



Rhode Island Bar Journal

Rhode Island Bar Association Volume 58, Number 5. March/April 2010

**Interpreting Attorney-Client Privilege
Under the Open Meetings Act**

**Emerging Trends in Construction Indemnity
and Insurance Law**

All That Jazz and Trial Law Too



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RHODE ISLAND BAR ASSOCIATION LAWYER'S PLEDGE

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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Justice, Justice, Shall You Pursue¹



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President Rhode Island
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Dr. Frederic G. Reamer
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As lawyers, our most virtuous goal is the pursuit of justice. This is not a cliché. There's much that lawyers can do inside their own tent, i.e., zealous representation, legal advocacy, pro bono service. However, to be especially effective, lawyers must recognize they are part of a larger commonweal with a public purpose. Lawyers ought to think about ways to promote justice in collaboration with colleagues in other human service professions, particularly those that share a keen commitment to social and criminal justice issues. We can learn and benefit from each other's perspectives and skills. This is in fact referenced in Rule 2.1 of the Rules of Professional Conduct which speaks to the lawyer's role as advisor: "In rendering advice, a lawyer may refer not only to law but to other considerations, such as *moral, economic, social and political factors, that may be relevant to the client's situation.*"²

Wearing one of my other hats as Vice Chair of the Rhode Island Parole Board, I have an opportunity every month to engage in a collaborative effort, in this case including psychiatry, law enforcement, education, and social work. For this issue of the *Bar Journal*, I invited a Parole Board colleague, Dr. Frederick G. Reamer, Ph.D, to share his thoughts about this collaborative intersection among professions sharing a deep-seated commitment to social and criminal justice. Dr. Reamer's comments appear below.

At 8:00 a.m., on days when the Rhode Island Parole Board conducts inmate hearings, Board members convene to meet with crime victims who wish to share their opinions about the merits of inmates' possible parole. These are victims of sexual assault, armed robbery, domestic violence, burglary, home invasion, and other serious offenses.

Recently, the Board met with the parents of a teenager who was killed by an inmate convicted of driving under the influence – death resulting. The parents' angst was intense, and they vehemently opposed the inmate's release. My Parole Board colleagues and I certainly understood why.

Nearly three hours later, at about 11:00 a.m., the Parole Board conducted the inmate's hearing. Prior to the hearing, we reviewed the inmate's extensive prison records which clearly indicated

he had matured significantly during his prison stay, which began six years earlier, shortly after the inmate's 18th birthday.

The inmate entered the prison hearing room with his attorney and fielded serial questions from Parole Board members concerning the circumstances surrounding his crime, his insights about his poor choices, his remorse, and his plans for the future. After the inmate left the lengthy hearing, the Parole Board wrestled with its daunting decision. Our task was to blend, somehow, the complex welter of information before us. We were deeply impressed by the inmate's astute insights and genuine remorse. It was evident to us that, to use the vernacular, this inmate got it. His anguish was palpable and his sorrow sincere. He had been punished, sought rehabilitation, and had grown from the experience.

Yet, alongside this compelling profile, the Parole Board heard echoes of the sorrowful, mournful voices of the parents of the young man who died in the automobile accident. Only hours before the hearing, we had seen their tears flow copiously as they struggled to catch their breath. The passage of time had not healed their deep, painful wounds.

At that moment the Parole Board stared justice in the face, and pursued it.

Not all Parole Board hearings are this intense and dramatic, but many are. What I have learned during my years on the Board is that the genuine pursuit of justice requires the sort of keen insight and understanding most likely when passionate, principled, and dedicated professionals, especially lawyers, join forces.

Functioning in our respective professional silos can be very limiting and myopic. By statute, fortunately, the Rhode Island Parole Board must include a mix of professional perspectives. We have several attorneys on the board, whose acumen often sheds light on subtle legal concepts and issues germane to our decisions. The Board also features a senior police official, whose street smarts and extensive curbside experience offer rich insights into the subtleties of criminal conduct. Our psychiatrist member is invaluable when there are complex psychiatric factors involved in a crime, and our senior educator, and Board Chair, brings to

bear his rich and decades-long experience with both juvenile and adult offenders. My own background as a social work professor, along with my many years of experience working in prisons, contributes, I hope, to a fuller understanding of why people commit serious crimes and their prospects for true rehabilitation.

My tenure on the Rhode Island Parole Board has taught me a great deal about the complex pursuit of justice, especially about the need for conscientious members of diverse professions to collaborate. When I sit beside my Board colleagues, I know that none of us has a monopoly on wisdom, that we draw moral strength and insights from each other. My lawyer colleagues help me to sort through complex evidentiary and statutory issues that influence my judgment. My psychiatrist colleague broaches critically important issues related to the organic determinants of some forms of mental illness found among inmates. It is not unusual for my law enforcement and educator colleagues to introduce compelling points that significantly alter my thinking in the midst of a hearing.

I have discovered we Parole Board members need each other in our earnest efforts to pursue justice. We do our work in a legal context and, without a doubt, our interdisciplinary mix broadens and

deepens our grasp of complicated, sometimes conflicting, data. When we find ourselves on the horns of a dilemma, trying to reconcile incompatible perspectives on an inmate's prospects for parole, the diverse lenses through which Board members view the evidence at hand bring us as close to justice as is humanly possible. Further, our poignant collaboration with crime victims does far more than satisfy a statutory requirement. Indeed, it closes the circle in our efforts to consider every imaginable perspective as we endeavor to make decisions that are wise, fair, and prudent.

Like all professionals, lawyers yearn for clarity and decisiveness. Yet, all of us know that justice often resides in the gray zone – frequently layered with multiple shades of gray – despite our fervent wish for black-and-white circumstances.

When the inmate convicted of driving under the influence – death resulting left the hearing room, my Parole Board colleagues and I deliberated long and hard. In such moments we know that we need each other. This is what justice often requires. As Aristotle said, “In justice is all virtues found in sum.”

ENDNOTES

1 *Deuteronomy 16:18-20*

2 *R.I. R. Prof. Conduct, Art. V. Rule 2.1 (emphasis added)*. ♦



Rhode Island Parole Board members Captain Thomas A. Verdi; Kenneth R. Walker, Ed.D., Board Chairperson; Dr. Frederic G. Reamer; and Victoria M. Almeida, Esq. Board Vice Chairperson review a crime victim's concerns during a Board hearing. Parole Board members not pictured: Dr. Charles Denby II and Hebert F. DeSimone, Esq.

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.

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Two Points Off

Rhode Island Bar Foundation President's Message



John A. Tarantino, Esq.
Rhode Island Bar Foundation
President

Every day, the Fellows of the Bar Foundation do their best for their clients. And it's the Foundation's goal to ensure that when anyone seeks justice in our court system, he or she is never made to feel cheap.

I'll never forget my first oral argument. We represented the petitioners, the mother and father of a disabled child who had been deprived access to educational opportunities that were available to other children in public schools. On a petition for writ of certiorari, which was granted, we raised constitutional and statutory challenges to the school district's positions. We had lost below, based on the trial court's application of archaic precedent, which failed to account for intervening developments in the law. Our clients were now seeking justice in the Supreme Court. Actually, the Supreme Court of Grimes, a fictional jurisdiction that served as the forum for our law school moot court argument. Yes, it was a fictional lawsuit in a fictional jurisdiction, but I was passionate about the case and, as I've always been, I was set and determined to win. My moot court partner was equally ready, willing and able to convince the stern-looking panel of judges who made up the Supreme Court of Grimes that we should win, in fact, that *we had to win*.

My partner and I worked hard to prepare. We read every case, practiced our oral arguments, and indulged in the cheap pleasure of sleep only when absolutely necessary. After all, our case was going to make new law in Grimes and we were going to be the lawyers who helped to establish important precedent. And, after we'd won, we would move on to the next round, and eventually to the moot court finals, where, of course, we'd also win. Although we lacked experience, we didn't lack confidence.

My partner and I divided the oral argument, as required by the moot court rules. She handled the jurisdictional and procedural challenges that the school district had raised, and I argued the merits of the case. We knew that we would get tough questions from the judges, but we also knew that we were up to the challenge. And so, the arguments began.

We handled the judges' questions deftly (at least in my view) with just the right combination of professionalism and passion (yes, there is room for some passion in appellate arguments). Our opponents were able adversaries, focused and talented. As I listened to the arguments that I wasn't making, and to the questions posed by

the judges during those arguments, I started to wonder how I would have answered the questions if they had been posed to me. Then I quickly reminded myself that I had to focus on my argument. I couldn't allow myself to get too distracted, no matter how interesting or provocative someone else's questions and answers might be.

After the arguments were done, and while we were waiting for the judges to deliberate, our friends, classmates and even a professor came to offer congratulations. Yes, the other side was very good, no question about that. But we were the better team. We had won. That was the clear consensus. We awaited the decision anxiously, but confidently. We knew that we would be scored in three areas: knowledge of the facts and law, oral advocacy skills, and presentation. A perfect score was 30, 10 points in each area.

It took the judges approximately 30 minutes to deliberate, and it was an excruciatingly long 30 minutes. I can still remember looking at my watch over and over again, waiting for justice. Finally, they took the bench. The Chief Justice (a practicing lawyer in a large Boston firm in real life) rendered the decision of the court.

We lost. Judgment affirmed. I couldn't believe what I was hearing. How could we have lost? It made no sense. Everyone had said we had won, even a law professor. So, what was going on? The Chief Justice explained.

"This was a very difficult decision for us to make. Both teams did a terrific job. You were evenly matched."

But, in the end, our team lost, 26-25. We scored a 9 in knowledge of the facts and law, a 9 in oral advocacy, but only a 7 in presentation. Our opponents received a 9 in knowledge of the facts and law, an 8 in oral advocacy, and a 9 in presentation. We lost because of our score in the presentation. Why? Well, as the Chief Justice explained, we lost because of *my presentation*.

"Mr. Tarantino, you did an excellent job in your oral argument, but this was an argument before the highest court of Grimes," I was reminded.

Then the Chief Justice continued: "And it

March 1996 – 2008

In March, 1996, the Rhode Island Bar Association instituted the annual *Ralph P. Semonoff Award for Professionalism* named for past Bar Association President, Ralph P. Semonoff who championed the law as a high calling, justice as a defendable right, and public service as the beacon of a life's work.

Since that time, the Bar has instituted additional annual awards including, in 2003, the *Florence K. Murray Award* named in honor of Hon. Florence K. Murray, who, in a distinguished 56 years at the bar, pioneered the causes of women in the law, influenced women to pursue legal careers, opened doors for women attorneys, and advanced opportunities for women within the legal profession.

