

Rhode Island

# Bar Journal

Rhode Island Bar Association Volume 63, Number 6. May/June 2015

Special Needs Trusts for  
Personal Injury Awards

2015 Rhode Island Estate  
Tax Change

Medical Marijuana Business  
Regulation in Rhode Island  
and Other States

Rhode Island Hall of Fame:  
Six Legal Luminaries

BOOK REVIEW: *Scratched*



RIBA NEW HOME



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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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**Front Cover Photograph – by Brian McDonald**

**SOUTH COUNTY MUSEUM, NARRAGANSETT, RI** (under renovation)

*South County Museum is a research and educational institution, focusing upon history and culture, guided by generally accepted principles and standards of museum stewardship, archival management, and historical research and dedicated to preserving the history and heritage of rural and coastal life in southern Rhode Island for the education and inspiration of people of all ages and for all times.*



# We Are On The Move!

Dear Colleagues:

In a break from tradition, the President's message in this issue of the *Rhode Island Bar Journal* comes from both of us. Our reason is that, through an extraordinarily successful partnership between the Bar Association and the Bar Foundation, we now have a brand new Rhode Island Law Center!

Our new, stand-alone, signature building furthers our shared goal of making your lives better by combining the best member and public services with the best value. By moving from our current location in Providence, to our new, 10,000 square foot building on a 1.3-acre site in Cranston, we have significantly lowered our long-term financial liabilities and secured many excellent features directly benefiting you. These include, but are not limited to:

- Operational cost savings stabilizing expenditures, reducing pressure on Association dues, and allowing enhanced long-term planning
- Well-designed interior spaces with advanced technology facilitating improved member use and networking
- Expanded exterior space providing immediately adjacent parking and greater meeting and event flexibility
- Handy highway proximity outside the congested city allowing simplified and convenient access with reduced traffic-related issues

Beyond this, the new Rhode Island Law Center, at 41 Sharpe Drive, is located in a vibrant professional business park with the Rhode Island Certified Public Accountants Association headquarters across the street and Swarovski America's administrative offices and WJAR Channel 10's broadcast studios nearby. The new building also offers modern facilities, better handicapped access, and close proximity to the Kent County Courthouse, State Offices, Garden City, Chapel Hill and the Warwick-area malls.

We anticipate our move to the new Law Center will take place this Spring, and we will provide you with regular updates regarding our progress and timing. We are grateful to all the Bar member volunteers who made this move a reality, and we will be sharing the details of their wonderfully generous contributions in the near future.



**Bruce W. McIntyre, Esq.**  
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**Michael A. St. Pierre, Esq.**  
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# Rhode Island Bar Association Annual Meeting June 18th and 19th

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



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### Try the Bar's dynamic List Serve.

From nuances of the **Rhode Island Courts e-filing system** to requests for **local and out-of-state referrals**, List Serve members provide their colleagues with timely answers. List Serve topics encompass a wide range of practice areas including **consultants, traffic violations, medical marijuana, landlord/tenant, divorce, pro hac vice, immigration** and more!

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and growing  
every day!**



Free and available for all actively practicing Rhode Island attorney members, the Bar's List Serve gives you immediate, 24/7, open-door access to the knowledge and experience of hundreds of Rhode Island lawyers.

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To access to this free member benefit go to the Bar's website: [www.ribar.com](http://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.

## 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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# Special Needs Trusts for Personal Injury Awards



Chad E. Nelson, Esq.  
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W. Howe, Ltd., Newport

*Federal law provides practitioners with a means to preserve the person's personal injury award, while at the same time keeping the person eligible for public benefits programs.*

For those entitled to large personal injury awards, settlements or proceeds from other legal claims, payment made directly to the claimant can be problematic when the claimant is already receiving certain needs-based public benefits such as Supplemental Security Income (SSI) or Medicaid. Where a person is already receiving these public benefits prior to the claim, or where he or she may become eligible for such public benefits as a result of their personal injury or other claim, outright payment of any substantial amount of money generally puts them over these programs' financial eligibility limits. As a result of ineligibility for these programs, the person's personal injury award or settlement may be quickly diminished by the high cost of his or her ongoing health care and other needs.

Fortunately, federal law provides practitioners with a means to preserve the person's personal injury award, while at the same time keeping the person eligible for public benefits programs. The way to accomplish this having-your-cake-and-eating-it-too scenario is by placing the personal injury proceeds in a properly created and carefully drafted special needs trust.

Normally, programs like Medicaid and SSI are unavailable to people with anything more than modest assets. For example, in Rhode Island, someone with more than \$4,000 in countable assets is excluded from receipt of Medicaid funds. By law, certain assets are deemed non-countable or exempt from that tally, such as a person's primary residence and an automobile. However, even a small bank account eclipsing this \$4,000 threshold would cause the person to be ineligible for Medicaid benefits, even if it is held by virtually any type of trust other than a special needs trust.

The special needs trust exception to the rule is contained in 42 U.S.C. 1396(p)(d)(4)(a) and codified by the Rhode Island Department of Health and Human Services Regulation 0356.50.20. This type of exempt special needs trust is commonly referred to as a D4A Special Needs Trust (referring to the statute authorizing it), or a First Party Special Needs Trust. These two terms are interchangeable.

## Properly Created and Carefully Drafted

D4A or First Party Special Needs Trusts serve to hold assets that already belong to the disabled individual, such as personal bank accounts or personal injury awards. A second kind of special needs trust, referred to as a Third Party Trust, serves to hold assets contributed to or for the benefit of the disabled individual by his or her parents, relatives, or other third party sources.

The distinction between First Party and Third Party Special Needs Trusts is an important one. The federal statute mentioned above, as well as Rhode Island's adopted provision of it, mandates that a First Party Special Needs Trust must meet the following requirements:

- 1) It may only be established for a disabled person 65 years of age or younger;
- 2) It may only be established by a parent, grandparent, legal guardian or court order;
- 3) It must name the state as a remainder beneficiary upon the disabled beneficiary's death, up to the amount of funds expended by the state on behalf of the disabled beneficiary

Thus, to protect a disabled person's personal injury award, the trust that receives the proceeds must meet these conditions. Many times, the second requirement proves the biggest obstacle to successful special needs trust planning.

It is often the case that the disabled person no longer has a living parent or grandparent, meaning a court order authorizing the trust, or a guardianship must be obtained. Neither is a small task. Depending on the disabled person's circumstances, one or the other of these options might be preferred. For example, if the disabled person is already in need of a guardianship irrespective of his or her need for a trust, it would make sense to seek the establishment of the trust through the guardianship. On the other hand, where no guardianship is needed, a Superior Court petition probably makes more sense.

## Involving Special Needs Planning Attorney in the Litigation

Perhaps the easiest and most efficient means to create the First Party Trust is to collaborate with a qualified special needs planning attorney



## 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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during the actual litigation phase. While the civil action remains open, a plaintiff's attorney can petition the court for the creation and funding of the First Party Special Needs Trust, which can then receive the settlement proceeds or award directly. This advance work avoids the subsequent need to re-initiate court action to fund the trust. More importantly, the court sanctioned process avoids the result that the disabled person will be deemed the holder of the award which result would put the person over their allowable resource limit and his or her benefits would be lost.

#### **Avoid Commingling of Personal Injury Award Proceeds and Third Party Funds**

Because funds held by a First Party Trust are subject to state payback upon the beneficiary's death, it is important not to fund the First Party Trust with assets that would not otherwise be subject to the payback to the state. When parents or other relatives desire to leave the disabled person an inheritance, or to make a gift to the disabled person, the First Party Trust should not be named as the beneficiary of the inheritance.

For inheritance and other such third party funds, a Third Party Trust would be the appropriate beneficiary. Upon the disabled beneficiary's death, the Third Party Trust may pay the remaining trust funds to private, non-state beneficiaries, since Third Party Trusts are not subject to the same, stricter standards set forth in the Federal and State Medicaid regulations. ❖

# 2015 Rhode Island Estate Tax Change



Anthony R. Mignanelli, Esq.  
Mignanelli & Associates, Ltd,  
Providence

*Rhode Island spouses and domestic partners, with a collective net taxable estate of \$3,000,000 or less, with proper estate planning, can fully eliminate the estate tax on these assets.*

The Rhode Island Legislature passed a new estate tax law in June of 2014 which effectively raised the Rhode Island estate tax exemption to \$1,500,000 and also eliminated the cliff tax in the prior law. The effect of this new law for Rhode Island residents is that now spouses and domestic partners, with a collective net taxable estate of \$3,000,000 or less, with proper estate planning, can fully eliminate the estate tax on these assets. This is a major change in Rhode Island law and significantly different from the prior estate tax law with a 2014 exemption of \$921,655, or \$1,843,310 per couple.

