



THE JOURNAL

OF THE DELAWARE STATE BAR ASSOCIATION

Upcoming CLE Seminars P. 8

**Dr. Martin Luther King, Jr., Breakfast
and Statewide Day of Service** P. 30

2016 Legal Directory Form P. 35

Get Involved in DSBA Leadership!



The Delaware State Bar Association is looking for a number of talented members to join the 2016-2017 Executive Committee and lead DSBA to continued success.

The following positions on the Executive Committee of the Association must be filled for the year 2016-2017:

Vice President-at-Large; Vice President, New Castle County; Secretary; Assistant Secretary; Treasurer; Assistant Treasurer; Six Members-at-Large

Note: The Vice President, Kent County and the Vice President, Sussex County will be those persons selected by, respectively, the Kent County Bar Association and the Sussex County Bar Association.

The following position must be filled for terms as noted:

One (1) DSBA Representative to the Delaware Bar Foundation Board for a four-year term

DSBA Delegate to the ABA House of Delegates: Two-year term

The Nominating Committee wants to consider all interested candidates. If you are interested in serving on the Executive Committee or would like to recommend a candidate, please send your name or the candidate's name along with a CV and at least one letter of nomination to Johnna M. Darby, Executive Director, by e-mail at: jdarby@dsba.org or by mail at: Delaware State Bar Association, 405 North King Street, Suite 100, Wilmington, DE 19801 by **February 12, 2016**.

WE NEED YOUR HELP TO FIND STRONG LEADERS FOR THE FUTURE!

The Nominating Committee consists of:

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

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OF THE DELAWARE STATE BAR ASSOCIATION

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PRESIDENT'S CORNER

By Richard A. Forsten, Esquire

It's the Economy, Stupid!

As a fiscally-conservative Republican, there is not a lot on which James Carville, Bill Clinton's presidential campaign strategist, and I agree. But, there is one. A big one. An important one. "It's the economy, stupid!"

That phrase had its origin in the campaign war room of the 1992 Clinton presidential campaign, where Carville posted "the economy, stupid" on the wall as a way to remind staff to keep on message about one of the campaign's central themes (note, the original phrase was simply "the economy, stupid," but it is more often repeated as "it's the economy, stupid" and has passed into popular culture with the addition of the word "it's").

Not only do I agree with Carville on this point, but we all should. Aside from law and order, there is nothing more important to society than a thriving economy.

Pick just about any social woe, whether it be drug abuse, crime rates, poverty, poor public health, etc., and I think we could all agree that such woes are not as bad or not as great when there is a thriving economy that is providing jobs for citizens. But, take jobs away, and idle hands make the devil's work.

It is certainly not a stretch to say that the last 10 years or so have not been all that kind to Delaware. Two auto plants have closed. DuPont has split into two companies, with job layoffs. The Edgemoor Plant has closed. The Claymont steel plant has closed. Wilmington Trust is no more, a victim of the great real estate bust. AstraZeneca has downsized. Just

"Pick just about any social woe, whether it be drug abuse, crime rates, poverty, poor public health, etc., and I think we could all agree that such woes are not as bad or not as great when there is a thriving economy that is providing jobs for citizens."

recently, plans for a proposed poultry processing plant in Sussex County were abandoned. While there have been some bright spots and success stories, there has been far too much bad news, and statistics bear this out.

In December 2005, Delaware had 422,205 workers according to the Bureau of Labor Statistics. In September 2015, that number was 441,196 — a gain of roughly 21,000 workers over 10 years. Yet, each year roughly 8,000 students graduate from a Delaware high school. Even with people retiring from the workforce, we are not creating enough jobs to keep our children, grandchildren, nieces, and nephews in this state. More people are moving out of New Castle County than moving in, and if not for births, the population in New Castle County would be declining. Nationally, the labor participation rate is at its lowest point since the 1970s. The number of persons on food stamps in Delaware has tripled over the last decade from roughly 51,000 to 152,000 (or 17 percent of the population).

If those numbers seem depressing, they are. Long term, they do not bode well for our state. But, a rising tide lifts all boats. Imagine a state where everybody

is focused on economic development and understands its importance. Imagine a state where neighbors welcome new employers, even when those employers might be in their own backyards. Imagine a state where the newspaper headlines read: "State welcomes _____ [name of company]" rather than "Neighbors oppose _____ [name of company]."

Recently, I was part of a focus group in which New Castle County asked groups of 8-10 people to sit around a table with an aerial photograph of a hypothetical land use project and asked the group to indicate the factor or factors the County should focus on when considering such a project in the future. My hypothetical went something like this: A 50-acre industrially-zoned parcel, which fronted on a road, backed up to a railroad line, and had other industrial properties on each side. There were some older single-family homes on the other side of the street. The area was relatively undeveloped. A new employer was looking to come to Delaware. It would employ 500 workers at an average annual salary of \$80,000. There was a small 25,000 square foot building on the property that would need to be expanded to 150,000 square

feet. With that as background, we were asked, “What should the County focus on in evaluating the proposed project?”

And so, around the table we went. The first person said, “What do the neighbors think?” The next person agreed, asking, “Yeah, what do the neighbors think?” The third person followed along saying, “Definitely what the neighbors think.” And, the fourth person then asked, “What do the neighbors think, and what about traffic?”

At this point, the moderator looked to me, and I looked at the folks around the table and simply said (somewhat facetiously), “Guys, I don’t care what the neighbors think. In fact, I know what they think — they oppose it.”

“But,” I went on, “if we’re talking about a new employer bringing 500 jobs to this state, that would make it one of the top 20 or so employers in this state. And, if we’re talking an \$80,000 annual salary, when the median salary is around \$50,000, and we need jobs in this state — then my only question is this: How quickly can this employer get through

the approval process, get their project built, and start hiring?”

“Plus,” I said, “150,000 square feet on 50 acres is very low density (it works out to 3,000 square feet per acre), so there could be a lot of landscaping and whatnot to hide this use from the road; but, understand this — this state needs jobs, and so we should be hyper-focused on that, and the sooner we can get this built the better. Delaware is in competition every day for new employers and we need to be able to move quickly and efficiently and we can’t afford newspaper headlines that say, ‘Neighbors oppose new employer.’”

Well, the folks around the table all looked at me a little funny, and some jaws started to drop, and there was a brief pause, and then the guy sitting next to me chimed in, “Absolutely we need jobs.” And, we finished going around the table with everyone all agreeing that jobs were an important consideration. Some of the first speakers even conceded that maybe jobs were more important than what the neighbors thought.

My point in telling this story and about quoting the disheartening statistics about our state is simple. We need to be focused. What can we do to make our state better? What can we do to reduce poverty and crime and the plight of the poor? As James Carville put it so well: “It’s the economy, stupid.”

Richard “Shark” Forsten is the current President of the Delaware State Bar Association, as well as President of the Appoquinimink School Board, chairman of the Board of the Everett Theatre, and a member of the boards of Goodwill of Delaware and the Delaware Homebuilders Association. He has been writing monthly book reviews for the *Bar Journal* since 1998, and elsewhere in these pages you can find his latest review. In 2006, he was recognized by the Delaware Supreme Court for Exemplary *Pro Bono Publico* Service. He is a partner with the firm of Saul Ewing, LLP, where he practices in the areas of commercial real estate, land use, business transactions and related litigation, and can be reached at rforsten@saul.com. His golf handicap remains much too high.

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EDITOR'S PERSPECTIVE

By Benjamin A. Schwartz, Esquire

I read Mike Sensor's last column in the September 2015 edition of *The Journal* with a mixture of sorrow, admiration, anxiety, and joy. Mike is one of the smartest guys I know, and his intelligence, wit, and personality come through in his writing. I will miss Mike's quarterly editorial musings in *The Journal*.



For those of you who missed it, Mike told us all in that last column that he was handing over his *Journal* editorial pen to me.

"Good grief! How did Mike get Ben to agree to take over the awesome responsibility of writing this quarterly column?" you may ask. Well, it was rather simple. He promised me gifts.

As you may know, not too terribly long ago, Mike joined Lundy Law. What you may not know is that Lundy Law has some of the finest branded merchandise of any personal injury law firm in or outside the State of Delaware.

When I was a kid, I used to listen to old time radio shows. There was a *Burns and Allen* skit where Gracie just could not say no to door-to-door salesmen. Well, now I understand how Gracie felt. When I saw my set of four shiny new "presents," I just could not turn down the opportunity to become a *Journal* Editor.

In any event, as I write this piece, I am sipping my Folgers from one of my rewards. Thank you, Michael!

• • •

Since we are already on the topic of columns that appeared in the September 2015 *Journal*, I want to turn your attention to something raised by Shark Forsten.

