



THE JOURNAL

OF THE DELAWARE STATE BAR ASSOCIATION



**Miranda D. Clifton
Delaware State Bar Association
President, 2016-2017**

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 on December 6, 2016 at the Hotel du Pont.

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 by **September 16, 2016** to Johnna Darby, Executive Director, e-mail jdarby@dsba.org or fax to (302) 658-5212.

DSBA BAR JOURNAL

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OF THE DELAWARE STATE BAR ASSOCIATION

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PRESIDENT'S CORNER

By Miranda D. Clifton, Esquire

Standing on the Shoulders of Giants

As a child, I remember attending parades and other events that did not especially cater to the vertically challenged (or wee) and having difficulty seeing what was going on through the legs of others. However, I had a secret weapon in my arsenal of tools for these occasions. I had a father who was six foot three and could be persuaded to let me sit on his shoulders for quite an unobstructed view of the festivities.

As Delaware practitioners, we have the same advantage. We come from a long line of legal giants who are not afraid to use their stature, experience, and perspective to help us to gain a better vantage point in moving forward. I learned a long time ago that the best way to move forward successfully is to understand the past. The Delaware Bench and Bar history is colorful and notable. I love conversing with a group of attorneys older than me that I have not been around for a while and listen to them verbally relay their stories of an era behind us.

I am personally grateful for excellent mentors through the years. My law career actually began because of one of the greatest attorneys I have known, Harry K. F. Terry. I worked as his secretary for several years and observed, with admiration, the manner in which he interacted with the courts, his clients, his colleagues, and his staff. In fact, he was the person who first suggested that I should consider going to law school. He not only spoke vision to me, but personally invested in mov-

ing me towards that direction. I will forever be grateful for him planting and watering that dream.

I am also grateful for the guidance and examples given to me by many of the attorneys at Heckler & Frabizzio, who, in the midst of a very fast-paced environment, were able to portray professionalism and congeniality while I was in law school and beyond. I am also thankful for the invaluable mentoring from arbitrators, mediators, and opposing counsel as my legal practice developed. I would be remiss if I did not recognize my special “assigned” mentor in former Commissioner Mark Vavala, who has been and continues to be an instrumental sounding board and fountain of knowledge.

I entered the Delaware Bar at a great time, towards the end of the Rodney Square Courthouse era, when motion days were as much a social gathering as they were designed to actually hear various issues before the Court. I learned a great deal in the hours I spent waiting for my Motion to be called about professionalism, demeanor, and nuances within the law. Also, because of the increased frequency that attorneys were in the courthouse, as well as the physical layout of that courthouse, every time I went to the courthouse, I would run into several other attorneys, enabling us to resolve many issues in those impromptu meetings. I treasure the early years because it was during this time I learned the building blocks that are essential for being a successful Delaware attorney. Below are some of the insights that were passed on to me by legal giants.

“I treasure the early years because it was during this time I learned the building blocks that are essential for being a successful Delaware attorney.”

1. If you do not understand and practice civility, you will not be successful. It goes without saying that Delaware is a small Bar and that you will inevitably practice multiple times with the same opposing counsel and judicial officers. The greatest part of civility is that you do not have to agree with the other individual, you just have to disagree agreeably. We are not a jurisdiction defined by stories describing bad behavior and temper tantrums, but of heroic meetings of the minds in impossible situations coming together for creative solutions.

As a very young attorney, I was told by Richard Abrams that an attorney’s reputation in the legal community is your biggest asset. Similarly, I have also observed over time that sometimes a win is not a win if you lose the respect of others in pursuit of the win (the end does not always justify the means). Develop-

ing and maintaining your reputation as a Delaware attorney is sometimes less results-oriented, but more about the process in obtaining the result.

2. Our judiciary is excellent and should be treated with deference and respect. While this seems obvious on its face, I have seen this concept erode ever so slightly since I have been a Delaware attorney. As a new attorney, we appear almost awestruck at the knowledge and wisdom flowing from the Bench. However, with the passage of time, a decision or two may be written (usually against us) with which we do not agree. Also, if we practice long enough, our peers are elevated to the Bench. Then, the Bench as a whole becomes more familiar. Although tempting at times, it is of utmost importance to revere the Bench in all of our courts, all of the time. This reverence to our courts by the Bar has given them the freedom to make cutting edge decisions that are well-grounded in law.

We are extremely blessed to have a Bench that is free of outside political pressures predicated on Delaware's nomi-

nation system with appointment by the Governor with equal political balance. Recently, our judiciary has been under attack from sources from another state with a different perspective on outside political pressures on courts, trying to exert political pressure for a decision on which they do not agree. It is important that we stand behind and support our judiciary to ensure the political detachment to intellectually and equitably uphold the laws that our legislative branch has crafted. As Delaware attorney, we cannot take for granted that we have the greatest and most forward-thinking legal minds in the country on our Bench and we benefit every day from their service to our court system.

3. Treat the court staff, vendors, and office staff of your opposing counsel as equals, because they are. Nothing disturbs me more than observing an attorney being demeaning to staff, vendors, and especially the court staff. These individuals make us (as attorneys) look good every day of our lives. They are extremely competent and, surpris-

ingly, motivated to continue to make us look good. We are all in this profession together. Respecting and acknowledging those that are the hardest workers and never in the limelight for the credit should be the rule, not the exception. It is a wise legal professional who is in tune with their staff.

The above are just a few of the jewels that have been instilled in this Delaware attorney by senior mentors. Delaware's continued success will be because our Bar has had the wisdom to glean the wisdom of our senior Bar and integrate it into our contemporary practice. As with any organization, our future is only one generation away from extinction. We would be wise to take a more seasoned attorney out to lunch and let them talk, soaking in their wisdom. They have an amazing amount of wisdom to share and we would be remiss to let that wisdom "retire" with them.

The Delaware State Bar Association Bar History Standing Committee is

President's Corner (continued on page 7)

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EDITOR'S PERSPECTIVE

By Seth L. Thompson, Esquire

Freedom and Fear, Justice and Cruelty

I suppose my sister based the selection on my enjoyment of Nick Offerman's book, *Paddle Your Own Canoe*. Nick Offerman played *Parks and Recreation*'s walking paradox, Ron Swanson, a government employee who did not believe in government. That character's ever-enthusiastic boss with an affinity for the term "literally," Chris Traeger, was portrayed by Rob Lowe. Whatever the motivation, when departing from a visit to the beach earlier this summer, Betsy decided to leave with me Rob Lowe's autobiography, itself with the paradoxical title of *Stories I Only Tell My Friends*. (Clearly, Shark Forsten need not fear that my beach reads will usurp his book review articles on any level of relevance or depth of thought.)

long odds. In the show, Chris Traeger was diagnosed with a rare blood disorder and given three weeks to live, leading him to view each day as a gift.

By a lot of measures, that notion of beating the odds indeed radiated through in the autobiography. The book recounts the clichéd, but all too real trappings of fame that once threatened his career, as well as lack of guidance as the child of divorced parents, with a mother suffering from mysterious illnesses and an attorney father that he largely just visited in the summer. There are also moments of unique absurdity that provide comic relief, 1980s style. The thought of Rob Lowe and Michael J. Fox talking trash at a boxing match over which star's movie

“Just a little over a minute after launch, the Challenger exploded into a ball of fire and smoke. As a child on an Army base in the Cold War, I knew the under-the-desk routine when the air raid siren sounded. But, this was different.”

My practice has included working for members of municipal and State governments, adding a layer of appreciation to certain plots and themes in *Parks and Recreation*. By way of example, in Season 5, Leslie Knope, played with equal parts heart and humor by Amy Poehler, meets with representatives of the Restaurant Association regarding a proposed soda tax. In responding to an inquiry as to why "child size" is the largest soda container, with a whopping 512 ounces, the spokesperson calmly explains that it is "roughly the size of a two-year-old child, if the child were liquefied."

When an actor plays the same character week in and week out for the television season and the show extends multiple years, there is the tendency to meld the character with the actor. Character-cast is basically the more extreme version of type-cast. Combine that with recency bias, and I half-expected the book to reflect the view of an exercise-obsessed, ultra-positive person with the sense of hope that comes from having beaten

theme song was better, John Parr's *St. Elmo's Fire (Man in Motion)* or Huey Lewis and the News' *Power of Love* from *Back to the Future*, is truly a curious thing that made this man simultaneously weep and sing.

The book's most moving chapter — and the reason for its appearance in this article — came at the end, after the author discussed his four years playing Sam Seaborn, speechwriter for the White House on *The West Wing*. After filming in Washington, D.C., Rob Lowe hopped American Airlines Flight 77 to Los Angeles on August 31, 2001, as he had many times to return home to his wife and children. The August 31 flight turned out to be the dry run for the terroristic attack eleven days later that would have flown into the Pentagon, and Rob Lowe's name appeared on Zacarias Moussaoui's list of deponents.

I was wearing a suit that day, for one of those 20-minute on-campus interviews in which a law student probably can-

not outright win a summer internship spot with the firm, but almost certainly can lose one. But first, I had the now apropos Political and Civil Rights class in the morning. Driving from Manayunk to North Philly, I listened to a light-hearted discussion on a morning radio show when the first plane hit the World Trade Center. The radio personalities made a few off-hand, uninformed comments that I am almost certain they would like back. By the time I arrived at Temple, the severity of the situation was setting in, as shocked students watched on monitors until the unwitting professor turned them off to start class — an act which I know he would like to take back, as the class two days later began with a remorseful apology.

Odds are, I was wearing a striped rugby shirt with corduroy pants that matched one of the sets of shirt stripes. That was my self-imposed unofficial uniform in third grade. My teacher for the Reachout program, Mr. Rose, gathered us around the television to witness history, the first teacher in space. Just a little over a minute after launch, the *Challenger* exploded into a ball of fire and smoke. As a child on an Army base in the Cold War, I knew the under-the-desk routine when the air raid siren sounded. But, this was different. I searched his face for clues as to how to respond, like a kid looking to his nearby parent's reaction the moment before crying over flipping his Big Wheel. Was it possible those tanks and trucks on base were not indestructible, but instead flawed? I do not recall what Mr. Rose did or said; I just recall that the moment of shaken confidence passed, as sadness set in for the astronauts and their families. As Maya Angelou said, "People will forget what you said, people will forget what you did, but people will never forget how you made them feel."

Truth be told, I did not remember the name of the software salesman that led the passengers who stormed the cockpit of the hijacked United Flight 93, resulting in it crashing into a Pennsylvania field, rather than the White House or the Capitol. And, I did not

recall what Todd Beamer said before the simple, resolute "Let's roll." I will remember on this 15th anniversary of 9/11 and every one after, how his heroism makes me feel.

A week after Rob Lowe received the letter about appearing on the twentieth hijacker's list of deponents, he received a package from the White House head speechwriter. It contained a copy of the President's speech from September 20, 2001, including the following: "The course of this conflict is not known, yet its outcome is certain. Freedom and fear, justice and cruelty, have always been at war, and we know that God is not neutral between them. Fellow citizens, we'll meet violence with patient justice, assured of the rightness of our cause and confident of the victories to come." 

Bar Journal Editor **Seth L. Thompson** is a shareholder with Sergovic Carmean Weidman McCartney & Owens, P.A., 406 S. Bedford St., Suite 1, Georgetown, Delaware. He may be reached at seth@scdelaw.com.

President's Corner (continued from page 5)

currently creating videos of some of the senior attorneys to chronicle the history of practicing law in Delaware for future generations. We understand the value of senior attorneys' knowledge and need their collective wisdom to move forward to be as great as we possibly can be.

