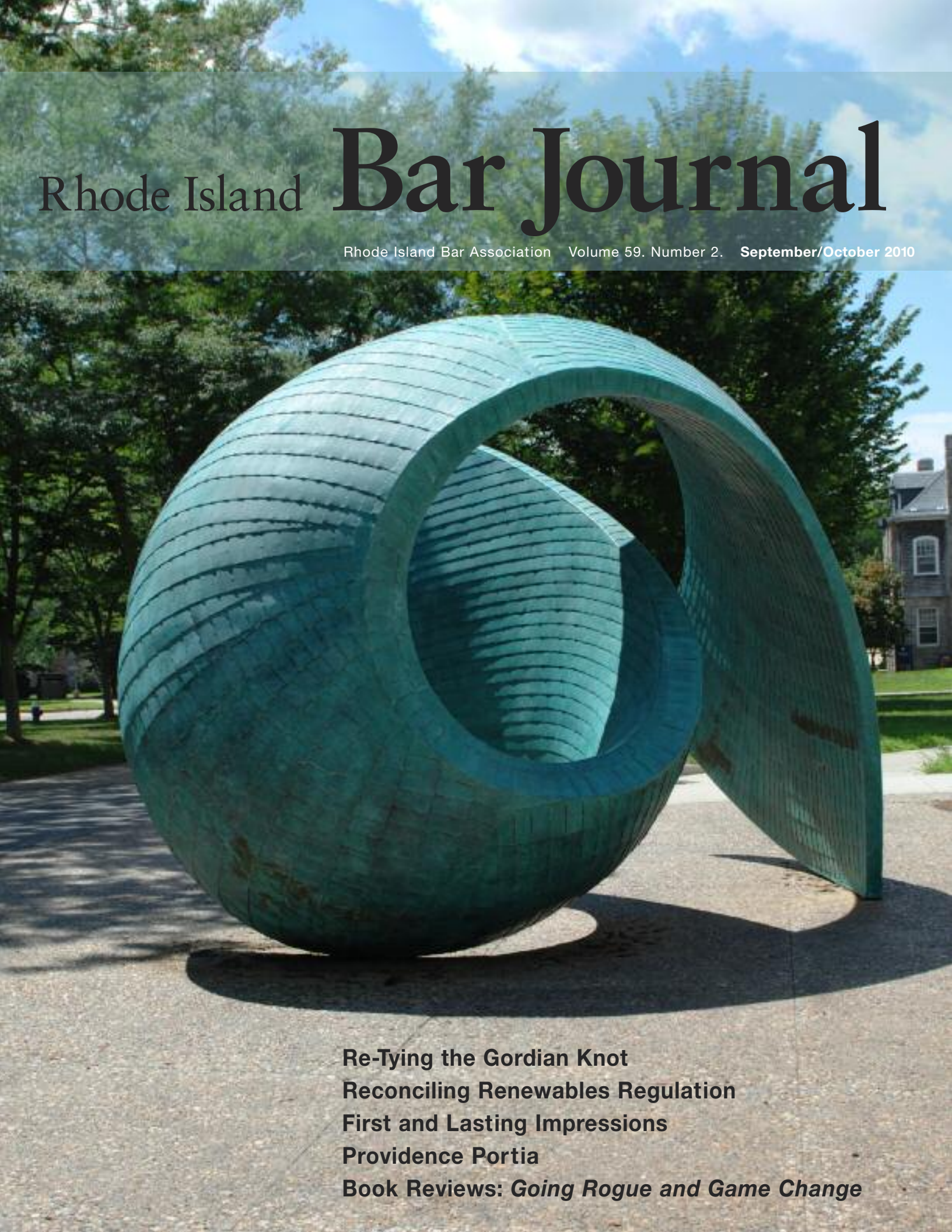

Rhode Island Bar Journal

Rhode Island Bar Association Volume 59. Number 2. **September/October 2010**

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RHODE ISLAND BAR ASSOCIATION
Bar Association
1898

RHODE ISLAND BAR ASSOCIATION LAWYER'S PLEDGE

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

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Front Cover Photograph
Peter Diepenbrock's *Torsion III*
outside University of Rhode Island's Lippitt Hall, Kingston, RI by Brian McDonald

Our Balancing Act: Get A Life!

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

Clearly, lawyers particularly, and especially now, must develop self-awareness and self-protection skills. We have to know when we have too much on our plates. We must develop a sense of balance between our professional and personal lives.

Waiting for cases to be heard, the most common courthouse comments from lawyers are that they are burned out, feeling abused, not appreciated and how the practice of law has become more difficult with increasingly complicated client problems. Many of these lawyers are suffering from compassion fatigue where people exposed to traumatic events while helping others develop their own stress-related symptoms. Here are some other sobering facts:

- In studies conducted in Washington and Arizona, one third of lawyers showed symptoms of clinical depression or substance abuse, double the national average for disorders of this type.
- In a survey of 105 occupations, lawyers ranked first in experiencing depression, and they are four times more likely to be depressed than the general population.
- Lawyers suffering from depression consider suicide in alarmingly high numbers, and those who consider suicide are more likely to carry out that intent.
- In the United States, the number of practicing lawyers with alcohol or drug problems is twice the national average.
- Substance abuse exists in a significant number of disciplinary complaints brought against lawyers.
- Statistics show many lawyers are leaving the profession citing burn-out, stress, job dissatisfaction and disillusionment.

Clearly, lawyers particularly, and especially now, must develop self-awareness and self-protection skills. We have to know when we have too much on our plates. We must develop a sense of balance between our professional and personal lives.

Our profession requires long hours, hard work and dedication. However, learning to develop balanced and fulfilling lives is equally important. We need to take care of ourselves emotionally, physically, and spiritually. When we improve ourselves, we spread the love and reap the joy. Teaching classes, taking courses, learning to play a musical instrument, reading good books, studying history, philosophy, art, and literature, all these pursuits develop our souls and help nurture inner peace.

Beyond the things we do for ourselves, if we hope to develop balanced and fulfilling lives, we must also share our time, skills and talents to connect meaningfully with those around us. Volunteering doesn't have to be related to the legal world. Work for Habitat for Humanity building houses, walk, bike or swim for charity. Bring your pet to visit the infirm, cook fabulous food for someone who is homebound. Serve on a statewide or community non-profit organization's board of directors. Create your own support network and, in turn, support yourself.

My group of lawyer friends gets together every other month. We have dinner, share stories, briefs and judicial nuances. We put money in a pot, and, once a year, we take a vacation. We started off with Nantucket, but we have since branched off to Bermuda, Paris, and Rome. However, the benefits of this group are not the fabulous travel vacations. We all reap the benefits daily. I can call one of my colleagues on the way to the courthouse to make sure I haven't forgotten a point in an argument. We can complain to each other about the bad things, but offer up positives and give each other support both personally and professionally. These are friends with enormous benefits.

We need to retrain ourselves. Learning to live balanced lives does not happen overnight. I believe columnist and novelist Anna Quindlen says it best:

> *Get a life in which you notice the smell of salt water pushing itself on a breeze over seaside heights, a life in which you stop and watch how a red tailed hawk circles over the water, or the way a baby swallows with concentration when she tries to pick up a Cheerio with her thumb and first finger. Get a life in which you are not alone. Find good friends and people you love, and who love you. And remember that love is not leisure, it is work. Pick up the phone. Send an email. Write a letter. Get a life in which you are generous. And realize that life is the best thing ever and that you have no business taking it for granted. Care so deeply about its goodness that you want to spread it around. Take money you would have spent on beers and give it to charity. Work in a soup kitchen. Be a Big Brother or Sister. Take good care of yourselves.*

I'll see you at the lobby of Theatre by Sea, at the Beverly Hale Library, at a Learning Connection photography class, in a kayak under Middlebridge, or at the Bar Association. ❖

New Attorney Advancement Task Force Gears Up For 2010-2011

The Rhode Island Bar Association's New Attorney Advancement Task Force (NAATF) sponsors a wide range of excellent programs and seminars offering new members of the Bar a wealth of opportunities to improve their practice, knowledge of the law and lives. Plans for this year include: a repeat performance of the highly successful networking event with the chairs and representatives of Bar Committees and the Bar's Lawyer Referral Service and Volunteer Lawyer Program; a review and analysis of the Bar's new lawyer-oriented seminars; focused seminars on Superior and District Court practice; a legal career option event; and more!

Superior Court Bench/Bar Committee Co-Chair Melissa E. Darigan was one of the more than 20 participating Bar committee representatives who provided over 50 new Bar members with information at the fast-moving, fun and educational speed-dating-style Bar Committee Networking event last year. Similar events, and many more new attorney focused programs, are planned for 2010-2011.

Bar members, both new and seasoned, interested in joining and working with this group on related programming and events are encouraged to log in on the Members Only section of the Bar's website at www.ribar.com and sign up for the New Attorney Advancement Task Force through the Bar Committee Sign-up link.

To learn more about the New Attorney Advancement Task Force, please contact Task Force Chair Rebecca E. Dupras by telephone: 401-824-5130 or email: rdupras@pldwlaw.com.

