Rhode Island Bar Journal

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Front Cover Photograph – by Brian McDonald

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RHODE ISLAND Bar Association
1898

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

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Sharing Our Experience, Strength and Hope

Bruce W. McIntyre, Esq.
President
Rhode Island Bar Association

Whether you are a litigator or a transactional attorney, every one of your clients will remember you as a participant in some of the most important moments in their lives.

Making History

One of the most delightful opportunities associated with the Bar presidency is participation in the Rhode Island Supreme Court swearing-in ceremonies for attorneys who recently passed the State Bar Examination and the Character and Fitness review. Our Bar Association presents each attorney with a quill pen gift symbolizing a lawyer's place in history, and reflecting their use in crafting important documents dating back to the Magna Carta, the Declaration of Independence and the Constitution of the United States. On a related note, today, attorneys arguing before the United States Supreme Court receive one of these pens, provided by the Court, at the counsel table.

It occurred to me that our new Rhode Island attorneys will make history, as they represent clients in their practices. Whether you are a litigator or a transactional attorney, every one of your clients will remember you as a participant in some of the most important moments in their lives. Our words, advice and deeds during difficult moments are rarely, if ever, forgotten by our clients. And, our actions form the foundation for our reputations.

Banding Together

It is gratifying to see how well Bar Association members banded together to help each other during the implementation of the State courts' electronic filing system. Change is never easy. This is especially true for more senior practitioners who have seen a lot of change over the course of their careers. Many attorneys struggled with the looming electronic filing system deadlines. For many, it felt as though the sky was falling. But, as the court's training sessions unfolded, Bar members did what they do best, providing training and assistance to each other. Court administrators, judges and staff were all learning the new system together with lawyers. I have been through a number of large-scale technological implementations at State agencies, and I have collaborated on interstate technological implementations. They all have challenges and frustrations, but we could not function without them and the support of our colleagues. Well done!

Buying Happiness

Psychologists have discovered the old adage, "Money can't buy happiness" is, as many suspected, only partially true. As it turns out, spending money on ourselves does not add much to the quality of our happiness. However, being charitable with our money seems to provide the psychological ingredient that gives us a sense of well being and contentment. Another way to enhance our well being is to take better care of ourselves. Exercise, smoking cessation, and limiting or eliminating alcohol consumption our proven ways to improve our quality of life, and our Bar Association's Lawyers Helping Lawyers Committee is here to assist us through difficult transitions in our lives. We are fortunate to have their support, and that of many of our colleagues, in addressing our personal and professional challenges.

As we enter this new year, I encourage you to celebrate our past, present and future in the knowledge that we have come so far and so well through our shared respect and assistance. Let's keep up the good work! ❖

You Are What You Write

Your effective client representation is based, in large part, on your proven court experience and your reputation as creditable counsel. What better way to enhance your standing than through an article published in the *Rhode Island Bar Journal* and seen by its over 6,500 lawyers, judges and new media editors? To find out how you may have an article considered for *Bar Journal* publication, and related Mandatory Continuing Legal Education credit, please contact *Rhode Island Bar Journal* Editor and Rhode Island Bar Association Director of Communications Frederick Massie at 401-421-5740 or email: fmassie@ribar.com.

A friendly reminder on email communications from the Bar

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RHODE ISLAND BAR JOURNAL

Editorial Statement

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

Article Selection Criteria

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

Direct inquiries and send articles and author's photographs for publication consideration to:
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In-House Counsel: Protecting Confidential Communications and Work Product

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In-house attorneys are regularly tasked to perform non-legal duties or are merely kept in the loop in the mistaken belief their involvement is sufficient to protect purportedly confidential communications.

Civil lawsuits and government investigations targeting corporations are routine these days, often involving substantial data and document collection from numerous sources. In-house lawyers play a critical role in this process, both in the investigatory stages and responding to requests for information. Their duty to safeguard internal confidential communications and work product from disclosure is particularly important. In so doing, in-house attorneys must recognize their dual responsibilities for both business and legal matters create potential obstacles to the successful invocation of the attorney-client privilege and the work product doctrine. As one court noted, "[c]ommunications that principally involve the performance of non-legal functions by in-house counsel are not protected."[1] Having a legal degree does not necessarily ensure in-house counsel's communications or work product will receive adequate protection. Hence, in-house counsel must be mindful of the pitfalls and how to avoid them.

Preserving Confidential Communications

The attorney-client privilege is one of the central tenets of legal representation. The privilege protects the communications between attorneys and their clients to encourage full and frank discussions. To invoke the privilege, there must be a showing that a confidential communication has occurred between the client and counsel made for the purpose of obtaining or providing legal advice. The privilege applies equally to in-house counsel and their clients. That is, the corporation itself, rather than any individual directors, officers or employees.

The complicating factor is that in-house attorneys are regularly tasked to perform non-legal duties or are merely kept in the loop in the mistaken belief counsel's involvement is sufficient to protect purportedly confidential communications. These circumstances create the greatest risk the attorney-client privilege will not protect communications the corporation expects will be protected. The burden of proof always remains with the corporation to prove the attorney-client privilege applies.

What's My Line?

In-house attorneys regularly wear more than one hat – providing business, human resources and even marketing advice. Courts addressing the dual roles of in-house attorneys have ruled consistently that communications providing *business*-related advice – as opposed to legal advice – do not receive attorney-client privilege protection.

Not all situations are clear-cut. Many communications involve both legal and business advice. According to the U.S. Court of Appeals for the District of Columbia Circuit in *In re* **Kellogg Brown & Root, Inc.**,[2] if one of the significant purposes of the communication was to obtain or provide legal advice, the document will be protected under the attorney-client privilege. Courts in other jurisdictions have been far less generous, ruling that, even if a business decision can be viewed as containing both business and legal evaluations, the business aspects are not protected simply because legal considerations were also involved.[3] If the communication reflects a business-centric purpose or relies on in-house counsel's business acumen, as opposed to legal advice, courts are less likely to apply the attorney-client privilege.

Regardless of the approach, in-house lawyers are advised to separate their legal and business advice to ensure the former receives adequate protection. By combining the two, in-house attorneys run the risk that the business advice will overshadow the legal advice, and the entire document will not receive any protection. When communications unavoidably have both legal and business content (and the two cannot be separated out), in-house counsel should state, expressly, they are providing a legal opinion or responding to a request seeking legal advice. Moreover, in-house counsel may want to include only their legal title on their communications to distinguish their non-legal roles. Likewise, they should keep their legal documents separated, and password-protected in a discrete database, with access solely to those with a need to know.

Are You Going to Label That?

Many lawyers – in-house counsel included –

believe documents containing the phrase "privileged and confidential" or "attorney client privilege" have adequate protection from disclosure. Examination of labels is the starting point for any analysis about the applicability of the attorney-client privilege. Labeling allows in-house counsel to distinguish between protected and non-protected communications. It is especially important when there may be some question whether a communication is providing legal strategy or merely contains business-related advice. However, labeling alone does not guarantee protection and is not the benchmark against which the documents are judged. The substance of the communication must contain legal advice for it to be privileged.

In-house lawyers must avoid the urge to mark all their communications as protected by the attorney-client privilege or to encourage funneling all sensitive documents through their offices. Courts may view these actions as illegitimate attempts to hide business-related documents under the guise of the attorney-client privilege.[4] If that occurs, in-house lawyers run the risk that the privilege will not apply to any of the documents at issue.

The key lesson is that in-house counsel should always label their legal-related communications and avoid doing so for the non-legal ones. For communications with a mix of legal and business advice that cannot be separated, the better approach is to err on the side of caution and label the material as protected. Similarly, non-legal staff must ensure any documents they create for purposes of assisting in-house counsel or obtaining legal advice are labeled conspicuously, such as in the subject line of an email or letter, as being requested for seeking or providing legal advice.

Courtesy Copy is not Privileged

It is tempting for business colleagues to send a courtesy copy of their communications to in-house counsel to invoke the protections of the attorney-client privilege. There is a common misperception a cc is a proper and effective way to cloak the communication with the attorney-client privilege. It is not.

Sending a copy of a communication to in-house counsel does not make that communication privileged. For the privilege to apply, the communication should request in-house counsel to review the substance and provide legal advice or analysis. The communication will have the best chance of being protected if it, in fact, prompts counsel's involvement and legal review. Merely copying in-house counsel undermines any future argument the communication was for the purpose of obtaining confidential legal advice.

Similarly, having in-house counsel present at meetings may not, alone, provide sufficient grounds for invoking the privilege for the associated communications. To ensure maximum protection, detailed minutes should be prepared specifying the names and titles of all attendees, the substance and confidentiality of the meeting, and, most importantly, the need for legal advice and any confidential advice provided.

The Need to Know

In large corporations, preserving confidential information can present challenges. A company may have multiple layers of management and thousands of employees potentially privy to internal communications. This issue may be particularly acute in the context of an internal investigation.

In-house counsel should ensure legal communications are disseminated only to those working on the project or problem at hand. Distribution of confidential material more broadly creates the risk the protection will be lost through improper or inadvertent dissemination to outsiders. Including unnecessary employees may lead to the conclusion the privilege was not applicable in the first instance. Prudence dictates in-house counsel document where and when such communications were made and the reasons for doing so. It is equally important to remind all officers and employees of the importance of retaining internal attorney-client confidences.