In conclusion, thank you to the senior attorneys and judges of our Bar. We are great because you have given us better perspective in allowing us to stand on the shoulders of giants. 

Miranda "Mindy" Clifton 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 cliftom2@nationwide.com.



SAVE THE DATE

CELEBRATE PRO BONO WEEK

2016 Christopher W. White Distinguished Access to Justice Awards Breakfast

Tuesday, October 25, 2016 • 8:00 a.m.
Chase Center on the Riverfront, Wilmington, DE

Registration to follow

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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

September 2016

Wednesday, September 14, 2016

Rules of the Road: A Lawyer's Guide to DUI/DWI
3.0 hours CLE credit (with 0.5 hour ethics)
Delaware State Bar Association, Wilmington, DE

Tuesday, September 20, 2016

Public Speaking for Lawyers

3.0 hours of 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

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1.5 hours CLE credit
Delaware State Bar Association, Wilmington, DE
Webcast to Kent County Courthouse, Dover, DE
Webcast to Tunnell & RAYSOR, Georgetown, DE

Thursday, September 29, 2016

Rules of the Road: A Lawyer's Guide to DUI/DWI
3.0 hours CLE credit (with 0.5 hour ethics)
Live at Kent County Courthouse, Dover, DE

Friday, September 30, 2016

Supreme Court Review 2016: A Discussion of Decisions at the Highest State and Federal Judicial Levels

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

Thursday, October 6, 2016

Rules of the Road: A Lawyer's Guide to DUI/DWI
3.0 hours CLE credit (with 0.5 hour ethics)
Live at Tunnell & RAYSOR, Georgetown, DE

Tuesday, October 11, 2016

Seize the Data! Identifying, Capturing and Using E-Discovery

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, October 12, 2016

The Best Practices for Pro Bono Programs at Law Firms and Corporate Law Departments

1.5 hours CLE credit
Delaware State Bar Association, Wilmington, DE
Webcast to Kent County Courthouse, Dover, DE
Webcast to Tunnell & RAYSOR, Georgetown, DE

Tuesday, October 18, 2016

Teddy Roosevelt for President 2016

3.0 hours CLE credit
Delaware State Bar Association, Wilmington, DE
Webcast to Kent County Courthouse, Dover, DE
Webcast to Tunnell & RAYSOR, Georgetown, DE

Friday, October 28, 2016

Office and Trial Practice 2016

7.0 hours CLE credit (with 3.0 hours ethics)
Chase Center on the Riverfront, Wilmington, DE

SECTION & COMMITTEE MEETINGS

September 2016

Monday, September 12, 2016 • 12:00 p.m.

Litigation Section Meeting

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

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

Wednesday, September 14, 2016 • 4:00 p.m.

Real & Personal Property Section Meeting

The Kirsh Law Firm, 910 South Chapel Street, Suite 202, Newark, 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

Friday, September 16, 2016 • 5:00 p.m.

Health Law Section Meeting

Catherine Rooney's, 1616 Delaware Avenue, Wilmington, DE

Thursday, September 22, 2016 • 2:00 p.m.

Executive Committee Meeting and Dinner

White Clay Creek Country Club, 777 Delaware Park Boulevard, Wilmington, DE

October 2016

Monday, October 3, 2016 • 12:30 p.m.

Senior Lawyers Committee Monthly Luncheon Meeting

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

Tuesday, October 4, 2016 • 3:30 p.m.

Estates & Trusts Section Meeting

Connolly Gallagher LLP, Brandywine Building, 1000 West Street, 14th Floor, Wilmington, DE

Wednesday, October 12, 2016 • 4:00 p.m.

Real & Personal Property Section Meeting

The Kirsh Law Firm, 910 South Chapel Street, Suite 202, Newark, DE

Monday, October 17, 2016 • 12:00 p.m.

Litigation Section Meeting

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

Thursday, October 27, 2016 • 12:00 p.m.

Executive Committee 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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TIPS ON TECHNOLOGY

By Richard K. Herrmann, Esquire

Virtual Liability

The Litigation of the Future

We all know that texting while driving is as dangerous as other forms of distracted driving and claims lives every day. What we do not appreciate is that the cellphone is responsible for sending thousands to the emergency room each year. In fact, according to a *Wall Street Journal* study, “emergency room visits involving distracted pedestrians using cellphones were up 124 percent from 2010 — and up 10-fold from 2006.”

If you would like to take a peek into the future, just peer over the Delaware Memorial Bridge to our sister state New Jersey. In the spring of 2016, the General Assembly found itself faced with a “no texting while walking” bill which would impose a fifty dollar fine for those caught walking on sidewalks or streets using their phones and other mobile devices without hands-free tools.

This may seem like nonsense until you do a little research and realize that studies show people on cellphones are 48 percent more likely to walk into oncoming traffic. A separate report, released in 2015 by the Governors Highway Safety Association, found that nearly two million pedestrian injuries were related to cellphone use. And, we are not simply talking about people walking into traffic. Other examples of tragic deaths or injuries include a man who fell to his death in 2015 when he fell off of a cliff in San Diego as a result of being distracted by his mobile device. In 2013, a woman, preoccupied with texting, fell off a 60-foot cliff and was severely injured. In Indiana, another woman fell into a river connected to Lake Michigan while she was attempting to walk along a pier while sending a text message.

The litany of examples continues: In Washington, D.C., a woman exited an escalator into the metro while texting and continued walking off the platform onto the tracks. A Staten Island, New York, teenager fell into an open manhole, and a Pennsylvania woman accidentally fell into a shopping mall fountain while texting.

In addition to the obvious injuries from distracted texting, the mobile phone seems to be the cause of a number of new medical issues. “Text neck,” the posture formed by leaning over a cellphone while reading and texting, is a big problem, according to a study in the National Library of Medicine. The bad posture we are developing while we text can put up to 60 pounds of pressure on the upper spine. If this continues, centuries from now we may not look too different from our ancestors in the Jurassic days.

And, the list goes on. “Texting thumb” is now a well-known condition in the medical profession. According to some studies, an average person sends more than 40 emails daily and spends around 23 hours a week texting (hard to believe). “Texting thumb” is much akin to trigger finger, caused by a constriction of the tendon in the thumb resulting from repetitive gripping motions while texting and holding the phone.

Lawyers will no doubt refer to this as “repetitive stress injury” (RSI) in the pleadings against the cellphone manufacturers. And, finally, there appears to be a wave of facial injuries to teens and college students resulting from dropping their phones while texting in bed.

Where will all of this take us? No doubt we will be seeing an added keynote to the old West system. Obvi-



ously it will appear in products liability and in traditional torts; but I am thinking of something a bit more in keeping with the technology- something like "Virtual Torts." This would include actions relating to virtual injuries against the user, the manufacturer as well as the app provider. That is right. We did not talk about the apps. If you want to really encourage texting while walking, take a look at the app "Type and Walk" which, by activating your camera, will permit you to see where you are walking while you text. I see the developer CGactive LLC as a defendant under the theory of contributory distraction (*see West Keynote Virtual Torts... Mobile Technology Injuries...Contributory Distraction 4.2*). 

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.

Sponsored by The Delaware State Bar Association

DSBACLE

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.**

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PROGRAM HIGHLIGHTS:

- Delaware Supreme Court Decisions
- U.S. Supreme Court Decisions and Preview of Upcoming Cases

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What is Reasonable in Today's Technology Age?

By Richard K. Herrmann, Esquire

The Rules of Professional Conduct do not require members of the Bar to be perfect. Perfection is a laudatory goal, and something to which we can all strive, but few of us will ever achieve. What the Rules do require is that we act reasonably; we need to make reasonable efforts. The application of reasonableness has not yet been tested in Delaware as it relates to technology and competency under Rule 1.1 or client confidentiality under Rule 1.6.

Rule 1.1 provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation **reasonably** [emphasis added] necessary for the representation."

Comment 8 specifically adds the technology requirement: "[8] Maintaining competence — To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology** [emphasis added], engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."

The Rules do not provide any guidance on what reasonable steps need to be taken to understand the benefits and risks associated with relevant technology. We, through the Commission, try to teach it, but this is a daunting task. One can argue that the concept of what is relevant technology varies from practice to practice. Electronic discovery, for example, does not mean too much to a lawyer whose practice centers on residential real estate. And, even though a family lawyer may not have a Facebook account, it might be unreasonable to practice family law today without a fair understanding of social media and its impact on daily life of the family law client.

But, there are certain kinds of technology which transcend all of our practices and we need to make reasonable efforts to get our arms around the benefits and risks associated with them. These include email, calendaring, backup, cloud computing, and security. Not only do these tools relate to our very competence to practice, in many instances they impact our ability to maintain client confidentiality under Rule 1.6.

"There are certain kinds of technology which transcend all of our practices and we need to make reasonable efforts to get our arms around the benefits and risks associated with them."

Comments 18 and 19 to Rule 1.6 frame the issues to be considered in protecting client confidentiality. They reference reasonable efforts to keep the client information secure, and, in doing so, provide some very general and thought provoking concepts. The attorney must make reasonable efforts to prevent access or disclosure of confi-

dential information. Factors include, "the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients." These concepts may be helpful in hindsight, but difficult in application up front, particularly when setting up the technology to be used.

During the first three years in which the Commission has been operating, we have offered education and best practices. The common request coming from the Bar seems to be the answer to the question of what is reasonable. The Bar would like the names of acceptable email services, cloud services, and network providers. We have not yet been able to provide a means of reasonably doing this. There are many variables including the ever-changing landscape of new offerings and recent failures. Will the Bar ever have a simple, easy to follow list of services which would be reasonable to adopt? I think so — I hope so. In the meantime, each lawyer needs to treat herself or himself as a client. Read the contracts that accompany the services before you subscribe to them. If you would not recommend that your client enter into the contract, do not do it yourself. That would hardly be reasonable. ☐

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.

Popular Supreme Court Review Seminar To Be Held on September 30

The annual seminar reviewing the recent leading Supreme Court decisions of the United States and Delaware will be held at the Bar Center on Friday, September 30. The success of the morning seminar has been attributed to the high quality of the presentations each year.

Widener Law Professor Allen E. Garfield will discuss the leading U. S. Supreme Court decisions, and Thomas A. Foley, Esquire; Gretchen S. Knight, Esquire; Thomas P. McGonigle, Esquire; and Jennifer C. Voss, Esquire, will present the important Delaware Supreme Court decisions. Delaware Supreme Court Justice Karen L. Valihura will act as the seminar Moderator.

This fourth annual seminar, offering 3.3 credit hours, is co-chaired by Justice Valihura and Harvey Bernard Rubenstein, Esquire, a past president of the Bar Association. We thank Delaware Supreme Court Justice Randy J. Holland, who was the co-chair and moderator of the previous three seminars, for his contributions to the seminar program. ☺



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ETHICALLY SPEAKING

By Charles Slanina, Esquire

New ABA Rule Prohibiting Discrimination and Harassment

On August 8, 2016, the ABA House of Delegates voted to amend the ABA Model Rules of Professional Conduct to bar harassment and discrimination in all conduct related to the practice of law. Resolution 109 passed on a voice vote without dissenting comment. The adopted version contains a late amendment which changed the *mens rea* requirement from strict liability to a “known or reasonably should have known” standard. The new **Model Rule 8.4(g)** makes it professional misconduct to:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socio-economic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

The **Comments to Model Rule 8.4**, which address the new Section (g), were also adopted:

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence in the legal profession and the legal system. Such discrimination includes harmful, verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of anti-discrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, co-

workers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this rule by, for example, implementing initiative aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[5] A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer’s practice or by limiting the lawyer’s practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments by a tribunal except for good cause. See Rule 6.2(a),(b) and (c). A lawyer’s representation of a client does not constitute an endorsement by the lawyer of the client’s views or activities. See Rule 1.2(b).

