

Rhode Island Bar Journal

Rhode Island Bar Association Volume 64. Number 3. November/December 2015

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on Experts**

**Eyes in the Skies:
Regulating Drones**

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MIANTONOMI TOWER STAIRCASE, NEWPORT, RI

Miantonomi Hill and Memorial Park are named after a Native American Narragansett Tribe's Sachem and served as Miantonomi's seat of power until its purchase by colonists in 1637. Initially used as a lookout and a beacon, during the Revolutionary War, fortifications were built on the Hill. In 1921, the City of Newport received the property from the local Stokes family, and in 1929, the Park Commission built a stone tower as a World War I memorial. The Park's 30 acres became part of the Aquidneck Land Trust through an easement in 2005.

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

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Changes in How We Practice: Limited Scope Representation is Here



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

If you've been reading any law-related publications, you know changes in the legal profession are common themes, among them, the burgeoning number of unrepresented litigants in the courts. These litigants include those who cannot afford a lawyer and do not qualify for legal aid or who find that legal assistance programs are overstretched due to decreases in budget or personnel. Increasingly in the last decade, they also include the middle-class and small business owners who are without sufficient resources to pay for traditional full-scope legal services. Many who are left to go it alone do it in cases involving life-altering situations like divorce, child custody and housing.

The gap between the need for legal assistance and the availability of legal services is felt across the nation and in Rhode Island. Spend just one day at the Garrahy Complex and you will see the challenges *pro se* litigants pose to our

judges and clerks, fellow litigants and their counsel. One tool for addressing the growing unrepresented population is Limited Scope Representation, sometimes known as unbundling. This is permitted by Rhode Island Rule of Professional Conduct 1.2(c), but, until recently, has received very little attention.

That changed this past year when the Rhode Island Supreme Court issued an opinion on ghostwriting as a form of Limited Scope Representation and set forth guidelines for that practice. *FIA Card Services, N.A. v. Pichette*, 116 A.3d 770 (RI 2015). In this opinion, the Court also noted the lack of current parameters for Limited Scope Representation and invited comments from stakeholders throughout the profession.

As reported in my last President's Message, our Bar Association has formed an ad hoc committee to develop recommendations for the Court and hopes to play an important role in the rule-making process on Limited Scope Representation.

So what is Limited Scope Representation anyway? Put simply, it is a method of legal representation where the attorney and client agree to limit the scope of that attorney's involvement in a legal proceeding, leaving responsibility for the

other aspects of the case to the client. In some ways, this is not a new concept. Business lawyers routinely provide clients with discrete legal services such as reviewing contracts or providing tax advice. Legal aid and volunteer attorneys often assist on one aspect of a case. And, anyone who has provided legal advice at an initial consultation that never went any further has provided a form of unbundled services.

What is different now is that Limited Scope Representation is expanding into the courtroom where arguably affordable and competent representation is most needed, but where the playing field is not well defined and the potential for controversy is greatest. When is limited representation in the litigation context reasonable? How is the engagement to be documented? What must lawyers disclose, when and to whom? And how do lawyers enter and, more importantly, exit a case?

Our Bar Association believes having clear guidelines to assist our members, the courts and the public are key to creating a framework where Limited Scope Representation can be a win-win-win. Litigants win by having some representation, at a price they can afford, versus doing it all themselves. For lawyers, there are potential new business opportunities, as many clients attracted to Limited Scope Representation would otherwise not use an attorney at all. Limited engagements may create a revenue stream along with opportunities for new relationships which could translate to full scope representation in future cases or referrals. This practice may also reduce receivables and limit lawyers' financial risk. And, as found in many states, including our New England neighbors, the judicial system wins. Limited Scope Representation can result in better educated clients and more realistic litigants, better pleadings and reduced frivolous filings, and a smoother, more predictable litigation process.

For sure, there are difficulties to the practice of Limited Scope Representation. Without good communications, the lines between an attorney's responsibility and the client's can be blurred. Litigants who use lawyers only for drafting may not be prepared to present in court and, without attorney oversight, defenses could be missed or complex issues poorly presented. Limited Scope

**Limited Scope Representation
is expanding into the courtroom
where arguably affordable and
competent representation is most
needed, but where the playing
field is not well defined and
the potential for controversy
is greatest.**

Representation also challenges the legal profession's long-rooted practices and beliefs that our ethical duty requires an all-inclusive approach, and that the lawyer is in for all purposes. Some believe attorneys and the courts devalue the services of an attorney when they permit cases to be handled piecemeal, or the system will become so user-friendly attorney services will not be needed. And others think judges, who are lawyers after all and steeped in precedent, will not embrace limited representation of clients in litigation and exiting from cases.

I don't discount these sentiments at all and agree there are challenges to this way of practicing. But, from all indications, Limited Scope Representation is an economic necessity and reality, and it is here.

In my view, this is not the time to debate whether limited attorney engagements should be permitted – they are. Now is the time to develop good, practical and clear rules and effective training and education at all levels.

Limited Scope Representation will not be for everyone – for every attorney, every type of case or every client. But there are many instances where the ability to obtain *some* legal advice is better for all parties involved. The Court's invitation to comment on Limited Scope Representation is a unique opportunity for our Bar Association to promote the interests of our members by helping to develop the regulatory framework for how to practice in this way. As your Bar Association, it is also our responsibility. ♦

RHODE ISLAND BAR JOURNAL

Editorial Statement

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

Article Selection Criteria

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

Direct inquiries and send articles and author's photographs for publication consideration to:
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Are you looking for answers to practice-related questions?

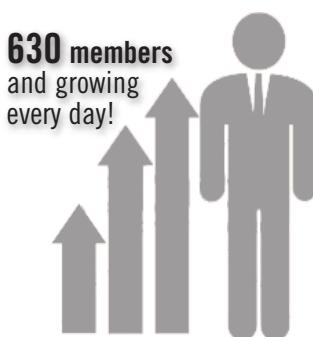
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According to Rhode Island Bar Member and Johnston-based Attorney Angelo A. Mosca III: *In my opinion, the Bar's List Serve is one of the best things to come to the Bar in recent years.*

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

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

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



Becoming Expert On Experts: A New Attorney Primer



Travis J. McDermott, Esq.
Partridge Snow & Hahn
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Once you become familiar with the role experts play in litigation, working with experts can be one of the most interesting aspects of litigation practice.

Expert testimony can be crucial in litigation and often shapes the outcome of the case. This is true not only of the small subset of cases that go to trial; well-prepared and knowledgeable expert witnesses often drive settlement discussions.

For a new attorney, dealing with experts can be daunting. Identifying when to use an expert, searching for and retaining experts, and making initial inquiries are all difficult for junior attorneys, who likely have never dealt with experts before receiving the assignment to find one. Tasks like assisting in preparing an expert report or affidavit can only be done well with experience, but some simple guidelines can put you in position to succeed. There are numerous pitfalls to be wary of: maintaining privilege; providing information; challenging assumptions; and ensuring stated opinions are properly supported, for starters. Dealing with opposing experts is particularly challenging for a young attorney, as experts are not only knowledgeable in their field, but also generally experienced witnesses.

Remember: experts can be an exceptional resource. Once you become familiar with the role experts play in litigation, working with experts can be one of the most interesting aspects of litigation practice.

Retaining Experts

Generally, an expert should be retained when a finder of fact will not possess the requisite skill or knowledge to understand a subject.¹ This is known as the **Daubert** test, and determines whether a witness can clear two hurdles to his or her testimony's admission: 1) he or she has applicable expertise; and 2) he or she will impart reliable and relevant expert testimony to assist the trier of fact. Under Rhode Island law, the party proffering such testimony must establish, by a preponderance of the evidence, that its expert can meet the two requirements. The Rhode Island Supreme Court "has recognized the applicability of **Daubert** to situations in which scientific testimony is proposed in Rhode Island state courts (that is, where Rule 702 of the Rhode Island Rules of Evidence comes into play)."²

This decision to retain an expert is case-

specific, but, as a rule of thumb, you should engage an expert if advanced education or specialized experience will help the judge or jury understand the case. An economist can explain a damages valuation model. A fate and transport expert can explain how waste reached a parcel of property. The key question regarding experts is whether an expert will help the trier of fact understand the issues. If so, you should strongly consider retaining one.

