Rhode Island Bar Journal

Rhode Island Bar Association Volume 58. Number 2. **September/October 2009**

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RHODE ISLAND BAR ASSOCIATION LAWYER'S PLEDGE

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

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Just a Taste

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

We who have been given so much, who have the ability to announce greater justice to all we meet, must be open to gifted opportunities.

As I pen this message, we are in the midst of my favorite time of year, ice cream season. Having been born and bred in Rhode Island, my favorite ice cream flavor is coffee. Period. Not coffee mocha, not coffee mocha fudge, not coffee cinnamon, just plain coffee.

Recently, on a Sunday, while on the Cape, I went to my favorite ice cream shop there, Ben & Bill's Chocolate Emporium. Limited to four stores in Maine and Massachusetts, Ben & Bill's store is fitted with an air of nostalgia. It has worn, but highly polished, wood floors. Its narrow interior is lined with shelves containing homemade chocolates and brightly colored penny candy on one side and a store-length ice cream counter on the other. Ice cream flavors include "Lobster" and "Graham Slam." I usually peruse the newest flavors, but always select coffee, straight up, hold the frills.

On that Sunday afternoon, my sister ordered her usual skinny frappe, and I ordered coffee ice cream, neat. While we were waiting for our orders, a woman behind us ordered "just a taste." The freckled-faced kid behind the counter didn't bother to ask her what flavor. He simply took a tiny plastic spoon, dipped it randomly into a tub of ice cream and handed it her. The woman took her sample spoon and slowly savored the taste as she walked across the floor to peruse the candy counter. I was still waiting for my order. The freckled-faced kid must have seen my perplexed expression and volunteered, "She comes here every day for just a taste. We think she's homeless." My attention focused on this solo figure, tanned from months in the sun, dressed in worn and torn clothing, carrying her belongings in a blanket held together with a tiny cord. This person was my neighbor in my summer community. I wanted to do something for her, but felt helpless and useless. I wanted her to have more than just a taste. I asked the kid if he knew her name. He said she uses a different name every day. I decided to call her "Eunice," as in Eunice Kennedy Shriver, champion of the underdog. I was, after all, at the Cape, Kennedy Country.

Let me digress for a moment. According to the Bible, Eunice was the mother of Timothy to whom St. Paul wrote the beautiful letter that became the motto of the Special Olympics founded by Eunice Kennedy Shriver. It is one of my favorite biblical passages: "I have fought the good fight. I have completed the race. I have kept the faith."[1] My dog is named Timmy, after St. Timothy. My adorable dog, my faithful companion, helps me to keep the faith by bringing out the human in me.

I became intrigued with this stranger. I felt an obligation, maybe out of a sense of guilt, to be kind to her. When my box of coffee ice cream came, I turned around to give it to her, but she was gone. I ran outside to find her, and, as if she were waiting for me, she was sitting in a chair at one of the outside tables. I approached her not knowing what to expect and handed my box of ice cream to her and said, "Eunice, you forgot this." At first she seemed surprised and then she looked at me and asked, "What's ya name?," and I told her. Then she took the ice cream and said, "Thanks, Vicky." I believe that I was guided or perhaps inspired that afternoon by something beyond my control. A stranger and I shared, for a brief moment, on a hot summer day, our common humanity in the simple gift of an old childhood treat. I was an instrument for good to someone in need of love and kindness.

As we go about out every day lives, as lawyers, and as neighbors in communities, let us be mindful of opportunities to be graced and blessed in service to a stranger. It is good to greet someone. We can all agree on that. However, it is better to greet someone by name. We who have been given so much, who have the ability to announce greater justice to all we meet must be open to those gifted opportunities when we can insure a stranger gets more than just a taste of ice cream, more than "just a taste" of a job that brings dignity, more than "just a taste" of a place to call home, more than "just a taste" of justice.

When you meet Eunice, and you will, remember to offer her more than just a taste. Please give her a quart or more of what she lacks or of that for which she yearns. Listen to her need in the phrase, "just a taste," pay attention, and, as any good lawyer would do, ask the questions worth asking and then respond with abundance and greet her by name. ❖

P.S. Since writing this column, Eunice Kennedy Shriver passed away on Cape Cod. I believe that the love and service she gave to those in need is now being returned to her in full measure.

1 *2Timothy 4:7.*

The 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. The Foundation invites you to join in meeting the challenges ahead by contributing to the Foundation's Tribute Program. The Foundation's Tribute Program honors the memory, accomplishments, or special occasion of an attorney, a friend, a loved one, his or her spouse, or another family member. Those wishing to honor a colleague, friend, or family member may do so by filling out the form and mailing it, with their contribution, to the Rhode Island Bar Foundation, 115 Cedar Street, Providence, RI 02903. You may also request a form by contacting the Rhode Island Bar Foundation at 401-421-6541. All gifts will be acknowledged to the family.

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RHODE ISLAND BAR JOURNAL

Editorial Statement

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

Article Selection Criteria

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

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

Please Join 700 Rhode Island Bar Members Celebrating Pro Bono

Christine J. Engustian, Esq.
Legal Services Committee Chair.
Authored as a collaborative effort by the members of Rhode Island Bar Association Legal Services Committee

Many members of our Bar dedicate thousands of hours each year providing free legal services to our fellow citizens who, due to their circumstances and, more importantly, without regard to the cause of these circumstances, have no voice in obtaining a just result when seeking redress for wrongs.

October 25th through the 31st, 2009 is the American Bar Association's (ABA) National Pro Bono Celebration Week. Attorneys from around the country are being showcased for the important pro bono services they provide to improve the quality of life for the poor. Hopefully, this week of celebration will inspire more lawyers to join in the pro bono effort to meet the growing need for services, particularly during these difficult economic times.

The Rhode Island Bar Association, through its commitment to pro bono services, joins this celebration. As attorneys, we are charged with the critical civic role of facilitating the administration of justice, which is essential to the smooth functioning of our free society. Among the responsibilities we, as a self-regulated profession, are asked to shoulder is to minimize the deficiencies in the administration of justice by doing what we reasonably can to ensure that the poor have access to our justice system. Facilitating programs include: the Bar Association's Volunteer Lawyer Program (VLP), facilitating pro bono referrals for a wide range of civil areas; the Bar's Legal Information & Referral Service for the Elderly, facilitating pro bono referrals and statewide clinics for senior citizens 60 years of age or older; the Lawyer Referral Service (LRS), whose members provide free half-hour consultations in almost every area of the law and reduced fee services for financially eligible citizens; and the Pro Bono Collaborative operated in conjunction with Roger Williams University School of Law, facilitating pro bono advocacy within community-based organizations.

Let us spend a moment and reflect upon how committing our professional resources to this noble cause can be selfless and profitable. Many members of our Bar dedicate thousands of hours each year providing free legal services to our fellow citizens who, because of their circumstances and, more importantly, without regard to the cause of these circumstances, have no voice in obtaining a just result when seeking redress for wrongs. Each of our volunteer lawyers recognize that none of our citizens who qualify for our pro bono services volunteer to take on the problems caused by a rogue landlord, an abusive spouse or insurmountable debt because of illness or loss of job. Keeping in mind that there is only one volunteer in this equation, we need many, many more members to share the load and do so much more to uphold our commitment to promote the public good.

Participating in the Volunteer Lawyer Program has many rewards beyond helping a person whose problems are no different than the ones you solve for the bank vice president who is being denied visitation by a former spouse, or for the school teacher who purchases a new car that refuses to start on cloudy days. Lawyers new to the Bar seeking experience, or lawyers not new to the Bar but wishing to expand their fields of practice, are provided with mentors who guide them through the law procedure specific to the volunteer case. In these economic times, it is no secret that certain areas of practice are slow and income generated from these practices is even slower. Now, more than ever, your time and energies are needed to help others and to gain knowledge and experience in areas of law not devastated by the economy and currently generating income for lawyers.

Lawyers providing pro bono services find the experience enjoyable, meaningful and rewarding. Being grateful for opportunities given to them and successes they have achieved, these attorneys often express their desire to uplift and assist those less fortunate. Attorney Kevin Dwyer, whose law office is in Newport, Rhode Island, has devoted a significant portion of his thirty year career to representing pro bono clients through Rhode Island Bar Association programs. Attorney Dwyer believes that a true lawyer will seek to "do something satisfying, which is to help people." He emphatically states that "if you really want to help someone, one of the things you do is join the VLP." In addition to the personal satisfaction in helping the needy, the benefits of joining the VLP as a young lawyer includes, according to Attorney Dwyer, gaining knowledge of how the court system works and how to interview clients and getting into court and handling cases from start to finish. Attorney Dwyer reminds us of the positive impact VLP attorneys make on society by advocating for

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Mark A. Sjoberg

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

fair treatment.

The Rhode Island Bar Association's goal for each attorney is 50 hours of pro bono services per year. Upon the Legal Services Committee's recommendation, this past Spring, our Bar president, Victoria M. Almeida, announced the Executive Committee's adoption of a new policy, effective with the 2009 calendar year, whereby any member of the Volunteer Lawyer Program and the Pro Bono Program for the Elderly, contributing and reporting at least 30 hours of pro bono services in a calendar year, will receive free attendance at a one, three-hour credit Continuing Legal Education (CLE) seminar or free attendance at three, one-hour CLE Food for Thought seminars. This is a substantial savings in the cost of meeting your mandatory CLE requirement. What better way to help others and, at the same time, help yourself? Please, come join the celebration!

