Rhode Island Bar Journal

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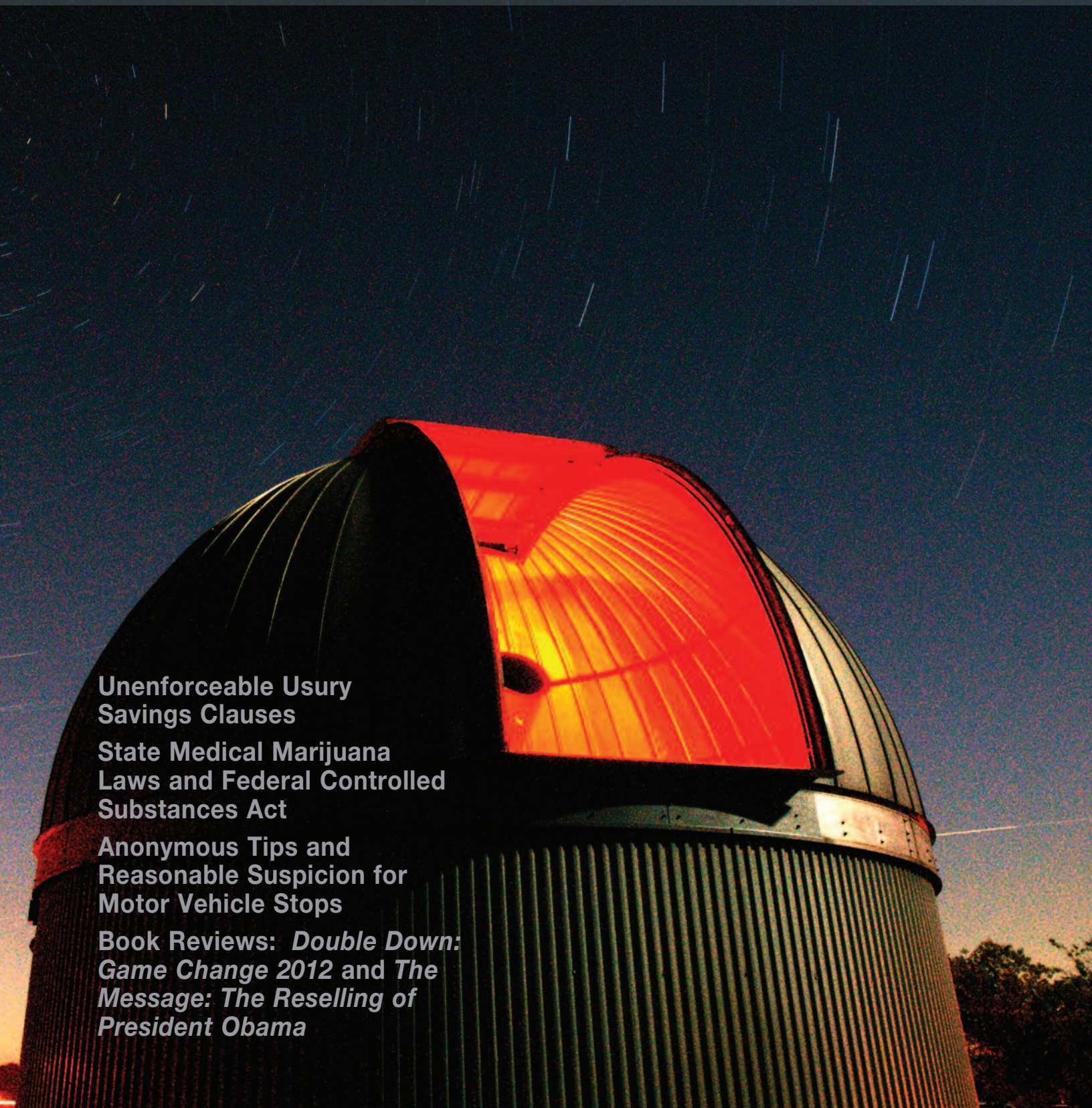

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Front Cover Photograph – by Brian McDonald

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1898

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

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Mentoring's Mutual Benefits

Bruce W. McIntyre, Esq.
President
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It is gratifying to have the temporary privilege of getting someone started on their professional path.

One of the most gratifying experiences of my professional life is supervising legal interns and mentoring young lawyers. I have been doing this for many years now, and I have come to realize I get more than I give in this process. Interns and young attorneys help keep you sharp because the nature of this role is that of teacher. The unscripted, real life, day-to-day challenges as a teacher can be exhilarating.

Most of us have had many mentors over the years. My most memorable was a physician who had attained great prominence in his profession. In addition to being the top student at Harvard College, Medical School, and a researcher who discovered the test for thyroid, he was an amazing teacher. Brown Medical School has a teaching award named after him. But his greatest gift was his presence. I don't mean just physical presence. He *listened* and *engaged* in real conversation. He was genuinely interested in his patients, medical students and me as a young lawyer. He demystified medicine and life. He got me thinking and put me into action.

I have had about 100 interns in my office over the years. Some stayed in Rhode Island and continue to teach me as they appear as opposing counsel on cases. Others are spread across the country from San Francisco to Boston. I occasionally get a visit, note or an email from them. It is gratifying to have the temporary privilege of getting someone started on their professional path.

Now, it is more critical than ever to help young professionals get started. Roger Williams University School of Law, the state's only law school, provides a wealth of local talent. It has a public service (field work) requirement for graduation. But the entire region's law schools have internship programs. Young lawyers and law students need experience, and most of us could use some help.

When I look back I realize that just the right intern came at just the right time. Sometimes really great things happened right before a trial, such as finding a key piece of evidence in a giant pile of discovery. Other times, the victories were smaller, such as teaching me how to use the latest technological gadget that is now part of my daily life. But the best part often comes years later, when you open the mail and read the note that says "thank you." ❖

RHODE ISLAND BAR JOURNAL

Editorial Statement

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

Article Selection Criteria

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

Direct inquiries and send articles and author's photographs for publication consideration to:
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email: **fmassie@ribar.com**
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Clause Without Effect: Unenforceable Usury Savings Clauses

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U.S. Court of Appeals
for the First Circuit

In the wake of ***NV One*** *and* ***LaBonte****, it is now crystal clear that usury savings clauses, which are commonly found in loan agreements, are unenforceable under Rhode Island law.*

Usury is an antediluvian concept, sounding "in an ancient moral tradition, skeptical of the advisability of high-cost loans to those with limited means."[1] But, while it may be old, in Rhode Island, it's still news. During its most recent term, the Rhode Island Supreme Court issued two opinions that will change the way contracts are drafted and loans are made. The cases of **NV One, LLC v. Potomac Realty Capital, LLC**, 84 A.3d 800 (R.I. 2014) and **LaBonte v. New England Development R.I., LLC**, 2014 WL 2802772 (R.I. 2014), while factually quite different, both involve the question of whether a usury savings clause is enforceable under Rhode Island's usury statute.

"A 'usury savings clause' is a provision in a loan agreement that attempts to negate any other provisions in the agreement that might result in the extraction of an illegal rate of interest."[2] These clauses generally seek to conform the agreement to the local usury laws, either by lowering the interest rate to the maximum rate permitted by law, or by applying payments made in excess of that rate to reduce the principal balance of the loan.

The question of whether these clauses will be given effect is a crucial one, because Rhode Island's usury statute imposes a drastic remedy. "Every contract made in violation of any of the provisions of § 6-26-2 [the usury statute], and every mortgage, pledge, deposit, or assignment made or given as security for the performance of the contract, shall be usurious and void."[3] Further, "the borrower shall be entitled to recover from the lender the amount so paid in an action on the case."[4] In other words, if a loan contract is held to be usurious, the contract is void and the borrower is entitled to recover not only the excess interest payments, but the entire amount he or she has paid on the loan, and, because the contract is void, the lender cannot even recover the principal.

Although long enshrined in Rhode Island law, little attention had been focused on this remedy until the Rhode Island Supreme Court heard the appeal of **NV One, LLC v. Potomac Realty Capital, LLC**, a case of first impression. In **NV One**, the plaintiff entered into a loan agreement with Potomac to secure financing to renovate a former post office.[5] NV One signed a promissory note for the principal amount of $1,800,000 and granted a mortgage to Potomac, as well as an assignment of leases and rents.[6] The note set the interest rate at "the greater of 5.3% or the LIBOR Rate, plus 4.7%."[7] The note also set a "default rate" at the lesser of 24% percent or the maximum rate allowable under applicable law.[8] After including fees associated with the loan, the total value of the loan was $1,815,000.[9] However, the entire principal balance was never fully disbursed.[10]

In August 2008, the plaintiff invoked a provision in the loan agreement allowing it to extend the maturity date of the loan for another ten months, until June 2009.[11] Prior to August 2008, Potomac charged interest at 10%, however, it charged the interest on the total $1.8 million dollars, despite not having disbursed the full amount to the plaintiff.[12] After the loan was extended, Potomac charged interest at a rate of 12%—again on the total amount of $1.8 million.[13] It was later determined that the highest amount ultimately disbursed was only $1,007,390.52."[14]

In February 2009, Potomac sent a thirty-day notice of default to plaintiff, and when the default was not cured by March, Potomac began charging the 24% default rate against the entire $1.8 million.[15] In November 2009, Potomac sent a notice of foreclosure to NV One and demanded payment from the plaintiff's principals, pursuant to their personal guarantees.[16] Plaintiff NV One filed suit against Potomac, alleging fraud, breach of contract and usury.[17] Subsequently, the plaintiff moved for summary judgment on its usury claim.[18]

The defendant sought to invoke a savings clause in the loan agreement that stated:

> A. It is the intention of Maker [NV One] and Payee [PRC] to conform strictly to the usury and similar laws relating to interest from time to time in force, and all agreements between Maker and Payee, whether now existing or hereafter arising and whether oral or written, are hereby expressly limited so that in no contingency or event whatsoever,

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In August and September, the Bar's 2014 Continuing Legal Education (CLE) Risk Management seminars, sponsored by Aon Attorneys Advantage Liability Insurance, were rated the best ever by many Bar members. *Ethics Chess: Problems and Strategies for the Virtuous Lawyer* was a challenging and interactive CLE seminar providing real tools and strategies to help practicing attorneys see ethics problems in the offing, avoid them if possible, and deal with them effectively if they cannot be avoided. All five seminar sessions were free and provided 3 CLE ethics credits.

