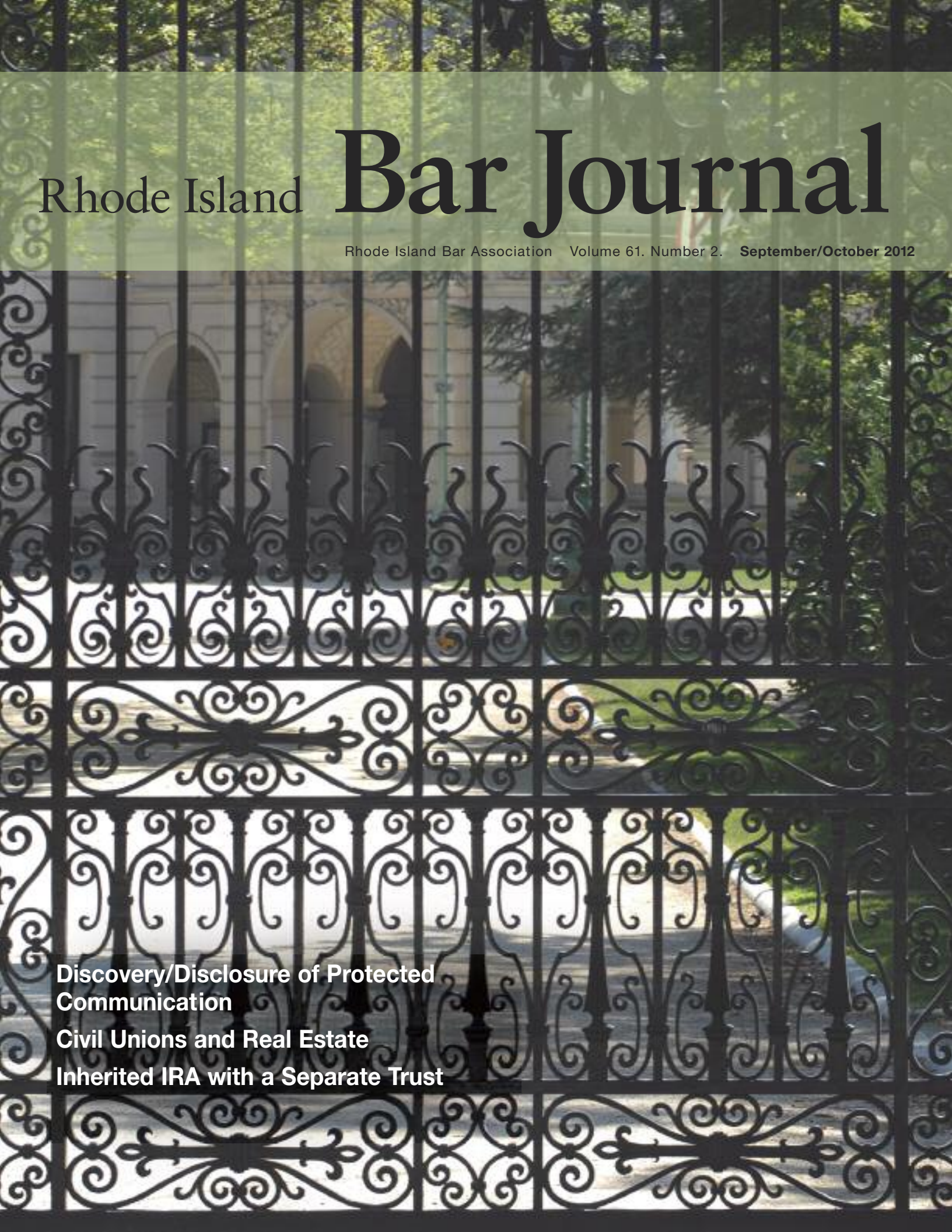

Rhode Island Bar Journal

Rhode Island Bar Association Volume 61. Number 2. **September/October 2012**

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RHODE ISLAND Bar Association
1898

RHODE ISLAND BAR ASSOCIATION LAWYER'S PLEDGE

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Front Cover Photograph
The Breakers Gates, Newport,
by Brian McDonald

First Thing We Do, Let's Kill All the Law Schools

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

I propose that law schools adopt a modified medical school format. Spend the first six months to a year reading cases and thinking like a lawyer, but then make sure law students learn the basics.

Traditionally, the first two years of medical school are spent taking foundation classes such as anatomy, physiology, pathology, pharmacology, immunology, how to take a history and a physical, and related courses. Patient care begins in the next two years of medical school, and students are generally rotated through specialties such as internal medicine, surgery, pediatrics, obstetrics and gynecology, psychiatry, neurology, and emergency medicine.

Comprehensive exams must be passed at the end of the second and fourth years, and the M.D. is awarded. This is followed by a one-year internship, another comprehensive exam, and then, at least two more years of residency. If a doctor wants to specialize, then fellowships of varying additional years are required. Board certifications and hospital privileges must be obtained.

Instead, imagine if we trained doctors solely in classrooms and only for three years, with no patient contact, and had them, almost exclusively, read nothing but medical case studies. Then, without ever having been required to see a patient, give an injection, or work in a hospital or doctor's office, they are awarded their M.D. If they pass an exam, they receive their license to practice medicine, and are unleashed on the public. The license would allow them to practice medicine in any field without any further training. Heart surgery? No problem – you are a doctor, you have your license, so grab a scalpel and let's get started! Well, isn't that how law schools train lawyers? It was for me.

Most new lawyers have never been inside a courtroom, been to a closing, done a title examination, prepared a will or a promissory note (or even seen one), or learned any of the many skills needed to practice law on a daily basis, with one exception – they know how to read appellate decisions. In my personal opinion, they are no more prepared to represent a client than a doctor with a similar lack of training would be prepared to treat a sick patient.

Up until a few years ago, when the U.S. economy tanked, this legal training gap was filled by law firms, large and small, that would hire new law school graduates as associates and start their internship and residency in the practical aspects of how to represent a client and run a law office.

Think of the skills you need to do your job every day. How many of those skills did you learn in law school? My personal experience is that I learned about 5% of what I need in law school. The other 95% I learned from other lawyers, CLE programs, or by just bumbling through.

What do I need to know to run my solo law office? How do I hire (and retain) quality employees, rent office space, attract and keep clients, track time and expenses, send out and collect bills, handle accounts and file and pay taxes, buy insurance, keep organized, meet deadlines, keep the computers, printers and copiers running?

What do I need to know to practice law? How do I handle cases in different courts and before a myriad of administrative agencies, how do I negotiate and draft all manner of documents, from routine contracts to purchase a home or small business to wills, notes, mortgages, assignments, bills of sale (and the tax implications of each of these transactions)? The list goes on and on. How much of this did I learn in law school? Very little.

Is that really the right way to educate lawyers? I, personally, think it is not, especially when so many new lawyers are being forced by the poor state of the economy to hang out their shingles straight out of school.

The Bureau of Labor Statistics estimates that law schools are turning out about twice as many lawyers as there are or will be available legal jobs (an excess of about 25,000 law grads per year), and this trend is expected to continue for many years. And, the average law student is graduating from private law school with over $100,000 in loans that need to be repaid and cannot be wiped out in bankruptcy.

It is my belief that the law school model is broken. Law schools need to produce practice ready lawyers, but they are not doing so. Law schools have recognized this to some small extent, but are taking excruciatingly slow baby steps to fix the problem – a voluntary legal clinic here, a small *pro bono* project there, but

no real, substantive, institutional sea change is taking place in the way lawyers are trained.

My proposal is a radical one. First, because we need only half the lawyers we are producing each year, this means that either law schools must cut their enrollment in half, or half of the schools must close.

Second, we must start from the ground up and radically change the teaching model. We have an opportunity to do this right now. Our economy has made hiring a lawyer virtually unaffordable for most average people, no matter how badly a lawyer is needed. The need for legal help is greater than ever, but there is less ability to pay. The needs are obvious – foreclosures, bankruptcies, divorces, child custody/visitation, access to government benefits – the list is huge. Bar Associations (and law schools) have tried to increase *pro bono* assistance, but it does not even come close to stemming the tsunami of need.

I propose that law schools adopt a modified medical school format. Spend the first six months to a year reading cases and thinking like a lawyer, but then make sure law students learn the basics: What is a promissory note? How do you draft it? How does it differ from a mortgage? How do you draft a deed or a will? How do you handle a probate?

Make sure they know their way around the courthouses and administrative agencies and, partnering with mentor lawyers, learn how to handle a divorce/custody matter, defend an eviction, handle a bankruptcy, defend a consumer collection, handle an arraignment, a trial, an appeal, etc. Just like medical students start with the basic see one, do one, teach one, law students need to do the same. The courts will also need to cooperate by expanding law student practice rules and limited representation rules. But, I believe, we will then have better trained lawyers who are able to hit the ground running, make a living and properly represent clients.

I started law school almost 40 years ago, and maybe things have changed a lot since then. But one of the most common complaints I hear from legal employers (and judges) is that new graduates are just not ready to practice law – not by a long shot – so I don't think I am too far off the mark.