Adoption of the Rule followed a joint comment from 52 ABA member attorneys from 22 States and the District of Columbia to the ABA Standing Committee on Ethics and Professional Responsibility. (There were no signers from Delaware). While there had been substantial debate about the state of mind requirement for a violation and some criticism that the Rule harmed free speech and religious freedom and was driven by “PC politics,” the final resolution was widely embraced and adopted. The resolution was co-sponsored by the ABA Standing Committee on Ethics and Professional Re-

sponsibility, the Section on Civil Rights and Social Justice, the Commission on Disability Rights, the Diversity & Inclusion 360 Commission, the Commission on Racial and Ethnic Diversity in the Profession, the Commission on Sexual Orientation and Gender Identity, and the Commission on Women in the Profession. The final adopting voice vote was without opposition.

Currently, approximately 20 states already have provisions in their Professional Conduct Rules addressing the same subject. For example, Ohio's Rule 8.4(g) bars conduct "in a professional capacity" involving "discrimination prohibited by law." However, it does not expressly cover harassment or specify discrimination based on gender identity, ethnicity, and socio-economic status.

Comment [3] to Rule 8.4 of the Delaware Professional Conduct Rules already provides a variation of this prohibition:

[3] a lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. DPCR 8.4(d) states that it is professional misconduct for a lawyer "to engage in conduct that is prejudicial to the administration of justice."

It should be noted that the Preamble to the Rules states that the Comments are not authoritative and are meant only for interpretive guidance. PROF. COND., Preamble, para. 21; *Matter of Barakat*, Del. Supr., 99 A.3d 639 (2013). Delaware is one of 17 states which adopted the Model Comment despite something of a trend to reject such adoptions. The Supreme Courts in Arizona,

Tennessee, North Carolina, Oregon, and New Hampshire have all rejected proposals to adopt the Comment.

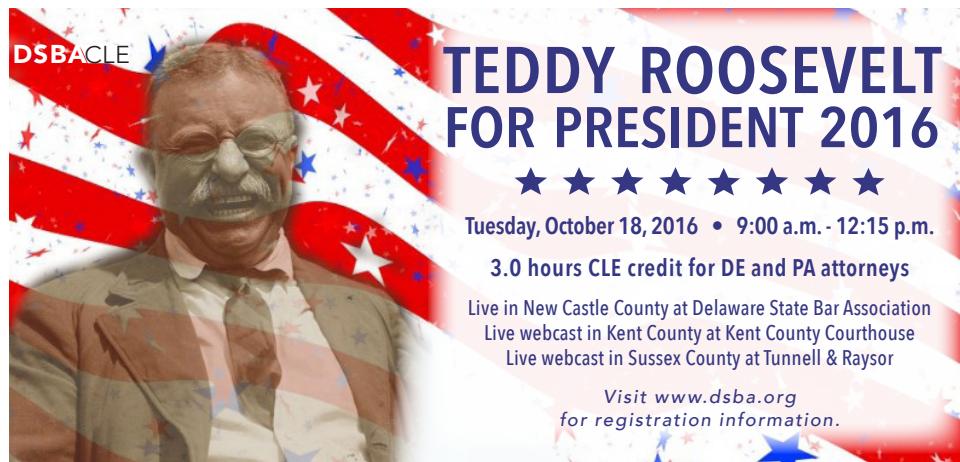
It will be interesting to see when or if Delaware adopts the Model or similar rule. When Chief Justice Norman Veasey was chairman of the Ethics 2000 Commission tasked with revising the ABA Model Rules, Delaware was an early adopter of most, if not all, changes to the Model Rules.

Welcome back from the summer! More news, if any, as it develops.

"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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Report: The 2016 Annual Meeting of the ABA House of Delegates

By William D. Johnston, Esquire

The 2016 Annual Meeting of the House of Delegates of the American Bar Association took place on August 8 and 9, 2016, in San Francisco, California. The House of Delegates, with over 500 members, is the principal policy-making body of the ABA. For the San Francisco meeting, the “Delaware Delegation” included The Honorable William C. Carpenter, Jr. (member of the ABA Board of Governors), Benjamin Strauss (State Bar Delegate), and yours truly (State Delegate).

Remarks by the President of the ABA and Others

As is typical during meetings of the House, members heard from the President of the ABA and others. Speakers included Paulette Brown (President), Linda Klein (President-Elect), Patricia Lee Refo (Chair of the House), G. Nicholas Casey, Jr. (Treasurer), Hilarie Bass (incoming Chair-Elect), and John G. Levi (Chair of Legal Services Corporation).

Election of ABA Officers: History in the Making

For the first time in the history of the ABA, members of the House witnessed Paulette Brown, the ABA’s first female African American president, passing the gavel to another woman, Linda Klein. And, unprecedented will be Hilarie Bass’ following of Linda — three female presidents in a row.

On a personal note, I am so delighted that Linda Klein has become president of the ABA. My wife, Mary, and I first met Linda when we were all students at The Washington and Lee University School of Law. Linda has pursued a distinguished legal career, served as president of the Georgia State Bar Association, and already has contributed immeasurably to the work of the American Bar Association. We will all benefit from her outstanding leadership in the year to come.

Resolutions Adopted by the House as ABA Policy

During the Annual Meeting, the House of Delegates adopted the following resolutions (with numbers as indicated), among others, the effect of which was to articulate ABA policy that can be advocated throughout the world:

- Reaffirming support of lawyer referral services sponsored by bar associations, and encouraging lawyer referral services sponsored by bar associations, to adhere to the standards of the ABA Model Supreme Court Rules Governing Lawyer Referral and Information Services (10A);
- Calling on the Government of Turkey to provide a fair hearing before an impartial tribunal applying established legal principles before suspending or dismissing any lawyer or judge from the bar or a tribunal and to commit to protect human rights, to respect freedom of speech, and to ensure that any measures taken that derogate from such obligations be only those that are strictly necessary given exigencies of the situation (10B);
- Granting reapproval of paralegal education programs at Delaware Technical and Community College (Georgetown, DE) and Widener University Delaware Law School (Wilmington, DE), and extending the term of approval of the paralegal education program at Wilmington University (New Castle, DE) until the February 2017 Midyear Meeting of the ABA House of Delegates to allow for consideration of that program’s pending application for reapproval (101);
- Urging the President of the United States and appropriate parties to recognize the importance of racial, ethnic, disability, sexual orientation, gender identity, and gender diversity in the selection process for United States Circuit Judges and United States District Judges, United States Bankruptcy and Magistrate Judges, and for other qualified employees in the Judicial Branch of the United States, and to expand the diversity of the pool of qualified applicants, nominees, and appointees, including without limitation, the use of diverse merit selection panels (102);
- Urging state and territorial election administrators and officials to ensure that state-wide and territorial-wide ballot counting guidance is in place as soon as practicable (103);
- Urging jurisdictions to adopt court rules or legislation authorizing the award of class action residual funds to non-profit organizations that improve access to civil justice for persons living in poverty (104);
- Urging federal, state, territorial, and tribal courts and legislative bodies to adopt rules or enact legislation to establish an evidentiary privilege for lawyer referral services and their clients (“LRS clients”) for confidential communications between an LRS client and a lawyer referral service when an LRS client consults a lawyer referral service for the purpose of

retaining a lawyer or obtaining legal advice from a lawyer (106);

- Adopting the black letter of the *ABA Standards for Criminal Justice: Criminal Justice Mental Health Standards*, chapter seven of the ABA Standards for Criminal Justice, dated August 2016, to supplant the Third Edition (August 1984) of the *ABA Criminal Justice Mental Health Standards* (107);

- Supporting the treatment of the likelihood-of-confusion standard in federal trademark law as a question of fact (108A);

- Supporting an interpretation of the federal Lanham Act, 15 U.S.C. § 1051 et seq., recognizing that the ineligibility of an otherwise valid mark for registration with the U.S. Patent and Trademark Office (USPTO), through the cancellation of an existing federal registration or the denial of an application for a federal registration, does not in and of itself disqualify that mark for protection under all provisions of the Lanham Act, the common law, or from registration on the state registers (108B);

- Supporting an interpretation that venue in patent infringement actions is the sole province of the special patent venue statute, 28 U.S.C. § 1400(b), such that the general venue statute, 28 U.S.C. § 1331, does not supplement, interpret, or apply to 28 U.S.C. § 1400(b), except in instances that are not addressed by 28 U.S.C. § 1400(b) (108C);

- Amending Rule 8.4 of the *ABA Model Rules of Professional Conduct* to add an anti-discrimination and anti-harassment provision (109);

- Urging federal, state, local, and territorial law-enforcement authorities to provide an accurate translation of the *Miranda* warning in Spanish (110);

- Urging state, local, territorial, and tribal legislatures to abolish “offender funded” systems of probation supervised by private, for profit companies (111B);

- Urging Congress to enact legislation to require federal agencies to provide an online source at which material that has been incorporated by reference into proposed or final regulations can be consulted without charge (112);

- Urging all providers of legal services, including law firms and corporations, to expand and create opportunities at all levels of responsibility for diverse attorneys and urging clients to assist in the facilitation of opportunities for diverse attorneys, and to direct a greater percentage of the legal services they purchase, both currently and in the future, to diverse attorneys (113);

- Urging courts and other governmental entities, bar associations, non-profit organizations, and entrepreneurial entities that make forms for legal services available to individuals through the Internet to provide clear and conspicuous information on how people can access a lawyer or a lawyer referral service to provide assistance with legal matters to prevent errors or omissions (114);

- Urging federal, state, local, and territorial legislative bodies, governmental agencies and applicable entities to eliminate the school-to-prison pipeline where students of color, students with disabilities, LGBTQ students, and other groups suffer disproportionately from inadequacies and inequities in the education system (115); and

- Amending Principles 2(B) and 6(C) of the *ABA Principles for Juries and Jury Trials* to include marital status, gender identity, and gender expression to the groups which should not be excluded from jury service, and to recommend that jurors be educated as to implicit bias and how to avoid such bias in the decision-making process (116).

A detailed report of the work of the House can be found at www.americanbar.org.

Membership in the ABA

If you are not currently a member of the ABA, please consider joining (or re-joining). Through its Sections, Divisions, and Forums, the Association provides valuable content, leadership opportunities, and networking. Most significantly, you will forge enjoyable, life-long relationships.

ABA members also can take advantage of numerous products and services discounts as well as other benefits.

Once you are a member of an ABA Section, Division, or Forum, you may join for free one or more committees within these groups and one or more subcommittees within the committees. Those committees and subcommittees are welcoming and empowering “homes” for law students, lawyers, and judge members throughout the world.

For the complete list of offerings, please see www.americanbar.org.

Next Meeting of the House of Delegates

The ABA House of Delegates will next meet on February 6, 2017, in Miami, Florida during the 2017 ABA Midyear Meeting. In the meantime, if you have any questions or concerns, please contact me at wjohnston@ycst.com or (302) 571-6679.

It continues to be my privilege and pleasure to serve as State Delegate from Delaware. 

Bill Johnston is a partner with Young Conaway Stargatt & Taylor, LLP. He is a Past President of the Delaware State Bar Association and serves in the ABA House of Delegates as State Delegate from Delaware. As State Delegate, he is a member of the Nominating Committee of the American Bar Association.

