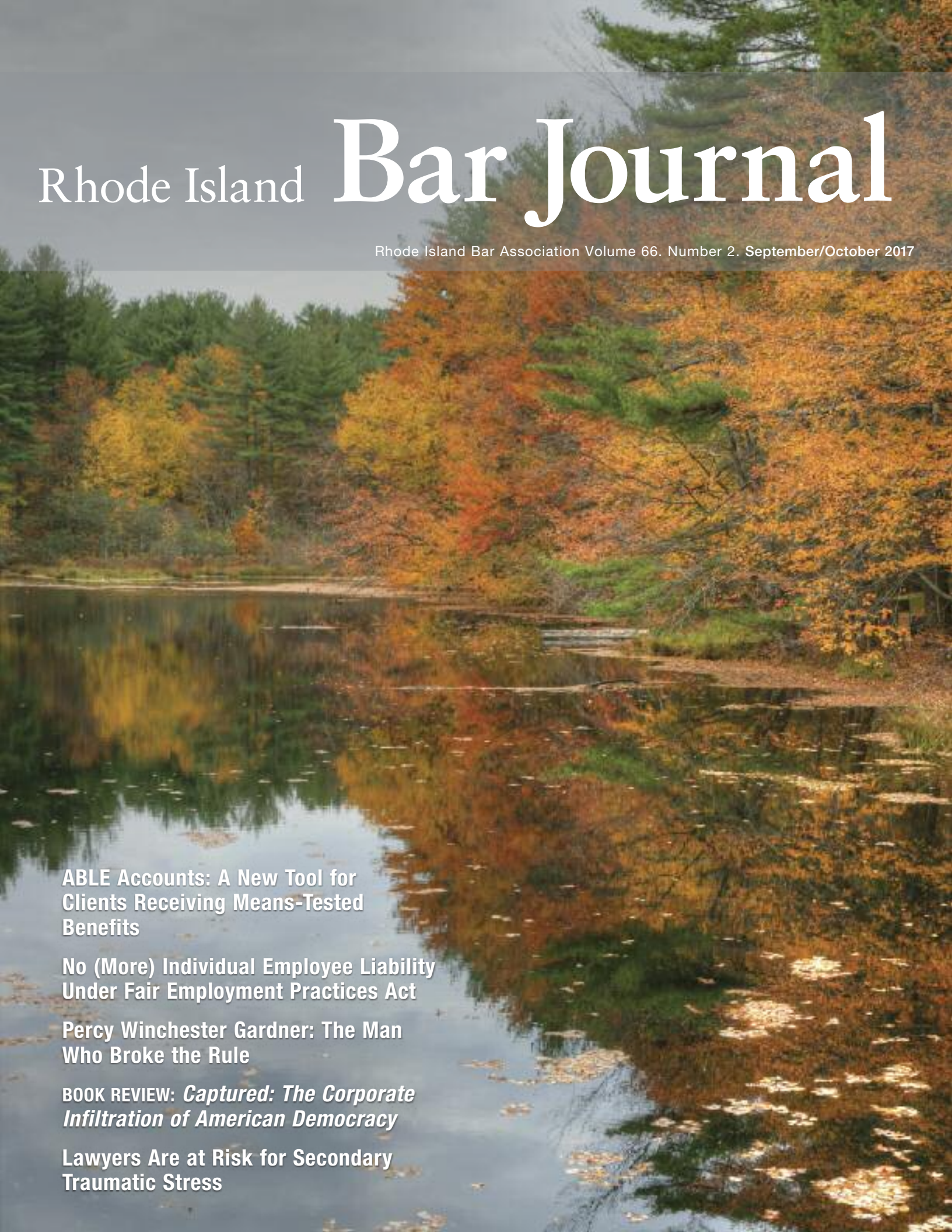
Rhode Island Bar Journal

Rhode Island Bar Association Volume 66. Number 2. September/October 2017



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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 Editor, Kathleen M. Bridge, Rhode Island Bar Journal, 41 Sharpe Drive, Cranston, RI 02920, (401) 421-5740.

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

PERIODICALS POSTAGE PAID AT PROVIDENCE, RI

Subscription: $30 per year

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

ribar.com

Pay It Forward

Linda Rekas Sloan, Esq.
President
Rhode Island Bar Association

I appeal to your hearts by reminding you that someone once took the time to teach you when you were a new attorney. I am asking you to *pay it forward* by taking the time to offer advice or even train a new lawyer.

Let me introduce myself. I was born in Taipei, Taiwan with a different name than I have now. My father, a career Navy man, was serving in Taiwan where he met my mother. We were subsequently transferred to Hawaii, then to Groton, Connecticut. We settled down in my Dad's hometown of Coventry, Rhode Island to be close to his family and where my three younger sisters and I were raised. I went through the Coventry public school system, then Providence College, followed by Boston University School of Law. My husband, Jeff, calls me a chronic volunteer. I have always felt that when asked to do something, if you can, you should; or as my fellow Rotarians would say: "Service above self."

When I think back to the beginning of my career, newly licensed and fresh out of law school, I realized that I knew a lot of law but I really didn't know how to practice law. I was terrified but I found myself surrounded by more experienced attorneys who took the time to show me the ropes. The attorneys at Olenn & Penza taught me how to be a real lawyer. As I was working on cases, I met other attorneys. I adopted those whom I deemed wise as my advisors and mentors (whether they knew it or not). Many of these attorneys freely offered guidance, or at least looked over my shoulder, and from time-to-time provided feedback and encouragement. I then participated in the Bar Association's New Lawyers Committee to expand my network. I learned how to be a professional by example and by association with leaders of our bar and our legal community.

I suspect most new lawyers have the same fear of not knowing how to practice law and many do not have a law firm to teach them. Newly licensed attorneys are facing challenges we did not, including massive student loans. It is our responsibility as learned professionals to ensure that the next generation of young lawyers have a strong and vibrant Bar Association to provide those same opportunities, practice tips and sage advice that I received. Some of you may be thinking, "I had to do it the hard way so young lawyers should too." It doesn't have to be a gauntlet. There is no need to make it any harder than it already is. So, what I hope to accomplish in my year as the Bar Association president is to convey the following message: "**pay it forward**."

I have had some wonderful mentors who have shaped my career and I will be forever indebted to them for the lessons learned. For example, I met Mark Sylvia from the New Lawyers Committee and from getting to know him, he offered me a job in a completely different practice area. Chris Montalbano, an icon in real estate title insurance, called me one day and said, "I think you'd be great working at my title company." Although I had no experience, he was willing to take a chance on me.

When I was thinking about starting my own firm, Ted Orson (who would be considered a competitor) said to me, "Whatever you need, if I have it, it's yours. You may have all my forms and I will help you in any way I can." When Mark Comstock asked me to come back to the title insurance industry after being in private practice, he gave me a chance to come back to something I love and often pushes me out of my comfort zone to grow. When I met John Comery he said, "You are the future of the title industry, and my goal is to give you all of my knowledge to help you become the best underwriter in the state." Freely offered, even though he works for a competitor!

Judge Silverstein once said to me: "Instead of working for Receivers, you should be a Receiver." Attorney General Dennis Roberts has been a wonderful friend and advisor to me as has Judge Licht, both of whom are the fiercest feminists I know, always pushing to advance women to leadership positions.

Many people encouraged me to get involved in Bar governance. When I was active in the Thurgood Marshall Law Society, Judge Clifton encouraged me to accept leadership positions. The point is, that at many points in my life, others graciously reached out and impacted the course of my life and career.

Search your memories for a time when someone helped you and remember how that made you feel. I appeal to your hearts by reminding you that someone once took the time to teach you when you were a new attorney. I am asking you to **pay it forward** by taking the time to offer advice or even train a new lawyer. Go out of your way to encourage a woman lawyer. Reach out to an attorney of color and ask them to take a leadership position. It just may shape the path of their career, and it is simply the right thing to do. I love and live by the words of Richard Branson that a true leader trains people well enough that they could leave, but then treats them well enough that they won't want to.

I say to you that if this little girl from Taiwan can become President of the Rhode Island Bar Association due to the guidance and encouragement of the many mentors named above (and others that I just do not have the space to acknowledge), think about the impact you can have. Let's invest in others so that they, in turn, can do likewise. We can do more together by "**paying it forward.**" It's the right thing to do. ❖

Free Non-Credit Enrichment Workshops Open to Bar Members

What Writing can do for Your Career

This free, non-credit enrichment workshop offers Bar members tips on how to write a book, article, or speech to help grow their business. Our speaker is award-winning book writing coach Lisa Tener. This workshop is scheduled for **Tuesday, October 3, 12:00 – 1:30 p.m. at the RI Law Center**. For more information or to register, contact Tanya Nieves, CLE Director, at tnieves@ribar.com. Space is limited, so we ask that you register early to guarantee your seat.

Basic Building Blocks of Law Firm Marketing for Small Firm and Solo Practitioners

This free, non-credit enrichment workshop focuses on how small firms and solo practitioners can create a marketing plan which can help grow their business. The speaker, Carolyn Lavin, of Lavin Marketing, will discuss building and updating a website, why mobile technology is vital, how to maximize your marketing budget effectively, best practices when using LinkedIn, and more. This workshop is scheduled for **Tuesday, November 14, 12:00 – 1:30 p.m. at the RI Law Center**. For more information or to register, contact Tanya Nieves, CLE Director, at tnieves@ribar.com. Space is limited, so we ask that you register early to guarantee your seat.

RHODE ISLAND BAR JOURNAL

Editorial Statement

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

Article Selection Criteria

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

Direct inquiries and send articles and author's photographs for publication consideration to:
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ABLE Accounts: A New Tool for Clients Receiving Means-Tested Benefits

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Associate at the Law Office of Gayle F. Tarzwell

Elizabeth S. Phillips, Esq.
Partner at Hackman & Phillips Elder Law RI LLC

On December 16, 2014, Congress passed the Stephen Beck, Jr. Achieving a Better Life Experience Act — commonly referred to as the "ABLE Act." It was signed into law by President Obama on December 19, 2014. The ABLE Act is codified in the Internal Revenue Code and amends Section 529 to allow establishment of tax-free savings accounts for eligible individuals with disabilities.[1] The significance of ABLE accounts cannot be overstated. Persons receiving Supplemental Security Income (SSI) and Medicaid are subject to both income and resource limits. If a person has more than $2,000 of countable resources on the first day of the month he or she is ineligible for SSI for that month. For some this means the loss of their monthly check, for others it jeopardizes their eligibility for Medicaid Long Term Care Services and Supports – including services for disabled individuals through the Rhode Island Department of Behavioral Healthcare, Developmental Disabilities and Hospitals (BHDDH) if they have more than $4,000 worth of countable resources. These income and resource limits have not been increased for years and are not adjusted for inflation. These limitations essentially eliminated the possibility for anyone receiving SSI or Medicaid services to save for "big ticket" expenditures that may enrich their lives such as a vehicle, computer or assistive technology, medical equipment, or a new mattress.

ABLE accounts represent the first opportunity for eligible individuals themselves to save for certain expenses and maintain eligibility for means-tested benefits they receive such as SSI, Medicaid, Supplemental Nutrition Assistance Program ("SNAP") and subsidized housing.[2]

ABLE accounts can provide a sense of empowerment to persons with disabilities. Unlike special needs trusts, a competent Designated Beneficiary of an ABLE account has direct access to his or her funds – there is no Trustee exercising discretion over distributions of funds in the account.

