

Rhode Island Bar Journal

Rhode Island Bar Association Volume 69, Number 4, January/February 2021



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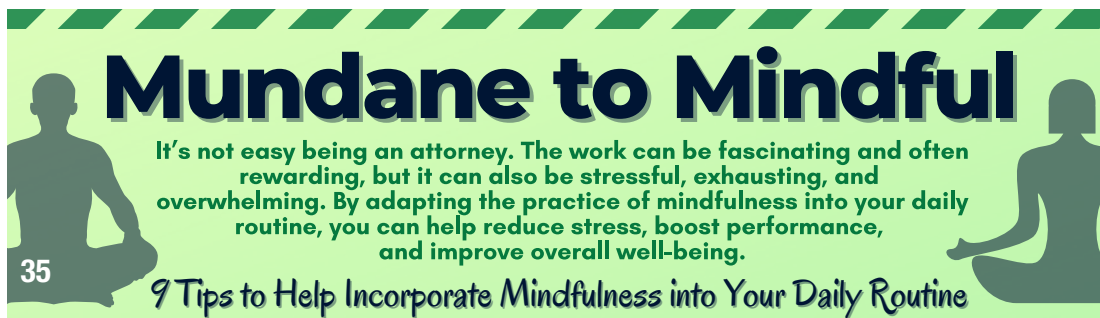
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Mundane to Mindful

It's not easy being an attorney. The work can be fascinating and often rewarding, but it can also be stressful, exhausting, and overwhelming. By adapting the practice of mindfulness into your daily routine, you can help reduce stress, boost performance, and improve overall well-being.

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Front Cover Photograph by Brian McDonald

Old Stone Barn, Colt State Park, Bristol, RI The Old Stone Barn in Colt State Park was built in the early 1900s to house Samuel P. Colt's prize Jersey cattle.



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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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Helping Ourselves



Richard P. D'Addario, Esq.
President
Rhode Island Bar Association

..sharing the weight of our work with a helpful colleague can go a long way in getting the job done and in reducing the stress of our profession.

There is no question that we all look to each other for assistance when we are faced with thorny legal or ethical issues in our practice. In addition, we certainly have a need to discuss personal matters in confidence with members of our profession, from time to time, in our careers.

Bouncing thoughts and ideas off each other has always been an enjoyable and rewarding exercise for me in my years of practice. This is especially true when I may have dealt with a unique issue or novel legal problem. Under those circumstances, I usually feel increased pressure in getting to that issue in a prompt and responsive fashion, and leaning on my fellow colleagues has always been a reliable option for me. If we do not avail ourselves of this opportunity, we should. Otherwise, I believe we are missing out on one of the benefits of being a member of our profession.

I have always felt, as I'm sure we all have, that when a client brought his or her problem to me for legal help, that problem became mine as well. With that responsibility came the resulting stress from owning the client's predicament as well as the feeling that I was then expected, and even required, to resolve or lessen that trouble. If it was a difficult or very important legal matter, the pressure and responsibility were enhanced. I am sure we have all experienced this reality in our practice.

Under these circumstances, communicating with each other is vital for all of us—sharing the weight of our work with a helpful colleague can go a long way in getting the job done and in reducing the stress of our profession.

The recent and continuing bout with the coronavirus has forced us to work remotely, most times alone, and lessened day-to-day contact with each other. This is the inevitable result of an increasingly digital world, where social and professional contact is more likely to be through a keyboard or smartphone than personal contact.

At the same time, our use of technology gives us access to social and professional support other than in-person contact, and we should embrace these additional opportunities to stay in touch.

For starters, our Bar Association operates a very active list serve where we can each bounce questions, ideas, and answers amongst ourselves. If you have not done so already, consider this as an option when you are seeking the support of

your colleagues. The list serve is available without charge, and the reality is that it allows each of us to tap into the knowledge and experience of a vast number of highly skilled practitioners in this state. It certainly is a good feeling when you get an educated answer from another attorney who has experienced the same issue or problem, and, at the same time, it is rewarding to be able to provide information and advice, on occasion, to members of the bar in areas that you are familiar with from your own past experience.

In addition, we should all keep an open office and an open ear to our fellow colleagues. I have practiced as a solo for over 35 years, and I can't tell you how many times I have relied on the input of my fellow members of the Bar and offered the same in return. My door is always open and my phone is always answered to anyone who contacts me with a legal question or wants to discuss a personal matter. I should note that I am fortunate to be a member of the Newport County Bar which is small enough to allow us to build professional bonds that support a collegial approach to our business. This approach should be followed by all of us.

A few years ago, I was asked by a client if I would meet with his daughter who had just passed the bar exam and was embarking on her legal career in this state. I gladly did so and hopefully provided some guidance to her as she had questions concerning legal, ethical, and business matters. I did so because I distinctly remember leaning on some of my more experienced colleagues in my early years of practice for advice, guidance, and encouragement. I can't tell you how many times I was educated and encouraged by the words of some of the respected members of our Bar and judges in my years of practice.

I should also note here that our Bar Association has a valuable resource for technical and business questions that you may face in your practice. We have arranged with Red Cave Law Firm Consulting to provide free advice and information concerning the management of our practice, and everyone can take advantage of this rewarding benefit. I have done so myself, and Red Cave has been very helpful.

Finally, the Lawyers Helping Lawyers program of our Association provides confidential consulta-

tion on any personal issues we may face in our practice. Take advantage of it when necessary and make it known to any of your fellow colleagues who you feel could benefit from it when faced with personal issues of any kind.

The bottom line is that the practice of law is a very difficult and very responsible profession. We routinely take on important tasks for our clients, resulting in work-related stress that can overwhelm us. It behooves all of us to bond together and be available to each other – if we do so, we can make our practice more manageable and enjoyable. ◇

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Bar's VLP-Sponsored Seminar Series Helps to Place 21 Pro Bono Cases

The Bar's Volunteer Lawyer Program (VLP), in collaboration with the Public Service Involvement Committee, sponsored a two-part Continuing Legal Education series offered free to all members of the Bar's pro bono programs who agreed to accept a case prior to attending. The series, "Unique Aspects of Military Divorces and Ancillary Issues," gave attendees the opportunity to specifically address the unique issues and challenges presented when handling a military divorce. When negotiating divorces for service members, there is often the opportunity to trade off certain benefits to create a favorable outcome for all parties, without extra cost to the

service member. Each aspect of the separating process was discussed, and special focus was given to the complexities of the issues including an outline of the recent changes to the military pension law. The VLP was able to place 21 pro bono family law cases as a result of the program. The Bar Association thanks the panelists for their time and expertise.

The program is still available to view for free to members of our pro bono programs who agree to take a case. For more information, contact Public Services Director Susan A. Fontaine at 401-421-7758 or sfontaine@ribar.com.



Kristy J. Garside, Esq.



Barbara L. Margolis, Esq.



Paul P. Pederzani III, Esq.

Not pictured: Francis J. Flanagan, Esq. and Kerry Reilley Travers, Esq.

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 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 Kathleen Bridge
 email: kbridge@ribar.com
 telephone: 401-421-5740

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Human Connections



Michael R. McElroy, Esq.
President
Rhode Island Bar Foundation

We all miss the human contact that occurs before and after our routine meetings, and I have especially missed our in-person Annual Meeting and awards luncheon.

In my last President's Message, I introduced you to the Bar Foundation's long-time treasurer, Jim Jackson. I would also like to tell you something about the other officers and directors of your Bar Foundation. We are extremely fortunate to have so many talented and experienced lawyers who have graciously volunteered to serve the Foundation as officers and/or directors. Over the years, they have devoted countless hours to your Foundation and its mission of: "providing legal services to the poor in Rhode Island; improving the delivery of legal services; promoting knowledge and awareness of the law; and improving the administration of justice."

Every time we have a Board of Directors meeting, when I look around the room (or at the Zoom screen), I am amazed at the depth and breadth of knowledge available to the Foundation as together we grapple with the matters necessary to run a successful Foundation in these difficult financial times.

By my count, there are 21 lawyers serving as officers and/or directors of the Bar Foundation. No less than 13 of us have previously served as president of the RI Bar Association. In addition, five of us have served multiple terms as president of the Foundation itself and continue to serve on the Board. We are also privileged to have on our Board a former member of the Supreme Court, a current member (soon to be two) of the Superior Court, and a current member of the Family Court.

You can rest assured that all issues before us are thoroughly vetted by the officers and directors and that the financial decisions being made, and the grants, scholarships, and fellowships being awarded, were carefully considered from every angle by this talented group.

I have also reached out to the past presidents of the Foundation and invited them to write "guest" president's messages for publication in the coming months. I am looking forward to hearing their perspectives and I hope you will enjoy what they have to say.

Although the Bar Association and Foundation offices remain closed due to the pandemic, the work of the Association and the Foundation continues unabated. In fact, the use of video confer-

encing technology, such as Zoom, has allowed us to continue our important work without interruption. Although this new technology took some getting used to, especially for us "senior" members of the bar, I have found that we are, in fact, more productive in many ways. The convenience of attending meetings from the comfort of our home or office, without the time and aggravation of fighting traffic to drive to the meetings, has resulted, by my informal view, in increased attendance and participation at our meetings. In fact, most meetings now have almost 100% attendance. The meetings also move along efficiently.

