Rhode Island Bar Journal

Rhode Island Bar Association Volume 63. Number 5. March/April 2015

Representing Clients Before the Rhode Island Personnel Appeal Board

Restitutionary Causes of Action & Remedies in Civil Litigation

Volunteer Lawyer Program Annual Report

BOOK REVIEW:
The Cottoncrest Curse

Articles

Features

Front Cover Photograph – by Brian McDonald

MUSEUM OF WORK AND CULTURE, WOONSOCKET, RI

In the late 19th and early 20th centuries, immigrants flocked to Rhode Island in search of work and prosperity within the state's mill towns. Their labor – both on and off the factory floor – helped define the culture of the Blackstone River Valley. Through its exhibits, the Museum of Work & Culture explores the continued impact of the industrial revolution. It preserves and honors the experience of people, past and present, for future generations. The Museum of Work & Culture is a division of the Rhode Island Historical Society.

RHODE ISLAND Bar Association 1898

Editor In Chief, David N. Bazar
Editor, Frederick D. Massie
Assistant Editor, Kathleen M. Bridge

RHODE ISLAND BAR ASSOCIATION LAWYER'S PLEDGE

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

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We Can Help Make Our State Great

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

It is time to leverage our best assets while we chip away at what is holding us back.

Rhode Island is consistently ranked one of the worst states to do business. Over-regulation and high utility costs and taxes are among the many problems that face our state. A change is in the air, however. Business leaders, state and federal legislators, and our governor are asking for help. Lawyers have an obligation to try to help facilitate a turn-around of the business climate, as it is in the best interest of our profession. The past practice of blaming and shaming politicians, big business, and government workers has availed nothing.

Little Things Add Up

The days of the grand gesture are over. It is the little things that add up. And lawyers are often the first to see those important little things. Our profession is in a unique position to appreciate, first-hand, the impediments to success of businesses and government. We share in the success and failure of local businesses and government. An open minded and sensible approach to achieve public policy objectives while minimizing costs will help Rhode Island become competitive again.

There are many ways to help. Suggestions on how to improve the climate for small businesses are as important as attracting large employers. Consulting with our clients to identify impediments to business success and making sure that these impediments are communicated to lawmakers may have a real impact.

The sustainability of non-profits organizations and foundations depends upon donations of corporations, law firms and individuals in addition to government grants. Transactional law firms that utilize Interest on Lawyers Trust Accounts (IOLTA) help our Rhode Island Bar Foundation and many others do important public service work.

Today, the prospects for Rhode Island's growth are promising. Our State has attracted venture capital investment and offers a very attractive lifestyle and geographical location. It is time to leverage our best assets while we chip away at what is holding us back. A review of our practice areas and consulting with clients will assist in determining which laws and regulations need to be reassessed.

Lawyers have been social and economic designers since the beginning of the republic. Helping to ensure there is proper education, skills training and business opportunities for everyone will define the future of our profession here in Rhode Island.

Every Practice Area Matters

Whether your practice is in estate planning, family law, government, real estate, health care or business transactions, it is all important. Our profession is built upon finding and implementing solutions for our clients. We can do this for our state and our profession. The time to act is now. ❖

You Are What You Write

Your effective client representation is based, in large part, on your proven court experience and your reputation as creditable counsel. What better way to enhance your standing than through an article published in the *Rhode Island Bar Journal* and seen by its over 6,500 lawyers, judges and new media editors? To find out how you may have an article considered for *Bar Journal* publication, and related Mandatory Continuing Legal Education credit, please contact *Rhode Island Bar Journal* Editor and Rhode Island Bar Association Director of Communications Frederick Massie at 401-421-5740 or email: fmassie@ribar.com.

2015 Annual Meeting Thursday Keynote Address: *Ouch! The Ethical Thicket of Social Media for Lawyers*

Back by popular demand, Louisiana attorney, nationally-known speaker, and novelist* Michael H. Rubin will deliver the Thursday Keynote address at the Rhode Island Bar Association's 2015 Annual Meeting in June. *Ouch! The Ethical Thicket of Social Media for Lawyers* reviews the ethical issues lawyers and judges face when dealing with social media. When more than half of all in-house counsel report using social media for news and information, when lawyers tweet, and law firms and judges maintain blogs, there is no doubt social media permeates our society. This prevalence raises a host of ethical issues ranging from judges "friending" lawyers and vice versa, to investigating witnesses and jurors, and from improper advertising, to First Amendment rights and more. Mike Rubin's unique blend of humor and scholarship, coupled to an extraordinary multi-media presentation is a great start to the Bar's two-day, 2015 Annual Meeting, on June 18th and 19th, at the Rhode Island Convention Center in Providence. Watch your mailbox for your invitation to attend and the 2015 Annual Meeting brochure featuring descriptions of the over 40 excellent CLE seminars, social events, Bar Award information, and product and service provider exhibits.

Michael H. Rubin, Esq.

From Baton Rouge, Louisiana, Michael Rubin heads the Appellate Practice Team of the multi-state law firm of McGlinchey Stafford PLLC. In addition to the full-time practice of law, for more than three decades, he also has served as an Adjunct Professor teaching finance, real estate and advanced legal ethics at Louisiana State University and Tulane law schools. Mike has presented hundreds of major lectures and papers throughout the U.S., Canada, and England and is an author or co-author and contributing writer of eleven books and over thirty articles. His publications are regularly cited as authoritative by state and federal courts, including state supreme courts and federal appellate courts. Mike currently is Chair of the ABA Real Property Section's Ethics Committee.

**Editor's Note: Please read the review of Michael Rubin's novel,* The Cottoncrest Curse, *on page 21 in this issue of the Rhode Island Bar Journal.*

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**

Rhode Island Bar Association's Volunteer Lawyer Program 2014 Highlights and Accomplishments

Program Summary

In keeping with its mission, the Rhode Island Bar Association's Volunteer Lawyer Program (VLP) continued to provide legal assistance to those who cannot obtain legal representation either on their own or through other legal resources. Administered by the Bar Association for twenty-eight years, the VLP continues to offer many interesting opportunities for the private bar to handle *pro bono* cases. VLP membership provides a satisfying variety of experiences that cannot be duplicated elsewhere and can open the door to justice for low-income citizens. Volunteer Lawyer Program attorneys impact their clients' lives in a significant and purposeful way. Through the VLP, volunteer attorneys know their contributions are essential to the system of justice. Accordingly, the advocacy and dedicated public service activities of VLP members reflect the ethical commitment of the Bar Association to the delivery of *pro bono* assistance to those who need help the most.

VLP/CLE Guardianships seminar series speakers included l-r: Barbara L. Margolis, Esq., Office of the Disciplinary Counsel; Brian Adae, Esq., Rhode Island Disability Law Center, Inc.; David F. Reilly, Esq., Law Offices of David F. Reilly; and Elizabeth W. Segovis, Esq., Rhode Island Legal Services.

Education – A Member Benefit

Ongoing recruitment of members is essential to respond to the needs of the community for *pro bono* assistance. The most effective method of member recruitment and retention is through sponsoring and providing free continuing legal education in cooperation with the Bar's Continuing Legal Education (CLE) department.

This year, through the outstanding efforts of the Public Service Involvement Committee, in conjunction with the VLP and *Pro Bono* Program for the Elderly, a free three part seminar series, *Guardianships: A Practical Approach*, was presented in October, November and December, 2014. Over 40 volunteer attorneys attended each session and agreed to accept a *pro bono* guardianship case.

Organized through the Bar's CLE department and the Bar's Foreclosure Prevention Project, in collaboration with Rhode Island Legal Services, Inc., Volunteer Lawyer Program members were invited to attend two, free, 3.0 credit, CLE seminars. *A Roadmap to Loan Modification and Loss Mitigation* was presented in February, 2014 and *Special Issues in Foreclosure: Mediation and Litigation* was offered in October, 2014 in exchange for accepting a foreclosure/foreclosure related case. The Foreclosure Prevention Project assisted both homeowners and tenants facing the loss of their homes as well as related issues.

