



THE JOURNAL

OF THE DELAWARE STATE BAR ASSOCIATION



NOMINATIONS SOUGHT FOR 2016 AWARDS P. 2

**NOMINATIONS WANTED FOR THE 2016
DISTINGUISHED ACCESS TO JUSTICE AWARDS** P. 31

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DIRECTORY CORRECTION FORM** P. 34

Nominations Sought for 2016 Awards

The Delaware State Bar Association and the Awards Committee are seeking nominations for the following four awards* **:

- Daniel L. Herrmann Professional Conduct Award**
- Outstanding Service to the Courts and Bar Award**
- Distinguished Mentoring Award**
- Government Service Award**

These and other awards will be presented in a special Awards Luncheon in December 2016.

Awards Description

Daniel L. Herrmann Professional Conduct Award

Awarded to a member of the Delaware Bar who, over the course of time, has demonstrated those qualities of courtesy and civility which, together with high ability and distinguished service, exemplifies the Delaware lawyer.

Outstanding Service to the Courts and Bar Award

Awarded to a Delaware lawyer or judge who, by exemplary service to the Delaware Courts and the Delaware Bar, has substantially assisted the courts and the Bar and has strengthened public trust and confidence in the courts in the state of Delaware and the administration of justice.

Distinguished Mentoring Award

Awarded to a Delaware lawyer or judge who, by distinguished mentoring of other Delaware lawyers (or future lawyers) over a period of many years, has served as an inspiration to and a model for those lawyers in striving for and maintaining the highest standards in their professional careers and in their community involvement.

Government Service Award

Awarded to a full-time government service employee in recognition of dedicated and distinguished contribution to the Administration of Justice.

** These are not necessarily annual awards. All or some of these awards will be presented only upon the recommendation of the Awards Committee and approval by the Executive Committee of the DSBA.*

*** Please note that previous nominations must be renewed to be considered.*

Delaware State Bar Association Awards Nomination Form

Name of Candidate: _____

Title/Occupation of Candidate: _____

Award: _____

Date: _____

Nominator: _____

Phone: _____ Fax: _____ E-Mail: _____

Firm: _____

Address: _____

Brief statement of reasons that candidate is deserving of Award (see above Award criteria). Please attach sheet if necessary.

Nominations should be submitted to Johnna Darby, Executive Director, e-mail jdarby@dsba.org or fax to (302) 658-5212.

DSBA BAR JOURNAL

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The *Bar Journal* is the independent journal of the Delaware State Bar Association. It is a forum for the free expression of ideas on the law, the legal profession and the administration of justice. It may publish articles representing unpopular and controversial points of view. Publishing and editorial decisions are based on the quality of writing, the timeliness of the article, and the potential interest to readers, and all articles are subject to limitations of good taste. In every instance, the views expressed are those of the authors, and no endorsement of those views should be inferred, unless specifically identified as the policy of the Delaware State Bar Association.

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THE JOURNAL

OF THE DELAWARE STATE BAR ASSOCIATION

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PRESIDENT'S CORNER

By Miranda D. Clifton, Esquire

Connection Reflection

The most observant readers have probably noted a new author to this column. I feel honored and excited to have the opportunity to communicate with you every month (or so) with some of the key concepts I feel are important to individuals so close to the legal system in Delaware. Although, as members of the Delaware State Bar Association, we are extremely diverse, we all have one thing in common. We are proud members of the Delaware State Bar Association.

In the spirit of keeping my remarks brief in this article, I want to focus for a minute on what we mean by Association (the “A” in DSBA). The word “Association” comes from Latin origin meaning “uniting for a common purpose.” Merriam-Webster defines the word association in three different ways. The first definition is “a feeling, memory, or thought that is connected to a person, place, or thing.” We all understand this in its simplest form when I say a certain word each of us associates different feelings or memories with that word. The second definition is “an organized group of people who have the same interest, job, etc.” This is most likely how most of us view the DSBA — as a group of individuals who have passed the Delaware bar exam and are licensed to practice in this State. That is absolutely correct. However, I would like to propose that we all would be better served by the DSBA if we also considered the third definition, which is “a connection or relationship between things or people.”

The DSBA is more than just an association of Delaware lawyers and judges. Granted, the more I travel around the country and have contact with non-Delaware lawyers and judges, the more convinced I am that we have the brightest and the best right here. Delaware has a rich history of legal brilliance and the legal legacy continues. The Delaware legal community also continues to pride itself on its unmatched civility among the Bench and the Bar. We may duel, but we do it congenially and we leave our differences in the courtroom, where they belong.

During the tenure of my practice, I have observed the Delaware Bar dive headlong into the electronic age. With all of the benefits that technology provides, if we are not vigilant, one of the negative side effects could be a loss of community. I understand the alternative social media communities. However, there are some things that cannot be done electronically. There is no electronic substitute for a handshake. Also, many issues can be resolved just by being able to make some eye contact. I would much rather see a real smiley face any day than an emoji.

We are also entering an age where professions (traditionally medicine, law, and the clergy) are requiring innovation in order to remain viable. Innovation is accelerated by collaboration. However, collaboration is impossible without



Photographs from the 2016 Bench and Bar Conference on June 17, 2016.

a strong foundation of community or association. Therefore, in order for us as legal professionals to retain our professionalism and purpose, it is imperative that we foster community with each other.

Time is our most precious resource. However, this year I challenge you as a member of the Delaware State Bar Association to invest some time into networking by taking advantage of opportunities offered

vision in connecting with this segment of our Bar. Moving forward, our CLEs will be expertly coordinated by our newest addition, former Superior Commissioner, Mark Vavala, who comes to us with a rich history of coordinating excellent CLE seminars. Anyone who knows Mark is in awe of his creativity, which will be obvious in upcoming continuing legal education programming.

Historically, DSBA history has been built upon social events bonding attorneys together. As our practices have become more demanding, we have out of necessity had to “let something go.” I am afraid, however, that we have undervalued regularly meeting with colleagues in a relaxing atmosphere for no other reason than just to be with each other. By investing the time into some of these more social events, I have found that I can always learn from others’ concepts, tools, and techniques and that I can immediately integrate them into my life, whether personally or professionally. For new attorneys, I suggest that

“There is no electronic substitute for a handshake. Also, many issues can be resolved just by being able to make some eye contact. I would much rather see a real smiley face any day than an emoji.”

I have countless examples in my own practice when issues I have wrestled with for days are resolved within minutes by just “talking” it out with trusted colleagues, both inside and outside of my firm and practice area. Efficiency and simplification are not only contemporary corporate buzzwords, but they are the expectation and dictate of our clients. We cannot meet these expectations without relying on resources beyond ourselves. The practice of law is hard enough. The day-to-day stressors can wear us down and we do not always do ourselves any favor by retreating into our own silos.

by the DSBA to connect with other individuals who are members of our Bar. As this year progresses, I will do my best to present you with opportunities both law-related or non-law related where you can connect with other Delaware attorneys.

Our continuing legal education programs are excellent and designed for interaction between attorneys. We have provided relevant and engaging programming in the past under the extremely capable hand of Alison Macindoe. However, as of July 1, Alison will be working exclusively with our small firms and solo practitioners. We are excited about Alison’s

President’s Corner (continued on page 6)

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you gather all the nuggets of wisdom you can. You will get much more useful information in a relaxed atmosphere. There is an untold amount of wisdom and experience at your fingertips with a minimal investment of time. To experienced attorneys, when is the last time that you poured yourself into someone else? You have invested enough blood and tears in many valuable lessons you have learned; pass them on and save someone else the grief. By sharing our institutional and professional knowledge, we can save younger attorneys time and they can pour that energy into making our legal community better.

One such social opportunity coming up very soon is DSBA night at the Blue Rocks on Friday, August 26 (and yes, there will be fireworks). I strongly encourage you to set this night aside, bring your family, and relax together with other members of the Delaware State Bar Association. We have a limited number of tickets available through the Delaware State Bar Association. The success of these events, of course, depends on your participation. We would like to create more opportunities like this for attorneys and their families to get together just to connect.

Another opportunity to get involved with other attorneys is to join and be active in a DSBA section. Most of the practice areas are represented by a section. We also have sections that cater to certain populations within our Bar that cross practice areas. The sections' meetings are usually monthly either at lunch or the end of the day. Our sections not only discuss topics relative to their specialty, but many initiate legislation, organize and sponsor continuing legal education, provide networking events, and reach out into the community.

Another great way to connect with other attorneys and walk away with a feeling you have truly accomplished something is to volunteer to help our community through *pro bono* efforts. If you are not sure where to start, call our Access to Justice Coordinator, Susan Simmons, and she will be thrilled to help guide you to a great volunteer opportunity.

Finally, attend our Delaware State Bar Association functions. Optimum benefit comes from attending Bar events with the resolution to actively meet new people and connect with other lawyers. I have learned that merely attending does not provide the greatest benefit to be gleaned from these events.

