DELAWARE LAWYER

A PUBLICATION OF DELAWARE BAR FOUNDATION

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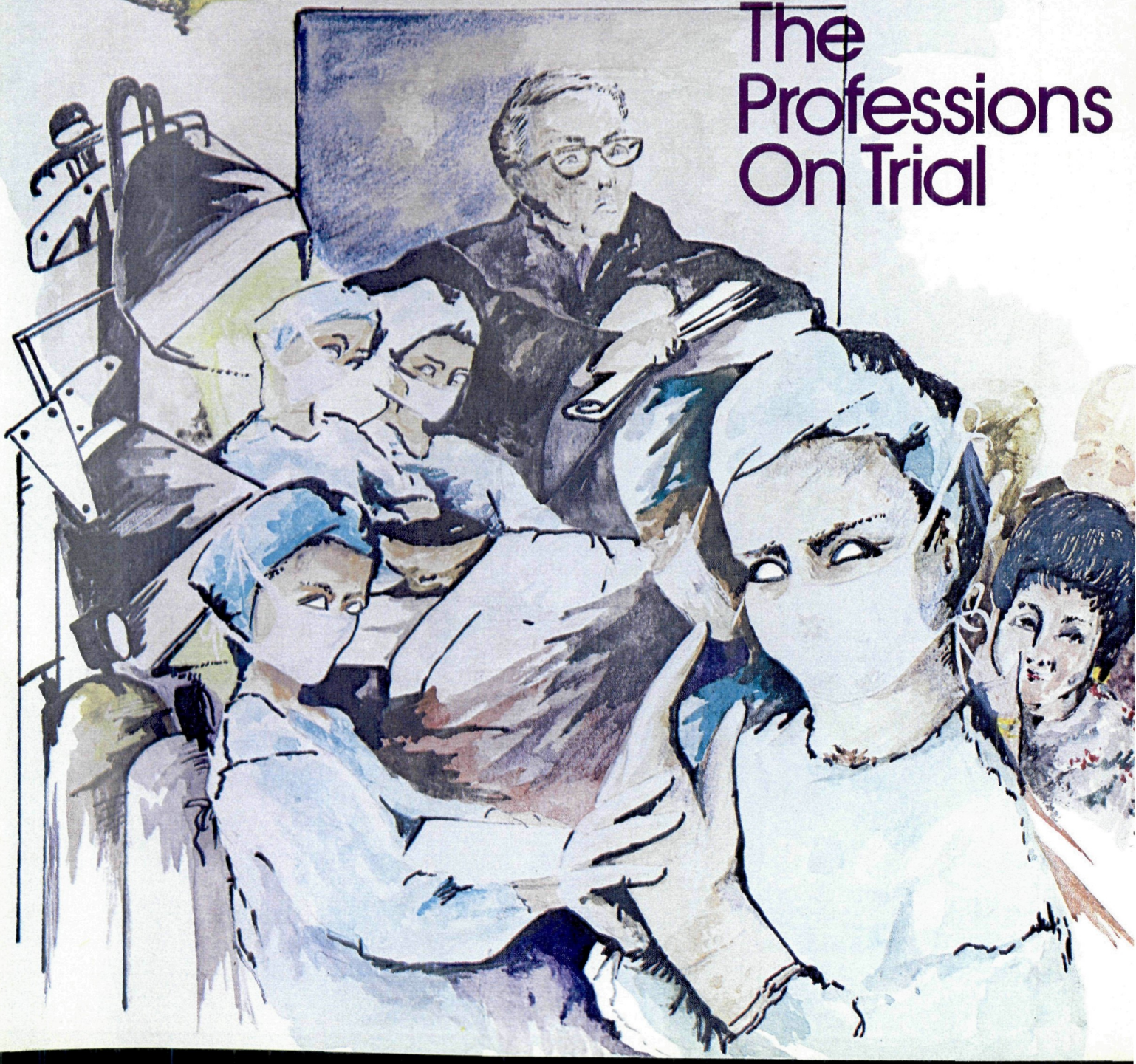
The Professions On Trial



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VOL. 2 NO. 1
SUMMER 1983

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Contents

Our Cover:

Mr. McDonald Norman's surrealistic portrayal of surgery conducted under the eyes of judge and jury embodies our theme this time out: the professions in a more complex, litigious world, with special emphasis on the relation between law and medicine. Mr. Norman is an officer of the Family Court in Wilmington and a gifted part-time artist and caricaturist. He infiltrated Superior Court, Courtroom No. 3, for inspiration. Old courthouse hands will recognize the chandeliers.

Up-Coming in Delaware Lawyer:

November brings our big environmental issue, designed and organized by our fellow editor, Dave McBride. We shall also have a continuation of Judge Pennewill's memoirs, edited by Dave Drexler, and a comic-creepy bit of real life drama from one of our most deft and entertaining contributors, Bill Prickett.

DELAWARE LAWYER is published by Delaware Bar Foundation as part of its commitment to publish and distribute addresses, reports, treatises and other literary works on legal subjects of general interest to Delaware judges, lawyers and the community at large. As it is one of the objectives of DELAWARE LAWYER to be a forum for the free expression and interchange of ideas, the opinions and positions stated in signed material are those of the authors and not, by the fact of publication, necessarily those of Delaware Bar Foundation or DELAWARE LAWYER. All manuscripts are carefully considered by the Board of Editors. Material accepted for publication becomes the property of Delaware Bar Foundation. Contributing authors are requested and expected to disclose any financial, economic or professional interests or affiliations that may have influenced positions taken or advocated in the articles. That they have done so is an implied representation by each author.

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BAR FOUNDATION CORNER

O. FRANCIS BIONDI

Frank Biondi, a member of the Board of Directors of our sponsor, the Foundation, is chairmanship personified. He is Chairman of (take a deep breath) the Board on Professional Responsibility, the Supreme Court ad hoc Advisory Committee to Review the Disciplinary System, the Supreme Court ad hoc Advisory Committee on Dispute Resolution, and, until recently, the General Legislative Committee of the Delaware Bar Association. As of this writing he is President-Elect of the Association. He also serves as a member of the Supreme Court Long Range Planning Committee. In his fleeting moments of spare time, Frank practices law very ably as a member of Morris, Nichols, Arsht & Tunnell.

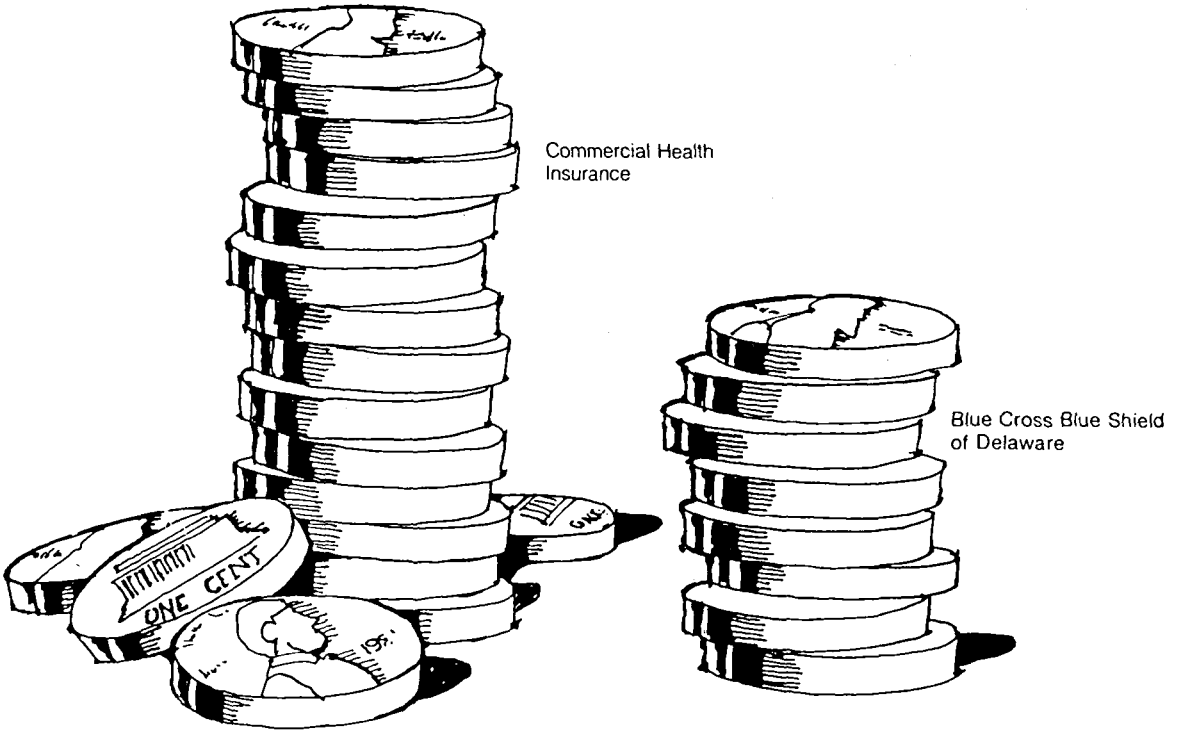
Frank's wide experience in appraising the state of the profession makes his message an important one.

Failure to communicate is the most common complaint against lawyers. Clients, who retain lawyers to speak for them before Courts and with other parties, are often frustrated by their attorneys' failure to keep them informed. Unanswered phone calls and letters about the status of a client's affairs superficially reflect the contrasting positions of a busy lawyer with many cases and a troubled client with only one, but it masks a more serious failure to educate the client about the process in which he is involved. Clients unaccustomed to litigation do not understand the complex and time-consuming processes of investigating facts, pleading, discovery, motions, and other pre-trial activity. No one can be patient with the unknown. Lawyers have an important educational function in dealing with their clients, and they too often ignore it.

The second most frequent cause of complaint to the Bar Association and the Board on Professional Responsibility is disagreement over fees. Disputes often arise from failure to let clients know the extent of services required, and—this is even more serious—the lack of clear agreements about costs and fees. Clients are consumers of legal services in a consumer environment characterized by disclosure. They rightly insist on knowing what they are paying for. Lawyers who enforce similar rights against providers of goods and services often fail to recognize that they too are providers with the same obligations of full and fair disclosure. Complaints about fees have prompted the Bar Association to form a Fee Dispute Conciliation and Mediation Committee.

There are less frequent but more serious complaints of neglect—failure to act or to act competently. These are matters for the disciplinary system, where proceedings are directed to maintain standards of professional conduct and to protect the public and the administration of justice from lawyers unable or unwilling to abide by rules of professional responsibility. The disciplinary system must be known to the public, it must be accessible, it must be fair (and appear to be fair), and it must be efficient.

Since 1973 the Delaware Bar has grown from 546 to 1,105 members. We now have a law school in Delaware, and we may expect our lawyer population to grow faster than our client population. There will be more and more lawyers, and this means more professional surveillance. We see greater complexity in the cases before the Board on Professional Responsibility, and increasing sophistication in the defenses interposed. Re-examination of our disciplinary system has become urgent. The Board on Professional Responsibility appointed by the Supreme Court now consists of nine voting members, who adjudicate, nine associate members, who investigate, and one paid part-time lawyer. The Board has no budget. Members bear their own costs except for unusual expenses. While complaints reach



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the Board from a variety of sources, clients, courts, the Bar Association, and other lawyers, the Board's role and its very existence are little known to the general public.

A volunteer Board has experienced inevitable delay in investigating and disposing of cases. Although the system has served the Bar well, and the lawyers who have contributed time, talent, and unreimbursed expenses do credit to the profession, it is uncertain that the system as now constituted can continue to serve well. The Supreme Court has asked the Board and a specially appointed committee of the Bar to address this issue. They will face questions of structure, budget, adequacy of staff, reorganization of volunteer effort, and needed changes in procedure and standards. They will have to find a way to deal with the increased costs that changes will inevitably impose. The Bar has no greater priority than the maintenance of a disciplinary system, responsive, fair, and efficient. I am confident that the Bar will respond in that spirit of attention to public duty it has traditionally displayed. □

Is Your Lawyer Fit To Serve You?

Lest we become a little too smug dwelling on the shortcomings of our medical brethren, DELAWARE LAWYER has asked Januar D. Bove, Jr., a leader of the Delaware Bar and a former Attorney General, to air his concerns about lawyer competence. The rise of malpractice litigation against ***all*** *professions suggests that no learned discipline has a monopoly on virtue—or on human frailty either. Jan's article confirms the existence of* ***our*** *problems, and forthrightly urges we embrace correctives—now.*

It is a chilling throught to the intelligent layman that his lawyer may be a covert drunk, dilatory and ineffectual, an emotional cripple, a dilettante of the law who dabbles in highly specialized regions beyond his advertised competence, or, saddest of all, a bright, dedicated young lawyer in sole practice, doing his best without the guidance of more seasoned practitioners—on the job training at its most sinister.

JANUAR D. BOVE, JR.

Januar D. Bove, Jr., a graduate of the University of Delaware, and of Harvard Law School, served as the Attorney General of Delaware from 1959 to 1962. He is a senior member of the distinguished Wilmington firm of Connolly, Bove, Lodge & Hutz.

Increasing numbers of attorneys and increasingly complex litigation (and more and more of it) have raised serious questions about lawyer competence. The American Bar Association's Commission on Evaluation of Professional Standards, recognizing this, prescribes:

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

In Delaware, the Rules Committee of the Supreme Court and a special subcommittee have made recommendations to the Court in the form of rules governing performance deficiency. These recommendations address the Court's problems with practitioners who continually violate or disregard communications, orders, and rules of the Court or whose performance is grossly below professional standards in the preparation of briefs and argument. Disciplinary problems have been otherwise left to the Court's Board of Professional Responsibility.

Just one of many problems of lawyer competence arises from the physical and emotional aspects of alcohol and drug abuse. The Delaware Bar Association has a standing committee on Alcohol Abuse. The ABA Task Force has urged the use of this type of committee as well as a disciplinary agency such as the Board of Responsibility. The Delaware Rules Committee has recommended that this responsibility remain with the Bar Association, but that the program should be expanded to include drug abuse and physical and emotional problems. **The chairman of the**

Alcohol Abuse Committee reports that his Committee receives few referrals and that there are probably members of the Bar who should be, but are not, referred.

Other lawyer competence subjects urgently competing for our attention include Continuing Legal Education, Specialization, Peer Review and Mentor programs. A poll of lawyers by the *ABA Journal* concerning the likely effectiveness of certain of these measures produced the following results:

	Extremely Effective %	Somewhat Effective %	Not at all Effective %	Not Sure %
1. Mandatory continuing legal education	50	42	8	.5 or less
2. Specialization recognition and certification	35	51	12	2
3. Strong system of peer review	18	47	31	4

Improving lawyer competence is difficult. It involves questions of character, capability, knowledge, skill and judgment. **Although a substantial effort has been devoted to the improvement of trial techniques, other aspects of the practice of law have been virtually ignored.**

A discussion draft of a Model Peer Review System by the joint American Law Institute ("ALI")—ABA Committee on Continuing Professional Education recites:

"Legal competence is measured by the extent to which an attorney (1) is specifically knowledgeable about the fields of law in which he or she practices, (2) performs the techniques of such practice with skill, (3) manages such practice efficiently, (4) identifies issues beyond his or her competence relevant to the matter undertaken, bringing these to the client's attention, (5) properly prepares and carries through the matter undertaken, and (6) is intellectually, emotionally and physically capable. Legal competence is measured by the extent to which an attorney fails to maintain these qualities." This test of lawyer competence is becoming widely accepted.

Perhaps the most direct route to lawyer competence is Continuing Legal Education ("CLE") presenting various legal subjects from the pragmatic view of experienced practitioners. The Delaware Bar Association, in cooperation with The Delaware Law School, has an effective program of CLE. **The principal failure of this program may be that it is optional.**

Only eleven states now have mandatory programs requiring lawyers to take a prescribed number of hours of CLE. Such programs generally require fifteen hours of study per year. The ABA Task Force on Professional Competence has been reluctant to recommend mandatory CLE programs and has suggested instead further experimentation. But even in mandatory programs the emphasis has been more on attendance rather than results. An ALI-ABA group's Model for Continuing Legal Education suggests voluntary or even mandatory testing of the attorneys attending their programs.

In states with mandatory CLE, attorneys must spend a given number of hours at legal seminars each year. Since lawyers already devote an average of 24.5 hours a year to CLE, mandatory attendance should not constitute an undue burden, but critics contend that only a few lawyers are incompetent and only a few benefit from a program incumbent on all. They argue further that states with mandatory programs have not established standards to assure that lawyers who need the program will actually benefit. This division of opinion exists in Delaware. A subcommittee of the Delaware Rules Committee recommended a mandatory system of CLE, and suggested 30 hours of study in every two year period and the passing of pass/fail tests, with credits for out-of-state CLE courses approved by the Bar Association. The Rules Committee, chary of recommending a mandatory program at this time, disagreed. Further study of the effectiveness of such programs was needed, it seems, but as a first step, more encouragement should be given *voluntary* participation in existing CLE programs.

Another aspect of lawyer competency, specialization certification, is currently attracting attention as a result of newly relaxed standards for lawyer advertising. Regulated specialization may help to inform the public of the qualifications of lawyers who profess skill in specialized legal disciplines.

Certification plans have generally not received wide support among members of the Bar. Nevertheless, as in other professions, legal specialization is a fact of life, growing rapidly in response to the increasing complexity of practice. **The choice is not between specialization and the denial of its very real existence, but between orderly regulation and rank unchecked growth.**

In January, 1980, thirty-four states had some form of designation or certification specialization plan. They follow no standard format, but the ABA Committee on Specialization has recommended a model plan. A Delaware Bar Assocaition committee on specialization has been studying plans in other states. Recognizing that some lawyers may represent themselves in their advertising as specialists and that other lawyers who do not advertise may be placed at consequent disadvantage, the Rules Committee suggests that if lawyers are to represent themselves as specialists, certification by some arm of the Court is in order. The Committee, nothing if not orthodox in committee practice, suggested that the issue required "further study".

The subcommittee of the Rules Committee had recommended that a lawyer should not represent himself as a specialist in any field unless (1) he has engaged in the practice of law for five years and has completed a requirement of eighteen hours in the field of specialty either in law school or in formal post-admission study or (2) a substantial portion of his practice has been in that specialty for at least five years. The subcommittee suggests as specialties administrative law (including workmen's compensation), civil trials, criminal law, corporate law, bankruptcy (including debtor/creditor relationships), family law, patents, trademarks and copyrights, real estate, taxation, wills, estates, and estate planning. It recommends a Court-appointed panel to administer the program. The adoption of such a

plan may require amendment of the Code of Professional Responsibility.

Peer Review, while very controversial, provides a method of identifying and assisting the incompetent attorney revealed by poor performance in practice. The Model Peer Review System report of the ALI-ABA Committee proposes three systems, Referral Peer Review, Disciplinary Peer Review, and Law Practice Peer Review undertaken voluntarily by an attorney or a law firm in order to attempt to achieve the optimum performance level.

The subcommittee of the Rules Committee recommended, as a pilot project, that the Court appoint a Peer Review Panel to consider matters of lawyer competency. A rule has been drafted and is under consideration. The preamble recites that it is a function of Court and Bar to improve professional responsibility, that grievance procedures are not the way to correct attorneys, and that the rule is designed, primarily in a spirit of collegiality, to commit a peer group to the aid of lawyers in need of improvement.

The proposed rule includes review by a panel with right of appeal to the full Board. The measure of legal competence is that recommended by the ABA Committee. The stated purposes are the establishment of standards of competence, definition of inadequate performance, and a remedial program to improve competence. **Provision is made for referral to the Board of Professional Responsibility of attorneys beyond assistance or charged with substantial professional misconduct apart from incompetence.** Referrals may be made by judges, lawyers, attorney organizations, and laymen. The Board would have the authority, *sua sponte*, to summon attorneys.

The Board would be able to recommend remedial action, to conduct remedial programs, and to monitor the progress of an attorney. The referred attorney might participate in devising the remedial program, and he might at any time withdraw from participation. After such withdrawal, the Board would decide whether remedial action was in order, the attorney would be notified in writing, and, if necessary, referred to the Board of Professional Responsibility. Failure to cooperate would result in referral of the matter to the Chief Justice.

In the opinion of some members of the Bar, legal education, passing a bar examination, and a six month clerkship do not necessarily qualify an attorney to practice. There are programs to ease the transition from admission to the Bar to the truly professional conduct of practice. These programs are denominated Bridge-the-Gap courses or Mentorship, Buddy or, "SCOPE" (Seek Counsel On Professional Experience) programs. Most states have adopted some such program and law firms and agencies assign new associates to senior associates who monitor their practice and make themselves available for informal counseling. The ABA Task Force recognizes that the ALI-ABA Committee is still evaluating Bridge-the-Gap courses and that, while the results of that study are not complete, such courses serve a distinct and important purpose by stressing "how to do it" information. The Task Force encourages state authorities to adopt mandatory Bridge-the-Gap courses. In the past few years a number of state bar associations have adopted other programs in which inexperienced lawyers can seek help and guidance from experienced lawyers.

Each year sixty to eighty new lawyers enter the profession in Delaware. Although some of them in large firms receive training from their seniors, many practice immediately without guidance. The subcommittee has recommended that the Bar Association establish a voluntary Mentor system, but the Committee to which the subcommittee reports has expressed doubts about a voluntary program.

Throughout the country, Bench and Bar have initiated a variety of competence programs. Courts have acknowledged their responsibility to the public to see that those licensed to practice law are competent and remain so. Once a responsibility is acknowledged, it must be conscientiously borne. I submit that this must be our first order of business. I expect that the topics discussed here will be the subject of very serious further discussion and—I hope—*prompt action* by the Bench and Bar of Delaware. □

Recent Developments In Delaware Constitutional Law

A Response to Governor du Pont

In a speech to the Rotary Club of Wilmington on March 10, 1983, Governor Pierre S. du Pont, IV asserted that three recent decisions* of the Delaware Supreme Court constitute ". . . a trend toward judicial narrowing of legislative and executive authority." However, his real concern is clearly the effect of the decisions on *executive* authority, rather than with any collateral impact on the powers of the General Assembly.

