



Rhode Island Bar Journal

Rhode Island Bar Association Volume 73, Number 4, January/February 2025

Why Loper Bright Should Not Change the Practice of Administrative Law in Rhode Island

Lessons Learned from A Not So Public 'Mismatch': Firearms, Toolmark Analysis, and Rhode Island's Publicly Funded Crime Laboratories

Protecting Your Practice: Understanding the SS7 Vulnerability

Articles

5 Why Loper Bright Should Not Change the Practice of Administrative Law in Rhode Island

Katherine B. Savage, Esq.

13 Lessons Learned From A Not So Public ‘Mismatch’: Firearms, Toolmark Analysis, and Rhode Island’s Publicly Funded Crime Laboratories

Michael A. DiLauro, Esq.

25 TECH TIPS: Protecting Your Practice: Understanding the SS7 Vulnerability

Nicholas Matlach, Esq.

FEATURES

- | | | | |
|----|-------------------------------------------------------------------------------------------|----|---------------------------------------------------------|
| 3 | Navigating the Era of Artificial Intelligence in Law | 27 | Establish Yourself as a Thought Leader! |
| 4 | Build your Client Base and Serve Your Community with the Bar’s Lawyer Referral Service! | 27 | Thanks to Our CLE Speakers |
| 6 | Rhode Island Bar Foundation Spotlight | 29 | Continuing Legal Education Seminars |
| 7 | Serve Your Community with the Bar’s Volunteer Lawyer Program! | 32 | In Memoriam |
| 7 | Stay Connected | 33 | Help Us Grow Our List Serve |
| 8 | IOLTA Honor Roll Banks | 34 | Online Attorney Resources (OAR) |
| 9 | Rhode Island Bar Foundation Seeks Law School Scholarship Applicants | 34 | Looking to Post or Search for a Job in the Legal Field? |
| 11 | 2024 Rhode Island Constitution Day | 35 | Cartoon |
| 12 | Seeking Law Related Education Program Attorney Volunteers: Update Your Preferences Today! | 35 | Lawyer on the Move |
| 12 | Combine Profit & Public Service in 2025 with LRS | 35 | RIBA DEI Committee Call to Action! |
| 14 | Ethics Advisory Panel | 35 | Advertising Index |
| 15 | Superior Court Bench/Bar Committee Sponsors Technological Competence CLE | BC | CorpCare – Your Lawyers Assistance Program |
| 19 | Now Accepting 2025 Rhode Island Bar Award Nominations | | |
| 20 | House Of Delegates Letters of Interest – Due February 21, 2025 | | |
| 21 | Honor Roll | | |
| 22 | Lawyers Helping Lawyers | | |
| 22 | SOLACE | | |
| 23 | Bar Association Mentor Programs | | |

Front Cover Photograph by Brian McDonald **Nightingale-Brown House, Providence** Built in 1792 for Captain Joseph Nightingale and later home to the Brown family for over a century, the Nightingale-Brown House is an example of Federal-style architecture. Restored to its 18th-century grandeur, this 19,000-square-foot National Historic Landmark now houses the John Nicholas Brown Center for American Civilization and welcomes visitors for tours.



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USPS (464-680)ISSN 1079-9230

Rhode Island Bar Journal is published bimonthly by the Rhode Island Bar Association, 41 Sharpe Drive, Cranston, RI 02920.

PERIODICALS POSTAGE PAID AT PROVIDENCE, RI

Subscription: \$30 per year

Postmaster

Send Address Correction to:
Rhode Island Bar Journal
41 Sharpe Drive
Cranston, RI 02920

ribar.com

Navigating the Era of Artificial Intelligence in Law



Christopher S. Gontarz, Esq.
President
Rhode Island Bar Association

“...AI tools are a first draft, not the final product.”

Artificial intelligence (AI) has become an integral part of our daily lives, profoundly transforming various aspects, including the practice of law. It has been a major topic of discussion at the last two National Conferences of Bar Presidents as well as the recent New England Bar Association Annual Meeting in October 2024. An executive order¹ issued in October 2024 by the Rhode Island Supreme Court has established the Committee on Artificial Intelligence and the Court, chaired by Justice Erin Lynch Prata and Justice Brian Stern, to examine artificial intelligence and its impact on the practice of law. In the same month, President Biden issued the first national security memorandum detailing how national security institutions should use and protect artificial intelligence technology.²

As Chief Justice John Roberts of the United States Supreme Court noted in his annual report³ released on December 31, 2023, AI “obviously has great potential to dramatically increase access to key information for lawyers and non-lawyers alike.”

There are essentially two models of AI, non-generative and generative. Non-generative AI models perform computations based on input data and focus on tasks such as classifications, predictions, and decision-making. Generative AI can generate text, images, videos, or other data using generative models, often in response to prompts. Examples are ChatGPT, Vincent AI, and chatbots.

Chief Justice Roberts focused on artificial intelligence after ChatGPT, an AI tool, passed several law school exams at the University of Minnesota.⁴

The use of AI can also be fraught with peril. In June 2023, a US District Court Judge imposed sanctions on two New York lawyers who submitted a legal brief that included six fictitious case citations generated by an AI chatbot. In imposing sanctions, the Judge noted the Code of Professional Responsibility imposes a gatekeeping role on attorneys to ensure the accuracy of their filings.⁵

There are nine significant Ethics opinions on generative artificial intelligence and the Rules of Professional Responsibility. They are ABA Formal Opinion 512; California – Practical Guidance For the Use of Generative Artificial Intelligence in the Practice of Law; D.C. Bar Ethics Opinion 388;

Florida Bar Ethics Opinion 24-1; Report and Recommendations of the New York State Bar Association Task Force on Artificial Intelligence; New York City Bar Formal Opinion 2024-05; Philadelphia Bar Association Joint Formal Opinion 2024-200; State Bar of Michigan Ethics Opinion JI-155; and West Virginia Legal Ethics Opinion 24-01.

All of the noted opinions emphasize the following rules of the Code of Professional Responsibility to be considered when utilizing AI.

Rule 1.6 Duty of Confidentiality

Without client consent a lawyer must not input confidential client information into any generative AI system that will share the inputted confidential information with third parties.

Rules 1.7 through 1.12 Conflicts of Interest

Lawyers must ensure that the system implements any ethical screens required under the Rules.

Rule 1.1 & 1.3 Duties of Competence and Diligence

Lawyers must be aware that generative AI may include information that is false, inaccurate or biased.

Rules 7.1 & 7.3 Advertising and Solicitation

AI cannot be used in a way that would circumvent the rules regarding marketing and solicitation.

Rule 8.4 & 1.2(d) Duty to Comply with the Law

Lawyers need to be aware of privacy laws, cross-border transfer data transaction laws, intellectual property and cybersecurity concerns.

Rules 5.1, 5.2, 5.3 & 8.4 Duty to Supervise Lawyers and Non-Lawyers

Supervising lawyers must establish clear policies regarding permissible uses of AI and ensure subordinate conduct complies with the Rules.

Rules 1.4 & 1.2 Communication Regarding Generative AI Use

Lawyers should consider disclosing to the client the intent to use AI that is not routinely used as part of the representation.

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Rules 1.2(c), 3.1, 3.3 & 1.16 Candor Toward the Tribunal

Generative AI has fabricated or “hallucinated” precedent. Lawyers need to check rules and orders issued by the Court that may necessitate the disclosure of AI.

Rule 1.5 Charging for Work Produced by AI and AI Costs

Lawyers must not charge hourly fees for the time that would otherwise have been spent absent the use of generative AI.

Rule 8.4 Prohibition on Discrimination

Lawyers need to be aware of possible biases and the risks they may create when using AI to screen potential bots or employees.

All members of the Rhode Island Bar have free access to Fastcase, which offers access to cases, statutes, and regulations. In November 2024, members gained access to vLex Fastcase, a global legal intelligence company that includes an upgrade featuring some capabilities of Vincent AI, a research assistant to enhance your legal research. According to the developers, Vincent is primarily a Retrieval-Augmented Generation (RAG) tool. Unlike traditional generative AI, Vincent retrieves information from authoritative sources in real time, synthesizing and summarizing it for the user. This reduces the risk of bias and ensures accuracy by focus-

ing on well-established legal authorities.

The Continuing Legal Education (CLE) Committee of the RIBA is committed to prioritizing programming on AI and its impact on the legal profession to ensure our members stay informed of developments and advancements in this rapidly advancing field. And remember, members may contact Jared Correia, our Law Practice Management Consultant, who is available for virtual consultations free of charge to answer questions about using practical AI software tools. Additionally, the Law Practice Management page on the Bar’s website features non-credit programs on three popular AI tools that members can view at their convenience.

We have entered the Artificial intelligence era, and while the courts and bar associations continue to assess the fast-evolving challenges using AI, there are many implications that may affect how you utilize it. The best advice I’ve heard from AI experts is that all AI tools are a first draft, not the final product. Attorneys must carefully review and analyze any data generated by AI when doing their research.

ENDNOTES

- 1 *RI Supreme Court Executive Order No. 2024-03.*
- 2 *THE NEW YORK TIMES, October 25 2024, page A18.*
- 3 *2023 Year-End Report on the Federal Judiciary.*
- 4 *Samatha Kelly, CNN BUSINESS, January 2023.*
- 5 *Mata v. Avianca, 1:22-cv-1461 PKC, US District Court for Southern District of NY.* ◇

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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 magazine published bi-monthly, six times annually, and digitally distributed to, among others, all practicing attorneys and sitting judges, in Rhode Island. This constitutes an audience of over 6,300 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 articles, interviews, columns, and editorials are not the official view of the Rhode Island Bar Association. Letters to the Editor are welcome.

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- > Contributors are requested to submit articles, book review, editorial, and interview topic ideas for approval to the Managing Editor prior to submission.
- > The *Rhode Island Bar Journal* gives primary preference to original articles, written expressly for first publication in the *Bar Journal*, by attorney and judicial 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 unless co-authored with a RIBA member. Law student members may submit articles co-authored by either a law school professor (not necessarily a RIBA member) or a RIBA member.
- > A maximum of two authors (co-authors) is permitted for article submissions.
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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 Editor reserves the right to edit pieces for legal size, presentation and grammar.
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- > Submissions are preferred in a Microsoft Word format emailed as an attachment.
- > 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.

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Why Loper Bright Should Not Change the Practice of Administrative Law in Rhode Island

This article is a special project by a participant of the 2023–2024 Leadership Academy, developed with feedback and edits from their mentor. It reflects the dedication and growth fostered within our program. We are proud to showcase the hard work and insights of our future leaders.



Katherine B. Savage, Esq.
Hinckley Allen
Providence

“This suggests that Rhode Island’s independent body of law developed before *Chevron* was decided and that Rhode Island has never adopted *Chevron* into that body of law.”

