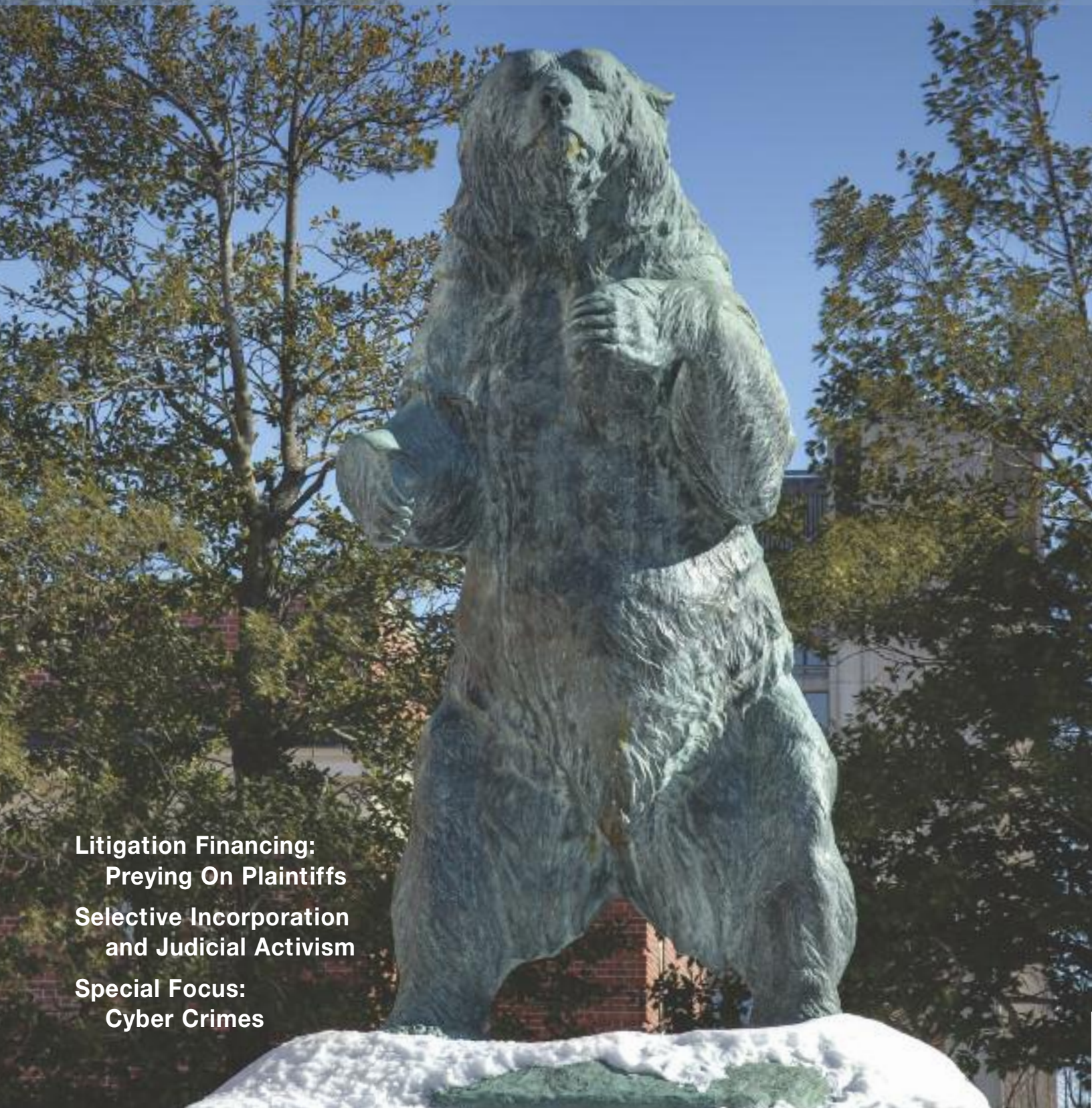
Rhode Island Bar Journal

Rhode Island Bar Association Volume 59. Number 5. **March/April 2011**



Litigation Financing: Preying On Plaintiffs

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CORRECTION

Please note: **the cover photograph for *Rhode Island Bar Journal* January/February 2011 issue was misidentified. The correct identification is: *Gilbert Franklin's sculpture, Dawn, Rhode Island School of Design's RISD Beach, Providence, RI by Brian McDonald.***

RHODE ISLAND Bar Association
1898

RHODE ISLAND BAR ASSOCIATION LAWYER'S PLEDGE

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

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Front Cover Photograph
Brown Bear, sculpted and cast by Eli Harvey
Brown University, Providence, RI
by Brian McDonald

Welcoming 225 Into Our Most Honorable Profession

Lise M. Iwon, Esq.
President
Rhode Island Bar Association

Bar Committees are terrific ways for you to network and meet lawyers who will give you referrals and assistance.

Over the summer, the Rhode Island Supreme Court Justices swore in 225 new lawyers in intimate, inspirational ceremonies in the Supreme Court chambers. In February of 2011, approximately 125 applicants are sitting for the bar exam.

We currently have 6,206 members, 938 are inactive, 1,800 are from out-of-state, and 973 have been admitted in the past five years. With the February bar results, we will have over 6,300 members. Over the past ten years, our membership has increased by 1,818! We are a force for good, helping to maintain a peaceful and fair society.

My life partner tells me people do not like unsolicited advice, and I am trying to get better at keeping my mouth shut unless asked. However, I cannot resist this bully pulpit and opportunity to give a little counsel to our new colleagues. Here goes:

- *Be prepared* – The Scout motto applies to all of us. You may be up against a lawyer with 30 years experience, but you may learn the veteran lawyer has not consulted the court rules since then either. Preparation will always pay off and may win the day.
- *Be courteous and kind* – Being an unreasonable jerk will not better serve your client, will alienate your judge and will eventually come back to haunt you. Check your egos at the door, be nice, and always treat people the way you want to be treated.
- *Do not interrupt a judge* – It is shocking to see how many times this simple rule is violated. If the judge wants to point out a concern, stop talking and listen.
- *Do not personally attack opposing counsel* – This will never serve your purposes, and it only invites mudslinging back your way. Again, treat people the way you want to be treated professionally, with dignity and respect.
- *Realize that you do not create the facts* – This idea will take a lot of stress out of your practice. Live with your facts and be as persuasive as you can with them. Hiding or twisting facts will only hurt your cause and destroy your creditability. The only thing in life over which you have control is your reputation. Protect and guard it at all times.
- *Keep your client's expectations reasonable* – Only a fool promises the moon and the stars to a client. Matters sometimes go south, and you will find yourself in an uncomfortable situation if you have led your client to believe that there is a guaranteed outcome. The judge is the only one who makes the decisions.
- *Treat your client's money as sacred* – It is sacred! Even if a furious loan shark is on your tail, do not touch your client's money. If you do, you will go to jail and will be disbarred. Don't worry, eventually your kneecaps will heal.
- *Live within your means* – Do this and you won't have to worry about the situation described above. My partner and I shared one office space for almost two years. She would meet with clients on Mondays, Wednesdays and Fridays, and I would go to the library on those days. I would meet with clients on Tuesdays and Thursdays and Peg would work outside of the office. The fact is, impressing shallow people is overrated.
- *Find an area of law that you enjoy* – You will like your work more, be able to command greater demand for your services, and request a higher fee. You will work more efficiently and obtain better results. Work that you enjoy is not work!
- *Get to know the court personnel, and treat them with respect* – Sheriffs, stenographers, clerks and capitol police are your peers, so treat them with the same dignity and respect that you expected to be treated with. The court workers will determine if you have a good day or a bad day, guaranteed.
- *Always take at least one pro bono case* – You will be a hero to someone who is in over his head and needs a hand. You will always remember these cases. They are the

fodder for stories and a warm heart. You went to law school because you wanted to help someone, right? Take a pro bono case through your Bar Association's Volunteer Lawyer Program, and find an experienced lawyer to mentor you and show you the way.

- *Sit in a courtroom and watch the practice of law* – There is no better way to learn how to practice law than to observe others. Watch, listen and take note. Everyday you go to court you will learn at least three new things. If not, there is something wrong.
- *Do not neglect your personal health and relationships* – Be careful not to neglect yourself or neglect your loved ones. Get enough sleep. Eat right, including vegetables. Exercise. Develop your friendships. Protect your mental health. Avoid addiction. Do fun things that inspire and invigorate you. Read poetry. Listen to music.
- *Join your Bar's SOLACE program* – Join this excellent program through the Rhode Island Bar Association's website at www.ribar.com. If you have something to share or have a need, this is a great resource. A lawyer who is closing her or his practice may have statutes, furniture, copiers to donate. If you have a fire or a flood in your office (heaven forbid!) reach out to your supportive community.
- *Participate in your Bar's CLE programs* – If you have special knowledge, share it. If you see a need for Continuing Legal Education (CLE) programming, contact the Bar's CLE Department or the CLE Committee chair.
- *Get involved in a Bar Association Committee* – The New Attorney Advancement Task Force and the Bench/Bar Committees are terrific ways for you to network and meet lawyers who will give you referrals and assistance. But, there are also many other Bar committees that offer equally excellent professional and personal help. There is nothing better for you than having a colleague you can call or text when you have a question you know they can answer on the spot, without you having to research for hours. Experienced lawyers remember what it was like to be a new lawyer as if it were yesterday. Almost all are willing to mentor and assist you.

Welcome to our new colleagues!

And, my deepest thanks to all of the Rhode Island Bar Association committee chairs and members for their invaluable service and commitment to the Bar, the legal community, and the citizens of our state. We appreciate your contributions!

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Thank you for allowing me to serve as your President.

Lise M. Iwon, Esq.

Litigation Financing: Preying on Plaintiffs

John P. Barylick, Esq.
Principal, Wistow & Barylick Incorporated

Jenna Wims Hashway
Third-year student, Roger Williams University School of Law and Law Review Editor-in-Chief

Despite calls for regulation, litigation financing companies (LFCs), operate with no licensing or oversight.

Juan Echeverria was severely injured in a workplace accident. His employer did not provide Worker's Compensation insurance.[1] Juan filed suit against several responsible parties, but any judgment or settlement would come too late to pay for the surgery he needed. With no health care coverage or traditional lending options available to him, Juan discovered LawCash, a litigation financing company (LFC) which offered, what seemed like, a great deal. A quick, hassle-free advance with no repayment due unless and until he either won or settled his lawsuit. If he lost, he'd owe nothing. Juan borrowed $25,000 from LawCash at a rate of 3.85% per month, compounded monthly. The interest on this advance accrued at a rate of $48.94 per day. To put this in perspective, prior to his injury, Juan earned $80.00 per day.

Every day, plaintiffs like Juan find themselves in economic straits while awaiting resolution of their claims, either due to health care costs or the inability to work in the wake of an injury. Increasingly, these plaintiffs turn to LFCs and the promise of quick, allegedly no risk cash. LFCs, the brainchild of a former loan shark,[2] offer cash advances to plaintiffs during the pendency of their litigation. If they win or settle their case, the loan is repaid from the proceeds of the lawsuit at annual interest rates of up to 280%.[3]

Despite calls for regulation, LFCs operate with no licensing or oversight. Their lending agreements are carefully dubbed advances rather than loans, to avoid application of state usury statutes. Some plaintiffs have succeeded in rescinding their loan agreements but, to date, LFCs have been able to adapt and lobby for legislation which allows them to operate with impunity. Legislation is needed to protect plaintiffs from being further victimized as they await the outcome of their litigation.

The origins of the LFC industry are illuminating. Perry Walton, a Las Vegas entrepreneur, is the godfather of litigation financing. Following a career which included stints as a rock musician and mobile-home park developer, Walton made his first foray into extortionate lending with a business he named Wild West Funding.[4] In 1997, after several of Walton's borrowers complained that they were threatened when they fell behind in their loans, a police investigation resulted in Walton's pleading guilty to "extortionate collection of debt."[5] Walton drew a sentence of eighteen months probation. By the following year, he had hit upon a somewhat more legitimate lending opportunity.[6]

Walton began loaning money to plaintiffs, structuring these advances as "contingent obligations" in order to sidestep usury laws.[7] He then invited would-be lenders to seminars, charging as much as $12,400 to impart the secret of his lucrative new scheme.[8] Two years later, four hundred people had been trained by Walton, and a new subprime industry was born.[9]

The precise size of this industry today is impossible to gauge.[10] Barriers to entry are almost nonexistent; with no licensing requirements, all a prospective lender needs is a website and fairly modest capitalization.[11] A Google search of the phrase litigation financing company returns 103,000 hits. Clearly, in the ten years since Walton began his seminars, the number of LFCs has grown exponentially.

