DELAWARE LAWYER

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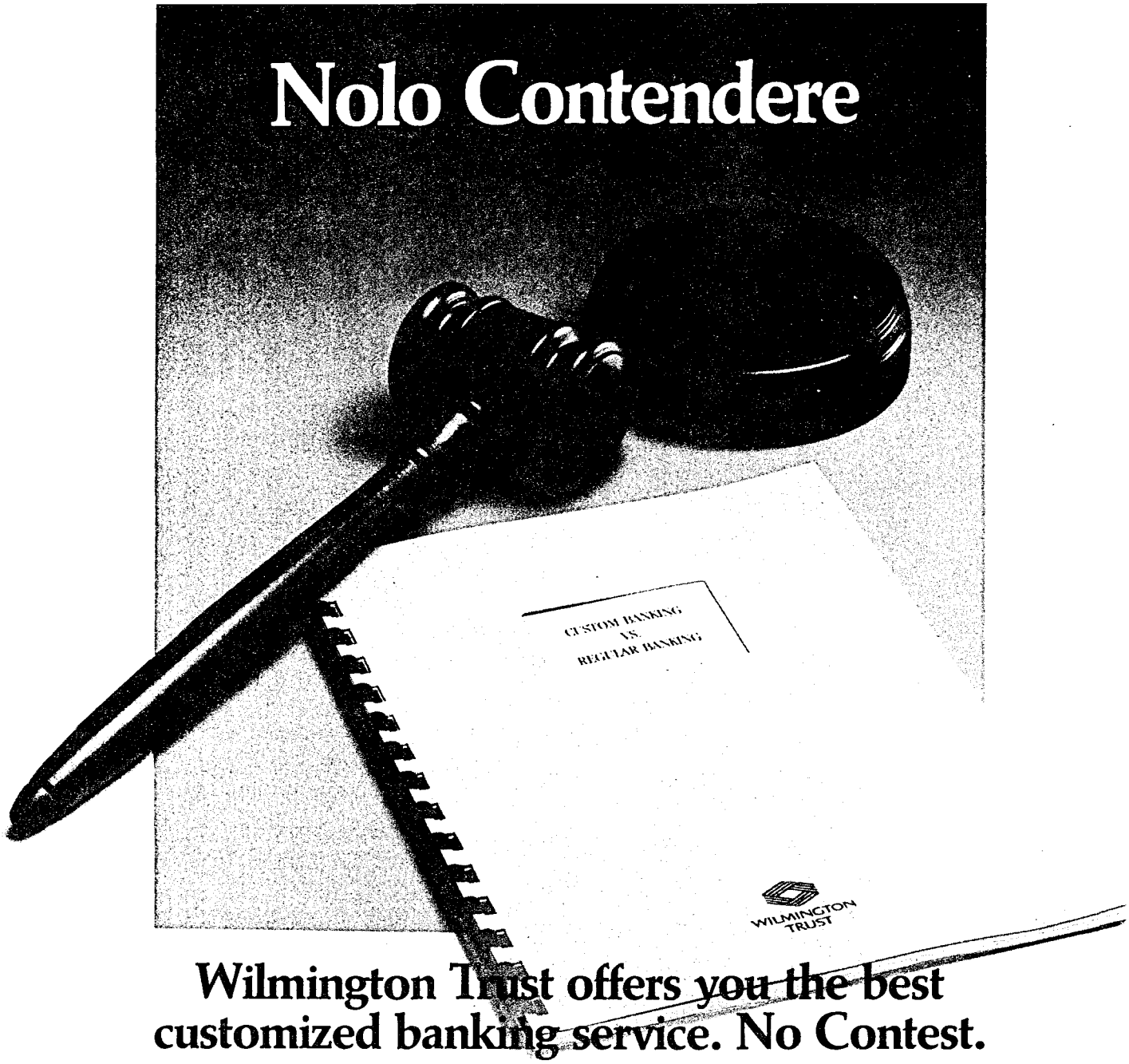
Susan C. Del Pesco, President
Delaware State Bar Association



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Cover: Susan C. Del Pesco, President of the Delaware State Bar Association, photographed in the Presidents Room at the new Association headquarters. See page 9 for her message to the profession and pages 60 and 61 for views of the Law and Education Center of Widener University and the Delaware Bar.

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EDITORS' PAGE

Five Years Later

If you will examine the fine print on the cover of this issue you will see that this is Volume 6, No. 1 of *DELAWARE LAWYER*. Our first issue appeared in May, 1982 and is now collectible, not, I suspect, so much because of intrinsic merit as because of the insatiable urge of an acquisitive society to grab at things in short supply. Well, here we are at an anniversary of sorts for a Bar Journal that has managed to stagger into its sixth year of publication.

What is a "Bar Journal"? Well, for starters, the cover of a typical one is a washed out color photo of a Victorian Gothic courthouse squatting somewhere in the backwoods of the state of publication. Behind this alluring facade you will find strings of lawyer obituaries, lists of disbarments, and some of the sorriest written English ever inflicted on an educated reading public.

In late 1981 my then partner, E. Norman Veasey, approached me, all smiling menace, and announced that he had fingered me to preside over the Delaware contribution to this roster of tripe. It seemed that Harold Schmittinger, Chairman of Delaware Bar Foundation, wanted a publication, and Norm had obligingly hurled me to the wolves.

Well, it all turned out to be a succession of very pleasant surprises, for which I shall always be grateful. Harold gave me a free hand and was extraordinarily good-natured about the initial deficits, and Norm came forward with a fine article for our second issue. We decided at the outset to abjure the style and format of the typical Bar Journal (described so glowingly above) and to aim instead at something readable and accessible not only to lawyers but to the general public. The first issue proclaimed this wistful hope:

"Articles in *DELAWARE LAWYER* will be, ideally, short. Our Editorial Board will wield blue pencils with missionary fervor. Things won't 'transpire' around *DELAWARE LAWYER;* they will simply 'happen'. Our authors will not discuss 'verbal' contracts when they mean 'oral'. We shall aim at correct usage, decent grammar, and unpretentious clarity. In short, we want to make *DELAWARE LAWYER* attractive to the sensible and intelligent audience to whom it is addressed."

Smiling menace.

Indulgent patron.

It was our thought that non-lawyers should have some opportunity to become acquainted with the problems of lawyers and, if possible, reach a sympathetic enlightenment about the administration of justice. Accordingly, like the Bishop of Rome, *DELAWARE LAWYER* speaks *urbi et orbi**. Taking this approach, we have printed fiction, poetry, and we have rejoiced in the production of outrageous covers, both to make a point and to do so as entertainingly as possible. (The current cover is "respectable". One does not ask a statuesque, handsome woman to get into the business of pratfalls and hurling custard pies, especially when the statuesque, handsome woman is one's boss.) Never fear! Outrage will return in the near future, it being our object to stir things up. Our covers are intended to offend not too many people—nor too few.

I should be remiss if I closed these remarks without thanks to the splendidly supportive Board of Directors of Delaware Bar Foundation, our talented Editors, the imposingly accomplished Lois Rasys, our great official photographers, Eric Crossan and "Babe" Johns, Ed Golin and his fine staff at Gauge Corporation. Special thanks to our invaluable Managing Editor, Richard Levine, who, with almost insufferable ease, transformed himself overnight into a brilliant publishing lawyer. Oops! I almost forgot to thank the authors whose work we have been privileged to print.

Curator of tripe.

I look forward to the next five years of creative audacity and the sheer fun of putting this magazine together. I hope you look forward to reading it.

WEW

**How's that for good, old-fashioned hubris just like Mother use to make!*

(Continued on page 6)

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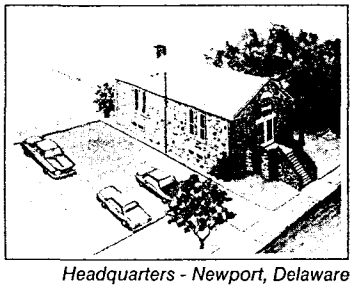

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Letters to the Editors

Very Reverend Dr. William E. Wiggin
Delaware Bar Foundation
706 Market Street Mall
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Dear Rev:

Never have I seen such a deliciously unctuous, sanctimonious and generally obnoxious Man of the Cloth as appears on the cover of the Spring, 1987 issue of *DELAWARE LAWYER.*

I urge that you notify PTL of your availability forthwith.

Sincerely,
Ernest S. Wilson, Jr.

Good thought! Unfortunately, while the flesh is willing, the spirit's weak.

WEW

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(More Lillian Hellman and Those Wicked Folks from the ACLU)

Dear Sirs:

On your Winter 1986-87 Editors' Page I called ACLU advisor Lillian Hellman "a leading apologist for Stalinism." Mr. Wiggin remonstrated that I "should check the facts before indulging in the luxury of ill-informed vituperation."

I did "check the facts", as recounted in a critically acclaimed biography published only last year. See William Wright, *Lillian Hellman–The Image, The Woman,* New York: Simon and Schuster, 1986. The author concludes that "Hellman was a lifelong communist" (p. 367), citing evidence from her defense of Stalin's purge trials in 1937 (p.139), to "her setting up in her will a fund for the promulgation of Marxism" (p. 366; *see, generally,* pp. 355-367). "There is no question that Hellman displayed an unshakeable fidelity to the Stalinist cause" (p. 139). Hellman had "a thirty-year habit of seeking out mitigation for Stalin's brutal acts, or seeking out bad behavior on the part of his adversaries to distract from them" (p. 319).

Mr. Wiggin, therefore, was incorrect in calling my remark about Hellman "ill-informed vituperation." But he was right to say that accusations of Stalinism should not be made lightly, because for an American to give aid or comfort to the Soviet tyranny is a far more dangerous and blameworthy breach of trust than (for example) embezzlement.

ACLU leaders Bell and Morris disagree, asserting that to worry about Soviet expansionism—and ACLU measures that assist it—amounts to "grossly myopic" McCarthyism. But in the years since Joe McCarthy was silenced, the Soviets have crushed popular revolts in Hungary,

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★ ★ ★
Where is McCarthy now that we really need him?
★ ★ ★

Czechoslovakia and Poland. They have extended their hegemony over Indochina, South Yemen, Ethiopia, Mozambique, Angola, Cuba and Nicaragua, and have embarked upon the armed conquest of Afghanistan. They have tortured and harassed dissidents at home, and trained and funded terrorists abroad. Meanwhile, the newly elected chairman of the sensitive House Foreign Affairs Subcommittee on the Western Hemisphere, Rep. George Crockett, has befriended the Communist party and Soviet spies for decades (*Human Events,* February 14, 1987, p. 2). Where is McCarthy now that we really need him?

Any "myopia" with respect to Soviet intentions is in the eyes of liberal organizations like the ACLU. But the ACLU's deliberate choice of leftists like Hellman and Morton Halperin for its national leadership, and its collaboration with pro-Soviet groups like the National Lawyers Guild, suggest that myopia is too kind a word.

Gregory A. Inskip

We reply:

In support of his reproach to me Mr. Inskip cites William Wright's biography, *Lillian Hellman–The Image, The Woman,* and I am grateful to him for bringing it to my attention. It is a fine book, which probably comes as close to the truth about its subject as is possible. Hellman emerges as a mixture of principle and dishonesty, generosity and meanness, blunt courage and sly evasion, a fascinating blend of Joan of Arc and Lizzie Borden. Wright also provides some highly intelligent criticism of Hellman's work. He analyzes with exceptional insight her great powers as a dramatist, and he achieves an almost Proustian subtlety in examining the creative aspects of memory.

Unfortunately for Mr. Inskip, Wright's book has afforded more pleasure for Wiggin than vindication for Inskip.

In rejoinder to my suggestion that he "check the facts before indulging in the luxury of ill informed vituperation"

Inskip self-righteously observes (see above): "I did 'check the facts', as recounted in a critically acclaimed biography (the Wright book)."

This will not do. Inskip mounted his attack on Hellman and the ACLU in a letter to this magazine dated October 17, 1986. A quick check with Simon & Schuster disclosed that the Wright biography wasn't published until *November* 1986, suggesting rather strongly that Inskip is now engaged in something akin to damage control aboard the Titanic.

Worse yet, it appears that Inskip has really put his hands on the tar baby in relying on this text. Wright scrupulously records Hellman's admission that she had long mistakenly denied the sins of Stalin communism in her book, *Scoundrel Time,* published in 1976, six years before she joined the ACLU National Advisory Council. To be sure, Wright suggests that Hellman didn't hit the anti-Stalinist sawdust trail with sufficient born again fervor, but he recites her condemnation. Always thoroughly fair, Wright notes that Hellman's play, *Watch on the Rhine,* staged in New York during the Nazi-Soviet pact, caused Hellman to incur severe Communist criticism. He also points out that in 1948 she offended party liners by interviewing Tito at a time when he and Stalin were at daggers drawn. (Naturally, she got holy hell from uncritical American enthusiasts of Soviet policy.)

Inskip goes on to misstate Wright, who does not "conclude" at page 367 of his book that "Hellman was a lifelong Communist". The precise language is: "There are large ramifications to the *supposition* that Hellman was a lifelong Communist." (Emphasis supplied.) His actual position: Wright thinks it highly likely that she *was* a communist "at least for a few years". See Wright at page 366.

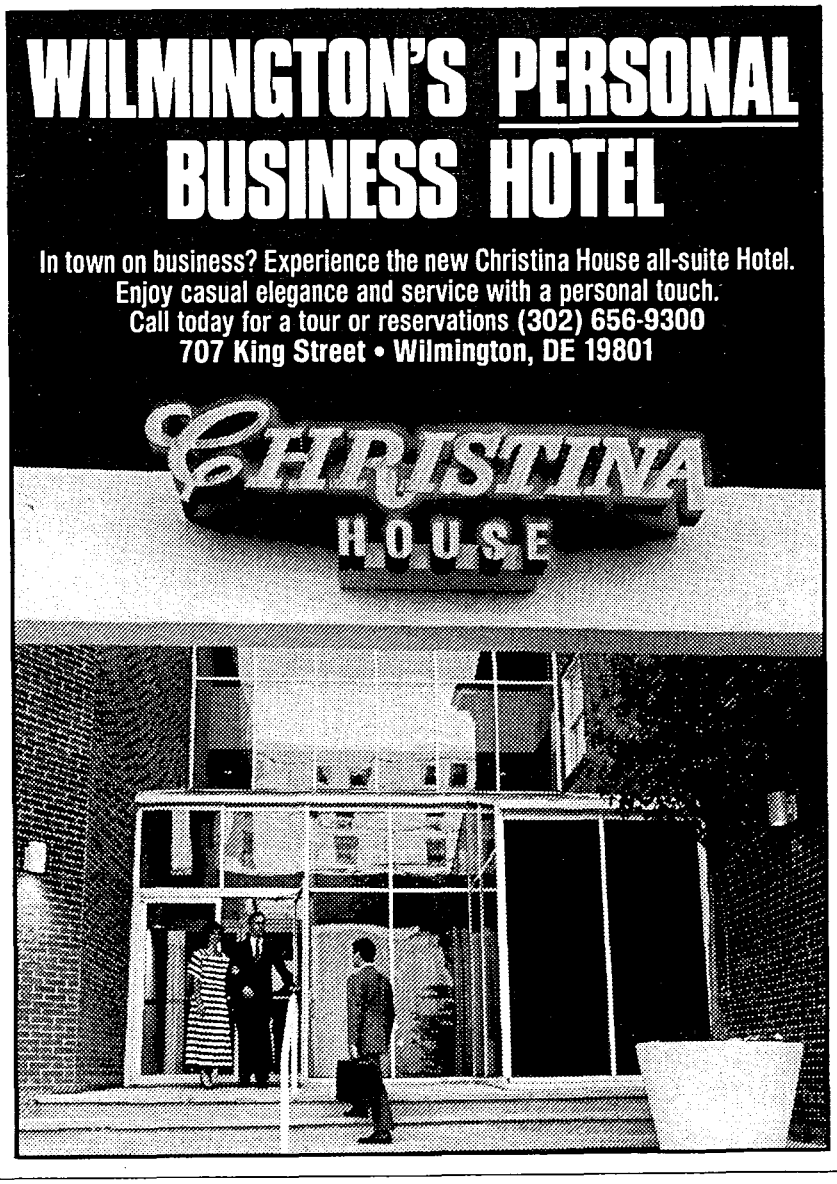
Hellman certainly entertained Marxist views, which I regard as grotesque nonsense, but Marxism and Stalinism can be very different, even fiercely antagonistic, disciplines. Has Mr. Inskip ever heard of Leon Trotsky? "Stalinism" is a convenient catch-all for left wing Fascism. In her memoirs Hellman observes, "great honor must be paid to those who did protest the criminal purges" and she admits to a long mistaken refusal to recognize "the sins of Stalin". Thus Inskip's charge that in 1982 Hellman was "a leading apologist for Stalinism" puts poison in the well of history, and by implication impugns the bona fides of a resolutely anti-totalitarian group, the ACLU. Since I regard myself as conservative, I dislike having to disagree with Mr. Inskip, but I must decline to be stampeded by a "Reds under the beds" mentality into revamping history and denigrating decent people.

Having dusted off Hellman with some highly selective quotations from Wright, Inskip launches into a panegyric to—of all people—Senator Joseph R. McCarthy! One of the most devastating attacks on McCarthy appears—you guessed it—in Wright's book. He quotes with apparent approval Diana Trilling's shrewd observation "that the McCarthyite purges played into the Kremlin's hand ('McCarthy was the greatest gift Russia ever had from this country')". See Wright at pages 372-373.

Trilling's point is extremely well taken: McCarthy never caught a single Communist, and his buffoonery made leftists look positively respectable when contrasted with his wretched public performances. One suspects that had McCarthy not given legitimate anti-Communism a permanent black eye, it would be far easier today to mobilize ourselves in squelching the nasty little left wing tyranny now infesting Nicaragua.

Since it is just plain mean to topple a man's idol, I will try to conclude on a more gracious and conciliatory note about the late Senator from Wisconsin. "Where is McCarthy now that we really need him?" Fear not, gentle reader, the spirit of Senator McCarthy will burn bright and beneficent so long as Mr. Inskip is around to tend the sacred flame.

WEW



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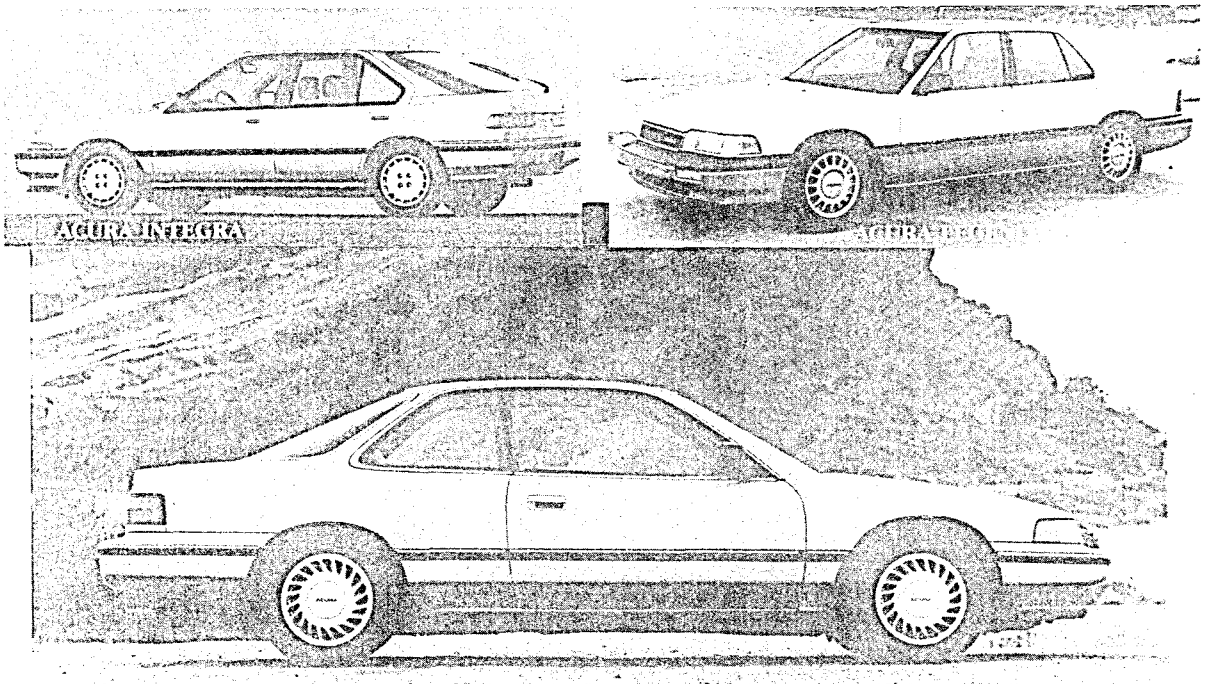

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At the outset of her administration Delaware State Bar Association President Susan C. Del Pesco reflects upon her goals of service to a changing profession.

As I begin my year as President of the Bar Association, there are certain goals and objectives that readily come to mind.

Because the Executive Committee depends so heavily on the work of the Committees and Sections, one of my first tasks as President will be to assist those groups in understanding the importance of their work and continuing the liaison relationships that Joe Kwiatkowski began between those groups and the Executive Committee.

A second goal for my term is facilitating contact among the members of the bar. Our new Bar Center at 706 Market Street Mall will aid in this objective because it brings together the various bar related operations, which were previously scattered. Our Executive Director and his staff, Disciplinary Counsel and her staff, the new executive director of the commission on CLE, *DELAWARE LAWYER*, DVLS and the Delaware Law School of Widener University, with whom we work on our CLE Programs, are in the same location. In addition, the Sections and Committees are urged to use the conference room for their meetings, thereby bringing more of our membership into the facility.

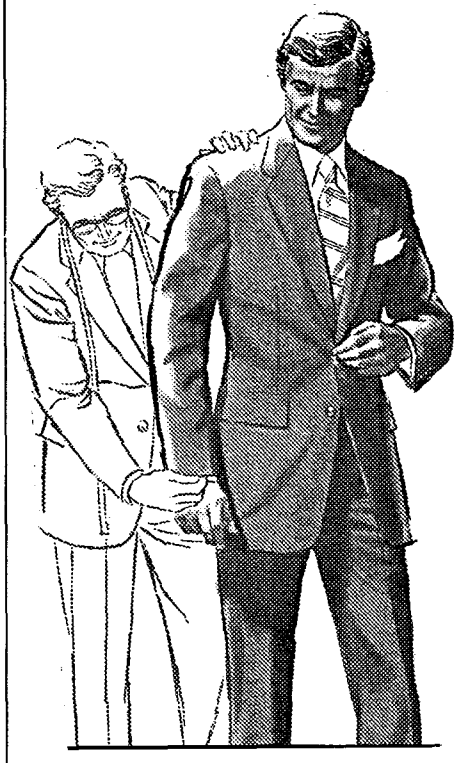
Our Newsletter offers the best vehicle for improving communication among the members of the bar. Harvey Rubenstein has agreed to take on the very demanding job of Editor next year. Under his guidance, we can expect to see continued progress in the quality and scope of information included.

My third goal, and perhaps the most challenging, is to find ways to improve the public perception of the legal profession.

I know from my contacts in our Bar that lawyers are daily providing assistance in important ways to our Community. Indeed, we lawyers are the first called to serve on Boards of various non-profit organizations; or to take on a community project. It is time we put modesty aside and find appropriate ways to let the Community know about the good deeds we do.

More important, perhaps, is to develop ways to improve the public's understanding of the legal system so that seemingly outrageous anecdotes of cases gone awry cannot so easily be accepted at face value. Along those lines, we must continue our vigilance in defending the Courts against the type of biased reporting that occurred this past Spring in the *News-Journal* article attacking Family Court. Perhaps the lesson from that experience is that we must buy space to respond since the letter prepared by Bruce Stargatt of our Judicial Criticism Response Committee was distorted beyond recognition by the reporter in his follow-up *mea culpa* article.

We must learn how to market our profession and our Judiciary more effectively. We must also look toward ways of improving the operations of the system of justice so that the public's expectations of speed and equity can be met. In a word, our mission is enhanced professionalism, the theme of this issue. ■



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A stern new rule of court casts a baleful glance at current professionalism.

Amended Rule 11: A Sign Of The Times

Lawrence S. Drexler

The Supreme Court, by Order dated April 28, 1983 amended Rule 11 of the Federal Rules Civil Procedure, effective August 1, 1983. Since that date, there has been a veritable explosion in Rule 11 litigation. A computerized search of federal court cases citing the Rule shows that in the first 20 months after it became effective form it was cited in 84 cases in either form. In the following 16 months 245 opinions predicated on violation of the Rule were filed. The cases in the Court of Appeals citing the Rule grew eightfold in that period. It is clear that Rule 11 litigation has become something of a cottage industry.

" 'Who is conducting the prosecution?'
Mr. Crawley said that Mr. Walker was doing so.
'Walker, Walker? Oh, -yes; Walker and Winthrop, isn't it?
A decent sort of man, I suppose?'
'I have heard nothing to his discredit, Mr. Toogood.'
'And that's saying a great deal for a lawyer.' "

—Trollope, *The Last Chronicle of Barset*

It is equally clear that it is an area of the law upon which legal scholars are feasting. One only need look at the Index to Legal Periodicals to realize that Rule 11 invites analysis just as chum draws sharks. In fact, the Delaware Bar was treated to a lecture on the subject at its 1986 Bench and Bar Conference.[1] I do not attempt to duplicate or in any way compete with that intellectual feeding frenzy. Each of those articles represents a complete entree in the menu that is Rule 11. I offer a smorgasbord touching lightly on the practical issues related to the Rule.