1 Ethics Chess seminar Presenter Jack Marshall, president and founder of ProEthics, and Brian Ahrens, representing seminar sponsor Aon Attorneys Advantage, shared a light moment during a seminar break. **2** Over 1,500 Bar members attended the seminars over the five days they were offered at locations in Bristol, South Kingstown and Cranston.

whether by acceleration of maturity hereof or otherwise, shall the amount paid or agreed to be paid in the aggregate to Payee as interest hereunder or under the other Loan Documents or in any other security agreement given to secure the Loan Amount, or in any other document evidencing, securing or pertaining to the Loan Amount, exceed the maximum amount permissible under applicable usury or such other laws (the "Maximum Amount").

B. If under any circumstances Payee shall ever receive an amount that would exceed the Maximum Amount, such amount shall be deemed a payment in reduction of the Loan owing hereunder and any obligation of Maker in favor of Payee * * * or if such excessive interest exceeds the unpaid balance of the Loan and any other obligation of Maker in favor of Payee, the excess shall be deemed to have been a payment made by mistake and shall be refunded to Maker.[19]

In ruling on the plaintiff's motion, the hearing justice first held that the loan was void as usurious because "the value for computing the maximum permissible interest is not the amount on the face of the loan, but, rather, the actual amount received by the borrower."[20] Although the rate charged varied from 10% to 12% to 24% during the course of the loan, because those rates were applied to the entire loan amount rather than the amount actually disbursed, the hearing justice found that "[t]here can be no doubt that these interest amounts charged exceeded twenty-one percent," the maximum allowable rate under the Rhode Island usury statute.[21]

The defendant appealed and did not contest the lower court's factual findings. Instead, Potomac argued that the hearing justice erred by declaring the usury savings clause unenforceable.[22] Potomac contended that usury savings clauses should be enforceable under Rhode Island law.[23]

On appeal, the Rhode Island Supreme Court first affirmed the lower court's holding that the loan was usurious, noting that, not only was the default interest rate (24%) usurious on its face, but, regarding the lower interest rates imposed, "[t]he fact that PRC calculated the interest amount against the face amount of the loan as opposed to the amount of the dis-

bursed funds is of critical importance to the usury determination."[24] The Court calculated that in August 2007 when the facially benign rate of 10.25% was charged against the total loan amount, rather than the considerably lower amount actually disbursed, an effective rate of interest of 23.17% resulted.[25] Further, the Court found that the default rate, "when calculated against the actual disbursed amount …skyrockets to 43.48 percent per annum."[26] Thus, the Court held, "it is abundantly clear…that the loan between PRC and NV One was usurious."[27]

The Court next addressed the enforceability of the usury saving clause, citing the long-settled principle that "a contract term is unenforceable only if it violates public policy."[28] The Court relied on the usury statute to "discern the public policy undergirding the usury laws."[29] The statute states, in pertinent part: "[N]o person, partnership, association, or corporation loaning money * * * shall, directly or indirectly, reserve, charge, or take interest on a loan, whether before or after maturity, at a rate which shall exceed * * * twenty-one percent (21%) per annum * * *."[30] The Court reasoned that the use of the word "shall" evinced a legislative intent to establish "an inflexible, hardline approach to usury that is tantamount to strict liability."[31] Further, the Court contrasted this language in the civil usury statute to that of the criminal usury statute – which punishes only willful and knowing violations of the maximum interest rate – and concluded that it underscored "the immateriality of a lender's intent in determining civil usury under § 6-26-2."[32]

The Court then reviewed a line of cases stretching from 1926 to 2006 that strictly enforced the usury statute.[33] The cases consistently reflect a policy of protecting borrowers by placing the burden on lenders to ensure compliance with the statute.[34] "Plainly the policy of the legislature was to provide severe penalties against the lender for his violation of the statute as the best method in its judgment to prevent usurious transactions."[35] Although the early cases referenced prior versions of the statute, the Court found that the policy undergirding the statute remained the same.

In addressing Potomac's argument that the parties were "sophisticated business entities" that should be bound to the usury savings clause in their loan agree-

ment, the Court noted that the usury statute provides a very specific exception for commercial business entities. Section 6-26-2(e) lays out that exception:

> [T]here is no limitation on the rate of interest which may be legally charged for the loan to, or use of money by, a commercial entity, where the amount of money loaned exceeds the sum of one million dollars ($1,000,000) and where repayment of the loan is not secured by a mortgage against the principal residence of any borrower, provided, that the commercial entity has first obtained a *pro forma* methods analysis performed by a certified public accountant licensed in the state of Rhode Island indicating that the loan is capable of being repaid.

Despite the fact that the loan in question had been extended to a commercial entity, had exceeded one million dollars, and was not secured by a mortgage on the borrowers' principal residences, no *pro forma* methods analysis was performed.[36] The Court stated that "the loan at issue surely qualified for the exception. By not securing the requisite *pro forma* analysis, PRC failed to avail itself of the exception and is therefore bound by the maximum interest rate."[37]

The Court declined Potomac's invitation to enforce the usury savings clause, stating:

> We have no doubt that the inclusion of usury savings clauses in loan contracts would lead to results that are injurious to the money-borrowing public, as well as potentially unconscionable or tending towards injustice or oppression. *See Gorman*, 853 A.2d at 39. We therefore hold that, in loan contracts such as the instant loan, usury savings clauses are unenforceable as against the well-established public policy of preventing usurious transactions.[38]

Four months later, the Rhode Island Supreme Court issued an opinion in yet another case involving a usury savings clause. In **LaBonte v. New England Development R.I., LLC**, Lawrence C. LaBonte, the owner of New England Development, sought a short-term loan to purchase property in Scituate.[39] The owner contracted with a consultant, Joseph Garies, to obtain the necessary financing.[40] The consultant arranged for a

continued on page 36

Your Bar Foundation Needs Your Help Today

Michael A. St. Pierre, Esq.
President, Rhode Island Bar Foundation

Although we are well below the IOLTA income levels of prior years, IOLTA is still vital to fulfilling the critical need of providing civil legal services to the poor.

The Rhode Island Bar Foundation was created in 1958 to serve as the fundraising and charitable arm of the Rhode Island Bar Association. During the past fiscal year, the Foundation's Board of Directors and other dedicated volunteers have continued to help the Foundation fulfill its mission to foster and maintain the honor and integrity of the profession of law and to study, improve and facilitate the administration of justice.

For over 30 years, the Rhode Island Bar Foundation has invited members of the Bar who meet certain standards to become Fellows of the Foundation. Fellows are attorneys and judges who have distinguished themselves professionally, who have made a significant monetary contribution to the Foundation, and who have given generously of their time to public service in communities where they live and where they work. At our Annual Meeting in June, I am pleased to report that we welcomed 10 new Fellows. At this time, 339 attorneys are Fellows. It is truly gratifying that many Life Fellows have answered the call during these difficult economic times, as evidenced by the fact that annual donations have increased significantly over the past two years. We also receive annual voluntary contributions from members of the Rhode Island Bar whose generosity is likewise noted.

The Interest on Lawyers Trust Accounts (IOLTA) Program continues to face challenges. Since the 2008 recession hit, the falling numbers continue to astound Bar Foundations across the country. This year continued to be a difficult year for funding legal services programs. It is expected that the near zero federal funds short-term interest rate will continue for at least the next year.

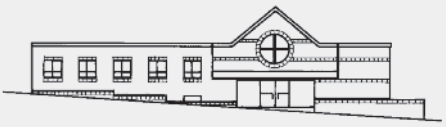
Although we are well below the IOLTA income levels of prior years, IOLTA is still vital to fulfilling the critical need of providing civil legal services to the poor. The Board of Directors is optimistic that the future economic climate will improve, resulting in increased revenue. Under the leadership of Treasurer James Jackson, we have a very strong Finance Committee and thank them for their diligence in monitoring the investment accounts in order to maximize additional income for the IOLTA grants and other Foundation Programs.

Again this year, with the continued generosity of The Horace A. Kimball and S. Ella Kimball Foundation, The Champlin Foundations, and The Nicholas J. Caldarone Foundation, we were able to award two, $20,000 Thomas F. Black, Jr. Memorial Scholarships to two promising first-year law students from Rhode Island who demonstrated financial need, achieved superior academic performance and community and public service, and who have established contacts with and commitment to the State of Rhode Island. This past year, we also received additional donations earmarked for the Scholarship Program totaling $3,450 from Rhode Island Bar Association members. To date, this fund has awarded 54 scholarships, totaling many thousands of dollars to promising law students from Rhode Island, many of whom returned to Rhode Island to further contribute to our mission.

As the Foundation's activities have grown, the efforts and commitment of Board members, Committee members, and Fellows have increased. None of these outstanding initiatives would be possible without their valuable wisdom and service to the Foundation. We also commend the leadership of the Rhode Island Bar Association for their on-going support, and we are grateful for their assistance with our programs.

Together, we look forward to bringing more Fellows, and more donations and funds to the Foundation to support our worthwhile programs.

Note: Rhode Island Bar Association members are encouraged to donate to the Rhode Island Bar Foundation by using the Foundation Gift form on page 12 of this Bar Journal.



Rhode Island Bar Foundation

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

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

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State Medical Marijuana Laws, the Federal Controlled Substances Act and Criminal Prosecutions

Thomas R. Bender, Esq.
Practices law in Providence

The ultimate touchstone in determining whether federal law preempts state law is congressional intent.

In 2013, in its first opportunity to interpret the state's Medical Marijuana Act, the Rhode Island Supreme Court suggested, or at least questioned, during oral argument and its subsequent decision, that a state law legalizing the medical use of marijuana might indeed be preempted and rendered void, even when raised as an affirmative defense in a state law criminal prosecution. While it may be prudent for state officials to advise an individual, when they provide State authorization to cultivate or use marijuana, that they are not immune from criminal prosecution under *federal* law by *federal* authorities, for the following reasons. I do not think a State's decision to decriminalize marijuana is preempted by federal law, void, or without effect, for the purposes of *state* criminal law prosecutions by *state* authorities. The rationale for this conclusion may be stated this way: Under the system of federalism designed by the United States Constitution, Congress does have the constitutional authority to command State legislatures to enact *state* laws that criminalize, in any respect, the cultivation and possession of marijuana or to command State executive officials to enforce *federal* criminal laws that do.

The Rhode Island Act

Enacted by the state General Assembly in 2006, the Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act was based on a legislative finding that "[s]tate law should make a distinction between the medical and nonmedical use of marijuana."[1] Thus, the Act's stated legislative purpose "is to protect patients with debilitating medical conditions, and their physicians and primary caregivers from arrest and prosecution, criminal and other penalties, and property forfeitures" under the Rhode Island Controlled Substances Act.[2]

In a 2013 opinion, however, the Rhode Island Supreme Court, looking to federal criminal law and the federal constitution's Supremacy Clause, questioned the General Assembly's constitutional authority to decriminalize marijuana for any purpose.

