Rhode Island Bar Journal

Rhode Island Bar Association Volume 59. Number 3. **November/December 2010**

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RHODE ISLAND Bar Association
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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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Front Cover Photograph
Peter Diepenbrock's *Torsion III*
outside University of Rhode Island's Lippitt Hall, Kingston, RI by Brian McDonald

What if…
Introducing SOLACE!

Lise M. Iwon, Esq.
President
Rhode Island Bar Association

I believe there is nothing too big or too small we are willing to do for each other, and SOLACE gives us all a chance to prove the truth of this.

What if…You are a solo practitioner, and you lose your office in a fire. What would you do? How soon could you obtain, and afford, office space, furniture and supplies to get you back on track? Wouldn't it be great if you could send out an email and, within two days, have all of your professional needs met?

What if…You are diagnosed with cancer and instructed to report to a hospital in Houston, Texas. You are told you will need to be in Houston for four months while undergoing out-patient chemotherapy. Where would you stay? Where would your family stay? How could you afford it?

What if…Your spouse is diagnosed with a very rare syndrome resulting from past substance abuse, and your physician tells you there are no resources in your local area to assist you and your spouse. How would you determine out where to go? How would you gain admission?

Realizing some Louisiana attorneys facing difficult personal tragedies often had limited access to, and limited knowledge of, assistance avenues, and realizing many other Louisiana attorneys have vast resources of compassion and contacts, New Orleans Attorney Mark C. Surprenant and United States District Court Judge Jay C. Zainey developed a concept. That concept became the SOLACE program, an acronym for Support of Lawyers, All Concern Encouraged. That program began operation on October 28, 2002 with a number of attorneys forming the initial assistance network.

Now, just over eight years later, that network has grown to more than 5,000 lawyers, all quickly accessible by email. To date, the network has assisted more than 500 individuals and families. That assistance can come in the form of a condolence card to the grieving family of deceased attorney to immediate air transportation for an attorney needing to get to a hospital out-of-state for a life-saving organ transplant. The speed at which these requests for assistance are filled is amazing. Answers can come in a few minutes, a few hours or a few days. SOLACE was particularly instrumental assisting attorneys who were displaced as a result of Hurricanes Katrina, Rita, Gustav and Ike helping locate housing, office space, office furniture and books.

I learned about the SOLACE program at the San Francisco ABA meeting, at a presentation by Judge Zainey. The above *What if's* are real life examples of situations Louisiana attorneys faced and SOLACE members responded to.

In the first *What if*, after the solo practitioner who lost everything in the fire contacted SOLACE, an email went out at 6:18 p.m. on a Saturday night asking for assistance. The lawyer in need sent the following message, Monday evening, two days later; "The responses and offers of assistance from attorneys and judges have been overwhelming, and I am happy to announce that all of my computer and furniture needs have been met. I have even met a female attorney in Shreveport asking for my address so that she could send a gift card for an office supply store."

In the second *What if*, an email, requesting housing in Houston for a period of four months for the attorney undergoing treatment for cancer, was sent to SOLACE members, at 11:58 p.m. The following response was received eight and a half hours later, at 8:35 a.m., "One of my good friends and a Houston attorney has come to the rescue for the patient. Ed's wife is a physician, and both of them go above and beyond giving back. When I read your note, I knew Ed would help. He will contact the patient directly."

For the third *What if*, within twenty-four hours of the date and time the request for information about the rare syndrome was circulated to the SOLACE members, a SOLACE member had made arrangements for the family in need to receive a consultation, and follow-up treatment, at the Mayo Clinic.

After speaking with Judge Zainey and being inspired by his story, I realized we could start a SOLACE program with the Rhode Island Bar Association, at little cost, to help the members of our community. I am inviting you to become part of this voluntary list serve program.

Of course, many of us are adversaries in court. But, we are truly members of an honorable profession, and, out of court, I believe there are many of you who will gladly volunteer to keep your eyes and ears open and let us know when we can help fellow members of our profession who are experiencing a hardship. Think about it. If each of us has a circle of twenty friends, family members and clients we can call upon for information, we could feasibly have a network of 120,000 people who are potentially available to address any issue we face.

The sole purpose of the SOLACE program is

for lawyers to reach out in small, but meaningful and compassionate, ways to each other and our families who need help.

For example, if you're going paperless and decide you want to do all your legal research via the internet, I know you won't want to just toss your ALR's, statutes and other legal research books, you could easily contact SOLACE and see if there is an attorney who would like to take them off your hands. The same thing is true for office furniture, file cabinets, fax machines, and the like.

A local inspiration for this program is the story of Rhode Island attorneys John T. Longo and Kenneth D. Haupt. Ken was in need of a kidney transplant to survive, but could not find a donor. John, realizing his friend's plight, most generously volunteered to donate one of his kidneys to Ken. Through a two-day process at Rhode Island Hospital, the donation was made, and, today, both attorneys are leading happy, healthy and productive lives.

Here's how we will make SOLACE work for our Bar:

First, you may join the SOLACE program by going to the Bar's website and selecting the SOLACE Sign-Up in the Members Only section. Or, you may simply telephone or drop by the Bar and request a sign-up form. Membership costs you nothing. Hopefully, you and your family will never need the services of SOLACE. However, by agreeing to join the SOLACE email list, you will be kept informed on what attorneys and other legal professionals do for each other in times of need, as the communications provide a reminder that if you have a need, help is only an email away.

Second, keep your eyes and ears open. Contact the Rhode Island Bar Association's SOLACE program if you know of any Bar member or members of their family who may have a need. SOLACE will circulate the request, and we will get results.

Please go to the Rhode Island Bar Association website and become a SOLACE member by completing the online form today. After your sign-up is quickly processed, you will be linked in to the SOLACE email network. Once you are a part of this network, you may offer assistance or make a request for help.

I believe there is nothing too big or too small we are willing to do for each other, and SOLACE gives us all a chance to prove the truth of this. ❖

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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Harnessing Your Client's Wind Power Rights

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Wind power, both on and off shore, is gaining momentum in Rhode Island and across the United States. State and local governments are looking to develop renewable and sustainable forms of energy, including wind power, and federal grants are available to contribute to these efforts.

As wind power comes to be seen as a consistent and reliable source of energy, wind developers are seeking to erect turbines and other energy-generating equipment and are looking for the right space to do so. Perhaps a wind power developer will seek out your client's property as an ideal location for a turbine, or perhaps your client will seek out a developer, eager for the potential income. Perhaps a new client will ask you to review a final agreement with a wind developer before signing on the dotted line. In any case, you should consider taking an active role in the ensuing negotiations, because landowners have a lot to lose. This article serves as an introduction to some of the aspects of wind development most critical for a landowner, and his or her attorney, to consider.

Wind Power in Rhode Island

Rhode Island has shown that it supports sustainable energy forms, and it has good reasons to do so: environmental concerns; desire for long-term energy sustainability; and production of new jobs. For example, the Rhode Island Renewable Energy Standard Act, R.I. Gen. Laws § 39-26-1, *et seq.* (2004), requires energy companies to sell increasing amounts of renewable energy each year. Under the statute, fourteen percent of an energy company's total electricity output must arise from renewable sources by the end of 2019.

Rhode Island joins the federal government in the sustainable energy movement, with more than eighty billion dollars in clean energy investments included in the 2009 federal American Recovery and Reinvestment Act (ARRA). Some of those funds have made their way to the Ocean State. On April 9, 2010, the Rhode Island Office of Energy Resources announced $3.3 million in ARRA funds for renewable energy projects. These projects include: an award of $750,000 to the Narragansett Bay Commission for the construction of three wind turbines (capable of producing between 2.4 million and 5.9 million kilowatt-hours each year); an award of $156,250 to Hodges Badge Company in Portsmouth, to install a 225 kilowatt (kW) wind turbine which will supply all of its electrical manufacturing needs; and an award of $235,000 to Sandywoods Farm in Tiverton for a 225 kW wind turbine. These turbines will not be the only ones in Rhode Island, however: the first one, a commercial-size 660 kW turbine, was installed in spring 2006 to provide electricity to the Portsmouth Abbey and was supported by a grant from the Rhode Island Renewable Energy Fund. Additional turbines are located at Portsmouth High School (on line in March 2009) and at New England Technical Institute in Warwick (erected in July 2009).

Governor Carcieri has been heavily advocating for an eight-turbine wind farm off the coast of Block Island, and the Rhode Island Economic Development Corporation was awarded a $22.3 million grant from the US Department of Energy to support the project. In March 2010, the Rhode Island Public Utilities Commission rejected a long-term contract for National Grid to buy power from the wind farm developer, Deepwater Wind, LLC, because the price would not be commercially reasonable. In response, the General Assembly passed legislation which allowed the parties to renegotiate a new agreement, and the parties submitted a new agreement (one which allows for the possibility of a lower price) to the Rhode Island Public Utilities Commission in June 2010. In July 2010, Governor Carcieri and Massachusetts Governor Patrick signed a memorandum of understanding supporting collaboration between the states on offshore wind projects in federal waters off their coasts. In addition, the Rhode Island Coastal Resources Management Council seeks to adopt a Special Area Management Plan (SAMP), which will zone the ocean off the Rhode Island coast for various uses, including a wind farm, in October 2010.

Local towns and municipalities are also getting involved with the wind power movement, developing standards for wind projects

that take landowners' reservations, public safety issues, and environmental concerns into account.

