



Rhode Island

# Bar Journal

Rhode Island Bar Association Volume 62, Number 3, November/December 2013

**Domestic Use of Drones**

**Estate Planning for  
Florida Snowbirds**

**Economic Stewardship**

**Book Review:  
*Zoning the Oceans***



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### Front Cover Photograph by Brian McDonald Herreshoff Marine Museum, Bristol

Catboat Sprite, built in 1859 by Captain Nathaniel Herreshoff who noted this was “the first of what was to become my life’s work.” Sprite is said to be the oldest catboat and private yacht in the United States. The Herreshoff Marine Museum/America’s Cup Hall of Fame is dedicated to the education and inspiration of the public through presentations of the history and innovative work of the Herreshoff Manufacturing Company and the America’s Cup competition.

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# Gaining Perspective on Limited Scope Representation



J. Robert Weisberger, Jr. Esq.  
President  
Rhode Island Bar Association

*Although some jurisdictions have drafted guidance under their rule, Rhode Island has not, including whether or not an attorney must write their name on the document prepared with their assistance.*

In his President's Message in the January/February 2013 *Rhode Island Bar Journal*, our immediate past President Michael McElroy wrote to us about the dangers of the *pro se* explosion and effective unbundling of legal services, also known as limited scope representation. After a presentation about the subject at the Bar's Annual Meeting in 2011 and attending a New England Bar Association meeting in 2012 where unbundling was a hot topic, Mike and I agreed the Rhode Island Bar Association needed to address limited scope representation, especially in light of what is permissible under Rule 1.2(c) of the Rhode Island Rules of Professional Conduct.

We knew this subject would require study and analysis. Therefore, last year, Mike, with great prescience, recommended that the Executive Committee and House of Delegates (HOD) create a task force of lawyers and jurists to study the issues and report back to the HOD.

As the task force chairperson, I did the initial research to prepare a package for review, prior to the task force first meeting. At that meeting, we agreed to break into several subcommittees to separately investigate each branch of our judiciary to determine the utility of limited scope representation. We learned there was a need, in certain venues and areas of practice, for limited scope representation. Accordingly, we studied what had been done in this regard in the other 49 states. We learned that most, if not all, states had the same Rule 1.2(c), based on the American Bar Association (ABA) Model Rule, as we do here in Rhode Island, which states, "a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."

After lengthy review and discussion, the task force agreed to prepare a position paper containing its recommendations. Once the position paper is reviewed and accepted by all the task force members, it will be transmitted to our Bar Association's House of Delegates for review and, hopefully, approval. The drafting committee is currently in the process of crafting the position paper. If all goes according to plan, which is

often the exception, the position paper will be completed sometime this fall.

The unbundling of legal services, an appropriate but somewhat misleading term referencing limited scope representation, is when an attorney represents or assists a litigant with part, but not all, of his or her legal matter. The attorney and litigant enter into a detailed agreement defining what tasks the attorney and the litigant are individually responsible for. In several jurisdictions, one way an attorney can practice limited scope representation is by coaching the litigant outside of court on the law and the rules of procedure without ever filing an appearance or appearing in court to represent the litigant. The attorney may also draft documents for the litigant to file without filing an appearance or going into court with the litigant. Although some jurisdictions have drafted guidance under their rule, Rhode Island has not, including whether or not an attorney must write their name on the document prepared with their assistance.

The ABA's position on this issue is that no disclosure is required. Some jurisdictions require disclosure and others, such as Massachusetts, take a middle tier approach that disclosure must be made when prepared with the assistance of counsel, but no identification of the preparer needs be made. This practice is referred to as ghostwriting. In Massachusetts, the attorney can also appear in court with the litigant for part of the entire case, for example only a pre-trial conference. In some jurisdictions, such as Massachusetts, this has been implemented by allowing an attorney to file a Notice of Limited Appearance describing the issue or event on which the attorney is representing the litigant. After the completion of the work, the attorney files a Notice of Withdrawal of Limited Appearance.

Parties benefit by having some legal assistance in prosecuting or defending a case, and courts will benefit by having documents prepared properly and issues presented to the court more clearly, thereby saving court time. Attorneys benefit by being able to help a party for a short time, without being required to remain in a case until completion, and be paid in a timely

fashion as part of the specific agreement between the party and attorney.

Limited scope representation is currently being used successfully in several other jurisdictions, including Alaska, California, Colorado, Florida, Maine, Nevada, New Hampshire, New Mexico, Washington, Wyoming and very successfully in our sister state, the Commonwealth of Massachusetts.

And now, as Paul Harvey used to say, page 2.

While attending the Annual ABA meeting in San Francisco this past August, I attended a seminar regarding Limited Licensed Legal Technicians (LLLT). This is a growing trend to create these positions, if court rules permit. To my knowledge, there is only one state that has enacted such a license thus far, the state of Washington, and it was Washington attorneys who presented the LLLT-related ABA program. In their opinion, because there was such an explosion of self-represented litigants (*pro se* litigants) in their jurisdiction, as well as the unauthorized practice of law by purveyors of forms and advice, LLLTs would help reduce the unauthorized practice of law and provide legal assistance at a more reasonable rate to otherwise self-represented litigants. I thought this was very interesting, but requires statistical analysis. For instance, how do they know that those generators of forms and advice who are engaged in the unauthorized practice of law would take the time and spend the money to obtain such a license, rather than contin-

uing to attempt to fly under the radar? How did they know that otherwise self-represented litigants would pay for the services of a limited license legal technician when they were not willing to pay for the services of an attorney? And, how do we know what the discount rate would be that would attract otherwise *pro se* litigants to limited license legal technicians? After all, such a subclass of professionals would also have to make enough money to support their efforts.

After the seminar, I asked the presenters whether they had considered limited scope representation as a potential solution to the *pro se* litigation explosion and the unauthorized practice of law, as this is a very cost effective way for self-represented litigants to obtain the assistance of counsel at reduced cost and avoid seeking advice through those who would be engaged in the unauthorized practice of law. To my amazement, they said they were just studying the unbundling of legal services now. It seemed to me they had placed the cart before the horse.

I respectfully submit that, since we already have a rule that allows limited scope representation, it would be much better to define it. This approach will make the parameters clear and allow its use as a tool for greater access to and improved administration of justice and provide better guidance to legal practitioners in the limited scope representation field, ensuring they do not run contrary to the Rules of Professional Responsibility. ❖

## Attorney's *Bar Journal* Article Sparks Newspaper Coverage



**Jenna Wims Hashway, Esq.**  
Judicial Law Clerk to Chief Justice Paul A. Suttell,  
Rhode Island Supreme Court

Jenna Wims Hashway's *Rhode Island Bar Journal* article, *Cold War Cancer: Texas Instruments and the Energy Employees Compensation Program*, was the focus of a front page story in the Sunday, September 8th issue of *The Sun Chronicle* in Attleboro, Massachusetts. Attorney Hashway's article, published in the September/October 2013 *Bar Journal*, details workers' health issues related to the nuclear defense industry and an associated federal program designed to help those workers and their families. Attorney Hashway's article has a poignant, personal element, as her father Lou Wims was taken by lung cancer, most likely caused by his years of service for a local nuclear defense manufacturing company.

## 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.
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- 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.
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- Submissions are preferred in a Microsoft Word format emailed as an attachment or on disc. Hard copy is acceptable, but not recommended.
- Authors are asked to include an identification of their current legal position and a photograph, (headshot) preferably in a jpg file of, at least, 350 d.p.i., with their article submission.

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# Coming Home to Roost – Domestic Use of Unmanned Aerial Vehicles



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



**Matthias Rubekeil**  
2013 Suffolk Law School  
Graduate

*If the appearance of drones hovering in the sky becomes commonplace rather than novelty, and subsequently society becomes desensitized to seeing drones floating over the backyard or the football field, then a search by drone might cease to interfere with the reasonable expectation of privacy.*

## Introduction

Today's toddler learns to operate a smart phone even as she learns to walk. Once upon a time, she might have flown radio-controlled airplanes. How soon will it be until she flies a drone? Unmanned robotic vehicles, more commonly known as drones, are no longer obscure military contraptions used only to combat foreign insurgents. Drones are flying, swimming and driving in the homeland, some of them right here in Little Rhody. If you've sailed in Narragansett Bay or hopped the ferry to Block Island, chances are that a U.S. Navy UUV (Unmanned Undersea Vehicle) has been lurking in the waters below you, mapping the ocean floor or autonomously navigating from Point A to B.<sup>1</sup> If you have driven around New Mexico, you could have been tracked by a U.S. Air Force UAV (Unmanned Aerial Vehicle) for drone pilot training.<sup>2</sup> The U.S. Customs and Border Protection agency is using Predator drones to monitor the Texas/Mexico border. They fly over Arizona, Florida, North Dakota and Washington State.<sup>3</sup> Police departments in Texas, Washington State and California have begun using smaller drones or are applying for permits to use them. Individuals are also flying drones for private use. For about \$300 you can get all the necessary equipment to fly a small drone equipped with a high definition streaming-capable camera controllable via smartphone or tablet.

The demand for drones for government and private use is rising quickly, with industry experts predicting worldwide UAV spending reaching \$89 billion in the next ten years.<sup>4</sup> However, legislative bodies, policy-makers, and the courts are struggling to keep pace with these rapid developments. The proliferation of drones will create myriad legal and policy issues, while bringing new business and market opportunities.

## What is a Drone?

Typically, drones are vehicles without an onboard operator. They are controlled via ground control

stations or may operate autonomously through onboard computers. They are manufactured by domestic and international corporations, including those already present in the Rhode Island, like Raytheon and Textron.<sup>5</sup> Yet drone production is not exclusive to big defense contractors. Start-up companies can compete and are actively supported and encouraged to do so by agencies like the Defense Advanced Research Projects Agency (DARPA).<sup>6</sup> This article focuses on UAVs due to their significant legal and policy impacts on the citizenry.

UAVs come in many sizes and capabilities. The MQ-1 Predator drone, made infamous by the media, looks similar to a regular airplane. It is remotely operated and capable of being armed. But the Predator is already old news. Its successor, aptly dubbed the MQ-9 Reaper, comes with a significant increase in payload, fuel capacity and autonomous capabilities, including taking off and landing. The Avenger, the third iteration currently in development, is larger and will perform better with no human input whatsoever. Meanwhile, AeroVironment has developed the Nano Hummingbird, a remotely operated, hummingbird-shaped UAV with a wingspan of 6.5 inches that weighs two-thirds of an ounce. While drones like the Predator series are used for reconnaissance and combat, the Hummingbird only delivers imagery. There are also small drones that are themselves weapons. The Switchblade, another AeroVironment drone named for the way its wings deploy upon launch, is an anti-personnel weapon that can be carried in the packs of soldiers. A soldier can view imagery from the Switchblade on a handheld screen, and identify and lock onto targets. It can autonomously follow moving targets and, when commanded to attack, will launch itself at the target and detonate its explosives upon impact.

