Rhode Island Bar Journal

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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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Giving and Receiving at the Bar Association

Melissa E. Darigan, Esq.
President
Rhode Island Bar Association

It is “Giving Tuesday” as I write this President’s Message. That is, it’s the first Tuesday of December, which is now a movement aimed at countering the consumerism of Black Friday, Small Business Saturday, and Cyber Monday and encouraging charitable giving. The media is awash on this day with stories about giving back, but one item caught my attention: Millennials are great givers of their cash and, even more so, their time, and they lead all the generations except baby boomers with their philanthropy.

This is not what many of us routinely hear about millennials. We are more likely to hear millennials are not loyal to employers, are more interested in themselves than the enterprise, that they eschew human contact in favor of technology and gadgets, and they want it all without having to pay their dues. Given this, a news program about millennials’ high rate of volunteerism and charitable giving took me by surprise. And it got me to thinking. How do we harness our Bar’s millennial members’ energy, willingness to invest for a cause and passion for doing good through the Rhode Island Bar Association?[1]

Involvement with the Bar Association, in particular joining one the Bar’s many committees, is an excellent way to get first-hand exposure to cutting-edge developments in a particular industry or subject matter, direct insights into how the court system works, and an opportunity to shape legislation and regulations.

I confess, I don’t have the answer. Barriers to active participation in the Bar Association run the gamut, from financial (lack of discretionary income and overwhelming student loans) to psychological (“I won’t know anyone.”) to practical (demands on time and the struggle to balance work with life outside of work). But, what I do have is two decades of being an active member in the Bar, and I think I have turned out alright. So, I offer our young lawyers some ways the Bar Association helped me when I was starting out.

First and foremost, young lawyers need to learn how to be good lawyers. Going it alone – that is, diving in without having the necessary knowledge and background in an area and not wanting to look foolish by asking questions or seeking guidance – is never the best way to achieve this goal. Our Bar Association supports young lawyers in their practices by providing resources and tools through a wide array of CLEs on substantive areas of law. Rarely is just being knowledgeable in a particular field enough for young lawyers to have successful and productive careers. Lawyers today must also know how to run a business and how to attract and retain clients. The Bar Association helps here too, by supplying training in practice management, finances, technology and marketing. Young lawyers can and should take advantage of these offerings. While you are still building your practices you may have extra time on your hands, so take as many CLEs as your budget and schedule permit. I’ve never heard anyone say that they know too much about the practice of law.

The Bar’s List Serve also is a terrific way to get advice and information from across the Bar’s membership and usually within moments of your post. And don’t forget the many articles in our *Bar Journal*!

Part of being a good lawyer is learning the ins and outs of how things get done. Involvement with the Bar Association, in particular joining one the Bar’s many committees, is an excellent way to get first-hand exposure to cutting-edge developments in a particular industry or subject matter, direct insights into how the court system works, and an opportunity to shape legislation and regulations. Committee membership also introduces young lawyers to seasoned attorneys and contemporaries alike, increasing the opportunities for finding mentors in a particular subject matter and potential referral sources for new clients, developing friendships or simply upping the odds of seeing a friendly face in the courthouse corridor.

One of the challenges along the way to becoming a good lawyer is getting actual experience. Increased competition for jobs and fewer clients means less work. Even young lawyers employed by larger firms may miss out on assignments because, increasingly, clients refuse to pay for what they see as new lawyer training, and we all know that there are fewer trials and other opportunities to get into court. A sure fire way to obtain badly-needed, real-world experience is to volunteer with the Bar Association’s Volunteer Lawyer Programs. Many of these programs offer mentorship and training on the subject matter free of charge in exchange for *pro bono* services. Learn a practice area, get experi-

ence in court, meet fellow practitioners, grow in confidence and do good for others, all in one. Being a volunteer lawyer is a great opportunity for young attorneys trying to break into the profession.

Beyond knowing the nuts and bolts of the trade, young lawyers want to be perceived as being good lawyers and leaders. One way to achieve professional recognition is to be an active part of the Bar Association. Giving CLEs, working with committees, writing for the *Bar Journal* and serving on the Bar's governance boards all offer young lawyers unique opportunities to elevate their profile within the legal and business community. In particular, Bar Association work helps young lawyers develop important leadership skills. This is not a skill set taught in school, and it can take years for a young lawyer to even have exposure to leadership opportunities in a law firm setting. Skills developed working with the Bar are useful in all areas of life, from client development to law practice management, to being president of your child's school PTA.

My President's Messages this year have focused on the changes in the legal profession and the challenges all lawyers are facing, and no one will be more impacted by the changing legal landscape than young lawyers. I urge young lawyers to pay attention and to get involved. Put your passion and your energies into shaping our profession, helping each other be better lawyers and helping those in need. And remember the old adage, the more you give the more you receive.

ENDNOTE

1 *Millennials are those born roughly between 1982 and 2000. They make up approximately 12.4% of the Rhode Island Bar Association's membership.* ❖

Are you looking for answers to practice-related questions?

Try the Bar's dynamic List Serve!

According to Rhode Island Bar Member and Johnston-based Attorney Angelo A. Mosca III: ***In my opinion, the Bar's List Serve is one of the best things to come to the Bar in recent years.***

Since its inception under the sponsorship of Past Bar President Michael McElroy, our Bar's List Serve has grown exponentially in participating members and in a wide range of answered questions. From nuances of the Rhode Island Courts e-filing system to requests for local and out-of-state referrals, List Serve members are providing each other with timely answers. List Serve topics encompass a wide range of practice areas including consultants, traffic violations, medical marijuana, landlord/tenant, divorce, *pro hac vice*, immigration and more!

Free and available for all actively practicing Rhode Island attorney members, the Bar's List Serve gives you immediate, 24/7, open-door access to the knowledge and experience of hundreds of Rhode Island lawyers. If you have a question about matters relating to your practice of law, you post the question on the List Serve, and it is emailed to all list serve members. Any attorney who wishes to provide advice or guidance will quickly respond.

If you have not yet joined the List Serve, please consider doing so today. To access this free member benefit go to the Bar's website: **ribar.com**, click on the **MEMBERS ONLY** link, login using your Bar identification number and password, click on the **List Serve** link, read the terms and conditions, and email the contact at the bottom of the rules. It's that easy!

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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Equitable Adoption Doctrine

David J. Strachman, Esq.
McIntyre Tate LLP

The doctrine of equitable adoption can be utilized to avoid injustice which is often caused to a victimless adult or minor child who, for all intents and purposes, was the child of a decedent.

I. Introduction

Often, practitioners are confronted with a client whose stepparent dies intestate. The stepchild seeks recognition of his relationship in the probate and estate proceedings and, accordingly, a share of the stepparent's estate. This situation is occurring more frequently in light of the increase of divorce and patched together, untraditional families. One commentator thusly described the disconnect between traditional laws of intestacy and the current reality of American family life.

> When it comes to inheritance rights in the United States, it is an unfortunate reality that, while the number of American families who fall into the nuclear-family model has declined, the laws of intestate succession have nonetheless continued to cling to that model for purposes of defining an intestate decedent's "family." Accordingly, for the many Americans who die intestate, there is a strong likelihood that those whom the decedent considered to be family will not inherit any of the decedent's estate. As a result, critics of the modern intestacy scheme have called for more inclusive inheritance rights to help encompass those who do not fit the "traditional" definition of family.[1]

Under the Rhode Island intestacy statute, the stepchild is seemingly without a remedy after the death of his parent.[2] However, the equitable adoption doctrine is a legal tool that can assist in these situations. Though little known, it has been applied on two occasions by Rhode Island courts beginning over two decades ago and throughout the United States for almost a century. Moreover, the Pawtucket Probate Court recently applied the doctrine in an intestate estate for the first time.

II. Probate Court Jurisdiction to Determine Decedent's Heirs at Law

Rhode Island Probate Courts have wide authority to carry out their obligations under the probate statute, including "the power to follow the course of equity insofar as necessary to fulfill the mandates of Title 33 of the General Laws."[3] Regarding this provision, the Supreme Court noted "the inherent power of the Probate Courts of this state to do all which is necessary and incidental to the jurisdictional powers provided in § 8-9-9."[4] Often probate judges are hesitant to take action that could be perceived as exceeding their limited statutory authority. Frequently, they invoke the statutory limits of their jurisdiction. However, this provision makes clear that they have wide latitude to fulfill their statutory duties and utilize both equitable and legal tools and mechanisms to do so.

Probate Court jurisdiction is exclusive and involves adjudicating matters that are uniquely within its province.

> The jurisdictional scope prescribed by the General Assembly for probate courts in Rhode Island is essentially the same creature as that found within the federal common law, regularly referred to as the "probate exception" to federal jurisdiction. **Lepard v. NBD Bank**, 384 F.3d 232, 237 (6th Cir. 2004). "*The probate exception is a practical doctrine designed to promote legal certainty and judicial economy by providing a single forum of litigation, and to tap the expertise of probate judges by conferring exclusive jurisdiction on the probate court.*" *Id.*[5]

Accordingly, our Supreme Court has ruled that the "issue of heirship" is a matter to be determined by the Probate Court.[6] Moreover, the probate court's jurisdiction to determine heirship is parallel to its authority to adjudicate whether a claimant is a common law spouse for the purpose of obtaining a widow's share[7] and to determine whether a purported common law spouse can invoke the priority afforded to spouses under R.I. Gen. Laws § 33-8-8.[8] This authority provides a statutory opening for step children to seek equitable relief.

III. The Equitable Adoption Doctrine

A. Background

Equitable adoption is a doctrine of long standing application throughout the United States.

> The doctrine is applied in an intestate estate to give effect to the intent of the decedent to adopt and provide for the child. It is not

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applicable where the decedent dies testate…Equitable adoption only affects the child's rights against the intestate estate of an adoptive parent and not of a natural parent. By one view, the reach of the decree of equitable adoption has been limited to allowing the equitable adopted child to inherit from the adoptive parent but not to inherit through the collateral kin. Other courts have recognized that the doctrine may also be applied to allow the child to inherit from a blood relative of the adoptive parent.[9]

The doctrine of equitable adoption can be utilized to avoid injustice which is often caused to a victimless adult or minor child who, for all intents and purposes, was the child of a decedent.

In an effort to prevent such unfairness, many courts have come to recognize the doctrine of equitable adoption– also known as virtual adoption, *de facto* adoption, adoption by estoppel, and specific performance of a contract to adopt–and have held that if an individual who is legally competent to adopt another as his child enters into a valid and binding contract to do so, and if such contract is not fully performed by the promisor during his lifetime, it may be enforced in equity against his estate… It has been noted that a claim to a right of inheritance under the equitable adoption theory inevitably places the court in a dilemma, since, on the one hand, the child is asserting a claim which is conceded to be strong on grounds of simple justice, while, on the other hand, the court must give heed to the policy of the Statute of Wills and must not lose sight of the fact that the claimant seeking to inherit the share of a natural child is a… However, the trend of judicial opinion appears to favor the doctrine, and in some jurisdictions its recognition has been characterized as a matter of public policy.[10]

It is important to note that equitable adoption is a separate and distinct legal doctrine from other equitable and legal remedies employed in probate matters,

Equitable adoption is to be distinguished from adoption by deed, contract, or notarial act as authorized by statute. Being legislatively sanctioned, adoption by such means gives rise to a legal status which is no different from that which results from a decree

New Rhode Island Law Center Opens to Rave Reviews

l to r: Bar Association President Melissa E. Darigan, Bar Foundation President Michael A. St. Pierre and Cranston Mayor Allan W. Fung.

