

Rhode Island Bar Journal

Rhode Island Bar Association Volume 71. Number 4. January/February 2023



**If It's Not Football, Don't Bet on the
GOAT: What Lawyers Should Expect
Following the Crypto Crash**

**The Dormant Commerce Clause
and The Rhode Island Cannabis Act:
An Introduction**

**Performance/Payment Bonds –
Owners' Concerns**

Articles

7 If It's Not Football, Don't Bet on the GOAT: What Lawyers Should Expect Following the Crypto Crash

Hon. Brian P. Stern and Jordan Z. Sasa, Esq.

13 The Dormant Commerce Clause and The Rhode Island Cannabis Act: An Introduction

Victoria Litman, M.Div., LL.M., Esq.

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

Jenna Giguere, Esq. and Angela Yingling, Esq.

27 Performance/Payment Bonds – Owners' Concerns

Girard R. Visconti, Esq.

FEATURES

- | | | | |
|----|---|----|---|
| 3 | Balancing Our Roles | 29 | Committee Corner |
| 4 | Build your Client Base and Serve Your Community with the Bar's Lawyer Referral Service! | 30 | Online Attorney Resources (OAR) |
| 5 | IOLTA Client Account Issues | 33 | RI Bar Association Continuing Legal Education Seminars |
| 6 | Stay Connected | 34 | Rhode Island Municipal Court Listing |
| 8 | Rhode Island Bar Foundation Seeks Law School Scholarship Applicants | 36 | Bar Association Mentor Programs |
| 11 | House Of Delegates Letters of Interest – Due February 24, 2023 | 36 | Looking to Post or Search for a Job in the Legal Field? |
| 14 | Combine Profit & Public Service in 2023 with LRS | 37 | In Memoriam |
| 17 | Seeking Law Related Education Program Attorney Volunteers: Update Your Preferences Today! | 38 | Fastcase Tip: Download Multiple Documents at One Time |
| 18 | Help Us Grow Our List Serve! | 38 | Establish Yourself As An Expert in An Area of Law |
| 19 | Now Accepting 2023 Rhode Island Bar Award Nominations | 39 | Cartoon |
| 21 | Thanks to Our CLE Speakers | 39 | Advertiser Index |
| 22 | Rhode Island Family Court Celebrates National Adoption Day | 39 | Lawyers on the Move |
| 25 | Honor Roll | | |
| 25 | Keep Your Directory Listing Up to Date! | | |
| 26 | Lawyers Helping Lawyers | | |
| 26 | SOLACE | | |

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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

Balancing Our Roles



Mark B. Morse, Esq.
President
Rhode Island Bar Association

“Symptoms of burnout are characterized by feelings of exhaustion, difficulty concentrating, self-medication, chronic stress, and difficulty maintaining a work-life balance.”

As lawyers, we have obligations to our clients, to our community, to our families, and to ourselves. It is important that we try to keep things in perspective. Mostly though, our profession demands that we concentrate on the task or the client before us. The work requires our immediate attention. The deadline looms, and attention to the family or to ourselves is sacrificed. Before long, we face burnout.

Attorney burnout is real. In 2016, the American Bar Association Commission on Lawyer Assistance Programs, in conjunction with the Hazelden Betty Ford Foundation, conducted a study entitled, “The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys.”¹ The study revealed that 21% of licensed, employed attorneys reported issues consistent with those of problem drinkers. The highest incidence of problem drinking occurred in the first ten years of practice. Additionally, 28% reportedly suffered some level of depression, while another 19% had symptoms of anxiety. This manifestation of stress among lawyers was reported to be at a higher rate than among other professionals.

Burnout is included in the 11th Revision of the International Classification of Diseases (ICD-11). It is classified as an occupational phenomenon, rather than a medical condition. ICD-11 defines burnout as follows:

“Burnout is a syndrome conceptualized as resulting from chronic workplace stress that has not been successfully managed. It is characterized by three dimensions:

- feelings of energy depletion or exhaustion;
- increased mental distance from one’s job, or feelings of negativism or cynicism related to one’s job; and
- reduced professional efficacy.

Burnout refers specifically to phenomena in the occupational context and should not be applied to describe experiences in other areas of life.”²

So why is it that lawyers, more than other professions, experience this high degree of burnout. One study describes several factors that contribute to attorney burnout. Among these attributes are a high-achieving personality type, a need for perfectionism, the rigorous deadlines and demands required under the law, the culture of our profes-

sion, which values excessive hours, and the lack of available professional support.³

What can we do about this to prevent attorney burnout? First, recognize the symptoms. Symptoms of burnout are characterized by feelings of exhaustion, difficulty concentrating, self-medication, chronic stress, and difficulty maintaining a work-life balance. Once you recognize the symptoms, take an active role in addressing them. Undertake stress-relieving exercises such as yoga, pay more attention to your hobbies, spend more time with family and friends, learn to say no when you must, and delegate when you can. Most importantly, learn to ask for help.

The Rhode Island Bar Association offers a variety of resources that can help. Visit the [Lawyers Living Well](#) page on our website, where you will find a compilation of resources to help attorneys find a work-life balance focusing on mindfulness, fitness, and overall wellness. The page also links to the ABA wellbeing toolkit for use by legal service employers to help reduce stress in the workplace and help their lawyers and staff maintain a balanced work-life environment. Also included on the Lawyers Living Well page are a number of articles, wellness infographics, and phone apps to help with relaxation techniques.

Your Bar Association offers free and confidential help, information, assessment, and referral for personal concerns through our long-standing Lawyers Helping Lawyers Program (LHL). Lawyers Helping Lawyers Committee members choose this volunteer assignment because they understand the issues and want to help their peers find answers and appropriate courses of action. Committee members listen to your concerns, share their experiences, and offer strictly confidential, free, peer and professional assistance for your personal challenges. In addition to the LHL program, the Association recently contracted with CorpCare—a lawyer assistance program that provides professional clinical assessments and

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facilitates getting appropriate treatment for Bar members free of charge. The professionals at CorpCare provide confidential consultation for a wide range of personal concerns including (but not limited to): balancing work and family, child and eldercare, depression, anxiety, domestic violence, aging, grief, career satisfaction, alcohol and substance abuse, and problem gambling. Everyone occasionally experiences problems. The CorpCare helpline provides counseling resources that quickly and professionally assist you in handling problems affecting your personal or work life. You can call 866-482-8378 to reach a CorpCare counselor for confidential, round-the-clock support. Visit the [Do You Need Confidential Assistance](#) quicklink on the Bar's homepage for more information on the services provided through the LHL and CorpCare programs.

CorpCare recently announced that they have expanded their provider network to include the BetterHelp platform. RIBA members now have the option to access video, phone, or chat message counseling directly through the BetterHelp virtual platform. You can access the online portal to schedule services without having to call the CorpCare helpline. Just visit betterhelp.com/corpcare, enter your informa-

tion, and search for Rhode Island Bar Association in the "Employer Name/Access Code" field. Accessing help has never been easier!

Our obligations as lawyers include a recognition that we take care of ourselves. Don't allow your job-related duties to take over and subsume this obligation. Take time to appreciate things outside of the office, and as necessary, allow the Bar Association to be part of the solution.

ENDNOTES

1 Krill, Patrick R. JD, LL.M.; Johnson, Ryan MA; Albert, Linda MSSW. *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*. *Journal of Addiction Medicine: January/February 2016 - Volume 10 - Issue 1 - p 46-52*
doi: 10.1097/ADM.0000000000000182

2 *Burnout an "Occupational phenomenon": International Classification of Diseases (2019) World Health Organization. World Health Organization. Available at: <https://www.who.int/news/item/28-05-2019-burnout-an-occupational-phenomenon-international-classification-of-diseases> (Accessed: December 8, 2022).*

3 Miki, S. (2021) *Lawyer burnout: Stopping it before it starts*, Clio. Available at: <https://www.clio.com/blog/lawyer-burnout/> (Accessed: December 8, 2022). ◇

Rhode Island Bar Journal

Editorial Statement

The *Rhode Island Bar Journal* is the Rhode Island Bar Association's official magazine for Rhode Island attorneys, judges, and others interested in Rhode Island law. The *Bar Journal* is a paid, subscription magazine published bi-monthly, six times annually and sent to, among others, all practicing attorneys and sitting judges, in Rhode Island. This constitutes an audience of over 6,000 individuals. Covering issues of relevance and providing updates on events, programs, and meetings, the *Rhode Island Bar Journal* is a magazine that is read on arrival and, most often, kept for future reference. The *Bar Journal* publishes scholarly discourses, commentary on the law and Bar activities, and articles on the administration of justice. While the *Journal* is a serious magazine, our articles are not dull or somber. We strive to publish a topical, thought-provoking magazine that addresses issues of interest to significant segments of the Bar. We aim to publish a magazine that is read, quoted, and retained. The *Bar Journal* encourages the free expression of ideas by Rhode Island Bar members. The *Bar Journal* assumes no responsibility for opinions, statements, and facts in any article, editorial, column, or book review, except to the extent that, by publication, the subject matter merits attention. Neither the opinions expressed in any article, editorial, column, or book review nor their content represent the official view of the Rhode Island Bar Association or the views of its members.

Article Selection Criteria

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

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Build your Client Base and Serve Your Community with the Bar's Lawyer Referral Service!



Attorney Denise Acevedo Perez, a member of the Lawyer Referral Service, enthusiastically supports the program. *"The Lawyer Referral Service has many advantages—it allows small firms to grow their clientele AND provide income-based representation when needed. It also connects clients not only to lawyers who are competent in a specific area of law but also to newer practitioners desirous of obtaining more experience in a particular field of law. In short, everyone wins."*

Membership in the Rhode Island Bar Association's Lawyer Referral Service (LRS) is an excellent and inexpensive way to increase your client base and visibility within the community while expanding public access to legal representation. Optional special LRS projects include: **Senior Citizen Center Clinics** throughout the year and the state; **Reduced Fee Program** offered to qualifying clients; and the **Arts Panel** for local artists' legal needs all offer unique opportunities for increasing your business while you provide an important public service to your community.

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

IOLTA Client Account Issues



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

“The best advice I can give to attorneys with regard to properly maintaining their IOLTA client accounts is to keep meticulous records.”

In a 2020 study, the American Bar Association determined that 26% of lawyers in America are solo practitioners. Unfortunately, not all solo practitioners maintain adequate records to locate the owners of the funds in an IOLTA account when a solo attorney dies or becomes disabled. Even if the deceased or disabled attorney practiced in a firm, especially a small firm, the IOLTA records may be inadequate.

A number of IOLTA client account issues have recently come to our attention at the Rhode Island Bar Foundation. Most of the IOLTA account issues relate to inadequate record keeping. For example:

- > You may be holding funds in your IOLTA account for a client that you have not been able to locate for a while.
- > You have been appointed under Article III, Rule 18 of the Supreme Court Rules as substitute counsel for an attorney who has died, suffers from incapacity or disability, has been suspended or disbarred, or has disappeared. You have control of that attorney’s IOLTA account, but you have been unable to locate the owner or owners of all or some of the funds in that account.
- > You have been appointed executor of the estate of a deceased attorney, or you have been hired to represent an executor of a deceased attorney’s estate, and you locate an IOLTA account of that attorney with funds that you cannot trace to a particular client.
- > You received a retainer from a client that you deposited in your IOLTA account, but the matter never went forward or became dormant; you owe the client a refund, but you have not been able to contact the client despite your best efforts.
- > You and your law partner maintain separate IOLTA accounts. Your partner dies with a substantial sum in his or her IOLTA account, but you do not have access to the account records, or they are inadequate to identify the owner of the funds in the account.
- > You are planning to retire soon, and as part of wrapping up your practice, you attempt to reconcile your IOLTA account, and you find that the funds in the account exceed what your office records show as belonging to

identifiable clients.

