Rhode Island Bar Journal

Rhode Island Bar Association Volume 65. Number 3. **November/December 2016**

Expert Witnesses in the Wake of *Cashman*

Streetlight Reform in Rhode Island

Proposed Estate Planning Regulations

Justices of the Peace: Law, Language, and Virtue

RHODE ISLAND Bar Association
1898

Articles

7 **Testifying Expert Witnesses in the Wake of the *Cashman* Decision**
Jackson Parmenter, Esq.

13 **Streetlight Reform in Rhode Island**
Seth H. Handy, Esq. and Jeff Broadhead

19 **Proposed Regulations on Estate Planning for Family Controlled Entities**
Joshua R. Caswell, Esq. and Leigh E. Furtado, Esq.

25 **Justices of the Peace: A Conversation about Law, Language, and Virtue**
Ernest G. Mayo, Esq. and Suzanne Baldaia, Ph.D.

35 **The City by the Bay: San Francisco, American Bar Association Delegate Report – 2016 Annual Meeting**
Robert D. Oster, Esq.

Features

3 Our Bar Offers Resources for New Lawyers
4 Good Business for Good Lawyers
5 New Fellowship Promotes Public Service
6 Seeking Law-Related Education Program Attorney Volunteers!
11 Labor Law Committee Meeting Speakers Review Sexual Harassment Trial
12 BAR MEMBERSHIP BENEFIT ABA Members Retirement Program
12 Online Attorney Resources (OAR)
14 Bar List Serve
21 FREE Committee CLE seminar – E-Discovery Basics
28 BAR MEMBERSHIP BENEFIT Career Center
31 Continuing Legal Education
32 SOLACE
33 VLP Honor Roll
38 Lawyers on the Move
38 Probate Court Listing on Website
38 BAR MEMBERSHIP BENEFIT Zola Creative Media LLC
39 Your Free Casemaker Online Law Library is Even Better!
40 In Memoriam
41 Working Too Much May Increase Risk of Cardiovascular Disease
42 Interested in Writing an Article for the *Rhode Island Bar Journal*?
42 Advertiser Index

***SAMUEL SLATER* CANAL BOAT, BLACKSTONE RIVER, PAWTUCKET, RI**

Built in Cambridgeshire, England, this authentic British 40-foot long canal boat is named in honor of the father of the American Industrial Revolution, Samuel Slater. The boat is a reminder of the two decades (from 1828 – 1848), when canal boats were a common sight on the Blackstone River and the nearby Blackstone Canal.

Cover Photograph by Brian McDonald

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.

Direct advertising inquiries to the Editor, Frederick D. Massie, Rhode Island Bar Journal, 41 Sharpe Drive, Cranston, RI 02920, (401) 421-5740.

USPS (464-680)ISSN 1079-9230
Rhode Island Bar Journal is published bimonthly by the Rhode Island Bar Association, 41 Sharpe Drive, Cranston, RI 02920.

PERIODICALS POSTAGE PAID AT PROVIDENCE, RI

Subscription: $30 per year

Postmaster
Send Address Correction to:
Rhode Island Bar Journal
41 Sharpe Drive
Cranston, RI 02920

www.ribar.com

Our Bar Offers Resources for New Lawyers

Armando E. Batastini, Esq.
President
Rhode Island Bar Association

New lawyers ultimately have to focus upon finding the intersection between what they like doing, what they are good at, and what will generate sufficient income.

In the early 2000s, I was often asked to address new associates about the transition from law school to practicing lawyer. I often began my remarks by stating that when I die and come back to life, I wanted to return as a summer associate. The pay was good, not much was required, and the summer events and free meals were outstanding. I would transition by adding that I would not want to come back as a first year associate, which is perhaps the most stressful time in many lawyers' professional lives.

A lot has changed since then. Summer associate classes and programs at bigger firms are far more modest, if they exist at all. And, firms generally now use the summer associate program as a try-out, so that summers have to work hard to earn an offer. One thing remains true, however. The first years of practice are amongst the most difficult. While I imagine that it was difficult to establish oneself as an attorney in Abraham Lincoln's day, it is more difficult now to develop a sustainable legal practice than at any time since I have been a lawyer. The reasons are well-known and oft-repeated: more lawyers; growing competition from non-lawyers, particularly on the internet; and, a growing do-it-yourself ethos have coalesced to reduce demand for services from lawyers.

Because of these challenges, I spoke with our New Lawyers Committee this fall about ways with which new lawyers can begin developing their practices. I thought that it might be beneficial to share those comments more broadly.

Through a combination of competence and hard work, newer lawyers can succeed. I know many lawyers in Rhode Island who started from scratch and now have thriving practices because they applied themselves. The old bromide that success does not happen overnight is particularly apt in this context and for new lawyers. Continued hard work over time is still the most proven path to a successful practice.

Additionally, the best way for a lawyer to distinguish him or herself is to become highly competent. Work will find its way to really good lawyers. That said, new lawyers in private practice need to establish themselves in practice areas that will generate profitable work.

While all of the foregoing may seem manifest, it is not so obvious to many new lawyers, particularly those who are starting out on their own. Over the years, I have fielded calls from many new lawyers seeking advice. One of the first questions I ask is what that lawyer is doing to develop profitable work. The responses I receive run the gamut, from not having an answer to detailing the work that the lawyer is currently attracting. These conversations inevitably turn to law practice economics, and the question of whether that lawyer's current work will lead to a sustainable practice. This subject is one that most new lawyers (me included, at the time) have not thought through sufficiently. I do not mean to underplay how difficult it is, and new lawyers generally are happy to be generating any paying business. This is not to say that profitability determines whether a lawyer has a successful practice of law; many factors, different for each practitioner and mostly non-monetary, define "success." However, new lawyers ultimately have to focus upon finding the intersection between what they like doing, what they are good at, and what will generate sufficient income.

The Bar Association is mindful of and sensitive to these issues, and has several ways to assist. Two of the most underutilized Bar programs are the Lawyer Referral Service and the Reduced Fee Program. In August 2016 alone, the Bar placed over 900 new matters through these programs. Multiple attorneys receive well over 50 placements over the course of a year. Underemployed new lawyers would be well-served in joining both of these programs. At a minimum, placements may provide a base of work from which a new lawyer could expand his or her practice.

The Bar Association also has a stand-alone mentorship program and a Volunteer Lawyer Program mentorship program. The Bar Association has experienced attorneys ready, willing and able to serve as mentors to young lawyers. The limited numbers of persons who have participated in these programs have generally had very positive experiences.

The VLP mentorship program provides a double benefit. The purpose of the program is to allow new lawyers to take on a case in combination with a more senior lawyer in an area in which the junior lawyer has limited experience. The team approach provides real-world experience to the new lawyer and delivers needed *pro*

bono services. I have served as a VLP mentor, and had a very good experience doing so.

Unfortunately, few new lawyers take advantage of these opportunities. We will be doing more, consequently, to publicize these programs to new lawyers, particularly through media that this demographic favors, over the next year.

The New Lawyers Committee is also a great way for new lawyers to begin forming professional relationships. Over the next year, the Bar Association will be facilitating collaboration of that Committee with like professional groups, including new CPAs and new financial planners, with the aim to begin developing career-long referral sources.

The new Bar Association Law Center is also a resource for all members, including new lawyers. The Law Center has work space and conference rooms available for use for member attorneys at no charge. This resource is particularly helpful to new lawyers who utilize virtual offices – a phenomena that continues to grow.

Establishing oneself in practice today is difficult, but not impossible. The Bar and its members are here to help. I strongly encourage new members to contact me directly if they would like to discuss this or any other topic, and further encourage new members to take advantage of Bar programs and resources that will assist in making those stressful first years of practice a little easier. ❖

RHODE ISLAND BAR JOURNAL

Editorial Statement

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

Article Selection Criteria

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

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

New Fellowship Promotes Public Service

Michael A. St. Pierre, Esq.
President
Rhode Island Bar Foundation

Students entering their second year at Roger Williams University School of Law will receive a stipend for an internship at a Rhode Island nonprofit organization engaged in providing legal services to persons of limited means.

For many years, the Foundation and Association have jointly supported a Law Center to serve the Bar's and the public's interests consistent with our mission to foster and maintain the honor and integrity of the profession of law, and to study, improve, and facilitate the administration of justice in Rhode Island.

As many of you are aware, during the past year the joint effort of the RI Bar Foundation Board of Directors and several dedicated volunteers have been very focused and busy on facilitating our move to new headquarters at 41 Sharpe Drive in Cranston, RI. In choosing a new Law Center space, our joint priority was highway proximity and parking in order to make the Law Center as accessible to all, no matter what part of the state you travel from to visit the Center.

In addition to important issues of highway proximity and parking to facilitate travel to the Law Center, all should note that we have, with this move, significantly lowered our long-term financial liabilities while at the same time securing many excellent new features directly benefiting Bar members and the public. Among these new features are a new CLE classroom and conference rooms which have been updated with the very latest in technology. We hope that those of you who attended our Volunteer Lawyer Program's 30th anniversary celebration on October 27th, at the Law Center, enjoyed the event.

For over 30 years now, the Rhode Island Bar Foundation, on an annual basis, has invited members of the Bar who meet certain standards to become Fellows of the Foundation. Fellows are attorneys and judges who have distinguished themselves professionally, who have made a significant monetary contribution to the Foundation, and who have given generously of their time to public service in communities where they live and where they work. I am pleased to report, at our Annual Meeting in June, that we welcomed eight (8) new Fellows. At this time, 342 attorneys are Fellows. We also receive annual voluntary contributions from members of the Rhode Island Bar whose generosity is likewise noted.

We are very excited to announce the establishment of a new program. The RI Bar Foundation was recently honored with a generous donation from the Honorable Thomas J. Caldarone, Jr., which will be utilized to establish an endowment for summer fellowships. Students entering their second year at Roger Williams University School of Law will receive a stipend for an internship at a Rhode Island nonprofit organization engaged in providing legal services to persons of limited means. The Rhode Island Bar Foundation recognizes that frequently there are no funds to compensate law students for their important efforts in the public interest and, given today's costs of a legal education, many are forced to turn away from the beneficial experience afforded by such service. As Caldarone Fellows, second year law school students will have the opportunity to assist in providing crucial legal services to the public, and in so doing, may encourage those students to pursue public service careers.

Again this year, with the continued generosity of The Horace A. Kimball and S. Ella Kimball Foundation, The Champlin Foundations, and The Nicholas J. Caldarone Foundation, we were able to award two $20,000 Thomas F. Black Jr. Memorial Scholarships to two promising first-year law students from Rhode Island who have demonstrated financial need, superior academic performance, community and public service, and demonstrated contacts with and commitment to the State of Rhode Island. This past year, we also received donations for this program from Fellows and other members of the Rhode Island Bar. To date, this fund has awarded 58 scholarships to promising law students from Rhode Island.

The Interest on Lawyers Trust Accounts (IOLTA) Program continues to face challenges. Since the 2008 recession hit, we have seen a significant decrease in IOLTA income. This year continued to be a difficult year for funding legal services programs. The net effect is of course a devastating blow to low-income persons most in need of our services. While most IOLTA grant money continues to help fund legal services for the poor, some funding has been allocated to promote knowledge and awareness of the law. While the Board of Directors remains cautiously optimistic about a gradual improvement on the economic climate in the coming year, we are likewise mindful that any increase in IOLTA income will be gradual at best.

I am very proud to say that the Rhode Island Bar Foundation has survived these very difficult times. This was largely due to the hard work of the Board of Directors, and its Finance and

Rhode Island Bar Foundation

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

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

Help Our Bar Foundation Help Others

RHODE ISLAND BAR FOUNDATION GIFT

PLEASE PRINT

My enclosed gift in the amount of $ _____

Please accept this gift in my name

or

In Memory of _____

or

In Honor of _____

Your Name(s) _____

Address _____

City/State/Zip _____

Phone (in case of questions) _____

Email: _____

Please mail this form and your contribution to:

Rhode Island Bar Foundation

41 Sharpe Drive

Cranston, RI 02920

Questions? Please contact Virginia Caldwell at 421-6541

or gcaldwell@ribar.com

Grant committees, who long ago recognized the need to have a reserve on hand in the event that there were changes in the economy and markets. But for the skills of our Finance Committee, I dare say that our ability to award scholarships to college and first year law students and others would have been curtailed years ago. Unfortunately for other Bar Foundations around the country, that has in fact been their fate. We have been prescient enough to avoid that event to date and are hopeful that these scholarship and fellowship programs can continue.

I would be remiss if I didn't especially commend the leadership of the Rhode Island Bar Association for their ongoing support and assistance with our programs and with our objectives.

In closing, I would continue to urge all RIBA members and Fellows of the Foundation to consider making future donations to the RIBF by using the Foundation Gift Form found in every issue of the Rhode Island Bar Journal. ❖

Seeking Law-Related Education Program Attorney Volunteers!

Your Bar Association supports law-related education (LRE) for Rhode Island children and adults through three, longstanding programs: *Lawyers in the Classroom* and *Rhode Island Law Day* for upper and middle school teachers and students, and the *Speakers Bureau* for adult organizations. Responding to LRE requests, Bar volunteers are contacted – based on their geographic location and noted areas of legal interest – to determine their interest and availability.

If you are interested in serving as a LRE volunteer, please go to the Bar's website at **ribar.com**, click on **FOR ATTORNEYS**, click on **LAW RELATED EDUCATION**, click on **ATTORNEY ONLY LRE APPLICATION**. All Bar members interested in serving as LRE volunteers, now and in the future, ***must*** sign-up this year, as we are refreshing our database.

Questions? Please contact: Frederick D. Massie, Director of Communications or Kathleen Bridge, Assistant Director of Communications at: **401-421-5740**.