**Opinion of the Justices,* Del. Supr., 405 A.2d 694 (1979) (the "Pocket Veto Opinion"); *State ex rel. Gebelein v. Killen,* Del. Supr., 454 A.2d 737 (1982) (the "Recess Appointment Decision"); and *Perry v. Decker,* Del. Supr., 457 A.2d 357 (1983) (the "Line Item Veto Decision").

RICHARD E. POOLE
JOHN E. JAMES

Our analysis causes us to disagree with the Governor. The Delaware Supreme Court is appropriately sensitive to the limitations of its role as the third, co-equal branch of government under the State Constitution. Each of the three decisions supports this conclusion.

I. The Pocket Veto Opinion

In 1969, Article II, Section 4, of the Delaware Constitution was amended to provide that each session of the legislature ends on June 30 ". . . unless . . . recalled by . . . the mutual call of the presiding officers of both Houses." The Constitution had previously limited legislative sessions to no more than 90 days in odd years and 30 days in even years.

The 1969 amendment has had two principal consequences. First, June has become a hectic month in Dover, as many bills are pressed for passage before the end-of-the-month deadline. Second, the General Assembly has obtained a new power to keep itself in session for almost two full years at a time.

In his Rotary speech Governor du Pont described the difficulties he faces each July in being saddled "... with some 200 or so bills to consider." He did not advocate amending Article II, Section 4, to remove the June 30 cut-off so as to permit legislation to flow more evenly throughout the year. Nor did he recommend that Article III, Section 18, be amended to give him more than 10 days to consider each bill. Instead, Governor du Pont misdirected his criticism at the Supreme Court's 1979 Pocket Veto Opinion. He asserted that the Court erred in holding that, as he told his audience, ". . . the Legislature never adjourns during its two-year lifetime, which means that the pocket veto power has no practical significance."

The "pocket veto" power arises from the provision in Article III, Section 18, of the Delaware Constitution that after the "final adjournment" of the General Assembly, the Governor has 30 days to approve each bill affirmatively; every bill not so approved fails to become law. At all other times the Governor must specifically veto each bill within 10 days if he disapproves; that is, before the "final adjournment" of the General Assembly, the Governor's inaction results in a bill becoming a law.

The Supreme Court obviously sympathized with the strain on the Governor during 10 days each July. The Court observed in its 1979 opinion that "... no matter that has come before us within the last year has occupied more time and received more serious attention ..." It must be burdensome for the Governor to be required to consider 200 bills in less than two weeks every summer, and to write veto messages for every one he disapproves. The pressure on the Governor would be eased considerably if he had 30 days to consider and to sign those bills he approves, and to let all the others fail by simply leaving them unsigned, that is, by "putting them in his pocket."

Yet Governor du Pont did not suggest in his Rotary speech that the Supreme Court could have provided any relief in odd years. The biennial duration of each General Assembly means that in odd years any adjournment after June 30 will not be "final;" instead, there can be only a

temporary recess until the second Tuesday of January of the following calendar year, at the latest. *Opinion of the Justices,* Del. Supr., 175 A.2d 543 (1961). During odd years particularly, then, the Governor and his staff must pay close attention to legislative activities in May and June so as to be prepared to act expeditiously in July.

The Governor's complaint against the Court has another, even more fundamental, flaw. The Supreme Court could not have decreed that a "final adjournment" of the General Assembly must take place on June 30 in every even year. To have done so would have been in disregard of the prerogative guaranteed to the legislature by Article II, Section 4, to extend itself beyond the last day of June. Governor du Pont's speech made it plain that ". . . the legislative branch of government should be concerned about the judicial branch fishing about in their internal procedures; it is neither good government, nor good politics, nor constitutionally proper." It follows that if the practice of the presiding officers of the General Assembly—to recall each session followed by a recess to the call of the chair—has resulted in an emasculation of the Governor's "pocket veto" powers, the Governor has only two remedies. He can seek a Constitutional amendment of the 1969 version of Article II, Section 4. Or the Governor can try to presuade the legislature that they should voluntarily adjourn *sine die* on June 30 in even years. In the event he is successful with either alternative, there is one possible saving grace. To the extent that the legislature chooses actually to conduct business after June 30, the demands on the Governor to consider as large a number of bills all at once could be somewhat mitigated.

II. The Recess Appointment Decision

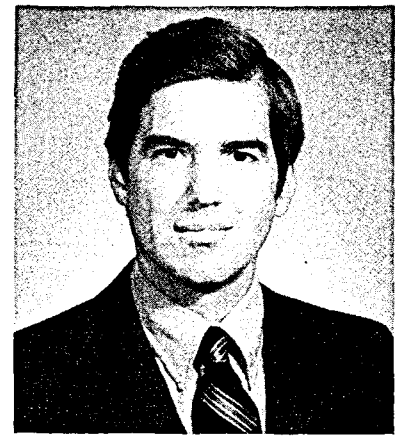
Over 85 years ago, the Delaware Constitution of 1897, Article XV, Section 5, provided that "all public officers shall hold their respective offices until their successors shall be duly qualified . . ." The purpose of this provision was to establish one procedure by which public offices will be occupied while proposed successors are under consideration. Today this holdover provision continues unchanged.

Another provision in the 1897 Constitution, Article III, Section 9, is designed to permit public offices to be filled when the Senate is not in session. The Governor may make appointments ". . . during the recess of the Senate. . .," but such appointments expire ". . . at the end of the next session of the Senate." While the operative language of the Governor's recess appointment power likewise has never varied since 1897, modern developments have reduced its importance considerably.

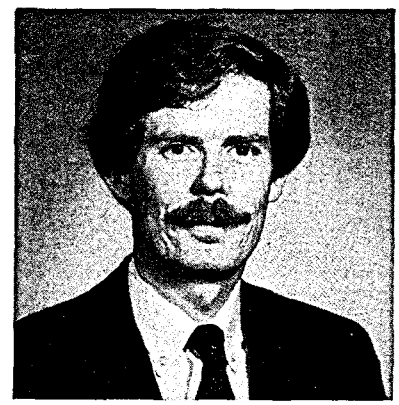
Governor du Pont in his Rotary speech criticized last year's Recess Appointment Decision because it ". . . reversed eighty-six years of accepted executive . . . practice in order to strike down a large portion of the governor's interim appointment power." Justice Horsey, in a similar vein, dissented from ". . . a result which does violence to the doctrine of separation of powers by weakening the Governor's ability to perform his executive function." Justice Quillen, joined by the other three justices, held that the holdover provision of the Delaware Constitution is nevertheless controlling.

Oddly enough, this decision may not warrant the attention it has generated. If the Supreme Court had decided in favor of the Governor's recess appointment prerogative notwithstanding a holdover incumbency, the Governor would still not possess very much of the interim appointive power of his early Twentieth Century predecessors. In those days the Senate was seldom in session. Recently, particularly after the 1969 amendment to Article II, Section 4, allowing for the legislative recall of its session, the Senate is seldom in "recess" in the probable Constitutional meaning of that term, that is, "being between sessions." The Governor can therefore now count on just one recess of two months every two years for purposes of the exercise of his temporary appointment powers. It is only every other year between the November election day and the convening of the new General Assembly the following January when the legislature lacks the Constitutional power to keep itself in session or to call itself back. *Opinion of the Justices,* Del. Supr., 330 A.2d 764 (1974). The additional question arises whether it would be good policy in any event to expand executive appointment powers during such interregna when at least every eighth year the Delaware Governor is a lame duck because of the Constitutional limitation to two terms.

It is therefore clear that the principal impediment to the appointive process is the Constitutional holdover provision, not the Supreme Court. When incumbents desired by neither the executive nor the legislative branch continue in office during deadlocks over the choice of their successors, the Senate, as well as the Governor, is frustrated in its public duty. A recent Constitutional amendment to article IV,



Richard E. Poole is a partner in the firm of Potter Anderson & Corroon. He received his undergraduate education at Swarthmore College (B.A., 1963), where he majored in political science, and the University of St. Andrews, St. Andrews, Scotland. Mr. Poole attended law school at the University of Chicago (J.D., 1966). Upon graduation from law school, Mr. Poole clerked for now Chief Judge Collins J. Seitz of the Third Circuit Court of Appeals.



John E. James is an associate in the firm of Potter Anderson & Corroon. He is a Phi Beta Kappa graduate of Davidson College (A.B., 1972), where he majored in history, and he has received graduate degrees from Brown University (M.A., 1973) and the University of North Carolina (J.D., 1979). Mr. James is a member of the Corporation Law and Litigation sections of the Delaware State Bar Association.

Section 3, provides for a limited holdover period of 60 days for Constitutional judges. If a similar Constitutional amendment to Article XV, Section 5, were adopted, changing the indefinite holdover period to one of a limited fixed duration, there would be improved accountability of elected and appointed officials alike. A possible concern is that such an amendment to the holdover provision might materially increase the numbers and durations of absolute vacancies. But a limitation on the holdover period would more likely lead to better staffing by eliminating the incentive for both executive and legislative inaction that exists under the current unrestricted holdover provision.

III. The Line Item Veto Decision

The Delaware Constitution of 1897 in Article III, Section 18, gives the Governor a "line item veto" power with respect to "any bill making appropriations of money." On July 21, 1982, Governor du Pont purported to exercise a line item veto over the implementing appropriation of $135,000 included as a part of the State's new law governing the offense of driving under the influence of alcohol or other drugs. The Governor acted to reduce the appropriation to $20,000 to comply with the overall spending limitation of 98% of the State's estimated revenue, as mandated by Article VIII, Section 6, of the Delaware Constitution.

In its Line Item Veto Decision earlier this year, the Supreme Court ruled that the legislation ". . . in its entirety failed of enactment." Governor du Pont in his Rotary speech condemned the Court on the grounds that it had thereby ". . . eroded the line item veto power of the executive branch and nullified a public policy decision of the other two branches when it need not have done so."

However, even the State's argument in this case did not unequivocally favor the Governor's attempted line item veto. The questions certified from the lower courts assumed ". . . *arguendo* that the Governor has no power to reduce the amount of an appropriation under Article III, Section 18 . . ." In this context it is hardly surprising that the Surpreme Court went on to reject the notion that the Governor's action could be sustained as a line item veto. Having been asked to assume that the purported reduction was invalid, the Court was unlikely to hold that the lump sum of $135,000 constructively amounted to an aggregation of smaller, divisible appropriations which would then be stricken by the Governor until an item or items costing just $20,000 remained. Indeed, later in his speech Governor du Pont conceded that the "governor's veto power" had been "improperly used on one section."

The Supreme Court's second task was to determine the effect of the line item veto upon the drunk-driving legislation as a whole. The State advanced three mutually exclusive positions. The first was its argument on behalf of the Governor's partial veto. If deemed proper, the veto would have resulted in substantive legislation financed with a $20,000 appropriation. Second, the State suggested that ". . . the Governor's purported reduction was a nullity and of no effect whatsoever." If accepted, this contention would have meant that substantive legislation had been enacted to be financed with the full $135,000 appropriation. Third, the State asserted that ". . . the invalid appropriation was severable from the remainder of the bill." If adopted, this approach would have required the Division of Motor Vehicles to administer the new law without any of the intended funding.

Governor du Pont found fault with the Supreme Court for rejecting both the second and third alternatives that ". . . the entire legislation could become law . . . as if the Governor had in fact not acted at all . . .," or that ". . . when a governor's veto power is improperly used on one section," the Court should have ". . . saved the remainder of the statute." The Supreme Court's reasoning is equally fatal to both arguments, the one premised on the "nullity" of the executive action and the other on "severability" of the legislative action.

The Court cited *Opinion of the Justices*, Del. Supr., 210 A.2d 852, 855 (1965), for the basic Constitutional principle that ". . . the Governor and the Houses of the General Assembly are a legislative team . . ." In that 1965 *Opinion* the Court observed that ". . . to conclude that since the veto of the portion is a nullity the Governor's approval of the balance must be held to include the portion rejected by the abortive veto would be to ascribe to the Governor an approval he has demonstrated he did not have." *Id.* To allow a severance ". . . would permit the Governor to cause a law to be enacted in which the Senate and House have not concurred." *Id.* The 1965 *Opinion* was followed in *Opinion of the Justices*, Del. Supr., 306 A.2d 720 (1973). In short, as so decided twice before in the last 20 years, the Supreme Court in the Line Item Veto case was not permitted under the Constitution to speculate whether the Governor would have been satisfied with the new drunk-driving legislation fully funded with $135,000, or whether the General Assembly would have been content with a totally unfunded new law.

* * *

Governor du Pont concluded that "these three cases suggest . . . an accelerating trend in our Court's decisions, away from deference to the policy roles played by co-equal branches of government, and towards a technically-oriented jurisprudence, that needlessly restricts the authority of the other branches to function." To the contrary, the 1979 Pocket Veto Opinion shows the Court's regard for the control of the other two branches over their own political processes. Last year's Recess Appointment Decision represents the Court's refusal to mediate political issues between the two branches, arising in that case from the indefinite holdover provision of the Delaware Constitution. This year's line Item Veto Opinion underscores the Supreme Court's determination not to second guess the clearly-manifested judgments of either the executive or the legislative branch.

Although we have reached different conclusions on the merits of three of the Court's most recent decisions, we agree with Governor du Point that ". . . the tradition of excellence and integrity advanced by the men and women who serve on Delaware courts" does not preclude continually examining ". . . the relationship between the functions of our co-equal branches of government . . ." Indeed, we commend the Governor for calling attention to some serious problems in State Government. We hope that our response will shift public concern from the Court to the Constitution as the principal source of these problems. Only then is there likely to be a resolution of such problems by Constitutional amendment, a process properly outside the Court's jurisdiction. □

Guilty But Insane

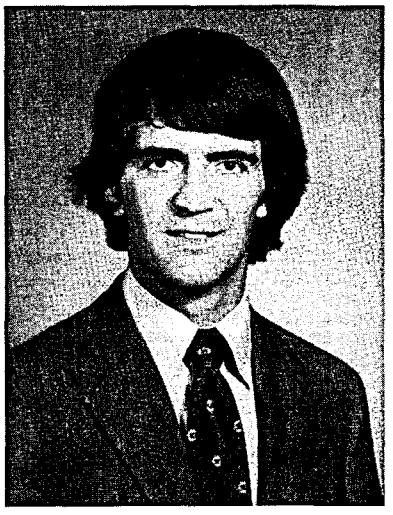
EUGENE J. MAURER, JR.

As Eugene J. Maurer, Jr. tells us in the following legislative critique, the acquittal of President Reagan's would-be assassin, Mr. Hinckley, has occasioned a degree of resentment, especially among our elected representatives. Result: Delaware has a new law aimed at thwarting the evasion of punishment by recourse to claims of insanity. Gene's article suggests that we may have exchanged an imaginary peril for an actual one—the old law wasn't much abused and the new one may be vexing to apply.

The "Hinckley" insanity acquittal has prompted several State legislatures, including that of Delaware, to push through bills abolishing the traditional defense of "not guilty by reason of insanity". In response to a widespread belief, reinforced by a highly publicized verdict, that the insanity defense in criminal trials is outmoded and regularly abused by defendants, the Delaware General Assembly enacted into law, effective July 2, 1982, its version of "Guilty But Mentally Ill".

Before the enactment in 1973 of the Delaware Criminal Code, the "Insanity Defense" in Delaware was defined as follows: "To exempt a person from responsibility for crime, the insanity must be of such a character as either to deprive him of the capacity to distinguish between right and wrong in respect to the particular act committed, or to deprive him of sufficient will to choose whether to do the act or refrain from it." *State v. Jack*, Del. Supr., 58A 833 (1903). See also, *Longaria v. State*, Del. Supr., 168 A.2d 675 (1962). This is essentially the test first applied in M'Naughton's case, *R. v. M'Naughton*, (1843) 10 CLLF 200, Eng. Rep. 718, coupled with the "irresistible impulse" rule.

The passage of the Code in 1973 carried forward the same principles. Under 11 *Del. C.* §401(a), it was an affirmative defense that: "At the time of the conduct charged, as a result of mental illness or mental defect, the accused lacked substantial capacity to appreciate the wrongfulness of his conduct or lacked sufficient will power to choose whether to do the act or refrain from doing it."



Gene Maurer is active in representing defendants in criminal proceedings. He graduated from Temple University Law School in 1975 and was admitted to the Delaware Bar that year. He has served as a Public Defender. Gene is an adjunct professor teaching at the Delaware Law School. He is also Chairman of the Board of Directors of the Greater Wilmington unit of the American Cancer Society. Gene's particular interest, constitutional law, is reflected in this, his first article for DELAWARE LAWYER.

As the commentary to this section noted, "The first section of §401's definition of insanity is not very controversial." There has been unanimity among courts and commentators that a person unable to recognize that his conduct is wrong should not be punished.

The second section of §401(a) covered the person who knew what he was doing, knew it was wrong, but was unable because of mental illness or defect to restrain himself. There has always been some contrariety of opinion over "irresistible impulse" as a defense, but it nonetheless had been a part of the Delaware common law, and it was retained in the 1973 statute.

Both "mental illness" and "mental defect" were defined, (11 *Del. C.* §222). The proponent had to show that the illness or defect was recognized as such "by a substantial part of the medical profession." The defendant bore the further burden of establishing his defense by a preponderance of the evidence.

The consequences of a verdict of "not guilty by reason of insanity" were set out in 11 *Del. C.* §403. Upon motion by the State (at the Attorney General's discretion), the Court was required to commit the acquitted defendant to the Delaware State Hospital. There the defendant remained until the Superior Court in the county where the defendant was tried determined that "the public safety would not be endangered by his release." The Court was required to reconsider detention after one year, and at any time thereafter on motion

by the defendant or when advised by the Delaware State Hospital. The committed defendant was free to petition the Court at *any* time, and was entitled to release upon a showing that he was "not likely to commit serious harm to others or to property." *In Re Dio Lewis*, 402 A.2d 1115 (Del. Supr., 1979). While the burden was on the defendant to make such a showing, once he did so, he was entitled to release outright, and the Court retained no supervisory or probationary authority over him.

The recent amendment of Title 11 has drastically modified the traditional approach to mental illness as a defense. It has also created some serious procedural ambiguities.

The heading of 11 *Del. C.* §401 has been redesignated "Mental Illness or Psychiatric Disorder." A defendant who "lacks substantial capacity to appreciate the wrongfulness of his conduct" because of mental illness or defect may still defend a criminal charge, and if he proves by a preponderance of the evidence his insanity and the causal connection to his actions, he can still be found "not guilty by reason of insanity", subject to the commitment and release procedures described above.

The object of the new law is to abolish "irresistible impulse" as a defense. Henceforth, if the trier of fact determines that at the time of the conduct charged, the defendant was suffering from a "psychiatric disorder" which left the defendant unable "to choose whether to do the act or refrain from doing it", he will return a verdict of guilty but mentally ill. Such a verdict is also warranted where a defendant suffered from a psychiatric disorder which "substantially disturbed such person's thinking, feeling or behavior." *Del. C.* §401(b). A defendant who because of psychiatric disorder lacks sufficient will power to choose between a wicked act and abstention, will no longer have resort to the "defense" of insanity. He will now be limited to establishing that his *guilt* arises from mental illness.

The subsection now appears both to give and to take away: The term "psychiatric disorder" seems to allow a broader range of emotional impairments as grounds for ascribing guilt to mental illness. The effect of the disability need not be so severe; it is now necessary only that the psychiatric disorder substantially disturb thinking, feeling or behavior. The new law arguably extends "guilty but mentally ill" to many offenders who in the past have been adjudged guilty or not guilty and nothing else. Nonetheless, the law deprives a broad range of mentally ill offenders of the advantages of traditional examination of their disorders. For example, in a recent Superior Court trial, *State v. Terence Figurell*, the defendant had been charged with multiple counts of reckless endangering and possession of a deadly weapon during the commission of a felony, arising out of a shooting spree. The defendant, a former Wilmington police officer and Vietnam war veteran, defended on the ground that his post traumatic stress disorder made him unable to choose between acting and refraining. The defendant was found not guilty by reason of insanity and, after establishing the present absence of the illness and the absence of any threat to the community, was released from the State Hospital after a short stay. Such a defense today would not be available, and a verdict of guilty but mentally ill would send the defendant to jail for at least five years minus time spent in the State Hospital.

A lurking problem with this new legislation arises from the procedures it establishes for determining whether a defendant is guilty but mentally ill. In order to illustrate, it is necessary to recite new 11 *Del. C.* §408(a) in its entirety:

"(a) Where a defendant's defense is based upon allegations which, if true would be grounds for a verdict of 'guilty, but mentally ill' or the defendant desires to enter a plea to that effect, no finding of 'guilty, but mentally ill' shall be rendered until the trier of fact has examined all appropriate reports (including the presentence investigation); has held a hearing on the sole issue of the defendant's mental illness, at which either party may present evidence; and is satisfied that the defendant was in fact mentally ill at the time of the offense to which the plea is entered. Where the trier of fact, after such hearing, is not satisfied that the defendant was mentally ill at the time of the offense, or determines that the facts do not support a 'guilty but mentally ill' plea, he shall strike such plea, or permit such plea to be withdrawn by the defendant. A defendant whose plea is not accepted by the trier of fact shall be entitled to a jury trial, except that if a defendant subsequently waives his right to a jury trial, the judge who presided at the hearing on mental illness shall not preside at the trial."