## I) Analysis of the New Estate Tax Law

The new estate tax law, as set forth in R.I. Gen. Laws 1956, § 44-22-1.1 is as follows:

*For decedents whose death occurs on or after January 1, 2015, a tax is imposed on the transfer of the net estate of every resident or nonresident decedent as a tax upon the right to transfer. The tax is a sum equal to the maximum credit for state death taxes allowed by 26 U.S.C. Section 2011, as it was in effect as of January 1, 2001; provided, however, that a Rhode Island credit shall be allowed against any tax so determined in the amount of sixty-four thousand four hundred (\$64,400). Any scheduled increase in the unified credit provided in 26 U.S.C. Section 2010 in effect on January 1, 2003, or thereafter, shall not apply; provided, further, beginning on January 1, 2016 and each January 1 thereafter, said Rhode Island credit amount under this section shall be adjusted by the percentage of increase in the Consumer Price Index for all Urban Consumers (CPI-U) as published by the United States Department of Labor and Statistics determined as of September 30 of the prior calendar year; said adjustment shall be compounded annually and shall be rounded up to the nearest five dollar (\$5.00) increment.*

The cliff tax that existed under the previous Rhode Island law essentially removed the estate tax exemption in the tax calculation, once the value of the taxable estate exceeded the decedent's exemption for the year of death. The fol-

lowing is an example of the effect of the removal of the cliff tax for estates of persons passing away in 2014 versus 2015:

## 2014 Rhode Island Estate Tax Return

### Table B Calculation: In Form RI-100A Rhode Island Estate Tax Return

\$1,500,000	Net Taxable Estate
<u>60,000</u>	Standard Tax Deduction
\$1,440,000	Taxable Estate
<b>\$64,400</b>	<b>Estate Tax Due to the State of Rhode Island</b>

## 2015 Rhode Island Estate Tax Return

### Table B Calculation: In Form RI-100A Rhode Island Estate Tax Return

\$1,500,000	Net Taxable Estate
<u>- 60,000</u>	Standard Exemption
\$1,440,000	Taxable Estate
\$64,400	Estate Tax Due Before Credit
<u>- 64,400</u>	RI Estate Tax Credit (\$1,500,000 exemption)
<b>\$0</b>	<b>Estate Tax Due to the State of Rhode Island</b>

To take full advantage of this change in the law, spouses and domestic partners should implement a revocable trust in each of their estate plans allowing the survivor to benefit from those trust assets upon their passing. The basic design of the plan is to have the first-to-die person's assets, valuing no more than \$1,500,000, pass to that revocable trust for the benefit of the survivor's lifetime. With proper drafting and administration of the trust, upon the death of the second person, the assets held in the trust will pass estate-tax-free to the remainder beneficiaries, typically the children of the decedent.

While at times this standard style of estate planning can be executed in a text book format, today, the bulk of most people's assets are tax deferred retirement investments. These assets require a more complex estate plan and addi-

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tional planning tools to help eliminate or reduce the estate tax.

Additionally, Rhode Island estate tax law reflects a Consumer Price Index adjustment. Therefore, the exemption amount will rise slowly to keep pace with inflation, allowing individuals to shelter more of their estate assets as those assets increase in value.

**II) Financial Impact on the State of Rhode Island's Estate Tax Revenue<sup>1</sup>**

**Estate Tax Revenue and Returns**

**TAXABLE ESTATES - FISCAL YEAR 2012**

TAXABLE ESTATE VALUE	NUMBER OF ESTATES
\$892,866 - \$1 million	53
\$1 million - \$1.5 million	75
\$1.5 million - \$2 million	50
Over \$2 million	67
<b>Total Taxable Estates</b>	<b>245</b>

**REVENUE COLLECTED - FISCAL YEAR 2012**

Lien Discharge	\$211,700.00
Taxable Estates Closed	\$26,260,068.47
Interest/Penalty	\$502,799.35
Estimated Payments	\$5,162,011.55
<b>Total Revenue</b>	<b>\$32,136,579.55</b>

**TAXABLE ESTATES - FISCAL YEAR 2013**

TAXABLE ESTATE VALUE	NUMBER OF ESTATES
\$910,656 - \$1 million	40
\$1 million - \$1.5 million	73
\$1.5 million - \$2 million	44
Over \$2 million	51
<b>Total Taxable Estates</b>	<b>208</b>

**REVENUE COLLECTED - FISCAL YEAR 2013**

Lien Discharge	\$202,700.00
Taxable Estates Closed	\$14,551,225.36
Interest/Penalty	\$258,930.70
Estimated Payments	\$16,131,538.35
<b>Total Revenue</b>	<b>\$31,144,394.41</b>

**TOTAL REVENUE FOR TAXABLE ESTATES OF \$1.5 MILLION OR LESS**

FISCAL YEAR	NUMBER OF ESTATES CLOSED	TAX PAID
2012	132	\$4,198,000.00
2013	117	\$3,777,466.00
<b>Total Revenue</b>		<b>\$7,975,466.00</b>



The above figures indicate that approximately 55% of the *taxable estates* filed in 2012 and 2013 were at or below \$1,500,000, and the associated estate tax revenue generated by these estates was an average of just under \$4,000,000 per year. This change in the law is a positive change for Rhode Island taxpayers and, hopefully, will influence a sufficient number of Rhode Islanders to maintain their residency in Rhode Island and not move to a state with no estate tax impact such as Florida.

**ENDNOTES**

<sup>1</sup> Information provided by the Rhode Island Division of Taxation. ❖



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# Medical Marijuana Business Regulatory Landscape in Rhode Island and Other States



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*To fully understand the existing regulatory variations, one must first appreciate the role the federal government has played in the medical marijuana industry and how the DOJ has influenced state regulators.*

In 2006, the Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act became law, making Rhode Island the tenth state to legalize medical marijuana in some capacity. Since then, there has been a significant increase in the number of states legalizing the sale and use of medical marijuana through legislation or some form of ballot initiative. Currently, twenty-three states permit the sale and use of medical marijuana, and this trend of legalization is continuing. In the most recent election, there were ballot measures in four jurisdictions for the legalization of marijuana for either medical or recreational use. Oregon's, Washington D.C.'s and Alaska's ballot measures were passed by voters. Florida's measure was just two percentage points short of reaching the requisite 60% approval needed for passage of a state constitution amendment.<sup>1</sup> Additionally, the federal government took an enormous step in this same direction with the passage of the latest Continuing Appropriations Act, signed into law by President Obama on December 16, 2014. That act prohibits the United States Department of Justice (DOJ) from using funds to prevent states from implementing their own laws authorizing "the use, distribution, possession, or cultivation of medical marijuana."<sup>2</sup>

This increase in legalization has created enormous business opportunities for entrepreneurs seeking to capitalize on the newly-established legal marijuana market by opening cultivation and dispensary operations to grow and sell cannabis. In addition to the burgeoning market for cultivation and retail sale of cannabis itself, the legalization of medical marijuana has fueled the growth of many ancillary businesses supporting the marijuana industry, including: facility security and armed or protected transportation services; financing; laboratory product testing; software systems for inventory recordkeeping and seed-to-sale tracking of product; and manufacturing of cultivation supplies (such as lamps, air exchange systems, and oil extractors), drug delivery devices, and secure packaging.

However, the growth of these ancillary businesses is not fueled just by legalization of medical marijuana in and of itself. Instead, much of

this growth is the result of statutory and regulatory requirements placed on the medical marijuana industry to ensure safety of patients and staff and to protect against product diversion into the black market. On a related note, enabling statutes and regulations can, in some cases, create enormous barriers to entry into the medical marijuana business due to compliance costs.

These regulations vary greatly from jurisdiction to jurisdiction, ranging from the largely unregulated states, where there are few restrictions on the growing and selling of medical marijuana, to the hyper-regulated states where the costs required to operate in full compliance with state regulations prevent many from entering the market. This article explores the regulatory landscape of the medical marijuana industry in Rhode Island and nearby Massachusetts, as well as Illinois, a relative new-comer to the medical cannabis arena. However, to fully understand the existing regulatory variations, one must first appreciate the role the federal government has played in the medical marijuana industry and how the DOJ has influenced state regulators.