Editor's Note: *For information on how you can assist those in need and fulfill your pro bono responsibilities, please contact Rhode Island Bar Association Public Services Director Susan A. Fontaine by telephone: 401-421-7722 x 101 or email: sfontaine@ribar.com.* ❖

Rhode Island Bar Association Initiative for 2009-2010: *Greater Justice for All*

The weakening economy and the associated loss of Interest on Lawyers Trust Account (IOLTA) revenue has increased unmet legal needs, and Rhode Island Bar Association President Victoria M. Almeida's *Greater Justice for All* initiative makes meeting these needs a priority in the coming year. In addition to the excellent recent and ongoing public service work performed by generous Bar members, new efforts include:

Public Service/CLE Coupon Incentive Program – Offering no-charge CLE credit for Rhode Island Volunteer Lawyer Program (VLP) attorneys providing services to the economically disadvantaged.

Recent Donation of Petition Preparation Software – Through the outstanding efforts of Susan Thurston, Clerk of the Bankruptcy Court in Rhode Island and Art Engelbrecht, VP, Product Support, EZ-Filing, Inc., members of the Rhode Island Bar Association Volunteer Lawyer Program are free to use the software for handling pro bono cases.

United States Armed Forces Legal Services Project – A new and exciting initiative assisting military staff legal service providers with volunteer Bar attorneys serving as mentors or counsel for direct representation in a full range of civil matters for military personnel and their families. Referrals to the Bar Association's public service programs are coordinated with the military Attorney-Advisor. Volunteer Bar member support for our men and women in the armed forces is welcomed and encouraged. Areas of need include, but are not limited to: family law, probate issues, landlord tenant, real estate, contracts, consumer, bankruptcy, collections, employment (USERRA), immigration/naturalization, torts and income tax.

Housing Program – Reviewing current housing issues and outreach and expanding information services available through VLP, the Bar's Lawyer Referral Service, Rhode Island Legal Services and other legal public service providers accordingly

Elderly Program – Collaboration with Rhode Island Legal Services on a federal grant to provide hotline, CLE trainings/recruitment and clinics for Rhode Island Senior Citizens. Given our combined history of a successful working relationships and partnership, we believe our two organizations have all the qualifications to successfully institute Model Approaches to Statewide Legal Assistance Systems for senior citizens in our state.

American Bar Association (ABA) National Pro Bono Celebration – This week-long celebration, October 25th-31st, kicks off the Bar's Durable Power of Attorney clinics and *Rhode Island Bar Association Celebrates Public Service, A Public Service Profile* which will be distributed in relation to the National Celebration.

Guardianship Project – The VLP accepts guardianship cases for frail senior citizens in collaboration with Cornerstone Adult Services. VLP attorneys are also encouraged to participate with the Roger Williams University School of Law Pro Bono Collaborative on a Guardianship Project to provide representation to parents of severely and profoundly disabled children, about to turn 18, who are considering guardianship and/or related options.

Child Support Training – Organized through the Rhode Island Bar Associations Continuing Legal Education and Public Services departments, these will provide necessary attorney training concerning child support-related legal matters.

For information on these efforts, please contact Rhode Island Bar Association Public Services Director Susan A. Fontaine by telephone: 401-421-7722 x 101 or email: sfontaine@ribar.com.

Preparing Your Business for Federal Immigration Audits

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Managing partner at
Gonzalez Law Offices Inc.
in East Providence

On July 1, 2009, the United States Immigration and Customs Enforcement (ICE) announced that it is now investigating workplaces in every state, as it begins random and targeted audits of Form I-9 compliance.

On July 1, 2009, the United States Immigration and Customs Enforcement (ICE) announced that it is now investigating workplaces in every state, as it begins random and targeted audits of Form I-9 compliance. In an email, ICE told members of Congress it is beginning audits of the I-9 Forms that must be completed for every new employee, regardless of whether or not the employee is a U.S. citizen. Under federal law, if an employer fails to verify the identity and employment authorization of a new employee, by completing the I-9 Form, the employer has violated federal immigration law.

The role of employers as involuntary partners in the enforcement of federal immigration laws originated with the enactment of the Immigration Reform and Control Act (IRCA) in 1986. Among other things, IRCA prohibits employers from "knowingly" employing "unauthorized" aliens. To accomplish this, employers are required to verify the identity and employment authorization of every new hire, by referencing a limited list of verification documents and completion of the I-9 Form. However, until now very few resources had been committed to assuring that employers are, in fact, complying with the I-9 requirements.

The Bush administration was criticized for raiding businesses and arresting workers, but not doing enough to go after the employers who hire them. In a major policy shift from the previous administration, President Barack Obama notes his administration's strategy for stemming illegal immigration is focusing on employers who hire undocumented workers.

ICE will now conduct random and targeted audits ensuring employers are actually completing the I-9 Forms and that they are not skirting their responsibilities by doing a purposely poor job in completing these forms and collecting the required documentation. Just as the IRS conducts random and targeted tax audits, these Form I-9 compliance audits, at least in theory, will serve as a check on the overall compliance regime.

The problem for employers is that Form I-9 is one of the most complicated one-page forms ever created by the government. In fact, this one-page form has a 65-page manual that attempts to explain how to properly complete it. Technical violations can result in fines, and egregious violations can lead to criminal liability.

Given that ICE is currently emphasizing criminal worksite enforcement and the potential for criminal liability, disruption of business operations, and loss of government contracts, maintaining I-9 program compliance with ICE standards and establishing a plan for periodic I-9 audits are the best defenses to charges of knowingly employing or harboring undocumented workers. Every employer should be prepared for a random audit, especially high risk industries, including construction, manufacturing, restaurant-food services, hotels, temporary employment agencies, and landscape maintenance. Some employers are more likely to be subjected to targeted audits. For example, employers who have received "no match" letters from the Social Security Administration (SSA) advising them of potential problems with an employee's social security number may be on the ICE radar. Similarly, those employers previously investigated for wage and hour violations or had employees deported by ICE are candidates for a targeted audit.

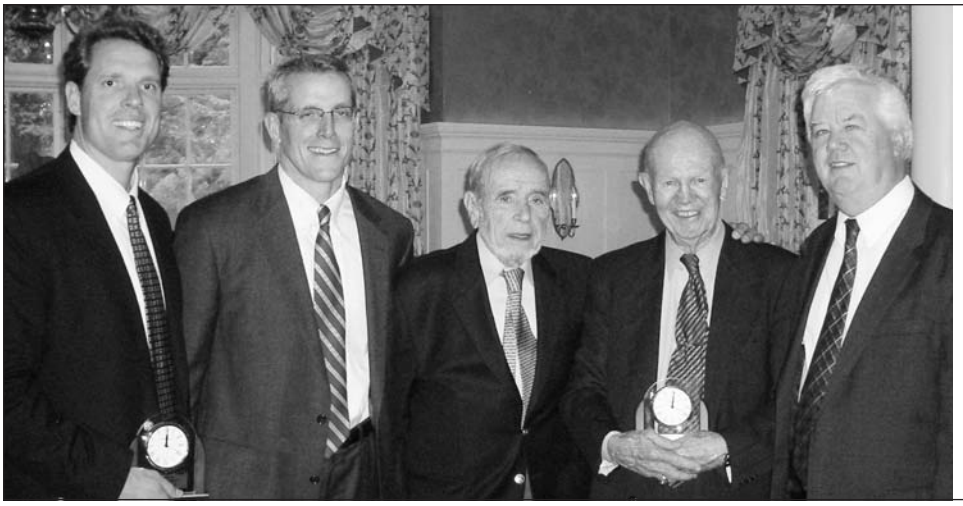
Some simple procedures to prepare and be ready for an audit include, at a minimum, ensuring: 1) section 1 of an I-9 is completed by or for every employee at time of hire; 2) verification documents are provided within three business days after date of hire; 3) forms evidencing current work authorization (i.e., Employment Authorization Documents, work visa approvals) are accepted and added to a reminder or tickler re-verification system; 4) the employer completes section 2 of I-9 within three business days after date of hire; 5) employees are not only required to produce certain documents, or more documents than law requires; 6) I-9 forms are retained for requisite term (later than three years from the date of hire or one year following termination of employment); 7) I-9s are segregated from the regular personnel file; and 8) immediate completion of any missing I-9 form or with the current date (backdating can trigger criminal liability).

I-9 Forms may be retained in paper, micro-

film, microfiche, or electronic format. To maintain records electronically, businesses must meet specific standards, most of which closely track Internal Revenue Service (IRS) standards and requirements.

Every business should have standards and procedures reasonably capable of reducing the risk of criminal violations and civil fine liability. Every business should assign I-9 employment eligibility verification to a high-level company official. And, every business should enact I-9 employment eligibility verification procedures, training and implementation programs for key management and human resources personnel.

The best policy is to have an internal audit procedure in place. An internal audit is one that the employer arranges with legal counsel to review paperwork, staff training and internal policies in advance of any government enforcement action. An internal audit establishes internal compliance, trains key employees to prepare, document and retain regulatory paperwork, and establishes clear response plans in the event of an ICE audit or enforcement action. Similarly, engaging immigration counsel to conduct an internal audit can help to uncover potential liabilities and minimize or eliminate exposure to civil and criminal charges. Conducting an internal audit is prudent before applying for state and federal contracts. ❖



Defense Counsel of Rhode Island (DCRI) honored three attorneys and elected officers and directors at the group's Annual Meeting. John F. Dolan, Joseph A. Kelly and Raymond A. LaFazia were honored for their long and outstanding service and dedication to the defense bar. In the photograph, left to right: Michael R. Dolan, Mark P. Dolan, Raymond A. LaFazia, Joseph A. Kelly and DCRI President Robert J. Quigley, Jr.