Like traditional 529 programs, ABLE accounts are administered at the state level.[3] The Internal Revenue Code provisions provide the framework for states to follow when establishing their programs. As of May 10, 2017, twenty-one states, including Rhode Island, have active ABLE programs.[4] The ABLE account program in Rhode Island, which is under the auspices of the General Treasurer's office, is called RI's ABLE.

Under the federal statute eligible individuals may establish ABLE accounts in any state program.[5] However, some states like Florida and Kentucky have elected to limit their programs to residents only.[6]

ABLE Account Eligibility Requirements

Social Security's Program Operations Manual (POMS) provides a concise but detailed explanation of the basic eligibility requirements and account management that must be followed in order for an ABLE account to remain an excluded resource.[7] To be eligible for an ABLE account an individual must be disabled and the disability must exist before his or her twenty-sixth birthday. There is currently a push by special needs advocates lobbying Congress to raise the age limit to forty-six years to make ABLE accounts more widely accessible.[8] Raising the age restriction would be especially helpful to persons whose disabilities are brought on later in adulthood by illness or accident as well as for those with mental health conditions that may not have presented symptoms or been properly diagnosed until after age twenty-six.

The disability component can be satisfied by showing that the person meets the disability requirements under the Social Security Act or by filing a Disability Certification in which the individual, his or her agent, parent or legal guardian certifies in writing that he or she has a medically determinable physical or mental impairment that meets the necessary requirements.[9] Some practitioners have advised applicants to have their physicians complete the Physician's Statement section of IRS Publication 524 – Credit for the Elderly or Disabled. The physician's statement is not filed with the applicant's income taxes, but should be retained by the individual to provide further supporting documentation if requested.[10]

The disabled individual for whom an ABLE account is established is referred to as the Designated Beneficiary and is also the account owner regardless of who contributes money to the account.[11] An ABLE account can be estab-

lished by the Designated Beneficiary himself, a parent, legal guardian or an agent of the Designated Beneficiary.[12] Anyone may contribute money to an ABLE account. The maximum annual contribution from all sources to a single account is tied to the Internal Revenue Service's gift tax exclusion in effect for a given calendar year—currently $14,000.[13] Contributions from third parties do not count as income of the Designated Beneficiary and the account balance is not considered a resource by Social Security as long as its value does not exceed $100,000. Given the relatively low gift tax exclusion, reaching the $100,000 threshold should not be an issue for account owners for at least six or seven years. If an account exceeds $100,000 the Designated Beneficiary's SSI eligibility is suspended until the account value falls back below $100,000.[14] However, the account value does not affect the beneficiary's Medicaid eligibility.

Qualified Disability Expenses – Permissible Use of ABLE Account Funds

ABLE accounts are intended to be used to pay for Qualified Disability Expenses (QDEs). The term Qualified Disability Expense is defined in the statute as "any expenses related to the eligible individual's blindness or disability which are made for the benefit of an eligible individual who is the designated beneficiary…"[15] The language is quite broad and could potentially include almost any expense. The statute goes on to provide a list of expenses that qualify as QDEs including but not limited to education, housing, transportation, employment training and support, assistive technology and related services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for ABLE account oversight and monitoring, funeral and burial; and basic living expenses.[16] The statute also grants the Secretary of the Treasury the regulatory authority to approve additional expenses as QDEs.[17] The POMS incorporate the statutory list and also provides some guidance as to non-qualified expenses, such as gambling, through hypothetical scenarios.[18] It is unclear whether travel and entertainment expenses will qualify.

ABLE account distributions used to pay for non-qualified expenses are subject to income tax penalties and may reduce certain means-tested benefits, such as SSI

for the Designated Beneficiary.[19] The rules governing ABLE account distributions for SSI eligibility purposes are complex and beyond the scope of this article. In general, whether a distribution is a countable resource for SSI purposes depends on the timing and whether it was actually used for a QDE.[20]

The statute puts the onus on individual states to track ABLE account distributions and non-qualified expenditures. Presently there is no audit system in place for RI ABLE. At this early stage it is unknown what requirements the state's Department of Human Services and/or the Social Security Administration will impose on Designated Beneficiaries with respect to documentation and accounting for distributions. Consequently, it is wise for ABLE account holders and their Agents or Guardians to maintain records of all withdrawals, receipts and expenditures in the event of an audit.

Similar to first party special needs trusts, at the Designated Beneficiary's death all funds remaining in the account are subject to a Medicaid payback, meaning that the state can recoup account funds up to the total cost of Medicaid benefits received by the Designated Beneficiary. However, unlike first party special needs trusts, an ABLE account is only subject to payback for expenditures made *after* establishment of the account.[21]

Rhode Island's ABLE Program

In July 2015, Rhode Island's General Assembly voted to establish its own state ABLE account program.[22] Rhode Island's program launched in December 2016 and immediately began accepting account applications through its website.[23] Although the program itself is managed by the General Treasurer's office, the statute delegates authority to create rules and regulations to the Department of Health and Human Services. As of the date of this writing no regulations have been promulgated by the executive office.

Rhode Island is a member of the National ABLE Alliance, a multi-state consortium. As of the last meeting of the Rhode Island ABLE Advisory Group in April 2017, nine states in the consortium have ABLE programs that are up and running. Three or four additional states in the consortium are expected to be open for business by July of this year.[24] Each state within the consortium maintains control over its own state program but partner for administrative and invest-

The Story of My Health and Fitness Journey

John A. Tarantino, Esq.

"The old that is strong does not wither." J.R.R. Tolkien, *The Fellowship of the Ring.*

President Rekas Sloan asked me to write about my health and fitness regimen and explain why I do what I do to maintain a strong body, good health and proper nutrition, which are all essential ingredients in overall fitness.

Let me give you some background. I am 62 years old and I have been a lawyer for almost 36 years. I've always been a litigator, trying cases and arguing appeals. It's stressful work, requiring focus, willpower and often long hours. That effort eventually takes a toll, not only on the mind, but also on the body.

In 2011, I went for my annual physical (which I had skipped for a couple of years, because I was too busy). I learned that my weight had increased substantially and my blood pressure and cholesterol numbers weren't great either. My doctor recommended that I lose some weight and start a moderate exercise program. If not, he cautioned that things could get worse and I could be at risk for serious health problems. Of course, he also reminded me that I was getting older, a fact the mirror reminded me of every morning.

I had not exercised – at least deliberately – in years. My son, Michael, who is 30 years younger than I am, had just completed P90X® – a 90-day at-home extreme fitness program. Michael looked fantastic; and he was in tremendous physical condition. But he was 26 at the time and I was 56. I asked Michael if he thought I could complete the P90X® program, as he had done. Now, my son loves and supports me and he wanted to be as encouraging as possible, but he also wanted to be realistic and cautioned: "I guess you could give it a try, Dad. But, please take it easy. It's a really tough program. Physically demanding." I could hear more than a hint of doubt in his voice; and that doubt served as much greater motivation for me than anything the doctor could have said. And so, on March 20, 2011, I began P90X®. For the next 90 days I dedicated myself to the pull-ups, push-ups, plyometrics, weight training, martial arts, yoga and core workouts that comprise the P90X® program. Little by little, day by day, week by week, I felt better and stronger. I also followed the P90X® nutrition plan and started eating smaller, healthier meals five times a day to keep my metabolism constantly fired up.

After about a month, others started to notice changes; and their compliments served as further motivation to continue to improve and work even harder. When I finished the program in late June 2011, I looked and felt like a different person. I was strong and fit, healthy and physically confident – and 38 pounds lighter!

What did I do next? I decided to keep going. I completed other at-home fitness programs to further improve my strength, cardiovascular health, flexibility and mobility and also focused on martial arts training, specifically, Krav Maga and Muay Thai. I have completed dozens of these programs, and I consider each new one to be a fresh challenge. Each morning I work out at home, or do so on the road when I travel. Initially, I used DVDs, but now the workouts are streamed live, so I can do any workout at any time, anywhere. I have no plans to stop. I want to stay strong because, despite the aging process (which unfortunately I can't stop), I do not plan to wither.

ment purposes to reduce fees by creating an economy of scale.[25] Accounts can be opened online at RI's ABLE website with as little as a $25 initial deposit.[26] Ascensus serves as the investment manager and plan administrator for Rhode Island's program. Account owners can select from six different investment options, including a simple checking account. The investment options range from conservative to more aggressive risk portfolios depending on the needs and desires of the Designated Beneficiary.

The daily debit limit for RI ABLE accounts is $5,000 for purchases and $810 for cash withdrawals. These limits can be raised temporarily if the Designated Beneficiary has a large purchase to make. The standard daily withdrawals may be lowered if the Designated Beneficiary, his agent, or guardian elects to impose stricter limits. Accounts are assessed an annual account maintenance fee of $40. There is a $15 annual fee for paper statements, however checking account fees are waived for accounts with an average balance exceeding $250.

When and Why ABLE Accounts Are Useful

ABLE accounts can provide a sense of empowerment to persons with disabilities. Unlike special needs trusts, a competent Designated Beneficiary of an ABLE account has direct access to his or her funds — there is no Trustee exercising discretion over distributions of funds in the account. However, a parent, court-appointed Guardian or Agent acting under a Durable Power of Attorney can have signature authority to help manage an ABLE beneficiary's distributions from the account.

In one case, a client's young adult child with Asperger's has a job that brings in a small income in addition to his Social Security income. In lieu of having to spend down his extra income every month to maintain his $2,000 resource limit for his social security benefits, he can deposit the excess funds into an ABLE account and allow them to grow tax-free. The parent client believes her son's ability to transfer his earnings to an ABLE account will forge a sense of self-worth, independence, and work ethic in her son. Further, he will have the ability to save his earnings for the future and achieve greater financial security while maintaining his income and health care benefits.

An ABLE account may serve as a more

Keeping Fit at the Office

As a former desk jockey, I understand the pain and frustration of an 8 to 10 hour day seated in squeaky chairs under the buzz of fluorescent lighting. However, this doesn't have to preclude one from having a healthy and active lifestyle. Follow the tips below to feel more alive and more productive; perhaps creating more free time to be spent in the great outdoors!

> **Go outside and walk during calls or while checking voicemails**

> **Schedule walking meetings instead of doing lunch**

> **Always take the stairs (hit them hard if you're already in good shape)**

> **Find a reason to get up at least once every 30 minutes (even if you have a standing desk, you should still change position regularly)**

> **Schedule "movement snacks" – 3 to 5 minutes of anything from pushups and squats to yoga poses or deep breathing**

> **Tell everyone you work with you're trying to live healthier and get some of them to join you!**

> **Become the coordinator of your next corporate bonding event! Doing something from a group walk, 5k, or a mud run (if you've got some ambitious colleagues), etc. will boost morale and give you some fresh water cooler material!**

Although the office is not the ideal environment to spend 40+ hours of your week, our bodies are resilient. We can offset unnatural habits through regular (preferably natural) movement. Also, since the work day typically doesn't leave one feeling energized, train before work! Few things can mess up your day before 0630; compared to 530pm when life often gets in the way of your workouts. Finally, keep in mind that activity is cumulative, so if you can only squeeze in 5 minutes at a time, but can do it a few times a day, you're "hitting your numbers" as they say!