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:
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Re-tying the Gordian Knot: *Hindson v. Allstate* and its progeny

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*In **Hindson v. Allstate Insurance Co.**,…the Supreme Court of Rhode Island declared a ceasefire in the battle of the draftsmen… However, since then,…the Court has created a series of rule-swallowing exceptions and effectively negated the force and effect of **Hindson**.*

In **Hindson v. Allstate Insurance Co.**, 694 A.2d 682 (R.I. 1997) (Flanders, J.), the Supreme Court of Rhode Island declared a ceasefire in the battle of the draftsmen often waged by two insurance companies whose policies cover the same loss on a primary basis yet contain other-insurance clauses that purport to disclaim primary coverage because of the existence of the other policy. In the future, the Court eloquently and stridently ruled, such clauses would be deemed mutually-repugnant, and the primary policies in which they were contained would share coverage on a pro-rata basis, according to their respective coverage limits.[1] However, since then, most recently in **Irene Realty Corp. v. Travelers Property Casualty Company of America**, 973 A.2d 1118 (R.I. 2009) (Robinson, J.), the Court has created a series of rule-swallowing exceptions and effectively negated the force and effect of **Hindson**.

Some history is in order. In **Brown v. Travelers Insurance Co.**, 610 A.2d 127 (R.I. 1992) (Kelleher, J.), the Court had to determine the priority, if any, between two uninsured/underinsured automobile-insurance policies that covered the same injured person but contained other-insurance clauses that purported to disclaim primary coverage due to the availability of the other policy.[2] The Court explained that "[p]rimary coverage is provided when an insurer is liable for the risk insured against, regardless of any other available coverage," while "'[o]ther-insurance' clauses purport to limit the coverage of a policy if there is another policy or policies protecting the risk insured against."[3] One of the **Brown** policies contained an excess other-insurance clause, "which provides that the insurer will pay for a loss only after any primary coverage of other available insurance has been exhausted[.]"[4] The other policy contained an escape other-insurance clause, "which provides that the insurer is not liable for any and all liability if other coverage is available[.]"[5] These clauses are in addition to the *pro-rata* clause, "which provides an insurer is required to share the loss in proportion to the aggregate liability coverage available for the same risk," and the hybrid excess-escape clause, "which provides that the insurer is liable for the amount of the loss that exceeds the limits of other available insurance and that the insurer is not liable when other available coverage contains limits equal to or in excess of its own limits."[6]

Brown struggled with the fact that conflicts between and among the various types of other-insurance clauses often are not "readily resolved by 'word logic.'"[7] A majority of jurisdictions created a hierarchy favoring certain clauses over others, but the Court found this akin to "refereeing the 'battle of the draftsmen' waged by insurance companies."[8] "[O]ther jurisdictions[,]" the Court found, "have resolved this conflict in …a more effective manner, that is, by requiring both insurers to share the loss on a pro-rata basis."[9]

While the competing clauses in **Brown** were not "mutually repugnant,"[10] and the clauses could have been – and actually had been – reconciled in other jurisdictions, the Court did "not wish to encourage the complication of insurance legerdemain at the expense of the policyholders' money or the court's time."[11] Rather, the Court decided, the "conflict between an excess clause in one policy and an escape clause in another is more readily and efficiently resolved by requiring both insurers to afford pro-rata coverage."[12]

Later, in **Hindson**, the Court addressed competing pro-rata and excess other-insurance clauses within two automobile-insurance policies that covered the same injured person.[13] Because neither insurer agreed that its policy afforded primary coverage for the loss, the injured person had to commence a declaratory judgment action "seeking to have these insurers pay for his covered losses on a pro-rata basis."[14] In assessing the two policies, the Court found compelling that both insurers would have been "primarily liable to plaintiff if either one was the lone insurer providing coverage[; h]owever, when other insurance is available to compensate for an insured's loss, they both seek to limit their liability."[15]

As in **Brown**, the Court found that a majority of jurisdictions would have ruled in favor of one of the two competing insurers.[16] However,

the Court believed that "the reasoning of the Supreme Court of Oregon in **Lamb-Weston, Inc. v. Oregon Automobile Ins. Co.**, 219 Or. 110, 341 P.2d 110 (Or. 1959), provided "the better solution."[17] That case "rejected the multifarious approaches followed by the majority of jurisdictions to subjugate pro-rata clauses to excess clauses and concluded that any conflicts between such other-insurance clauses should be resolved by construing them as mutually repugnant and therefore unenforceable."[18]

In fact, the **Lamb-Weston** decision found that *all* competing other-insurance clauses should be declared mutually-repugnant and require pro-rata sharing. The Court noted that, regardless of the types of other-insurance clauses that may be in dispute, the competing insurers will use circular reasoning to disclaim primary coverage: both will argue that its other-insurance language is triggered by the other insurer's coverage, and that its other-insurance language is more effective than that of the other insurer.[19] Finding none of the cases that attempted to reconcile competing other-insurance clauses to be "logically acceptable,"[20] the **Lamb-Weston** court concluded that, "whether one policy uses one clause or another, when any come in conflict with the 'other insurance' clause of another insurer, regardless of the nature of the clause, they are in fact repugnant and each should be rejected in toto."[21]

Using the **Lamb-Weston** reasoning, **Hindson**, much like **Brown**, concluded that, while "it could well be argued that some effect should be given to the terms of each policy's other-insurance clause[,]"[22] it was more important "to call at least a temporary halt to the incessant 'battle of the draftsmen' waged by, between, and among the various insurance companies in these other-insurance-clause cases."[23] "Inevitably," the Court noted "the front-line casualties of such clashes are the insureds."[24] "Accordingly," the Court held, "when as here an insurance policy would provide primary coverage to an insured if it were the only applicable policy, we are of the opinion that the coverage responsibilities of all such insurers should be shared on a pro-rata basis despite the existence of conflicting other-insurance clauses."[25]

To magnify its holding, the Court cited the hoary fable of the Gordian Knot, which had been "fastened…so ingeniously that no one could untie it," until Alexander the Great was able to reign supreme "over the whole East" after cutting the Knot with his sword. The Court expressed its "fervent hope" that "cutting the Gordian Knot" of competing other-insurance clauses would "free ensnared insureds like this plaintiff from the coils of such disputes. But," the Court continued, "if our wish remains unrequited and our hope is soon dashed (that is, the battling draftsmen rearm anon and retie the Gordian Knot), we will still abide here, with our sword poised and ever at the ready to cut the knot again."[26]

The Superior Court of Rhode Island soon agreed that **Hindson** (like the **Lamb-Weston** decision upon which it relied) was without exception. **In Ferreira v. Godbout**, 2000 WL 1910036 (R.I.Super., Dec. 15, 2000) (Vogel, J.), this court said, "**Hindson** gave this court clear direction when examining [other-insurance clauses]."[27] **Hindson** "adopted a rule requiring pro-rata apportionment of liability among different insurers providing uninsured/underinsured motorist coverage according to the limits of their respective policies."[28] "[U]nder **Hindson**, regardless of the wording of such provisions, the court

construes them as providing that each carrier shall be liable for a pro rata share of the loss."[29]

However, the Superior Court's decision was appealed to the Supreme Court of Rhode Island, which took a very different slant on its own **Hindson** decision. In **Ferreira v. Mello**, 811 A.2d 1175 (R.I. 2002) (per curiam), the Court applied **Hindson** to a situation involving competing other-insurance clauses in the two automobile insurance policies that covered the same defendant in a personal-injury action. The defendant was involved in an accident while driving someone else's automobile. The terms of the policies that covered the defendant, one of which was issued by the defendant-driver's insurer, the other of which was issued by the owner's insurer, both agreed to extend primary coverage when its insured was involved in an accident while driving his own automobile, but merely excess coverage when its insured was involved in an accident while driving someone else's automobile. Otherwise, the policies agreed to share primary coverage with other applicable policies on a pro-rata basis.[30]

Because the insured-defendant was not involved in an accident while driving his own automobile, neither of these other-insurance clauses should have been applied and both insurers should have been required to share primary coverage; and, either policy would have extended primary coverage had it been the only policy. Thus, **Hindson** seemingly required pro-rata sharing. Alas, the Court decided to have the automobile-owner's policy cover the defendant on a primary basis, and have the defendant's own policy cover him on an excess basis. In doing so, the court somehow did "not read **Hindson** to apply to any and all multiple insurance coverage disputes, particularly when, as here, the policy language is identical."[31]

Standing alone, this finding would have been innocuous, for competing policies rarely have exactly the same language. However, the Court went further, declaring that **Brown** and **Hindson** only govern competing other-insurance clauses that are "irreconcilable" and "do not conflict in any material manner."[32] "Where the respective clauses are in agreement[,]" the Court believed, "there is no reason to deviate from the terms of the policies, each carrier receives that which it bargained for in the policy as written."[33]

Insofar as neither of the two insurers involved in **Ferreira** actually (or even impliedly) bargained for primary coverage under the facts of that case, what the court essentially did was to impose upon the insurers the principle behind both of their policies – that an automobile owner's policy should come before an automobile driver's policy. However, even assuming that the equities required such a result, the Court did not stop at the equities. Instead, it created a new rule to govern all future other-insurance disputes – a rule that invited litigants and the courts to determine on a case-by-case basis whether the competing other-insurance clauses are "identical" and "do not conflict in any material manner," after it was just this kind of quibbling that **Brown** and **Hindson** specifically and painstakingly sought to avoid (for the sake of policyholders and injured parties). Indeed, and again, **Brown** and **Hindson** both involved policies that could have been – and actually had been – reconciled in other jurisdictions, so it cannot be said that **Ferreira** addressed a previously-unseen dilemma.[34]

It was inevitable that **Ferreira** would cause problems. Sure enough, in **Irene Realty Corp. v. Travelers Property Casualty Company of America**, supra,

two insurers used Ferreira to argue that, when read together, their other-insurance clauses, even though not identical, required just one of them to extend primary coverage to the defendant in an underlying premises-liability action. Rather than spurning this battle of the draftsmen, limiting the reach of **Ferreira**, and requiring the insurers to share primary coverage on a pro-rata basis, the Court required just one of them to extend primary coverage – the insurer (American Empire) that agreed to defend the underlying action despite its belief that the other insurer (Travelers) was primarily liable;[35] reinforcing the adage that no good deed goes unpunished.

