Rhode Island Bar Journal

Rhode Island Bar Association Volume 62. Number 6. May/June 2014

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RHODE ISLAND Bar Association
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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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Sharing the Wealth of Knowledge

J. Robert Weisberger, Jr. Esq.
President
Rhode Island Bar Association

A person is said to be the sum of his experiences and mine have been rich indeed.

This is my final President's Message, for which many of you may be grateful. Since this is my swan song, as far as President's Messages go, I would like to say a few words about how fortunate I have been to practice law with so many giants of the profession. A person is said to be the sum of his experiences and mine have been rich indeed.

My first position was with the law firm of Gunning, LaFazia & Gnys, Inc., a veritable who's who of outstanding trial attorneys; to wit, the late Raymond LaFazia, Edward L. Gnys, Jr., and Guy J. Wells, three attorneys extraordinaire. Also in that firm were Netti C. Vogel, now of the Superior Court; Jeanne E. LaFazia, now Chief Judge of the District Court; Bennett R. Gallo, who went on to become a Justice of the Superior Court; and, Edward P. Sowa, a distinguished jurist with the Workers' Compensation Court. There were also a great group of young attorneys like Ed Gnys, III, Fred Polacek, Alan LaFazia, Tom Chester and Vicky Almeida. Every day was an adventure, with new and interesting things to research and learn, memoranda and appellate briefs to write, motions to prepare, matters to be argued in court almost daily, cases to be tried, and sometimes the opportunity to argue an appeal before the Rhode Island Supreme Court, which I was lucky enough to do several times during my first four years of practice. I considered myself very fortunate indeed. At that old and venerable firm, a young attorney could observe, participate in, and experience what the life of a trial lawyer was about, with all the sage advice and guidance a new attorney could want. Moreover, the merriment and good will shared by all was as Dickensian as a scene at Old Fezziwig's.

The firm was perhaps a throwback to earlier times when aspiring lawyers clerked with experienced attorneys to learn that which isn't taught in law school – the nuts and bolts of the practice of law. I will never forget my first jury trial. Judge Vogel, then just Netti, could not have been more helpful in assisting me with my case. She took great interest and enthusiasm in helping me prepare. I think I still have all the notes she provided which I used to draft my first trial notebook! I remember everyone there as being so kind and helpful. The senior partners were progressive yet old school in many ways, which was part of the charm. I don't know of any firms like that today. It was the ideal model for a young lawyer's training camp to learn the art of the practice of law.

There was also plenty of opportunity to learn by observing and listening to some of the state's best civil trial attorneys and, in many instances, having the privilege to sit with these marvelous mentors as second chair, in significant cases, both in state and federal court. One highlight was a major dram shop defense case where I was privileged to sit second chair with Ed Gnys. It tried in Newport for over six weeks before Justice Israel. Ed and I made the winter trek every day through the snow in January and February (not the best time to visit Newport!). I participated in the trial and gained first-hand experience watching outstanding trial attorneys in action. One co-defendant was represented by the late Joe Houlihan, a very talented trial attorney and a great person. Another co-defendant was represented by distinguished trial attorney, the late Gene Higgins. Gene was nearly 80 at the time, but he was as smooth as silk in his cross-examinations. Of course, Ed Gnys won the prize for best actor! (That's an inside joke that some of you may get.) He was also one of the most capable and hard-working trial attorneys I have ever known. We won that trial, and the appeal, in the first reported case I ever worked on.

Not long after that, there was the plaintiff's case I got to sit second chair on, in a product liability action in the federal district court with Guy "Jack" Wells against learned and formidable adversaries, Gerry DeMaria and the late, great Joseph Cavanaugh, Sr. There were also many, many opportunities to observe the legendary Raymond LaFazia demonstrate his skill as a trial lawyer, which my late father would often refer to as "the highest form of the lawyer's art."

After four and a half years with that venerable firm, I took a position with the law firm of Wistow & Barylick, Inc. There, I learned from two more outstanding Rhode Island trial attorneys, Max Wistow and John Barylick, whose scholarly abilities and skill are legendary. Witnessing their work and their brilliant minds

analyzing and deciphering complex legal problems was an opportunity any attorney would consider lucky to experience. As with my prior position, there were also young, talented associates to grow with in the practice of law who have now become outstanding attorneys in their own right, such as Steve Sheehan, Peter Loveley and the indomitable Mark Grimm. While there, I was privileged to try several cases over the years, some of which were against great opponents such as David Carroll, one of the most talented defense trial attorneys in Rhode Island. You learn a lot from your adversaries. One lesson I hope I learned is aplomb or, in other words, confidence and skill under pressure.

When I became a shareholder at Wistow & Barylick, I thought I would finish my career at that distinguished venue. However, after more than two decades of trial practice, I decided to take advantage of an unusual and exciting opportunity, a position in a litigation management department with 20 other attorneys as national litigation counsel for a Fortune 500 company. In that position, I became part of a team supervising and working with trial counsel in other jurisdictions. Together, we defend our client in venues throughout the United States. That position, which I currently hold with one of the oldest and venerable firms in the state, Edwards Wildman Palmer, formerly Edwards & Angell, allowed me to serve as Bar president. Without my firm's gracious support, the time commitment for such a responsibility would never have been possible. Accordingly, I want to thank the firm's leadership, and especially James J. Skeffington, Esq., for allowing me to dedicate the time necessary to serve as president this year.

My term is now just about over and I can hardly believe how fast the year has gone by, not to mention the last 30 years! We all get bogged down occasionally by the responsibilities of life and the rigors of our profession. Therefore, I am happy to have had the opportunity to serve our Bar Association and have the opportunity to publicly thank all of the outstanding attorneys who I have had the privilege to learn from over the years. I wish to express my sincere gratitude for all you have taught me. Neither my career nor the Bar presidency would have been as rich and fulfilling without the learning experiences I gained from all of you.

Finally, there was of course one other attorney I want to thank. He was a legal scholar, an outstanding jurist and a gentleman in the true sense of the word. He had the utmost influence over my life. He was my father, the late Chief Justice Emeritus. I only wish he could have been around for another year to see me serve the term as President of the Rhode Island Bar. If you could only know what great respect he had for each one of you as members of our profession, it would make you swell with pride as it did for me. So, in closing, a heartfelt thank you to all of the attorneys and judges who have been such a positive influence over the years and thank you to all the members of the Bar for allowing me to serve as president. It has been a privilege and an honor! ❖

Sign Up For Your 2014-2015 Bar Committee Membership Today!

If you have not yet signed up as a member of a 2014-2015 Rhode Island Bar Association Committee, please do so today. **Even Bar members who served on Bar Committees this year must reaffirm their interest for the coming year, as Committee membership does not automatically carry over from one Bar year to the next.** Bar members may complete a Committee registration form online or download and return a form to the Bar. Please join no more than three committees.

>> To sign up for a 2014-2015 Bar Committee, please go to the Bar's website at www.ribar.com and go to the MEMBERS LOGIN. After LOGIN, click on the BAR COMMITTEE SIGN-UP link. <<

As an alternative, you may download the Bar Committee Application form appearing above the button and mail or fax it to the Bar Association. Please only use one method to register to avoid duplication. If you have any questions concerning membership or the sign-up process, please contact Kathleen Bridge at (401) 421-5740.

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
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2014 Annual Meeting Features

Features Attorney Stephen H. Oleskey's Keynote on the Ethical and Tactical Issues Arising in Habeus Corpus Litigation, a Session on Cyber Security Risks for Lawyers and More!

The Bar Association's 2014 Annual Meeting is on Thursday and Friday, June 19th and 20th, at the Rhode Island Convention Center, providing attendees with outstanding opportunities to learn, to improve your practice, socialize with your colleagues, and fulfill annual CLE requirements. A wide range of 42 seminars offer guidance in family, probate, criminal, trial and commercial law, a variety of ethics-related topics, the popular State and Federal Court updates and more.

Stephen H. Oleskey, Esq.

This year's Keynote Speaker is Stephen H. Oleskey, of counsel to the Boston office of Hiscock & Barclay law firm, and co-lead counsel in **Boudmediene v. Bush**, where the U.S. Supreme Court held that detainees at Guantanamo had the right to seek *habeus corpus*. Thursday night begins with a lively reception followed by dinner, Annual Bar Awards for outstanding achievements, recognition of exceptional *pro bono* work, and an address by incoming Bar Association President, Bruce W. McIntyre. The Annual Awards Luncheon on Friday, honors 50-year and *Bar Journal* contributors, while Rhode Island Supreme Court Chief Justice Paul A. Suttell will deliver his update on the Rhode Island Judiciary.

Niki Kuckes
Roger Williams University
Law Professor

As technological devices are increasingly utilized within the legal field, the threat to the security of information stored, and digitally transferred by lawyers, grows as well. To learn more about cyber security risks and ethical issues, check out Professor Niki Kuckes' Friday plenary session.

To learn about the increasingly complex debate regarding the legal rights of nonhumans, visit Attorney Elizabeth Stein's Friday afternoon session, and hear about the potential impact it could have on your practice.

Elizabeth Stein, Esq.

Seminar Materials Flash Drive Format & Printed Alternative

Once again this year, all seminar materials are provided to attendees on a USB flash drive included in the registration cost. While printed seminar materials are available, they must be pre-ordered, and there is an added charge of $30. Those who want the printed version must check the appropriate box on the registration form and pay the fee. Switches from the flash drive to the printed materials are not allowed at the Meeting. At-the-door registrants only receive a USB flash.

Bar members may use the registration form on the inside back cover of the 2014 Annual Meeting brochure or access the brochure and/or the interactive registration form available, online, at the Bar's website: **www.ribar.com**.

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Not to be Countenanced: Pre-Bail Revocation Hearing Detention in Rhode Island District Court

Peter F. Skwirz, Esq.
Practices out of East Providence

Although not often challenged, there is a strong argument that the current practice of a standard two week pre-bail revocation hearing detention in misdemeanor cases is at odds with the Rhode Island Constitution and established Rhode Island Supreme Court case-law.

Rule 46 of the Rhode Island District Court Rules of Criminal Procedure governs bail practice in District Court misdemeanor cases. Rule 46(a) states: "[i]n accordance with the Constitution and laws of this State, a defendant shall be admitted to bail before conviction." Rule 46(d) allows the Court to place conditions on bail "to assure for the person's appearance, for the person's good behavior and that the person will keep the peace." Under Rule 46(g), if a defendant violates a condition of bail, the Attorney General can move to have bail revoked or have more stringent bail conditions set. If a defendant commits an additional misdemeanor while on bail, it is considered a violation of the condition requiring him to keep the peace and be of good behavior. Therefore, when a second misdemeanor offense is alleged while the defendant is on bail for the first misdemeanor charge, bail revocation proceedings are triggered.

In misdemeanor bail revocation proceedings, the defendant is first brought before a judge or magistrate of the District Court sitting on the arraignment calendar. The judge will arraign the defendant on the second misdemeanor charge and set a date, two weeks in the future, for a bail revocation hearing. It is routine practice for the judge or magistrate to order the defendant held without bail pending the revocation hearing. After the defendant is ordered held without bail, he or she will then be incarcerated for two weeks waiting for a bail revocation hearing. At the revocation hearing, the defendant has the right to confront and cross-examine witnesses against him or her, testify on his or her own behalf, present witnesses, and be represented by counsel. After the revocation hearing, a judge or magistrate of the District Court determines whether a bail violation has occurred. If the judge or magistrate is reasonably satisfied a violation occurred, then the judge or magistrate may order the defendant held without bail pending trial, or may impose more stringent bail conditions pending trial. If no violation is found, then the bail on the original misdemeanor charge is maintained, and the second misdemeanor charge is often dismissed.