In his September "President's Corner" article titled "Get Involved in Your Bar Association," he wrote, "Now, I said at the outset that my 'theme' is to 'get involved.' If you are not a member of a section, join one." I want to echo that sentiment, but I want to tell you why I think Shark is right on point.

I have little kids. I am familiar with a lot of kids' movies. One of my favorites is *Mr. Popper's Penguins*. There's a scene where Jim Carey wakes up, drags himself out of bed, looks in the mirror and says "Monday morning... THANK GOD!" Something in that movie speaks to me.

I have been doing this for fourteen years and I still love Monday mornings because I get to go back to the office. No matter how awesome my weekend may have been, I rarely dread going back to work.

Do you love Monday mornings? Do you find your work meaningful? Challenging? New and exciting?

One of the reasons why I am always interested in getting to the office, tuning in, and turning on is because I get to learn about all kinds of new and interesting things.

For example, one of my favorite things about the Delaware State Bar Association is membership in the Health Law Section. The Health Law Section is a relatively small section made up of attorneys who represent hospitals, doctors, ancillary medical providers such as physical therapists and optometrists, attorneys from the Delaware Department of Justice who are responsible for Board of Medical Licensure cases and Medicaid Fraud cases, and others with an interest in the intersection of law and medicine.

There is always something new going on in the field of Health Law, and the practitioners are some of the smartest and most engaged attorneys around. It is a great group to be part of and when I attend section meetings, I feel energized.

Here is my challenge for you: If you answered the questions above about loving Monday mornings, finding work meaningful/challenging/new and exciting with something other than "Absolutely!" then you need to take action now.

Find the page in this magazine that says "Section & Committee Meetings" at the top. Close your eyes. Put your finger on the page. Then, go ask to attend whatever meeting your finger just landed on.

It does not matter if the section is not in your practice area. It does not matter if it is not within your area of interest. I do not really even care if it is something you think you would like or not like.

The challenge is to do something different, to do something that is outside your comfort zone, and to meet one or two people that you would not normally have contact with in your day-to-day practice.

Go have fun. The sections are where the fun is! 🎉

Bar Journal Editor **Ben Schwartz** is Managing Partner of Schwartz & Schwartz, where he helps people recover after catastrophic injuries and accidents. He is a frequent speaker, writer, and blogger. For more information, go to facebook.com/schwartzandschwartz or email ben.schwartz@schwartzandschwartz.com.

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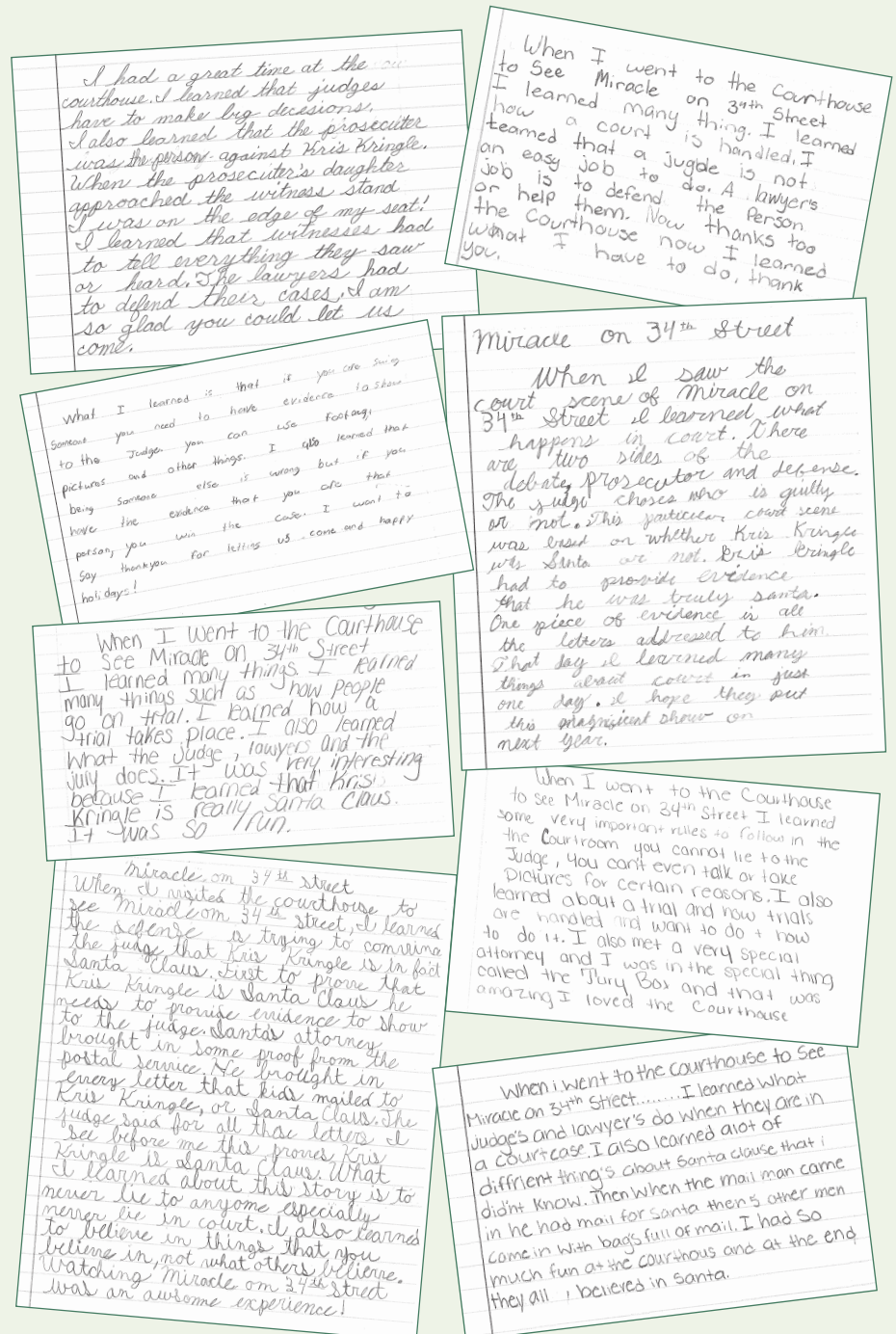
*on her new position as
Executive Director of the
Delaware State Bar Association*

**We will miss you,
but we know you will do
GREAT things with DSBA!**

And, the Miracle Continues

By Richard K. Herrmann, Esquire

On December 8, 2015, Kris Kringle will begin his series of 12 competency hearings in the Superior Court throughout the State. For more than 10 years, the Miracle Team has been recreating the Courtroom scene from *Miracle on 34th Street* for thousands of school children. Judge M. Jane Brady will preside, keeping order for the rest of the Miracle Team. This is a rare opportunity for third, fourth, and fifth graders throughout the State to experience the real courtroom in a very positive way. More than 15,000 children have participated in the hearings. We thought we would share with you a few of the comments. 📝



Professional Guidance Committee

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

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CALENDAR OF EVENTS

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

December 2015

Wednesday, December 2, 2015

Memory Skills for the Successful Attorney

6.3 hours CLE credit

Delaware State Bar Association, Wilmington, DE

Webcast to Tunnell & Raysor, Georgetown, DE

Wednesday, December 9, 2015

Confidentiality in the Age of Cyber (In)Security

2.0 hours CLE credit

Delaware State Bar Association, Wilmington, DE

Webcast to Tunnell & Raysor, Georgetown, DE

Thursday, December 10, 2015

Awards Luncheon

du Barry Room, Hotel du Pont, Wilmington, DE

Friday, December 11, 2015

Superior Court Trial Practice and Ethics Seminar

Sponsored by the DSBA and the Delaware Chapter of ABOTA

7.0 hours CLE credit

Delaware State Bar Association, Wilmington, DE

Webcast to Tunnell & Raysor, Georgetown, DE

Tuesday, December 15, 2015

Family Law Update 2015

6.3 hours CLE credit

Christiana Hilton, Newark, DE

Wednesday, December 16, 2015

Closing and Retiring from a Law Practice

3.5 hours CLE credit

Delaware State Bar Association, Wilmington, DE

Webcast to Tunnell & Raysor, Georgetown, DE

January 2016

Thursday, January 7, 2016

Social Security Retirement

3.0 hours CLE credit

Delaware State Bar Association, Wilmington, DE

Webcast to Tunnell & Raysor, Georgetown, DE

Monday, January 18, 2016

Dr. Martin Luther King, Jr. Breakfast and Statewide Day of Service

Chase Center on the Riverfront, Wilmington, DE

Tuesday, January 19, 2016

Workers' Compensation Breakfast Seminar

3.3 hours CLE credit

Chase Center on the Riverfront, Wilmington, DE

Friday, January 29, 2016

Fundamentals of Family Law

6.0 hours CLE credit

Delaware State Bar Association, Wilmington, DE

Webcast to Tunnell & Raysor, Georgetown, DE

SECTION & COMMITTEE MEETINGS

December 2015

Monday, December 7, 2015 • 12:30 p.m.