Testifying Expert Witnesses in the Wake of the *Cashman* Decision

Jackson Parmenter, Esq.
Kelly & Mancini, P.C.
Providence

Michael A. Kelly, Esq.
Kelly & Mancini, P.C.
Providence

The Rhode Island Supreme Court recently issued a decision which drastically changed what many Superior Court practitioners believed to be the scope of discovery relative to testifying experts. **In Cashman Equipment Corporation, Inc. v. Cardi Corporation, Inc., et al**. No. 2014-284-M.P., the Supreme Court held that all documents, regardless of whether they are relied upon or considered by a testifying expert, are shielded from discovery. In furtherance of this position, the Supreme Court noted that Rule 26(b)(4)(A) of the Rhode Island Superior Court Rules of Civil Procedure is "clear and unambiguous" in that it "does not provide for the disclosure of documents." The Supreme Court went on to note the only permitted avenues of discovery with respect to testifying experts are interrogatories and depositions. Understandably, this decision has caused some consternation for practitioners who routinely engage testifying experts and who routinely exchange expert documents.

The underlying Superior Court action in **Cashman**, involves a multitude of complex engineering issues related to the design and construction of the newly-erected Sakonnet River Bridge connecting Portsmouth to Tiverton. One of the foremost issues to be decided is whether certain repairs to the Sakonnet River Bridge were necessitated as a result of design defects or construction defects. Cardi Corporation Inc., as the general contractor on the bridge project, argued the repairs were necessitated due to allegedly defective construction by its subcontractor. Whereas Cashman Equipment Corporation, Inc., as the subcontractor, argued the defective design of certain bridge elements necessitated the repairs. Given this complex engineering issue, among others, the respective parties retained testifying experts and exchanged expert reports, the disclosure of which is not required or even contemplated by Rule 26. Cardi's expert report relied upon computer modeling of the as-built marine cofferdams, the form system into which concrete is poured to form the bridge's marine pier caps. In the wake of that exchange, Cashman requested, by way of subpoena, all documents (less core attorney work product) considered by Cardi's testifying expert in formulating his ultimate opinion, not just those relied upon. In relevant part, Cashman's subpoena requested, among other things, that Cardi's testifying expert produce the following:

> [a]ny and all computer models, inclusive of all text input data, created by you and/or relied upon by you which form the basis for the opinions set forth in your expert report dated January 15, 2014 regarding the marine cofferdams.

More broadly, Cashman's subpoena requested the following:

> [a]ny and all documents and things relating in any way to the Project, and/or relating to your expert reports regarding the cofferdams and Type F concrete regarding the Project, including but not limited to (a) models, mockups, samples and tested objects or materials and (b) electronic and paper document files, including but not limited to correspondence, letters, emails, telecopies, contracts, proposals, agreements, minutes, books, papers, records, reports, diaries, statements, questionnaires, schedules, programs, data, calendars, graphs, charts, transcripts, tapes, recordings, photographs, videos, ledgers, worksheets, summaries, digest and all other information of data, records or compilations, calculations, including all underlying supporting or preparatory material now or ever in your possession, custody or control, or available to you, your counsel, accountants, agents, representatives, associates, or co-workers, from whatever source obtained, however produced or reproduced, whether in draft or otherwise, whether sent or received, or neither, and including all originals and copies thereof.

After Cardi's testifying expert refused to produce materials beyond those specifically relied upon, Cashman motioned the Superior Court to compel production. After hearing, the Superior Court reluctantly denied Cashman's request for materials beyond those specifically *relied upon*

***Cashman* makes clear the substance of discoverable testifying expert material is limited to what the expert relied upon in formulating the ultimate opinion, and the available avenues of discovery related to that ultimate opinion are interrogatory answers and a deposition – not documents.**

by Cardi's testifying expert, noting the following:

> If the Court were writing on a clean piece of paper there is no question but that the Court, at least based on my reading and the arguments presented and the papers presented by the parties, would order the production…. However, the Court is constrained to deny the motion.[1]

Accordingly, the specific question raised by the writ in **Cashman** was whether, under Rule 26(b)(4)(A), an adverse party is entitled to all materials *considered* by a testifying expert or whether discovery is limited to just those materials *relied upon* by the testifying expert in rendering its final opinion. Importantly, the petitioner was careful to note it was not seeking any core attorney work product – information which is decidedly protected under Rhode Island law.[2]

In its existing state, Rule 26(b)(4)(A) provides as follows:

> A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion. A party may depose any person who has been identified as an expert expected to testify when the expert interrogatory has been responded to by the other party. Unless otherwise ordered by the court, the party seeking to depose the expert shall pay the expert the reasonable fee for the time spent attending the deposition and the reasonable expenses incurred in attending the deposition. In the absence of agreement between the parties as to the timing of disclosures required under this subdivision, any party may apply to the court for an order establishing a schedule of such interrogatories, responses, and depositions. Obligation to respond to interrogatories shall be stayed until the ruling on the application.[3]

As the petitioner, Cashman argued that Rule 26 should be read broadly to foster the truth seeking mission of the Court. Cashman argued that considered materials are as important, if not more important, than those materials specifically relied upon by a testifying expert:

> Documents considered but rejected by the testifying expert in reaching opinions may be equally necessary for effective cross-examination.[4] In fact, the documents considered but rejected by the expert trial witness could be even more important for cross-examination than those actually relied upon by him.[5]

It is important to note the unique, but not altogether novel, undertaking which the testifying experts in **Cashman** were tasked with performing. Specifically, Cardi's testifying expert was tasked by Cardi with analyzing whether the as-designed cofferdam system would have failed. In furtherance of this task, Cardi's testifying expert performed computer modeling of the as-designed cofferdam system, ultimately concluding that the cofferdams, as designed, would not have failed. Cashman posited this exercise involved testing a multitude of different models, and employing a multitude of different load distributions and engineering principles until the desired result was

achieved. It was these other models performed by Cardi's testifying expert, models which may have demonstrated failure and were therefore not relied upon, which Cashman was seeking via discovery. The discovery of these models, assuming they exist, would have allowed Cashman the ability to cross-examine Cardi's testifying expert as to why certain modeling was rejected in favor of others. This would have shed light on the reliability of the methodology employed by the expert in rendering the final opinion. Cashman argued these other models, despite their rejection, were relied upon by Cardi's testifying expert in furtherance of creating the models ultimately evidenced. The rejection of certain engineering principles and load distributions was necessary and integral to the formulation of the final models – one model would build upon the next until the desired result was achieved. Secondarily, Cashman argued the discovery of these other models may have shed light on potential impartiality, thereby discrediting Cardi's testifying expert as one qualified to "assist the trier of fact."[6]

To this end, Cashman argued a broad reading of Rule 26 will serve to bolster the purpose of Rule 26 – to ensure "full disclosure of the factual basis underlying an expert's opinion…"[7] Cashman argued a ruling in its favor would promote the integrity and reliability of the truth finding process by delivering the necessary transparency to experts' opinions. Such a ruling would, in turn, facilitate effective and expeditious expert cross-examination, thereby reducing ever-growing expert costs. Most importantly, Cashman argued a ruling in its favor would curtail the potential increase in improper influences upon testifying experts, their methodologies and ultimate opinions in Rhode Island.

Conversely, and in favor of the protection-oriented approach, Cardi argued the disclosure of considered material will impede the free flow of information between counsel and testifying experts. Ultimately, Cardi argued, this will preclude attorneys from "fully and confidently prepar[ing] expert witnesses for their clients' trials."[8] Additionally, Cardi argued that expanding discovery as advocated by Cashman will result in increased discovery expense to the detriment of all parties.

Cashman and Cardi disagreed on the federal authority to which the Rhode Island Supreme Court should refer to for guidance on this particular issue. Cashman argued the 1970 amendments to Federal Rules of Civil Procedure 26 provided the most persuasive authority. Cardi argued Rhode Island's 2006 amendments to Rule 26 indicated a clear rejection of the 1970 amendments' broad, expert discovery mandate. Specifically, Cardi argued the federal decisions relied upon by Cashman advocated for broad expert discovery under the 1970 amendments – on which our Rhode Island's Rule was originally based – all relied on a provision of the 1970 rule deleted from Rhode Island's Rule 26 in 2006. The deleted provision states: "upon motion the court may order further discovery by other means." Accordingly, Cardi argued that the expansive expert discovery promoted by the 1970 amendments are no longer authorized in Rhode Island.

As amended in 1970, Federal Rules for Civil Procedure 26 provides as follows:

> "A Party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion.

(ii) Upon motion the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(c) of this rule, concerning fees and expenses as the court may deem appropriate."

1970 Amendments to F.R.C.P. 26(b)(4)(A)(i).[9] In its current state, and as amended in 2006, Rule 26(b)(4)(A) of Rhode Island's Rule 26 states as follows:

> A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion. A party may depose any person who has been identified as an expert expected to testify when the expert interrogatory has been responded to by the other party. Unless otherwise ordered by the court, the party seeking to depose the expert shall pay the expert the reasonable fee for the time spent attending the deposition and the reasonable expenses incurred in attending the deposition. In the absence of agreement between the parties as to the timing of disclosures required under this subdivision, any party may apply to the court for an order establishing a schedule of such interrogatories, responses, and depositions. Obligation to respond to interrogatories shall be stayed until the ruling on the application.

R.I. R. Civ. Pro. Rule 26(b)(4)(A).[10]

Cashman argued the 2006 amendments to Rhode Island's Rule 26, if anything, expanded the breadth of discoverable material. Cashman argued the 2006 amendments made it clear that parties are entitled, at a minimum, to interrogatory answers and an expert deposition. On the other hand, the 1970 federal procedures amendments permitted only interrogatory answers with anything further requiring a motion and court approval. Cashman posited there is no limiting language in the 2006 amendments, specifically, no use of the word shall, only may, which is permissive. Cashman argued the differences do not implicate the substance of discoverable material – only avenues of discovery – and are therefore irrelevant to the sub-

stantive considered debate. In contrast, Cardi argued Rhode Island's decision to remove the language "[u]pon motion the court may order further discovery by other means…" was an explicit election to scale back the availability of testifying expert discovery to an interrogatory response and a deposition on the subjects specified in the Rule – nothing more. Cashman replied that even if the Supreme Court were to agree with Cardi's interpretation that the 2006 amendments limited that which was discoverable, it can only be said to have scaled back the available *avenues* of discovery (interrogatories and depositions), it does nothing to address the *substance* of the discovery by way of those avenues. That is, it does not limit that which is discoverable by way of interrogatories and depositions to only that material relied upon.

Interestingly, in the wake of the Superior Court's denial of Cashman's request for considered materials, and while Cashman's writ was pending before the Supreme Court, a conflicting order was entered by a different Superior Court justice granting a party's request for considered materials.[11] Specifically, in a bench decision issued by Superior Court Associate Justice Stern it was held that materials reviewed and considered by a testifying expert, regardless of whether that expert relies upon those materials in formulating his final opinion, are discoverable. This decision was made in the wake of a request for production which mirrored that of Cashman's subpoena at issue in **Cashman**: "All documents reviewed, used and/or relied upon by [the Expert] relative to his engagement as an expert in this matter."

Ultimately, the Supreme Court rejected Cashman's substantive request for the materials considered by a testifying expert and found Rule 26 "clear and unambiguous."[12] The Supreme Court held that Rule 26, in its existing form, clearly limits the scope of discovery with respect to testifying experts, entitling an adverse party to interrogatory answers and a deposition *only*. To be sure, the **Cashman** decision went above and beyond the specific substantive question posed and held that all *documents* related to a testifying expert's opinion, regardless of their substantive merit, are shielded from discovery. Accordingly, the **Cashman** decision makes

Continued on page 36

Labor Law & Employment Committee Meeting Speakers Review Sexual Harassment Trial

At a Rhode Island Bar Association Labor Law & Employment Committee fall meeting, guest speakers, Kevin F. McHugh, Esq. and John Martin, Esq., opposing trial counsel in the recent federal court trial **Franchina v. City of Providence**, shared their perspectives on the case, the trial experience, and the jury's verdict during an interesting and informative session in the Bar Association's seminar classroom.

RHODE ISLAND
BAR ASSOCIATION'S

Online Attorney Resources (OAR)

Exclusively designed to help Bar members receive and offer timely and direct assistance with practice-related questions.

OAR provides new and more seasoned Bar members with the names, contact information and Bar admission date of volunteer attorneys who answer questions concerning particular practice areas based on their professional knowledge and experience. Questions handled by **OAR** volunteers may range from specific court procedures and expectations to current and future opportunities within the following **OAR** practice areas:

Administrative Law
Business Law
Civil Law
Creditors and Debtors
Criminal Law
Domestic/Family Law
Federal Court
Probate and Estates
Real Estate
Workers' Compensation

TO CHOOSE YOUR OAR OPTION:

- **Bar members with questions about a particular area of the law.**
- **Bar members willing to volunteer as information resources.**

Go to the Bar's website at **ribar.com**, login to the **MEMBERS ONLY**, and click on the **OAR** link.

Streetlight Reform in Rhode Island

Seth H. Handy, Esq.
Handy Law, LLC
Providence, RI

Jeff Broadhead
Executive Director
Washington County
Regional Planning Council

A new day has dawned for our municipal energy system thanks, in part, to valuable night lighting.

Today's energy debate raises tensions between the old energy economy and the new. It compares attributes of centralized administration of production and operations to local production and control. Rhode Island's recent experience with streetlight reform provides insight on the administration of municipal energy policy.