Yet, drones are no longer exclusive to the military-industrial complex. Once prohibitive costs have significantly decreased, private enthusiasts could fly low-cost UAVs with spectacular results. A group calling themselves Team Blacksheep, fly small fixed-wing aircraft equipped with pivoting camera mounts that transmit video to the pilots via goggles that display images in

a first-person view as if they were seated on the UAV. First-Person View (FPV) flying has become increasingly popular as evidenced by millions of views on Team Blacksheep's YouTube channels and the emergence of communities dedicated to this hobby.<sup>7</sup>

### Coming Home to Roost

Many UAVs can carry sensors and cameras that produce quality real-time imagery, making them ideal vehicles for surveillance tasks. Combining sensor capabilities with facial or biometric recognition software would make UAVs even more appealing for such purposes,

and allow potentially significant intrusions and threats to constitutionally-protected privacy.<sup>8</sup> While tension between Fourth Amendment guarantees and rapid technological advancement is nothing new, it never seems to get old either.

Consider the instructive case of Rodney Brossart, a cattle farmer from Lakota, North Dakota.<sup>9</sup> In June 2011, six cows wandered onto land owned by Mr. Brossart.<sup>10</sup> When the cows' owner asked for their return, Mr. Brossart refused, demanding instead to be compensated for the feed they had consumed on his land.<sup>11</sup> The cows' owner contacted the local Sheriff's Office. When law enforcement

officers ventured to Mr. Brossart's farm, he refused the officers' demand to release the cattle and prohibited them from entering his property. The Sheriff vowed to return with a search warrant and an altercation ensued, resulting in Mr. Brossart's arrest. A search warrant was subsequently obtained, denoting that "three cow calf pairs" were "secreted" and "concealed" on the property in violation of Chapter 36-13 of the North Dakota Century Code.<sup>12</sup> When the officers later arrived at Brossart's property, they encountered several Brossart family members carrying firearms, advising the



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officers that they “had no right to be there.” Knowing the Brossarts to be “an exceedingly close-knit family, who prefer the company of one another over the company of extended family or friends,” the officers decided that discretion was the better part of valor and retreated.<sup>13</sup> They returned with a SWAT team and a Predator drone on loan from the Department of Homeland Security hovering in the sky above. It expediently located the cattle and the Brossart family members, and ultimately led to several arrests.

In a motion to dismiss the charges, the Brossarts argued that the warrantless use of unmanned surveillance aircraft to infiltrate the ranch had been an unlawful and unreasonable search.<sup>14</sup> The State contended that the use of the drone was a “non-issue in this case because [it was] not used in any investigative manner to determine if a crime had been committed [and] {t}here is, furthermore, no existing case law that bars [the] use in investigating crimes.”<sup>15</sup> The State District Court Judge hearing the motion agreed with the State of North Dakota and denied the motion to dismiss, finding that, “there was no improper use of an unmanned aerial vehicle. It appears to have had no bearing on these charges being contested here.”<sup>16</sup> Thus, the Brossart family had the dubious honor of becoming some of the first American citizens to be arrested with the help of a drone. Although the North Dakota Judge found no issues with the constitutionality of the UAV surveillance, it seems questionable and perhaps even somewhat alarming that current Fourth Amendment jurisprudence has not developed as quickly as the technology.

#### The Fourth Amendment and Drones

While neither the United States Supreme Court nor the Rhode Island Supreme Court have yet addressed the use of UAVs in conducting domestic surveillance, there are cases that could be instructive as to how the Court might treat UAVs. First, there are cases pertaining to surveillance by manned aircraft, where police have attempted to investigate marijuana-growing operations based on information obtained from tipsters.<sup>17</sup> Unable to spot the contraband from a vantage point on the ground, the police officers called in aircraft which allowed them to plain-view the contraband. Courts decided that this was not a search due to the defendants’ lack of a reason-

able expectation of privacy. There was no reasonable expectation because a member of the public could have flown over the properties as the police did and spotted the marijuana at any time.

Conversely, the impact of technological advances on searches covered by the Fourth Amendment was examined by the U.S. Supreme Court in *Kyllo v. United States*.<sup>18</sup> In *Kyllo*, the police used a highly-advanced thermal-imaging device on a house to detect heat signatures from high-intensity lamps used in an interior marijuana-growing operation. After detecting suspicious amounts of heat, they requested a search warrant and

discovered the contraband. The Court found the search to be unlawful, reasoning that the information could not have been obtained without the sense-enhancing technology or by physically entering the defendant’s home. Therefore, it fell squarely under the protections of the Fourth Amendment. However, the Court emphasized that the thermal-imaging device was not in general public use, but rather only available to a certain few law enforcement agencies.<sup>19</sup> This finding ties into Justice Harlan’s concurrence in *Katz* which proposed that a Fourth Amendment search occurs when the government violates a subjective expectation of privacy

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recognized by society as reasonable.<sup>20</sup> In *Kyllo*, society would not have access to the very expensive and exclusive thermal-imaging device, while the private flying of helicopters and airplanes, though still uncommon, is not entirely unheard of.

In light of these cases, should the citizenry be concerned about law enforcement's use of drones for surveillance? Drones are ideal for surveillance, after all, they can be small and hard to detect, never tire, and are inexpensive enough to be affordable to a police department that may not have the budget to purchase helicopters and pilot training. Under *Kyllo*, the Fourth Amendment may protect the

citizenry from warrantless searches for the time being, due to the relatively low usage of drones and society's expectation that drones will not violate its privacy. The Orwellian scenario of a drone hovering "like a bluebottle... and snooping into people's windows" is not likely to become a reality very soon.<sup>21</sup> However, if the appearance of drones hovering in the sky becomes commonplace rather than novelty, and subsequently society becomes desensitized to seeing drones floating over the backyard or the football field, then a search by drone might cease to interfere with the reasonable expectation of privacy. Congress, appearing to

approve of the widespread expansion of commercial drones, has required the Federal Aviation Administration (FAA) to change current regulations concerning UAVs, allow their use for commercial and governmental uses in federal airspace.

### Current Regulation of UAVs

Under current regulations, it is easier for private citizens to fly a drone than to obtain a license to operate a car. The United States airspace is regulated by the FAA.<sup>22</sup> The FAA follows the rules found in the Code of Federal Regulations (CFR).<sup>23</sup> Like standard piloted planes, UAVs entering the national airspace system (NAS) must be granted authorization from the FAA. The NAS is a complex system encompassing not only U.S. airspace but also navigation facilities, airports and aircraft, as well as passengers. Unsurprisingly, NAS is highly regulated. Applications for authorization to enter NAS are reviewed on a case-by-case basis. Due to the lack of an onboard pilot on an UAV, unmanned aircraft cannot comply with various sections of the CFR.<sup>24</sup> The FAA takes this issue into account when considering approval of UAVs entering the NAS.

Under current regulations, there are two ways that the FAA can allow the operation of an UAV depending on whether the operator is a private or public entity. Public entities consist of the military, federal, state and local agencies, like fire and police departments. Basically, this includes any organization that operates a public aircraft.<sup>25</sup> These agencies must obtain a Certificate of Waiver or Authorization (COA) from the FAA.<sup>26</sup> Such a COA is not necessary if the UAV is operated within restricted, prohibited or warning area airspace with permission from the authority using that airspace, for example, a military UAV flying in the restricted airspace over a military facility. COAs are usually issued for a limited period of time, and, in many cases, they expire after two years. In 2009, the FAA issued 146 such COAs. At the end of November 2012, 354 COAs were active.<sup>27</sup>

Meanwhile, civil agencies like drone manufacturers have only one legal way to operate UAVs for commercial purposes. They must obtain special airworthiness certificates. These are usually issued for a period of one year and remain experimental certificates.<sup>28</sup> It is on the applicant to show that the UAV and its control systems are designed, built and maintained

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in a safe and airworthy condition.

This leaves hobbyists or enthusiasts. They are neither required nor able to obtain COAs or special airworthiness certificates. Members of communities like the aforementioned FPV flyers can operate their drones under the FAA model aircraft advisories as long as they abstain from flying their aircraft for business purposes.<sup>29</sup> This advisory is very brief, offers suggestions on site selection, and suggests a maximum altitude of 400 feet while operating the aircraft within visual line of sight. As long as private individuals abide by these suggestions, nothing prohibits them from operating an UAV. There is no regulation stopping someone from purchasing a camera-equipped drone, flying it close to a neighbor's backyard, and investigating ongoing activities. A private party is not required to license the UAV or undergo any test or evaluation regarding their fitness to operate it. Of course, this also means that private individuals are not required to carry liability insurance on their hobbyist UAV. The implications are self-explanatory, especially in light of the growing popularity of this hobby.

The U.S. Government recognizes the need to update these regulations. Civil agencies and private corporations are clamoring for the ability to fly drones unhindered by administrative red tape. Congress responded by enacting the FAA Modernization and Reform Act of 2012 which requires the Federal Aviation Administration to "develop a comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems into the national airspace system."<sup>30</sup> The deadline for this plan as mandated by Congress is September 2015 and likely to create a lot of movement in the market for drone use by private companies, perhaps resulting in changes to society and business similar to those of the mass proliferation of affordable cellular telephony in the early 21st century. It was only thirty years ago that the 2.2 pound DynaTac cellular phone was made commercially available for \$4,000. Today, mobile technology comprises a significant part of modern living at a much more affordable price. Drones are poised to effectuate similar results.

#### **Proposed Bills Before the Rhode Island General Assembly**

In February 2013, two bills were proposed before the Rhode Island General

Assembly regarding domestic drone legislation. On February 26, 2013, Senators Kettle and Hodgson introduced a bill titled Aerial Privacy Protection. The bill finds that persons within the state of Rhode Island have a reasonable and justifiable expectation not to be monitored with unarmed aerial vehicles by Rhode Island law enforcement agents, unless a warrant based on probable cause has first been issued. The bill also finds that, without a warrant, the benefit of the law enforcement and criminal justice system from the use of UAVs is far outweighed by the violation of individuals' fundamental right to privacy, secured by both

the Constitution of the United States, as well as the Constitution of Rhode Island. Thus, the bill proposes that a search warrant shall be issued prior to the use of an UAV by law enforcement agents of Rhode Island. The privacy of the people of Rhode Island is said to be invaded if a warrant is not issued prior to the utilization of an UAV, and such an act would be an unreasonable and actionable violation. Furthermore, if a warrant has not been obtained, any information or evidence acquired or gathered by an UAV shall be deemed inadmissible in any court of law

*continued on page 32*

# Florida

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# Estate Planning for Florida Snowbirds



David J. Correira, Esq.  
Correira & Correira LLP



Eric D. Correira, Esq.  
Correira & Correira LLP

*In many instances, the tax savings alone for a Rhode Island client moving to Florida will cover the expense of living in the Sunshine State, so long as domicile is established and appropriate estate planning is implemented.*

Many Rhode Island, Massachusetts, and other New England attorneys find their older clients heading south to Florida for the winter. While Florida offers retirees warm weather, golf and beaches, it also presents the opportunity to significantly reduce one's overall tax burden. Florida currently has no state income tax or state estate tax, and its real estate tax laws favor residents over nonresidents. In many instances, the tax savings alone for a Rhode Island client moving to Florida will cover the expense of living in the Sunshine State, so long as domicile is established and appropriate estate planning is implemented. If a Rhode Island attorney is advising a client with interests in both Rhode Island and Florida, it is important for him or her to understand the difference and interplay between the laws of the two states, as well as neighboring states such as Massachusetts. Because most Florida retirees maintain some connection to Rhode Island (and one day may return to the Ocean State due to the death of a spouse or declining health), problems can arise if both states' laws are not considered when preparing an estate plan.