However, there is one major drawback to doing things remotely. We all miss the human contact that occurs before and after our routine meetings, and I have especially missed our in-person Annual Meeting and awards luncheon. The small, personal interactions that occur at these meetings are an invaluable opportunity to connect with each other on a human level. It is in these small gatherings where we would shake hands (will we ever be able to do that again?), make new friends, get to know our colleagues better, and renew and deepen existing friendships. And we would often discuss legal or personal problems and challenges, and joys and sorrows, unrelated to the business of the meeting.

We would draw strength and comfort from those interactions with our friends. I miss those human interactions. A lot. And it is my fervent hope that we will soon have one or more vaccines that will eventually bring us all back together, in person, to deepen our personal and professional connections. Until then, please do everything you can to keep yourself and your families (and others) safe. ◇

Expand
your **Client Base**
with the **Bar's Lawyer
Referral Service!**



Attorney **Kristy J. Garside**, a member of the Lawyer Referral Service, enthusiastically supports the program. *"The Bar Association's Lawyer Referral Service is a win-win for both attorneys and clients. Attorneys are able to expand their client base while clients are able to connect with competent attorneys in the area of law they need."*

Membership in the Rhode Island Bar Association's Lawyer Referral Service (LRS) is an excellent and inexpensive way to increase your client base and visibility within the community while expanding public access to legal representation. Optional special LRS projects include: **Ask A Lawyer** providing live, television studio lawyer panels in partnership with Channel 10; **Senior Citizen Center Clinics** throughout the year and the state; **Reduced Fee Program** offered to qualifying clients; and the **Arts Panel** for local artists' legal needs all offer unique opportunities for increasing your business while you provide an important public service to your community.

Applications and more detailed program information and qualifications may be found on our website ribar.com in the Members Only section. You may also request information by contacting Public Services Director Susan Fontaine at 401-421-7799 or email sfontaine@ribar.com.

IMMIGRATION LAW

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Thanks to Our CLE Speakers

The success of the Rhode Island Bar Association's Continuing Legal Education (CLE) programming relies on dedicated Bar members who volunteer hundreds of hours to prepare and present seminars every year. Their generous efforts and willingness to share their experience and expertise helps to make CLE programming relevant and practical for our Bar members. We recognize the professionalism and dedication of all CLE speakers and thank them for their contributions.



Below is a list of the Rhode Island Bar members who have participated in CLE seminars during the months of November and December.

- | | |
|-------------------------------------------------------------------------------|----------------------------------------------------------------|
| Hon. Keith A. Cardoza, Jr.
Rhode Island Workers' Compensation Court | Patricia A. McLaughlin, Esq.
Attorney-at-Law |
| John Dorsey, Esq.
Ferrucci Russo, P.C. | Hon. Armando O. Monaco, II
Rhode Island Family Court |
| Hon. Michael J. Feeney
Rhode Island Workers' Compensation Court | W. Mark Russo, Esq.
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Fair Chance Licensing Bill (2020)



Jenna Giguere, Esq.¹

Even if a person with a criminal background overcomes the hurdle of finding a willing employer, they may also face the hurdle of obtaining occupational licensing required for the job.

On July 22, 2020, a bill was signed into law that provides state agencies responsible for issuing occupational licenses with uniform review criteria and procedures applicable to adverse decisions on the basis of criminal background information.² The name “Fair Chance Licensing Act,” though not appearing in the bill language itself, was used by advocates and in General Assembly press to express the intent to give persons with criminal backgrounds a “fair chance” to pursue occupations requiring state licensing.

This informational summary provides a data-supported review of the policy landscape that led to efforts by advocacy groups to the eventual adoption of this bill. Building on that background, the summary reviews the pre-enactment sources of law on the review criteria and procedures applied to occupational licensing cases involving criminal background information. Finally, the summary details the key provisions of the Fair Chance Act.

Criminal justice is being looked at nationally and locally through a “justice reinvestment” lens.³ National scale data shows that states that lower recidivism (such as through efforts that increase employment potential of the risk population) could save state governments hundreds of millions of dollars annually on corrections spending and associated costs.⁴

Criminal justice experts agree that access to employment is crucial to reducing recidivism.⁵ Accordingly, there is a broad policy interest in evaluating the barriers to employment faced by persons with criminal backgrounds. The directly affected population is also larger than most readers may have thought – Did you know that 1 in 3 adults in the U.S. has a criminal record?⁶

One obvious barrier that persons with criminal backgrounds face in seeking employment is finding a willing employer. The issue is quite timely, with the leading national organization Society of Human Resource Management (SHRM) launching an initiative in 2019 called “Getting Talent Back to Work.” Statistics related to this effort show that 68% of human resource managers have already hired persons with criminal backgrounds and that 50% of coworkers surveyed at all levels had no reservations working alongside such candi-

dates.⁷ Employers cite a number of varied reasons for their increasing willingness to hire from this candidate pool, including a focus on the “best candidate” despite criminal background, benefits for internal and external company reputation from giving “second chances,” and improving the larger community. Additionally, federal tax credits and bonding programs are available for certain qualifying employment of individuals with criminal backgrounds.

Even if a person with a criminal background overcomes the hurdle of finding a willing employer, they may also face the hurdle of obtaining occupational licensing required for the job. Nationally, 25% of workers are in a position that requires a government-issued occupational license.⁸ The job sectors that are the fastest growing and feature the best long-term wage growth potential are those that will also most typically require a government-issued occupational license.⁹

Prior to the enactment of the Fair Chance Act, agencies applied the uniform procedures applicable to administrative hearings found in the Administrative Procedures Act (Chapter 42-35) to licensing cases involving criminal background information. Agencies also applied review criteria for criminal background cases (and some additional procedural provisions) found in sections of separate chapters of the General Laws, typically organized by subject area and/or agency. Some agencies also had robust regulations and/or administrative case precedent which were applied in such cases.

Additionally, there are constitutional protections that can be applied to these cases, both before enactment of the Fair Chance Act, and which now continue to add an additional layer of protection beyond the statutes. Under “procedural due process” constitutional law, a person must be afforded a measure of notice and hearing procedures based on balancing of the person’s and the government’s interests. Under “substantive due process” constitutional law, licensing requirements must have a rational relationship to the applicant’s ability to provide the regulated service or state’s police power for the protection of public health, safety, or welfare. Under the minimum scrutiny rational basis review standard under equal protection constitutional law, licensing laws that

Now Accepting 2021 Rhode Island Bar Award Nominations

Dorothy Lohmann Community Service Award
Joseph T. Houlihan Lifetime Mentor Award
Chief Justice Joseph R. Weisberger Judicial Excellence Award

All 2021 Award Nominations Are Due March 19, 2021

2021 Dorothy Lohmann Community Service Award

This award recognizes Rhode Island attorneys who donate their time and legal expertise for charitable work. It is given to those whose efforts most closely reflect those of Rhode Island attorney Dorothy Lohmann. Ms. Lohmann devoted her entire professional life working to help the poor, volunteering her services at many human service organizations and advocating for laws and policies to relieve the suffering of the poor and disenfranchised. The Lohmann Award Committee is particularly interested in candidate actions most closely reflecting those of the award's namesake as detailed in the nomination criteria and award entry form accessed on the Bar Association website at ribar.com, under the **NEWS AND BAR JOURNAL** tab on the left side of the home page. All nominations are due no later than March 19, 2021.

Please Note: Lohmann Award nominations are *only* accepted from representatives of organizations where Rhode Island attorneys have devoted a significant amount of their time and efforts on a strictly voluntary, non-paid basis. Postal mail or email nominations and/or direct questions to:

2021 Dorothy Lohmann Community Service Award Committee
Kathleen M. Bridge
Rhode Island Bar Association
41 Sharpe Drive
Cranston, RI 02920
(401) 421-5740
kbridge@ribar.com

2021 Joseph T. Houlihan Lifetime Mentor Award

This award honors individuals who, like Attorney Joseph T. Houlihan, have, during their careers, consistently demonstrated an extraordinary commitment to successful mentoring in the Rhode Island legal community. The award recognizes an attorney who serves as a role model to other lawyers in Rhode Island, who has significantly contributed to the profession and/or the community and who, with their excellent counsel, has excelled as a mentor and contributed to the ideals of ethics, civility, professionalism and legal skills. The Houlihan Award Committee is particularly interested in candidate actions most closely reflecting those of the award's namesake as detailed in the nomination criteria and award entry form accessed on the Bar Association website at ribar.com, under

the **NEWS AND BAR JOURNAL** tab on the left side of the home page. All nominations are due no later than March 19, 2021. Postal mail or email nominations and/or direct questions to:

2021 Joseph T. Houlihan Lifetime Mentor Award Committee
Kathleen M. Bridge
Rhode Island Bar Association
41 Sharpe Drive
Cranston, RI 02920
(401) 421-5740
kbridge@ribar.com

2021 Chief Justice Joseph R. Weisberger Judicial Excellence Award

This award, named in honor of its first recipient the late Chief Justice Joseph R. Weisberger, is presented to a judge of the Rhode Island State Courts or Federal District Court for exemplifying and encouraging the highest level of competence, integrity, judicial temperament, ethical conduct and professionalism. The Weisberger Award Committee is particularly interested in candidates whose actions most closely reflect those of the award's namesake as detailed in the nomination criteria and award entry form accessed on the Bar Association website at ribar.com, under the **NEWS AND BAR JOURNAL** tab on the left side of the home page. All nominations are due no later than March 19, 2021. Postal mail or email

nominations and/or direct questions to:

