



# Rhode Island Bar Journal

Rhode Island Bar Association Volume 68. Number 3. November/December 2019

**A Review of the SECURE Act and Its Effect on Estate Planning with Retirement Assets**

**Clearing the Record: How to Seal Criminal Records and Expunge Criminal Convictions in Rhode Island**

**U.S. Supreme Court Finds North Carolina's Taxation of a Beneficiary's Undistributed Share of a Trust to Violate the Due Process Clause**

# Articles

## 7 A Review of the SECURE Act and Its Effect on Estate Planning with Retirement Assets

*Gene M. Carlino, Esq.*

## 13 Clearing the Record: How to Seal Criminal Records and Expunge Criminal Convictions in Rhode Island

*John P. Larochelle, Esq.*

## 17 Rhode Island Women Lawyers: Past, Present, & Future

*Cassandra L. Feeney, Esq. and Etie-Lee Schaub, Esq.*

## 21 U.S. Supreme Court Finds North Carolina's Taxation of a Beneficiary's Undistributed Share of a Trust to Violate The Due Process Clause

*Marc J. Soss, Esq.*

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

*Stephen Adams, Esq. and Jenna R. Trott, Esq.*

## 27 I Left My Heart in San Francisco – American Bar Association Delegate Report Annual Meeting 2019

*Robert D. Oster, Esq.*

## FEATURES

- |  |   |
|--|---|
| 3 Love of the Law  | 31 Proposed Title Standards Practice Form 15 Open for Bar Member Review and Comment       |
| 4 Past Bar Foundation Presidents Honored for Their Service         | 32 Casemaker Tip: Case Digest – Now integrated!   |
| 4 A Winning Deal With the Bar's Lawyer Referral Service!           | 33 In Memoriam  |
| 5 The Good We Do   | 35 Rhode Island Probate Court Listing and Judicial Communications Survey on Bar's Website |
| 12 Bar's Government Lawyers Committee Offering Free, 1-Credit CLE  | 35 Share Your Wealth...   |
| 19 Bar Association Mentor Programs                                 | 36 Seeking Law Related Education Program Attorney Volunteers!                             |
| 20 SOLACE  | 37 Bar's Law Practice Management Consultant Presents CLE Seminar on Productivity Apps     |
| 22 Online Attorney Resources (OAR)                                 | 38 Cartoon  |
| 25 Continuing Legal Education                                      | 38 Lawyers on the Move  |
| 26 Rhode Island Legal Services Equal Justice Awards Recognize Many | 38 Updating Your Attorney Directory Photo Is a Snap!                                      |
| 28 Thanks to Our CLE Speakers                                      | 38 Advertising Index  |
| 29 VLP Honor Roll  | 39 Stress Less This Fall  |

*Front Cover Photograph by Brian McDonald*

**Rocky Point Park Arch, Warwick, RI** The 60-foot arch sits on the land of the former Rocky Point amusement park in Warwick on the Narragansett Bay. The arch originally stood at the 1964/1965 World's Fair in New York and was moved to Rocky Point in 1966.



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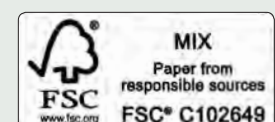
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## Love of the Law



David N. Bazar, Esq.  
President  
Rhode Island Bar Association

**There are many days when the practice of law may seem routine, but we should all remember the excitement we had when we first began our journeys in the law.**

I had the opportunity to attend the orientation for the new law students at the Roger Williams University School of Law. The dean of admissions spoke of all the different paths the students took on their journey to law school. The excitement of the new law students was palpable. The day reminded me of the enthusiasm we all had for the law when we began law school. It also reminded me of the route I took to law school.

I knew exactly what I wanted to do as I began college. I was going to go to medical school. I would major in biology, breeze through organic chemistry and pick which medical school had the most to offer. So there I was, a freshman in physiology class. One of the lab requirements involved cutting the heads off of live rats and draining the blood in a sink. I discovered something about myself that day. I don't like to see blood, my own or the blood of any other living thing. Medical school was not going to work. So, what next?

Sitting in French class as a sophomore I was smitten with the professor with the cute accent. This was the perfect major. I would fulfill the requirement by taking as many classes as I could from her. After class one day, I revealed my plan to the professor. She looked at me and said, "You are from Rhode Island, right?" "Mais oui," I replied. She then said, "With your accent, you would need six years in Paris to complete a major in French." Devastated.

So there I was, the only junior in History 101 with one hundred and fifty freshmen. The class was taught by the chair of the department who asked a question on the first day, "Why would anyone want to major in history?" He then told this story:

There was a bright young Trinity College graduate who majored in history working at a company in New York City. The president of the company called the young man into his office. He told him that he noticed the young man had been doing a good job and that he was going to promote him to executive vice-president and double his salary. "Thank you," replied the young man. The president looked at him and said, "You are a graduate of Trinity College. You majored in history. I just promoted you and doubled your

salary. And the only thing you can say is thank you?" The young man looked at him and said, "Well then, thank you very much, Dad!"

I had found my major. Prior to desktop, laptop, or for that matter any home computers other than maybe Apple I or II computers, we had to type our papers on typewriters. My brother was in law school at the University of Bridgeport, so I would drive from Hartford to Bridgeport to have the papers I was writing typed by someone at his law school. He suggested that I should go to law school and that we could open a practice when I graduated. He introduced me to the dean of the law school, Anthony Santoro. It took Dean Santoro about five minutes to convince me that I wanted to go to law school.

The love of the law as a first-year law student is infectious. Following my exams in the winter of that first year, I had dinner with a lawyer named Edward Goldin. I spent the entire dinner telling him about every fact pattern and the nuance of every issue. He told me that we should never lose the enthusiasm born in law school that we have for the law. There are many days when the practice of law may seem routine, but we should all remember the excitement we had when we first began our journeys in the law. As for my brother, when I graduated from law school I suggested we practice law together. He said, "Who wants to practice law? I'm working for Dad." ♦

## Past Bar Foundation Presidents Honored for Their Service

At the October Rhode Island Bar Foundation Board of Directors meeting, past Bar Foundation presidents Joseph J. Roszkowski, Esq., Susan Leach DeBlasio, Esq., John A. Tarantino, Esq., and Michael A. St. Pierre, Esq. were presented with awards in grateful appreciation of their outstanding service to the Bar Foundation. These luminaries are lauded for their ongoing commitment, professionalism, and dependable leadership on behalf of the Bar Foundation.



L to R: Michael A. St. Pierre, Esq., Joseph J. Roszkowski, Esq.,  
John A. Tarantino, Esq., and Susan Leach DeBlasio, Esq.

## A Winning Deal With the Bar's Lawyer Referral Service!



Attorney **Mariah L. Sugden**, a member of the Lawyer Referral Service, enthusiastically supports the program. *“The Lawyer Referral Service provides a mutually beneficial service to the public and to the participating attorney by connecting someone in need of legal counsel to a competent, experienced attorney and by offering a cost-efficient marketing tool for the attorney seeking new clients. It’s a win-win situation.”*

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

### Rhode Island Bar Journal

#### Editorial Statement

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

#### Article Selection Criteria

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

Direct inquiries and send articles and author's photographs for publication consideration to:  
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## The Good We Do



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

**The probate attorney also created a trust fund for James with the money from the house so James would never be homeless again.**

Have you ever wondered what happens with the interest that is earned on your IOLTA account? The Rhode Island Bar Foundation administers the IOLTA program. Eligible non-profit grantees who comply with the Foundation's mission of supporting access to legal services for the disadvantaged use their IOLTA grants in a variety of ways. I hope to use my President's Messages to spotlight some of the good things that our grantees are doing every day.

One IOLTA grantee is the Rhode Island Coalition for the Homeless Legal Clinic.

Through the Homeless Clinic, thousands of people have received free legal help. Lawyers who volunteer their time through our Bar Association host legal clinics at shelters and meal sites throughout the state. Legal barriers to housing can often be resolved with legal support.

The Homeless Clinic has been able to help people get their lives back and feel like they are strong members of our community. Dee Dee Williams, Deputy Director of the Coalition, provided two success stories to me.

John (not his real name) came to the Amos House Clinic. John wanted the Clinic to find out if he had outstanding fines. John did not have a job and did not want to get arrested for unpaid fines. John also could not get a job due to a charge on his record from more than 20 years ago. Clinic attorney Bob Johnson checked into the charge, helped him to fill out the necessary forms, prepared him for his court appearance, and supported him throughout the legal process. John is now working full time for Amazon and has been able to secure his own apartment.

James (not his real name) also came to the Amos House Clinic. James was homeless and sleeping in a condemned house. James was asked to not go back to the house by the City and local police. The City inspector continued to see James at the property, so the City brought him to court. Clinic attorney Steve Miller went with James to court and recommended resources to help James. Steve eventually discovered that the house actually belonged to James because his mother had left it to him in her will. James was then connected to

a probate attorney who helped James to sell the house. The probate attorney also created a trust fund for James with the money from the house so James would never be homeless again. James was then able to get into affordable housing for seniors. James is now living in a fully furnished, beautiful apartment.

In future President's Messages, I will spotlight the good work being done by other IOLTA grantees, including the RI Coalition Against Domestic Violence, Dorcas International Institute, The Center for Justice, and the RI Bar Association Pro Bono Programs.

We should all be proud of the good work done by Foundation's IOLTA grantees and the volunteer lawyers who selflessly dedicate their time and talents to assisting the less fortunate. ♦

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# A Review of the SECURE Act and Its Effect on Estate Planning with Retirement Assets



Gene M. Carlino, Esq.  
Pannone Lopes Devereaux  
& O’Gara LLC  
Johnston

On May 23, 2019, the United States House of Representatives passed the SECURE Act by a vote of 417-3.<sup>1</sup> The acronym SECURE stands for Setting Every Community Up for Retirement Enhancement. The Act presents the most significant change to the income tax and administrative laws affecting individual retirement accounts and employer sponsored 401(k) plans since the enactment of the ROTH IRA legislation in 1997.<sup>2</sup> This article will discuss both the benefits and disadvantages of the Act. It will review the effect the bill has on a common estate planning technique used in certain sensitive situations. Finally, it will conclude with a proposal to address what the author views as the proposed law’s major shortcoming. For convenience, this article will refer to both traditional individual retirement accounts and employer sponsored 401(k) plans as Retirement Plans or Plans.

As originally conceived, saving for retirement in a retirement plan was intended to be a trade-off. On the one hand, Congress would defer taxing otherwise taxable contributions to a Retirement Plan. In exchange, the retiree promised to withdraw the funds contributed and the growth thereon during retirement to supplement

his or her retirement income. The withdrawals in retirement would be income-taxed to the retiree at that time. Any balance left in the retirement plan at the account owner’s death could be withdrawn by the designated beneficiary and subjected to an income tax at that time. A win-win for sure. Individuals were motivated

to save for retirement by the income tax advantages of doing so. This, in turn, lessened the need for public assistance and the related drain on the public fisc to support older people who had not properly saved for retirement. The tax incentives of tax deferral on the initial contribution and the growth in the account, plus the added incentive of likely being in a lower tax bracket in retirement verses earlier, provided a powerful incentive to save for retirement.

