period of time, it is also possible for neighbors to create the legal boundary between their properties by agreement.[21] In fact, the theory underlying the doctrine of acquiescence, in effect, sets up a conclusive presumption that there was an earlier agreement to establish a particular line as the boundary. As stated in the original Rhode Island acquiescence case and repeated often,

[A]cquiescence in a boundary line,

assumed or established, for a period equal to that prescribed in the statute of limitations to bar an entry, is conclusive evidence of such an agreement, and will preclude the parties from setting up the claim that the line so acquiesced in is not the true boundary.[22]

Thus, when the boundary line between adjacent lands is uncertain or disputed, the owners may establish a division line between them by parol agreement and if such an agreement is immediately executed and given effect by actual possession according to such line, the agreement is binding and conclusive, even though it turns out not to be the true line according to the paper title.[23]

This does not raise a problem with the statute of frauds since, theoretically at least, acquiescence does not pass title to real estate but merely defines the line between the respective parcels of land.[24]

As a practical matter, of course, an oral agreement, even if sealed with a handshake, is, as the Supreme Court put it in one acquiescence case, "tantamount to an invitation to a lawsuit."[25] Obviously the better course of action would be, if not to exchange new deeds, at least to record a memorandum of their agreement.[26]

However, although an express agreement will satisfy the legal requirements for acquiescence, it is clear that such an agreement is not required. Mere silence or failure to object to a physical line established or treated as the boundary by the neighboring property owner may constitute the agreement necessary for the doctrine of acquiescence,[27] as long as the silent party was at least aware of the alleged boundary line agreement or acquiescence of a predecessor in title.[28] An even stronger case for creating a boundary by acquiescence is presented when both property owners actively maintain or repair the boundary,[29] although this too is not conclusive evidence of acquiescence.[30] Of course, acquiescence is almost certainly to be found where a landowner unilaterally makes statements that can only be interpreted as relinquishing any claim to ownership of land marked off by a fence or other physical feature.[31]

Conversely, of course, evidence of objection to a claim of acquiescence, especially if backed up by litigation or a threat of litigation, defeats the claim.[32]

Bar and Law School Divorce Mediation Clinic Provides Pro Bono Assistance

Mediation Clinic facilitators included VLP Attorneys and RWU Law School students, left to right, back row: Diana Peretti, Aaron Greenlee, Christine Engustian, Esq., Jay Miller, Neville Bedford, Esq., Bar President Lise M. Iwon, Esq., Kelly Nardone Rafferty / middle row: Kristine Trocki, Esq., Matthew Casey, Jessica Deschenes, Maria Corvese, Jennifer Spavins, Lynne Radiches, Bar Public Services Director Susan Fontaine / front row: Professor Bruce Kogan, Margie Caranci, Kaitlyn Sanders, David Tassoni, Esq.

The 2nd Annual Divorce Mediation Clinic was organized through the Rhode Island Bar Association's Volunteer Lawyer Program (VLP) and the Roger Williams University School of Law Mediation Clinic with the assistance of volunteer attorney mediators, law students, Bar staff and the Rhode Island Family Court. Eight couples attended and were provided with mediated memoranda of understanding. All the couples have since been referred to VLP attorneys to finalize the process. Given the success of this joint venture, another Mediation Clinic is in the works for February, 2011.

What constitutes an observable boundary line?

Virtually any kind of a physical feature on the landscape can serve as an observable boundary line between adjacent properties under the doctrine of acquiescence. The most obvious kind of boundary that neighbors recognize is probably a wall or fence,[33] or the remains of a fence.[34] When a fence or other physical structure along the boundary is not vertical but leans to one side or the other, the boundary line established by acquiescence is measured on the ground, along the base of the fence or other structure.[35]

However, the boundary line required by acquiescence need not be a fence or other man-made structure; it may be a hedge,[36] a row of arborvitae,[37] or the edge of a regularly mowed lawn.[38] Where the boundary established by acquiescence is a line of trees or shrubs, whether the exact boundary bisects or lies on one side or the other of their trunks may depend on which of the neighboring landowners planted the row,[39] or on whether it was maintained by both or only one of the owners,[40] or on a combination of those facts.

Proof of acquiescence

A determination of acquiescence is a mixed question of law and fact.[41] The Supreme Court has explained that the issue of what constitutes the boundaries of a parcel of land is a question of law, while the determination of where such boundaries are located is a question of fact.[42] For example, *whether* a row of vegetation is the proper boundary between two properties is a question of law, but exactly *where* the vegetation is or was located during the time of acquiescence is a question of fact.[43] Also, whether the parties really acquiesced in the alleged boundary is an issue of fact.[44]

The mutual acceptance of the boundary line required for acquiescence is said to be an objective test, without regard to what either party knew or thought.[45] Thus even strong evidence that a landowner "always believed" that he owned bushes forming a boundary line cannot overcome an objective determination that the bushes were owned by both adjoining landowners since they both maintained the side that faced them.[46] In other words, the conduct of the parties may speak louder than their words

on the issue of acquiescence.[47]

A mere preponderance of the evidence, not clear and convincing evidence, is the standard to be applied in establishing acquiescence.[48]

Conclusion

Sometimes neighboring property owners feel so strongly about the location of a disputed boundary line that court action is the only way to resolve it. Sometimes one of the property owners is so diligent and the other so indifferent that the matter is ultimately settled in favor of the diligent one under the doctrine of adverse possession.

But for all the boundary disputes that do not fall in one of those two categories, the common law doctrine of acquiescence may be the best way to not only resolve the dispute, but do it amicably, leaving neighborly neighbors.

ENDNOTES

1 *Of course, the fact that boundary disputes can legally be settled by acquiescence does not necessarily mean it is always a good idea. The result may still be litigation, perhaps when a new owner moves in. However, acquiescence does have its attractive aspects and, in any case, is an important doctrine for resolving disputes that for whatever reason have ended up in court.*

2 ***O'Donnell v. Penney**, 17 R.I. 164, 20 A. 305 (1890).*

3 ***DiMaio v. Ranaldi**, 49 R.I. 204, 142 A. 145 (1928) (fence that had remained unchanged and unmoved for more than 20 years was true boundary, despite contrary measurements in deeds, where fence location had been acquiesced in by adjoining owners during that time); **Locke v. O'Brien**, 610 A.2d 552 (R.I. 1992) (party claiming ownership by acquiescence must show that boundary marker existed and that parties recognized that boundary for period equal to that prescribed in statute of limitations to bar reentry, or ten years); **DeCosta v. DeCosta**, 819 A.2d 1261 (R.I. 2003) (although hedgerow planted by defendants was situated two feet onto plaintiffs' property, doctrine of acquiescence operated to vest title to property on plaintiffs' side of hedgerow in defendants since hedgerow was treated by both parties as boundary for more than ten years).*

4 ***Locke v. O'Brien**, 610 A.2d 552 (R.I. 1992); **Nye v. Brousseau**, 992 A.2d 1002 (R.I. 2010).*

5 ***Locke v. O'Brien**, 610 A.2d 552 (R.I. 1992).*

6 ***See Ungaro v. Mete**, 68 R.I. 419, 27 A.2d 826 (1942) (chicken wire fence constructed and maintained by both neighboring property owners did not become boundary through acquiescence where there was credible evidence of express agreement between neighbors that fence was not true boundary but was temporary fence to keep dogs and children away from plants); **Daneker v. Olenn**, 705 A.2d 988 (R.I. 1997) (fence located 12 feet*

continued on page 45

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Continuing Legal Education Update

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All dates and times are subject to change.

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RI Law Center, Providence
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January 19
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Defense Counsel's Objections At Trial
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January 20
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Identity Theft – Who Is Covered?
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Estate Planning in Uncertain Times
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February 15
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Practical Skills
Civil Law Practice in Rhode Island Superior Court
Crowne Plaza Hotel, Warwick
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4.0 credits + 1.0 ethics

February 17
Thursday
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RI Law Center, Providence
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February 9
Wednesday
Food for Thought
Linked into Social Media in the Workplace
Holiday Inn Express, Middletown
12:45 p.m.—1:45 p.m., 1.0 credit

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Attorney Practice Guide: Criminal Defense Representation Part III* The Post-Verdict Phase

George M. Muksian, Esq.
Chief Legal Counsel to the Rhode Island Department of Elementary and Secondary Education

…counsel's first responsibility is to ensure that such information [drawn from the totality of the evidence admitted at trial, or, in the case of a negotiated plea, based on the information contained within the reports and witness statements, as well as the information provided by the presentence report] is not misconstrued, inaccurate or otherwise misstated or improperly presented to the court.

I. Motion for a New Trial

a. Counsel should be knowledgeable about the procedural requirements and legal standards for requesting a new trial pursuant to Rule 33 of the Superior Court Rules of Criminal Procedure, and should approach the preparation and hearing according to the following:
   a) in arguing for a new trial, the court should be viewed primarily as a finder-of-fact, and all the testimony and material evidence presented at trial should be taken into consideration;
   b) in asking the court to exercise its own independent judgment, counsel should articulate the evidence in terms of witness credibility and the weight of the evidence, and do so in light of the charge to the jury;
   c) in conclusion, counsel should argue that the evidence and all reasonable inferences drawn from there should be viewed as insufficient, that the prosecution has failed to sustain its burden of proof, and that the jury's verdict should be adjudged as clearly wrong.

b. In weighing the appropriateness of filing a motion for a new trial, counsel should consider its merits per se and whether a denial of the motion for a new trial would offer a meritorious issue for appellate review.

