Rhode Island Bar Journal

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NEWPORT TOWER, TOURO PARK, NEWPORT, RI

The Newport Tower (also known as Round Tower, Touro Tower, Newport Stone Tower and Old Stone Mill) is a round stone tower located in Touro Park in Newport, Rhode Island. There are various theories on its history, though many believe the tower was once used as a windmill.

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Direct advertising inquiries to the Editor, Kathleen M. Bridge, Rhode Island Bar Journal, 41 Sharpe Drive, Cranston, RI 02920, (401) 421-5740.

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Secure Your Own Mask First

Linda Rekas Sloan, Esq.
President
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We can, and should, all be mindful of the absolute necessity of taking enough time away from the resolution of others' problems to take care of ourselves.

We have all been on an airplane and heard a flight attendant instruct:

> *If the cabin loses pressure, an oxygen mask will drop down. Pull the mask toward you, secure your mask, and breathe normally. If you are traveling with a child or someone who requires assistance, please secure your own mask first and then assist others.*

Why do they say that? If we lose consciousness we will be unable to help children or others. This advice applies to the practice of law as well.

Our clients are facing jail, losing custody of a child, suffering financial ruin. During a week, several of these life-altering problems are funneled onto our shoulders. As lawyers, in trying to keep that client from going to jail, help them keep custody of a child, or save that business from shutting down, we put our own needs aside. We rationalize it by saying to ourselves, "their problems are bigger and more important than time at the gym or going to the doctor or having dinner with my family." Many lawyers suffer from what I call "martyr syndrome" – that you should sacrifice everything for the good of the client. You know, the ones who say, "I haven't taken a vacation in 3 years," like a badge of honor.

Lawyers often feel it is selfish to take an hour to go to the gym or to take a vacation. Focusing on self-care and wellness is not being selfish. It is necessary. If you needed to hire a brain surgeon, would you hire the chronically stressed, insomniac who smokes and drinks more than he or she should?

The next time you read a disciplinary decision about one of our colleagues, instead of thinking, "that would never be me," I ask you to think for a moment, "that could be me." Then, let that thought encourage you to take steps so that you never get to a point where you feel you have no alternative.

Often, the apparent issue in these discipline cases is substance abuse – alcohol or drugs. Sometimes there is a diagnosis of depression or some other mental or emotional illness. But these diagnoses do not just spring up out of nowhere. They develop over time because the lawyer is expending all of his or her energy and resources to help clients and is not taking care of themselves.

A recent *New York Times* article, "The Lawyer, the Addict" is a sad story about the death of a high-powered Silicon Valley attorney, at the peak of his career. It is written by his ex-wife who uncovered his drug abuse. This excerpt really struck me:

> Peter, one of the most successful people I have ever known, died a drug addict, felled by a systemic bacterial infection common to intravenous users.
>
> Of all the heartbreaking details of his story, the one that continues to haunt me is this: The history on his cellphone shows the last call he ever made was for work. Peter, vomiting, unable to sit up, slipping in and out of consciousness, had managed, somehow, to dial into a conference call.

Please read the article. I could certainly relate to certain parts of the story about heavy, chronic stress, but it also reminds me of lawyers I know and worry about. The ones that look exhausted with nothing in the tank left to give.

What can we do? We can, and should, all be mindful of the absolute necessity of taking enough time away from the resolution of others' problems to take care of ourselves. We all need to find things we like to do and make the time to do them. We need to spend time with family. And while we are doing these fun things, we need to learn to stop worrying about what is happening at the office.

We can all help one another by agreeing to extensions of time and continuances when a colleague says he or she legitimately needs to take a vacation.

And if we need help, ask for it. Yes, asking for help is scary and seems risky because we fear being seen as weak or ineffective. We do not want our colleagues or judges to know we are in distress. Seeking help is not a sign of weakness. It does not mean you have failed as a lawyer or are crazy. It does not mean you should leave the profession. It simply makes you human.

The Rhode Island Bar Association has a free program called "Lawyers Helping Lawyers" (LHL). Many think LHL is like AA for lawyers and only associate it with substance abuse problems. Yes, one of the functions of LHL is peer

support where very good lawyers who understand depression, drug and alcohol addiction simply want to help other lawyers by confidentially sharing their experiences and offering a compassionate ear to a lawyer having a problem of that sort. We have other volunteer lawyers who are simply the kindest souls willing to listen and help in any way.

But LHL is much more than that. The Bar Association contracts with Coastline Employee Assistance Program to provide free counseling services for lawyers and their dependents having problems coping with their high-pressure practices and lives. Just call 401-732-9444 or visit **coastlineeap.com**. Coastline provides confidential consultations for a wide range of personal concerns including (but not limited to): balancing work and family, child and eldercare, depression, anxiety, domestic violence, aging, grief, career satisfaction, alcohol and substance abuse, and problem gambling.

As for me, here is my confession, I am a chronic volunteer who regularly over-extends myself with work, family, social and civic obligations, so I suffer from high stress. After a few health scares, I decided to exercise regularly. I read somewhere that it takes 21 days to build a habit, so I told myself, "I just need to exercise for 21 days and I should be all set." Whoever said that is a liar. It took me a full year before I embraced the exercise habit. It required me putting appointments in my calendar for the gym and committing to not breaking the appointment, as if I was meeting a client. I needed a gym-buddy to hold me accountable, so my friend Amy Stratton agreed to keep me on track. When one of us wanted to cancel, the other would push through the resistance. That is what worked for me. If you think it might work for you, I commend it to you.

My dear brothers and sisters, take care of yourselves so you can take care of your clients and others. And, I ask you to take care of other lawyers when you can. Remember: "Secure your own oxygen mask before assisting others." ❖

Know Thyself

SUBMITTED ANONYMOUSLY BY A BAR MEMBER

"Know thyself" and "Nothing in Excess." These are the two phrases inscribed into the stone pediments above the doorways leading into the temple of Apollo at ancient Delphi. It's a smart place if we listen to it. I've been in recovery for about 27 years and a lawyer for just short of 20. One thing I've noticed about me is that whatever direction I am inclined toward I'm a better person for myself and others when I try to push myself the other way. When I want to talk I could stand to listen a bit. When I want to beat myself up I could stand to stop and think something good about myself.

A colleague of mine just today told me that she burns the candle at both ends. There are too many work projects to do and too much pressure for billable hours. There aren't enough hours in the day.

In a ground-breaking study that I just made up, the data strongly suggests that most people are actually more productive when they take some time off. On average, persons included reported achieving more productivity over the course of a 50 minute hour (with a 10 minute break) than a sixty minute hour with no break. They also reported more work satisfaction and an ability to work for longer stretches.

Take time off. Off off. Take time for yourself. You will bring more to your work if you do and both will benefit. Even if this turns out not to be true, remember that nobody complains on their death-bed that they didn't spend enough time at work.

RHODE ISLAND BAR JOURNAL

Editorial Statement

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

Article Selection Criteria

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

Direct inquiries and send articles and author's photographs for publication consideration to:
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Nonconforming Uses: Still Muddying the Waters

Roland F. Chase, Esq.
Of counsel at Miller Scott & Holbrook, Newport and author of the Rhode Island Zoning Handbook, 3rd Ed.

...zoning boards are allowed to interpret the local zoning ordinance to find out whether a claimed nonconforming use exists, but they are not allowed to declare that such a use exists.

Sixteen years ago the Rhode Island Supreme Court announced, in **RICO Corp. v. Town of Exeter**,[1] that zoning boards do not have jurisdiction to determine the existence of a nonconforming use. The **RICO** case stemmed from an administrative appeal of a cease and desist order by the Exeter zoning official, who had ruled that a local excavator had a valid nonconforming use but was unlawfully expanding it.

That came as news to many land-use lawyers who had been regularly asserting or challenging the existence of claimed nonconforming uses before zoning boards. Laying out my own puzzlement on paper, I wrote a *Bar Journal* article[2] explaining the facts involved in **RICO** and trying to elucidate the Court's rationale. In the article, I pointed out that:

> The exact holding of the Court was that "the Exeter Zoning Board of Review *had no statutory authority to make such a finding* [that the excavating corporation had a valid nonconforming use] *and lacked subject matter jurisdiction to do so*."[3]
>
> The Court cited only two easily-distinguishable cases to support its broad ruling that zoning boards do not have jurisdiction to determine the existence of a nonconforming use.[4]
>
> Zoning boards are expressly authorized by the enabling act to decide appeals from determinations made by zoning officials in enforcing or interpreting the local zoning ordinance,[5] and when they do, they have the same powers as the zoning official who made the determination.[6]
>
> The Zoning Enabling Act also authorizes zoning ordinances to permit the alteration of nonconforming uses by means of a special-use permit, which must be approved by the zoning board of review,[7] and this necessarily requires the board to determine, at least impliedly, that the nonconforming use exists.

Since it involved an administrative appeal from a determination by a zoning official that a nonconforming use had been established, the **RICO** decision upended earlier law. In holding that zoning boards do not have jurisdiction to decide whether a nonconforming use exists, the **RICO** court established a confusing precedent which it has not yet clarified. Court decisions since **RICO** have only muddied the waters.

The first nonconforming use case to reach the Supreme Court after **RICO** involved a large recreational-vehicle campground in the Town of Richmond,[8] which had been established in a district in which such campgrounds were permitted as a matter of right, and continued after the zoning was changed to require a special exception for campground use. When the campground built an addition to a recreation building on the premises without seeking zoning relief, the town issued a violation notice ordering the campground to either remove the addition or obtain a special-use permit to allow it. The campground did neither, but instead appealed the notice to the Richmond Zoning Board of Review, which denied the appeal.

When the campground failed to appeal the board's decision to Superior Court, the town brought suit in Superior Court seeking a permanent injunction against further use of the unauthorized addition.[9] The trial justice agreed with the town, ruling that the addition to the recreation building had illegally expanded the nonconforming use, but rather than rest its decision on the substantive grounds relied upon by the trial justice, the Supreme Court said that any further review of the zoning board's decision on the illegality of the recreation building addition was precluded by the doctrine of *res judicata*, which prohibits "repetitive litigation of claims and defenses previously decided in a final adjudicative proceeding."[10]

So, in **Wawaloam** the Supreme Court said the zoning board's decision, on an administrative appeal from a building official's notice of a zoning violation, that a nonconforming use was unlawfully expanded, was final and binding under the doctrine of *res judicata*. But in **RICO** the Supreme Court said the zoning board's decision, on an administrative appeal of a zoning officer's cease and desist order, that the landowner held a valid legal nonconforming use was not binding because it lacked authority to determine the existence of a nonconforming use.

It is very difficult to reconcile these cases. In both of them (1) the town and the landowner

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agreed that a nonconforming use existed on the property; (2) the question was whether the nonconforming use had been unlawfully expanded; (3) a town official charged with enforcing the zoning ordinance determined that it had been violated; (4) the landowner appealed this determination to the zoning board; (5) the zoning board upheld the determination of the zoning official; and (6) the landowner did not appeal the zoning board's decision to Superior Court.

The main difference between them is that in **RICO**, *after the unappealed zoning board decision became final*, the property owner sued in Superior Court for declaratory and injunctive relief and the town counterclaimed, challenging the existence of the alleged nonconforming use.[11] The town's position before that point was that the property owner did have a nonconforming use but was exceeding it. In **Wawaloam**, the town never claimed that the landowner did not have a nonconforming use; the issue was whether it was unlawfully expanding it.

Query: Why should it make a difference to the zoning board's jurisdiction that the municipality claimed, after the board's decision became final for lack of an appeal, that the landowner never had a nonconforming use in the first place?