A plaintiff who is short on cash is only a few keystrokes away from what can appear to be an easy, painless solution to his problem. To begin the process, one need only fill out a short, online application. The lender then evaluates the plaintiff's case by assessing: the presence of a skilled plaintiff's attorney; the defendant's potential liability; in car accident cases, the extent of damage to the vehicle; bright blood injuries; medical bills; and a proprietary statistical analysis of jury verdicts in comparable cases.[12] The plaintiff must waive his or her attorney-client privilege in order for the lender to contact his or her attorney for information necessary to assess the strength of the case.[13] If the loan is approved, the lender generates a litigation lending agreement (LLA) and, once the LLA is executed by the plaintiff and his or her attorney, the lender expedites funds to the plaintiff.[14] Then, the interest meter begins to run.

The ease and speed with which a plaintiff can enter into an LLA has caused at least one commentator to observe that this "instant grati-

RHODE ISLAND BAR JOURNAL

Editorial Statement

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

Article Selection Criteria

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

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

fication" may "encourage or facilitate poor financial management."[15] This is particularly troubling when one compares the plain language and short form of a typical LFC's online application to the fine print of the multi-page LLA.[16] Online applications are straightforward. In addition to name, address and attorney information, they request only basic information about the plaintiff's accident claim.[17] The language in the LLA, however, is far less clear. A typical LLA recites:

> The monthly use fee shall be a charge in an amount equal to 3.10% monthly of the amount funded to me herein. This funded amount includes the Application Fee that I agreed to when first applying for this funding. *The monthly use fee is charged from this date until the end of the 5 month interval during which payment of proceeds is made…*[18] [emphasis added]

The above paragraph is probably the closest borrowers will come to learning the Annual Percentage Rate (APR) of their loan.

LFCs are not required to adhere to the federal Truth in Lending Act, which would mandate clear disclosure of the APR, because they are not considered "creditors," as defined by the Act.[19] It is even possible that a plaintiff/borrower could mistake the 3.10% monthly rate for an APR. This would be a dire mistake, as the actual APR for these loans, which varies greatly depending on when the loan is repaid, can amount to anywhere between 58% and 120%.[20] APRs from some LFCs can exceed 200%.[21]

LLAs are structured so that the LFC is paid by the plaintiff's attorney before any other funds are disbursed from the client's portion of the settlement or judgment.[22] This is possible because, as previously noted, the attorney, as well as the plaintiff, is a signatory to this agreement.[23]

The litigation financing industry claims it provides a much-needed service to plaintiffs. LFC providers argue that they assume a high degree of risk, justifying their high profit. But, how can one quantify, or even verify, this alleged high risk? Unlike credit cards, litigation advances are not unsecured debt. The LFC holds a security interest in the proceeds of the lawsuit.[24] The risk, therefore, is not whether the borrower will default on the loan, but whether the lawsuit will result in a settlement or judgment. There are clues, however, that the risk is far

Bar's Annual Meeting Speaker Legendary Civil Rights Activist Morris Dees

Morris Dees, Co-Founder of the Southern Poverty Law Center

At this year's Annual Meeting, June 16th and 17th, the Rhode Island Bar Association is pleased to present legendary civil rights activist Morris Seligman Dees, Jr., Esq., as the plenary speaker. Born in Shorter, Alabama, the son of farmers, after a successful career in book publishing, in 1971, he and his Montgomery, Alabama law partner Joseph J. Levin, Jr. and civil rights activist Julian Bond founded the Southern Poverty Law Center, a nonprofit organization dedicated to seeking justice. Through the Southern Poverty Law Center, Dees uses the law like a sword in his battle against prejudice and hatred. In the 1980s and '90s, he bankrupted the Ku Klux Klan and neo-Nazi groups with a series of historic lawsuits. Today, he focuses his attention on anti-government militias. In his book, *Gathering Storm: America's Militia Threat*, Dees explains the dangers these groups represent. He is also author of *A Lawyer's Journey*, an autobiography, and *Hate on Trial: The Case Against America's Most Dangerous Neo-Nazi*.

The subject of the television movie *Line of Fire* and portrayed in the feature film *Ghosts of the Mississippi*, Dees has received numerous awards in conjunction with his work at the Center. Trial Lawyers for Public Justice named him Trial Lawyer of the Year in 1987, and he received the Martin Luther King Jr. Memorial Award from the National Education Association in 1990. The American Bar Association gave him its Young Lawyers Distinguished Service Award, and the American Civil Liberties Union honored Dees with its Roger Baldwin Award. Colleges and universities have recognized his accomplishments with honorary degrees, and the University of Alabama gave Dees its Humanitarian Award in 1993. In 2001, the National Education Association selected Dees as recipient of its Friend of Education Award, its highest award, for his "exemplary contributions to education, tolerance and civil rights."

In addition to this distinguished guest speaker, the Rhode Island Bar Association's 2011 Annual Meeting features a wide range of exceptional Continuing Legal Education seminars, the Bar's Annual Award winners, a diverse group of law-related product and service providers, and many opportunities to connect with your colleagues. Please watch your mail and the Bar's website for your invitation to attend this excellent event.

lower than portrayed by the industry. First, LFCs carefully analyze applicants' cases and accept only those they deem to have a high likelihood of recovery.[25] Furthermore, because plaintiffs' attorneys, who work on a contingent fee basis, screen potential cases and only accept those with a high probability of success, the LFC is actually performing a secondary credit determination.[26]

Perhaps the most revealing information regarding LFCs' actual level of risk was provided by Harvey Hirschfeld, President of LawCash and Chairman of the American Legal Finance Association (ALFA).[27] According to Hirschfeld, LawCash targets lawsuits in the "mid-resolution" stage, thereby increasing the likelihood that the case will be resolved in less than two years.[28] LawCash limits its exposure to advancing up to 10% of the settlement value of a case.[29] But the most candid glimpse at the level of risk borne by this LFC came in Hirschfeld's admission that his company "uses strict underwriting screening rules that ensure only about 4% of the cases it advances money on are lost in court."[30] Another industry figure, Michael Douglas, CEO of ExpertFunding.com, put his company's default rate even lower, at only 2%.[31]

Despite such caution, or perhaps because of it, LawCash has prospered. The LFC projected its case portfolio of $3 million in 2001 would swell to between $25 and $30 million in 2004.[32]

What seems clear is that the bloated profits available to LFCs, and the low barriers to entry, have transformed the business once termed "the wild west of finance"[33] from a fringe industry into an established branch of the financing sector (albeit one which enjoys freedom from regulation). At last count, there were at least a hundred LFCs operating in the United States.

In 2005, this burgeoning industry drew the attention of former New York State Attorney General, Eliot Spitzer. Prompted by concerns that consumers could not adequately understand the terms of the LLAs that they were signing, Spitzer launched an investigation.[34] In response, a consortium of LFCs, led by Hirschfeld, formed the trade association ALFA.[35] The group succeeded in persuading Spitzer to resolve the investigation by entering into an "Assurance of Discontinuance."[36] The member LFCs paid a total of $45,000 for the cost of the investiga-

tion and agreed that their LLAs would: disclose the APR; display the total amount to be repaid broken down in six month increments; include a five-day right to rescission; be translated into the borrower's native language; and contain no mandatory arbitration clause.[37]

ALFA issued a press release, vowing to "establish and maintain the highest ethical standards and fair business practices in the legal funding industry."[38] An advertisement on the ALFA website encourages attorneys to "only trust an ALFA member company" because "member companies adhere to best practices for the industry according to guidelines created with the New York Attorney General."[39] The ad creates the impression that Spitzer's reforms are applied beyond New York citizens to benefit all plaintiff-borrowers. However, a look at some recent LLAs casts doubts on ALFA's assurances.

The authors reviewed three such agreements, entered into by plaintiff-borrowers who were not New York residents. The lenders – CaseFunding, U.S. Claims and LawCash – are all ALFA members. Each of the LLAs includes the five-day right of rescission.[40] The prohibition against mandatory arbitration clauses, however, is not so strictly heeded. CaseFunding does not call for mandatory arbitration. However, its LLA provides that "[a]ny controversy or claim arising out of or relating to this contract…may be settled by final, binding arbitration…"[41] LawCash is even clearer about its right to compel arbitration: "…at the sole and exclusive option of LAWCASH, any controversy or claim arising out of or relating to this contract…shall be settled by final, binding arbitration…"[42]

While CaseFunding and U.S. Claims prominently display their APRs (51% and 27%, respectively), the LawCash agreement contains absolutely no mention of an APR.[43] Moreover, the language regarding cost of borrowing is purposefully obtuse. Instead of an interest rate, the borrower incurs an "accrued use fee, compounded monthly," and a "monthly use fee" of 3.10%. It is impossible, with the information provided, for any plaintiff-borrower to determine the APR.

The difficulty in calculating effective interest under the LawCash contract illustrates how that lender turned a seemingly

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Remembering Joseph M. Fernandez, Esq.

Joe was a dedicated, enthusiastic and hard-working member of the Rhode Island Bar, representing the best the legal profession has to offer in terms of honor and integrity.

We were all shocked and saddened by the unexpected and tragic passing of our friend and colleague, Joseph M. Fernandez, this past December. Joe was a dedicated, enthusiastic and hard-working member of the Rhode Island Bar, representing the best the legal profession has to offer in terms of honor and integrity. In plain and simple terms, Joe set an example for all Rhode Island Bar members to follow, and he will surely be missed by all who knew him and by the many who called him friend.

Joe was an active and energetic Bar leader. He was a valued member of the Rhode Island Bar Foundation Board of Directors and was instrumental in the planning and execution of the Interest on Lawyers Trust Accounts (IOLTA) and the Black Law School Scholarship programs. He served as a member of the Bar Association's House of Delegates, and on many Bar Committees, including the Federal Court Bench/Bar Committee and the Children at Risk Committee. For many years, Joe served as the Chairperson of the Involvement of Minorities Committee, which eventually formed the Thurgood Marshall Law Society.

Joe's service to the bar and to our state's system of justice was nothing less than exemplary. In addition to serving as a Bar leader, he was a member of the Rhode Island State Advisory Committee for the United States Commission on Civil Rights, the American Bar Association and the International Municipal Lawyers Association. In 2007 and 2008, Joe co-chaired the Rhode Island presidential campaign of his friend and law school classmate, President Barack Obama, and served as a member of the Obama for America, New England Steering Committee.

He was also actively engaged in, and a big supporter of, the Rhode Island nonprofit community, serving on the boards of Trinity Repertory Company, the Community College of Rhode Island Foundation, FirstWorks and Crossroads Rhode Island. Always proud of his alma mater, Joe served as the current President of the Brown Alumni Association (BAA), which represents the interests of 88,000 alumni world wide. In addition to his duties as President of the BAA, he served as a member of the Brown Corporation, the University's governing body. In his every endeavor, Joe strove for excellence, and achieved it, undoubtedly accomplishing a great deal in an unfortunately short lifetime.

Born in Pennsylvania, Joe was the eldest son of Dr. Oscar V. and Concepcion G. Fernandez. He attended Phillips Exeter Academy, receiving his Bachelor's Degree in American Civilization from Brown University and his Juris Doctorate from Harvard Law School. Most recently, Joe waged a spirited, but professional and civil, campaign for the Democratic nomination for Rhode Island Attorney General. From January 2003 until September 2009, Joe served as the Providence City Solicitor, where he quickly earned a reputation as an attorney with a no-nonsense approach to rooting out corruption, vigorously prosecuting crime, protecting taxpayers and making the city work and be safe for its residents. Before heading the City's law office, Joe spent six years in New York City litigating complex commercial cases and five years serving the Rhode Island business community as a lawyer in private practice.