In 2007, the Bar created the *Chief Justice Joseph R. Weisberger Judicial Excellence Award*, named in honor of its first recipient, Chief Justice (ret.) Joseph R. Weisberger, who exemplifies and encourages the highest level of competence, integrity, judicial temperament, ethical conduct and professionalism.

Most recently, in 2008, the Bar initiated the *Joseph T. Houlihan Lifetime Mentor Award*, named for the late Joseph T. Houlihan who was known for his generosity of spirit and legal expertise in and out of the courtroom. Today, the recipients for all these awards are determined in March.

For information concerning annual Bar award nomination criteria and deadlines, please contact the Bar's Director of Communications Frederick Massie by telephone: 401-421-5740 or email: fmassie@ribar.com.

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wasn't appropriate for you to wear a sport coat, tie and slacks. A suit for an oral argument is absolutely necessary. We know that it wasn't intended, but it was disrespectful to this Court and to your clients not to wear a suit. And, so, two points were taken off."

That was it. Judgment rendered. Case closed. Our moot court experience was over, because I hadn't worn a suit.

Needless to say, I was mortified. I hadn't worn a suit for the oral argument. That was true. I hadn't worn a suit because I didn't own a suit. And I didn't own a suit because I didn't have the money to buy one. All I had to wear for so-called dressy occasions (and I had assumed that an oral argument before the Supreme Court of Grimes counted as a dressy occasion) was what I had on: a white shirt, a blue and maroon striped tie, gray slacks, and a navy blue blazer. It had been good enough for a friend's wedding just a few weeks earlier and for a relative's funeral several months back; but the attire was flat-out wrong – a real legal fashion *faux pas* – for an oral argument before the Supreme Court of Grimes.

I apologized to my partner for ruining our chances at moot court success and then I left for the long, painful ride from Boston College Law School (where the fictional jurisdiction of Grimes was located) to the apartment where my wife, baby daughter and I lived in Providence. I had lost the oral argument because I didn't have a suit. And I didn't have a suit because I didn't have the money to buy one. It was that simple. For the first time in my life, I felt poor. And I had other feelings. At first, I felt shame. Then I felt sorry for myself. And, finally, after a few days of reliving the awful moment, I felt anger. How could any court – even one in the fictional jurisdiction of Grimes – render a judgment against a party who should have prevailed, simply because the lawyer who represented that party didn't dress well? *Now, that was unjust.*

I soon had to leave my anger behind, though. Moot court was over (at least for my partner and me), but classes weren't done. And, suit or no suit, I had to keep up with my work and do well, or I wouldn't eventually pass the bar and get a job. So, I worked hard. And I got through the first year of law school *sans* suit, but at least cloaked with some of my pride. I landed a job for the summer, although it wasn't a legal one. I worked

at what is now Justice Assistance, helping juvenile offenders at the training school.

I also knew that in my second year of law school I could participate in the mock trial competition. And I didn't want to make the same mistake twice. I decided to save some of the money I earned each week so that by the end of the summer I would have enough money to buy a suit. My plan worked. Now, the suit wasn't much to look at it, and it only cost \$65, but the gray jacket and pants matched, so it qualified as an official suit. And I wore that suit for the mock trial competition, and on my job interviews, and on my first day at work the next summer at Adler Pollock & Sheehan.

More importantly, I wore that suit to my first real oral argument in the Rhode Island Supreme Court. By that time, I had other suits, and all of them cost more than \$65. But wearing that gray suit had special meaning and significance to me. Today, I don't remember all that much about the oral argument in the Rhode Island Supreme Court. It didn't seem to last very long and I didn't get nearly as many difficult questions from the justices of the Rhode Island Supreme Court as the ones I had remembered getting the night of my Grimes moot court argument. Maybe our Supreme Court justices were taking it easy on a young lawyer. What I do remember, though, is that I wore a suit – an inexpensive gray one – along with a crisp white shirt and a blue and maroon striped tie (the fashion remnants from my moot court oral argument).

I also remember that as I walked back to my office after the oral argument, I wondered if I had won or lost, as those deducted two points continued to haunt me. After a moment, I exhaled, because I knew that I had done my best for my client on that day, just as I had done my best for my clients on the night of the moot court oral argument a few years earlier. And so I was at peace. My suit was inexpensive, but this time I didn't feel cheap.

Every day, the Fellows of the Bar Foundation do their best for their clients. And it's the Foundation's goal to ensure that when anyone seeks justice in our court system, he or she is never made to feel cheap. We'll continue to try hard to meet that goal and we'll look forward to your help in doing so. ♦



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Interpreting Attorney-Client Privilege Under the Open Meetings Act



Ronald M. LaRocca, Esq.
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Goldman in Providence

Because the Rhode Island Open Meetings Act does not provide a general attorney-client privilege exception to its mandate for open and public meetings, public bodies risk serious exposure should they participate in private meetings for general attorney-client dialogue.

Introduction

May a Rhode Island public body¹ use the attorney-client privilege as a separate and independent justification to close a public meeting and enter into a confidential discussion when that public body is not engaged in litigation or reasonably anticipating litigation? Because the Rhode Island Open Meetings Act (Act) does not provide a general (non-litigation) attorney-client privilege exception to its mandate for open and public meetings;² public bodies risk serious exposure should they participate in private meetings for general attorney-client dialogue.³ This exposure necessarily causes two undoubtedly unintended, but undeniably harmful, results. It chills “full and frank communication between attorneys and their [public body] clients”⁴ and/or it encourages public bodies to exploit the litigation exception to the open meetings rule beyond its intended scope.⁵

The Act provides a broad guarantee to the State’s citizens that “[i]t is essential to the maintenance of a democratic society that public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy.”⁶ It is clear from this language that the General Assembly considers public participation and public attendance and inclusion during the deliberative process to be at the heart of Rhode Island’s representative democracy. To facilitate this public attendance and participation, the General Assembly mandates, through the Act, that all public bodies open nearly all meetings to the public.⁷

The rule does have exceptions. Public bodies may close their meetings, and engage in “executive sessions,” for ten specifically enumerated exceptions as set forth in R.I. Gen. Laws § 42-46-5.⁸ If the topic for discussion does not fit within these exceptions, the public body must speak and deliberate in an open and public forum.⁹ It may not ask a member of the public to leave the room or seal the meeting minutes from the discussion. A seemingly fundamental exception to the open meeting rule is missing from § 42-46-5, namely, an exception for attor-

ney-client discussions not pertaining to litigation (i.e. otherwise privileged communications between public bodies and their counsel concerning non-litigation, but nonetheless confidential, matters).

Although the Act’s litigation exception does permit executive sessions “pertaining to collective bargaining or litigation, or work sessions pertaining to collective bargaining or litigation,” this caveat does not encapsulate all attorney-client conversation.¹⁰ Should a public body not be involved in active litigation or at least reasonably anticipate litigation, it has no statutory right to enter into an executive session to speak with its legal counsel in confidence. The third-party public, conversely, has an absolute statutorily-enforced right to attend that discussion session and listen to the confidential advice of

“The search for significance in the silence of [the Legislature] is too often the pursuit of a mirage. We must be wary against interpolating our notions of policy in the interstices of legislative provisions.”

United State Supreme Court
Justice Felix Frankfurter,
Scripps-Howard Radio v.
Federal Communications Commission,
316 U.S. 4, 11 (1942)

that public body’s counsel. Indeed, the General Assembly would seemingly consider the public’s right to be present at that conference “essential to the maintenance of a democratic society.”¹¹

It is difficult to determine whether the Act’s omission of general attorney-client privilege was a reasoned choice to facilitate open democracy or an unintentional oversight because no official legislative history is available. Consequently, the legislative omission, viewed in light of the Act’s statutory framework, makes it unlikely that a public body has a right to close a public meet-

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ing under the common law doctrine of attorney-client privilege.

II. The Act's failure to provide for general attorney-client privilege leaves public bodies vulnerable.

A. Attorney-Client Privilege

"The attorney-client privilege protects from disclosure only the confidential communications between a client and his or her attorney."¹² "[C]ommunications by a client to his attorney for the purpose of seeking professional advice, as well as the responses made by the attorney to such inquiries, are privileged communications not subject to disclosure."¹³ Through the privilege, the Rhode Island Supreme Court seeks "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observation of law and administration of justice...exceptions to the attorney-client privilege should be made only when the reason for disclosure outweighs the potential chilling of essential communications."¹⁴

However, the Court has repeatedly held that it "narrowly construes" the privilege "because it limits the full disclosure of the truth."¹⁵ The burden rests on the party seeking to invoke the privilege to establish, *inter alia*, that the conversation was "without the presence of [third-parties]."¹⁶ Because members of the public, backed by a statutorily-reinforced right to attend an open discussion, would constitute third-parties, the inability to exclude the public would eviscerate the public body's attorney-client privilege.

Consequently, should the public body seek legal advice for a matter not within the ten enumerated exceptions of § 42-46-5, but within the public body's jurisdiction, such as a liability analysis or confirmation of the legality of a course of action, the public would have a right to attend and hear that discussion. The public body would then lose the protection afforded by the attorney-client privilege and risk revealing its attorney's confidences to the public and possibly a court.

The Superior Court disagreed with this conclusion in **Fischer v. Zoning Board of the Town of Charlestown**.¹⁷ The **Fischer** case featured private conversations between an attorney and a minority of zoning board members regarding a legal memorandum.¹⁸ While holding that the Act did not apply to the conversation,¹⁹

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the Superior Court added it “believes in the free and unhindered discussions between lawyer and client. Quite simply, that is what occurred in this case and such discussions should not be, nor are they, subject to the requirements of [the Act]...”²⁰ The Court did not address the Act’s failure to provide a general attorney-client privilege exception but, instead, implied the common law doctrine of attorney-client privilege overcame the statutory silence. As a result, Rhode Island government attorneys are still guessing the legality of using the attorney-client privilege as a separate and independent justification for convening executive sessions and sealing the minutes from such meetings.²¹

B. Statutory Interpretation

It is not likely that the Act’s silence on attorney-client privilege is an implied imprimatur for public bodies to use the common law doctrine to exclude the public from discussions. Although the Court has “well-established the rule” that it strictly construes “statutes that abrogate the common law,” the public body cannot escape the clear and unambiguous general law that “[e]very meeting of all public bodies shall be open to the public...”²² and that the public body shall limit executive session to only those specifically enumerated matters “exempted from discussion at open meetings.”²³ The simple fact that the Act’s explicit exceptions do not account for general attorney-client discussions is likely fatal to any public body attempting to justify the privatization of a governmental meeting through a claim of attorney-client privilege.