On June 28, 2024, the United States Supreme Court overruled its holding in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) in a 6-2 decision. For 40 years, *Chevron* stood for the proposition that, where Congress has delegated power to an agency through statute, but the statute itself is silent or ambiguous with respect to a specific issue, reviewing courts should defer to the agency’s statutory interpretation so long as it is based on a permissible construction of that statute.¹ In the consolidated cases of *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Dep’t of Commerce* (“*Loper Bright*”), the Court held that the Administrative Procedures Act, 5 U.S.C. § 551 *et seq.* (the “federal APA”), prohibits courts from deferring to agency interpretations on any question of law. It found that “*Chevron* defies the APA’s command that the reviewing court—not the agency whose action it reviews—is to decide *all* relevant questions of law and interpret...statutory provisions.”²

This article analyzes the *Loper Bright* decision and explains why it is unlikely to change the practice of administrative law in Rhode Island.

I. *Loper Bright* and *Relentless*

The Petitioners in both *Loper Bright* and *Relentless* challenged the National Marine Fisheries Service’s (“NMFS”) adoption of a new rule requiring certain vessels to pay for third-party observers to accompany them on fishing trips to collect data about the health of herring fisheries. Relying on *Chevron*, the federal district courts granted summary judgment in favor of the NMFS, finding that its interpretation of the statute was reasonable. On appeal, the D.C. and First Circuit Courts affirmed, finding that the statute was silent on the question of *who* should pay for the monitoring costs and noting that NMFS’s interpretation was reasonable because, when an agency establishes regulatory requirements, regulated parties generally bear the costs of compliance.

The Supreme Court granted the petitions for certiorari, but expressly declined to hear arguments about the facts underlying these disputes. Instead, the Court asked the parties to brief a single question: “Whether the Court should overrule *Chevron* or at least clarify that statutory

silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.”³

A. The *Chevron* Two-Step

In *Chevron v. Natural Resources Defense Council, Inc.*, the United States Supreme Court articulated a two-step process for determining whether to uphold or reverse an agency’s interpretation of its own statute. First, the court must determine whether Congress has directly and unambiguously spoken to the precise question at issue. If so, then “that is the end of the matter,” and the agency as well as the court must give effect to the unambiguously expressed intent of Congress.⁴ If not, however, then the Court must decide whether the agency’s interpretation is based on a permissible construction of the statute. If it is, then the court must defer to the agency’s interpretation because the decision as to the meaning or reach of the statute involves reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation depends upon specialized knowledge about the regulated subject matter.⁵

B. Majority Opinion

In *Loper Bright*, the Court overruled the “interpretive methodology” articulated in *Chevron*, but expressly preserved the holdings of all the cases that have already been decided using the *Chevron* two-step.

Chevron is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, *as the APA requires*. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the

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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 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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agency acts within it. But courts need not *and under the APA may not* defer to an agency interpretation of the law simply because a statute is ambiguous.⁶

As indicated by the emphases, the Court's holding is based on its analysis of the specific language in the federal APA. Section 706(2)(A) of the federal APA states, in pertinent part:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The Court found that this provision codified the "unremarkable, yet elemental proposition" that "courts decide legal questions by applying their own judgment."⁷

To bolster its interpretation, the Court contrasted subsection (2)(A), cited above, against a later subsection (2)(E), which "mandate[s] that judicial review of agency policymaking and fact-finding be deferential."⁸ According to the Court:

In a statute designed to 'serve as the fundamental charter of the administrative state,'...Congress surely would have articulated a similarly deferential standard applicable to questions of law had it intended to depart from the settled pre-APA understanding that deciding such questions was 'exclusively a judicial function.'⁹

The Court found that the "default" level of judicial review at the time the federal APA was enacted in 1946 was *de novo* review for questions of law and deferential for questions of fact. (The majority does not consider what standard of review applies to mixed questions of law and fact).

Rhode Island Bar Foundation Spotlight

Grantee Organization Spotlight

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"The financial support from the IOLTA grant program to the Rhode Island Bar Association's Pro Bono Project reinforces and strengthens the Bar's mission of extending and increasing access to justice for our neediest Rhode Islanders. With this support and the continued dedication and commitment of volunteer attorneys, many more of our lowest income individuals and families can have the opportunity to be fairly represented when facing a legal crisis."

— Susan Fontaine, PUBLIC SERVICES DIRECTOR

The Court appears to be returning to **Skidmore** deference, noting that while judges may not defer to agency interpretations on question of law, they may consult agency interpretations as “a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”¹⁰ Because judges can seek guidance from agency interpretations—which are premised on their unique knowledge as experts in the field—the majority argues that “delegating ultimate interpretive authority to agencies is simply not necessary to ensure that the resolution of statutory ambiguities is well informed by subject matter expertise.”¹¹

The majority also states that, if overturning **Chevron** is a mistake, then Congress and the Executive Branch “are of course always free to act by revising the statute.”¹² That argument loses integrity when, a few pages later, the majority argues that there is no reason the Court must “wait helplessly for Congress to correct our mistake” in **Chevron**.¹³ Other than this one sentence, the Court does not acknowledge the arguments that Congress, by living with **Chevron** for over forty years, ratified its “interpretive mythology” and legislated against that backdrop.

On the issue of *stare decisis*, the Court found that **Chevron** “undermined the very ‘rule of law’ values that *stare decisis* exists to secure” while also preserving all prior holdings that relied on the **Chevron** framework. The Court justifies this double-speak by arguing that “[m]ere reliance on **Chevron**...is not enough to justify overruling a statutory precedent.”¹⁴

Justices Thomas and Gorsuch wrote separate concurrences, both of which (1) focused on the issue of *stare decisis* and (2) argued that **Chevron** violated the separation of powers doctrine. There are two key takeaways from these concurrences. First, both justices would have made the **Loper Bright** decision a constitutional ruling, rather than a statutory ruling, which would have more far-reaching consequences (though perhaps not in Rhode Island). Second, Justice Thomas implies that agency policymaking of any kind amounts to an unconstitutional exercise of the legislative powers vested in Congress.¹⁵

Justice Kagan’s dissent, in which Justices Sotomayor and Jackson joined, powerfully refutes every portion of the majority’s holding. The key takeaway from her dissent is that the questions arising from ambiguous statutes are not legal questions—they are subject matter-specific questions. She explains:

Deciding when one squirrel population is ‘distinct’ from another...requires knowing about species more than it does consulting a dictionary. How much variation of what kind—geographic, genetic, morphological, or behavioral—should be required? A court could, if forced to, muddle through that issue and announce a result. But wouldn’t the Fish and Wildlife Service, with all its specialized expertise, do a better job of the task[?].¹⁶

Justice Kagan’s rationale is relevant because, historically, Rhode Island courts have relied heavily on agency expertise when reviewing agency statutory interpretations.

II. Impact on Rhode Island

Loper Bright is unlikely to significantly change the practice of administrative law in Rhode Island for four reasons. First, the **Loper Bright** decision is a statutory decision that overrules **Chevron** based on the Court’s reading of Section 706 of the federal APA, which is distinguishable from the Rhode Island Administrative Procedures Act (“RI APA”) on the dispositive

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Attorney **Amanda Wuoti**, a member of the Volunteer Lawyer Program (VLP), enthusiastically supports the program. *“As a corporate attorney who primarily works from home, the VLP not only affords me the opportunity to interact with and help my community, it also refreshes legal doctrine that has gone stagnant since bar prep. The VLP has shown me that pro bono service is excellent for the mind and soul and often reminds me why I went to law school!”*

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issue. Second, Rhode Island courts have developed an independent body of law governing review of agency interpretations of ambiguous statutes that is not dependent on *Chevron* or its progeny. Third, the standard of review announced in *Loper Bright* is substantially similar to the standard of review Rhode Island courts already employ when reviewing agency interpretations of statutes, except that Rhode Island courts are willing to rely on and accord deference to agency expertise where the *Loper Bright* Court was not. Fourth, even when Rhode Island courts have invoked *Chevron*, those decisions did not represent an adoption and incorporation of *Chevron* as an essential part of Rhode Island's independent body of law; those citations are supplemental support for the court's holding. For all these reasons, the *Loper Bright* decision should not change the way Rhode Island courts review agency actions.

A. The RI APA is distinguishable from the federal APA on the issue that was dispositive in *Loper Bright*

The *Loper Bright* decision is a statutory decision that overrules *Chevron* based on the Court's reading of Section 706 of the federal APA. The extent to which *Loper Bright* will change the way Rhode Island courts review agency decisions under the RI APA therefore depends on whether the specific text the Court analyzed and interpreted in Section 706 is also present in the RI APA. As explained below, there are meaningful differences between the federal APA and the RI APA on the precise issue that was dispositive in *Loper Bright*.

In *Loper Bright*, the Court found that Section 706(A)(2) of the federal APA prohibits courts from deferring to agency statutory interpretations, stating:

[The federal APA] specifies that courts, not agencies, will decide 'all relevant questions of law' arising on review of agency action...even those involving ambiguous laws—and set aside any such action inconsistent with the law as they interpret it. And it prescribes no deferential standard for courts to employ in answering those legal questions.¹⁷

Section 706 outlines the courts' "scope of review" of agency actions, and opens with this statement: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."¹⁸ As the majority notes, section 706(2) "further requires courts to 'hold unlawful and set aside agency action, findings, and conclusions found to be not in accordance with law.'¹⁹ Thus, from the outset, section 706 places a judge's power—and its mandatory exercise of that power—at the center of the conversation. The court "*shall* decide all relevant questions of law" and "[t]he reviewing court *shall*...set aside agency action, findings, and conclusions" that are defective in one of six enumerated ways.²⁰

This language differs from the RI APA. The analogous section of the RI APA, outlining "judicial review of contested cases," begins: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact."²¹ That subsection goes on to say that "[t]he court may affirm the decision of the agency or remand the case for further proceedings, or it *may* reverse or modify the decision" if it suffers from one of six defects. Where the federal APA frames everything in terms of the Court's mandates ("the court *shall*"),²² the RI APA thus frames judicial review of agency

actions in terms of discretion (“the court *may* affirm...reverse or modify the decision”) and deference (“the court *shall not* substitute its judgment for that of the agency”).²³ The two statutes thus strike different tones.

Next, both the RI APA and federal APA identify six circumstances in which a court may (or in the federal APA’s case, “shall”) reverse, remand, modify, or set aside an agency’s decision, including: when the decision is (1) arbitrary and capricious, (2) in violation of constitutional or statutory provisions, (3) in excess of the agency’s statutory authority, or (4) made upon unlawful procedure. Similarly, although the wording is different, both statutes contemplate overturning agency decisions that lack “substantial evidence” in the administrative record.