II. Sentencing Considerations

1. Given that the sentencing process is built on information drawn from the totality of the evidence admitted at trial, or, in the case of a negotiated plea, based on the information contained within the reports and witness statements, as well as the information provided by the presentence report, counsel's first responsibility is to ensure that such information is not misconstrued, inaccurate or otherwise misstated or improperly presented to the court. Moreover, counsel should undertake the following:
   a. Fully inform the client as to all sentencing possibilities and the prerequisites and consequences as to each;
   b. Prepare the client for the presentence report interview process and, anticipating his or her role at sentencing, assist the client in exercising the right of allocution;
   c. Prepare the client for his or her role at sentencing without adversely affecting the client's position in the event of an appeal, retrial, trial or as relating to matters or hearings before the parole authority;
   d. Prepare by obtaining personal history of the client, including education, employment, trade skills, health issues, family history, and financial information, as well as sources for corroboration of this information;
   e. Present or make arrangements for the presentation of available mitigating or otherwise favorable information to the sentencing court;
   f. Research and compare sentences imposed for the same or similar offense(s) in other cases for purposes of addressing proportionality in sentencing;
   g. Refer to the sentencing guidelines, if applicable, when advantageous to the client;
   h. Offer a reasonable sentencing scheme that minimizes the term of imprisonment or lessens the burdens associated with the imposition of a sentence in light of the circumstances related to the offense(s) and other aspects of the case and the client's personal history as reflected in the presentence report;
   i. Inform the client of counsel's sentencing recommendation, and, in the event the client does not support counsel's recommended sentence, counsel should advise the client of the right to state his or her preferred sentence recommendation at the time of sentencing;
   j. Move to delete all information from the presentence report that is inaccurate, unreliable, unproven or otherwise unfairly prejudicial to the client;
   k. Consider retaining sentencing or mitigation specialists, as well as other experts

from the field of human services;

1. Consider preparing and introducing witnesses at sentencing to provide testimony that is relevant and favorable to the client;
2. Counsel should be knowledgeable about sentencing procedures, including:
   a. The sentencing guideline system and the court's discretion to deviate from the sentencing range;
   b. The statutory authority of the court to recommend or order as part of the sentence specific classification status or programming opportunities for the client;
   c. The process of the presentence investigation and report, and the client's rights in the process to access and provide input;
   d. The practice of preparing and submitting a sentence memorandum, including a sentence proposal, when there is a strategic reason for doing so; for example: to correct or supplement information contained in the presentence report; to provide corrective inferences and alternate conclusions to adverse ones provided in the presentence report; references to documentary and testimonial sources that support refuted information contained in the presentence report; to provide information that mitigates the client's guilt or offers favorable characterization based on personal history; information that would favor a sentence other than imprisonment; facts that would support a disposition defined by therapeutic rehabilitation or referral to community resources.
   e. The practice and procedure of challenging information contained in the presentence report, including the opportunity to engage in an evidentiary hearing for purposes of challenging such information;
   f. Preservation of the client's interests in the event the court denies a request to conduct a hearing on any presentence information that is materially prejudicial to the client;
   g. The right of victims and interested parties to participate in the sentencing process.
3. Counsel should be knowledgeable about all collateral sentencing matters and available institutional services that

may be subject or related to the court's sentencing authority, including:
   a. Parole eligibility in terms of statutory and administrative provisions;
   b. Good-time credit, including how good-time credit is earned, calculated and applied to determine the release date;
   c. The institutional classification process and security-level determinations;
   d. Institutional programs, including: treatment services for substance dependency and mental health issues; primary and specialized health care; educational programs; and, work-release program;
   e. Impact on voting rights, governmental insurance benefits, licenses, and immigration status;
   f. Discharge services for educational, employment and housing needs.

III. Post-Sentencing Considerations

1. Counsel should advise the client of the right to appeal, as well as the steps that are necessary for perfecting an appeal. In those instances where the client wishes to exercise the right of appeal, or where the client expresses an uncertainty about appealing the judgment of the court, counsel should file a notice of appeal. Where the client expresses a desire to exercise the right of appeal, counsel should fulfill all other requirements, including the ordering of the trial transcript, as required by the rules of court. Appellate considerations should encompass both the judgment of guilt as well as the legality of the sentence that has been imposed.
2. Counsel should advise the client of the right to request the setting of bail pending appeal from the judgment and/or sentence of the court, and should make a timely motion for the setting of bail if the client so instructs.
3. In the event that trial counsel does not serve as appellate counsel, trial counsel should assist appellate counsel in becoming generally knowledgeable about the history of the case and those issues that may be relevant to the appeal.
4. When the sentence of the court is a term of imprisonment, counsel should move for a stay of execution, at the client's request, if to do so would be reasonably supported by the law as

well as under the circumstances.

5. Counsel should advise the client of the right to move for a reduction of sentence pursuant to Rule 35 of the Superior Court Rules of Criminal Procedure, as well as the option of the prosecution to request a sentence increase or the right of the court to increase the sentence sua sponte pursuant of Rule 35(b).
6. Counsel should advise the client of his or her right to expunge the record of arrest and subsequent judicial proceedings, whether resulting in conviction, acquittal, dismissal or other record of exoneration, and the relevant provisions of law governing expungement.

***Editor's Note:** *Attorney Practice Guide: Criminal Defense Representation – Part I: Pretrial Phase* appeared in the *Rhode Island Bar Journal*, November/December 2008. *Attorney Practice Guide: Criminal Defense Representation – Part II: The Trial Phase* appeared in the *Rhode Island Bar Journal*, January/February 2010.

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Counting to Ten Really Does Work

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

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

Rhode Island Bar Association House of Delegates Letters of Interest Due February 21, 2011

Involvement in the activities of our Bar Association is a richly rewarding experience. One way to become familiar with the activities of our Bar Association is by becoming a member of the House of Delegates. Certainly, if one is interested in becoming a member of the Executive Committee and an eventual officer, being a member of the House of Delegates is the necessary first step. To learn more about Rhode Island Bar governance, please visit our website at http://www.ribar.com/aboutus/governance.asp

The Nominating Committee will meet soon to prepare a slate of officers and members of the 2011-2012 Rhode Island Bar Association House of Delegates. The term of office is July 1, 2011 - June 30, 2012. If you have not already done so, to be considered for appointment to the House of Delegates, please send a letter of interest no later than **February 21, 2011.**

Letters of interest should include the member's length of service to the Rhode Island Bar Association (i.e., participation in Committees and positions held in those Committees; community service to the Bar Association and outside the Bar Association, and positions held outside the Bar Association). Testimonials and letters of recommendation are neither required nor encouraged. Direct and indirect informal contact by candidates or those wishing to address a candidate's qualifications to members of the Nominating Committee is prohibited.

HOD Nominating Committee Chairperson
Rhode Island Bar Association
115 Cedar Street
Providence, RI 02903

Or, you may send your letter of interest to Helen Desmond McDonald, Executive Director by fax: 401-421-2703, or email: hmcdonald@ribar.com

There will be an Open Forum at the Bar Headquarters at a date in February or March to be determined at which candidates for the House of Delegates and for Officer Position(s) may, but are not required to, appear before the Nominating Committee and further explain their candidacy. Candidates for officer positions and candidates for the House at large will be given up to ten minutes each to speak (or as determined by the Chair). Candidates who elect to address the Nominating Committee are encouraged to present their vision of how they would advance the mission of the Bar through their service in the office.

Any member planning to make a presentation at the Open Forum must inform Executive Director Helen McDonald, prior to the Forum via email: hmcdonald@ribar.com or telephone: 401-421-5740.

Cordially,

Lise M. Iwon
President Rhode Island Bar Association

Sometimes, What is Public is Private

Robert Ellis Smith, Esq.
Publisher of the Providence-based, *Privacy Journal* newsletter.

…according to the clear implications of previous federal court holdings in the U.S., many activities in public are entitled to privacy protection.

Conventional wisdom notes that nothing can be done legally about ubiquitous camera surveillance in our communities, that it does not violate any law or constitutional principle. Part of that acceptance, is the mistaken idea that because an activity takes place in public view, it is not protected by any expectation of privacy.

In fact, according to the clear implications of previous federal court holdings in the U.S., many activities in public are entitled to privacy protection. These include: going to and from a house of worship, an abortion clinic, or a medical facility; holding hands or embracing affectionately in public; participating in a political demonstration or wearing political symbols; reading a book or a magazine; mediating or praying, and perhaps chatting on a cell phone in a way that is audible nearby. The right to vote in the U.S. and Canada may be interpreted to prohibit videotaping citizens as they visit a polling place.

"The Fourth Amendment protects people, not places," said the U.S. Supreme Court 1967, in an opinion that restricted law enforcement's use of audio evidence from a public phone booth.[1] And, the Fourth Amendment to the U.S. Constitution protects not merely homes, but also citizens' "persons, houses, papers, and effects."

In 1972, the U.S. Supreme Court recognized that certain activities in public "are historically part of the amenities of life as we have known them. They are not mentioned in the Bill of Rights [the first ten amendments to the U.S. Constitution guaranteeing individual rights]. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence."[2] The Court said that a state or city may not punish persons engaging in these amenities or "wandering or strolling around from place to place without any lawful purpose or object." In 1983, the court cited this case, **Papachristou v. City of Jacksonville**, approvingly.

Would the 2010 Court allow a city or state to keep a permanent video record of these wanderings? Court members have changed significantly (and to the right) over the years, and there may not be a current Court member who would endorse the opinion in the **Papachristou** case. Still, the case represents the kind of precedent building blocks innovative lawyers must use to protect rights in the high-tech age.

What Kind of Transactions in Public Are Private?

An example of the kind of in-public activities that is entitled to privacy protection is affectionate hand-holding. "A Day In Hand," a new equal-rights initiative in London, England, aiming to inspire same-sex couples to hold hands in public, is calling on gay people, worldwide, to hold hands in public on the last Saturday of each month so the public will get used to the idea. The first international "Sshh!" (same-sex hand-holding) Saturday was held September 26, 2009. David Watkins, the founder of the movement, acknowledged this simple act of autonomy – and perhaps defiance – may be dangerous. In an age of pervasive video monitoring, it is increasingly dangerous. Would anyone argue that such a simple public display of affection is any business of law enforcement? Would anyone argue that it is right to keep a permanent video record of this practice? Would anyone argue that the right to privacy, as we understand it in American law, does not protect this activity?

President Obama, in a speech October 10, 2009, said, "Together we can look forward to that day when no one has to fear walking down the street holding the hand of the person they love." Of course, with state-run video cameras in place, there is every reason to believe that there will be people who fear this for many years to come.

What about videotaping a woman's comings and goings at a clinic that administers abortions? The law of the land in the United States protects the right of a woman to have an abortion without governmental intervention, based on

the constitutional right to privacy. Wouldn't the same right protect the right of a woman not to be photographed by state agents as she seeks the procedure? Would it protect against having a non-governmental group, like a group adamantly opposed to abortion, capture images outside a clinic and post them on the World Wide Web?

Legal scholars in the U.S. disagree on the answers to these questions. Eugene Volokh, law professor at the University of California at Los Angeles, presumably referring to photography by private parties, not governmental agents, concludes that posting the photos is constitutionally protected free expression. But Laura Hodes, a frequent guest columnist and book reviewer on the Findlaw Web site and an attorney, argues, "After all, the Supreme Court has dealt with clashes between asserted First Amendment rights and the constitutional right to obtain an abortion before – and has done so, in particular, in suits on behalf of women who sought not to be intimidated on their way to the abortion clinic. For example, in the 1994 case of **Madsen v. Women's Health Center**,[3] the Court upheld the constitutionality of a 36-foot buffer zone on a public street around an abortion clinic, as well as limited noise restrictions around the clinic. The Court remarked that 'The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests.'"