Moreover, when “a statute is silent on the subject at issue, [] judges have absolutely no clue about what result the Legislature would have intended had it ever considered the question presented, especially when [judges] depart from the text of a statute and attempt to find some hidden legislative design or intent that answers a problem not resolved by what the Legislature actually said.”²⁴ Therefore, a Court refuses “to divine sound public policy out of legislative silence, references to imagined legislative intentions, or [its] own predilections.”²⁵ Otherwise, it risks the “omnipresent” temptation for it “to intrude its own preferred policies into the law under the euphemistic banner of ‘filling in a legislative gap’ or ‘interstitial’ lawmaking.”²⁶

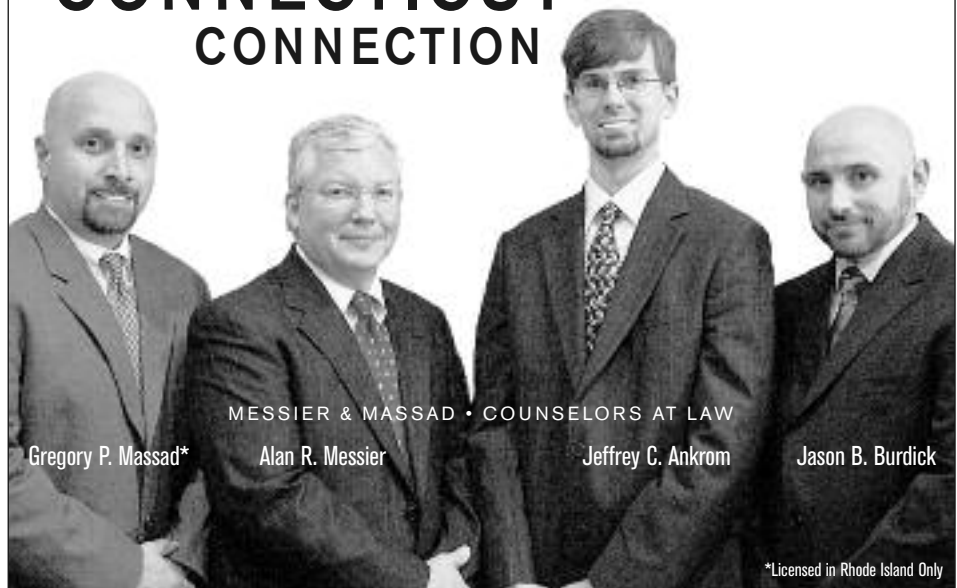
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The general rule that "[e]very meeting of all public bodies shall be open to the public unless closed pursuant to §§ 42-46-4 and 42-46-5," is clear and unambiguous. "When the language of a statute is clear and unambiguous,²⁷ [the Supreme Court] must interpret the statute literally and must give the words of the statute their plain and ordinary meanings."²⁸ Because general attorney-client privilege is not an independent exception to the Legislative directive, the Act substantially chills communication between public bodies and their counsel.²⁹

C. A Lesson from Massachusetts?

Massachusetts recently unveiled a new open meeting law effective July 1, 2010 (New Law). For years, its open meeting law (Former Law) was made up of several provisions codified in three different chapters of its General Laws. The Commonwealth separated its Former Law into those affecting state, county, and local public bodies.³⁰ The New Law consolidates the three provisions into one general Open Meeting Act that expressly repeals the older provisions.³¹ Despite the revamping, Massachusetts also fails to include (or intentionally omits?) general attorney-client privilege under its New Law.³² Unlike Rhode Island, Massachusetts public bodies do benefit from some in-depth judicial interpretation of the interplay between attorney-client privilege and its New Law concerning governmental meetings.

In *District Attorney for Plymouth Dist. v. Selectmen of Middleborough*, the Supreme Judicial Court unequivocally held that public bodies could not [emphasis added] use attorney-client privilege alone to close public meetings and enter into executive session.³³ The Court reasoned that "[t]he Legislature enumerated seven exceptions to its prohibition against private meetings of governmental bodies. Exceptions are not to be implied. Where there is an express exception, it comprises the only limitation on the operation of the statute and no other exceptions will be implied."³⁴

At first blush, the Court seemed to turn an about face in *Suffolk Constr. Co. v. Div. of Capital Asset Mgmt.*, a case involving a plaintiff's records request for government-attorney work product.³⁵ The Suffolk Court distinguished *Plymouth* by declaring that, while the Legislature required certain discussions between

public officials and their counsel to take place in the open, it did “not imply that no communication between public counsel and the public client can ever be confidential.”³⁶ The Court refused to allow “the Legislature’s statutory silence on a matter of common law of fundamental and longstanding importance” to impede “the administration of justice” by mandating public officials perform their duty without access to privileged legal advice.³⁷

As a result, common-law governs attorney-client privilege issues until the Massachusetts Legislature explicitly demands otherwise. Many attorneys have construed the **Suffolk** holding as designating the attorney-client privilege a separate and independent ground for entering into executive session.³⁸

The **Suffolk** Court did not explicitly overturn **Plymouth** or even directly address open meetings. The Court states “it is now well established that communications between government agencies and agency counsel are protected by the privilege as long as they are made *confidentially* [emphasis added]....”³⁹ Moreover, the burden remains on the public body to show, *inter alia*, “the communications were made in confidence.”⁴⁰

Because a public body may only speak with their attorney in confidence during a permitted executive session, it seems the **Suffolk** holding has only limited applicability to open meetings law. In light of this, and **Plymouth**’s pointed open meetings conclusion, attorneys advising Massachusetts public bodies are putting their clients at some risk by using **Suffolk** as an independent means to enter into executive session.

Unfortunately for those seeking unwavering clarity, the New Law fails to account for attorney-client privilege in non-litigation settings. In effect, it ignores the **Suffolk** holding, and lends credence to the argument that the Massachusetts Legislature has spoken again by not affirmatively providing an exception for general attorney-client privilege despite its cognizance of the **Suffolk** decision.⁴¹ Consequently, Massachusetts and its newly-unfurled open meetings law provide only some guidance for Rhode Island.

III. A simple suggestion to clarify a pressing and critical question.

Rhode Island’s Act does nothing to

Continued on page 28



This Month In Bar History

April 2000

In April, 2000, the Rhode Island Bar Association received the *Partnership Award* from the Rhode Island Coalition for the Homeless acknowledging the Bar’s ten year commitment to delivering legal services to the homeless through the Volunteer Lawyer Program (VLP). Since that time, VLP attorneys have continued to offer free legal counsel and advice at homeless shelter clinics throughout the state. In recognition of this ongoing service, The Rhode Island Coalition for the Homeless honored both the Rhode Island Bar Foundation and the Rhode Island Bar Association with the Coalition’s 2009 *Homeless Legal Clinic Award*.

For information concerning the Rhode Island Bar Association’s Volunteer Lawyer Program and other public services programs, please contact the Bar’s Public Services Director Susan Fontaine by telephone: 401-421-7722 x 101 or email: sfontaine@ribar.com.

Paralegal Association Elects Directors and Officers

The Rhode Island Paralegal Association elected its Board of Directors and appointed Officers for 2009-2010. President, for a sixth term, is Kelly A. Lajoie-Burns of CVS Caremark Legal Department; Vice President, Pauline Long of Cameron & Mittleman; Secretary, Madonna Cardillo of Picerne Military Housing; and Treasurer, Laurie Emond of Little Medeiros Kinder Bulman & Whitney, P.C. Board members are; Elaine White of Express Employment Professionals, Patricia Lyons of Roger Williams University, Eileen Tobin of Cameron & Mittleman, Carol Blanchard of Partridge Snow & Hahn; Karen Bradbury, Melanie Catineault of the RI Emergency Management Agency, and Sue Cook; Roberta Arsac of Shechtman Halperin Savage, LLP serves as Advisory Director. For information about the Paralegal Association, contact Kelly Lajoie-Burns at 770-3190 or Elaine White at 739-8460.

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In addition, upon request, USI will provide Bar Association members with a spreadsheet of the Blue Cross Blue Shield health insurance options available to them at renewal time. This will include any financial and benefit plans that are available. At any member's request (after providing an updated census), USI will also shop other carriers on behalf of members to help them find the best carrier for the best price. USI has recently reported that the Rhode Island Bar Association groups they currently administer will experience an average increase of less than 5%, much lower than the average for 2010.

USI will provide services to interested members throughout the year, updating them on areas of changes in benefits legislation on the national and state level. USI's labor relations attorney will be available at no cost to Bar members to provide updates on any issues related to their own employee benefits.

With the help and support of your Bar committees, your Executive Committee and Bar staff, we look forward to providing further membership benefit updates in the future.

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President
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C09-1005-035 (10/09)

Emerging Trends in Construction Indemnity and Insurance Law



Andrew A. Beerworth, Esq.
Practices with Morrison
Mahoney LLP in Providence

.....
*... an overview
of indemnity and
insurance law in
Rhode Island and
an examination
of recent doctrinal
developments for
the benefit of gen-
eral contractors,
subcontractors and
liability insurers
caught at the cross-
roads of traditional
contract law and
the anti-indemnity
statute.*
.....

I. Introduction

As a general proposition, it is well settled that Rhode Island's so-called anti-indemnity statute set forth in R.I. Gen. Laws § 6-34-1 prohibits a general contractor from shifting the consequences of its own negligence to its subcontractors. But does the statute necessarily relieve a non-negligent subcontractor from its contractual indemnity obligations? Does it apply to insurance policies as well as construction industry contracts? Can liability insurers effectively extend additional insured protection to general contractors and simultaneously guard against the risk of having to cover the general contractor's sole negligence? The Rhode Island Supreme Court has not yet definitively answered many of these questions, but some recent pronouncements (albeit, *dicta*) have signaled an interpretive approach which limits the statute's breadth in several important respects.

This article provides an overview of indemnity and insurance law in Rhode Island and examines recent doctrinal developments for the benefit of general contractors, subcontractors and liability insurers caught at the crossroads of traditional contract law and the anti-indemnity statute.

II. Fundamentals of Contractual Indemnification

Indemnity is a bargained-for obligation owed by one party to another whereby the indemnitor (subcontractor) agrees to make good any loss or damage incurred by the indemnitee (general contractor) while acting at the indemnitor's request or for his or her benefit. Most indemnity contracts fall within one of two distinct categories: those in which the indemnitor agrees to indemnify regardless of fault, and those in which the indemnitor's fault is a necessary predicate for indemnification. A full indemnification agreement, often referred to as the "broad form indemnity,"¹ obligates the indemnitor to personally reimburse (or "hold harmless") the indemnitee from all liabilities, losses and damages, including those caused by the indemnitee's sole or concurrent negligence. Under a partial indemnification agreement, also

known as the "limited form indemnity,"² the indemnitor is only required to indemnify for losses attributable to its own negligence.³

Rhode Island's anti-indemnity statute was enacted in response to the Court's decision in **DiLonardo v. Gilbane Building Co.**, 114 R.I. 469 (1975). **DiLonardo** was a construction case involving an indemnity contract which immunized the general contractor from all negligence, including its own gross negligence. Drawing on longstanding common law tenets, the Court held that such an agreement "in no way violate[d] public policy,"⁴ and reasoned the freedom of contract permitted the parties to shift or allocate the financial burden of liability in any manner they chose.