**2021 Chief Justice Joseph R. Weisberger
Judicial Excellence Award Committee**
Kathleen M. Bridge
Rhode Island Bar Association
41 Sharpe Drive
Cranston, RI 02920
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discriminate against persons with a criminal background must generally relate to any reasonably conceivable/legitimate state purpose.¹⁰

The Fair Chance Act, effective January 1, 2021, at its core, provides that “no person shall be disqualified”¹¹ for an occupational license “solely or in part, because of a prior conviction of a crime or crimes unless the underlying crime or crimes substantially relate to the occupation to which the license applies.”¹² The Act recognizes that these licensing decisions involve balancing two different state interests, stated as “protect[ion] [of] the property and the safety and welfare of specific individuals or the general public”¹³ and “access to employment for persons with criminal backgrounds.”¹⁴

The Act gives a list of factors for the licensing agency to use in “determining if a conviction substantially relates to the occupation for which the license is sought,”¹⁵ including “the relationship of the crime or crimes”¹⁶ to the “fitness required to perform the duties and discharge the responsibilities of the position of employment or occupation.”¹⁷ In the situation in which a person convicted of a crime which “substantially relate[s] to the occupation for which a license is sought,”¹⁸ there is a way that such person “can show competent evidence of sufficient rehabilitation and present fitness to perform the duties of the occupation for which the license is sought.”¹⁹ For example, evidence may be submitted regarding “completion of a period of at least two (2) years”²⁰... “without subsequent conviction or pending criminal charge(s);”²¹ “the age of the person at the time the crime or crimes were committed;”²² “letters of reference by persons who have been in contact with the applicant since the applicant’s release from any state or federal correctional institution;”²³ etc.

As for the uniform procedures, the Fair Chance Act requires the agency to issue notice to the affected person, citing the specific conviction at issue and stating “the rationale for deeming the conviction substantially relates to the occupation.”²⁴ The affected person has thirty (30) days to respond to the notice by submitting evidence of mitigation and rehabilitation. The agency must also provide the affected person with the ability to re-apply for a license (in a denial case) in two years (or an earlier time period provided by the agency). Any final adverse decision must include the same details substantiated in the action upon application of the review criteria. Appeals are governed by the Administrative Procedures Act, Chapter 42-35.

ENDNOTES

1 *This article is written in my individual capacity, not on behalf of my employer.*

2 <http://webserver.rilin.state.ri.us/PublicLaws/law20/law20065.htm> [The mechanism for achieving this uniformity is by expressly pre-empting inconsistent state statutes and regulations. The Act includes language that recognizes the continued application of federal laws addressing occupational licensing decisions based on criminal background information.]

3 “Justice Reinvestment” fosters “a data-driven approach to improve public safety, reduce corrections and related criminal justice spending, and reinvest savings in strategies that can decrease crime and reduce recidivism.” More information about Justice Reinvestment generally may be found here - <http://csgjusticecenter.org/jrl>. The Rhode Island specific page, with references to executive orders and bills signed in the Raimondo administration, is found here - <https://csgjusticecenter.org/jrl/ri/>.

4 <https://www.justice.gov/opa/pr/justice-and-education-departments-announce-new-research-showing-prison-education-reduces>.

5 <https://bj.a.ojp.gov/sites/g/files/xyckuh186/files/Publications/CSG-Reentry-and-Employment.pdf>.



Rhode Island Bar Foundation

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

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

Help Our Bar Foundation Help Others

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Please accept this gift in my name

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In Memory of _____

or

In Honor of _____

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The Rhode Island Bar Foundation Scholarship application deadline is March 31, 2021. More information and application forms are available on the Rhode Island Bar Association website: ribar.com in the Rhode Island Bar Foundation section.

- 6 <https://www.ncsl.org/research/labor-and-employment/barriers-to-work-individuals-with-criminal-records.aspx>.
- 7 <https://www.shrm.org/about-shrm/press-room/press-releases/pages/shrm-globeforce-survey-br-professionals-indicate-recognition-programs-have-positive-impact-on-retention-and-recruitment-.aspx>.
- 8 <https://obamawhitehouse.archives.gov/blog/2016/06/17/new-data-show-roughly-one-quarter-us-workers-hold-occupational-license>.
- 9 <https://www.nelp.org/publication/fair-chance-licensing-reform-takes-hold-states/>.
- 10 *The federal Constitution equal protection and due process clauses are found in the 14th Amendment, as “incorporated” to apply to state governments. The Rhode Island [State] Constitution counterparts to these federal constitutional provisions are found in Article I, Section 2. A more detailed overview of these constitutional standards and the relevant case citations for the US Supreme Court cases (the most recent of which dates all the way back to 1957) and federal Courts of Appeal case citations (up to date through 2018) can be found here in this law review article in the Washington University Journal of Law and Policy - https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=2061&context=law_journal_law_policy.*
- 11 *R.I. Gen. Laws § 28-5.1-14(d) (2020).*
- 12 *Id. at (e).*
- 13 *R.I. Gen. Laws § 28-5.1-14(f)(2) (2020).*
- 14 *Id. at (f)(1).*
- 15 *Id. at (f).*
- 16 *Id. at (f)(3).*
- 17 *Id.*
- 18 *Id. at (f).*
- 19 *Id. at (g).*
- 20 *Id. at (g)(1).*
- 21 *Id. at (g)(2).*
- 22 *Id. at (g)(4).*
- 23 *Id. at (g)(6).*
- 24 *Id. at (i)(1).* ◇



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Rhode Island Probate Court Listing and Judicial Communications Survey on Bar's Website

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Clinical Trials Laws and Test Subjects



William J. Connell, Esq. M.Ed.
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Under HHS regulations, basic elements of informed consent include that the proposed human subject be informed of and given an explanation of the purpose of the study, the duration of the person's involvement, and descriptions of reasonably foreseeable risks, harms, and benefits from the research.

Introduction and Overview

The COVID-19 pandemic has generated much discussion regarding vaccines. Clinical trials, also known as clinical investigations, which use live human beings as test subjects, are a critical part of the process to find a vaccine. This article will discuss the federal laws governing clinical trials, with a focus on the regulations protecting the health and safety of test subjects.

What are Clinical Trials?

Clinical trials are a form of medical research studies that often involve human beings as subjects. These studies are ways to evaluate the effectiveness of medicines, vaccines, surgeries, therapies, and other medical intervention. Clinical trials can help researchers learn if a drug or therapy is both safe and effective.¹ To say that someone is a “human subject” is to say the person can be a recipient of a test article, such as a drug, medical device, or food article (as examples), or that the person participates in the research as a control or part of a control group.² The control group does not receive the test article, but is given either a standard treatment or a placebo. Results from the control group are compared to results from the group receiving the drug or other treatment being studied, and these are compared for efficacy.³

There are other types of medical research that are less invasive than clinical trials known as observational studies; however, according to the National Institutes of Health (“NIH”), which is an agency of the U.S. Dept. of Health and Human Services, “a well-designed clinical trial is the gold standard for proving that a treatment or medical approach works...”⁴ When it comes to viruses such as the flu, a vaccine is essentially a weakened or dead infectious agent – i.e. with influenza, a small dose of the virus. If it works, it produces a weak instance of the disease in the body, which leads to the person developing immunity. For a vaccine to be effective, it is crucial that the infectious agent be identified with great precision.⁵ This is where clinical trials are essential.

Ethical issues can arise with many clinical trials

because the goal of the clinical trial is research, to gain information. While the ultimate goal may be to find a cure, a treatment, or some other response to help humanity, research may not provide or even be intended to provide the individual test subject with a particular health benefit.⁶

In the United States, much of the law at the federal level which governs clinical trials is found in the regulations of federal departments and agencies. The Department of Health and Human Services (“HHS” or “Department”) and in particular the Food and Drug Administration (“FDA”), another agency within the Department, are prominently involved in overseeing many clinical trials and have regulations giving protections to human subjects.⁷ The FDA jurisdiction includes, but is not limited to, drugs for human use, medical devices, and biological products.⁸ The Health and Human Services section is written a little more broadly to cover most research involving human subjects that is supported by a federal agency.⁹

To start an FDA clinical trial, a sponsor applies to the FDA for permission to conduct a clinical trial using human subjects. Under the FDA's policy, tests must first be performed on animals to test safety and effectiveness of a proposed intervention prior to the authorization of clinical trials using humans. If the FDA approves the study for human participation, there follow four phases of a clinical trial. A drug or therapy or intervention must show sufficient success in the test groups before moving on to the next phase. In each phase, more subjects tend to be included, so that a Phase 1 trial may have as few as twenty participants, whereas a Phase 4 trial may have several thousand participants, and potentially can go on for years.¹⁰

A Brief History

Since the middle of the twentieth century, a fundamental guiding principle with clinical trials has been that the test subject must give informed consent prior to participating in the trial. Prior to World War II, some commentators mentioned this, but informed consent was not always sought. The Nuremberg War Crimes trials following World War II brought to light the issue of mistreatment of clinical trial subjects in a dramatic way. At the Nuremberg trials, Nazi and other German doctors

House of Delegates Letters of Interest – Due March 5, 2021

Involvement in the activities of our Bar Association is a richly rewarding experience. One way to become familiar with Bar Association activities is by serving as a member of the House of Delegates. For those interested in becoming a member of the Bar's Executive Committee and an eventual Bar officer, House of Delegates' membership is a necessary first step. To learn more about Rhode Island Bar Association governance, please go to the Bar's website.