We provide a summary of the important distinctions between Rhode Island, and its neighbor Massachusetts, and Florida in the areas of tax, creditor protection, Medicaid, and incapacity, as well as the planning techniques available to structure one's estate plan to optimize those differences. A brief ethical discussion of Florida's strong stance against the unlicensed practice of law concludes the piece.

## **Establishing Florida Domicile**

To take advantage of Florida's favorable tax laws, one must become an actual Florida resident, instead of merely a Rhode Island resident spending time in Florida. In both Rhode Island and Florida, the standard used to determine if an individual has established domicile is whether he or she: 1) is physically present in the given state; and 2) intends to make that state his or her permanent residence.<sup>1</sup> The same standard is applied in other states, including Massachusetts.<sup>2</sup> The first, and more straightforward prong of the two-part test, physical presence, is fulfilled

when one purchases a home (or rents an apartment) in the new state and spends time during the year living in that residence. The second prong, the intent to be a resident, involves weighing those factors indicative of the intent to be a resident of the new state against those showing an intent to remain a resident of the former state.

In *Deblois v. Clark*, the Rhode Island Supreme Court applied the domicile analysis to a married couple who relinquished their Rhode Island residency in favor of Florida. While the couple purchased a home in Vero Beach, Florida, they also retained a condominium in Warren, Rhode Island, and spent time throughout the year at both homes. After they had filed income tax returns for three years as Florida residents, the Rhode Island Division of Taxation challenged the couple's purported residency.<sup>3</sup> The matter was first heard before a Rhode Island District Court judge, who determined that the couple had failed to establish "clear and convincing evidence" of an intent to become Florida residents.<sup>4</sup>

On appeal, the Rhode Island Supreme Court first determined that the "clear and convincing evidence" threshold was incorrectly applied by the District Court, noting that the applicable burden of proof in general tax cases is merely a "preponderance of the evidence."<sup>5</sup> Having established the appropriate evidentiary standard, the Court next applied the two-prong test to the facts before it. While the couple continued to have connections to Rhode Island, including ownership of a condominium, association with the business community, and visits with family members on holidays and special occasions, the Court noted that the domicile test does not require a complete severance of one's ties to his or her former residence. Instead, after reviewing all of the relevant evidence, the Court concluded that the couple had established both a subjective and objective intent to become Florida residents. The Court stressed that the couple spent the majority of each year in Florida, the value of the couple's real property and personal possessions in Florida was greater than those in Rhode Island, and that the couple had filed a Florida homestead, obtained Florida driver's

licenses, changed their voter registration to Florida, executed Florida last will and testaments, opened Florida bank accounts, joined Florida civic, social, and religious groups, and become active in Florida politics.<sup>6</sup> While the Rhode Island Division of Taxation raised the additional concern that one of the couple's reasons for changing residency to Florida was avoidance of Rhode Island taxation, the Court pointed out that "Although a motive to avoid taxes without additional evidence to establish domicile may militate against finding a change in domicile, a person may move to a new state for tax reasons *and* have a bona fide intention to establish domicile in that state."<sup>7</sup>

As the *DeBlois* case illustrates, there is no hard and fast rule for establishing domicile (such as the common misconception that being physically present in Florida for "six months and a day" will satisfy the test). Instead, courts will review all of the relevant facts and circumstances when a question of one's residency arises. If an individual intends to become a Florida resident, and wants to minimize any potential issues from such a change, his or her attorney should provide a checklist of steps to follow. These steps include, but are not limited to: filing a

homestead exemption; changing the primary address for credit cards and bills; changing voter registration; changing title to automobiles; obtaining a Florida driver's license; executing Florida estate planning documents; opening Florida bank and financial accounts; filing income tax returns as a Florida resident; acquiring Florida burial plots; consulting with a Florida physician; joining Florida social and religious organizations (and changing membership status with non-Florida social and religious organizations to non-resident); becoming active in Florida politics; and opening a Florida safety deposit box. In addition, one should file a Florida Declaration of Domicile with the Clerk of the Circuit Court for the county of residence in Florida. This filing, authorized under the Florida Statutes, allows one to place in the public record a sworn statement that he or she resides in Florida and intends to make Florida his or her permanent residence, serving as further evidence in support of a genuine change of domicile.<sup>8</sup>

#### **Homestead Law Comparison**

One of the major benefits of changing one's domicile to Florida is its favorable homestead laws. Florida offers not only

a homestead for creditor protection, but also a separate homestead for protection from significant yearly increases in the property tax assessment of one's principal residence.

In Rhode Island, a home owned by an individual (including life tenants and trust beneficiaries) is exempt from attachment if the individual "occupies or intends to occupy the home as his or her principal residence." The Rhode Island homestead for creditor protection is automatic, and unlike many other states, does not require a document to be filed in order to assert the right. The Rhode Island creditor protection homestead shields the first five hundred thousand dollars (\$500,000) of equity in the property. Exceptions to the creditor protection afforded by the homestead include, but are not limited to, mortgages obtained for the purchase of the real property and tax liens and assessments.<sup>9</sup>

Massachusetts, in comparison, has both an automatic and declared homestead for creditor protection. The automatic creditor protection homestead insulates only one hundred twenty-five thousand dollars (\$125,000) of equity, whereas the declared homestead is equal to Rhode Island's automatic protection of five hundred

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thousand dollars (\$500,000).<sup>10</sup> This distinction between automatic and declared homesteads in New England is important, as one of the two homesteads in Florida (the property tax homestead) must be declared. A Massachusetts resident changing domicile to Florida is more likely to be attuned to the need to file a homestead for their new residence than a Rhode Islander who has never faced this issue.

The first of the two Florida homesteads, the one for creditor protection, is set forth in the Florida Constitution. Like the Rhode Island homestead, the Florida creditor protection homestead is automatic. However, unlike the Rhode Island homestead, the limit of protection provided is not a specific value, but instead a total acreage of land. Up to one-half (1/2) an acre of land can be protected by the homestead if the land is located within a municipality, while up to one hundred sixty (160) acres of land can be protected by the homestead if the land is located outside a municipality.<sup>11</sup> Because the Florida homestead system is based on size, not value, the creditor protection homestead can be used to shelter significant assets from attachment and seizure. For example, a \$2 million homesteaded residence in Rhode Island would only be

afforded protection of up to five hundred thousand dollars (\$500,000) in equity, whereas the same property homesteaded in Florida would be fully protected, so long as it is within the acreage limit.

One particularly noteworthy issue regarding the Florida creditor protection homestead is whether it continues to apply if the homestead property is transferred to a revocable trust. As part of many estate plans in Rhode Island, all real estate is transferred to a trust to avoid probate proceedings upon the client's death. However, while the Rhode Island homestead statute includes either "a revocable or irrevocable trust," the homestead law in Florida related to trusts is far less clear.<sup>12</sup> In 2001, Florida attorneys were surprised by a Bankruptcy Court ruling. In *re Bosonetto*, it was held that a trust beneficiary could not claim homestead protection for her home transferred by her to her own revocable trust. The Florida Constitution states that the homestead is available only to "property owned by a natural person." Applying a strict interpretation of this language, the Court in *Bosonetto* held that the creditor protection homestead did not extend to an interest in a revocable trust, as a trust is an entity and not an individual.<sup>13</sup>

Subsequently, despite the Bankruptcy Court's reasoning in *Bosonetto*, the Florida Court of Appeal adopted a contrary position when faced with the same issue of whether property held in a revocable trust was insulated by the creditor protection homestead. In *Engelke v. Estate of Engelke*, the Court stated that "because the [grantor] retained all control over his homestead during his lifetime, conveying no vested property interest in the homestead to the trust, we hold the homestead protections attached to the residence."<sup>14</sup> Other decisions have also largely rejected the *Bosonetto* ruling, but many Florida practitioners are still wary to transfer homestead property to a revocable trust.<sup>15</sup> If a client, such as a physician or businessperson, has strong concerns about creditor liability, it is advisable to leave the homestead property outside of a trust or other entity. While this approach may seem out of sync with typical estate planning for probate avoidance in New England, it is important for the Rhode Island practitioner to remember that the legal expense of a probate proceeding for a piece of Florida real estate may be greatly outweighed by the liability risks from the loss of creditor protection for that same property.



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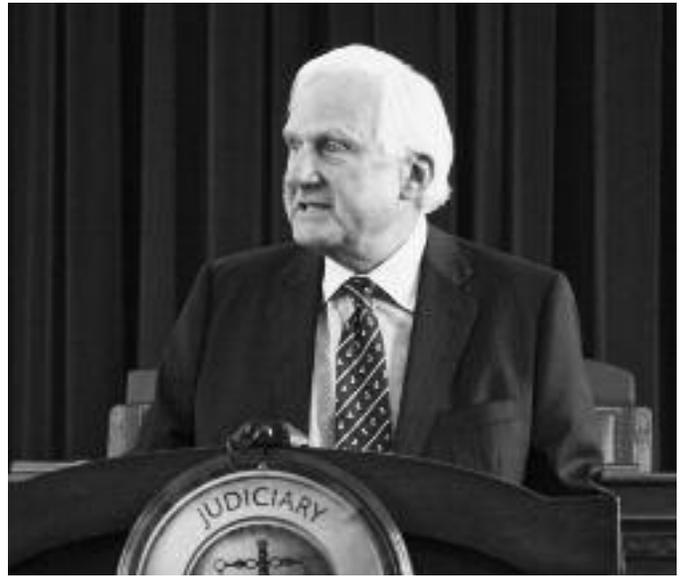
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## Constitution Day at the Rhode Island Supreme Court



Bar President J. Robert Weisberger and Chief Justice Paul A. Suttell were among those who spoke at the September celebration of Constitution Day at the Rhode Island Supreme Court. The Center for the Study of the American Constitution presented three-volume sets on the ratification of the federal Constitution by Rhode Island to the Governor, the Secretary of State, members of the Supreme Court, the state's Historian Laureate, Patrick T. Conley, Esq., and the President of the Rhode Island Bar Association.



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The second, and in many ways more well known, type of homestead in Florida affords protection from sharp property tax increases on the homesteaded real estate. Available to Florida residents only, this property tax homestead is yet another reason Rhode Islanders may wish to change domicile. Under the Save Our Homes Amendment to the Florida Constitution, any yearly increase in the assessed value of one's principal residence is limited to the lesser of: 1) three percent of the prior year's assessment; or 2) the yearly percent change in the Consumer Price Index for all urban consumers. To activate the property tax homestead, an application must be filed with the County Property Appraiser by the Florida resident for his or her principal residence.<sup>16</sup> Unlike the uncertainty surrounding the creditor protection homestead in Florida, a principal residence transferred to trust, either revocable or irrevocable, can still receive the property tax homestead so long as the resident explicitly retains in the trust document the right to occupy the property and to claim the property tax homestead.