III. The Anti-Indemnity Statute and the Concept of Moral Hazard

The freedom of contract principles espoused in **DiLonardo** were short-lived. In 1976, the General Assembly enacted R.I. Gen. Laws § 6-34-1, which effectively overturned **DiLonardo** in the context of construction contracts.⁵ The anti-indemnity statute provides in pertinent part:

A covenant, promise, agreement, or understanding in, or in connection with or collateral to, a contract or agreement relative to the design, planning, construction, alteration, repair, or maintenance of a building, structure, highway, road, appurtenance, and appliance...pursuant to which contract or agreement the promisee or the promisee's independent contractors, agents, or employees has hired the promisor to perform work, purporting to indemnify the promisee, the promisee's independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence of the promisee, the promisee's independent contractors, agents, employees, or indemnitees, is against public policy and is void; provided that this section shall not affect the validity of any insurance contract, worker's compensation agreement, or an agreement issued by an insurer.⁶

The anti-indemnity statute declares void full indemnification subcontracts whereby a general contractor attempts to insulate itself through its subcontractor against exposure for the general contractor's own negligence.⁷

The vast majority of states have anti-indemnity statutes similar to R.I. Gen. Laws § 6-34-1.⁸ The widespread emergence of public policy against full indemnity contracts is at least partly explained by the societal problem of "moral hazard."⁹ The concept of moral hazard stems from the notion that a general contractor, assured that it will be fully indemnified for its conduct (however reckless or dangerous) loses the financial incentive to exercise due care, and therefore sloughs off any moral responsibility to prevent foreseeable injury to others.¹⁰ The carelessness engendered by the absence of accountability or economic incentive is a "moral hazard" because it increases the chances of injury to innocent third-parties.¹¹

The Utah Supreme Court famously articulated the moral hazard argument against full indemnity contracts as follows:

Undoubtedly contracts exempting

persons from liability for negligence induce a want of care, for the highest incentive to the exercise of due care rests in a consciousness that a failure in this respect will fix liability to make full compensation for any injury resulting from the cause. It has therefore been declared to be good doctrine that no person may contract against his own negligence.¹²

Many cases of injury or death on construction sites involve subcontractor employees who collect workers' compensation benefits from their employer and subsequently bring tort claims against the general contractor. Courts will also enforce contractual indemnification provisions against employers despite the exclusive remedy provisions of the Workers' Compensation Act¹³ provided the indemnity language is clear and unequivocal.¹⁴ Although the collection of workers' compensation benefits forecloses a direct action by the injured party/employee against the subcontractor/employer, the general contractor essentially steps into the shoes of the injured worker and forces litigation on the question of the subcontractor's tort liability under the guise of contractual

indemnity.¹⁵ The specter of third-party complaints for contractual indemnification, coupled with the no-fault nature of the workers' compensation system, serves to eradicate the problem of moral hazard by encouraging subcontractors to observe safety standards and institute accident prevention methods.

IV. The Anti-Indemnity Statute as Contract Gap-Filler

The nature of the construction-bidding process, disparities in bargaining power and corporate prowess, and other modern business realities often prevent subcontractors from negotiating the ideal contract. Nonetheless, subcontractors should be wary of indemnity provisions not expressly and narrowly tailored to the consequences of their own negligence.

According to the Court's decision in **Rodriguez v. DePasquale Building & Realty Co.**, 926 A.2d 616 (R.I. 2007), the anti-indemnity statute does not bar enforcement of oppressive contracts even if the subcontractor ultimately proves to be the proverbial innocent bystander. The subcontract at issue in **Rodriguez** contained sweeping language which required indemnification for all losses, not merely

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those arising out of the subcontractor's negligence. The Court held that the subcontractor was required to indemnify the general contractor in full for a settlement the latter had paid to the underlying tort plaintiffs even though both parties had been exonerated of any negligence at trial. The Court reasoned that the contract should be enforced as written:

"The contract's language is clear and unambiguous and in no way requires negligence on [the subcontractor's] part for [the general contractor] to seek indemnity. Under the contract, [the subcontractor] agreed to indemnify [the general contractor] for 'any and all claims of any nature arising out of the performance of the work by [the subcontractor]'. The only limit on the full indemnification that the contract specifies, of course, is that [the subcontractor] is not bound to indemnify [the general contractor] for [the general contractor's] own negligence, for such a provision would violate public policy...Although the contractual indemnification agreement may have been unwise, it clearly provides for such wide-ranging indemnifications by [the subcontractor]."¹⁶

The lesson of **Rodrigues** is the anti-indemnity statute voids only those contractual provisions which purport to indemnify a general contractor for its own negligence. It does not relieve a subcontractor from an express contractual duty – however onerous or imbecilic – to foot the bill for claims, damages, losses, judgments, settlements, and expenses incurred for any other reason.¹⁷ That is, the plain language of the statute does not mandate a fault-based cap on subcontractor liability; it simply requires a monetary off-set or reduction based on the general contractor's share of negligence, if any. Shrewd draftsmen must, therefore, pick up where the limited scope of the statute leaves off. Explicit contract terms must make a subcontractor's negligence both a condition precedent to, as well as a limitation on, its indemnity obligations.

V. Does the Anti-Indemnity Statute Limit Liability Insurance Coverage?

General contractors will typically circumvent the anti-indemnity statute through the inclusion of insurance procurement provisions in the subcontract, whereby the general contractor is named as an additional insured on the subcon-

tractor's liability policy. Before work commences on a project, the general contractor will insist the subcontractor furnish a certificate of liability insurance confirming the general contractor's status as an additional insured on the subcontractor's liability policy. This clever maneuver is intended to facilitate precisely the kind of full indemnification from the subcontractor's insurer which the general contractor cannot exact from the subcontractor directly.¹⁸

Given the appreciable risks involved in commercial construction, the property owner will require the architect, program manager and general contractor to name it as an additional insured on their individual policies. The general contractor, in turn, will pass the burden of insurance liability down to the subcontractor at the bottom of the totem pole.¹⁹ By obtaining status as an additional insured on the subcontractor's policy, the general contractor enjoys a direct contractual relationship with the insurer and receives the benefit of coverage without having to pay any policy premiums or deductibles.²⁰

Although the general contractor is not entitled to the entire panoply of rights afforded to the named insured/subcon-

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tractor (such as notice of cancellation and renewal), it may elect to tender its defense solely to the subcontractor's insurer. This so-called targeted tender is a strategic ploy which triggers defense and coverage obligations from the subcontractor's insurer without implicating the general contractor's own insurance at all. Acceptance of the tender relieves the general contractor from paying any premiums or deductibles, and destroys any subrogation rights the subcontractor's insurer would otherwise have against the general contractor (and its insurer) for having caused or contributed to the underlying loss.²¹ Furthermore, additional insured status is a more surefire means of leveraging prompt payment of defense costs. Under the traditional indemnity clause between contractors, a duty to defend may not arise until after a finding of fault on the part of the subcontractor, and the general contractor must incur out-of-pocket expenses in the interim.²²

For all these reasons, insurance procurement and additional insured provisions are the most advantageous risk-shifting method for general contractors. But are they valid and enforceable? The Rhode Island Supreme Court has contemplated, but not yet squarely confronted, the question of whether R.I. Gen. Laws § 6-34-1 prohibits a general contractor from shifting all risk of liability to a subcontractor's insurer. However, from what can be gleaned from the case law, the anti-indemnity statute does not appear to place any strictures on transactional risk transfers to liability insurers.

In *A.F. Lusi Construction v. Peerless Inc. Co.*, 847 A.2d 254 (R.I. 2004), the Court discussed, but did not decide, whether § 6-34-1 invalidates or limits insurance procurement agreements and insurance policies in the same manner as traditional, non-insurance indemnity contracts. The decision references a litany of extra-jurisdictional decisions which clearly distinguish between contracts to procure liability insurance for a general contractor's negligence, and contracts which require the subcontractor itself to personally insure (indemnify) the general contractor for the latter's own negligence. The Court noted that the statute explicitly excluded insurance contracts from its scope.²³ It also cited, with apparent approval, the reasoning set forth in *Meadow Valley Contractors, Inc. v. Transcontinental Ins. Co.*, 27 P.3d 594

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(Utah Ct. App. 2001), in which the Court held that an anti-indemnification statute did not invalidate insurance-procurement agreements because a promise by a subcontractor to purchase insurance for a general contractor does not transform the subcontractor into an indemnitor, but simply shifts the cost of obtaining insurance to the subcontractor. The tenor of the Court's opinion in *Lusi* suggests that § 6-34-1 does not apply to insurance policies or insurance-procurement provisions even though the subcontractor's insurer may be required to indemnify the general contractor for its own negligence.

Lusi is a textbook example of the Court's laudable respect for legislative prerogatives and fidelity to the plain meaning doctrine of statutory interpretation. Still, the moral hazard rationale seems to apply with equal force to insurance procurement clauses whereby the general contractor is named as an additional insured on the subcontractor's liability policy.²⁴ The subcontractor has a continuing relationship with its insurer, and the insurer typically maintains a rating system based on loss experience.²⁵ If the subcontractor has a relatively high frequency of claims and losses, deterrent or punitive measures can include anything from higher future premiums to policy non-renewal. An insurer may also reduce premiums if the subcontractor showcases a sterling loss record and takes overt steps to reduce the risk of loss. In sharp contrast, the general contractor purchases additional insured protection from the subcontractor at a one-time bargained-for price, is insured under the policy for a single experience (the construction project), has no ongoing relationship with the insurer, pays no premium or deductible under the policy, and is unaffected by premium adjustments. Here, the major economic catalyst which might otherwise propel human action beyond the narrow confines of self-interest is severely attenuated, if not lacking altogether. If a motivation to exercise reasonable care exists in such an environment, it is because of altruistic or other business-oriented considerations, and not the product of the tort liability and insurance system.

Because the anti-indemnity statute does not affect the enforceability of insurance procurement provisions, and appears to render insurance policies wholly exempt

Continued on page 30



Among the presenters at the Rhode Island Bar Association's first *Introduction to Practice* seminar of 2010 were: Brian Adae, Lawyers Helping Lawyers Committee; Stephen J. Angell, Insurance Committee; Victoria M. Almeida, Bar President; and David D. Curtin, Office of Disciplinary Counsel.

