Rhode Island Bar Journal

Rhode Island Bar Association Volume 58. Number 6. **May/June 2010**

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RHODE ISLAND BAR ASSOCIATION LAWYER'S PLEDGE

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

Direct advertising inquiries to the Managing Editor, Frederick D. Massie, Rhode Island Bar Journal, 115 Cedar Street, Providence, RI 02903, (401) 421-5740.

USPS (464-680) ISSN 1079-9230
Rhode Island Bar Journal is published bimonthly by the Rhode Island Bar Association, 115 Cedar Street, Providence, RI 02903.
PERIODICALS POSTAGE PAID AT PROVIDENCE, RI

Subscription: $25 per year

Postmaster
Send Address Correction to Rhode Island Bar Journal, 115 Cedar Street, Providence, RI 02903

www.ribar.com

Front Cover Photo
Horseshoe Falls, Shannock Village, Richmond, RI
by Brian McDonald

Don't Let the Light Go Out

Victoria M. Almeida, Esq.
President Rhode Island
Bar Association

I have received many blessings in my life – periods of grace that were pure gifts to me. As you probably know, I do not believe in coincidence, but I do believe in providence and that we are called to do something at a particular season in our life.

I have received many blessings in my life – periods of grace that were pure gifts to me. As you probably know, I do not believe in coincidence, but I do believe in providence and that we are called to do something at a particular season in our life. We may not know why at the time, but sooner or later we come to a human, if imperfect, understanding as to why. I was called to lead the Bar somewhat out of time, as we lawyers would say. When called to do so, I was at peace with where I was. Indeed, I felt compelled to be nowhere else. On the following pages, you will find my President's Report, my accounting, if you will, to you, as your Servant Leader, on some of the initiatives accomplished with the inimitable assistance of the Executive Committee, Executive Director Helen McDonald and the Bar's program Directors. These initiatives and services were done in your name and on behalf of those in our society who look to us, as lawyers, as the means by which to seek and find greater justice. History and you will be the judge of those efforts. Now, I wish to remind you of my President's Messages over the last 16 months and provide you with a suggestion or two on the work that remains to be done by us and those who succeed us.

1. ***Don't Go Mistaking Paradise for That Home Across the Road***: Find paradise in your core values of faith, love of neighbor and hard work as you announce justice to others.

2. ***Servant Leader***: Be a Servant Leader to all you meet, and, in every circumstance of your life, bring out the best in others so they are motivated into action.

3. ***Just a Taste***: Give more than just a taste to all in need of your gentleness, tenderness and compassion.

4. ***Thanksgiving Without Grapes***: This Thanksgiving, and every day, part company with the status quo, forego a grudge, welcome a stranger, gladden the heart of a child and carry your candle as you run to the darkness and seek out the helpless and the poor.

5. ***In the Bleak Midwinter We Need Beacons and Valentines***: Remember the beacons and valentines in your life and honor them, your parents, your teachers, brave friends, opposing counsel and your children by seeing them in those who are broken, torn and forgotten.

6. ***Justice, Justice, Shall You Pursue***: Pursue justice with all those with whom you work in civil and criminal matters and collaborate with those in other disciplines who can assist in bringing clarity to complex issues.

7. ***Don't Let the Light Go Out***: For the last 113 years, the Rhode Island Bar Association and its lawyers have illuminated the path to greater justice for all. More than ever before, we as lawyers must continue to be that light.

Thank you for the honor to be your Servant Leader. Soon you may not recall any of my messages or what I have said, but I do hope you remember how those messages made you feel. We are many, 6,600 strong, yet we truly are one. Each of us has different gifts and pursues different aspects and practices in the law. Whatever you pursue, I think this is wise counsel:

> Let love be sincere; hate what is evil, hold on to what is good; love one another with mutual affection; anticipate one another in showing honor. Do not grow slack in zeal, be fervent in spirit. Rejoice in hope, endure in affliction, persevere in prayer. Contribute to the needs of the poor, exercise hospitality. Bless those who persecute you, bless and do not curse them. Rejoice with those who rejoice, weep with those who weep. Have the same regard for one another; do not be haughty but associate with the lowly.[1]

P.S. I would like to express my gratitude and affection to my colleagues at Adler Pollock & Sheehan for their immeasurable support of my Presidency in both word and deed. Special thanks to my boiler room cabinet, John Tarantino, Pat Rocha, my assistant, Debbie Kubacki and the best note editor anywhere, Nicole Dulude. Last, but not least, a tip of the hat to my parents and my sister, Lillian. How do I say the unsayable?

ENDNOTES
1 *St. Paul to the Romans 2:5-16.*

President's Report Follows on next page.

President's Report – 2009-2010
Victoria M. Almeida – Greater Justice For All

As attorneys we face challenges every day. This past year, I called on members of the Rhode Island Bar Association to participate in the *Challenge of Greater Justice for All*. I am happy to report that, with your assistance, we made great strides in keeping justice accessible for our poorest citizens. Your care for and involvement with the neediest, through the Rhode Island Bar Association's Volunteer Lawyer Program, the Elderly Pro Bono Program or the new US Armed Forces Legal Services Project, provided services to those in desperate need of legal assistance. Details concerning some of our Bar's stand-out programs follow.

Unmet Legal Needs of Veterans and Families – This new program is filling the need for attorneys to directly represent military personnel by accepting pro bono cases. Volunteer opportunities are in a variety of civil law areas including, family law, probate issues, landlord/tenant, real estate, contracts, consumer, bankruptcy, collections, employment (USERRA), immigration/naturalization, torts, income tax, and other areas.

Mediation Day Clinic – An exciting new initiative to help address the unmet need for low income clients needing a divorce has been organized between the Bar Association, Professor Kogan of the Roger Williams School of Law Mediation Clinic and David Tassoni, the Deputy Family Court Administrator.

Elderly Programs – Including a continuing series of Collection Clinics on an ongoing basis at both the Bar Headquarters and volunteer attorneys' offices, clinics have also been provided in the areas of Bankruptcy, and Family Law.

Volunteer Incentives – A new policy reflects our Association's support of the pro bono effort and our members' direct participation in the Volunteer Lawyer Program (VLP) and/or Pro Bono Program for the Elderly. Any volunteer attorney participating in either the VLP or Pro Bono Program for the Elderly who has contributed and reported a minimum of thirty pro bono hours will earn free attendance at either one, three credit Rhode Island Bar Continuing Legal Education (CLE) seminar or three, one credit CLE Food for Thought seminars of their choice.

Involvement in Bar Association activities supports and strengthens our professional lives and connects us to our colleagues, providing valuable, direct networking within distinct areas of the law. For example, Bar committee participation is a particularly excellent means for new lawyers to grow and advance professionally while benefiting from the experience and wisdom of our more seasoned Bar members. We sought other ways to bridge our diverse communities throughout the past year:

New Attorney Advancement Task Force – The Task Force implemented a number of programs and events to stimulate new lawyer interest and participation in the Rhode Island Bar Association. These have led to greater participation in organizational education, professional and public service activities and eventually to strong, increased involvement in leadership. Bar Committee Chairpersons were requested to increase their membership by conscripting new lawyers as members, to aid in this effort, over 65 new and seasoned Bar members attended the Bar Committee Networking Event on Thursday, February 25, 2010.

Penning a New Chapter in Rhode Island Legal History – This year, the Bar's President had the honor of representing the Rhode Island Bar Association at the admission ceremonies for our newest members. To mark this occasion, which is our Bar Association's first attendance at an admission ceremony, each new member was presented with a quill pen to remind our new colleagues of their obligation to use as much care in their pleadings and writings as did those lawyers who preceded us and carefully and elegantly penned the Declaration of Independence.

Rhode Island Supreme Court Chief Justice Paul A. Suttell, welcomed Kyle F. Correia, Zoe K. Cooper, Amanda J. Chaves, Maura Nugent, and other new attorneys to the Rhode Island Bar where Rhode Island Bar Association President Victoria M. Almeida presented all the new Bar members with quill pens.

The mission of the Rhode Island Bar Association is to represent the members of the legal profession of the state, serve the public and profession, and promote justice, professional excellence and respect for the law. To facilitate that mission, we offer services and programs to assist you in your practice. Each year, we work to expand and improve those services and programs.

Bar Association Website – Bar member response to the Association's new website is highly positive. New web site highlights include: 1) Fresh new appearance and organization; 2) Improved, user-friendly, web site navigation; 3) Bar control over the content and appearance of most web-site pages (previously required outside web site administrator direct involvement) allowing rapid updating of copy, photographs and graphics; 4) Improved Bar member access to information and interaction including Bar member CLE seminar registrations and payments and public service sign-ups; 5) Easily viewable and downloadable copies of complete *Bar Journals*. Also on the new website, members will find an updated version of Casemaker – **Casemaker 2.2** – is now live. It has the same look and format but features some new and useful additions to make the program more powerful and user friendly.

Bar Journal – A new column, *This Month in Bar History*, is running in the *Rhode Island Bar Journal*. A series of short stories highlighting aspects of Bar Association history are presented in each issue and also on the Bar's website, highlighting important events and serving as a reminder of our rich and important history and the many contributions made by the Bar.

Bar Members Credit Card Program – The Rhode Island Bar Association recently added the Law Firm Merchant Account™ as our newest member benefit. The Law Firm Merchant Account, credit card processing for attorneys, is a custom payment solution designed by Affiniscape Merchant Solutions (AMS). AMS examined the requirements for handling client funds and developed a system that resolves the ethical dilemma attorneys face when processing credit cards. With the Law Firm Merchant Account, Bar members can easily accept credit card payments from clients.

Our CLE program is aimed at ensuring professional excellence and competence for our members. This year, there is a greater focus on education in the area of technology to assist our members with staying competitive. We expanded our online CLE options and begun simulcasting live, CLE programs, allowing member access to educational programming of a very specialized nature.

Annual Meeting – There were a total of 1,363 registrations for the June 2009 Annual Meeting. This year's Committee, chaired by Linda Rekas Sloan, has finalized plans for this June's meeting. Over 40 CLE sessions and a number of social events are scheduled. Our featured speakers are Michael Rubin, past president of the Louisiana State Bar who speaks on ethics at bar associations across the country and best-selling author Jodi Picoult, a close friend of our Rhode Island Bar President-Elect Lise M. Iwon, who will offer remarks at our annual luncheon and a non credit program on fiction writing.

The free risk-management program *Protect and Build Your Law Practice In a Tough Market* – Sponsored by Aon Affinity, our endorsed professional liability agent, this program had record registration and attendance this past year. 1,595 lawyers registered for the program.

Food For Thought – The popular CLE programs continue and many sell out. Topics include: the work product doctrine, ethical issues in criminal law, advanced healthcare directives and privilege logs, planning for the expected or unexpected closing of a law practice, QDRO practice, child support, and an overview of the DEM and CRMC.

Massachusetts Continuing Legal Education/Rhode Island Practice Collection – The first book in the collection, ***Domestic Law Practice***, was released. It contains techniques, tips, strategies and best practices of thirty of Rhode Island's expert authorities on divorce law practice. In addition to our On-line CLE offerings, we are beginning to offer simulcasts of live seminars to broadcast at the Law Center. Brochures and announcements will be sent to Bar members regularly.

The Association has a goal to increase public understanding of and respect for the Law. The Bar Association's website has expanded to include a section on all the law related programming and organizations in Rhode Island and the development of a comprehensive online curriculum library was added to assist lawyers and educators in teaching about the legal system.