### State Income and Estate Tax System Comparison

To compare the Rhode Island state income and state estate tax system to that of Florida is a fairly straightforward task. Rhode Island currently has both a state income and state estate tax, whereas Florida has neither. More specifically, for 2013, the Rhode Island state income tax rate ranges between 3.75% to 5.99%, and a state estate tax is applied to all estates in excess of \$910,725.<sup>17</sup> In comparison, not only does Florida currently have neither a state income or state estate tax, but the likelihood of either tax being imposed in the near future is highly unlikely, as Florida's taxing ability is tempered by its state constitution.<sup>18</sup>

### State Income Tax Planning

The Rhode Island income tax is imposed on all Rhode Island income in a given year.<sup>19</sup> For a nonresident, the income tax is applied only to income derived from Rhode Island sources. These include income generated by Rhode Island real estate, a Rhode Island business, or Rhode Island gambling activities.<sup>20</sup> As such, if an individual retires to Florida and properly establishes Florida domicile, he or she will completely avoid any Rhode Island

state income tax whatsoever, so long as his or her income is attributable only to non-Rhode Island sources such as social security and investment vehicles. The avoidance of state income tax is, without a doubt, a primary motivation for many Rhode Island retirees who become Florida residents either by making an existing vacation home their new principal residence, or buying a new home altogether. As in the Rhode Island Supreme Court's **DeBlois** decision, the intent to avoid taxes does not alone mitigate the validity of one's change of residency to Florida.<sup>21</sup>

### State Estate Tax Planning

Decedent with Total Gross Estate = \$1,500,000  
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 FL Real Estate (\$600,000)  
 Intangible Property (\$300,000)

RI Resident with No Additional Estate Planning,  
 RI Estate Tax = \$38,640

FL Resident with No Additional Estate Planning,  
 RI Estate Tax = \$25,760

FL Resident with Additional Estate Planning,  
 RI Estate Tax = \$0.00

The elimination of the Rhode Island estate tax for many individuals leaving the Ocean State and establishing residency in Florida often requires an additional level of planning. A nonresident is still subject to the Rhode Island estate tax if he or she owns any real estate or tangible property situated in Rhode Island at the time of his or her death.<sup>22</sup> As a result, if a Florida resident passes away still owning real estate in Rhode Island, his or her estate is subject to Rhode Island estate tax.

One approach to eliminate this issue is to convert the Florida resident's Rhode Island real estate into a Florida business entity, by creating a Florida limited liability company or other entity that owns the Rhode Island real estate. The result of this ownership arrangement is that at the time of death, the individual is deemed to own an interest in a Florida business, a non-Rhode Island asset, and thereby avoids being subject to the Rhode Island estate tax which would have otherwise been applied to the Rhode Island real estate. When using

*continued on page 36*



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## BOOK REVIEW

# *Zoning the Oceans: The Next Big Step in Coastal Zone Management*

by John M. Boehnert, Esq.



**Michael Rubin, Esq.**  
Assistant Rhode Island  
Attorney General

*Ocean zoning will directly affect significant uses of the ocean and coastal waters, including offshore alternative energy development; oil, gas, and mineral extraction; recreational boating; commercial and recreational fishing; shipping and transportation; underwater cabling and communications; recreation and tourism; and aquaculture; to name just a few.*

It is no coincidence that Rhode Island, the Ocean State, leads the nation in a series of firsts in marine law. Among the innovations:

- This state was the first to constitutionalize parts of the public trust doctrine. When Roger Williams wrangled Rhode Island's Charter of 1663 from the King, he made sure it included "liberty...of the...coast," a tradition continued in the Constitution, Art. I § 17.
- The 1827 opinion of *Tyler v. Wilkinson*,<sup>1</sup> arising from the "Pawtucket River" (recognizable to readers as the Blackstone), was the first to systematize riparian rights.
- This state is the first to comprehensively zone the near-waters off its coast. In 1976, the Coastal Resources Management Council (CRMC)<sup>2</sup> promulgated the Coastal Resources Management Plan (CRMP). In 1978, the National Oceanic & Atmospheric Administration (NOAA)<sup>3</sup> approved the CRMP, essentially adopting it into federal law.<sup>4</sup>
- Now, this state has likewise become the first to comprehensively zone the deep waters off its coast. In October 2010, CRMC promulgated the Ocean Special Area Management Plan (Ocean SAMP). In December of that year, NOAA approved.

It is this last pioneering achievement that Rhode Island Bar member John M. Boehnert (not to be confused with the similarly-monikered speaker of the U.S. House of Representatives) turns his attention. The result is a vigorously-written, thoughtfully-researched, and meticulously-documented – e.g., a convenient CD with a digitized version of the voluminous Ocean SAMP is included with each copy – full-length book: *Zoning the Oceans*.

To the above commendations add at least one more: The book is handsomely bound with an alluring cover. At first blush, this might seem to be a trivial and superficial matter. But, in this case, a careful examination of the two images on the front is illustrative of a deeper truth. While the book emanates from Rhode Island events, scrutiny of the sepia-toned map forming

the background of the cover reveals that it depicts the area of the Great Barrier Reef off Australia and the nearby South Pacific. Moreover, the wave featured on the cover is beyond the dimensions of those typically experienced here. The implication, borne out by the text, is that Rhode Island's "blueprint"<sup>5</sup> is global in potential scope and reach. Not only is it the first-in-the-nation but it the first-in-the-world, and it is receiving international attention.

As the book states:

Other states have been pursuing interests in ocean zoning and have visited Rhode Island to learn what it did and how it did it. Similarly, other nations are very much interested in ocean zoning and Rhode Island's pioneering efforts, and England invited the executive director of Rhode Island's coastal regulator [Grover Fugate of the CRMC] for a weeklong visit to share his insights on ocean zoning.<sup>6</sup>

The author adds: "not only representatives of other states but representatives of other countries have contacted Rhode Island to find out what they did and how they did it."<sup>7</sup>

The pictorial allusion to the Great Barrier Reef might also reflect the recent origins of the idea of ocean zoning and its corollary, marine spatial planning. As the book reports, one scholar "traces the beginning of marine spatial planning to the conservation management approach that led to the Great Barrier Reef Marine Park, established in 1975."<sup>8</sup> This reflects the short pedigree of the concept. Rhode Island's leap forward is especially significant in such a short time-frame.

In sum, Rhode Island has taken a new approach in a new field and has done so in a manner that has global implications. These, however, are not the most legally significant features of Rhode Island's Ocean SAMP. Rather, as highlighted by Boehnert, the most significant feature for the lawyer is that it embodies a two-dimensional increase in state jurisdiction, the first of which has been in practice for several decades, and the second of which is new and startling.

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Specifically, the document reflects the following jurisdictional increases: 1) *substantively*, to include a veto power over federal permits as well as non-binding authority over many federal installations. This increase is not new. It has been exercised since the 1972 enactment of the CZMA; 2) *spatially*, to govern federal waters. The latter is an astounding break with the past.

This surprising jurisdictional reach is the result of a complex series of historical accessions and concessions by and between the dual sovereigns, which Boehnert makes lucidly understandable. Suffice it to say that these culminated in the CZMA, which partly reverses Federal supremacy, albeit with checks and balances. The Federal government has voluntarily yielded back to the states, as stated by the Supreme Court in *Martin v. Waddell's Lessee*,<sup>9</sup> "the rights...surrendered by the Constitution to the general government." Further, certain obscure regulations under the CZMA afforded states the opportunity, if they had a scientific basis, to regulate activities in Federal waters.

But, as Boehnert makes clear, these legal developments merely set the stage by providing the juridical context. It remained for a state to take full advantage of the Federal offer, something no state did until Rhode Island "recognized"<sup>10</sup> the opportunity and came forward. This move on the part of Rhode Island officials is described by Boehnert as "very shrewd."<sup>11</sup> In passages that lend a hint of drama to a technical topic, Boehnert describes how Rhode Island's CRMC and associated working groups "effectively exploited"<sup>12</sup> and "capitalized upon"<sup>13</sup> the provisions of the arcane CZMA regulations allowing extra-territorial jurisdiction.

The upshot is that Rhode Island has authority over traditionally federally-regulated matters, not only in its own territorial sea of roughly several hundred square miles, but beyond. The state has managed to "dramatically extend...its influence."<sup>14</sup> "The special area management plan prepared by Rhode Island involves far more than Rhode Island state waters, incorporating federal waters in the almost 1,500-square-mile Ocean SAMP region."<sup>15</sup>

Boehnert makes clear that a further ingredient was needed, beyond a favorable statutory/regulatory climate and beyond legal acumen: institutional knowledge and experience. In a comparison with

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Massachusetts' slightly later and much less elaborate program, lacking the "depth and comprehensiveness of the Ocean SAMP,"<sup>16</sup> Boehnert clarifies Rhode Island's advantages:

Rhode Island's plan arose...within an existing regulatory structure. And that regulatory structure included an experienced coastal manager...that had...implemented numerous such plans.<sup>17</sup>

In short, this innovation was built on prior innovations. Zoning the deep ocean was facilitated by CRMC's knowledge of zoning immediate coastal waters. In the Ocean State, innovation bred more innovation when it came to the marine environment.

This review has given short shrift to the substance of Rhode Island's program, which creates zones for compatible, and presumptively approvable, uses of the ocean and its floor. Those in ocean-dependent industries and environmentalists alike will have to turn to the book itself which gives a full exposition.

This book is a great addition to the libraries of admiralty law practitioners and environmental law practitioners. But, it has an appeal beyond that. Administrative lawyers and political scientists will admire it is an excellent case-study of a political process and one that worked. Beyond that, in these difficult times for our state, all Rhode Islanders should cherish this dynamic narrative of a local story with a successful outcome.

*\*The views expressed herein are solely those of the reviewer and do not reflect those of the Rhode Island Attorney General, any State agency, or the State of Rhode Island.*

*EDITOR'S NOTE: Rhode Island Bar Association member John M. Boehnert's book, ZONING THE OCEANS: THE NEXT BIG STEP IN COASTAL ZONE MANAGEMENT was published in 2013 by the American Bar Association and available for purchase through that Association.*

#### ENDNOTES

1 24 F. Cas. 472, No. 14312 (C.C.D. R.I. 1827).

2 The CRMC was created in 1971 by its enabling statute, R.I. Gen. Laws § 46-23-1 et seq.

3 NOAA is part of the U.S. Department of Commerce.

4 Pursuant to the Coastal Zone Management Act ("CZMA"), 16 U.S.C. §§ 1451, et. seq.

5 ZONING THE OCEANS at xviii & 207.

6 *Id.* at xxi.

7 *Id.* at 207.

8 *Id.* at 64 (citing *Univ. of Del. & CCPI, Delaware Marine Spatial Planning: Offshore Wind Context (Final Report)* 10 (Mar. 19, 2012),

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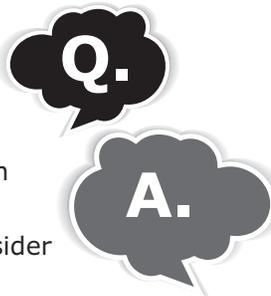
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9 41 U.S. [16 Pet.] 367, 410 (1842).

10 ZONING THE OCEANS at 256.

11 *Id.* at 208.

12 *Id.* at 209.

13 *Id.* at 256.

14 *Id.* at 208.

15 *Id.* at 135.

16 *Id.* at 202.

17 *Id.* ❖

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



Matthew R. Plain, Esq.



Elizabeth R. Merritt, Esq.