Ryan McGowan is a former engineer who left the construction industry to help people become healthier and more adventurous. His company, Laid-back Fitness, is located in Warwick and is a combination of a fitness center and playground. He recently won the Projo Readers' Choice Award for Best Personal Trainer, and is the co-founder of the Frozen Clam Obstaplunge, a charity obstacle course + cold water plunge on New Year's Day.

cost effective alternative to a special needs trust where the person is the recipient of a small, one-time inheritance, or personal injury award (under $14,000/yr funding cap), or can be used in tandem with a spend-down plan. In these instances, where there is a relatively small sum of money a stand-alone special needs trust is cost prohibitive and would likely create unnecessary barriers between the individual and the assets.

An ABLE account can also be an alternative repository for child support or alimony payments under the $14,000/yr funding cap. For individuals receiving SSI, outright payment of child support or alimony leads to a dollar-for-dollar reduction of the person's SSI monthly check. Prior to the ABLE Act the only way to avoid this scenario would be to create a first party special needs trust or first party pooled trust account and obtain a court order irrevocably assigning the payments to the trust.

Child support and alimony payments are generally needed to cover weekly or monthly expenses. It may be more efficient to have direct access to the funds through an ABLE account to pay bills than to make requests for distributions by a trustee. In addition, placing child support or alimony payments in an ABLE account gives the Designated Beneficiary greater spending flexibility than if the money was placed in a first party trust subject to the "sole benefit" rule. However, it is still necessary to obtain a court order irrevocably assigning the child support or alimony payments to the individual's ABLE account. ABLE accounts may also be more cost effective than pooled trusts for smaller amounts.

Where larger sums of money are received by a beneficiary, a special needs trust is still the optimal planning vehicle since there is no limit to the amount of funds that can be transferred or gifted to a special needs trust account. However, ABLE accounts provide the potential for more sophisticated planning methods by utilizing special needs trust distributions and ABLE accounts together to maximize an individual's benefits. If the individual is already the beneficiary of a special needs trust, it may be advantageous to spend ABLE account funds in lieu of requesting a trust distribution. For example, trust distributions or direct payments from family or other benefactors towards a beneficiary's housing costs will reduce a beneficiary's Supplemental Social Security Income.[27] However, a Trustee of a properly drafted special needs trust may be authorized to make trust fund distributions to a beneficiary's ABLE account. Then, the Designated Beneficiary can use ABLE account funds towards housing costs, a QDE, without impacting their means-tested government benefits like SSI.

Family members who want to make contributions to ABLE accounts for the purpose of accumulating funds for a beneficiary's future use should be aware that upon the designated beneficiary's death, the state is entitled to reimbursement from the ABLE account for Medicaid paid for the beneficiary from the date of establishment of the ABLE account. Therefore, a third-party special-needs trust, for which there is no Medicaid reimbursement requirement, may be a better savings vehicle for family members who wish to provide for a beneficiary with a disability.

Conclusion

Practitioners advising clients on ABLE accounts should be wary of the perceived simplicity of the system. To properly

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No (More) Individual Employee Liability Under Fair Employment Practices Act

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Providence Solicitor's Office
Senior Assistant City Solicitor

Federal courts repeatedly have recognized it as inconceivable that Congress intended to protect small entities with limited resources from Title VII liability, yet would allow civil liability to run against individual employees – "the smallest of legal entities."

Introduction

The Supreme Court recently provided much needed clarity in employment discrimination matters, firmly holding in **Mancini v. City of Providence** that individual employees may not be held personally liable under Rhode Island's Fair Employment Practices Act (FEPA).[1]

The Supreme Court specifically considered, on a certified question from the United States District Court for the District of Rhode Island, whether § 28-5-7(6) of the General Laws, the so-called "aiding and abetting" provision, provides for individual employee liability—a provision unique to FEPA and not found in Title VII of the Civil Rights Act of 1964 (Title VII).[2] In declining to read claims for individual liability into § 28-5-7(6), the Supreme Court's opinion not only brought Rhode Island law into agreement with the federal circuit courts' unanimous interpretation of Title VII, it faithfully followed well-established principles of statutory construction and reached the right result for employers and employees in Rhode Island on principles of policy.

Considering that it has been the practice of the Rhode Island Commission for Human Rights (the Commission)—the agency statutorily responsible for investigating and passing upon charges of unlawful employment practices[3]—to allow claims against individuals, the Court's recent decision undoubtedly has its detractors. Irrespective, importantly for practitioners, individuals named in existing and future FEPA claims must now properly be dismissed.

History of Individual Liability Under FEPA

The Court's decision in **Mancini** follows a trend in courts across the country reconsidering individual liability in employment discrimination matters. Until 2009, employees, at least supervisors, clearly were subject to individual liability under Title VII and FEPA in this circuit.[4] By the time the First Circuit was presented with the question of whether Title VII provided for individual lability, however, every other federal circuit had held that no personal liability attaches to employees under Title VII.[5] The First Circuit, in **Fantini v. Salem State College**, adopted the analysis of its sister circuits, holding that "it is inconceivable that Congress intended to allow civil liabilities to run against individual employees."[6] After **Fantini** became the law of the land in this circuit, it left unresolved the question of whether FEPA allowed for individual liability claims—particularly because prior holdings that it did so were premised on the analogous determination that individual liability existed under Title VII.[7]

Rhode Island state and federal trial courts were left to wrestle with the "evolving nature of the law on the issue of supervisory liability under … [FEPA],"[8] reaching conflicting decisions on a case-by-case basis. Not long after the First Circuit's decision in **Fantini**, the federal court for the District of Rhode Island issued a thoughtful order regarding individual liability under FEPA, bringing § 28-5-7(6) to the forefront of the issue.[9] The federal court noted that despite courts' established reliance on the analogous nature of Title VII to interpret FEPA, the language of § 28-5-7(6) provided "an independent ground for individual liability which is broader than Title VII."[10] On that basis, the court recommended that the complaint before it be dismissed with leave to amend in order to properly assert a claim under that provision. Meanwhile, on a number of occasions, the Superior Court dismissed FEPA claims brought against individual employees, even in cases where the plaintiff specifically asserted a claim under § 28-5-7(6).[11] At the same time, the Commission was allowing such claims to proceed and entering orders against individuals for their purported violations of FEPA.[12]

It was with this unsettled landscape that the federal district court was presented with a motion to dismiss an individually named defendant in **Mancini**, prompting the court to certify the question to the Rhode Island Supreme Court, which had yet to opine on the issue.[13]

Statutory Construction

In **Mancini**, the Supreme Court was called

upon to answer a narrow question of statutory construction—whether § 28-5-7(6) provides for individual liability of an employee of a defendant employer. The statutory provision provides as follows:

> "It shall be an unlawful employment practice … [f]or any person, whether or not an employer, employment agency, labor organization, or employee, to aid, abet, incite, compel, or coerce the doing of any act declared by this section to be an unlawful employment practice, or to obstruct or prevent any person from complying with the provisions of this chapter or any order issued pursuant to this chapter, or to attempt directly or indirectly to commit any act declared by this section to be an unlawful employment practice[.]"

The plaintiff in **Mancini**, along with *amici curiae* the Commission, the Rhode Island Association for Justice, and the American Civil Liberties Union of Rhode Island, argued that the plain and unambiguous language of this provision provides for individual employee liability, and asked the Court to rely on judicial interpretations of state statutes with similar aiding and abetting language in Connecticut, Massachusetts, and New York.[14] The individual defendant, along with *amicus curiae* State of Rhode Island, countered that the provision is ambiguous, and encouraged the Court to follow state court precedent from Alaska, California, and Minnesota.[15]

The Supreme Court, focusing on its goal of giving effect to the General Assembly's intent, held that § 28-5-7(6) is ambiguous with respect to whether it imposes individual liability, as exemplified by the conflicting decisions among courts in Rhode Island as well as among courts around the country in construing statutes with identical or similar language.[16] Quite logically, the Court emphasized that, were § 28-5-7(6) to be construed to allow an imposition of individual liability, the Court would have to reach the absurd result whereby an employee could be held liable for aiding and abetting himself.[17] Or, put differently, it would require a conclusion that an employee "aided and abetted" his or her employer when the employee acted *on behalf of* the employer. Indeed, on the facts of the **Mancini** case before the Court that would be the result, as the alleged unfair employment practice for which the plaintiff sought to hold both

the individual employee and his employer liable stemmed solely from the act of the individual defendant.[18] Such an interpretation "would create a strange and confusing circularity where the person who has directly perpetuated the [wrong] only becomes liable through the employer whose liability in turn hinges on the conduct of the direct perpetrator."[19] The Court expressly found that such an interpretation would be linguistically and jurisprudentially unacceptable.[20]

Although the Court recognized that FEPA is to be construed liberally, it concluded that, had the General Assembly intended to create a basis for individual employee liability, it would have done so using language far clearer than that used in § 28-5-7(6).[21] The Court "decline[d] to hold that the legislature intended to accomplish a result so significant by a method so abstruse."[22]

In keeping with traditional principles of statutory construction, including that courts consider the entire statute and statutory scheme as a whole, and consider individual sections in that context, rather than myopically focus on but one narrow provision,[23] the Supreme Court observed that FEPA exempts employers with less than four employees from potential liability.[24] The Court concluded that it would be illogical for FEPA to exempt small employers from liability while exposing individual employees to the risk of personal liability.[25] The Supreme Court's reasoning in this respect is consistent with federal jurisprudence interpreting Title VII, which also exempts small employers. Federal courts repeatedly have recognized it as inconceivable that Congress intended to protect small entities with limited resources from Title VII liability, yet would allow civil liability to run against individual employees – "the smallest of legal entities."[26]

The Court also noted, somewhat in passing, that its interpretation was consistent with the remedies FEPA provides —including the issuance of a cease-and-desist order, hiring, reinstatement, upgrading of employees with or without back pay, and admission or restoration of union membership.[27] Clearly these are remedies that an employer, not an employee, would be able to provide.

Policy Considerations

The Court made clear that its decision was based squarely on principles of statu-

tory construction.[28] Nonetheless, it devoted a portion of its opinion to discuss the chilling effect that a contrary interpretation would have on discretionary management decisions by supervisory employees.[29] In the humble opinion of this author, it is this consideration that exemplifies why the Supreme Court reached the "right" decision in this case and, further, that its decision is in keeping with the spirit of FEPA.

Allowing FEPA claims to proceed against individuals would create unavoidable conflicts of interest between employees and their employers. There can be no doubt that personal liability would place a heavy burden on those who routinely make personnel and management decisions in the workplace. It would put supervisory employees at unavoidable risk of personal financial ruin (losing their homes, retirement savings, or ability to pay for their children's college education), because personnel decisions are an inherent part of the supervisory function. This inevitably would result in supervisory employees making employment decisions based on which decision would least likely result in a lawsuit brought against them personally, rather than the optimum lawful employment action.[30] In other words, the constant threat of litigation—which affects the innocent as well as the wrongdoer—would cause managers and supervisors to act in their own interest, rather than in the interest of their employer. Furthermore, because employment decisions are often made collectively, the threat of individual liability for collective decisions might leave these decision-makers in an adversarial position vis-à-vis each other as well.[31]

These concerns are well illustrated on the facts of the **Mancini** case itself.[32] In that case, the plaintiff had applied for a promotion within the police department, and the promotional process was governed by a collective bargaining agreement. The hired candidates were selected for promotion based on which applicants received the highest scores out of 100 possible points. Of those, 95 points were non-discretionary, based on a written examination, length of service, and level of education. The chief of police also awarded each applicant between 0 and 5 service points based on his subjective assessment of the applicant's overall performance as a police officer. The plaintiff's entire basis for suit was that the

chief of police awarded him zero service points because of a perceived disability. Were FEPA to provide for individual liability, it would be far more reasonable and less risky for the chief of police to award every applicant the same number of service points, so as to avoid the potential risk of litigation. Of course, this would be contrary to the very purpose of including discretionary service points, and it would damper the police department's ability and lawful endeavor to promote those officers who had demonstrated superior performance over others.