Pending a bail revocation hearing, according to current practice, a misdemeanor defendant is held for two weeks in the Adult Correctional Institution (ACI), without an opportunity for bail, and without a hearing prior to being held. Since it is uncommon for District Court misdemeanor defendants to receive any jail time, even after a full trial, this practice of customary two week pre-bail revocation hearing detention seems particularly harsh. By way of illustration, a defendant charged with simple assault and battery would only be facing a sentence ranging from a filing (if the assault is not serious and the defendant has no prior convictions) up to a year suspended sentence and year probation (due to recent prior convictions or if the assault was particularly serious). Neither of these sentences, if successfully completed, would require the defendant to spend any time in jail. Additionally, if the defendant elects not to plea, he is entitled to a trial where the prosecuting attorney must produce evidence to prove the charge against him beyond a reasonable doubt. However, if that same defendant elects to exercise his or her right to trial and the complaining witness files another complaint against him or her before the trial on the first charge is held, this will likely result in a second misdemeanor charge. The second charge would constitute an alleged bail violation for bail set in the first charge, and the defendant would be subject to an immediate two week detention pending a bail revocation hearing. This detention would occur at a time when neither of the misdemeanor charges had been tried.

Another harsh aspect of pre-bail revocation hearing detention is when the defendant is initially brought into court on the second misdemeanor charge, he or she is often faced with a dilemma: either plea immediately to all charges currently pending against him or her and receive a disposition allowing him or her to walk free (e.g. probation or a suspended sentence) or maintain his or her innocence and spend two weeks in the ACI waiting for a bail revocation hearing. Faced with this choice, most defendants choose the option that allows them to walk free immediately. This dilemma leads many defendants to plea to crimes without due considera-

tion given to the case. If the defendant manages to obtain private counsel or is represented by the Public Defender, the dilemma often forces a defendant to plea without allowing his or her counsel time to adequately examine and prepare the case, without giving counsel an opportunity to negotiate with a prosecuting attorney (as only a prosecuting police officer is present at arraignments), without giving counsel time to file motions to suppress or to dismiss and without allowing counsel to take the case to trial if appropriate. In this way, the truth-finding function of the criminal justice system is undermined.

Rhode Island Bail & Bail Revocation Law

Although not often challenged, there is a strong argument that the current practice of a standard two week pre-bail revocation hearing detention in misdemeanor cases is at odds with the Rhode Island Constitution and established Rhode Island Supreme Court case-law. The Eighth Amendment of the United States Constitution merely states: "[e]xcessive bail shall not be required," but "says nothing about whether bail shall be available."[1] Accordingly, the federal Constitution allows detention for "regulatory purposes" other than ensuring the defendant's presence at trial.[2] By contrast, Article I, Section 9 of the Rhode Island Constitution guarantees a defendant the right to bail on any charge, unless the charge falls within one of three enumerated exceptions. The exceptions to Rhode Island's right to bail are:

1. Offenses punishable by imprisonment for life;
2. Offenses involving the use or threat of use of a dangerous weapon by one already convicted of such offense or already convicted of an offense punishable by imprisonment for life; or
3. Offenses involving the unlawful sale, distribution, manufacture, delivery, or possession with intent to manufacture, sell, distribute or deliver any controlled substance or by possession of a controlled substance punishable by imprisonment for ten (10) years or more.

These three serious offenses are never charged as misdemeanors in District Court. Therefore, all Rhode Island misdemeanor defendants have a constitutional right to be released on bail, and detain-

ing them without bail violates that right.

In **Mello v. Superior Court**, 370 A.2d 1262 (R.I. 1978), the Rhode Island Supreme Court held that, although a defendant is entitled to bail in the first instance under the Rhode Island Constitution, bail may be revoked and a defendant held without bail if a condition of bail is violated. However, the Court held that, before bail may be revoked, the due process "rights afforded defendants in [parole and probation revocation hearings or in imposition of a suspended sentence] must attach to a defendant in a bail revocation proceeding."[3] The Court cited **O'Neill v. Sharkey**, 268 A.2d 720 (R.I. 1970), which held that a defendant at a probation revocation hearing has a right to counsel, to be heard in his defense, and to confront and cross-examine the witnesses against him. These fundamental due process rights must be afforded a defendant prior to revoking his bail and holding him without bail. But, in the context of a pre-bail revocation hearing detention, a defendant is held without bail without being afforded these rights. Affording a misdemeanor defendant the rights guaranteed him in **Mello** at a hearing subsequent to the two week detention is too late, since he has already been significantly deprived of his liberty at a time when the "presumption of innocence [is] still attached."[4] Because the presumption of innocence is still attached, detention pending a bail revocation hearing is starkly different from detention pending a probation violation hearing. An alleged probation violator may be held for two weeks pending a violation hearing pursuant to statute.[5] However, probation is only imposed after a plea of guilty or *nolo contendere*, or after a trial on the merits. In contrast, conditions of bail are imposed merely upon the as yet untested allegations of a prosecuting police officer. Therefore, the due process protections of an alleged bail violator should be significantly higher than the protections afforded an alleged probation violator.

Further, the current practice of pre-bail revocation hearing detention contravenes established bail guidelines, as a bail determination "should be the result of an individualized decision, taking into account the special circumstances of each defendant."[6] The need for an individualized assessment is also grounded in the constitutional requirement of due process.[7] When a defendant is brought to court to

be arraigned on an alleged bail violation, it is considered routine to hold the defendant without bail for two weeks. The standard, customary nature of pre-bail revocation hearing detention precludes the arraignment judge from considering the "special circumstances of each defendant," and infects the bail process with legal and constitutional error.

In **Mello**, the Rhode Island Supreme Court addressed a situation factually similar to the situation described above. The defendant in **Mello** was held for two weeks without bail pending a bail revocation hearing. The Court responded by holding that "a revocation hearing is subject to the same requirements as a bail hearing in the first instance…. [A] defendant awaiting a revocation hearing still has the right to a speedy determination of his status."[8] Further, the Court held that "[a] bail revocation hearing must be conducted with the same promptness as a hearing in the first instance," and "*a 2-week delay, absent a defendant's consent, is not to be countenanced*."[9] (emphasis added) This passage seems to hold that a bail revocation hearing is subject to the same prompt presentment requirements

for a bail hearing in the first instance, as set forth in Rule 9 of the District Court Rules of Criminal Procedure. Accordingly, the defendant needs to be brought before a magistrate or judge for a bail revocation hearing at the next session of the criminal court. This means no more than an overnight detention, or at most over a weekend, is permissible prior to the revocation hearing.[10] At the very least, the above passage from **Mello** explicitly holds that the current practice of automatically detaining a defendant for two weeks pending a bail revocation hearing is impermissible.

Arguments in Favor of Pre-Bail Revocation Hearing Detention

Under Rhode Island's constitutional right to bail, and because of the due process rights guaranteed defendants facing bail revocation as explained in **Mello**, the current practice of subjecting defendants to a two week pre-bail revocation hearing detention is ripe for challenge. However, there are practical countervailing arguments in favor of the current practice. The foremost practical consideration in favor

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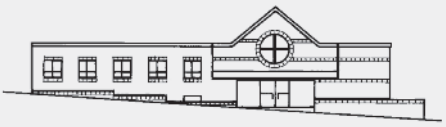

Rhode Island Bar Foundation

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

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

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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.**

TRIBUTE

Stephen R. Famiglietti, Esq.

Rhode Island Attorney Stephen R. Famiglietti, 66, of Lincoln passed away peacefully at home on December 29, 2013. Stephen was the husband of Susan Marcotte Famiglietti, Esq., and the son of Angela Nardolillo and the late Vittorio Rocco Famiglietti. He was the brother of Marianne Ferraresi and the late Paul V. Famiglietti. He was a graduate of St. Ann's School, LaSalle Academy, Providence College and Suffolk University Law School in Boston. Stephen was admitted to the Rhode Island Bar in 1972. He was also admitted to the Bar of the United States and the District Court for the District of Rhode Island. Additionally, he was a member of the Rhode Island Trial Lawyers Association, The Association of Trial Lawyers of America and the American Bar Association.

Following law school, Stephen served as law clerk for the Honorable William E. Powers, Associate Justice of the Rhode Island Supreme Court. He also served with distinction as a Prosecutor in the Rhode Island Department of the Attorney General. Later, he co-founded and was a partner in the law firm of Famiglietti & Carlin where he engaged in civil litigation and criminal defense.

Stephen was an accomplished lawyer who tried many celebrated cases including **State v. Claus von Bulow**. He was appointed to the Rhode Island Select Commission to Investigate the Failure of Rhode Island Share and Deposit Indemnity Corporation (RISDIC)-Insured Institutions and served on the Rhode Island Ethics Commission.

He was presented with the UNITAM award for "outstanding contribution to mankind and in honor of his Italian-American Heritage" and was recognized by the Suffolk University Law School Alumni Association for "his dedicated public service and for leadership in the pursuit of excellence in the legal community."

Stephen was noted for his courtroom skills, passion, quick-wittedness and street wise charm. He enjoyed reading, cooking, singing, New York City, the Yankees and celebrating with family and friends. He was a gregarious man with a big heart and an easy spirit of adventure. Stephen was considered unique by many of his friends and family.

Upon his passing, both the Rhode Island House of Representatives and the Senate passed resolutions expressing the Rhode Island General Assembly's "deepest condolences."

He was the son-in-law of Gabrielle Marcotte, brother-in-law of Daniel Ferraresi, Joyce Famiglietti, Charles L. and Patricia Marcotte, Lisa Marcotte-Costa, Michael and Lori Longtin and Michael and Beth McLoughlin. He is survived by his nieces and nephews: Kristine and John Toic, Paul Famiglietti, Anthony, Stephen and Nicholas Ferraresi, Charles H. and Kerri Marcotte, Joseph H. Marcotte, Ashley Longtin and Dave Delahunt, Shane McLoughlin, Robert Longtin, Mathew Costa, Anne McLoughlin and Gabrielle Costa; grandniece Vanessa Toic; grandnephews Alexander Toic and Zachary Marcotte; two aunts, Mary "Mimi" Nardolillo and Jenny Nicastro; an uncle, Guy Lancellotti; and many cousins including his "brother" Guy Lancellotti, MD.

Volunteer Lawyer Program Receives Grant and Gifts in Attorney Famiglietti's Memory: Commemorative Reception on May 15, 2014

The Batchelor Foundation, Inc., a charitable non-profit organization headquartered in Miami Beach, Florida, made a grant of $10,000 to the Rhode Island Bar Association's Volunteer Lawyer Program (VLP) in honor and memory of Stephen R. Famiglietti, Esq. The VLP also received many generous donations from Stephen's family, friends and colleagues friends.

Acknowledging the generosity of the Batchelor Foundation and the individual donations, the Bar's Volunteer Lawyer Program is hosting a commemorative reception to honor Attorney Stephen R. Famiglietti and highlighting the dedication of VLP attorneys on Thursday, May 15, 2014 from 4:30 to 6:30 pm, at the Rhode Island Bar Association, on 115 Cedar Street, in Providence.