Taylor Duane Barton & Gilman, LLP, Providence

David W. Carroll was born in Providence, Rhode Island on December 29, 1938. He graduated from North Providence High School in 1956, and, in 1960, he graduated from Providence College where he majored in Political Science. He committed to the United States Army before graduating from Boston College Law School in 1963, and, in a unique unfolding of events, sat for the Rhode Island bar exam prior to graduation to accommodate his military commitment. After completing his service, he returned to Rhode Island to become the fifth member of Roberts & McMahon, a law firm started and headed by former Governor Dennis Roberts. Roberts & McMahon has evolved into Roberts Carroll Feldstein & Pierce, where Mr. Carroll still practices today. Mr. Carroll is one of the state's most prolific trial attorneys in the professional liability arena, having obtained over one hundred defense verdicts at trial. Excerpts from our conversation with this fifty-year Rhode Island Bar veteran follow.



David W. Carroll

## *What was your most memorable experience in the course of your legal career?*

When I finished a case involving a doctor who had been sued, and his patient had delivered a baby, and the patient died shortly after the birth of the baby. We got a good result from the jury. They found the doctor had done nothing wrong. As we were walking out, I said to the doctor, you must feel pretty satisfied the jury exonerated you. He looked at me and said, 'David, I still lost my patient. My patient died.' And that impacted me, feeling and knowing that trials are not about me, they are about my client.

## *Over the course of your legal career, who has been your most formidable opponent?*

The minute you underestimate someone, you're not doing yourself or your client a service. It's really terrible to try to grade opponents. I'm afraid of the person who's going to be on the other side of the next case I try.

## *What's been your biggest challenge over the course of your legal profession?*

The challenge is making absolutely certain that I'm totally prepared. Know your files backwards and forwards. Know it up and down. Know every period, every comma, and every semicolon. And, when you know that, then, Governor Roberts used to say, things can be extemporaneous.

## *What skills or qualities would you attribute some of your career successes?*

I think I've got a good trial record because I concentrate on the fact that the trial is not about me, the trial is about my client. And my job is to make sure the client presents in a way that a jury can see him or her. If the jury believes the client, they'll vote for the client. I've said to a number of clients, if we leave the courtroom and the jury says I was the best person in the courtroom, they should think about discharging me, because my job is to make sure that the jury says the client was the best person in the courtroom.

## *What has been the single biggest change in the legal profession since you started practicing?*

I really think it's terrific that there are more women not only in the legal profession but in the other professions generally. I think women have made the legal profession so much better through brilliance, the variety of ideas, and an aggressive thought process.

## *What challenges do you foresee for newer members of the bar?*

I have to go back to something that former Presiding Justice Rodgers said at a presentation he made about seven or eight years ago. He said he was concerned that people who want to go into litigation are not trying the same number of cases as other people are trying. He was concerned about litigation lawyers not getting actual trial experience. I share his concern in that.

## *What's the best advice you ever received?*

From the late Governor Roberts: "You can't get quoted on things you don't say."

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# The Rhode Island Constitution on Economic Stewardship

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Seth Handy, Esq.  
Handy Law, LLC, Providence

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*One very clear threat to the secure use and enjoyment of natural resources by our populace is air quality concerns, including their well-documented impact on climate change.*

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Rhode Island has yet to fulfill its mandate and its opportunity for economic stewardship. Our state constitution gives us all the right to use and enjoy Rhode Island's rich natural resources and the responsibility to preserve their values.<sup>1</sup> This piece of our bill of rights has driven delegations of administrative authority and some resource protective judicial decisions, but our general assembly has yet to act on all its transformative value for public policy.

In 1843, the drafters of our state constitution empowered Rhode Islanders to "enjoy and freely exercise all the rights of fishery and privileges to the shore..." In 1986, a state constitutional convention broadened Article 1, Section 17 to state:

The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore; and they shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values; and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.

Rhode Island was early among states that have constitutionally established a shared general public right and responsibility for natural resource use.<sup>2</sup> Many more states have since recognized public rights to the use, enjoyment and preservation of specific natural assets.<sup>3</sup>

These provisions raise standard questions of constitutional interpretation that are good subjects for scholarly review. One is whether these

rights and responsibilities are self-executing or require legislative action for enforcement. Rhode Island courts have held that Article 1, section 17 was meant to be "carried into effect by legislative regulation, such regulation having for its object to secure to the whole people the benefit of the constitutional declaration, and being necessary for that purpose."<sup>4</sup> The 1986 amendments made this delegation of authority explicit. Other questions of constitutional interpretation include who is empowered to enforce these rights and whether any specific alleged right is a "fundamental right" warranting "strict scrutiny" review in due process or equal protection claims.<sup>5</sup> This article focuses, instead, on our legislature's efforts to uphold and implement the constitutional mandate.

Our general assembly has repeatedly recognized the importance of agriculture, fisheries, forestry and tourism to our economy and our general well-being<sup>6</sup> and has endowed state agencies with many powers meant to fulfill Article 1, section 17. The Rhode Island Department of Environmental Management (RIDEM) was granted power to supervise and control the utilization of natural resources<sup>7</sup> and to cooperate with the Economic Development Corporation in planning functions related to those resources, particularly including agriculture, fisheries and recreation.<sup>8</sup>

The Farmland Preservation Act of 1981 delegated authority to preserve the importance of agriculture to our quality of life and the Right to Farm Act was designed to uphold the importance of farming to our economy and well-being.<sup>9</sup> The general assembly formed the Coastal Resources Management Council to protect our coastline, deemed important to our quality of life and our economy.<sup>10</sup>

The Narragansett Bay Commission was formed to "combat the discharge of pollutants into Narragansett Bay...[which] creates severe and detrimental ecological and economic impact upon the people of the state of Rhode Island."<sup>11</sup> Legislation held the Water Resources Board's job of protecting our drinking water "essential to the health, safety, and welfare of the general public, and to the continued growth

## Do you have a problem with alcohol?

Alcohol has been described as “cunning, baffling, and powerful.” For many, its use is fraught with problems that can destroy a profession, a family, or a life. Unlike some medical problems there are no exact diagnostic tools to determine whether someone is over the line with their drinking. Often those with an alcohol problem have great difficulty acknowledging it. The following twenty questions may be helpful in determining whether you or someone close to you may have a problem with alcohol.

1. Have you had problems at work (lateness, missed time, errors, etc.) due to drinking?
2. Is your drinking making your home life unhappy?
3. Do you drink in order to help you feel more comfortable around people?
4. Have you spent money on alcohol that was supposed to be spent on other things, like children’s clothes? Rent? Money owed to others?
5. Have you been spending time with people you don’t really care for just because of alcohol?
6. Has your alcohol and other drug use led you to take dangerous risks?
7. Do you get cravings for alcohol during a specific time of day?
8. Has your drinking led you to do things you are ashamed of?
9. Have you ever drunk in the morning?
10. Have you been involved in physical or serious verbal fights when drinking?
11. Do you ever drink in order to escape worries?
12. Is it hard for you to imagine living your life without alcohol?
13. Have you ever thought you should cut back on your drinking?
14. Has anyone ever criticized your drinking?
15. Have you ever been arrested for an alcohol-related incident?
16. Have you ever had trouble remembering what happened as a result of drinking?
17. Have you ever had a health problem because of your drinking?
18. Have you ever lied about your drinking?
19. Have you ever lost interest in things or activities that you used to find enjoyable?
20. Do you feel like your life simply isn’t working out?

If your answer to any one of these questions about you, a family member or a friend is yes, you may benefit from discussing your answers or concerns with Judith Hoffman or one of her colleagues at the Coastline Employee Assistance Program (Coastline EAP), a private, non-profit assessment and referral program with a Bar Association contract for confidential, and free help, information, assessment and referral for Bar members. Simply call 401-732-9444 or toll free 1-800-445-1195 and identify yourself as a Bar member. You may also contact, in complete confidence, any member of the Lawyers Helping Lawyers Committee. Please see the listing of available LHL members and their telephone numbers on page 29 of this *Bar Journal*.

and economic development of the state.”<sup>12</sup>

State law also created three conservation districts bestowed with the power to conserve resources for their best use for the needs of our state.<sup>13</sup> Many energy laws have been crafted on the foundational intent of improving environmental quality while enhancing our local economy.<sup>14</sup> Clearly, our legislature has put in place some important mechanics necessary for implementing Article 1, section 17.

The courts have upheld these administrative powers when challenged by special interests. When commercial fisherman contested RIDEM’s regulations setting fishing quotas, alleging a state constitutional right of unfettered access to the fishery, our Supreme Court held that a fisherman’s right is qualified by the general assembly’s duty to preserve fishery resources for broader public benefit.<sup>15</sup>

The Supreme Court upheld a state statute preventing scuba divers from collecting shellfish in four coastal ponds despite invocation of the constitutional rights of fishery and privileges of the shore, concluding that “the very nature and scope of the right to fish that art. 1, sec. 17 protects is not unqualified; rather, it anticipates that reasonable legislative regulation is necessary to properly effectuate that right.”<sup>16</sup> In that decision, the Court cited its long-held resolve that “fishing must be carried on for the ultimate benefit of the people of the state and not merely for the profit and emolument of the fishermen engaged in the business.”<sup>17</sup> When a citizen claimed his right to ride a horse along the shore could not be prohibited in the summer by a town ordinance, the trial judge agreed with Judge Williams’ decision to deny a motion to dismiss the Town’s enforcement action concluding that the constitutional right to enjoy the shoreline “does not ensure that the exercise of such rights will be totally unburdened by any governmental regulation intended to preserve such natural resources, to secure their existence for future generations and to protect the right of all people to enjoy this state’s natural beauty.”<sup>18</sup> Our courts have clearly understood and applied the need to balance individual interests in our state’s rich natural resources against their preservation for public and future use.

Yet the general assembly’s delegations of authority and the courts’ affirmation of administrative power to defend our natural resources against special interests does not realize the full power of our

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constitution's pronouncement. Constitutional law dictates that "every clause must be given its due force, meaning and effect and that no word or section must be assumed to have been unnecessarily used or needlessly added."<sup>19</sup> We must "presume the language was carefully weighed and its terms imply a definite meaning."<sup>20</sup> Article 1 section 17 states that the people of Rhode Island "shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values [emphasis added]."<sup>21</sup> It then holds our general assembly responsible for ensuring such security by providing adequate planning for the use of our resources.<sup>22</sup> These are formidable obligations in our state's bill of rights, together with the freedom of religion, the prohibition of slavery and habeas corpus. If given their "due force, meaning and effect," our legislature must be viewed as a steward of our natural resources, not only protecting them against present threats, but also planning and setting the foundation for a robust economy that is also sustainable for future generations.

The first step in proactive planning for natural resource security is to gather information and analyze the security risks. This calls for a robust study with expert and public input, but some results can already be anticipated. One very clear threat to the *secure* use and enjoyment of natural resources by our populace is air quality concerns, including their well-documented impact on climate change. The fact of this insecurity is evident in our frequent air quality alerts (giving rise to free bus rides in the summer) and the damage regularly caused by the increasing ferocity of our storms, made more and more ominous by rising sea levels.

Our general assembly clearly can be stewards of air quality as required by our Constitution, and such stewardship would be beneficial to our economy. The fact that our air can be impacted by sources outside of our borders does not excuse our legislature from such action. Our government must be active in national and international advocacy for improved air quality; but it can also act locally. As long as policies implemented in Rhode Island can enhance the security of our air quality and stem the risks and impacts of climate change, our constitution requires such action. Significant sources subject to local control include energy production and consumption and transportation

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emissions. Although some good laws and policies are on our books to help address these concerns, they have not gone far enough to provide the security required by our constitution.