The Dicta and its Context

State v. DeRobbio,[3] involved the State's appeal of a criminal information dismissal under the state's Controlled Substances Act, charging the defendants with the criminal possession and manufacture of marijuana. The dismissal was based upon the affirmative defense provisions contained in the Medical Marijuana Act,[4] and, on appeal, the Attorney General challenged the trial court's interpretation of the Act.[5] The Court, however, began its analysis section by volunteering: "At the outset, this Court recognizes that there is a constitutional question as to whether the Act is preempted (either in whole or in part) by federal law, which prohibits the manufacture, distribution, or possession of marijuana, even if it is used for medical purposes. * * * * [But s]ince neither party has questioned whether the Act can survive under the Supremacy Clause of the United States Constitution, either below or on appeal, we decline to do so. * * * * *[W]e leave for another day the resolution of whether the Act is preempted by federal law and therefore void, either in whole or in part*."[6] Thus, the Court placed a significant Supremacy Clause cloud over the general concept of state medical marijuana legislation.

The Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof:… shall be the Supreme law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding."[7] Stated simply and compactly, in **DeRobbio** the Court suggested that because the medical use of marijuana was not exempt from *federal* criminal law prohibitions, a state legislature is, by operation of the Supremacy Clause, constitutionally prohibited from exempting the medical use of marijuana from *state* law criminal prohibitions.

Federalism and the Anti-Commandeering Principle

Of the many innovations the Framers built into the federal Constitution, there are two that fundamentally define the American concept of federalism.

The first was the establishment of a "two-government system,"[8] of "dual sovereignty."[9] This constitutional structure gives Americans "two political capacities, one state and one federal, each protected from incursion by the other[,]" establishing what the Supreme Court has characterized as "a legal system unprecedented in form and design, establishing two orders of government, each with its own privity, its own set of mutual rights and obligations to the people who are governed and sustained by it."[10] In adopting the Constitution proposed by the Framers, the States surrendered certain enumerated powers to the proposed federal Government, but retained "a residuary and inviolable sovereignty."[11] A sovereignty that is "concurrent with that of the Federal Government."[12] Thus, this design contemplates that a State government "will represent and remain accountable to its own citizens."[13]

The Framers' second fundamental decision was to reject "the concept of a [national] government that would *act upon and through the States*," as was the case with the Articles of Confederation, explicitly choosing instead "a Constitution that confers upon Congress the ability *to regulate individuals*," rather than States.[14] As a result, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."[15] While Congress has the constitutional authority "to pass laws requiring or prohibiting certain acts" by individual persons, "it lacks the power to directly compel the States to require or prohibit those acts."[16]

Consequently, the Court has struck down federal legislation that commandeers a State's legislative or executive departments to enact by legislation, or to enforce by executive action, federal policies.[17] Stated another way, the anti-commandeering principle prohibits Congress from requiring a State's legislature to enact any particular law, or requiring State executive department officials to assist in the enforcement of a federal statute,[18] such as, for instance, the Federal Controlled Substances Act. State legislatures are free to criminalize marijuana for all purposes; for some, but not all purposes; or to not criminalize it at all. The enforcement of the federal Controlled Substances Act is a *federal* executive branch responsibility.

While federal law and policy would preempt any conflicting state law and policy in a *federal* prosecution, it plays no role in dictating or determining what state criminal law will be in state prosecution. And, notwithstanding the Rhode Island Supreme Court's dicta suggesting the contrary, the specific dictates of the Supremacy Clause and federal preemption jurisprudence do not change that conclusion.

The Supremacy Clause and Its Federal Preemption Doctrine

The Supremacy Clause is a structural clause addressing federalism's dual sovereignty concept, defining in part the "delicate balance the Constitution strikes between State and Federal power."[19] Its object is the enforcement of federal law, notwithstanding any state law on the same subject matter, and it is implemented by the judicially-created doctrine of federal preemption.

The ultimate touchstone in determining whether federal law preempts state law is congressional intent,[20] and courts start with the presumption, particularly where Congress has enacted legislation in fields traditionally occupied by the

States[21] – "that the historic police powers of the States were not superseded by the federal Act unless that was the clear and manifest purpose of Congress."[22] State legislation permitting and regulating the medical use of marijuana concerns the regulation of medical practices, ensuring the health and safety of the state's citizens, and defining the state's criminal law, fields historically occupied by the States.[23]

To determine Congress' preemptive purpose when it enacts legislation, the United States Supreme Court has developed four analytical approaches.[24] First, courts look to the Act for explicit statutory language declaring Congress' intent.[25] Second, in the absence of express statutory language, courts will look to the federal law as a whole to determine "if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the states to supplement it[,]"[26] so-called field preemption.[27] Then there are the two so-called conflict analyses.

The first is generally referred to as "impossibility" or "positive conflict" preemption.[28] Impossibility conflict preemption occurs where federal and state law impose conflicting requirements, and "it is impossible for a private party to comply with both[.]"[29] Stated differently, the test is whether "simultaneous compliance with both state and federal directives is impossible."[30] The second conflict analysis, obstacle preemption, involves a less precise conflict. One that courts determine exists where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal act.[31]

The Federal Controlled Substances Act includes an express *limited* preemption provision that has loosely been characterized as a "non-preemption"[32] or "anti-preemption"[33] clause. Section 903, entitled "Application of state law," provides: "No provision of this subchapter shall be construed as indicating an intent on the part of Congress to occupy the field in which the provision operates, including criminal penalties, to the exclusion of any state law on the same subject matter which would otherwise be within the authority of the State, unless there is a *positive conflict* between the provision of this subchapter so that the two *cannot consistently stand together*."[34] At least two State court decisions, **Ter Beek v. City of Wyoming**,[35] and **County of San Diego v. San Diego NORML**,[36] have construed the plain language of § 903 to limit the preemptive effect of the CSA to *actual* conflict between provisions of the CSA and state law.[37] It is in effect, a savings clause intended to preserve state law to the greatest extent possible.[38] Therefore, the preemptive effect of the CSA is focused on the impossibility and obstacle preemption conflict analyses.

Impossibility Preemption – Impossibility conflict is a very narrow preemption category, particularly when measured against Congress' intent, as expressed in § 903, to preserve state law where possible. Fundamentally, impossibility preemption involves conflicting legal *requirements*, not mere *inconsistency* between state and federal law. It exists only where federal and state law impose conflicting requirements, so that fulfilling the federal legal requirement requires violating the state legal requirement, and vice-versa, making it physically impossible to simultaneously fulfill both.[39] Under impossibility analysis, only "state laws that *require* a private party to violate federal law are preempted," and thus "without effect[.]"[40] Federal preemption of a state law under an impossibility analysis

is dependent on the existence of a state law *requirement*, and Medical Marijuana Acts, like Rhode Island's, do not mandate or require any person to cultivate or possess marijuana. They simply make it permissible, and exempt medical marijuana use from *state* penalties and prosecution. A policy choice a state is permitted to make under the dual sovereignty construct of the federal constitution. Because the medical use of marijuana is merely permitted, not mandated, by Medical Marijuana Acts, it is not physically impossible to comply with both federal and state law simultaneously, and a State's public policy decision to decriminalize the cultivation and possession of marijuana *for state purposes*, is not preempted on the basis of impossibility conflict preemption.[41]

This conservative application of impossibility preemption respects and implements the system of dual sovereignty established by the Constitution's Framers. And where, as it is with medical marijuana laws generally, it is federal law that proscribes conduct that state law does not proscribe, this conservative application of impossibility conflict preemption does not offend the general constitutional requirement that federal law is supreme, because the federal government is still free to enforce its laws, without encumbrance, to the extent it decides it is appropriate to do so.

Obstacle Preemption – Obstacle preemption is invoked when there are no actual conflicting federal and state law requirements, but a court nevertheless determines that "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[42] By its very nature, obstacle analysis is imprecise measure of congressional intent that gives courts broad authority to effectively supplant duly enacted state law by making conclusions about the full purposes and objectives of Congress, and whether the state law poses an obstacle sufficiently troublesome that Congress would have intended for the state law to have been preempted. To paraphrase one Supreme Court Justice's observation, "[u]nder this approach, [courts are empowered to invalidate] state laws based on *perceived* conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied in the text of the federal law."[43]

Therefore, the United States Supreme Court has warned lower courts that obstacle preemption "does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives; [because] such an endeavor would undercut the principle that it is Congress rather than the courts that preempts state law."[44] As a consequence, the Court's precedents have required that "a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act."[45]

As an initial matter, however, § 903 arguably limits the preclusive effect of the federal Controlled Substances Act to impossibility preemption analysis, and precludes obstacle analysis when it comes to federal and state law concerning controlled substances. While every state law that constitutes an *actual* positive conflict with a federal, because they contain conflicting *requirements*, such that it is impossible for the two requirements to stand together, constitutes an obstacle to the full accomplishment of Congress' purpose and intent, not every state law (or absence of a state law) that is an obstacle to the purpose and intent of the federal law, in the sense that the state is not pursuing the same purpose with the same vigor, does not constitute an actual positive conflict between conflicting federal and state requirements. For example, where a State decriminalizes the medical use of marijuana, and the State does not prosecute that use, in the strictest sense of the word, it might plausibly be considered an obstacle of sorts to the federal goal of deterring marijuana use because the State is not operating in a parallel manner under its own criminal law. But, since state medical marijuana laws do not require marijuana use, there are no positive conflicting state and federal law requirements. Since the decriminalization of marijuana by a State is not in positive conflict with the CSA, as is required for preemption under § 903, the state law is not the type of obstacle to the full purposes of the legislation that Congress intended to be preempted.[46]

But, even if obstacle preemption was permitted under the plain language of § 903, the General Assembly's decision to decriminalize the medical use of marijuana for purposes of state criminal law does not constitute an unconstitutional

continued on page 39

Past Bar President Lise Iwon To Be Honored With ABA Stonewall Award

Attorney Lise M. Iwon, Past President of the Rhode Island Bar Association (2010-2011) and partner in the Wakefield, Rhode Island, law firm of Laurence & Iwon, is one of three attorneys nationwide to be honored by the American Bar Association (ABA) Commission on Sexual Orientation and Gender Identity with its third annual Stonewall Award during a ceremony on February 7, 2015, at the ABA Midyear Meeting in Houston.