There would appear to be no problem where the defendant seeks to enter a plea of guilty but mentally ill. The judge will presumably be the trier of fact, will examine all of the reports, including a presentence investigation, and will conduct the hearing. If the judge is convinced of the defendant's mental illness, he will make a finding to that effect and will sentence him. If, however, the judge refuses to make such a finding, the plea is stricken and the defendant is entitled to a jury trial. The statute *seems* to permit the defendant to assert the defense of "guilty but mentally ill" again. However, the "trier of fact" must then examine all the reports as well as a presentence investigation which will not even have been completed if a defendant has not plead guilty. The statute is not clear about who has the burden of proof under these circumstances and what that burden is. Another question—this time constitutional—would arise if a jury rejected the defendant's "guilty but mentally ill" claim and then returned a straight guilty verdict. Suffice it to say that there are significant procedural problems which do not appear to have been carefully analyzed in the legislative rush to respond to the Hinckley verdict.

The treatment of a "guilty but mentally ill" offender has not been similarly left to the imagination. Such a defendant may be sentenced to any term of imprisonment to which he could have been sentenced had he been found guilty, 11 *Del. C.* §408(d). However, the defendant, while remaining in the "custody" of the Department of Corrections, shall be confined to the Delaware State Hospital for evaluation and treatment. The hospital may discharge the defendant and return him to the Department of Corrections whenever that facility believes that it is "in the best interest of the defendant". It should be noted here that there are no specific statutory provisions allowing for judicial review of this decision. The statute does provide that "where the Court finds that the offender, before completing his sentence, no longer needs nor could benefit from treatment for his mental illness, the

offender shall be remanded to the Department of Corrections." Essentially, then, upon such a verdict, the defendant will be taken to the Delaware State Hospital until such time as treatment is no longer "in his best interest," at which time he will be sent to jail and treated just like any other convicted defendant who seeks release. He will receive a credit towards his sentence for time spent at the Delaware State Hospital.

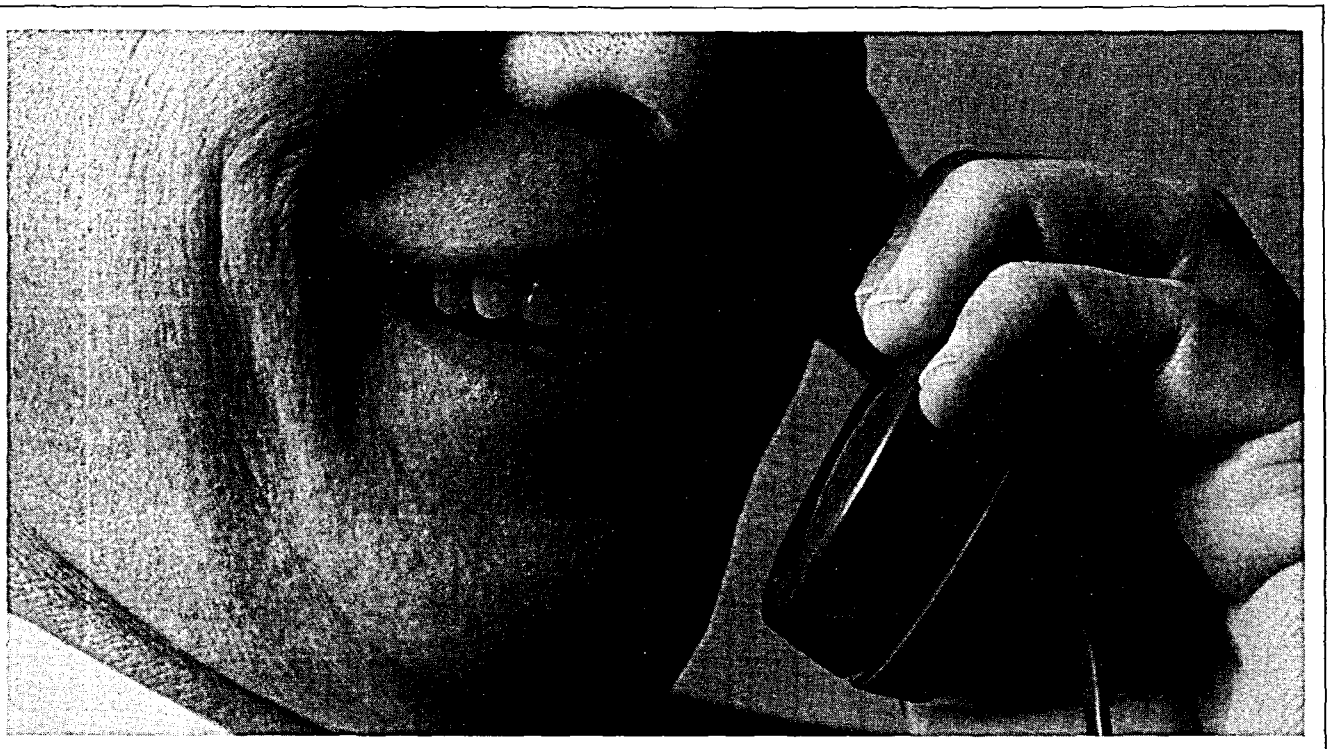
Other provisions in the statute relating to treatment of offenders deal with probation and parole. Essentially, they require consultation with the Delaware State Hospital by the Parole Board before releasing an offender, and close supervision with counseling thereafter. When a court decides on probation, upon recommendation by the Attorney General, treatment must be a condition.

Finally, 11 *Del. C.* §403(c) provides a mechanism whereby a patient committed upon a finding of not guilty by reason of insanity, or of incompetency to stand trial or to be sentenced, may obtain partial release for certain outside programs at the specific designation of the Hospital Director.

Delaware is one of several jurisdictions which have passed similar statutes. In Michigan, a pioneer in this approach, there is evidence that the law is ineffectual: one study suggests that seventy-five percent (75%) of the convicts went straight to prison and received no treatment. Idaho has gone so far as to eliminate the defense almost completely.

Whatever the experience in other jurisdictions, the traditional insanity defense has not been of much help to defendants in Delaware. Juries have been skeptical of the defense, rejecting the claim in numerous Superior Court trials. Almost all verdicts of not guilty by reason of mental illness have been rendered by judges sitting without juries, almost always in cases where the medical experts' testimony has agreed. Until the recent verdict in the *Figurell* case, there has not been a New Castle County jury verdict of not guilty by reason of insanity for at least nine years.

How the new law will work cannot be foretold: there has been only one case arising under it. Specific procedures and jury instructions are now being worked out by the Superior Court and will soon be promulgated. The wisdom of the legislation must be tested by experience. In the meantime, the courts will strive to construe a statute enacted in hasty indignations, rich in uncertain implication, tantalizingly incomplete in substantive content. □



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Examples of Broker Fee Savings*

Stock purchase	Full broker's fee	Bank of Delaware discount fee	Dollar savings	Percent savings
200 shares at $35	$136	$ 70	$ 66	49%
500 shares at $50	$370	$135	$235	64%
2000 shares at $9	$420	$107	$313	75%

*Survey conducted March 1983

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Health Care Costs and the Legal Profession

W. MICHAEL IRELAND

For ten years, health costs have been rising faster than the rate of inflation. The tremendous growth in the health care industry has had a two-sided effect. The industry now employs directly and indirectly over 12 million people (just imagine unemployment rates without them) and provides the world's best health care. The flip side is cost. In 1965 we spent $42 billion on health care. By 1982, the bill had risen to $300 billion, or 10% of our gross national product.

Many critics suggest that no sector of the economy can continue to afford this rate of growth and that we must restrict it. Other nations have already done so. The Canadian health care system, under strict control since 1962, is less expensive than ours: roughly 8% of Canada's GNP is for health. The human costs are waiting lists for hospital admissions. In South Saskatchewan Hospital in Regina, "urgent" candidates for open heart surgey may languish for six months. Situations like that are rare in this country. During the 1980s and 90s, we will have to decide between continued growth and restriction. As attorneys, we shall play four major roles in these decisions.

- as users of the health care system;
- as active community members, making our views known;
- as employers, financing health care through insurance; and
- as attorneys, advising clients and legislators, and in litigation.

I should like to talk about the fourth role:

Analysts have identified many reasons for the dramatic rise in health care costs. The principal ones are lack of competition, Federal intervention, modern technology, including medical specialization and defensive medicine, and unhealthy lifestyles.

Lack of Competition

In health care, general economic theory has been set on its ear. We are taught in Economics 101 that supply rises to meet demand; but in health care, demand has historically risen to meet supply. As new hospital beds are built, they are filled. Perhaps the best example of this topsy-turvy economic behavior is a federal medical school grant program begun in the early 1970s. The government, theorizing that lack of competition among physicians was a major cause of rising costs, began giving medical schools grants based upon enrollment. The incentive was not ignored. Enrollment increased and a greater supply of physicians followed. Everyone but the most optimistic bureaucrat agrees that this has *added* to health care inflation, instead of curbing it.

W. Michael Ireland, Senior Vice President of Blue Cross & Blue Shield of Delaware, Incorporated, graduated in 1971 from the School of Foreign Service at Georgetown University and in 1974 from the University of Detroit Law School. Formerly an Assistant to General Counsel at Blue Cross Blue Shield of Michigan, he joined Blue Cross Blue Shield of Delaware as Legal Counsel in 1976, moved into corporate management in 1980 as Vice President of Corporate Relations, and became Senior Vice President in June, 1981. Mike is also a member of the Board of Directors of the Delaware Safety Council.

Mike is more than a writing contributor to DELAWARE LAWYER. Over a year ago Mike, in his capacity as Chairman of the Delaware Bar Association Publications Committee, was working with Ed Golin of Gauge Corporation in developing a sophisticated newsletter. Along came Harold Schmittinger—President of our sponsor, Delaware Bar Foundation—and suggested an even more ambitious project, the formation of what is now DELAWARE LAWYER.

On the hospital supply side (perhaps because of the failure of the medical school grant program), the government took the opposite approach and enacted health planning laws to restrict growth in the supply of hospital beds and other capital expenditures. The results have been favorable, but pressures to move away from regulation are growing.

By and large, the nation's hospitals are old. They are wearing out and need to be replaced. Arthur Henkel of Kidder Peabody estimates that hospitals will need $193 billion just to maintain current capacity. Delaware is not immune: in 1983, health care costs will rise $9 million for expansion and renovations alone. In 1984, another $9 million will be added over and above "normal" increases. Between 1985 and 1988, over $50 million will be added to Delaware health care bills.

Cost increases and the raging debate between capacity control and competition have raised antitrust concerns. Since the mid 1970s, the U.S. Supreme Court has stripped away many of the health care industry's treasured antitrust exemptions, from the "learned profession" exemption, through the narrowing of McCarran Ferguson "business of insurance" exemption. Heavy legal expenses have become a

resultant part of our health care bill. The Supreme Court has also ruled that: the operation of a hospital can be traced to interstate competition, that competition does exist within the industry, and that concerted action of a professional society which results in *savings* is still concerted action. Decisions of this type have opened the courthouse doors to public and private litigants. The publicity associated with health care cost has whetted the appetites of antitrust enforcers, and costly investigations abound. You may advise a client to proceed with a cost saving device, and a year later learn that the FTC is about to investigate his innovation.

There are private actions, too. Health maintenance organizations and insurers complain of anti-competitive behavior by medical societies. Physicians complain that so-called "cost containment" activities by insurers are anti-competitive. They also complain that hospitals deny them staff privileges, and that limits on fees amount to price fixing.

We may expect actions by health care providers against business coalitions, preferred provider organizations, and others for restraint of trade, by government enforcement agencies complaining of "lessened" competition arising from cooperative ventures between hospitals and from hospital mergers, and by those resentful of ethical advertising restrictions imposed by medical professional societies.

Since the list could include hundreds of possible causes of action, continual antitrust education of your health care clients is essential. While advising clients of antitrust risks, the attorney must be careful not to put up insurmountable barriers. "Playing it safe" will stifle badly needed innovation. The client who always gets "No" answers will eventually step out without advice and, as luck would have it, that step may be the riskiest he has ever taken.

Federal Intervention

It's difficult to imagine an industry more beset by federal agencies. Regulatory intervention (and rapid health care cost inflation) began in 1965 with Medicare. The 1982 national health care bill was 41% financed by federal, state and local governments, even though as much as 25% of the private sector hospital bill has been "shifted" from the government by federal legislation and regulation. Resultant medicare hospital reimbursement regulations have created subspecialities within the accounting and legal professions.

The lawyer must advise the client about the direction in which federal laws and regulations are heading and keep him up-to-date. One need only remember the effect of ERISA on business client health insurance. Subsequently the Pregnancy Disability Act and *its* regulations, the Age Discrimination Act and *its* regulations, TEFRA and its *two* sets (one by the Department of Labor and the other by HCFA—and yes, they are conflicting) to name but a few, brought the regulation of health care and insurance to the vexed attention of all employers. Future governmental involvement should be even more complex. The SEC will follow proprietary hospital corporations into the health care market (imagine the discussions in a §10b(5) disclosure of malpractice and growth potential for filling hospital beds). The potential for new civil rights actions is nearly unlimited. "Do all Americans have a right to equal access to quality health care?" We may expect to be expensively enlightened.

To make things more menacing, the government has not shied away from retroactive health care decisions. In advising a potential investor or an individual proprietor, the attorney must describe both the present state of law and regulation and the likelihood and contours of future intervention. The practitioner of health law covers a very big legal territory, and keeping current is difficult. A specialty association, the National Health Lawyer Association, has grown faster than health costs over the past ten years. Finally, as TEFRA has shown, just because your client's business has nothing to do with health care, there is no guarantee that governmental initiative won't embroil that business.

Modern Technology and Medical Specialization

Over the past twenty years, there has been an explosion in medical technology. Yesterday's miracles, such as micro surgery, laser surgery, CAT Scanners (Computerized Axial Tomography) autoblood analyzers, heart transplants and infant liver transplants, are commonplace. We confidently foresee breakthroughs such as NMR scanners (nuclear magnetic resonance) to replace the CAT Scanner, organ transplants, and genetic engineering. The change in medical practice has had three major results. First: medical professionals now work miracles, and the quality of life has improved dramatically. Second: given these rapid advances, it is impossible for a physician to stay on top of the broad field of medicine. Physicians were once divided generally into two classes—medicine and surgery. Today there are over 20 recognized specialties and, within each of them, subspecialties. Third: as you might have already guessed, the first two developments have made health care much more costly. New equipment is never less expensive than its predecessor. CAT Scanners cost up to $1 million. NMR Scanners will probably cost between $2 and $3 million. (The coincidence of this new age of medical technology, with the opening of federal Medicare coffers, is too ripe not to mention.) Specialists are compensated more richly than general practitioners. Furthermore, the whole profession is becoming a grouping of specialists to the exclusion of the generalist. Today, the closest thing to a general practitioner is a "Board Certified Family Practitioner".

These changes bear significantly on the lawyer's role. Our profession has received some of the blame for increasing health costs, in part because of the medical malpractice "crisis" of the late 1970s and the consequent resort to "defensive medicine". The accusation: to deflect malpractice suits and awards, we encourage physician clients to run test after test to ensure isolation from liability. I venture gingerly into a legal subspecialty to suggest that the lawyer in preventative consultation take a more realistic approach, since the indiscriminate use of tests may be fertile of still more malpractice actions. Clients should be counselled to spend time with their patients. The patient will get to know the physician—too often not the case today, given specialization. The physician can make sure the expectations of the patient are realistic. Personal professional relationships and proper patient expectations will avoid malpractice complaints much more effectively than batteries of tests.

The future of legal practice in health care is beyond my ken.

Certainly, those members of the Bar who deal with regulatory agencies such as the FDA can expect that pleasure to continue. One can also reasonably foresee, given trends in product liability and the rapid development of medical technology, that many businesses never before involved in health care industry will be supplying goods and services for health care. They should gird themselves for new liabilities.

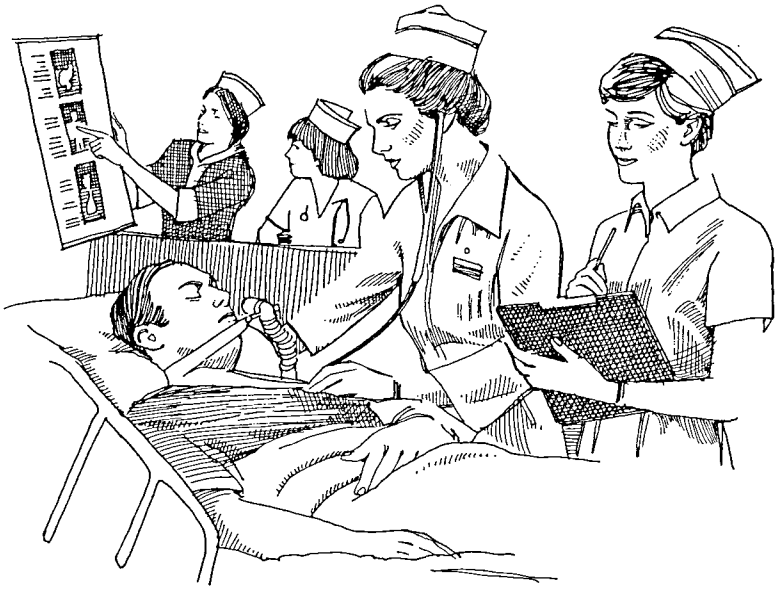
Unhealthy Lifestyles

Health care analysts project that approximately 50% of the nation's medical costs arise from unwholesome living. We could halve those bills if we could stop self-inflicted injuries, illnesses, and disease, while increasing productivity through reduced absenteeism and loss of skills due to employee death. Targets: drinking, smoking, unsafe driving, stress, lack of exercise, and weight.

My advice here is not to the lawyer as a lawyer, but to the lawyer as a productive member of society. When, as a young lawyer, I first saw the list of controllable factors, I couldn't help but think it was a catalogue of reasons for high health insurance premiums paid by attorneys. Reflect a moment, then look in the mirror and then at your peers. How many lawyers do not run afoul of at least one of these health threats? Drinking does not mean alcoholism. Smoking is not limited to cigarettes. Driving includes rushing to court and home. Who would ever consider the law a non-stressful profession? Walking the stairways of the Public Building is not adequate exercise. Life insurance companies' liberalized height-weight tables do not evidence a modified view of the ideal so much as unwholesome realities. Lawyers can produce more and enjoy an improved quality of life if they will only control the controllable. They can also serve as role models and thereby help lower the nation's health care bill.

Obviously, this short article could not possibly address the many areas where the practice of law meets the health care industry. What I hope I have conveyed is my conviction that health care law is no longer limited to tax and tort, serving on a hospital board, and giving free legal advice to chief officers of the hospital. Today the field is complex and it's going to be *more* complex. The lawyer's role in the rendition of effective and *cost*-effective health care will be vital. □

A New Nursing Practice Act



Recent legislation takes a big step forward in validating what has been common practice among highly trained nurses . . . It recognizes the propriety of diagnosis by nurses.

MICHELE BOCKRATH, R.N., M.S.N.

On May 10 Governor du Pont signed into law a new Nursing Practice Act. The previous act had become law in October 1963 and had been modified by only a few minor amendments 13 years ago. The new act is a triumph of realism, in which responsible nursing behavior in a much changed medical environment is accorded statutory recognition.

Delaware has more than 7,000 registered nurses and more than 1,800 licensed practical nurses. Together they account for 77% of the licensed health care practitioners in the State. A profession of this importance in health care deserves an up-to-date statutory scheme of regulation, and it now has it.

The new act takes a big step forward in validating what has been common practice among highly trained nurses for at least a decade: it recognizes the propriety of diagnosis by nurses. The new act defines nursing diagnosis as the "identification of an individual's actual or potential health needs obtained from nursing assessment data and which are amenable to nursing interventions." The act also carefully distinguishes a nursing diagnosis from a medical, osteopathic, or dental one. The authority of a nurse to engage in diagnosis (accurate judgment of a patient's needs) permits a more individualized and competent means of planning, with consequently better patient care.

The new act also recognizes that registered nurses are exceptionally well-educated professionals. The former act did not recognize nurses with specialized education beyond basic entry level, who should be licensed to carry out more advanced nursing functions. The new act defines an advanced registered nurse practitioner as "a currently licensed registered nurse who has gained added knowledge and skills through

Michele Bockrath, President of the Delaware Nurses' Association and a formidably well-educated professional, is a natural spokeswoman for her profession in Delaware, as it emerges from a traditional role to a state of advanced proficiency. Ms. Bockrath is a graduate of the University of Delaware; she holds a masters degree from the School of Nursing at the University of Pennsylvania and is presently a candidate for a doctoral degree from the University of Maryland School of Nursing. She has had wide-spread professional practice and teaching experience in diverse specialties both in hospitals and institutions of higher learning. She is a contributing author to *Nursing Diagnosis Clinical Application in Care Planning* which will be published in the near future by the Lippincott Company.

an organized post-basic program of study and experience and who has met certification requirements as approved by the Board of Nursing and is designated to perform advanced specialized nursing practices." This should lead to better health maintenance care, minimization of preventable illness, and reduction of health care costs.

The new act also reorganizes the Board of Nursing. It previously consisted of 7 members—5 registered nurses and 2 licensed practical nurses. The new act expands the Board to 11 members, the previous composition plus 2 additional practical nurses and two public members. By putting consumers as well as professionals on the Board, the act seeks to provide a broader perspective on the quality of health care. The new act also renders eligible as Board members, those nurses who do not possess baccalaureate degrees, but who are licensed for the conduct of their profession. A new insistence on a Board member's 3 years active practice during the 5 years preceding appointment stresses familiarity with current professional conduct. The act also makes it very plain that the public members must be independent. Affiliation with any licensed health care occupation board or employment in any health care institution bars appointment as a public member.