Attorneys who are VLP members and contribute and report 30-plus hours of *pro bono* service annually are eligible to receive CLE coupons to be used in the following calendar year to attend one, *free* 3 credit seminar or three Food for Thought seminars of their choice. Instituted in 2009, this policy reflects the Bar's long standing support of *pro bono* legal assistance and public service.

Family Law Mediation

This year, the Volunteer Lawyer Program continued its partnership with Roger Williams University School of Law on Saturday, November 15, 2014, providing a mediation clinic focused on family law issues for low-income couples. Held at the Bar Association headquarters, the clinic was made possible under the direction of Professor Bruce Kogan, working with volunteer Roger Williams University School of Law alumni mediators. Eight couples were assisted during this session and subse-

Participants in the VLP RWU School of Law Mediation Clinic held at the Bar.

quently placed with VLP attorneys to review and complete the court process.

Volunteer Recognition/Events

On May 15, 2014, VLP members were recognized by President J. Robert Weisberger for their outstanding *pro bono* representation and service at a reception held at the Bar's headquarters. President Weisberger thanked Attorney Susan Famiglietti and her family and friends and the Batchelor Foundation for their generous contributions to the Volunteer Lawyer Program in memory of the late Attorney Steven Famiglietti. He also thanked Rhode Island Legal Services for their long standing collaboration and support to provide justice to those in greatest need.

L. Gregory Abilheira, Esq. and Allison C. Belknap, Esq. signed on as volunteers for VLP and the U.S. Armed Forces Legal Services Project.

The *Pro Bono* Awards presentation was held at the Bar Association's Annual Dinner on June 19, 2014. President Weisberger presented Attorneys Lauren E. Jones, Phillip C. Koutsogiane, and Dianne L. Izzo with the Pro Bono Publico Award for their outstanding contributions to the *pro bono* effort. Together, these three attorneys donated 372 hours of *pro bono* service!

Phillip C. Koutsogiane was one of three attorneys recognized for their outstanding *pro bono* efforts at the Bar's 2014 Annual Meeting.

Placement Strategies

VLP staff attended numerous 2014 Continuing Legal Education seminars at the Rhode Island Law Center, as well as at off site locations, to recruit new attorney members and place cases. *Pro bono* case summaries were prepared and distributed to attendees to emphasize the need for *pro bono* legal assistance and encourage participation. This was one of several effective methods of case placement, in addition to the traditional direct calls to panel members and blast e-mailing. Direct mail was primarily used to promote free CLE offerings.

The majority of potential clients contacted the VLP by telephone to request *pro bono* service. The public is continually referred to the VLP by the human service network, Rhode Island Legal Services and other legal assistance agencies, internet/Rhode Island Bar Association web site, law offices, the courts, and other sources.

In addition to sponsoring domestic mediation clinics, collection clinics were held at the Rhode Island Law Center, serving many low income clients requesting help with this issue.

In 2014, 952 requests for assistance were accepted for bankruptcy, collections, consumer, education, employment, foreclosures, guardianships, landlord/tenant, license registry, non-profit, probate, tort defense, and family law issues.

National *Pro Bono* Week

Attorney Armando E. Batastini and his law firm, Nixon Peabody LLC pledged to accept VLP cases and related *pro bono* programs.

In honor of National *Pro Bono* Week in October 2014, recruitment efforts were directed toward larger law firms to encourage them to participate in one or more of the Bar Association's *pro bono* programs. To date, through the leadership and cooperation of Rhode Island Bar Association Treasurer, VLP member, and partner in the Providence office of Nixon Peabody LLP, Armando E. Batastini, the firm has pledged to accept cases through the Volunteer Lawyer Program and related *pro bono* programs. Continued efforts to achieve VLP case placement with other large firms is ongoing. A collection clinic was held at the Bar headquarters during National *Pro Bono* Week. Past Bar President and Adler Pollock & Sheehan Shareholder Victoria M. Almeida and her law firm signed up to take cases through the Bar's US Armed Forces Legal Services Project during this time.

Community Appreciation

A sampling of the client evaluations of the legal assistance they received in 2014 demonstrates the amazing dedication of the volunteer attorneys and the sincere appreciation of the clients. These evaluations truly summarize the critical need for expanded and continued private bar involvement to provide individual representation to protect the rights of our poorest citizens. The following are some of the many comments that were received:

Not only did he stop the eviction, we got a new lease for one year!

Thank you for all your help and have an awesome New Year.

Very professional and informative and very kind.

I wish I had the finances to pay my lawyer. He deserves it.

She listened and she was patient.

I never knew about the benefits I could receive. After the bankruptcy, he guided me and now I receive food allotment, prescription Part D and other help I was not aware of.

Always remember you have saved at least one life in your lifetime.

How do I get involved?

Please consider making the Bar's Volunteer Lawyer Program part of your practice in 2015. For information and to join the Volunteer Lawyer Program, please contact Susan Fontaine at: sfontaine@ribar.com or 401-421-7758. For your convenience, VLP membership applications may be accessed on the Bar's website at www.ribar.com and completed online. Once we receive your application, we will contact you.

The Rhode Island Bar Association's Volunteer Lawyer Program is funded by Rhode Island Legal Services, Inc. and the Rhode Island Bar Foundation. ❖

Representing Clients Before the Rhode Island Personnel Appeal Board

Michael R. McElroy, Esq.
Schacht & McElroy[1]

The State of Rhode Island employs approximately 13,900 people. Therefore, at some point, a State employee may seek representation from you before the Personnel Appeal Board.

Introduction

The largest employer in Rhode Island is the State itself. In 2013, the State employed approximately 13,900 people. Therefore, at some point, a State employee may seek representation from you before the Personnel Appeal Board of the State of Rhode Island (Board).

The Board is a quasi-judicial agency of the State.[2] Under R.I. Gen. Laws § 36-3-6, the Board is comprised of five members appointed by the Governor with the consent of the Senate. The Board usually sits in panels of three per case.

The Board's primary jurisdictional statutes are R.I. Gen. Laws § 36-3-10, R.I. Gen. Laws § 36-4-41, and R.I. Gen. Laws § 36-4-42. Most of the Board's cases fall into two distinct groups.

The first group deals with adverse employment actions (dismissals/terminations, demotions, suspensions, layoffs, discrimination). Jurisdiction is governed by R.I. Gen. Laws § 36-3-10 and R.I. Gen. Laws § 36-4-42.

The second group consists primarily of those State employees who seek to avail themselves of the reclassification (desk audit) process. By this process, an employee who feels he or she is being required to perform duties and responsibilities of a higher position can file a request with the Office of Personnel Administration (OPA) for a review of his or her duties and responsibilities to determine whether he or she is working at a grade higher than the grade at which he or she is being paid.

Although the evidence presented to the Board in these two types of cases is different, the procedures applied by the Board, prior to and during the hearings, are similar.[3]

Filing the Appeal

An appeal must be timely filed with the Board. For an appeal from a decision of the Administrator of Adjudication (AA) on a desk audit, under R.I. Gen. Laws § 36-4-41, the appeal must be filed within 30 calendar days of the rendering of the decision and the employee may request either a review of the decision or a public hearing regarding the decision.

Under R.I. Gen. Laws § 36-4-42, in the case of an appeal from a dismissal/termination, demotion, suspension, layoff, or action which the employee believes has resulted in discrimination because of race, sex, age, disability, or political or religious beliefs, the appeal must be filed in writing with the Board within 30 calendar days of the *mailing* of the notice of the adverse personnel action. Again, the employee may request either a review or a public hearing.

Shortly after filing an appeal, the employee will receive a jurisdictional questionnaire from the Board. This questionnaire allows the Board, at an early stage, to determine whether it has jurisdiction.

If jurisdiction is unclear from the questionnaire, the Board may set the matter down for a preliminary jurisdictional hearing.

When to File the Appeal

R.I. Gen. Laws § 36-4-41 requires filing an appeal to the Board within 30 calendar days "of the rendering of a decision" by the AA.