The Nominating Committee will meet soon to prepare a slate of officers and members of the 2021-2022 Rhode Island Bar Association House of Delegates. The term of office is July 1, 2021 – June 30, 2022. If you have not already done so, to be considered for appointment to the House of Delegates, please send a letter of interest no later than **March 5, 2021**.

PLEASE NOTE: Current members of the Bar's House of Delegates who wish to be considered for reappointment must also send a letter of interest by this date.

Letters of interest should include the member's length of service to the Rhode Island Bar Association (i.e., participation in Committees and positions held in those Committees; community service to the Bar Association and outside the Bar Association, and positions held outside the Bar Association). Testimonials and letters of recommendation are neither required nor encouraged. Direct and indirect informal contact by candidates or those wishing to address candidates' qualifications to members of the Nominating Committee is prohibited. Please send letters of interest to:

HOD Nominating Committee Chairperson
Rhode Island Bar Association
41 Sharpe Drive
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Or, you may send your letter of interest to Helen Desmond McDonald, Executive Director by fax: (401) 421-2703, or email: hmcDonald@ribar.com. The Nominating Committee welcomes letters of interest from candidates of diverse backgrounds in regard to race, color, religion, country of ancestral origin, handicap, age, sex, or sexual orientation.

There will be an open forum at the Bar Headquarters at a date in March, to be determined, at which candidates for the House of Delegates and for officer position(s) may, but are not required to, appear before the Nominating Committee and further explain their candidacy. Candidates for officer positions and candidates for the House at large will be given up to ten minutes each to speak (or as determined by the Chair). Candidates who elect to address the Nominating Committee are encouraged to present their vision of how they would advance the mission of the Bar through their service in the office.

Any member planning to make a presentation at the Open Forum must inform Executive Director Helen McDonald, prior to the Forum via email: hmcDonald@ribar.com or telephone: (401) 421-5740.

and scientists were accused of conducting gruesome experiments on persons being held in concentration camps. One tactic adopted by some defendants was to identify medical trials that had been done by other countries, including the United States, which purportedly mistreated some subjects. In 1947, the Nuremberg International Medical Tribunal (the "Tribunal") issued a decision finding many of the Nuremberg defendants guilty of war crimes and crimes against humanity for their experiments. In their decision, the Tribunal included ten points or rules for conducting experiments on human beings, which became known as the Nuremberg Code.¹¹ The Code addressed experimentation on human subjects. The opening sentence in the Code is "The voluntary consent of the human subject is essential." According to the Code, voluntary consent means the subject person gives consent without any form of coercion, and only after being appraised of all aspects of the experiment.¹² This idea of voluntary consent would appear again in later laws.

In 1947, the World Medical Association adopted the Declaration of Geneva, which has been described as an updated and modernized version of the Hippocratic Oath.¹³ On December 10, 1948, the United Nations issued the Universal Declaration of Human Rights, a document signed by forty-eight countries or states, including the United States, which addressed fundamental rights as a human being.¹⁴ In 1964, the World Medical Association adopted the Declaration of Helsinki, which contained specific recommendations to doctors in regard to humans in clinical trials. This Declaration emphasized the need for free consent of the subject and the duty to inform the subject of the nature, purpose, and risk of the clinical research.¹⁵

While the United States generally supported the Declarations and Codes set forth above, effective regulations in the U.S. did not really emerge until the 1970s. Congress passed the National Research Act in 1974 (the "Research Act").¹⁶ The Research Act established the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. In 1979, this Commission released The Belmont Report, which discussed basic principles for the treatment of subjects in clinical research. The Report also identified ethical principles for research involving human subjects.¹⁷ In 1981, both the U.S. Dept. of Health and Human Services and the Food and Drug Administration revised their human subject regulations and incorporated many of the recommendations of the Belmont Report.¹⁸

Specific Rules and Regulations Governing and Protecting Human Subjects

Many federal departments and agencies which regulate clinical trials with human subjects have adopted what is known as "the Common Rule."¹⁹ Key provisions of the Common Rule include: that institutions doing research under a Federal department or agency comply with the regulations;²⁰ that all human subjects give informed consent, and this consent be obtained and documented;²¹ and that institutional review boards exist to provide an ongoing review of a clinical trial and to promote safety for the clinical trial subjects.²²

Perhaps the most extensive regulations governing the use of human subjects is found in the regulations of the Department of Health and Human Services. The current version of the Department's regulations involving human subjects in clinical trials are found at 45 C.F.R. Part 46, entitled "Protection of Human Subjects."²³ The equivalent regulations for the FDA

are found in 21 C.F.R. 56.²⁴ The opening of Part 46, Subpart A – “Basic Health and Human Services Policy for the Protection of Human Research Subjects,” seeks to give the policy broad application, and states in relevant part that, with some exceptions, “this policy applies to all research involving human subjects conducted, supported, or otherwise subject to regulation by any Federal department or agency...”²⁵

Researchers may question if their research work is subject to and must be registered with the Department prior to or shortly after commencing a clinical trial. As noted, a few types of research are excluded, such as research involving many types of educational tests, but most biomedical clinical trials would seem to all fall squarely within the Part 46 policy, so long as there is the requisite nexus to the government.²⁶ The Department has

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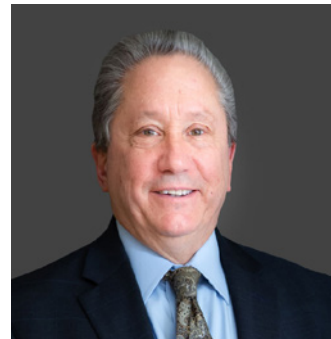
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produced a number of charts to help researchers determine if their proposed research falls within the ambit of the policy which can be found at <https://www.hhs.gov/ohrp/regulations-and-policy/decision-charts-2018/index.html>.

Although there is considerable regulatory language on the elements of informed consent, it is not an easy topic to quantify. Under HHS regulations, basic elements of informed consent include that the proposed human subject be informed of and given an explanation of the purpose of the study, the duration of the person's involvement, and descriptions of reasonably foreseeable risks, harms, and benefits from the research.²⁷

One of the key protections included for all clinical trials is the use of Institutional Review Boards (IRB or "Boards"). The regulations set forth how the Boards should operate, and have provisions including but not limited to the requirements for membership of the boards, the functions and operations of the Boards, the review of research by the Boards, establish criteria for Board approval of research, and giving the Boards authority to stop research that is not following their requirements or may be creating unexpected harm to clinical trial participants.²⁸ The protections of IRB apply to all clinical trials. In essence, the Boards must act as a buffer between the subjects and the parties conducting the test, trial, or experiment, and ensure a safe process where each subject gives informed consent.

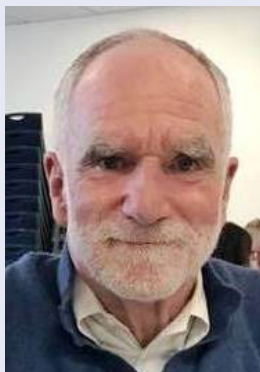
There are critics of the current policy who argue that Institutional Review Boards do not offer the protections they should, and may be undertrained, overworked, and subject to conflicts of interest between the institutions and the pharmaceutical companies.²⁹ Nevertheless, the regulations speak to requirements the Boards must consider and assess while they provide oversight to a clinical trial.³⁰

Additional Protections for Vulnerable Populations

Federal regulations recognize and provide additional protections for certain groups identified as vulnerable populations. These include pregnant women, human fetuses, and neonates involved in research, codified at 46 C.F.R. Subpart B, and children, codified at 46 C.F.R. Subpart D.

Some of the most unique protections are given to prisoners being used in clinical trials, codified at 45 C.F.R. Part 46 Subpart C, entitled "Subpart C-Additional Protections Pertaining to Biomedical and Behavioral Research Involving Prisoners as Subjects."³¹ Subpart C applies "to all biomedical and behavioral research conducted or supported by the Department of Health and Human Services involving prisoners as subjects."³² The stated purpose of Subpart C is "to provide additional safeguards for the protection of prisoners."³³ Prisoners are considered a vulnerable population when it comes to clinical trials on the theory that due to their incarceration and other factors, prisoners are potentially more vulnerable to taking unacceptable risks in trials where there are inadequate protections for their health and safety.³⁴ As an example of the different protections, there are additional requirements in Subpart C that a majority of the Board members for studies involving prisoners have no affiliation with the prison, other than being on the board or being an actual prisoner at the facility, and that at least one member of the Board be a prisoner or prisoner representative.³⁵

Arguably, the greatest protections to prisoners are contained in 45 C.F.R. § 46.305. This section contains the most specific points that address the unique pressures that may be placed