Stormwater Flood Crisis Response – Working as a team, Rhode Island Bar Association President Victoria M. Almeida, the Bar's Executive Director Helen McDonald, Communications Director Frederick Massie and Public Services Director Susan Fontaine, developed and executed an action plan for the public and member response to the crisis caused by the stormwater flooding in Rhode Island. The plan provided Rhode Island residents with no-client-cost legal assistance, specifically relating to stormwater-related issues; created opportunities for Bar members to provide volunteer legal assistance; secured news media coverage of Bar Association flood-related work; and provided disaster recovery information to Bar members.

2010 Rhode Island Law Day Classroom Programs and Essay Contest – Over 25 schools and over 43 lawyer-judge teams provided classroom presentations for the 2010 Rhode Island Law Day. Topics were: 1) Downloading Copyrighted Music; 2) Posting Personal Information on the Web & Cyber-Bullying; and 3) Sexting. ❖

Bar Acts Swiftly to Aid Flood Victims

Photo by Brian McDonald

As storm waters reached their highest point, deluging homes and businesses and closing roads throughout the state, the Rhode Island Bar Association quickly responded, offering Rhode Island residents free legal assistance for flood-related issues. Volunteers were swiftly recruited through the Bar's Lawyer Referral Service (LRS), and news releases detailing the assistance – available via telephone, email and online through the Bar's website – were provided to all the state's print and electronic news media. Immediately following the storm, LRS volunteer lawyers began providing unlimited consultation time to assess resident concerns and, if appropriate, developing legal strategies.

Additionally, the Rhode Island Bar Association posted vital information and links to flood and disaster relief resources on the Bar's website. These included connections to: federal aid programs for Rhode Island disaster recovery; Small Business Administration Disaster Loans; road closures; fire station locations and contact numbers; Rhode Island Emergency Management Agency; and Red Cross aid and shelters.

According to Rhode Island Bar Association President Victoria M. Almeida, "I am proud and heartened by the rapid response of Bar members and staff to this calamity. And, I am pleased our Bar continues to play such a positive and prominent role in the recovery effort."

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**

Irons v. Ethics Commission: Missing Pieces

Thomas R. Bender, Esq.
Partner in the law firm of Hanson Curran LLP in Providence

The aim of every political constitution is, or ought to be, first to obtain for rulers men [or women] who possess most wisdom to discern, and most virtue to pursue, the common good of society; and in the next place, to take precautions for keeping them virtuous while they continue to hold their public trust.

Creating an adequate scheme to address legislative ethics is not simply about punishing unethical conduct by individual legislators. It is primarily, and most importantly, about promoting and protecting public trust and confidence in the legislative process. That trust and confidence is essential to the democratic process and, indeed, government itself. People must believe that laws are enacted because they serve and benefit the public's interests, not the private interests of individual legislators to the detriment of the public interest. And public trust and confidence in the legislative process benefit, I think, legislators themselves. The citizen-legislators who lend their time and talents to tackle increasingly difficult and complicated issues, affecting many legitimate but diverse and conflicting interests, can only benefit from the perception and belief that the hard choices they must make are driven by the honest assessment of the public good. **Irons v. Rhode Island Ethics Commission**, 973 A.2d 1124 (R.I. 2009), concerned the constitutionality of the scheme Rhode Island had employed for several decades to promote legislative ethics, implemented and enforced by the Rhode Island Ethics Commission.

The central debate in **Irons** was whether the 1986 Ethics Amendment to the state constitution was intended by the framers and voters to give the Ethics Commission limited jurisdiction to regulate the "core legislative acts" of state legislators, including voting, deliberating or otherwise taking action on legislation, notwithstanding the normal immunity that would apply to such acts under the Speech in Debate Clause, which provides: "For any speech in debate in either house, no member shall be questioned in any other place."[1]

The debate in **Irons** was not, or should not have been, about whether that was a good idea or a bad idea. That is a political theory question. Nor was it, or should it have been, a referendum on the Ethics Commission's actual exercise of jurisdiction over core legislative acts for the last two decades. That is a public policy question. It was, or should have been, about what the framers and voters intended for their constitution to say and mean. That is a legal historical question.

But the legal historical analysis in **Irons** was, unfortunately, less than complete.

Missing Pieces

One of the Rhode Island Supreme Court's most consistent teachings with respect to interpreting the state constitution is that, "[i]n construing constitutional amendments, our chief purpose is to give effect to the intent of the framers."[2] To determine that intent, the Court has said, "it is appropriate for us to consult whatever extrinsic sources of information are available, such as proceedings of the Constitutional Convention itself, and legislation, if any is available, relating to the constitutional provision in question."[3] But disappointingly absent from the legal debate in **Irons** – whether the Ethics Amendment was intended to effect a limited partial repeal of the Speech in Debate Clause in favor of Ethics Commission jurisdiction over core legislative acts – are three pieces of significant historical evidence:

- the pre-Amendment tradition of a Commission authorized to question core legislative acts, as represented by the former § 36-14-5 of the Conflict of Interest Act;
- the evidence from the 1986 Constitutional Convention demonstrating the framers intent to constitutionalize that pre-Amendment tradition;
- and the immediate post-Amendment enactment of R.I. Gen. Laws § 36-14-6, which evidenced the contemporary legislative understanding that the pre-Amendment tradition was now embodied in art. 3, sec. 8 of the Rhode Island Constitution.

The Pre-Amendment Tradition of a Commission Questioning Core Legislative Acts

For a decade prior to the 1986 Constitutional Convention that debated and drafted the Ethics Amendment, the former *Act Relating to Conflict of Interest* contained a statute that authorized an independent non-partisan commission, outside of and separate from the General Assembly, to question a state legisla-

tor's vote, deliberations or other participation concerning pending or proposed legislative matters.[4]

That statute, the pre-1987 version of § 36-14-5, represented a governmental scheme requiring a state legislator with a potential conflict of interest concerning a pending legislative matter to file a written statement with an independent commission – then called the Conflict of Interest Commission – "describing the matter requiring action and the nature of the potential conflict."[5] And, where the state representative or senator declined to:

> request that he [or she] be excused from *voting, deliberating or taking action on the matter*, the statement shall state why, despite the potential conflict, he [or she] is *able to vote and otherwise participate fairly[,] objectively, and in the public interest*; and deliver a copy of the statement to the commission, and . . . to the presiding officer of the [legislative] body [in which they serve.][6]

This statute, implemented by the Conflict of Interest Commission with the permission of the legislature for a decade prior to the 1986 Constitutional Convention, envisioned a non-legislative Commission, outside of the House or Senate, that would examine and question state legislators with respect to core legislative acts that would otherwise be protected from such questioning by the Speech in Debate Clause.

This statute is historically significant to understanding and ascertaining the intent underlying the Ethics Amendment to the State Constitution 10 years later, because it represented a vision and understanding that core legislative activities of state legislators would be "questioned" by an independent and non-partisan administrative entity outside the House or Senate. Whether the General Assembly could "waive" Speech in Debate immunity, as this statute purported to do, is a debatable and unresolved constitutional question. But the intent to do so is unmistakable. That pre-amendment statute stands as significant historical evidence that the notion of a non-legislative independent commission, regulating and enforcing the ethical exercise of core legislative acts, had been an accepted and integral part of Rhode Island's state governmental fabric for a decade when the 1986 Constitutional Convention was convened. And the record of the convention

shows the framers of the Ethics Amendment knew that, and intended to embed that tradition in the State Constitution.

The Framers' Embrace of the Pre-Amendment Tradition

There is extensive evidence from the 1986 Constitutional Convention's Ethics Committee demonstrating that the Committee recommended an amendment to the State Constitution for the precise purpose of preserving, with a constitutional foundation, "what we already have in the Conflict of Interest Commission[,]"[7] that is, the pre-Amendment tradition of an independent and non-partisan commission with authority to question a state legislator's votes and deliberations for the limited purpose of conflicts of interest. The evidence from the Constitutional Convention demonstrates the Ethics Amendment's framers intended that the proposed amendment would constitutionally preserve the pre-Amendment tradition, as well as constitutionally prohibit the dismantling of that tradition "in any way, shape or form[, and to] protect what we have now."[8]

The record of that Ethics Committee proceeding reveals three recurring themes: 1) that the standards, procedures and reach of the existing Conflicts of Interest Act not be diluted; 2) the concern that the Legislature might one day dilute those standards, procedures and reach; and 3) that consequently some entity apart from the Legislature should be constitutionally, rather than merely statutorily, responsible for creating and enforcing an ethics code applicable to the General Assembly. The May 22, 1986 transcript of the meeting of the Ethics Committee demonstrates these concerns:

> Chairman DeSisto: [Expressing concern about] "a watered down version of the Conflict of Interest Statute * * * we might lose what we have already in the *Conflict of Interest Commission* [if left to the General Assembly]."[9]
>
> * * *
>
> Delegate LaCouture: ". . . there has to be something – some agency or body or official who's *charged with enforcing whatever the ethics are*."[10]
>
> * * *
>
> Delegate Millette: ". . . we should make sure that we put wording where the General Assembly cannot weaken the Conflict of Interest Commission

RHODE ISLAND Bar Association 1898

This Month In Bar History

May

On May 1, 1986, the Volunteer Lawyer Program (VLP) was added to the roster of Rhode Island Bar Association's public services. Initially funded by a grant from Rhode Island Legal Services (RILS), and now financially supported by RILS and the Rhode Island Bar Foundation, VLP expands the delivery of legal services to financially-eligible, low income Rhode Island residents and provides opportunities for private attorney *pro bono publico* participation. VLP attorneys include Bar members from every county in the state and areas of the law they handle include: consumer, bankruptcy, special education, license registry, tort defense, landlord/tenant, family, wills, collections, guardianship, and homeless-related issues. Through the participation of its generous members, the Volunteer Lawyer Program handles approximately 1,100-1,200 client cases on an annual basis. To become a member of this historic program, please contact Volunteer Lawyer Program Coordinator John H. Ellis by telephone: (401) 421-7758 ext. 103 or email: jellis@ribar.com. Bar members may also sign-up for VLP, online, through the Bar website's Members Only section at www.ribar.com

in any way, shape or form. We need to do that – *protect what we have now.*[11]

* * *

Delegate Gelch: ". . . the tragedy of what we have to do here is that we have to leave *the implementation of a code of ethics* to the thoughts [sic] guarding the chicken coop . . . when we look at the whole legislature, *we don't trust the legislature*. What we are trying to do is provide a code of ethics to raise the level of performance of our own *legislature*, executive and judiciary.[12]

* * *

Delegate Brown: ". . . I think fundamentally if we are going to address through the Constitution the problem of having a state known for its blue ribbon corruption, *you're going to have to have something a little out of step to set the tone.*[13]

* * *

Delegate Philips: ". . . we should require all [appointed and elected officials in the state and local government] to follow a detailed code of ethics which we would require the Conflict of Interest Commission or successor agency to *implement,*..."[14]

* * *

Delegate Millette: ". . . put the responsibility on the Conflict of Interest Commission instead of on the state legislature. Now that takes the fox away from the chickens. * * * *[I]f we are all concerned about the state legislature doing it or doing it right, let's take it away from them. Let's give it to another body.*"[15]

Both the pre-Amendment tradition evidenced by § 36-14-5 of the former Conflict of Interest Act, and the delegates' statements demonstrating an intent to preserve and constitutionalize the pre-Amendment tradition of an independent non-partisan commission with authority to question core legislative acts, are vital and illuminating pieces of evidence for any attempt to discern the intent of the framers. But neither was addressed or analyzed by the majority opinion in an attempt to understand the intended design of the Ethics Amendment.