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March 11 <i>Thursday</i>	Avoiding the Ethical Minefield of Online Social Networking and Marketing – Do You Know Who Your Friends Are? Cosponsored by Suffolk University School of Law Simulcast at RI Law Center, Providence 4:00 p.m. – 6:30 p.m., 2.5 ethics credits
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All That Jazz and Trial Law Too



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Identifying a logical theory or defense theme and then improvising during the give and take of trial, while remaining true to the original theme, has much in common with what good jazz musicians do.

Identifying a logical theory or defense theme and then improvising during the give and take of trial, while remaining true to the original theme, has much in common with what good jazz musicians do. And, when done right, both are startlingly beautiful, creative, and memorable.

I recall sharing this analogy with Superior Court Judge Ed Clifton (also a jazz buff) who suggested what may be the best analogy of jazz and trial work, the title track from John Coltrane's 1961 classic album, *My Favorite Things*, a rendition from Rodgers & Hammerstein's Broadway play and film, *The Sound of Music*. In Coltrane's version, the well-known tune's melody is heard numerous times with soloists McCoy Tyner (piano) and Coltrane (tenor saxophone) taking extended, complex solos, logically grounded in the original piece's melody, rhythm, and chord structure. Attentive listeners can hear Tyner, and especially Coltrane, wrestling with the tune's melody and other component parts. Try rolling it around in your head for awhile, "Raindrops on roses and whiskers on kittens, bright copper kettles and warm woolen mittens..." They never let the central theme go, as they take turns soloing and improvising on it for almost 14 minutes. Their collaboration results in a creative tension that is unforgettably resolved. At the tune's conclusion, "...when the dog bites, when the bee stings, when I'm feeling sad, I simply remember my favorite things and then I don't feel so bad!" Tyner and Coltrane remain true to the original theme.

In the documentary, *The World According to John Coltrane*, narrator Ed Wheeler remarks, "In 1960, Coltrane left Miles [Davis] and formed his own quartet to further explore modal playing, freer directions, and a growing Indian influence. They transformed *My Favorite Things*, the cheerful populist song from *The Sound of Music*, into a hypnotic Eastern Dervish dance. The recording was a hit and became Coltrane's most requested tune and a bridge to broad public acceptance." That public acceptance suggests, among other things, the power of staying true to a theme while bringing the full force of the artist's creative improvisatory talent to bear in making a memorable work of art. In like fashion, the trial lawyer's instruments (argument, cross examination, *voir dire*, etc.) should advance and elaborate on a logical case theory

or defense theme, all while improvising during the ebb and flow of trial, thereby presenting a powerful and memorable story consistent with innocence.

The analogy of trial lawyer and jazz musician is probably appealing to most of us. Both are often perceived as soloists, performing for an audience, without a net, practicing their craft, consequences be damned, as long as it advances the cause of the client and the music, respectively. Less sexy, but perhaps more valuable, is the notion of what can be learned from listening to jazz and how that can help lawyers interact more productively with clients.

In one of his *Jazz Times* magazine columns, long-time jazz critic Nat Hentoff addressed some recent work in the medical field aimed at helping improve doctors' listening skills. Brought to Hentoff's attention by his doctor son-in-law, the work is based on the increasingly well understood notion the doctor/patient relationship is more than just the sum of its parts. Rather than the simple giving and receiving of information, the doctor who engages in active listening with her/his patients is more productive, getting more and better quality information from patients while gaining their trust and cooperation. How does one acquire these active listening skills? Citing pianist Bill Evans' 1961 masterwork, *Waltz For Debby*, as a prime example, Dr. Paul Haidet, as related by Hentoff, suggests how listening to jazz can help:

In an article, *Building a History Rather Than Taking One (Archives of Internal Medicine, May 24, 2003)*, Haidet tells doctors how to improvise collectively, to develop "the ability of the physician not only to observe the patient during the medical interview, but himself/herself as well. This ability to observe one's words and actions applies directly to questions asked during the development of the patient's narrative;"...a contrast to doctors' "narrowly constructed yes/no questions." Referring to *Waltz for Debby*, Dr. Haidet told the doctors and medical students at Mt. Sinai, "Listen to the first 30 seconds of this track... [E]ven on something as straightforward as the statement of the melody, Evans and (bassist Scott) LaFaro compress and stretch time – in perfect unison! How did they do that?"



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By being able to hear inside one another. "Also," Haidet continued during his seminar, "listen to what Paul Motian is doing on drums. LaFaro is not playing the usual thunk, thunk, thunk that you might expect from the bass player. Instead, he is running up into the high registers of the bass to 'play' with Evans. Then, when Motian goes off to rejoice with Evans, the drummer ever so subtly picks up the timekeeping function and accents his playing with the brushes in such a way that the song never loses its pulse, its 'spark.'" Dr. Haidet concluded: "These three define what it means to listen and play, simultaneously, harmoniously."¹

The notion of building a history can also be applied in a legal setting. When I read Hentoff's and Haidet's cited and other work on the subject, I was struck by the similarities between the medical and legal applications. For example, I suggest the following might be useful interactive listening tools to better and more effectively elicit information and gain trust:

"Help me understand..."

"Can you tell me more about that?"

"Let me see if I got this right..."

"Let me think about that..."

"Help me think this thing through..."

In like fashion, Dr. Haidet suggests the following Conversational Devices, followed by examples, to do exactly the same in a doctor/patient setting.

Orientation statements

"Now I would like to talk about your other medical problems."

Paraphrasing

"OK let me make sure I have this straight..."

Reflection

Patient: "I'm worried." Physician:

"You're worried?"

Directive

"Tell me what happened next."

Request for clarification

"Help me understand what the pain felt like at that point."

Empathic statements

"That sounds like it must have been difficult."

Time management

"We only have about 1 more minute to talk. Is there anything else I should know?"

Facilitating body language

Head nods, facial expressions, hand movements, etc.

Facilitating utterances

"Uh-huh," "mm-hmm," etc.

The pleasure I have received over the years from this wonderful and uniquely American art form has recently been matched by the experiences of a small beta group of public defender attorneys I have shared the aforementioned music and ideas with, in anticipation of larger office-wide training next year. Some of them like jazz, most merely tolerate it, but all report that listening to the Evan's piece helps them understand the intricacies of active listening. All report an improvement in their ability to give and receive client information and relationships. And, most important for busy criminal defense practitioners, the length of time it takes to implement these techniques is not appreciably longer than the old fashioned way.

Try listening to jazz. Then try some of these new active listening techniques. You may never go back to the old fashioned way of doing attorney/client interviews and relationships again.

ENDNOTES:

¹ Nat Hentoff, *Final Chorus: Listening Guides for M.D.s and Us*, *Jazz Times Magazine* (August/September 2009)

² Haidet & Paterniti, *Building a History Rather Than Taking One* (*Archives of Internal Medicine*, May 24, 2003) at p. 1138. ♦

Counting to Ten Really Does Work

Deep Breaths: Slow racing thoughts and relax knotted muscles by breathing deeply and slowly. Put one hand on your stomach. Breathe in deeply counting to five, hold your breath for a count of five, breath out for a count of five and repeat ten times. Breathe in through your nose and exhale through your mouth.

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Attorney-Client Privilege

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clarify its position on attorney-client privilege, leaving attorneys and their clients to calculate the strength of attorney-client privilege against an unfriendly statutory framework. This has left many governmental bodies and their counsel to ponder the extent of the litigation exception⁴² to the general open and public meeting rule, and to ask how close to litigation a public body needs to be to qualify for that exception. Indeed, a public body can argue that any discussion with an attorney could ultimately relate to litigation. Otherwise, why seek the advice of an attorney? Because of the undeniable importance of privileged and open communication with counsel, the litigation exception's ambiguity encourages public bodies to stretch the litigation exception to include conversations only remotely related to litigation as an excuse to enter into private, executive session.

With a pending case in the Superior Court involving the extent to which the litigation exception stretches,⁴³ the Court currently has an opportunity to fully confront the litigation exception's extent. In

doing so, it must carve a line by which a public body can (and cannot) utilize the litigation exception because the Act's wording dictates a line of demarcation. The Act does not except all attorney-client discussions; it only provides an exception for conversations pertaining to litigation. The limited scope of the exception, therefore, necessarily means that some communications with counsel will fall outside that line, rendering such legal consultation a grossly inadequate, or risky, proposition.

While the extent of the litigation exception is presently before the Superior Court, it is not likely that a singular interpretation can account for the many factual scenarios that may arise in the future. The potential for further ambiguity and confusion, combined with the incentive to artificially stretch the exception, leads to the conclusion that the General Assembly must amend the current Act to identify the scope of protection the Act affords attorney-client communications. By adding an explicit exception to the general rule for open and public meetings, the General Assembly can provide for public bodies what individuals already enjoy – the ability to engage in “full and frank

communication” with counsel – or, at the very least, clarity as to the circumstances under which they may do so.⁴⁴

An exception may read “discussions involving a public body and its legal counsel wherein the public body seeks legal advice concerning a matter over which the public body has supervision, control, jurisdiction, or advisory power.” The revised Act should reinforce that no voting should occur in attorney-client executive session to help prevent from any potential abuse. Together, these measures will finally provide clear direction to public bodies and reinforce that the “attorney-client privilege serves the same salutary purposes in the public as in the private realm.”⁴⁵

Editor's Note: *The author thanks Nicholas Bernier, a second-year law student at Washington University School of Law, and Arthur Defelice, a third-year law student at Roger Williams University School of Law, for their valuable help with this article.*

ENDNOTES

1 The Open Meetings Act defines “public body” as “any department, agency, commission, committee, board, council, bureau, or authority or any subdivision thereof of state or municipal government or any library that funded at least twenty-five percent (25%) of its operational budget in the prior budget year with public funds, and shall include all authorities defined in § 42-35-1(b).” R.I. GEN. LAWS § 42-46-2(3).

2 “‘Meeting’ means the convening of a public body to discuss and/or act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power...” R.I. GEN. LAWS § 42-46-2(1).

3 Violations of the Open Meetings Act can result in serious consequences including nullification of the particular act that is the subject of the violation, serious fines, and mandatory payment of attorneys’ fees to the successful litigant. See R.I. GEN. LAWS § 42-46-8(d); *Tanner v. East Greenwich*, 880 A.2d 784, 800 (R.I. 2005).

4 *Mortgage Guar. & Title Co. v. Cunha*, 745 A.2d 156, 159 (R.I. 2000) (quoting *Metropolitan Life Insurance Co. v. Aetna Casualty & Surety Co.*, 730 A.2d 51, 60 (Conn. 1999)).

