



Rhode Island Bar Journal

Rhode Island Bar Association Volume 70. Number 4. January/February 2022

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The Still Evolving and Shifting Landscape**

**Intentional Infliction of Emotional Distress:
A Gap-Filler Tort More Limited Than Punitive
Damages**

**Helping Self-Represented Litigants Isn't
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Pontiac Mills, Warwick, RI Originally a cotton spinning mill built in 1810, the Mills went through several owners before being sold to what became the B.B. & R. Knight company. The Knight Mills went on to become one of Rhode Island's most prosperous and largest textile plants, and was the original home of Fruit of the Loom. In 1972 Pontiac Mills was added to the National Register of Historic Places. Today the Mills have been restored into luxury loft apartments and commercial space.



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Civility



Lynda L. Laing, Esq.
President
Rhode Island Bar Association

Attorneys should not personally attack or bully each other; instead, we should learn and benefit from each other's perspectives and skills.

Welcome 2022! As the New Year arrives, we all start to make our New Year's resolutions. This year, I encourage you to add civility to your resolution list. During the height of the pandemic, many of my fellow bar friends reached out to me to see how I was coping under the difficult circumstances. I also reached out to other fellow attorneys making certain they and their families were well. The Judiciary also extended courtesies by allowing attorneys and witnesses to appear remotely. As a result, I was not surprised that the Bar's COVID-19 Impact Survey showed that there was an increase in civility during the pandemic. I hope we continue to show civility and professionalism as we move into 2022.

I recently attended the 2021 New England Bar Association Annual Meeting where one of the panels consisted of judges and representatives from the court systems of each New England state. One of the judges on the panel described witnessing unprofessional and uncivil conduct by an attorney while conducting a remote hearing. This judge felt that the attorney would not have conducted himself in the manner that he did if he were physically in the courtroom. We need to make certain that we continue to treat each other and the Judiciary with the same respect and civility that we saw during the height of the pandemic. This professionalism extends to depositions, discovery disputes, and other non-judicial proceedings. The new practice of remote hearings does not grant us the liberty to speak out of turn or be disrespectful when challenging a judge's ruling. We should appear on time, dress appropriately, and be prepared to present the facts of our client's case.

Being civil does not mean we are not zealously representing our clients. Our ethical rules of conduct require that we zealously represent our clients, but being zealous does not constitute rude, abrasive, and uncooperative behavior. Attorneys should not personally attack or bully each other; instead, we should learn and benefit from each other's perspectives and skills. It's necessary to be cooperative and attempt to resolve disputes that arise in litigation in a civil manner with our colleagues. I believe that good lawyering and being professional can help promote your client's case.

As lawyers, by nature, we often work in high-pressure environments and sometimes experience

secondary trauma through serving our clients' needs. We've all heard the statistics that lawyers suffer from stress and mental illness at a higher rate than the general population. Because of this, it is especially important that we take the time to be kind to one another. On a related note, if you see a colleague struggling or are struggling yourself, keep in mind that the Bar's Lawyers Helping Lawyers (LHL) program is available to offer confidential, free, peer and professional assistance with any personal challenges. To discuss your concerns, you may contact an LHL member, or go directly to professionals at Coastline EAP who provide confidential consultations for a wide range of personal concerns including but not limited to balancing work and family, depression, anxiety, domestic violence, childcare, eldercare, grief, career satisfaction, alcohol and substance abuse, and problem gambling. For more information on how to contact a Lawyers Helping Lawyers Committee member or the professionals at Coastline EAP, please visit the Bar's website by clicking [here](#).

Unfortunately, uncivil behavior impacts the public perception of the practice of law and affects many attorneys with job satisfaction, mental health, and other wellness issues. I know that long hours and the pressures of the practice can give us short fuses that can lead us to snap back at opposing party. However, we need to be aware of these situations and find other ways to release the tension. Please remember to visit the Bar's [Lawyers Living Well](#) page on our website for a variety of resources to help attorneys find a work-life balance focusing on mindfulness, fitness, and overall wellness. You can also follow the Bar on our social media channels for weekly Wellness Wednesday tips that provide mental, emotional, and physical health advice. Thank you all for your efforts to be civil and professional with each other and the Judiciary. Let us all start the New Year with a resolution to continue the important practice of civility within the profession. ◇

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Free and available for all actively practicing Rhode Island attorney members, the Bar's List Serve gives you immediate, 24/7, open-door access to the knowledge and experience of over 700 Rhode Island lawyers. If you have a question about matters relating to your practice of law, you can post the question on the List Serve, and it will be emailed to all list serve members. Any attorney who wishes to provide advice or guidance can, and hopefully will, quickly respond. Help us grow our online community by joining TODAY! Visit ribar.com and the Members Only section, and click [List Serve](#) for instructions to join.

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Attorney Tara R. Cancel, a member of the Lawyer Referral Service, enthusiastically supports the program. *"Being part of the Lawyer Referral Service has been essential to the growth of my firm. It has allowed me to assist clients with limited financial means, who truly are in need of legal services, and in return those clients have recommended my firm to friends, family members, and colleagues. It has been a truly rewarding experience."*

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: **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.

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 any article, editorial, column, or book review, except to the extent that, by publication, the subject matter merits attention. Neither the opinions expressed in any article, editorial, column, or book review nor their content represent the official view of the Rhode Island Bar Association or the views of its members.

Article Selection Criteria

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

Direct inquiries and send articles and author's photographs for publication consideration to:
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Kindness



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

A single act of kindness can change a person's life.

My wife and I are blessed with five grandchildren. We have three granddaughters under the age of twelve who live in Colorado. Unfortunately, we do not get to spend as much time with them as we would like. We also have two grandsons, ages seven and nine. They have lived very close to us from the time they were born, and, as a result, we spend a lot of time with them.

We've been picking our grandsons up from school on Fridays and taking them to piano practice. They attend a terrific public elementary school. The teachers at the school create excitement about learning, and that excitement really shows when we pick them up.

Recently my oldest grandson was telling my wife and I about things he learned that day in school. He talked about World War I ending on the 11th hour of the 11th day of the 11th month. He talked about the United States trying to remain neutral in World War II and he explained how the United States had to fight back when Pearl Harbor was attacked. He talked about Roger Williams founding Rhode Island and about how Rhode Island got its name. I was impressed that his school was teaching these things in only the third grade.

My grandson also asked us if we knew what holiday was coming up shortly after Veterans Day. We told him we did not know and he excitedly told us that it was World Kindness Day. My wife and I told him that we were unaware of World Kindness Day and he told us what the upcoming holiday was all about. He explained that Kindness Day is celebrated every year on November 13 and that the theme is to be kind to yourself, to others, and to the environment. I was struck by how important it is to teach kindness to our children and grandchildren, and to practice kindness ourselves.

Princess Diana famously said, "Carry out a random act of kindness, with no expectation of reward, safe in the knowledge that one day someone might do the same for you." Mark Twain said, "Kindness is the language which the deaf can hear and the blind can see." Maya Angelo said, "Continue to be who and how you are, to astonish a mean world with your acts of kindness."

A single act of kindness can change a person's life. I am writing this message on Sunday,

November 21, 2021, and I read a wonderful story in today's *Providence Journal* about an act of kindness that changed a young boy's life. That act of kindness was by a well-known local basketball coach who reached out in compassion to a young boy who was dealing with difficult times because his parents were going through a divorce.

The *Journal* article was written 50 years later by the formerly young boy who now stated "What I remember most about it all isn't a thrilling win or a heartbreaking loss. What has stayed with me for more than 50 years is Armand's kindness that day in the hallway, before I ever donned a blue and gold Kennedy uniform. Thanks to him, the boy I had tried so hard to make invisible had been seen."

That basketball coach was Armand Batastini, the father of Armando Batastini, a past president of our Bar Association. Coach Batastini was known as a tough "old-school" coach who really pushed his players, but he also understood the importance of kindness and the impact it could have on a young person.

Also in that same *Providence Journal*, was an article discussing the first-ever state Superior Court debt review program. At least 114 people had over \$360,000 in court fines and fees forgiven on the first day of this program which was held at the Nonviolence Institute. The program was established by the state Supreme Court Committee on Racial and Ethnic Fairness in the Courts. This panel was created by Chief Justice Paul Suttell in 2020 in the wake of the death of George Floyd to raise public confidence in the independence, integrity, and impartiality of the Rhode Island Judiciary. As the article stated, "So many people walked out with tears of joy." One of the volunteers said that the judges who oversaw the proceedings were "friendly and kind to all who came before them."

Your Rhode Island Bar Foundation uses the money generated by your IOLTA accounts to pro-

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Rhode Island Bar Foundation

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

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

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vide grants to nonprofit organizations that provide legal services to those in need, including the RI Coalition for the Homeless, RI Coalition against Domestic Violence, RI Legal Services, and others. Although your IOLTA accounts represent the Bar Foundation's primary source of income, your foundation also generates income from the pledges made by Bar Foundation fellows and from other gifts made by members of the Rhode Island Bar. If you are interested in making a donation to your Bar Foundation, there is a form in every issue of the *Rhode Island Bar Journal* (usually located near this President's Message) that you can utilize to make a donation. Every little bit helps.

If you are so inclined, you could also consider making a more substantial gift or bequest to the Bar Foundation while doing your estate planning. As an example, a few years ago, former Superior Court Justice Thomas J. Caldarone, Jr. made a wonderful gift of \$50,000 to the Bar Foundation. Those funds were used to establish the Thomas J. Caldarone, Jr. fellowship program which provides summer fellowship grants to two Roger Williams Law School students every year. The students must spend the summer working at non-profit legal organizations.

Our society seems to be getting more and more divided. At times, it can certainly be a "mean world" and it often seems that there is not much we can do about it. But, I believe, as my grandson has reminded me, that performing acts of kindness for people in need is at least the start of a solution to the problem. ◇

Rhode Island Bar Foundation Seeks Law School Scholarship Applicants

The Bar Foundation intends to award two scholarships of \$25,000 each to Rhode Island residents who enroll as first-year students in an American Bar Association accredited law school for the academic year beginning September 2022. The scholarship is for the first year of law school only and is non-renewable. Each scholarship award is made on the basis of demonstrated financial need, superior academic performance, community and public service, and demonstrated contacts with and commitment to the State of Rhode Island. The Scholarship Committee seeks applications from candidates without regard to race, color, religion, country of ancestral origin, handicap, age, sex, or sexual orientation.

The Scholarship Committee will also award two additional \$25,000 scholarships to applicants who meet the same criteria and who self-identify as black, indigenous, or people of color (BIPOC).

The Rhode Island Bar Foundation Scholarship application deadline is March 25, 2022. More information and application forms are available on the Rhode Island Bar Association website, ribar.com, in the Rhode Island Bar Foundation section.

Transgender Student Rights Under Title IX – The Still Evolving and Shifting Landscape



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A much-debated and evolving Title IX question has concerned whether discrimination against a transgender student in an education program or activity constitutes discrimination “on the basis of sex” subject to the statute’s protections.