Yet the final piece of evidence missing from the **Irons** discussion is perhaps the most significant piece – the 1987 General Assembly's response to the passage of the Ethics Amendment.

Legislative Recognition that Pre-Amendment Tradition had been Constitutionalized

The 1986 amendment resulting in Art. 3, sec. 8 directed the creation of "an independent non-partisan ethics commission" that would adopt an ethics code to which "[a]ll elected officials … of state … government" would be subject. While that particular provision made it clear that state legislators were subject to the ethics code and the Ethics Commission's jurisdiction generally, it did not necessarily make it clear that the code and the Commission's jurisdiction applied to core legislative acts, acts that were historically protected by the Speech in Debate Clause.

But it is a well-settled and oft-repeated principle of Rhode Island constitutional law that in construing constitutional provisions that may be ambiguous, "it is indeed proper to consult what extrinsic sources are available: not only the proceedings of the Constitutional Convention itself *but also legislation relating to the constitutional provision in question adopted at the same time as the constitutional amendment or subsequently.*"[16] That is because "[i]t is proper to seek extrinsic aid in the determination of [the

constitution's] meaning by ascertaining the contemporaneous construction placed upon the words at the time of their adoption[.]"[17]

This principle of constitutional interpretation holds a prominent position in other states as well,[18] because "[a] construction of the constitution adopted by the legislative department and long accepted and acquiesced in by the people is entitled to great weight, and in the absence of some showing of palpable error, is to be accepted as a correct interpretation[,]" of the amendment in question.[19] This widely held rule is based on the belief that the legislative construction is "likely reflective of the mindset of the framers[,]" and therefore assists the Court in the process of interpreting an ambiguous constitutional provision "to carry out the intent of the framers[.]"[20]

In the legislative session immediately following the 1986 approval of the Ethics Amendment the General Assembly enacted a new statute, § 36-14-6, set forth in Chapter 14 of Title 36, renamed "Code of Ethics," that was identical in all material respects to the former § 36-14-5 under the Conflict of Interest Act.[21] Like the former § 36-14-5, the post-Amendment § 36-14-6 also required a state legislator, confronted with a conflict of interest in the performance of his or legislative duties, to prepare a statement "describing the matter requiring action and the nature of the potential conflict[.]" Under this statute, as under the pre-Amendment statutory scheme, the legislator must deliver the statement to both the Ethics Commission and the presiding officer of the House in which the legislator serves;[22] and if the legislator:

> does not request that he or she be excused from *voting, deliberating, or taking action on the matter*, the statement shall state why, despite the potential conflict, he or she is able to *vote and otherwise participate fairly, objectively, and in the public interest[.]*[23]

In light of the decade-old pre-Amendment tradition under the Conflict of Interest Commission, and the subsequent record of the framers' intent reflected in the records of the Constitutional Convention, one could conclude based on those two pieces of evidence alone that the 1986 Ethics Amendment was intended to give the Ethics Commission jurisdiction over core legislative acts, notwithstanding the Speech in Debate Clause. But the post-Amendment enactment of § 36-14-6, a statute enacted to implement art. 3, sec. 8 of the State Constitution, cements that conclusion. That statute explicitly sets forth the 1987 legislature's awareness that the Ethics Amendment was intended to apply to the core legislative acts of "voting, deliberating, or taking action on" proposed or pending legislation, and explicitly demonstrates that the 1987 legislature understood the command of art. 3, sec. 8 – "[t]he ethics commission shall have the authority to investigate violations of the code of ethics and to impose penalties, as provided by law" – to include the jurisdiction to "question" alleged violations of the Ethics Code occurring in connection with those core legislative acts.

Section 36-14-6 has remained in chapter 14 of Title 36 for over 22 years and through two revisions of the State Constitution, once in 1994 and again in 2004, and it remains there even today. The enactment of that statute, and the two decade old acquiescence to the Ethics Commission's actual exercise of jurisdic-

Continued on page 35

Special Education in Rhode Island
Seclusion and Restraint

Christine H. Barrington, Esq.
Barrington Law Centers,
West Haven, CT

Neville J. Bedford, Esq.
Providence, RI

…as the populations eligible for special education continue to grow and… legal issues arising in Special Education Law, the need for increased advocacy is inevitable…

The Individuals With Disabilities Education Act (IDEA), as amended by the Individuals With Disabilities Education Improvement Act of 2004 (IDEIA),[1] and its predecessor statute the Education For All Handicapped Children Act,[2] were enacted by the United States Congress. This action was largely due to consideration of public concern and for federal case law holding that deprivation of free public education to disabled children constitutes a deprivation of due process. IDEA governs how states and public agencies provide early intervention, special education, and related services to children with disabilities. Since its passage, IDEIA has grown in scope and form to address growing concerns for children with qualified disabilities. Today, a related issue concerning the use of seclusion and restraint has come under increased public scrutiny. These practices presently affect some Rhode Island students, and the outcome of this issue may result in dramatic change.

Generally, children in residential facilities or hospitals that receive federal health care funding have been protected from abusive interventions under the Children's Health Act.[3] However, children in public schools receive protection governed by the laws of the state. Efforts to pass laws and adopt regulations of seclusion and restraint for public school students have failed in many cases. Other states with laws and regulations only provide limited protection from the use of seclusion and restraint.

The "Children's Right to Freedom of Restraint Act,"[4] specifically states "…the public school system"[5] is exempt. The use of seclusion and restraint on students in Rhode Island's public school system is governed by the Rhode Island Board of Regents for Elementary and Secondary Education Physical Restraints Regulations. According to section 3.24, "seclusion" is defined as "…placing a child alone in a locked room without supervision" and "…such action is strictly prohibited in Rhode Island."[6] Section 3.20 defines "manual restraint" as the "…use of physical intervention intended to hold a person immobile or limit a person's movement by using body contact as the only source of physical restraint…" and "seclusion restraint" as "…physically confining a student alone in a room or limited space without access to school staff."[7] Section 3.20(b) further provides that the use of "time out" procedures during which a staff member remains accessible to the student shall not be considered "seclusion restraint" and that the "…use of seclusion restraint is prohibited in public education programs."[8] According to section 3.27, "an isolation timeout" is defined as when "…the student remains in a separate room or booth for a certain period of time. The small room or booth may or may not have a door."[9] Thus, an isolation timeout is permitted under these regulations so long as any room or booth doors remain unlocked. Section 8.0 sets forth the reporting requirements on the use of seclusion and restraint by local education agencies, which includes, but is not limited to, maintaining and reporting detail-specific written documentation on the use of restraints or crisis interventions and timely parental notification.[10]

In the landmark 1982 case, **Youngberg v. Romeo**, the United States Supreme Court recognized that the use of restraint is a drastic deprivation of personal liberty, holding that "[t]he right to be free from undue bodily restraint is the core of the liberty interest protected by the Due Process Clause from arbitrary governmental action."[11] In 1998, the *Hartford Courant* newspaper published a series of articles chronicling the many deaths of adults and children resulting from the improper use of restraint in mental health facilities. This groundbreaking investigative series identified 142 deaths across the country related to these procedures between 1988 and 1998, one-fourth of those deaths involved children.[12] The *Courant* also retained a researcher from the Center for Risk Analysis at Harvard's School of Public Health who estimated that between 50 and 150 deaths occur each year from the use of restraint and seclusion.[13]

A United States Government Accountability Office study found "…hundreds of cases of alleged abuse and death related to the use of these methods on school children during the past two decades."[14] On December 9, 2009, the Preventing Harmful Restraint and Seclusion in

Bar, Law School and Family Court Partner on Unique, New Divorce Mediation Clinic

An exciting, new initiative helps address the unmet need for low income clients seeking divorce. Organized by the Rhode Island Bar Association's Volunteer Lawyer Program (VLP), Professor Bruce Kogan of Roger Williams University School of Law (RWU) and David Tassoni, Rhode Island Deputy Family Court Administrator, the first Mediation Day Clinic was held at the Bar on Saturday, February 27, 2010 from 9 to noon.

The Law School and the Court provided mediators, including students, who helped seven couples craft a Memorandum of Understanding, an unofficial divorce agreement. With preliminary work already completed, VLP attorneys easily filed these with the Court within a week of the clinic. Given the success of the pilot project, the partnership plans to offer future clinics several times a year as an alternative resource for low income clients.

For information about how to participate in the Bar Association's Volunteer Lawyer Program, please contact VLP Coordinator John Ellis by telephone: (401) 421-7758 x 103 or email: jellis@ribar.com.

Front row – David Tassoni, RI Family Court Mediator, and RWU students Margie Caranci, Brittanee Bland-Masi, Alexandra Busa, and Nicole Legere. *Back row* – Neville J. Bedford, VLP Member, Professor Bruce Kogan, RWU Mediator, and students Dadriana Alexandria Lepore, Alixandra Tretter, and Anna Clough.

RWU Student mediators who participated but not pictured are Angela Alexander, Carleen Aubee and Alan Lapre.

Schools Act[15] was introduced in the United States Congress. It is sponsored by Congressman George Miller (D-CA), Chair of the House Education and Labor Committee, and Congresswoman Cathy McMorris Rodgers (R-WA), Vice Chair of the House Republican Conference and Co-Chair of the Congressional Down Syndrome Caucus. Senator Chris Dodd (D-CT) introduced an almost-identical Senate bill.[16]

On February 4, 2010, Rhode Island State Representatives Eileen S. Naughton (D-21) and Michael A. Rice (D-35) introduced an amendment to the Rhode Island "Children's Right to Freedom of Restraint Act."[17] The amendment would specifically include "public schools" as a "covered facility" in the Act.[18]

The laws and regulations affecting the use of seclusions and restraints on children eligible for special education are progressing. However, as the populations eligible for special education continue to grow and the public becomes more aware of the legal issues arising in Special Education Law, the need for increased advocacy is inevitable in this fast-growing area of legal practice.

Editor's Note: The Rhode Island Bar Association's Lawyer Referral Service (LRS) and the Volunteer Lawyer Program (VLP) provide referrals for individuals seeking assistance in Special Education Law matters. Special Education Law is an area practitioners may be interested in growing or expanding their practices. The Legal Services Bench Bar Committee provides members with Continuing Legal Education seminars in this area. For more information on the Bar's VLP, LRS and/or the Legal Services Committee, please contact Public Services Director Susan Fontaine by telephone: 401-421-7722 or email: sfontaine@ribar.com

ENDNOTES

1 *20 U.S.C. § 1400 et seq.*

2 *Public Law 94-142*

3 *42 U.S.C. § 290jj*

4 *R.I. Gen. Laws § 42-72.9-1 et seq.*

5 *R.I. Gen. Laws 42-72.9-3(2)*

6 *Rhode Island Board of Regents for Elementary and Secondary Education P.R.R § 3.24 (Sept.1 2002).*

7 ***Id.** at § 3.20(a) and § 3.20(b)*

8 ***Id.** at § 3.20(b).*

9 ***Id.** at § 3.27*

10 ***See e.g., id.** at § 8.0 (reporting requirements); § 8.1 (informing school administration); § 8.2 (informing parents); § 8.3 (contents of reports); § 8.4 (report to the R.I. Department of Education).*

2010 ANNUAL MEETING HIGHLIGHT:

Friday, June 11th
Lunch & Seminar Speaker

Bestselling Author Jodi Picoult

One of the many highlights of the upcoming 2010 Rhode Island Bar Association Annual Meeting on June 10th and 11th is a luncheon address and a later breakout session by bestselling author Jodi Picoult. Jodi will discuss her successful writing career including the many connections her plot lines have to the law and the courts as referenced in her thought-provoking, suspenseful and enjoyable books. Ms. Picoult, who was recently profiled in the March 23rd *Providence Journal's Lifebeat* section, was invited to the Annual Meeting by incoming Bar President Lise M. Iwon.