If you disagree with me (I can hear the law school deans and professors yelling at me as I type), feel free to sound off and tell me how wrong I am. An open dialogue among many is much more likely to develop a solution to this crisis than my lone voice crying out in the wilderness.

In the meantime, until real change takes place, please do me a favor. Call the Rhode Island Bar Association Public Services Director Sue Fontaine at 421-5740 x101, and offer to take just one *pro bono* case. If it deals with an area you are unfamiliar with, you will be provided with all the tools you need, including, but not limited to, sample documents and mentors to learn the new field. If each of you reading this message takes only one *pro bono* case per year, it will go a very long way toward helping people in desperate need. And, you might even learn something and enjoy yourself along the way!

EDITOR'S NOTE: Bar President McElroy and the Rhode Island Bar Journal welcome reader comments and letters on all president's messages and all other articles published in the *Journal*. Please direct comments and letters to: *Rhode Island Bar Journal* Editor Frederick D. Massie, fmassie@ribar.com, or call 401-421-5740. ❖

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RHODE ISLAND BAR JOURNAL

Editorial Statement

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

Article Selection Criteria

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

Direct inquiries and send articles and author's photographs for publication consideration to:
Rhode Island Bar Journal Editor Frederick D. Massie
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Experts and the Discovery/Disclosure of Protected Communication

George E. Lieberman, Esq.
Vetter & White, Providence

The interrelationship between the Federal Rules of Civil Procedure, and the Federal Rules of Evidence impacts discovery before trial, disclosure at trial of attorney-client communications and attorney work product material.

Introduction

An issue of significant importance is the interrelationship between the Federal Rules of Civil Procedure (Fed. R. Civ. P.), and the Federal Rules of Evidence (FRE), and how that interrelation impacts discovery before trial and disclosure at trial of attorney-client communications and attorney work product material. The courts have taken different views on the questions raised in this area.[1] Further, Fed. R. Civ. P. 26 makes this issue of discovery, and what is considered privileged protected information and material, even more acute and pressing.

A ruling compelling pretrial discovery or production/disclosure or a preclusion order may well mean the difference between winning and losing a lawsuit. Consequently, we need to recognize the issues, be knowledgeable concerning the decisions concerning those issues, and be sensitive as to how best to proceed.

In Sections II through IV below, the case law preceding the December 1, 2010 amendments to the Fed. Rs. Civ. P. directed to the issue of discovery of communications between counsel and her expert is explored. In Section V, the Fed. Rs. Civ. P. December 2010 amendments and how those amended rules impact the scope of expert discovery are examined.

Protected Communication

Fed. R. Civ. P. 26(b)(3) protects work product of both the attorney and the party. A showing of substantial need is required before production will be ordered. Note: the rule refers to documents only. Are oral communications discoverable? Are they given more, less or the same protection?[2]

Concerning "mental impressions, conclusions, opinions or legal theories of an attorney or a party…" the "…courts shall protect against disclosure."[3] This type of material has been referred to as core or opinion work product. Is it discoverable, and, if so, under what standard?[4] FRE 501 looks to common law and, in cases decided by state law, to state law to determine what constitutes privileged communication. Most states consider attorney-client communication as privileged.

Losing the Privilege/Protection

Let us examine how the discovery/disclosure issues arise. You are assisting/preparing your witness and having her or him formulate an opinion. You obviously talk to the witness and share documents. Have you relayed attorney-client communications? Have you provided some of your opinions, thoughts, mental impressions? Have you given the witness some work product documents? Have you orally communicated attorney-client communications? Are these discoverable? Under what procedural or evidentiary rules might your opponent claim they are? And, under what circumstances might they be discoverable, i.e., has the expert relied upon/considered the information given to her or him in formulating an opinion? And when are they discoverable? During pretrial proceedings? At trial? At both stages? Are the rules governing production/disclosure the same during both trial and pretrial proceedings?

These issues are raised because you have provided, either in written or oral form, sensitive information to your expert. If you have not done so, the issue of discovery/disclosure would not have arisen. Moreover, if you have not provided sensitive information, such as attorney-client communication or work product, but documents available to the other side, and there is no question of core work product being disclosed as a result of your selection of the documents, you probably do not care whether such documents are provided, or provided again.

The various issues can and should be identified. Did the expert rely upon/consider the information in reaching an opinion? Did the expert or lay witness use it to refresh a personal recollection before testifying or while testifying? At a deposition? At trial? Is the material at issue in written or oral form? Is the information/document within the ambit of the attorney-client privilege or work product doctrine, or both? If work product, is it core work product?

An important, indeed critical, question is whether the expert relied upon or considered the information in reaching an opinion, i.e., are there facts or data upon which she or he relied or which considered in reaching an opinion? If

not, even courts inclined to order production/disclosure probably will, and should, not.[5]

Fed. R. Civ. P. 26(a)(2)(B) requires that a party provide a report disclosing, in detail, the opinions to which the expert is expected to testify and the basis for such opinions. FRE 705 provides an expert may be required to disclose the facts or data upon which her or his opinion rests during cross-examination. Cross-examination may include a deposition of an expert since the "[e]xamination and cross-examination [during depositions] may proceed as permitted at trial under the . . . Federal Rules of Evidence. . . ."[6] The **Boring** court did not invoke FRE 612 as the basis for its decision.[7]

In **Derderian v. Polaroid Co.**,[8] the court denied a request for production of documents falling within the attorney-client privilege and work product doctrine even though such documents were reviewed by the expert before the deposition. The court believed the examining party would get the information it needed at trial, thus distinguishing the process for discovery from the trial process. The Court of Appeals for the Third Circuit in **Bogosian** denied production of core attorney work product documents shown to experts before their trial depositions, emphasizing the special protection afforded such material.[9] Further, the Court of Appeals, *in dictum*, stated FRE 612 did not serve as a basis for production.[10] In **Carolina**, the court denied the request for documentary opinion attorney work product reviewed by the expert to be disposed. Observing that such material "is absolutely privileged under Rule 26(b)(3),"[11] the court denied production. The **Duplan** court, 509 F.2d 731, 736, also considered such material absolutely immune from discovery.

In **Sporck v. Peil**,[12] the Third Circuit did not order production of core attorney work product material because the evidentiary foundations of FRE 612 were not satisfied.[13] This opinion is difficult to harmonize with the court's year-earlier opinion in **Bogosian**.[14] Under FRE 612(1), a cross-examining party is entitled to have a writing produced if it is used to refresh the memory of the witness during his testimony. If it was used before testifying, then the court may order its production if such production is "in the interest of justice."[15]

Regarding attorney-client communica-

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tions, courts are inclined to order disclosure on the basis of the waiver of the privilege when such communications are provided to third parties.[16] Consequently, providing them to an expert may result in a court ordering disclosure, even if the expert did not rely on such communications in formulating an opinion solely on the basis of waiver of the privilege. If the expert did rely upon such communications in formulating an opinion or refreshing a recollection, production/disclosure probably will be ordered.

In summary, some courts will not permit discovery of core work product even if relied upon by an expert witness or used to refresh a recollection.[17] Other courts will order production if expert witness used it to formulate her opinion[18] – or if used to refresh the witness' memory in connection with testimony at a deposition.[19]

Some courts are more inclined to order production on the basis of FRE 612 if the witness uses the document to refresh her or his memory during her or his deposition than if used before testifying.[20] Of course, either basis – Fed. R. Civ. P. 26(B)(4)(A)(i) coupled with FRE 705 used to formulate opinion, or FRE 612 used to refresh recollection, or both can be used to support disclosure.[21]

An interesting question is what constitutes opinion/core work product? Suppose your case involves a substantial amount of documents and you select several to show your witness, expert or otherwise. The selection process arguably reveals your mental process, opinions, and perhaps legal theories. The Third Circuit so found in **Bogosian** and **Sporck**.[22] In the context of court-ordered disclosure of exhibits to be used during depositions, the First Circuit concludes to the contrary.[23]

Fed. R. Civ. P. 26 – Automatic Disclosure

The issue of having to disclose privileged/protected communications is even more acute as a result of the automatic disclosure requirements under Rule 26.

Fed. R. Civ. P. 26(a)(1) and (2) require automatic disclosure of relevant information and production of relevant material before discovery requests are made, including documents that may be used to support a claim or defense, subsection (1)(A) and (B), and documents upon which a party's computation of damages is based. Subsection (a)(1)(C). Further, as

LETTER TO THE EDITOR

Further Thoughts on Thomas More

Thomas More, a lawyer gone almost five centuries, appears prominently in the last two issues of the *Rhode Island Bar Journal* (May-June 2012, pg. 27: Commentary: *St. Thomas More and the Cranston West Banner Case*, John Mulcahy, Esq., and July/August 2012, pg. 4: Letter to Editor, *Response to Commentary*, Brian Clifford, Esq.). I offer a different view of Thomas, whom Mulcahy calls a "hero for freedom of conscience" and Clifford refers to as "the patron saint of all lawyers."

