Rhode Island Bar Journal

Rhode Island Bar Association Volume 60. Number 5. **March/April 2012**

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RHODE ISLAND Bar Association 1898

RHODE ISLAND BAR ASSOCIATION LAWYER'S PLEDGE

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

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Front Cover Photograph
Warwick City Hall, by Brian McDonald

Balancing Our Personal and Professional Lives

William J. Delaney, Esq.
President
Rhode Island Bar Association

I know both of you and Mom have made sacrifices to support my Bar work, but my actions are grounded in the honor and privilege I enjoy as a lawyer.

The following letter to my daughters addresses a number of challenges I believe many of my cherished colleagues also share.

Dear Blair and Jilly,

Balancing my responsibilities as a loving father and my professional life is not always easy, but it is rewarding. As daughters of a Rhode Island lawyer, you have often heard promises like, "I am leaving the office and coming right home," only to have me arrive two hours later. I have missed dances, school trips and even some vacation time due to my practice and on behalf of the Rhode Island Bar Association. Given your sacrifices, I want to explain why the Bar Association is so important to me and to all the other lawyers in our state.

I began my involvement with the Bar, twenty-five years ago, when I joined several Bar committees. These committees provide opportunities for Bar members to directly participate in advancing and enhancing specific areas of legal practice and interest. Additionally, Bar committees often produce educational programs for their colleagues offered throughout the year and at the Bar's Annual Meeting. Frequently, active members of Bar committees are elected to the House of Delegates, and this was a track I followed.

The House of Delegates is a democratically-elected group of Bar members representing the interests of all Rhode Island's lawyers. Delegates meet quarterly, discuss important issues affecting Rhode Island lawyers, and often take positions on by votes at these meetings.

Within the House, some individuals are elected to serve on the Bar's Executive Committee which meets monthly to review the Bar's finances and identify and deal with matters regarding the Bar and its members. The Executive Committee also acts as a sounding board for questions and concerns raised by any of the Bar's thirty-two committees. Today, I am a proud member of the Executive Committee.

The Bar's Volunteer Lawyer Program helps lawyers provide their legal services to Rhode Islanders who could not otherwise afford this representation. Serving as a volunteer for this excellent program, I have the great pleasure to help the less fortunate achieve justice, and I am always willing to take such cases when needed. Recently, the Volunteer Lawyer Program expanded to assist Rhode Island military veterans and their families, and I have had the honor of representing several of these veterans who give so much to their country.

The Bar Association often works in partnership with the Roger Williams University Law School. You both know how much teaching at the Law School over these past twelve years has meant to me, and it was wonderful to have you come with me to some classes. It is important for Bar members to provide students with assistance and mentoring to better prepare them for the profession. This fall, the Executive Committee went to the Law School and met with Dean Logan and his senior staff members to discuss common issues of concern and how the Bar can assist these future lawyers. I hope these meetings will continue, and that law school graduates will become even better contributors to the legal system and Rhode Island.

Right now, the Bar is addressing the challenges many of our new lawyers are encountering. Last year, almost 200 new attorneys were sworn into the Bar. These new lawyers are facing difficulty finding jobs and repaying their student loans, and they look to the Bar for help, and the Bar is working to address their expectations.

I have three months remaining as the Bar's President. I know both of you and Mom have made sacrifices to support my Bar work, but my actions are grounded in the honor and privilege I enjoy as a lawyer. Being a lawyer is great, and serving the Bar provides me the opportunity to give back to those who need my help. And, each year, the number of people needing our help only grows.

I have been fortunate to have you accompany me to Court on several occasions. Having you there with me is wonderful. Grandma and Grandpa never had the opportunity to see me in action, and I am happy you have been able to share some of those experiences with me.

The law has been great for me. It fulfills me, and I constantly strive to be a better lawyer, not only for my clients, but for the legal system as well. I am so fortunate to be a Rhode Island lawyer and a member of the Rhode Island Bar Association. And, every day Mom and I wake up with each of you, I am even more grateful for being a Rhode Island lawyer and treasure how, although sometimes demanding our accommodation, the law has benefited and strengthened us as a family.

I love you very much,

Dad ❖

LETTER: Response to *Modest Proposals for Rhode Island Superior Court Reform*

Modest Proposals for Rhode Island Superior Court Reform, by David A. Wollin, Esq., appeared in the *Rhode Island Bar Journal, Volume 60, Number 4, January/February 2012* beginning on page 7. The author's first proposal is that the Court mandate mediation in all civil cases.

We spend a significant portion of our professional efforts either mediating or training new mediators. We agree with this suggestion. We disagree with his ideas about who should mediate and how they should be compensated.

Mediation saves parties time and money. Mediations produce more flexible and lasting resolutions than if a Court were to impose a decision. Mediation gives conflicting parties a managed and confidential opportunity to engage in a productive conversation in which they can talk and listen to each other. Mediation often settles cases, freeing up the Court's time and closing cases for the attorneys.

Mediation's potential benefits depend upon the mediator's skill and experience. Mandatory mediation of civil cases would increase the demand for mediators. Attorney Wollin proposes the Bar Association recruit members to serve as mediators in exchange for Mandatory Continuing Legal Education (MCLE) credit. We strongly disagree with this part of his proposal as, we believe, it demeans the training and experience of the professionals who work as mediators.

State law [R.I. Gen. Laws § 9-19-44] requires that for confidentiality and mediator privilege to attach to a mediation, the mediator must have either completed at least thirty hours of mediation training or have two years of professional experience mediating, or have been appointed by a judicial or governmental body. Most professional mediators pursue far more training than the minimal thirty hours, continuing their education and joining professional mediator organizations such the American Bar Association Section of Dispute Resolution, the Association for Conflict Resolution, or locally, the RI Mediators Association. Some professionals, based upon their skills and training, litigate personal injuries cases, litigate family issues, handle criminal matters, do transactional work, estate planning or tax work. Others mediate. All are professionals entitled to be paid a reasonable compensation.

We find it puzzling that Attorney Wollin thinks that simply any attorney recruited through the Bar Association could successfully mediate a civil case that counsel on their own have not been able to settle. We disagree. Clients are entitled to professional mediators. Further, we disagree that it would be sufficient to compensate mediators with the award of MCLE credits. If attorneys expect to be compensated reasonably for their time and skill, why would a mediator be entitled to less for his or her time and skill? We also doubt that performing mediation services in this manner would qualify for MCLE credit under the existing MCLE rules and regulations.

While we laud Attorney Wollin's ambitions for improving Superior Court, we wish that he had recognized that not just any lawyer can be an effective mediator and that professional mediators are entitled to be paid for the value of the work they do.

Steven J. Hirsch, Esq. & Bruce I. Kogan, Esq.

RHODE ISLAND BAR JOURNAL

Editorial Statement

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

Article Selection Criteria

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

Direct inquiries and send articles and author's photographs for publication consideration to:
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A Common Sense Approach to Corporate Environmental Compliance

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Roger Williams University
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Roger Williams University
School of Law Student

The best defense against most deficiencies targeted in environmental enforcement actions is an effective Environmental Compliance Program…

Introduction

Environmental laws create a system of liability that burdens businesses and their managers. Strict liability can even attach to past activities which may have been legal at the time of occurrence. Further pitted against the businesses, are environmentalists empowered by the citizen suit provisions of most environmental regulatory schemes.[1] Given the strength of these forces, developing a common sense compliance program is necessary to help companies navigate the minefield of environmental regulations and to mitigate legal risks and hazards.

The Benefits of Establishing a Corporate Environmental Compliance Plan

The tangible benefits of compliance, such as avoiding the high cost of Environmental Protection Agency (EPA) enforcement actions or minimizing the impacts of such action, are clear. Even the most basic violations can result in penalties of $25,000 per day plus any economic benefit that accrues to the company as a result of noncompliance.[2] These costs are compounded if the agency determines the responsible persons at the facility were aware of the noncompliance and failed to take appropriate actions. The additional cost may include criminal liability for known violations of certain statutes. Under the Resource Conservation and Recovery Act (RCRA), for example, criminal penalties can cost up to $50,000 per day[3] and knowing endangerment can cost the corporation up to $1,000,000.[4]

Furthermore, the personal liability of management is at stake. Corporate officers cannot isolate themselves from liability by remaining intentionally ignorant of environmental issues within their facilities.[5] Therefore, upper level management should make a concerted effort to ensure compliance and to be aware of actual or potential violations and proposed remedial strategies.

The best defense against most deficiencies targeted in environmental enforcement actions is an effective Environmental Compliance Program (ECP) with routine compliance. Given the high cost of noncompliance, the additional investment necessary to create and sustain these policies should be viewed as a prudent investment and as insurance to protect against frightful fines and EPA-mandated compliance programs.

Enforcement decisions are left to the judgment of administrative agencies,[6] allowing enforcement personnel to decline enforcement or reduce penalties based on the existence and sophistication of the ECP. Accordingly, the Department of Justice (DOJ) gives favorable treatment to companies with ECPs when it makes the decision of whether to criminally prosecute an environmental violation. The policy states, in relevant part:

> The attorney for the Department should consider the existence and scope of any regularized, intensive, and comprehensive environmental compliance program; such a program may include an environmental compliance or management audit. Particular consideration should be given to whether the compliance or audit program includes sufficient measures to identify and prevent future noncompliance, and whether the program was adopted in good faith in a timely manner.[7]

The DOJ will only consider pre-inspection, self-reporting or voluntary compliance efforts by a violator. Adoption of a compliance program after an enforcement proceeding will not be considered favorably when the DOJ makes its enforcement decisions. A published policy that mandates environmental compliance, by itself, is not enough to satisfy the regulators, however. Corporations should be aware that the EPA and state regulators will look beyond the articulated policy to determine whether the written work is consistent with corporate action.

In addition to avoiding criminal prosecution, corporations can also reduce civil penalties with pre-inspection, self-reporting, and voluntary compliance. The EPA issued a policy statement that provides "several major incentives for regulated entities to voluntarily come into compliance with federal environmental laws and regulations."[8] Although there is no way to guarantee a favorable EPA response, experience has shown that self-reported violations frequently

evoke minimal EPA action.

A successful ECP can serve to either eliminate or reduce gravity-based (punitive) penalties based on the agency's satisfaction with the corporation's self-policing.[9] Companies that meet all of the policy's conditions, including voluntarily identifying, disclosing and correcting violations, may have all of their gravity penalties reduced. Companies that meet most of the policy's conditions are eligible for up to a 75% decrease in gravity penalties. This policy clearly notes that the EPA will still assess an economic benefit penalty (amount of costs saved by noncompliance).[10] At a minimum, self-reporting demonstrates the commitment of management to environmental compliance and may help protect management from personal liability for knowing about violations of environmental statutes.

Like the DOJ, the EPA is looking for corporate compliance that becomes an integral part of the corporate philosophy. Publication of a policy without a showing of true intent to carry out the policy will not provide any protection from EPA scrutiny. Neither will hastily drawn programs, or programs spawned as the result of an impending or just completed facility inspection impress the EPA to reduce penalties.

The EPA also provides particular incentives for small businesses with 100 or fewer employees on a company-wide basis.[11] If the business meets all of the criteria set forth in the policy, EPA may waive 100% of the gravity component of the fine. A business that shows "good faith" effort to comply may also receive a proportional reduction, subject to the EPAs discretion.

EPA will only apply the penalty reductions when the detection was the result of voluntary corporate activity, rather than the product of a government or legally-required action. Both EPA policies also preclude certain repeat offenders from repeating the benefits of the incentive.[12] The EPA incentives will not apply to enforcement actions for violations that pose an imminent danger to public health.[13]

Useful Hints for Establishing a Corporate Environmental Compliance Program

The first step to establishing an ECP is creating an Environmental Compliance Team (ECT). Each facility should designate a team leader with overall responsibility

for coordinating environmental compliance for all media. The ECT lead's responsibility is to determine that all information submitted is consistent and accurate for all environmental filings, including annual reports, community right to know information and Resource Conservation and Recovery Act (RCRA) manifests. Some corporations have designated an attorney from general counsel as the ECT lead, while others may designate the duties to the CEO or the Chairman of the Board of Directors.[14] While there is no legal requirement that upper management take any designated position in the ECT, there will be a logistical need to have at least one member of upper management with the authority to authorize routine expenditures for the ECT. The fact that management personnel share in the liability regardless of their knowledge or lack of it,[15] should also incentivized upper management to have active representation on the ECT and make every effort to keep current on environmental compliance status.

The ECT lead should ensure that all personnel are aware of impending deadlines by keeping track of compliance deadlines. A "compliance calendar" may be something as simple as a weekly memo outlining filing deadlines for that week and providing advanced notice of significant future deadlines. The ECT may elect to utilize computer software designed to keep track of such dates and generate reports on demand. Companies can maintain a database which lists all environmental permits, expiration dates and any monitoring, testing or reporting requirements. Whatever the method selected, the most important element is that the system provides an effective means of keeping track of deadlines.

The individuals responsible for required submissions to state or federal agencies should send copies of all submissions to the ECT lead. The lead can then compare the deadlines on the compliance calendar with the actual submission date. This system creates a central file that will aid in the performance of comprehensive environmental audits.

a. Self-Audits

One of the most important aspects of an ECP is self-auditing. All facilities should undergo at least annual self-audits. The audit should include a review of past filings, discharge and testing histories and

other relevant data to make sure all statutory requirements have been met.

These audits should be performed by an independent auditor. At a minimum, the auditor should be a designated individual distinguished from the environmental compliance officer.[16] For those companies just establishing an ECT, and with a questionable compliance history, it may be advisable to have the first audit performed by a competent outside consultant. The facility should select a consultant with the resources and knowledge to evaluate and assess all environmental media and encompass all possible applicable federal and state statutes.

Once a violation is known, failure to act becomes knowing noncompliance. This incurs significantly greater liability including the potential for criminal prosecution. Therefore, prior to undertaking the audit, the top management of the facility must commit to taking the steps necessary to resolve any problems the audit may uncover. Once a complete corporate compliance audit is performed, the facility must act on the results and report the violation. An agency review that reveals the same discrepancies may trigger a full inspection, whereas self-reporting may be regarded favorably.

b. Employee Training and Discipline

Board members and/or officers should demonstrate their dedication to environmental compliance by dedicating their time, equipment and other resources to effective, comprehensive training. The most effective training programs are those that continually educate "the chief executive officer right on down to the night janitor"[17] using interactive training methods that keep employees engaged. The training program should be subject to review to include new educational materials and adjust for relevant changes in technology and law.[18] Management should always keep records of employee training experiences to document its efforts.