In **Irene Realty**, the competing other-insurance clauses were contained in two commercial general liability insurance policies that covered a commercial landlord (Irene Realty) that had leased commercial property to a tenant who agreed in writing to "provide to Landlord evidence of coverage with at least $500,000 limits for Commercial General Liability insurance for both property damage and bodily injury [and to] add the Landlord as an Additional Insured on Tenant's insurance policies."[36] The tenant procured from Travelers a commercial general liability policy that covered the tenant on a primary basis and, through an additional-insured endorsement, also covered the landlord on a primary basis: The endorsement extended the definition of insured in the tenant's primary policy to "any person or organization (referred to below as additional insured) with whom you [the tenant] have agreed in a written contract, executed prior to loss, to name as an additional insured[.]"[37] Later, in the same additional-insured endorsement, an other-insurance clause said, "[t]he insurance afforded to the additional insured is excess over any valid and collectible insurance available to such additional insured, unless you have agreed in a written contract for this insurance to apply on a primary or contributory basis."[38]

Meanwhile, Irene Realty had its own commercial general liability insurance policy with American Empire that contained the following other-insurance language, only part of which (subsections 4.a. and 4.b.) was cited by the court:

> 4. Other Insurance….a. **Primary insurance**. This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.
> b. **Excess insurance**. This insurance is excess over: * * * (2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement." c. **Method of sharing**. If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first. If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.[39]

While these two policies were in effect, an employee of the tenant very seriously was injured at the subject property. The employee sued Irene Realty alleging that

it was responsible for the incident. American Empire agreed to defend the claim on behalf of the Irene Realty, while Travelers refused to participate in the defense or settlement of the claim (as it had done in **Brown**).[40]

American Empire and Irene Realty commenced a Superior Court declaratory-judgment action seeking a declaration that Travelers was the co-primary (or even the sole-primary) insurer of Irene Realty. These plaintiffs argued that, if **Ferreira** applied, it applied in favor of American Empire, because its policy relegated itself to excess status in cases where the insured was covered by an additional-insured endorsement (like the Travelers endorsement), and because the tenant contractually was required to obtain primary insurance for Irene Realty, the latter of which triggered the last segment of the Travelers endorsement, which required Travelers to cover Irene Realty on a sole-primary basis. If **Ferreira** did not apply to the dispute, the plaintiffs argued, **Hindson** required the primary coverage to be shared on a pro-rata basis because, if either policy had been alone, it would have extended primary coverage to Irene Realty.[41]

The Superior Court accepted neither view, believing that the Travelers policy was – and could only be – an excess policy as it related to additional insureds such as Irene Realty, and thus permitting Travelers to remain the excess insurer.[42] American Empire and Irene Realty appealed to the Supreme Court of Rhode Island, which found that the two policies were in "complete harmony" and not "actually in conflict"; and, that **Ferreira** applied in favor of Travelers.[43] The Court found that "the American Empire policy provides that its insurance for Irene Realty is primary unless any other applicable insurance is primary"; that "[t]he Travelers policy provides that its coverage of Irene Realty as an additional insured is excess unless the parties have agreed in writing for the insurance to be primary"; and, that "[t]he plain and simple fact is that no such writing exists."[44] Travelers thus remained the excess insurer and, in the end, it was able to avoid paying any defense or settlement costs on behalf of Irene Realty.

The Court's "plain and simple" finding that the tenant had not agreed to obtain primary coverage for Irene Realty was too facile. This was a legal issue of first impression, and the Court previously had given assurances that, "[i]n cases of first impression, we often look to leading authorities and the law of other jurisdictions for guidance in making our determination." **Liberty Mutual Insurance Company v. Herben Insurance Company**, 603 A.2d 300, 302 (R.I. 1992).

The plaintiffs introduced such materials, including the on-point **Pecker Iron Works v. Travelers Ins. Co.**, 786 N.E.2d 863, 864 (N.Y. 2003). That case involved the very same Travelers other-insurance clause and a similar underlying contract that required Travelers's insured to name the plaintiff as an additional insured. The Court of Appeals of New York decided that Travelers was required to extend primary coverage to the additional insured because the term additional insured is a "recognized term in insurance contracts," the "well-understood meaning" of which is "an entity enjoying the same protection as the named insured."[45]

Despite its stated policy of surveying the law of other jurisdictions on issues of first impression, and despite the similarity of **Pecker Iron Works**, in which a highly-

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Reconciling Renewables Regulation in Rhode Island

Elliot Taubman, Esq.
Practices law on Block Island

There is a public policy favoring renewable energy in state and federal law in the State of Rhode Island and Providence Plantations. Unfortunately, the laws do not exactly line up, and there is no clear line for approval of all the elements of the process. This article examines related issues and recommends actions to create consistent policy.

Renewable energy is not one definition in the law. The earliest definition adopted in Rhode Island came from federal law. Section 210 of the Public Utilities Regulatory Policies Act of 1976 (PURPA 210) required state regulatory agencies act consistently with the concept of avoided costs for alternative energy. In the federal law, "alternative energy" includes "qualified co-generation" as well as solar, wind, wave and geothermal energy, which are not much further defined in the statute. The Federal Energy Regulatory Commission (FERC) and the Rhode Island Public Utilities Commission (PUC) have adopted regulations for renewable energy under PURPA 210. "Avoided cost" is both the short term and long term savings electric utilities may obtain by buying options as diverse and a photovoltaic array on a single house and an offshore, multi-megawatt wind farm.

In the case of single wind turbines in the range of 20 watts on Block Island, this means the yearly rolling average of the avoided cost of diesel fuel for generators of Block Island Power Company (BIPCO). In contrast, if the New Shoreham Sewer District chose to sell power to BIPCO from its qualified co-generating diesels (which can provide heat and do provide hot water to the sewer plant and associated employee housing), some contribution toward the avoided cost of new diesel generators could be given in what is paid back to the Sewer District. National Grid (NG) and BIPCO for small units, go a step further, since the PUC has allowed ordinary electric meters to just reverse for small photoelectric so the producers get paid back the full cost of electricity they would otherwise buy.

In contrast, it was a hard fought battle to determine a reasonable price for NG to pay to Deepwater Wind, which has proposed a 28,800,000 watt (28.8 MW) wind farm three miles southeast of Block Island. The contract uses an implied capital contribution of 40% toward long term avoided cost; this is adopted under a special state statute, as amended, although PURPA 210 arguably would apply as well.

Coming at renewables from a different angle are federal and state statutes which provide various incentives for energy efficiency and alternative energy. Under the 2009 federal economic stimulus law, a 30% tax credit is provided, time limited, for a large range of technologies which do not rely on fossil fuel. These renewables include: photovoltaic (PV – direct production of electricity); solar thermal (heating of air or water); large and small wind; geothermal; and biofuel projects. There is a 50% tax credit for alternative fueling capabilities including hydrogen, ethanol and natural gas. There is a state tax credit, generally for 25%, which, in some cases, is piggybacked on federal law (enacted before 1996) and, in most cases, stands alone. There are additional federal benefits, such as direct grants to municipalities for PV, but these are defined differently than under state law. If a renewable source produces electricity, it may come under both PURPA 210 and the federal and state tax benefits, but these do not fully line up. An important reason for the deadline to put Phase 1 of the Deepwater project on line is that the initial stimulus law required a December 31, 2012 project deadline.

State zoning and planning law is playing catch-up on renewables. After a hard fought battle on Block Island, the Town Council adopted, by a split vote, a special use wind turbine permit for the land on which the town transfer station stands. The ordinance has since been challenged in Superior Court. Clearly, state standards would have been helpful to guide the decision-making process. For instance, if the types of issues abutters could raise were defined and there were deadlines for decision-making. Specifically, distinguishing purely aesthetic issues ("I do not like looking at windmills") from legitimate scientific issues (Would a large wind turbine interfere with flight patterns for endangered bird species?). How should debatable scientific issues be handled? Should we use the

federal evidentiary standard for scientific opinion? How wide a net can be spread to cover alternative technologies: Why not four small wind turbines instead of one large one? Why not use a photovoltaic array? Why put in another large wind turbine on land when there will be eight large ones offshore?