First, a brief aside on Judge Lagueux's decision in **Ahlquist v. City of Cranston**, which both writers noted. Although I disagree with Mulcahy and Clifford on Thomas More's attitude toward freedom of conscience, it is breathtaking how many other people expressed vehement views on the January decision without ever reading one word of it. Why let the facts get in the way of a good argument? Regardless of one's political persuasions, Judge Lagueux's very thorough discussion makes good reading for anyone willing to consider that separation of church and state does not involve either promotion of, or an attack on, an individual's religious practices or beliefs.

But exactly who was Thomas More, revered today as the innocent martyred victim of a tyrannical Henry VIII? Was he indeed some early combination of Dietrich Bonhoeffer, Nathan Hale and Nelson Mandela? Is he appropriately characterized five centuries later as the patron saint of *all* lawyers, or revered for his "unwavering dedication to freedom of conscience" as Mr. Mulcahy tells us? Clearly, it took courage and grace to lay his head on the chopping block in 1535, and many biographers find him likeable to an extent. After all, he even good-naturedly complied with Henry's request to keep his pre-beheading words briefer than his usual speech-making.

But in the 1520's, More was in the inner circle of power. He was Kissinger to Henry's Nixon. As a strong believer in the Catholic Church, More was given increasing authority to stamp out the spread of dreaded Lutheranism. In 1526, he led the raid on the Steelyard in London, where German merchants were arrested for shipping heretical books into England. Bonfires consumed the offending books. In 1528, royal authorities commissioned More to write a rebuttal to the spreading Protestant ideas, resulting in the publication of More's *Dialogues Concerning Heresies*. In it, More moves away from his lifelong friend Erasmus, who has grown too lenient on heretics in Thomas's view. He includes a defense of burning heretics at the stake in order to repel Satan. Burning such people, declared Thomas, was "lawful, necessary, and well done."

More's lack of tolerance may also be found in the pages of *Utopia*, where both men and women guilty of adultery would be condemned to slavery (first offense) and death (second offense). Ironically, he led the prosecution against Wolsey, who fell from favor with Henry over allegations of lack of loyalty to the King and lack of correct religious views. More then succeeded Wolsey as Lord Chancellor, only to suffer a similar fate a few years later. Wolsey was given a choice of trial before Parliament or the King's Bench, and he chose the latter, avoiding capital punishment. Thomas More's prosecutorial signature is the first on Wolsey's Bill of Particulars.

It is just as unfair to pass judgment on Thomas More in light of current notions of separation of church and state as it is to try to speculate how he would have voted as a member of the 2011 Cranston School Committee. Five centuries have passed. More believed in the supremacy of church over state, not their separation. Furthermore, he believed in the supremacy of his one true church, as opposed to the heretical views of those who had to be burned to death to protect the Commonwealth.

In fact, more recent concepts of separation of church and state, courtesy of Jefferson and Madison, arose precisely because of centuries of religious violence in Europe. Thomas More was part of his century, not this one.

But he should also not be placed on a bronze pedestal of patron sainthood, or revered as a champion of freedom of conscience, which he was not. He died for his belief that his religious views trumped his King's directive, but not for any general primacy of freedom of conscience. He was, indeed, firmly in the camp of those fair-weather First Amendment fans best described in the tongue-in-cheek titled book by Nat Hentoff, *Free Speech For Me, But Not For Thee*.

Patron saints, it turns out, have feet of clay, not bronze. We are all imperfect. That's what makes it interesting.

John W. Dineen, Esq.

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The Rhode Island Bar Association is now presenting live, streaming-video simulcasts, on the web, of designated Continuing Legal Education (CLE). Throughout the year, selected CLE seminars are offered as both in-person classroom programs *and* as real-time, live, streaming-video simulcasts on the web. For those choosing simulcasts, CLE seminar course materials are included in a PDF format.

Except where the RI Supreme Court's carryover credit limitation applies, there is no limit to the number of credits Bar members may accrue by participating in real-time, live, streaming-video simulcasts of CLE seminars. However, the 3.0 credit limit, established by the RI Supreme Court for watching pre-recorded CLE seminars via the web – as opposed to real-time, live, streaming video simulcast CLE seminars – remains in effect. Self study seminars, including those in podcasts, dvds, cds, and stand-alone, printed transcripts of seminars, *do not* receive CLE credit.

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to opinions of experts, a party must provide a complete report detailing the data the expert *considered* in forming an opinion and any exhibits used in support of that opinion?[24]

As to automatic disclosure, you must now judge whether by transmitting documents to your expert you have waived/lost the privilege or protection. If you do not produce or, at least, identify the documents and claim immunity from discovery, you might be precluded from having your expert testify concerning an opinion based upon the non-produced/disclosed material considered in forming the opinion?[25]

Fed. R. Civ. P. 26(a)(2)(B) expands greatly the type of information/documents you arguably have to provide or produce. No longer are the documents limited to those upon which the expert relied in forming an opinion, but, rather, also those merely considered by the expert.[26] Consider is defined as "to think about seriously," "to regard," "to take into account," and/or "to bear in mind."[27] Assuredly, to consider is vastly broader and more encompassing than to rely upon.

Must you thus disclose/produce documents or other evidentiary material considered by your expert in forming an opinion? If you do not have to disclose, must you not, at least, identify the material in the expert's complete report?[28] And, when the inevitable request for production is served, will you not have to produce it? And if, at the expert's deposition, a matter of right under Fed. R. Civ. P. 26(b)(4)(A), your expert identifies this material as that which he or she considered or relied upon, will you not have to produce it? Indeed, the Advisory Committee Notes strongly support that Fed. R. Civ. P. 26's disclosure requirements eliminate claims of privilege concerning materials experts consider in forming an opinion?[29]

Amendments to Fed. R. Civ. P. 26 – Effective December 1, 2010

As the above discussion and the canvas of just some of the many cases show, Rule 26 diverted the focus of litigation from the merits of the case to such matters as: the discovery of oral and written communications between counsel and the expert; the existence of such written communications; the details surrounding the destruction of same; and who had written or contributed to the written

report of the expert. Rule 26 and case law interpreting it interfered significantly with counsel's ability to work effectively and efficiently with the expert, and also had the effect of increasing the cost of litigation. Further, the work product of counsel, once vigorously protected against discovery, and rightly so, was now being required to be produced on a virtually regular basis.

Sensitive to these problems caused by Rule 26, in December 2009, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States recommended to the United States Supreme Court that Rule 26 be amended "to extend work-product protection… to the discovery of communications between testifying expert witnesses and retaining counsel."[30]

The amendments to Rule 26, in particular Sections 26(a)(2)(B)(iii), (b)(4)(B), and (b)(4)(C), significantly alter Rule 26, and much for the better.[31]

Amended Rule 26(b)(4)(B) essentially provides that an expert's draft report constitutes trial-preparation material which is generally protected from discovery. The Committee Notes reinforce that draft reports are to be immune from discovery, stating that "Rule 26(b)(4)(B) is added to provide work protection… for draft of expert reports." With one notable exception, below discussed, this amended Rule should be easy to apply by the courts and give counsel solid assurance draft reports will not wind up in the hands of opposing counsel.

Amended Rule 26(b)(4)(C) affords protection from discovery "communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B)...," i.e., a retained expert, with certain exceptions.[32] The Notes of the Advisory Committee state that the "addition of Rule (b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery." But, caution in this area must be observed because of the exceptions to this Rule.

First, subsection (i) carves out from this protection communications that "relate to compensation for the expert's study or testimony." This exception is

continued on page 29

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

Louise Durfee grew up in Tiverton where she lives today. After graduating from Connecticut College with a major in government, she attended Yale Law School where she was one of only four women in a graduating class of approximately 125. Although she graduated in 1955, she did not begin practicing law in Rhode Island until 1966. When asked why, she explained that after interviewing with one of Rhode Island's well-known and largest law firms, she received a letter stating that the firm already had one woman and urged her to seek employment elsewhere. So she did. She worked at a New York firm for eleven years until she made her way back home, accepting a position as the first female attorney at Tillinghast. At the time, Ms. Durfee was one of only a handful of female faces in the Rhode Island legal community (Ada Sawyer being another). While she humbly rejects being categorized as a legend, over forty-five years later, she was and is a mover and shaker in the Rhode Island legal community. Excerpts from our conversation with Ms. Durfee follow.

Louise Durfee

What has been your biggest challenge, hurdle or obstacle during the course of your legal career? I wished in some ways that I had come to Rhode Island when I got out of law school, because I always felt as if I was catching up. I mean, people had eleven years on me.

How did being a woman in your early career impact your law practice? It was okay for me to be in the back room doing research, but exposure to clients was not something that they could quite adjust to. And that took a while. My mentor was a fellow by the name of Andy DiPrete who had been at Yale Law ahead of me. And, after watching this go on, [at Tillinghast] he introduced me to clients. I would say that he was probably the one person who really helped my career. No question.

To what do you attribute your success as a professional? Living longer always helps. Honestly. I have worked at it, and I've certainly enjoyed the practice of law more than I ever enjoyed law school. So, all I can tell you is I probably worked to do whatever had to be done. It's not very exciting, but that's how I view it.