The compliance policy should encourage employees to monitor environmental compliance and to report instances of noncompliance. While environmental whistleblowers are protected from retaliation by law, internal reporting should be encouraged before resorting to outside disclosure.[19] Employees must be assured "freedom from retaliation" for reporting problems internally.[20] Additionally, the employee policy should provide affirmative motivation for employees to offer alternative operating and production methods that may result in waste stream reduction or reduction in the use of hazardous materials. Techniques for encouraging internal reporting and creative compliance ideas include third-party operated hot lines, open-door policies, and generic forms requiring specificity and support of allegations.[21] These tools help employees understand that "environmental compliance is an important goal of the corporation."[22] The ultimate motivating scheme would consider ECP contributions "when awarding bonuses, promotions and salary increases."[23]

Another important aspect of compliance is the proper disciplining of responsible employees. This requires establishing environmental compliance as the corporate benchmark, using a disciplinary program to encourage cooperation and to deal with violators. The corporate environmental policy should include identifying those individuals responsible for the compliance failure and careful consideration of the obviousness, duration, frequency and history of the employee's contribution to noncompliance. Of course, established corporate discipli-

nary policy must be actively enforced to assure the EPA and the DOJ that management does not tacitly encourage ignoring environmental regulations to meet production quotas or budget demand.

c. Inspection Preparation

There are numerous triggers that may prompt a governmental inspection of a facility. Complaints from citizens or employees are an obvious basis for an inspection. Some environmental statutes provide for mandatory routine inspections.[24] The law does not even require proof of violation before an unannounced inspection.[25]

There are other prompts for multimedia inspections, created by the regulatory system itself. The Emergency Planning and Community Right-to-Know Act (EPCRA) require filing reports listing all toxic chemicals. These reports give the EPA sufficient information to determine the potential types of waste a facility is likely to generate based on its chemical inventory. The EPA may then review waste transport manifests filed pursuant to the RCRA. If a discrepancy is apparent, an inspection will likely follow. The EPA may also compare similar facility reports to determine if there are significant discrepancies in the filings of the facilities. Chronically late reports or those with incomplete or confusing information may also trigger the interest of EPA inspectors, prompting an on-site inspection.

Because of these various triggers, it is far too risky to assume the regulatory official will offer prior notice of an inspection. More commonly the inspectors will appear unannounced. RCRA provides:

> …For purposes of developing or assisting in… enforcing the provisions of this chapter,…any officer, employee or representative of the Environmental Protection Agency, duly designated by the Administrator, or upon request of any duly designated officer, employee or representative of a State having an authorized hazardous waste program…are authorized—
> (1) to enter at reasonable times any establishment or other place where hazardous wastes are or have been generated, stored, treated, disposed of, or transported from;
> (2) to inspect and obtain samples from any person of any such wastes and samples of any containers or labeling for such wastes.[26]

It is in the facility's best interest to prepare for these unannounced inspections by performing its own mock surprise inspections. Either support management personnel or an outside environmental consultant should conduct the mock inspection. The results of the inspection should be shared in a confidential debriefing with all personnel involved. This practice inspection should make it easier for the facility to effectively handle a "real" inspection.

When the regulatory inspector knocks on the door, do not panic, especially if the environmental compliance program has been in operations for any period of time. While it is likely that an inspection will reveal some deficiencies, it is best to deal with these as they arise. While refusing immediate entry may gain a small amount of time, the time gained is normally insufficient to perform any but the most basic corrective actions. Further, refusing immediate entry sends the wrong signal to the inspectors and may result in a higher level of scrutiny. Although permitting immediate entry may result in more violations, the level of antagonism is likely to be lower and the inspectors

continued on page 38

Now Accepting 2012 Bar Award Nominations

Ralph P. Semonoff Award for Professionalism
Florence K. Murray Award
Victoria M. Almeida Servant Leader Award

All nominations are due March 16, 2012.

2012 Ralph P. Semonoff Award for Professionalism

The Rhode Island Bar Association *2012 Ralph P. Semonoff Award for Professionalism* is named for past Rhode Island Bar Association President Ralph P. Semonoff who championed the law as a high calling, justice as a defendable right, and public service as the beacon of a life's work. This award is presented at the Bar's Annual Meeting in June to an attorney who has, by his or her ethical and personal conduct, commitment and activities exemplified, for fellow Rhode Island attorneys, the epitome of professionalism in the law, advancing the calling of professional practice through leadership, high standards of integrity, commitment and dedication.

This award's selection criteria include:

1) respect for the law;
2) service as an officer of the court and protector of individual rights;
3) contribution of time and resources to public service, public education, charitable and pro bono activities in the community;
4) working with others in the legal system to make our legal system more accessible and responsive;
5) knowledge of the law and proficiency in practice;
6) courtesy, personal dignity, and professional integrity. The recipient of the Ralph P. Semonoff Professionalism Award should not only observe the principles set forth above, but demonstrate an effort to educate those who do not conform to them to ensure adherence by the entire profession.

In a written communication, based on the selection criteria noted above, describe your nominee's qualifications. Please include:

1) the nominated attorney's name; and
2) your name, telephone number and email address.

Please send nominations no later than **March 16, 2012** to:

Chairperson Deborah M. Tate, Esq.
2012 Semonoff Award Nomination
Rhode Island Bar Association
115 Cedar Street
Providence, RI 02903

2012 Florence K. Murray Award

The Rhode Island Bar Association annually presents the *Florence K. Murray Award* to a person who by example or otherwise has influenced women to pursue legal careers, opened doors for women attorneys, or advanced opportunities for women within the legal profession. The Award is named in honor of the first recipient, Hon. Florence K. Murray, who, in a distinguished 56 years at the bar, pioneered the causes of women in the law as the first woman attorney elected to the Rhode Island Senate, the first woman Justice on the Superior Court, the first woman Presiding Justice of the Superior Court, and the first woman on the Rhode Island Supreme Court. The nominee is selected by a committee composed of six members of the Bar appointed to staggered two-year terms by the President of the Bar Association.

Please send 2012 Florence K. Murray Award nominations, no later than **March 16, 2012**, to:

Chairperson Marcia McGair Ippolito, Esq.
2012 Florence K. Murray Award
Rhode Island Bar Association
115 Cedar Street
Providence, RI 02903

2012 Victoria M. Almeida Servant Leader Award

Named in honor of its first recipient, the *Victoria M. Almeida Servant Leader Award* is presented to an individual who demonstrates the principles and values of servant leadership and who is a beacon of light and hope to others by illuminating the path to greater justice for all. Servant leadership seeks to encourage others in achieving the goals of the Rhode Island Bar Association while remaining faithful to the mission and values of the organization and preserving its integrity.

To nominate a Bar member for this Award, please send a letter of nomination, with any supporting documents, no later than **March 16, 2012** to:

Chairperson Michael R. McElroy
2012 Victoria M. Almeida Servant Leader Award
Rhode Island Bar Association
115 Cedar Street
Providence, RI 02903

Why Rhode Island Needs Default Surrogate Consent Statutes

Eric D. Correira, Esq.
Correira & Correira LLP,
Swansea, MA

Default Surrogate Consent Statutes provide clear legal guidelines, avoid burdensome judicial proceedings, and protect all relevant interests.

I. Introduction

All individuals should execute a durable power of attorney for healthcare, appointing another person to act as their healthcare agent and make medical decisions on their behalf in the event that they are one day incapacitated. However, most people have not completed this important document.[1] The failure to execute an advance directive is often the result of a misunderstanding of the legal system or psychological inability to think about future illness or death.[2]

When a person becomes incapacitated without an appointed healthcare agent, the possibility exists for a dispute to arise amongst interested parties (either amongst family members, or between family members and doctors), potentially requiring court involvement to reach a final determination. These conflicts are more easily resolved if a healthcare agent has been appointed because that individual has clear legal authority to make the ultimate decision.

Recognizing this problem, the majority of states (today thirty-eight and the District of Columbia) have enacted a statutory mechanism for appointing a surrogate for healthcare decision-making for incapacitated persons without a designated healthcare agent. Generally known as Default Surrogate Consent Statutes, particular provisions of these statutes vary from state to state.[3]

The remaining twelve states, including Rhode Island, have still declined to implement this important safeguard. Instead, in those states, if disputes between interested parties are irresolvable outside of court, a party must petition for a decision to be made on behalf of the incapacitated person. In those cases, the court must determine what choices the incapacitated person would make in their current situation if they still possessed decision-making capacity.

II. Default Surrogate Consent Statutes

Surrogacy statutes vary from state to state, but all versions of these statutes share several features. Most are based on Section 5 of the Uniform Health-Care Decisions Act (UHDCA), a model act promulgated by the National Conference of Commissioners on Uniform State Laws. Some states have adopted the uniform statute in full, whereas other versions are a derivation of the UHDCA.[4]

Surrogacy statutes apply when a person lacks capacity to make healthcare decisions. The healthcare provider determines whether the person lacks capacity. The statutes only become effective if a person has not previously appointed a healthcare agent by means of an advance directive.[5] Most states limit the applicability of surrogacy statutes to those situations where a patient is "terminally ill, in a persistent vegetative state, or irreversibly comatose."[6]

To determine the incapacitated person's default healthcare surrogate, most statutes contain a hierarchical listing of family members and close friends who are to serve if capable, moving down the list until someone becomes available.[7] Many state priority listings are similar to the UHDCA, which provides that if an agent is either unavailable or has not been appointed, "Any member of the following classes of the patient's family who is reasonably available, in descending order of priority, may act as a surrogate: (1) the spouse, unless legally separated; (2) an adult child; (3) a parent; or (4) an adult brother or sister."[8] If none of the listed individuals can serve, "An adult who has exhibited special care and concern for the patient, who is familiar with the patient's personal values, and who is reasonably available may act as surrogate."[9]

Most surrogacy statutes provide a mechanism for choosing a surrogate when more than one person is available at the applicable priority level. Usually, the majority controls, although a few states have formulated alternative processes to reach a resolution.[10] Several states, reflecting concerns for non-traditional families, include domestic partners within the priority list.[11] The District of Columbia places close friends at a higher level than some family members.[12] Some states place physicians, as a person of last resort, to make healthcare decisions if the patient is "unbefriended" and without any other potential surrogate.[13] Finally, two states, Colorado and Hawaii, take a different approach to the priority list model and instead specify "interested per-

sons" who together choose the surrogate from amongst a group based on closeness to the incapacitated person and familiarity with his or her wishes.[14]

Once a person is established as the incapacitated patient's default surrogate, that person is legally the equivalent of an appointed healthcare agent.[15] Healthcare providers are required to receive informed consent from the surrogate and follow the surrogate's medical choices for the patient.[16] The surrogate can authorize many forms of treatment, including the issuance of a DNR Order.[17] However, many Default Surrogate Consent Statutes place some degree of limitation on the scope of the surrogate's decision-making authority.[18] Some statutes prohibit surrogate consent if the incapacitated person is pregnant.[19] Other states prohibit consent to specific treatments such as abortion, psychosurgery and sterilization.[20]

When making decisions on behalf of an incapacitated person, most statutes, but not all, require the surrogate to use a specified standard of judgment.[21] This is to prevent the surrogate from acting as a separate decision-maker and from making decisions reflecting their own personal beliefs.[22] Some surrogacy statutes require that the surrogate use the "substituted judgment" approach and make decisions they believe the incapacitated person would have made if able to do so themselves.[23] Other statutes ask the surrogate to instead decide what he or she believes to be in the general "best interest" of the incapacitated person (as opposed to trying to determine the patient's personal preferences).[24] Finally, many states, as well as the UHDCA, require first the "substituted judgment" approach be considered by the surrogate, and then, if the patient's wishes are unknown and unattainable, the surrogate is to decide what they believe to be in the person's best interests.[25] This layering of the two approaches appears to be the most effective means to reach a correct decision.[26]

III. Considerations in Support of Default Surrogate Consent Statutes

Default Surrogate Consent Statutes provide clear legal guidelines, avoid burdensome judicial proceedings, protect all relevant interests, and implementation in Rhode Island would be one more step toward greater uniformity with the rest of the country.

A. Clear Legal Guidelines

Public policy favors creating clear legal guidelines for assisting family members or friends in making informed medical decisions for an incapacitated person. A publicized surrogate list will result in increased awareness and may encourage people to discuss treatment preferences with potential surrogates.[27] Surrogacy statutes allow people to avoid the question of having to determine who should make decisions, and instead allow for a more immediate focus on the patient and his or her healthcare needs.[28] A definite procedure gives notice to both family members and doctors of the specific person possessing decision-making authority, as well as the scope of that authority. By providing the judgment standard to use, and factors to consider, the statute assists the surrogate in making decisions for the incapacitated person. It also provides legal protections for decision-makers acting in good faith.[29] Decisions about an incapacitated person's healthcare, especially if involving life-sustaining treatment, are extremely difficult without the addition of legal liability.[30]

B. Avoidance of Judicial Involvement

If family members, close friends and treating physicians are unable to agree on the proper course of treatment for an incapacitated person, then the burdensome process of appointing a guardian may be required. Judicial intervention is cumbersome and expensive, and rulings by the court appear to be no more likely to reflect the incapacitated person's ultimate wishes than a statutorily appointed surrogate.[31] Judges do not possess a special expertise for deciding whether to terminate medical treatment, and in other areas of the law avoid making personal family decisions involving "moral, ethical and theological elements."[32]

Judges often defer to the physician's medical judgment, defeating the purpose of judicial review to act as a neutral arbitrator in resolving conflicts between physicians and family members.[33] In addition, the criteria used by the courts typically emphasizes individualized concerns, without necessarily taking into account what the incapacitated person would decide when considering the interests of family members and close friends.[34]

Judges also approach cases involving the termination of life-sustaining treatment with pre-existing assumptions.[35] In

such decisions, judges tend to err toward preserving life, rather than alleviating pain and suffering.[36] Also, judges usually proceed with the presumption that a patient would want to be kept alive by machines, and must be shown evidence otherwise.[37] Other unfounded assumptions made by judges include the belief that younger people are more likely to want to terminate medical treatment for the elderly and that financial reasons are often a primary reason for ending treatment.[38] These and other judicial assumptions do not reflect the views of most people, or necessarily the views of the incapacitated person in question.[39]

In addition, if the situation is not seen as an emergency by the court system, it may be treated as a routine matter that can result in a long delay.[40] Often patients die before courts reach an ultimate decision.[41] While a delay may not put the patient's life or health at risk, it can result in continued, unnecessary physical pain, emotional suffering and increased medical expenses. It will likely result in further emotional strain on the patient's family members, close friends and attending healthcare providers.[42] As Justice Brennan noted, in his dissent in **Cruzan**, "An erroneous decision not to terminate life support, however, robs a patient of the very qualities protected by the right to avoid unwanted medical treatment. His own degraded existence is perpetuated; his family's suffering is protracted; the memory he leaves behind becomes more and more distorted."[43]

Furthermore, judicial participation moves the process from the private, clinical setting to a public forum, opening the conflict to public scrutiny.[44] Surrogacy statutes, on the other hand, allow for decision-making to remain in the healthcare setting, involving only concerned parties and protecting the patient's privacy.