Named after the New York City Stonewall Inn police raid and riot of June 28, 1969, which was a turning point in the gay rights movement, the award recognizes lawyers who have considerably advanced lesbian, gay, bisexual and transgender individuals in the legal profession and successfully championed LGBT legal causes.

Attorney Lise Iwon was instrumental in gaining the Rhode Island Bar's support for same-sex marriage prior to the State's passage of the Marriage Equality Act. In addition, as a litigant, Iwon sought and won a declaratory ruling that same-sex couples in Rhode Island who are married or joined in civil union are allowed to take the same marital deductions, for estate tax purposes, as married, different-sex couples.

The ABA Commission on Sexual Orientation and Gender Identity leads the ABA's commitment to diversity, inclusion and full and equal participation by lesbian, gay, bisexual and transgender people in the ABA, the legal profession and society. Created in 2007, the commission seeks to secure equal treatment in the ABA, the legal profession and the justice system without regard to sexual orientation or gender identity. Each year the ABA Commission on Sexual Orientation and Gender Identity presents the ABA Stonewall Award to a small group of distinguished individuals who have made significant contributions to the advancement of lesbian, gay, bisexual, and transgender (LGBT) individuals in the legal profession, and/or to LGBT legal issues. According to ABA Commission on Sexual Orientation and Gender Identity Chair Jim Holmes, "These three remarkable attorney leaders, Lise Iwon, Kate Kendell and Brian Sims, live and work within the LGBT community, and they serve as outstanding visible examples for that community."

With nearly 400,000 members, the American Bar Association is one of the largest voluntary professional membership organizations in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law.

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

Matthew R. Plain, Esq. **Stephen Adams, Esq.**
Barton Gilman LLP, Providence

Melvin Zurier was in born in Providence, Rhode Island on April 30, 1929. He attended the Henry Barnard School and Classical High School. His involvement in Classical's debate society, under the tutelage of local attorney and debate society volunteer, C. Bird Keach, would spark his interest in a legal career. Upon graduating from Classical in 1946, he enrolled at Harvard University. Mr. Zurier graduated from college in 1950, obtained a commission in the Air Force Reserve, and deferred active duty until he completed law school. He graduated from Harvard Law School in 1953, gained admission to the Massachusetts bar that same year, and began service in the Judge Advocate General's Corp in 1954. While in service, he successfully defended a Korean War veteran and prisoner of war accused of collaborating with his captors, and obtained an acquittal for an enlisted private facing first degree murder charges. He completed his service, returned to Providence to work at the firm Weller, Reynolds, and Johnson (initially at a rate of $5 per hour), and gained admission to the Rhode Island bar in 1957. Mr. Zurier volunteered for John Notte's campaign for Governor in 1960 and, upon Notte's election, commenced service as his Executive Counsel. In 1962, he partnered with Martin Temkin and Amedeo Merolla to form Temkin, Merolla & Zurier, where he practiced for nearly twenty years. Thereafter, Mr. Zurier became a partner at Levy, Goodman, Licht & Semonoff, stayed at the firm through its merger with Tillinghast Collins & Graham, and left when Tillinghast Licht dissolved in 2008. Mr. Zurier concentrated in real estate, zoning, business, probate, and trust law. We had the opportunity to speak with this near sixty-year veteran of the bar. Excerpts from our conversation follow.

Melvin Zurier

What is your most memorable experience from your law practice? Probably the combined accomplishments relating to the buildings in Providence, seeing the construction of the several buildings and what was, at the time, regarded as the renaissance of Downtown Providence.

What was your biggest challenge, hurdle, or obstacle in your professional career? I'll point to an event that happened in my early days of practice, because it's hard to believe now. One Saturday I was in the office and I saw a file next to another file I was looking at, Zurier was written on the cover. So, I opened it. And I saw some handwritten notes: "What do you think of this guy Zurier?" "Well, it's interesting, he has a good résumé." And another said, "Yeah, but he's Jewish. How do you think some of our clients would feel about him?" Was that an obstacle? Hmm? I don't know.

What is the biggest single change in the legal profession or practicing law since you started in 1957? The commercialism that has crept into what I always thought would be a profession and an art. It has turned a skill, which is an art, into a business. I think it has not been good for our profession. I say that with disappointment.

What is the best advice you received as a lawyer? In 1961, I represented a little Irish maid who had been left a bequest by her boss. Now, the reason I'm mentioning this is that my friend and fellow attorney, Mr. Weller told me, "Don't let those big firm lawyers try to wear you down. They're going to try to use whatever techniques they can because you're young, and so on and so forth, and you stand by your guns." That was very good advice, and I won the case.

What advice would you give to new lawyers? First, listen. Pay attention. Be civil. Concentrate. Be kind. Don't give up. Know that there is more than one way to come to a conclusion. And be thankful for the opportunity to be able to think that way.

To what do you attribute your success as an attorney, what qualities, traits or characteristics? Well, I hesitate to call it success. Survival, I suppose. I'm just very pleased to have lived this long, and been able to maintain my, whatever memory I have and whatever I don't have, and the opportunity to live in a city and a state like this, and to maintain relationships and friendships and opportunities to do the things I love in a field that I love. Enough said.

Pull Together as a Team with OAR!

The Rhode Island Bar Association's unique, **Online Attorney Resources (OAR)** is exclusively designed to help Bar members receive and offer timely and direct assistance with practice-related questions. **OAR** provides new and more seasoned Bar members with the names, contact information and Bar admission date of volunteer attorneys who answer questions concerning particular practice areas based on their professional knowledge and experience. Questions handled by **OAR** volunteers may range from specific court procedures and expectations to current and future opportunities within the following **OAR** practice areas:

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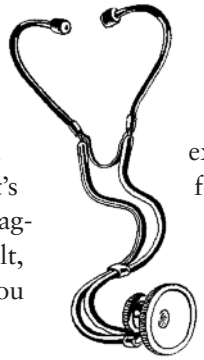
To review the names and contact information of Bar members serving as **OAR** volunteers, or to sign-up as a volunteer resource, please go to the Bar's website at **www.ribar.com**, login to the **MEMBERS ONLY** section and click on the **OAR** link.

OAR TERMS OF USE Since everyone's time is a limited and precious commodity, all Bar members contacting OAR volunteers must formulate their questions concisely prior to contact, ensuring initial contact takes no longer than 3 to 5 minutes unless mutually-agreed upon by both parties. OAR is *not* a forum for Bar members to engage other Bar members as unofficial co-counsel in an on-going case. And, as the Rhode Island Bar Association does not and cannot certify attorney expertise in a given practice area, the Bar does not verify any information or advice provided by OAR volunteers.

Tips for Healthier Living

Manage Your Condition and Your Emotions



When you're diagnosed with a serious medical condition, both emotional and physical symptoms will contribute to your distress, and the emotional part can be the more difficult. It's normal to have negative feelings about your diagnosis, including anger, fear, depression and guilt, but working through these feelings will help you to better manage your condition and possibly improve your prognosis. Indeed, studies have shown that managing difficult feelings and emotions can develop hope, critical in overcoming a serious condition. Talk about your anger with the people you love. Anger can mask other feelings, like fear, and talking with patient, loving listeners will help you find solutions to what is troubling you the most. Overcome fear by learning all you can about your condition, treatment options, and ways to cope. Don't try to soldier through depression. Ask your doctor about medications, and see a professional counselor for support. Don't overlook support groups. Hundreds of such groups exist for almost every medical condition, and online forums can provide you with a surprising level of support if you can't locate a specific local group. The right one can be the most powerful coping strategy of all.

This message is brought to you by the Bar's Lawyers Helping Lawyers (LHL) Committee and the Bar's mental health care provider Coastline Employee Assistance Program (EAP). To discuss your concerns, or those you may have about a colleague, for free confidential help, information assessment and referral, you may contact an LHL member, or you may go directly to professionals at Coastline EAP. For LHL member and Coastline EAP information and contacts, please see the Lawyers Helping Lawyers Committee notice on page 34 of this Bar Journal.

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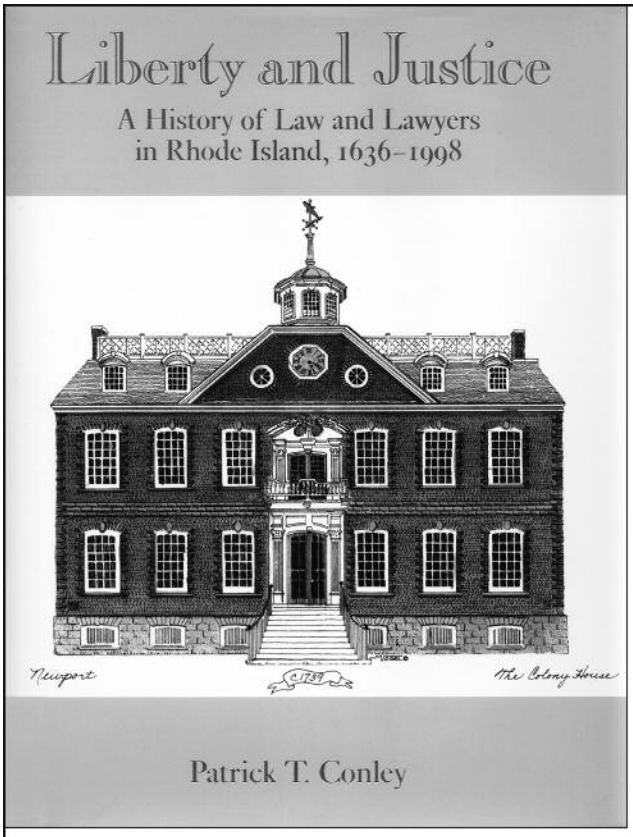

In this work entitled *Liberty and Justice*, Dr. Patrick T. Conley, the noted Rhode Island historian, has set forth a compilation of essays and excerpts from treaties and books which chronicle the history of Rhode Island law and lawyers from the founding of the colony in 1636 down to the present time. The book consists of three parts and thirty-one chapters. No aspect of Rhode Island legal history has been overlooked.

This volume contains a panoramic overview of the history of our state that should be invaluable both to scholars and to students of the law. Dr. Conley has brought together in this compilation numerous sources of historical and legal information. In each instance he has provided an introduction that places the essay or excerpt in the overall historical context. In some instances his introduction may correct factual material on the basis of Dr. Conley's own intensive research on the subject matter.