Most important, Joe was a devoted husband to Emily Maranjian and a father to his beautiful twin daughters, Coco and Phoebe. His greatest enjoyment in life was the time spent with his family. Joe was an incredibly well-rounded person. He was an active member of Central Congregational Church, relished plays at Trinity Rep, enjoyed Brown football games, sought out unique and eclectic diners, cooked elaborate (and delicious) breakfasts for his family, and always made time to talk about, and usually debate, the events of the day. In addition to his mother, his wife and his beloved children, Joe is survived by his siblings, David of Singapore, Thomas of Cincinnati, OH, and Susan of San Jose, CA.

The lawyers of Rhode Island received the news of Joe's passing with a great, and stunning, sadness; but his sparkling personality, steadfast commitment to justice and the law and his noteworthy contributions to the Bar Association, the Rhode Island Bar Foundation and to the people of Providence and the State of Rhode Island will be long remembered and cherished. Joe lived an extraordinary life in an all-too-short amount of time. We all will miss him. ❖

John A. Tarantino, Esq.
President, Rhode Island Bar Foundation
Lise M. Iwon, Esq.
President, Rhode Island Bar Association

SOLACE

Helping Bar Members in Times of Need

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

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

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

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

The Selective Incorporation Process and Judicial Activism

Hon. Joseph R. Weisberger
Retired Rhode Island Supreme Court Chief Justice

In U.S. Supreme Court Chief Justice Marshall's opinion, referring to the Bill of Rights Amendments, he observed: "These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them."

When the Constitution was drafted during the summer of 1787 in Philadelphia, the delegates from twelve of the states (Rhode Island did not send delegates to the Convention) were generally in agreement that the new National Government should be one of limited powers. Their memories of their association with the strong central government of the British Monarchy and Parliament were vivid and unpleasant. The delegates were also suspicious of their sister states and extremely jealous of their local. Many of the states had already adopted constitutions providing for their own governmental structures.

When the final document was ready for signatures, many of the delegates were disappointed that it did not contain a bill of rights to prevent the encroachment of federal power upon the people and the states. Notably James Mason, a delegate from Virginia refused to sign the document for that very reason. During the long and controversial process of ratification, the issue of a bill of rights to restrain federal power was very much in the forefront of discussion in the various state conventions. The proponents of ratification in many instances promised to exercise their best efforts to add a bill of rights by amendment as soon as the new federal government became effective.

True to their promise, the members of the first Congress, under the leadership of James Madison, drafted and enacted the first Ten Amendments to the Constitution which were ratified by the states in 1791. This so called Bill of Rights was generally regarded at the time of ratification as a limitation on federal power rather than state authority. However, it was not until 1833 that a question was presented to the Supreme Court of the United States related to this issue. In **Barron v. Mayor and City Council of Baltimore**, (7 Peters 132), 32 US 243 (1833) Chief Justice Marshall, writing for the Court, declined to apply the Fifth Amendment's requirement of just compensation for the taking of private property to the states or their subdivisions. In his opinion, referring to the Bill of Rights Amendments he observed: "These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them."

These general principles remained undisturbed until after the adoption of the Fourteenth Amendment in 1868. This Amendment contained a Privileges and Immunities Clause an Equal Protection Clause and a Due Process Clause, all directed at state action. The first major challenge to state action under the Privileges and Immunities Clause came in the **Slaughter-House Cases**, 83 U.S. (16 Wall) 36 (1873). The Louisiana Legislature granted a corporation an exclusive license for 25 years to operate a slaughterhouse to serve the City of New Orleans and the Parishes of Orleans, Jefferson and St. Bernard in specific portions of the area. Butchers and other tradesmen adversely affected brought suit alleging that the statute created a monopoly. The Louisiana courts upheld the statute. The plaintiffs sought review in the U.S. Supreme Court citing the Privilege and Immunities Clause, the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. Justice Miller, in the majority opinion, rejected the argument based on the Privileges and Immunities Clause. He declared that this Clause was narrowly designed to protect the recently freed slaves from discrimination. It did not profess to control the power of the state over its own citizens. There was no intention to transfer the protection of civil rights from the states to the federal government. Justices Field, Bradley and Swayne dissented.

In the ensuing years, no significant changes may be noted in the judicial landscape. In **Hurtado v. California**, 110 U.S. 516 (1884) the Court held that the Fifth Amendment requirement of indictment by grand jury in felony cases was not applicable to the states. In **Twining v. New Jersey**, 211 U.S. 106 (1908) the Court held the Fifth Amendment privilege against self incrimination was not binding upon the states. The first chink in the armor occurred in **Gitlow v. New York**, 268 U.S. 652 (1925) where Justice Sanford, writing for the majority and reviewing a conviction for criminal anarchy, assumed (without extensive analysis) that the First Amendment freedoms of expression were fundamental personal rights protected by the Due

Process Clause of the Fourteenth Amendment and therefore binding upon the states. The Court, however, affirmed the conviction over the dissents of Justices Holmes and Brandeis.

The next major chapter in the saga occurred in **Palko v. Connecticut**, 302 U.S. 319 (1937). Palko had been tried in the Superior Court of Connecticut on a charge of first degree murder, but had been found guilty by the jury of murder in the second degree and sentenced to life imprisonment. The State appealed as allowed by statute. The Connecticut Supreme Court overturned the conviction for evidentiary errors and erroneous jury instructions and ordered a new trial. The state courts rejected Palko's argument that a second trial would violate his Fifth Amendment right against double jeopardy. Palko was re-tried, found guilty by a jury of first degree murder and sentenced to death. On review by the Supreme Court of the United States, Justice Cardozo wrote the opinion of the Court. He reviewed the case law and outlined a rational basis for the "absorption" or incorporation of elements of the first eight amendments to the Federal Constitution into the Due Process Clause of the Fourteenth Amendment. He concluded that only those rights that are "implicit in the concept of ordered liberty" (such as the First Amendment freedoms of expression and religion) would be incorporated into the Due Process Clause of the Fourteenth Amendment.

Applying this test to the Double Jeopardy Clause of the Fifth Amendment, he declared that this right was not so fundamental as to be implicit in the concept of ordered liberty. A state may grant itself a right to a trial free from legal errors as reciprocal to the right of the accused. "There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before." As we shall see, the specific holding of **Palko** was overturned in 1969, but its formula for selective incorporation of the guarantees of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment remains valid to the present day.

The next step in our judicial analysis occurred in **Adamson v. California**, 332 U.S. 46 (1947). In that case, the defendant was accused of murdering his paramour. He declined to testify. Under California law, the defendant's failure to deny or explain the evidence against him could be commented upon by the prosecution and the judge and considered by the court and jury. In this case, the procedure was followed. The defendant was found guilty of murder in the first degree and sentenced to death. The conviction was affirmed by the state courts. Upon review by the Supreme Court of the United States, Justice Reed wrote a straightforward opinion for the majority, affirming the conviction and adhering to the established precedents that the Fifth Amendment Privilege against Self Incrimination had not been incorporated into the Due Process Clause of the Fourteenth Amendment.

The most intellectually challenging parts of **Adamson** were a dissenting opinion written by Justice Hugo Black and a concurring opinion written by Justice Felix Frankfurter. Justice Black contended that all elements of the first Eight Amendments to the Federal Constitution should be binding upon the states through the Due Process Clause of the Fourteenth Amendment. He advanced the theory of total incorporation of the Bill of Rights into the Due Process Clause. Justice Frankfurter responded that this theory

had been proposed to 43 judges of the Supreme Court in the 70 years since the adoption of the Fourteenth Amendment, and only one whom he termed an "eccentric exception" had indicated a belief that the Fourteenth Amendment was a shorthand summary of the first Eight Amendments. (He was referring to the elder Justice Harlan, not his colleague Justice Black). He suggested that the Due Process Clause of the Fourteenth Amendment had "an independent potency, precisely as does the Due Process Clause of the Fifth Amendment."

Justice Black was unconvinced. He argued that total incorporation was the better alternative, but stated that if he had to choose between the selective incorporation set forth in **Palko** and no incorporation at all, he would choose selective incorporation.

In the following years, selective incorporation largely fulfilled Justice Black's aspirations. In **Wolf v. Colorado**, 338 U.S. 25 (1949) the Court, in an opinion written by Justice Frankfurter, found the right to privacy at the core of the Fourth Amendment implicit in the concept of ordered liberty and therefore applicable to the states but declined to adopt the exclusionary rule of evidence that had existed in federal cases since 1914. However, in **Mapp v. Ohio**, 367 U.S. 364 (1961) the Court applied the exclusionary rule of **Weeks v. United States**, 232 U.S. 383 (1914) to state courts, thus fully incorporating the Fourth Amendment into the Due Process Clause of the Fourteenth Amendment.

Thus began a process in which the liberal members of the Court often led by Justices Black, Marshall, Douglas or Chief Justice Warren proceeded to incorporate almost all provisions of the Bill of Rights into the Fourteenth Amendment Due Process Clause. In **Robinson v. California**, 370 U.S. 335 (1962) the Eighth Amendment ban on cruel and unusual punishment was made applicable to the states. In **Gideon v. Wainwright**, 372 U.S. 335 (1963) the Sixth Amendment right to counsel in felony cases was made binding upon the states and incorporated into the Fourteenth Amendment. In **Malloy v. Hogan**, 378 U.S. 1 (1964) the Fifth Amendment right against self incrimination was incorporated. **Twining v. New Jersey and Adamson v. California** were overruled. The following year, in **Griffin v. California**, 380 U.S. 609 (1965) the Court forbade comment by the prosecution or the court upon the silence of the accused in a criminal case. That same year, the Court incorporated the Sixth Amendment right to confrontation in **Pointer v. Texas**, 380 U.S. 400 (1965). Three years later, in **Duncan v. Louisiana**, 391 U.S. 145 (1968) the Sixth Amendment right to trial by jury in felony cases was incorporated into the Fourteenth Amendment. Finally, in **Benton v. Maryland**, 395 U.S. 784 (1969) the ban on double jeopardy was incorporated from the Fifth Amendment to the Fourteenth. The specific holding of **Palko v. Connecticut** was overruled, but not its rationale for selective incorporation. By this time, the criminal procedure of the states had effectively been nationalized. In **Miranda v. Arizona**, 384 U.S. 436 (1966) the Court had prescribed detailed admonitions to be given prior to any interrogation of a criminal suspect. The Court had also held in **Griswold v. Conn.**, 381 U.S. 479 (1965) in an opinion written by Justice Douglas, that the specific guarantees in the Bill of Rights have emanations and penumbrae. The emanations from those guarantees read together with the Ninth Amendment create a zone of privacy into

which governmental power may not intrude. The specific holding was that a Conn. Statute, which made it a crime for married couples to use contraceptives or for any person to assist aid or counsel them in so doing, was a violation of that right to privacy. This case provided the philosophic underpinnings for the 1972 landmark case of **Roe v. Wade**, 410 U.S. 113 (1972) which invalidated numerous state criminal statues relating to abortion.

As the twentieth century drew to a close, virtually all elements of the Bill of Rights had been made applicable to the states by selective incorporation. Only the Second Amendment (right to bear arms) the Third Amendment (quartering of soldiers) and the Seventh Amendment (right to jury trial in civil cases in controversies exceeding twenty dollars) remained unincorporated.

Many conservatives and originalists were critical of The Warren Court and various liberal members thereafter (such as Justices Blackman, Souter, Ginsburg, Breyer and, at times, Justice O'Connor) for amending the Constitution by interpretation. The conservatives pointed to Article V which specifically provides for amending the Constitution. This article requires a two-thirds vote of both houses of Congress and ratification by three-fourths of the states to validate a proposed amendment. An alternative route to propose an amendment would be upon application of two-thirds of the legislatures of the several states the Congress shall call a convention to propose amendments. Such proposed amendments would also require ratification by the legislatures of three-fourths of the states or by conventions in three-fourths of the states. This process is extremely difficult to achieve and requires massive public support. It has been invoked successfully for only twenty-seven proposals since 1789. Consequently, conservatives would argue, amendments by interpretation should be avoided, and activist judges who would amend the Constitution by interpretation should not be appointed or confirmed say the conservatives with vehement emphasis.

During the latter part of the first decade of the twenty-first century, the Supreme Court's conservative group consisted of Chief Justice Roberts and Justices Scalia, Thomas and Alito. The so called liberal group consisted of Justices Stevens, Ginsburg, Breyer and, most

recently joined by, Justice Sotomayor. Justice Kenedy has served as the "swing vote" giving the majority to either group from time to time. Earlier in the decade, Justice Souter was a member of the liberal group. Upon his retirement, he was replaced by Justice Sotomayor.