I have restricted myself to a review of Federal Circuit Court opinions, with the exception of the lone Delaware District Court case interpreting Rule 11, located through LEXIS.[2] The research was thus restricted in order to isolate the issues litigated during the transition from old Rule 11 to the new Rule. This transition is of particular interest to the Delaware attorney in that effective November 1, 1984 the Superior Court adopted new Rule 11. Meanwhile Chancery retains the old Rule.

The Law

The contrast of the various rules is graphically portrayed by comparing the Chancery Court rule and the new Superior Court rule. The Chancery rule reads as follows:

Every pleading of a party represented by an attorney shall be signed by at least one (1) attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by statute or rule, pleadings need not be verified or accompanied by affidavit. ***The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.*** *If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as a sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney must be subject to an appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.* [Emphasis added].[3]

The Superior Court rule, dovetailing the federal rule reads as follows:

Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified by affidavit. The rule in equity that averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. ***The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded fact and it is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law,*** *and that it is not interposed for any improper purpose, such as to harass, to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is not signed it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movent. If a pleading, motion, or other paper is signed in violation of this rule, the Court, upon motion or on its own initiative shall impose upon the person who signed it, a representative party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expense incurred because of the filing of pleadings, motion, or other paper, including a reasonable attorney's fee.* [Emphasis is added].[4]

The differences in the versions of the rule are clear and sharp: Under the Chancery Rule the attorney's signature merely represents that, after reading the pleading, he has a reasonable belief that there is good ground to support it. Further, *Pro Se* pleadings are not subject to the good faith requirements. Under the new rule, the signature on the pleading, whether it be by an attorney or *Pro Se,* signifies that the signor has conducted a reasonable inquiry into the facts, circumstances, and law underlying the complaint, thereby removing the standard of good faith under the former rule and applying a standard of reasonable inquiry.[5] Under new Rule 11, the signor has an affirmative duty to investigate the facts and law prior to certifying them by signature. On its face, the new Rule seems designed to apply to the *Pro Se* litigant; however, at least one United States District Court Judge has stated that the purpose for the new Rule 11 is to "get rid of the stupid, senseless, baseless lawsuits brought not by pro se litigants but by lawyers."[6] Judge Duffy notes that, although the standard of review is identical, it is within the Court's discretion to consider circumstances that arise in connection with pro se litigation.[7] On the other hand, as will be discussed below, several courts including the Delaware District Court, have taken a different approach.

Applicability

The initial query when a law or rule is replaced is the applicability of the new rule to cases then in litigation. Rule 11 is unique in that it is essentially a housekeeping rule for the Court rather than a procedural or substantive rule. Therefore, it is possible that each version of the Rule could be applied in any particular case. This question has not been resolved on the appellate level.

The Third Circuit has addressed the issue of retroactivity in *Glaser v. Cincinnati Milacron, Inc.*[8] Therein, the plaintiff filed a wrongful death action alleging that the plaintiff's decedent had died of leukemia caused by exposure to Benzene. The plaintiff's attorney filed the Complaint the day before the statute of limitations ran and named 96 corporate defendants allegedly engaged in the manufacture or sale of Benzene and Benzene containing products during the period of exposure. The Complaint contained a separate cause of action against the several manufacturer/defendants, asserting the market share theory of liability.

Within a month of that filing, one of the manufacturer defendants and, later the plaintiff, sought to have the filing of responsive pleadings stayed pending discovery limited to identifying the suppliers of Benzene. After some discovery, the plaintiff was able to identify seven of the manufacturing defendants as the likely suppliers of Benzene containing products to which the plaintiff was exposed. Most of the manufacturing/sales defendants filed motions to strike the Complaint pursuant to Rule 11, several seeking attorneys fees. The plaintiff consented to the dismissal of all of the manufacturing/sales defendants except the seven likely suppliers.

Five months after the manufacturing/sales defendants were dismissed, the District Court issued a memorandum opinion which found that the plaintiff's counsel had acted in bad faith in violation of Rule 11 for failing to research the likely defendants and were thus liable to all eighty-nine of the dismissed defendants for the defense costs. The District Court found that the plaintiff's counsel could not have believed he was acting in good faith in naming the manufacturers of Benzene during the particular period in which plaintiff was exposed.

The Third Circuit reversed finding that the plaintiff's counsel had not acted in bad faith in asserting a theory of market share liability. At the outset, the Court held that the old version of Rule 11 applied because the lawsuit was filed in 1982. It is important to note that the moving defendants had been dismissed from the lawsuit before the new Rule became effective. The Court went on to hold that under the subjective bad faith standard imposed under old Rule 11, the conduct of the plaintiff's attorney was not "so lacking as to constitute subjective bad faith."[9] The Court expressly reserved opinion as to whether "the limited investigation would be sufficient under amended Rule 11, which explicitly requires an attorney to conduct a reasonable investigation before filing a Complaint."[10]

A similar result was reached in the *Matter of Yagman,*[11] one of several suits arising out of the death of Reginald Ronell Settles, a football player at Cali-

Although this is Larry Drexler's first credited appearance in DELAWARE LAWYER, he has for some time been shifting scenery, dusting props, and generally sprucing up the production to its considerable benefit. His enthusiasm in undertaking research projects without the hope of praise or even mention is implausible and refreshing. Diligence rewarded: we welcome Larry to the pantheon of unpaid authors who sustain this magazine.

Larry is a graduate of Franklin and Marshall College with a Baccalaureate in government, and of the Hofstra University School of Law. He practices in Wilmington with the firm of Elzufon & Associates.

Amended Rule 11
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fornia State University at Long Beach, who was found dead in his jail cell, the result of an apparent suicide. The investigation revealed that Settles had suffered multiple traumatic injuries allegedly caused by the arresting officers. The law suit from which *Matter of Yagman* arose was a defamation action brought by the accused police officers against two medical examiners who conducted a second autopsy on Settles. Yagman was the plaintiff's attorney. The Complaint was filed on July 1, 1982 and was tried on April 3-5, 1984. The defendant's motion for a directed verdict was granted at the close of plaintiff's case. Thereafter, the District Court imposed sanctions against Yagman and his professional corporation totaling $250,000.00 based, in part, on Rule 11.

The Ninth Circuit reversed the award of $250,000.00. The Court found that old Rule 11 applied to the case as the complaint was filed before the effective date of the new Rule. The Court assumed, that given the size of the award against the plaintiff's attorney the District Court had applied the new Rule. Further, the new Rule specifically makes attorneys fees an element of sanctions, while no such language is contained in the old.

In *Matter of Yagman,* the Ninth Circuit also noted a second distinction between the versions of Rule 11. The Court stated that under the old Rule discovery abuses were governed primarily by Rule 26 (g) and Rule 37, rather than Rule 11 of the Federal Rules of Civil Procedure. Under new Rule 11, discovery motions clearly "fall within the ambit of amended Rule 11."[12] Thus, the trial court's finding that plaintiff's counsel engaged in discovery abuse was not a proper old Rule 11 matter. [Your author commends *Matter of Yagman* to anyone interested in excesses committed by an attorney in the litigation process. For further documentation of the exploits of attorney Yagman, see *Handlen v. County of Los Angeles*[13] in which he is taken to task for filing a frivolous appeal with the Ninth Circuit.]

The question of the applicable law in an action that is removed from state court to federal court, or from Chancery to Superior Court is the more enduring question as the number of cases that straddle the pendency of the rules will decrease over time. *Kirby v. Allegheny Beverage Corporation*[14] is apparently the first case in which a Circuit Court has considered whether a pleading signed in a state court proceeding later removed to a federal court could be subject to Rule 11 sanctions. The Court held that Rule 11 would not apply to pleadings originally filed in a state court. The Court interpreted Rule 11 as providing sanctions when a "pleading is signed 'in violation of this rule'."[15] Ergo, sanctions are not available unless the signor was subject to Rule 11 at the time of signing. The Court reasoned that to hold otherwise would defeat the purpose of Rule 11 as it would encourage frivolous lawsuits in states that do not have a rule or statute analogous to Rule 11. The Court observed that the availability of Rule 11 sanctions and attorneys fees in a federal Court would encourage parties to seek removal to obtain the benefits of the Rule.

The Court in *Kirby* did not address the question of whether subsequent pleadings would subject the signor to sanctions even though he was insulated from sanctions for pleadings filed in another court. *Oliveri v. Thompson*[16] includes language supportive of an argument that the amended rule would apply to pleadings filed in a lawsuit that either straddled the pendency of a rule or was removed to a Rule 11 court. The Court held that the central feature of Rule 11 being the certification established by the signature. Therefore, any pleading that is signed during the pendency of a case in the federal courts or other courts under new Rule 11 is subject to its requirements. Under this rationale, the Court clearly could apply its own rule to pleadings filed while the case is in its jurisdiction even though the case originated in a court with a differing rule.

In *Orange Production Credit v. Front Line Ventures Ltd.*[17] the Ninth Circuit had to decide whether sanctions were precluded by virtue of the District Court's lack of jurisdiction to consider the merits of the case. It was held that the plaintiff had violated Rule 11 by filing a complaint, which the attorney must have known, by virtue of a previous dismissal, the Court lacked jurisdiction to adjudicate. The Court ordered sanctions, which included reimbursement of the defendant's attorneys fees and court costs.

Groundless Litigation Strategy

A. Film at 11:00.

The question of groundless litigation tactics has been met head on by the federal courts under Rule 11. It is one area in which a court can act to streamline its own docket by eliminating tactics that do not serve to advance a lawsuit. In *Westmoreland v. CBS,*[18] the court allowed sanctions against a party for its groundless attempt to hold a non-party witness in contempt for refusing to have a deposition videotaped. The Rule 11 related controversy arose in connection with the libel action brought by General William Westmoreland against CBS. The Rule 11 issue was decided after the case in chief had been settled. In the course of the litigation, CBS sought to depose Richard Helms, the director of the Central Intelligence Agency from 1966 to 1973. Mr. Helms was not a party to the lawsuit. The notice of deposition did not specify that it was to have been videotaped. Mr. Helms arrived at the deposition to find, for the first time, that CBS intended to videotape the deposition. Helms refused to consent to be videotaped. Helms did state that he would proceed with the deposition before a stenographer. CBS advised that it

would seek an order authorizing videotape. CBS then, instead of requesting an order to videotape the deposition, sought to have Helms held in contempt of court. The District Court rejected the CBS attempt to hold Helms in contempt of court as well as Helms' petition for an award of attorneys fees under various rules of the court including Rule 11.

United States Court of Appeals held that Rule 11 applied to the discovery motion. The Court found that Federal Rule of Civil Procedure 30 (b)(4) does not authorize the use of videotape or any other non-stenographic recording technique. Instead, under Rule 30, it is the burden of the party seeking the non-stenographic deposition to apply for a court order in advance to record the deposition by means other than stenography. The Court concluded that CBS's position was supported neither by the law nor by the facts as it did not notice the deposition to be videotaped or seek a court order to have the videotaped deposition. Thus, the "petition seeking to hold Helms in contempt of court clearly violated Rule 11."[19]

The Court, in assessing damages, held that Helms was entitled to his expenses not only in the District Court case, *but also the expense incurred in pursuing the appeal.* The Court noted:

It is very possible that appellate expenses might exceed substantially the sanctions of the District Court, thus forcing many litigants in appellant's position to conclude that the vindication of the Rule 11 interest is not worth the candle. [Citation omitted]. *Unquestionably, this would undermine the purposes behind Rule 11. Rule 11 is specifically designed to deter groundless litigation tactics and stem needless litigation to courts and counsel.*[20]

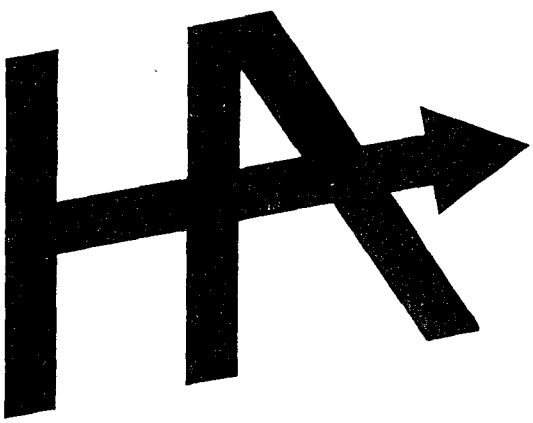
B. In the Alternative...

In *Rolls Royce, Ltd. v. GTE Valeron Corporation*[21] the Court, in *dicta* held that the filing of numerous unfounded defenses, followed by failure to press them at trial, is an abuse of the judicial process at the trial level. The Court intimated that this would be violative of Rule 11 of the Federal rules of Civil Procedure. In *Rolls Royce,* the trial record did not reflect that Rolls Royce's pursued sanctions under Rule 11 in the District Court level.

This language is relevant to the drafting of pre-trial stipulations in Delaware Superior Court pursuant to Superior Court's Civil Rule 16. The rationale of *Rolls Royce* allows the plaintiff's attorney leverage in having certain defenses struck from the pre-trial stipulation. Furthermore, the possibility of sanctions against a defense attorney may end that laundry list of affirmative defenses so often pleaded in Superior Court personal injury accidents, often without any discernible connection with the facts of the particular case. An example of such overpleading is a statute of limitations defense, which appears frequently in pleadings without regard to the date the complaint is filed.

Sanctions

An important, yet more obscure, distinction between old and new Rules 11 is the sanction imposed under each version. Under the Chancery rule, the initial remedy for a violation was to strike the pleading as a sham and false. The action would then proceed as though the pleadings had not been served. Only where the attorney was found to have ▶



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committed a willful violation of the rule would disciplinary action follow. Under the new rule, the pleading is struck and the Court, "upon motion or its own initiative shall impose upon the signator, a represented party, or both an appropriate sanction..." In *Oliveri* the Court held that this portion of the rule made sanctions mandatory.[22]

Since sanctions are mandatory under Rule 11, it is prudent to know what the Court deems a reasonable inquiry and the degree of conduct warranting sanctions.

Reasonable Inquiry

A. History! What History?

Inherent in the new text of Rule 11 is the tension between pleadings construed to be frivolous and creativity in developing new factual and legal theories. The Federal Rule of Civil Procedure 11 Advisory Committee note provides:

The rule was not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The Court is expected to avoid using the wisdom of hindsight and should test the signor's conduct by requiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted."[23]

In *Dalton v. United States*[24] the Fourth Circuit imposed sanctions against a taxpayer's attorney who brought an appeal of the imposition of a tax penalty against the client/taxpayer for taking a deduction which claimed a tax credit for federal military expenditures to which the taxpayer objected. The Court held that "[a]ny doubt an attorney harbored with respect to the nature of the tax credit could have been quickly dispelled by reading the legislative history."[25] The Court then assessed sanctions against the attorney rather than the client.

B. Time wasn't on their side.

A client's arrival at the lawyer's doorstep one jump ahead of the statute of limitations will not excuse his attorney's failure to make the "reasonable inquiry" required by Rule 11.[26] Although the issue has not arisen in a case brought to the attorney on the eve of the running of a statute of limitations, in *Southern Leasing Partners, Ltd. v. McMullan,*[27] the Court imposed sanctions against the plaintiff's attorneys for failing to investigate the claim. In the three months prior to filing the Complaint, the plaintiff's attorneys spent little or no time in factual investigation of the previous claim. The law firm did spend approximately 30 hours in factual research. Notably, the plaintiff's attorneys did not review or consider the court proceedings in an earlier case between the parties. The Court found that had they done so, they would have found that the Complaint filed was a mirror image of counterclaims asserted in the previous lawsuit. Furthermore, in the second litigation no new facts were added. The Complaint was barred by *res judicata,* collateral estoppel, and various statutes of limitations arguments.

The Court was obviously distressed that the plaintiff's counsel did not initially inquire into the prior litigation, and after it learned of the prior case, failed to re-evaluate its position. As a result, the

(Continued on page 16)

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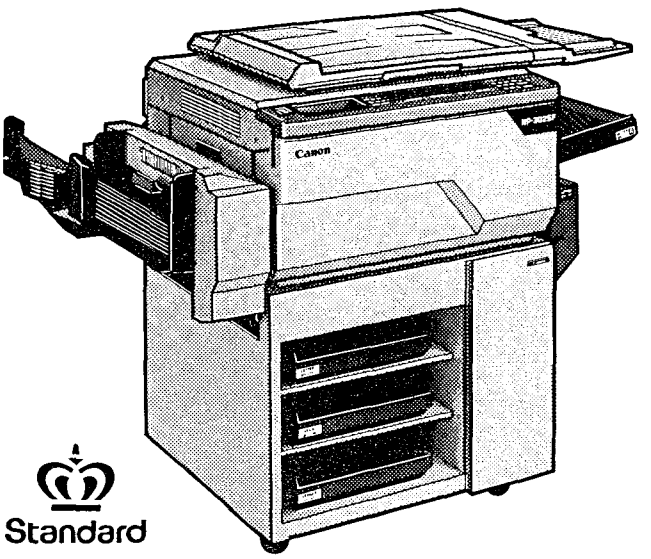

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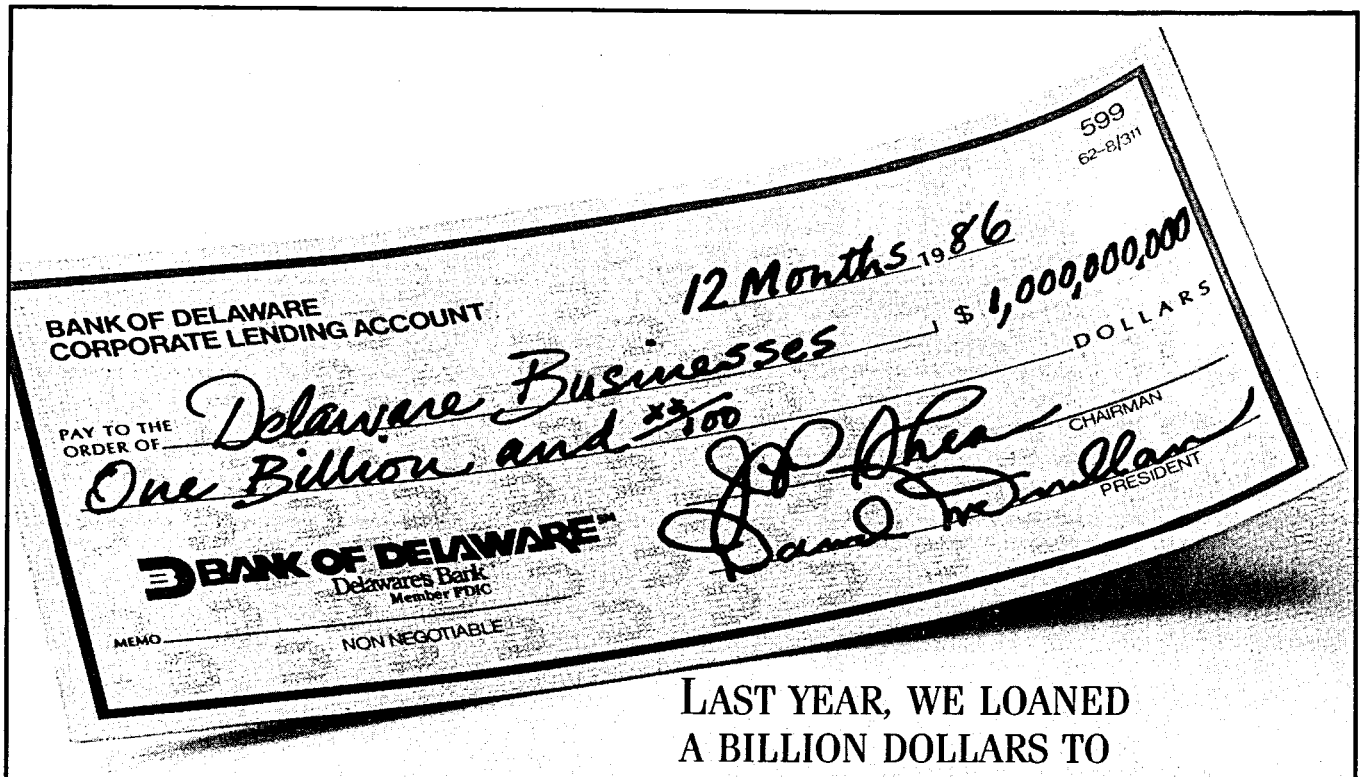

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Court of Appeals upheld the District Court's award of $7,355.00 in sanctions against the plaintiff and his attorneys.

Similarly, sanctions were found proper where all claims asserted under a complaint were time barred.[28] In *Norris v. Grosvenor Marketing, Ltd.*, the Court found that since the claims were time barred, it was "patently clear that the Norris's had absolutely no chance of success under existing precedents."[29] The Court added a second tier to the inquiry in that it also determined that "no reasonable argument had been advanced to extend, modify or reverse the law as it stands."[30]

Thus, under the *Norris* rule, the Court must engage in a qualitative review of the arguments advanced to support the Complaint. Only where it finds that no reasonable argument had been advanced must it impose sanctions upon the pleading attorney or party. It is of interest that the Court of Appeals awarded sanctions based on a time barred claim even though that issue was never reached in the District Court.

C. Texaco Beware.

In *Davis v. Veslan Enterprises*,[31] the plaintiff was awarded a verdict in a Texas state court for $1,000,000 as compensatory damages and $12,000,000 as punitive damages against two defendants. On the day prior to the hearing on the plaintiff's Motion for Judgment on the Verdict, counsel for the liable party filed a petition for removal to federal court. As a result, the state court could not enter the judgment until the case was remanded to the state court. The removal had the corollary effect of depriving the plaintiff of interest, since Texas law provided that interest could run only from the date of entry of judgment. The District Court found that the removal petition was filed in bad faith and awarded the plaintiff's $5,800.00 in attorneys fees and $32,988.99 as the amount of lost interest because of the delay in entering the state judgment.[32]

The removing defendant argued that the plaintiff had abandoned certain claims in her closing to the jury. The Court read the plaintiff's closing argument and found no statement which "could reasonably [be] construe[d] as abandoning her claim against the defendants."[33] In fact, the Court noted that the supposedly dismissed defendants continued to attempt to settle the claim prior to the jury returning its verdict. Thus, the Court found the moving party's arguments totally implausible. Lack of plausibility combined with a significant savings in interest support the inference that one purpose of the removal petition was to delay entry of the State Court judgment. Thus the Court of Appeals upheld the imposition of sanctions based on attorneys fees and lost interest.

D. Proximal Cause.

New Rule 11 has been construed to be a weapon in the arsenal against the "gut feeling" lawsuit.[34] Often, a lawsuit is brought because the plaintiff feels it is right even though its position lacks basis in fact or law. As the Court in *Dreis & Krump Mfg. v. International Association of Machinists* noted:

It is human nature to crave vindication of a passionately held position even if the position lacks an objectively reasonable basis in the law.[35]

The Court went on to state that under amended Rule 11, parties seeking such vindication and failing must pay the opponent's reasonable attorneys fees. In *Dreis & Krump,* the plaintiffs lost in arbitration regarding the interpretation of a collective bargaining agreement. The Court found that the company's suit was barred by statute of limitations, and by the company's submission of the matter to arbitration without taking any reservation. The Court went on to specifically warn lawyers practicing in the Seventh Circuit that rules designed to discourage groundless litigation would be enforced "to the hilt."[36]

E. Repetitive Pleadings.

Repetitive pleadings surface in cases in federal courts as a result of state court decisions. Such a suit generally names the judge in the state court action as a party in the federal court action. In fact, the lone Delaware case applying Rule 11 sanctions against a *pro se* plaintiff arose under such circumstances.[37] In *Slater v. Wilmington Trust Company,* the litigation arose out of the foreclosure and sheriff's sale were litigated in both the

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Superior and Supreme Courts in Delaware. The District Court dismissed the claims against the Superior Court Judge and the New Castle County Sheriff by virtue of judicial and public office immunity. The Court dismissed the balance of the claims as barred by the doctrine of res judicata. The Court awarded Rule 11 damages against the plaintiffs and in favor of the defendants, who applied for attorneys fees and expenses in their motions to dismiss.

A similar result was reached in *Chu by Chu v. Griffith.*[38] Therein, the plaintiffs brought a claim for damages against a Virginia state court judge as a result of his decisions in a divorce proceeding. The Court of Appeals affirmed the District Court finding that the judge was clothed with absolute immunity from the claim. The Court sustained a sanction of an attorney's fee in the amount of $1,000.00 to be paid by the plaintiff's lawyer to the Attorney General of Virginia who provided the State Court judge's legal representation. The Court of Appeals then remanded the case to the District Court for a determination of costs and a reasonable fee to be assessed against the plaintiff's counsel in connection with the appeal of the original Rule 11 sanctions.

Appending a constitutional theory to a complaint otherwise similar to a claim in a state court is a further invitation to sanctions. In *Bartel Dental Books Company, Inc. v. Schultz,*[39] the plaintiffs added an equal protection claim to a complaint otherwise virtually indistinguishable from the pleading previously rejected by the New York state courts. The Court sustained an award of attorneys fees to the defendants and stated that the District Court would have *"erred if it had not awarded attorneys fees."*[40] (Emphasis in original).

Prisoner Litigation

It is well documented that the courts are staggering under the weight of prisoner litigation. At least one District Court has attempted to confront this problem by resort to Rule 11; however, in *Procup v. Strickland*[41] the Court of Appeals reversed the District Court. The District Court had issued an injunction against a prisoner prohibiting him from filing Complaints with the court except for Complaints filed with the aid of an attorney. The District Court rationalized that this would reduce the number of frivolous lawsuits without foreclosing truly meritorious claims. The Court of Appeals, while applauding the goal, found that a private attorney might be unwilling to devote the time necessary to sift through the frivolous claims proffered by the prisoner to see if a meritorious claim existed. The Court also noted that the attorneys who traditionally represent such prisoners (Legal Service offices) were already defendants in suits brought by prisoners. The Court concluded that such a bar would virtually bar the prisoner from filing any suit in federal court, a patently unconstitutional result. The Court then provided a laundry list of potential solutions to the problem.[42]

Conversely, in *Cotner v. Hopkins*[43] the Court of Appeals sustained three conditions placed by the District Court on a prisoner's future lawsuits. The Court found that the conditions were designed to assist in curbing the particular abusive behavior. One of the preconditions was the rules must be certified as provided by Rule 11.