In-house counsel should also establish written procedures ensuring personnel within the company (such as investigatory or audit committees) have a protocol for retaining counsel to protect their communications from disclosure. They must be involved in all aspects of the committee's work to maximize protections for the communications being generated throughout the process, and their participation should be documented at every stage. There is less protection if non-legal staff is directing the effort and in-house counsel's role is minimal or non-existent.

While it is always preferable that attorneys lead any investigation, this is

not always feasible. In those circumstances, non-legal staff should regularly report to and consult with in-house counsel (or specially retained outside counsel). Any documents created during the course of the investigation should be directed to counsel and marked accordingly so it is clear legal advice is being solicited.

Don't Waive Goodbye

Even when communications are privileged, corporations face the risk of waiver when they must produce confidential information to outside auditors or governmental agencies. For instance, a voluntary presentation of privileged information to the government can waive the attorney-client privilege. In fact, several courts have held that a disclosure to one agency constitutes a waiver as to all, including adversaries in private litigation.[5]

Corporations now have limited protection, afforded by Federal Rule of Evidence 502(a), which addresses whether a disclosure to the federal government also waives undisclosed but related materials. Under the rule, the waiver only extends to undisclosed communications or information if the waiver was intentional, if those communications concerned the same subject matter, and if they should in fairness be considered together. The rule also protects inadvertent disclosures when the privilege holder has taken reasonable steps to prevent the disclosure and prompt reasonable steps to rectify the error. A subject-matter waiver occurs only when fairness requires an additional disclosure to limit misleading or incomplete evidence that could put the opposition at a disadvantage.

Given the real threat of waiver, in-house lawyers should take prophylactic steps to ensure adequate protection for confidential communications. For example, when corporations are faced with a governmental demand for confidential information, in-house counsel should negotiate a confidentiality/non-waiver agreement. Similarly, when information is provided to independent auditors, in-house counsel should seek an agreement that the auditor will maintain the confidentiality of the requested materials and provide advanced notice in the event the information is subpoenaed. As a general matter, obtaining as clear and ironclad an agreement as possible from a third party, to whom confidential communications must be disclosed, is critical to preserving the communications' privileged status.

Protecting In-House Counsel's Work Product

Since the U.S. Supreme Court's seminal ruling in **Hickman v. Taylor**,[6] courts have recognized a work product doctrine that protects materials prepared in anticipation of litigation. Now codified in Federal Rule of Civil Procedure 26(b)(3) and many state rules, the doctrine protects "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)," unless the requesting party can show "that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means."[7] Even when disclosure is ordered, courts "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation."[8] The test for determining if material was prepared in "anticipation of litigation" focuses on whether it was prepared because of the prospect of litigation. The doctrine does not protect documents prepared in the ordinary course of business, pursuant to public requirements unrelated to litigation or for other non-litigation purposes.[9]

What's in a Name?

In-house lawyers must remember the work product doctrine does not apply simply because they created a document. Similarly, merely labeling a document work product does not guarantee protection. The document's substance must constitute protected work product. That is, the content must reflect it was prepared because of the prospect of litigation. When in-house lawyers are called upon to perform non-legal tasks, their documents are not protected. Many courts have held that documents created in the ordinary course of business will not be protected, even if counsel is aware the documents may be useful in the event of litigation.[10] Otherwise, companies would be able to immunize their internal documents from discovery merely by having lawyers in strategic positions performing non-legal work.

A recent decision in a products liabili-

ty lawsuit is illustrative of these principles.[11] When plaintiffs sought to obtain a medical consultant's investigatory report, the product manufacturer argued it was specifically prepared for, and at the direction of, in-house counsel to assist in ongoing litigation. The court disagreed, ruling that the report was not protected work product. Despite its attorney work product label, the document did not reference any ongoing or anticipated claims or suits and contained no analysis of any particular set of facts that caused concern over potential litigation.[12] Rather, it merely relayed the results of a study of incident reports in an FDA database and testing designed to gauge the performance of the product relative to its competition.[13]

To ensure work product protection, in-house lawyers should separate documents containing work product and business advice. The former should reflect that in-house counsel prepared the material in his or her role as legal advisor and make clear the litigation being anticipated. And, if labels are to be used, the substance of the document must support the label.

Where's the Beef?

In-house counsel can maximize the likelihood of protecting work product by identifying the prospective or pending litigation that prompted the creation of the material. For instance, if a document is designed to avoid and eventually defend against threatened or anticipated litigation, the cover memorandum or preamble should identify the prospective or threatened litigation. The identification should be as specific as possible under the circumstances. Citation to demand letters or other threats of litigation against the company, or even against similar businesses facing the same problems or issues, is appropriate. The work product doctrine is most applicable when the prospect of litigation is concrete, not remote.

A class action lawsuit involving claims that defendant Procter & Gamble sold denture cream resulting in consumers suffering the effects of zinc poisoning illustrates this point.[14] Plaintiffs moved to compel 28 sample disputed documents, claiming they were not entitled to work product protection and, therefore, a larger group of similar documents should be discoverable. The court concluded the documents related to product labeling were entitled to work product protection because they specifically referenced litiga-

tion and expressed impressions from legal counsel.[15] Other pre-litigation documents were protected because they were prompted by suits against another denture adhesive manufacturer and were sought by counsel to develop legal guidance and advice on anticipated claims against Proctor & Gamble's products.[16]

Mind Over Matter

The work product doctrine provides the greatest protection for materials containing mental impressions, opinions, conclusions, or legal theories concerning the prospective or pending litigation. A prime example of opinion work product is an attorney's notes reflecting a witness interview, an assessment of the strengths and weaknesses of a lawsuit or an outline of trial strategy. Thus, in-house counsel should weave through their communications information reflecting mental impressions, opinions, legal theories, and strategies as applied to factual investigations, interviews, witness statements, or memoranda. The more closely internal documents reflect in-house counsel's legal analysis of matters at issue, in the context of anticipated or pending litigation, the greater the likelihood they will be protected from disclosure.

A recent patent case illustrates the foregoing principles.[17] Plaintiffs hired a Canadian lawyer/U.S. patent agent to prosecute a patent. After the patent issued, however, plaintiffs discovered key features of the invention were not included within the patent's scope. They retained new attorneys who successfully prosecuted a reissue application and subsequently sued several alleged patent infringers. Though the original attorney had agreed not to speak with defendants' attorneys, he had numerous such conversations, during which defense counsel took notes. When plaintiffs moved to compel the notes, defendants claimed work product protection. The court agreed, ruling the notes were "not simply a word-for-word transcript of the meeting."[18] Rather, the "selection of information contained in the notes and certainly the hand-written notes commenting on [the original attorney's] oral statements constitute mental impressions" and thus were "properly classified as non-discoverable work product."[19]

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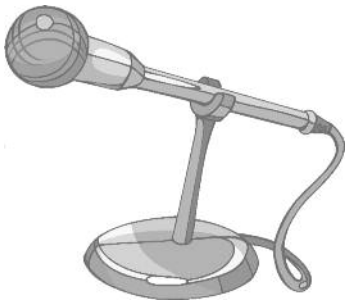
Thanks to Our CLE Seminar Speakers

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 make CLE programming relevant and practical for our Bar members. We recognize the professionalism and dedication of all CLE speakers, and we thank them for their contributions. The Bar member volunteers noted below participated in CLE seminars this past fall.



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Rhode Island's Home Grown Medical Marijuana vs. Zoning

John A. Pagliarini, Jr., Esq.
Practices law in Tiverton

Conflicts with local ordinances and state laws are inevitable and will persist unless communities and the Rhode Island Legislature adopt corrective measures.

The author has a Masters of Community Planning degree.

The Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act (Slater Act) is the law of the land in Rhode Island. See: R.I. Gen. Laws § 21-28.6-1 et seq. Compassion Centers draw attention, but forgotten is the right of Cardholders to grow up to twelve marijuana plants in their residential property. See: R.I. Gen. Laws § 21-28.6-4. With the Department of Health reporting the issuance of 7,600 registered Medical Marijuana Cardholders in Rhode Island, conflicts with local ordinances and state laws are inevitable and will persist unless communities and the Rhode Island Legislature adopt corrective measures. A theoretical example follows.

A local police chief receives an anonymous tip marijuana is being grown at a single family residence rented on Peaceful Way. An inspection finds a cardholder is growing seedlings and mature plants in accordance with the Slater Act and the Rules and Regulations related to the Medical Marijuana Program, as amended and promulgated by the Rhode Island Department of Health. The inspection, however, uncovers the growing equipment violates a host of building and fire code violations: overloaded circuits; poor ventilation; and compromised load bearing beams. The neighbors on Peaceful Way want this operation shut down and demand that the mayor take action. Notice of violations are sent. Those notices are ignored. The building official issues a cease and desist order and ultimately deems the residence uninhabitable. The building official's decision is appealed to the zoning board of review sitting as the board of appeals. See: R.I. Gen. Laws § 45-24-64. A public hearing is called and notice is given via the newspaper and to required parties. Conflicts begin.

The cardholder's privacy is protected under the R.I. Gen. Laws § 21-28.6-6(h), (h3) and the federal Health Insurance Portability and Accountability Act of 1996 (HIPPA). Notwithstanding the fact that the cardholder, or his or her landlord, brought the appeal, the Town, in accordance with the existing process, advertises the appellant's name, address and issue in the local paper. The appeal process of R.I. Gen. Laws § 45-24-64 is silent regarding treatment of the Cardholder's privacy.