Your Source for Excellent Benefits

Your Rhode Island Bar Association membership entitles you to a range of great benefits including, but not limited to, free products, discounts on services, opportunities to build your practice and assist those in need, the means to improve your personal life, and references to Bar-reviewed and approved product and service providers.

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Rhode Island Bar Journal – your free magazine featuring a wide range of articles of legal, political and social interest written by Bar members for Bar members.

Lawyer Referral Service – your means to build your law practice and make it easier for clients to find the appropriate legal help they need.

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Bar Association Committees – your interactive forums for deepening and broadening your knowledge and appreciation for areas of practice in the company of like-minded colleagues.

Volunteer Lawyer Program – your pathway to helping the less fortunate receive legal assistance while fulfilling your pro bono responsibilities.

Lawyers Helping Lawyers – your highly-confidential counseling service of empathetic volunteer attorneys supported and enhanced by the professionals of Resource International Employee Assistance Services.

Benefits Unlimited – USI New England – your source for friendly assistance when deciding which Blue Cross/Delta Dental Program is right for you and your family.

Insurance Programs – you have a wide variety of insurance companies, screened and approved by the Rhode Island Bar Association, offering liability, personal lines, disability and more all eager to help you find the right coverage for your professional and personal life.

Whether you want to access your free online legal research library Casemaker, have a potential client locate you through the Bar Association's online Attorney Directory, or take advantage of any of the other great Bar membership benefits, telephone the Bar at **401-421-5740** or go to the Bar's website at **www.ribar.com**. And, while you are at it, please ensure the Rhode Island Bar Association has your correct contact* information.

** Unless directed otherwise, only members' business contact information is posted in the Rhode Island Bar Association's online web-based Attorney Directory. Home address information is kept confidential.*

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Rhode Island Bar Association 1898

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Problem Gambling: Legal and Medical Issues

Hon. Janette A. Bertness
Associate Judge,
Rhode Island Workers' Compensation Court

Recent studies conclude that there is a direct link between problem gambling and criminal offenses. At least one study suggests that 30-40% of addicted gamblers support their addiction through illegal activities.

Problem gambling (ludomania) is a progressive behavioral disorder where an individual has an uncontrollable urge to gamble despite harmful and negative consequences.[1] Estimates indicate problem gambling occurs in 1.6% of the United States adult population.[2] The medical community considers extreme cases of problem gambling a chronic and progressive mental illness known as pathological gambling.[3]

In 1975, Nevada was the only state with casino gambling.[4] Presently, forty-eight states have some form of legalized gambling.[5] The public's growing acceptance of gambling as a form of entertainment is partially responsible for the industry's growth worldwide.[6] The increase in legalized gambling parallels an increase in problem gambling.[7]

States have increasingly legalized gambling as a way to decrease treasury deficits.[8] In 2006, commercial casinos in the United States contributed 5.2 billion dollars in direct gaming taxes.[9] Therefore, gambling is an attractive alternative to increasing taxes since participation is voluntary. In fact, gambling generates substantially more revenue than either tobacco or alcohol.[10]

While states enjoy the benefit of gambling revenue, there is little data concerning the economic and social costs generated by problem gambling.[11] Proponents of gambling argue that gambling provides entertainment and social interaction, particularly for older adults who have fewer recreational alternatives.[12] Opponents argue that gambling causes increased crime, detrimental effects on family including divorce and child abuse, increased alcohol and drug addiction, a destabilizing effect on the business environment, and an increased number of personal bankruptcies, forcing third parties to lose money due to gamblers' failure to pay their debts.[13]

Recent studies conclude that there is a direct link between problem gambling and criminal offenses.[14] At least one study suggests that 30-40% of addicted gamblers support their addiction through illegal activities.[15] As a result, the justice system is overloaded with gambling-related crimes.[16] In addition to this drain on the criminal justice system, problem gambling overloads the dockets in other courts that adjudicate such matters as divorce, child abuse, drug and alcohol addiction, and bankruptcy.

Problem gamblers accused of criminal behavior have attempted to lessen their criminal sentences by claiming reduced mental capacity as a result of pathological gambling.[17] Although this defense initially met with some success, in 2003, Congress passed the Feeney Amendment specifically disallowing pathological gambling as an excuse to reduce criminal sentences under federal sentencing guidelines.[18] However, in bankruptcy cases, defaulters seeking bankruptcy protection may still use pathological gambling as a viable defense against creditors' claims that debts should not be discharged.[19]

To complicate matters further, civil litigation stemming from problem gambling is increasing. A Canadian attorney who became addicted to slot machines, leading to a multitude of financial and legal problems resulting in his 3 month disbarment, is leading a massive class action lawsuit on behalf of 119,000 gambling addicts against Loto-Quebec, the government agency that runs all gaming activities in that province.[20] The lawsuit claims slot machines lure unsuspecting citizens with flashing lights and sounds causing addiction.[21] Lotto-Quebec is expected to argue genetics and brain chemistry are responsible for problem gambling rather than the slot machines themselves.[22] A judgment for the plaintiffs will surely open the floodgates for similar litigation in the United States and elsewhere.

In another class action lawsuit filed against the Ontario Lottery and Gaming Corporation, the plaintiffs are addicted gamblers who allege that they were allowed into Ontario casinos after voluntarily signing up for a "self-exclusion" program.[23] The program allows people to ban themselves from casinos in order to curb their gambling habits.

In the United States, a successful attorney who became a problem gambler and was recently disbarred, filed a $20 million racketeering lawsuit in Federal Court against six Atlantic City casinos alleging that they had a duty to notice her compulsive gambling habit and to

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cut her off.[24] In another lawsuit filed in the U.S. District Court in Minneapolis, a plaintiff who took the drug Mirapex to treat Parkinson's disease claimed the drug turned him into a compulsive gambler.[25] He recently won an $8.2 million judgment against the drug's manufacturers which alleged that the manufacturers knew that the drug caused gambling addiction, but did not issue any warnings or take steps to investigate the problem.

Gambling has existed in one form or another throughout history.[26] Society has recognized problem gambling throughout its existence.[27] Problem gambling, also referred to as compulsive gambling, was initially labeled an addiction.[28] In 1980, the American Psychiatric Association first recognized extreme cases of problem gambling as a mental disorder in *Diagnosis and Statistical Manual of Mental Disorders, Third Edition* (DSM-III). The disorder is now classified in DSM-IV as an "impulse control disorder," which is a compulsive disorder.[29] An impulse control disorder is defined by DSM-IV as "the failure to resist an impulse, drive or temptation to perform an act that is harmful to the person or to others."[30] DSM-IV includes ten criteria describing individual attributes of pathological gambling.[31] An individual must have at least five of the ten criteria to be diagnosed as a pathological gambler.[32] A recent meta-analysis of 120 studies concluded that 3.85% of the United States population will be problem gamblers at some point during their lifetime, and 1.6% will probably be pathological gamblers.[33]

Although the psychiatric community classifies pathological gambling as a compulsive disorder, the symptoms of pathological gambling do not correspond well with the medical definition of a compulsion. DSM-IV defines compulsion as "repetitive behaviors or mental acts, the goal of which is to prevent or reduce anxiety or stress not to provide pleasure or gratification."[34] In contrast, the pathological gambler typically experiences gambling as a pleasure-activating activity, at least until late into the disorder.[35] Moreover, while there is a consensus that gambling involves impulsiveness and risk taking, empirical evidence is inconclusive about whether pathological gambling actually results in loss of self control.[36]

In the medical and scientific communities, a controversy exists whether to classify pathological gambling as an impulse control disorder or some form of an addiction, like alcohol or drug addiction?[37] In medical lexicon, an addiction is a state

where the body develops a tolerance and dependence on a substance for normal functioning.[38] Sudden withdrawal of the substance produces a certain set of symptoms.[39] When describing physical dependence, abuse and withdrawal from drugs and other substances, DSM-IV does not use the word addiction. Instead, it uses the term "substance dependence" described as follows: "[w]hen an individual persists in use of alcohol or other drugs despite problems related to use of the substance, substance dependence may be diagnosed. Compulsive and repetitive use may result in tolerance to the effect of the drug and withdrawal symptoms when use is reduced or stopped. This, along with substance abuse, is considered a Substance Use Disorder…"[40]

Research studies have found similarities between pathological gambling and substance abuse.[41] Similar symptoms include experiencing the same type of sensations, tolerance, withdrawal and cravings.[42] There is also a common need to continue the behavior and high rates of relapse.[43] Pathological gamblers are generally broken down into two groups: 1) action seekers and 2) escape seekers.[44] They often pursue defective gambling strategies, misjudge the randomness of gambling, and fail to evaluate their losses.[45]

Brain imaging studies have recently shown pathological gambling activates the same neural circuits as cocaine addiction.[46] These neural circuits evoke feelings of euphoria and arousal by releasing the neurotransmitter dopamine.[47] Preliminary research demonstrates pathological gamblers have deficits in serotonergic, noradrenergic and dopaminergic systems.[48] Moreover, pathological gamblers are more likely to have other comorbid disorders such as depression, bipolar disorder and attention deficit hyperactivity disorder (ADHD).[49] They are also more likely to abuse alcohol and drugs.[50] Nevertheless, pathological gambling is not solely a biological disorder.[51] Researchers point out that environmental factors such as quality of family life, education in the mathematics of gambling odds, proximity of casinos and types of gambling involved also influence who will become addicted.[52] Advertising also contributes to the addiction because it portrays the gambling environment as glamorous, and emphasizes winning.[53] Pathological gamblers also believe that easy access to money at banks, ATM machines and finance companies located in close proximity to gambling facilities contribute to their addiction.[54]