However, with respect to the sixth circumstance, the RI APA identifies “other errors of law” as grounds for reversal, while the federal APA allows courts to set aside agency decisions that are “unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.”²⁴ Thus, the federal APA expands the purview of reviewing courts to reconsider agency fact-finding decisions, while the RI APA limits the court’s role to assessing whether those decisions are “[a]ffected by other error of law.”²⁵

In sum, the federal APA presumes that courts have plenary authority to review agency decisions *de novo* and creates a deferential standard of review only for agency fact-finding, and even then, only by implication. The RI APA, on the other hand, mandates that courts defer to agency decisions “as to the weight of the evidence on questions of fact” and suggests that the court’s plenary, *de novo* review of agency actions is limited only to “other error[s] of law.” This distinction strikes at the heart of the **Loper Bright** holding.

B. Rhode Island common law does not depend on *Chevron* or its progeny

Rhode Island courts have developed an independent body of law governing review of agency interpretations of ambiguous statutes under the Rhode Island Administrative Procedures Act (“RI APA”) that is not dependent on **Chevron** or its progeny. Rhode Island courts rarely invoke **Chevron** when reviewing agency actions, but even when they do, they are not adopting **Chevron** as an essential part of Rhode Island’s law on the subject. Rather, the citations to **Chevron** are for supplemental support.

The Rhode Island Supreme Court has issued 237 decisions under the R.I. Gen. Laws § 42-35-15 (governing “judicial review of contested cases”), 84 of which were decided before **Chevron** and use substantially similar analysis as that employed by Rhode Island courts today. This suggests that the standard of review has never changed to incorporate **Chevron**.²⁶

In fact, the vast majority of cases reviewing agency actions in Rhode Island do not cite to **Chevron** at all. Only 6 of the 238 decisions issued by the Rhode Island Supreme Court cite to **Chevron**, and only 2 of those resolved the dispute by giving deference to an agency’s interpretation of an ambiguous statute.²⁷ In both cases, the Court’s analysis suggests that it simply disagreed with the trial court’s statutory interpretation and, given all the attendant circumstances, found the agency’s interpretation more persuasive.

continued on page 30

Rhode Island Bar Foundation Seeks Law School Scholarship Applicants

The Rhode Island Bar Foundation is offering several scholarship opportunities to Rhode Island residents interested in a career in the law for the academic year 2025–2026.

The Thomas F. Black, Jr. Memorial Scholarship Fund was established in 1989 to support and foster high legal practice standards by assisting Rhode Island residents who show promise that they will become outstanding lawyers and who need financial assistance to study law. Since 1984, this fund has awarded 76 scholarships to promising law students from Rhode Island. The Scholarships are named in honor of the late Thomas F. Black, Jr., a person known for his impressive ability as a lawyer and banker, his deeply rooted legal scholarship and his notable participation in civic and charitable causes. Two \$25,000 Black scholarships will be available to incoming first-year law students.

In addition to the Thomas F. Black, Jr. Memorial Scholarships, the Foundation will award two new \$25,000 scholarships, the Patrice A. Tarantino Memorial Scholarship and the Nicole J. Benjamin Scholarship. The Patrice A. Tarantino Memorial Scholarship Fund was established in 2022 by former Bar Foundation President John A. Tarantino, Esq., in memory of his late wife, Pat. The Scholarship is a lasting tribute to Pat’s memory. The Nicole J. Benjamin Scholarship was founded in 2023, also by former Bar Foundation President John A. Tarantino, Esq., and recognizes attorney Benjamin’s exemplary contributions to the legal community. It aims to support aspiring legal professionals who exhibit leadership potential and a commitment to service to the community.

Two additional law school scholarships from the Papitto Opportunity Connection Foundation in the amount of \$25,000 each will be awarded to candidates who are committed to actively promoting diversity, equity, and inclusion in society. Papitto candidates must provide specific examples of strategies that have been undertaken, or will be undertaken, within both the legal profession and the broader community to promote diversity, equity, and inclusion. Founded in December 2020, the Papitto Opportunity Connection was formed by Barbara Papitto as a continuation of the long-time commitment she and her late husband Ralph have made to creating educational opportunities and supporting diversity, equity, and inclusion in Rhode Island.

In January 2025, the Rhode Island Bar Foundation will be accepting applications for all of these scholarships for the academic year 2025–2026. Each scholarship is a one-year, non-renewable award for full-time Rhode Island residents entering their first year of law school in September 2025. The Rhode Island Bar Foundation Scholarship application deadline is **March 31, 2025**. For application forms, telephone: (401) 421-6541 or email: tgallo@ribar.com. More information on the scholarships and application forms is also available on the Rhode Island Bar Association website: ribar.com, in the Rhode Island Bar Foundation section.

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Following the success of last year’s inaugural Constitution Day program, the Rhode Island Bar Association’s Diversity, Equity, and Inclusion (DEI) Constitution Day Subcommittee partnered with the Rhode Island Judiciary’s Committee on Racial and Ethnic Fairness in the Courts (CREF) Civics Subcommittee to expand this impactful initiative. This year’s program, held on Tuesday, October 29th, focused on the theme *First Amendment Rights of Students in the Digital Age: Navigating Social Media, AI, and the Dangers of Information Overload*. Through this theme, the presenters explored the role of First Amendment rights in today’s digital landscape, with a focus on the complexities of social media, artificial intelligence, and the challenges posed by information overload.



RI District Court Judge Melissa R. DuBose and RIBA President Christopher S. Gontarz led a fun and informative lesson at the Woonsocket High School Career & Technical Center.

Twelve presentations were conducted across eight schools in Rhode Island: Barrington High School, Central Falls High School, Classical High School, Roger Williams Middle School, Segue Institute for Learning, Sophia Academy, Westerly High School, and Woonsocket High School Career and Technical Center. Notably, Secretary of State Gregg Amore attended and presented at the Barrington High School session.



Workers’ Compensation Court Judge George J. Lazieh and attorney Matthew DiMario connected with students at Central Falls High School.

We want to thank all of the attorneys and judges listed below who volunteered their time for the inaugural Constitution Day program. The program represents a significant step towards empowering Rhode Island students to become informed and engaged citizens. The Rhode Island Judiciary and the Rhode Island Bar Association look forward to expanding this educational endeavor in the years to come.

Rhode Island Bar Association

- James J. Bagley, Esq.
- Hamza Chaudary, Esq.
- Anthony Conte, Esq.
- Matthew DiMario, Esq.
- Jenna Giguere, Esq.
- Christopher S. Gontarz, Esq.
- Clovis Gregor, Esq.
- Patrick A. Guida, Esq.
- Sarah Oster Kelly, Esq.
- Zachary Lyons, Esq.
- Etie-Lee Schaub, Esq.
- Jennifer Sylvia, Esq.

Rhode Island Judiciary

- Hon. Alberto Aponte Cardona
- Hon. Keith A. Cardoza
- Hon. Melissa R. DuBose
- Hon. Susan Pepin Fay
- Hon. George J. Lazieh
- Hon. Melissa A. Long
- Hon. Luis Matos
- Hon. Elizabeth Ortiz
- Hon. Erin Lynch Prata
- Hon. William Trezvant



Attorney Zachary Lyons, Secretary of State Gregg M. Amore, Hon. Susan Pepin Fay, and teacher John West participated in an engaging discussion at Barrington High School.



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A new question has been added to the LRE form to inquire if potential volunteers speak another language besides their primary language. This addition will help us better match volunteers with language-specific speaking opportunities. Please ensure we have your updated preferences by filling out the LRE Volunteer Application today!

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

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

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Lessons Learned From A Not So Public ‘Mismatch’: Firearms, Toolmark Analysis, and Rhode Island’s Publicly Funded Crime Laboratories



Michael A. DiLauro, Esq.¹
The Just Criminal Justice
Group, L.L.C.
Warwick

“In response to reports highlighting the limits of toolmark analysis, courts across the country have taken various steps.”

It is no secret that forensic evidence is playing an ever-increasing role in the criminal justice system. Scientific breakthroughs and rapidly advancing technologies not only allow attorneys to present new types of evidence in court, but they also allow us to better understand more “traditional” types of forensic evidence, such as toolmark and firearms analysis. Our knowledge of these areas does not remain static, however, and it is important that we continually improve upon our understanding of this evidence—and its limitations.

A recent investigation at the Rhode Island Crime Laboratory (RICL) reminds us of the importance of remaining vigilant and why it is essential that all stakeholders are involved with developing solutions to the problems that will inevitably arise.

Publicly Funded Crime Laboratories in Rhode Island: A Background

The Rhode Island criminal justice system has long enjoyed high-quality services provided by two publicly funded entities, the RI Department of Health (RIDOH) in Providence and the aforementioned RICL at the University of Rhode Island. The RIDOH, compartmentalized into separate laboratory ‘umbrellas,’ provides often-interrelated services such as the identification of controlled substances, DNA sequencing and testing, toxicology and serology analyses, and cause and manner of death determinations.² The RICL, on the other hand, analyzes fingerprint evidence; hair, fiber, and filament samples; toolmarks and other firearm components; footwear and tire impressions; and evidence in arson cases.³

These laboratories are ably led and staffed by thoroughly trained, experienced, dedicated, and hardworking individuals—many of whom have undertaken careers in public service rather than pursue more lucrative opportunities available in the private sector. Some past and present supervisors and employees have been there for decades.⁴

The high-quality work of these institutions is increasingly necessary,^{5,6} expected, and relied upon in the investigation into and resolution of a variety of criminal matters. And unlike a host of other jurisdictions, for many years there has not even been the slightest hint of questionable practices or subpar work—that is, until now.⁷

The Current Controversy

On September 3, 2024, both the RICL and the Rhode Island Department of Attorney General (RIAG) issued public statements regarding an issue that had arisen at the laboratory. The issue was identified as a ‘nonconformity’ with laboratory standards in a single case within the laboratory’s firearms and toolmarks section.