Interestingly, the Court, in *Cotner,* found the imposition of a $1,000.00 "fine" pursuant to Rule 11 improper in that the District Court failed to afford the plaintiff the procedural protection of Federal Rule of Criminal Procedure 42(b), which establishes the parameters for imposing sanctions for contempt of court, prior to imposing the fine.[44] It is important to note that it appears the $1,000.00 was not related to attorneys fees and was in reality a fine. It appears that where sanctions are grossly disproportionate to attorney misconduct and the costs incurred as a result of such misconduct, it is more likely to be construed as a fine.[45] In such circumstances, litigants are entitled to the protection afforded those standing before the bar on charges of criminal contempt.[46]

The Dark Side

For all its professed virtues new Rule 11 has a sinister aspect: the potential for spawning a whole new subspecies of litigation, characterized by nit-picking that merely deflect the Court from resolving disputes. One court spent considerable time and effort to nip in the bud precedent for such litigation. In *Golden Eagle Distributing Corporation v. Burroughs Corp.,*[47] the Court reversed the award of a sanction against an attorney who failed to cite authority in a motion before the court where the Court relied on the uncited authority. The District Court had awarded sanctions in part because the authorities were identified in *Shepard's* as "distinguishing" the case relied upon by the chastened attorney. The Appellate Court

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Del McGlaughlin, a talented local artist, makes her irreverent first appearance in this magazine with a mildly cynical comment on legal economics.

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found that, although the lawyer was wrong as to his decision the cases were dissimilar, such an error in judgment was not sanctionable. The Court of Appeals stated:

[N]either [amended] Rule 11 [n]or any other rule imposes a requirement that the lawyer, in addition to advocation the cause of his client, step first into the shoes of opposing counsel to find all potential contrary authority and finally step into the robes of the judge to decide whether the authority is indeed contrary or whether it is distinguishable."[48]

Thus, the Court rejected the idea that the Court would have a duty to perform research beyond that provided by the parties. More important, an attorney is entitled to make a judgment regarding the applicability of a case without being liable for sanctions in the event that he is incorrect.

Homiletics

As an attorney I regard the advent of amended Rule 11 with mixed emotions. On the one hand, I recognize the burden placed on courts by frivolous lawsuits and pleadings. I hope that Rule 11 will reduce and streamline the litigation process. On the other hand, amended Rule 11 is a degrading commentary on the state of our profession. The objective standard and mandatory sanctions raise a significant flag that greed has triumphed over honor. The assumption that an attorney would not file a frivolous lawsuit has been erased. Implicit in the new rule is that monetary considerations will motivate today's attorney. It is a sad recognition of the fact that the modern attorney is motivated to investigate, not by professional pride, but by the threat of economic sanctions.

The connotations of Rule 11 are especially distressing to the Delaware attorney with a historical sense of the Gentlemen's Bar, a term used to connote the highest honor of the profession, without sexist overtones. This bar has long prided itself on the high standards that are part and parcel of the Gentlemen's Bar. Implicit in that term, is the connotation that the law is an honorable profession motivated by service, not money. The Gentlemen's Bar was embodied in old Rule 11.

In actuality Rule 11 addresses the minority in the bar who fail to perform the basics in preparing a pleading. Those who fail to investigate the facts, develop theories, research the law and "Shepardize", as a matter of course will act accordingly in order to avoid monetary sanctions. If it succeeds, Rule 11 will be the catalyst to a return to the Gentlemen's Bar rather than its tombstone.

Postscript

The Delaware Supreme Court, effective May 8, 1987, amended Rule 12(a) to include provisions giving substantive meaning to the signature on matters there filed. Rule 12(a) combines features of both the Superior Court and the Chancery Court Rules. It contains both the good faith standard of the Chancery Court Rule and broader scope of the Superior Court Rule encompassing all "paper" filed with the Court. Consistent with the Superior Court Rule, the Supreme Court Rule applies to *pro se* parties as well as attorneys.ic ■

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[1]On June 4, 1986, Honorable William W. Schwarzer addressed the annual Delaware Bench and Bar Conference.

[2]I am indebted to Stephen L. Nowak, a third year law student at Delaware Law School, for invaluable assistance in the research for this article, especially his work on LEXIS.

[3]Ch. Ct. Civ. R. 11.

[4]Super. Ct. Civ. R. 11.

[5]*Brown v. National Board of Medical Examiners,* 800 F2d 168,171 (7th Cir. 1986) and cases cited therein.

[6]Duffy, Remarks: The History and Purposes of Rule 11, LIV Fordham L.R. 4,20 (1985). Judge Kevin Thomas Duffy sits in United States District Court for the Southern District of New York.

[7]Id.

[8]808 F2d 285 (3rd Cir. 1986).

[9]Id. at 291.

[10]Id. Fn5.

[11]796 F2d 1165 (9th Cir. 1986).

[12]Id. at 1187.

[13]803 F2d 462 (9th Cir. 1986).

[14]811 F2d 253 (4th Cir. 1987).

[15]Id. at 257.

[16]803 F2d 1265 (2nd Cir. 1986).

[17]792 F2d 797 (9th Cir. 1986).

[18]770 F2d 1168 (2nd Cir. 1985).

[19]Id. at 1179.

[20]Id.

[21]800 F2d 1101 (Fed. Cir. 1986)

[22]Supra, note 16, at 1274.

[23]F.R.Civ. P.11, Advisory Comm. note

[24]800 F2d 1316 (4th Cir. 1986)

[25]Id. at 132.

[26]*Southern Leasing Partners, Ltd. v. McMullen,* 801 F2d 783 (5th Cir. 1986).

[27]Id.

[28]*Norris v. Grosvenor Marketing Ltd,* 803 F2d 1281 (2nd Cir. 1986).

[29]Id. at 1288.

[30]Id. at 1288.

[31]765 F2d 494 (5th Cir. 1985).

[32]Id.

[33]Id. at 499.

[34]*Dries & Krump v. International Association of Machinists,* 802 F2d 247 (7th Cir. 1986).

[35]Id. at 255.

[36]Id. at 256.

[37]*Slater v. Wilmington Trust Company,* C.A. 85-454-JRR (D.Del July 7, 1986).

[38]771 F2d 79 (4th Cir. 1985).

[39]*Bartel Dental Book Comp v. Schultz,* 786 F2d 486 (2nd Cir. 1986).

[40]Id. at 490.

[41]792 F2d 1069 (11th Cir. 1986).

[42]Id. at 1072-73.

[43]795 F2d 900 (10th Cir. 1986).

[44]Id.

[45]See *Yagman,* supra note 10.

[46]See *Cotner,* supra note 43.

[47]801 F2d 1531 (9th Cir. 1986).

[48]Id. at 1542.

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Honorable Antagonists: An Inquiry into Discovery Practice in the Delaware Courts

Michael J. Rich

Discovery is the procedural tool with which the lawyer seeks to determine the merits of an opponent's case, enhance negotiability and the prospects for settlement, and eliminate surprise at trial. Unchecked or excessive discovery creates delay, increases expense for clients, and sometimes gives a wealthier litigant an unfair advantage over an opponent less able to bear the cost of obtaining or responding to discovery.

Discovery abuse is a catchall, shorthand expression to describe the variety of procedural practices used by lawyers to vex their opponents during the time between filing of the initial pleadings and the trial of the case. Because the discovery process is governed by rules written by lawyers and interpreted by judges (also lawyers), the client generally is unable to determine whether his lawyer's discovery tactics were intelligent and cost effective or abusive and fee generating. Because many of the lawyer's discovery decisions are usually made without the client's knowledge or input, there is a correspondingly greater burden placed on the lawyer to ensure that his decisions are guided by the highest standards of ethics and professionalism.

While I shall discuss certain tactics Delaware attorneys regard as abusive, misbehavior is in fact the exception rather than the rule. Litigation practice in Delaware is relatively free of complaint, because most concerns are resolved by discussion between opposing attorneys to obviate court intervention and sanction.

In response to a perceived problem, the Delaware Supreme Court appointed an Ad Hoc Advisory Committee on Discovery Abuse in 1981. The Committee concluded that discovery abuse in Delaware was not so excessive that it could not be controlled by the current rules, a greater intervention by the trial courts, and the enforcement of sanctions provided by Civil Rule 37.

In all trial courts, civil discovery practice is guided by Rules 26 through 36. Rule 37 provides the means by which adherence to the spirit of the discovery rules can be enforced by the court. Those enforcement powers include the ability to assess fees against a party or an attorney for violation of the discovery rules, the ability to prohibit the introduction of evidence, and even the power to dismiss a case. While Rule 37 motions are frequently filed, there are few reported decisions from the Delaware Courts that define uniform standards for identifying and correcting abuse. Ultimately, it is the practitioner's responsibility to ensure that discovery proceeds in a prompt, fair, and reasonable manner.

To avoid unnecessary generalities in this article, I asked forty litigation attorneys throughout the state to respond to four questions directed toward: (1) identifying examples of abuse; (2) explaining how they individually handled perceived abuse; (3) defining the role of the judiciary in the discovery process; and (4) any other relevant suggestions or comments. The responses were detailed, informative and, most important, expressive of a sincere concern for the integrity of litigation practice. The consistent theme among the thirty responses (and the ultimate conclusion to be drawn from them) is that discovery abuse is not really a problem in the Delaware Bar. However, there are certain sharp practices that offend practitioners and that arise routinely during the discovery process. While the survey was not intended to be exhaustive or scientific, there were sufficient responses to establish some patterns and conclusions.

Deposition problems tend to occur more often when out-of-state attorneys participate in trials because of differences in practice or rules in other jurisdictions.

The responses cited problems in the production of documents, depositions, and interrogatories, and I shall discuss them in that order. Requests for the production of documents brought few comments but three concerns were expressed: (1) requests for obscure or difficult to locate documents, (2) requests for documents of record, and (3) requests for documents inappropriate to the case. The last concerned the "canned" request: for example, a request for production in a malpractice case more suitable for a personal injury case. Such requests are more of a nuisance than an abuse because they usually prompt an exchange of correspondence that leads to amended or re-drafted requests.

Depositions generate different problems for the lawyer because the client is more involved in that process as a witness. Deposition problems tend to occur more often when out-of-state attorneys participate in trials because of differences in practice or rules in other jurisdictions.

The single-most cited problem in depositions is the instruction to a witness not to answer a question. Nothing in the rules relating to depositions suggests the authority of an attorney to give such an instruction whether or not the deponent is a party witness. The correct procedure is for the attorney to state the objection and the grounds therefor and

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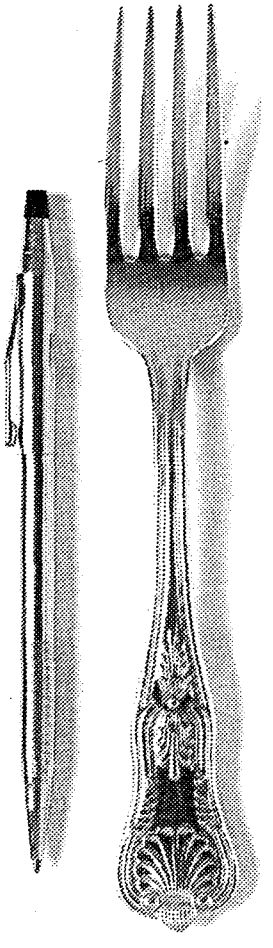

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then to allow the witness to answer the question. His reasons for doing so may include trade secrets, the privilege against self-incrimination, or other privileges. In the face of a refusal to answer, the examining attorney should continue the deposition and then seek the appropriate sanction under Rule 37 rather than suspend the deposition for a ruling. If the witness is not easily available for recall or where time is of the essence, rulings from a judge during depositions are desirable. A pre-deposition ruling on expected objections is an option, but, in the absence of a judicial assignment of the case, the attorneys may find a judge unwilling to anticipate his ruling. Ultimately, the deponent and the attorney have to weigh a decision not to answer a question against a possible sanction that would preclude the party from introducing favorable trial testimony on the issues encompassed by the refusal.

Another objectionable deposition practice is when an attorney goes off the record to confer with or suggest an answer to the deponent. Equally objectionable is the practice of recessing to accomplish the same end. Since the purpose of a deposition is to obtain a witness's testimony in his own words, a lawyer's interruptions or suggestions during the deposition or recess is unappropriate, and indeed, unwarranted.

Other concerns included prolonged depositions on minute points and the unnoticed unilateral cancellation of scheduled depositions. The unilateral cancellation presents a significant problem as well as a discourtesy, especially when either the attorney, the witness or both are from out of state.

One other deposition practice that can be mentioned in passing is the request to sequester witnesses. At trial, the attorney can sequester or exclude witnesses from the courtroom. The witness's testimony is thereby untainted by what he may have seen or heard before he takes the stand. There is no corresponding right to sequester deposition witnesses in the absence of a court order. Nevertheless, a number of attorneys accept that practice without question when it would not be to their advantage to do so.

As opposed to requests for production or depositions, the most significant problems in discovery arise from interrogatories. A uniform complaint is that too many responses to interrogatories are evasive or that lawyers use an overly technical approach in framing the answers to interrogatories. Following closely is the complaint that many responses are untimely filed or not filed at all. Most Delaware attorneys are fairly liberal with respect to granting extensions of time to their opponents, especially where an opposing client is a corporation or an out-of-state defendant. Most attorneys prefer to agree orally on an extension and then memorialize their agreement with an exchange of letters or a stipulation. Because interrogatory answers are the least expensive method of discovery and because they also provide a basis upon which depositions can be taken, late or evasive answers tend to defeat the very purposes for which the rule was originally written. Furthermore, when an attorney fails to update or correct his answers he not only violates the rules, he can lose the opportunity to introduce trial evidence in support of his case or in opposition to his opponent's.

Another undesirable practice is the use of canned interrogatories. While it may be difficult to characterize this as an abuse, canned interrogatories can be confusing and irritating. The canned interrogatories tend to be too detailed and occasionally they are not reviewed to ensure that they actually apply to the subject matter of the litigation (the same problem as previously identified with canned requests for production). Many attorneys observed that the state courts permit too many interrogatories and that the federal guidelines restricting the number of interrogatories provide a more sensible approach. The limited interrogatory approach has not met with uniform favor, but many attorneys restrict their use of interrogatories in favor of deposing a live witness.

When problems in discovery are encountered, the attorney's response is likely to be guided by two considerations: (1) the practice of his peers; and (2) his perception of how the court would react to a request for sanctions. The Delaware Bar is small and the litigation attorneys are apt to see each other more frequently than their counterparts in other states. Because courtesies extended are likely to be returned, almost all attorneys said that the first and preferred method to handle a problem was to call or write their adversary to discuss an objection. This tends to resolve the question promptly, efficiently, and without affecting the "offending" attorney's relationship with his client. As a result of the change in Superior Court Civil Rule 37 to require a statement of attempts to seek compliance with the rule, a number of attorneys maintain tickler systems to send out periodic reminders to the opposing attorney. This promotes communication and, if necessary, establishes a record for a motion to compel. In certain cases, some attorneys will make discovery agreements at the outset so that discovery can proceed without the necessity for formal requests or interrogatories. Most attorneys try to solve potential problems in advance because they are aware of their client's desire to keep their legal billings reasonable and predictable. Also it is practical to establish a mutually agreeable format for discovery in cases where the economic stakes do not justify a more formal approach. All attorneys agree that when courtesy fails, one must resort to the court by motion under Rule 37 or, in extreme cases, under Rule 11. How

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quickly the attorney resorts to motion practice varies, and attorneys find that their response to discovery problems is a function of previous experience with their adversary.

The practitioner's response to "Abuse" is also tempted by his perception that a judge will generally take a very liberal view of what may be permitted in discovery. There was a significant response from the attorneys surveyed: when Rule 37 motions are filed, courts do not impose sanctions if discovery responses are submitted by the motion date and judges frequently grant extensions of time without a corresponding sanction. There was a distinct preference for a sterner approach to the imposition of sanctions where the moving attorney has complied with Rule 37 and is then required to seek court relief to cure a discovery problem. While attorneys do not generally seek the imposition of the evidentiary sanctions of Rule 37, they favor a monetary penalty whenever there is a good cause for the Rule 37 motion. A significant number of practitioners support the adoption of the discovery practices in the Federal courts. In particular, they cite the practice of case assignment to a particular judge who monitors the progress of the case. There is also support for preset deadlines for discovery once the answer is filed. For example, in cases where there are no preliminary motions, the parties would automatically have nine months from the filing of the answer to complete discovery before submitting the case for pre-trial conference. The nine month period would be extended only for good cause specified in motions buttressed by supporting reasons and affidavits.

As previously noted, there is strong support for the adoption of a limited interrogatory rule. Because an attorney exercises the most control over the form of discovery response, the interrogatory should be used for only the very elementary information required for the case and the attorney should use requests for admissions or depositions to build his trial case.

By comparison, the Supreme Court Advisory Committee felt that judicial supervision and firm enforcement of existing rules would be more effective than arbitrary deadlines or limits on the number of interrogatories. This conclusion follows the committee's finding that discovery problems arise from the failure to respond adequately, not from oppressive conduct by the initiator of the discovery. With that frame of reference, it would be natural to find a solution by stronger enforcement instead of by changes in the way discovery is managed. The Committee also recommended that violations of discovery rules should be met with fines or expenses of at least one hundred dollars for each violation.

The Delaware Supreme Court has read Rule 37(a) and (b) to mandate an award of attorneys' fees and expenses where a responding party fails to comply with discovery orders issued by the court or otherwise engages in unjustified discovery conduct or in the absence of exigent circumstances making the conduct reasonable. *Bader v. Fisher,* Del. Supr., 504 A.2d 1091 (1986); *Wyleman v. Signal Finance Corp.,* Del. Supr., 385 A.2d 689 (1978). In fact, those attorneys who believe in sanctions reflect the feeling of the Supreme Court, which stated in 1984 that the trial court should diligently impose sanctions on parties who refuse to comply with discovery orders as a deterrent and to assure that litigants, the public, and the bar are not subjected to abuse that delays proceedings and increases litigation expense beyond tolerable levels. *Holt v. Holt,* Del. Supr., 472 A.2d 820 (1984).

Most attorneys try to solve potential problems in advance because they are aware of their clients' desire to keep their legal billings reasonable and predictable. Also it is practical to establish a mutually agreeable format for discovery in cases where the economic stakes do not justify a more formal approach.

The foregoing discussion of discovery problems and solutions should not be taken out of the context of litigation practice in general. In my opinion, litigation in Delaware proceeds at a normal and reasonable pace toward conclusion, and the typical Delaware lawyer takes a sensible and responsible view of the discovery process and the resolution of problems arising during litigation. The very personal relationship among the members of the Bar virtually dictates the extension of a courtesy when a question is raised about the adequacy of a discovery response or the failure to provide it. Motion practice under Rule 37 is not favored, but it is not ignored. The preference for active judicial oversight recognizes the vital role of the courts in pre-trial as well as trial proceedings. As noted, case assignment is recommended by a number of attorneys responding to my questionnaire. It was also recommended by the Supreme Court committee as early as 1981. In fact, the Sussex County Superior Court has recently adopted a similar case assignment and a time-limited discovery approach with favorable results. The Court of Chancery has found case assignment worthwhile, especially in corporate matters where prompt action is often required. The Delaware lawyer can be justifiably pleased with the overall performance and professionalism of his peers in the discovery process. His approach to the conduct of a case embodies respect for his fellow advocates and the integrity of the courts. ■

Mike Rich, a member of Morris, Nichols, Arsht & Tunnell, practices law in Georgetown. He is a Vice president of the Delaware State Bar Association, and a member of the Executive Committee of that association. This is his second appearance in the pages of DELAWARE LAWYER.

In Partnership for Betterment

Anthony J. Santoro and Joseph M. Kwiatkowski

Joe Kwiatkowski, Immediate Past President of the Bar Association, and Tony Santoro, Dean of the Delaware Law School of Widener University, have done much to reinforce the fruitful collaboration between the Association and the school—all as described more fully in the following article. Despite a very busy practice Joe has served the Association for years in a variety of roles culminating in his recently completed year as President. Tony's Deanship has been marked by increasing recognition of and honors to the school he so ably leads. Under his guidance that institution was recently admitted to the Association of American Law Schools. One of the outstanding satisfactions of his Deanship has been the inauguration as President of the Bar Association of the first Delaware Law School graduate to attain that honor. See cover photo of Susan C. Del Pesco, Esquire and Susan's article at page 9.

The principal issue facing lawyers today lurks under an abstract catch-all, "Professionalism", a roundabout way of referring to an increased public disfavor. Once accorded high respect as members of a learned profession, lawyers are now widely regarded as merchants or mechanics, plying a trade for profit. Many believe that lawyers have cast aside a public trust, the core of the profession, in the pursuit of fees. Many cite the rush to Bhopal as evidence of a bar corrupted by greed. There are even *lawyers* who believe that the quality of the bar is in decline. According to a recent survey conducted for the American Bar Association the majority of state and federal judges queried have seen a decline in professionalism over the last few years.

Few critics entertain the possibility that some of the lawyer conduct complained of may actually benefit society. For example, there are those who earnestly believe that the rush for profit in Bhopal was necessary if legal services were to be extended to a defenseless group. And if lawyers have been corrupted by the pursuit of business, is there any reason to think that those whose business is business are immune from the same corrupting influence? If lawyers did not behave as they do would the injured so readily achieve compensation from those who injure them?

While it may be interesting to engage in conjecture, reality must command our first attention: there is great disaffection with lawyers, and responsible lawyers must face up to it. In so doing, it is important to understand that the modern view of lawyers is less related to their function than to the manner in which they perform it. Otherwise, the criticism of lawyers could be dismissed as the nostalgic hand-wringing of traditionalists. To illustrate, few today would agree with the charter of Carolina colony, which declared it "a base and vile thing to plead a cause for a fee". Today few would deny that the act of represent-

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Partnership
(Continued)

ation is prompted by self-interest as well as solicitude for clients. The difference is subtle—our ancestors did not accept the profession; our contemporaries do, but they cannot accept the economic necessities implicit in effective lawyering.

The present attitude toward lawyers may also be explained by the wrenching changes that have taken place within the profession during the last quarter century. The profession was then a homogeneous group of white males with a median age of few years under 50. There was one lawyer for every six hundred Americans. The bar was aloof from mainstream America and largely insulated from state regulation. The rules of practice governing the solicitation of clients and charging of fees were well-defined and rigorously enforced.

Since 1960 the number of lawyers has doubled (and the number of Americans per lawyer has halved). The number of women in the profession has increased from under 10,000 to over 110,000, the number of lawyers belonging to minority groups has doubled to 12,000, and many, if not most, of the new lawyers are second or third generation Americans. The median age of the bar is now approximately 38.

Sacrosanct minimum fee schedules and ultrafastidious methods of attracting clients have fallen victim to economics, the erosion of the per lawyer client base, and social activists bent on making legal services universally available. Add to these profound changes the unprecedented increase in the cost of delivering legal services.

The once aloof and homogeneous bar has become as diverse as American Society and, because of that diversity, it has shed a separatist ethic and absorbed the values of American society in general. The profession's barriers against state regulation have eroded. The bar has been compelled to compete in a manner that many think to be in the best interests of prospective clients.

Lawyers are now vilified for doing many things that a few years ago were heralded as much needed reforms. What is perceived as a mad scramble for business was seen until recently as the only reasonable prospect for extending legal services to all Americans. Even the Supreme Court has suggested that the notion that lawyers are above trade is an anachronism.

Whatever the source of present disaffection with lawyers, the organized bar and the law schools have a responsibility to restore public faith in the profession in order that it may enjoy the necessary confidence of those to whom its services are essential. In Delaware we take that responsibility seriously. Through the efforts of the bench and bar we have created a model of cooperation between the Bar Association and the Law School. The two organizations have combined in several ways to raise standards among practitioners and aspiring lawyers. The symbol of that partnership is the Law and Education Center of Widener University and the Delaware Bar Association.

We believe that "professionalism", to the extent it admits of precise definition, means today that lawyers have a responsibility to acquire and maintain the training needed to solve complex legal problems in the best interest of their clients and to do so, when the interests of justice require it, without

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regard to compensation. It also means that lawyers must rigorously regulate themselves.

That regulation must emcompass three distinct elements—competency in practice, dedicated service to the client and commonweal, and supervision of the bar so that the public will be free from the incompetent and the rampantly self-interested. It is with this in mind that the Law School and the organized bar cooperate.

Delaware Volunteer Legal Services (DVLS)

DVLS is an agency of the Delaware State Bar Association, bringing together licensed lawyers and students from Delaware Law School to provide free legal services to the poor. DVLS achieves the combined advantages of adequate representation to those Delawareans who can least protect themselves and the training of future lawyers as competent practitioners. Additionally, young law students learn that serving the disadvantaged is part of their responsibility.

Inns of Court

Through the efforts of Judge Latchum and William Prickett, Delaware Law School agreed to co-sponsor a chapter of the American Inns of Court program for Delaware. Former Chief Justice Burger started the program in response to a widespread perception that the quality of trial and appellate practice in the United States left much to be desired. Today, the chapter, headed by Justice Walsh of the Delaware Supreme Court, consists of judges, law professors, senior practitioners, junior practitioners, and law students. Five times a year the Inn holds programs to increase the competency of attorneys at trial. Most of the sessions are simulations or demonstrations of trial techniques. Again the object is to ensure competent representation of clients.

