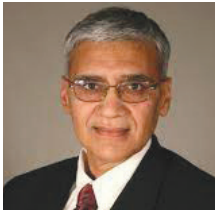


# CONVERSATION WITH A COLLEAGUE: ROBERT H. THOMAS

This article is part of the continuing series of interviews between, published in *The Practical Lawyer*, Rajiv S. Khanna, principal of The Law Offices of Rajiv Khanna, and leading practitioners across the country, designed to provide personal and professional insights into various areas of the law.



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**Rajiv: Let's begin with an introduction of who you are, what you do, how you got here.**

**Robert:** My name is Robert Thomas and I'm a lawyer with the Pacific Legal Foundation, a public interest law firm that represents people for free in court. But I also spend a lot of my time as a law professor. During the fall, I teach property law at the William and Mary Law School in Williamsburg, Virginia.

**What is the trajectory of your legal career? Where did you think you were going to go and how did you end up where you are?**

In a completely different place than I would have imagined if you'd asked me during law school. I attended the University of Hawaii Law School and got my JD there in the late 1980s. And, yes, attending the University of Hawaii Law School is about as pleasant as a law school can be. When I was going through law school, I imagined that I would be a courtroom lawyer practicing criminal law, but I had

the good fortune, during the summer between my second and third years, to clerk for a private law firm in downtown Honolulu where one of the first cases I handled happened to be a property case. I was sure that property was not of interest to me before that, based upon, among other things, my grade in my Real Property class, but also because being a courtroom lawyer doing criminal law seemed really appealing. I had no idea that the practice of property law was so different than the study of it, especially your first-year basic property class. And I was just hooked. So the roadmap suddenly veered off in a 90-degree direction. A majority of my practice ended up being in property, eminent domain, inverse condemnation, land use law, and the related topics. Because I was practicing in a mid-to-small market where it is very tough to specialize in a particular area, I had to do a lot of other things. I was doing appeals, occasional criminal law, voting rights, and election law, but the main focus always remained property. I have a completely unplanned career that somehow seems to be working out pretty well.

**What do you like about the practice of property law as opposed to other areas of law that you've been exposed to? What makes this special for you?**

What's really nice is when you're dealing with the property law in the areas I deal with—the question or the relationship between property owners, their neighbors, and the government—there's a lot of what I would call “running room,” a lot of room to be creative. Modern land-use law only really started coming around about 100 years ago. And while it's a pretty substantial body of law, there still are a lot of unresolved questions where creative thinking, as well as the constitutional requirements you overlay on top of that, becomes necessary. And so that's what I appreciate the most out of it. I had a partner early on in my career, a mentor, who told me that if you're practicing in a place like Hawaii where land is probably the scarcest commodity, you'll never be out of work. From a very practical matter, that really helped guide me. And he was absolutely right. Despite cycles in the economy in a place like Hawaii, very tied to the tourist economy, the one thing that we were never short of were cases and disputes involving property, land, how land is used, how those resources are allocated, how it interacts with environmental concerns, maybe population and antidevelopment concerns. And yet there are people who need to live in a place where the median home price is hovering just over a million dollars.

That's a function, of course, of the physical size of the islands. But it's also due to the difficulty in building a home. The impacts of the regulations that one has to go through in order to build something like a single-family home is something like \$200,000, last I checked, which is pretty significant. And that is also accurate for a national practice in land use, as regulation of the private uses of property becomes more stringent.

So to answer your question, it just was an area that was metaphysically kind of fascinating. What does it mean to “own” something is something that I think it doesn't take a law degree to understand and yet, at the same time, the layers of what that means are

just fascinating to me. To get to put that into practice and to do it every day just makes for very interesting work.