Title IX of the Education Amendments of 1972 (“Title IX”)¹ provides that no person “shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance....”² As the plain statutory language makes clear, Title IX “prohibits a [federal] funding recipient from subjecting any person to ‘discrimination’ ‘on the basis of sex.’”³ The term “discrimination” typically “refers to distinctions or differences in treatment that injure protected individuals.”⁴ And, “[t]he statute’s other prohibitions” further “help give content to the term ‘discrimination’ in this context.”⁵ “Students are not only protected from discrimination, but also specifically shielded from being ‘excluded from participation in’ or ‘denied the benefits’ of any ‘education program or activity receiving Federal financial assistance.’”⁶ Title IX is enforced in two ways: (1) through private causes of action against the federal funding recipient and (2) by federal agencies that provide funding to the educational programs or activities.⁷

Enacted under the Spending Clause of the United States Constitution,⁸ Title IX makes compliance with its anti-discrimination mandate a condition for receiving federal funding in any education program or activity. Title IX applies to federally-funded schools at all levels of education. All public school districts receive some federal financial assistance, as do institutions of higher education through their participation in federal student aid programs.⁹ Significantly, when any part of a school district or higher education institution receives federal funds, all of the recipient’s operations are covered by Title IX.¹⁰

A much-debated and evolving Title IX question has concerned whether discrimination against a transgender student in an education program or activity constitutes discrimination “on the basis of sex” subject to the statute’s protections. Such issues have arisen in multiple educational contexts, including debates over school transgender bathroom policies and transgender student athlete participation rights. Interpretations have varied significantly depend-

ing on the presidential administration in charge of federal agencies or the judges presiding in a case (at times resulting in 2-1 panel splits at the federal appellate level or prompting full *en banc* review).

This article examines judicial and administrative paths traveled over the past several years to bring us to where Title IX law stands today on transgender student rights. First, we analyze whether case law under Title VII of the Civil Rights Act of 1964 (“Title VII”)—a statute that protects against discrimination in the workplace and shares similarities with Title IX—helps to answer by analogy the scope of transgender student rights and protections under Title IX.¹¹ Second, we examine the divergent and shifting federal administrative interpretations of Title IX and transgender student rights under the Obama, Trump, and Biden administrations. Third, we focus on the question as it has been specifically adjudicated in federal appellate decisions addressing transgender student use of bathrooms and locker rooms consistent with their gender identity. Today, Title IX law is still evolving with varying interpretations that may ultimately prompt United States Supreme Court review. Also, as noted below, much of the analysis applies concurrently to issues concerning sexual orientation discrimination.

Title VII and *Bostock* – Do They Provide Guidance to Answer the Title IX Question?

To assess whether discrimination against a student for being transgender is sex discrimination under Title IX, Title VII’s language and precedent provide guidance and, as some would suggest, clarity under Title IX. Both statutes focus on the discriminatory treatment of individuals, not groups. Title VII protects “[a]ny individual”¹²; Title IX protects any “person.”¹³ Both statutes require “but for” causation: Title VII prohibits discrimination “because of” sex;¹⁴ Title IX prohibits discrimination “on the basis of” sex.¹⁵ Although Title VII and Title IX are separate statutes, both

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the First Circuit and Rhode Island Federal District Court have held that a court should look to Title VII to interpret Title IX.¹⁶

In a landmark ruling, on June 15, 2020, the United States Supreme Court issued its decision in *Bostock v. Clayton County*, where the Court addressed three related cases wherein an employee was fired after their employers learned that they were homosexual or transgender.¹⁷ The Court held that Title VII’s prohibition against sex discrimination includes prohibiting the discharge of an employee because of their sexual orientation or gender identity.¹⁸ In the majority opinion, Justice Gorsuch stressed that sex played a necessary and evident role in the adverse employment decision, which is expressly what Title VII forbids:

For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII’s plain terms – and that should be the end of the analysis.¹⁹

The Court’s Title VII reasoning would seem to apply as well to discrimination based upon sex under Title IX. Yet, in the *Bostock* opinion, the Court stated an important caveat regarding the scope of its ruling: “The employers [in the three cases] worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination.... But none of these laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudice any such question today.”²⁰ Indeed, the Court stated that there could be limitations to the application of its analysis under Title VII itself:

... [W]e do not purport to address bathrooms, locker rooms, or anything else of the kind. The only questions before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual “because of such individual’s sex.”... Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.²¹

Additionally, in a lengthy and strongly worded dissent, Justice Alito (joined by Justice Thomas) contended that the statutory analysis should turn on whether, in 1964 when it enacted Title VII, Congress believed that discrimination on the basis of sexual orientation and gender identity fell well within the statute’s scope.²² In Justice Alito’s view, the clear answer to that question is “no.”²³ Justice Alito’s dissent cautioned that “What the court has done today – interpreting discrimination because of ‘sex’ to encompass discrimination because of sexual orientation and gender identity – is virtually certain to have far-reaching consequences. Over 100 federal statutes prohibit discrimination because of sex.”²⁴ Specifically as to Title IX, Justice Alito warned against the application of the majority’s Title VII analysis to posing issues in the educational setting relating to student access to bathrooms based upon gender identity or the rights of a transgender student to participate on a school sports team or in an athletic competition previously reserved for members of one biological sex.²⁵ In a separate dissent, Justice Kavanaugh contended that, under separation of powers principles, Congress and the President bear the responsibility in the legislative process, not the judiciary, to define the application of a federal civil rights statute regarding questions of homo-

sexuality and gender identity.²⁶

Putting *Bostock* in perspective as it relates to Title IX, the Court's six-justice majority analysis included the late Justice Ginsberg, who has since been succeeded by Justice Coney Barrett. Given the cautionary limitations expressed in its majority opinion, the dissenting justices' firm positions, and the change in the Court's composition, it remains unanswered whether *Bostock's* inclusion of sexual orientation and gender identity in the definition of sex for certain Title VII adverse employment actions will establish controlling precedent to establish clear Title IX protections against gender discrimination as to transgender students. As addressed below, both the United States Department of Education, in its administrative enforcement, and federal courts, in private causes of action, have analyzed *Bostock's* application to Title IX with varying interpretations.

The Shifting Federal Administrative Guidance on Title IX and Transgender Students

Since 2016, the United States Department of Education's Office for Civil Rights ("OCR") has issued multiple guidance documents addressing whether Title IX applies to claims of discrimination in education programs or activities based on gender identity or sexual orientation. Under the Obama administration, OCR issued a Dear Colleague Letter dated May 13, 2016 stating that it had "received an increasing number of questions from parents, teachers, principals, and school superintendents about civil rights protections for transgender students."²⁷ OCR made clear its position that Title IX's prohibition against gender discrimination "encompasses discrimination based on a student's gender identity, including discrimination based on a student's transgender status.... This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity.... A school's Title IX obligation to ensure nondiscrimination on the basis of sex requires schools to provide transgender students equal access to educational programs and activities even in circumstances in which other students, parents, or community members raise objections or concerns. As is consistently recognized in civil rights cases, the desire to accommodate others' discomfort cannot justify a policy that singles out and disadvantages a particular class of students."

Early in the Trump Administration, OCR reversed its position. On February 22, 2017, OCR issued a short Dear Colleague Letter stating that it was withdrawing prior Obama administration policy and guidance on transgender student rights under Title IX. OCR noted that the predecessor administration's documents had resulted in effects including requirements of access to sex-segregated facilities based on gender identity. In making this significant reversal, it stated that the now-rescinded "guidance documents do not, however, contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did they undergo any formal public process."

Nearly four years later in the waning days of the Trump administration and in light of the Supreme Court's 2020 decision in *Bostock*, OCR's Acting Assistant Secretary issued a memorandum dated January 8, 2021, stressing that *Bostock* does not construe Title IX. Most significantly, adopting a statutory construction consistent with Justice Alito's Title VII's analysis in his *Bostock* dissent, OCR's memorandum purported that "the Department [of Education's] longstanding construction of the

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term ‘sex’ in Title IX to mean biological sex, male or female, is the only construction consistent with the ordinary public meaning of ‘sex’ at the time of Title IX’s enactment [in 1972].”

Upon taking office, the Biden administration quickly took action to negate the Trump administration’s Title IX interpretations on transgender student rights, reverting back to positions consistent with the Obama administration’s 2016 Dear Colleague Letter. On his first day in office, President Biden issued an Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.²⁸ Citing to **Bostock**, President Biden announced his administration’s priorities that “[a]ll persons should receive equal treatment under the law, no matter their gender identity or sexual orientation.” The Biden administration ordered each federal agency to consider whether to revise, suspend, or rescind agency actions, or promulgate new agency actions, to implement the policy prescribed in the Executive Order.

Acting in accordance with the Executive Order, on March 26, 2021, the United States Department of Justice issued a memorandum indicating that its Civil Rights Division “has determined that the best reading of Title IX’s prohibition on discrimination on the basis of sex is that it includes discrimination on the basis of gender identity and sexual orientation.” The Department of Justice stated that “the Division ultimately found nothing persuasive in the statutory text, legislative history, or case law to justify a departure from **Bostock**’s textual analysis and the Supreme Court’s longstanding directive to interpret Title IX’s text broadly.”²⁹

Within the Department of Education, OCR published its public notice dated June 22, 2021 pronouncing that, relying on **Bostock**, it “will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department.” OCR will address administrative complaints that raise “allegations of individuals being harassed, disciplined in a discriminatory manner, excluded from, denied equal access to, or subjected to sex stereotyping in academic or extracurricular opportunities and other education programs or activities, denied the benefits of such programs or activities, or otherwise treated differently because of their sexual orientation or gender identity.”³⁰

Clearly, the Biden Administration has signaled a clear shift away from the Trump Administration’s more narrow reading of Title IX’s prohibitions against gender discrimination “on the basis of sex.” Recently, the United States Senate confirmed Catherine E. Lhamon as the Department of Education’s Assistant Secretary for Civil Rights, a position that she held during the Obama administration, which further indicates the Biden Administration’s intention to reinstate and expand upon the Title IX protections that the Trump administration rescinded.

In a significant development, on December 10, 2021, OCR announced that the Department of Education will issue, by no later than April 2022, a notice of proposed rulemaking to promulgate amendments to the Department’s Title IX regulations addressing Title IX sexual harassment in educational programs and activities (which took effect on August 14, 2020, after a well-publicized and hotly debated eighteen-month public rule-making process).³¹ OCR will implement amendments consistent with the Biden Administration’s Title IX priorities, including those articulated in the President’s January 2021 Executive

Order. Consequently, we expect that the Title IX regulatory amendments will include specific language (relying upon **Bostock**) protecting transgender students under Title IX against sexual harassment (as well as protecting against sexual orientation harassment). The Title IX regulatory amendments could take effect by the start of the 2022-23 academic year.

A Case Study – The Long Judicial Path of the Grimm Case

The long procedural history of **Grimm v. Gloucester County School Board**, provides an interesting and important case study in how the shifting administrative and judicial interpretations of Title IX have impacted transgender student rights. In 2015, Gavin Grimm, a female-to-male transgender student, brought a Title IX action alleging that his high school denied him access to the bathroom that corresponded to his gender identity.³² The school district’s policy restricted bathroom access based on the student’s “biological genders,” and provided “alternative facilities” for students with “gender identity issues.” The parties spent the next two years litigating whether the student’s motion for a preliminary injunction should be granted based on the Obama Administration’s guidance documents.³³ The Supreme Court agreed to review the question, but the Court later vacated its issuance of a writ of certiorari and remanded the case in March 2017, based upon the Trump Administration’s February 2017 withdrawal of the Obama Administration guidance documents at issue in the lower court proceedings.³⁴ A few months later, the student graduated from high school, but the case proceeded on remand.³⁵

In August 2019, a Virginia federal district court ruled in the plaintiff’s favor and rejected the school district’s argument that “sex” under Title IX is a binary term encompassing the physiological distinctions between males and females. The trial court concluded that the school’s bathroom policy discriminated against transgender students on the basis of gender nonconformity.³⁶ On appeal, in August 2020 (after the Court’s ruling in **Bostock**), the United States Court of Appeals for the Fourth Circuit, in a split 2-1 panel ruling affirmed the district court’s decision.³⁷

The Fourth Circuit’s majority opinion concluded that Grimm had suffered a legally cognizable harm, both because the restrooms that he was required to use were inconveniently located within his high school and because “[t]he stigma of being forced to use a separate restroom... invites more scrutiny and attention from other students, very publicly branding all transgender students with a scarlet ‘T’”³⁸ The Fourth Circuit addressed “the heart of the Title IX question in the case: whether the policy unlawfully discriminated against Grimm.”³⁹ Guided by **Bostock**, the Fourth Circuit recognized that the term “discrimination” typically “mean[s] treating [an] individual worse than others who are similarly situated.”⁴⁰ Grimm was treated worse than other similarly situated students, because, unlike all other students at his high school, he “could not use the restroom corresponding with his gender” and had to use alternative single-stall facilities.⁴¹ The Fourth Circuit explained, that while Title IX’s implementing regulations,⁴² allow schools to provide “separate toilet... facilities on the basis of sex,” they do not authorize schools to do so in a manner that subjects students to separate and unequal treatment.⁴³

A strongly worded dissenting opinion characterized the majority’s ruling as “an outcome-driven enterprise prompted



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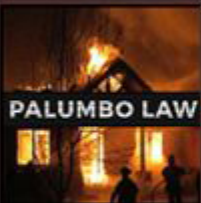
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by feelings of sympathy and personal views of the best policy” that fell “short of construing the law.” The Fourth Circuit later denied the school’s petition for rehearing *en banc*,⁴⁴ and the school district filed a petition for a writ of certiorari seeking the United States Supreme Court’s review.