Jodi is the bestselling author of seventeen novels, the last three of which debuted at number one on the *New York Times* bestseller list, and her newest novel, *House Rules* (2010). It's about Jacob Hunt – a boy with high-functioning autism – who is accused of murder. Her intelligent, complex, challenging, and compelling novels nearly always involve the legal system. In 2003, she was awarded the New England Bookseller Award for Fiction. She has also been the recipient of an Alex Award from the Young Adult Library Services Association; the Book Browse Diamond Award for novel of the year; a lifetime achievement award for mainstream fiction from the Romance Writers of America; Cosmopolitan magazine's 'Fearless Fiction' Award 2007; Waterstone's Author of the Year in the UK, a Vermont Green Mountain Book Award, a Virginia Reader's Choice Award, the Abraham Lincoln Illinois High School Book Award, and a Maryland Black-Eyed Susan Award. Her books are translated into thirty four languages in thirty five countries. Three – *The Pact*, *Plain Truth*, and *The Tenth Circle*, were made into television movies. *My Sister's Keeper* is a big-screen film starring Cameron Diaz and now available in DVD.

Remember to save the Annual Meeting dates:
Thursday, June 10th and Friday June 11th.

New Rhode Island Bar Association Website Goes Live!

The Rhode Island Bar Association's new website's enhanced features make it more user friendly and more informative for Bar members and the public. Building on the solid foundation of the existing website, the new website incorporates all the best from that site including the ever-popular Attorney Directory, Latest News, Continuing Legal Education seminar information, and your *free to Bar members*, online, 24/7 law library Casemaker. Additionally, the new Bar website offers even more great features including online issues of the *Bar Journal*, improved membership information maintenance and other upgrades. And, all this is presented in an attractive format reflecting the Rhode Island Bar Association's outstanding reputation, not only here, but throughout the United States. If you haven't already visited the website, please take a few minutes to visit today at **www.ribar.com**.

Updated Rhode Island Probate Court Information Now Available Online

Looking for specific information about one of Rhode Island's many city or town probate courts? Then look no further than your Rhode Island Bar Association web site. Go to the **HOME** page, click the **FOR ATTORNEYS** button on the left side menu, then scroll down and click on the **Probate Court Listing** link. This easily viewed and printable listing contains: the names of probate judges and clerks; court telephone numbers; the day, time and location where the courts meet; and the courts' designated newspaper and advertising deadlines. To view or print the Rhode Island Probate Court Update, please visit the Bar's website at: **www.ribar.com**.

11 ***Youngberg v. Romeo**, 457 U.S. 307, 316 (1982)(constitutionally protected liberty interests under the Due Process Clause of the Fourteenth Amendment to freedom from unreasonable bodily restraints).*
12 *Weiss, E., et al., Deadly Restraint: A Nationwide Pattern of Death, Hartford Courant (Oct. 11, 1998).*
13 ***Id.***
14 *GAO, Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers, GAO-09-719T (May 19, 2009).*
15 *H.R. 4247, 111th Cong., 2nd Sess. (2009)*
16 *S. 2860, 111th Cong., 2nd Sess. (2009)*
17 *H.R. 7376, 1st Sess. (R.I. 2010)*
18 ***Id.*** ❖

Publish and Prosper:

Write an article for the Rhode Island Bar Journal.

Writing an article for the *Rhode Island Bar Journal* is not only a great way to help your colleagues better understand issues and topics of mutual concern, publication also positions you as an authority on your subject. And, for some of the *Bar Journal*'s authors, this results in professional case references from other attorney readers. The *Bar Journal* is always seeking articles authored by members of the Rhode Island Bar Association for first publication in the *Journal*. The Editorial Policy Statement and Article Selection Criteria appear on page 4 of every *Rhode Island Bar Journal*. Authors may also receive a maximum of 5 MCLE credits for published articles. For further information contact the *Rhode Island Bar Journal*'s Managing Editor Frederick D. Massie by telephone: 401-421-5740 or email: fmassie@ribar.com.

Chilling in Orlando

American Bar Association Delegate Report: ABA Midyear Meeting

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

Collaborative law differs from mediation in that each party is represented by lawyers only during negotiations, but not in court.

The American Bar Association Midyear Meeting on February 8 and 9, 2010 took place in Orlando. The weather was not much better than in Rhode Island due to a long cold snap in Florida. While I wore my fleece jacket each day and evening, the meeting itself was warmed by some hotly-debated issues.

First and foremost was the issue of collaborative law. Collaborative law is a voluntary non-judicial approach to client dispute resolution. It is a type of alternative dispute resolution I have not seen much of in Rhode Island practice, but is popular in large jurisdictions, particularly in domestic relations and commercial transactions. Collaborative law differs from mediation in that each party is represented by lawyers only during negotiations, but not in court. Advocates of the process claim high levels of success and client satisfaction. Detractors, of which there are many, claim it breaches the zealous advocacy required of an advocate/attorney which adversarial litigation provides. Action was deferred to the ABA Annual Meeting in August 2010 to refine and perhaps reconcile the opposing viewpoints.

The second major issue of the meeting was a proposal to delegitimize lawyer/law firm rankings as provided in commercial publications including *US News and World Report*. Proponents criticized commercial ratings as self-aggrandizement and puffery. Those opposed argued the First Amendment allows commercial speech, like the ratings, whatever the subjective or objective validity. As an example, in Rhode Island, we have the *Best Lawyers* publication. The proposal passed in a watered-down version.

Other issues of interest and importance debated were a Veterans Affairs Court to deal with veterans of our current and past wars who can be neglected or mistreated by our present systems, a complete overhaul of our immigration courts, several criminal law proposals, pay discrimination initiatives, and child welfare placement issues.

At the meeting, I was elected President of the National Caucus of State Bar Associations and presided over a lively debate on many issues. We were addressed by ABA President-Elect Steve Zack of Florida, who shocked us by noting that, based on high level national security briefings he received, there is a high likelihood of a dirty bomb detonation in the United States within six months. This information caused us, and I hope it will cause you, to think and rethink your personal and professional disaster preparedness plans.

Each year, the ABA provides me with an opportunity to judge the National Negotiation Competition and, from what I see of the competing law students, the future of the profession will be in good hands.

Currently, the ABA is encouraging small law firms and solos to join. Only one third of all lawyers are members of the ABA. Are the other two thirds questioning the ABA 's relevance to their practice? Is there a perception, whether right or wrong, that the ABA is a big firm or corporate-geared organization? I wish more lawyers had the opportunity to learn what I have learned as an ABA member and to see the everyday, practical benefits membership brings to any practice. I urge you to consider membership now, particularly in light of the ABA's new program of radically reduced fees and, in some cases, free memberships for new members during this outreach.

I have had many questions from judges and lawyers about the ABA, and I encourage you to speak to me about any ABA-related issue. It is a pleasure and an honor to serve as the Rhode Island Bar Association's ABA delegate, and I hope, one day, to be elected an ABA officer and provide even greater service to the members of our Bar. ❖

Drunk Driving: Beyond the Basics

Robert H. Humphrey, Esq.
Law Offices of Robert H. Humphrey

As a result of extensive police officer training at the state and municipal level and the emphasis placed on the apprehension and prosecution of suspected drunk drivers, the successful defense of DUI cases needs to move beyond the basic case components.

In every drunk driving (DUI) case, the prosecution and defense are concerned with five basic components of the case:

1. Can the prosecution establish the requisite reasonable suspicion to stop the suspect's vehicle;
2. Can the prosecution prove the suspect's operation of the vehicle;
3. Can the prosecution demonstrate the necessary probable cause to arrest the suspect;
4. Can the prosecution prove the suspect was under the influence of intoxicating liquor and/or drugs to a degree that rendered him/her incapable of safely operating the vehicle; and
5. Can the prosecution prove compliance with R.I. Gen. Laws 31-27-3 (the suspect's right to an independent physical examination by a physician of his/her own choosing).[1]

As a result of extensive police officer training at the state and municipal level and the emphasis placed on the apprehension and prosecution of suspected drunk drivers, the successful defense of DUI cases needs to move beyond the basic case components. This article focuses on recent Rhode Island Superior Court cases prosecutors and defense attorneys should consider when handling a DUI case.

I. PBT Refusal Precludes Subsequent Chemical Tests

In **State v. Cote**,[2] a suspected drunk driver was stopped by the Jamestown Police and refused the Officer's request that she submit to a preliminary breath test (PBT). However, at the Jamestown Police station, the suspect did submit to a breathalyzer test at the request of the Officer which resulted in readings of .127 and .125 blood alcohol content (BAC).

In granting the defendant's motion to suppress the breathalyzer test results, the Court, relying on **State v. DiStefano**,[3] held the following:

> Even if a law enforcement officer is armed with a search warrant, the **DiStefano** holding mandates that no test shall be given to any suspect refusing a chemical test. Upon such refusal, the "plain and unambiguous" language, "none shall be given… becomes operative" and precludes further testing. **DiStefano**, 764 A.2d at 1163. Thus, Defendant Cote's refusal extinguished the right of the officer to request and/or administer any further tests. The officer did have the right to cite the Defendant's refusal and subject her to the penalties of § 31-4.1-4, but the officer did not opt to do this.
>
> Accordingly, Defendant Kathryn Cote's Motion to Suppress the breathalyzer results is granted.[4]

So, in accordance with the **Cote** decision, if a suspected drunk driver refuses to submit to a preliminary breath test on the side of the road the arresting Officer may not request the suspect to submit to a breathalyzer test at the station or the results of that breathalyzer test will be suppressed.

II. Lack of Release

In a DUI case, the prosecution has the burden of proving a suspected drunk driver was advised of his/her right to be examined at his/her own expense immediately after his/her arrest by a physician selected by the suspected drunk driver. This is why the Rights for Use at Scene card is read to the suspected drunk driver at the time of his/her arrest and why the Rights card is entered as a state's exhibit at trial.

Rhode Island General Law 31-27-3 states the following:

> **Right of person charged with operating under influence to physical examination.** A person arrested and charged with operating a motor vehicle while under the influence of narcotic drugs or intoxicating liquor, whatever its alcoholic content, shall have the right to be examined at his or her own expense immediately after the person's arrest by a physician selected by the person, and the officer so arresting or so charging the person shall immediately inform the person of this right and afford the person a reasonable opportunity to exercise the right, and at the trial of the person the prosecution must prove that he or she was so informed and was afforded that opportunity.