Even if there are state standards, they may be preempted by federal law. Rhode Island, through the Coastal Resources Management Council, has defined a Special Area Management Plan (SAMP) for offshore renewable energy projects. The impetus for this is Phase 1 of the Deepwater project three miles southeast of Block Island with eight, 3.6 MW turbines. However, although federal agencies know of the SAMP, they are not bound by it, and there is no statutory way to combine the state hearings with federal ones, although the FERC, Department of Interior, and Army Corps of Engineers could combine their public hearing process with the State's.

There are interesting constitutional issues about whether there is any state jurisdiction beyond the low water mark around Block Island, and whether the state can set rates affected by federal policies. Can NG ignore its overall regulated environment to the detriment or benefit of Rhode Island ratepayers? While the SAMP ends just off Montauk Point, the Governor has opposed connecting Rhode Island with New York. How does this play with the "Smart Grid" policy of the Obama Administration, which is promoting a *real* national grid to improve both the spread of renewables, including offshore wind, with more efficient use of all electricity. *See* PURPA Section 116.

Another area in which federal, state and local standards are not integrated is in building codes. Rhode Island has adopted national Building Officials and Code Administrators (BOCA) standards, but BOCA standards are not fully integrated with Leadership in Energy and Environmental Design (LEED), the state/international Energy Conservation Code, Energy Star, local zoning, nor the federal and state tax standards. For instance, the latest LEED standards give points for including renewable energy, as well as energy efficiency, in a project. Issues such as parking, setbacks, green space, and other issues directly impact zoning. One point is that state law requires electric utilities to allow reverse metering for

affordable housing, renewable energy projects. How does this relate to the state and local affordable zoning laws and the right to appeal a zoning matter, involving a utility, to the PUC rather than Superior Court?

As a hypothetical example: What if a local non-profit organization wanted to do a low income rental housing project, with a large photovoltaic display, close to a residential neighborhood, and applied under the single hearing provisions of the state affordable housing law? They, or the opponents, could appeal to the State Affordable Housing Board and/or the PUC if they were dissatisfied with the decision on the solar array. In both cases, a further appeal would be directly to the Rhode Island Supreme Court. Maybe there should be some procedural rules for this?

This article just scratches the surface of potential matters which should be considered in reconciling federal, state and local laws and regulations. I suggest the matter be studied with a goal of proposing any necessary reconciliation language to the General Assembly for the 2010 Session. Participating parties in the process could include interested attorneys practicing environmental law, the Governor's Renewable Energy coordinator, Statewide Planning, Public Utilities Commission, Coastal Resources Management Council, Department of Environmental Management, Federal Energy Regulatory Commission, United States Department of the Interior, United States Department of Energy, Army Corps of Engineers, Coast Guard, National Grid, Block Island Power, Pachaug Utility District, and the New England Governors Council.

The proposed legislation would not have to be lengthy if it incorporates and cites all the relevant existing laws and regulations. A list of important considerations follows:

Renewable Energy Reconciliation Issues for Rhode Island

Definitions for renewable energy should be consistent and, if different for different purposes, should clearly state the differences.

The public policy statements, in the Zoning Enabling Act, Public Utility law (R.I. Gen. Laws 39-1-1), Coastal Resources Management Act, tax law, affordable housing and others should be consistent.

Energy siting laws, local, state and fed-

eral, should respect each others priorities.

Standing to propound or object should be clearly stated for local government, state government, non-profit groups, abutters and ordinary citizens.

Differences over scientific issues should be based on peer-reviewed scientific literature or specific qualified and quantified studies.

Should reconciliation be made on purely aesthetic issues, such as whether wind turbines are attractive or whether solar collectors should be allowed in historic districts? What mitigation measures for aesthetic effects should be allowed or required?

Time limits should be clearly stated, consequences of non-compliance should be indicated, and interrelation of different regulatory regimes should be considered (e.g. CRMC, DEM, Zoning and tax credit approvals.)

END NOTES

* The positions stated in this article are only of the author, and may not be consistent with the opinions of clients, or former employers, who may have different views on the issues discussed, including: National Consumer Law Center, New York Attorney General, Brookhaven National Laboratories, Town of New Shoreham and Block Island Power Company.

1. The Office of Energy Resources, by Kenneth Payne, Ph.D., has initiated an effort to herd cats. This is to make the widely divergent views, in the State of Rhode Island and Providence Plantations, come together on a technical and legal basis. The hope is to promote consistent laws, which allow renewable energy to flourish.

2. In order to obtain quicker publication, this article is short on scholarly footnotes. The text references the important laws, but the author stands ready to provide other specific references. Please send requests to ETBI@aol.com and a realistic effort will be made to provide such references. ❖

First (and Lasting) Impressions

Hon. Daniel A. Procaccini
Associate Justice, Rhode Island Superior Court

…the simple qualities that forge solid relationships outside the courtroom - respect, common courtesy, and common sense – are equally important in establishing credibility in the courtroom.

I am once again sitting in my chambers, disappointed by an inexplicable display of unprofessional conduct by an attorney. The source of my displeasure was an incident in my courtroom involving a young attorney's understanding, or lack thereof, of proper courtroom etiquette and decorum.

It was a sunny, but not particularly hot, early summer day in Kent County. I was spending some time getting acquainted with my summer interns. These law students appeared eager to begin absorbing that practical knowledge necessary to cross the bridge from the classroom to the courtroom.

Since an internship with a trial judge is primarily an observational experience, I dispensed some practical advice about courtroom advocacy: "Know your judge. Know your case. Be prepared and articulate. And finally, conduct yourself in a professional manner at all times." I also explained that during their internship, they could expect to observe a wide range of lawyer competence, mostly good and occasionally bad. Unfortunately, their first experience was the latter.

It was time to take the bench to hear a lengthy contested motion. Immediately upon entering my courtroom, I noticed a young attorney I was unacquainted with sitting at counsel table. He briefly stood for introduction by his co-counsel and then sat down as his co-counsel commenced argument. A few seconds later, I glanced in this attorney's direction and observed a disturbing profile. He was slouched in his chair facing sideways (in relation to my bench) with both legs stretched out straight in front of him. His shirt collar was open, and his tie was knotted well below his collar. This combination of posture and appearance, which was reminiscent of someone lounging at the beach, caught me by surprise. In addition to his obviously unacceptable and unprofessional appearance, he appeared to have no interest in the ongoing proceeding.

I could not let this situation pass without comment. As I admonished this young man, he stared blankly ahead and offered no apology or reply whatsoever. His more seasoned and professional co-counsel attempted to offer some cover for his colleague's appearance explaining that his younger associate was inexperienced and unfamiliar with courtroom etiquette.

It bothers me greatly to see lawyers – young or old - ignore and disrespect the time-honored practices and customs of the courtroom. Notwithstanding the laudable efforts of the Rhode Island Bar Association through its quill pen presentation[1] at bar admission ceremonies and its aspirational code of conduct,[2] which is displayed on our courtroom counsel tables, their message is sometimes forgotten or ignored.

As a teacher of trial advocacy and a mentor to law students, I continuously reinforce the customs and etiquette of our profession at every opportunity. I want these future lawyers to appreciate that the courtroom is a uniquely contrived atmosphere where the ultimate human drama unfolds. As they develop their technical trial skills, I remind them that once the rigors of the substantive law curriculum and bar exam are over, they must remember that the simple qualities that forge solid relationships outside the courtroom – respect, common courtesy, and common sense – are equally important in establishing credibility in the courtroom.

The best empirical support for the relationship between an attorney's appearance and manner in the courtroom and his or her credibility and, more importantly, persuasive ability is the observations made by jurors during trials. At the conclusion of a trial, my practice is to meet with jurors to personally thank them for their service and generally to discuss their jury experience. In most instances, one of the first topics jurors raise is the attorney's performance, and, specifically, the attorney's attitude, appearance, and manner of conduct in the courtroom. Whether their notions of professionalism are shaped by popular culture or everyday trial media coverage, it is evident that jurors form positive impressions of attorneys who are professional in both appearance and conduct. Interestingly, when jurors discuss attorneys who have made unfavorable impressions from their courtroom appearance or behavior, they often characterize the deficient performance as a lack

of respect for the court and the judicial process.

One of my objectives in jury trials is to ensure a meaningful and rewarding experience for jurors. I want them to leave with a greater understanding, appreciation, and most importantly, respect for our judicial process. Most jurors have little in the way of background or experience to draw upon in evaluating the work of judges, lawyers, or court staff except through their service during trial. The appearance and performance of all trial participants are important to a jury's perceptions as the unfamiliar, and often stressful, judicial process unfolds before them.

Effective trial advocacy starts with the understanding that the impact of an argument or witness examination is affected by the style and manner of the advocate. At the least, unprofessional behavior is an unnecessary distraction for jurors. In a close case, such behavior can be the difference between winning and losing.