The nomination process previously used for the selection of Board members has been broadened to authorize nominations by recognized clinical specialty organizations. This reflects the recent formation of nursing groups that keep nurses in specialty areas abreast of their skills.

The new act sets up categories of advanced registered nurse practitioners and standards for practitioners in each category. By regulation the Board may establish standards to insure good nursing practice in the several categories. (The Board is directed to consult with other registered nurse practitioners, physicians, and health care organizations who use advanced registered nurse practitioners.) Those nurses seeking licensure in Delaware by reciprocity and who have been inactive professionally for over five years are now required to successfully complete an approved refresher course before approval.

Like the former act, the new one specifically exempts nursing administered by friends or family members, nursing rendered during an epidemic or a disaster, and nursing by a nurse's aide or an attendant under adequate supervision. The act carefully exempts from regulation non-medical nursing administered by prayer or other spiritual means in accordance with the tenets of a religious denomination.

There is a further exception which I find unsettling, and the profession as a whole regards as controversial: non-professional aides under the supervision of professionals are excepted from the operation of the act. I think this poses a danger to a profession which, first and foremost, strives to provide optimal health care and to ensure that only the competent practice. The public frequently identifies a nurse, not by her skill, but by her attire. The non-regulation of the untrained, camouflaged in uniforms for the administration of nursing responsibilities, can only confuse the consumer of health care. He should be aware that not all nurses wear white and that all who wear white are not nurses.

The new act is less than perfect in a further particular: it exempts those designated as child care providers employed in day care centers, child care homes, residential child care facilities regulated by the State, foster homes, group homes, and rehabilitation centers for the developmentally disabled. These exempted practitioners may administer medication, other than by injection, provided the medication is in the original container and properly labeled. The act proposes that child care providers exempt under this section be required to complete a medication training program. The interests of professionalism and good care will require us to watch the operation of this exemption very closely.

To sum up: the new act (which generated a good deal of controversy and opposition, and was a culmination of many hours of discussion and compromise before it reached the Governor's desk) was much needed. It may not be perfect, but it is a major improvement. By coming to grips with realities of medical and nursing practice today, it can only lead to better and more discriminating regulation and the delivery of superior health services. □

Peering Down the Retrospectroscope

The ever-present menace of suit has caused physicians to treat patients as potential adversaries.

Jane Roth, doyenne of the medical malpractice bar, is of the third generation of her family to be a member of Richards, Layton & Finger, the firm founded by her grandfather, Robert H. Richards, Sr. (Vide inaugural issue of DELAWARE LAWYER, May, 1982). Jane, a graduate of Smith and Harvard Law School, embarked on a practice heavy in medical-legal matters under the tutelage of the late Rodney M. Layton. Jane is married to the Honorable William V. Roth, our senior United States Senator.

JANE R. ROTH

In the early spring of 1974, I was dining at the Hotel Intourist in Moscow. The orchestra was playing and many diners were dancing to the music. Someone bumped a table, knocking a wine glass to the floor. The shattered glass lay in the path to the dance floor, lending a crunching sound to the footsteps of those passing by. A waiter, noticing this, kicked the largest hunk of glass under a nearby table, but left the rest.

I remarked to our Russian host that in an American restaurant, the waiters would have swept up the glass as soon as possible for fear a patron would slip on the pieces and injure himself. Viktor replied "Oh, but that would be his fault for not looking where he was walking."

The lesson I learned that evening was, of course, a simple one: the American legal system can be effective in reducing the hazards we encounter in our daily lives.

I now spend a great deal of my professional life defending physicians and hospitals in medical malpractice actions. From this experience, I have had occasion to ponder whether malpractice litigation has served any beneficial purpose in promoting better medical care in our community and in our country—whether it has helped to clear the broken glass from the floor of the physician's office.

The physicians do not seem to think that it has. I have discussed medical malpractice with many doctors. At a round table session on malpractice, I threw out the question: "What benefits or increase in quality of medical care do you think malpractice litigation, or its threat, has produced?" The doctors had a great deal to say about malpractice litigation and their dislike of it, but my question wasn't answered.

I think that this apparent belief of physicians, that malpractice litigation has served no beneficial purpose, arises from the fact that every physician knows that he may exercise his professional skill and experience according to the highest standard of care, but if the patient isn't cured, he may still be sued and his professional reputation attacked. This ever present menace of suit has caused physicians to treat patients as potential adversaries and has destroyed between some physicians and patients the personal relationship that may work, along with medical science, to help cure the ill.

Certainly the threat of being sued has had some tangible effects on the practice of medicine. Without doubt, the number of x-rays taken and other diagnostic tests performed has been inflated by the malpractice specter. Many of these tests have been needless. A few have turned up unsuspected problems or injuries. The fear that, if the unsuspected is not discovered, the physician will be accused of malpractice, has led to the practice of defensive medicine—to the performance of many tests that a physician, in the exercise of his best professional judgment, really doesn't think are necessary.

Few patients will protest that an x-ray isn't needed. I have found myself in just this situation when I brought my son to an emergency room with a cut finger. As Bud was led off to have his finger x-rayed, I realized that there was no need for the x-ray. However, rather than jumping up to protest, I sat back and relaxed again, with the reassuring thought that the cost of the x-ray was covered by my medical insurance.

An obvious result is that defensive medicine is increasing the cost of our medical care and of our medical insurance. In addition, the cost of the malpractice insurance, necessary to protect the physician and the hospital from the consequences of being sued, is playing a significant and increasing role in the price we pay for medical care. Here in Delaware, where malpractice premiums

are considerably lower than in some other areas of the country, surgical specialists still have a premium to pay that averages out to a $100 cost every day the office is opened—a cost that will ultimately be born by the patients. If such a surgeon sees 20 patients a day, that is $5 a head to cover the malpractice premium.

Another example of the cost to the community of high malpractice premiums is the growing impracticality of a semi-active practice. Many physicians, as they grow older, would like to partially withdraw from practice, treat a few selected patients, and provide advice and consultation to their colleagues. However, such a physician's malpractice premium will remain the same even though his patients are fewer. It becomes economically impossible to practice at less than full patient load. The community loses the wisdom and experience of an elder physician who can't afford to cut down his practice but must cut it off completely.

I do not pretend that in my defense of malpractice cases I have not encountered instances of negligent or incompetent physicians. There are physicians who attempt procedures they are not capable of doing. There are physicians who, although competent, have through poor judgment or a momentary lack of attention, committed errors. There are also physicians who, using all their skill, training and experience, make a judgment that, with hind sight, is not the best decision for that particular patient.

A disturbing aspect of medical malpractice is that, when a case comes to trial, the point that is emphasized to the jury often is the poor result to the patient. Lost in a forest of scientific jargon is the deliberative process that the physician went through in order to decide on the course of treatment he chose for the patient. For this reason, because of the focus that the plaintiff will place on result, the question of whether or not the physician conformed to the appropriate standard of care may lose its importance in the eyes of a lay jury. Yet this same potential of failing to distinguish a well-reasoned decision on treatment which ends with a poor result from negligent treatment is what creates the situation physicians find so oppressive.

In preparing the defense of a malpractice suit, it is particularly important to find an expert witness who not only can support the conduct of the defendant physician but can do so in language which is convincing and comprehensible to the jury.

Medical malpractice litigation is, perhaps as much as any type of litigation, the arena of the expert. It has been recognized for years that a jury of laymen cannot establish the standard of care required of physicians. The burden in a malpractice case is on the plaintiff to demonstrate by expert testimony what is the standard of care required of the defendant and how the defendant failed to meet that standard. When a plaintiff has made such a showing, the defendant must then produce testimony on the standard of care, defendant's version, and on the fact that the defendant met that standard.

Without doubt, the number of x-rays and other diagnostic tests has been inflated by the malpractice specter. Many of these tests have been useless; few have turned up unsuspected problems. Fear of being accused of malpractice has led to the practice of defensive medicine.

The fear of the defense, when plaintiff has produced an expert, is that the jury will listen to the evidence of injury to the plaintiff, supported by plaintiff's expert's testimony on violation by the defendant of his duty of care to plaintiff, and that the jury will decide for plaintiff on that basis, without giving sufficient credence to the testimony of defendant's expert.

This apprehension of the defense is particularly heightened when plaintiffs bring in a "traveling expert"—a physician whose primary occupation is not practicing medicine but testifying in court on the practice of medicine. Such "travelling experts" seem to testify primarily on behalf of plaintiffs. The credentials of many of them do not bear up their qualifications to testify on the aspect of medical care that may be in litigation.

During the first half of the 1970s, certain such "travelling experts" showed up in Delaware. A surgeon, partially crippled by polio and no longer able to endure the physical demands of major surgery, joined the ranks of the "travelling experts" and came to Wilmington to testify on the standard of care required in performing vasectomies for sterilization. It became apparent that this physician had not performed a vasectomy in 15 to 20 years, and then not for sterilization but as part of surgery to remove the prostate. In the ensuing years the technique of vasectomies had changed considerably in view of the increasing demand for sterlizations. However, the jury, hearing the expert's testimony that just because the vasectomy had not been successful, it must have been negligently done, found in favor of plaintiffs.

In the above case, the Court did, after the verdict, rule that plaintiffs' expert was not qualified and ordered a new trial. *Peters v. Gelb*, Del. Super., 303 A.2d 685 (1973), *aff'd* 314 A.2d 901. Nevertheless, this is an example of the persuasive power of an unqualified expert witness to sway a lay jury.

In reaction to the threat of such a peripatetic expert, ready to testify on the practice of any medical specialty in any part of the country, the Delaware legislature did, in enacting the Malpractice Insurance and Litigation Act, Title 18, Chapter 68, of the Delaware Code, create standards for the qualifications of experts. These standards are intended to limit experts to those who have actual knowledge of the standard of medical care in Delaware or those who come from adjoining communities, such as Baltimore or Philadelphia, where there is a contact and communication between medical communities that will ensure that an expert, when testifying on standards of care, is testifying on standards applicable in Delaware.

Plaintiffs have for years complained of a conspiracy of silence in the medical community. The claim is that one physician will not testify against a fellow physician.

My experience has been that, in a case of physician malpractice, there are doctors who will recognize a responsibility to testify for the

plaintiff and will do so. Nevertheless, plaintiffs and their attorneys seem more concerned about a poor result for plaintiff rather than any actual negligence which may have caused that result. Those cases where plaintiffs are unable to find an expert are frequently just those where there has been a poor result without any negligence on the part of the physician.

Plaintiffs have another tactic to avoid this stumbling block of the lack of an expert witness. They plead lack of informed consent: "If the doctor had told me about the risk of this complication, I never would have had the surgery." The doctor says he did tell the patient. The patient swears that he didn't. The whole issue then rests on the credibility of the parties. No wonder the legal world seems like madness to the medical community when, no matter how careful or diligent a physician may have been, his vindication in a lawsuit rests on a swearing match between him and the patient.

Studies have also demonstrated that a patient may not recall what a surgeon explained prior to an operation. When a recording or videotape of the conversation is played back for the patient, it is met with frank disbelief that the conversation really did occur. A patient with a serious illness facing major surgery may not be thinking about what the doctor is telling him. Instead of hearing what is being said, he is thinking "will I live," or "will I be disabled," or "will I be able to bear the pain." Therefore, the credibility decision for the jury may be between a plaintiff and a defendant who both sincerely believe they are telling the truth.

From the defense point of view, in preparing such a case for trial, it is important to find any scrap of evidence that corroborates your physician's testimony. This may be the doctor's office notes, plaintiff's answers to interrogatories, statements made by the plaintiff to others, notes in the hospital record, or whatever you can dredge up.

Another tactic used by plaintiffs to avoid the necessity of an expert witness is the claim that the poor result of the treatment in and of itself is evidence of negligence, *res ipsa loquitur*. Case law has developed in Delaware that, if the bad result occurred in a certain percentage of

Continued on page 52

The Impairment of Patients' Tort Rights in Delaware

Ben Castle frequently represents plaintiffs in medical malpractice cases, and does so with great distinction. DELAWARE LAWYER congratulates itself on persuading Ben to be the author of this article. It complements Jane Roth's view in the preceding article. Ben, a graduate of the University of Pennsylvania and of the Georgetown University Law Center, is a member of the firm of Young, Conaway, Stargatt & Taylor, where he engages in an extensive trial practice.

A seven-year perspective of Delaware's Malpractice Review Panel proceedings

BEN T. CASTLE

The enlarging rights of the sick to know about their ailments, to receive competent treatment reasonably priced, and to engage in useful dialogue with those who would cure them has made an anachronism of Delaware's relatively new procedures for medical negligence. Only seven years ago, in April, 1976, Governor Tribbitt signed into law a statute establishing special judicial procedures for medical malpractice, procedures that materially altered long-established legal remedies. The Health Care Malpractice Insurance and Litigation Act, 18 *Delaware Code* Chapter 68, affords special protection for physicians, nurses and hospitals. Enactment occurred under the shadow of a purported national "malpractice crisis" in the mid-seventies, and Delaware was not alone in prescribing specialized procedures for medical negligence cases.

I want to tell you about the procedural and financial impediments created for victims of medical negligence by this special interest legislation and to challenge the continued existence of an anomalous legal straitjacket.

My point is best made by comparing the legal treatment given a surgeon who is rear-ended by a housewife and sustains a serious back injury with the treatment afforded the same housewife who suffers the same injury through a botched laminectomy at the hands of the same surgeon. No one would deny that the surgeon is entitled to redress for the paralysis he sustained at the hands of the housewife or that he is entitled to a fair, reasonably priced, prompt, and predictable judicial procedure to secure just compensation. Surely the surgeon has a right to be heard by a disinterested jury. A sense of rudimentary fairness demands that the negligently treated housewife get similar, if not identical, judicial treatment. This is not the case. The housewife must first submit her claim to expensive and cumbersome screening by a panel of volunteers, whose composition is weighted in favor of the surgeon, and whose findings could affect the disposition of her case. If she ever gets her day in court before an unbiased jury, it is virtually certain that it will be long after the injured surgeon has been compensated for *his* back injury.

The Malpractice Review Panel and Its Makeup

If you manage to persuade an attorney to press your medical malpractice claim (not so easy as popular misconception would suggest) you are at liberty to file a complaint, like anyone else who suffers injury by another's fault. Your case will proceed like any other personal injury case. The defendant will file an answer and the parties will amass their evidence under well-established rules of discovery. Depending on the state of the Court's docket, a trial may be scheduled a year to eighteen

months after the filing of your complaint.

However, for medical malpractice claims there are significantly different rules. At any time after the answer is filed, either party may convene a malpractice review panel on notice to the State Insurance Commissioner. The statute directs the Insurance Commissioner to "*promptly* convene such panel." While this sounds innocuous, the mere mechanics of convening a panel can consume many months. I recently experienced a delay of more than fifteen months between demand and the convening of a panel. The delay is understandable: assembling a group of busy volunteers and coordinating their schedules with those of the attorneys and the witnesses can be difficult and frustrating. Furthermore, when the case is in the Federal District Court each panelist must be paid $100.00 a day.

There are five panelists. Two must be health care providers, at least one of them a physician. The other three are a lawyer (who presides) and two laypersons. Majority rule controls. It is apparent that on a review panel so constituted, the odds are tilted in favor of a defendant physician, since at least one (and most often two) of his professional brethren are sitting in consideration of his case. No matter how objective and conscientious the panel, it is only natural that the doctor members will filter the evidence through personal experience. This is especially true where the claim involves a solitary lapse by a physician of otherwise unblemished record. The doctors on the panel would be less than human if they did not think "There but for the grace of God . . ." One physician who cast the lone vote for the defendant stated in his minority opinion that *both* the patient and the doctor "were, in essence, victims of an insidious and vicious disease." Natural bias, coupled with the heavy influence that the physician members can exert on non-medically trained members, affords a starting advantage to defendants. To date their success rate before panels has been 79%.

The Review Panel Hearing And Its Aftermath

Although the statute contemplates a summary proceeding, panel procedure has in practice become so cumbersome that plaintiffs' lawyers refer to it as the "first trial". The parties generally submit their evidence in writing before the hearing. The statute allows the panel to review deposition transcripts, medical records, treatises, and "any other form of evidence allowable by the malpractice review panel." Despite the apparent breadth of this evidentiary standard, it is routine for one party to challenge the other's proffers of evidence. Are medical reports admissible? Are affidavits admissible? The chairman, a lawyer, must review briefs and issue rulings before convening the panel. Here again, the practice has developed a built-in mechanism for delay and infliction of expense upon one's opponent. At all of its stages this two-step procedure created to screen out non-meritorious claims and promote settlement of valid ones has done little more than enable the defendant's insurer, who benefits from avoidance of the day of reckoning, to prolong litigation.

When the formal hearing is held, the patient plaintiff is put to his entire proof, aside from pecuniary loss. Although the statutory standard which the panel applies is not especially severe from the patient's point of view—*viz.*, that the panel shall have the duty "of making a finding as to whether or not in its opinion the evidence supports the conclusion that the defendant . . . acted or failed to act within the applicable standards of care"—in practice the plaintiff is virtually required to prove by a preponderance of the evidence his entitlement to relief in order to secure a supportive opinion from the panel.

After the hearing, the panel chairman must issue a written opinion within 30 days, an opinion subject to review by the Superior Court. Each opinion that has favored the patient (and there have only been eight since 1976) has been taken up for review by the defendant. The review consists of examining the opinion and striking those portions founded in errors of law or unsupported by substantial evidence. Review keeps the clock ticking for another year. A full transcript of the panel hearing must be prepared, briefs are written and the matter is argued before the Court issues *its* opinion. Meanwhile, the injured (and perhaps disabled) patient waits, and the insurance carrier continues to earn investment income on the premiums it has collected.

After the review is completed, the case can be set down for jury trial. At the trial, the panel opinion can be introduced as *prima facie,* but not conclusive, evidence of what it discusses. This is the sole product of the panel procedure.

Medical Negligence And The Expert Witness

The statute reaches its pinnacle of concern for malpractice defendants in its treatment of expert testimony. While broad general guidelines, for the most part liberal, have been laid down for the use of expert testimony in the recently adopted Uniform Rules of Evidence, a special set of arcane practices applies when the subject matter is the alleged negligence of a health care defendant. First, the statute provides that there can be no finding of negligence, "unless expert medical testimony is presented as to the alleged deviation from the applicable standard of care in the specific circumstances of the case and as to the causation of the alleged personal injury or death . . .". A finding of negligence by a malpractice review panel may, however, be used to satisfy this requirement.

The statute further hobbles the plaintiff in his selection of an expert. It states that no person "shall be competent" to give expert medical testimony regarding applicable "standards of skill and care unless such person is familiar with that degree of skill ordinarily employed in the community or locality where the malpractice occurred." Delaware thus lines up with the dying breed of jurisdictions that maintains allegiance to the so-called "locality rule", which, in conjunction with the understandable reluctance of physicians to testify against their brethren in the same medical community, further jeopardizes the effective presentation of the patient's claim.

Defendants have already used the statute to bar physicians licensed in Delaware, certified by a national organization in a particular specialty, and actively engaged in the practice of that specialty in one part of this State, from testifying to the standard of care applicable to a fellow of the same specialty and the same certification, who practices in another part of Delaware. To date these efforts to cut off testimony by Delaware physicians on Delawre claims have been unsuccessful, but in

the process the statutory word "familiar" has been judicially tightened to mean "thoroughly conversant", "well acquainted" and possessing "actual knowledge". This holds out the possibility that such efforts may eventually succeed. A liberalizing amendment adopted in 1980 does provide that any physician in active practice for the five immediately preceding years and in practice in Delaware or in a contiguous state within a radius of seventy-five miles of Dover shall be presumed competent to testify about standards of skill and care in Delaware, if it shall be established that the degree of skill and care required of the expert in the locality where the expert practices or teaches is equivalent to that prevailing where the claimed malpractice occurred. This means, for example, that an orthopedic surgeon practicing in Baltimore or Philadelphia will be permitted to testify in Delaware if it can be shown, presumably by still another expert, that the degree of skill and care that he exercises is the same expected in Wilmington or Dover. Where the seventy-five mile idea originated is anybody's guess, but it makes no sense whatever for Delaware to take the position that a Baltimore surgeon is qualified to testify while a practitioner from Washington, D.C., or Pittsburgh or Newark, New Jersey is not.

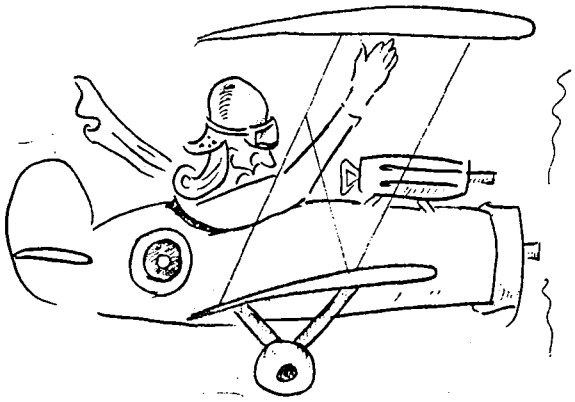
What with increased medical specialization, the establishment of *national* academic standards for medical schools and board certification of specialists, the availability of *national* medical journals and standard textbooks, and the frequent attendance by Delaware doctors at *national* and international seminars, it is odd of the Delaware medical community to argue that standards of care in Wilmington are somehow different from (*i.e.*, lower than) those in Cleveland and Albuquerque. Yet that is precisely what the defense argues whenever it tries—and try it will in every case—to prevent testimony by an expert from outside the local community.