To ensure retirees withdrew the funds during retirement so Congress ultimately received the

income tax, the United States Treasury, under direction from Congress, enacted a series of complicated rules known as the “Required Minimum Distribution rules,” or RMD for short. The RMD rules, true to their name, generally required that starting at age 70½, a certain amount based on the life expectancy of the account owner had to be withdrawn from the Retirement Plan each year so it could be subjected to income tax.<sup>3</sup> After the death of the retirement account owner, a properly designated beneficiary could continue to withdraw from the Retirement Plan over his or her own life expectancy.<sup>4</sup> Failure to withdraw the required amount resulted in a substantial penalty from the Internal Revenue Service equal to 50% of the amount that should have been withdrawn, on top of the income tax otherwise due.<sup>5</sup> In addition, if funds were withdrawn too early, an early withdrawal penalty was imposed.<sup>6</sup> Sounds good so far, right?

## So What Went Wrong?

Individuals and their financial advisors soon discovered that investing funds in an account where the growth of the account in the form of interest, dividends and capital gains remained untaxed for several years or in many cases several decades, created the ability to grow significant amounts of wealth inside the retirement account.<sup>7</sup> In short, the power of investing without having to pay tax on the wages or salary originally contributed, or the investment gains earned in the account after contribution, resulted in retirement funds growing at a significantly faster rate than if the same investments were held outside of a retirement account. Because of this, financial advisors encouraged their clients to contribute as much as they could to these types of accounts. As a result, the value of Retirement Plans grew much more substantially than Congress originally envisioned with the result that many people passed away with large balances left in their retirement accounts without having used the funds during their lifetimes.

And therein lies the problem. What was envisioned to be a fund to be withdrawn and taxed in retirement, turned into an intergenerational wealth transmission tool.<sup>8</sup> Not what Congress

**The SECURE Act, recognizing that certain persons and situations deserve special attention, excepted out three classes of persons, each referred to as an Eligible Designated Beneficiary, from the mandatory 10-year payout.**



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had intended. I guess you could say it worked too well. To aid their clients in taking advantage of this opportunity, many estate planning and financial advisors designed estate plans so older beneficiaries with shorter life expectancies received non-Retirement Plan assets and younger beneficiaries with longer life expectancies received the Retirement Plan assets. This served to magnify the tax-free growth period as payout periods for younger beneficiaries are much longer due to the longer life expectancy of younger beneficiaries.

### The SECURE Act to the Rescue

Section 401 of the Act provides that all assets must be withdrawn from the Retirement Plan within 10 years after the death of the person who established and funded the Plan. Alas, with the stroke of the legislative pen, the authors of the bill found a way to tax the funds in a Retirement Plan at the death of the owner over a ten year period, as opposed to over the life expectancy of the beneficiary, which often can be as long as 50 years depending on the age of the beneficiary. According to the Congressional Budget Office (“CBO”) analysis, this provision alone is intended to increase tax revenues to the federal government by nearly 16 billion dollars over the next ten years.<sup>9</sup>

Section 401 of the Act offers three exceptions to the mandatory ten-year withdrawal period for beneficiaries. Those exceptions are for a surviving spouse, a minor child, and a disabled or chronically ill person. For the reasons discussed further on, these exceptions are critically important and although well-intended, much more is needed in the bill or through regulations to allow these exceptions to fulfill their stated objectives.

### Pro-Taxpayer Provisions of the SECURE Act

Fortunately for taxpayers, according to the CBO analysis, nearly all but 9 million of this 16 billion in new tax revenue is expected to be returned to taxpayers through a loosening of several of the rules related to Retirement Plans.<sup>10</sup> The SECURE Act contains several important changes to the tax laws and laws governing the administration of Retirement Plans that are favorable to the taxpayer and one that is somewhat controversial. Those provisions are described below.

**Later Date at Which Distributions Must Start:** Section 114 of the SECURE Act delays the date at which required minimum distributions (“RMDs”) must begin. Under present law, a Retirement Plan account owner must begin taking RMDs at age 70½. Section 114 delays the start date for RMDs until the year in which the Plan owner attains 72. If the Secure Act is signed into law, this provision is effective starting 2020.

**Removing the Date at Which Contributions Must Stop:** Under present law, once a Plan owner reaches age 70½, he or she can no longer contribute to a traditional individual retirement account. Starting in 2020, Section 107 of the Act repeals the age limitation at which contributions can no longer be made to a traditional individual retirement account. There would no longer be an age limitation for otherwise qualifying contributions.

**Part-Time Employees Can Participate:** Currently an employee is not entitled to participate in an employer 401(k) plan unless the employee completes 1,000 hours of service during the plan year. Section 112 of the Act provides that long-term, part-time



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workers who work for a number of years with the same employer but do not reach the 1,000 hours of service requirement are now eligible to make elective contributions to a Plan. A long-term, part-time worker is defined as any employee that has worked for at least 500 hours per year with an employer for at least three consecutive years and is at least 21 years old by the end of the three consecutive year period. This provision has an effective start date of 2021.

Each of these three provisions has a common theme. All three provisions, deferring RMDs until age 72, allowing contributions after age 70½, and allowing part-time workers to make elective contributions to a 401(k) plan, implicitly recognize that people are living longer. Many are required to work longer, even if on a part-time basis, in order to sustain themselves. In light of this development, the bill recognizes that the Retirement Plan rules needed to be adjusted to conform to this new reality.

**Penalty Free Withdrawals for Birth or Adoption:** Section 113 of the Act allows penalty free early withdrawals from a Retirement Plan for the birth or adoption of a child. Up to \$5,000 per parent may be withdrawn from a Retirement Plan during the 12-month period following the birth or finalization of the legal adoption of a child under the age of 18. This provision applies to distributions beginning in 2020.

The final two provisions offer employers relief from liability in certain circumstances.

**Liability Relief Provision No. 1 - Relief From Liability for Employers in Multi-Employer Plans:** Section 101 of the Act provides relief from the so-called “one bad apple rule.” Current law allows multiple employers to band together and operate a single plan. This allows smaller employers to achieve lower administrative costs associated with operating the Plan. However, many employers are discouraged from participating in a multi-employer plan for fear that if one employer fails to take required action to maintain the Plan in compliance with required regulatory filing and compliance actions, the entire Plan would lose its tax-favored status. The Act in Section 113 provides relief from the one bad apple rule by providing the Plan will not lose its tax-favored status if a particular employer commits such an error. To fall under the exception, the Plan must provide that the assets of the employees attributable to the non-complaint employer will be transferred to another tax favored Plan and that the non-compliant employer is liable for liabilities attributable to the employees. This provision has a start date effective 2020.

**Liability Relief Provision No. 2 - Relief From Liability For Employers Offering Annuities:** This provision, found in Section 204, addresses the fiduciary responsibility an employer has as the Plan sponsor over the investment options offered by the Plan. 401(k) plans generally do not offer lifetime income options, which are typically provided through the use of annuities, for fear that the employer will have breached its fiduciary duty and be exposed to significant liabilities if the annuity issuer is unable to meet its financial obligations. The proposed new law, which is effective immediately upon passage, provides that the Plan sponsor will be deemed to have satisfied its fiduciary duty as to the selection of the issuer if at the time the issuer is selected, the employer follows the procedure below:

A. Engaging in an objective, thorough and analytical search to identify insurers from which to purchase guaranteed

# HIGGINS, CAVANAGH & COONEY, LLP

is pleased to welcome our newest attorney

## Thomas R. Bender



as Of Counsel  
to the Firm.

A fellow of the American Academy of Appellate Lawyers, Tom most recently served as an Associate Counsel, Office of General Counsel, Brown University, handling litigation matters. Prior to joining Brown, he had more than 25 years of experience briefing and arguing motions and appeals in both state and federal court. Tom is available to provide litigation assistance to outside counsel, including post-trial and appellate matters.



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retirement income contracts;

- B. Considers the financial capability of each insurer to satisfy its obligations under the contract; and,
- C. On the basis of the above analysis, concludes that, at the time of the selection, the insurer is financially capable of satisfying its obligations under the guaranteed retirement income contract and that the cost of the selected contract is reasonable.

The employer/fiduciary is deemed to have satisfied this requirement if it obtains certain written representations from the insurer that:

- A. It is licensed to offer guaranteed retirement income contracts;
- B. The insurer for each of the immediately preceding seven years operates under a certificate of authority that has not been revoked or suspended;
- C. Maintains (and has maintained) reserves that satisfy all the statutory requirements of all States where the insurer does business;
- D. Is not operating under an order of supervision, rehabilitation, or liquidation; and,
- E. The insurer undergoes, at least every five years, a financial examination by the Insurance Commissioner of the domiciliary State (or representative, designee, or other party approved thereby).

Section 204 evidences a desire on the part of the House of Representatives to remove some of the perceived barriers to offering a permanent lifetime income option with a 401(k) plan.<sup>11</sup> If signed into law, it represents an interesting evolution from employer provided pensions in the burgeoning industrial economy starting in the 1940s and 50s, to tax motivated employee saving for retirement with the advent of Retirement Plan, to employee funded lifetime income solutions. This provision has a large contingent of both champions and detractors. Some commentators have observed this portion of the bill stems from a belief that although employees may be good at saving for retirement, they may not be as good at managing money in retirement. Encouraging a lifetime income solution is perhaps a solution to that problem.<sup>12</sup> Observers on the other side of the coin note that this is a potentially disastrous change given the complex nature of annuities and the hidden costs and fees associated with them and the propensity to over sell them, given the high commission structure.<sup>13</sup>

**How Does All This Affect My Estate Plan?**

Good estate planning accomplishes the client's objectives as to who receives their assets and at what time and under what conditions in an income tax and estate tax-efficient way. To accomplish these objectives, it is common to use a revocable trust under which a trustee, often a family member, maintains assets and distributes them as needed to the beneficiaries. This type of trust is often used in the following situations:

- A. To allow a person to leave a minor beneficiary an inheritance that can be protected from his or her bad judgment in their younger years;
- B. To protect assets from being considered countable resources which would cause a disabled child to lose valuable government benefits;
- C. By married couples in a second marriage to share assets between a spouse and children from the prior

marriage; and

D. By a married person to prevent the state estate tax exemptions of the spouse that died first from being wasted.

Under current Treasury regulations, when a Retirement Plan is beneficiary designated to this type of trust, the trust is eligible to receive distributions based on the life expectancy of the oldest trust beneficiary, if certain requirements are met.<sup>14</sup> The SECURE Act, recognizing that certain persons and situations deserve special attention, excepted out three classes of persons, each referred to as an Eligible Designated Beneficiary, from the mandatory 10-year payout. **But the bill as written is not broad enough to allow a person in one of these three classes to also obtain the protection afforded by a properly drafted trust under which the trustee makes distributions to the beneficiary at his or her discretion as set forth under the terms of the trust.** To understand why, we need to take a close look at the three exceptions under the SECURE Act to the forced 10-year payout.