Judicial Clerkships

Chief Justice Christie, former Justice Duffy, William Lynch, Esquire, and the Dean of the Law School choose summer clerks for the Delaware judiciary from among second year law students. The program is made possible by the generosity of the Vale Foundation and Delaware Bar Foundation. The experience affords the young people selected an opportunity to work for sitting Delaware judges, to learn judicial administration from the point of view of the court, and to hone legal writing, research, and scholarship skills. It provides clerks with first hand experience of what occurs after a case is submitted for decision. Such an opportunity is unique until a student gets a judicial clerkship or—years later—is appointed to the bench.

Continuing Legal Education

The advent of mandatory continuing legal education has strengthened the ties between the organized bar and the Law School in their presentation of programs designed to help practitioners keep abreast of new developments in the law. At considerable expense the bar and the Law School have installed satellite receivers atop the Law School and the Law and Education Center of Widener University and the Delaware Bar. In this way CLE programs from across the country can be made available to the practicing bar. In addition, the two organizations produce programs related to Delaware law and a "Fundamentals" series of programs to assist younger members of the profession through the transition from law school to practice.

Alternative Dispute Resolution

Through the leadership provided from former Chief Justice Daniel L. Herrmann, Delaware Law School students are exposed to theories of alternative dispute resolution designed to unclog the courts and make justice more accessible. Recently Judge Joshua Martin of the Superior Court joined Chief Justice Herrmann in helping students explore methods for resolving disputes before they reach the courts.

Street Law

Under the supervision of a Delaware practitioner several students each semester take the message of our legal system into the high schools across the state. The purpose of this program is to provide teenagers with a greater understanding of our legal system so that they may better appreciate the administration of justice.

Appellate Handbook Project

The Delaware Appellate Handbook project was initiated in 1983 by the Delaware Supreme Court by the Rules Committee of the Supreme Court. A nationwide ABA sponsored project to prepare a handbook of appellate practice for each state by July 19, 1985 was the impetus for the Delaware project. The Handbook was written by a team of experienced appellate advocates. William D. Johnston, Esquire and Associate Dean Thomas J. Reed were the co-reporters for the project.

Library

In its continuing attempt to afford practitioners the latest in research techniques, the Law School, through its Library Director, Eileen Cooper, is presently developing a plan whereby small firms can access a law related computer information retrieval system directly from their personal computers. Soon to be established, the program will afford lawyers the opportunity to access LEXIS direct from their offices.

There are a number of others, less formal, connections. Several times a year members of the bench and bar visit the Law School to address students. This year several judges and faculty members spent the day together to discuss matters of legal philosophy. Last year, the Law School changed its rules of governance to include the President of the Delaware State Bar Association as a member of the Board of Overseers to ensure continuing dialogue between the school and the bar.

It is probably not true that professionalism has declined. More likely, it is changing, and for the better! An American Bar Association commission studying the matter put it succinctly when it said "Perhaps the golden age of professionalism has always been a few years before the time that the living can remember." We are confident, however, that at least in Delaware we are entering that age. ■

Specialization in Delaware: The Proposed Pilot Plan

H. Murray Sawyer, Jr.

When Frank Biondi, then the President of the Bar Association, asked me to head a special committee on Specialization in 1984, there were proposals in Dover to make a number of professions—more than 20 as I recall—subject to a uniform set of standards, procedures, and regulations. The professions ran the gamut—from law to real estate to landscape architecture to physical therapy to podiatry to geology. All were subject to proposed uniform governing rules dealing with the Administrative Procedures Act. Fortunately, that legislation was not enacted. It did however cause the Bar Association to look critically at questions of lawyer competency and public access to qualified professionals.

A Special Committee on Specialization was established to examine the issue of "specialization *vel non*", and to draft a plan, should we conclude that such was appropriate. We ultimately did. The Committee was approximately 20 in number, consisting of lawyers from solo practices, small firms, and large practices. Upstate and down. Old and young. For two years Marie Bifferato was our Vice Chairman and for the last year Barry Guerke has served as our Vice Chairman. The Committee had mainstream lawyers and those more staunchly individualistic. We analyzed information from the American Bar Association and from other states with specialization plans. We discovered that approximately 35 states either had specialization programs or had proposed plans in various stages of progress.

Our Committee concluded that *de facto* specialization is a fact of life for the legal community. We further concluded that sophisticated purchasers of legal services generally know how to find the specialists who best may serve their legal needs—in tax, patents, and labor law. We believed that the consumer of "retail legal services" was generally least able to determine who might best serve him. The four proposed specializations in our Delaware Plan—criminal law, personal injury, family law, and estate planning and probate—were oriented toward that retail audience.

Another important issue was lawyer competence. As early as 1981, ABA President-elect David Brink had said that lawyer competence was "the single dominant issue in the 1980s." In Delaware, we have taken a multi-faceted approach to the issue—the powers of the Board on Professional Responsibility have been materially improved, Mandatory Continuing Legal Education is here, and specialization may be right behind it.

We believe that specialization might help to assuage a public affected by real or imagined difficulties in locating competent lawyers. Advertising, originally believed to be a panacea, would in our judgment, help point the public in the direction of qualified specialists. See *Bates and O'Steen vs. State Bar of Arizona,* 433 US 350 (1977). That expectation has, however, not been met. Despite mandatory disclaimers regarding specialization in legal advertising we think that the public continues to regard an attorney advertising certain legal services as a specialist in his field, and we knew this might not be so. A primary goal of specialization is to identify Bar-sanctioned specialists to whom the public may turn and in whom they may repose confidence.

It has been felt intuitively by many that the use of the word "specialist" denotes "quality" in the minds of the public. That intuition was borne out. The ABA Foundation and the Survey Research Laboratory of the University of Illinois recently conducted a survey about the word "specialization". The University conducted its survey in Minnesota, which has no established specialization plan, and in Florida, which has an extensive one. The results are strikingly similar and revealing:

Percent of Respondent's Saying it is "Very Likely" or "Likely" (as opposed to "Unlikely" or "Very Unlikely") that a Specialist...

	Florida	Minnesota
1. Is more efficient	92%	92%
2. Provides better advice	94%	93%
3. Has more experience	97%	94%
4. Has additional formal education	79%	88%
5. Should meet certain standards	73%	71%

It is significant that in both states over 90 percent of the respondents were aware that attorneys do, in fact, specialize. Interestingly, the vast majority of the respondents did *not* know whether their state imposed requirements for specialty designation. 73 percent were ignorant in Minnesota, where there are no Bar-designated specialists, and 82 percent were ignorant in Florida where there are.

The survey furnishes empirical verification that the public sees a specialist as a lawyer of qualifications not necessarily expected of a non-specialist providing services in the same legal field. A specialty designation can give some assurance to the public that a lawyer who claims to be the self-same specialist has qualifications not normally attributed to non-specialists.

With that historical overview behind us, let us examine the proposed Delaware Plan. The first point to be made is that the Plan is, as of this writing,* under review and consideration by the Supreme Court ("Court").

The Court retains jurisdiction over amendments to the Plan, appeals, and the establishment of fees. The Court has express jurisdiction over lawyer specialization.

If the Court looks favorably upon the Plan (and it has received the blessing of the last three Executive Committees of the Bar Association) then a three-year Pilot Plan will commence. It will be closely monitored. Whether the Plan will continue thereafter will depend on our Delaware experience.

In its present form, the Plan is fundamentally an adoption of the American Bar Association draft model plan, modified for Delaware purposes. (The "Philadelphia Plan" designation in the Commentary to our Plan was, itself, the ABA model.) The Plan establishes a Specialty Board ("Board") and Advisory Commission ("Commission"). Under the Specialty Board there will be four Specialty Committees ("Committee").

The Board will consist of nine members. Five will be appointed directly by the Court. Some of those Board members appointed by the Court must be generalists. The other four Board members will come, one each, from the Committees. The Court will also appoint the members of the Committees. After initial terms of office, the Board members will serve for three years.

An Advisory Commission appointed by the Court consists of three non-lawyers. The purpose of the Commission is to assist and advise the Board and the Court as to the public's legal needs. Commission members also will serve three years. They will attend Board meetings but not be voting members of the Specialty Board.

The Board will have general jurisdiction to regulate specialization and to recognize specialists. It will be empowered to:

1. Administer the Pilot Plan;
2. Recommend specialities to the Court, define the scope of those specialties, and delineate procedures with respect to those specialties;
3. Act on recommendations of and consult with Specialty Committees;
4. Create standards for the recognition of specialists;
5. Deny, suspend, or revoke specialty recognition either upon its own initiative or upon recommendations from Specialty Committees;
6. Establish rules;
7. Propose amendments of the Plan to the Court;
8. Cooperate with other organizations.

There will be a Specialty Committee for each specialty. The Committees are composed of five members appointed by the Court. Three year terms are established. The Committees advise the Court and the Board. Each Committee appoints one of its members to the Board. The Committees are charged with the active administration of the Plan in that particular specialty. That active administration is to include:

1. Recommendation of reasonable and non-discriminatory standards for specialty qualification;
2. Recommendation to the Board for the recognition, denial, suspension and revocation of specialties;
3. Administration of procedures established by the Board;
4. Administration of exams if exams are subsequently required;
5. Investigation of references and securing of additional information about applicants; and
6. Recommendation of specialty-related CLE courses to the Board.

Upon compliance with plan requirements an attorney may publicly designate that he or she is a specialist. Attorneys meeting plan requirements, and only such attorneys, may hold themselves out, for example, as a "Board Recognized Criminal Law Specialist" or "Delaware Board Personal Injury Law Specialist".

Minimum standards for specialty designation are established by the Board to require of duly licensed lawyers that they:

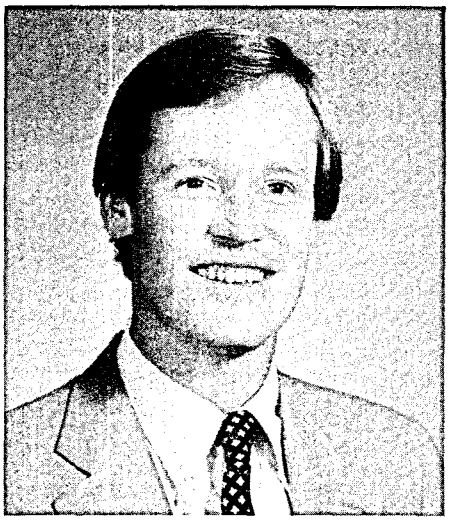
1. Have been in practice for three years;
2. Have spent one-third of their time in their specialties for each of the three immediately-preceding years;
3. Have accumulated 45 hours of CLE in their specialty area during the three years preceding the filing;
4. Make a satisfactory showing of competence, as determined by the Board after advice from Specialty Committee, by providing five references from fellow attorneys experienced in the field;
5. Have available appropriate reference materials in their offices or by access to the County Law Library.

"the choice is not between specialization and the denial of its very real existence, but between orderly regulation and rank unchecked growth."

No more than two areas of specialization may be designated. The attorney must file a separate sworn statement with the Board and the Court setting forth compliance with the standards and agreeing to continue CLE over the next 3 years. A non-refundable fee is to be paid to the Board. Minimum standards for *continued* specialty designation are similar. Additional standards may be established by the Board. No *law firm* is allowed to hold itself out as a specialist. Procedures are set forth for revocation or suspension.

The Committee sees specialization as an experiment. Jan Bove, in a 1983 article in *DELAWARE LAWYER*, addressed the issue of specialization in lawyer competence. He wrote that "the choice is not between specialization and the denial of its very real existence, but between orderly regulation and rank unchecked growth." We believe the Delaware Plan will help to control and regulate *de facto* specialization.

* *April 1987.*



Murray Sawyer is nothing if not diligent. For more than two years he and his fellow committee members have wrestled and writhed like the Laocoon with the serpents of specialization, including the particularly snaky Section on Taxation of the Delaware State Bar Association. Murray, no newcomer to these pages (see the Fall Issue, 1984) is the founder of that rising law firm, Sawyer and Akin, whose excellences were portrayed a while back in the Journal of the American Bar Association.

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Specialization in Delaware
(continued)

The Plan includes minimum standards for substantial specialty experience, mandatory CLE over and above that called for presently by Delaware, and peer review. Specialty MCLE calls for 45 hours in the area of specialty designation. As for peer review, the ALI-ABA Model Peer Review system uses the following definition of competency:

"Legal competence is measured by the extent to which the attorney (1) is specially knowledgeable about the field of law in which he or she practices, (2) performs the techniques of such practice with skill, (3) manages such practice efficiently, (4) identifies the issues beyond his or her competence relative 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 incompetence is measured by the extent to which an attorney fails to maintain these qualities."

In looking at the issue of specialization *vel non,* many concerns were raised. For example, the concern of "exclusivity" was raised, the fear being that generalists would end up being frozen out of areas of law. To address that issue our Plan makes it expressly clear that there is to be no prohibition to the practice in any area by any non-specialist. Plans in California and Texas, both of which began operating in the early to mid-70s, contain specific language guarding against that and the experience has been encouraging—generalists have not lost areas of law to designated specialists. Furthermore, the standard, which requires that only 33 percent of one's time be devoted to the specialty, is meant to insure that specialization not look toward a limited licensure.

Another concern raised regarding potential specialization was the effect it would have on downstate, solo, and small firm practitioners. It was the Committee's determination that large firms are typically broken down internally into *de facto* specialists, and that clients of large firms are able to secure a variety of services from those firms. Specialization has proven to be a boon, not a detriment, to the small firm and solo practitioners in states where plans have been in force for awhile. In both California and Texas, for example, more than one-third of the specialists are in firms of three persons or less. In each state, more than one-half are in firms of nine people or less. Lawyers in large firms represent a minority of specialists in those states.

The tension between self-designation and certification also raise concern. It expresses itself in competing policy interests to:

1. Allow the broadest access, both in permitting attorneys to participate in the program and in giving consumers a longer list from which to make a choice ("self-designation"); and
2. In rigidly enforcing plans through examination and strict compliance so that only "true" experts might become certified ("certification").

The Delaware Plan avoids examinations (unless subsequently recommended by the Specialty Committee and adopted by the Board pursuant to the Court's authority). It seeks to strike a middle-ground between that self-designation and certification. Substantial specialty practice and continuing legal education are required, but no self-designation is permitted. These standards are designed to give a reasonable degree of assurance of competency to the public and still encourage active participation by Delaware attorneys in the Delaware Plan.

Another concern was the effect of specialization on newly admitted lawyers. We did not want to discriminate against young members of the Bar. At the same time, we recognized that a certain amount of experience is, *per se,* a necessary element of specialization. Our Plan looks to meet those competing needs by requiring three years of MCLE in the subject area before certification. Other states have a five-year requirement. Our experience led us to conclude that in Delaware an attorney can gain public recognition faster than he might be able to in a more populated Bar.

We also addressed grandfathering. We decided it would be inappropriate to create two standards for Delaware specialists, one for most lawyers and a more lenient one for "grandfathers". The ABA Standing Committee on Specialization, and the ABA;s Young Lawyers Section, also vigorously oppose any proposed lessening of standards for a certain class of lawyers. Consequently

any lawyer who wants to seek specialization will have to meet the same standards that his fellow-lawyer will have to meet.

Unlike the ABA model, we rejected examinations *per se*. We felt they would discourage practitioners from seeking certification. We also felt that the Bar in Delaware is sufficiently homogenous so that the five letter-peer review requirement would help to identify any lawyers who might not, in fact, be true specialists.

The Delaware Plan is designed to encourage, rather than to discourage participation by lawyers in specialist designations. This is particularly true for the experienced practitioners. As for them, the Delaware Plan needs them to establish the credibility of the program more than they need the recognition specialization would bring. In addition, exams are expensive to administer, expensive to the applicant, and excessively bureaucratic. They are also of limited value in skill-oriented specialties in which judgment and experience count. On balance, the Committee felt that the Delaware Plan and Delaware lawyers would be better off without an examination requirement.

In regard to the issue of costs, the goal of the Plan is to become self-supporting. It is believed that the Court can include a fee for those Delaware lawyers who wish to become Board certified in the annual fee now paid for other court related matters such as the Client Security Trust Fund.

Specialization has proven to be a boon... to the small firm and solo practitioners in states where plans have been in force for awhile.

Concerns about malpractice insurance also surfaced. Would higher premiums be required because of specialty designation and would premiums paid by general practitioners rise because they work in specialized areas? The best information available to the ABA Conference on Specialization is that specialization plans do *not* affect rates, and that insurance companies do not take formal specialization into account when setting rates. Predictions as to what will happen should only be hazarded by the most fearless among us. (That's not me. My firm's rates have recently gone up enough without specialization.) The best we have been able to determine is that to the extent rates may go up in the future, that increase will not be tied to specialization.

The benefits afforded the public and the Bar through specialization seem enormous. We should not lose the opportunity to test that thesis.

In 1985 Frank Biondi said at his annual report to the Bench and the Bar, "In truth we specialize and we need a coherent system for regulating that practice. I am convinced that the advantages to the profession, both in improved capacity to serve the public and in consequent economic reward will be profound—this is a time when the economics of practice and an enlarged Bar dictate measures calculated to insure the finest professional performance by individual lawyers." Frank's observation is a challenge, but one I am certain that we can meet. ■

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Communicating with Expert Witnesses

Richard K. Herrmann

The business of practicing law is resource oriented. Our daily professional business revolves around our physical plant, our staff, and now around computers. Unfortunately, lawyers are not the most proficient managers of these resources.

Obviously, our resources are not limited to the procedural aspects of the practice. There are substantive resources as well. In litigation we are surrounded by books. We encountered this resource early in our careers and we use it extensively in practice. There is no question that, when it comes to books, we excel. After all, the use of published research material has been engrained in us from the first day of law school.

Another equally important tool in litigation is people. Facts are discovered through them, cases are developed around them, and juries are persuaded by them. One very important person in this group is the expert witness.

In products liability and construction litigation, the outcome often depends on a battle of the experts. We traditionally have not developed the skills, however, to fully exploit the potential of this all-important resource. We have no formal training in the use of experts. We have little continual legal education dedicated to our interaction with them. We deal with experts instinctively. And of course, some lawyers have better instincts than others.

As we are exposed to engineers, we develop certain biases. If I may be permitted to generalize: like any professional, the engineer has his shortcomings. Most of the problems we encounter with him seem to arise from a difference in modes of communication. Some of these difficulties can be avoided or corrected. Others simply flow from a fundamentally different way of perceiving and expressing reality.

The lawyer, for example, tends to be a word person, comfortable with an ability to be precise with language, and less comfortable with numbers because they lack persuasive impact. On the other hand, the engineer is trained in a scientific discipline, and is comfortable with numbers and relatively uneasy with words, which he views as imprecise and emotional.

For some time I have wanted to write about these professional differences. In order to sharpen my ideas, I decided to articulate them to an engineer.

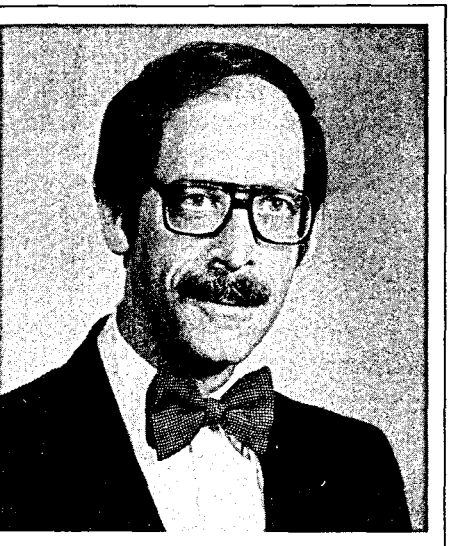
Over the years, I have developed a close working relationship with Daniel W. Luczak, Senior Vice President of Forensic Technologies International (FTI) in Annapolis, Maryland, an engineering firm that specializes in failure analysis and accident reconstruction. Not only have I worked with and against FTI on a number of occasions, but I have worked with Dan on many related activities. In this case, he was both a willing and a captive audience. Our conversation went like this:

HERRMANN: Dan, people are blaming the products liability crisis on the courts and the lawyers. I personally think that the forensic engineers have played a significant role in this crisis.

LUCZAK: There you go again, Richard, with your sweeping generalizations. Lawyers expect too much from the engineer, often only half implying that they wanted anything in the first place. Engineers have to use technically accurate terms. We do indeed have a communications problem.

HERRMANN: I'll tell you what I expect. An engineer is a tool that helps a lawyer to achieve satisfactory results. Like a computer or any other resource, I expect that the engineer will perform accurately and correctly from the first time I deal with him.

LUCZAK: When the tool doesn't work as expected, I suppose your reaction is to kick the tool.



Richard Herrmann, a member of the firm of Bayard, Handelman and Murdoch, practices product liability law with a distinction worthy of his fine firm. He is, not surprisingly, the Chair-elect of the Product Liability Committee of the American Bar Association Torts and Insurance Practice Section. He has other interests and abilities that usually evoke the epithet "Renaissance man". If such he is, the Renaissance must have been a very entertaining period in Western civilization. He is an accomplished photographer, wit, poet, and a past master of the son et lumière *circuit. (Many of us remember happily his tour de force at the May 1985 dinner in honor of his father, the Chief Justice.) In this article we encounter a more thoughtful and scholarly Richard Herrmann. Oh, well, into each life a little stuffiness must fall.*

HERRMANN: What can be done then to improve communication between lawyers and experts like forensic engineers?

LUCZAK: Instead of answering that directly, I'll ask you a question. What is the bottom-line here? What do you expect to get from an engineer?

HERRMANN: Expert analysis, expert testimony.

LUCZAK: Exactly. And that testimony doesn't come in the form of a dissertation. The engineer can only respond to questions asked by an attorney. In order to make that work, you have to function as a team. You have to take the time to develop a professional relationship with the expert.

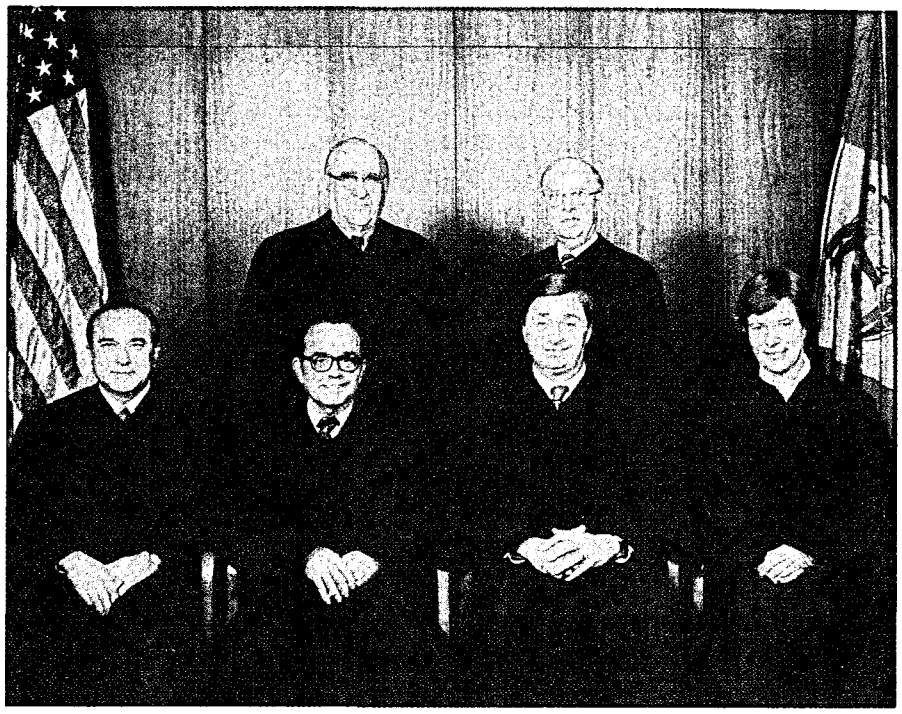
HERRMANN: And how do you think that should be done?

LUCZAK: I know one very prominent, very successful attorney from the Deep

A Judicial Portfolio

Last year William Prickett, Chairman of the Judicial Portraits Committee of the Delaware State Bar Association, conceived of a means of regularly recording the composition of the several Delaware Courts and the local Federal District Court. The following album is the result of his initiative and that of Wayne Carey, Esquire, who labored mightily to corral Judges and photographers in assembling this portfolio.

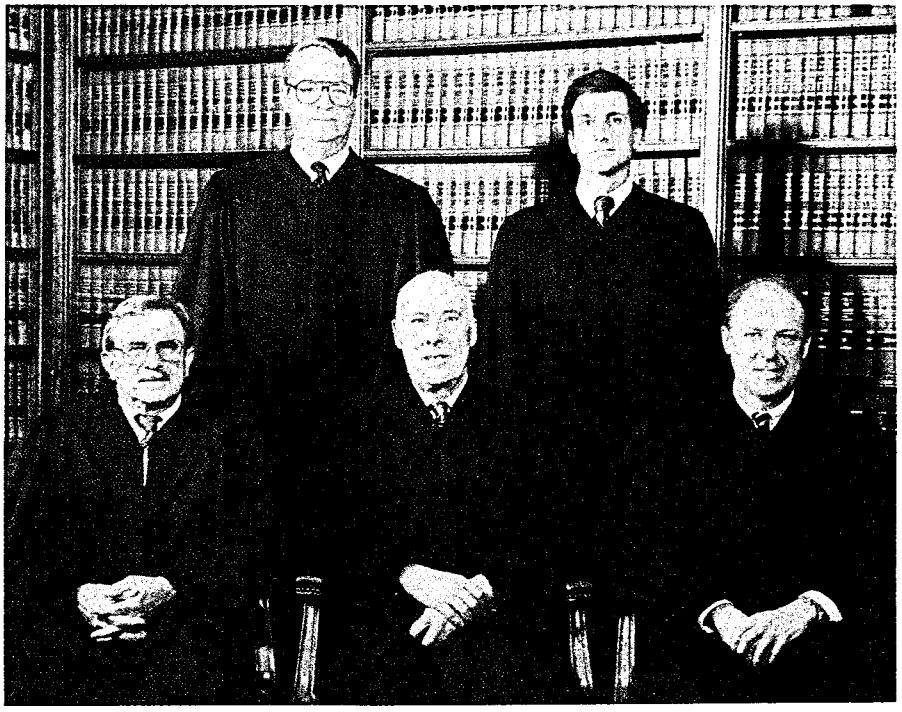
Readers interested in a more permanent record may consult with the photographers about reproductions suitable for framing.