What has been one of the most challenging transactions you were involved with over the course of your career? When I was Director of the Rhode Island Department of Environmental Management, at one point, we closed down a steel plant that was emitting pollutants over in East Providence. It was done under Sundlun's cabinet, and we went in on a contempt action. Now, this was a big employer, a steel mill, the only one in Rhode Island, and the judge closed it down. Those kinds of things you don't forget. There was a headline in the *Providence Journal* which said, "Durfee 1, Jobs 0."

What is the best advice that you've ever received? I have worked with people over the years, but there is one standout, and that is a guy by the name of Ted Pliakas (now deceased). He was great to work with, but sometimes exasperating. He had extraordinarily high standards, and one of the things I watched about him was that he made his clients' problems his problems. And what that meant was almost total care of an issue. He worked beyond belief, but he was very kind to his clients. Just watching him work, you would emulate that a little, or try to. You could never do it as successfully as he did it, but he was just terrific to work with.

What has been one of your most inventive or creative legal arguments? I can't say. With most projects I've worked on it's just a tough slog, you know? Nothing really stands out. It's just perseverance, staying with it, patience, countering issues, and solving them. I'm not really a legend. I'm more of a foot soldier.

The letter advising her that the large firm already had one female remained on Louise Durfee's wall for years. Certainly, the communication served as an amusing inspiration to her, in the same way as her trailblazing legal career serves as an inspiration for others. Yet, her legendary status does not exist because she is a woman. Rather, she earned it by being a dedicated foot soldier, "slogging" it out for her clients, and getting the job done.

Editor's Note: The authors thank Dorothy M. Depointe for her valuable assistance in transcribing this and past recordings of interviews from which Lunch with Legends are drawn.

Civil Unions and Real Estate: How One Little Word Can Cause So Many Problems

David M. Dolbashian, Esq.
The Law Office of David M. Dolbashian, Esq., P.C., Providence

Edward Stravato, Esq.
Linear Title & Closing, Newport

The Rhode Island General Assembly may have inadvertently caused an issue pertaining to real estate for civil union partners.

"Wait a minute, how can there be a problem? Didn't they pass that civil union law last year?"
Correct, but that does not mean those couples in a civil union can hold property the same as a married couple.

"Wait another minute, that civil union law was supposed to grant those couples all the same rights as married couples, right?"
That may be the theory, but the application may not be so simple.

In 2011, the Rhode Island state legislature passed a statute allowing same-sex couples to be joined in a civil union,[1] making Rhode Island the 5th state in the country to pass such a law.[2] As the original bill for same-sex marriage was debated, the resistance to gay marriage within the State's bi-cameral chambers was strong enough that the civil union statute was seen as a compromise.[3] In doing so, the legislature may have inadvertently caused an issue pertaining to real estate for those civil union partners. Can a couple joined as civil union partners actually hold property as Tenants by the Entirety as would a married, heterosexual couple? Surprisingly, the answer may be no.

With the possibility of dredging up the painful days of first year law school property class, a brief review of concurrent estates is needed to understand the implication of what gay couples may be facing. Rhode Island recognizes three ways for two people to hold property together: Tenants in Common; Joint Tenants; and Tenants by the Entirety.[4]

Property held by two (or more) as Tenants in Common is such that the parties each hold an equal undivided share while they are alive. However, at the passing of one of the co-tenants, the remaining co-tenant does not retain the entire property automatically. Even if the surviving tenant were to be named in their co-tenant's last will or was their heir at law, such determinations for title purposes (and just as importantly, creditor liens) must be addressed through the decedent's estate, which means dealing with the required time, expense, and uncertainties of probate court. In Rhode Island, failure to state any other type of tenancy on the deed granting title defaults to being a Tenancy in Common for any grantees numbering two or more.[5]

If parties hold property in a Joint Tenancy, each holds an equal undivided share. At the death of one, the other becomes the sole owner of the decedent's share without the requirement of opening a probate estate. As a matter of law, the joint tenant has a right of survivorship. However, joint tenants can break their joint tenancy without the permission of the other tenant by simply deeding their share away. In doing so, the tenancy then reverts to a holding of Tenants in Common unless specified otherwise at the time of the co-tenant's alienation of the property.

The last tenancy is when property is held by two as Tenants by the Entirety. As with Joint Tenancy, holding property as Tenants by the Entirety grants a right of survivorship. However, there are three major differences between holding as Tenants by the Entirety and holding as Joint Tenants. The first is that only married couples are able to hold as Tenants by the Entirety.[6] The second difference is that, unlike Joint Tenants that can break their right of survivorship unilaterally, a change to the Tenants by the Entirety holding only can be accomplished with both parties' signatures.[7] The third is that due to the nature of the Tenants by the Entirety holding, it affords some more creditor protection than a Joint Tenancy would, mainly due to the lack of one party's unilateral ability to change the tenancy. The amount of protection Tenants by the Entirety potentially provides is more expansive, and, as such, it would appear to be the most desirous to have when receiving title to real estate with another individual. The marriage requirement severely limits those who are able to access it. However, Tenants by the Entirety is not universally accepted; Rhode Island is one of only 26 states that actually recognize Tenants by the Entirety as a form of tenancy.

Now that your nightmares of Blackacre and such phrases as "from A to O" have subsided, the connection between civil unions and real estate still may not be obvious. While the civil union statute purportedly gives same-sex couples

wishing to join in a state recognized union the ability to do so, the name or nomenclature does not indicate it as marriage. That last line is important because the State legislature did not pass a same-sex *marriage* bill. The actual statute also purports to equalize any and all rights as would be available had the couple been heterosexual.[8] However, the gender issue does not change the fact that civil unions are not marriages, not only by the terminology, but also by the legislative history of the failure to pass a same-sex marriage bill.

It is that legislative failure that could very well be the opening used to claim that same-sex partners holding property as Tenants by the Entirety may actually only hold it as Tenants in Common. (Under Rhode Island law, if a tenancy were to fail, such as Tenants by the Entirety, the tenancy does not revert the next step down (i.e. Joint Tenancy), but rather reverts to the default of Tenants in Common.) A claimant, such as an heir at law, may ask a court to declare property that was thought to be held originally by the parties with rights of survivorship actually be such that the surviving tenant would not be entitled to the decedent's share.

The Rhode Island civil union statute does specifically contain gender equalizing language.[9] By that initial blush, that fact alone should settle the issue. However, there are recent events that should give real estate practitioners cause for concern. In October 2011, The Providence Journal reported issues encountered by a couple that had taken advantage of the civil union law.[10] The civil union partners, along with their attorney, Susan Gershkoff, had approached the Rhode Island Division of Taxation with the intent of utilizing tax advantages that are routinely used by married couples. What they encountered was a refusal by the Division of Taxation to apply those provisions. The rationale for the tax office director's position was that the Rhode Island regulation in question was based on federal tax law, which does not recognize same-sex marriage or civil unions. Even though Rhode Island tax law was invoked by the civil union partners and the civil union law was to eliminate any different interpretation for gender based laws, the result was that an administrative department in this State still conflicted with the perceived intent of the civil union law, and more importantly, denied the couple what the law

supposedly had given them.

That has subsequently raised concerns among title insurance companies and real estate attorneys. Would partners to a civil union actually be entitled to all of the same rights, specifically including the right to hold property as Tenants by the Entirety? Rhetorically, it is unknown, and the consequences would not be felt immediately. In the future, potential claims from third parties could cause an unforeseen change in ownership, either through a possible action by a creditor against one of the couple or as intimated earlier, the death of one of the two partners. The failure of the Tenants by the Entirety could significantly change the chain of title going forward, and one who may have a legitimate claim to hold title had the couple been heterosexual and married, now would have that claim of ownership placed in doubt with a possible suit that could eventually be heard by the Rhode Island Supreme Court. That general hypothetical is what will concern a title insurance underwriter with respect to future conveyances. The uncertainty of who actually could potentially have claim to a property would present too much risk for any title insurance underwriter, thus preventing a surviving tenant the ability to convey clear and marketable title in the future.

Given those recent events, the ability for the real estate attorney to grant sound legal advice becomes very tenuous as to what the future will hold due in the inevitable contests against a surviving property holder who is also the surviving civil union partner. The doubt as to what the legislature's action had created, combined with a State agency's refusal to enable civil partner's wishes, now requires some adept footing for the real estate attorney when advising clients how to take property if they are civil union partners. To advise such a couple to accept a deed only as joint tenants may be denying them all of the protections that the law purports to give. To suggest that they should be able to take the property as Tenants by the Entirety may inadvertently be placing their hold on that property at the lowest tier of tenancy.

It is important to see how other states have dealt with similar issues. Out of the 26 states which recognize Tenants by the Entirety, only five also recognize civil unions: Rhode Island, Delaware, Illinois, Hawaii and New Jersey. Vermont also recognized both Tenants by the Entirety

and civil unions until 2007, when it began recognizing same-sex marriage. In 2000, Vermont was the first state to enact civil unions. Vermont House bill H. 847 was a thorough piece of legislation, totaling over 50 pages, and directly covered such topics as workers compensation rights of civil union partners, discrimination and divorce, amongst other topics. H. 847 also clearly and unequivocally stated that civil union partners are statutorily allowed to hold property as Tenants by the Entirety, clearing any questions about whether they met the old statutory definition of marriage.