Article I Section 9 of the Rhode Island

Constitution, R.I. Gen. Laws 12-13-1 and Rule 46(a) of the Superior and District Court Rules of Criminal Procedure state that a Defendant shall be admitted to bail before conviction in most cases. To facilitate a Defendant's timely release on bail, R.I. Gen. Laws 12-10-2(a)(1) states in pertinent part "[t]he chief judge of the district court shall from time to time appoint,… as many justices of the peace as he or she may deem necessary, who shall be authorized to set and take bail in all complaints bailable before a division of the district court…."[5]

In **State v. Lemieux**,[6] a suspected drunk driver was stopped and arrested by the Portsmouth Police at 11:47 p.m. At the station, the suspect indicated his desire to go home, but was informed by the Officer "that no call would be made to a justice of the peace unless and until $200 cash was in '[the police department's] hands.'"[7] The **Lemieux** Court held, "[i]t can not be gainsaid that the purpose of G.L. § 12-10-2(d) is to provide an arrestee with the opportunity to be released on bail when taken into custody during times when court is not in session. Clearly, this Defendant was not afforded his statutory and constitutional right to have an opportunity to secure his release."[8] Furthermore, the Court held that "[a]bsent prompt and timely release, a Defendant's invocation of his right to a medical examination per G.L. § 31-27-3 is hollow 'because of the fleeting nature of the evidence that might be obtained as a result of the medical examination…' **Comm. v. King**, 429 Mass. 169, 176 (1999). The timeline of the events (and absence of events) in the instant case clearly establishes that the Defendant was deprived of his right under this statute as well."[9] In granting the defendant's motion to suppress, the Court held that as a result of the violation of the defendant's constitutional and statutory rights the proper remedy is the suppression of the breathalyzer test results.[10]

Although not addressed in **Lemieux**, the lack of a timely release of a suspected drunk driver, who has submitted to the breathalyzer test, also triggers the defendant's rights pursuant to R.I. Gen. Laws 31-27-2(c)(6) which states:

> [t]he person arrested and charged with operating a motor vehicle while under the influence of intoxicating liquor,… was afforded the opportunity to have an additional chemical test. The officer arresting or so charging the person shall have informed the person of this

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right and afforded him or her a reasonable opportunity to exercise this right, and a notation to this effect is made in the official records of the case in the police department. Refusal to permit an additional chemical test shall render incompetent and inadmissible in evidence the original report.

Therefore, in any DUI case, it would benefit the state's case to ensure strict compliance with a suspected drunk driver's right to bail, right to an independent physical examination and right to an independent chemical test or the state's best evidence of intoxicated driving, the breathalyzer test results, may be suppressed.

III. Standardized Field Sobriety Tests

The results of Standardized Field Sobriety Tests (SFST), in connection with other circumstantial evidence of intoxication such as a suspect's erratic driving and the indicia of alcohol, generally provide an arresting officer with sufficient probable cause to arrest a suspect for drunk driving. The National Highway Traffic Safety Administration (NHTSA) has developed SFSTs consisting of the Horizontal Gaze Nystagmus (HGN) test, the Walk and Turn test, and the One Leg Stand test. According to the NHTSA the validity of the SFST applies only when: "the tests are administered in the prescribed, standardized manner; the standardized clues are used to assess the suspect's performance; [and] the standardized criteria are employed to interpret that performance. If any one of the standardized field sobriety test elements is changed, the validity is compromised."[11]

In **State v. Scalisi**,[12] the Court held that "[t]he State bears the burden of establishing that the three above-described tests [HGN, Walk and Turn and One Leg Stand tests] were administered properly in order for them to be cloaked in reliability. The credible and unequivocal testimony at trial reveals a trio of deviations from the standardized test protocol which yielded unreliable results. The infirmities in the administration of the tests to the Defendant and the conclusions of the officer based upon the unsound results can not constitute any just or lawful evidentiary basis for a finding of guilt. As proof beyond a reasonable doubt is lacking, the Court enters a verdict of not guilty."[13]

The defendant in the **Scalisi** case had been involved in a motor vehicle accident with another vehicle in the town of

Middletown. The responding officer noticed certain indicia of alcohol including: an aroma of alcohol, slurred speech, and bloodshot eyes. The officer then administered the three standardized field sobriety tests. At trial, the officer "agreed that 'any deviation from NHTSA's instructions compromise the validity of the results of the test.'"[14] The **Scalisi** Court held that the deviations in the standardized testing protocols rendered the field sobriety tests results inadmissible and the absence of other sufficient evidence of intoxicated driving resulted in the dismissal of the DUI charge.

Conclusion

The Superior Court's holdings in **Cote**, **Lemieux** and **Scalisi** are of great significance because these decisions address fundamental DUI case issues including: the admissibility of breathalyzer test results; the admissibility of standardized field sobriety test results; and a suspect's right to a release in a timely fashion to exercise his/her statutory and constitutional rights. Due to the significance of these decisions and their potential effect upon the prosecution and defense of all DUI cases within the state, it is likely these decisions will be appealed to the Rhode Island Supreme Court. Hopefully, this review of these three recent Superior Court decisions will assist practitioners involved in this ever-evolving area of the law.[15]

ENDNOTES

1 ***See**, DEFENDING A DWI CASE, RHODE ISLAND BAR ASSOCIATION, Kenneth R. Tremblay, Esquire, No.: 93-17 (1993).*

2 ***State v. Cote**, C.A. No.: N3/08-0120A (R.I. Super. 2009).*

3 ***State v. DiStefano**, 764 A.2d 1156 (R.I. 2000).*

4 ***Cote** at 2.*

5 *R.I. GEN. LAWS 12-10-2(a)(1).*

6 ***State v. Lemieux**, C.A. No.: N3/07-0126A (R.I. Super. 2008).*

7 ***Lemieux** at 1.*

8 ***Id.** at 3.*

9 ***Id.***

10 ***Id.** at 4.*

11 *NHTSA, DWI Detection and Standardized Field Sobriety Testing Student Manual at VIII-3.*

12 ***State v. Scalisi**, C.A. No.: N3/07-0180A (R.I. Super. 2009).*

13 ***Scalisi** at 3. (citations omitted)*

14 ***Id.** at 2.*

15 *The author expresses his deep appreciation for the assistance of Kathleen Child and Jodi Van Sprang in the preparation of this article.* ❖

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C09-1005-035 (10/09)

Rhode Island Bar Association President Victoria M. Almeida joined retired Chief Justice Frank Williams, Rhode Island Supreme Court Chief Justice Paul A. Suttell, Associate Justices Francis X. Flaherty and William P. Robinson III, and others in the state's legal community participating in a unique, new, Narragansett Council of the Boy Scouts of America, Law Merit Badge Clinic. 25 Rhode Island Boy Scouts, aged 11 through 17, learned about judicial roles, attorney duties and law enforcement. Discussion topics included civil law, the Justinian Code, the requirements of becoming a lawyer, the duties of law enforcement, and consumer rights.

Lawyers on the Move

G. Judson Boyce, Esq. has opened the Boyce Law Firm, P.C. at 10 North Main Street, 3rd Floor, Fall River, MA 02720.
508-678-3943 jud@boycelegal.com

Paula M. Cuculo, Esq. has opened a law office at 7 Waterman Avenue, North Providence, RI 02911.
401-232-4000 pcuculo@yahoo.com

George J. Grossi, Esq. has moved his office to 21 College Hill Road, Warwick, RI 02886.
401-826-4600 Grossilaw@msn.com

Kara J. Kayarian, Esq. joined Kenyon Law Associates, 133 Old Tower Hill Road, Wakefield, RI 02879.
401-789-0276 x47 kk@kenyonlawyers.com

Suzanne Kelly, Esq. is now Corporate Attorney for Cookson Electronics, Inc., One Cookson Place, Providence, RI 02903.
401-228-8800 skelly@cooksonelectronics.com

William M. Kolb, Esq. relocated Law Offices of **William M. Kolb, LLC** to 321 South Main Street, Suite 302, Providence, RI 02903.
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Joseph R. Marion III, Esq., of **Burns & Levinson LLP**, is now a member of the Professional Advisory Council of the Rhode Island Foundation.
401-831-8370 jmarion@burnslev.com

Robert D. Oster, Esq. and **Shilpa Naik, Esq.** relocated **Oster & Naik Law Offices** to P.O. Box 22003, Lincoln, RI 02865.
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Susan T. Perkins, Esq., William C. Dimitri, Esq., and **Eugene V. Mollicone, Esq.** opened an additional office at 37 Touro Street, Newport, RI 02840.
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Carol L. Ricker, Esq. has joined the **Law Firm of Joseph M. Rameaka**, 873 Warwick Avenue, Warwick, RI 02861.
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Robyn A. Sisti, Esq., relocated her law office, **Robyn Sisti Law**, to 120 Wayland Avenue, Suite 7, Providence, RI, 02906.
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www.robynsistilaw.com

Heather H. Spellman, Esq. is now with the **Law Office Patrick Conley, Jr.**, Staff Counsel for GEICO Insurance Company, 42 Weybosset Street, Suite 303, Providence, RI 02903.
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Rhode Island Bar Association Annual Meeting June 10th and 11th, 2010

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BOOK REVIEWS

The Death of Conservatism by Sam Tanenhaus
The Future of Liberalism by Alan Wolfe

Anthony F. Cottone, Esq.
Sole practitioner, Deputy City Solicitor & Chief of Litigation, City of Providence*

"today's Conservatives resemble the exhumed figures of Pompeii, trapped in postures of frozen flight, clenched in the rigor mortis of a defunct ideology."

**The views expressed in this article are solely those of the author.*

In the opening chapter of his new book, *The Death of Conservatism* (Random House, 2009), Sam Tanenhaus confidently asserts that "today's Conservatives resemble the exhumed figures of Pompeii, trapped in postures of frozen flight, clenched in the rigor mortis of a defunct ideology." See *Death* at 7. Tanenhaus, who is the editor of *The New York Times Book Review*, the author of the deservedly prize-winning *Whittaker Chambers, A Biography* (Random House, 1998), and who currently is working on an intellectual biography of William F. Buckley, Jr., is well-qualified to deliver the movement's post-mortems, as is political science professor Alan Wolfe of Boston College. In Wolfe's new book, *The Future of Liberalism* (Alfred A. Knopf, 2008), he argues that liberalism – and by this he means the classic liberalism grounded in the philosophy of the Enlightenment rather than its periodic progressive or populist imitators – is, in the aptly titled first chapter of his book, "the most appropriate political philosophy for our times." See *id.* at 1-29.

Yet, no doubt there are many, including the freshman senator from Massachusetts, who would invoke Mark Twain and claim that reports of conservatism's death have been greatly exaggerated. Of course, both *Death* and *Liberalism* were published well before either Scott Brown's Massachusetts miracle, or even President Obama's first real dip in the polls, and so perhaps we can forgive their authors for not predicting that the conservative corpse they buried would show signs of political life. Yet, the readiness of both authors to bury what they thought was a corpse illustrates the politically disastrous tendency of intellectuals, and especially liberal intellectuals, to conflate intellectual and political legitimacy, a tendency which left unchecked will ensure the survival of today's Tea Party-going Frankensteins, even if the Massachusetts miracle turns out to have been less nostalgia for a discredited neo-conservative agenda than the result of an ideologically indifferent, populist backlash.

In any event, *Death* and *Liberalism* remain well-written and insightful attempts to define past ideological excess and chart a more sensible course for the future. *Death* is the much shorter of the two – it could almost be considered an extended essay – and contains far less reference material than *Liberalism*, which is far more ambitious, at least from an historical perspective. But both are fun to read and, retail politics aside, present a welcome contrast to the political posturing and special interest propaganda clogging our public airwaves and blogosphere.

The Death of Conservatism

Both Tanenhaus and Wolfe agree that from an historical perspective, there was very little about the Bush-Cheney agenda or its tactics that could be described as classically conservative. As Tanenhaus notes, "to read Edmund Burke and Hannah Arendt is to realize how far 'the movement' has strayed from genuinely conservative ideals. Today, it is almost taken for granted that the American Right is intrinsically hostile to both governmental and social institutions, seeing in each a purveyor of false values that imperil the 'true America.'" See *id.* at 20. Burke, on the other hand, although the founding father of conservatism, "drew no meaningful distinction between the state and society – that is, between the formally established institutions of government and those institutions rooted in patrimony, custom and habit." See *id.* at 19.