What is really aimed at is the so-called "traveling hired gun" or "wandering expert" who combines minimum credentials with a lack of inhibition about coming into Delaware to criticize a physician

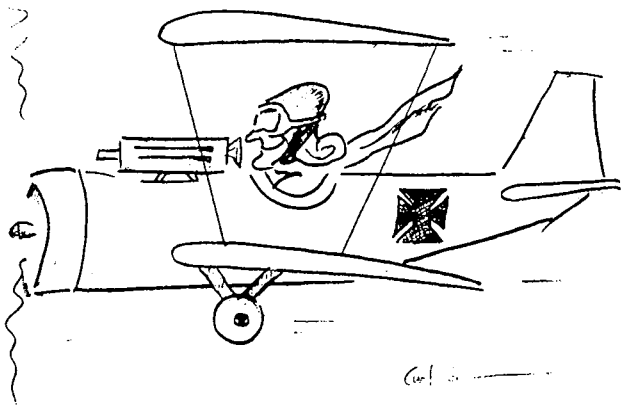
Continued on page 52

You Can't Win For Losin'

"For the Defendant . . ."



"For the Plaintiff . . ."



CARL I. GLASSMAN

I accept your invitation to publicly air my views regarding malpractice activities in the State of Delaware. I write as a private citizen—practitioner of medicine. I do not purport to represent the views of the State Medical Society of Delaware, but I should not be surprised if my sentiments were shared by many of my colleagues.

A recent experience in the malpractice arena gave me an opportunity to organize some of my thoughts which had previously been only theoretical.

I was advised that I should look upon the lawsuit as no more meaningful than an automobile accident case or any other case covered by insurance. Impossible! A malpractice lawsuit against me was a personal assault. A suit charging me with negligence was an assault upon my honor, my technical ability, my medical judgment, my self respect. Such a suit was a threat to my security.

My counselor did a splendid job of representing my best interests. The State did a superb job in providing me with a highly selected jury of my peers. The judge, impeccably impartial, presided serenely. But to my dismay, I found myself an observer at a *game,* a game being played among the attorneys and the judge. I found that the jury's avenue to enlightenment and truthful information was through the advocacy system only. It mattered little that the jury might not have understood the information presented to them. At the request of both attorneys the jury was denied the opportunity to question any of the technical testimony or factual information presented. My lawyer explained to me that permission to question might lead the jury to paths of information unfavorable to the case being made by the lawyer. The judge explained to the jury that the proceeding was an advocacy exercise. It was the responsibility of each attorney to make his case as lucid as possible. The implication was clear: if the attorney couldn't make his case clear enough to satisfy the jury, his client would lose. Justice, then, depended upon the skill of the attorneys and not necessarily upon the truth.

Carl Glassman, artful surgeon and surgical artist, is drawn naturally to the metaphor of aerial combat. (The accompanying illustration is from his hand.) He was a bomber pilot in World War II, shot down over Germany in 1944, and for many months among those missing in action.

Upon separation from service, he attained a baccalaureate from Temple and a doctorate from State University of New York, College of Medicine. After a four year residency at Delaware Hospital in Wilmington, he entered private practice in this city. He is the program director for the Department of Surgery at the Wilmington Medical Center and holds privileges in general and vascular surgery at St. Francis Hospital and Riverside Hospital. He is a fellow of the American College of Surgeons and the author of many scientific publications and editorials. His experience as a writer shows in his wryly charming account of what it is like to be sued.

Even before the trial, I had felt at a disadvantage, even impotent, during negotiations over the criteria for expert witnesses. The key witness in the prosecution's case was a medical man who had never been in an operating room in his life. Yet he was permitted by the defense counsel, the plaintiff's counsel, and the court, to render surgical opinion as an expert. This acceptance of the non-expert-expert was part of the game being played by the participants in the courtroom. The counselors and the judge knew the man was not an expert, but negotiations among the game players established him as one. To me, a very interested observer at the game, arose the vision of the World War I dog fight between the Red Baron in his Fokker and Sir Gledhill Thrashbottom in his Spad . . . both pilots careening wildly across the sky, their white scarves lashing brilliantly in the slip streams

of their open cockpit airplanes, their combat rich with the chivalry of the great knights of medieval times. At the conclusion of their wild encounter, each ace, spent of ammunition, saluted the other by dipping wings and gesturing nobly with a wave of the hand to a worthy opponent, and then flew off into his separate sky. The war they fought was of little consequence. The game of chivalry was all important.

From the moment the suit was instituted, I found myself in a cannot-win, must-lose position. No matter who won the case, I was to be a loser. I was to lose sleep. I was to lose a degree of privacy which I had previously enjoyed. I was to lose reputation by accusation. I was to lose reputation yet again at the hands of inaccurate journalists. I was to lose financially for the many hours I spent away from my practice because of the time devoted to litigation. And I was to lose the convenience of available and economical insurability. Even before my case reached the courtroom, and despite the fact that this was the first case against me in a twenty-five (25) year history of surgical practice, my insurance carrier summarily discontinued my coverage.

At the same time that I was guaranteed to be a loser, the plaintiff found himself in the enviable position of being in a cannot-lose, may-win status. He had nothing at risk. Indeed, he had everything to win and a front row seat at the best show in town.

It seems to me that the law's self-satisfied claims of even-handed justice could be better made if the plaintiff as well as the defendant were at risk. If the plaintiff be indigent and has truly nothing to lose, then perhaps his counselor might be put at risk. Duck hunting is not much of a sport for ducks—only for the hunters.

I believe that a partial solution to the problem of the mounting cost of medical insurance might be found by placing both parties at risk in such proceedings.*

The discomforts, inconveniences and disappointments which I have described so far pale into insignificance next to the monstrous concern I have for the evolving distortion in the practice of medicine in this consumer-oriented, litigious society. I object to being put into the position where my first concern is not for the patient's welfare but for those things I can do for his welfare within the limits of what is safe for my tail. I long for the bygone day when my very best efforts were dictated by nothing more than my concern for my patient. The great majority of patients benefited from this total dedication to their welfare. A few patients undoubtedly suffered from mistakes of omission or commission which I, as a human being, made in the pursuit of my practice for their best interests. I make no fewer mistakes now than I made then, but now I am limited in what I can do for the patient's best interest. The patient doesn't realize it, but he and I both sit with the sword of Damocles dangerously poised above our heads. The sword threatens the patient since he is deprived of absolute dedication on the part of a physician in fear of litigation. The physician, of course, expects the fall of the sword at any time a result does not suit the patient's fancy.

Some middle ground must be found where the physician can practice without fear of frivolous attacks and where the patient will be protected under the law against negligent medical practice. It is lawyers who write the laws and who modify them and it will have to be lawyers who find a solution.

Although a physician's response to a malpractice action is as predictable as sunshine in Florida, the reader should not delude himself into believing that malpractice litigation is a disease limited to the medical profession. "Their case may any day be yours, my dear, or mine." The professional doctor suer will not long limit his horizons to the medical profession. Every professional will eventually fall prey to his form of bounty hunting. Unless a drastic alteration in course of professional malpractice litigation is effected, every professional can confidently look forward to a situation in which, after a great deal of discomfort, insult, shame, and untold expense, a jury finds him faultless, the court folds its tent, and all the players leave. The professional suer shrugs his shoulders, sighs with regret, and mutters to himself, "Better luck next time". No apologies are offered. There is no redress of the grievances of the defendant. There is not even an offer to pay his expenses.

You can't win for losin'. □

Essentially a plea for the English system of costs. The Editors.

The Impetus of a Tragedy

Living will legislation was enacted in Delaware as a principal result of the Mary Severns case. To know her tragedy is to understand the desirability of a living will. This declaration allows a person, later incapacitated and in a terminal condition, to direct the withholding or withdrawal of artificial life support systems and thereby avoid futile prolongation of the dying process.

THOMAS HERLIHY, III

Brackenville Road, as it goes north from Old Wilmington Road and descends through a sylvan setting to the Ashland covered bridge, is the starting point for this life and death drama. The road is narrow, winding and, even in December when the trees are without leaves, the trunks crowd close to the asphalt. To the traveler it is at once a road of rare rural beauty and impending danger. For 55-year-old Mary Severns, it was the last road she would ever see.

It was a cloudy day in December of 1979 when the car in which she was driving skidded off Brackenville Road into a tree. The road was dry and clearly visible in the mid-morning light. We shall never know why her car left the road. We shall never know if she suffered a ruptured aneurysm in her brain causing her to lose control of the car or if she suffered her brain injuries as a result of the accident. When she arrived at the emergency ward she was in a coma. Her brain injuries were severe. After a series of tests performed over a period of 72 hours, the attending neurosurgeon knew that Mary Severns would not recover. It was a critical point for Mary Severns, for her physician and her family.

Shortly after her arrival at the hospital Mrs. Severns was connected to a respirator which performed her breathing. If the respirator were removed, she would die. The longer she was connected to the respirator, the greater the chance for recovery of her pulmonary functions, but the neurosurgeon made it clear to her family that she would never recover her awareness and reasoning functions. At best, she would have a vegatative existence.

No one in the Severns family had any doubt what Mary Severns would want done. She had been an active member and officer of the Euthanasia Council of Delaware. It was one of the objectives of this organization that "life supporting measures should not be used to prolong dying in the case of terminal illness with intractable pain or irreversible brain damage." Mary Severns had done volunteer work in nursing homes, observed some of the more difficult patients, and on a number of occasions expressed to her family and friends that, in the event of a serious accident or illness with no hope of her recovery, she did not want to be kept alive as a vegetable. At least twice she had suggested to her husband their joint agreement to sign living wills. The pertinent provision of this form of will was: "If there is no reasonable expectation of my recovery from physical or mental disability, I, Mary Severns, request that I be allowed to die and not be kept alive by artificial means or heroic measures." Because Mr. Severns was not ready, neither signed a living will. Nonetheless, she had made her wises clear. She would want all artificial life support systems, particularly the respirator, terminated.

With this in mind the family turned to the treating neurosurgeon, but he declined their request to "pull the plug." He responded that the law in Delaware did not permit termination of the respirator in these circumstances, and he was not going to subject himself and his family to the tension and expense of a possible criminal prosecution or civil suit. Furthermore, he was concerned lest any doctor disconnecting the respirator be violating professional ethics. The family decided to seek a court order permitting the discontinuation of the respirator.

No one knew it at the time, but this phase of Mary Severns' "life" would be the first impetus for the enactment of living will legislation in Delaware. The next would come from the Delaware courts. This was not clear until near the end of the Severns' litigation, which had a course not unlike Brackenville Road, a narrow path with many difficult curves.

The litigation phase began in the Court of Chancery, better known as a legal arena for disputes between corporation shareholders and directors, employers and employees, and parties to a broken contract. However, the Court of Chancery was the only court with jurisdiction which could possibly appoint a guardian, enter an order allowing the guardian to cause discontinuance of the respirator, and protect the participants from liability for civil wrongs or criminal or unprofessional conduct. These issues were not new. The Karen Quinlan case had brought the thin line between life and death to the minds of the New Jersey judiciary. The Severns family hoped that the strong similarity of the

Quinlan precedent would provide a straight road to a prompt order allowing discontinuance of a respirator.

At the first curve in that legal road the Attorney General of Delaware, representing the public and the Board of Medical Practice, opposed the issuance of an order. The Attorney General contended that to discontinue the respirator would violate the Delaware criminal laws and constitute unprofessional medical conduct. He argued that Delaware should not follow the decision in *Quinlan*. The attorney appointed to represent the interests of the comatose body of Mrs. Severns stood at the next curve. He took a position similar to that advanced by the Attorney General. The same parties created more obstacles in the family's path when they argued that, since Delaware law did not permit a "pull the plug" order in the absence of legislation, the Court of Chancery could enter no such order.

The legal issues seemed clear, but the litigation clouded over when the Attorney General sought the opinion of another neurosurgeon. The *treating* neurosurgeon repeated that Mrs. Severns would not recover a sapient and sentient existence. The *consulting* neurosurgeon stated that (1) she had one chance in ten thousand of such a recovery, (2) she had one chance in one hundred that she would recover those brain functions typical of a child between birth and the age of three months, and (3) if she failed to demonstrate any significant improvement within four to six months after the onset of the coma, the probability of her recovery of a cognitive existence would diminish to zero.

A certification procedure enabled the parties to save considerable time in removing the issues from Chancery to the Delaware Supreme Court. Obviously, a case of this significance would eventually wind up in that Court. The Supreme Court accepted certification and gave the case "priority status", but it told the parties that it would decide only one issue: did Chancery have jurisdiction to hear and enter an order on Mr. Severns' application to terminate the use of life sustaining machines and treatment. By the time the limited Chancery proceedings were undertaken, the certification process initiated, and the briefs of all the parties filed, the Supreme Court was able to hear oral argument on April 18, 1980. As legal procedures go, this was faster than usual.

After prompt oral argument in the Supreme Court, the Severns family met its first and frustrating delay: the Court did not hand down its decision for over five months. During that period Mrs. Severns was weaned from the respirator. As expected, she recovered her primitive functions, such as breathing, but not her cognitive functions. While the Supreme Court was deliberating, the end of the four to six month period used as a guide by the consulting neurosurgeon came and went. *All hope of recovery ended and Mrs. Severns was and is to this day in a vegetative state.*

The Supreme Court decided that the Court of Chancery did have power to grant orders to continue or discontinue Mrs. Severns' life sustaining systems. The mode of relief would have to be framed by Chancery after an evidentiary hearing to be held still later. A little over a year from the date the case started, Chancery decided that Mr. Severns, as guardian for his comatose wife, could lawfully deny the restoration of the respirator to his wife in the event she needed it. However, the Supreme Court decision made it quite clear that contemplated actions (or inaction) to determine whether a person lives or dies should be authorized, conditioned or barred by the General Assembly. The Court "earnestly invite(d) the prompt attention of the General Assembly" to this subject. The living will had received a formal but very impressive invitation to Delaware.

Phase Three. Legislation authorizing living wills had been introduced in the Delaware General Assembly on several occasions before the Severns case. These bills had not progressed any further than one chamber or the other. Even without legislative validity, Delawareans had been signing living wills. Although these declarations had no legally binding effect, the declarations told physicians that the declarant when terminally ill, wanted no artificial prolongation of life. Now, the Supreme Court's request for prompt attention and the tragedy of Mrs. Severns was before each legislator. The legislative road to enactment was not to be smooth and straight, but coursed with Brackenville curves of strong opposition and weakening amendments. In the first legislative session after the Supreme Court decision, the living wills survived the Senate only to expire in the House. A new bill was introduced in the next session a year later.

Opponents attacked with a one-two punch. First, they preyed on fear. A representative stated on the floor of the House that he had visited a nursing home where elderly patients had firmly grasped his hands and tearfully begged him to prevent this bill from becoming law. The feared that members of their families would coerce them to sign living wills, which might lead to quicker death and faster distribution of their estates. The short answer was that the fearful need not sign living wills. A living will is only for him who wants one. Besides, there are other safeguards: witnesses to the will must not be related to the declarant, and a patient in a nursing home must have a patient advocate or ombudsman as one of his two witnesses.

Others feared that the bill was at least a first step toward, if not an outright authorization of, euthanasia. But the bill expressly provided that nothing in it should be construed to condone mercy killing. The legislation does not permit a deliberate, intervening and direct act

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to end life, but it allows an individual some, if not complete, self-determination in the natural process of dying. Before the law was enacted, a subjective preference not to be kept alive in a vegetative state could be overriden by the duty of a doctor, as well as the interest of the state, to preserve life, no matter what its quality.

The opponents' second punch was less emotional. It honestly challenged the necessity of living will legislation. Do the Quinlan and Severns situations happen infrequently? When the issue of prolongation of life arises, can't it be worked out privately between the doctor and the patient's family? Isn't this in fact what is happening in Delaware regardless of living will legislation? The answer to all of these questions is "yes". However, in the Severns case the doctor was not willing to take the risk of civil and criminal liability or the charge of unprofessional conduct by agreeing to terminate the respirator. How much risk is there? Who is going to complain? Certainly the patient or the patient's family will not condemn a doctor for honoring their wishes. How will the state prosecutor find out if no one complains? Has any Delaware doctor been prohibited from practicing because of unprofessional conduct based on terminating a life support system?

These concerns found chilling expression in a recent California case. On August 26, 1981, Clarence Herbert, 55, suffered a respiratory arrest after uneventful intestinal surgery. After he was resuscitated it became obvious that extensive brain damage had followed cardiac arrest and consequent anoxia (lack of oxygen to the brain cells). The brain damage was severe and irreversible. With the family's written consent that "all machines" be removed, Dr. Neil Barber and Dr. Robert Nejdl discontinued Mr. Herbert's respirator on August 29. However, the comatose patient continued to breath on his own and his vital signs were within normal range. Two days later the doctors withdrew the nasogastric tube and the intravenous administration through a monitor-pump of a fluid composed of 5% dextrose and water at the rate of 2400 c.c. per day. Both systems were withdrawn at the documented request of the patient's family. The patient had been receiving no other calories or nutritional support. Seven days thereafter Clarence Herbert died. He had no living will.

When the Supreme Court "earnestly invited the prompt attention of the General Assembly," the living will received a very impressive invitation to Delaware.

In August, 1982, the two doctors were charged with capital murder. Who complained to the prosecutor and to the California Board of Medical Quality Assurance?—a nurse. She stated that the doctors removed the respirator before an electroencephalogram was done to determine if Mr. Herbert's brain was still functioning. She also complained that she objected to the denial of intravenous fluids when it was the doctors' duty to Mr. Herbert to "maintain health". The case has not come to trial as of this writing.* Even if the doctors are found innocent of this capital charge, consider the substantial expense and strain on them and their families.

Could a living will have helped? Yes, if it covered the applicable life support systems. The maker of a living will could specify that he desires not only the withholding or withdrawal of artificial life support systems such as respirators, but the withholding of nutrition. Physicians have greater protection under a living will because family consent alone is not a safe harbor. The prior written word of the patient, secured with legal safeguards, gives the patient a directing role in the process of his death, and it protects the physician in carrying out the patient's wishes. The Delaware General Assembly eventually realized this and enacted the bill in June of 1982.

The vote in the House of Representatives was very close, the outcome unknown until the very end of the tally. The chamber had not been the scene of a dry debate. When it was first clear that the bill had passed, smiles and exultant gestures of accomplishment erupted from the supporters, but one opponent stood up, slammed his pen against the top of his desk, and quickly left the chamber.

*The charges, dismissed after a preliminary hearing, have been reinstated by the California Superior Court.

The bill became law when the governor signed it without fanfare on July 12, 1982. It was now clear public policy in Delaware that, unless contrary to public health laws, the patient's right to determine his own medical treatment was paramount to the doctor's or state's obligation to preserve life.

The law has these important provisions:

1. One may make a written living will (referred to as a "declaration" in the statute) directing the withholding or withdrawal of maintenance medical treatment when he is in a terminal medical condition.

2. "Maintenance medical treatment" is a procedure which resorts to mechanical or other artificial means to sustain, restore, or supplant a vital function, and which would serve where death is imminent only to artificially prolong the dying process and delay the moment of death. "Maintenance medical treatment" does not include medication or medical procedures to alleviate pain.

3. "Terminal condition" is any illness or injury from which there is no reasonable medical expectation of recovery and which, as a medical probability, will result in death regardless of medical treatment to sustain life processes.

4. A declarant may appoint in writing an agent to accept or refuse medical treatment when that appointing person becomes incapable of making decisions.

5. The statute sets forth a number of safeguards:

a. Many of the requirements for signing a living will are similar to the procedures for signing a testamentary will, which takes effect after death. A "living will" derives its name from these procedures and the fact that it takes effect before death.

b. A number of persons are prohibited from being the necessary two witnesses: those related to the declarant by blood or marriage, those entitled to share in the declarant's estate, those with a claim against the declarant, those having financial responsibilities for the declarant's care, and employees of institutions in which the declarant is a patient.

c. The living will can be revoked at any time orally or in writing.

d. Any declarant in a nursing home or other medical institution must have as one of his witnesses a

patient advocate or ombudsman designated by the Division of Aging or the Public Guardian.

e. The making of a living will does not impair life insurance.

f. The living will takes effect when two physicians confirm in writing that the circumstances described in the living will have taken place.

6. Health care providers (such as physicians and nurses) and health care institutions, properly acting in accordance with a living will, are immune from civil liabilities and shall not be guilty of any criminal act or unprofessional conduct, but they must comply in all other respects with community standards of health care practice.

The new law is not without flaws. It provides that a living will is effective for only ten years. Suppose a person with a nine and one-half year old living will develops a terminal condition. This terminal condition does not immediately cause death and artificial life support systems are withheld. If the person is unable to make a new living will, because of mental incapacity, there is then a serious question whether artificial life support systems must be instituted when the living will becomes ineffective at the end of its tenth year. The apparent purpose of the ten year provision is to make persons signing living wills redeclare their desires every ten years so that they are forced to think about continuation of their position. However, if the living will were indefinite, easy and comprehensive revocation procedures already in the law would allow unrestricted reconsideration without the threat of the ten year limit.

The definition of "maintenance medical treatment" may be too restrictive. The law provides that maintenance medical treatment is allowed to be withdrawn or withheld only when "death is imminent, whether or not such procedures are utilized." It has been argued that the class of persons for whom death is imminent constitutes at most only a small percentage of the incapacitated for whom decisions about life-sustaining procedures must be made. Far more numerous are those who can possibly live for some time, if life-sustaining procedures are used. During the House debate a thoughtful question was raised. Would this law have benefited Mary Severns if she had made a living will and had suffered the accident when the law was in effect? It was argued that the respirator had restored her primitive functions and her death was no longer imminent. However, there was a critical period shortly after the respirator was first applied and the severity of her injuries determined. Mary Severns' death was then imminent because the respirator had not yet sufficiently aided the restoration of her primitive functions. If the attending physician had then withdrawn her respirator under valid living will legislation, the physician would have had the protection he needed and Mary Severns the natural death she desired.