A Second Amendment controversy arose in the District of Columbia when Dick Heller, a special police officer who was authorized to carry a handgun while on duty at the Federal Judicial Center, challenged the District's prohibition upon keeping of handguns in the home and the requirement that registered long guns be kept at home in a dysfunctional state by disassembling the weapon or use of a trigger lock. He challenged the District prohibition on Second Amendment grounds in a suit brought in Federal District Court. The District Court dismissed the action in 2004. On appeal, the Court of Appeals for the D.C. Circuit reversed in 2007, holding that the Second Amendment protects an individuals' right to possess firearms and that the city's total ban on handguns and the requirement that firearms in the home be kept dysfunctional even when necessary for self defense, violated that right.

On certiorari, the U.S. Supreme Court, in a lengthy opinion written by Justice Scalia, affirmed the judgment of the D.C. Circuit. **District of Columbia v. Heller**, 554 U.S. 128 S.Ct. 2783 (2008). He brushed aside the holding of **United States v. Miller**, 307 U.S. 174, 59 S.Ct. 816 (1939) that the Second Amendment protected the right to keep and bear arms for certain military purposes relative to the maintenance of a well regulated militia, but did not curtail the legislature's power to regulate the non-military use and ownership of weapons. He held that the Second Amendment guaranteed the individual right to possess arms for self defense. In this holding, he was joined by Chief Justice Roberts and Justices Kennedy, Thomas and Alito.

In an equally lengthy opinion, Justice Stevens dissented, joined by Justices Souter, Ginsburg and Breyer. Justice Breyer wrote a separate dissenting opinion in which Justices Stevens, Souter and Ginsburg joined. They were vehement in their disagreement with the departure from precedent and lack of deference for legislative judgment. However, this

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Beyond the Bar

West Place Animal Sanctuary: Helping our fine feathered friends

Peepers the Wild Turkey in treatment

Peepers after a full recovery

Learning and understanding the nature of law typically takes seven years of schooling, a library card so worn it needs a replacement monthly, and a social life that extends as far as a head nod to the bailiff as court documents are handed off. But, when it comes to the laws of nature pertaining to wildlife, one Rhode Island attorney knows that there isn't always a bar separating our two worlds.

Wendy Taylor Humphrey, full time attorney and partner in the Providence law firm Taylor Fay, P.C., has been taking in and caring for injured, orphaned, and unwanted farm animals for nearly a decade. As the number of animals needing help grew, she decided to offer her experience and compassion for needy animals to the Saunderstown-based Wildlife Rehabilitators Association of Rhode Island (WRARI). WRARI is a 501 (c)(3) non-profit organization providing medical care and rehabilitation to injured and orphaned wild animals and birds in Rhode Island since 1993. Licensed by the Department of Environmental Management (DEM), WRARI operates The Wildlife Clinic of Rhode Island, which trains and supports many of the state's licensed rehabilitators including Wendy. "The various rehabilitators each specialize in different types of wildlife, and we volunteer as extensions of the clinic. Since many more animals are delivered to the clinic than they have room or staff to handle, the additional wildlife is sent to the rehabilitators."

Wendy's initial focus volunteering for the clinic four years ago was baby songbirds, but when she realized the time commitment required by their multiple daytime feedings, she shifted her attention to the more self-sufficient Eastern Wild Turkeys and other water fowl. After the clinic became inundated with the turkeys, and with no other rehabilitators having focused on them, Wendy became their go-to rehabilitator. Luckily for the turkeys, and many other species of animals, Wendy had plenty of room for them at the wildlife sanctuary she runs out of her own property. "With the number of wildlife and farm animals always growing, I felt I could do even more to help them if I started a 501 (c)(3) non-profit organization, dedicated to their rehabilitation, and food and medical care, expenses which continue to rise year after year."

"Three years ago, with the help of my current law partner, Thomas J. Fay, we created the West Place Animal Sanctuary." With her husband taking on the role of handyman, and the help of a local girl cleaning stalls and hutches, Wendy now runs the sanctuary while also practicing as a full time attorney. "Currently there are over 40 animals being cared for at the property, although each spring, with the influx of wildlife, we can easily have 60 or 70 at a given time. Stringent records must be kept on each and every wild animal a rehabilitator cares for, detailing the history, care provided, and release or disposition information."

Wendy notes that wildlife can present in the form of an injured adult, an orphaned baby, or anything in between. The main goal is to treat the sick and the injured and allow them to heal using nutrition, shelter and medicine; the more complicated task thereafter is deciding where and how to release the wildlife. "Some animals require a 'soft' release, where they are set free on one's property, with shelter and food still available to allow them time to become comfortable in the wild. Others are taken to a location known to attract their species, so that they may be released, and learn from others like them."

Wendy hopes her non-profit will continue to allow her to provide care for animals in need through fundraising opportunities and charitable donations. While funding is necessary for a sanctuary to run successfully, Wendy's passion for and commitment to the animals is the driving force behind West Place. "I think anyone, no matter what their situation, would have the same answer. Sometimes work interferes with life, and sometimes life interferes with work, but if you want to make time to do it all and you believe in what you do, you find a way to balance it all out and enjoy the best of both worlds." ❖

Cyberbullying
An age old problem, a new generation

Hon. Brian P. Stern
Associate Justice, Rhode Island Superior Court

Thomas Evans
Third-year student, Roger Williams University School of Law

…cyberbullying brings new and unique challenges for the judiciary, the legislature and the executive branch of government.

A recent societal trend has made its way into the courtroom. As this trend makes its presence known in the legal arena new and unique challenges for the judiciary, the legislature and the executive branch of government emerge. This issue has even garnered an official name during its short presence in our society: cyberbullying. It is illustrated by instances of individuals willfully and repeatedly inflicting harm through the use of technology. Cyberbullying has recently attracted local and national media attention due to its role in a tragic series of events involving people across the nation. While generally thought of as a problem limited to schools and young people, the issue of cyberbullying has expanded beyond the schoolyard into the workplace and neighborhood. This article discusses an age old problem which has taken on a new form.

As cyberbullying spreads, it appears before Rhode Island courts more and more frequently. Cyberbullying occurs via online communications. In its most basic form, it is harassment, but it can be far worse than the traditional harassment that occurs when two co-workers call each other names, a former boyfriend or girlfriend refuses to accept the end of a relationship, or neighbors at an apartment complex get into an argument. Tormentors carry out cyberbullying by utilizing online social networking services such as Facebook,[1] Myspace,[2] Craigslist,[3] instant messaging[4] or one of the other many other online mediums which promote social interaction, even via standard email messages. (For clarity in this article, the person doing the cyberbullying is referred to as the tormentor).

Cyberbullying is a powerful and effective harassment tool. Tormentors are able to single out and attack their victims with a steady stream of online messages and interaction. With the click of a mouse button and a few keystrokes, tormentors can reach their targets any time of day or night from anywhere in the world. Tormentors are instantly able to spread lies and embarrassing information about their victims to hundreds and thousands of people at a time. This 24/7 widespread harassment can have a far more dangerous effect on the victim than traditional bullying.[5] The recent stories from across the country which report the terrible effects of cyberbullying serve to highlight the fact that it has developed into a real and prevalent problem.[6] The following is an example of cyberbullying brought before the Rhode Island Superior Court in the past year.[7]

Joan Emers came before the Superior Court requesting a Temporary Restraining Order against Barbara Mills. The Court deals with numerous requests for restraining orders between non-married individuals every week. Instances where individuals are threatened with guns, knives, and physical harm are common reasons motivating people to seek these restraining orders. This complaint, however, was very different in that the instrument used to harass Joan Emers was the online website Craigslist. Ms. Mills was in a dispute with Ms. Emers over a former boyfriend and wanted to "make Ms. Emers's life miserable." Ms. Emers alleged that Ms. Mills went on Craigslist and pretended to be Joan Emers. According to the complaint, Barbara Mills posted a listing on Craigslist that read:

> "My name is Joan Emers and I have to move from my apartment in Providence. I don't have much room in my new apartment and have to get rid of a 42" Plasma TV, a new couch and several tables. The television, couch and the tables are FREE to the first people who come to my apartment to get them. The apartment is located at 143 Miles Street, Apartment 4D, in Providence. **I am hard of hearing so please bang on the door loudly** so I can hear you when you come to get the FREE stuff!"

The result of the posting was almost immediate. Numerous people from Providence and the surrounding area showed up at Joan Emers's home and banged on her door demanding the free television and other items. When she told them she did not know what they were talking about, many of these people became very angry and upset, threatening her and using obscenities. This continued for several days with people arriving at all hours looking for the free items. Finally, Ms. Emers alleged that Barbara Mills asked her if she, "liked all the visitors that [Ms.

Rhode Island Law Day
Friday, April 29, 2011

Rhode Island Supreme Court Executive Order 2011-02

Law Day shall be commemorated on Friday, April 29, 2011. Rhode Island courts shall remain open, but all regular calendars shall be suspended in order that the state's judges and judicial officers, volunteer lawyers from the Rhode Island Bar Association, and members of the law enforcement community may take part in Law Day presentations in Rhode Island schools.

This year's Rhode Island Law Day classroom program topics include:
Posting Personal Information & Cyberbullying Sexting Same-Sex Marriage

Bar members interested in volunteering for Rhode Island Law Day and the Bar's other Law Related Education (LRE) programs are asked to contact the Bar's LRE Coordinator Allison Baker by telephone: 401-421-5740 or email: abaker@ribar.com.

Mills] sent to [her] home." Ms. Emers testified that it was at this point she realized who posted the message on Craigslist. The issuance of a restraining order by the Superior Court stopped future conduct by Ms. Mills. However, Ms. Emers testified that this type of harassment was much worse than even physical harm. She further testified that this Craigslist posting caused her psychological distress because she did not know when it might happen again.

The speed with which online mediums, specifically online social networking sites, has developed over recent years has far eclipsed the pace of the laws in place to protect against it (Even as this article is being written, Facebook announced the release of an email component to its social networking service). This rapidly developing area is challenging law enforcement, our educational institutions, employers, families, and social service organizations to develop effective ways to prevent and respond to cyberbullying. This article explores some of the challenges the judiciary faces in addressing cyberbullying. The primary challenge lies in determining the role that the court should take, along with deciding appropriate sanctions when cyberbullying enters the courtroom.

I. The Current State of Law

In recent years, more and more cases have come before the Rhode Island Superior Court involving disputes over online conduct. Most of these disputes arrive through legal channels designed to handle more traditional forms of harassment; through a no contact order or by an action for a civil temporary restraining order, for example.[8] As it is with any quickly emerging technology, existing laws need to be reviewed and revised to keep up. Here in Rhode Island, for example, there are two laws addressing electronic or cyber harassment, but they do not have a provision for the harassing conduct of minors outside of schools: R.I. Gen. Laws § 11-52-4.2 addresses cyberstalking and cyberharassment between adults and R.I. Gen. Laws § 16-21-26 addresses electronic bullying at school. As this problem expands, executive branch agencies, including those that deal in law enforcement, social service and education, are feverishly trying to develop the best practices to address the problem. The legislative branch has taken a keen interest in addressing this problem,

creating a very active Senate Commission dedicated to properly dealing with cyberbullying.[9] This Commission is charged with making recommendations to the General Assembly during the next legislative session about what additional laws should be introduced and/or if any modifications need to be made to existing statutes.

The age of computers and the internet have already provided us with several legal issues. Freedom of speech, invasion of privacy, electronic signatures, software piracy and even electronic harassment have all been hot button issues created by online conduct. During the past ten years, Rhode Island has addressed many of these issues by passing landmark legislation. Some examples include R.I. Gen. Laws Title 11 Chapter 52: Computer Crime, Chapter 52.1: Internet Misrepresentation of Business Affiliation, Chapter 52.2: Software Fraud, Chapter 52.3: Online Property Offenses. As mentioned above, Rhode Island already has two laws in place that address certain aspects of cyberbullying. These laws are an excellent start and their swift introduction and approval should be applauded. However, as cyberbullying continues to have an adverse effect on younger and younger members of society and the manner in which people interact online evolves, it is not hard to predict that changes to these laws and the introduction of further legislation will be necessary to continue to adequately address cyberbullying issues.