5 See *Phoenix Times Publishing Co. v. Barrington School Comm.*, Providence Superior Court, C.A. 09-4665.

6 R.I. GEN. LAWS § 42-46-1.

7 R.I. GEN. LAWS § 42-46-3.

8 A public body may hold a meeting closed to the public pursuant to § 42-46-4 for one or more of the following purposes: “(1) Any discussions of the job performance, character, or physical or mental health of a person or persons...; (2) Sessions pertaining to collective bargaining or litigation...; (3) Discussion regarding the matter of security...; (4) Any investigative proceedings...; (5) Any discussions or considerations related to the acquisi-

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tion or lease of real property for public purposes, or of the disposition of publicly held property wherein advanced public information would be detrimental to the interest of the public; (6) Any discussions related to or concerning a prospective business or industry locating in the state of Rhode Island when an open meeting would have a detrimental effect on the interest of the public; (7) A matter related to the question of the investment of public funds where the premature disclosure would adversely affect the public interest...; (8) Any executive sessions of a local school committee exclusively for the purposes: (i) of conducting student disciplinary hearings; or (ii) of reviewing other matters which relate to the privacy of students and their records...; (9) Any hearings on, or discussions of, a grievance filed pursuant to a collective bargaining agreement; or (10) Any discussion of the personal finances of a prospective donor to a library.” R.I. GEN. LAWS § 42-46-5(a).

9 R.I. GEN. LAWS § 42-46-3.

10 R.I. GEN. LAWS § 42-26-5(a)(2).

11 R.I. GEN. LAWS § 42-46-1.

12 *Callahan v. Nystedt*, 641 A.2d 58, 61 (R.I. 1994) (quoting *State v. von Bulow*, 475 A.2d 995, 1004 (R.I. 1980)).

13 *State v. Grayhurst*, 852 A.2d 491, 512 (R.I. 2004).

14 *Mortgage Guar. & Title Co., 745 A.2d at 159* (quoting *Metropolitan Life Insurance Co., 730 A.2d at 60*).

15 *Callahan v. Nystedt*, 641 A.2d at 61 (quoting *State v. von Bulow*, 475 A.2d at 1004).

16 *Id.*

17 1997 R.I. Super. Lexis 58.

18 *Id.*

19 *The Act did not apply because the no “meeting” occurred triggering the public’s right to notice and attendance. That is to say that less than a quorum of the zoning board existed during the conversation.*

22 *Id.* at 5.

21 *Fisher v. Zoning Board of the Town of Charlestown*, 723 A.2d 294 (R.I. 1999).

22 R.I. GEN. LAWS § 42-46-3.

23 R.I. GEN. LAWS § 42-46-4.

24 *State v. DiStefano*, 764 A.2d 1156, 1185 (R.I. 2000) (Bourcier, J. Dissenting) (quoting *Kaya v. Partington*, 681 A.2d 256 (R.I. 1996) (Flanders, J. Dissenting)).

25 *Id.* at 1187.

26 *Id.*

27 R.I. GEN. LAWS § 42-46-3.

28 *In re Toryn C.*, 982 A.2d 592 (R.I. 2009) (quoting *State v. LaRoche*, 925 A.2d 885, 887 (R.I. 2007)).

29 *Failure to comply with Act – attorneys’ fees, etc – harsh penalties – high risk*

30 See MASS. GEN. LAWS ch. 30A §§ 18-25 repealing MASS. GEN. LAWS ch. 30A, §§ 11A, 11A1/2 (State); MASS. GEN. LAWS ch. 34, §§ 9F, 9G (County); MASS. GEN. LAWS ch. 39, §§ 23A, 23B (Local).

31 MASS. GEN. LAWS ch. 30A §§ 18-25.

32 MASS. GEN. LAWS ch. 30A, §§ 11A, 11A1/2.

33 481 N.E.2d 1128, 1130 (Mass. 1985).

34 *Id.*

35 870 N.E.2d 33, 38 (Mass. 2007).

36 *Suffolk*, 870 N.E.2d at 45.

37 *Id.* at 44-45.

38 *Christopher J. Petrini, The Attorney-Client Privilege Between Municipalities and their Counsel in Light of Suffolk Constriction Co., Inc. v.*

Division of Capital Asset Management, 499 Mass. 444 (2007), February, 2008. < <http://www.petrini.law.com/category/publications/articles-by-christopher-j-petrini/>>: “Suffolk Construction now constitutes a separate and independent ground to enter into executive session for the purpose of giving legal advice to municipal clients.”

39 *Suffolk Constr. Co.*, 870 N.E.2d at 39.

(Emphasis added).

40 *Suffolk Constr. Co.*, 870 N.E.2d at 39 (citing *Matter of the Reorganization of Elec. Mut. Liab. Ins. Co. Ltd.* (Bermuda), 681 N.E.2d 838 (1997)).

41 Though one may argue the Massachusetts Legislature reinforced Suffolk’s silence interpreta-

tion by remaining silent.

42 “Sessions pertaining to collective bargaining or litigation, or work sessions pertaining to collective bargaining or litigation.” R.I. GEN. LAWS § 42-26-5(a)(2).

43 See e.g., *Phoenix Times Publishing Co. v. Barrington School Comm.*, Providence Superior Court, C.A. 09-4665.

44 *Mortgage Guar. & Title Co. v. Cunha*, 745 A.2d 156, 159 (R.I. 2000) (quoting *Metropolitan Life Insurance Co. v. Aetna Casualty & Surety Co.*, 730 A.2d 51, 60 (Conn. 1999)).

45 *Suffolk Constr. Co.*, 870 N.E.2d at 39. ♦

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Emerging Trends

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from its purview, parties must rely on general contract principles and the rules governing contract interpretation.²⁶ For decades, liability insurers have struggled to define the coverage available to the general contractor through the use of additional insured endorsements (policy amendments) and policy exclusions. Their objective has been to limit coverage for the additional insured/general contractor to claims of vicarious liability (i.e., those claims which are rooted in some negligent act or omission of the primary named insured/subcontractor). In reality, this practice has met with mixed results in the courts.²⁷

VI. Judicial Interpretation of Additional Insured Endorsements

Liability coverage for an additional insured general contractor depends on whether the applicable policy language is broad enough to encompass liability due to the general contractor's independent negligence or whether it expressly limits coverage only to claims of vicarious liability against the general contractor for

negligence or omissions of the named insured/subcontractor.

The Insurance Services Office (ISO) has developed a handful of standard form additional insured endorsements. Form CG 20 09 extends coverage to the general contractor "but only with respect to liability *arising out of* [the subcontractor's work] for the [general contractor] or acts or omissions of the [general contractor] in connection with their general supervision of [the subcontractor's] work." Form CG 20 10 affords coverage to the general contractor "but only with respect to liability *arising out of* [the subcontractor's] ongoing operations." Similarly, Form CG 20 33 limits coverage to the work, operations, facilities or liability of the named insured/subcontractor.

In 2004, the CG 20 10 form was re-issued, this time with significant changes. The new form provides coverage, "*but only with respect to* liability for 'bodily injury' caused in whole or in part, by [the subcontractor's] acts or omissions; or the acts or omissions of those acting on [the subcontractor's] behalf; in the performance of [the subcontractor's] ongoing operations for the [the general contractor]." Another form, CG 7482, states,

inter alia, that "the coverage afforded to the [general contractor] is limited solely to the [general contractor's] 'vicarious liability' that is a specific and direct result of [the subcontractor's] conduct." The term vicarious liability is defined in the endorsement as "liability that is imposed on the [general contractor] solely by virtue of its relationship with [the subcontractor], and not due to any act or omission of the [general contractor]."

All of these additional insured endorsements are designed to limit coverage for the general contractor to instances of vicarious liability only. However, there is an emerging judicial consensus in favor of broadly construing certain additional insured endorsements to cover the general contractor's independent negligence as well.²⁸ Insurers are, therefore, increasingly more reluctant to deny defense tenders and disclaim coverage to general contractors even where the factual allegations of the underlying complaint do not implicate the subcontractor's liability at all. Once the insurer undertakes the defense of a general contractor against claims alleging its sole negligence, the faultless subcontractor is forced to pay increased premiums and a deductible or self-insured

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retention (SIR) while its primary insurance coverage is exhausted by the general contractor.

Courts in most jurisdictions have found coverage for a general contractor's own negligence where the policy language extends coverage for liability arising out of the subcontractor's work. Historically, courts have held that the phrase, "arising out of," denotes a considerably broader and more flexible concept of causation than the concept of proximate causation in tort law.²⁹ This canon of insurance contract interpretation has prompted many courts to find coverage (or at least a duty to defend) where the underlying loss is not proximately caused by any negligence of the subcontractor, and bears only the most remote, tangential and tenuous relation to the subcontractor's work.³⁰ Although these endorsements define the parameters of coverage in terms of the *liability* – as opposed to the injury or defect – which arises from the subcontractor's work, most courts have failed to grasp that the subcontractor's liability is a prerequisite to coverage.³¹

In response to the judicial momentum in favor of coverage for general contractors' sole negligence, many insurers

scrapped the expansive arising out of language altogether and returned to the drawing board. They then re-issued endorsements such as the 2004 version of the CG 20 10 and the CG 7482 which unequivocally define the subcontractor's negligence as a condition precedent to coverage for the general contractor. On the whole, these refurbished, fault-based endorsements have fared considerably better in the courts.³² Insurers who wish to leave no trace of ambiguity for the court to exploit in favor of the additional insured³³ have combined fault-based coverage clauses with fault-based exclusions.³⁴ Courts have been constrained to deny additional insured coverage for a general contractors' sole negligence where the policy language both (1) limits such coverage to liability with respect to the subcontractor's acts, omissions or work, *and* (2) expressly excludes coverage for the "independent acts or omissions" of the general contractor.³⁵

The Rhode Island Supreme Court has had only one occasion to address the meaning and scope of an additional insured endorsement in the construction context. In *Lusi*, an employee of a subcontractor sustained personal injuries

during the course of his employment on a construction project. The employee subsequently collected workers' compensation benefits from the subcontractor's workers' compensation carrier and later filed a complaint against the general contractor alleging the general contractor negligently maintained the conditions of the job site which proximately caused his injuries. The general contractor then filed a declaratory judgment action against the subcontractor's liability insurer, claiming that it was entitled to a defense from the insurer in the plaintiff's personal injury action.