I challenge you to look at your level of involvement of the Delaware State Bar Association. We are not just an Association because we feel the need to provide another line on our resumes. We belong to the DSBA because we are a vibrant, inter-connected group of Delaware lawyers who are interested and invested in each other. I am excited about the year ahead and know that as we connect with each other, an excellent Bar comprised of quality attorneys will soundly move forward personally and professionally to an even higher level. 🌐

Miranda “Mindy” Clifton considers herself a Delawarean even though she has only lived in Delaware for 28 years at which time she transplanted from Tulsa, Oklahoma. Since being in Delaware, she has graduated from every college and university beginning with a “W” including Wesley (BS), Widener (JD), and Wilmington (MBA). She is the current President of the Delaware State Bar Association. In her spare time, Mindy is a Trial Attorney for Nationwide Mutual Insurance Company and represents its customers in almost every court in all three counties throughout the State. Mindy is also an adjunct professor for Wilmington University in their Graduate Business Studies. She can be reached at cliffom2@nationwide.com.



Photographs from the 2016 Bench and Bar Conference on June 17, 2016.

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EDITOR'S PERSPECTIVE

By David W. deBruin, Esquire

The Summer Wind

The practice of law does not generally allow for frequent and/or extended holidays. Especially as newly admitted attorneys, we often convince ourselves that a vacation is a three-day weekend planned around an out-of-state deposition. Four-day weekends are exceptional (and usually overlapped with a government holiday — when courts are closed) and taking an entire week away from the office is the stuff of legend! We do not really need to read or watch Stephen King's *The Shining* to know that “all work and no play makes Jack a dull boy” and could lead to a myriad of distressing issues. Like most people, attorneys function at a much more effective rate when refreshed and focused.

Thankfully, (like an innate annual migration) something happens to the practice of law during the months of June through August. During the summer, the time-sensitive nature of some legal matters can often be more readily expanded without major incident. It is almost as if all sides agree to put the most important and time-consuming work on the shelf to a certain extent. That causes things to slow down in order to actually allow for some individual vacation time, as well as family or non-work related commitments.

That being said, summertime is fraught with challenges for lawyers. The last thing you want to have happen (especially as a young associate) is to impugn your reputation by failing to meet an expected goal or deadline. Working with other attorneys (whenever possible) and clients to clearly communicate what is expected should allow for planning some time off and preparing to overcome summertime work challenges. If properly handled, that will ensure that we have an enjoyable summer and still meet our work goals.

If you have children who are of school age (but, importantly, are NOT in school), the summer represents some of the best and some of the most challenging times as parents. While our kids are relishing the long stretch of unbridled freedom, getting into

“Rest is not idleness, and to lie sometimes on the grass on a summer day listening to the murmur of water, or watching the clouds float across the sky, is hardly a waste of time.”

- John Lubbock

everything and nothing all at once, most of us are trying to find a balance between summer activities and the office. We must endure long, hot swim meets, lacrosse tournaments, baseball games, etc. and still manage to meet our deadlines. As children, the summer was ours; we took full ownership of it with both hands. Now that we are adults, the grip begins to loosen and eventually relinquishes to forces beyond our control. Hopefully, we can guard against exasperation when confronted with deadlines at work and boundless youthful exuberance at home.

One of the keys to summer survival is to carve out some time in the schedule for a well-deserved break, regardless of age; a chance to put away “smart” phones and laptops, and plant our feet in some sand. Summer is the best time to attempt to purposefully cleanse ourselves of technology (for at least a day or two), i.e., a “digital detox” if you will. Part of a successful digital detox is selecting the appropriate time both in terms of when we attempt it and for how long. The easiest way to start is to identify a weekend when there are no exigent matters on the calendar. Then just declare a pre-determined amount of time for the digital detox and once again, clearly communicate with the people we work with and our clients that we will be unavailable over the upcoming weekend. There is a valid reason that someone created an “out-of-office” notification system.

It is my sincere hope that reading this column is not the first reminder for all of us to take some much needed time out for ourselves. There is a mountain of data that demonstrates that it will absolutely benefit all of us in the long run. We can always save the great picture from that beautiful day at the beach as a background to remind us of the importance of taking a well-thought out and deserved break during the summer. 📌

Bar Journal Editor **David deBruin** is the founder of The deBruin Firm and his practice is dedicated to representing victims of mesothelioma, dangerous drug and medical devices, and select complex litigation. He can be reached at ddebruin@thedebuinfirm.com.

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ROOT FOR THE HOME TEAM!

DSBA Blue Rocks Night on August 26, 2016

Spend a little down time with your DSBA colleagues at the Blue Rocks game on Friday, August 26, 2016! Bring your friends and family and enjoy a fun night of baseball, a fan favorite – The Cowboy Monkey Rodeo, and post-game Fireworks! Tickets are available for purchase through DSBA. Call (302) 658-5279.

Professional Guidance Committee

This committee provides peer counseling and support to lawyers overburdened by personal or practice-related problems. It offers help to lawyers who, during difficult times, may need assistance in meeting law practice demands. The members of this committee, individually or as a team, will help with the time and energy needed to keep a law practice operating smoothly and to protect clients. Call a member if you or someone you know needs assistance.

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CALENDAR OF EVENTS

Remember that CLE Videos are shown for CLE credit five days a week at the DSBA in Wilmington! Call (302) 658-5279 to make an appointment.

September 2016

Wednesday, September 7, 2016

**Is Delaware's Death Penalty Already Dead?
A Review of *Rauf v. State* and the Delaware Statute**

1.5 hours CLE credit

Delaware State Bar Association, Wilmington, DE
Webcast to Kent County Courthouse, Dover, DE
Webcast to Tunnell & Raysor, Georgetown, DE

Wednesday, September 21, 2016

Trademark Basics

1.0 hour CLE credit

Delaware State Bar Association, Wilmington, DE
Webcast to Tunnell & Raysor, Georgetown, DE

Friday, September 30, 2016

Supreme Court Review 2016

3.3 hours CLE credit

Delaware State Bar Association, Wilmington, DE
Webcast to Kent County Courthouse, Dover, DE
Webcast to Tunnell & Raysor, Georgetown, DE

October 2016

Friday, October 28, 2016

Office and Trial Practice 2016

6.5 hours CLE credit

Chase Center on the Riverfront, Wilmington, DE



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SECTION & COMMITTEE MEETINGS

August 2016

Monday, August 1, 2016 • 12:30 p.m.

Senior Lawyers Committee Monthly Luncheon Meeting

Delaware State Bar Association, 405 North King Street, Suite 100, Wilmington, DE

Wednesday, August 3, 2016 • 8:30 a.m.

Multicultural Judges and Lawyers Executive Board Meeting

Delaware State Bar Association, 405 North King Street, Suite 100, Wilmington, DE

Tuesday, August 9, 2016 • 11:00 a.m.

LGBT Section Meeting

TBD

Thursday, August 18, 2016 • 12:00 p.m.

Executive Committee Meeting

Delaware State Bar Association, 405 North King Street, Suite 100, Wilmington, DE

September 2016

Monday, September 12, 2016 • 12:30 p.m.

Senior Lawyers Committee Monthly Luncheon Meeting

Delaware State Bar Association, 405 North King Street, Suite 100, Wilmington, DE

Thursday, September 15, 2016 • 12:00 p.m.

Annual Section Chair Meeting

Delaware State Bar Association, 405 North King Street, Suite 100, Wilmington, DE

Please contact Janice Myrick at jmyrick@dsba.org or (302) 658-5279 to have your Section or Committee meetings listed each month in the *Bar Journal*.

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The CLE Program *Current Ethical Issues and Dilemmas: What's New and What's News* was comprised of a two-part program beginning with five Breakout Sessions from which to choose while the second part of the CLE featured a panel discussion for the Plenary Session.



DSBA President Richard A. Forsten, Esquire, welcoming attendees to the Annual Meeting.

DELAWARE STATE BAR ASSOCIATION BENCH AND BAR CONFERENCE

FRIDAY, JUNE 17, 2016
CHASE CENTER ON THE RIVERFRONT
WILMINGTON, DE

2016



DSBA President-Elect Miranda D. Clifton, Esquire.



Just a few of the Exhibitors and Sponsors of the 2016 Bench and Bar Conference.



DSBA President Richard A. Forsten, Esquire, (left) with Michael S. Purzycki, Esquire, (middle) who presented the First State Distinguished Service Award to Charles S. McDowell, Esquire (right).



Recognition of Individuals Who Have Been Members of the Delaware Bar for More Than 50 Years. (For a full list of awardees, see page 14.)



Outgoing President Richard A. Forsten, Esquire, passing the gavel to incoming President Miranda D. Clifton, Esquire.



Miranda D. Clifton, Esquire, giving Richard A. Forsten, Esquire, the President's Ring.