The new Rhode Island Law Center Open House in October was well-attended by Bar members eager to tour the new facilities. Other guests included members of the Rhode Island Judiciary and Bar member and Cranston Mayor Allan W. Fung. Mayor Fung presented Bar Association President Melissa E. Darigan and Bar Foundation President Michael A. St. Pierre with a Citation from the City of Cranston to welcome the RI Law Center to his city.

The new home of the Rhode Island Bar Association and the Rhode Island Bar Foundation features well-designed interior spaces with advanced technology facilitating improved member use and networking. Expanded exterior space provides immediately adjacent free parking and greater meeting and event flexibility. Handy highway proximity allows simplified and convenient access.

Roger Williams University School of Law Dean Michael J. Yelnosky chats with Bar member Benjamin A. Pushner.

The Rhode Island Law Center is located at 41 Sharpe Drive, in Cranston, Rhode Island, and Bar members are invited to stop by during business hours to check out your new digs!

of adoption in a judicial proceeding, whereas an equitable adoption is never viewed as the equivalent of a formal adoption, in terms of establishing a parent-child relationship, and is merely a status invented by courts of equity as a means of allowing a child in an appropriate case to enjoy part of the advantage of adoptive status.[11]

While the doctrine typically is invoked in probate and wrongful death cases, it has been found to apply in a wide variety of circumstances including:

- inheritance tax[12]
- life insurance[13]
- social security benefits[14]
- federal black lung benefits[15]
- railroad retirement annuity[16]
- workers compensation benefits[17]

B. Equitable Adoption in the United States

For many decades, numerous states have recognized the equitable adoption doctrine. For instance, since 1933, "New Jersey [has] recognize[d] the doctrine of equitable adoption as a theory of inheritance under intestacy."[18] Over 50 years ago, the Arizona Supreme Court indicated that the doctrine of equitable adoption

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was "widely held."[19]

The Uniform Probate Code took exception with the doctrine. However, the objection has been rebutted as several "uniform states" have also endorsed equitable adoption.[20]

C. Rhode Island Application of the Equitable Adoption Doctrine

For over 20 years, Rhode Island courts have recognized the doctrine of equitable adoption. For instance, in **Francois v. Cahill**, 1993 WL 853814, p. 2 (R.I. Super 1993), Judge Grande found that:

> Driven by new recognition of the ways in which families function and the impact dysfunctional families have upon society, courts began to readily permit recovery to those who in all respects function as children in a mutual relationship within a family unit.

In that personal injury action, Judge Grande enumerated five specific elements required to establish an equitable adoption:

1) some showing of an agreement between the adoptive parent and the natural parents;
2) the natural parents giving custody of the child to the adoptive parent;
3) the child giving filial affection, devotion and obedience to the adoptive parent during that parent's lifetime;
4) the adoptive parent taking custody of the child and treating the child as that parent's natural child; and
5) the death of the adoptive parent without the completion of formal adoption procedures.[21]

Judge Grande further indicated that,

> Among other factors that will help to present the issue of equitable adoption to a jury, with appropriate instructions, would include whether the child used the family name of the adoptive parents, whether the adoptive child was known in the community and schools as the child of the adoptive parent; whether the child conducted himself or herself, appropriate to age, as the child of that adoptive parent; the extent to which the child maintained contact with his/her biological parent(s), whether in all respects the child was treated as the natural child of the adoptive parent.[22]

Following **Francois**, Judge Lagueux of the U.S. District Court similarly found that "the doctrine has gradually been

continued on page 32

RHODE ISLAND
Bar Association

Dear Colleagues,

Bar’s CLE Director Nancy Healey Retires

After 26 years of professional service to the Rhode Island Bar Association and its members, our Continuing Legal Education Director Nancy Healey retired from her position at the end of 2015. Nancy helped create the Bar’s acclaimed CLE Department and programming, working in partnership with CLE presenters on developing, staging and marketing their seminars.

Drawing on the expertise of Bar members and guest speakers, Nancy helped provide our Bar with a wide range of seminars covering a whole host of legal topics. Aiming to offer educational opportunities for the many professional and personal interests of all Bar members, Nancy and the CLE staff managed the production and delivery of an impressive array of seminars throughout the year, capping these off with the extraordinarily multi-faceted CLE programming at the Bar’s outstanding Annual Meeting. Including over 40 different seminars, providing hundreds of regular and ethics CLE credits, this annual event consistently draws in over 1,200 attendees, making it one of the most successful annual meetings in the nation.

Additionally, with Nancy’s direction, the Bar implemented live, CLE seminar webcasts throughout the year, allowing members to view them from any computer, Apple or Android device and to secure mandatory CLE credits from the comfort of their homes or offices. While this electronic option is popular and widely used, in-person CLE seminar attendance remains strong and vital, a testament to the value of the traditional CLE programming the Association sponsors.

According to Nancy, the success of the program is due to the hundreds of attorneys who have volunteered for committees and as program planners or speakers over the years and to the thousands of attorneys who have supported CLE by attending seminars and the Annual Meeting. She notes, *I’ve met many wonderful people during my time here and am very thankful for their support and encouragement. I will miss working with the CLE Committee and all the attorneys who always said yes when asked to put a seminar together. Their interest and commitment is amazing. And Thursdays just won’t be the same without a Food For Thought seminar at lunchtime!*

While we are sorry to say goodbye to our friend and colleague, we wish her the very best in her life and new adventures!

Bar’s Assistant CLE Director Tanya Nieves Assumes CLE Director’s Position

In relation to Nancy’s retirement, we are pleased to announce that Nancy’s Assistant CLE Director Tanya Nieves, who has worked closely with Nancy for the past ten years, assumed the CLE Director’s position on January 1st of 2016. Given her background and familiarity with the Bar’s CLE programming, we are confident Tanya’s dedicated efforts will provide a smooth and seamless transition of the great work of our Bar’s CLE Department into the future.

I hope you will let Nancy know how much we appreciated her work on our behalf, and encourage and support Tanya in her new position.

Sincerely,
Melissa E. Darigan, Esq.
President
Rhode Island Bar Association

Pro Bono Publico: 30 Years Old and Growing Stronger Every Day!

During the thirtieth anniversary year (1986-2016) of the Rhode Island Bar Association's Volunteer Lawyer Program, the Bar asks members to consider serving as a legal representative for those in greatest need afford them legal counsel.

PRO BONO PUBLICO RESOLUTION

The Rhode Island Bar Association adopts the following policy and urges its members to act accordingly.

> *We urge our members to engage in public service. Recognizing the continuing need for legal assistance for economically-disadvantaged citizens attempting to obtain legal services in our state, we, as an association, are mindful of the opportunity that is present for us to fulfill our moral, ethical and social duty to those who have limited or no access to the legal system. We therefore reaffirm our strong commitment to the delivery of legal services to the poor by strongly urging each member of this association to render pro bono public legal services in accordance with Rule 6.1. The Rhode Island Bar Association urges all attorneys, as well as law firms, government and corporate employers to support, endorse and adopt a pro bono policy that will encourage open participation by associates and employees. Be it resolved that in order to implement the above statement of policy, the Bar Association urges each member to join and participate in a volunteer lawyer program of the Rhode Island Bar Association.*

Passed by the Rhode Island Bar Association House of Delegates on January 21, 1992.

To do your part, contact the Bar's Public Services Director Susan Fontaine by telephone: **401-421-5740** or email: **sfontaine@ribar.com**.

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Whose Energy Grid Is It Anyway?

Seth H. Handy, Esq.
Handy Law, LLC
Providence

A recent proceeding at the Public Utilities Commission restored some of Rhode Island's control over its electric distribution grid. In Docket 4539, the Commission reviewed National Grid's proposed electric infrastructure safety and reliability plan (ISR Plan) for 2016. Wind Energy Development (WED), a renewable energy developer sought to intervene and present the case that the utility had ignored upgrades needed to serve the new, local and distributed generation that Rhode Island policy calls for. The intervention was denied based on objections from National Grid and the Division of Public Utilities and Carriers. However, the Commission ultimately acted on the developer's concerns and future ISR Plans will now have to consider the system improvements needed to diversify our electricity supply.

The business of distributing electrical energy is "affected with a public interest."[1] Lower electrical rates promote our economy and general welfare, and it is necessary for Rhode Island to achieve reasonable, stable rates, and system reliability including energy resource diversification and distributed generation.[2] Our General Assembly declared "[s]upervision and reasonable regulation by the state of the manner in which [our electric distribution companies]…carry on their operations within the state are necessary to protect and promote the convenience, health, comfort, safety, accommodation, and welfare of the people, and are a proper exercise of the police power of the state."[3] The Public Utilities Commission and the Division of Public Utilities and Carriers have the exclusive power and authority to supervise, regulate, and make orders governing the conduct of such companies for the purpose of increasing and maintaining efficiency and protecting the public against improper and unreasonable rates, tolls and charges by providing full, fair, and adequate administrative procedures and remedies."[4]

Rhode Island will not get significant diversification of our energy supply without proper, planned investments in the capacity of our distribution system.

Rhode Island's State Energy Plan (RISEP) was approved in October 2015.[5] In response to a major research initiative and input from many experts and stakeholders including National Grid and the Division, the Office of Energy Resources' new plan calls for a better infrastructure planning process. The plan describes our energy challenge and opportunity as follows:

> Rhode Island should continue its leadership in regional efforts to address high and volatile energy costs in New England. In recent years, growing demand for natural gas in the power generation and heating sectors have placed increasing pressures on the region's limited interstate gas pipeline infrastructure. These constraints have led to significant wholesale energy price spikes and instability; increased use of peaking oil power plants, which have higher emissions than gas generators; and reliability concerns. To ameliorate the regional electricity and gas constraints and attendant soaring costs, Rhode Island should coordinate with other states to explore the range of available solutions—from local, customer-sited resources such as energy efficiency, demand response, renewable energy, combined heat and power, and storage to infrastructure investments in the region's electric and natural gas transmission systems.[6]

In response to that dynamic, the plan makes a clear and resounding call to action.