The 2016 Combined Campaign Cup Results

By Makenzie Windfelder, Esquire, and Charles Vincent, Esquire

Thank you to all who contributed to the Fourth Annual Combined Campaign Cup. A little rain did not stop this year's Cup from being the biggest success yet, netting more than \$36,000 to benefit the Combined Campaign for Justice, a 52% increase over last year. More than 200 golfers, tennis players, lawn gamers, and volunteers participated in the golf and tennis tournaments, lawn games, lunch, dinner, and silent auction. We thank the many members of the Bar, volunteers, and this year's planning committee, including co-chairs Sean Brennecke, Shauna Hagan, Jaclyn Quinn, Jason Stoehr, Charlie Vincent, Jason Warren, Makenzie Windfelder, and Julie Yeager.

The winners of the 2016 Combined Campaign Cup competitions are:

Championship Course

Ted Behm, Esquire; Kevin Collins, Esquire; Chris Lee, Esquire; and Jonathan Sun

Nemours Course

Tony Flynn, Esquire; Bill Gamgort, Esquire; Dan Johnson, Esquire; Richard Levine, Esquire

Tennis Tournament

John Ellis, Esquire, and Richard King, Esquire

A big thank you to this year's sponsors, listed below. Pictures from the event are available on the Combined Campaign for Justice website. If you would like to help plan next year's tournament, please contact Charlie Vincent at charlie@innovincent.com or Jason Stoehr at jstoehr@declasi.org. We look forward to seeing you at DuPont on July 17, 2017! ☺

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CCC Co-Chair Jaclyn Quinn, Esquire, presents Kevin Collins, Esquire, with the award for Team Barnes & Thornburg winning the 2016 DuPont Championship Course Combined Campaign Cup.



Team Young Conaway Stargatt & Taylor (Dan Johnson, Esquire; Richard Levine, Esquire; Bill Gamgort, Esquire; and Tony Flynn, Esquire) won the 2016 Nemours Course Combined Campaign Cup.



The team of Richard King, Esquire, and John Ellis, Esquire, won the 2016 Combined Campaign Cup Tennis Tournament.

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By Susan Simmons

Learning by Doing

As lawyers, you may continue to learn by practicing law, and for most that is a lifelong experience. According to the University of California's Science, Technology and Environmental Literacy Workgroup's Experiential Learning Project Group, learning by doing (experiential education) has a long history because, "if your goal is to have the person understand the concept at a level that they can generalize and apply the understanding to new situations... experiential education is probably the best way to develop that level of mastery." For many professionals — doctors, teachers, trade professionals — this style of learning takes place in school. For lawyers, experiential education primarily happens after leaving law school and starting to work.

For young lawyers, the chance to work directly with clients, draft documents, and argue in court can vary depending on their work setting. In a large firm, that opportunity is deferred a few years, but in a solo practice it is immediate. Regardless of the work situation, the opportunity to do *pro bono* work can greatly enhance a lawyer's practice and provide important skill-building experiences.

Most lawyers do *pro bono* work for altruistic reasons. According to the 2011 LexisNexis/Probono.Net survey, *Why Lawyers Give Back*, "personal fulfillment" is the most common reason for doing *pro bono* (cited by 75 percent of respondents), with "commitment to a specific cause" and "meet an ethical obligation" coming in second and third. Nevertheless, the practical experience gained through *pro bono* work is a valuable benefit — whether the lawyer is starting his or her own solo practice, becoming part of a small firm, or joining a large firm. Most *pro bono* programs are aware of this and offer the training, support, and mentoring that allow volunteers to both learn and succeed.

Skills that can be developed or enhanced by taking *pro bono* clients include negotiating (with your client and with opposing counsel), drafting pleadings, handling discovery, arguing motions, representing clients at trial, learning about new courts, and writing briefs. For younger lawyers in larger firms, this might also mean the opportunity, early in their careers, to manage a case and client, develop a case budget, and work with opposing counsel. Lawyers who are entering into solo practice can gain additional experience by doing *pro bono* work in their practice areas, alongside their

paying clients. In addition, they can find the kind of support and training needed to build their practice and confidence, as well as finding a community in which to participate.

"Case Studies" in *Pro Bono* Work

"Al Truistic," a solo practitioner in "Needful," DE, has been doing *pro bono* work since he opened his practice in 2013. The opportunities for newly admitted lawyers were limited at the time, and "Al" knew he wanted additional training, as well as mentoring, in family law — one of his chosen practice areas. Volunteering for the Delaware State Bar Association's Wills for Seniors event provided him with the training and support needed in his new practice, in addition to fulfilling his own desire to do *pro bono* work. The training session materials were helpful in his *pro bono* work and his regular practice, and the mentoring support was crucial. He learned along the way with both paying and *pro bono* clients. He also found a community of other practitioners — something that is often difficult in a solo practice, which can be isolating. "Al" says he has gained important experience with his *pro bono* cases — and has helped those who are most disenfranchised, as well.

"Penny Wise" has a solo practice in "Budget," DE, and has been doing *pro bono* work from the start. She notes that you can graduate from law school knowing the law, but that it does not mean much until you can apply it to real situations and actual clients. She started volunteering with Delaware Volunteer Legal Services (DVLS), that serves indigent residents throughout the State of Delaware by providing quality, *pro bono* legal services to those individuals without financial resources, enabling them to receive the same access to justice in civil matters as other litigants. DVLS provided her with a constant stream of real clients and situations, along with the expertise and support of the DVLS staff lawyers. The service helped her gain confidence, as well as exposure to clients and client expectations. Her primary motivation for *pro bono* work is a basic belief that lawyers have an aspirational goal to provide access to justice; she has seen what the lack of legal assistance can do to people. Still, on a more practical level, "Wise" says that *pro bono* work can provide additional experience when starting a new practice and that support and training from the *pro bono* program is important. When asked about the idea that

pro bono lawyers might use *pro bono* cases to “practice” on low-income clients, “Wise” felt it was a condescending attitude — it assumes incompetent lawyers. She points out that, as lawyers, we do not always know everything about a case, but it is our job (and our training) to figure it out, do the research, and come up with a plan. In addition to gaining experience and confidence in her own practice, her *pro bono* work has been extremely gratifying and has allowed her to make a difference in clients’ lives.

“Bee Available” and “Stan Dup” are both relatively new sole practitioners in Delaware, and both started their volunteer work with the Office of the Child Advocate (OCA), a non-judicial state agency charged with safeguarding the welfare of Delaware’s children. OCA fulfills this charge by providing legal representation for dependent, neglected, and abused children in civil Family Court proceedings. “Dup” says that he wants to give back to the community by doing *pro bono* work, but he has also gained confidence from participating in the program. His *pro bono* work made him realize that he could handle himself in court. In addition, he has found that it provided him with networking opportunities and a degree of credibility with more experienced lawyers when he mentions his work with the OCA. “Available” says that when she started her practice, the job market was very competitive and lawyers needed courtroom, trial, and client experience to compete. She, too, has gained confidence in her ability to walk into a courtroom and figure it out, along with improving her negotiating skills and her ability to think on her feet. Both “Dup” and “Available” say that the support and training provided by the *pro bono* project were critical to their success.

Years ago, larger firms were not as supportive as they are today. Back then, *pro bono* work may not have counted toward billable hours, and it was difficult for younger associates to find the time to take cases. Those running programs often would recruit these lawyers by emphasizing the kinds of skills that would be used. Today, firms are supportive of *pro bono* work and try to make it easier for all of their lawyers to handle *pro bono* cases — and many are now finding that their corporate clients expect the firm to be active in *pro bono* cases.

Younger associates in many larger firms are often not given the opportunity to manage their own clients for several years. “Sow Young,” a fourth-year associate with the Dover firm of “Training and Mentors PLLC,” started volunteering for a landlord-tenant project last year. She saw it as an opportunity to work with her own clients and provide representation for people who have none. “Young” recognized that having both

parties represented by counsel was the ideal situation. She found the *pro bono* program staff to be excellent, and having training and support was a major consideration in choosing her *pro bono* work. From her volunteer work, she gained actual courtroom experience arguing before a judge and learned a number of important skills, including negotiating with opposing lawyers and working with clients and managing their expectations — none of which she would have experienced with the firm’s clients for a few years. Through her *pro bono* work, she has gained confidence that will apply to her future work with the firm. “Young” says that *pro bono* work is definitely something in which all lawyers should get involved — not just to give back to the community, but also to help their development as lawyers, to develop new skills, and to become a part of a community of like-minded lawyers.



“Donna Goodwork” is a senior associate at “Wee, Hart, Justice & Associates” in Middletown, DE. Her primary practice is in bankruptcy. In her *pro bono* work with unaccompanied immigrant children, she has represented minors who needed assistance and representation at hearings. She had never been in immigration court before and found it to be very different from her normal practice. She says that her *pro bono* experiences have increased her comfort level in going into a new court. She now approaches new situations with more ease and confidence — and she has found her *pro bono* work to be very rewarding.

“Rick Reachout” expressed the importance of mentors and a support network for *pro bono* lawyering. As a young lawyer with a background in real estate and construction, he was reticent about taking on DVLS *pro bono* cases, which were primarily in family law areas. It was challenging and time consuming finding out basic information, like what form to use, and he really needed the help that DVLS provided. Noting that efficiency is even more important when lawyers are working for free, he empathizes with lawyers concerned with the amount of time working in an unfamiliar area of law may require. Now that he has learned the ropes “Rick” is more than willing to help other volunteers.

A Winning Proposition

Pro Bono Coordinators for many firms in Delaware note that most young associates typically review documents and work behind the scenes on firm cases. *Pro bono* work is often a way to gain the requisite skills to achieve professional development milestones at a faster pace. Through *pro bono* work, lawyers

Irving Morris, Esquire

1925 - 2016

By Victor F. Battaglia, Sr., Esquire

Irving Morris passed away on June 28, 2016, at the age of 90, having lived a life that can best be symbolized by the baseball evaluation "he hit for the cycle."¹

He was a distinguished corporate litigator, a civil rights icon, a dedicated husband, father, and grandfather, and a community activist.

He was married to Doris Richter for 58 years until her death. He is survived by daughters Deborah Zakheim (Bruce) and Karen Morris (Alan Levenson), son David, and nine grandchildren, each of whom loved and respected him.

Irving Morris practiced law in what has to be a golden era for the Delaware Bar. He was admitted to the Bar in 1951. In the time between 1960 and 2000, many of us were privileged to practice among great lawyers like Ned Carpenter, Henry Canby, Aaron Finger, H. Albert Young, Rod Ward, Bruce Stargatt, Andy Kirkpatrick, Sam Arsh, Dick Corroon, Jim Tunell and others who were not just practitioners, but role models, mentors, teachers, and students of the law.

Younger, but with the same quality of character and obligation, not just to clients but to the rest of the world, Irving became an icon among icons.

Irving was a general practitioner, but he devoted his considerable talent and training to the protection of two very different groups of clients. The clients were vastly different, but the goal was the same — to guarantee fairness to people who were victimized by the law.

Irving became our nation's most prominent and successful plaintiff's class action lawyer. His goal was to prevent unfairness in corporate transactions frequently involving thousands of investors. Irving's skill and hard work embellished the fame of our nation's most important business court, the Delaware Court of Chancery and, who many would identify as our state's most distinguished Chancery judge The Honorable Collins J. Seitz. The Delaware Court of Chancery and Irving were made for each other. Lawyers came from New York, Chicago, Los Angeles, and other venues across the country to litigate here. Lawyers sought out Irving as local and lead counsel and all were delighted to appear in our nationally recognized Court of Chancery.