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upon prisoners when deciding whether to participate in a clinical trial. The regulation provides that any advantages or benefits accruing to the prisoner by participating in a clinical trial, in comparison to the prisoner's life in the prison, "are not of such a magnitude that his or her ability to weigh the risks of the research against the value of such advantages in the limited choice environment of the prison is impaired."³⁶ The risk of participating in the clinical trial would have to be similar to the risk that would be undertaken by volunteers who are not prisoners.³⁷ For instance, using the current pandemic as a hypothetical example, imagine if researchers from the state offered prisoners the opportunity to be pardoned for any and all convictions if they allowed themselves to be deliberately exposed to the COVID-19, and then studied to determine how the virus impacted their health. Would the possibility of a pardon be of such a magnitude as to remove the prisoners' ability to give genuine, informed consent? Would the researcher be taking too much advantage of the prisoners' incarceration in order to gain clinical trial subjects? It is a difficult question.³⁸

A final protection afforded to prisoners is a section that limits the permitted research involving prisoners. What is permitted includes research to study the causes and effects of incarceration, of criminal behavior, studies of prisons as institutional structures, and research on conditions affecting prisoners as a class. While the categories are broad, they do provide another layer of protection for prisoners, especially regarding biomedical or behavioral research.³⁹

It should be added that states may also have laws that govern clinical trials undertaken in their state which do not conflict with the federal laws. Finally, it should also be noted that some commentators argue that even the current protections are insufficient and can be circumvented.⁴⁰

Final Thoughts

While there are some references in the United States Code to clinical trials, most of the protections for human subjects are found in department and agency regulations.⁴¹ Clinical trials which use human beings as subjects play an important part in developing preventative measures, treatments, and cures for sickness and disease. It is essential that human subjects be protected from unreasonable harm, and that these subjects give informed consent prior to participating in clinical trials. These protections are primarily provided in the Common Rule, which is incorporated into the regulations of many federal departments and agencies.

ENDNOTES

1 *National Institute on Aging, What are Clinical Trials and Studies?* <https://www.nia.nih.gov/health/what-are-clinical-trials-and-studies#four>, accessed 10/26/2020.

2 *See, e.g., 21 C.F.R. §§ 50.3(g) and (j) (2013) (Food and Drug Administration definitions) (2013).*

3 *U.S. Food and Drug Administration, Step 3: Clinical Research*, <https://www.fda.gov/patients/drug-development-process/step-3-clinical-research> accessed 10/30/2020.

4 *National Institutes of Health, Why Do Researchers Do Different Kinds of Clinical Studies?* *Infographic*, <https://www.nih.gov/sites/default/files/about-nih/public-trust/clinical-trials-infographic.pdf>, accessed 10/26/2020.

5 *Lynette Tezzoni, Influenza 1918: The Worst Epidemic in American History*, 108 (1999).

6 *See, e.g., Barbara E. McDermott, Coercion in Research: Are Prisoners the only Vulnerable Population?*, 41 *Journal of the American Academy of Psychiatry and the Law Online* 8, 9 (March 2013), <http://jaapl.org/content/>

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jaapl/41/1/8-full.pdf, accessed 10/2/2020 (discussing clinical trials which use vulnerable populations, including but not limited to prisoners, as test subjects).

7 U.S. Dept. of Health and Human Services, HHS Organizational Chart, <https://www.hhs.gov/about/agencies/orgchart/index.html>, accessed 10/27/2020)

8 21 C.F.R. § 56.101 (2013)(Discussing the scope of standards for institutional review boards (IRB) that oversee clinical trials regulated by the FDA).

9 45 C.F.R. § 46.101 (2018).

10 U.S. Food and Drug Administration, *supra* note 3.

11 For more background on the Nuremberg Trials, visit the official Nuremberg Historical Museum website at <http://museen.nuernberg.de/memorium-nuernberger-prozessel>, accessed 10/3/2020. Initially you may see the text in German, but it can be translated into English and several other languages.

12 National Institutes of History, *The Nuremberg Code*, <https://history.nih>.

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13 World Medical Association, Declaration of Geneva, <https://www.wma.net/what-we-do/medical-ethics/declaration-of-geneva/>, accessed 10/6/2020. The original version has been amended several times, and those amendments as well as the current version can be found on the W.M.A. website.

14 United Nations, The Universal Declaration of Human Rights, <https://www.un.org/en/universal-declaration-human-rights/>, accessed 11/10/2020.

15 World Medical Association, Declaration of Helsinki, <https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/>, accessed 10/6/2020. The original has also been amended several times, and those amendments as well as the current version can be found on the W.M.A. website.

16 National Research Service Award Act of 1974, Pub. L. 93-348, 88 Stat. 342 (1974).

17 U.S. Department of Health and Human Services, Office for Human Research Protection: The Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects. <https://www.hhs.gov/ohrp/regulations-and-policy/belmont-report/index.html>, accessed 9/29/2020.

18 U.S. Dept. of Health & Human Services, Office for Human Research Protections, 45 C.F.R. 46 FAQs, What is the historical basis for the current human research regulations, 45 CFR part 46?, <https://www.hhs.gov/ohrp/regulations-and-policy/guidance/faq/45-cfr-46/index.html>, accessed 9/28/2020.

19 U.S. Dept. of Health & Human Services, Office for Human Research Protections, 45 C.F.R. 46 FAQs, How does 45 C.F.R. part 46 relate to the Common Rule and human subjects regulations used by non-HHS agencies?, <https://www.hhs.gov/ohrp/regulations-and-policy/guidance/faq/45-cfr-46/index.html>, accessed 9/28/2020; See also, U.S. Dept. of Health & Human Services, Office for Human Research Protections, Federal Policy for the Protection of Human Subjects, <https://www.hhs.gov/ohrp/regulations-and-policy/regulations/common-rule/index.html>, accessed 10/6/2020.

20 See, e.g., 45 C.F.R. § 46.103 (2018).

21 See, e.g., 45 C.F.R. §§ 46.116-117 (2018).

22 See, e.g., 45 C.F.R. §§ 46.107-108 (2018).

23 45 C.F.R. Part 46 - Protection of Human Subjects.

24 21 C.F.R. Part 56 - Institutional Review Boards

25 45 C.F.R. § 46.101(a) (2018).

26 45 C.F.R. § 46.104 (2018).

27 See, e.g., 45 C.F.R. § 46.116(b) (2018).

28 See 45 C.F.R. §§ 46.107 – 113 (2018).

29 See generally *Laura Ippelman*, The Captive Lab Rat: Human Medical Experimentation in the Carceral State, 61 B. C. L. Rev. 1 (January 2020), on Digital Commons at <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3813&context=bclr>, accessed 10/2/2020, at 61-62 (the author critically discusses many clinical trials which used prisoners as test subjects).

30 See, e.g., 45 C.F.R. § 46.109 (2018).

31 45 C.F.R. §§ 46.301-306 (1978 except § 304 which is 1981).

32 45 C.F.R. § 46.301(a) (1978).

33 45 C.F.R. § 46.302 (1978).

34 National Institutes of Health, Policy and Regulations, Vulnerable and Other Populations Requiring Additional Protections, <https://grants.nih.gov/policy/humansubjects/policies-and-regulations/vulnerable-populations.htm>, accessed 9/30/2020. The NIH includes pregnant women, human fetuses, neonates, children, and prisoners as vulnerable and other populations requiring additional protections.

35 45 C.F.R. § 46.304 (1981).

36 45 C.F.R. § 46.305(a)(2) (1978).

37 45 C.F.R. § 46.305(a)(3) (1978).

38 See generally *Richard E. Shope*, "The R.E. Dyer Lecture. Influenza: History, Epidemiology, and Speculation," Public Health Reports, 73 No. 2, 165, 170-171 (February 1958). Shope discusses research studies similar to the hypothetical, which occurred in 1918 with naval military prisoners in Boston and San Francisco during the 1918 flu pandemic.

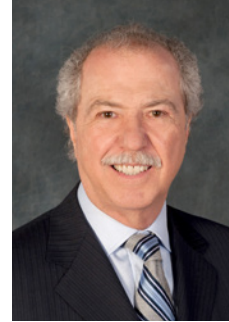
39 45 C.F.R. § 46.306 (1978).

40 See generally *McDermott*, *supra* note 6; *Ippelman*, *supra* note 29.

41 See, e.g., 42 U.S.C. § 289(a); 42 U.S.C. § 300v-(b), which governs the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research. ◇

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Government Lawyers Committee Sponsors Administrative Hearings CLE

The Government Lawyers Committee sponsored a virtual CLE presentation in November featuring State Administrator of Adjudication (DOA) Catherine Warren, Esq., who presented **Administrative Hearings – Foundational Concepts and Virtual Practice**. Attendees gained knowledge of foundational concepts such as the Administrative Procedures Act, due process, evidence, and procedure as applied to administrative hearings and practice. Building on that foundation, attendees discussed how these concepts translate to the virtual hearing context. A small segment was included to consider access to administrative hearings by persons with disabilities and non-English speakers. The program is available for purchase in the Bar's On Demand CLE catalog on ribar.com.



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Rhode Island Women Lawyers: Past, Present, & Future

This series was inspired by Roger Williams University School of Law's annual *Women in Robes* event, and was created in alliance with their exciting new project *The First Women*, which recognizes and honors the first women of the Rhode Island bar.



Lynette J. Labinger, Esq.

As she was completing her junior year at Mount Holyoke College in Massachusetts in 1970, Attorney Lynette Labinger considered her career options. She had assumed that she would most likely pursue teaching, not because she had any passion for education, but because it was a typical career path for women attending college at that time. While studying Russian history of the 1800s, her interest was re-focused to American current events and civil rights as she participated in Vietnam war protests, teach-ins, and the news coverage of the shooting of unarmed student protesters at Kent State University overtook her college studies. At the same time, she was also dating a student at Harvard. A few of his friends said that they didn't know what they wanted to do after they graduated, so they planned to go to law school. She thought to herself, "if it's good enough for them, it's good enough for me."