A junior attorney can be tasked with identifying potential experts. This is another daunting step for some, who may be more familiar with Westlaw searches and Bluebook citations than scouring academia or industry for expertise. Fortunately, there are a great number of resources to mine beyond Google. Some bar associations maintain directories of experts. Legal publications often have advertisements from expert consulting agencies. However, be careful of these. If the ad is easy for you to find, opposing counsel likely will find it as well, and may use it to demonstrate that the expert is merely a hired gun. Thompson Reuters (the publisher of Westlaw) and others provide search services for experts in a variety of fields. And never underestimate the value of simply asking another attorney. Expert referrals from a trusted attorney are well-worth seeking out.

In your search, you should be conscious of the qualities your expert should have. Most potential experts will have an impressive background, such as advanced schooling and professional experience. But you must make a broader inquiry: is this person the right fit for the case? This question of fit is more art than science, but should not be overlooked. Does she present well? Will a jury trust him? Does she seem too academic? Does some aspect of his personality or background highlight facts in the case that you want to minimize? Is she going to be difficult to work with? All these questions should be considered before retaining an expert. It is therefore critical to meet with potential experts in person.

Working with Experts

Always review and challenge the expert's opinions, and trust your instinct in the process.

If it doesn't make sense to you, it probably won't make sense to a judge or jury either. In the most extreme cases, experts can stumble right into a *Daubert* challenge because their opinions were not adequately challenged before being presented. Rhode Island law is relatively clear on the court's gatekeeping function regarding expert testimony, and the savvy practitioner will consider whether the expert's opinions risk a challenge on credibility or validity grounds.³

Because of this gatekeeping rule, the court can and will determine if the "expert's opinion... [has] 'substantial probative value' and not be speculation, mere conjecture or surmise."⁴ If the expert's opinion is not properly supported, it faces exclusion. Thus, it is far better to challenge your expert directly in your office or on a telephone call than to wait for the other side to do so in a motion *in limine* with trial looming!

Ensure you give experts as much advance notice of deadlines as possible. While associates may be all-too-familiar with scrambling to assemble work product on the eve of deadlines, experts may not. You do not want to find yourself missing a key part of your proof because

no one notified an expert of a pending deadline until it was too late.

Be clear about the exact scope of work and whether the expert has leeway to go beyond that scope. Some experts – particularly academics – tend to pursue subordinate questions that arise during their work on a case much further than they need to, down unexpected pathways, or even into opinions neither useful nor desired for the case. These side-trips lead to large and unanticipated bills and, in some cases, less effective testimony. The expert should not drive the case, even when expert testimony is key evidence.

Don't be afraid to delve into and discuss the expert's opinion at some length. While the expert brings expertise in a particular area, he or she may have little or no familiarity with legal wrangling. All too often, expert opinions are written to be *generally* persuasive, an appropriate goal. But without linking that opinion to specific elements of legal claims or defenses, the persuasive value of an expert is drastically reduced. This is one of the attorney's key roles in working with experts: the opinion should directly support or negate specific elements of claims or defenses. It's not enough for

an expert opinion to persuade someone that the expert is correct; the opinion should persuade a finder of fact that an element is established or negated.

Communications with Experts and Discovery

As in any relationship, clear communication with experts is essential. Attorneys must, however, exercise caution when communicating with experts, as those communications are not absolutely protected from discovery. As a general matter, discovery regarding expert witnesses in Rhode Island state court is governed by Superior Court Rule of Civil Procedure 26(b)(4). Under that Rule, parties may require opponents, through interrogatories, to answer the standard expert questions:

- identity of any experts expected to testify;
- the substance of the facts underlying the expert's expected testimony;
- the substance of the opinions the expert is expect to offer; and
- a summary of the grounds for each opinion to be offered.

Note that in Rhode Island, a party must *file a motion* to depose the adverse



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party's expert, or for discovery by any other means beyond the expert interrogatories, though such a motion is subject to the provisions relating to scope and to Rule 26(b)(4)(C) concerning expenses and fees. This latter restriction may require the discovering party to contribute to the costs incurred by the other party's expert in responding to discovery.

In a landmark 2006 decision, the Rhode Island Supreme Court considered whether an attorney's communications with an expert were subject to discovery.⁶ The Court held that attorney opinion work product is absolutely privileged even if communicated to and relied on by a testifying expert. However, factual or ordinary work product is discoverable, subject to qualified immunity under Rule 26(b)(3). In practice, this means a judge may review such documents *in camera* and order redactions and production as necessary. The rule of thumb is simple: be careful what potentially privileged documents you provide an expert, and always consider the risks of disclosure.

In cases where both sides retain experts, it is almost always worthwhile to discuss case-specific ground rules for expert discovery. If possible, parties

should stipulate what precisely will be protected from discovery. For the cost of the discussion with opposing counsel, a skillful attorney can avoid costly fights over any privilege issues, and the availability of expert depositions. Whether agreement can be reached or whether the general rules will apply, ground rules for communications with experts should be communicated early and often to anyone working the file, on both attorney and expert sides.

Keeping a log of communications between attorneys and experts is helpful, as are storage sites such as Dropbox or Sharefile, which allow documents to be shared easily. Having a Dropbox folder assigned to an expert also creates a log of what and when documents were shared. Technology has made this process extremely straightforward, so take advantage of that.

Preparing Your Expert for Deposition and Trial

The general rules for deposition and trial preparation of any witness apply to experts, and should be reviewed with the expert. Beyond the basics, however, many experts will benefit from a frank discus-

sion about cross-examination. Particularly for experts without significant experience testifying, it is crucial to emphasize how aggressively opposing counsel may challenge experts.

Counsel should thoroughly question their own experts on every assumption and conclusion. Even more than a fact witness, an expert may be unfamiliar with having assumptions, analysis, critical thinking, or conclusions challenged. Some experts will need practice responding to aggressive questioning. Do not wait for opposing counsel to ask the tough questions – you must put the expert in position to succeed, and that means preparing for an uncomfortable examination.

Although the expert may be knowledgeable, do not assume that knowledge will guarantee effective communication. Particularly with experts who may be decades older, young attorneys tend to let the expert to determine how best to communicate opinions. It is the attorney's responsibility to work with the expert to hone testimony that advances the client's position. If the testimony is equivocal, or undermines the client's position, it may be time to re-evaluate the merit of your case. Even testimony from the world's

Rhode Island Bar Association Public Service Legal Assistance Referral Process

Please direct inquiries to 401-421-7799 or ribar.com first.

The recent relocation of the Rhode Island Bar Association headquarters from Providence to 41 Sharpe Drive, Cranston, RI, 02920 prompted us to remind the Rhode Island Courts, legal community, and social service agencies of our standard, public service programs' referral processes, including: **Lawyer Referral Service; Legal Information & Referral Service for the Elderly; Volunteer Lawyer Program; and US Armed Forces Legal Services Project.** To ensure individuals receive the most efficient and timely attention when requesting legal assistance provided through the Rhode Island Bar Association's public service programs, please direct them to first telephone **401-421-7799**. Or, they may email their request by accessing the Bar Association's website at **ribar.com**. Once on the Bar's website, click on the FOR THE PUBLIC drop down, and then click on the sub-menu category, Finding and Choosing a Lawyer. This page provides email addresses and an email lawyer referral request form that is easy to fill out and send to the Bar. Upon receipt, Bar staff will contact the individual and make the proper referral.

Please do not send potential clients to the Bar offices. There are no attorneys at the Bar building who handle public service legal assistance requests. Individuals who walk into the Bar offices before making the telephone call and/or going through the Bar's website are unduly inconvenienced, often by having to arrange transportation for a matter more efficiently and easily resolved by telephone or email.

12 Good Reasons to have a VALUE Appraisal on an Antique, Collector, or Special Interest Vehicle

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leading expert in a field is ineffective if not presented in a manner the jury can understand. The obligation to advocate for the client does not end because an expert witness has more experience, but rather requires you work with the expert to communicate in an understandable and effective manner.

Conclusion

Experts can be a critical piece in the litigation toolbox and expose attorneys to knowledgeable, experienced professionals in other fields. While working with experts can be challenging for young attorneys, it is also an excellent way to develop the skills and qualities that turn young attorneys into experienced and formidable attorneys. Addressing the key issues involving experts – searching, retaining, privilege, drafting reports, and preparing testimony – will improve legal skills, potentially save the client money, and put the client in the best position to succeed.

ENDNOTES

¹ See R.I. R. Evid. 702 (a person with specialized "knowledge, skill, experience, training, or education" can apply that to "assist the trier of fact to understand the evidence...").

Rule 702 of the Rhode Island Rules of Evidence (Rule 702), provides as follows:

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of fact or opinion." R.I. R. Evid. 702.

² *Rainbeault v. Takeuchi Mfg. (U.S.), Ltd.*, 772 A.2d 1056, 1061 (R.I. 2001).