Tanenhaus also takes issue with the popular notion that the Bush-Cheney fiasco was due to the administration's abandonment of its own principles. According to Tanenhaus, Bush-Cheney had "a Jacobin-like emphasis on orthodoxy," a tendency which one might argue it shared with modern conservatism in general. Unlike Burke (and later, Benjamin Disraeli), modern conservatives fail to recognize that to govern effectively is to engage in perpetual compromise, which, according to Tanenhaus, is in accord with the modern liberal worldview, which "is premised on consensus." See *Death* at 16-19. And, like most public intellectuals, Tanenhaus came to the conclusion that movement Conservatives simply failed to develop a coherent public policy agenda. Thus, it was Bush-Cheney's inflexible adherence to a rigid,

Attorneys Peter G. DeSimone, Esq. and Neville J. Bedford, Esq. received the Rhode Island Coalition for the Homeless' 2010 Homeless Legal Clinic Award for their work on behalf of the individuals in the Providence Tent Cities. Neville and Peter met in the judge's chambers during the first Tent City court cases and developed a rewarding legal partnership and friendship. Both attorneys are also members of the Rhode Island Bar Association's Volunteer Lawyer Program.

and deeply flawed, neo-conservative ideology – "the aggressively unilateralist foreign policy; the blind faith in a deregulated Wall Street-centric market; the harshly punitive 'culture war' waged against liberal enemies" – that was the problem. See *Death* at 8.

A year later, Tanenhaus' insights remain relevant. Conservatives after Bush-Cheney do not even attempt to address our more intractable problems – such as global warming, the ever-widening chasm between the super rich and everybody else, the need for meaningful regulation of the financial sector, soaring health care costs or our national debt – with any seriousness. The feeble alternatives published by Republicans in the wake of President's Obama's first State of the Union Address and the few policy statements associated with Tea Party Nation are transparently political. It appears these ostensible reformers and self-styled Washington outsiders have yet to figure out that "just saying no" is a slogan, not a coherent policy, and dismantling the government and lowering taxes on the rich is hardly a cure-all, and in fact helped create many of our more intractable problems.[1] And the Supreme Court, another Bush-Cheney legacy, appears dominated by justices who, while railing about judicial activism when seeking judicial appointment, go out of their way to ignore *stare decisis* and to reverse long-standing legal precedent when actually on the bench.[2]

All of this makes one wonder why the tired mantra of Ronald Reagan and the harsh rhetoric of neo-conservatism evidently remain persuasive to so many not on the *Fox News* payroll. Tanenhaus looks to recent history for some answers and sees the post-War history of conservatism "as a continual replay of a single long-standing debate. On one side, are realists who accept the empirical evidence and uphold the Burkean ideal of replenishing civil society by adjusting to changing conditions. On the other, are revanchists[3] committed to a counterrevolution, whether the restoration of America's pre-New Deal *ancien regime*, the return to Cold War-style Manichaenism, or the revival of pre-modern 'family values.'" *Id.* at 21. Significantly, Tanenhaus concludes that "at almost every critical juncture, the revanchists have won the argument" by "perfecting a politics energized by Jacobin-like marshalings of shared enmi-

ty," *id.*, even if, as he notes, "a striking difference between conservatism past and present is the reverse flow of intellectuals away from the movement." *Id.* at 114.

Tanenhaus does a great job of tracing the historical development of conservatism's major fault lines, but spends less time explaining why, as he put it, "the revanchists always win the argument," even in the face of devastating empirical failure. Can this really be due primarily to the populist appeal of resentment and accusatory politics, i.e., the influence of the McCarthyites, the John Birchers, the fruit of Nixon's southern strategy, or of our nation's traditional antipathy towards immigrants and intellectuals? Or is it due primarily to the unifying effect of the primal conservative impulse to "Just Say No!"?[4]

In fact, I would suggest that the popular appeal of what Tanenhaus calls revanchism can be explained, in large part, by simply following the money. As Thomas Frank has observed, failing to appreciate that "conservatism has always been an expression of business . . . is like setting off to war with maps of the wrong country."[5] Indeed, aside from the lobbyists, over $1 billion was spent by the Heritage Foundation and other conservative think tanks promoting conservative ideas in the 1990's.[6] With "so much damn money"[7] working to legitimize so many business-friendly public policy myths – such as the notion that cutting taxes for the super rich will create jobs[8] – one should not be surprised that, as Wolfe puts it in *Liberalism*, "over the past few decades, any one conservative theorist in a Washington, D.C. think tank has had the public influence of at least ten liberal philosophers in America's prestigious universities." See *Liberalism* at 6. And this tendency will, if possible, become even more pronounced in the wake of *Citizens United v. Federal Election Commission*. See *supra*, note 2.

I suggest that no small part of the conservatives' apparent success at the polls is due to the fact that liberals have a habit of failing to meet the political challenge of making their case directly to the American people, despite the overwhelming evidence in their favor. After over three decades of loud and angry rhetoric equating liberalism with a national slouching to Gomorrah, it should come as no surprise that liberalism has lost favor, even among the Left, many of

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This Month In Bar History

June

Throughout the Bar's long and illustrious history, and according to the Association's current by-laws, June has traditionally been the month of the Rhode Island Bar Association's Annual Meeting. Initially a business meeting where the members received a report on the Bar's previous year's activities and expenses and elected new Bar Officers, over time, the Meeting has become much more. Today, the Meeting takes place over two days and, in addition to the election of new Bar Officers and a business meeting, features over 40 Continuing Legal Education seminars reflecting a wide range of practice areas. At the Meeting, Bar members are honored with annual awards for excellence in practice, professionalism and public service. There, members have the opportunity to socialize with their colleagues, young and old, and recognize those who have achieved fifty years of service in the legal profession. If you haven't already registered for the 2010 Annual Meeting, you may secure information and a registration form by contacting the Bar's CLE office at 401-421-5740 or online at the Bar's web site at **www.ribar.com**.

whom now refer to themselves as Progressives, a tendency which Wolfe bemoans. He suggests the progressive label is "the wrong term and the wrong turn," harkening back as it does to the days of Woodrow Wilson and "a political agenda too convinced of its own moral superiority and too hostile to civil liberties to serve the needs of an open and dynamic society." See *Liberalism* at 8. "If Liberals run away from their own traditions by hiding behind other labels," Wolfe asserts, they "will hardly be in a position to make the case for liberalism's relevance both to their own times and to the future," See *id.,* a case which Wolfe makes persuasively in his new book.

The Future of Liberalism

Wolfe traces the intellectual roots of our modern ideological divide to the contrasting philosophies of Jean-Jacques Rosseau (1712-1778) and Immanuel Kant (1724-1804). According to Wolfe, "Rosseau was an optimist on human nature before the creation of civilization and a pessimist after it came into being, while Immanuel Kant, like the American theorist and Constitution builder James Madison, saw matters the other way around." *Id.* at 36. Yet, for Wolfe:

> The important question is not whether human nature is good or bad; it is whether human beings can do anything about it, whatever it happens to be. For Liberals hold that human beings are neither naturally free nor naturally equal; in fact, they are naturally not much of anything. Freedom and equality, even more, the ability to realize them, depend upon the determination of human beings to govern nature so that they will not be governed by it. *Id.*

In *Liberalism*, Wolfe consistently harkens back to this philosophical divide to explain what he believes are proper "liberal" positions, which derive from advocating, like Kant, the supremacy of "culture" over Rosseau's "nature," an emphasis which focuses upon the ways government can effectively empower, rather than deter, individual initiative. Thus, according to Wolfe, it is hardly "liberal" to engage in identity politics, see *id.* at 58, various form of economic protectionism, *id.* at 60-61, or to resist the conservative insistence on the role of personal responsibility in the context of social welfare programs, see *id.* at 89 –

all positions which Wolfe believes are at odds with the classically liberal emphasis on individual self-empowerment. Wolfe also notes that Rosseau, although a brilliant thinker and literary master, "distrusted those who spoke on behalf of the intellect," *id*. at 32, as do many of the voices of movement conservatism, which has evolved into an explicitly anti-intellectual movement that evidently requires its leaders to take public oaths that they do not believe in evolution.

Wolfe identifies three ways of defining liberalism, which could be used to describe President Obama's emerging political philosophy. Wolfe's first definitional category emphasizes substance and is bottomed on the ideas of freedom and equality – a freedom defined by a devotion to the proposition that *"as many people as possible should have as much say as is feasible over the directions their lives will take,"* see *id*. at 10 *(emphasis in original)*, and an equality measured in practical terms, by an opposition to those conditions naturally occurring "in the highly organized and concentrated" form of modern capitalism which reduce the ability of people to take control of their own lives. See *id*. at 15. Thus, traditional liberalism recognizes that economic freedom means little to one who is unemployed and has no health insurance.[9]

The second definitional category employed by Wolfe focuses on procedure, "the constitutional imperative [that] reflected a desire to create rules that would enable competing interests within society to peacefully negotiate their differences." *Id*. at 16. And again, Obama has consistently shown a willingness to defer to constitutional prerogative and parliamentary procedure, whether by his hands-off approach to pending health care legislation or his willingness to defer to his Attorney General with respect to the need for a special prosecutor to investigate allegations of torture. The contrast with the Bush-Cheney years, and particularly with Cheney's aggressive (some might say lawless) promotion of the so-called unitary executive theory, could not be more obvious.[10]

Wolfe suggests the Cheney approach came right out of a playback written, not by Addington or Yoo, but by Carl Schmitt, a highly influential German political scientist who was writing during

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Rhode Island does not have a procedure for the recognition of specialization among attorneys.

tion over the core legislative acts of state law-makers, represent compelling evidence that the Ethics Amendment was intended, and understood, to confer constitutional jurisdiction over such acts upon the Ethics Commission for the limited purpose of enforcing the ethics code with respect to the legislative process.[24]

The Implied Repeals are Disfavored Principle Is Still Subject to the Central Role of the Framers' Intent

Instead of examining the considerable history surrounding the Ethics Amendment, both before and after its addition to the State Constitution, the **Irons** majority relied, in large part, on the principle that the law generally disfavors the repeal of a constitutional or statutory provision by implication. But the fact that a repeal is not expressly provided for, and must instead be implied, is not in and of itself dispositive. What is dispositive is the intent of the framers.[25] With respect to statutes, "if [a legislature] clearly intends to repeal the former law but merely fails to say so explicitly, a court should accede to the legislative intent."[26] The same should be true with respect to framers of a constitutional amendment.

As in all cases of constitutional or statutory construction, "intent . . . is always of prime importance."[27] "As the legislative intent defines the operation of a statute [or constitutional provision] and divulges the purpose … of the enactment, it may establish … a repeal by implication."[28] Only "[w]here the repealing effect of a statute is *doubtful*, [is] the statute strictly construed to effectuate its consistent operation with previous legislation."[29] But where the intent of a statute or constitutional provision is clear, and giving full effect to that intent would necessarily require the implied partial repeal of a prior provision, they are irreconcilably repugnant and the most recent enactment is construed to prevail in order to effect that intent.

The Speech in Debate Clause prohibits the questioning of a state legislator's core legislative activities "in any other place."[30] If one accepts that the historical evidence shows, beyond any reasonable doubt, that the framers and adopters of the Ethics Amendment intended the Ethics Commission to have the limited constitutional authority to question a legislator's core

legislative activities in a single place for a single purpose – in the Ethics Commission for an ethics code violation – finding a limited repeal of the Speech in Debate Clause should have been inevitable, if the intent and will of the amendment's framers and adopters was to be respected.

What Now?