But, Irving's talent and drive were not limited to his corporate practice. He had the talent and courage to help people — not just the corporate world. He played an important role in pulling us along into what was then the 20th Century. He saw remnants of an old social bias and he did not like it one bit. He did not appreciate that water fountains at the train station were marked for "Colored" use. He was bothered that we had two school systems — one for African Americans and one for others. He went out of his way to work with lawyers of color to make sure they were treated in the same way others were treated. His interest was anywhere people were treated differently than the rest of us. He surmised the most important area for remediation was the public schools area. From the college to kindergarten classes, it was unfair to separate the races in the effort to educate our people. He joined forces with iconic lawyer Louis Redding on the issue headed for the U.S. Supreme Court. Wherever segregation was an issue, Irving positioned himself with the underdog.

Make no mistake about it — Irving did not limit his interest to corporate remediation or even to the recurring problems presented by a school system that seemed at times to be centered in an earlier century.

Irving had the uncanny ability to see and understand the pain and disadvantage that grows like mold in the presence of inequality, unfairness, and injustice, and the courage to deal with it.

He knew how to break the barriers of racial segregation not just in public education, but in the pain that concept spreads in the course of daily living. He was smart, tenacious, and most of all, he was fair. He loved people and loved removing the pain of antiquated social bias. He did not go looking for a fight, but when issues of fairness presented, he was quick to become engaged.



Photo source: The New York Times

1. "Hitting for the cycle" is a rare occurrence for a single player in baseball lore. It means a single player gets four hits in a single game; one of which is a home run, one a triple, one a double, and one a single. It is a symbol of excellence.

Given the tremendous amount of litigation with which he was engaged, it is wrong to assume he was not distracted with issues of daily living.

Irving was a prolific author, and his novel, *The Rape Case; A Young Lawyer's Struggle for Justice in the 1950's*, was favorably commented upon by Justice John Paul Stevens and Frederick A. O. Schwartz, Jr., counsel of the Brennan Center for Justice at New York University Law School.

Irving was repeatedly honored by his peers at the Bar. He served as President of the Delaware State Bar Association. He was awarded the First State Distinguished Service Award, the Delaware State Bar Association's highest award for leadership and service.

He was elected to fellowship by the American College of Trial Lawyers. He was appointed to the Board of Bar Examiners by the Delaware Supreme Court. He served as a law clerk to U.S. District Court Judge Paul Leahy.

Irving was an active member of our community. He served as President of Temple Beth Shalom. He chaired fundraising campaigns for the United Way and the Jewish Federation of Delaware. He served with honor in the United States Army and was captured during the Battle of the Bulge.

Irving was married to Doris Richter until her death. For 58 years, they were engaged in what can only be called a perfect joint venture. They were perfectly matched. Doris was sophisticated, smart, and every bit the fighter that Irving was.

Each of the Morris children lives in and according to the standards they inherited from Irving and Doris. All are educated, with advanced degrees. All are kind, considerate, socially active, dedicated to community service, and concerned for the underdog. No man knows a more desirable legacy.

Irving Morris was a citizen, a soldier, a lawyer, a litigator, a scholar, a humanitarian, and, most importantly to his family, he was a devoted husband, father, and grandfather. He loved his family, his country, his religion, and the promise of this great country to the World. ☀

Access to Justice (continued from page 21)

have learned how to manage the client relationship, negotiate, manage cases, and draft legal memos, motions, and pleadings. In addition, the opportunity to represent a client in court is a highlight for younger lawyers, and even lawyers who are not litigators can gain insight by, for example, participating in a trial and seeing what happens in court when documents are poorly drafted. The firms encourage *pro bono* work and are honored to be able to help others. They also note that firms have found less attrition with associates who do *pro bono* work — they seem to be happier and more satisfied with their work. They have seen lawyers gain skills in writing briefs, arguing motions, and working with both clients and opposing lawyers — all things that new associates do not routinely get to do. In addition, these associates have the confidence to step forward when asked by the firm to work more directly on a case.

Doing *pro bono* work can be immensely satisfying and fulfilling — but along the

way, one also learns more about the practice of law. It is a win-win situation for everyone involved — the lawyer, the client, and the judicial system. If you are not yet working with a *pro bono* program, investigate our legal services' programs and see what opportunities are offered. Whether you are a newly-minted lawyer or one with years of experience, take a case and you will find yourself hooked on providing access to justice to our most vulnerable citizens.

If you or your firm are interested in or already participates in *pro bono*, let us know:

Susan Simmons
Director of Development & Access to Justice Coordination
Delaware State Bar Association
405 N. King Street, Suite 100
Wilmington, DE 19801
ssimmons@dsba.org
(302) 658-5279, ext. 101 ☀

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.

SAVE THE DATE | Sunday, October 23

Wills for Seniors

10:00 a.m. - 4:00 p.m.
Elsmere Fire Hall
1107 Kirkwood Highway
Elsmere, DE 19805

Call for Volunteers! Volunteers offer, at no cost, estate-planning services such as wills, advance health care directives, and financial powers of attorneys. Contact Jacki Chacona at (302)478-8680 x212 or jchacona@dvls.org to volunteer and to schedule time slots at the event.



Mediation Arbitration Neutral Assessment

James J. Haley, Jr., Esq.

ABOTA Member; Certified Mediator

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1716 Wawaset St., Wilmington, DE 19806-2131

Re-thinking *Voir Dire*

By Steven P. Wood, Esquire

Superior Court Criminal Rule 24(a) explicitly permits attorneys to participate in the *voir dire* process by directly questioning prospective jurors.¹ Despite the plain language of the Rule, in 1971, the Delaware Supreme Court's opinion in *Parson v. State* effectively ended the practice of allowing attorneys to question jurors during *voir dire*.² Since that time, nearly all of the available relevant empirical research about jury selection practices has concluded that jury selection practices such as those now used in Delaware, during which only the judge questions the venire, and does so primarily using "yes/no" leading questions, is the least effective way of empaneling an impartial and unbiased jury, which was described by the *Parsons* court as the "true purpose" of *voir dire*.³ It should thus be no surprise that Delaware is now in the extreme minority of jurisdictions in the United States that persist in prohibiting attorneys from directly questioning jurors during *voir dire*. The time has come to conform our jury practices to those that are demonstrably effective, used nearly everywhere else, and are recommended by national professional organizations.

According to a 2007 study by the National Center for State Courts, Delaware ranked 3rd in the United States for having the most "judge-dominated" *voir dire* practices.⁴ Delaware is one of only six states that entirely prohibit attorneys from questioning the venire in felony criminal

"The time has come to conform our jury practices to those that are demonstrably effective, used nearly everywhere else, and are recommended by national professional organizations."

cases.⁵ By contrast, in four states, judges are entirely prohibited from questioning the jurors during *voir dire*. In the other 40 states, and in the District of Columbia and Puerto Rico, both judges and attorneys directly question the venire.⁶ Judge-only *voir dire* is now also a minority practice in the Federal Courts. A 1994 study showed that a "majority of Federal District Court judges were now permitting attorneys to ask questions during *voir dire*".⁷ The Federal Judicial Center has concluded that in Federal courts attorney participation in *voir dire* has roughly doubled over the past few decades.⁸

The empirical data gathered by social scientists across the United States over the last several decades almost universally supports the conclusion that Delaware's style of *voir dire* is the least effective method of detecting biased jurors. Judge-only questioning has been empirically studied and compared to attorney-conducted *voir dire* in order to test its efficacy in producing honest and accurate self-reports of attitudes and beliefs from prospective jurors.⁹ Those

studies have consistently demonstrated that judge-only *voir dire* produces considerably less candid responses from prospective jurors than is the case with attorney-conducted *voir dire*.¹⁰ Several researchers have theorized that judge-only *voir dire* was comparatively ineffective because "prospective jurors viewed the judge as an authority figure" which prompts them to be "much more guarded" in their responses.¹¹ At least one study, conducted by a District of Columbia Superior Court judge, concluded that the process of allowing individual *voir dire* only after a juror first indicates "yes" to a general *voir dire* question was demonstrably ineffective in detecting bias among prospective jurors. The study found individual questioning of all jurors as "indispensable".¹² In fact, pursuant to current practice in Delaware, unless a juror has a "yes" answer to one of the Court's preliminary leading questions, he or she may be seated as a juror without the parties ever hearing that juror utter a single word — and this happens routinely.¹³ Other researchers have reached the same conclusion:

1. Rule 24(a) provides in pertinent part that "[t]he court shall permit the defendant or the defendant's attorney and the attorney general to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper."

2. *Parson v. State*, 275 A.2d 777, 784 (Del. 1971).

3. *Id.* at 784.

4. Hon. Gregory E. Mize, Paula Hannaford-Agor, Nicole L. Waters, The National Center for State Courts, *The State of the States Survey of Jury Improvement Efforts: A Compendium Report* 79 (2007).

5. U.S. Dept. of Justice, Bureau of Justice Statistics, *State Court Organization 1998*, 273–276 (2000). At the time of the study, seven states utilized "judge only" *voir dire*. In 2014, one of those states, Massachusetts, adopted lawyer-conducted *voir dire* by statute.

6. Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 Chi.-Kent L. Rev. 1179, 1184 (2003).

7. Hans & Jehle, *supra* at 1184.

8. John Shapard & Molly Johnson, *Memorandum From the Federal Judicial Center, to the Advisory Committee on Civil Rules and Advisory Committee on Criminal Rules* (Oct. 4, 1994); quoted in Valerie P. Hans & Alayna Jehle, *supra* at 1201.

9. E.g. Susan E. Jones, *Judge-Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 No.2 Law And Human Behavior 131 (1987).

10. *Id.* at 13.

11. *Id.* at 14; David Suggs and Bruce D. Sales, *Juror Self Disclosure in Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245, 245 (1981); Neal Bush, *The Case for Expansive Voir Dire*, 2 Law and Psychology Review 9, 17 (1976). See also Defendant's Motion at ¶ 9.

12. The Hon. Gregory E. Mize, *On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room*, Ct. Rev., Spring 1999, at 10. See also The Hon. Gregory E. Mize, *Be Cautious of the Quiet Ones*, Voir Dire, Summer 2003, at 1.

13. It is the personal experience of the author, based upon more than thirty years of jury trial experience in the Superior Court, that in most non-capital trials roughly one-third to one-half of the jurors are seated without ever being heard to speak a single word during *voir dire*.

"limited *voir dire* encourage[s] a lack of candor."¹⁴

There is virtual unanimity of opposition to "judge only" *voir dire* as an effective method of juror selection as evidenced by policy positions of national organizations such as the American Bar Association, the National Institute for Trial Advocacy, the Association of Trial Lawyers of America, and the National Association of Criminal Defense Lawyers — all of whom have explicitly urged the judiciary to permit greater participation in jury selection by the attorneys who represent the parties whose interests are at stake in litigation.¹⁵ In 2005, the House of Delegates of the American Bar Association adopted Principles for Juries and Jury Trials, a set of 19 "best practice" principles as recommended by the A.B.A.'s American Jury Project. Among these was the recommendation that:

Questioning of jurors should be conducted initially by the court, and should be sufficient, at a minimum, to determine the jurors' legal qualifications to serve in the case. Following initial questioning by the court, each party should have the opportunity, under the supervision of the court and subject to reasonable time limits, to question jurors directly, both individually and as a panel.¹⁶

It may be true that attorney participation in *voir dire* in Delaware would modestly increase the amount of time consumed by the *voir dire* process. And, that is a good thing. Delaware is currently the third-fastest state in the nation when ranked by the median length of *voir dire* in felony criminal cases.¹⁷ Since there is overwhelming evidence suggesting that perfunctory *voir dire* is ineffective in ferreting out prospective jurors who are biased, the speed with which juries are currently

selected in Delaware should rightly be viewed not as a point of pride, but rather as a symptom of a problem that must be addressed. Given the importance of effective *voir dire*, the prospect of adding a few hours to the process must not be allowed to stand in the way of improving it. Whatever concerns might exist about the possibility that lawyer-conducted *voir dire* will take "too much time" can be significantly ameliorated by imposing time limits on the process, as in other jurisdictions and by appellate courts.¹⁸

Attorney participation in *voir dire* through the questioning of jurors is the most commonly employed method of jury selection in the United States. Delaware's adherence to judge-only *voir dire* has become an extreme anachronism, given that attorneys now conduct *voir dire* in 44 other states, the District of Columbia, Puerto Rico, and also before a majority of Federal judges. The em-

pirical data gathered by social scientists over decades has proved, with virtually unanimity, the judge-only *voir dire* employing "yes/no" questions is the worst possible way of detecting biased jurors. It is time for Delaware to join most of the rest of the United States by adopting jury selection practices that elevate efficacy over expediency. 