³ See *Rainbeault*, 772 A.2d at 1061 ("The critical inquiry for deciding whether to admit expert testimony is whether the expert testimony reflects scientific knowledge that can be tested by scientific experimentation and whether the expert testimony logically advances a material aspect of the plaintiff's [or defendant's] case.").

⁴ *Morra v. Harrop*, 791 A.2d 472, 477 (R.I. 2002) (quoting *Montuori v. Narragansett Elec. Co.*, 418 A.2d 5, 10 (R.I. 1980)).

⁵ See *Rodriquez v. Kennedy*, 706 A.2d 922, 924 (R.I. 1998) (precluding expert from testifying because he had not conducted the necessary tests and thus his testimony was mere speculation); see generally *DiPetrillo v. Dow Chem. Co.*, 729 A.2d 677, 688 (R.I. 1999) (recognizing that "[e]xpert evidence can be both powerful and quite misleading...").

⁶ See *Crowe Countryside Realty Associates, Co., LLC v. Novare Engineers, Inc.*, 891 A.2d 838 (R.I. 2006). ♦



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Eyes In The Skies: Regulating Drones



Guy R. Bissonnette, Esq.
Professor of Legal Studies
Johnson & Wales University,
Providence

While we cannot predict every problem or regulatory need in advance of the use of this technology, there are many issues which can be anticipated and addressed before they become legal and safety concerns.

Despite the fact that various laws/regulations refer to them as Unmanned Aerial Vehicles (UAV),¹ Unmanned Aircraft Systems (UAS)² or Unpiloted Aerial Vehicles (UAV),³ the public knows them as Drones. In spite of the recent publicity surrounding these pilotless airborne vehicles – i.e., a crash landing on the White House Lawn⁴ or interfering with commercial aircraft at heights nearing 7500 feet⁵ – there are actually only a few hobbyist vehicles now authorized to fly legally in the United States. Currently, there are no laws regulating and/or authorizing the commercial use of drones.

Is the deployment of civilian drones a good idea? Or, just because you can – doesn't mean you should.

All technologies have the potential for good and/or evil. And, of course, which it is, is often in the eye of the beholder. When drones are discussed one should never lose sight of the fact that these vehicles were created as a military technology, used against the enemies of our nation, on foreign soil, and that same technology (minus the weapon systems) is proposed for law enforcement and commercial uses, in and around the civilian populations of the United States.

When the argument for the commercial use of drones is put forward, the advocates mention such activities as: aerial photography; mapping;

crop monitoring; inspecting cell towers, bridges and other tall structures; monitoring pipelines; journalists covering disasters; and realtors showing property in the context of the neighborhood.⁶ Few would argue with these uses. But, it does not take much imagination to foresee the potential misuse of this technology by criminals, stalkers, voyeurs, private investigators, and terrorists. One question that is never asked in the current discussion: Is the use and deployment of civilian drones a good idea?

The trickle down use of technologies from the military and the National Aeronautics and Space Administration (NASA) is rarely questioned. If there is a viable civilian use for these

technologies, why wouldn't it be introduced into the civilian market place? No one has stopped to ask if it is inevitable that drone technology will be in general use. Or, rather, is it a technology (like civilian nuclear power) which should only be available under tightly controlled and restricted circumstances?

We will never know the answer to this question. Not only does no one seem willing to even entertain this issue, there appears to be an assumed inevitability about the use, regulation and availability of drones which belies this fundamental underlying inquiry. So, drones it shall be.

Existing and Proposed Federal Law/Regulations

The United States Congress has passed no federal law regulating drones. The Federal Aviation Administration (FAA) has currently authorized, via federal regulations, the operation of only one class of drones – those flown by hobbyists.⁷ Obviously, these machines are of limited range, size and capabilities, and the rules under which they are permitted to operate reflect those limitations. Hobbyist drones can weigh no more than 55 pounds; they must be flown within line of sight of the operator; are not to be flown at an altitude higher than 400 feet; and restricted from being operated within 5 miles of an airport. Hobbyist drones are also prohibited from flying over people and stadiums.⁸

Yet under only this limited authorization, we have witnessed numerous news reports over the past few months outlining the misuse and inappropriate operation of these small, simple and unsophisticated vehicles. The United States is not alone. On April 22, 2015 a drone carrying radioactive sand landed on the roof of the Japanese prime minister's office in Tokyo. In 2014 more than a dozen French nuclear plants were buzzed by drones. In March of 2015, drones were seen hovering around the Eiffel Tower and other Parisian landmarks. And, also in March of 2015, there was an attempt to use a drone to deliver tools and drugs into a British prison.⁹

The FAA recently proposed new rules to permit and regulate the operation of commercial drones.¹⁰ It has also begun authorizing the com-



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mercial use of drones on a case by case basis, issuing over 1300 waivers nationally.¹¹ Several of the operational restrictions on this new class of drones are: they must be operated in line of sight of the operator; commercial drones cannot be operated at nighttime; the commercial operator must pass a knowledge based test and receive an operator certificate; the operator must be 17 years of age or older; the vehicles cannot weigh more than 55 pounds; all commercial drones must be flown under 500 feet of altitude and at no more than 100 miles per hour; operators must stay out of airport flight paths and restricted airspace; and drones cannot be flown over people.¹² The comment period on these proposed regulations has now passed, but it may still take as long as a year or two for the FAA to issue its final proposed rules permitting commercial drones.

Rhode Island's Regulation of Drones

No Rhode Island statute regulates the operation of drones within the State of Rhode Island. This has not stopped the Rhode Island Airport Corporation (RIAC), the state equivalent of the federal FAA, from attempting to regulate drones within the boundaries of the state. Unfortunately, it appears the various efforts to ban the use of drones at recent events (e.g. the May, 2015 Volvo Ocean Race,¹³ and the June, 2014 Newport to Bermuda race¹⁴), while well-meaning, are, in all probability, without legal foundation.

In the absence of a state statute or the full implementation of a state regulation, RIAC must rely upon its general powers in any attempt to regulate drones. In essence, RIAC has cobbled together a series of general regulations and asserted authority over drones under the following guise. AR (Aeronautical Regulations) Section 3.3 provides that RIAC has the authority to regulate aircraft under Rhode Island Aeronautical Regulations. While few would contest that drones are aircraft, of a sort, nowhere therein are drones or unmanned aerial vehicles mentioned or defined. Further, AR Section 5.3.7 (and R.I. Gen. Laws § 1-4-10.1) indicated that no person may operate an aircraft within Rhode Island in a careless or reckless manner. AR Section 3.9 defines "careless and reckless," in part, as the failure to comply with FAA requirements and RIAC directives; which constitutes a misdemeanor (R.I. Gen. Laws § 1-4-19).

So, the rationale for RIAC authority goes like this: If the FAA does not regulate drones, and there is no directive issued by RIAC permitting the operation of commercial drones, then this absence of regulations means the use of a drone (by anyone other than an hobbyist) does not comply with FAA requirements (because there are no regulations explicitly permitting same) and therefore constitutes an enforceable/chargeable misdemeanor in Rhode Island by definition as the “careless and reckless operation of an aircraft.”¹⁵ Or, to rephrase the approach simply: The absence of a rule or regulation means the commercial operation of drones is illegal. Or, to put it more succinctly: No rule means the use of drones commercially is prohibited.¹⁶

While RIAC has issued warnings and bans over various events during the last two years, it appears no one has yet been charged with a misdemeanor for operating a drone. This may be because there have been no violations. However, it is more likely that RIAC hasn’t charged anyone because, if and when it does, its authority to act vis-à-vis drones, in the absence of a law or regulation, will be directly challenged in court.

Proposed State Regulations

In the last Legislative Session (2015) there were four proposed bills in the Rhode Island legislature regarding drones;

1. **2015 – H 5292. Unpiloted Aerial Vehicles.** Would amend R.I. Gen. Laws § 1-8-1 to make the State the sole legal authority over the regulation of drones, to the exclusion of municipalities.
2. **2015 – H 5293. Creating a Special Legislative Commission To Study and Review Regulation of Drones and Unmanned Aerial Vehicles.** Would create a “Special Legislative Commission” to study, review and propose new drone regulations.
3. **2015 – H 5453. The Rhode Island Unpiloted Aerial Vehicles Act of 2015.** Is a more comprehensive bill which would regulate the use, possession, and registration of drones; and in addition would also outlaw the use of drones for the invasion of privacy; and
4. **2015 – H 5454. Aerial Privacy Protection Act.** This act would amend Title 12 entitled “Civil Procedure” by adding R.I. Gen. Laws § 12-5.3-1 et seq which would prohibit the use of drones by law enforcement for surveil-

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lance without first obtaining a warrant based on probable cause.