R.I. Gen. Laws § 21-28.6-4 requires the marijuana plants "to be stored in an indoor facility." Growing marijuana plants in a residential property is permissible by R.I. Gen. Laws § 21-28.6-4(c): "No school, employer or landlord may refuse to enroll, employ or lease to or otherwise penalize a person solely for his or her status as a Cardholder." The term landlord, without the word commercial just prior to, permits the cardholder to grow marijuana plants in a residential property. Presumably and implied, a fee simple owner enjoys the same rights as a tenant. Therefore, the ability of a municipality to prohibit the growing of marijuana in a residential zoning district is thwarted. The power of a municipality to pass a zoning ordinance regulating the growing of marijuana in a residential zoning district is permissible under the inherent and recognized powers of the Zoning Enabling Act, R.I. Gen. Laws § 45-24-30(1) "Promoting the public health, safety, and general welfare" and R.I. Gen. Laws § 45-24-30(10) "Promoting safety from fire, flood, and other natural or unnatural disasters." [emphasis added]

Adopting a special regulation to the local zoning ordinance is needed, as privacy and safety demand special attention. The following changes are recommended for adoption by municipalities:

Special Regulation: Medical Marijuana

Whereas, The Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act is the law of the land in Rhode Island. See R.I. Gen. Laws § 21-28.6-1 et seq.; and.

Whereas, registered Cardholders are protected under the Act and under the federal Health Insurance Portability and Accountability Act of 1996; and,

Whereas, the Rhode Island Zoning Enabling Act requires "Notwithstanding any other provisions of this chapter, plant agriculture is a permitted use within all zoning districts of a municipality, including all industrial and commercial zoning districts, except where prohibited for public health or safety reasons or the protection of wildlife habitat"; and,

Whereas, the Rhode Island Zoning Enabling Act defines "Plant Agriculture" as "The growing of plants for food or fiber, to sell or consume"; and,

Whereas, the public health, safety and general welfare is threatened by Cardholders who install necessary equipment without proper permits and inspections; and,

Whereas, safety from fire for the Cardholder's apartment, house and neighborhood is paramount; and,

Now therefore, all zoning districts in the city/town shall be subject to the following requirements:

Section 1. A licensed Cardholder shall apply for all appropriate Building, Electrical, Mechanical and Plumbing Permits as required by the Building Official. The Building Official shall grant the application for permits pursuant to R.I. Gen. Laws § 23-27-100.01 et seq. All permits applied for in furtherance of the Act shall be sealed by the Building Official and not subject to review by any party other than the Cardholder.

Section 2. A licensed Cardholder shall apply for the appropriate approvals and inspections by the local Fire Marshall. The Fire Marshall shall grant the application for permits pursuant to R.I. Gen. Laws § 23-28.1-1 et seq. All permits applied for in furtherance of the Act shall be sealed by the local Fire Marshall and not subject to review by any party other than the Cardholder.

Section 3. In addition to the requirements above, the Building Official shall require the following:

a. That the area used for growing be secured by locked doors and an alarm system.

b. That the area used for growing have two (2) means of ingress and egress.

c. That the area used for growing not be below grade and not in a basement.

d. That the area used for growing shall not be within ten (10) feet of a heating source such as propane, natural gas or an oil tank.

Section 4. Once permitted, the grow-

ing of medical marijuana shall not constitute probable cause or reasonable suspicion, nor shall it be used to support the search of the property of the person possessing, or otherwise subject the property of the person to inspection by any governmental agency.

The above requirements, while seemingly minimal, are quite important. The cardholder's privacy is important, but safety is paramount. The intense electrical demands for the growth of marijuana increase the possibility of a fire. Sending local firefighters into a cluttered basement, with only one ingress, to extinguish a blaze is too risky, therefore, excluding below grade and basement areas is recommended.

Having addressed the local zoning matters, the Legislature needs to amend several statutes to protect cardholders' rights and the interests of the municipalities. Deficient in our state statutes is that the Rhode Island Access to Public Information Act, R.I. Gen. Laws § 38-2-1 et seq., does not address a Zoning Board of Appeals hearing a medical marijuana matter. The following statutes need to be amended:

1. To protect Cardholder's privacy under HIPPA, the zoning appeal statutes of R.I. Gen. Laws § 45-24-66 need to exempt Cardholders from the Public Notice Requirements.
2. The Rhode Island Access to Public Information Act, R.I. Gen. Laws § 38-2-2, should exempt all local permits and appeal documents related to a Cardholder.
3. The Open Meetings Act, R.I. Gen. Laws § 42-46-5, should be amended to exclude Cardholder related appeals under R.I. Gen. Laws § 45-24-64. Zoning appeals should be exempt from public session and all appeals regarding matters related to medical marijuana should be in closed session.

This article does not address Compassion Centers or Regional Growing Centers, but those uses raise similar concerns to those presented for cardholders. Regardless of what Rhode Island community you live in, medical marijuana is a regulatory challenge, and it is uncertain whether your community is prepared to reap what it has sowed. ❖

Bar Partners with RWU School of Law Offering Free Family Law Mediation Clinic

On November 15th, the Rhode Island Bar Association's Volunteer Lawyer Program, in conjunction with the Roger Williams University (RWU) School of Law, offered a free, mediation clinic focused on family law. Held at the Bar's headquarters in Providence, individual consultations were handled by RWU School of Law alumni. Seven couples were helped with divorce mediation and one couple was assisted with mediation for custody, visitation, and child support. Special thanks to RWU Professor Bruce Kogan and RWU Legal Administrator Margie Caranci for their longstanding and continued support of the Bar's Volunteer Lawyer Program serving low income clients mediating their family law cases. To join VLP, please contact Public Service Director Susan Fontaine, sfontaine@ribar.com or 401-421-5740 x101.

(l-r) Margie Caranci, RWU School of Law Legal Administrator, RWU School of Law Alumni – Christine Colella, Esq., Jessica Hayward, Esq., Diana Robbins, Esq., Jessica Doyle, Esq., Caitlin Evans, Esq., Aaron Greenlee, Esq., Bruce Kogan (RWU School of Law Professor), Dadriana Lepore, Esq., Nicole Solas, Esq., Neville Bedford, Esq., Amanda Sorensen, Esq., Rachel Levine, Esq., and Sharlene Rossi, Esq.

Now Accepting 2015 Rhode Island Bar Award Nominations

All 2015 Bar Award Nominations Due March 13, 2015.

2015 Dorothy Lohmann Community Service Award

This award recognizes Rhode Island attorneys who donate their time and legal expertise for charitable work. It is given to those whose efforts most closely reflect those of Rhode Island attorney Dorothy Lohmann. Ms. Lohmann devoted her entire professional life working to help the poor, volunteering her services at many human service organizations and advocating for laws and policies to relieve the suffering of the poor and disenfranchised. The Lohmann Award Committee is particularly interested in candidate actions most closely reflecting those of the award's namesake as detailed in the nomination criteria and award entry form accessed on the Bar Association website at **www.ribar.com**, under the **NEWS AND EVENTS** tab on the left side of the Home page. All nominations are due no later than March 13, 2015. **Please Note:** Lohmann Award nominations are *only* accepted from representatives of organizations where Rhode Island attorneys have devoted a significant amount of their time and efforts on a strictly voluntary, non-paid basis. Postal mail or email nominations and/or direct questions to:

2015 Dorothy Lohmann Award for Community Service Committee
c/o Frederick Massie
Rhode Island Bar Association
115 Cedar Street
Providence, RI 02903
telephone: 401-421-5740
email: fmassie@ribar.com

2015 Joseph T. Houlihan Lifetime Mentor Award

This award honors individuals who, like Attorney Joseph T. Houlihan, have, during their careers, consistently demonstrated an extraordinary commitment to successfully mentoring in the Rhode Island legal community. The award recognizes an attorney who serves as a role model to other lawyers in Rhode Island, who has significantly contributed to the profession and/or the community and who, with their excellent counsel, have excelled as mentors and contributed to the ideals of ethics, civility, professionalism and legal skills. The Houlihan Award Committee is particularly interested in candidate actions most closely reflecting those of the award's namesake as detailed in the nomination criteria and award entry form accessed on the Bar Association website at **www.ribar.com**, under the **NEWS AND EVENTS** tab on the left side of the Home page. All nominations are due no later than March 13, 2015. Postal mail or email nominations and/or direct questions to

2015 Joseph T. Houlihan Lifetime Mentor Award Committee
c/o Frederick Massie
Rhode Island Bar Association
115 Cedar Street
Providence, RI 02903
telephone: 401-421-5740
email: fmassie@ribar.com

2015 Chief Justice Joseph R. Weisberger Judicial Excellence Award

This award, named in honor of its first recipient the late Chief Justice Joseph R. Weisberger, is presented to a judge of the Rhode Island State Courts or Federal District Court for exemplifying and encouraging the highest level of competence, integrity, judicial temperament, ethical conduct and professionalism. The Weisberger Award Committee is particularly interested in candidates whose actions most closely reflect those of the award's namesake as detailed in the nomination criteria and award entry form accessed on the Bar Association website at **www.ribar.com**, under the **NEWS AND EVENTS** tab on the left side of the Home page. All nominations are due no later than March 13, 2015. Postal mail or email nominations and/or direct questions to:

2015 Chief Justice Joseph R. Weisberger Judicial Excellence Award Committee
c/o Frederick Massie
Rhode Island Bar Association
115 Cedar Street
Providence, RI 02903
telephone: 401-421-5740
email: fmassie@ribar.com

Reviewing Your and Clients' Unpaid Internships

Evan P. Shanley, Esq.
Gursky Law Associates,
North Kingstown

Clearly the intern rights movement, although small, is beginning to get the attention of the business and legal community.