According to Rhode Island Bar Association President, J. Robert Weisberger, "Every year, over 1,000 of our poorest citizens receive critically-needed information and access to justice through our Bar's Volunteer Lawyer Program. Stephen represented the highest standards of our profession, and we know he would appreciate the fact that these gifts to our Volunteer Lawyer Program will go to subsidize the litigation costs and expenses of individuals in the greatest need of *pro bono* representation."

Federal Rules of Civil Procedure Amendments on the Horizon

Stephen J. MacGillivray, Esq.
Edwards Wildman Palmer, LLP, Providence

Raymond M. Ripple, Esq.
Edwards Wildman Palmer, LLP, Providence

The proposed rules should be monitored through the remainder of the rule-making process so litigants are properly prepared for these changes.

Changes to the Federal Rules of Civil Procedure – the procedural rules that govern the life of a case in the federal trial courts – are on the horizon. On June 3, 2013, the Standing Committee on Rules of Practice and Procedure (Standing Committee) approved a report for publication containing proposed amendments to the Federal Rules of Civil Procedure (Report). On August 15, 2013, the Report was released to the bench and bar for a six month public comment period, including a series of public hearings held in Washington, D.C., Phoenix, Arizona, and Dallas, Texas. The public comment period was initially scheduled to close on February 15, 2014.

If approved by the Standing Committee, the proposed amendments will be submitted to the Judicial Conference with a recommendation for approval, who, in turn, submits the proposals to the Supreme Court. If approved by the Supreme Court, Congress has seven months to approve or reject the new rules. The revised rules would be officially promulgated on or before May 1, 2015, and take effect on or after December 1, 2015.

If approved, the proposed changes will have a significant impact on practice in the federal courts. The changes are designed to promote early case management, streamline discovery, and advance cooperation among the parties. What follows is a summary of the proposed changes reflected in the Report, a consideration of their rationale, and a discussion of the reaction thus far.

I. Summary of the Proposed Amendments

For many years, courts and litigants have recognized the escalating cost of discovery and pre-trial practice in federal civil litigation. In May 2010, a conference was held at Duke University Law School (Duke Conference) to discuss ideas and proposals designed to reduce the cost and delay of civil litigation. Although numerous ideas were considered, the main themes emerging were proportionality in discovery, cooperation among lawyers, and early and active judicial case management. The majority of the present proposed changes to the Federal Rules of Civil Procedure were generated at the Duke Conference – the so-called "Duke Rules Package." The Duke Rules Package contains a comprehensive proposal to amend Rules 4, 16, 26, 30, 31, 33, 34, 36, and 37 of the Federal Rules of Civil Procedure. Additionally, the Civil Rules Advisory Committee's Discovery Subcommittee proposed revisions to Rule 37(e), seeking to modify the use of sanctions for e-discovery violations by adopting a uniform standard for spoliation.

A. The Duke Rules Package – *Proposed Amendments to Federal Rules of Civil Procedure 4, 16, 26, 30, 31, 33, 34, 36, and 37.*

1. **Rule 4(m) – Service of Summons and Complaint**

Proposed Rule 4(m) shortens the time to serve the summons and complaint after filing from 120 days to 60 days. This proposal stems from the perception that the early stages of litigation take too long. Like the present rule, the court may repeatedly extend the time for service upon a showing of good cause.

2. **Rule 16(b)(2)** – *Timing of Scheduling Order*

Under the current version of Rule 16(b)(2), the district judge must issue a scheduling order within the earlier of 120 days after any defendant has been served or 90 days after any defendant has appeared. The proposed amendment to Rule 16(b)(2) cuts these times to 90 days after any defendant is served or 60 days after any defendant appears. By reducing these time frames, the drafters again seek to reduce the down-time associated with the early stages of federal court litigation.

3. **Rule 16(b)(1)(B)** – *Scheduling Conference*

The proposed amendment to Rule 16(b)(1)(B) authorizes the issuance of a scheduling order after receiving the parties' Rule 26(f) report or after consulting "at a scheduling conference." A conference may no longer be held by "telephone, mail, or other means." Thus, it appears conferences are still not required, but, if the court conducts a scheduling conference under the proposed rules, it must do so in person with counsel.

4. Rule 16(b)(3), Rule 26(f) – *Contents of Scheduling Order*

The proposed amendment to Rule 16(b)(3) provides that additional subjects may be included in the court's initial scheduling order. Under the proposed rule, a scheduling order and discovery plan would be permitted to include provisions for the preservation of electronically stored information and agreements reached under Rule 502 of the Federal Rules of Evidence. Additionally, a scheduling order could "direct that before moving for an order relating to discovery the movant must request a conference with the court." The proposal, however, stops short of mandating all scheduling orders contain such a provision. This change effectively adopts the practice that is now a local rule in many federal courts throughout the country.

5. Rule 26(b)(1) – *Proportionality in Discovery*

The proposal to amend Rule 26(b)(1) introduces the concept of proportionality in discovery. Rule 26(b)(1) provides the general scope of civil discovery in federal courts. The current version of the rule provides that unless the court orders otherwise, a party may obtain discovery "regarding any non-privileged matter that is relevant to any party's claim or defense – including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." The rule also states that relevant information does not have to be admissible at trial, so long as "the discovery appears reasonably calculated to lead to the discovery of admissible evidence."

The proposed amendments to Rule 26(b)(1) significantly alter these standards. First, Rule 26 would be amended to provide that discovery must be "proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Second, the proposed amendment removes the language allowing discovery of relevant but inadmissible information, so long as it appears reasonably calculated to lead to the discovery of admissible evidence. Courts and litigants frequently rely on this language to justify a broad scope of discovery simply because

it is reasonably calculated to lead to the discovery of admissible evidence. If the proposed amendment is adopted, presumably such reliance would no longer be permissible. As important, the courts would have broad power to limit discovery in actions involving smaller amounts in controversy or where the parties have limited resources.

6. **Rule 26(d)(2)** – *Early Requests for Production*

The proposed amendment to Rule 26(d)(2) permits a party to serve requests for production of documents under Rule 34 before the parties conduct their Rule 26(f) Conference. However, the thirty-day time period for responding to this discovery would not commence until the parties conduct their Rule 26(f) Conference.

7. **Rules 30, 31, 33, and 36** – *Presumptive Numerical Limits to Discovery*

The proposed amendments seek to reduce the limits of certain types of discovery included in the current version of the rules. The amendments propose the following new limits on depositions and written discovery:

- Depositions: The presumptive limit would be reduced to 5 depositions total. The presumptive length of a deposition would be limited in duration to 1 day of 6 hours.
- Interrogatories: The presumptive limit would be reduced to 15 interrogatories.
- Requests for Admission: A presumptive limit of 25 requests would be added to the rules. Currently, there is no limit. Requests to admit the genuineness of documents would not be subject to the new limit.

8. **Rule 34** – *Objections and Responses to Requests for Production*

The proposed amendment adds two new concepts to Rule 34. First, Rule 34(b)(2)(B) would require the grounds for objecting to a request are stated with specificity. Second, Rule 34(b)(2)(C) would require that an objection "state whether any responsive materials are being withheld on the basis of that objection." Vague objections or those which do not state whether documents have been withheld would be prohibited under the proposed rules.

B. Proposed Revisions to Rule 37(e)

In revising Rule 37(e), the Civil Rules Advisory Committee's objective is to

replace the differing treatment of preservation obligations and sanctions in federal circuits throughout the country with a uniform standard. Under the amended rule, a court may order curative measures such as permitting additional discovery or ordering a party to pay the reasonable attorney's fees and expenses caused by the failure to retain the discoverable information. However, sanctions for failing to preserve are available only in situations where the loss of information "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation," or where the failure to preserve was willful or in bad faith and caused substantial prejudice in the litigation.

Accordingly, a negligence standard for sanctions relating to spoliation of evidence is explicitly rejected. This new standard is contrary to certain high profile spoliation standards that have emerged in recent years, including the negligence standard adopted by in **Residential Funding Corp. v. DeGeorge Fin. Corp.**, 306 F.3d 99 (2d Cir. 2002). Proposed Rule 37(e) also would remove any reliance by a court on its "inherent powers" to sanction a party for spoliation of evidence.

Under the proposed rule, even where the standard for sanctions has not been established, a court still would have the ability to order curative measures such as permitting additional discovery or ordering a party to pay the reasonable attorney's fees and expenses caused by the failure to retain the discoverable information. The scope of this provision is unclear.

Notably, unlike the current version of Rule 37(e), the proposed Rule 37(e) applies to all types of discoverable information and not just electronically stored information.

A complete list of the proposed amendments, as well as the Report of the Advisory Committee on Civil Rules, is available at http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf.

II. Reaction to the Proposed Amendments

The proposed amendments have received a mixed and highly contentious response from the public[1] Although many commentators are concerned about the presumptive numerical limits on written discovery and depositions, as well as the shorter presumptive time period a party

will have to conduct a deposition, the most heated debate has focused on the concept of proportionality and the new standard for spoliation.

Generally, self-described plaintiff's lawyers and groups concerned about access to the courts have expressed concern over the new rules addressing proportionality and whether they will unfairly limit a litigant's ability to obtain the necessary discoverable information to prepare for trial. Additionally, commentators have expressed concern over the proposed amendment to Rule 37(e) because it shifts the burden to the innocent party to explain why missing information irreparably deprives it of a "meaningful opportunity to present or defend against the claims in the litigation." Some commentators have expressed the opinion that willfulness and bad faith are too high a standard to determine whether sanctions are warranted for a loss of discoverable information. These concerns are amplified by the fact that these changes follow the U.S. Supreme Court rulings in **Iqbal** and **Twombly,** which these groups view as limiting the ability of plaintiff to sue corporations.

Others see the proposed changes as an appropriate response to the immense growth of electronically stored information and the burdens that our traditionally broad discovery rules place on entities that produce it. They feel the e-discovery system has not worked to achieve the purpose of allowing the litigants to obtain information that is going to help the trier of fact. These commentators note that a country-wide uniform standard for spoliation would curtail the dramatic unnecessary expense associated with over-preservation.

Because the proposed amendments are preliminary and still subject to public comment, it remains unclear to what extent the proposed amendments will be modified before becoming final. It is clear, however, that the proposed rules, at least in their current form, are a significant revision to the Federal Rules of Civil Procedure. The proposed rules should be monitored through the remainder of the rule-making process so litigants are properly prepared for these changes.

ENDNOTES

1 *Comments are publicly available at http://www.regulations.gov/#!docketDetail;D=USC-RULES-CV-2013-0002.* ❖

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

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

Lise Gescheidt was born on Staten Island, New York on October 15, 1952. She spent most of her childhood in New York, but moved to Florida during high school, graduating from the Pine Crest School in Fort Lauderdale. Venturing back north after high school, she graduated from Trinity College in 1974 with a major in History and a minor in Psychology. Inspired by her father's service as a New York police officer, the popularity of the Perry Mason television series during her formative years, and the drama, suspense, and humanity of criminal law, she attended Boston College Law School, graduating in 1977, and beginning her career as a public defender in January of 1978. She worked under the stewardship of the Rhode Island Public Defender, William Reilly, whom she describes as "a man who was like my second father, [a] wonderful person…a real role model for me." She spent nine years at the Public Defender's office before beginning private practice in 1986. After a brief stint at Adler Pollock & Sheehan, she partnered with other notable criminal defense attorneys, Terry MacFadyen and Leonard O'Brien. Over the course of her thirty-seven-year career, she has handled over one hundred jury trials and countless bench trials. Excerpts from our conversation with this veteran of the Rhode Island Bar, and Rhode Island Public Defender Hall-of-Famer follow.