"It would not be a stretch," continued Hodes, "to say that the court would find that patients should not have to take Herculean efforts to escape prying cameras outside an abortion clinic, either."

Actually, it may be a stretch. Chief Justice William W. Rehnquist said, in 1974, that he wasn't sure an abortion was protected by the right to privacy because, after all, it was a procedure that was observed by others, like a doctor and a nurse![4] At the same time, in a speech at the University of Kansas Law School, Rehnquist declared there was no constitutional infirmity in the police photographing everybody at a political rally "because citizens have no right to privacy when they attend a public rally." John G. Roberts, who became chief justice upon the death of Rehnquist in 2005, is even more hostile to notions of a constitutional right to privacy than was Rehnquist.

Another issue: Cameras maintained by a clinic or by police to document harassment of patients may be constitutionally protected whereas cameras intended to deter or harass visitors or law-enforcement cameras intended to document their comings and goings may not be.

Hodes goes on to observe, "It is worth asking whether we as a society want people posting photos of individuals entering a building for say an Alcoholics Anonymous meeting, or a support group for people with HIV."

How Are Cameras Different From Human Observers?

It is true that each of us, whenever we leave home and enter public spaces, run the risk another person will observe our movements, remember them, and tell others about them. This does not mean we consent to a permanent video record of our comings and goings, a video record that may now be stored digitally, searched by date or by location or by characteristics (like time of day, weather conditions, proximity to landmarks in a community, the nature of a public gathering, or even the density of persons within camera view).

Videotape scenes can potentially be reviewed, in an automated way without human intervention, to detect persons with certain characteristics, including the geometrical relationships of the face of a person (biometrics).

It is this new *permanent* and *digital* search capacity that makes video monitoring a far greater threat than the possibility any stranger will witness our activities in public. The permanent storage of electronic data is far more threatening than the possibility another person may see us in a public place and even take notes or still photographs about what takes place. It is even more threatening than the possibility that a person may post the images on a web site available to millions of people around the globe.

There are other significant differences between human observation and permanent automated camera monitoring. The first relies on the limits of human memory and eyesight, the second does not. The first can be searched electronically by time, place, or biometric characteristics, the second cannot. The first can be altered and still appear accurate. That is usually not true of the second. The first is impersonal and degrading, the second

Bar's Public Service Department Provides Assistance at Resource Fair

Bar Volunteer Lawyer Program Coordinator John Ellis helping one of the many attendees at the Bradley Hospital Resource Fair.

The Rhode Island Bar Association's Public Service Department joined representatives from Rhode Island Parent Information Network, Parent Support Network of Rhode Island, Rhode Island Department of Human Services Center for Child and Family Health, Office of the Mental Health Advocate, Rhode Island Disability Law Center, and CEDARR Family Centers at the fifth annual Bradley Hospital Resource Fair. Representatives from the Bar and the other organizations were on hand to offer details about services and resources available for parents, families, teachers, and children and adolescents with mental health needs.

is not. The first has great monetary value, especially in our culture of reality shows and gotcha news coverage. This is not true of the second. The first can view through darkness, zoom in for a closer look, and swivel 360 degrees, the second cannot. The first can be programmed to focus on certain ethnic groups. The first no longer needs to be labor intensive.

Therefore, the place to look for Supreme Court precedents on whether governmental video surveillance is constitutional may be the line of cases concerning whether intrusions made possible by new technologies require a search warrant even though a warrant is not a requirement for surveillance conducted with the naked eye or ear. More about this later, in a discussion of the **Kyllo** case.

What Is Included in the Right to Privacy?

One reason scholars and average citizens alike immediately, and erroneously, assume there can be no privacy claim for things done in public is that they have a narrow view of privacy. Many people believe privacy is about keeping personal secrets and no more. But, it *is* more. Privacy covers a right of autonomy, or what (in American legal arguments and Supreme Court opinions) has been called "personhood."[5] This is akin to a right of autonomy, a right to do that which you desire to do unless it tends to harm others. In fact, the very first recognition of a right to privacy by the U.S. Supreme Court, in the case of **Union Pacific Railway Co. v. Botsford** in 1891, involved not the right to keep secrets, but the right to control your own person. "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[6] Still, throughout the United States, Canada, and the United Kingdom, camera surveillance systems are installed without any authority of law at all.

Further, part of the right to privacy, in American jurisprudence, is a right of anonymity. Repeatedly, the U.S. Supreme Court has proclaimed a right of anonymity in political discourse.[7] This term, the Court agreed to hear still another.[8] The state may not ban or punish the circulation of political flyers that do not identify the author, for instance. Alan Westin, the foremost academic expert on privacy in the U.S., described anonymity as a form of privacy that "occurs when the individual is in public places or performing public acts but still seeks, and finds, freedom from identification and surveillance." Would not this right to anonymity argue against pervasive state camera surveillance in public places?

The constitutional right to privacy in the U.S. has been based on several interests, including the constitutionally-protected right against government interference with the right to assemble peaceably.[9] This would mean Rehnquist's acceptance of police cameras at political rallies is misplaced. The First Amendment, the source of the right to assemble, has also been held to include a "right to read" (in other words, freedom to select reading materials free of undue government censorship or intrusion). If the gaze of the cameras is refined enough, this right to read is threatened by police cameras in public places.

Privacy Act Covers Federal Monitoring

Beyond that, in the U.S., certain video surveillance *by a federal agency* that becomes part of a system of records in which information may be retrieved by an individual's name or identifiers violates the federal Privacy Act.

The Privacy Act, enacted in the U.S. in 1974, requires collected information to be relevant to a government agency's purpose, prohibits disclosure of personal information for purposes incompatible with the purpose for which it was collected, and requires "to the greatest extent practicable" that information about a person is collected directly from the individual (this is also true in Canada). Further, the Act states that federal agencies may "maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual." The First Amendment protects freedom of speech, freedom to petition one's government and to assemble peacefully, and freedom to practice religion unfettered by the government. Thus, this prohibition would seem to prohibit the federal government from gathering information or images about a person's reading, religious practices, political activities, legislative activism, friendships, or associations. The law also permits an individual to inspect any "records," pre-

sumably including videotapes, about himself or herself.

What about video monitoring conducted by private entities, like a webcam or video camera in a lobby or parking lot or overseeing a public place? Once again, it is erroneously assumed that if it's in public, it's not private. But the monitoring is governed by the common law of torts, encoded in statutes in nearly every state. This allows a victim to collect damages for commercial exploitation of any videotaping of a person's image without consent, even in a public space. (Other branches of the tort would permit recovery of damages for any distribution of still photos or videotapes, whether for profit or not, disclosing "private facts" or depicting a person "in a false light." It was this branch of the tort that was implicated when nude photos of a 19-year-old immigrant player for the Toronto Maple Leafs were circulated on the Internet in 2007. Threatening possible legal action, a lawyer for the player succeeded in getting the images erased within hours, a miracle in the Internet age.)

This misappropriation tort is the commercial use of an individual's face, name, or personality without consent, usually (but not always) implying endorsement of a product or service (as when a gift shop videotapes customers outside or inside its place of business and uses the images to imply the individuals depicted endorse the business or its products). The persons depicted could sue for the misappropriation tort that is part of the common-law right to privacy.[10]

It is this misappropriation tort that is implicated in Google's Street View product, which allows searching for an image of virtually any structure on most American and overseas cities. Virtually all of the public objections to Street View in Canada and Europe are based on vehicle registration numbers and individuals possibly being visible on the web site, but Google promptly agreed to blur them out. (There have been hardly any objections to Street View in the U.S.)

What is more alarming than the possible inclusion of individuals or vehicle plates is Google's claim it may capture images of a personal residence, without consent, and display the image on a site supported by advertising revenue. According to case law developed in the U.S. under the misappropriation tort, the owner of the residence should share in the revenue, by way of royalties, or, at least, have the right to withhold consent to the display in the first place.[11]

Privacy on Fifth Avenue

It's important to recognize that the two most successful invasion-of-privacy (tort) lawsuits in the Twentieth Century in the U.S. involved snooping *on public streets*. And, they involved two of the most famous Americans in the century.

Jacqueline Kennedy Onassis successfully sued an independent paparazzo cameraman who, a federal court ruled, came too close to her and her children on the sidewalks of Fifth Avenue in New York City. Even though the cameraman rightfully claimed a First Amendment right to gather the news, in 1973, the Court ordered him to keep his distance, at least 25 feet from her and her two children, and the Court made its order stick.[12]

Three years earlier, the highest court in New York State ruled that Ralph Nader could sue for damages resulting from monitoring him in public places. After Nader's documented criticism of unsafe automobile manufacturing, the General Motors Corporation (GM) hired agents to shadow him everywhere he went in Washington. They even looked over Nader's shoulder when the man made personal bank transactions. Nader used the money from an eventual settlement with GM to finance his consumer advocacy over many years.

The New York Court said, "The mere gathering of information about a particular individual does not give rise to a cause of action…Privacy is invaded only if the information sought is of a confidential nature and the defendant's conduct was unreasonably intrusive…The plaintiff must show that the conduct was truly 'intrusive' and that it was designed to elicit information *which would not be available through normal inquiry or observation*."[13] [emphasis added]

Similar to Constitutional Standard

This implies that observation by a private entity enhanced by technology, and therefore abnormal, gives rise to a right to redress. This would closely track the constitutional standard in determining whether a governmental entity violates one's privacy: Is the government using techniques and technology *not in general public use*?

In 2001, in the case of **Kyllo v. U.S.**, the high court in the U.S. reiterated its standard: "Where…the government uses a ['sense-enhancing' technology] device that is *not in general public use* [emphasis added], to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."[14]

Would the same standard apply to specialized sense-enhancing technology focused not towards a home but on "persons, papers, and effects" in *public* that have previously been regarded as constitutionally protected?

The next question is, are ubiquitous and covert TV cameras a type of technology not in general public use? Ten years ago, yes, in 2010, perhaps not.

However, what about use of the, so-called, black screen? Simon Davies, the director general of Privacy International in London, has identified this as an emerging technology in England. It permits permanent archiving of video images and search capability by time and place, by biometric identifiers like face geometry, or by other criteria supplied by police.

"Digital CCTV allows for more substantial archiving, comprehensive wireless networking and the potential for analysis of face, gait and even behavior. The potential for use of such systems has attracted the interest of private and public sector bodies interested in pursuing 'black screen' technology that would involve less operator scrutiny with, ironically, a presumption of fewer threats of privacy invasion or discrimination. Research has been by EPSRC [Engineering and Physical Sciences Research Council] in the U.K. on a prototype behavior-recognition system that has been tested in Liverpool Street and Mile End Stations, according to a 2004 study project on 'Privacy and Law Enforcement' by the Information Commissioner in the United Kingdom."[15]

Surely, in an American court of law, civil rights lawyers could cogently argue this pervasive surveillance is a type of technology *not in general public use*, certainly not closed-circuit systems with the ability to store, search, archive, and categorize images 24 hours a day, seven days a week. That kind of capability is *not in general public use*.