The tragedy of Mary Severns catalyzed the enactment of Delaware living will legislation. The synopsis attached to the bill detailed the irony of her vegetative existence. Mrs. Severns had for years wanted to make a valid living will and had widely expressed her wishes not to exist as a vegetable. But Mary Severns now suffers the existence she feared, and only after and because of her accident did living wills become valid. The events of her case were the progenitors of some provisions of the law. At one point two neurosurgeons had differing opinions on the probability of her recovery. The law requires two physicians to confirm in writing that the circumstances described in the living will have occurred before that will takes effect. The legal decisions in Mary Severns' case inspired enactment of living will legislation. The Delaware Supreme Court issued an unusual call to the General Assembly to act promptly upon the issues of contemplated actions or inactions that are expected to determine whether a person lives or dies.

We started on Brackenville Road and we end in a nursing home not far from the opening scene. Stand with me beside the bed of Mary Severns who had been an active proponent of living will legislation. She breathes. Her hand is warm. Her eyelids open periodically and her eyes roll randomly. Her body is inert. She does not demonstrate awareness of anything. Don't you wish you could make her aware of the beneficial result of her tragedy? You feel the frustration of not being able to make a person realize what has happened. Your thoughts turn to Mary Severns' family and you perceive their agony and suffering. Is the resulting living will law some solace to them? Let us hope it is. □

The Systematic Killing of Handicapped Newborns

ROBERT J. D'AGOSTINO and JOSEPH M. MORAN

The Issue

A child is born. He is not perfect and his imperfection is not correctable. He is handicapped and will continue to be. The baby may have Down's Syndrome, spina bifida, or he may be anencephalic.

In April of 1982, in Bloomington, Indiana, an infant born with Down's Syndrome and with a correctable congenital problem, tracheosophageal fistula, was literally starved to death, as hospital personnel kept watch over the dying newborn. The ordinary lifesaving operation denied the "Bloomington Baby" had a 90 percent success rate, but this operation was not performed, because the obstetrician advised the parents to withhold their consent.

A short time later a baby born with spina bifida was removed by his parents from a hospital that could perform the necessary operations to a hospital that could not. Death was almost certain; a death sentence handed down by his parents with the connivance of the second hospital's administrators and doctors. The baby was saved through the intervention of the state child welfare agency and the U.S. Departments of Justice and Health and Human Services. The baby was operated on and has been adopted. His name is Kevin, he is of normal intelligence, and he will have some paralysis below the knees.

These are not isolated instances. Ordinary lifesaving treatment and care is deliberately and frequently being withheld from handicapped newborns. It is being withheld in those instances where with treatment or care the infant would remain handicapped.

The standard most often proposed to justify terminating treatment for handicapped newborns is "quality of life", and, in many cases, the degree of mental retardation determines quality of life. As Dr. Judson Rudolph expressed it:

"It is, in my mind, the addition of limited mental abilities that measurably and materially alter the quality of life . . . as long as there is any hope of salvaging a child with reasonable brain function (rehabilitative surgery) seems an appropriate course . . . Conversely, if there is significant definite brain limitation, I feel strongly that options for non-operative care should be open to parents and physicians."

One advocate of the quality of life standard suggested that only the parents should decide what to do. "Intervention (by the state) would . . . be limited to those individual life or death cases in which the state could establish that the medical profession agreed upon the rejected medical treatment and that the treatment would provide the dying child with an opportunity *for what societal consensus held to be either a life worth living or a life of relatively normal healthy growth.*" (emphasis added).

The quality of life standard

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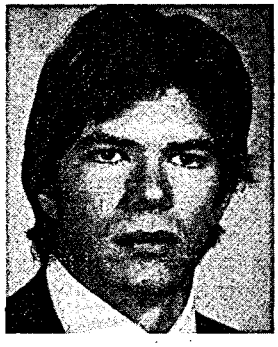

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becomes a way of deciding whether a life is worth living, and only those lives with the prospect "of relatively normal healthy growth" are, accordingly, worth living. Was the Bloomington baby's life worth living? Is Kevin's with his partially paralyzed legs?

The Law

One commentator has suggested that denial of treatment of care to a handicapped baby would subject the physician and the parents to criminal liability for homicide by omission. Another has concluded that the parents alone should decide without the threat of legal sanctions. A third commentator is of the opinion that a court of law should review every non-treatment decision.

The sanctity of human life is a recognized legal principle. The U.S. Constitution protects citizens from "deprivation of life." And, in regard to the death penalty, one federal court has written, "The right to life is the basis of all other rights and in the absence of life, other rights do not exist . . . A denial of this fundamental concept would be tantamount to a denial of human existence."

The Supreme Court's words give additional support for the legal importance of human life. "The fundamental right to life . . . (is) secured by . . . constitutional law . . . the very idea that one man may be compelled to hold his life . . . at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Although the law does not demand the unreasonable or extraordinary, "unless the quality of the infant's life affects its value, a judgment for which there is no legal precedent, the likelihood that treatment means life should justify the procedure."

Despite the arguments of the quality of life advocates, the law does not recognize a private power in the parents or anyone else to make life or death decisions. The Roman law of *manus mariti* gave a husband and father that power over wife and children. in certain circumstances. It is not the law of the United States. In fact, every state has neglect statutes which impose a duty of care on parents and others who occupy a position of trust towards a child. Although the law recognizes the right of a parent to deal with his child, that right ends when the child's life or health is at stake. Despite religious convictions, parents may not prevent a child from receiving an essential blood transfusion. The parents' right to educate the child as they see fit is limited by the state. Parents are prosecuted for killing their handicapped children.

Increasingly in the late twentieth century, the state performs the abdicated duties of parents through child welfare agencies. However, before a welfare agency can act, it needs to know the facts, facts that are hard to get, given the involvement of the attending physicians and parents in the death of the handicapped child. Hospital administrators are often reluctant to act against the wishes of doctors and may remain ignorant, purposefully or otherwise, of medical decisions. Social workers and state bureaucrats are often medically and legally unsophisticated, subject to social and political pressures not to act, and understandably they rely for advice on the very physicians who are treating the handicapped child.

But for those willing to act, neglect statutes are generally written so that anyone may file a neglect complaint with the state agency, or even seek custody for the purposes of ordering medical treatment and care.

Although Delaware has a neglect statute there is apparently no criminal sanction for violating it. Recently a bill "to make clear that the destruction of any child, no matter what his or her condition is, is prohibited by Delaware law" was defeated with the opposition of the Delaware League for Planned Parenthood, Inc. Co-sponsor Senator Holloway is reported to have said that "the medical men were all over me." Granted the bill's shortcomings, its defeat bodes ill for the protection of handicapped children in Delaware.

The Federal Response

Recently, the application of Section 504 of the Rehabilitation Act of 1973 for the protection of handicapped infants was suggested. Section 504 provides in part that "No otherwise qualified handicapped individual in the United States . . . shall solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." The threshold issue in enforcing Section 504 is whether the violator is receiving federal financial assistance. In the usual case the parties, aside from the child, are the parents, physician, hospital, and state child welfare agency. Through various federal programs and block grants the state agency is likely to be a recipient of federal assistance, and so is the hospital, if medicaid and medicare payments are considered federal financial aid. If not, there are several other federal programs in which a hospital may participate.

A possible limitation on Section 504 is its program specificity. As the Supreme Court reiterated recently, coverage by civil rights statutes like Section 504 is program specific, that is, only those programs or activities receiving the federal financial assistance are covered.

The Department of Health and Human Services ("HHS") takes the position that hospitals are covered for purpose of enforcing Section 504. Recently in response to concern expressed by President Reagan, HHS issued new regulations to enforce Section 504 protections more efficiently and quickly.

The new regulations require recipients of federal funds that provide health care services to infants to post conspicuously "in delivery, pediatric and maternity wards and nurseries, including intensive care nurseries" this notice: "Discriminatory failure to feed and care for handicapped infants in this facility is prohibited by federal law."

The notice further advises that anyone having knowledge that a handicapped infant is being discriminatorily denied nutrition or medical care should immediately report the violation to the HHS hotline or a state child protection agency. The notice warns that failure to feed or care for infants may also violate the criminal laws of the state in which the health care facility is located.

In a recent decision, now on appeal, District Judge Gerhard H. Gesell, Washington, D.C., struck down the regulation as violative of The Administrative Procedure Act. Leave aside that issue, because it is the remainder of the opinion and what it says about Judge Gesell's attitude toward the handicapped and the sanctity of life that is important.

The Judicial Attitude

In Judge Gesell's opinion striking down the additional Section 504 regulations, he states that "It is clear that a primary purpose of the regulation is to require physicians treating newborns to take into account only

wholly medical risk-benefit considerations . . ." Exactly, Judge Gesell. The essence of antidiscrimination law is that you may not take the very characteristic, whether race, sex, or condition of handicap, into account in making a decision except when the lack of that characteristic is a *bona fide* requirement. But Judge Gesell suggests that a handicap is precisely what may be taken into account in choosing between life or death. Parents and doctors may "in the infant's best interest" decide that the inconvenience to the family unit or to society makes death preferable. Despite the judge's frequent juxtaposition of "quality of life" with "futile cases", those cases are irrelevant to the proposed section 504 regulations and to the issues he himself raises. Judge Gesell is concerned with the negative "economic, emotional and marital effects on the family" that an effort "to preserve an unwanted child" might cause. We wonder how many of the civil rights advocates who are fond of the slogan "you can't put a price tag on our civil rights" reacted to Judge Gesell's concern for "allocating scarce medical resources" and "funding the extensive care."

To those familiar with the course of enforcement of civil rights statutes generally, not to mention rules of statutory interpretation, Judge Gesell's determination that "no congressional committee or member of the House or Senate even suggested that section 504 would be used to monitor medical treatment of defective newborn infants or establish standards for preserving a particular quality of life" is hardly relevant. Congress was concerned with equality of opportunity, societal attitudes, and discrimination in delivery of services by recipients of federal assistance "solely on the basis of handicap." Judge Gesell has not gotten the message and he is not alone. On top of this, the courts are now manufacturing something called "wrongful life."

Although a wrongful life action was upheld in a recent New York case, the opinion was later "corrected" by the Court of Appeals in New York. That court found that a wrongful life action really contains three separate elements, wrongful conception, wrongful diagnosis, and wrongful birth. The court stated that,

"regarding birth . . . the law can assert no competence to resolve the issue, particularly in view of the nearly uniform high value which the law and mankind has placed on human life, rather than its absence. Not only is there to be found no predicate at common law or in statutory enactment for judicial recognition of the birth of a defective child as an injury to the child, the implications of any such proposition are staggering . . . a cause of action brought on behalf of an infant seeking recovery . . . demands a calculation of damages dependent upon a comparison between . . . life in an impaired state and non-existence."

Another court in New York relied on the legalization of birth control to find a cause for wrongful conception. "The notion that individuals (in this case, parents) should be compensated for the negligence of a physician in facilitating the birth of an unwanted child (in this case, perfectly healthy and normal in every respect), is no more offensive to such philosophical beliefs (i.e., that human life is sacred) than is the concept of birth control itself."*

A California case held that a child born with an hereditary hearing defect could recover "special damages" for the extraordinary expenses necessary to treat the hereditary aliment. The physician's negligence here consisted of failing to warn the parents that their second child had a "reasonable degree of medical probability" of inheriting the hearing defect from the parents, therefore preventing the parents from deciding against having the child.

Doubtless spurred by compassion for the handicapped child, the Supreme Court of California has nonetheless inadvertently gone further than any other court toward establishing the idea that handicapped newborns are legally less than human.

The court reasons that, "It is hard to see how an award of damages to a severely handicapped or suffering child would 'disavow' the value of life or in any way suggest that the child is not entitled to the full measure of legal and non-legal rights and privileges accorded to all members of society."

*The Supreme Court of Delaware speaking through the former Mr. Justice Duffy has explicitly rejected the notion of wrongful life; *Coleman v. Garrison*, Del. Supr. 349 A 2d 8 (1975).

An award of monetary compensation to a child for a handicap while his parents are compensated for the lost opportunity to prevent his conception or to abort their handicapped child, covertly endorses the view that his birth was an injury to him because his birth could have been, and legally should have been, prevented.

The court tried very diligently to separate the ideas of "general compensation for having been born at all" (which is impossible to calculate, and therefore, impossible to be granted by a court) and "special damages" necessary to treat the expenses of the hereditary ailment (which are possible to calculate, and therefore possible to be granted by a court.) The court nonetheless awarded a child money because it was born handicapped and deprived of the benefit of not being born.

The religious heritage of the United States in all its variety and sectarian divisions uniformly affirms the sanctity of life; the Constitution forbids the taking of life without due process; neglect statutes are clear; the federal government moves to protect the handicapped; and court precedents protect the lives and welfare of children without reference to quality of life or lives not worth living. Unfortunately, in an age when judicial discretion has largely superceded the safeguards of precedents and shared societal values, and judicial opinion and utilitarian analysis reign, confidence that the judiciary will protect the handicapped child is misplaced. In fact, the connivance of sympathetic courts at the death of those who are both socially embarrassing and expensive to maintain is to be feared. This attitude toward the unwanted innocent contrasts rather oddly with the scrupulous concern of the courts for convicted assassins and rapists. The quality of life in our nation's prisons must be very high, indeed.

In an article entitled "Medical Science Under Dictatorship", Leo Alexander observed that "whatever proportions these crimes finally assumed, it became evident to all who investigated them that they had started from small beginnings . . . It started with the acceptance of the attitude . . . that there is such a thing as a life not worthy to be lived. Its impetus was the attitude toward the non-rehabilitative sick."

An Interview with

The Honorable Roxana Arsht

PART II

DAVID CLAYTON CARRAD

In the last issue of DELAWARE LAWYER we began an account of Judge Arsht's career, cast in the form of a question and answer exploration of her years on the Family Court bench. In this, the concluding part of Mr. Carrad's interview, Judge Arsht discusses candidly the Court and the difficulties in rendering justice in the peculiarly vexing controversies over which it exercises jurisdiction.

Judge Arsht will retire from the Court in July. We suspect her so-called retirement will be a vigorous one, conducted by this able, active lady at a time when she is manifestly at the height of her exceptional powers. During a very full life that has included marriage, raising two children, and a variety of professional and charitable interests, Judge Arsht has never stopped working. We suspect she does not know how to stop working. As of this writing, she is on her way to mainland China to consult with judges of that jurisdiction. She has taken with her copies of our previous issue, the better to enlighten her counterparts about the conduct of domestic relations law in these United States. We are touched and flattered. It now appears that the sun never sets on DELAWARE LAWYER. Thank you, Judge Arsht.

Carrad: How do you feel about the present level of judicial salaries? Who should set the salaries and how should they be set?

Arsht: I think there should be a commission which would take into the account the salaries of the Governor, the members of the General Assembly and the Judiciary and make recommendations for changes in the salary structure to the General Assembly from time to time. That has been proposed in the past and I think it makes a lot of sense. It would take the Governor off the hook and the legislators off the hook and would probably stop the periodic controversy about judicial salaries. I do think the salaries need to be raised, and I'm not just thinking about inflation. I think it is very difficult for a lawyer with a family, if his paycheck or her paycheck is the only family income, to adequately raise that family on a judge's salary and still try to enjoy the standard of living that he could in some instances, enjoy if he stayed in private practice. I would like to encourage the very best lawyers to become judges, but I think the salary very often prevents that.

Carrad: How do you feel about the present 12 year length of judge's term?

Arsht: I would hate to see it reduced, and I am certainly not in favor of any proposal to elect judges.

Carrad: Do you think State judges should be appointed for life like Federal judges?

Arsht: I don't have any problem one way or the other with the present 12-year term. I think there are some advantages and some disadvantages to lifetime terms. I think to a certain extent they relieve Federal judges of some pressure to be responsive to the needs of the community.

Carrad: I've always thought that if you are a judge and are looking forward to more than one term on the Family Court, you could be very brave in the first two or three years, but perhaps not so brave when you have only a year or eighteen months to go before you have to be reconfirmed.

Arsht: Well, I think the Family Court is very vulnerable in some respects as far as the public is concerned because of our very high case volume and the issues we deal with. We deal with the emotionally charged issues—sex, money, and children! I try to remember that every man who comes in here is either my brother, my son or my father; and every woman is either my daughter, my sister or my mother. How would I want them to be treated? People come in here because they can't resolve things themselves and they need somebody to make the decision for them. I had a woman in not long ago with her son. She said, "I've come to this Court I don't know how many times. I want help for my son and you have never given it to me. You refer him to the Family Court staff and nothing gets done. Nobody does anything." I try to tell myself that there isn't a cure for every illness or problem. I don't have the solution to every child's problems. But that woman cried out for help, and I thought to myself, "I can cry with you and I can do whatever I can but I don't know whether anybody has any answers or whether we can do anything for this child of yours." And it just tears you to bits at times.

Carrad: I have noticed that when I come to Family Court with clients there is something that means a terrific amount to them. It may not seem like much, but it means so much to the client, and that is the courtroom demeanor of the judge. If the judge goes out of his way and spends a few moments talking to the people even if it is just one or two remarks about their conduct or even to say that he or she wishes them well for the future, that means a lot.

Arsht: I think we all would like to do that in every case. I certainly try, although there are times when I know I have a backlog, or I may be angry or something else and that does not happen. But I try. My concern is that when somebody goes out the courtroom door, even if he lost the case at least he feels he got a fair and considerate hearing from me.

I think in some of the Family Court procedures we treat people too casually. Not that we are doing anything wrong, but we just don't make enough of a ceremony of it. Now that divorce hearings only take 2 or 3 minutes, whether they're heard by a Judge or a Master, somehow it doesn't seem to be enough. We're dissolving a relationship that society is still very much in favor of, and it is a very significant moment in people's lives. There is a lot to be said for having an expeditious procedure, but it seems too perfunctory at times.

Carrad: I think the Court does do a very good job. The proceeding is dignified, but sometimes I think people would appreciate a little ceremony or some sort of rite of passage just to memorialize it.

Arsht: I feel that way, too. Now people don't even get their divorce decrees when they are in the courtroom; they get them in the mail signed by some stranger before whom they have never appeared. I'd also like to see something more cere-

monious in adoptions. When people adopt a child, I think they would like to have a little more than a court order in the mail. Or when juvenile delinquents successfully finish a period of probation. We ought to have a little ceremony in the courtroom, or at least a certificate for a child who has completed probation and proved that he can do it.

Carrad: Do you think there are significant differences between Family Court judges in their predispositions in deciding cases?

Arsht: I worry about that sometimes. I hope some day that the Family Law Section might want to come up with—not exactly a survey, but some sort of recommendation to the judges of this Court to help us get what we all say we're trying to achieve, which is some uniformity in approach and in our rulings. I know this is a goal that we can never entirely realize, but there are some areas where I think we could try to be more uniform. Perhaps not in how we conduct trials. I'm very flexible—that's a favorable word—maybe you could say I am more lax, or less willing to cut people off.

Carrad: You do tend to listen and allow more evidence in than some other judges I can name. But I don't think that's an earth-shattering difference.

Arsht: You don't think there is that much difference between the judges?

Carrad: Not is most areas. When people come to me to talk about property divisions, I read them the property division statute. I tell them these are the ground rules, which are binding on the judges, the lawyers and the parties. And I always try to give clients a feel for roughly where they may come out. At the time I have that discussion with a client, nobody knows which judge will be assigned to the case. The final outcome is still going to be within a fairly reasonable and narrow range.

Arsht: It's basically how you are going to present it rather than where it is going to come out.

Carrad: That's right.

Arsht: Okay, how about in custody cases?

Carrad: There are some judges who are terrific fans of joint legal custody, and others who are very reluctant to impose it. I guess the spectrum is a little wider in that area. I think you fall about in the middle.

Arsht: When that idea first came out I said "This is ridiculous." If people have to come to Court to ask a judge to resolve their custody dispute, then obviously they can't get along well enough to have joint custody. It's ridiculous. But I've found that sometimes if you order joint custody and give people time to work it out, lo and behold it does work out. I didn't expect it to work but I've found that sometime it does even if the parties do have a lot to argue about. I think it became, in the eyes of some judges, the wave of the future a few years ago. I think maybe the pendulum is swinging back a little bit but the end result may be more and more joint custody.

"When we grant a divorce, we dissolve a relationship that society very much favors. It is a very significant moment in people's lives. There's a lot to be said for expedition, but sometimes divorce proceedings seem too perfunctory."

Carrad: I've seen judges thrust joint legal custody for six months on legal custody for six months on people wo are really at daggers drawn with each other and say to them months if this doesn't work out, and at the point I'll give one of you sole custody. I am going to look very carefully at who has tried sincerely and who has thrown up all the obstacles." Sometimes that scares people so badly they say "My God, rather than have that happen to me, okay, I'll cooperate and try this joint custody thing".

Arsht: That does work. I know a lawyer who has joint custody and he pushes for it for his clients because it has worked out very well for him. I can remember getting an idea from Judge Wakefield. We all tried to come up with varying ways to handle these disputes between people who do have to bring up their children together. We suggest to them that they meet once a week at a restaurant over a cup of coffee to discuss whatever needs discussing when the child is not present. This works a lot better than trying to have these discussions when the child is being picked up for visitation. That's where the fights occur. It's a very good idea to meet in public, where both parties will behave better.

This whole idea of joint custody and trying to give people some insight into how to handle it comes back to a part of the work in this court that I enjoy the most. Trying to create innovative and varied dispositions in areas like this. Custody. Imperilling family relations charges. What's the most effective thing to do in a juvenile delinquency charge. The traditional thought of fines and probation may not really be what is required to turn this child around.