This could not have been FEPA's intent, particularly because of the paradoxical effect it would have on employment decisions—potentially resulting in "reverse discrimination." It would create an environment in which supervisors would be less likely to make merit-based hiring, firing, and promotional decisions that adversely affect members of a protected class. This result clearly undermines FEPA's expressly stated policy of fostering employment *without regard to* race, color, religion, sex, sexual orientation, gender identify or expression, disability, age, or country of ancestral origin.[33]

Courts across the country have rejected the opposing "parade of horribles" argument—that individual employee liability is essential to deter supervisors and individual employees from engaging in acts of discrimination and that they will do so with impunity without the threat of punishment.[34] Rather, FEPA, like similar anti-discrimination laws and Title VII, is structured on the principle of *respondaet superior*, making employers vicariously liable for the acts of their agents. This ensures both that no employee can violate the civil rights laws with impunity and protects employees who are the victims of workplace discrimination. Practically speaking, an employer is not likely to look favorably upon employees whose intentional acts subjected the employer to well-founded claims of discrimination. Because the employer remains liable, there are proper incentives to instruct and train employees to avoid discriminatory actions and adequately discipline wayward employees.[35]

Furthermore, because FEPA makes employers vicariously liable for the acts of their agents, victims of employment discrimination are adequately protected

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Percy Winchester Gardner: The Man Who Broke the Rule

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


First Woman Lawyer to be Admitted to State's Bar

After three years in local law office Miss Ada Sawyer passes examination and becomes a full-fledged attorney

MISS SAWYER CAN PRACTICE BEFORE SUPREME COURT

One hundred years ago, in 1917, Percy W. Gardner, Esq. entered the name of A. L. Sawyer with the Board of Bar Examiners to begin the process of becoming an attorney in Rhode Island. The law at the time allowed any person to read the law under the supervision of an attorney in good standing for a period of three years. After three years of study, that person could then register to take the Rhode Island bar examination.

As we all know, when the three years of study was completed, A. L. Sawyer tried to register for the bar exam. It was at that point that the Board of Bar Examiners learned that Sawyer was Ada Lewis Sawyer, a female. They balked.

A decision was required from Supreme Court Justice (and later Chief Judge) William H. Sweetland. He concluded, "After consideration, we are of the opinion that the word "person" contained in the rules regulating the admission of attorneys and counselors should be construed to include a woman as well as a man."

Since Ada Lewis Sawyer was found to be a "person," she could sit for the bar exam in September 1920.

But today I celebrate the decision of Percy W. Gardner, Esq. His action 100 years ago was not without cost to him. Some in our Bar Association were cold to him in the following years. He was the man who broke the rule. That rule was: "NO GIRLS ALLOWED."

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BOOK REVIEW

Captured: The Corporate Infiltration of American Democracy

by Senator Sheldon Whitehouse

Anthony F. Cottone, Esq.
Solo practitioner in Providence
Hearing officer and counsel for RI Department of Education[1]

Senator Sheldon Whitehouse's intellect and passion for his job comes through loud and clear in his new book.[2] Yet, only four of the bills that he introduced in the last Congress (the 114th) were signed into law, and one of the four re-named a post office.[3] This is not to imply that the Senator is lacking either in initiative or political skill. He has distinguished himself as an ardent environmentalist[4] and has authored and/or sponsored significant legislation in a host of other areas, including for example, bills to effect meaningful campaign finance reform[5] and to force anonymous shell corporations to pay their fair share of taxes.[6] In fact, only three Democratic Senators in the last Congress saw more than four of their bills become law.[7]

Thus, rather than reflecting adversely upon the Senator, the fact that few of his many bills were enacted evidences that his tenure in the Senate has coincided with what a recent study by the Pew Research Center has concluded is a period when "partisan antipathy is deeper and more extensive than at any point in the last two decades."[8] Indeed, although the division of our body politic into emotionally over-charged ideological factions is nothing new (especially to those of us who came of age during the Vietnam War and its aftermath), it does feel like familiar fissures have now widened into unprecedented chasms, whether due to the alarming levels of economic inequality,[9] the erosion of civic institutions that historically have brought together people of differing ideologies and socioeconomic profiles,[10] or more recently, our President's near daily lies and shameless pandering to his low-information base.[11]

And nearly as unsettling as the Senator's message, which describes nothing short of a de facto corporate takeover of our democracy, is the fact that many of our most talented lawyers continue to toil away at high-paying law firms – aiding and abetting the very corporate takeover described by the Senator – despite the fact that evidence of the takeover described in Captured has been staring us in the face for years.

The very title of Senator Whitehouse's new book reflects this unfortunate reality and suggests that like over sixty percent of those polled in the recent Pew study, the Senator views certain political opponents not merely as "misguided," but as "dangerous,"[12] i.e., as corporate agents who have infiltrated our democracy. Yet, in *Captured* the Senator engages in neither political score-settling nor pious moralizing and resists the temptation to describe the danger in strictly partisan terms. Thus, Jeffrey Toobin's reference to the Senator's "starchy sense of rectitude" in his review of the book[13] misses the mark. Kirkus was more accurate when it commented that "the book reads more like a legal brief or a series of position papers,"[14] which is hardly surprising inasmuch as the Senator has spent much of his career as a lawyer[15] and was assisted with the book project by a policy analyst.[16] But *Captured* is far from boring. The Senator's economical and engaging prose style makes the book hard to put down. And this is no self-aggrandizing campaign piece. Rather than engaging in empty partisan talking points, the Senator packs a wealth of relevant information and history into a mere 204 pages and 35 pages of notes and makes a compelling case that various "faces of corporate power," which for the most part remain anonymous in the book, pose a very real danger.

The Senator argues that those acting on behalf of wealthy corporations have purposefully exploited a blind spot in our Constitution – which nowhere even mentions the word "corporation" – and now constitute "an unseen ruling class" which has "captured" the government institutions we should be able to rely upon for protection.[17] The very characteristics that make modern corporations "without peer" as economic actors – i.e., the fact that they "are dedicated exclusively to profit making, by law," "have no soul or conscience," "have no loyalty to any flag or nation," "do not rest, retire or die" and have "no limit to their appetite" – make them "dangerous" political actors, according to the Senator.[18] And he provides ample evidence to support the claim that many corporations, especially in the fossil fuel and financial industries, are in the business of "sowing deliberate deceit to create public confusion about issues that should be clear,"[19] adding that:

> [o]n major issues where the facts are against them, the corporate lobby has developed a very complex system to do a very simple thing: to lie. To lie so persistently, so smoothly, and with such craft that plain truth is distorted, obscured, and sometimes demonized.

> This system – call it the 'denial machine' – has been carefully built over the past several decades to deceive the public about the scientific facts at the heart of major political debates.[20]

The Senator asserts that corporations are enabled by "an increasingly compliant and even corporate-owned media,"[21] as well as by "business friendly judges"[22] and a Supreme Court that "shows patterns that are completely inconsistent with disinterested neutrality."[23] Citing a study by Judge Richard Posner and law professors Lee Epstein and William Landes, he notes that the decisions of the Roberts Court have been "'far friendlier to business than those of any Court since at least World War II,'" adding that Chief Justice Roberts and Justice Samuel Alito are the two most business-friendly judges in the past sixty-five years.[24] The Senator perceives "an unmistakable pattern and purposefulness" where "over and over, the conservative justices ignored traditional, conservative judicial principles when those principles obstructed a political result favorable to corporations."[25] Speaking more broadly, he adds that:

> [w]hat were once fringe conservative ideas – hostility to our nation's civil rights, environmental protection and consumer protection laws – have been steadily dripped into the legal mainstream by endless repetition. The mainstream of American law has been shifted steadily to the right by the force of this effort, backed by seemingly endless corporate funds.[26]

Hardly what one might expect from a descendant of the Crocker railroad fortune and alumnus of both St. Paul's and Yale. And nearly as unsettling as the Senator's message, which describes nothing short of a *de facto* corporate takeover of our democracy, is the fact that many of our most talented lawyers continue to toil away at high-paying law firms – aiding and abetting the very corporate takeover described by the Senator – despite the fact that evidence of the takeover described in *CAPTURED* has been staring us in the face for years. Indeed, the Senator walks on well-trodden ground. The dangers of corporate personhood have been described by Robert Reich and others;[27] the corrosive impact of money in politics and specifically, the legal errors in *CITIZENS UNITED*, have been addressed by Jane Meyer, Lawrence Lessig, Zephyr Teachout, to name just a few;[28] following

Al Gore, Naomi Klein and others have described corporate malfeasance in the debate over climate change;[29] and finally, Thomas Pikkety, Joseph Stiglitz and others have established the connection between laissez faire capitalism and ever-increasing levels of economic inequality.[30]

Yet *Captured*, while perhaps not original in most respects, is well worth the read. The Senator remarks that "never in [his] life" has he seen "such influence in our elections from corporations," or "such a complex web of front groups sowing deliberate deceit to create public confusion about issues that should be clear," or the courts "under such political sway."[31] If anything, the fact that one with the Senator's experience is neither alone in feeling this way nor the first to pinpoint its causes only underscore the urgency of the message. And as one who has been "actually in the arena"[32] for his entire professional life,[33] the Senator has a valuable perspective and is able to draw upon concrete examples from his own experience to illustrate his larger point.

To cite one such example, the Senator explains how when reversing the trial court's verdict for the state in the civil action he brought against lead paint companies while state attorney general, the Rhode Island Supreme Court relied upon an article written by a law professor, evidently without realizing that the article had been "planted mid-litigation by a paid advisor to the lead paint companies."[34] He goes on to note that:

> a cottage industry has cropped up of conservative, pro-corporate organizations hosting 'continuing legal education' sessions for judges at luxurious resorts where, between the golf and fishing outings, they can hear from 'experts' in pro-corporate legal theories.[35]

However, it must be said that Senator Whitehouse does a better job of diagnosing problems in *Captured* than of offering practical solutions. Although it is no doubt true that, as the Senator claims, "Trump could not have accumulated his wealth without the power of the corporation and the favorable tax and regulatory environment corporate lobbying has secured,"[36] it does not appear that reversing *Citizens United* (were that even possible) would, standing alone, level the playing field or cure the ills that have enabled the likes of Trump to ascend to the presidency. In fact, the very thor-

CLE Program Benefits Attorneys Looking to Enter Real Estate Practice

The May 2017 Practical Skills seminar, ***Residential Real Estate Closings in Rhode Island***, reviewed everything from disclosures and purchase and sales agreements to the closing and avoiding post-closing problems. The presenters, including (l-r) John W. Montalbano, Esq., of Montalbano & Cloutier LLC, Michael B. Mellion, Esq., of Fidelity National Title Insurance Company, and Vanessa J. Varone, Esq., of Cranston, discussed the process of preparing for the closing, the duties of counsel for the buyer and the seller, and the mechanics of the closing, focusing on the preparation of the settlement statement. They reviewed forms and figures and compliance with regulatory requirements, while also examining the closing package and various promissory notes, mortgage deeds and their attendant forms. While the program was intended for new attorneys in their transition from law school to law practice, attorneys who were unfamiliar with this area of law and those hoping to expand into a real estate practice also benefitted from this seminar. This CLE program is now available, on-demand for purchase and viewing on the Continuing Legal Education section of the Bar's website at **ribar.com**.

oughness of the Senator's analysis in *Captured* makes clear that there is no easy fix for the Constitution's blind spot vis-a-vis corporations or the influx of money into politics,[37] and the Senator offers few solutions to mitigate the toxicity of our political climate, without which no solution seems possible. He is left extolling us to "wake up and get off the couch,"[38] which may in fact be the only effective solution to the deep-seated problems he describes.