- > You represent a bank that has been approached by an executor or beneficiary of a deceased lawyer’s estate, seeking to have funds in an IOLTA account at that bank released to the executor or beneficiary.

The question becomes: what are your options?

In my opinion, one thing you should not do is to attempt to escheat the funds to the state. It is the consensus of the Bar Foundation Board of Directors that client funds may never be escheated to the state.

One option is to file a petition with the Supreme Court. In the petition, you would explain the situation and the efforts you and/or your client have made to locate the owner of the funds. You could then ask the Supreme Court to issue an Order authorizing you to take control of the IOLTA account and to distribute those funds to the Rhode Island Bar Foundation. Having a court order will protect you. In a recent case involving a deceased lawyer, the Supreme Court issued such an order.

A second option, depending on the particular circumstances of your case, is to seek the appointment of substitute counsel under Rule 18 of Article III of the Supreme Court rules. Substitute counsel is generally authorized to deal with the files and accounts of the absent lawyer.

A third option is presently before the Supreme Court. The Bar Foundation has proposed an amendment to Rule 1.15 to address all of these situations and provide a uniform procedure for dealing with these varied circumstances. The Board of Directors of the Bar Foundation recently authorized me to submit the proposed rule change to the Supreme Court. If approved by the Supreme Court, the proposed addition to Rule 1.15 would provide a procedure so that if, after the exercise of reasonable diligence, a lawyer in any of the examples above is unable to identify or locate the owner of funds deposited in an IOLTA account, the lawyer shall remit those funds and related

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Rhode Island Bar Foundation

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

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

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information to the Bar Foundation so that the funds can be used by the Foundation consistent with the purposes listed in Rule 1.15.

The lawyer remitting funds would have to provide the Foundation with a statement of the last known address of the owner of the funds, if known to the lawyer, the amount remitted, a description of the efforts taken by the lawyer to find the owner, and, if the lawyer is unable to determine and identify the owner of the funds, a description of the efforts taken by the lawyer to identify the owner of the remitted funds.

Under the proposed rule, the Bar Foundation is required to maintain records regarding the funds remitted. The rule provides a procedure to follow if, within three years of the remission of the funds, the original owner of the funds is located or a putative owner makes a claim for the funds. The proposed Rule also provides that if no claim to the remitted funds is made within three years, the remission will be treated as final.

The best advice I can give to attorneys with regard to properly maintaining their IOLTA client accounts is to keep meticulous records. These records should be prepared knowing that it is possible that an executor, an attorney for an executor, or a substitute attorney may someday be required to pour over your client account records in an attempt to locate each person who is entitled to all or any portion of the funds in your IOLTA client account. These records should be regularly updated with contact information for each client.

If you carefully maintain and update your IOLTA client account records, your surviving spouse and other beneficiaries, your executor, your substitute counsel, and all those who might be responsible in the future for locating the owner(s) of the funds in your IOLTA account will thank you.

I would like to acknowledge and thank Lauren Jones and Michael St. Pierre for their hard work in drafting the proposed revisions to Rule 1.15. I would also like to thank Lauren for his assistance in the preparation of this President's message. ◇

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If It's Not Football, Don't Bet on the GOAT: What Lawyers Should Expect Following the Crypto Crash



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



Jordan Z. Sasa, Esq.
Law Clerk
Rhode Island Supreme Court

“Because cryptocurrency is traded with little oversight, it is valuable to both bona fide investors and criminals. More than \$1 billion in cryptocurrency was reported stolen through fraud just in the past year.”

“It’s an incredibly exciting time in the crypto-world . . . and the revolutionary FTX team continues to open my eyes to the endless possibilities . . . This particular opportunity showed us the importance of educating people about the power of crypto. . . .”

— TOM BRADY¹

Introduction

Last year, one Bitcoin was worth over \$60,000.² Today, it is only worth \$18,000, a seventy percent decline.³ Surprisingly, Bitcoin is faring well compared to the crypto market as a whole; over eighty percent of all cryptocurrencies have fallen by ninety percent or more from their all-time highs last year.⁴ However, this figure does not consider FTX’s recent crash, whose losses are currently impossible to calculate. Overall, the cryptocurrency market capitalization has plummeted from \$3 trillion to \$850 billion.⁵ The largely unregulated cryptocurrency industry is leaving investors broke and attracting attention from governments and regulatory bodies.⁶ The Securities and Exchange Commission (SEC) and state securities regulators are reexamining their authority over cryptocurrencies, exchanges, and promoters.⁷ It is unfortunate that this focus comes too little, too late for Main Street investors.

What are Cryptocurrencies, and Why Are They Receiving More Attention?

Cryptocurrencies are digital assets used as a medium of exchange, commonly for payment in online transactions.⁸ But notably, cryptocurrencies are also popular investments.⁹ Trading platforms offer cryptocurrency just like stocks or exchange-traded funds (ETFs), which investors can buy and sell.¹⁰ Cryptocurrencies are also being used by hedge funds and lenders.¹¹

For now, cryptocurrencies and the exchanges they trade on are largely unregulated.¹² In other words, they are being sold to average investors with little regulatory oversight. Unlike traditional securities, many cryptocurrency companies have taken the position that they are not subject to federal and state securities laws,¹³ which would require exchanges to disclose material risks of cryptocurrency investments and determine whether cryptocurrency investments are suitable for particular investors.¹⁴ Securities laws also apply to promoters; celebrity spokespeople are required

to disclose relationships with cryptocurrency companies when advertising financial investments and services, and must also disclose any compensation they receive in exchange for promotions.¹⁵ Recently, the SEC brought charges against Kim Kardashian, who failed to disclose that she was paid \$250,000 to promote EthereumMax on her Instagram account.¹⁶

Because cryptocurrency is traded with little oversight, it is valuable to both *bona fide* investors and criminals. In the past year, more than \$1 billion in cryptocurrency was reported stolen through fraud.¹⁷ Crime syndicates, including drug cartels, use cryptocurrency to launder illegal funds because it is practically untraceable. Bitcoin is typically used in money laundering, but criminals are switching to newer coins that afford even greater privacy, which has made tracing transactions even more difficult.¹⁸

In addition, promoters exploit cryptocurrency’s speculative nature through “pump and dump” schemes, in which they convince investors to buy large quantities of a particular cryptocurrency to raise its value, then sell off their cryptocurrency for a massive profit, leaving investors holding the bag.¹⁹ In essence, the cryptocurrency market is flush with Stratton Oakmonts, *a la Wolf of Wall Street*.²⁰

Moreover, because cryptocurrencies are highly speculative, they pose high levels of risk for investors. For example, a token called TerraUSD (UST) crashed in May of 2022, erasing \$60 billion from the market.²¹ Billionaire investor Bill Ackman expressed his views of the Terra ecosystem, calling it “the crypto version of a pyramid scheme.”²² On November 7, 2022, FTX’s token, FTT, dropped in value by eighty percent and took \$2 billion

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Rhode Island Bar Foundation Seeks Law School Scholarship Applicants

For its Thomas F. Black, Jr. Memorial Scholarship program, the Bar Foundation intends to award two scholarships of \$25,000 each to Rhode Island residents who enroll as first-year students in an American Bar Association accredited law school for the academic year beginning September 2023. The scholarship is for the first year of law school only and non-renewable. Each scholarship award is made on the basis of demonstrated financial need, superior academic performance, community and public service, and demonstrated contacts with and commitment to the State of Rhode Island. The Scholarship Committee seeks applications from candidates without regard to race, color, religion, country of ancestral origin, handicap, age, sex, or sexual orientation. Since 1984, this fund has awarded 70 scholarships to promising law students from Rhode Island. The scholarship program receives substantial funding from the Horace A. Kimball and S. Ella Kimball Foundation, and The Champlin Foundation in honor of the late Thomas F. Black, Jr. who was 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 additional scholarships from the Papitto Opportunity Connection Foundation in the amount of \$25,000 each will be awarded to candidates who self-identify as Black, Indigenous, or People of Color (BIPOC). 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 the BIPOC community in Rhode Island.

The Rhode Island Bar Foundation Scholarship application deadline is March 24, 2023. For application forms, telephone: (401) 421-6541 or email: tgallo@ribar.com. Information and application forms are also available on the Rhode Island Bar Association website: ribar.com in the Rhode Island Bar Foundation section.

down with it.²³ On November 11, 2022, FTX filed for Chapter 11 bankruptcy.²⁴

In light of cryptocurrency's *laissez-faire* market and potentially illicit uses, the White House announced future policy goals for cryptocurrency in March of 2022, including protecting consumers and investors, protecting American financial stability, and mitigating risks to national security.²⁵ The SEC has led the charge, bringing lawsuits against cryptocurrency giants Coinbase and Ripple Labs, Inc. for violating securities laws.²⁶ Other policy groups, such as the North American Securities Administrators Association (NASAA), have worked with state governments to stop unregistered cryptocurrency offerings and alert investors to potential fraud.²⁷

However, the proverbial jury is still out on whether cryptocurrencies are securities; the industry is still fighting to stay outside securities laws, and some major players simply refuse to comply with the securities regulators' demands.²⁸

Securities, or not Securities? That is the Question

Overall, it is a fact-dependent analysis of whether cryptocurrencies will fall under securities laws, but a "security" as defined by the Securities Act of 1933 casts a wide net.²⁹ SEC Chair Gary Gensler is of the opinion that most cryptocurrencies are "investment contracts," which fall under the Securities Act and state securities laws' broad-brush definition of "security."³⁰ The existence of an "investment contract" is largely dependent on facts, and based on the substance, rather than the form, of the particular investment.

The United States Supreme Court established a test to determine whether a transaction is an investment contract in **Securities and Exchange Commission v. W.J. Howey Co.** The Howey Company (Howey) owned large tracts of citrus groves in Florida.³¹ In order to finance further development, Howey sold parcels of land to members of the public, who in turn leased their parcels back to Howey pursuant to a ten-year service contract.³² Howey cultivated, harvested, and marketed the produce from each parcel and gave a portion of the net profits to each landowner.³³ Those who purchased land from Howey were predominantly vacationers without the knowledge, skill, and equipment necessary for the care and cultivation of citrus trees, but were enticed by the possibility of substantial profit.³⁴

The SEC argued that Howey's sale of citrus groves amounted to the sale of unregistered and nonexempt securities under the 1933 Securities Act.³⁵ The United States Supreme Court agreed and found that Howey's operation was an "investment contract," which it defined as (1) an investment of money; (2) in a common enterprise; and (3) where the investor expects profits solely from the efforts of a third party.³⁶ Howey's investment plan was more than merely selling fee-simple interests in land coupled with management services.³⁷ The investors contributed money to a singular citrus fruit enterprise and relied solely on that enterprise to cultivate and sell the fruit.³⁸ Because the investor's predominant interest was profit, Howey's offerings were securities.³⁹

The Howey test was later applied by the United States District Court for the District of Rhode Island in **Securities and Exchange Commission v. M.A. Lundy Associates**,⁴⁰ this time regarding scotch whiskey. Lundy advertised and sold warehouse receipts for barrels of scotch whiskey located in Scotland, with a minimum purchase price of \$1,000.⁴¹ Prospective buyers received

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a brochure stating that the whiskey would appreciate in value as it aged.⁴² Each warehouse receipt entitled investors to a three-year interest in the whiskey barrels.⁴³ However, investors were unlikely to ever take physical possession of the barrels.⁴⁴ The District of Rhode Island held that the warehouse receipts were investment contracts because it was “abundantly clear ‘that the nature of the investor’s participation in the enterprise’ is that ‘of providing capital with the hopes of a favorable return.’”⁴⁵

Of course, **Howey** and **Lundy** are not the only instances of unusual *res* falling under securities laws. Courts have found that deals involving self-improvement courses, cosmetics, earth-worms, animal breeding programs, and a seat on the New York Stock Exchange were also investment contracts, just to name a few examples.⁴⁶

Where is the Current Battle Being Fought?