In response, the RICL took immediate and specific remedial action, suspending firearm and toolmark examinations and requiring any further examinations to be done by an external, accredited laboratory or qualified consultant during a remedial period. It was reported that the entity responsible for the oversight of the RICL, the State Crime Lab Commission (Commission), had met on August 21 and 27, 2024, and recommended the following:

- 1) that firearm toolmarks examinations be suspended for the time being;
- 2) that the RICL should arrange and pay for the examination or re-examination of all evidence by an outside laboratory as needed; and
- 3) that an outside accredited agency be retained (in consultation with the RIAG and the Rhode Island State Police (RISP)) to conduct a comprehensive assessment, including technical review of the operations of the firearms section of the RICL.⁸

Soon after, a variety of news outlets reported on the controversy (referred to hereafter as the “mismatch case”).⁹ In addition, defense lawyers with potentially affected cases utilized court-sanctioned discovery mechanisms and motions *in limine* concerning the reliability and admissibility of toolmark and firearms work done by the RICL. At this writing (mid-November 2024) these motions are awaiting decisions by the courts involved.¹⁰

It is important to note that although the Commission is required to meet four (4) times a year, it met twice during the month of August 2024.¹¹ Curiously, the Commission, subject to the man-

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date of the Open Meetings Law, decided to label the non-conformity issue as a “personnel matter.” As a result, although the Commission’s discussions of other items on the agenda (including certain remedial steps to be taken in light of the “non-conformity issue/personnel matter”) were included in the minutes of these meetings and eventually made public, the Commission’s specific discussions—including the names of the three examiners involved—remain sealed.¹² The Open Meetings Law allows but, does not require, that such proceedings be held outside of the public purview, and it is unknown if the individual(s) subject to remedial measures requested proceedings be held in secret.¹³ More troubling is that at its meeting on April 11, 2024, the Commission disclosed information relating to a non-conformity issue that appears to be nearly identical to the one that is the subject of the current controversy. The following appears in the public minutes of that meeting:

The Laboratory underwent a remote accreditation audit by the ANSI-ASQ National Accreditation Board (ANAB) for continued accreditation under the ISO/IEC 17025:2017 guidelines. **The audit team cited two non-conformities relating to the substitution of observation-based performance monitoring for a proficiency test even though other options were available, and an internal audit did not include a direct observation of an accredited laboratory activity in Trace.** Both non-conformities are being addressed and will be reviewed by the audit team leader. The current Certificate of Accreditation expires on July 31, 2027. **It is expected that ANAB will accept the resolution of the non-conformities.** An on-site audit will be conducted in Spring of 2025. (emphasis added).¹⁴

The Nichols Report: Findings

Thankfully, what appears to be at best an inconsistent application of the Open Meetings Law was partially mitigated by a report prepared in connection with the Commission’s third recommendation, i.e., that an outside accredited agency be retained to conduct a comprehensive assessment and technical review of the firearms section of the RICL. That assessment/review resulted in an October 9, 2024 report by Ronald G. Nichols, President, Nichols Forensic Science Consulting, Inc. (“report” or “Nichols”) and was provided to defense counsel in the cases previously mentioned.¹⁵ The report’s findings include the following:

- > In the “mismatch” case, three examiners made misidentifications of thirteen (13) fired cartridge cases, incorrectly identifying a submitted Glock firearm as having made the toolmarks in question.
- > The misidentification came to light when the cartridges were correctly connected to a different Glock pistol recovered by another agency in the New England area, which indicated a lack of diligence in the comparison of the cartridge cases.
- > The misidentification is attributable to the examiners’ exclusive reliance on a toolmark known as an “aperture shear mark,” a toolmark commonly found on cartridge cases fired by Glock pistols. Other marks (breech-face marks and firing pin impressions) were not considered. Had these other markings been considered, it would have led to a reconsideration of the disparities between the aperture shear marks on the casings.
- > Greater attention should be paid to “sub-class character-

istics,” toolmarks that are more individualized and may be linked to a specific firearm and not just a class of firearms. > Had the examinations and verifications been as critically performed as each examiner indicated in their interviews, this error should have not occurred.

The Nichols Report: Recommendations

Going forward, the Nichols report makes the following recommendations regarding the RICL’s toolmark division:

1. Analysts should increase their reliance upon sub-class characteristics.
2. Disagreements between examiners on final test results should be made more explicit, and analysts should use language more discerning than ‘conclusive’ or ‘inconclusive’ when in describing results.
3. ‘Conclusive’ results should be based upon an examination of both class characteristics (which are common to all firearms of the same make and model), incidental characteristics (which are unique to a particular firearm) characteristics, as well as additional toolmarks in certain cases.
4. Analysts should use more discerning language when describing final test results.
5. The reports should provide a better explanations of proficiency test results.
6. Analysts should include error rates when appropriate
7. The RICL should improve its training, testing, and testimony reviews.

Reliability, Admissibility & Litigation Involving Toolmarks

Although this “mismatch” controversy is recent news, this is not the first time that Rhode Island courts have had to address the inclusion of toolmark analysis in criminal cases—among other kinds of forensic evidence. Indeed, on rare occasions the Rhode Island Supreme Court (RISC) has excluded scientific or technical evidence as being unreliable or unable to satisfy the evidentiary predicates necessary for admissibility.¹⁶ In order to perform the best possible review, the Rhode Island Supreme Court has encouraged litigants to develop the record via pre-trial admissibility hearings in these cases.

Rhode Island is not the only state to grapple with toolmarks evidence. In response to reports highlighting the limits of toolmark analysis,¹⁷ courts across the country have taken various steps. The similarities between these courts’ holdings and the Nichols recommendations are striking, and include:

1. **Limiting to firearms examiners’ testimony.** In some cases, courts have admitted the proffered testimony along with a limiting instruction that restricts the degree of certainty to which firearm and toolmark identification specialists may express their identifications.
2. **Limiting conclusion testimony and non-class-based opinions.** Some courts have limited testimony to opinions offered on class characteristics only, i.e. an expert can explain that the same type of gun fired the bullets or cartridge cases, but the expert cannot say that the same gun fired the bullets or cartridge cases.
3. **Requiring enhanced qualifications and proficiency testing of experts.**
4. **Allowing “as applied” (case by case) challenges.** Some courts have allowed challenges to an individual analysis

Superior Court Bench/Bar Committee Sponsors Technological Competence CLE

The Rhode Island Bar Association’s Superior Court Bench/Bar Committee is sponsoring a free-to-Bar-members, one-credit, virtual Committee CLE seminar on **Thursday, February 6, 2025, from 4:00 – 5:00 pm**. Titled *How to Stay Technologically Competent as a Rhode Island Legal Practitioner*, the program will feature Hon. Brian P. Stern, Rhode Island Superior Court Associate Justice; Brian Murphy, Esq., of the Rhode Island Supreme Court; and Jared Correia of Red Cave Consulting. This timely seminar will explore the essential skills attorneys need to navigate today’s complex technological landscape, emphasizing the importance of digital proficiency for effective legal representation. Participants will gain valuable insights from a Superior Court Associate Justice and receive practical recommendations for maintaining competence in an evolving digital environment.

Space is limited! [Click here](#) to register for the program. For any questions, please contact Communications Coordinator NaKeisha Torres atntorres@ribar.com or 401-421-5740.

Please note that per the RI MCLE Commission, the Rhode Island Bar Association can only report the attendance of attorneys completing a minimum of 90% of this CLE program.

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(as opposed to the entire field). For example, such a challenge might focus on a specific analyst's lack of documentation or methodology.¹⁸

Conclusion

At this point, Rhode Island is facing a choice: Will the Commission and RICL voluntarily accept and implement the Nichols report's recommendations in this jurisdiction, or will they be forced upon them piecemeal through litigation, as has been the case in other jurisdictions? Only time will tell. And although it goes beyond the scope of this article, many options exist to help ensure that these thoughtful recommendations and other necessary improvements are carefully considered, vetted by stakeholders, and implemented by the RICL.¹⁹ The Rhode Island criminal justice system has long enjoyed the availability of the high-quality forensic science services necessary for the full and fair administration of justice. Although this is due in large part to those who lead and staff our state's publicly funded crime laboratories, all options should be on the table so that this important work may continue at the highest level.

ENDNOTES

- ¹ *Owner-Manager, The Just Criminal Justice Group, L.L.C. AKA 'JCJG' provides training, consulting, and advocacy to and for those interested in and impacted by the criminal justice system especially under-resourced and therefore under-served systems and communities. The author wishes to acknowledge the invaluable contributions of fellow Rhode Island Association of Criminal Defense Lawyers (RIACDL) Executive Committee members Angela M. Yingling and Kara Hoopis-Manosh to the preparation of this article.*
- ² *Programs, State of Rhode Island Department of Health (RIDOH) Forensic Science Services, https://health.ri.gov/programs/detail.php?pgm_id=135 (last visited November 13, 2024); What we do, RIDOH State Medical Examiner's Office, https://health.ri.gov/programs/detail.php?pgm_id=149 (last visited November 13, 2024).*
- ³ *Rhode Island State Crime Laboratory (RICL) Services and Functions, The University of Rhode Island, <https://web.uri.edu/riscsl/services/> (last visited November 13, 2024).*
- ⁴ *These observations are informed by the author's almost forty-two years of criminal defense experience and frequent dealings with both RIDOH and RICL personnel in connection with a wide variety of criminal cases.*
- ⁵ *This is sometimes referred to as the "CSI Effect," first described in the media as a phenomenon resulting from viewing forensic and crime-based television shows. This effect influences jurors to have unrealistic expectations of forensic science during a criminal trial and affect jurors' decisions in the conviction or acquittal process. John Allredge, The "CSI Effect" and Its Potential Impact on Juror Decisions, Volume 3 THEMIS: RESEARCH JOURNAL OF JUSTICE STUDIES AND FORENSIC SCIENCE (Spring 2015).*
- ⁶ *Some forensic science applications (in the experience of the author, these can include fingerprint analysis, accident reconstruction, and determination of blood alcohol levels) are performed internally by the police department investigating the case or outsourced to other out-of-state public or private laboratories for analysis. Although the allocation within Rhode Island is difficult to determine, at the national level it is estimated that state-run forensic crime laboratories received almost 60% of all requests in 2020 (totaling nearly two million requests for service from law enforcement). Connor Brooks, Publicly Funded Forensic Crime Laboratories 2020, CENSUS OF PUBLICLY FUNDED FORENSIC CRIME LABORATORIES (December 2023).*
- ⁷ *Newer research has revealed weaknesses in the scientific foundations of several methods that were once widely accepted by the criminal legal system (and used to help secure earlier convictions). For example, the reliability of bite mark analysis, hair comparisons, arson investigation, fingerprint analysis, dog scent evidence, comparative bullet lead analysis, shaken baby syndrome diagnosis, and bloodstain pattern analysis have all been called into question. Moreover, specific problems have been reported in over 130 crime lab scandals across the country, most recently in Massachusetts, Washington, DC, New Jersey, California, and Oregon. The Innocence Project Misapplication of Forensic Science, <https://innocenceproject.org/misapplication-of->*

forensic-sciencel (last visited November 13, 2024); Jeannie Naujeck, Autopsy of a Crime Lab, 40 DUKE LAW MAGAZINE 2 (Fall 2021) (reviewing Brandon L. Garrett, Autopsy Of A Crime Lab: Exposing The Flaws In Forensics (2021)).

⁸ Press Release, Rhode Island Attorney General (RIAG), Attorney General issues statement on the State Crime Lab and firearms examinations (Sept. 3, 2024), <https://riag.ri.gov/press-releases/attorney-general-issues-statement-state-crime-lab-and-firearms-examinations>; Press Release, RICL, Statement from the Crime Laboratory (Sept. 3, 2024), <https://web.uri.edu/riscfl>.