Finally, court proceedings usually require the incurring of significant legal fees.[45] Most families, already facing staggering medical expenses, do not have either the financial resources or emotional wherewithal to partake in a legal battle. This is particularly problematic when the opposing party is a hospital, with a much greater financial ability to pursue a lengthy court proceeding.[46] Even if there is not a conflict, and instead only the need for a court order, this legal procedure may still be burdensome on those unfamiliar with the legal system or who are already dealing with the illness of a loved one.[47]

C. Americans Prefer Family Members to Serve as Healthcare Surrogates

Another reason for enacting a surrogacy statute is to ensure the incapacitated person's wishes are more likely to be followed.[48] The priority listing used in surrogacy statutes is harmonious with the stated preferences of the majority of Americans who choose their healthcare agent from among close family members.[49] Studies show that most Americans would first select their spouse as healthcare agent, followed by an adult child.[50] From this research, it appears that surrogacy statutes match the selection preferences of most Americans.

It is understandable why people usually choose close family members to be their healthcare agents, and why, in turn, it is close family members that are given priority in surrogacy statutes. Family members often have the greatest concern for the incapacitated person's welfare, spending the most time at the hospital and acting as advocates for the person. Also, family members must live their lives with the decisions that they make,

with elements such as love, guilt and fear resulting in a deeper consideration of what treatment to provide or refuse.[51] There is a bond and common experience shared with the incapacitated person that allows a family member to better understand that person's wishes. This shared knowledge and way of thinking, however, may be difficult for a family member to convey to a judge during a court proceeding.[52]

Designating family members as the possible surrogates on the priority list is supported by further evidence as well. It is standard practice for physicians to share medical information with a person's family members, and receive their input in informal decision-making.[53] In addition, while family members may at times be inaccurate in predicting the patient's wishes, studies have shown that family members make closer predictions than physicians.[54]

D. All Relevant Interests Addressed

Surrogacy statutes address the interests of the incapacitated person, the person's family members and close friends, the state and attending physicians.[55] The incapacitated person is, through their surrogate, allowed to have invasive or life-sustaining treatment refused or removed. Family members and close friends, those with the greatest concern for the person's well being, are in the best position to make these decisions. Also, it is these people who will be able to avoid the emotional, financial and time expenses of litigation.[56] Finally, for healthcare providers, a clearly designated surrogate relieves concerns over balancing preservation of life with alleviation of pain and suffering, as well as the possibility of civil or criminal liability.[57] Physicians, if the family agrees, may decide to remove life-sustaining treatment without the requisite legal authority. However, such unauthorized actions, while perhaps conforming to the patient's desires or in his or her best interests, should not need to take place.[58]

E. Uniformity with the Majority of States

Most states have enacted some version of a surrogacy statute, and implementation in Rhode Island would be one more step toward national consistency and uniformity.[59] Having uniform or similar statutes in all states is particularly useful because of the increasing mobility of American society.

Admittedly, Default Surrogate Consent Statutes cannot solve all the problems that arise when a healthcare agent has not already been appointed such as when a serious dispute occurs between two possible surrogates or if no potential surrogate is available to serve. Still, by providing a priority listing or selection process, the statutory mechanism is able to resolve most disputes. This, in turn, decreases the need for judicial involvement. While state courts have already indicated the desire that many healthcare decisions should be made without court intervention, due to fears of potential litigation, doctors are, at times, understandably hesitant to act without first obtaining court approval. Surrogacy statutes provide much needed clarity.[60]

IV. Default Surrogate Consent Statutes: Shortcomings and Possible Solutions

Some commentators have noted that Default Surrogate Consent Statutes are an imperfect remedy, containing several significant shortcomings. Because differ-

continued on page 41

SOLACE

Helping Bar Members in Times of Need

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

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

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

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

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 **Resource International Employee Assistance Services** (RIEAS) 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 RIEAS 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 RIEAS, please identify yourself as a Rhode Island Bar Association member or family member. A RIEAS 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. Please contact RIEAS 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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Lawyers Helping Lawyers Committee Members Protect Your Privacy

Lawyers Helping Lawyers Book Review

I Don't Want To Talk About It

by Terrence Real

Genevieve M. Martin, Esq.
Assistant Attorney General
Rhode Island

…it is a sign of true strength to talk about depression and not to bury it.

"Stop crying, or I'll give you something to cry about." "Big boys don't cry." From an early age, we are conditioned to expect boys and men to control their emotions. We teach them that if they cry, or show too much emotion, they will never be good enough, or worthy enough of respect.

So what happens to those feelings and the hurts that make a young boy want to cry in the first place? Those feelings, the pain, the trauma inflicted by forcing young men to not be who they are inside ends up buried and hidden and pushed deep down inside because of shame. Only when that young boy can bury these feelings and needs will he be considered strong, someone worthy of being the one that others will rely upon for strength.

Unfortunately, sometimes the strength we see projected on the outside may be masked by addictive behaviors (drugs, alcohol, gambling), domestic violence, workaholic behavior, cheating on spouses and loved ones, and obsessive weight loss behavior. These behaviors are used to mask the pain from holding in those emotions and ability to express need to be loved and understood. They tear families and individuals apart while, at the same time, some defensive and masking behaviors, such as workaholic and weight loss tendencies, are not only rewarded, but revered by society, only serving to reinforce them.

Psychotherapist Terrence Real tells a story of truth and compelling analysis, through recounting his life and the lives of numerous patients of in his book, *I Don't Want To Talk About It, Overcoming the Secret Legacy of Male Depression*. The author decided to become a psychotherapist to, first, understand his father's depression, and the impact it had upon his family. It was only when Terrence was an adult that he found the strength to ask his own father, a depressed man, a man whose "horrible disease whittled him, sucked the marrow out of him…."[1] what happened to him. Terrence begins his story with the night before his father died when his father gave him his blessing and Terry gave him his. But, it seems what they both wanted most was forgiveness, and to prevent the past from destroying the future.

The courageous stories of numerous therapy sessions contained in this important book, some of success and some of profound failure, show us the child we thought was so resilient, so able to survive whatever he faced, often does so at a terrible price. He survives while leaving a piece of his youth and innocence behind. He survives believing that he can never show emotions or his need of love and understanding. This is the child Terrence Real reveals to us in such a compelling fashion that we realize we need to help him to understand it is not a sign of weakness to need someone or to need love rather, it is a sign of strength. This strength helps the man who turns to a mistress to seek comfort to, instead, turn to his significant other. This strength helps the man who has pushed those who love him away with both hands to accept the love and comfort those close to him want so much to give.

This book presents a life-changing reason to talk about depression. Specifically, to teach our children and ourselves it is a sign of true strength to talk about depression and not to bury it. When that child inside learns that he can have needs and still be a man, that he can be compassionate and empathetic and still be a man, only then can healing begin. But, as Terry tells us, we must talk about it. Why? If we do not, the cycle will continue for generations, perpetuating itself and continuing to damage ourselves, our families and our futures. This book is not only a compilation of stories of courage, but also of hope.

Editor's Note: *This book review is brought to you as a service of the Rhode Island Bar Association's Lawyers Helping Lawyers Committee. Please see page 16 for more information about this Committee's sponsored services for Bar members and their families.*

ENDNOTE

1 *Real, Terrence, I Don't Want To Talk About It, Overcoming the Secret Legacy of Male Depression, New York, Scribner, 1997, p. 19.*

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How Financial Decisions Can Adversely Impact Your Medicare Premiums & Social Security Tax

Marc J. Soss, Esq.
Licensed in Florida,
Connecticut & Rhode Island

A significant financial income increase from the sale of investment assets or exercising stock options can trigger increased Social Security taxes and Medicare Part B premiums.

Retired taxpayers may be surprised to learn that financial decisions can adversely impact not only their income taxes, but their Medicare premiums and Social Security tax. A significant financial income increase, resulting from the sale of investment assets (stocks, bonds, real estate, etc.), portfolio rebalancing, IRA withdrawals, a Roth conversion, or the exercise of stock options, can trigger income tax, long-term capital gains, increased Social Security taxes, and Medicare Part B premiums. The worst part is the damage can impact the taxpayer for several years into the future.

Medicare Part B is medical insurance that covers doctors' services, outpatient care, physical therapy and some home health care. The standard monthly premium, which is $99.90 (higher income consumers may pay more) a month per person, is paid by approximately 95% of all Medicare recipients. The federal government pays 100% of Medicare Part A, which is hospital insurance.

Medicare premiums are calculated on a taxpayer's "modified adjusted gross income" (taxable and tax-exempt interest income). The Social Security Administration calculates a taxpayer's Medicare Part B premium based upon their most recent tax return. For example, in 2012, the Medicare premiums will be based upon federal income tax returns filed in 2011 for the 2010 tax year. Since 2007, higher-income taxpayers have been required to pay an income-adjusted Medicare surcharge (ranging from $139.90 to $319.90 a month per person). In 2012, individuals with incomes greater than $85,000 a year, and couples with incomes above $170,000, will pay a surcharge.

For tax year 2011, Social Security benefits will not be taxed on income less than $25,000 for singles and $32,000 for a couple. However, the taxable amount can rise to 85% when a single taxpayer's taxable income reaches $34,000 or $44,000 for a couple.

Financial Decisions Requiring Consideration

Avoidance of an increase in the Medicare Part B premium and social security taxes can impact a taxpayer's financial decision making process. A taxpayer may exercise stock options in a single year, instead of over several years, to limit higher premiums to a single year instead of multiple.

A large IRA withdrawal could also result in higher Medicare premiums and social security taxes. To avoid this tax problem, many financial advisors recommend making the IRA to Roth IRA conversion and large IRA withdrawals prior to attaining Medicare and Social Security eligibility. Alternatively, for those charitably inclined, make your charitable gifts directly from your IRA and avoid having the funds included in your taxable income.

What the Future Holds

Beginning in 2013, a single taxpayer with an income in excess of $200,000, or $250,000 for a couple, will be subject to a new 3.8% Medicare tax. Since Medicare premiums are deducted from Social Security benefits, the increased Medicare premiums can significantly reduce a taxpayer's monthly benefits. ❖

SEEKING 2012 BAR AWARD NOMINATIONS

Do you know a colleague worthy of recognition? If so, please consider nominating that person for one of this year's Rhode Island Bar Association Awards. Nominations are now open for:

Ralph P. Semonoff Award for Professionalism

Florence K. Murray Award

Victoria M. Almeida Servant Leader Award

Please see page 10 in this issue of the Bar Journal for award nomination details.

2012 Bar Award nominations are due no later than March 16, 2011

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Continuing Legal Education Update

To register for CLE seminars, contact the Rhode Island Bar Association's CLE office by telephone: 401-421-5740, or register online at the Bar's website: www.ribar.com by clicking on CONTINUING LEGAL EDUCATION in the left side menu.
All dates and times are subject to change.

March 7
Wednesday
Session Two – Fundamentals of an Uncontested Divorce Series: Document Preparation & Filing
Volunteer Lawyer Program
RI Law Center, Providence
4:00 p.m. – 5:30 p.m., 1.0 credit + .5 ethics

March 8
Thursday
Food for Thought
Advising Clients on Civil Unions
RI Law Center, Providence
12:45 p.m. – 1:45 p.m., 1.0 credit

March 13
Tuesday
Food for Thought
Advising Clients on Civil Unions
Casey's Restaurant, Wakefield
12:45 p.m. – 1:45 p.m., 1.0 credit

March 14
Wednesday
DUI Update 2012 ***(in person)***
RI Law Center, Providence
2:00 p.m. – 5:00 p.m.
2.5 credits + .5 ethics

March 14
Wednesday
DUI Update 2012 ***(Live webcast)***
2:00 p.m. – 5:00 p.m.
2.5 credits + .5 ethics

March 15
Thursday
Food for Thought
Best Practices for Supreme Court Appeals
RI Law Center, Providence
12:45 p.m. – 1:45 p.m., 1.0 credit

March 20
Tuesday
The "CSI Effect": The Realities of Forensic Science
RI Law Center, Providence
2:00 p.m. – 5:00 p.m., 3.0 credits

March 21
Wednesday
Food for Thought
Best Practices for Supreme Court Appeals
Holiday Inn Express, Middletown
12:45 p.m. – 1:45 p.m., 1.0 credit

March 27
Tuesday
Food for Thought – Starting & Ending an Attorney/Client Relationship
Casey's Restaurant, Wakefield
12:45 p.m. – 1:45 p.m., 1.0 ethics credit

March 29
Thursday
Practical Skills – Domestic Relations Practice in Rhode Island
RI Law Center, Providence
9:00 a.m. – 3:00 p.m., 4.0 credits + 1.0 ethics

April 3
Tuesday
Practical Skills – Residential Real Estate Closings in Rhode Island
RI Law Center, Providence
9:00 a.m. – 3:00 p.m., 4.0 credits + 1.0 ethics

April 4
Wednesday
Session Two – Fundamentals of an Uncontested Divorce Series: Mock Nominal Trial
Volunteer Lawyer Program
RI Law Center, Providence
4:00 p.m. – 5:30 p.m., 1.0. Credit + .5 ethics

April 10
Tuesday
Mechanics' Lien Update
RI Law Center, Providence
2:00 p.m. – 5:00 p.m., 3.0 credits

April 11
Wednesday
Food for Thought
Managing Environmental Liability
Holiday Inn Express, Middletown
12:45 p.m. – 1:45 p.m., 1.0 credit

April 12
Thursday
Food for Thought – Starting & Ending an Attorney/Client Relationship
RI Law Center, Providence
12:45 p.m. – 1:45 p.m., 1.0 ethics credit

April 26
Thursday
Food for Thought
Managing Environmental Liability
RI Law Center, Providence
12:45 p.m. – 1:45 p.m., 1.0 credit

SAVE THE DATE

Rhode Island Bar Association
Annual Meeting
June 14 & 15, 2012
at the Rhode Island Convention Center

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

New, Unique, Members Only
Online Attorney Resources (OAR)

The Rhode Island Bar Association developed the unique Online Attorney Resources (OAR), exclusively for Bar members and available through the Members Only section of the Bar's web site at **www.ribar.com**, to help Bar members provide and receive timely and direct assistance with practice-related questions.

OAR provides Bar members with the names, contact information and Bar admission date of volunteer attorneys willing to answer questions concerning particular practice areas based on the volunteer's professional knowledge and experience. As the Rhode Island Bar Association does not and cannot certify attorney expertise in a given practice area, the Bar does not verify any information or advice provided by OAR volunteers. Questions channeled through OAR volunteers may range from inquiries concerning specific court procedures and expectations to current and future opportunities within practice areas. *However, OAR is NOT a forum for Bar members to engage other Bar members as unofficial co-counsel in an on-going case.*

Since everyone's time is a limited and precious commodity, all Bar members who contact volunteers must formulate their questions concisely prior to contact and ensure the initial contact takes no longer than 3 to 5 minutes unless mutually-agreed upon by both parties.