Senior Lawyers Committee Monthly Luncheon Meeting

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

Tuesday, December 8, 2015 • 11:00 a.m.

LGBT Section Meeting

TBD

Tuesday, December 8, 2015 • 12:15 p.m.

Small Firms & Solo Practitioners Section Meeting

The Law Offices of Denise D. Nordheimer, Esquire, LLC, 2001 Baynard Boulevard, Wilmington, DE

Tuesday, December 8, 2015 • 3:30 p.m.

Estates & Trusts Section Meeting

Duane Morris LLP, 222 Delaware Avenue, Suite 1600, Wilmington, DE

Wednesday, December 9, 2015 • 12:00 p.m.

ADR Section Meeting

Berger Harris, LLP, 1105 North Market Street, 11th Floor, Wilmington, DE

Wednesday, December 9, 2015 • 12:00 p.m.

Environmental Law Section Meeting

Richards, Layton & Finger, P.A., 920 North King Street, Wilmington, DE

Monday, December 14, 2015 • 4:00 p.m.

Taxation Section Meeting

DuPont Headquarters, 974 Centre Road, Chestnut Run Plaza, Building 735, Room 1135, Wilmington, DE

Thursday, December 17, 2015 • 12:00 p.m.

Executive Committee Meeting

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

Thursday, December 17, 2015 • 4:00 p.m.

Family Law Section Meeting

Bayard, P.A., 222 Delaware Avenue, Suite 900, Wilmington, DE

January 2016

Monday, January 4, 2016 • 12:30 p.m.

Senior Lawyers Committee Monthly Luncheon Meeting

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

Tuesday, January 5, 2016 • 3:30 p.m.

Estates & Trusts Section Meeting

Duane Morris LLP, 222 Delaware Avenue, Suite 1600, Wilmington, DE

Wednesday, January 6, 2016 • 12:30 p.m.

Women and the Law Section Meeting

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

Thursday, January 7, 2016 • 4:00 p.m.

Real & Personal Property Section Meeting

Tim Rafferty's Office, Artisans Bank, Centerville Road, Wilmington, DE

Tuesday, January 12, 2016 • 11:00 a.m.

LGBT Section Meeting

TBD

Tuesday, January 12, 2016 • 12:15 p.m.

Small Firms & Solo Practitioners Section Meeting

The Law Offices of Denise D. Nordheimer, Esquire, LLC, 2001 Baynard Boulevard, Wilmington, DE

Wednesday, January 13, 2016 • 4:00 p.m.

ADR Section Meeting

Berger Harris, LLP, 1105 North Market Street, 11th Floor, 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 Kevin F. Brady, Esquire

What Do You Do When Your Data is Held Hostage?



What do you do when this menacing email shows up in your mailbox?

These attacks, known as ransomware, are on the rise and if you think only big companies are the targets — think again. Individuals and law firms in Delaware have been targeted recently, so this could happen to you. You might be putting all of the data on your computer at risk unless you take steps to avoid this disaster.

What is Ransomware?

Ransomware is a type of malware or virus that infects your computer and prohibits you from accessing the data you have stored on your computer. In this type of attack, thieves attempt to extort money from their victims, not by removing their data from the computer, but by encrypting or locking down the data on the computer so the victims cannot use it without downloading a “key” from the attacker to unencrypt or unlock the data.

These attacks start out as innocent-looking emails referred to as “phishing emails” because the emails are

masquerading as a communication from a company generally familiar to the victim. It is imperative that the victim believe that the email is a valid communication from an authentic and familiar business, such as a bank or credit card company, for the fraud to be successful. The email may reference a problem such as a security breach and implore the victim to click on a link and change or verify personal information such as addresses, financial information, or passwords, etc. Once the victim clicks on the link, the victim is redirected to a website that is hosting the ransomware and the virus is automatically downloaded to the victim’s computer without the victim taking any further action.

Without access to the “key,” it is nearly impossible for the victim to gain access to their data. To add to the frustration, the thieves demand that the ransom be paid using “virtual currency” like Bitcoin so that the currency cannot be traced using traditional banking methods.

What Do You Do? Pay the Ransom or Not?

In the latest ransomware cases, the demand has been relatively modest (in the range of \$300 - \$2500) to get the unencryption key to unlock their data. The amount is low enough that many victims will be tempted to pay the ransom in order to get their data back. However, you need to remember that you are dealing with dishonest individuals, so you should not expect that they will honor their promise to give you the “key” to unlock your data. To make a bad situation worse, even when you pay the ransom and download the “key” to unencrypt your data, instead of unlocking your encrypted data, new malware might infect your data in different ways (with a subsequent demand for ransom from the thieves). The FBI will not make a recommendation about whether to pay the ransom and data security experts are split on whether to pay or not pay the ransom. Everyone does agree that the best approach is to be proactive and to take steps now before any attack to minimize the risk of loss of your data.

What’s the Answer?

1. **Back Up Your Data Often.** It is critically important that you backup your data often so that you are never at risk of losing any critical data. While creating backups will not prevent a ransomware attack, it will eliminate the damage to you in terms of loss of your personal data. Experts recommend that you back up your data to a local hard drive

and store the hard drive at your office or home. If you have a good backup of your data, then you have the option to ignore the ransom demand and instead go to an IT professional who can identify and remove the infected files from your computer. Once those files are removed, you can replace the infected data with your data from the backup media. If you do not have a good backup of your data, you do not have that option which puts you in a very difficult situation. In that case, paying the ransom may be your only viable option.

2. Think Before You Click. This should be your mantra every day when you are dealing with email. At a recent Technology Inn of Court presentation, Stephen Martin, Director of Information Systems at Potter Anderson and a member of the Delaware Supreme Court's Commission on Law & Technology, emphasized that the user plays a pivotal role in defeating this attack by "thinking before you click." If you are unsure, then DO NOT CLICK. Instead, ask your IT department for help.

3. Use Antivirus Software and Keep It Up to Date. Whether you are talking about a business computer or a home computer, make sure you have antivirus software and that it is up to date.

4. Hit the "Time Out" Button. If you think you have been the victim of a ransomware attack, disconnect your computer or device from the internet and contact an experienced IT professional for advice. Staying connected to the internet only makes it easier for the attacker to access your information. If you have an iPad or iPhone, put the device in "airplane mode" and the device will be free from external influence. ☺

Kevin F. Brady is Of Counsel at Redgrave LLP in Washington D.C. and can be reached at kbrady@redgravellp.com.

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

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Demonstrative Evidence:

Getting Your Factfinder into the Game...Within Reason

By Diane M. Coffey, Esquire, Kyle Evans Gay, Esquire, and Sean P. Lugg, Esquire

Technology permeates our lives and, more importantly, the lives of our factfinders. The breadth of the internet is available today in wearable form. Research is done by speaking a question to Siri¹ or Cortana² and receiving an immediate answer, likely accompanied by a photograph and video. Jurors bring these expectations through the Court-house door; they want some degree of technological savvy in the presentation of evidence delivered to them. The effective use of technology will help them render a verdict. When you begin to prepare your case, it is incumbent upon you to consider how you can make use of technology to effectively advocate your position.

Presentation software has been employed by attorneys to provide a two-dimensional graphical roadmap of a case. Photographs may be neatly organized and arguments may be outlined. Digital technology, however, is rapidly advancing and new tools provide access to a third dimension. Through three-dimensional, or “3D” printing a computer can create, or “render” a malleable object. Using an

intricate process, the successive layering of material is used to create the desired three-dimensional object. These printers are being employed by physicians to create custom implants and prostheses, and assist in product development industries to create component parts and prototypes. Might these devices be useful in our staid legal field? Only time will tell; however, the advanced technology provides a platform for assessing the use of demonstrative evidence.

Let’s say you represent a client in a product liability action in Superior Court. She was repairing her lawn mower when the machine engaged and almost immediately amputated three of her fingers. You contend that the mower’s safety switch was improperly designed; you gather photographs and device schematics to make your case to a jury. You may even choose to show the jury the offending lawn mower itself. Without the actual switch, however, the jury may not fully grasp your argument; so, you use a 3D printer to create models of the switch. Jurors may hold and manipulate the replica of the safety switch. In conjunction with the testimony of an expert witness, you might provide the jury with nearly a first-person perspective of the device.

But, what are the evidentiary and ethical implications of using this technology?