This legislation, if passed, would at least begin to create a structure to regulate this technology. But does it go far enough?

Weaponizing Drones

As recently as July, 2015, a provocative video surfaced out of Connecticut showing a hobbyist drone discharging a handgun while in flight.¹⁷ Strangely, the use of drone as a weapons platform is not illegal, per se. There is no federal or state statute prohibiting the installation of weapons on either commercial drones or those UAVs used by law enforcement. On January 23, 2014, H7170 was introduced in the Rhode Island legislature. This bill would have prohibited the weaponization of drones. But, it was never passed by the legislature. It is difficult to imagine a reason which would justify the use of weapons, fired from drones, within the confines of the United States. This is not Afghanistan, Pakistan, Somalia, Yemen, Iraq, or Syria. In the opinion of this author, federal and state law should prohibit the placing of any type of weapon on a privately owned drone, and this restriction should also apply to drones operated by law enforcement and/or any other public entity. The penalties should be both a large fine and a substantial term of imprisonment sufficient to send the message that the nefarious and/or potentially deadly use of these vehicles is not worth the risk.

Privacy Concerns

One of the primary concerns, over the prospect of having literally thousands of privately operated drones flying overhead, is the loss of privacy. While, traditionally, none of us has much privacy when we are out and about in public, drones change that dynamic. Most of us think of our private property as being, well, private. Drones permit an interloper, in a remote location, the opportunity of filming private property, as well as the people and goings thereon. Don't like tan lines? Your captured images may now be available to the teenager down the block. And, what of those voyeurs who we already know are spying on their neighbors and flying over the private property of others attempting to gather glimpses of the intimate and private activities therein? One of the most infamous examples being the Seattle woman who discovered a drone

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hovering outside her third floor apartment window streaming video back to the voyeur operating it on the sidewalk outside.¹⁸

This begs a whole series of other questions: If there is a drone flying over your property, is that a trespass? Does the trespass give you the right of self-help to end the invasion of privacy? And, if so, what kind of self-help can be employed (the use of weapons)? What if the drone isn't destroyed (merely captured)? Do you now own it, or does it have to be returned to the owner/operator?

Another problem that can be anticipated is the ownership of the images, of both property and people, captured on the private property of another. And, can these images be used commercially without the consent of the individual whose image or property was captured? In a recent article in the *Providence Journal* (8/31/15), a homeowner complained about drones taking photographs of his property, and he subsequently discovered at least some of those images of his home on a local TV station broadcast, apparently being used by the business which captured the images as a form of advertising for a new drone business.¹⁹ Who actually owns those images? Who *should* own these images?

How should law enforcement be permitted to use drones? When covering general activities, such as major public events, protests, marches, other displays of public conduct, it seems logical that drones should and could be used effectively by law enforcement. But, what happens when the use becomes specific to a particular individual? Or, even more significantly, when the drone is used to gather evince about a specific person and/or the activities associated with a particular property? Should a warrant be required when the investigation hones in on a specific person or property? None of these issues has yet been addressed.

What drone regulations should be put in place?

The FAA has rules and regulations covering the hobbyist use of drones and proposed new regulations restricting their commercial use.²⁰ In part, these proposed commercial regulations would restrict operation of commercial drones to operators over the age of 16, and to a person

continued on page 30



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Deming Sherman was born in Providence in 1943. He attended Moses Brown School, Phillips Exeter Academy and Amherst College. He enrolled in University of Chicago Law School where he graduated in 1968, but not before witnessing portions of the Chicago riots sparked by the assassination of Dr. Martin Luther King Jr. After graduating, and as his draft deferment expired, Mr. Sherman returned to Rhode Island and joined a Military Police Unit of the National Guard.

Before going to basic training in Georgia, he took and passed the Rhode Island Bar. Mr. Sherman returned to Rhode Island in 1969 and remained with the National Guard's Military Police Unit, on a part-time basis, until 1974. Following the footsteps of his grandfather, Eliot Parkhurst, one of the first lawyers at Edwards & Angell, Mr. Sherman joined that firm in April of 1969 and was designated as the 54th attorney to join the firm since its founding in 1894. Though there have been several mergers since he joined in 1969, he has practiced at the firm (now Locke Lord) for forty-six years. We had the opportunity to speak with this longstanding veteran of the Bar. Edited excerpts from our conversation follow.

What made you decide to become a lawyer?

I could see what was happening in society in general in the 1960s, and I could see the role a lawyer could play in bringing about change.

Who would you consider your early mentor?

There were some giants of the Bar in the firm when I started. I worked most closely with a lawyer named Ed Hindle, who was a litigator. I would characterize him as my mentor in the firm.

What was the biggest obstacle that you've faced in practice?

There is a time in every case when you ask yourself, "How do I prevail here?" Also, every once in a while I've come across abusive lawyers, and I think that's always an obstacle.

To what do you attribute your success as a lawyer?

Well, two things. Number one is preparation. There's no substi-

tute. I made a vow to myself early on I would never be less prepared than my opponent. And second, credibility with the court. Once you've lost your credibility, that's a serious loss. It takes a long time to get it back.

What is the best advice you ever received?

One of the best pieces of advice was to be responsive to clients, and if a client calls you, call him back as soon as possible.

What are your most memorable moments?

I'd put them in a couple of different categories. The most significant case I tried earlier on in my career was the so-called Picillo case. It was one of seminal cases in the environmental law field for a number of years. In the 1970s, I had a client who had a very valuable American painting by Albert Bierstadt. A man named Conley spotted the painting. He said he was a student at RISD, and he wanted to borrow the painting. So he took the painting, and, of course, he didn't return it. It was purchased by a business person here in Rhode Island. So I brought a cause of action for replevin. That was the first time, and probably the last time, I ever filed a suit for replevin. The judge gave a judgment against Conley. And then, this is the high point, he said "I believe that perjury

has been committed in my presence by Mr. Conley, and I charge him." I was just dumbfounded. I was walking out of the courtroom, and this gentleman sitting in the back of the courtroom looked at me and said, "Sherman, you really know how to hurt a guy!"

Would you do it all over again?

I don't think it's possible for me to do it all over in the way I did it starting in 1969. I still love the practice of law. I still love the community involvement. I still love mentoring younger attorneys. The difficulty these days is the business pressures are very severe. So it's hard to love that. You have to tolerate it and do the best you can.

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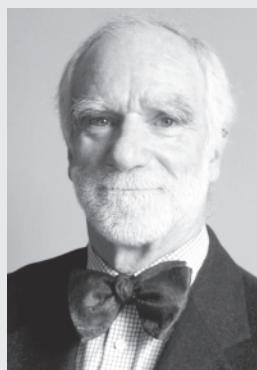
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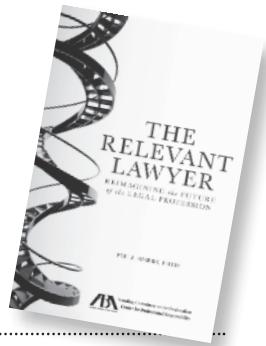
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BOOK REVIEW

The Relevant Lawyer: Reimagining the Future of the Legal Profession

Edited by Paul A. Haskins



Jerry Cohen, Esq.
Burns & Levinson, Boston

The contributors include the Rhode Island Bar Association's own Thomas W. Lyons, whose Chapter 16, "Legal Education: Learning What Lawyers Need" addresses a critical piece of any transformation effort.

In 20 contributed chapters of this book, the American Bar Association's Standing Committee on Professional Responsibility presents a vision of where the legal profession stands now in relation to its challenges, how it can fare well in a changed world, and how to make the transition. The contributors include law firm partners, in-house lawyers, solos, educators and researchers, including, among the law firm partners, the Rhode Island Bar Association's own Thomas W. Lyons, whose Chapter 16, "Legal Education: Learning What Lawyers Need" addresses a critical piece of any transformation effort. Mr. Lyons briefly limns the past and present as a lead-in to profiling the future of law schools, including diverse law school models, affordability, faculty value, and learning after law school. This chapter is a key piece among book sections (groups of chapters) investigating the need for transformation, equity for women and minorities, practice settings, regulation and development.

Other chapter authors include:

Professor Stephen Gillers (NYU Law School), renowned legal ethicist; attorney Richard Grant of Baltimore, founder of an early virtual law firm and a provider of services to modernize systems of other lawyers and law firms; present and past government attorneys such as Carolyn Lamm of Washington D.C.; Mark Smith of LexisNexis; military lawyer Benjamin Grimes; and editor/contributor Paul

A. Haskins, Senior Counsel for the ABA Standing Committee on Professional Responsibility. ABA President, William C. Hubbard, provided an introduction calling on the bar to "deliver legal services in the most accessible, effective way" and rejecting the predictions of others of the "demise of the United States legal system."