Recent studies demonstrate that video gambling machines cause rapid onset of pathological gambling.[55] Video lottery terminals (VLTs) including video slots, keno, poker and other games have been referred to as the "crack cocaine" of gambling.[56] Pathological gamblers, who become hooked on VLTs, generally do so in about one year as compared with an average of three and one half years for other types of gambling including sports betting, race track betting, instant lottery, and traditional casino games.[57] Presently, it is estimated 70% of casino revenue comes from gaming machines as compared with only 40% ten years ago.[58] Moreover, research shows problem gamblers contribute 42% to 53% of VLT net revenues.[59]

Many players describe slot machines as reassuringly hypnotic.[60] Machines allow players to withdraw into their own worlds.[61] They provide the fastest and most continuous form of gambling, allowing players to regamble winnings immediately without time to think about financial repercussions.[62]

There is no specific treatment for pathological gambling.[63] Present treatment options include counseling, step-based programs like Gamblers Anonymous, online peer support, and prescription medication.[64] Some experts believe the success rate of these treatment options is not much higher than the rate at which pathological gamblers recover on their own.[65]

Researchers believe that the best treatment options should be tailored to the individual patient's characteristics, taking into consideration any comorbid disorders and whether the individual is an action seeker or escape seeker.[66] Medication may be indicated to treat comorbid disorders, reduce negative affects, and reduce cravings.[67] Unfortunately, 90% of problem gamblers relapse regardless of what treatment option is chosen.[68] This does not mean that 90% do not recover; it simply means it generally takes several attempts to succeed.[69] Presently, the best treatment option may be a combination of medication and behavioral therapy.[70]

What can society do to deal with the unfortunate consequences of problem gambling? There are a number of things that can and need to be done to balance the positive and negative social and economic consequences of gambling. First, society must get a better handle on the socio-economic impact of the gambling industry, both locally and globally, through independent research studies. At the same time, more medical and scientific research is needed to better understand what causes pathological gambling and how to effectively treat it.

In the meantime, we can use the information presently available to help identify and treat those individuals who are at risk for problem gambling. First and foremost, states need to educate the general public about the the risks associated with gambling. Although some information is presently available, states need to actively provide information to all sectors of the population.

Additionally, gaming machines can be modified to limit the hypnotic effect described by problem gamblers. Machines can be designed to periodically stop the action for a short period of time, which may interfere with this effect. While play is stopped, machines can display information to the patron including the amount of time played and the amount of money already bet, won and lost during that period of play. Machines can also provide other information including the odds of winning, the amount held and the odds of losing.

Gaming regulators can implement regulations that will limit the amount of credit extended to patrons based on credit reports and other financial information. Gaming establishments can be required to provide all patrons with written information on problem gambling including information on where to get help. They

can also be required, at a patron's request, to set a limit on the amount of money wagered or the amount of time spent gambling. All establishments can also be required to maintain a voluntary exclusion list excluding the patron from the establishment at the patron's request.

The medical and legal communities must also be educated to recognize and screen for problem gambling. Individuals suspected of problem gambling can then be referred for appropriate treatment including counseling, medication, and financial assistance. In addition, states can establish gambling courts, similar to drug courts, providing therapeutic justice.[71] Working together, society can reap the recreational and economic benefits of gambling while limiting its detrimental effects.

ENDNOTES

1 *2004 Nevada Council on Problem Gambling; http://en.wikipedia.org/wiki/Problem-gambling.*
2 *Gamblers Anonymous, http://en.wikipedia.org/wiki/Gamblers_Ananymous.*
3 *Problem Gambling, http://en.wikipedia.org/wiki/Problem_gambling.*
4 *Eggert, Truth in Gaming: Toward Consumer Protection in the Gambling Industry, 63 Md. L. Rev. 217, 221 (2004).*
5 *Samson, Compulsive Gambling as a Criminal Excuse Under the Federal Sentencing Guidelines sec. 5K2.13, 8 (6) Gaming L. Rev. 361 (2004).*
6 *Eggert,* ***supra*** *note 4, at 222.*
7 *Samson,* ***supra*** *note 5, at 361.*
8 ***Id.***
9 *2007 State of the States, The AGA Survey of Casino Entertainment.*
10 *Eggert,* ***supra*** *note 4, at 223.*
11 ***Id.*** *at 227-30.*
12 ***Id.*** *at 227, 230.*
13 ***Id.*** *at 228-29.*
14 *Samson,* ***supra*** *note 5, at 361.*
15 ***See United States v. Liu****, 267 F. Supp. 2d 371, 373 (E.D.N.Y. 2003).*
16 *Samson,* ***supra*** *note 5, at 361.*
17 *Geis, Pathological Gambling and Insanity, Diminished Capacity, Dischargability, and Downward Sentencing Departures, 8 (6) Gaming Law. Rev. 347 (2004).*
18 ***Id.*** *at 347-48.*
19 ***Id.*** *at 348.*
20 *http://www.salon.com/news/feature/2008/06/16/gambling-science/.*
21 ***Id.***
22 ***Id.***
23 *Problem Gamblers hit Ontario Casinos With $3.5B Lawsuit, CBC News, June 11, 2008, http://www.cbc.ca/canada/toronto/story/2008/06/11/gambling-lawsuit.html?ref=rss.*
24 *Parry, Lawsuit Blames Gambling Habit on Casinos, The Seattle Times, March 9, 2008.*
25 *Mirapex Victim Awarded $8.2 Million in First Gambling Addiction Lawsuit, August 2, 2008, http://www.newsinferno.com/archives/3562.*
26 *National Research Council Committee on Social and Economic Impact of Pathological Gambling, Pathological Gambling, A Critical Review 9 (1999).*
27 ***Id.***

Bar Journal Buzz

Over the past few years, the *Rhode Island Bar Journal* has served as original source material for state and regional news coverage extending far beyond the magazine's pages. A number of *Providence Journal* newspaper articles and columns, as well as articles and stories in *Providence Business News*, *Rhode Island Lawyers Weekly*, and television and radio stations found their inspiration in the Bar Journal.

In mid-Summer, Harris K. Weiner, recipient of the *Rhode Island Bar Journal 2009 Lauren E. Jones, Esq. Writing Award*, spoke with Frank Colletta on the NBC10 Sunrise show about his winning article, *Eminent Domain and Economic Development: Rhode Island General Assembly Addresses Kelo vs. City of New London*. *Bar Journal* author and Editorial Board member Willis Riccio recently informed us the *Rhode Island Bar Journal* was cited in a memorandum supporting motion to dismiss a Securities and Exchange (SEC) insider trading case filed in the United States District Court in Massachusetts, Springfield Division.

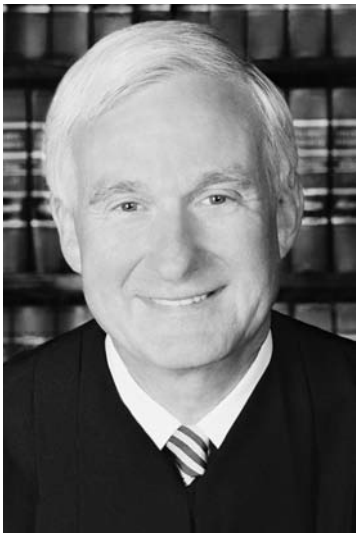
Bar members may access past *Bar Journal* articles on the Rhode Island Bar Association website at www.ribar.com through the free-to-members, 24-hour, seven-days-a-week, online law library, Casemaker. Bar members are encouraged to submit articles for *Rhode Island Bar Journal* publication consideration. Please see page 4 of this, or any other, *Bar Journal* for the *Journal's* editorial policy and article selection criteria, or contact *Bar Journal* Editor Frederick D. Massie by telephone: 401-421-5740 or email: fmassie@ribar.com.