This compilation was commissioned as the defining work in celebration of the 100th anniversary of the Rhode Island Bar Association. It is an excellent symbol not only of the centennial of the organized bar but of 362 years of Rhode Island legal history. No portion of the centennial observance and celebration will be of such enduring value as this book. On behalf of the Rhode island judiciary and the members of the bar of this state, I express our deep appreciation to Dr. Patrick T. Conley for his magnificent effort and splendid literary achievement. —*The late chief Justice Joseph R. Weisberger*

The foremost authority on Rhode Island's history and the state's first Historian Laureate has written a volume to commemorate the 100th anniversary of the Rhode Island Bar Association that lawyers and history buffs will cherish — the trials and banishment of Roger Williams and Anne Hutchinson for their religious views, the condemnation of four whites for the murder of an Indian, the execution of 26 pirates on Goat Island, the investigation into the burning of the *Gaspee*, the rejection of the federal Constitution, divorce in the late 18th century, the Dorr War, the Gordon murder trial, the Industrial Revolution's impact on the development of the law of negligence, the Bloodless Revolution, the Race Track War, the Long Count of 1956 — it's all here, in 526 pages with 207 captioned illustrations in a limited edition of 1,500 copies.

Dr. Patrick T. Conley delivers his second of four Law Day addresses to the state Supreme Court (1987).

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Anonymous Tips and Reasonable Suspicion for Motor Vehicle Stops

Richard S. Humphrey, Esq.
Law Offices of Richard S. Humphrey, Tiverton

An anonymous tip without sufficient detail or corroboration will not permit even a brief stop.

This article compares the case law under both State and Federal law with regard to anonymous tips, in particular, **State v. Bjerke** and **Prado Navarette v. California**.[1]

Anonymous Tips and the Rhode Island Supreme Court

For a number of years, the definitive case in Rhode Island concerning the role of the anonymous tipster in determining reasonable suspicion for a DUI investigation has been **State v. Bjerke**. In **Bjerke**, the police received an anonymous telephone call reporting that the operator of a tan-colored Oldsmobile bearing license-plate number TV-536 was traveling on a particular road and was possibly intoxicated.[2] As a result of the anonymous tip, an officer was dispatched to the location and also told by the dispatcher that the target-vehicle had a suspended registration (a violation of G.L. 1956 § 31-8-2).[3]

Upon arriving at the area described by the anonymous tipster, the officer identified the target-vehicle by vehicle color and license plate number, and conducted a motor vehicle stop.[4] Prior to conducting the motor vehicle stop, the officer did not observe any erratic driving. He conducted the stop based solely upon his knowledge of the suspended registration.[5] After making contact with the defendant driver, and after observing the odor of alcohol, slurred speech, and confusion, the defendant exited the vehicle, failed certain field sobriety tests, and was arrested for: operating on a suspended registration; operating on a suspended driver's license; and, for suspicion of operating a vehicle while under the influence of alcohol.[6] He subsequently refused a chemical test, and was charged for the same (under R.I. Gen. Laws § 31-27-2.1).[7]

Ultimately, the Court in **Bjerke** reinstated the refusal charge, which had been dismissed by the trial court, on the grounds that the officer's knowledge of the driver's separate criminal violation (i.e. the suspended registration) easily satisfied the need for reasonable suspicion to conduct a stop.[8] However, in its reasoning, the Court addressed the information of the anonymous tipster, explaining:

> In this case the [AAC] panel concluded that the officer's reliance upon the information furnished by the anonymous telephone caller concerning the probable intoxication of the driver of a tan Oldsmobile bearing registration-plate number TV-536 did not furnish reasonable suspicion that would permit the officer's stop of the vehicle and the detention of the defendant driver in order to determine his sobriety. We agree with this proposition generally. *An anonymous tip without sufficient detail or corroboration will not permit even a brief stop.*[9]

Anonymous Tips and the United States Supreme Court

On April 22, 2014, the United States Supreme Court released its decision in **Prado Navarette v. California**, which is highly instructive to the issue of anonymous tips. The **Prado Navarette** decision, because it is so new, is virtually untested in any lower court, including those in Rhode Island.

In **Prado Navarette**, the Court held, by a very narrow 5-4 vote, that the standard for evaluating reasonable suspicion based upon anonymous tips invokes a "totality of the circumstances" analysis.[10] In reaching its holding, the Court made much ado about the reliability of 9-1-1 calls, generally, as well as how, in the Court's view, the caller identification and tracking functions of the 9-1-1 system act to lend credibility to an anonymous tip.[11]

Put differently, cell phone calls are generally not anonymous because identifying information about the caller is automatically received by the 9-1-1 recording systems of law enforcement agencies.

The Fourth Amendment of the Federal Constitution and Rhode Island's Declaration of Rights.

However, the cautious practitioner must be certain to evaluate the unique relationship between Federal and State Constitutional law, especially as it relates to searches and seizures. In particular:

1. The Rhode Island Constitution provides an independent authority governing

searches and seizure within the State;
2. Rhode Island's heightened standard for searches and seizures under the State Constitution is consistent with State and Federal precedent governing constitutional law;
3. Thus, Practitioners should move to suppress under the State Constitution and under the United States Constitution.

The Rhode Island Constitution, article I, section 6 reads:

> The right of the people to be secure in their persons, papers and possessions, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but on complaint in writing, upon probable cause, supported by oath or affirmation, and describing as nearly as may be, the place to be searched and the persons or things to be seized.

The Rhode Island Supreme Court has continually expressed an interest in defining protections for its citizens under the State Constitution. And, particularly, as noted in **Pimental v. Dept. of Transp.**,[12]:

> We have previously noted that Rhode Island citizens hold "a double barreled source of protection which safeguards their privacy from unauthorized and unwarranted intrusions: the [F]ourth [A]mendment of the Federal Constitution and the Declaration of Rights which is specified in the Rhode Island Constitution."[13]

In **Pimental**, the Rhode Island Supreme Court elaborated on the legal relationship between State and Federal constitutional power, explaining:

> The [United States] Supreme Court… has recognized the right and power of state courts as final interpreters of state law "to impose higher standards on searches and seizures [under state constitutions] than required by the Federal Constitution."[14] This greater protection may be afforded to citizens under a state constitution even if the federal and state language is similar.[15] The Federal Constitution only establishes a minimum level of protection.[16]

This pronouncement of law has not been hollow. The Rhode Island Supreme Court has reasserted the power of the State Constitution on numerous occasions.[17]

In sum, we will wait to see how the

Prado Navarette decision impacts the **Bjerke** holding.

Postscript

Extra-jurisdictional arrests also often factor into DUI/Refusal cases. Please see **State v. Morris,** also see **State of Rhode Island ex rel. Town of Little Compton v. Simmons,** where the Supreme Court did not reach the jurisdictional issue and decided the case on other grounds.

ENDNOTES

1 ***State v. Bjerke**, 697 A.2d 1069 (R.I. 1997) and **Prado Navarette v. California**, 572 U.S. __ (2014).*

2 ***Id.**, 697 A.2d at 1070.*

3 ***Id.***

4 ***Id.***

5 ***Id.***

6 ***Id.**, 697 A.2d at 1070.*

7 ***Id.***

8 *697 A.2d at 1072.*

9 ***See Alabama v. White**, 496 U.S. at 329-30, 110 S.Ct. at 2416, 110 L.Ed.2d at 308-09; **In re John N.**, 463 A.2d at 177 (corroborated and detailed information justifies an investigatory stop)." **Bjerke**, 697 A.2d at 1071-72 (emphasis added).*

10 ***Prado Navarette v. California**, 572 U.S. __, at 1, 3.*

11 ***Prado Navarette v. California**, 572 U.S. __, at 5-8.*

12 *561 A.2d 1348 (R.I. 1989).*

13 ***State v. Sitko**, 460 A.2d 1, 2 (R.I.1983) (quoting **State v. Luther**, 116 R.I. 28, 29, 351 A.2d 594, 594-95 (1976)). **Pimental v. Dept. of Transp.**, 561 A.2d at 1350 (internal citations included).*

14 ***Cooper v. California**, 386 U.S. 58, 62, 87 S.Ct. 788, 791, 17 L.Ed.2d 730, 734 (1967).*

15 ***Id.***

16 ***Oregon v. Hass**, 420 U.S. at 719, 95 S.Ct. at 1219, 43 L.Ed.2d at 576. **Pimental**, 561 A.2d at 1350 (internal citations included).*

17 ***See Pimental**, 561 A.2d at 1350 (citing **In re Advisory Opinion to the Senate**, 108 R.I. 628, 278 A.2d 852 (1971)(increased number of petit jury members); **State v. Maloof**, 114 R.I. 380, 333 A.2d 676 (1975) (electronic-eavesdropping statute); **State v. Benoit**, 417 A.2d 895 (R.I.1980) (the warrantless search of an immobile automobile); **State v. von Bulow**, 475 A.2d 995 (R.I.1984) (suppression of seized evidence State Constitution)).*

18 *Please see **State v. Morris**, No. 2012-105-C.A. (P1/11-651A) (May 28, 2014). Please also see **State of Rhode Island ex rel. Town of Little Compton v. Simmons**, No. 2012-251-M.P. (21-2011-3139) (March 25, 2014).* ❖