As these cryptocurrency issues were never addressed proactively, they are being decided through litigation and bankruptcy proceedings. For example, the cryptocurrency world waits with bated breath over the SEC’s lawsuit against Ripple Labs, Inc. (Ripple Labs). In 2020, the SEC brought an action against Ripple Labs in the Southern District of New York for allegedly offering unregistered securities in the form of a token called XRP.⁴⁷ The SEC argued that Ripple Labs sold \$1.38 billion of XRP and used that money to fund its operations “to assist in its efforts to develop a ‘use’ for XRP and maintain XRP secondary trading markets.”⁴⁸

The SEC’s position is that XRP is a security because when investors purchased XRP, those funds were used by Ripple Labs to develop other aspects of its business, which would in turn raise the value of XRP.⁴⁹ According to the SEC, Ripple Labs’ sale of XRP amounts to an investment contract.⁵⁰ Ripple Labs, not surprisingly, argues that XRP is not a security because XRP holders have no right to company profits, and that simply because investors share a common interest in XRP’s value increasing does not mean that they invested in a common enterprise.⁵¹ Both parties moved for summary judgment in September 2022, and the Southern District of New York’s decision could have far-reaching consequences for cryptocurrency issuers worldwide.⁵²

Not every cryptocurrency or exchange lasts long enough to expose itself to litigation, though. Some go belly-up not long after they reach mainstream popularity.⁵³ When it comes to bankruptcy proceedings, there are pertinent questions surrounding investors’ rights to funds and assets entrusted to defunct cryptocurrency issuers and exchanges. For example, cryptocurrency company Celsius advertised itself as a cryptocurrency “bank” where customers could keep their cryptocurrency and receive interest.⁵⁴ When Celsius initiated Chapter 11 bankruptcy proceedings, its customers learned that the company’s terms of service granted all rights to assets in the cryptocurrency “bank” to Celsius as a condition of use.⁵⁵ Although Celsius claims to have \$167 million in cash on hand, customers are not allowed to make withdrawals.⁵⁶ It is increasingly unlikely that Celsius users will recover even pennies on the dollar from bankruptcy.

In addition, cryptocurrency investors’ assets are not currently insured, even if those assets are deposited in a traditional bank. Voyager Digital (Voyager), another cryptocurrency company, filed for Chapter 11 bankruptcy earlier this year.⁵⁷ Voyager claimed to hold \$1.3 billion in cryptocurrency assets.⁵⁸ Unlike Celsius, Voyager kept cryptocurrency investors’ funds in an

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FDIC-insured deposit account.⁵⁹ However, Voyager falsely claimed and advertised that (1) Voyager was FDIC-insured; (2) cryptocurrency investors' funds were also FDIC-insured; and (3) the FDIC would insure customers against loss if Voyager failed.⁶⁰ This was not true because “[t]he FDIC only offers protection of funds in the event of a *bank’s* failure, not a cryptocurrency exchange.”⁶¹

A similar story is present in FTX’s recent Chapter 11 filing but on a much larger scale. FTX, the third-largest cryptocurrency exchange with \$10 to \$50 billion in assets, recently filed for bankruptcy in the District of Delaware.⁶² FTX’s balance sheets show that FTX loaned significant client funds to another company, Alameda Research, to invest in high-risk cryptocurrencies that ended up going bust.⁶³ Talk about overleverage! FTX is the cryptocurrency version of Bear Stearns or Lehman Brothers,⁶⁴ and the results could be catastrophic. The investors who could lose out are not just individual cryptocurrency holders; professional athletes and pension funds have invested money in cryptocurrency and will potentially lose their investments as well.⁶⁵ Moreover, FTX contributed tens of millions of dollars to American political campaigns on both sides of the aisle.⁶⁶ It is hard to imagine that lawmakers, regulators, and wealthy investors did not see this danger brewing, but “[t]he closer you [are] to the market, the harder it [is] to perceive its folly.”⁶⁷

Conclusion

It is often said that those who do not know history are doomed to repeat it. The cryptocurrency industry should take this to heart; it is making the same mistakes that financial institutions made leading up to the Great Recession. Sound business practices, measured expectations, and regulatory oversight are necessary to prevent crashes like FTX.

Lawyers, likewise, have a lot to learn from the crypto crash. Like it or not, digital assets are the future; the Federal Reserve Bank of New York is researching the “technical feasibility, legal viability, and business applicability” of cryptocurrency in place of paper money, and the United States Federal Reserve has released reports on the potential benefits of issuing a “central bank digital currency” piloting a “digital dollar” that it claims one day replace paper money.⁶⁸ So, like social media and the internet, the law will constantly chase these advances in technology. It is important for attorneys to stay apprised of the legal developments in cryptocurrency and digital assets. These issues will undoubtedly become commonplace—if they are not already—in certain disciplines such as bankruptcy law, corporate law, taxation, securities law, wills, trusts, and estates, family law, labor and employment, and administrative law. While federal and state elected officials and the courts wrestle with pertinent foundational and legal questions, it is best practice to recognize these issues and consult with subject matter experts when appropriate.

ENDNOTES

1 *Ryan Glasspiegel*, Tom Brady, Gisele Bündchen Now Caught Up in FTX Collapse, *N.Y. POST* (Nov. 9, 2022, 2:12 PM), <https://nypost.com/2022/11/09/tom-brady-gisele-bundchen-now-caught-up-in-ftx-collapse/>.

2 See *James Royal*, Bitcoin’s Price History: 2009 to 2022, *BANKRATE* (Oct. 7, 2022), <https://www.bankrate.com/investing/bitcoin-price-history/#:~:text=January%202021%20%E2%80%93%20June%20>

continued on page 34

House Of Delegates Letters of Interest – Due February 24, 2023

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

The Nominating Committee will meet soon to prepare a slate of officers and members of the 2023-2024 Rhode Island Bar Association House of Delegates. The term of office is July 1, 2023–June 30, 2024. If you have not already done so, to be considered for appointment to the House of Delegates, please send a letter of interest no later than **February 24, 2023**.

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

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

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

Or, you may send your letter of interest to Kathleen M. Bridge, Executive Director by fax: (401) 421-2703, or email: kbridge@ribar.com. **The Nominating Committee welcomes letters of interest from candidates of diverse backgrounds in regard 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 in March, to be determined, at which candidates for the House of Delegates and for officer position(s) may, but are not required to, appear before the Nominating Committee and further explain their candidacy. Candidates for officer positions and candidates for the House at large will be given up to ten minutes each to speak (or as determined by the Chair). Candidates who elect to address the Nominating Committee are encouraged to present their vision of how they would advance the mission of the Bar through their service in the office.

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The Dormant Commerce Clause and The Rhode Island Cannabis Act: An Introduction



Victoria Litman, M.Div.,
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Victoria Litman Law LLC
East Providence

“As the smallest state, Rhode Islanders know that the survival of small businesses relies on residents spending their money at local institutions.”

Introduction

The Dormant Commerce Clause (“DCC”) is a judicially implied constitutional doctrine that has been receiving significant attention in the world of legal cannabis. Most recently, the DCC has been in the headlines for its impact on the rollout of New York State’s conditional adult-use retail licensing and in an Oregon lawsuit challenging a law disallowing exports of cannabis products to other states.¹ In August, the 1st Circuit applied the DCC to invalidate the requirement that businesses seeking licenses to sell medical cannabis in Maine must be state residents.² Given that Rhode Island is also in the 1st Circuit and recently legalized recreational cannabis, it is worth exploring what, if any, impact the 1st Circuit’s decision may have on possible challenges to the Rhode Island Cannabis Act. This article discusses the DCC and cannabis law and explores possible implications for Rhode Island.

The Dormant Commerce Clause

In Article 1 of the U.S. Constitution, Congress is granted the power to regulate commerce between the states.³ Congress’ affirmative Commerce Clause (“CC”) power has expanded and narrowed throughout history, often at the whim of the Justices and depending on the subject matter.⁴ Through its CC power, Congress has the power to expand and limit state and local powers to tax and regulate.⁵ From this affirmative or direct power to regulate whatever a court may interpret to be within the CC, the U.S. Supreme Court has interpreted the CC to have an implied or indirect aspect. This implied or negative implication of the CC has evolved to permit the judiciary to limit states’ powers to tax and regulate when Congress has not spoken and preempted state action on a specific issue.⁶ This debated concept, that courts have relied on to strike down burdensome state regulations and taxes, is most often called the DCC.

The histories of the CC and DCC are intertwined with the creation of the United States and our system of dual sovereignty. At the time of the founding, there was a broad consensus among the delegates that national regulation of protected interstate commerce was necessary to create a level playing field in the new united national market-

place.⁷ A federalist compromise created our system whereby Congress may only act through granted powers (such as the CC) and the States have general police power, under the 10th Amendment, to regulate the public welfare subject to federally created statutory and constitutional limitations.⁸ The CC was designed to promote free trade among the states, assure national uniformity in foreign commerce, and overcome the local bias of state legislators.^{9,10} Over time, the implied aspect of the CC or the DCC emerged as a tool utilized by courts to do their part in protecting federalist interests when Congress had not spoken and preempted the state’s actions.¹¹ Courts have struck down as unconstitutional a variety of state regulatory and taxation measures as unduly burdensome by applying this doctrine, and it has reached the Supreme Court on multiple occasions including recently in 2019 when the Court applied the DCC to invalidate Tennessee residency requirements for alcohol licensing.¹²

In October 2022, the Supreme Court heard another DCC case concerning a regulation in California, Proposition 12, requiring more humane treatment of pigs to be sold as pork in the state of California.¹³ Generally, a state law that regulates commerce in another state is per se invalid because it exceeds the states’ powers, so the key question is: what does it mean to *regulate* commerce? The pork industry argues that California is regulating extraterritorially by putting requirements that would raise prices on commerce outside of California.¹⁴ So far, the courts have found that California is regulating wholly intrastate activities, specifically only sales in the state of California, and therefore the DCC does not apply. In whatever way the Court decides, this case will likely have an impact on the cannabis industry and potentially provide clarity as to the extent of the DCC’s reach. Given the current majority conservative makeup of the Court, this case could go either way. On the one hand, there

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is a strong argument for states' rights to pass laws to regulate wholly intrastate activity and the DCC is an implied and not textual doctrine, generally disfavored by originalists. On the other hand, California is passing an animal cruelty law that will allegedly have a huge financial impact on the nationwide pork industry, and it's questionable whether they should have the power to impose their views on animal welfare, either as a public health need or a moral imperative, on other states. It is also very possible, as happens in this area and as the pork industry is advocating for, that the Court will rule very narrowly and find an exception for pork specifically without deciding the broader issue of state regulations that have interstate effects.

The Dormant Commerce Clause and Cannabis

The DCC has been a hot topic in the legal cannabis¹⁵ world, with multiple articles being written by leading scholars in the field. Some have even gone as far as arguing that Congress should consider "suspending the DCC" by utilizing language from the McCarran-Ferguson Act ("MFA"), which was enacted in response to a Court decision impacting the insurance industry.¹⁶ These proposals have ignored the DCC's unique application to state tax laws and the fact that insurance has retaliatory taxes, which had developed over decades when Congress acted to limit the application of the DCC through the MFA. These proposals also rely on the idea that legalization will "unleash the DCC" and invalidate many cannabis regulations, even though courts are already applying the DCC and the DCC would not necessarily invalidate many states' cannabis laws. It is worth emphasizing that suspending the DCC would be detrimental to the area of state tax laws, especially when there is legal interstate commerce because it would allow legislatures to tax out-of-staters more, who have no power to vote them out.¹⁷ One could imagine a legacy producer state, such as California, taxing out-of-staters significantly more to the detriment of a fair national marketplace.