28 ***Id.***
29 *American Psychiatric Association, Diagnosis and Statistical Manual of Mental Disorders (4th ed. 1994).*
30 ***Id.***
31 *The 10 criteria that describe the pathological gambling include:*
1. *Preoccupation. The subject has frequent thoughts about gambling experiences, whether past, future, or fantasy.*
2. *Tolerance. As with drug tolerance, the subject requires larger or more frequent wagers to experience the same "rush."*
3. *Withdrawal. Restlessness or irritability associated with attempts to cease or reduce gambling.*
4. *Escape. The subject gambles to improve mood or escape problems.*
5. *Chasing. The subject tries to win back gambling losses with more gambling.*
6. *Lying. The subject tries to hide the extent of his or her gambling by lying to family, friends, or therapists.*
7. *Loss of control. The person has unsuccessfully attempted to reduce gambling.*
8. *Illegal acts. The person has broken the law in order to obtain gambling money or recover gambling losses. This may include acts of theft embezzlement, fraud, forgery, or bad checks.*
9. *Risked significant relationship. The person gambles despite risking or losing a relationship, job, or other significant opportunity.*
10. *Bailout. The person turns to family, friends, or another third party for financial assistance as a result of gambling.*

32 *Buchhandler-Raphael, THE RELATIONSHIP BETWEEN PATHOLOGICAL GAMBLING DISORDER AND SUBSTANTIVE CRIMINAL LAW AND SENTENCING, 12 (2) Gaming L. Rev. and Economics 109 (2008).*
33 *Eggert, **supra** note 4, at 225.*
34 *American Psychiatric Association, **supra** note 29.*
35 *National Research Council Committee on Social and Economic Impact of Pathological Gambling, **supra** note 26, at 24.*
36 *Buchhandler-Raphael, **supra** note 32, at 111.*
37 ***Id.** at 110.*
38 *http://en.wikipedia.org/wiki/Addiction.*
39 ***Id.***
40 *American Psychiatric Association, **supra** note 29.*
41 *Buchhandler-Raphael, **supra** note 32, at 112.*
42 ***Id.***
43 ***Id.***
44 *Rosenthal, THE ROLE OF MEDICATION IN THE TREATMENT OF PATHOLOGICAL GAMBLING: BRIDGING THE GAP BETWEEN RESEARCH AND PRACTICE, Gambling, The Electronic Journal of Gambling Issues 27, http://www.camh.net/egambling/issue10/ejgi_10_rosenthal.html.*
45 *Eggert, **supra** note 4, at 219.*
46 *Schlief, THIS IS YOUR BRAIN ON GAMBLING, http://network.nature.com/boston/news/articles/2008/03/19/this-is-your-brain-on-gambling.*
47 ***Id.***
48 *Rosenthal, **supra** note 44 at 14.*
49 ***Id.** at 1.*
50 ***Id.** at 22, 24.*
51 *Schlief, **supra** note 46.*
52 ***Id.***
53 *Clarke, et al, KEY INDICATORS OF THE TRANSITION FROM SOCIAL TO PROBLEM GAMBLING, 4 Int. J. Mental Health Addiction 247 (2006).*
54 ***Id.***
55 *Breen and Zimmerman, RAPID ONSET OF PATHOLOGICAL GAMBLING IN MACHINE GAMBLERS, 18 (1) J. Gambling Studies 31 (2002); Breen, RAPID*

Onset of Pathological Gambling in Machine Gamblers: A Replication, 2 (1) International J. Mental Health & Addiction 44 (2004).
56 *RI Gambling Treatment Program, http://www.lifespan.org/rih/services/mentalhealth/gambling/research/default.htm*
57 ***Id.***
58 *Breen and Zimmerman,* ***supra*** *note 55, at 32.*
59 *Breen,* ***supra*** *note 55, at 44.*
60 *Breen & Zimmerman,* ***supra*** *note 55, at 32.*
61 ***Id.***
62 *Eggert,* ***supra*** *note 4, at 227.*
63 *Collier, Gambling Treatment Options: A Roll of the Dice, 179 (2) Canadian Med. Assoc. J. 127-29 (2008).*
64 ***Id.***; ***see*** *http://en.wikipedia.org/wiki/Problem_gambling; Rosenthal,* ***supra*** *note 44. Gamblers Anonymous is a twelve-step program for problem gamblers similar to Alcoholics Anonymous. http://en.wikipedia.org/wiki/Gamblers_Anonymous.*
65 *Collier,* ***supra*** *note 63, at 127.*
66 *Rosenthal,* ***supra*** *note 44, at 32-33.*
67 ***Id.*** *at 32.*
68 *Collier,* ***supra*** *note 63.*
69 ***Id.***
70 ***Id.***
71 *Rychlak & Hinshaw, From the Classroom to the Courtroom: Therapeutic Justice and the Gaming Industry's Impact on Law, 74 Miss. L. J. 827 (2005). The first gambling court was created in New York in 2003. Id. at 830.* ❖

Hon. Paul A. Suttell 51st Chief Justice of the Rhode Island Supreme Court



On Thursday, July 16th, 2009, Hon. Paul A. Suttell was sworn in as the 51st Chief Justice of the Rhode Island Supreme Court. Accompanied by his wife, Mary and his two children, William and Grace, he took the oath of office in a ceremony attended by many Rhode Island Bar Association and Rhode Island Judiciary members, as well as state leaders and friends.

Born in Providence on January 10, 1949, he graduated from Moses Brown School in 1967. He graduated from Northwestern University in Evanston, Illinois in 1971 and from Suffolk University Law School in 1976.

Chief Justice Suttell began his legal career in Pawtucket with the firm of Crowe, Chester & Adams and later served as an associate with Beals & DiFiore in Providence. A resident of Little Compton, Rhode Island, he previously represented Little Compton, Portsmouth and Tiverton in the Rhode Island General Assembly from 1983 to 1990. He also served as legal counsel for the late House Minority Leader Fred Lippitt. He was appointed to the Rhode Island Family Court bench in 1990, and was named to the Rhode Island Supreme Court in 2003.

He is a member of the American, Rhode Island, Massachusetts, and Newport County Bar Associations, the National Council of Juvenile and Family Court Judges and the American Academy of Adoption Attorneys.

He is moderator and former chairman of the Trustees of the Little Compton United Congregational Church, a current director and a past president of both the Little Compton Historical Society, and a past president of the Sakonnet Preservation Association.

At the ceremony, the new Chief Justice noted "My goal is to keep it [the Rhode Island Judiciary] on a level and steady course." He stated that his first order of business is to sit down with the finance director and begin dissecting the Judiciary's budget.

New Public Service Project Provides Legal Aid to Military Families

The Rhode Island Bar Association United States Armed Forces Legal Services Project is a new public service effort developed as part of Bar President Victoria M. Almeida's Greater Justice for All initiative. The Project is specifically designed to provide those serving in the military and their families with legal assistance. A special request by President Almeida for volunteers follows.

Dear Members:

I am extremely pleased to announce we have expanded our public service outreach directly to our men and women in the Armed Forces. This exciting initiative is coordinated with the Attorney-Advisor at the Office of the Staff Judge Advocate.

Many of you actively participate in one or all of our public service endeavors, and I invite you to also consider this opportunity to help those so willing to serve our nation. For those of you who have not yet joined one of the Bar Association's public service programs, the Bar Association's United States Armed Forces Legal Services Project may be the volunteer service activity that is right for you.

There is a need for attorneys to directly represent military personnel by accepting pro bono cases. There is also a need for attorneys to act in an advisory capacity as mentors to the military Attorney-Advisor or a volunteer attorney accepting a pro bono case. Volunteer opportunities are in a variety of civil law areas including family law, probate issues, landlord/tenant, real estate, contracts, consumer, bankruptcy, collections, employment (USERRA), immigration/naturalization, torts, income tax, and other areas.

Your important decision to participate provides assistance to active and reserve military personnel, family members of Reserve Component members undergoing pre-mobilization legal preparation, military retirees or those receiving disability and their family members, and surviving family members of all the groups noted above.

Public Service is a defining characteristic of the members of our Bar Association, and I thank you for your support of this new initiative. Please contact the Bar's Public Service Director Susan Fontaine via email: sfontaine@ribar.com or by telephone: 401-421-5740 for further information on joining the US Armed Forces Legal Services Project. Project applications may be accessed online, through the Bar's website at www.ribar.com.

Cordially,

Victoria M. Almeida

Victoria M. Almeida
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RI Law Center, Providence
1:00 p.m. – 3:00 p.m.
2.0 RICLE credits

September 16
Wednesday
Food For Thought – Representing A Buyer at a Foreclosure Sale
Courtyard Marriott Hotel, Middletown
12:45 p.m. – 1:45 p.m.
1.0 RICLE credit

September 17
Thursday
Food For Thought – Title Standards Update
RI Law Center, Providence
12:45 p.m. – 1:45 p.m.
1.0 RICLE credit

September 22
Tuesday
Food For Thought – Title Standards Update
Casey's, Wakefield
12:45 p.m. – 1:45 p.m.
1.0 RICLE credit

September 23
Wednesday
Protect and Build Your Law Practice In A Tough Market
2009 Risk Management Seminar
Rhodes on the Pawtuxet, Cranston
5:00 p.m. – 7:00 p.m.
2.0 ethics credits

September 24
Thursday
Protect and Build Your Law Practice In A Tough Market
2009 Risk Management Seminar
Rhodes on the Pawtuxet, Cranston
1:00 p.m. – 3:00 p.m.
2.0 ethics credits

September 25
Friday
Protect and Build Your Law Practice In A Tough Market
2009 Risk Management Seminar
Rhodes on the Pawtuxet, Cranston
9:00 a.m. – 11:00 a.m.
2.0 ethics credits

September 30
Wednesday
Settlements: Solving the Medicare Compliance Puzzle
RI Law Center, Providence
3:00 p.m. – 6:00 p.m.
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October 1
Thursday
Food For Thought – Representing A Buyer at a Foreclosure Sale
RI Law Center, Providence
12:45 p.m. – 1:45 p.m.
1.0 RICLE credit

October 6
Tuesday
Food For Thought – The Small Estate
Casey's, Wakefield
12:45 p.m. – 1:45 p.m.
1.0 RICLE credit

October 7
Wednesday
QDRO Practice In RI: From A-Z
RI Law Center, Providence
4:00 p.m. – 7:00 p.m.
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October 8
Thursday
Food For Thought – Crafting Effective Interrogatories
RI Law Center, Providence
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October 14
Wednesday
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Thursday
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Recent Developments in the Law 2009
Crowne Plaza Hotel, Warwick
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Reminder: You may also complete three credits through an online seminar. Go to the Rhode Island Bar Association website at www.ribar.com and click on CLE events.