II. Role of the Judiciary

The role of the court is to determine if a law has been violated due to a cyberbullying issue, and to impose consequences on the tormentor based upon their actions. Like many other legal issues involving the conduct of individuals towards one another, there is not a cookie cutter solution for every case. Unfortunately, the vast majority of harassment cases are a direct or indirect result of interpersonal relationships gone bad, mental health issues, or substance abuse problems. With cyberbullying cases, courts are required to think outside the box to stop the bullying or harassment. The courts need to impose consequences ensuring harassment does not occur again and send an appropriate message that this conduct will be dealt with seriously and directly to deter future tormentors. While there is a clear ability for the court to

June 2011 Annual Bar Meeting

Designed as a means to promote Bar member health and wellness, the Rhode Island Bar Association and the Bar's Lawyers Helping Lawyers Committee, in partnership with Blue Cross/Blue Shield of Rhode Island, are offering a free-to-Bar-members, Wellness Center at the Bar's Annual Meeting on June 16th and 17th, 2011, at the Rhode Island Convention Center in Providence.

Located in the Rotunda, the Center features a range of free, interesting, healthful and educational activities including:

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…and Lawyers Helping Lawyers Committee members and Resource International Employee Assistance Services staff are available for Bar member consultations on a range of physical and mental health issues.

Thomas R. Bender, Esq. (l) and Michael J. Reed, Jr., Esq. were among the Defense Counsel of Rhode Island members and others who secured and donated over 700 pounds of food to the Rhode Island Community Food Bank during a holiday food drive this past December.

operate as an automaton to dole out the maximum punishment under our law, in many cases this does not fully and appropriately address the situation.

A case that came before the Superior Court recently helps illustrate this point.[10] Joan Thomas and Tammy Held are 18 year-old high seniors at a private school in Rhode Island. Both are good students attending college next year. They both appear to have loving families who fully support them. Joan Thomas came before the court requesting a Temporary Restraining Order against Tammy Held. She stated that she feared for her safety as a result of harassing messages Ms. Held posted on Facebook about her. Due to the nature of the allegations, rather than issuing an ex-parte restraining order, the court asked that Tammy Held be contacted by the Clerk and ordered to appear in court the following day to respond to these allegations.

During the restraining order hearing held the following day, both parties presented Facebook postings that clearly demonstrated these two young women were tormenting one another online. The content on the public website included provocative pictures and threats of harm. It was also clear from the evidence before the court that each feared for their safety and had met the elements for the issuance of a temporary restraining order in accordance with R.I. Super. Ct. R. Civ. P. 65(b). Two orders were issued prohibiting each of the women from harassing, interfering, threatening, or contacting the other person directly or indirectly. It was explained to them that the consequences for a violation of a civil court order is a contempt proceeding pursuant to R.I. Gen. Laws § 8-6-1. If one or both of them were found to have violated this order, sanctions, including, but not limited to, monetary penalties and/or incarceration may have resulted.

Approximately four weeks after the issuance of the restraining order, both parties filed requests to hold the other in civil contempt for violating the order's terms. An evidentiary hearing was scheduled to determine if any violation of the restraining orders occurred, and, if so, what were the appropriate consequences. On the morning of the hearing, both women came to court dressed professionally. They were accompanied by their parents, and one also brought her grandparents. Two successful, educated women

from good families who were preparing to attend college were in my courtroom accused of contempt of a court order, a serious charge.

The testimony that followed was very troubling. It was established to the court's satisfaction that both the young women had violated the terms of the restraining order to a differing degree. Joan Thomas posted more provocative pictures of Tammy Held on the internet with derogatory captions and forwarded them to hundreds of people. The evidence further showed that Ms. Held was so afraid of Ms. Thomas that she did not attend her own high school graduation. Tammy Held also posted extensive derogatory comments about Ms. Thomas's weight and underage drinking on Facebook. She also got into two physical altercations with Ms. Thomas at a local club and again at Scarborough Beach in Narragansett.

III. The Appropriate Sanctions

After the court found both young women in contempt, the Court was faced the difficult task of deciding what consequences would be appropriate to impose. In deciding how to rule, the court was reminded of Senior Circuit Judge Bruce Selya's wise and axiomatic saying in the matter of **Anderson v. Beatrice Foods Co.,** 900 F2d 388 (1990):

> The Judge should take pains to neither use an elephant gun to stay a mouse, nor to wield a cardboard sword if a dragon looms.

The range of sanctions for contempt is expansive and within the sound discretion of the trial justice. The rationale behind this great latitude and discretion is that the facts in every contempt situation are distinct and the trial judge considering live testimony and evidence is in the best position to weigh and balance the circumstances. There is not one correct or best way to punish every case of contempt.

In the case of cyberbullying, this is particularly true. To determine the appropriate consequences the court must consider a number of factors including but not limited to the: 1) relationship between the parties; 2) actual tormenting conduct 3) effect of that conduct on the victim; 4) presence of substance abuse or mental health issues; 5) tormentor has engaged in this type of conduct before

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Enjoying the festivities at the International Armenian Bar Association (IABA) reception held in Providence were (l to r), Bar members Margaret A. Laurence, Christine J. Engustian also IABA Vice Chair, Bar President Lise M. Iwon, and IABA Chair Edvin Minassian.

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March 3
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RI Law Center, Providence
12:45 p.m. – 1:45 p.m.
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March 8
Tuesday
Food for Thought
Estate Planning Issues When Representing "Snowbirds"
Casey's Restaurant, Wakefield
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1.0 credit

March 9
Wednesday
DWI Update – 2011
RI Law Center, Providence
2:00 p.m. – 5:00 p.m.
3.0 credits + 0.5 ethics

March 10
Thursday
Food for Thought
Immigration Consequences of Criminal Convictions
RI Law Center, Providence
12:45 p.m. – 1:45 p.m.
1.0 credit

March 15
Tuesday
Practical Skills Seminar
Planning for and Administering an Estate
Crowne Plaza Hotel, Warwick
9:00 a.m. – 3:00 p.m.
4.0 credits + 1.0 ethics

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Wednesday
Food for Thought
Immigration Consequences of Criminal Convictions
Holiday Inn Express, Middletown
12:45 p.m. – 1:45 p.m.
1.0 credit

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Residential Real Estate Closings
RI Law Center, Providence
9:00 a.m. – 3:00 p.m.
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Cyber Crimes: Bullying, Stalking, Sexting & Texting

Robert H. Humphrey, Esq.
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While Internet connectivity has many positive social benefits, it also has a dark side.

With the emergence of the Internet, an entirely new form of social interaction was created. Currently, social networking sites, such as Facebook, LinkedIn, MySpace, Twitter, and others allow millions of people throughout the world to interact and communicate with each other almost instantaneously. While Internet connectivity has many positive social benefits, it also has a dark side, as was most recently demonstrated in the case of the eighteen year old Rutgers University student who committed suicide after his college roommate posted a video, on the Internet, of the student engaged in a sexual liaison. This is just one example of a cyber crime. Although Rhode Island does not have a legal definition for cyber crime, cyber is a prefix meaning "computer" or "computer network," and it is the electronic medium in which online communication takes place.[1] Therefore, cyber crimes are crimes committed through the use of a computer or similar types of electronic devices including cellular phones.

I. Cyberbullying, Cyberstalking and Cyberharassment

Cyberbullying is defined as "when the Internet, cell phone or other devices are used to send or post texts or images intended to hurt or embarrass another child."[2] By this definition, cyberbullying only refers to minors, and it is a growing problem in middle schools and high schools. Cyberbullying is most prevalent among girls, as both victims and bullies.[3] Cyberbullying does not refer to adults whose similar actions are categorized as cyberharassment, although Rhode Island law does not make such a distinction. To address the growing problem of cyberbullying, a special Senate commission was established.[4]

R.I. Gen. Laws 11-52-4.2 defines cyberstalking and cyberharassment as:

Whoever transmits any communication by computer or other electronic device to any person or causes any person to be contacted for the sole purpose of harassing that person or his or her family…. For the purpose of this section, "harassing" means any knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, or bothers the person, and which serves no legitimate purpose. The course of conduct must be of a kind that would cause a reasonable person to suffer substantial emotional distress, or be in fear of bodily injury. "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct."[5]

The penalties for violating the cyberstalking and cyberharassment statute are as follows:

First Offense: The person is guilty of a misdemeanor, and "shall be punished by a fine of not more than five hundred dollars ($500), by imprisonment for not more than one year, or both."[6]

Second or Subsequent Offense: The person is guilty of a felony, and shall be punished "by imprisonment for not more than two (2) years, by a fine of not more than six thousand dollars ($6,000), or both."[7]

Cyberbullying and cyberstalking are forms of communication designed to harass the recipient. Often, victims may seek protective orders, restraining further harassment. If such a restraining order is in place and the victim is still harassed through cyberbullying or cyberstalking, the harasser faces additional penalties.

R.I. Gen. Laws 11-52-4.3 addresses the violation of a restraining order stating:

Whenever there is a restraining order or injunction issued by a court of competent jurisdiction enjoining one person from harassing another person, and the person so enjoined is convicted of the crime as set forth in section 11-52-4.2 [cyberstalking or cyberharassment] for actions against the person protected by the court order or injunction, he or she shall be guilty of a felony which shall be punishable by imprisonment for not more than two (2) years, or by a

fine of not more than six thousand dollars ($6,000), or both.[8]

II. Sexting and Child Pornography

The general definition of sexting is sending sexually-explicit photos, images and/or videos electronically. Sexting is only illegal when the sender or the recipient is a minor. Pursuant to the child pornography statute, a minor is defined as "any person not having reached eighteen (18) years of age."[9] There is currently no legal definition of sexting under Rhode Island General Laws. Instead, sexting is considered child pornography if it involves a minor.

The child pornography statute, R.I. Gen. Laws 11-9-1.3(c), states the following:

(1) "Child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct where:

(i) The production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(ii) Such visual depiction is a digital image, computer image, or computer-generated image of a minor engaging in sexually explicit conduct; or

(iii) Such visual depiction has been created, adapted, or modified to display an identifiable minor engaging in sexually explicit conduct.[10]

According to the current law, a minor who takes the picture or image for the purpose of sexting can be charged with "knowingly produc[ing] child pornography."[11] A minor who then sends the image through a text, e-mail, live Internet feed, or other means, to another person is "knowingly mail[ing], transport[ing], deliver[ing] or transfer[ing] by any means, including by computer, child pornography."[12] Any recipient who receives the image and then forwards it to another person is "knowingly reproduc[ing] child pornography."[13]

The penalties for violating the child pornography statute include "a fine of not more than five thousand dollars ($5,000), or imprisoned for not more than fifteen (15) years, or both."[14] Merely

having an image on a computer or cell phone amounts to "knowingly possess[ing] any…material that contains an image of child pornography."[15] The penalties for knowingly possessing child pornography include "a fine of not more than five thousand dollars ($5,000), or imprisoned not more than five (5) years, or both."[16]

There are affirmative defenses to a potential violation of the child pornography statute. An affirmative defense to a charge of violating the child pornography statute by knowingly producing any child pornography, knowingly mailing, transporting, delivering or transferring by any means, including by computer, any child pornography, and/or knowingly producing child pornography by any means, including a computer, is as follows:

> (i) The alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and
>
> (ii) Each such person was an adult at the time the material was produced; and
>
> (iii) The defendant did not advertise, promote, present, describe or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct.[17]

An affirmative defense to a charge of violating the child pornography statute by knowingly possessing any book, magazine, periodical, film, videotape, computer disk, computer file or any other material that contains an image of child pornography is as follows:

> (i) [The defendant] possessed less than three (3) images of child pornography; and
>
> (ii) Promptly and in good faith and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy of it:
>
> (A) Took reasonable steps to destroy each such image; or
>
> (B) Reported the matter to a law enforcement agency and afforded that agency access to each such image.[18]

III. Texting

Texting, although much less serious than sexting, is also illegal under Rhode

Island General Laws. Pursuant to R.I. Gen. Laws 31-22-30 (b) "no person shall use a wireless handset to compose, read or send text messages while operating a motor vehicle on any public street or public highway within the state of Rhode Island."[19] A wireless handset refers to any "portable electronic or computing device, including cellular telephones and digital personal assistants (PDAs), capable of transmitting data in the form of a text message."[20]