Lise Gescheidt

What has been your most memorable experience in the course of your law practice? One of the most interesting was the Block Island rape case, where three men were accused of sexually assaulting a waitress on Block Island. That was the case where Judge Williams found that the law prohibiting oral sex was unconstitutional. So that's my claim to fame.[1] It was unprecedented to be representing a citizen accused in a case and have such public media coverage against the lawyers. Mary Ann Sorrentino had the 'scum bag countdown,' and my name was mentioned on the radio because I was defending someone who was presumed innocent. It was a pretty amazing experience at the time, and I learned a lot. And the three defendants were acquitted, as they should have been.

Over the course of your career who was your most formidable opponent? That's a tie between Marc DeSisto and Patrick Youngs. And I think what made them formidable was that I could never hate either one of them. They were really professional, really kind, really fair, very talented, and they never stopped being gentlemen.

What's been the single biggest change to the profession or the practice since you started in '77? That's a tie between two things. The first one is the rampant sexism. When I first started in 1978 there were hardly any women in the field, and I think there was one defense lawyer, Allegra Munson, from the public defender's office, who was a fabulous advocate and really effective lawyer. But we just weren't taken seriously by the judges. Those were the days when people pinched you on the rear end. To this day, I remember trying a case in the 1990s [and the Judge took the bench] would say, 'Good morning, gentlemen.' I was a co-counsel in the case, and I just felt like saying, Jesus, they don't even know, or they don't even recognize I'm here. It really was difficult negotiating with other lawyers or being taken seriously, and that was hurtful. And that really has gone by the boards now. Women have made tremendous progress.

The other thing that has changed dramatically is the use of computers and the Internet. In terms of research, this is positive, but it has really changed the practice. It has changed the interaction between lawyers. Communication between attorneys has suffered because people are hiding behind emails. I don't think that's healthy, because it makes it much harder to establish relationships.

What advice would you give to new lawyers? Be yourself. Don't stay in a job so long that you become frustrated. Learn what it is you want to do. Never be afraid to ask for advice or for help. Call a more experienced member of the Bar. Don't be afraid to ask a stupid question. Go to court and watch other lawyers. Keep up on your reading. And do the best you can.

In addition to her zealous advocacy and legal victories, Attorney Gescheidt takes pride in her role as a trailblazer for professional attire. She helped champion the way for pant suits (and, cowboy boots) in court. In more ways than one, her service to the Bar certainly warrants appreciation.

1 *You can read the full decision at* ***State v. McGovern****, 1998 WL 252236 (R.I. 1998).*

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COMMENTARY

The War to End All Wars

Jerry Elmer, Esq.
Conservation Law
Foundation Staff Attorney

Although American leaders in three different centuries have proved adept at lying to provide the excuses for wars, the trait is a human one and not limited to Americans.

2014 is the centenary of the beginning of World War I, and we are in for four years of hundredth-anniversary observances. In 2016, we'll hear about the Battle of Verdun, the longest battle of the war, as well as one of the longest in the history of warfare, from February through December 1916. On November 11, 2018, we'll mark the one hundredth anniversary of the armistice, ending the fighting at the eleventh hour of the eleventh day of the eleventh month.

And this year, on June 28th, we will be reminded of the assassination in Sarajevo, Bosnia, of the Austrian Archduke Franz Ferdinand and his wife Sophie at the hands of a Serbian nationalist. The long-forgotten name of Gavrilo Princip, the Archduke's assassin, will resurface. And, it will be glibly repeated that this assassination caused the war.

But that is not really true. The assassination was the *occasion* for the Austrian invasion of Serbia on July 28, 1914, but it was not the *reason*. There had long been tensions between Austria and Serbia. In 1912, during the First Balkan War, Serbia and Montenegro had driven out the Ottoman Turks, the colonial masters of Serbia since 1389. In 1913, in the Second Balkan War, Serbia was attacked by Bulgaria, but Serbia defeated Bulgaria and its allies and expanded its territory. In 1914, Austria viewed rising Serbian nationalism as a threat to its empire, and Serbia viewed Austria as a dangerous imperial power like the long-hated Ottoman Turks.

The Austrian Army's Chief of Staff, Field Marshal Franz Conrad, had long wanted to invade upstart Serbia. In 1911, Conrad had been disciplined by the Austrian Kaiser, Franz Joseph, for his unbridled war-mongering. In 1913, the year before the Sarajevo assassination, Conrad had formally proposed invading Serbia 25 separate times, but the Kaiser had rebuffed Conrad's invasion proposals every time. When the assassination occurred in 1914, Conrad finally got what he had been primping for all along, but the assassination was merely the excuse used by Conrad to accomplish what he had wanted to do and proposed doing literally dozens of times in the past.

The consequences of the First World War were horrific. Nine and half million soldiers were killed on all sides, and another 15 million soldiers were wounded. No one has ever accurately calculated the number of civilians killed or wounded. The Versailles Treaty that ended the war led, more or less directly, to Hitler's rise to power in Germany. And it all started in July 1914, with Field Marshal Conrad lying, using the assassination in Sarajevo as an excuse to get what he wanted, the invasion of Serbia.

(Image, above right, is taken from http://www.theguardian.com/commentisfree/2013/aug/12/first-world-war-centenary-history)

Contemporary readers will notice immediately the parallel to the 2003 Bush-Cheney Administration's lying about weapons of mass destruction in Iraq as an excuse to get what it wanted, the invasion of Iraq and the commencement of a long and bloody war. The analogy is valid, but my point here is a broader one. Politicians and military leaders lie to get us into wars. The results are often horrific for millions upon millions of victims. World War I and Iraq are exemplars, but so are the Franco-Prussian War of 1870-71, the Spanish-American War of 1898, and the Vietnam War. In warfare, as in other aspects of human intercourse, patterns are important.

Although American leaders in three different centuries have proved adept at lying to provide the excuses for wars, the trait is a human one and not limited to Americans. The case of the Franco-Prussian War of 1870-71 is instructive.

The ostensible cause of the Franco-Prussian War was the so-called "interview at Ems" on July 13, 1870. On that date, a French ambassador, Vincent Benedetti, met the Prussian Kaiser Wilhelm in the spa resort town of Bad Ems. Benedetti conveyed certain French demands of

Prussia, including that Prussia would foreswear putting forth candidates for the Spanish throne. Prussia rejected the French demands, and less than a week later, on July 19th, France declared war on Prussia.

But while the Ems incident was the ostensible reason for the declaration of war, it was not the real reason. In fact, both Louis-Napoleon Bonaparte, Emperor Napoleon III, in France and Chancellor Otto Von Bismarck in Prussia had been itching for war with each other for some years. Both wanted a foreign military adventure for domestic political benefit.

In France, Napoleon III was facing increasing opposition to his autocratic constitution of 1852 from liberals and democrats. In the election of 1869, Napoleon's Second Empire candidates went down to resounding defeat at the same time that there was a sudden bourgeoning of opposition newspapers. In January 1870, anti-imperial demonstrations, some violent, swept through Paris after a prince, the emperor's cousin, murdered an anti-imperial reporter seeking an interview. Napoleon III was itching for a foreign war and the jingoism he knew would inevitably accompany war, to quell dangerously rising domestic political opposition.

Meanwhile, in Prussia, Chancellor Bismarck was in the middle of his project of unifying the many small German states. Although some of these states came into Bismarck's union eagerly, others, including Bavaria and Hessia-Darmstadt, were deeply reluctant. Socialist sentiment was growing among the factory workers, and urban liberals were advocating for Prussian (and pan-European) disarmament. Bismarck was itching for a foreign war and the jingoism he knew would accompany war, to quell domestic opposition and speed the project of German unification.

Indeed, so eager was Bismarck for war, that when the telegram arrived in Berlin describing the incident at Ems, Bismarck and General Helmuth von Moltke carefully re-wrote it, changing what had been a mild, bordering on conciliatory, message into a hostile and chauvinistic one. The crafty Bismarck then carefully released the heavily doctored document to Prussian embassies and the domestic press. It turns out the Bush-Cheney practice of doctoring documents in order to fabricate a *casus belli* is a very old trick indeed.

During the ten months of the Franco-Prussian War (July 1870 to May 1871), well over 100,000 French soldiers and well over 100,000 Prussian soldiers were killed or wounded. But luckily, Bismarck and Napoleon III both got the nice, little war they wanted so badly for reasons of their respective domestic political situations.

And, American leaders can play the same game. In the 1890s, during the Cuban war of independence against colonial Spain, the United States warship *Maine* was dispatched to Havana harbor to protect U.S. economic interests in Cuba. On February 15, 1898, there was an explosion on the *Maine*. The ship sank and much of the crew was lost. Although the ship's captain reported the ship had not been attacked, President William McKinley, who was eager for conquest, did not let mere facts interfere with his grandiose plans. "Remember the Maine," President McKinley cried. "Remember the Maine; to hell with Spain," was the cry taken up by the yellow press, especially the newspapers in the empire of William Randolph Hearst. The United States went to war with Spain, and acquired the Guantanamo base in Cuba and the Philippines as colonies. In 1976, a U.S. Navy investigation confirmed the *Maine* had never been attacked. The fatal explosion was the ship's own coal furnace. The Philippines remained a U.S. colony until 1946. Guantanamo is, of course, still a U.S. base.

On August 4, 1964, U.S. President Lyndon Johnson announced that the U.S.S. *Maddox* had been attacked by North Vietnamese gunboats in the South China Sea, off the coast of Vietnam. Johnson asked Congress to authorize military action in response. Three days later, on August 7th, Congress approved the Gulf of Tonkin Resolution. The resolution passed the House of Representatives unanimously. There were only two dissenting votes in the Senate, Wayne Morse (D-OR) and Ernest Gruening (D-AL). The resolution authorized the President "to take all necessary measures … to prevent further aggression." This was the blank check that Johnson wanted and needed to begin 11 years of illegal, immoral warfare in Vietnam.

In 1971, the New York Times published the Pentagon Papers, a secret Pentagon study of the war that had been leaked to the Times by its principal author, Daniel Ellsberg. In the Pentagon Papers we

learned the Gulf of Tonkin incident had never occurred. That is, there was one salient difference between the burning of the Reichstag in Berlin on February 27, 1933, the excuse used by Hitler for seizing dictatorial power, and the Gulf of Tonkin incident in August 1964, the excuse used by Johnson for commencing over a decade of war: the Reichstag actually did burn down. In 2005, the U.S. government declassified a National Security Agency investigation of the Tonkin Gulf incident that concluded: "It is not simply that there is a different story as to what happened; it is that no attack happened that night."

Over 58,000 Americans were killed during the war, and over 300,000 were wounded. Over two million Vietnamese, Cambodians, and Laotians died. The Tonkin Gulf incident may never have happened, but President Johnson got the excuse he needed for war.

Today, the Bush-Cheney Administration is held in very low regard because everyone remembers its blatant lies about weapons of mass destruction as an excuse for invading Iraq in March 2003. But that kind of behavior is really not that unusual. Indeed, out-and-out lies as justification for going to war are quite common.