United States District Court

Photo by: John D. Newell
102 Presidential Drive, Greenville Place, Greenville

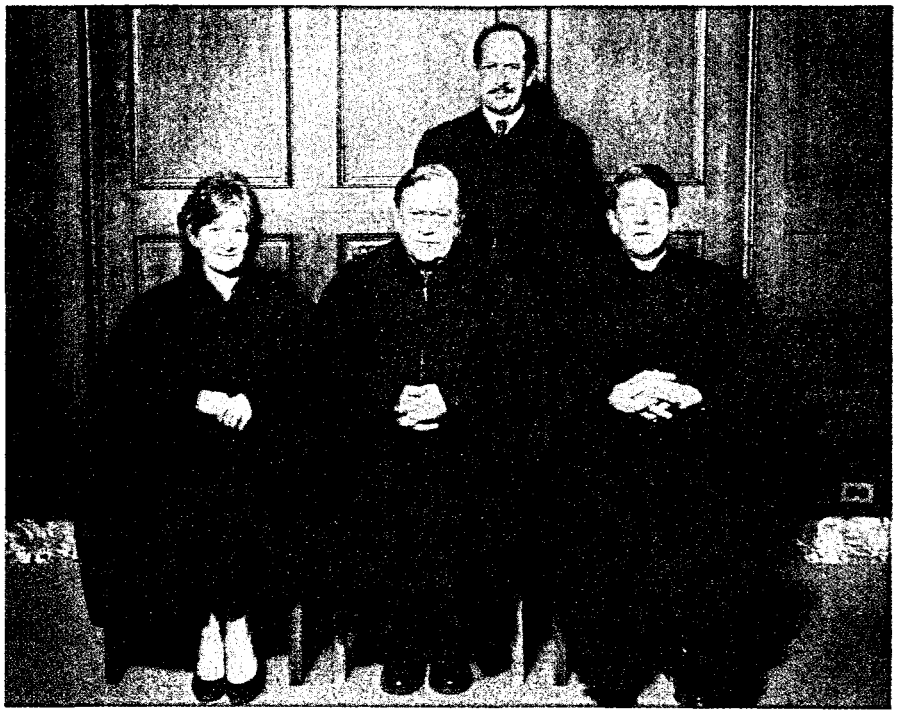
United States District Court
Front row (left to right): Judge Joseph J. Longobardi, Chief Judge Murray M. Schwartz, and Judges Joseph J. Farnan and Jane R. Roth
Rear row: Senior Judges Caleb M. Wright and James L. Latchum.



Delaware Supreme Court

Photo by: Young's Studio
134 Loockerman Street, Dover

Delaware Supreme Court
Front row (left to right): Justice Henry R. Horsey, Chief Justice Andrew D. Christie, and Justice Andrew G. T. Moore, II
Rear row: Justices Joseph T. Walsh and Randy J. Holland.

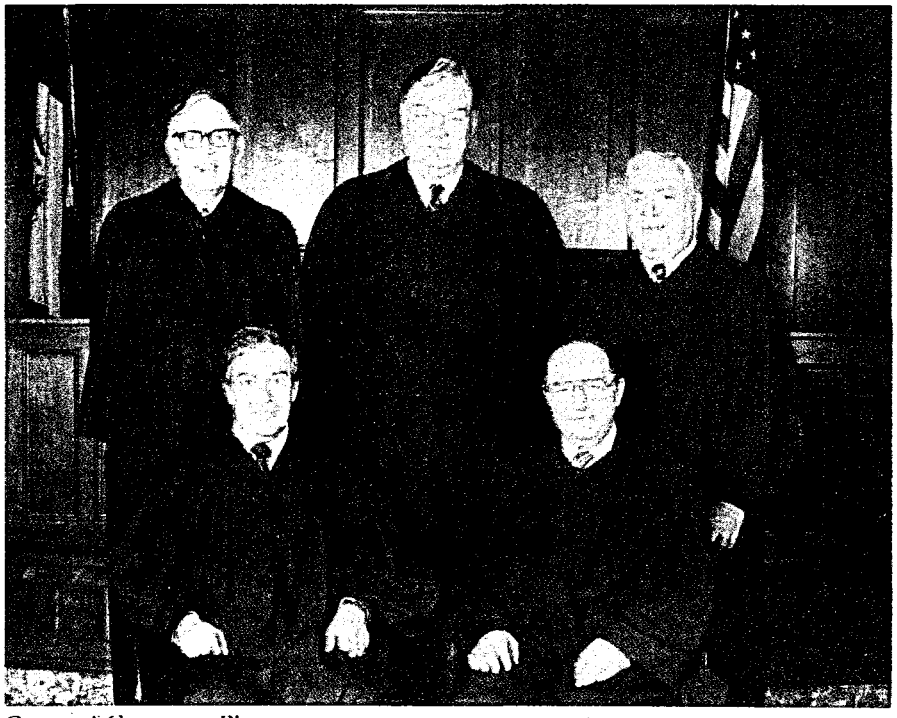


Court of Chancery

Photo by: Jack Bungarz
903 Orange Street, Wilmington

Court of Chancery
Front row (left to right): Vice Chancellors Carolyn Berger, Maurice A. Hartnett, III, and Jack B. Jacobs

Delaware Superior Court
Front row (left to right): Judges Clarence W. Taylor, Robert C. O'Hara, Albert J. Stiftel, Vincent A. Bifferato, and William G. Bush, III
Rear row: Judges William S. Lee, John E. Babiarz, Jr., Henry duPont Ridgely, Joshua W. Martin, Bernard Balick, Vincent J. Poppiti, Richard S. Gebelein, and William B. Chandler, III

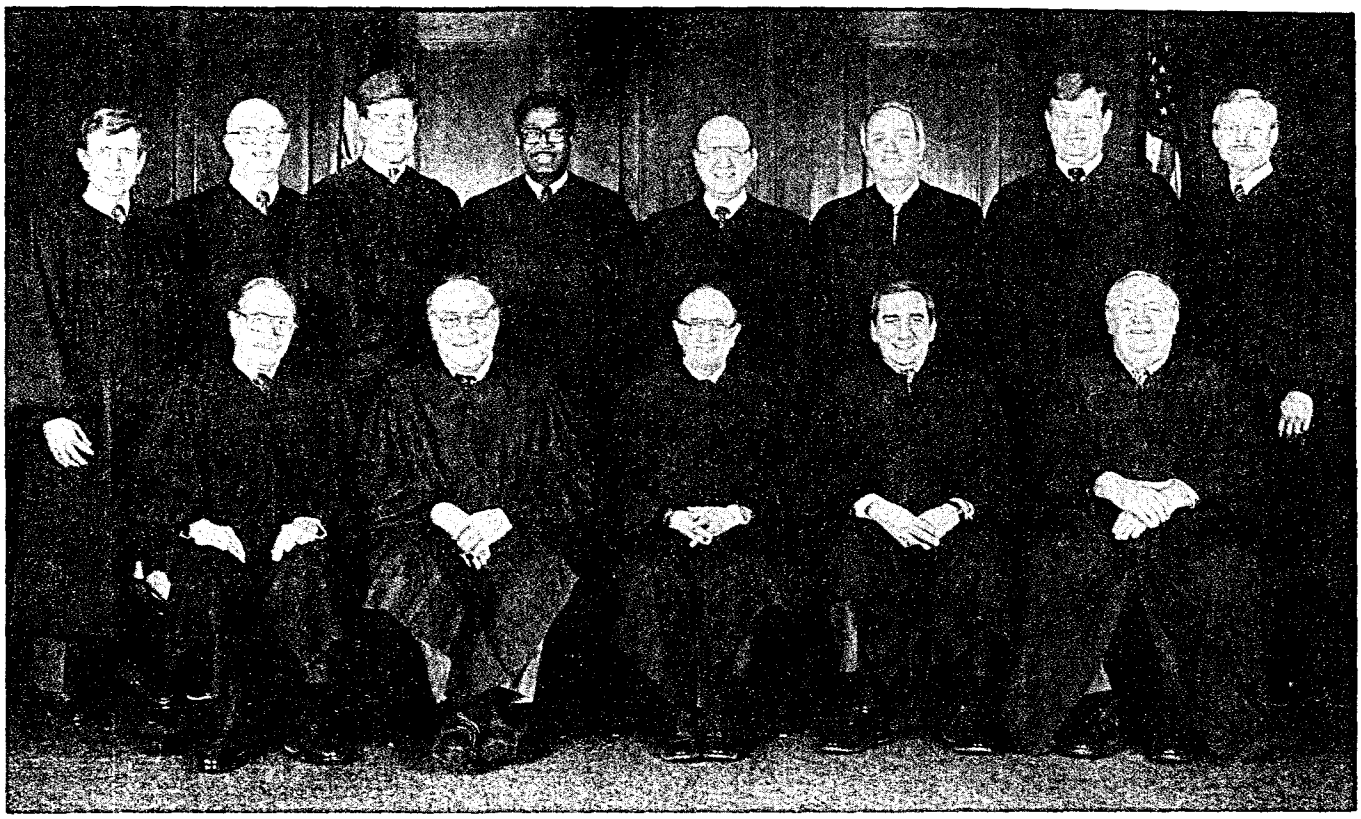


Court of Common Pleas

Photo by: Eric Crossan Studio
Blackbird Landing Road, Townsend

Court of Common Pleas
Front row (left to right): Judge Arthur D. DiSabatino and Chief Judge Robert H. Wahl
Rear row: Judges Merrill C. Trader, William C. Bradley, and Paul E. Ellis.

Family Court
Front row (left to right): Judges Battle R. Robinson, Robert W. Wakefield, Chief Judge Robert D. Thompson, Judges Roger D. Kelsey and Peggy L. Ableman
Rear row: Judges Kenneth M. Millman, Karl J. Parrish, David P. Buckson, James J. Horgan, Charles K. Keil, John R. Gallagher, Jay H. Conner, and Jay Paul James



Delaware Superior Court

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Family Court

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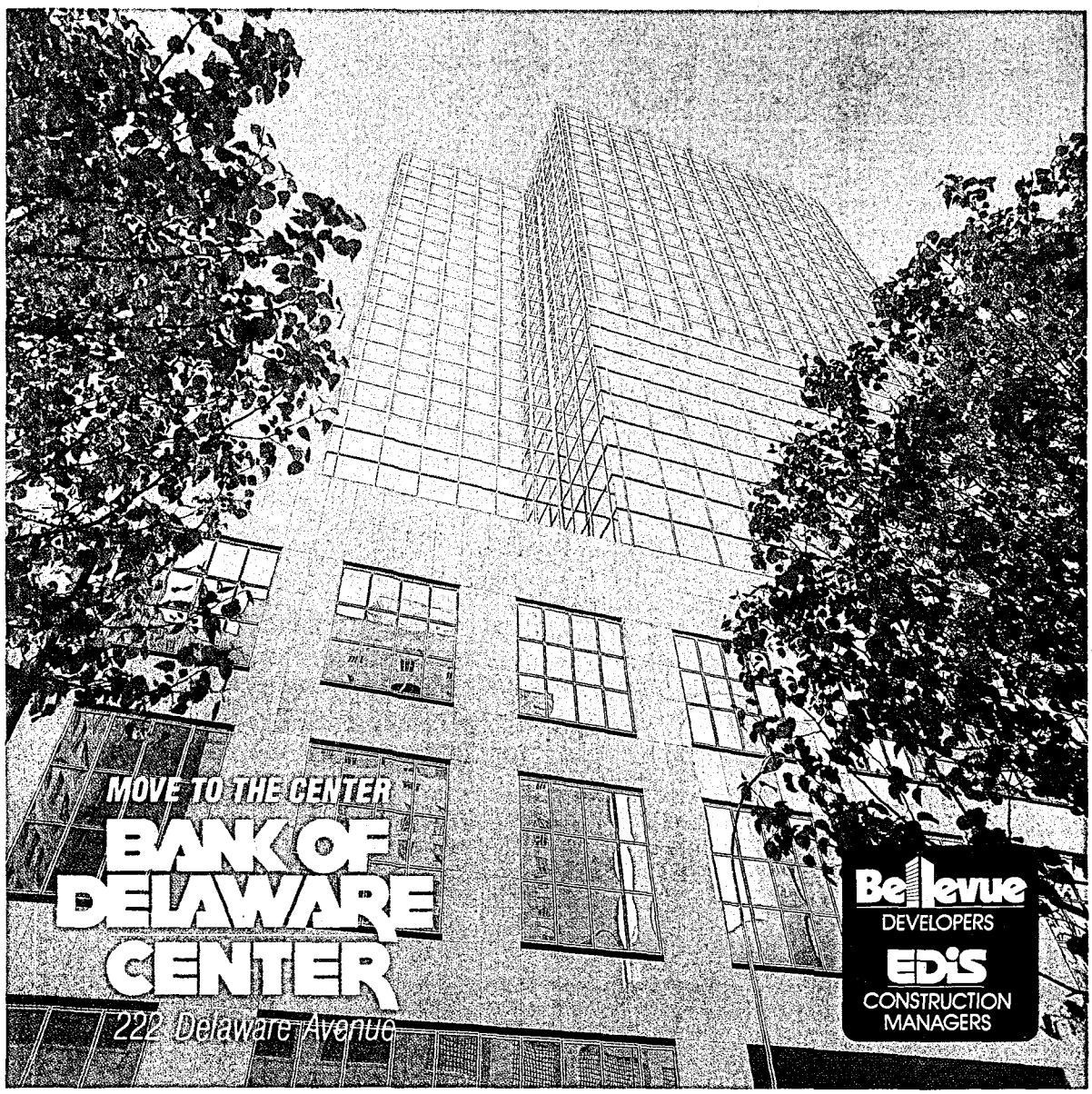

South who never hires an engineering expert until he sees him, talks to him, or does whatever else is necessary to evaluate how that expert is going to perform throughout the case.

HERRMANN: But that is an expensive process. You are tying up both the lawyer's time and the engineer's time, and you have accomplished nothing of substance.

LUCZAK: First, it is not all that expensive. Whatever it costs is cheap if the expert is not the right person.

The attorney can delegate this job to an associate or to a paralegal. With some training a good paralegal could locate and interview prospective engineers economically, screen out some, and leave the lawyer only to pick the best of the best. The lawyer just has to take time to spell out exactly what he wants.

HERRMANN: What guidelines for interviewing engineers can I give to a paralegal?

LUCZAK: The paralegal should be able to describe the situation fully over the phone and to answer questions. Ask for a proposal in writing from the engineer. The proposal should state how the engineer would approach the problem, identify the credentials needed to carry out the investigation, and give you a ballpark cost estimate. The proposal will convey some feel for the engineer's communication skills as well as his understanding of the technical problem. Basically, you want to know if the engineer is going to be able to solve the technical problem, if he can communicate, and if he is someone you can work with.

HERRMANN: That raises another question. Is it more important to find a forensic engineer who is an expert at failure analysis or an expert courtroom witness?

LUCZAK: You hope, you will be able to find both in one person. Some cases, however, may require a team analysis, and only one member of the team may testify in court.

HERRMANN: I have often found that engineers are "response oriented." Although they respond well to questions, they do not initiate ideas or direction to the case. Rarely do you hear an engineer suggest a new approach. Rarer still is the mechanical engineer who suggests that you might want to try this from a human factors point of view.

Guidelines for Interviewing Experts

- ☐ Get a written proposal
- ☐ Outline of technical approach
- ☐ Expert's credentials
- ☐ Cost estimate
- ☐ Communication skills
- ☐ Testifying references

LUCZAK: At risk of sounding self-serving, that is the value of an engineering *firm* over an individual expert. A top quality engineering firm has too much at stake to allow the wrong engineer to remain on a task or to not be the initiator of ideas.

HERRMANN: Dan, in your seminar on expert testimony you suggest that attorneys discuss legal issues with engineers. Personally, I think there ought to be a limit on how much the engineer should know about the litigation or the issues in the case.

LUCZAK: We find that many attorneys feel the same way. That kind of an attitude, however, may cost you time and money. For example, if you have a case that hinges on design defect, the engineer can write a thesis on the failure analysis without ever addressing what you need. This kind of communication does not contaminate the engineer's thinking by suggesting results. It merely provides the engineer with a glimpse of the bigger picture so that he can see his input in the larger context. Then he can make rational decisions about optional approaches and can make the kind of recommendations you need. Why are lawyers so reluctant to discuss legal issues with an engineer?

"A little knowledge can be a dangerous thing...No knowledge can be even more dangerous."

HERRMANN: Very often, there is little to gain from discussing the legal points with someone who does not have a legal background. A little knowledge can be a dangerous thing.

LUCZAK: *No* knowledge can be even more dangerous. If you do not offer insight and direction in the form of information about all aspects of the case, you risk surprises. You also cut off any possibility of helpful advice.

HERRMANN: So our ideal expert must also be able to follow directions.

LUCZAK: Yes, with one big exception. Once the engineer raises his hand and swears to tell the truth, you have to understand that a whole new set of principles comes into play. Professional ethics demand that, if we are asked to reveal something that we know, we have to answer. If the engineer and the lawyer have communicated fully and clearly up to now, at least you will know what to expect.

HERRMANN: Dan, it looks like attorneys and engineers have a good deal more communicating to do. In order to develop an effective team relationship we have to spend more time talking together, preparing interrogatories, witnessing tests, preparing for trial, and basically listening to the other's point of view. I just wish there were a school somewhere to teach engineers how to talk to lawyers.

Our conversation went on for some time, but that was the heart of it. Now that I have recorded the conversation, I may not have to write that article on communicating with engineers. ■

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THE ACQUISITION OF WISDOM

William Prickett and Irving Morris are both former Presidents of the Delaware State Bar Association. Their articles below are very different accounts, but with an important thing in common: They describe the gradual process of experience accumulated, leading the authors to their present distinction.

Flunking the Bar

William Prickett

This painful account is really only addressed to one small group of unfortunate people: those, who, like the writer, have had the truly awful experience of flunking a Bar Exam. I write this account, not only to air an ancient wound, but to share the common misery of what happened with others who, like myself, coming bright and shiny out of law school, have failed the ultimate professional hurdle that allows them to represent clients before the Courts. Those who have not suffered such a professional humiliation should read no further, unless in reading about my downfall the reader would get the almost obscene pleasure in gloating over the deserved comeuppance of a snotty young ivy leaguer and a graduate of the Harvard Law School or unless an account of long awaited retribution of a crusty old Delaware Bar Examiner is something that you can truly savor. However, only, as I say, if you enjoy reading about misfortunes of others or on the odd chance that you are a student of pig latin, or would enjoy a passing reference to "Winnie the Pooh", should you read on. Otherwise, do not go any further: stop right here and now.

If these caveats and disclaimers have been disregarded, let us proceed with this melancholy tale, for melancholy it still is for me and all others who have come a cropper at the very threshold of their legal careers.

This account must start with my late Father—the crusty Delaware Bar Examiner. On his return from World War I in 1919, he did not have to take the Delaware Bar Examination. Not only was he a decorated and injured World War I artillery officer and flyer, but he had come back to Wilmington armed with a war bride, my mother, from poor little ravaged Belgium. In addition, he, I believe, was the only person applying for admission to the Delaware Bar that year. Thus, I believe that the nine senior lawyers who constituted the Delaware Board of Bar Examiners considered his war record and his brief attendance as a Rhodes Scholar at Oxford and decided that there was no necessity for making this war hero take the Bar Exam, especially as his own father was a Delaware lawyer and part-time judge. (Oh, for the good old days!)

It should be said that in those days the complete power to admit or reject would-be lawyers in Delaware, as in most States, was vested in the Delaware Supreme Court. The Court in turn appointed an advisory committee known as the Board of Bar Examiners, which in effect wielded the admitting power for the Court. In olden times, this Board almost automatically consisted of the nine senior respectable members of the Bar. The Board looked on its task as one of preserving the right to audience before the Courts to persons whom they themselves found acceptable and congenial (*i.e.*, good old boys—and when I say boys, I mean boys). The Board required those who aspired to become full-fledged Delaware attorneys to be preceptees or clerks to the members of the Bar for six months during or after law school but before being admitted to practice. There were continual and un-

(Continued on page 36)

Justice And a Jury Verdict

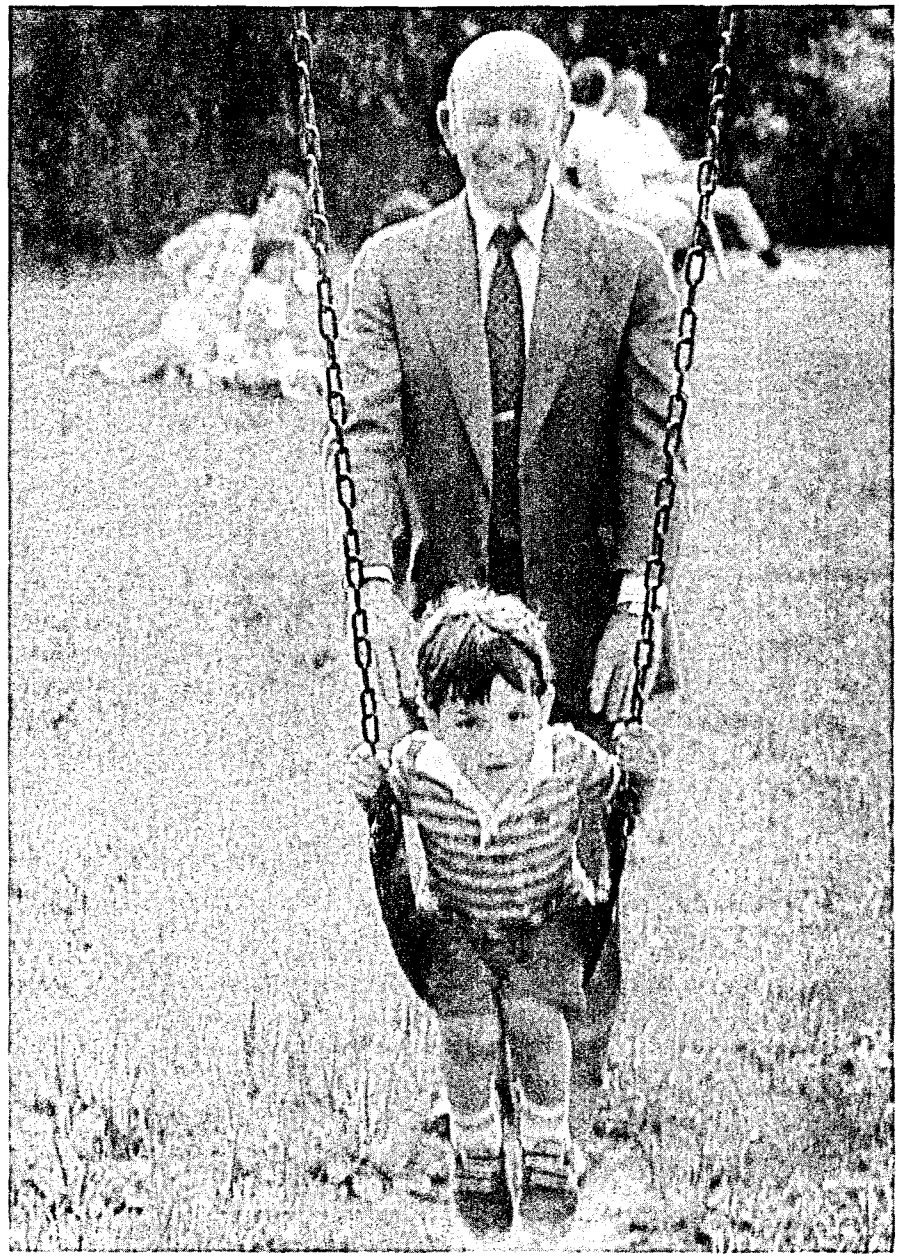
Irving Morris

How my mentor, Philip Cohen, came to acquire Deemer's Beach I am not certain. John K. "Bud" Walters could have brought it to Mr. Cohen's attention. Mr. Cohen considered Bud Walters the best bird dog of unusual values in real estate he knew. I never saw the signs of affluence that should have surrounded "the best bird dog of unusual values in real estate." It may have been that Mr. Cohen's brother, Hymie, had told Mr. Cohen about it, since Hymie was always bringing "bargains" to Mr. Cohen's attention. For his part, Mr. Cohen always made time to investigate a real estate or a business proposition.

In all the years of our association, Mr. Cohen never kept from me his preference for the wheeling and dealing of the business world to the tedious detail of the law, punctuated by acerbic controversies in a courtroom. But when he went to court, Mr. Cohen was not only good, he was excellent.