Mitigating Technologies

If civil rights/civil liberties lawyers are able to persuade a court that persuasive video surveillance in public places threatens individual rights under the U.S. constitution, the remedy need not be an absolute ban on use of the technology. There are a series of mitigating technologies and administrative precautions that could make these cameras more palatable. The identity of individuals could be masked. Cameras could be programmed not to peer into private residences. Images could be erased after a reasonable period of time if no suspicious activity is detected. Dragnet searching of the images could be prohibited without a warrant. A third-party entity could be created to administer the system and authorized to search the images. This entity could enforce a ban on capturing images of activities courts have said are entitled to privacy protection.

All of this is by way of saying: Simply because the technology has been deployed everywhere does not mean a lawsuit challenging it could not be successful. Simply because the cameras are in public places does not mean the right to privacy does not protect many of the activities captured in the millions of images. To concede these points is to default on our birthrights of privacy, autonomy, and anonymity, even in public places.

ENDNOTES

1 ***Katz v. U.S.**, 389 U.S. 347 (1967).*
2 ***Papachristou v. City of Jacksonville**, 405 U.S. 156 (1972).*
3 *512 U.S. 753 (1994).*
4 *Stephens Lectures, University of Kansas Law School, 1974.*
5 *J. Braxton Craven, PERSONHOOD: THE RIGHT TO BE LET ALONE, 1976 Duke Law Journal 699, and Laurence H. Tribe, American Constitutional Law (2d Ed. 1988).*
6 *141 U.S. 250 (1891).*
7 ***McIntyre v. Ohio Elections Comm'n**, 514 U.S. 334 (1995).*
8 ***Doe v. Reed**, 09-559.*
9 ***Griswold v. Connecticut**, 381 U.S. 479 (1965).*
10 *J. Thomas McCarthy, THE RIGHTS OF PUBLICITY AND PRIVACY (New York, Clark Boardman, 1987).*
11 *Restatement (Second) of Torts sec. 652B-E, at 378-400 (1977).*
12 ***Galella v. Onassis**, 487 F. 2d 986 (2d Cir. 1973).*
13 ***Nader v. General Motors Corp.**, 25 N.Y. 2d 560, 307 N.Y.S. 2d 647, 255 N.E. 2d 765 (N.Y. 1970).*
14 ***Kyllo v. U.S.**, 533 U.S. 27 (2001).*
15 *"Privacy and Law Enforcement" by the United Kingdom Information Commissioner, p. 44.* ❖

Beyond the Bar

Para-kin: Defining Our Relationships

Bar Member Debra L. Chernick with her para-husband Brian.

Our mission is to add words to our vocabulary and dictionary which will accurately reflect, describe and embrace evolving family relationships through the promotion of para-kin terms.

Attorney Debra L. Chernick sat in a local hospital emergency room, anxiously trying to finish the formality of intake paperwork, allowing her to meaningfully participate in the care of her longtime partner. Acquaintance, friend, or spouse, nothing accurately described their relationship. The absence of a legally-recognized relationship suddenly became a barrier. As alarming as it was to realize she didn't have any legal standing to make decisions on her partner's behalf, it wasn't until months later that a possible solution came to her. "My life partner resolved some household catastrophe, and I turned to him and said, 'Honey, you are as wonderful as any para-hubby could be!'" From her experience and this domestic interaction, came the idea for a term that could answer not only Deb's dilemma, but also a situation faced by many other people, in a word, *para-kin*.

An outgrowth of the word paralegal, meaning support, Deb embraced the prefix and determined to share her concept with others through the creation of a website, www.para-kin.com. According to Debra's para-kin website, "Our mission is to add words to our vocabulary and dictionary which will accurately reflect, describe and embrace evolving family relationships through the promotion of para-kin terms." Such words certainly would be helpful in legal situations, such as Deb and her partner experienced at the hospital. Deb notes, "As family court attorneys, we know our clients are often in situations of blended families. Regardless of their love, many people shy away from the prefix *step* (i.e., stepmother, stepfather). There seems to be a subliminal connection between step and evil. Para-kin offers positive alternatives." She points out a similar situation with another descriptive prefix. "In precisely the same way the designation of *Ms.* filled a void in our language and culture in the 1960s, there is a need to provide positive words to describe some of the non-traditional close relationships that exist today."

Perusing the para-kin website at www.para-kin.com, one encounters public testimonials of support and gratitude for the noticeably sensitive issue she is addressing. One reader, Marc, writes, "As blended families in transition, from all strata of our socio-economic spectrum, search for language that appropriately describes their relationships with new family members, they will find that para-kin is a wonderful new descriptor that captures the essence of close family connections in a positive and heartfelt manner."

Deb believes the same thing, as she was inspired to create the concept of para-kin for that reason. "It's about gaps in the English language…our language does not provide words for this type of relationship. In fact, English lacks the words for many loving connections."

For now, para-kin is an idea, but with increasing interest and support, stimulated by the para-kin website and a growing cadre of believers, Deb hopes that someday it may become a means by which we can define our relationships to each other and under the law. ❖

Shelter from the Storm

continued from page 15

at the authority of the City Council, as compared with that of the municipal entities which had signed the consent decree, and then more carefully weighed the propriety of his continued involvement under the circumstances. In any event, the Supreme Court, not surprisingly, upheld the validity of the consent decree, rejecting the argument that "a part of the City," i.e., the City Council, was "greater than the whole," i.e., those municipal entities authorized by the Charter to enter into the decree.[30]

The solicitor's approach was very different in a more recent Providence case involving the pension of a disgraced Director of Administration (the Director), who many Rhode Islanders will recall watching on television as he allegedly accepted a bribe on videotape as part of an FBI sting. Although the Director had been found guilty of five criminal counts in 2002, including bribery, conspiracy and attempted extortion, there was no evidence he had engaged in any criminal activity during his first tour of duty with the City between June 26, 1967 and January 23, 1987. Thus, the Retirement Board, following the recommendation of a Roger Williams University School of Law professor, approved a reduced monthly pension benefit which did not include his less than honorable second tour of duty with the City, begun in 1990.

The Mayor denounced the Board's decision to award any pension to the former Director as "an insult to residents and City employees" and "vowed to oppose [the Board's action] in court." Unfortunately (at least from the Mayor's point of view), it is the Retirement Board, not the Mayor, which is authorized by the Charter "to establish rules and regulations for and be responsible for the administration and operation of the city employee retirement systems under its jurisdiction."[31] Thus, as much as the Solicitor may, or may not, have shared the Mayor's outrage, it would have been improper for the Solicitor to have argued that the Retirement's Board's action in adopting the express recommendations of an impartial hearing officer somehow justified an independent action against the Board.[32]

Tidewater Realty, LLC v. State of R.I.[33] also illustrates the need to carefully consider the authority of a government client. In **Tidewater**, the City of Providence attempted to exercise a statutory right of first refusal with respect to certain commercial waterfront property the state had acquired by condemnation. Tidewater Realty, LLC (Tidewater) had successfully bid on the property, subject to the City's waiver of its right of first refusal, which the City was statutorily required to exercise by a date certain. The City attempted to exercise its statutory right within the prescribed time period by passing a resolution authorizing the Providence Redevelopment Authority (PRA) to acquire the property as the City's agent and on its behalf.[34] The attempt was challenged by Tidewater on several grounds, including that the PRA, a quasi-municipal creature of statute, lacked the authority to purchase the property.[35]

The Court held in **Tidewater** that the PRA's power to purchase property under the Redevelopment Act of 1956 was limited to purchases with a redevelopment purpose in a redevelopment area;[36] and since, according to the Court, the PRA had failed to meet its burden of proving the existence of either condition precedent, its attempted purchase, and the City's exercise of its statutory right of first refusal, was a nullity.[37]

Rule 1.9 – Former Clients

Government lawyers also must be cognizant of the prohibitions set forth under Rule 1.9, entitled "Conflict of Interest: Former Client." Essentially, the Rule prohibits attorneys from representing clients in certain cases where the matter is "substantially related" to the interests of a former client. *Id.* A recent case involving the termination of the Providence Tax Collector illustrates the Rule's applicability.

In a February 1, 2009 newsletter to Providence residents published in *The Providence Journal*, the Mayor, attempting to clarify recent press accounts, announced that upon taking office in October 2007, the City's Finance Director determined that the Tax Collector's Office was lagging far behind national and state best practices. The Collector allegedly agreed to resign (after allegedly failing to make needed improvements after nine months), rather than be re-assigned, and his resignation was then requested. For his part, the Tax Collector

2011 Rhode Island Law Day Program

District Court Associate Justice Rafael A. Ovalles, Attorney Matthew H. Parker and many other volunteer judges and lawyers participated in last year's Rhode Island Law Day.

Every year, thousands of Rhode Island students, teachers, judges and lawyers share important law related education lessons on Rhode Island Law Day. Scheduled for Friday, April 29, 2011, Rhode Island Law Day classroom programs enhance curriculum and help meet statewide educational goals. Rhode Island Law Day classroom program lessons are open to Rhode Island middle and upper school, 7th to 12th grade classes, and feature the in-school participation of a Rhode Island judge and lawyer team.

2011 Rhode Island Law Day programs promote active student participation and aim to provide meaningful educational experiences. Working with the Rhode Island Judiciary and other members of the Rhode Island Law Day Committee (RILDC), this year chaired by Supreme Court Associate Justice Gilbert, the Rhode Island Bar Association developed lesson plans, discussion points, and related background information aimed at soliciting student opinions, surfacing legal issues relating to the topics, and reviewing the role of judges and lawyers in addressing these and other legal matters.

The 2011 Rhode Island Law Day classroom topics include: 1) posting personal information and cyber bullying on the Internet; 2) sexting; 3) same-sex marriage; and 4) alternative lesson topics related to juvenile justice or other legal topics teachers would like to address.

Additionally, for the past eight years, the RILDC has sponsored the Rhode Island Law Day Essay Contest for all 10th and 11th grade students attending school in Rhode Island. 2011 Essay topics are the same as those noted for the Rhode Island Law Day classroom programs noted above.