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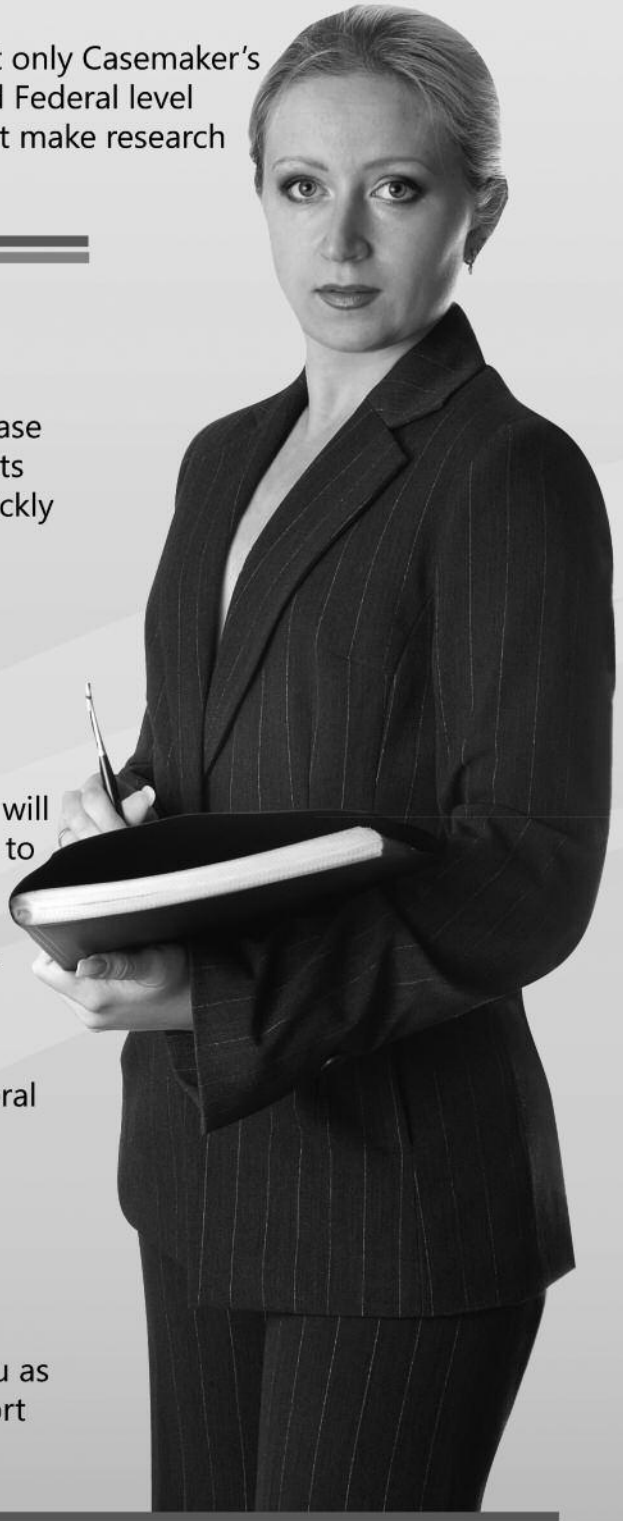

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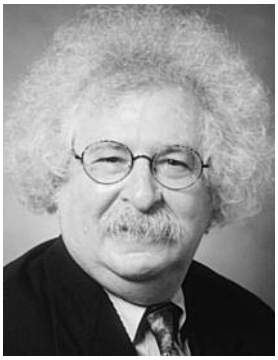
BOOK REVIEWS

Double Down: Game Change 2012 by Mark Halperin and John Heilemann and *The Message: The Reselling of President Obama* by Richard Wolfe



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

Two books reveal the successful and failed strategies and inner workings of the 2012 Presidential Campaign

Double Down: Game Change 2012, written by Mark Halperin and John Heilemann of *Time* and *New York* magazines, respectively, gives these two intrepid reporters the opportunity to reprise their best-seller about the 2008 campaign, *Game Change: Obama and the Clintons, McCain and Palin, and the Race of a Lifetime*. The 2008 effort also produced a spectacular television version on HBO. It's a tough act to follow, because the 2008 book and movie were most interestingly about Sarah Palin, a more colorful player than usual in American national politics. For this volume, of what is now a franchise, they did five hundred interviews with four hundred people under the rules of deep background, meaning no direct identification. However, the sources are almost always obvious. Clearly, the authors spoke with both President Obama and Governor Romney. Perhaps because of the long sequence of primaries, perhaps because the losing campaign is often more interesting, more chapters cover the Republicans than Obama. The authors are also upfront about what the book is about: "an unrelenting focus on the candidates and those closest to them." This is inside baseball, instant history, what happened, who said what, who's up and who's down in the campaigns. Great!

Obama: The Curtain is Pulled

Obama created his own narrative with his autobiography and speech at the 2004 Democratic National Convention. Part of the image was "no drama Obama," the claim that the staff all loved each other and him. The 2008 victory was bathed in a soft glow, abetted by an adoring press and documented soft coverage. By 2012 all unraveled. Infighting soared. The press secretary, Robert Gibbs, and the deputy campaign manager, Stephanie Cutter, were everyone's targets. First Friend and senior staffer Valerie Jarrett, the Obama Whisperer with access to the living quarters, was widely resented. And fear of losing was palpable amidst a rotten grinding economic recession and poor, if not fatal, polls. In other words, the Obama White House resembled all other American political operations: a Borgia court. Nothing special anymore.

The book also reveals a practical, totally unidealistic President, also no surprise. He turns the campaign over to the razor sharp unsentimental operatives David Plouffe in the White House and Jim Messina at the Byzantine Chicago campaign headquarters. By the summer of 2012, the campaign decides to win not on Obama's record, but by destroying Romney with negative commercials. Romney's past gave Obama-land two gigantic openings: Romney's career of flip-flopping on important issues as he navigated the rocky right wing water of Republican politics; and his mind-blowing wealth accumulation at the equity firm he created, Bain Capital. Also, by the summer of 2012, Obama faced resistance from the real big dollar bundlers and givers, from finance and big business, who perceived the Administration as hostile to their interests and nasty about wealth. Thus derived a decision to go all in during the summer and try to obliterate Romney. As this proceeded, with the President's approval (bye-bye to the high road), he coldly removed Gibbs and his long-term image guru David Axelrod, from the White House.

How Could Romney Lose

The Republican primaries were a slugfest. Romney and Gingrich wounded each other with negative ads, attacks, and wasted resources. The other rich, handsome, super-white Utah Mormon prince, John Huntsman, Jr. irritated Romney, as well as the Obama White House as it watched a guy who took the plum job of Ambassador to China, turn and run against it. That was low even by Washington standards. The book reports the alleged source of the damaging slime-shot by majority leader Senator Harry Reid that Romney paid no taxes for ten years was Huntsman Jr.'s father, Huntsman Sr., the billionaire who invented the crab packaging for Big Macs. The Mormon Game of Thrones left everyone weakened.

Elections resemble sports in that the team that makes the least errors owns the edge.

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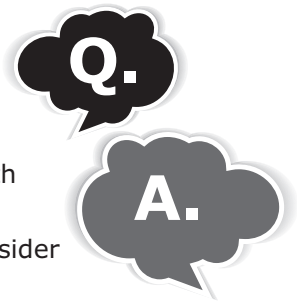

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Romney made so many errors that one wonders how it could happen to someone who clearly possessed a clear head on many aspects of his life. But consider what the book reveals. Romney's chief strategist, the dashing Stuart Stevens told him to just go ahead and live his life in the year before the campaign, thus ratifying the decision to build a $27 million house, complete with an internal car elevator, in Santa Monica during the country's devastating recession. By this account, no one questioned Ann Romney's Olympic dressage horse, Rafalca, as an appropriate wifely focus. No one prepared Romney for the public assault on his taxes and his opaque investments, including dark holes in Switzerland and the Cayman Islands. So he bumbled around when asked about how much he paid and finally said at least thirteen percent, hardly reassuring, while defending his strategies on the grounds that the American people would respect him for not paying more than he legally owed (translation: paying only what the best tax lawyers in the world, the head of Ropes and Gray among them, could not find any place in the world to hide).

Romney and his best friend and closest advisor, Bob White, both made rich by Bain Capital, failed to see how that entity looked to the rest of the world. Romney kept investments in the Caymans because they were Bain instruments, and he seems to have told the authors that he could not resist the incentive of not having to pay any commissions or fees. Too good a deal to turn down! Bain Capital's activities, particularly stripping purchased companies of assets and firing workers, hurt Romney in his defeat for the United States Senate by Ted Kennedy in 1994. Now, eighteen years later, there was still no answer and the pro-Obama Super PAC, Priorities USA, killed with having laid-off workers testify (again). Bain was revealed as a pioneer in outsourcing. And, the most damaging off all, the "forty-seven percent" video, could not have been made public at a worst time, in mid-September with six weeks left to go.

There were other damaging glitches including a calamitous summer foreign trip that left the British tabloids calling him "Mitt the Twitt." A failure of preparation for the second debate in October left him arguing with Candy Crowley of CNN, the moderator, over what language the President had used to describe the

Benghazi attacks at one of his press conferences. (Mitt had it wrong but Crawley should not have refereed.) The authors portray Romney as hard-working, relentless, ruthless towards his opponents, and surprisingly even tempered, not a blamer or a whiner. But, in the crucible of a national campaign, his mistakes all hurt.

Obama: Not Quite Mistake Free

The Obama campaign outthought the Romney campaign at almost every turn but one: the President's terrible first debate. The President famously debated poorly, did not enjoy it, and hated the preparation and rehearsal days. Playing Romney in the rehearsals, John Kerry clobbered him. Obama's team recognized the catastrophe from the early moments – detached, arrogant, rambling. And Romney, supremely prepared, reverted to likeable liberal Massachusetts "Governor Mitt" in the center of the political spectrum. Post-debate polls showed Romney the overwhelming winner and ahead of the President head-to-head in some samplings. Obama needed to rally and he did, carrying the last two debates easily and righting the ship.

Money, Money, Money.

The authors chronicle both campaigns' relentless pursuit of money. *Citizens United* freed the way for the creation of Super PACs, entities which could raise and spend unlimited amounts of money and did not have to reveal the identities of their donors. Repeatedly, internal meetings rally collections of free spending billionaires on both sides. Some of it is comic: these titans expect coddling, which Obama hates and will not do. He'll take their money but not schmooze them. And, they all have advice which they expect the campaign to listen to. The amount of time devoted to pursuing these extremely rich people, chronicled and identified by name, took up much high level staff and candidate time. Highly courted, as bundlers for the campaign proper coffers and as unlimited givers for the Super PACs, these individuals sat at the very center of both campaigns.

Richard Wolfe, a well-known former *Newsweek* political correspondent seem to have enjoyed total access to the president and his top aides in writing *The Message: The Reselling of President Obama*. A rapt admirer of Obama and the team, he also chronicles the internal

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bickering and rivalries and the endless pursuit of money, money, money, over a billion dollars for the two campaigns combined, $520 million by the president and his allies. The Message of his title, in contrast to the positive campaign of '08, was Romney Bad. What Wolfe achieves and what Halperin and Heilemann do not, is he reports how and why Obama won.

Why Obama Won

With hindsight, the frantic spending and the rote kabuki debates seem like epiphenomena. As the end approached in late October 2012, the candidates were where they were at the beginning, very close. The static economy dragged everything down. Romney's pollsters told him he would win based upon their model of the electorate. The national polls were close and split and several had Romney winning. But Wolfe discovered why the Obama team knew they would win. Abandoning professional consultants entirely for the project, early on, they hired social media and math geniuses to conduct a not-so-stealth internet campaign and a remarkable and successful get-out-the-vote operation. African-Americans turned out more heavily than whites. The Obama team won every toss-up state because of turnout. In contrast, the Romney mobilization program, "Orca," untested, crashed on Election Day. (The same failure occurred for the Obama program in '08 but not in '12).