Mr. Cohen took me into his office first as an office boy to run his errands while I was still in high school and a decade later as his partner in the practice of law after I had completed law school and a clerkship with Chief Judge Paul Leahy of the United States District Court for the District of Delaware. Accordingly, one might dismiss my words of praise of Mr. Cohen as a flattering remembrance dutifully uttered but not easily supported by a disinterested, knowledgeable source. The support exists. One of the most able trial lawyers I have ever known, the late William Prickett, paid Mr. Cohen high tribute in a public setting by referring to two defeats in litigation at the hands of Mr. Cohen that rankled Mr. Prickett the most in his career at the Bar. The two cases he cited were *Reid v. Baker* and *Jones v. Bodley.*

Reid v. Baker (reported on appeal as *Baker v. Reid,* Del. Supr., 57 A.2d 103 [1948]), established with finality the application of the principle of last clear chance in Delaware. In *Jones v. Bodley,* Mr. Cohen and Mr. Prickett in a decade long bitter fight crossed swords over one William Fortner's gift to his lady friend. Six reported decisions in *Jones v. Bodley* show to a fare-thee-well how hard Mr. Cohen and Mr. Prickett went at each other and with a tenacity seldom matched at our Bar. For the four substantive decisions, *see Jones v. Bodley,* Del. Ch., 27 A.2d 84 (1942), *reversed,* Del. Supr., 32 A.2d 436 (1943), *on remand,* Del. Ch., 39 A.2d 413 (1944), *affirmed,* Del. Supr., 59 A.2d 463 (1947). Mr. Prickett even tried to deprive the lady friend of the full value of her friend's gift by having the fee he charged for opposing the gift taxed as a cost and paid from the value of the gift, an effort Mr. Cohen thwarted. In the brief he wrote, Mr. Cohen called Mr. Prickett a "pettifogger," the most opprobrious epithet he could think of short of an obscenity. The "fee" opinion is reported at Del. Supr., 65 A.2d 484 (1948). Mr. Prickett won the final skirmish concerning an interest charge after Mr. Cohen had won the war. See Del. Ch., 66 A.2d 425 (1949). (The Prickett of whom I write was the father of my contemporary at the Bar who bears the same name.) *(Continued on page 42)*



Author Irving Morris shown with his grandson, Jonathan Ari Zakheim. Irv's story is a part of a collection of professional reminiscences that he is writing for Jonathan and his recently arrived brother, Adam Robert.

Flunking the Bar

(Continued)

availing whispered complaints that the clerkship program was enforced peonage and thus contrary to the Thirteenth Amendment. Of course, no one even contemplated saying anything out loud about the clerkship requirement, much less doing anything about it (such as bringing a class action suit). In addition, before they could achieve even the threshold status of clerks, each would-be attorney had to appear in front of a panel of the Board of Bar Examiners to be examined by these august attorneys on an ancient tome written in 1921—Zane's *Story of the Law*. Later, I asked my father why it was that the Board continued to use that truly awful book. Zane was not only highly opinionated on the conservative side, but the book was full of the most outrageous historical errors and blunders. I pointed out that Justice Oliver Wendel Holmes had written a fine book entitled *The Common Law* that might provide a basis for a colloquy between the aspiring lawyers and the Board of Bar Examiners.

My father replied that there were several good and sufficient reasons why Zane continued to be used. First, the members of the Board of Bar Examiners were all familiar with Zane, errors and all. It would take considerable time and effort on their part to read and become knowledgeable about another book, especially a "radical" book like Holmes's *Common Law*. Secondly, they knew that the practice of law has many tedious aspects (an understatement if there was one!). Wading through and becoming entirely familiar with Zane would give some indication as to whether the would-be lawyer had the capacity to take on a boring job and do it well. In reply to my general question as to why there should be a preadmission ordeal by Zane, my father said that the Board of Bar Examiners felt strongly that the "right" to audience before the Courts to represent members of the public was not a "right" at all belonging to anyone who simply happened to get through some law school. Rather, admission to the Bar was a sacred privilege that should be accorded only to those who were qualified in every way to take on this weighty fiduciary responsibility. The Board of Bar Examiners felt that if a young man was not qualified by character, morality, or temperament to take on this sort of task, it was better to tell him right at the outset rather than let him go to law school and then defeat his legal aspirations afterwards (perhaps even after he passed the Bar). That makes a good deal more sense now than it did when I first heard it. (Of course, it is my perspective that has changed: at the time, I thought it was arrant nonsense, though I had the good sense not to say so).

As I have said, my father was simply waived into the Bar. Thus, he was admitted with very little knowledge of the law and no knowledge whatsoever of the niceties of procedure. Of course, this meant he was without any misconceptions or windy theories taught by legal academics ("those who can, do; those who can't, teach"). Rather, my father had to learn in the school of hard knocks. However, from the very first, it is a fact that he gave out more knocks than he received. Indeed, my father became known and respected for his prowess in the Byzantine-like intricacies of the Rules of Procedure of the Delaware Courts. I was told and I believe that these ancient rules had remained virtually unchanged from the rules of pleading adopted by the King's Bench in 1709 after the Great Legal Reforms that marked the later years of good Queen Anne. In time, my father was called upon to become one of the nine members of the Board of Bar Examiners. Of course, his assigned topic on which to make up and grade the Bar examination for would-be lawyers was Delaware practice and procedure. In the next ten to fifteen years, there was many a would-be Daniel Webster who was forever relegated to selling shoes or real estate, owing to his inability to field the nice questions my father put to him and the other candidates in matters of legal practice and procedure. My father was concerned (and rightly so) that those who were about to be turned loose on the public as lawyers should know the basic ABCs of practice and procedure in the Delaware Courts. He had precious little interest in legal theories or balanced arguments so dear to those who teach in law schools: rather, he wanted a plain, simple, and above all, correct answer on questions of practice and procedure that would be immediately critical for the legal success or failure of these would-be Solons and, more important, for their clients. Thus, he would ask questions as to how many returns of *non est* were required in order to perfect a sheriff's return (two), or what was the only proper response to an affidavit of demand (a reply affidavit). Simple, if you knew the answer, but fatal if you didn't. No careful essay learnedly discussing pros and cons of what the answer might be or should be would or could pass legal muster with my father.

In due course, Delaware moved out of the middle ages of pleading. In fact, in one large bound, Delaware went from the rear of the common law jurisdictions

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Flunking the Bar
(Continued)

in matters of practice and pleading to the head of the pack. Specifically, Delaware adopted almost verbatim the notice pleading that the Federal Courts had so recently adopted. Thus, the Delaware Rules paralleled the Federal Rules of Civil Procedure, replacing the ancient hoary practices that stemmed back to the time of Blackstone and Coke.

There was a great sigh of relief and general rejoicing in the Delaware legal community at this monumental leap forward. It was also privately hoped that this adoption of entirely new Rules would put my father right square out of business. It was thought that he would be left with a vast storehouse of knowledge of medieval pleadings but would be at a loss when it came to simple, straightforward factual statements of what a case was actually about. However, my father heartily approved of the Rule changes. Further, he put "his money where his mouth was" by chairing the committee that adopted the proposed new Rules for Delaware. My father later told me that he saw no reason why he could not learn the new Rules as quickly as any other Delaware lawyer. He also surmised that he could deal with the merits of a case if he had to as handily as any other Delaware lawyer, be he neophyte or veteran.

That year my father then examined the newest crop of law school graduates on the new Rules of Procedure. They, of course, had had courses on the new Rules at their respective law schools. They felt comfortable in discoursing on all the theoretical problems that might arise under the new Rules. However, my father's bent remained practical: he, for example, would ask that they draft two complaints based on stated facts, one to be filed in the Federal Court and one to be filed in the State Court. There were significant but subtle differences between the Rules in the two Courts. He wanted to make sure that the differences were understood by the applicant because these differences could well spell the difference between victory and defeat for his client. Again, there was wailing and gnashing of teeth, since many who thought they were saved were not among those who passed.

Over the years, my father became known as the toughest of the Board of Bar Examiners. Indeed, at times, his colleagues, not as severe as he was, would overrule his wholesale slaughter of the year's entire crop and admit some aspirants who, he could and would point out, seemed not fully qualified. In due course, however, his term as a member of the Board of Bar Examiners expired. He retired, having amply fulfilled what he had conceived his duty to the Supreme Court and to the public to be.

However, my father's approach had not been entirely draconian. One time, I saw him look up from his nightly task in the Fall of correcting the Bar exams. He gave a hearty laugh. He said that the student whose paper he was marking had written a response to one question in some sort of gibberish. He read it to us. My sister remarked brightly that the answer was as plain as the nose on anyone's face: it was written in pig latin.

"Pig Latin! What is that?" my father asked in astonishment. My father's language of choice was Oxford English, albeit with somewhat of a Delaware accent. We three children thereupon spent the rest of the evening talking entirely in pig latin among ourselves to the amusement of my father and consternation of my mother, to whom English remained a second language. The student had written the following answer to this question:

State in plain, understandable language how many returns of service are required in an action of detinue.

His answer in pig latin to the question was something like this as I recall:

I ouldway atherway oinjay a ircus and avehay a aintedpay acefay ikelay a lowncay orfay the estray ofymay ifelay if histay is the ortsay of hingtay hatay awyerslay do and hargecay the ublicpay orfa. *

My father thought that this showed a daring approach to the problem. To the young man's considerable surprise, he passed procedure. Further, this particular lawyer went on to become an excellent practitioner of law, including procedure. Of course, he owes his professional career to a solid grounding in pig latin.

Thus, my father had become a symbol of the bad old clubby days in terms of admission to the Bar when I came back to Wilmington having graduated from Harvard Law School. I for my part, was as saucy as a jaybird. After all, had I not been to an ivy league college? Had I not successfully graduated from the Harvard Law School? Had not my father and grandfather been respected members of the Delaware Bar? "Pride goeth before a fall and a haughty spirit leads to destruction". However, not satisfied with strutting about with all these self-appointed accolades, I compounded my almost certain fate by an incredible series of overbearing acts. First, I plunged into the work at my father's office as if I were already admitted. Further, I did not hesitate to contradict and correct older admitted lawyers, even though I did not yet have the right to practice. Beyond that, when I ran into my fellow aspirants, I disdained their fearful looks and nervous apprehension

* *I would rather join a circus and have a painted face like a clown for the rest of my life if this is the sort of thing that lawyers do and charge the public for.*

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about the upcoming Bar examination. It just never occurred to me that anybody with my extraordinary ability and credentials could stumble over something as minor as a provincial Bar Exam. Indeed, I had totally forgotten that a witty professor at Harvard told me after I had recited in class that I was to get a treatise by one Milne from the library because the second line on page 37 contained a perfect description of me. He told me to report to the class the next day on what I found. To unending guffaws of my class, I had to report that Milne had said in the words of Christopher Robin: "Oh, Pooh Bear, you are a bear of very little brain."

There was a young lady who had studied at a fine thorough law school. She confided to me one day in the law library where I was looking up weighty English precedents that she was very worried about the Bar Exam. She said that she and two young men were holding a study group at nights in order to go over questions that had been given on prior exams and thus prepare themselves for the current Bar Exam. She invited me to attend. (Privately, I said to myself that this was simply a crude attempt by the lady to profit by my obvious knowledge and slide into the Bar on my intellectual coattails.) I said somewhat patronizingly that I thought that what they were about was probably a good idea for them but I was far too busy with the important cases that had been confided to me to take the time to attend any such skull sessions.

In due course, the examination day rolled around. I showed up with all the other candidates. Some of them looked quite gray with fear and apprehension. I was serenely confident as I calmly wrote my assigned number down on the first answer booklet. Some measure of my self-delusion can be gleaned from the fact that, never in the course of the three day examination, did it ever occur to me that I was doing anything other than writing the definitive answers to the questions posed. When the day's examinations were over, there were always huddled conferences in the hallways. Some candidates were concerned that they had missed this issue or that answer. I disdained all such post-mortems and quickly got back to the office to help with the case load. My father, deluded, I suppose, by paternal pride, never questioned that I might not have done what

(Continued on page 40)

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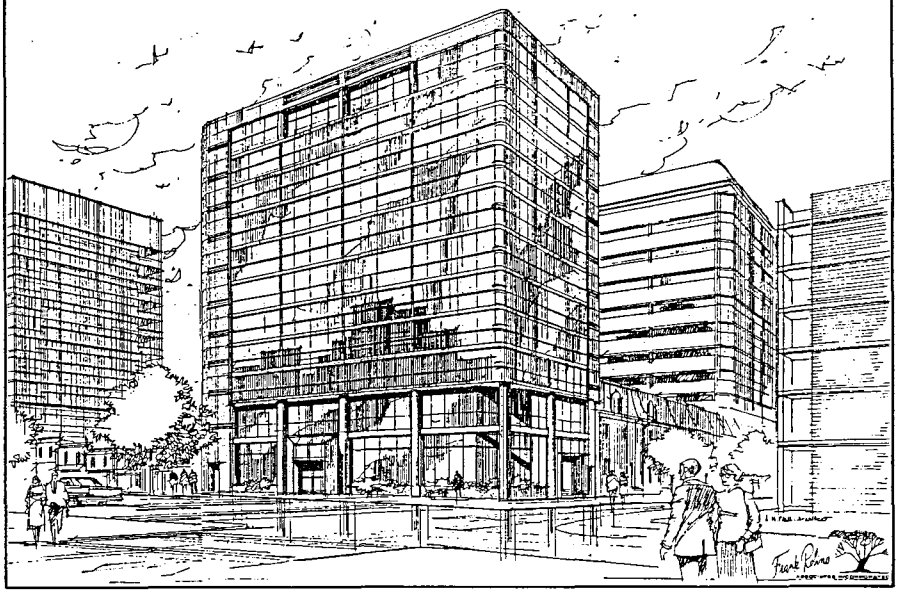

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Flunking the Bar
(Continued)

was necessary in preparing for these crucial examinations. Once the examinations were over, I promptly forgot entirely about them and went about my self important legal business (and pleasures).

Thus, on Saturday, October 16, 1954, I got up and came in town from my digs for a leisurely breakfast at the old Toddle House Diner on Delaware Avenue. Every detail of that painful day is seared into my memory! I remember everything that happened with the garish clarity of last night's nightmare. Thus, I remember that I bought a *Wilmington Morning News*. I scanned it loftily as I waited for my poached eggs. As I was idly turning the pages, an article caught my eye—"The Results of the Delaware State Bar Examination". Ahh, I thought. I looked it over. In the list of those who passed, I could not find my name. I looked back over the list more carefully and still could not find my name. Then hastily, I went through it backwards to see if that produced anything. I noted ominously that the article said that 13 applicants had failed the examination. Pointedly, the article stated that the names of those who had flunked were not published. Suddenly, with the clarity of a flash of lightning, the awful truth dawned on me.

My fork dropped back onto my plate of poached eggs. My hand shook as I tried to take a bracing slurp of black coffee. Unless there had been some awful oversight or error in the marking of the examinations or a mix-up of the assigned numbers, I had failed the Delaware Bar Exam. I telephoned my father. He was, of course, already at the office. I told him what the newspaper revealed. He took it stoically and said something for which I will always be grateful: "Never mind, I still think you have the qualities to make a Delaware lawyer. It just means that you will have to take the Bar Exam again next year."

When I got to the office, my father had already called the Secretary of the Board of Bar Examiners. The Secretary had the difficult task of confirming the fact that I had indeed totally failed the Bar Exam: I had missed, not narrowly, but by a country mile. Worse, the results had been public information the day before. Thus, it was known "on the street" that the son of the feared Bar Examiner of yesteryear had failed. Thus, I had walked around in snooty ignorance of the fact that I had just made a total ass of myself. I dumbly wondered how many people I had talked to the day before knew what I had not known—that is, that I had blown the Bar Exam. I wondered if I had compounded this fiasco by some further asinine patronizing statement that had been characteristic of my attitude before that precise moment.

Unfortunately, I had made plans to go to a football game that Fall day: I could not back out. I spent a day of acute misery with young friends who were as happy as only young alumni can be at their university for a Fall football game and general revelry. I did not want to mar the day by announcing my own intellectual downfall. When asked about the Bar, I had to casually dissemble: already I was trimming sail by saying vaguely that the Delaware Bar Exam was

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a somewhat dicey matter even for a Harvard Law School graduate.

This justified downfall, however, had several beneficial results. In the first place, it justifiably gave an awful lot of people secret satisfaction at my discomfiture and that of my father: they were fully entitled to savor this retributive moment. Second, it assured any doubters that the Delaware Bar Examination system was fair and impartial. Finally, it taught me a well-deserved lesson in humility and a more realistic evaluation of my own limited gifts.

I spent a sober, modest year working as a clerk in my father's office, not only learning the virtues of modesty and diligence but learning some practical law. I had received a sympathetic phone call from the young lady who had so diffidently inquired as to whether I wanted to join her study group. She, of course, had passed and was a practicing lawyer for a number of years and thus was always my senior at the Bar. She did not even suggest (as I probably would have done) that I had gotten precisely what I had deserved. Instead, she was sympathetic and helpful. Incidentally, she has gone on to higher and better things: she is a successful wife and mother. Remembering her professional solace, I try to make a special effort with colleagues who have stumbled on their initial attempt at the Bar Exam.

When the time rolled around in the Spring to begin serious preparations for the Bar Examinations, I not only joined a group but formed one consisting of those that I thought were the ablest young men and ladies who were going to take the Bar Exam that year. I applied myself earnestly to the preparation for the awesome Delaware Bar Examination. When the time came, I sat down with sweaty palms and a butterfly feeling in my stomach.

I spent many sleepless nights between the time of the Bar Exam and the dreaded day when the results were due out. However, the Secretary of the Board of Bar Examiners was kindly disposed towards the now apprehensive father and son. He telephoned us personally just as soon as the Bar results became official that year. I had not only passed but had done well. I almost wept with pleasure at this news. My father was quietly pleased. I must say that there was a spate of felicitations and congratulations from the Bar generally and the Bench. People, after all, were kindly and well-disposed.

I do not suppose that I have carried many readers to the end of this awful personal account. It is simply a recitation of a very painful episode in my professional life and, as well I know, for my father. However, my retelling has some beneficial aspects. First, as noted at the outset, this account may give some passing pleasure to those who secretly enjoy the suffering of others. Second, it also serves to remind me that my intellectual gifts always were and always will be limited.

Finally, and obviously most important, this account may also serve some really useful purpose. It may well-encourage others who likewise failed in their first attempt to pass the Bar Exam. It is worth passing along to others who have failed the first time the realization that with perseverance and diligence, almost everyone can, in the end, pass the dreaded Delaware Bar Examination. ■

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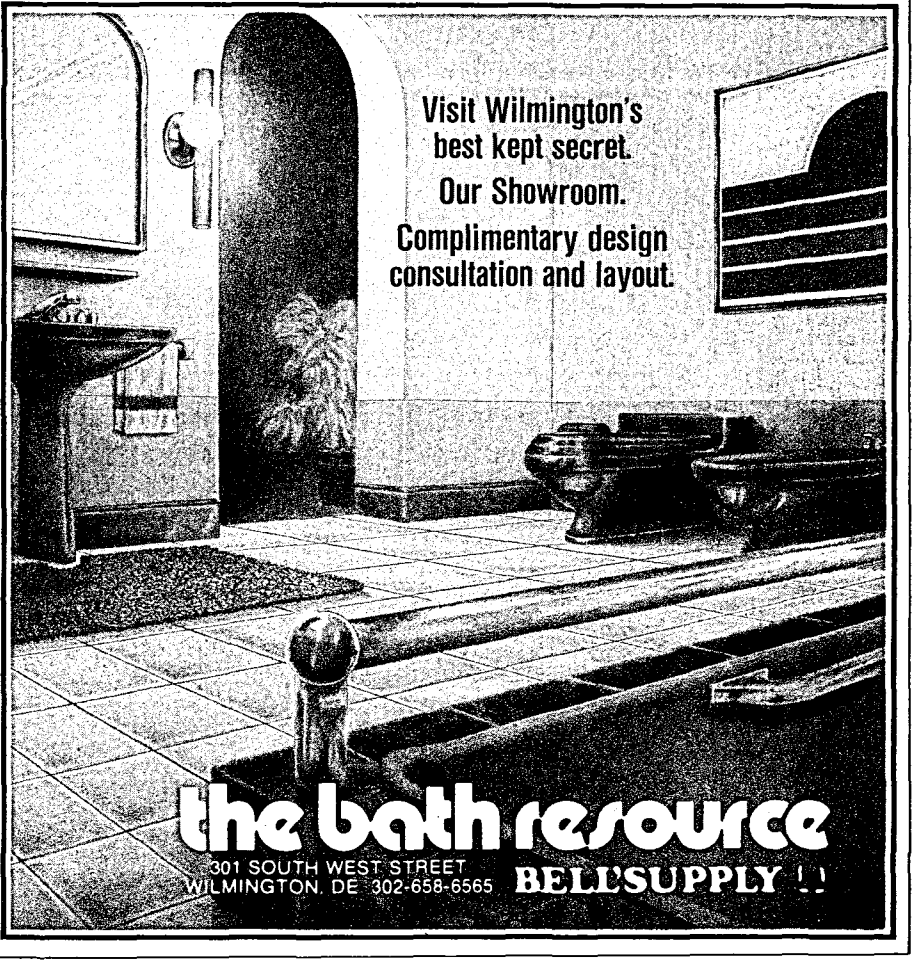


Jury Verdict
(Continued)

But Mr. Cohen could not abide the pressure of trials. He took me with him in the practice of the law to insulate himself against ever having to go to court again and face the discord that accompanies litigation. In sharp contrast, the equally onerous pressures of business deals never fazed him.

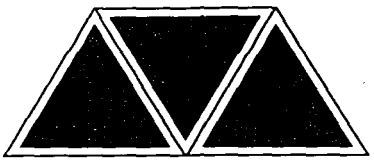
Thus, in the mid-1950s, Mr. Cohen found himself occupied with the affairs of Deemer's Beach as its owner. Much earlier, Deemer's Beach had been an amusement park and resort where people could come for the day to picnic and bathe in the Delaware River. With the heavy industrialization of both banks of the river, the public used its good judgent and abandoned bathing off Deemer's Beach years before environmentalists would have protested to achieve the same result. The amusement park closed. By the time Mr. Cohen became its owner, the Deemer's Beach property offered the prospect that at some future date someone would want to use the property for light industry; and it was on this speculation that Mr. Cohen had made his judgment to buy. (His judgment was to prove eminently sound. Mr. Cohen sold the Deemer's Beach property in the early 1960s to Samuel "Sam" Cohen—no relation—when Synvar, Sam Cohen's chemical plant in Wilmington, blew up on Election Day, 1960. Sam Cohen, under pressure, had to find a site outside the City to relocate the plant.)

There was some modest income from the Deemer's Beach property. A series of row houses—shantytown places to be more accurate—on the property generated enough dollars to meet the payments on the mortgage, which Mr. Cohen had placed on the property to raise the purchase money. Mr. Cohen, of course, did not personally collect the rents. Mr. William Jennings Bryan Evans performed the collection chore and delivered the rent money to Mr. Cohen at the office once a month.

I came to know Bryan Evans (I did not know about the "William Jennings" part until the time of his arrest) from his monthly trip to the office. I would see him sitting in the outer office near Sadie Golden's desk waiting patiently to see Mr. Cohen. Bryan Evans was a spare person in his fifties with a taciturn nature. On one or two occasions, I accompanied Mr. Cohen on a visit to Deemer's Beach and I would see Bryan Evans. Like most of the people we say we "know" who cross our paths in life, I really did not know anything about Bryan Evans. But what little I thought I knew was altogether at odds with the facts Mr. Cohen reported one summer afternoon in 1958. Mr. Cohen told me that the State Police had arrested Bryan Evans and charged him with burglary at the Farmers Market near New Castle, Delaware. It fell to me to defend Bryan Evans.

Mr. Cohen arranged for Bryan Evans' release on bail. He promptly came to the office where I had to pry from him the few facts he could tell me about the events on the evening before his arrest. In the early evening, Bryan Evans had begun drinking. His only distinct recollection of the entire night was that he had called upon a neighbor around 11:00 p.m., or so he thought. The additional facts he shared with me were all ones he had learned from talking to other people. According to what he had learned, Bryan Evans had accompanied two young fellows from West Virginia to the Farmers Market where they had broken in and stolen hamburger patties and ice cream sandwiches. Bryan Evans served as the "lookout" to warn the young fellows in the event anyone came along while they were stealing the hamburger patties and the ice cream sandwiches. The police had come to his house the following morning and had arrested him charging him with burglary. It was only after persistent questioning of Bryan Evans that he told me that the two young fellows had lived in his house. He had taken them in when they had first arrived from West Virginia and needed a place to stay. They no longer lived with him. Bryan Evans had absolutely no recollection of accompanying anyone to the Farmers Market or serving as the "lookout" while people burgled the place.

My attempt to interview the young fellows who claimed that Bryan Evans had accompanied them met with failure. They refused to talk to me. They had pled guilty and claimed that Bryan Evans had masterminded the crime. Since the



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quantity of the hamburger patties and the ice cream sandwiches was over $100, the charge against Bryan Evans was a felony. The neighbor Bryan Evans claimed he had visited and with whom he had fallen asleep and spent the night turned out to be a lady friend who said that he had indeed come by but that he had departed after but a few minutes. She did confirm the drinking part of Bryan Evans' story. No one else among his neighbors could help me, since they professed to know nothing. I was to learn at trial that they knew more than what they were willing to tell me. Thus, the case proceeded toward trial with Bryan Evans, my client, as the target of the State's wrath.

The case came to trial in January, 1959, in the Superior Court. It was among the first cases brought to trial by the new Attorney General, Januar D. Bove, Jr., who had succeeded J. Donald Craven. Craven sought the Democratic Party's renomination but had lost out to Michael A. Poppiti. In the General Election, Bove had defeated Poppiti. Bove named Charles L. Paruszewski to serve as a Deputy Attorney General, the highest office a person of Polish extraction had ever held in Delaware as of that time. Charlie Paruszewski had selected *State of Delaware v. William Jennings Bryan Evans* as his first case to try. From his selection, I inferred his hobby was shooting fish in a barrel.

