



# Rhode Island Bar Journal

Rhode Island Bar Association Volume 65. Number 6. May/June 2017

**The Case of *Trevett*  
v. *Weeden*: 1786 – 2004**

**Five Things the Rhode Island  
Supreme Court Wants You to Know  
About Civil Trial and Appellate Practice**

**You're fired! Voter recall of elected  
officials in Rhode Island**



# You're fired!

## Voter recall of elected officials in Rhode Island

---



Samuel D. Zurier, Esq.  
Providence

**Because the recall process has not yet been successful in Rhode Island, we do not completely know whether it improves accountability, creates chaos, or achieves some combination of the two.**

This past Election Day provided the setting for an unusual campaign. Citizens stationed outside precincts in a Providence neighborhood engaged voters in a discussion about their incumbent City Councilman, when neither his name nor the office he held was on the ballot. In the weeks leading up to Election Day, the councilman sued his constituents in Superior Court (and appealed to the Supreme Court) to enjoin their Election Day activities.<sup>1</sup> When his claim for judicial relief was denied, the councilman hit the campaign trail, discouraging his constituents from speaking to the volunteers or signing the petitions on which his name appeared.<sup>2</sup> The incumbent in question is in the middle of a four-year term, and his constituents canvassed signatures to authorize a special election to decide whether he should be recalled from office.

The Election Day campaign yielded more than 1,800 signatures.<sup>3</sup> In March, 2017, the Board of Canvassers certified petitions containing 2,383 signatures, and a recall election is currently scheduled for May 2, 2017.<sup>4</sup> To the best of the knowledge of the Rhode Island League of Cities and Towns,<sup>5</sup> this effort will make history if it succeeds, as previous recall campaigns in Rhode Island have been generally rare and uniformly unsuccessful.

While the political consequences (if any) will be local, the Constitutional and policy issues this campaign raises may help answer several questions about the form of representative democracy that prevails in the State of Rhode Island. When voters elect someone to a fixed term of office, by what measures (if any) should the official be held accountable prior to the next election? If voters are granted the authority to retract their approval mid-term, should this power be plenary, or should it be limited to specific types of official misconduct? When voters exercise this power, what boundaries (in terms of timing or thresholds of petition signatures) should be imposed? If the current Providence recall campaign succeeds, will it be a victory for the voters, or the opening of a Pandora's box of a "permanent campaign" that makes it

impossible for elected officials to govern in a community's long-term interest?

To help understand these issues, this article first will review the recall election process in Rhode Island, describing notable prior (failed) efforts and governing municipal and State law. It will then offer a brief overview of experience and laws in other states. Finally, it will discuss how the different forms of recall law advance public policy goals, suggesting ways to improve our current structure.

### I. Recalls in Rhode Island

#### A. Attempted Recalls

The closest any Rhode Island community came to recalling an elected official probably happened in Exeter in December, 2013. At that time, the Rhode Island Firearms League aimed their sights at four Exeter Town Council members who had passed an ordinance regulating the issuance of concealed weapons permits by the Town Clerk.<sup>6</sup> To support their efforts, the Firearms League established a political action committee with the pretentious name of "We the People," which poured several thousand dollars of ammunition into their campaign. When the people of Exeter spoke, the recall effort failed by a roughly two-to-one margin.<sup>7</sup>

Other recall efforts in Rhode Island did not even reach the ballot. In 2014, a group of Woonsocket voters filed an initial affidavit seeking the recall of two City Council members because of their vote in favor of all-day kindergarten, but the proponents failed to collect sufficient signatures to require a recall vote.<sup>8</sup> In Tiverton in 2015, citizens targeted three Town Council members for a range of issues, including a vote concerning development of a mall.<sup>9</sup> The effort ended when the proponents failed to collect enough signatures necessary to put it on the ballot. Also in 2015, citizens began the process to recall the North Smithfield Town Administrator for his claimed "lack of leadership" and support of a controversial charter school, but their effort also failed due to a lack of signatures.<sup>10</sup> The League of Cities and Towns is unaware of any other efforts in recent history.<sup>11</sup>