Should you have been compensated for your unpaid internships during college or law school? Should you be paying your firm's summer interns? Should your clients be paying their interns? These questions were, until recently, largely overlooked by our legal system. The current economic downturn has led more employers to take advantage of the free work interns provide. In their desire to save money, some employers have lost sight of the essence of internships, potentially crossing ethical and legal lines. Right now, there is a growing intern rights movement, with interns challenging the status quo through the courts and seeking protections under state and federal employment law. Several recent decisions make this topic worthy of further investigation.

What is the FLSA? Who does it protect?

The Fair Labor Standards Act (FLSA/Act) provides a range of protections for covered employees, including a requirement that covered employers pay employees a set minimum wage.[1] Section 3(g) of the Act defines "employ" as, including "to suffer or permit to work," and 3(e) defines "employee" as "any individual employed by an employer." These vague definitions leave room for Department of Labor (DOL) and court interpretation

The United States Supreme Court opined that, "the definition 'suffer or permit to work' was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another."[2] In doing so, the Court arguably carved out an exception to the protections of the law for volunteers and interns. In **Tony and Susan Alamo Foundation v. Secretary of Labor**,[3] the Supreme Court addressed whether volunteers working at a for-profit branch of a religious organization were exempt from the Act. The Court held that,

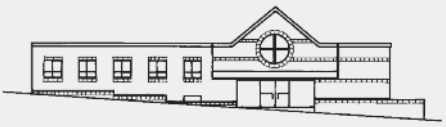
> The purposes of the Act require that it be applied even to those who would decline its protections. If an exception to the Act were carved out for employees willing to testify that they performed work "voluntarily," employers might be able to use superior bargaining power to coerce employees to make such asserts, or to waive their protections under the Act.[4]

The Court elaborated on this principle, explaining that allowing such an exception would exert a "general downward pressure on wages," and undermine the Wage and Hour Administrator's authority to enforce the Act.

The Supreme Court articulated three important principles relevant in any examination of whether apprentices or volunteers are covered by the FLSA. First, those who are working for their own advantage, as opposed to the employer's, may still be entitled to the protections of the Act. Second, just because an individual does not seek protection under the Act, it does not mean they are not entitled to it or that employers are not obligated to conform to the Act. Third, and most importantly, the Court interpreted the Act to provide a broad definition of the word employ and, thus, a narrow definition for exempted work performed by apprentices, or volunteers. In doing so, the Court made it tenable for more workers, including unpaid interns, to claim they are covered by the definition of employ under the Act and entitled to its protections.

Interns Under FLSA

The Department of Labor has established a test for trainees or interns excluded from the Act's employee definition and, thus, exempt from its protections. Interns fall under the umbrella of trainees if they meet the six-part test established by the Department of Labor.[5] To qualify as an exempt trainee: 1) interns must receive training similar to training received in an educational environment; 2) said training must be for the benefit of the intern; 3) trainees cannot replace regular employees and must be closely supervised; 4) the employer derives no immediate advantage from the activities of the intern and, on occasion, its operations may actually be impeded; 5) the intern is not necessarily entitled to a job at the conclusion of the internship; and 6) the employer and intern understand the intern is not entitled to compensation. Although this test is not binding on



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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115 Cedar Street

Providence, RI 02903

Questions? Please contact Virginia Caldwell at 421-6541

or gcaldwell@ribar.com

courts, its use is widespread.

The DOL's narrow test attempts to comport with the Supreme Court's discussions of volunteer workers/trainees exempted from coverage. At first glance, this test may surprise employers who, otherwise, believed they were not breaking any laws by using unpaid interns. The common public perception seems to be that if the employer is providing some kind of relevant work experience and networking for the intern, then they are upholding their end of the bargain. In reality, employers may owe far more to their interns than they might think. For example, interns delivering inter-office mail, putting letters in envelopes, or doing filing work are arguably performing work customarily performed by regular employees and, in doing so, are providing an immediate advantage to the employer. As a result, it seems interns performing these tasks deserve protection under the Act. When interns are spending the majority of their time running errands or performing menial tasks, it is difficult to make the case that the Act intended to exclude them from coverage.

The Supreme Court has yet to weigh in on the issue of whether, or to what extent, unpaid interns are covered by the FLSA. However, recently, the Southern District Court of New York had the occasion to consider the issue. In **Xuedan Wang v. Hearst Corp.**,[6] unpaid interns at various magazines brought a class action against the magazine's owner, the Hearst Corporation, alleging violations of the FLSA and state law. The plaintiffs' discovery revealed that as Hearst made staffing cutbacks, the company instructed supervisors to use interns to save costs. Interns regularly worked 8 to10 hour days performing such tasks as responding to readers' emails, researching for articles, transcribing interviews, compiling sales statistics, fact checking articles, writing posts for the website, picking up and returning clothes, and much more. The District Court concluded that all interns understood their internship was unpaid, there was no guarantee of a job, and some of the duties performed by interns were formerly performed by paid employees. The parties disputed the amount of supervision provided, as well as Hearst's benefits.

Plaintiffs sought summary judgment on the immediate advantage standard, arguing that since Hearst derived an

immediate advantage from their work, they were entitled to coverage under the FLSA. Conversely, Hearst advocated for a totality of the circumstances analysis which examined the economic reality of the relationship to make a balanced decision. The District Court agreed with Hearst, stating that the Supreme Court had indicated support for a "totality of the circumstances" approach in **Walling**. Further, the District Court reasoned that, "it does not logically follow that…the presence of an "immediate advantage" alone creates an employment relationship under the FLSA."[7] Rather, the District Court said that, "there is no one dimensional test; the prevailing view is the totality of circumstances test."[8]

The District Court noted the DOL Fact Sheet #71 was useful as a framework for analysis of the employee-employer relationship.[9] However, the District Court stated that it was unclear what weight should be given to each of the factors since the DOL Fact Sheet #71 states that, "whether an internship or training program meets this exclusion depends upon all of the facts and circumstances of each such program." The District Court reasoned:

> This is not a winner-take-all test, and Hearst has shown with respect to each Plaintiff that there was some educational training, some benefit to individual interns, some supervision, and some impediment to Hearst's regular operations…[10]

Accordingly, the **Xueden** Court denied the plaintiffs' motion for summary judgment, finding that under a totality of circumstances analysis, a jury could find in Hearst's favor.

In **Glatt v. Fox Searchlight Pictures Inc.**, 293 F.R.D. 516 (S.D.N.Y. June 11, 2013) the Southern District Court of New York considered the claims of a group of former interns[11] seeking the protections under the Act. In this case, unpaid interns brought a class action against Fox Searchlight Pictures Inc.[12] (Searchlight) and Fox Entertainment Group[13] (FEG) alleging they violated federal and state laws by classifying them as unpaid interns instead of paid employees. The interns worked on the set of the films *Black Swan* and *500 Days of Summer*. The plaintiffs contended they were part of a common policy, applied to interns at FEG, of using unpaid interns to perform work that required them to be paid.

Applying DOL Fact Sheet #71, and a totality of the circumstances approach, the District Court found the interns were covered by the Act. The Court said that the DOL Fact Sheet #71 had support in **Walling** "because they were promulgated by the agency charged with administering the FLSA and were a reasonable application of it which was entitled to deference."[14]

The Court applied each standard listed in DOL Fact Sheet #71 to the facts of the case and determined the employer was the primary beneficiary of the relationship because the defendant received the benefits of their unpaid work, which otherwise would have required paid employees. In addition, the Court found the interns did not receive any formal training or education during the internship. Focusing on one plaintiff, the Court said that "he did not acquire any new skills aside from those specific to *Black Swan's* back office." With regard to **Glatt**, the Court stated that there was not sufficient evidence either way to determine whether training was received.

The Court concluded the plaintiffs displaced regular employees. Plaintiffs tasks included: picking up paychecks; tracking and reconciling purchase orders and invoices; drafting cover letters; organizing filing cabinets; making copies; running errands; assembling furniture; taking out trash; taking lunch orders; answering phones; and making deliveries.[15] One of the plaintiff's supervisors testified that if the plaintiff "had not performed this work, another member of my staff would have been required to work longer hours to perform it, or we would have needed a paid production assistant or another intern to do it."[16] Thus, the Court had ample reason to conclude that the plaintiffs' work displaced other employees.