Clearly, such a re-creation, much like an animated re-creation of a collision, is “demonstrative evidence.” But, you quickly realize, there is no rule within the Delaware Rules of Evidence applicable to “demonstrative evidence.” In fact, there is no clear definition for this concept. You must look to the Delaware Uniform Rules of Evidence 401–403 (Relevance) for guidance. Courts generally accept the proposition that exhibits that provide a first hand impression, offered to explain or clarify evidence, may be admitted if (1) relevant, and (2) not unduly prejudicial. A properly created 3D rendition should withstand this assessment. Similarly, employing this type of a demonstrative tool might greatly enhance at least the appearance of your competence (DRPC 1.1). Given the novelty of this approach and to ensure that the evidence reaches its intended audience, some fair warning to opposing counsel is advisable (DRPC 3.4). And, much like asking a witness to try fitting himself for a glove, it is imperative that you adequately assess your exhibit before presenting it to the factfinder.

While we may have stumbled a few years ahead with this hypothetical, it is important to be mindful of the world around us as we prepare to present our cases. While there will always, appropriately, be clear lines between advocates and factfinders, when a jury can be brought into the game, their level of understanding is greatly enhanced. But,

“When you begin to prepare your case, it is incumbent upon you to consider how you can make use of technology to effectively advocate your position.”

1. Apple, Inc.

2. Microsoft Corp.

it is imperative that the use of such novel advocacy devices be supported by substantial planning and research. As with most endeavors, if it is worth doing, it is worth doing right.³ ⚖️

3. This quote is generally attributable to American author and journalist Hunter S. Thompson.

This article was written by the Courtroom Technology Working Group of the Delaware Commission on Law and Technology: **Diane M. Coffey, Esquire, Kyle Evans Gay, Esquire, and Sean P. Lugg, Esquire.**

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Attention Bilingual Attorneys

The DSBA intends to provide a list of bilingual attorneys on its website. This list would be a resource for other members of the Bar and the general public. If you speak a language other than English, and would like to be included on the list of such attorneys, please forward your name and the language(s) you speak to Janice Myrick at jmyrick@dsba.org by January 15, 2016.

Please note that the inclusion of any attorney on the bilingual list is not an endorsement or representation by the DSBA as to such attorney's fluency in any language, and the DSBA will be relying solely on the attorney's representation that she/he is fluent in such language(s).



DSBA Executive Director Emeritus Rina Marks; DSBA Past-President Yvonne Takvorian Saville, Esquire; DSBA President Richard A. Forsten, Esquire; and DSBA President-Elect Miranda D. Clifton, Esquire, at this year's Mid-Atlantic Bar Conference in Washington, D.C. in September 2015.

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ETHICALLY SPEAKING

By Charles Slanina, Esquire

Digest of Previous *Ethically Speaking* Columns

“Ethically Speaking” closes out the year with a holiday gift of digests of previous columns for the past few years. As a reminder, copies of the full texts are available on the Delaware State Bar Association website at www.dsba.org.

2015

Ethics in the News: Prosecutors as Debt Collectors and Intra-Firm Attorney-Client Privilege (January 2015) “Ethically Speaking” began the year with a two-fer. The highly controversial practice of prosecutors permitting debt collectors to use prosecutorial letterhead in dunning letters to debtors is discussed. The topic included threats of criminal prosecution in order to collect on the debts. Are inter-firm communications with in-house ethics and compliance counsel privileged? California is the latest jurisdiction to say “yes” joining Massachusetts, Oregon, and the Federal District Court for Ohio.

Lawyers on the Hook for Online Content (February 2015) The dangers of social media were explored, including tales of a blogging public defender, an attorney revealing confidential information as vengeance on a client for a bad online review, a lawyer who waged an online campaign against a trial judge, a judge who had an *ex parte* Facebook communication with a lawyer in trial before the judge, and a lawyer who had Facebook communications with a *pro se* party opponent.

Ethics Online (March 2015) An exploration of various issues relating to social media following the issuance of ABA Formal Opinion 466 regarding the permissibility of lawyers viewing juror internet postings.

Lawyers Behaving Badly (April 2015) Everyone’s favorite roundup of examples of attorney conduct rode the coattails of the March 2015 column *Ethics Online* by providing examples of attorneys sanctioned for internet conduct.

New Threats to Your Escrow Account (May 2015) Delaware real estate practitioners were hit with a new scam in which hackers posed as the Sellers or their agents in real estate transactions to re-direct the wire proceeds of the settlement.

Lawyers Still Behaving Badly in 2015 (June 2015) Attorney misconduct across the nation, including Delaware, were described — purely for educational purposes.

Still More Threats to Your Escrow Account (July/August 2015) Risks to escrow accounts and attorney files continued. This time “Ethically Speaking” described the use of “ransomware,” “malware” and “data kidnapping” in which attorneys and their staff are lured into clicking on attachments or downloading infected programs which hijack or block access to the computers until a fee is paid to the hackers.

Ethics Bites (September 2015) The following topics received mini-discussions: Do I have to report my own mis-

conduct?; May I threaten another attorney with a disciplinary complaint?; Does a disciplinary complaint create a conflict of interest?

Paper or Plastic: Credit Cards for the Payment of Legal Fees (October 2015) The practical and professional issues arising from attorneys accepting credit card payments were explored.

Lawyers Behaving Badly (November 2015) More educational examples of attorney misconduct drawn from across the country.

2014

The Use, Selection and Compensation of Experts from an Expert’s Perspective: Part 2 (January 2014) Guest columnist Brett Margolin, Ph.D., an economist and testifying expert, presents anecdotes of common, but questionable, expert selection and management practices.

Bona Fide Office Requirement Update (February 2014) From traditional to cyber to virtual, how jurisdictions, including Delaware, define a *bona fide* office in the changing landscape of technology and the practice of law.

Musings (April 2014) A contemplation of the role of the attorney as “Advisor” as inspired by former Delaware Disciplinary Counsel Mike McGinniss’ Texas A&M Law Review article, “Virtue and Advice: Socratic Perspectives on Lawyer Independence and Moral Counseling of Clients.”

Liability for Non-Lawyer Ads (June 2014) A discussion of attorney liability for the conduct and claims of third-party marketing services using television, the internet and social media.

Can I Get a Witness?: The Propriety of Calling Opposing Counsel as a Witness (July/August 2014) The use and misuse of subpoenas to create a conflict of interest for opposing counsel.

Ethics Medley (September 2014) A collection of ethics, professional responsibility and disciplinary news items including the pitfalls of social media, deposition misconduct, and an answer to the question, “Does a complaint create a conflict?”

What is a Proper Law Suit? A Retrospective of Attorney Attire (October 2014) If not wearing socks is wrong, I don’t want to be right. Can attorneys be disciplined (or kept out of court) for what they wear — and what they don’t.

Ethics and Professional Responsibility in the News (November 2014) Searching the globe to bring you the freshest and finest examples of ethics in the news.

2013

Virtual Law Offices (January 2013) A discussion of how some states are changing bona fide office requirements to accommodate new technologies and modes of practice.

New Professional Conduct Rules! (February 2013) A January 15, 2013 order of the Delaware Supreme Court put into effect changes to the rules relating to technology, confidentiality, prospective clients, advertising, outsourcing, co-counsel, conflicts, and disclosure.

The Bona Fide Office is CLOSED (In New Jersey) (March 2013) New Jersey had a brick and mortar *bone fide* office requirement much like Delaware’s. A January 2013 New Jersey Supreme Court rule change permits virtual offices.

Disciplinary Believe It or Not (April 2013) Disciplinary decisions from across the country provide a mixture of humor and cautionary tales.

Ethics in the Cloud (May 2013) Changes to Rule 1.1 of the Delaware

Lawyers’ Rules of Professional Conduct require a lawyer to keep abreast of changes in the law including the benefits and risks associated with emerging technology. Cloud computing or storage of data by outside vendors is discussed.

Delaware Supreme Court Resolves an Important Disciplinary Issue (June 2013) The highly litigated issue of the scope of what constitutes disciplinary conduct as a result of criminal conduct occurring outside the practice of law was significantly narrowed in a case involving a rare loss by the Office of Disciplinary Counsel.

Summer Reading (July/August 2013) Fiction and non-fiction summer readings were suggested.

Conflict by Association (September 2013) The risks and extent of imputation of conflicts under Rule 1.10 including conflicts arising from the retention of experts is discussed.

Or Else: The Propriety of Threatening Criminal Charges to Leverage a Civil Settlement (October 2013) “Ethically Speaking” returns to a familiar topic for its readers.

The Use, Selection and Compensation of Experts from an Expert’s Perspective: Part 1 (November 2013) Guest columnist Brett Margolin, Ph.D., an economist and testifying expert in State and Federal jurisdictions in Delaware shares the issues and problems experts face when retained by attorneys.