Steven P. Wood is Deputy Attorney General in the Homicide Unit at the Delaware Department of Justice. He is the Department's most senior prosecutor and a fellow of the American College of Trial Lawyers. He can be reached at Steven.Wood@state.de.us.

18. E.g. see *State v. Adams*, 45 N.E.3d 127 (Ohio 2016); *People v. Steward*, 110, 950 N.E.2d 480 (N.Y. 2011); *People v. Lenix*, 187 P.3d 946, 963 (Cal. 2008); *Linder v. State*, 485 N.E.2d 73, 77 (Ind. 1985). See also C.J. Williams, *supra* at 63.

CALL FOR APPLICATIONS!

DELAWARE STATE
BAR ASSOCIATION
YOUNG LAWYER
DELEGATE TO THE
AMERICAN BAR
ASSOCIATION

The Delaware State Bar Association is looking for a talented, young lawyer to serve as the DSBA Young Lawyer Delegate to the American Bar Association. The lawyer must be 36 years of age or younger at the beginning of the term, a member of the Delaware State Bar Association, and a member of the American Bar Association in good standing. The first term will last until the adjournment of the 2019 American Bar Association Annual Meeting.

The Executive Committee would like to consider all interested candidates. If you would like to apply to serve as the DSBA Young Lawyer Delegate to the American Bar Association, please send your name along with a CV and at least one letter of nomination by email to Johnna M. Darby, Esquire, Executive Director, at jdarby@dsba.org or by first class mail to: Johnna M. Darby, Esquire, Executive Director, Delaware State Bar Association, 405 N. King Street, Suite 100, Wilmington, Delaware 19801. Application materials must be received on or before October 17, 2016.

14. Valerie P. Hans & Alayna Jehle, *supra* at 1197. See also Reid Hastic, "Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Jurors?" 40 Am. U.L. Rev. 703, 703-04 (1991).

15. See generally Richard K. Gabriel, *Jury Selection Strategy and Science* §15.7 (3rd.ed.).

16. A.B.A., American Jury Project, *Principles for Juries and Jury Trials*, Principal 11.B

17. Mize, Hannaford-Agor, and Waters, *supra* at 73.



DE-LAP ZONE

A Message from the Delaware Lawyers Assistance Program

By Carol P. Waldhauser, Executive Director

Stress and Stress Management

Jean is a skilled attorney and a loving mother, but she is feeling more stress than ever. As an attorney, Jean is putting her problem solving skills to use. Jean is beginning to analyze both her personal and her professional life in order to determine where she could ease the stress in her life and prevent burnout. Sadly, despite Jean's best intentions, her analysis falls short. There is an emergency in the law office and as usual, Jean addresses the emergency rather than her own wellness.

If you ask most lawyers whether they have stress in their life, not only will they say "yes," they will have a whole list of examples. It seems that many have it and everyone talks about it. In fact, it is difficult to go through the day without seeing or hearing the word "stress" somewhere or someplace.

If you were to browse through an old magazine prior to the 1960s, you would be hard-pressed to find a reference to the word "stress." In fact, the word "stress" is a term originally from the field of physics meaning physical force or tension placed on an object. It was not until after World War II that the term was used to signify psychological tension within human beings. Today, the word stress is as common as the words "food," "exercise," and the "Internet."

The practice of law is full of stress, anxiety, and worry. Sadly, this is true whether you are a patent attorney or a litigator, a prosecutor or a probate lawyer, whether you practice alone or in a large firm. The legal profession is full of requirements for

exact and timely performance. Lawyers carry the burden of their clients' problems, as well as their own. Many lawyers find satisfaction in the profession and even grow and thrive professionally and personally in the face of these pressures. But, many experience mental and physical problems or develop other career-related concerns as a result.

Studies have found that lawyers fall prey at an alarming rate to burnout, job dissatisfaction, depression, chemical dependency, and a host of psychological, behavioral, and physical symptoms related to stress from the practice of law. This is devastating to the lawyers who suffer these effects and the clients whose matters affected lawyers may fail to attend. Equally as important to realize is the very tools that "promised" more leisure time, i.e., technological conveniences, are now thought to be associated with several diseases, including, but not limited to coronary heart disease.

Glance at the most recent *National Vital Statistics Report* listing the 10 leading causes of death in America, and you will not find the word "stress" anywhere. Yet, many well-respected studies link stress to heart disease and stroke — two of the top five killers. (*National Vital Statistics Report*, Vol. 58, Number 19, May 20, 2010.) Stress may also influence cancer and chronic lower respiratory diseases, which rank as numbers two and four, respectively, in the top 10 killers.

For most, there is no quick way to avoid stress. Americans spend more time working than they did in previous decades. Cell phones, telecommuting, email, and smart phones have breached the wall between work and leisure time. In fact, the rapid pace of technology may appear to make life simpler, but experts agree that the fallout, called techno-stress, will take its toll by increasing demands on both time and money and decreasing personal time.

Principles and Strategies for Stress Management and Wellbeing

A certain amount of stress in life is desirable. You would not want a life without stress. How boring would that be? Some stress keeps us motivated and productive. This is often referred to as good stress. When properly regulated and channeled, good stress can be one of life's most positive energies.

On the other hand, too much stress or stress experienced over a long period of time without relief can be harmful to our physical, and mental health, and spiritual well-being.

Some Physical Symptoms of Stress:

- Anxiety, depression or unexplained crying
- Difficulty concentrating, nervousness, or restlessness
- Shaking, trembling, or dizziness
- Heart palpitations, chest pain, headaches, difficulty breathing, upper and lower back pain, or stomach problems



- Sleep problems, chronic fatigue, no energy or stamina
- Lack of interest in sex
- Burnout

This type of stress can wear us down, sap our energy, and make us so irritable that no one wants to be around us. It also has physical consequences. Our bodies are not meant to remain under distress. Your stress symptoms are a response to the stressors in your life.

Stress can be managed. Effective stress management programming must address issues related to mental, physical, emotional, and spiritual well-being.

First, there are many tools that we can put in our stress management toolbox: exercise, get enough sleep, eat right, talk to someone, get out, and take a time out are just a few.

Second, the right attitude means that we can be proactive rather than reactive in dealing with our stress. If there is a major case ahead, plan for it well in advance. Learn to prioritize by making a list of what you need to do and re-frame items when necessary.

Third, look for whatever helps you to cope with change in a positive way.

Plan to join the DE-LAP with four new one-hour workshops to build a coping plan to manage your stress, as well as to design your blueprint for change. Hopefully, you will acquire new tools to develop practical wellness skills that will enable you to successfully handle difficult situations that will affect your professionalism and representation of your clients.

If you, or someone you know, is experiencing symptoms of stress, or if you know a lawyer who is in need of confidential assistance, or if you want additional information on issues of stress management, please call me at (302) 777-0124 or email cwaldhauser@de-lap.org. ☺

Carol P. Waldhauser is the Executive Director of the Delaware Lawyers Assistance Program and can be reached at cwaldhauser@de-lap.org.

DE-LAP SIDE BAR

My definition of a successful lawyer is a person who finds happiness and does not experience chronic distress. Successful lawyers, like successful people from all walks of life, have habitual ways of thinking, emoting and behaving. They:

- Set Goals
- Develop Plans
- Act
- Continuously Improve

Furthermore, successful lawyers know that most things are created twice, once in the mind and once in reality. Strive for excellence not perfection.

Amiram Elwork, Ph.D.

PRESCRIPTION DRUG ABUSE DOES NOT DISCRIMINATE
LAWYERS CAN BE ADDICTED TOO
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C E L E B R A T I N G **10** years OF ASSISTANCE

Delaware
Lawyers Assistance Program

By Alison W. Macindoe

DSBA's Law Office Management Assistance Program

The Exciting and Challenging World of the Small Firm and Solo Practitioner

An attorney who chooses to practice as a solo practitioner or in a small firm takes a deep dive into an exciting, rewarding, and challenging world of law practice. To be successful, one needs to be savvy in law and in business. One needs knowledge of law office accounting, law office technology, data security, personnel management, estate planning, family law, personal injury, criminal law, and MANY others areas of law and business. And, those are just issues for running a law office. What about opening or closing a practice, which presents a whole different set of issues? And, all this must be done by following the Rules of Professional Conduct! Where will a lawyer find the time and knowledge for addressing these issues? Let us help.

The Delaware State Bar Association is now offering a Law Office Management Assistance Program. We will give you information and provide resources; we will work with office management providers to help you save time and money; we will provide CLE seminars directed to your needs; and most importantly, we will be there for you. Calendaring issues? Conflicts of interest software? Need case management help? Let us do some of the legwork for you.

“The world of the small firm practitioner is huge and interesting and, yes, exciting. As Director of our Law Office Management Assistance Program, I am honored to be able to assist with services to help the Delaware lawyer with his or her law office management matters.”

Solo and small firm practices have so many advantages. The work is varied, for one. You might have workers' compensation, elder law, family law, and real estate cases all in one day. You could be learning about muscle injuries in the morning and real estate settlement issues in the afternoon. You will probably have more direct contact with clients — more one-on-one with people — people you can help. You can have more flexibility in your schedule. If you are interested in part-time work or remote commuting, small firms might offer the best opportunity for you. If, on the other hand, you are ready for more responsibility and growth, the fast track to

partner can indeed be faster in a small firm. Success in the solo or small firm depends on you and the vision you have for your future.

According to the ABA, the majority of lawyers in the United States practice in law firms of five lawyers or less. The largest single group of legal practitioners is made up of solos where the same lawyers who own the practice and are responsible for managing it are also responsible for delivering the legal work product to clients. Thus, there is a constant tug of war between running the office and providing legal services.

To help our solo and small firm (SFSP) lawyers, we will be presenting CLE seminars on starting a law practice, running a law practice, and closing a law practice, along with topical seminars on subjects commonly practiced by solo and small firms and aimed specifically at solo and small firms. We will also provide more seminars on the business of law. If you have issues with debt collection, we already have a seminar on it in the works. And, get ready for the 2nd Annual Small Firms and Solo Practitioners Conference next April. The first one was a great success and we have already started planning the Conference for next spring, using many of the ideas you provided us on the evaluation forms. We do listen!