The situation is somewhat different with an employee appealing directly to the Board from a dismissal/termination, demotion, suspension, layoff, or alleging discrimination. There, the employee must appeal "within thirty (30) calendar days of the *mailing* of the notice" of the adverse action. (emphasis added). A dismissal/termination, demotion, suspension, or layoff letter may have a date on the letter, but the date on the letter will not control. The employee should always save the envelope in which the letter was mailed. The postmark is important evidence of the date of mailing, which is the date upon which the 30 days commences to run.[4]

Mailing of the appeal on the last day of the appeal period is not sufficient. The appeal must be physically received by the Board within the 30-day period.[5]

Who May File an Appeal

An employee must file the appeal under R.I. Gen. Laws § 36-4-41 and R.I. Gen. Laws § 36-4-42. Frequently, an employee who is a union member has attempted to appeal by having a union representative file the appeal on the employee's behalf. Although a union represen-

Rhode Island Bar Foundation

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

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

Help Our Bar Foundation
Help Others

RHODE ISLAND BAR FOUNDATION GIFT

PLEASE PRINT

My enclosed gift in the amount of $ _____

Please accept this gift in my name

or

In Memory of _____

or

In Honor of _____

Your Name(s) _____

Address _____

City/State/Zip _____

Phone (in case of questions) _____

Email: _____

Please mail this form and your contribution to:

Rhode Island Bar Foundation

115 Cedar Street

Providence, RI 02903

Questions? Please contact Virginia Caldwell at 421-6541

or gcaldwell@ribar.com

tative may practice before the Board in hearings under Rule 3 of the Board's Rules and Regulations, except in extraordinary circumstances, the Board rarely allows a union representative to file the initial appeal. A Rhode Island attorney may file the initial appeal on behalf of an employee, but it is better practice to have the employee also sign the appeal.

Discovery/Subpoenas

The Board's subpoena power under R.I. Gen. Laws § 36-3-10.1 and Rule 4 of the Board's Rules and Regulations differ from the process for taking discovery or issuing trial or deposition subpoenas in court. Only the Board can issue a subpoena for the attendance of witnesses or the production of documents. Subpoenas are issued by and in the name of the Board and are signed by the Presiding Officer after a majority vote of the Board thereon.[6]

Under the Board's Rules, a subpoena shall not be approved for issuance by the Board "unless the Board determines that the public interest or the interest of justice be served thereby." (Rule 4.03). Under Rule 4.04, the party requesting a subpoena must "establish the reasonableness of such subpoena request by detailing the relevancy and necessity for its issuance and the materiality of the evidence being sought." If a subpoena is issued, it may be modified or quashed by the Board "upon proper showing to the Board of it being unreasonable or oppressive." (Rule 4.05).

If the Board votes to issue the subpoena in whole or in part, then the moving party must prepare the subpoena[7] and deliver it to the Board. It will then be executed by the Presiding Officer and returned to the moving party for service. (Rule 4.06). The Board has allowed subpoenas for producing witnesses and/or documents to Board hearings, as well as producing witnesses and/or documents for prehearing discovery, including depositions.

Board Hearings

The Board encourages exchange of documentary evidence in advance. Parties should ensure they bring enough copies to the hearing so they have: one for each of the three Board members; one for the Board's legal counsel; one for the Board's Office Manager; at least one for opposing counsel; and one for the witness.

Board hearings are subject to the Administrative Procedures Act. The hearings are tape recorded and transcribed. The Board generally follows the Superior Court Civil Rules of Evidence, but can be more liberal than those Rules. Unless precluded by a statute, evidence that would not be admissible under the Superior Court Civil Rules of Evidence may be admissible before the Board "if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs." (Rule 5.04(4)(a)).

In a case under R.I. Gen. Laws § 36-4-42, the state has the burden of proof regarding a dismissal/termination, demotion, suspension, or layoff, and therefore presents its evidence first and has opportunity for rebuttal. In an appeal from a decision of the AA under R.I. Gen. Laws § 36-4-41, the employee has the burden of proof, goes first, and has opportunity for rebuttal. In a discrimination case, the special burden shifting rules of discrimination cases apply, so the employee must first set forth a *prima facie* case of discrimination. If the employee does so, the burden then shifts to the state.[8]

Witnesses are sworn and questioned as they would be in any other court or administrative proceeding. At the conclusion of the evidence, the parties will usually be asked if they want to deliver closing arguments or if they would prefer to file post-hearing briefs, or sometimes both.

Special Issues Regarding Appeals from the Administrator of Adjudication

In an AA appeal under R.I. Gen. Laws § 36-4-41, it is the employee's responsibility under R.I. Gen. Laws § 3-4-40.2(d) to order and pay for the transcript before the AA and have it forwarded to the Board.

In appeals involving a decision of the AA on a desk audit, the job classification description for the position to which the employee believes he or she should be upgraded should be used as a guide by counsel. Demonstrate, if possible, with testimony, exhibits, and examples that, as of the date the desk audit was filed, the employee was substantially performing each of the duties and responsibilities of the higher classification being sought.

Employees often get caught in a trap of trying to argue that another employee currently in the higher classification being sought performs the same duties and

responsibilities as the appealing employee, and the employee argues that he or she is therefore entitled to the higher classification. The Board is almost never willing to hear such testimony.

Counsel should ensure that the classification description is covered in every detail, including General Statement of Duties and Responsibilities, Supervision Exercised, Supervision Received, and each of the Illustrative Examples of Work Performed. If there are educational or experience requirements, or any special requirements, each matter should be addressed.

The test is one of "substantial performance,"[9] but in this non-contractual context, the word substantial is usually interpreted strictly by the Board. It does not mean 50% of the duties and responsibilities; it means virtually all. The Board prefers the employee meet each requirement of the classification description for the position being sought, and only rarely will it deviate from that.

If there is a relevant special requirement, the Board usually enforces the special requirement, whether that involves having particular education, experience, licensing, etc.

If the higher grade being sought by the employee requires that supervision must be exercised by the employee, the employee must demonstrate that he or she is supervising, not only by directing another employee's activities, but by signing their timesheets, approving leave, getting involved in discipline, etc. However, some classification descriptions say only that the position being sought "may" supervise, and, in such a situation, the Board may not require that demonstrated supervision.

If the Board overturns the AA decision and awards the higher grade being sought, the Board will award back pay.

Special Issues Regarding Dismissals/Terminations, Suspensions, and Demotions

Under the case of **Cleveland Board of Education v. Loudermill,**[10] the United States Supreme Court held that public sector employers must provide a pre-termination hearing (commonly known as a Loudermill hearing) and a pre-termination letter (commonly known as a Loudermill letter) before dismissing/terminating an employee. The usual State practice is to provide a Loudermill letter

with dismissals/terminations, suspensions, and demotions.

Hopefully, your client will hire you as soon as he or she receives the Loudermill letter. Review the allegations in the letter and discuss potential defenses to the letter's claims with your client. Although the Loudermill hearing is usually scheduled for a date shortly after delivery of the Loudermill letter, for good cause shown, the State will sometimes continue the hearing for a brief period.

The Loudermill hearing is not a full hearing. It is the right to have: 1) notice of the charges being made against the employee; 2) a brief explanation of the employer's evidence to support those charges; and 3) an opportunity for the employee to present his or her side of the story.

It makes good sense to prepare for the Loudermill hearing and to represent your client at the Loudermill hearing. You may be able to persuade the State to drop some of the allegations in the Loudermill letter based on information you or your client can present at the hearing. However, the final dismissal/termination, suspension, or demotion letter will usually closely track the letter.

Shortly after the conclusion of the Loudermill hearing, the State will issue its final adverse action letter and you should file your client's appeal to the Board.

The Board will hold the State to the allegations in the final letter. Occasionally, the State's witnesses have attempted to stray into areas not set forth in the final letter. If objected to, the Board will usually not allow discussion of any evidence that does not directly relate to the allegations set forth in the final letter.

Issues Related to Direct Appeals

Regarding direct appeals to the Board of a dismissal/termination, demotion, suspension, or layoff, the test is usually whether the State has shown substantial evidence to support the adverse action. Under R.I. Gen. Laws § 36-4-38, a classified employee with permanent status may only be dismissed for "just cause" when the appointing authority "considers the good of the service to be served thereby, stated in writing, with full and sufficient reason."[11] The phrase "good of the service" in R.I. Gen. Laws § 36-4-38 places

continued on page 26

SOLACE

Helping Bar Members in Times of Need

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

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

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

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

Recognizing Restitutionary Causes of Action & Remedies in Civil Litigation

Colleen P. Murphy, Esq.
Professor, Roger Williams
University School of Law

With this brief primer, a Rhode Island lawyer may recognize more restitutionary causes of action and remedies in his or her practice.