> Rhode Island cannot achieve the Rhode Island Energy 2035 Vision without bold steps to increase the generation and use of clean, renewable sources of energy—wind, solar, hydropower, anaerobic digestion, and others. Renewable energy will diversify the state's energy supply portfolio, help mitigate long-term energy price volatility, stimulate the state's economy through industry growth and job creation, and set Rhode Island on pace to meet ambitious greenhouse gas emission reduction targets.[7]

More specifically, it calls for Rhode Island to "bring online a total of over 500 MW of locally-based renewable energy projects through expansion of the state's successful renewable energy procurement policies" to "bring economic development, system reliability, and job creation benefits to the state."[8] Finally, the plan understands that delivering that future requires putting the proper mechanics in place. In the following

Some Very **Useful Resources** for the Stressed-Out Lawyer

Lawyers are increasingly conscious of the many stresses inherent in the practice of law. The good news is that help in the form of confidential solid support and care is readily available through the helping hand of Coastline EAP's Judith Hoffman and her colleagues at: 401-732-9444 and any member of the Rhode Island Bar's Lawyers Helping Lawyers Committee whose names and telephone numbers appear on page 26 of this *Bar Journal*. Additionally, some recommendations for useful resources follow:

- *How Lawyers Can Avoid Burnout and Debilitating Anxiety* by Leslie Gordan appears in July 2015 issue of the *ABA Journal* (**abajournal.com**; click **more** and **back issues**)
- *Getting Workaholics to Stop and Recharge* by Paul Sullivan is found in the August 8, 2015 issue of *New York Times* (**nytimes.com**)
- *Making the Case for Mindfulness and the Law* by Rhonda Magee appears in the April/May 2014 issue of the Washington State Bar Association's magazine the *NW Lawyer* (**wsba.org**; click **News and Events** and **Publications, Newsletters, Brochures**)
- *Lawyer Burnout* by John Ordway, Director of the Wyoming Bar Association's Lawyer Assistance Program appears in the August 2015 issue of the *Wyoming Lawyer* (**wyomingbar.org**; click **current issue of Wyoming Lawyer** and **archives**)
- *Positive Psychology for Lawyers – The Science of Sleep* by Hallie N. Love appears in the September 23, 2015 issue of the State Bar of New Mexico's Bar Bulletin (**www.nmbar.org**; click **Publications and Resources** button). You may also access psychologist Hallie N. Love's website at **positivepsychologyforlawyers.com**.

Professor Scott Rogers at the University of Miami law school runs the Mindfulness in Law program, **miamimindfulness.org** and maintains the website of The Mindful Lawyer; **themindfullawyer.com**.

The Rhode Island Bar's Lawyers Helping Lawyers Committee counterpart in Massachusetts, Lawyers Concerned for Lawyers (**lclma.org**), maintains a website with a wide variety of resources Rhode Island Bar members are invited to access online at **lclma.org/resources**.

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language, the plan recognizes that investments in our distribution system will be necessary and warranted to bring the new vision to fruition.

> Modernize the Grid—Rhode Island can improve the everyday operation of its energy infrastructure by continuing the key investments that will repair, upgrade, and modernize the state's electric and gas distribution systems… In order to reduce energy costs over the long run, Rhode Island needs a strategy designed around a long-term vision, rather than repeated short-term investment decisions. The RISEP recognizes that achieving a least-cost energy future depends on a proper accounting of the lifetime net costs and benefits of energy procurement in all sectors…As the costs of many renewable energy technologies have fallen precipitously in recent years, the non-hardware "soft" costs associated with siting, permitting, zoning, and interconnection now comprise an increasing portion of project costs. Rhode Island should focus on reducing these costs by addressing key regulatory barriers, establishing uniform standards and advancing streamlined permitting processes wherever possible.[9]

Rhode Island's new energy plan sets a path for changed policy direction in Rhode Island.

The challenge is that our electric distribution company operates under different priorities. We are in the midst of a transformative new energy economy. In the old energy economy,

> …both the technology of the original electricity system and its ownership were large and centralized. Vertically-integrated utility companies owned everything, from the power plant to the meter outside a home or business. In an era when cost-effective power generation came from coal or nuclear – with massive economies of scale – centralized ownership was the key to raising the capital for power generation. Utilities were rewarded with public monopolies and guaranteed rates of return to attract low-cost capital and drive down costs…[10]

Now, "[t]he new technologies of power generation no longer require the same scale or centralization of ownership."[11] This transition benefits customers, but not the utility.

The flattening of electricity demand

and rise in distributed renewable energy are causing tension in the utility business. Utilities continue to make investments in the grid as though these changes are not already happening, largely because their financial incentives remain tied to a Utility 1.0 business model. As former utility executive Karl Rabago says, 'utilities simply do not think things they do not own or control can be resources…'[12]

Some States, including Rhode Island, have tried to correct this misalignment of incentives through policies like decoupling.[13] In those laws, the utility's profits are decoupled from the volume of electricity it distributes, with the intent to relieve any disincentives for efficiency and distributed generation. However:

> While revenue decoupling can reduce the pressure to increase sales, incentives to build new power plants and power lines are often stronger…As noted by Commission staff in New York: '[Rate of return] regulation may ...encourage the utility to over-invest in capital spending, because earnings are directly tied to rate base…regulators in New York warn that while decoupling makes utilities indifferent to sales losses from energy efficiency and distributed generation, it does not shield ratepayers from the risk of widespread revenue loss should distributed generation grow substantially.[14]

This conflict of interest manifests itself clearly in the question of whether public resources should be focused on large, transmission-scale investments or improvements to the local distribution system.

> The distribution system, rather than the transmission system, is likely to be the hub of the 21st century electricity system, acting as a two-way network between power producers and consumers. Unfortunately, this system is aging badly. The American Society of Civil Engineers estimates that utilities will have to spend $20 billion annually over the next several years just to replace aged distribution infrastructure and that, 'America will see an investment gap in distribution infrastructure of $57 billion by 2020.' Not only that, but 'the majority of the spending on distribution in recent years has been targeted at hardening the system against weather-related outages,' and not in preparing for a two-way grid to support lots of distributed renewable energy systems. On the other hand, utility spending on new and upgraded transmission lines has increased steadily since 2007 (not long after the 2005 Energy Policy Act increased the ease and financial return for doing so). 'Investor-owned utilities plan to spend an additional $54.6 billion on transmission infrastructure [between late 2013 and] 2015.'[15]

Both financial incentives and regulatory proceedings drive the utility's resource prioritization.

> …Not only is it difficult for non-transmission options to share costs, but utilities frequently receive federal incentives for high voltage transmission lines that cross state boundaries …the federal overseers of transmission projects don't consider any non-grid benefits that would weight a decision toward a transmission alternative for serving grid needs…Local economic benefits are a key omission in both federal and state regulatory bodies… While states would prefer to make evaluations of new grid infrastructure on these broad energy and economic values, most regulatory bodies focus narrowly on benefits to utilities and utility ratepayers.[16]

As Forbes magazine recently reported, in the context of a smart grid proposal offered in Maine,

> In a recent filing with the MPUC, GridSolar argued that smart grid services like non-transmission alternatives are not – and will not be in the future – provided by existing transmission and distribution (T&D) utilities for several reasons. 'The first and largest problem is that T&D utilities have an inherent and legally insurmountable conflict of interest that prevents them from [promoting] (now, or even with revenue decoupling) … non-transmission alternatives that will compete with transmission reliability projects proposed by the utilities…' In my view, this statement is true.[17]

This is the context within which Rhode Island's Public Utilities Commission considered National Grid's proposed ISR Plan.

The ISR planning process is mandated by Rhode Island's Revenue Decoupling statute.[18] The purposes of that statute include "[i]ncreasing efficiency in the operations and management of the electric and gas distribution system" and "[r]educing risks for both customers and the distribution company including, but not limited to, societal risks, weather risks

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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.

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and economic risks" and "[f]acilitating and encouraging investment in utility infrastructure, safety, and reliability."[19] National Grid's proposed ISR Plan was designed to "address load growth and migration" and to "sustain asset viability through targeted investments driven primarily by condition" referred to as the "[c]ore of work required for Company to meet its public service obligation in Rhode Island."[20] Sixty three percent (63%) of the proposed $73,000,000 of investments contemplated in National Grid's ISR Plan for 2016 were "system capacity investments required to ensure the electrical network has sufficient capacity to meet growing needs of its customers."[21] Yet, the Company's proposed plan never once considered customers' needs for system capacity improvements to provide energy source diversification from the interconnection of renewable energy.

WED sought to intervene and argue that Rhode Island customers need to ensure the security and reliability of our energy supply and reduce its costs by making the system capacity investments needed to interconnect renewable energy.[22] In December 18, 2014, National Grid had quoted WED a cost of over $12,759,544 to interconnect seven wind turbines planned for siting in Coventry, Rhode Island.[23] Of that total, $10.4 million was for "System Modifications to Company Electric Power System" including "remote station modifications."[24] Only $40,000 of the total was for the "Interconnecting Customer Interconnection Facilities."[25] Three additional turbines were denied interconnection altogether on the ground the company's distribution system could not accommodate them.[26] WED could not bear such a high cost of rebuilding the Company's electric power system in association with getting its power to the distribution system and saw the ISR Plan as one opportunity to address long deferred maintenance of the distribution grid.

National Grid opposed WED's intervention and moved to strike its objection. The utility argued that the ISR planning process was not the place to address WED's policy objectives.[27] It contended that the Commission had no right to consider Rhode Island's need for grid improvements to accommodate more renewable energy as part of its ISR approval process.[28] It maintained that:

If the PUC concludes that the spending

proposed in the ISR Plan is "reasonably needed to maintain safe and reliable distribution service over the short and long-term," the PUC "shall … approve the plan[.]" There is no language in the revenue decoupling statute about providing for spending to accommodate renewable energy distributed generation in the ISR Plan.[29]

The Company also argued that the Division would represent any public interest that WED sought to advocate in the proceeding.[30] Unfortunately, the Division clearly did not agree with WED; it opposed WED's intervention on substantive grounds. As the Commission's final order summarized, the Division argued that:

> WED will suffer no actual or threatened legal injury as a result of the PUC's decision in the instant matter… WED does not possess a real interest in the pending matter, but seeks 'to transfer its duly-tariffed financial responsibility to pay for interconnection costs onto ratepayers'… the Division posited that WED's intervention is not in the public interest because the PUC could arrive at the same result without WED's participation in the instant docket, noting that WED's goals, while laudable public policy goals, are not relevant to the merits of the matter.[31]

Based on the objections from National Grid and the Division, the PUC denied WED's intervention, with this ruling:

> After review of the record, the PUC found that WED's concerns are outside the scope of the ISR Plan proceeding in that WED attempts to use the ISR Plan to shift responsibility of interconnection costs from developers to the ratepayers …. and that WED's participation cannot be said to be in the public interest.[32]

The Commission concluded that WED's position in the proceeding was inconsistent with the public interest, and that the Division adequately represented WED's interests. In its subsequent public comments, WED contended that diversification of our electric supply will not happen in the way Rhode Island needs it to without substantial investment in the system upgrades necessary to integrate renewable energy. National Grid and the Division were consistently involved in crafting the

continued on page 35

Coastline EAP and the Lawyers Helping Lawyers Committee – Confidential Help When You Are In Need

The Rhode Island Bar Association's Lawyers Helping Lawyers Committee wishes to remind you that one of the most valuable benefits Bar Association members enjoy is unlimited access to the professional services offered by Coastline EAP. For many years, Judith Hoffman has been Coastline EAP's liaison to the Rhode Island Bar. She and her colleagues are available 24/7 to provide lawyers and family members with ***confidential*** crisis support, consultation, resources, and follow-up.