## **Federal Influence on States**

Despite the recent trend toward legalization of medical marijuana, and the new prohibition on the use of DOJ funds to prevent states from implementing medical marijuana laws, marijuana still remains a Schedule I controlled substance under the federal Controlled Substances Act, 21 U.S.C. § 801 et seq. (CSA).<sup>3</sup> Thus, under Section 841 of the CSA, it is unlawful "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense" marijuana.<sup>4</sup>

With cultivation, dispensing and possession of marijuana becoming legal in so many states, yet remaining unlawful under the CSA, it became unclear to federal law enforcement officials and prosecutors how, and even whether, they should proceed with enforcement of the CSA in states with legalized marijuana. Thus, the DOJ provided guidance regarding enforcement, investigation and prosecution of marijuana-related offenses through the issuance of a sequence of memoranda aimed at articulating the DOJ's

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enforcement priorities. The guidance set forth in these memoranda influenced state regulators to draft regulations avoiding federal interference with the newly-legalized marijuana industry in their states. Despite the fact that the DOJ is now prohibited from using funds to prevent states from implementing their own medical marijuana laws, the regulations issued to comply with the DOJ memoranda remain in full force and effect.

The first of the DOJ memoranda (the Ogden Memo) was issued on October 19, 2009 by Deputy Attorney General David W. Ogden. Although the Ogden Memo made clear the DOJ “[wa]s committed to the enforcement of the Controlled Substances Act in all States,” it went on to explain that, to make “efficient and rational use of its limited investigative and prosecutorial resources,” the DOJ needed to establish priorities for its use of those limited resources.<sup>5</sup> The Ogden Memo stated that the DOJ should focus its efforts on “commercial enterprises that unlawfully market and sell marijuana for profit” and not “on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana,” such as those “with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen..., or those caregivers...who provide such individuals with marijuana.”<sup>6</sup>

The Ogden Memo set forth the DOJ’s investigative and prosecutorial priorities by delineating several factors to be used by United States Attorneys and law enforcement officials. The Ogden Memo instructed that efforts should focus on: preventing marijuana-related activities involving unlawful possession or use of firearms; violence; sales to minors; activities inconsistent with state or local laws; illegal possession or sale of other controlled substances; or activities with ties to other criminal enterprises.<sup>7</sup> Thus, the Ogden Memo appeared as an indication to those in the medical marijuana business that, if they operated within the parameters established by their respective states, then the long-arm of the law would not be inclined to reach into their operations.

However, on June 29, 2011, Deputy Attorney General James M. Cole issued another memorandum (the First Cole Memo) clarifying the policy announced almost two years earlier in the Ogden Memo.<sup>8</sup> The First Cole Memo made clear

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that when the Ogden Memo spoke of focusing efforts away from “caregivers” it was describing “individuals providing care to individuals with cancer or other serious illnesses, not commercial operations cultivating, selling or distributing marijuana.”<sup>9</sup> Thus, under the First Cole Memo, anyone “in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate[d] such activities,” was subject to full federal investigation and prosecution “regardless of state law.”<sup>10</sup>

Despite the somewhat harsh language of the First Cole Memo, the DOJ reversed course two years later, when Cole issued another memorandum (the Second Cole Memo).<sup>11</sup> This time, the DOJ declared it would defer to state and local agencies to enforce marijuana-related offenses and would only focus its efforts on preventing certain harms similar to those described in the Ogden Memo.<sup>12</sup>

The Second Cole Memo noted the guidance provided therein was made under the expectation that states with legalized marijuana-related conduct “will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests.”<sup>13</sup> The Second Cole Memo emphasized a state regulatory system “must not only contain robust controls and procedures on paper; it must also be effective in practice.”<sup>14</sup> Thus, where such robust regulatory schemes exist, it is state enforcement of those regulations that should be used to address marijuana-related activity, not DOJ enforcement of federal law.<sup>15</sup> The Second Cole Memo also effectively repealed the previous DOJ policy focusing enforcement efforts on large commercial operations “regardless of state law.”<sup>16</sup>

Nonetheless, the Second Cole Memo did caution, “[i]f state enforcement efforts are not sufficiently robust to protect against the harms set forth above, the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecution.”<sup>17</sup> Thus, from the standpoint of those in the marijuana business, compliance with a robust state regulatory scheme provided the best chance of avoiding investigation and prosecution for marijuana-related activities under federal law. Furthermore, the Second Cole

Memo sent a strong message to state regulators that their regulatory schemes and enforcement efforts with regard to marijuana should be both strong and effective to ensure protection from federal interference. As a result, the trend is an increase in regulation across the country, with some of the most stringent and demanding regulatory regimes appearing in states that legalized marijuana after the Second Cole Memo was issued.

### Rhode Island's Regulatory Landscape

Rhode Island's Medical Marijuana Act (Act) and its promulgated regulations were originally passed several years before the DOJ memoranda were issued. Thus, state regulators did not have the benefit of the guidance those memoranda provided. Nonetheless, the regulatory scheme in Rhode Island has become more robust in recent years as the regulations were revised to include rules for larger-scale cultivation and dispensing operations, as well as stricter protocols for individual providers.

The Act establishes a somewhat unique structure whereby cannabis may be grown and sold both on an individual level by patients and caregivers and on a large-scale by entities called compassion centers. The cultivation and sale of marijuana by patients and individual caregivers remains largely unregulated by the state. However, the regulations over compassion centers are much more stringent.<sup>18</sup>

Although individual patients and caregivers are under less scrutiny, they still must operate within the parameters of the Act and its regulations by, first and foremost, being approved by the Rhode Island Department of Health (DOH).<sup>19</sup> For patients, this requires a declaration by a physician, licensed in Rhode Island, Massachusetts, or Connecticut with whom the patient has a bona fide doctor-patient relationship, that the patient has one of eleven debilitating medical conditions,<sup>20</sup> and that marijuana may alleviate the symptoms of the patient's condition.<sup>21</sup> Caregivers must also apply for registration with the DOH, and must be at least 21 years old.<sup>22</sup> Both patients and individual caregivers are subject to possession limits. Patients may possess up to 12 mature marijuana plants and two and one-half ounces of usable marijuana. Caregivers are subject to this same limit for each

*continued on page 32*

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## BOOK REVIEW

# *Scratched: An Algy Temple Mystery*

by J.J. Partridge



John M. Boehnert, Esq.  
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*Congratulations to Jack Partridge, one of us, for demonstrating that at least some good lawyers can do something other than be good lawyers, such as being a good novelist.*

It isn't often a Rhode Island lawyer can review a novel set in Providence, written by another Rhode Island lawyer, which has received national attention. But, reviewing *Scratched* gave me that opportunity. In fact, *Scratched* is the third novel in a series set in Providence by Providence business lawyer Jack Partridge. The novels feature Alger "Algy" Temple, General Counsel to Ivy League Carter University, located on Providence's College Hill. (Even lawyers may be able to figure out just what real life university that could be.) Temple, the scion of a prominent Rhode Island family, lives on his own income, although he does tap family funds in the most recent novel to forestall a pending disaster amidst his fiancé's family which threatens to erupt just as the wedding approaches.

Temple has his hands full, with a feisty fiancé, who has an even feistier family, which is small potatoes compared with a faculty Senate off on its own toot to de-list Columbus Day as a holiday because Columbus was emblematic of imperialism. That, of course, does not go over well with the Rhode Island Italian-American community. But those are hardly problems compared to the university's Italian Studies Institute, the mysterious death (suicide or murder?) of its Director Emeritus, the questionable conduct of its current director, and sinister ties to a deadly Italian crime syndicate. There is also an important trip to Italy's boot to gather further information on the deadly crime syndicate, by interviewing connected individuals. Throw in a high stakes pool tournament in Providence, and the involvement of local Rhode Island gangsters, and you have more than a full plate for the average university general counsel. Did I mention Algy is also a pool tournament commissioner, best friend of the Mayor, best enemy of the Mayor's brother, and butts heads with the local gangsters, including his abduction in a car's trunk and a sojourn at the Central Landfill? Also, his childhood friend is not only in the pool tournament, but he has everything to win, and everything to lose, including more of Temple's family money.