As noted, the three classes of persons excepted out of the 10-year mandatory payout for beneficiaries under the SECURE Act are a surviving spouse, minor children, and disabled/chronically ill persons. A person in one of these groups is referred to as an Eligible Designated Beneficiary under the bill.<sup>15</sup> Often, an individual in one of these groups, for the reasons noted above, is not named directly as a beneficiary; rather a revocable trust that accumulates assets for later distribution is established for the would-be Eligible Designated Beneficiary's benefit and the retirement account is beneficiary-designated to the trust. If certain rules are followed in drafting the trust, one can look through the trust and use the age of the oldest trust beneficiary to determine the RMD payout period. However, it is common with each of the three classes of Eligible Designated Beneficiaries to use a single trust that includes both an Eligible Designated Beneficiary *and other* family members who are also beneficiaries. As the *others* in the group of trust beneficiaries in an accumulation trust are likely to include person(s) who are not in one of the three classes, this will cause the use of one of the most common types of trusts in estate planning to protect an Eligible Designated Beneficiary to prevent the exception to the 10-year payout rule from applying. Although these exceptions are well-intended, the law as drafted ultimately fails to protect a beneficiary in one of these groups because they are forced to forgo the trust protection they need in order to obtain the tax deferral the bill intended each of them to have.

#### Let's Look at Some Quick Examples<sup>16</sup>:

##### Spouses:

Mitch lives in a state with a state estate tax and has left his IRA with a \$1,000,000 balance to his trust for the benefit of his wife and children to use his state estate tax exemption. Or, Joe lives in a state without an estate tax but has children from a prior marriage. To ensure his wife does not use the IRA funds improvidently and there is something left for his children after reasonably providing for his wife, he designates his IRA to a trust for his wife and his children. In each case, all of the trust beneficiaries will be considered thus preventing the Eligible Designated Beneficiary exception for a spouse from applying.

*continued on page 36*

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# Clearing the Record: How to Seal Criminal Records and Expunge Criminal Convictions in Rhode Island



John P. Larochelle, Esq.  
Larochelle Law  
Providence

There are benefits to having a clean driving record, such as being eligible for discounts on the cost of motor vehicle insurance and being able to make an application for dismissal of certain driving infractions (such as a minor speeding offense) for having a good driving record, pursuant to Rhode Island General Laws § 31-41.1-7. More importantly, clearing one's criminal record will make gaining employment easier. Successful motions to seal and motions to expunge will also give many people renewed peace of mind by eliminating from public view bad behavior that resulted in a misdemeanor – and in more limited circumstances, a felony conviction – that occurred years ago and that no longer accurately reflects a person's present lifestyle. Thus, our Rhode Island legislature has given applicants who meet important criteria the ability to gain a fresh start on a clean slate.

## 1. Motor Vehicle Infractions

The best way to start the process of eliminating driving infractions is to obtain a copy of a driving abstract (the record of a motorist's driving offenses). One may obtain a driving abstract from the Rhode Island Department of Motor Vehicles: ([ri.gov/DMV/mvr/](http://ri.gov/DMV/mvr/)). Pursuant to Rhode Island General Laws § 31-41.1-10, traffic violations that are more than three years old shall be expunged by the clerk of the court, whether those offenses were adjudicated in the Rhode Island Traffic Tribunal, or whether they were adjudicated in one of Rhode Island's twenty-three municipal courts. Judgments of guilt for Refusal to Submit to Chemical Test are ineligible to be removed from a Driving Abstract.

## 2. Misdemeanors

Misdemeanor offenses may be eliminated from your record by applying to the court through a motion to expunge or a motion to seal.

### A. Motion to Expunge

A motion to expunge is the appropriate application to the court to eliminate your criminal record if you pleaded guilty, pleaded *nolo contendere*, or were found guilty after trial for a criminal offense. You should file your motion in the same

court in which the conviction occurred. You are eligible to expunge misdemeanor criminal offenses if all of the following circumstances are met:

1. an applicant has not been convicted (received a term of incarceration, a suspended sentence, probation, a deferred sentence, or a fine; or, if there was a guilty plea or guilty verdict) of a felony;
2. an applicant is not currently facing criminal proceedings;
3. the misdemeanor an applicant seeks to expunge is not for a conviction of Driving Under the Influence of Liquor or Drugs;
4. five years have elapsed since the completion of the sentence;
5. during the five years prior to the filing of the motion to expunge, the applicant has not been arrested for any felony or misdemeanor;
6. an applicant has exhibited good moral character;
7. an applicant has paid all monies owed to the court or to victims of the crime;
8. an applicant has given the Rhode Island Department of the Attorney General and the police department that originally brought the charge against him or her at least ten days' notice of the motion to expunge's hearing date (which will be determined by the clerk of the court);
9. the court determines that the expungement of an applicant's records is consistent with the public interest;
10. an applicant has paid one hundred dollars to the clerk of the court after the court has granted the motion; and,
11. the applicant is a first-time offender; that is to say that it is an applicant's only conviction<sup>1</sup>; or,
12. an applicant has fewer than six misdemeanor convictions;
13. an applicant has waited ten years since the completion of the most recent misdemeanor sentence;
14. during the ten years prior to the filing of the motion to expunge, an applicant has not been arrested for any felony or misdemeanor.

**A plea of *nolo contendere* to a felony followed by a sentence of probation or a deferred sentence would make an applicant ineligible to expunge a misdemeanor.**



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### **B. Motion to Seal**

A motion to seal is the appropriate application to the court and to the arresting entity (e.g., City of Providence) to eliminate documents, photographs (e.g., a mug shot), reports, and related records produced as a result of an arrest for which the applicant was exonerated. This means that if the case was dismissed for any reason, was officially not prosecuted by the State of Rhode Island (through a finding of No True Bill or No Information), or if the applicant was acquitted by a judge or jury after trial, the applicant is eligible to have all records sealed, pursuant to Rhode Island General Laws § 12-1-12.1.

An applicant is not, however, eligible to have records sealed, even in instances of exoneration, if the applicant has been convicted of a felony. The definition of a felony conviction for purposes of a motion to seal is, however, more forgiving than it is for a motion to expunge. A plea of *nolo contendere* to a felony followed by a sentence of probation or a deferred sentence would make an applicant ineligible to expunge a misdemeanor. Contrarily, “a plea of *nolo contendere* followed by probation would not preclude a defendant from sealing his or her records.”<sup>2</sup> An applicant would still be ineligible to have records sealed if he or she pleaded *nolo contendere* and received a term of incarceration, a suspended sentence, or a fine; or, if there was a guilty plea or guilty verdict for a felony.

### **C. Filing Dispositions**

With a one-year filing as a disposition for a criminal charge, an applicant is eligible to have the record of the crime for which the filing was received automatically expunged after one year has passed since the imposition of the filing disposition, so long as the applicant meets the following criteria:

1. if the filing disposition received was for a domestic violence misdemeanor, more than three years must have elapsed since the completion of the sentence;
2. an applicant has not been convicted of a felony or a private complaint;
3. an applicant has successfully completed the term of the filing sentence;
4. an applicant has paid all monies owed to the court or to victims of that crime.

In Rhode Island State District Court, unlike a typical motion to expunge, with a filing disposition, at the successful completion of a one-year period of time since the imposition of the filing, a defendant is automatically eligible to have an order of destruction issued by the clerk of the court that imposed the filing sentence, without having to submit a motion or give notice to any governmental entity.

### **3. Felonies**

A felony offense may be eliminated from an applicant's record by applying to the court through a motion to expunge or a motion to seal. A motion to seal for a felony has the same requirements as a motion to seal for a misdemeanor. An applicant is eligible for expungement of a felony if all of the following criteria are met:

1. it is the applicant's only conviction;
2. the conviction is not for a crime of violence, as defined in Rhode Island General Laws § 12-1-12.1;
3. the felony for which expungement is sought is not for a conviction related to the statute governing Driving Under

the Influence of Liquor or Drugs: Rhode Island General Laws § 31-27-2;

4. ten years have elapsed since the completion of the sentence;
5. during the ten years prior to the filing of the motion to expunge, the applicant has not been arrested for any felony or misdemeanor;
6. the applicant is not currently facing criminal proceedings;
7. the applicant has exhibited good moral character;
8. the applicant has paid all monies owed to the court or to victims of the crime;
9. the applicant has given the Rhode Island Attorney General and the police department that originally brought the charge at least ten days' notice of the hearing;
10. the court determines that the expungement of the applicant's record is consistent with the public interest;
11. the applicant has paid one hundred dollars to the clerk of the court (after the court has granted the motion).

Successful completion of a deferred sentence disposition does not entitle a person to automatically have that sentence expunged. Deferred sentence dispositions are treated the same as any felony conviction for purposes of expungements.<sup>3</sup>

#### 4. Decriminalized Offenses

If an applicant has been convicted of an offense that has since become decriminalized, the procedure and criteria to bring a successful motion to expunge is the same as it is for misdemeanors, except for the elimination of the requirement that one hundred dollars be paid to the clerk of the court.

#### 5. Prostitution and Solicitation to Commit a Sexual Act

Consonant with the Uniform Act on Prevention of and Remedies for Human Trafficking, under Rhode Island General Laws 1956, § 11-67.1-17, if an applicant was convicted of a prostitution or solicitation offense, the procedure and criteria to bring a successful motion to expunge is the same as it is for misdemeanors, provided that in addition to the criteria listed for misdemeanors, the applicant must be able to prove that his or her participation in the offense was a direct result of being a victim. Documentation from a governmental agency that the applicant was a victim at the time of the offense creates a victim-designation presumption.

#### 6. Adult Drug Court

In accordance with paragraph 15 of the Rhode Island Adult Drug Court Contract, all criminal charges adjudicated through the Rhode Island Superior Court's Adult Drug Court are eligible to be dismissed and expunged upon successful completion of the Drug Court Program.

Once an applicant's motion to expunge or motion to seal has been granted by the court, the applicant should prepare an order directing the clerk of the court, the Department of the Attorney General's Bureau of Criminal Identification, and the arresting police agency to destroy all documents, photographs, and records produced as a result of an arrest or violation.

Once expunged, a person may truthfully state he or she has not been convicted of a crime. Pursuant to Rhode Island General Laws § 12-1.3-4(b): "In any application for employment, license, or other civil right or privilege, or any appearances as a witness, a person whose conviction of a crime has been expunged pursuant to this chapter may state that he or

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she has never been convicted of the crime.” This provision does not apply to applicants for law enforcement positions, lawyers, teachers, coaches, or day-care providers.<sup>4</sup>

ENDNOTES

1 *In State v. Badessa*, 869 A.2d 61, 66 (R.I. 2005), the Rhode Island Supreme Court interpreted “first offender” to mean “one who has been convicted of only one offense.”