Recognition of Delaware State Bar Insurance Services, Inc. Board Members William H. Sudell, Jr., Esquire (left), and John C. Andrade, Esquire (right), with DSBA President Richard A. Forsten, Esquire (middle).



The DSBA would like to thank the 2016 Exhibitors and Sponsors for supporting our Annual Bench and Bar Conference!

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 Sheldon A. Weinstein

Johannes R. Krahmer
 F. Edmund Lynch
 Harry Pogach
 L. Vincent Ramunno
 Louis H. Rombach
 Hon. Jane R. Roth
 Lawrence M. Sullivan
 Hon. Peter J. Walsh
 Charles E. Welch
 James M. Winfield
 Melvyn A. Woloshin

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 Lewis S. Black, Jr.
 Ben T. Castle
 Michael N. Castle
 Pierre S. du Pont IV
 John A. Herdeg
 Rudolf E. Hutz

1965

A. Richard Barros
 Robert W. Crowe
 Hon. Paul E. Ellis
 Alan H. Hershberger
 Roger D. Kelsey
 Don M. Kerr
 Morton R. Kimmel

SUPREME COURT REVIEW 2016:

A Discussion of Decisions at the Highest State and Federal Judicial Levels

FRIDAY, SEPTEMBER 30, 2016
8:50 A.M. - 12:30 P.M.

Registration and Continental Breakfast begin at 8:15 a.m.

3.3 hours CLE credit for Delaware and Pennsylvania attorneys

Live in New Castle County at Delaware State Bar Association
 Live webcast in Kent County at Kent County Courthouse
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DSBA BENCH AND BAR CONFERENCE JUNE 17, 2016

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The Art Connolly Race Judicata 2016

By Pat Quann, Executive Director
Delaware Law Related Education Center

The 11th Annual 5K Walk/Run was held on April 2nd at the Wilmington Riverfront. In 2015, it was renamed the Art Connolly Race Judicata to honor Arthur G. Connolly, Jr., Esquire, a partner in Connolly Gallagher LLP, who died in 2014. The event was sponsored by the Young Lawyer's Section of the Delaware State Bar Association. In spite of a cold and rainy day, close to 150 people participated in the race. We are grateful to Joe's Crab Shack, who served as our host again and to Arthur (Chip) G. Connolly III, Esquire, who served as the starter for the race.

The Art Connolly Race Judicata 2016 was organized by Alessandra Glorioso, Esquire, of Dorsey & Whitney LLP with the support of Kyle Evans Gay, Esquire, of Connolly Gallagher LLP, Jenny Rebecca Kasen, Esquire, of Kasen & Kasen, Jason D. Warren, Esquire, of McCann & Wall, LLC, Kristen S. Swift, Esquire, of Heckler & Frabizzio, P.A., and Sarah M. Ennis, Esquire, of Margolis Edelman. We thank our Business Sponsors; DLS Discovery, LLC and Next Generation Reporting LLC for their support. We are grateful to all the volunteers who helped with registration and other activities at the event, including members of the Delaware High School Mock Trial teams from the Wilmington Friends School, the Charter School of Wilmington and Howard High School of Technology, Katharine Glenn, Esquire, Darren Payne, Lynn Buffington, and Susan Simmons from the Delaware State Bar Association.

Funds and donations raised by the race will benefit the programs of the Delaware Law Related Education Center, Inc. The Art Connolly Race Judicata raised nearly \$12,000 for the Center. We deeply appreciate the generous support from the following firms and individuals:

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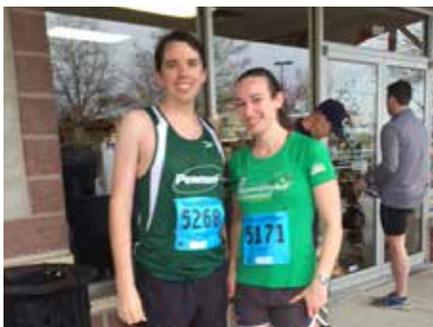
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TIPS ON TECHNOLOGY

By Richard K. Herrmann, Esquire

Did You Hear the One About Jonathan Roy?

We often focus so much on external hacking and the dangers of cloud computing, we lose sight of a common source of network intrusion—from within. Network and security audits are a must these days. However, there are those who would argue they certainly cannot guarantee security, and then they will tell you the story of Jonathan Roy.

• • •

Jonathan Roy had been an associate at the firm for nine years. He was good, he was dedicated, and he averaged more than 2,400 billable hours a year. But, his firm did not think he was partnership material; and it told him so rather indirectly. Those associates in his peerage who were being invited into the partnership were all going out for a drink with the managing partner and the chairs of each of the practice groups. This was a time-honored tradition, one which served two purposes. Those invited knew they were becoming partners, and those not invited knew they were being passed. This was Jonathan's last year and he knew it. "JONATHAN ROY WILL NEVER BE A PARTNER IN THIS FIRM" might as well be sent as a blast to everyone in the office.

March 3rd

Jonathan needed to make something happen. He needed to hurt someone. He needed to hurt the firm. The Tulane Corporate Law Institute was in two weeks; he would do it then.

March 17th

The Conference was as crowded as always. Several hundred lawyers from all parts of the country renew acquaintances, network, fulfill needed CLE requirements, and relax in mid-March, in the well-known University setting offering nearby golf, tennis, biking, fly casting, and dozens of other activities. The workshops, centering on annual case updates in Delaware corporate law, are filled to standing room only; brochures and marketing materials are neatly stacked on tables in every room. And, on one of those tables, in the room reserved for Alternative Entities, sat a large clear bowl filled with flash drives with the logo Minority Shareholder Alliance (MSA). The sign on the bowl listed the contents of each drive to include the updated Delaware Corporate Code, annotated, and PDFs of all opinions within the past five years. The drives were popular, full of content and reusable — the new flat wafer drives no thicker than a credit card. They were gone by 2:30 p.m. on the first day.

June 8th

Jonathan sat back and smiled to himself. He was still at the firm and would be for at least eight more months. About then, the chair of each practice group would be notifying any 10th year associate who had not made partner that "it was time to be thinking of the future" and "life would be better as a lateral hire in another law firm." He had plenty of time; it was all scripted. In fact, he had three weeks before the malware would automatically release; and it would release everywhere at the same time. The plan was simple, it was elegant. The 200 flash drives Jonathan planted at the Conference three months ago would be located at law firms throughout the country. Many would be in briefcases or drawers, but others would have been connected to networks of the nation's largest law firms, in-



cluding his own. He was certain of his own firm, because he had seen to that himself. Not from his own computer, of course. He used the desktop of one of the mid-level partners — easy to do, not rocket science. Security was no better here than at 90% of the AMLAW 100 firms.

At noon on July 3, a dialog box would appear on every computer on any law firm network to which a flash drive had been connected. The message would be the same, “ALL OF YOUR EMAILS HAVE BEEN COPIED. ALL OF YOUR CLIENT RECORDS HAVE BEEN COPIED. ONE LAW FIRM WILL BE SELECTED AT RANDOM. ITS RECORDS WILL BE PUBLISHED ON THE INTERNET. BETTER NOTIFY YOUR CLIENTS ;-)”

What no one would discover is that the malware did not copy and send files to a secret cloud server in some foreign country. It simply forced the publication of the dialog box. Jonathan had copied the sensitive firm records on his own, over a period of time. They included

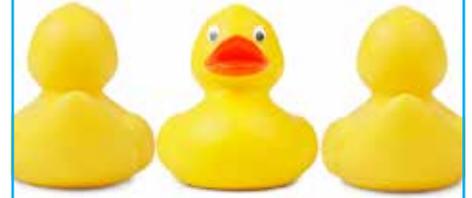
internal and client emails, documents withheld from discovery, and other “bet the farm” confidential records. No audit would uncover the manner of copying since he used a forensic software package distributed at an eDiscovery and Security conference last fall. It would appear his firm was the one randomly selected. Once the records were published, the firm would be embroiled in litigation and ultimately destroyed.

• • •

Well, that is the story of Jonathan Roy. Of course, his name has been changed. What happened to the firm? Well, we do not yet know. The records are about to be published. . . 

Richard K. Herrmann is partner at Morris James LLP, handling many forms of complex litigation, including intellectual property, commercial, and technology. He can be reached at rherrmann@morrisjames.com.

“Tips on Technology” is service of the E-Discovery and Technology Law Section of the Delaware State Bar Association.



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ETHICALLY SPEAKING

By Charles Slanina, Esquire

Where Are They Now?

I first started doing “Ethically Speaking” (although the column did not have a name at first) in 1990 in *In Re*; the predecessor to the *Bar Journal*. Doing some casual (and in my case, always highly suspect) math, there have usually been eleven issues per year because of the combined July/August edition. In addition, I have had a few missed months and guest columnists over the years. As a result, I estimate that this is approximately my 250th column. As such, I thought it a good opportunity to offer a mix of the old and the new and to revisit some persons and topics that were in the news here and elsewhere in the past. The column could also be called “Whatever Happened To...”