**I take it that you are one of the very few at the bar who do not wake up screaming about the rule against perpetuities?**

No. I found out as a law professor, when I asked my students who are all 2Ls or 3Ls, if they still study the rule against perpetuities. Surprisingly, a couple of them told me no. And I laughed and asked why not. And they said, “Well, our professor said it was an archaic thing, never used, you'll never do a case.” One, I understand from some of them who recently took the latest bar exam, that in one jurisdiction at least it was a bar exam question, which is unbelievably cruel on the part of the bar examiners of that state. And then two, that same mentor that I mentioned earlier? He actually argued in the Hawaii Supreme Court a rule against perpetuities case.

And he said, “They told me as a student this was completely useless information, but here I am actually arguing what that rule means.” And so I tell people to be careful if you don't study something like that. It's going to come up. But yes, thankfully I have avoided that question. I tell the students who are taking wills and trust that they should know it, because that's where it actually comes into play.

**How did you end up on the mainland if Hawaii was your base camp?**

Even though I was born in Hawaii and I spent a lot of my youth there, I went to university in California, returned to Hawaii for law school, and began practicing there. But my horizon was always a little broader than that. This was in the 80s and 90s when, in order to really survive, even in a small market, you needed to look outwards. And in the 80s and 90s, even though the issues and cases were on Oahu, Maui, or Kauai, the owners and decisionmakers were often someplace else. We had to be very up on the technology—the fax machine was the big thing in those days—because being so allowed us to expand our practice and our abilities beyond the islands out to the mainland and the world. It

was just a necessity of doing business. It became a requirement to not limit yourself even in something that you considered to be a local practice, like property, to just your neighborhood or your city or your state. I was also licensed in California, so that helped as well.

**Do you find there's a lot of difference in the property law practice in Hawaii and the mainland?**

Much of the basics are the same, even prior to the imposition of US jurisdiction over Hawaii—from the time when Hawaii was an independent republic and, prior to that, a kingdom. When the law shifted in Hawaii from the cultural feudal system of property law to Western-style law in the 1840s and 1850s, the model they used was the English common law of property, and then the American property law. Many of the lawyers were either English or American barristers or solicitors so there was a natural fit. The broad concepts were there and would be quite familiar to somebody trained in the common law either in the English or American system of property law. But there are some fascinating differences about the extent of property rights that an individual might have, the nature of public resources or shared resources like beaches, air, water, and those type of things. Today there are still some very big distinctions between black-letter American property law and Hawaii property law. There are traps for the unwary. If you simply bring your knowledge, as extensive as it might be, of American property law in the other 49 states and assume it's the same in Hawaii, you'll be in for quite a surprise simply because of those feudal roots as well as a lot of the cultural distinctions and how that law was developed organically. But it's one of the reasons why I really took to property law because it was so dramatically different and therefore interesting.

**Do you remember any cases that stick out in your mind as unique?**

I hate pointing out my losses, but this was one that I think was unique and would baffle the outside observer. In fact, a very prominent property law professor from a mainland law school presented

a lecture at the University of Hawaii a few years ago and he noted, "There's this one very strange case I want to point out," not realizing that I was the guy who had represented the property owner. Without going into too much detail, the case involved the regulation by the county, state, and federal governments of water use. There was a family-owned business that purchased water from a natural spring and bottled it into those big five-gallon water coolers—750 gallons a day coming out of an aquifer of something like 300,000 or 400,000 gallons per day. The question was whether he had to undertake a study costing hundreds of thousands of dollars to see what the impact of the removal of that 750 gallons a day would be. And this was on the island of Kauai, which is reputed to be the wettest spot on earth because of the amount of rainfall it receives annually. But I lost that case four to one in the Hawaii Supreme Court. The court held that, yes, indeed, he had to undertake those studies and he had to prove that he would not harm the water resources of the entire island by drawing 750 gallons a day and putting it into plastic bottles. The law professor I mentioned earlier said, "I don't know where that decision came from. It's completely inexplicable to me." That, to me, is an illustration of the principle of *that's not the way we do things here* that you often see in Hawaii property law. I still think I was right on that one, even though we lost.