The penalty for texting, while operating a motor vehicle in Rhode Island, is a fine of eighty-five dollars ($85). A second conviction is punishable by a fine of one hundred dollars ($100). For a third and/or subsequent conviction a person is subject to a fine of one hundred twenty-five dollars ($125). The Rhode Island Traffic Tribunal has jurisdiction in connection with texting violations.[21]

In October of 2010, the Commonwealth of Massachusetts passed its own texting law. The Massachusetts texting law specifically targets teen drivers. Pursuant to M.G.L.A. Ch. 90, § 8M, "no person under 18 years of age shall use a mobile telephone, hands-free mobile telephone or mobile electronic device while operating a motor vehicle on any public way."[22] A "mobile electronic device" includes "any hand-held or other portable electronic equipment capable of providing data communication between two or more persons, including, without limitation, a mobile telephone, a text messaging device, a paging device, a personal digital assistant, a laptop computer, electronic equipment that is capable of playing a video game or digital video disk, equipment on which digital photographs are taken or transmitted or any combination thereof, or equipment that is capable of visually receiving a television broadcast."[23]

The penalties for texting in the Commonwealth of Massachusetts are severe when compared to the penalties in Rhode Island. For a first offense, the penalties include a one hundred dollar ($100) fine and a sixty (60) day license suspension. In addition, before the teenager driver can have his/her license reinstated, the driver must complete "a program selected by the registrar that encourages attitudinal changes in young drivers."[24] A second offense includes a two hundred and fifty dollar ($250) fine and a license suspension of one hundred

and eighty (180) days. A third and/or subsequent convictions are punishable with a five hundred dollar ($500) fine and license suspension for one (1) year.[25]

As the Internet continues to permeate our daily lives and increasingly forms our social interactions with others, it is of the utmost importance to consider the criminal liability potentially associated with the use of the Internet. Hopefully, this article will be of assistance to practitioners involved in this emerging area of the law.[26]

ENDNOTES

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8 *R.I. Gen. Laws § 11-52-4.3(a)*
9 *R.I. Gen. Laws § 11-9-1.3(c)(3)*
10 *R.I. Gen. Laws § 11-9-1.3(c)(1)(i), (ii) and (iii)*
11 *R.I. Gen. Laws § 11-9-1.3(a)(1)*
12 *R.I. Gen. Laws § 11-9-1.3(a)(2)*
13 *R.I. Gen. Laws § 11-9-1.3(a)(3)*
14 *R.I. Gen. Laws § 11-9-1.3(b)(1)*
15 *R.I. Gen. Laws § 11-9-1.3(a)(4)*
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23 *M.G.L.A. Ch. 90 § 1*
24 *M.G.L.A. Ch. 90 § 8M*
25 *M.G.L.A. Ch. 90 § 8M*
26 *The authors express their deep appreciation for the assistance of Kathleen Child and Jodi Van Sprang in the preparation of this article.* ❖

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Litigation Financing

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innocuous requirement of the Assurance of Discontinuation into a trap for unwary borrowers. The Assurance of Discontinuation calls for an itemization of the total amount to be repaid, broken down into six-month increments.[44] Both the U.S. Claims and CaseFunding LLAs express these payoff amounts in a straightforward manner, with both LFCs breaking the payoff numbers down further into monthly totals, thus meeting both the letter and the spirit of the agreement.[45] LawCash, however, quotes the amount due if paid on each of four dates, at six-month intervals:

Date of Payment to LAWCASH If payment is made on	Amount Due
2/26/2010	$64,512.73
8/26/2010	$75,377.88
2/26/2011	$87,896.38
8/26/2011**	$102,699.78

***After this date, monthly fees continue to accrue until LAWCASH is paid in full. This chart includes example dates only. Dates in-between and after those shown may reflect other pay-off amounts. Always contact LAWCASH for your exact pay-off amount.*[46]

The language following the asterisks is deceptively simple. A fair reading would suggest that interest and payoff amounts are interpolated on a linear basis and that payments made between the window dates will be pro-rated. However, the trap is sprung one paragraph later: "[t]he monthly use fee is charged from [the date of the advance] *until the end of the 5 month interval during which payment of proceeds is made to LawCash*."[47] This carefully buried language derogates from the seemingly clear disclosure page. In effect, what happens is that if the borrower pays any time during the first six-month period, he or she will pay the amount contained within the six month window. If paid *one day* later, thus tipping over into the 12 month window, the *entire* amount in that window is owed, just as if the money was used for twelve months, rather than six months and one day.

The difference in effective interest rate is stunning. A plaintiff in this scenario, who borrowed $47,000, would repay $64,512 on the last day of the six-month window, and $75,377 just one day later, taking the APR from 74.5% to near-

AP&S Awards Diversity Scholarship

Muska Nassary receiving the Adler Pollock & Sheehan Diversity Scholarship from AP&S managing partner Mark O. Denehy.

Adler Pollock & Sheehan P.C., awarded its $10,000 Diversity Scholarship to Muska Nassery of Eastham, Massachusetts. Muska, a first year student at Suffolk Law School, is a native of Afghanistan whose family brought her to the U.S. to obtain an education that would not have been available to her in Afghanistan. Muska excelled in both high school and college. Her writing was so outstanding that she was selected during her sophomore year at Bryn Mawr College as one of the only 50 people in the country to participate in the National Book Foundation writing program. Before starting law school, Muska volunteered as a copy editor for the National Lawyers Guild, a GED tutor for the Cape Cod Literacy Council, and an intern for the Barnstable Family and Probate Court. Developed as part of Adler Pollock & Sheehan's Diversity Plan, the scholarship encourages and assists a minority student who has demonstrated academic excellence and a commitment to the community, is attending law school and successfully enters the practice of law, with the ultimate goal of diversifying the legal profession as well as the firm. The financial needs of the applicant, as well as the applicant's desire to work and reside in Massachusetts or Rhode Island (where the firm's home office is located) upon graduation, are contributing factors in the selection.

ly 120%.[48] This is why it is impossible for a plaintiff-borrower (or his or her attorney or accountant) to calculate the APR at the time the LawCash LLA signing, because the APR varies greatly depending on when the loan is repaid.

There are other terms in the LLAs that also violate the spirit, if not the letter, of the ALFA guidelines/Assurance of Discontinuation. Both the CaseFunding and LawCash LLAs contain a "waiver of any defense to payment."[49] CaseFunding's LLA calls for "liquidated damages of twice the amount due" in the event that the plaintiff-borrower breaches the agreement.[50] LawCash's LLA contains an express waiver of the right to consolidate actions or participate in a class action.[51] The *in terrorem* purpose of these provisions is clear.

Despite the promise of ALFA's advertising, there is still reason to be concerned that LFCs are preying upon plaintiffs. It would appear that, rather than maintaining "the highest ethical standards and fair business practices within the legal funding industry," ALFA members are working to avoid regulation and maintain abusive interest rates.[52]

ALFA has proven a powerful lobbying force. After an Ohio court ruled that litigation advances were void as a form of "champerty and maintenance,"[53] ALFA successfully lobbied the state legislature to overturn Ohio's rule against champerty and maintenance.[54] ALFA's press release hailed the new Ohio law as "consumer-focused."[55] However, when the LFC run by its chairman fails to follow the guidelines embraced in ALFA's own advertising, it is hard to believe that consumer protection lies at the heart of ALFA's efforts.

The litigation financing industry is no more transparent today than when Perry Walton made his first loan. When a state court rules for the plaintiff in a claim against an LFC, rather than comply with that state's ruling, LFCs simply opt not to do business there.[56] Competition has not served to bring down costs for the simple reason that borrowers need adequate information in order to choose between vendors. When APRs are difficult, if not impossible, to calculate, and terms vary greatly from LLA to LLA, there is no meaningful way for a plaintiff to comparison shop.

Even the language used in LFC advertising is designed to mislead plaintiff-borrowers. On their websites, LFCs offer

"litigation funding" or "plaintiff financing," words which certainly indicate the concept of a loan to a plaintiff. When it's time to sign on the dotted line, however, the LLA will be titled a contingent proceeds purchase agreement or some similarly obscure term. The word lender will not appear in the LLA. Instead, the LFC is dubbed the purchaser. These contracts are carefully drafted to sidestep usury statutes, but their language further serves to keep borrowers in the dark. Litigation funding is not lending in the same way that gaming is not gambling. They are distinctions without a difference. It is time for state legislatures to step in to protect their constituents from those members of the litigation financing industry who would prey on plaintiffs.

Because the litigation financing industry has proven itself unwilling to self-regulate, simple, effective legislation is needed. Instead of designing a licensing and regulatory framework of whole cloth, a remedial statute could be incorporated into a state's existing law, to simply bring LFCs within the purview of that state's usury statute.

If LFCs operated within the boundaries of each state's usury statutes, further regulation would be unnecessary. Loans would be available to plaintiffs at fair pricing and, despite their cries to the contrary, LFCs would be able to make a decent profit. It's a simple, effective fix.

The proposed remedial statute would be comprised of two parts: 1) a definition section which clearly indicates what constitutes an LLA; and 2) a statute requiring that any lending tied to litigation, whether contingent or not, be construed as a loan within the purview of the existing usury statute.

An example of such a remedial statute for Rhode Island follows:

Definitions: "Litigation Lending Agreement" (LLA): Any agreement whereby monies are paid to parties to civil litigation (litigants) in consideration for a litigant's agreement to repay such monies (with or without interest, one-time charges, use fees, or any other add-on charges) from proceeds of the litigation. Not included in the definition of an LLA are advancements of expenses of litigation made by attorneys on behalf of their clients, as permitted by Rule 1.8(e) of the Rhode Island Rules of Professional Conduct.

Regardless of:

(a) whether an LLA characterizes itself as a "loan," an "advance," an "investment," an "assignment of proceeds," or any other characterization,

(b) whether monies to be repaid under an LLA are called "interest," "use fees," or any other term,

(c) whether the amount received by the litigant under the LLA otherwise exceeds any monetary limit for loans falling within Rhode Island's usury statute, and

(d) whether the obligation on the part of the litigant to repay monies is contingent upon the outcome of the litigation, all payments by litigants under LLAs shall be considered interest on loans within the purview of Title 6, Chapter 26, Section 2 of the Rhode Island General Laws, entitled, "Maximum rate of interest."

Usury statutes vary greatly from state to state. Most states set interest rate ceilings, with the limit established by the legislature. A handful of states, including Idaho, Oregon, Nevada, New Hampshire and Wyoming, have no laws at all against usury.[57] It is fair to view these differences as an expression of each state's public policy. By utilizing a state's existing usury statute, the suggested remedial statute implicitly embodies the public policy of that state towards lending. Because it is consistent with existing public policy, passage of the remedial statute should be far easier than attempting to establish an entirely new regulatory framework. Unlike a regulatory program, this statute will rein in the excesses of litigation financing without costing a dime to administer.

The litigation financing industry is sure to decry this proposal as the end of litigation funding. Any prior attempt to construe LLAs as usurious has been met with strong resistance and the assertion that plaintiff-borrowers will be denied access to financing.[58] However, a look at the history of the industry belies this argument. After the Ohio case, which cited interest rates of 180%-280%, it was claimed that efforts to regulate LFCs would result in plaintiffs being denied access to financing. However, eight years later, U.S. Claims is entering LLAs at an APR of 27%, (Rhode Island's usury threshold is 21%) and the number of LFCs has increased substantially.[59] Even without access to the sort of industry

statistics that would be available if LFCs were regulated, it would appear that litigation lending can still be profitable if conducted in accordance with usury statutes.

Every day, in every state, persons who have been injured by others' negligence turn to LFCs for desperately needed funds. It is only reasonable that they not be further victimized by usurious interest rates.