Charlie Paruszewski was a hard worker whose practice, like that of most journeymen lawyers in Delaware at that time, consisted of searching titles to property and earning fees set in accordance with a schedule the Delaware State Bar Association had formally approved. Almost every member of the Bar followed the fee schedule. Those who did not and charged less to attract business, did so surreptitiously, since to go public with violating the fee schedule would bring the Bar's scorn. As it was, the members of the Bar thought they knew "the violators" and talked about them as pariahs. The lawyers confined their condemnation to talk and took no action to bring "the violators" to account, a stance which through the years has too often regrettably marked the profession's attitude. In this instance, the Bar's failure to act was just as well. Years later, in *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), the United States Supreme Court was to outlaw the Bar's practice of adopting and following a fee schedule as a violation of the federal anti-trust laws. (When I served my first term as the elected Secretary of the Bar Association in 1955-1956, I suggested to William H. Foulk, the then President, that we prepare a printed fee schedule and distribute it so that no member of the Bar would have the excuse of claiming not to know the charges. With economy in mind, I was able to put the entire fee schedule on a postal card which went forward with a bottom line reading: "By Order of the Delaware State Bar Association, Irving Morris, Secretary." I never gave a thought to the anti-trust violation either when I made the suggestion or when I implemented it. Self-interest

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Jury Verdict
(Continued)

does have a way of blinding good judgment. But for the fact the attack on fee schedules for searching titles arose in Virginia and not in Delaware, Exhibit 1 in the case could well have been the Bar Association's postal card bearing my signature, not quite the contribution I would want to make to the law of my time.)

Earning a livelihood by searching titles was a tedious, dull business as I knew full-well from personal experience. It nonetheless was the most certain and consistent source of income for many, if not most, of the members of the Bar. Charlie Paruszewski had searched thousands of titles. I searched only hundreds of them. But then Charlie Paruszewski was older than I. But for the chanciness of life, I might have practiced law searching titles. I am certain Charlie welcomed Jan Bove's call to public service as a Deputy Attorney General, just as I welcomed trial work. Both took us away from the drudgery of title work.

Charlie Paruszewski delighted in giving the outward appearance of a hard, dour fellow. He would respond to the greeting, "How are you?" by answering "Miserable," without a smile on his face. Some people were put off by Charlie's attitude. I liked him.

The State's case against Bryan Evans was apparently airtight. Charlie Paruszewski put on the two young fellows from West Virginia who had confessed to their role in the burglary and laid on Bryan Evans what Charlie was trying to make out as "the crime of the century." In my cross-examination of the two young fellows, I established that Bryan Evans had befriended them and taken them into his home when they had no place to go. I could not shake their story that Bryan Evans was the "lookout" at the scene of the crime. Charlie Paruszewski then paraded to the witness stand persons who rented other abodes in the row of houses at Deemer's Beach. The first person to testify set the pattern for the others both in direct and cross-examination. The direct examination was devastating to Bryan Evans' claim of innocence. Each witness testified that sometime in the middle of the night, Bryan Evans had knocked at the door and upon admission asked if he could store some hamburger patties and ice cream sandwiches in the homeowner's icebox. My cross-examination was desperate but I thought I had to do something. With each witness I asked but a single question: "Isn't it the fact that Bryan Evans collects your rent?" The answer in every case was "Yes." So much for the motive of each of those witnesses and their damning testimony.

When it came my turn to put on the defense, I called Bryan Evans to the stand. He recounted to the jury what he had told me some few months earlier. He had been drinking and had no recollection of the events of that evening. To the best of his knowledge, he had not participated in any burglary as the "lookout" or in any other manner, shape or form. Bryan Evans' testimony on the witness stand was the longest speech I had ever heard him make.

There was no rebuttal. So far as Charlie Paruszewski was concerned there was no need for a rebuttal. I was inclined to agree with him. We both spoke briefly to the jury. The Court charged the jury, who retired to deliberate. Bryan Evans and I left the courtroom together to await the result.

Bryan Evans and I were standing at the railing on the third floor of the northeast side of the Public Building near the door of the courtroom. But a short while after the jury had retired, a bailiff came forward and announced that the jury in the case of State against Evans had reached a verdict and was coming in. As Bryan Evans and I turned to go toward the courtroom, Bryan Evans softly asked, "Do you think you can get me probation, Mr. Morris?" Without hesitation, I answered, "I'll do the best I can." There was no doubt between us that we were about to listen to a verdict of guilty.

With the lawyers back in the courtroom and with the judge back on the Bench, the jury filed in from the jury room off to the right of the courtroom. The Court then directed the staff person from the Prothonotary's Office to take the verdict of the jury. To the shock of everyone assembled and to the delight of Bryan Evans and his lawyer, the foreman of the jury announced its verdict of not guilty. Charlie Paruszewski immediately asked that the jury be polled. We all sat quietly as the clerk called each member of the jury one-by-one and asked if the verdict of not guilty was that juror's verdict. Charlie Paruszewski had to listen to the verdict twelve more times which had to make him really feel "miserable".

What motivated the jury to acquit Bryan Evans I do not know. It may be that the jurors resented the fact that the young people had turned on the one person who had befriended them when they came to Delaware. It may be that they thought that Bryan Evans was so far consumed with drink that he did not know what he was doing and they were unwilling to hold him criminally responsible. It may be that the jury was expressing its own criticism of the judgment of prosecutors who would use the august power of the State in the particular circumstances of State against William Jennings Bryan Evans. After all, they were only hamburger patties and ice cream sandwiches. ■

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Joseph Donald Craven, the first member of the Democratic Party elected Attorney General of Delaware in more than forty years, took office in 1955 during a turbulent period in Delaware law and politics. His fierce insistence upon enforcing the law as enacted made him enemies in high places, but, more important, it earned him wide respect. Joe Craven began his career as an educator. His many and fascinating writings demonstrate that he remains one. His volumes, "All Honorable Men" and "T'was a Famous Victory" are prized collectibles among lawyers with a bent for Delaware legal and political history.

He now resides in Naples, Florida in a state of vigorous retirement. The following article is drawn from a forthcoming book.

T'was a Famous Victory

Joseph Donald Craven

The election was to be held on November 2, 1954. As the vital day approached, I had the feeling that I had waged a vigorous and effective campaign. Most people with whom I talked were certain that Senator Frear would be re-elected. There was even optimism about Harris McDowell's chances of going to Congress. But, there were those, even my friends, who were doubtful about my success.[1] However, I did not share their pessimism. I had campaigned from one end of the state to the other. The audiences were friendly and responsive. The smell of victory was in the air. I felt my chances of being elected were good, and I awaited the verdict of the people with confidence.

On the night of the election, I had invited several friends to the house to listen to the returns. I had suggested that they come over about ten o'clock. Actually, we did not expect any important returns to be in before eleven o'clock. That had been our experience in past elections. But in the election of November, 1954, voting machines, which I had recommended in the Democratic Platforms of 1940 and 1944, were being used for the first time. I had not realized how the use of the machines would accelerate the returns. The polls closed at eight o'clock but I did not turn on the radio until shortly after nine. To my surprise, and delight, the returns had me leading my opponent by a majority of over ten thousand! The Democratic sweep had been so tremendous, and the voting machines so fast in computing totals, that the results of the election were known an hour after the polls closed.

When the final returns were in, the Democratic Party had won "the most one-sided rout in Delaware's modern political history."[2] All of the state offices were won by Democrats; and the party succeeded in winning twenty-eight out of thirty-five contests for the House of Representatives and eight out of ten Senate contests. I had won by a majority of 15,516 votes, the first Democrat to be elected Attorney General since 1910.

Among the many congratulatory messages that I received, the one I prize most highly was from Judge Paul Leahy of the United States District Court. I set it out below:

November 3, 1954

Dear Joe:

Several weeks ago I saw you at 10th & Market and wanted to tell you something but you were busy talking to someone. I did call to you about the TV Session with Theisen. Right after that program—it was the night before—I made a note on the enclosed piece of paper. As an expert in political prognosis, you can see I was wrong—yet, not far off, was I?**

Sincere congratulations! Another prognosis: You will have one of the best administrations of any Attorney General of Delaware. *Illegitimati Non Carborundum.**

Sincerely,
Paul Leahy

* Get one of my former Law Clerks (Irv. Morris or Steve Hamilton or Jim Collins) to give you the American translation.

Honorable Joseph D. Craven
North American Building
Wilmington, Delaware

Shortly after receiving Judge Leahy's letter I interviewed Irving Morris for the purpose of offering him a position in the Attorney General's office, which he accepted. I also asked him if he was familiar with the latin quotation. He said he was, that it was framed and hung over Judge Leahy's desk and the translation was: "Don't let the Bastards get you down." I was heartened by Judge Leahy's expression of confidence and appreciated, and followed, his advice.

I never did let the Bastards get me down.

On the morning of January 2, 1955, I, and my Deputies, were administered the oath of office. My associates in the Attorney General's office were:

New Castle County
Herbert Cobin, Chief Deputy
Frank O'Donnell
Alton Tybout
Albert Stiftel
Alexander Greenfield
Irving Morris
Wilfred Smith
Richard Baker
Harold Shaffer

Kent County
James Messick

Sussex County
Ralph Banker
Meyer Ableman

State Detective
Walter J. Wassmer

Wassmer was the only member of my staff who had any experience with the work and procedures of the Attorney General's office. It is no exaggeration to say that he was indispensable. He was tireless, loyal and dedicated; and we had much in common. We were not only co-workers but close friends, and remained so until his untimely death. Everyone in the office, including the secretaries, depended on Walter. Because of his experience and ability we were able to handle the Grand Jury and prepare our cases for trial in a manner that pleased and encouraged us, and won the approval of the court.

Immediately following our swearing in, we went to the Attorney General's office and began presenting witnesses to the Grand Jury.

In this prosaic manner began the most exciting and memorable administration of the Attorney General's office in the history of the state.

The powers and responsibilities of the Attorney General of Delaware were, and are, unique.* Not only is he the legal advisor to all branches of government; he has sole responsibility for enforcing the provisions of the Constitution and Statutes that define crimes and provide penalties therefor. Specifically, the Attorney General had the power and responsibility to:

- Investigate matters involving the public peace, safety and justice and to subpeona witnesses and evidence in connection therewith...
- Direct the activities of state detectives;
- Have charge of all criminal proceedings...
- Recommend revisions in the Constitution and statutes of the State with particular reference to law enforcement...

During my term of office, I had occasion to exercise *all* of these powers.

Philosophy And Procedures Of The Attorney General's Office

Early in my administration, I set up certain guidelines and procedures to be followed in processing the work of the office.

I knew that efforts would be made to persuade us to drop cases, or reduce the

** Judge Leahy predicted that I would win by 7,500 votes.*

* *In all other states, except Rhode Island, the responsibility for enforcing criminal statutes was vested in District Attorneys or County Attorneys.*

Famous Victory
(Continued)

seriousness of the offenses. I also knew that most of these cases would involve drinking or gambling. Accordingly I issued a directive to my deputies that no case, involving either of these categories of crimes, should be dismissed, or reduced to a lesser offense, without my written consent. This policy was welcomed by the members of my staff.

I also directed that we should be prepared to try cases when they were called for trial and to oppose the practice of defense attorneys of asking for continuances without good cause. When the clerk read the trial calendar, our response was always the same "The State moves for trial."

I was surprised and shocked to learn that innocent people were being held in jail, sometimes for months, because they were unfortunate enough to have witnessed the commission of a crime and could not raise the bail required.

The police were also arresting all drivers of motor vehicles engaged in a fatal accident, even though there was no evidence that the drivers of such vehicles were in any way responsible for the fatality. I arranged a meeting with the principal officers of the city and state police as a result of which, it was decided that:

1. No material witnesses would be required to post bail, or be confined, unless there were unusual circumstances (such as a possibility of flight) to justify such action.

2. No driver of a motor vehicle, unavoidably causing the death of another person, would be arrested and charged with manslaughter.

I petitioned the court to release all persons held in either of these categories and to compensate them for their unjust imprisonment. The court complied with my request.

The practice of arresting or putting innocent people in jail was ended.

I also read, approved and co-signed all opinions prepared by our office.

Our Laws Must And Shall Be Obeyed

Neither I nor the members of my staff had any experience in prosecuting criminal cases; nor had we had much experience in defending those charged with crimes. Habitual criminals preferred to retain Republican lawyers who, they had good reason to believe, would have a better chance of making deals with the Attorney General's office than would a Democratic lawyer. I, therefore, felt it necessary in the Spring of 1955, to appoint a committee to survey crime in Delaware. This committee was composed of the following members:

Walter J. Wassmer, Chairman
Patrolman Martin Krasnick,
Wilmington City Police
Detective Sgt. B. F. McCoy,
Delaware State Police

My instructions were short and to the point: "I don't care whether you work day or night or night and day. You are on your own. We shall meet every Friday morning to discuss your findings and the progress of your investigation.

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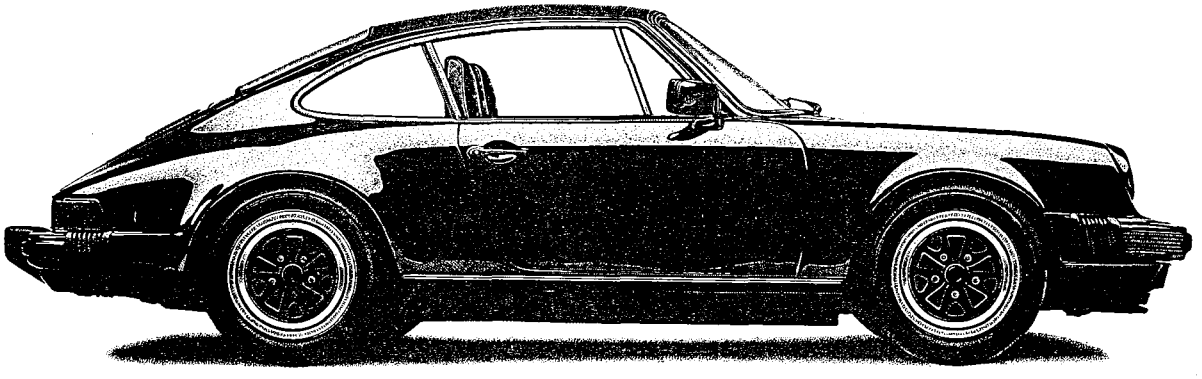

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Famous Victory
(Continued)

Shortly after the committee began its work, the *Wilmington Morning News* ran a series of articles describing wide-open gambling that was being carried on throughout the state without any interference by the police. The form of gambling described was "bingo." It had a certain respectability because the games were sponsored by Firemen's Associations, Veterans of Foreign Wars, and St. Elizabeth's R.C. Church.

Originally, the games were small and confined to members of the organizations. But they had expanded and, in the case of St. Elizabeth's, attracted large crowds. Some came in buses from Maryland and Pennsylvania.

I could not in good conscience direct a campaign against bookies, numbers writers, and crap game operators, and ignore the flagrant violation by "respectable" law breakers of our Constitution and statutes prohibiting gambling.

On April 12, 1955, I called a meeting in my office of state and city officials involved in law enforcement. Those who attended the meeting were Col. Harry S. Shew, Superintendent of State Police; Captain Carl L. Lawrence, in charge of criminal investigation for the State Police; Chief Harry I. Wadman; Deputy Police Chief Arthur N. Wilson, Inspector Harry W. Towers, and Captain Charles P. Hallahan—all of the Wilmington Bureau of Police; City Solicitor Januar D. Bove, Jr., and Deputy Attorney General Irving Morris.

All of the top police officials of the state were present except Andrew J. Kavanaugh, Superintendent of the Wilmington Police Department. I did not invite him. All those attending the meeting agreed that the playing of bingo was illegal gambling.

At a subsequent meeting with Kavanaugh I told him that the playing of bingo was illegal (as he knew) and must stop at St. Elizabeth's School Hall and everywhere else in the state. I asked him to convey my message to the Bishop and to ask him, on my behalf, for his cooperation. Kavanaugh agreed. I also told him that I would take no further action until I received the Bishop's reply.

The reply from the Bishop was short and to the point: the Bishop said he had been advised that the "bingo-like" games being played at St. Elizabeth's School Hall were not illegal and he would not order them discontinued.

I thereupon directed the Wilmington and State Police to notify all places where bingo was being played to close their operations or that those participating would be arrested. All obeyed except those running the Church games.

The St. Elizabeth operation was larger and more lucrative than all the others combined. The person in charge was Francis X. Burns, the Assistant Pastor. He was also the principal of St. Elizabeth's High School.

The inevitable confrontation occurred on a Sunday night in early November, 1955. Wilmington police officers, acting upon information that bingo was being played, went to the school hall to stop the operation. They were met at the door by Father Burns. He told them that the organization inside was a private club, the Camilus Welfare Guild, and that they could not enter without a search warrant. Earlier, he had told the officers that they would be welcome to watch the proceedings.

Later in the week, the police officers returned to the hall with a search warrant and were again met at the door by Father Burns. He studied the search warrant and then admitted them. When they finally entered the hall, about 175 persons were singing, "Hail, Hail, the Gang's All Here." A search failed to locate any evidence that bingo, or any other game, was being played. The police were frustrated and I was angry.

The next day I issued the following statement:

"It is with regret that I find it necessary to issue a statement in explanation and justification of the Police and the Attorney General's office in carrying out our respective law enforcement duties.

"A series of articles which recently appeared in the Morning News revealed the fact that gambling in the form commonly known as Bingo was being carried on openly and extensively throughout New Castle County. Some of these games had outgrown the social angle and as much as $100 has been won on a single game. The participants in the various games were not limited to parishioners or members of local fire companies, but in some instances came from a considerable distance and special buses were provided to transport players back and forth.

"Both our State Constitution and statutory provisions enacted thereunder make such gambling illegal.

"As the Attorney General of the State of Delaware whose duty is to uphold the laws and the Constitution of the State, I could not ignore facts which had been so forcefully brought to my attention. On Friday, April 15, I called a meeting in my office at which were present the principal state and city police officials, the City Solicitor of Wilmington and Chief Deputy Attorney General, Irving Morris. I found that both the city and state police had already made investigations and submitted reports which verified the story that appeared in the daily press. There was no doubt in the minds of anyone present that the games being played were in violation of our Constitution and our anti-gambling statutes.

"I therefore directed the police to advise all those who were engaged in running such games that they were illegal and if persisted in, those responsible would be arrested. These orders were carried out, and we have received complete cooperation from all places known to have been running these games except one church in the City of Wilmington.

"We were first advised by the assistant pastor of the church that the games were legal and that he would welcome a test in the courts. We were and are prepared for such a test. But when the city police visited the basement of the church for the purpose of obtaining evidence that would permit such a test, they were met at the door by the assistant pastor who refused to allow them to enter unless they obtained a search warrant.

"That was on a Sunday night. A search warrant was thereafter prepared by my office and the officers again went to the basement of the church last night. When they arrived, a game was in progress but by the time they entered the building the game had ceased and group singing was in progress.

"Neither the attorney general nor the police are responsible for the constitutional and statutory prohibitions against gambling. The Constitution has been amended to permit certain types of racing. Otherwise, all gambling is forbidden. It is not within the discretion of the attorney general or the police to decide what laws shall be enforced. We are bound by the responsibilities of our offices and the oaths which we have taken to enforce all laws. In carrying out our duties, we have a right to expect the

cooperation and support of our fellow citizens. In particular, we have a right to rely on the support of the clergy and the teachers of our youth.

"The fight of our citizens against the rising tide of juvenile delinquency and general lawlessness is not aided when those to whom our children look for guidance, mock the law and play games of hide and seek with the police. The issue is far more important than bingo. It is a question of whether an individual or organization has a right to decide whether he or it will obey the law. On this issue there can be no compromise: Our laws must and shall be obeyed."

The Test Case

Shortly thereafter Father Burns and his legal staff, consisting of Michael Poppiti, Hiram Warder, and Stewart Lynch met with one of my deputies to set up a test case. In the meantime, there was to be no more playing of bingo.

I was busily engaged with other matters at the time, but I intended to try the case and expected to be kept informed of developments. I was disappointed in both respects.

The game set up for testing was not bingo, but something called Quiz. A participant was asked the question: "Is Joe Pyne Mayor of Wilmington?" and answered correctly, "No." He was then awarded a certificate worth $10.00. Furthermore, the deputy attorney general filed a Bill of Particulars in which he admitted that:

"The defendants did not receive any monetary benefits from the game, and monetary benefits derived applied to charitable purposes.
"The defendants are not alleged to be associated with the Camilus Welfare Guild (an auxiliary of St. Elizabeth's School where the alleged gambling was carried on).
"It is not alleged that defendant's affiliation with it (Camilus Welfare Guild) *involves criminal activity*"! (emphasis supplied).

The whole scenario, from beginning to end, could have been (and probably was) written by the attorneys for the defendants. My deputy, knowing full well that I intended to argue the case myself, had arranged for the argument to be held when I was confined to my home because of illness.

The question of whether or not the playing of commercial bingo was illegal was not presented to the court, and, of course, was not decided. In view of the type of "test" case presented to Judge Layton and the admissions contained in the Bill of Particulars, he had no alternative but to grant defendants' motion to dismiss the information.

Judge Layton could have, and should have, reprimanded the deputy for wasting the time of the court by filing an information which, he admitted, did not charge the defendants with the commission of an illegal act.

The names of defendants' attorneys were prominently displayed in the news account. But the name of the deputy who "represented" the state does not appear. He had good reason for desiring to remain anonymous.

I was angered and humiliated. But a statement was expected from me, and I did the best I could:

"Attorney General J. Donald Craven last night expressed disappointment at the Superior Court's dismissal of the St. Elizabeth's bingo case.

"Confined to his home for the past few days through illness, the attorney general said he still had not read the opinion of Judge Caleb R. Layton III. But from the newspaper account and what he had been told of it, Mr. Craven said:

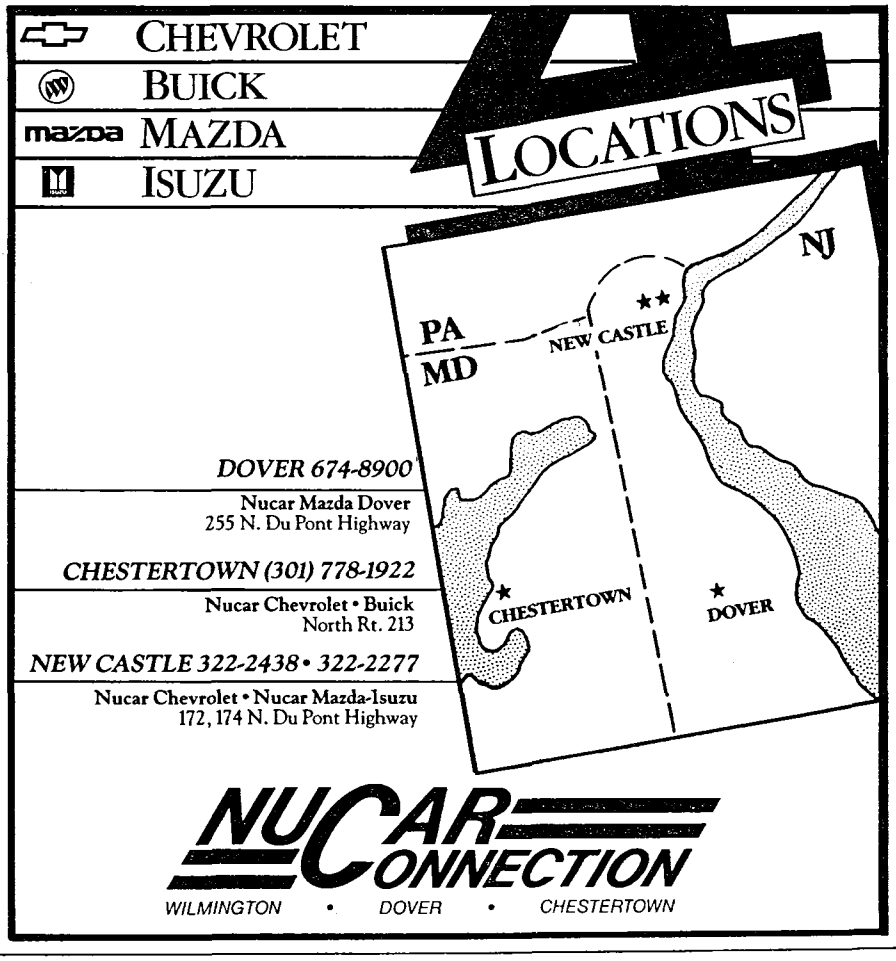
'I am very disappointed that the court in its opinion did not decide the question as to whether or not the game as played was or was not gambling within the prohibitions of the Delaware Constitution and statutes.' "[3]

However, the playing of bingo was not resumed at St. Elizabeth's School Hall, or anywhere else. The game was subsequently legalized by the General Assembly.

Coming Events Cast Their Shadows Before

The bingo controversy was the opening skirmish in my attempt to enforce the anti-gambling laws of the state. No such attempt had ever previously been made.

The Wilmington Police Department, controlled by Republicans, made no effort to suppress gambling, or close



Famous Victory
(Continued)

"After Hours" clubs, which opened at 12 a.m. Sunday morning and remained open all day Sunday in violation of the law. The Chief Judge of the Wilmington Municipal Court, who was allowed to practice law when not sitting, had for his clients, two of Delaware's most prominent bookies. Previous Attorneys General, all Republicans, had taken no action to enforce the anti-gambling statutes. Yes, the gamblers and their ilk had friends at court.

But my principal antagonist was not a Republican, but the State Chairman of the Democratic Party, Garrett E. Lyons. Lyons was one of the most colorful and dangerous characters ever to appear on the Delaware political scene. He was the friend and associate of gamblers. His home was a kind of unofficial headquarters for the clan. He loved power and would allow nothing to stand in his way to get it. He believed that laws were made to be broken; and that every man had his price. He was dishonest, and the truth was not in him.