In August 2022, the 1st Circuit Court of Appeals followed Supreme Court precedent and predictably held that Maine's residency requirements for medical marijuana licenses violated the DCC. The state argued that since cannabis remains federally illegal under the Controlled Substances Act, that law should preempt any state law regulating the industry.¹⁸ The Court found that the market for medical cannabis is functionally interstate due both to medical card reciprocity, meaning medical patients certified in other states can shop in Maine, and because of Congress' Rohrabacher-Farr Amendment, which limits the use of federal funds to enforce against state-legal medical cannabis businesses, functionally endorsing state markets.¹⁹ A petition for rehearing was denied on September 21st. Scholars and advocates agree that the reasoning used by the 1st Circuit opens the door for similar arguments to be made about other state laws that burden interstate commerce such as bans on state exports.²⁰

Outside of the 1st Circuit, in November 2022, a district court judge in New York granted a motion for a preliminary injunction, which stops New York's Office of Cannabis Management, its cannabis regulatory body, from issuing conditional adult-use retail licenses in the five geographic areas in which the plaintiff in the lawsuit had indicated an interest in.²¹ New York's licensing application defined an applicant as someone having "a significant presence in New York state."²² The U.S. District Court in the Northern District of New York issued a preliminary injunc-

tion, finding that there was a likelihood of success on the merits. The Court cited the recent 1st Circuit Case and other District Court cases in Michigan, Missouri, and Illinois, which invalidated residency requirements for state-legal cannabis businesses. The practical effect is that when New York's Office of Cannabis Management issued the first licenses on November 20, 2022, five of the fourteen regions were excluded.

The Dormant Commerce Clause and Rhode Island Cannabis

So, what does all the above mean for Rhode Island's soon-to-be adult-use Cannabis industry? One key aspect that may differentiate the case in Maine and a potential case challenging Rhode Island's new law is that the law challenged in Maine was medical and the law in Rhode Island is adult-use. The 1st Circuit Court of Appeals' consideration of medical card reciprocity may not be relevant because the adult-use market is open to all consumers. But, the Court's consideration of the Rohrabacher-Farr Amendment, which applies exclusively to medical marijuana programs, may be relevant. It is possible a 1st Circuit Court would find that there is not enough similar federal guidance in the adult-use landscape to justify a functionally endorsed interstate market and therefore the Controlled Substances Act would preempt the application of the DCC. That said, this was not an argument relevant to the New York case, which was successful in a New York district court. Of course, that case is not binding, but its reasoning may still inspire 1st Circuit judges.

The specific language of Rhode Island's Cannabis Act, which was signed May 25, 2022, by Governor McKee, that may be of concern is the definition of applicant. The statute reads: "Applicant" means a Rhode Island resident or a business entity with a principal place of business located in Rhode Island...and in which fifty-one percent (51%) of the equity in the business entity is owned by residents of Rhode Island.²³ This is a similar aspect of the law challenged in New York. But Rhode Island is not New York.

Rhode Island is very proud of its locally (and worker) owned businesses. As the smallest state, Rhode Islanders know that the survival of small businesses relies on residents spending their money at local institutions. Gregg's, Del's, Seven Stars, Knead Donuts, and many more are examples of Rhode Island institutions that have thrived because of robust local support. Whether the law may eventually require that the cannabis program be open to outside owners, just like it is for restaurant owners, does not have to change the supportive Rhode Island culture.

Conclusion

The DCC is one of the hottest topics in the legal cannabis world because its guarantee of a fair national marketplace is missing. Why states have felt that they could pass laws related to cannabis that would not pass constitutional muster if applied to any other industry is debatable.²⁴ The current reality for states rolling out legal cannabis now, such as Rhode Island, is that the DCC is more at play than ever. Striving to create a locally-owned business industry is admirable and is to be expected in a state as community-minded as Rhode Island. However, if Rhode Island wants to launch adult-use cannabis without being held up by litigation, the to-be-appointed Cannabis Control Commission may take DCC concerns into account.²⁵ One thing that makes the future of Rhode Island cannabis look especially bright is that as of December 1st, just a little over six months since the Rhode

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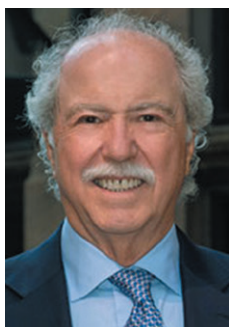
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Island Cannabis Act was signed, all Rhode Islanders will be able to go buy local cannabis products, no medical card needed. This is an especially fast timeline in the world of legal cannabis and a positive sign for Rhode Island's budding cannabis industry.

ENDNOTES

- Variscite NY One, Inc. v. State of New York et al*, No. 1:22-cv-1013, (W.D.N.Y. Nov. 2022); *Jefferson Packing House, LLC v. Brown et al*, No. 3:22-CV-01776, (D. Ore., filed Nov. 14, 2022).
- Ne. Patients Grp. v. Maine Dep't of Admin. & Fin. Servs.*, 554 F. Supp. 3d 177 (D. Me. 2021), *aff'd sub nom. Ne. Patients Grp. v. United Cannabis Patients & Caregivers of Maine*, 45 F.4th 542 (1st Cir. 2022).
- The Commerce Clause ("CC")* provides: "The Congress shall have Power... To regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes." Each of the three underlined clauses are treated as separate clauses by courts and commentators. U.S. Constitution, Article 1.
- During the Civil Rights Era and a broader interpretation of Congress' CC power, interstate commerce was interpreted to include hotels and motels operating intrastate near an interstate highway. Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241 (1964). On the other hand, just a few decades later, the Supreme Court found that guns on school campuses or medical healthcare were not sufficiently related to interstate commerce. See *United States v. Morrison*, 529 U.S. 598 (2000) and *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012). Of course, the Supreme Court and specifically Scalia who is known to have a disdain for drugs also found that medical cannabis grown by an individual in compliance with state law fell within Congress' commerce clause powers upholding the Controlled Substances Act ("CSA"). *Gonzales v. Raich* (previously *Ashcroft v. Raich*), 545 U.S. 1 (2005).
- Examples of Congressional expansions of the states' power to tax: 4 U.S.C. § 116 *et seq.* (Authorizes state taxation of charges for mobile telecommunications services,) 42 U.S.C. § 16491 (Energy Policy Act of 2005 § 1402). (Energy Production Incentives,) 15 U.S.C. § 1011-1015. (McCarran Ferguson Act,) Pub. L. 109-13, § 6036(a). (The Reaffirmation of State Regulation of Resident and Nonresident Hunting and Fishing Act of 2005.)
- "Dormant Commerce Clause restrictions apply only when Congress has not exercised its Commerce Clause power to regulate the matter at issue." U.S. Const. art. 1, § 8, cl. 3. *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 204 L. Ed. 2d 801 (2019).
- Tatarowicz, Phillip M. *The Dormant Commerce Clause and State Tax Discrimination: Parceling State Actions Between Permissible and Impermissible Burdens. The State and Local Tax Lawyer. Symposium Edition*, 2007, p 149.
- These federal limitations include the Bill of Rights, the Supremacy Clause, and implied doctrines such as the DCC.
- Tatarowicz, Phillip M. *The Dormant Commerce Clause and State Tax Discrimination: Parceling State Actions Between Permissible and Impermissible Burdens. The State and Local Tax Lawyer. Symposium Edition*, 2007, p 141.
- In fact, "removing state trade barriers was a principal reason for the adoption of the Constitution as a whole." *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2460, 204 L. Ed. 2d 801 (2019).
- Id.*
- "See, e.g., *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 204 L. Ed. 2d 801 (2019) (holding that Tennessee's two-year residency requirement for retail liquor store license applicants violate the Commerce Clause); *Bacchus Imports, L.t.d. v. Dias*, 468 U.S. 263, 276 (1984) (holding that state excise tax on alcoholic beverages, which exempted certain locally produced beverages, was unconstitutional under the dormant Commerce Clause); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 335-36 (1977) (holding that New York transfer tax on securities transactions was unconstitutional under the Commerce Clause because transactions involving an out-of-state sale were taxed more heavily than most transactions involving a sale within the state); *Great Atl. & Pac. Ice Co. v. Cottrell*, 424 U.S. 366, 381 (1976) (holding that Mississippi regulation providing that out-of-state milk could be sold in Mississippi only if the producing state would accept Mississippi milk on a reciprocal basis was unconstitutional under the Commerce Clause); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 146 (1970) (holding that state regulatory order prohibiting a taxpayer from shipping cantaloupes outside the state unless they were packed in containers approved by the state was unconstitutional).
- See. *National Pork Producers Council v. Ross*, No. 20-55631 (9th Cir. 2021).

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14 “According to the allegations of the complaint, the pork industry is highly interconnected. A single hog is butchered into many different cuts which would normally be sold throughout the country. To ensure they are not barred from selling their pork products into California, all the producers and the end-of-chain supplier will require assurances that the cuts and pork products come from hogs confined in a manner compliant with Proposition 12. This means that all pork suppliers will either produce hogs in compliance with California specifications or incur the additional cost of segregating their products. As a practical matter, given the interconnected nature of the nationwide pork industry, all or most hog farmers will be forced to comply with California requirements. The cost of compliance with Proposition 12’s requirements is high, and would mostly fall on non-California transactions, because 87% of the pork produced in the country is consumed outside California. Therefore, the complaint alleges, Proposition 12 violates the dormant Commerce Clause given its substantial extraterritorial impact as a practical matter.” See, *National Pork Producers Council v. Ross*, No. 20-55631, 13-14, (9th Cir. 2021).

15 I use the words cannabis and marijuana interchangeably as has been the trend in states that have legalized, for example, the New York Cannabis Law. But what I am referring to is the state-based marijuana markets as opposed to hemp, although I do think even lower barriers for hemp would also be good. Prior to the 2018 Farm Bill, marijuana was defined in 21 U.S.C. 802(16) as follows: “The term ‘marihuana’ means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.” The 2018 Farm Bill modified the foregoing definition by adding that “the term ‘marihuana’ does not include hemp as defined in section 1639o of Title 7.” Furthermore, the Farm Bill also added a definition of “hemp” to 7 U.S.C. 1639o, which reads as follows: “The term ‘hemp’ means the plant *Cannabis sativa* L., and any part of that plant, including the seeds thereof and all derivative, extract, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a Delta-9 tetrahydrocannabinol concentration of not more than .3 percent on a dry weight basis.” Together these definitions limit marihuana to only include cannabis or cannabis-derived material with a delta-9-thc content of more than .3% and remove hemp from the CSA. This removal from the CSA made hemp fully federally legal although still subject to regulation and licensing and not free to be grown.

16 See Bloomberg, Scott and Mikos, Robert A., *Legalization Without Disruption: Why Congress Should Let States Restrict Interstate Commerce in Marijuana* (September 27, 2021). *Vanderbilt Law Research Paper No. 21-33, Pepperdine Law Review, Forthcoming*. Available at SSRN: <https://ssrn.com/abstract=3909972>; Kline, Andrew and Tobin, Thomas, *A Sleeping Giant: How the Dormant Commerce Clause Looms Over the Cannabis Marketplace*, *Yale Law & Policy Review*, January 3, 2022.; Title, Shaleen and Kline, Andrew, *Flaws in Federal Cannabis Bills Threaten the Legal Market*, *Bloomberg Law*, January 24, 2022.

17 It should be noted that state legislatures regularly pass laws which attempt to tax out of states more because doing so would allow legislatures to fund projects for their constituents without raising taxes, but these laws are regularly challenged and are unconstitutional because of the DCC. The standard for state tax laws is derived from the case *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977).

18 “These characterizations ignore the reality that there is in fact interstate commerce in marijuana investment that has in no sense been “effectively eliminated.” *Ne. Patients Grp. v. Maine Dep’t of Admin. & Fin. Servs.*, Page 11, 1st Circuit Brief.

19 “Maine’s medical marijuana program is part of a national market that includes the 37 states (and the District of Columbia) that have legalized medical marijuana to date; consumers who travel from state to state to purchase and consume medical marijuana; and—except where state law discriminates against them—interstate investors in medical marijuana businesses.” *Id.*

20 *Jefferson Packing House, LLC v. Brown et al*, No. 3:22-CV-01776, (D. Ore., filed Nov. 14, 2022).