2 *State v. Poulin*, 66 A.3d 419, 425 (R.I. 2013).

3 *State v. Briggs*, 934 A.2d 811 (R.I. 2007).

4 12 R.I. Gen. Laws Ann. § 12-1.3-4 (West). ◇

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# Rhode Island Women Lawyers: Past, Present, & Future

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



**Cassandra L. Feeney, Esq.**  
Adler, Cohen, Harvey,  
Wakeman & Guekguezian,  
LLP, Providence



**Etie-Lee Schaub, Esq.**  
Providence City Solicitor's  
Office

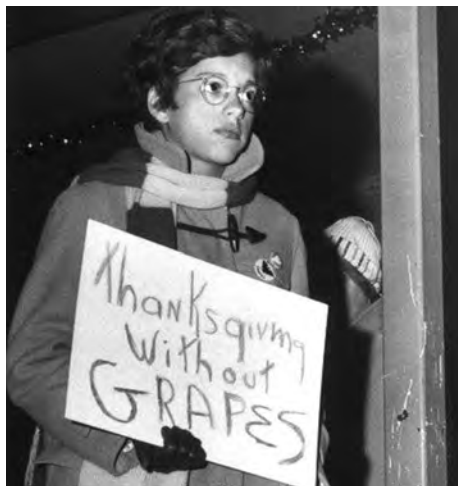


**Victoria M. Almeida, Esq.**

*Victoria graciously provided us with a first-person narrative as a part of our series. In providing a somewhat alternative perspective, Victoria's story highlights how advancing equality in the workplace serves the best interest of our profession and our community. If you are interested in sharing your story, or know someone who is, please contact Cassandra L. Feeney at [cfeeney@adlercohen.com](mailto:cfeeney@adlercohen.com) and/or Etie-Lee Schaub at [etieschaub@gmail.com](mailto:etieschaub@gmail.com).*

There is a photo that I treasure. It was taken in November 1969 by the Providence Journal. The young college freshman in the photo is in a picket line outside a supermarket in Newport, RI. She is holding a sign that reads "Thanksgiving Without Grapes." That was my first experience with injustice as it was directed at migrant farm workers. I decided then that I wanted to do more than demonstrate. I wanted to become the voice of those who had no voice. That is why I pursued a career in law and why I am honored to be a part of the law, a glorious vocation that enables lawyers to enrich others with the application of law and justice to a myriad of life and business experiences.

I have received many blessings in my life — periods of grace that were pure gifts to me. I do not believe in coincidence, but I do believe in providence and that we are called to do something at a particular season in our life. We may not know why at the time, but sooner or later we



come to a human, if imperfect, understanding as to why.

Upon graduation from law school in June of 1976, I returned home to Rhode Island to practice law. I purposefully decided to return to Rhode Island, in part, because this state held my treasure; all that was dear to me and all that had formed me was in Rhode Island. Margaret Elizabeth Sangster said "[t]here is nothing half so pleasant as coming home again."

A few months after returning home, I was offered the career opportunity of a lifetime which has had a lasting impact on me, my profession and my community. I became the first woman to serve as executive counsel to a governor. The governor was J. Joseph Garrahy, who demonstrated, by word and deed, those qualities essential for my legal career, as well as for my 43 years of public service. Governor Garrahy always upheld the commonality of virtues among all people that transcends race, class and other distinctions that

sometimes separate people from each other.

Being part of Governor Garrahy's cabinet allowed me to participate in historic events in our state's history. While many Rhode Islanders fondly recall the Blizzard of 1978 as an example of his quiet and steady leadership, I remember the tumultuous issues of that time that ushered in a sea of change in so many areas that included: major reforms that led to the closure of the Institute of Mental Health and resulted in the reintegration of residents into the community; improving the deplorable and inhumane conditions at the Adult Correctional Institutions ("ACI") in conjunction with the courageous action taken by the late Judge Pettine and the federal court; and establishing the Department of Environmental Management, the Department of Elderly Affairs, and the Department of Children, Youth and Families. Governor Garrahy, by Executive Order, established the first judicial merit selection process and appointed the state's first African American to the RI Judiciary. He also made history with the appointment of women and minorities to key cabinet positions.

Governor Garrahy inspired me to believe that public service, if entered into only in the utmost of good faith and selflessness, is the crown of any career. I was privileged and honored to be the first woman lawyer to advise a governor and serve my fellow citizens. I am delighted that many women lawyers have served in that role in the ensuing years with great distinction.

Governor Garrahy also appointed me to the RI Parole Board and successive governors, both democrats and republicans, have re-appointed me to the Board. That public service has contributed to the development of my professional reputation in the area of criminal law and procedure. I had the privilege to serve on the other side of the bench as municipal court judge in my hometown. This provided a different and important perspective. I also serve as chair of the RI Health Services Council, the advisory council to the director of the RI Department of Health. That area of public service also helped to establish my



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I believe in the values of servant leadership. The concept of servant leadership is said to be rooted first in China, c.600 B.C., in the words of Lao Tzu who said:

*The greatest leader forgets self  
And attends to the development of others.  
Good leaders support excellent workers.  
Great leaders support the bottom ten percent.  
Great leaders know that  
The diamond in the rough  
Is always found "in the rough."*

Fresh out of law school when I entered public service, I was that "diamond in the rough."

I also believed it was important to become active in the RI Bar and have served in many capacities including as the longest-serving president of the Bar. My theme as president was Servant Leadership. As president, I urged the members of the Bar to believe in the law of love, as Clarence Darrow did, in his closing argument on his defense of Henry Sweet. As lawyers, we are good technicians. But I proposed to the Bar that we have to be more than good legal technicians of the art of law. We must be good people and literally take care of each other. As the data shows, lawyers experience a great deal of second hand trauma in handling a myriad of client matters. As a reminder, we have the highest rate of depression and associated risks of any other profession. We also are distinguished in providing the most hours of pro bono services of all professions. I asked lawyers to join me as a servant leader in caring for each other – to leave a colleague a little bit better than she/he was before you entered the courtroom, the office, the coffee shop or the elevator. Civility is a lesser and included virtue in the greater virtue of what it means to be good. If we are good to each other, civility will take root when we are in the right relationship with one another. I hope that all lawyers agree with me that service to others, and being good to others, in and of itself, is rewarding and good for the spirit.

As president of the Bar, I asked lawyers to join me in seeking "Greater Justice for All" to keep justice accessible for our poorest citizens. I also created the US Armed Forces Legal Services Project. We were the first Bar in the country to do this and we became the model in the country. I was honored when the RI Bar established the Victoria M. Almeida Servant Leader Award at the end of my presidency. I am grateful that my law firm, Adler Pollock & Sheehan ("AP&S") continues to support my public service opportunities and my pro bono contributions for those in need. While I have a vast and diversified civil and criminal practice, my public service experience has provided me with outstanding opportunities to my firm and our clients. AP&S is committed to pro bono matters and some of the most rewarding legal work I do is for those individuals unable to pay for my services.

For those who seek to follow a career path similar to mine, consider public service and become active with the RI Bar for opportunities to hone your leadership skills, be of service to our profession to foster respect and confidence in our Bar and in our judiciary.

I initially returned to RI to practice law because my treasure was here. I have remained because my heart is here as well. ♦

## Bar Association Mentor Programs

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

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

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

If you have any questions about either form of mentoring, or if you would like to be paired with a mentor through our traditional program, please contact Communications Director Kathleen Bridge by email: [kbridge@ribar.com](mailto:kbridge@ribar.com), or telephone: 401-421-5740.



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

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

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

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

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

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

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## Lawyers Helping Lawyers Committee Members Protect Your Privacy

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

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

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

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

## SOLACE ..... Helping Bar Members in Times of Need

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

To sign-up for SOLACE, please go to the Bar's website at [ribar.com](http://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](mailto:hmcdonald@ribar.com) or 401.421.5740.

# U.S. Supreme Court Finds North Carolina's Taxation of a Beneficiary's Undistributed Share of a Trust to Violate The Due Process Clause



Marc J. Soss, Esq.  
Licensed in FL, RI and CT

The trustee paid the tax under protest and then sued the taxing authority in state court, arguing that the tax violated the Fourteenth Amendment's Due Process Clause.

On June 21, 2019, a unanimous United States Supreme Court issued its opinion in *North Carolina Department of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*. The court found that the Kaestner Trust beneficiaries did not have the requisite relationship with the Trust property to justify the North Carolina's state tax. The Court did not specifically address the "degree of possession, control, or enjoyment would be sufficient to support taxation."

## Background

Joseph Lee Rice III formed a New York trust (the "Trust") for the benefit of his children and appointed a New York resident as the trustee. The Trust agreement granted the trustee "absolute discretion" to distribute the Trust's assets to the beneficiaries. The trustee subsequently divided the Trust into separate subtrusts for each child. The Trust agreement provided that the subtrusts would terminate when each child turned age 40, after the time period relevant here. The state of North Carolina sought to tax the subtrust created for the child then living within the state under a law authorizing the state to tax any trust income that "is for the benefit of" a state resident.<sup>1</sup> North Carolina ultimately assessed a tax of more than \$1.3 million for tax years 2005 through 2008. The tax was assessed notwithstanding the fact that the child living in North Carolina had no right to, and did not receive, any Trust distributions. Of additional note is the fact that the trustee (i) kept the Trust documents and records in New York, (ii) the Trust asset custodians were located in Massachusetts; (iii) the Trust maintained no physical presence in North Carolina; and (iv) the Trust made no direct investments in the state and held no real property there. The trustee paid the tax under protest and then sued the taxing authority in state court, arguing that the tax violated the Fourteenth Amendment's Due Process Clause.

## State Court Argument

In state court, North Carolina argued that "a trust and its constituents are always inextricably intertwined, and thus, because trustee residence supports state taxation, so too must beneficiary residence," and adopting the Trust's position

"would lead to opportunistic gaming of state tax systems." The North Carolina state courts disagreed and found the child's in-state residence was too tenuous a link between the state and the Trust to support the tax. As a result, the North Carolina tax violates the Due Process Clause of the Fourteenth Amendment.

## U.S. Supreme Court

The U.S. Supreme Court granted certiorari to decide whether the Due Process Clause ("Clause") prohibits states from taxing trusts based only on the in-state residency of trust beneficiaries. In the context of state taxation, the Clause limits states to imposing only taxes that "bear a substantial fiscal relation to protection, opportunities and benefits given by the state."<sup>2</sup>

In determining whether a state action violates the Clause, the Supreme Court applies a two (2) step analysis: (i) "there must be some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax;" and (ii) "the 'income attributed to the State for tax purposes must be rationally related to values connected with the taxing State." The "minimum contacts" inquiry is "flexible" and focuses on the reasonableness of the government's action. The Supreme Court has previously found (i) a tax on trust income distributed to an in-state resident passes muster under the Clause<sup>3</sup>; (ii) a tax based on a trustee's in-state residence; and (iii) a tax based on the site of trust administration is constitutional.<sup>4</sup>

In reaching its decision, the Supreme Court found that North Carolina's tax on the Trust did not meet the first requirement of some minimum connection to the state. The residency of a Trust beneficiary, not receiving any distributions from the Trust, insufficient to "empower a State to tax trust income that has not been distributed to the beneficiaries where the beneficiaries have no right to demand that income and are uncertain ever to receive it."