A novel needs a good story, and there are more than enough good stories to go around

in Partridge's third novel. But, a good novelist needs more than a good story. A good novelist also needs a good ear and a good eye. I still remember, more than forty years later, reading a foreword by the great novelist and short-story writer John O'Hara to a collection of his stories, *Assembly*. In it, he commented on the ear a writer needs. "Today, for instance, I was thinking about dialog, listening to dialog of some characters in my mind's ear, and I learned for the first time in my life that almost no woman who has gone beyond the eighth grade ever calls a fifty-cent piece a half-a-dollar." Now that is an ear for words. And, as for an eye, consider Dashiell Hammett's opening to *The Maltese Falcon*: "Samuel Spade's jaw was long and bony, his chin a jutting v under the more flexible v of his mouth. His nostrils curved back to make another, small v. His yellow-grey eyes were horizontal. The v motif was picked up again by thickish brows rising outward from twin creases above a hooked nose, and his pale brown hair grew down....in a point on his forehead. He looked rather pleasantly like a blond satan." That is a good eye.

Since this is Partridge's third novel, it is unfair to compare him with these veterans, for, as O'Hara said, writers learn by doing. That said, there is no question J.J. Partridge has both a good ear and a good eye. Consider these examples. About a private detective, formerly with the State Police, he says: "A conversation with Benno Bacigalupa is like shaving with a dull razor." Describing the desolate Boot of Italy, where, according to one character, no one goes without a reason, he writes: "Gianosa d'Acri looked like it had been through its share of earthquakes and refused, stubbornly, to fall down, a place where, for some unknown historic reason, generations lived and died perched in tiers of houses above a dry rocky valley." And, as one of the characters muttered seeing the landscape, "What do they grow here, stones?"

Writing of his meeting with an Italian banker: "I was greeted by an embodiment of an Italian banker, a man of slight stature in a dark suit that whispered discretion, gleaming shoes, and

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whose pale complexion, keen expression, and intelligent eyes reminded me of likenesses captured in museum portraits of sixteenth century cardinals.” Describing a hobo who witnessed the last minutes of life of the Institute’s Director Emeritus: “He lowered himself, arthritically, into a facing beach chair while Ray butted up against the desk. ‘So, wha’ ya wanna know?’” Joe asked warily. “I didn’t do no’hin.” His th’s, and g’s were lost in his lack of front teeth.”

*Scatched* is a good story, intelligently written. And, although Partridge is writing about something we all know, Providence, he sees things we normally don’t see, such as the inside of strip clubs, mafia back rooms, and sleazy pool halls. (Well, ok, perhaps I should only speak for myself.) But, he also sees things we all see, like Waterfire, Federal Hill, and the Providence riverfront, and manages to show these in a new perspective.

*Scatched* is an excellent read, great for the beach or vacation, but why wait that long? Congratulations to Jack Partridge, one of us, for demonstrating that at least some good lawyers can do something other than be good lawyers, such as being a good novelist. ❖



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

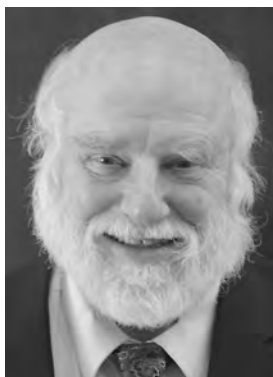


Matthew R. Plain, Esq.  
Barton Gilman LLP, Providence



Stephen Adams, Esq.

Robert Mann was born in 1948, in Stuttgart, Germany where his father served as a lawyer to the Army's Judge Advocate General at Headquarters, Seventh Army. Mr. Mann attended American schools on the Army base. At age 16, upon graduating from Ludwigsburg American High School in 1964, he enrolled at Yale University, where he studied Political Science. Mr. Mann graduated in 1968, obtained a commission in the Army, and served as a Military Intelligence Officer for two years, with nine months in Vietnam. He then returned to Yale for law school, graduating in 1973. Jack Donahue, then Executive Director of Rhode Island Legal Services (RILS), recruited Mr. Mann to work for RILS through the Volunteers in Service to America (VISTA) program, a national service program designed to fight poverty. After a year at RILS, Mr. Mann opened his own firm on Wickenden Street. Initially, Mr. Mann handled a variety of legal matters, including civil rights and criminal law, also devoting a considerable portion of time helping Vietnam veterans with legal issues. He jokes the Reagan and Bush years wiped out his civil rights practice and increased his criminal practice, now his specialty. Practicing at Mann & Mitchell, he is considered by many as one of Rhode Island's premier criminal defense attorneys. We had the opportunity to speak with this forty-two-year veteran of the bar. Excerpts from our conversation follow.



Robert Mann

**What made you decide to become a lawyer?** I think we had the sense back when I was applying for law school, in '67 or '68, that the law was this incredibly powerful instrument of change, and we could make things happen. I still think that to some extent, tempered a little bit with time.

**Who would you consider your early mentors?** John Roney and I were early partners. That meant I got his advice totally for free. You just have to meet John to enjoy being with him. He's a wonderful lawyer and a wonderful human being. Later on, John Tramonti served as an almost endless source of information. We used to call him the dean of the bar.

**Describe some memorable experiences you had as a lawyer.** Some of my memorable moments were the sort of stuff that you generally don't see. It was a day or two before Christmas at the ACI. The guards were being really ridiculously rule-bound. They

wouldn't let a little girl in to see her uncle because, they said, her outfit had too many buckles on it. I just happened to be there, and I called the legal counsel of the Department of Corrections. And, in a gutsy move, she overruled the correctional officers. The whole thing took a few minutes. And it only happened because the Department's legal counsel was willing to make the call.

I remember the tiny courtroom on the third floor opposite four. It was a homicide case. It was such a small courtroom that the victim's and the defendant's families were in close proximity. Both these families had lost sons, and you had the sense there was a connection between the two families. Maybe I read too much into it, but I don't think I did. Both families were suffering enormous loss and both understood the loss the other family had suffered. Maybe it doesn't happen in a huge courtroom where people can be separated.

**What is the biggest obstacle you have faced in practice?** Since I've been a lawyer, I've watched people's incarceration sentences increase dramatically. There's this march toward massive incarceration, and that burden falls disproportionately on minorities and poor people.

**To what do you attribute your success as a lawyer?** First, I'm lucky, I mean, I love it. I've had the chance to work on some really good cases with issues I believe in very strongly.

**What would you change, if anything?** I wish I spoke Spanish. I wish I had more of a science background, because the law gets more and more scientific. I don't think it's so much what I would have done differently, but I wish I could have done more.

**What do you think are the challenges for the next generation?** My hope is that the number of incarcerated people decreases dramatically, and it's reasonable to speculate about whether you'll need as many prosecutors and defense lawyers. That's not going to happen overnight, but lawyers are going to be competing for a smaller pie with a larger number of people engaged in that competition.

**What advice would you give to somebody who is just getting out of law school?** My advice is to practice civility. And do something you like. Don't do something you think you ought to do. Do something you really like.

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# Rhode Island Hall of Fame Honorees: Six Legal Luminaries



**Patrick T. Conley, Esq.**  
Rhode Island Historian  
Laureate and Rhode Island  
Heritage Hall of Fame  
President

The Rhode Island Heritage Hall of Fame was founded in 1965, and, at its most recent recognition ceremony held in November 2014, eleven individuals from the interwar decades, 1920 and 1940, were inducted into the Hall of Fame. Of those, six were trained in the law. The profiles of these legal luminaries follow.

**Governor William S. Flynn** (1885-1966) was born in South Providence on August 14, 1885



to a working class Irish family. After graduation from Classical High School, he worked his way through Holy Cross College serving as a purser and ticket agent for a local steamship company operating from Providence harbor near his Rhodes Street home. After college graduation in 1907, William went to Georgetown University Law School, again paying his own way by taking government jobs, and received his degree in 1910.

William began his law practice in Providence in 1911 and immediately secured election as state representative from South Providence. He served from 1912 to 1914 and from 1917 to 1922, rising to the position of Democratic floor leader. In that capacity, he urged amendments to secure such constitutional reforms as the elimination of the discriminatory property tax requirement for voting in city council elections which, in effect, disfranchised the lower economic class from having a say in the composition of the all-powerful city councils of that era.

In the 1922 campaign, he won a hard-fought Democratic nomination for governor, capturing the general election. During his brief tenure, he supported the Democratic Senate filibuster designed to force the Republican Party to grant the constitutional reforms for which he had long campaigned. When that June, 1924 filibuster was broken by the detonation of a bromide gas bomb in the Senate chamber and the Republican senators fled the state for a 6½-

month self-imposed exile, Flynn's turbulent administration was discredited. Though it was subsequently discovered that Republican party bosses commissioned the gassing, the *Providence Journal* knowingly blamed Flynn and the Democrats because its candidate, Jesse Metcalf, was Flynn's opponent for U.S. Senator in 1924. This dishonesty cost Flynn the election and he resumed his law practice for the remainder of his career.