Judge Roy Pearson, Jr.

Does everyone remember now-former judge Roy Pearson, Jr.? He was a Washington, D.C., administrative law judge who sued his dry cleaner in 2005 after they lost the pants he had brought in to be altered. He filed suit (pun intended) on the basis of their “satisfaction guaranteed” sign seeking \$67 million dollars for alleged violations of D.C. consumer protection laws.

After six and a half years of litigation, Judge Pearson’s suit was dismissed. In part due to the negative national publicity, he was not reappointed to the bench in the interim and a disciplinary prosecution was initiated. On June 3, the D.C. Board on Professional Responsibility found that Pearson had committed two ethics violations and recommended a thirty-day suspension, stayed for a two-year probation, finding “Respondent chose to escalate and prolong the run-of-the-mill dispute into a four-year, no-holds-barred crusade. Whether he did so for personal gain or to make his mark in consumer law, or both, Respondent carried his claim to such an extreme set of answers that no one could reasonably believe that he had even a faint hope of prevailing.”

Mr. Pearson, who is now a solo practitioner and contract attorney, responded to the original complaint by describing the ethics case against him as a “slap-stick, ludicrous, and nightmarish reality.” The D.C. Disciplinary Counsel Wallace Shipp, Jr., stated, “The public, the Courts and the Bar deserve better.”

Disciplinary Counsel had alerted counsel as far back as 2007 that they were watching the case and that the “question of improper or excessive litigation has been raised.” The disciplinary case proceeded six and a half years after Pearson’s suit was ended.

Ethics and the DOJ

A federal judge in Brownsville, Texas, presiding over an immigration case involving Texas and twenty-five other states, recently agreed to stay his order that the U.S. Department of Justice attorneys involved in the case undergo five years of ethics training. Judge Andrew S. Hanen of the U.S. District Court for the Southern District of Texas found that DOJ lawyers misled him and opposing counsel about

whether the Department of Homeland Security had begun processing requests from immigrants seeking relief under the Obama Administration’s directives that would shield immigrants from deportation. Judge Hanen’s ruling would affect hundreds of DOJ lawyers. In fashioning this sanction, Judge Hanen found that the two most common remedies for attorney misconduct, striking pleadings, and monetary penalties, would be ineffective as applied to public sector attorneys.

The judge also ordered that someone at DOJ be appointed to file an annual report identifying every DOJ lawyer who had appeared in any court in the twenty-six plaintiff states along with a certification that each had attended the ethics training he would require. The order also called for the DOJ to provide a comprehensive plan within sixty days of the steps taken to prevent a recurrence of the alleged misconduct. In addition, the order also revoked the pro hac vice status of a number of DOJ lawyers.

Florida. It’s Always Florida.

The next update will remind us all of how lucky we are that we do not have an elected judiciary in Delaware. Orange Osceola Circuit Judge Kim Shepard has been charged with a judicial ethics violation after being elected to the bench approximately a year ago. During her 2014 campaign, her campaign materials, which claimed that she was endorsed by the *Orlando Sentinel*, included a quote in support of her. Unfortunately, that endorsement was actually received during her 1994 campaign for re-election to the Florida

House of Representatives and not in her judicial bid. In fact, the *Orlando Sentinel* had endorsed her opponent in the 2014 judicial campaign. Judge Shepard has denied the charges.

Snoring?!?

Virginia attorney Wayne Richard Hartke was suspended for six months after falling asleep and snoring loudly during a continuing legal education program. He continued even after the seminar coordinator asked him to stop. One seminar attendee testified that he smelled alcohol on Hartke and another attendee saw a nearly empty liquor bottle in the lawyer's possession. Hartke denied falling asleep and snoring and denied bringing alcohol to the seminar before later admitting that those denials were not accurate.

Recently, the District of Columbia suspended Hartke on a reciprocal basis. Hartke had argued that sleeping and snoring in a CLE did not constitute misconduct in the District of Columbia. The Court found, however, that making misstatements to disciplinary authorities does constitute misconduct and imposed the same six-month suspension.

Have a great summer!

"Ethically Speaking" is intended to stimulate awareness of ethical issues. It is not intended as legal advice nor does it necessarily represent the opinion of the Delaware State Bar Association.

"Ethically Speaking" is available online. The columns from the past three years are available on www.dsba.org. 

Charles Slanina is a partner in the firm of Finger & Slanina, LLC. His practice areas include disciplinary defense and consultations on professional responsibility issues. Additional information about the author is available at www.delawgroup.com.



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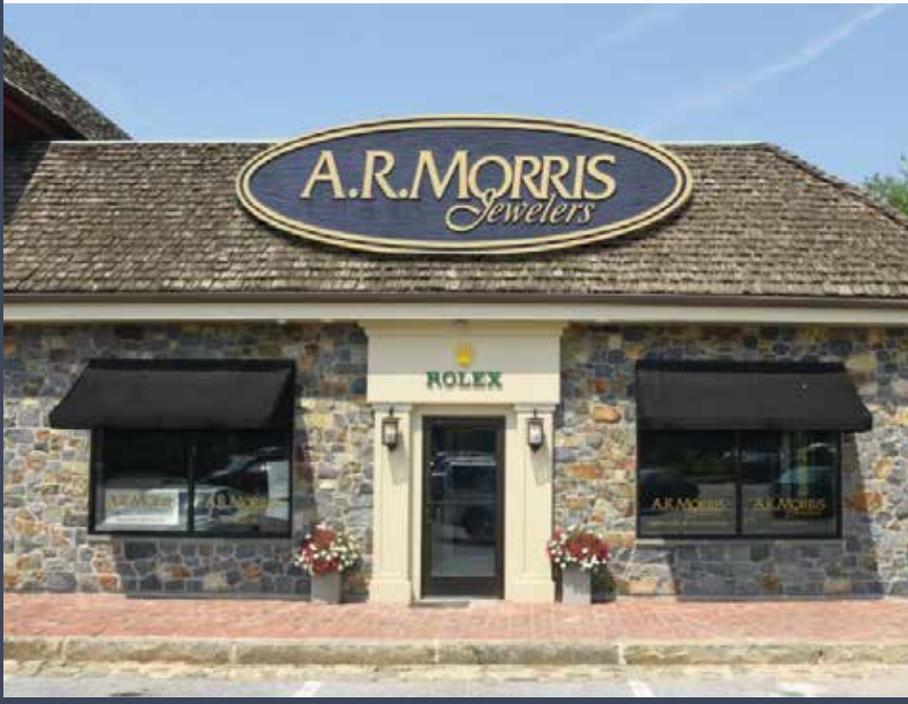
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PRIVATE ADMONITION**ODC File No. 112679-B.****Effective Date: June 3, 2016**

A panel of the Preliminary Review Committee (“PRC”) authorized the Office of Disciplinary Counsel (“ODC”) to offer the Respondent attorney the sanction of private admonition for violations of Rules 1.15(a), 1.15(b), 1.15(c), 8.4(c) and 8.4(d) of the Delaware Lawyers’ Rules of Professional Conduct in connection with the apportionment of an attorney’s fee between Respondent’s firm and an attorney who had left the firm. The PRC determined there was probable cause to find Respondent failed to hold the disputed fee separate from the firm’s property until a resolution was reached with the attorney, failed to promptly deliver to the attorney their portion of the attorney’s fee, and failed to respond to the attorney’s repeated inquiries regarding the fee which was prejudicial to the administration of justice.

PRIVATE ADMONITION**ODC File No. 112680-B.****Effective Date: June 3, 2016**

A panel of the Preliminary Review Committee (“PRC”) authorized the Office of Disciplinary Counsel (“ODC”) to offer the Respondent attorney the sanction of private admonition for violations of Rules 1.15(a), 1.15(b), 1.15(c), 8.4(c) and 8.4(d) of the Delaware Lawyers’ Rules of Professional Conduct in connection with the apportionment of an attorney’s fee between Respondent’s firm and an attorney who had left the firm. The PRC determined there was probable cause to find Respondent failed to hold the disputed fee separate from the firm’s property until a resolution was reached with the attorney, failed to promptly deliver to the attorney their portion of the attorney’s fee, and failed to respond to the attorney’s repeated inquiries regarding the fee which was prejudicial to the administration of justice.

PRIVATE ADMONITION**ODC File No. 112681-B.****Effective Date: June 3, 2016**

A panel of the Preliminary Review Committee (“PRC”) authorized the Office of Disciplinary Counsel (“ODC”) to offer the Respondent attorney the sanction of private admonition for violations of Rules 1.15(a), 1.15(b), 1.15(c), 8.4(c) and 8.4(d) of the Delaware Lawyers’ Rules of Professional Conduct in connection with the apportionment of an attorney’s fee between Respondent’s firm and an attorney who had left the firm. The PRC determined there was probable cause to find Respondent failed to hold the disputed fee separate from the firm’s property until a resolution was reached with the attorney, failed to promptly deliver to the attorney their portion of the attorney’s fee, and failed to respond to the attorney’s repeated inquiries regarding the fee which was prejudicial to the administration of justice.