2012

The Partnership Between Prosecutors and Debt Collectors (November 2012) “Ethically Speaking” explores the definition of “simony” and a national (but apparently not local) practice of prosecutors allowing private debt collectors to send out dunning notices on the prosecutors’ letterhead.

Annual Lawyers (and Others) Behaving Badly Roundup (October 2012) The title says it all. More cautionary tales from around the country. Examples include a Cuban cigar-smuggling Illinois attorney and two Texas attorneys caught peeking at texts on a judge’s cell phone.

Deposition Dangers Redux (September 2012) and **Deposition Dangers (July/August 2012)** Both columns deal with the potential for attorney liability for attorney conduct and misconduct in the context of depositions. Topics include witness coaching, witness preparation, payments to deposition witnesses and the propriety of contacting adverse expert witnesses.

Changes Coming to the ABA Model Rules on Professional Conduct? (June 2012) Under consideration before the ABA are changes to the rules dealing with technology, outsourcing, practice pending admission, admission by motion, and conflicts screening.

Ethics in the News (May 2012) “Ethically Speaking” once again discusses the antics of Maricopa County Sheriff Joe Arpaio as well as attorney liens and internet scams on attorneys.

Pardon Me, Do You Have Any Lawyer Groupons? (April 2012) The propriety of group discount offers by attorneys for marketing and advertisement is analyzed.

Attorney Liens in Delaware: An Update to the Update (March 2012) A recent Delaware Supreme Court opinion reaffirmed the existence of an attorney’s right to assert a charging lien in Delaware.

Brief Misconduct (February 2012) In which recent examples of attorneys being disciplined or fined for the content of their pleadings is explored.

Happy Holidays! 🎅

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.



CYBER RISKS AND EXPOSURES FOR LAW FIRMS

Presented by Steven C. Taylor

The convenience of modern technology comes with the added dangers of cyber risks and exposures. Technology changes quickly, and the latest developments are used in law firms today more than ever before. Information is stored electronically and accessed from laptops, tablets, smartphones, cloud computing systems and USB or flash drives. Risks for a data breach are everywhere, and law firms are especially susceptible.

Law Firms Are Attractive Targets

Law firms have a reputation for being easy to hack, making them appealing targets to data thieves. Law firms are also desirable for computer hackers because they store a large amount of sensitive material about clients, lawsuits and the firm itself. These materials could include details about high-profile lawsuits, business deals, mergers and acquisitions. Information like this could be leaked or sold to the media, the opposing party in a lawsuit, or other interested parties.

Lower Your Risks and Exposures

The size of a law firm does not make it more prone to attack than another. However, firms are more prone to attack if they exhibit a weakness that attackers know how to exploit. For example, if your firm's network can be accessed remotely, and if a portable device used to access it is left in an unlocked car, forgotten in a hotel room, or lost at the airport, it would be easy for a data thief who picks up the device to access your network and the information on it.

There are many strategies that will decrease the chances of a data breach at your firm. Actions such as requiring a strong password or using firewalls may seem obvious, but others may be less clear-cut. Here are some steps you can take to increase your cyber security:

- Use different passwords and usernames for everything. This way, even if a hacker finds one set of login credentials, the rest are still safe.

- Change your passwords regularly. Your network may be set up to automatically prompt you to do this after a certain amount of time. If not, set your own schedule.
- Be sure your laptop and other devices — including USB drives — are encrypted so if they are stolen or lost, your data is still protected.
- Control how much access your employees have to your data. Not everyone needs access to your case files, for example.
- If you have social media accounts, check them often to make sure they have not been compromised. Update passwords and other sign-in information regularly.
- Dispose of old devices properly. Wipe the device clean of all data, even if you do not consider the data to be sensitive.

Cyber risks and exposures are a relatively new threat for law firms, and the methods hackers use to access your network or cloud system are constantly changing. Contact DSBIS today to talk about your cyber risks and learn how you can protect your firm and clients.

Delaware State Bar Insurance Services (DSBIS) is a wholly owned insurance brokerage subsidiary of the Delaware State Bar Association and powered by USI Insurance Services. DSBIS was formed by Delaware attorneys for Delaware attorneys and serves all insurance needs for attorneys, their firms, their families, and their clients.

Steve Taylor is a DSBIS Consultant specializing in professional liability coverages and Vice President at USI Insurance Services. He may be reached at (302) 397-0182 or steven.taylor@usi.biz.

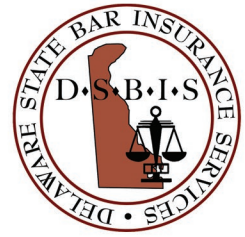


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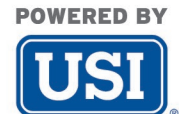
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By Susan Simmons

Pro Bono Week Wrap-up

The Access to Justice Spotlight is dedicated to those that were named to the Christopher W. White Distinguished Access to Justice Awards roster this year, as well as those that participated in the Wills for Seniors event and the Celebrate Pro Bono 5K Run/Walk with all of their supporters in the Delaware State Bar Association. Thank you!

Volunteer DSBA Attorneys, DVLS & DSBA staff, and members of the Delaware Paralegal Association provided free legal estate planning services to eligible senior citizens in Delaware at the Elsmere Fire Hall on Saturday, October 17, 2015.



At the start line of the Celebrate Pro Bono 5K Walk/Run on Sunday, October 18, 2015 at the Dravo Plaza on the Riverfront in Wilmington.

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.

2015 Christopher W. White Distinguished Access to Justice Awards Breakfast

Thursday, October 29, 2015 • Chase Center on the Riverfront, Wilmington, DE

DSBA President Richard A. Forsten, Esquire, was presented with the DSBA Access to Justice Tribute by Melanie George Smith, Esquire, Delaware State Representative.



Delaware State Representative Melanie George Smith, Esquire, presented the *Pro Bono* Celebration Week Proclamation to Janine N. Howard-O'Rangers, Esquire, of Delaware Volunteer Legal Services, Inc.



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



David H. Williams, Esquire, accepted the Leadership Award on behalf of Morris James LLP.



Natalie Wolf, Esquire, of Young Conaway Stargatt & Taylor, LLP received the Achievement Award.



C. Malcolm Cochran IV, Esquire, of Richards, Layton & Finger, P. A. received the Commitment Award.

The Christopher J. Battaglia Memorial Awards



The Small Firm Participation award was presented to Ross, Aronstam & Moritz LLP.



The Large Firm Participation award was presented to Potter Anderson & Corroon, LLP.



The Emerald Award for Most Tocqueville Society members was presented to Potter Anderson & Corroon, LLP.

The Honorable Alan N. Cooper

1952 - 2015

By The Honorable Joelle P. Hitch

On October 18, 2015, the Delaware Bar lost not only a beloved family law attorney and Family Court Judge, but also an incredible person, Alan N. Cooper. His loss came both suddenly and surprisingly. Though many knew he was ill, he had more life to live and was taken too soon. Capturing the life of such an amazing person in a few words is an impossible task, but I will do my best as I reflect on my past ten years working side by side with him.

Alan and I joined the Family Court December 7, 2005. We were the first set of twin judges appointed to Family Court, but I can assure you it was an easy delivery. From the first day of the process, Alan was there by my side doing what he does, smiling and helping. Knowing I was nervous about our confirmation hearing, he volunteered to go first, hoping the Legislature would be out of questions by the time they got to me; he was right. Every day for the next ten years, he was by my side no matter the challenge, smiling and helping.

He was excited every year to pick our new law clerks, always full of desire to inspire the next generation to practice family law and to share in their future accomplishments. Together, we hired eleven law clerks, married three, and are the proud grand-Judges to five babies. Alan could not have been more proud of each and every one of them, as evidenced by their pictures around his office, his annual Christmas card, and Christmas luncheon, which he invited them to so he could hear of their successes throughout the year.

When Alan first told me he had cancer he said, "I just want a chance to fight this. Too many good things worth fighting for." Anyone who knew Alan knew what those "good things worth fighting for" were: Nancy, Andrew, and Justin. Alan adored his family. If you ever sat in the courtroom wondering where Judge Cooper was, chances are he was upstairs on the 9th floor telling another story about the escapades of his boys. They were his heart and he relished every moment with them.



His love and deep respect for Nancy was evident in his daily conversations, as well. Having been together since college, they knew each other well. Like many, she called him "Coops." Having been fortunate enough to know Alan and Nancy these past ten years, I have been witness to their love for each other. They were happy and comfortable; a comfort achieved through mutual understanding of what the other was thinking and needed. They truly were partners in life.