An attorney once asserted: "Restitution is a legal growth area." His listener asked, "How do you know?" The attorney responded: "I practiced law for twenty years without seeing one restitution case, but in the year since I taught Remedies, I have seen one about every week."

What follows is a brief primer on the law of restitution, with respect both to the substantive law of unjust enrichment and to various restitutionary remedies.[1]

I. General Principles

A. Restitution and Unjust Enrichment Defined

The terms restitution and unjust enrichment are interchangeable to denote a basis of civil liability, distinct from contract or tort, premised on the basic principle that someone who is unjustly enriched at the expense of another is subject to liability in restitution. To be unjustly enriched is to obtain an economic benefit (such as money, property, a service, a saved expenditure, or a discharged obligation) when that benefit was transferred without an adequate legal basis. The Supreme Court of Rhode Island has recognized unjust enrichment as a distinctive cause of action and stated its fundamental elements:

> "Unjust enrichment… can stand alone as a cause of action in its own right.… To recover for unjust enrichment, a claimant must prove: 1) that he or she conferred a benefit upon the party from whom relief is sought; 2) that the recipient appreciated the benefit; and 3) that the recipient accepted the benefit under such circumstances 'that it would be inequitable for [the recipient] to retain the benefit without paying the value thereof."[2]

The cause of action in unjust enrichment historically has been recognized in a variety of settings carrying different names, including implied-in-law contract, quasi-contract, and *quantum meruit*. The modern trend is to use the terms unjust enrichment or restitution, making clear this basis of civil liability is independent of contract law.

Very importantly, a cause of action in unjust enrichment may exist even if the plaintiff has not suffered an economic loss. The cause of action depends instead on whether the *defendant* has received an economic benefit. Moreover, in contrast to contract or tort causes of action, the cause of action in unjust enrichment, in many contexts, does not require that the defendant was at fault. The focus instead is on whether the defendant has been unjustly enriched, even if the defendant is not at fault or even if the claimant instead was the one at fault (e.g., the claimant mistakenly conferred the benefit on the defendant).

B. Distinctive Advantages of the Unjust Enrichment Cause of Action and of Restitutionary Remedies

Restitution, in both its substantive and remedial aspects, has several distinctive advantages over other civil causes of action and remedies. The law of restitution is most advantageous when:

- Plaintiff's only cause of action is unjust enrichment (i.e., the circumstances do not present a tort, contract, or statutory cause of action);
- Defendant's gain from the benefit exceeds plaintiff's loss;
- Defendant's gain is easier to prove than plaintiff's loss;
- Defendant is insolvent and the restitution claimant is able to obtain specifically identifiable property held by the defendant; or
- Plaintiff seeks to reach its property or traceable proceeds of the property in the possession of a third person.

C. Restitution May be Legal or Equitable

The cause of action in unjust enrichment may loosely be termed equitable in the broad sense of achieving fairness. However, as a technical/historical matter, some strands of restitution are legal, while others are equitable. Concrete consequences, including whether a right to jury trial exists, whether an action is authorized by statute, and whether certain types of defenses are available, depend on a proper understanding of which restitutionary causes of action and remedies are technically legal and

which are technically equitable. Typically, a simple money judgment for the value of a benefit obtained by the defendant is a legal remedy, as is monetary restitution of a defendant's unjust gain of money. By contrast, the asset-based remedies of constructive trust and equitable lien are equitable remedies.

II. Liability in Restitution: The Cause of Action in Unjust Enrichment

The general categories of liability in unjust enrichment are when: 1) a transfer of a benefit is subject to avoidance (such as for mistake or defective consent); 2) the recipient of the benefit did not request the benefit, but it would be unjust for the recipient to retain the benefit; 3) the recipient requested the benefit but the plaintiff does not have a valid contract claim against the recipient; and 4) the benefit was acquired by tort or breach of a fiduciary or confidential duty. In all these categories, the transfer of the benefit lacked an adequate legal basis.

A. Transfers Subject to Avoidance

Transfers of benefits that are subject to avoidance include:

- payment of a monetary judgment that is later reversed
- mistaken conferral of a benefit (such as mistaken payment of money, mistaken good faith improvement of another's property, or mistaken performance of another's obligation)
- transfer of a benefit without proper consent or authority (such as a benefit obtained by fraud, duress, undue influence, or incapacity to contract).

For all these transfers of benefits subject to avoidance, a claim in unjust enrichment against the recipient of the benefit exists.

B. Benefit Was Not Requested, but Recipient Would be Unjustly Enriched If Recipient Did Not Pay for the Benefit

In some circumstances, the recipient of the benefit did not request the benefit, but a cause of action in unjust enrichment exists because it would be unjust for the recipient to retain the benefit. Examples include: emergency intervention by the restitution claimant to protect the life, health, or property of the recipient of the benefit; necessary expenditure by a restitution claimant to protect an interest in his or her property that confers an economic benefit on another who has an

economic interest in that property; and substantial, uncompensated contributions (either in the form of property or services) by one unmarried, intimate cohabitant to an asset owned by the other cohabitant.

C. Benefit Was Requested by Recipient but Plaintiff Does Not Have A Contract Claim

A claimant may sometimes recover in restitution the value of the claimant's contractual performance even if, for one of several possible reasons, the claimant has no claim on the contract. The claimant would lack a viable contract claim if: 1) the contract, when made, is unenforceable (e.g., the contract was not in writing as required by statute or the contract terms are indefinite); 2) the contract is illegal or otherwise unenforceable as a matter of public policy; 3) the recipient of the performance lacked the capacity to contract; 4) an initially valid contract is avoided subsequent to the plaintiff's performance because of mistake or supervening change of circumstances; 5) the defendant demanded, and the plaintiff supplied, a performance that was not in fact due under the contract; or 6) the claimant who conferred a benefit under the contract also materially breached the contract. Moreover, a claimant may have believed, erroneously, that a contract had been formed. The claimant nonetheless may have a valid claim in unjust enrichment against the recipient of the benefit.

A plaintiff may plead breach of contract and unjust enrichment as alternate theories. If the court finds that the plaintiff does not have a valid contract claim, the plaintiff may continue with its unjust enrichment claim. If, however, a valid contract claim exists, the appropriate cause of action is breach of contract, not unjust enrichment.

D. Benefits Acquired by Wrongs

1. Tort

When a defendant has acquired a benefit because of a tort committed against the plaintiff (such as misappropriation of funds or conversion of property), the plaintiff may pursue either a tort claim or an unjust enrichment claim. This is true even if the defendant is not the person who committed the tort or even knew of the tort, providing the defendant was unjustly enriched by a benefit obtained at the plaintiff's expense. The cause of action in unjust enrichment may provide a more

favorable remedy than the cause of action in tort. Specifically, if the defendant's gain from the benefit exceeds the plaintiff's loss and the defendant was a conscious tortfeasor, the plaintiff may seek restitution (disgorgement) of the defendant's gain in unjust enrichment rather than compensatory damages in tort for the plaintiff's loss.

2. Breach of a Fiduciary Duty or Breach of an Equivalent Duty Imposed by a Relation of Trust or Confidence

One must return a benefit and any resulting gain if the benefit was obtained in violation of a fiduciary or equivalent duty imposed by a relation of trust or confidence (which in Rhode Island may include certain family relationships).

III. Restitutionary Remedies

A. Restitution Through a Money Judgment

With an unjust enrichment cause of action, the monetary remedy should be measured by how much the defendant was unjustly enriched, as opposed to how much the plaintiff lost. In addition, the measure of the defendant's unjust gain generally varies depending on whether the defendant was innocent or wrongful in acquiring the benefit. Accordingly, a restitution defendant may be liable for less than the market value of the benefit transferred to it (for example, the defendant was innocent in acquiring the benefit and the benefit is worth *less* to the defendant than its market value) or *more* than the market value of the benefit transferred to it (for example, the defendant was a conscious wrongdoer and thus must disgorge any profits it made from the benefit).