The Romney team's confidence included buying fireworks for Boston on Election Night. But, in the end, ironically, the Democratic algorithm geeks, guided by no less than Eric Schmidt, a founder of Google, outthought and outfought the corporate rulers-of-the-universe on the Republican side who ran an old souls campaign against a state-of-the art version of "micro-targeting." Wolfe eschews the breathless "you are there" mode of campaign coverage but he uncovers and explains what happened in the end. Great reporting, Mr. Wolfe! ❖

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Rocking the Cradle of Liberty

American Bar Association Delegate Report – Annual Meeting 2014

Robert D. Oster, Esq.
ABA Delegate and Past Rhode Island Bar Association President

The American Bar Association (ABA) Annual Meeting in Boston this past August was exciting and informative. On a related note, the ABA Commission on Sexual Orientation and Gender Identity selected our colleague and Past Rhode Island Bar Association President Lise Iwon as a recipient of the third annual Stonewall Award which will be presented to her during a ceremony on February 7, 2015, at the ABA's Midyear Meeting in Houston. Named after the New York City Stonewall Inn police raid and riot of June 28, 1969, which was a turning point in the gay rights movement, the award recognizes lawyers who have considerably advanced lesbian, gay, bisexual and transgender individuals in the legal profession and successfully championed LGBT legal causes. And, this is not Lise's first award from the ABA. She was previously recognized for her efforts on behalf of her *pro bono publico* service in the past. Her upcoming award recognition honors Lise, our Bar and our State.

The ABA Annual Meeting was packed with hundreds of CLE opportunities and social gatherings. We were addressed by United States Supreme Court Chief Justice John G. Roberts on the 800th anniversary of the Magna Carta signing. One might ask why he would chose to address us on this subject, as opposed to some of the contemporary legal issues facing the Court. While the latter are important and interesting, I submit the Magna Carta is what we are about as a profession, that is, the rule of law and representative democracy. While we are not the English Barons confronting the King, the thread that ties us to Magna Carta extends to our own Declaration of Independence and the functioning of our society under the rule of law. In an unscripted moment, after the Chief Justice's speech, as we were both leaving the Hynes Convention Center, I had a rare opportunity to exchange brief pleasantries with him.

Once again, I served and contributed to the following ABA committees: the Select Committee, which prepares official reports to the House of Delegates; the Constitution and Bylaws Committee; the National Caucus of State Bar Delegates; the Section of Family Law; and the General Practice, Small Firm and Solo Division.

On matters of substance, the House adopted resolutions relating to: the increased cyber security threat to lawyers; the inclusion of recognized tribal members as full ABA members; formal policies and responses to domestic violence in the home and the workplace; and forced marriage. Additionally, the House passed resolutions concerning the huge unmet legal needs of our population and matching those needs with new members of the Bar seeking employment. The continuing problem of the large student loan debt that some law students have incurred was also addressed. Other passed resolutions dealt with death penalty legislation, recusal of judges, and the influx of unaccompanied minors and others at our border with Mexico.

It was an honor to be a part of history as the ABA elected its first, female, African American President-Elect, Paulette Brown, Esq. of New Jersey.

Please note that ABA Day in Washington, DC in April 2015 is a tremendous opportunity to meet with our elected national representatives to discuss issues of concern to the profession. As always, I am honored and humbled to be your delegate to the ABA House of Delegates and I am always available to address your concerns or to discuss ABA policy and practice. You may reach me by email: rdoesq@yahoo.com or telephone: (401) 724-2400. ❖

Rhode Island Paralegal Association

Rhode Island Paralegal Association Officers for 2014-2015: Paralegals Carol A. Blanchard, Partridge Snow & Hahn, LLC, elected President for a fifth term; Vice President Melanie Catineault, Rhode Island Department of Public Safety; Secretary Jeremy Hesford, Citizens Bank; and Treasurer Linda G. Sears, Partridge, Snow & Hahn, LLC.

Usury Savings Clauses

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loan from American Steel, whose managing member, Eric Greene, testified that he had never before made a loan to anyone other than a family member.[41] The terms of the loan were simple. American Steel would provide $275,000 to LaBonte at the closing in January 2010. Thirty days later, LaBonte would pay back $325,000 plus sixteen percent interest per annum.[42] The $50,000 difference represented a "commercial loan commitment fee" that was to be split between American Steel and the consultant.[43] A promissory note was prepared, as well as a mortgage to secure it; the promissory note contained a usury savings clause.[44] The loan was not repaid, and in August 2010, LaBonte filed a petition in Superior Court seeking reorganization "and/or the orderly liquidation and dissolution" of New England Development.[45] American Steel filed a motion to approve its secured claim, alleging it held a "first position mortgage" on the Scituate property.[46] The receiver and LaBonte objected to the motion, arguing that the loan was void as usurious.[47]

After a hearing on the motion in Superior Court in June 2011, the hearing justice issued a bench decision in favor of New England Development, holding that the $50,000 "commercial loan commitment fee" was "nothing more than a disguised addition to interest" that rendered the loan usurious.[48] Accordingly, the hearing justice sustained the receiver's objections and voided the loan.[49] Although the loan agreement contained a usury savings clause, the hearing justice declined to enforce it, stating "to give a lender the ability to nullify the policy of this state by including * * * a savings clause, would do violence to what our General Assembly has said the law ought to be and is."[50]

American Steel appealed the ruling, arguing that the hearing justice erred by considering the commitment fee to be interest, and in failing to enforce the usury savings clause in the loan agreement.[51] On appeal, the Supreme Court first turned to the plain language of the statute in order to define the term "commercial loan commitment fee."[52] Section 6-26-2(c)(1) delineates those items that shall not be construed as interest, including "[c]ommercial loan commitment or availability fees to assure the availability of a specified amount of credit for a specified period of time."[53] The court found the term to be clear and unambiguous.[54] However, because the entire $275,000 was disbursed at the closing, and New England Devel-

opment had no expectation of receiving any further funds, the Court came "to the inescapable conclusion that the fee in the instant case was a part of the interest being charged on the loan."[55] Further, because the interest rate was in excess of 21%, whether it was calculated by including the entire $50,000 fee or only that portion that was due to American Steel, the Court affirmed the lower court's holding that the loan was usurious.[56] Regarding the usury savings clause, the Court reiterated its holding in **NV One** that such clauses are unenforceable.[57]

In the wake of **NV One** and **LaBonte**, it is now crystal clear that usury savings clauses, which are commonly found in loan agreements, are unenforceable under Rhode Island law. The usury statute is an expression of this state's public policy of protecting borrowers from rapacious lenders, evidenced by the draconian penalty for violating the statute – the loan is voided, the borrower is no longer under any obligation to repay it, and the lender must disgorge the total amount, if any, that the borrower had paid on the loan. Intent is beside the point. Although the Court in **NV One** noted that it was not confronted "with a good faith bookkeeping error, be it human or electronic," it made clear that intent was immaterial in the face of the statute's "inflexible, hardline approach."[58] It explained that the reason these clauses cannot be enforced is straightforward: "If lenders could circumvent the maximum interest rate by including a boilerplate usury savings clause, lenders could charge excessive rates without recourse. This would have the reverse effect of incentivizing lenders to attempt to charge excessive interest rates because, at worst, the lender could invoke the savings clause and the interest rate would simply be reduced to the highest acceptable rate without any penalty to the lender."[59]

Wise drafters should take note that this common clause provides no safe harbor. A diligent attorney should also be aware that a loan agreement containing a facially valid interest rate may subsequently be determined to be usurious if the lender charges interest on funds not yet disbursed, or includes fees that are, in reality, disguised interest. Finally, if the loan is made between sophisticated commercial entities that meet the exception under § 6-26-2(e), a *pro forma* analysis absolutely must be performed in order to charge a rate in excess of the maximum.

Usury laws may be as ancient as the Old Testament, but they are far from toothless. In Rhode Island, would-be

lenders should beware our statute's very sharp bite.

ENDNOTES

1 *Christopher L. Peterson, Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits, 92 MINN. L. REV. 1110, 1116 (2008).*
2 *44B AM. JUR. 2d Interest and Usury § 134 (2007).*
3 *R.I. Gen. Laws § 6-26-4(a).*
4 *R.I. Gen. Laws § 6-26-4(c).*
5 *84 A.3d 800, 801 (R.I. 2014).*
6 ***Id.***
7 ***Id.** at 802.*
8 ***Id.***
9 ***Id.***
10 ***Id.***
11 ***Id.** at 803.*
12 ***Id.***
13 ***Id.***
14 ***Id.***
15 ***Id.***
16 ***Id.***
17 ***Id.***
18 ***Id.** at 804.*
19 ***Id.** at 802.*
20 ***Id.***
21 ***Id.***
22 ***Id.***
23 ***Id.***
24 ***Id.** at 806.*
25 ***Id.***
26 ***Id.***
27 ***Id.** at 805.*
28 ***Id.** at 807 (quoting **Gorman v. St. Raphael Academy**, 853 A.2d 28, 39 (R.I. 2004)).*
29 ***Id.***
30 *R.I. Gen. Laws § 6-26-2(a).*
31 ***NV One, LLC**, 84 A.3d at 807.*
32 ***Id.***
33 ***Id.** at 808.*
34 ***See Sheehan v. Richardson**, 315 B.R. 226, 240 (D.R.I. 2004), aff'd, 185 Fed. Appx. 11 (1st Cir. 2006); **In re Swartz**, 37 B.R. 776, 779 (Bankr. D.R.I. 1984); **Nazarian v. Lincoln Finance Corp.**, 78 a.2d 7, 10 (R.I. 1951); **Colonial Plan Co. v. Tartaglione**, 147 A. 880, 881 (R.I. 1929); **Burdon v. Unrath**, 132 A. 728, 730 (R.I. 1926).*
35 ***Nazarian v. Lincoln Finance Corp.**, 78 A.2d 7, 10 (R.I. 1951).*
36 ***NV One, LLC**, 84 A.3d at 809, n. 19.*
37 ***Id.***
38 ***Id.** at 810.*
39 *2014 WL 2802772 (R.I. 2014).*
40 ***Id.** at *2, *3.*
41 ***Id.***
42 ***Id.** at *2.*
43 ***Id.***
44 ***Id.** at *1, *2.*
45 ***Id.** at *1.*
46 ***Id.***
47 ***Id.***
48 ***Id.** at *1, *3.*
49 ***Id.** at *3.*
50 ***Id.** at *4.*
51 ***Id.***
52 ***Id.** at *5.*
53 *R.I. Gen. Laws §6-26-2(c)(1)(iv).*
54 ***LaBonte**, 2014 WL 2802772, at *6.*
55 ***Id.***
56 ***Id.** n. 12.*
57 ***Id.***
58 ***NV One**, 84 A.3d at 807, 810 n. 18.*
59 ***Id.** at 810.* ❖

Medical Marijuana Laws

continued from page 17

obstacle to enforcement of the federal Controlled Substances Act. The reason flows from the anti-commandeering principles previously discussed. Because of the independent and separate sovereignty of the state governments and the federal government, Congress cannot require the States to criminalize the cultivation and possession of marijuana in *any* respect, nor can Congress dictate what the prescribed penalties must be if the State does decide to criminalize it. The concept of dual sovereignty permits States to make independent policy choices whether *state* law will criminalize marijuana use, and if so, what the penalties will be for that violation of state law. The Supremacy Clause does not alter the State's sovereign right in that regard.