OAR offers two options:

1. **Bar members willing to volunteer as information resources.**
2. **Bar members with questions about a particular area of the law.**

OAR practice areas include: Domestic/Family Law Practice; Civil Practice in Rhode Island District Court – Collections Law & Evictions; Civil Practice in Rhode Island Superior Court – Plaintiff's Personal Injury Practice; Criminal Law Practice; Commercial Real Estate Transactions; Organizing a Rhode Island Business; Probate and Estate Planning; Residential Real Estate Closings; Workers' Compensation Practice; Creditors' and Debtors' Rights; Federal Court Practice; and Administrative Law

To sign-up as a volunteer resource or to review the names and contact information of Bar members serving as Bar volunteers, please go to the Bar's website at www.ribar.com, login to the Members Only section and click on the OAR link.

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

Matthew R. Plain, Esq. **Elizabeth R. Merritt, Esq.**
Taylor Duane Barton & Gilman, LLP, Providence

Criminal defense attorney, Jack Cicilline, began his career as a public servant. Upon graduating from LaSalle Academy in 1956 and Providence College in 1960, this Providence native took various jobs in the State House while working his way through Suffolk Law and supporting his young family. After graduating from law school in 1964, long before his son, David, took the reins at City Hall, Mr. Cicilline had his own stint in the Mayor's office, working as an assistant and lobbyist for then-Mayor Joseph Doorley on the Fair Housing Act which later passed in the Rhode Island General Assembly.

Jack Cicilline, Esq.

In 1968, Mr. Cicilline entered private practice. Over the ensuing forty years, Mr. Cicilline earned a reputation as one of Rhode Island's well-known criminal defense attorneys. Though many of his local cases have garnered considerable attention, Mr. Cicilline's legal accomplishments span the country. He has handled cases in approximately twenty-six states, including a *pro bono* death penalty case in rural Georgia at the request of the Southern Poverty Law Center. Mr. Cicilline cites the Georgia death case as his most memorable professional experience. In sparing his client from the death penalty, Mr. Cicilline not only persuaded a seemingly obstinate jury, but opposed the old boy network of prosecutors and judges of Lee County, an enclave nestled in Georgia's Bible Belt. We spoke with Mr. Cicilline to learn more about this career. Below are excerpts from our conversation:

Who were your mentors when you were a young lawyer?

[Joseph Belivacqua] was my mentor…but there were a lot of these old-timers I remember – Anthony DeSimone, Mike Addio, Ralph Rotondo, Charlie Curran – they were the big-time criminal lawyers of that era. And Joe, of course, knew all of them. So we'd go out after work to the Ming Garden.[1] You know, we'd run into all these guys, and we'd talk. They were different people than you find today. They were much gentler, less aggressive with one another. They were a good breed.

What do you think has been the single biggest change in the legal profession, practicing law since you first started in private practice?

Well, I think incivility amongst lawyers. I mean, you would never have a case where a lawyer would go talk to your client and try to solicit him as a client. Today that's routine. We had none of that. I remember if a lawyer would go out to the prison and talk to somebody and the guy says, "Your lawyer is Jack Cicilline? You got a fine lawyer." And get up and leave. But we don't have any more of that. It's a tragedy.

What's been the biggest challenge in your legal career?

I've made many speeches, and the first question that always comes up is, "How can you represent a guilty man, a person you know is guilty?" So that's a problem, getting people to understand that; including jurors.

What is one of your most inventive or creative legal arguments?

I did a murder case up in New Bedford. The defendant was Jerry Ouimette, who was a Trojan around here. And the prosecutor was a guy who thereafter became a judge, and I saw him ten years ago, and he told me that was the toughest case he had ever prosecuted, and he had the case won until I made my final argument. He said, "You won that case in the final argument." I spend a lot of time on my final arguments, beginning them before the trial starts, because I have a pretty good sense of where the case is going, and then I work on them while the trial is going on. I'm constantly making notes on a side paper – add this to the final argument. So I spend a lot of time on that. And, for me that's been an important part of my life and the work I do.

What are some of the skills or characteristics that you think have made you so successful?

You know something? I think the only thing that I would say that consistently has been a trait of mine is balls.

Perhaps unconventional at times, Mr. Cicilline's career nevertheless certainly provides guidance on achieving success in this profession – work hard, persevere, overcome obstacles, and show some guts.

1 *The Ming Garden was a legendary Chinese food restaurant and bar where today's legends and yesterday's young attorneys routinely gathered.*

BOOK REVIEWS

Class Warfare: Inside the Fight to Fix America's Schools

by Steven Brill

The Death and Life of the Great American School System: How Testing and Choice are Undermining Education

by Diane Ravitch*

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

…it is hard to see how we could ever make substantial progress in our urban public schools without first reaching agreement on commonsensical conclusions…

Almost thirty years ago, President Ronald Reagan's Commission on Excellence in Education gave birth to the modern education reform movement by publishing what Diane Ravitch describes in her most recent book, *The Death and Life of the Great American School System*, as "the all time blockbuster of education reports."[1] As Stephen Brill notes in his new book, *Class Warfare: Inside the Fight to Fix America's Schools*,[2] the report, *A Nation at Risk: The Imperative for Educational Reform* opened with the claim that "the educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a nation and a people."[3]

It is now fair to say that risk has become reality. Despite the federally-mandated testing regime initiated by the federal No Child Left Behind Act of 2001 (NCLB),[4] and despite the fact that federal education funding to local schools increased by some 40 percent in the years following NCLB,[5] Brill notes that "we're not just behind – way behind – countries like China, South Korea, and Japan, whose educated masses our media typically depict as threatening out competitiveness. We're also behind Estonia, Slovenia, Poland, Norway, New Zealand, Canada and the Netherlands…"[6]

In *Warfare*, Brill, drawing upon his skills as a journalist, tells the stories of some of the leading new reformers in short, readable, chronologically-arranged chapters which manage to convey a sense of excitement and suspense. *Death*, while more argumentative than narrative in format, is no less eloquent, although, at times, repetitive.

As Ravitch notes, the latest reform agenda is, in broad strokes, all about "accountability and choice."[7] The accountability prong emphasizes the utility of uniform testing as one way to measure the effectiveness not only of school districts and individual schools, but also of teachers. Whereas the choice prong encourages the opening of presumably high-achieving charter schools, which are not burdened by some of the contractual constraints of their public counterparts, to offer some choice, model effective policies and, hopefully, motivate traditional public schools. The agenda defies traditional ideological labels by combining a conservative's faith in the utility of free markets with a liberal's focus on the urban poor. However, Brill and Ravitch have very different views on the agenda's likely impact, as is apparent from their rather testy exchanges on C-Span.[8]

The New Faces of Reform

Brill tells the story of T*each for America* (TFA) program founder Wendy Kopp, who hatched the idea for TFA while a student at Princeton in 1989. Convinced that "'today's average teacher comes from the bottom rungs of academic achievement," and that promising students "viewed teaching as a downwardly mobile occupational choice,"[9] Kopp put together a business plan to recruit high-achieving students from top colleges to teach for two years at public schools in underprivileged communities, and founded TFA in 1990.[10] By 2010, TFA would be the largest single employer of students in Princeton's, as well as Yales' and Harvard's, graduating class, drawing applications from an astounding 15-18 percent of all three schools' seniors."[11]

Brill and Ravitch both support the concept of TFA, while recognizing that it is by no means the complete answer. As Ravitch notes, "TFA sends fewer than 10,000 new teachers each year into a profession with nearly 4 million members."[12]

As Brill tells it, some of the driving concepts behind the reform agenda originated in a 1999 Harvard Business School class entitled *Entrepreneurship in the Social Sector* attended by Jonathan Schnur, who had worked in the Clinton administration on education issues and who was moonlighting as an education policy advisor to the Gore presidential campaign, and Michael Johnston, a former TFA volunteer in the Mississippi Delta. At the time, both were actually students at Harvard's Kennedy School of Government, but thought that the business

school elective "seemed like a good course for someone who wanted to change the nation's schools."[13] Soon after they met, Schnur and Johnston co-founded *New Leaders for New Schools* (NLNS), a non-profit organized "to pick out star teachers, train them intensely as principals, and place them in charter schools or public school systems looking for new blood, then provide support by donations and government grants, as well as placement fees…"[14] Six years after Schnor and Johnston founded NLNS, four other young people interested in education reform – Boykin Curry, John Petry, Whitney Tilson, and Charles Ledley (who later became famous as the savvy investor protagonist in Michael Lewis' 2010 book *The Big Short*) – would join then Senator Barack Obama and others in Boykin's Central Park South apartment to help launch Democrats for Education Reform (DFER).

Brill also recounts Joel Klein's experience as New York City Schools Chancellor from 2003 to 2010. Klein, although a brilliant and accomplished lawyer who gained national attention for his efforts to break up Microsoft while head of the Justice Department's Antitrust Division, and who is now working for Rupert Murdoch, had little if any experience in the field of education when appointed Chancellor by Mayor Michael Bloomberg in 2003. It was not long after his appointment that Klein locked horns with the United Federation of Teachers (UFT) over the expansion of charter schools and various seniority-related issues embedded in the parties' collective bargaining agreement (CBA). As Brill noted, the CBA was "layered over with all kinds of byzantine procedures for teachers to engage in a long, three-stage grievance process, in which they could protest just about anything related to how they were managed by their principals."[15]

What followed was a protracted battle over the terms of the expired CBA. However, Klein made little progress as a negotiator. The impasse ended only after Mayor Bloomberg agreed, on the eve of his re-election, to most of the union's demands regarding seniority in return for some limited concessions regarding the arbitration process.[16]

To would-be reformers, this type of mayoral capitulation on the eve of an election illustrates that much of the problem with public education lies with the intransigence of the teachers' unions, which, as reformers like to put it, advance

the interests of adults at the expense of children. Brill claims that "much of the fundamental dynamic in labor-management relations – an adversarial process – was largely absent when it came to politicians negotiating with public employee unions, let alone with the union that was fast becoming the largest, richest, and most politically powerful union in the country… in Democratic strongholds, teachers could pretty much decide the fate on Election Day or Primary Day of the local officials who negotiated their contracts.[17]

The Billionaires Boys' Club Takes on the Teachers' Unions

From 1989 through 2010, the teachers' unions contributed some $60.7 million to candidates for federal office, with 95 percent going to Democrats.[18] In fact, the two national teachers' unions, the National Education Association (NEA) and its rival, and more moderate, UFT, "donate three times more money to Democrats than any other union or industry group" and their members "account for more than 25 percent of all union members in the country and 10-15 percent of the delegates to the Democratic Party convention that chooses the presidential nominee.[19] Thus, as Brill noted, "if unions were the base of the Democratic Party, teachers were the base of the base."[20]

Ravitch, while simply ignoring the political muscle of the teachers' unions as well as the well-documented inability of school districts throughout the country to manage the schools due to restrictive CBAs imposed by the teachers' unions, with the help of mandatory mediation, arbitration and impasse procedures,[21] defends the unions by suggesting they are needed so teachers can "think, speak and teach without fear,"[22] and so teachers can obtain adequate salaries and decent working conditions.[23] The rationale seems somewhat antiquated in light of the plethora of civil rights laws that now protect teachers and other public servants,[24] as well as the fact that teachers at non-union charter schools are, on average, paid more?[25] Oddly, Ravitch fails to mention what Brill sees as the best case for the continued existence of the teachers' unions, which is the pivotal role they could play in bringing about needed reform.

In any event, the contest between unions and would-be reformers became a little less one-sided as education reform captured the attention of some of the

richest men and foundations in the world. By 2002, the nation's two top philanthropies, the Bill & Melinda Gates Foundation and the Walton Family Foundation, were alone responsible for 25 percent of all private funds contributed to elementary and secondary schooling, according to Ravitch.[26]

Ravitch, who, as noted, all but ignored the millions contributed by the teachers' unions to Democratic candidates, spent a lot of time in *Death* bemoaning the involvement of private foundations, which she believes are a threat to democracy. "As their policy goals converged," Ravitch contends that these private foundations, which are accountable to no one, "set the policy agenda not only for school districts, but also for states and even the U.S. Department of Education."[27]

Klein and other would-be reformers also support the expansion of charter schools. To reformers, the ability of some charter schools to dramatically increase the performance, by any measure, of students with the same troubled backgrounds as those in the traditional public schools, proves what effective teachers can accomplish. On the other hand, as Brill notes, "in Weingarten's world, charter schools were to teachers' unions and conventional public schools what Toyota or Honda had been to the autoworkers' union and the big three Detroit automakers."[28]

According to Ravitch, the nominal gains seen by some charter schools resulted from dealing only with those motivated students likely to apply for admission.[29] Ravitch makes the commonsensical point that diluting the traditional public schools of even some of the more motivated students impoverishes the learning environment for those left behind.[30] Thus, she sees charters as a threat to neighborhood public schools, "the one local institution where people congregate and mobilize to solve local problems, where individuals learn to speak up and debate and engage in democratic give-and-take with their neighbors."[31]

Ravitch appears to overstate the reformers' actual claims for the charter schools and exaggerates the threat they pose to traditional public schools in order to make her point, as she does in other contexts.[32] And, she presents no practical alternatives, other than to bemoan the loss of the neighborhood public school, an institution which, whatever one might say about its civic utility, is not doing a very good job educating

Defense Counsel of Rhode Island Celebrates Its Tenth Anniversary

Michael B. Isaacs, Esq., Defense Counsel of Rhode Island Executive Director

On October 13, 2011, Defense Counsel of Rhode Island (DCRI) celebrated its tenth anniversary at the Citizens Bank Rotunda. DCRI president Howard A. Merten introduced deans of the defense bar Joseph A. Kelly and Joseph J. McGair, who provided the evening's entertainment with a roast of the founders and first three presidents; Gerald C. DeMaria, James T. Murphy and John A. Tarantino. The Tenth Anniversary Celebration Committee was chaired by Katy A. Hynes and included Thomas R. Bender, John F. Kelleher and DCRI executive director Michael B. Isaacs.

The Rhode Island Association of Defense Trial Counsel was founded as an unincorporated association in 2001 by organizers Gerald C. DeMaria, who served as the association's president, and James T. Murphy, who was the first vice president and president-elect. In November 2003, the association changed its name to Defense Counsel of Rhode Island and incorporated.

DCRI is an advocate for the interests of businesses, individuals and its members in the state legislature and in the court system. Over the past ten years, the association has expanded the services provided to the membership, offering CLE courses, social events and legislative activity. DCRI members include lawyers engaged in private practice, corporate counsel and insurance company counsel. In recognition of the growth of DCRI and the level of services provided, in 2009, DCRI was the recipient of the Rudolph A. Janata Award which DRI (the national association of the civil defense bar) presents annually to an outstanding state or local defense bar association. For more information about DCRI, contact Executive Director Michael B. Isaacs at (401) 884-7307 or email: dcri@defensecounselri.org or visit www.defensecounselri.org.

l-r: Joseph A. Kelly, Gerald C. DeMaria, Joseph J. McGair, John A. Tarantino, James T. Murphy.

the urban poor. It hardly makes sense to hold *all* public school students in our cities hostage until the regrettable pet peeves of the far right become less fashionable, and we are able to implement sensible national standards.