Carrad: What are you going to do after you retire? How are you going to spend your time and what are your looking forward to?

Arsht: I am looking forward, first of all, to enjoying a little slower pace. Finding out what my husband does all day now that he doesn't go into the office any more! I'd like to get involved with him in what he's doing, gardening and so on. I would also be willing to be on call to hear cases as a retired judge. I would be willing, on my own time schedule, to come down to the court if there was a need. But not property division or support matters! I'm still primarily interested in juvenile delinquency proceedings, imperilling family relations charges, custody and visitation—the human dimension. I'd also like to continue to travel and read. I'd like to become more actively involved in the National Association of Women Judges after going to China with them to meet with some judges there.

Carrad: Anything else?

Arsht: I've always thought it might be interesting to open a little shop. I remember that years ago on Delaware Avenue there was a place called the Little Heel and a place called the Purple Door. I was going to open a place called the Bleeding Heart, and I was going to serve tea and sympathy there. The idea would be that there are so many people who need to know where they can go and or what they can do and don't want to get involved in calling a lawyer to start with. People like to get clued in to what they can do without making a commitment by going to see an attorney. Sometimes I think there is a crying need for that kind of thing. But I don't think I would do that or anything else full time or really make any commitments until I see a little more of what retirement is like. □

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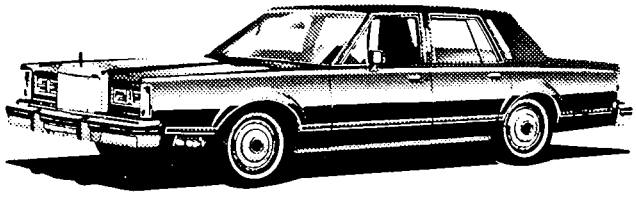

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The Memoirs of Chief Justice James Pennewill

DAVID A. DREXLER

James Pennewill served as Chief Justice of Delaware from 1909 to 1933. His 36-year tenure as a judge, which he commenced in the Superior Court in 1897, was one of the longest of any Delaware jurist. Between 1931 and 1934, as his long service was ending, Chief Justice Pennewill gave three talks to the annual meetings of the Delaware State Bar Association, then held in Rehoboth, which he entitled collectively, "Recollections of Bench and Bar."

Justice Pennewill's reminiscences dealt primarily with the lawyers and judges he had known in his early days at the Bar when Delaware was for the most part rural, and from the practitioner's standpoint, a somewhat backwater state.

Nonetheless, in Delaware the practice of law attracted many talented individuals who leavened their professional careers with public service. Pennewill was born and raised in Greenwood, Sussex county. As a student and young lawyer, he had known as elder statesmen many of the now legendary figures of the Delaware courts from pre-Civil War days. Many of the young men who heard him speak fifty years ago are senior members of the Bar today. Thus, through his talks, Justice Pennewill provided a bridge spanning what is today a century and a half of Delaware lawyers and judges.

Pennewill read law under N. B. Smithers in the one-story wooden clapboard building, which still stands on the south side of Dover Green between the Supreme Court and Superior Court buildings. Admitted to practice in 1878, he was active in the practice of law and in Republican politics in Kent County until his appointment as Associate Judge of the Superior Court in 1897. His appointment by a Democratic Governor was one of several made to fill vacancies created by the adoption of the Delaware Constitution of 1897, which provided for the political balance among Delaware judges which still persists.

A sardonic contemporary observer attributed Judge Pennewill's appointment to the influence of the Pennsylvania Railroad, then the dominant political-economic force in the State. This was no doubt because of Pennewill's long friendship and close professional association with George V. Massey, a Dover lawyer who rose to be General Counsel of the Railroad and who was well qualified to evaluate Pennewill's talents. His subsequent judicial record reflected no untoward solicitude for the Railroad. In all events, Justice Pennewill, after prefacing his comments with a disclaimer, devoted a lengthy segment of the first of his "Recollections" to extolling the talents and accomplishments of Mr. Massey.

Pennewill's remarks give a comforting sense of continuity to knowledgeable readers. They feature prominently nineteenth century lawyers whose surnames still grace the roll of Delaware lawyers and judges; for example, he spoke glowingly of Charles F. Richards of Sussex County, whose descendants moved to Wilmington and have been for four subsequent generations among the most respected Delaware lawyers and judges. He referred at length to several members of the Ridgely family of Dover who were already by Pennewill's day third-generation Delaware lawyers including Justice Henry Ridgely Horsey of the Delaware Supreme Court. Pennewill also mentioned James L. Wolcott, who founded an on-going dynasty of Delaware jurists and lawyers, and Thomas F. Bayard, ancestor of the several Bayards practicing law today in Delaware. This continuity exists even where descent has been through the female line. Two great-grandsons of Pennewill's valued colleague, George Massey, John Briggs, III and Richard L. Sutton, stand high in the ranks of the Bar today.

Fellow editor, Dave Drexler, a native New Yorker, has become an authority on Delaware history during his twenty years in the First State. Dave is a member of the firm, Morris, Nichols, Arsht & Tunnell. He specializes in corporate practice and is the author of the BNA monograph on Delaware information, their organization and operation.

An old man's reminiscences are happily filtered through lenses of nostalgia. Pleasant times and camaraderie come through; old antagonisms and blemishes are screened out. Nonetheless, Justice Pennewill's memories were not wholly without spice, although the overall evocation is of a pleasanter, slower-moving time, when the practice of law was largely local and principally concerned with land controversies, inheritance, and other intensely personal disputes and crimes. In all probability, the day-to-day problems of making a living at the practice of law in the rural, localized Delaware of the 1880s weighed as heavily upon practitioners as the difficulties of being a lawyer in the 1980 urban, corporate Delaware weigh upon modern lawyers. Pennewill did not touch on this darker reality, but one can forgive him for concentrating on the pleasures of his younger days. After all, he was reminiscing, not delivering an historical dissertation. Nostalgia has its place. It is pleasant

to contemplate the possibility that in 2031 one of today's young lawyers will look back publicly on his 1980 seniors with fond regard.

We do not have the space to give Justice Pennewill's recollections in full. What follows are some typical segments from the first of his talks, delivered June 27, 1931. This talk concentrated on the downstate lawyers and judges with whom he was most intimate. His 1933 and 1934 talks dealt with New Castle laywers and judges and Delawareans who achieved renown as lawyers in other states. They will be exerpted in future issues of *"Delaware Lawyer"*.

Political Campaigns

I was, at one time, Chairman of my party's County Committee, and later Chairman of the State Committee; and my chief duty and difficulty seemed to be the securing of speakers for the campaign. Sometimes I could prevail on Frank Hoffecker, Harry Conrad and one or two others from Wilmington to help me, but usually had to go it almost alone. Political speeches did not do any more good then than now, but the people expected them anyway.

In the campaign of 1882, the boat called the "NEW CONSTITUTION" played a spectacular part. That boat was a large structure, mounted on wheels, commanded by a captain and small crew and drawn through the entire State by eight or ten large horses. It was a very expensive proposition and cost so much for building and operation that all our party funds were exhausted before election day arrived. But we did make a great splurge with that boat. Our entrance into a town attracted as much attention as any other circus would. The matinee performances were dull and poorly attended, but at night, fireworks and the novelty of the enterprise attracted an immense business. In the light of results the undertaking was foolish, but it did perhaps fix in the minds of the people the thought of a new Constitution which was realized some years afterwards.[1]

During that memorable campaign we had on the boat regularly but two or three speakers—Beniah Watson, Major Lofland, Candidates for Congress, myself, and at times Judge George P. Fisher. A part of the time we had a speaker from Wilmington named Roberts, a newspaperman, and a most valuable utility man he was. He would speak ten minutes, thirty minutes, an hour or two hours, just as requested and did it with the utmost ease. I often envied him. Roberts had a wonderful memory, and I sadly remember one occasion—an afternoon meeting at a small place in Sussex, called "Horsey's Cross Roads"—where a few people were gathered, and Roberts asked permission to make the first speech. He had not done this before. The others gladly consented and before he finished he had made not only his own speech but the speeches of others, stories and all, and better than they would have done. There were no other speeches made on that occasion.

We had a small band on the boat, consisting of three pieces, with Ed Bacon, of Laurel, as leader. At Ellendale one afternoon before the first speaker was presented, the band, which had a very small repertoire, played a piece called "Bringing in the Sheaves" as it had done many times before. The speaker arose and said to the leader—'It is the same old tune' and Bacon replied—'Yes, and it will be the same old speech.' And it was.

I was a regular member of the company on the boat. My uncle, Albert Curry, was a candidate for Governor at the time. I had to enlist for the entire war, but I grew very tired before peace was declared. Mr. Curry was useful in footing the bills, which sometimes had to be paid before our horses were released from livery in the morning. I need not tell you that, although, the speeches and music of that campaign linger with me still, we did not bring in any sheaves or accomplish any good, unless there was planted then the seed that grew and fruited in the Constitution of today.

The Judges

My earliest recollection of the Delaware Bench was at the first term in Kent in my student days. Gilpin,[2] the Chief Justice, died suddenly during the term. He was not imposing in appearance but wonderfully keen and alert. From what members of the Bar told me then I can say without disparagement of his accociates that the Chief Justice was at all times a very considerable part of the Bench. He functioned, so to speak, nearly all the time. His thin but clear and penetrating voice was easily and often heard and his wide knowledge of pleading and practice, which everyone conceded, was ever manifest.

Judge Wootten[3] of Sussex was another member of that Bench and had been for many years. I grew to know him well and to like him very much. He was very stout, short in stature, and slow in movement. It seemed to me that he was becoming tired and weary of his work. He seemed willing that the others should do it all, and slept a little at times. The Judges then stayed in the town, when holding Court, from Monday until Friday, and I have heard Judge Wootten say more than once from the Bench:

'The business of the Term ought to be finished by Friday afternoon, but whether it is or not, I am going home on a certain train.' But he was not offensively impatient, and had a very kindly heart.

In those days there were but two terms a year, consuming usually two weeks each, and the most lengthy and difficult cases were those of ejectment and replevin. Such cases were common in the times of which I speak, and the lawyers, particularly in Sussex, revelled in such trials.

I want to tell you something about Judge Houston,[4] for a long while an associate of Wootten on the Bench. He lived in Dover not far from the room I occupied on the public square and consequently I saw him often. He was small in stature, of medium height, large head, and very impressive face. He always wore a high silk hat. But it was his innate dignity, courtesy and grandeur, so to speak, that impressed one most. He was the personification of politeness, but credited with this rare faculty—he could and would, under great provocation, use the strongest language to the 'queen's taste'. At such times his words were not only expressive and picturesque but classical in a way. He had a vocabulary of his own. And just to show how a man's natural dignity can be shocked and mortified, I think this incident as told to me, may be related without offense to anyone:

The Judge was once bathing in the ocean at Rehoboth with some ladies and gentlemen, when an unusually high wave came along and lifted his wig from his head. He heard his friends laugh, saw the disappearing headpiece, clapped his hands to his head, and in a torrent of words more expressive and forceful suddenly and permanently disappeared from the scene. He was deeply mortified. To those who think that dignity is a cloak most becoming a Judge and a garment to be always worn, that he should be ever courteous, but not overly intimate with the Bar in a social way, Judge Houston was the ideal Judge. He was reserved without being austere, dignified without being offensive, and always thoughtful and kind. Dear Judge Houston, I am sorry to say, began to fail not only physically, but mentally before leaving the Bench. There were lapses for a moment or two at times known to but a few, and it was pathetic to see these evidences of a failing mind that had been so strong.

I have devoted some time to Judges Wootten and Houston because they were the first whom I knew very well, had served many years on the Bench, were splendid lawyers in their time and made records at the Bar and on the Bench of which the State may well feel proud. They received very small pay for the services they rendered, the best return for their labors being the consciousness of work well done and the public estimation in which they were held.

I must tell you something of my recollections of two other later members, Chief Justice Comegys[5] and Chancellor Saulsbury.[6] The former was the most impressive looking Judge I have ever seen. He was a large man and very aristocratic in appearance; so much so that he did not seem over genial and approachable to any who did not know him well. But he was a friendly man, socially inclined to those he was intimate with, and fond of talking with laboring men. His practice had been large before he went on the bench, but he had been losing it to younger men. Perhaps that was one reason he was willing to become a Judge with a Judge's small pay. Rehoboth was very attractive to Mr. Comegys, and his greatest diversion and pleasure was in sojourning there. He was one of the pioneers and first cottagers of that now popular resort.

Like Gilpin, Chief Justice Comegys largely dominated the Bench and sometimes did not confer with the other members before deciding a case. I have heard it said that when he was sitting in New Castle County, he would gather up his papers at the close of the day, go down to the home of his niece, Mrs. Frank Buck, write a charge at night, and deliver it in the morning without conferring with his associates. I feel sure that such a course would cause a small rebellion now.

The Comegys family was truly remarkable. There were several other sons, and they were all large and impressive looking men, noticeable anywhere. They were born and raised near Little Creek, three miles east of Dover. When growing up they attended school in the quaint octagon shaped school house three miles from their home and walked the distance every school day no matter what the weather might be.

They were fine talkers, those Comegys men, and especially the Chief Justice and his brother Benjamin, who was a prominent banker in Philadelphia for many years. They were both highly gifted in conversation, and in power of description unusual. The Chief Justice always delivered many unwritten opinions and charges from the bench, and always in a conversational, clear and forceful way. He was remarkably gifted in that regard, and his diction was as perfect, and his thoughts as clearly expressed as if they had been carefully prepared and written down.

Chancellor Saulsbury I knew after his appointment and removal to Dover. He was before that a successful lawyer with a large practice. Probably no other man in Delaware, with the possible exception of John M. Clayton, ever exerted as much influence and power over the people of lower Delaware. The Chancellor was a whimsical and humorous man at times, and sly and foxy, too. No one in the State had a greater knowledge of current politics than he. He dearly loved the game and was thoroughly informed. Chancellor Saulsbury, a very large man, was badly paralyzed then, and I can see him now going along, leaning heavily on the arm of his faithful colored servant.

Because of his influence with the people and especially with a jury, Willard Saulsbury was once called upon to defend a man in Dover charged with murder. The defendant was a doctor who had attempted to defraud an insurance company. He had planned to collect his insurance by killing a negro of his own size, burning the body, and disappearing from the State.*

To destroy the identity of his victim in case the fire failed, the doctor skinned the body and in some way concealed or destroyed the skin. He attempted flight after starting the fire but was apprehended at Harrington on the midnight train and brought back to Dover. It was the most extraordinary and sensational case the County had ever known. Saulsbury came as near to achieving the impossible as a lawyer ever did, when he saved the life of his client on the ground of self defense. His client was convicted of the commission of a less serious crime and sentenced for a term. I was living in Dover when his term expired and well remember that during the first night after the prisoner's discharge a colored person could not be seen on Dover streets: They were afraid. The man might have remained in Dover, but wisely concluded to move far away. He went to Texas where he died.

Sussex County Lawyers

I must tell you something of my recollections of the Sussex County Bar of years ago who are gone. The leading members were Jacob Moore, Charles M. Cullen, Alfred P. Robinson and Charles F. Richards. They were all real lawyers, fine citizens and useful men. I doubt that four abler attorneys could then or even now, be found in any small town, and to those named should be added Robert C. White, although he was admitted at a later date.

Robinson, as you know, became Chief Justice, and I have no doubt he would have made a fine judicial record if he had lived longer. He was, as I remember him, of a highly nervous temperament and that, with the newness of his position, and the duties it entailed proved more than he could stand. He died in a very short time.[8] Cullen also became a member of the Bench as all of you know.[9].

Mr. White was so unusual in his mental make-up and habits as to deserve some notice. He was a merchant before he became a student at law under Chancellor Saulsbury. He was not highly educated so far as books were concerned, but uncommonly well versed in human nature and the ordinary affairs of men. In common sense and mother wit Bob White was a past master and seemed to have an intuitive sense about how a jury would feel. He was a successful jury lawyer sometimes given to surprising argument. For example, in a suit for damages in which one element was loss of the sense of smell, Robert made this defense: the loss of the sense of smell is no injury at all—it is a blessing in disguise because there are more disagreeable odors in the world than agreeable ones. Well, who can say he was wrong?

These Sussex lawyers had the reputation of being a bit canny at times and chary of expressing a definite opinion, leaving something to be desired. Consider the following story, told me many years ago: A candidate for Governor had received a very embarrassing letter. He called on a friend who was a prominent member of the Bar and in whose opinion he had good cause to confide, and asked him for help. The friend said the answer required careful consideration. He gave it much thought and finally said:

"Rol, this matter gives me deep concern on your account; I am sorry you received the letter. If I were in your position, I would think the writer should not have asked such embarrassing questions.' And that was the extent of his advice.

Kent County Lawyers

The Bar of Sussex, with the leading members I have mentioned, was fully equalled, I want to tell you, by that of Kent of the same time. It had five outstanding members, too, viz: N. B. Smithers, Edward Ridgely, George V. Massey, James L. Wolcott and Henry R. Johnson. I am sure that no town of any size could then or since present a stronger array. I read law under Mr. Smithers in the little one story building on the south side of "Dover Green". I spent much time, both with Mr. Massey who occupied the other room in the same building, and in the offices of Ridgely and Johnson a few doors away.

There was no lawyer whose character and life I admired more, and in whose legal opinions I had greater confidence than Edward Ridgely. He was a most capable counsel, and although strong in both, it seemed to me he liked office better than court work. He was not a great speaker and knew it, but his opinions were safe and it was a great comfort to have him with you in a case. He was always a member of the Examining Board and ever faithful in performance of that important duty. Incidentally, it may be said, I have never known one of Ridgely blood who did not possess to some extent what may be called 'the legal mind'.

*Presumably the good Justice compressed his account. Would the doctor's 'widow' have collected? Even in the late 19th century, insurance carriers were not given to making out checks to specters.

Closely associated with Mr. Ridgely was his nephew, Henry Johnson, also an able member of the Bar. He was not well known to the Bar of New Castle County, but was exceptionally strong in the knowledge of law, and a great help to the younger members in Kent. He knew his Blackstone better than anyone else and was the most helpful assistant to the student I have ever known. He was always willing to assist others and was almost daily called upon by the younger members of the Bar and sometimes by the older ones, too. He took no active part in Court trials, never sought publicity, but left the impress of his mind on many students, as well as members of the Kent County Bar.

Mr. Smithers was an exceptionally able lawyer along any line in his knowledge of the law of real estate he had perhaps no equal in the State. When a comparatively young man, he was Governor Cannon's Secretary of State during the troublesome times of the Civil War. In this State, as you know from history, excitement sometimes ran high, especially in the Legislature, and the office of Governor was beset with many trials. Without the valuable services of his Secretary, who proved equal to every emergency, Governor Cannon would have had a much more difficult term. Smithers was also Secretary of State much later under Governor Marvil.

Mr. Smithers was distinguished in one way that the people of today know but little about. He was perhaps the finest Latin scholar in the State. His chief diversion was the translation of the old and immortal hymns of the Church from Latin into English text.

I have said that Mr. Smithers was an unusual real estate lawyer and that suggests a bit of history. At one time the title to a part of the land on which one of the towns of the State stands was in dispute. Mr. Smithers was asked to represent the defendants. He told them his charge would be a thousand dollars and it was considered too much. The defendants retained Reverdy Johnson of Baltimore, a noted lawyer, for a smaller fee. The trial took place when I was attending school and I happen to be in the Court room when the arguments were made. I scarcely knew what it was about, but later recalled that the Bayards, who represented the plaintiffs, talked for a great length of time and Johnson for not more than a half hour. The plaintiffs won but the feeling in the Kent County Bar, I afterwards learned, was strong that if Smithers had been counsel the result might have been different. Although he was not counsel in that case, be became so interested in the litigation that he wrote a treatise on the law of estates tail and other subjects involved. He would sometimes read parts of the work to me when a student under him and I found it then dry and unprofitable in the extreme.

I come now to a subject that I hope and believe can be treated fairly notwithstanding my admiration for the man—George V. Massey, who was one of the truest and best of friends. It is my opinion that our State never produced a stronger all around man.

Mr. Massey came to Dover with that dear Mother when not much more than a boy, without any outside influence then or afterwards to push him along in life. He was for a while a clerk in the office of the Recorder of Deeds. He read law under Mr. Smithers, was admitted to the Bar, and occupied a small room, as an office, adjoining that of his preceptor. He worked there for many years, from early morn till late at

Intimations of Plaintiff Immortality

Proposed Amendment to Chapter 81, Title 10 of the Delaware Code:

". . . the time limitation for an action to recover damages for wrongful death . . . due to exposure to phenoxy herbicides . . . shall not expire until two years has elapsed from the date that said person has been told by a licensed physician . . . that his . . . death may be related . . . to exposure to phenoxy herbicides."
House Bill No. 174, The 132nd General Assembly.

By notification to the decedent, care of the Dead Letter Office?
The Editors

night. He became, in point of practice, the leading attorney at his bar.

Massey's ability attracted, after a while, the attention of the Pennsylvania Railroad officials and he was made local counsel for the corporation. He was in due course made assistant solicitor and connected with the Philadelphia Office, where only the janitor was before him in the morning and after him at night. On the death of the solicitor, Massey became general counsel, head of the legal department. Certainly this was, in itself, a wonderful accomplishment for a plain country lawyer with very limited education and nothing to aid him but his industry, ambition, merits and character. Think of the able lawyers in Philadelphia and elsewhere with strong influence back of them who no doubt would have liked the position!

It would not have been possible for Massey to attain such success if he had been a lawyer only. Smithers was his superior in knowledge of the law and so was Ridgely, but neither was the aggressive lawyer, able executive and business man that Massey was.