ENDNOTES

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

2 ***See*** *Senator Sheldon Whitehouse (with Melanie Wachtell Stinnett), Captured: The Corporate Infiltration of American Democracy (The New Press, 2017). This is the Senator's second book. His first was a collection of quotations, On Virtues: Quotations and Insight to Live a Full Honorable and Truly American Life (Adams Media, 2012).*

3 *The post office was in North Kingstown and was named for Melvoid J. Benson, a longtime educator, state representative and school committee member.* ***See*** *Govtrack at https://www.govtrack.us/congress/members/sheldon_whitehouse/412247/report-card/2016.*

4 *The Senator has introduced numerous pieces of legislation on the environment, including a carbon fee bill,* ***see*** *S. 1548 (114th Cong.) American Opportunity Carbon Fee Act of 2015, and has co-authored a report with Massachusetts Senator Elizabeth Warren highlighting the corporate disconnect over climate change,* ***see*** *Danny Hakim, U.S. Chamber Out of Step With Its Board, Report Finds, New York Times (June 14, 2016), as well as launching a "Time to Wake Up" campaign in which he takes to the Senate floor once a week to talk about global warming.* ***See generally*** *https://www.congress.gov/member/sheldon-whitehouse/W000802.*

5 ***See*** *S. 229 (114th Congress, 2015-2016), DISCLOSE Act of 2015.*

6 ***See*** *S. 1454 (115th Cong.) 2017 TITLE Act.*

7 ***See*** *Govtrack, note 3,* ***supra****.*

8 ***See*** *Emily Badger and Niraj Chokshi, Partisan Relations Sink from Cold to Deep Freeze, New York Times, June 16, 2017. In fact, the study suggests that prejudice related to political affiliation now exceeds racial hostility in implicit association tests that measure how quickly people subconsciously associate groups (blacks, Democrats) with traits (wonderful, awful).* ***Id.***

9 ***See*** *Thomas Pikkety, Capital in the Twenty-First Century (Harvard University Press, 2014); Joseph E. Stiglitz, The Price of Inequality: How Today's Divided Society Endangers Our Future (W.W. Norton & Co., 2012); and Inequality Matters: The Growing Economic Divide in America and Its Poisonous Consequences, compiled by James Lardner, David A. Smith (New Press 2007);* ***see also*** *Robert D. Putnam, Our Kids: The American Dream in Crisis (Simon & Shuster, 2015).*

10 ***See*** *Robert D. Putnam, Bowling Alone: The Collapse and Revival of American Community (Simon & Shuster, 2000).*

11 *Many media organizations, including the New*

York Times, have been cataloguing the astounding number of Trump's outright lies. ***See, e.g.****, David Leonhardt and Stuart A. Thompson,* Trump's Lies, New York Times, *June 23, 2017;* Politifact, All Pants-on-Fire! Statements involving Donald Trump, *available at http://www.politifact.com/personalities/donald-trump/statements/byruling/pants-fire/;* ***see also*** *Maria Konnikova,* Trump's Lies vs. Your Brain, PoliticoMagazine *(Jan./Feb., 2017) (noting that "a whopping 70 percent of Trump's statements that* PolitiFact *checked during the campaign were false" and "[t]hose who have followed Trump's career say his lying isn't just a tactic, but an ingrained habit").*

12 ***See*** *note 8,* ***supra****.*

13 ***See*** *Jeffrey Toobin,* What Makes Sheldon Whitehouse Angry? The New Yorker *(April 1, 2017).*

14 ***See*** Kirkus Review *(February 21, 2017), https://www.kirkusreviews.com/book-reviews/sheldon-whitehouse/captured/.*

15 *The Senator, who was born in 1955, was elected state Attorney General in 1988, appointed Director of the state's Department of Business Regulation in 1992, and as United States Attorney in 1994. He was first elected to the Senate in 2006.*

16 Captured *was written with the research and editorial help of Melanie Wachtell Stinnett, a 2007 graduate of Stanford Law School and Co-Founder of the Environmental Voter Project, which seeks to "increase voter demand for progressive environmental policy by identifying inactive environmentalists and then turning them into consistent activists and voters." Ms. Stinnett also is the Director of Policy and Communications at the Tobin Project, an independent, non-profit research organization focusing (broadly speaking) on "government and markets, institutions of democracy, economic inequality and national security."* ***See*** *https://www.linkedin.com/in/melanie-wachtell-stinnett-48aa0614/.*

17 Captured *at 4, xix and xxii;* ***see also*** *Ganesh Sitaraman,* The Crisis of the Middle-Class Constitution: Why Economic Inequality Threatens Our Republic *(Knopf, 2017) (arguing that unlike its ancient and British predecessors, the U.S. Constitution was not designed to function in a society with high levels of economic inequality and does not function properly in the absence of a strong middle class).*

18 Captured *at 6-7.*

19 ***Id.*** *at xviii.*

20 ***Id.***

21 ***Id.*** *at xxi.*

22 ***Id.*** *at xx.*

23 ***Id.*** *at xviii.*

24 ***See id.*** *at 77 and 78, citing Adam Liptak,* Corporations Find a Friend in the Supreme Court, New York Times, *May 4, 2013, in turn citing Lee Epstein, William Landes and Richard A. Posner,* How Business Fares in the Supreme Court, *97 Min.L.Rev. 1434 (2013).*

25 Captured *at 78. The Senator claims that the Court's result in the Obamacare decision –* ***Nat'l. Fed. of Ind. Business v. Sebelius****, 567 U.S. 519 (2012) – was "predictable" and "anticipated by many of us."* ***Id.*** *at 79. Thus, he argues (not all that convincingly) that Obamacare's survival was due to the fact that its continued existence was in the interest of the health insurance industry and because Chief Justice Roberts did not want to deprive Conservatives of a unifying rallying cry or foist the problem of health care upon an unprepared Republican party.* ***Id.***

Defense Counsel of Rhode Island Elects New Officers, Honors DCRI Past President

(l-r) DRI State Representative Faith A. LaSalle, Esq., Incoming DCRI President Lauren D. Wilkins, Esq., Outgoing DCRI President John F. Kelleher, Esq., and DRI National Director Emily Coughlin, Esq.

At its Annual Meeting, the Defense Council of Rhode Island (DCRI), the state association of attorneys defending the interests of business and individuals in civil litigation, elected new officers including President Lauren D. Wilkins, Esq., President-Elect William F. White, Esq., Vice President Angela L. Carr, Esq., Secretary Paul M. Kessimian, Esq. and Treasurer Amy Beretta, Esq. DCRI also honored James T. Murphy, Esq., one of DCRI's founders and also past president, for his outstanding longtime service to the defense bar.

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Questions? Please contact: Kathleen M. Bridge, Director of Communications or Erin Bracken, Member Services Coordinator at: **(401) 421-5740**.

26 *Captured at 76.*
27 ***See*** *Robert Reich, Supercapitalism: The Transformation of Business, Democracy, and Everyday Life (Vintage Books, 2007).*
28 ***See*** *Jane Meyer, Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right (Doubleday, 2016); Lawrence Lessig, Republic Lost: How Money Corrupts Congress and a Plan to Stop It (Hachette Book Group, 2011); and Zephyr Teachout, Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United (Harvard University Press, 2014);* ***see also*** *Robert Kaiser, So Much Damn Money: The Triumph of Lobbying and the Corrosion of American Government (First Vintage Books, 2010).*
29 ***See*** *Naomi Klein, This Changes Everything: Capitalism vs. The Climate (Simon and Shuster, 2014) and Erik M. Conway and Naomi Oreskes, Merchants of Doubt (Bloomsbury Press, 2010);* ***see also*** *Arlie Russell Hochschild, Strangers in Their Own Land: Anger and Mourning on the American Right (The New Press, 2016).*
30 ***See*** *note 9,* ***supra****.*
31 *Captured at xvii.*
32 *To quote Teddy Roosevelt. For the full quote,* ***see*** *https://www.goodreads.com/quotes/7-it-is-not-the-critic-who-counts-not-the-man.*
33 ***See*** *note 15,* ***supra****.*
34 *Captured at 75-76.* ***See State of Rhode Island v. Lead Paint Assoc., et al.****, 951 A.2d 428, 443, 444, 448, 449, 450, 454 (R.I. 2008), citing Donald G. Gifford, Public Nuisance as a Mass Products Liability, 71 Univ.Cin.L.Rev. 790-91, 794 (2003).*
35 ***Id.*** *at 72.*
36 ***Id.*** *at 44.*
37 *Thus, in a Postscript where he briefly discusses the 2016 election, the Senator simply ignores the fact that the Democrats outspent the Republicans in the election by a whopping $152 million.* ***See*** *Center for Responsive Politics, Election Overview, https://www.opensecrets.org/overview/.*
38 *Captured at 204.* ❖

Lawyers on the Move

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Lawyers Are at Risk for Secondary Traumatic Stress

Hallie Neuman Love, Esq.
New Mexico

This article, originally published in the February 15, 2017 New Mexico Bar Bulletin, has been republished with permission from the State Bar of New Mexico.

This article, fourth in an occasional positive psychology series, examines what secondary trauma is and how positive psychology and body-based therapies are effective prevention and treatment approaches.

Introduction

Legal work is replete with stress. That's a given, but what is not as well understood is that secondary traumatic stress, also known as vicarious trauma or compassion fatigue, is a high occupational risk for lawyers.

Consider immigration and civil rights attorneys, public defenders, prosecutors, juvenile justice attorneys and family law attorneys (just to name a few) who are barraged on a daily basis with stories of traumatic hardship or violence. Many attorneys, day in and day out, directly observe their clients' pain, fear and terror as they listen to accounts of adversity and suffering. Many attorneys read stacks of heart wrenching reports of traumatic events, or view endless graphic evidence. The cumulative direct exposure to others' trauma can result in emotional duress to the lawyers and judges and other legal personnel who work with traumatized populations.

What is Secondary Trauma?

When lawyers are continually called on to support their clients and listen to their traumatized clients' feelings and experiences it is nearly unavoidable to not take in some emotional pain. Further, lawyers are obliged to control their reactions so they often maintain an image of toughness, or seek to appear unruffled as a stronghold of calm. They often feel a responsibility to fix their clients' trauma, conceivably by winning, even when they have no control over the outcome. Imaginably they may feel guilt when the outcome is not positive. To make matters more difficult, lawyers' high caseloads mean the exposure to trauma may never let up.

Under these conditions it's not surprising that some lawyers empathize with, internalize, and to some degree, experience their clients' feelings of fear, hopelessness, anger or rage. Secondary trauma can create within lawyers a state of psychological tension and preoccupation. Some may experience disturbing images from cases intruding into their thoughts or dreams, and they may experience intense emotions alongside these images. Another area of concern is that a lawyer, having been triggered by secondary trauma, may find him/herself re-experiencing personal past trauma memories.