In the book, explorations of ways forward include technology and virtualization in large measure, no less so than the prominence given to these topics at last June's Rhode Island Bar Association annual meeting. But these explorations also include: revamping bar associations' leadership for greater participation of young

lawyers; consideration of the experiments in non-lawyer participation in law firm ownership (and welcoming outside investment) as in Australia, Canada and England; professionalism, including *pro bono*, and a service ethic as a survival strategy; globalization and regulation, Indie Lawyering; self navigation of law by consumers as a positive rather than a negative; and alternative legal services such as the Washington state program of "limited license legal technician (LLLT)" providers. Many of these paths to a future of survival and even prosperity may involve changes in ethical rules including Model Code of Professional Responsibility Rules 5.4 (interdisciplinary practice), 5.5(b) (multi-jurisdictional practice) and/or 7.3 (a) (direct solicitation). Some of these changes are already in progress in various U.S. and foreign jurisdictions.

The marketplace drives change, including such trends as large business clients applying to their outside law firms the same metrics and objectivity they apply internally to their own operations and other outsource service vendors, resulting in the consolidation and reduction of the number of law firms engaged and shifting some outsource functions from law firms to accounting firms. Some law firms and lawyers respond by strategically narrowing their scope of offerings to excel in certain areas and back away from the trend of past decades of all things to all clients in all national and global locations.

The book shows pressures to change the hourly rate billing model, provide better advance notice of likely charges for a service project as a whole, or even fixed pricing and greater accessibility beyond the traditional 9 to 5. Some of these market pressures conflict with the legal profession's aspirations for work-life balance and presage hard choices to be made. But the book does show silver linings of some of those hard choices, including the rewards of independent practice, in-house lawyering and even shifting to non-legal careers.

The book as a whole is a good buy for its multiple perspectives by knowledgeable authors on reality of today's legal profession and pointing out ways towards better tomorrows. ♦

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- 1) Bar members with questions about a particular area of the law.
- 2) Bar members willing to volunteer as information resources.

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

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

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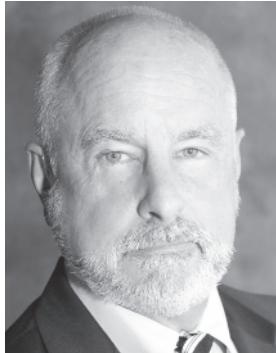
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What Makes a Great Mediator?



James E. Purcell, Esq.
Providence

The subject at hand is mediation, the attempt at resolution of a dispute consensually, facilitated by a trained mediator. We all know that, but, let's for the moment, consider those traits and skills that make a great mediator.

Setting the Tone

A great mediator will set the tone at the outset, which is usually during the initial telephone conference with counsel. The mediator will make it clear he/she insists on courtesy and respect at all times, referring to the objective of reaching settlement, not inflaming the parties. The mediator will note the day of mediation will be different. Hyper-aggression must be shelved. The mediator will let counsel know that he/she will mention this directly to their clients on the day of mediation, thereby giving counsel cover to act in a more conciliatory fashion.

Protect Counsel – No Surprises

A great mediator aims to avoid surprise and embarrassment of counsel and the parties as much as possible. The mediator understands that mediation day will not be easy for counsel. They are performing a somewhat unnatural act with the client present. The process may well, at some point, become emotional for the client. To that end, the mediator will ensure the lawyers understand the process

that will be followed, and even confidentially surface some of the questions that will be put to counsel and the client in caucus. A great mediator understands that client expectations must be managed, and gently so. In fact, a thoughtful mediator will speak directly to the clients at the outset of the mediation, mentioning that their lawyers are trying to do the right thing by them by attempting to settle. He/she will caution the clients that this is not a sign of weakness or an abandonment of their obligation of zealous representation – anything but. Today is different. Tomorrow, zealotry can again be the standard.

The true value of the mediator is to accept that there are disagreements on the vital issues and aim to get the parties to be realistic in their assessment of their position.

Written Mediation Agreement and Confirmation

A written Mediation Agreement, signed by counsel on behalf of their parties, accomplishes a number of things. Thoughtful drafting up front helps avoid misunderstandings, and, once drafted, it can be used by the mediator repeatedly with mere tweaking. The agreement addresses: process; fees; disclaimer of representation of the parties; party representative settlement authority; confidentiality; immunity from liability; written submissions; timing; ex parte communications; and logistics on the day of mediation. It also signals that the mediator is taking this seriously and will be prepared. The mediator usually sends the agreement to counsel in advance and expects it returned, signed, with the fee and any written submissions, usually at least seven days before the mediation.

Disclosures

A mediator should disclose any potential or real conflicts in writing to counsel. While not as crucial as in arbitration, given that the mediator is not a decision maker and cannot compel settlement, it recognizes that fairness and impartiality are required. Once disclosed, counsel and the parties can determine whether to proceed or select another mediator.

Ex Parte Communications

Unlike arbitration or court litigation, ex parte communications between the mediator and counsel are permissible, and, in fact, are a superb tool to get to the heart of a matter, confidentially, with one side or the other. It can give insights to the mediator to assist in the quest of resolution. Questions can include: "Are your client's expectations realistic?" Whether the mediator gets a completely candid response or not remains to be seen. Of course, such matters are kept confidential by the mediator and not disclosed to the other party.

At the Mediation

Tone is critically important. The mediator must avoid appearing friendlier to one side than the other. Small talk with old friends should be

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shelved for another day. At the onset, some mediators do not even enter the joint session room until both parties and counsel are present and ready to proceed.

At the onset, the great mediator will speak as much to the parties as to counsel. This is their day in court, so to speak, and a great mediator will lose no time establishing a rapport directly with the clients. And how does he/she do that? By requiring courtesy and respect, telling them something about him or her self to show experience in such matters, or, perhaps, sharing some personal background. By quietly, but firmly, outlining the process to be followed and then, by active, attentive, and respectful listening. A great mediator knows to achieve success, he or she must establish credibility and rapport with the clients. This is especially true if a client is relatively unsophisticated in legal matters.

While credibility and rapport can start to be built in the joint session, where it can blossom is in caucus when the parties are separated and each can be talked to privately and confidentially. A great mediator will take a little time to draw the client out by discussing their business, profession, or family. A great mediator will empathize with the client. There always are two sides to a dispute. He/she will listen, and avoid being judgmental, at least for a while. The mediator might even try to get the client to speak directly in the joint session, of course with counsel's permission. This activity can help, or sometimes backfire.

There is some disagreement amongst mediators concerning whether the mediator should be strictly facilitative (not voicing an opinion on the merits or the positions taken by the parties) or whether they should be evaluative (at some point, telling a client or lawyer that their position appears unrealistic or overly aggressive). Done correctly, some evaluation at the right time can be helpful to achieving resolution, particularly if credibility, rapport, and respect have been established. But such evaluative comments must be made confidentially in caucus, of course.

And, even purely facilitative mediators will tell the parties of the realities of such things as:

- The arduousness of court trial, length of time to trial, and cost of discovery and trial preparation;
- The resources misallocation required to go it in court, including distraction

from personal or business matters, time and energy spent, the emotional cost, etc.;

- The vagaries of court trials, whether judge or jury, including that judges and juries don't always get it right;
- That over 97% of all cases settle. Why is yours different? And, if you wait until the eve of trial to settle, the likely settlement will be depressingly similar to what you could have settled for at a much earlier mediation and before you spent [fill in the blank] in fees and costs for trial preparation.

Subject Matter Expertise

Of course, knowing the lingo, the business, and the law of the matter in dispute is helpful. It helps to establish credibility with counsel and the client. It can, however, be overemphasized when choosing a mediator. The mediator, of course, will not decide the case, nor even sometimes get to the bottom of the issues. The true value of the mediator is to accept that there are disagreements on the vital issues and aim to get the parties to be realistic in their assessment of their positions. Helping them understand the pros and cons and the merits of early settlement. That takes touch and tone, perhaps more than subject matter expertise. It can be said that litigation expertise is as valuable in establishing credibility as subject matter expertise.

Persistence

A great mediator never, ever gives up. It is remarkable how early parties can reach the frustration stage. They need the active encouragement of the mediator, and his/her enthusiasm. "It's not unusual that you think you are at impasse, but believe me, we can settle this." When all are exhausted, the great mediator is just hitting his or her stride. Enthusiasm, optimism, and sheer persistence work a remarkable number of times. And, if it doesn't, and the parties are packing their bags to leave, the great mediator will try to get them to consider reconvening, or at least plan another conference call once all have considered what has transpired and gotten a little rest.