Next, the Court looked at whether the employer obtained an immediate advantage from plaintiffs' work. The Court concluded there was no evidence the interns work impeded operations, rather they performed essential menial work.[17] The Court found there was no evidence the plaintiffs believed they were entitled to a job, and it was clear the plaintiffs understood they would not be paid. However, the Court also stated it was inconsequential that the plaintiffs understood they would not be paid because, "the FLSA does not allow employees to waive their entitlement to wages."[18]

Considering the totality of the circumstances, the Court found that plaintiffs Glatt and Footman were improperly classified as unpaid interns. Thus, the Court granted the plaintiffs' motion for partial summary judgment, declaring them employees covered by the FLSA and declaring FEG and Searchlight their joint employers. The Court also granted conditional class certification for an FLSA collective action.[19]

Fresh off the **Glatt** decision, in July of 2013, Charlie Rose and his production company agreed to pay $110,000 to former interns to settle their FLSA lawsuit. In January of 2014, Elite Model Management agreed to pay $450,000 to settle an unpaid wages suit brought by a group of former interns. Remarkably, both Elite Model Management and Charlie Rose chose not to fight the interns in Court, perhaps perceiving a shift in intern rights or just wary of appearing in the Southern District of New York to defend their decision not to pay their interns.

Intern Problems Outside FLSA's Scope

In addition to wage and hour laws, there are other legal issues regarding intern rights which are or will be coming to the forefront. Notably, most federal and state employee protection laws do not cover interns. This creates a particular problem when an intern seeks protection under a whistle blower statute, as in **Masri v. State of Wisconsin Labor and Industry Review,**[20] or an intern brings a claim under Title VII claiming sexual harassment and assault in the workplace, as in **Doe v. Lee,**[21] 943 F.Supp.2d 870 (N.D.I.L. 2013), or **Wang v. Phoenix Satellite Television, US, Inc.,**[22] 2013 WL 5502803 (S.D.N.Y. October 3, 2013). In **Wang**, an intern sued under New York State Human Rights Law, claiming she was denied an employment opportunity after rebuffing her employer's sexual advances. The common issue which stands out in these decisions is the courts found the interns did not qualify as employees under the relevant law and, thus, not entitled to protection. These cases exposed a gap in our legal system which permits employers to discriminate against interns in ways they would not with regular employees.

continued on page 36

House of Delegates Letters of Interest 2015-2016

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 2015-2016 Rhode Island Bar Association House of Delegates. The term of office is July 1, 2015-June 30, 2016. 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 20, 2015**.

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; 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
115 Cedar Street
Providence, RI 02903

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

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

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

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Register online at the Bar's website www.ribar.com and click on CONTINUING LEGAL EDUCATION in the left side menu or telephone 401-421-5740. All dates and times are subject to change.

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Rhode Island Law Center, Providence
1:00 p.m. – 4:00 p.m., 3.0 credits
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January 23
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Tips & Tricks for Email – *Outlook 2007*
Rhode Island Law Center, Providence
12:45 p.m. – 1:45 p.m., 1.0 credit
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January 30
Friday
Food For Thought
Tips & Tricks for Email – *Outlook 2010+*
Rhode Island Law Center, Providence
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Also available as a ***LIVE WEBCAST***

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Food For Thought
Social Host – Liability & Coverage Issues
Phil's Main St. Grille, Wakefield
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February 4
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Social Media's Impact on Employment Law
Rhode Island Law Center, Providence
2:00 p.m. – 4:00 p.m., 2.0 credits

February 12
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Food For Thought
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Rhode Island Law Center, Providence
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February 24
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Domestic Violence: Jurisdiction, Special Issues and Recent Developments
Rhode Island Law Center, Providence
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February 25
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12:45 p.m. – 1:45 p.m., 1.0 credit

February 26
Thursday
Food For Thought
Social Host – Liability & Coverage Issues
Rhode Island Law Center, Providence
12:45 p.m. – 1:45 p.m., 1.0 credit

Times and dates subject to change.
For updated information go to www.ribar.com

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Practical Skills – Criminal Law Practice 2015 – *Updated and Revised*

This book has been updated and revised by attorneys Christopher Gontarz, Thomas Dickinson, Pamela Chin, Jason Knight, William Murphy and Stacey Pires-Veroni. Due to their efforts we are able to offer this informative and practical resource for Rhode Island attorneys. Arrest, District and Superior Court proceedings, bail, pretrial motions, and dispositions are all reviewed in this comprehensive volume. To order please complete the order form on the opposite page or you may order through the Bar's website at www.ribar.com.

Reminder: Bar members may complete three credits through participation in online CLE seminars. To register for an online seminar, go to the Bar's website: **www.ribar.com** and click on CONTINUING LEGAL EDUCATION in the left side menu.

New Law: Rhode Island DUI Conditional Hardship Licenses

Robert H. Humphrey, Esq.
Law Offices of Robert H. Humphrey, Tiverton

The new statutes authorize the installation of an ignition interlock device in first offense DUI cases, with unknown, or below .15 BAC readings, at the discretion of the sentencing judge or magistrate.

On January 1, 2015, Rhode Island joined Massachusetts and Connecticut in allowing individuals convicted of drunk driving (DUI) to have a conditional hardship license (CHL) during the period of license suspension.[1] However, the CHL comes at a price and will "only be granted in conjunction with the installation of an ignition interlock device."[2] The CHL "shall be valid only for twelve (12) hours per day."[3] The primary purpose of the CHL is to allow individuals the ability to travel to and from their employment, but other non-employment hardships may also be considered. The terms of the CHL are to be set by the sentencing judge or magistrate after a hearing in which the individual shall provide proof of employment or evidence of a non-employment hardship.[4]

A CHL will also be available for an individual convicted of a first offense Refusal charge.[5] In all cases where a CHL is available, the individual requesting the CHL must first install an ignition interlock device (IID) and must suffer at least a thirty day license suspension. For more serious offenses, a greater license suspension may be required, with or without the benefit of a CHL.

Of great significance is that the newly revised statutes of R.I. Gen. Laws 31-27-2 (drunk driving statute), R.I. Gen. Laws 31-27-2.1 (refusal statute), and the newly enacted R.I. Gen. Laws 31-27-2.8 (ignition interlock statute) all hereinafter referred to collectively as the new statutes, will allow for, and in some cases require, the installation of an IID. Previously, an IID was only utilized in the most serious offenses. However, these new statutes now authorize the installation of an IID in first offense DUI cases with blood alcohol content (BAC) readings below .15 or with unknown BAC readings at the discretion of the sentencing judge or magistrate.[6] An IID is mandatory in more serious cases such as a first offense DUI charge with BAC readings over .15, as well as second, third and subsequent offenses for DUI and second, third and subsequent offenses for Refusal.[7] Please note that, although an IID is required in more serious DUI and Refusal offenses, a CHL is not always available.[8] An individual who violates the requirements of the CHL or the IID "shall be subject to the penalties enumerated in: § 31-27-18.1."[9]

The following chart illustrates potential outcomes when an IID is discretionary or mandatory, the eligibility for a CHL and the period of license suspension if an IID is installed.

The new statutes address one of the greatest

Offense	License Suspension Period (Prior to Revisions)	Must the Ignition Interlock Device (IID) be installed?	License Suspension Period (no CHL available); **THEN** License Suspension Period once IID installed	Conditional Hardship License ("CHL") Eligibility if IID installed
1st offense DUI .08-.10	30 – 180 days	No	Min. 30 days; 3 months to 1 yr	YES
1st offense DUI .10-.15/Unknown	3-12 months	No	Min. 30 days; 3 months to 1 yr	YES
1st offense DUI .15 and above	3-18 months	Yes	Min. 30 days; 3 months to 1 yr	YES
2nd offense DUI .08-.15/Unknown	1-2 years	Yes	Min. 45 days; 6 months to 2 yrs	YES
2nd offense DUI .15 and above	2 years from date of sentence completion	Yes	Min. 45 days; 6 months to 2 yrs	YES
3rd offense DUI .08-.15/Unknown	2-3 years	Yes	Min. 60 days; 1 yr to 4 yrs	NO
3rd offense DUI .15 and above	3 years from date of sentence completion	Yes	Min. 60 days; 1 yr to 4 yrs	NO
1st offense Refusal	6 months – 1 year	No	Min. 30 days; 6 months to 2 yrs	YES
2nd offense Refusal	1-2 years	Yes	Min. 60 days; 1 yr to 4 yrs	NO
3rd offense Refusal	2-5 years	Yes	Min. 90 days; 2 yrs to 10 yrs	NO
DUI Serious Injury/Death	Up to 2 years/ 5 years	No	1 yr to 5 yrs if installation of IID	NO

problems in connection with most DUI and Refusal cases: the need for individuals to continue their employment and to care for their families during the period of license suspension. These are significant changes to Rhode Island's DUI and Refusal laws, and there will be a dramatic change in how these cases are litigated and resolved after January 1, 2015. Once these aforementioned changes are implemented, the varying components of the provided illustrative chart will require revision. This article provides conditional, initial prosecutorial and defense attorney guidance in these challenging cases.[10]

Note: *Kimberly A. Petta, Esq., of the Law Office of Robert H, Humphrey, provided valued assistance in researching and writing this article.*

ENDNOTES

1 *R.I. Gen. Laws 31-27-2 and 31-27-2.8.*
2 *R.I. Gen. Laws 31-27-2.8(b)(7).*
3 ***Id.***
4 ***Id.***
5 ***Id.***
6 *R.I. Gen. Laws 31-27-2(d)(1)(i) and (ii).*
7 *R.I. Gen. Laws 31-27-2(d)(1)(iii), (d)(2)(i), (ii), (d)(3)(i) and (ii); 31-27-2.1(b)(2) and (3).*
8 *R.I. Gen Laws 31-27-2 and 31-27-2.1. (emphasis added)*
9 *R.I. Gen. Laws 31-27-2.8(b)(7).* ***See also****, R.I. Gen. Laws 31-27-2.8(h).*
10 *The authors express their deep appreciation for the assistance of Kathleen Child and Jodi Van Sprang in the preparation of this article.* ❖