SUSPENSION OF 18 MONTHS**S. Harold Lankenau****Supreme Court No. 73, 2016**

By order dated June 9, 2016, the Supreme Court of Delaware (“Court”) suspended S. Harold Lankenau from the practice of law in Delaware for 18 months for violations of the Delaware Lawyers’ Rules of Professional Conduct. The Court approved the findings of the Board on Professional Responsibility (“Board”) finding Mr. Lankenau engaged in criminal conduct when he misappropriated funds from his employer, over a period of five years, and engaged in dishonest conduct when he lied to his mortgage company and forged his employer’s signature.

The Court, however, rejected the Board’s recommendation of suspension for 6 months and a day and found 18 months suspension was the appropriate sanction. In doing so, the Court noted its precedent supported an imposition of a one-year suspension for misappropriation of firm funds alone and that Lankenau’s

dishonest conduct in connection with his mortgage company alone also merited suspension.

Mr. Lankenau had consented to an interim suspension beginning on February 22, 2016 pending the Court’s decision.

SUSPENSION OF 30 DAYS**Adam D. Gelof, Esquire****Supreme Court No. 143, 2016****Effective Date: July 1, 2016**

By Order dated June 10, 2016, the Delaware Supreme Court suspended Adam D. Gelof, Esquire from the practice of law for 30 days, beginning July 1, 2016, for violations of the Delaware Lawyers’ Rules of Professional Conduct (“Rules”). The Court approved the findings of the Board on Professional Responsibility (“Board”) that Mr. Gelof engaged in undignified or discourteous conduct degrading to a tribunal (Rule 3.5(d)) and engaged in conduct prejudicial to the administration of justice (Rule 8.4(d)).

To effectuate a prank, Mr. Gelof, a Deputy Attorney General (“DAG”), persistently requested a bailiff in the Sussex County Courthouse open the Attorney General’s interview room, brandish his firearm and tell another DAG to remove hard boiled eggs from the room. Although the bailiff initially refused, Mr. Gelof pursued the bailiff until he agreed. A police officer, standing behind the door as it opened, was only able to see a black semi-automatic handgun and a hand come past the edge of the door. The officer perceived a threat and attempted but was unable to reach his firearm.

The Court affirmed the Board’s finding Mr. Gelof intentionally, knowingly and recklessly created a potentially very dangerous situation in the Courthouse which could have resulted in injury or even death. Mr. Gelof’s misconduct also caused actual harm to Superior Court’s administration of justice by diverting the Court’s resources to handle the aftermath of Mr. Gelof’s misconduct.

The Court imposed a 30 day suspension. Ⓢ



By Susan Simmons

The Universal Declaration on Volunteering

With the passing of Muhammad Ali, we are reminded that he was a man of great convictions who once stated, “Wars of nations are fought to change maps. But wars of poverty are fought to map change.” The prizefighter’s concern demonstrates that poverty is mankind’s fight. The war can only be won by enlisting the masses. To those living in poverty, the act of offering *pro bono* services to the underserved, is a step towards change.

During his days as a pugilist, Ali became the most recognized person in the world. He appreciated the love of fans, but wished that people would give that same love to each other: “I wish people would love everybody else the way they love me. It would be a better world.” The world is not a better place yet.

Volunteers are too few. Dollars are too short. Progress is being made, but too slow.

“Poverty is the worst form of violence.”

- Mahatma Gandhi

The International Association for Volunteer Effort established a Universal Declaration on Volunteering in January 2001. If volunteers in sufficient numbers followed the declaration, the world would soon be flourishing with better representation and access to justice for more children and families. In part, the Declaration on Volunteering says, “Human values of community and serving can be sustained and strengthened” through volunteering. It declares, “Connections can be made across differences that push us apart so that we can live together in healthy, sustainable communities, working together to provide innovative solutions to our shared challenges and to shape our collective destinies.”

“In a country well governed, poverty is something to be ashamed of. In a country badly governed, wealth is something to be ashamed of.”

- Confucius

The Universal Declaration on Volunteering

Volunteering is a fundamental building block of civil society. It brings to life the noblest aspirations of humankind — the pursuit of peace, freedom, opportunity, safety, and justice for all people.

In this era of globalization and continuous change, the world is becoming smaller, more interdependent, and more complex. Volunteering — either through individual or group action — is a way in which:

- human values of community, caring, and serving can be sustained and strengthened;
- individuals can exercise their rights and responsibilities as members of communities, while learning and growing throughout their lives, realizing their full human potential; and
- connections can be made across differences that push us apart so that we can live together in healthy, sustainable communities, working together to provide innovative solutions to our shared challenges and to shape our collective destinies.

This Declaration supports the right of every woman, man and child to associate freely and to volunteer regardless of their cultural and ethnic origin, religion, age, gender, and physical, social, or economic condition. All people in the world should have the right to freely offer their time, talent, and energy to others and to their communities through individual and collective action, without expectation of financial reward.



We seek the development of volunteering that:

- elicits the involvement of the entire community in identifying and addressing its problems;
- encourages and enables youth to make leadership through service a continuing part of their lives;
- provides a voice for those who cannot speak for themselves;
- enables others to participate as volunteers;
- complements, but does not substitute for responsible action by other sectors and the efforts of paid workers;
- enables people to acquire new knowledge and skills and to fully develop their personal potential, self-reliance and creativity; and
- promotes family, community, national and global solidarity.

We believe that volunteers and the organizations and communities that they serve have a shared responsibility to:

- create environments in which volunteers have meaningful work that helps to achieve agreed upon results;
- define the criteria for volunteer participation, including the conditions under which the organization and the volunteer may end their

commitment, and develop policies to guide volunteer activity;

- provide appropriate protections against risks for volunteers and those they serve;
- provide volunteers with appropriate training, regular evaluation, and recognition; and
- ensure access for all by removing physical, economic, social, and cultural barriers to their participation.

Taking into account basic human rights as expressed in the United Nations Declaration on Human Rights, the principles of volunteering and the responsibilities of volunteers and the organizations in which they are involved, we call on:

All volunteers to proclaim their belief in volunteer action as a creative and mediating force that:

- builds healthy, sustainable communities that respect the dignity of all people;
- empowers people to exercise their rights as human beings and, thus, to improve their lives;
- helps solve social, cultural, economic and environmental problems; and,
- builds a more humane and just society through worldwide cooperation.

The leaders of:

- all sectors to join together to create strong, visible, and effective local and national “volunteer centers” as the primary leadership organizations for volunteering;
- government to ensure the rights of all people to volunteer, to remove any legal barriers to participation, to engage volunteers in its work, and to provide resources to NGOs to promote and support the effective mobilization and management of volunteers;
- business to encourage and facilitate the involvement of its workers in the community as volunteers and to commit human and financial resources to develop the infrastructure needed to support volunteering;
- the media to tell the stories of volunteers and to provide information that encourages and assists people to volunteer;
- education to encourage and assist people of all ages to volunteer, creating opportunities for them to reflect on and learn from their service;
- religion to affirm volunteering as an appropriate response to the spiritual call to all people to serve;
- NGOs to create organizational environments that are friendly to volunteers and to commit the human and financial resources that are required to effectively engage volunteers.

Adopted by the international board of directors of IAVE – The International Association for Volunteer Effort at its 16th World Volunteer Conference, Amsterdam, The Netherlands, January 2001, the International Year of Volunteers. The Universal Declaration on Volunteering www.iave.org. 

Susan Simmons is the Director of Development & Access to Justice Coordination at the Delaware State Bar Association and can be reached at ssimmons@dsba.org.



DE-LAP ZONE

A Message from the Delaware Lawyers Assistance Program

By Carol P. Waldhauser, Executive Director

The Hidden Addiction

This month, I am pleased to welcome to the DE-LAP Zone an anonymous guest columnist. In his extraordinary article, our author tells his story of where he was, what happened and where he is today. Furthermore, he details ways to climb out of the dark of an addiction. I believe firmly that all will benefit hugely from reading his story.

• • •

After carefully unlocking the back door, I quickly pushed it open in an effort to minimize the noise I knew it would make. I crept upstairs toward my bedroom in silent panic and continuously glanced at the phone whose ringer I silenced hours before. Despite my promises to be home by midnight, it was now 3:00 a.m. At least, she had not called or texted “Where are you?” as she had done so many times before. Of course, I would swear I had no choice but to work late at the office. Being married to an attorney for over thirty years, my wife was all too familiar with the adage, “The law is a jealous mistress.” When I finally reached my bed, my mind was racing as I stared blankly at the ceiling. What am I doing? Why am I risking my home life, my relationship with my family, and my career? I was not unlike any man involved in an extramarital affair. Except, my motel room was a casino. And, my lover was a slot machine.