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Legal Framework and Benefits of Public-Private Partnerships

David M. DiSegna, Esq.
Pannone Lopes Devereaux & West LLC

Teno A. West, Esq.
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Throughout the United States, governments and public agencies face the daunting task of upgrading or replacing their antiquated and deteriorating infrastructure, while grappling with fiscal pressures, such as declining tax revenues, increased expenses, rising pension costs, and state and federal mandates. As a result, municipalities and governmental agencies are seeking innovative financing and project delivery methods and increasingly turning to public-private partnerships (P3s) to carry out infrastructure projects in a cost-effective manner.

P3s are contractual arrangements between governmental bodies and private entities.[1] Through these agreements, the respective skills and assets of the public and private sectors are shared in delivering a service or facility for the use of the general public.[2] In addition to sharing resources, the parties also share in the risks and rewards associated with delivery of the service and/or facility.[3]

P3s are utilized for a variety of reasons, including monetization of the value of existing assets and the development or expansion of new and existing facilities, including water and sewer systems, solid waste facilities, toll roads, light rail, bridges, government buildings, and sports and entertainment complexes. Generally, P3s are structured such that the private sector takes on additional project risks, such as design, finance, and long-term operation and maintenance.

While traditional financing options still exist – including government bonds, federal grants, low-interest loans through state revolving fund programs, and emergency or disaster relief aid – partnering with a private entity provides an attractive alternative financing option.

Depending on the legal and regulatory framework in a particular jurisdiction, P3s will vary greatly and may be limited in many respects.

Legal Framework for P3s in Rhode Island

In many jurisdictions, P3s are precluded by laws that require public contracts to be awarded using traditional design-bid-build (DBB) methods. Under DBB procurements, a public entity must contract with an engineer to design a project and separately with a contractor to construct it.[4] Furthermore, each of these contracts must be awarded to the responsible bidder offering the lowest price.[5] Thus, P3s in which a private entity would take on responsibility for any combination of the design, construction, operation, and financing of a project, or which involve allocation of risk between the parties based on negotiated terms, would be prohibited in jurisdictions with these low-bid laws. However, where the laws permit alternative delivery methods, governmental entities may procure contracts based on the best value to the public, while considering many factors in addition to cost alone.

Although governmental entities in Rhode Island are generally subject to low-bid laws, exceptions exist permitting municipalities and state agencies to enter into P3s. R.I. Gen. Laws §§ 37-2-18 (governing state agency contracts) and 45-55-5 (governing municipal contracts) require that contracts exceeding certain threshold amounts "shall be awarded by competitive sealed bidding…to the responsive and responsible bidder whose bid is either" the "lowest bid price, or lowest evaluated or responsive bid price" based on "objective measurable criteria."[6] This second option to award contracts based on the lowest evaluated bid price using objective measurable criteria was interpreted by the Rhode Island Supreme Court to allow evaluation of factors that need not "be quantifiably reducible or digitized to a dollar amount,… 'which permits the awarding authority to exercise a reasonable, good-faith discretion, and does not commit it unqualifiedly to the lowest bid.'"[7] The Court blessed the use of evaluation factors such as "relative experience, expertise, qualifications, and quality of work" of bidders.[8] Thus, under §§ 37-2-18 and 45-55-5, state agencies and municipal governments need not award contracts based on cost alone.

Additionally, R.I. Gen. Laws §§ 37-2-19 and 45-55-6 permit state agencies and local governments, respectively, to enter into contracts through competitive negotiation when "the purchasing agent determines, in writing, that the use of competitive sealed bidding is not practicable," under regulations promulgated by the Director of the Rhode Island Department of Administration,[9] the executive director or chief

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operational officer of the agency, or the city or town council undertaking the project.[10] Under these statutes, state agencies and municipalities may enter into competitive negotiations with two or more proposers and may award contracts "to the responsible offeror whose proposal is determined, in writing, to be the most advantageous to the" state or the municipality, taking into consideration price, as well as other factors set forth in the solicitation documents distributed by the governmental entity.[11]

Furthermore, § 37-2-39 and the regulations promulgated pursuant thereto explicitly permit alternative delivery methods for state projects, provided that certain criteria, such as project cost, are met.[12] These delivery methods include Design-Build (DB) (where a single contractor designs and constructs a project), and Owner's Program Manager (OPM) (where a private entity provides preconstruction and construction project management services on behalf of a state agency).[13] Moreover, §§ 37-2-27 – 37-2-27.5 provide explicit authorization for state agencies to enter into Construction Manager At-Risk (CMAR) contracts, under which a firm provides preconstruction and construction management services at a guaranteed maximum price.[14] To enter into these contracts, however, certain requirements must be met, including a minimum estimated project cost of $5 million and the need to hire an OPM.[15]

In addition to the explicit statutory exemptions from low-bid laws, the Rhode Island Supreme Court has also recently interpreted § 45-55-5 such that it is inapplicable to concession agreements.[16] In **Kayak Ctr. at Wickford Cove, LLC v. Narragansett**, the Court held that § 45-55-5 (the low-bid statute governing municipal contracts) did not apply to the procurement of a concession agreement, under which a private entity would make payments to a town for the right to operate a business on town-owned land.[17] The Court reasoned that the statutory language requiring contracts to be awarded to the bidder offering the "lowest bid price" demonstrated the statute was meant to "regulate contracts that require the expenditure of public funds," not "contracts that produce revenue."[18] Thus, the low-bid law is inapplicable to this type of contract.[19]

Although state and local governmental bodies may utilize the statutory frame-

work and applicable case law to enter into P3 arrangements, there currently is no comprehensive act governing P3s, as is the case in other states.[20] However, during the 2015 legislative session, a bill was introduced that would have created a comprehensive scheme granting state and local governments explicit authority to enter into P3s for a wide array of public projects.[21] The law would have permitted both solicited and unsolicited proposals from the private sector and broadened the ability for governmental entities to enter into P3s.[22] Although this bill did not become law, public entities are, nonetheless, able to enter into P3s under the existing legal framework.

Procurement of P3 Contracts

P3 contracts are awarded using an alternative procurement process, whereby the governmental entity issues one or more solicitation documents to request information or detailed proposals from private parties interested in entering into an agreement with the governmental body. Types of solicitation documents include Requests for Proposals (RFP), Requests for Qualifications (RFQ), and Requests for Information (RFI).

The most common of these documents is an RFP, which constitutes a formal solicitation of private entities to provide a full proposal for a particular project or service, including not only pricing, but technical specifications, firm information relating to personnel, finances, legal and regulatory compliance history, stock of equipment or other assets, and any other information, guarantees or commitments that the governmental body may choose to require as part of the P3.

In larger projects, governmental bodies may also choose to issue an RFQ prior to issuing an RFP. An RFQ will solicit a statement of qualifications from interested firms, but generally will not seek an actual proposal for a particular project or service. The purpose of an RFQ is to give the public entity a clearer idea of which firms may wish to participate in a certain type of project, to gather information about these firms and the qualities of the pool of potential proposers, while at the same time allowing the public entity to narrow the group of responding firms to a short list, prior to issuing an RFP.

Additionally, public entities may choose to begin the entire procurement process by issuing an RFI to gather infor-

House of Delegates Letters of Interest 2016-2017

Involvement in the activities of our Bar Association is a richly rewarding experience. One way to become familiar with Bar Association activities is by serving as a member of the House of Delegates. For those interested in becoming a member of the Bar's Executive Committee and an eventual Bar officer, House of Delegates' membership is a necessary first step. To learn more about Rhode Island Bar Association governance, please go to the Bar's website at **ribar.com**.

The Nominating Committee will meet soon to prepare a slate of officers and members of the 2016-2017 Rhode Island Bar Association House of Delegates. The term of office is July 1, 2016-June 30, 2017. If you have not already done so, to be considered for appointment to the House of Delegates, please send a letter of interest no later than **February 19, 2016**.

Letters of interest should include the member's length of service to the Rhode Island Bar Association (i.e., participation in Committees and positions held in those Committees; service to the Bar Association and outside the Bar Association, and positions held outside the Bar Association). Testimonials and letters of recommendation are neither required nor encouraged. Direct and indirect informal contact by candidates or those wishing to address candidates' qualifications to members of the Nominating Committee is prohibited. Please send letters of interest to:

HOD Nominating Committee Chairperson
Rhode Island Bar Association
41 Sharpe Drive
Cranston, RI 02920

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

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

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

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Types of P3s

There are many different forms of P3s, and indeed, even within a particular category, no two P3s are exactly the same. Below is a general description of the most

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Design-Build (DB)

Under a design-build (DB) contract, a single entity is responsible for designing and building an improvement or new facility and is accountable for all results through acceptance of the project by the governmental entity. The design-builder assumes the responsibility for the design work and all construction activities – together with the risks associated with providing these services – in exchange for a fee. The public entity will typically retain the responsibility for financing, operating, and maintaining the project in DB contracts. This delivery method provides a single source guarantor for both design and construction. Importantly, performance and business risks, such as cost overruns and construction delays, are transferred to the private entity.