Bar members interested in volunteering for the 2011 Rhode Island Law Day and/or any of the Bar Association's Law Related Education (LRE) programs, including the ongoing Lawyers In The Classroom and the adult organization-oriented Speakers Bureau, please contact Rhode Island Bar Association Director of Communications Frederick D. Massie by telephone: 401-421-5740 or email: fmassie@ribar.com.

denied all allegations of professional malfeasance and/or that he had agreed to resign, and claimed he was fired in retaliation for reporting instances where the Mayor, and/or agents of the Mayor, had directed him to provide favorable tax treatment to various individuals, including, but not limited to, the Mayor's brother. He then promptly filed suit for wrongful termination.[38]

The City Law Department, which recently had defended the Tax Collector in a civil suit by a disgruntled taxpayer whose property had been sold at a foreclosure sale, was hesitant to jump in and defend the City against its former client's allegations. Under Rule 1.9, the client of the Law Department, when it defends a suit premised upon allegations of illegal tax collection, foreclosure or sale procedures, is the Tax Collector, one of six members of the City's Finance Department which along with the Collector consists of the Finance Director, City Controller, Budget Officer, Budget Analyst and City Assessor.[39] This would be true whether or not the Collector had been sued individually. And, although it was impossible to predict the precise information that would be material to the defense of the Tax Collector's wrongful termination suit, the mere fact that the Law Department would be precluded under Rule 1.9 from using information it may have obtained during the course of its prior representation of the Tax Collector counseled against undertaking such representation. The Law Department also was cognizant of Rule 3.7, governing the attorney-advocate as witness.

In addition, disqualification under either Rule 1.7 or Rule 1.9 would be imputed to all attorneys employed by a municipal law department under Rule 1.10, which provides that "while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing do so by [*inter alia*] Rules 1.7 or 1.9."[40] Thus, in the case involving the terminated Tax Collector, the Law Department recused itself and hired independent counsel to defend the City and the individually-named City defendants, as well as to determine whether a civil suit against the Mayor's brother was sustainable.

Conclusion

In a thought-provoking article published nearly a decade ago, Timothy Dare, a lawyer and philosophy professor, had the temerity to question the ethics of Atticus Finch, and in the process illustrated why legal ethics are best discussed with reference to specific facts.[41] In *To Kill a Mockingbird*, Atticus agreed to conceal Boo Radley's role in the death of Bob Ewell, presumably in order to spare feeble-minded Boo the ordeal of a trial. Most commentators have justified, indeed praised, the decision as a sterling example of the occasional need to elevate personal judgment over principle. Indeed, the novel's author seems to have been well aware that the professionals we most admire employ what Professor Dare characterizes as an Aristotelean emphasis on '"practical judgment' (*phronesis*), a reasoning skill which is neither a matter of simply applying general principles to particular cases nor of mere intuition," but something more, something reliant upon the "good character" of the person making the decision.[42]

Professor Dare, on the other hand, argues that when Atticus became complicit in the cover-up, he abandoned his defining principle, a faith that our courts were the "one human institution that makes a pauper the equal of a Rockefeller" (as Atticus articulated in his closing argument on behalf of Tom Robinson). Professor Dare believes this abandonment of principle was tragic, both from the viewpoint of Atticus, who betrayed himself, and from the viewpoint of Boo Radley, who, as a result of the decision to spare him the ordeal of a trial (which Professor Dare speculates would almost certainly have resulted in Boo's acquittal), no doubt quickly retreated back into his darkened attic without having been afforded even the chance of being seen by, or interacting with, the community in which he lived.[43]

Professor Dare is thus wary of character-based approaches to legal ethics, which he suggests are particularly ill-suited to today's often impersonal lawyer-client relationships. Unlike residents of small, rural, Alabaman towns in the 1930's, clients today rarely have any meaningful knowledge as to the values of their attorneys and are functionally incapable of properly evaluating their "good character."[44] Professor Dare concludes that "Atticus's lesson is not that lawyers should throw over rule and principled-based models of professional ethical obli-

gation, but that they should be brought to appreciate the significance of the social roles they serve, and to understand and take pride in fulfilling the duties which flow from these roles."[45]

The point should not be lost upon government lawyers in these depressingly politicized times, whatever one may think of Atticus's decision to spare Boo Radley. Untangling the political motives and legal views of your client from your own and providing impartial legal advice on issues that frequently impact public policy is challenging, especially when the client, more often than not, is a professional politician. It is a challenge which requires not only a detailed knowledge of the applicable ethics rules and the analytical tools to apply them properly, but also a keen sense for the proper role of the government attorney, who, after all, was not elected. Without such knowledge and understanding, the government lawyer is at risk of becoming either a cipher and mere tool of his client (no matter how legally incorrect or misguided), or even worse, of advancing his or her own interests and beliefs at the expense of the client's.

Under either scenario, everybody loses: the government client is deprived of sound legal advice; the government lawyer is viewed through the prism of political patronage rather than as a badly-needed professional whose value is in many ways directly related to his independence; and the public is victimized by overly politicized policy decisions and a government overseen by lawyers appointed on the basis of political connectedness rather than legal ability.

Sound familiar?

ENDNOTES

1 ***See generally*** *Note, The Independence of the Law Department, 53 N.Y.L.Sch.Rev. 479, 482 (2009); Who is the Client of the Municipal Government Lawyer?, 209 P.L.I. Litig. & Adm. Prac: Crim & Urban Problems 117 (2007); Josephson and Pearce, To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients are in Conflict?, 29 How.L.J. 539, 562-63 (1986).*

2 *260 App.Div. 9, 12, 20 N.Y.S.2d 898, 901 (1st Dep't.),* ***appeal dismissed****, 284 N.Y. 578, 29 N.E.2d 657,* ***dismissing appeal from*** *173 Misc. 943, 18 N.Y.S.2d 821 (Sup. Ct. N.Y. Cty. 1940).*

3 ***See Kay****, 173 Misc. at 943-945, 18 N.Y.S.2d at 823-24.*

4 ***See id.****, 220 App.Div. at 12, 20 N.Y.S.2d at 901. In criticizing the public interest approach illustrated by* ***Kay*** *and rebuffing the notion that "an agency lawyer had some inherent and compelling responsibility, superior even to that of the agency head, to determine whether various courses of action can or cannot be undertaken," one experienced government lawyer emphasized that "the agency head takes his own oath of office, and he is also subject to the inscrutable forces of public opinion" and thus "the lawyer's counsel can never usurp the decision which must be made by the responsible head of the agency." Josephson and Pearce,* ***supra*** *note 1, at 568-69 (citation omitted).*

5 *282 A.2d 631 (Del. 1971).*

6 ***See id.*** *at 632.*

7 *The ABA Ethics Committee also has held that "where the municipality's law department is privy to relevant confidences of the agency or its employees as well as the municipality, due to its statutory status as counsel for both, the law department may not represent either the municipality or the agency when their interests come into conflict." ABA Comm. on Ethics and Professional Responsibility, Informal Op.1282 (1973).*

8 *The state Constitution empowers cities and towns to enact and amend local laws* ***only*** *to the extent that they are "not inconsistent with this Constitution and laws enacted by the general assembly."* ***See*** *R.I. Const., Art XIII, § 2. And there is no exception for laws regarding ethics.* ***See*** *Commentary to Rule 1.13, 2004 Annotated Rulebook at p. 147;* ***see also Gray v. Rhode Island Dept. of Children, Youth and Families****, 937 F.Supp. 153, 158 (D.R.I. 1996) ("Governmental attorneys are also generally held to a higher standard because of the fact that their position within the government lends itself to publicity and notoriety");* ***Ogden Energy Resource Corp. v. State of R.I.****, 1993 WL 406375 (D.R.I. 1993) (firm precluded from representing energy corporation in action against town due to its prior representation of town).*

9 *A minority of states have adopted a version of Rule 1.13 which expressly provides that "the lawyer's duty is to the organization itself and not to the various individuals connected with it."* ***See*** *Legler, Accounting for Differences in Ethics Rules from State to State, Mun.Law., Mar-Apr. 1997 at 24, 26-27. The version of Rule 1.13 which has been adopted in Rhode Island does not contain this express language.*

10 *As noted in a recent reference guide:*

> *As of 2006, seven of the state's cities (Warwick excepted) and 28 of the state's 31 towns (North Providence, Richmond and Scituate excepted) had adopted a home rule charter. These municipalities operate under four different forms of government: (1) the mayor-council; (2) council-manager; (3) administrator-council; and (4) town council-town meeting.*

See *P.T. Conley and R.G. Flanders,The Rhode Island Constitution, A Reference Guide, at 265 (Praeger Publilshers, 2007).*

11 ***See*** *Charter, §§ 301, 302(a), (c).*

12 ***See id.****, §§ 401, 402(a)(c).*

13 ***Compare*** *Charter, § 1201 (c) with § 1202.*

14 ***See Retirement Board of the City of Providence v. City Council of the City of Providence****, 660 A.2d 721, 728-29 (R.I. 1995).*

15 *For the most part, City boards and commissions are empowered to hire their own legal counsel, but such counsel is, in the normal course, expressly made "subordinate to" the city solicitor (and with respect to litigation, board and/or commission counsel is expressly placed "under the direction of" the City solicitor).* ***See*** *Charter, § 1101(a)(4).*

16 ***See*** *Charter, § 603(b). In addition, under the*

City's Code of Ordinances, the Solicitor is given modest monetary authority ($3,000) to settle negligence claims against the City. ***See*** *Code of Ordinances, Art. VI, § 2-99.*

17 ***See*** *Rule 1.13(e) (emphasis added).*

18 ***See*** *Commentary to Rule 1.13, R.I.* COURT RULES ANNOTATED, *at 147. Frequently, an employee receiving such a letter will demand that the municipality pay for his or her private counsel. Absent a contractual undertaking or an actual conflict, the municipality would not appear to be under any obligation to do so, especially if it has agreed to indemnify the employee.*

19 ***Compare*** *Rule 1.7 (a) with 1.7(b).*

20 ***See, e.g., Franklin v. Clark****, 454 F.Supp.2d 356, 370 (D.Md. 2006) ("a conflict of interest which requires disqualification does not exist merely because an attorney may be personally interested in the outcome of litigation.");* ***Guillen v. City of Chicago****, 956 F.Supp. 1416, 1422 (N.D.Ill.1997) (counsel should not be disqualified "unless there is a substantial basis for believing that actual, rather than merely potential, conflicts of interest are afoot");* ***Shaffer v. Farm Fresh, Inc.****, 966 F.2d 142, 145 (4th Cir.1992) (disqualification "may not be rested on mere speculation that a chain of events whose occurrence theoretically could lead counsel to act counter to his client's interests might in fact occur").*

21 *But* ***see id.*** *at 133-139 (Robinson, J., dissenting). In an interesting dissent, Justice Robinson reasoned that the unique role of school committees, which was reflected in the state constitution, created a latent ambiguity with respect to the meaning of the term "department" in the town charter.* ***Id.***