The second post-**RICO** Supreme Court case involving a claimed nonconforming use is **Duffy v. Milder,**[12] in which residential landowners claimed that keeping horses and conducting various equestrian activities on their property constituted a nonconforming use. Although agreeing that they had a nonconforming use, the town's zoning official cited them for exceeding that use and, when they disregarded the notice of violation, the town summoned them to municipal court.

The landowners responded by suing the town in Superior Court, seeking declaratory and injunctive relief upholding their claimed nonconforming use. The Superior Court sent it back to the town's zoning board for resolution of the zoning issues, and the board upheld the zoning officer's ruling that the keeping of horses on the subject property was a lawful nonconforming and permitted use. The objecting neighbors appealed this decision, but the Superior Court appeal was dismissed for failure to give proper notice, and that ended the zoning board's involvement in the case.

But the nonconforming use issue was

still alive in municipal court. The municipal court held that the landowners had not violated the zoning ordinance because keeping horses was a permitted nonconforming use. On appeal, the hearing justice affirmed this decision under the doctrine of *res judicata*, but the Supreme Court, harkening back to **RICO**, held that the municipal court did not have statutory authority to determine whether conducting equestrian activities on the subject property was a lawful nonconforming use.[13]

So, **Duffy v. Milder** does not directly hold that zoning boards cannot determine the existence of nonconforming uses, but it strongly implies it by citing **RICO** as the governing authority for its ruling that municipal courts do not have jurisdiction to determine whether a nonconforming use exists on particular property.

No other nonconforming use cases made their way to the Supreme Court until 2013. **Cigarrilha v. City of Providence**[14] contains language that, at first glance, seems to conflict with the **RICO** rule that zoning boards do not have jurisdiction to determine the existence of a nonconforming use. However, a closer reading – and a peek at the lower court's opinion in the case – shows no inconsistency.

In **Cigarrilha** a husband and wife claimed that their property, although located in a residential zoning district limited to one- and two-family buildings, had historically housed three families and therefore they had a nonconforming use. The city of Providence disagreed and refused to issue permits after an inspection. When the property owners sued in Superior Court to force the city to issue the appropriate permits, the Superior Court justice issued a temporary restraining order "until an administrative hearing could be held before the city's zoning board on the issue of what plaintiffs contended was the legal nonconforming use of the property."[15] This, of course, is exactly what the Supreme Court in **RICO** said zoning boards cannot do.

The landowners then tried this route. They filed with the city's zoning board an appeal of the city official's determination that their property was an illegal three-family dwelling, but after a hearing the board held for the city and the landowners filed an amended verified complaint in their pending Superior Court

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action, in which – according to the Supreme Court – they *appealed the zoning board's decision* and sought a declaration that their use of the property as a three-family dwelling was a legal nonconforming use.[16]

However, the Superior Court did not treat the matter as a zoning appeal; in fact, it did not even mention the word "appeal" in connection with the zoning board's decision against recognizing a nonconforming use. Rather, the court stated, "The parties agree that jurisdiction over the issue of legal nonconforming use lies with the Superior Court as opposed to the Zoning Board."[17]

If it were an appeal from the zoning board's decision, it would be decided by the court on the record from the zoning board.[18] But the court decided the case under the Uniform Declaratory Judgments Act,[19] finding that the landowners had failed to prove continuous use of their property as a three-family dwelling since the enactment of the first zoning ordinance in 1923 and thus did not have a nonconforming use.[20]

Cigarrilha, therefore, despite some misleading language, does not challenge the holding of the **RICO** case that zoning boards have no authority to determine the existence of a nonconforming use.

Finally, just this year (2017) the Supreme Court decided **Bellevue-Ochre Point Neighborhood Assoc. v. Preservation Society of Newport County**.[21] In this case, the Bellevue-Ochre Point Neighborhood Association (BOPNA), initiated a declaratory judgment action in the Superior Court, pursuant to the Uniform Declaratory Judgments Act, seeking three declarations. The first one was that the Breakers, a famous Newport museum operated by the defendant, is a lawful nonconforming use, and the defendant's proposed construction of a "Welcome Center" on the Breakers property would be a prohibited movement or change in the nonconforming use under the Newport Zoning Ordinance.

That sounds like a classic **RICO** case. The issue was whether or not a nonconforming use existed on the Breakers property, and **RICO** said this issue cannot be decided by a zoning board because it does not have jurisdiction to make such a decision. Strangely, **BOPNA** did not directly press this argument, although it did assert that a civil action in the Superior Court was "the only avenue"

to resolve the issues raised in its complaint.[22] It also argued that the hearing justice was required to hear and decide its request for declaratory judgment because "*an interpretation of the zoning ordinance* is 'to be determined exclusively by the courts.'"[23]

The Supreme Court, although citing **RICO** as holding that "the local zoning board lacked jurisdiction to find the property's use a legal pre-existing nonconforming use," nevertheless concluded that in this case the local zoning board "had the authority to decide the issues raised in BOPNA's complaint."[24] Since the first issue in BOPNA's complaint was that the Breakers is a lawful nonconforming use, the Supreme Court ruled that the zoning board did, in fact, have jurisdiction to determine whether or not the Breakers is a nonconforming use.

Did the Court then *overrule* **RICO** on this issue? No, it *distinguished* **RICO** by saying, in effect, that in **RICO** the zoning board was issuing a declaratory judgment that the landowner had a nonconforming use, but in the case before it the zoning board was merely *interpreting* the zoning ordinance to determine that the Breakers was not a nonconforming use.

So, zoning boards are allowed to interpret the local zoning ordinance to find out whether a claimed nonconforming use exists, but they are not allowed to declare that such a use exists. But what is an "interpretation" of an ordinance or statute? Doesn't it mean to apply the language of the ordinance to particular facts to see if it applies or not? In discussing interpretation of administrative rules by an agency, the Rhode Island Supreme Court explained in **Lerner v. Gill**[25] that "The interpretations represent no more than an agency's opinion regarding *the application of a statute to a particular situation*."[26]

It sounds like the Supreme Court is toying with words in dealing with the question of whether zoning boards can determine the existence of nonconforming uses. Perhaps the Court in **RICO** would have held differently if the zoning board, instead of stating flatly, "RICO holds a gravel bank license and that the gravel bank is a legal nonconforming use,"[27] had stated, "We interpret our zoning ordinance to find that RICO holds a gravel bank license and that the gravel

continued on page 36

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Eric M. Shorr,
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Sampling and Extrapolation in Medicaid Audits: Authority, Methodology, and Future Directions

Bruce W. McIntyre, Esq.
Chief, Office of Program Integrity, Office of Health and Human Services

Tanis Caine
Candidate for JD 2019
Roger Williams University School of Law

With the threat of sweeping Medicaid cuts expected to become a reality, states will search for savings where they can.

Introduction

Rhode Island is like most states in that it is looking for ways to discover waste, fraud and abuse in its Medicaid payment systems. Inefficient mechanics in payment systems become increasingly expensive because providers may be overpaid or underpaid. Some providers may use loopholes or exercise poor management/judgment to abuse the system and collect more in fees for services than they are entitled to collect. Rhode Island has instituted numerous pathways to discover, correct and collect overpayments in this system. One such method is auditing by sampling and extrapolation of Medicaid claims. Private health insurers use this technique also.

Attorneys must understand the methods and the current Medicaid landscape both in Rhode Island and nationally to best represent provider's interests. This article discusses legal issues and the statistical basis for sampling and extrapolation.

Sampling And Extrapolation In Rhode Island

States receive federal funding for administering Medicaid programs in accordance with methodology of the Social Security Act. The Act also created the state Program Integrity Departments to conduct post-payment audits to investigate fraud and form a referral system in place to handle suspected fraud.[1] Medicaid providers must return any overpayments they received resulting from improper billing practices short of fraud, and states must have methods for the recovery of any overpayments due to abuse or misuse of funds. Unlike in Medicare recovery, Medicaid auditors must abide by the laws of financial audits and appeals unique to each state and so methodologies may vary.[2]

The first attempt at sampling and extrapolation in healthcare payments in Rhode Island stumbled when the payer neglected to include this methodology in its provider contract. In **Garden City Treatment Ctr. v. Coord. Health Partners, Inc.**,[3] a healthcare provider challenged the results of a series of audits conducted by Blue Cross & Blue Shield of Rhode Island and its subsidiary. The State Supreme court held the use of statistical techniques to recoup overpayments was not authorized because the provider agreements did not expressly state they would be used. In accordance with this decision, all EOHHS Medicaid provider agreements include a clause authorizing statistical sampling and extrapolation to calculate overpayments. There is a clear distinction between contract law and laws involving public funds. Both federal and state courts have ruled that the use of sampling and extrapolation is a valid process given the burdensome nature of documentation review required.[4] Courts have stated that the extrapolation process is a methodology and used in an evidentiary role. Aggrieved parties must have the right to challenge the findings.[5]

Current Medicaid Landscape

Rhode Island had the highest Medicaid percent per capita enrollment in New England in 2016 with approximately 325,000 residents enrolled. The number of enrollees averaged 282,000 over the year (26.7% of the total population of Rhode Island) since many recipients were only enrolled for short periods of time. The state spent $1.85 billion on Medicaid before the ACA expansion and rose to $2.4 billion in 2016 due to 86,000 newly eligible residents. The federal government shared $1.6 billion of that cost with the state.[6] Under the current version of the ACA the federal government covers the expansion population in full and Rhode Island will cover up to ten percent of program costs for that group in the future.[7] The Kaiser Family Foundation estimates that roughly half of the 55,000 RI residents still uninsured in 2015 are eligible to receive Medicaid.[8]

The Rhode Island state Medicaid program comprises roughly one third of the state's budget of $9 billion dollars. The federal government recently proposed to cut state Medicaid by 15% or roughly $3 billion dollars over the next ten years. Rhode Island and other states will need to continue reviewing cost savings opportunities.

Overpayment Recovery In Federal Medicare Audits

The Centers for Medicare and Medicaid Services (CMS) developed a national recovery audit program to collect improper Medicare over-

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payments and limit "fraud, waste and abuse in the U.S. healthcare systems."[9] The CMS Medicare Integrity Program requires the review and audit of providers of services billing Medicare, and approves the use of statistical sampling and extrapolation to achieve recovery of overpayments.[10] Sampling and extrapolation overcame numerous due process and methodological challenges spanning over thirty years.[11] The methods are recognized as valid tools for overpayment recoupment, and are widely used by numerous branches of the federal government.

The Medicare audit begins with the auditing agency obtaining a sample of records for review to examine whether any billing discrepancies exist that resulted in overpayment to the Medicare provider. Progress notes are commonly used to base a determination of overpayment, and typically contain enough information for the auditor to determine if the documentation was complete, or if the procedures billed for were medically necessary or reasonable.[12] Common discrepancies include missing documentation, improper documentation that does not support the billing codes, and misuse of billing codes.

Federal Use of RAT-STATS™

In 1978, the Office of Inspector General, U.S. Department of Health and Human Services (HHS OIG) created a statistical software package called RAT-STATS™ to provide an efficient tool to review the more than one trillion dollars in Medicare and Medicaid claims processed annually by CMS.[13] Use of the program in Medicare and Medicaid audits is not required but it is the primary tool used by the Office of Audit Services and is recommended for use by CMS.[14] RAT-STATS™ is user-friendly and provides an accurate and mathematically supported process for expanding to a full universe of identified paid claims, resulting from a statistically random sample of the universe. RAT-STATS™ allows the auditor to predict the dollar value of improper payments with a high-level of accuracy and is available for free on the OIG website.