Chief Justice Paul A. Suttell and the Rhode Island Heritage Hall of Fame

Rhode Island Supreme Court Chief Justice Paul A. Suttell (r) holds the indicia of induction into the Rhode Island Heritage Hall of Fame for his predecessor, Chief Justice Edmund W. Flynn, whose twenty-two-year tenure as Chief Justice, from January 1935 until his death in office on April 28, 1957, is the longest in Rhode Island history. Flynn was nominated by Hall of Fame president, and Rhode Island Historian Laureate Dr. Patrick T. Conley (l). The ceremony, at Providence's Conley Conference Center, focused on the 1920 to 1940 era and included five legal luminaries among the eleven Hall of Fame inductees: Governor William S. Flynn (brother of Edmund); long-time Providence mayor Joseph H. Gainer; Associate Supreme Court Justice Antonio Capotosto, also the founding president of the Aurora Club; Colonel G. Edward Buxton, Jr., World War I hero, prominent businessman, and a founder of the Central Intelligence Agency; and Colonel Everitte St. John Chaffee, World War I commander and the founding superintendent of the Rhode Island State Police.

SOLACE

Helping Bar Members in Times of Need

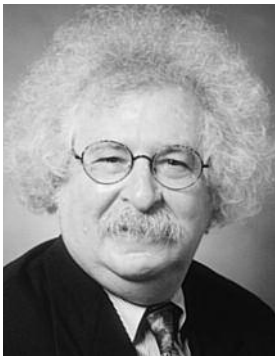
SOLACE, an acronym for Support of Lawyers, All Concern Encouraged, is a new Rhode Island Bar Association program allowing Bar members to reach out, in a meaningful and compassionate way, to their colleagues. SOLACE communications are through voluntary participation in an email-based network through which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

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

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

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

Affirmative Action Takes Another Supreme Court Hit



Jay S. Goodman, Esq.
Professor of Political Science, Wheaton College

*Clearly, the door is closing on judicially approved racial preference admissions cases. **Schuette** hammers another nail in what appears to be a legal coffin.*

The Case and the Political Process Doctrine

On April 22, 2014, the Supreme Court ruled on the latest affirmative action case, **Schuette, Attorney General of Michigan v. Coalition to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality by Any Means Necessary** (BAMN) et. al., 572 U.S.____, 134 S.Ct. 1623 (2014). (**Schuette v. Bamn**.) The case challenged the constitutionality of a 2006 referendum in which Michigan voters, 58% to 42%, passed so-called Proposal 2, making it Article I, section 26 of the Michigan constitution. Proposal 2 banned preferential treatment in public college or university admissions, as well as in public employment or public contracting.

This was the third Michigan case in a decade involving admission preferences.[1] A coalition of groups brought suit claiming an equal protection violation. The federal district court granted summary judgment, 539 F. Supp. 924,[2] but the Sixth Circuit reversed, holding that Proposal 2 violated the so-called "political process" doctrine set forth in **Washington v. Seattle School District #1**, 458 U.S. 457 (1982). The political process doctrine is a "less familiar and more nuanced branch of equal protection doctrine."[3] Whereas traditional equal protection analysis focuses on discriminatory intent, the political process doctrine looks at the discriminatory results of government restructuring.[4] It looks at a change in political structure that places special burdens on the ability of minorities to achieve their goals.[5] Michigan appealed and the Supreme Court granted certiorari, 133 S. Ct. 1633 (2013). With an Opinion written by Justice Kennedy and joined by Chief Justice Roberts and Justice Alito, a separate concurrence by Justice Scalia joined by Justice Thomas, and a separate concurrence by Justice Breyer, the Court by a six to two vote, reversed the Sixth Circuit and upheld the constitutionality of Proposal 2. Justice Sotomayor wrote a very long and passionate dissent joined by Justice Ginsberg. Justice Kagan recused herself.

Reasoning Seattle Away

At the outset, Justice Kennedy made clear that the case was not about "race-sensitive" admissions. ("Race-sensitive" admissions is what used to be called "affirmative action.") In the prior term, the Court allowed such considerations, in very limited, narrow circumstances, in **Fisher v. University of Texas at Austin**, 133 S. Ct. 2411 (2013). But **Schuette**, as Kennedy put it, concerns "…whether, and in what manner, voters in the States may choose to prohibit the considerations of racial preferences in governmental decisions, in particular with respect to school admissions."[6] The Court noted that such preferences are already banned in admissions in the states of California, Florida, and Washington State.

Proposal 2 changed the governmental locus of decision-making on admissions at public higher educational institutions in Michigan. The prior long-standing procedure placed the power in the hands of elected boards at each institution— **Schuette** specifically mentioned the University of Michigan, Michigan State University, and Wayne State University. The members of these boards campaigned and often took positions on racial preferences. However, as to the actual admissions policies, they delegated the policies and the decisions to university administrators. Proposal 2 altered and escalated the decision process on race-sensitive admissions to all the voters in the state in the form of a constitutional amendment. This escalation brought into constitutional challenge the "policy process." At least three earlier cases had held that changing the procedural governmental rules of the game in the middle of political controversies in such a way that made it harder for minorities to achieve their goals was unconstitutional.[7]

In **Reitman v. Mulkey**, 387 U.S. 369 (1967), California voters amended their constitution to protect individual's rights to discriminate in renting or selling housing. In **Hunter v. Erickson**, 393 U.S. 385 (1969), where the label "political process doctrine" first appeared, Akron voters amended the city charter to overturn a fair housing ordinance and took the power to enact

anti-discrimination measures away from the city council and amended the charter to require referenda. In **Seattle**, *supra*, voters passed a state-wide initiative that overturned a mandatory busing scheme passed by the school board to alleviate racial isolation in local schools. Busing was barred.

In each of these cases, as currently interpreted by Justice Kennedy, the alteration of the locus of the decision making and the new outcomes had at least the risk and probably the purpose of causing specific injuries on account of race. Arguing that the **Seattle** court went beyond what its facts required, Justice Kennedy objected to its new and broad rationale: wherever a government policy benefits primarily a minority and the minority considers that policy in its interest, then any action that places that policy at a different level of government had to face "strict scrutiny." That is what the Sixth Circuit held and what **Schuette** rejects.[8]

Kennedy proceeded to reason **Seattle** out of existence. It impossibly required the Court to determine which policies served the interest of a racial group. There was no guide for decisions. It could not be considered either authoritative or controlling. It assumed that all members of a group had the same interests and demeaned them by assuming they held the same views and that those views were different from other citizens. It would encourage all policy issues to be framed in racial terms. Every issue could be transformed into an equal protection issue—tax policy, housing subsidies, wage regulations, "and even the naming of public schools, highways, and monuments."[9] **Seattle** was also devoid of any standards identifying what policies would fall under the rubric. Kennedy stated that the courts "may not disempower the voters from choosing which path to follow."[10] Claiming that the Michigan facts directed no specific injury to minorities, Kennedy said: "This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it."[11] And the answer is: the voters.

In his brief separate concurrence, Justice Roberts complained that in her dissent Justice Sotomayor did not concede that disagreement on racial issues could be in good faith. In his blistering concurrence, Justice Scalia took issue with the plurality for reasoning **Hunter** and **Seattle** out of existence rather than overruling them outright. He took issue in the text and in footnotes with every-

thing in Justice Sotomayor's dissent, even engaging with her in arcane argument about the famous footnote four in the 1938 **Caroline Products** case, 304 U.S. 144, 151-153, n.4, in which the Supreme Court referred to "discrete and insular" minorities.[12] That footnote is generally held to be an early signal that the Court would actively move to protect minorities. Reaching back to 1938, Scalia derides **Caroline** as ill-reasoned and chides Sotomayor's reliance on it now.[13] Justice Breyer, surprisingly with the plurality in this case, concurred on the grounds that the Michigan referendum involved no anti-minority animus and actually moved the decision from unelected administrators to the voters.

In a fifty-eight page dissent, Justice Sotomayor attacked the majority reasoning at many levels. She argued that the Michigan case fell clearly within the reasoning of **Hunter** and **Seattle** and that *stare decisis* should be followed. She points out that under the new Michigan rule, only racial minorities are prohibited —absent a new constitutional amendment —from seeking admissions advantages. Athletes and legacies remain free to seek their goals through the former processes. She accuses the majority of overlooking the sorry racial history of the United States and goes through many historical examples, especially in the South, but including current restrictions on early voting and voter identification requirements, to suppress minority participation. An affirmative action beneficiary herself, she cites the dire results when "race-sensitive" admissions were banned in California and minority enrollments subsequently plummeted, removing opportunities for students who now could not be admitted and removing the benefit of "diversity" for these institutions.

Although much of the dissent goes mano-a-mano with Justice Scalia, Justice Sotomayor also revives a running argument with Justice Roberts. Roberts famously said "the way to stop discriminating on the basis of race is to stop discriminating on the basis of race." **Parents Involved**, 551 U.S. ___, at 748 ( ). Saying that "race matters," Justice Sotomayor calls that statement out of touch.[14]

Conclusion: Coming to the End of Affirmative Action?