Because the Supreme Court had previously granted a writ of certiorari in the litigation (but later withdrew it), many pundits and educational law practitioners expected that the Court would grant certiorari again, especially in light of *Bostock* and the resulting questions of whether its analysis equally applied to Title IX. Without comment, on June 28, 2021, the Supreme Court denied the school district’s petition.⁴⁵ While there could be several reasons for the Court’s action (especially given the limited number of cases that it accepts each term and the fact that Grimm had graduated during the litigation), the Court likely concluded that the issue is not yet entirely mature and requires further development among the federal circuits.

What’s next?

The Biden administration will enforce Title IX to ensure protections against discrimination based upon gender identity and sexual orientation. Such increased federal administrative oversight could entail more proactive investigations and resulting remedial actions (including resolution agreements with agency oversight requirements) on issues relating to access to school facilities and participation on sports teams. Of course, the Title IX administrative playing field could once again shift back in the other direction again after the 2024 Presidential election, if there is a resulting change in administrations.

Judicially, high-profile cases continue to progress on dockets nationally addressing Title IX’s protections against discrimination “on the basis of sex” and transgender student rights, including issues relating to bathroom policies, locker room access, and sports participation. One important case to watch is *Adams v. School Board of St. John’s County, Florida*, addressing a Florida school board’s bathroom policy.⁴⁶ The Eleventh Circuit recently granted the school board’s petition for a rehearing *en banc*, after the appellate court had twice ruled against the board’s policy. Eighteen states have filed an *amicus* brief arguing that Title IX unambiguously allows educational institutions to maintain restrooms that are separated based on biological sex and that construing Title IX to prohibit distinctions based on biological sex would constitute a judicial trespassing on legislative functions. Twenty-two other states (including Rhode Island through its Office of Attorney General) and the District of Columbia have filed an *amicus* brief taking a counter position, arguing that Title IX requires recipients of federal funds to refrain from discrimination based on sex and that the school board’s bathroom policy constitutes unlawful gender discrimination against transgender students.⁴⁷ As *amici*, major businesses, civil rights organizations, legal advocacy groups, and religious groups have also weighed in on the appeal. The Eleventh Circuit’s *en banc* ruling (expected sometime in 2022) could prompt the Supreme Court to reconsider its recent refusal to address the still-evolving, and highly significant issues interpreting the scope of Title IX’s prohibition against discrimination “on the basis of sex.”

ENDNOTES

1 20 U.S.C. §§ 1681-1688.

2 20 U.S.C. § 1681(a) (*emphasis added*).

3 *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005) (*quoting*

20 U.S.C. § 1681(a)).

⁴ *Burlingham N. & Sante Fe Ry. Co. v. White*, 548 U.S. 53, 59 (2006).

⁵ *Davis ex. rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).

⁶ *Id.* (quoting 20 U.S.C. § 1681(a)).

⁷ Title IX is not the exclusive remedy for victims of sex discrimination in schools. In matters pertaining to public colleges, universities, or school districts, 42 U.S.C. § 1983 provides an avenue for relief against state actors who deprive individuals of a constitutional right. The Supreme Court has held that Title IX does not displace the availability of § 1983 claims based on the Equal Protection Clause for plaintiffs alleging gender discrimination in schools. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 248 (2009). The subject of liability under § 1983 is beyond the scope of this article.

⁸ U.S. Const. art. 1, § 8, cl. 2.

⁹ 20 U.S.C. § 1681(a). Title IX contains several exceptions, such as exceptions for educational institutions controlled by a religious organization and those whose primary purpose is training for military service or the merchant marine. *Id.* 1681(a)(1)-(9).

¹⁰ 20 U.S.C. § 1687.

¹¹ Title VII declares that it is “unlawful... for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. 2000e-2(a)(1) (emphasis added). Employees of educational institutions are protected from sex discriminations under Title VII, and courts have generally held that employees may bring concurrent causes of action under Title VII and Title IX.

¹² 42 U.S.C. § 2000e-2(a)(1).

¹³ 20 U.S.C. § 1681(a).

¹⁴ 42 U.S.C. 2000e-2(a)(1).

¹⁵ 20 U.S.C. § 1681(a).

¹⁶ *Wills v. Brown Univ.*, 184 F.3d 20, 25 n.3 (1st Cir. 1999) (recognizing that some aspects of Title VII and Title IX are *in pari materia*); *Doe v. Brown Univ.*, 327 F. Supp. 3d 397, 408 (D.R.I. 2018) (citations omitted).

¹⁷ 140 S. Ct. 1731 (2020).

¹⁸ *Id.* at 1737.

¹⁹ *Id.* at 1743.

²⁰ *Id.* at 1753.

²¹ *Id.*

²² *Id.* at 1756-57.

²³ *Id.*

²⁴ *Id.* at 1778.

²⁵ *Id.* at 1779-80.

²⁶ *Id.* at 1822-23, 1823 n.1.

²⁷ A “Dear Colleague Letter” is a “significant guidance document” under the Office of Management and Budget’s Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007). OCR issues “Dear Colleague Letters” and other policy guidance to provide educational institutions and school districts with information to assist them in meeting their obligations under federal laws enforced by the Department of Education (such as Title IX) and to provide the public with information about their rights. OCR purports that its guidance and policy documents are not designed to add requirements to applicable law, but provide information and examples to inform federal educational funding recipients about how OCR evaluates compliance with legal obligations. Copies of the guidance documents (both current and rescinded) referenced in this article are available for public viewing on OCR’s website: <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/readingroom.html>.

²⁸ The White House, Executive Order on Preventing and Combatting Discrimination on the Basis of Gender Identity or Sexual Orientation (Jan. 20, 2021). <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>.

²⁹ Memorandum from Principal Deputy Assistant Attorney General for Civil Rights, Pamela S. Karlan to Federal Agency Civil Rights Directors and General Counsels regarding Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972 (March 26, 2021). <https://www.justice.gov/crt/page/file/1383026/download>.

³⁰ Federal Notice of Interpretation: Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County* (June 22, 2021). <https://www.federalregister.gov/documents/2021/06/22/2021-13058/enforcement-of-title-ix-of-the-education-amendments-of-1972-with-respect-to-discrimination-based-on>.

³¹ Statement by U.S. Department of Education Assistant Secretary for Civil Rights Catherine E. Lhamon on Title IX Update in Fall 2021 United Agenda

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32 *The Grimm litigation also involved claims of Equal Protection violations. For purposes of this article, our analysis focuses on the Title IX claims only.*

33 *Initially, the United States District Court for the Eastern District of Virginia dismissed the student's Title IX claim and denied his request for a preliminary injunction. 132 F. Supp. 3d 736 (E.D. Va. 2015). The Fourth Circuit reversed relying significantly upon the impacts of the Obama Administration's then-applicable Title IX guidance documents. 822 F.3d 709 (4th Cir. 2016).*

34 *137 S. Ct. 1239 (2017) (mem.).*

35 *The fact that Grimm removed his request for injunctive relief and compensatory damages on remand from his complaint against the school board, which challenged that board's policy of requiring students to use bathrooms based on biological sex, did not moot his claims, where he still sought nominal damages and declaratory relief as to the bathroom policy and his claims could be redressed through a favorable judicial decision.*

36 *400 F. Supp. 3d 444 (E.D. Va. 2019).*

37 *972 F.3d 586 (4th Cir. 2020).*

38 *Id.* at 617-18 (quotation omitted).

39 *Id.* at 618.

40 *Id.*

41 *Id.*

42 *The Department of Education's Title IX implementing regulation, 34 C.F.R. § 106.33, allows for "separate toilet, locker room, and shower facilities on the basis of sex," so long as they are "comparable" to each other. In Grimm, the school district argued that this regulation should be interpreted in a binary manner based upon the person's biological sex.*

43 *972 F.3d at 618.*

44 *976 F.3d 399 (4th Cir. 2020).*

45 *141 S. Ct. 2878 (2021).*

46 *Appeal No. 18-13592 (11th Cir.).*

47 *In the amicus brief joined by Rhode Island, the amici state that Rhode Island has enacted civil rights statutory protections for transgender individuals. R.I. Gen. Laws § 11-24-2 (public accommodations); §§ 28-5-6(11), 28-5-7 (employment); §§ 34-37-3(9), 34-37-4 (housing). The amici contend that the experiences of states, such as Rhode Island, with policies and practices that ensure equal access to public facilities for transgender people – including access to common restrooms consistent with their gender identity – promote safe and inclusive school environments. ◇*

January Compare & Contrast Free, Non-Credit Program: Electronic Signatures

The next session in the, **FREE, non-credit**, technology program series, **Compare & Contrast**, is scheduled on **Monday, January 24th at 12:30 pm** and will focus on electronic signatures. In this session, Jared Correia of Red Cave Law Firm Consulting and Attorney Mike Goldberg, co-chair of the Bar's Technology in the Practice Committee, will review three top electronic signature providers, and take questions on the subject.

This quick (30 minute) and free presentation will get you the information you need to make an informed choice. Please [click here to register](#) for the program via Zoom.

This series will review different law-related products and services and each webinar will be focused on a particular topic. In just 30 minutes, Jared will discuss what makes the most sense for members depending on practice size and budget. All sessions will be recorded and available to view free of charge on the Bar's **Law Practice Management** page on [ribar.com](#).

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House Of Delegates Letters of Interest – Due February 25, 2022

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The Nominating Committee will meet soon to prepare a slate of officers and members of the 2022-2023 Rhode Island Bar Association House of Delegates. The term of office is July 1, 2022 – June 30, 2023. 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 **February 25, 2022**.

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:

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Or, you may send your letter of interest to Kathleen M. Bridge, Executive Director by fax: (401) 421-2703, or email: kbridge@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 Kathleen Bridge, prior to the forum via email: kbridge@ribar.com or telephone: (401) 421-5740.

Intentional Infliction of Emotional Distress: A Gap-Filler Tort More Limited Than Punitive Damages



Thomas R. Bender, Esq.
Attorney at Law
Cranston

... the threshold for intentional infliction of emotional distress liability is an even more rigorous standard posing an even higher bar to recovery.

There are two points in Rhode Island Supreme Court decisions about the standard for a viable intentional infliction of emotional distress (“IIED”) claim that deserve close attention early in the litigation process. The first seems to be well-known, the second may not be.