Sampling and Extrapolation

There are certain terms that must be understood to defend these cases effectively.
Review period: the window of time selected for review.
Universe of claims or data: the total number of claims that exist within the

review period.

Random claim sample: the number of claims within the universe sample that are taken for individual review.

Error rate: the total number of errors found within the random claim sample that is usually expressed as a percentage.

Extrapolation: the process that explains how the error rate is projected to the universe of claims.

Mathematically you must infer values of a variable in an unobserved interval from values within an already observed interval.

Challenges to methodology have been made on various courts but the focus of most of the debate has been regarding *sample size*.

Valid Sample Size

Sample sizes have survived challenges on multiple occasions in the federal courts and sample sizes as small as thirty are recognized as statistically valid.[15] Claims within the sample are individually reviewed for payment errors that did not meet guidelines for payment and not necessarily indicative of fraud or abuse.[16] Determining whether to project or "extrapolate" that error rate to the universe of claims depends on what the threshold for error was set at. Based on an established error base, an error rate below the threshold is not extrapolated. The errors within the sample resulting in overpayments below the base error rate would result in the provider paying back only the determined dollar amount. An error rate above the threshold means that percentage of error, along with other variables, is applied to the entire universe of claims resulting in a higher dollar amount is subject to recovery. Common thresholds relevant to this discussion are 3% found in the U.S. Government Accountability Office (GAO) Financial Audit Manual, and 5% used in the HHS-OIG CIA work.[17] Statistical analysis provides a range of figures within the error window and many auditors request repayment of the lower, more conservative figure. Repayment using the lower figure is financially beneficial to healthcare providers and accounts for any imprecisions inherent in the sampling and extrapolation process.[18]

In Rhode Island, the error rate is set at a 4%. This threshold used by the state is then extrapolated to the universe of claims. The lower value in the predicted

Exercise? That was so last year!

Insanity: doing the same thing over and over again and expecting different results. - Unknown

Apparently Einstein didn't say that! Anyway, when resolving to get in shape this year, let's consider something new before embarking on this endeavor (again).

This year, instead of going for fitness, play more and develop a skillful body!

Here's some food for thought: will your time on the elliptical translate if you have to run away from something? Do lat pull-downs help you keep up with kids on the monkey bars? Does your 1 Rep Max on the Bench matter in any situation at all?

No! So forget about exercise! Be done with it! Instead, try moving naturally, or MovNat. MovNat is a physical education and fitness system based on training the full range of natural human movement abilities.

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- It's more fun to play and move like a kid again. And remember, if it's fun, we'll keep doing it!
- Skills gained from MovNat training have real-world applications. Moving with mindfulness and developing skills make you better at everyday things and may prepare you better for an emergency.
- It gives you an advantage during your next obstacle race or mud run. Seriously you haven't done one yet? What are you waiting for?
- Longevity. You can MovNat for the rest of your life! I view it as a "practice" – you can relate to that, right?
- The cognitive benefit of learning new skills; MovNat will make your brain sweat!
- It requires no equipment, can be done anywhere, and will likely bring you outside more! It also pays dividends during active vacations, which you're more likely to take!

Ryan McGowan is a former engineer who left the construction industry to help people become healthier and more adventurous. His company, Laid-back Fitness, is located in Warwick and is a combination of a fitness center and playground. He recently won the Projo Readers' Choice Award for Best Personal Trainer, and is the co-founder of the Frozen Clam Obstaplunge, a charity obstacle course + cold water plunge on New Year's Day.

Convinced? Good! Make 2018 the year you move more, move better, move naturally, and sign up for an event to apply your skills! If you *train* deliberately, you'll be fitter, freer, more athletic, and you'll reap the benefits of accepting and conquering a challenge! If improved body composition is your goal, forget the number on the scale! Pick a size you want to be or clothes you want wear again. I think we can agree that it is more gratifying to comfortably zipper up those old skinny jeans/pants/etc. than to look down at a number nobody else cares about.

Happy New Year! Go after something you want, and make it happen!

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House of Delegates Letters of Interest Due February 16, 2018

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

The Nominating Committee will meet soon to prepare a slate of officers and members of the 2018-2019 Rhode Island Bar Association House of Delegates. The term of office is July 1, 2018 - June 30, 2019. If you have not already done so, to be considered for appointment to the House of Delegates, please send a letter of interest no later than February 16, 2018.

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

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

HOD Nominating Committee Chairperson
Rhode Island Bar Association
41 Sharpe Drive
Cranston, RI 02920

Or, you may send your letter of interest to Helen Desmond McDonald, Executive Director by fax: (401) 421-2703, or email: hmcdonald@ribar.com.

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

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

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range of values representing dollars owed in overpayments is always used in provider audits in this state. The provider is educated on the source of the errors and provided an opportunity to produce records supporting their initial billing documentation. Providers can appeal the findings of the audit and are given time to produce documents supporting their claims.

Recent Federal Court Cases Supporting RAT-STATS™ and Extrapolation

In a recent federal court decision, the plaintiff employee alleged falsification of claims and challenged the defendant request to use RAT-STATS™ and random sampling to audit patient records. The defendant hospital requested the use of RAT-STATS™ to ease the burden of examining each of the 15,574 patient records individually at a cost of $230,000 and 8,982 hours of labor. The court, after "considering the source and reliability of the statistical tool," directed the defendant to use RAT-STATS™ and expressed confidence that the methodology would not prejudice the plaintiff.[19]

Another noteworthy case decided in federal court in 2010 addressed the issue of precision in extrapolation in relation to the size of a confidence interval or range of values. The statistical expert explained that a wide or "imprecise" confidence interval does not imply the results are inaccurate if the methodology for drawing the sample were properly executed. Precision in this context refers to the replicability of the study and not the size of the range of values. The court accepted that if a probability sample was properly drawn "then assertions that the sample and its resulting estimates are not statistically valid cannot be legitimately made."[20]

Sampling and Extrapolation in Internal Compliance

Internal audits and monitoring are important to protect organizational structure and enhance compliance with program goals and objectives. Internal auditing provides objective quality assurance and a checks and balances system of accountability.[21] The audit also demonstrates integrity and communicates a transparent report. Internal auditing of government programs, particularly those that visibly operate within the public sector, provides assurances to the public

that government and tax payer dollars are spent effectively and efficiently, and with greater public interests in mind.[22]

CMS recommends that providers perform routine self-audits to maintain compliance with "applicable laws, rules, and regulations." Self-audits and internal monitoring are important aspects of a robust compliance program and is an effective way for a provider to "reduce non-compliance, reduce fraud and improper payments, improve patient care, and lower the chances of an external audit." In some states (ex: New Mexico, Alaska, New Hampshire, and Pennsylvania) providers are required to perform self-audits to identify over-payments in addition to state audits.[23] For example, Alaska requires a self-audit report be submitted to Program Integrity every two years along with any overpayments that were discovered.[24] The provider self-audits allow for more improper payments to be recovered than what "program integrity could do through state-initiated audits and investigations."[25] HHS-OIG also sets out expectations and requirements for provider self-audits and disclosure on their website and highly recommend the providers utilize RAT-STATS.™[26]

Conclusion

With the threat of sweeping Medicaid cuts expected to become a reality, states will search for savings where they can. Recoupment of Medicaid overpayments by the most cost-effective means is one obvious pathway to savings. The tools of sampling and extrapolation are vital in state efforts to continue to deliver the most beneficial and cost-effective Medicaid program to their residents.

The authors express their special appreciation to Thomas Bouchard, Chief of Investigation in the Office of Health and Human Services' Office of Program Integrity, for his significant contributions in the development of this article.

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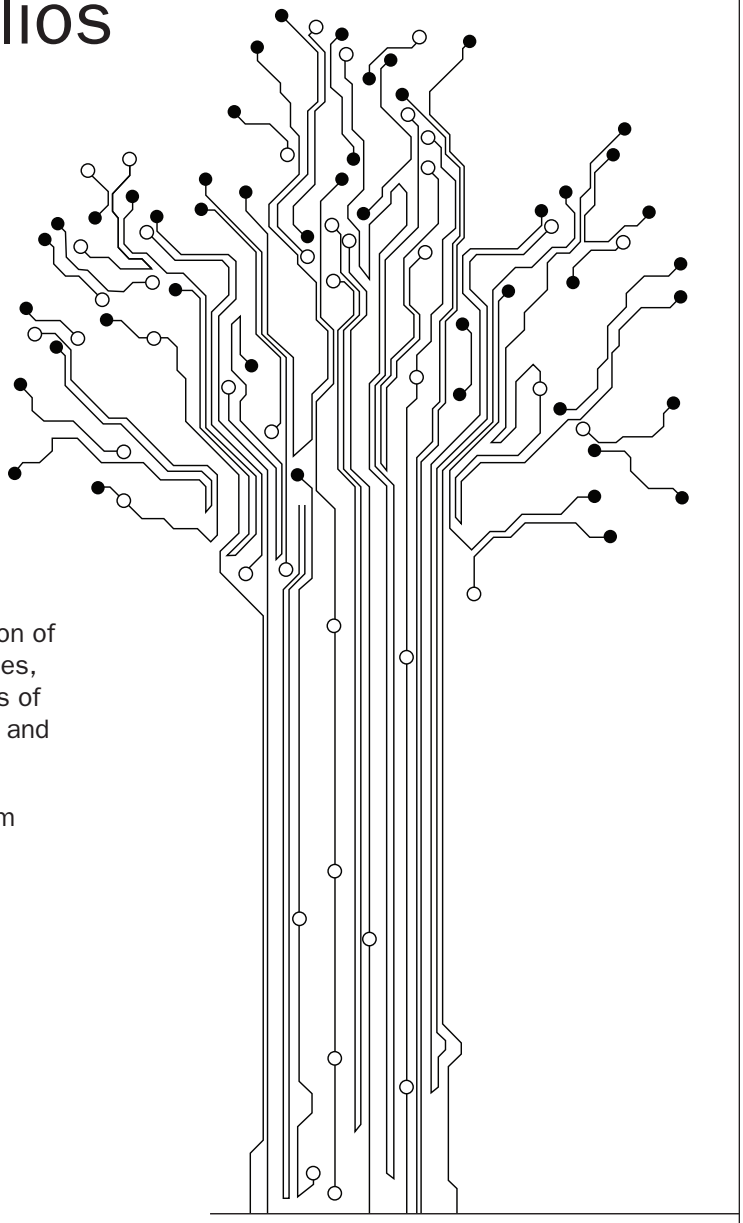

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Named for its first recipient, Victoria M. Almeida, this Rhode Island Bar Association award is presented to an individual who demonstrates the principles and values of servant leadership and who is a beacon of light and hope to others by illuminating the path to greater justice for all. Servant leadership promotes putting the needs of the organization before oneself. The Award Committee is particularly interested in attorney actions as detailed in the nomination criteria accessed on the Bar Association website at **ribar.com**, under the **NEWS AND BAR JOURNAL** tab on the left side of the home page. All nominations are due no later than March 9, 2018. Postal mail or email nominations and/or direct questions to:

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Our Commitment to Survivors – Partners Overcoming Domestic Violence (PODV)

Janet Gilligan, Esq., Deputy Director of Rhode Island Legal Services, Inc.
Susan A. Fontaine, Rhode Island Bar Association Public Services Director

The problem was clear. Even the concerted efforts of Rhode Island Legal Services (RILS) and the Rhode Island Bar Association's Volunteer Lawyer Program (VLP) could not satisfy the demand for attorneys to represent survivors of domestic violence in the Rhode Island Family Court. At the same time, many Rhode Island attorneys wanted to represent survivors of violence but feared they did not have the necessary background and training to be effective in this challenging area of law. Putting these two groups together became the goal of a team of attorneys dedicated to empowering survivors of domestic violence and advocating for their safety and wellbeing. The result was Partners Overcoming Domestic Violence (PODV).