Rhode Island voters amended Article IV,



## 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.

### *Help Our Bar Foundation Help Others*

#### RHODE ISLAND BAR FOUNDATION GIFT

##### PLEASE PRINT

My enclosed gift in the amount of \$ \_\_\_\_\_

Please accept this gift in my name

or

In Memory of \_\_\_\_\_

or

In Honor of \_\_\_\_\_

Your Name(s) \_\_\_\_\_

Address \_\_\_\_\_

City/State/Zip \_\_\_\_\_

Phone (in case of questions) \_\_\_\_\_

Email: \_\_\_\_\_

Please mail this form and your contribution to:

**Rhode Island Bar Foundation**

**41 Sharpe Drive**

**Cranston, RI 02920**

**Questions? Please contact Virginia Caldwell at 421-6541**

**or [gcaldwell@ribar.com](mailto:gcaldwell@ribar.com)**

Section 1 of its Constitution to permit recall elections of the State's general officers with the introduction of four-year terms in the 1994 election. The Constitution does not provide for the recall of members of the General Assembly. There is no reported instance of a recall petition of a Rhode Island general officer reaching a significant stage of progress.

#### **B. Rhode Island laws governing recall elections**

As displayed in a chart at the end of this article, the charters of nineteen Rhode Island cities and towns permit recall of certain local legislators, administrators and other elected officials under widely varying procedures and requirements.<sup>12</sup> The Providence Home Rule Charter, whose provisions were tested in Superior Court in October and likely will be again this spring, contains the following typical combination:

The time window for recalling a Providence Mayor or City Council member opens after the official has been in office for at least six months, and closes a year before the conclusion of their four-year terms.<sup>13</sup> To start the process, a resident must present a declaration of intent with the signatures of 300 (City Council) or 1,000 (Mayor) signatures of qualified City electors for the position in question.<sup>14</sup> Once the signatures are verified, the proponents have 120 days in which to collect signatures of 15% of the City's qualified electors (Mayor) or 20% of the qualified electors of the council member's ward.<sup>15</sup> If these signatures are verified, a special election will take place within 60 days on the specific question of whether the incumbent be removed from office.<sup>16</sup> If the majority of votes cast favor removal, the incumbent will be deemed removed upon certification by the board of canvassers.<sup>17</sup> The resulting vacancy will then be filled with a special election.<sup>18</sup> The City Council has the authority to adopt legislation to implement the Charter provisions,<sup>19</sup> but has not exercised that authority to date.

Following the pattern of other Rhode Island municipalities, the Providence recall process does not limit the reasons voters may choose to recall their elected officials; instead, elected officials are effectively "employees at will" – subject to recall for any reason (or no reason at all) should the voters meet all the procedural requirements of timing, signatures

and votes. While the Providence Home Rule Charter does not explicitly address the issue of whether a recalled official can run in the special election to fill the seat he or she has vacated, the Supreme Court has decided this issue. In *Gelch v. State Board of Elections*,<sup>20</sup> then-Mayor Buddy Cianci filed papers to be a candidate in a special mayoral election to fill the vacancy created by his first criminal conviction while in office. The Supreme Court interpreted Section 206 of the Providence Home Rule Charter to render Cianci ineligible to serve as Mayor for the remainder of that four-year term.<sup>21</sup>

Other cities and towns offer variations on this general theme. Exeter (the target of the Rhode Island Firearms League) has one of the lowest signature requirements at 10% of eligible voters, while Richmond and West Warwick are distinctive by permitting recall petitions at any time.<sup>22</sup> On the other hand, Cranston and North Kingstown have a narrow time window, limiting petitions to a one-year interval after the first six months and before the last six months of an office holder's two-year term.<sup>23</sup> All of Rhode Island's cities and towns that authorize recall contain the same "employee at will" feature found in Providence. In this way, the recall process, which depends on the will of the voters, is less restrictive than impeachment or other ways to remove a sitting elected official from office.<sup>24</sup>