For example, the zoning ordinances of Charlestown, Rhode Island were amended by Ordinance Number 317 in January 2010 to add a section on *Wind Energy Generator Towers and Systems*. This ordinance requires site plan reviews, building permits, and, for wind energy systems with a rated capacity of 20 kW or more, a special use permit. The ordinance also regulates setbacks, tower height, noise level, shadow flicker, access, clearing, lighting, signs, ancillary structures, wiring, and turbine color, and imposes liability on the landowner for repair or removal of defective and/or abandoned wind energy systems. The Town further requires applicants for large wind power systems (with a rated capacity of more than 100 kW) to submit: detailed siting and design descriptions; impact statements; plans for landscaping, operation, and maintenance; proof of liability insurance; documentation of site control; and a telephone number and contact person for public inquiries and complaints. The Town requires removal of large wind energy systems within 130 days after the date of discontinued operations. If a large wind energy system is abandoned, the Town retains authority to enter the property and physically remove it, leaving the owner, operator, and/or landowner liable for the costs.

Forms of Agreements

As Rhode Island continues to look for sources of sustainable energy, wind developers will need the appropriate land for turbines and electric facilities. To this end, wind developers must seek to enter into some form of an agreement allowing them to test the feasibility of wind power on a particular piece of land and, if possible, build wind turbines and other improvements to facilitate the production of energy.

Generally, wind developers seek to enter into an initial option agreement with a landowner, providing the developer with an opportunity to later enter into a lease or sale agreement. The option agreement will last for a certain length of time – say, five years – with the option to renew at an additional cost to the wind developer. During which time, the developer will investigate the feasibility of the wind project on the property. If the wind developer decides that a wind energy

project is feasible on the property, it can exercise its option within the option period, and, depending upon the language in the option agreement, the landowner will likely be required to enter into a lease or sale agreement with the developer. Therefore, the initial option agreement should include a proposed and agreed-upon lease or sale agreement, setting forth the specific terms of the potential lease or sale of property. In the case of a lease, the agreement generally provides for a long-term land lease, spanning decades, so the landowner should take care to negotiate the terms of the potential agreement.

In addition to the land purchased or leased for the erection of wind turbines, the developer may also seek to acquire a wind easement on neighboring property. Generally, such easements are granted in perpetuity, but the parties' contract can include an expiration date. A wind easement ensures that the wind developer has sufficient access to wind and may restrict any obstacles, including structures, on the servient tenement property (the property burdened by the easement) that may interfere with the flow of wind. Some states have passed statutes regulating the terms of wind easements and leases. **See, e.g.**, Minn. Stat. § 500.30[1]; Mont. Code Ann. § 70-17-303[2]; N.D. Cent. Code § 17-04-03.[3]

Alternatively, if the landowner is not currently willing to lease or sell the property, but may be open to doing so in the future, a wind developer may seek to purchase a right of first refusal. This would allow the developer to have the right to match any other offer to buy or lease the property for wind power purposes if the landowner seeks to transfer any interest in the property. A right of first refusal does not generally set the price or terms of a future sale or lease, but grants the developer the right to match any other offer to buy or lease the property.

In the case of a lease agreement between a landowner and wind developer, the following issues should be carefully considered:

Compensation

Your client may be primarily concerned with compensation. After all, money is usually the primary motivation for landowners entering into agreements with wind power developers. Along with different forms of agreement come different forms of compensation. You and your client should know the options and be

prepared to negotiate.

An option agreement, providing the wind developer with a finite period of time to determine the feasibility of the wind project before committing to leasing or buying the property, usually calls for either a lump sum payment or an annual payment to the landowner throughout the duration of the agreement. The option agreement may also provide the developer with a right to renew the option agreement for a limited time, with additional compensation for the landowner. The option is forfeited if the developer does not exercise its right by the end of the agreement term. The option agreement should indicate whether either party can terminate the agreement before the end of its term and on what grounds termination is permitted.

If the option agreement provides the developer with the right to purchase the property, the option agreement should set forth a proposed sale amount of the property along with the precise terms for the exercise of the option. The option agreement and the proposed lease agreement should explain how the landowner is to be compensated if the parties enter into a lease. The developer may make annual payments to the landowner: a set sum or a sum based on the number of turbines erected; the amount of energy produced; or the acreage used by the developer.

A royalty payment provides another alternative for compensation in a lease agreement. With a royalty payment, the landowner is paid a certain percentage of the gross revenues of the wind power produced. In this case, the calculation for compensation should be clearly defined within the option and lease agreements. Furthermore, if a lease agreement provides for royalty payments or partial royalty payments, the landowner should have a clear understanding of power sales in the region, as well as the developer's potential sales, to ensure the calculation represents a fair deal for the landowner.

Some lease agreements provide for a combination payment: some annual amalgamation of royalty payments and lump sum. Other lease agreements give the landowner equity in the wind power development. In any case, a developer and landowner should negotiate to ensure that the landowner is being fairly compensated.[4]

If the developer seeks to develop a wind power project on the property, con-

struction may result in damage to the property, improvements on the property, or crops. A lease agreement should take potential loss into account and provide a mechanism for the landowner to be justly reimbursed for any losses or impose a duty on the developer to restore the property to its original condition. Some agreements include a construction impact fee, payable by the developer to the landowner at commencement of construction. Such a provision may, for example, provide that a landowner is compensated for each acre damaged, with the amount dependent on the nature of the crop and its seasonal market price.

Finally, a developer seeking to develop a wind power project will need to build more than the wind turbines. In addition to the turbines and the power generator, such a project will require other improvements to the land, including roads, access ways, buffer areas, and meteorological equipment. Some lease agreements provide additional compensation to the landowner for these improvements.

Scope of Wind Project

Any form of agreement between a landowner and a wind power developer should clearly, and in no uncertain terms, set out the specific property where the developer may conduct its wind power activities, including the initial investigation and the potential construction. The agreement can limit where the developer places its wind turbines, roads, construction areas, operations, and maintenance areas. The agreement may even include an attached map describing areas available to the developer and/or areas that are off-limits. Such limitations may be particularly important when the landowner resides, grows crops, or conducts business on the property.

The wind developer's construction and use of roads on the landowner's property are particular issues which should be addressed in an agreement between the parties. The lease agreement can address the following inquiries: Will the landowner have access to the roads built by the developer? Could potential road construction impede the natural flow of water, negatively affecting landowner's crops? How should the developer access the property? Who will pay for road maintenance costs, including snow removal?

continued on page 34

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Distinguishing Your Practice With Charitable Planning

James S. Sanzi, Esq.
Rhode Island Foundation
Development Officer

When you, as the client's attorney, do charitable planning, you provide added value to your client... you also provide value to your practice by enhancing your reputation for trust and civic-mindedness, building deeper client relationships, and increasing your potential for client referrals.

We all know that giving to charity can help people in the community. After all, charitable giving can be efficiently targeted and directed to specific community needs, for which there are many. The activities of recipient charitable organizations can be researched and these organizations are held accountable to their donors through, among other things, transparent and detailed public filings.

We also know that philanthropists, big or small, often derive significant psychological benefit from helping others through their charitable giving. Charitable planning also benefits a client's legal and financial planning objectives, especially through income and estate tax deductions. When you, as the client's attorney, do charitable planning, you provide added value to your client. As a result, you also provide value to your practice by enhancing your reputation for trust and civic-mindedness, building deeper client relationships, and increasing your potential for client referrals. Furthermore, charitable planning involves not just strategy, but often document drafting, review, asset transfers, and related follow-up. In short, charitable planning is good for client, community, and your practice. By accepting this and viewing charitable planning as a critical element of the legal and financial planning process for many clients, one's possible reluctance to engage in charitable planning dissipates. Client needs always drive the planning process, and charitable planning can offer creative solutions to address those needs.

Over $300 billion is given to charity annually in the United States (more than the annual amount spent on legal services). Although it may not happen every day, opportunities for meaningful, client-centric, charitable planning can be readily found in both good and difficult economic times. At your disposal are a host of giving strategies, from simple directs gifts or bequests to more complex charitable trusts, from life-estates to lifetime income, from endowment to direct giving. Below are just a few practical scenarios where charitable solutions can be employed. You will distinguish and enhance your practice by recognizing these opportunities, and you'll probably feel pretty good about doing so too.

Your client is considering the disposition of a highly appreciated asset (and especially if your client is considering the disposition of a highly appreciated and low income yielding asset).

An attorney in basically any practice area may encounter a client considering the disposition of a long-term, highly-appreciated asset. If sold, your client may incur a heavy capital gains tax. If given away during life or at death, then the gift or estate tax could be quite burdensome.

The maximum tax deduction allowed by law is obtained by giving any asset outright to a public charity under section 501(c)(3) of the Internal Revenue Code. However, many clients can't, or don't want to, make an outright gift. Such a client, though, may want to consider the creation of a charitable remainder trust or charitable gift annuity funded with the highly appreciated asset. The charitable remainder trust is a tax exempt entity that can sell the asset, tax-free, and invest the full proceeds of the sale to create an annual income stream, for life, to your client or to whomever your client may name. There are several variations of the charitable remainder trust with different features to benefit your client, and the income payment can be either fixed or variable.

The charitable gift annuity provides a fixed payment to your client, also for his/her lifetime, or to whomever your client names. Any capital gains on the sale of the asset by the sponsoring charity is reduced and spread out over the life expectancy of the named annuitant. Both the charitable remainder trust and the charitable gift annuity give whatever amount remains after the income stream ends to your client's favorite charity. For this reason, these vehicles provide an income tax deduction upon their creation in the amount of the present value of the remainder gift to charity. The charitable remainder trust and charitable gift annuity are especially powerful when the highly appreciated asset is low yielding, such as a stock that pays little or no dividend. These giving vehicles could convert that highly-appre-

ciated, low-yielding asset into far more income for your client with far less capital gains tax exposure.

Your client has or is considering a private foundation.