22 ***See*** *Charter, § 603(b)(9).*

23 *In Providence, an ordinance automatically becomes law after it is read and approved twice by the council and not vetoed by the mayor within 10 days, which leaves room for the exercise of a certain degree of agnosticism by the executive branch.* ***See*** *Charter, §§ 410(b) and 412.*

24 ***See, e.g., Rhode Island Convention Center Authority, et al. v. City of Providence, et al., C.A.*** *No. CV 09-527 (D.R.I. 2010) (Law Department defending City's Displaced Workers' Ordinance, which was enacted without signature of Mayor, against constitutional challenge) (pending).*

25 ***See*** *note 2,* ***supra; see, e.g., Adrienne G. Southgate v. The City Council of the City of Providence, et al.****, C.A. No. 10-0634 (complaint to enjoin Council from abrogating exclusive power of Mayor by reorganizing Providence External Review Authority) (pending)*

26 *749 A.2d 1088 (R.I. 2000).*

27 ***See id.*** *at 1090.*

28 ***See id.*** *at 1091.*

29 ***See id.*** *at 1092.*

30 ***See id.*** *at 1093.*

31 ***See*** *Charter at § 908;* ***see also*** *HSO, § 17-189.1(a) (5).*

32 ***See Ryan v. City Providence****, C.A. No. PC 08-268 (Silverstein, J.),* ***appeal pending****, No. 09-311 A.*

33 *942 A.2d 986 (R.I. 2008) (Flaherty, J.).*

34 ***See id.*** *at 989-991.*

35 ***See id.*** *at 991.*

36 ***See id.*** *at 996, citing R.I. Gen. Laws 45-32-5(a)(4).*

37 ***See id.*** *at 999. The state relied upon the opinion of private counsel as to the PRA's authority, thus raising an interesting question as to the apportionment of liability as between the state and city* ***vis a vis*** *the eventual purchaser, who incurred legal fees and other alleged damages due to the delay.* ***See Tidewater Realty v. State of R.I.****, PB No. 05-3316 (Silverstein, J.) (case pending).*

38 ***See Robert Ceprano v. David Cicilline, et al.****, C.A. No. PC 09-2712 (pending).*

39 ***See*** *Charter at § 813. The Finance Director is appointed and serves "at the pleasure" of the mayor, whereas the other members of the Finance Department, including the Tax Collector, are appointed and serve "at the pleasure" of the Finance Director.* ***Id.***

40 ***Id.; see also Gray v. Rhode Island Dept. of Children, Youth and Families****, 937 F.Supp. 153, 158 (D.R.I. 1996).*

41 ***See*** *Dare,* LAWYERS, ETHICS AND TO KILL A MOCKINGBIRD, *Philosophy and Literature, Vol. 25, No. 1, at pp. 127-141 (The Johns Hopkins University Press, April 2001)*

42 ***See id.*** *at 132.*

43 ***Id.*** *at 136.*

44 ***Id.***

45 ***Id.*** *at 140.* ❖

The Third, and Best, Way

continued from page 23

inside rear boundary of one property did not become true boundary through acquiescence, even though owners of other property repaired fence, continuously maintained and mowed strip of land inside fence, sodded land, and cut down trees within disputed area, since owners also admitted that fence was only intended as screening device).

7 ***Rosa v. Oliveira**, 115 R.I. 277, 342 A.2d 601 (1975) (difference between experts as to location of line dividing properties as shown by deeds and plats was "completely immaterial" in light of trial justice's finding that parties had acquiesced in fence line as boundary); **Acampora v. Pearson**, 899 A.2d 459 (R.I. 2006) (once trial justice found that boundary marked by arborvitae, evergreens, and line of mowed grass was sufficiently obvious to place adjacent landowners on notice, outcome of case depended not on conflicting surveys offered by parties but on whether requirements for acquiescence were satisfied).*

8 ***See Mari v. Lankowicz**, 61 R.I. 296, 200 A. 953 (1938) (picket fence that followed irregular line, veering several inches to one side of true boundary line and then to other side, became boundary since for over ten years parties had accepted it as dividing line between their premises).*

9 ***See Doyle v. Ralph**, 49 R.I. 155, 141 A. 180 (1928) (removing solid board fence that had served as boundary for 16 years and replacing it with new picket fence at same location did not give adjoining landowner right to contest location even though new survey showed that fence encroached on landowner's property).*

10 ***Acampora v. Pearson**, 899 A.2d 459 (R.I. 2006) (citing Richard R. Powell, Powell on Real Property ¶ 68.05[6] [b] at 68-30, 68-31 (Michael Allan Wolf ed. 2000)).*

11 ***Essex v. Lukas**, 90 R.I. 457, 159 A.2d 612 (1960) (trial justice was not clearly wrong in rejecting acquiescence where both survey of property conducted after plaintiff inherited property and subsequent deed executed by plaintiff described premises by metes and bounds, and neither referred to 50-year-old hedge nor included strip of land in dispute). **See also Manchester v. Point St. Iron Works**, 13 R.I. 355 (1881) (rejecting establishment of boundary claimed to have been recognized by parties for over 50 years, where several conveyances by plaintiffs' predecessors in title during 50-year period purported to convey land by definite boundaries).*

12 ***Di Santo v. De Bellis**, 55 R.I. 433, 182 A. 488 (1935) (noting in finding acquiescence that although deed described premises according to record title, both grantors and grantees understood that premises conveyed went to fence that was three feet away from true boundary; that purchaser built garage projecting approximately 18 inches into disputed strip; and that all parties acted in good faith and in reliance on location of fence as marking true boundary line).*

13 ***O'Donnell v. Penney**, 17 R.I. 164, 20 A. 305 (1890), cited in **Locke v. O'Brien**, 610 A.2d 552 (R.I. 1992). **See also Rosa v. Oliveira**, 115 R.I. 277, 342 A.2d 601 (1975) (acquiescence is rule "of repose in that it quiets title to real estate and prevents uncertainty, confusion, and litigation which can result from the disturbance of a long-established boundary line").*

14 ***See, e.g., Paquin v. Guiorguiev**, 117 R.I. 239, 366 A.2d 169 (1976) (since parties and their predecessors in title had acquiesced in boundary line marked by fence and retaining wall for 46 years, and had exercised unequivocal acts of ownership over their respective parcels of land, plaintiffs had acquired title to disputed parcel under either acquiescence or adverse possession).*

15 *Numerous cases state that "hostility" is one of the requirements for adverse possession. **See, e.g., Locke v. O'Brien**, 610 A.2d 552 (R.I. 1992); **Norton v. Courtemanche**, 798 A.2d 925 (R.I. 2002).*

16 *See cases cited in footnote 3.*

17 ***Reitsma v. Pascoag Reservoir & Dam**, 774 A.2d 826 (R.I. 2001) (implying that express permission from owner will defeat claim for adverse possession); **Santurri v. DiPietro**, 818 A.2d 657 (R.I. 2003) (impliedly upholding trial justice's decision that permissive use of property defeated claim for adverse possession); **Hilley v. Lawrence**, 972 A.2d 643 (R.I. 2009) (landowners' express permission allowing neighbors to cross land for vehicular access to their own property defeated neighbors' claims to easements by prescription as matter of law).*

18 ***Pucino v. Uttley**, 785 A.2d 183 (R.I. 2001) (although neighbor who owned truck-towing business asked permission to clear trees on disputed land, and land owners testified that they always viewed neighbor's use of disputed land as permissive, their failure to object demonstrated acquiescence sufficient to support preliminary injunction against them).*

*Although the court in **Hilley v. Lawrence**, 972 A.2d 643 (R.I. 2009), said that landowners' express permission allowing neighbors to cross their land for vehicular access to their own property defeated the neighbors' claims to easements by prescription and acquiescence as a matter of law, there was no question of establishing a boundary line in that case and the dictum about permission defeating acquiescence was probably not meant to state a general rule.*

19 ***Taffinder v. Thomas**, 119 R.I. 545, 381 A.2d 519 (1977) (possession of property must be "uninterrupted and peaceful" during prescriptive period). **See also DeCosta v. DeCosta**, 819 A.2d 1261 (R.I. 2003) (erecting chainlink fence on plaintiffs' property was hostile act, but did not constitute adverse possession because fence was not in place for ten years).*

20 *Olin L. Browder, Jr., THE PRACTICAL LOCATION OF BOUNDARIES, 56 Mich. L.Rev. 487, 514 (1958) (citing non-Rhode Island cases). This is not necessarily true in Rhode Island; see cases cited in footnote 23.*

21 ***Daneker v. Olenn**, 705 A.2d 988 (R.I. 1997) (in order to demonstrate acquiescence, plaintiff must show evidence of either express agreement or existence of boundary marker recognized by parties for ten years).*

22 ***O'Donnell v. Penney**, 17 R.I. 164, 20 A. 305 (1890). This language has often been quoted or paraphrased, most recently in **DelSesto v. Lewis**, 754 A.2d 91 (R.I. 2000). **See also Malone v. O'Connell**, 86 R.I. 167, 133 A.2d 756 (1957) ("when ... a boundary has been maintained for the statutory period of ten years, such fact is 'conclusive evidence' of an agreement that it is the true*

boundary").