Issues of courtroom dress, decorum, and conduct have surfaced elsewhere. In **Friedman v. District Court**, the court plainly observed: "Attorneys occupy a different position in relation to the courts than do ordinary citizens. Attorneys are officers of the court. The privilege of practicing law is subject to certain conditions among which is that an attorney must observe reasonable rules of courtroom behavior and decorum."[3] The court in **Sandstrom v. State** likewise recognized that proper courtroom attire is "a sign of respect" for the proceedings.[4]

Trial advocacy commentators universally acknowledge the relationship between attorneys' professionalism and their credibility in the courtroom.[5] Successful trial advocacy begins with "trustworthy and likeable advocates who…display respect and courtesy to everyone in the courtroom."[6] "In a very real sense, a lawyer is 'on trial' from the first moment she[or he] steps in front of the fact finder. Judge and jury will constantly evaluate (and reevaluate) your credibility as they assess your behavior, appearance, bearing and conduct."[7] In the end, "[j]urors respect lawyers who are real and act professionally toward the judge, opposing lawyers, witnesses, and jurors."[8]

I will readily acknowledge that most young or inexperienced lawyers do not appear before me as the lawyer in this story did. However, over my past nine

years on the bench, I have noticed a small but growing erosion of professionalism by new members of the bar. The causes of these youthful indiscretions are many: fewer cases being tried, less opportunity for sitting second chair with a seasoned litigator, and living in a more casual and informal society. Whatever the cause, my purpose in discussing this topic is simply to encourage some contemplation and thought about the unique and important role trial lawyers have in our justice system; to explain how perception and reality are inextricably linked in the courtroom; and to show how relatively simple, but sometimes neglected, customs and etiquette directly impact both an attorney's and our profession's credibility in the courtroom.

Forty-five years ago, a juror writing about his experience recognized the inextricable link between courtroom etiquette and the power of persuasion:

> "The most important persons in the courtroom to the juror are the attorneys who participate in the trial.
>
> In all situations involving human beings, each person and each group of persons chooses a leader for guidance, and in a court of law the attorney is the leader. Invariably, the remarks in the jury room center on the impression made by the attorney. The verdict of the jury in every case reflects the skill of the attorney in presenting the case. The attorney is always on the spot and is the focus of attention; the attorney's appearance, manners, logic, and what the attorney puts value upon are the factors that bring jurors to conclusions."[9]

The message is unmistakable: respect for our profession and successful advocacy are inseparable.

So let's button up, sit up, and draw a line in the sand as a reminder that a day in court is not a day at the beach.

ENDNOTES

1 *I recently heard Rhode Island Bar Association Treasurer, Michael McElroy's eloquent comments to newly sworn lawyers that the quill pen is a symbolic reminder of the long-standing customs and traditions of our noble profession.*

2 *The Rhode Island "Lawyer's Pledge," the first tenet reads: "As a member of the Rhode Island Bar Association, I pledge to: Conduct myself in a manner that reflects honor on the legal profession…."*

3 ***Friedman v. District Court**, 611 P.2d 77, 78 (Alaska 1980).*

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4 ***Sandstrom v. State***, *309 So.2d 17, 23 (Fla. Dist. Ct. App. 1975); see also State v. Cherryhomes, 840 P.2d 1261, 1262 (N.M. Ct. App. 1992) (finding that regardless of the dictionary definition of "tie" or the description provided by "a book on nineteenth century western wear[,]" a bandanna was not appropriate substitute for the conventional tie when appearing before a court).*

5 ***See, e.g.***, *Steven Lubet,* MODERN TRIAL ADVOCACY *(3d Ed. 2010); Thomas A. Mauet,* TRIALS: STRATEGY, SKILLS, AND THE NEW POWER OF PERSUASION *(2005); L. Timothy Perrin et al.,* THE ART & SCIENCE OF TRIAL ADVOCACY *(2003).*

6 *Perrin,* ***supra*** *note 3, at 6.*

7 *Lubet,* ***supra*** *note 3, at 6.*

8 *Mauet,* ***supra*** *note 3, at 11.*

9 *J. Alexander Tanford,* THE TRIAL PROCESS: LAW, TACTICS & ETHICS *39 (3d. Ed. 2002).* ❖

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Wednesday
An Ethical Lawyer Meets …. The Internet
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September 30
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An Ethical Lawyer Meets …. The Internet
17th Annual Risk Management Seminar
Rhodes-on-the Pawtuxet, Cranston
9:00 a.m. – 11:00 a.m., 2.0 ethics credits

October 5
Tuesday
Commercial Law Update 2010
RI Law Center, Providence
9:00 a.m. – 12:30 p.m., 4.0 credits

October 6
Wednesday
Food For Thought –
Preparing Bankruptcy Documents
Holiday Inn Express, Middletown
12:45 p.m. – 1:45 p.m., 1.0 credit

October 7
Thursday
Food For Thought –
Practicing Before the Mental Health Court
RI Law Center, Providence
12:45 p.m. – 1:45 p.m., 1.0 credit

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Food For Thought –
Practicing Before the Mental Health Court
Casey's Restaurant, Wakefield
12:45 p.m. – 1:45 p.m., 1.0 credit

October 14
Thursday
Food For Thought –
Collecting Consumer Debts
RI Law Center, Providence
12:45 p.m. – 1:45 p.m., 1.0 ethics credit

October 21
Thursday
Recent Developments in the Law 2010
Crowne Plaza Hotel, Warwick
9:00 a.m. – 4:00 p.m., 7.0 credits

October 26
Tuesday
A Practice in Special Education Law –
Due Process
Rhode Island Law Center, Providence
2:00 p.m. – 5:00 p.m., 3.0 credits

October 27
Wednesday
Food For Thought –
Collecting Consumer Debts
Holiday Inn Express, Middletown
12:45 p.m. – 1:45 p.m., 1.0 ethics credit

BOOK REVIEWS

Sarah Palin, Barack Obama and the 2008 Political Wars

Jay S. Goodman, Esq.
Professor of Political Science
at Wheaton College

Both of these books give us, in different ways, great insights into the election. Hang on. The contests among these players are not over yet.

Going Rogue: An American Life
by Sarah Palin

Game Change: Obama and the Clintons, McCain and Palin, and the Race of a Lifetime
by John Heilemann and Mark Halperin

2008 saw a brutal presidential campaign in the United States, but it certainly featured interesting characters, two new and one continuing an upward climb from First Lady to United States Senator, to presidential candidate: Sarah Palin, Barack Obama, and Hilary Clinton. Sarah Palin has written a best-selling autobiography. And John Heilemann and Mark Halperin, of *New York Magazine* and *Time* respectively, have written a gripping blow-by-blow retelling of the presidential campaign.

Going Rogue: The Palin Derangement Syndrome

To observe what is being called the Palin Derangement Syndrome, just say her name in the company of any liberal, educated woman and watch what happens – often screams, curses, near hysterical outbursts of calumnies. President Obama reacts pretty much the same way. What is it about the former Alaska governor that touches such angst? She went to eight schools! She knowingly had that special needs child! She talks funny! She quit her job! Her teenage daughter got pregnant! She's dumb! All but the last are true, but what's the negative here? Lots of people take time to finish undergraduate life. Isn't it admirable that she paid for it herself – with beauty pageant money and money from working long shifts on fishing boats? Keeping and cherishing the Down's syndrome child, Trig, demonstrates that her pro-life position is deeply principled. Recent polling shows more women are now pro-life than pro-choice and gaining. Her Wasilla dialect, which sounds like the Minnesota characters in the movie *Fargo*, is not so out of the American mainstream if your experience is broader than the coasts. When I was an undergraduate in Wisconsin fifty years ago, most of my classmates at Beloit College talked like that. They still do. She did quit her governorship after only two plus years. But she makes a strong case in *Going Rogue* that she was driven out by frivolous and malicious ethics complaints – all of which were rejected by tribunals in the end – that pushed her family into half a million dollars in personal debt and destroyed her ability to govern. And, with teenage pregnancy an epidemic in this country, how about a little sympathy for yet another set of upset parents.

Going Rogue: Childhood

And, whatever she is, she is not dumb. Her autobiography, the childhood and Alaska politics parts apparently based upon journals she always kept, makes that very clear. The first half of her book is her family history and her experiences in local and state government. She calls her autobiography, An American Life, and it is, but a different one. Her science teacher father teaches her to hunt and fish. Most everyone she knows catches or kills a lot of their food. She plays basketball and is the gritty point card on a state championship girls' team, which leaves her with a nickname, Sara Barracuda, and a permanently damaged ankle. She speaks jock talk: "Everything I ever needed to know, I learned on the basketball court." She goes to school and claims she loves to read. She plays sports. She goes to church. She marries her childhood sweetheart, an athletic guy who is a big part Native American, a Yupik, and very much in touch with his tribal aunts and uncles in the frozen bush country. It's all very old-fashioned small town America. Except it is dark a lot of the year, and this is the last frontier, the heir to the Wild West fueled by oil money.