Our streetlight reform began with the American Recovery and Reinvestment Act's (ARRA) public sector energy efficiency initiative.[1] Rhode Island's Office of Energy Resources offered ARRA funding for municipalities to organize performance contracting where energy service companies (ESCOs) do efficiency audits of municipal facilities and propose improvements guaranteed to pay for themselves. When the Washington County Regional Planning Council took this on for its town members in southern Rhode Island, it learned how much they were spending on streetlights; often the largest energy expenditure after a wastewater treatment plant, generally about 40% of the town energy budget. Their ESCO knew the streetlight line item was particularly ripe for reduction, but could not do anything about it. The utility, National Grid, owned the streetlights. It charged the cities and towns a flat rate for maintenance and energy consumption. The streetlight tariff calculated energy consumption by multiplying the number of dark hours in a year by the consumption of each type of streetlight fixture.[2] Municipalities wanting to dim their lights, or turn them off at times, would not get reduced costs given the utility's inflexible rate calculation. WCRPC's ESCO recommended LED fixtures that required less maintenance and energy, but the tariff had no rate for LED streetlights so, even after conversion, the LED lights would be billed as older fixtures. WCRPC saw the opportunity to band together and operate the streetlights at a much-reduced cost, but could not do that unless they owned the streetlights. The performance contracting effort had to pass on this low hanging fruit, but WCRPC resolved to take action.

Narragansett Electric put up the first Rhode Island streetlight in Narragansett in 1888. By 1891, the Providence Advance Club, an association of Providence business owners, published this commentary:

> As to the general question of the far greater economy and advantage of public ownership of lighting plants, as well as other monopolies of municipal service, there can be no serious denial…While those who advocate for public ownership are actuated solely by public spirit, those opposed are for the greater part guided by the purely selfish motives of powerful corporate interests seeking to perpetuate their power.[3]

When WCRPC hired an expert, Dan Carrigg of Belenus LLC, to find out how much municipalities would save from owning and operating their own streetlights, they learned that the bottom line had not changed much since Mr. Baxter's 1891 expose. Our municipalities still pay the capital and operating costs of streetlights through property taxes, as they have always done. All capital costs of streetlights and operations and maintenance costs are built in to the facilities charge in the S-14 tariff. In our streetlight reform process, National Grid revealed an annual operating cost of between $1.5 million and $2 million for the streetlights and if/when they sold the system, total, annual lost revenue of $8,155,205.[4] That did not account for the potential savings from better light fixtures and better-controlled lighting. Given National Grid's estimated $7.5 million price tag for the purchase of all of the municipal streetlights in Rhode Island, the municipalities purchase of their streetlights would just about pay for itself in the first year of operation.

The WCRPC prepared legislation, modeled after Massachusetts' precedent, designed to enable the municipalities to buy back their streetlights at their depreciated value and operate and maintain them under a tariff that allowed the flexibility to upgrade and control their streetlighting. The Municipal Streetlight Investment Act, now R.I. Gen. Laws § 39-30-1 *et seq.* passed, thanks to the diligence of its legislative sponsors and supporters, including, principally, the Rhode Island League of Cities and Towns and the WCRPC.

The League of Cities and Towns partnered

Are you looking for answers to practice-related questions?
Try the Bar's dynamic List Serve!

According to Rhode Island Bar Member and Johnston-based Attorney Angelo A. Mosca III: ***In my opinion, the Bar's List Serve is one of the best things to come to the Bar in recent years.***

Since its inception under the sponsorship of Past Bar President Michael McElroy, our Bar's List Serve has grown exponentially in participating members and in a wide range of answered questions. From nuances of the Rhode Island Courts e-filing system to requests for local and out-of-state referrals, List Serve members are providing each other 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!

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. If you have a question about matters relating to your practice of law, you post the question on the List Serve, and it is emailed to all list serve members. Any attorney who wishes to provide advice or guidance will quickly respond.

If you have not yet joined the List Serve, please consider doing so today. To access this free member benefit go to the Bar's website: **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. It's that easy!

with WCRPC as interveners at the Public Utilities Commission (PUC), to ensure proper implementation of the Act with guidance from their consultant, George Woodbury, of LightSmart Consulting, and his team of experts.[5] The proposed tariff established a rate for light-emitting diode (LED) lighting and allowed limited control over the lighting, but it did not allow for metering and maintained a rate calculation methodology allowing exaggerated energy consumption numbers. Whether municipalities' could meter their consumption of electricity on streetlights, thereby getting full control and accurate billing based on actual use, became the most divisive issue in the tariff proceeding. The Rhode Island Division of Public Utilities and Carriers sided with the utility's conclusion that streetlight metering technology was not a control contemplated by the Act and was not sufficiently tested to be implemented without upgrading the utility's billing system.[6] The Commission held a technical session on metering technology and the municipalities produced experts from across the country to inform on extensive national and international experience with streetlight metering and metered billing. After the technical session, the Commission ordered National Grid to implement a metering pilot.[7] State and municipal advocacy was able to reduce the cost of that pilot from National Grid's proposal of $4.2 million to $241,000.[8]

The proposed tariff required any acquiring town to sign a sales agreement and two attachment agreements (one for above ground attachments to the utility's poles and one for below ground attachments to distribution grid infrastructure) before buying their lighting. The proposed agreements began at over 100 pages in length. Over National Grid's opposition, the Commission agreed to review these agreements in the tariff proceeding, giving the municipalities negotiating power they otherwise would have lacked. After nine months of negotiation, the agreements were simplified to half their starting size. Important issues were resolved, including the methodology to inventory and price the lighting systems (incoherent as initially proposed), a rate schedule allowing for part-night and dimming, and a wattage billing procedure that cuts down on exaggerated energy consumption. However, the parties were unable to resolve other concerns that were then submitted

to the Commission for final decision. Having paid to put up the streetlights and overpaid for their operation, municipalities asked to control them without onerous terms and conditions. After hearing testimony, oral argument and receiving repeated briefing on the disputed issues, the Commission refused jurisdiction over the sales agreement and deferred to the Division's recommendations on outstanding issues with the attachment agreement. Two of those issues warrant discussion.

The municipalities asked to be allowed to use the purchased streetlight arms and equipment for streetlighting and any other purposes they desired. The Act states that "[u]pon such payment, the municipality shall have the right to use, alter, remove, or replace such acquired lighting equipment in any way the municipality deems appropriate."[9] In contrast, National Grid's attachment agreement restricted use of the arms solely to streetlight equipment. The municipalities proposed National Grid review and approve any change impacting the load on National Grid's pole or involving a new electrical connection not metered or otherwise accounted for under the Tariff. The Division supported the use restrictions as "desirable and appropriate" and "consistent with the usage right provisions contained in the Company's agreement for third-party attachments to utility poles jointly-owned by the Company and Verizon, such as those attachments owned by cable TV companies and competitive telecommunications providers."[10] Other occupants of the poles do not control streetlight arms, do not share the municipalities' interest in other uses, and are not the beneficiaries of a statute allowing use of the equipment "in any way the municipality deems appropriate." The Commission deferred to the Division's recommendation.

The municipalities asked that National Grid only be informed of any work and oversee it if the work could impact the pole or distribution system; otherwise the utility would just be notified of any changes to the electrical service or rate. The cost of utility oversight is substantial, not to mention related delays. The Division agreed on this point, advising that "[o]nce the municipalities acquire ownership of the streetlights, they should be able to work on their facilities so long as they do not interfere with the delivery of electricity, comply with safety requirements, and indemnify the Company

against any damage that might be caused." However, the Division and Commission then accepted a compliance filing that requires utility supervision on any change in the physical attributes or mode of operation or maintenance of the streetlights, over the municipalities' objection.[11]

In the end, the tariff was approved, allowing Rhode Island's cities and towns to purchase their streetlights, install LED fixtures and operate and maintain the lights more effectively at much-reduced cost. The metering pilot docket is open and underway and should ultimately allow for greater billing accuracy and better control over streetlight operations and costs. The negotiations that took place under the Commission's watch enabled major improvements to the utility's proposed terms and conditions. Now, WCRPC's affiliate, the Partnership for Rhode Island Streetlight Management (PRISM) and the municipalities move forward with streetlight acquisition and management and continue to work on clearing away remaining impediments to efficient and effective implementation of the Act. Municipal experience is now showing a reduction in streetlighting costs of 70% or more, and the quality of light from the new LED streetlights shows true colors while using less electricity. The City of Providence has now bought its streetlights and is converting them to LED lighting with controls and anticipating $24 million in resulting savings over the next eleven years. A new day has dawned for our municipal energy system thanks, in part, to valuable night lighting.

EDITOR'S NOTE: The authors thank Dan Beardsley, Executive Director of the Rhode Island League of Cities and Towns, for his help with this article and on streetlight reform for Rhode Island.

ENDNOTES

1 *The American Recovery and Reinvestment Act of 2009, Public Law 111-5.*

2 *The Narragansett Electric Company General Street and Area Lighting Service (S-14), R.I.P.U.C. No. 2071 (January 1, 2012).*

3 *Baxter, Sylvester, "Significant Comparisons of the Cost of Light Furnished Under Municipal Ownership with that by Private Corporations," Advance Club Leaflets, No. 1 (1891).*

4 *Response to Commission Data Requests 1-3 and Exhibit 1-7(c).* ***See*** *http://www.ripuc.org/events actions/docket/4442-NGrid-DR-PUC1(10-16-13) .pdf; http://www.ripuc.org/eventsactions/docket/*

4442-NGrid-DR-PUC1-7(10-25-13).pdf

5 *The Narragansett Electric Company Street and Area Lighting – Customer Owned Equipment S-05, R.I.P.U.C. No. 2142.*

6 *R.I. Gen. Laws § 39-30-3(a)(1) ("the new tariff shall be structured so as to allow options for various street lighting controls").*

7 *Proceeding to Establish a Pilot Metering Program for Municipally Owned Streetlights, July 25, 2014.* ***See*** *http://www.ripuc.org/eventsactions/docket/4513page.html.*

8 ***See*** *Streetlight Metering Pilot Proposal, October 23, 2014; http://www.ripuc.org/eventsactions/docket/4513-NGridMeteringPilot(10-23-14).pdf and* ***see*** *Streetlight Metering Pilot, July 27, 2015;* ***see*** *http://www.ripuc.org/eventsactions/docket/4513-NGrid-Compliance-Pilot-Tariff_7-27-15.pdf*

9 *R.I. Gen. Laws § 39-30-3(b).*

10 *Hahn Memo, p. 6.*

11 *Attachment Agreement, §§ 4.1.1, 4.1.2; Richard Hahn, Memorandum of 8.6.14 (Hahn Memo II), pp. 6-8.* ❖

Technology Lawyers Helping Technology Companies Grow Their Portfolios

Patentability Opinions

US and International Patent Prosecution

Patent Infringement Opinions

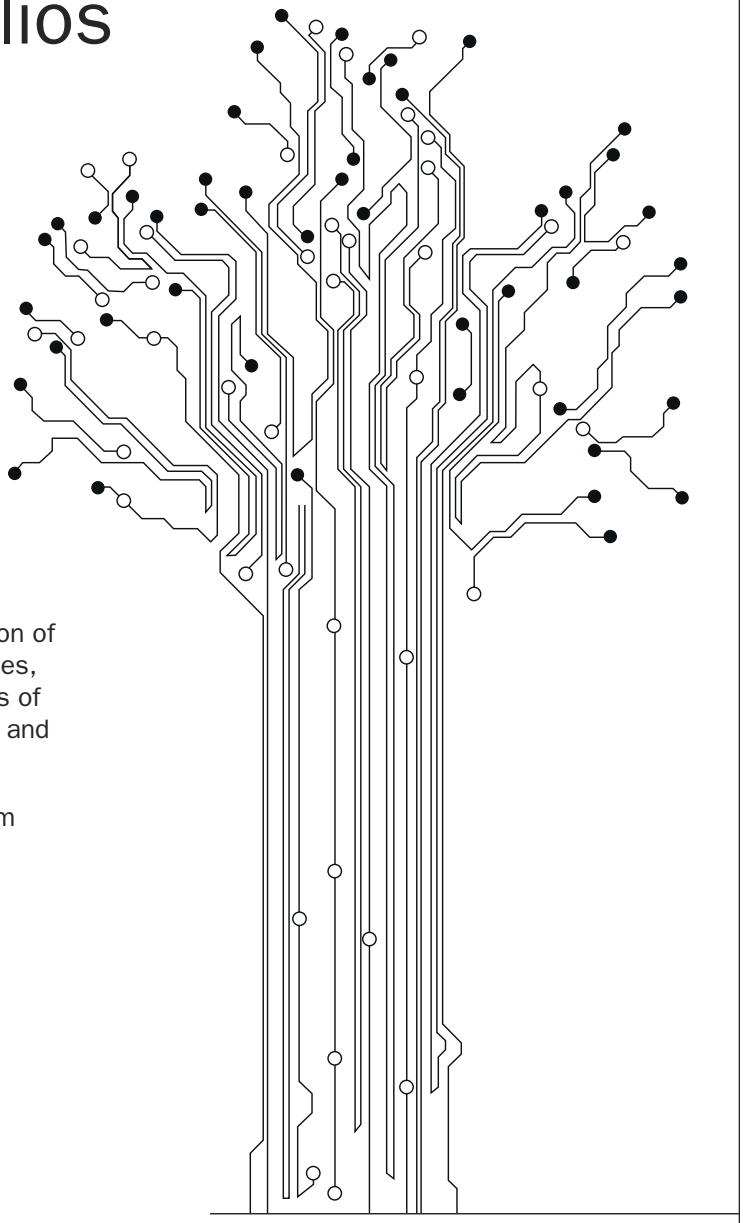
Trademark Clearance Opinions

US and International Trademark Prosecution

Intellectual Property Due Diligence

Intellectual Property Licensing

Intellectual Property Audits



From complex patent prosecution to the selection of a new trademark, to internet domain name issues, Barlow, Josephs & Holmes has helped hundreds of companies across New England identify, exploit and protect their intellectual property.

Barlow, Josephs & Holmes is a personalized firm that caters to the needs of growing technology businesses. We understand the need for quick response and no-nonsense answers.

For more information, call Steve Holmes or David Josephs at 401.273.4446.

BJH

Barlow, Josephs & Holmes, Ltd.