Wealthier individual clients or successful business entity clients may consider establishing a private family or corporate foundation from which the philanthropic family or business can donate to various charities. Although effective and appropriate for some clients, these private foundations can also be very costly and administratively burdensome for others. An alternative to the private foundation is a donor advised fund sponsored by a public charity. Many community foundations, non-profit commercial gift funds, and other public charities sponsor donor advised funds. With a donor advised fund, your client names the fund and recommends to the sponsoring charity the non-profit organizations to receive its pay-out. Like most private family foundations, many donor advised funds are also structured to allow successor family generations to continue this advising process.

As a component fund of a public charity, donor advised funds are not subject to private foundation rules. They may be charged an annual fee, but they involve little other start-up and maintenance costs. Private foundations, on the other hand, have various start-up and ongoing costs associated with regular Internal Revenue Service (IRS) filings and other compliance, investment management, and possibly staff as well. For a donor advised fund, it is the sponsoring charity's obligation, not your client's, to ensure that any administrative requirements are met. Donor advised funds are also not subject to the 1-2% excise tax on the investment income, as is the case with private foundations. Donor advised funds also have less rigid required pay-out rules as well. Finally, the donor advised fund allows for more private or anonymous grant-making, if desired by your client, since it does not have its own individual form 990 IRS filing, unlike a private foundation. You will cement the trust of your clients and their families, perhaps for generations to come, for your ability to advise them on what may be a more cost-effective, yet still powerful, philanthropic tool.

Your client wants to give to charity

but simply doesn't know the best way to do it.

As a general rule, a charitable planner advises his/her charitable client to leave the most heavily taxed asset to charity and direct other assets to loved ones. Income in respect of a decedent (IRD) is the name given to all types of taxable income earned, but not received by the decedent by the time of his/her death. The most common example may be the traditional Individual Retirement Account (IRA). For many clients, IRD will be subject to both estate and income taxes, perhaps as high as 75% of the amount. If your client with IRD is considering an estate gift to charity, then the IRD, not a bequest, should be used to fund the charitable gift instead. By directing the bequest to heirs, their inheritance will be less taxed. The use of life insurance can be an effective way to replace assets gifted to charity upon passing.

Although often known yet forgotten, your client's lifetime charitable gift of long-term appreciated stock generates the same income tax deduction as a charitable gift of cash in the same amount. However, gifting the stock also bypasses what would have been the capital gains tax due upon its sale. Charitable clients are generally aware they can support their favorite charities with a direct gift that generates immediate impact, but you could also explore with interested clients ways to endow their favorite charities for maximum long-term support and personal legacy. Charitable planning can be complex, using sophisticated legal and tax strategies, but it need not be. Often, the best charitable planners are those who keep it practical, simple, and inspirational.

Attorneys are their clients' trusted advisors. You learn not just about their legal and financial objectives, but also their personal goals, and family circumstances. Charitable planning won't and, dare I say, shouldn't be the focus of your practice. It should, though, be considered one of your important tools, used as appropriate, to construct creative solutions for your client and create added value for your practice and the community. ❖

Beyond the Bar

Style Up Helping Disadvantaged Youth Land Jobs

(l-r) Style Up co-founder Heather A. Pierce, Esq., Style Up clients Dee Saint Franc and Rodeline Saint Felix, and Style Up co-founder Nancy H. Van der Veer, Esq.

"Seeing what a difference Style Up has made in the lives of our clients makes it well worth all of the hard work."

When the economy took a turn for the worse a couple of years ago, two Providence attorneys at Edwards Angell Palmer & Dodge LLP (EAPD) put their heads together to create a non-profit corporation that collects and distributes professional clothing to disadvantaged youth who are either working, or actively looking for a job.

Attorneys Heather A. Pierce and Nancy H. Van der Veer know how important a first impression is, and how feeling confident with your appearance can sometimes make all the difference. Heather notes, "It was just a few years ago that we were in law school shopping for our first interview suits, and we can still remember how having the right outfit helped us feel prepared and ready to take on the world." While working together in the litigation department at EAPD, Heather and Nancy found they had much more in common than just work. "The idea to start Style Up developed out of our shared passion for clothing, as well as our desire to find a way to connect with other young professionals in the community," says Heather. When the reality set in of how much work it would take to start a non-profit, the two new attorneys knew they needed help. Florence A. Crisp and Stephen J. McGillivray, also of EAPD, agreed to come on board.

Their fledgling non-profit, Style Up Inc, relies on donations to help their clients dress for success. Most of their clients are referred by other non-profits with whom they are partnered, including Rhode Island Foster Parents Association and the Comprehensive Community Action Program's (CCAP) Learn to Earn Program. "Once we receive a referral, we pull together clothing that we think might work for the individual client. We then bring the clothing and meet with the client at the partner organization who provided the referral." For Heather, the excitement isn't just about the clothing. "Our goal is to not only provide clients with clothing, but to give them an experience that feels like a personal shopping trip where they leave with stylish clothing they are excited to wear. You can see a change in them as soon as they put on their new clothes – they look comfortable, confident, and ready to face the world."

Perhaps the most difficult part of running their non-profit is finding the time to move it forward. According to Heather, "As most people know, our careers can be quite demanding. Whether we are sorting donations on the weekend, pulling together clothes for clients during lunch, or attending appointments with clients in the evening, we find a way to get it all done." The Style Up founders attribute much of their success to the help they get from the community. Heather states, "One of the best things to come out of Style Up is seeing how others have really rallied behind the organization and pitched in to help. Seeing what a difference Style Up has made in the lives of our clients makes it well worth all of the hard work."

Rhode Island Bar Association President Lise M. Iwon's Note: *Our* Rhode Island Bar Journal *provides us with a wealth of excellent information about the practice of law through member-authored articles and more. Previously, the* Bar Journal *stories ran occasional Bar member profiles describing attorneys' lives inside and outside of the practice. With the piece above, we are reintroducing this feature, but we need your help. Clearly, with 6,000 members, there are a lot of stories to tell, and we all know some great characters' lives and interests worthy of sharing with our colleagues. Profiles may range from an individual's hobby and passion, to pieces about their unique experiences and talents. But we can't tell these stories without your participation! Please send your attorney profile stories or story ideas to:* Rhode Island Bar Journal *Editor Frederick D. Massie, via email:* fmassie@ribar.com *Or, if you would like more information and guidance, please see Fred at the Bar or telephone him at 401-421-5740.* ❖

Do You Have A Problem With Alcohol?

Alcohol has been described as cunning, baffling, and powerful. For many, its use is fraught with problems that can destroy a profession, a family, or a life. Unlike some medical problems, there are no exact diagnostic tools that will determine whether someone is over the line with their drinking. Often, those with an alcohol problem have great difficulty acknowledging it. The following twenty questions may be helpful in determining whether you or someone close to you may have a problem with alcohol.

1. Have you had problems at work (lateness, missed time, errors, etc.) due to drinking?
2. Is your drinking making your home life unhappy?
3. Do you drink in order to help you feel more comfortable around people?
4. Have you spent money on alcohol was supposed to be spent on other things, like children's clothes? Rent? Money owed to others?
5. Have you been spending time with people you don't really care for just because of alcohol?
6. Has your alcohol and other drug use led you to take dangerous risks?
7. Do you get cravings for alcohol during a specific time of day?
8. Has your drinking led you to do things you are ashamed of?
9. Have you ever been drunk in the morning?
10. Have you been involved in physical or serious verbal fights when drinking?
11. Do you ever drink in order to escape worries?
12. Is it hard for you to imagine living your life without alcohol?
13. Have you ever thought you should cut back on your drinking?
14. Has anyone ever criticized your drinking?
15. Have you ever been arrested for an alcohol-related incident?
16. Have you ever had trouble remembering what happened as a result of drinking?
17. Have you ever had a health problem because of your drinking?
18. Have you ever lied about your drinking?
19. Have you ever lost interest in things or activities that you used to find enjoyable?
20. Do you feel like your life simply isn't working out?

If your answer to any one of these questions is yes you may benefit from discussing your answers with one of the Bar's Lawyers Helping Lawyers Committee Bar members, or go directly to professionals at Resource International Employee Assistance Services who provide free, confidential services to all Rhode Island Bar Association members and their dependents by telephoning 401-732-9444 or toll free 1-800-445-1195 and identifying yourself as a Rhode Island Bar Association member. You may also contact, in confidence, any member of the Lawyers Helping Lawyers Committee whose names and contact numbers are listed in the notice on page 18 in this issue of the Bar Journal.

San Francisco Treats

American Bar Association Delegate Report: ABA Annual Meeting

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

Collaborative law differs from mediation in that each party is represented by lawyers only during negotiations, but not in court.

The annual meeting of the American Bar Association (ABA) and its House of Delegates on August 9-10, 2010 in San Francisco was a reflection of the momentous legal times in which we live. On the meeting's opening day, Judge Vaughn Walker of the federal District Court in California issued his historic legal opinion invalidating California's Proposition 8 which banned gay/lesbian marriage. As if this were not enough, Elena Kagan was confirmed and sworn in at the United States Supreme Court two days before the meeting. She was the second female Obama appointment in as many years, bringing the Court to three females for the first time in history.

The ABA had an equally historic meeting. First, it elected its first Hispanic President in history, Steve Zack. Luckily, I have been a witness to many historic firsts in the ABA: its first African American President, its second and third female Presidents; and now its first Hispanic President. I was privileged to meet David Boies, Esq., Zack's law partner and one of the leading attorneys who prepared and argued the opposition to Proposition 8. As a side note Boies and Zack's firm also represented Al Gore in Bush v. Gore out of Florida to the United States Supreme Court.