B. Restitution Through an Asset-Based Remedy

The law of unjust enrichment affords very powerful asset-based remedies. These remedies are particularly advantageous in two circumstances: 1) when the claimant's asset (or traceable product of the asset) has increased in value; or 2) when the defendant is insolvent. Asset-based restitutionary remedies at law include replevin, which is the return of personal property to which the plaintiff retains legal title (such as when the property has been stolen). Asset-based restitu-

tionary remedies in equity include the constructive trust and equitable lien, allowing the plaintiff to obtain a specific asset to which the defendant has obtained legal title, but in which the plaintiff has an equitable interest (such as when the defendant obtained the property because of the claimant's mistake or due to the defendant's breach of fiduciary duty). Moreover, if the claimant wants to trace its property or funds through subsequent changes in form, it must employ the equitable remedies of the constructive trust or equitable lien.

1. Constructive Trust and Equitable Lien Defined

The constructive trust is a remedy that requires the defendant to convey specific property or funds to the plaintiff. It is based on the fiction that the defendant is holding the property or funds as trustee for the plaintiff, with the plaintiff being the equitable owner of the property or funds. The equitable lien is a remedy securing a money judgment against the defendant with specific property in which the plaintiff is deemed the equitable lienholder. Importantly, the restitution claimant seeking a constructive trust or equitable lien may trace its property or funds through subsequent changes in form, resulting in an entitlement to the traceable property.

Generally, a plaintiff should prefer a constructive trust if the plaintiff's property or its traceable product has increased value. A plaintiff should prefer an equitable lien if the value of the identifiable property is less than the amount of the defendant's liability, because the plaintiff will be entitled to a money judgment for the full liability amount. That judgment amount is secured by an equitable lien on the property, and the deficiency can be pursued by other collection means.

2. Requirements for Imposition of the Constructive Trust or Equitable Lien

To obtain a constructive trust or equitable lien, the restitution claimant must both establish a claim under the substantive law of unjust enrichment and identify specific property in which the claimant has an equitable interest. In terms of substantive law, Rhode Island courts thus far have recognized the possibility of a constructive trust or equitable lien when an

continued on page 31

Two Prominent Providence Law Firms Commit to Rhode Island Bar's *Pro Bono* Programs

Rhode Island Bar Association Past President and Adler Pollock & Sheehan P.C. shareholder Victoria M. Almeida and Rhode Island Bar Association Treasurer and partner in the Providence office of Nixon Peabody LLP, Armando E. Batastini, Esq. represented their respective law firms' commitment to the Bar's *pro bono* programs.

The Rhode Island Bar Association is pleased to announce the Providence law firm of Adler Pollock & Sheehan P.C. (AP&S) has pledged to accept *pro bono* cases through the Bar's **United States Armed Forces Legal Services Project**. In 2009, as Bar Association Past President, AP&S shareholder Victoria M. Almeida spearheaded this exciting military legal assistance program initiative, and she continues to enthusiastically support the expansion of her firm's *pro bono* efforts by encouraging and providing service to those who serve our nation every year.

Additionally, through the leadership and cooperation of Rhode Island Bar Association Treasurer and partner in the Providence office of Nixon Peabody LLP, Armando E. Batastini, that law firm has also pledged to accept Volunteer Lawyer Program, Elderly Pro Bono and US Armed Forces Legal Services Project cases.

All of the Bar's public service programs and projects, including the **Volunteer Lawyer Program** and the **Elderly Pro Bono Program**, offer specific and unique opportunities based on practice areas/interests for attorney and law firm participation. The Bar's *pro bono* programs are designed to help meet the legal assistance needs of our needy and vulnerable populations, including our most at-risk elderly citizens and veterans, low income families and the homeless, and those currently serving our nation in uniform.

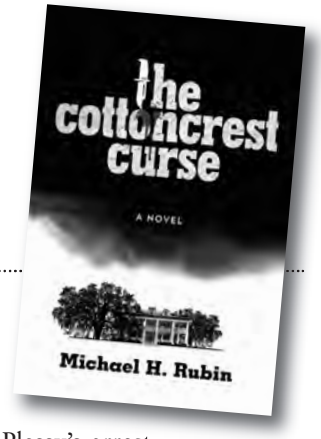
Last year, through its public service programs, the Bar received over 1,300 requests for *pro bono* assistance from our citizens in greatest need. The demand is expected to grow this year. Today, Bar members' help is needed more than ever!

Members may sign up for and request membership information and details about the **US Armed Forces Legal Services Project**, the **Volunteer Lawyer Program** and the **Elderly Pro Bono Program** by contacting Susan Fontaine, sfontaine@ribar.com or 401-421-7758.

BOOK REVIEW

The Cottoncrest Curse

by Michael H. Rubin, Esq.



Stephen J. Sypole, Esq.
Gidley, Sarli & Marusak, LLP
Providence

The themes of racial and economic inequality that Michael H. Rubin explores in The Cottoncrest Curse are as relevant today as they were in 1893 and 1961.

Michael H. Rubin is known in Louisiana and throughout the country as an accomplished attorney and wildly popular CLE presenter. He can now add successful novelist to his list of accolades. His debut novel, *The Cottoncrest Curse*, is a thrilling mystery that takes the reader on a journey from 1893 to the present day while exploring themes including racial tension and economic inequality that are as relevant today as they were in the post-Civil War era.

The story opens with the violent and gruesome deaths of Colonel Judge Augustine Chastaine, an elderly Civil War veteran, and his beautiful young wife, Rebecca, who are found dead on the staircase of their plantation home in Petit Rouge Parish, Louisiana. Many of the local residents – mostly poor white sharecroppers and former slaves – suspect the Colonel Judge and Rebecca were victims of a murder-suicide brought on by the "Cottoncrest Curse," a rumor that began after the Colonel Judge's father killed himself at the conclusion of the Civil War. Local Sheriff Raifer Jackson, however, carefully pieces together clues that lead him to believe they were murdered. The sheriff is then persuaded by the leader of a white supremacist group to identify Jake Gold, a Jewish peddler with mysterious ties to the deceased couple, as his main suspect.

Jake, a chameleon-like master of the various languages and dialects spoken by the diverse denizens of the Louisiana bayou, leads a sheriff's deputy and a group of armed, racist thugs on an exciting chase that culminates on the streets and railways of New Orleans. Interspersed with Jake's story are chapters set in 1961 and in the present day as Jake's descendants travel back to Cottoncrest in a quest to uncover the truth of what occurred in 1893. The book is hard to put down as the reader explores the impact that the deaths of the Colonel Judge and Rebecca had on a colorful cast of characters over the course of more than a century.

Also interspersed throughout the novel is the story of **Plessy v. Ferguson**, the 1896 United States Supreme Court case that upheld the constitutionality of racial segregation laws. Louis Martinet – the African American attorney who orchestrated Homer Plessy's arrest for violating the Separate Car Act – makes an appearance in the story and provides assistance to Jake and his allies in their attempt to evade capture. The chapters set in 1961 depict a rural Louisiana still coming to grips with the new reality imposed by **Brown v. Board of Education** which finally overturned **Plessy** and declared the state's "separate but equal" laws unconstitutional.

The themes of racial and economic inequality that Michael H. Rubin explores in *The Cottoncrest Curse* are as relevant today as they were in 1893 and 1961. One cannot help but compare the stories of police violence against unarmed minorities that permeate the news today with the plight of Jake Gold and the former slaves from the Cottoncrest plantation as they are accused, persecuted and pursued following the plantation owner's death because of their Jewish heritage or skin color. The exploration of these themes is extremely thought provoking and distinguishes *The Cottoncrest Curse* from the typical whodunit mystery novel.

The Cottonrest Curse is well written, meticulously researched, and highly recommended to any fan of the mystery and historical fiction genres.