The **Irons** decision eliminated the only mechanism that existed in this state for investigating and addressing conflicts of interest in the legislative process, where a legislator's self-interest takes precedence over the public interest. That leaves three options.

First, do nothing and simply rely on the ballot box in a legislator's home district to address unethical behavior – the actual paradigm for most of this nation's history up until the late 1960's.

Second, each house of the General Assembly could, pursuant to the Discipline Clause,[31] adopt its own internal code of ethics and establish a committee of legislators, with sufficient staff, funding and authority, to investigate and sanction violations of that code. Since the late 1960's that is the paradigm that has existed in Congress under the federal constitution. Each house of Congress has a standing ethics committee to investigate and recommend sanctions for violations of their own internal code of ethics. But for a such committees to be at all efficacious, they would each require a nonpartisan staff of professionals, like those supporting the congressional committees, that would investigate alleged violations – essentially twice duplicating the administrative and legal staff that already exist in the Ethics Commission.

The third option is to amend the State Constitution to restore the Ethics Commission's jurisdiction over core legislative acts by making that intent more explicit. A proposed joint resolution to do just that has been offered in both the House and Senate.[32] While an independent, nonpartisan commission, outside of the legislature, with the authority to question core legislative acts is admittedly a very unique paradigm not applied in any other state, we do have the benefit of 22 years of experience – 33 if you count the tenure of the Conflict of Interest Commission – with which to assess whether Ethics Commission jurisdiction over core legislative acts has unacceptably interfered with the legislative process, or has instead promoted public confidence in the legislative process.

By the time this article is published, perhaps one of the latter alternatives will be poised to be implemented, let us hope so. It is essential to our state government that there be some mechanism that protects the legislative process from isolated, but damaging, acts of legislative self-dealing, thereby promoting public confidence in the legislative process. And it is, I think, important to both the public and the vast majority of state legislative representatives who do serve honorably and ethically.

ENDNOTES

1 *R.I. Const., Art. 6, sec. 5.*

2 ***In re Advisory Opinion to the Governor (Ethics Commission)**, 612 A.2d 1, 7 (R.I. 1992).*

3 ***Kleczak v. Rhode Island Interscholastic League**, 612 A.2d 734, 739 (R.I. 1992).*

4 ***See** G.L.R.I. 1956 (1968 Re-enactment) (1976 Supp.) § 36-14-5.*

5 ***Id.***

6 ***Id.** (emphasis added)*

7 *(May 22, 1986 Tr. at 17).*

8 *(May 22, 1986 Tr. at 33).*

9 *(Tr. at 17) (emphasis added).*

10 *(Tr. at 19) (emphasis added).*

11 *(Tr. at 33) (emphasis added).*

12 *(Tr. at 39) (emphasis added).*

13 *(Tr. at 49) (emphasis added).*

14 *(Tr. at 54) (emphasis added).*

15 *(Tr. at 60-61) (emphasis added).*

16 ***In re Advisory Opinion to the Governor (Ethics Commission)**, 612 A.2d at 7-8 (internal quotes omitted) (emphasis added); **accord, Kleczak v. Rhode Island Interscholastic League**, 612 A.2d 734, 739 (R.I. 1992) ("[I]t is appropriate for us to consult, … legislation, if any is available, relating to the constitutional provision in question."); **State ex rel. Webb v. Cianci**, 591 A.2d 1193, 1201 (R.I. 1991).*

17 ***Gorham v. Robinson**, 57 R.I. 1, 186 A. 832 (1936) (quoting **Opinion of the Justices**, 35 R.I. 166, 167, 85 A. 1056, 1057 (1913)).*

18 ***See, e.g., Greene v. Marin County Flood Control and Water Conservation District**, 171 Cal. App. 4th 1458, 1480, 91 Cal. Rptr. 3d 27, 44 (2009). ("Generally, legislative implementation of constitutional amendments adopted by initiative are traditionally accorded considerable weight by courts construing the amendments."); **Clark v. Pawlenty**, 755 N.W.2d 293, 306 (Minn. 2008) ("[A] practical construction of the constitution, which has been adopted and followed in good faith by the legislature and people for many years, is always entitled to receive great consideration from the courts.") (quoting **City of Fairibault v. Misener**, 20 Minn. 396, 401 (Gil. 347, 352) (1874)); **Halverson v. Miller**, 186 P.3d 893, 897 (Nev. 2008) ("[A] contemporaneous construction by the legislature of a constitutional provision is a safe guide to its proper interpretation and creates a strong presumption that the interpretation was proper.") (internal quotes and citations omitted); **Block v. Vigil-Giron**, 135 N.M. 24, 28, 84 P.3d 72, 76 (2004) ("A contemporaneous construction by the legislature of a constitutional provision is a safe guide to its proper interpretation; and creates*

Remembering Lynne B. Dawson, Former VLP Coordinator

Denise C. Aiken, Esq.
Rhode Island Legal Services, Inc and VLP Member


Lynne B. Dawson

As word spread of Lynne Dawson's passing in March, I could not help but think back to the impact Lynn had on my approach to my profession. Many of my colleagues share my sorrow.

Lynne Dawson, as Volunteer Lawyer Program Coordinator for more than eight years, had a way of recruiting attorneys to represent an underserved population that was part charm, part brilliant smile, and part persistent persuader. You could start off having a simple conversation with Lynne at a seminar. Before you knew what happened, you had agreed to take one VLP case, or maybe two little ones, and you could get a swell t-shirt out of it.

Lynne helped us to do what we do better. She coordinated training seminars, along with recruitment and retention of volunteer lawyers. She always made recognition of the attorneys who gave of their time a priority.

While serving as Communications Director, she helped us keep up with our Bar news. She managed our public relations events to let the rest of Rhode Island know how the Bar Association was serving the public. Lynne was proud of what Rhode Island lawyers do, and she wanted everyone to know it.

Without Lynne Dawson, I might never have become a Family Law practitioner. But Lynne had me on speed dial, and I never learned how to say no to her. It is up to us to go out there and be as good as she thought we were.

a strong presumption that the interpretation was proper.") (internal quotes and citation omitted).

19 ***American Civil Liberties Union of Tennessee v. Darnell**, 195 S.W.3d 612, 626 n. 12 (Tenn. 2006).*

20 ***Halverson**, 186 P.3d at 897.*

21 *R.I. Gen. Laws § 36-14-6(1); see P.L. 1987, ch. 195, sec. 3.*

22 *R.I. Gen. Laws § 36-14-6(2), (2)(i).*

23 *R.I. Gen. Laws § 36-14-6(1) (emphasis added).*

24 ***Id.***

25 ***See United States v. Tackett**, 113 F.3d 603, 608 (6th Cir. 1997)*

26 ***See Id. accord, First National Bank of Millville v. Horwatt**, 192 Pa.Super. 581, 586, 162 A.2d 60, 63 (1960). ("In determining whether a prior at is repealed by implication, the question is exclusively of legislative intent.").*

27 *1A Sutherland Statutory Construction § 23.9 (6th ed.).*

28 ***Id.***

29 ***In re Request for Advisory Opinion from the House of Representatives (Coastal Resources Management Council)**, 961 A.2d 930, 935, n. 7 (R.I. 2008) (internal citations omitted) (emphasis added).*

30 *R.I. Const. art. 6, sec. 5.*

31 *R.I. Const., art. 6, sec. 7 ("Each house may determine its rules of proceeding, punish contempts, punish its members for disorderly behavior, and with the concurrence of two-thirds, expel a member, but not a second time for the same cause.").*

31 ***See** 2010 H-7557, introduced February 4, 1010 and 2010 S-2391, introduced February 11, 2010.* ❖

continued from page 33

and after the first two world wars. (Indeed, a chapter in *Liberalism* is entitled *Mr. Schmitt Goes to Washington*). Schmitt's writings, which argued against parliamentary restrictions upon executive power, especially in times of emergency, helped bring the Nazis to power; and in *The Concept of the Political*, published in 1932, Schmitt introduced his idea of the "friend-enemy distinction," which he found nowhere more operable than in politics. "The political is the most intense and extreme antagonism," Schmitt wrote, requiring "that you treat your opposition as antagonistic to everything in which you believe." See *Liberalism* at 135.

In commenting upon the influence of such ideas in the context of the so-called war on terror, Wolfe observes that "even as conservative a legal scholar as Judge Richard Posner, a member of the U.S. Court of Appeals for the Seventh Circuit, who has written his own explanation of why the war on terror requires that the balance between civil liberties and national security be shifted in the direction of the latter, finds [Bush-Cheney] to be offering 'an extravagant interpretation of presidential authority' that 'confuses commanding the armed forces with exercising dictatorial control over the waging of war, the kind of control exercised by a Napoleon, or a Hitler or a Stalin, or by the dictators of the Roman Republic.'" *Id.* at 150.[11] As Wolfe notes, "only in a Schmittian world is it possible for those who hold the United States to its historical traditions of liberal constitutionalism to be dismissed as radicals, while those who call upon the president to ignore both the text and the spirit of the Constitution are viewed as faithful to it." See *Liberalism* at 149.

Wolfe's third and final definition of liberalism is framed with reference to its characteristic temperament, one which "is not defined by the positions one takes, but by the spirit by which they are taken." *Id.* at 20. As Wolfe notes, "a Christian who argues that religious liberty applies to Muslims and Buddhists is more temperamentally liberal than a secularist who dismisses all religion as superstitious nonsense." *Id.* at 19. Indeed, Since Wolfe is director of the Bosi Center for Religion and American Public Life at Boston College, it is perhaps not surprising that

one of the more interesting chapters in his book is entitled "How Liberals Should Think About Religion."

Conclusion

For as long as I can remember (or at least since President Carter's famous malaise speech in 1979), politicians of every stripe have been trained by their well-paid political consultants to repeat *ad nauseum* that the electorate was far ahead of the curve on almost every issue, especially as compared with those inside the Washington, D.C. bubble. Yet, as far as I can see, the only curve today's well-financed Tea Partiers are ahead of is on the wrong road, the same wrong road we have been traveling for some time, apparently heedless of the consequences. While "extremism in the defense of liberty is no vice" (to quote Barry Goldwater), extremism in defense of Glenn Beck's pernicious notion of American exceptionalism is quite another matter. Maybe that is why Tanenhaus began *Death* by invoking Daniel Patrick Moynihan's plea: "God preserve us from ideologues."

ENDNOTES:

1 *According to James K. Gailbraith, "all the ideas that define conservative economic thought in America (and in the rest of the world) were well known a generation ago," and they "were tested and nearly all abandoned by policymakers."* ***See*** *J.K. Gailbraith, THE PREDATOR STATE at 9 (Free Press, 2008);* ***see also*** *P. Krugman, THE RETURN OF DEPRESSION ECONOMICS AND THE CRISIS OF 2008 at 182 (W.W. Norton & Co., 2009) ("The specific set of foolish ideas that has laid claim to the name 'supply-side economics' is a crank doctrine that would have had little influence if it did not appeal to the prejudices of editors and wealthy men"); R.A. Posner, A FAILURE OF CAPITALISM at 317-18 (Harvard University Press, 2009) ("The economists and eventually the politicians who pressed for deregulation were not sensitive to the fact that deregulating banking has a macroeconomic significance that deregulating railroads or trucking or airlines or telecommunications or oil pipelines does not"); J. Fox, THE MYTH OF THE RATIONAL MARKET, A HISTORY OF RISK, LOSS AND DELUSION ON WALL STREET at 46 (HarperCollins, 2009) ("The efficient capital market hypothesis was 'one of the most remarkable errors in the history of economic thought,'"* ***quoting*** *Yale Professor of economics Robert Shiller).*

2 ***See, e.g., Citizens United v. Federal Election***

In Memoriam

Patricia Beede, Esq.