The well-known point is that (just as for punitive damages claims) whether a party’s conduct is legally sufficient to impose liability for intentionally inflicted emotional damages is a question of law for the court, not a factual one for the jury. Upon a proper motion, a Superior Court motion justice must evaluate whether the alleged facts (assumed to be true at the Rule 12(b)(6) stage, or not genuinely in dispute at the Rule 56 stage) constitute sufficiently egregious conduct to satisfy the legal standard for a viable claim. The second in

my experience is less talked about. It concerns the legal standard and the nature of the conduct that will satisfy it. More specifically, the relationship of that conduct to the conduct that would justify liability for punitive damages. As the title of this article suggests, if you thought punitive damages were the least favored common law damages, as I did, you would be wrong, as I was. Because the requisite conduct for a viable IIED claim has been defined by the Court with reference to the standard for punitive damages. Simply put, the conduct must be more egregious than conduct that may be punished by punitive damages. In the hierarchy of tort claims, therefore, intentional infliction of emotional distress damages are intended to be more disfavored, and more rarely awarded, than punitive damages. While that comparison does not so much “describe” the standard, as it does illustrate and inform it, it may be worth a thousand words. The first part of this article will highlight these two points in the Court’s decisions.

The article will then turn to a question that the Court has not yet had occasion to address: whether, when the defendant’s alleged conduct constitutes a traditional tort for bodily injury or some other injury other than emotional distress, an IIED claim may be paired with the more traditional tort claim based on the same facts. The small number of state courts that have answered

that question have said no, holding that IIED was adopted as a “gap-filler” tort to redress an injury not redressed by existing common law torts. That holding would seem to be significantly more consistent with the very limited IIED tort recognized by the Rhode Island Supreme Court than the alternative holding and limit it being “thrown in” as an ancillary claim.

More Limited than Punitive Damages and Subject to Judicial “Gate-Keeping”

To define the nature of the conduct that would permit liability for the tort of intentional infliction of emotional distress, the Rhode Island Supreme Court has adopted the standard described in comment d to the Restatement (Second) Torts § 46.¹ That standard has two parts: first, the actor must have intended to inflict emotional injury; and second, the intent to cause emotional injury must be carried out by especially egregious conduct. More specifically, conduct that is “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”² To inform the meaning to be given to those words, and give them context, the Court compared the IIED standard to the standard for punitive damages.³ For conduct to be sufficiently “extreme and outrageous” to establish liability for intentionally inflicted emotional distress, the conduct constitutes *more than* the “degree of aggravation which would entitle the plaintiff to punitive damages for another tort.”⁴

As is widely understood, the familiar standard for punitive damages requires that the defendant be guilty of conduct of “such willfulness, recklessness or wickedness...as amounts to criminality, which for the good of society and warning to the individual, ought to be punished.”⁵ It follows then that to impose liability for intentionally inflicted emotional distress the defendant’s conduct must be more extreme in degree, more atrocious, *more*

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intolerable, and more criminal in nature than conduct that would warrant punitive damages.

That hierarchy is significant. Because the Court has described the punitive damages threshold as “a rigorous” standard that sets “the bar quite high,”⁶ it follows that the threshold for intentional infliction of emotional distress liability is an even more rigorous standard posing an even higher bar to recovery. That is high, and, as the reader is aware, the Court has repeatedly characterized punitive damages as an “extraordinary sanction,” that is “disfavored,” and permitted only “with great caution and within narrow limits.”⁷ It therefore follows, again, that the liability for intentionally inflicted emotional distress is more disfavored, more extraordinary, and is to be imposed even more cautiously, and more narrowly than punitive damages are. An unmistakable signal has been sent by the Court’s juxtaposition of the two remedies. In the hierarchy of tort remedies, intentional infliction of emotional distress liability should occur less frequently than punitive damages liability.

Just as the Court has done to ensure the limited application of punitive damages, it has assigned an essential “gate-keeping” function to the Superior Court to ensure the limited application of damages for intentionally inflicted emotional distress. In the context of punitive damages, the trial justice must first evaluate the defendant’s conduct and find it was sufficiently culpable to meet the legal standard as a matter of law before permitting the jury to consider awarding such damages.⁸ The Court has assigned virtually the same judicial gate-keeping responsibility with respect to intentional infliction of emotional distress claims, with the exception that, unlike with punitive damages, the gate-keeping may be applied as early as the initial pleading stage,⁹ deciding “whether the defendant’s alleged conduct, set out in the complaint, could reasonably be regarded as so extreme and outrageous to result in liability.”¹⁰ Thus, the trial justice is permitted to determine “whether undisputed (or assumed) facts suffice to state a claim for intentional infliction of emotional distress,” and “if those facts would not allow a rational factfinder to classify the defendant’s conduct as extreme or outrageous...then dismissal is proper.”¹¹

Pulling these pieces together, damages for intentionally causing another to suffer severe emotional distress are more disfavored than punitive damages; are available in fewer instances than punitive damages; are only available where the actor’s conduct is more egregious, culpable, and extreme than conduct that would warrant punitive damages; and are subject to strict gate-keeping by the courts at the earliest stages of litigation. These strictures make intentional infliction of emotional distress the most disfavored tort with perhaps the most rigorous standard of all common law actions. The next section will address whether the tort’s most disfavored status should also mean that the cause of action and remedy is unavailable if the defendant’s alleged conduct already constitutes another tort. In other words, whether it is only a gap-filler tort that is available only where no traditional common law claim applies, and emotional distress is the sole injury.

IIED is a Specific Intent Gap-Filler Tort

IIED was a cause of action recognized as a somewhat later addition to the common law to address a situation that existing common law actions did not address. Conduct that is specifically intended to cause emotional, not physical injury,¹² because the


existing common law actions did not. While more traditional common law actions provided redress for personal injuries such as physical injury, property damage, or reputational harm, there was no recognized action that provided redress where the defendant intended to inflict only emotional harm.¹³

Occasionally the tort is paired with the more long-standing traditional tort claims for physical injuries. For example, the tort of assault and battery. That presents a situation where a plaintiff is simultaneously seeking damages for both physical injury and intentionally inflicted emotional injury, but from the identical set of facts and for the identical conduct. They are essentially alleging the defendant intended to inflict emotional injury at the same time he or she was intended to inflict bodily injury while pummeling the plaintiff. Although the Rhode Island Supreme Court has not specifically addressed whether a defendant can have both the intent to physically and emotionally injure a plaintiff at the same time, thus permitting both claims to be brought for the same conduct, a small number of state courts have. They have held as a matter of law that they may not, reasoning that because the intent requirement for the bodily injury claim is incompatible with the intent requirement for the other, in one tort the specific intent is to cause physical injury and in the other it is to cause emotional injury. In those jurisdictions, where the alleged facts already constitute a traditional claim for bodily injury, and “the claim of emotional distress is a supplement to” that claim, “the burden of showing sole intent [to inflict emotional distress] cannot be met.”¹⁴ The intent requirements for each tort are incompatible, they cannot exist in one mind at the same time.¹⁵ Unlike every other traditional personal injury tort, the intent that a defendant must have to give rise to a cause of action for intentional infliction of emotional distress must be “the specific purpose of causing emotional distress” or at minimum an intent to commit specific conduct he “knew or should have known...would cause emotional distress rather than personal (physical) injury.”¹⁶ An intent to cause bodily injury, or any injury other than emotional distress, negates the possibility of the specific intent necessary for the tort of IIED because the tort is limited to circumstances where the defendant’s sole intent is to cause emotional distress and injury.¹⁷ In short, “[w]hen the claim of emotional distress is a supplement to another tort claim...the burden of showing sole intent [to inflict emotional distress] cannot be met.”¹⁸

The courts that have addressed this question characterize IIED as a tort originally intended to simply be a “gap-filler” tort that would “stand alone” to provide redress when traditional common law torts did not. For extreme emotional suffering that was the object of the defendant’s conduct, and for which no other traditional tort provided relief.¹⁹ Thus, “[w]here the gravamen of the complaint is really another tort, intentional infliction of emotional distress is unavailable.”²⁰ Based on the extent to which the Rhode Island Supreme Court has cabined and limited the intended application of the tort of IIED, it would be entirely consistent to explicitly join those jurisdictions and recognize it as a limited gap-filler tort. The Court cannot do that unless a defendant makes that argument.²¹

Conclusion


There is ample basis for defense counsel to assert, and for Rhode Island courts to specifically recognize, the rule that where the gravamen of the complaint would constitute a tort other




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than IIED, an IIED claim is, as a matter of law, not available to the plaintiff.²² That rule makes sense given the very specific intent requirement for establishing intentional IIED, the existence of which precludes finding an intent to cause other long-standing traditional personal common law tort injury. Equally germane, such a rule fits most consistently with the very limited, very narrow, very cabined application of the tort established by the Rhode Island Supreme Court. The tort of intentional infliction of emotional distress should be recognized for what it is, a stand-alone, gap-filling tort that may only be brought where no other cause of action will address the defendant's conduct, and the limited viability of the claim should be tested in the early stages of litigation.

ENDNOTES

- 1 *Gross v. Pare*, 185 A.3d 1242, 1246 (R.I. 2018) (quoting *Restatement (Second) Torts* § 46 cmt. d (1965)); accord, *Hoffman v. Davenport*, 851 A.2d 1083, 1090 (R.I. 2004); *Jalowy v. Friendly Home, Inc.*, 818 A.2d 698, 707 (R.I. 2003); *Swerdlick v. Koch*, 721 A.2d 862, 863 (R.I. 1998).
- 2 *Id.*
- 3 See *Gross*, 185 A.3d at 1246.
- 4 *Gross*, 185 A.3d at 1246 (emphasis added).
- 5 *Felkner v. Rhode Island College*, 203 A.3d 433, 461 (R.I. 2019) (quoting *Palmisano v. Toth*, 624 A.2d 314, 318 (R.I. 1993)).
- 6 See *Felkner v. Rhode Island College*, 203 A.3d 433, 461 (R.I. 2019) (“rigorous standard”); *Castellucci v. Batista*, 847 A.2d 243, 248 (R.I. 2004) (“sets the bar quite high”).
- 7 *Felkner*, 203 A.3d at 461 (quoting *Palmisano*, 624 A.2d at 318).
- 8 *Id.* (internal citation omitted).
- 9 See *Jalowy*, 818 A.2d at 707 (internal quotation marks and citation omitted).
- 10 *Clift v. Narragansett Television L.P.*, 688 A.2d 805, 813 (R.I. 1996) (citing *Restatement (Second) Torts* § 46, comment b (1965)).
- 11 *LaChapelle v. Berkshire Life Ins. Co.*, 142 F.3d 507, 511 (1st Cir. 1998) (applying Maine law); see also *Cassotto v. Aeschliman*, 130 Conn. App. 230, 235, 22 A.3d 697, 700 (2011) (“[I]n assessing a claim for intentional infliction of emotional distress, the court performs a gatekeeping function. In this capacity, the role of the court is to determine whether the allegations of the complaint...set forth behaviors that a reasonable fact finder could find to be extreme and outrageous.”) (Internal citations omitted)).
- 12 *Gross v. Pare*, 185 A.3d 1242, 1246 (R.I. 2018); accord, *Hoffman v. Davenport*, 851 A.2d 1083, 1089 (R.I. 2004); *Jalowy v. Friendly Home, Inc.*, 818 A.2d 698, 707 (R.I. 2003). But only emotional distress that is extreme, that is, distress so severe it is manifested by bodily symptoms and signs. *Gross*, 185 A.3d at 1246; see also *Vallinoto v. Disandro*, 688 A.2d 830, 838 (R.I. 1997); see also *Wright v. Zelinski*, 824 A.2d 494, 499 (R.I. 2003) (holding that “[i]t generally requires expert medical evidence to establish that the physical symptoms that are the alleged manifestation of the emotional distress, are in fact caused by that distress”).
- 13 *Naselrod v. Mabry*, 184 F.Supp.3d 534, 560 (E.D. Ky. 2012) (citation omitted) (applying Kentucky law).
- 14 *Id.*
- 15 *Childers*, 367 S.W.3d at 580.
- 16 *Id.* (quoting *Craft v. Rice*, 671 S.W.2d 247, 249 (Ky. 1984)) (emphasis in original); see also *Gross*, 185 A.3d at 1246 (defining the tort as conduct “intended to inflict emotional distress” or at least in “reckless disregard of the probability of causing emotional distress.”); *Jalowy*, 818 A.2d at 707 (“intended to inflict emotional distress”); *Vallinoto*, 688 A.2d at 839 (defining as a tort “for a wrong intended to inflict emotional distress”).
- 17 See *Childers*, 367 S.W.3d at 580; *Gross*, 185 A.3d at 1246.
- 18 *Naselrod*, 184 F.Supp.3d at 561 (citation omitted) (applying Kentucky law); see also *Crews v. County of Nassau*, 996 F.Supp.2d 186, 214 (E.D.N.Y. 2014) (“New York courts do not allow IIED claims where the conduct complained of falls within the ambit of other traditional tort claims[,]”) (internal quotation marks and citations omitted) (applying New York law).
- 19 See, e.g., *Childers v. Geile*, 367 S.W.3d 576, 584 (Ky. 2012) (“But where severe emotional distress is caused by outrageous conduct, the Court determined as a matter of policy that compensation should be available and allowed the gap-filler tort of intentional infliction of emotional distress.”);