**Have you seen a lot of general practitioners dabble in property law and are there any consequences stemming from that?**

In private practice, I still consider myself a generalist even though I'm with a public interest firm where my sole job is to focus on property cases. In private practice, I worked in a firm with 25 to 30 lawyers, which was considered one of the top 10 in size in the state. It's not a very big market. So there is some segmentation and some ability to develop a specialization or expertise, but you've got to be open to doing a lot of different types of work. I dealt a lot with smaller, solo, or boutique law firms and actually had very good experiences with them. The ones I encountered were smart enough to know that a particular property issue seemed much too

specialized, particularly something like eminent domain, which is this “dark corner of the law” that is not really taught in law schools. That would be the example I would use of cases or instances where non-specialists seem to have that sense that they should talk to somebody who understands it better.

One of the great things I liked about practicing in a small market was that you kind of know most of the people. I think the last I checked, and this number could be wrong, there are around 4,000 active practicing lawyers in the entire State of Hawaii. I won't say you know *everybody* but you're maybe two degrees of separation from every lawyer in the state. It's really easy to pick up the phone and say, “Do you know somebody who does that kind of work?” It tends to be a pretty friendly environment. A lot of willingness to help colleagues. Here's what you need to know so you don't screw up. Call me if you need my help, and if you lose, let's team up for an appeal. Things like that. I've had fairly positive experiences with that because my small firm and solo colleagues understand enough to know when they're outside of their usual area of practice.

**You still consider yourself to be a general practitioner. You have focused on property in private practice. You teach property in law school, and you also are doing public interest litigation. Out of all of these careers, what do you think you find the most satisfying?**

That is truly a tough question. I loved private practice. I loved being able to help people solve their problems. I liked both large and small cases, cases that were money makers. Unfortunately, there were a lot of cases that were not money-makers but I still treasure the associations I have with those clients or cases where we couldn't win. I love the people I worked with. I remain friends with them to this day.

I also love teaching law because you're not bound by what the client can afford. Should I be looking at that issue? How about that side issue? Can I go there? In the academic world, that is actually encouraged. And secondly, I love working with

soon-to-be lawyers and watching as the lights turn on in their eyes and they open their minds to the possibilities. A lot of them, I think, were like I was in law school and thinking, “This class on land use is at a good place and fits in my schedule.” And then they find out that property is not a static subject. It's right on the cutting edge of things, and they really enjoy it.

And then the last two years I've been a lawyer with the nonprofit Pacific Legal Foundation and I really am enamored of that. In private practice, there were a few days here and there when you have to get your bills out or you have to call a client who's late in paying, or you have to get into a fight with the other side. And you think, *when is this day going to end?* But I have yet to have any of those days at PLF. I wake up every day eager to get back to work. It's a great freedom being able to tell clients, don't worry, we will cover all of your legal fees and all of the costs. We're here to help you, and to help shape the law to benefit everyone. When you can tell clients that, they view you as someone who is coming in solely to help them, as opposed to someone coming in to help them and maybe make some money. It really changes the dynamic of the relationship. The colleagues that I work with are the best and the brightest in our field—really dynamite advocates—so I feel incredibly lucky to have come into this position.

But if I had to choose between private practice, teaching, and public interest law, I think I have to go with public interest practice. Just because there hasn't been a day yet that I haven't thought, *Today is going to be fun. I'm going to learn some stuff.* I don't have to worry about billable hours. I don't have to worry about chasing clients for overdue invoices. I don't really have to worry too much about the drudgery of litigation. I've also somehow avoided many of the big drawbacks that you might hear about in typical civil litigation. I don't know whether that's because I'm dealing with mostly government lawyers on the other side who are very professional. It would pain me to have to let go of my academic and scholarly work, but if I had to, I would choose public interest law. It's fantastic.