In addition to his troubles with the so-called "stink-bomb legislature," Flynn had to combat the local Klu Klux Klan during this period of extreme nativism. After the KKK held a rally at the Providence Marine Corps of Artillery Armory on Benefit Street, Flynn denounced the gathering and issued an executive order forbidding the group to meet on state property.

During the 1930s and 40s, Flynn held positions on several governmental boards including the chairmanship of the advisory board of the Public Works Administration and the director of the Providence Civilian Defense Council during World War II. He died in Providence on April 6, 1966 at the age of eighty.

**Chief Justice Edmund W. Flynn** (1890-1957) was the youngest of the brothers from Rhodes



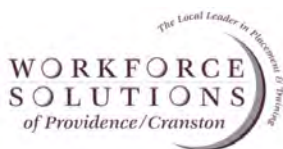
Street who made the Flynn's the first family of South Providence during the first half of the 20th century. His brother William is the Hall of Fame inductee noted above.

A staunch Democrat, Edmund succeeded William as a reform-oriented state representative from South Providence. With the assistance of William, and Pawtucket mayor Thomas P. McCoy, he was elected Rhode Island Supreme Court Chief Justice in January, 1935 as part of the famous Democratic reorganization of Rhode Island government known as The Bloodless Revolution. At that time, Flynn was the House majority leader, popular and respected on both

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sides of the political aisle. His legislative contacts provided him with the edge over his chief rival for the post, former Providence mayor Joseph H. Gainer, even though Gainer was supported by Governor Theodore Francis Green and Lieutenant Governor Robert Emmet Quinn, the major architect of the Revolution.

Despite the political nature of his election by the newly-ascendant Democratic General Assembly, Flynn's intelligence, knowledge of the law, and leadership skills made him a fine chief justice. He was a legal craftsman who played a major role in preparing two digests of Rhode Island general laws in 1938 and 1956, and he wrote authoritatively on Rhode Island legal history.

Flynn's court image was slightly tarnished in the aftermath of the 1956 gubernatorial election when incumbent Democrat Dennis J. Roberts was outpolled by Republican Christopher Del Sesto in the Eisenhower landslide, only to have the Supreme Court invalidate a number of absentee and shut-in ballots cast prior to election day, thus giving the victory to Roberts. Though legally and technically sound, the Court's decision created a popular backlash resulting in a Del Sesto victory over Roberts in the 1958 election. By that time, however, Edmund Flynn had ceased to preside. He died in office on April 28, 1957 after compiling the longest tenure of any chief justice in Rhode Island history.

**Justice Antonio A. Capotosto** (1879-1962) was born in the Province of



Campobasso, Italy, and, as a young child, came to the United States with his parents. After obtaining his degree from Harvard University Law School in 1904, as its first graduate of Italian birth, he moved to Providence.

Soon after Antonio's 1905 arrival, he became the first Italian-American to gain admittance to the Rhode Island Bar. He practiced law privately until 1912 and then assumed the position of assistant in the office of the attorney general. This appointment was facilitated not only by

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his ability, but also by the fact that Antonio had become a spokesman for the Republican Party among his fellow immigrants. At this time, most Rhode Island Italians were adherents of the GOP.

As a devotee of Italian culture, Capotosto founded the Grand Lodge of the Sons of Italy in 1915, and, in May 1924, the Royal Italian Government conferred him the decoration of Chevalier of the Crown of Italy. Despite this passion for his heritage, Antonio spoke about the harmony between Americanism, Catholicism, and ethnic pride at a time when so-called "hyphenated Americans" were under attack from nativists and the local Ku Klux Klan. At the dedication of the Holy Ghost parish school on Atwells Avenue in 1923, he observed that "the best way to combat and overcome the many isms that are destroying...our faith and our country is a good Christian education." Foreign language instruction in parochial schools, then under attack in Rhode Island, did not produce divided loyalties, said Capotosto. "I teach [my children] Italian, not because I want to show them any allegiance to Italy, but because I do not want them to forget the home of their forefathers." He believed there was room for Old World traditions to coexist with New World ways.

In 1922, Capotosto's legal experience and leadership qualities led to his appointment as a Rhode Island Superior Court Associate Justice. He held that position with such fairness and distinction that when the Democrats staged their Bloodless Revolution in 1935, they elevated Republican Capotosto to the state Supreme Court. This selection was yet another first for Capotosto, as he became the first Italian-American to serve on the highest legal tribunal of any American state.

Despite his judicial role, Capotosto continued his social and cultural activities. In 1932, he became the founding president of the prestigious Aurora Club, a position he held until 1934, and again from 1942 to 1944. He remained culturally active in Rhode Island's Italian American community until his death on December 3, 1962 at the age of eighty-three.

**Mayor Joseph H. Gainer** (1878-1945), the son of John and Margaret Gainer, was born in Providence on January 18, 1878. His parents, both Irish immigrants, had settled in the city's North End and operated a grocery store on the corner

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of Branch and Charles Streets. Personal tragedy dogged the family in the early years. Young Gainer lost his father at the age of four, and three of his four brothers and sisters died in infancy. Joseph

attended local parochial schools and graduated from LaSalle Academy in 1896. He obtained his bachelor's degree from Holy Cross in 1899 and a law degree from Catholic University in 1902.

Gainer returned to Providence to practice law and developed an early interest in politics.

In 1902, he was elected to the Providence School Committee. Two years later, he was elected a councilman; and, in 1908, was elected alderman in the city's bicameral legislature. He ran for mayor in 1912 against four-term Republican incumbent Henry Fletcher and lost by a razor thin margin of ninety-five votes. In a 1913 rematch, the thirty-four year old Gainer defeated Fletcher by 400 votes.

Gainer, the youngest person then elected to the Providence mayoralty, held his post for fourteen successive years. Although true to his Democratic base, Gainer's tactful demeanor, progressive policy, and leadership ability won over many Republicans, who, in 1918, joined Democrats in unanimously nominating him for reelection.

Gainer's record of achievement is impressive. By December 1913, his strong support for a City Plan Commission became reality. Under his leadership, large-scale public works projects were implemented, most notably the construction of the Scituate Reservoir (begun in 1915) and the expansion of the port with a 3,000-foot municipal wharf (completed in 1916). In addition, City Hall was completely remodeled, a new mall was created to beautify the once barren Exchange Place, several schools were built, including a new Commercial High School (later Central), and playgrounds expanded.

In 1926, Gainer declined to seek re-election as mayor to accept the Democratic nomination for governor in an attempt to unseat the very popular incumbent Republican Aram Pothier. Although carrying Providence by a com-

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fortable margin, Gainer lost by more than 16,000 votes and returned to the private practice of law.

Gainer married Christina McPherson of Quincy, Massachusetts on April 22, 1915 and a short time later they moved to Grotto Avenue on the city's East Side where they raised three children. The former mayor remained very active in his community and served on numerous boards and commissions and as trustee of several banks. He died on December 12, 1945 at the age of sixty-seven and is buried at St. Francis Cemetery, Pawtucket.

**Colonel Everitte St. John Chaffee**

(1880-1971) is credited with developing



standards of excellence exemplified by the Rhode Island State Police, and he was that force's first and founding superintendent. Born in Dutchess County, New York, in 1880, Chaffee graduated

from Yale and Harvard Law School. He came to Rhode Island in 1904 and married Carolyn Peck of Barrington in 1911. His new wife was a member of the politically powerful Republican family of state chairman Frederick S. Peck, facilitating his rise to prominence.

Chaffee distinguished himself during World War I as commander of the Rhode Island Battalion on the Mexican border. That battalion went overseas as part of the 26th Yankee Division cited for action near the Chateau Thierry in July 1918. Chaffee received a battlefield promotion to the rank of colonel and was referred to with that rank from then onward.

When the Rhode Island State Police was created in 1925 to deal with matters ranging from increasing automobile traffic to political pandemonium, Chaffee was the choice to lead it due to his military command experience. As its first superintendent, during his tenure, he guided the birth and development of the state police using rigid military type standards for trooper selection. Chaffee actually chose the officers personally, most of whom, like him, had military experience. He established a training camp for them at his twenty-acre summer home in South Kingstown; and he even designed their

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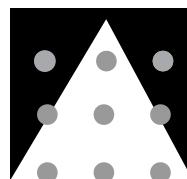
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Under Chaffee, many rural areas of the state received modern police services for the first time. The Colonel wrote a brief account of these achievements in a 1953 booklet entitled *The Amateurs*. He passed away on August 9, 1971 at the age of 91.