Predictably, Ravitch is no fan of *Race to the Top*, President Obama's signature education initiative. Without seeing the logical contradiction, Ravitch claims *Race to the Top*, NCLB and support for charter schools all represent unnecessary intrusions of federal control into what should be local decisions, while at the same time attacking the programs as attempts to privatize public education. As she opines towards the end of *Death*, "Deregulation contributed to the near collapse of our national economy in 2008, and there is no reason to anticipate that it will make education better for most children."[33]

In fact, it is the pre-NCLB status quo advocated by Ravitch, not the focused federal initiatives illustrated by NCLB and *Race to the Top*, which resemble the *laissez faire* approach which arguably caused the collapse of both our financial system, as well as our urban public schools. Contrary to Ravitch's argument, the latest education reform agenda defies ideological classification, although advocates like Ravitch are evidently well aware of the political utility of aligning Barack Obama with Milton Friedman and attempting to cram reformers into inappropriate ideological boxes.

Conclusion

Do the TFA program and charter schools improve student performance in the aggregate, or merely provide slight gains to some fortunate students at the expense of the many who are left in traditional public schools? Are neighborhood schools in our larger cities worth preserving as a bastion of community and participatory democracy, or does the *de facto* class segregation in our cities dictate that we attempt to even the scales by providing some choice to disadvantaged inner city parents?

As is evident from *Warfare* and *Death*, top leaders in education cannot agree on the correct answers or the conclusions to be drawn from the copious data generated by NCLB and other studies over the last decade. Too often, the issues are framed as either/or, whereas, in reality, it appears there is some role for testing in evaluating both students and teachers, and charter schools can play a role in buttressing the neighborhood public school.

In *Warfare*, Brill noted that it always confounded New York City Schools Chancellor Joel Klein that UFT President Randi Weingarten, who is a lawyer, "never admitted who her real – and only – clients were. Her counterparts at the rival NEA had no compunction about whom they worked for. But Weingarten's line was always that what was good for teachers was always good for children."[34]

Policy makers should begin any consideration of the relevant issues by finally putting to rest the myth that the interests of teachers and students are synonymous. It should not take overwhelming and unambiguous statistical data to reach the commonsensical conclusions that: 1) the teachers' unions are interest groups that

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Parental Alienation Syndrome in Divorce

Barbara A. Barrow, Esq.
Moore, Virgadamo & Lynch, Ltd.

If a parent chooses to play the alienation game, it is the children who ultimately pay.

When parents divorce and children are involved, at times, the case takes on dimensions of distrust, coercion and manipulation. If the parties cannot mediate and/or come to agreement, over time, emotional turmoil escalates, issues fester, and the parents may find it difficult or are unable to act in the best interests of their children. My intent is to increase awareness of the phenomenon of Parental Alienation Syndrome (PAS) and the surrounding controversy.

Parental Alienation Syndrome (PAS) describes a phenomenon where one parent attempts to garner the love and respect of the children and turn them against the other parent. Unclear in temperament and difficult to define, arguments both for and against PAS recognition abound in both the psychiatric and legal professions.

The American Psychological Association (APA) is presently considering whether to include Parental Alienation Syndrome in its catalog of mental disorders. The term was introduced in the 1980's by Richard A. Gardner, M.D. who worked to educate courts about PAS and for its acceptance in the scientific community. This work has continued through the efforts of Richard A. Warshak, M.D., author of articles and books on the subject, and others.

At the annual 2011 International Conference of the Association of Family and Conciliation Courts, there was a debate on whether this syndrome should be included in the APA Diagnostic and Statistical Manual (DSM-5). Some courts have found that PAS is sufficiently established to have gained general acceptance in the scientific community[1] and parental alienation is recognized and referred to in recent cases.[2] Rhode Island has not yet addressed the issue.

However, this is a hotly debated topic among professionals. Opponents, including Joan Meier, George Washington University Law School professor and domestic violence and child custody author who considers PAS a "fabricated notion," maintains PAS is a perilous concept used to redirect attention from the target parent's abusive behavior and to divert any attention from the emotional chaos the children suffer in an abusive home.[3] Some states have refused to admit expert PAS testimony.[4]

When a one parent obtains placement of minor children, temporarily and/or permanently, in most cases, that parent is entitled to child support from the other parent. In our adversary system, this can translate to children being used as pawns in the divorce proceedings. Thus, efforts to win placement of the children can cloud what might be in the children's best interests. In a very complex web of presentation, courts must make difficult determinations regarding with whom the children will live.

PAS proponents point to red flags of alienation. The alienating parent limits contact between the children and the target parent. Telephone communications may be blocked by the alienating parent. Time spent with the minor children begins to deteriorate. Disparaging remarks about the target parent are made to the children who may or may not be aware these are designed to align them with the alienating parent. In some cases, contact may be severed due to the children's subsequent reluctance to see the target parent.

The reaction of the children to divorce proceedings, internalization of emotions and language of the alienating parent can result in the children mimicking and reinforcing the alienating behavior. After a time, they believe what they are saying because their concept of the truth is distorted by the alienating parent's manipulation. In cases where children refuse to visit, the target parent may give up on reluctant children. A lack of willingness of the alienating parent to sincerely encourage visitation simply increases alienation.

The silver bullet is an abuse allegation making a resounding echo in the courtroom, often leading to increased litigation. While the alleged conduct may not rise to actual abuse and neglect, intervention may be necessary merely to dispel the allegation. Appointment of a guardian *ad litem*, as well as extensive investigation of the children by psychiatric professionals and provision of counseling services for the family, may be ordered at the increased expense of the litigants.

In Rhode Island, consideration of the "best interest" factors, delineated in the **Pettinato**

case, augments the wide discretion of the trial justice.[5] When these factors are weighed by the trial justice, no single factor should be determinative. In high conflict divorce cases, if abuse issues surface, the court must first determine whether any abuse occurred and whether visitation should take place.

The Rhode Island Supreme Court has held that visitation rights "should be strongly favored and should not be denied absent extreme circumstances."[6] Nevertheless, there may be instances where termination of visitation is necessary because the parent is found unfit. The court must make findings of fact in all hearings regarding denial of visitation. See *R.I. Gen. Laws* § 15-5-16 (e). Each family has their own unique dynamic for the court to review.

There are many facets and difficulties arising through divorce and separation of a family. PAS is a topic of debate and something that either parent may exploit. If a parent chooses to play the alienation game, it is the children who ultimately pay.

ENDNOTES

1 ***Bates v. Bates*** *18th Judicial Circuit, Dupage County, IL Case No. 99D958, Jan 17, 2002*

2 *The Supreme Court of New Hampshire Portsmouth Family Division No. 2009-806;* ***In The Matter of James J. Miller and Janet S. Todd*** *(Opinion Issued: March 31, 2011)*
Matter of ***Bond v. MacLeod*** *2011 NY Slip Op 03153 509360 Appellate Division of the Supreme Court of New York, Third Department (Decided April 21, 2011)*

3 *Meier, Joan S.: A Historical Perspective on Parental Alienation Syndrome and Parental Alienation, Journal of Child Custody, 6:232–257, 2009*

4 ***People v. Fortin****, 706 N.Y.S.2d 611 (Co.Ct. 2000)*

5 ***Pettitano v. Pettitano*** *582 A.2d 909 (R.I. 1990) Factors: "the wishes of the child's parent or parents regarding the child's custody; the reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference; the interaction and interrelationship of the child with the child's parent or parents, the child's siblings, and any other person who may significantly affect the child's best interest; the child's adjustment to the child's home, school, and community; the mental and physical health of all individuals involved; the stability of the child's home environment; the moral fitness of the child's parents; the willingness and ability of each parent to facilitate a close and continuous parent-child relationship between the child and the other parent."*

6 ***Hervieux v. Hervieux****, 603 A.2d 337 (R.I. 1992)*

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Lawyers on the Move

R.J. Connelly, III, Esq. received the non-profit Alliance for Better Long Term Care's, the designated office of the Rhode Island State Ombudsman for Long Term Care, Hero Award.

Paul M. Kessimian, Esq. is now a partner of **Partridge Snow & Hahn LLP**, 180 South Main Street, Providence, RI 02903. 401-861-8200

Bethany A. Macktaz, Esq. opened **Macktaz Law, Inc.**, 127 Dorrance Street, Penthouse, Providence, RI 02903. 401-490-0717 Bethany@Macktazlaw.com

Victor J. Orsinger, Esq., William A. Nardone, Esq., Jon D. Lallo, Esq., and **Matthew H. Thomsen, Esq.** are pleased to announce the formation of **Orsinger Nardone Lallo & Thomsen, Attorneys and Counselors at Law**, 42 Granite Street, Westerly, RI 02891.
401-596-2094 vjo@onltlaw.com wan@onltlaw.com jdl@onltlaw.com mht@onltlaw.com

Ann Marie Paglia, Esq. is now Staff Counsel for Chartis Insurance at the law firm of **Long & Leahy,** 100 Summer Street, Boston, MA 02110.
617-235-7968 AnnMarie.Paglia@chartisinsurance.com

Joshua N. Pila, Esq. is now Senior Counsel for LIN Media, One West Exchange Street, Suite 5A, Providence, RI 02903. 401-457-9525 joshua.pila@linmedia.com

David E. Revens, Esq., a partner in the law firm of **Revens, Revens & St. Pierre**, was chosen as Lawyer of the Year for his zealous client advocacy and community service commitment by the Kent County Bar Association.

Ronald Thompson, Jr., Esq. moved the **Law Offices of Ronald Thompson** to 74 East Street, Pawtucket, RI 02860. 401-475-9595 Attron@aol.com www.immigratetorhodeisland.com

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

Proposed Title Standards Revisions Open for Bar Member Review and Comment

The Rhode Island Bar Association's Title Standards and Practices Committee, chaired by Michael B. Mellion, Esq., voted unanimously to submit the following proposed Title Standards revisions to the Rhode Island Bar Association's Executive Committee for its consideration. Bar members are invited to comment on these proposed changes, no later than April 15, 2012, by contacting Rhode Island Bar Association Executive Director Helen Desmond McDonald by email: hmcdonald@ribar.com.

Revisions Appear in Bold Type

DRAFT STANDARD 5.7

SECTION V CONTINUED

STANDARD 5.7

PROOF OF SUCCESSION OF ENTITY

In the event that an entity holding record title to an interest in real estate has changed its name, has merged into or been converted into another entity, or has otherwise undergone a succession affecting its existence as an entity, information regarding such succession obtained from the websites of one or more of the governmental agencies named below (or the appropriate successors of those agencies), and recorded in the manner described below, shall be deemed conclusive evidence of the entity's succession for all purposes, unless evidence to the contrary is recorded in the land evidence records, or such contrary evidence is presented by a party to a transaction involving the entity's interest in the real estate.

The governmental agencies from whose websites information may be obtained are:

1. The Rhode Island Department of Business Regulation;
2. The Rhode Island Secretary of State;
3. The Secretary of State of the state in which the entity was created;
4. The Secretary of State of any other state;
5. The Federal Deposit Insurance Corporation;
6. The Federal Reserve (National Information Center);
7. The Office of the Comptroller of the Currency; and
8. The Office of Thrift Supervision.

The information shall consist of actual printouts of pages from the websites of the agencies documenting the succession of the entity, which pages must include evidence identifying the website from which it was obtained.

The printouts must be attached as exhibits to an affidavit executed by: (a) an officer of the entity holding record title to the interest, or an attorney representing that entity; (b) an officer of the entity which succeeded to the interest of the entity holding record title to the interest, or an attorney representing that entity; (c) an attorney representing a party to a transaction involving the real estate, or (d) an attorney employed by a title insurance company licensed to do business in the State of Rhode Island, which affidavit attests to the facts of the entity's succession and to the fact that the printouts were obtained from the agency's website. The affidavit must be recorded in the land evidence records in the city or town where the real estate is located.

COMMENT:

The best evidence of the change of an entity's name, or the fact that it has undergone a succession affecting its existence as an entity, is an original certificate from the Secretary of State of the state where the entity was created, or of the states where the entity or entities that succeeded to the original entity were created.

If such certificates cannot be timely obtained and recorded, or federal agencies are involved which either do not provide such certificates or cannot provide them in a timely manner, an affidavit meeting the requirements of this standard will serve as an acceptable substitute.

As of the date of approval of this Title Standard, the website addresses of the governmental agencies referred to are set forth below.

AGENCY	WEBSITE ADDRESS
Rhode Island Department of Business Regulation	www.dbr.state.ri.us
Rhode Island Secretary of State	www.sos.ri.gov/corpsearchinput.asp
Federal Deposit Insurance Corporation	www3.fdic.gov/idasp
National Information Center of the Federal Reserve	www.ffiec.gov/nicpubweb/nicweb/nichome.aspx
Office of the Comptroller of the Currency	www.occ.treas.gov/topics/licensing/national-bank-lists/index-national-bank-list.html
Office of Thrift Supervision	www.ots.treas.gov/?p=institutionsearch

Proposed Revision to Standard No. 8.5

SECTION VIII CONTINUED

STANDARD NO. 8.5

RECITALS

Any conveyance or other instrument which has been a matter of record for twenty (20) years in the office of land records of any municipality in this state shall be evidence that recitals therein as to death, birth, age, intestacy, family history, heirship, relationship, **name change, merger, conversion, consolidation or other succession of an entity**, or the happening of any condition or event which may terminate an estate or interest, are true insofar as they affect title to any interest in real estate which such instrument purports to convey or create, unless there is affirmative record evidence to the contrary.

History: This Title Standard was originally approved on July 14, 1978. The standard was revised to reduce the number of years from thirty (30) to twenty (20) to conform with Rule 901 of the Rhode Island Rules of Evidence. Revision approved by the Title Standards and Practices Committee on December 2, 1993 and by the Executive Committee on August 25, 1997.