Like most gamblers, I started as a social gambler. Gambling was a form of entertainment and a great way to relieve life’s stresses. And, it was both acceptable and accessible.

Unfortunately, the more I gambled, the more I lost. And, the more I lost, the more I “chased.” Chasing losses only lead me to gamble with more frequency and with more money than I wanted or could afford to lose. Paradoxically, winning was almost worse than losing. A win caused me to want to gamble more. I would not only give back my winnings, but I would lose additional money chasing another win. As my gambling continued to increase, and my losses continued to mount, I experienced almost unbearable shame. This caused me to hide my gambling from family and friends. Additionally, the type of gambling I engaged in changed. Blackjack, roulette, and poker had been my games of choice. But, I grew bored with each of these games, as they did not move quickly enough.

And, they required me to gamble with other people, which I wanted to avoid.

I then discovered high stakes slot machines. These machines seduced me for a number of reasons. First, playing in the high stakes slot area made me feel privileged, as it was reserved for “high rollers.” Second, this type of gambling was not dependent upon the skill or luck of any other player, but me. Third, the speed of play is faster, as slot players do not have to wait for other players to place bets in order to see whether they won or lost. And, there are no wheels to spin or cards to shuffle. Fourth, the adrenaline rush is much greater, as a win typically results in a jackpot in the thousands of dollars.

My escape into gambling damaged all aspects of my personal life. Family dinners, birthday parties, and evenings with friends were missed. Time spent with my wife and children was scarce. And, when I was with family and friends, my focus was getting away so I could return to the casino as soon as possible. If my schedule permitted, I would leave work and go to the casino. Some days, I would miss work entirely. I became physically exhausted, financially ruined, and emotionally bankrupt. I knew I was destroying myself, but I could not stop gambling.

I have come to learn that I am a compulsive gambler. I have an addiction that is just as destructive as an addiction to substances such as heroin, prescription drugs, and alcohol. However, my addiction can easily be hidden. There are no physical signs of gambling addiction: no needle marks, no evidence from breath, or blood tests. Many mental health experts believe that problem gamblers closely resemble alcoholics and drug addicts, not only from the external consequences of problem finances and destruction of relationships, but increasingly, on the inside as well. In fact, Gambling Disorder is the only behavioral addiction recognized in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM-5), the leading guide of the mental health profession. According to Dr. Charles O’Brien, chair of the Substance-Related Disorders Work Group for DSM-5, brain imaging studies and neurochemical tests have made a “strong case that [gambling] activates the reward system in much the same way that a drug does.” What

is now unquestioned is that gambling behaviors can become compulsive, can lead to major financial and emotional problems, and are treatable using similar approaches to the treatment of substance addictions.

“I have an addiction that is just as destructive as an addiction to substances such as heroin, prescription drugs, and alcohol. However, my addiction can easily be hidden. There are no physical signs of gambling addiction: no needle marks, no evidence from breath, or blood tests.”

The National Council on Problem Gambling (NCPG) estimates that about 80 percent of those with a gambling addiction consider suicide, while one in five actually attempts it. That is roughly twice the rate of other addictions.

My recovery began with a week’s stay in Rockford Center, where I was admitted for psychiatric evaluation. My family arranged for me to attend Gamblers Anonymous (GA) following discharge. I had no desire to go, but was in no position to object. I felt GA was not going to benefit me. I was convinced that either bipolar disorder or some other undiagnosed physiological disorder was causing my brain to poison my moral fabric. After all, I was raised in a family with high moral values and I myself taught my children the importance of doing what is right.

Little did I know that it was virtually impossible to gamble compulsively without lying, avoiding reality, and escaping into a dream world.

It was at my first GA meeting that I learned about gambling addiction. Some people talked about how they depleted their savings in order to gamble. Others admitted to taking secret loans, pawning valuables, and embezzling funds. What amazed me was that many of these people had not gambled in months and even years.

Now, I am nearly one year into my recovery. I attend several GA meetings per week, and receive one-on-one therapy from a counselor who specializes in gambling addiction. I also work two or three times a month taking calls on a helpline sponsored by the Delaware Council on Problem Gambling. Abstaining from gambling has not been the hardest part of my recovery. The greatest

challenge has been rebuilding the personal relationships I destroyed by gambling.

I am grateful that my gambling addiction is no longer hidden from my family and friends. The support and encouragement I have gotten from them, and my brothers and sisters in GA, has been instrumental in my recovery. Life is good, and I pray it will continue to be good, one day at a time.

By: J

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BOOK REVIEW

Reviewed by Richard A. Forsten, Esquire

A Constitution for All: *Our Republican Constitution, Securing the Liberty and Sovereignty of We the People*

By Randy E. Barnett (Broadside Books, 2016)

Georgetown law professor Randy Barnett believes that there are two visions of the Constitution, a “Democratic Constitution” and a “Republican Constitution.” However, by his use of the terms “Democratic” and “Republican,” Barnett is not suggesting that the two political parties themselves have different views. As he explains in the introduction to his new book, *Our Republican Constitution, Securing the Liberty and Sovereignty of We the People*:

Americans today are divided politically, ideologically, and culturally. Some of us live in blue states and watch CNN; others live in red states and watch Fox News. Some Americans want more government, others less. We engage in passionate debate over myriad issues: gun control, health care, same-sex marriage, immigration, the war on terrorism — the list of issues that divide Americans goes on and on. Our divisions are reflected in print, on the airways, and increasingly online. Battles are fought in city councils, state legislatures, and in the halls of Congress.

Of course, as we saw with Obamacare, the Supreme Court, too, is divided. This is because Americans are not just divided about politics, culture, and ideology. Americans are also divided about the Constitution itself. . . .

In this book, I call these divergent visions the ‘Democratic Constitution’ and the ‘Republican Constitution,’ but I don’t intend these labels to be partisan. There are political conservatives who hew to some aspects of the Democratic Constitution and some progressives who adopt aspects of the Republican one. Many people flit between conceptions depending on which happens to conform to the results they like. I chose the terms democratic and republican constitutions because both terms have deep roots in our constitutional history, and neither is pejorative. I dislike arguments by labels and both these labels today have a positive connotation.

At its core, this debate is about the meaning of the first three words of the Constitution: ‘We the People.’ Those who favor the Democratic Constitution view We the People as a group, as a body, as a collective entity. Those who favor

the Republican Constitution view We the People as individuals. This choice of visions has enormous real-world consequences.

Each vision of We the People yields a different conception of what is called ‘popular sovereignty.’ Those who adhere to the Democratic Constitution hold a different conception of popular sovereignty than those who adhere to the Republican Constitution.

To Barnett, those who favor a Democratic Constitution believe in the will of the people as a whole, in majority rule, and that individual rights must yield in the face of majority rule, since it is the majority which decides what rights get protection. To Barnett, though, this is a “living” constitution. Those who favor a Republican Constitution, on the other hand, start with the premise that the first purpose of government is to protect individual rights. Indeed, he quotes the Declaration of Independence that “to secure these rights . . . Governments are instituted among Men.” Under this view, the meaning of the Constitution is fixed, unless and until it is properly amended.

These two constitutional visions can and do lead to differing visions of judicial review. For those believing in a democratic constitution, judicial restraint is the preferred approach. A judge will exercise caution and restraint in assessing the constitutionality of a statute, and seek out a construction that upholds the statute. The democratic constitution strains to uphold the will of the majority.

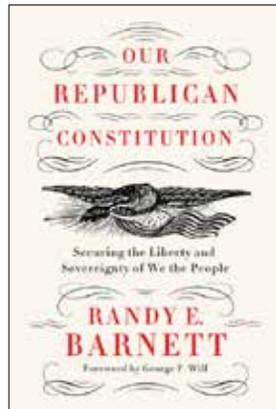
For those supporting a republican constitution, the judiciary is an independent branch of government, whose members have lifetime tenure precisely so they can stand up to the will of a majority if the majority's preference goes beyond the powers afforded by the constitution or infringes upon a constitutional right. Deference to the legislature is not shown, nor is there judicial restraint, because, as Chief Justice Marshall explained in *Marbury v. Madison*, “[i]t is emphatically the province and duty of the judicial department to say what the law is.”

Barnett opens his book with a discussion of the Supreme Court's decision upholding Obamacare. In that case, five justices held that the individual mandate compelling persons to purchase health insurance or pay a penalty/tax was beyond the scope of Congress' power to regulate interstate commerce. This represents the republican approach. The Court looked at Congress' claimed authority to act, and found that claim wanting.

However, Chief Justice Roberts then departed from the five justices who found the mandate unconstitutional under the Commerce Clause, and joined the other four justices to find that Congress could impose a non-coercive tax on those who did not purchase health insurance on their own. Roberts explained in his opinion “[t]he Government asks us to interpret the mandate as imposing a tax, if it would otherwise violate the Constitution. Granting the Act the full measure of deference owed to federal statutes, it can be so read.”