When Delaware passed their civil union law in 2011, the Delaware legislature handled the issue of Tenancy by the Entirety in the same method that Vermont had used in 2000 by placing the definition directly into the civil union bill.[11] The Delaware civil union bill clearly defined a party to a civil union as fitting the spousal-specific definitions found throughout Delaware law, specifically including Tenancy by the Entirety. By directly stating within their civil union law that civilly-joined couples fit the definitions found in the Tenancy by the Entirety statute, Delaware bypassed the problem of potential judicial interpretation of the statute.

Illinois handled the issue of civil partners holding property as Tenants by the Entirety in a different manner. Initially, it was debated whether civil union partners in Illinois could hold property as Tenants by the Entirety.[12] However, a 2002 edit of the public laws of Illinois removed the language of "husband and wife" from the statutory requirement of Tenants by the Entirety, meaning any two persons may hold a property as Tenants by the Entirety.[13]

There are two states in which this issue is still up for debate. Hawaii passed its civil union act in 2011, and it went into effect on January 1, 2012.[14] The act was short and broad, and dealt mostly with the procedure to be joined civilly, rather than the substantive rights. In January 2012, Hawaii Senate Bill SB 2571 was introduced to further expand the rights of civil partners, specifically including the right to hold property as Tenants by the Entirety, but, to date, has not been enacted in any form. As for New Jersey, that state's law is also silent on whether civilly-joined couples can hold property as Tenants by the Entirety.[15]

It is interesting to note how Massachusetts handles Tenancy by the

Entirety. Although Massachusetts recognizes same-sex marriage, they have also placed certain protections in the language of their Tenants by the Entirety statute. Under Massachusetts law, should a Tenants by the Entirety holding fail because the parties were not married, that tenancy will revert to a Joint Tenancy, rather than the traditional common law default of Tenancy in Common.[16] This not only protects the property of couples where the Tenants by the Entirety failed for one reason or another, it also minimizes risk for insurance companies insuring the titles going forward.

Looking past the scope of the Rhode Island civil union statute, could same-sex couples, legally married in a state that recognizes same-sex marriage, move to Rhode Island and acquire property as Tenants by the Entirety? It appears they too would meet similar road blocks as would the couple joined in a civil union in Rhode Island. Even though a legally married couple would fulfill the Tenants by the Entirety's marriage requirement, the impediment is related to Rhode Island's history in addressing same-sex marriage through its Supreme Court as recently as 2007 with **Chambers v. Ormiston**.[17] The decision had been issued prior to the passage of the civil union law, but the court's decision adds to the ambiguity of how it may decide a civil union/property case when it arrives at its door. In **Chambers**, the Court determined that the Rhode Island Family Court did not have the authority to grant same-sex divorces. Among the factors as to why, the Court looked at the definition of marriage as it was understood by the State legislature at the time its grant of the Family Court's authority.[18] Even though the **Chamber's** decision was split, it may be the same logic the Court could use in the future to determine the availability (or lack thereof) of Tenants by the Entirety to those in civil unions, which, by definition, would not be marriages since marriage was not redefined or recast by the passage of the civil union statute.

The uncertainty that the civil union law has created as to this type of tenancy forms a void for the real estate practitioner, preventing him or her from accurately predicting the situation in the future. If there were to be new legislation revamping the civil union statute to a closer model of Vermont's initial foray

continued on page 34

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Inherited IRA with a Separate Trust for Grandchildren and an Irrevocable Life Insurance Trust for Children

Russell E. Towers, Esq., CLU, ChFC
Vice President-Business & Estate Planning Brokers' Service Marketing Group

…income and estate tax free life insurance death proceeds can offset any second death federal estate taxes and state death taxes of the IRA owner and spouse and provide a significant inheritance to the children alone.

A popular planning technique for a large balance individual retirement arrangement (IRA) is the so-called stretch or inherited IRA. At the death of an IRA owner, the IRA beneficiary can take distributions over his/her lifetime as long as these distributions start no later than December 31st of the year following the death of the IRA owner. The required minimum distribution (RMD) Single Life Table factor will determine this initial life expectancy for the beneficiary of the IRA (See Treas. Reg. 1.401(a)(9)-9, Q&A-1, Single Life Table).

If a generation-skipping type of trust for the benefit of grandchildren only is named as beneficiary of this stretch IRA, distributions could hypothetically be made over the life expectancy of the trust beneficiary with the shortest life expectancy. This measuring life would usually be the oldest grandchild. Depending on the facts of the case, this could mean a 50 to 60 year distribution schedule in a typical case (See Treas. Reg. 1.401(a)(9)-4, Q&A-5 for trust beneficiary rules).

Of course, the children of the IRA owner would get no benefit from these inherited IRA distributions made to the trust for the benefit of the grandchildren. However, the IRA owner could transfer after-tax dollars from required minimum distributions (RMD) from the IRA during lifetime based on the Uniform Lifetime Table factor (See Treas. Reg. 1.401(a)(9)-9, Q&A 2, Uniform Lifetime Table) as annual exclusion gifts or lifetime exemption gifts to an irrevocable life insurance trust.

These annual gifts to the trust could be used by the trustee to pay premiums for a single life insurance policy or survivorship life insurance policy owned by the irrevocable life insurance trust for the benefit of the children only. This way, income and estate tax free life insurance death proceeds can offset any second death federal estate taxes and state death taxes of the IRA owner and spouse and provide a significant inheritance to the children alone.

Case Example: Inherited IRA Paid to Grandchildren's Trust and Creation of a Separate Irrevocable Life Insurance Trust for Children

Assume your client and his or her spouse are both 72 years old and have a significant net worth subject to federal estate taxes and Rhode Island state estate taxes. Part of this net worth includes an IRA currently owned by the client valued at $1,800,000. Your client started taking required minimum distributions (RMD) from the IRA last year and simply reinvested after-tax dollars into a personally-owned, non-qualified asset portfolio. There are three children, ages 44, 42, and 40. Also, there are five grandchildren ranging from the oldest at age 14 to the youngest at age 7.

Your client and her or his spouse want to set up an IRA distribution plan to manage the underlying IRA assets over an extended period of time while taking care of all their heirs, both children and grandchildren. They have a marital-credit shelter type of estate plan which defers estate taxes to the death of the surviving spouse. Second death federal estate taxes, Rhode Island state death taxes, and other final administrative costs are estimated at about $2,000,000, based on an average of different federal estate tax exemptions that may be available depending on what Congress legislates after the sunset of the current federal estate tax law on December 31, 2012. The federal estate tax exemption under current law is indexed at $5,120,000 for 2012 only. It is scheduled to sunset back to only $1,000,000 on December 31, 2012 unless there is intervening legislation enacted by Congress in a lame duck session after the 2012 election.

Three Phases of the IRA

Phase 1 - The IRA owner names his or her spouse as beneficiary of IRA. The IRA owner takes RMDs during lifetime (go to Uniform Lifetime Table each year for RMD factor). Assume IRA owner dies at age 80. Since the surviving spouse is the beneficiary of the IRA, it qualifies for the estate tax marital deduction.

Phase 2 - At death of the IRA owner, the surviving spouse executes a spousal rollover IRA and names the trust for the benefit of the five

grandchildren as the beneficiary of the IRA. The spouse continues to take RMDs during her or his lifetime (go to Uniform Lifetime Table each year for RMD factor). Assuming the surviving spouse dies at age 85, federal estate taxes and Rhode Island state estate taxes are due and payable.

Phase 3 – The IRA is re-titled an inherited IRA. For instance, the registration wording could be "John Q. Citizen (deceased) IRA for the benefit of John Q. Citizen Grandchild Trust, dated 1/1/2012." The federal tax identification number of the trust would be provided to the IRA custodian for purposes of future IRS Form 1099-R distributions.

The IRA custodian continues the inherited IRA with RMD payments made to the trust for the grandchildren. The measuring life for RMD distributions (go to Single Life Table once for RMD factor) is the grandchild with the shortest life expectancy, which is the oldest grandchild who, in our sample case, has now reached age 32. The Single Life Table life expectancy factor for a 32-year old is 51.4 in year 1, 50.4 in year 2, 49.4 in year 3, and continually reduced by 1 each year thereafter. The trustee of the trust could take only the required minimum distributions over 51 years while continuing to invest the inherited IRA funds in a variety of mutual funds and qualified annuity products. The trustee could always take more than the required minimum distribution if certain discretion is permitted by the trust document.

The IRA custodian will distribute annual taxable RMDs to the trust via an IRS Form 1099-R. The trust will file a Form 1041 U.S. Income Tax Return for Estates and Trusts listing the taxable inherited income. The trust will act as a conduit and funnel these RMD payments proportionally to the five grandchildren and take a distributable net income (DNI) deduction. The trust will issue a trust K-1 to each grandchild for their respective share of the taxable RMD which has flowed through the trust to each of them personally. Each grandchild will list this trust K-1 income on Schedule E of their personal Form 1040 U.S. Individual Income Tax Returns every year.