The plan to implement the PODV came together in the summer of 2015. An Advisory Committee was formed by attorney and staff members from Rhode Island Legal Services, the Rhode Island Coalition Against Domestic Violence (RICADV), the Rhode Island Bar Association's Volunteer Lawyer Program, the Roger Williams University School of Law, and the Rhode Island Family Court. After considering and rejecting a variety of options, the committee members joined forces with enthusiastic private attorneys and designed a comprehensive legal mentoring program designed to strengthen the available legal resources for survivors.

Over the next several months, and prior to launching the PODV, the committee undertook defining the essential steps needed for a successful program. These steps included the preparation of documents setting forth the mission and objectives of the project and the development of a comprehensive training schedule/curriculum for CLE credit. Committee members also determined training logistics, recruiting methods for volunteer attorneys/mentors, case intake/administration and evaluation procedures, etc.

Don't Miss Out on This Great Opportunity to Get Experience and Earn CLE Credit!

This very successful pro bono partnership is back for 2018! Get comprehensive domestic violence and family law training, mentorship, and real court experience.

For additional information on this exciting new opportunity to build your professional legal knowledge and experience while helping those in dire need, please contact the Project Manager Janet Gilligan at (401) 274-2652 or jgilligan@rils.org.

In February, 2016 the recruitment process was complete and the first phase of PODV was initiated. Nine teams, each comprised of 2 volunteer attorneys with one assigned mentor, were selected. Attendance at a three part seminar series covering the reality of domestic violence advocacy, criminal vs. civil options, divorce, custody, visitation, child support, third party intervention, etc., was required for volunteers. Seasoned family law mentoring attorneys as well as the Executive Director and advocates from the Rhode Island Coalition Against Domestic Violence participated as trainers. The final session of the in-depth training series, held in a courtroom of the Family Court, consisted of a role play of a contested custody hearing.

Once the teams completed the comprehensive training, the staff of the Rhode Island Bar Association's Volunteer Lawyer Program assigned eligible clients for assistance with their family law issues. The VLP staff utilized the domestic violence screening tool in accordance with the objectives of the PODV to ensure eligibility and initially nine family law cases with varying degrees of complexity were placed.

The following comment typifies the feedback the PODV received from the volunteer attorneys at the completion of their cases:

My mentor (our mentor) was wonderful to work with and such a great resource! She answered any and all questions we had and provided support and guidance along the way. The PODV program is excellent. I learned a lot of practical information and skills that I use almost daily. I enjoyed working with my partner, we worked well together and our styles and skills meshed well together. We were able to produce a favorable outcome for our client.

The positive impact of the PODV has been substantial for all involved. As a result of the project, the Volunteer Lawyer Program staff is using a more detailed and beneficial client interview model designed specifically for domestic violence survivors. Eighteen additional attorneys were recruited for the VLP and received comprehensive training in domestic violence. The awareness of the private bar/legal community of this crucial issue has been heightened by instituting this project and promoting its continuance. Community organizations, especially those serving survivors that were involved in the crafting of the project, now have this focused legal resource for their clients. Additionally, the Rhode Island Bar Association was the recipient of the Lexis/Nexis Community & Educational Outreach Award at the August 2016 National Association of Bar Executives Annual Meeting for its collaboration with the partners and ongoing growth potential of the Partners Overcoming

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Presently plans are underway for a second attorney recruitment effort and PODV session to be held in early 2018. Once again, new attorneys who pledge their support to the Rhode Island Bar Association's Volunteer Lawyer Program will have the opportunity to engage in compelling pro bono work with the guidance and support of mentor attorneys. In addition to gaining important skills about litigating in Family Court and learning the dynamics of domestic violence, these volunteer attorneys will have the satisfaction of working toward the long-term safety and stability of their clients and their children. ❖

Casemaker Tip: Related Federal

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9 Strategies for Improving the Legal Internship Experience at Your Office

Nicole P. Dyszlewski, Esq.
Research/Access Services Librarian, RWU School of Law Library

Laura A. Pickering, Esq.
Ball Law Associates, P.C.

By investing time to give interns regular and meaningful feedback, supervisors can create a more productive and fulfilling experience for everyone.

At Roger Williams University School of Law there is a strong commitment to experiential education. In addition to the Feinstein Center for Pro Bono & Experiential Education, RWU Law engages students in experiential education through in-house clinics, clinical externships, and field clinics. In fact, not only are all students required to complete 50 hours of pro bono legal service in order to graduate, but the school has a guarantee that qualified students can receive a substantial clinical experience during their three years. This commitment to experiential education would be hard, if not impossible, to maintain without the support of the Rhode Island bench and bar. As stated in the Alliance for Experiential Learning in Law's *Report of the Working Group on Integration with the Profession*, "As experiential learning becomes an increasingly critical component of legal education, collaboration with practitioners also becomes increasingly critical.… Through strategic, purposeful collaboration with practicing lawyers, schools can increase their ability to provide students with relevant, authentic, and substantive learning opportunities that have greater potential to increase the depth of their understanding, give them a working knowledge of how concepts apply in practice, and improve their ability to practice law upon graduation." Given how critical collaboration with members of the Rhode Island Bar is for the future success of law students and the profession, the goal of this article is to share practical information on supervising law students or recent graduates.

Written by members of the Roger Williams University School of Law community, Nicole Dyszlewski, Research/Access Services Librarian, and Laura Pickering, 3L*, this article aims to be a helpful tool for those members of the Rhode Island Bar currently working with interns, externs, clerks, or recent graduates, or those members who might be considering supervisory responsibilities for placements in the near future. This article is written as a series of practical tips for attorneys with supervisory responsibilities. These tips have been compiled from interviews with externship supervisors, interviews with RWU Law staff, interviews with current law students with previous clinical experience, and a review of current literature on experiential education. This article was inspired by the authors' experiences being a legal intern (Laura) and helping law students work through legal research questions while wrestling with the expectations of their placement supervisors (Nicole).

Introduce Your Interns

One way to support a law student's entry into the profession is by introducing her to lawyers, judges, mediators, clerks, and other legal professionals you encounter. According to Donna Gerson's *Building Career Connections: Networking Tools for Law Students and New Lawyers*, "networking is the means by which most law students will find employment, particularly full-time employment following graduation.… Most law students find jobs either through networking or self-initiated contact with prospective employers, often a combination of the two." Veronica Paricio, Assistant Dean for Career Development at Roger Williams University School of Law explains, "Students are encouraged to get to know as many attorneys as they can throughout an experience. This is not only to expand their network, but also to see that even attorneys in the same organization may have different writing styles, research preferences, or trial techniques. No two attorneys are alike and students need to adapt their work product to each supervisor they report to. It is a skill they will be using throughout the rest of their career. In addition, the more attorneys who are familiar with a student's work, the better positioned that student will be to utilize these attorneys as references or for referrals to other employers." Even introducing your intern to non-attorney staff in the firm or organization can prove helpful by making the intern feel more comfortable in her new surroundings. One student we interviewed stated, "The environment within a busy law firm may at times appear cold or unfriendly. I recall that although this appearance of coldness was not intentional, but rather the mere nature of a firm that advocates zealously for its clients, I felt as if I were forgotten." Making your intern feel included in the organization and the profession

VLP Attorney Honored by Legal Services Corporation

Legal Services Corporation, an independent nonprofit established to provide financial support for civil legal aid to low-income Americans and promoting equal access to justice by providing funding to 133 independent non-profit legal aid programs in every state, awarded Bar Volunteer Lawyer Program (VLP) Attorney Michael A. Castner with its Pro Bono Award for his volunteer work. Attorney Castner took on 47 pro bono cases for South Coastal Counties Legal Services over the past three years, in addition to the 80 cases referred to him by the Bar's VLP. Attorney Castner was recently awarded the Bar's Pro Bono Publico Award for his hard work and dedication.

by remembering to introduce her to others is a small, supportive gesture that can make a real difference.

Treat Law Students Like Law Students

In addition to law students, some placements also accept undergraduate students. Some of the students we interviewed suggested that in situations where law students and undergraduates work together that supervisors should acknowledge their differences in legal knowledge and make accommodations accordingly. For example, one student commented that it would be "very beneficial to conduct specific orientations for the law students about things like professionalism in the workplace, communication with clients, and goal-setting. Law students and undergraduate interns will likely have very different expectations and perspectives about the job placement and tailoring a program to law students will help to improve their experience." Another student commented that if practical, it may even be helpful to separate 1L legal interns from 3L legal interns. While separate programs for law students and undergraduate students may not be feasible or desirable in all placements, supervisors should consider the unique and varying skills of their interns.

Develop Written Procedures

If your office does not already have written procedures for placements, consider developing them. Some of the law students interviewed suggested that it would be helpful for placements to provide new interns with written office procedures. Likely, some office procedures are already documented, but providing the guidance in a concise document may save an intern time and increase her familiarity with the ethos of the worksite. Linda Tappa, 3L*, commented, "it's amazing how much a quick introduction can help a student quickly orient herself in an environment that's very foreign and slightly intimidating at first." The orientation procedures at each placement are different, but providing written procedures to which an intern can refer after the excitement of the first few days has passed can be helpful. Professor Andrew Horwitz, Assistant Dean for Experiential Education at Roger Williams University School of Law explains, "Each of our clinical programs has developed an office manual that lays out procedures, policies,

and expectations as clearly as we can. We modify these manuals annually based on student feedback and input. Our students universally say that they appreciate the guidance that these manuals offer." In fact, one student we interviewed praised her placement for having given her access to work that had been completed by a previous intern as this helped reduce her learning curve and avoid feeling like she was reinventing the wheel. Similarly, one way to figure out what your next intern needs to know would be to ask your current intern. Ask your intern to share a short list of tips or hints on office procedures or other topics that she would have found useful in the placement.

Set Expectations

One of the most critical skills for supervisors of law students is being able to set clear expectations. Jeannine Casselman, Program Manager at Medical Legal Partnership Boston states:

"I have supervised over a dozen students…and the most common placement problems arise when the supervisor and student have not clearly articulated to each other their personal goals and expectations of the other. For example, my particular program has unique elements not commonly found in public interest organizations. My office is situated within a hospital, my referrals come from physicians and social workers, and the goal of the work is to address the legal needs that adversely impact health. The scope of the work requires the student to be open minded about this practice form and flexible given the place of work and target population. To avoid a misunderstanding about the program and the role the intern plays in the program I meet with students before placement decisions have been finalized to provide a detailed overview of the program's mission and my expectations of the potential intern. In most cases, students have agreed to continue with the placement process, but in some cases, this discussion has resulted with the student choosing an alternative placement. As the director of a small program, I want to maximize the efficiency of my services and that does mean a careful screening of my interns and I encourage potential applicants to engage in the same thoughtful exploration before choosing

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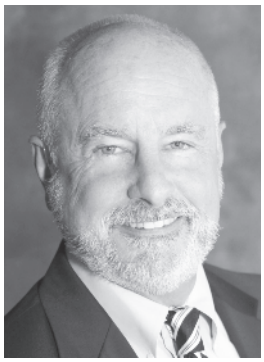

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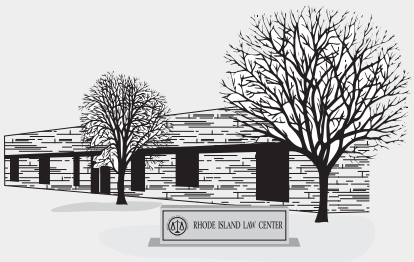

Rhode Island Bar Foundation

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

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

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an internship so as to avoid failed expectations."