Thus, in the short space of the *Obamacare* opinion, the Chief Justice applied a republican constitutional vision on the one hand (finding the mandate exceeded Congress' power) and a democratic vision on the other (showing deference to Congress and adopting a saving construction).

The use of the terms “democratic” and “republican,” though, is in my view somewhat unfortunate and misleading, as there will be a temptation on the part of many to assume that republican-appointed judges will follow the “republican” constitutional vision and democratic-appointed judges will follow the “democratic” constitutional vision, as such visions are defined by Barnett. But not so. Indeed, in the Court's recent decision in *Whole Woman's Health v. Hellerstedt*, striking down certain Texas abortion provisions, the four democratically-appointed justices who voted to uphold Obamacare voted to overturn the Texas provisions and did not show deference to the Texas legislature, or, put another way, the majority opinion in *Hellerstedt* applied a republican constitutional vision to strike down the Texas provisions. (note — the *Hellerstedt* decision



was only handed down this past June, after the release of Barnett's book; nevertheless, the switch in vision exhibited by virtually all the justices, save Kennedy, who arguably exhibited a republican constitutional vision in both cases, tends to support Barnett's claim that “[m]any people flit between the two conceptions depending on which happens to conform to the results they like”).

At the end of the day, or at least, at the end of Barnett's book, what are we to do? Barnett suggests a series of constitutional amendments as one way to address the issues, although, for example, it is hard to see how congressional term limits (one of his suggestions) will address the lack of proper constitutional vision. He also suggests that “[e]very justice appointed to the Supreme Court must publicly commit

to the principle that judges have no power to amend or modify the Constitution of the United States by ‘interpretation.’” However, I am not sure any justice has ever consciously said to him or herself that in interpreting the Constitution a certain way they were “amending” or “modifying” the Constitution. One person's “amendment” is another person's proper application of original intent.

Moreover, Barnett's complaint that folks “flit” back and forth between the democratic and republican constitutional visions is, in a certain sense, overstated. To paraphrase Thomas Jefferson, we are all republicans and we are all democrats. No legislator will, in good faith, vote for a statute they believe exceeds their power (although some may acknowledge it a close call and leave it to the courts to decide), and no justice will uphold a statute which they believe exceeds Congress' powers under the Constitution. Nor will any legislator vote to unconstitutionally infringe a right, and no justice will uphold a statute they believe infringes a right, granted by the Constitution. The play in the joints is whether one believes the statute within congressional power and whether the statute infringes a constitutional right — and here is where personal biases and inclinations undoubtedly play a role. Judges and legislators need to have the self-awareness to ask themselves whether they are applying the same standards across the board, or whether they are shading their analyses depending on their personal preferences.

Barnett's book is full of interesting observations and constitutional history, written in a lively and engaging style. Even if one is not totally persuaded by his arguments and approach, he nevertheless offers a valuable reminder that the Constitution exists for a reason, that its language and intent matter, and that the possible tyranny of the majority is a danger that we should not disregard or take lightly. ☯

Richard “Shark” Forsten is a Partner with Saul Ewing LLP, where he practices in the areas of commercial real estate, land use, business transactions, and related litigation. He can be reached at rforsten@saul.com.



A PROFILE IN BALANCE

By James G. McGiffin, Jr., Esquire

Chuck Kunz

A Bankruptcy Lawyer in the Wilderness

If I aspire to be the best lawyer I can be, I must first try to be the best person I can be. I am fortunate to know many lawyers who have succeeded in their work, in part, because they are excellent people. This column in The Bar Journal will feature an article on one such lawyer. Each featured lawyer will exemplify the art of balance in life. I have learned much from these people. Perhaps readers will also benefit.

- Jim McGiffin

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What does bankruptcy law have in common with wilderness camping? Nothing, and for Wilmington attorney Carl N. (Chuck) Kunz III, that is just the point.

Chuck practices bankruptcy law with the firm Morris James, a situation where he enjoys interesting and challenging work, great colleagues, and great support. But, he loves to get away, and by that we mean that he searches out remote and sometimes scary areas of wilderness, sometimes with family and sometimes with friends, where he finds contentment.

Chuck was born in New England. His father is an Episcopal priest. His father's vocation brought the family to Delaware and Chuck attended St. Andrew's School before returning to New England for college at the University of New Hampshire.

The summer after his freshman year, Chuck found work as a lifeguard at the Cavaliers Country Club pool in Newark. There he met a fellow lifeguard, the lovely Carol Lee Burton¹, and the course of his life was forever altered.

Carolee finished her undergraduate degree and then headed north to Boston College for law school. Chuck accelerated his own college program and

moved south to Boston to be near her, finding a job in food service accounting at Logan Airport. Chuck, inspired by Carolee, decided to return to Delaware and start at Widener Law. Carolee determined that she could return with him and finish her third year of law school at Widener while still graduating from BC. Eventually, they would work at the same Delaware firm for a short time. It was there that Chuck discovered his interest in and aptitude for bankruptcy work, and he is happy to concentrate in that area as a partner with Morris James.

Chuck also volunteers with the Office of the Child Advocate and he serves on the Board of Bar Examiners.

An avid reader of adventure and mountaineering books, Chuck has always been fascinated with the romantic idea of mountain climbing. He had some trouble reconciling this interest with his own fear of heights and ledges. Then, he had a chance to climb to the summit of Mt. Shuksan in the North Cascades in Washington, and he did it. It was difficult and a bit scary. He decided he did not need to do that again. But, there is something about the climb that continued to compel him. The thrill, the challenge, the accomplishment. It stayed with him.



Chuck and his kids, photographed by his wife.

1. Spoiler Alert! She now uses the name Carolee Burton Kunz.

Chuck began going to the local rock climbing gym. And, he did not go alone. His family members did some rock climbing, too. Chuck got used to working with the ropes and other gear, and has gone on to climb Mt. Washington in New Hampshire four times (in winter, with temperatures as low as minus 20 degrees Fahrenheit and winds up to 75 miles per hour) and reaching 18,000 feet on Pico de Orizaba in Mexico. "It is amazing what one can do with the right gear and the right attitude," he says.

Chuck and Carolee are married and blessed with two children, and Chuck shares his avocational interests with those children. Daughter Hannah has become an accomplished rock climber. Son Tuckerman is in the Boy Scouts and Chuck serves as Assistant Scout Master. The Scouts engage in many forms of outdoor recreation, including rock climbing, light mountaineering, kayaking, backpacking, snow boarding, and skiing. As assistant Scout Master, Chuck does not just oversee these activities, he engages in them right beside the Scouts. They also camp once

each month, year round. And, they carry all of their gear on their backs. This is not the camping at a music festival with a cooler full of drink with which your writer is familiar. This is camping in the wilderness.

Chuck was not involved in scouting as a boy, but he and his family enjoyed camping and other outdoor activities his entire life. And, he and Carolee did backpack around Germany during a law school summer. But, did she really know what was in store?

We are all energized in different and particular ways. Some folks love the theatre, others go for sport. Some retreat into literature or music. Others fly airplanes, ride horses, or motorcycle around the country. Chuck Kunz finds what he needs in the great and majestic outdoors. We are glad he comes inside once in awhile. 📍

James G. McGiffin, Jr. is a Senior Staff Attorney with Community Legal Aid Society, Inc. and a former President of the Delaware State Bar Association. He can be reached at jmcgiffin@declasi.org.

OF NOTE

Condolences to the family of **Marilyn Talman, Esquire**, who died on June 5, 2016.

Condolences to the family of **Richard K. Goll, Esquire**, who died on June 12, 2016.

Condolences to the family of **Kevin W. Gibson, Esquire**, who died on June 19, 2016.

Condolences to **Joan Schneikart, Esquire**, on the death of her mother, Henrietta P. Schneikart, who died on June 20, 2016.

Condolences to **The Honorable Ferris W. Wharton**, on the death of his mother, Mildred S. Wharton, who died on June 26, 2016.

Condolences to the family of **Irving Nathaniel Morris, Esquire**, who died on June 28, 2016.

Condolences to **John R. Garey, Esquire**, on the death of his father, Paul R. Garey, who died on June 28, 2016. 📍

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Cooch and Taylor Director, the Honorable Chandlee Johnson Kuhn, has been elected a Fellow of the American Bar Foundation, in recognition of her demonstrated extraordinary leadership in the profession and service to society.

Fellows of the American Bar Foundation represent less than one percent of the lawyers admitted to practice law in the United States. Chief Judge Kuhn joins other distinguished present and former Delaware jurists who have been elected to the Fellows of the American Bar Foundation including, among others, Jane R. Roth, Walter K. Stapleton, Myron T. Steele, Randy J. Holland, Karen Valihura and Joshua W. Martin III.