The trust for the benefit of the grandchildren could also be structured as a separate share trust for the benefit of each grandchild individually. The inherited IRA beneficiary designation filed with the IRA custodian must specifically name

each trust share separately. If structured properly, a number of IRS Private Letter Rulings have held that the life expectancy of each separate share trust beneficiary may be used to determine RMDs based on the Single Life Table (See PLR 200537044 for a detailed description on how to accomplish this separate share split of an inherited IRA for RMD purposes. Private Letter Rulings are an indication of IRS thinking about a very specific fact pattern and may not be used or cited as precedent).

Note: *If the value IRA account is greater than the generation-skipping exemption in effect when the surviving spouse dies, then the potential generation-skipping estate tax may be due in addition to the regular estate tax. The federal generation-skipping exemption under current law is $5,120,000 for 2012 only. It is scheduled to sunset back to only $1,000,000 on December 31, 2012 unless Congress enacts intervening legislation.*

Irrevocable Life Insurance Trust for Children

- The Client and spouse create a separate Irrevocable Life Insurance Trust (ILIT) for the benefit of their 3 children only. The trustee of the ILIT purchases a guaranteed $2,000,000 no-lapse Survivorship Universal Life Insurance policy which is allocated to offset estimated second death estate taxes. The annual no-lapse premium for preferred underwriting from a competitive and highly rated carrier is about $40,000 per year.
- The RMD factor for a 72-year old from the Uniform Distribution Table is 25.6 years. So, the first year RMD is $1,800,000 divided by 25.6 = $70,313. Client and spouse gift after-tax dollars from RMDs each year as an annual premium to fund the $2,000,000 no-lapse survivorship life policy owned by the ILIT. This RMD and premium gifting process will continue until the death of the surviving spouse.
- $2,000,000 of income and estate tax free death proceeds will eventually be paid by the insurance carrier to the ILIT trustee to be managed and distributed for the benefit of the children. The ILIT trustee is given authority in the trust document to buy assets from the estate of the survivor if estate liquidity is needed by the executor of the survivor's estate to pay federal estate taxes and Rhode Island state estate taxes.

Plan Design Summary

Estate taxes and settlement costs are funded efficiently and guaranteed via the no-lapse survivorship universal life policy owned by the ILIT. The after-tax internal rate of return (IRR) on the income tax free death benefit at joint life expectancy (age 91 for joint ages 72/72 in our case study based on Table VI of Treas. Reg. 1.72-9) is 8.97% in the example above. In a 30% combined tax bracket, the pre-tax equivalent IRR is 12.81%. This pre-tax IRR is exceptional when compared to non-guaranteed current rates of return for fixed financial assets like corporate bonds, bank CDs, or U.S. government securities where the annual yields are taxable each year.

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Lawyers Helping Lawyers Committee Members Protect Your Privacy

Discovery/Disclosure

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clear and should produce no problem for counsel.

The exceptions provided in subsections (ii) and (iii) are not quite as simple. The subsection (ii) exception applies to "facts or data that the party's attorney provided and that the expert considered in forming the opinion to be expressed." Note the use of the word "considered."[33] Subsection (iii) carves out from the protection against discovery the "assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed." Note the use of the words "relied on."

As to subsection (ii), the "facts or data" exception, the Advisory Committee explains that "[t]he refocus of disclosure on 'facts or data' is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel." However, the Committee further explains that "the intention is that 'facts or data' be interpreted *broadly* to require disclosure of any material considered by the expert…that contains factual ingredients." (emphasis added)

It would appear that counsel should be reasonably comfortable that her theories, opinions or mental impressions about the provided fact or data are protected against discovery. The Committee's Notes lend support to such comfort by stating that "communications 'identifying' the [provided] facts or data" are subject to discovery, while "further communications about the potential relevance of the facts and data are protected." Although the application of this Rule by the courts to the innumerable, myriad and varied ways counsel-expert communications take shape remains to be determined, it would seem that if counsel is cautious to adhere to the language of the Rule and the courts enforce the Rule in accordance with the intention of the framers, core work product of counsel communicated to a retained expert should be protected against discovery.

Explanation of the breadth and intent of subsection (iii) is provided by the Committee in its Notes, wherein it is stated that "…the party's attorney may tell the expert to assume the truth of certain testimony or evidence, or the correctness of another expert's conclusions. This exception is limited to those assumptions

that the expert actually did rely on in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside the exception." However, the Committee emphasizes that counsel "…are also free to question expert witnesses about alternative analysis, testing, methods or approaches to the issue on which they are testifying, whether or not the expert considered them in forming the opinions to be expressed." These statements of the Committee can be harmonized in that the former – the hypotheticals or possibilities based upon hypothetical facts – concern protection of work product from discovery, while the latter – alternative analysis, testing methods or approaches – deal with the scope of discovery. The subsection (iii) assumption exception may prove to be the source of interesting discovery motion practice. Finally, whether counsel can protect from discovery facts or data considered by or assumptions relied upon by a retained expert by providing same in a draft report remains an open question, i.e., can counsel use Rule 26(b)(4)(B) to trump Rule 26(b)(4)(C)(ii-iii)? It would not seem that courts would be receptive to such a practice and caution dictates against embarking upon such a course.

Rule 26, even in its amended form, poses a challenge for litigators. Failure to produce the material arguably within the ambit of Fed. R. Civ. P. 26's automatic disclosure requirement or considered/relied upon by an expert may result in preclusion of expert testimony. Preclusion of the introduction of certain documents can be very harmful to the presentation of a case. Preclusion of expert testimony usually will be devastating. And that is the critical problem – the duty to disclose/produce and the draconian sanction of preclusion resulting from failure to satisfy that duty. A possible, if not directly satisfactory, solution is the employment of a motion *in limine* whereby you ask the court to determine if you need to produce/disclose the material. Such a motion offers, at least, the chance of protecting the material from production while at the same time avoiding the all-too-grave risk of a preclusion order.

Practical Suggestions

I submit the following suggestions for your consideration to aid in protecting

against discovery of your work-product:

1. Limit communications to your expert to the facts or data to be considered or the assumption he/she is to rely upon.
2. Do not provide written communications to an expert containing mental impressions, opinions or theories with the facts/data or assumption you offer the expert.
3. Label draft expert reports with the words "Privileged/Protected Rule 26(b)(4)(B) Draft Report."
4. Object to document requests that seek all your communications with experts.
5. Object to document requests seeking draft expert reports.
6. Object to questions at depositions as to your general communications with your expert.
7. Object to questions at depositions as to your input as to draft reports.
8. Object to discovery as to facts/data you provided the experts which she did not consider.
9. Object to discovery as to assumptions you gave your expert upon which she did rely.
10. Object to a request for production/provision of documents at a deposition of your expert which she did not use to refresh her recollection or did not refresh her memory, assuming it is not a document considered or relied upon. Also, if need be, argue the interests of justice do not support disclosure and, if advisable, demand an *in camera* inspection by the Court.

Conclusion

When working with an expert, the only sure way to protect attorney-client/work product information and material from being ordered disclosed/produced is not to share it with her or him or, at least, limit any such communication to non-sensitive material, to the extent possible, and to communicate orally, rather than in writing. To the extent you provide written facts or data for an expert to consider or ask the expert in writing to rely upon certain assumptions, make sure you are providing material in a form and in a manner that strictly adheres to the language of the amended Rule and provide protected written material in a form and in a manner emphasizing and making clear its protected nature and provide it separately

Lawyers on the Move

James G. Atchison, Esq. is now an associate at **Shechtman Halperin Savage, LLP**, 1080 Main Street, Pawtucket, RI 02860.
401-272-1400 jatchison@shslawfirm.com www.shslawfirm.com

Patrick T. Conley, Esq. was appointed the State of Rhode Island's Historian Laureate.

S. Michael Levin, Esq. has opened his new practice **SMLevin Law** at 55 Dorrance St., Suite 200, Providence, RI 02903.
401.228.6339 mlevin@smlevinlaw.com www.smlevinlaw.com

Vicki J. Ray, Esq. was promoted to Deputy Chief Counsel in the Boston Office of Chief Counsel, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, P.O. Box 8728, JFK Station, Boston, MA 02114.
617-565-3140 Vicki.j.ray@ice.dhs.gov

James W. Ryan, Esq. is now a Partner at **Pannone Lopes Devereaux & West LLC**, 317 Iron Horse Way, Suite 301, Providence, RI 02908.
401-825-5173 jryan@pldw.com www.pldw.com

Patrick J. Smock, II, Esq. is now Corporate Compliance and Ethics Program Manager at Blue Cross & Blue Shield of Rhode Island, 500 Exchange Street, Providence, RI 02903.
401-459-5845 patrick.smock@bcbsri.org www.bcbsri.com

Irving J. Waldman, Esq., **Kristen P. Moonan, Esq.** and **Amy E. Stratton, Esq.**, announce their law firm name is now **Moonan, Stratton & Waldman**, 120 Wayland Avenue, Suite 5, Providence, RI 02906.
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For a free listing, please send information to: Frederick D. Massie, Rhode Island Bar Journal Managing Editor, via email at: fmassie@ribar.com, or by postal mail to his attention at: Lawyers on the Move, Rhode Island Bar Journal, 115 Cedar Street, Providence, RI 02903.

from the writings which are subject to discovery.