The initial welcoming reception for the ABA House of Delegates was held at the historic Herbst Theatre, a part of the War Memorial and Performing Arts Center where the historic United Nations charter was signed in 1945. A President's reception was also held thereafter at the equally historic San Francisco City Hall. For an amateur architecture buff, it was a delight to see. Gavin Newsome, the Mayor of San Francisco addressed the opening ceremony of the House of Delegates and gave an impassioned speech highlighting the constitutional principles inherent in the same sex union case in California.

The ABA House of Delegates, with both Rhode Island delegates voting in the affirmative, voted overwhelmingly in favor of eliminating all legal barriers to civil marriage between two persons of the same sex. This was a proud moment for me, as I have long believed it is a matter of civil liberty found in the Constitution's equal protection clause and as substantive due process of law. Some may disagree with that position, and some did within the House of Delegates, but it stands as a historic first for the ABA.

As is a frequent occurrence in the ABA House of Delegates, an issue that affects few lawyers in terms of numbers was debated the most, specifically, the issue of allotting Guam an additional voting delegate. After much debate and a close vote, the measure was defeated.

The House also took a historic vote on Civil Gideon which guarantees the right to counsel in cases involving basic human needs such as housing, safety, health, and child custody. How such guarantees would be funded by the Courts in these lean economic times was not discussed, but remains a serious question unless the Resolution was merely meant to be aspirational.

Other proposals included micro-stamping parts of semi-automatic pistols for easier identification in criminal cases and a renewed call for civic education for American students, clearly lacking under the present educational mandates. Immigration consequences of criminal adjudications were also discussed.

A Resolution was passed honoring 84 year old Alabama author Harper Lee and her novel To Kill a Mockingbird on the fiftieth anniversary of its publication. Among the many literary and cinematic portrayals of lawyers, her Atticus Finch character has done the most to raise the positive profile of our profession.

Among the finer moments of the meeting was the award of the ABA Medal, its highest honor, to Ruth Bader Ginsburg of the United States Supreme Court. Despite her age, illness and the recent loss of her husband, a tax attorney, she gave a stirring address in accepting the award for all that the ABA has done to advance the cause of women and minorities in the law since she became a lawyer decades ago.

We were also addressed by Professor David Wilkins of Harvard Law School who introduced us to the concept of what he called the "glocal reach" of legal services. That is, the effect new technology on the practice of law,

making it less about who the lawyers are and more about the results achieved. My take on the practice is that we need to use technology to make our services value-laden as opposed to time-billed or some other method of charging for our services.

The ABA is not without problems or detractors. It has had three executive directors in the last five years and serious budgetary issues, not the least of which its failure to enlist two-thirds of American lawyers to its ranks despite bold and repeated efforts.

As always, I am ready, willing and able to answer any questions you may have regarding this meeting and my role as Rhode Island Bar Association's ABA Delegate, and I am honored to have been elected to my fourth, two-year term this past June. I will continue to serve the Bar to the best of my ability, and I hope I have honorably fulfilled a service to the Bar in Rhode Island by doing so. ❖

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Continuing Legal Education Update

To register for CLE seminars, contact the Rhode Island Bar Association's CLE office by telephone: 401-421-5740, or register online at the Bar's website: www.ribar.com by clicking on CONTINUING LEGAL EDUCATION in the left side menu.
All dates and times are subject to change

November 4
Thursday
Food for Thought
Recognizing Tax Issues in LLCs, LLPs, and Sub S Corporations
RI Law Center, Providence
12:45 p.m. – 1:45 p.m.
1.0 credit

November 5
Friday
Practical Skills
Criminal Law Practice
RI Law Center, Providence
9:00 a.m. – 3:00 p.m.
4.0 credits + 1.0 ethics

November 9
Tuesday
Food for Thought
How and When To Use Legal Investigators
Casey's Restaurant, Wakefield
12:45 p.m. – 1:45 p.m.
1.0 credit

November 10
Wednesday
Food for Thought
Recognizing Tax Issues in LLCs, LLPs, and Sub S Corporations
Holiday Inn Express, Middletown
12:45 p.m. – 1:45 p.m.
1.0 credit

November 16
Tuesday
Avoiding Foreclosure with Successful Loan Modifications
Rhode Island Law Center, Providence
9:00 a.m. – 4:00 p.m.
6.0 credits + 1.0 ethics

November 18
Thursday
Food for Thought
How and When To Use Legal Investigators
RI Law Center, Providence
12:45 p.m. – 1:45 p.m.
1.0 credit

November 30
Tuesday
Food for Thought
Evaluating Long-Term Care Insurance
Casey's Restaurant, Wakefield
12:45 p.m. – 1:45 p.m.
1.0 credit

December 2
Thursday
Food for Thought
Non-Profit Endowments – The Rules Have Changed
RI Law Center, Providence
12:45 p.m. – 1:45 p.m.
1.0 credit

December 8
Wednesday
Food for Thought
Non-Profit Endowments – The Rules Have Changed
Holiday Inn Express, Middletown
12:45 p.m. – 1:45 p.m.
1.0 credit

December 9
Thursday
Food for Thought
Evaluating Long-Term Care Insurance
Casey's Restaurant, Wakefield
12:45 p.m. – 1:45 p.m.
1.0 credit

December 10
Friday
Practical Skills
Organizing a Rhode Island Business
RI Law Center, Providence
9:00 a.m. – 3:00 p.m.
4.0 Credits + 1.0 ethics

Reminder: Bar members may complete three credits through participation in online CLE seminars. To register for an online seminar, go to the Bar's website: **www.ribar.com** and click on CONTINUING LEGAL EDUCATION in the left side menu.

French Law: Reforms in Real Property and Estate Law

Nancy E. Muenchinger
Avocat à la Cour, Paris Court of Appeals; Attorney-at-law, Rhode Island, Massachusetts and Connecticut

The logical result of the repercussions of one country's actions on the nationals of other jurisdictions is that we are also bound to be interested in the laws of that country.

If few doubted after September 11, 2001, that the world was getting to be a smaller place, then the recent financial and environmental crises have reminded us of that fact. The United States is no longer isolated from the impact of a potential meltdown of the euro or from the economic failures of a trading partner. Oil dumped into the Gulf on our coastline could well end up on shores of another country. Military actions in remote third world countries will be remembered and may be held against us decades and perhaps even centuries from now, independently of the political assessment in our own history books.

The logical result of the repercussions of one country's actions on the nationals of other jurisdictions is that we are also bound to be interested in the laws of that country. One example is the current revolution of the economy in France.

France has, historically speaking, had a special, tumultuous relationship with the United States, starting with its support of the colonies in the Revolutionary War, the rescue of French honor during the Normandy Invasion of World War II, and, most recently, its refusal to join the troop coalition in the war against Iraq. It has also, notably, been the top ranked tourist destination in the world for some years now. One natural side effect of its relationship with the United States is that many foreigners, including Americans, have invested in French real estate for vacation and retirement homes. But recent debacles in the financial and real estate markets have meant that property owners are looking at new ways to make their investments as profitable as possible. What are the new rules that apply?

The Sarkozy Reforms

France is one of those older regimes on the Continent that, saddled with a huge debt, needs to implement reforms in a Socialist system, quite rapidly, to be competitive in the new world order. Nicolas Sarkozy, the current President of France, was elected on a platform promising immediate radical reform. His legislative proposals, although not uniformly popular, have extended earlier reforms undertaken with regard to the system of inheritances and estates and continued with the retirement system and the educational system.

The reform of estates and inheritances has been far-reaching. To begin, the French régime of *successions* had a very different philosophy from estate and probate laws in the U.S. In contrast with the high exemptions under U.S. federal estate tax law in effect since 2001 (but are about to be repealed in 2011), taxes on estates in France remained high up until the recent reforms. With few exceptions, family members did not receive special treatment, loopholes were few, and, as one would expect in a Socialist régime, the State is a major beneficiary. The notarial system ensured a State-managed inheritance system, and still does so. Further, traditionally, the family members who were recipients of preferential treatment in the form of a forced share of the estate of a parent were children. Now, subject to certain conditions, a spouse can be the beneficiary of a forced share in an estate. In addition, in a parallel to U.S. federal exemptions, an important system of abatements or allowances was created to lessen the estate tax burden within families.

The Basics:
Buying and Selling Real Property in France: the Notarial System

Aside from locating the property one wishes to buy, the most important step in purchasing real property in France is the designation of a *notaire* to be responsible for drafting the act of sale, coordinating all the relevant documentation, and overseeing the sale transaction, which is categorized as an *acte authentique* or officially registered transaction, under French law. The *notaire* is an officer of the French judicial system for the management of *patrimoine* (property which is inherited) and, is thus, technically the legal representative of the State, not the parties. This individual ensures the sale price is paid. The *notaire* also carries out title searches, holds money in escrow to ensure the performance of the sale, and registers any necessary modifications with the land registry. All activities and fees are regulated by the State.

Amounts of fees for an *acte authentique* are in proportion to the value of the property and can be sizeable. (For example, a *notaire's* fees for the sale of a property valued at 1,000,000 euros would run about 64,000 euros.)

An *acte authentique* has force of law between the parties, so, to dispose of real property, no one else needs to be involved other than the buyer, the seller, the *notaire* (and eventually, the tax representative appointed by the seller to make any required payments to the French Tax Administration). However, in practice, many foreigners involve a lawyer in order to understand what is required because not many *notaires* speak English and foreign buyers may not feel comfortable with their level of comprehension of the different aspects of the operation in French.