Nancy commented during the Celebration of Alan's Life how he loved to come to work at the courthouse. I doubt anyone would disagree with her. Alan had a passion for family law and it was evident in everything he did, though, I will admit he had some colorful language on occasion when dumbfounded at the antics of some of the litigants and attorneys. We often vented to each other following a particularly troubling hearing. Despite the sad circumstances of these hearings, Alan always managed to find the humor.

I doubt most realize he was quite the impressionist. He had several attorneys down pat, all in good fun of course, but you could hear the laughter down the hallway following one of his illustrations. Alan arrived at work every day with a smile on his face and it was contagious. As he traveled the hallways, he would smile and say "hello" to every employee, most he knew by name. He truly loved the Family Court and often commented how he had the best job on earth.

Roughly five years ago, Alan started handling the At Risk work, criminal and child welfare proceedings. Alan was excited to do the work, particularly the adoptions. During the adoption ceremonies Alan would tell the prospective parents, "I especially like adoptions because I get to learn a little something about the good, decent, and generous people in my court who, before this, I rarely ever got to meet. In doing so, I get to reinforce my belief that given the opportunity, most people will, time and time again, demonstrate that they can be caring and loving,

that they are resilient to life's setbacks, hard working, industrious, spiritual and eternally optimistic about their ability to succeed and are consumed by a strong desire that their loved ones do likewise." These words of hope Alan shared reflect his own outlook on life. Though I never practiced in front of Alan, while he was ill, I listened to many recordings of his hearings in an effort to help him from falling behind. Regardless of the troubling nature of the hearings or the poor behavior of the parties, Alan always found a way to end the hearing by sharing with the parties something positive about their unfortunate situation and providing words of inspiration to help them improve their lives.

The Family Court will continue to move forward and we look forward to welcoming our newest members of the bench, but we will forever feel the loss of The Honorable Alan N. Cooper. I cannot begin to imagine the loss each of you feels with his passing as he touched and inspired so many people. Personally, there is a hole in my heart that will never be filled. His love for his family, contribution to the Court, and love of family law will continue to inspire me and lift my heart when dealing with the most unsettling of cases. I miss his smile everyday and if he is listening from Heaven, to you, Alan, I say, "Catch you later." ☺

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DE-LAP ZONE

A Message from the Delaware Lawyers Assistance Program

By Carol P. Waldhauser, Executive Director

The Traditional End of Year Self-Audit: Great Expectations vs. Realistic Expectations

As a practicing attorney, what better time than now to reflect on the past year, both professionally and personally, as to where you have been, where you are presently, and where you plan to be in 2016. In fact, this may become an annual tradition for you. Or, in the alternative, you may ask, why take the time for a self-audit?

Lawyers are referred to as great problem-solvers. It is important, however, for lawyers to realize that even when they are highly successful in treating a client's dilemma, it is often difficult for them to address their own concerns, goals, plans, wellness, and stamina. I refer to this as the shoemaker syndrome, recalling the tale growing up of the shoemaker who had time to fix everyone else's shoes but his/her own. The day-to-day pressures and deadlines of practicing law, coupled with the ongoing responsibilities of life itself, often do cause a lack of time for lawyers to take time for themselves.

This lack of time is unfortunate because it is important for all of us to pencil ourselves into our calendars. It is important that we realize success takes foresight, patience, courage, and excellent legal skills, plus personal wellness and stamina. Realistically, it takes planning, implementation, and management for a successful business and life.

Stop, sit down now and ask yourself these master questions:

- Do I have realistic short-term, as well as long-term plans for my law office and/or career goals?
- Do I have a written budget and accounting practices in place for the coming year both professionally and personally? Am I in compliance with The Professional Rules of Conduct? If not, now is the time to implement the changes needed.
- Do I monitor the types of cases that are most and least profitable? Is my billing up-to-date? Remember, it is not wise for lawyers to sue for fees.
- Do I have an updated checklist for Lawyers Planning to Protect Client's Interest in the event of my death, disability, impairment, or incapacity? Because life happens, do I have

“It is important, however, for lawyers to realize that even when they are highly successful in treating a client's dilemma, it is often difficult for them to address their own concerns, goals, plans, wellness, and stamina.”

a succession plan in place for my business (Solo and Small Firm)?

- Do I have a manual with an updated checklist with passwords (especially if I pay bills online) so that my designated attorney can protect the interest of my clients, my phone line, my rent, etc.? (Go to www.de-lap.org and/or the DSBA'S Law Office Management page and click on the transition page for boilerplate forms.)
- Do I feel that I work too many hours? If so, can I design a plan to add more balance to my life and learn to implement it? Bottom line: Do I have a personal wellness plan to maintain stamina and fitness to practice law successfully?

Susan Cariter Liebel, Founder & CEO of Solo Practice University, has sound advice in her article, “6 Steps to Propel You Forward” for the ALPS blog:

Too many lawyers live in yesteryear. Remember, you can't keep practicing law the way you “have always done it.” You can't build today's practice looking in the rear view mirror. There is only one time, and one time only, that you should be looking in the rearview mirror. It is to see what you've done wrong, where you've possibly failed, so you don't continue this practice or process into the future and guarantee future failure. Otherwise, keep your eyes on the road in front of you.

All firms, small or large, new or old, need a written budget especially in today's rocky economic climate. This budget should be implemented and reviewed regularly. You should work

with an accountant or financial advisor familiar with law firms of your size. Your budget should include all fixed expenses for the coming year on a month-to-month basis. This allows you to keep an eye on spending, billing, etc. If you are a solo or small firm lawyer, your financial advisor or accountant should be someone who works with solo and small firm lawyers.

Monitor the types of cases that are most and least profitable. Stop doing work that is not profitable (This does not include your *pro bono* work.) It does include, however, those cases that take a lot of your time and the clients either do not pay, will not pay, or the case is just a bow-wow. Many hard-working, honest lawyers find that their expectations about getting paid are not shared by their clients. The result is stress, frustration, and problematic cash flow. Therefore, weed them out.

Remember, life events happen. Most individuals (lawyers included) will deal with loss, trauma, and change at some point in their lives. It is part of being human. Although for many lawyers, it is a frequent trait to ignore unpleasant thoughts such as disaster, unexpected illness, misfortune, or even death. By ignoring these events, we fail to prepare for the day the unexpected illness, disaster, or even death may prevent us from executing our responsibilities as lawyers: the law office, the clients, the existing deadlines and the staff.

Blueprint for Short-Term and Long Term Planning In Your Professional and Personal Life

A lawyer, like other business people, should write a business plan that includes short-term and long terms goals. This written plan allows for focus on what you need to do today, next week, and next month in order to position yourself so you and your business are traveling in the right direction and do not end up somewhere else. A lawyer also needs to have a personal wellness plan.

Then, once you have the written plan, you should implement it. Implementation is action and action converts your business and personal visions. Call this implemen-

tation "action or baby" steps. Equally as important is management. Through both business and personal management, you build the foundation and framework that unifies purpose and meaning, while maintaining balance in your personal life. Bottom line, it allows you to be aware of great expectations vs. realistic expectations.

Other Habits to Consider During Your Self-Audit

The Golden Rules (Or How Not To Be a Difficult Attorney)

- Behave yourself.
- Answer the phone.
- Return your phone calls.
- Keep your hands off your clients' money.
- Tell the truth.
- Admit ignorance.
- Be honorable.
- Show civility.
- Defend the honor of your fellow attorneys.
- Be gracious and thoughtful.
- Value the time of your fellow attorneys.
- Give straight answers.
- Think first.
- Define your goals: Remember you are first a professional, then a businessperson. If you seek riches, become a businessperson, then hire an attorney.
- Tell your clients how to behave — if they can not, they do not deserve you as their attorney.
- Solve problems — do not become one.
- Have ideals you believe in.
- Do not do anything that you would not be proud to tell your mother about!
- If you need help, get it.
- If you need someone to talk to, make that confidential call to the Delaware Lawyers Assistance Program (DE-LAP).

(In part from *The 20 Golden Rules*/Florida Lawyer's Assistance Program)


Fortunately, most lawyers are passionate about being lawyers. Unfortunately, some lawyers may not devote enough time to their personal well being. For that reason, it is not too late to review some simple personal procedures that can contribute to time, money and the establishment of habits that can enhance you and your professional life.

Habits and Behavior Tips from the Happy Attorney

- Take time to eat right.
- Take time to sleep.
- Take time to play.
- Take time to pray.
- Take time to love.
- Take time to give.
- Take time to laugh.
- And, take time to plan, implement, and manage, both professionally and personally — it is the road to success.

No matter what, prioritize your personal wellness — if there are changes you should (or want to) make — take small realistic steps in achieving those changes.

Many of us love being a legal professional. Generally, the profession has met our great expectations upon entering law school. Most lawyers take great pleasure and pride in their work. Realistically, however, it is the planning, implementation, management, and annual self-audit that may be the difference between success and failure.