⁹ E.g., Mark Reynolds, *Crime lab work draws attention—Attorneys question gun-related evidence reliability*, THE PROVIDENCE JOURNAL, September 14, 2024; Mark Reynolds, *‘Nonconformity’ at state crime lab raises questions*, THE PROVIDENCE JOURNAL, September 5, 2024; Christopher Shea, *Rhode Island State Crime Lab suspends firearms forensic testing pending review*, THE RHODE ISLAND CURRENT (September 4, 2024), WPRI, *Community Focus interview of RIAG Peter Neronha* (ABC television broadcast Sept. 11, 2024), <https://www.wpri.com/video/community-focus-attorney-general-peter-neronha/10033044/>. Critically, the Attorney General stated during this interview that the non-conformity issue involved the crime lab incorrectly labeling a firearm component (such as a spent casing or bullet retrieved from a crime scene or victim) and a particular firearm as a match: “[T]he crime lab called it a match and it wasn’t.”

¹⁰ Upon information and belief *State v. Martinez-Scarlet*, P1-2022-0296 AG, is the ‘mismatch case’ at the center of the current non-conformity controversy. Similarly, the same individuals and section of the RICL are involved in: *State v. Mann*, P1-2022-3059 AG; *State v. Brown, Veng, Castillo*, P1-2020-1885 AG, BG, CG.; and *State v. Martinez-Scarlet*, P1-2022-0296 AG. It is anticipated that additional cases involving a ‘mismatch’ by the RICL may be revealed later.

In making discovery motions, attorneys relied upon Superior Court Rules of Criminal Procedure 16(a)(5); 17(c) (disclosure of physical or mental examinations, scientific tests or experiments, and pre-trial subpoena to access information necessary to prepare case); *Brady v. Maryland*, 373 U.S. 83 (1963) (due process requires disclosure of exculpatory evidence); *Giglio v. United States*, 405 U.S. 150 (1972) (impeachment evidence is exculpatory-disclosure required); *Kyles v. Whitley*, 514 US 419 (1995) (prosecutions duty to seek out discoverable material); *State v. Wyche*, 518 A.2d 907 (RI 1987) (information that alleged rape victim consumed alcohol was exculpatory-failure to disclose required reversal of the conviction).

Similarly, “gatekeeper” motions in limine are grounded in, inter alia, *DiPetrillo v. Dow Chemical Co.*, 729 A.2d 677, 686-687 (R.I. 1999) (encouraging the use of pre-trial admissibility hearings in criminal cases and the trial judge’s enhanced role as a ‘gatekeeper’ to determine the reliability and admissibility pursuant to the applicable RIRE’s).

¹¹ R.I. GEN. LAWS § 12-1.1-7 (Commission is required to meet at least four (4) times a year as called by the chairperson); the first four meetings of 2024 were held on 1/21/24, 4/11/24, 8/21/24, and 8/27/24. A fifth meeting was held on 10/23/24 to review the Nichols report discussed in the next section. At that time the Commission again went into Executive Session on the ‘non-conformity / personnel’ issue. See Rhode Island Department of State (RIDOS), State Crime Laboratory Commission Meetings, <https://opengov.sos.ri.gov/OpenMeetingsPublic/OpenMeetingDashboard?subtopmenuId=201&EntityID=750&MeetingID=1062365> (last visited November 13, 2024).

¹² R.I. GEN. LAWS §§ 42-46-5(a)(1), (5) (public body may hold a meeting closed to the public in order to discuss job performance, character, or physical or mental health of a person or persons or any investigative proceedings regarding allegations of misconduct, either civil or criminal) (emphasis added); Commission meetings, agendas, and minutes available at the RIDOS website, <https://opengov.sos.ri.gov/OpenMeetingsPublic/OpenMeetingDashboard?subtopmenuId=201&EntityID=750&MeetingID=1062365> (last visited November 13, 2024).

¹³ R.I. GEN. LAWS § 42-46-5 (a)(1) (public body may hold a meeting closed to the public pursuant but the failure of the body to provide notification to the person subject to remedial action shall render any action taken against the person or persons affected null and void).

¹⁴ (RIDOS), State Crime Laboratory Commission Meetings, <https://opengov.sos.ri.gov/OpenMeetingsPublic/OpenMeetingDashboard?subtopmenuId=201&EntityID=750&MeetingID=1062365> (last visited November 13, 2024). It is unclear if the two ‘non-conformities’ that were the subject of the April and August meetings are related to one another and, if so, how.

¹⁵ Nichols Forensic Science Consulting, <https://www.nichols-fsc.com>. The report and the review of it by the Commission at its meeting on 10/23/24

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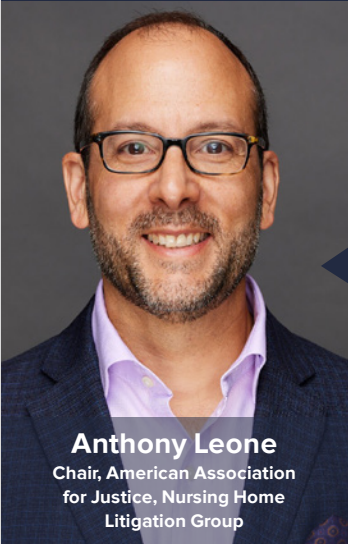
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was the subject of online and front-page articles. At that time the Commission again went into Executive Session in order to discuss the non-conformity / personnel issue; therefore, the substance of its discussions are not publicly available. Mark Reynolds, Experts says RI crime lab in need of reform after troubling findings on bullet examination, *THE PROVIDENCE JOURNAL* (October 24-25, 2024). The Commission agenda and minutes can be found at <https://opengov.sos.ri.gov/openmeetings>.

16 In the following cases the court reversed / remanded for the trial court to conduct a pre-trial reliability / admissibility hearing: *State v. Quattrocchi*, 681 A.2d 879 (R.I. 1996) (repressed memory); *State v. Quattrocchi*, C.A. 92-3759 (R.I. Super. Feb 01, 2001-Clifton, J.) (on remand repressed memory inadmissible); *State v. Webber*, 716 A.2d 738 (R.I. 1998) (dog sniff alert for arson); *State v. Walters*, 551 A.2d 15 (R.I. 1988) (trajectory check by police officer); *State v. Dery*, 545 A.2d 1014 (R.I.1988) (polygraph).

17 See The National Research Council, Strengthening Forensic Science in the United States (2009) (NRC REPORT), available at <https://www.ojp.gov/pdffiles/nij/grants/228091.pdf>; President's Council of Advisors on Science and Technology (PCAST), Report to the President, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods, (PCAST REPORT) (2016), available at https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf. A pre-publication copy of the NRC Report was relied upon in the ground-breaking decision of *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318 (2009) holding that a defendant's right to confront and cross-examine was violated when written lab results were substituted for the live testimony of the lab technician doing the work. Justice Scalia, writing for the court, stated that "[t]he majority of [laboratories producing forensic evidence] are administered by law enforcement agencies.....Confrontation is one means of ensuring accurate forensic analysis." *Id.* at 318.

18 Motions *in limine* and requests for admissibility hearings have been filed in several of the pending Rhode Island cases cited herein. For further information, Brandon L. Garrett, et. al., Judging Firearms Evidence, 97 S. CAL. L. REV. 101, 146-153 (2024) is an excellent and comprehensive overview of courts decisions across the country made in response to our better understanding of the limits of toolmark analysis.

19 Strict adherence to basic scientific precepts is an improvement worth considering, something that appears to be lacking in the Commission's approach to the current controversy. For example, it's resort to a series of partial closed meetings and limited access to relevant information is inconsistent with the 'scientific method' which requires free and unfettered access to any and all relevant data. That data is then subject to experimentation and testing, formation of hypotheses, and reaching conclusions based upon them. Alina Bradford, Ashley Hamer, Science and the scientific method: Definitions and examples. *LIVESCIENCE* (1/16/22) <https://www.livescience.com/20896-science-scientific-method.html>. ◇

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All 2025 Award Nominations Are Due by March 14, 2025

2025 Dorothy Lohmann Community Service Award

This award recognizes Rhode Island attorneys who donate their time and legal expertise for charitable work. It is given to those whose efforts most closely reflect those of Rhode Island attorney Dorothy Lohmann. Ms. Lohmann devoted her entire professional life working to help the poor, volunteering her services at many human service organizations, and advocating for laws and policies to relieve the suffering of the poor and disenfranchised. The Lohmann Award Committee is particularly interested in candidate actions most closely reflecting those of the award's namesake as detailed in the nomination criteria and award entry form accessed on the Bar Association website at ribar.com, under the **NEWS AND BAR JOURNAL** tab on the left side of the home page. Please Note: Lohmann Award nominations are only accepted from representatives of organizations where Rhode Island attorneys have devoted a significant amount of their time and efforts on a strictly voluntary, non-paid basis.

2025 Chief Justice Joseph R. Weisberger Judicial Excellence Award

This award, named in honor of its first recipient the late Chief Justice Joseph R. Weisberger, is presented to a judge of the Rhode Island State Courts or Federal District Court for exemplifying and encouraging the highest level of competence, integrity, judicial temperament, ethical conduct and professionalism. The Weisberger Award Committee is particularly interested in candidates whose actions most closely reflect those of the award's namesake as detailed in the nomination criteria and award entry form accessed on the Bar Association website at ribar.com, under the **NEWS AND BAR JOURNAL** tab on the left side of the home page.

2025 Joseph T. Houlihan Lifetime Mentor Award

This award honors individuals who, like Attorney Joseph T. Houlihan, have, during their careers, consistently demonstrated an extraordinary commitment to successfully mentoring in the Rhode Island legal community. The award recognizes an attorney who serves as a role model to other lawyers in Rhode Island, who has significantly contributed to the profession and/or the community and who, with their excellent counsel, have excelled as mentors and contributed to the ideals of ethics, civility, professionalism, and legal skills. The Houlihan Award Committee is particularly interested in candidate actions most closely reflecting those of the award's namesake as detailed in the nomination criteria and award entry form accessed on the Bar Association website at ribar.com, under the **NEWS AND BAR JOURNAL** tab on the left side of the home page.

NEW! 2025 Holly Hitchcock Award for Non-Attorney Legal Professionals

This award recognizes non-attorney professionals who have provided valuable service and contributions to the legal profession over a significant period of time. It is given to those whose efforts most closely reflect those of Holly Hitchcock, who devoted her professional life to working to educate attorneys through the Mandatory Continuing Legal Education Commission and the National Continuing Legal Education Regulators Association. The Holly Hitchcock Award for Non-Attorney Legal Professionals Award Committee is particularly interested in candidates whose actions most closely reflect those of the award's namesake as detailed in the nomination criteria and award entry form accessed on the Bar Association website at ribar.com, under the **NEWS AND BAR JOURNAL** tab on the left side of the home page.