Ms. Kuhn is a Director of Cooch and Taylor's Family Law Department and concentrates her practice on Family Law, Mediation and access to Education for all Delaware students. Ms. Kuhn served as the Chief Judge of the Family Court of the State of Delaware from 2003 – 2015 and as a Judge from 1998 – 2003.

She is a member of the Board of Directors of the National Council of Juvenile and Family Court Judges, a member of the Judicial Advisory Council of the National Juvenile Offenders Center and an Advisor to the National Yoga Service Council Board of Directors.

Ms. Kuhn continues to serve her local community volunteering as a Guardian Ad Litem, a Domestic Violence volunteer attorney and a volunteer for the Juvenile Expungement Project. Ms. Kuhn also serves as a Co-Chair of the Wilmington Education Improvement Commission.

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Mock Trial Essay Scholarship Contest



Winner of the First Mock Trial Essay Scholarship Contest, River Shannon, with Delaware Law Related Education Center's Board Member Anthony Iannini. The award was presented at the Graduation Awards Ceremony at Newark High School on June 1, 2016.



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Nominations Sought for the Delaware State Bar Association's 2016 Christopher W. White Distinguished Access to Justice Awards

The DSBA and the Awards Committee are seeking nominations for the 2016 Distinguished Access to Justice Awards formerly known as the Distinguished *Pro Bono* Service Awards. The change in name is based on a desire to be more inclusive in designating those deserving of recognition. The awardees will be announced during Celebrate *Pro Bono* Week.

The Christopher W. White Distinguished Access to Justice Awards Ceremony
Tuesday, October 25, 2016, Chase Center on the Riverfront

There are five categories for which individuals, firms, or organizations can be nominated.

The Leadership Award

This award is presented to a legal organization (legal department or law office) that has demonstrated outstanding leadership in the field of *pro bono* service to Delaware's indigent population based on the following criterion:

- The number of *pro bono* hours the organization contributes to the direct representation of indigent clients.
- The number of cases the organization accepts for *pro bono* representation.
- Flexibility and accessibility in accepting cases.
- The organization's commitment and service on committees dedicated to promoting and supporting the provision of legal services to those in need.
- Financial support to agencies providing legal services to Delaware's indigent population.
- The percentage of attorneys in the organization who accept *pro bono* cases.
- Fostering a culture, which recognizes the value of *pro bono* service.

The Commitment Award

This award is presented to a member of the Bar who has demonstrated a sterling commitment to *pro bono* work throughout his or her career by dedicating time and energy to the support and provision of legal services. The criterion includes, but is not limited to:

- The number of *pro bono* hours devoted to legal representation of indigent clients over the lawyer's career.
- The number of cases accepted for *pro bono* representation over the lawyer's career.
- The lawyer's commitment and service on committees dedicated to promoting and supporting the provision of legal services to those in need over the lawyer's career.

The Achievement Award

This award is presented to a member of the Bar who has shown an exemplary recent contribution to *pro bono* services (generally in the past one to three years) and stands as a role model to other attorneys. The criterion includes, but is not limited to:

- The number of *pro bono* hours recently devoted to legal representation of indigent clients.
- The number of cases accepted for *pro bono* representation.
- Consistency, flexibility, and accessibility in accepting cases.
- The lawyer's commitment and service on committees dedicated to promoting and supporting the provision of legal services to those in need.

Service to Children Award

Awarded to an individual lawyer, legal professional, or organization principally including lawyers, which demonstrates outstanding commitment to, and work for, children in the provision of legal or community services. It may be given to volunteers or those employed in the provision of legal services for children. This award is given as warranted, not necessarily annually.

Legal Professional *Pro Bono* Service Award

Awarded to a person, qualified by education, training or work experience, who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity, who performs *pro bono* legal work in the pursuit of Access to Justice. This is a newly-created award that is given as warranted, not necessarily annually.

Delaware State Bar Association Awards Nomination Form

Name of Candidate: _____

Title/Occupation of Candidate : _____

Award: _____

Date: _____

Nominator: _____

Phone: _____ Fax: _____ E-Mail: _____

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Address: _____

Brief statement of reasons that candidate is deserving of Award (see above Award criteria). Please attach sheet if necessary.

Nominations should be submitted to Susan Simmons, Director of Access to Justice Coordination, e-mail ssimmons@dsba.org or fax to (302) 658-5212. The deadline for nominations is August 5, 2016.

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DO TELL

My recent endeavors in creating specialty cocktails were inspired by a happenstance meeting in New York's East Village. Last January, Vincent and I spent several days in Manhattan, and I included a handful of dining recommendations from this trip in my February article. One establishment I left off my list is a tiny restaurant with an enormous Zagat rating. Its food was underwhelming; in fact, I am amazed it holds the same Zagat rating as such stars as Eleven Madison Park and Gramercy Tavern. I bring it up now not to describe our meal (perhaps I will return at some point to taste more and write a review), but because the story begins at one of its square counter-height tables.

The host installed us at one of these tables where three other couples were already enjoying their first courses. Hence, we discovered that the seating was communal. I believe this detail should be mentioned when making a telephone reservation, but I digress. While I was skeptical about dining with complete strangers in such tight quarters, I am now thankful for the experience. It led to stimulating conversation with the young couple (she is an attorney!) with whom we were bumping elbows and an invitation to a nearby speakeasy. Our charming new friends had a highly sought after reservation at "Please Don't Tell," and we were up for an adventure in "The City That Never Sleeps."

Within ten minutes of paying our checks, we arrived at a hot dog stand on St. Mark's Place in the East Village. We walked down a few steps and entered the "shack" to find diners snacking on bacon-wrapped and chili dogs after midnight. As I was taking it all in, our guide entered a phone booth in the left wall, engaged in a brief conversation, and

then led the way through a secret door. We were ushered into a mysterious bar with taxidermy lining the walls and handed a leather book of cocktail options.

While one of our companions told the server she was in the mood for egg whites and her beau for Mezcal, I spotted a concoction containing "Suze." At the time, I did not know that Suze is a French bitter flavored with the roots of the gentian flowering plant that grows in the Jura and Auvergne mountains. I simply recognized it as my dearest friend's nickname for me. In any case, my instinct served me well as the citrus and floral notes complemented Suze's bitterness. While I have not yet experimented with Suze in any of my signature cocktails, the spirit (pun intended) of the evening inspired me to try my hand at mixing ingredients that I would not otherwise consider. And, I am able to compare notes with our two friends in NYC!

The below cocktails are ones that I have created based on reading cocktail books (especially *The PDT Cocktail Book* by Jim Meehan) and online recipes. The key ingredient in all three is Damrak Gin, which contains over a dozen botanicals, including juniper berry, coriander, lemon and orange peel, cinnamon, and honeysuckle. I typically do not enjoy gin, but the smooth texture and citrus flavor of this brand have won me over.

Also, in my recipes, 1 part = 1 shot or jigger (about 1.5 ounces). I serve these cocktails in vintage champagne coupes, which hold about 5.5 ounces. For all of the recipes, I add the ingredients to a cocktail shaker in the order listed, shake over ice, and strain.

THE GODMOTHER

- 1 part Damrak Gin
- 1 part Cointreau
- 1 part Lillet Blanc
- 1 part freshly squeezed blood orange juice

JUST A SPOONFUL OF SUGAR

- 1.5 parts Damrak Gin
- 0.5 part Cointreau
- 0.5 part freshly squeezed lemon juice
- 0.25 part simple syrup
- 1 egg white

COCKEVED OPTIMIST

- 1 part Damrak Gin
- 1 part Lillet Blanc
- 0.5 part maraschino cherry juice
- 0.5 grapefruit juice
- 0.5 freshly squeezed lime juice
- 1 maraschino cherry for garnish

Enjoy these refreshing cocktails with hors d'œuvres before a summer meal. And, no need for secrecy, feel free to pass them along... 🍹

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Delaware Legal Directory correction form

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In order to have the correct information published in the 2017 Delaware Legal Directory, corrections must be received no later than September 16, 2016 – no exceptions!

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A. KIMBERLY HOFFMAN, CARL N. “CHUCK” KUNZ, III AND BRETT D. FALLON

have been selected as fellows of the American Bar Foundation in recognition of their extraordinary leadership in the profession and service to society.

A. Kimberly Hoffman represents clients primarily in commercial **real estate** matters with a focus on **land use**, health care, environmental issues, and related litigation. Kimberly chairs the firm’s land use and zoning practice, and heads the multi-disciplinary Morris James healthcare team.

Carl N. “Chuck” Kunz, III represents all types of creditors in **bankruptcy** courts around the country. He co-chairs the firm’s data privacy and Information governance group. Chuck advises companies and clients on **data security**, data management, privacy and appropriate exercise of fiduciary duties when dealing with privacy and data management issues.

Brett D. Fallon has over 25 years of litigation experience in all Delaware Courts. His record includes a list of more than 70 matters that have resulted in published court decisions indexed by Lexis or Westlaw, including many seminal issues in **bankruptcy** and **corporate law**.

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