PATENT, TRADEMARK AND COPYRIGHT LAW | EST 1857

101 DYER STREET
5TH FLOOR
PROVIDENCE, RI 02903
401.273.4446 TEL
401.273.4447 FAX
WWW.BARJOS.COM

All attorneys of the firm Barlow, Josephs & Holmes, Ltd. are admitted to practice as Patent Attorneys before the United States Patent and Trademark Office.

The Rhode Island Supreme Court licenses all lawyers in the general practice of Law. The Court does not license or certify any lawyers as an expert or specialist in any field of practice.

Proposed Regulations on Estate Planning for Family Controlled Entities

Joshua R. Caswell, Esq.
Howland Evangelista
Kohlenberg Burnett LLP
Providence

Leigh E. Furtado, Esq.
Howland Evangelista
Kohlenberg Burnett LLP
Providence

Over the last several decades, family controlled (or closely held) business entities, such as partnerships, corporations and limited liability companies, have been a significant and commonly used tool by many planners and advisors as part of comprehensive wealth transfer plans. Family controlled entities have been particularly attractive, in part, because of the ability to make gifts of interests in such entities to family members at significantly reduced transfer tax costs through the use of valuation discounts. These discounts are justified as a result of various restrictions imposed on the recipient's ability to: a) participate in the management of an entity; b) force a distribution or liquidation of an entity; and c) sell or transfer his or her interest in an entity.

On August 2, 2016, the Treasury Department and the Internal Revenue Service (IRS) issued proposed regulations under section 2704 of the Internal Revenue Code (Code) which, if finalized in their current form, will severely limit the ability to use valuation discounts (Proposed Regulations).

Recently, the Treasury Department and the Internal Revenue Service issued proposed regulations amending and expanding the current regulations under section 2704 of the Internal Revenue Code. If adopted, these will have a dramatic impact on estate planning for owners of family controlled entities.

Background

In 1990, Congress enacted sections 2701-2704 of the Code, generally referred to as Chapter 14, with the goal of limiting the effectiveness of a number of "estate freeze" techniques involving intra-family transfers of interests in family controlled entities. The basic assumption underlying the Chapter 14 rules is that despite the establishment of restrictions nominally justifying valuation discounts, senior family members will, in fact, work in concert with junior family members to effectuate transfers of family controlled business entities to younger generations without giving real effect to those restrictions to minimize transfer tax costs. Section 2704, in particular, was aimed at limiting the use of valuation discounts in such transactions. Section 2704(a) treats certain lapses of voting or liquidation rights as deemed transfers.[1] Section 2704(b), provides that "applicable restrictions" are disregarded in valuing interests in a family controlled entity that is transferred to a family member.[2] Section 2704(b) defines applicable restrictions as restrictions that: 1) limit the ability of an interest holder to force the liquidation of an entity; 2) lapse after a transfer or can be removed by family members; and 3) are more restrictive than the default provisions under applicable state law.[3]

Despite having produced a great deal of litigation between the IRS and taxpayers, IRS challenges to valuation discounts under section 2704(b) have been largely unsuccessful, primarily because a number of states have changed their laws to ensure the defaults are very restrictive (e.g., requiring consent of all partners to liquidate a partnership). Consequently, similar restrictions in family controlled entity agreements are not more restrictive than state law and cannot be disregarded under the current regulations. As a result, section 2704(b) has become somewhat toothless, and the use of family controlled entities has continued. In response, the Treasury Department and the IRS issued the Proposed Regulations, which, if enacted as currently drafted, *will largely restrict or eliminate valuation discounts*, significantly increasing the transfer tax cost of transferring such interests in a number of ways, including the following key changes in the Proposed Regulations.

Lapses of Voting and Liquidation Rights: New Rule for Deathbed Transfers

As noted above, section 2704(a) treats the lapse of a voting or liquidation right in a family controlled entity as a transfer by the person holding that right immediately prior to the lapse.[4] However, the existing regulations provide an important exception. Transfers resulting in the loss of a voting or liquidation right are not subject to the section 2704(a) deemed transfer rules if the rights with respect to the transferred interest are not restricted or eliminated.[5] Assume, for example, that Parent owns 84% of the stock in a family controlled corporation that requires a 70% majority to liquidate. If Parent transfers

14% of his stock to each of three children (leaving Parent with 42% of the stock), section 2704(a) will not apply, despite Parent losing his ability to force a liquidation of the entity, because the voting rights of the transferred stock are not restricted or eliminated.[6] This exception gave rise to the practice of making deathbed transfers to convert a controlling interest into a number of minority interests, thereby reducing the total value of the estate's interest for transfer tax purposes.

Although the rule operates properly in most scenarios, it allows a transfer by which the transferor loses his or her controlling interest in an entity to escape transfer taxation on the loss of this right.[7] The IRS believes this exception should not apply when such transfers occur at, or shortly before, the transferor's death.[8] Accordingly, the Proposed Regulations limit the exception to lifetime transfers occurring more than three years before the death of the transferor.[9] Thus, in the example above, if Parent were to die within three years of the transfer to his children, the lapse of his ability to liquidate the corporation would be treated as if it occurred at his death.[10] The liquidation value (the estimated value he would have received at liquidation using date-of-death values) of his 84% interest would be compared to the value of an 84% interest with no right to compel liquidation.[11] The difference in value is the value of the liquidation right that lapsed.[12] That value will be includible in the Parent's estate for estate tax purposes as a phantom asset which will not qualify for the marital or charitable deduction. This scenario could pose a serious problem for those relying on the marital deduction to defer estate taxes until the death of the surviving spouse.

Modification of "Applicable Restrictions" and New Category of "Disregarded Restrictions"

The most far-reaching aspect of the Proposed Regulations is the creation of a new category of restrictions to be disregarded for valuation purposes, so-called disregarded restrictions. Under the current framework of section 2704(b), applicable restrictions limit an interest holder's ability to force a liquidation of the entity as a whole.[13] This new category of disregarded restrictions are those limiting the ability of an interest holder to force the liquidation or redemption of his or her

individual interest.[14]

A disregarded restriction: 1) limits the ability of the interest holder to compel liquidation or redemption of his or her interest; 2) limits liquidation proceeds to a value less than a minimum value, defined as a pro rata share of the net value of the entity; 3) defers payment of the liquidation proceeds for more than six months; or 4) permits the payment of liquidation proceeds in something other than cash or property.[15]

The disregarded restriction rules essentially provide every interest in a family controlled entity transferred to a family member must be valued as if the interest carries with it a put right to sell the interest to the entity at any time, with six months notice. As such, these provisions will significantly reduce or eliminate valuation discounts for lack of control and lack of marketability.

In addition to the introduction of disregarded restrictions, the Proposed Regulations also remove the exception for restrictions that are not more restrictive than default state law.[16] Instead, the only exception to the applicable and disregarded restriction rules are restrictions mandated by federal or state law.[17]

As an example of how disregarded restrictions may limit the options of family controlled entities going forward, consider the plight of the fictional partnership Craig's Candies. Craig and his two daughters are partners in Craig's Candies. Craig is a 98% limited partner, and his daughters are each 1% general partners. The partnership was formed on September 1, 2016, and the partnership agreement provides that Craig's Candies will dissolve and liquidate on August 31, 2066, or earlier upon the unanimous agreement of the partners (consistent with default state law). Partners may not withdraw prior to the termination of the partnership. Craig dies in 2017, leaving his 98% partnership interest to his two daughters.

Under the Proposed Regulations, the prohibition of withdrawal is a restriction on liquidation which may be removed by the family through an amendment of the partnership agreement and which is not required by state law. As a result, that restriction would be disregarded for valuation purposes when evaluating the estate and GST tax implications. Assume that Craig's Candies is worth $15 million dollars at Craig's date of death. Assume also that Craig's 98% limited partnership

interest would have received a 35% discount for lack of control and lack of marketability under the current regulations. His interest would then be worth around $9.5 million. Applying the disregarded restriction rules under the Proposed Regulations, the restriction on liquidation and withdrawal in the partnership agreement would be disregarded and Craig's interest would instead be valued at $14.7 million dollars.

New Definition of "Family Control"

To be deemed an applicable restriction, a restriction must lapse after a transfer or be removable by the family.[18] Under the current framework of section 2704(b), even nominal interests held by a non-family member, such as a charity, may be taken into consideration in determining whether a family can remove an applicable restriction.[19] Taxpayers have accordingly avoided section 2704(b) by transferring a nominal interest to a non-family member so the family alone does not have the power to remove what would otherwise be an applicable restriction disregarded for valuation purposes.

Under the Proposed Regulations, the ability of a non-family member to participate in the removal of a disregarded restriction will be disregarded in any of the following circumstances:

A. The non-family member interest has been held for less than three years prior to the transfer of an interest to a family member.
B. The non-family member's interest is less than 10% of the value of all interests in the entity.
C. All non-family members hold less than 20% of all equity interests.
D. The non-family member does not have a put right to receive the minimum value as defined above.[20]

Practically speaking, non-family member interest holders will almost never satisfy all the above conditions. As such, including a non-family member in an entity to avoid the disregarded restriction rules is not a viable strategy.

Effective Date and Planning Considerations

From a planning perspective, the most favorable aspect of the Proposed Regulations is that they are not currently effective.[21] The process of finalizing regulations, even ones not nearly as controversial as these, is typically a multi-year

process. It is expected there will be significant comments and lively discussion at the public hearings scheduled to commence on December 1, 2016. However, if the IRS treats this project as a high priority, the Proposed Regulations could be finalized very quickly. In fact, the original Chapter 14 regulations were finalized within 15 months. In any event, planners have time to address how the new rules will apply to prior transactions and to effectuate new transactions before the new regulations become effective. Anyone who holds an interest in a family controlled corporation, partnership or other entity, should consider making transfers to family members before the end of the year.

ENDNOTES

1 *26 I.R.C. § 2704(a) (1990).*
2 *§ 2704(b).*
3 *§§ 2704(b)(1), (3).* ***See also, Kerr v. Commissioner****, 113 T.C. 449, 473 (1999), aff'd on other grounds, 292 F.3d 490 (5th Cir. 2002).*
4 *§ 2704(a)(1).*
5 *Reg. § 25.2704-1(c)(1).*
6 *Reg. § 25.2704-1(f) Ex. (4).*
7 *Rev. Rul. 93-12, 1993-7 I.R.B. 13.*
8 ***Estate of Murphy v. Commissioner****, T.C. Memo. 1990-472.*
9 *Prop. Reg. § 25.2704-1(c)(1), -1(c)(2)(i)(B), -1(f) Ex. (4), -1(f) Ex. (7), 81 Fed. Reg. 51413 (2016).*
10 *Prop. Reg. § 25.2704-1(c)(1), -1(c)(2)(i)(B), -1(f) Ex. (4), -1(f) Ex. (7).*
11 *Prop. Reg. § 25.2704-1(c)(1), -1(c)(2)(i)(B), -1(f) Ex. (4), -1(f) Ex. (7).*
12 *Prop. Reg. § 25.2704-1(c)(1), -1(c)(2)(i)(B), -1(f) Ex. (4), -1(f) Ex. (7).*
13 ***Kerr****, 113 T.C. at 473.*
14 *Prop. Reg. § 25.2704-3(b)(1).*
15 *Prop. Reg. §§ 25.2704-3(b)(1), -3(b)(1)(ii) (regarding "minimum value").*
16 *Prop. Reg. § 25.2704-2(b)(2), -2(b)(4)(ii) (regarding applicable restrictions), -3(b)(2), -3(b)(5)(iii) (regarding disregarded restrictions).*
17 *Prop. Reg. § 25.2704-2(b)(2), -2(b)(4)(ii) (regarding applicable restrictions), -3(b)(2), -3(b)(5)(iii) (regarding disregarded restrictions).*
18 *Prop. Reg. § 25.2704-2(b)(1).*
19 ***Kerr****, 113 T.C. at 473.*
20 *Prop. Reg. §§ 25.2704-3(b)(3)-(4).*
21 *Prop. Reg. §§ 25.2701-8, -4(b)(1)-(2).* ❖

Justices of the Peace: A Conversation about Law, Language, and Virtue

Ernest G. Mayo, Esq.
Warren Municipal Court
Johnson & Wales University
Professor

Suzanne Baldaia, Ph.D.
Independent Scholar
Johnson & Wales University

Cast: Atticus & Portia, Rhode Island lawyers, and the waiter

Scene: Lunchtime at Giada's Ristorante Providence. Atticus and Portia are seated at a table.

Waiter: [arrives with bread and olive oil] *Benvenuto*.

Atticus: [to the waiter] Soup, do you have soup today?

Waiter: *Si*, today's *zuppa* is Italian Wedding – very excellent – made with pork, beef endive, and freshly grated *parmigiano* in a chicken broth. *Bellissima*.

Atticus: [to Portia] Will I like that?

Portia: It's worth a try Atticus. [to the waiter] I'll have the Caesar salad.

Waiter: *Molto bene*. [to Atticus] *Signore*?

Atticus: The soup.

Waiter: *Grazie*. *Vino*?

Portia: No, two waters only. Thank you.

Waiter: *Sì, acqua*.

Atticus: While we're speaking of weddings.

Portia: Ah, but we were not.

Atticus: Italian wedding soup, remember?

Portia: We started this conversation on the negative note of food-induced sleep, are we now going to venture into one of your *agita* inducing rants?

Atticus: Rants! I merely make observations for your consideration. For example, speaking of weddings, how is it that the term justice of the peace is routinely bandied about as the proper appellation for the person who may legally officiate at a civil wedding? And, I must add, is also used incorrectly by those few who are, in fact, authorized to officiate. They should, and undoubtedly do, know justice of the peace is being improperly used. Tell me that!

Portia: Well, could it be that JPs are licensed to perform weddings in Little Rhody?

Atticus: No, it could not.

Portia: Wow. Learn something new every day.