Unlike local recall provisions, Article IV, Section 1 of the Rhode Island Constitution limits recall petitions to instances where the elected official has engaged in actual or possible misconduct, as documented by a felony indictment, a misdemeanor conviction, or an Ethics Commission probable cause finding. The window of eligibility opens after the general officer has been in office for six months, and closes twelve months before the expiration of his or her term. The Constitution does not have a recall provision for General Assembly members.<sup>25</sup>

## II. Recalls in other states

### A. National experience with recalls

Recall laws date back to the Massachusetts Bay Colony and the Articles of Confederation.<sup>26</sup> More recently, numerous state and local governments began enacting voter recall laws in the Progressive Era, beginning with the city of Los Angeles, and the states of Michigan, and Oregon.<sup>27</sup> Today, there are major

# Good Business for Good Lawyers

## New Lawyers Build Their Practices with the Bar's Lawyer Referral Service!



**Attorney Jack D. Pitts**, a Lawyer Referral Service member, enthusiastically supports LRS. *Rhode Island's Lawyer Referral Program has provided me, and countless other attorneys, with the opportunity to represent individuals, families and businesses in our areas of concentration and expertise. In an incredulous time,*

*I take pride in participating in an organization where the soliciting general public look to, and find, our Association and its membership, as a competent and trustworthy resource.*

Membership in the Rhode Island Bar Association's Lawyer Referral Service (LRS) is an excellent and inexpensive way to increase your client base and visibility within the community while expanding public access to legal representation. Optional special LRS projects include: **Ask A Lawyer** providing live, television studio lawyer panels in partnership with Channel 10; **Senior Citizen Center Clinics** throughout the year and the state; **Reduced Fee Program** offered to qualifying clients; and the **Arts Panel** for local artists' legal needs all offer unique opportunities for increasing your business while you provide an important public service to your community.

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



advertising



public relations



social media

# andvertisinginc

[bitly.com/make-and-not-ads](http://bitly.com/make-and-not-ads)



# YOUR CONNECTICUT CONNECTION



21 Huntington Street  
New London, CT 06320  
860-443-7014



— ATTORNEYS AT LAW —

1050 Main Street, Suite 8  
E. Greenwich, RI 02818  
401-385-3877

## AREAS OF PRACTICE:

Personal Injury	Bankruptcy	Landlord & Tenant
Real Estate	Wills & Probate	DUI
Commercial Litigation	Family Law	Foreclosure Defense

[www.messiermassad.com](http://www.messiermassad.com)

OCEAN  
STATE *Weather*

STEVEN R. CASCIONE  
*Meteorologist*

5 Maplecrest Drive  
Greenville, Rhode Island 02828  
Tel: 401-439-9023

CONSULTING & EXPERT WITNESS SERVICES

internet compilations of recall election data, namely the Recall Elections Blog<sup>28</sup> and Ballotpedia.<sup>29</sup> These sources reported a total of around 200 recall efforts involving 340 officials in 31 states in 2016, led by California (58 officials targeted), Colorado (32) and Michigan (31). Forty-five officials (including sixteen mayors) were recalled from office nationally in 2016, and ten more officials resigned before the recall vote took place.<sup>30</sup>

The great majority of recall efforts nationally are directed at local officials. Only two governors have been recalled: Lynn Frazier of North Dakota in 1921 and Gray Davis in California in 2003. Governor Evan Meacham of Arizona was impeached in 1988 while a recall petition was underway, and Governor Scott Walker of Wisconsin survived a recall effort in 2012.<sup>31</sup> During 2011-13, seventeen state legislators faced recall votes, of which eight were removed from office.<sup>32</sup>

### B. Recall laws in other states

Recall laws vary widely across the country in many of the same ways they vary among Rhode Island cities and towns. In contrast to Rhode Island's local rules, several states have enacted measures to discourage purely political recalls, such as requiring the petitioners to list the general grounds on which they base their petition,<sup>33</sup> limiting recalls to specific permitted grounds (usually involving malfeasance),<sup>34</sup> or requiring a court to review whether the stated charges are legally sufficient or, in some states, supported by clear and convincing evidence.<sup>35</sup>