### Colonel Gonzalo Edward "Ned"

**Buxton, Jr.** (1880-1949) was born in



Kansas City, Missouri to Dr. G. Edward and Sarah A. Harrington Buxton. When Ned was a teenager, his father moved the family back to his Rhode Island ancestral home. Showing early signs of

leadership and intelligence, Ned graduated from Worcester's Highland Military Academy in 1898 as class valedictorian and then graduated from Brown University in the class of 1902.

Buxton worked as a staff reporter

and telegraph operator at the *Providence Journal*, before entering Harvard Law School. He obtained his law degree in 1906. For the next decade, he combined a military career in the Rhode Island National Guard with work at the *Journal* where he rose to the position of treasurer and business manager. From 1912 to 1916, he held the rank of major and served as Judge Advocate (JAG) of the Rhode Island National Guard.

When World War I began in August, 1914, Ned became a war correspondent for the *Journal*, and, when the U.S. entered the war in April 1917, he was commissioned major of infantry and assigned a command in Georgia with the Second Battalion of the First Officers' Training Camp. In this capacity, he met and mentored the war's greatest American hero, Medal of Honor recipient Sgt. Alvin York of Tennessee.

Buxton performed his own heroics upon his arrival in Europe in May, 1918 by engaging in such crucial encounters as the Battle of Saint-Mihiel and the Meuse-Argonne Offensive. In these campaigns, he won awards including the Purple Heart and the Distinguished Service Medal.

In the immediate aftermath of war, to establish the American Legion and, with his legal training, chaired the committee that drafted the organization's constitution. In 1922, following his return to Rhode Island, he was promoted to colonel and commanding officer of the 385th Rhode Island Infantry, 76th division and held this post until his retirement in 1932.

Buxton's life in the private sector was equally impressive. In 1926, he rose to the presidency of the giant textile firm of BB&R Knight Company which, at one time, had 22 cotton mills under its Fruit of the Loom trademark. He held that post through the 1930s.

After the outbreak of World War II, Buxton was recruited by President Franklin D. Roosevelt and Director William J. Donovan to join a new civilian unit attached to the White House to inform the president concerning all the intelligence activity of the Army, Navy, State Department, and FBI. This unit evolved into the Office of Strategic Services (OSS), forerunner of the CIA. Donovan appointed Colonial Buxton as his first assistant director. After distinguished service with the OSS, Buxton resigned in June, 1945. Many of the critical activities of Buxton (a.k.a. Number 106) remain classified.

Following World War II, Colonel Buxton reentered the business world, heading several boards and companies prior to his death in Providence after a long illness on March 15, 1949 in his sixty-ninth year. ♦







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## American Bar Association Delegate Report – Midyear Meeting 2015

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

*Two men are standing on a riverbank in Africa when suddenly they see babies floating downstream. One man frantically starts pulling babies from the water and the other runs away from him. The man rescuing the babies calls out to the other asking why he is leaving when he is needed to help. The man running away answers, "I am running upstream to see who is putting babies in the water."*

AFRICAN PARABLE

The American Bar Association (ABA) Mid-year Meeting this past February in Houston, Texas reflected the parable noted above. First, identify the ways we, as lawyers, can make a difference for both our members and the justice system. Second, act on those discoveries. Major resolutions passed by the ABA House of Delegates addressed: the civil justice gap; the future of legal services; the border crossings of unaccompanied minors fleeing violence in Central America; financing a legal education; and serving veterans and their families. Other debated resolutions included the aspects of: criminal law; intellectual property; death penalty due process; disaster preparedness both of Bars and individual lawyers; Stand Your Ground laws; domestic violence; and human trafficking.

A highlight of the meeting was the presentation by the ABA's Commission on Sexual and Gender Identity, of the prestigious Stonewall Award to Rhode Island Bar member and Past President Lise M. Iwon. It was a proud day for Rhode Island at the ABA, and a time to take stock of Lise's accomplishments and perseverance in fighting for LGBT community equal rights both in the Rhode Island Bar and in the state legislature.

With over 200 committees, divisions and sections in all areas of practice, the ABA continues as a source of information and guidance. And its member lawyers make a living and a difference in the lives of others and who are committed to advancing the civil and criminal justice systems.

As a member of the ABA Constitution and By Laws Committee appointed by the ABA President, I am honored to serve in revising the ABA's working mandate. As a member of the

Solo, Small Firm and General Practice Division, I contribute to the discussion of how to make it easier for hard working small and solo law firms, whether through the SoloEz listserv for lawyers or other initiatives designed to benefit our profession. As a member of the National Caucus of State Bar Associations, where I served as chairperson, I have worked to develop State Bar initiatives that help law firms and bar associations nationwide. In the Section on Family Law, my colleagues and I are working on new ideas in family law practice such as IVF rules. I also attend the meetings of the ABA Minority Caucus where we work to ensure diversity in our bars and strive to achieve racial and ethnic justice for African Americans, Latinos, and Native Americans. The New England Bar Association delegation, of which I am a proud member, makes significant contributions to the regional and national issues of law.

Recently, on our own Rhode Island Bar Association List Serv, which I encourage all members to join, a participant recently asked what discount programs the ABA offers to lawyers. These programs include valuable savings on Ricoh products, Mercedes-Benz autos, Hilton Hotels, Hertz Rentals, UPS products, Paychex, Brooks Brothers, and more. And, as an ABA member who has taken advantage of these benefits, I attest to their value.

Back to the parable. We, as lawyers, can make a difference for positive change for our own lives and the lives of others, both upstream and downstream, as we tackle the problems of our civil justice system which is no small task. Equal justice for all is still the goal and, unfortunately, not often enough the reality.

As always, I welcome your comments and advice on any ABA matters, and I continue to appreciate your support in allowing me to serve our Bar and the ABA. ❖



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## **Medical Marijuana**

*continued from page 15*

patient to whom he or she is connected through the DOH registration, with an overarching limit of 24 mature plants and 5 ounces of usable marijuana, although individual caregivers may assist up to 5 patients.<sup>23</sup>

Individual caregivers must submit to a national criminal records check including submitting fingerprints to the Federal Bureau of Investigation.<sup>24</sup> Applicants are disqualified if they have been convicted of a felony drug offense, or, based on a recent amendment, some other serious crime delineated in the Act.<sup>25</sup> Interestingly, principal officers, board members, agents, volunteers and employees of compassion centers must also submit to the same criminal records check, but will only be denied registration for a conviction or plea of *nolo contendere* on a felony drug offense, and not any of the other crimes listed for caregivers.<sup>26</sup>

Nonetheless, the apparent leniency in the regulations over compassion centers as compared to individual caregivers ends there. The regulations set forth stringent rules for these centers, including the need to operate on a not-for-profit basis and not located within 1,000 feet of the property line of a school.<sup>27</sup>

The regulations require abundant security measures to prevent loss or diversion of product including: measures to control and light the perimeter of the facility and limit access to storage areas; alarm systems with automatic notification to law enforcement agencies; comprehensive inventory requirements; alarm maintenance and testing; 24-month inventory record retention requirements; and personnel records requirements.<sup>28</sup> Compassion centers are also required to notify the DOH and local law enforcement upon the occurrence of certain emergency events, including alarm activation or malfunction, and must follow up with written reports of the events.<sup>29</sup> Furthermore, before being licensed, compassion centers are required to develop a manual with numerous procedures and policies for operation of the center, including those for dispensing, recordkeeping, security, crime prevention, and an alcohol and drug free workplace, all reviewed by the DOH when choosing which centers to register.<sup>30</sup>

The regulations require labeling of all



usable marijuana with a description of the strain, batch and quantity along with a statement that the product is for medical use and not for resale.<sup>31</sup> Compassion centers are restricted to: possession of 150 marijuana plants, of which no more than 99 may be mature; 1,500 ounces of usable marijuana; and only dispensing 2.5 ounces of usable marijuana to a patient in a 15-day period.<sup>32</sup> Compassion centers are required to implement employee training programs or hire outside consultants to provide training on professional conduct and ethics, state and federal patient confidentiality laws, medical marijuana developments, proper use of security measures, and emergency preparedness.<sup>33</sup>

Thus, the Rhode Island regulations appear largely in accord with the DOJ memoranda. For individuals, although the regulations are not burdensome, the restrictions provided in the regulations have increased in recent years, and patients and caregivers under the Act appear to be precisely the individuals the Ogden Memo and First Cole Memo described as people on whom federal resources should not be focused. Regarding compassion centers, the regulatory scheme is fairly robust, despite its adoption prior to the issuance of the Second Cole Memo.<sup>34</sup> Nonetheless, states that promulgated regulations after the stern warning given in the Second Cole Memo established regulatory regimes creating incredible barriers to entry into the medical marijuana markets in those states. Illinois is a prime example.