FORM 11

AFFIDAVIT AND MEMORANDUM OF NOMINEE TRUST UNDER RIGL 34-4-27

Now comes the undersigned, _____ (Name of Trustee) of the City/Town of _____, State of _____, upon oath and depose as follows:

1. _____ (Names of all Settlors) created The _____ (Name of Trust) pursuant to that certain Declaration of Trust dated _____ (Date of Trust) (the "Trust"), in which _____ (Names of all original Trustees) was/were named as Trustee(s) (the "Trustee").
2. [ ] The Trust was amended or restated on the following dates: _____,

   and the Schedule of Beneficiaries was restated on _____,

   OR

   [ ] The Trust has not been amended or restated.
3. The current and sole Trustee(s) of said Trust is/are _____ (Names of current Trustees).
4. The Trustee(s) has/have the power to perform acts as Trustee(s) only with the written direction of the beneficiaries of the Trust.
5. The Trustee has the authority to convey, mortgage, lease, grant restrictions or easements or any other interest in real estate only with the written direction of the beneficiaries of the Trust.
6. [ ] The Trust has not been revoked or otherwise terminated and is presently in full force and effect;
   [ ] The Trust was revoked or terminated on _____ (Date) and the Trustee(s) has/have the power to convey trust property to effect such revocation or termination pursuant to
   [ ] The terms of the Trust; or
   [ ] Rhode Island General Laws § _____; or
   [ ] Other (describe):
   _____.
7. The Trustee(s) is/are replaced and successor trustees are appointed by written instrument signed and acknowledged by beneficiaries holding not less than _____ (___%) percent of the beneficial interest in the Trust.
8. The Trust terminates on _____ or sooner upon receipt by the Trustee of a notice of termination in writing signed and acknowledged by beneficiaries holding not less than _____ (___%) percent of the beneficial interest in the Trust.
9. The Trust is revocable and/or may be amended by written instrument signed and acknowledged by beneficiaries holding not less than _____ (___%) percent of the beneficial interest in the Trust.
10. The undersigned is/are authorized to and have the full power to execute this Affidavit or Memorandum of Trust pursuant to the Trust instrument.
11. [ ] As of the date hereof the Settlor(s) is/are alive,
    OR
    [ ] The Settlor(s) died on _____ in the City/Town of _____ in the State of _____.
12. Since its creation, the only beneficiaries of the Trust have been _____ (Names of all beneficiaries).
13. _____ are the current and sole beneficiaries of the Trust and they have authorized and directed the Trustee(s) of the Trust to _____ (Describe act or acts that Trustee has been authorized to take).

IN WITNESS WHEREOF, the undersigned has executed this Memorandum of Trust on this _____ day of _____, _____.

_____ _____

Witness (Signature of trustee)

STATE OF _____

COUNTY OF _____

Subscribed and sworn to before me this _____ day of _____, _____.

_____

Notary Public
Printed Name:
My commission expires:

In Memoriam

Robert Burnett, Esq.

Robert Burnett, 71, of East Providence, passed away on December 8, 2011. Born in Providence, he was the son of Roberta Sherwin and Robert Burnett. He is survived by his beloved wife of 47 years, Kathleen Cullis Burnett. Bob graduated from Mount Hermon School in Northfield, MA and Wesleyan University in Middletown, CT, where he joined a local fraternity. There, he and his fraternity brothers formed the folk singing group "The Highwaymen" whose song, "Michael Row the Boat Ashore," won a gold record in 1961. Bob joined the Army in 1962, doing basic training in Fort Dix, New Jersey where he met and fell in love with his wife, the Colonel's daughter. After serving in the military, he lived and sang with The Highwaymen in Greenwich Village at the height of the folk singing era. He later graduated from Harvard Law School, beginning his career at the law firm of Edwards & Angell. He later worked for Hospital Trust National Bank, Fleet, Bank Boston and Bank of America. He was an active member of both the Probate & Trust Committee of the Rhode Island Bar Association and the Estate Planning Council of Rhode Island. Bob served as chairman of the board of Moses Brown School, on the board of the Rhode Island chapter of the American Cancer Society, and sat on and advised numerous non-profit boards. In 1990, the original "The Highwaymen" began performing all over the country for 20 years. Bob and his wife were members of the Chorus of East Providence, and the Chorus recently honored him for his contribution to music. Bob was recently awarded a confirmation that his 13-foot pole-vaulting record at Wesleyan would remain as the top height with the equipment of his era. He grew up in Mystic, CT, as an avid sailor and member of the Mason's Island Yacht Club. Bob maintained his interest in sailing throughout his life, racing his Ensign Bobcat out of the Bristol Yacht Club. He also raced in the Newport to Bermuda race several times and in many other sailboat races. Bob was a runner and completed the Ocean State and the New York Marathons. He is survived by his son, Michael and wife Mary-Ellen Burnett of Rindge, NH; his daughter, Melissa and husband Anthony Burnett-Testa of East Greenwich, RI; his daughter Katherine and husband Scott McDonald of West Hartford, CT; his brother Alan and wife Denise, of Mystic, CT; his brother David and wife Nancy, of Norwich, CT; and his brother-in-law, Michael Cullis and wife Susan, of Middletown, NJ.

Christopher T. DelSesto, Esq.

Christopher T. DelSesto, 77, passed away on January 10, 2012. Born in Providence, he is survived by his wife of 29 years, Donna Lee. He was the son of the late Lola and Governor Christopher DelSesto. He was a graduate of Classical High School, where he was the state fencing champion, and a Harvard University and Harvard Law School graduate. He was an attorney in Rhode Island, first assistant city solicitor in Cranston in the 1960s, and Cranston councilman-at-large from 1965-1971. He served on the Cranston Zoning Board, board of directors of the Greater Providence Chamber of Commerce, the board of directors of Harvard Law School Association of RI, as a Fellow of the Rhode Island Bar Foundation, and as a member of the American Civil Liberties Union. He joined Johnson & Wales as general counsel, managed the endowment for many years, was on the Johnson & Wales University (JWU) Board of Directors, and helped establish JWU campuses in South Carolina, Virginia, St. Maarten, Sweden, Denver and Charlotte. JWU named their information technology building on Weybosset Street in his honor. A convivial raconteur with a sharp intellect, he loved to gather people around him for a challenging debate. In addition to his wife, he is survived by his children: Geoffrey DelSesto and wife Sherry of Natick, MA; Gabrielle Lesser and husband Richard of Hastings-on-Hudson, NY; Eric DelSesto and wife Sharneth of Lafayette, CA; Christopher Mark DelSesto and wife Jennifer of Hudson, NH; Karen DelSesto of Richmond, RI; Amy DelSesto of Grenoble, France; his stepsons Tom Funk and wife Elizabeth of Bristol, VT; and James Lee and wife YuQing of Belmont, MA; brothers Ronald DelSesto and wife Deborah of Providence; Gregory DelSesto and wife Janice of Ft. Lauderdale, FL; former wives Carol Maccarone of Cranston and Marina Ewart of Westborough, MA; and 13 grandchildren.

Robert N. Greene, Esq.

Robert N. Greene, 89, of Palm Desert, CA, passed away on January 4, 2012. He was the husband of Dorcas Parsons Greene for 38 years. Born in Providence, he was the son of Louis and Anna Donner Greene. A Rhode Island resident for most of his life, he graduated from Classical High School, attended Brown University, and graduated from Boston University Law School. He was a United States Navy officer on LST 694 in the Pacific Theatre during World War II. He was a silver life master duplicate bridge player and a ranked Rhode Island and New England tennis player. For several years, he was the Jewish War Veterans Judge Advocate. In addition to his wife, he is survived by his daughter-in-law Elaine Lang Greenstein and two granddaughters.

G. Scott Nebergall, Esq.

Rohis G. Scott Nebergall, age 60, of Tiverton, passed away on January 19, 2012. He was the husband of Cynthia Nebergall for the past 32 years. Scott was a son of Myrta Myers Nebergall of Kansas City, MO and the late Vernon Nebergall. He was a graduate of the University of Missouri-Columbia, and Pepperdine Law School and earned his Masters of Law, Taxation, from Georgetown Law. An attorney and Partner with Edwards Wildman Palmer in Providence since 1984, Scott served as co-chair of the

Tax Department. Prior to joining Edwards Wildman, he was a Trial Attorney in the Tax Division of the U.S. Department of Justice and was a recipient of the Justice Department Outstanding Attorney Award. During the past 19 years, he served as the Municipal Court Judge in Tiverton. An avid golfer, he was a member of the Rhode Island Country Club. He also enjoyed sailing, particularly cruising each summer with his family on his Baltic 38, *Eroica*. In addition to his wife, he is survived by his daughter: Daphne Elizabeth Nebergall of NY, NY; triplets: Christian Spencer, Audrey Katherine and Gregory William Nebergall all of Tiverton; and his brothers: Mark Nebergall of Annapolis, MD, and Jeffrey Nebergall of Marshall, MO.

Hon. Robert J. Rahill

Robert J. Rahill, of North Providence, formerly of South Kingstown, passed away on January 27, 2012. He was the husband of Mary Elaine Leonard Rahill for 56 years. Judge Rahill was born in Queens, New York, the son of James and Mary Kerrins Rahill. He received his B. Ed. degree and his M. Ed. degree from Rhode Island College, and he received his law degree from Suffolk University Law School. While completing his education, Judge Rahill also served his country first in the UA Air Force (USAF) Special Operations School and in the USAF Air Command and Staff College, retiring as a Lt. Colonel in the Rhode Island Air National Guard. He previously served as both a teacher and department head at Barrington High School, as the Rhode Island Registrar of Motor Vehicles, as a member of the American Association of Motor Vehicles Administrators, Executive Secretary of the State Advisory Council on Vocational Technical Education, Director of the State Department of Transportation, and as Executive Assistant for Policy in charge of Evaluations and Recommendations for Policy Operations. He opened his own law practice with offices in Pawtucket, Warwick and South Kingstown. He was appointed to the District Court Bench, serving until 2009. Judge Rahill was a member of the Rhode Island Bar Association, Massachusetts Bar, Federal Bar of Rhode Island, and MENSA. Besides his wife, he is survived by his four children, Robert J. Rahill, Esq. of South Kingstown, Thomas M. Rahill and his wife Lauren of Orlando, FL, Mary Tomlinson and her husband David of South Kingstown and Catherine Rahill of North Providence.

Augusto W. SaoBento, Esq.

Augusto W. SaoBento, 85, of Barrington, formerly of Warren, East Providence and North Providence, passed away January 9, 2012. He was the husband of Carmela Reale SaoBento. Born July 10, 1926, in Pawtucket, he was a son of the late Antonio and Adelaide Reis SaoBento. He graduated from Providence College and Boston University Law School. He served as a U.S. Army military police officer in World War II. He was private practice as an attorney for over 50 years in East Providence. He served the State of Rhode Island for almost 30 years, in numerous roles: Chairman of the Third Representative District Committee; Delegate to Constitutional Convention; member of the RI State House of Representatives from; member of the RI Legislative Council; Assistant Director to Legislative Research Department; and Legal Counsel to the Speaker of the House. He served on the East Providence Democratic Committee; Disabled American Veterans, East Providence Council, Knights of Columbus; I.B.E.S. of Rhode Island; P.A.D.C. of East Providence; as the Chairman of the Portuguese section of Foreign Language Program for the Democratic Party; and the American, Rhode Island, and Federal Bar Associations. He loved being on the water, fishing on his boat, *Ramboa*, in his early years and was an avid golfer. He was a 25-year resident of Touisset Point, Warren, where he was a former Touisset Point Community Club President. He also maintained a residence for 25 years in Pompano Beach, Florida. Gus was a member of both the Kirkbrae Country Club in Lincoln, RI and the Montaup Country Club in Portsmouth, RI. In addition to his beloved wife of 46 years, he is survived by his son and daughter: Dennis SaoBento and his wife Marie of Warren; and Cara Boyce and her husband John of Pelham Manor, NY; and his brother Zita Lanni of North Providence.

Michael J. Underhill, Esq.

Michael J. Underhill, 54, passed away on January 23, 2012. Born in Somerville, NJ, he was the son of Mary Louise Daigle Underhill and the late Harold Underhill; father of Michael T. Underhill; brother of Robert, David, Steven and Karen Underhill. Mr. Underhill had worked as a self-employed attorney.

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

A Common Sense Approach

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are less likely to assume that the facility has something significant to hide.

Inspectors must be afforded access to non-confidential documents. To prepare for the inspectors visit, prepare and maintain a duplicate documents file which contains all current non-confidential environmental documents, including permits, monitoring and sampling reports and related data. This will make the inspection more time efficient as it will prevent the facility personnel from having to separate confidential and non-confidential documents at the time of the inspection.

Pre-inspection planning makes facility personnel available to follow along with the inspector when the time comes. Someone well-versed in corporate environmental compliance programs and in the operation of the facility should accompany the inspectors at all times. This point person is responsible for ensuring that the inspection goes "smoothly" by facilitating the inspection so that it is not unnecessarily complicated and confusion is minimized.

The inspection point person should be cooperative and professional, treating the inspectors like any other visitor to the facility. On the one hand, an overly friendly approach is not likely to keep inspectors from citing deficiencies. On the other hand, a rude or condescending attitude may antagonize the inspectors. Most importantly, the point person's communications should demonstrate the company's intent to take the necessary steps to remedy the violations.

The point person should take notes during the inspection and note areas where the inspectors took any photos, and take the same photo from the same angle with his/her own cell phone camera. This gives the corporation its own record of the inspection, complete with photos taken simultaneously or immediately after, the inspector leaves. Before an inspector leaves, the point person should attempt to get a thorough briefing or summary from the inspector to further supplement this record.

It is important to remember that the corporation is entitled to take split samples during the inspection.[27] Taking split samples is advisable because of the possibility of lab error or other testing discrepancy. Facilities are also entitled to receive a copy of the results of any test or analysis performed on the samples.[28]

Some violations may be addressed immediately without waiting for the completion of the inspection. In fact, the inspectors may offer some assistance with compliance options. Other problems may require long term remedial solutions or involved outside consultants.

Corporate policy should emphasize the importance of appropriate and cooperative dealings between the enforcement agency and the company's employees. If employees follow this policy, it will not be necessary to involve corporate counsel in the site inspection. In fact, doing so may be ill advised due to its tendency to lead the inspectors to believe there is something to hide.

d. Equipment Management

The ECP should also include regular equipment maintenance inventory. Failure to maintain equipment and the lack of a comprehensive preventative maintenance program are factors that regulators may consider in calculating penalties.[29] Therefore, any equipment requiring a permit or that emits regulated substances, should be part of a regular, comprehensive maintenance program.

When considering the efficacy of

removing a large piece of obsolete or nonfunctioning equipment, keep in mind the possible impact its presence may have on permit applications. The potential for a nonfunctioning piece of equipment to emit air toxics, volatile organic compounds or other hazardous waste streams may have to be considered in permit applications and other filings. The omission of the equipment from an application or inventory report may trigger suspicion on the part of inspectors. It is good practice therefore to dismantle or otherwise remove nonfunctioning equipment and reflect such changes on subsequent filings.

e. Emergency Response

Regardless of how an environmental problem comes to light, rapid resolution is the key to minimizing exposure. One function of the ECT is to establish emergency response and notification procedures, with a clear chain of command. This involves review of all applicable state and federal statutes and regulations to create a company blueprint for responding to noncompliance. Frequently, contractors that provide waste hauling services are willing to assist facilities in developing response plans.

Certain violations, including some spills, must be reported immediately.[30] Therefore, procedures for immediate response actions, spill response, containment, and reporting should be clearly established by the ECT. At the very minimum, this requires making the phone numbers for the National Response Center and any necessary state reporting phone numbers readily available to all employees. Response plans are an essential part of the program and one that every employee needs to be familiar with in order to implement an effective ECP.