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33 *Susan Lorde Martin, The Litigation Financing Industry: The Wild West of Finance Should be Tamed, Not Outlawed, 10 Fordham J. Corp. & Fin. L. 55, 55 (2004).*
34 *Press Release, Office of New York State Attorney General Eliot Spitzer, Personal Injury Cash Advance Firms Agree to Reforms (Feb. 28, 2005) available at http://www.oag.state.ny.us/media_center/2005/feb/feb28a_05.html (last accessed Oct. 17, 2010).*
35 *Dee McAree, Legal Cash-Advance Businesses Form Group, The National Law Journal, March 28, 2005 at 4.*
36 *Assurance of Discontinuance Pursuant to Executive law §63(15), Att'y. Gen. Of N.Y., Bur. Of Consumer Frauds and Prot., In re: Plaintiff Support Services Inc., (Feb. 17, 2005).*
37 ***Id.***
38 *American Legal Finance Association, http://www.americanlegalfin.com/FactsAboutALFA.asp (last visited Oct. 17, 2010).*
39 ***Id.*** *(pull down "People Are Saying" menu and click "ALFA Advertisements").*
40 *LawCash Funding Agreement,* ***supra*** *note 18; CaseFunding Contingent Proceeds Purchase Agreement (April 10, 2009) (on file with authors); U.S. Claims Purchase Agreement, May 13, 2009) (on file with authors).*
41 *CaseFunding Contingent Proceeds Purchase Agreement (April 10, 2009) (on file with authors).*
42 *LawCash Funding Agreement,* ***supra*** *note 18.*
43 ***See supra*** *note 42.*
44 ***See*** *Assurance of Discontinuance,* ***supra*** *note 37.*
45 *U.S. Claims Purchase Agreement, May 13, 2009) (on file with authors); CaseFunding Contingent Proceeds Purchase Agreement,* ***supra*** *note 43.*
46 *LawCash Funding Agreement,* ***supra*** *note 18.*
47 ***Id.****, emphasis supplied.*
48 ***Id.***
49 *LawCash Funding Agreement,* ***supra*** *note 18; CaseFunding Contingent Proceeds Purchase Agreement,* ***supra*** *note 43.*
50 *CaseFunding Contingent Proceeds Purchase Agreement,* ***supra*** *note 43.*
51 *LawCash Funding Agreement,* ***supra*** *note 18.*
52 *ALFA website,* ***supra*** *note 39.*
53 ***Rancman v. Interim Settlement Funding Corp.****, 789 N.E.2d 217 (Ohio 2003).*
54 *ALFA website,* ***supra*** *note 39 (pull down "About ALFA" menu, click "Press Releases").*
55 ***Id.***
56 ***See*** *http://www.oasislegal.com "Not available in Arkansas, Kansas, Maryland or North Carolina."*
57 *Barksdale,* ***supra*** *note 13 at 725.*
58 ***See*** *Martin,* ***supra*** *note 11.*
59 *U.S. Claims Purchase Agreement, May 13, 2009 (on file with authors).* ❖

The Selective Incorporation

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involved the District of Columbia, a territory governed by federal law.

It was not until the next Second Amendment case that the selective incorporation doctrine was invoked in the case of **Otis v. McDonald et al. v. City of Chicago, Ill. et al.**, 561 U.S. 130 S.Ct. 3020 (June 28, 2010). The plaintiffs were residents of the City of Chicago and the Village of Oak Park, a suburb of Chicago. They, together with the National Rifle Association, brought suit in Federal District Court (N.D. Ill) against both municipalities seeking to invalidate ordinances which effectively banned the possession of handguns by private citizens even within the home. These ordinances were similar to those declared invalid in **Heller**. The three actions were assigned to the same judge who rejected the plaintiff's constitutional claims based on 7th Circuit precedent. On appeal, the Seventh Circuit affirmed, denying the plaintiff's assertion of a Fourteenth Amendment Privileges and Immunities Clause claim. The Court of Appeals relied on the narrow interpretation of that Clause in the **Slaughterhouse Cases**, 83 U.S. (16 Wall) 36, 21 L.Ed 394 (1873). It did not consider the argument that the Second Amendment should be selectively incorporated into the Due Process Clause of the Fourteenth Amendment.

On certiorari, Justice Alito wrote the opinion of the Court upon which the judgment was based. He began by acknowledging that the Seventh Circuit had relied upon **Miller v. Texas**, 153 U.S. 535 (1894); **Presser v. Illinois**, 116 U.S. 252 (1886); and **United States v. Criukshank**, 92 U.S. 542 (1876) as well as the **Slaughterhouse Cases**. In rejecting the plaintiffs' privileges and Immunities Clause argument, he declined to disturb this line of cases, but pointed out that they all preceded the period where the Court began the process of selective incorporation of elements of the Bill or Rights into the Due Process Clause of the Fourteenth Amendment. He therefore concluded that they would not preclude such an analysis in this case. He then devoted much of his 44 page opinion to the history of selective incorporation and the historical basis of the right to bear arms for self defense. He reached the conclusion that the right to bear arms for self defense is fundamental and therefore meets the test for incorporation into the Due Process Clause of the Fourteenth Amendment. Thus the personal right to bear arms recognized in **Heller v. District of Columbia** became applicable to the states. Justice Thomas, in a 55 page opinion, concurred in part and concurred in the judgment. In his opinion, the Privileges and Immunities Clause was the most straightforward path to the conclusion. He would have revisited the narrow holding of the **Slaughterhouse Cases**. Justice Scalia agreed with this majority, but wrote separately to respond to Justice Stevens' dissent. Justice Stevens, in his 57 page dissent, reemphasized his disagreement with **Heller**. He argues that the Second Amendment did not create a personal right, but was designed to prevent the elimination of the militia as set forth

in **United States v. Miller**, 307 U.S. 174 (1939). He noted the long history of firearms regulation by the states and argued that incorporation of the Second Amendment into the Due Process Clause took a much greater toll on state sovereignty than the incorporation of other elements of the Bill of Rights during the Warren Court years and beyond.

Justice Breyer, joined by Justices Ginsburg and Sotomayor, wrote a 51 page dissent. He asserted, as did Justice Stevens, that the Second Amendment was not intended by the framers to protect a private right of self defense. He further contended that history does not support the conclusion that such a right is fundamental. It does not meet the test for selective incorporation. In all, the total length of opinions in support of and in opposition to the judgment reached 202 pages. This illustrates the controversial intellectual path to include the Second Amendment into the Incorporation Hall of Fame.

Thus, as the first decade of the twentieth century draws to a close, we observe a complete role reversal between the conservative and liberal wings of the Court. The Second Amendment right to bear arms is first declared to be a personal right in **Heller** and then selectively incorporated in **Otis McDonald v. Chicago** by the conservative justices over the vigorous dissent of the liberal justices. In his concurring opinion, Justice Scalia reaffirms his misgivings about Substantive Due Process as expressed in numerous dissenting opinions including his vigorous dissent in **Planned Parenthood of Southeastern Pa. v. Casey**, 505 U.S. 833 (1992) on the issue of abortion. He disputes the philosophic and legal basis for Justice Stevens' analysis of the doctrine of **Palko**. The debate between Justice Scalia and Justice Stevens evokes memories of the debate between Justices Frankfurter and Black in **Adamson v. California** (Stevens in the role of Frankfurter and Scalia in the role of Black, highly unlikely for either).

For many years, the conservative members of the Court (in prior years led by Justices Frankfurter, Harlan, Stewart, White and Rehnquist and, more recently, by Justices Scalia, Thomas and Alito) have counseled their colleagues to accord great deference to the elected branches of government. In his memorable dissent in **Casey**, Justice Scalia recalls the dreadful consequences of the first substantive due process case **Dred Scott v. Sanford**, 19 How 393 (1857) and decries the removal of a controversial issue from the democratic process to the strait jacket of constitutional limitation.

Although the right to bear arms is not as explosive an issue today as was slavery in 1857, it is more comparable to the extremely controversial issue of abortion which, prior to **Roe v. Wade**, 410 U.S. 113 (1973) was purely a matter of state regulation as was the possession and use of firearms before **Otis McDonald v. Chicago**, (2010).

In **Casey** 506 U.S. at 979 Justice Scalia expressed the following opinion:

"The States may if they wish permit abortion on demand, but the Constitution does not *require* them to do so. The permissibility of abortion, and the limitations upon it are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting…where reasonable people disagree the government may adopt one position or the other" [emphasis added].

In a comparative defense of state and local power Justice Stevens in his dissent in **McDonald** sets forth at slip. op. 44:

"From the early days of the Republic, through the Reconstruction era, to the present day, States and municipalities have placed extensive licensing requirements on firearm acquisition, restricted the public carriage of weapons and banned altogether the possession of especially dangerous weapons, including handguns." He goes on at p. 48 to declare:

"The structure and limitations of federalism…allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort and quiet of all persons…The promotion of safety of persons and property is unquestionably at the core of the State's police power" [cit. and quotation marks omitted].

It is apparent that our Supreme Court is as badly fractured on this issue as it has been on other controversial issues relating to the Selective Incorporation process. We may only fervently hope that the Court will be guided by such principles in its future determinations as to reach unanimous conclusions that will avoid result oriented decisions to the greatest extent possible in a human tribunal. ❖

Cyberbullying

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with this victim or others; 6) age and maturity of the tormentor and the victim; and 7) likelihood the tormentor will respond to alternative educational, substance abuse, or mental health treatment.

After weighing and considering these factors, in the light of the evidence presented, the court must then decide upon consequences to serve the following goals: 1) stop the violative behavior; 2) educate and rehabilitate the tormentor so this conduct will not occur in the future with this or any other victim; and 3) send a clear message to other tormentors that this behavior is not appropriate and will not be tolerated in civilized society.

After considering the evidence at the hearing and considering the facts of this contempt and the factors used to arrive at appropriate consequences, the court arrived at a pronged punishment approach for both women. Rather than imposing the maximum punishment authorized by statute, incarceration at the Adult Correctional Institution, the court chose an alternative ruling with consequences the court believed would serve to both punish the offending conduct and educate the women. It was important to deter them from continuing their unacceptable behavior towards each other while offering them some education as to how to behave in society.

In particular, it was apparent that it was crucial for these women to understand just how fortunate they were. They are both healthy, have loving families and a chance to pursue all the options and benefits of a higher education. The court made clear the severity of cyberbullying by sentencing each girl to three days at the Adult Correctional Institution. After that sentence sunk in for a moment, the court then explained that it would stay the jail sentences if certain conditions were met. The women was required to have absolutely no contact with each other and complete thirty hours of volunteer community service during the summer break at a not for profit agency that serves less fortunate women.

At the conclusion of the sentencing, both women were visibly upset, but relieved that they had an opportunity to avoid going to jail. The parents of both women were also very pleased and encouraged. Both expressed their sincere hope this approach would finally resolve their daughters issues as both tormentor and victim. Even though the jail sentence was stayed, the parents expressed concern that their daughters may have acted tough, but could not emotionally handle serving time in jail. They also related that any monetary fine would not have much of an impact, because, in the end, it would be the parents that paid the fine. Finally, the parents were hopeful that by performing volunteer work, for people less fortunate it would make their daughters see the forest through the trees as they enter adulthood.

After over six months, the result is positive. Both women completed the volunteer work, are in college and there have been no further complaints by either woman regarding the other. Time will tell whether these women have learned the appropriate long term lessons intended to be taught by the court.

IV. Conclusion

Cyberbullying is a new method for carrying out old fashioned harassment. In the ever changing age of computers and the internet, this problem will continue and become more complex as technology evolves. The executive, legislative and judicial branches of government must continually evaluate current best practices to comprehensively address this issue. As for the judicial branch, these best practices must include sentencing benchmarks and must assure that a just punishment is meted out. Flexibility is important in an ever changing world. These decisions should punish the conduct of tormentors, deter them from engaging in future cyberbullying acts, and provide an adequate deterrent to other, would be, tormentors. It is also crucial that tormentors receive the necessary and proper education along with other ancillary social services so that they may completely understand the harmful nature of their actions.