There are significant opportunities to provide for natural resource security while enhancing our economy. Recently and regularly proposed climate change legislation requires much needed analysis of the impacts and causes of climate change and subsequent development of legislative and regulatory programs to mitigate them. Energy efficiency laws have been effective at reducing energy consumption and emissions and saving consumers money that can then be reinvested in our economy.

However, recent audits of low income housing in Providence and subsequent improvements led by the Green and Healthy Homes Initiative<sup>23</sup> demonstrate how much work remains to be done in our housing stock and how much of a positive impact that work can have on our citizenry in terms of energy and health care savings and improved educational performance. Recent legislation has enhanced the procurement of clean, local, renewable energy, offsetting the apparent

and hidden cost of our current energy sourcing, but those policies do not go far enough to truly have the impacts intended.<sup>24</sup> Rhode Island is very fortunate to be home to innovative companies seeking to improve air quality and energy use around the globe.<sup>25</sup> Such endeavors warrant every bit of available state support.

The best means to reduce the impacts of transportation emissions is to reduce vehicle miles travelled by improving the service and ridership on our public transportation system. Yet, the Rhode Island Public Transit Authority has yet to provide comprehensive, statewide planning for the most effective transit modes and routes and we continue to underfund public transit. Proper transit planning and investment promises to enhance our economy by increasing mobility and reducing the societal cost of transportation. The important transformation from fossil fuels to electric vehicles has been accelerated by Project Get Ready's installation of 50 charging stations throughout the state – setting the stage for the economic benefit of much cheaper, domestically powered transportation and huge air quality enhancement. State policies can accelerate such important transfor-

mations.

Air quality provides only one example of how resource stewardship can be better aligned with our economic policy. Many other examples are available, including but not limited to the water, energy and health benefits of progressive policies that better support Rhode Island farms and a vibrant, domestic food economy. We are fortunate that our Constitution directs our general assembly to plan for sustainable development. Now is the time to fully implement that mandate.

*EDITOR'S NOTE: The author thanks and credits Kenneth Payne for his invaluable contributions.*

#### ENDNOTES

- 1 R.I. Const., Art. 1, § 17.
- 2 E.L. Const. art. II, § 7; H.I. Const. art. XI, § 9; I.L. Const. art. XI, § 2; L.A. Const. art. IX, § 1; M.A. Const. art. XCVII; M.I. Const. art. IV, § 52; M.T. Const. art. II, § 3 (inalienable right and responsibility to clean environment and pursuit of life's basic necessities); N.M. Const. art. XX, § 21 (environment of fundamental importance to public and legislature must manage for maximum benefit of the people); N.Y. Const. art. XIV, § 4 (legislature must enact policies to use and protect natural resources); P.A. Const. art. I, § 27 (natural resources common property of all people with Commonwealth acting as trustee); V.A. Const. art

## 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](http://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](mailto:hmcDonald@ribar.com) or 401.421.5740.

XI, § 2 (legislature manages use and protection of natural resources for general welfare).

3 A.L. Const. art. XI, § 21907(1) (lands and waters); C.A. Const. art. X, § 2 (water resources); C.O. Const. art. XVIII, § 6 (forests); I.D Co.nst. art XV, § 1 (water use); M.N. Const. art. XIII, § 12 (hunting and fishing); N.C. Const. art. XIV, § 5. (lands and waters); U.T. Const. art XVIII, § 1 (forests).

4 *Windsor et al. v. Coggeshall*, 169 A. 326, 327 (R.I. 1933) citing *State v. Cozzens*, 2 R. I. 561 (R.I. 1850).

5 *Riley v. RI Dept. of Env. Mngmnt.*, 941 A.2d 198, 206 (R.I. 2008) (no fundamental right to fish without licensing restrictions); *Cherenzia v. Lynch*, 847 A.2d 818, 823-24 (R.I. 2004) (no fundamental right to gather shellfish in particular waters by particular method without restrictions intended to benefit the greater public right).

6 R.I. GEN. LAWS §§ 42-82-1; 2-23-2 (agricultural operations are valuable to the state's economy and the general welfare of the state's people); 2-25-2(5) (farms and fisheries integral part of Rhode Island economy); 20-3.2-2(c) (fisheries support commercial and recreational activities that are significant contributors to our economy); 20-3.2-2(d); 42-63-4 (economic development through tourism asset); 42-125-2(a)(5) (greenways are tourism asset that promotes economic development).

7 R.I. GEN. LAWS § 42-17.1-2(1).

8 R.I. GEN. LAWS § 42-17.1-2(6).

9 R.I. GEN. LAWS §§ 42-82-1; 2-23-2. See also R.I. GEN. LAWS § 2-25-2(5) (farms and commercial fishing integral parts of Rhode Island economy).

## Request for Bar Member Participation in Bar Tax Committee Formation

Members of the Rhode Island Bar Association are invited to participate in the formation of a new Committee on Taxation. The proposed Committee charge is to study and make recommendations on legislation, practices and procedure relating to taxation and to work toward the improvement of this area of law. The Committee would provide a networking opportunity for tax practitioners and provide educational support in the areas of tax practice through Committee meeting presentations, CLE programming and Annual Meeting programming. The Committee would address a range of federal taxation issues, including issues relating to individual income taxation, partnership taxation, corporate mergers and acquisitions, business formations, structuring debt and equity investments, tax-favored investment vehicles, legislative changes, compensation and benefits, and state and federal distinctions in all tax matters. Bar members interested in serving on a Bar Association Committee on Taxation are asked to email [hmcDonald@ribar.com](mailto:hmcDonald@ribar.com) or send a letter of interest to: Helen Desmond McDonald, Executive Director, Rhode Island Bar Association, 115 Cedar Street, Providence, RI 02903.

## Do you or your family need help with any personal challenges? We provide free, confidential assistance to Bar members and their families.

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

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

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

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- 10 R.I. GEN. LAWS § 46-23-1(a)(2) (natural, commercial, industrial, recreational, and aesthetic assets of value to the development of this state).
- 11 R.I. GEN. LAWS § 46-25-2(2), (5).
- 12 R.I. GEN. LAWS § 46-15-1(1).
- 13 R.I. GEN. LAWS § 2-4-12(9).
- 14 R.I. GEN. LAWS §§ 42-140-3(1) (Office of Energy Resources to provide energy resources that enhance economic well-being, social equity, and environmental quality); 39-26-3 (renewable energy standard passed in part to create jobs in the renewable energy sector); 42-140.3-2(2) (renewable energy coordinating board formed to reduce environmental impact of energy use while creating new businesses, jobs and economic growth).
- 15 Riley, 941 A.2d at 208; Windsor et al v. Coggeshall, 169 A. 326, 326-327 (R.I. 1933).
- 16 Cherenzia, 847 A.2d at 824 (R.I. 2004).
- 17 Id. citing Opinion to the Senate, 87 R.I. at 38-39, 137 A.2d 525, 526 (R.I. 1958).
- 18 Middletown v. Wehrly, 2000 WL 343902 at \*1-2 (R.I. Super. 2000).
- 19 Riley, 941 A.2d at 205 citing In re Advisory Opinion to the Governor, 612 A.2d at 7 (quoting Kennedy v. Cumberland Engineering Co., 471 A.2d 195, 198 (R.I.1984) and Bailey, 120 R.I. at 391, 394 A.2d at 1339).
- 20 Id.
- 21 R.I. Const., Art. 1, § 17 (emphasis added).
- 22 Id.
- 23 See <http://www.greenandhealthyhomes.org>.
- 24 See e.g., R.I. GEN. LAWS § 39-26.2-1 et seq. Fortunately, the energy planning under way at the Office of Energy Resources provides data and vision to correct this deficiency. See <http://www.energy.ri.gov/energyplan/index.php>.
- 25 See e.g., eNow at <http://www.enowenergy.com> and VoltServer at <http://www.voltserver.com>. ❖

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## In the City by the Bay American Bar Association Delegate Report: ABA Annual Meeting

**Robert D. Oster, Esq.**

ABA Delegate and Past Rhode Island Bar Association President

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The American Bar Association Meeting (ABA) annual meeting was held in San Francisco in August. The meeting was widely reported in the media because of two keynote speakers, Hillary Rodham Clinton, who received the ABA Medal, the organization's highest honor, and United States Attorney General Eric Holder who delivered remarks on drug sentencing on the federal level.

Mrs. Clinton received the ABA Medal for her work as the first chair of the Women in the Profession Commission, as a board member of the Legal Services Corporation, appointed by President Jimmy Carter, and the Children's Defense Fund. It is unusual to have a political candidate receive the award, and it is clear to me she will be a candidate in the next presidential election. Her speech, which was well delivered and well received, related to efforts to make voting rights easier to exercise. She cited Burma, now known as Myanmar and the efforts that have been made there to block voting rights.

Eric Holder's speech made national headlines. He stated the "criminal justice system is broken" and it is necessary to reform mandatory sentencing and develop new law enforcement strategies as "too many Americans go to jail for too long, for no adequate reason." His speech identified disparities in the criminal justice system and the unjust and unsustainable status quo. Specifically, he urged reform of the collateral consequences of convictions stating, "We cannot prosecute or incarcerate our way to the prevention of crime." He noted we should focus on prevention and reentry and that long sentences for substance abuse disorders are "shameful."

The resolutions considered by the House of Delegates were manifold, including gender equity, cyber attacks, and human slavery. Also considered were the under-served rural populations and their pressing need for lawyers. In fact, South Dakota has legislated financial incentives for lawyers who relocate their practice to rural areas.

The Delegates passed a resolution dealing with so called gay and trans panic defenses, seeking to partially or completely excuse crimes on the grounds that the victim's sexual orientation or gender identity is to blame for the defendant's violent reaction. I had not heard of either defense prior to the meeting, and I was educated by the number of cases where the defense has been raised.

John G. Levi, chair of the Legal Services Corporation, reminded Delegates that the promise of *Gideon v. Wainwright* has not been met. He urged, as do I, that more attorneys answer the call to *pro bono* service instead of only paying lip

service. Sequestration and lackluster support in Congress has led to reduced budgets for Legal Services Corporation, and, in addition to affecting the courts, it is affecting the average lawyer.

In Rhode Island, there is an explosion of *pro se* litigants who know very little of the law, but are charged with knowledge of it. This has slowed down the administration of justice locally and nationally, leading to a perversion of *Gideon*. Chief Justice Paul Suttell has appointed an Access to Justice Commission, and, if my conversations with the Chief Justice are any indication, he is very serious about the problems associated with *pro se* litigation. He has appointed Bar Executive Committee member David Bazar to the Commission and David has ably represented the Bar on that Commission.

As reported in my last report, there is an access to justice paradox. There are too few good jobs for law school graduates, and the legal needs of the poor remain unserved. The United States ranks 66 out of 90 countries in access to justice, according to the World Justice Project. And, there are 2 million unrepresented litigants every year in the United States. If the needs of the poor and the young graduates of law school can be matched, there may be light at the end of the tunnel.