21 *Variscite NY One, Inc. v. State of New York et al*, No. 1:22-cv-1013, (W.D.N.Y, Nov. 2022).

22 NY CANBS § 3.

23 *Rhode Island Cannabis Act* §21-28.11-3. *Definitions*.

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

Following a recommendation from the Bar’s Diversity and Inclusion Task Force and to enhance both the *Lawyers in the Classroom* program as well as the *Speakers Bureau*, topics related to DEI in the legal profession have been added to our current areas of focus. The following topics were added to attorney LRE signup forms and volunteers are requested for these, and all other areas of focus:

Lawyers in the Classroom

- Title VII as it relates to students/schools
- Equal opportunity and affirmative action

Speakers Bureau

- Title VII and Employment Law
- Civil Rights
- Harassment in the workplace

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 signup this year, as we are refreshing our database.

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24 It has been argued by Mikos and others that the states passed unconstitutional laws because they wanted to be protectionist and though they would be able to get away with it due to federal illegality. A more sensible answer is that state's thought that by keeping their state legal cannabis programs within their own state as much as possible they could limit risk of federal enforcement, especially since that is spelled out as a factor in a DOJ memo issued in August 2013. Memorandum for All United States Attorneys: Guidance Regarding Federal Marijuana Enforcement, Office of the Deputy Attorney General (August 29, 2013).

25 It is worth noting that so far, the Court has not found that providing subsidies to residents violates the DCC which may be something for the CCC to consider, especially considering the challenging tax situation that many cannabis businesses find themselves in. ◇

Help Us Grow Our List Serve!

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

All 2023 Award Nominations Are Due March 17, 2023

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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 to 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. All nominations are due no later than March 17, 2023. Please Note: Lohmann Award

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NEW! 2023 Diversity, Equity, and Inclusion Trailblazer Award

This new award, created by the Bar's Task Force on Diversity & Inclusion, recognizes Rhode Island attorneys who encourage and cultivate social discourse related to DEI among all members of the Rhode Island Bar, supports the advancement of attorneys from diverse backgrounds to positions of leadership, and promotes interest in the practice of law among diverse populations. The Diversity, Equity, and Inclusion Trailblazer Award Committee is particularly interested in candidates who have demonstrated a commitment to promoting DEI in the legal profession and the public's awareness as detailed in the nomination criteria and accessed on the Bar Association website at ribar.com, under the **NEWS AND BAR JOURNAL** tab on the left side of the home page.

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NEW! 2023 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 named in honor 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 accessed on the Bar Association website at ribar.com, under the **NEWS AND BAR JOURNAL** tab on the left side of the home page. All nominations are due no later than March 17, 2023. Postal mail or email

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Thanks to Our CLE Speakers

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

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

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Rhode Island Family Court Celebrates National Adoption Day

Rhode Island Family Court Chief Judge Michael B. Forte and the Judiciary sponsored a special event on November 19, 2022, to celebrate National Adoption Day. The event coincided with events planned across the United States to draw attention to the adoption process and the large number of children available for adoption. The Rhode Island Family Court finalized nine (9) adoptions with seven (7) families at their 19th National Adoption Day event. The celebration began at 9:00 a.m. on the 3rd floor of the Kent County Courthouse, where Family Court Chief Judge Michael B. Forte welcomed over 125 participants to the event. Many community sponsors helped make the event memorable for all families involved. Each child adopted received a special gift bag filled with toys, stuffed animals, a frame for a donated portrait of their new Forever Family, gift cards and certificates, etc.



The Rhode Island Family Court has granted 279 adoptions during this calendar year to date. National Adoption Day is a collective effort to raise awareness for the thousands of children waiting to be adopted from foster care in the United States.

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Rhode Island Women Lawyers: Past, Present, & Future

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



Barbara Hurst, Esq.

Barbara Hurst's career has been—and continues to be—notable for many reasons, but her dedication to public service is certainly among the top of them. After her admission to the Rhode Island bar in 1976, Attorney Hurst joined the Rhode Island Public Defender Office (RIPD). Together with Terry MacFadyen, she wrote the grant that established the Appellate Division where she litigated for nearly two decades, primarily as the chief of the unit—a position she held until she became the Deputy Public Defender in 1993. She served in that capacity until she retired in July 2012. Retirement, however, did not mark the end of Attorney Hurst's career, as she has spent the past decade working in various capacities for the Federal Court of the District of Rhode Island (where she is currently employed as a clerk in Judge Mary S. McElroy's chambers) and as a consultant to the nonprofit sector, where she shared the management, personnel, and budgeting skills she developed as the Deputy Public Defender. In addition, Attorney Hurst is still an adjunct professor at the Roger Williams University School of Law, teaching such courses as State Constitutional Law and Advanced Appellate Advocacy, and has served on the national executive committee for the American Civil Liberties Union.

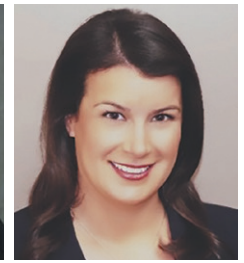
At the RIPD, Attorney Hurst used her voice

to make sure that public defenders were given a "seat at the table" when important policy decisions were being made, something that did not always happen as a matter of course. For example, she recognized the need for a more active public defender representative on the then-Governor's Justice Commission, which oversaw the distribution of significant federal funding for justice initiatives. Almost overnight, she was able to secure large grants for the RIPD, including funding for much-needed computer upgrades and an early intervention project with social workers—which marked the beginning of the RIPD's transition into one of the national forerunners of the "holistic defense" movement. Most incredibly, she was able to convince the courts and the Department of Corrections to provide the necessary matching funding for the early intervention project when the State Budget Office would not do so. The impact went beyond these specific grants, for it set the precedent that the RIPD should have a voice in the conversation and modeled a level of partnership to achieve common goals that were extremely rare at that time in the criminal justice community. She credited this success to the strength of the personal relationships she had developed and the recognition that different stakeholders may have shared goals—even if this is not always obvious from the outset. "It was also a time," she said, "where there had been leadership transitions in state government, particularly in Corrections, to people who recognized the value of cooperative enterprises, even while we all continued our primary adversarial roles. Much of that credit goes to former Directors George Vose and A. T. Wall."

Attorney Hurst's positive impact on the criminal justice system is also evidenced by her appointment to the federal Global Justice Information Sharing Initiative Advisory Committee, commissioned by then-Attorney General John Ashcroft. The committee's charge was to advise on the development of a new system of inter-agency information-sharing among criminal justice agencies—a priority in the aftermath of



Jenna Giguere, Esq.



Angela Yingling, Esq.
RI Assistant Public
Defender

9/11. While law enforcement entities—like the Department of Justice, probation, the courts, sheriffs, police, and state attorney general—were well represented on the committee, Attorney Hurst was the only member to represent the defense community on what, she was told, was the last federal advisory committee retaining a defense representative. She remembers her primary charge was "to stay on the Committee" and, despite many heated disputes over policy, the defense retained its "seat at the table." She found her experience served her particularly well when she served on the subcommittee on privacy, where she helped ensure that arrestees' privacy interests were protected in the data-sharing scheme. This work allowed her to once again collaborate with a seemingly unlikely ally: the domestic violence advocacy community, which also places a strong value on data privacy. As a result of this mutually beneficial partnership, Attorney Hurst even received an invitation to speak at a national domestic violence conference for judges.

Although the majority of her career was spent with the RIPD, Attorney Hurst's sphere of positive influence goes beyond the world of criminal justice. One of her most fascinating experiences with the U.S. District Court was when Chief Judge John J. McConnell, noting the influx of foreclosure proceedings that were filed during the financial downturn, envisioned a large-scale mortgage settlement project under the sponsorship of the Court. The project was the brainchild of banker Merrill Sherman, and Attorney Hurst was hired as Deputy Special Master to help administer this project, which brought together lenders and homeowners to re-negotiate mortgage contracts under the guidance of a special master. This helped many homeowners stay in their homes or, if they could not afford the even lower new terms, receive some settlement money toward relocation. This unique program also served as a model for other states dealing with the aftermath of the housing crisis. The project was also a rare opportunity for a criminal defense lawyer to oper-

ate in the civil law realm, in which Attorney Hurst had spent a brief 8 months “on leave” from the RIPD to become Director of Litigation for Rhode Island Legal Services (RILS). Although that was a short tenure, it gave her a skeletal familiarity with litigation in housing, consumer rights, and immigration. Most of her time was spent co-counseling class action lawsuits, including a number of civil rights cases on behalf of prisoners. “This was in 1979-1980,” she said, “when we had the privilege of litigating before Chief Judge Raymond Pettine. My favorite case—mostly for the sheer novelty of it—was one brought by 14 prisoners transferred from the ACI to federal penitentiaries across the country. The RIPD, RILS, and Jack Cicilline each represented some of the 14, and we tried the case for weeks in the basement of then-Medium Security at the ACI.”

The greatest challenge Attorney Hurst faced as a new lawyer was her status as a non-native Rhode Islander. When reminiscing about her early days as a Rhode Island attorney, she remembers being an “outsider” in a state characterized by minimal “degrees of separation.” Criminal defense was, in particular, a tight-knit, homogeneous male community, with few exceptions. Additionally, she joined an office that, at the time, was mostly made up of Catholic, white, male attorneys. “I hadn’t grown up in the same neighborhoods,” she said, “I wasn’t a member of a parish, and I wasn’t anyone’s second cousin. For me, the ‘out of place’ issue was not primarily about gender. It was the absence of cultural connection.” For a Jewish woman who grew up in the suburbs of Boston, it took a while for her to feel as though she belonged—but eventually, she did. “I was lucky, though, that Allegra Munson had paved the way and that strong women lawyers like Lise Gescheidt, Paula Rosin, and Jannie Weisfeld soon joined the office.” Attorney Hurst stated, “I was also grateful, that talented and established defense lawyers—like Jack Cicilline, Peter DiBiase, and Kirk Griffin—welcomed and helped me. And for many years I was able to work as a team

with Terry MacFadyen, who also came from out-of-state.” Although she did not have native Rhode Island roots, Attorney Hurst built her own network, citing her nonprofit board service as a helpful way to expand her Rhode Island connections—something she encourages other “new Rhode Islanders” to explore.

She sees the increased diversity of the bar over the past few decades as a positive step. After all, as she noted, the legal system itself is a masculine, autocratic structure, with even the courtroom set-up perpetuating the hierarchical nature of the system: judges sit high above the lawyers, who are separated from their clients by a literal bar. Attorney Hurst reflected that women often have a different style as lawyers and leaders: they are more focused on relationship-building, more approachable, and less authoritarian. She hopes that the increased numbers of women in the field will help us to challenge some long-held beliefs and systems that could benefit from re-examination.

Similarly, Attorney Hurst reflected that client “hand-holding” should be recast in a positive light and not as inefficient or a waste of time. Facing a legal proceeding is stressful for clients, and lawyers should expect to walk clients through those stresses as a major part of the service they provide. In her personal practice, Attorney Hurst tried to ensure her clients knew she was not just another authority figure. “We need to learn from the increased awareness in the medical profession that we have to provide more than simply technical services. Legal services, like medical services, ought to be a partnership between the professional and the client. The relationship itself is part of the service.”

Looking towards the future, Attorney Hurst noted that women should not run away from a more feminine model; instead, they should advocate for changes that move the legal system towards collaborative problem-solving as a tool in addition to strict litigation. The adversarial system is designed to be “winner take all,” which is rarely the best solution, she feels and is often prohibitively costly. Often, mediation might be the best first step in the civil context and should not be something that happens near the end of the process. In the criminal sphere, the Federal Hope Court is an example of a different type of alternative dispute resolution that puts the defendants squarely in the discussion, where they belong. “Hope Court is a great example because it demands that a defendant become someone who helps determine the outcome, not just someone ‘to whom things happen.’”