## ENDNOTES

<sup>1</sup> N. C. Gen. Stat. Ann. § 105-160.2.

<sup>2</sup> *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444 (1940).

<sup>3</sup> *Maguire v. Trefry*, 253 U. S. 12, 16-17 (1920).

<sup>4</sup> *Hanson v. Denckla*, 357 U. S. 235, 251 (1958). ◇

**RHODE ISLAND BAR ASSOCIATION'S  
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*Exclusively designed to help Bar members receive and offer timely and direct assistance with practice-related questions.*

**OAR** provides new and more seasoned Bar members with the names, contact information and Bar admission date of volunteer attorneys who answer questions concerning particular practice areas based on their professional knowledge and experience. Questions handled by **OAR** volunteers may range from specific court procedures and expectations to current and future opportunities within the following **OAR** practice areas:

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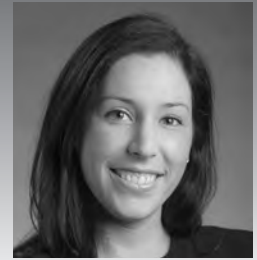
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# Lunch with Legends: Trailblazers, Trendsetters and Treasures of the Rhode Island Bar



Stephen Adams, Esq.  
Barton Gilman LLP, Providence



Jenna R. Trott, Esq.  
Barton Gilman LLP, Providence

Arlene Violet grew up near Plain and Dudley streets in South Providence, where her father was a city alderman, and she joked, “you either became a priest, a nun, or a criminal?” She graduated from St. Xavier High School in 1961, joined the Sisters of Mercy, and thereafter got her undergraduate degree from Salve Regina University. She worked in the inner city after becoming a nun, working to address discrimination in housing and helping victims of crime. Her experiences led her to Boston College Law School to fulfill what the Sisters of Mercy called “the unmet need.” She was admitted to the bar in 1974 and clerked for the Honorable Thomas Paolino of the Rhode Island Supreme Court. She went into private practice after clerking and continued to serve the underrepresented population she had served as a community organizer. In 1984, Ms. Violet became the first female elected state attorney general in the nation. In addition to her weekly column and a host of other pursuits, she continues to represent clients on a number of different matters, including toxic tort matters and, interestingly, a pension case against the bishop.



Arlene M. Violet, Esq.

Excerpts from our conversation with this trailblazing attorney follow.

## *Why law school?*

Before law school, I lived in the Hartford Avenue Housing Project with four other nuns. I primarily did inner city work as a nun which was, in a way, my motive for wanting to go to law school, because people were telling me that “x” was the law, so something couldn’t be done for poor folk, and I wanted to know, was that true, and if it was, how could I change it. In my neighborhood, these people would work as clerks in a drugstore or something and then they’d go take time out of work and go to court four or five times, if they had been victimized, and then, the sixth time, they would be told, “oh, the case is all settled. It was a plea bargain.” And it further re-victimized them, because they had no say, and I said, we’ve got to get victims’ rights for those folks. And that led me to law school to change some of the things I was seeing.

## *How did that work affect your career as AG?*

When I became attorney general, part of the motivation for some of the programs I put in place was what I had seen in my neighborhood. For example, I was very, very cautious, when I was AG, about making sure what the evidence was relative to prosecutions, for everybody, but particularly, because I saw what was happening in the neighborhood with people who were innocent but actually presumed guilty. So when I was AG, I said, if you were going to use a confession, I wanted it taped from start to end with no interruptions.

## *What was your most inventive or creative legal argument?*

My clients were living in a neighborhood near a landfill where they were dumping chemicals, and the smell was terrible. So, among my five clients I was representing in the lawsuit, one had his bees die. So, the law was, you had to actually step on the property for trespass. So I used the Trespass Theory, that molecules could be an element. And therefore, it killed the bees, you know, and I won. I was able to show that by polluting the neighborhood, and killing one of my client’s bees, the chemicals were a trespass. I remember arguing to the Judge, “How can you say it’s not trespass? You smell it, don’t you? Would you like to come, your Honor, come and see? And he said, no, no, no, I am taking your word for it.”

## *Some of your views didn’t always go over well with the status quo, right?*

Oh, no kidding. When I was AG, there was a list of restaurants that I told my prosecutors and everybody in the office they couldn’t go to. Two of the restaurants had nothing to do with anything other than the fact that we had undercover drug operations there, so they were on the list. But the other eight really were owned by the mob, and the prosecutors thought nothing of going in and having their tab picked up for drinks after work, or, you know, a date. They would go over and wouldn’t have to pay so I did this edict that you can’t go. The General Assembly was up in arms on the basis that I shouldn’t tell people what they can do after they’re out of work. And I said they’re prosecutors 24-7. It really was like the Wild Wild West.

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**November 6 Direct & Cross Examination of Digital Witness**

*Wednesday*  
Rhode Island Law Center, Cranston  
3:00 p.m. – 5:00 p.m., 1.5 credits + 0.5 ethics

**November 7 An Overview of the Veterans Treatment Court**

*Thursday*  
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**November 8 Recent Developments in the Law 2019**

*Friday*  
Crowne Plaza Hotel, 801 Greenwich Ave, Warwick  
9:00 a.m. – 4:00 p.m., 6.0 credits + 1.0 ethics

**November 14 How to Impanel a Civil Jury in Superior Court**

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**November 19 The Downfall of Open and Obvious**

*Tuesday*  
Rhode Island Law Center, Cranston  
12:45 p.m. – 1:45 p.m., 1.0 credits  
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**November 22 Bridge the Gap**

*Friday*  
Rhode Island Law Center, Cranston  
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## Rhode Island Legal Services Equal Justice Awards Recognize Many



On Thursday, June 22nd, at Rhodes-on-the-Pawtuxet in Cranston, Rhode Island Legal Services held its 50th Anniversary Celebration and honored their Equal Justice Award recipients. The following honorees were recognized for their contributions to the equal justice community:

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# I Left My Heart in San Francisco

## American Bar Association Delegate Report

### Annual Meeting 2019



**Robert D. Oster, Esq.**  
ABA Delegate and Past Rhode  
Island Bar Association President

The American Bar Association Annual Meeting in San Francisco on August 12-13 was eventful, to say the least. The governing body of the Association, the House of Delegates, met two days with a full and controversial agenda. The current debate over immigration occupied much of the discussion, and several Resolutions were passed dealing with that issue. The ABA took a strong stance early on that undocumented detainees at the border be provided with competent legal representation and be held in proper facilities until their claims of asylum or other claims could be heard. The problem of unaccompanied minors and division of families was also addressed. There are an estimated 50,000 such persons in custody at this time and their cases are hindered by the 900,000 case backlog faced by immigration courts. Due process demands that they be treated fairly even in such extraordinary times.

Gun violence was a prevalent issue as well, as one might expect. Random shootings, mass gun violence, and “red flag” laws were the subject of Resolutions that passed overwhelmingly. As an aside, I was appointed by Linda Klein two years ago to the Gun Violence subcommittee of the House, which led me to meet with amazing experts in the field. We have been able to craft several reasonable gun restriction Resolutions, including some addressing gun violence in and around courthouses.

The Commission on Women in the Profession celebrated with the House the centennial of the passage of the 19th Amendment. An important Resolution dealing with pay equity or the pay gap between female and male attorneys was passed. It is hard to believe that this is still a large problem, but it remains so and needs to be addressed immediately.

Other committees of which I am a member are the General Practice and Solo Division, and the National Caucus of State Bar Associations, of which I am a former President. The New England Bar meets regularly at the Annual Meeting and it is a productive way of hashing out our regional and other differences before the House meets. I have recently been appointed state membership chair for Rhode Island for the ABA and, as such, I hope to prove the value of the ABA to all practitioners, regardless of practice area or years in the

profession. This is especially true given the drastic reduction in dues and the virtually free membership to new lawyers. The ABA has kept me on the crest of changes in the profession and has helped my practice in myriad other ways which I think would be valuable for all lawyers.

Other Resolutions that passed dealt with regulation and establishing best practices for online advertising and the estimated billion dollar legal forms industry; Proactive Management Based Regulation (PMBR), or “prevention not reaction” to ethical problems of lawyers; expansion of broadband access to rural areas, as this is only way some geographically distant cases can be handled; intellectual property issues; and criminal law and procedure.

We were addressed once again by the director of the Legal Services Program, Edward Levi, who exhorted us to work towards providing access to justice that an estimated 59 million Americans qualify for in issues related to housing, domestic violence, and opioid abuse and treatment. The chronic underfunding of Legal Services Corporation and our own Rhode Island Legal Services as a result thereof was addressed.

In closing, I am humbled and honored to be the Rhode Island Bar Delegate to the ABA and, as such, I welcome your comments and suggestions to this report or any matter facing the profession and the ABA. ♦

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## Rhode Island Legal Services Campaign for Justice

### Call to Serve!

Rhode Island Legal Services, Inc. needs **YOUR** help in fundraising for our annual Campaign for Justice! We are recruiting **committee volunteers** who are eager to help the local Rhode Island community. Your participation on this committee will assist us with our fundraising efforts during our Campaign for Justice.

Participating on the **Campaign for Justice Committee** is an excellent opportunity to give back to people in need, network with community passionate individuals, and become more involved in RILS' mission to provide legal aid to low-income Rhode Islanders.

A Planning Meeting will be held on **Friday, September 20th**. Lunch to be provided.

If you are interested in volunteering for the **Campaign for Justice Committee**, please send an email expressing your interest to Annie Dwyer at [adwyer@rils.org](mailto:adwyer@rils.org) or call 401-633-9139.



### Make a Contribution!

**Unable to volunteer?** Continue to support our mission to serve Rhode Islanders and their families by making a **tax-deductible donation**.

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## Thanks to Our CLE Speakers

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



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

**William J. Balkun, Esq.**

Law Office of William J. Balkun

**Hon. Karen Lynch Bernard**

Rhode Island Family Court

**John Boyajian, Esq.**

Chapter 13 Trustee  
US Bankruptcy Court

**Jared D. Correia, Esq.**

Red Cave Law Firm Consulting

**Hon. Diane Finkle**

Consumer & Family Law Center

**Hon. John J. Flynn**

Rhode Island Superior Court

**Lisa A. Geremia, Esq.**

Chapter 7 Trustee  
US Bankruptcy Court

**Patrick A. Guida, Esq.**

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**Lisa M. Kresge, Esq.**

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**Nicholas A. Lambros, Esq.**

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Office of Disciplinary Council

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## HONOR ROLL

# Volunteers Serving Rhode Islanders' Legal Needs

The Rhode Island Bar Association applauds the following attorneys for their outstanding pro bono service through the Bar's Volunteer Lawyer Program, Elderly Pro Bono Program, Foreclosure Prevention Project, and Legal Clinics events during August and September 2019.