Conclusion

There is no question that establishing an effective corporate environmental compliance policy requires a significant commitment of time, personnel and money. The advantage of establishing such a program prior to any governmental involvement should be clear, however. Corporations that wait to develop a program when the government brings an enforcement action will discover the ultimate costs exceed any savings resulting from delayed compliance. As public awareness of corporate environmental responsiveness grows, the indirect impacts on a company are also likely to increase. Therefore, the benefits of an environmental compliance program weigh heavily in favor of its early development.

ENDNOTES

1 ***See, e.g.**, 33 U.S.C. § 1365 (permitting citizens suits against any person or corporations alleged to be in violation of a Clean Water Act effluent standard); 42 U.S.C. § 7604 (providing for citizen suits based on Clean Air Act emission standard violations).*

2 *33 U.S.C. § 1319 (enforcement provisions of the Clean Water Act).*

3 *42 U.S.C. § 6928(d).*

4 ***Id.** at (e).*

5 ***U.S. v. Dotterweich**, 320 U.S. 277, 285 (1943) ("Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce rather than to throw the hazard on the innocent people who are wholly helpless"); **U.S. v. Park**, 421 U.S. 658, 672 (1975) (corporate officers have "a positive duty to seek out and remedy violations when they occur, but also, and primarily, a duty to implement measures that will insure that violations will not occur"); **U.S. v. Ming Hong**, 242 F.3d 528, 532 (4th Circ. 2001) (corporate officer liable because "[a]lthough [the officer] went to great lengths to avoid being formally associated with [the discharger], in fact he substantially controlled corporate operations").*

6 *On prosecutorial discretion, **see Heckler v. Chaney**, 470 U.S. 821 (1985).*

7 *Department Of Justice, Factors In Decisions On Criminal Prosecutions For Environmental Violations In The Context Of Significant Voluntary Compliance Or Disclosure Efforts By The Violator (July 1, 1991), available at*

http://www.justice.gov/enrd/3058.htm

8 *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19618 (April 11, 2000), available at http://www.epa.gov/compliance/resources/policies/incentives/auditing/auditpolicy51100.pdf.*

9 ***Id.***

10 *For information on how this penalty is calculated, **see** Lynn M. Dodge, ECONOMIC BENEFIT IN ENVIRONMENTAL CIVIL PENALTIES: IS BEN TOO GENTLE? 77 U. Det. Mercy L. Rev. 543.*

11 *Environment Protection Agency, Q&A's on EPA's Small Business Compliance Policy (May 19, 2004), http://www.epa.gov/compliance/resources/policies/incentives/smallbusiness/smbfactsht.pdf*

12 *Incentives for Self-Policing, **supra** note 9, at 19622.*

13 ***Id.** at 19623. **See also** GREEN BUSINESS NETWORK, COMPLIANCE INCENTIVES FOR BUSINESS: SELF-POLICING, SELF-AUDITING, AND SELF-DISCLOSURE POLICIES (October 2001), http://www.pneac.org/compliance/smallbusinesscompliance/ci4sb.pdf*

14 *Jeffrey C. Fort, Reporting Lines, Corp. Compl. Series: Envtl. § 2:19 (2010-2011).*

15 *Park, **supra** note 6, at 6703 (a corporate officer can be found liable in absence of conscious wrongdoing if the officer had the power to prevent the violation).*

16 *Roger J. Marzulla & Brett G. Kappel, NOWHERE TO RUN, NOWHERE TO HIDE: CRIMINAL LIABILITY FOR VIOLATIONS OF ENVIRONMENTAL STATUTES IN THE 1990S, 16 COLUM. J. ENVTL. L. 201, 220 (1991)*

17 ***Id.** at 224*

18 *Annual review is mandatory under the RCRA's training program requirement. 40 C.F.R. § 265.16(c).*

19 *Whistleblower provisions have been incorporated into the major federal environmental laws, including the Clean Air Act (CAA), Clean Water Act (CWA), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Toxic Substances Control Act (TSCA). Michael A. Zody **et. al.**, Responding to Environmental Whistleblower: Listen Carefully to that Sound Coming 'Round the Bend, 51 RMMLF-INST 6 (2005).*

20 *Lynn E. Pollan, CORPORATE COMPLIANCE IN ENVIRONMENTAL MATTERS: OUTLINE FOR DISCUSSION. Practicing Law Institute, Corporate Law and Practice Course Handbook Series. PLI Order No. B4-7175 (June 1996).*

21 *Zody, **supra** note 20.*

22 *Marzulla & Kappel, **supra** note 17, at 224*

23 ***Id.***

24 ***See, e.g.**, 42 U.S.C. § 6927(e)(1) ("The Administrator (or the State in the case of a State having an authorized hazardous waste program under this subchapter) shall commence a program to thoroughly inspect every facility for the treatment, storage, or disposal of hazardous waste for which a permit is required under section 6925 of this title no less often than every two years as to its compliance with this subchapter.")*

25 *The standard is probable cause. **See National-Standard Co. v. Adamkus**, 881 F.2d 352 (7th Circ. 1989).*

26 *42 U.S.C. § 6927(a)*

27 *Split samples are those "equal in volume or weight to the portion retained" **Id.***

28 ***Id.***

29 *Department Of Justice, **supra** note 8.*

30 ***See, e.g.**, the Clean Water Act self-reporting requirement. 33 U.S.C. § 1321(b)(5) requires any person in charge of an onshore or offshore facility or vessel to notify immediately the appropriate agency of the federal government as soon as he has knowledge of any discharge of oil or hazardous substance. The appropriate agencies for notification include the United States Coast Guard and he United State Environmental Protection Agency. Any failure to notify may result in a fine and/or imprisonment.* ❖

Default Surrogate Consent

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ent statutory variations can be implemented, it is worthwhile for legislators to consider the different issues raised here. Also, it is important to note that the majority of commentators still ultimately conclude that these statutes should be implemented.[61]

A. The Priority List

One potential problem with surrogacy statutes involves the use of a priority list of, for the most part, family members. While a priority list reflects most individuals' preferences, it does not take into account other factors some may consider when choosing a healthcare agent, such as age and gender.[62]

Additionally, a problem may still arise if there is a disagreement between multiple members of the available level as to who amongst the group should serve.[63] The dispute may be unsolvable if the statute does not provide a resolution mechanism. Even if the conflict can be resolved by a majority decision or other means, not only was there a disruption in family harmony, but the chosen surrogate may not reflect the incapacitated person's preferred choice from amongst the group.

Also, as noted above, most surrogacy statutes do not reflect nontraditional families, including couples who forego marriage or civil unions. While some states have taken the appropriate steps to place these relationships alongside legally married and civil union couples at the top of the priority list, most do not account for life partner relationships and instead those individuals are delegated to the lower level of "close friends."[64]

Some people are estranged from their families. This means the person responsible for the incapacitated person's medical treatment may be someone with hostile or totally indifferent feelings toward that person.[65] One possible solution to this problem is to better screen individuals with potential conflicts of interest.[66] Surrogate selection is more likely to be problematic when a family-relationship is dysfunctional rather than harmonious. However, surrogacy statutes do not create more problems than already exist under the present system, where uncertainty in different family situations is already an issue without a surrogacy statute.[67]

Another problem with a priority list is that it may not reflect the views of some ethnic or racial groups who have inclusive or intergenerational notions of family. For instance, there is evidence that Latino and Asian cultures have a more familial focus than other groups which may conflict with surrogacy statutes elevating one individual above the rest of the family.[68] One study has shown that Mexican Americans and Korean Americans are significantly more likely than other racial groups to want decisions concerning the use of life-sustaining treatment made as a family. In addition, in some African cultures, the eldest family member is seen as the person with the authority to provide informed consent.[69] These beliefs may conflict with a surrogate statute hierarchy giving a spouse priority above all and placing adult children before parents and grandparents. On the other hand, although there may be a concern about raising one family member above others, surrogacy statutes still allow families to work together because the person with legal authority may, and often should, consult with other family members.

These different factors related to the priority list structure should be considered when creating or altering a surrogacy statute listing. In addition, the consensus-based model used in Colorado and Hawaii

helps address many of these concerns. However, the major drawback of the consensus-based model is that it cannot be implemented as quickly because of its requirement of deliberation between potential surrogates.

B. Excessive Limitations on Surrogate Decision-Making Powers

Many surrogacy statutes place excessive limitations on the authority of decision-makers.[70] The greater the limitations, the less effective a statute can be. When a surrogate's authority is restricted, court intervention is still necessary, defeating one of the main surrogacy statutes' purposes. Therefore, a surrogate's decision-making authority should be broad in scope, with appropriate safeguards.[71] An example of an appropriate safeguard would require concurring medical opinions when determining whether a patient is incapacitated or whether a surrogate may withdraw life-sustaining treatment.[72]

C. Surrogate Decisions May Not Reflect Patient Preferences

Researchers have found default surrogates may not necessarily authorize or refuse treatment reflecting the incapacitated person's preferences. If a patient's wishes are unknown, the surrogate may have difficulty predicting those wishes and may, instead, make nonconforming decisions.[73] Many times surrogates are either uninformed or unprepared to make medical decisions.[74] Moreover, some surrogates, even when a patient's wishes are known, may not follow those known wishes and, instead, make decisions reflecting their own personal views, religious beliefs or paternalistic impulses.[75] Also, surrogates sometimes believe they know the incapacitated person's wishes when, in fact, that belief is mistaken.[76] Despite these potential issues, research shows that default surrogates are statistically just as likely to follow a patient's wishes as appointed healthcare agents.[77] While this may seem to raise a problem with advance directives in general, most Americans are much more concerned with who will be their agent and not the specific decisions that the agent will make.[78] Furthermore, it appears that courts are no more likely to correctly determine an incapacitated person's unknown preferences and wishes.[79]

D. Potential Unethical Behavior by Surrogates

Due to a lack of total congruence between patient preferences and surrogate actions, commentators have noted the default surrogate mechanism could result in unethical behavior to the detriment of the incapacitated person. For instance, the surrogate might be motivated by a financial incentive, such as an inheritance, when making the determination to remove life-sustaining treatment.[80] Another problem may arise if one family member disagrees, not out of concern for the incapacitated patient, but rather to seek a form of revenge on other family members. A person could be left on futile life-sustaining treatment to drain that person's savings or inflict emotional suffering.[81] One process to address these ethical concerns employs the consensus-based model used in a couple of states.[82] By giving many family members a voice, the wrongful decision-making of one person is more likely to be prevented. Another option, if the dispute is irresolvable, is for the hospital to provide a board to review all relevant information presented and then make a final determination.[83] If these options fail, the surrogacy statute does not cause any detriment because the dispute will instead be taken to court in the same manner as if the surrogacy statute had never existed.

E. Physician Involvement in Decision-Making

Beyond family members, problems arise in some versions of Default Surrogate Consent Statutes allowing physicians, despite the decision-making authority of the incapacitated person's surrogate, to intercede and act contrary to the surrogate's choices. This is allowed if the physician believes that the surrogate's decision is neither in accordance with the patient's known wishes or best interests.[84] Physician decisions tend to reflect the doctor's own personal values and not the values of the patient.[85] Additionally, doctors could ignore a surrogate's decisions for other, unethical reasons. With the rising costs and scarcity of resources in healthcare facilities, doctors may feel pressured to forego certain treatments due to financial pressures.[86] To address these concerns, surrogacy statutes should place a heavy burden upon healthcare providers before a surrogate's decision may be overridden.[87]

V. Conclusion

Rhode Island should strongly consider enacting a Default Surrogate Consent Statute for the benefit of those who become incapacitated without having appointed a healthcare agent. In addition, it is advisable for all states to revisit existing statutes to consider changes in society that have occurred over the past two decades.

Of course, Default Surrogate Consent Statutes, while an improvement, are not a perfect solution and do contain admitted flaws. This article has not put forward a specific statutory construction. Instead, if Rhode Island accepts such a statute is needed, a greater analysis should be undertaken, considering both the different approaches in other states, potential pitfalls and particular circumstances in the Ocean State.

ENDNOTES

1 ***See, e.g.**, Stanley S. Herr & Barbara L. Hopkins, Health Care Decision-Making for Persons With Disabilities: An Alternative to Guardianship, 271 JAMA 1017 (1994). Bernard Lo & Robert Steinbrook, Resuscitating Advance Directives, 164 Archives Internal Med. 1501, 1502 (2004) (finding that twenty-five percent of patients have advance directives); Christopher B. Rosnick & Sandra L. Reynolds, Thinking Ahead: Factors Associated with Executing Advance Directives, 15 J. Aging & Health 409, 411 (2003) (surveys show low rate of advance directive completion).*

2 *Mary Coombs, Schiavo: The Road Not Taken, 61 U. Miami L. Rev. 539, 585 (2007) (noting reasons people do not execute advance directives).*

3 ***See e.g.**, ALA. CODE 22-8A-11 and 6 (2007); ALASKA STAT. § 13.52.030 (2007); ARIZ. REV. STAT. ANN. § 20-17-214 (2007); ARK. CODE ANN. § 20-17-214 (2007); CAL. PROB. CODE § 4711 – 4716 (West 2007); COLO. REV. STAT. ANN. § 15-18.5-101 to 103 (West 2007); **see also** American Bar Association Default Surrogate Consent Statutes Chart **available at** http://www.abanet.org/aging/legislativeupdates/pdfs/Famcon_Chart.pdf (last modified Sep. 1, 2008) (provides an updated listing of enacted surrogacy statutes including the noteworthy aspects of each statute).*

4 *Uniform Health-Care Decisions Act § 5 (1993).*

5 ***See** sources **supra** note 3.*

6 *Kathleen M. Boozang, An Intimate Passing: Restoring the Role of Family and Religion in Dying, 58 U. Pitt. L. Rev. 549, Part IV.B.3. (1997).*

7 ***See e.g.**, ALA. CODE 22-8A-11 and 6 (2007); ALASKA STAT. § 13.52.030 (2007); ARIZ. REV. STAT. ANN. § 20-17-214 (2007); ARK. CODE ANN. § 20-17-214 (2007); DEL. CODE ANN. tit. 16, § 2507 (2006); D.C. CODE § 21-2210 (2007).*

8 *Uniform Health-Care Decisions Act § 5(b) (1993).*

9 *Uniform Health-Care Decisions Act § 5(c) (1993).*

10 ***See e.g.***, *ALASKA STAT. § 13.52.030 (2007); ARIZ. REV. STAT. ANN. § 20-17-214 (2007); ARK. CODE ANN. § 20-17-214 (2007); DEL. CODE ANN. tit. 16, § 2507 (2006); FLA. STAT. § 765.113 and § 765.401 (2009); 755 ILL. COMP. STAT. 40/1 to 40/65 (2007).*

11 ***See***, *ARIZ. REV. STAT. ANN. § 20-17-214 (2007); MD HEALTH-GEN. CODE ANN., § 5-605 (2007); N.M. STAT. ANN. § 24-7A-5 (West 2007); WASH. REV. CODE ANN. § 7.70.065 (West 2006).*