Rule of Court and the Motion Calendar

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

… Rule of Court provisions of Rule 7(b)(3), can be your friend, or if unknown, a large thorn.

There are likely two times in most attorneys' lives when the Rhode Island Superior Court Rules of Civil Procedure are studied from cover to cover. The first is in a Rhode Island Practice class at law school. The second is studying for the Rhode Island Bar Exam. Just as I did, you probably read Rule 7 very quickly. I can certainly remember a professor speaking about Rule 7, but I do not remember it as Rule 7. Instead, I remember just one phrase: "Rule of Court." More specifically, I recall that I had no idea what that meant. Many years later, I recognize the Rule of Court provisions of Rule 7(b)(3), can be your friend, or if unknown, a large thorn.

The Rule of Court section of Rule 7 provides seven motions will not appear on the motion calendar unless an objection is served and filed at least 3 days before the time specified for the hearing. These motions are: 1) to assign to the trial calendar; 2) to consolidate cases for trial; 3) to enlarge the time for permitting an action after the expiration of the specified period if said action was not performed due to excuseable neglect; 4) for leave to serve third-party complaints under Rule 14; 5) to amend pleadings under Rule 15; 6) for an order for physical or mental examination under Rule 35; and 7) under Rule 26 or Rule 37 to obtain a protective order, or to compel discovery.

Ignorance of this Rule can have damaging results. If you decide to orally argue an objection to a Rule 7 motion rather than file it, you will find there is no hearing. Obviously, you will have no opportunity to present your oral argument. In addition, you could sit through the entire motion calendar only to learn that the motion to be opposed was granted by Rule of Court prior to the hearing. Besides costing the client money for attendance at the calendar, you will face a decision as to whether or not to file a motion to vacate the order. Unfamiliarity with Rule 7 is an embarrassing and probably unavailing basis for a motion to vacate.

Conversely, awareness of the rule can save you time and, thus, money for the client. Rule 7 reduces a client's bills for preparation for calendar attendance while also allowing the attorney to focus on other aspects of that case or another – both positives for your practice.

I still remember a comment by a panel of judges at a Continuing Legal Education (CLE) seminar for Superior Court Practice last year. The panel expressed surprise that more attorneys do not have the rules with them in court. It is important, particularly for newer attorneys, to have an awareness of all the Superior Court Rules of Civil Procedure. Newer attorneys often face opposing counsel who will likely have more experience with the rules, knowing how each can be utilized to benefit their case. While total knowledge of all the rules by newer attorneys may take some time, knowing enough to open the Green Book either to consult or review them is invaluable. The comment by the panel of judges may or may not have been a polite means to reinforce the importance of learning the rules. However, it is clear that heeding the counsel of our jurists can lead to success for both you and your client. ❖

Editor's Note: *This is one of a series of pieces dedicated to the challenges and rewards encountered by new lawyers. New and more seasoned members of the Rhode Island Bar Association are encouraged to share their experiences, opinions and recommendations regarding their initial years before the bar in future Rhode Island Bar Journals.* ❖

Lawyers on the Move

Gary D. Berkowitz, Esq. has moved his practice to 2377 Pawtucket Avenue, East Providence, RI 02914.
telephone: 401-751-7671
email: garyberkowitz@rocketmail.com

William L. Bernstein, Esq., of Gloucester, is Gloucester Town Solicitor, **Timothy F. Kane, Esq.**, of Smithfield, is Assistant Solicitor and **Jane Gurzenda, Esq.**, of Foster, is Probate Judge all by appointment of the Gloucester Town Council.

David J. Correira, Esq., managing partner of **Correira & Iacono LLP**, was recently honored by Bridgewater State College with the Dr. Adrian Rondileau Award for Professional Achievement and Community Service.

Christine J. Engustian, Esq., practicing law from One Grove Avenue in East Providence, RI 02914, now has a Leadership in Energy and Environmental Design Accredited Professional (LEED AP) designation from the U.S. Green Building Council.
telephone: 401-434-1250 email: cjengustian@gmail.com

Tricia K. Jedele, Esq. is now Vice President of Conservation Law Foundation and Director of the Rhode Island Advocacy Center located at 55 Dorrance Street, Providence, RI 02903.
telephone: 401-351-1102 email: TJedele@clf.org
web: www.clf.org

Peter Lawson Kennedy, Esq. is now Of Counsel to **Ratcliffe Harten Burke & Galamaga LLP** located at One Financial Plaza, 16th Floor, Providence RI 02903.
telephone: 401-331-3400 email: pkennedy@rhbglaw.com
web: www.rhhelaw.com

Chip Muller, Esq. opened his law practice, **Chip Muller, Attorney at Law**, located at 155 South Main Street, Suite 101, Providence, RI 02903.
telephone: 401-256-5171 email: chip@chipmuller.com

Karen Pelczarski, Esq., a partner at **Blish & Cavanaugh**, was elected to a two-year term as President of the Board of the Rhode Island Philharmonic Orchestra and Music School.

For a free listing, please send information to: Frederick D. Massie, Rhode Island Bar Journal Managing Editor, via email at: fmassie@ribar.com, or by postal mail to his attention at: Lawyers on the Move, Rhode Island Bar Journal, 115 Cedar Street, Providence, RI 02903.

Are you interested in becoming healthier and happier in your practice and home life?

All Rhode Island Bar Association members and their dependents may receive free and confidential help, information, assessment and referral for personal health concerns through the Bar's contract with Resource International Employee Assistance Services (RIEAS) and through the members of the Rhode Island Bar Association's Lawyers Helping Lawyers Committee providing confidential assistance to lawyers and their families. To discuss your concerns, or those you may have about a colleague, you may go to RIEAS, contact a Lawyers Helping Lawyers Committee member, or use both resources.

The mental health professionals at RIEAS provide confidential counseling and referral on mental health issues including alcohol and substance abuse, problem gambling, depression, anxiety, domestic violence, aging, grief, and career satisfaction. To reach RIEAS, telephone RIEAS staff person, Judy Hoffman or her colleagues at 1-800-445-1195 or 732-9444.

The Rhode Island Bar Association's Lawyers Helping Lawyers Committee members choose this volunteer assignment because they understand the issues and want to help their peers find answers and appropriate courses of action. Committee members listen to concerns, share their experiences, and offer advice. Attorneys are invited to contact any of the Committee members listed at right.

You may call the Employees Assistance Services directly at 800-445-1195

Or call committee members confidentially

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Rhode Island Bar Association Lawyers Helping Lawyers Committee

New Opportunities for IRA-Related Charitable Giving

Mark J. Soss, Esq.
Practices law in Lakewood Ranch, Florida

For most eligible taxpayers, in 2009, more income tax benefits will be derived by making a charitable contribution directly from his or her retirement account than by receiving the RMD directly and making a corresponding charitable donation.

Every retired taxpayer, aged over 70 and six months (eligible taxpayer), is required to withdraw an amount equal to his or her annual Required Minimum Distribution (RMD) from their Individual Retirement Account (IRA, Roth IRAs and SEP-IRA). The RMD must be withdrawn on or before December 31st each year. In August 2006, the Pension Protection Act of 2006 (PPA), amended Section 408(d)(8)(A) of the Internal Revenue Code (IRC) permitting eligible taxpayers to make a direct transfer of up to $100,000 from their retirement account to a charity without including the distribution as taxable income. The PPA provision expired on December 31, 2007.

The Emergency Economic Stabilization Act of 2008 (EESA), signed into law on October 3, 2008, extended the charitable giving options contained in the PPA through December 31, 2009. Subsequently, 2009 tax planning opportunities were further expanded by enactment of the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA). Signed by President Obama on Dec. 23, 2008, WRERA suspends the minimum required distributions in 2009 for eligible taxpayers (otherwise a 50% tax would apply to the amount not withdrawn).

Tax Benefits:

IRA Rollover Qualifies for RMD

Despite the fact that RMD is calculated on January 1st of each taxable year, a large number of IRA owners receive their RMD at the end of the fiscal year. This allows the IRA assets to continue growing (in most years) tax-free before they are required to be withdrawn (on or before December 31st).

Under EESA, instead of receiving the RMD and including the funds into taxable income, a taxpayer may contribute (through a charitable rollover) his or her RMD to a charitable organization. The charitable rollover will be limited to $100,000 per taxpayer (a husband and wife may contribute $100,000 each from two separate IRA accounts). While the charitable rollover will not be eligible for a corresponding charitable deduction, the taxpayer must still establish that the contribution was a "qualified charitable distribution" under IRC Sec. 408(d)(8)(B).

State Tax Impact

States fall into several different categories with respect to the charitable IRA rollover. States either: (i) do not provide for charitable income tax deductions; (ii) permit charitable deductions, but use the federal adjusted gross income as an initial reference number for determining state tax; or (iii) do not recognize the IRA charitable rollover and require IRA reporting for state income tax purposes. Under each scenario, a taxpayer will benefit from the IRA rollover by reducing their state taxable income and reducing their state taxes.

Income Tax Benefits

An eligible taxpayer who receives a distribution from his or her IRA must include the funds as part of their gross income. A corresponding charitable contribution will provide a charitable deduction for the amount transferred to charity. However, an eligible taxpayer in one of the highest income brackets may not be able to totally offset the tax associated with the RMD received with a corresponding charitable contribution. Eligible taxpayers can deduct (i) cash contributions, in full, up to 50% of their adjusted gross income; (ii) property contributions, in full, up to 30% of their adjusted gross income; and (iii) contributions of appreciated capital gains assets, in full, up to 20% of their adjusted gross income. Charitable contributions in excess of the limits can be carried over for a maximum of five years.