Going Rogue: Politics

Palin moved into politics, first on the Wasilla city council and then as a reform mayor. She developed her taste for small government rhetoric and lower taxes in these roles, but especially she casts herself as an outsider fighting corruption and the closed cabals of good old boy male politicos. She lost a close race for Lt. Governor

but was appointed to the state agency that regulated the oil industry, which gave her a good grasp of many, very complicated, energy development issues and a close look at big-time corruption. Running as a reformer, she was elected governor in 2006. When John McCain summoned her to Arizona in August 2008 to discuss running for vice-president on his ticket she had the highest approval rating of any governor in the U.S., over 80% positive. The second half of *Going Rogue* details her experiences as a national candidate and her subsequent life, with a heavy dose of personal philosophy and issue advocacy at the end of the book. Of course, the question everyone is looking to have answered in the book is not about her faith in God, but how could she have so botched her interview with Katie Couric. By the time she got to Couric, it was late September, and, after her amazing beginning at the Republican convention, she was already having trouble with press questions. In response to a query about her foreign policy bona fides, she claimed that living in Alaska in proximity to Russia gave her credentials, a response widely mocked and turned by Tina Fey into "I can see Russia from my living room." (Why her proximity argument was so mocked, while Obama's argument that living in Indonesia until he was ten gave him foreign policy gravitas was taken seriously is a question for another essay.)

The Couric interview was a catastrophe. Her inability to answer a simple question about what newspapers she read remains mystifying. That performance, along with the *Saturday Night Live* defenestration by Tina Fey, gave her the reputation for being unprepared for national office and for being just plain dumb. Her book devotes eight pages to the Couric fiasco, without clarifying why she performed as she did. *Game Change*, with interviews with McCain's top staff and those assigned to manage Palin, has a lot more to say on that topic.

Game Change: The View of Palin from Inside the McCain Campaign

The McCain campaign had only five days to vet Palin and the results were, necessarily, not complete. (She later received a personal bill for $50,000 for the vetting work!) McCain only spent a few hours with her before making up his mind. Always a risk-taker, and with no

other transforming choices on the table, he picked her. And, the original roll out through the convention was a spectacular success which did change the national dynamic in the Republicans' favor. The campaign knew of her knowledge deficiencies and tried desperately to cram national level conversational competency into her from zero. It provided high-level briefers, endless note cards. At first she tried, but she got more and more remote. The campaign flew her to Arizona, brought back her rambunctious family and crew and tried to restore her confidence. She vacillated between petulant and resentful diva and just catatonic. No one knew how this could happen but they did know the Couric interview, which took part over a series of days, would be bad. Wow, was it ever!

Game Change: Clinton v. Obama

Game Change is about the whole election, but the first sixty percent of the book is about the war between Hillary Clinton and Barack Obama. The authors are clearly sourced all the way up to all the principals and the most inner staff. The Clinton campaign was riveted by internal bickering and staff greed and Hillary's misplaced sense of inevitability. The Obama campaign had the discipline, a then-magical candidate, the right position on the Iraq war, and the correct starting point, the Iowa caucuses. The authors note the game-changing moments. At the debate at Drexel University on October 30, 2007, all six of the other candidates ganged up on her. Moderator Tim Russert went after her with a red-faced, over-the-top vengeance. And she faltered, on a question about driver's licenses for illegal immigrants. When she ran a funny commercial the next day showing all of the testosterone-fueled guys ridiculing her, they jumped, saying she could not take the heat! Welcome to what happens to women candidates, a clue as to why Hillary Clinton and Sarah Palin never say a bad word about each other. Her political vulnerability was now revealed.

Obama won big in the Iowa caucuses, but Clinton upset him in New Hampshire. On the road to South Carolina, everything went wrong for the Clintons, as both she and Bill came undone over race. Hillary, in a Martin Luther King Day comment, said that King would never have achieved the Civil Rights Act of 1964 alone, with-

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Outgoing Defense Counsel of Rhode Island (DCRI) President Robert J. Quigley, Jr., Esq. of McKenney, Quigley, Izzo & Clarkin passed the gavel to incoming DCRI President Brooks R. Magratten, Esq. of Pierce Atwood LLP. DCRI Officers include: President-Elect Howard A. Merten, Esq. of Partridge Snow & Hahn LLP; Vice President Faith A. LaSalle, Esq. of the Law Offices of Faith A. LaSalle; Secretary Rebecca McSweeney, Esq. of Jackson Lewis LLP; and Treasurer Amy Beretta, Esq. of the Law Offices of Amy Beretta.

out President Lyndon Johnson. The Obama campaign characterized that as a racist put down of King. And, when Bill Clinton, frantically careening through South Carolina to call in all the chits he felt was owed for his decades of support for civil rights, remarked that Jesse Jackson had carried the South Carolina primary, he was criticized for playing a race card. *The New York Times*, in an editorial, attacked both Clintons for racism. The Clintons were completely bewildered by this through-the-looking-glass use of language. There was something going on, but they did not see it. The solid minority and liberal media support they had enjoyed was leaving them. When people and interests are about to betray people who have helped them, the betrayers have to find a way to justify their movement, make it the old benefactors' fault and therefore justified. That is what happened to Bill and Hillary, and they were taken totally aback and by surprise. Indeed, one of the revelations of *Game Change* is how hurt the Clintons were by many of these actions. Senator Ted Kennedy not only backed Obama, but berated Clinton for his language in South Carolina, neatly overlooking, as Clinton complained to friends, the extraordinary things Clinton had done for the Kennedys. (Not least was President Clinton's use of the U.S. Navy and Coast Guard to help recover the body of John Kennedy Jr. off Martha's Vineyard.)

The list of old friends who did not support Hillary and turned on her was long and painful. Gordon Craig, a law school classmate and President Clinton's impeachment counsel, endorsed Obama with a vicious dig at Hillary's lack of foreign policy experience. The viperish Senator Claire McCaskill, who had been saved by the Clintons' fundraising for her, endorsed Obama with a jab at Bill's licentiousness. Senator Pat Leahy told her to drop out. President Clinton had named New Mexico's Governor Bill Richardson to no less than two cabinet posts. Richardson broke his promise to at least stay neutral and went for Obama. Many people in politics are hurt when those they support do not help them. Politicians are so friendly that people think they are friends. But they are more like nation-states, with interests not friends. The Clintons, with all their experience, nonetheless were wounded.

Game Change: The Economy Collapses

Depending on the poll you read, in mid-September, McCain was either a few points ahead or a few points behind. He was definitely in the game. Then Lehman collapsed. Then McCain himself embarked on a four-day sequence of bizarre behavior. He suspended his campaign and the first debate to work on the economy. He went to meetings in Washington and did nothing at all. He reversed himself and went on with the campaign and eschewing preparation, showed up and was grumpy through the debate. Game changed and game over.

Why Obama Won

Obama outplayed the opposition in all phases of campaigning. Most important, for the Democratic primary electorate, he had the correct position on the Iraq War. In the end, Hillary got almost as many votes as he did, but too late and in the wrong places. He won the general election by vastly out fundraising McCain (after breaking his pledge to take public money only) and by expanding the electorate to bring out record turnout of young people and minorities. It was a clean win: 53%.

Both these books give us, in different ways, great insights into the election. Palin's portrait of Alaskan life is riveting. No one reading *Going Rogue* will doubt that the driven former governor will be back. I predict that she will be the Republican nominee for president in 2012. *Game Change* brilliantly gives us the campaigns from the inside, a big and fascinating contribution. Hang on. The contests among these players are not over yet. ❖

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Top Ten Things I Wish I Knew When I Began My Practice as a Litigator

Mark S. Adelman, Esq.
Practices law at Partridge Snow and Hahn LLP in Providence

When the bar exam was over, nobody told me that the learning process for a litigator was trial by fire.

After practicing for a few years, it is easy to forget the first one. If you do look back to your first year, I am sure that you would realize just how much you learned, especially if you are a litigator. I had that realization sitting in court the other day. We all know just how much study and preparation went into passing the bar, but, back then, who of us knew what practicing law actually meant? As one attorney put it – "my ridiculous notions of practicing law do not even remotely resemble the actual practice of law." For me, I was just concerned about filling in the correct circles with a number 2 pencil. When the bar exam was over, nobody told me that the learning process for a litigator was trial by fire. I am not just referring to the basics of pleadings and motion practice when I use the phrase learning process, but the real nuts and bolts basics: what, where, why, when and how. It is these basics that are interesting, so without further ado, the list of the top ten things I wish I knew when first beginning to practice as a litigator:

10. To check the docket for the Motion Calendar before you needlessly sit through the entire call only to not hear your case.
9. That you do not need to wait in line for security unless you have forgotten your bar card.
8. Not only that there are usual stipulations in a deposition, but what they are.
7. That District Court begins at 9:00 am, but Superior Court begins at 9:30 am.
6. The difference between default judgment for a sum certain and default judgment and an entry of default versus default judgment. Also, for that matter, anything having to do with collecting on a judgment.
5. That if a judge tells you that she will "hold" the case after you argue your motion, then that does not mean you can leave because it will be heard another day.
4. How to explain to your client that you need to file a motion to compel, then have the hearing, then get a conditional order, then file the default, then have that hearing, and that right before that hearing discovery can be served on you.
3. That an order needs to be presented to the court; otherwise nothing will be entered.
2. That we have an asbestos calendar (…and a gun calendar).
1. That there are no 1st or 5th Divisions of the District Court.