Hoffman-LaRoche Inc. v. Zeltwanger, 144 S.W.3d 438, 447 (Tx. 2004) (stating that “intentional infliction of emotional distress was, first and foremost, a ‘gap-filler’ tort, judicially created for the limited purpose of allowing recovery in those rare instances in which a defendant intentionally inflicts emotional distress in a manner so unusual that the victim has no other recognized theory of redress.”) (quoting *Standard Fruit and Vegetable Co. v. Johnson*, 985 S.W.2d 62, 68 (Tex. 1998)); *A.H., a minor, by her next friends, C.H. and E.H. v. Church of God in Christ, Inc.*, 297 Va. 604, 632, 831 S.E.2d 460, 476, n. 18 (2019) (“Unlike negligent infliction – which is best understood as a mere remedial theory governing recoverable damages – intentional infliction of emotional distress creates a stand-alone tort duty.”).
 20 *Hanold v. Raytheon Co.*, 662 F.Supp.2d 793, 808 (S.D. Tex. 2009) (citation omitted) (applying Texas law).
 21 That is, at least, the theory.
 22 *Hanold v. Raytheon Co.*, 662 F.Supp.2d at 808. ◊

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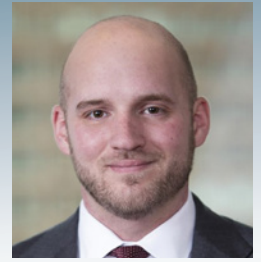
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Lunch with Legends: Trailblazers, Trendsetters, and Treasures of the Rhode Island Bar



William J. Delaney, Esq.
Cohn & Dussi LLC, Warwick



Paul L. Keenan, Esq.
Jones Kelleher LLP, Providence

The Rhode Island Office of the Public Defender is the oldest indigent defense service provider in the United States, having been enacted under the General Laws in 1941. For forty of these past eighty years, one constant in the Office has been Mike DiLauro, the Office's current Director of Training & Legislative Liaison.

Always on the run, Mike 'sat' down for this interview with us on a slow-moving train, somewhere in Connecticut, on his way to see his son and his wife in New York City on a Saturday morning. We hope you enjoy it.

So, why law school (University of Toledo)?

You know, I don't even remember. I had taken a couple of classes with Dr. Patrick Conley at Providence College (the long-time professor of history and lecturer on western civilization, former Rhode Island historian and now the expert on Rhode Island real estate tax sales as a practicing attorney), who made quite an impression on me, especially the history behind the Civil War and the 13th, 14th, and 15th Amendments.

Fast forward thirty or so years later and I worked on the John Gordon pardon case with Pat, Rhode Island's version of *Sacco & Vanzetti* as to indigents and minorities.

Why did you choose to become a Public Defender?

I have never seen myself as a business person; I have always had problems asking people for money which is required of private practitioners. So, I have had the best of both worlds; I get to practice law and don't have to worry about collecting fees.

What was John Hardiman like and what was his presence to the Office?

John was very instrumental in my career. He was a true visionary in every way, developer of the Holistic Representation Model here in Rhode Island which is modeled on the Brennan Center of NYU Law. Basically, the Model is all about representation of the client in the fullest sense; the question to be discussed is why the defendant is engaging in actions giving rise to an arrest. That involves addressing mental health, substance abuse, poverty, and employment issues, among other things. Public defenders from across the country came (and still come) to Rhode Island to observe the Model and bring it back to their home states.



Michael A. DiLauro, Esq.

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What was your most interesting case thus far?

The *Howard Gilbert* case, probably. A gun charge case with direct overtures of 9/11. It still brings back some emotions for me; issues surrounding 9/11 (my Mom's godson, a New York City firefighter, perished attempting to rescue the injured and lost), my client's former relationship as an FBI informant, and the courage/dedication to the law and legal system of the late RI Superior Court Associate Justice William Dimitri. We (along with the now Rhode Island District Court Associate Judge Anthony Capraro) used the defenses of duress and necessity in Howard's defense and following a skirmish with the FBI leading up to and including trial, Judge Dimitri accepted the duress defense and ruled in Howard's favor, ruling that the dismissal of the charges was 'the right thing to do on the law and not

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Lunch with Legends (continued from prior page)

because I was upset with the FBI? Following trial, I received a call from one of Howard's relatives with the news that Howard had been found dead; his killer remains unknown.

What can you say about the other professionals in the Office?

I continue to be amazed every day by the caliber and quality of the talent we have; under the leadership of Lara Montecalvo, the Public Defender, our people do good and important work daily. Our young lawyers in particular invigorate and recharge me every day in coming to work. The pandemic has wreaked havoc in that delays in moving cases have doubled and sometimes tripled the caseloads of our people. They respond to the challenge on a daily basis in the spirit of other former Public Defenders like Billy Reilly, Richard Casparian, John, and now, Lara.

And the work goes on. Like that slow-moving train.

Soliciting Bar Member Response to Proposed Alternative Dispute Resolution Committee

After reviewing a Rhode Island Bar Association member request, the Bar's Executive Committee is interested in learning of any Bar members interested in joining, and regularly attending meetings for, a proposed Alternative Dispute Resolution Committee. This Committee would seek the participation of all interested members of the Bar to educate members, practitioners, and users of ADR, including supporting education for our members; reviewing and discussing ethical rule issues; encouraging public education regarding the nature and benefits of the dispute resolution processes and how to utilize them; and discussing best practices for neutrals and practitioners alike. At least thirty members must volunteer to serve on the committee which would be formed on an ad hoc basis for at least two years to determine if interest is sustainable. A chairperson will then be appointed by the President. If the Committee is active for two years, the House of Delegates will consider establishing a standing committee consistent with the Bar's bylaws. Bar members interested in joining the proposed Alternative Dispute Resolution Committee are asked to contact Rhode Island Bar Association Membership Services Coordinator Sherilyn Gutierrez by email: sgutierrez@ribar.com no later than **January 31, 2022**.

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Register online at the Bar's website ribar.com and click on CONTINUING LEGAL EDUCATION on the left side menu or telephone 401-421-5740. All dates and times are subject to change.

- January 19** **The Lawyer's Guide to the Access to Public Records Act**
Wednesday
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- January 21** **Forming a Nonprofit Organization in Rhode Island**
Friday
12:30 – 2:00 p.m., 1.0 credit + 0.5 ethics
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- January 26** **The Senate's Discovery Task Force: Recommendations for a Comprehensive Approach to Improving Discovery Procedures in Criminal Cases**
Wednesday
10:00 – 11:30 a.m., 1.5 credits
LIVE WEBINAR ONLY!
- January 26** **I Think, Therefore I Am ... Biased – How Implicit Biases Manifest in the Legal Profession**
Wednesday
1:00 – 2:00 p.m., 1.0 credit
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*Times and dates subject to change.
For updated information go to ribar.com*

NOTE: You must register online for live webinars.

Continuing Legal Education Telephone: 401-421-5740

- February 4** **The Lawyer's Guide to the Open Meetings Act (OMA)**
Friday
12:30 – 1:30 p.m., 1.0 credit
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- February 10** **The Adult Drug Court, Probation Termination Calendar, and the Sexually Violent Predator Calendar – What Lawyers Need to Know**
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- February 17** **RI Disciplinary Proceedings: Meet the New Disciplinary Counsel**
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- February 24** **RI Family Court: Family Treatment Drug Court and Safe and Secure Baby Court**
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Seminars are always being added to the CLE schedule, so visit the [CLE calendar](#) for the most up-to-date information.

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Reminder: Bar members may complete six credits through participation in video replay or on demand CLE seminars. To register for an online seminar, go to the Bar's website: ribar.com and click on CONTINUING LEGAL EDUCATION on the left side menu.

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

The Rhode Island Bar Association regularly updates the Rhode Island Probate Court Listing to ensure posted information is correct. [The Probate Court Listing](#) is available on the Bar's website at ribar.com by clicking on **FOR ATTORNEYS** on the home page menu and then clicking on **PROBATE COURT INFORMATION** on the dropdown menu. The Listing is provided in a downloadable pdf format. Bar members may also increase the type size of the words on the Listing by using the percentage feature at the top of the page. The Bar Association also posts a chart summarizing the preferences of Superior Court justices relating to direct communications from attorneys, and between attorneys and the justices' clerks which is updated yearly. The [chart](#) is available by clicking **MEMBERS ONLY** on the home page menu and then clicking **JUDICIAL COMMUNICATIONS**.



Kelly, Souza & Parmenter, P.C. (KSP Law)

is pleased to announce that

Michael D. Resnick,

who joined KSP Law in 2018,

has become a partner at the firm.



Michael is an integral part of the construction, business, and land use practices at KSP Law. He regularly appears before municipal boards in all aspects of land use, zoning, and planning throughout Rhode Island and Massachusetts.

As a partner, Michael plans to continue to grow his practice and provide his clients with excellent service and successful outcomes while continuing the tradition of tenacity at KSP 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.

Nicole J. Benjamin, Esq.
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Fay Law Associates

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Looking to Post or Search for a Job in the Legal Field?

The Rhode Island Bar Association's Career Center is operated by YourMembership.com. At no charge, Bar members may: search and quickly apply for relevant jobs; set up personalized Job Alerts for immediate notification any time a job is posted matching your skills and/or interests; create an anonymous job seeker profile or upload your anonymous resume allowing employers to find you; and access job-searching tools and tips. For a fee, employers may place job openings; search our resume database of qualified candidates; manage jobs and applicant activity right on our site; limit applicants to those who meet your requirements, and fill openings more quickly with talented legal professionals. For more information, visit the Bar's website at ribar.com and click Career Center under the list of Quick Links.

Helping Self-Represented Litigants Isn't Charity Work, It's A Professional Obligation



Suzanne Harrington-Steppen, Esq.