Utilization of a charitable rollover allows a taxpayer to avoid (i) inclusion of the RMD in their Adjusted Gross Income (AGI); (ii) the payment of federal and/or state income tax on the RMD; (iii) the phase out of income tax exemptions resulting from higher AGI levels, (iv) increased social security taxation (avoidance of the 50% or 85% level of taxation); and (v) the higher capital gains tax rate (15%). It also benefits eligible taxpayers' who utilize the standard deduction (the charitable deduction is an itemized deduction) and would otherwise be

unable to benefit from the charitable deduction on their income tax return.

Eligible Charitable Organizations

Both the PPA and EESA require the charitable rollover is made to an IRC Sec.509(a)(1) or IRC Sec.170(b)(1)(A) charity (collectively a "Charitable Organization"). Eligible entities include a (i) community foundation; (ii) private foundation (which meets the conduit rules); (iii) college or university scholarship fund; or (iv) relief organization. The charitable rollover may also be utilized to satisfy a charitable pledge (IRS Notice 2007-7). In contrast, a charitable rollover may not be made to (i) an IRC Sec. 509(a)(3) supporting organization; (ii) IRC Sec. 4966(d)(2) donor-advised fund; (iii) private foundations (which do not meet the conduit rules); (iv) split interest trusts (charitable lead and remainder trusts); or (v) pooled income fund.

Limitations and Restrictions

Charitable donations from 403(b) plans, 401(k) plans, pension plans, and other retirement plans are ineligible for the tax-free treatment. Distributions must be made directly from the IRA trustee payable to the Charitable Organization. The recipient organization should issue an acknowledgment for the IRA rollover. The acknowledgement should include (i) the date of the gift; (ii) the name of the IRA custodian; (iii) the amount of the gift; (iv) that the gift is a qualified charitable distribution under IRC Sec. 408(d)(8)(A); and (v) state that no goods or services were provided in exchange for the gift.

Conclusion

For most eligible taxpayers, in 2009, more income tax benefits will be derived by making a charitable contribution directly from his or her retirement account than by receiving the RMD directly and making a corresponding charitable donation. The tax benefits include avoidance of: (i) the payment of federal and/or state income tax on the RMD; (ii) the phase out of income tax exemptions resulting from higher AGI levels, (iii) increased social security taxation (avoidance of the 50% or 85% level of taxation); and (iv) the higher capital gains tax rate (15%). ❖

BOOK REVIEW

The Activist: John Marshall, *Marbury v. Madison*, and the Myth of Judicial Review

By Lawrence Goldstone

Kimberly Ann Page, Esq.
Adjunct professor at
Community College of
Rhode Island

… while the Constitution articulates the powers of the Supreme Court in Article III, the Constitution does not specifically allow the judiciary to decide the validity of legislative acts.

The first case I read in Constitutional law was **Marbury v. Madison**, but that was a long time ago to remember all the relevant details. *The Activist* author, Lawrence Goldstone, assumes most readers need a review of the case and thus begins his book with a summary. Defeated Federalist President John Adams was in his last two days of office when he signed forty-two nominations for judgeships in Washington D.C. The Senate approved the nominations in March 1801 on Adams' last full day in office, and the commissions had to be signed, sealed and delivered before Thomas Jefferson's mid-day inaugural on the following day. Adams did not want to attend Jefferson's swearing in, so he left town and assigned Secretary of State John Marshall to deliver the commissions. This was the same Marshall who delayed taking his seat on the Supreme Court until the day he swore in Thomas Jefferson as President. In the rush of delivering forty-two commissions, taking a Supreme Court seat and swearing in a new president, some judicial commissions went undelivered. President Jefferson took no action whatsoever to deliver commissions to his rival's supporters. By December 1801, four of the would-be judges, including William Marbury, sued the new Secretary of State James Madison for their commissions through a writ of mandamus delivered to the Supreme Court. Their suit alleged Section 13 of the Judiciary Act of 1789 allowed their appointment.

Goldstone points out that **Marbury v. Madison** could have been heard by an appellate court rather than initiating at the Supreme Court. However, the plaintiffs and defendant wanted Chief Justice John Marshall to decide the case. When Marshall took control of the case he told Marbury that he was properly appointed, entitled to his commission and that Jefferson had no right to void his appointment. (See *The Activist* at 6.) Marshall knew Jefferson would ignore a Court order to appoint Marbury and realized that if a Court order were ignored, the Supreme Court's authority would be weakened. As a result, Marshall refused Marbury his commission because the suit rested on Section 13 of the Judiciary Act which Marshall found contradicted Article III of the United States Constitution. Thus, the Act and Marbury's suit were invalid. In essence, Marshall ruled the plaintiff was right but lost, the defendant is wrong but won, and the Court was always supreme.

The author recognizes law schools teach the main significance of the **Marbury** case as initiating the concept of judicial review. (*Id.*) He reminds the reader that, while the Constitution articulates the powers of the Supreme Court in Article III, the Constitution does not specifically allow the judiciary to decide the validity of legislative acts. Goldstone emphasizes Marshall's decision inaugurated the Supreme Court's ability to interpret and reject Congressional laws. By page six of *The Activist*, Lawrence Goldstone reviewed the **Marbury** history and paraphrased its importance. As I turned to chapter two of *The Activist*, I was wondering if Goldstone would hold my attention for 249 more pages. This was not an issue.

Goldstone sets the next chapters in 1787 at the convention to reframe the Articles of Confederations into what would be the future United States Constitution. He details who the delegates were, where they were from and their political agendas. The impending animosity between the future Chief Justice of the Supreme Court, John Marshall and Thomas Jefferson is foreshadowed by Marshall's service in the Continental Army and his persuasion of 1,500 Virginians to enlist in the Revolutionary struggle in the face of Virginia Governor Jefferson's refusal to pay for shoes and uniforms. (*Id.* at 40) Subsequent chapters weave together the popular, as well as lesser known, founding fathers and highlight their political differences regarding the Constitution.

Goldstone describes James Madison's tenacious work on the Constitution, pitting him against the mesmerizing orator, Patrick Henry. Henry favored greater state sovereignty rather than a strong central government and voted against the approval of the Constitution. Henry argued the federal courts would not fairly judge state cases. (*Id.* at 52) His arguments were challenged by John Marshall who opined it was

considered necessary for federal judges to have broad power and jurisdiction:

> "…To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection." (*Id.* at 53)

Henry did not respond to Marshall's questions. Goldstone reflects that the Constitution passed by nine states regardless of Patrick Henry's vote. Marshall's diatribe on judicial review was not addressed. That issue was saved for the future **Marbury** case.

Goldstone asserts that the launch of judiciary branch of government floundered. (*Id.* at 105) The Supreme Court's first term lasted only two days due to a yellow fever outbreak. President Washington asked the court to issue an opinion regarding French auctions which the vehemently anti-French Chief Justice, John Jay, considered a political question. During the two day term, Jay muzzled his own judgment and counseled Washington that writing an advisory opinion was an "inappropriate role for the justices." (*Id.*) This was the last time the Supreme Court was asked for such counsel. (*Id.*)

John Jay, who detested the circuit riding aspect of the Court, served a short term as Chief Justice, was prone to distractions. *Id.* at 91.) President Washington requested the Chief Justice attend to a diplomatic mission in England. Jay quickly agreed, but did not resign his judicial office for a trip that took months and ended with the successful *Jay Treaty*. (*Id.* at 106) While Jay was abroad, his name was put forth as governor of New York. This was his second stab at a political office, and this time he won. Jay's resignation necessitated Washington's appointment of another justice to the Court.

Goldstone notes in the 1790's lawyers did not view a position on the Supreme Court as prestigious nor revered. (*Id.* at 91) Washington was forced to implore lawyers to take a position on the Supreme Court. During his eight years as President, not only did he appoint the original six Supreme Court justices, he appointed five more due to resignations. The Supreme Court did not have a heavy case load, indeed by August 1791, the Court's fourth term, not a single case was heard. (*Id.*) Goldstone's explanation for this reluctance to serve on the Court was due to the heavy circuit court travel required of the justices until 1891. At one point,

Washington cajoled Thomas Johnson of Maryland to take a seat on the Court by assuring Johnson he would be exempt from "this tour" of circuit court riding, then Washington turned around and persuaded the sitting Court justices to give Johnson a pass on riding the southern circuit for only the summer. (*Id.*) Washington's power of persuasion managed to appease both sides.

In 1795, George Washington decided not to run for a third term of office. While Washington was elected by a unanimous Electoral College vote, the votes for the second place Vice President were deeply divided. Washington's like-minded associates were termed Federalists and consisted of Vice President John Adams and Alexander Hamilton. Goldstone calls the other party the Republicans (other sources refer to this party as the Democratic-Republicans since it ultimately became the Democratic Party). This party was led by Thomas Jefferson and Aaron Burr. Each party battled for control when Washington announced he would step down. (*Id.* at 115)

Goldstone's writing strength is his ability to clearly convey the intricacies of the past and why it mattered. He notes the 1796 Electoral College results were contentious because the electoral vote did not reflect the popular vote. The Southern states could count three-fifths of a slave as a person to increase their number of electoral delegates, thus the South held a disproportionate number of delegates to the Northern electorates. Essentially, the South had more delegates per vote because non-voters were tallied for the delegates. In the election of 1796, John Adams carried the popular vote by 53.4% to Jefferson's 46.6%, but Adams only won by three Electoral College votes. (*Id.* at 117)

For Adams, Goldstone emphasized, the 1796 election did not bring a honeymoon period. Article II, Section I of the Constitution, gave the vice presidency to the man with the second highest electoral vote, which meant Adam's second in command was his rival, Thomas Jefferson. This was the perfect scenario for an underling to accentuate the failings of the president in order to plan a coupe.[1] For the next four years, Adams was "assailed mercilessly" by Jefferson. Adams was accused of being stubborn, shortsighted, stupid and mentally ill. (*Id.*) Adam's one ally during this time was John Marshall.