Please submit all nominations or direct any questions to Erin R. Cute, Director of Communications, at the Rhode Island Bar Association. Nominations can be emailed to ecute@ribar.com (preferred) or sent via postal mail to 41 Sharpe Drive, Cranston, RI 02920.

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**House Of Delegates Letters of
Interest – Due February 21, 2025**

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 visit the Bar's website.

The Nominating Committee will meet soon to prepare a slate of officers and members of the 2025–2026 Rhode Island Bar Association House of Delegates. The term of office is July 1, 2025–June 30, 2026. If you have not already done so and wish to be considered for appointment to the House of Delegates, please send a letter of interest no later than **February 21, 2025**.

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 (e.g., participation in committees and positions held in those committees; community service to the Bar Association and beyond, as well as 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

Alternatively, you may send your letter of interest to Kathleen M. Bridge, Executive Director, by email at kbridge@ribar.com. **The Nominating Committee welcomes letters of interest from candidates of diverse backgrounds, including but not limited to race, color, religion, country of ancestral origin, handicap, age, sex, or sexual orientation.**

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

Any member planning to make a presentation at the open forum must inform Executive Director Kathleen Bridge prior to the forum via email at kbridge@ribar.com or telephone at (401) 421-5740.

HONOR ROLL

Volunteers Serving Rhode Islanders' Legal Needs

The Rhode Island Bar Association applauds the following attorneys for their outstanding pro bono service through the Bar's Volunteer Lawyer Program, Elderly Pro Bono Program, Ask A Lawyer Clinic, Legal Clinics, U.S. Armed Forces Legal Services Project, and the VLP Mentor Program during October 2024 and November 2024.

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

PRO BONO PUBLICO RESOLUTION

In 2008, the Rhode Island Bar Association House of Delegates adopted the following policy and urges its members to act accordingly.

We urge our members to engage in public service. Recognizing the continuing need for legal assistance for economically disadvantaged citizens attempting to obtain legal services in our state, we as an association are mindful of the opportunity that is present for us to fulfill our moral, ethical and social duty to those who have limited or no access to the legal system. We therefore reaffirm our strong commitment to the delivery of legal services to the poor by strongly urging each member of this association to render pro bono publico legal services in accordance with Rule 6.1.

The association urges all attorneys, as well as law firms, government and corporate employers to support, endorse and adopt a Pro Bono policy that will encourage open participation by associates and employees.

Be it resolved that in order to implement the above statement of policy the association urges each member to join and participate in a Volunteer Lawyer Program of the Rhode Island Bar Association.

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

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

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

The CorpCare helpline provides counseling resources that quickly and professionally assist you in handling problems affecting your personal or

work life. Counselors answer the phone 24/7 to provide immediate support and assistance. Simply pick up the telephone and call **866-482-8378** for confidential, round the clock support. Virtual telehealth consultations with a counselor are available upon request. Bar members can also access a wide variety of resources online by visiting corpcareeap.com and enter the Life Advantage code: RIBALAP.

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

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Lawyers Helping Lawyers Committee Members Protect Your Privacy

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

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

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

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

SOLACE Helping Bar Members in Times of Need

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

To sign-up for SOLACE, please go to the Bar's website at ribar.com, login to the Members Only section, scroll down the menu, click on the SOLACE Program Sign-Up, and follow the prompts. Signing up includes your name and email address on the Bar's SOLACE network. As our network grows, there will be increased opportunities to help and be helped by your colleagues. And, the SOLACE email list also keeps you informed of what Rhode Island Bar Association members are doing for each other in times of need. These communications provide a reminder that if you have a need, help is only an email away. If you need help, or know another Bar member who does, please contact Executive Director Kathleen Bridge at kbridge@ribar.com or 401-421-5740.

Bar Association Mentor Programs

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

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

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

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



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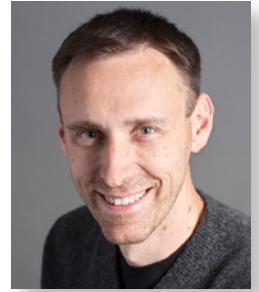
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TECH TIPS Brought to you by the RI Bar Association's Technology in the Practice Committee, this new feature will provide members with practical insights and informed advice, ensuring you stay ahead in the ever-evolving legal tech landscape.

Protecting Your Practice: Understanding the SS7 Vulnerability

by Nicholas Matlach, Esq., *ioLiberum Law Firm, P.C., Providence*



Although we think of cell phone calls and text messages as private methods of communication, they are actually left vulnerable to interception in a way most of us have never considered. This same vulnerability can put your email and every online recordkeeping system you use in jeopardy of being intercepted as well.

How we got here, and why we will have to live with these vulnerabilities for decades to come, should be top of mind for every practitioner that relies on secure and confidential communication and should make you think twice about how you are fulfilling your Rule 1.6 obligations for ensuring confidentiality.

Early Phone Hacking – Phreaking

When the telephone was invented, operators used to manually connect calls with physical wires. Then came rotary dial phones, which sent electrical pulses to a central switchboard to route calls. As the network expanded, and the distances grew, the electrical pulses became too weak to function properly, and tone dial phones were invented to send audible signals to the electrical switchboards to connect calls.

Phreaking was an early hack on these audible signals. Devices called “blue boxes” (or specific toy whistles) sent specific frequency tones to trick the switchboards into allowing free long-distance calls. To combat this vulnerability, the carriers adopted the Signaling System No. 7 (SS7) protocol to transmit call routing tone to wires that only ran between carriers! By doing this, the first switchboard “listened for” the dial tones and all other routing switchboards would use the SS7 control signals to route the call to its destination.

The Advent of SS7

The SS7 technology was further enhanced over the years to allow mobile carriers to send short text messages to other mobile phones, find cell phone users by pinging signals off cell towers, and route calls and messages to other carriers, in a case where a mobile phone is roaming to another country, for example.

Today, the role of a carrier looks completely different than it did when SS7 was developed, but the communications of today are still reliant on this aging protocol. Every cell phone carrier relies upon SS7 to route calls and text messages to other carriers and land lines. Additionally, all other services that send text messages interface with the SS7 protocol as well?

When this technology was developed, each operator trusted the others to use the protocol responsibly and provided every other carrier with unfettered access. This means even the smallest carrier in a loosely regulated country gets the same access as Verizon or AT&T.

How SS7 makes law firms vulnerable

Every lawyer practicing law today relies upon the security of the SS7 protocol to efficiently manage their practice and provide services to their clients. Post-COVID, a growing number of lawyers have abandoned their

paper-piled downtown offices in favor of online and virtual client experiences. This deepens our reliance upon communications infrastructure and the risks to confidential client communication.

The initial goal of an attacker is to get access to your cell phone's IMEI³ number. Obtaining this IMEI number is as simple as sending an inquiry request through the SS7 network for the latest IMEI number based on your phone number.

Once an attacker has your IMEI number, they can send a coded message to the entire SS7 network asking for all calls to be redirected to their network, as if you had just landed in a different country and registered your phone there to start making calls. The attacker will then redirect calls from your IMEI number to their own phone's IMEI number, allowing them to receive and send calls and texts as if they were you. It could take you hours or days before you realize why you aren't receiving any calls or messages.

Once a hacker has control of your phone number, they will start a “Forgot Password” process on your email and any other service that sends you text messages to authenticate. They can then change your passwords and then change the phone number associated with your accounts, locking you out.

With unlimited access to your email, the hacker can download your inbox and start password resets and account takeovers on every application that is connected to your email. What's worse, they also can start sending fraudulent messages, as you, from your phone number or email address to direct clients to send money to their bank account.

The only thing that a hacker needs is your cell phone number and a monthly subscription to a rogue carrier's access to the SS7 network.⁴

How you can protect yourself and your practice

Having to type in a one-time passcode before accessing sensitive content or when registering a new device is a best security practice. If you have the option to enable this functionality on any account, implement it immediately.⁵

However, these one-time passcodes can be generated in several ways. When you have the option, use an app such as Google Authenticator or Microsoft Authenticator on your phone to generate the code instead of having it sent to you via email or SMS. Configuring these apps is often as simple as scanning a QR code displayed from a secure area of your app. Once configured, the app does the logic of creating and providing you with a new code every 60 seconds. Because this is generated on your phone in a secure application, attackers cannot use SS7 to gain access to these codes.

Also, for secure communications, avoid SMS and adopt an end-to-end

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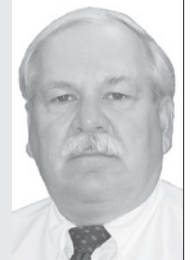
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encrypted platform. Case management systems like Clio and Practice Panther have client portals and mobile applications for secure communications.

For the best security approach, implement hardware tokens, like Yubikey⁶ or Google Titan⁷, for critical applications such as VPNs and case management systems when available. These physical devices generate unique authentication codes that must be entered alongside traditional passwords, significantly reducing the risk of unauthorized access from any device outside your control. Unlike software-based solutions, hardware tokens are immune to remote hacking attempts since they require physical possession, making them an ideal choice for safeguarding the most sensitive information, such as your client's data. If your critical application doesn't support hardware tokens, file a support ticket asking for this functionality to be added. The more people that ask, the more likely the software companies will implement.

ENDNOTES

1 See Electronic Frontier Foundation, *EFF to FCC: SS7 Is Vulnerable and Telecoms Must Acknowledge It*, (July 15, 2024), <https://www.eff.org/deeplinks/2024/07/eff-fcc-ss7-vulnerable-and-telecoms-must-acknowledge>.

2 Internet telephony (often called Voice over Internet Protocol, or VoIP) carriers have service offerings that bridge from the internet to the traditional land line carriers through the SS7 routing. Additionally, cloud-based services such as Amazon Web Services, Google Cloud, Azure, Alibaba, and others rely upon SS7 technology to send SMS messages for marketing and transactional purposes. While there are newer protocols that have been developed to secure the 4G and 5G networks, any phone capable of operating on the 2G or 3G networks, even if just for emergency calls, is vulnerable to SS7 attacks.

3 IMEI stands for International Mobile Equipment Identity and it functions like the unique serial number that identifies your device unique to every other device on a cellular network. This is the unique code that registers your phone with your cell carrier so the SS7 network knows where to direct calls and messages to allow them to reach you. This ability to register your IMEI number on a different carrier enables you to travel internationally and use your phone on a carrier other than the one in which you have a phone plan.

4 For a detailed discussion on how SS7 has been used by hackers see GSMA, *SS7 Security Analysis*, (July 2018), https://www.gsma.com/get-involved/gsma-membership/wp-content/uploads/2018/07/SS7_Vulnerability_2017_A4.ENG_0003.03.pdf.