This year, the world will observe the hundredth anniversary of the start of the First World War. In June, we will surely hear the assassination of Archduke Ferdinand in Sarajevo caused the war. But, it was not the cause, merely the occasion. The causes went much deeper. The causes included a world bristling with armaments: Germany's so-called "Schlieffen Plan" to launch a pre-emptive attack against France in the event of rising international tensions; and an Austrian military looking for any excuse to invade the Balkans.

But, no matter what is provided as a cause for war, it is important to remember the difference between an excuse and a reason. ❖

Refusal Cases: Sworn Report Required

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*In **Sleiman**, the arresting officer, while testifying at trial, conceded that, in fact, he did not swear to the facts of his report before a notary public.*

In the **Town of Smithfield v. Sleiman**,[1] the Rhode Island Traffic Tribunal Appeals Panel clarified the role of a police officer's sworn report in cases where a suspected drunk driver refused to submit to a chemical test in violation of R.I. Gen. Laws § 31-27-2.1. To review, the refusal statute requires proof – by clear and convincing evidence – of the following:

1) A sworn report stating that a law enforcement officer possessed reasonable grounds to suspect an arrestee of driving under the influence;
2) The refusal of the arrestee to submit to a chemical test upon a law enforcement officer's request;
3) The reading of rights to the arrestee in accordance with § 31-27-3; and,
4) The notification of the arrestee regarding penalties that will be incurred as [a] result of noncompliance.[2]

The decision in **Sleiman** brings a newfound importance to the refusal statute's first requirement: the sworn report. Prior to **Sleiman**, the most definitive case law regarding the sworn report in refusal cases was **Link v. State**.[3]

In **Link**, the police officer's sworn report presented to the trial court contained a factual error as to the amount of an applicable fee for the underlying violation. The report incorrectly listed the $147 fee for refusing the breathalyzer test as $115. The trial judge, without a hearing, dismissed the refusal charge against the defendant on the grounds that prior District Court case law required dismissal where a sworn report failed to precisely disclose the penalties for refusal to submit to a chemical test.

On appeal, the Supreme Court reversed the trial judge, and held that the trial judge erred when she dismissed the charge of refusal without holding a hearing because a defective sworn report containing factual inaccuracies can be cured by live testimony at trial which, in **Link**, had never occurred.

In **Sleiman**, the Appeals Panel addressed more existential questions in relation to the sworn report requirement: What if the police officer's report was improperly sworn to, or not sworn to at all? That issue arose in **Sleiman** when the arresting officer, while testifying at trial, conceded that, in fact, he did not swear to the facts of his report before a notary public.[4] Given the Supreme Court in **Link** had already proclaimed that § 31-27-2.1 is "clear and unambiguous and [therefore should] be applied literally,"[5] the Appeals Panel in **Sleiman** held that "it is clear from that reasoning that there must be, at a minimum, a showing that a sworn report was indeed made."[6]

There is a rather unorthodox history which underpins the **Sleiman** decision. Prior to **Sleiman**, the same issue regarding the effect of the lack of a sworn report was pursued in two cases: **Samson v. State**,[7] and, **Sarhan v. State**.[8]

Samson and **Sarhan** had effectively equivalent facts and case travel. Both defendants were charged with refusal and went to trial where, despite testimony by the arresting officers that the report was not sworn to properly, the trial judges sustained the charge. On appeal, the Appeals Panel, and subsequently the Sixth Division District Court, both affirmed the trial judge's decision. The defendants filed Petitions for Writ of *Certiorari* to the Supreme Court. Responding to the defendants' Petition, the Attorney General filed a Concession of Error concurring with the defendants' position that the lack of a properly sworn report appeared incongruous with the express language of § 31-27-2.1. That Concession of Error was accepted by the Supreme Court, and the refusal charge was dismissed by an unpublished Order.

It was against this backdrop that the Appeals Panel made its determination in **Sleiman**.[9] The Appeals Panel reemphasized its position in **Sleiman** – that a properly sworn police report is indeed a necessary element of a refusal charge under § 31-27-2.1 – in a more recent case, **Town of Narragansett v. Laura Imswiler**.[10]

In **Imswiler**, the trial judge sustained a refusal charge, after trial, despite having made the finding that no sworn report was made by the arresting officer. Upon review, the Appeals Panel in **Imswiler** held that the prior decision in **Sleiman** required that the trial judge's decision to sustain the reversal and dismissal of the refusal charge.[11] Again, the Appeals Panel in

TITLE CLEARING

QUIETING TITLE ACTIONS

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Dealing with a colleague's grief

It is a myth that only those who have been there can help bereaved people suffering with grief over the loss of a loved one. This myth adds to the confusion associated with helping grief-stricken people. Grief is difficult to comprehend if you haven't experienced it, but you can take steps to understand it better and be a supportive and in tune colleague.

Grief is a natural, normal reaction to a serious loss of any kind. Profound loss affects the entire being, physically, emotionally, spiritually, and psychologically. Overcoming grief is accomplished in waves; it stops and starts, and it often feels like three steps forward for every two steps back, or worse.

Recovery from grief is as unique as a fingerprint, because we are all different. One's life experiences, psychology, environment, and health all play a role in recovery. A roller coaster of emotions often occurs throughout the grief process. You will not be able to say something that fixes grief or elevates a person out of it, but being present and patient are two valuable gifts you can offer a grief-stricken colleague.

Learn more about grief in the workplace at **www.apa.org/helpcenter/grief**. You may also contact Judith Hoffman or her colleagues at Coastline EAP, 800-445-1195, **www.coastlineeap.com**. Coastline EAP is a totally confidential, free service for Bar Association Members and their families. You may also contact any member of the Bar Association's Lawyers Helping Lawyers Committee. See page 32 in this issue of the *Rhode Island Bar Journal* for contact names and numbers and more information about the services provided by the Bar and the Lawyers Helping Lawyers Committee. All communications are confidential as a matter of law.

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.

Imswiler made reference to the Supreme Court Orders in **Samson** and **Sarhan**.[12]

The practical effect of **Sleiman** and **Imswiler** is that the factual question of whether the police officer's report, as submitted to the trial court, was sworn to properly, if at all, is now elevated to a determination of true consequence.

NOTE: The author acknowledges the efforts of Richard S. Humphrey, Esq. and Christina Dzierzek, Esq. in preparing this article.

ENDNOTES

1 *C.A. No. T12-0022, August 1, 2013, R.I. Traffic Trib.*
2 ***See Sleiman**, C.A. No. T12-0022, at 7.*
3 *633 A.2d 1345 (R.I. 1993).*
4 ***Sleiman**, T12-0022, at 3-4.*
5 *633 A.2d at 1348.*
6 ***Sleiman**, T12-0022, at 11.*
7 *No. 12-285-M.P. (R.I., filed April 18, 2013) (Unpublished Order), A.A. No. 2012-093, T11-0039.*
8 *No. 12-311-M.P. (R.I., filed April 18, 2013) (Unpublished Order), A.A. No. 2012-094, T11-0046.*
9 ***See Sleiman**, T12-0022, at 13 n. 5.*
10 *No. T13-0012, February 3, 2014, R.I. Traffic Trib.*
11 ***Imswiler**, T13-0012, at 9.*
12 ***See Imswiler**, T13-0012, at 7 n. 9, and 8-9.* ❖

Bar Volunteers Supporting Generation Citizen's Law Related Education Initiative

Rhode Island Bar President Bob Weisberger is championing the mission of *Generation Citizen* (GC), asking Bar members to volunteer for this and the Bar's own law related education programs.* Among those who responded is Attorney Christopher S. Gontarz (third from the right) who practices with the Middletown law firm of Updegrove & Gontarz, Ltd. A long-time and greatly appreciated volunteer for the Bar's law related education programs and Chairman of the Bar's Criminal Law Bench/Bar Committee, Chris is working with GC Rhode Island Site Director Thomas Kerr-Vanderslice (second from left) at the Met School in Providence, one of GC's twelve Rhode Island partner schools. The class elected to work on the issue of drug abuse in Rhode Island after hearing about the numerous, recent drug-related deaths and overdoses. The students researched the issue through reading articles and hearing from Chris Gontarz who shared his experience as a defense attorney, and former prosecutor and police officer. After learning the legal background around drug crimes and enforcement, including related initiatives, the students are now lobbying their state representatives to divert more funding to drug enforcement and rehabilitation agencies. Generation Citizen teaches students the civic skills and knowledge they need to become successful citizens. College volunteers are partnered with classroom teachers to implement the curriculum. During the ten-week program, students select an issue they see in their community, research and learn about the policy and service-based causes, and then design and implement an action plan to address the problem. For more information on Generation Citizen, and to learn how you can volunteer for this and the Bar's own law related education programs, visit the Bar's website at **www.ribar.com**, click on FOR ATTORNEYS, then click on LAW RELATED EDUCATION and browse that section for more information.

*See: *Educating the Electorate: With a Little Help From My Friends*, page 3, RIBJ MA 2014.

Do you or your family need help with any personal challenges?

We provide free, confidential assistance to Bar members and their families.

Confidential and free help, information, assessment and referral for personal challenges are available **now** for Rhode Island Bar Association members and their families. This no-cost assistance is available through the Bar's contract with **Coastline Employee Assistance Program (EAP)** and through the members of the Bar Association's Lawyers Helping Lawyers (LHL) Committee. To discuss your concerns, or those you may have about a colleague, you may contact a LHL member, or go directly to professionals at Coastline EAP who provide confidential consultation for a wide range of personal concerns including but not limited to: balancing work and family, depression, anxiety, domestic violence, childcare, eldercare, grief, career satisfaction, alcohol and substance abuse, and problem gambling.

When contacting Coastline EAP, please identify yourself as a Rhode Island Bar Association member or family member. A Coastline EAP Consultant will briefly discuss your concerns to determine if your situation needs immediate attention. If not, initial appointments are made within 24 to 48 hours at a location convenient to you. Please contact Coastline EAP by telephone: 401-732-9444 or toll-free: 1-800-445-1195.

Lawyers Helping Lawyers Committee members choose this volunteer assignment because they understand the issues and want to help you find answers and appropriate courses of action. Committee members listen to your concerns, share their experiences, offer advice and support, and keep all information completely confidential.

Please contact us for strictly confidential, free, peer and professional assistance with any personal challenges.

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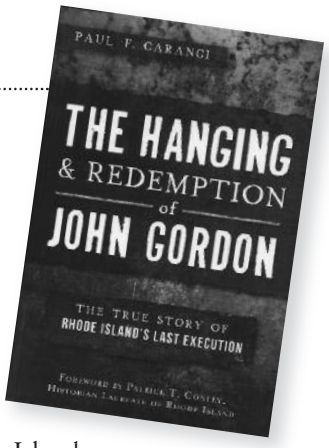
BOOK REVIEW

The Hanging and Redemption of John Gordon: The True Story of Rhode Island's Last Execution by Paul Caranci



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As a result of the state's hang-first-and-ask-questions-later approach, Amasa Sprague's actual murderer was never found, and justice never attained.

A member of a prominent local family was found brutally murdered on December 31, 1843, near the String Bridge crossing the Pocasset River on the Cranston-Johnston line. Footsteps from the murder scene led near the door of the home of Nicholas Gordon, a small businessman recently emigrated from Ireland. At the time, anti-Irish, anti-Catholic, anti-immigrant hysteria reigned supreme within Rhode Island. During the ensuing investigation, the cart was placed before the horse. Evidence was linked to predetermined suspects. Three show trials were conducted, and for one defendant, led to the worse possible scenario in American criminal justice: the conviction and execution of an innocent man. The man's name was John Gordon.