In his address to the Delegates, Professor Brian Tamanaha of Washington University noted the following statistics as evidence of the problems faced by recent law school graduates. In 2001, the average student at a private law school had debt of \$70,000 upon graduation. In 2011, the figure was \$124,000. Public law school graduates had debt of \$46,000 in 2001 and \$75,000 in 2011. Harvard, Columbia, and Fordham law schools average \$80,000 per year in tuition. In 2001, \$23,000 was the average private law school tuition. In 2012, it was \$40,000. These statistics illustrate many people are mortgaging their futures with uncertainty as to how the debt can and will be paid. Clearly, we can do better for our young lawyers, and we cannot assume the market will address this issue.

I am honored to be your representative to the ABA and I am open to your comments and questions regarding my representation. ❖



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## Coming Home to Roost

*continued from page 9*

in the state of Rhode Island. Any search warrant issued shall expire forty-eight (48) hours after issuance.

On February 28, 2013, Representatives Tanzi, Cimini, Ajello, Valencia, and Blazejewski introduced a bill titled Unmanned Aerial Vehicles.<sup>31</sup> The bill provides, first, acquisition of UAVs by state law enforcement agencies shall be contingent on a public hearing and approval by the governor, or, in the case of a municipal law enforcement agency, approval by the city or town council overseeing that agency. Second, the UAV shall be used only under the direction of the Attorney General, and shall be required for the Attorney General, or a specially-designated assistant attorney general, to obtain an advanced order from the presiding justice of the Superior Court authorizing the use of the UAV. Exigent circumstances will allow UAV use without a court order approving that use in advance. Third, UAVs shall collect data only on the designated target and shall avoid data collection on individuals, homes, or areas other than the target. Additionally, use of facial-recognition software or biometric-matching technology on non-target data is prohibited. Fourth, if UAV use is authorized, the period of use shall not be longer than necessary to achieve the objective of the authorization and in no event shall it be longer than forty-eight hours. Extensions allowing use up to thirty days may be granted. Fifth, not later than ten days after the authorized use has ceased, the presiding justice shall cause to be served on the person named in the order an inventory including, *inter alia*, notice of the order, duration of the order, whether or not data was obtained and, upon filing of a motion, the judge may in her or his discretion make available to the person portions of the intercepted data. Finally, non-target data shall not be retained longer than twenty-four hours after collection. Neither the House nor Senate bills were passed during the 2013 legislative session.

Currently, bills concerning domestic drone legislation have been introduced in forty-two states, and enacted in six states.<sup>32</sup> Almost all of them center on a requirement for law-enforcement officers to obtain a probable cause warrant before being allowed to use a drone in an investigation.<sup>33</sup> However, these bills are mostly concerned, as are the bills introduced in Rhode Island, with drone use by govern-



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ment agencies and do not attempt to regulate civil drone use, which should be considered from a public policy perspective in light of the fact that the technology is increasingly available at a low cost, and due to the impending changes expected to be handed down by the FAA.

### Conclusion

It is inevitable that the widespread use of drones will impact our community and our expectations of privacy. State and local law enforcement agencies will likely expand the use of drones to more effectively, efficiently and safely carry out their duties. Instead of an officer following a suspect for hours or days, a UAV can covertly monitor that suspect for an indefinite period. UAVs can also be sent into areas where it would be dangerous or not practical for a law enforcement officer to enter. A UAV even has the ability to search for a missing child after the issuance of an Amber Alert.

On the other hand, the use of this technology may impact our right to privacy and other constitutional protections. For example, is it permissible for law enforcement to have a UAV follow an individual for an undisclosed period of time without probable cause or reasonable suspicion? Should law enforcement keep the videos recorded by UAVs for use in future or unrelated investigations? Other issues may also arise as the use of UAV by private individuals expands. For instance, should a husband who suspects that his wife is having an affair be able to use a UAV to track her movements, including peering through a neighbor's window? Will business people follow their competitors by using a UAV in the hopes of learning confidential business secrets?

It is probable that there will be extensive legal battles over issues raised as a consequence of this evolving technology. A multitude of challenges await, and there is an opportunity for the small state of Rhode Island, home to defense contractors, the Navy base in Newport, and excellent schools, to be on the cutting edge of these emerging legal and public policy issues. It is in the best interest of all stakeholders to participate in the development of a framework to use this ever-changing technology, while at the same time assuring our constitutional rights are protected.

### ENDNOTES

1 See *MILITARY TIMES, NAVY TESTS OCEAN DRONES IN NARRAGANSETT BAY*, available at <http://militarytimes.com/news/2012/08/ap-navy-tests-ocean->

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- drones-080712/ (last visited March 19, 2013).
- 2 See THE NEW YORK TIMES, DRONE ZONE, available at <http://www.nytimes.com/2012/07/08/magazine/the-drone-zone.html?smid=pl-share> (last visited March 20, 2013).
- 3 See THE SPOKESMAN REVIEW, DRONES PATROLLING WASHINGTON STATE BORDER, available at <http://www.spokesman.com/stories/2012/apr/30/drones-patrolling-washington-border/> (last visited March 15, 2013).
- 4 Teal Group Corporation, TEAL GROUP PREDICTS WORLDWIDE UAV MARKET WILL TOTAL \$89 BILLION IN ITS 2012 UAV MARKET PROFILE AND FORECAST, available at <http://tealgroup.com/index.php/about-teal-group-corporation/press-releases/66-teal-group-predicts-worldwide-uav-market-will-total-89-billion-in-its-2012-uav-market-profile-and-forecast> (last visited Feb. 20, 2013).
- 5 See Raytheon, PYROS OFFERS THE WARFIGHTER LIGHTWEIGHT, POWERFUL PRECISION, available at <http://www.raytheon.com/capabilities/products/pyros/> (last visited April 4, 2013); Textron Systems, TETRON DEFENSE SYSTEMS' BATTLEHAWK™ SQUAD-LEVEL LOITERING MUNITION EXCELS DURING RAPID EQUIPPING FORCE DEMO, available at [http://www.textrondefense.com/news/press\\_release\\_item.php?ReleaseID=1698589](http://www.textrondefense.com/news/press_release_item.php?ReleaseID=1698589) (last visited April 2, 2013).
- 6 UAV Forge, CROWDSOURCING FOR UAV INNOVATION, available at <http://www.uavforge.net> (last visited January 20, 2013).
- 7 Team Blacksheep, FPV VIDEOS BY TEAM BLACK SHEEP, available at <http://www.youtube.com/user/nastycop420> (last visited April 3, 2013).
- 8 See Lawrence Livermore National Laboratory, PERSISTICS DATA PROCESSING, available at <https://missions.llnl.gov/defense/persistics> (last visited April 2, 2013).
- 9 Defendants' Notice of Motion and Motion to Dismiss, *State of North Dakota v. Rodney Brossart et al.*, N.E. Cen. D. (N.D. 2012) (Nos. 32-2011-CR-00049, 00071).
- 10 See Brief of Defendants in Support of Motion to Dismiss, 2, *State of North Dakota v. Rodney Brossart et al.*, N.E. Cen. D. (N.D. 2012) (Nos. 32-2011-CR-00049, 00071).
- 11 *Id.*
- 12 *Id.* at 4.
- 13 *Id.* at 2.
- 14 *Id.* at 20.
- 15 State's Response to Defendants' Combined Motion to Dismiss, 12, *State of North Dakota v. Rodney Brossart et al.*, N.E. Cen. D. (N.D. 2012) (Nos. 32-2011-CR-00049, 00071).
- 16 Memorandum Decision and Order Denying Motion to Dismiss, *State v. Brossart*, 12, (N.E. Cen. D. (N.D. 2012) (No. 32-2011-CR-00049).
- 17 *Florida v. Riley*, 488 U.S. 445, 448 (1989); *California v. Ciraolo*, 476 U.S. 207 (1986).
- 18 *Kyllo v. United States*, 533 U.S. 27, 29-30 (2001).
- 19 *Id.* at 34.
- 20 *Katz v. United States*, 389 U.S. 347, 361 (1967).
- 21 George Orwell, 1984 (1948).
- 22 The FAA, originally known as the Federal Aviation Agency, was created by Congress under the Eisenhower Administration in 1958 with the Federal Aviation Act of 1958. It empowered the FAA to regulate American airspace. Federal Aviation Act, Pub.L. No. 85-726, 72 Stat. 731, (1958) Congress recodified the existing aviation legislation in 1994.
- 23 FAA Aeronautics and Space, 14 C.F.R.
- 24 See 14 C.F.R. § 91.113, RIGHT-OF-WAY RULES: EXCEPT WATER OPERATIONS. This rule regulates the

actions to be taken by aircraft if operation results in close proximity to other aircraft, directing aircraft pilots to be on the lookout for other aircraft and avoid them if necessary.

25 14 C.F.R. § 1.1.

26 Federal Aviation Administration, UNMANNED AIRCRAFT SYSTEMS OPERATIONS IN THE U.S. NATIONAL AIRSPACE SYSTEM – INTERIM OPERATIONAL APPROVAL GUIDANCE (2005).

27 Federal Aviation Administration, FACT SHEET: UNMANNED AIRCRAFT SYSTEMS (UAS), available at [http://www.faa.gov/news/fact\\_sheets/news\\_story.cfm?newsId=14153](http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=14153) (last visited January 12, 2013).

28 The applicable regulations for an experimental certificate are found in 14 C.F.R. §§ 21.191, 21.193, and 21.195.

29 Federal Aviation Administration, MODEL AIRCRAFT OPERATING STANDARDS, Advisory Circular 91-57 (1981).

30 FAA Modernization and Reform Act of 2012, Pub.L. No. 112-95, § 332, 126 Stat. 11, 73 (2012).

31 H 5780, Gen. Assem., Jan. Sess., (R.I. 2013).

32 Domestic drone legislation has been enacted in Florida (effective July 1, 2013), Idaho (effective July 1, 2013), Montana (effective Oct. 1, 2013), Tennessee (effective July 1, 2013), Texas (effective Sept. 1, 2013), and Virginia (effective July 1, 2013). American Civil Liberties Union, STATUS OF DOMESTIC DRONE LEGISLATION IN THE STATES, available at <http://www.aclu.org/blog/technology-and-liberty/status-domestic-drone-legislation-states> (last visited July 09, 2013).

33 American Civil Liberties Union, STATUS OF DOMESTIC DRONE LEGISLATION IN THE STATES, available at <http://www.aclu.org/blog/technology-and-liberty/status-domestic-drone-legislation-states> (last visited July 15, 2013). ❖

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**Estate Planning**

*continued from page 15*

this approach, it is strongly preferable to use a multimember business structure, to counter any taxing authority argument that the business is nothing more than a pass-through entity.