As a student at NYU Law School, she had the opportunity to work with the New York Legal Aid Society, an organization that provides public defender services for indigent defendants in New York. While working with the organization, whenever she could, she would go down to the criminal courts and observe criminal arraignments. She was also in a program called Root-Tilden (now called Root-Tilden-Kern) which is a merit scholarship program for individuals selected as being committed to their involvement in public

service. As part of that program, she spent time debating the meaning of public service. She initially anticipated that she would be a public defender, but first applied to be a clerk with several federal judges, focusing on judges who were well-known for their decisions in the civil rights arena.

Thus, in 1974, Attorney Labinger started her clerkship in the United States District Court for the District of Rhode Island for the Honorable Raymond J. Pettine. She reflects that her time working as a law clerk for a federal judge "spoils you for everything else." In working for Judge Pettine, who used to be a prosecutor, she was often tasked with researching and working on civil litigation issues. She observed that there was a lot of work that could be done in the civil rights arena.

After her clerkship, she became an associate attorney at Abedon, Michaelson, Stanzler, Biener, Skolnik & Lipsey. She worked closely with Milton Stanzler, recognized for his legal work in securing labor rights and civil liberties. While there, she worked on cases of employment discrimination, election rights, and First Amendment cases including a number of cases sponsored by the American Civil Liberties Union of Rhode Island ("ACLU").



Lynette Labinger with family and friends celebrating the dedication of the Harry and Dorothy Labinger Fitness Center at New England Institute of Technology in April 2018



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Several years later, Attorney Labinger started a legal partnership with attorney John Roney. She and John worked together for over 35 years before John decided to wind down his practice. After they closed the firm, Attorney Labinger limited her practice to cases sponsored by the ACLU, serving her passion for using the law to promote civil liberties and preserve constitutional rights while at the same time saving her from having to deal with the administrative headaches of running a firm.

Attorney Labinger attributes her ability to have achieved and accomplished so much in her career in large part to the support of her husband, Ross Eadie, whom she married in 1972. While Attorney Labinger was the primary breadwinner, Ross provided the primary childcare for their daughter as he is an artist and was able to work from home. He also provided administrative support to Attorney Labinger's law firm as the accounts manager for more than twenty years.

When asked whether or not she felt that discrimination held her back or if her career was made harder because she is a woman, she commented that she was likely oblivious to that kind of discrimination if it did happen to her. She acknowledges that she probably did not get



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certain clients because she was a woman, and not a man, but she never let that stop her. She felt that unless and until she saw a discriminatory behavior or attitude that affected an outcome, then it was the *other* person's problem, and not her problem. Attorney Labinger also felt that she benefitted from attending a law school that had approximately 30% women when she attended. "When there's a significant enough number, you're not looked to as the 'spokesperson' for all women."

She still did recall some situations in the early years of her practice, such as a judge welcoming her, co-counsel, and opposing counsel by saying "hello gentlemen." Clerks at the court would also assume that she wasn't a lawyer when she went to the desk for help for her client. However, she never felt alienated. Attorney Labinger is not exactly certain why (she confesses that it might be due to some underlying self-confidence) but she always felt that she was supposed to be in any room she was in, and never let it get to her.

As an employment rights attorney, she is particularly well-positioned to discuss issues in our own industry. She has periodically consulted with other women attorneys in larger law firms in Rhode Island concerning pay or other treatment issues. She observed that one way to address perceptions or realities of pay inequity would be to promote or require transparency in compensation for employers, including law firms, in Rhode Island. Requiring companies to disclose compensation data (as many public corporations and governments provide) would (1) allow each employee to know, without any "awkward efforts" what others are being paid and (2) incentivize the company to proactively analyze its own data to ensure equity and legal compliance.

In reflecting on her career and life, she noted that it is always a struggle to balance "work" and "life" and there is not enough value placed on the "life" side of the balance. If she could provide one piece of advice, it would be to "do what you love." She understands that not everyone is blessed to be able to do that. "Many come out of law school saddled with huge debt that they have to deal with...but if you're able to find something fulfilling and make a living at it—even if it doesn't make you as much money, don't beat yourself up about it." She referred to the sentiment attributed to Senator Paul Tsongas, who is reported to have said no one on his death bed says, "I wish I had spent more time at the office."

If you are interested in sharing your story or know someone who is, please contact Cassandra L. Feeney at cfeeney@adlercohen.com and/or Etie-Lee Schaub at etieschaub@gmail.com.

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Beyond Just Surviving: Aging Lawyers and Fitness to Practice



Craig Pinkus, Esq.¹
Bose McKinney & Evans LLP
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*Edited to include Rhode Island
specific annotations by:*



Casey Lee, Esq.
Lawyers Helping Lawyers
Committee

“...unlike substance use disorder, anxiety, and depression usually approached from the perspective of recovery and prevention, age related cognitive decline is usually discussed with an air of incurable inevitability.”

This is for lawyers who hope to practice law at their best for as long as they want. If you strive to do that—not just dodge disciplinary commissions or malpractice lawsuits—you must include physical fitness as you age. Beyond old familiar reasons to get in shape, medical science tells us fitness keeps old brains working and being unfit does the opposite. Today there is another bonus for older persons: fitness reduces vulnerability to COVID-19.²

Rules v. Excellence

We are not required by law to do our best. Failing to pursue excellence at 25 or 75 is not professional misconduct.³ As for physical and mental conditions, the Rules of Professional Conduct deal only with serious impairment.^{4,5} They focus on compliance with express obligations and prohibitions [Rules Approach].

Failing to pursue excellence is not malpractice. Liability comes from “failing to exercise the ordinary skill and knowledge expected of lawyers.”^{6,7} Over a century ago, Indiana lawyers were told they are not “bound to bring to the practice of his [or her] profession the highest skill and learning.”^{8,9} They are merely invited as a matter of “personal conscience” to “strive to attain the highest level of skill.”¹⁰

The complexity of our occupation likely insulates it against a simple Rules Approach commandment to do your best. Yet as medical science accumulates research on aging minds doing complex tasks, it is not unthinkable that some-day mental fitness metrics may enable a Rules Approach. Meanwhile, only sole practitioners today are encouraged to have succession and client notification plans.¹¹

If your conscience demands high standards and devotion to clients, being fit as you age is truly the only option. Indiana Chief Justice Loretta Rush believes in the importance of mind-body fitness at any age. She explained, “For any of us to be our most effective, we have to take time for ourselves and families. That means dedicating part of the day for exercise, meditation, prayer, thoughtfulness—something to keep each of us on a path of wellbeing and recommitment to the daily tasks at hand.” [Excellence Approach].

Lawyer Assistance Programs Look at the Person Practicing Law

The inadequacy of treatment of serious mental impairments under the Rules Approach gave rise to the protective and compassionate work of lawyer assistance programs. The needs of lawyers with alcohol impairment led to the earliest program in 1973 in California.¹² The stressful profession, sheer numbers of the impaired, and harm to the public led to similar programs including Indiana’s highly regarded Judges and Lawyers Assistance Program and Rhode Island’s Lawyers Helping Lawyers Committee.

Reflecting national studies, lawyers are seeking help with substances used disorders, depression, anxiety, and stress. A steady stream of contacts requires creative, delicate, and respectful resolutions, and more resources are needed. But JLAP’s might also be the logical place to offer a trusted clearinghouse of information and resources on aging, cognitive decline, and counteracting them with fitness. The Rhode Island Bar Association provides strictly confidential help to its members and their families through the Lawyers Helping Lawyers Committee and Coastline EAP, a private organization that has been helping Rhode Island lawyers for more than 30 years.¹³

Science, Fitness, and Aging Brains

We speak of “mind” and “body” as different things. Convenient to discuss a broad range of human events, this convention obscures the fact that thinking is performed by cells and chemical reactions in our bodies. Medical science does not know everything about the intricacy of the central nervous system doing the thinking, but it all occurs in a body and much is known that should not be ignored.

Reported research points to fitness as critical for cognitive health. One hour of exercise three times a week is associated with substantial improvements in information processing speed, auditory and visual attention, planning, and working memory. This may in part be due to exercise causing significant increases in the size of critical areas of the brain.¹⁴ Brains on exercise become more responsive and develop new wiring.¹⁵

Exercise influences blood vessel formation

Proposed Title Standard 9.4 Open for Bar Member Review and Comment

The Rhode Island Bar Association's Real Estate Title Standards and Practices Committee, chaired by John A. Comery, Esq., at their meeting on November 19, 2020, voted unanimously to submit the following Proposed Title Standard 9.4 to the Rhode Island Bar Association's Executive Committee for its consideration. Bar members are invited to comment on these proposed changes, no later than February 1, 2021, by contacting Rhode Island Bar Association Executive Director Helen Desmond McDonald by postal mail: 41 Sharpe Drive, Cranston, RI 02920 or email: hmcDonald@ribar.com.

Explanation

SECTION IX CONTINUED

STANDARD 9.4

NON-RELIANCE UPON CERTIFICATE OF DESCENT

While it may include useful information, a certificate of descent recorded pursuant to R.I.G.L. § 33-3-14 does not constitute a conclusive determination of title to a decedent's real estate, and may not be relied upon by an examiner.