Atticus: The General Laws are quite clear on this point: a justice of the peace may perform essentially the duties of a notary, which does not, as you well know, include marriages, and those of a bail commissioner if so appointed by the appropriate court, again, no weddings.[1]

Portia: What brought this on? Are you looking to get married?

Atticus: No. And did you know that there is a very comprehensive list of those who are empowered to perform weddings in Little Rhody; a list with no JPs?[2]

Waiter: [delivering pitcher to the table] *Acqua con fettine di limone* – with lemon slices.

Portia: Thank you.

Atticus: I happened to be in a town clerk's office recently when a couple asked for a marriage license and the names of some justices of the peace to perform their nuptials. The clerk responded immediately, presenting a printed list of names and phone numbers. I glanced over. Well, really, I moved several feet to my left and deliberately read the clerk's list titled justices of the peace!

Portia: Why does this annoy you so much or are you just trying to annoy me?

Atticus: Why does it bug me? I'll tell you why it bugs me. It's exasperating that members of our lawyer club, particularly lawyers who do have authority to perform weddings, should know better and so should the clerks. But they persist in referring to themselves improperly as justices of the peace and JPs do not have marriage authority! How can we expect the public to understand if our colleagues don't? That's why it annoys me.

Portia: But, don't these self-mislabeled justices of the peace have authority under the law as, for example, retired judges, or ministers of the internet temple of wedded bliss and such?

Atticus: I don't doubt it. I'm sure they are not perpetrating a fraud on the couples who appear before them; the weddings are valid, but that is not my point.

Waiter: [delivering the meal to the table] *Scusa*.

Zuppa per il signore – insalata per la signora. Godere – enjoy!

Portia: *Grazie*.

Atticus: Oh, now you speak the language.

Portia: [gesturing a tiny bit with thumb and forefinger] *Sì - così così*.

Atticus: Back to my point. I'm sure the term is misused because people have encountered it so often in movies, on television, and in novels. But is that a legitimate reason for those who know better to do so? Look on the internet for someone to perform a wedding ceremony in Rhode Island and you encounter JP as the search term.[3] In phone books ...

Portia: [interrupting] Remember them?

Atticus: ... you had to look in the yellow pages under JP.[4]

Portia: But, isn't the term justice of the peace, or shall I say *giudice di pace*,...

Atticus: [interrupting] Nice touch.

Portia: ... the commonly used and accepted synonym for one who performs civil wedding ceremonies?

Atticus: Yes, but my point is that it is not the correct usage in this state even if it is in our neighbors' states.

Portia: Oh, so, Massachusetts and Connecticut authorize JPs to solemnize marriages?

Atticus: Yes, but I'm concerned with the Ocean State.[5]

Portia: Ah, the cooler and warmer state.

Atticus: Rants, you want rants, don't get me started on that one.

Portia: Well, what about the term's etymology? Hasn't it been understood to include the authority to perform weddings since early common law?

Atticus: Not really. Originally, and I'm talking the 14th century, a justice of the peace was appointed by the English monarch to "keep the peace."[6] Even the leading colonial manual for justices of the peace makes no mention of marriage authority, which is much closer to the Rhode Island JP as bail commissioner concept than the colloquial marrying JP.[7]

Portia: What about Rhode Island, were JPs ever authorized by statute?

Atticus: Just during the first half of the nineteenth century, more or less.[8]

Portia: So, what do you propose, amending the statutes?

Atticus: No. They're fine. I suggest members of the bar and those who deal with civil marriages be reminded that misuse of the nomenclature is simply wrong. Wouldn't Aristotle have something to say about that, you know, basic ethics?

Portia: You're right. Words matter. And we are in a profession that relies on language. Hell, our entire form of government is dependent on words.

Atticus: Precisely. It's unprofessional and maybe even prohibited by the rules.[9]

Portia: It may be a violation, but philosophically I think Aristotle would say that we ought to use the language correctly, something like developing virtue in the use of language. *Eudaimonia*, striving for one's *telos* and all that.[10] You know?

Atticus: No, I don't know, but okay.

Portia: MacIntyre would also argue in terms of virtue as a necessity, though he and Aristotle might be of different camps.

Atticus: Who's MacIntyre, the publican at an Edinburgh pub?

Portia: Alasdair MacIntyre. Contemporary virtue ethicist. Follows the Aristotelian tradition.[11]

Atticus: So, they'd be in two camps two millenia apart. Right?

Portia: Right.

Atticus: Well, even self-respecting tradespeople, the direction our "club" [gesturing air-quotes] is headed, respect the language of the trade. Carpenters[12] don't refer to a mortise as a groove.

Portia: Yes, Aristotle would probably be on your side, but MacIntyre would likely honor practices as they unfold, the changing use of language. And that would be to see it as a changing tradition.

Atticus: Isn't that oxymoronic? "Changing tradition"?

Portia: Seems to be at first, but isn't that what common law has been doing for centuries?

Atticus: Okay, but some modicum of professionalism is expected of us. At least that used to be the case before ambulance-chasing television ads, highway billboards, ...

Portia: [interrupting] It's populism; totally trending.

Atticus: Well, in any event, professionalism should include the proper use of the language.

Portia: Yes, well, I agree. But context matters, too. Like in linguistic theory and semiotics.

Atticus: Do they still teach that?

Portia: Maybe at Brown, don't know. What about the justices of the peace who are not licensed attorneys? The rules, even if they apply to lawyers, cannot address your concerns about their misuse of the term. They are not members of "the club" as you say.

Atticus: Well, the Secretary of State's web site has a good admonition. It's a start. It cautions readers that JPs do not have marriage authority in Rhode Island, but is education of the public necessary? I don't know if it's cost effective for such a relatively harmless matter.[13] I simply direct today's gripe session at those who have a duty to know better yet continue to misuse the terminology simply as the path of least resistance.

Portia: I would argue that yes, you're right, the club, or community as I would say, should use the proper term in order to express excellence. And the practice ought to include modelling excellence in order to uphold the tradition of excellence in that practice. Otherwise, the virtue and excellence gets lost. It's all very MacIntyrian.

Atticus: So what about the people in the town hall with the 'JP List'?

Portia: Really, they should change the document wording, I suppose. Although people will probably still call them justices of the peace. It's like a common-sense word. I think Wittgenstein talked about...

Atticus: [interrupting] Common sense?! *It's the wrong word!* In Rhode Island a JP is *not* empowered to marry people!

Portia: So start a campaign! Hashtag notjpinri.

Atticus: I wouldn't even know how to do that.

Portia: Kidding. Kind of. This is how we teach now, in tweets. You've got soup on your tie. [Atticus wipes his tie]

OK, let's go with this: lawyers with authority to perform weddings – judges, ordained ministers, etc., and municipal officials with licensing duties who, after all, are only trying to be helpful with their lists of officiants – are to be cautioned and enlightened. And the internet search engines, well fixing that is just impossi-

ble. And the Secretary of State receives a basket of fruit for a job well done.

Atticus: No, a basket of coffee syrup, johnnycake mix and frozen lemonade.

Portia: Yeah! And a Buddy's marinara and some wiener sauce!

Frankly, Atticus, I'm a bit saddened by today's dilemma. You usually pose rather more compelling conundrums.

Atticus: I'm not done. On the theme of marriage...

Waiter: [interrupting] *Tutto bene?* Is good? *Caffè, tè, aperitivo?*

Portia: *Molto bene.* Just the check, please.

Atticus: O.k., so ...

Portia: [interrupting] Atticus, not today. Must run, I do have to earn a living.

Waiter: [delivers check to the table] *Ciao, si prega di venire nuovamente* – come again.

Portia: [takes check and rises from the table] I'll pay on the way out. Leave a good tip. *Ciao.*

Atticus: Next week then.

ENDNOTES

1 *R.I. Gen. Laws § 42-30-1 et seq. Notaries Public and Justices of the Peace.*

R.I. Gen Laws § 42-30-7. Powers of notaries and justices.
The officers mentioned in §§ 42-30-3 - 42-30-5, inclusive, shall possess all the powers which now are or hereafter may be conferred by law upon justices of the peace or notaries public.

R.I. Gen. Laws § 12-10-2. Powers of justices of the peace.
(a) (1) The chief judge of the district court shall from time to time appoint, …, from those qualified justices of the peace who shall be members of the bar of the state of Rhode Island …, as many justices of the peace as he or she may deem necessary, who shall be authorized to set and take bail…, to issue warrants ….

R.I. Gen. Laws § 8-10-14.1. Powers of justices of the peace.
The chief judge of the family court shall from time to time appoint, …, from those qualified justices of the peace who shall be members of the bar of the state of Rhode Island as many such justices of the peace as he or she may deem necessary who shall be authorized to set and take bail … to issue warrants ….

2 *R.I. Gen. Laws § 15-3-5. Officials empowered to join persons in marriage.*

3 *http://www.riwedding.com/wedding officiants.asp (accessed July 1, 2016).*

4 *Verizon*, Verizon SuperPages, Providence, May, 2012-2013, *SuperMedia LLC: 296.*

5 *Conn. Gen. Stat. § 46b-22. (Formerly Sec 46-3).*
(a) ***Persons authorized to solemnize marriages in this state include*** *(1) ..., (2) ...* ***and justices of the***

***peace who are appointed in Connecticut**, and .... (emphasis added)*

*Mass. Gen. Laws ch. 207, § 38. A marriage may be solemnized ... by **a justice of the peace if he is also clerk or assistant clerk of a city or town, or a registrar or assistant registrar, or a clerk or assistant clerk of a court, or a clerk or assistant clerk of the senate or house of representatives, by a justice of the peace if he has been designated as provided in the following section and has received a certificate of designation and has qualified thereunder**; .... (emphasis added)*

*Mass. Gen. Laws ch. 207, § 39. **The governor may in his discretion designate a justice of the peace ..., to solemnize marriages**, ... (emphasis added)*

6 Oxford English Dictionary, *2nd ed., "justice of the peace." (Oxford: Clarendon Press, 1998), vol. viii, 326. "justices of the peace were instituted in England in 1327, …to keep the peace…principal duties consist in committing offenders to trial, … convicting and punishing summarily in minor causes, granting licenses…"*

7 *Surrency, Erwin C. "The Courts in the American Colonies."* The American Journal of Legal History *(Oxford University Press) 11, no. 4 (Oct. 1967): 348-351. "The justices of the peace in England had several books for their guidance – the best known being* Country Justice, *by Michael Dalton. This volume was reprinted often and was well known in the colonies …" (350).*

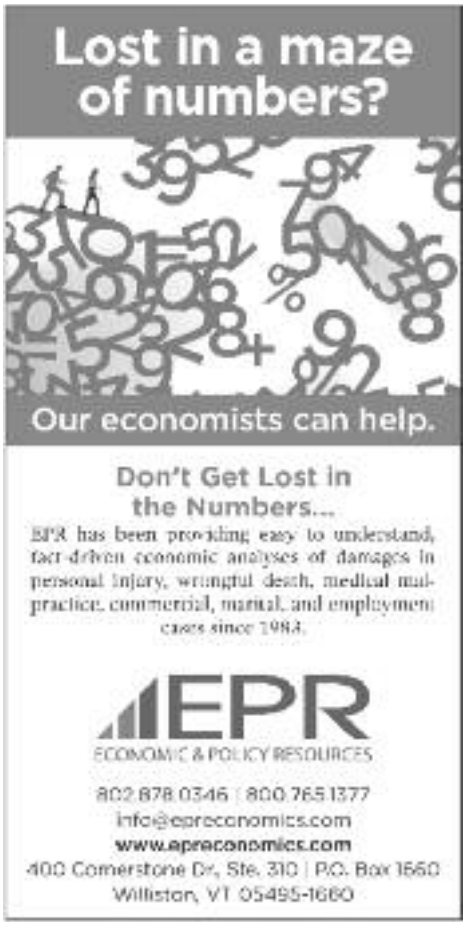
A review of Dalton's 1618 text, republished in 1975 by Walter J. Johnson, Inc., Norwood, NJ, reveals no mention of marriage authority in justices of the peace. (Dalton, Michael. The Countrey Justice. *London: Societie of Stationers, 1618.) A suggested area for further research is exploration of the possibility that colonial era justices of the peace had the inherent common law authority to join person in marriage.*

8 *A summary of the relevant Rhode Island statutory authority of justices of peace to join persons in marriage:*

Eighteenth century Rhode Island justices of the peace were authorized to perform weddings pursuant to P.L. 1798, An act to prevent clandestine marriages, § 4, *as follows: "That any assistant, judge of the supreme judicial court, **justice** of a court of common pleas, or **of the peace**, or warden, minister or elder as aforesaid, in this state, is fully empowered and authorized to join persons together in marriage ..." (emphasis added).*

Such authority continued in the early nineteenth century although without naming justices of the peace in P.L. 1822, An act to prevent clandestine marriages, § 4, *which act removed the term justice of the peace ("That any senator, justice of the supreme judicial court, **justices of a court of common pleas**, or warden, minister or elder as aforesaid residing in this state, is fully empowered and authorized to join persons together in marriage ...") (emphasis added). However, in that same year justices of the peace were identified as among those justices of the court of common pleas in* P.L. 1822, An act establishing courts of common pleas in the several counties in this state, § 1. *"...the said **justices of the courts of common pleas shall be justice of the peace** ..." (emphasis added); hence extending the justice of the peace marriage authority.*

Continued on page 40



CLE Publications Order Form

NAME

FIRM or AGENCY

MAILING ADDRESS *(Cannot be a P.O. Box)*

CITY & STATE

ZIP PHONE

EMAIL ADDRESS

BAR ID #

☐ Check enclosed (made payable to RIBA/CLE)
Please do not staple checks.