### AUGUST 2019

#### Volunteer Lawyer Program

Alyse Antone Smyth, Esq., *Newport*  
Michael A. Castner, Esq., *Jamestown*  
Laurie Christensen, Esq., *Gerstenblatt Law Offices, Ltd.*  
Joanne C. D'Ambra, Esq., *Cranston*  
Jeffrey L. Eger, Esq., *Warwick*  
Michael W. Garland, Esq., *McKinnon & Harwood, LLC*  
Jacqueline M. Grasso, Esq., *Grasso Law Offices*  
Charles Greenwood, Esq., *Providence*  
William W. Harvey, Esq., *Moore, Virgadamo & Lynch, Ltd.*  
Allen M. Kirshenbaum, Esq., *Kirshenbaum Law Associates*  
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James J. Lombardi, Esq., *Providence*  
John T. Longo, Esq., *Citadel Consumer Litigation, PC*  
Kimberly Ann Page, Esq., *North Kingstown*  
Bienvenido Perez, Esq., *A.C. Law Group, LLC*  
John S. Petrone, Esq., *Law Office of John Petrone*  
Janne Reisch, Esq., *Janne Reisch, Attorney at Law*  
John S. Simonian, Esq., *Pawtucket*  
Elizabeth Stone, Esq., *Cranston*  
Elliot Taubman, Esq., *Taubman Law Offices, Ltd.*  
Amy E. Veri, Esq., *Providence*  
Samuel D. Zurier, Esq., *Samuel D. Zurier, Esq.*

#### Elderly Pro Bono Program

David D. Bagus, Esq., *Woonsocket*  
Armando E. Batastini, Esq., *Nixon Peabody, LLP*  
David N. Bazar, Esq., *Bazar & Associates, P.C.*  
Christopher M. Bijesse, Esq., *Woonsocket*  
John Cappello, Esq., *Law Office of John Cappello*  
Joanne C. D'Ambra, Esq., *Cranston*  
Karen L. Davidson, Esq., *Cranston*  
Peter M. Iascone, Esq., *Peter M. Iascone & Associates, LTD.*  
Richard Jessup, Jr., Esq., *Law Office of Richard Jessup, Jr., Esq.*  
Ellen L. Jordan, Esq., *Saunderstown*  
James T. Marasco, Esq., *Law Office of James T. Marasco*  
Frederic A. Marzilli, Esq., *Marzilli Law Offices*  
Cristine L. McBurney, Esq., *McBurney Law Services*  
Robert A. Mitson, Esq., *Mitson Law Associates*  
Adam G. Northup, Esq., *Law Office of Adam G. Northup*  
Janne Reisch, Esq., *Janne Reisch, Attorney at Law*  
Jennifer M. Reynolds, Esq., *The Law Office Howe & Garside, Ltd.*  
Gregory P. Sorbello, Esq., *Peter M. Iascone & Associates, LTD.*  
Susan D. Vani, Esq., *Providence*

### SEPTEMBER 2019

#### Volunteer Lawyer Program

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Robert A. Arabian, Esq., *Arabian Law Offices*  
Neville J. Bedford, Esq., *East Providence*  
Michael A. Castner, Esq., *Jamestown*  
Rebecca F. Clarke, Esq., *Newport*  
Sheila M. Cooley, Esq., *Law Office of Sheila M. Cooley*  
Misty Delgado, Esq., *Law Office of Misty Delgado*  
Sean C. Donohue, Esq., *The Law Offices of Sean C. Donohue, LLC*  
Joshua R. Karns, Esq., *Karns Law Group*  
Phillip C. Koutsogiane, Esq., *Law Offices of Phillip Koutsogiane*  
Mark B. Laroche, Esq., *Providence*  
Tracy A. Loignon, Esq., *Warwick*  
Frank S. Lombardi, Esq., *Frank S. Lombardi Law Associates, P.C.*  
Robert A. Mitson, Esq., *Mitson Law Associates*  
Elisha Morris, Esq., *Elisha L. Morris, Esq.*  
Michelle Bessette Oliveira, Esq., *PK Boston Law*  
Timothy J. Robenhymer, Esq., *Warwick*  
John S. Simonian, Esq., *Pawtucket*  
Joel J. Votolato, Esq., *Gannon, Bailey & Votolato, P.C.*

#### Elderly Pro Bono Program

Cristina A. Azzinaro, Esq., *Azzinaro Manni-Paquette*  
John A. Beretta, Esq., *Law Office of John A. Beretta*  
Kristy J. Garside, Esq., *The Law Office Howe & Garside, Ltd.*  
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The Bar also thanks the following volunteers for taking cases for the Foreclosure Prevention Project and for participating in Legal Clinic events during August and September.

#### Foreclosure Prevention Project

Sean C. Donohue, Esq., *The Law Offices of Sean C. Donohue, LLC*

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For information and to join a Bar pro bono program, please contact the Bar's **Public Services Director Susan Fontaine** at: [sfontaine@ribar.com](mailto:sfontaine@ribar.com) or **401-421-7758**. For your convenience, Public Services program applications may be accessed on the Bar's website at [ribar.com](http://ribar.com) and completed online.



## Rhode Island Bar Foundation

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

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

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## Proposed Title Standards Practice Form 15 Open for Bar Member Review and Comment

The Rhode Island Bar Association's Real Estate Title Standards and Practices Committee, chaired by Michael B. Mellion, Esq., at their meeting on September 19, 2019, voted unanimously to submit the following Proposed Practice Form 15 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 December 1, 2019, by contacting Rhode Island Bar Association Executive Director Helen Desmond McDonald by postal mail: 41 Sharpe Drive, Cranston, RI 02920 or email: [hmcDonald@ribar.com](mailto:hmcDonald@ribar.com).

### Explanation

The use of an attorney-in-fact to execute deeds, mortgages and other title documents as agent of the donor of a power of attorney is a common and accepted conveyancing practice. However, deficiencies in the preparation of such documents and in the manner in which they are executed can result in title issues. In order to effectuate the intent of the parties, the Real Estate Title Standards and Practices Committee proposes the adoption of the Title Standard 3.16, which provides a five-year curative period for issues arising from such documents.

### SECTION III CONTINUED

#### PROPOSED STANDARD 3.16

#### POWER OF ATTORNEY – ATTORNEY-IN-FACT AS GRANTOR – DEFECTIVE EXECUTION BY ATTORNEY-IN-FACT

The validity of a conveyance of an interest in real estate which, in the granting clause, named an attorney-in-fact as grantor instead of naming the donor of the power as grantor, and/or was not properly executed by the attorney-in-fact, i.e., it was not executed in the name of the donor of the power by the attorney-in-fact, is not for that reason impaired. The interest thereby conveyed shall be considered as effective and as marketable as if it had been properly executed provided that (a) five (5) years have elapsed since the conveyance was recorded, and (b) there is no record evidence of a challenge to the validity of the conveyance.

### COMMENTS

An attorney should make sure that when an attorney in fact will be executing a document, the name of the donor of the power appears as the grantor in the document's granting clause, and it is signed by the attorney in fact as follows: "John Doe, by Jane Doe, his attorney in fact," or "John Doe, by his attorney in fact, Jane Doe." The reason that the name of the donor must appear as grantor, and that it must be signed in this manner, is that the grantor in the document is the donor of the power, John Doe, not the attorney in fact, Jane Doe.

### History

Approved by the Executive Committee of the Rhode Island Bar Association on \_\_\_\_\_.

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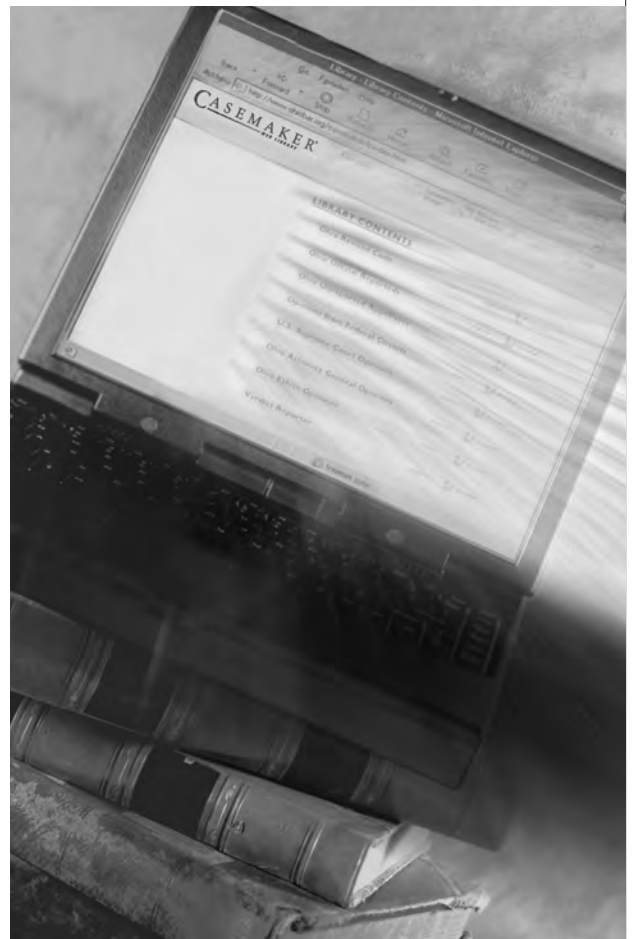
**Case Digest**, previously known as **CasemakerDigest**, is a summary service of cases that are currently coming out of the court system which is now integrated within the Casemaker4 system. These are usually published within about 72 hours of the case's publication. After clicking the **Case Digest** menu on the left-hand side, you can select your area of practice, court, judge, and jurisdiction to view summaries from. The summaries are displayed in the central area of the screen and will provide you with the case name, area of practice, court, the date decided, docket number, judge, and the date it was added to our system. This is in addition to the short summary itself. Just below the listed summary information is a link labeled **More**. Clicking this link will display the longer, full summary for that case. The case name is a link, that when clicked on, will take you to the case's full text in our system.

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# In Memoriam

## **James Nicholas Azzarone, Jr., Esq.**

James Nicholas Azzarone, 51, of North Kingstown, passed away on Thursday, August 8, 2019. He was the husband of Robyn Pandozzi Azzarone, son of Sylvia DiGianfilippo Azzarone and godfather to Emily Loiselle. Jim was born in Providence, the only child of the late James Azzarone Sr. and grandson to the late Sylvio and Jennie DiGianfilippo, and Frank and Rose Azzarone. He grew up in North Providence and graduated from Lasalle Academy in 1986. He earned his degree in Accounting from Providence College and later graduated from Syracuse University Law School. He was a member of the Rhode Island and Massachusetts Bar Associations. After law school, Jim continued to work with his grandfather Sylvio DiGianfilippo, co-owner of Imperial Tile and Marble Inc. He later opened his own company, Natural Stone & Tile Inc.