Although the Court in *Lusi* decided the case on narrower grounds in characteristic minimalist fashion,³⁶ it nonetheless addressed the broader question of whether the insurer had a duty to defend or indemnify the general contractor as an additional insured under the policy. The policy at issue afforded coverage to an additional insured "but only with respect to [the subcontractor's] operations, [the subcontractor's] 'work' or facilities owned or used by [the subcontractor]." The Court interpreted this provision so as to exclude coverage for the general contractor's own negligence:

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[E]ven if [the general contractor] was an 'additional insured' pursuant to the Peerless policy, we are unable to say that the language of the additional-insureds clause of the policy provides insurance coverage for the claim that [plaintiff] brought against [the general contractor]. The additional-insureds provision limited coverage to [the subcontractor's] 'operations,' 'work, or facilities owned or used by' [the subcontractor]. Therefore, given this limitation on the coverage, even if the Peerless insurance policy covered [the general contractor] as an additional insured, it does not appear to us that Peerless agreed to indemnify or defend [the general contractor] in connection with claims asserting [the general contractor's] own negligence.³⁷

The Court's interpretation of the additional insured provision is significant, particularly against the backdrop of the liberal "pleadings test"³⁸ which determines an insurer's duty to defend. The general contractor in *Lusi* cited the "arising out of" jurisprudence in support of its proposition that the policy should be construed so as to extend coverage for its own direct negligence. The Court concluded that the policy at issue contained no such language and was not reasonably susceptible of such a far-reaching interpretation:

The language of the policy at issue here...does not include claims 'arising out of' [the subcontractor's] operations. Rather, the policy uses the more limited language that the Peerless insurance will extend to additional insureds 'only with respect to' [the subcontractor's] operations, work or facilities that [the subcontractor] owned or used.³⁹

Lusi marks a subtle yet crucial distinction between additional insured endorsements which cover liability "arising out of" the named insured's work or operations, and those which restrict coverage to liability "with respect to" or "because of" the subcontractors' work or operations. Whereas the former phrase potentially encompasses a general contractor's independent negligence, the latter phrase plainly conditions coverage on the subcontractor's liability. *Lusi* strongly suggests that the Court would construe the revised policy endorsements (namely the CG 20 33, the newly minted CG 20 10 and the CG 7842) to exclude coverage for a general contractor's independent negligence.⁴⁰

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VII. Conclusion

Rhode Island's anti-indemnity statute protects subcontractors from having to personally pay defense costs, settlements, judgments and other losses attributable to the general contractor's negligence. It does not protect them from negotiating unwise or draconian contracts in all other respects. Driven by the concept of moral hazard, the statute aims to preserve those economic incentives which are built into the tort system and the insurance industry, and which encourage prudence and due concern for others. Although the Court has not yet squarely addressed the statute's application to the contractual transfer of risk to subcontractor insurers, a close reading of the dicta in *Lusi* indicates that the statute does not apply to insurance policies. Although moral hazard may exist when a general contractor becomes an additional insured on the subcontractor's liability policy, the anti-indemnity statute does not appear to carry the moral hazard rationale to its logical terminus.

If anything is clear from the case law, it is that the anti-indemnity statute is exceedingly narrow in scope and should not be relied on as a contract gap-filler by subcontractors or their liability insurers. Subcontractors who wish to limit their exposure must negotiate indemnity contracts which define their maximum reimbursement obligations in relation to their percentage or degree of fault. For their part, insurers should rely on fault-based additional insured endorsements which expressly exclude coverage for the independent negligence of the general contractor, and which confine coverage to claims of vicarious liability based on the subcontractor's negligent acts or omissions. Such policy language would reduce the insurer's exposure and prevent the subcontractor's policy limits from being depleted; it would also ameliorate the problem of moral hazard in the construction industry by forcing the general contractor to rely on its own insurance as primary coverage for most losses.

In the final analysis, the anti-indemnity statute is not the promising panacea subcontractors and their insurers have been pining away for. They will need to look to the subcontract and insurance policy for solutions, not the courts. The heavy lifting in this area is perhaps better left to the draftsman in the first instance, not the appellate attorney.

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ENDNOTES

1 Samir B. Mehta, ADDITIONAL INSURED STATUS IN CONSTRUCTION CONTRACTS AND MORAL HAZARD, 3 Conn. Ins. L.J. 169, 179 (1996).

2 *Id.*

3 There is a third category of contractual indemnity agreements known as the "intermediate form indemnity" which obligates the indemnitor to reimburse the indemnitee for all liability except where the indemnitee is wholly at fault. *See id.*

4 DiLonardo v. Gilbane Building Co., 114 R.I. 469 (1975).

5 By its plain terms, the statute only applies to indemnity contracts relative to certain types of construction work. The statute is in derogation of the common law, and has been narrowly construed. *See Vaccaro v. E.W. Burman, Inc.*, 484 A.2d 880 (R.I. 1984). Outside the construction context, the Court recognizes the validity and enforceability of full indemnification contracts. *See Rhode Island Hospital Trust National Bank v. Dudley Service Corp.*, 605 A.2d 1325, 1327 (R.I. 1992). However, indemnity provisions in all contracts are strictly construed against the indemnitee (party enforcing a right of indemnification). *See Sansone v. Morton Machine Works, Inc.*, 957 A.2d 386, 393 (R.I. 2008).

6 R.I. Gen. Laws § 6-34-1.

7 Such contracts are still valid and enforceable to the extent that they provide indemnification to the general contractor in a manner commensurate with the subcontractor's degree or percentage of fault. *See Gormly v. I. Lazar & Sons*, 926 F.2d 47 (1st Cir. 1991); *Cosimini v. Atkinson-Kiewit Joint Venture*, 877 F. Supp. 68 (D.R.I. 1995) ("In the event that the contract calls for a subcontractor to indemnify the general contractor for its own negligence and for that of the general contractor, the former obligation is enforceable, while the latter obligation is unenforceable").

8 *See Mehta, supra* note 1, at 180.

9 *Id.* at 182.

10 *See id.*

11 *See id.*

12 *Jankele v. Texas Co.*, 54 P.2d 425, 427 (Utah 1936).

13 The exclusive-remedy provision states in full: The right to compensation for an injury under chapters 29—38 of this title, and the remedy therefore granted by those chapters, shall be in lieu of all rights and remedies as to that injury now existing, either at common law or otherwise against an employer, or its directors, officers, agents or employees. R.I. Gen. Laws § 28-29-20.

The Rhode Island Supreme Court has held, and reaffirmed on several occasions, that "the exclusivity provisions of § 28-29-20 extinguish all other recovery rights based upon the wrongful conduct of the injured employee's employer, as well as the employer's employees, officers, directors, or agents." *Boucher v. McGovern*, 639 A.2d 1369, 1375 (R.I. 1994); see also *DiQuinzio v. Panciera Lease Co.*, 641 A.2d 50 (R.I. 1994); *Cacchillo v. H. Leach Machinery Co.*, 111 R.I. 593 (1973).

14 *See Vaccaro v. E. W. Burman, Inc.*, 484 A.2d 880 (R.I. 1984).

15 The courts have held that the exclusivity provi-



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sions of the Workers' Compensation Act do not preclude an action against the employer for contractual indemnification because such a claim is not based upon the employee's injury but upon an express contractual obligation between the employer and the third party. See, e.g., *Cosentino v. A.F. Lusi Construction Co.*, 485 A.2d 105 (R.I. 1984); *Ferguson v. Marshall Contractors, Inc.*, 707 A.2d 660 (R.I. 1998); *Fish v. Burns Brothers Donut Shop, Inc.*, 617 A.2d 874 (R.I. 1992); *Cosimini v. Atkinson-Kiewit Joint Venture*, 877 F. Supp. 68 (D.R.I. 1995); *A & B Construction, Inc. v. Atlas Roofing & Skylight Co.*, 98 F.3d 1333 (1st Cir. 1996).

16 *Rodrigues v. DePasquale Building & Realty Co.*, 926 A.2d 616 (R.I. 2007)

17 For example, in *Manning v. New England Power Co.*, 2004 R.I. Super. LEXIS 216 (Dec. 22, 2004), the Superior Court held that a subcontractor was obligated to pay the general contractor's attorney's fees and all other costs incurred in the defense of an underlying negligence action in which the general contractor was exonerated of any negligence. Because the indemnity contract at issue did not make the subcontractor's negligence a prerequisite to the contractual duty to defend the general contractor in the underlying suit, and the general contractor was not negligent, the court concluded that § 6-34-1 did not bar enforcement of the subcontract as written.

18 **Comment:** FROM THE BOTTOM OF THE FOOD CHAIN LOOKING UP: SUBCONTRACTORS ARE FINDING THAT ADDITIONAL INSURED ENDORSEMENTS ARE GIVING THEM MUCH MORE THAN THEY BARGAINED FOR, 23 St. Louis U. Pub. L. Rev. 697, 706-707 (2004).

19 See *id.* at 702.

20 See *id.*

21 See *id.* at 705.

22 See *id.* at 706.

23 § 6-34-1(a) specifically states that "this section shall not affect the validity of any insurance contract," and that § 6-34-1(b) states that "nothing in this section shall prohibit any person from purchasing insurance for his or her own protection."

24 *Mehta*, *supra* note 1, at 181.

25 **Comment:** FROM THE BOTTOM OF THE FOOD CHAIN LOOKING UP: SUBCONTRACTORS ARE FINDING THAT ADDITIONAL INSURED ENDORSEMENTS ARE GIVING THEM MUCH MORE THAN THEY BARGAINED FOR, 23 St. Louis U. Pub. L. Rev. 697, 718 (2004).

26 Courts will "view the agreement in its entirety and give the contractual language its plain, ordinary and usual meaning." *Lajayi v. Fafiyebi*, 860 A.2d 680 (R.I. 2004). When there is an "unambiguous contract and no proof of duress of the like, the terms of the contract are to be applied as written." *Gorman v. Gorman*, 883 A.2d 732 (R.I. 2005). "Parties are bound by the plain terms of their contract." *Capital Properties, Inc. v. State of Rhode Island*, 749 A.2d 1069 (R.I. 1999). It is a "basic tenet of contract law that the contracting parties can make as good a deal or as bad a deal as they see fit." *Durfee v. Ocean State Steel, Inc.* 636 A.2d 698 (R.I. 1994).

27 See David M. McLain and Alex M. Nelson, ADDITIONAL INSURED AND INSURED CONTRACT

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LIABILITY INSURANCE COVERAGE FOR GENERAL CONTRACTORS, 36 Colo. Law. 45, 48 (Nov. 2007).
 28 *Comment: FROM THE BOTTOM OF THE FOOD CHAIN LOOKING UP: SUBCONTRACTORS ARE FINDING THAT ADDITIONAL INSURED ENDORSEMENTS ARE GIVING THEM MUCH MORE THAN THEY BARGAINED FOR*, 23 St. Louis U. Pub. L. Rev. 697, 711 (2004).
 29 See, e.g., *Merchants Insurance Company of New Hampshire, Inc. v. United States Fidelity &*

Guaranty Co., 143 F.3d 5, 9-10 (1st Cir. 1998); *National Union Fire Insurance Co. v. Lumbermens Mutual Casualty Co.*, 385 F.3d 47, 52 (1st Cir. 2004).
 30 A minority of jurisdictions have held that no coverage exists for a general contractor where the subcontractor did not proximately cause the plaintiff's injury by some act or omission connected to its own work of operations. See *Garcia v. Federal Ins. Co.*, 969 So. 2d 288, 294 (Fl. 2007); G.E.