Moreover, a State's determination under its police powers to not criminalize, or to limit the criminalization of the cultivation and possession of marijuana, does not limit or prevent the federal government from prosecuting the medical use of marijuana offenses under federal law, to effectuate the full purposes of that law. In fact, it is the responsibility and prerogative of the United States Attorney General to execute and enforce that law and determine the manner and extent to which federal law is enforced, and *not* the States. Consequently, obstacle conflict preemption would not apply in a state marijuana prosecution, where state law has exempted the medical use of marijuana from state criminal prohibitions.

Conclusion

The fact that the cultivation and possession of marijuana, even for medical purposes, is a crime under federal law has no bearing on whether it is a crime under state law. Under this nation's dual sovereign structure Congress may make it a federal crime, but cannot require the States to make it a state crime. Nor can Congress require State executive departments to enforce the federal criminal statute. That is the exclusive function of the United States Attorney General. Moreover, under § 930 of the CSA there is no evidence suggesting Congress intended for the Act to preempt a State's decision to permit the medical use of marijuana, because the State's decision in that regard does not *require* anyone to violate the

federal criminal prohibition on the use of marijuana for any purpose, nor does it pose an obstacle to federal enforcement of the federal law.

Consequently, the Supremacy Clause and federal law do not render void, a State's decision, under its historic police powers, to decriminalize the medical use of marijuana. And that is particularly true in the context of a state criminal prosecution, where the question is whether the defendant has committed an act defined as criminal by the State. If a person, cultivating and possessing marijuana in accordance with a state Medical Marijuana Act, is to be prosecuted and convicted for cultivating and possessing marijuana, it may only be in federal court in accordance with U.S. Department of Justice guidelines and priorities, not in state court. That is federalism's design with respect to the relatively recent state-by-state recognition of the medically beneficial effects of marijuana, for the health, welfare, and well-being of the state's injured and ill citizens.

ENDNOTES

1 ***See*** *P.L. 2005, Ch. 442 § 1 (enacted, January 3, 2006); R.I. Gen. Laws § 21-28.6-2(5).*

2 ***Id.*** *The state CSA was also amended to remove the authorized medical use of marijuana from its criminal prohibitions.* ***See*** *R.I. Gen. Laws §§ 21-28-4.01(c) (1), (2)(iii),(iv),(v).*

3 *62 A.3d 1113 (R.I. 2013).*

4 ***Id.*** *at 1114.*

5 ***Id.*** *at 1118.*

6 ***Id.*** *at 1119 (emphasis added).*

7 *U.S. Const. Art. VI, Cl. 2.*

8 ***National Federation of Independent Businesses v. Sebilius****, 132 S.Ct. 2566, 2601 (2012).*

9 ***Printz v. United States****, 521 U.S. 898, 918 (1997).*

10 *521 U.S. at 920.*

11 *521 U.S. at 918-919 (quoting The Federalist No. 39, at 245 (J. Madison)).*

12 ***Taflin v. Levitt****, 493 U.S. 455, 458 (1990).*

13 ***Printz****, 521 U.S. at 920.*

14 *521 U.S. at 919-920 (emphasis added).*

15 *521 U.S. at 162 (citations omitted).*

16 ***Printz****, 505 U.S. at 166.*

17 ***Id.***

18 ***See Reno v. Condon****, 528 U.S. 141, 151 (2000).*

19 *505 U.S. at 159.*

20 ***Wyeth v. Levine****, 555 U.S. 555, 565 (2009) (internal citation omitted).*

21 ***See Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries****, 348 Or. 159, 190, 230 P.3d 518, 536 (2010)(Wallers, J., dissenting)(citation omitted).*

22 ***Id.*** *(internal citations omitted).*

23 ***See County of San Diego v. San Diego NORML****, 165 Cal.App.4th 798, 822-823, 81 Cal.Rptr.3d 461 (2008), cert. denied, 566 U.S. 1235, 129 S.Ct. 2380, 173 L.Ed.2d 1293 (2009).*

24 ***See, e.g., English v. General Electric Company****,*

496 U.S. 72, 78-79 (1990).
25 ***Id.** at 78-79.*
26 ***Cipollone v. Liggett Group, Inc.**, 505 U.S. 504, 516 (1992) (quotations and citations omitted).*
27 *496 U.S. at 79.*
28 ***Id.***
29 ***Id.***
30 *165 Cal.App.4th at 820.*
31 *496 U.S. at 79.*
32 ***See Gonzales v. Oregon**, 546 U.S. 243, 289 (2006) (Scalia, J., dissenting).*
33 ***See City of Hartford v. Tucker**, 225 Conn. 211, 621 A.2d 1339, 1341 (1993).*
34 *21 U.S.C. § 903 (emphasis added).*
35 *297 Mich.App. 446, 823 N.W.2d 864 (2012).*
36 *165 Cal.App.4th 798, 81 Cal.Rptr.3d 461 (2008), **cert. denied**, 566 U.S. 1235, 129 S.Ct. 2380. 173 L.Ed.2d 1293 (2009).*
37 *823 N.W.2d at 871 and n.5; 165 Cal.App.4th at 819.*
38 ***See** 348 at 192, 230 P.3d at 537 (citing **Wyeth**, 129 S.Ct. at 1196).*
39 *823 N.W.2d at 871.*
40 ***Mutual Pharmaceutical Company, Inc. v. Bartlett**, 133 S.Ct. 2466, 2470 (2013).*
41 *823 N.W.2d at 871.*
42 *496 at 79.*
43 *555 U.S. at 582 (Thomas, J., concurring in the judgment).*
44 ***Chamber of Commerce v. Whiting**, 131 S.Ct. 1968, 1985 (2011) (internal quotation marks and citation omitted).*
45 ***Id.** (internal quotation marks and citation omitted).*
46 ***See** 165 Cal.App.4th at 823.* ❖

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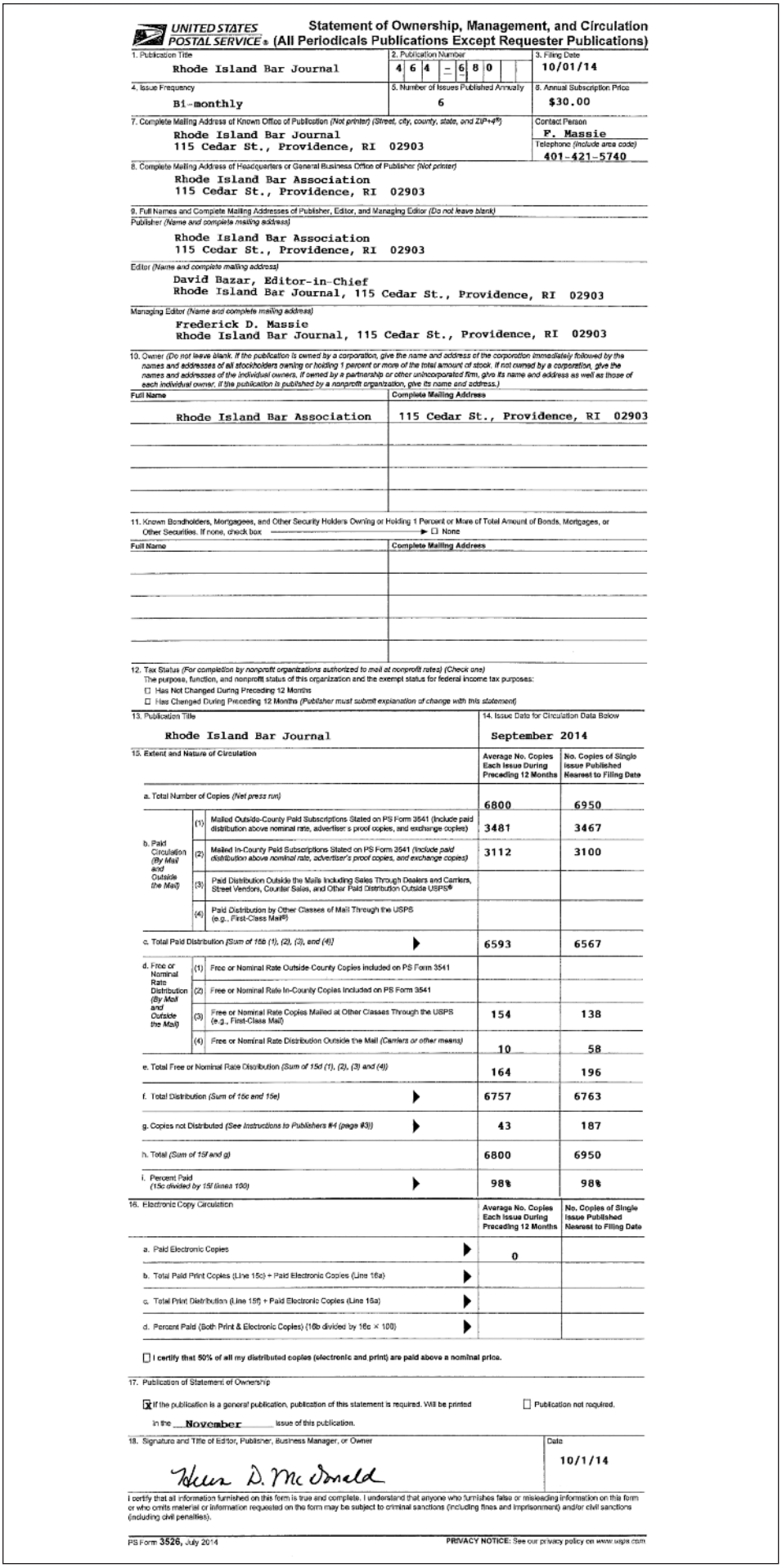

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