In short, Attorney Hurst encourages women to give voice to the issues they care about. She advises new women attorneys to take a seat at the table and not wait to be invited. Another sage piece of advice is for women to let other women know that they are not alone in their fears. Long a taboo topic, it is time to talk about insecurities with each other—and how to face them together. ◇



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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.

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.

Please contact us for strictly confidential, free, peer and professional assistance with any personal challenges.

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Lawyers Helping Lawyers Committee Members Protect Your Privacy

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.

Performance/Payment Bonds – Owners’ Concerns



Girard R. Visconti, Esq.
Savage Law Partners, LLP
Providence

“If the Owner or Contractor does not comply with the strict requirements, the surety bond may be voided.”

On Public Works projects, many states, including Rhode Island and Massachusetts, require performance and payment bonds. A “statutory bond” should be pursuant to the state statute, i.e., citation, and its general laws, which mandate that a surety will be responsible for the performance of a construction contract as well as claims for labor and materials.

Previously, the American Institute of Architects (AIA) utilized Form A311, which was a basic form and acceptable to many Owners. The AIA developed Form A312, which is rather complicated, burdensome, and has notice provisions as a prerequisite to recovering under the bond, and the failure to follow the strict notice provisions will result in the surety being absolved of all liability under the bond. See *Seaboard Surety Company v. Town of Greenfield*, 370 F.3d 215 (1st Cir. 2004).

On Public Works projects, the statutory bond form required should closely resemble the prior AIA A311 type bond, which is without many conditions to recover against the bond.

AIA A312 is not a statutory bond but is a common law bond that contains onerous and burdensome notice requirements that must be satisfied as a precondition to the surety’s liability under the bond. If the condition precedents are not satisfied, then the obligee/claimant cannot resort to the bond for recovery.

The AIA A312 contains the following conditions:

Section 3: If there is no Owner Default under the Construction Contract, the Surety’s obligation under this bond shall arise after,

.1 the Owner first provides notice to the Contractor and the Surety that the Owner is considering declaring a Contractor Default. Such notice shall indicate whether the Owner is requesting a conference among the Owner, Contractor and Surety to discuss the Contractor’s performance. If the Owner does not request a conference, the Surety may, within five (5) business days after receipt of the Owner’s notice, request such a conference. If the Surety timely requests a conference, the Owner shall attend. Unless the Owner agrees otherwise, any conference requested under this Section 3.1 shall be held within ten (10) business days of

the Surety’s receipt of the Owner’s notice. If the Owner, the Contractor and the Surety agree, the Contractor shall be allowed a reasonable time to perform the Construction Contract, but such an agreement shall not waive the Owner’s right, if any, subsequently to declare a Contractor Default;

.2 the Owner declares a Contractor Default, terminates the Construction Contract and notifies the Surety; and

.3 the Owner has agreed to pay the Balance of the Contract Price in accordance with the terms of the Construction Contract to the Surety or to a contractor selected to perform the Construction Contract.

(The bond between the Contractor and Subcontractor contains similar conditions).

For an Owner to recover against a General Contractor pursuant to the performance bond (or for a General Contractor or CM to recover against a Subcontractor’s performance bond using A312) the aforesaid conditions apply under Section 3 of AIA A312.

Pursuing the surety under the A312 bond requires notification to the surety that the Owner or Contractor is considering declaring a default and requesting a conference and thereafter, the Owner or Contractor declares the Contractor or Subcontractor in default and terminates the Agreement and notifies the surety, and the Owner or Contractor has agreed to pay the balance of the Contract Price.

If the Owner or Contractor does not comply with the strict requirements, the surety bond may be voided.

Such is the matter of Seaboard Surety as noted, plus the First Circuit’s recent opinion of *Arch Insurance Company v. The Graphic Builders LLC* (Case No. 21-1126), whereby the court noted that the claimant declared the subcontractor in default but did not terminate the subcontractor and never

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agreed to pay Arch, the surety, any portion of the contract price. Further, in this case, the contractor failed to terminate the sub-contractor “if it sought recourse for the default from Arch.”

The Massachusetts court stated:

“We acknowledge the difficulty contractors may face in navigating between the risk of premature termination of a subcontractor and the risk of failing to comply with the requirements of Section 3 of the A312 Performance Bond.”

And further that,

“Pursuant to the unambiguous language of the performance bond, any obligation of Arch to provide the window warranty was condition on Graphic’s termination of RCM, an action Graphic chose not to take.”

And further that,

“The performance bond required Graphic to terminate RCM to trigger Arch’s obligation to provide a window warranty...”

Conclusion: Thus, utilization of the A312 has a burdensome responsibility of an Owner pursuing a surety in relation to a General Contractor or CM’s bond or a General Contractor or CM’s pursuit of a Subcontractor in relation to the AIA A312 bond. To effectuate coverage under the AIA A312, it is clear from the cases that the Owner or Contractor must declare that the General or Subcontractor is in default and terminates the Contractor or Subcontractor as the case may be and agrees to pay the balance of the Contract Price, and to the surety in accordance with the terms of the contract.

Termination of a Contractor or Subcontractor is fraught with risks in that there must be “justifiable termination” a fact-finding issue to be determined by a court or arbitrator.

Thus, it is this author’s opinion that the A312 should not be utilized by an Owner either as a public entity or a private entity, and that a simple statutory or simple surety bond without the three-step process as noted in the AIA A312 be utilized. ♦



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1. Publication Title		2. Publication Number		3. Filing Date	
Rhode Island Bar Journal		401-480		11/16/2022	
4. Issue Frequency		5. Number of Issues Published Annually		6. Annual Subscription Price	
Bi-monthly		6		30.00	
7. Complete Mailing Address of Known Office of Publication (Not printer) (Street, city, county, state, and ZIP+4®)				Contact Person	
Rhode Island Bar Journal 41 Sharpe Drive Cranston, RI 02920				K. Bridge Telephone (include area code) (401) 421-5740	
8. Complete Mailing Address of Headquarters or General Business Office of Publisher (Not printer)					
Rhode Island Bar Association 41 Sharpe Drive Cranston, RI 02920					
9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor (Do not leave blank)					
Publisher (Name and complete mailing address) Rhode Island Bar Association 41 Sharpe Drive Cranston, RI 02920					
Editor (Name and complete mailing address) Eric D. Correia, Editor-in-Chief Rhode Island Bar Journal, 41 Sharpe Drive, Cranston, RI 02920					
Managing Editor (Name and complete mailing address) Erin Cufe, Managing Editor Rhode Island Bar Journal, 41 Sharpe Drive, Cranston, RI 02920					
10. Owner (Do not leave blank. If the publication is owned by a corporation, give the name and address of the corporation immediately followed by the names and addresses of all stockholders owning or holding 1 percent or more of the total amount of stock. If not owned by a corporation, give the names and addresses of the individual owners. If owned by a partnership or other unincorporated firm, give its name and address as well as those of each individual owner. If the publication is published by a nonprofit organization, give its name and address.)					
Full Name		Complete Mailing Address			
Rhode Island Bar Association		41 Sharpe Drive, Cranston, RI 02920			
11. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities. If none, check box <input checked="" type="checkbox"/> None					
Full Name		Complete Mailing Address			
12. Tax Status (For completion by nonprofit organizations authorized to mail at nonprofit rates) (Check one)					
<input type="checkbox"/> Has Not Changed During Preceding 12 Months <input checked="" type="checkbox"/> Has Changed During Preceding 12 Months (Publisher must submit explanation of change with this statement)					
13. Publication Title		14. Issue Date for Circulation Data Below			
Rhode Island Bar Journal		09/01/2022			
15. Extent and Nature of Circulation			Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date	
a. Total Number of Copies (Net press run)			6727	6727	
b. Paid Circulation (By Mail and Outside the Mail)	(1)	Mailed Outside-County Paid Subscriptions Stated on PS Form 3541 (Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	3771	3771	
	(2)	Mailed In-County Paid Subscriptions Stated on PS Form 3541 (Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	2931	2931	
	(3)	Paid Distribution Outside the Mails Including Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Paid Distribution Outside USPS®			
	(4)	Paid Distribution by Other Classes of Mail Through the USPS (e.g., First-Class Mail®)			
c. Total Paid Distribution (Sum of 15b (1), (2), (3), and (4))			6702	6702	
d. Free or Nominal Rate Distribution (By Mail and Outside the Mail)	(1)	Free or Nominal Rate Outside-County Copies included on PS Form 3541			
	(2)	Free or Nominal Rate In-County Copies included on PS Form 3541			
	(3)	Free or Nominal Rate Copies Mailed at Other Classes Through the USPS (e.g., First-Class Mail)	9	9	
	(4)	Free or Nominal Rate Distribution Outside the Mail (Carriers or other means)	16	16	
e. Total Free or Nominal Rate Distribution (Sum of 15d (1), (2), (3) and (4))			25	25	
f. Total Distribution (Sum of 15c and 15e)			6727	6727	
g. Copies not Distributed (See Instructions to Publishers #4 (page #3))					
h. Total (Sum of 15f and g)			6727	6727	
i. Percent Paid (15c divided by 15f times 100)			99%	99%	
16. Electronic Copy Circulation			Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date	
a. Paid Electronic Copies					
b. Total Paid Print Copies (Line 15c) + Paid Electronic Copies (Line 16a)			6702	0	
c. Total Print Distribution (Line 15f) + Paid Electronic Copies (Line 16a)			6727	6727	
d. Percent Paid (Both Print & Electronic Copies) (16b divided by 16c × 100)			99%	99%	
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17. Publication of Statement of Ownership					
<input checked="" type="checkbox"/> If the publication is a general publication, publication of this statement is required. Will be printed in the 1/1/23 issue of this publication. <input type="checkbox"/> Publication not required.					
18. Signature and Title of Editor, Publisher, Business Manager, or Owner				Date	
Kathleen Bridge				11/16/2022	
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Committee Corner

In an effort to promote more involvement in our Bar committees, the *Journal* will now feature brief reports from a few committees in each issue. The reports will include summaries of recent meetings, the committee's goals for the year, and/or projects the committee is currently working on. If you decide that you would like to join one of the committees below or any of our 27 Bar committees, please contact Membership Services Coordinator NaKeisha Little at nlittle@ribar.com.



Annual Meeting Planning Committee

Leslie Lloyd Mullings Ocean, Co-Chair
Kathleen Wyllie, Co-Chair

The Annual Meeting Planning Committee has been hard at work creating the best possible program for Rhode Island Bar Association members. We are very excited to announce that Judge Victoria Pratt will be joining us as our opening plenary speaker! Judge Pratt is a former Chief Judge in the Newark Municipal Court in Newark, New Jersey. Now, a Professor at Rutgers Law School, she teaches Problem Solving Justice and Restorative Justice. She is a fierce advocate committed to reforming the criminal justice system. Her TED Talk, *How Judges Can Show Respect*, went viral and has since been

translated into 11 languages, and received over 21 million views on Facebook. More information on Judge Pratt's program and the closing plenary speaker will be included in the March/April issue.

This year's 2023 Annual Meeting will take place on June 1st and 2nd at the Rhode Island Convention Center. More information will be disseminated to members in the New Year on our closing plenary speaker and further details about this year's Annual Meeting.



Continuing Legal Education Committee

Collin E. Bailey, Co-Chair
Krista J. Schmitz, Co-Chair

The Continuing Legal Education Committee assists in the planning and administration of the Association's annual program of continuing legal education for members of the Bar. Coming up this year, we have programs scheduled on topics such as a 2022 legislative summary, social media use and other complex jury issues, a mindful approach to daily life series, ethics programs, gift tax, divorce and bankruptcy, real estate liens, tax updates, and DUI laws and hardship licenses.