☐ MasterCard ☐ VISA ☐ AMEX ☐ Discover

Exp. Date _____

Card No. _____

Signature _____

Mail entire page to: CLE Publications
Rhode Island Bar Association
41 Sharpe Drive
Cranston, RI 02920

OFFICE USE ONLY

Check No. _____

Date Rec'd _____

Amount _____

Date Sent _____

Title	Book #	Price	*Choose* Book	USB	Qty.	Total
Business						
NEW! Commercial Law 2016: Update on Recent Developments	CL-16	$40				
Creditors/Debtors						
Collections Practice in RI	13-04	$35				
Avoiding Foreclosure/Loan Modifications	10-14	$28				
Family Law						
Equitable Distribution in Divorce	14-03	$35				
QDRO Practice in RI from A-Z	09-13	$40				
Law Practice Management						
Billing Clients	13-02	$25				
Practical Skills						
Domestic Relations Practice	16-01	$70				
Criminal Law Practice in RI	14-05	$55				
Workers' Compensation Practice in Rhode Island	12-11	$40				
Planning for and Administering an Estate	12-09	$30				
Residential Closings	12-07	$55				
Civil Practice in Superior Court	12-03	$40				
Basic Commercial & Real Estate Loan Documentation	12-02	$55				
Civil Practice in District Court	12-01	$40				
Probate/Elder Law						
Portability	13-05	$35				
Administrative Local Rules	PR-13	$65				
Real Estate						
Landlord/Tenant Handbook	16-04	$15				
RI Real Estate Liens: A Field Guide	14-02	$25				
RI Title Standards Handbook	TS-16	$35				
Trial Practice						
The Changing Science & Technology of DUI Cases	15-01	$35				
Civil Law Practice: The Basics	14-06	$35				
Auto Accident Reconstruction	13-01	$35				
Recent Developments in the Law 2016 available after 11/1/16	RD-16	$55				
Model Civil Jury Instructions	03-02	$49.95				
RI Law of Workers' Compensation	WC-12	$40				

Publication Total	Shipping and Handling Cost
Up to $45	$6
$45.01 - $75	$9
$75.01 - $100	$12
$100.01+	$15

Please allow 2-3 weeks for delivery. All books are sent by FedEx Ground.

Books $ _____

Shipping/Handling $ _____

Sub-Total $ _____

7% R.I. Sales Tax $ _____

Total $ _____

Detach Here

RI Bar Association Continuing Legal Education Seminars

Register online at the Bar's website www.ribar.com and click on CONTINUING LEGAL EDUCATION on the left side menu or telephone 401-421-5740. All dates and times are subject to change.

November 1
Tuesday
Recent Developments in the Law
Crowne Plaza Hotel, Warwick
9:00 a.m. – 4:00 p.m.
6.0 credits + 1.0 ethics credit

November 3
Thursday
Food for Thought
Encryption 101: Keep Your Client Files Safe
RI Law Center, Cranston
12:45 p.m. – 1:45 p.m.
0.5 credit + 0.5 ethics credit

November 7
Monday
What Starbucks Teaches About Ethically Inspired Marketing
LIVE WEBCAST ONLY
12:00 p.m. – 1:00 p.m., 1.0 ethics credit

November 9
Wednesday
Food for Thought
Encryption 101: Keep Your Client Files Safe
Holiday Inn Express, Middletown
12:45 p.m. – 1:45 p.m.
0.5 credit + 0.5 ethics credit

November 12
Saturday
The 2016 Ethy Awards
LIVE WEBCAST ONLY
9:00 a.m. – 11:00 a.m., 2.0 ethics credits
OR
12:00 p.m. – 2:00 p.m., 2.0 ethics credits

November 15
Tuesday
Civil Law Practice in Rhode Island – The Basics of Depositions
RI Law Center, Cranston
3:00 p.m. – 5:00 p.m.
1.5 credits + 0.5 ethics credit

November 16
Wednesday
Food for Thought
Helping Clients Understand the New Overtime Rule
RI Law Center, Cranston
12:45 p.m. – 1:45 p.m., 1.0 credit
*Also available as a **LIVE WEBCAST***

November 18
Friday
Anatomy of a Multi-Million Dollar Verdict
RI Law Center, Cranston
2:00 p.m. – 4:00 p.m.
1.5 credits + 0.5 ethics credit
*Also available as a **LIVE WEBCAST***

November 21
Monday
The Truth, The Whole Truth and Nothing But the Truth: The Ethycal Imperative for Honesty in Law Practice
LIVE WEBCAST ONLY
1:00 p.m. – 2:00 p.m., 1.0 ethics credit

November 30
Wednesday
An Ethics Biography of F. Lee Bailey
LIVE WEBCAST ONLY
12:00 p.m. – 1:00 p.m., 1.0 ethics credit

December 1
Thursday
Food for Thought
Probate Practice: Just the Basics
RI Law Center, Cranston
12:45 p.m. – 1:45 p.m.
0.5 credit + 0.5 ethics credit
*Also available as a **LIVE WEBCAST***

December 9
Friday
Practical Skills
Domestic Law Practice in Rhode Island
RI Law Center, Cranston
8:45 a.m. – 4:45 p.m.
5 credits + 2 ethics credits

Times and dates subject to change.
For updated information go to ribar.com

NOTE: You must register on-line for live webcasts.

The Rhode Island Law Center is now located at
41 Sharpe Drive in Cranston, Rhode Island.
Continuing Legal Education Telephone: 401-421-5740.

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

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. Or, visit our website at www.coastlineeap.com (company name login is "RIBAR"). 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.

Brian Adae, Esq.	831-3150
Neville J. Bedford, Esq.	348-6723
David M. Campanella, Esq.	273-0200
Susan Leach DeBlasio	274-7200
Sonja L. Deyoe, Esq.	864-3244
Christy B. Durant, Esq.	272-5300
Brian D. Fogarty, Esq.	821-9945
Nicholas Trott Long, Esq. (Chairperson)	351-5070
Genevieve M. Martin, Esq.	274-4400
Joseph R. Miller, Esq.	454-5000
Henry S. Monti, Esq.	467-2300
Roger C. Ross, Esq.	723-1122
Adrienne G. Southgate, Esq.	301-7823
Judith G. Hoffman, LICSW, CEAP, Coastline EAP	732-9444 or 800-445-1195

Lawyers Helping Lawyers Committee Members Protect Your Privacy

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.

HONOR ROLL

Volunteers Serving Rhode Islanders' Legal Needs

The Rhode Island Bar Association applauds the following attorneys for their outstanding *pro bono* service through the Bar's Volunteer Lawyer Program, Elderly *Pro Bono* Program, US Armed Forces Legal Services Project, and Foreclosure Prevention Project during August and September 2016.

AUGUST 2016

Volunteer Lawyer Program

Matthew R. Reilly, Esq., *Law Office of George Bauerle*
Phillip C. Koutsogiane, Esq., *Law Offices of Phillip Koutsogiane*
Jacqueline M. Grasso, Esq., *Grasso Law Offices*
Doris A. Lavallee, Esq., *Lavallee Law Associates*
Michael A. Castner, Esq., *Jamestown*
Nancy R. Neis, Esq., *Bazar & Associates*
Stephen G. Linder, Esq., *Law Office of Stephen G. Linder*
James T. Marasco, Esq., *Law Office of James T. Marasco*
Stephen M. Miller, Esq., *Providence*
Richard Howell James, Esq., *James Law*
Jennifer M. Reynolds, Esq., *The Law Offices of Howe & Garside, Ltd.*
David P. Craven, Esq., *David Craven, Attorney at Law*
Andrew M. Cagen, Esq., *Providence*
David B. Kreutter, Esq., *Law Office of David B. Kreutter, Esq.*
Barbara A. Barrow, Esq., *Moore, Virgadamo & Lynch, Ltd.*
Casey J. Lee, Esq., *Providence*
Edward G. Lawson, Esq., *Pawtucket*
Sean C. Donohue, Esq., *The Law Office of Sean C. Donohue, LLC*
Carolyn R. Barone, Esq., *Kirshenbaum Law Associates*
Kimberly Ann Page, Esq., *North Kingstown*
Artika Wadhwa, Esq., *Levoy & Wadhwa, LLC*
Peter C. Tashjian, Esq., *Tiverton*

Elderly Pro Bono Program

Arthur D. Parise, Esq., *Warwick*
James P. Creighton, Esq., *Johnston*
Casey J. Lee, Esq., *Providence*
Jean A. Boulanger, Esq., *Capaldi & Boulanger*
Richard E. Fleury, Esq., *Law Office of Richard E. Fleury*
Ronald R. Warr, Jr., Esq., *Warr & Warr, PC*
Susan D. Vani, Esq., *Providence*
Steven J. Boyajian, Esq., *Robinson & Cole, LLP*
Richard E. Kyte, Esq., *Mapleville*
Michael J. Furtado, Esq., *Cranston*
Charles Greenwood, Esq., *Law Office of Greenwood & Fink*
Joseph F. Hook, Esq., *Middletown*
Richard K. Foster, Esq., *Coventry*
Peter C. Tashjian, Esq., *Tiverton*
Brian G. Goldstein, Esq., *Law Offices of Brian G. Goldstein*
H. Reed Cosper, Esq., *Providence*
Elizabeth Silberman Phillips, Esq., *Hackman and Phillips Elder Law RI LLC*
Steve Conti, Esq., *North Providence*
Stephen A. Rodio, Esq., *Rodio & Brown, Ltd.*
Todd S. Dion, Esq., *North Providence*

US Armed Forces Legal Services Project

Regina Schwarzenberg, Esq., *Newport*
Charles A. Pisaturo, Jr., Esq., *Providence*

SEPTEMBER 2016

Volunteer Lawyer Program

Elizabeth M. Stone, Esq., *Providence*
Jane F. Howlett, Esq., *Bristol*
Phillip C. Koutsogiane, Esq., *Law Offices of Phillip Koutsogiane*
Mark B. Laroche, Esq., *Providence*
John S. Simonian, Esq., *Cranston*
Charles Greenwood, Esq., *Law Offices of Greenwood & Fink*
Allen M. Kirshenbaum, Esq., *Kirshenbaum Law Associates*
Amy E. Veri, Esq., *Providence*
Michael A. Castner, Esq., *Jamestown*
Tiffinay Antoch Emery, Esq., *Law Office of Tiffinay Emery*
Andrew H. Berg, Esq., *Sammartino & Berg LLP*
Kimberly Ann Page, Esq., *North Kingstown*
Richard Jessup, Jr., Esq., *Law Office of Richard Jessup, Jr., Esq.*
Sheila M. Cooley, Esq., *Law Office of Sheila M. Cooley*

Elderly Pro Bono Program

Steven Aaron Robinson, Esq., *Robinson & Robinson*
Steve Conti, Esq., *North Providence*
James P. Creighton, Esq., *Johnston*
Joanne C. D'Ambra, Esq., *Cranston*
John Boyajian, Esq., *Providence*
Jill S. Votta, Esq., *Votta & Votta Offices, Ltd.*
Karen L. Davidson, Esq., *Providence*
Elizabeth Peterson Santilli, Esq., *Asquith & Mahoney, PC*
Arthur D. Parise, Esq., *Warwick*
Denise Acevedo Perez, Esq., *The Law Office of Denise Acevedo Perez*
Frank J. Manni, Esq., *Johnston*
Lori J. Norris, Esq., *Law Office of Lori J. Norris*
Joanne C. D'Ambra, Esq., *Cranston*
Christopher M. Lefebvre, Esq., *Pawtucket Legal Clinic*
Casey J. Lee, Esq., *Providence*
Kathleen G. Di Muro, Esq., *Law Office of Kathleen G. Di Muro*
Joseph P. Casale, Esq., *The Aquidneck Legal Center*
Priscilla Facha DiMaio, Esq., *Providence*
John T. Longo, Esq., *Citadel Consumer Litigation, P.C.*
Phillip C. Koutsogiane, Esq., *Law Offices of Phillip Koutsogiane*
Joseph P. Murphy, Esq., *Amalfitano Murphy, LLC*
William J. Delaney, Esq., *The Delaney Law Firm, LLC*

US Armed Forces Legal Services Project

Clare T. Jabour, Esq., *Providence*

The Bar also thanks the following volunteers for taking cases for the Foreclosure Prevention Project and for participating in Ask A Lawyer and Legal Clinic events during August and September.

Foreclosure Prevention Project

Stephen M. Miller, Esq., *Providence*
James T. Marasco, Esq., *Law Office of James T. Marasco*

Continued on next page

Nancy R. Neis, Esq., *Bazar & Associates*
Doris A. Lavallee, Esq., *Lavallee Law Associates*
Brian G. Goldstein, Esq.,
Law Offices of Brian G. Goldstein
Peter C. Tashjian, Esq., *Tiverton*
Edward G. Lawson, Esq., *Pawtucket*
Charles A. Pisaturo, Jr., Esq., *Providence*
Barbara A. Barrow, Esq.,
Moore, Virgadamo & Lynch, Ltd.
Carolyn R. Barone, Esq.,
Kirshenbaum Law Associates
Todd S. Dion, Esq., *North Providence*
Elizabeth Silberman Phillips, Esq.,
Hackman and Phillips Elder Law RI LLC
Joseph P. Murphy, Esq.,
Amalfitano Murphy, LLC
William J. Delaney, Esq.,
The Delaney Law Firm, LLC

Legal Clinic

Brian G. Goldstein, Esq.,
Law Offices of Brian G. Goldstein
Denneese C. Seale, Esq., *Providence*
Tara R. Cancel, Esq.,
The Law Offices of Tara R. Cancel
Kermin Liu, Esq., *Law Office of Kermin Liu*
Brian D. Fogarty, Esq.,
Law Office of Devane, Fogarty & Ribezzo
Steven Aaron Robinson, Esq.,
Robinson & Robinson

Ask A Lawyer

Kathleen Wyllie, Esq., *Wyllie Law LLC*
Brian D. Fogarty, Esq.,
Law Office of Devane, Fogarty & Ribezzo
Joseph M. Proietta, Esq., *Providence*
Sheila M. Cooley, Esq.,
Law Office of Sheila M. Cooley

For information and to join a Bar *pro bono* program, please contact the Bar's **Public Services Director Susan Fontaine** at: **sfontaine@ribar.com** or **401-421-7758.** For your convenience, Public Services program applications may be accessed on the Bar's website at **ribar.com** and completed online.