Now, let's talk insurance. We will have seminars that will help you identify and address insurance coverage. Learn about coverage that you may not have known was available to you, and may be imbedded in an existing policy. Do you know what your insurance covers? When thinking about insurance, you need look no further than the Delaware State Bar Insurance Services, not only a great provider of insurance, but a great resource for information. Visit <http://www.dsba.org/pages/delaware-state-bar-insurance-services/>

Are you a member of the DSBA's Small Firms and Solo Practitioner's Section? If you are in a small firm or contemplate starting a firm, you should be a member of the Section. There are no better resources than your peers and those lawyers who have joined a small firm or have started a firm and are now running their own. Learn from their experiences and, yes, from their mistakes. The SFSP Section is filled with great lawyers who are interested in, not only bettering themselves and helping their clients, but are willing to share information. Take advantage of it! Contact Janice Myrick, Director of Bar Services and Membership for info at jmyrick@dsba.org.

The world of the small firm practitioner is huge and interesting and, yes, exciting. As Director of our Law Office Management Assistance Program, I am honored to be able to assist with services to help the Delaware lawyer with his or her law office management matters. I worked at the Delaware State Bar Association for 16 years as the Director of Continuing Legal Education before joining the LOMAP program. I know the Bar well. I know so many of you and I am looking forward to working with you. Together, we will do some improving, adapting, relying, and succeeding! ☺

Alison W. Macindoe is the Director of the Law Office Management Assistance Program for the DSBA. She can be reached at amacindoe@dsba.org.

DISCIPLINARY ACTIONS

PUBLIC REPRIMAND WITH CONDITIONS

James J. Woods, Jr.
Supreme Court No. 253, 2016

On July 13, 2016, the Delaware Supreme Court ordered James J. Woods, Jr., Esquire be publicly reprimanded for violation of Delaware Lawyers' Rule of Disciplinary Procedure 7(c) (violation of prior disciplinary order) and Rules of Professional Conduct 1.15 (books and records), 8.4(c) (misrepresentation) and 8.4(d) (conduct prejudicial to the administration of justice). The Court approved the Board on Professional Responsibility ("Board") recommendation that Mr. Woods' interim suspension be lifted immediately and he be reinstated to the practice of law with a 3-year period of public probation, subject to conditions.

In 2013, Mr. Woods consented to the imposition of a 2-year Private Probation with conditions ("2013 Private Probation") for failure to maintain his law practice's books and records and for filing an inaccurate Certificate of Compliance with the Supreme Court. As a condition of the 2013 Private Probation, Mr. Woods was required to provide a pre-certification by a licensed certified public accountant with his 2014 and 2015 Certificates of Compliance. Mr. Woods failed to provide the required pre-certifications.

In 2015, the Lawyers' Fund for Client Protection ("LFCP") conducted a second audit of Mr. Woods' law firm's books and records. The audit revealed Mr. Woods' books and records remained out of compliance with Rule 1.15. The Office of Disciplinary Counsel ("ODC") requested Mr. Woods bring his firm's books and records into compliance and submit a report from a certified public accountant approved by the LFCP. Mr. Woods failed to provide the requested certification from a licensed CPA, despite extensions from ODC.

On October 7, 2015, the Supreme Court entered an Order immediately

suspending Mr. Woods from the practice of law pending disposition of disciplinary proceedings before the Board for failure to comply with the conditions of his 2013 Private Probation and continued failure to provide a pre-certification from a certified public accountant. The Order was entered "upon receipt of sufficient evidence reflecting that [Mr. Woods] has engaged in professional misconduct demonstrating that he poses a significant threat of substantial harm to the public and to the orderly administration of justice...."

As conditions of the public reprimand, Mr. Woods is required to provide pre-certifications during the 3-year probation, fully cooperate with the performance of any audit of his firm's books and records by an auditor for the LFCP, pay ODC's costs, and reimburse the LFCP the costs of the audits performed.

PRIVATE ADMONITION

**ODC File Nos. 112431-B,
112432-B, 112435-B.**
Effective Date: July 27, 2016

A Delaware lawyer was privately admonished for violations of Rules 3.4(c) (knowingly violate a court order and 8.4(d) (engaged in conduct prejudicial to the administration of justice) of the Delaware Lawyers' Rules of Professional Conduct. The lawyer agreed to act as a Receiver for a suspended lawyer's law practice and was appointed by Order of the Court of Chancery. The lawyer failed to take possession of all of the suspended lawyer's open client files, failed to obtain exclusive control of the suspended attorney's former law firm's books and records, and failed to file a First Accounting with the Court of Chancery when due. Subsequently, the Court of Chancery issued an Order vacating the lawyer's appointment and appointing a new Receiver. ☺



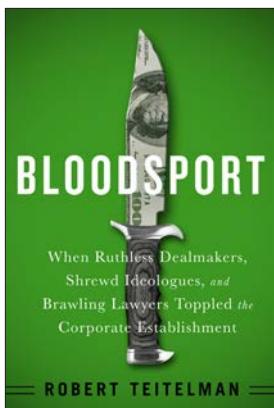
BOOK REVIEW

Reviewed by Richard A. Forsten, Esquire

Bloody Good Reading: *Bloodsport*

By Robert Teitelman (PublicAffairs, 2016)

The late seventies through the early nineties are often considered the golden age of Delaware corporate law. Many of the canonical corporate cases — *Van Gorkom*, *Unocal*, *Revlon*, *Moran*, *Macmillan*, *Paramount* — were decided during that time. But, the story of corporate takeovers and corporate takeover law is more than just a series of Delaware court decisions. In *Bloodsport, When Ruthless Dealmakers, Shrewd Ideologues, and Brawling Lawyers Toppled the Corporate Establishment*, author and journalist Robert Teitelman traces the history of modern mergers and acquisitions from the fifties through to the modern day. It is a well-told tale, full of historical context, larger-than-life characters, and insider intrigue.



Teitelman begins his story in an interesting place: “E.I. du Pont de Nemours and Company was hardly the sort of corporation, and Edward Garland Jefferson hardly the kind of chief executive, we would expect to find in one of the messiest takeover brawls in US history.” After providing a thumbnail history of “the oldest big corporation in America,” he provides an excellent summary of DuPont’s battle to acquire

Conoco. He then fast forwards to December 2015, as his book was going to print, with the news of the Dow/DuPont merger, noting that:

[i]n these last days for the old DuPont, the Conoco deal still hung over DuPont, raising the intriguing counterfactual: What might Jefferson have accomplished in the life sciences if he had never made the fateful decision to buy Conoco? Perhaps most galling to DuPont loyalists, Wall Street insisted on comparing the company to Monsanto, a once-second-tier chemical rival that had aggressively made the transformation to agricultural biotech

and was now being rewarded with a more highly valued share price than DuPont. The reality of a counterfactual, of course, is that we will never know the answer.

After discussing DuPont, Conoco, and Dow, Teitelman tells us the purpose of his book:

Many books have been written about the ‘80s takeover wars, but this book offers a view of the modern era of hostile takeovers that goes beyond the conventional imagery of Pickens and Carl Icahn riding the corporate range or Milken as Disney’s sorcerer’s apprentice, or whether greed was a plague upon the land . . . or whether Henry Kravis was a barbarian, with a horned helmet and muddy shoes. Towards this end, *Bloodsport* returns to the original arguments about the nature and governance of corporations when tested by hostile takeovers. There are deals here and dealmakers, the pursuit of self-interest and the exercise of judicial judgment, but what’s unique about this story is how much of it is shaped by ideas and ideologies...Did these crazy Rube Goldbergian deals really occur? How did that great governance shift occur? What role, if any, did the federal government play? How do we parse the politics of governance? How American is the hostile takeover?

This rereading of the 1980s may not answer the question of whether the bold experiment in economic change was worth it, but it does reveal a lot about how we view this powerful, diverse, and omnipresent latter-day institution — the corporation — and how we should govern it and, like barbarians of old, divide its spoils.

All of the players one might expect to see in a history of mergers and acquisitions show up at one point or another — Joe Flom, Marty Lipton, Michael Milken, Bruce Wasserstein, Ronald Perelman, to name but a few. As might be expected, Delaware plays a role in this story, although not necessarily as a main character, and several Delaware lawyers and judges are spotlighted, including William Allen, Jack Jacobs, Henry Horsey, Andrew G.T. Moore, and Charlie Richards.

Teitelman's summary of Delaware corporate law is succinct and to the point: "Corporate law, meaning mostly Delaware law, has, like the military, sports teams, the Boy Scouts, and religion, a thing about duty. The heart of corporate law is fiduciary duty. That breaks down into the duty of care, the duty of loyalty, and into various minor, and much debated, satellite duties like candor." And, of course, there are the *Revlon* duties, coming out of the battle for Revlon cosmetics, under which, directors must obtain the highest sales price once they decide to transfer control of the company.

Bloodsport, though, is about more than just personalities, takeover battles and court cases; it also considers the theoretical underpinnings of corporate governance, the various theories of the corporation, and the academic debate that accompanied the great takeover decisions. Teitelman begins his book by asking a counterfactual about the DuPont/Conoco merger, but he might just as easily have posed counterfactuals throughout his book, as Delaware law grew and adapted to address the great corporate takeover battles. Any number of times the law might easily have gone in a different direction, but it did not, and "[t]he reality of a counterfactual, of course, is that we will never know the answer." Nor need we know. As lawyers, our job is to know the law, and not worry about what might have been. In this regard, *Bloodsport* does provide a lot of helpful background and context on how the law came to be, which can only further understanding. Part history and part legal analysis, *Bloodsport* transports the reader back to a time before the great corporate takeover issues were decided, when the issues were uncertain and the future still unknown. If there is a flaw to *Bloodsport*, its only flaw may be that it does not focus enough on the law; but for some, that may be a strength. 

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.

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A PROFILE IN BALANCE

By James G. McGiffin, Jr., Esquire

Karen Lantz & Christian Wright

Nerd Love

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

• • •

Wilmington lawyers Karen Lantz and Christian Wright are lucky they found each other — in the same law firm. Lucky and most grateful. They had done well for themselves as individuals, but they have truly found success as a family.

Karen was born to Methodist ministers in Michigan who wound their way to Delaware while she was a child. She is a champion Math Leaguer, a graduate of the Concord High School, and of the University of Delaware. At Delaware, she studied international relations, perhaps inspired by a four-month-long visit to India after high school.

Armed with her Bachelor's Degree, she headed for New York City and landed a job with an organization called The Lawyers Committee for Human Rights (now Human Rights First). She then moved closer to home (Chester County, PA) to work with a domestic violence victims service center. Karen decided that she needed to further her education, and the study of law seemed appealing, so she enrolled at the University of Pennsylvania. Though she claims an undistinguished career as a law student, she so impressed Chief Judge Theodore McKee of the Third Circuit Court of Appeals that he hired her as a law clerk, with a two-year lead time. Karen spent that lead time at the Delaware firm of Young Conaway Stargatt & Taylor.

Christian's upbringing was as an Air Force brat. He was born in San Antonio, Texas. His family moved to Mississippi, then back to Texas, then to Dover, then to Spain, then to Illinois, and finally back to Dover, where his father retired. Christian is a Caesar Rodney High School graduate, and he spent his time involved with the Science Olympiad, the chess club and (perhaps the reader has guessed from the title of this article) the Math League. Then, he moved on to the University of Delaware and Duke University Law School.



Though he is also a University of Delaware graduate, Christian did not chance to meet Karen in Newark as their tenures did not overlap. They did not meet until she started with Young Conaway Stargatt & Taylor, where he worked in the corporate law section. They got to know each other while involved in one of those intense projects that require long hours and allow for little sleep. There is not much that is romantic about that kind of work, and apparently Christian was totally oblivious to Karen's charms (which are obvious to anyone else). Karen saw something redeeming in Christian, despite his obtuseness, and she admits that as she prepared to leave the firm for the clerkship job, she flirted with Christian a bit to spark an interest. Alas, her efforts were to no avail.