12 *D.C. CODE § 21-2210 (2007);*

13 ***See e.g.***, *ALA. CODE 22-8A-11 and 6 (2007); ARIZ. REV. STAT. ANN. § 20-17-214 (2007); MISS. CODE ANN. §§ 41-41-201 to 229 (West 2007); N.Y. PUB. HEALTH LAW §§ 2965 & 2966 (2007); N.C. GEN. STAT. § 90-322 (2007); OR. REV. STAT. § 127.635, § 127.505(12) and § 127.535(4) (2007).*

14 *COLO. REV. STAT. ANN. § 15-18.5-101 to 103 (West 2007); HAWAII REV. STAT. §§ 327E-2 and E-5 (2007).*

15 ***See*** *sources* ***supra*** *note 3.*

16 *Uniform Health-Care Decisions Act § 5(a) (1993).*

17 *Margaret C. Jasper,* THE RIGHT TO DIE *36 (Oceania Publications, Inc. 2000).*

18 ***See*** *sources* ***supra*** *note 3.*

19 ***See, e.g.***, *ARK. CODE ANN. § 20-17-214 (2007); CONN. GEN. STAT. ANN. § 19a-571 (West 2007); DEL. CODE ANN. tit. 16, § 2507 (2006).*

20 ***See, e.g.***, *ARIZ. REV. STAT. ANN. § 20-17-214 (2007); D.C. CODE § 21-2210 (2007); FLA. STAT. § 765.113 and § 765.401 (2009).*

21 ***See*** *sources* ***supra*** *note 3.*

22 *Boozang,* ***supra*** *note 6, at Part IV., B., 3.*

23 ***See., e.g.***, *ALA. CODE 22-8A-11 and 6 (2007); DEL. CODE ANN. tit. 16, § 2507 (2006).*

24 ***See, e.g.***, *IND. CODE ANN. § 16-36-1-1 to 14 (West 2006).*

25 ***See***, *Uniform Health-Care Decisions Act § 5(f) (1993); HAWAII REV. STAT. §§ 327E-2 and E-5 (2007); MD HEALTH-GEN. CODE ANN., § 5-605 (2007); ME. REV. STAT. ANN. tit. 18-A, § 5-801 to § 5-817 (West 2007).*

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27 *Richard S. Saver,* CRITICAL CARE RESEARCH AND INFORMED CONSENT, *N.C. L. Rev. 205, 260 (1996).*

28 *Andrew T. Wampler,* TO BE OR NOT TO BE IN TENNESSEE: DECIDING SURROGATE ISSUES, *34 U. Mem. L. Rev. 333, 384 (2004) (citing Vassyl A. Lonchyna,* TO RESUSCITATE OR NOT … IN THE OPERATING ROOM: THE NEED FOR HOSPITAL POLICIES FOR SURGEONS REGARDING DNR ORDERS, *6 Annals Health L. 209 (1997)).*

29 ***Id.*** *at 385.*

30 ***Id.*** *at 384 (paraphrasing C.J. Rehnquist's majority opinion in* ***Cruzan v. Dir., Mo. Dep't of Health****, 497 U.S. 261, 283 "We think it self-evident that the interests at stake in the instant proceedings are more substantial, both on an individual and societal level, than those involved in a run-of-the-mine civil dispute").*

31 ***In re Jobes****, 529 A.2d 434, 449 (N.J. 1987).*

32 *Ardath A. Hamann,* FAMILY SURROGATE LAWS: A NECESSARY SUPPLEMENT TO LIVING WILLS AND DURABLE POWERS OF ATTORNEY, *38 Vill. L. Rev. 103, 137-138 (1993).*

33 *Jessica W. Berg, et. al.,* INFORMED CONSENT: LEGAL THEORY AND CLINICAL PRACTICE *120 (Oxford University Press 2001).*

34 *Coombs,* ***supra*** *note 2, at 584.*

35 *Hamann,* ***supra*** *note 32, at 140.*

36 ***Id.*** *(citing* ***Cruzan****, 497 U.S. at 350).*

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38 ***Id.*** *at 150-151.*

39 ***Id.*** *at 158.*

40 *Berg,* ***supra*** *note 33, at 120.*

41 ***In re Jobes****, 529 A.2d at 449.*

42 *Berg,* ***supra*** *note 33, at 120.*

43 ***Cruzan****, 497 U.S. at 320.*

44 *Berg,* ***supra*** *note 33, at 119.*

45 ***Id.*** *at 120.*

46 *Hamann,* ***supra*** *note 32, at 167.*

47 ***Id.*** *at 167-168.*

48 *Nina A. Kohn & Jeremy A. Blumenthal,* DESIGNATING HEALTH CARE DECISIONMAKERS FOR PATIENTS WITHOUT ADVANCE DIRECTIVES: A PSYCHOLOGICAL CRITIQUE, *42 Ga. L. Rev. 979, 987 (2008) (citing arguments raised by advocates of a New York state surrogacy law)).*

49 *William D. Smucker et. al.,* MODEL PREFERENCES PREDICT ELDERLY PATIENT'S LIFE-SUSTAINING TREATMENT CHOICES AS WELL AS PATIENT'S CHOSEN SURROGATES DO, *20 Med. Decision Making 271, 273 (2000).*

50 *Angela Fagerlin et. al.,* PROJECTION IN

Surrogate Decisions About Life-Sustaining Medical Treatments, 20 Health Psychol. 166, 171 (2000).

51 *Hamann, **supra** note 32, at 162.*

52 ***Id.** at 165.*

53 *Saver, **supra** note 27, at 261.*

54 *Jeremy A. Blumenthal, Law and the Emotions: The Problems of Affective Forecasting, 80 Ind. L.J. 155, 221 (2005) (citing Kristen M. Coppola et. al., Accuracy of Primary Care and Hospital-Based Physicians' Predictions of Elderly Outpatients' Treatment Preferences with and without Advance Directives, 161 Archives Internal Med. 431 (2001)).*

55 *Bishop, **supra** note 26, at 164.*

56 ***Id.** at 165 (citing **In re Quinlan**, 355 A.2d at 646, 655; **Schloendorff v. Soc'y of N.Y. Hosp.**, 105 N.E. 92 (N.Y. 1914).*

57 *Bishop, **supra** note 26, at 167 (citing **In re Quinlan**, 355 A.2d at 667).*

58 *Kohn, **supra** note 48, at 989 (citing Cass Sunstein, The Right to Die, 106 Yale L.J. 1123, 1130 (1997).*

59 ***See** sources **supra** note 3.*

60 *Wampler, **supra** note 28, at 385.*

61 ***See, e.g.**, Kohn, **supra** note 48; Aaron N. Krupp, Health Care Surrogate Statutes: Ethics Pitfalls Threaten the Interests of Incompetent Patients, 101 W. Va. L. Rev. 99 (1998); Matthew B. Hickey, Oklahoma Advance Directive Act: Denying Choice to Those Who Cannot Choose: A Proposal for Legislative and Practical Alternatives 59 Okla. L. Rev. 449 (2006).*

62 ***See** sources **supra** note 3.*

63 *Kohn, **supra** note 48, at 991.*

64 ***Id.** at 991-992.*

65 ***Id.** at 992.*

66 *Marah Stith, The Semblance of Autonomy: Treatment of Persons with Disabilities Under the Uniform Health-Care Decisions Act, 22 Issues Law & Med. 39, 79 (2006) (offering suggestions to improve the UHDCA and similar statutes).*

67 *Hamann, **supra** note 32, at 169.*

68 *Olatawura, M., "Ethics in sub-Saharan Africa," Ethics, Culture and Society 103-108 (J. Arboleda-Florez & N. Sartorius eds., 2000).*

69 *Blackhall, L.J., et. al., Ethnicity and attitudes toward patient autonomy, 274 JAMA 820, 820-826 (1995).*

70 *Bishop, **supra** note 26, at 179 (discussing the limitations of some surrogacy statutes and suggesting improvements).*

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72 ***Id.** at 182-183 (noting that the Illinois surrogacy statute requires concurring medical opinions before the withdrawal of life support, 755 ILL. COMP. STAT. 40/1-55).*

73 *Christina Cooley, Maximizing Patient Autonomy Through Expanded Medical Surrogacy Mediation, 30 Law & Psychol. Rev. 229, 238 (2006).*

74 *Thomas L. Hafemeister, End of Life Decision Making, Theraputic Jurisprudence, and Preventative Law: Hierarchical v. Consensus-Based Decision Making Model, 41 Ariz. L. Rev. 329 (1999).*

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76 *David I. Shalowitz et. al., The Accuracy of Surrogate Decision Makers: A Systematic Review, 166 Archives Internal Med. 493, 494-495 (2006) (examination of sixteen separate studies found that surrogates are accurate 68% of the time).*

77 *Smucker, **supra** note 49, at 276 (finding surrogates no more likely to make accurate predictions with an advance directive than without).*

78 *Kohn, **supra** note 48, at 1008.*

79 *Berg, **supra** note 33.*

80 *Krupp, **supra** note 61, at 111-113 (discussing potential financial motivations for removing a person from life-sustaining treatment).*

81 ***Id.** at 117 (discussing potential unethical motivations a family member might have to disagree with others over the proper course of treatment for the incapacitated person).*

82 *COLO. REV. STAT. ANN. § 15-18.5-101 to 103 (West 2007); HAWAII REV. STAT. §§ 327E-2 and E-5 (2007).*

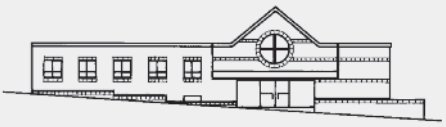
83 *Hamann, **supra** note 32.*

84 *Krupp, **supra** note 61, at 118.*

85 *Cooley, **supra** note 73, at 240.*

86 *Krupp, **supra** note 61, at 120.*

87 ***Id.** at 128.* ❖



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Book Reviews

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are all about teachers, not students; 2) like any other interest group which may serve a useful and, arguably, critical function, the power of the unions must be checked and balanced against their negative impact on the mission of public education; and 3) the great majority of our three million public school teachers should not continue to be advanced in their careers simply on the basis of their ability to breathe.

After reading *Warfare* and *Death*, it is hard to see how we could ever make substantial progress in our urban public schools without first reaching agreement on these commonsensical conclusions, whatever approach we may decide to take with respect to the use of testing data and the opening of new charter schools.

ENDNOTES

1* *The views expressed herein are solely those of the author and do not reflect those of the City, any City official, or the Providence School Board.*

***Death** at 24. Ravitch is Research Professor of Education at New York University and a senior fellow at the Brookings Institution. From 1991 to 1993, she was Assistant Secretary of Education and Counselor to Secretary of Education Lamar Alexander in the administration of President George H.W. Bush. She is the author of over twenty books on education, including* THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973 *(Basic Books, 1974).*

2 *Brill, the founder of* THE AMERICAN LAWYER AND COURT TV, *is the CEO of Press+, which, according to Brill's publisher, has "created a new business model for journalism to flourish online." He also teaches journalism at Yale University. Brill became interested in education after researching an article he wrote for* THE NEW YORKER *magazine involving New York City's inability to dismiss poor teachers. See Warfare at 27-28; Steven Brill,* THE RUBBER ROOM: THE BATTLE OVER NEW YORK CITY'S WORST TEACHERS, THE NEW YORKER, *Aug. 3, 2009 ("Rubber Room").*

3 *National Commission on Excellence in Education,* A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM *(Washington, D.C.,U.S. Government Printing Office, 1983) at 5.*

4 ***See** 20 U.S.C. §§ 6301-7941.*

5 ***See Warfare** at 85.*

6 ***Id.** at 27, **citing** a 2010 study of the International Organization for Economic Cooperation and Development. Unfortunately, Rhode Island's statistics are no exception. In the most recent year of data available (2007), over several sub-populations, Rhode Island's public schools achieved the lowest score of any of the six New England states in almost every single category.*

7 ***See Death** at 15. Hence the subtitle of her new book.*

8 ***See** http://www.c-spanvideo.org/program/300570-1. (For those of you too young to get the reference, I apologize).*

9 ***Warfare*** *at 52-53.*
10 ***Id.*** *at 55-56.*
11 ***Id.*** *at 52.*
12 ***Death*** *at 190.*
13 ***Warfare*** *at 8.*
14 ***Id.*** *at 82-83.*
15 ***Id.*** *at 90.*
16 ***See id.*** *at 121-22, 125-27.*
17 ***Id.*** *at 39.*
18 ***See id.*** *at 177.*
19 ***Id.*** *at 2. The picture in Rhode Island is similar. According to the National Institute on Money in State Politics, in 2010 alone, public sector labor unions in Rhode Island contributed $402,123 to candidates for state office, with roughly a third coming from the teachers' unions. For the actual records, see the Institute's website at http://www.followthemoney.org/database/state_overview.phtml?s=RI&y=2010.*
20 ***Id.*** *at 40.*
21 ***See e.g., Rubber Room****, note 3,* ***supra****.*
22 ***Death*** *at 174.*
23 ***Id.***
24 ***See, e.g.,*** *Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (prohibiting discrimination on the basis of race, color, religion, sex, or national origin); Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, as amended by the Older Workers Benefit Protection Act of 1990, 29 U.S.C. § 626(f) (prohibiting age discrimination); Americans with Disabilities Act, 29 U.S.C. §§ 12101* ***et seq.*** *(discrimination on the basis of a disability); R.I. Gen. Laws §§ 28-9.1-4, 28-7-13(5) and (8) (protecting labor organizing). In addition, many home rule charters prohibit politically motivated employment discrimination.* ***See, e.g.,*** *Providence Home Rule Charter at § 1206 (proscribing discrimination against employees "on any political basis").*
25 ***See Warfare*** *at 15.*
26 ***Id.*** *at 199.*
27 ***Death*** *at 200;* ***see generally id.*** *at 195 – 222.*
28 ***See id.*** *at 8.*
29 ***See, e.g.,*** *Death at 81.*
30 ***See Death*** *at 219-20.*
31 ***Id.***
32 *Thus, for example, she claims erroneously that "NCLB assumes accountability based solely on test scores will reform American education,"* ***id.*** *at 163, and that reformers advocate that "tests" should be the "decisive tool" used to evaluate teachers.* ***Id.*** *at 177. In reality, as Brill noted in his C-Span interview,* ***see*** *note 13,* ***supra****, nobody advocates such heavy reliance on test scores alone.*
33 ***Death*** *at 222.*
34 ***Id.*** *at 101. Brill quotes longtime NEA general counsel Robert Chanin who, in a valedictory speech on the eve of his retirement opined that his union was effective:*

> *'not because we care about children, and it is not because we have a vision of a great public school for every child. NEA and its affiliates are effective advocates because we have power. And we have power because there are more than 3.2 million people who are willing to pay us hundreds of millions of dollars in dues each year because they believe that we are the unions that can most effectively represent them … protect their rights and advance their interests… When all is said and done, NEA and its affiliates must never lose sight of the fact that they are unions and what unions do first and foremost is represent their members.'*

Id. *at 250.* ❖

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