Many of us have heard John Gordon's name when we talk about why Rhode Island abolished capital punishment, and whenever legislation is introduced to re-institute same. The state executed an innocent man, for which there is no excuse. Finally, we have an opportunity to learn more about John and his story.

The Hanging and Redemption of John Gordon: The True Story of Rhode Island's Last Execution, authored by local historian and scholar Paul F. Caranci, chronicles the events which led to this human tragedy and flagrant miscarriage of justice. Caranci story takes place in the historical setting of post-Dorr Rebellion, mid-nineteenth century Rhode Island. This was a time when anti-Irish, anti-Catholic sentiments ran high among the state's powerful white, Anglo-Saxon, Protestant, law and order, Yankee establishment. After 1830, Rhode Island remained the only state without a written constitution or bill of rights. Under its supreme law, the Royal Charter of 1663, only freemen (i.e., males who were free of debt and inservitude) could own property and therefore vote.

Nicholas Gordon, John's brother, immigrated alone to the United States from Ireland in 1836. He first opened a general store in the Knightsville section of Cranston and later obtained a liquor license from the town council. Nicholas purchased a rifle and handgun for protection at his store. He was pursuing the American dream and wished to share the same with his family he left behind in Ireland.

John, his brother William, their mother Ellen and the rest of the Gordon family immigrated to Rhode Island in 1843. Nicholas paid for their passage. Upon arrival in Rhode Island, William worked as a tailor. John worked as a dyer, and he enjoyed hunting. Both would ultimately play a role in his demise. John and Nicholas Gordon were often observed by others with a gun while hunting in the woods near what would later become the crime scene.

Nicholas opened an ale house frequented by workers from the nearby Sprague Mill, owned and operated by Amasa Sprague, a textile magnate, former Cranston town clerk, and member of the General Assembly. His brother, William Sprague, III, was likewise a former member of the General Assembly, a past member of the U.S. House of Representatives and at the time of Amasa's murder, a U.S. Senator. Amasa's son, William Sprague, IV, would later serve as Governor of Rhode Island and, after serving at the First Battle of Bull Run in the Civil War, became a U.S. Senator.

It was against this powerful dynasty that the Gordons' pursuit of the American dream would soon become a nightmare. The Gordons and the Spraques were on a collision course eventually leading to the loss of a loved one for each. The renewal of Nicholas' ale house license was denied by a unanimous vote of the town council, based largely on the objection of the omnipotent Amasa Sprague who complained that many of his millworkers were showing up to work drunk. Amasa's objection was supported by many of his associates and employees. Nicholas lost his license, and with it, his livelihood. Others would later testify that Nicholas vowed revenge on Amasa Sprague, thereby providing a motive for murder. The state would later successfully, and unfortunately, impute this motive to John.

Caranci provides a detailed account of the events leading up to and including Amasa

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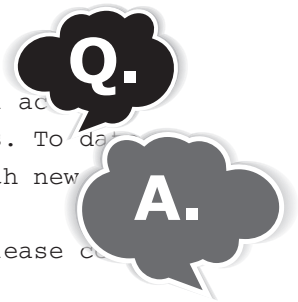

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All you need to do to access to this free member benefit is read the Bar list serve rules, which you can access by going to the Bar's website at **www.ribar.com**, click on the **MEMBERS ONLY** link, login using your Bar identification number and password, click on the **List Serve** link, read the terms and conditions, and email the contact at the bottom of the rules.

The more lawyers who join and participate in the list serve, the more valuable it will be, so we encourage all Bar members to seriously consider joining. If, at any time, you want to stop participating in the list serve, you will be able to unsubscribe with a single click.

We hope you find this new member benefit helpful to you in your practice of law. We are especially hoping that this list serve will be of particular benefit to solo and small firm practitioners.

Sprague's murder, and the sloppy investigation in its aftermath conducted by the High Sheriff and his posse. Amasa left his mansion in the Spragueville section of town in the late afternoon on December 31st. He took a walk on a well-traveled foot-path to check on his farm and livestock due to the cold weather. He would never return from this excursion. At approximately four o'clock that afternoon, at the foot-bridge spanning the Pocasset River, Amasa Sprague was attacked, shot and severely beaten to death.

A coroner's jury was assembled for the purpose of gathering evidence, and here began the process that would ultimately send John Gordon to the gallows. To say the crime scene was substantially altered is an understatement. No effort was made by the Sheriff to seal the site. Crucial evidence at the scene was trampled upon. Mistaken identifications by eyewitnesses became a cornerstone of the prosecution. Before one piece of evidence was found linking them to the crime, the entire Gordon family, including the family dog, were arrested and confined at the state prison at Providence Cove, now the site of the Providence Place Mall.

Pretrial publicity by a bigoted and biased *Providence Journal*, all but destroyed the Gordons' chances for a fair trial before an impartial jury. Credible witness statements regarding John's alibi were conveniently ignored in favor of perjured testimony. Witness credibility was accessed based on the nationality and religion of the proffering witness. Nicholas Gordon's guns were hidden. Irregularities within the jury itself occurred during John's trial which were intolerable in any American courtroom, at any time in our history. Witnesses testified as to their doubts as to whether the murder weapon seized at the scene belonged to Nicholas and whether the wet, blood-stained clothes belonged to John. Others testified that the tracks leading from the murder scene to Gordon's home could have been made by any villager along that well-traveled foot-path. Still others expressed doubt as to the validity of the method used to trace the suspect's foot-prints. Several more identified individuals not matching the Gordon brothers' description who were present at the time of the murder. In the words of the defense, the government was, "at the wrong end of their proof." This plea fell on deaf ears, as the Court would hear none of it.

Evidence of questionable admissibility

and reliability were admitted at trial due to the incredulous, and frankly injudicious, rulings of then-Chief Justice Job Durfee, himself a member of the Yankee establishment. The reader's jaw will drop at this Court's rulings and statements made in the presence of the jury during John's show trial, in particular, Durfee's refusal to separate John and William's cases for trial, and his prejudicial instructions to the all-Yankee jury. Contradictory circumstantial evidence was equated with direct evidence. Even John's volunteer defense attorneys, among the most competent in the state, were aghast at the Court's lack of impartiality and its willingness to use this trial to re-write judicial law.

Notwithstanding evidence that clearly exhibited reasonable doubt, only one verdict was possible. After his jury deliberated for less than two hours, John was convicted and sentenced to death by hanging. John's motion for a new trial was summarily rejected. His motion to postpone sentencing until after his brother Nicholas' trial was also denied. The appeal process was a farce. Durfee presided at the hearing on John's motion for an appeal, which was denied, a blatant example of conflict of interest in any era. Neither a trial decision nor an appellate opinion, setting forth the initial grounds for the conviction and sentence as well as the affirming of same on appeal, were ever published or reported. All that exists is the transcript of John's trial. Post-conviction relief and executive clemency were nonexistent. Petitions to postpone John's hanging went unheeded by the General Assembly. The attorney general insisted the hanging had to proceed as a so-called deterrent to criminals, and an example of law and order to all.

Thus, at approximately eleven o'clock on the morning of February 14, 1845, despite enormous public opposition, the last execution in Rhode Island was carried out. John neither confessed to the crime, nor asked for forgiveness after mounting the scaffold. Rather he forgave those who persecuted him, before courageously turning to the Sheriff and, with a nod of his head, simply stated, "Yes, I'm ready." Judge Staples, with whom Durfee presided at both John's trial and appeal, pulled the lever. John was twenty-nine years of age.

Shortly afterward, the horrible truth was revealed during Nicholas' retrial. Public sentiment against the death penalty in Rhode Island, on the rise since the

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1830s, now reached a critical mass. No further executions occurred. In 1852, the General Assembly, with the Dorrites in control, abolished capital punishment in Rhode Island. Executive clemency was enacted in 1854. Only later would Rhode Island have political leaders courageous enough to admit John's hanging was a terrible mistake. On June 29, 2011, after more than 166 years, at the request of the General Assembly, John would receive a posthumous pardon from Governor Lincoln Chafee. The pardon was signed in the same courtroom in which John was wrongfully condemned, and less than three-quarters of a mile from the site of his hanging. John's epitaph now appropriately reads, "Forgiveness is the ultimate revenge."

As a result of the state's hang-first-and-ask-questions-later approach, Amasa Sprague's actual murderer was never found, and justice never attained. First the Gordons, and then the Spragues, experienced financial ruin in the years following the hanging.

The Hanging and Redemption of John Gordon is a must read for lawyers, judges, elected officials, educators and anyone interested in social justice or local history. Less than two hundred pages in length, the book is as short and to the point as it is enlightening on this long-neglected and dark chapter of Rhode Island history. As Patrick T. Conley, Esq., states in the introduction, the similarities are striking between John's case and that of Nicola Sacco and Bartolomeo Vanzetti, who were later wrongfully executed by neighboring Massachusetts in 1927. As in John's case, anti-Catholic, anti-immigrant sentiment again raised its ugly head, stripping Lady Justice of her blindfold. Numerous works have been written on the Sacco-Vanzetti case. It is long overdue for the case of John Gordon to be brought to light. Caranci has achieved that.

Many lessons remain to be learned from John's story. Any legal system run by human beings is far too imperfect to so cavalierly take a human life by judicial process. Most importantly, hysteria, ignorance, bias or prejudice should never trump reason, professionalism, detachment or prudence in our criminal justice system, regardless of whether our state has a death penalty. The most recent failing in this regard is **State v. Scott Hornoff**. Fortunately for Scott Hornoff, his sentence, to some degree, had a reverse gear. John Gordon's did not. ❖

Windy City Blues

American Bar Association Delegate Report: ABA Midyear Meeting

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

For anyone who thinks being the American Bar Association (ABA) delegate is a glamorous position, the temperature in Chicago at the ABA midyear meeting in February 2014 was below zero every day. They don't call it the Windy City for no reason. Fortunately, there was warmth inside the meeting generated by hundreds of meetings, speakers and the deliberations of the ABA House of Delegates. This report summarizes some of those meetings that I attended, which ranged from issues of cybersecurity to redefining juvenile justice.

The meeting opened with a moving citizenship ceremony of 24 people from countries including the Ukraine, Mexico, Congo, and Syria, presided over by U.S. District Court Judge Marvin E. Aspen of the Northern District of Illinois. We ABA House members were the first to congratulate them as full-fledged citizens.

Several new resolutions were adopted by the policymaking House of Delegates: 1) creating a greater legal and public awareness of labor trafficking and child labor trafficking, said to victimize 200 million people worldwide; 2) urging governments to ensure juveniles are provided effective appellate representation and access to appeals consistent with state statutes and/or state constitutional provisions; 3) encouraging governments to adequately fund judicial system security protocols and urging courts to create and review judicial system security protocols. A total of fifty, court-related incidents, including bombings, shootings and arson attacks were reported in the U.S. from 2000 to 2010, with an additional 67 incidents in 2011; and 4) urging governments to promote human rights to adequate food and nutrition for all, including millions of children through increased funding, development and implementation strategies. The most debated issue was an ABA dues increase proposal. Although millions of dollars in cuts were made to the ABA budget, this delegate voted against the proposal, feeling the issue needed more study.