23 ***O'Donnell v. Penney**, 17 R.I. 164, 20 A. 305 (1890); **Di Santo v. De Bellis**, 55 R.I. 433, 182 A. 488 (1935); **LaFreniere v. Sprague**, 108 R.I. 43, 271 A.2d 819 (1970).*

24 ***Rosa v. Oliveira**, 115 R.I. 277, 342 A.2d 601 (1975).*

25 ***DelSesto v. Lewis**, 754 A.2d 91 (R.I. 2000).*

26 ***See DelSesto v. Lewis**, 754 A.2d 91 (R.I. 2000) (noting that predecessor in title to owner asserting boundary line by acquiescence had failed to record description of boundary-line changes, despite fact that he had agreed to do so).*

27 ***Locke v. O'Brien**, 610 A.2d 552 (R.I. 1992) (failure to remove fence posts or to challenge neighbors' claim that posts demarcated boundary was sufficient recognition of boundary line to satisfy mutual-recognition element required for acquiescence); **Acampora v. Pearson**, 899 A.2d 459 (R.I. 2006) (recognition of boundary line can be inferred from silence of party, or his predecessor in title, who is aware that it exists).*

28 ***See DelSesto v. Lewis**, 754 A.2d 91 (R.I. 2000) (whether woman who became owner of property upon divorce was ever aware of "land swap" between her former husband and neighbor, or had acquiesced in new boundary line between lots, was disputed fact question).*

29 ***See Di Santo v. De Bellis**, 55 R.I. 433, 182 A. 488 (1935) (noting in finding acquiescence that ancient fence, which was about 3 feet away from correct boundary as shown by deeds, was repaired by agreement between neighbors with expense being shared by them equally); **DeCosta v. DeCosta**, 819 A.2d 1261 (R.I. 2003) (finding acquiescence where both property owners trimmed and otherwise maintained hedgerow on both sides of line); **Nye v. Brousseau**, 992 A.2d 1002 (R.I. 2010) (finding that boundary extended through middle of trunks of line of yews where neighbors had each trimmed side of yews facing their properties).*

30 ***Ungaro v. Mete**, 68 R.I. 419, 27 A.2d 826 (1942) (fact that claimant's predecessor in title had actively cooperated in maintaining chicken wire fence did not show acquiescence where there was credible evidence of express agreement between parties that fence was not true boundary but was temporary fence to keep dogs and children away from plants); **Essex v. Lukas**, 90 R.I. 457, 159 A.2d 612 (1960) (fact that adjoining owners had always trimmed and taken care of hedge and land on their respective sides of hedge did not prove acquiescence where surveys and recorded plats described property by measurement and did not mention hedge).*

31 ***See Di Santo v. De Bellis**, 55 R.I. 433, 182 A. 488 (1935) (landowner obtained title to three-foot strip of land along boundary by acquiescence where his neighbor's predecessor in title had replied, when informed that fence was not on true boundary, "Let the fence stand as it is, I have enough land here").*

32 ***Sorel v. Miller**, 73 R.I. 16, 53 A.2d 332 (1947) (noting that respondent not only denied that she acquiesced in complainant's acts of clearing and using disputed triangular piece of land but after learning of them she brought action of trespass and ejectment against him).*

33 ***DiMaio v. Ranaldi**, 49 R.I. 204, 142 A. 145 (1928) (board fence); **Mari v. Lankowicz**, 61 R.I. 296, 200 A. 953 (1938) (picket fence); **Malone v. O'Connell**, 86 R.I. 167, 133 A.2d 756 (1957) (wire fence); **Paquin v. Guiorguiev**, 117 R.I. 239, 366 A.2d 169 (1976) (fence and retaining wall); **Pucino v. Uttley**, 785 A.2d 183 (R.I. 2001) (fence along physical boundary line created by berm at edge of disputed land).*

Annot., Fence as Factor in Fixing Location of Boundary Line – Modern Cases, 7 A.L.R.4th 53 (1981 & supp.).

34 ***Locke v. O'Brien**, 610 A.2d 552 (R.I. 1992) (vestiges of posts remaining from former wire fence).*

35 ***Rosa v. Oliveira**, 115 R.I. 277, 342 A.2d 601 (1975) (although leaning pickets of wooden fence might have constituted intrusion of air space, boundary established by fence under doctrine of acquiescence ran along bottom of fence as determined by wooden posts that were solidly positioned in ground).*

36 ***See, e.g., DeCosta v. DeCosta**, 819 A.2d 1261 (R.I. 2003) (hedgerow, which was planted by owners of adjoining parcels and was treated by both parties as boundary line, was sufficient evidence to trigger doctrine of acquiescence).*

37 ***Acampora v. Pearson**, 899 A.2d 459 (R.I. 2006).*

38 ***DelSesto v. Lewis**, 754 A.2d 91 (R.I. 2000) (evidence that mowing extended as far as common boundary line established by handshake created disputed issue of fact on claim of acquiescence); **Acampora v. Pearson**, 899 A.2d 459 (R.I. 2006) (boundary marked by arborvitae, evergreens, and line of mowed grass).*

39 ***See DeCosta v. DeCosta**, 819 A.2d 1261 (R.I.*

2003) (determining that party who located and planted shrubbery that constituted boundary under doctrine of acquiescence owned shrubbery itself).

40 ***Nye v. Brousseau**, 992 A.2d 1002 (R.I. 2010) (rejecting argument by boundary claimant that "the proper boundary should hug the outside edge of the trunks of the shrubs so that the entire circumference of the trunks rests on his property," where claimant rarely maintained shrubs on his side and did not maintain shrubbery on other side at all, but neighbor and his predecessor in title both trimmed side of shrubbery that faced their property).*

41 ***Locke v. O'Brien**, 610 A.2d 552 (R.I. 1992); **Nye v. Brousseau**, 992 A.2d 1002 (R.I. 2010).*

42 ***Rosa v. Oliveira**, 115 R.I. 277, 342 A.2d 601 (1975); **Nye v. Brousseau**, 992 A.2d 1002 (R.I. 2010).*

43 ***See DeCosta v. DeCosta**, 819 A.2d 1261 (R.I. 2003) (determining that hedgerow constituted boundary under doctrine of acquiescence, but remanding for declaration of where hedgerow originally was located).*

44 ***Essex v. Lukas**, 90 R.I. 457, 159 A.2d 612 (1960).*

45 ***Nye v. Brousseau**, 992 A.2d 1002 (R.I. 2010).*

46 ***Nye v. Brousseau**, 992 A.2d 1002 (R.I. 2010) (notwithstanding testimony of plaintiff and affidavit of defendant's predecessor in title that they "always believed" that shrubs on boundary were owned by plaintiff, court ruled that each adjoining landowner owned to middle of shrubs' trunks based on actions of parties and former owners of properties in maintaining each side of shrubbery).*

47 ***See Essex v. Lukas**, 90 R.I. 457, 159 A.2d 612 (1960) (recognizing that mutual recognition and acquiescence in boundary can be established by conduct of owners of adjoining lands for prescribed period of time, although holding that under facts owners' conduct did not override survey and deed descriptions of property).*

48 ***Mari v. Lankowicz**, 61 R.I. 296, 200 A. 953 (1938). **See also Acampora v. Pearson**, 899 A.2d 459 (R.I. 2006), in which the Supreme Court stated that although the trial justice had found acquiescence by clear and convincing evidence, it could find no case in which it had said that the standard of proof required to establish acquiescence is clear and convincing evidence.* ❖

Soliciting Bar Member Response to Proposed Animal Law Committee

After reviewing a Rhode Island Bar Association member request, the Bar's Executive Committee is seeking responses from any Bar members interested in joining, and regularly attending meetings for, a proposed Animal Law Committee. This Committee would seek the participation of all interested members of the Bar, including plaintiff and defense counsel, from both the public and private sectors, in order to benefit such members by providing a forum for members to exchange ideas, consider and discuss the legal issues involved in human beings' relationship and coexistence with animals, and to understand laws, regulations, and case law pertaining to all areas of animal law; and establishing a related, annual Continuing Legal Education (CLE) seminar. At least thirty members must volunteer to serve on the committee which would be formed on an ad hoc basis for at least two years to determine if interest is sustainable. A Chairperson will be then be appointed by the President. If the Committee is active for two years, the House of Delegates will consider establishing a standing committee consistent with the Bar's bylaws. Bar members interested in joining the proposed Animal Law Committee are asked to contact Rhode Island Bar Association Communications Coordinator Kathleen Bridge by email: **kbridge@ribar.com**, or by a letter addressed to her attention at 115 Cedar Street, Providence, RI 02903.

In Memoriam

Louis B. Cappuccio, Sr., Esq.

Louis B. Cappuccio, Sr., 93, of Watch Hill, RI, passed away on November 26, 2010. Son of the late Antonio and Mary Auletta Cappuccio, he is survived by his wife of 59 years, Lillian Turco Cappuccio, his two sons: Louis B. Cappuccio, Jr., Esq. and wife Tammy, Lawrence J. Cappuccio, Esq. and his wife Pamela.

Louis graduated from the University of Rhode Island, and Boston University School of Law (Cum Laude). Louis was a Naval Communications Officer in World War II.

He and his brother Attorney Frank S. Cappuccio were partners in the law firm of Cappuccio and Cappuccio. He was a member of the Rhode Island and Connecticut Federal Bar Association.

Active in local politics, he served as a former Town Solicitor, Probate Judge, and Chairman of the Zoning Board. He was a member of the State Democratic Executive Committee and was a delegate to two National Conventions. For many years he served as a Rhode Island Bar Examiner.

Samuel J. Kolodney, Esq.

Samuel J. Kolodney, 91, of Providence, passed away on November 5, 2010. He leaves a wife of 50 years, Zelda Holland Kolodney. Born in Providence, he was the son of the late William and Gussie Kolodney.

A graduate of Rhode Island College and the Boston University School of Law, he was a partner in the law firm of Arcaro, Belilove & Koldney from 1959 until retirement. A U.S. Army staff sergeant during World War II, he participated in the liberation of the Wobbelin concentration camp. A past president of the Roger Williams Lodge of the B'Nai B'rith and a former Post Commander of the Jewish War Veterans Sackin Shocket Post #533, he was an associate member of Hadassah, and a member of Temple Emanu-El for over 50 years.

Lane W. Newquist, Esq.

Lane W. Newquist, 70, of Peace Dale, passed away on October 19, 2010. He was the beloved husband of Ruth Bell Newquist for 47 years. Born in Chicago, IL, he was a son of the late Wesley and Ruth Fagerstrom Newquist.

A retired attorney, he was an accomplished photographer, a longtime member and past president of the Photographic Society of RI and a member of many other photography clubs. He enjoyed traveling with his wife and was a member of Christ the King Church in Kingston, where he was active as a Stephen Minister.

Surviving, besides his wife, are five children, Sheila R. Turner and her husband John of North Kingstown, Michael L. Newquist and his wife Anne of Attleboro, MA, Brian C. Newquist of Boston, MA, Matthew D. Newquist and his wife Lori of Richmond, VA, and Daniel A. Newquist of Georgetown, SC.

Aram R. Schefrin, Esq.

Aram R. Schefrin, of Barrington, passed away on November 4, 2010.

Martin M. Temkin, Esq.

Martin M. Temkin, 81, passed away on December 4, 2010. He was the beloved husband of Beatrice DePasqual Temkin. Born in Providence, RI, he was a son of the late Charles and Rose Pullman Temkin. A lifelong resident of Providence, Martin graduated from Hope High School, Brown University, and Boston University School of Law.

He was a member of the Rhode Island, Massachusetts and American Bar Associations and the Estate Planning Council. His past and present activities include: chairman and board member of Hospice Care of RI Foundation, lifetime trustee and former vice chair of the Miriam Hospital, board member and former president of First Night Providence, board member of Jewish Senior Agency of Rhode Island , former board member of AIDS Project Rhode Island, a former member of the board of Trustees for the YMCA, former president and a board member for the Jewish Home for the Aged of Rhode Island, former co-chair of the Rhode Island Food Bank, former president of the Urban League of Rhode Island, former president of the Hebrew Free Loan Association, former board member of Jewish Federation of Rhode Island, and a former board member for the Friends of Rhode Island School for the Deaf. He also founded an ecumenical dialogue group of priests and rabbis, and was a member of Temple Beth-El, Providence. He enjoyed tennis, wind surfing, and downhill skiing. He was a veracious reader and loved classical music. He is survived by his three children: Lisa Nisky and her husband Michael; Donna Paolino Urciuoli; and Joseph R. Paolino, Jr. and his wife Lianne.