Clinical Professor of Law and Associate Director of Pro Bono Programs, RWU School of Law



Eliza Vorenberg, Esq.

Clinical Professor of Law and Director of Pro Bono and Community Partnerships, RWU School of Law

When someone can't afford a lawyer, we need to ensure some basic level of fairness in how that person moves through a civil court case.

"I have a hearing today, but I don't know what to do. I'm not even sure why I'm being evicted."

This quote represents how a tenant typically approaches the Eviction Help Desk outside of Courtroom 3E in the Garrahy Judicial Complex. Launched in October 2021, the Eviction Help Desk is a partnership between Roger Williams University School of Law's Pro Bono Collaborative, the Rhode Island District Court, Rhode Island Center for Justice (CFJ), and Rhode Island Legal Services, Inc. (RILS), which was developed to help address the anticipated spike in evictions following the end of the eviction moratorium. The Help Desk is staffed Monday through Friday from 9 a.m. until 12 p.m. by RWU Law students, working alongside seasoned housing attorneys from RILS and CFJ. Each day one legal services attorney and two or three law students staff the Eviction Help Desk. On some days, the need can be overwhelming with upwards of twenty-five self-represented tenants on the calendar. Nearly all of the landlords have retained counsel while most people facing eviction cannot afford a lawyer and, due to the limited funding of legal services organizations, it is extremely challenging to secure representation, even for those who are eligible!

As self-represented tenants approach courtroom 3E, the law students greet them, help them understand and navigate the legal process in 3E, offer information, resources, a friendly smile, and conduct screening intakes for the supervising attorney on duty that day. Although the Eviction Help Desk was created to help address the tremendous increase in evictions post-moratorium by providing limited assistance to self-represented tenants facing eviction, RWU Law's role goes far beyond that individual assistance. In addition to providing immediate assistance to self-represented tenants in the courthouse, RWU Law is exposing law students to the realities self-represented litigants face in the courts and developing the students' client-centered legal skills and their understanding of ethical considerations in practice. The law students involved in the project, part of the next generation of lawyers and judges, will better understand and appreciate the need for, and their professional obligation to pro-

vide, pro bono legal service and their professional responsibility to monitor and improve the quality of justice administered through our legal systems.



Law students Nellie Large and Tony Henson with RILS, Inc. attorney David Leveillee.

Most of us went to law school with some notion that we would use our legal education to help others. In addition to the personal motivation to give back, the Rhode Island Rules of Professional Conduct require that we care about who has access to justice and the quality of justice provided. The preamble to the Rhode Island Rules of Professional Conduct provides powerful guidance:

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession.... In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to

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our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.²

The Eviction Help Desk is one way the law school is teaching law students about pro bono legal service and what it means to be responsible for the quality of justice administered. The Help Desk is a triage model and as such it has significant limitations. But the tremendous impact it is having on the twenty volunteer law students involved is unquestionable. When you see firsthand how disadvantaged self-represented litigants are in an eviction proceeding, it's hard to look the other way and pretend like it's not happening.³

Law student volunteers engage in reflective meetings with the Pro Bono Collaborative faculty members to discuss the work of the project, but more importantly to discuss and react to what they are seeing in the courthouse. Students are asked to think critically about their burgeoning professional identities, civility in the courthouse, ethical issues, and other aspects of lawyering that will influence how they practice and how they see themselves as members of a profession.⁴

We are all responsible for the experience self-represented litigants face when they find themselves involved in a court case. Unlike criminal cases, where there is a constitutional guarantee of representation, tens of thousands of Rhode Islanders are without representation in high-stakes civil cases, like an eviction proceeding.⁵ When someone can't afford a lawyer, we need to ensure some basic level of fairness in how that person moves through a civil court case. It's inefficient and inhumane to ask someone to participate in a process where the rules and norms can only be understood with three years of professional education.

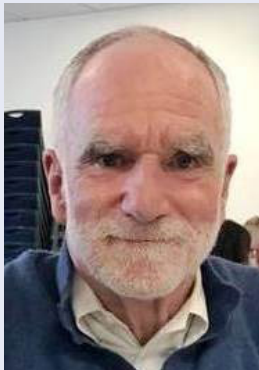
Law students can offer all of us a fresh perspective on these complicated access to justice issues and on our professional responsibility to be part of the solution. At a recent law student meeting, several students expressed surprise at how quickly the eviction process moves regardless of a self-represented tenant's understanding of their case and the potential outcomes of their court appearance. They reflected on the extent of heartbreak they'd witnessed in the hallway and the limitations on the lawyers' power to address that heartbreak. They also tried to put themselves in the shoes of a self-represented litigant entering the courthouse, trying to locate the appropriate courtroom, reading the forms as laypeople, sometimes with language barriers, and witnessing the commotion in the hallway outside Courtroom 3E. This is an experience they can't get in the law school classroom. By placing them in the courthouse and introducing them to the awesome responsibility we all have to provide pro bono legal service, RWU Law is bringing that fresh perspective to our community and instilling a critical ethic in our law students.

The Eviction Help Desk will be expanding to Kent County in January 2022. Private volunteer attorneys are always welcome to work alongside legal services attorneys at the Eviction Help Desk in either court. Not only is the need tremendous but it would be wonderful for our law students to see private attorneys engaged in pro bono legal service. Private attorneys are also encouraged to consider taking a pro bono eviction case through the Bar Association's Volunteer Lawyer Program (VLP) *Ed*.

ENDNOTES

- 1 “86% of the civil legal problems reported by low-income Americans in [2016] received inadequate or no legal help.” Legal Services Corporation. THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS, 30 (2017), <https://lsc-live.app.box.com/s/6x4wbb5d2gqxwy0v094os1x2k6a39q74>.
- 2 R.I. Model Rules of Prof'l Conduct R., pmb1. 6 (2017).
- 3 To learn more about the experience of self-represented litigants in Rhode Island, see National Center for State Courts, RHODE ISLAND JUDICIARY AND SELF-REPRESENTED LITIGANTS, A STUDY (July 21, 2021).
- 4 During law student project meetings, students are asked to respond to the following prompts:
 - What is one thing that has surprised you?
 - What is one thing that you've observed about lawyering that will influence how you lawyer in the future?
 - How do you think self-represented tenants experience the hallway? The courtroom?
 - What could be changed to improve self-represented tenants' experience?
 - Do the self-represented tenants have 'access to justice'— from your viewpoint? Why or why not?
 - Who is responsible for the self-represented litigants' circumstances? Why are these tenants in this situation?
- 5 National Center for State Courts, *supra* note 3, at 10-11. ◇

EDITOR'S NOTE: The Bar's Volunteer Lawyer Program (VLP) facilitates the placement of hundreds of pro bono cases each year. Volunteer attorneys positively impact the quality of their clients' lives by providing critically needed representation and protections for people who could not otherwise afford it. Members of our pro bono programs report satisfying and unique experiences that can sometimes open a door for a new practice area. There are volunteer opportunities in many areas of law, especially civil matters and evictions, and staff prescreen potential clients for eligibility. Whether you have been an attorney for years or it is the beginning of your career, pro bono cases can provide the opportunity for you to explore new areas of law with a seasoned mentor. The VLP also recently sponsored a CLE program, *An Overview of Tenant Protections & Strategies for Successful Results*, which can be viewed free of charge on-demand if you agree to join the VLP and accept an eviction case. Joining the program is simple! For more information, please contact Volunteer Lawyer Program Coordinator John H. Ellis at jellis@ribar.com or by phone at (401) 421-7758.



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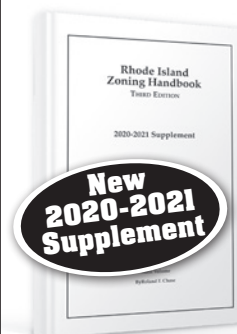
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An Interview With Koye Idowu, Esq.

by Nicole P. Dyszlewski, Esq., MLIS and Meghan L. Hopkins, Esq.

Focus on the Future is a spotlight series where members of the *Rhode Island Bar Journal* Editorial Board interview attorneys who are newer to the Rhode Island Bar.

> **What is your current title and position?**

I am Counsel at ESPN.

> **What do you actually do all day?**

I support certain business units within ESPN, including music, sales & marketing, business development, and travel. I also handle legal matters related to certain sports and leagues such as Little League baseball, professional softball, and bowling. My work is contract-focused, but it touches many areas within ESPN.

> **Prior to your position at ESPN, when you lived in NY, did you have any celebrity sightings you want to tell us about?**

Unfortunately, no. I saw a bunch of filming on location but no celebrity encounters during my time in NY.

> **Can you tell us one thing you have learned while being a new attorney?**

I have learned the importance of building a collaborative relationship and maintaining open lines of communication with clients. The best attorney-client relationships often arise from clients viewing attorneys as trusted, business-minded confidants working towards their goals rather than obstacles who slow things down. Building that relationship takes time, and it's important to demonstrate to clients that we appreciate the need to keep the process moving forward while also identifying and addressing potential risks associated with taking certain actions.

> **We have done a few of these interviews now and several of the new attorneys we have talked to mention the value of having a good reputation, even early on in your legal career. Have you thought much about this issue yet?**

Absolutely. I started building my reputation in the legal community during law school when I served as an intern at the United States District Court for the District of Rhode Island and as a summer associate at a global law firm in New York. During those opportunities, I sought to demonstrate professionalism, build trust, and make the lives of my supervisors easier by asking pertinent questions and taking ownership of my work assignments. I think building your reputation starts with establishing a strong support system so you can lean on your mentors in moments of uncertainty. For that reason, I make an effort to meet other professionals in my industry to learn about their career paths, and I try to share my knowledge and experience with new attorneys entering the workforce.

> **How has it been integrating into a new job in an all remote or mostly remote post-pandemic world? How have the mentorship and communication been?**

It's certainly been an adjustment, but it's pushed me to actively seek



KOYE IDOWU, ESQ.

professional connections with people that I might not have crossed paths with otherwise, which is great. In the remote world, we've lost the casual conversations that occur while walking into the building, stopping into someone's office, or getting lunch, so you have to make them happen. For me, that's been reaching out to people and setting up 30-minute Zoom introductions or establishing monthly catch-up meetings with mentors. While scheduling set times to replace the organic in-person conversations takes a bit more forethought, I think it has definitely expedited my integration and opened lines of communication.

> **Who is your biggest inspiration inside or outside of law?**

Steph Curry. I admire the way he carries himself and the joy with which he plays basketball. He displays a level of confidence that inspires others to follow his lead and simultaneously shows respect for everyone that he encounters. That way of being is admirable and can be applied beyond sports and law to life in general.

> **What do you do to de-stress?**

I go to the gym. I get up at 4 AM and workout from 5-7 AM. Knowing that I have that time to myself each day to



DYSZLEWSKI



HOPKINS

Continued on next page

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unwind and rest my mind is huge for me. I also listen to podcasts daily. My favorites are *The Ryan Russillo* podcast, *The Joe Budden* podcast, *Higher Learning* with Van Lathan and Rachel Lindsay, *Brian Windhorst & The Hoop Collective*, *New Rory & MAL*, and *Small Talk* with Michelle Smallmon, and Steve Ceruti.

> **Snooze button or nah?**

Nope. And no coffee either.

> **What is your favorite restaurant in Rhode Island?**

Nino's Pizza in Cranston. It reminds me of my childhood!

> **Name one thing that you could not live without and why?**

Peanut butter. I have it every day.

> **You haven't really established your new office yet. How will you decorate your office?**

The décor will be sports themed and definitely will include some Steph Curry memorabilia and items from my favorite sports teams (Red Sox, Patriots, and Celtics). There will be pictures of my girlfriend and I, and I will also have some music-themed décor mixed in there like my Chance the Rapper "Coloring Book" poster.