### III. Policy considerations and recommendations

The wide range of recall procedures and requirements reflects diverging views of the goals and purpose of this voter prerogative. At one end of the spectrum, voters can recall elected officials throughout most of their term for any reason. This vision was advanced during the Progressive Era, along with voter initiatives and referenda. The latter two Progressive reforms have generated controversy in such states as California, where critics contend the process can be hijacked by big money interests, and can place valuable civil rights at risk.<sup>36</sup>

Locally, the Exeter recall effort, which targeted Town Council members for their vote on a single gun-related measure, fits this mold. Critics of this type of

“extreme accountability” worry that it can prevent elected officials from making difficult or long-term decisions, as officials find themselves engaged in a “permanent campaign” rather than having an opportunity to act as statesmen and stateswomen. Rhode Island’s voters accepted this line of thinking by extending the governor’s term of office from one year to two years in 1912, and to four years in 1994. There also are dynamic considerations, as the volume of recall efforts in other states appears to expand over time. For example, according to Ballotpedia,<sup>37</sup> California had a total of eleven recall efforts between 1913 and 1996, twelve during 1997-2008, but 243 in the last eight years.

At the other end, states such as Minnesota require that recall petitions be supported by proof of malfeasance as found by a judge in an evidentiary hearing, eliminating recalls based on political differences. This approach embodies the philosophy of Edmund Burke, a distinguished member of the British Parliament in the eighteenth century, who once famously declared “your representative owes you, not his industry only, but his judgment; and he betrays instead of serving you if he sacrifices it to your opinion.”<sup>38</sup> Mike Burk, the aptly named Chair of the Tiverton Democratic Town Committee, echoed Edmund’s view of representative democracy when he wrote a letter to the editor making this argument against the recall of sitting Republican town council members:

While our Town Charter allows a recall for no reason, recalls should not be about disagreements over decisions made (or not), how quickly (or slowly) a decision is made, or because a councilor is bombastic and brash. As a representative democracy, we elect councilors every two years and trust them to make decisions based on the public good. If we don’t like their behaviors or decisions, we can vote against them the next time around.<sup>39</sup>

Extreme Burkeanism has its own problems. The Minnesota model, which requires judicial determinations of malfeasance before permitting a recall petition to go to the voters, create hurdles that might be impossible for ordinary citizens to surmount. In this regard, the Rhode Island Constitution’s list of permitted

*continued on page 38*

## Your Bar’s 2017 Annual Meeting Highlights

Thursday, June 15, Keynote Session

### *The Supreme Court in a Time of Transition*

The role of Solicitor General is ultimately to gather information, and decide what position the government should take before the Supreme Court, but there is more to it than meets the eye. Providing his perspectives from some of his noteworthy cases argued before the Court during his time as Solicitor General, Attorney Donald B. Verrilli, Jr. discusses what litigating before the Supreme Court in a time of transition means for our nation, given the current political climate.



Our speaker, **Donald B. Verrilli, Jr.**, is one of the nation’s leading Supreme Court and appellate advocates. He served as Solicitor General of the United States from June 2011 to June 2016 under the Obama Administration. During that time he argued dozens of cases before the U.S. Supreme Court, was responsible for representing the United States government in all appellate matters before the High Court and in the courts of appeals, and was a legal advisor to President Barack Obama and the Attorney General. Mr.

Verrilli’s landmark victories include his successful advocacy in defense of the Affordable Care Act in *National Federation of Independent Businesses v. Sebelius* and *King v. Burwell*; his successful advocacy for marriage equality in *Obergefell v. Hodges* and *United States v. Windsor*; and his vindication of federal immigration authority in *Arizona v. United States*. Currently, Mr. Verrilli is a partner with Munger, Tolles & Olson, and the founder of its Washington, D.C. office, where he focuses on representing and counseling clients on multi-dimensional problems, where litigation, regulation and public policy intersect to shape markets and industries in our evolving economy.