A rear guard legal fight continues over the meaning of the Texas case, **Fisher.**[15]

continued on next page

However, it is clear that the door is closing on judicially approved racial preference admissions cases. **Schuette** hammers another nail in what appears to be a legal coffin.

**Jay S. Goodman is Professor of Political Science at Wheaton College and a retired member of the Rhode Island and Massachusetts bars.*

ENDNOTES

1 *134 S.Ct. at 1629.*
2 ***Id.***
3 *Christopher E. D'Alessio, "A Bridge Too Far: The Limits of the Political Process Doctrine in* ***Schuette v. Coalition to Defend Affirmative Action****," 9 Duke J. Const. Law 103, 123.*
4 ***Id.*** *at 103.*
5 ***Id.*** *at 104.*
6 *134 S. Ct. 1630.*
7 *D'Alessio,* ***op. cit.***
8 *134 S. Ct. at 1634.*
9 *134 S.Ct. at 1632.*
10 *134 S. Ct. at 1638.*
11 ***Id.***
12 ***Id.*** *at 1643*
13 ***Id.***
14 ***Id.*** *at 1676.*
15 *The longstanding dispute at the University of Texas is still playing out. See* ***Fisher v. University of Texas at Austin****, 2014 U.S. App. Lexis 13461 (5th Cir.) (July 5, 2014). The newest rules were set forth in* ***Fisher v. Univ. v. Tex., op. cit.*** ❖

In-House Counsel

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Lawyers and Non-Lawyers Alike

The work product doctrine is not limited to documents prepared by or even reviewed by counsel. Rather, the protection is afforded to materials prepared by a party or its representative. Thus, there is work product protection even when others within the corporate structure pen the relevant documents. Nonetheless, in-house counsel should ensure any documents or materials non-lawyers produce reflect that the work product was prepared in anticipation of litigation.

The District of Columbia Circuit's decision in **United States v. Deloitte LLP**[20] is the leading case on this issue. There, the federal government sought to obtain a memorandum prepared by Dow Chemical Company's independent auditor, Deloitte LLP, summarizing a meeting with Dow employees and outside counsel about the possibility of litigation over a Dow partnership, and the necessity of accounting for such a possibility in an ongoing audit. The court of appeals rejected the government's claim that the Deloitte memorandum was not work-product protected because it was prepared by the accountant, not Dow's counsel.[21] The court observed "the question is not who created the document or how they are related to the party asserting work-product protection, but whether the document contains work product – the thoughts and opinions of counsel developed in anticipation of litigation."[22]

A word of caution: Because in-house counsel cannot always control the substance of what others write, it is much safer to have documents prepared by counsel rather than non-lawyers. This is especially appropriate when meeting summaries are prepared or strategic decisions are made. The same holds true for internal investigations, although the best protection is to retain outside counsel for this purpose.

Don't Volunteer

As with the attorney-client privilege, work product may lose its protection through distribution to government entities or third parties such as outside auditors. The **Deloitte** decision sets the standard for waiver: "[D]isclosing work product to a third party can waive protection if 'such disclosure, under the circumstances, is inconsistent with the

maintenance of secrecy from the disclosing party's adversary.'"[23] "Under this standard, the voluntary disclosure of attorney work product to an adversary or a conduit of an adversary waives work-product protection for that material."[24]

In Deloitte, the court of appeals rejected the government's argument that several documents created by Dow accountants, in-house counsel and outside lawyers no longer had work product protection because they were shared with Dow's outside auditors, Deloitte. The court ruled that Deloitte, even though serving as independent auditors, was not Dow's adversary in the sort of litigation the Dow documents addressed.[25] Nor was Deloitte a conduit to an adversary because Dow expected the auditor would fulfill its obligation to refrain from disclosing confidential client information.[26]

In other contexts, however, courts have ruled that voluntary disclosure of work product waives the protections. This is particularly true of disclosures to the federal government. Most circuit courts have refused to allow companies to preserve work product in the face of disclosure to the government, ruling that compliance with a subpoena amounts to a waiver. For instance, in **United States v. Massachusetts Institute of Technology (MIT)**,[27] the First Circuit held that **MIT**, a defense contractor under Internal Revenue Service investigation, waived the work product protection when it disclosed expense reports to the Defense Contract Audit Agency, a branch of the U.S. Department of Justice, a potential adversary in a dispute over those reports.

To avoid a waiver, in-house counsel can protect their work product in several ways. Counsel should be vigilant that third parties who might undermine the protection are not privy to or present at meetings where work product is to be discussed or distributed. A confidentiality/non-waiver agreement should be negotiated when in-house counsel is faced with a demand from the government. In-house counsel should also obtain a confidentiality agreement with outside auditors. These safeguards will maximize counsel's ability to prevent a waiver of the work product doctrine.

ENDNOTES

1 ***Vidal v. Metro-North Commuter Ry. Co.**, No. 3:12-cv-0248, at *14 (D. Conn. 2014).*

2 *756 F.3d 754, 2014 U.S. App. LEXIS 12115, at *14 (D.C. Cir. 2014).*

3 ***See, e.g., Vidal**, No. 3:12 cv 0248, at *14.*

Annual Neil J. Houston, Jr. Awards

Justice Assistance, a nonprofit criminal justice agency in Cranston, awarded the following individuals with Annual Neil J. Houston, Jr. Awards for their dedicated service and citizen contribution toward the criminal justice profession and the public interest: (l-r) U.S. Court of Appeals, 1st Circuit Judge O. Rogeriee Thompson; Rhode Island District Court Associate Justice William C. Clifton; Justice Assistance Edward V. Healey, Jr. Lifetime Achievement Award Winner, Rhode Island Family Court Chief Judge Haiganush R. Bedrosian; and Houston Award winners: Adler Pollock & Sheehan, PC Shareholder John A. Tarantino, Esq.; RI Department of Corrections Special Projects Coordinator Paula A. Kocon; and Richmond Police Department Chief Elwood M. Johnson, Jr.

4 ***See, e.g., Payne v. C.R. Bard, Inc.***, *C.A. No. 6:11-cv-1528, 2014 U.S. Dist. LEXIS 58202, at *31 (M.D. Fla. 2014).*
5 ***See, e.g., In re Pacific Pictures Corp.***, *679 F.3d 1121, 1127-29 (9th Cir. 2012).*
6 *329 U.S. 495 (1947).*
7 *Fed. R. Civ. P. 26(b)(3)(A).*
8 *Fed. R. Civ. P. 26(b)(3)(B).*
9 *Fed. R. Civ. P. 26(b)(3), advisory committee note.*
10 ***See, e.g., Bridgewater v. Carnival Corp.***, *286 F.R.D. 636, 641 (S.D. Fla. 2011).*
11 ***Payne v. C.R. Bard, Inc.***, *C.A. No. 6:11-cv-1528, 2014 U.S. Dist. LEXIS 58202 (M.D. Fla. 2014).*
12 ***Id.*** *at *21.*
13 ***Id.***
14 ***In re Denture Cream Products Liability Litigation***, *C.A. No. 09-2051, 2012 U.S. Dist. LEXIS 151014 (S.D. Fla. 2012).*
15 ***Id.*** *at *70-75.*
16 ***Id.*** *at *64-66.*
17 ***Mass Engineered Design, Inc. v. Ergotron, Inc.***, *C.A. No. 2:06-cv-272, 2008 U.S. Dist. LEXIS 89151 (E.D. Tex. 2008).*
18 ***Id.*** *at *17.*
19 ***Id.***
20 *610 F.3d 129 (D.C. Cir. 2010).*
21 ***Id.*** *at 136-39.*
22 ***Id.*** *at 136.*
23 ***Id.*** *at 140 (citations omitted).*
24 ***Id.***
25 ***Id.***
26 ***Id.*** *at 141-42.*
27 *129 F.3d 681, 687 (1st Cir. 1997).* ❖

Unpaid Internships

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Interns in RI and the Intern Rights Movement Future

Perhaps recognizing the problems associated with unpaid internships, the State of Rhode Island has acted recently to subsidize and expand the availability of paid internships. In January, Governor Chafee announced a new partnership between the State, several local organizations, and local employers aimed at expanding internship opportunities in Rhode Island. The partnership, part of a year-old campaign called BRIDGE.JOBS, reimburses qualifying employers for 50% of wages paid to eligible interns, and 75% for eligible interns hired by the employer at the conclusion of the internship. These subsidized work experiences are available to both unemployed adults and student interns.

It is too soon to tell if decisions in **Glatt** and **Xueden** are the initial cracks in the dam, or if they will be ignored in other districts. However, it is clear the intern rights movement, although small, is beginning to get the attention of the business and legal community. At the very least, large employers are taking intern lawsuits far more seriously. If you or your clients are utilizing unpaid interns, it is worth your time to keep tabs on the progress of the intern rights movement. In some cases, it may be worth paying certain interns minimum wage to avoid the threat of litigation at a later date. Short of that, the safest approach is to ensure your internship practices conform to all the standards set forth in the DOL Fact Sheet #71. That way, if you fall short on one, you may be saved under a totality of circumstances analysis.