I write this with the caveat that I am certainly aware that I have much more to learn and many more trials by fire to undergo. Therefore, for all those more experienced lawyers that are reading this, I ask that you do so with an eye towards your first year. Maybe you will remember a story that you can share with a newer attorney, particularly if that attorney is waiting anxiously for his or her first case to be called on the motion calendar.

I would also like to thank those that either provided some specific ideas or some very funny stories. ❖

Ada L. Sawyer: The Providence Portia

Denise C. Aiken, Esq.
Rhode Island Legal Services, Inc.

"After consideration, we are of the opinion that the word "person" contained in the rules regulating the admission of attorneys and counselors should be construed to include a woman as well as a man…."

RHODE ISLAND SUPREME COURT ASSOCIATE JUSTICE WILLIAM H. SWEETLAND

On September 24, 1920, a Miss Ada L. Sawyer, the personal secretary of Rhode Island Bar Association member Percy Winchester Gardner, sat for the Rhode Island Bar exam. She did so without the benefit of attending college or law school. She was the only woman in the room. Of the 22 people taking the bar exam that day, 12 passed. Among them was Miss Ada Sawyer. The 12 new lawyers were notified in November, and on November 14, 1920, the *Providence Journal* published an article about the first woman lawyer to be admitted to the State's Bar, dubbing Miss Sawyer the "Providence Portia."

In 1920, when Ada took the Bar exam, many states including Rhode Island still allowed its applicants to read the law. This process entailed spending three years under the tutelage of a Bar member after filing a registration with the Bar Association. Percy W. Gardner was Ada's employer and tutor. However, when Ada went to take the exam, the Board of Bar Examiners balked. After all, the rules stated that any "person" could read the law. Was a woman a person? They required a letter from Supreme Court Associate Justice (and later Chief Judge) William H. Sweetland that …. *"After consideration, we are of the opinion that the word "person" contained in the rules regulating the admission of attorneys and counselors should be construed to include a woman as well as a man…."* Since Ada L. Sawyer was found to be a person, she could sit for the exam.

Ada Sawyer went to work for Percy Gardner on the day after she graduated from high school in 1909. When she passed the Bar exam, her name went on the door of the Turk's Head Building law firm as Gardner & Sawyer. Percy Gardner and Ada Sawyer still have their names on the door, along with those of Robert Gates and James Sloan, the young attorneys Ada hired in 1953 and 1955.

While her practice centered on corporate matters, banking, trust estates and probate, she recognized the law, and lawyers, were not always kind to women. In an interview with the *Evening Bulletin*, on April 7, 1921, she noted, *"It may be interesting to know that there have been twice as many women as men to consult me; and that those of my own sex who have come to me, not only have evinced confidence in me, but have preferred to talk with a woman rather than a man."* The reporter asked Miss Sawyer about women serving on juries, for which Judge Hahn considered women unfit. While Ada demurred from giving an opinion because her only trials thus far had been with a judge sitting without a jury, she stated, *"…until I knew more of the workings of the minds of men jurors, I could not compare them with my idea of what women might do. As far as their mentality is concerned, however, I think that the average woman compares very favorably with the average man juror."*

By the time Ada Sawyer was admitted to practice before the U.S. Supreme Court in 1925, she was the President of the Rhode Island Federation of Women's Clubs, a member of the Women's Republican Club, for which she served as the legal adviser, the Gaspee Chapter of the Daughters of the American Revolution, the Four Leaf Clover Club, Providence Plantations Club, the Wakefield Area Advisory Board of the Industrial National Bank, and she served as a director of seven Rhode Island corporations.

Ada Sawyer was a frequent guest lecturer at area organizations, and, as early as January of 1937, she told the Barrington Unit of the Rhode Island League of Women Voters that the current laws dealing with marriage, divorce, guardianship and property rights were unfair to women, telling them the special commission set up in 1926 to revise the marriage laws had not accomplished anything.

Rhode Island Governor Pothier gave Ada her opportunity to have a greater impact on the law when he named her to the Rhode Island Children's Laws Commission, which served as part of an initiative to reform the Rhode Island Labor laws relating to minors. Miss Sawyer had earlier drafted the bill creating the Commission.

During this time, Ada Sawyer and Percy Gardner were trying cases dealing with the banking industry in front of the Rhode Island Supreme Court. While Judge Hahn may not have thought women were fit to serve on a jury, he wrote a dissenting opinion in favor of Miss

Sawyer's client in the case of **Gilmore v. Prior**, 52 RI 395, 161 A 137 (1932). However, we have no indication on his feelings about women practicing law. In all, Ada Sawyer brought thirteen cases to the Supreme Court between 1921 and 1959 as either counsel or litigant. The attorneys involved in the related Court decisions read like a Who's Who of Rhode Island practitioners.

Brown University bestowed her with an honorary Doctor of Laws degree from in June of 1964 which came with the following citation; *"Your quiet example has inspired others to follow your path and has helped to bring about equality in fact as well as theory. We honor what you represent, and what you have done privately and publicly to serve your clients and your community."*

Ada Sawyer retired from the world of law in February of 1983. When she died on May 13, 1985, at the age of 93, Rhode Island lost its Providence Portia. ❖

In Memoriam

Norman A. Peloquin, II, Esq.

Norman A. Peloquin, II, 49, of South Dartmouth, Massachusetts, passed away on July 23, 2010. He leaves behind his wife of 19 years, Deborah J. Bozak, and their two children, daughter MacKenzie, 9, and son Oliver, 7. He is survived by his mother, Dr. Eleanor M. Morad and his brother Luke and his wife Diane. He is the son of the late Norman A. Peloquin.

Mr. Peloquin was born in Jamaica Plain, MA, graduated from Tabor Academy, Boston College, and Suffolk Law School. He was a partner in the law firm of Partridge, Snow & Hahn, LLP in Providence, RI and New Bedford, MA, and a nationally recognized expert in admiralty and maritime law. He was very active in the community as a member of the Dartmouth Waterways Management Commission and as a member of the board of directors of the Buttonwood Zoological Society. He was an ardent sailor and member of the New Bedford Yacht Club.

Eustace T. Pliakas, Esq.

Eustace T. (Ted) Pliakas passed away on June 24, 2010. Born in Providence to Theodore G. Pliakas and Lambrini Bratiotes. He is survived by his wife Dorothy; his sister Demetra Pliakas Hills; his three children Paul, Stephen, and Rhea; his daughter in-laws Jean Pliakas and Lizzie Mudenda and his son in-law George Zikos.

Ted was a graduate of Classical High School. Following his graduation, Ted joined the Army Air Corps during World War II. He served in Lille and Le Havre, France where he supervised military communications.

Ted received his undergraduate education from several schools including Providence College and, during his military training, at City College of New York and Clark University. After the war, he took undergraduate courses and attended the Law School at the University of Chicago. After being admitted to the Rhode Island Bar, Ted worked in tax law with Christopher Del Sesto and then joined the law firm Graham, Reid, Ewing & Stapleton. Ted became a partner and remained with the firm through three mergers and name changes for over 50 years.

Ted's Greek heritage was an enduring source of pride for him that manifested itself in many ways, especially in his dedication to the Annunciation Church in Cranston. Here he served as co-chairman of the Building committee in the 1960s and also served as Parish President during the 1990s and for decades provided the church with pro bono legal work. For his service, he was made an Archon Nomophylax of the Order of Saint Andrew the Apostle of the Ecumenical Patriarchate. As a young lawyer, he worked for the Legal Aid Society. He also worked on a pro bono basis for community groups in South Providence. He served the RI Commission to Encourage Morality in Youth where he successfully worked to abolish the Commission, thereby ensuring that several important works of literature would not be banned from public schools.

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Re-tying the Gordian Knot

continued from page 9

regarded court in a business-sophisticated jurisdiction ruled against Travelers itself, the Supreme Court of Rhode Island did not even mention that case in its **Irene Realty** decision. By failing to address this issue, the Court threw into doubt the many contracts, such as landlord-tenant and contractor-subcontractor agreements, that require indemnitors to name their indemnities as additional insureds on their insurance policies. Read strictly, **Irene Realty** means that the typical, standard-form, business-contract language does not require indemnitors to obtain primary insurance for their indemnitees.