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

You ought to be in pictures!

Okay, so you missed your chance for a timeless clinch on the silver screen. The good news is, you still have the opportunity to appear on computer screens throughout the state and beyond by sending the Rhode Island Bar Association your photographic portrait for inclusion in the Bar's website-based, online **Attorney Directory**. Unparalled as an easy and economical (free!) way to get face time with potential clients and your colleagues, the Bar's Attorney Directory is only a few clicks away.

To view your current listing, go to the **Bar's website at www.ribar.com**. On the left side of the **Home** page, double click on the blue and white **Attorney Directory** icon, type in your name and click on Search. Once you have the correct listing, click on **View Details**. If you have a photograph on file with the Bar, it will appear on this page. And, while you are there, please ensure all your contact information, including your practice name or business, telephone number, and postal and email addresses, are correct.

If you do not have a photograph on file, or if you would like to replace your photograph, simply email a picture to the Rhode Island Bar Association's Communications Program Coordinator Kathleen Bridge at: **kbridge@ribar.com**. Emailed photographs must be sent in a jpg format of at least 300 dpi. Or, you may mail, or drop off, a printed photograph addressed to: Rhode Island Bar Association Attorney Photo Directory, 115 Cedar St., Providence RI 02903. All photographs must be accompanied by your name and telephone number.

Questions? Contact Katy directly at (401) 421-5740. We look forward to seeing you on screens everywhere!

Publish and Prosper in the *Rhode Island Bar Journal*

The Rhode Island Bar Journal is one of the Bar Association's **best means of sharing your knowledge and experience with your colleagues.** Every year, attorney authors offer information and wisdom, through scholarly articles, commentaries, book reviews, and profiles, to over 6,000 subscribers in Rhode Island and around the United States. In addition to sharing valuable insights, **authors are recognized by readers as authorities in their field and, in many cases, receive Continuing Legal Education (CLE) credit for their published pieces.** The *Bar Journal*'s Article Selection Criteria appear on page 4 of every *Bar Journal* and on the Bar's website at www.ribar.com.

Aspiring authors and previous contributors are encouraged to **contact the *Rhode Island Bar Journal*'s Editor Frederick Massie by telephone: (401) 421-5740 or email: fmassie@ribar.com.**

MEMBERSHIP BENEFIT UPDATE

LRS: The Biggest Bang for Your Buck!

Did you know that:

- **Joining the Lawyer Referral Service costs only $8 a month?**
- **Every year, thousands of people call our Bar Association looking for a lawyer referral?**
- **This year, LRS has connected participating attorneys to over 3,500 clients?**

Our Bar's Lawyer Referral Service (LRS) receives calls every day asking for lawyers who practice in every area of civil law including, but not limited to: personal injury; negligence; landlord tenant; real estate; intellectual property; guardianships; trusts; estates and more! This is a benefit many of you have not yet realized by joining. Your Bar Association promotes good business for good lawyers through LRS. Don't delay in taking advantage of this benefit to increase your business. Referrals lead to retainers! Please contact our Bar's Lawyer Referral Service today by telephone: 421-7799 or email: sfontaine@ribar.com.

Lawyers on the Move

E. Colby Cameron, Esq., partner at **Cameron & Mittleman** in Providence, was appointed to the **Rhode Island Judicial Nominating Commission.**

Charles Garganese, Jr. Esq. has moved the **Law Offices of Charles Garganese, Jr. Ltd.** to Corliss Landing, 2 Bridge Street, Providence, RI 02903.
401-521-1800

Kenneth F. McGunagle, Jr., Esq., partner in **McGunagle, Reidy & Hentz, LTD** in Cranston, has been elected Secretary of the newly-established National Board of Representatives of the ALS Association (ALS amyotrophic lateral sclerosis often referred to as Lou Gehrig's disease).
401-941-2088 kfm@mrlawltd.com www.mrlawltd.com

Ronald P. Langlois, Esq., Lauren D. Wilkins, Esq., George E. Furtado, Esq., and **Earl E. Metcalf, Esq.** take great pleasure in announcing the formation of **Langlois, Wilkins, Furtado & Metcalf, P.C.** at 317 Iron Horse Way, Suite 203, Providence, RI 02908.
401-351-9970 Rlanglois@lwfmlaw.com Lwilkins@lwfmlaw.com
Gfurtado@lwfmlaw.com Emetcalf@lwfmlaw.com www.lwfmlaw.com

Mark S. Mandell, Esq., of **Mandell, Schwartz & Boisclair, LTD**, Providence, and a **Rhode Island Bar Association Past President**, was elected to serve as the next chair of the **Roger Williams University School of Law's Board of Directors.**

Chad Nelson, Esq. is now an associate with **Correira & Iacono**, 1010 GAR Highway, 2nd Floor, Swansea, MA 02777.
508-679-5040 chad@cilaw.com

O'Neill Estate Law has merged with **Lahti & Lahti, P.C.** forming **Lahti, Lahti & O'Neil PLLC** headquartered at One Richmond Square, Suite 303N, Providence, RI.

Sean T. O'Leary, Esq. has returned to the law firm **O'Leary & Associates**, Nine Mark Fore Drive, West Warwick, RI 02893.
401-615-8584 sto@oleary-law.net www.oleary-law.net

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.

Advertiser Index

Ajootian, Charles – 1031 Exchange Services	36
All States 1031 Exchange Facilitator	42
Amica	30
Aon Liability Insurance	10
Balsofiore & Company, Ltd. – Forensic Accounting, Litigation Support	29
Boezi, Henry – Trademark/Copyright	32
Briden, James – Immigration Law	35
Coia & Lepore, Ltd. – Workers' Comp.	37
Cote, Molly Kapstein – Lynch, Lynch & Friel	41
Delisi & Ghee, Inc. – Business Appraisal	45
Dennis, Stephen – Workers' Compensation	23
Deitel & Associates – Medical-Legal Consulting	34
Dumas, David – Heirs/Genealogy	50
Engustian, Christine – Green Building Lawyer	7
Favicchio, Michael – Florida Legal	16
Franklin Templeton Investments	40
Goodman Shapiro & Lombardi LLC – Legal Services	18
Hart – Bankruptcy	32
Humphrey Law Offices	34
LaBonte, Theresa – Interpreter	22
Lahti, Lahti & O'Neill, LLC	26
Lawyers Collaborative – Shared Office Space	23
Law Offices of Michael A. Kelly	46
Marasco & Nesselbush – Social Security Disability/Medical Malpractice	12
Mathieu, Joan – Immigration Lawyer	13
McElroy Law Group – Employee Benefits Law	43
Messier & Massad	15
Mignanelli & Associates, LTD. – Estate Litigation	6
Novation Capital, LLC – Structured Settlements	20
Ocean State Weather – Consulting & Witness	28
Office Space – Warwick	28
Paralegal Services, Catalano	41
PellCorp Investigative Group, LLC	29
Pfieffer, Mark – Alternate Dispute Resolution	21
Piccerelli, Gilstein & Co. – Business Valuation	28
Providence Valuation, LLD – business appraisal & forensic accounting	20
Revens, Revens & St. Pierre – Bankruptcy	12
Revens, Revens & St. Pierre – Workers' Compensation	29
Rhode Island Private Detectives LLC	13
R. J. Gallagher – Life Insurance	22
Ross, Roger – Title Clearing	16
Seifer Handwriting	15
Sciarretta, Edmund – Florida Legal Assistance	14
Soss, Marc – Florida Estates/Probate/ Documents	38
Souza, Maureen – Drafting/Research	47
Space for Lease – Providence	26
Spanish/Portuguese Interpreter Services, Paulson	14
StrategicPoint – Investment Advisory Services	32
Washington Trust	30
Zoning Handbook – Roland F. Chase	4

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To contact staff members, dial the main number 401.421.5740 or use the individual's email address.
Staff telephone extensions or direct lines and email addresses appear beneath their titles and names.
Information concerning Bar-related programs and services may be directly accessed via the Bar's website at www.ribar.com.

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The Rhode Island Bar Association web site is an easy-to-navigate, valuable information resource and interactive tool for Bar members and the public.

Search allows web visitors to locate information by typing in key words.

MEMBER LOGIN provides quick, secure access to **Members Only** sections.

LATEST NEWS provides ever-changing news, keeping the web site fresh, lively and up-to-date.

ABOUT THE BAR ASSOCIATION provides general information about the Rhode Island Bar Association including: **Bar President's Message**; **Bar Officer Profiles**; **Bar Staff Contact Information**; **Bar Directions**; **Bar Hours of Operation/Holidays**; **RI Courts**; and more.

FOR ATTORNEYS connects our members to the Bar's many excellent services and programs including: **Attorney Directory**; **Membership Benefits**; **Bar Committees**; **Lawyers Helping Lawyers**; **CLE Calendar**; **Committee Meeting Calendar**; **Governance and Bylaws**; and more. Members may also login to the **Members Only** area here.

CONTINUING LEGAL EDUCATION displays the **CLE Seminar Calendar** and allows online registration; provides access to **Online CLE seminars**; allows online ordering of **CLE Publications**; and notes **New Attorney Requirements**.

NEWS AND EVENTS links to the **Latest News** articles and connects to the **Bar Journal**.

MEMBERS ONLY AREA, accessed through the **Member Login**, provides members with a wealth of exclusive services including **Casemaker**, the free-to-members, 24/7, law library and allowing online: membership renewals; contact information changes, CLE seminar registration; and sign-up for **Bar Committees**, **Lawyer Referral Service**, **Volunteer Lawyer Program**; and **US Armed Forces Legal Services**.

RHODE ISLAND BAR FOUNDATION offers information about **Interest on Lawyers Trust Accounts** (IOLTA) and the **Bar's Law School Scholarship Program**.

FOR THE PUBLIC connects to Bar services for the public including valuable information help to find and choose a lawyer and offering online request connections to all the Bar's legal public service programs and law related education programs.

QUICK LINKS provides direct, easy access to frequently visited areas.

ATTORNEY DIRECTORY provides attorney business contact information including email and postal addresses, telephone numbers, and photographs when provided by members.

RHODE ISLAND BAR JOURNAL includes: an archive of downloadable PDFs of Bar Journals from July/August 2009 forward; an article index dating back to 1952; advertising rates and requirements; article submission criteria; and more.