For more information on the topics discussed above and for free checklists call The Delaware Lawyers Assistance Program (DE-LAP) or e-mail cwaldhauser@de-lap.org. Remember too, if you, or someone you know, is having problems that are affecting your/their ability to practice law or quality of life, call DE-LAP OR (302) 777-0124. 

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

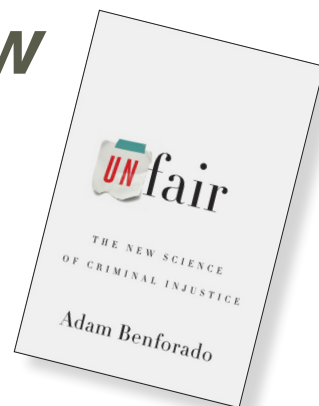


BOOK REVIEW

Reviewed by Richard A. Forsten, Esquire

True Reading: *UNfair: The New Science of Criminal Injustice*

By Adam Benforado (Crown Pub., 2015)



We all want our criminal justice system to be as perfect as it can be, but we all recognize that nothing can be perfect; and so, we have trial by jury, appellate review, habeas corpus, and a host of other protections built into the system in an effort to avoid as much as error as possible. And yet, we are all familiar with cases where someone was wrongfully convicted, only to be released from prison years later. No system is perfect, we just try to do the best we can and hope that the errors are few and far between.

“No system is perfect, we just try to do the best we can and hope that the errors are few and far between.”

In *Unfair: The New Science of Criminal Injustice*, Professor Adam Benforado demonstrates that our criminal justice system might not be nearly as fair as we think, and that there is room for substantial improvement. Along the way, he challenges many of our perceptions and suggests some commonsense reforms.

Benforado examines all of the problems one might expect — police lineups, false confessions, withheld information, confirmation bias, eyewitness memory issues, sentencing, and deterrence — but his examples are powerful, memorable, and tragic. He provides much to think about.

Take the issue of memory. John Jerome White was convicted of the 1979 rape of an elderly woman in her home. He vehemently denied being anywhere near the house the night of the attack. The physical evidence linking him to the crime was scant — no fingerprints, only hair that “could have” come from White. But, the prosecution had a powerful trump card — the victim identified White as her attacker, not once, but three separate times. White was sentenced to life in prison. Twenty-eight years later, White was released from prison when DNA samples collected at the time (but never previously analyzed) proved he was not the attacker. And so, DNA tests lead

once again to the release of an innocent man — a tale all too familiar. But, there’s still more to the story.

Police had focused on John White as the potential perpetrator and so brought the victim in to view a lineup. To round out the lineup, of course, the police added several other persons to the lineup from their holding cells as “fillers.” The victim not only identified John White as her attacker, she was “almost positive” it was him. One of the “fillers,” though, was John Edward Parham, who was in lockup for an entirely different matter. The same DNA tests which exonerated

John White also identified John Parham as the rapist.

The victim’s actual attacker was in the lineup, but she had identified the wrong person.

Hindsight is always 20/20, and, in hindsight, the identification of White should not have been as powerful as it was. There were no lights on in the room where the attack occurred (the only light came from a closet in an adjoining room). The victim was elderly and did not have her glasses on. But, an eyewitness identification is always a dramatic moment in any trial, and White’s trial was no different.

There are numerous factors that affect memory, and witness identification is not always accurate (as the White case demonstrates). Benforado examines all these factors to the point where the readers may question their own memories of events. Indeed, Benforado discusses the famous experiment conducted at a convention of jurists, psychologists, and physicians. During the proceedings, a clown burst into the room followed by a man with a gun. The two proceeded to wrestle, the gun went off, and the intruders then picked themselves up and, continuing their chase, ran out of the room. Given that a criminal investigation was bound to follow, the president

of the association asked the forty people in attendance to each separately write down what had happened to aid the police. The statements were filled with false details and omitted numerous key facts. Our memory is far from perfect, particularly in times of stress.

Confessions are another powerful indicator of guilt. Why would someone confess to a crime they did not commit? Particularly in this day and age. And yet, false confessions do happen. Eleven-year-old Holly Staker was babysitting when she was raped and then stabbed twenty-two times. Police focused their attention on twenty-year-old Juan Rivera, a petty criminal with a record, but a petty criminal who had an alibi (he was home on the phone talking to his mother in Puerto Rico) that was supported by phone records and data from an electronic leg monitor he was wearing as a condition of bail for another matter. But, Rivera was convicted. Although there was no physical evidence linking him to the scene, he had signed a confession. Moreover, after his initial conviction was set aside and a new trial ordered, he was convicted a second time. Life in prison. No parole. But then, years later, DNA samples from the crime scene were examined, and they did not match Rivera. So, a third trial was held. The prosecution claimed the DNA samples must have been corrupted, and, relying on the confession, the prosecution obtained a third conviction. The Illinois Court of Appeals overturned the conviction in December, 2011, but by then Rivera had spent 19 years in prison for a crime he did not commit. Even more horrific, the DNA from Holly Staker's murder matches DNA samples from another murder committed a decade after the Staker murder, and the perpetrator remains unknown to this day. False confessions happen, and Benforado does a nice job of explaining how and why they can.

Confirmation bias is another potential problem of the criminal justice system (and other fields as well). We all have a tendency to view evidence that supports our case or argument favorably, and to ignore or explain away contrary evidence. Even something as objective as DNA

evidence can be subject to the problem of confirmation bias. Benforado recounts a recent study where researchers gave experts a DNA sample, telling them that it was part of a gang rape case in which one of the gang members had accepted a plea deal and was testifying against the others. The researchers needed to confirm the truth of the witness's statement that one of the other gang members had been involved in the rape. All of the experts found the DNA matched the other gang member's DNA, thereby corroborating the cooperating gang member's testimony. But, when the same evidence was provided to a different group of seventeen researchers, without any of the backstory about a gang rape, only one of the experts found that the DNA sample was a match. For Benforado, this is strong evidence of confirmation bias. Somebody had to interpret the results of the DNA testing, and with the backstory already in their minds, the first group of experts were predisposed to find a match.

At times, reading *Unfair* almost makes one think that fair justice is not possible.

That's obviously not the case, nor does Benforado make that argument. He does argue for certain reforms that seem to make a lot of sense, though he also offers ideas that are bit farfetched. Still, we can do things better — indeed we must do things better — if we are to achieve equal justice under law. ☺

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

Greg Johnson

A Little Bit Family Man, A Little Bit Rock'n'Roll

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 criminal defense attorney Gregory M. Johnson is a man of many talents. It may be that balancing his many obligations with grace and humor is chief among them.

Gregory M. Johnson is really a Kent County, Delaware guy, though he makes his home in Chadds Ford, Pennsylvania these days. He was born in Smyrna and grew up in both Smyrna and Dover. He attended Smyrna High School, where he excelled at baseball, and he also played ball in the Dover Little League and Big League organizations. It was in Little League that he met a baseball coach (and local lawyer) by the name of Rob Young. This coach, who was a teammate's father, would reappear in Greg's life years later in a very different set of circumstances. But, back to baseball.

He was a pitcher, and a good one, until he sustained a rotator cuff injury at age 14. Greg continued to play baseball into early adulthood, but his arm was never the same. He has remained involved in sports and now coaches his daughters in softball.

Greg left Smyrna for Morgantown, West Virginia, and West Virginia University. There he studied Political Science, which is somewhat

significant; he began to play music with some degree of seriousness, which is more significant; and he met Teri, who would become his wife, which is really quite significant.

Harvey Johnson, Greg's father, is a music lover, and he owned quite a collection of records (of the vinyl variety). Greg loved to listen to those records and found himself inspired to learn to play the guitar, starting at about age 13. His musical inclinations flourished in the college town environment of Morgantown, and Greg fell in with a rock 'n roll cover band that worked regularly in the area. He undoubtedly met lots of interesting young women as a rock singer (one would think) but one in particular, the roommate of a bandmate, won his heart. That would be the aforementioned Teri.

Greg enjoyed the rock'n'roll lifestyle enough to consider, briefly, remaining in Morgantown with the band after his graduation. For better or for worse (depending on the day he is asked), he opted instead for law school and relocated to Emory University in Atlanta, Georgia. Fortunately, Teri went with him. She taught middle school while he attended law school. Greg could not stray far from home for too long, however. He clerked after his first year with Georgetown attorney John Sergovic, and after his second



Photo by Mary Wicks

year with Potter Anderson & Corroon. Greg then went with Potter as a first year associate. After a few years of working as a corporate litigator, he was anxious to get some trial experience so he moved over to the Delaware Department of Justice as a prosecutor and worked there for four years.