Just one more fact that shows the rare capacity of Massey for accomplishing things. I have never known anyone who could secure more from the Legislature than he. His influence, coupled with that of Mr. Wolcott,[10] who was often associated with him, was almost supreme in matters of legislation.

I want to say something about Mr. Wolcott, who was close to Massey as well as to me. He was, in face and form a strikingly handsome man, always neatly and becomingly dressed, and attractice in every way. He had a large practice, a clientage second only to Massey in his busiest days. Like Massey he prepared for many years all his papers in his own hand, and many a paper did each of them draw. He was Chancellor for a short time, as all of you know, but it seemed to me he did not like the work. It was too confining for him. His office was a place where congenial spirits liked to gather when he was not too busy, especially in the evenings, and there was nothing that Mr. Wolcott enjoyed more than social contact with friends. I have heard him reply to a client who asked him what his charge was, 'Oh, I don't know, whatever you think the service is worth, and you need not pay anything now unless

you wish.' By charging for his services and collecting the charges in a business way, he would have made more money but, maybe, fewer friends, and it was the latter he enjoyed above everything else.

Wolcott, when engaged in an important trial, or in the heat of a political campaign, was a speaker of much more than ordinary eloquence and power.

In the days to which reference has been made, attorneys fees were almost always small, five and ten dollars being the rule. But this made no difference in the service the lawyers rendered; they loved the work regardless of the pay, and the fees charged were based on service rather than on the ability of the client to pay. It seemed to me they would rather try a case than settle it any time, and in this I thought they were wrong. Apparently they did not consider the costs the client might have to pay if unsuccessful in the suit.

One of the first cases tried in Sussex after I went on the Bench was an ejectment case. The value of the land in dispute was less than fifty dollars, the quarrel being about a division line. The trial went on day after day, witness after witness was called, and the costs against the losing party in the end were over a thousand dollars. I was told that one of the parties was ruined as the result of the trial and the condition of the other almost as bad. But in the matter of settling cases without trial I am sure there has been a wholesome change. □

[1] As noted earlier, a new Delaware Constitution was adopted in 1897, some 15 years after the campaign Justice Pennewill describes.

[2] Edward W. Gilpin served as Chief Justice from 1857 to 1876.

[3] Edward Wootten was an associated judge of Superior Court from 1847 to 1887.

[4] John W. Houston was an associate Judge of Superior Court from 1855 to 1893.

[5] Joseph P. Comegys served as Chief Justice from 1876 to 1893.

[6] Willard Saulsbury served as Chancellor from 1873 to 1892. He had earlier served as U.S. Senator and his son, Willard, Jr., an attorney, served as U.S. Senator during President Wilson's term.

[7] Under the rules of practice in effect at the time, many cases were heard by several Superior Court judges sitting as a panel.

[8] Chief Justice Robinson died after only six weeks in office in 1893.

[9] Charles M. Cullen served as Associate Judge of the Superior Court from 1890 to 1897.

[10] James L. Wolcott served as Chancellor from 1892 to 1895. His son Josiah served similarly from 1921 to 1938. His grandson Daniel F. Wolcott served briefly as Chancellor in 1950-51 and as Justice and thereafter Chief Justice from 1951 to 1973.

RETROSPECTROSCOPE

Continued from page 27

the cases of the procedure involved, the doctrine of *res ipsa loquitur* was not applicable. This could lead to a barrage of statistics: In one-half percent to two percent of the cases where a bilateral tubal ligation is properly performed, the patient still becomes pregnant. *Coleman v. Garrison,* Del. Super., 327 A.2d 757 (1974), *aff'd* 349 A.2d 8. In two percent of properly performed thyroidectomies, the recurrent laryngeal nerve is injured. *DiFilippo v. Preston,* Del. Supr., 173 A.2d 333 (1961).

Again a physician could find himself in an anomalous position—would he be able to find published statistics that would force the plaintiff to find an expert and not just make a layman's accusation in court based on the poor result.

In Delaware at the present, we have statutorily defined the instances where the negligence is so blatant that no expert is required of plaintiffs. These situations are 1) where a foreign object was unintentionally left within the body following surgery; 2) where an explosion or fire originating in a substance used in treatment occurred in the course of treatment or 3) where a surgical procedure was performed on the wrong patient or the wrong organ, limb or part of the patient's body. 18 *Del.C.* §6853.

This statute, fortunately, has gotten us out of the statistics game. But there are still, I feel, too many other games that a physician must face when he has been sued for malpractice: Will it be a contest of credibility; is the plaintiff's expert judging the propriety of the defendant's conduct with an understanding of what was available to defendant under the circumstances; is hindsight—the retrospectoscope—distorting an evaluation of what the defendant should have known and done at the time of treatment; has plaintiff's attorney evaluated the case to determine if there was improper treatment or did he file suit just on the basis of the poor result; what does the plaintiff have to lose because he only has to pay his attorney if he wins—why not roll the dice and see what happens.

Plaintiffs' attorneys proclaim that a man injured by a physician negligently driving an automobile should have no greater burden to recovery than a man injured by a physician negligently wielding a scalpel. I disagree. Almost all of us drive and know the rules of the road. Any attorney filing suit based on a collision at an intersection can understand the elements of negligence involved. This is not so in a medical malpractice case—the plaintiff's attorney rarely can comprehend whether or not the physician defendant met the appropriate standard of care required of him. In too many instances, the plaintiff's attorney will file suit for a poor result, without having made the determination that there was, in fact, malpractice.

As long as a physician faces the threat of losing a malpractice case to jury sympathy for the plaintiff—despite the physician's conscientious treatment of the patient with all appropriate skill and judgment—the medical community will continue to view medical malpractice litigation with hostility. Their professional reputation can be attacked and their professional performance can be condemned despite the exercise of all proper care.

We have gradually created safeguards to prevent a phycisian's performance from being judged by persons unqualified to establish the standard of care required of physicians. The standard of care must be established for the jury by expert witnesses. The Malpractice Insurance and Litigation Act provides for a panel of two physicians, 2 laymen and an attorney to hear medical malpractice cases and to determine if the physician defendant met the appropriate standard of care. However, these safeguards do not prevent an unjustified suit from being brought.

Unless and until plaintiffs can be prevented from bringing suit on bad result alone—by having to find an expert witness before suit is filed or by having to pay their lawyers if they lose or even by having to pay defendant's lawyers if suit is unjustified, medical malpractice litigation will not be considered by physicians as a part of the legal process beneficial to the practice of medicine. They will look upon it as a hazard to their reputation that may bear no relation to their skill and care. As such, it is broken glass in the physician's path that may trip him up no matter how careful he is. □

IMPAIRMENT OF RIGHTS

Continued from page 30

unknown to him. Why the medical profession deserves such a special protection unavailable to professionals in other fields is open to debate, but there is no practical reason for the Delaware medical community to fear the traveling troubadour. If there is no underlying merit to the position taken by the hired gun, why worry? It should be no problem for a defendant to do substantial and perhaps irreparable damage to the "expert's" credibility under cross-examination and to overwhelm his testimony with that of a competent Delaware practitioners in support of the defendant's actions, if they warrant it. The enormous amount of time and expense consumed in deciding whether a witness may testify makes you wonder what possible statutory objective is served by application of these arbitrary rules. This particular provision highlights the apparent purpose of the entire statute—to make pursuing a claim arduous and expensive for the injured patient.

Other Statutory Hurdles For The Negligently Maimed

Another serious impediment is the statutory excision of the common law doctrine of *res ipsa loquitur.* While the physician walking along the street who is struck by a sack of flour tumbling out of a warehouse window can establish his right to recovery merely by proving the occurrence, the anesthetized victim of a surgical mishap has no such advantage, even in the case of an incident that would not ordinarily have occurred without some negligence by someone. There are some exceptions to this anomaly; the statute does permit an inference of negligence in the bizarre circumstances of (a) explosions or fire originating in a substance used in treatment; (b) a foreign object left in the patient's body following surgery; and (c) a surgical procedure performed on the wrong patient or the wrong limb. But, in the more likely situations, for example, that of a hysterectomy patient who emerges from surgery with a lacerated and infected bladder, it is incumbent upon the victim to establish through expert testimony the precise act of substandard care or skill that caused her damage.

There are other nuggets of discrimination; a special statute of limita-

tions, a liberalized collateral source doctrine, which permits the introduction of certain types of evidence of third-party payment, and authority in the court (1) to reduce the amount of an award if and when a judgment is ever obtained, (2) to provide for periodic payments of a judgment, and, (3) that ultimate incentive to a lawyer to undertake so difficult a representation, the power to limit an attorney's fees for representing the patient—but not the doctor.

The Panel Record To Date

The history of the panel proceedings to date discloses statistical proof that they have led to unnecessary expense, delay, and peculiar hardship for plaintiffs. Of a total of 94 demands for medical malpractice review panels since 1976, 7 are currently pending and 39 have been decided. Of the cases decided, 31 favored the defendant and 8, the plaintiff. Of the remaining 48 cases, 8 demands were either withdrawn or dismissed, and 40 resulted in a settlement before a panel convened. Presumably, these last-mentioned cases would have been disposed of in like fashion had jury trials rather than panel hearings been imminent. It is accordingly difficult to see what purpose was served by the panel procedure in those 48 cases. While the statistical sample of decided cases, 39, may be too small to draw firm conclusions about the fairness of the process, there is nothing in the win-loss ratio to persuade patients that their evidence will be fairly evaluated according to that minimum criterion of "supporting the conclusion" that their doctors failed to meet the applicable standard of care.

The language of the statute and its operation to date strongly suggest that the victim of medical negligence is further victimized by a justice-delayed and justice-denied system. Although the statute has thus far survived constitutional attack, I hope that a Delaware court may eventually share Michigan's assessment of its "malpractice crisis" counterpart:

"The present malpractice arbitration system does not lend itself to public confidence but to public criticism. The present system does a disservice not only to the medical community but also the legal process of this state." *Strong v. Oakwood Hospital Corp.*, 325 N.W.2d 435, 437 (1982). □

AVE ATQUE VALE

The Board of Editors has decided it would be fitting to publish annually a short tribute to members of the Bar who have died during the preceding year. We thank our fellow editor, Battle Robinson, for assembling these brief biographies.

Clement C. Wood (d. June 16, 1982)

A native Pennsylvanian, Mr. Wood first came to Delaware to work for the Associated Gas & Electric Company. In the 1940's he became a member of the Delaware Bar and opened a firm with his law school classmate, Bayard Allmond. Mr. Wood was deeply interested in the history of his adopted state. He spoke twice at Delaware Day ceremonies at Valley Forge. His public service included election as Register of Wills for New Castle County. He served as Chief Deputy Attorney General of Delaware and as First Assistant City Solicitor of Wilmington. He was a Director of the Delaware Motor Club, which he also served as counsel. From 1964 until his death he was a member of the Board of Trustees of the Dickinson School of Law, of which he was a distinguished alumnus.

William J. Storey (d. June 28, 1982)

Judge Storey, described by friends as a "Kent County institution" served Delaware and his native County as Secretary of State, Mayor of Dover, Resident Judge of the Superior Court, and Deputy Attorney General. Early in his career, he acted as Secretary to Senator T. Coleman duPont. After the Senator's defeat in 1922, he remained in Washington to become a stenographer at the Department of Justice. He later graduated from the National University Law School, now part of George Washington University. In 1929, he returned to Delaware and commenced 28 years of private practice in Dover. In 1943 Governor Walter Bacon appointed Storey Secretary of State. He served in that position until he was elected Mayor of Dover in 1949. He was appointed to the Bench of the Superior Court in 1957 and reappointed in 1969. After his retirement, Judge Storey served as counsel to the Dover firm of Schmittinger & Rodriguez.

James P. Kranz, Jr. (d. August 13, 1982)

Mr. Kranz came to Delaware in 1950 to join the Legal Department of the Du Pont Company. Before coming to Delaware he had served as an Assistant to the Faculty of Law at Harvard University, where he received his legal education. He then clerked for Judge Patterson of the United States Court of Appeals for the Second Circuit. From 1939 to 1950 he practiced law in New York City. At the Du Pont Company he became a senior attorney and specialized in antitrust matters. Before retiring in 1977, he was instrumental in establishing a program for the recruitment of new attorneys for Du Pont. He was admitted to the Delaware Bar in 1966. He was a member of the American Bar Association and the Lawyer's Association of the Textile Industry.

James H. Hughes, III (d. August 16, 1982)

James Hughes was the son of the late James Hurd Hughes, United States Senator from 1937 to 1943. He graduated from Princeton in 1938 and from the University of Pennsylvania Law School in 1940. Admitted to the Delaware Bar in 1941, he began a career of 37 years as a single practitioner in Dover. He was especially interested in criminal matters. He also served as Deputy Attorney General for Kent County from 1967 to 1970 and as attorney to the State Senate in the 1950s.

During World War II Mr. Hughes was a naval gunnery officer and served on destroyer escorts in both the Atlantic and Pacific theaters. After the war he became the first commander of the Delaware Veterans of World War II, now the Delaware Veterans, and donated the land for its post building in Dover. He remained active in the Naval Reserve until 1965.

Joseph A. L. Errigo (d. August 25, 1982)

Mr. Errigo practiced in Wilmington following his admission to the Delaware Bar in 1929. He became the first Public Safety Commissioner for the City of Wilmington, and served for years as Chief Appeals Referee for the Unemployment Compensation Commission. He was a founder and past president of the Committee of 39. He wrote and published histories of two local churches, "St. Joseph on the Brandywine" and "The History of St. Anthony's Catholic Church".

Of a lifetime of dedicated civic, legal, and religous activity, Mr. Errigo's finest achievement was a useful and productive life after conviction for misuse of client accounts. Paroled in his mid-sixties, he worked with a Dover insurance firm and later became a paralegal. He was elected President of the Dover Lions Club, and helped found a Sons of Italy lodge in southern Delaware. He was also President of the Kent County chapter of the Delaware Association of Christians and Jews. A year before his death he received a pardon from the Governor.

W. Reese Hitchens (d. September 14, 1982)

Mr. Hitchens, a member of the Bar for over 50 years, was known as a practical lawyer who always searched for a sensible and equitable solution. He received both his undergraduate and legal education at Dickinson, where he taught domestic relations and public utility law in the early 1930s. In 1932 he returned to Delaware to join the firm of Hering & Morris—now Morris, James, Hitchens & Williams, where he remained throughout his career. For several years he served as a Deputy Attorney General in charge of taxes and as Chairman of the State Tax Board. He was a former Secretary of the State Board of Bar Examiners and a former Secretary of the Bar Association. He was general counsel and director of the Bank of Delaware from 1966 until 1972, and served on the boards of several savings and loan associations.

John T. McEvilly (d. September 15, 1982)

Mr. McEvilly had considered becoming a doctor before he decided on a career in law, and he maintained a life-long interest in science and medicine. A Delaware native, he graduated from Wilmington High School in 1929. In 1933 he received a B.S. degree in chemistry from St. Joseph's College in Philadelphia. He graduated from the University of Detroit Law School in 1938, and was admitted to the Delaware Bar in 1945. Mr. McEvilly was a specialist in real estate matters. He was associated during his career with the late Judge Thomas Herlihy, and with the firm of Cohen and Cohen. Mr. McEvilly, who retired in 1977, was an exceptionally well-read man with wide cultural interests. At the time of his death he had accumulated a large personal library.

The McEvilly name is prominent in the Delaware Bar: his brother, Walter P. McEvilly is a member, and his nephew, Walter P. McEvilly, Jr. is with the Wilmington firm of Prickett, Jones, Elliott, Kristol & Schnee.

Joseph Lichtenbaum (d. January 4, 1983)

Mr. Lichtenbaum attended the University of Delaware and the Law School of the University of Cincinnati. He remained in that city following his graduation, serving as a state prosecuting

attorney and later as an Assistant United States Attorney. He also engaged in private practice and specialized in criminal defense work. He was well-known in Cincinnati as an effective litigator. He was once a President of the Federal Bar Association of Cincinnati.

In 1969 after a thirty year career in Cincinnati, he returned to Delaware and was admitted to the Bar. During his three years with the City Solicitor's Office he handled both civil litigation and criminal prosecutions. He frequently represented the Solicitor at City Council meetings. Mr. Lichtenbaum retired in 1972 because of declining health and divided his time between Florida and Cincinnati. A veteran of World War II, he served with the U.S. Army in the Aleutian Islands.

Joseph P. Hurley (d. January 17, 1983)

Judge Hurley, a native Pennsylvanian, came to Delaware after World War II to attend the University of Delaware. He received his law degree in 1950 from Catholic University in Washington, D.C., and remained in Washington working as a lobbyist. In the 1950s he returned to Delaware and worked with Attorney General Craven. He later became a partner in the firm of Michlin, Hurley & Wilson. In 1964 he was appointed to the Family Court and served until 1976. During his years as Judge, he was especially interested in juvenile justice. On leaving the Bench, he became Acting Director of the Standards and Goals Project of the Delaware Criminal Justice Planning Commission, and was instrumental in developing proposals for reform of the criminal justice system. His son, James Patrick Hurley, Jr., is an attorney with the State Department of Justice, and his daughter, Donna Hurley Tyler, has worked as a paralegal.

Rodney M. Layton (d. April 14, 1983)

Mr. Layton's family has been active in Delaware politics and law since the 17th century. A graduate of Princeton and the Dickinson School of Law, he was admitted to the Bar in 1949. During much of his practice, Mr. Layton specialized in medical malpractice matters. At the end of his career he successfully defended the Wilmington Medical Center in litigation challenging plans to close two Wilmington hospitals and build a larger facility south of the city, in Stanton. He found time for a wide variety of useful interests beyond the practice of law. He served as Chairman of United Way, as Co-Director of SANE of Delaware, Inc., which sought peaceful school desegregation, as Chairman of the Board of Game & Fish Commissioners, and as a Director of a number of corporations, including Wilmington Trust Company. On hearing of his death, the Delaware General Assembly adopted a resolution praising his many contributions and describing him as a lawyer "who never used a word he did not need".

Battle R. Robinson

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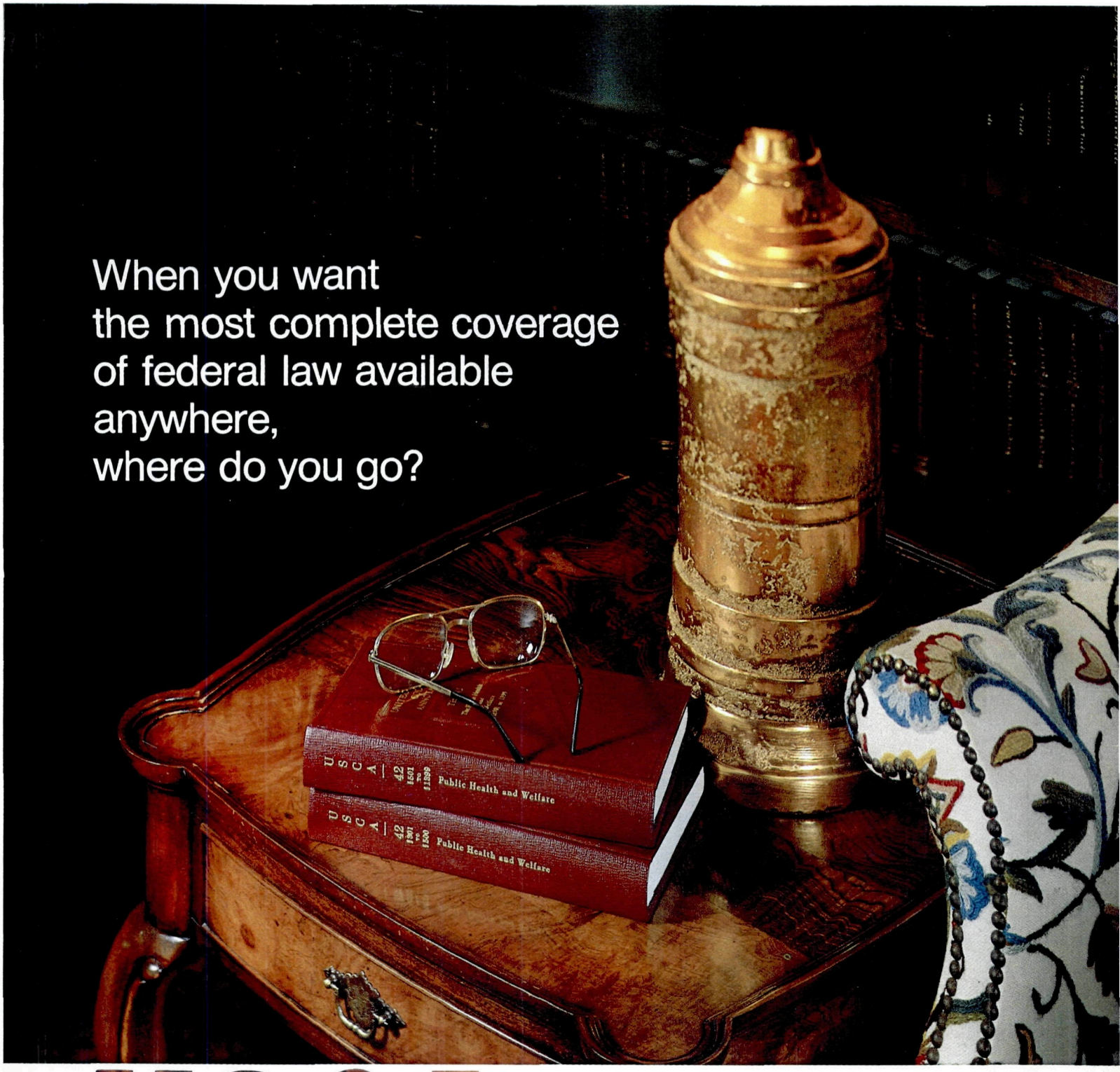

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