No one leaves a good settlement particularly happy, other than the mediator. Yet, the definition of a good settlement is just that. There will always be some extent of buyer's remorse. Accordingly

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Proposed Title Standard 13.7 Open for Bar Member Review and Comment

The Rhode Island Bar Association's Title Standards and Practices Committee, chaired by Michael B. Mellion, Esq., at their meeting on September 17, 2015, voted unanimously to submit the following Proposed Title Standard 13.7 to the Rhode Island Bar Association's Executive Committee for its consideration. Bar members are invited to comment on these proposed changes, no later than December 1, 2015, by contacting Rhode Island Bar Association Executive Director Helen Desmond McDonald by postal mail: 41 Sharpe Drive, Cranston, RI 02920 or email: hmcdonald@ribar.com.

Proposed Title Standard No. 13.7

SECTION XIII CONTINUED

STANDARD NO. 13.7

COMPLIANCE WITH R.I.G.L. § 44-30-71.3

CONVEYANCES FOR WHICH NO TRANSFER TAX UNDER R.I.G.L. § 44-25-1 IS REQUIRED

Despite the lack of formal compliance with language prescribed by the Rhode Island Division of Taxation, if the stated amount of consideration in a deed is for an amount for which no real estate conveyance tax under R.I.G.L. § 44-25-1 is required, and/or a statement appears in a deed to the effect that the consideration is such that payment of the real estate conveyance tax is not required, the interest conveyed by the deed shall be deemed to be free and clear of the lien imposed by R.I.G.L. § 44-30-71.3, whether or not the deed is from a Rhode Island resident or from a non-resident.

The title conveyed by that deed shall be considered as marketable as if: a) language acceptable to the Rhode Island Division of Taxation appeared in the deed, or b) an Acknowledgement of Discharge of Lien had been recorded.

Explanation for Proposed Title Standard:

R.I.G.L. § 44-30-71.3 imposes tax withholding requirements on the buyer of real estate sold by a nonresident in order to remove the withholding lien on the real estate created by that statute. The Rhode Island Division of Taxation has adopted regulations NRW 91-01, NRW 95-02 and NRW 95-03 governing the enforcement of the statute.

Occasionally, strict adherence to the regulations leads to incongruous results, especially when real estate is conveyed without payment of monetary consideration. This standard would allow conveyancers to pass title without requiring the recording of an Acknowledgement of Discharge of Lien from the Division of Taxation when the recorded deed includes language to the effect that the consideration is such that payment of the real estate transfer tax is not required.

the great mediator will make certain that the parties know they did the right thing. "You may not believe it now, but you just did a very wise thing. You've achieved closure. You're moving on with business/life. I am here to tell you that you did the smart thing today. Never second guess yourself for settling today." The words can vary, but the point is clear. Make them feel as good as they can about what they did.

A great mediator brings peace into the room by his/her presence, comportment, gravitas, persistence and touch. Such a person is to be valued. ♦

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In the City of the Big Shoulders

American Bar Association Delegate Report – Annual Meeting 2015



Robert D. Oster, Esq.
ABA Delegate and Past
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The American Bar Association (ABA) House of Delegates Annual Meeting was held on August 3-4, 2015, in Chicago. Mayor Rahm Emanuel welcomed the assembly, noting a number of his accomplishments, including Chicago's serving as an economic hub and an academic center. He talked about guaranteeing a free community college education for high school students who maintain a B average. However, his energetic and upbeat performance did not address Chicago's crime rate and tumultuous, political climate.

The meeting took place a few weeks after the Charleston, South Carolina church shootings and the Confederate flag controversy. Often, current events tend to add a thematic backdrop to our meetings. Over my decade of service to our Bar, I have watched history in the making at the ABA, including the elections of the first African American ABA President and the first Hispanic ABA Officer. And, this meeting marked the election of the first female, African American ABA President, Paula Brown. Ms. Brown grew up in segregated Baltimore and is now a vaunted partner at Locke Lord. Her election was a historic moment and focused our attention on important issues of the day. Incidents like those in Charlestown, South Carolina, Ferguson, Missouri, and the unrest in Baltimore, Maryland this past year, all point to the need to address the racial and economic disparities in our country. Whether we like to hear it or not, bias in the criminal justice system, whether implicit or explicit, detracts from our goal of equal justice for all. Ms. Brown pointed out that 88% of our legal profession is white, and no other profession is less diverse. Our prison population is the highest in the world and gun violence is rampant.

John Levi, Executive Director of the national Legal Services Corporation, cautioned us that Congressional funding cuts are imminent for his agency, and, as officers of the court, we have a duty to assure justice for those who cannot afford it. As we know, justice for only those who can afford it is not justice at all. In fact, right now, 80% of low-income Americans do not even recognize they have a legal need. Mr. Levi implored the delegates and the communities they represent to support a strong, level-funded Legal Services Corporation.

The president of AVVO Corporation, Rutgers

University-Camden Chancellor Phoebe Haddeson, and a variety of legal service providers provided another presentation. They noted the number of individuals entering law schools this year is the smallest since 1973. This contributes to low ABA membership, and it will also deeply affect the future provision of legal services for all Americans. Law student loan debt is still a hot button issue, as many young lawyers have indebtedness up to \$200,000 after law school, and there is a dearth of good paying jobs to pay back such loans.

As a member of the ABA's Constitution and Bylaws Committee, I was in the middle of the debate relative to certain governance issues, and I worked on their passage. Governance is the least glamorous of the ABA duties, but it is necessary and mandated for review every ten years.

Outgoing ABA President William Hubbard of South Carolina highlighted the 800th Anniversary of the Magna Carta signing, and we were privy to the details of the refurbishment of the ABA monument at Runnymede in Surrey, England. Runnymede represents the English barons' insistence on the rule of law in the face of autocratic and despotic uses of law by the King. Protecting and preserving the rule of law is the ABA's mantra and mission.

The celebration of ABA Day in Washington is April 19-21, 2016. During that time, ABA members are encouraged to meet with their Congressional representatives to advance ABA objectives in the areas of legal services for the poor, proper court funding levels, and addressing systemic bias in our legal system. All lawyers are encouraged to attend.

I would be remiss if I did not congratulate and thank Richard McAdams, Esq., our state ABA representative. Richard, my colleague in the ABA House of Delegates, who was always a valuable source of collegiality and constructive discussion, is now retiring as Delegate. Richard's service was an invaluable asset to our Bar.

Once again, I thank Rhode Island Bar Association and our Bar's House of Delegates members for their confidence in allowing me to represent you in the ABA. I take my responsibility seriously, and, as your delegate, continue to address your concerns. I am available at any time to discuss ABA matters of interest with any of my friends and colleagues of the Rhode Island Bar. ♦

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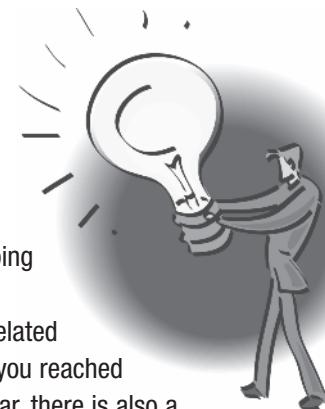
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Eyes In The Skies

continued from page 13

who has an operator certificate which can only be obtained by passing a “knowledge based test.”²¹ One questions whether these restrictions, both existing and proposed, are sufficient. If one were to start from scratch to develop a comprehensive statutory scheme to regulate the use of drones, both civilian and by law enforcement, to proactively address the potential legal issues presented by drones – before being overcome by their reality – what should that regulatory package include?

Recommended Statutory Considerations:

1. The first issue to reevaluate is the current distinction between the hobbyist and commercial use of drones. As drone technology advances and becomes generally available, the capability of these machines will quickly blur this distinction. It is important to remember that the current drone problems we already face are almost exclusively generated by hobbyists, since the commercial use of drones without a waiver is illegal.
 2. The operator of a drone should be a minimum of 18 years old and vetted by the Department of Homeland Security (individuals with prior criminal records and on a watch list should be prohibited from obtaining an operator's certificate). Operation of a drone by anyone *not* possessing a certificate should be a felony. An exception may be for minors under specific circumstances.
 3. All civilian drones must be, at all times, under the operational control of an operator with an operators certificate.
 4. All operators must pass a knowledge base test and receive an operators certificate issued by the FAA.
 5. Only a person with an operator's certificate should be able to register, or operate, a drone.
 6. Operation of a drone needs to be discussed, clarified and defined. Does it include autonomous operation pursuant to a predetermined flight plan? In autonomous operation, does there still need to be an operator with an operator's certificate? If not, is the owner, by default, the operator? And how would a corporate owner obtain

an operator's certificate and/or be able to operate drones?