Editor's Note: Louisiana attorney, nationally-known speaker and "The Cottoncrest Curse" author Michael H. Rubin, Esq. is the Thursday, June 18th, keynote speaker at the Rhode Island Bar Association's 2015 Annual Meeting at the Rhode Island Convention Center in Providence. His presentation on helping lawyers navigate the ethical thicket of social media combines an informal style with scholarship, thought-provoking comments, humor and music. See page 4 for more information about Attorney Rubin's background and his Annual Meeting presentation.

Volunteers Serving Rhode Islanders' Legal Needs

The Rhode Island Bar Association applauds the following attorneys for their outstanding *pro bono* service through the Bar's Volunteer Lawyer Program, Elderly Pro Bono Program, and the US Armed Forces Legal Services Project during December 2014 and January 2015.

December 2014

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January 2015

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Rhode Island Law Center, Providence
1:00 p.m. – 4:00 p.m., 3.0 credits
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March 10
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1:30 p.m. – 4:30 p.m., 2.5 credits +.5 ethics
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March 26
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April 8
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Food For Thought
Zoning Board Decisions 101
Holiday Inn Express, Middletown
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Rhode Island Bar Association 2015 Annual Meeting June 18th and 19th

The Rhode Island Bar Association Annual Meeting is on
Thursday, June 18th and Friday, June 19th, 2015
at the Rhode Island Convention Center.
Featuring over 40 Continuing Legal Education seminars, great keynote and workshop speakers, Bar Awards, many practice-related product and service exhibitors, and the chance to socialize with colleagues, the Bar's Annual Meeting, traditionally drawing over 1,500 attorneys and judges, is an event to attend and enjoy!

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

Personnel Appeal Board

continued from page 13

the burden of proof on the appointing authority to establish that the dismissal was based on substantial grounds.[12] The Supreme Court has held in a similar context that just cause for termination "must be understood as relating to personal deficiencies in the officeholder, such as shortcomings in job performance, inappropriate activities, conduct worthy of discipline, and other similar usually punishable activities on the part of the employee as an individual."[13]

Under R.I. Gen. Laws § 36-4-42, upon a finding in favor of the employee, the Board has the authority to confirm or reduce the dismissal of the employee or may reinstate the employee. The Board may also order payment of part or all of the salary to the employee. Further, upon a finding in favor of the employee, the employee shall be returned to his position without loss of compensation, seniority, or any other benefits he may have enjoyed, or under such terms as the Board shall determine.

Under R.I. Gen. Laws § 36-3-10(a)(4), the Board is given jurisdiction to decide a grievance under a union contract, if the contract so provides. However, the employee cannot process both a contractual grievance and an appeal to the Board. Unless proceeding under the grievance provisions of a union contract, the employee usually must have provisional, probationary, or permanent status in a position in the classified service of the State to appeal, unless the employee is claiming discrimination due to race, sex, age, disability, or political or religious beliefs, or unless a personnel policy of the State of Rhode Island, vests a right of appeal in the Board.

One potential trap is that R.I. Gen. Laws § 36-3-10(b) provides that the Board "may dismiss the appeal of a person who has already appealed or seeks to appeal the same matter under provisions of a contractual agreement or other law or regulation." The Board freely exercises this option. The employee will be asked in the jurisdictional questionnaire whether the employee has already appealed or is seeking to appeal the same matter in another forum under provisions of a contractual agreement or other law or

regulation. If the answer is yes, usually, the Board will opt to dismiss the appeal and the employee will be left to his or her rights under the other appeal.

Unclassified and Non-Classified State Employees

If your client is a State employee, is classified, and has provisional, probationary, or permanent status, then the Board will usually have jurisdiction to hear the appeal, provided you file a timely appeal.

If your client is an unclassified employee (there is a statutory listing of unclassified positions in R.I. Gen. Laws § 36-4-2), then the Board's jurisdiction is limited. An unclassified employee can attempt to allege discrimination to attempt to obtain Board jurisdiction. Also, an unclassified employee who fits within the definition of Executive Order No. 89-25 establishing the Personnel Appeal Board as the Unclassified Appeal Board has a right to appeal to the Unclassified Appeal Board. Executive Order 89-25 only applies to unclassified employees who; 1) were appointed for a fixed term; and 2) were discharged before the end of the fixed term.

If the employee is a non-classified employee, then the Board usually has no jurisdiction. Non-classified employees are primarily those who are employees of the Board of Governors, such as professors at the University of Rhode Island, employees of the Legislature, or other employees who by statute have been made non-classified employees, such as certain employees of the Narragansett Bay Commission and the judicial department. Note that R.I. Gen. Laws § 36-4-2.1 provides:

> **36-4-2.1 Exemptions from merit system.**
> The appointment, promotion, salaries, tenure, and dismissal of employees of the legislative and judicial departments shall not be subject to control in any manner or degree by the personnel administrator, or by any other officer or board of the executive branch of government.

Review vs. Public Hearing

When an appeal is filed or shortly thereafter, the employee will be asked, in the jurisdictional questionnaire, to make an election between a review and a public hearing. A review is an abbreviated process by which the Board will usually

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informally meet with the parties, allow the parties to each make a generalized statement, and then the Board will review the documentation on file and decide based on that review.[14] A public hearing is much different. It is a full-blown contested case under the Administrative Procedures Act and it is conducted with the presentation of witnesses, documents, etc.

Remedial Powers

Under R.I. Gen. Laws § 36-3-42, the Board has broad remedial powers and "may order payment of part or all of the salary to the employee for the period of time he or she was demoted, suspended, laid off, or dismissed." In addition, the Board may order the employee to be "forthwith returned to his or her office or position without loss of compensation, seniority, or any other benefits he or she may have enjoyed, *or under such terms as the appeal board shall determine*." (emphasis added).[15]

Superior Court Appeal

Appeals from Board decisions to the Superior Court are available under the Administrative Procedures Act. An appeal must be filed within 30 days after mailing the Board's decision.[16] Although it is common practice for an employee who has lost before the Board to file an appeal and name the Board and/or its members as Defendant/Respondent in Superior Court, in my opinion, it is unnecessary to name the Board or its members in a Superior Court appeal.[17] I believe the better practice is for a disappointed appealing employee to name the State of Rhode Island and the department the employee works for as Defendant/Respondent. However, a copy must be served on the Board.[18]

The Board usually does not file an answer (See Rule 80 of the Superior Court Rules). Instead, the Board files the administrative record with the Superior Court. A briefing schedule is established, and, once the matter is briefed by the parties, it is assigned to a judge for decision. The Board rarely files a brief. The exception is where a decision impacts the Board's jurisdiction or other internal procedures. Usually, the Board looks to the prevailing party to defend the decision of the Board.

Because this is an appeal under the standards set forth in R.I. Gen. Laws § 42-35-15(g), the Superior Court's

review is limited, especially regarding factual matters.[19]

In conducting a review, the Court "shall not substitute its judgment for that of the [Board] as to the weight of the evidence on questions of fact."[20] The Court must affirm the Board's decisions on questions of fact, unless such decisions are "totally devoid of competent evidentiary support in the record."[21] In essence, if 'competent evidence exists in the record, the Superior Court is required to uphold the [Board's] conclusions.'"[22]

On questions of law, "[w]here the provisions of a statute are unclear or subject to more than one reasonable interpretation, the construction given by the [Board] charged with its enforcement is entitled to weight and deference, as long as that construction is not clearly erroneous or unauthorized."[23] However, the Court is not bound by the Board's decisions of law, and reviews these questions *de novo*.[24] Ultimately, issues of statutory interpretation and agency jurisdiction are quests of law for which the Court is responsible.[25]

A disappointed party at the Superior Court level may seek Supreme Court review by way of *certiorari* "to review any questions of law."[26]

ENDNOTES

1 *The opinions expressed herein are solely the opinions of Mr. McElroy and do not necessarily represent the opinions of the Personnel Appeal Board. Mr. McElroy has been legal counsel to the Board for 23 years.*

2 ***Department of Corrections v. Tucker**, 657 A.2d 546 (RI 1995).*

3 *The Board follows the Administrative Procedures Act (R.I. Gen. Laws § 42-35-1 et seq.), its own statutes in R.I. Gen. Laws § 36-3 and § 36-4, its own Rules and Regulations (which can be found at http://sos.ri.gov/documents/archives/regdocs/released/pdf/RIPAB/RIPAB_524_.pdf), relevant case law, and the Board's prior administrative decisions.*