5 See https://www.americanbar.org/groups/law_practice/resources/law-practice-magazine/2023-may-june/sometimes-phone-call-answer/.

6 See <https://www.yubico.com/>.

7 <https://cloud.google.com/security/products/titan-security-key>. ◇

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Similarly, the Superior Court has issued 632 decisions under the RI APA, 169 of which were decided before **Chevron**, and only three of which invoked **Chevron**'s interpretive methodology. In those three cases, deference to the agency's statutory interpretation was outcome determinative. However, it is important to note that the Superior Court *still* did not apply **Chevron** as binding law—it merely cited to **Chevron** in support of its decision.²⁸ The analysis in these cases reflects that Rhode Island has a robust, independent body of law on agency deference under the RI APA. As such, a change in the interpretation of the federal APA need not herald any changes under the RI APA.

Finally, to the extent that Rhode Island courts defer to agency statutory interpretation at all, they often cite to case law that predates **Chevron**.²⁹ This suggests that Rhode Island's independent body of law developed before **Chevron** was decided and that Rhode Island has never adopted **Chevron** into that body of law.

C. Rhode Island courts already employ the *Loper Bright* standard of review to agency statutory interpretations

The standard of review announced in *Loper Bright* is substantially similar to the standard of review Rhode Island courts already employ when reviewing agency decisions.

Loper Bright prohibits judges from deferring to agency interpretations of ambiguous statutes, but acknowledges that “an agency's interpretation of a statute...may be especially informative ‘to the extent it rests on factual premises within [the agency's] expertise.’”³⁰ Likewise, Rhode Island courts always have reserved for themselves the right to decide questions of law, and specifically have held that agency statutory interpretations only have “persuasive” value.³¹ The three outlier cases from the Superior Court deferring to agency interpretations are not enough to change the overall legal landscape on this point, least of all because those decisions are not binding on any Rhode Island court.

D. Where *Loper Bright* rejects agency expertise, Rhode Island courts rely on it

The Court in *Loper Bright* rejected the argument that agency expertise was necessary to come to the best statutory interpretation, finding that “interpretive issues arising in connection with a regulatory scheme often ‘may fall more naturally into a judge's bailiwick’ than an agency's.”³² This is at odds with Rhode Island's common law which specifically holds that agency expertise is necessary to reach the best outcome and, therefore, is entitled to great weight.³³

Even if Rhode Island courts fully embraced all the holdings in *Loper Bright*, they would still have authority to uphold agency decisions by finding that the agency's expertise mean its statutory interpretation is entitled to more weight than other, competing interpretations of the same statute.

E. R.I. Gen. Laws § 39-5-3 – *Loper Bright*'s impact on decisions of the Rhode Island Public Utilities Commission and Energy Facilities Siting Board

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Energy Facilities Siting Board (EFSB) can be reviewed only by the Supreme Court and only upon statutory (mandatory) petition for writ of certiorari.³⁴ R.I. Gen. Laws § 39-5-3 provides that the Commission's findings of fact "shall be held to be prima facie true," that the court "shall not exercise its independent judgment," and that orders of the Commission made in the exercise of administrative discretion "shall not be reversed unless the commission exceeded its authority or acted illegally, arbitrarily, or unreasonably."³⁵ State law thus demands great deference to the PUC and EFSB's decisions.

The Court has interpreted R.I. Gen. Laws § 39-5-3 provision to mean that it must give binding deference to the Commission's findings of fact, as well as its determinations on mixed questions of law and fact.³⁶ Even under this standard, however, the Rhode Island Supreme Court has held that "[d]espite the great deference we afford to the PUC, 'we review the PUC's determinations of law under a *de novo* standard.'"³⁷ Thus, even where state law mandates a high degree of deference on some points, our Supreme Court has reserved for itself the exclusive right to decide pure questions of law.

Accordingly, the Rhode Island Supreme Court should continue to be "extremely deferential" to the RIPUC and EFSB's findings of fact and determinations on mixed questions of law and fact because Rhode Island law demands it.

F. Conclusion

Loper Bright is a historic case, but it is unlikely to significantly change the practice of administrative law in Rhode Island. **Loper Bright** is a statutory decision, based on the Court's interpretation of the federal APA; the RI APA is distinguishable on the precise issue that was dispositive in **Loper Bright**, and R.I. Gen. Laws 39-5-3 (for the PUC and EFSB) is even more distinguishable. Additionally, Rhode Island courts have developed an independent body of common law governing review of agency statutory interpretation that does not rely on **Chevron** or its progeny. This independent body of law developed before **Chevron** was decided, and Rhode Island cases post-**Chevron** have not changed the court's analytical framework in response to **Chevron**. Although Rhode Island courts have on occasion cited to **Chevron**, these decisions do not represent an adoption and incorporation of **Chevron**; rather, the vast majority of these cases cite to **Chevron** only for supplemental support. Finally, Rhode Island already employs a standard of review similar to the standard announced in **Loper Bright**. Accordingly, the **Loper Bright** decision overturning **Chevron** does not herald a shift in the courts' analytical approach and should not require any changes to Rhode Island administrative law.

The author extends her gratitude to Michael McElroy, Esq., her mentor in the Rhode Island Bar Association Leadership Academy, and to Jerry Elmer, Esq., for their valuable feedback and contributions to this article.

ENDNOTES

- 1 *Chevron*, 467 U.S. at 843.
- 2 *Decision at 21 (quotations omitted) (emphasis added by Court)*.
- 3 *Loper Bright Petition for Cert p.ii; Relentless Petition for Cert, at p.i.*
- 4 *Chevron*, 467 U.S. at 843.
- 5 *Id.* at 844.
- 6 *Decision at 35 (emphases added)*.
- 7 *Id.* at 14 (quoting *Marbury v. Madison*, 1 Cranch. 137 (1803)).

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In Memoriam

Joseph C. Manera, Esq.

Joseph Charles Manera, Jr., 77, died on November 17, 2024. Born on November 30, 1946, he was the son of the late Joseph and Helen (Cortellessa) Manera. Joseph served in Vietnam from 1969 to 1971. He graduated from the University of Rhode Island with a degree in Political Science and earned his JD from the University of Maine. He ran his own law practice and was a probate judge for the city of Cranston for three years. Joseph volunteered as a Big Brother and served on the board of the Rhode Island chapter of the organization for fifteen years. He is survived by his wife, Marie; his children, Lisa and Joseph; their spouses; and two grandchildren.

George M. Prescott Sr., Esq.

George M. Prescott Sr., 84, of Lincoln, died on Sunday, December 8, 2024. He was the devoted husband of Linda L. (Read) Prescott, with whom he shared 35 years of marriage. Born in Pawtucket, George was the son of the late Lewis A. and Faith A. (Jenks) Prescott. A resident of Lincoln since 1950, he previously called Pawtucket home. His mother, Faith A. Jenks, was a seventh-generation descendant of Joseph Jenks, founder of the City of Pawtucket, and an eighth-generation descendant of John Howland and Elizabeth Tilley, Mayflower passengers who landed in Plymouth, MA, in 1620. A graduate of the University of Rhode Island and Suffolk University Law School, George was a distinguished and highly respected attorney who practiced law in Lincoln for over 50 years, specializing in estate planning, wills and trusts. He was the owner of his own practice, where he provided guidance and expertise to countless clients. George was also a past President of the Pawtucket Bar Association. George leaves behind his beloved wife, Linda; his beloved children, George M. Prescott Jr. of Newport and Christine E. Prescott and her husband, Bradley J. Diegel, of Pawtucket; and his sister, June M. Tougas of Connecticut. George is also the stepfather of John D. Fanning of Georgia and Peter F. Fanning of Maine. He will also be fondly remembered by his step-grandchildren and many nieces and nephews. He was the brother of the late Lewis A. Prescott Jr. and Richard T. Prescott.

Steven J. Votta, Esq.

Steven J. Votta, 67, formerly of Johnston, RI, died on October 30, 2024. He was the son of Camille (Valletta) and the late Joseph S. Votta, Sr., and the husband of Joan (Procaccini) Votta. Steven was a partner of Votta & Votta Law Offices for over 37 years before retiring to Cape Cod. He is survived by his wife, Joan; his mother, Camille; his sisters, Jill S. Votta, Esq., Debra Votta Mesolella, and Jodi Votta Paterson; his brother, Joseph S. Votta, Jr.; and many nieces and nephews.

8 *Id.* (citing 5 U.S.C. § 706(2)(E)).

9 *Id.* at 14.

10 *Id.* at 16 (quoting *Skidmore*, 323 U.S. at 140).

11 *Id.* at 25.

12 *Id.*

13 *Id.* at 34.

14 *Id.* at 34-35.

15 *Thomas Concurrence* at 3-4.

16 *Dissent* at 9.

17 *Decision* at 14 (emphasis added by Court).

18 5 U.S.C. § 706.

19 *Decision* at 14 (citing 5 U.S.C. §706).

20 5 U.S.C. § 706.

21 R.I. GEN. LAWS § 42-35-15(g).

22 5, U.S.C. § 706 (emphasis added).

23 R.I. GEN. LAWS § 42-35-15(g) (emphasis added).

24 5 U.S.C. § 706(2)(F).

25 R.I. GEN. LAWS § 42-35-15(g)(4).

26 *Compare Caboone v. Bd. of Rev. of Dep't of Emp. Sec.*, 246 A.2d 213, 214-15 (R.I. 1968) (noting that courts may reverse agency decisions only in the six discrete circumstances outlined in the RI APA) with *Champlin's Realty Assocs. v. Coastal Res. Mgmt. Council*, 283 A.3d 451, 461 (R.I. 2022) (citing the same six bases for overturning agency decisions under the RI APA, without citation to *Chevron* or its progeny).

27 *See Labor Ready Ne., Inc. v. McConaghy*, 849 A.2d 340, 346 (R.I. 2004); *Pawtucket Power Assocs. Ltd. P'ship v. Pawtucket*, 622 A.2d 452, 453 (R.I. 1993).

28 *See Parents of CD v. McWalters*, C.A. No. 0-0098, 2005 WL 1984450 (R.I. Super. Ct. August 15, 2005); *Blue Cross & Blue Shield of Rhode Island v. McConaghy*, No. PC 04-6806, 2005 WL 1633707, at *7 (R.I. Super. July 11, 2005); *Shola v. Flamino*, C.A. No. 99-4532, 2001 WL 100408 (R.I. Super. Ct. Jan 23, 2001).

29 *See, e.g., Olivieri v. McLeod*, No. 97-4189, 1998 WL 306785, at *5 (R.I. Super. June 3, 1998) (“While the deference due to an agency interpretation of its governing statute and regulations is far from blind allegiance...it



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is given controlling weight unless the reviewing court determines it to be clearly erroneous or inconsistent with the law.”) (citing *Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 104 S.Ct. 439, 78 L.Ed.2d 195 (1983)).