#### **Illinois: A Hyper-Regulated State**

Of the states permitting the use and sale of medical marijuana, Illinois is one of the most heavily regulated. The Illinois agencies tasked with overseeing the medical cannabis program issued 284 pages of regulations governing medical marijuana, all of which were issued after the Second Cole Memo was released.<sup>35</sup> This is compared to the 25 pages of marijuana regulations promulgated by the Rhode Island DOH.

On a high level, there are a few key differences between the models established in Rhode Island and Illinois. First, vertical integration within the cannabis industry is prohibited in Illinois. Illinois's medical cannabis act does not permit cultivation of marijuana along with retail sale by the same business. Instead, culti-

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vation centers grow and package cannabis for the ultimate consumer and then distribute it to dispensaries. Only dispensaries may advertise to patients and sell the cannabis at retail.<sup>36</sup> Illinois permits cultivation centers and dispensaries to operate for a profit. Illinois's medical cannabis act does not allow individual patients or caregivers to grow their own marijuana. All product must be purchased from a dispensary.<sup>37</sup>

Looking to the regulatory framework in both states, there are some similarities. However, the Illinois regulations set forth many more requirements and restrictions

that burden marijuana businesses. One major regulatory difference is the need for laboratory testing of all cannabis. Illinois requires a state-certified laboratory to test cannabis for microbiological contaminants, toxins, pesticide levels, and residual solvents. Any batch not within required levels must be destroyed or used only for extraction of oil, which then must be retested.<sup>38</sup> Due to these cannabis tests, and because the industry is not vertically integrated, any product produced at a cultivation center must be transported to dispensaries, and samples must be delivered to laboratories. Various

protocols are set forth for this transportation including maintaining the ability to contact law enforcement during any trip and ensuring all routes to labs and dispensaries are randomized.<sup>39</sup>

During the licensing process, both cultivation centers and dispensaries are required to prove their financial responsibility by maintaining a surety bond or escrow account in the amount of \$2 million (\$50,000 for dispensaries) and provide proof of liquid assets in the amount of \$500,000 (\$400,000 for dispensaries) certified by a CPA.<sup>40</sup> Prior to being licensed, cultivation centers and dispensaries must submit engineering plans with precise specifications of the facilities including building materials, locations of entrances, windows, security equipment, loading docks, and a plethora of other details, even down to the location of each toilet.<sup>41</sup>

There are rigorous inventory controls and recordkeeping requirements including conducting comprehensive inventories of all cannabis plants and products maintained at the facilities and products purchased, sold or destroyed, all on a daily basis with additional monthly audits of these records.<sup>42</sup> These inventories must record the quantity, strain, variety and batch number of each product, along with a unique identification number assigned to each package, and the names of the agents of the facilities who delivered and accepted the product.<sup>43</sup>

The requirements include detailed sanitation protocol, with specifics such as the necessity for hand-washing stations and adequate sanitary towel or hand-drying devices.<sup>44</sup> The regulations set forth requirements for the placement of signs in certain areas, which even contain size parameters for both the signs themselves and the font used.<sup>45</sup>

The regulations provide strict security, alarm and surveillance system requirements, including closed circuit television surveillance with detailed technical minimum standards, all of which must be available to state agencies and law enforcement officials via a web-based portal, 24 hours per day, 7 days per week.<sup>46</sup> Disposal of any cannabis product or any waste from the production of medical cannabis, including any unusable part of the cannabis plant or any recalled or contaminated product, a cultivation center must grind such waste together with other non-cannabis wastes of at least the same

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weight of the cannabis waste before disposing of the entire mixture.<sup>47</sup>

The regulations set forth strict packaging and labeling rules for cultivation centers, requiring child-resistant, light-blocking packages, with affixed labels detailing the registered name of the product, unique serial numbers, amount of cannabis, lab results, a comprehensive list of contents such as cannabinoid compounds, as well as other items.<sup>48</sup>

These regulations present not only enormous costs of entry into the business, but also an ongoing compliance cost once a license is acquired. It is safe to say those businesses able to comply with these regulations certainly would have been safe from investigation and prosecution by federal authorities, even prior to the latest federal appropriations act, under the policies set forth in the Second Cole Memo, as it is difficult to imagine the DOJ would have expected states to implement a regulatory system more robust than Illinois.

#### The Massachusetts Model

In 2012, the Massachusetts Legislature passed An Act for the Humanitarian Medical Use of Marijuana. Subsequently, the Massachusetts Department of Public Health issued regulations on implementation of that act on May 8, 2013, just prior to the release of the Second Cole Memo. The model established in Massachusetts is essentially a hybrid of the systems in Rhode Island and Illinois, with more stringent regulations than the former, but without the exhaustive restrictions of the latter.

Massachusetts established a vertically integrated model, whereby cultivation and retail sale are conducted by the same entity. These Registered Marijuana Dispensaries (RMDs) must operate on a not-for-profit basis.<sup>49</sup> Patients may possess up to 10 ounces of marijuana, unless a physician certifies that a larger amount is needed. However, no home cultivation is permitted except in cases of hardship.<sup>50</sup> The regulators' intent was to minimize home cultivation, but not ban it completely in cases of financial need or physical inability to travel to a dispensary.<sup>51</sup> Thus, Massachusetts has not prohibited home cultivation, as is the case in Illinois, but does not generally allow patients and caregiver to grow marijuana like in Rhode Island.

Certain portions of the Massachusetts regulations resemble the stringent Illinois

rules, such as the detailed packaging and labeling requirement, strict sanitization regulations, and the required laboratory testing for contaminants and cannabinoid profiles by an accredited lab.<sup>52</sup> However, other areas of the regulations are considerably softer than the Illinois rules. For instance, inventory must only be conducted monthly, with comprehensive annual reviews, a middle ground between the Illinois daily inventory requirement in Illinois and Rhode Island's required two-year comprehensive inventory.<sup>53</sup>

Massachusetts' security requirements are relatively robust with certain specifics

regarding signage and 24-hour surveillance, but without the hyper-technical rules over things such as surveillance resolution and video monitor size.<sup>54</sup> In Massachusetts, dispensaries may dispose of marijuana waste by first rendering it unusable, however, normal disposal by incineration or transportation to a landfill is permitted so long as two dispensary agents document the event.<sup>55</sup> Thus, waste disposal regulations find a happy medium between the burdensome Illinois requirements and the complete lack of discussion in Rhode Island, consistent with the overall pattern of the level of regulation in the

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three states. This pattern is illustrative of the nationwide trend of increased regulation due, in part, to the influence on the federal level, from the relative lack of regulation prior to the DOJ memoranda, to the hyper-regulation resulting after the Second Cole Memo.