4 ***See Rivera v. Employees' Retirement System of Rhode Island**, 70 A.3d 905 (RI 2013).*

5 ***See Wood v. Ford**, 525 A.2d 901 (RI 1987).*

6 *A majority of the 3-member panel assigned to the case.*

7 *Use the Superior Court subpoena form as a guide and modify it to come from the Personnel Appeal Board.*

8 ***See**, for example, **Panarello v. State**, No. 2011-105-Appeal, April 7, 2014 (RI Supreme Court) (military discrimination); **Bucci v. Hurd Buick Pontiac GMC Truck, LLC**, No. 2011-163-C.A., March 4, 2014 (RI Supreme Court) (age and disability discrimination).*

9 ***See**, for example, **Rosa Lopez v. Personnel Appeal Board**, C.A. No. 99-4151, March 5, 2002 (RI Superior Court).*

10 *470 U.S. 532 (1985).*

11 *Under R.I. Gen. Laws § 36-4-38:*

A classified employee with temporary status may be dismissed at the pleasure of an appointing authority under the provisions of § 36-4-31. A classified employee with provisional or probationary status may be dismissed for reasons relating to the employee's qualifications or for the good of the service.

12 ***Aniello v. Marcello***, *162 A.2d 270 (RI 1960);* ***Hardman v. Personnel Appeal Board***, *211 A.2d 660 (RI 1965).*

13 ***Castelli v. Carcieri***, *961 A.2d 277, 286 (RI 2008).*

14 ***See Masyk v. Parshley***, *180 A.2d 314 (RI 1962).*

15 *R.I. Gen. Laws § 36-4-42.*

16 *(R.I. Gen. Laws § 42-35-15(b)).*

17 ***See Providence Journal Co. v. Mason***, *359 A.2d 682, fn.3 (RI 1976).*

18 *R.I. Gen. Laws § 42-35-15(b).*

19 ***See Caroselli v. State of Rhode Island Department of Administration Personnel Appeal Board***, *C.A. No. PC 10-4104 (June 6, 2012).*

20 ***Ctr. for Behavioral Health, Rhode Island v. Barros***, *710 A.2d 680, 684 (R.I. 1998) (citations omitted).*

21 ***See Baker v. Dep't of Employment and Training Bd. of Review***, *637 A.2d 360, (R.I. 1994).*

22 ***Auto Body Association of Rhode Island v. State of Rhode Island Department of Business Regulation et al.***, *996 A.2d 91, 95 (R.I. 2010).*

23 ***Gallison v. Bristol School Committee***, *493 A.2d 166 (R.I. 1985).*

24 ***Arnold v. R.I. Rhode Island Department of Labor and Training Bd. of Review***, *822 A.2d 164, 167 (R.I. 2003).*

25 ***City of East Providence v. Public Utilities Comm'n***, *566 A.2d 1305, 1307 (R.I. 1989).*

26 ***See*** *R.I. Gen. Laws § 42-35-16.* ❖

Restitutionary Causes

continued from page 19

asset has been acquired through breach of a fiduciary or confidential relationship, undue influence, fraud, or misappropriation. *The Restatement (Third) of Restitution and Unjust Enrichment* also recognizes mistaken transfer of an asset as supporting the imposition of a constructive trust or equitable lien.

Once a claim under the substantive law of unjust enrichment is established, the claimant also must show that specific property – to which the initial recipient or a third person has legal title – rightfully belongs to the claimant. This showing can be made directly (when the very thing obtained from the claimant is held by the initial recipient or a third person) or by tracing claimant's money or property through subsequent changes in form.

3. Advantages of Asset-Based Equitable Remedies Compared to a Simple Money Judgment

• The constructive trust is advantageous to the restitution claimant when the property in which the claimant has an equitable interest has increased in value.

Example: Through undue influence, defendant obtained stock from claimant worth $1,000. The stock is now worth $2,000. The restitution claimant may obtain a constructive trust over the stock rather than a money judgment for the initial loss of $1,000.

• The constructive trust or equitable lien enables a plaintiff to trace its property through subsequent changes in form.

Example: Through fraud, defendant obtained stock from plaintiff worth $1,000. Defendant sold the stock and reinvested the full $1,000 to purchase a work of art for $1,000. The art is now worth $2,000. The plaintiff is entitled to the work of art through a constructive trust.

• If property of the claimant has been commingled with the property of the defendant in a common account, the claimant may, by tracing rules, identify her property in the account and, in some circumstances, take advantage of withdrawals that are invested profitably.

Example: Defendant had a personal account with $1,000 in it. Defendant,

Kent County Bar Association 2014 Achievement Awards

The Kent County Bar Association honored three individuals with 2014 achievement awards at their year-end meeting. l-r: Tim Morgan, Kent County Bar Association Board Member; Anthony F. Amalfetano, Lawyer of the Year Award Winner; John D. Lynch, Kent County Bar Association Board Member; Rhode Island Superior Court Associate Justice Bennett R. Gallo, Lawyer Lifetime Achievement Award; Gregory S. Inman, Kent County Bar Association President; Krista Schmidt, Kent County Bar Association Member; William Van Wormer, Court Employee of the Year Award Winner; Gerry Cook, Kent County Bar Association Vice President; and Patrick Sullivan, Kent County Bar Association Board Member.

in breach of his fiduciary duties to plaintiff, took $1,000 of plaintiff's money and deposited the money into the defendant's personal account. Later, the defendant withdrew $700 to purchase stock that is now worth $2,000. $1,300 remains in the defendant's personal account. Under modern tracing rules, the plaintiff/restitution claimant can treat the $700 withdrawal to purchase the stock as coming from the plaintiff's money. The plaintiff is thus entitled to all the stock, via a constructive trust. The plaintiff is also entitled to recover the remaining $300 from its initial $1,000 loss. (The $300 can be obtained through a constructive trust over $300 in the defendant's account or through a simple money judgment).

- **The constructive trust or equitable lien enables the claimant to trace property into the hands of a third person and obtain that property.**

Example: Due to coercion, defendant obtains $1,000 from plaintiff, buys a used car with the $1,000, and transfers title of the car to a third person. Plaintiff is entitled to a constructive trust over the car held by the third person even if the third person committed no wrong. (However, the third person may have a defense against the restitution claim if she was was a bona fide purchaser of the car for value.)

- **The constructive trust or equitable lien is advantageous to the plaintiff if the defendant is insolvent, because the property is not considered part of the debtor's estate.**

Example: If the plaintiff proved an unjust enrichment claim and traced its money into the bank account of an insolvent debtor, a constructive trust should be imposed on those funds for the benefit of the plaintiff. Other creditors have no claim on those funds. Limitation: The restitution claimant can only recover its actual losses against the insolvent debtor – i.e., the claimant is not entitled to recover any gains that the insolvent debtor may have obtained from the claimant's property.

C. A Restitutionary Remedy for Breach of an Enforceable Contract: Disgorgement of Defendant's Profits

Upon breach of an enforceable contract, the non-breaching plaintiff typically

considers pursuing the traditional contract remedies of compensatory damages or specific performance. More and more courts nationally, however, have recognized that, in certain circumstances, a plaintiff proving breach of contract should be entitled to pursue the alternative remedy of disgorgement of the defendant's profits from the breach. The cause of action is breach of contract but the remedy is restitutionary in nature, because it depends on defendant's gain, not plaintiff's loss. *The Restatement (Third) of Restitution and Unjust Enrichment* endorses this national trend regarding opportunistic breach, stating that a plaintiff should be able to recover defendant's profits if the breach was deliberate and profitable to the defendant and if contract damages would afford "inadequate protection to the promisee's contractual entitlement."[3] The latter condition is satisfied if a court with the benefit of hindsight would have granted an injunction or specific performance (because a damages remedy would not have been adequate to protect the plaintiff's rights). To illustrate the concept of disgorgement of defendant's profits from an opportunistic breach, consider a seller in a real estate contract who breaches and sells the property to another buyer at a higher price. Because the contract in hindsight would have been subject to specific performance, the seller must disgorge its profits from the sale.