While setting overarching goals and expectations is important, so is setting short term expectations or checkpoints. One third-year law student stated that in her placement she felt like there were overall clear expectations, "but not clear day-to-day expectations, or actionable goals to get to the end of the expectations." Several law students stated that when supervisors were transparent about their expectations and gave them examples to work from it was much easier to understand and meet expectations. Providing examples of previous work done by the firm or sample documents for the law student to review, may help students more fully understand the assignments and supervisor expectations. One third-year law student praised his placement supervisor's ability to set clear expectations by remarking, "These clear expectations were effectuated when supervising attorneys sat down to discuss assignments with me and referred me to possible sources of guidance and authority. Moreover, supervising attorneys have made their expectations clear by referring to some of my prior work and drawing similarities and distinctions therefrom." While setting clear expectations is an important task for supervisors, it is also the responsibility of students to ask questions and seek clarity. According to Laurie Barron, Director of the Feinstein Center for Pro Bono & Experiential Education, all students in the Clinical Externship Program are encouraged to figure out what they need to know in order to complete an assignment successfully and to ask for what they need before embarking on the task.

Communicate

As previously discussed, communication of clear expectations is critical to establishing an effective supervisory relationship. Communication between a supervisor and student, however, can be difficult. As noted by Liz Ryan Cole and Leah Wortham in *Learning from Practice*, supervisors often "forget how big the differences can be between a law student and an experienced attorney.…With practice, professional judgments become almost intuitive." Similarly, Cole and Wortham point out that legal interns do not have the same professional knowledge or experience that the attorneys supervis-

ing them have and what may seem "obvious" to the supervisor actually requires more elucidation—students are not "mind readers." Laurie Barron points out that students are often "afraid to ask questions because they want to be able to hit the ground running and are fearful of taking too much of the supervisor's time." She cautions that virtually all misunderstandings that occur in the work place between supervisors and students are a result of ineffective communication and unclear expectations. While students certainly have a role in facilitating effective communication, supervisors may preempt communication problems by establishing how and when to communicate (e.g., in-person, texting, email, phone) at the outset of the placement.

Assign Both Long Term & Short Term Assignments

When asked to name some of the most common issues with internship placements, Laurie Barron was quick to list workflow as one of the top concerns. Some students struggle with having too much work while others struggle with not having enough meaningful work to do. One way to prevent a potential workflow issue is to assign your intern both long-term and short-term projects. This insures that if the supervising attorney is out sick or busy with a pressing matter, the intern will still have work to do. Jeannine Casselman explains, "When I consider my externs I think about my internship experience I had while in law school and try to avoid those aspects of the internship that were poor, such as poor expectation setting by a supervisor and lack of work (I particularly hated being bored). I try to be sure that my externs/interns always have daily tasks as well as a long term project." A legal research assignment is one type of long-term project that a law student can work on independently and start/stop as demanded by short-term tasks. A long-term research assignment can also provide an opportunity for the student to present the information to the supervisor, formally or informally, which can allow the student to grow and hone a different set of professional skills.

Explain Processes & Thinking

While students in legal placements are

continued on page 40

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BOOK REVIEW

Cashed Out

by Michael H. Rubin, Esq.

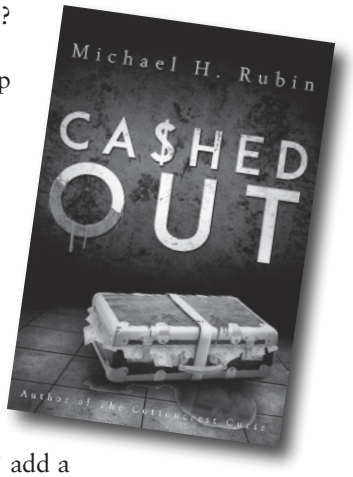
Stephen J. Sypole, Esq.
Gidley, Sarli & Marusak, LLP
Providence

Many of this publication's readers will remember Michael H. Rubin's musical keynote address at the 2015 Rhode Island Bar Association Annual Meeting. At that time, I had the pleasure of reviewing his debut novel, *The Cottoncrest Curse*, for the *Bar Journal*. I jumped at the opportunity to review his sophomore novel, *Cashed Out*, the second book in the "Bayou Thriller" series. I thoroughly enjoyed *Cashed Out* from beginning to end and would highly recommend it to any fan of mystery novels or legal thrillers.

Cashed Out follows protagonist Hypolite "Schex" Schexnaydre as he struggles to negotiate the blurred lines between government, business, and organized crime in Baton Rouge, Louisiana. Schex is a burned-out and down-on-his-luck attorney. He has no clients and is struggling to keep the lights on when he receives a surprise visit from G.G. Guidry, the notorious owner of a noxious industrial waste plant. His luck seems to change when Guidry retains Schex to create several new corporations and entrusts him to safeguard a briefcase filled with over four million dollars in cash. Things go downhill quickly, however, when Guidry is murdered and Schex's ex-wife is identified as the prime suspect.

Guidry's death creates a personal and ethical quagmire for the young attorney. Who does the cash belong to? Where did it come from? Who is his client? How does Taylor Cameron, his manipulative ex-wife, fit into the picture? The most important question to Schex, though, is how can he keep Guidry's millions for himself without landing in jail or losing his life? Schex joins a colorful cast of unscrupulous businessmen, crooked politicians, zealous environmentalists, southern lawmen, and mob enforcers as he navigates a maze of corruption, lies, and deadly old secrets.

One of Mr. Rubin's novels would not be complete without a healthy dose of thoughtful social commentary. The source of Guidry's wealth was the Camellia Industries plant that had been poisoning the poorest neighborhoods on the bayou for years. Should the fortune that landed in Schex's lap rightfully belong to the victims living in "cancer alley" downstream from Guidry's plant? Schex's story is set against the backdrop of a messy legal battle being waged between the polluters, the State, and a coalition of environmental activists. The idealistic leaders of "Parish Local Environmental Action" and "EarthResponsible" add a touch of optimism and conscience in contrast to the cutthroat underworld that Schex is dragged into.



The local environmental misdeeds committed by Guidry and his ilk are presented in the larger context of the existential threat posed to the region by climate change, rising sea levels, and powerful storms; a topic that is more relevant than ever after the brutal 2017 hurricane season. The fragility of a region that is one burst levee away from disaster is on full display.

The author's detailed descriptions of Baton Rouge, New Orleans, the bayou, and their diverse people make his affection for his home state apparent. Even if you've never been within five hundred miles of Baton Rouge, you will feel a connection to the rich, unique culture of Southern Louisiana after enjoying *Cashed Out*. ❖

Thanks to Our CLE Speakers

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

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

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Justice Assistance Honors Five Rhode Islanders

Justice Assistance, a nonprofit criminal justice agency in Cranston, awarded the following individuals with Annual Neil J. Houston, Jr. Awards for their dedicated service and citizen contribution toward the criminal justice profession and the public interest: (l-r) Deputy Chief Thomas A. Verdi, Providence Police Department; Chief Inspector Robert A. Catlow, RI Department of Corrections; RI Batterers' Intervention Program President George J. Sheehan III; RI District Court Associate Judge Stephen M. Isherwood; Institute for the Study and Practice of Nonviolence Executive Director P.J. Fox III.

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

Stephen Adams, Esq. **Jenna Pingitore, Esq.**
Barton Gilman LLP, Providence

Lynette Labinger grew up in Los Angeles. She came east for college, attending Mount Holyoke College in western Massachusetts. After graduating from NYU Law School in 1974, she came to Rhode Island to clerk for Chief Judge Raymond Pettine of the United States District Court. She did not intend to stay after the clerkship, but she and her husband fell in love with Rhode Island so they decided to stay after the two-year clerkship. Lynette's first job after the clerkship was with Abedon, Stanzler & Biener, working primarily with the late Milton Stanzler on a number of civil rights cases. The firm disbanded when former Attorney General Julius Michaelson, then a member of the firm, ran for U.S. Senate against John Chafee. Lynette decided to become partners with John Roney on January 1, 1983. Initially, the firm included famed criminal attorney Bob Mann. Bob went out on his own, but she and John have remained law partners for nearly 35 years. Lynette has handled some of the state's most significant civil rights cases, and continues to take on these challenging and profoundly rewarding cases to this day. We had the opportunity to speak with this forty-plus-year veteran of the Rhode Island Bar. Excerpts from our conversation follow.

Lynette Labinger, Esq.

Why go to law school?

My brother and I were the first to graduate in my family. My father put in a couple of years and then went into World War II. My last full year of college at Mount Holyoke was the year of all the student strikes involving Vietnam. And I had been studying Russian history. So this was very different to be involved in politics, in current events. The law seems to be one of the ways that one deals with objecting to what is going on and trying to effectuate social change. A lot of lawyers were involved in that. So I kind of moved from "I don't know what I want to do so I can go to law school" to saying that this is something that could be a vehicle to do something fulfilling. And starting with the first year of law school, one of the words that was really significant to at least me was relevance. Not the way you think of it as relevant evidence, but does this actually have any meaning or relevance or importance to what is happening to people today?

What is your most memorable case or experience?

The Title IX case. Title IX, the education amendments, were originally passed to address the fact that a lot of colleges and universities discriminated against women in their graduate programs. Women couldn't get into medical school, or there were quotas. It is a spending law that says that no educational institution that receives federal funding shall discriminate on the basis of gender. There was a big groundswell by the powerhouse [colleges], because they got so much money at the schools where there were big sports programs which were all out of proportion to what the women's programs were, which were either usually run on a shoestring or they had to find people who would do bake sales and provide their own transportation. That kind of stuff. They'd have hand-me-down equipment, volunteer coaches. Then you'd have football. And Brown decided that they needed to cut back everywhere and sports teams were eliminated. The students who were affected by it all protested. They were redirected to what was then called Trial Lawyers for Public Justice, who worked with local counsel, and somehow they were given my name. We first had a trial on a preliminary injunction – it basically has to do with the participation opportunities for women versus men. And we got our preliminary injunction ordering that two teams be reinstated. Brown took an emergency appeal and we all had a week to file our briefs in the First Circuit on an issue of first impression. I remember I had dial-up AOL. And it's like, you didn't attach a big file to something, so you sent discs by FedEx overnight. And you got that, and then you're on the phone and you're faxing pages back and forth and writing on them and trying to do this on the weekends. That's what we did. That was what that was like. We got a great decision and Brown appealed and then filed a petition for certiorari. That was denied.

And that was, I think, a fairly watershed moment, because, you know, knock on wood, that was pretty much the last of the real big assaults on Title IX. Since that time, Brown made golf co-ed. And they now have men's and women's golf. They added equestrian, which could be coed, but it's basically all women. And the latest one is women's rugby. And no women's team has been cut in all this time. And the number of women participating has gone up, and the number of men's teams, whether they're less large than they were before, that may be. But, I think it's been very successful.

What is the best advice you ever got?

One of the things I was told early on, it was Rhode Island advice, which is just assume that everything you say will be on the front page of the *Providence Journal*.

Limited Scope Representation Seminar Explores Changes in the Practice of Law

At the November 15th Limited Scope Representation Seminar, attorneys (l to r) Melissa E. Darigan, J. Robert Weisberger, Jr., and Lynda L. Laing provided an explanation of what Limited Scope Representation is and how to ethically comply with the new rules adopted by the Supreme Court concerning this type of representation. The seminar is available on-demand on the Bar's website.