## **Alfred Factor, Esq.**

Alfred Factor, 88, died Thursday, August 15, 2019. He was the husband of Marilyn (Presel) Factor for 63 years. Born in Providence, a son of the late Benjamin and Jenny (Singer) Factor, he had lived in Cranston for 60 years, previously living in Providence. He was a lawyer and former president for Kirshenbaum & Kirshenbaum for 51 years, retiring in 2008. Alfred was a graduate of URI and Boston University School of Law, where he was on the Law Review. He was a member of the former RI Jewish Fraternal Association, a member and former president of the RI Board of Bar Examiners and member of the Committee of Character and Fitness. He is survived by Jeffrey Factor, MD and his wife, Susan, of Avon, CT and Robyn and her husband, William Forte, of Cranston, and several grandchildren. He is predeceased by his sister, the late Eleanor Zettel.

## **Charles A. Hirsch, Esq.**

Charles A. Hirsch, 84 of West Greenwich passed away Thursday September 12, 2019. He was the husband for 34 years to Jade C. (Grossman) Hirsch. Born in Providence, he was a son of the late John "Johnny" and May (Goldstein) Hirsch. Charles was a lawyer and former vice president for Kirshenbaum & Kirshenbaum for 51 years before starting his own practice. Charlie was a graduate of URI and Boston University School of Law. He was a member of the Rhode Island Bar Association for 58 years. Together with the Rhode Island Judiciary, Charles established the Mediation Program in Rhode Island Superior Court. He was a lifelong advocate of Settlement Week and the resolution of civil cases. He was the father of Staci M. Hirsch and step-father of David J. Cicerchia, MD and wife Bethany.

## **Richard L.E. Jocelyn, Esq.**

Richard L.E. Jocelyn, 76, of Bristol and formerly of Riverside, passed away on July 27, 2019. Born in Providence, he was the son of the late Willard M. Jocelyn and Norma A. Jocelyn (Thorpe). He is survived by his wife, Christine Jocelyn (Theroux). Richard graduated from East Providence High School and began his career at Brown & Sharpe Manufacturing Company as an expediter. After graduating in 1966 from the Machinist Apprenticeship program, he began his career in manufacturing and then continued in labor and employee relations. He received his BS degree from URI in 1971. Richard graduated cum laude from Suffolk University and, after passing the bar at age 44, began his second career in labor and employment law at Hinckley Allen in 1988. He retired from Hinckley Allen in 2011. He is survived by his children Rock Jocelyn (Sha) and Willard Jocelyn (Jennifer); grandchildren Joshua and Amanda; great-grandchildren Jakob and Anna; sister Wilma Sanders (Harold Roth); parents-in-law Paul and Gerry Theroux; brother-in-law Stephen

Theroux (Stephanie); sister-in-law Skye Pennington (David Allison); and former wife (and one of his biggest champions), Diane Jocelyn Warner.

## **Joseph G. Kinder, Esq.**

Joseph G. Kinder, of Bristol, passed away on September 17, 2019. He was born in Fall River, MA to Ralph F. Kinder and Marion Miller Kinder in 1931. He was raised and educated in Bristol until attending Moses Brown School in Providence, from which he graduated in 1950. He performed his undergraduate studies at the College of William & Mary in Williamsburg, VA, where he majored in legal studies. He completed his first year of law school as part of the program at William & Mary and graduated in 1954. He finished his legal studies at Boston University, where he was an editor of the Law Review and graduated in 1956. After becoming a member of the Rhode Island Bar Association and serving a short clerkship with the firm of Edwards & Angell, he married Linnea Pearson and became associated with the law firm of Armstrong, Gibbons & Lodge. He developed there a practice spanning over 50 years, specializing in corporate, tax, real estate, and estate planning law. He served as the Chancellor to the Rhode Island Episcopal Diocese and Bishop Belden from 1972 to 1979 and represented Almacs and many other businesses. He was a member and fellow of the Rhode Island and American Bar Associations. He was a member of the Bristol School Committee during the period of its construction of what is now Mount Hope High School and was a long-time trustee of the Benjamin Church Home For Aged Men, the Rhode Island SPCA, and the Friends of the Rogers Free Library. He was an active member of the Bristol Yacht Club for most of his life and served as a flag officer for many years and as Commodore. He was also a longtime member and past Commodore of the Twenty Hundred Club. He spent many years as a director of the Prudence Island Utilities Corporation, working to upgrade water service on the island. He is survived by his three children: Ralph M. Kinder, Esq. (Beth) of Providence, Kristine K. Campagna (Jim) of Bristol, and Philip F. P. Kinder (Blair) of Portsmouth, as well as five grandchildren. He was predeceased by his wife Linnea Pearson Kinder (2013) and his brother Robert S.L. Kinder, M.D.

## **Hon. John E. Orton III**

John E. Orton III, Associate Justice of the RI Superior Court (ret.), passed away September 20, 2019. He was the husband of Denise (D'Abate) Orton and the late Sabra W. (Webb) Orton. Born in Providence, he was the son of the late John E. and Irene (Shea) Orton, Jr. Judge Orton was a graduate of Cranston High School, class of 1949, where he was class president, Cheshire Academy, class of 1950, Brown University, class of 1954, and the Boston University School of Law, class of 1962. He was admitted to the RI Bar Association in 1962 and practiced law in Warwick and Providence with Philip Noel, 1962-1969. Judge Orton was appointed as an associate justice of the RI District Court by Governor Frank Licht in 1969 and then appointed as an associate justice of the RI Superior Court by Governor Philip W. Noel in 1974, before retiring as acting presiding judge in 1991. Judge Orton served in the US Marine Corps and the US Marine Corps Reserve. John was the father of John W. Orton, Richard E. Orton (Karen), Christopher M. Orton (Elizabeth); and stepfather of Karen E. Soderi (Paul), Sheila J. Felice (John). He is also survived by many grandchildren, great-grandchildren, nieces, nephews, and friends.

## **Hon. Donald F. Shea**

Donald Francis Shea, Associate Justice of the Rhode Island Supreme Court

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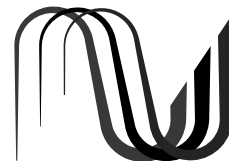
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## In Memoriam *(continued)*

(ret.), 93, of Providence, died on Wednesday, August 14, 2019. Born in Pawtucket to the late Edward and Lucy (Read) Shea, he grew up in Valley Falls, RI. He was predeceased by his siblings, Leonard E. Shea, Natalie M. Blais, and Daniel J. Shea. Justice Shea lived a life of service, enlisting in the Navy in 1943 upon completing high school. He served in the European and Pacific theatres during WW II, participating in both the Normandy and Okinawa invasions. After discharge from the Navy, he earned his BA from Providence College in 1950. He and his bride, Ursula Rafferty, moved to Washington DC where Justice Shea pursued his law degree at Georgetown University. He practiced law in the DC area before returning to Rhode Island in the aftermath of Hurricane Carol. He was elected to the House of Representatives in 1960 representing Riverside (the first Democrat to serve from the district in 40 years) where he and Ursula raised their family. After eight years in the House, he helped elect Governor Frank Licht and served as his executive assistant. In 1972, Justice Shea began his tenure as a jurist on the Superior Court and was elevated to the Supreme Court in 1981. His service to the court did not end upon retirement in 1995, continuing for a decade to mediate cases on appeal. He volunteered with hospice patients and their families, with the Society of St. Vincent de Paul, and as an advocate for the disabled with the Summit Club of East Providence. He was instrumental with his friend, colleague, and carpool mate Justice Weisberger in founding the law school at Roger Williams; served on the President's Council at Providence College; and conducted mediations for conflict resolution. He was predeceased by his wife of 65 years, Ursula Rafferty Shea and is survived by his five children: Donald E. Shea and his wife Meredith of Windham, CT; Michaela Shea McInnis of Providence; Christopher J. Shea and his wife Brenda of Carlsbad, CA; Sara Shea McConnell and her husband Jack of Providence; and Ellen Shea Reinhardt and her husband Frederick of Providence. Justice Shea is survived by 11 grandchildren and two great-grandchildren.

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

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

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## Seeking Law Related Education Program Attorney Volunteers!

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

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

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

## A Review of the Secure Act

*continued from page 11*

### Minor Children:

Regarding the minor child exception, many parents will leave assets to children in a trust for all of the children until the youngest reaches a certain age, for example 21. Under the trust, after the youngest child reaches age 21, the trust breaks into separate shares for each child. If Elizabeth and Bernie have three children, each 5 years apart, and pass when the children are ages 7, 12 and 17, as soon as one of the trust beneficiaries reaches age 18, the minor child exception for an Eligible Designated Beneficiary will not apply.

### Disabled Children:

Regarding disabled children, to preserve access to government benefit programs that are essential to maintain the disabled person safely in the community, it is critical that the trustee have discretion to withhold distributions for services otherwise covered by these programs, and accumulate assets in the trust to be used for other essentials not covered by these programs. To preserve eligibility for these important governmental benefits, a special needs trust is often used. The trust must be an accumulation trust to avoid impacting government benefits and would typically name a remainder beneficiary, or alternate beneficiary, as part of the termination provisions in the trust. This will cause the disabled child exception contained within the definition of an Eligible Designated Beneficiary to not apply.

The failure for a special needs trust to qualify for the disabled child exception is particularly troublesome. The effect of this rule is that if a trust for a disabled child is used to preserve benefits, Retirement Plan assets under the bill will have to leave the tax-free retirement account within ten years of the Retirement Plan owners' death and be paid into the trust where what is not distributed so as to preserve benefits will be taxed at the exceptionally high income tax rates currently applicable to trusts. The only alternative to avoid the high rates is to distribute the Retirement Plan distributions out of the trust in the same year they are withdrawn from the Retirement Plan and placed in the trust. But doing that is likely to cause the disabled beneficiary to lose his or her eligibility for the much-needed government assistance they are receiving.

Clearly, by excepting out disabled persons, minor children and spouses, the bill's authors recognized that certain individuals of a Retirement Plan warrant special treatment. However, absent a legislative change by the Senate before passage or a broadening of the SECURE Act's exceptions for Eligible Designated Beneficiaries by Treasury regulations to coordinate them with the trust rules, the ability to obtain a stretched payout for persons in these groups is severely imperiled. The bill should direct the Secretary of the Treasury to implement regulations to accomplish the following:

For minor beneficiaries, the definition of Eligible Designated Beneficiary should be expanded to include a trust of which a minor child of the settlor is a beneficiary and the exception to the ten-year payout should be allowed to continue until the minor attains the age of majority and not be terminated when the oldest beneficiary attains the age of majority.