The steps required to sell property in France are: 1) hiring a real estate agent who finds the buyer; 2) signing a *compromis de vente* with the buyer (the agent or the *notaire* can prepare this document); 3) the buyer puts down 10 or 15% of sale price at time of signature of *compromis* and has seven day reflection period to retract if he chooses; 4) if the buyer goes ahead, the file is sent to the *notaire* for processing of the sale transaction; 5) typically, the paperwork process handled by the *notaire* takes two and a half to three months in order to finalize the sale; 6) the *acte de vente* is signed by the parties in the presence of the *notaire*, the remainder of the sale price is paid, and the buyer takes possession.

Tax Consequences of a U.S. Citizen Selling Real Property in France: Capital Gains

Under Article 13 of the U.S.-France Tax Treaty for the Avoidance of Double Taxation of Income and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital of January 1996, "Gains from the alienation of real property situated in a Contracting State may be taxed in that State." French capital gains tax would thus be applicable to the sale of real property located in France. The applicable rate depends on the country of origin. Non-residents from outside the European Union (EU) pay capital gains tax at the rate of 33.3%. However, non-residents also qualify for a ten percent reduction in liability for every year of ownership beyond five years. Thus, from the sixth to the fifteen year of ownership,

a reduction on the tax of 10% applies, up until the fifteenth year when the owner is completely exonerated from the tax.

On the U.S. side, the tax issues can be quite complex. By way of a few preliminary comments, since U.S. citizens are subject to tax on their worldwide income, a capital gain from the sale of French property would thus, in principle, be subject to declaration to the Internal Revenue Service (IRS) as part of the U.S. national's worldwide income for the year in question. To determine the actual impact, the tax advisor would examine issues such as whether the U.S. national had paid any foreign tax on the capital gain in France and, thus, could benefit from a Foreign Tax Credit. If he/she had not paid foreign tax (for example, if he/she had held the property for the fifteen-year period), he/he would, in principle, be subject to the full U.S. tax load. As a corollary, whatever foreign tax was paid, could be applied to reduce U.S. capital gains tax liability. Other issues would determine the applicable rate (the maximum rate at this time is 15%). Favorable tax treatment in France under the fifteen year rule does not absolve the tax payer from U.S. tax liability for capital gains on sale of the property.

New Estate Law Rules

French private international law applies the law of the *situs* (location) of property to the disposition of immoveable assets or real property. French law on inheritance is, therefore, the only law that will apply to determine the distribution of the rights to property located in France. French law on inheritance is restrictive in that it imposes limits on what is available to be left by will by the owner of real property. In particular, it imposes a *réserve* or "hereditary forced share" in favor of children, the amount of which is determined by Article 913 of the Civil Code which reads as follows: "Gratuitous transfers, either by inter vivos acts or by wills, may not exceed half of the property of a disposing person, where he leaves only one child at his death; one-third, where he leaves two children; one-fourth, where he leaves three or a greater number...." In certain circumstances, set forth below, it may also create a réserve in favor of a spouse, but this réserve is always subject to the children's forced shares, and can be set aside by will, whereas the forced share of the children may not be.

Let's assume that a hypothetical parent, Edward, has two children, is a U.S. citizen, and owns property in France which he himself has inherited. He wishes to leave his property to his children and to his wife Bella. Applying the text to the current set of circumstances, a hereditary forced share in favor of his two children amounting to two thirds of the property exists with respect to his property they will each inherit a one-third share of Edward's property at a minimum. Edward may decide to devise the remaining third of his share to the children, or to his wife by will, but he cannot devise less than their respective forced shares to his children.

Regarding the rights of a spouse, the laws of December 3, 2002 (applicable starting on July 1, 2002) and June 23, 2006 (applicable starting January 1, 2007) have created new rights in favor of the surviving spouse. Article 757 of the French Civil Code (which incorporates the relevant provisions of the new laws) states: "Where a predeceased spouse leaves children or descendants, the surviving spouse shall take, at his or her option, either the usufruct of the whole of the existing property or the ownership of the quarter where all the children are born from both spouses..." Further, under the new law in effect on 1st January 2007, if there are no children, but there is a surviving spouse, then the spouse is able to take all of the deceased's estate, in preference to the deceased's parents, as was previously the case.

Thus, returning to our example, in the event that Edward were to predecease his wife Bella without a will, his wife would have the option of taking the *usufruct* (a life interest) in Edward's property, or ownership in a quarter of it. The spouse must express the desire to opt for a life

interest within one year of the death or she will inherit only a quarter ownership. However, the rights of the surviving spouse created by the new laws exist only *ab intestat*, i.e. in the absence of a will, and thus may be modified by will of the predeceasing spouse.

Given that Edward and Bella may have other property in the U.S., and Edward may wish to dispose of such property in Bella's favor (or it may go to her outright through a right of survivorship), it might make sense, for estate planning purposes, for Edward to deal with the issue of the available remainder of his property (*quotité disponible*) in a will. To the extent it does not contradict French public policy on forced shares, for example, a U.S. will valid under the laws of the testator's domicile at death, will also be generally given effect in France. But, if Edward dies without a will, Bella will receive the above-mentioned rights. French law does recognize a spousal right of survivorship in the form of ownership called the *tontine* (universal community of property), but this form of ownership only applies if the couple acquire the property together as husband and wife.

French Inheritance Tax and Gift Tax

French inheritance tax will apply to the assets of an estate located in France. It is paid by each beneficiary, pro rata, based upon the value of net assets received after deduction of liabilities. Since Nicolas Sarkozy has taken office, large abatements have been created greatly reducing estate tax within families. There is now a tax-free allowance of 156,974 euros that applies between parents and children in the context of calculation of estate tax (and also gift tax). In addition, inheritance tax between spouses has been done away with. So, for example, if Bella and her two children have each inherited a third share in property which is worth 450,000 euros, the tax position is as follows, on a beneficiary by beneficiary basis: 1) the spouse is exempted from inheritance tax entirely and thus receives 150,000 euros tax free (450,000 divided by 3); 2) the children's liability for tax (450,000 divided by 3) is 150,000 euros each, but is covered by the abatement of 156,974 euros apiece and thus each receives 150,000 euros tax free. Therefore, no inheritance tax is due on the above facts. If there is still an amount subject to tax after application of the abatement(s),

Lawyers on the Move

Michael L. Carey, Esq. has joined the law firm **Pannone Lopes Devereaux & West LLC**, 317 Iron Horse Way, Suite 301 Providence, Rhode Island 02908.
401-824-5100 mcarey@pldw.com www.pldw.com

Joshua L. Celeste, Esq. is now a partner at **Duffy & Sweeney, Ltd.**, 1800 Financial Plaza, Providence, RI 02903.
401-455-0700 jceleste@duffysweeney.com

Roberta L. Coen, Esq. is now Corporate Affairs Counsel with FM Global, 270 Central Avenue, Johnston, RI 02919.
401-275-3000

Keith E. Fayan, Esq. has joined **Blais Cunningham & Crowe Chester, LLP**, 150 Main Street, Pawtucket, RI 02862.
401-723-1122 kfayan@blaislaw.com

Matthew G. Feher, Esq. has joined the law firm **Pannone Lopes Devereaux & West LLC**, 317 Iron Horse Way, Suite 301 Providence, Rhode Island 02908.
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For a free listing, please send information to: Frederick D. Massie, Rhode Island Bar Journal Managing Editor, via email at: fmassie@ribar.com, or by postal mail to his attention at: Lawyers on the Move, Rhode Island Bar Journal, 115 Cedar Street, Providence, RI 02903.

following are the inheritance tax rates for surviving children (and parents):

Taxable Inheritance Tax Rate (euros) from Article 777 of the CGI (French Tax Code) Modified (Version in effect on December 29, 2009)

Taxable Amount	Applicable Tax Rate *(percentage)*
Up to 7 922 euros	5
7 922 euros to 11 883 euros	10
11 883 euros to 15 636 euros	15
15 636 euros to 542 036 euros	20
542 036 euros to 886 020 euros	30
886 020 euros to 1 772 041 euros	35
Over 1 772 041 euros	40

Liability for gift tax works very similarly to French inheritance tax. Gifts can be made tax free by parents to children up to the amounts which can be inherited tax free, every six years, i.e. 156,794 euros per child. For spouses, tax-free gifts of 79,533 euros can be made every six years.

There is a popular way of reducing inheritance tax which is the *démembrement* (dismemberment) of property into so-called naked ownership (or legal title) held by the children and *usufruct* held by parents (a life interest, which allows the parent to remain in residence and to draw any income such as rent, during his lifetime). An abatement of tax (same amount applicable to inheritances) applies to the *démembrement* with respect to transfers of interests to children. In addition, if tax is due, a reduction of the amount of the gift is applicable depending upon the age of the donor and the rights that the donor has passed on to his or her children. The reduction is calculated according to the following table:

Article 669 of the CGI (French Tax Code)
Cancels and replaces Article 762; applicable starting 01/01/2004

Age of the usufruct holder	Value of the usufruct	Value of naked ownership
Less than 21 years	90%	10%
Less than 31 years	80%	20%
Less than 41 years	70%	30%
Less than 51 years	60%	40%
Less than 61 years	50%	50%
Less than 71 years	40%	60%
Less than 81 years	30%	70%
Less than 91 years	20%	80%
More than 91 years	10%	90%

Thus, if the parent has retained the usufruct or lifetime right to occupy and draw income, there is a 40% reduction in the value of the gift of naked property, if the donor is less than 71 years old. So, supposing a property is valued at 450,000 euros, and supposing that the donor is less than 71 years old, has two children, and keeps the life interest in the property, then the naked property will be valued at 450,000 euros x 60% = 270,000 euros (40% reduction of the total property value). Each donee child would have a potential tax liability of 135,000 euros, but each will benefit from a right to an abatement of 156,974 euros. Thus, in the situation that there are two children, no tax will be due at the time of the gift.