Please visit page 33 for a complete list of January and February programming available for registration now. All currently available programs can be found on the Rhode Island Bar Association website under the CLE calendar at ribar.com/calendar. In addition to live programs, we have an extensive on-demand catalog that includes CLE seminars on a wide range of topics from both local and out-of-state speakers. Our on-demand catalog is being updated regularly.

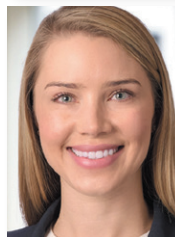
We are seeking speakers for topics that relate to real estate law, employment law, family law, and diversity, equity, and inclusion. Any members who have program ideas or who are interested in presenting on a topic can reach out to Madeline Benner, CLE Director. Any members interested in serving on the CLE Committee are still welcome and encouraged to join.



Diversity, Equity, and Inclusion Committee

Hamza Chaudary, Co-Chair
Sarah Oster Kelly, Co-Chair

The Diversity, Equity, and Inclusion Committee was established in 2022 to continue the great initiatives developed by the RIBA Diversity & Inclusion Task Force. The Committee meets regularly to discuss DEI-related matters of interest to the membership and to make recommendations that will foster a sense of equity and inclusion among members. The Committee also proposes DEI-related CLE and Annual Meeting programming, networking events with affinity legal organizations, and resources for the membership.



The Committee recently broke into subcommittees: Leadership/Pipeline, Outreach, Education, and Messaging/Communication. The meetings were very productive and there were great ideas offered including, but not limited to: ways to strengthen relationships with affinity groups; networking events with law students, new members, and affinity groups; expanding the Bar's diverse speakers pool; improving and expanding the DEI section of the Bar's website, and; attracting newer members and members from diverse backgrounds to Bar governance. Subcommittee and full committee meetings will alternate monthly.

The Committee is also looking forward to continuing its collaboration with the RI Supreme Court Committee on Racial and Ethnic Fairness in the Courts. Any members interested in serving on the DEI Committee are still welcome and encouraged to join.

Government Lawyers Committee

Kara DiPaola, Co-Chair
Lynne M. Radiches, Co-Chair

The second meeting of the Government Lawyers Committee (GLC) was held on Thursday, November 3, 2022, from 12:30-1:30 pm, using the Zoom format, at which time members of the GLC and a number of non-member guests received (1) CLE credit for attending a presentation by GLC member Amy Goins, Esq., entitled *Recently Enacted Legislation Affecting Land Use*. The presentation included important and useful information about topics such as: The Moratorium on Zoning Enforcement Related to the Expansion of Restaurants/Bars due to COVID-19, Accessory Dwelling Units, and The Quorum



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

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

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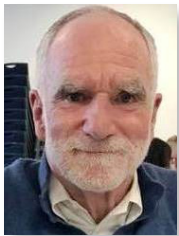
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Visit our website resource page at
www.barrettvaluation.com

Requirement for Planning and Zoning Boards, to name a few. Ms. Goins distributed handouts to those in attendance which memorialized and expanded upon her impressive presentation.

The GLC next met on Thursday, December 1, 2022, from 12:30-1:30 pm, using the Zoom format, at which time we welcomed guest speakers Lee Ann Byrne and Nicole Verdi, Esq. Ms. Byrne, Deputy Chief of Staff for the Office of the General Treasurer, and Ms. Verdi, New England Head of Government Affairs and Policy at Ørsted, addressed the GLC on the topic of tracking legislation relevant to state agencies and municipalities. Both the dialogue that ensued and the number of questions asked during the presentation evidenced the high level of interest in the topic and the appreciation for the speakers' expertise thereon.

Additional meetings of the GLC are scheduled for: February 2, 2023; March 2, 2023; and April 6, 2023. A social event is expected to take place in May of 2023, the date and details for which have yet to be determined. The GLC is pleased to welcome new members throughout the year.



Lawyers Helping Lawyers Committee

Nicholas Trott Long, Chair

The Lawyers Helping Lawyers Committee serves as a confidential resource to Bar members and their families, providing support and encouragement when needed. Committee volunteers give generously of their time to help their colleagues.

Their primary role is to lend an ear and assist in

making an appropriate referral to professional resources. The communications between lawyers seeking help and members of the Committee are **strictly confidential**, even within the Committee itself. Lawyer-Committee member contacts are noted only for statistical purposes, and no names are ever mentioned.

The RIBA contracts with CorpCare, a lawyer assistance program, which provides professional clinical assessments and facilitates getting appropriate treatment for Bar members and their family members. While members can always call 866-482-8378 for confidential, round-the-clock support, members may be interested to learn that CorpCare has expanded their provider network to include the BetterHelp digital platform. Often times the phone call can be a barrier; some people want the option of an online portal, to schedule online, and to avoid the phone call. Members can access the BetterHelp platform via a website and/or QR code. When you arrive at the site, enter your information, and search for Rhode Island Bar Association in the "Employer Name/Access Code" field. Once the correct place is selected, follow the prompts to get started. Members get access to video, phone, or chat messaging.

The Committee is looking forward to the next meeting, where members will learn about the benefits of Narcan, the opioid overdose reversal agent. Given the continued opioid epidemic, the information will be timely and beneficial.

The Committee encourages affinity groups and local bar associations to let them know if they are interested in learning about the Committee and CorpCare program offerings and benefits to RIBA members and their families.



Probate & Trust Committee

Meaghan Kelly, Esq., Co-Chair

Kristin Matsko, Esq., Co-Chair



The Probate & Trust Committee holds regular meetings on the second Monday of each month at 4 pm to discuss any probate, estate, and trust-related matters. Our meetings are currently held via Zoom, but we are excited to move to a hybrid format beginning in January 2023. As a committee, we recently solicited 2023 Annual Meeting proposals and *Bar Journal* articles, and participation in the Bar Association's Diversity, Equity, and Inclusion initiatives. We have also discussed necessary updates to the Rhode Island probate court forms, as well as a more formal procedure for the transfer and custody

of original estate planning documents upon the death, incapacity, or retirement of attorneys. As in prior years, we anticipate that new legislation pertaining to the state estate tax will be presented in the coming legislative session. We always welcome the opportunity to discuss probate, estate, and trust related issues with attorneys involved in other practice areas, such as family law, tax, personal injury, and medical malpractice. Any members interested in serving on the committee are encouraged to join.

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Rhode Island Municipal Court Listing

The Rhode Island Bar Association recently created a Municipal Court Listing, similar to our popular Probate Court Listing. Bar staff will regularly update the listing to ensure posted information is correct. The Municipal Court Listing and the Probate Court Listing are available on the Bar's website at ribar.com by clicking on **FOR ATTORNEYS** on the home page menu and then clicking on **MUNICIPAL COURT INFORMATION** or **PROBATE COURT INFORMATION** on the dropdown menu. Both Listings are provided in a downloadable pdf format. Bar members may also increase the type size of the words on the Listing by using the percentage feature at the top of the page.

The Bar Association also posts a chart summarizing the preferences of Superior Court justices relating to direct communications from attorneys, and between attorneys and the justices' clerks which is updated yearly. The chart is available by clicking **MEMBERS ONLY** on the home page menu and then clicking **JUDICIAL COMMUNICATIONS**.

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29 A "security" is defined under the Securities Act of 1933 as:

... any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Securities Act of 1933 § 2(a)(1), 15 U.S.C. § 77b(a)(1); see also Securities Exchange Act of 1934 § 3(a)(10), 15 U.S.C. § 78c(a)(10). The First Circuit Court of Appeals noted that "by this list, Congress 'did not attempt precisely to cabin the scope' of the securities laws, but '[r]ather, it enacted a definition of "security" sufficiently broad to encompass virtually any instrument that might be sold as an investment.'" *Lerner v. Colman*, 26 F.4th 71, 82 (1st Cir. 2022) (quoting *Reves v. Ernst & Young*, 494 U.S. 56, 61 (1990)) (emphasis added).

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31 *SEC v. W.J. Howey Co.*, 328 U.S. 293, 294-95 (1946).

32 *Id.* at 295-96.

33 *Id.* at 296.

34 See *id.* at 296-97. Those vacationers stayed at a hotel and resort (also owned by Howey) immediately adjacent to the citrus groves. *Id.* at 296. The hotel incorporated the groves into its advertisements and told its patrons that the groves were for sale. *Id.* at 296-97. The Howey Company gave a sales pitch to prospective buyers. *Id.* at 297.

35 *Id.* at 294. See generally Securities Act of 1933 § 5(a), 15 U.S.C. § 77e(a) (2020).

36 See *id.* at 298-300.

37 *Id.* at 299.

38 *Id.* at 299-300.

39 *Id.* at 300-01.

40 The authors cannot mention this case without acknowledging the lead attorney for the SEC and Special United States Attorney Willis Riccio. Willis told the Lundy story to thousands of SEC and state securities regulators prior to his passing in 2016. Willis is deeply missed, but his lessons and counsel live on to this day.

41 *SEC v. M.A. Lundy Assocs.*, 362 F. Supp. 226, 236 (D.R.I. 1976).

42 *Id.*

43 *Id.*

44 *Id.* at 236 & n.6.

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48 *Id.*

49 Plaintiff Securities and Exchange Commission's Memorandum of Law in Support of its Motion for Summary Judgment at 54, *SEC v. Ripple Labs, Inc. et al.*, No. 1:20-cv-10832-AT-SN (S.D.N.Y. Sept. 17, 2022), ECF No. 640.

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50 *See id.* at 49-63.

51 *Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment* at 33-34, 42-43, *SEC v. Ripple Labs, Inc. et al.*, No. 1:20-cv-10832-AT-SN (S.D.N.Y. Sept. 17, 2022), ECF No. 622.

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64 *Compare id. with Katie Berman & Joe Knight*, Lehman's Three Big Mistakes, *HARVARD BUS. REV.* (Sept. 16, 2009), <https://hbr.org/2009/09/lessons-from-lehman>.

65 *See generally Jing Pan*, Ontario Teachers'—One of the World's Largest Pension Funds—Says That it Invested \$95M in Troubled Crypto Exchange FTX. Here's how to Bet on Digital Currency if You're Still a Believer, *YAHOO FIN.*, (Nov. 13, 2022, 11:00 AM), <https://finance.yahoo.com/news/ontario-teachers-one-world-largest-160000962.html?guccounter=1>; *Glasspiegel, supra* note 1 (“Whether or not FTX is bailed out by Binance, Brady and Bündchen have likely lost a vast majority — if not 100 percent — of the value of their ownership stake in the firm.”). *Brady, Bündchen, Shaquille O’Neal, and Stephen Curry are named defendants in a recent class-action lawsuit against FTX founder Sam Bankman-Fried. Greg Norman, FTX Founder Sam Bankman-Fried Hit with Class-Action Lawsuit that Also Names Brady, Bündchen, Shaq, Curry*, *FOX BUS.* (Nov. 16, 2022, 12:00 PM), <https://www.foxbusiness.com/markets/ftx-founder-sam-bankman-fried-hit-class-action-lawsuit-also-names-brady-bundchen-shaq-curry>.

66 *Stefania Palma et al.*, Sam Bankman-Fried's Fall Cuts Off Big Source of Funds for US Democrats, *FIN. TIMES* (Nov. 13, 2022), <https://www.ft.com/content/428c7800-c72d-4c59-9940-4376fea6e263>; *Martin Young*, SBF Has Been a ‘Significant Donor’ in the US Midterm Elections, *COINTELEGRAPH* (Nov. 7, 2022), <https://cointelegraph.com/news/sbf-has-been-a-significant-donor-in-us-midterm-elections>. *Sam Bankman-Fried was the second-largest donor to the Democratic Party, behind only George Soros. Laura Davison & Sonali Basak*, FTX Turmoil Raises Risk That Two Huge Political Donors Will Fade, *BLOOMBERG* (Nov. 8, 2022, 1:11 PM), <https://www.bloomberg.com/news/articles/2022-11-08/ftx-crypto-bros-clashing-politics-meet-cz-chaos-on-election-day?leadSource=verify%20wall>.