Marshall was a lawyer who previously

rejected Washington's requests to serve in public life. When Adams asked Marshall to serve as one of three emissaries to France to negotiate a treaty, he finally accepted. (*Id.* at 120) Upon his arrival in France, Marshall and the other two emissaries were surprised to learn a treaty could be procured from the French for the modest sum of a $250,000 bribe. Marshall, who was the scribe, wrote of the "slur" to Americans and labeled his dispatches from "X," "Y," and "Z." His correspondence ignited American sentiment to declare war against the French and their insulting behavior in the XYZ Affair. Marshall was unaware of the American "self-righteous patriotism" and was surprised to return to America in 1978 as a hero. (*Id.* at 122)

Adams did not declare war against France, but he asked the popular Marshall to author a bill reorganizing the judiciary. Re-election approached and it was questionable whether the unpopular Adams would occupy the Presidency and if the Federalists could retain control of Congress. (*Id.* at 137) Goldstone observes the Federalists realized strength lay in the appointed judiciary. Adams wanted the federal court system expanded to include layers of circuit courts, thereby eliminating the need for circuit riding among the Supreme Court justices. (*Id.* at 134) Marshall's bill granted Adams the opportunity to fill the seats of the expanded courts with Federalist judges. (*Id.* at 137) Goldstone notes Adams's plan ran amuck when the Federalist Congress voted to table the judiciary bill from April until December 1st. (*Id.*)

Goldstone's book is sympathetic to John Adams, yet he does not gloss over the founding father's flaws. As the political arenas were quicksand for Adams, he solidified support and nominated John Marshall as Secretary of War. As had happened with another appointment, Adams failed to ask Marshall if he wished to be Secretary of War prior to submitting Marshall's name to the Senate. Marshall

Superior Court Clerk's Passage Noted by Judges and Press

Pasco "Pat" Picano Jr., 78, administrative clerk of the Rhode Island Superior Court, and past recipient of a Rhode Island Bar Association Certificate of Appreciation and of a Rhode Island Association for Justice Public Service Award, passed away on June 15, 2009. Pat had worked in state government for about 40 years, including 37 years in the court system. In a newspaper piece, Providence Journal columnist Edward Fitzpatrick quoted Presiding Superior Court Justice Joseph F. Rodgers who said, "It's going to be a great loss. He was just totally accessible and interested and willing to help anyone, be it a judge or pro se litigant." In the column, Fitzpatrick noted Superior Court Judge Francis J. Darigan Jr. saying, "If you wanted to define the epitome of a state employee and a public servant, it would be a description of Pat Picano. The hallmark of his career is the way he treated everybody with complete dignity and respect. Everybody loved him because he was so upbeat and so self-effacing."

did not want the job. (*Id.* at 142) John Marshall thought the Secretary of State's job more appealing. Since Adams' only trusted advisor was Marshall, he fired his head of State and nominated the popular Marshall, who was quickly confirmed.

Jefferson won the popular vote in the November 1800 election, but no person had a clear majority of electoral votes. The December Electoral College meeting merely enumerated that John Adams lost. (*Id.* at 146) The Federalists also lost both Houses of Congress by wide margins. (*Id.* at 147) Since the Electoral College did not give a majority to any Presidential contender, the election was pushed to the House of Representatives to choose between Aaron Burr and Thomas Jefferson.

The Federalists saw their influence quickly waning. They also saw that the only branch of government "not susceptible to shifts in the electoral wind" was the judiciary. (*Id.* at 149.) Goldstone states the Federalists awakened to the correlation between their ability to maintain any authority in the government and a strong federal court system. (*Id.*) While Adams initially decried the postponement of the Marshall's judiciary act, Goldstone illustrates how the delay serendipitously worked to his favor. Part of the Judiciary Act cut the Supreme Court from six justices to five. If the Act had passed in April 1800, a September resignation from the Court would have barred Adams a Federalist justice appointment. When in September 1800, Chief Justice Oliver Ellsworth resigned due to his health, the Court was still held to six judges, so Adams was given an opportunity. Quickly, Adams nominated John Jay to serve again. Like his previous nomination for Secretary of War, Adams did not ask Jay if he wanted to be back on the Court.

Lawyers and judges attending a Summer Lawyers' Lunch in Westerly included: kneeling: Charles A. Nardone and Frank J. Williams, Retired Chief Justice Rhode Island Supreme Court. Back row, left to right: Jon Lallo; Debra Chernick; Kelley Fracassa; Victor Orsinger; John Gentile; Fred Eckel; Samuel Fiore; Patrick McKinney; Kirsten Stackpole; Paul Kuhn; Hon. Edward Newman; Campbell Fields; Hon. Paul Cravinho; Peter Lewiss; and Matthew Lewiss. Attending the luncheon, but missing from photograph: Robert Liguori; Hon. Linda Urso; and Thomas Liguori.

(*Id.* at 150) The Senate approved Jay's nomination and began to discuss the Judiciary Act and the court reorganization. Jay, however, declined the nomination for health reasons. Adams was devastated. Without a moment's hesitation, Adams turned to Marshall and said, "I believe I must nominate you." (*Id.* at 152)

Goldstone's recital of the last rushed days of Adam's administration give the latter part of the book a fast pace. On January 20, 1801, Adams nominated John Marshall as the fourth Chief Justice of the Supreme Court.[2] On the same day, the House passed the Judiciary Act and forwarded the bill to the Senate. The Act finally passed on February 13th. Goldstone underscores Adams' last minute bills allowed Adams to nominate 216 appointments in his last month in office, of which 96 were judicial. (*Id.* at 163) On the last day of the Federalist Congress, almost one hundred of Adam's nominations were approved. The "Midnight Judges," as Jefferson branded them, necessitated Adams and Marshall to stay long past midnight to sign and deliver the commission, but a few, including William Marbury's commission as justice of the peace for the District of Columbia, remained undelivered.

Less than a year after taking office, President Thomas Jefferson repealed Adam's Judiciary Act for the District of Columbia. His antagonistic attitude to all Federalists continued in the **Marbury** case as the Republican President dared Marshall to rule against him. Goldstone points out the Federalists were just as divisive, as William Marbury brought his case before the Supreme Court rather than a district court, in the Federalist hope that the Chief Justice would rule against Jefferson.

Since neither party asked for Marshall's recusal in a case that Marshall acknowledged a blatant conflict of interest, Goldstone rationalizes that the counsel's focus was to force Marshall to either rule for Jefferson or rule against Jefferson. (*Id.* at 208) What Jefferson did not contemplate was that Marshall would "ultimately rule both for and against Jefferson." (*Id.*)

Goldstone is in awe of Marshall's astute wisdom, stepping through the political landmine of the **Marbury** case to produce a decision that the book's author considers as "profoundly and forever" affecting Americans every day. (*Id.* at 215) Goldstone calls Marshall's decision a "masterpiece of misdirection." (*Id.* at 216) As one of the seminal cases in constitutional law, it is not an overstatement to say the **Marbury** case was a de facto addition to Article III, granting the judiciary equal footing with the executive and legislative branches, and thus, setting forth today's complete set of checks and balances. (*Id.* at 224) Goldstone's final and well stated point is, with one case, John Marshall made the Court supreme. (*Id.* at 6)

ENDNOTES

1 *The Twelfth Amendment directed the Electoral College to vote for President and Vice President as one vote. It was not adopted until 1804 after two terms of a Vice President undermining the President.*

2 *The Twentieth Amendment changed the date of presidential inauguration from March to January 20th but it was not ratified until 1933.* ❖

Annual Meeting Law-Related Movie Raffle Results

During this year's Rhode Island Bar Association Annual Meeting the Continuing Legal Education (CLE) department asked Bar members to vote for their favorite law-related movies. Participants were then entered in a raffle drawing. The CLE Department thanks all the participants and notes the event sparked many spirited discussions. And the winners are:

1st prize, a free CLE* and *To Kill a Mockingbird* DVD – Stephen J. Weiner, Esq.
2nd prize, a free CLE* and *My Cousin Vinny* DVD – Rita Turcotte, Esq.
3rd prize, two free Food for Thought CLE seminars – Santino Martinelli, Esq.

Bar member law-related movie ratings:

1. *My Cousin Vinny*
2. *To Kill a Mockingbird* and *12 Angry Men* (tie)
3. *The Verdict*
4. *A Few Good Men*
5. *A Civil Action* and *Philadelphia* (tie)
6. *Erin Brockovich*
7. *Miracle on 34th Street*
8. *Anatomy of a Murder*
9. *Presumed Innocent* and *The Paper Chase* (tie)
10. *Amistad, And Justice for All* and *Witness for the Prosecution* (tie)
11. *Chicago* and *Inherit the Wind* (tie)
12. *Adam's Rib* and *A Man for All Seasons* (tie)
13. *Reversal of Fortune*

**2010 Annual Meeting and 2009 Recent Developments in the Law are excluded*

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