The City by the Bay: San Francisco

American Bar Association Delegate Report – 2016 Annual Meeting

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

Mark Twain is credited with saying, "The coldest winter I ever spent was a summer in San Francisco." There is some question whether that comment was ever made, but no question that San Francisco weather is mercurial. August 2016 was no exception, with residents and visitors wearing winter coats and gloves to brave the summer's chill. The weather inside the Moscone Convention Center was a little warmer due to the spirited discussions on resolutions before the American Bar Association (ABA) House of Delegates.

At the Meeting, ABA President Linda Klein appointed me to the Gun Violence Standing Committee, a topical and important task. I also serve on the ABA's Rules and Bylaws Committee, Solo, Small Firm and General Practice Division, and the National Caucus of State Bar Associations, a grassroots House of Delegates committee. I continue to keep an eye on happenings in the Minority Caucus and Women's Caucus, all of which created a very busy annual meeting.

At the meeting, there were discussions relating to how technology has forced us to adapt our delivery of the legal service model. The ABA Commission on The Future of Legal Services has published, *Report on the Future of Legal Services in the United States*, which I recommend you access, online, via this link – ambar.org/ABAFuturesReport – as it contains information on what we will be faced with in the next few years in our practices.

I am happy to report the current ABA leadership features a number of outstanding women. Outgoing ABA President Paulette Brown is the first female African American president. Current ABA President Linda Klein, of Georgia, is a leader in the Women's Bar and a staunch advocate regarding the delivery of *pro bono* legal services. And, our House of Delegates Chair, Patricia Lee Refo of Arizona, rounds out the leadership of amazing women.

Current events have always impacted ABA meetings, and this meeting was no different. The issue of human rights in Turkey, specifically, due process rights of lawyers and journalists and others allegedly involved in the Turkish coup, was a subject of discussion. A threat to lawyers anywhere is a threat to lawyers everywhere. The very day the delegates met, scores of lawyers were attacked in Pakistan and murdered by forces opposed to freedom and the access to justice lawyers embody and represent. We also discussed the violence against police officers and citizens in Dallas, Minnesota, and Baton Rouge. This conversation underscored the need for progress in the area of race relations. The ABA is uniquely equipped to stand up for human rights, whether in Turkey, Pakistan, or the United States, due to its focus on diversity and inclusion. I hope you will join me in facilitating a dialogue about these important issues.

Passed ABA House of Delegates resolutions included those dealing with: evidentiary privilege for lawyer referral services; the inequities of offender funded private probation; and continued discrimination and harassment of women and people of color in large law firms.

As Lyndon Johnson was quoted as saying, "There is no problem that cannot be solved together, and none we can solve alone." Helping lawyers work together is what the ABA does best. Although it only represents a third of all American lawyers, the ABA can focus its 300,000 members on solving these problems. The ABA is made up of 3,500 different commissions, committees, and sections. All these entities represent specific segments of the practice. Every attorney may find a place in the ABA in one of these entities.

Still, the ABA cannot be completely representative of the United States legal profession if only 300,000 are members out of a total of 1.3 million lawyers. The ABA has a lot of work to do to better engage young lawyers, Main Street lawyers, and others who see no value to ABA membership other than a glossy magazine published monthly.

I will continue to work hard to represent your interests as your Bar Delegate. I welcome your comments, suggestions and questions as to current ABA policy. As always, I am honored to serve as your ABA delegate and strive to be a servant leader of our Bar. ❖

Testifying Expert Witnesses

continued from page 11

clear the substance of discoverable testifying expert material is limited to what the expert relied upon by in formulating the ultimate opinion and the available avenues of discovery related to that ultimate opinion are interrogatory answers and a deposition – not documents.

Interestingly, the **Cashman** contradicts and renders meaningless the Supreme Court's previous **Crowe** decision.[13] In **Crowe**, the Supreme Court held that "that the clear language in the second sentence of subdivision (b)(3)[, of Rule 26,] requires that a court protect all core or opinion work product of an attorney, whether or not shared with an expert."[14] The Supreme Court went on to note: "We believe that this command to courts, that they 'shall protect' opinion work product, was intended to apply to all discovery requests of materials prepared in anticipation of litigation because of the admonition's location in the general portion of Rule 26 applying to all discovery. *See* Rule 26(b)(3)… On the other hand, most factual or ordinary work product prepared in anticipation of litigation is discoverable according to the first sentence of subdivision (b)(3)…"[15]

Cashman has two practical effects on **Crowe**: 1) it renders **Crowe's** distinction between core attorney work product and ordinary work product meaningless; and 2) it explicitly contradicts **Crowe's** statement that "most factual or ordinary work product prepared in anticipation of litigation is discoverable according to the first sentence of subdivision (b)(3)…"[16] With respect to the distinction **Crowe** draws between protected core attorney work product and discoverable, ordinary, work product, **Cashman** has rendered that distinction meaningless. Because **Cashman** precludes the discovery of *all* documents relative to a testifying expert, there is no need to distinguish between core attorney work product documents and ordinary work product documents. This further exemplifies the long-standing confusion surrounding Rhode Island's Rule 26. Confusion which is now heightened by the fact that the Supreme Court has issued two conflicting decisions. **Crowe** or **Cashman** – which is it?

In the wake of **Cashman**, it is important practitioners grasp the effect this bright line rule will have on their pending

and future cases involving testifying experts. Of obvious significance is the limited ability practitioners now have to cross-examine testifying experts relative to the substance of the documentation which they intend to introduce at trial. Barring an agreement between the parties, the Supreme Court's interpretation of Rule 26 precludes an adverse party from cross-examining an expert witness relative to trial exhibits until trial. This reality has the unfortunate potential of fostering trial by ambush. To the extent documents, such as computer models, are shielded from discovery, it will severely limit an adverse party's ability to conduct a **Daubert** hearing relative to the expert's methodology reliability. Without the documents relied upon by the testifying expert, it is significantly more difficult to determine whether the methodology employed is reliable or generally accepted in the particular field of expertise. Given this reality, as well as the confusion sure to stem from the conflict between **Cashman** and **Crowe**, an amendment to Rhode Island's Rule 26 appears to be necessary.

Since the last Rhode Island amendment to Rule 26 in 2006, its federal counterpart has been amended three times. A good indication Rhode Island's Rule 26 is due for an overhaul. The competing arguments in **Cashman** and **Crowe** provide a good foundation for the debate relative to revision. As noted by Cashman, the existing federal counterpart to Rhode Island's Rule 26 provides for the disclosure of *all considered material*, less core attorney work product. Specifically, Federal Rule for Civil Procedure (FRCP) 26 requires parties exchange expert reports, the substance of which is required to include "the facts or data considered by the [expert] witness in forming them."[17]

Recently, the U.S. District Court of Rhode Island, interpreting FRCP 26 (a)(2)(B), has stated "[t]he inclusion of the requirement to produce 'facts or data' is broadly interpreted to require disclosure of any material considered by the expert that contains factual ingredients; it is not limited to the facts or data relied on by the expert."[18]

This is not to say, that FRCP 26 is limitless with respect to disclosure. As noted by one federal court, notwithstanding the broad considered language, "attorneys' 'theories or mental impressions' *are* protected, but everything else is fair game."[19]

Lawyers on the Move

Michael F. Edwards, Esq. and **Jeffrey E. Estey Jr., Esq.** are partners at **Morrison Mahoney LLP, Providence Office**, 10 Weybosset Street, Suite 900, Providence, RI 02903.
401-331-4660 medwards@morrisonmahoney.com
jestey@morrisonmahoney.com

Adi Goldstein, Esq. is now a partner at **Hinckley Allen**, 100 Westminster Street, Suite 1500, Providence, RI 02903.
401-274-2000 agoldstein@hinckleyallen.com www.hinckleyallen.com

Hailey M. Munns, Esq. is now with the **Law Office of Michael C. Lima**, 692 Warren Avenue, East Providence, RI 02914.
401-270-1144 Hailey@LimaLawOffices.com

Daniel C. Murray, Esq. is now an associate at **Hinckley Allen**, 100 Westminster Street, Suite 1500, Providence, RI 02903.
401-274-2000 dmurray@hinckleyallen.com www.hinckleyallen.com

Michael David Resnick, Esq. is now practicing with **John Reilly and Associates**, 300 Centerville Road, Summit West, Suite 300, Warwick, RI 02886 and 8 North Main Street, Suite 304, Attleboro, MA 02703.
401-272-2800 508-222-1400 mresnick@Lawyers-Online.us

Kathleen Wyllie, Esq. has opened her own law practice, **Wyllie Law LLC**, 615 Jefferson Boulevard, Suite B107, Warwick, RI 02886.
401-234-1575 kwyllie@wyllielaw.com.

Rhode Island Probate Court Listing on Bar's Website

The Rhode Island Bar Association regularly updates the Rhode Island Probate Court Listing to ensure posted information is correct. The Probate Court Listing is available on the Bar's website at **ribar.com** by clicking on **FOR ATTORNEYS** on the Home page menu and then clicking on **PROBATE COURT INFORMATION** on the drop-down menu. The Listing is provided in a downloadable pdf format. Bar members may also increase the type size of the words on the Listing by using the percentage feature at the top of the page.

This accords with the Rhode Island Supreme Court's **Crowe** Decision which affirmed that core attorney work product is protected from disclosure even with respect to testifying expert discovery.[20]

In sum, the Supreme Court's recent **Cashman** decision should provide the impetus for revising Rhode Island's Rule 26. It is the authors' opinion that FRCP 26, as revised, provides a well-reasoned approach to testifying expert discovery, similar to the approach advocated by Cashman in its writ. While requiring disclosure of facts and data considered, it stops short of requiring the disclosure of core attorney work product, something the Supreme Court has decidedly protected already.[21] Importantly, amending Rhode Island's Rule 26 to mirror that of its federal counterpart will remove the potential for any trial by ambush. Specifically, it will require litigants to fully disclose all documents considered by an expert in formulating its final opinion. This will foster the truth-seeking mission of the court, and ensure that parties adverse to a testifying expert are provided all the material necessary to conduct a full and thorough cross-examination of the expert prior to trial.

ENDNOTES

1 ***See** May 13, 2014 hearing transcript at pgs. 38-39, Silverstein, J.*

2 ***See Crowe Countryside Realty Assocs. Co., LLC v. Novare Engineers, Inc.**, 891 A.2d 838, 839 (R.I. 2006).*

3 ***See** Super. R. Civ. P. 26(b)(4)(A).*

4 ***See Heitmann**, 98 F.R.D. at 743 (non-testifying expert's report necessary to cross-examination of testifying expert who relied on report). **See also In re IBM Peripheral EDP Devices Antitrust Litigation**, 77 F.R.D. 39, 41 (N.D.Cal.1977) (purpose of rule 26(b)(4)(A)(ii) to promote effective cross-examination); **Quadrini v. Sikorsky Aircraft Division, United Aircraft Corp.**, 74 F.R.D. 594, 595 (DC D. Conn. 1977) (same); Advisory Committee Note to Fed.R.Civ.P. 26, 48 F.R.D. 497, 503, 504 (1970) (rule 26(b)(4) needed for effective cross-examination of expert trial witnesses).*

5 ***See Eliasen v. Hamilton**, 111 F.R.D. 396, 400 (N.D. Ill. 1986) (emphasis added).*

6 ***See** R.I. R. Evid. 702.*

7 ***Crowe Countryside Realty Ass., Co., LLC v. Novare Engineers, Inc.**, 891 A.2d 838, 848 (R.I. 2006).*

8 *Cardi Brief at Pg. 39, dated December 28, 2015.*

9 ***See** 1970 Amendments to F.R.C.P. 26(b)(4)(A)(i).*

10 ***See** R.I. R. Civ. Pro. Rule 26(b)(4)(A).*

11 ***See** Superior Court Order dated September 3, 2015, Stern, B.*

12 ***See** Superior Court Opinion dated June 3, 2016, Robinson.*

13 ***See Crowe Countryside Realty Associates, Co., LLC v. Novare Engineers, Inc.**, 891 A.2d 838, 847 (R.I. 2006).*

14 *Id.*
15 *Id.*
16 *Id.*
17 ***See*** *F.R.C.P. 26(a)(2)(B)(ii).*
18 ***See JJIInt'l, Inc., v. Bazar Grp., Inc.****, No. 11-206ML, 2013 WL 3071299, at *2 (D. R.I. 2013) (emphasis added) (citing* ***Chevron Corp.v. Shefftz****, 754 F.Supp.2d 254, 264 (D. Mass. 2010)) "Rather, Rule 26(a)(2)(B) requires any information furnished to a testifying expert that such an expert generates, reviews, reflects upon, reads, and/or uses in connection with the formulation of his opinions, even if such information is ultimately rejected."* ***Id.*** *(emphasis added) (internal quotes omitted);* ***see also In re Pioneer Hi-Bred Intern., Inc.****, 238 F.3d 1370 (U.S. App. Ct. F. Cir. 2001). ("…Rule 26 of the Federal Rules of Civil Procedure make clear that documents and information disclosed to a testifying expert in connection with his testimony are discoverable by the opposing party, whether or not the expert relies on the documents and information in preparing his report.") (emphasis added).*
19 ***See Yeda Research & Dev. Co. v. Abbott GmbH & Co. KG****, 292 F.R.D. 97, 104-05 (D.D.C. 2013) (citing* ***Fialkowski****, 2012 WL 2527020, at *3 ("[R]equired disclosures under Rule 26(a)(2)(B) [after the 2010 amendment] still include 'any information furnished to a testifying expert that such an expert generates, reviews, reflects upon, reads, and or uses in connection with the formulation of his opinions ....'" (quoting* ***Synthes Spine Co., L.P. v. Walden****, 232 F.R.D. 460, 463 (E.D.Pa.2005)).*
20 ***See Crowe Countryside Realty Assocs. Co., LLC v. Novare Engineers, Inc.****, 891 A.2d 838, 839 (R.I. 2006).*
21 ***See id.*** ❖