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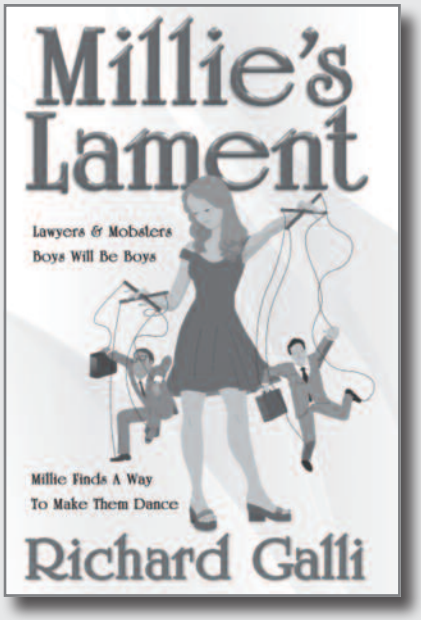

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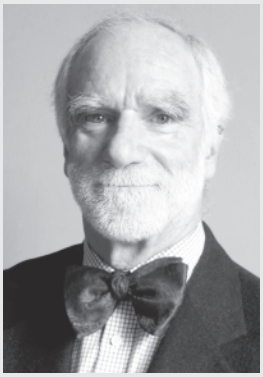

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Proposed Title Standards 3.13, 3.14, and 3.15 Open for Bar Member Review and Comment

The Rhode Island Bar Association's Title Standards and Practices Committee, chaired by Michael B. Mellion, Esq., at their meeting on September 28, 2017, voted unanimously to submit the following Proposed Title Standards 3.13, 3.14, and 3.15 to the Rhode Island Bar Association's Executive Committee for its consideration. Bar members are invited to comment on these proposed changes, no later than February 1, 2018, by contacting Rhode Island Bar Association Executive Director Helen Desmond McDonald by postal mail: 41 Sharpe Drive, Cranston, RI 02920 or email: hmcdonald@ribar.com.

SECTION III CONTINUED
Standard No. 3.13
INSUBSTANTIAL DEFECTS

Any deed, mortgage, lease, power of attorney, discharge, release, assignment or other instrument made for the purpose of conveying, leasing, mortgaging or affecting any interest in real property in this state, which instrument contains any one or more of the following defects or omissions will be deemed as valid as if it had been executed without the defect or omission, and the existence of such defects or omissions will not render the title defective or unmarketable, unless an action challenging the validity of that instrument was commenced, and a notice of lis pendens was recorded in the land evidence records of the city or town where the instrument is recorded, within ten years after the instrument is recorded:

(1) The instrument does not include an acknowledgment clause;

(2) In the case of a conveyance by a corporation, limited liability company, partnership, limited partnership, or limited liability partnership, or by any other entity authorized to hold and convey title to real property within this state, the instrument designated such entity as the grantor but fails to disclose either the authority of or the office or status held in the entity by the individual who executes the instrument, and/or was signed by an individual in such person's individual capacity;

(3) The instrument transfers an interest in land by reference to a recorded map or subdivision plan and the map or plan does not comply as to preparation, form, certification, approval or filing with any requirement of any special or general law, municipal ordinance or regulation;

(4) The record does not disclose the date of recording;

(5) The instrument fails to state the city or town and state in which the real property described in the instrument is located.

PURPOSE: The purpose of this proposed Title Standard is to eliminate as title issues certain matters with respect to title which are otherwise capable of resolution by investigation, preparation and execution of corrective instruments.

SECTION III CONTINUED
Standard No. 3.14
SELF-DEALING BY FIDUCIARY

Any recorded deed, mortgage, lease, release, assignment or other instrument made for the purpose of conveying, leasing, mortgaging or affecting any interest in real property in this state, which instrument is executed by a fiduciary, but which instrument is voidable because the fiduciary is the grantee, mortgagee, lessee, releasee or assignee designated in such instrument, will be deemed a valid and effective instrument, and will not render the title defective or unmarketable, unless an action is commenced to avoid and set aside such instrument and a notice of lis pendens is recorded in the land evidence records of the city or town where the instrument is recorded within ten years from the date of recording of such instrument.

PURPOSE: The purpose of this proposed Title Standard is to eliminate, after the expiration of ten years from the recording of a conveyance by a fiduciary, any title issue that may exist based upon purported self-dealing by the fiduciary.

SECTION III CONTINUED
Standard No. 3.15
DISCHARGE OR ASSIGNMENT OF MORTGAGE BY FOREIGN FIDUCIARY

A discharge or assignment of a mortgage interest in real property in this state held by a nonresident or deceased nonresident that is executed by an out-of-state fiduciary shall be deemed to have the same effect as if executed by a fiduciary of this state, and will not render the title to the real property defective or unmarketable, unless an action contesting the validity of the discharge or assignment has been commenced and a notice of lis pendens has been recorded in the land evidence records of the city or town where such release or assignment is recorded within five years after the instrument is recorded.

PURPOSE: The purpose of this proposed Title Standard is to eliminate, after the expiration of five years from the recording of a discharge or assignment of mortgage by a foreign fiduciary, any title issue that may exist due to the fact that the fiduciary was not appointed by a Rhode Island court.

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Here's an early glimpse at what the CLE Committee is working on for this Spring!

March 15
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Practical Skills: Workers' Compensation Practice in Rhode Island
Rhode Island Law Center, Cranston
9:00 a.m – 3:00 p.m.
pending CLE credit approval

April 10
Tuesday
Opening Statements
Rhode Island Law Center, Cranston
12:00 p.m. – 2:00 p.m.
pending CLE credit approval

April 12
Thursday
How to Perform a Title Search
Rhode Island Law Center, Cranston
12:45 p.m. – 1:45 p.m.
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April 25
Wednesday
Closing Your Practice in a Personally and Professionally Responsible Manner
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1:00 p.m. – 4:00 p.m.
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April 26
Thursday
Immigration 101
Rhode Island Law Center, Cranston
9:00 a.m. – 12:00 p.m.
pending CLE credit approval
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May 9
Wednesday
Practical Skills: Civil Law Practice in Rhode Island Superior Court
Rhode Island Law Center, Cranston
9:00 a.m – 3:00 p.m.
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Reminder: Bar members may complete CLE credits through participation in online CLE seminars. To register for an online seminar, go to the Bar's website: **ribar.com** and click on CONTINUING LEGAL EDUCATION on the left side menu.

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Nonconforming Uses

continued from page 9

bank is a legal nonconforming use."

The apparent dissonance in the Supreme Court's opinions on this issue is reflected in Superior Court decisions since **RICO** was decided in 2001. For example, in **Town of Charlestown v. Charlestown Zoning Bd.**[28] and **R. Champlin Crane & Excavating, Inc. v. Westerly Zoning Bd.,**[29] the Superior Court for Washington County, with different justices presiding, rejected zoning board decisions finding a nonconforming use but the court did so because of inadequate findings. In neither case did the court suggest that the zoning board lacked jurisdiction to decide whether use of the subject property constituted a legal nonconforming use. In fact, in the **R. Champlin Crane** case the court said the existence of a nonconforming use was the "crux" of the issue before the board.

Similarly, in **LaCroix v. Town of Westerly Zoning Board of Review**[30] the court held that a landowner appealing a zoning official's notice of zoning violation to the zoning board had "carried his burden of proving that the first-floor residential units are a legally nonconforming use" and that therefore the board's decision rejecting the appeal was "clearly erroneous."

In other cases, Superior Court judges affirmed zoning board decisions that expressly found that a nonconforming use did or did not exist. See **Contardo v. Monahan**[31] (affirming zoning board decision that landowner did not have a preexisting nonconforming use and expressly rejecting landowner's contention that board lacked jurisdiction to determine whether nonconforming use existed); **Nicholson v. Town of Barrington**[32] (affirming zoning board decision that structures would be nonconforming by dimension).

On the other hand, some Superior Court cases have come down firmly on the **RICO** side by unequivocally holding the zoning boards do not have jurisdiction to determine the existence of a nonconforming use. See **Little Compton Resorts, Inc. v. Zoning Board for the Town of Little Compton**[33] ("Our Supreme Court has repeatedly stated that the establishment of nonconforming uses falls within the Superior Court's exclusive jurisdiction").

Finally, in some Superior Court cases

the court expressly raised, but did not decide, the question whether a zoning board has authority to decide the existence of a nonconforming use. See, e.g., **Morse v. Cranston Zoning Bd.**[34] (remanding zoning board decision effectively rejecting nonconforming use claim for lack of adequate findings, but directing board to determine whether zoning official or board itself has authority to find that use of the property is legally pre-existing non-conforming use). Note that in **Morse** the appellant herself, represented by counsel, expressed bewilderment about whether the zoning board had the authority to determine the existence of her claimed nonconforming use ("Appellant further asserted that she was not confident that the Zoning Board has the power to declare the existence of a legally pre-existing non-conforming use ... [she] suggested to the Zoning Board that if the Zoning Official and the Municipal Court lacked the power to make the requested determination, perhaps her only recourse would be to seek a declaratory judgment in this Court").[35]

In another confusing Superior Court case, **Dwelly v. Zoning Board of Review of Town of Little Compton**,[36] the primary issue was whether the owner of a dog kennel was excused from obtaining a special use permit for the operation of a kennel in a residential zone because the kennel use pre-existed the zoning ordinance. In reversing the zoning board's decision against the owner, the court noted that the board had failed to address or answer the issue regarding the owner's prior non-conforming use of the property, but then it added this "Oh by the way" sentence at the end of its opinion, "On remand, ... the Zoning Board must be mindful that zoning boards lack the statutory authority to issue declaratory judgments on the legality of a pre-existing use **See RICO Corp. v. Town of Exeter** ...."[37]

To sum it up, the law in Rhode Island about whether a zoning board has the authority to determine that a nonconforming use does or does not exist on particular property is a mess. Courts and counsel and litigants do not know what the law is.

Can the problem be remedied? Yes, and rather easily. Either the Legislature or, in an appropriate case, the Supreme Court should disavow or at least substantially revise the **RICO** opinion and revert to the pre-**RICO** rules. The relevant pre-

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RICO cases generally held that a zoning board had no jurisdiction to determine the existence of a nonconforming use on a petition for such a determination or on an application for zoning relief to confirm a nonconforming use, but could do so on an administrative appeal.[38]

A close study of the main precedent relied on by the RICO court, **Olean v. Zoning Bd. of Review of Lincoln**,[39] is instructive. In **Olean**, the question of the legality of the pre-existing use was brought before the zoning board twice, first on an appeal from a decision of the building inspector, and then subsequently on an application by the property owner for a "Special exception ... as a continuation of the present operation."

The **Olean** court emphasized that it was not reviewing the board's denial of the appeal from the building inspector's decision, but rather was reviewing the zoning board's second decision authorizing a continuance of a use previously established. The holding of the court in **Olean** was that "the board was clearly without jurisdiction to act on the petition for an exception."[40] Nothing in the **Olean** opinion suggested that the zoning board had acted without jurisdiction in upholding the building inspector's decision its first decision.

Moreover, **Olean** cannot fairly be read to prohibit zoning boards from deciding whether a landowner has a nonconforming use when applying for some zoning relief *other than asking the board to confirm the existence* of the nonconforming use. For example, if a zoning ordinance allows nonconforming uses to be expanded or changed by obtaining a special-use permit (as expressly allowed by the enabling act[41]), or allows the dimensional requirements applicable to a nonconforming structure to be relaxed by obtaining a variance, these kinds of applications for zoning relief should not be derailed by requiring the landowner to go to Superior Court if objectors challenge the existence of the nonconforming use or structure. The zoning board should be able to weigh the evidence of historic use and decide whether the nonconformity exists.