Karen decided to play the long game. Many months after she left Delaware, she reached out to Christian to suggest they meet for coffee as she came through Wilmington. Christian lifted his head up from his computer keyboard long enough to agree to the idea. Then, Karen cut to the chase — she asked him about his political affiliation. Christian was confused. Why would she care about his politics if this was just coffee? Wait a minute, he thought as the fog lifted, maybe this is more than just coffee? One could see that light bulb go on from Dover.

Coffee dates evolved to doggie play dates (they are both dog lovers) to a formal marriage proposal, though they dispute whether the proposal was done on bended knee. These two are so well-suited to each other that when Karen told him she did not care for an engagement ring,¹ he knew exactly what to do. He bought her a Hello Kitty ring (garishly perfect) and, for himself, matching cufflinks.

After the wedding, Karen and Christian were ready to start a family, and they did. Karen stepped away from the job she took with the U.S. Attorney after her clerkship, so as to be available to stay home with Zachary (now four years of age) and Alice (a precocious two-and-a-half year old). She maintains life as a working lawyer, however. During the Delaware legislative season, Karen serves the House Majority Caucus as a staff attorney, drafting and editing legislation and advising House members on legal issues.

Christian continued with the firm, but he started to re-think his personal priorities. In particular, he recalled lessons he learned from Judge Bill Quillen, for whom Christian clerked at the Superior Court just after law school, and the value Judge Quillen put on public service. When his former Young Conaway Stargatt & Taylor colleague, Matt Denn, decided to seek the office of Attorney General, Christian found the prospect of working for an Attorney General Denn attractive. Christian made the jump to the Delaware Department of Justice, first as a Deputy Attorney General in the Investor

Protection Unit and now as Director of the Consumer Protection Unit. With a few years of perspective now, he is convinced he made the right move.

Both Karen and Christian spend a lot of time drafting legislation, a part of their jobs they thoroughly enjoy. As a true testament to their respective nerdhood, they are both passionately committed to the Oxford comma. During our interview, they tried to engage your writer in a debate about the appropriate number of spaces after a period. Unfortunately, your writer dozed off during this part of the conversation.

The family is now front and center in the lives of these two accomplished lawyers. As a foursome they ride bicycles, visit playgrounds, go to the pool, and take day trips to the beach. They enjoy the Children's Museum and Longwood Gardens. The young ones are already inveterate travelers, having endured car trips to Pittsburgh and Michigan. This summer will include a trip to a rustic family campground in rural West Virginia. Although Karen and Christian remark upon the amazing energy exhibited by their children, it is clear that the entire family is pretty energetic, at least most of the time.

Christian Wright and Karen Lantz enjoy rewarding work and the rewards of raising a family. They make nerd look good. ☺

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 **Kevin W. Gibson, Esquire**, who died on June 19, 2016.

Condolences to the family of **The Honorable Karl J. Parrish**, who died on July 2, 2016.

Condolences to **Josette D. Manning, Esquire**, on the death of her father, Joseph T. DelleDonne, who died on July 24, 2016.

Condolences to the family of **Gary A. Samuels, Esquire**, who died on July 26, 2016.

Condolences to **Lori A. Brewington, Esquire**, on the death of her father, Roland Clarence Brewington, who died on July 27, 2016.

Condolences to the family of **R. Franklin Balotti, Esquire**, who died on August 2, 2016.

Condolences to **Derek C. Abbott, Esquire**, on the death of his father, F. Clarke Abbott, who died on August 4, 2016.

Condolences to the family of **The Honorable William T. Quillen** who died on August 19, 2016.

Congratulations to **N. Christopher Griffiths, Esquire**, and **Leigh-Anne M. Raport, Esquire**, on their August 20, 2016 nuptials.

If you have an item you would like to submit for the Of Note section, please contact Rebecca Baird at rbaird@dsba.org. ☺


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1. No political statement here, she just does not like that kind of jewelry.



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Joelle E. Polesky
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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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By Susan E. Poppiti, Esquire

Scales of Delicious

What's in a Zagat score?

Does a 23 signify that a restaurant is very good, or just mediocre?

The colleague and I contemplated the questions above as we dined in Cambridge each night after our summer classes at the Harvard Graduate School of Education. We were fortunate enough to attend a program at the end of July at Harvard's Project Zero, founded in 1967 to promote arts education. So, along with discussing grand themes such as nurturing global and digital citizens, we conferred about fried squash blossoms and grilled octopus at the highly rated restaurants we visited.

We ventured to Alden and Harlow, Craige on Main, and Oleana, all in Cambridge. Before our trip, I researched their Zagat scores and learned that they were 25, 26, and 27, respectively. As I am sure you know, these are noteworthy scores, 30 being the cap. I expected superb dinners as such scores in Philadelphia and New York equate to outstanding food. For example, one of my favorite restaurants in New York, Gramercy Tavern...a 28! My top restaurant in Philly, Sbraga...a 25! Yet, our meals were fair to good with the exception of Oleana, which was very good – tasty tapas with a creative use of spices and herbs.

The point of this analysis is that one must consider Zagat scores relative to the city. A 27 in Cambridge is not the same as a 27 in New York. I believe this is due to the fact that anyone can rate a restaurant on Zagat as long as he or she dines out and takes the time to submit a review. As a result, someone who rates a bistro in Cambridge may not have a point of comparison in Philly.

As a math teacher, I focus on numbers and wonder if Zagat scores should be standardized. To add to the dilemma, I am now unable to claim that a 27 in Cambridge would translate to a 21 in New York. As of the last week of July, no restaurant will be a 27!

When I returned home from Cambridge, I began my research for this article by checking Zagat online and was thrown for a loop. I discovered that while I was walking the Harvard Yard, Zagat revamped its entire rating scale. Now scores range from 1 to 5 rather than 1 to 30. The conversion permits for decimals so that Gramercy Tavern, which had a 28, now has a 4.8. And, Zagat still offers three separate scores for food, decor, and service. (Note: All scores mentioned in this article are for food.)

I expect that Google, which purchased Zagat (founded in New York over three decades ago), changed the scale to make it more user friendly. Zagat now states that a 4.6 to 5.0 is "extraordinary to perfection"; 4.1 to 4.5 is "very good to excellent"; 3.1 to 4.0 is "good to very good"; 2.1 to 3.0 is "fair to good"; and, 2.0 or below is "poor to fair."

Several years ago, in addition to researching Zagat scores, I began to rely on Michelin stars. This only works for some areas, as the U.S. restaurants reviewed by Michelin are limited to New York, Chicago, San Francisco and the Bay Area. For over 100 years, Michelin only rated restaurants in France and cities in Europe; however, about a decade ago, Michelin expanded its rating system to some of our top food cities. And, unlike Zagat ratings, Michelin reviews are based on reports of "inspectors" employed by Michelin and expected to maintain anonymity – they are unknown by restaurants and even their friends. The job qualifications include a degree in culinary arts, extensive experience in the hotel or restaurant industry, and formal wine training, to name a few.

Restaurants are awarded one, two, or three stars. Three stars means "exceptional cuisine, worth a special journey"; two stars equates to "excellent cuisine, worth a detour"; and one star represents "a very good

restaurant in its category." To put this in perspective, of the thousands of restaurants in NYC, six are currently awarded three stars, ten are awarded two, and about five dozen are awarded one.

My husband and I have been fortunate enough to dine in two three-star restaurants: Eleven Madison Park and Jean Georges. These are among our top five dining experiences ever. We have also found the one and two-star ratings extremely reliable; in fact, many overlap with the top Zagat-rated restaurants. In addition, Michelin stars have also caused us to explore a variety of cuisines in a variety of neighborhoods. For example, I found Junoon, a fine dining Indian restaurant with an excellent prix fixe lunch, by identifying it on the list of one-star restaurants.

So, if you are dining in New York, I would rely on both Michelin and Zagat (perhaps this is because New York diners are among the most sophisticated, with thousands of restaurants at their feet). If you are dining anywhere else (aside from San Francisco and Chicago), I would take into account that your idea of a 27 may not be the same as the diner at the next table.

Wow, that was a mouthful...now, I invite you to contact me at spoppiti@hotmail.com to share any interesting experiences you have had with highly-rated Zagat and/or Michelin restaurants around the country. ☺



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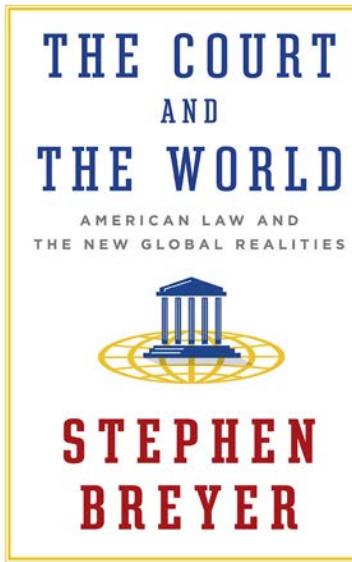
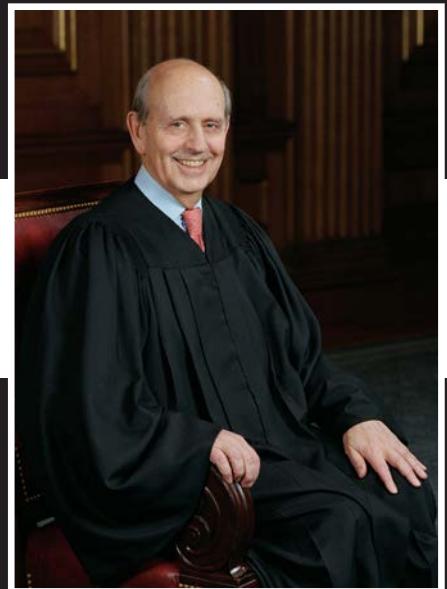
Justice Stephen Breyer *Supreme Court of the United States*

on

The Court and the World

Thursday, November 3, 2016

Gold Ballroom, Hotel du Pont



Thursday, November 3, 2016

Lunch: 12:00 noon - 1:00 p.m.

Justice Stephen Breyer: 1:00 p.m. - 2:00 p.m.

Introduction by Justice Randy J. Holland

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*A copy of the book, *The Court and the World: American Law and the New Global Realities*, will be provided to all attendees.*

Stephen Breyer, born in San Francisco in 1938, is a justice on the Supreme Court of the United States. He is a graduate of Stanford, Oxford, and Harvard Law School. He taught law for many years as a professor at Harvard Law School and at the Kennedy School of Government. He has also worked as a Supreme Court law clerk (for Justice Arthur Goldberg), a Justice Department lawyer (antitrust division), an Assistant Watergate Special Prosecutor, and Chief Counsel of the Senate Judiciary Committee (working closely with Senator Edward M. Kennedy to pass the Airline Deregulation Act). In 1980 he was appointed to the United States Court of Appeals for the First Circuit by President Carter, becoming Chief Judge in 1990. In 1994 he was appointed a Supreme Court Justice by President Clinton. He has written books and articles about administrative law, economic regulation, and constitutional law, including *Regulation and Its Reform*, *Breaking the Vicious Circle: Toward Effective Risk Regulation*, *Active Liberty*, *Making Our Democracy Work: A Judge's View* and, *The Court and the World* which was recently published. His wife, Joanna, was born in Great Britain and is a retired clinical psychologist. They have three children (Chloe, Nell, and Michael) and five grandchildren.

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Mr. Noble served as a law clerk to the Chief Judge of the United States District Court for the District of Delaware, the Honorable James L. Latchum, after earning his law degree from the University of Pennsylvania Law School where he was an editor of its law review and elected to the Order of the Coif. He received his undergraduate degree in chemical engineering from Bucknell University.

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