The examiner must review the decedent's probate court filings in order to reach a conclusion regarding to whom the decedent's real estate descended or was devised.

which increases blood flow to vital brain areas.¹⁶ Neuroimaging shows that aerobic exercise reduces age-related loss of brain tissue and “enhances cognitive strategies.”¹⁷

Standard medical disclaimers apply. Get medical advice before starting a mid or late-life exercise program. I cannot give you medical clearance.

With that caution, going from zero to some regular exercise is almost always good for practicing law at your best. But be mindful that exercise benefits are specific to what you do. Most studies cited here measure aerobic exercise effects, and it is essential. Many experts add weight training and stretching. An example of the specificity of training is research finding more central nervous system benefit from high load resistance [heavy weights] training than using lighter weight repetitions totaling the same cumulative weight.¹⁸

The Need and Doing More Than Just Recognizing It

Most Americans engage in no physical activity as they age. There was little improvement over the last decade. In 2010, about 11 percent of people 65¹⁹ and over participated in leisure-time aerobic and muscle-strengthening activities meeting the modest 2008 federal physical activity guidelines.²⁰ Four years of cheerleading and threats by government, health organizations, insurance companies, wellness programs, charity events, physicians, physical therapists, and sports figures increased that a single point. Another four years and the percentage improved less than 1%.²²

Bar associations recognized the dangers of cognitive decline in aging lawyers during this period. But unlike substance use disorder, anxiety, and depression usually approached from the perspective of recovery and prevention, age related cognitive decline is usually discussed with an air of incurable inevitability.²³

Influential voices in the last decade recognized the research,²⁴ but their recommendations for older lawyers speak mostly to those around them. The National Taskforce on Lawyer Well-Being calls for education to detect cognitive decline, succession plan development, and transition programs to respectfully support lawyers into retirement.²⁵ They emphasize giving much control to an impaired lawyer in a transition from practice.²⁶ But that lawyer's friends, family, colleagues, and professional authorities are the real audience.

Some lawyers who follow an Excellence Approach but lack a fitness program may only need to learn what medical science has found. Yet the power of decades of daily routine may make the habit of physical inactivity almost as difficult to overcome as smoking or other substance dependencies.

Lawyers are exceptional people. Yet if lawyers 65 and older met the 2008 guidelines at twice the rate of all other Americans, that still means 75% do not. If lawyers keep that pace, 100% of us will not meet the guidelines until the 2060s.

Law firms, bar associations, and courts should support kicking the habit of inactivity. To all the messages about reducing stress by participating in physical exercise, it may be time to add a warning label: lack of exercise causes cognitive decline in aging lawyers.

Now What?

We cannot start late-life exercise with the same abilities and conditions. Medical clearance and restrictions may be complicated for some. But when I have been asked over the last 45

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years, I offer my own evidence that nearly everyone can become more fit. Medical science is more persuasive. If aerobics, strengthening, and stretching can help people with an incurable condition like ALS, reconsider the excuse of your knees hurting ten years ago when you last ran.²⁷

A multitude of readable books and articles waits for older people starting from scratch. Some give overviews of the science and recommend doses of weekly effort.²⁸ Running can be ideal for older lawyers, and it's suited to the era of COVID-19 because it can be done from home with little specialized gear and automatic social distancing. And there is gentler, more enjoyable running than 100-meter sprints back in high school.²⁹ Pandemic resources offer many more ideas.³⁰

In the last year of her life, an 87-year-old cancer survivor wrote the most US Supreme Court opinions of the Term by the end of February 2020.³¹ Justice Ginsburg met the demands of life and the Court by religiously following an exercise program including strength training.³² She continued in the pandemic, and the Court approved her request for unused space to exercise, although the DC stay-at-home order prevented her trainer from helping.³³ Justice Ginsburg was still working, and exercising, until shortly before her death from the last round of cancer complications.³⁴

Maybe you have no interest in working that hard that long. Yet her example of productivity and cognitive fitness makes most of the usual excuses look like what they are. Please take this seriously and thank you for reading. I would love to hear from you.

ENDNOTES

1 *Craig E. Pinkus is an attorney with Bose McKinney & Evans LLP and practices law in Indiana. The original article cited Indiana decisions and rules. The article is reprinted with permission and has been edited to include references to Rhode Island by Casey J. Lee, a member of the Bar Association's Lawyers Helping Lawyers Committee. Mr. Pinkus' email address is: CPinkus@boselaw.com. Mr. Lee's address is casey@cjlfirm.com.*

2 *Centers for Disease Control and Prevention, "Coronavirus Disease 2019 (COVID-19), Older Adults...Things you can do to support yourself;" ("Take care of your body...exercise regularly..."), <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications/older-adults.html>.*

3 *Ind. Rules Prof. Conduct (July 3, 2019), Rule 8.4. [R.I. Sup. Ct. R. 8.4 (October 16, 2020).]*

4 *Id.*, Rule 1.6(c) ("In the event of a lawyer's physical or mental disability or the appointment of a guardian..."; Rule 1.16. (a)(2) ("the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client...") [*Id.*, Rule 1.16(a)(2) ("the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client..."). Rhode Island's Rule 1.6 does not contain language concerning a lawyer's physical or mental incapacity or appointment of a guardian."

5 *The Rhode Island Disciplinary Procedures for Attorneys further address consequences related to an attorney's physical or mental incapacity. R.I. Sup. Ct. R. 4(d)(3) (allowing Disciplinary Board to investigate "information that an attorney is incapacitated from continuing the practice of law by reason of mental infirmity or illness or because of addiction to drugs or intoxicants..."); Rule 5(b)(5) (allowing Disciplinary Counsel to intervene when an attorney has been deemed "incompetent or committed on grounds of incompetency or disability..." or where misconduct); Rule 5(b)(8) (allowing Disciplinary Counsel to require medical evaluation where alleged attorney misconduct may be "related to substance abuse or mental health problems..."); Rule 17 (generally discussing procedures where attorney is physically or mentally incapacitated); Rule 18 (allowing appointment of substitute counsel "Whenever an attorney has been transferred to inactive status because of incapacity or disability...").*

6 *Roumbos v. Samuel G. Vazanellis & Thiros and Stracci, PC, 95 N.E.3d 63, 65 (Ind., 2018).*

7 *Likewise, "[i]t is well settled under Rhode Island law that a legal malpractice plaintiff must prove the 'want of ordinary care and skill' by the*

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defendant." *Focus Inv. Associates, Inc. v. American Title Ins. Co.*, 992 F.2d 1231, 1239 (1st Cir.1993) (citing *Holmes v. Peck*, 1 R.I. 242, 245 (R.I. 1849).
8 *Hillegass v. Bender*, 78 Ind. 225, 227, 1881 WL 7287, at *1 (Ind. 1881).
9 Similarly, in Rhode Island, "[t]he law exacts...from all persons exercising any art or mystery, ordinary skill and care. It does not require the highest degree of these qualities...nor is it satisfied with the lowest degree...but it takes the medium as the rule, that is, the average of skill and the average of care." *Fletcher v. Seekell*, 1 R.I. 267, 269-70 (R.I. 1849).

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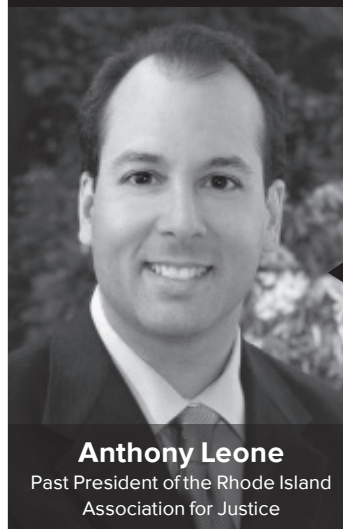
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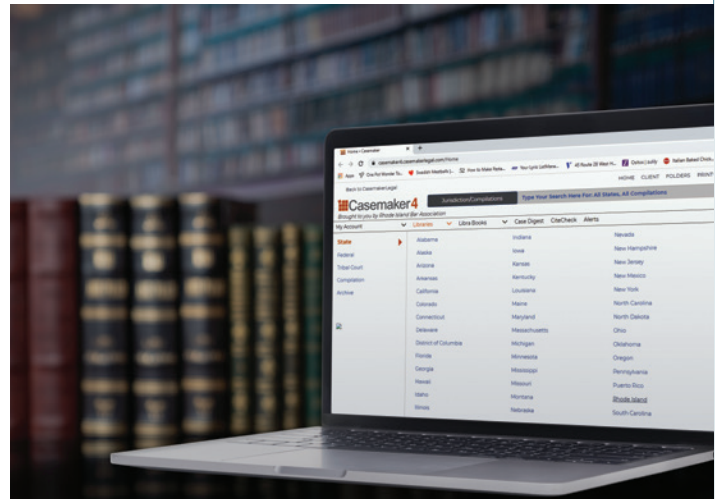
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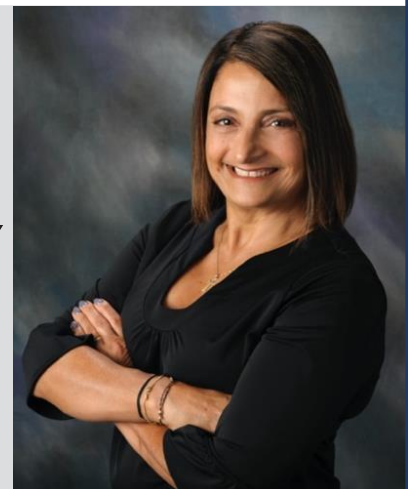
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In Memoriam

G. John Gazerro Jr., Esq.

G. John "Jack" Gazerro, Jr., 80, of Coventry, died November 30, 2020. Jack was the husband of Carolyn M. (DiPippo) Gazerro. Born in West Warwick, he was the son of the late Guido J. and Lucy (Petrarca) Gazerro. He was a practicing attorney for fifty-five years, most of them as a founding member and partner with the law firm of Gazerro & Richardson. Jack graduated from Providence College in 1962 and Boston University School of Law in 1965. He was appointed as town solicitor in both West Warwick and Coventry and was a former trustee of Centreville Bank. He served on the Executive Board and as president emeritus at The Narragansett Gun Club. Besides his spouse he leaves a son, John F. Gazerro and his wife Courtney A. Robinson of East Greenwich; a daughter, Kerra Lynn Gazerro, Ph.D. of Attleboro, MA; and a granddaughter. He was the brother of the late Antonette N. Della Grotta.