30 *Decision at 25* (quoting *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 98, n.8 (1983)).

31 *Mancini v. City of Providence*, 155 A.3d 159, 167-68 (R.I. 2017) (“[T]he true measure of a court’s willingness to defer to an agency’s interpretation of a statute depends, in the last analysis, on the persuasiveness of the interpretation, given all the attendant circumstances.”); see also *Portsmouth Water & Fire Dist. v. Rhode Island Pub. Utilities Comm’n*, 150 A.3d 596, 602 (R.I. 2016) (“Despite the great deference we afford to the PUC, we review the PUC’s determinations of law under a de novo standard.”).

32 *Decision at 24* (quoting *Kisor*, 588 U.S., at 578).

33 See *Jasset v. Department of Human Servs.*, No. C.A. PC 05-3815, 2006 WL 2169891, at *4 (R.I. Super. July 31, 2006) (“[I]t is well-established that a higher level of deference is owed when reviewing agency determinations of matters within the agency’s specialized expertise.”); *Brown Univ. v. Rhode Island Comm’n for Hum. Rts.*, No. 00-0286, 2001 WL 91399, at *5 (R.I. Super. Jan. 16, 2001) (“Judicial deference to an administrative agency decision is proper and necessary when the agency’s decision is based on highly specialized knowledge of a particular matter within the agency’s expertise.”) (citing *Robert E. Derecktor of Rhode Island, Inc. v. United States*, 762 F.Supp. 1019, 1022 (D. R.I. 1991)); *McLaughlin & Moran, Inc. v. State*, No. C. A. NO. 94-3361, 1996 WL 936959, at *2-3 (R.I. Super. July 25, 1996) (same).

34 R.I. GEN. LAWS § 39-5-3 (governing appeals and judicial review of decisions from the RIPUC); see also R.I. GEN. LAWS § 42-98-12 (incorporating by reference R.I. GEN. LAWS § 39-5-3 into judicial review of EFSB decisions).


35 R.I. GEN. LAWS § 39-5-3 (emphases added).

36 *Providence Gas Co. v. Malachowski*, 600 A.2d 711, 714 (R.I. 1991), (The commission’s factual findings are taken as prima facie evidence of truth, over which the court cannot apply its own judgment or weigh conflicting evidence.”); *Pascoag Fire Dist. v. Pub. Utilities Comm’n of Rhode Island*, 636 A.2d 689, 692 (R.I. 1994) (“[T]he same deference mandated by statute [R.I. GEN. LAWS § 39-5-3] should be given to the findings of the commission on mixed questions of law and fact. The court cannot substitute its judgment on these issues relating to accounting principles as well as to statutory construction.”).

37 *Portsmouth Water & Fire Dist. v. Rhode Island Pub. Utilities Comm’n*, 150 A.3d 596, 602 (R.I. 2016) (quoting *Portsmouth Water & Fire Dist. v. Rhode Island Pub. Utilities Comm’n*, 37 A.3d 114, 117 (R.I. 2012)). ◊

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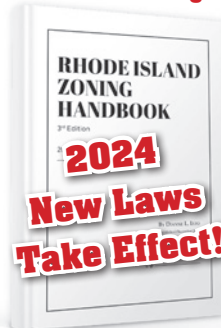
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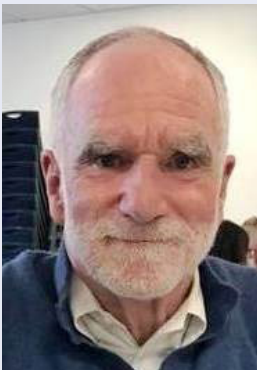
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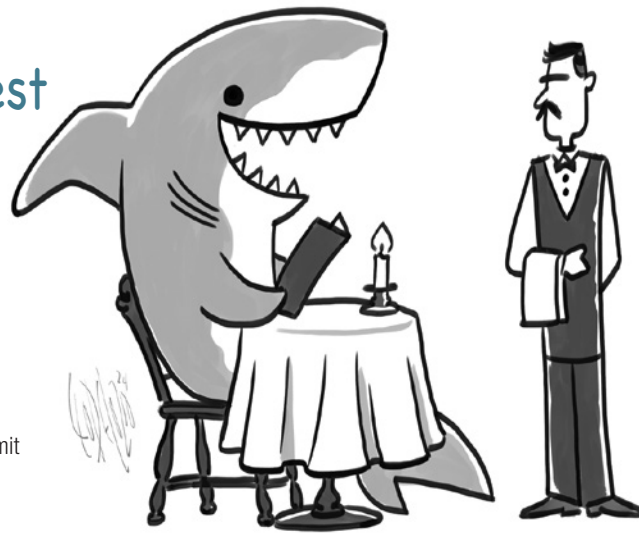
We will post a cartoon in each issue of the *Rhode Island Bar Journal*, and you, the reader, can create the punchline.

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

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

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Advertiser Index

Alliant Title and Escrow – Florida	33
Arbitrator – Nicholas Trott Long	34
Barrett Valuation Services, Inc.	31
Bottaro, Laura- Arbitration and Mediation	12
Briden, James – Immigration Law	34
Coia & Lepore, Ltd. – John Cascione	32
Coia & Lepore, Ltd. – Mediation	23
Connecticut Lawyers – Messier, Massad, Burdick & Flynn, LLC.	8,26
Delaney, William – ADR Commercial Law	33
Dennis, Stephen – Workers' Compensation	32
Enright Law LLC	16
Goldman, Janet – Office Space for Rent	24
Greenwich Bay Brokers – Jen Cosgrove O'Leary	20
Humphrey, Richard – Law Offices	34
Lavoie Law LLC	30
Law Offices of Michael W. Favicchio	23
Leone Law, LLC – Anthony R. Leone II	18
Marasco & Nesselbush – Personal Injury Law Firm	30
Mignanelli & Associates, LTD. – Estate Litigation	23
Morowitz, David – Law Firm	10
PAH Professional Services LLC	27
Palumbo, Richard – Condominium Law	14
Palumbo, Richard – Property Damage & Insurance	18
PellCorp Investigative Group, LLC	26
Prieffer, Mark – Alternate Dispute Resolution	26
Planned Lifetime Assistance Network of Massachusetts and Rhode Island, Inc.	15
Red Cave Legal Consulting	16
Secure Future Tech Solutions	31
Slip & Fall – Henry S. Monti	26
Soss, Marc – Florida Estates/Probate/ Documents	18
Withum – Forensic & Valuation Services	17
Workers' Compensation – Revens, Revens, & St. Pierre	26
Zoning Handbook, 3rd Edition – Roland Chase	33

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RIBA DEI Committee Call to Action!

For those who may be interested, the Rhode Island Bar Association's Diversity and Inclusion Task Force created a Diversity, Equity, and Inclusion ("DEI") Pledge that invites lawyers, law firms, legal departments, legal services, and law-related organizations to join RIBA in its commitment to increase diversity in the legal profession. Those who participate in the Pledge will be acknowledged on the RIBA website and in the quarterly DEI Newsletter for their good faith efforts. For more information on the Pledge and how to sign up, visit the DEI page on the Bar's [website](http://www.ribar.com).

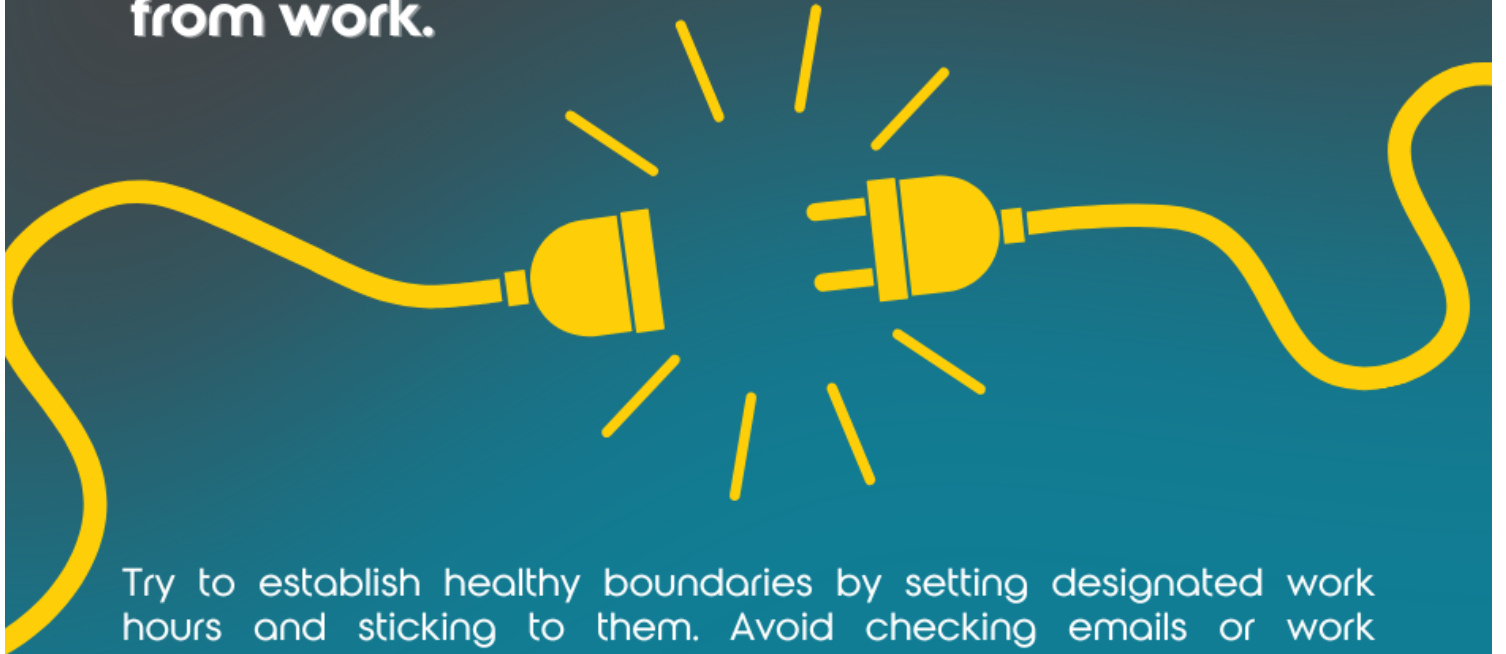
The RIBA DEI Committee is in the process of creating a list of contacts of DEI chairpersons at the various law firms in the state. The list will be used as a resource to communicate and collaborate on RIBA's DEI initiatives. We are working to compile the list of contacts over the next few months. If your firm has a DEI Committee, Task Force, and/or contact person, please reach out to Communications Coordinator NaKeisha Torres at ntorres@ribar.com with the contact information of your firm's DEI Committee chair.

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