7. All drones should be registered, disclosing the name of the manufacture, make, model, serial number and the owner/operator's name and address, with the FAA.
8. All transfers of ownership of a drone should be registered with the FAA prior to the transfer.
9. All owners, operators, and all drones should be covered by a policy of liability insurance in an amount(s) to be set and through insurance companies approved by the FAA.²²
10. The use of a drone in the commission of a crime should result in an automatic increase (add on) in the penalty for that crime, e.g. misdemeanors – 6 months imprisonment; felonies – 1 year imprisonment.
11. State tort law should be amended to make drone owners, operators and manufacturers, strictly liable for any and all civil damages caused by the operation of a drone.
12. The mounting of any weapon, explosive, or chemical/biological agent on a drone (whether owned/operated privately, by a public entity or by a law enforcement agency), should be explicitly prohibited and subject to a substantial jail penalty (e.g. a minimum of 10 years).
13. All public law enforcement agencies should be prohibited from using drones for surveillance of specific individuals/property, except in a case where they have first obtained a warrant based on probable cause.
14. The private/civilian use of a drone for surveillance should be prohibited and subject to a significant jail sentence (a felony).
15. All uses of the specific images of private individuals or private property captured by or through the use of a drone should be prohibited unless with the written consent of the persons/owners involved. Violation of this provision should be the subject of both civil and criminal penalties.

While several of these suggestions are clearly controversial, they are proffered for the purposes of promoting a discussion. Drones are a new technology which will be quickly upon us in the next two to three years. While we cannot predict every problem or regulatory need in

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advance of the use of this technology, there are many issues which can be anticipated and addressed before they become legal and safety concerns. If we are going to adopt and even embrace drones, our legislatures/regulators must take some common sense steps to protect the public from their misuse by private individuals, law enforcement and persons intending to cause us harm. And, for once, before the harm actually occurs.

ENDNOTES

1 2015 - H 5293, *Creating a Special Legislative Commission to Study and Review Regulation of Drones and Unmanned Aerial Vehicles; 2015 - H5292, Unpiloted Aerial vehicles; See also 2015 - H5454, Aerial Privacy Protection Act.*

2 FAA Advisory Circular 91-57.

3 2015 - H 5453, *An Act Relating to Aeronautics, The Rhode Island Unpiloted Aerial Vehicle Act of 2015.*

4 Lederman, Lowy, "Hobbyist was flying drone," THE PROVIDENCE JOURNAL, Tuesday, January 27, 2015, Pg. A9; see also "Copping a 'copter," THE ECONOMIST, May 2nd 2015, Pg. 69.

5 "FAA investigating drone citing near Furman University," GreenvilleOnline.com/story/money/business/2015/07/06/faa-investigating-drone-sighting-near-furman-university/24771025.

6 "U.S. a step closer to wide domestic use of drones," cbsnews.com/news/us-a-step-closer-to-wide-domestic-use-of-drones/, see also, "Concerns rise about growing use of domestic drones," usatoday.com/story/tech/2013/07/18/drone-concerning-rules-regulations/2552999.

7 Section 336 of Public Law 112-95 (*The FAA Modernization and Reform Act of 2012*).

8 *Ibid.*

9 "Copping a 'copter," THE ECONOMIST, May 2nd 2015, pg. 69-70.

10 DOT and FAA Proposed Rules for Small Unmanned Aircraft Systems, www.faa.gov/news/press_releases/news_story.cfm?newslid=...

11 "Regulations up in the air," Patrick Anderson, THE PROVIDENCE JOURNAL, Monday, August 31, 2015, Section A, Page 1 & 5.

12 DOT and FAA Proposed Rules for Small Unmanned Aircraft Systems, www.faa.gov/news/press_releases/news_story.cfm?newslid=...

13 "Regulations up in the air," Patrick Anderson, THE PROVIDENCE JOURNAL, Monday, August 31, 2015, Section A, Page 1 & 5.

14 Press Release from Aeronautics Inspector James Warcup of the Rhode Island Airport Corporation, June 14, 2014, Neil Remesiewicz, "No drones above summer events in RI, officials say," http://wpri.com/2014/06/14/no-drones-above-summer-events-in-ri.

15 "Regulations up in the air," Patrick Anderson, THE PROVIDENCE JOURNAL, Monday, August 31, 2015, Section A, Page 1 & 5.

16 Please also see: "Rhode Island's RIAC and its Drone "Ban," Peter Sach, Esq., DRONE LAW JOURNAL, http://dronelawjournal.com/rhode-islands-riac-and-its-drone-ban/.

17 *Drones gone wild:9 memorable moments (video)*, Syracuse.com/politics/index.ssf/2015/08/drones_gone_wild_9_memorable_moments-video.html.

18 "Seattle women worries after drone flies next to her home's window," Meghan Kelly, venturebeat

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.com/2013/05/13/seattle-drone/.

19 "Regulations up in the air," Patrick Anderson, THE PROVIDENCE JOURNAL, Monday, August 31, 2015, Section A, Page 1 & 5.

20 DOT and FAA Proposed Rules for Small Unmanned Aircraft Systems, www.faa.gov/news/press_releases/news_story.cfm?newsId=...

21 Ibid.

22 A basic principle of Newtonian physics is that what goes up – must come down. Since the FAA is seeking to permit commercial drones weighing up to 55 pounds and traveling at speeds up to 100 miles per hour, it is inevitable that some of these vehicles will fall out of the sky causing property damage and personal injuries. With registration and liability insurance the victims of these "accidents" will be assured compensation. ♦

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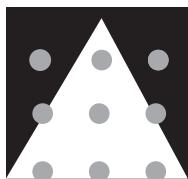
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In Memoriam

John P. Hawkins, Esq.

John P. Hawkins, 80, of Providence, passed away on September 14, 2015. He was the husband of the late Jane A. Ross Hawkins. Born in Providence, he was the youngest child of William J. and Catherine E. Keegan Hawkins. He is survived by his sister; Catherine E. Graziano, and his sisters-in-law, Anne Hawkins, Margaret Ross and Betty Casey. He was a graduate of LaSalle Academy, the University of Rhode Island and Suffolk Law School. He served in the Signal Corps Research Unit of the US Army in Kyoto, Japan. While attending URI, earning both a Bachelor of Arts degree and a Master's in Public Administration, he served as a Providence firefighter. He was elected as a Senator in the Rhode Island General Assembly from 1967 to 1976, and elected Senate Majority Leader in 1973. He was later appointed Rhode Island Lottery Director by Governor Bruce Sundlun. He served as legal counsel for the Providence Firefighters Local 799 and as Treasurer for the Retired Legislators Association which provides a number of annual scholarships to local high school seniors.

Craig A. Johns, Esq.

Craig A. Johns, 61, of Waterman Lake Drive, Harmony, passed away on August 14, 2015. He was the beloved husband of Barbara L. Ostrove. They had been married for 22 years. Born in Providence, he was a son of the late William D. and Marilyn M. Stake Johns, Sr. He had lived in Harmony since 1993 and had previously resided in Smithfield and Barrington. He was self-employed with the Law Office of Craig A. Johns in Cranston, previously a trial attorney for Nationwide Insurance. Besides his wife, he leaves his daughters, Megan L. Johns of Tampa, FL, Amanda "Mandy" Johns Corrigan and her husband Matthew Corrigan of Los Angeles, CA, his brother, William D. Johns, Jr. and his husband Rick Carbone of Southbury, CT, his mother Marilyn Stake Johns of Harmony, mother-in-law Eileen Ostrove and sister-in-law Nona Ostrove of New Jersey.