John W. Kershaw, Esq.

John W. Kershaw, 82, died November 22, 2020 in Jupiter, Florida. He was the husband of Georgette (Langevin) and father of Michele Ann Kershaw. Born in Washington, D.C., he moved to Rhode Island with his family as a child and lived most of his life in Barrington. John was a civil trial lawyer practicing in Providence for 45 years and was a Fellow of the American College of Trial Lawyers. He was a graduate of Barrington High School, the College of the Holy Cross, and Boston College Law School. Between college and law school, John was an officer in the US Navy for four years of active service, and he continued to serve in the Navy Reserve for many years thereafter. John was an active alumnus and past president of the Holy Cross General Alumni Association. He received the In Hoc Signo award from Holy Cross in 1986 in recognition of his service and contributions to the college. John also leaves his brother Jim and sister-in-law Susan Kershaw of Rumford. He is preceded in death by his parents, John F. and Katherine (Dwyer) Kershaw and brother Larry.

Kenneth J. Macksoud, Esq.

Kenneth J. Macksoud, 81, of Barrington, died December 2, 2020. He served our country in the U.S. Army and achieved the status of captain during the Vietnam War. Ken attended Providence College and then Boston University School of Law. He was admitted to practice before the United States Supreme Court in 1980. Ken leaves his wife of more than 50 years, Carolyn Macksoud; his daughter Kara Macksoud Shenton, her husband Gregory, and Ken's two grandchildren; his sister Donna Langton and her husband Chris of Smithfield; his sister Jackie Wesolowski and her husband Butch of Lincoln; his sister-in-law Betty Germain of Tampa, FL and her husband Bernie; and numerous nieces and nephews. He is predeceased by his parents Yvonne Beauregard Macksoud and Charles Beshara Macksoud, his brother and best friend Carl Macksoud, and Carl's wife Winnie.

Anthony J. Montalbano Jr., Esq.

Anthony J. Montalbano Jr., 95, died November 4, 2020. Born in Enfield, CT, he was a son of the late Joseph and Rose (Gannuscio) Montalbano; husband of the late Joan M. (Molloy) Montalbano. Anthony was a US Coast Guard veteran who served aboard the Navy troop transport ship USS General M. C. Meigs during WWII. After the war, Anthony attended Providence College and after graduation moved to Washington D.C. to attend law school. Anthony graduated from Catholic University School of Law and worked at the Central Intelligence Agency. Upon returning

to Rhode Island, Anthony became a member of the Rhode Island Bar and practiced law for over 50 years. In 2010 Anthony was awarded the Joseph T. Houlihan Lifetime Mentor Award from the Rhode Island Bar Association. He founded Home Owners Title Guarantee Company which later acquired Mortgage Guarantee and Title Company. Anthony served as vice president of Mortgage Guarantee until it was acquired by First American Title Company. He taught a course on title examination at local Universities for many years. After a brief retirement, Anthony was hired as legal counsel to CATIC which provides title insurance to homeowners throughout Rhode Island until his final retirement at the age of 90.

He was also a member of The Knights of Columbus. Anthony was the recipient of the Duffy Dwyer Fan of the Year award from Providence College in 2004. He leaves his children, Kathryn McCaughey and her husband Bill, Joseph A. Montalbano and his wife Linda, John W. Montalbano and his wife Kathleen, Mark M. Montalbano, Joan DiOrio and her husband David, Elizabeth Sarkisian and her husband Charles and Christopher J. Montalbano and his wife Julie, and several grandchildren, a great-grandchild, and nieces and nephews.

Gerald G. Norigian, Esq.

Gerald G. Norigian, 86, of Boynton Beach, FL and Warwick, RI, died October 17, 2020. He was the husband for 40 years of Lillian (Del Greco) Norigian. Born in Providence, he was the son of the late Bedros "Peter" and Satenig (Proodian) Norigian. Gerald was a practicing attorney for over 60 years before retiring. Besides his wife Lillian, he was the grandfather of the late Nicholas R. Moll; brother of Zaven Norigian, the late Deacon Avedis Edward Norigian, Marion "Mary" Der Vartanian and R. Carol Norigian; and uncle of several nieces and nephews.

V. James Santaniello Jr., Esq.,

V. James Santaniello, Jr., of Barrington, died November 15, 2020. He was married to Jean (Roy) Santaniello for 60 years. A graduate of La Salle Academy, Providence College (1956), and Georgetown University Law School (1959), he practiced law in Rhode Island for forty-one years, retiring in 2001. He was on the Zoning Board Review for Barrington since 1976. He served as the bail commissioner for Barrington, Bristol, and Warren. His parents were the late V. James and Gilda (Palmieri) Santaniello. Besides his wife, he is survived by his son, Vincent James Santaniello, III, his daughter Donna J. Casanova, and his daughter Susan A. Santaniello and her husband, Vinny Perez. He is also survived by three grandchildren. He was the brother of the late Salvatore R. and Mary (Mahar) Santaniello, the late Margaret M. and the late Vincent D. Iacono, and the late Marie D. and John A Bishop.

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 above 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 January/February" in the subject line.

Deadline for entry: Contest entries must be submitted by February 1st, 2021.

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 November/December



"You can't object that the evidence is boring."

ANONYMOUS

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Lawyers on the Move

Steven J. Boyajian, Esq. is now a partner at **Robinson+Cole**, One Financial Plaza, Suite 1430, Providence, RI 02903. 401-709-3359 sboyajian@rc.com rc.com

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The Bar's online Attorney 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. Have your photo taken at the Bar Association, or send in your own headshot to Erin Cute at ecute@ribar.com. Photographs must be provided in a jpg format of at least 300 dpi.

Mundane to Mindful



It's not easy being an attorney. The work can be fascinating and often rewarding, but it can also be stressful, exhausting, and overwhelming. By adapting the practice of mindfulness into your daily routine, you can help reduce stress, boost performance, and improve overall well-being.

9 Tips to Help Incorporate Mindfulness into Your Daily Routine

Start Your Day with Meditation

Training your mind through meditation offers the potential to transform your perspective on life. Taking just 5 minutes in the morning to sit quietly and follow your breath can help you feel more conscious and connected for the rest of your day.

Focus on One Thing at a Time

Even though multitasking can make us feel more productive, taking on one task at a time allows us to connect more deeply to the task at hand. This can lead to more creative thinking and allows us to utilize problem-solving skills.

Slow Down

Savor the process, whether it's writing a report, drinking a cup of tea, or cleaning out closets. Make your actions deliberate, not rushed and random. Paying thoughtful attention to daily actions, promotes healthy focus and can keep you from feeling overwhelmed.

Schedule Space Between Tasks

When scheduling your day, leave 10 minutes at the start or end of every hour to allow yourself some room to breathe and do your task with intention before rushing to accomplish the next item on your to-do list. Use this time for water, food, or walks outside.

Eat Mindfully

Savor each bite, slowly, and really get the most out of your food. Eating your meal without the TV, computer or paper in front of you, where you can truly taste and enjoy what you're eating, gives you time to tune into whether your body is hungry or full.

Practice Mindful Listening

When you listen mindfully, you are fully present in the moment absorbing the speaker's whole message. Learn to let go of personal reactions and other distractions that block your understanding, so that you remain receptive to other people's ideas.

Limit Screen Time

With all forms of media at our fingertips, our minds can easily become overloaded with information. Set boundaries for screen time with designated times for social networking and news consumption. Remember to skip scrolling through your phone before bed.

Keep Moving

Being mindful during exercise can relieve stress, make you feel good and even make your workouts better. Whether it's walking, practicing yoga, or just stretching at your desk, become aware of your body's sensations by moving.

Stay in the Moment

Become more aware of your thinking. Are you constantly worrying about the future? Learn to recognize when you're doing this, and then practice bringing yourself back to the present. It will help you see things as they are, not as you believe them to be.

Lawyers Helping Lawyers

A Rhode Island Bar Association Member Benefit. For more information, visit our website at ribar.com, and the *Do You Need Confidential Help Quick Link*. Also, learn how to log in to *Coastline EAP*, a private non-profit consulting service contracted by the Association to assist you at no charge.

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