Justices of the Peace

continued from page 29

By the mid-nineteenth century, however, via P.L. 1844. An act to prevent clandestine marriages, § 4, *the authority to perform weddings as detailed in* P.L. 1822, An act to prevent clandestine marriages, § 4, *remained unchanged. Yet,* P.L. 1844, An act establishing courts of common pleas, § 5, *redefined the justices of the courts of common pleas eliminating the inclusion of justices of the peace. Hence, the 1844 statutory enumeration of those empowered to perform weddings in Rhode Island remained as it was in the 1822 statute, but the 1844 courts of common pleas statute redefined the serving justices without the inclusion of justices of the peace. Rhode Island justices of the peace could no longer join persons in marriage.*

P.L. 1857, Of domestic relations, Title XX §§ 7 & 8, and P.L. 1872, Of marriage, § 7 & 8, *refined and limited the authority to perform weddings with no mention of justices of the peace.* P.L. 1872 § 7 *reads as follows: "Any ordained minister or elder of any religious denomination who shall be domiciled in this state, and either justice of the supreme court, may join persons in marriage in any town of the state."* P.L. 1872 § 8 *authorized New Shoreham wardens.*

P.S. 1882, ch. 163, § 6, and G.L. 1896, ch. 191, § 8 *modified the statutory language yet again without extending power to justices of the peace; those authorized were limited to "Minister or elder so licensed, and every justice of the supreme court ... and wardens of New Shoreham ..."*

Rhode Island's current statute, R.I. Gen. Laws § 15-3-5, Officials empowered to join persons in marriage, *traces its history from* G.L. 1896 *through numerous subsequent reenactments and modifications primarily enlarging the persons authorized to perform weddings, but without adding justices of the peace.*

Currently, R.I. Gen. Laws § 15-3-5 *contains a lengthy list of those empowered to join persons in marriage, but justices of the peace are not among them.*

9 *R. I. Supreme Court Rules, Article V. Rules of Professional Conduct. Preamble and Scope. In addition, **a lawyer should further the public's understanding of and confidence in the rule of law** and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. (emphasis added)*

*R. I. Supreme Court Rules, Article V. Rules of Professional Conduct. Rule 7.1. Communications concerning a lawyer's services. **A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services.** A communication is false or misleading if it: (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;... (emphasis added)*

10 *Aristotle*, Nicomachean Ethics, *trans. Robert C. Bartlett and Susan D. Collins (Chicago and London: University of Chicago, 2011). In Aristotelian ethics aiming for and hitting the target "good" fulfills one's* telos, *which is the final end or purpose of human life (see 1094a, 1-26. The correct use of language would seem to be part of that excellence. Virtues for Aristotle are: courage* (andreia)*; moderation* (sōphrosumē)*; liberality* (eleutheriotēs)*; magnificence* (megaloprepeia)*; greatness of soul* (megalopsuchia)*; "ambition"* (philotmia)*; "gentleness"* (praotēs)*; "truthfulness"* (alētheia)*; wittiness and tact* (eutrapelia & epedexia)*; "friendliness"* (philia)*; and justice* (dikaiosunē)*. The "perfection" of the virtues targets "good"* (agathos), *leading to* eudaimonia *or human flourishing, loosely translated as excellence and "happiness."*

11 *Alasdair MacIntyre*, After Virtue: A Study in Moral Theory, *3rd ed. (Indiana: University of Notre Dame, 2007).*

*MacIntyre takes Aristotle's idea of virtue and makes it more modern. MacIntyre says that virtue can only be understood in terms of virtue in **community**. In various communities there are **practices** and **traditions**; traditions of the community are used to inform the practices which make for excellence in that community. MacIntyre uses an example from chess. A chess player who is seeking excellence as a chess player uses the traditions to*

In Memoriam

Thomas F. Connors, Esq.

Thomas F. Connors, 68, of North Scituate, passed away April 12, 2016. Born on March 9, 1948, in Providence, Rhode Island, he was the son of the late Leo T. and Janet M. Olson Connors. He was a Pilgrim High School graduate. He enlisted in the U.S. Army and served in active combat in Vietnam for 18 months with the 82nd Airborne Division and the 173rd Airborne Brigade. He received the Bronze Star, Purple Heart, Vietnamese Cross of Gallantry, Air Medal, Distinguished Unit Citation, and Vietnamese Campaign Ribbon.He graduated from the University of Rhode Island and Suffolk Law School, after which he joined his father at the Law Firm of Connors & Kilgas and, later, Joseph Voccola and Associates. He practiced family and criminal law, and he was a guest lecturer at Roger Williams University. An avid outdoorsman, Tom loved to be in nature. He was deeply passionate about spending time with his family, especially his children and grandchildren. He was the father of Thomas F. Connors, Jr. of Cranston, Sean D. Connors of New Bedford, MA and Kelly Connors of Warren.

Raymond Alan LaFazia, Esq.

Raymond Alan LaFazia, 67, of Chepachet, passed away on September 23, 2016. He was the husband of the late Dale Dwyer. Ray was born in Providence, the son of the late Raymond A. LaFazia and Helen Jones LaFazia. Ray graduated from Moses Brown, University of Rhode Island, and Suffolk Law School. He practiced at Gunning & LaFazia until December 2015, when he retired as president. He was a member of the U.S. District Court, the U.S. Court of Appeals, and the RI Asbestos Defense Counsel Steering Committee. Ray was a lover of animals and a supporter of animal rights and shelters. He was a knowledgeable gardener and an avid baseball player, where he enjoyed both the game and the camaraderie that followed. Ray is survived by his sister, Jeanne LaFazia, and her husband, George Mason, and his two dogs Lucky and Star.

inform the practices, practices the art/science to become better, all the while striving to achieve what he calls a ***narrative unity*** *or* ***narrative coherence****. Narrative coherence relates to the morality story of ourselves. He says that adherence to the good(s) internal to various practices (such as knowing how to strategize a chess match) will bring an individual closer to achieving what he calls a narrative coherence which is, in a sense, a* telos.

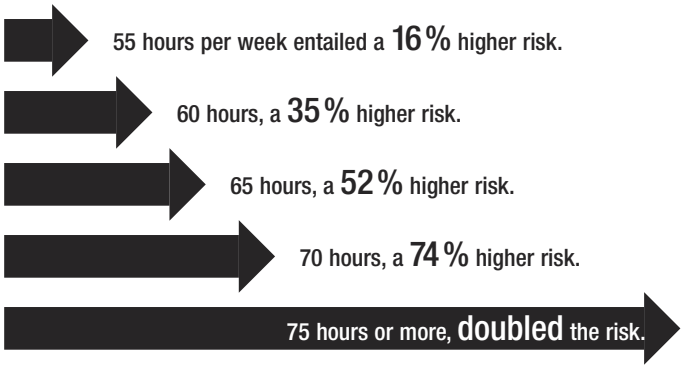
12 *Atticus' use of the carpenter merits comment. Aristotle uses the carpenter in* Nicomachean Ethics *(1098a, 27-35) in a way that points directly to the idea of virtue* as understood *in a community. At the beginning of* Nichomachean Ethics *he says, "one must not seek out precision in all matters alike but rather in each thing in turn as accords with the subject matter in question and insofar as is appropriate to the inquiry. For both carpenter and geometer seek out the right angle but in different ways: the former seeks it insofar as it is useful to his work; the latter seeks out what it is or what sort of a thing it is, for he is one who contemplates the truth." Therefore, one has to ask whether Atticus' request for precision in the language is less virtuous than it appears.*

13 *"Justices of the Peace in Rhode Island serve four year terms and are authorized to take acknowledgments; administer oaths and affirmations; execute jurats; witness signatures; certify copies; execute protests; and issue subpoenas to witnesses. The power to perform a marriage ceremony is* **NOT** *granted to Justices of the Peace by Rhode Island Law." http://sos.ri.gov/divisions/notary-public/justice-of-the-peace [accessed June 8, 2016].* ❖

Working Too Much May Increase Risk of Cardiovascular Disease

Working long hours may increase your risk for cardiovascular disease. The *Wellness Letter* of the University of California School of Public Health recently reported on a study from the University of Texas which followed a representative sample of 1,926 initially healthy American workers for 25 years. As reported in the *Journal of Occupational and Environmental Medicine,* researchers found a relationship between average hours worked per week for at least 10 years and increasing risk of heart attack, stroke, hypertension, angina, and other cardiovascular events.

Compared to working 45 hours per week, working . . .



The researchers controlled for age, sex, education, race/ethnicity, and pay status.

Most, but not all, previous studies have also found an association between long work hours and increased cardiovascular risk. It's not known how the longer hours may boost the risk – perhaps by increasing stress, depression, or sleep problems, or by encouraging poor eating and exercise habits. Though the study did not evaluate this, if you work long hours by choice and like what you're doing, you're probably less likely to have adverse health effects. What's more, being involuntarily unemployed or underemployed is also linked with poorer health.

Editor's Note: *This health tip is brought to you as a service of the Rhode Island Bar Association's Lawyers Helping Lawyers (LHL) Committee. Please see page 32 for more information about the LHL Committee's sponsored services for Bar members and their families.*

Interested in Writing an Article for the *Rhode Island Bar Journal?*

The Bar Association is always looking for well-written, thought-provoking, topical submissions for publication consideration in the *Bar Journal*. And, what better way to enhance your professional standing than through an article published in the *Rhode Island Bar Journal* and seen by its over 6,500 lawyers, judges and news media editors? To find out how you may have an article considered for *Bar Journal* publication, and related Mandatory Continuing Legal Education credit, please contact *Rhode Island Bar Journal* Editor and Rhode Island Bar Association Director of Communications Frederick Massie at 401-421-5740 or email fmassie@ribar.com.

Advertiser Index

Advocacy Center Director, RI	29
Ajootian, Charles – 1031 Exchange Services	11
Alliant Title and Escrow – Florida	26
AndvertisingInc	41
Aon Liability Insurance	back cover
Arbitrator – Nicholas Trott Long	41
Balsofiore & Company, Ltd. – Forensic Accounting, Litigation Support	16
Briden, James – Immigration Law	42
Coia & Lepore, Ltd. – Mediation	36
Connecticut Attorneys – Messier Massad & Burdick LLC	12
Consulting – Peter Barry	27
Dennis, Stephen – Workers' Compensation	16
Economists – EPR	29
Financial Guardianship – Goldman	20
Fulweiler LLC – Marine-Related Legal Services	28
Higgins, Cavanagh & Cooney, LLP – Additional location	15
Howe & Garside – Meditation	20
Humphrey, Richard – Law Offices	29
Kelly & Mancini, PC – Randall Souza	37
Leone Law, LLC – Anthony R. Leone II	10
Life Insurance – Arlen	22
Mathieu, Joan – Immigration Lawyer	34
Mediation & Arbitration – Donald Gregory	22
Mediation & Arbitration – Joseph Keough	14
Mignanelli & Associates, LTD. – Estate Litigation	17
Morowitz, David – Law Firm	24
Ocean State Weather – Consulting & Witness	34
Office Space – Warwick Law Office	17
Pannone Lopes Devereaux & West LLC	8
Paradigm Computer Consulting	17
PellCorp Investigative Group, LLC	22
Pfieffer, Mark – Alternate Dispute Resolution	34
Piccerelli, Gilstein & Co. – Business Valuation	10
Purcell, Jim – ADR	23
Professional Office Space – South Kingstown, RI	40
Real Estate Analysis – Marie Theriault	27
Revens, Revens & St. Pierre – Workers' Compensation	39
RILawyers.com	inside back cover
Sciarretta, Edmund – Florida Legal Assistance	42
SecureFuture Tech Solutions	37
Soss, Marc – Florida Estates/Probate/ Documents	23
StrategicPoint – Investment Advisory Services	9
Technology Lawyers – Barlow Josephs & Holmes	18
Vehicle Value Appraisals – Green Hill	36
YKSM – CPAs/Business Consultants	21
Zoning Handbook, 3rd Edition – Roland Chase	15

RILawyers.com

Need a lawyer? Find a lawyer.

401.714.3126

Are you a Lawyer in Rhode Island?

Get Listed. Get Business. Get Results.

Join Rhode Island's Largest Online Attorney Directory. Showcase your legal knowledge, experience & qualifications via attractive search-optimized listings.

New Features:

- Claiming Your Listing is Easy & Free
- Featured Listings Available
- Search Engine Optimized Profiles
- Post Articles, Events & Classifieds
- Get Monthly Reporting
- Dedicated, Local Account Manager
- Lawyer Marketing Solutions
- Get Listed on Other Top Directories

Visit **RILawyers.com** today to learn how to get started!

The Aon Attorneys Advantage
Professional Liability Insurance Program

looks at insurance from a fresh perspective...

YOURS

For professional liability insurance designed from YOUR perspective, please call **1-800-695-2970** or visit **www.attorneys-advantage.com** today!

When you sit down with a client, you strive to see their legal issue from their perspective and make recommendations based on their unique situation. We operate similarly.

At Aon Attorneys Advantage, we understand the services you perform and the types of risks you may encounter, so we are able to offer insurance solutions designed to fit your individual needs. You receive:

- A team of specialists dedicated solely to attorneys' professional liability.
- Insurance created to help cover law firms' unique exposures.
- Quality coverage at a price that fits your budget.

Sponsored by: RHODE ISLAND Bar Association 1898

Administered by: AON

Underwritten by: AXIS

E-10932-0914