Please see your **2017 Rhode Island Bar Association Annual Meeting Brochure** for more information about the Meeting’s 38 great CLE-credited seminars, social events and other interesting and informative activities and to access your registration form, or go to the Bar’s website at **ribar.com** to download a Brochure pdf and an interactive registration form. **Please note, to save \$25, you must register before June 9, 2017.**



**JOSEPH A. KEOUGH**  
Retired Magistrate Judge /  
Rhode Island Superior Court

Is Now Available For  
**Mediation & Arbitration Services**  
*Torts, Business Disputes, Domestic Matters*

41 Mendon Avenue, Pawtucket, RI 02861  
(401) 724-3600 [jakemast235@aol.com](mailto:jakemast235@aol.com)

**Alternate Dispute Resolution**

# Why Outsource Legal Writing and Research?



- Gain the fresh perspective an outside attorney can bring to your case;
- Provide a sounding board to help frame and narrow the issues;
- Weather the inevitable busy times; and
- Avoid fixed overhead. Pay only for the time to complete the project

## Law Offices of Maurene Souza

120 Wayland Avenue, Suite 7

Providence, RI 02906

401-277-9822 [souzalaw@cox.net](mailto:souzalaw@cox.net)

Licensed in Rhode Island and Massachusetts.

## You're fired!

*continued from page 21*

bases for recall of general officers (felony indictment, a misdemeanor conviction, or an Ethics Commission probable cause finding) has the advantage of self-authentication, providing voters with threshold conditions that can be objectively verified without protracted court proceedings.

While nobody is asking for this writer's advice, he would recommend adjusting the current procedures to achieve a better balance of these goals. When an elected official engages in misconduct, there should not be any time limits (either after the start or before the end of a term of office) to recall the official. Providence residents remember the agony of Plunderdome, in which a sitting mayor remained in office through years of a high-profile racketeering investigation, trial and conviction, leaving behind a stain the City is still removing fourteen years after he left City Hall for federal prison.

In contrast, the pot shots misfired by the Firearms (minor) Leaguers in 2013 exposed the havoc that outside groups with ideological agendas can wreak upon local government. For purely political or ideological recalls, time boundaries make sense; indeed, one can question whether any such recalls are necessary or appropriate when a public official must win re-election every two years.

The current recall effort in Providence might not provide a perfect "test case" to consider these issues. While the councilman's argument to the court and to the voters has been that his election entitles him to four years in office barring a Cianci-style conviction and imprisonment, the recall proponents are not litigating a single vote (as in Exeter) or a general grievance of voter dissatisfaction (as in Tiverton). Instead, the Providence petitioners have based their campaign on specific instances of actual or potential malfeasance, namely the councilman's arrest and indictment on multiple counts of embezzling more than \$127,000 from a non-profit youth sports organization and misappropriation of campaign funds.<sup>40</sup> The specificity and gravity of the case for this recall help to explain the dramatic collection of 1,800 signatures in a single day (and 2,383 altogether) in a district in which the incumbent won his most recent election with 1,955 votes.<sup>41</sup> As this article

## Buying, Owning, and Selling Rhode Island Waterfront and Water View Property

### What Readers Are Saying:

"Valuable 'take-away' information you can't find elsewhere. Anyone who has anything to do with coastal property in Rhode Island....must have this book. I have never seen anything like it."