Leading trauma, emotional intelligence, and resilience authorities agree that emotional residue from trauma gets lodged in the brain, body and nervous system. A brain response is the uncontrollable hair trigger for emotional hijacking. Body responses may be physical and emotional exhaustion, stomachaches, headaches, nausea, and a variety of physical illness. Nervous system responses may include feeling upset, on edge, or powerless and hopeless.

Secondary trauma can produce extreme imbalances in the autonomic nervous system, whereby one can get stuck in a neurochemical deluge of fight, flight, freeze, or shut-down physiology. Some nervous system symptoms of secondary trauma mimic posttraumatic stress disorder. These common symptoms include: anxiety, feeling emotionally overwhelmed, depression, insomnia and other sleeping problems, concentration problems, memory problems, feeling numb, feeling agitated and prone to anger, or hypervigilant and viewing the world as inherently dangerous.

Further, attorneys may begin to question their own competence or efficacy. With lower self-esteem and PTSD-like symptoms producing problems in work and personal relationships they may further spiral downward and be at risk for self-medicating and substance abuse. And, of course, all these responses to trauma result in less productivity and less effective representation.

While it's true that secondary trauma may be nearly unavoidable in some legal fields, it's important to understand that it is a logical response to the job. It is also vital to recognize that using prevention strategies can help you cope with

your feelings and support your nervous system to mitigate this trauma.

Those that chronically endure the effects of secondary trauma without fortifying themselves against its effects or treating it may experience debilitation that forces them to stop working or leave the field of law.

How Can Lawyers Prevent Secondary Trauma?

The types of tools for resilience training offered by the science of positive psychology can help prevent secondary trauma. "Resilience Training for Lawyers" will be the focus of a companion article in the Bar Bulletin Positive Psychology series, available in the near future. For now, here's a brief overview of resilience:

Resilience is the process of adapting well in the face of adversity, trauma, tragedy, threats or significant sources of stress. It means, "bouncing back" from difficult experiences.

Resilience training focuses on developing awareness of thoughts, emotions, behaviors and physiological responses (usually with mindfulness training) so you can self-regulate and change those thoughts, emotions, behaviors and physiology to achieve a desired positive outcome. Other important aspects of building resilience include a strengths-based focus in order to be more engaged, overcome challenges, and create a life aligned with one's values. Resilience is also significantly enhanced when one is able to cultivate close relationships, acquire the ability to look at situations from multiple perspectives, think creatively, develop optimism, and practice mind-body techniques that keep the autonomic nervous system in balance.

To prevent the long-term, deleterious effects from secondary trauma, it is advisable to conduct periodic self-assessments to determine if you are beginning to experience depletion, and to create an effective action plan.

Here are several effective preventative elements to incorporate into your life:

- Resilience training
- Self-care such as vacations, work breaks, exercise, healthy eating, quality sleep, hobbies or activities outside work and connection with friends and family;
- Regular use of stress-reduction techniques such as yoga, meditation, mindfulness, breathing exercises, body

sensation scans and deep nervous system relaxation to turn off the fight, flight, or freeze nervous system response;
- Wherever possible have a reduced or diverse caseload, a holistic approach to work that includes overall life quality, and the ability to debrief with others who are knowledgeable and supportive of how you think and feel and how you are affected;
- Professional assistance, when necessary, is an additional avenue to increase well-being and resilience.

Treatment

It is now well understood that trauma affects the nervous system and that residue from trauma continues to affect neurophysiology even after the traumatic event has passed. To move the absorbed trauma out of the body, trauma experts agree that body-based techniques are key strategies.

Here's how trauma can get lodged in the body: people who have experienced trauma often have continued autonomic nervous system and hypothalamic-pituitary-adrenal activity from the initial trauma. This is because a traumatized individual's brain doesn't distinguish between past trauma and present peril. The brain continues to indicate danger, and individuals feel body sensations from the danger long after the initial traumatic occurrence. Some body sensations may feel frightening—for example, a knot in the belly, breath-limiting tension or heart-pounding in the chest, a constricted throat, pain or thick fog in the head, the need to fight, take flight or freeze. Individuals can also experience hypo-arousal where they numb out, shut down or dissociate. If frightening sensations aren't given time and attention to move through the body and resolve or dissolve, individuals may continue to be traumatized.

Body-based therapy provides lawyers with safe, natural tools to manage and neutralize the physiological symptoms and body sensations related to trauma. Body-based therapies heal the fight-flight-freeze-collapse nervous system response and create a feeling of safety in the body whereby individuals can attain a calm and peaceful mind, experience emotions in a healthy way, feel a sense of strength, control and efficacy, and thereby begin to alleviate the malady.

Traditional talk therapy can help with insights, but when one digs up memories and relives the event by retelling the story, it can reignite the agony without undoing the effects of dread, anger, powerlessness, or depression contained within the body. This is one reason that individuals with PTSD-like symptoms respond well to body-based therapies coupled with psychotherapy.[1]

A three-year yoga and trauma study funded by the National Institutes of Health found that participation in trauma-informed yoga significantly reduced PTSD symptoms in women with treatment-resistant complex PTSD.[2]

Integrative Restoration® Yoga Nidra (iRest) is a proven body-based approach used by that the military, VA centers and countless other civilian organizations to overcome trauma.[3] As iRest founder Richard Miller explains, "It works directly by changing sensory, cognitive and emotional symptoms that keep PTSD in place. It's shown to bring about deep relaxation while also producing healthy changes in the structure of your brain, stimulating healing and tissue repair, providing you self-care skills for changing negative emotions and thoughts into positive ones… to restore an inner sense of ease and well-being."

What is Post Traumatic Growth?

People who endure psychological struggle following adversity often see positive growth afterward. As part of treatment for trauma, it's valuable to be aware of posttraumatic growth as a possibility. This is because if all you know is posttraumatic stress disorder and you have some horrible occurrence where you think you're going down a slippery slope, the symptoms will worsen. If instead, you understand that a typical response to trauma is resilience, that given time you may be stronger as a result of what you experienced, and that it's also possible to experience growth, the downward spiral can be stopped.

Psychologist Richard Tedeschi, professor of psychology at the University of North Carolina, and Harvard psychologist Richard McNally, created a course taught to US Army soldiers on post-traumatic growth that begins with the wisdom that positive growth and personal transformation following trauma comes from a renewed appreciation of being alive, enhanced personal strength, acting on

new possibilities, improved relationships, and spiritual deepening ("spiritual" meaning belonging to or serving something larger than the self).[4]

Conclusion

In conclusion, enhancing resilience can help prevent secondary trauma, and body-based therapies can help heal secondary trauma. It is important to take care of yourself in order to not become a victim of secondary trauma. Secondary trauma can cause debilitating physical and emotional symptoms as well as functional impairment such as difficulty solving problems, increased errors, and low motivation or productivity that interferes with effective legal representation and negatively impacts the legal profession.

Remember, in order to effectively advocate for your client—you need to effectively care for yourself first.

About the Author

Santa Fe attorney Hallie N. Love is nationally certified in positive psychology and mind-body therapies and is the co-author of *Yoga for Lawyers—Mind-Body Techniques to Feel Better all the Time*.

ENDNOTES

1 *Sparrowe, Linda. Transcending Trauma: How Yoga Heals, YogaInternational.com, June 12, 2013.*

2 *van der Kolk, BA1, Stone L, West J, Rhodes A, Emerson D, Suvak M, Spinazzola J. Yoga as an adjunctive treatment for posttraumatic stress disorder: a randomized controlled trial. J Clin Psychiatry 2014 Jun; 75(6): 559-65.*

3 *Miller, Richard. The iRest Program for Healing PTSD. New Harbinger Publications, Inc. 2015.*

4 *hbr.org/2011/04/building-resilience.* ❖

Rhode Island Bar Foundation

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

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

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RHODE ISLAND BAR ASSOCIATION
2016-2017 LEGISLATIVE REPORT
William A. Farrell, Esq.
Rhode Island Bar Association Legislative Agent

During the course of the 2017 General Assembly session, over 2,300 legislative proposals were introduced and reviewed by RIBA's legislative counsel; 121 of those bills were deemed to impact the practice of law and were forwarded to the relevant RIBA committees.

In addition to the monitoring of legislative introductions, the RIBA adopted a very aggressive legislative agenda comprised of six legislative initiatives which are more fully described in the 2017 Amicus Notice, a copy of which can be found in the Volume 66, Number 1, July/August 2017 issue of the RI Bar Journal.

Ultimately, the Bar Association was successful in urging the adoption of a proposal sponsored by Representative Carol McEntee and Senator William Conley which would update the statutory cap on court-awarded guardian ad litem fees from $400 to $800. Other legislation proposed by the Bar's Probate and Trust Committee involving the Rhode Island Estate Tax failed due to the impact the proposals would have on the state's budget as did the Committee's proposal to insulate certain Trustee action in Directed Trusts. The proposal suggested by the Bar's Title Standards and Practices Committee to validate certain conveyance defects in recorded real estate documents, failed in its third attempt, due primarily to the legislative belief that the proposal went too far in its designation of what defects would be deemed validated.

In addition to the legislative agenda initially approved by the Executive Committee, two other legislative proposals were subsequently introduced and required a response from the RIBA. The first issue involved legislation which would have required all members of the Bar to acquire and maintain $1,000,000 of malpractice insurance. The legislation was scheduled for a hearing and consideration late in the session. Meetings with the sponsor and Senate leadership took place along with the preparation and submittal of a detailed memo outlining the Bar's concern with the proposal as drafted. Ultimately the sponsor withdrew the legislation. A second issue involved the prohibition of certain practices relative to the collection of debts. At the urging of the District Court Bench Bar Committee, the RIBA expressed its support for the legislation.

Senator Erin Lynch Prata, Chairwoman of the Senate Judiciary Committee, and Representative Cale Keable, Chairman of the House Judiciary Committee, due to the complexity of the RIBA Agenda, required supportive memoranda detailing the issues involved in each of the RIBA legislative proposals and scheduled 14 legislative hearings on the legislation. Representatives from both the RIBA Committees on Title Standards and Practices and Probate and Trusts, along with RIBA's legislative counsel, testified in support of the proposals and responded to questions from the respective Committees.

A special word of thanks to those RIBA member legislators who introduced the legislation on behalf of the RIBA and who managed the legislative package through the committees and on the floor of the Senate and House; namely, Senator Frank Lombardi/Representative Carol McEntee – Elective Shares; Senator William Conley, Jr./ Representative Carol McEntee – Guardian Ad Litem Fee; Senator Michael McCaffrey/Representative Mia Ackerman – Conveyancing Defects; Senator Walter Felag, Jr./ Representative Alex Marszalkowski – Estate Tax Credit; Senator Stephen Archambault – Portability; and Representative Robert Craven/Senator Stephen Archambault – Directed Trusts.

Throughout the 2017 session, the response of the House leadership team led by Speaker Nicholas Mattiello and Majority Leader Joseph Shekarchi, together with the Senate leadership team of Senate President Dominick Ruggerio and Majority Leader Michael McCaffrey, was truly appreciated and their support of the RIBA agenda was instrumental in the accomplishments achieved.

The specific detail of any of the RIBA-sponsored proposals or of any other proposal relating to the practice of law can be available upon request to the RIBA.