D. Restitutionary Remedies and Their Implications for Discovery

It is prudent during discovery to ascertain what the defendant did with an asset unjustly obtained from the claimant. For example, did the recipient sell claimant's asset? Did the recipient purchase an asset with claimant's money or property? Did the recipient put claimant's money in a banking or investment account?

There are three independent reasons for seeking to trace the claimant's asset. First, if the defendant was a conscious wrongdoer or defaulting fiduciary, any gain that the defendant made with the asset can be recovered by the claimant via restitution, even if that gain is greater than the plaintiff's loss. Second, the claimant may be entitled to an asset-based remedy in the traceable product of its asset (i.e., a constructive trust over the new property or an equitable lien on the new property to secure a money judg-

ment). Third, if the defendant becomes insolvent, the successful unjust enrichment claimant who can trace its money or property into an asset held by the defendant is entitled to a constructive trust or equitable lien in the asset, and the asset will not be considered part of the debtor's estate.

In a breach of contract case, it is advisable during discovery to inquire whether the breaching party made a profit from the breach. If so, the plaintiff may be entitled to the breaching party's profits, providing that the breach meets the elements of an "opportunistic" breach as discussed in the prior section.

IV. Defenses to the Unjust Enrichment Cause of Action

In the absence of a specific statutory limitations period applicable to a particular claim, it appears that unjust enrichment claims fall within the general limitations period of ten years under R.I. Gen. Laws § 9-1-13. In addition, there are defenses that are unique to the law of unjust enrichment. One example is detrimental change of position—an innocent recipient of a benefit (usually in the circumstance of a mistaken payment) has a defense to the restitution claim if the recipient justifiably relied to its detriment on the mistaken benefit. The defendant may not escape making restitution to the claimant if the defendant's only reliance was paying living expenses or preexisting debts. Another example is the bona fide purchaser/payee defense. A claimant may not obtain restitution of property from a third person if the third person was a bona fide purchaser for value of the property. Moreover, when a person receives money not his own, whether by mistake or misappropriation, and the person uses that money to pay his creditor, the creditor, if it did not have notice of the mistake or misappropriation, is a bona fide payee with a defense to any restitution claim. This is true even if the money is still identifiable as the property of the restitution claimant and even if the bona fide payee had not detrimentally relied on the payment.

****

With this brief primer, a Rhode Island lawyer may recognize more restitutionary causes of action and remedies in his or her practice and, like the attorney at the beginning of this article, be able to say that "restitution is a legal growth area."

ENDNOTES

1 *A more detailed treatment of this subject, along with extensive citations to Rhode Island cases and the* Restatement (Third) of Restitution and Unjust Enrichment, *will be published in my forthcoming article in the* ROGER WILLIAMS UNIVERSITY LAW REVIEW.

2 ***Dellagrotta v. Dellagrotta****, 873 A.2d 101, 112 (R.I. 2005) (citations omitted).*

3 ***See generally*** Restatement (Third) Restitution and Unjust Enrichment *§ 39.* ❖

In Memoriam

Michael H. Feldhuhn, Esq.

Michael H. Feldhun, 56, of Providence, passed away on January 12, 2015. Born in Norwalk, Conn., to the late Lawrence and Estelle Kodar Feldhuhn, Michael grew up in Westport, Conn., where he graduated from Staples High School. He graduated from the University of Connecticut with a B.A. in history and as a member of Phi Beta Kappa. He received his J.D., cum laude, from the University of Connecticut School of Law. He was a member of the Connecticut Law Review, serving as a Note and Comment Editor. Michael began practicing in New Haven, at Wiggin and Dana, before moving to Rhode Island, in 1985. He worked for several well-respected firms in Providence before starting his own solo practice in 1993. In 1987, Michael married Margaret E. (Meg) Curran, the law school classmate he had followed to Rhode Island. She is now chairperson of the Rhode Island Public Utilities Commission and a former U.S. attorney for Rhode Island. Besides, Ms. Curran, he is survived by their daughter, Margaret Elise Margy Feldhuhn, of Providence, lately of Taiwan. Michael is also survived by a brother, Paul Feldhuhn, and his wife, Janelle, of Palm Bay, Florida, and a sister, Jeanne Sheridan, and her husband, Mark, of Washington Depot, Connecticut.

Lewis J. Pucci, Esq.

Lewis J. Pucci, 88, passed away on January 10, 2015. He was the beloved husband of Janice Monaco Pucci. They were happily married for 53 years. Born in Providence, he was the son of the late Luigi and Caterina Chiaro Pucci. He served in the U.S. Navy during WWII. He was a graduate of Boston University School of Law. He served on the Bonnet Shores Fire District Council. He was past President of the NP FOPA #13 and served on the NP Land Trust. Besides his wife, he is survived by his loving daughters, Carolyn Pucci of Boynton Beach, FL, Leslie Lancia and her husband Richard of Glocester.

Lawyers on the Move

Jeffrey B. Cianciolo, Esq. is now a Partner at **McLaughlin & Quinn, LLC**, 148 West River Street, Suite 1E, Providence, RI 02904.
401-421-5115 x219
jcianciolo@mclaughlinquinn.com
www.mclaughlinquinn.com

John Dorsey, Esq., was appointed to the Board of Directors of Quonset Development Corporation. John is an attorney at the law firm of **Ferrucci Russo**, 55 Pine Street, Providence, RI 02903.
401-455-1000 www.frlawri.com

Kevin J. Gallagher, Esq. is now Deputy Chief of Staff, Office of Governor Gina M. Raimondo, State House, Room 228, Providence, RI 02903.
401-222-8148
kevin.gallagher@governor.ri.gov

Marcus I. Howell, Esq. is now an Associate at **McLaughlin & Quinn, LLC**, 148 West River Street, Suite 1E, Providence, RI 02904.
401-421-5115 x230
mhowell@mclaughlinquinn.com
www.mclaughlinquinn.com

Andrea M. Iannazzi, Esq. is now Special Counsel, Office of Governor Gina M. Raimondo, State House, Room 112, Providence, RI 02903.
401-222-8117
andrea.iannazzi@governor.ri.gov

Gregory S. Inman, Esq., Mark D. Tourgee, Esq., Timothy A. Williamson, Esq., John T. Kaveny, Esq., Tara L. Fontaine, Esq., and **Joanna M. Achille, Esq.** have moved to **Inman Tourgee & Williamson**, 1500 Nooseneck Hill Road, Coventry, RI 02816.
401-823-9200 www.itwlaw.com

Matthew R. Joyce, Esq. is now an Associate at **McLaughlin & Quinn, LLC**, 148 West River Street, Suite 1E, Providence, RI 02904.
401-421-5115 x228
mjoyce@mclaughlinquinn.com
www.mclaughlinquinn.com

Jeffrey W. Kasle, Esq. is now of counsel to **Olenn & Penza, LLP** and moved his private practice to 530 Greenwich Avenue, Warwick, RI 02886.
401-737-3700
jwk@olenn-penza.com
www.olenn-penza.com

Amy E. Moses, Esq. is now Deputy Counsel, Office of Governor Gina M. Raimondo, State House, Room 119, Providence, RI 02903.
401-222-8114
amy.moses@governor.ri.gov

John R. Pariseault, Esq. is now a partner at **Hinckley Allen**, 50 Kennedy Plaza, Suite 1500, Providence, RI 02903.
401-274-2000
jpariseault@hinckleyallen.com
www.hinckleyallen.com

Cristen L. Raucci, Esq. is now Assistant Counsel at Rhode Island Housing, 44 Washington Street, Providence, RI 02903.
401-457-1239
craucci@rhodeislandhousing.org
www.rhodeislandhousing.org

Matthew R. Reilly, Esq. is now an Associate with the **Law Office of George J. Bauerle, III**, 7405 Post Road, North Kingstown, RI 02852.
401-374-6050 mreillyesq@gmail.com
www.GeorgeBauerleLaw.com

Diana M. Sladen, Esq. is now an Associate at **Cordell & Cordell**, 10 Dorrance Street, Suite 700, Providence, RI 02903.
dsladen@cordelllaw.com
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