> **What do you want attorneys to know about being in-house counsel?**

It is hard to say because I'm still learning myself. From the perspective of a firm attorney, it may look like being in-house counsel is less onerous because there is only one client. However, this job presents its own unique challenges. Despite the perception that in-house counsel only have one client, we all have multiple clients within the various business units that we support with unpredictable schedules and deadlines. One very different aspect of life as in-house counsel is that, unlike the law firm model of specializing in a particular area of the law, I'm able to experience various areas of law, which has afforded me the opportunity to develop a broader set of skills. I frequently encounter new and interesting issues to consider, which keeps my day-to-day fresh and interesting. It's a great experience for a new attorney, and I'm excited to continue learning and growing in my role.

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Bar Association Mentor Programs

Our Bar Association is proud to offer mentorship opportunities to our members, promoting professional development and collegiality, and assistance and guidance in the practice of law. Experienced practitioners can share their wealth of knowledge and experience with mentees, and mentees receive a helping hand as they begin, or revitalize, their legal careers. Over the years, the Bar Association has matched numerous new members with seasoned attorneys, and we would like to refresh our directory.

For traditional mentoring, our program matches new lawyers, one-on-one with experienced mentors, in order to assist with law practice management, effective client representation, and career development. If you would like to volunteer and serve as a mentor, please visit ribar.com, select the **MEMBERS ONLY** area, and complete the **Mentor Application** form and return it to the listed contact.

As an alternative, the Bar Association also offers the Online Attorney Information Resource Center (OAR), available to Bar members through the **MEMBERS ONLY** section of the Bar's website, to help members receive timely and direct volunteer assistance with practice-related questions.

If you have any questions about either form of mentoring, or if you would like to be paired with a mentor through our traditional program, please contact Communications Director Erin Cute by email: ecute@ribar.com, or telephone: 401-421-5740.

Do you or your family need help with any personal challenges?

We provide free, confidential assistance to Bar members and their families.

Confidential and free help, information, assessment and referral for personal challenges are available **now** for Rhode Island Bar Association members and their families. This no-cost assistance is available through the Bar's contract with **Coastline Employee Assistance Program (EAP)** and through the members of the Bar Association's Lawyers Helping Lawyers (LHL) Committee. To discuss your concerns, or those you may have about a colleague, you may contact a LHL member, or go directly to professionals at Coastline EAP who provide confidential consultation for a wide range of personal concerns including but not limited to: balancing work and family, depression, anxiety, domestic violence, childcare, eldercare, grief, career satisfaction, alcohol and substance abuse, and problem gambling.

When contacting Coastline EAP, please identify yourself as a Rhode Island Bar Association member or family member. A Coastline EAP Consultant will

briefly discuss your concerns to determine if your situation needs immediate attention. If not, initial appointments are made within 24 to 48 hours at a location convenient to you. Or, visit our website at **coastlineeap.com** (company name login is "RIBAR"). Please contact Coastline EAP by telephone: 401-732-9444 or toll-free: 1-800-445-1195.

Lawyers Helping Lawyers Committee members choose this volunteer assignment because they understand the issues and want to help you find answers and appropriate courses of action. Committee members listen to your concerns, share their experiences, offer advice and support, and keep all information completely confidential.

Please contact us for strictly confidential, free, peer and professional assistance with any personal challenges.

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Dana N. Weiner, Esq.	(401) 265-2751
Professionals at Coastline EAP	(401) 732-9444

Lawyers Helping Lawyers Committee Members Protect Your Privacy

SOLACE, an acronym for Support of Lawyers, All Concern Encouraged, is a new Rhode Island Bar Association program allowing Bar members to reach out, in a meaningful and compassionate way, to their colleagues. SOLACE

communications are through voluntary participation in an email-based network through which Bar members may ask for help, or volunteer to assist others, with medical or other matters.

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

The program is quite simple, but the effects are significant. Bar members notify the Bar Association when they need help, or learn of another Bar member with a need, or if they have something to share or donate. Requests for, or offers of, help are screened and then directed through the SOLACE volunteer email

SOLACE Helping Bar Members in Times of Need

network where members may then respond. On a related note, members using SOLACE may request, and be assured of, anonymity for any requests for, or offers of, help.

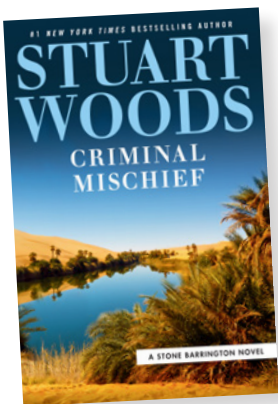
To sign-up for SOLACE, please go to the Bar's website at ribar.com, login to the Members Only section, scroll down the menu, click on the SOLACE Program Sign-Up, and follow the prompts. Signing up includes your name and email address on the Bar's SOLACE network. As our network grows, there will be increased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

An Interview with Author Stuart Woods



William J. Delaney, Esq.
Cohn & Dussi LLC
Warwick

A mixture of the law, intrigue, and a subtle amount of fraternization, has made me hooked on Woods.



Stuart Woods

This interview is the first of a four-part series that will feature authors who incorporate lawyers as the main character of their novels. The series is intended to highlight writers who help transport their readers into fictional worlds and help them escape the stresses of daily life. We hope the series reminds Bar members to take time for yourselves and engage in activities outside the practice of law.

Stuart Woods, by all measurements, is the consummate writer of mystery novels. From his first novel, *Chiefs*, in 1981, Woods has created surreal landscapes of tales of family, murder, intrigue, and deep character developments.

I read *Chiefs* about a dozen years ago following my first Woods novel, *New York Dead*. That novel introduced a New York police detective-turned lawyer, Stone Barrington, whose story was a compelling one as witnessed by the 58 succeeding novels involving him.

The character Stone Barrington graduated from NYU law and during his senior year, did an externship with the NYPD in a drive-along capacity on the streets. He loved the experience and joined the NYPD upon graduation. He rose through the ranks and became a homicide detective with his partner, Dino Bichetti. Over time, Stone became a thorn for his superiors and when he was injured in the line of fire, he was medically retired with a disability pension in a controversial manner. His best friend from law school offered him a position with a 'white shoe' law firm where he would be assigned 'fixer cases,' ala Michael Clayton. He first had to take the bar exam, which he crammed for, and passed.

Many of Woods' books involve white-collar crime, first with American mobsters and later Middle Eastern terrorists. Across the books, Stone becomes friendly with CIA agents and inevitably, the President of the United States and his wife, who is subsequently elected to the role. Stone also performs a lot of commercial law in the international world and has served as special counsel to the two presidents. Several of the novels involve international espionage.

Stone has a son who is involved in the film industry; he negotiated several contracts for his son and his NYPD partner, Dino's son. Dino became

the Police Commissioner of the NYPD and Stone is his unannounced advisor. Stone hates court but has an uncanny knack for establishing fine personal relationships with judges on the state and federal levels.

The great thing about Woods' books is that, except for a few non-fiction pieces, all of them are available on compact discs or can be found on the Audible app. Most of his novels are approximately six hours long in audio format and all of them have been narrated by actor Tony Roberts, famous for his Woody Allen roles.

In my 67 years on this earth, I was a voracious reader in my youth, but following law school, the only reading I enjoyed was reading sports stories, aside from case law. It was only in my late 50's did I come around to reading once again, but due to my schedule, I could only find the time for listening to novels. A former partner of mine turned me on to Stuart Woods and Stone and his merry group of friends. A mixture of the law, intrigue, and a subtle amount of fraternization, has made me hooked on Woods. For me to replace 'all sports radio' with Woods' novels some eleven years ago, was quite a feat.

Listening to the irascible Tony Roberts, while driving anywhere and everywhere (including traveling to Albany for the funerals of my folks), has made me very comfortable as well as anxious/concerned that Woods remains healthy to continue to push out new novels (his contract with his publisher calls for five novels 'every year for as long as I can stand it').

I had the idea to interview Mr. Woods over a year ago; then the pandemic happened, and everything fell apart. We resumed exchanging e-mails a few months ago and he agreed to an 'interview' on his terms: including referencing/incorporating a twenty-one page 'interview stream' that is paraphrased below.

I hope you enjoy it and try out a novel...or

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forty...

What inspired you to become an author?

My mother taught me to read the year before I went to school, and she did a good job. I became a voracious reader as a child, reading Mark Twain and Dickens and a lot of horse and dog stories from the Junior Literary Guild, then I moved up to my mother's Literary Guild selections. That has to be the basis of my career. One learns to write by reading, and by the time I was nine or ten, I wanted to write.

Who are the authors that have most influenced your style of writing?

I really don't know. I've read thousands of books and probably hundreds of them have had some sort of effect, but they all tend to run together, as far as their influence goes. I've never made a conscious effort to write like another writer (except as a student), though I'm sure influences reveal themselves to some astute readers. It's probably easier for you to tell me.

What is the most satisfactory part of being a writer?

The freedom. I'm as much my own master as anyone can be, without being the master of others. I can write anywhere—all I need is an hour of solitude and a computer, and I can write a chapter. Since my work is portable, I can live anywhere I like.

What prompted you to write about murder and crime, which are rather depressing subjects?

Murder and crime are depressing only if they're happening to you. And, they're among the most compelling human dramas, if you like that sort of thing.

In your Stone Barrington novels, you do very well with the legal terms, but according to your bio from your publicist, you don't have any legal background. Where do you get the knowledge?

I was a big fan of L.A. Law and I've seen just about every episode of Law & Order. If I really get stuck, I call one of the lawyers I know.

Did you base the Stone Barrington character on someone living, or is he entirely a figment of your imagination?

Stone is a fictional character. I know only one NYPD detective, and I didn't meet him until after the first Stone novel, *New York Dead*, had been written. I don't know any lawyers like Stone, either, and he is really not me, although there are a few similarities.

Of all of the books you have written, which is your favorite, and why?

Chiefs, mostly, because it was my first, and because it is infused with my childhood hometown and family experiences. It may also be my best, but that's for other, more objective readers to determine.

What awards have your books won?

Chiefs won an Edgar (Allen Poe Award) from the Mystery Writers of America and *Palindrome* was later nominated. *Imperfect Strangers* won the Grand Prix de Literature Policière, from the French Academy, I think. I also spoke to a lawyers' group and was given a very nice paperweight. ◇

In Memoriam

John R. Bernardo III, Esq.

John R. Bernardo III, 64, of South Kingstown, died on Tuesday, November 9, 2021. He was the husband and best friend of Christine (Turilli) Bernardo. Born in Providence, he was the son of Dolores Florence (Beauvais) Bernardo and the late Dr. John Ralph Bernardo, Jr. John graduated from Boston University and earned a JD degree from New England School of Law. He was a practicing member of the Rhode Island Bar for 38 years, with offices in Bristol, Providence, and Wakefield. He was a prosecuting attorney for the Town of Tiverton and he participated as a member of the South Kingstown Zoning Board for several years. John was chosen and awarded as "A Man Who Makes a Difference" from the Women's Resource Center in 2017. Besides his wife and his mother, John is survived by his two children, son, Matthew, and his wife Lauren (Pendergrass); daughter Allegra, and her husband Zachary (Matook); his siblings Janet, Joanna, Chris and his wife Carol, Robert and his wife Stephanie, and Mark and his wife Beth; in-laws, Edward and Louise (Trabuocco) Turilli of North Kingstown, sister-in-law, Anne Turilli and her husband Charley Beal; several grandchildren and nieces and nephews.

Dennis E. Carley, Esq.