Design-Build-Operate (DBO)

Under a design-build-operate (DBO) agreement, a single contract governs the design, construction, and operation of a capital improvement or public infrastructure asset. Title to the asset typically remains with the public entity; however, alternate forms of this P3 structure may vest title with the private party. The public sector secures the project's financing and generally pays the private entity a set fee for its services. Consequently, the public entity retains the risk, as well as

continued on page 37

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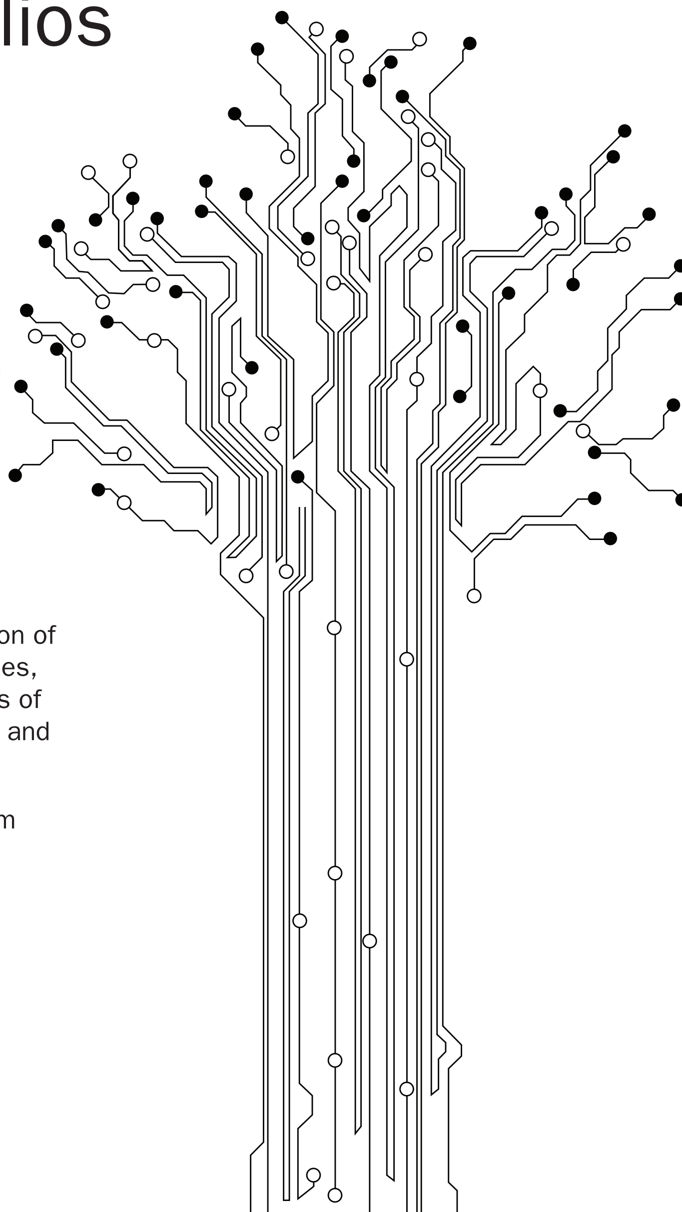

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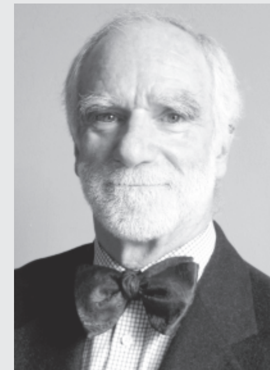

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BOOK REVIEW

Opium and Empire: The Lives and Careers of William Jardine and James Matheson by Richard J. Grace

Peter J. Comerford, Esq.
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The French novelist Honore de Balzac wrote that behind every great fortune lies a great crime.[1] Testing the veracity of this observation lies is the heart of *Opium and Empire: The Lives and Careers of William Jardine and James Matheson* (McGill-Queen's University Press, 2014), by Richard J. Grace, professor *emeritus* of history at Providence College.

This is a dual biography of William Jardine and James Matheson, 19th century Scots who traveled to Canton (now Guangzhou) China and, in 1832, began a trading firm, Jardine Matheson, whose products ranged from cotton and silk to opium. Almost two hundred years later, Jardine Matheson still exists as a very successful conglomerate, whose divisions include the luxury Mandarin Oriental hotel chain operating high end properties from Guangzhou to Boston. The company is in the top 200 companies globally by market capitalization.

It was the skill of Jardine and Matheson at the emerging use of bills of exchange, as well as mastering the increasingly sophisticated banking and insurance businesses that gave it key advantages over its competitors.

As a matter of history, Jardine Matheson and other firms involved in the opium trade have been caricatured as drug dealers akin to the Cali cartel in Colombia. [See, for example, *The Opium Wars: The Addiction of One Empire and the Corruption of Another*. Hanes III, W. Travis and Sanello, Frank, Sourcebooks, Inc. 2002.] Grace examines these stereotypes to determine whether his protagonists are less Pablo Escobar and more Samuel Bronfman.

William Jardine and James Matheson were born twelve years and a few hundred miles apart in the late 18th century in Scotland. Both went on to university studies in Edinburgh, and each decided to seek his fortune in the Far East. Grace vividly sets the stage for the Scottish Diaspora, sketching in a narrative from the Battle of Culloden in 1746 through the various repressive measures directed at Scotland by the British government, all of which led ambitious Scots such as these to seek their fortunes elsewhere.

Their disparate paths ultimately led Jardine and Matheson into partnership that began with the import/export business; notably cotton, silk, tea, and opium. Their interests later expanded to include banking and insurance. The opium trade put the merchants, including Jardine Matheson, into conflict with the imperial Chinese government, which adhered to a policy banning opium. The aggressive pursuit of this ban (following a period of relatively lax enforcement) led to millions of dollars of opium being seized and destroyed by the Chinese, and Matheson being put under house arrest. Jardine had already retired from his work at Canton and returned to Britain.

Britain determined to respond to the house arrest and seizure, coupled with a refusal by the Chinese to negotiate about trade policy generally and opium legalization specifically, with a show of force, hoping to open more ports to foreign trade and to have Britain treated as an equal. When that was unsuccessful, matters escalated into what has become known as the First Opium War. The Treaty of Nanking in 1842 attempted to end the conflict, and ceded Hong Kong to Great Britain, as well as offering a variety of other concessions.[2]

Beyond its general interest historically, and specifically regarding the history of international trade, two aspects of this book will be of particular interest to lawyers. One of these is that the success of Jardine Matheson as a firm was not due solely, or even mainly, to the fact that they sold opium. Many of the other firms in that trade are long since gone, yet Jardine Matheson survived and thrived. Grace does an excellent job of explaining that it was the skill of Jardine and Matheson at the emerging use of bills of exchange, as well as mastering the increasingly sophisticated banking and insurance businesses, that gave it key advantages over its competitors. Living as we do in a world where you can pay for something by pointing your telephone at it, it is easy to forget there was a time when big purchases in foreign trade were literally paid for with silver and gold. Indeed, that fact was the reason opium became so important. Britain was importing ever increasing amounts of tea from China, which had to be paid for in silver. Nothing China was buying from Britain beside opium generated much silver in return. It was the simple need of having enough pieces of

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metal to buy tea that drove the start of the opium trade.

Transportation of this silver and gold was cumbersome and dangerous, so the merchants developed a system of bills of exchange to repatriate their opium profits to Britain. It gives a whole new gloss to the law of negotiable instruments to know it began, or at least flourished, with the opium trade. The necessary corollaries of this lucrative long distance business were the development of insurance and banking to keep pace with the growing trade. Bear in mind that Jardine Matheson did most of its business as a middleman; financing, arranging and shipping goods belonging to others, so it not only made profits on its transactions, but also fees on the transactions of its clients.

It developed faster sailing vessels, which not only got its goods, and those of its clients, to market faster, but gave it market intelligence ahead of its rivals. (Think of the revolution in our own time of traders who had Bloomberg monitors giving them real time information ahead of competitors.) Moreover, both Jardine and Matheson focused on their work ferociously, often staying at their desks until 2:00 in the morning. In fact, Jardine kept only his own chair in his office, to discourage idle chatter.

The second issue of particular interest to us as a profession is more difficult; the moral and legal propriety of selling opium to the Chinese. Opium was legal throughout the world at that point, and, in Britain, was widely used, albeit in much milder form, for a variety of aches and pains. Jardine Matheson, and the other firms in this business, brought the drug to China in ships and then moored offshore. Chinese opium smugglers would bring their boats out to the larger vessels and purchase opium. These smugglers would then bring the drug on-shore and handle the retail aspect of the trade. The nearer analogy in our own time seems to be less drug cartels than to rum running in our own country during Prohibition.

An interview with *The Westport News* (Aug. 31, 1976) records the reminiscences of a local rum runner who recalls that steamers would bring thousands of cases of whiskey from Scotland to two islands off the coast of Newfoundland. Smaller boats would off-load portions of the cargo and bring it ashore in the many coves and inlets along our coast. When

asked what percentage of Westporters was involved in rum running, he replied, "105 per cent." Clearly, the rum runners violated the law, though the shipments to maritime Canada were quite legal. We think of rum runners nostalgically rather than with fear and loathing.

Grace's own assessment, without ignoring the problems caused by opium or the fact that China banned its importation, is essentially positive. He finds that Jardine and Matheson conducted their business affairs with probity, although aggressively. They were generous in philanthropy and were respected by their peers. They had concluded, rightly or wrongly, that abuse of the product they provided was the fault of the buyer, not the seller.

Opium and Empire is thoroughly researched and superbly written. It sets an important era in an insightful context. We can see the seeds of contemporary events, from the recent efforts of Scotland to regain independence, to the struggles China is having with Hong Kong, and vice versa, and China's reaction to perceived intrusions to its sovereignty. This is history at its best, enjoyably written.

ENDNOTES

1 *Pere Goriot, Balzac, Honore.*

2 *Thereafter, conflicts between China and its would-be trading partners, Britain, France, and America escalated further and the Second Opium War broke out. The second war was far more brutal and, from a Chinese perspective, humiliating. The Emperor's Summer Palace was looted and burned, and China's self perception as unique and powerful was revealed to be hollow. These events occurred after Jardine and Matheson had left, and are beyond the scope of the book under review.*

Full disclosure: Richard Grace was a teacher of mine in college. ❖

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Equitable Adoption

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incorporated into tort law and was recognized" in Rhode Island.[23] He then approvingly cited the five factor analysis of **Francois**. Most importantly, Judge Lagueux found that, "this Court concludes that the Rhode Island Supreme Court will adopt that statement of law when the occasion presents itself" referring to the five part test announced in **Francois**.[24]

These decisions directly approving the equitable adoption doctrine are compatible and consistent with a slew of Rhode Island rulings concerning the related but separate doctrine *de facto* parenthood.[25]

However, despite the widespread use of equitable adoption throughout the United States and two local lower court rulings, the Rhode Island Supreme Court has never addressed the doctrine and, until recently, it apparently has never been applied in a probate or estate matter. It has been asserted successfully in other local personal injuries actions, but without being reported in written decisions.

However, recently equitable adoption has been utilized by a step-child in a probate court proceeding to allow him to inherit in place of distant heirs at law in *In Re*: **Estate Canning**. In what is believed to the first case of its kind in Rhode Island, recently a step-son was successful in proving his equitable adoption in the Pawtucket Probate Court. Judge Cristine McBurney ruled that based on the extensive evidentiary presentation made by the step-son that "by clear and convincing evidence [step-son] is the putative son of Raymond J. Canning pursuant to the application of the doctrine of equitable adoption [and] shall be deemed the putative son and sole heir of the decedent."[26] Accordingly, the step-son was permitted to inherit decedent's entire estate.

This case, and the further application of the doctrine of equitable adoption, will open up new horizons for those with close personal relationships to decedents who die intestate. No longer will they be disfavored as against distant, so called "laughing heirs."[27] These relationships, often occurring in common but untraditional family situations will finally be afforded the justice they deserve in Rhode Island probate matters.