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September 11 *Monday*
Staying Within the Lines: Avoiding Ethical Penalties & Infractions
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September 26 *Tuesday*
Quite a Catch! Phishing for Social Engineering Fraud and Understanding the Importance of Legal Project Management
Rhodes-on-the-Pawtuxet, Cranston
5:30 – 7:30 p.m., 2.0 ethics

September 27 *Wednesday*
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2:00 – 4:00 p.m., 2.0 ethics

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October 12 *Thursday*
Medical Malpractice: From First Phone Call to Verdict
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When contacting Coastline EAP, please identify yourself as a Rhode Island Bar Association member or family member. A Coastline EAP Consultant will briefly discuss your concerns to determine if your situation needs immediate attention. If not, initial appointments are made within 24 to 48 hours at a location convenient to you. Or, visit our website at coastlineeap.com (company name login is "RIBAR"). Please contact Coastline EAP by telephone: 401-732-9444 or toll-free: 1-800-445-1195.

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SOLACE, an acronym for Support of Lawyers, All Concern Encouraged, is a new Rhode Island Bar Association program allowing Bar members to reach out, in a meaningful and compassionate way, to their colleagues. SOLACE communications are through voluntary participation in an email-based network through which Bar members may ask for help, or volunteer to assist others, with medical or other matters.

Issues addressed through SOLACE may range from a need for information about, and assistance with, major medical problems, to recovery from an office fire and from the need for temporary professional space, to help for an out-of-state family member.

The program is quite simple, but the effects are significant. Bar members notify the Bar Association when they need help, or learn of another Bar member with a need, or if they have something to share or donate. Requests for, or offers of, help are screened and then directed through the SOLACE volunteer email network where members may then respond. On a related note, members using SOLACE may request, and be assured of, anonymity for any requests for, or offers of, help.

To sign-up for SOLACE, please go to the Bar's website at **ribar.com**, login to the **Members Only** section, scroll down the menu, click on the **SOLACE Program Sign-Up**, and follow the prompts. Signing up includes your name and email address on the Bar's SOLACE network. As our network grows, there will be increased opportunities to help and be helped by your colleagues. And, the SOLACE email list also keeps you informed of what Rhode Island Bar Association members are doing for each other in times of need. These communications provide a reminder that if you have a need, help is only an email away. If you need help, or know another Bar member who does, please contact Executive Director Helen McDonald at hmcdonald@ribar.com or 401.421.5740.

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The Rhode Island Bar Association applauds the following attorneys for their outstanding pro bono service through the Bar's Volunteer Lawyer Program, Elderly Pro Bono Program, US Armed Forces Legal Services Project, and Foreclosure Prevention Project during June and July 2017.

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

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ABLE Accounts

continued from page 9

counsel clients, it is incumbent on practitioners to be attuned to the intricacies and interaction of regulations promulgated by the Social Security Administration (especially the POMS on special needs trust distributions), Department of Treasury and the Internal Revenue Service. Additional regulations on ABLE accounts are expected from the Centers for Medicare and Medicaid Services, the Department of Education and each state that implements an ABLE program, including the RI Department of Human Services. Failure to understand the rules can have serious consequences for individuals receiving means-tested benefits. Thus, while ABLE accounts provide new opportunities for special needs planners and attorneys advising trustees of special needs trusts, it is imperative to understand the intersection of special needs trust law, means-tested benefits and ABLE accounts.

ABLE accounts are generally more cost-effective than special needs trusts, but cost should not be the only consideration.[28] It is crucial to know the amount of money involved, understand the nature of the person's disability, his or her financial capabilities, whether the person has family or friends willing to assist managing the account and whether the person is susceptible to financial exploitation by others or likely to exercise poor judgment. Only with this information can an attorney advise clients whether the benefits of an ABLE account outweigh the potential risks.

ABLE accounts have the potential to forge a sense of independence and financial security for disabled individuals previously limited to maintaining their assets below the threshold for their means-tested benefits. ABLE accounts are a welcome addition to a practitioner's tool belt. In some instances an ABLE account may serve as an alternative to a special needs trust; in others the account may be used in conjunction with a special needs trust. Ultimately, as with every client matter, each situation is unique and all planning options should be considered.

ENDNOTES

1 *26 U.S.C. § 529A.*

2 *Social Security Administration, Program Operations Manual System ("POMS") SI 01130.740 Achieving a Better Life Experience (ABLE) Accounts (Oct. 19, 2016); Food and Nutrition*

Service, U.S. Dept. of Agriculture, Treatment of ABLE accounts in Determining SNAP Eligibility (Apr. 4, 2016), available at https://fns-prod.azureedge.net/sites/default/files/snap/Treatment-of-ABLE-Accounts-In-Determining-SNAP-Eligibility.pdf.

3 *Social Security Administration, Program Operations Manual System ("POMS") SI 01130.740 Achieving a Better Life Experience (ABLE) Accounts (Oct. 19, 2016).*

4 *ABLE National Resource Center, State Review, available at http://www.ablenrc.org/state-review. The twenty-one states that have implemented ABLE programs are: Alabama, Alaska. Florida, Illinois, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, and Virginia.*

5 ***Id.***

6 ***See*** *ABLE United Home Page, available at http://www.ableunited.com/overview/; STABLE Kentucky Home Page, available at https://www.stablekentucky.com/.*

7 *POMS,* ***supra*** *note III.*

8 *ABLE Age Adjustment Act, S. 817/HR 1874, 114th Cong. (2017).*

9 *POMS,* ***supra*** *note III, at B.1.; Internal Revenue Serv. Notice 2015-81, Section 529A Interim Guidance Regarding Certain Provisions of Proposed Regulations Relating to Qualified ABLE Programs (Nov. 20, 2015), available at https://www.irs.gov/pub/irs-drop/n-15-81.pdf.*

10 *Internal Revenue Service Publication 524, Credit for the Elderly or Disabled (October 24, 2016), available at https://www.irs.gov/pub/irs-pdf/p524.pdf.*

11 *POMS,* ***supra*** *note III, at A.*

12 ***Id.***

13 ***Id.*** *at B.2.*

14 ***Id.*** *at C.*

15 *26 U.S.C. § 529A(e)(5).*

16 ***Id.***

17 ***Id.***

18 *POMS,* ***supra*** *note III, at D.3.a.*

19 *Internal Revenue Serv. Notice 2015-81,* ***supra*** *note IX.*

20 *POMS,* ***supra*** *note III, at C. and D.*

21 *Id. at A.*

22 *R.I. Gen. Laws § 42-7.2.20.1 et seq. (2017).*

23 *RI's ABLE Home Page, available at https://savewithable.com/ri/home.html.*

24 *The RI ABLE Advisory Group was created by the Office of the General Treasurer and consists of state administrators as well as professionals including the authors of this article, disability advocates, non-profit administrators and legal counsel from RI DHS and RI BHDDH.*

25 *Investment fees range from .034% to 0.38%.*

26 *RI's ABLE,* ***supra*** *note XXIII.*

27 *POMS,* ***supra*** *note III, at SI 01120.200 E.1.b.*

28 *ABLE accounts are an additional planning tool, but not necessarily a replacement for more traditional special needs planning strategies such as first party, third party or pooled trusts. The Medicaid payback requirement and limit on annual contributions to ABLE accounts still makes third party special needs trusts the optimal planning tool when parents or other benefactors wish to devise a portion of their estate to a child with disabilities in lieu of an outright distribution.* ❖

No (More) Liability

continued from page 15

even if individual employees are not personally liable. As other courts have recognized, imposing personal liability against individual employees adds little to an alleged victim's legitimate prospects for a monetary or other form of recovery.[36] Rarely will it be the case that an individual employee will have more resources than his or her employer, or be the lynchpin in securing a recovery. Instead, it "adds mostly an in terrorem quality to the litigation, threatening individual supervisory employees with the spectre of financial ruin for themselves and their families and correspondingly enhancing the plaintiff's possibility of extracting a settlement on a basis other than the merits."[37]

Whether it meant to do so or otherwise, the Supreme Court's interpretation of § 28-5-7(6) is a conclusion that the General Assembly "struck a balance between deterrence and societal cost."[38] Further, without so stating, the Court reinforced the idea that FEPA's purposes are remedial in nature rather than punitive. By holding employers liable for the discriminatory conduct of their employees, FEPA's broad remedial purposes are realized, but without subjecting individuals to undue risk for the unavoidable discretionary decisions they make in the workplace.

Practice Points

Because the law was unsettled before **Mancini**, it is likely a number of employment discrimination cases are either pending or on appeal in which individual employees have been named or held liable. In pending cases, defense practitioners should seek dismissal of individually-named defendants (or seek agreement with opposing counsel in light of **Mancini**).

In a case that is on appeal or that has already been resolved, practitioners should review their options for revisiting the issue of an individual's liability and whether there are valid grounds for reversing or vacating that determination. For a case that is already on appeal, there may be issues of waiver if the issue had not been raised below. Nonetheless, Rule 60 of the Superior Court Rules of Civil Procedure allows relief from an order or judgment for "any…reason justifying relief from the operation of the judgment."[39] The

Rule also contemplates the possibility of an independent action to relieve a party from an order or judgment. It would seem that a clear pronouncement from the Supreme Court that there are no valid legal grounds for individual employee liability under FEPA would be as good a reason as any.

ENDNOTES

1 ***Mancini v. City of Providence***, *155 A.3d 1598, 2017 WL 924178, SU-2014-88 (13-92S) (R.I. Mar. 8, 2017); R.I. GEN. LAWS § 28-5-1 et seq.*

2 ***See*** *42 U.S.C. § 2000e et seq.*

3 ***See*** *R.I. GEN. LAWS § 28-5-13(6).*

4 ***See Iacampo v. Hasbro, Inc.***, *929 F. Supp. 562 (D.R.I. 1996) and* ***Wyss v. Gen. Dynamics Corp.***, *24 F. Supp. 2d 202 (D.R.I. 1998).*

5 ***See Powell v. Yellow Book USA, Inc.***, *445 F.3d 1074, 1079 (8th Cir. 2006);* ***Smith v. Amedisys, Inc.***, *298 F.3d 434, 448-49 (5th Cir. 2002);* ***Lissau v. Southern Food Service, Inc.***, *159 F.3d 177, 180 (4th Cir. 1998);* ***Wathen v. Gen. Elec. Co.***, *115 F.3d 400, 405 (6th Cir. 1997);* ***Sheridan v. E.I. DuPont De Nemours and Co.***, *100 F.3d 1061, 1077-78 (3d Cir. 1996);* ***Haynes v. Williams***, *88 F.3d 898, 901 (10th Cir. 1996);* ***Williams v. Banning***, *72 F.3d 552, 555 (7th Cir. 1995);* ***Tomka v. Seiler Corp.***, *66 F.3d 1295, 1315 (2d Cir. 1995);* ***Gary v. Long***, *59 F.3d 1391, 1399 (D.C. Cir. 1995);* ***Miller v. Maxwell's Intern. Inc.***, *991 F.2d 583, 587 (9th Cir. 1993), cert. denied, 510 U.S. 1109 (1994);* ***Busby v. City of Orlando***, *931 F.2d 764, 772 (11th Cir. 1991).*

6 ***Fantini v. Salem State Coll.***, *557 F.3d 22, 31 (1st Cir. 2009).*

7 ***See Johnston v. Urban League of Rhode Island, Inc.***, *No. CIV.A. 09-167 S, 2009 WL 3834129, at *2 (D.R.I. Nov. 13, 2009) (discussing* ***Iacampo***, *929 F. Supp. at 571-73, and* ***Eastridge v. Rhode Island Coll.***, *996 F.Supp. 161, 169 (D.R.I. 1998));* ***see also Evans v. R.I. Dep't of Bus. Regulation***, *No. CIV. A. 01–1122, 2004 WL 2075132, at *3 (R.I. Super. Aug. 21, 2004).*