The only scenario in which a zoning board should not be allowed to determine the existence of a nonconforming use is where the issue is raised solely to decide whether or not it really exists; in other words, to ask the board to issue what amounts to a declaratory judg-

ment.[42] Where the issue is but a stepping stone to some other relief – such as to obtain a building permit, or to alter a use claimed to be nonconforming – the zoning board should not hesitate to examine the facts and decide whether or not there is a nonconforming use, just as it decides other issues that properly come before it.

ENDNOTES

1 *787 A.2d 1136 (R.I. 2001).*
2 *Nonconforming Uses: Who Can Tell Whether They Even Exist? 51* Rhode Island Bar Journal, *Jan./Feb. 2003.*
3 *787 A.2d at 1144 (emphasis added).*
4 ***Hassell v. Zoning Bd. of Review of East Providence**, 108 R.I. 349, 275 A.2d 646 (1971); **Olean v. Zoning Bd. of Review of Lincoln**, 101 R.I. 50, 220 A.2d 177 (1966).*
5 *R.I. Gen. Laws § 45-24-57(1)(i).*
6 *R.I. Gen. Laws § 45-24-68.*
7 *R.I. Gen. Laws § 45-24-40(a)(1).*
8 ***Town of Richmond v. Wawaloam Reservation, Inc.**, 850 A.2d 924 (R.I. 2004).*
9 *There were actually multiple enforcement actions by the town against the campground, for both zoning and building code violations, and they were all decided in consolidated judicial appeals.*
10 *850 A.2d at 932.*
11 *787 A.2d at 1142 (R.I. 2001).*
12 *896 A.2d 27 (R.I. 2006).*
13 *896 A.2d at 36.*
14 *64 A.3d 1208 (R.I. 2013).*
15 *64 A.3d at 1211.*
16 *64 A.3d at 1211.*
17 ***Cigarrilha v. City of Providence**, C.A. No. PC-08-3279 (R.I. Super.Ct. 2011), slip opinion, p. 4.*
18 *R.I. Gen. Laws § 45-24-69.*
19 *R.I. Gen. Laws § 9-30-1 et seq.*
20 ***Cigarrilha v. City of Providence**, C.A. No. PC-08-3279 (R.I. Super.Ct. 2011), slip opinion, p. 5-6.*
21 *151 A.3d 1223 (R.I. 2017).*
22 ***Id.** at 1226.*[23]
23 ***Id.** at 1227 (emphasis added).*
24 ***Id.** at 1230.*
25 *463 A.2d 1352 (R.I. 1983).*
26 *463 A.2d at 1358 (R.I. 1983) (emphasis added).*
27 *787 A.2d at 1143.*
28 *C.A. No. WC2011-0667 (R.I. Super.Ct. 2013).*
29 *C.A. No. WC-15-0002 (R.I. Super.Ct. 2017).*
30 *C.A. No. WC-2008-0281 (R.I. Super.Ct. 2015).*
31 *W.C. No. 2002-0612 (R.I. Super.Ct. 2004).*
32 *C.A. No. P.C. 06-5829 (R.I. Super.Ct. 2008).*
33 *C.A. No. NC-2016-0262 (R.I. Super.Ct. 2016).*
34 *C.A. No. PC 10-4988 (R.I. Super.Ct. 2013).*
35 ***Id.***
36 *C.A. No. NC-2014-0276 (R.I. Super.Ct. 2015).*
37 ***Id.***
38 *See Nonconforming Uses: Who Can Tell Whether They Even Exist? 51* Rhode Island Bar Journal, *Jan./Feb. 2003, at p. 16.*
39 *101 R.I. 50, 220 A.2d 177 (1966).*
40 ***Olean v. Zoning Bd. of Review of Lincoln**, 101 R.I. 50, 220 A.2d 177, 178 (1966).*
41 *R.I. Gen. Laws § 45-24-40(a)(1).*
42 *See, for example, **Haronian v. Narragansett Zoning Board of Review**, C.A. No. WC/2006-0106 (R.I. Super.Ct. 2007), in which the court clearly implied that a zoning board can determine that a nonconforming use exists based on "direct evidence of when the present use was lawfully established," but not on past declarations of zoning boards or municipal officials that a particular property contains a nonconforming use.* ❖

Volunteer Bar Lawyers Offer Free Legal Guidance through Rhode Island Bar/NBC10 Ask a Lawyer Partnership

I-r: Christopher D. Turco, Esq., Sarah B. Oster, Esq., Denise Acevedo Perez, Esq., and Susan D. Vani, Esq.

At the NBC Channel 10 studios, a volunteer lawyer panel, staffed by members of the Rhode Island Bar Association Lawyer Referral Service (LRS) and Volunteer Lawyer Program (VLP), appeared on the station's news broadcasts on Tuesday, October 24th, from 5:00 p.m. to 7:30 p.m. The Rhode Island Bar Association attorneys answered over 65 viewer telephone questions related to family law, along with an additional 60 miscellaneous law related questions. The program was held during the American Bar Association's National Pro Bono Week. Other Bar activities held during Pro Bono Week include a limited scope clinic in the area of collections, and two elder law legal clinics.

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Lawyers on the Move

Mary Ann Carroll, Esq. is now partner at **Henneous Carroll Lombardo, LLC**, 1240 Pawtucket Avenue, Suite 308, East Providence, RI 02916.
401-424-5224 macarroll@hcllawri.com hcllawri.com

Andrew Henneous, Esq. is now partner at **Henneous Carroll Lombardo, LLC**, 1240 Pawtucket Avenue, Suite 308, East Providence, RI 02916.
401-424-5224 ahenneous@hcllawri.com hcllawri.com

Noah J. Kilroy, Esq. of **Kilroy Law Firm** was honored by the Sisters of Mercy Northeast for his commitment to social justice and founding the Transcending Through Education Foundation.

Aubrey Lombardo, Esq. is now partner at **Henneous Carroll Lombardo, LLC**, 1240 Pawtucket Avenue, Suite 308, East Providence, RI 02916.
401-424-5224 alombardo@hcllawri.com hcllawri.com

Ernest G. Mayo, Esq. has returned to private practice at **Mayo Alternative Dispute Resolution Services**, 628 Metacom Avenue, Warren, RI 02885.
401-245-7985 mayo.ernest@verizon.net

O'Leary Law Associates and **The Law Offices of Christopher A. Murphy** have merged law practices to form **O'Leary Murphy, LLC**, 4060 Post Road, Warwick, RI 02886.
401-615-8584 info@olearymurphy.com olearymurphy.com

Frank E. Reardon, Esq. is now of counsel to **Pannone Lopes Devereaux & O'Gara LLC**, 1301 Atwood Avenue in Johnston, RI 02919.
401-824-5100 freardon@pldolaw.com pldolaw.com

Amy G. Rice, Esq. is now re-associated with **Law Offices of Amy Rice**, One Courthouse Square, Newport, RI 02840.
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Internship Experience

continued from page 25

trying to complete legal tasks and improve their legal skills, they are also there to absorb as much information about being a professional lawyer as possible. When asked if there was anything that he wished to share about what lawyers and placement supervisors can do to help law students in a placement and/or help law students become more practice ready, one student we interviewed spoke about contextualism. He suggested that instead of a supervisor asking an intern to find a resource, that the supervisor instead explain the methodology of the case and what the supervisor intends to accomplish with the information prior to asking for the resource itself. Putting the request in context helped the student feel more comfortable with sharing his voice and reduced communication errors between the student and his supervisor. Similarly, Laurie Barron counsels supervisors to bring students into learning experiences that aren't necessarily as productive for the placement but which help teach context. While there are many concepts that can be mastered in a law school classroom, context and professionalism are uniquely suited to an experiential learning setting. Another student interviewed praised her placement, remarking, "My supervising attorneys spoke with me about their law school experiences, their previous positions, and certain habits and practices that they think are the most important. Those conversations about lawyering and advocacy were enlightening and touched on subjects that aren't necessarily covered in the classroom but that have a big impact in practice." Michael Yelnosky, the dean of the law school and the director of the Judicial Clinical Externship Program explained that "we are quite fortunate to have supervisors in all of our externship programs who understand how to help create a meaningful learning experience for our students. Many of our externship supervisors have been doing this for years, and for new supervisors the staff of the Feinstein Center for Pro Bono and Experiential Education have developed a great system for 'onboarding' new supervisors."

Recommend Research Resources

Legal interns are generally not familiar with the research resources that practicing

attorneys use on a regular basis, such as CLE materials, subject-specific secondary sources, and popular treatises. If you have a favorite or trusted resource, share it with your student. She likely will have, or likely can obtain, access to it through the law library. In addition to topic-specific resources, some interns may not realize that they can use most digital subscription resources available to them as law students to complete assigned work in credit-bearing placements. Another resource available to law students are law librarians. As author Kendall L. Kerew states in the Teacher's Manual to *Learning From Practice A Text For Experiential Legal Education* (3rd ed.):

> "From my experience, the two biggest pitfalls students face in researching unfamiliar questions are…students want to jump right in and perform an electronic search on Westlaw or Lexis without consulting secondary sources or thinking through the best search terms to use. Similarly, students do not always keep track of the research they have done so they are less able to determine whether they have reached an appropriate stopping point."

Both of these pitfalls can be ameliorated by having students contact their school's law librarians who are experts in legal research materials, familiar with the resources available to law students, and knowledgeable about developing comprehensive research strategies. Furthermore, some students may feel more comfortable approaching a law librarian about research questions because of the fear that a question is too rudimentary. Laurie Barron explains, "Students may be reluctant to ask questions because they want to take initiative and be able to figure the assignment out on their own." Referring your intern to library staff within the placement or within the law school can allow the student to talk through a research question, discover resources, and gain confidence in the placement. Reminding students to use available research resources, whether those resources are a website or a person, is important. Reminding them to be mindful not to compromise confidentiality during a reference interaction with a law librarian is also critical.

Provide Regular & Meaningful Feedback

Regular and meaningful feedback is essential to maximizing an intern's practi-

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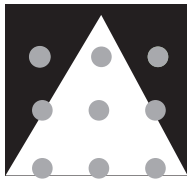

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When contacting Coastline EAP, please identify yourself as a Rhode Island Bar Association member or family member. A Coastline EAP Consultant will briefly discuss your concerns to determine if your situation needs immediate attention. If not, initial appointments are made within 24 to 48 hours at a location convenient to you. Or, visit our website at coastlineeap.com (company name login is "RIBAR"). Please contact Coastline EAP by telephone: 401-732-9444 or toll-free: 1-800-445-1195.