A final caveat: it is worth noting that the laws in France on the subject of inheritances and gifts to one's family are evolving so rapidly, that what is true today will not necessarily be true tomorrow. It is most important to decide what the objectives of the French property owner are. If the objective is to keep the property in the family, then gifts should be contemplated. If the objective is to realize proceeds from a sale, then it may be best not to make gifts to children, because, not only will the child's permission be required to sell the property, but the child will be subject to capital gains tax in France. Having made the foregoing observations, the options of inheritance, gift and sale must be further considered as to their eventual potential U.S. tax liability. In this regard, it should be noted: first, the current federal tax exemption is about to be repealed. Second, any strategies will be extremely fact dependent (size of respective estates, dates of death, etc.).

In this post 9/11 world, there appears to be no such thing as a legal vacuum. French law on real property and estates is no exception and it will extend to U.S. citizens who need to stay informed of its changing provisions. ❖

In Memoriam

John Richard Allen, Esq.

John Richard Allen, 82, of Barrington, Rhode Island, and beloved husband of Joan Luce Allen, passed away, September 3, 2010. Jack was born in Pittsburgh, Pennsylvania on July 14, 1928, the son of Richard Henry and Helen Hunt Allen. He lived in Barrington for 54 years.

Jack graduated from Brown University and Harvard Law School and served in the U.S. Navy during the Korean Conflict. In 1956, he joined the law firm of Hinckley, Allen, Salisbury & Parsons (Hinckley, Allen & Snyder LLP), becoming a partner in 1962 specializing in corporate law. He was appointed as a member of the Rhode Island Commission Against Discrimination for a term of 4 years, starting in 1968. He was a Trustee of Butler Hospital for 25 years, serving as President of the Board of Trustees for 3 years. He was the recipient of the Board Leadership Award by the East Bay Mental Health Center in 2001.

In addition to his wife, Jack is survived by his son Stephen and wife Holly, of Buffalo, New York, his son Thomas and wife Melissa, of Pleasant Hill, California, and his daughter Margaret, of Bath, Maine.

Albert J. Lepore, Esq.

Albert J. Lepore, 69, of Long Boat Key, Florida and Smithfield, RI passed away on September 19, 2010. He was the husband of Celia Pontarelli Lepore for 48 years and son of the late Angela Palmieri Lepore and Albert Lepore.

He was a graduate of of Pawtucket West High School, Providence College, and Suffolk University Law School.

He was a co-founder of the Law Offices of Coia & Lepore, Ltd. where he served as president for more than 30 years. He was a member of the Rhode Island Trial Lawyers Association, American Judicature Society, American Bar Association, US District Court Bar and US Supreme Court Bar which he maintained throughout his lifetime.

Elected to the Rhode Island House of Representatives, District 6, 1968-1980, where he was a member of the Finance Committee. He was a former secretary of the Providence Democratic City Committee, founder of the North End Democrats, a past president of the North End Businessmen's Association, and the Rhode Island Former Legislators Association. He was inducted into Wanskuck Boys' & Girls' Club Hall of Fame. He was also a member of Laborers' International Union of North America, Sons of Italy, Knights of Columbus, St. Anthony's Council, Providence College Alumni Association, Suffolk University Alumni Association, Wanskuck Boys' & Girls' Club, Kirkbrae Country Club, Long Boat Key Club, and his beloved Moron Club.

He was the father of Albert J. Lepore Jr. and his wife Carolyn of Lincoln, Sheri M. Lepore and Joseph Iaciofano of Lincoln, and the brother of Norma Lepore Borino.

James F. McCoy, Esq.

James F. McCoy passed away on April 30, 2010 in Boulder, Colorado. He was born in Pawtucket, Rhode Island and graduated from Brown University and Harvard Law School. He began the practice of law as assistant clerk of the Superior Court, special counsel to the RI Attorney General and probate judge. He served in the Navy during WWII, and during that time married his wife Eleanor Regan. Together they raised five children and were together for 49 years until her death in 1993. He had a private law practice in RI until he retired in 1994. He worked with the Pawtucket and Blackstone Valley Chambers of Commerce on economic development initiatives, the restoration of the Sayles Library and the Slater Mill in Pawtucket, the building of the Davies Career and Technical High School, and the establishment of the Rhode Island Board of Regents. He was active in Rotary and served as District Governor. He loved the outdoors and enjoyed squash, tennis, skiing and golf. He is survived by his children James, Jr. of Plymouth, MA, Marilyn of Chicago, IL, Christine McNeil in Philadelphia, PA Carol in Lakewood, CO and Charles in Boulder, CO, and their spouses.

A. Lauriston Parks, Esq.

A. Lauriston Parks, 75, of Church Lane in Wickford passed away on September 6, 2010. Larry was the husband of 49 years of Martha Anderson Parks. Born in Providence, RI he was the son of the late Albert L. Parks and Dorothy Arnold Parks.

After graduating from Moses Brown School in Providence he received his B.A. from Kent State University and his J.D. from the University of Chicago Law School. He practiced as an attorney with the former Hanson, Curran & Parks for 39 years where he was Managing Partner in 2000 when he retired from the firm and started a private practice in Jamestown, RI. Larry was an avid sailor and spent his summers racing out of the Saunderstown Yacht Club and cruising the New England Coast from Connecticut to Maine. His passion for sailing was most satisfied cruising for several weeks at a time Downeast where he kept his sloop, *Chickasheen*, for 19 years. He was Commodore of the Saunderstown Yacht Club, Chairman of the North Kingstown Republican Party, Senior Warden at the former St. Michael's and All Angels Episcopal Church in East Providence, Senior Warden at the Chapel of Saint John the Devine in Saunderstown, Rhode Island State Chair of the American Collage of Trial Lawyers, President of Pausacaco Lodge, Board Member of the North Kingstown Senior Association and Master of the Adelphoi Masonic Lodge. He was a current member of St. Paul's Episcopal Church in Wickford, Wickford Yacht Club, Saunderstown Yacht Club and the Society of Colonial Wars.

Besides his wife, he is survived by his children Amy P. Crownover and husband Art of Nashville, TN, George W. Parks and wife Lynda of Cohasset, MA, Reed A. Parks and wife Julie of Toronto, Canada, and his sister Gail Peet of East Providence.

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.

Seven Cases Every Rhode Island DUI Practitioner Should Know

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

Stefanie A. Murphy, Esq.
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Erin B. McKenna, Esq.
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The area of law involving the defense of clients accused of Driving Under the Influence (DUI) and Refusal to Submit to a Chemical Test in Rhode Island is constantly evolving. To assist you in preparing your next DUI or Refusal case for trial, case capsules of recent important decisions relative to DUIs and Refusals are provided to familiarize you with successful past arguments and areas of the law that may be ripe for challenge. We hope this article will aid you in utilizing these recent decisions effectively and assist you in providing a vigorous defense for your clients.

Case Capsules

Such v. State, 950 A.2d 1150 (2008)

The Rhode Island Supreme Court held that the Rhode Island General Assembly did intend the amendatory language in both the refusal bill and budget bill to be operative in the statute governing the civil offense of Refusal to Submit to a Chemical Test. The Court also noted that the rule of lenity only applies when the meaning of a criminal statute is ambiguous, and does not apply to criminal penalties in the refusal bill, which are clear and unambiguous.

State v. DeOlivera, 972 A.2d 653 (R.I 2009)

In order to admit Breathalyzer results, the suspect must have validly consented to the Breathalyzer. A suspect has the statutory right to refuse the Breathalyzer. However, the right to refuse the Breathalyzer can be waived, if the decision is made knowingly, intelligently, and voluntarily.

Here, even though the police did not state to the defendant that the victim had died as a result of the accident, the Court still found that the decision to waive the right to refuse the Breathalyzer was made knowingly, intelligently, and voluntarily. The Court held that when the record demonstrates that the defendant was made aware of his or her rights, a defendant does not need to be informed of all the information useful to making his or her decision.

Colorado v. Spring, 479 U.S. 564, 576-577 (1987).

Individuals charged with driving while intoxicated must be informed of their Miranda rights, the right to examination by a physician, the right to refuse the Breathalyzer, and the consequences of refusal.

State v. Robinson, 972 A.2d 150 (R.I. 2009)

After a Rhode Island Traffic Tribunal Appeals Panel affirmed the decisions to dismiss six defendants' charges of Refusal to Submit to a Chemical Test, the State appealed to the Sixth Division District Court. The defendants challenged the appeal, arguing the District Court lacked subject matter jurisdiction. The State claimed that several statutory provisions granted subject matter jurisdiction to the District Court to hear the appeals by the state.

The Rhode Island Supreme Court held that the District Court lacked subject matter jurisdiction to hear appeals by the State Traffic Tribunal Appeals Panel decisions. The State is not within the definition of a "person who is aggrieved" under R.I. Gen. Laws § 31-41.109(a). The State likewise had no right to appeal under procedural rules such as R.I. Gen. Laws § 31-41.1-9. **Addendum:**

The jurisdiction of the District Court to hear these appeals by the State was expanded by the General Assembly in R.I. Gen. Laws § 8-8.2-2(d). Currently, the State may appeal decisions by the Rhode Island Traffic Tribunal Appeals Panel to the District Court.

State v. Nelson, 982 A.2d 602 (R.I. 2009)

There are three major issues in this case. First, a trial justice was correct in finding that a remark made during *voir dire* by a prospective juror, a college professor, that three of her students had been killed by drunk drivers, was not enough for a mistrial. The remaining jurors knew that the defendant was charged with DUI. Furthermore, the comment did not imply guilt on the part of the defendant.