Patricia Beede passed away in March 2010.

Leonard F. Clingham, Jr., Esq.

Leonard F. Clingham, Jr. passed away on March 17, 2010. Born in Providence, a son of the late Leonard F. and Mary McGrath Clingham, he was a lifelong Providence resident and also maintained a home in Provincetown, MA.

He was a graduate of LaSalle Academy, Providence College and the Columbus School of Law at The Catholic University of America in Washington D.C. He was an attorney with the State of Rhode Island for more than 40 years, retiring as Deputy Director of the Department of Transportation. He served on multiple governmental committees and boards, most recently as Chairman of the Provincetown Public Pier Corporation. Active in the Democratic Party his entire life, he was National President of the Young Democrats during John F. Kennedy's campaign for President. He was a longtime supporter of the arts and a member of the Aurora Civic Association.

He is survived by his partner, Daniel T. Hurley of Providence; a daughter, Megan N. Clingham of Warwick; a son, Gavin M. Clingham of Bethesda, MD; and a sister, Eleanor C. Lewis of Mattapoisett, MA.

Marvin S. Holland, Esq.

Marvin S. Holland passed away on December 11, 2010.

Paul W. Scannell, Esq.

Paul W. Scannell, 54, passed away on March 12, 2010. He was the husband of Cheryl Ann Irvin Scannell. He was the son of the late Robert E. and Mary E. Dennigan Scannell. He was a graduate of Southeastern Massachusetts University and received his law degree from California Western School of Law. A partner in the law firm of Scannell and Lynn. P.C., he was admitted to practice in Massachusetts and Rhode Island. He served in the U.S. Army in Korea as a language interpreter. In addition to his wife, he leaves his children Calvin A. and Isabel R. Scannell of Wareham, MA and Kate Duvall of Acton, MA.

John Tramonti, Jr., Esq.

John Tramonti, Jr., of Starboard Drive Cranston passed away February 25, 2010 at his home. He was the husband of Patricia McStay Tramonti. He was born in Providence a son of the late John and Anna Tameleo Tramonti.

John was an Attorney in Providence for many years before retiring in 2003. He was a graduate of Providence College and Boston College Law School. He was a member of several professional organizations including; American Board of Trial Advocates, Rhode Island, Federal and American Bar Association, Rhode Island Trial Lawyers Association, and Rhode Island and National Association of Criminal Defense Lawyers. He was also a member of the Rhode Island Yacht Club and an Army Veteran of World War II.

Besides his wife he leaves two sisters; Verna Rao of Newport, Ruth Damiano of Middletown; and one brother, Donald Tramonti of Lincoln.

Please contact the Rhode Island Bar Association if a member you know passes away. We ask you to accompany your notification with an obituary notice for the Rhode Island Bar Journal. Please send member obituaries to the attention of Frederick D. Massie, Rhode Island Bar Journal Managing Editor, 115 Cedar Street, Providence, Rhode Island 02903. Email: fmassie@ribar.com, facsimile: 401-421-2703, telephone: 401-421-5740.

***Commission**, 558 U.S. __(slip op. at 60-63) (January 21, 2010) (Stevens, J., dissenting) (overturning settled law concerning the regulation of corporate speech); **Montejo v. Louisiana**, 556 U.S. __, 129 S. Ct. 2079 (2009) (overruling **Michigan v. Jackson** and presumptions raised by a defendant's request for counsel at arraignment); **Planned Parenthood of Southeastern Pennsylvania v. Casey**, 505 U.S. 833, 944 (1992) (Rehnquist, J., dissenting) (advocating the reversal of **Roe v. Wade**). And despite their rhetoric, these vocal opponents of judicial activism show absolutely no hesitancy to reverse Congress or local legislatures when they disagree on matters of public policy. **See, e.g., Citizens United, supra** (congressional regulation of campaign finance); **District of Columbia v. Heller**, 554 U.S. __, 128 S.Ct. 2783 (2008) (local regulation of firearms); **Town of Castle Rock v. Gonzales**, 545 U.S. 748 (2005) (overturning victim's right to enforce local restraining order); **Locke v. Davey**, 540 U.S. 712, 725-26 (2004) (Scalia, J., dissenting) (state decision to exclude religious students from state scholarships); **Bush v. Gore**, 531 U.S. 98 (2000) (state election law); **Romer v. Evans**, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (local ban on discrimination against gay men and lesbians).*

3 *The term derives from "revenge" and describes "a political policy designed to recover lost territory or status." **See** Merriam-Webster's Collegiate Dictionary at 1002 (Tenth Ed., 1996).*

4 ***See** The New Yorker, Sept. 28, 2009 at 32, The Republicans' new right wing by P.J. Boyer. As Boyer notes: "William F. Buckley's, Jr.'s 1955 mission statement in the debut issue of National Review remains part of the conservative liturgy: "'It stands athwart history, yelling Stop, at a time when no one is inclined to do so, or to have much patience with those who so urge it.'" **Id.***

5 ***See** T. Frank, The Wrecking Crew, How Conservatives Rule, at 30 (Metropolitan Books, 2008).*

6 ***See** Matt Bai, The Brain Mistrust, The New York Times Magazine, Sunday, February 21, 2010 at 13.*

7 ***See** R.G. Kaiser, So Damn Much Money, The Triumph of Lobbying and the Corrosion of American Government (Alfred A. Knopf, 2009).*

8 ***See** January, 2010 Report of the Congressional Budget Office, Policies for Increasing Economic Growth and Employment in 2010 and 2011, available at http://www.cbo.gov/doc.cfm?index=10803.*

9 *Yet, conservatives have co-opted the term, defending their brand of laissez faire economics in terms of freedom, even if it is only, as Galbraith notes, a "freedom to shop." **See Predator, supra**, at 16, 23.*

10 *At one time or another, Cheney blatantly ignored or mounted legal attacks upon nearly all of the legislative legacies of the Watergate era designed to curtail run-away executive privilege and power. **See** B. Gellman, Angler, The Cheney Vice Presidency at 99-108 (Penguin Books, 2008).*

11 ***Compare** John Yoo, The Power of War and Peace: The Constitution and Foreign Affairs After 9/11 (University of Chicago Press, 2005) with Gary Wills, Bomb Power: The Modern Presidency and the National Security State (Penguin Press, 2010).* ❖

William J. Delaney, Rhode Island Bar Association Treasurer and incoming President-Elect joined 300 other emerging leaders of lawyer organizations from across the country at the American Bar Association's Bar Leadership Institute (BLI), March 11-12, 2010. Bill [center] is pictured with ABA President Carolyn B. Lamm of Washington, D.C. and ABA President-Elect Steven N. Zack of Miami, FL.

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A few years ago, I decided that cold New England winters were no longer how I wanted to spend my time in retirement.

I considered Florida, as do most people, a Caribbean island and Costa Rica. I came, I saw and I did not conquer, but did decide to own a piece of paradise, in Guanacaste, Costa Rica. The land is physically beautiful, the culture unique and the weather perfect, every day. There is something here for everyone's interests. Boating, beaching, yoga and meditation, tennis, golf, scuba diving, horseback riding, hiking, birding, relaxing, fine dining, the list is endless. I met Michael Simons, the top realtor in Costa Rica, and he helped to make this dream come true. An investment for your retirement years awaits you and is affordable. Come on down and see for yourselves.

Feel free to call me with any questions.
Philip M. Weinstein, Law Office of Philip Weinstein
Providence, pweinst@aol.com
Costa Rica 011-506-8980-0661, USA 1-877-456-4333

Or contact Michael Simons directly.
Michael Simons, Co Owner / Broker
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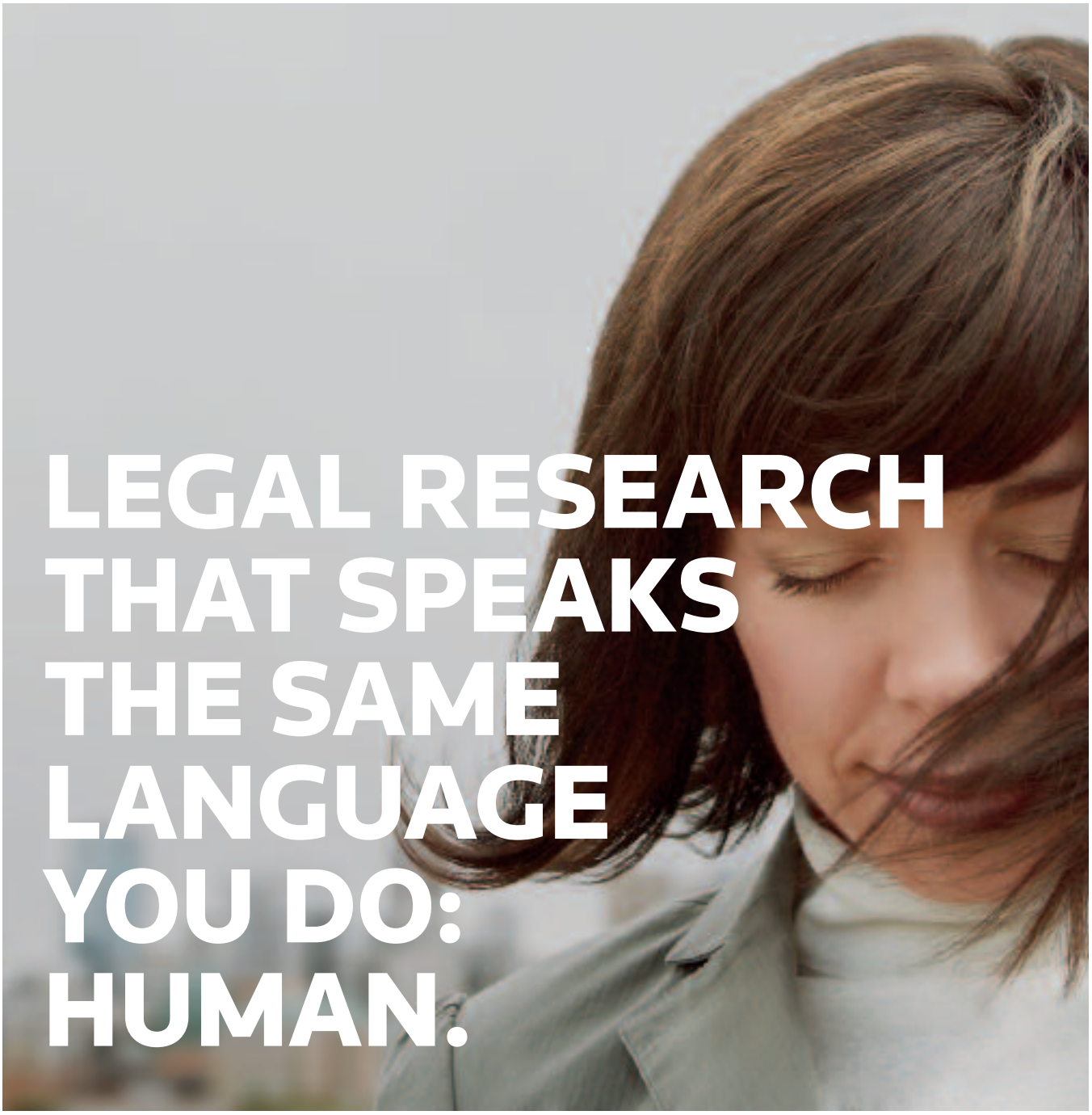

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