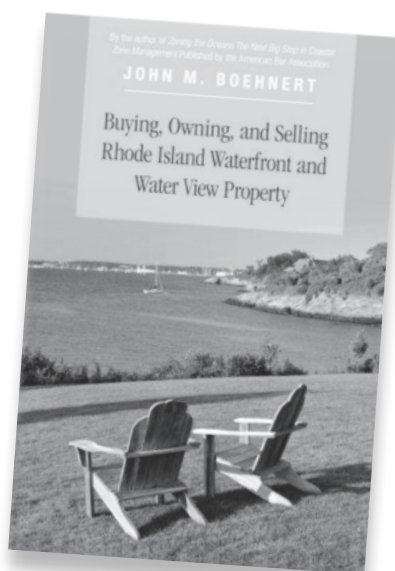
"I thought that after practicing environmental and civil engineering....for 30 years, I knew this system inside out. I learned something new in each chapter of John Boehnert's book, which is humbling"

"I learned a lot about real estate transactions and I have been in the real estate business for many decades."

"Written...to be useful for professionals and ....property owners."

"A must read for those....buying, selling and owning waterfront and water view property."

"Excellent information. Easy to read and understand."



Available at  
[amazon.com](http://amazon.com)



goes to press, the City Council set an election date of May 2, 2017.<sup>42</sup> With that said, there may be more legal challenges along the way in this unproven area, and perhaps a spirited campaign from the incumbent to hold onto his seat if and when the matter comes to a popular vote.

#### IV. Conclusion

Rhode Island pays a price every time an elected official squanders the public trust, and that price increases when the official in question refuses to step down unless or until imprisonment or some other legally required removal is complete or at least imminent. This lack of self-restraint may result from the official's personality or calculations of self-interest, but usually is publicly justified as the continued acceptance of an obligation to complete a term of office established by law following a free and fair election. The recall process offers a solution to this problem by using democratic elections to hold elected officials more accountable. Because the recall process has not yet been successful in Rhode Island, we do not completely know whether it improves accountability, creates chaos, or achieves some combination of the two. The current recall laws and ordinances at the state and local level strike a balance between Progressive and Burkean models of representative democracy, but those procedures could be improved by developing one set of (Progressive or broader) rules for cases of misconduct (especially if it is objectively documented) and a second set of (Burkean or stricter) rules for recalls arising from political or policy-based considerations.

For these reasons, the actions of a few thousand voters in a Providence neighborhood may foster a lively discussion of how democracy works (or should work) in the Ocean State. Stay tuned.

#### ENDNOTES

1 See *Jackson v. Haugen*, PC-2016-4909, PC-2016-4910; *Jackson v. Haugen*, SU-16-0318, SU-16-0319.

2 Author's discussions with participants.

3 See NPR report, <http://ripr.org/post/collecting-signatures-election-day-organizers-say-jackson-recall-effort-well-under-way>.

4 See PROVIDENCE JOURNAL, March 4, 2017, p. A1 and PROVIDENCE JOURNAL, March 14, 2017, p. A2.

5 I appreciate the assistance of Peder Schaefer, Associate Director of the Rhode Island League of Cities and Towns and Dan Beardsley, soon to be Director Emeritus, who generously shared their vast knowledge and research.

6 At the time of the recall vote, the officials in question were midway through a 2-year term. All

## FLORIDA LEGAL ASSISTANCE



Marc J. Soss, Esquire

(941) 928-0310

[mjs@fl-estateplanning.com](mailto:mjs@fl-estateplanning.com)

[www.fl-estateplanning.com](http://www.fl-estateplanning.com)

Estate Planning

Probate Administration

Probate Litigation

Elder Law

Corporate Law

Real Estate Closings

Call us today to learn how our qualified business valuers have helped clients with:

- Mergers/acquisitions
- Business purchase/sale
- Succession planning or buy/sell agreements
- Estate and gift taxes
- Divorce asset allocation
- Adequacy of insurance
- Litigation support
- Financing
- Mediation and arbitration

**Want a qualified, expert  
business valuation?  
Count on us.**

**PICCERELLI, GILSTEIN  
& COMPANY, LLP**



Certified Public Accountants and Consultants

William J. Piccerelli, CPA, CVA ♦ John M. Mathias, CPA, CVA ♦ Kevin Papa, CPA, CVA

144 Westminster Street, Providence, RI 02903 ♦ 401-831-0200 ♦ [pgco.com](http://pgco.com)