Tignall & Co., Inc. v. Reliance Nat. Ins. Co., 102 F. Supp. 2d 300, 306-7 (D. Md. 2000); *Baltimore Gas & Electric v. Commercial Union Ins. Co.*, 113 Md. App. 540, 688 A.2d 496, 503 (Md. App. 1997); *St. Paul Fire & Marine Ins. Co. v. Dynasty Surplus Lines Ins. Co.*, 101 Cal. App. 4th 1038, 1059 (2002); *Granite Construction v. Bituminous Insurance Co.*, 832 S.W.2d 427, 430 (Tex. App. 1992); *Consolidation Coal Co. v. Liberty Mutual Ins. Co.*, 406 F. Supp. 1292 (W.D.Pa. 1976).
 31 See *St. Paul Fire & Marine Ins. v. Hanover Ins.*, 187 F. Supp. 2d 584, n. 8, (E.D.N.C. 2000) (reasoning that an additional insured endorsement "defines the coverage available to additional insureds in terms of liability, not in terms of the bodily injury at issue. While [a plaintiff's] injury may have arisen from the subcontractor's work, it does not follow that the liability imposed or sought to be imposed upon the general contractor likewise arose from the subcontractor's work"); *Consolidation Coal Co. v. Liberty Mutual Ins. Co.*, 406 F. Supp. 1292, 1300 (W.D.Pa. 1976) (holding that the obvious purpose of additional insured endorsements is to "limit coverage to those instances where the acts or omission - negligence - of [the named insured] leads to [the additional insured's] liability").
 32 See *Lafayette College v. Selective Ins. Co.*, 2007 U.S. Dist. LEXIS 88001, *7 (E.D.Pa. Nov. 29, 2007); *Liberty Mutual Ins. Co. v. Capeletti Bros.*, 699 So. 2d 736, 738 (Fl. App. 1997); *Sprouse v. Kall*, 2004 - Ohio - 353, 3-9, 2004 WL 170451 (Ohio Ct. App. Jan. 29, 2004) (holding that coverage for additional insured "but only with respect to [its] liability because of acts or omissions of an insured" simply covers the additional insured "from vicarious liability for the acts or omissions of the primary insured"); *Vulcan Materials Co. v. Casualty Ins. Co.*, 723 F. Supp. 1263, 1264-65 (N.D.Ill. 1989) (holding that coverage for additional insured "but only with respect to his or her liability because of acts or omissions of an insured" is "plainly a vicarious liability provision and nothing more"); *Casualty Ins. Co. v. Northbrook Prop. & Cas. Ins. Co.*, 501 N.E.2d 812, 150 Ill. App. 3d 472, 476 (Ill. App. Dist. 1986) (citing with approval the Consolidation Coal decision); *Transp. Ins. Co. v. George E. Failing Co.*, 691 S.W.2d 71, 73 (Tex. App. 1985) (interpreting phrase "but only with respect to his or its liability because of acts or omissions of an insured" as providing coverage only for additional insured's liability for negligence of named insured); *Merchants Insurance Company of New Hampshire, Inc. v. United States Fidelity & Guaranty Co.*, 143 F.3d 5, 10 (1st Cir. 1998) (stating that an insurer may effectively limit coverage to instances of vicarious liability if the policy endorsement contains the phrase "but only with respect to acts or omissions of the named insured").
 33 An ambiguity exists when the policy language is "reasonably and clearly susceptible of more than one interpretation." *Rubery v. Downing Corp.*, 760 A.2d 945, 947 (R.I. 2000). According to the rule of contra proferentum, ambiguous terms must be construed against the insurer who drafted the policy. See *Amica Mutual Ins. Co. v. Streicker*, 583 A.2d 550 (R.I. 1990).
 34 Under the "pleadings test," an insurer is relieved

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of its obligation to defend and indemnify an insured if the facts alleged in the plaintiff's complaint fail to bring the case within the terms of coverage. See *Aetna Casualty & Surety Co. v. Wannamoisett Country Club, Inc.*, 706 A.2d 1329 (R.I. 1998); *Peerless Insurance Co. v. Viegas*, 667 A.2d 785 (R.I. 1995); *Mellow v. Medical Malpractice Joint Underwriting Ass'n of Rhode Island*, 567 A.2d 367 (R.I. 1989); *Grenga v. National Surety Corp.*, 371 A.2d 433 (R.I. 1974); *Angelone v. Union Mutual Insurance Co.*, 319 A.2d 344 (R.I. 1977). Additionally, it is the insured's burden to show that the allegations of the plaintiff's complaint fall within coverage and are not subject to exclusionary language. See *Napoletano v. Standard Fire Ins. Co.*, 232 A.2d 378, 381 (R.I. 1967).

35 See *Regent Ins. Co. v. Estes Co.*, 564 N.W. 2d 846, 848 (Iowa 1997); *American County Insurance Co. v. James McHugh Construction Co.*, 344 Ill. App. 3d 960, 801 N.E.2d 1031 (Ill. App. Dist. 1 2003); *Edwards v. Travelers Indemnity Co.*, 75 Fed. Appx. 929, 932 (5th Cir. 2003); *National Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. R. Olson Construction Contractors, Inc.*, 329 Ill. App. 3d 228, 769 N.E.2d 977 (Ill. App. Dist. 2 2002); *St. Paul Fire & Marine Ins. v. Hanover Ins.*, 187 F. Supp. 2d 584, 590 (E.D.N.C. 2000); *Buckeye Union Ins. Co. v. Zavarella Bros. Construction Co.*, 699 N.E.2d 127, 121 Ohio App. 3d 147, (Ohio Ct. App. 1997).

36 The Court ultimately held that the general contractor did not qualify as an additional insured because the policy conditioned such status on an underlying "written contract or agreement" with the named insured. Because the language of the subcontract did not contain an explicit "additional insured" requirement, the condition precedent to the availability of coverage was not satisfied and the insurer had no duty to defend the general contractor.

37 *Lusi*, 847 A.2d at 264.

38 An insurer's duty to defend is determined solely by reference to the allegations contained within the plaintiff's complaint. See *Allstate Insurance Co. v. Russo*, 641 A.2d 1304, 1306-07 (R.I. 1994); *Employers' Fire Ins. Co. v. Beals*, 240 A.2d 397, 402 (R.I. 1968). Under the so-called "pleadings test," the duty to defend is triggered when the complaint recites facts which bring the injury or loss alleged within the risk coverage afforded by the policy, regardless of whether the plaintiff will ultimately prevail on the merits of the case. See, e.g., *Sanzi v. Shetty*, 864 A.2d 614, 618 (R.I. 2005); *Progressive Casualty Ins. Co. v. Narragansett Auto Sales*, 764 A.2d 722, 724 (R.I. 2001); *Hingham Mutual Fire Ins. Co. v. Heroux*, 549 A.2d 265 (R.I. 1988); *Flori v. Allstate Insurance Co.*, 388 A.2d 25 (R.I. 1978); *Employers' Fire Ins. Co. v. Beals*, 240 A.2d 397, 402 (R.I. 1968).

39 *Lusi*, 847 A.2d at 264.

40 See *MacArthur v. O'Connor Corporation*, 2009 U.S. Dist. LEXIS 60355 *10-11 (D.R.I. July 15, 2009) (interpreting additional insured endorsement as limiting coverage to claims of vicarious liability and citing *Lusi* as supporting authority).

❖

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In Memoriam

John D. Archetto, Esq.

John D. Archetto, of Smith Ave., Greenville, passed away Friday, January 22, 2010. He leaves Lucille M. Kilcline. Born in Cranston, he was the son of the late John and Mary D'Amore Archetto.

John was associated with the firm of Cutliffe, Glavin and Archetto before retiring in 2000, and he was a former Assistant Attorney General under Richard J. Israel. He served on many charitable organizations notably as President of the North Providence Lions, and then as Deputy District Governor of the RI Lions. An avid golfer, John was past president of the Lincoln Golf Course.

He was the brother of Irene Wolanski of Coventry and Nancy Adamo of North Providence.

August Charles Van Couyghen, Esq.

August Charles Van Couyghen, 85, passed away on January 16, 2010. He was the beloved husband of the late Rosalind Burns Van Couyghen.

After graduating from East Providence High School in 1942, he enlisted in the U.S. Navy where he served as a naval fighter pilot. in the F4F Wildcat. He earned a Bachelor's degree in Business with a major in accounting at the University of Rhode Island where he competed in intercollegiate tennis and was a member of URI's, 1948 Yankee Conference Championship team. He earned his Juris Doctorate at Boston College Law School and worked as an attorney for the I.R.S. in the estate and gift tax division before entering the private practice in 1952. He was the founder of the law firm Van Couyghen and Lally. He was vigilant about helping those in need and always did a generous amount of pro bono work. His many interests included fly fishing, boating and playing the piccolo. He loved Narragansett Bay and the ocean. He was active in the Knights of Columbus, the Lions Club, and the Friendly Sons of St. Patrick and was an original trustee of the U.R.I. Foundation.

He leaves a son, Brian Van Couyghen and his wife Christine Moore, three daughters, Renee and Alison Van Couyghen and Jean Potter and her husband Franco, all of Narragansett, and his brother Pedro Van Couyghen of Barrington.

Harry Roll, Esq.

Harry Roll, 56, the beloved husband of Patricia Meehan Roll, Ed.D. for 36 years and 1 day, passed away on January 27, 2010.

Born in Brooklyn, NY, to the late Sally Siederer and Max Elias Roll, Mr. Roll leaves a son, Gregory Meehan Roll, a senior at Roanoke College.

Mr. Roll was a graduate of Rhode Island College, Northeastern University, and Suffolk University Law School. He worked as a social worker with the Rhode Island Department of Children Youth and Families and was a hearing officer with the Rhode Island Department of Motor Vehicles before becoming a practicing attorney in 1984, establishing a solo practice in 1991. Mr. Roll was a member of the Rhode Island, Massachusetts, and the American Bar Associations.

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

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I considered Florida, as do most people, a Caribbean island and Costa Rica. I came, I saw and I did not conquer, but did decide to own a piece of paradise, in Guanacaste, Costa Rica. The land is physically beautiful, the culture unique and the weather perfect, every day. There is something here for everyone's interests. Boating, beaching, yoga and meditation, tennis, golf, scuba diving, horseback riding, hiking, birding, relaxing, fine dining, the list is endless. I met Michael Simons, the top realtor in Costa Rica, and he helped to make this dream come true. An investment for your retirement years awaits you and is affordable. Come on down and see for yourselves.

Feel free to call me with any questions.
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