Second, despite information lacking in the chain of custody of the defendant's blood test results, the results can be admitted. Showing a continuous chain of custody operates as a guarantee of reliability, but is not necessary for the introduction of evidence, as long as it is probable that the evidence has not been

tampered with.

Finally, the Court considered the propriety of judicial interrogation.

State v. Carter, No. K309-0454A (R.I.Sup.Ct. 2010)

Refusal to Submit to a Chemical Test, second offense, is a criminal misdemeanor under R.I. Gen. Laws § 31-27-2.1(b)(2). A first offense refusal is a civil violation. Conviction predicated on a civil charge which does not have to be found beyond a reasonable doubt is not unconstitutional under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, section 10 of the Rhode Island Constitution. The prior violation of the chemical test refusal statute is an element of the crime of second offense refusal. As an element of the crime, the first violation has to be found beyond a reasonable doubt.

Virginia v. Harris, 276 Va. 689, 668 S.E.2d 141 (2008), cert. denied, 130 S.Ct. 10 (2009)

Anonymous tips reporting drunk driving lack sufficient indicia of reliability to justify an investigatory stop, absent observations indicating criminal conduct – even when the tip included giving the name of the operator, a description of his clothes, the make of the vehicle, a partial license plate number, and the direction in which the vehicle was traveling. An anonymous tip alone is not enough to form a reasonable suspicion of criminal activity, absent verification. This will become known as the One Free Swerve case.

Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009)

Affidavits, including a state forensic analyst's laboratory report prepared for use in a criminal prosecution, fall within the "core class of testimonial statements," rendering the affiants witnesses subject to the defendant's right of confrontation under the Sixth Amendment as interpreted in **Crawford v. Washington**, 541 U.S. 36, 51 (2004). This means that the analyst who produces a report must be made available by the prosecution for cross-examination by the defendant.

Authors' Note: *The authors thank Christina Dzierzek, Roger Williams University School of Law, class of 2010, and Matthew Casey, Roger Williams University School of Law, class of 2011, for their help with this article.* ❖

BOOK REVIEW

The Autobiography of an Execution
by David Dow

Nicole P. Dyszlewski, Esq.
University of Rhode Island
Graduate School of Library
and Information Studies

Dow's book shows that death row is not really about black and white, but, rather, it is various shades of gray.

David Dow's *Autobiography of an Execution* will not leave you feeling fully satisfied, but it may leave you feeling better about your own job. Dow is the litigation director at the Texas Defender Service, a non-profit legal aid corporation that represents death-row inmates. Dow's book is a memoir about how his personal life and career intermingle and sometimes about the lives of the inmates he represents.

The strength of Dow's work is that it illuminates the gray area in what is often portrayed as a black and white subject. The death penalty is usually seen as something one is either for or against. Convicts are guilty or not. Appellate lawyers win appeals or they don't. Dow's book shows that death row is not really about black and white, but, rather, it is various shades of gray. Dow writes, "In place of the death sentence Van Orman (a client of Dow's) will spend the rest of his life in prison for a crime he didn't commit. But I'm a death-penalty lawyer and Van Orman won't get executed, so I count it as a victory. One of my clients committed suicide a week before his execution. That's a victory. Another died of AIDS. A victory."

Dow, himself, is a good example of the gray area that this work depicts. He is a former death-penalty supporter who manages to present his life's work as a legal advocate for death-row inmates in an understated and realistic way. Dow is at his best when he is wrestling his professional demons amidst the personal life he shares with his wife, Katya, who is also a lawyer, his son, and his dog. Dow's book is not filled with heroes and villains, or even characters, but is populated with people who have made bad choices, people who are mentally ill, people who are parents, people who drink too much, people with bad judgment on both sides of the law, and members of the legal community and correctional system who work hard and have a conscience.

The obvious weakness of Dow's work is that it leaves the reader with more questions than it answers. This is in part due to the fact that the subject matter is morally ambiguous, but also because the writing of a legal memoir is a tricky undertaking. The book itself begins with an author's note acknowledging that certain names and facts have been changed to respect attorney-client privilege, which continues even after a client's death, and ends with an ethics opinion by Meredith Duncan, the George Butler Professor of Law at the University of Houston Law Center, where Dow also teaches, about the ethical rules of attorney-client privilege. Despite these additional materials in the text, the reader is left wanting more particulars about Dow's clients and cases. It is obvious that writing a legal memoir is difficult, but reading a legal memoir is equally so because at times the narrative seems choppy and lacking detail.

If the worst thing that can be said about a book is that the reader is left wanting more, then the book is surely worth the time it takes to read it. This book is an uncharacteristically subtle look into the topic of what some unsubtly call state-sanctioned murder. ❖

Wind Power Rights

continued from page 9

Termination

Frequently, agreements between a landowner and developer allow the developer to terminate the agreement, either for convenience or for cause, but do not provide such an out for the landowner. In any case, the agreement should allow the landowner to retain payments made by the developer up to the point of termination. The agreement may also require a developer to pay a termination fee, or provide a portion of lost future payments.

A landowner should negotiate a right to terminate for cause if the developer has breached any material terms of the agreement. The agreement should set forth which conduct on the part of the developer would constitute a *material breach*, including, for example, the wind developer's failure to pay monies due or its abandonment of the project.

Liability

A landowner may face serious potential liability if a developer commences construction and erects looming wind turbines and electricity-generating equipment on his or her property. To protect the landowner from the expense of potential litigation, an options agreement and a lease agreement should require the wind developer maintain general liability insurance. The agreements may also require that the developer add the landowner to its insurance policies on the property, as an additional insured, that the developer provide adequate notice before cancelling or changing any insurance policies, and/or the developer provide the landowner with certificates of insurance (or the insurance carrier do so) on a regular basis.

Any agreement should also include an indemnification clause, requiring the developer to indemnify the landowner for physical damage or injury caused by the developer's presence on the property.

Decommissioning

One of the worst case scenarios with any agreement between a landowner and wind developer is that the developer abandons the project, leaving the turbines, roads, and equipment for the landowner to decommission. Therefore, a lease agreement should address the developer's obligation to restore the property to its original condition after the developer terminates the wind energy project.[5] The devel-

oper should be required, for example, to remove its improvements and to backfill any underground improvements with topsoil within a specified amount of time after the expiration or termination of the agreement. The agreement could even require the developer to re-seed the land.

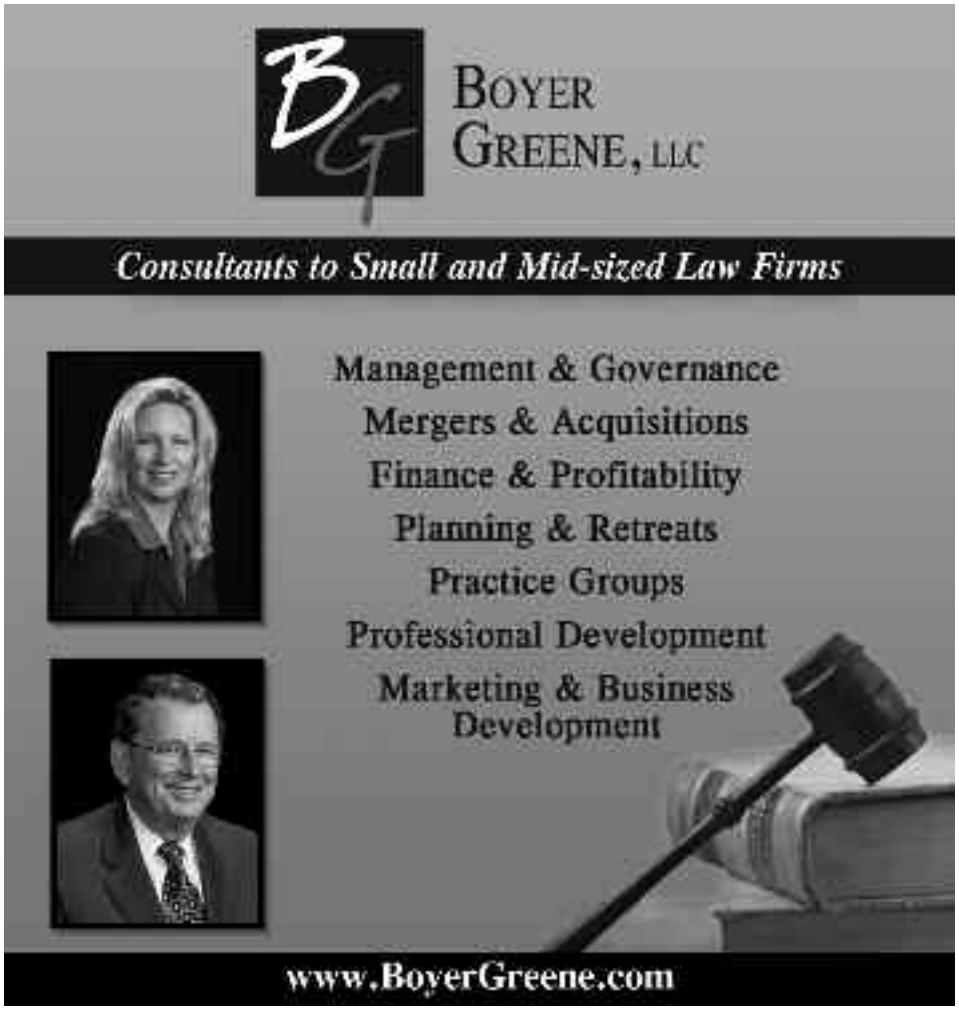
A lease agreement may also require a developer to provide a surety of some kind, for example, a bond which sufficiently ensures that financial resources will be available at the end of the lease period to pay for the removal of the improvements and the restoration of the property. Any agreement should provide for adequate protection to the landowner, particularly if a developer chooses to abandon the project, leaving the landowner with wind turbines, electric generators, and roads spanning his or her property.