ABA President Jim Silkenat introduced President-Elect Nominee Paulette Brown of New Jersey, the first African American woman to hold the ABA Presidency since its founding in 1878. President Silkenat addressed the lack of legal jobs for new graduates of law schools, promoting the view that the lack of legal aid attorneys should be linked to the graduates who cannot find jobs, and noting the ABA's commitment to finding jobs for graduates in areas with unmet legal needs. He discussed the issue of gun violence, indicating he has a farm near Newtown, Connecticut, and urged the ABA to take a strong stand to curb gun violence. Michael G. Heavican, Chief Justice of the Nebraska Supreme Court and President of the Conference of Chief Justices, spoke on discussed strategies for solving the judiciaries' financial issues.

Justice Randall T. Shepard (ret.) of Indianapolis presented the report of the Task Force on the Future of Legal Education, noting student loan debt has surpassed home mortgage loan debt and discounts are available to certain applicants while others pay in full. The Task Force on Human Trafficking presented its report aimed at helping end sex trafficking of young girls and boys and end forced labor for little or no wages. Nearly 750 events were held throughout the meeting on hot topics affecting lawyers and their clients.

On a personal note I was appointed by the ABA President to the Constitution and Bylaws Committee, a significant appointment since ABA governance is to be reviewed in the next year. This is in addition to my previous appointment to the Select Committee of the House of Delegates, which welcomes new members and prepares a daily journal of the deliberations of the House of Delegates.

The ABA is preparing a series of exciting events next year in London to celebrate the 800th anniversary of the Magna Carta sealing. There will also be legal education programs and plenary sessions. Receptions will be held at the Royal Courts of Justice and a visit to the ABA Memorial at Runnymede.

The ABA Annual Meeting, will be held in Boston on August 7th through 11th, 2014, and I invite my Rhode Island colleagues to attend. ABA membership and participation helps keep us abreast, and often in front of, trends in our legal profession. In terms of professional development, I have received more than I have given from both the ABA and Rhode Island Bar Association. I thank our Bar's House of Delegates for allowing me the honor to serve as your delegate and I look forward to your suggestions and comments for future ABA activities. I invite you to contact me at my law office telephone: 401-724-2400 or email: rdoesq@gmail.com. ❖

Pre-Bail Revocation

continued from page 11

of pre-bail revocation hearing detention is that the Attorney General needs time to be able to build a case for a bail revocation hearing affording a defendant the due process rights guaranteed him in **Mello**. A defendant who has flouted the conditions of bail in the first instance should not perpetually be permitted bail just because the Attorney General needs time to put together a bail revocation case. Even in **Mello**, while the Court stated that a two week pre-bail revocation hearing detention was not to be countenanced, the Court also "eschew[ed] the temptation to formulate a neat schedule of minimum and maximum time frames" for a permissible pre-bail revocation hearing detention.[11] This implies that, in some circumstances, detention is both permissible and appropriate, so long as it does not reach the two week limit. The question remains, however: exactly how long of a pre-bail revocation hearing detention is appropriate and permissible?

The answer to this question should serve the legitimate purpose of ensuring an alleged bail violator maintains good behavior and shows up at the revocation hearing, while minimizing the harsh effects on the defendant at a time when the presumption of innocence is still attached. To address this issue, a fact-specific inquiry, individualized to each defendant, should be used, just as an individualized fact-specific inquiry is used in setting bail in the first instance.[12] The Court should consider factors that include the severity of the penalty faced by the defendant, the defendant's ties to the community, his history of appearing at required court dates, and the minimum amount of time required by the Attorney General to put together a case for a bail revocation hearing. When all relevant factors are considered, the Court can allow the case to turn on its own facts in determining whether a pre-bail revocation hearing detention is warranted, and, if it is warranted, how long the detention should be. This argument for modifying pre-bail revocation hearing detention practice in District Court misdemeanor cases can be equally applied to Superior Court felony cases. However, the facts in felony case will more often call for an extended pre-bail revocation hearing detention, while the facts in misdemeanor

cases will often call for lesser measures.

One impediment to this modification of the current practice is that an assistant Attorney General is not present at District Court arraignments to argue for the state's interests when an alleged bail violation is on the calendar. This could be remedied by the Attorney General stationing an attorney at the District Court arraignment calendar, just as the Public Defender stations an attorney at that calendar. An assistant Attorney General at arraignment calendar would be available to argue on behalf of the state when a bail violation is alleged. With an assistant Public Defender present to assist the defendant in arguing his interests to the Court and an assistant Attorney General present to represent the interests of the state, the adversary system would assist the Court in reaching as equitable a determination as possible for everyone involved. This equitable result may entail holding a revocation hearing on the day of arraignment, setting surety bail pending a revocation hearing, or ordering a truncated detention pending an expedited revocation hearing. This fact-intensive inquiry, aided by the adversary process, would require additional time and monetary resources to be expended by the state, but it is necessary to protect the rights of the defendant and the integrity of the judicial system. If such a fact-intensive inquiry were conducted in misdemeanor cases, where the stakes are relatively low and the allegations relatively less egregious, an extended detention pending the revocation hearing would only be appropriate in uncommon cases and unusual circumstances.

Challenging the Current Practice of Pre-Bail Revocation Detention

The first instance in which a defense attorney can challenge the current practice is before a judge or magistrate of the District Court. If you find your client is being arraigned as an alleged misdemeanor bail violator before a District Court judge, and the judge is poised to order your client held without bail pending a revocation hearing, you can cite **Mello** and the Rhode Island constitutional right to bail to try and get your client released. You can also cite the Rhode Island Bail Guidelines, arguing an individualized assessment is necessary before a pre-bail revocation hearing detention may be ordered.

If arguing to the District Court judge is unsuccessful, the next step to pursue is filing a petition for *habeas corpus* in the Rhode Island Superior or Supreme Court. R.I. Gen. Laws § 10-9-1 *et seq.* sets forth the procedure for challenging an illegal detention in Superior or Supreme Court by means of *habeas corpus*. The time-frame for receiving *habeas corpus* relief would usually preclude the review of a two week detention.[13] However, a petitioner may seek relief with a justice of the Superior or Supreme Court on an expedited emergency basis.[14] At a conference with the justice, an advocate can present all the arguments as to why the pre-bail revocation hearing detention is illegal. If the justice is persuaded the detention is illegal, he or she would have the authority to order the defendant released.[15] The justice could also set bail for the defendant's release in the same manner the District Court judge could have in the first instance.[16]

Of course, challenging a misdemeanor pre-bail revocation hearing detention by means of *habeas corpus* is entirely dependent upon having a client who is willing to sit tight in the ACI while his lawyer pursues a *habeas* claim with uncertain results. Since many misdemeanor defendants would prefer to take a plea deal that allows them to go home to their jobs and family, rather than sit in the ACI to fight out a *habeas* petition, it is a perfectly reasonable decision, in most cases, for a defense attorney to forgo the *habeas* challenge to get his or her client out of handcuffs and back to his life as quickly as possible.[17] However, if, for whatever reason, a defendant chooses not to take a plea deal, pursuing a petition of *habeas corpus* may possibly win him or her early release from the pre-bail revocation hearing detention, and establish precedent for future cases.

Conclusion

Detention for two weeks pending a bail revocation hearing is a long-established practice in Rhode Island District Court. In many ways, it is especially expeditious and efficient in District Court misdemeanor cases due to the extremely high volume of misdemeanor cases the Court handles on a daily basis. However, the practice of a standard two week detention often has unjustifiably harsh consequences on misdemeanor defendants. Further, the practice of routine two week

detention in misdemeanor cases puts inordinate pressure on misdemeanor defendants to take a plea deal and subverts the truth finding function of the adversary system. The District Court should move toward a practice where misdemeanor defendants are assessed on an individual basis to determine what conditions should be imposed to ensure their good behavior and appearance pending a bail revocation hearing. The District Court should also move toward a practice where pre-bail revocation hearing detention, in misdemeanor cases, is a cautiously and sparingly used exception, not the rule.

ENDNOTES

1 ***See United States v. Salerno**, 481 U.S. 739, 752 (1987).*

2 ***Id.***

3 ***Mello**, 370 A.2d at 1266.*

4 ***Id.***

5 ***See** R.I. GEN. LAWS § 12-19-9 (pending a probation violation hearing, the court "may order the defendant held without bail for a period not exceeding ten (10) days, excluding Saturdays, Sundays, and holidays").*

6 ***See** R.I. BAIL GUIDELINE V(1), n.2.*

7 ***See Salerno**, 481 U.S. at 747; **Witt v. Moran**, 572 A.2d 261, 267-68 (R.I. 1990).*

8 ***Mello**, 370 A.2d at 1266.*

9 ***Id.***

10 ***See e.g. State v. Robinson**, 658 A.2d 518 (R.I. 1995); **State v. Wax**, 83 R.I. 319 (1955) (examining prompt present requirement).*

11 ***Mello**, 370 A.2d at 1266.*

12 ***See** R.I. BAIL GUIDELINE V(1), n.2.*

13 ***See, e.g.**, RI Sup. Ct. Art. I, Rule 14(b) (allowing the respondent twenty (20) days to respond to a petition for habeas corpus in the Supreme Court).*

14 ***See, e.g.**, RI Sup. Ct. Art. I, Rule 34 (allowing a hearing with a duty justice of the Supreme Court on an expedited emergency basis).*

15 ***See** R.I. GEN. LAWS § 10-9-3. **See, e.g., In re Vonda F.**, 447 A.2d 1159 (R.I. 1982) (single justice of the R.I. Supreme Court ordered release of juvenile detained in violation of R.I. GEN. LAWS § 14-1-11).*

16 ***See** R.I. GEN. LAWS § 10-9-31.*

17 *In instances where a defendant pleas in order to avoid a two week pre-bail revocation hearing detention, the plea might be subject to challenge by collateral attack. **See Fontaine v. United States**, 411 U.S. 213, 215 (1973) ("It is elementary that a coerced plea is open to collateral attack"); R.I. GEN. LAWS § 10-9.1-1 et seq. (providing for collateral attack of an involuntarily given plea). **See also State v. Parra**, 941 A.2d 799, 804-05 (R.I. 2007) (recognizing the coercive effect of an illegal detention, in holding that, although a warrantless search may be conducted when "consent has been given freely and voluntarily," when the "consent is obtained during the course of an illegal detention…such consent presumptively is invalid").* ❖

In Memoriam

Seth Ernest Bowerman, Esq.
Seth Ernest Bowerman, 60, of Saunderstown, passed away on February 5, 2014. Seth was the oldest child of the late George Bowerman and Virginia Scattergood Van Kluyve. Raised in Saunderstown, Seth graduated from the University of Rhode Island and Washington University School of Law in St. Louis. Seth began his career as a medical malpractice defense attorney with Hanson, Curran. He established his own firm in 2000. He had a reputation for being a true gentleman, fair and compassionate, and very generous to his friends and family. An avid sailor, Seth was a lifelong member and past commodore of Saunderstown Yacht Club and member of East Greenwich Yacht Club. He enjoyed skiing, bicycling and the companionship of his dog, Moses. Seth is survived by his wife, Mary Jean "MJ" Miniati, and stepson, Kevin Krueger of Saunderstown; children, Julie of New York City and Kim of Philadelphia. He is also survived by his mother, Virginia Van Kluyve and sister Jean of Exeter; and sister Nancy Miniter and her family of Sherborn, MA.