F. Moore McLaughlin IV, Esq.

F. Moore McLaughlin IV, 48, passed away on August 31, 2015. He was the beloved husband of Lisa A. Courtemanche McLaughlin. Born in Lubbock, TX he was the son of Franklin M. McLaughlin III of Dallas, TX and Sandra Seal McLaughlin of Fayetteville, AR. He was a graduate of the University of Texas and Pepperdine University Law School. He received his Master of Laws in Taxation (LL.M.) from New York University. He resided in Cumberland for the past 10 years, previously residing in Johnston. He was the founding partner of McLaughlin & Quinn, LLC, the Providence-Boston tax and business law firm. He was recently appointed president of the Rhode Island Association of Public Accountants. Besides his wife and parents he leaves two sons, Franklin M. McLaughlin V and Andrew T. "Tex" McLaughlin, both at home. He was also the brother of Devin McLaughlin of Coppell, TX. A devoted husband and father, Mr. Moore was also a Cubmaster for Pack 12 and Asst. Scout Leader for Troop 12, Berkeley/Ashton of Cumberland. He loved camping with his family and scouts. Moore was an avid fisherman and enjoyed being outdoors, whether it was canoeing or ice fishing or just taking a hike in the woods. Born and raised in Texas, Moore loved his Cowboys and also to barbecue. He competed in BBQ Cook-offs and eventually became an official judge by the Kansas City BBQ Association.

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, 41 Sharpe Drive, Cranston, Rhode Island 02920. Email: fmassie@ribar.com, facsimile: 401-421-2703, telephone: 401-421-5740.

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Rhode Island Probate Judges Association Elects New Officers



(l-r) Gregory F. Fater, Cristine L. McBurney, Paula M. Cuculo, and Bruce D. Sawyer.

The Rhode Island Probate Judges Association held its meeting, in August, at the Atlantic Beach Club. Longtime Association President Marvin H. Homonoff passed the gavel to the new President, Paula M. Cuculo. Also elected were Cristine L. McBurney, Vice President; Gregory F. Fater, Secretary; and Bruce D. Sawyer, Treasurer. The meeting's guest speaker was Chief Disciplinary Counsel David D. Curtin.



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As part of this effort, on October 30th, Rhode Island Bar Association President Melissa E. Darigan sent a personal invitation to all Rhode Island Bar members to sign-up for and accept a case through the Bar's Volunteer Lawyer Program (VLP), United States Armed Forces Legal Services Project and/or the *Pro Bono* Program for the Elderly.

Additionally, on October 16th, the Rhode Island Bar Association's Continuing Legal Education Program, in partnership with the Bar's Public Services Involvement Committee and the Volunteer Lawyer program, offered a 2.0 CLE credit seminar, *Representing Physically and Mentally Challenged Clients*, focusing on the real life implications of representing the interests of a client or their children with physical and/or mental challenges and how to do so effectively when they have limited financial resources. To be eligible for the seminar's CLE credits, Bar members agreed to accept a *pro bono* family law case through one of the Bar's *pro bono* programs.

Funded by the Rhode Island Department of Elderly Affairs and the Rhode Island Bar Foundation, the Rhode Island Bar Association also hosted a series of *pro bono* Legal Clinics and Ask A Lawyer events for the public in September, October, November, and December of 2015.

September

- 17 Legal Clinic: Cranston, RI

October

- 6 Health Care Power of Attorney Clinic: North Providence, RI
15 Legal Clinic: Cranston, RI
19 Ask A Lawyer - Senior Companion Program: Warwick, RI
20 Ask A Lawyer - Senior Companion Program: Providence, RI
26 Ask A Lawyer - Senior Companion Program: Warwick, RI
27 Ask A Lawyer - Senior Companion Program: N. Kingstown, RI

November

- 17 Legal Clinic: North Providence, RI
19 Legal Clinic: Cranston, RI

December

- 17 Legal Clinic: Cranston, RI

Volunteer Lawyer Program

The Rhode Island Bar Association's Volunteer Lawyer Program (VLP) is funded through a grant from Rhode Island Legal Services, Inc. and the Rhode Island Bar Foundation. VLP provides *pro bono* legal services to qualified low-income Rhode Islanders. Participating attorneys provide legal assistance, at no charge. The client's income must qualify under federally-regulated guidelines to receive *pro bono* assistance, and the case must fall under one of the areas of law handled by the VLP. Clients may be responsible for filing fees, court costs and other out-of-pocket expenses. For information, contact John Ellis by telephone: (401) 421-7758 or 1-800-339-7758, or by email: jellis@ribar.com. Through the *Pro Bono Program for the Elderly*, those 60 years and older are eligible for a free half hour attorney consultation and, if income eligible, are provided free legal assistance. For information, contact Elisa King by telephone: (401) 521-5040 or by email: eking@ribar.com.

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(2) Mailed to In-County Paid Subscribers Stated on PS Form 3641 (include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	3100	3075
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c. Total Paid Distribution (Sum of 15b (1), (2), (3), and (4))	6567	6650
d. Free or Nominal Rate Distribution (Sum of 15d (1), (2), (3) and (4))	138	59
e. Total Free or Nominal Rate Distribution (Sum of 15c and 15d)	196	87
f. Total Distribution (Sum of 15c and 15d)	6763	6737
g. Copies not Distributed (See Instructions to Publishers #4 (page #3))	187	63
h. Total (Sum of 15f and g)	6950	6800
i. Percent Paid (15c divided by 15f times 100)	98%	98%

*If you are claiming electronic copies, go to line 16 on page 3. If you are not claiming electronic copies, skip to line 17 on page 3.

	Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Paid Electronic Copies	0	0
b. Total Paid Print Copies (Line 15c) + Paid Electronic Copies (Line 15a)		
c. Total Print Distribution (Line 15b) + Paid Electronic Copies (Line 15a)		
d. Percent Paid (Total Print & Electronic Copies) (15b divided by 15c × 100)		

I certify that 50% of all my distributed copies (electronic and print) are paid above a nominal price.

17. Publication of Statement of Ownership
 If the publication is a general publication, publication of this statement is required. Will be printed
in the **November** issue of this publication. Publication not required.

18. Signature and Title of Editor, Publisher, Business Manager, or Owner
Helen D. McDonald Date
10/1/15

I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties).

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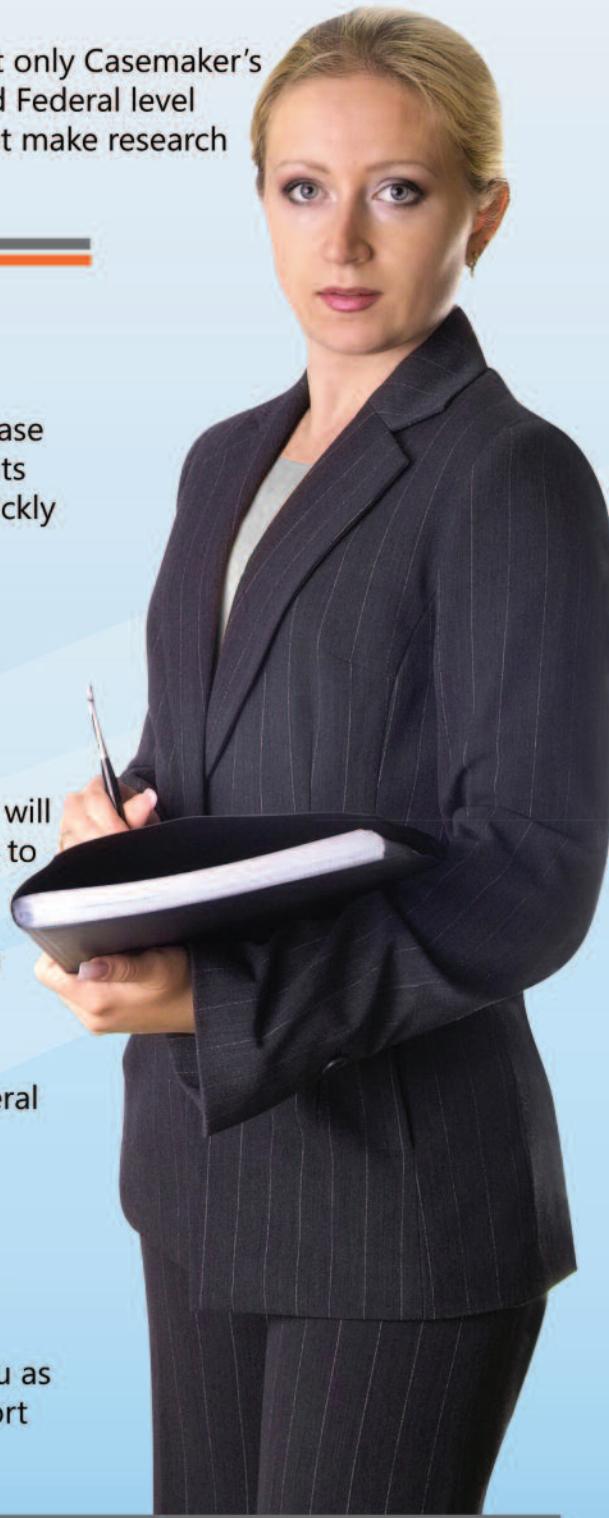


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