### Conclusion

The future of the medical marijuana industry remains to be seen. However, if the recent pattern continues, new business opportunities could open in other states as more marijuana legislation or referenda are passed. Though, perhaps, the legaliza-

tion trend will begin to slow as the more progressive states – which constitute the lowest hanging fruit for proponents of legalizing marijuana – pass legalization measures, the remaining, more conservative states may choose not to follow their lead. Nevertheless, it is likely the trend of hyper-regulation will come to an end, because the DOJ memoranda no longer control federal enforcement now that Congress and the President have weighed in and prohibited the use of DOJ resources to prevent states from implementing their own medical marijuana laws. Thus, across the country, the barriers to entry and cost

of regulatory compliance in the marijuana industry will likely begin to ease.<sup>56</sup>

### ENDNOTES

- 1 *Although Florida's ballot referendum for full legalization of medical marijuana failed, Florida law now permits the cultivation and sale of high-cannabidiol (CBD), low-tetrahydrocannabinol (THC) medical marijuana in certain limited circumstances.* FLA. STAT. § 381.986 (2014). Additionally, the most recent federal appropriations act prohibits the use of federal funds to implement the initiative that legalized marijuana possession in the District of Columbia, thereby effectively invalidating the measure. 113 H.R. 83, § 809.
- 2 113 H.R. 83, § 538.
- 3 21 U.S.C. § 821.
- 4 21 U.S.C. § 841.
- 5 David W. Ogden, "Memorandum for Selected United States Attorneys," October 19, 2009.
- 6 *Id.*
- 7 *Id.*
- 8 James M. Cole, "Memorandum for United States Attorneys," June 29, 2011.
- 9 *Id.*
- 10 *Id.*
- 11 James M. Cole, "Memorandum for United States Attorneys," August 29, 2013.
- 12 *Id.*
- 13 *Id.*
- 14 *Id.*
- 15 *The DOJ even went a step further and expanded this policy to include marijuana-related activities on Tribal Lands.* Monty Wilkinson, "Policy Statement Regarding Marijuana Issues in Indian Country," October 28, 2014.
- 16 James M. Cole, "Memorandum for United States Attorneys," June 29, 2011.
- 17 James M. Cole, "Memorandum for United States Attorneys," August 29, 2013.
- 18 Rhode Island Department of Health, Rules and Regulations Related to the Medical Marijuana Program, March 2006, as amended February 2014.
- 19 *Id.* § 3.1.
- 20 *The Act defines "debilitating medical condition" as: "Cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, Hepatitis C, or the treatment of these conditions, as well as "[a] chronic or debilitating disease or medical condition, or its treatment, that produces one or more of the following: cachexia or wasting syndrome; severe, debilitating, chronic pain; severe nausea; seizures, including but not limited to, those characteristic of epilepsy; or severe and persistent muscle spasms, including but not limited to, those characteristic of multiple sclerosis or Crohn's disease; or agitation of Alzheimer's Disease" or "[a]ny other medical condition or its treatment approved by the [D]epartment" of Health.* R.I. GEN. LAWS § 21-28.6-3.
- 21 Rhode Island Department of Health, Rules and Regulations Related to the Medical Marijuana Program, March 2006, as amended February 2014, §§ 1.11, 1.20, 3.1.1.
- 22 *Id.* §§ 1.12, 3.1.
- 23 *Id.* § 2.8.
- 24 R.I. GEN. LAWS § 21-28.6-6(d).
- 25 *Id.*
- 26 *Id.* § 21-28.6-12, Rhode Island Department of Health, Rules and Regulations Related to the

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Medical Marijuana Program, March 2006, as amended February 2014, § 2.11.  
 27 Rhode Island Department of Health, Rules and Regulations Related to the Medical Marijuana Program, March 2006, as amended February 2014, § 5.1.  
 28 *Id.* § 5.1.7.  
 29 *Id.* § 2.13.  
 30 *Id.* § 5.1.8.  
 31 *Id.*  
 32 *Id.* §§ 2.9, 5.8.  
 33 *Id.* § 5.1.9.  
 34 Some modifications were made to the regulations after the Second Cole Memo was issued; however, the most stringent rules that apply to compassion centers had already been implemented prior to the Second Cole Memo.  
 35 410 ILCS 130/1, et seq.; 8 Ill. Adm. Code 1000; 80 Ill. Adm. Code 100; Ill. Adm. Code 130, 80 Ill. Adm. Code 429; 68 Ill. Adm. Code 1290; 77 Ill. Adm. Code 946.  
 36 8 Ill. Adm. Code 1000.425.  
 37 *Id.* § 1000.50 (7).  
 38 *Id.* § 1000.510.  
 39 *Id.* § 1000.430.  
 40 *Id.* § 1000.40, 100; 68 Ill. Adm. Code 1290.50, 1290.120.  
 41 8 Ill. Adm. Code 1000.220; 68 Ill. Adm. Code 1290.110.  
 42 Full inventories with records of unique serial numbers need only be performed weekly for cultivation centers, though daily records of quantities of plants and cannabis must be recorded daily.  
 43 8 Ill. Adm. Code 1000.250; 68 Ill. Adm. Code 1290.400.  
 44 8 Ill. Adm. Code 1000.405.  
 45 *Id.* §§ 1000.270, 1000.440; 68 Ill. Adm. Code 1290.435.  
 46 8 Ill. Adm. Code 1000.445; 68 Ill. Adm. Code 1290.410.  
 47 8 Ill. Adm. Code 1000.460.  
 48 *Id.* § 1000.420.  
 49 105 CMR 725.004.  
 50 *Id.* §§ 725.010; 725.035.  
 51 Department of Public Health Medical Marijuana Work Group, "Request for Approval for Promulgation of Regulations at 105 CMR 725.000: Implementation of An Act for Humanitarian Medical Use of Marijuana (Chapter 369 of the Acts of 2012)," May 8, 2013 at 2.  
 52 105 CMR 725.105(C), (E).  
 53 *Id.* §§ 725.105(G); 68 Ill. Adm. Code 1290.400; Rhode Island Department of Health, Rules and Regulations Related to the Medical Marijuana Program, March 2006, as amended February 2014, § 5.1.7.  
 54 105 CMR 725.110(D).  
 55 *Id.* § 725.105(J).  
 56 Indeed, New York has just recently released proposed regulations for its medical marijuana program, which set forth heightened requirements compared to those in Rhode Island (such as requirements for laboratory testing and labeling), but without the strict, hyper-technical restrictions seen in Illinois. 10 NYCRR Part 80-1 (proposed December 18, 2014). ❖

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## In Memoriam

### Ira Bernard Lukens, Esq.

Ira Bernard Lukens, of Cranston, passed away on March 16, 2015. He leaves behind family and friends and his two cats. He was born June 30, 1951. He grew up in South Orange, NJ, attended Peddie School in Hightstown and Columbia H.S. in Maplewood, NJ. He attended Tufts University and Pratt University where he received a bachelor's in fine arts. He was an accomplished artist and sculptor. Later in life, he earned a J.D. from Tulane University and had his own law practice and practiced environmental law for New England Gas Co. He enjoyed kayaking, tennis, bicycling, skiing, drawing and sculpture, all types of music and intellectual discussions on any subject.

### Raymond W. Noonan, Esq.

Raymond W. Noonan, of Pawtucket, passed away February 4, 2015. He was the son of the late Raymond F. Noonan and the late Anna W. Noonan of Pawtucket. Mr. Noonan was a graduate of Pawtucket West Senior High School, class of 1971. He received a Bachelor of Arts degree from Washington & Jefferson College and a Juris Doctor degree from the University of San Diego. Mr. Noonan practiced law in California for many

years before relocating to Pawtucket. Mr. Noonan served two terms on the Pawtucket School Committee from 2009 to 2013. Mr. Noonan is survived by his long time companion, Gail Jenard, his sister Anne Noonan and her husband James Rathmann of Naples Florida, and his brother Edward Noonan and his wife Maryann Johnson of Bethesda, Maryland.

### John P. O'Connor, Esq.

John P. O'Connor, 73, passed away on March 22, 2015. He was the husband of Elizabeth Hutkowski O'Connor. A Providence resident most of his life, he was the son of the late Patrick and Bridie McKenna O'Connor. John was the Director of Legislative Counsel for the R.I. State General Assembly. He was previously in private practice. He was a graduate of LaSalle Academy where he was an all-state hockey player and captain of their team. He was a graduate from Bryant College and the New England School of Law. He was a Vietnam War veteran and a long time communicant of St. Joseph Church. Besides his wife he leaves two sons: Sean O'Connor and his wife Marguerite of Wilton, CT; Brendan O'Connor and his wife Julie of New York City; and a brother, Ernest O'Connor of Providence.

## Lawyers Helping Lawyers - Mental Health Screenings and Substance Abuse Toolkit

The Rhode Island Bar Association's Lawyers Helping Lawyers (LHL) Committee wants you to know the American Bar Association's (ABA) Commission on Lawyer Assistance Programs has produced **Substance Abuse Mental Health Tool Kit for Law Students and Those Who Care About Them** (<http://tinyurl.com/p3tbpm3>). There are several other useful resources on this subject, including The Dave Nee Foundation (<http://www.daveneefoundation.org>), which promoted Law Student Mental Health Day on March 27th and Screening for Mental Health, Inc. (<http://helpyourselfhelpothers.org>) where anyone can get access to online mental health screenings. If you have any questions concerning any physical or psychological issues concerning you or your family, please see the LHL notice on page 12 of this *Bar Journal* or go to the Lawyers Helping Lawyers page on the Bar's website at [www.ribar.com](http://www.ribar.com).

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