ENDNOTES

1 *"When informal adoption meets intestate succession: the cultural myopia of the equitable adoption doctrine."43 Wake Forest L. Rev. 223.*

2 *R.I. Gen. Laws §§ 33-1-1, 10.*

3 *R.I. Gen. Laws § 8-9-9.*

4 ***Burford v. Estate of Skelly**, 699 A.2d 854, 856 (R.I. 1997), **In re Gemma**, 2009 WL 361067 (R.I. 2009) ("The Probate Courts are empowered to do that which is necessary and incidental to the jurisdictional powers.").*

5 ***Burt v. Rhode Island Hosp. Trust Nat. Bank**, 2006 WL 2089254, 6 (R.I. Super. 2006) (emphasis added).*

6 ***Bilotti v. LaSalle**, 506 A.2d 1362, 1365 (R.I. 1986) ("The probate decree was a final determination of the heirship issue from which an appeal could have been taken."). **See also** additional cases noting and/or upholding Probate Court heirship determinations. i.e. **Grand d'Hauteville v. Montgomery**, 92 R.I. 453, 169 A.2d 916 (1961), **Batcheller-Durkee v. Batcheller**, 97 A. 378 (R.I. 1916), **King v. Ross**, 45 A. 146 (R.I. 1899).*

7 ***Petrarca v. Castrovillari**, 448 A.2d 1286 (R.I. 1982).*

8 ***Rosborough v. Rosborough**, 1986 WL 714220 (R.I. Super. 1986).*

9 *AMJUR ADOPTION § 63.*

10 *18 AMJUR POF 2d 531*

11 ***Id.***

12 ***In re Radovich's Estate**, 48 Cal. 2d 116, 308 P.2d 14 (1957)(the principle of equitable adoption operates to permit an equitably adopted child to be treated as an adopted child of his deceased foster parent, rather than as a stranger for the purposes of imposing an inheritance tax).*

13 ***Foster v. Cheek**, 212 Ga. 821, 96 S.E.2d 545 (1957)(an equitably adopted person will qualify as life insurance beneficiary).*

14 ***D'Accardi v. Chater**, 96 F.3d 97 (4th Cir. 1996) (equitable adoption of children could render them eligible for Social Security survivor's insurance benefits under 20 C.F.R. § 404.359).*

15 ***Edwards, on Behalf of Collins v. Director, Office of Workers' Compensation Programs**, 953 F.2d 637 (4th Cir. 1992) (Black Lung Act benefits would be available to equitably adopted claimant, had claimant proven sufficient facts).*

16 ***Minefield v. Railroad Retirement Board**, 217 F.2d 786 (5th Cir. 1954) (although the child would be entitled to benefits if equitably adopted, the court held that the evidence of the relationship was insufficient).*

17 ***Evergreen Sod Farms, Inc. v. McClendon**, 513 So. 2d1311(Fla. 1st DCA 1987), dec. app. 533 So. 2d 765 (Fla. 1988).*

18 ***In re W.R. ex rel.** S.W., 412 N.J.Super. 275, 279, 989 A.2d 873, 876 (2009).*

19 ***In re: Lamfrom's Estate**, 90 Ariz. 363, 368 P. 2d 318, 321 (1962). **See also Atkinson v. Atkinson**, 160 Mich. App. 601, 408 N.W.2d 516 (1987), **In re Estate of McGahey**,--- P.3d ----, 2015 WL 1119564, 4 (Okla.Civ.App. Div. 4, 2015) ("the doctrine has been recognized and applied in Oklahoma"), **LP v. LF**, 338 P.3d 908, 918 (Wyo. 2014), **Williams ex rel. Z.D. v. Colvin**, 581 Fed.Appx. 386 (5th Cir. 2014)(Texas recognizes equitable adoption), **DeHart v. DeHart**, 986 N.E.2d 85 (Ill. 2013)(recognizing equitable adoption in the context of an adult seeking inheritance in a probate proceeding), **In re Estate of Fairhurst**, 2014 WL 1499285, 1*

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(N.Y.Sur. 2014)("equitable adoption does not create a legal adoption of a child but is merely an exercise of the court's equitable powers to permit the child to acquire rights in intestacy based upon an agreement to adopt."), **Hoy v. Sandals Resorts Intern., Ltd.**, 2013 WL 6385019, 5 (S.D.Fla. 2013) ("In Florida, the doctrine of equitable adoption is 'judicially created and used in intestacy proceedings to enforce an oral or written agreement to adopt in order to establish the adopted child's rights of inheritance.'"), **Jolley v. Seamco Laboratories, Inc.**, 828 So.2d 1050, 1051 (Fla. 1st DCA 2002).

20 **See e.g. Poncho v. Bowdoin**, 138 N.M. 857, 126 P.3d 1221 (N.M.Ct.App. 2005), **Johnson v. Johnson**, 617 N.W.2d 97, (N.D. 2000), **Calista Corp. v. Mann**, 564 P.2d 53 (Alaska 1977), **Holt v. Burlington Northern Railroad**, 685 S.W. 2d 851 (Mo. App. 1984) (child found to have been equitably adopted could bring a wrongful death action). **See also** Restatement (Third) of Property (Wills & Don. Trans.) § 2.5 (1999)("Courts in over half the states have recognized such a doctrine, but courts in at least eight states have rejected it.").

21 **Id.**

22 **Id.**

23 **Crawford v. Cooper**, 14 F.Supp.2d 202, 212 (R.I. 1998).

24 **Id.**

25 **Rubano v. DiCenzo**, 759 A.2d 959, 969 (R.I. 2000) (recognizing that "consistent with the statutory law of domestic relations in this jurisdiction, a person who has no biological connection to a child but who has served as a psychological or **de facto** parent to that child may under limited circumstances …establish his or her entitlement to parental rights vis-a-vis the child" and noting that the non-biological "mother" has a **de facto** mother-child relationship, including the indicia of parenthood; "the Legislature demonstrated that it knew how to adopt appropriate limiting language when it wished to exclude non-biological parents from its provisions" and that in the absence of such language, **de facto** parents had sufficient interest to be included within the statute's scope.) **See also DeBont v. DeBont**, 826 A.2d 968 (R.I. 2003) (discussions **de facto** parenthood), **Keenan v. Somberg**, 792 A.2d 47 (R.I. 2002), **Pietros v. Pietros**, 638 A.2d 545 (R.I. 1994) (affirming a child support order against a non-biological or adoptive father where the family lived together and held the child out to the community as his son, and the child called the father "daddy"), **Resendes v. Brown**, 966 A.2d 1249 (R.I. 2009)(noting that "an agreement creating a **de facto** parent child relationship is a factual matter" and should be recognized based upon "a finding of 'a parent like relationship with the child that could be substantial enough to warrant legal recognition of certain parental rights and responsibilities.'")(citing **Rubano**).

26 **In re Canning**, 2015 WL 5224819 (R.I. Pro. 2015).

27 A "laughing heirs" are those "who had so little interest in decedent and so little contact with him that they did not concern themselves for many years as to whether he was living or dead." **In re MacCarthy's Estate**, 17 Pa. D. & C.3d 600, 614 (Pa. Com. Pl. 1979). ❖

Whose Energy Grid?

continued from page 15

State Energy Plan that they now presented as inconsistent with the public interest. WED's comments sought to regard the Plan as more than a shelved and misinterpreted aspiration. However, WED ultimately had to rely on the Division and the Commission to make it so.

The Commission's Final Order, issued on October 21, 2015, makes it clear that they did hear WED's call and it ultimately shaped their response to National Grid's ISR Plan. The Order observes that:

> There are currently limitations in the planning process, particularly in the coordination of customer-driven distributed generation projects with the standard planning process…Currently, National Grid does not have a system plan that would identify areas that would benefit from distributed generation.[33]

The Commission laments the lack of coordination between state policies.

> There needs to be a mechanism by which the PUC can determine whether these programs are truly integrated and working together to the overall benefit of ratepayers or whether as a standalone program, the cost benefit analysis is reasonable, but together, they are doing little more than shifting costs around, or worse, are duplicating costs. Nowhere is this more concerning than in the arena of large distributed generation projects.[34]

They resolve to begin addressing this problem, partially through the Infrastructure Safety and Reliability planning process.

> National Grid has admitted that, partially due to the nature of the distributed generation application process, there is little integration of the distributed generation program into the overall planning process…Furthermore, the long range plans should consider the extent to which the current system is prepared for generation growth, which requires some understanding of the least cost siting of reasonably anticipated generation growth on the current system. Additionally, long range plans should consider how designing for growth in load and distributed generation can be mutually beneficial; for example, investigating how new infrastructure necessary to

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serve load in one area can be designed to also serve generation at a lower cost than designing for load alone, or at a lower cost than designing to serve load in one area, while designing to serve generation in another. Testimony in this docket supported the ability of long-range studies to take system reliability, energy efficiency and distributed generation considerations into account. The long-range studies need to include consideration of distributed generation on the distribution system.[35]

In the end, the Commission understood WED's concern and met its regulatory charge to regulate the electric distribution company for the welfare of Rhode Island's people.[36]

Despite crushing increases in energy prices caused by over-reliance on transmission-constrained natural gas, and our State Energy Plan's call for diversification of our energy supply to enhance security, reliability and affordability, National Grid's proposed ISR Plan for 2016 said nothing about planning or implementing capacity upgrades to facilitate the integration of renewable energy. Rhode Island will not get significant diversification of our energy supply without proper, planned investments in the capacity of our distribution system. In Docket 4539, our Public Utilities Commission took one great step in the right direction.