ENDNOTES

1 *Compare* ***Bogosian v. Gulf Oil Co.****, 738 F.2d 587 (3d Cir. 1984) and* ***Duplan Co. v. Moulinage et Retorderie de Chavanoz****, 509 F.2d 730 (4th Cir. 1974) (denying production) with* ***Intermedics. Inc. v. Ventritex****, 139 F.R.D. 384 (N.D. 1991) and* ***James Julian v. Raytheon Co.****, 93 F.R.D. 138 (D. Del. 1982) (ordering production).*

2 ***See, e.g., Intermedics and William Penn Life Assur. v. Brown Trans. & Storage****, 141 F.R.D. 142 (W.O. Mo. 1990) (ordering disclosure of oral communications of counsel with expert witnesses).*

3 *Fed. R. Civ. P. 26 (b)(3).*

4 ***See Upjohn v. U.S.****, 449 U.S. 383, 400 (1991) ("Special protection" without (1) ruling whether core work product is always protected or (2) articulating a detailed standard);* ***Bogosian*** *at 593;* ***North Carolina Electric Membership v. Carolina Power & Light Co.****, 108 F.R.D. 283, 286 (M.D.N.C. 1985) (absolute privilege). Fed. R. Civ. P. 26(b)(1) also protects against discovery of privileged communications.*

5 ***Intermedics; Brown; Boring v. Keller****, 97 F.R.D. 404 (D. Colo. 1983).*

6 *Fed. R. Civ. P. 30(c).* ***See Boring*** *at 406-408, in which the court ordered protection of documents, including opinion work product which the expert had identified as being used to prepare him for his deposition on the basis that such production is essential to the preparation of a case and necessary for the purpose of effective impeachment and corroboration.*

7 ***See also Occulteo v. Adamar of New Jersey. Inc.****, 125 F.R.D. 611 (D.N.J. 1959) (same);* ***Intermedics*** *(same).*

8 *121 F.R.D. 13 (D. Mass. 1988).*

9 *138 F.2d at 592-595.*

10 *Id. at 595 n.3.*

11 *Id. at 286.*

12 *759 F.2d 312 (3d Cir. 1985).*

13 *Id. at 317-319.*

14 ***See also Hamel v. General Motors Co.****, 128 F.R.D. 281, 284-285 (D. Kan. 1989);* ***Julian.***

15 *FRE 612(2).*

16 ***Coastal States Gas Co. v. Dept. of Energy****, 617 F.2d 854 (D.C. Cir. 1980).*

17 ***Bogosian; Duplan; Carolina.***

18 ***Intermedics; Brown; Occulte; Boring.***

19 ***Sporck; Julian.***

20 ***Derderian.***

21 ***Hamel.***

22 ***See also Julian.***

23 ***In Re San Juan DuPont Plaza Hotel Fire Litigation****, 859 F.2d 1007, 1016-18 (1st Cir. 1988).*

24 *Fed. R. Civ. P. 26(a)(2).*

25 ***See*** *Rule 37(c)(1).*

26 *Rule 26(a)(2)(B).*

27 *Webster's New Riverside University Dictionary.*

28 *Fed. R. Civ. P. 26(a)(2)(B).*

29 *Fed. R. Civ. P. 26, Advisory Committee Notes, reprinted in 146 F.R.D. 627, 634 (1993).*

30 ***See*** *MEMORANDUM OF THE JUDICIAL CONFERENCE TO CHIEF JUSTICE JOHN C. ROBERTS, dated December 16, 2009.*

31 *The amendment to Section (a)(2)(C) relieves a party from having to provide a Rule 26(a)(2)(B) report of a non-retained testifying expert, e.g., treating physician, but does require that as to any*

such non-retained expert, a disclosure must be provided detailing the subject matter on which the witness is expected to testify, subsection (i), and a summary of the facts and opinions to which the expert witness is expected to testify. Subsection (ii). In recognition that a party or his counsel may not have the same type of relationship as exists between counsel and a retained expert, the Advisory Committee cautions that "[c]ourts must take care against requiring undue detail, keeping in mind that…[a non-retained expert] may not be as responsive to counsel as …" a retained expert. Whether a treating physician's office records will suffice as the required disclosure under amended Rule 26 will assuredly be addressed in the not too distant future.

32 *Under the amended Rule, communications with a non-retained expert do not enjoy this protection, if they ever did.*

33 *See Section IV, at 9 above.* ❖

SOLACE

Helping Bar Members in Times of Need

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

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

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

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

Civil Unions and Real Estate

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into civil unions or Delaware's current model, or possibly an amendment to the current statute specifically stating that Tenants by the Entirety would be a specifically granted right for such couples, the uncertainty would be diminished (but not eliminated). However, there is little likelihood that this statute will be revisited any time soon. The other alternative could be to alter how the State recognizes Tenants by the Entirety, as was done in Illinois which eliminated any husband and wife language and allowed any party to hold as Tenants by the Entirety with another. That would not only address the issue for civil union partners in Rhode Island, but also the same-sex married moving into Rhode Island as well. Although historically a privilege exercised by just married couples, Tenants by the Entirety recognition is not inversely true: 24 states do *not* consider holding property as Tenants by the Entirety so ingrained with the essence of marriage as to recognize it as a valid tenancy in their state.

The current law may encourage those civil union partners in Rhode Island to take property as Tenants by the Entirety. As a real estate law practitioner, you would be well-served to inform them of these potential pitfalls that the future may hold, all due to one little word.

ENDNOTES

1 *R.I. Gen. Laws 15-3.1*
2 *MacDougall, Ian. "Rhode Island Passes Civil Unions Bill." Washington Times Online. Associated Press, 30 June 2011. Web. <http://www.washingtontimes.com>.*
3 *Gregg, Katherine. "Fox Says Gay Marriage Has No Chance, Backs Civil Unions." Providence Journal. 27 Apr. 2011. Web.*
4 ***Bloomfield v. Brown**, 67 RI 452, 456(1942).*
5 *R.I. Gen. Laws 34-3.1*
6 ***Van Ausdall v. Van Ausdall**, 48 RI 106, 108 (1927)*
7 ***Id.***
8 *R.I. Gen. Laws 15-3.1-6*
9 *R.I. Gen. Laws 15-3.1-7*
10 *Marcelo, Philip. "Despite R.I. Civil-Union Law, Gay Spouses Excluded From Tax Exemption." Providence Journal. 10 Oct. 2011. Web.*
11 *Delaware Senate Bill No. 30, § 214(a)*
12 *Gunnarsson, Helen. "Can Civil Partners Hold Property as Tenants by the Entirety?" Illinois Bar Journal 99.3 (2011): 118. Print.*
13 *Illinois Public Act 92-136 (2002).*
14 *Hawaii S.B. 232*
15 *N.J. Public Laws Chapter 246.*
16 *M.G.L. Chapter 184 § 7.*
17 ***Chambers v. Ormiston**, 935 A.2d 956(RI 2007)*
18 *Id. at 967.* ❖

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The 2012-2013 Bar Committee registration is open. Given the demands of active Bar committee participation, members are only permitted to join up to three committees. Members who wish to serve on a Bar committee must be willing to play an active role and register each year – either online or via a printed registration form – as committee membership does not automatically carry over from one Bar year to the next. Using the quick and simple online option, in the Members Only area of the Bar's website **www.ribar.com**, for committee sign-up, makes the process easy.

In Memoriam

F. Monroe Allen, Esq.

F. Monroe Allen, 81, passed away on June 22, 2012. He left his wife of 57 years, Anne Hardman Allen, his son David, his daughter Heidi, and four grandchildren. He was the son of the late Phyllis Lapham Allen and the late Frederick W. Allen and the brother of Alfred Allen and Albert Allen. Monroe received an engineering degree from Brown University and a law degree from Boston University. He practiced law in Rhode Island and Massachusetts for 58 years. A longtime Republican, Monroe worked hard to improve life in Smithfield as state senator, town council member, probate court judge, and member of several local civic and fraternal organizations. In addition, he volunteered both as a *pro bono* lawyer through the Rhode Island Bar Association's Volunteer Lawyer Program and as a swimming teacher at the Smithfield YMCA. Monroe's passion was physical fitness. He competed in several marathons, including the Boston Marathon and national and international triathlons–completing his last triathlon at the age of 80.

Thomas F. Almeida, Sr., Esq.

Thomas F. Almeida, Sr., 65, passed away on August 6, 2012. He was the beloved husband of Suzanne Baillargeon Almeida. Born in Pawtucket, he was the son of Constance M. McPherson Almeida of Cumberland and the late Wenceslau S. Almeida, Jr. He was a life-long Cumberland resident. Mr. Almeida was a partner in the law firm of Capineri & Almeida, Pawtucket for over 20 years until his retirement in 2008. He was the Solicitor for the Town of Cumberland for 14 years. The Blackstone Valley Portuguese American Community honored him with their *Man of the Year* award. Among his many civic activities he was a Past President and long time member of the former Seven Castles Club of the Blackstone Valley, Filibuster Club and Cumberland Lodge 14, FOPA. He was also a former member of the R.I. Army National Guard with the 103rd Field Artillery. Besides his wife and mother he leaves children: Diane Almeida-Tootell of Pawtucket and Thomas F. Almeida, Jr. of Cumberland; Jason Dean and Jerred Dean both of Cumberland; Jamie Austin of North Smithfield; and a sister, Mary Ann Garrin of Cumberland.