**What would you advise someone who wants to break into any of these areas?**

My primary advice is to be patient. Many law professors come from probably 15 or 20 law schools and have a certain career arc—law review at an Ivy League law school, federal clerkship. I had none of those. I went to the University of Hawaii, the only law school in the state, and most of the lawyers, my classmates, ended up practicing in Hawaii. For the most part, I did not have the typical trajectory or qualifications you might see in academia. I didn't have a clerkship, much less a federal clerkship. But I was patient. I chased what I thought was an interesting path. And fate, or whatever it was, presented things to me that sounded interesting, and I went with it. Be patient. Be flexible. Be open to the possibilities. And when you find something you like doing, don't let it go. Latch on to it. You do have to worry about things like money and paying the rent and family and whatnot. But if you don't like going to work every day, it's going to be awfully hard to keep doing it.

**What do you do in the plenty of spare time I'm sure you have in these three careers that you are proceeding on simultaneously?**

The nice part is that all of these careers are very compatible and I have been super lucky to have colleagues, bosses, and clients who are very understanding about my wearing several different, but related, hats. First, because there's a lot of cross-over, it's not as time-consuming as doing two completely separate jobs. I love walking. I love being in the outdoors. Home base is California, even though for the fall I'm in Virginia. California can be tough to live in just because the cost of doing so is so high. But California has great weather, the beautiful outdoors, all of that. So, I love doing that. Whether it's traveling and being outside or seeing new things, there's always time.

Something I did not point out earlier was one of the reasons I really like my current position is that we're a remote law firm. You don't have to be in the office in DC or Sacramento or Seattle or South Florida

where we have offices. You can be pretty much anywhere with an internet connection and the ability to get to court when needed. With those parameters, there's a lot of opportunity to have a normal life. The two or three hours a day you might otherwise spend commuting to an office can now be used to do those things that you love. It's wonderful.

**Were you already doing some of this digital, transactional work pre-pandemic?**

Yes. That's the Pacific Legal Foundation business model. Even before COVID forced everybody to go remote, PLF was already a majority-remote workforce as a way to attract talent who may not have wanted to live in Sacramento, California where the home office is. Now we have the ability to tap into talent virtually anywhere. Even earlier, when I was practicing in Hawaii, we were on the cutting edge of remote technology in order to minimize the distance problems or the time gap between the rest of the country. For half of the year, Hawaii is six hours behind Eastern Time, which means it is a full day behind the business cycle. But we were early adopters of fax machines, email, and other technology that sped up communication. I also had the advantage of being primarily an appellate lawyer—you have your briefs and appellate record and that's it. I have taken advantage of technology over my career because it opens up a few extra hours in the day to do things other than sit in the car.

**Last question for you, Robert. Is there anything personal, something your colleagues might not know about you, that you would like to share?**

I'm trying to think of something new. Maybe I over-share already.

My dad was a career military man so, for the first 12 years of my life, we moved around. And one thing probably people don't know about me was that my formative years were spent in Bangkok, Thailand in the 1960s while the Vietnam War was going on. I went to a school where the headmistress, Mrs. Stevens, had been trained in England and she was a strict grammarian and speller so I tend to spell and pronounce words the British way. I want to

say *schedule* the British way. I will instinctively spell “color” with an *ou*. I remember the headmistress saying, “And you shall learn there’s only one proper way to spell colour. I don’t care how Americans misspell it, but we’re going to spell it with an *ou*.” That still sticks with me. A little bit of my DNA wants to spell things in the English fashion. Thank you, Mrs. Stevens.

**Any concluding comments you would like to share?**

You mentioned we may not like to call ourselves experts, and I still sort of shy away from that. Even though I am now heading up the property group in the Pacific Legal Foundation, I do still consider myself kind of a generalist. And in this age of increasing specialization in the American law business, being a generalist shouldn’t be a dirty word. It’s a good thing. Because I think we see the world and solutions to legal problems quite broadly and I think that’s a good thing.

**Actually, I agree with you. It helps to know a lot of different areas of the law because you’re sensitive to problems that might be otherwise invisible to somebody who is focused in that area.**

I agree. A lot of the times when I’m having these semi-Socratic dialogues with my students in class, I’ll ask them about tort law and contract law, and they look confused because it’s a property class. I keep telling them it’s all part of the same way of living in the world. I’m proud to say that I’m a generalist. 📌