ENDNOTES

1 *R.I. Gen Laws §§ 39-1-1(a)(1)-(2).*
2 ***Id.***
3 ***Id.***
4 ***Id.** at § 39-1-1(c).*
5 *Energy 2035, Rhode Island State Energy Plan, http://www.planning.ri.gov/documents/LU/energy/Energy2035_All_Preliminary_06032015.pdf.*
6 ***Id.** at p. 15.*
7 ***Id.** at p. 9.*
8 ***Id.** at p. 10.*
9 ***Id.** at p. 13-14;* **see also** *DG Standard Contract and REF Jobs, Environmental and Economic Impact Study, The Brattle Group April 2014 (adding between 164 MW and 1008 MW of renewable energy yields positive economic and environmental impacts… Economic output between $556 and $2,340 million… between 246 and 1,095 jobs…reduced carbon dioxide emissions with a social benefit of between $13 million and $54 million and reduced SO2, NOX, PM-10, and PM-2.5 emissions with benefit between $22 million and $94 million).*
10 Beyond Utility 2.0 to Energy Democracy, *John Farrell, The Institute for Local Self Reliance, p. 6 (see https://ilsr.org/report-energy-democracy/)*
11 ***Id.** at p. 7.*
12 ***Id.***
13 *R.I. Gen. Laws § 39-1-27.7.1.*
14 Beyond Utility 2.0 *at p. 19, 3 citing Fisher, George. Utility Equity Research In The 21st Century Part 1: Regulatory Environment, ROIC, WACC, Hurdle Rate. (Seeking Alpha, 9/29/14). Accessed 10/1/14 at http://bit.ly/1vuUHXu; Reforming the Energy Vision. (NYS Department of Public Service, Staff Report, 4/24/14). Accessed 10/20/14 at http://cl.ly/0C0V0T2j2u30.*
15 ***Id.** at p. 6-7, 16 citing Lacey, Stephen. America Gets a D+ in Energy Infrastructure. (GreentechMedia, 4/1/13). Accessed 11/7/14 at http://bit.ly/1tQRinV; Transmission & Distribution Infrastructure. (Harris Williams & Co., Summer 2014) Accessed 12/3/14 at http://bit.ly/11Ucm1E; Lewis, Craig. It's Time for Grid Planners to Put Distributed Resources On Par With Transmission (Greentech Media, 11/13/13), Accessed 8/11/14 at http://bit.ly/1ujkvs6.*
16 ***Id.** at p. 22-23.*
17 *Pentland, W.,* The Biggest Solar Breakthrough Never Heard Of, *Forbes Magazine, Nov. 12, 2015; http://www.forbes.com/sites/williampentland/2015/11/12/the-biggest-solar-breakthrough-youve-never-heard-of/2/*
18 *R.I. Gen. Laws § 39-1-27.7.1.*
19 ***Id.***
20 *ISR Plan, http://www.ripuc.org/eventsactions/docket/4539-NGrid-Electric-ISR-FY16_12-23-14.pdf, at p. 7.*
21 ***Id.** at p. 9.*
22 *WED's Motion to Intervene, http://www.ripuc.org/eventsactions/docket/4539-WED-Coventry-Intervene_2-10-15.pdf; WED's Objection, http://www.ripuc.org/eventsactions/docket/4539-WED-Coventry-Objections_2-10-15.pdf.*
23 National Grid System Impact Study for Coventry 1-6, *December 18, 2014, Appendix A.*
24 ***Id.***
25 ***Id.***
26 ***Id.** After WED petitioned the Commission and pursued legislation to resolve this concern, National Grid revised its interconnection impact study to allow interconnection of all ten proposed turbines at a total cost of $4.1 million, leaving the duct installation work to WED.* National Grid's Revised System Impact Study for Coventry 1-6, *July 9, 2015.*
27 *National Grid Memorandum at p. 4-5; http://www.ripuc.org/eventsactions/docket/4539-NGrid-Reply-WED_2-20-15.pdf*
28 ***Id.** at p. 5.*
29 ***Id.** at p. 3.*
30 ***Id.** at p. 6.*
31 *PUC Order at p. 22; http://www.ripuc.org/eventsactions/docket/4539-NGrid-Reply-WED_2-20-15.pdf; citing Division Memorandum at pp. 4-8.*
32 ***Id.** at p. 22.*
33 ***Id.** at pp. 17-18.*
34 ***Id.** at p. 25.*
35 ***Id.** at pp. 20, 26.*
36 *R.I. Gen Laws §§ 39-1-1(a)(1)-(2).* ❖

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Legal Framework

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any surpluses, associated with operating revenue fluctuations. While maintenance and repair responsibilities are shifted to the private sector, oftentimes, capital improvement obligations remain with the public entity. One major benefit of a DBO arrangement is the operational efficiencies realized when the design, construction and operation aspects of the project are brought under one contract. For instance, the project design can be tailored to the construction equipment and the materials used to operate the facility.

Design-Build-Finance-Operate (DBFO)

The design-build-finance-operate (DBFO) project delivery method combines the responsibility for the design, finance, construction, and operation components of a public project into a single contract and transfers that responsibility to a private entity. The private sector typically operates the infrastructure asset pursuant to a lease or operating agreement for a period of time that is sufficient to recoup its financial investment in the project. While there is great variety in DBFO arrangements, one commonality is that they are financed either partly or wholly by debt leveraged revenue streams derived from the project, such as roadway tolls or sewer system user fees. The capital and project development costs are often funded by the issuance of bonds or other debt that is leveraged against future revenues. In a DBFO, title to the assets also generally remains with the public entity.

Concession Agreements

Concession agreements involve a long-term lease arrangement for existing, publicly-financed assets to a private entity concessionaire for a certain period of time, in exchange for an upfront payment to the public entity. The public entity transfers the right to operate and maintain a facility or asset to the private party, which then operates the assets or becomes an exclusive provider for a designated service area. Frequently, the concessionaire is obligated to make improvements to the asset. The concessionaire recoups its investment over the term of the contract through fees assessed on the users of the asset and decreased operational costs stemming from the private entity's more efficient operation of the asset. Concession agreements provide a public entity with an immediate monetary infusion in exchange for the long-term operation of the public asset.[23]

Benefits of P3s

P3s provide an array of benefits to public entities. Most importantly, these arrangements offer governments the advantage of involving a private entity to deliver a project more efficiently, more cost-effectively, and with improved service. Frequently, the private entity is created solely to provide one particular service and, thus, has the expertise to improve the operational efficiency for that service. This expertise translates into lower overall project costs and faster project delivery when compared with traditional low-bid construction.

Under traditional design-bid-build contract procurements mandated by low-bid laws, governments may only award construction projects to the lowest bidder. However, P3s enable public entities to evaluate proposed projects based on the overall best value to the public. These project delivery methods allow the public entity to consider factors that optimizes quality, such as the experience and track record of a company on similar projects, while incorporating cost, efficiency, price, and performance criteria into the evaluation. Thus, governments that enter into P3s generally do not face many of the quality issues that stem from low-bid contract awards, such as contractors using inferior materials or otherwise cutting corners to undermine their competition to offer the lowest bid.

Furthermore, when a single firm provides design, construction and even operational components of a project, the public entity can shift greater responsibility and risk to the private sector to ensure projects are delivered to specification and are fully operational. This is the case because a private entity involved in a later stage of a project cannot blame those involved in the earlier stages if it fails to meet its obligations. Where a single entity manages all phases of a project, the operator cannot blame performance failures on design or construction flaws, and construction firms cannot blame performance failures on design flaws. Where one entity designs, constructs, and operates an infrastructure asset, it must – and generally is more willing to – take responsibility for all aspects of the project. Thus, P3s have the added benefit of decreased litigation, as there is less potential for finger pointing.

Finally, one of the most important reasons that public entities utilize P3s is that they provide increased access to capital needed to fund infrastructure projects. While traditional financing options still exist – including government bonds, federal grants, low-interest loans through state revolving fund programs, and emergency or disaster relief aid – partnering with a private entity provides an attrac-

Lawyers on the Move

Victoria M. Almeida, Esq., Shareholder at **Adler Pollock & Sheehan P.C.**, was elected Chairperson of the new Health Services Council for the State of Rhode Island.

Christopher S. Gontarz, Esq. is now with **Lynch & Pine, LLC**, 26 Washington Square, Newport, RI 02840.
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Stephen M. Miller, Esq., of the law firm of **Stephen M. Miller and Associates**, was named as the President of the House of Hope's Board of Directors.

David T. Riedel, Esq., of **Adler Pollock & Sheehan P.C.**, was appointed to the Audubon Society of Rhode Island's Board of Directors.

Hon. Bruce M. Selya of the United States Court of Appeals First Circuit and his wife received the *2015 Individual Champions Award* at Rhode Island Hospital's President's Pursuit of Excellence Dinner.

Moonan, Stratton & Waldman, LLP moved their law offices to 4 Richmond Square, Suite 150, Providence, RI 02906.

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tive alternative financing option. This type of funding can come from private equity firms and other private investors who invest in public projects in exchange for future payments from the public and/or private partner to the P3. Governments are relying more frequently on this type of funding to leverage the revenue-generating ability of public infrastructure assets in order to fund their construction or upgrades, rather than committing large amounts of public funds to finance the projects.

Important Contract Terms

P3s provide additional benefits to public entities through various contract terms that can be negotiated into a P3 agreement. These include contractual guarantees such as guaranteed costs, guaranteed schedules, and guaranteed performance. Cost overruns and delayed project completion dates often plague infrastructure projects. P3s, however, remedy this problem by providing for predictable future costs specified by contract.[24] Common cost guarantees include "fixed price guarantees," where a contractor is paid a certain price for the work, regardless of any delays or cost increases, and "guaranteed maximum" pricing, where the contractor is compensated for actual costs incurred plus a fixed fee, subject to a price ceiling. These mechanisms shift the risks of fluctuating input prices and delays to the private entities, encouraging them to complete the project on time and on budget. In Rhode Island, however, state agencies are unable to enter into cost plus a percentage of cost contracts, and they may only enter into guaranteed maximum pricing contracts that contain cost plus a fixed fee provisions (called "cost reimbursement contracts") upon a determination that the contract is likely to be the least costly to the state or that it is impracticable to utilize any other type of contract.[25]

P3s can also offer public entities guaranteed construction schedules that are negotiated into the agreements to ensure that projects are delivered on time. Construction schedules are easier to meet when the entity that is responsible for construction of a project is the same firm that designed it. With a single entity carrying out the design and construction, there is no lapse between those two phases of the project and no need for the construction firm to take time to familiarize itself with the design plans, thereby decreasing the likelihood of con-

struction mistakes.

Moreover, P3s allow for guaranteed performance standards atypical of projects procured by traditional methods. Common performance guarantees include: 1) acceptance standards to delineate criteria for acceptance of the contractor's work by the public entity; 2) construction guarantees, including design requirements, review standards, and environmental guarantees; and 3) operational guarantees or delineated maintenance requirements. These guarantees can be negotiated into a P3 contract to ensure proper performance by the private entity.

Although guarantee provisions can protect governmental entities from cost overruns, delays, and substandard performance, there is still a risk that a private entity may breach the contract. However, there are several mechanisms often included in P3 agreements to add an additional layer of protection for the governmental entity and the public funds entrusted to it. These mechanisms include operations bonds, performance bonds, or payment bonds from third party bonding companies, letters of credit from financial institutions that can be drawn against in the event of a breach, and guarantees from parent companies that provide additional assets and capital for payment if a contractor defaults on its obligations. Additionally, P3 contracts often require private entities to maintain various insurance policies with specified minimum amounts of coverage to further protect the public entity.

Finally, P3 contracts can provide for liquidated damages in the event of a breach, along with concomitant performance incentives for early completion or heightened levels of performance, which may be negotiated to further encourage efficient service and project delivery that is on time or ahead of schedule.