James Vincent Cambio, Esq.

James Vincent Cambio, 55, passed away on July 28, 2012. He was born in Providence, RI to Vincent A. Cambio, Jr. and Mary W. Higgins Cambio. He is survived by his wife Bambilyn Breece Cambio, former RI State Representative of North Providence and Johnston, his father, and sister Jo-Ann Cambio, both of North Providence. James and his wife also became citizens of Ireland in 2004, providing them dual citizenship in the United States and the European Union. James was a graduate of LaSalle Academy, Suffolk University and Suffolk Law School. James was certified as an attorney and counselor of the RI Supreme Court, permitting him to practice in all courts within the State of Rhode Island. James was admitted and qualified as an attorney and counselor of the United States Supreme Court. James had maintained a private law practice until he worked as an attorney within the Rhode Island Department of Revenue, Division of Taxation. His most recent position was Chief of Estate and Gift Taxes. James previously worked part time for RI Hospital Security, Mark Hutchinson and Associates as a surveyor, Bradley Hospital Security department, and in the Fiscal Department at St. Joseph Hospital as a collection representative until 1988. James became a member of the North Providence Democratic Town Committee and served on the North Providence School Committee for 16 years, serving two of those years as Chairman. James moved from North Providence to Smithfield in 2002, at which time he became a member of the Smithfield Democratic Town Committee until present. James was also a member of ALPCA (American License Plate Collectors Association) and enjoyed networking with fellow members during national conventions and local chapter shows. Many individuals describe James as a generous and compassionate person who was always willing to help others with his time. He often did *pro bono* or reduced fee legal work for individuals in an effort to help them during their time of need.

Hon. Benedetto A. Cerilli

Benedetto A. Cerilli, 95, of Barrington, RI, passed away, June 24, 2012. He was a retired Judge of the Rhode Island Traffic Court. He was married to Katherine Daly Cerilli. He and the late Mary Mainella Cerilli had four children, Benedetto A. Cerilli, Jr., Barbara Cerilli Mueller and her husband Steven, Peter J. Cerilli and his wife Patricia. He was the son of the late Agnello and Cecilia Menna Cerilli. He graduated from Cranston High School, and Providence College, with honors and academic distinctions. He received his law degree from Boston University, where he was selected as an editor of its Law Review. During World War II, he served in the United States Army 601st Military Police Battalion as Staff Sergeant, overseas in French Morocco, and as a Second Lieutenant in the Medical Administrative Corps. Before serving as an Associate Judge on the Rhode Island Traffic Court until his retirement, he was a general practitioner in the law. He served as the first Vice Chairman of the Disciplinary Board of the Rhode Island Supreme Court. He was admitted to practice law before the United States Supreme Court. He was a former member of the Uniform Commission of Laws of Rhode Island and the United States. He served as Cranston Assistant Solicitor. He was on the Executive Committee of the Rhode Island Bar Association, and received commendations from the organization for *pro bono* service, and for his work in the Volunteer Lawyer program. He was a member of the Rhode Island Trial Lawyers Association. He was active in the Republican Party in Cranston for many years. He is a

In Memoriam *(continued)*

Founder, Charter Member, and past president of the Alpine Country Club. He was a member of the Aurora Club, and served in many capacities for various charitable and civic associations over the years, receiving a Merit Award from the Silver Lake Community Center. He published a book on the history of Guarcino, Italy, birthplace of his parents and many immigrants from the Silver Lake area of Cranston. He enjoyed playing the piano, dancing, collecting coins, golf, playing board games and cards, good conversation, watching the Red Sox and Bonanza, and most especially, spending time with his family.

David J. McOsker, Esq.

David J. McOsker, 68, passed away, July 26, 2012. Born in Providence, a son of the late John & Ruth Monahan McOsker, he was a Newport resident for 23 years. He leaves his wife Elena Susi McOsker, two sons, Matthew D. McOsker of Balitmore, and Mark D. McOsker of Newport, and his sister, Susan Rist of San Diego. He graduated from Classical High School, Brown University, and Suffolk Law School. He was sworn in as an attorney on June 30, 1972, and he was a long-time partner in the law firm of McOsker, Moonan & Waldman. He was a former member of the New York Yacht Club and Edgewood Yacht Club.

Please contact the Rhode Island Bar Association if a member you know passes away. We ask you to accompany your notification with an obituary notice for the Rhode Island Bar Journal. Please send member obituaries to the attention of Frederick D. Massie, Rhode Island Bar Journal, Managing Editor, 115 Cedar Street, Providence, Rhode Island 02903. Email: fmassie@ribar.com, facsimile: 401-421-2703, telephone: 401-421-5740.

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Aspiring authors and previous contributors are encouraged to **contact the *Rhode Island Bar Journal*'s Editor Frederick Massie by telephone: (401) 421-5740 or email: fmassie@ribar.com.**

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For many years, the Bar Association has provided members and their families with free and *totally confidential* assessment and referral services for any personal issues through its contract with Resource International Employee Assistance Services. The service remains same but the organization has changed its name to Coastline Employee Assistance Program (EAP). Ms. Judith Hoffman remains our contact person at Coastline EAP, and you are welcome to telephone her or her colleagues at: (401) 732-9444 or 800-445-1195.

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Rhode Island Bar Association Staff & Responsibilities

To contact staff members, dial the main number 401.421.5740 or use the individual's email address.
Staff telephone extensions or direct lines and email addresses appear beneath their titles and names.
Information concerning Bar-related programs and services may be directly accessed via the Bar's website at www.ribar.com.

Executive Director
Helen Desmond McDonald, ext. 107
hmcdonald@ribar.com

Communications Director
Frederick D. Massie, ext. 108
fmassie@ribar.com

Continuing Legal Education (CLE) Director
Nancy J. Healey, ext. 109
nhealey@ribar.com

Finance Director
Karen L. Thompson, ext. 106
kthompson@ribar.com

CLE Coordinator
Tanya Nieves, ext. 117
tnieves@ribar.com

Receptionist
Karen A. Lomax, ext. 116
klomax@ribar.com

Communications Program Coordinator
Kathleen M. Bridge, ext. 157
kbridge@ribar.com

Law Related Education Coordinator
Allison Baker, ext. 111
abaker@ribar.com

Lawyer Referral Service & Elderly Program/Coordinator
Elisa King, 521-5040
eking@ribar.com

Office Manager
Susan J. Cavalloro, ext. 110
scavalloro@ribar.com

Public Services Director
Susan A. Fontaine, 421-5740 ext. 101
sfontaine@ribar.com

Public Services Coordinator/Finance/ Grants Assistant
Laura Bridge, 421-7799 ext. 104
lbridge@ribar.com

Rhode Island Bar Foundation – Interest On Lawyers Trust Accounts (IOLTA) Director
Virginia M. Caldwell, 421-6541 ext. 113
gcaldwell@ribar.com

Volunteer Lawyer Program Assistant
Debra Saraiva, 421-7758 ext. 123
dsaraiva@ribar.com

Volunteer Lawyer Program Coordinator
John H. Ellis, 421-7758 ext. 103
jellis@ribar.com

Continuing Legal Education (CLE) *Nancy J. Healey*
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Membership/Status Inquiries *Susan J. Cavalloro*

News Media Inquiries *Frederick D. Massie*

Pro Bono Programs *Susan A. Fontaine*
(401-421-7799)

Public Relations/Communications *Frederick D. Massie*

Rhode Island Bar Foundation *Virginia M. Caldwell*
(401-421-6541)

Scholarship Program/Grants *Virginia M. Caldwell*
(401-421-6541)

Website Inquires *Kathleen M. Bridge*

Rhode Island Bar Association, 115 Cedar Street, Providence, RI 02903 Tel: 401.421.5740
Fax: 401.421.2703 TTY: 401.421.1666 Email: info@ribar.com Web: www.ribar.com

You may ask yourself...

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THE RHODE ISLAND BAR ASSOCIATION is much more than a name. Your Bar consists of people and programs dedicated to enriching and enhancing your practice and your life. Through the thoughtful, caring leadership of volunteer attorneys, the Bar develops offerings designed specifically for Rhode Island lawyers. And, with the excellent assistance of the Bar's friendly and professional staff, your Bar creates and delivers a wide range of programs and services tailored to meet your needs.

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- Superb Continuing Legal Education (CLE) seminars offered live and online throughout the year
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- Terrific avenues for working with other members of the Bar and the Bench on a wide range of Bar Committee efforts
- Outstanding Lawyer Referral Service (LRS) connections to clients in search of representation
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- SOLACE (Support of Lawyers, All Concern Encouraged) allows Bar members to offer or ask for aid and assistance to or from their colleagues
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