Lawrence J. Hadfield, Sr., Esq.
Lawrence J. Hadfield, Sr., 84, of Avon Lake, OH, passed away on March 9, 2014. He was the son of the late Lawrence A. and Mary Hadfield of Cranston, Rhode Island. Lawrence graduated from Classical High School in Providence, RI, and received a Bachelor of Arts Degree from Providence College with Magna Cum Laude honors and a Juris Doctorate degree from Boston University School of Law. Lawrence was a proud U.S. Army Veteran and was married to Linda Hamann Hadfield in 1999. They resided in Avon Lake, OH for the past 15 years. He was previously married to Marie Servant Hadfield. In addition to his wife Linda, Lawrence leaves behind four children: Lawrence J. Hadfield, Jr., of Providence; Mark S. and Rebecca Hadfield of Town and Country, MO; L. Phillip and Terace Hadfield of Warwick; Karen M. and Ron Pomfret of S. Attleboro, MA and two step sons; Scott W. and Melissa Hamann of Avon Lake, OH, and Jason R. and Penny Hamann of Redondo Beach, CA.

William F. Hague, Jr., Esq.
William F. Hague, Jr., 70, of Wickford, passed away on March 6, 2014. He was born in Providence to the late Irene and William F. Hague, Sr. Mr. Hague attended St. Raphael Academy for high school, earned his Bachelor's Degree from Providence College and graduated from the Catholic University Law School, after which he served in the U.S. Army Reserves. He was married to Kathleen Kanina Radka Hague. During his 33 year career as an attorney, Bill was an associate, partner, and later principle of Dick and Hague, Ltd. Since his retirement, he pursued his love of hiking, sailing, and gardening, as Commodore of the Ocean State Catalina Association and as a graduate of the URI Master Gardener program. Bill coached Farm League baseball in Lincoln, prepared tax returns for the Volunteer Income Tax Assistance (VITA) program, and worked with Big Brothers of Rhode Island, which named him Big Brother of the Year in 2011. He was a devoted and

active member of the Christ the King Church in Kingston. In addition to his wife, Bill is survived by his children Kristen, Kurt and Keri Hague; his step children, Megan Radka Cleary and Elizabeth Radka; his brothers Dennis and Edmund Hague; and his sister Dianne Shannahan.

David C. Moretti, Sr., Esq.

David C. Moretti, Sr., 68, of Cranston, passed away on February 18, 2014. He was the fiancé of Shirley Adcock and former husband of Mary Lou Moretti and Sharon Moretti. Born in Providence, he was the son of the late Frank and Sarah Fusco Moretti. David was the founder of Moretti Perlow & Bonin Law Offices in Cranston, working there for 35 years before retiring. He was a graduate of Cranston High School East, Providence College, and Syracuse University College of Law. He was the father of David C. Moretti, Jr. of Atlanta, GA, Joseph D. Moretti of Smithfield and Justin Votolato of Providence. David was the brother of Gloria Moretti Laurie and her husband Bill of Cranston.

Hon. John M. McLoughlin

John M. McLoughlin, 73, of Saunderstown, passed away on February 5, 2014. He was the beloved husband of Margaret Hourigan McLoughlin for 48 years. Born in Bridgeport, CT, he was the son of the late Charles and Elizabeth McLaughlin McLoughlin and grew up in Woonsocket. He graduated from Cranwell Preparatory School in Lenox, MA, and from Boston College. He earned his JD degree from the University of Baltimore. Mr. McLoughlin was a District Court Judge for the State of Rhode Island from 1994 until his retirement in 2007. Prior to being a judge he was an Assistant Attorney General and practiced law privately. He was a past-president and board member of the Prout School and a docent for the Museum of Newport Irish History. He was previously an active member of South Kingstown Democratic Town Committee, the Friendly Sons of St. Patrick, the Sons of Irish Kings and the South Kingstown Lions Club. He is also survived by four daughters and their spouses, Mary Elizabeth and Richard Hess of Maryland, Tara and Glen Ross of Virginia, Heather and Edwin Kuffner of Pennsylvania, and Erin Brendan McCollam of Connecticut.

Carmine R. Santaniello, Esq.

Carmine R. Santaniello, 91, of Providence, passed away on February 20, 2014. He is survived by his loving and beloved wife of 62 years, Irma Zainetti Santaniello. Born in Providence, he was the son of the late Antonio and Maria Tella Santaniello. He was the father of Steven Santaniello of North Providence, Cheryl Santaniello of

In Memoriam *(continued)*

Providence, and Gloria Caprio of Venice Florida. He was a regular communicant at daily Mass at St. Ann Catholic Church in Providence. He was a graduate of LaSalle Academy in Providence, Providence College, and Boston College Law School. He practiced law for over 55 years. He was a U.S. Army Veteran of World War II from 1943 to 1946, serving as a Technician in the Medical Services Corps. He was a Venerable member of the Knights of Columbus, and he served on the Board of Education at the former St. Ann School in Providence.

Edward H. Torgen, Esq.

Edward H. Torgen of North Kingstown, passed away on February 21, 2014. He was the beloved husband of 54 years to Mary Ann Webster, brother of Dorothy Torgen Potter of Warwick, son of the late Samuel and Cora Cook Torgen, and loving father of daughters: Susan Torgen, Tracey and her husband Edward Keenan, Kristin Flannery, and Julie and her husband Joseph Mason. He graduated from Central High School, Brown University, and Boston University Law School. A retired Navy Commander, he served in both World War II and the Korean War, serving from 1945-1970, and on the destroyer USS *John W. Weeks*. He practiced law at Torgen and Callaghan. He served on the Warwick City Council, was Acting Judge of the Second District Court of South Kingstown and a Probate Judge for North Kingstown. He was a State Representative and served as Town Solicitor of the towns of Richmond and Narragansett. He was a member of Quidnessett Country Club. He and his wife started Stepping Out Inc., an organization for learning disabled adults. He was full of life and was passionate about his family, the law, Brown football, golf and his crew members on the USS *Weeks*.

Gilbert Walker, Esq.

Gilbert Walker passed away on March 5, 2014. Gilbert was born on February 13, 1951 in Philadelphia, Pennsylvania. He was the fourth of five children born to James Walker and Doris Murray Walker. Gilbert was educated in Levittown, Pennsylvania public schools, graduating from Woodrow Wilson High School. He graduated from Bucks County Community College and continued his education at Howard University graduating Cum Laude. He received his law degree from the University of San Francisco Law School. Gilbert married his high school sweetheart, Mattie Davis and they had three sons, Gilbert, Jr. Matthew and Samuel. Gilbert and his family relocated to Providence where he initially served as a Rhode Island Public Defender. He later became Special Assistant Attorney General in the Office of the Rhode Island Attorney General's Criminal Division. He left state government to start his own law practice. Gilbert was an avid runner and third degree black belt in Karate and he enjoyed watching football and basketball. Gilbert leaves his parents, James and Doris Walker; his devoted wife, Mattie; three sons, Gilbert, Matthew and Sammy; sisters, Ann and Paulette; and brother, James.

Reaching Out:

Learning the Signs of Depression and Suicide Risk

A depressed friend or colleague who talks about "ending it all" is not being secretive about the desire to commit suicide, but would you notice more subtle signs of suicidal risk in a friend who wasn't as open about thoughts and feelings or who felt it was a sign of weakness to ask for help?

Untreated depression is the most common cause of suicide, so the more you know about it, the easier it is to spot. You don't have to be a mental health professional to understand signs of depression. You need to know only what the signs are to have an edge in knowing whether to ask your friend if he or she is feeling suicidal. (Never shy away from this question. Clinicians agree that simply asking can be a valuable tool to help prevent suicide).

The National Institute of Mental Health has easily accessible information about depression and suicide at the following URLs: **http://tinyurl.com/7fc5okn**, (signs and symptoms of depression) and **http://tinyurl.com/849gqgb**, (warning signs of suicide).

There are many signs, not just sadness. Changes in eating, sleeping, or working habits; severe weight loss or gain; changes in mood or self-image; or excessively talking about guilt or other negative feelings and thoughts are all symptoms of depression. Having a greater knowledge of these symptoms will help you gauge your concern, so you can urge your friend or colleague to consult with a mental health professional.

If you have any questions you may contact Judith Hoffman at Coastline EAP, 800-445-1195, **www.coastlineeap.com**. Coastline EAP is a totally confidential free service for Rhode Island Bar Association members and their families. You may also contact any member of the Bar Association's Lawyers Helping Lawyers (LHL) Committee. Please see page 36 for a listing of LHL members and their contact telephone numbers. All communications are confidential as a matter of law.

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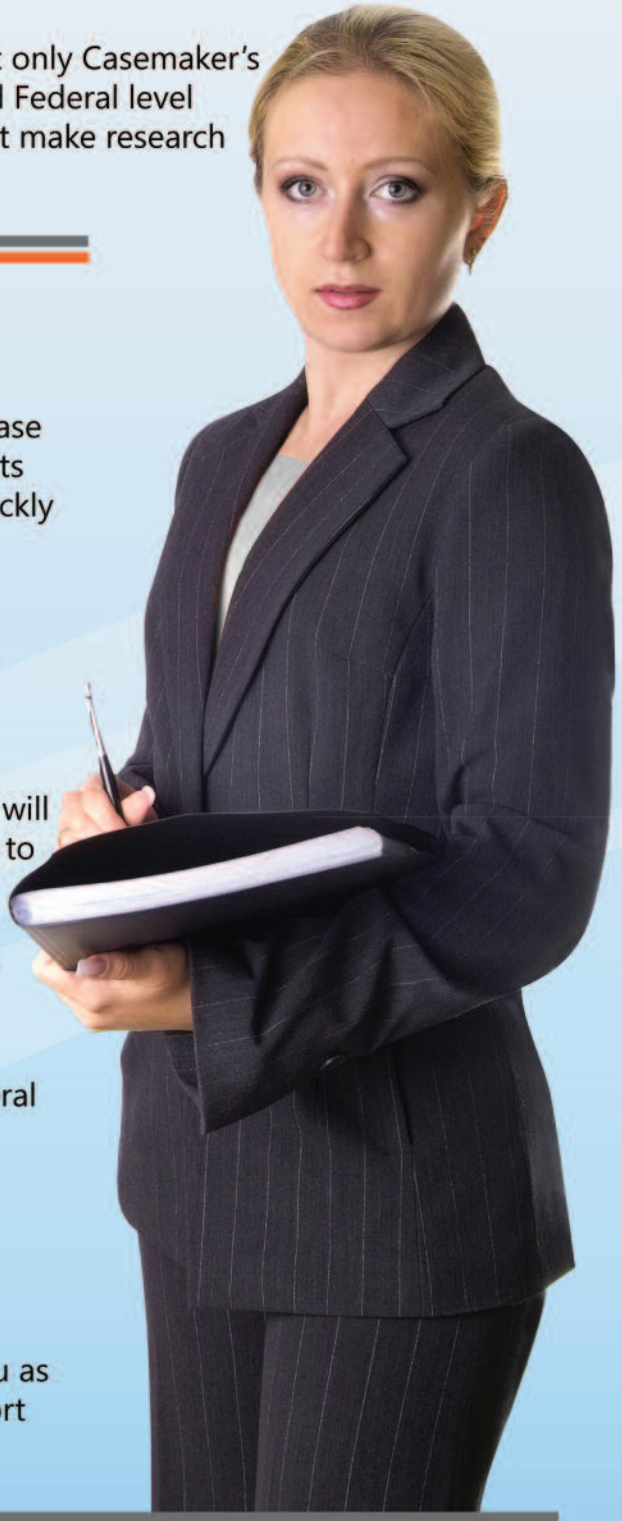

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