8 ***See Johnston***, *2009 WL 3834129, at *3.*

9 ***See id.*** *at *2-3.*

10 ***See id.*** *at *3 (quoting* ***Wyss***, *24 F. Supp. 2d at 210) (internal bracket omitted).*

11 ***See Bringhurst v. Cardi's Dept. Store, Inc.***, *No. CIV. A. KC-2010-1025, 2011 WL 9379273 (R.I. Super. Dec. 30, 2011);* ***Deninno v. City of Providence***, *No. CIV. A. PC-04-3026 (R.I. Super. Aug. 31, 2010);* ***Fabrizio v. City of Providence***, *No. CIV. A. PC-04-3025 (R.I. Super. Aug. 31, 2010).*

12 ***See, e.g., Luisa S. Oliveira v. Furniture Mattress Warehouse, Inc.***, *et al, RICHR No. 05 ESH 200, EEOC No. 16JA500124 (Decision and Order Dec. 28, 2011).*

13 ***See Mancini v. City of Providence***, *2013 WL 5423717, *2-3, No. CIV. A. 13-92S (D.R.I. Sept. 26, 2013).*

14 ***See Mancini***, *155 A.3d at 162.*

15 ***See id.***

16 ***See id.*** *at 163.*

17 ***See id.*** *at 164.*

18 ***See id.***

19 ***See id.*** *(quoting* ***Rassmussen v. Two Harbors Fish Co.***, *832 N.W.2d 790, 801 (Minn. 2013)).*

20 ***See id.***

21 ***See id.*** *at 164-65.*

22 ***See id.*** *at 165 (quoting* ***Mills v. Hankla***, *297 P.3d 158, 172 (Alaska 2013) and* ***Reno v. Baird***, *957 P.2d 1333, 1342 (Cal. 1998)).*

23 ***See, e.g., Nat'l Refrigeration, Inc. v. Capital Properties, Inc.***, *88 A.3d 1150, 1156 (R.I. 2014);* ***Peloquin v. Haven Health Ctr. of Greenville, LLC***, *61 A.3d 419, 425 (R.I. 2013);* ***Ryan v. City of Providence***, *11 A.3d 68, 71 (R.I. 2011).*

24 ***See Mancini***, *155 A.3d at 165; R.I. GEN. LAWS § 28-5-6(8)(i) (defining employer as "any person in this state employing four (4) or more individuals").*

25 ***See Mancini***, *155 A.3d at 165.*

26 ***Grant v. Lone Star***, *21 F.3d 649, 652 (5th Cir. 1994).* ***See also Fantini***, *557 F.3d at 29;* ***Lissau***, *159 F.3d at 180;* ***Tomka***, *66 F.3d at 1315;* ***Birkbeck v. Marvel Lighting Corp.***, *30 F.3d 507, 510 (4th Cir. 1994);* ***U.S. E.E.O.C. v. AIC Security Investigations, Ltd.***, *55 F.3d 1276, 1281 (7th Cir. 1995).*

27 ***See*** *R.I. GEN. LAWS § 28-5-24.*

28 ***See Mancini***, *155 A.3d at 165.*

29 ***See id.*** *at 165-67.*

30 ***See Reno v. Baird***, *957 P.2d 1333, 18 Cal. 4th 640, 652-53 (1998) (discussing at length the negative policy implications of individual employee liability).*

31 ***See id.*** *at 662.*

32 ***See Mancini***, *2013 WL 5423717, *1-2.*

33 ***See*** *R.I. GEN. LAWS § 28-5-3.*

34 ***See AIC Security Investigations, Ltd.***, *55 F.3d at 1282;* ***Lenhardt v. Basic Inst. of Tech., Inc.***, *55 F.3d 377, 381 (8th Cir. 1995);* ***Birkbeck.***, *30 F.3d at 510;* ***Miller***, *991 F.2d at 588.*

35 ***See AIC Security Investigations, Ltd.***, *55 F.3d at 1282.*

36 ***See Reno***, *18 Cal. 4th at 653.*

37 ***Id.***

38 ***AIC Sec. Investigations, Ltd.***, *55 F.3d at 1282.*

39 *SUP. CT. R. CIV. P. 60(b).* ❖

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In Memoriam

Eugene J. McCaffrey, Jr., Esq.
Eugene J. McCaffrey, Jr., 84, passed away Friday, June 23, 2017. He was the beloved husband of Ann (Davis) McCaffrey and son of Eugene J. and Catherine (Atkinson) McCaffrey. Born in Providence, he grew up in Oakland Beach. Gene was a graduate of LaSalle Academy, Providence College, and Suffolk University Law School. Upon graduation from PC, he served our country as a member of the U.S. Marine Corps, attaining the rank of Major. He enrolled in Suffolk University Law School, going to school nights, while working as Executive Secretary to Mayor Horace E. Hobbs. After graduation, he opened one of the first full time law practices in Warwick, practicing for over 50 years. He was elected to the RI House of Representatives and RI Senate. In 1972, he was elected Mayor of Warwick, serving two terms. Gene was involved in many civic organizations: Warwick Council Knights of Columbus, charter member of the Gaspee Day Committee, Warwick Rotary-Paul Harris Fellow, and Tri-City Elks Lodge. He was a communicant and Trustee of St. Benedict Church and a member of the Rhode Island and U.S. Supreme Court Bars. He is survived by his children: Honorable Mary E. McCaffrey, Senate Majority Leader Michael J. McCaffrey and wife, Deirdre, John T. McCaffrey and wife, Margaret, Eugene J. McCaffrey III, and William D. McCaffrey and wife, Heather. He was Gramps to his adoring grandchildren Michael, Cailin, Brenna, Catherine, Deirdre, Brendan, Matthew, and Luke. He was the brother of William M. McCaffrey, Robert F. McCaffrey, Irene A. Livsey, and the late Jacqueline F. McCaffrey.

Gregory G. Nazarian, Esq.
Gregory G. Nazarian, 49, of Norton, MA, passed away on Thursday, June 15, 2017. Greg was the beloved son of Patricia (Nessralla) and the late Honorable Judge George Nazarian. He was born in Pawtucket and attended Mercymount Country Day School and Bishop Feehan High School where he was a highly recruited, standout, defensive lineman on

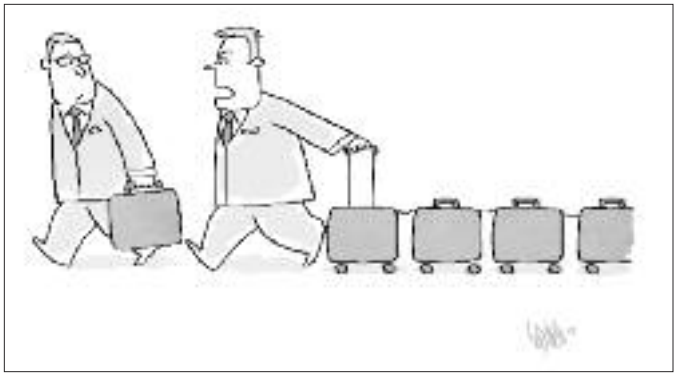
the football gridiron. He was subsequently named to the Bishop Feehan High School Football Hall of Fame and the Attleboro Area Athletic Hall of Fame. He received a four-year athletic scholarship to Boston University where he graduated in 1989 with a degree in Business Administration presented by former President George H. W. Bush. Greg followed his father's footsteps into the practice of law after graduating from New England School of Law in 1992 with a Juris Doctorate degree with distinction. He entered the Plymouth County District Attorney's office as an Assistant District Attorney where his legal acumen helped to prosecute hundreds of cases on behalf of the Commonwealth of Massachusetts. He entered into the private practice of law in both Rhode Island and Massachusetts in 2003. Greg is survived by his mother, Patricia Nazarian of Pawtucket; a brother, Dr. David Nazarian and his wife, Jody of Philadelphia, PA; two nephews, George, John and a niece, Grace.

Steven N. Ortoleva, Esq.

Steven N. Ortoleva passed away on Wednesday June 28th. He was the son of the late Nicholas and Lorraine (Dickens) Ortoleva. Steve was a member of the Rhode Island Bar and a practicing family law attorney for more than thirty years, and was a partner in the law firm of Ortoleva & Crudele for the past 25 years. He was a graduate of Providence College, the New England School of Law, and earned an MBA in accounting from Bryant University. Steve was a golf pro and an avid fisherman, often flying around the world to find secret spots where the fish were biting. He was an accomplished guitarist and pianist, and could often be found in his home music studio where he would record original rock and jazz pieces. He leaves his loving wife, Colleen Crudele, and his wonderful daughter, Alesandra (a/k/a The Col Dog and The Al Dog). Steve also leaves behind brothers, Jeffrey, William, and Matthew; 15 nieces and nephews; a great niece; and loving cousins.

Caption This! Contest

We will post a cartoon in each issue of the *Rhode Island Bar Journal*, and you, the reader, can create the punchline.



How It Works: Readers are asked to consider what's happening in the cartoon and submit clever, original captions. Editorial Board staff will review entries, and will post their top choices in the following issue of the *Journal*, along with a new cartoon to be captioned.

How to Enter: Submit the caption you think best fits the scene depicted in the cartoon above by sending an email to kbridge@ribar.com with "Caption Contest for September/October" in the subject line.

Deadline for entry: Contest entries must be submitted by October 1st, 2017.

By submitting a caption for consideration in the contest, the author grants the Rhode Island Bar Association the non-exclusive and perpetual right to license the caption to others and to publish the caption in its Journal, whether print or digital.

Winning caption for May/June issue cartoon

Finally I met the accountant in the Cloud.

TIMOTHY A. GAGNON, ESQ.

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The next time you are visiting the Rhode Island Law Center for a Continuing Legal Education program or committee meeting, be sure to ask how easy it is to update your online attorney directory photograph. All you need to do is step into the lawyers' lounge, located at the Law Center, and a staff member will snap your photo, upload it to the directory, and, if you'd like, email you a copy for your own personal use. The directory is available for the convenience of Bar members, clients, and potential clients, so be sure to keep your listing up to date! Attorney Directory contact information may include the Bar member's name, photograph, law office name, postal address, email address, telephone number, and facsimile number. If you would rather send us your own photo, you may do so by emailing it to Erin Bracken at ebracken@ribar.com. Photographs must be provided in a jpg format of at least 300 dpi.

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Practicing gratitude and mindfulness is a conscious process that trains the mind to see the good in any situation

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Frequent technology use puts a strain on cognitive functions. Research indicates exposure to natural settings improves our ability to focus and boosts productivity

Shared Activities

Many parents with demanding work schedules help instill a work ethic in their children by creatively allowing them to be close observers or even participate in a small way

Move More

Adults need at least 150 minutes of moderate physical activity per week. Consider asking a colleague or co-worker to join you for a brisk walk on your lunch hour

Communicate Better

Listening is more beneficial than talking; know what you want to say before you start talking

Ask for Help

Asking for help is a sign of strength, not weakness; it's easier to deny you have a problem than it is to make an effort to fix it

Schedule Sleep

Make 7-9 hours of sleep each night a priority for a more energy-filled and focused lifestyle

Give Back

Spending time volunteering or doing something for someone else can make a huge difference for your mental health

Eat Well

Snack on fresh food, and cut back on salt, sugar and fat; always start the day with a healthy breakfast

Stress Management Planning

Monitor what is causing you stress for a week by keeping a diary; try new techniques to manage stress such as meditation, physical exercise, yoga, creative writing, or a massage

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E-10932-0914