An alternative technique is available to married couples and can be accomplished without the additional expense of forming a Florida business entity. If a couple has or creates a Florida marital-credit shelter, or A-B revocable trust, the Rhode Island real estate should be transferred to that trust. Upon the death of the first spouse, the Rhode Island real estate should be included amongst the assets used to fund the credit-shelter or family trust, to which the first spouse's lifetime estate tax exemption is then applied, currently \$910,725 in Rhode Island. The Rhode Island real estate then remains in the credit-shelter trust during the surviving spouse's life, and is not in turn included in the surviving spouse's taxable estate at the time of his or her death.<sup>23</sup>

**Medicaid Planning**

In Rhode Island, as well as neighboring states such as Massachusetts, the most common and effective means to protect one's assets from having to be spent on nursing home care is to establish a qualifying irrevocable Medicaid trust. Any assets transferred to this type of trust will not be counted by the Rhode Island Department of Human Services when calculating the resources available to pay for the nursing home. By creating this type of trust, Rhode Islanders are able to protect their real estate and savings for future generations, while at the same time qualifying for Medicaid long-term care benefits. While the trust is irrevocable, the grantor (i.e. creator) of a properly structured trust can serve as the trustee, receive the trust income, reside on any trust real estate, and change the ultimate trust beneficiaries through a special power of appointment included in the trust document.<sup>24</sup> In order for an asset to be protected, it must be transferred to the irrevocable Medicaid trust five years prior to the individual's application for Medicaid long-term care benefits.<sup>25</sup>

In comparison, the Florida homestead, unlike the homestead in Rhode Island and Massachusetts, protects an individual's real estate if they need nursing home

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care.<sup>26</sup> As a result, Florida estate planning attorneys often do not advise clients to create an irrevocable Medicaid trust for homesteaded real estate. While that may be sound advice for a purely Florida client, many Rhode Islanders change their domicile to Florida upon retirement, but retain some connections to the Ocean State even if they do not still own real estate in Rhode Island. Estate planning practitioners often find that, although a client has changed residency to Florida, once their health begins to deteriorate, they return to Rhode Island to be closer to family. If they had been advised by a Florida attorney that their Florida property was not a countable resource for Medicaid qualification purposes, they will learn Rhode Island does not recognize this same protection.

For individuals who either intend or have the potential to return to Rhode Island if they ever need significant health care, the best practice is to establish a Florida irrevocable Medicaid trust for their Florida homestead real estate. This trust must be carefully drafted to meet the requirements for the Medicaid and trust laws in both states, as well as the Florida property tax homestead requirements for trusts. When drafting this type of multi-purpose trust, included amongst the non-typical Rhode Island irrevocable Medicaid trust provisions are: the Florida property tax homestead provision; Florida specific spendthrift provision; Florida rule against perpetuities provision; and the Florida requirement that trusts be executed in the presence of two witnesses and a notary similar to Rhode Island's last will and testaments requirement.

#### **Durable Power of Attorney Comparison**

Another significant distinction between Rhode Island and Florida law concerns durable power of attorneys. A durable power of attorney allows an individual, the principal, to appoint an agent, the attorney-in-fact, to act on his or her behalf, regardless of any subsequent disability or incapacity of the principal.<sup>27</sup>

Florida enacted a new durable power of attorney statute, which went into effect on October 1, 2011.<sup>28</sup> With the implementation of the new statute, the requirements for a valid durable power of attorney in Florida are far more stringent than those in Rhode Island. The purpose of the Florida statute is to better

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define the scope of an agent's power, and to curb abuses by agents. While a valid Rhode Island durable power of attorney should be recognized in Florida, because of the many differences between the documents used in each state, it is advisable for a Rhode Islander spending time in Florida, regardless of his or her state of residence, to execute either a Florida durable power of attorney or a Rhode Island durable power of attorney with similar provisions to the Florida version, as opposed to the more bare-bones Rhode Island statutory form power of attorney.<sup>29</sup>

One difference between the respective statutes of each state is that under the Florida statute, so-called blanket powers are no longer effective. Most durable power of attorneys contain such powers, which authorize the agent to act broadly and to take any action that the principal could take if he or she was personally present.<sup>30</sup> These open-ended grants of power are now invalid in Florida, and, instead, the agent is only authorized to take those actions specifically outlined in the document, as well as any additional actions reasonably necessary to give effect those specific grants.<sup>31</sup> In addition, a Florida durable power of attorney must be signed in the presence of two witnesses and a notary, as opposed to the practice in Rhode Island of signing a power of attorney in the presence of a notary only.<sup>32</sup>

Another distinction is that a springing power of attorney is no longer recognized in Florida. A Rhode Island durable power of attorney can be drafted to be either effective immediately at the time it is signed, or activated at the time the principal becomes incapacitated. In other words, the agent of a springing power of attorney can only act once the principal is disabled.<sup>33</sup> In Florida, as a result of the new statute, only immediate power of attorneys are permitted, and existing Florida springing power of attorneys are now deemed void.<sup>34</sup>

Another important change in Florida is that certain powers, known as super powers, requires the principal's signature or initial next to the enumeration of the given power in the document, as opposed to a single signature on the last page. Resulting from concerns over elder abuse and tampering with established estate plans by agents, the powers requiring a specific signature or initial include the powers to alter the principal's estate plan, make gifts, change beneficiary designa-

tions or other documents effective at death, and manage retirement plans.<sup>35</sup>

As many attorneys have experienced, when a Rhode Island document is scrutinized by an out-of-state individual or entity, issues often arise over whether the document is truly valid under Rhode Island law. The Florida durable power of attorney statute allows a third party to request an opinion of counsel regarding the validity of a presented document, and the cost to obtain that opinion is borne by the principal.<sup>36</sup> To avoid this, practitioners must review their durable power of attorney template with an eye toward whether it will create an issue for the client in states such as Florida with much more stringent requirements for such documents.

#### Ethical Issues

Unfortunately, the unlicensed practice of law is a far too often occurrence by New England attorneys representing their multistate clients. The Florida Bar, like the Rhode Island Bar, takes the unauthorized practice of law seriously, and may seek civil injunctive relief, a criminal contempt charge, a monetary penalty, and/or the payment of costs for litigating a claim against a violating attorney. In *State of Florida v. Sperry*, the Florida Supreme Court set the standard for reviewing an allegation of the unlicensed practice of law:

It is safe to follow the rule that if the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.<sup>37</sup>

In the estate planning realm, a common example of the unlicensed practice of law is the preparation of a Florida deed for a Rhode Island estate plan. Even such ancillary acts are a violation of the Bar Rules.

#### Conclusion

When a client has interests in Rhode Island and Florida, and potentially Massachusetts or another New England state, their estate plan should in turn take into account the law of both states regard-

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less of the individual's actual domicile. Too often issues arise when a Rhode Island practitioner does not consider the effect Florida's laws will have on a client and his or her estate plan, or, likewise, when a Florida practitioner does not consider Rhode Island law. To properly advise a client, a Rhode Island practitioner must be aware of the potential problems and pitfalls presented by Florida law, and know when to retain Florida counsel to assist with a matter to both properly advise the client and avoid any inkling of the unlicensed practice of law.

#### ENDNOTES

- 1 See, e.g. *Warren v. Warren*, 75 So. 35, 40 (Fla. 1917); *McCarthy v. McCarthy*, 122 A. 529, 531 (R.I. 1923).
- 2 See, e.g. *Feehan v. Trefry*, 129 N.E. 292 (Mass. 1921).
- 3 764 A.2d 727, 730 (R.I. 2001).
- 4 *Id.* at 731.
- 5 *Id.* at 732.
- 6 *Id.* at 734-737.
- 7 *Id.* at 735.
- 8 FLA. STAT. § 222.17 (2012).
- 9 R.I. GEN. LAWS § 9-26-4.1 (2012).
- 10 MASS GEN. LAWS ch. 188 (2012).
- 11 Art. X, § 4, Fla. Const.
- 12 R.I. GEN. LAWS § 9-26-4.1 (2012).
- 13 271 B.R. 403, 407 (Bankr. M.D. Fla. 2001).
- 14 921 So.2d 693, 694 (Fla.App. 4 Dist. 2006).
- 15 See, e.g. *In re Alexander*, 346 B.R. 546 (Bankr. M.D. Fla. 2006); *In re Edwards*, 356 B.R. 857 (Bankr. M.D. Fla. 2006); *In re Cocke*, 371 B.R. 554 (Bankr. M.D. Fla. 2007).
- 16 Art. VII, § 4, Fla. Const.
- 17 R.I. GEN. LAWS § 44-30 (2012); R.I. GEN. LAWS § 44-22 (2012).
- 18 Art. VII, § 5, Fla. Const.
- 19 R.I. GEN. LAWS § 44-30-1 (2012).
- 20 R.I. GEN. LAWS § 44-30-31 (2012).
- 21 *DeBlois* at 735.
- 22 R.I. GEN. LAWS § 44-22-1.1 (2012).
- 23 See *Mary Louise Kennedy, A PRACTICAL GUIDE TO ESTATE PLANNING IN RHODE ISLAND* § 4.2.6 (Nancy Fisher Chudacoff & Mary Louise Kennedy eds., Massachusetts Continuing Legal Education, Inc., 2011).
- 24 See *David J. Correia & Eric D. Correia, A PRACTICAL GUIDE TO ESTATE PLANNING IN RHODE ISLAND* § 11.3.3 (Nancy Fisher Chudacoff & Mary Louise Kennedy eds., Massachusetts Continuing Legal Education, Inc., 2011).
- 25 RI DHS Reg. 0356.50.10.
- 26 *Access Florida Program Policy Manual Chapter 1600 MSS1 1640.0578*.
- 27 FLA. STAT. § 709.2104 (2012); *Kristen N. Matsko & Kristen Prull Moonan, A PRACTICAL GUIDE TO ESTATE PLANNING IN RHODE ISLAND* § 8.5 (Nancy Fisher Chudacoff & Mary Louise Kennedy eds., Massachusetts Continuing Legal Education, Inc., 2011).
- 28 FLA. STAT. § 709.2106 (2012).
- 29 R.I. GEN. LAWS § 18-16-2 (2012).
- 30 See *Kristen N. Matsko & Kristen Prull Moonan, A PRACTICAL GUIDE TO ESTATE PLANNING IN RHODE ISLAND* § 8.5.2 (Nancy Fisher Chudacoff &

Mary Louise Kennedy eds., Massachusetts Continuing Legal Education, Inc., 2011).

31 FLA. STAT. § 709.2201 (2012).

32 FLA. STAT. § 709.2105 (2012).

33 Kristen N. Matsko & Kristen Prull Moonan, A PRACTICAL GUIDE TO ESTATE PLANNING IN RHODE ISLAND § 8.5.5 (Nancy Fisher Chudacoff & Mary Louise Kennedy eds., Massachusetts Continuing Legal Education, Inc., 2011).

34 FLA. STAT. § 709.2108 (2012).

35 FLA. STAT. § 709.2202 (2012).

36 FLA. STAT. § 709.2106 (2012).

37 140 So.2d 587, 591 (Fla. 1962). ❖

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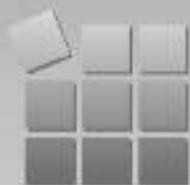
## In Memoriam

### John Hellew, Esq.

John Hellew, 63, of 377 Child St., Warren, passed away on August 11, 2013. He was the husband of Shirley Hellew, the loving father of Kelsey and Christian, and brother of Virginia and Janis. Born in Warren, a son of the late John and Helen, he attended Upper Iowa College, and he earned his law degree at the Franklin Pierce Law Center. He started his career in the appellate division of the Rhode Island Attorney General's Office, served as the Warren Town Solicitor for two years and was in private practice for more than 30 years.

### George K. Joovelgian, Esq.

George K. Joovelgian, 73, of West Greenwich, passed away on Tuesday, August 27, 2013. He was the beloved husband for 43 years of Karen Kehr Joovelegian. Born in Providence, he was the devoted son of the late Kevork "George" and Rose A. Ahlijian Joovelegian and dear brother of Harold A. Joovelegian, Esq. and his wife Francine of Cranston.



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