Conclusion

This article does not provide an exhaustive list of necessary protections for a landowner.[6] As your client's advocate, you will want to ensure that he or she is protected under the agreement. While your client may have much to gain financially under an agreement with a wind power developer, he or she may also be at risk of losing even more. Consider this checklist as a starting place for some of the most critical issues.

Landowner and Developer Agreement Checklist

- ❍ Contemplate the form of agreement between the landowner and the developer and confirm the chosen form meets your client's individualized needs.
- ❍ Check local ordinances and state statutes to ensure the proposed wind project will comply with all legal requirements.
- ❍ Carefully consider the method and amount of compensation to determine whether your client is entering into a fair deal.
- ❍ Consider whether your client could potentially incur any costs or sustain any damages as a result of the construction of a wind energy project, and insist he or she will receive compensation from the developer accordingly.
- ❍ Analyze the potential impact of the wind project on your client's property, the community, and the environment.
- ❍ Identify particular areas of liability and determine which party should be



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Founded in 1958, the Rhode Island Bar Foundation is the non-profit philanthropic arm of the state's legal profession. Its mission is to foster and maintain the honor and integrity of the legal profession and to study, improve, and facilitate the administration of justice.

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contractually responsible for each.

- Negotiate contractual grounds for termination both by the landowner and the developer.
- Limit the developer's use of the property by clearly defining the areas of the property in which wind energy activity can occur.
- Require the developer to articulate a decommissioning plan.
- If your client intends to continue using a portion of the property, confirm the landowner's and the developer's use will not conflict.

ENDNOTES

1 *Section 500.30 (1a) of the Minnesota Statutes defines a "wind easement" as "a right, whether or not stated in the form of a restriction, easement, covenant, or condition, in any deed, will, or other instrument executed by or on behalf of any owner of land or air space for the purpose of ensuring adequate exposure of a wind power system to the winds." The statute further provides that a wind easement may be granted "in the same manner and with the same effect as a conveyance of an interest in real property," and requires that the easement be filed, duly recorded, and indexed in the appropriate county recorder's office. Minn. Stat. § 500.30(2). A wind easement is required to include,* inter alia, *"a description of the vertical and horizontal angles, expressed in degrees, and distances from the site of the wind power system in which an obstruction to the winds is prohibited or limited." Minn. Stat. § 500.30(3)(c).*

2 *Section 7-17-303 of Montana Code Annotated provides:*

(1) An easement obtained for the purpose of insuring the undisturbed flow of wind across the real property of another must be created in writing and is subject to the same conveyancing and instrument recording requirements as other easements on real property.

(2) An instrument creating a wind energy easement must include:

a. a legal description of the real property benefited and burdened by the easement;

b. a description of the dimensions of the easement sufficient to determine the horizontal space across and the vertical space above the burdened property that must remain unobstructed;

c. the restrictions placed upon vegetation, structures, and other objects that would impair or obstruct the windflow across and through the easement; and

d. the terms or conditions, if any, under which the easement may be changed or terminated.

2 *Section 17-04-03 of the North Dakota Century Code provides that:*

A property owner may grant a wind easement in the same manner and with the same effect as the conveyance of an interest in real property. The easement runs with the land benefited and burdened and terminates upon the conditions stated in the easement. However, the easement is void if the following have not occurred with respect to the property that is the subject of the easement within five years after the easement commences:

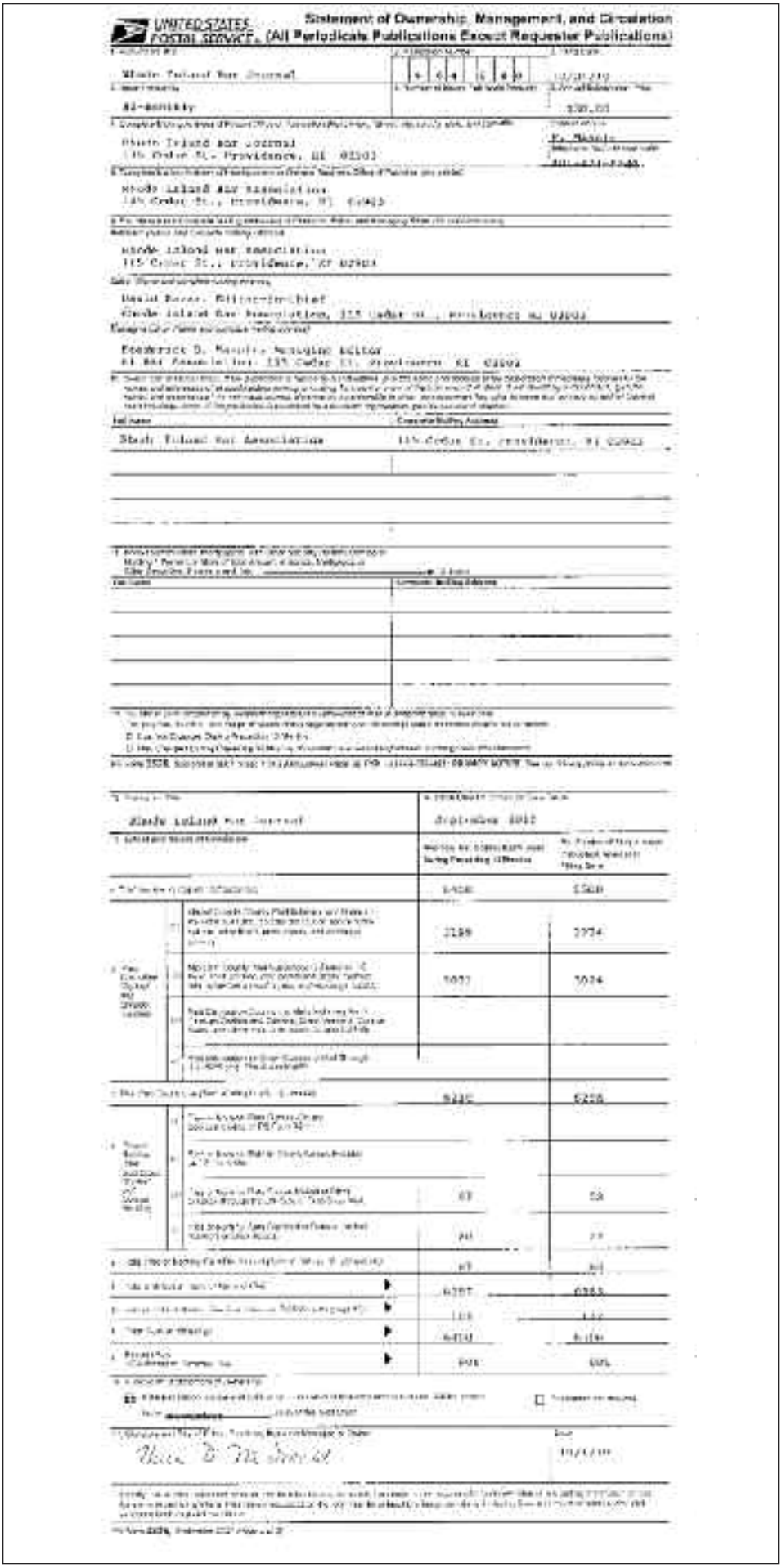
1. *A certificate of site compatibility or conditional use permit has been issued, if required; and*
2. *A transmission interconnection request is in process and not under suspension.*

Furthermore, § 17-04-06 of the North Dakota Century Code, among other restrictions and requirements, prohibits a confidentiality requirement in a proposed lease; requires the preservation of the property owner's business operations; imposes liability on the developer for property tax associated with the wind energy project and for any damages caused by the wind energy project; and requires the wind developer to carry general liability insurance.

4 *For more information regarding payment under a lease agreement, see* LEASE AGREEMENTS, *NYS Energy Research & Development Authority,* available at *http://www.powernaturally.org.*

5 *Decommissioning wind energy systems can be extremely costly and involves the removal of wind turbines, towers, and equipments, and may also involve removal of the foundation. Disassembly, removal, and restoration can cost hundreds of thousands of dollars.* ***See*** *Paul Gipe,* REMOVAL AND RESTORATION COSTS IN CALIFORNIA: WHO WILL PAY?*, 2003,* available at *http://www.wind-works.org/articles/Removal.html. The removed turbines may have some scrap value, however, off-setting part of the cost of decommissioning.* ***Id.***

6 *For more information about negotiating agreements regarding wind power systems, see Jessica A. Shoemaker,* FARMERS' GUIDE TO WIND ENERGY: LEGAL ISSUES IN FARMING THE WIND*, Farmers' Legal Action Group (June 2007),* available at *http://www.flaginc.org/topics/pubs/wind/FGWEcomplete.pdf.* ❖



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Alice D. McDonald

Paralegal Association Elects Officers and Directors

The Rhode Island Paralegal Association elected its Board of Directors and appointed Officers for 2010-2011. President, Carol Blanchard of Partridge Snow & Hahn; Vice President, Melanie Catineault of Cameron & Mittleman; Secretary, Connie McClurg of Kalander & Shaw; and Treasurer, Veronica Colon, Sovereign Bank. Board members include: Elaine White of RI Temps, Patricia Lyons of Roger Williams University, Laurie Emond of Little Medeiros Kinder Bulman & Whitney, Erin Dolan of Edwards Angell Palmer & Dodge, Deb Medeiros of Brown Rudnick, and Crystal Dartt of Duffy & Sweeney. Roberta Arsac, of Adler Pollock & Sheehan, continues to serve as Advisory Director. For more information about the Rhode Island Paralegal Association, contact Carol Blanchard at 401-861-8254 or Elaine White at 401-781-8400.

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