For disabled beneficiaries, the definition of Eligible Designated Beneficiary should be revised to apply as long as the



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primary beneficiary is disabled. The existence of a remainder or secondary beneficiary should be ignored.

For spousal situations, as long as the surviving spouse of the Retirement Plan owner is within the class of primary beneficiaries, the exception to the ten-year payout should be allowed to apply.

Clearly the bills authors and sponsors recognized that these three classes of persons require special consideration by excepting them out from the ten-year payout rule. The same rationale that recognizes they deserve special tax treatment also justifies the need to use a trust to receive those benefits. They should not be forced to choose between protective tax treatment and protective trust treatment.

#### ENDNOTES

1 H.R. 1994, 116th Congress 1st Session. It is expected that the bill will be taken up by the Senate after its August recess. With such strong bi-partisan support as evidenced by the House vote, barring political gamesmanship it is a strong candidate for passage.

2 Traditional IRAs were established by the Employee Retirement Income Security Act of 1974. In 1978 Congress passed the Revenue Act of 1978, which included a relatively obscure provision that gave employees a tax-free way to defer compensation from bonuses or stock options. The law went into effect on January 1, 1980 and was placed in section 401(k) of the Internal Revenue Code. The Roth IRA was established by the Taxpayer Relief Act of 1997 and named for its chief legislative sponsor, Senator William Roth of Delaware.

3 I.R.C. § 401(a)(9).

4 *Id.*

5 I.R.C. § 4974(a).

6 I.R.C. § 72(t).

7 Natalie B. Choate, *LIFE AND DEATH PLANNING FOR RETIREMENT PLANNING*, 7th (2011), pgs. 29-30.

8 Michael J. Taylor, *IMPROVING RETIREMENT, REDUCING ARISTOCRACY, The Banker*, <http://www.bankers-anonymous.com/blog/improving-retirement-reducing-aristocracy/> (last visited Aug. 28, 2019).

9 H.R. Rep 116-65, 1pt at 118-122 (2019).

10 *Id.* at 122.

11 Stephen Miller, *HOUSE PASSES SECURE ACT TO EASE 401(K) COMPLIANCE, PROMOTE SAVINGS*, <https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/house-passes-secure-act-to-ease-401k-compliance-and-promote-savings.aspx> quoting Bob Holcomb, vice president for legislative and regulatory affairs at retirement plan services firm Empower Retirement (last visited Aug. 28, 2019).

12 Allison Schrage, *IT'S TIME TO GET OVER HOW MUCH WE HATE ANNUITIES*, <https://qz.com/1630269/the-secure-act-will-encourage-retirees-to-open-annuities/> (last visited Aug. 28, 2019).

13 Ethan Schwart, *CONGRESS HAS A DANGEROUS IDEA FOR YOUR 401(K)*, <https://www.bloomberg.com/opinion/articles/2019-07-29/congress-s-secure-act-could-ruin-your-401-k> last visited Aug. 28, 2019).

14 Treas Reg § 1.401-9a(9)-4, A(5(a),(b)).

15 H.R. 1994, 116th 1 pt, Sec. 401.

16 Examples adapted NAELA Issue Brief on H.R. 1994, August 7, 2019. ◇

## Bar's Law Practice Management Consultant Presents CLE Seminar on Productivity Apps



On September 17th, at the RI Law Center, Jared D. Correia, Esq., of Red Cave Law Firm Consulting, presented "60 (Productivity) Apps In 60 (Productive) Minutes," a twist on a popular American Bar Association TECHSHOW staple. Modern lawyers are able to run more and more of their practices in the cloud, and on tablets and smartphones. Jared offered attendees the best productivity apps in one-minute increments. This program is now available On Demand through the Bar's website. Stay tuned for part two of this well-received program to be scheduled soon! As a reminder, your Bar Association has partnered with Red Cave to provide our members with virtual consulting services (telephone/video/email/chat) free of charge. Whether you are looking for help transitioning your firm to paperless, or you simply would like a recommendation on a good printer, Jared can help! Visit the Bar's Law **Practice Management** page in the **Members Only** section to get started.

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



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

**How to Enter:** Submit the caption you think best fits the scene depicted in the cartoon above by sending an email to [kbridge@ribar.com](mailto:kbridge@ribar.com) with "Caption Contest for November/December" in the subject line.

**Deadline for entry:** Contest entries must be submitted by December 1st, 2019.

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

## Winning caption for September/October



"Circumstantial evidence, my foot!"

KAREN LOMAX

## Advertiser Index

Ajootian, Charles – 1031 Exchange Services . . . . .	22
Alliant Title and Escrow – Florida . . . . .	8
Arbitrator – Nicholas Trott Long . . . . .	28
Balsofiore & Company, Ltd. – Forensic Accounting, Litigation Support . . . . .	14
Barrett Valuation Services, Inc. . . . .	16
Barton Gilman Family Law Practice . . . . .	34
Briden, James – Immigration Law . . . . .	26
Chisholm Chisholm & Kilpatrick LTD . . . . .	34
Coia & Lepore, Ltd. – John Cascione . . . . .	34
Coia & Lepore, Ltd. – Mediation . . . . .	12
Dennis, Stephen – Workers' Compensation . . . . .	14
Enright Law LLC . . . . .	18
Environmental, Land Use, and Zoning Legal Services . . . . .	19
Expert Witness – Rob DiSario . . . . .	35
Fulweiler LLC – Marine-Related Legal Services . . . . .	10
Gursky Wiens- Attorneys at Law, Ltd. . . . .	16
Higgins, Cavanagh, & Cooney LLP . . . . .	9
Howe & Garside – Associate Attorney . . . . .	31
Humphrey, Richard – Law Offices . . . . .	12
John A. Pagliarini, Jr., Esq. . . . .	30
Lavoie Law LLC . . . . .	22
LawPay . . . . .	Back Cover
Leone Law, LLC – Anthony R. Leone II . . . . .	26
Marasco & Nesselbush . . . . .	8
Mathieu, Joan – Immigration Lawyer . . . . .	16
Mignanelli & Associates, LTD. – Estate Litigation . . . . .	15
Morowitz, David – Law Firm . . . . .	6
Napatree Capital LLC/Wealth Advisors . . . . .	34
Ocean Roads Realty – Real Estate Sales . . . . .	10
Office Building for Sale – 999 Chalkstone Ave . . . . .	28
Office Space for Rent . . . . .	37
Palumbo, Richard – Condominium Law . . . . .	15
Palumbo, Richard – Property Damage & Insurance . . . . .	11
PellCorp Investigative Group, LLC . . . . .	26
Peter M. Sciotti & Associates, Inc. . . . .	32
Pfiever, Mark – Alternate Dispute Resolution . . . . .	31
Piccerelli, Gilstein & Co. – Business Valuation . . . . .	30
Purcell, Jim – ADR . . . . .	11
Red Cave Legal Consulting . . . . .	12
Restivo Monacelli LLP – Business Valuation Services . . . . .	36
Rhode Island Legal Services . . . . .	28
Rice, Amy – Arbitrator & Mediator . . . . .	26
Richard Galli – Millie's Lament (book) . . . . .	22
Sciaretta, Edmund- Florida . . . . .	22
SecureFuture Tech Solutions . . . . .	18
Slip & Fall – Henry S. Monti . . . . .	31
Soss, Marc – Florida Estates/Probate/Documents . . . . .	18
Vehicle Value Appraisals – Green Hill. . . . .	18
Zoning Handbook, 3rd Edition – Roland Chase . . . . .	26

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401-453-2300 [sclough@brcsm.com](mailto:sclough@brcsm.com) [brcsm.com](http://brcsm.com)

**Saikon T. Gbehan, Esq.** has moved her law firm, **Law Office of Saikon Gbehan, LLC**, to One Davol Square, Penthouse, Providence, RI 02903.  
401-228-0001 [saikon@stgattorney.com](mailto:saikon@stgattorney.com) [stgattorney.com](http://stgattorney.com)

**Michael J. Polak, Esq.** is now of counsel to **Henneous Carroll Lombardo, LLC**, 1240 Pawtucket Avenue, Suite 308, East Providence, RI 02916.  
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## Updating Your Attorney Directory Photo Is a Snap!

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

# Stress Less this Fall!

## 5 Tips to Help Avoid Burnout

### Develop Healthy Responses

Instead of attempting to fight stress with unhealthy habits do your best to make healthy choices when you feel the tension rise. Exercise is a great stress-buster. Make time for hobbies and favorite activities. Whether it's reading a novel, going to concerts or playing games with your family, make sure to set aside time for the things that bring you joy.

### Optimize Time Pockets

Time pockets are unplanned, short periods of unfilled time in a busy day that are opportunities for you to be productive. Take advantage of time pockets with a list of to-dos at the ready. Items that are important but not urgent are ideal—planning a meal, paying a bill, etc. Keep a list of completed tasks, and watch your productivity soar.

### Overcome Procrastination

Start the day by completing an important task that you would normally procrastinate about doing. It is a success secret used by many productivity pros to reduce burnout and accomplish more. The technique allows you to escape the gnawing sensation of what you know you eventually must do and it could make the rest of the day feel like a breeze.

### Make Time for Sleep

Getting enough good-quality sleep is important for effective stress management. When you are tired, you are less patient and more easily agitated. Build healthy sleep habits by limiting your caffeine intake late in the day and minimizing stimulating activities, such as computer and television use at night.

### Take Time to Recharge

To avoid the negative effects of chronic stress and burnout, we need time to “switch off” from work. This recovery process requires periods of time when you are neither engaging in work-related activities, nor thinking about work. When possible, take time off to relax and unwind, so you come back to work feeling ready to perform at your best.



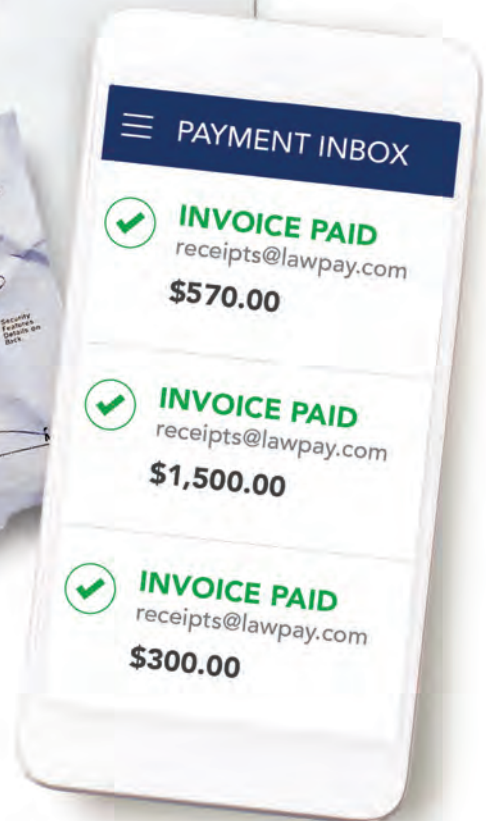
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