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

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

cal learning experience. Many of the law students we interviewed wished that their placement supervisors had provided them with more helpful feedback on their work, including specific suggestions on how to improve on future assignments. A lack of meaningful feedback from a placement supervisor to the student can create a situation in which both student and supervisor are frustrated. From the student's perspective, inadequate feedback leaves the student in the dark—unsure of whether her performance was satisfactory and, if not, why. Alternatively, from the supervisor's perspective, if a student's performance is insufficient, it often becomes easier for the supervisor to fix the student's mistakes rather than deal with an upset or defensive intern. In *Thanks for the Feedback: The Science and Art of Receiving Feedback Well*, Douglas Stone and Sheila Heen suggest that "much of the angst and frustration surrounding feedback is mismatch and differing perceptions between the giver and receiver of feedback." In Laurie Barron's experience, some supervisors "are reluctant to give negative albeit constructive feedback because they want the experience to be positive for the student." Students, however, desperately want and need feedback, "because it's the only way they can learn how to be a better lawyer." Barron recommends that feedback to legal interns be "prompt, concrete, and detailed." Supervisors should highlight what the student did well, where they need to improve, and provide recommendations on how they can be better in the future. Feedback should also be timely so that the assignment is still fresh in everyone's mind and to give the student time to improve their performance, assuming there is sufficient time and the opportunity. One student interviewed told us that her follow-up meetings with her supervisors regarding her completed assignments "were helpful guideposts for future tasks" and that the specific feedback she received during these meetings helped her to improve over the course of her placement. Barron adds that "the positive feedback should be just as detailed as the negative feedback." She also advises supervisors to establish a system for giving and receiving feedback. By investing time to give interns regular and meaningful feedback, supervisors can create a more productive and fulfilling experience for everyone.

Conclusion

Much of the burden of making a placement work falls to the student to bear. One interviewed student stated, "Students must go into legal job placements with the desire…necessary to prove their worth to their superiors. This requires students not only to accept—but to invite—challenging tasks…The most a lawyer or placement supervisor can do to help a law student become more practice ready is to sit down and discuss concepts with the student as if the student were the supervisor's equal…The remaining burden lies with the student; he or she must demonstrate the work ethic necessary to gain a supervising lawyer's trust." If you are currently working with interns, these tips are helpful reminders of lessons you may have already learned through experience. However, if you are reading this and considering a new role as an internship supervisor, Laurie Barron counsels, "Think concretely about the ways a law student can help you and consider whether you have the time to devote to an intern."

** Laura Pickering and Linda Tappa were 3L students at the time this article was written.* ❖

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Rhode Island Bar Association Annual Meeting June 21st and 22nd

The Rhode Island Bar Association Annual Meeting is on Thursday, June 21st and Friday, June 22nd, 2018 at the Rhode Island Convention Center. Featuring 38 Continuing Legal Education seminars, great keynote and workshop speakers, Bar Awards, many practice-related product and service exhibitors, and the chance to get together with your colleagues socially, the Bar's Annual Meeting, traditionally drawing over 1,500 attorneys and judges, is an event you'll want to attend and enjoy!

The Rhode Island Bar Association's **free**, web-based, **online Attorney Directory** provides an excellent means for your colleagues and clients to quickly connect with you.

Searchable by last name, first name or both, your Bar's online Attorney Directory serves as an easy means for you to communicate with your colleagues, and for clients and potential clients to connect with you. Attorney Directory contact information may include the Bar member's name, photograph, law office name, postal address, email address, telephone number, and facsimile number. And, email addresses are live, so simply clicking on a Directory email address creates a pre-addressed communication.

Access is easy through the **Attorney Directory** button at the top of the Rhode Island Bar Association's web site Home page at **ribar.com**. Bar members may update their information directly, online, via the **Members Only** feature on upper right corner of the Bar's website Home page. After logging in using your user name and password, you may click on the **Member Maintenance** button and update your information. This automatically updates both the Bar's secure and private database for home contact information and populates the publically-accessible, business-information-only online Attorney Directory. As an alternative, Bar members may provide address or other contact changes by connecting with the Rhode Island Bar Association's Member Services Coordinator Erin Bracken by email: ebracken@ribar.com or telephone: 401-421-5740. Attorney Directory photographs must be emailed to Ms. Bracken, provided in a jpg format of no smaller than 300 dpi.

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Exclusively designed to help Bar members receive and offer timely and direct assistance with practice-related questions.

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

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- **Bar members with questions about a particular area of the law.**
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Go to the Bar's website at **ribar.com**, login to the **MEMBERS ONLY**, and click on the **OAR** link.

In Memoriam

Hon. Jacob Hagopian
Retired Federal Magistrate Judge Jacob Hagopian, 90, passed away on November 19, 2017. He was the beloved husband of Mary L. (Pomoransky) Hagopian. Born in Providence, he was the son of the late Peter (Bedros) Hagopian and Varvar (Leylegian) Hagopian. He was predeceased by his sister Rosalie Yazijian and his brother Dr. Martin Hagopian. He enlisted in The United States Army at age 17, and entered active duty as a private and rose in rank to colonel. He received his GED and went to college and law school nights while raising a young family. Judge Hagopian graduated from George Washington University, and later American University where he earned his Juris Doctor degree. He later enrolled in the Judge Advocate General's School in Charlottesville, Virginia, and became a graduate in international law, as well as the Industrial College of the Armed Forces, Washington, DC, all while on active duty in the army and helping his young wife raise a family of five. In 1960-63, he was assigned as an officer in the Judge Advocate General Corps, along with his family, to Berlin, Germany, where he was the Deputy Staff Judge Advocate to the U.S. Army Commander in Berlin, and served in a Special Operations Unit as Principal Legal Adviser to the Intelligence Community, during the Berlin crisis. Soon reassigned in Washington D.C., he served as Appellate Counsel and Group Supervisor, Defense Appellate Division, Office of the Judge Advocate General and served in the capacity as Deputy Chief, Criminal Law Division, Office of the Judge Advocate General, Department of the Army, at the Pentagon. He received the Legion of Merit award for his judicial and legal advice to the government. In July 1970, he retired at the age of 42, from the U.S. Army where he served as Appellate Judge, on the U.S. Court of Military Review, the highest military court, USA Court of Criminal Appeals and USA Judiciary. In 1971, he was appointed Federal Magistrate Judge for the United States District Court for the District of Rhode Island and was later recalled into judicial service in 1995. Judge Hagopian fully retired from judicial service in 2012. He held several academic positions, alongside his civilian judgeship, and his judge advocate and military positions. Judge Hagopian is also survived by his loving children, Mark J. Hagopian and wife Soon-Hie, daughter Mary Lou Hagopian-Lamb and husband Kenneth, son Dana A. Hagopian, son Jan C. Hagopian and wife Glenna, and son Jon G. Hagopian and wife Christine. He is also survived by five cherished grandchildren, Jacob C. Hagopian, Sydney K. Hagopian, Jacqueline R. Hagopian, Julia E. Hagopian, and Livia A. Hagopian.

Hon. Vincent Pallozzi
Chief Judge of the Administrative Adjudication Court Vincent Pallozzi, 87, of Providence and West Palm Beach, FL, passed away on November 16, 2017. He was the beloved husband of Elvira (Tessicini) (Bird) Pallozzi. He was a devoted husband of the late Dolores P. (Sarcione) Pallozzi. Born in Providence, he was the son of the late Peter and Mary (Cioci) Pallozzi. Judge Pallozzi was a graduate of Providence College and Northeastern School of Law. He clerked under RI Supreme Court Justice Thomas J. Paolino. He was also an Army Veteran serving during WWII. He was admitted to the practice of law in 1954 and enjoyed the private practice for 25 years before entering public service. His public career spanned over two decades where he served in various leadership roles. He served under Mayor Joseph Doorley as the Director of the Department of Planning and Urban Development and the Providence Redevelopment Agency. He later served under Mayor Joseph R. Paolino, Jr. as Director of Administration and was appointed Chief of Staff in 1985. Judge Pallozzi was the lead negotiator and legal architect alongside Mayor Joseph R. Paolino, Jr., on behalf of the City of the Providence, negotiating with the State of Rhode Island on the "Moving of the Rivers" project. In 1989, he was appointed by Governor Bruce Sundlun as an Administrative Law Judge. In July 1993, he was confirmed Chief Judge of the Administrative Adjudication Court. He served on the Board of Directors for the Federal Hill House for over 25 years and was a member at the Metacomet Country Club for 22 years. Besides his wife, he is survived by his loving sons, Peter J. Pallozzi and his wife Paula M. (Palmieri) and Stephen M. Bird (stepson) and his wife Susan (Sheedy). He is also survived by his cherished grandchildren, Andrew Pallozzi and his wife Alessandra (Andreozzi), Nicole Pallozzi and Alanna Bird, a brother in-law John Landolfi and a nephew Steven Landolfi. He was the loving father of the late Marianne Paola and her late husband Jasper. He was a devoted brother of the late Elena M. Landolfi and late niece Anne Marie Landolfi.

Richard A. Toupin, Esq.
Richard A.Toupin, 65, of Narragansett, passed away on November 11, 2017. Richard was born in Woonsocket, graduating from Mount St. Charles Academy in 1970 and the University of Rhode Island in 1974. He obtained his Juris Doctor from Vermont Law School in 1977 and practiced law in both RI and MA with a specialty in real estate. He enjoyed his previous service on the Rhode Island Historical Preservation Commission, and he loved his time as Narragansett's Probate Judge. He was fond of beach days at the Dunes Club and time spent with family at the Point Judith Country Club. Richard is survived by his wife, Alison, children, Caitlin (Amanda), Brendan (Caitlin), and Patrick; his grandchildren, Emma, Callie, and Paxton Harold, as well as his mother, Ruth Degnan Toupin.

Caption This! Contest

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

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

How to Enter: Submit the caption you think best fits the scene depicted in the cartoon above by sending an email to kbridge@ribar.com with "Caption Contest for January/February" in the subject line.

Deadline for entry: Contest entries must be submitted by February 1st, 2018.

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

Winning caption for November/December issue cartoon

"That jury is acceptable."

RICHARD K. FOSTER, ESQ.

Rhode Island Bar Foundation Seeks Law School Scholarship Applicants

The Bar Foundation intends to award two scholarships of $20,000 each to Rhode Island residents who enroll as first-year students in an American Bar Association accredited law school for the academic year beginning September 2018. The scholarship is for the first year of law school only and non-renewable. Each scholarship award is made on the basis of demonstrated financial need, superior academic performance, community and public service, and demonstrated contacts with and commitment to the State of Rhode Island. The Scholarship Committee seeks applications from candidates without regard to race, color, religion, country of ancestral origin, handicap, age, sex, or sexual orientation.

The Rhode Island Bar Foundation Scholarship application deadline is March 30, 2018. More information and application forms are available on the Rhode Island Bar Association website: ribar.com in the Rhode Island Bar Foundation section.

Advertiser Index

BEAT THE WINTER BLUES

Keep Active

It's important to remember to stay active during the winter months. Even when your bed feels extra warm or the couch calls your name, don't forget to dedicate time to exercise. Devote at least 30 minutes daily to physical activity and you'll begin to boost your mood and reverse the effects of winter depression.

Eat Healthy

The holiday season is often filled with junk food and sugary sweets. These extra treats tend to leave us feeling sluggish and increase feelings of anxiety and depression. A healthy diet will boost your mood, give you more energy and stop you from putting on weight over winter.

See your Friends & Family

Even if you feel out of sorts, push yourself to get out of the house and socialize. Make an effort to keep in touch with people you care about and accept any invitations to social events, even if you just go for a little while. When you surround yourself with positive people the effects are contagious!

Get Outside

Convincing yourself to go outside in the chilly winter months can be hard, but the benefits are big! Soaking up as much natural daylight as possible can help improve symptoms of mild to moderate depression, increase focus, and lower stress levels.

Plan a Vacation

Longing for sunnier days at the beach? Nothing can perk your spirits quite like planning a warm getaway. Research shows that the simple act of planning a vacation causes a significant increase in overall happiness. Planning your trip in advance helps you beat the winter blues by giving you something to look forward to!

Take up a New Hobby

Keeping your mind focused on a new interest helps ward off symptoms of the winter blues. Try a new exercise class, join a book club, take up knitting, or start a blog. The important thing is that you have something to look forward to and concentrate on.

Lawyers Helping Lawyers

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