Dennis E. Carley, 67, died on Monday, November 8, 2021. He was the son of the late Edward and Alice (O'Day) Carley. He is survived by his three children, Jack E. Carley, Kayliegh A. Carley, and Karissa M. Carley; his siblings Michael, Elizabeth, Kevin, Timothy Carley, Kathleen Carley Skwara, and the late Peter Carley; and by his former wife, Christine Carley.

Anthony A. Cipriano, Esq.

Anthony A. Cipriano, 78, of Cranston, died on Thursday, October 28, 2021. He was the husband of Ann T. (Heelan) Cipriano. Born in Providence, he was the son of the late Alfred and Clotilda (D'Anella) Cipriano. Anthony graduated from Georgetown University and Suffolk Law School. Anthony served as the Chief Legal Counsel for the RI Department of Corrections for 30 years. Besides his wife, Anthony is survived by his five children, Anthony A. Cipriano, Jr. and his wife Jennifer of Falls Church, VA; Christopher J. Cipriano of Cranston, RI; Gregory S. Cipriano and his wife Melissa of Midland, TX; Patricia A. Cipriano of Cranston, RI; and Karen M. Cipriano-Porto of Cranston, RI; four grandchildren; and his brother Alfred A. Cipriano and his wife Carol of NH.

William J. O'Brien Jr., Esq.

William J. O'Brien, Jr., 82, of Johnston, died on Tuesday, October 19, 2021. He was the husband of Carol (Abbott) O'Brien. Born in Norfolk, Virginia, he was the third son of the late Capt. William J. and Helen O'Brien, USN. Bill was a graduate of the University of Virginia where he obtained both bachelor and law degrees. Prior to practicing law, he served in the US Navy where he achieved the rank of lieutenant commander and was a member of the submarine division. Besides his wife, Bill is survived by his son William J. O'Brien III and his wife Allison, of Great Neck, NY; his daughter Dr. Christine Fitzgibbons and her husband Timothy, of Hopkinton, MA; his brother Dr. Daniel H. O'Brien, of Bryan, TX; and his two grandchildren. He was predeceased by his brothers, Capt. John T. O'Brien, USN and Capt. Michael F. O'Brien, USN.

Dennis J. Roberts II, Esq.

Dennis J. Roberts, II, 80, died on Wednesday, October 20, 2021. He was the husband of Sherry (Alden) Roberts. Born in Providence, he was the son of the late Chief Justice Thomas H. Roberts and Florence (McCabe)

Roberts. Dennis graduated from Fordham University in 1963 and Boston College Law School in 1966, where he was chosen as Editor of the *Law Review*. He served three consecutive terms as Rhode Island's Attorney General from 1979 to 1985 and more than fifty years as a lawyer in private practice. Dennis won the RI Bar Association's 2018 Florence K. Murray Award for his promotion of women in leadership roles within the Attorney General's department. He was a member of the Rhode Island and New York Bars as well as the Bars of the US District Court, the US Court of Appeals, and the United States Supreme Court. For many years he served as Chair of the RI Board of Bar Examiners, and as attorney for the RI Consumers' Council. Besides his wife, Dennis is survived by his daughter Jane Roberts of Chicago, IL, his three grandchildren, and his brother Tom Roberts of Cranston, RI. He was predeceased by his son Thomas H. Roberts II.

Janis Sallinger Saunders, Esq.

Janis Sallinger Saunders, 77, died in early November. She was the wife of Gregory C. Saunders. Born in Wellesley, MA, she was the daughter of Peter and Marie (Rogers) Sallinger. Janis earned a BA from Boston University, a Juris Doctor from Northeastern University, and eventually an advanced degree in Law & Diplomacy from the Fletcher School at Tufts University. Janis was admitted to practice in both Rhode Island and Massachusetts. She started her legal career in family law but eventually moved on to wills and probates, as well as acting as a legal guardian to people needing court-appointed support. Janis' long career in law included having her own practice, Sallinger & Barrett Law Offices, working for Legal Services in St. Croix, the US Virgin Islands (where she also passed the bar), traveling in China to study remote sensing as a part of her Fletcher degree, and presenting a paper at a Superior Court in Bulgaria on 'Self Determination at End of Life'. In addition to her husband, she is survived by her three children, Roderick Mitchell and his late wife Patti; Alexander Mitchell and his wife Laura; Juliana Stroessenreuther and her husband Travis; her stepchildren Deborah, Nina, Robin, Richard, Keita, Gregg, Anne, Danita, Gregory II, and Kenyatta; several cherished grandchildren and step-grandchildren; and her two sisters Margaret Brown and Barbara Donlon. She is predeceased by her siblings Jackie, Martha, and Paul Sallinger.

John F. Smollins Jr., Esq.

John F. Smollins, Jr., 81, of Providence, died on November 20, 2021. He was the husband of Georgette M. (Molenat) Smollins. Born in Providence, John was the son of the late John F. and Catherine (Gartland) Smollins, Sr. John graduated from the Assumption School in 1955 and LaSalle Academy in 1958. He received a Bachelor of Arts degree from Providence College in 1962 and was simultaneously commissioned a 2nd lieutenant in the Transportation Corps of the United States Army Reserve. After graduating from Suffolk University Law School in 1965, he was called to active duty and served as an Army Captain in the Republic of South Vietnam. While in military service, he was admitted to the Rhode Island Bar in May of 1967. John started his law career as an administrative assistant to House Speaker John Wrenn, Providence Mayor Joe Doorley, and US Congressman Edward P. Beard. He provided legal counsel, supervised the Congressional staff, serviced constituents, and advised on policy matters in Washington, DC. From July 1981 to 1999, John served as Legal Services Developer Attorney at the Rhode Island Department of Elderly Affairs to facilitate access to legal counsel for older Rhode Islanders. From 1993 to 1999, he served as the DEA Liaison to the Silver Haired Legislature, an advocacy model of the Rhode Island House of Representatives. John was a member of the Rhode Island Bar Association, and the alumni associations of LaSalle Academy, Providence College, and Suffolk University. Besides his wife, John is survived by a son, John-Pierre "J.P." Smollins of Providence.

Joachim A. Weissfeld, Esq.

Joachim A. Weissfeld, 94, of Barrington, died on November 4, 2021. Born in Wuppertal, Germany, he was the son of Samuel and Emma (Erb) Weissfeld. He arrived in the United States in 1938, settling in New Bedford, Massachusetts. He joined the U.S. Navy in 1944. Joachim graduated from Brown University in 1950 and Harvard Law School in 1953. He practiced law in Providence for his entire career and was a valued colleague at Hinkley Allen for over 40 years. He was a member of the Hope Club in Providence and the Barrington Congregational Church. He served on several boards in his career, one being the International Institute (Dorcas International Institute of Rhode Island) and another being Camp Fire Girls of America. Joachim is survived by two daughters, Elizabeth Hopper and Katherine McGrady, and three grandchildren. He is predeceased by his wife Mary (Morton) Weissfeld.

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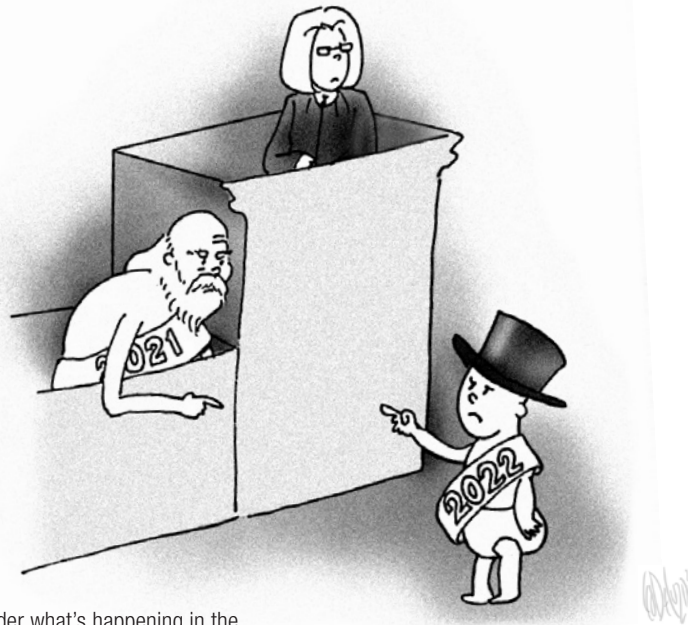
Your Bar Association supports law related education (LRE) for Rhode Island children and adults through three, longstanding programs: *Lawyers in the Classroom* and *Rhode Island Law Day* for upper and middle school teachers and students, and the *Speakers Bureau* for adult organizations. Responding to LRE requests, Bar volunteers are contacted – based on their geographic location and noted areas of legal interest – to determine their interest and availability.

If you are interested in serving as an LRE volunteer, please go to the Bar's website at ribar.com, click on **FOR ATTORNEYS**, click on **LAW RELATED EDUCATION**, click on **ATTORNEY ONLY LRE APPLICATION**. All Bar members interested in serving as LRE volunteers, now and in the future, *must* sign-up this year, as we are refreshing our database.

Questions? Please contact Director of Communications Erin Cute at ecute@ribar.com or **(401) 421-5740**.

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 ecute@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



"I know it's kind of twisted, but what can I do? Besides, it's my birthday. Give us all the chicken you've got."

LEE GREENWOOD, ESQ.

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Lawyers on the Move

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Fastcase Tip

Guide to the Fastcase Homepage

Below is a simple guide that explains where to find things and how to accomplish tasks within the homepage of Fastcase.

Search Bar: This is where you enter your search query. A query can consist of natural language, keywords (with or without boolean operators), and citations.

Jurisdictions and Sources: Located next to the orange magnifying glass, click on the dropdown menu to open a pop-out window that will allow you to narrow a search query to a specific content type, source, and/or jurisdiction.

The Orange Magnifying Glass: Located to the right of the search bar. Click here to run your search query.

Export Queue: The cloud icon with the down arrow located in the upper right corner. This is where you can find documents loaded into your current queue for exporting as well as view Past Export jobs (both batch exports and downloading of single documents).

History, Favorites and Alerts: Circle arrow located next to the Export Que in the upper right corner. This is where you find your search and document history, case law alerts, bookmarks, and saved searches.

Help and Support: Question Mark icon located in the upper right corner. This is where you find training materials, such as guides, tutorial videos, webinar training schedule, Boolean Tips, the Changelog, and hotkeys.

Tools and Apps: Multiple square icon located in the upper right corner. This is where you find tools and applications integrated with Fastcase, including Cloudlinking, TLOxp, Clio, Docket Alarm, and Law Street Media.

Account Menu: Orange circle icon located next to Tools and Apps in the upper right corner. This is where you find Settings (containing saved sources, advanced search options, and content inclusion/exclusion settings) and Account Management options (view subscription purchases, add secondary/optional content, reset password).

Chat Tab: Located in the lower right corner, click the chat icon to receive Live Chat Support from the Outreach Team. Chat support is offered Monday – Friday from 8 am to 9 pm EST.



Browse Libraries: Blue bar icon located under the search bar. This is where you find the browse menu for any given jurisdiction. This menu contains content organized by source, source outlines, and content update schedules.

Docket Alarm Integration: Pin icon located below Browse Libraries. This is where you can explore and add Docket Alarm's briefs, pleadings, motions, opinions, and orders to your Fastcase content library.

Fastcase Blog: Orange circle icon located next to the Docket Alarm icon. Click here to stay up to date on all things Fastcase via the constantly updated blog.

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To access Rhode Island Fastcase, connect to the Rhode Island Bar Association website at ribar.com. As always feel free to contact customer support with any questions you may have. Support is available Monday – Friday from 8 am to 9 pm EST and can be reached by email at support@fastcase.com or by phone at 866.773.2782.



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