67 *MICHAEL LEWIS*, *THE BIG SHORT* 91 (2010).

68 *Press Release, Fed. Reserve Bank of N.Y., New York Innovation Center to Explore Feasibility of Theoretical Payments System Designed to Facilitate and Settle Digital Asset Transactions* (Nov. 15, 2022), <https://www.newyorkfed.org/newsevents/news/financial-services-and-infrastructure/2022/20221115>. ◇

In Memoriam

Richard A. Brousseau, Esq.

Richard A. Brousseau, 67, died on Sunday, November 20, 2022. He was born in 1955 to the late C. Normand and Simonne (Fredette) Brousseau in Central Falls, RI. He was the husband of Georgette R. Dupuis-Brousseau. Richard was an attorney for the office of the Rhode Island Public Defender for the majority of his career. Besides his wife, Richard is survived by one daughter, Simonne A. Brousseau and her husband, Daniel A. Gogue, of Falls Church, VA, six siblings; Yvette St. Pierre and her husband, Eugene, of Tomball, TX; Charles Brousseau and his wife, Paulette, of Narragansett; Denise Couture and her husband, Ronald, of Smithfield; Normand Brousseau and his wife, Elizabeth "Betty," of Warwick; Estelle Bousquet and her husband, Ronald, of Chapel Hill, NC; and John Brousseau and his fiancée, Donna Costa, of Pawtucket; and many nieces, nephews, great-nieces, and great-nephews. Richard was predeceased by his son, Richard C.N. Brousseau.

William F. Carroll, Esq.

William F. Carroll (Bill), 86, of Needham, MA, died on Saturday, November 19, 2022. Bill was born in Providence on September 21, 1936, to the late William and Catherine (McDevitt) Carroll. He grew up in Greenville and was a graduate of Brown University and Suffolk University School of Law. Bill was a lieutenant in the US Air Force and later served in the Air National Guard, retiring as a Colonel. As Colonel, he was awarded the Legion of Merit for exceptionally meritorious conduct in the performance of outstanding services and achievements. Bill was an English and history teacher and football coach at Barrington High School. He moved on to public service under three Rhode Island Governors, ultimately serving as Chief Aid for Policy to Governor Joseph Garrahy and later as the Director of the Department of Business Regulation. Bill was a founder of Rhode Island Legal Services, and in 1984 he became Executive Director and later President of the Life Insurance Association of Massachusetts. Bill is survived by his five children, Patricia Janicek (Steven), Linda Phelan (Mike), Janice Sturchio (Rich), Kristen Dreyer (Chuck), and Michael Carroll (Siobhan), nine grandchildren, two great-grandchildren, and his sisters, Susan Caisse and Cathy Mason, as well as numerous nieces and nephews. He was predeceased by his wife Marilyn Carroll, brother Robert Carroll, and grandson William Ingram.

Veronica Harris, Esq.

Veronica (Ronee) Harris, 77, died on Monday, October 3, 2022. Ronee was born in Buffalo, New York, to James and Clara Lovas. She was raised in Buffalo, NY, and graduated from the State University of New York at Buffalo. After college, Ronee spent several years as a librarian at Jenks Junior High School in Pawtucket, RI. She graduated from Suffolk Law School in Boston in 1983. Ronee then began working as an attorney for the Rhode Island Department of Transportation, culminating her career as the Department's Chief Legal Counsel. Ronee is survived by her husband, Tim Harris; her daughters, Lisa (Keith) Noe and Kristen (David) Visnick; multiple grandchildren; and Tim's daughter, Heather (Costante) Mancini and son James "Jamie" (Trisha) Harris, and his grandchildren.

Joseph Hurley, Esq.

Joseph James Hurley, 55, of Willington, CT, died on Thursday, October 13, 2022. Joseph was a graduate of Marianapolis Preparatory School, the University of Hartford, and the Quinnipiac University School of Law. Following work as an auditor for the Department of Defense and as a White House aide, he served as a law clerk for the Tax Court of New Jersey, the Connecticut Appellate Court, and the United States Bankruptcy Court. He was also a Deputy Assistant State's Attorney for the State of Connecticut. For the past nine years, he was employed by the State Department of Correction. Richard is survived by his parents, James and Cecile Hurley

of Willington, his sister, Regina Hurley of Flower Mound, TX, many aunts and uncles, and numerous cousins.

Hon. Richard J. Israel

The Honorable Richard Jerome Israel, 91, died on Monday, November 7, 2022. Richard was born on December 9, 1930, in Slatersville, RI to Fred and Cecile (Kantrowitz) Israel. He was the husband of Lana Israel (Goldberg). Richard attended Classical High School in Providence. He graduated from Brown University and Yale Law School. He spent the first several years of his career in partnership with his father, Fred, in Woonsocket. He joined the Rhode Island Army National Guard in 1955, serving over 20 years and attaining the rank of Lieutenant Colonel. He left his law partnership in 1967 to serve as an Assistant Attorney General in Rhode Island and was twice elected to serve as the Attorney General of the State of Rhode Island. In 1974, he returned to private practice. In 1984, he was nominated to serve as an Associate Justice of the Rhode Island Superior Court. He retired from the bench in 2000. Besides his wife, Richard is survived by his brother David Israel (Karen), his sister Judith Israel, his two daughters Susan Mollohan and Karen Mollohan (Brian), his five sons Eric Israel (Susan), Jonathan Biller (Victoria Rand-Biller), Kenneth Biller (Hope), Cameron Biller (Kara), Michael Biller, and many grandchildren and great-grandchildren.

Raymond E. Lambert, Esq.

Raymond E. Lambert (Ray), 77, of West Warwick, died on Saturday, November 5, 2022. He was the companion of Karen E. Spatcher. A lifelong resident of West Warwick, he was the son of the late William E. and Jeanne B. (Giguere) Lambert. Raymond graduated from Bishop Hendricken High School, Providence College, and Notre Dame Law School with a Doctorate in Law. He practiced law for over 50 years. Raymond served as a prosecutor for the WWPD for many years. He was a Municipal Court Judge in the Town of West Warwick, served as the longest tenured chairman of the West Warwick Democratic Town Committee, and served as chairman for the cities and towns of the Democratic Committee for the State of Rhode Island. He was also chairman of the West Warwick Board of Canvassers. Raymond is survived by his companion Karen's sons, Matthew W. Beaudoin and Brian R. Beaudoin; his sister, Doris Sword and her husband Ralph; and his niece and nephew.

Michael McAteer, Esq.

Michael McAteer, 81, of Warwick, died on November 22, 2022. Michael was born in Providence to Dr. Raymond and Helen McAteer (Feeney) on May 17th, 1941. Michael resided in Cranston and Warwick. He was a graduate of Providence College and Boston University School of Law. He was a trial attorney, arguing before hundreds of juries over five decades. Michael is survived by his wife, Kathleen MacInnis of Warwick, and his two sons, Sean M. McAteer of Warwick, and Raymond F. McAteer of New York, as well as his four grandchildren.

Natale L. Urso, Esq.

Natale L. Urso, 93, died on Friday, October 21, 2022. Born in Westerly, he was the son of Louis and Felicia Urso. Natale was the husband of the late Bette Urso. After Westerly High School, Nat graduated from Holy Cross College and Georgetown Law School. As a young man, he was elected to the town council and was the youngest person to become Council President at the time. He then went on to serve as State Senator. He left politics to devote his time to family and the practice of law. Nat practiced law for over 65 years, his practice included extensive trial and appellate experience, particularly in the areas of civil and constitutional rights. He briefed and

continued on page 38

Fastcase Tip

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In Memoriam *(continued from page 37)*

argued 39 cases before the Rhode Island Supreme Court, and many cases in Federal Circuit and District courts and District of Columbia courts, as well as all Rhode Island state courts. He served as Special Counsel to the Rhode Island Attorney General at the outset of his career, and as Town Solicitor for the Towns of Hopkinton and Richmond, for many years. He was also General Counsel to the National Education Association of Rhode Island. Nat is survived by his four children, Linda Urso, Juliet (Peter) Rice and Mark Urso of Westerly, and Philip (Renee) of Jamestown, RI; eight grandchildren; one great-grandson; his sister, Dolores Haronian; and many nieces and nephews. Natale was predeceased by his wife Bette, his grandson Louis Capaldi, and his sister Angela Murray.

Richard L. Walsh III, Esq.

Richard Leo Walsh III (Rick), of North Kingstown, died on October 26, 2022. Rick was the son of the late Nancy (Riley) Walsh, formerly of Woburn, MA and the late Richard Leo Walsh Jr., formerly of Newburyport, MA. Rick graduated from East Greenwich High School, Tufts University, class of 1976, and Suffolk Law School in 1980. For more than 40 years he practiced law at his own firm in North Kingstown and took on significant pro bono work. Rick is survived by his brothers John Joseph Walsh (Susan) of North Reading, MA and James Paul Walsh (Kathleen) of Scituate, MA, and five nieces and nephews.

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Caption This! Contest

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



How It Works: Readers are asked to consider what's happening in the cartoon 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.

Deadline for entry: Contest entries must be submitted by February 1st, 2023.

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

Winning caption for November/December



"All this chatter is giving me
a splitting headache."

SCOTT A. RITCH, ESQ.

Advertiser Index

Alliant Title and Escrow – Florida	22
Arbitrator – Nicholas Trott Long	15
Barrett Valuation Services, Inc.	30
Bottaro Law Firm	10
Briden, James – Immigration Law	34
Burman, Sarah Karns – Statutory Arbitra- tions/Mediations	28
Coia & Lepore, Ltd. – John Cascione	24
Coia & Lepore, Ltd. – Mediation	22
Connecticut Lawyers- Messier, Massad, Burdick & Flynn, LLC.	18,30
Decof, Barry, Mega & Quinn – Professional Announcement	31
Dennis, Stephen – Workers' Compensation	17
Enright Law LLC	20
Humphrey, Richard – Law Offices	35
Lavoie Law LLC	18
Law Offices of Michael W. Favicchio	24
LawPay	Back Cover
Leone Law, LLC – Anthony R. Leone II	20
Louis E. Baldi, Inc.	34
Marasco & Nesselbush – Personal Injury Law Firm	20
Mignanelli & Associates, LTD. – Estate Litigation	16
Morowitz, David – Law Firm	12
Palumbo, Richard – Condominium Law	14
Palumbo, Richard – Property Damage & Insurance	8
PellCorp Investigative Group, LLC	14
Prieffer, Mark – Alternate Dispute Resolution	30
Red Cave Legal Consulting	20
Secure Future Tech Solutions	22
Slip & Fall – Henry S. Monti	35
Soss, Marc – Florida Estates/Probate/ Documents	18
Withum – Forensic & Valuation Services	9
Workers' Compensation – Revens, Revens, & St. Pierre	15
Zoning Handbook, 3rd Edition – Roland Chase	16

Lawyers on the Move

Hon. Cristine L. McBurney, probate judge for the City of Pawtucket since 1991, was recently elected President of the Rhode Island Probate Judge Association.

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Thomas J. Fay, Esq. is now a partner at **Donovan Hatem, LLP**, 53 State Street, 8th Floor, Boston, MA 02108.

617-406-4583 tfay@donovanhatem.com donovanhatem.com

Christopher V. Geney, Esq. is now an associate at **Cameron & Mittleman LLP**, 301 Promenade Street, Providence, RI 02908.

401-331-5700 cgenev@cm-law.com cm-law.com

Chad Nelson, Esq. is now of counsel at **Pelletier Marshall & Clark**, with offices at 36 Vermont Avenue, Ste. 4, Warwick, RI 02888 and 655 Mendon Road, Ste. 2G, Cumberland, RI 02888.

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Matthew J. Pimentel, Esq. is now an associate at **Cameron & Mittleman LLP**, 301 Promenade Street, Providence, RI 02908.

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