Since 2003, Greg has worked as a solo criminal defense attorney. He has a contract to handle cases that pose a conflict of interest with the Public Defender's office and he handles private cases as well. Although this work has a high burn-out factor, Greg finds it personally satisfying. He gets a greater sense of accomplishment, and feels that he has a more direct and practical impact on people's lives than he did as a corporate litigator.

Greg and Teri's two daughters (Abbey, 12 and Ally, 9) are also talented individuals. They are athletes, both playing softball 10 months out of the year on traveling teams. Both are serious dancers, studying all of the dance disciplines (ballet, tap, jazz, etc.). Greg describes his family life as "taxi mode" these days, carrying the girls

to their various activities. When they get a break in the schedule they enjoy their home in Sussex County near the beaches in the warm weather, or a ski trip in the winter.

Now, back to Rob Young. In 2007, (Judge) Rob Young and his merry troupe of actors and musicians had an emergency need for a man to play the romantic lead in the scheduled production of *A Tale of Two Cities: The Rock Opera*. This show was the second in a series of musical comedies written, produced, and performed by Delaware lawyers as a fundraiser. Judge Young had heard from a very reliable source that Greg could sing. Using his legendary powers of persuasion and some residual good will from the old player-coach relationship, Judge Young persuaded Greg to help out with the play (i.e. accept the lead role). Greg has played the romantic lead in all four subsequent shows, including the recent and wildly successful production of *The Crucible: Plymouth Rocks*. Greg's dedication to the cause is completely unrelated (according to him) to the fact

that in each show he has played opposite leading ladies who are Delaware lawyers of remarkable beauty and talent. Once a rock'n'roller...

Running a business while managing a family of busy people is a challenge for any lawyer. Greg Johnson does it by doing that which is important and without taking himself too seriously. 

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.

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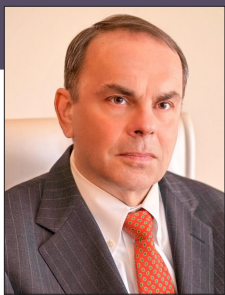


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By Chris Mourse

T³

Tips, Tools, and Techniques for Small Firms and Solos

LPM

Client Intake Process

Regardless of how you acquire a potential new client, whether it is a phone call, referral or they show up at your door, it is important that you design an intake process that reflects positively on your law practice, sets the tone for a client relationship, and captures useful information about the new client.

Your intake process should give you the opportunity to evaluate the potential new client and their legal matter. Is it among your legal capabilities, do you have the time and resources to take it on, do you believe you will get paid? You should not automatically take on a case referred to you by friends or family. You might be better off referring these cases to another attorney, especially if the matter is not within your primary areas of practice.

A solid intake process can assist you in avoiding conflicts, identifying tire kickers and other time wasters or seekers of free legal advice. A well-designed initial screening form can minimize unnecessary constraints on your resources, establish your business practices (retainers, payment terms, communications) and maximize the quality of your initial client interviews.

Your initial client interview can then allow you to focus on the important topics of the matter at hand and begin developing a plan for your legal strategy.

Consistency is the key in your intake as it helps you identify and target potential new clients in the future.

Do you have an intake process?

Marketing

You do not have to make a significant financial commitment to market your practice. Developing referral sources, nurturing existing clients, and being visible in your legal and personal community can be the best way to achieve success in your law practice. Identify your best referral targets based on your type of practice. Real estate agents, consultants, bankers, accountants, or other lawyers may be your best source for new business and you should develop this type of a relationship with them. If you provide good value to their clients, they will be happy to make referrals on your behalf. Speak regularly with existing clients and keep in touch with former clients. Let them know everything that you do in your law practice and do not be shy about asking them to let their friends and associates know about you.

Technology

There is an iPhone/iPad app called “Moment” that tracks how much time you spend on these devices. It can be helpful to make you recognize how much time you spend merely managing your inbox and not necessarily providing value to your clients. Use the app to develop parameters for your communications. Technology gets faster and faster every day and the volume of it grows exponentially... understand how attached you are to your devices and determine if it is necessary to disengage to some degree... some lawyers only review emails a few times a day. They advise their clients of this and provide them with alternative methods to connect with them if necessary. Surprisingly enough, if a client knows you are going to read an email in the next few hours, they rarely will invoke the alternative methods, except in the case of a real emergency.

Bonus Tip

From the Small Firm & Solo Practitioners Section Chair, Denise Nordheimer

Remember, this is your month to say “Thank You” to clients, staff, and

“You do not have to make a significant financial commitment to market your practice. Developing referral sources, nurturing existing clients, and being visible in your legal and personal community can be the best way to achieve success in your law practice.”

everyone who provides support to your business. One great way to say thanks and give back is to select a Delaware charity and support them in their mission for the holidays.

I also recommend that you make a list, even if it is just one item long, of a marketing goal for the first quarter — join a networking group, update the website, get a brochure — and start laying the groundwork for it now. Get names, talk to friends at holiday parties about what and who they are using and set yourself up so that you have a good chance of success.

And, if you did not take my advice last month to call your accountant to see what your income tax situation looks like, do it now. There is still time to evaluate your tax situation and make any appropriate adjustments. ⚖️

Chris Mourse is the Law Practice Management Advisor for the DSBA. He can be reached at cmourse@dsba.org.

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Condolences to **Chandlee Johnson Kuhn, Esquire**, on the death of her father-in-law, William J. Kuhn, Jr., who died on October 20, 2015.

Condolences to **Andrew D. Rahaim, Esquire**, and **Stephen Rahaim, Esquire**, on the death of their father, Thomas John Rahaim, who died on October 21, 2015.

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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Here's Lookin' at You

Champagne is synonymous with celebration. And, no one sips it better than the icons of Hollywood's Golden Age. Follow their lead and ring in the New Year with some Champagne cocktails from the silver screen.

Kir Royale

The Philadelphia Story (1940)

Starring Katharine Hepburn and James Stewart

This cocktail of blackcurrant liqueur and bubbly is a festive and fruity way to commence a celebration. Pour 10 ml of Crème de Cassis into a Champagne flute, then fill slowly with chilled dry Champagne. (Try the very fine Diebolt-Vallois Blanc de Blancs Brut for this cocktail.)

Champagne Cocktail

Casablanca (1942)

Starring Ingrid Bergman and Humphrey Bogart

Douse a white sugar cube in Angostura bitters and place into a Champagne flute. Add 24 ml of brandy, then gently top up with dry Champagne. I recently paired this cocktail with a flan as a dessert course. The bitters provided an aromatic counterbalance to the sweet custard, and the cocktail's amber color was quite lovely. (The most famous of Champagnes — a Veuve Clicquot Brut — is an excellent choice for this drink.)

Bellini

Every Day's a Holiday (1937)

Starring Mae West

For this cheerful brunch cocktail, make sure that your ingredients are well chilled. Half fill a Champagne flute with fresh peach juice, top up with dry Champagne and stir. Serve chilled.

Buck's Fizz

Top Hat (1935)

Starring Ginger Rogers and Fred Astaire

As with the Bellini, make sure that your ingredients are well chilled. Half fill a Champagne flute with dry Champagne. Top up with fresh orange juice and stir gently. To make a Mimosa, add a dash of Grand Marnier.

Egg Nog

The Man Who Came to Dinner (1941)

Starring Monty Woolley and Bette Davis

While there is no Champagne in this drink, what would a holiday soirée be without egg nog? Pour 30 ml of brandy, 30 ml of dark rum, one egg, and one teaspoon of sugar into a cocktail shaker filled with ice and shake sharply. Strain into a rocks glass. Top up with milk and stir. Sprinkle with freshly grated nutmeg.

NON-ALCOHOLIC DRINKS

Shirley Temple & Roy Rogers

Pour ginger ale (or 7-Up) into a highball glass filled with ice. Add grenadine to taste and stir. Garnish with a Maraschino cherry. For a Roy Rogers, substitute Coca-cola for the ginger ale.



HOLLY-DAY TRIVIA

Now that I have whetted your thirst, I offer a trivia contest. One of my favorite actresses, Bette Davis, enjoyed her fair share of cocktails. The first reader to correctly identify the cocktail that The Queen of the Silver Screen sipped in each of the below films will receive a bottle of bubbly to enjoy over the holidays.

All About Eve

(Hint: a variation of a martini.)

Dark Victory

(Hint: the Angostura bitters create a rosy color.)

Now, Voyager

(Hint: the plot is quite different from the drink's name.) ☹



Susan E. Poppiti is a mathematics teacher at Padua Academy High School and managing member and cooking instructor for La Cucina di Poppiti, LLC and can be reached at spoppiti@hotmail.com. Other recipes and cooking tips are available on Susan's food blog at www.cucinadipoppliti.com.

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