However, what was more remarkable than the Court's ignorance of **Pecker Iron Works** was the Court's finding that, without an agreement by the tenant to obtain primary coverage for Irene Realty, Travelers did not even have to share primary coverage with American Empire. There are two possible, yet equally-troubling, avenues for interpreting this aspect of the Court's decision. Either the Court found the competing other-insurance definitions primary insurance (American Empire) and other applicable similar insurance (Travelers) so vastly different from each other that they did not materially conflict, as in **Ferreira**; or, without saying as much, the Court found that the case fell within **Liberty Mutual**, supra, in which it was determined that true excess or umbrella policies (i.e., policies that are and can only be excess policies in any circumstances) should not have to share primary coverage with a primary policy containing an other-insurance clause.[46]

If, on the one hand, the Court made a value judgment between the competing definitions of other-insurance, then it both misread the American Empire policy and circumvented **Brown** and **Hindson**. The difference between the other-insurance definitions involved in **Irene Realty** – primary insurance (American Empire) and valid and collectible insurance (Travelers) – was similar to the differences between the competing definitions in **Brown** and **Hindson** – other applicable liability insurance, other collectable insurance; other applicable similar insurance. In each instance, the insurer simply was trying to elevate itself above other available insurers. But, even if it could be said that American Empire's use of the term pri-

mary in section b. of its other-insurance clause somehow excluded the Travelers policy, this merely negated section b. ("Excess insurance") of the clause and left the court with section c. of the clause ("Method of Sharing"), which the Court did not cite, but which, nevertheless, called for any other insurance to share primary coverage with American Empire on a pro-rata basis. The latter provision clearly brought the case within **Hindson**, in which competing excess and pro-rata clauses were deemed mutually repugnant.

If, on the other hand, the Court decided that Travelers prevailed because its policy was, and could only be, an excess insurer of Irene Realty in all cases, as in the **Liberty Mutual** case, then the Court simply misread the Travelers policy. As noted above, the Travelers policy offered primary coverage to additional insureds, such as Irene Realty, if and when they had no other available coverage. In fact, the Court seemingly acknowledged this, because it did not rely upon Liberty Mutual, and because it conducted a full **Ferreira**-type analysis and agreed with Travelers that "both policies contain 'other insurance' clauses which purport to limit coverage to excess coverage when the insured is covered by another policy providing primary coverage[.]"[47]

Thus, it appears that the better of these two available interpretations is that the Court did not find that the Travelers policy was and could only be an excess policy with respect to additional insureds but, instead, found that Travelers had the stronger other-insurance-clause draftsman. If this is indeed how the case was decided, then **Hindson**, while still admirable for its eloquence, has little, if any, remaining precedential value. Initially, the **Ferreira** exception to **Hindson** was created for other-insurance clauses that were in agreement and not actually in conflict, and was intended to give insurers what they specifically bargained for."

Now, we have **Irene Realty**, which purported to reconcile competing policy language that was not in agreement and which ruled against an insurer that specifically agreed not to extend primary coverage under the facts at hand. (If, as it turns out, **Irene Realty** was decided on the basis that Travelers merely extended excess coverage to additional insureds in every case, then the best that can be said for **Irene Realty** is that it wrongly was decided.)

Unless it is content to have this area of the law continue to befuddle practitioners, the Supreme Court of Rhode Island must abandon one or more of its earlier decisions. The best approach would be to uphold **Hindson** and **Ferreira** by strictly limiting **Ferreira** to cases involving truly identical policy language. However, in order to do this, the Court would have to abandon **Irene Realty**, which it presumably would be unwilling to do. (Better yet, the Court could abandon both **Ferreira** and **Irene Realty**, as they were not decided on their facts and the former's inability to curtail the battle of the draftsmen is manifested by the latter.) The only other alternative, short of formally abandoning **Hindson**, would be to reconcile **Hindson** with **Irene Realty**, but this seems impossible to do, at least in a manner consistent with the actual facts of those cases. In any event, until there is some clear and consistent reconciliation of the case law, the battle of the draftsmen shall wage on.

Editor's Note: The author was counsel for the appellants in **Irene Realty Corp. et al. v. Travelers Property Casualty Company of America**.

ENDNOTES

1 ***Hindson v. Allstate Insurance Co.**, 694 A.2d 682, 685 (R.I. 1997).*
2 ***Brown v. Travelers Insurance Co.**, 610 A.2d 127, 128 (R.I. 1992). Earlier, in **Pickering v. American Employers Ins. Co.**, 109 R.I. 143, 282 A.2d 584 (1971), and **Employers' Fire Insurance Co. v. Baker**, 119 R.I. 734, 383 A.2d 1005 (1978), the court invalidated excess-escape-type other-insurance clauses because they ran afoul of Rhode Island's compulsory-insurance legislation.*
3 *Id. at 128.*
4 *Id.*
5 *Id.*
6 *Id.*
7 *Id. at 129.*
8 *Id. at 130.*
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.*
13 ***Hindson**, supra, 694 A.2d at 683-684.*
14 *Id. at 684.*
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.*
19 ***Lamb-Weston, Inc. v. Oregon Automobile Ins. Co.**, 219 Or. 110, 119, 341 P.2d 110, 128 (Or. 1959).*
20 *Id. at 115-116.*
21 *Id. at 119.*
22 *Id. at 685.*
23 *Id. at 685 (citing **Brown**).*
24 *Id.*
25 *Id.*

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26 ***Id.** at 686. One month later, in **Ryan v. Knoller**, 695 A.2d 990 (R.I. 1997), the court determined that competing "excess" other-insurance clauses must share primary coverage on a pro-rata basis.*

27 ***Ferreira v. Godbout**, 2000 WL 1910036*1 (R.I. Super., Dec. 15, 2000), in which the court ultimately decided the case based upon the interaction between **Hindson** and Rhode Island's compulsory-insurance legislation.*

28 ***Id.***

29 ***Id.; see also** Nelson and Ludolph, 3 LAW AND PRAC. OF INS. COVERAGE LITIG. § 38:14 (Rhode Island among those jurisdictions adopting the "Lamb-Weston rule," which "provides for a uniform result, regardless of the number of concurrent policies or the nature of their respective 'other insurance' clauses").*

30 ***Ferreira v. Mello**, 811 A.2d 1175, 1177 (R.I. 2002).*

31 ***Id.** at 1177-1178.*

32 ***Id.***

33 ***Id.** at 1177.*

34 ***Brown**, **supra**, 610 A.2d at 130; **Hindson**, **supra**, 694 A.2d at 685.*

35 ***Id.** at 1119.*

36 ***Id.** at 1120.*

37 ***Id.***

38 ***Id.***

39 ***Id.***

40 ***Id.***

41 ***Id.** at 1121.*

42 ***Id.** at 1120-1121.*

43 ***Id.***

44 ***Id.***

45 ***Pecker Iron Works v. Travelers Ins. Co.**, 786 N.E.2d 863, 864 (N.Y. 2003). The plaintiffs also cited **Malecki on Insurance**, Volume 11, Number 6, at 1 (April, 2002), for the proposition that "[p]ersons or organizations seeking additional insured status typically have done so assuming that coverage would be provided on a primary basis; meaning that the policy to which the additional insured endorsement is attached will apply coverage first. The additional insured would then look to its own insurance policy for secondary protection. This perception is based, in large part, on the fact that one of the main reasons additional insured status is sought is to avoid involving the additional insured's own coverage in claims arising out of the activity for which additional insured status is provided."*

46 ***Liberty Mutual Insurance Company v. Herben Insurance Company**, 603 A.2d 300, 303 (R.I. 1992).*

47 ***Id.** at 1123.* ❖

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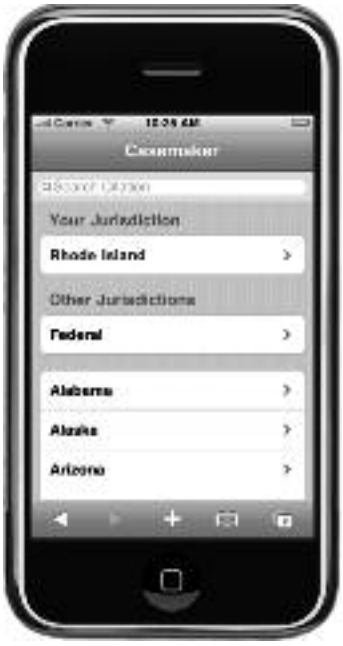

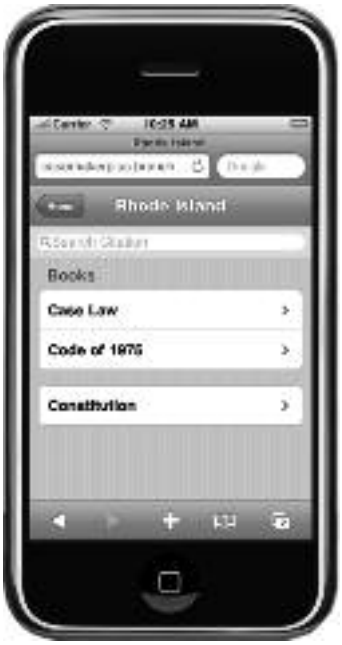

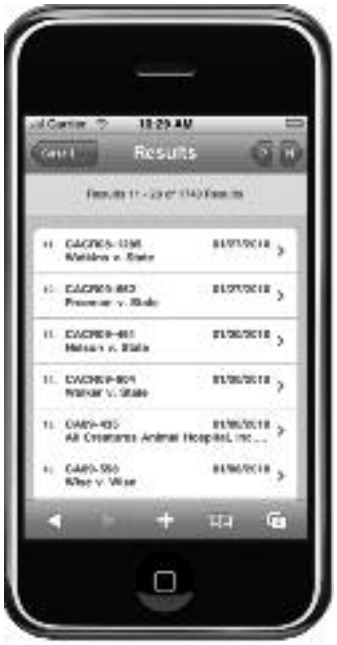

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