ENDNOTES

1 *Currently, this wage is $7.25 per hour, but there have been proposals to increase it to $10 or even $15. Each state has also established its own minimum wage; in Rhode Island, it is $8 per hour.*

2 ***Walling v. Portland Terminal Co.**, 330 U.S. 148, 152 (1947).*

3 *471 U.S. 290 (1985),*

4 *Id. at 301.*

5 *See http://www.dol.gov/whd/regs/compliance/whdfs71.pdf.*

6 *293 F.R.D. 489 (S.D.N.Y. May 8, 2013)*

7 ***Id.** at 493.*

8 ***Id.***

9 ***Id.** at 494.*

10 ***Id.** at 494.*

11 *Plaintiffs Eric Glatt, Alexander Footman, Kanene Gratts, and Eden Antalik.*

12 *Fox Searchlight Inc. does not produce films itself. Rather, it enters into agreements with corporations created for the sole purpose of producing individual films.*

13 *Fox Entertainment Group is the parent corporation of Fox Searchlight Pictures Inc.*

14 ***Id.** at 532.*

15 ***Id.** at 533.*

16 ***Id.** at 533.*

17 ***Id.** at 533.*

18 ***Id.** at 534.*

19 *On August 26, 2013, the Court certified a class of plaintiffs to include, "only those individuals who held unpaid internships between January 18, 2010 and September 1, 2010 at one or more of the following divisions or affiliates of FEG…". The case remains pending in the Southern District of New York, Case Number 1:11-cv-06784-WHP.*

20 *348 Wis.2d 1 (Wisc. App. 2013).*

21 *943 F.Supp.2d 870 (N.D.I.L. 2013).*

22 *2013 WL 5502803 (S.D.N.Y. October 3, 2013).*

❖

In Memoriam

David C. Morganelli, Esq.
David C. Morganelli, 47, of Milford, MA passed away in 2014. He was born in Framingham in 1967, the son of the late Dr. Peter J. and Barbara Ann DiVittorio Morganelli. He is survived by his wife Janet DiGregorio Morganelli and their three children: Ava Mary, Jane Helen, and Peter Carl. He leaves behind four siblings and their spouses: Peter Morganelli and his wife Karen, Paul Morganelli and his wife Brett, Mark Morganelli and his wife Julia, and Carla Morganelli Mullen and her husband John. After graduating from Marian High School, he entered Providence College, graduating cum laude with a degree in Accounting. David remained a loyal and active Providence College Friar, he held season tickets to Friars basketball games, and was a member of the Providence College Alumni Association Board of Governors. He earned his JD from New England School of Law and his Masters of Law from Boston University School of Law. David was also a Certified Public Accountant. David was most recently employed at the law firm of Partridge, Snow & Hahn where he was chair of the firms Tax Group. David was an active member of the Milford community. He was a member of the Milford Finance Committee, serving as the Chairman. He coached his son's basketball and baseball teams. David was a Town Meeting member, a lector at Sacred Heart of Jesus Parish, and a member of The Foggiano Club in Milford. He was actively involved in the Milford Anti-Casino movement. David strongly believed in giving back to the community he grew up in, that he conceived of and founded the Milford Farmers Market.

Hon. Peter Palumbo, Jr.
Peter Palumbo, Jr. passed away on November 9, 2014. Born July 4, 1928, he was the son of the late Peter and Loretta D'Ambra Palombo, and the beloved husband and companion of Evelyn Cipolla Palombo for 58 years. Besides his wife he is survived by his children, Mary Grace Quinn of West Warwick, Peter Michael Palombo of Broomfield, CO, Anne Jane Fartura of Bristol, and one brother, Richard Palombo of Coventry. He attended Providence Public Schools, achieved Eagle Scout with Boy Scouts of America and graduated Classical High School, Cum Laude. He enlisted in the U.S. Army and served in the Japanese occupation forces where he was Message Center Chief, 34th Infantry Division. He received the World War II Victory Medal and Army of Occupation Medal-Japan. He was a graduate of Harvard College and Harvard Law School and was engaged in law practice at the offices of Christopher DelSesto; DelSesto & Beiner; DelSesto, Nutini & Palombo; Nutini, Palombo & Piccirilli; and Palombo, Piccirilli & Sciacca. He was admitted into practice in the U.S. District Court for RI and the U.S. 1st Circuit Court of Appeals. He served as City of Cranston City Solicitor and was Executive Counsel to Governor DiPrete, Associate Justice of the Rhode Island Family Court and volunteered and served as Mediator with the Rhode Island Supreme Court. He was an avid aviation enthusiast and a private pilot with commercial and instrument ratings. He owned and flew his own Cessna 182 aircraft for 40 years. He volunteered and served as a member and as Legal Officer for the Rhode Island Wing of Civil Air Patrol. He was a member of the Harvard Club of Rhode Island, Harvard Law School Association, Aircraft Owners & Pilots Association, Rhode Island Pilots Association and Ancient & Secret Order of Quiet Birdmen.

Robert O. Tiernan, Esq.
Robert O. Tiernan, 85, of Matunuck Beach passed away on October 15, 2014. He was born in Providence, son of the late Joseph and Mary McConnell Tiernan. He was the husband of the late Dorothy McNally Tiernan. Bob graduated from LaSalle Academy, where he was an All State hockey player, Providence College where he was a celebrated track star, and the Catholic University Columbus School of Law in Washington, DC. After graduating from law school, he returned to Rhode Island to practice law in Providence. He was elected to the State Senate in 1960, representing Warwick, RI where he and his wife Dorothy raised their three sons. In 1967, he was elected to the United States Congress and proudly represented the State of Rhode Island as a Congressman for seven years. Following his years in Congress, he was appointed to the Federal Election Commission by President Gerald Ford and served two terms as an election commissioner in Washington, DC. He returned to Rhode Island in the mid-1980s, and continued his law practice until his retirement in 2009. In 2002, Bob was inducted into the Rhode Island Heritage Hall of Fame. Bob took great pleasure in his travels to Ireland, particularly his visits to Ballybunion. He was a long time member of Point Judith Country Club. He dearly loved his family and many friends, and had a deep fondness for Rhode Island. Bob is survived by his son Michael Tiernan and wife Nola of Silver Spring, MD, son Christopher Tiernan of Burbank, CA, his dear friend and longtime companion, Lois Quinn, his brother Peter Tiernan and wife Barbara, and sister Patricia Fegan.

Lawyers on the Move

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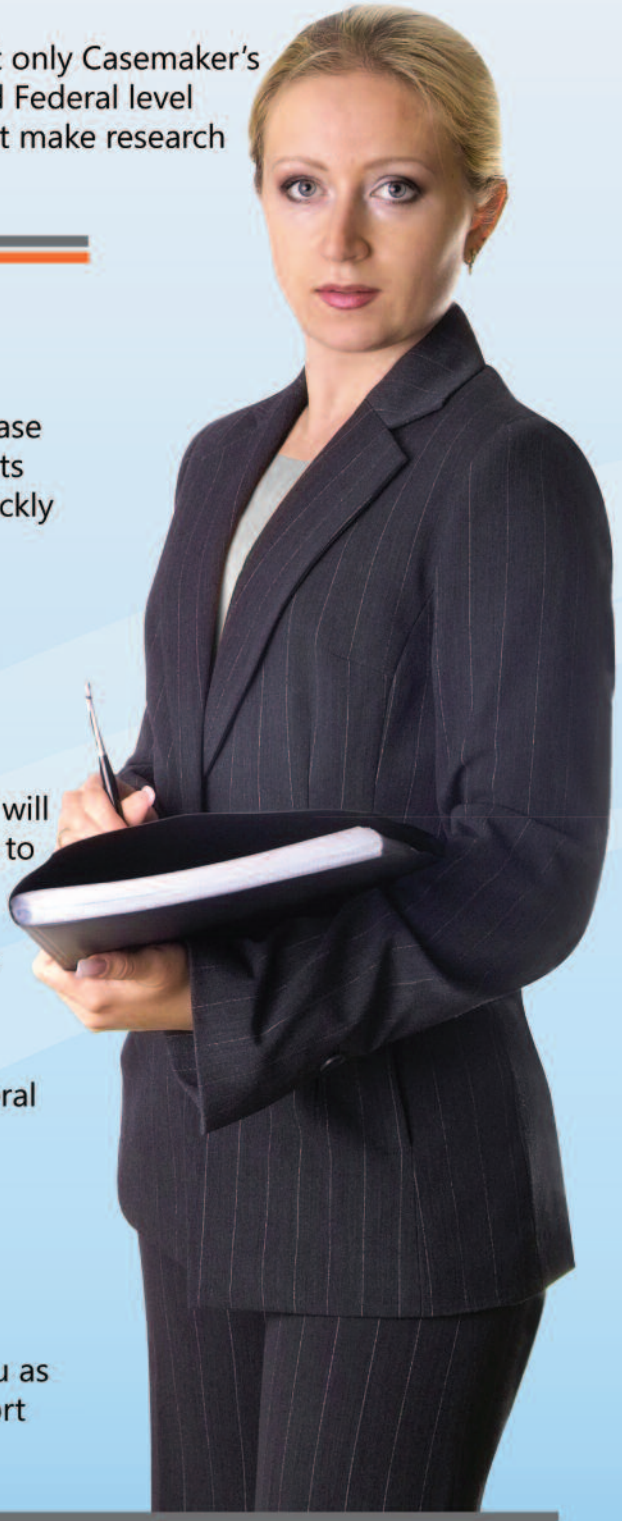

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