Rhode Island Case Study: Cranston

In one of the first sewer P3s in the country, the City of Cranston entered into a 25-year lease and service agreement[26] that transferred operation, maintenance, and capital improvement responsibility for the City's sewer system to a private entity.[27] Under the terms of the agreement, the company made a $48 million upfront payment to the City, which was used to retire approximately $26 million in sewer bonds, pay back $8.6 million that the City's Sewer Enterprise Fund had borrowed from its General Fund, fill a $6.9 million General Fund deficit, and create an approximately $6 million surplus.[28] This upfront payment had the further benefit of eliminating the City's yearly debt service expenses on the retired bonds, increasing its long-term investment income, and raising its bond rating.[29] In addition to the upfront payment, the contractor was responsible for approximately $30 million dollars in necessary upgrades to the system.[30] In exchange for the contractor's payment and services, the City agreed to pay a monthly service fee that is derived from the charges collected from the system's users.[31] The agreement had the added benefit of stabilizing these sewer fees for the life of the contract, which are estimated to save ratepayers $35 million in comparison to the fees that would have been needed had a private entity not taken over operation of the system.[32]

Conclusion

As exemplified in Cranston, P3s can provide governmental entities with many benefits, including long-term savings, an upfront infusion of funds, and the ability to shift various responsibilities and risks to a private entity. Because of these benefits, P3s have increased in popularity in recent years, yet there still remains considerable opportunity for governmental entities in Rhode Island, and throughout the United States, to take advantage of these arrangements.[33]

ENDNOTES

1 *National Council for Public-Private Partnerships, 7 Keys to Success, http://www.ncppp.org/ppp-basics/7-keys/.*
2 ***Id.***
3 ***Id.***
4 ***See, e.g.***, *New York General Municipal Law §§ 101, 103.*
5 ***See, e.g., Id.***
6 *R.I. Gen. Laws §§ 37-2-18, 45-55-5.*
7 ***H.V. Collins Co. v. Tarro***, *696 A.2d 298, 303 (R.I. 1997) (quoting* ***Paul Goldman, Inc. v. Burns***, *109 R.I. 236, 239, 283 A.2d 673, 675 (1971)).*
8 ***Id.***
9 *State of Rhode Island Procurement Regulations, § 6 (June 20, 2011).*
10 *R.I. Gen. Laws §§ 37-2-7, 37-2-19, 45-55-2, 45-55-6.*
11 ***Id.*** *§§ 37-2-19, 45-55-6;* ***see also*** *State of Rhode Island Procurement Regulations, § 6.1.1.2.1 (June 20, 2011).*
12 *State of Rhode Island Procurement Regulations, § 8.11.3 (December 2011).*
13 ***Id.***
14 *R.I. Gen. Laws § 37-2-7(30).*
15 ***Id.*** *§§ 37-2-27.1—27.2. These sections, however, do not apply to "highway or heavy construction projects."* ***Id.*** *§ 37-2-27.1.*
16 ***Kayak Ctr. at Wickford Cove, LLC v.***

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Narragansett, *116 A.3d 250, 254 (R.I. 2015).*
17 ***Id.*** *at 251-252, 254.*
18 ***Id.*** *at 254. Although this case only applied to municipal contracts, given the almost identical language of the laws governing state contracts, it appears that the same result would be reached in concessions with state agencies. This conclusion is further bolstered by the Court's recognition that § 45-55-5 only applies to "procurements" and "purchases."* ***Id.*** *Concessions are clearly not "purchases," as nothing is bought under these arrangements, nor are they "procurements" under state regulations governing concessions and other contracts "which are not procurements." Section 10 of the State of Rhode Island Procurement Regulations. Under these regulations, "[i]n general" concessions, must be awarded to the proposer offering "the greatest cash benefit to the state"; this implies that there are situations when the highest bidder need not be awarded a concession contract.* ***Id.*** *(emphasis added).*
19 ***Kayak Ctr.***, *116 A.3d at 254.*
20 ***See, e.g.***, *Va. Code § 56-575.1 et seq.; Fl. Stat. §§ 287.05712, 334.30.*
21 *R.I. General Assembly, House Bill No. 6250 (2015).*
22 ***Id.***
23 *The term "concession" can refer to any grant of a right to use one's property. The more traditional examples include concession stands in theaters or the paddle sports business in the* ***Kayak Ctr.*** *case, where one entity is granted the right to operate a business on another's property in exchange for periodic payments or a percentage of the business's revenue. 116 A.3d at 251-52. However, in the more modern, P3 context, concessions generally involve upfront and/or periodic payments from a private entity to a public entity in exchange for the right to operate and collect revenues of an infrastructure asset.*
24 ***See*** *Allen Consulting Group, Performance of PPPs and Traditional Procurement in Australia (2007).*
25 *R.I. Gen. Laws §§ 37-2-29, 37-2-30.*
26 *The agreement was later extended to a term of 30 years. City of Cranston, Department of Finance, Comprehensive Annual Financial Report of the City of Cranston, Rhode Island for the Year Ended June 30, 2006 at 3.*
27 *Public Works Financing, Cranston Opts for Private Finance for Wastewater Upgrade, (May 1996 to September 1997).*
28 *American City and County, The Pros and Cons of Long-Term Privatization (May 1, 1998). United States Conference of Mayors, Lease and Service Agreement Solves Financial and Environmental Problems for Cranston's Wastewater System.*
29 *Public Works Financing, Cranston Opts for Private Finance for Wastewater Upgrade, (May 1996 to September 1997); PR Newswire, Cranston RI $17.5M GOs Rated Underlying 'A-' by Fitch IBCA – Fitch IBCA Financial Wire.*
30 *American City and County, The Pros and Cons of Long-Term Privatization (May 1, 1998). United States Conference of Mayors, Lease and Service Agreement Solves Financial and Environmental Problems for Cranston's Wastewater System.*
31 *United States Conference of Mayors, Lease and Service Agreement Solves Financial and Environmental Problems for Cranston's Wastewater System.*
32 ***Id.***
33 *National Council for Public-Private Partnerships, Moody's Predicts Long-Term Increase in Cross-Sector US, International P3s, (September 24, 2015), http://www.ncppp.org/moodys-predicts-long-term-increase-in-cross-sector-us-international-p3s/.* ❖

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In Memoriam

Norman E. D'Andrea, Esq.

Norman E. D'Andrea, a World War II veteran, 88, of Warwick, RI, passed away on November 27, 2015. He was married for 42 years to the late Anna Bianchi D'Andrea. Born in Providence, he was the son of the late Armand E. D'Andrea of Providence and C. Irene Peregallo D'Andrea of New York City. He was the father of Deborah Ann D'Andrea Brace and Norman E. D'Andrea, Jr. In addition to his children and his son's wife Patricia De Beaulieu D'Andrea, he survived by his brother Dr. Eugene Milton D'Andrea of Warwick, RI. Norman graduated with honors from Mt. Pleasant H.S. in Providence and was accepted into the U.S. Army Specialized Training Program. After basic Army training, at Ft. McClellan, Alabama, he attended specialized radio training at Vint Hill, Virginia, then served overseas in classified locations in the Philippines. Following his return from Army service, he went to and graduated from Brown University and Boston University School of Law. He was admitted to practice before the U.S. Supreme Court and practiced trial law for 42 years. He was a Standing Master of Chancery in the R.I. Judiciary. He was among the Rhode Island Bar members honored for 50 years of service. Norman enjoyed jazz music as well as opera, discussions about world affairs, football and travel with his family. He was a devoted family man, and in his law practice was known as a strong advocate of disadvantaged people. He was a member of the Knights of Columbus, Cranston Post #8 ITAM and the Kelly-Gazzero Post, VFW.

Bradford Gorham, Esq.

Bradford Gorham, 80, of Chester, VT and formerly of Foster, RI, passed away on October 19, 2015. He was born in Providence, son of the late Sayles and Ruth Campbell Gorham. He was the beloved husband for 44 years of Diann Gebow Gorham, who died in 2004. Brad is survived by his second wife, Christine Callahan Gorham and his brothers: John and Nicholas Gorham; his sister: Desire Gorham Palmer, as well as his five children: Christopher Gorham and his wife, Gemma; Nicholas Gorham and his wife, Roseanna; Joshua Gorham and his wife, Rebecca; Jane Gurzenda; and Nancy Boyden and her husband, Robert, as well as Christine Gorham's children: Mary Hitchings and James Callahan. He graduated from Hope High School in 1953, where he was an Anthony Medal Award winner and from Dartmouth College in 1957. He graduated with honors from Harvard Law School in 1964. Between college and law school, he served as a platoon leader and company commander in the U.S. Marine Corps and continued in the U.S. Marine Corps reserves until 1965. He was honorably discharged as a Captain. Brad was a gentleman farmer, lawyer, probate judge, author, state representative and senator. Brad began his political career when he was elected to the Constitutional Convention in 1964. He served in the RI House of Representatives from 1968 to 1970 and from 1976 to 1990, during which time he served as Minority Leader. In 1970, he ran for Lieutenant Governor and in 1990 for Attorney General. He went on to serve in the Rhode Island Senate between 1992 and 1996. He practiced law for over 50 years. He served as Republican State Chairman 2002-2003. Brad was a Mayflower descendant and President of the Pilgrim John Howland Society of Plymouth Massachusetts. He wrote and published a book, *John and Elizabeth Howland, Pilgrims on the Kennebec*. With the John Howland Society, he built and sailed the "The Elizabeth Tilley" shallop from Plymouth up the Kennebec River to Augusta, ME, the same route taken by John Howland in 1625. He was a longtime member of the Foster Lions Club, the Moosup Valley Grange, the Rhode Island Vermont Society of Colonial Wars, the Ionic Lodge No. 28, FA&M and the Howard Foundation. Brad took great joy spending time with his family at their beach house in Quonochontaug, RI and on his farm in Chester, VT.

James Henry Hardy, Esq.

James Henry Hardy, age 66, passed away on November 9, 2015. Born in New York City, he grew up in Philadelphia and Bethesda, MD. He graduated from Walt Whitman HS, Trinity College and Boston University School of Law. His legal career was dedicated to social justice and serving people in need. He worked as a staff attorney at Jacksonville Area Legal Aid and then at Rhode Island Legal Services before starting his own private law practice. He served on the board of Providence Community Health Centers, an organization he was passionate about. Jim is survived by his children Michael M. Hardy and Sarah M. Masoin and her husband Pierre Masoin, his brother Charles J. Hardy and his wife Sharon Hardy, Mary and Molly Malcolm, his ex wife Naomi Morey and his best friend Demi Caris.

Vincent R. Patrone, Esq.

Vincent R. Patrone, 55, of North Scituate, passed away on September 10, 2015. He was the husband of Janet Walsh Patrone. and father of Rafe Vincent Patrone. Born in Providence, he was the son of Mary Notarianni Patrone and the late Ralph Patrone. He is also survived by his sister, Gail Dooley, and her husband, Paul Dooley, of Johnston. Vin was a graduate of La Salle Academy, Boston College, and Boston College School of Law. He was an attorney at the former Winograd, Shine & Zacks for many years, and eventually opened his own business law practice in Providence. His legal career was cut short by the development of a brain tumor, but this did not deter him from pursuing other work endeavors, as well as marrying his wife and fathering his beloved son in the ensuing 18 years. He worked for many years for United Cerebral Palsy, served on the Board of the National Brain Tumor Society. Vin was a communicant, volunteer and Chair of the Annual Bazaar and Raffle of St. Joseph's Church in North Scituate.

Joseph J. Rodio Sr., Esq.

Joseph J. Rodio Sr., 67, of Lincoln passed away on October 14, 2015. Joseph was a beloved husband, father, grandfather, nephew, brother, uncle, cousin and friend.

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My 12 years of working in 3 different prosecutors' offices (Manhattan 1982-84; Miami 1984-88, R.I.A.G. 1988-94) has led to my enduring commitment to seek justice.

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