ENDNOTES

1 www.facebook.com *is a website geared towards social interaction. Members create 'profiles' and interact with each other by sending messages, posting pictures, and following events businesses and social groups online.*

2 www.myspace.com *is a social network similar to facebook.com where users interact with each other via content posted to the pages that they create.*

3 www.craigslist.com *is a website that has many aspects and functions, one of which is to act as an online trading post where people can buy, sell, or trade items.*

4 *"Instant Messaging" is an online function that allows users to communicate with each other in real time by typing and sending messages to one another instantaneously.*

5 *A 2008 Psychiatric Times article,* CYBER BULLYING: RECOGNIZING AND TREATING VICTIM AND AGGRESSOR, *2008: 25(11) by Robin M. Kowalski, PhD notes that "although research on traditional bullying provides a useful starting point, it is important to recognize that cyber bullying is not the same thing as traditional bullying… The effects of cyber bullying are serious and, in some cases, life threatening." A more recent study in the July issue of the Archives of General Psychiatry,* PSYCHOSOCIAL RISK FACTORS ASSOCIATED WITH CYBERBULLYING AMONG ADOLESCENTS: A POPULATION BASED STUDY, *2010: 67(7): 720-728 further highlights the emotional and physical effects of cyberbullying on both the bully and the victim.*

6 *The deaths of Megan Meier (who tragically hanged herself after being bullied by an adult neighbor over the website, Myspace) and Tyler Clementi (the college freshman who recently took his own life after his roommate broadcast his romantic interludes over the internet via a streaming webcam) are cases that highlight the tragic results of cyberbullying and have received national media attention in recent years.* www.allnewswire.com/cyberbullying-the-hate-torment-and-death-virus. *A short media search will turn up many other cyberbullying stories relating various degrees of harm suffered by the victims.*

7 *Although this is a public filing, the parties' names have been changed and the facts slightly altered out of respect for the parties and the limited space available in this article.*

8 ***See*** *R.I. Gen. Laws Section 12-29-8.1 and Rhode Island Superior Court Rule 65(b), respectively.*

9 *The 11 members of this commission are; R.I. Senator and Chairman John Tassoni, Jr., R.I. Senator Beatrice A. Lanzi, R.I. Representative Deborah Ruggiero, Hon. Haiganush R. Bedrosian, Chief Justice of the R.I. Family Court, Colonel Brendan P. Doherty, Superintendent of the Rhode Island State Police, Robert O'Brien, Superintendent of Smithfield Schools, Dr. Lawrence P. Filippelli, Assistant Superintendent of Scituate Schools, Dr. Jacqueline Striano, Assistant Principal of Western Hills Middle Schools, Gina Picard, Principal of Robert F. Kennedy School, Christine Caron, Program Director of TalkWorks and Cynthia Richard, Dean of LaSalle Academy.*

10 *As with the above mentioned case, even though this is public record, names and circumstances have been changed out of respect for the parties.* ❖

Counting to Ten Really Does Work

Deep Breaths: Slow racing thoughts and relax knotted muscles by breathing deeply and slowly. Put one hand on your stomach. Breathe in deeply counting to five, hold your breath for a count of five, breath out for a count of five and repeat ten times. Breathe in through your nose and exhale through your mouth.

(Brought to you by the members of the Rhode Island Bar Association's Lawyers Helping Lawyers Committee)

In Memoriam

John R. Cosentino, Esq.

John R. Cosentino, 84, of Smithfield, RI, passed away on Thursday January 13, 2011. Prior to moving to Smithfield, he resided in North Providence for 32 years and was a summer resident of Bonnet Shores in Narragansett for 47 years. John was the beloved husband of Lena E. Aloia Cosentino, whom he was married to for over 59 years. He was born in Bristol, RI, and was the son of the late John and Rosalie Brunelli Cosentino.

Mr. Cosentino graduated from LaSalle Academy High School in 1944. The day after graduating high school, he voluntarily enlisted in the U.S. Navy, serving honorably in WW II, Pacific Theater aboard the U.S.S. Clytie and the U.S.S. Euryale. John graduated from Providence College and received his law degree from Boston College Law School in 1951. He was a practicing attorney in the State of Rhode Island for over 50 years. During his career, he served as Assistant Attorney General for the State of Rhode Island and as Legal Counsel for the North Providence Zoning Board. He was founding member and past president of the Alpine Country Club. He was a former member and past president of the Italo-American Club, as well as a former member of the Thomas L. Ryan American Legion Post, where he previously served as Commander. He also previously served as a Judge Advocate for the Department of RI American Legion. John was faithful communicant of St. Augustine's Church in Providence, RI.

Besides his wife, John is survived by his cherished children: Robert J. Cosentino, Esq. and his wife Renee of Cranston; David C. Cosentino of Johnston; Linda M. DiSanto and her husband Salvatore of Scituate; and Kathy A. Cosentino of Providence. He is also survived by his brother Louis J. Cosentino, Esq. and his wife Rita of Providence.

Leonard Decof, Esq.

Leonard Decof, 86, a resident of Providence, RI and Palm Beach Gardens, FL, passed away on December 31, 2010. He was the beloved husband of Veda I. Gross Decof and the late Adele R. Decof. Born in Providence, he was a son of the late Morty and Rose Metz Decof. Mr. Decof was a captain in the United States Marine Corps and served during World War II in the Pacific Theatre Operations in Guam from and also served stateside in Parris Island.

Mr. Decof was a 1948 graduate of Visit Yale University and Harvard Law School in 1953. Mr. Decof practiced law in Providence, Rhode Island for over 50 years. He established the first law firm devoted to plaintiffs' causes in 1975. His son, Attorney Mark B. Decof, became his partner in 1980, and Mr. Decof practiced law until his death. Mr. Decof was a member of the American Bar Association, Rhode Island Bar Association, and the Rhode Island Association for Justice. He was a Fellow and past Dean of the International Academy of Trial Lawyers, a Fellow of the American College of Trial Lawyers, the International Society of Barristers, and a Fellow of the Inner Circle of Advocates. He was a Diplomate of the American Board of Trial Lawyers, and was a two time recipient of the Rhode Island Bar Association Award of Merit for Outstanding Service to the Public and the Profession. Mr. Decof lectured for decades to lawyers, legal organizations, hospitals, physicians and medical organizations, including the American Bar Association, National Institute for Trial Advocacy, Practicing Law Institute, Association of Trial Lawyers of America, American Association for Justice, American College of Trial Lawyers, International Academy of Trial Lawyers, State Bar Associations throughout the United States, Harvard Law School, Yale Law School, Boston University Law School, and Suffolk Law School. He was the Chairman, Administrator, and Principal Lecturer for the Rhode Island Supreme Court Clerkship Program, and was a Member and Chairman of the Rhode Island Board of Bar Examiners. Mr. Decof authored several legal publications, including *Preparation of a Case for Trial* and a textbook entitled *Opening Statements*. He tried cases in state and federal courts not only in RI, but throughout the United States. He also successfully argued cases in appellate courts, both state and federal, throughout the U.S. and successfully argued three cases before the U.S. Supreme Court, establishing precedents in the areas of civil rights and antitrust.

In 1991, he was asked by Governor Bruce Sundlun to represent the State of Rhode Island to prosecute the major civil claims arising from the credit union failure and crisis in Rhode Island. On behalf of DEPCO, he recovered hundreds of millions of dollars and was publicly and officially commended for his work by Governor Lincoln Almond in February 2001.

Mr. Decof, along with his son and daughter, founded the Adele R. Decof Foundation in memory of Mrs. Decof. Since 2000, the Foundation has established and supported cancer centers at Roger Williams Medical Center and the Miriam Hospital. In addition to the financial support the Foundation provided to the cancer centers, Mr. Decof and his family have been actively involved in the mission of the Cancer Centers. Mr. Decof was a member of the Ledgemont Country Club, Metacomet Country Club, Carnegie Abbey Club, and the Frenchman's Creek Country Club in Palm Beach Gardens, FL. He was also a member of the University Club and the Aurora Club. Mr. Decof enjoyed playing golf, skiing, running and playing squash. He loved music, particularly jazz, and was an accomplished piano and saxophone player. He also was a licensed pilot and enjoyed recreational flying for many years. Besides his wife, he is survived by his children Andrea B. Decof and her husband Ed Malitsky, and Mark B. Decof and his wife Erica Decof.

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In Memoriam (continued)

Joseph M. Fernandez, Esq.

Joseph M. Fernandez, 46, of Providence, passed away on December 18, 2010. He is survived by his wife, Emily A. Maranjian, Esq., who was his classmate at Harvard as well as Brown, and twin daughters. Born in Pennsylvania, he was the eldest son of Dr. Oscar V. and Concepcion G. Fernandez. He attended Phillips Exeter Academy, received his Bachelor's Degree in American Civilization from Brown University, and his Juris Doctorate from Harvard Law School. Most recently, Fernandez waged a spirited campaign for the Democratic nomination for Rhode Island Attorney General. From January 2003 until September 2009, Joe served as the Providence City Solicitor. Prior to heading the City's law office, Joe spent six years in New York City litigating complex commercial cases, and five years serving the Rhode Island business community as a lawyer in private practice.

Joe was a member of the Rhode Island State Advisory Committee for the United States Commission on Civil Rights, American Bar Association, International Municipal Lawyers Association, and the Rhode Island Bar Association. In 2007 and 2008, Joe co chaired the Rhode Island presidential campaign of his law school classmate President Barack Obama and served as a member of the Obama for America, New England Steering Committee. Joe was actively engaged in the Rhode Island nonprofit community and served on the boards of Trinity Repertory Company, the Community College of Rhode Island Foundation, FirstWorks, and Crossroads Rhode Island. Joe served as current President of the Brown Alumni Association and as a member of the Brown Corporation, the University's governing body.

Joe was a devoted husband to Emily Maranjian and father to his beautiful twin daughters, Coco and Phoebe. His greatest enjoyment in life was spending time with his family. An active member of Central Congregational Church, Joe also relished plays at Trinity Rep, Brown football games, seeking out unique diners, cooking elaborate breakfasts for his family, and simply talking about the events of the day. In addition to his mother, his wife and his beloved children, Joe is survived by his siblings, David of Singapore, Thomas of Cincinnati, OH, and Susan of San Jose, CA.

John F. Flynn, Esq.

John F. Flynn, 73, of Warwick, passed away on December 19, 2010. He was the beloved husband of the late Joan Janson Flynn, and the loving father of Jennifer Flynn of Warwick. Born in Providence, he was the son of the late James and Teresa Manga Flynn. Before his retirement, Mr. Flynn was a self employed attorney. He was a graduate of Classical High School, Providence College, and Boston University School of Law and a member of the Rhode Island Bar Association since 1964.

Shayle Robinson, Esq.

Shayle Robinson, 83, of Warwick, passed away on December 31, 2010. He was the beloved husband of Judy Folgeman Robinson. They were married for 56 years. Born in Providence, he was a son of the late Fred and Fannie (Kohn) Robinson. Shayle was a World War II Navy veteran serving stateside and a Korean Conflict Air Force veteran serving in Korea. He attended Brown University and received his LLB degree at Boston University.

Shayle was admitted to the Rhode Island Bar in 1950 and admitted to the District of the United States for the District of Rhode Island in 1952. He was the founding partner of Robinson & Mascia, Attorneys at Law and Robinson & Robinson for over 50 years. He was a Probate Judge in Warwick for over 10 years, later becoming a Warwick City Solicitor. He was a member of the American and Rhode Island Bar Associations and admitted to the United States Military Court of Appeals and United States Supreme Court in 1956. He was the first attorney in Cranston to be appointed to the Cranston Housing Authority for Section 8 Housing. "Shayle Robinson Day" in the City of Warwick was decreed by Mayor Charles Donovan in 1992. He retired from his law practice in 1997. Shayle was a former member of Temple Sinai, serving on its board and as chairman of the Temple School Committee. He was active in the Ward 9 Democratic Committee. He was a past president of Kiwanis, Fineman-Trinkle Lodge of the Jewish War Veterans and the Friendly Community Owners Association. In addition to his wife, he is survived by his son Jeffrey Robinson and his wife Nancy of Mansfield, MA, son Steven Robinson and his wife Karen of Warwick and daughter Nancy Harring and her husband Don of Rye, NY.

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

Lawyers on the Move

Michael R. Bottaro, Esq. announces the opening of **The Bottaro Law Firm, LLC**, 21 Garden City Drive, Cranston, RI 02920.
401-383-5007 mike@bottarolaw.com www.bottarolaw.com

Kerri M. Morey, Esq. was elected as a Director of **Rindler Morgan, PC**, 133 Portland Street, Suite 300, Boston, MA 02114-1728.
617-973-0660 kmorey@rindlermorgan.com

Laura A. Pisaturo, Esq. announces the opening of her law practice at 1055 Elmwood Avenue, Providence, RI 02907.
401-383-3900 laura.pisaturo@gmail.com

A. Chace Wessling, Esq. and **Patrick S. Cannon, Esq.** have joined the Social Security Disability division and **Timothy P. Lynch, Esq.** has joined the Personal Injury division of **Marasco & Nesselbush**, 685 Westminster Street, Providence, RI 02903-4016.

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