He first came to public notice when an article appeared in the *Wilmington Morning News* under date of January 13, 1939, setting out in blazing headlines that Lyons and six confederates had been indicted by the New Castle grand jury for attempting to steal the election held on November 8, 1938. At that time, Lyons was City Chairman of the Democratic Party. The indictment specifically charged that the seven defendants "together with divers other persons whose names are to this Grand Inquest as yet unknown, at various times between October 15 and midnight of November 8 unlawfully, fraudulently, and deceitfully conspired to abet fraud in connection with the casting of votes, under the absentee voting provisions of the election laws of Delaware, at divers election districts in Wilmington Hundred."

A second count charged "that the defendants, in pursuance of the alleged conspiracy, caused to be prepared about 1,000 applications for official ballots substantially the same as the applications provided by law and about 1,000 envelopes bearing on one side the usual form for affidavit, and caused to be marked about 1,000 ballots and placed in the envelopes, and finally caused the envelopes containing the ballots to be delivered to the inspectors of election of numerous election districts in Wilmington."

Even in those days, Lyons' legal advisor was Stewart Lynch, who was running for Attorney General in the November election.

Lyons and his friends were caught red handed, and would certainly have gone to jail if these cases had come to trial. However, the Absentee Ballot Law was declared unconstitutional and the defendants went free.

Despite this disgrace and notoriety, Lyons was able to become State Chairman of the Democratic Party seventeen years later. How this happened, is a story yet to be told.

There was no way that Lyons and I, occupying the positions that we did, and differing so drastically in our conceptions and attitudes towards law enforcement and honesty in government, could have avoided a fight to the end. That is what happened. But Lyons made one last attempt to settle our differences.

In the off-year election, held in 1956, there was a political gathering at our home in Carrcroft, north of Wilmington, at which most of the Democratic office holders and their party supporters were present. Among the latter was Lyons. After the party had come to an end and the other guests had departed, Lyons remained. He said he wanted to talk to me. The only other person present was John D. Pelham, a friend of both of us. Lyons said, "Joe, you can be the next Governor of Delaware, or the next United States Senator. We don't have anyone in the party who speaks as well as you, or has your prominence. I am not asking you to stultify yourself. All I ask, is that you stop investigating."

I replied that I would have to do my duty as I saw it.

That was the last time I ever spoke to Garrett Lyons.

Footprints on the Sands of Time

In November, 1958, I attended the Annual Meeting of the National Association of Attorneys General being held in Chicago, where I was scheduled to speak. I had chosen as my subject "Law Enforcement and Public Opinion" from which I quote in part:

"Those of us who have had the experience and responsibility of enforcing our criminal laws know that it is no problem to convict the drunkard who has been picked out of the gutter, the highway robber, the rapist, or the murderer. But when we attempt to get convictions of professional gamblers and drunken drivers, we are far less successful.

"We have tried more drunken drivers and professional gamblers in Delaware during the writer's administration than in any similar period in the history of Delaware. But our success has not been commensurate with the number of cases tried. The reason is obvious. It is almost impossible to pick a jury in which some member of that jury has not placed a bet with a professional gambler or driven a car while under the influence of intoxicating liquor.

"It is not our prerogative, as public prosecutors, to pick and choose the laws that we have sworn to enforce; nor should we be deterred by any consideration as to how our actions are likely to affect our political futures. We have no guarantee—and should not expect—to remain in office forever. We have been privileged to serve in an important public office, and should, like Cincinnatus of old, be prepared to return to the plow when our work is done.

"We realize that, despite its frustrations, public office is not without its attractions. Nevertheless, we cannot sacrifice principle for expediency. If, having done our duty honestly and conscientiously, we are defeated and retired to private life, we shall, in defeat, have retained our self-respect and the respect of those whose opinions we value.

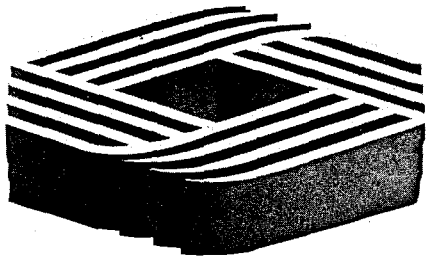
"Ours is the privilege and the duty of being crusaders, in the best sense of the word, for honest law enforcement and for decency in public life. These objectives are worth fighting for. Unless we succeed, we may be seeing the beginning of the end of the American Dream."

Ave! Atque Vale. ■

[1] *Two weeks before the election, William S. Potter, Democratic National Committeeman, said to me, "Joe, you know you don't stand a chance of winning."*

[2] *Journal Every Evening* (Del.), November 3, 1954.

[3] *Wilmington Morning News*, March 26, 1956.



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As lawyers and judges we make words our first business. Advocates owe clients the best exercise of their powers of persuasion. Judges have an equal obligation to do justice and to sustain it in the language of a high calling. For better or worse we are all stylists inescapably bound to literary servitude throughout our working lives, and our degree of success in this is a measure of our professional fitness. Each year law schools throughout the Republic disgorge thousands of otherwise qualified graduates who couldn't write their ways out of paper bags. An inquiry into style as an element of professional competence is overdue. William Domnarski's very stylish study of a stylist affords refreshment and reproach: how would Justice Holmes have regarded the various State and Federal reports as we know them today in all their giddy flatulence?

Style and Justice Holmes

William Domnarski

Stating the goals of his career to Canon Patrick Sheehan, his Irish correspondent on religious and personal matters for a decade, Supreme Court Justice Oliver Wendell Holmes (1841-1935) wrote that "the thing I have wanted to do and want to do is to put as many new ideas into the law as I can...and to do it with style." While legal historians and observers have quarrelled over the decades as to Holmes' success in putting new ideas into the law, with Holmes' place in the pantheon of judicial giants rising and falling each generation in reaction to their assessments, few would quarrel with the proposition that Holmes succeeded in articulating his ideas with style.

Harold Laski, for example, thought that "to read [Holmes'] opinions is to capture once again something of the excitement a lawyer feels when he first reads a judgment of Mansfield or Jessel or Bowen. Here is the law in the grand style, law as part of the fabric of life, law as literature as well as technic, law as philosophy not less than science." "To read his opinions as a whole," Laski continued, "is to know what Montesquieu would have been like had he presided over a modern court." Heady stuff, such praise. Cardozo, another great admirer and himself a gifted writer, beyond believing that Holmes was the most profound intellect who ever dispensed Anglo-American justice, thought that "law in [Holmes'] hands has been philosophy, but it has been literature too. If any one has ever been skeptical of the transfiguring power of style, let him look to [Holmes'] opinions." "One almost writhes in despair," Cardozo wrote, "at the futility, too painfully apparent, of imitation or approach." And from an equally impressive source, Walter Lippmann, we learn that Holmes "has the gift of delivery. I have no doubt," he continued, "that his prose is the purest American writing of our time, and I am ...sure...that in the American anthology his wisdom, so firm, so graceful, so spare, so clean, will be cherished as a tonic to the will of man above any thus far uttered on this continent."

At least one scholar, Yosal Rogat, has implied that an examination of the relationship between Holmes the man and Holmes the writer would be of limited value to those seeking to understand Holmes the man because Holmes used his prose as a shield. In Rogat's view, Holmes interposed his style between himself and the world to keep from being fully understood as the man behind the legal principles articulated in the opinions. To so hide himself, Rogat suggests, Holmes adopted a terse, cryptic style.

This view, however, does not square with the evidence. First, while it is true that Holmes' opinions were often substantively cryptic because of inadequate explanation or citation to precedent, Holmes' style can hardly be described as cryptic. Rather, his is a style distinguished by an aplomb that declares and reveals rather than muffles and hides. Second, the many references in Holmes' correspondence to style—his own style, the best style, and the styles of others—reveal that he viewed style as a function of personality. Together, these two points suggest that rather than hiding himself in his prose style as Rogat argues, Holmes used his style to articulate a public self that complemented his private self. An examination of his thoughts on style, with reference to his own judicial prose style and to aspects of his personality found in his correspondence, demonstrates this.

That style was important to Holmes is hardly surprising. His was a life committed to public expression. There was, of course, his enormous oeuvre as a

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justice—more than two thousand cases on the Massachusetts high court and on the United States Supreme Court—but there were also essays, articles, speeches, and his famous book on the common law. Moreover, Holmes' life was built on words, for as many as he wrote, he read even more. His letters to Laski and to Frederick Pollock mention the hundreds of books on all subjects that he had read and critiqued. Relatively isolated from the social life that whirled around him both by his occupation and his personal preference, Holmes found sustenance in words. When he was near death, for example, Holmes begged Laski, who had provided him with a steady stream of intellectual stimulation for nearly two decades, to keep sending him letters about his work and reading, apologizing that he was too infirm to return the correspondence. The same spirit can be seen in a letter Holmes wrote to Laski when he was ninety, saying that writing the first decisions of the new terms had put new life into him again. As Holmes wrote to diplomat Lewis Einstein, another of his longtime correspondents, "writing...has been all my joy and taken all my time."

"A man must be allowed his style," Holmes once declared to Laski. Holmes did not take kindly to being edited by his brethren, we learn, though he tried to make the best of it. At times, he gives the impression that he was amused by their editing, seeing it as a kind of challenge "to slip a phrase past the negative vigilance of [his] brethren." This ambition is corroborated by Felix Frankfurter's anecdote that Holmes had a "favorite remark, when as a naughty boy, he used to put some stinger in an opinion. With a mischievous twinkle in his eye he would say such and such phrase or sentence was 'calculated to give the brethren pain.'" But balanced against the light tone of Frankfurter's comment is significant evidence that Holmes was deeply troubled by what his brethren did to his opinions, both substantively and stylistically. On the substantive front, for example, Holmes wrote to Pollock that "years ago [I let my brethren alter my work] in the interest of getting a job done. I let [them] put in a reason I thought bad and cut out all that I thought good and I have squirmed ever since, and swore that never again but again I yielded and now comes a petition for rehearing pointing out all the horrors that will ensue from just what I didn't want to say."

...preparing small judicial diamonds for people of limited intellectual means...

As to the particular style with which he wanted to stamp his opinions, Holmes had a notable difficulty in getting certain phrases approved. "I was amused by a question of taste yesterday," he wrote to Pollock, "In one of my opinions I give a short account of a statute and say that there are amplifications 'to stop rat holes' that need not to be stated ...[T]he Chief Justice criticized. I said our reports were dull because we had the notion that judicial dignity required solemn fluffy speech, as, when I grew up, everybody wore frock coats and cravats." It was editing of this sort that prompted Holmes to write to Pollock, that "the boys generally cut out the genitals of [my prose when they edit] in the form of some expression that they think too free."

Holmes' irritation is consistent with the self-satisfaction he often displays in his letters regarding his opinions, but here again he presents more than one face in his correspondence. In a humble mood, he writes to Laski that "the brethren are a sure cure for the swelled head." He admitted as well to a certain anxiety about his work, writing Laski that "I always have a nervous apprehension that someone will discover a chasm [in my opinion] until I get [it] back [from my brethren]." "Writing opinions seems to me quite as easy as it ever was and I think I write rather better English," Holmes confided to Laski, "but one is always learning about that and I shudder to think that I do something or other that I ought to know to be an anathema." He repeated this sentiment to Pollock, writing that "at times I have felt that I succeeded [in writing with elegance and variety], but after reading [the popular book on usage] *The King's English,* it seemed to me that my sentences read as if they had been written by a schoolboy on a slate." "As long as one continues to write," Holmes wrote to Pollock a few years later, "the question is always of tomorrow and not of yesterday, and tomorrow one may show what a fool one is. So one's head does not swell beyond the dimensions of one's hat."[1]

Holmes' hat must have been amazingly elastic. With a swelled head, he writes of "preparing small [judicial] diamonds for people of limited intellectual means." Here he might be referring to the bar generally, which he once described as illiterate, but he could be referring as well to his brethren, whom he told when they complained about his prose that they ought to go to night school. His view of the value of his work generally is neatly expressed in his confession to a correspondent that "I should like to be admitted to be the greatest jurist in the world." A former law clerk reveals that "Holmes used to tell his [clerks] that the only 'prime' authority was to be found in his opinions in the Supreme Court of the United States; second, in his opinions on the Massachusetts Court; and, of much less importance, in the opinions of his brethren on the United States Court."

Holmes was as proud of the style of his opinions as he was of their substance. As for style, he favored the spontaneous, personal, terse, and amusing. "Style at bottom, of course," he wrote Einstein, "is a question of totals, not of single words. It is the personal equation of the writer. ...When the style is

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Style and Justice Holmes
(Continued)

fully formed if it has a sweet undersong we call it beautiful, and the writer may do what he likes in words, or syntax; the material is plastic in his hands to image himself, which is all that anyone can give. ...It achieves a pure spontaneous glee." To achieve this effect, Holmes advocated a prose style that eschewed the pedantic and embraced the rhythm and looseness of oral discourse. "Why is it that the literary style is so different from that of talk," he asked Laski. "I am apt to hear the words as I read...and the literary style makes them seem unreal. I don't see why men should not write in the same rhythm as they talk." To make his point, in the judicial context, Holmes told Laski that he often complained to Brandeis about the footnote-studded opinions the latter made famous, telling him, "I don't think an opinion should be like an essay with footnotes, but rather should be quasi an oral utterance."

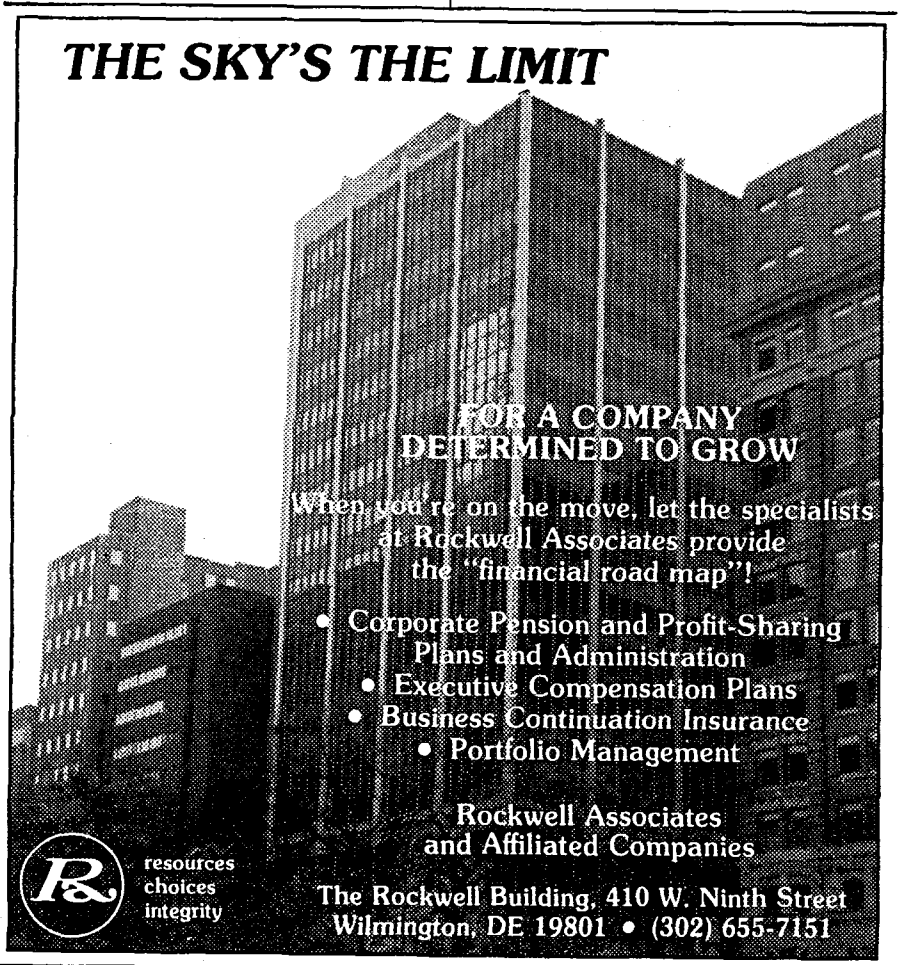
To the extent that style reflects individuality and that the best style is one in which the writer uses his material, in Holmes' phrase, to image himself, Holmes took his call for personal expression to heart. He was pained to learn that he had unconsciously used the phrase of another. Writing to Pollock, he complained that "after I sent back the proofs [of an opinion] the other day I was depressed to think that one little phrase 'for the joy of it' was an echo of Ruskin." "I hate to drop into something ready made," he continued, "that is not the expression of one's thought, organizing every word." Nor did Holmes like the idea of repeating himself. It is one thing, he wrote Laski, to use the same word in more than one sentence in a letter, a literary form he considered "not a composition but a talk, a breathing out of the casual contents of one's mind," but in writing for print, he declared, he would correct such repetition.

Repetition of a different sort also troubled Holmes. One of his long-standing complaints with lawyers was their unabashed verbosity. The master of the three, four, or five page opinion, Holmes thought that in writing opinions "there is always the fun of untying a knot and trying to do it in good compact form." Not surprisingly, then, he inveighed against those who believed that more is better. To Pollock he wrote pointedly, "I abhor, loathe, and despise those long discourses [of lawyers], and agree with Carducci the Italian poet who died some years ago that a man who takes half a page to say what can be said in a sentence will be damned."

Holmes applied this set of standards to the genre of the judicial opinion. It was not to be pedantic and filled with footnotes, certainly, nor was it to be dull. Judicial prose was to be little different from any other prose aimed at a general audience. Indeed, one anecdote suggests that Holmes considered his judicial prose to be little different from his epistolary prose. On one occasion, according to Justice Rutledge, Holmes had been persuaded to omit part of an opinion; Holmes remarked, "very well, I'll take it out but I'll use it in a letter to a friend." In the thousands of letters now published, Holmes had the same goals that he had for his judicial prose to express himself in good compact form, with a flair for the well chosen word or phrase. What unquestionably mattered most was that a prose style speak for the writer and stir the emotions. "I don't care for it," he said as a general matter, "if it does not fulfill the end of art for me by pulling the trigger of an emotion." To this end, he wrote Laski, "I think it permissible to end a sentence with an insignificant word. Not a paragraph, however. That should end with the blow of an axe."

Continuing with a list of particulars, Holmes condemned the use of latinate words and advocated the use of short words. He wrote Lewis Einstein, whom he often advised on matters of style, that "a sentence gets its force from short words. That is all." Holmes could rebuke as well as advise. He took Einstein to task for using the words "like" and "forebears" and for using "some words that I think not allowable because they are reporters' English." He criticized *The New Republic* for using "denote" and "connote," two words that had become a bore to his ears, Lewis Mumford for using "shall" when he meant "will," and anyone who would use a "for rent" rather than a "to let" sign.

Details of Holmes' writing habits offer glimpses into his personality in the



same way that his views on style do. His insistence on brevity, we learn, flows from his habit of writing, in longhand, while standing at a lectern. As he put it, "nothing conduces to brevity like a caving in of the knees." He was propelled to brevity as well by his habit of completing his allotted weekly work assignment in only a few days. He would receive his cases to write in a Saturday conference and engage in "an intellectual spasm until [he got the] opinions printed and distributed, usually by Tuesday or Wednesday mornings." He would then "lapse into relative repose." In dissenting, he would not even wait for the majority opinion to be written. As he neared ninety, Holmes revealed the understandable strain that writing, either sitting or standing, would have on an aged constitution. Writing to Dr. Wu, a Chinese correspondent on matters legal and philosophical, he said, "When I have a case to write I am there, but when it is over I incline to lie down and often to sleep."

It is surprising that, for a man devoted to words, Holmes did not keep a diary, or journal. Moreover, he wrote Laski, "I don't greatly admire the writer of diaries and the economical noters of their happy thoughts and felicities encountered in reading." Presumably, his insistence on spontaneity precluded culling choice phrases from private jottings. "I swear I don't hunt for epigrams." This declaration makes his hundred of judicial epigrams even more notable.

Considering what Holmes admired in the styles of others gives additional insight into Holmes' views on style. Not surprisingly, points of his general theory find expression in the styles of these writers. About Tacitus, for example, Holmes wrote Dr. Wu: "There is a man who could write. You care nothing for the events but he tells them so that you are absorbed—as the world knows, a master of pungent brevity." The style of Thackeray's letters, he wrote Laski "soothes one's ears," while Walt Whitman and the starling "are the two creatures that can produce symphonic effects by the sequence of sounds." For achieving the desired effect of pulling the trigger of an emotion, Holmes looked to Kipling, writing Laski that "where Stevenson laboriously selects a word and lets you feel his labor, Kipling puts his fist into the guts of the dictionary, pulls out the utterly unavailable and makes it a jewel in his forehead or flesh of his flesh with no effort or outlay except of the pepsin that makes it part of him." The greatest praise is reserved for Shakespeare: "Shakespeare had such a sense of the mystery of life and the universe, that everything pulls the trigger for a magnificent explosion."

The best place to find Holmes and his sense of style is in his own prose. Rogat was correct in describing Holmes' style as terse, but it is much more than that. It is also lively, active, imagistic, lucid, prone to the epigram or aphorism, and, above all, brimming with self-confidence. Consider the following examples.

In *Abrams v. United States*, the accused and several other Russian emigrants had thrown some innocuous political leaflets into the wind from a loft in the garment district in New York City. They were prosecuted under the Espionage Act amid the jingoistic atmosphere of World War I. Making, according to Max Lerner, "the greatest utterance on intellectual freedom by an American, ranking in the English tongue with Milton and Mill," Holmes wrote in dissent that

"[p]ersecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas, that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Holmes here makes the tenets of his theories on style come alive and, in turn, represent both his individuality and his understanding of style. Frankfurter's observation that "Holmes' dissenting opinion in the *Abrams* case will live as long as English prose has the power to thrill" is apt, but it looks only to the result and fails to suggest that in *Abrams* we have Holmes the aloof Olympian casting his attention to the fundamental issue of liberty and handling it with such precision and ease as to create the impression that it is on this plane that he lives. It is this particular quality that distinguishes Holmes' prose. Consider also Holmes' opinion in *Grant Timber and Mfg. Co. v. Gray*. Here the question was whether the Fourteenth Amendment was violated by a Louisiana statute prohibiting a petitory action for property to be brought by a defendant in a possessory action until after the judgment in that action. In an extraordinary tour de force summarizing the law spanning a period of a thousand years, Holmes undauntedly writes that "from the *exceptio spolii* of the Pseudo-Isidore, the Canon Law, and Bracton, to the assize of novel disseisin, the principle was of very wide application that a wrongful disturbance of possession must be righted before a claim of title would be listened to...and from Kant to Ihering there has been much philosophizing as to the grounds."

The self-assurance that allows Holmes to scan this vast landscape of the law in such fashion informs the figurative language that he is perhaps best known for. Thus, we have Holmes the aphorist writing that "three generations of imbeciles are enough." Such casual indifference gives way to Olympian sensibility when Holmes writes that "the power to tax is not the power to destroy while this Court sits," and the "the common law is not a brooding omnipresence in the sky but the articulable voice of some sovereign or quasi-sovereign that can be identified." Moreover, with great simplicity he writes that "[t]axes are what we pay for civilized society," and that "[g]reat cases like hard cases make bad law."

Style and Justice Holmes
(Continued)

Holmes could write with such aplomb only because he had no fears as a writer. He had complete self-confidence as to his social and intellectual status, tracing his lineage to three important New England families. Moreover, his father was a respected man of science and letters, whose influence helped open doors for Holmes, here and abroad. It is with these advantages that Holmes' career developed. Intellectually, Holmes considered only Laski and Pollock his equals; he might even have had doubts about Pollock when he failed to grasp Holmes' meaning in their correspondence. Holmes, simply put, was an intellectual snob. About Will Durant, for example, Holmes wrote Laski, "How could anyone who calls himself Will write anything on philosophy that I should care to hear."

Holmes' father, who had quintessentially portrayed the Boston Brahmin in one of his popular books, may have influenced his son's intellectual snobbishness. Though they were often at odds, on this issue at least they concurred. In *The Autocrat of the Breakfast Table,* for example, Holmes, Sr., wrote what Holmes, Jr., could easily have written a generation later: "Conceit," he wrote,

is just as natural a thing to human minds as a centre is to a circle. But little-minded people's thoughts move in such small circles that five minutes' conversation gives you an arc long enough to determine their whole curve. An arc in the movement of a large intellect does not sensibly differ from a straight line. Even if it has the third vowel as its centre, it does not betray it. The highest thought, that is, is the most seemingly impersonal; it does not obviously imply an individual centre."

The call of Holmes' father for impersonality found expression in Holmes' own life and partly accounts for his success in the role of spectator that Professor Rogat has cast him. Holmes was certainly disinterested as a justice, but beyond that he consciously distanced himself from those around him. He had few friends his own age as an adult, for example, and he led a relatively isolated social life. His evenings were largely spent reading to his wife and playing solitaire. He had no children. Holmes displayed his disdain for participation in its most extreme form by ignoring oral argument on the bench and casually writing letters, caring not that those around him knew that he was not paying attention. His habit of writing quickly and without research becomes further evidence that Holmes wanted to keep even the Court at a distance. As he wrote, comparing himself to the fellow justice he knew best, "Brandeis always desires to know all that can be known about a case whereas I am afraid that I wish to know as little as I can safely go on."

Holmes impersonality—his role as spectator—permitted him to take the broad view on any subject and helped cast his Olympian detachment. Evidence of the aloof, self-assured personality behind such a world view abounds in his correspondence. On philosophical issues, for example, Holmes writes casually that "civilization is the process of reducing the infinite to the finite" and that "philosophy is an end of life, yet philosophy is only cataloguing the universe and the universe is simply an arbitrary fact so that as gossip should lead to philosophy, philosophy ends in gossip." He wonders as well, "if cosmically an idea is any more important than the bowels," and notes that "prayers are like nettlerash—anything from heat to champagne may bring them out." Holmes was beyond intimidation on the intellectual front. As he wrote to Pollock, "It is absurd to be afraid of any book, as it is to be so of any case. I have long said that there is no such thing as a hard case. I am frightened weekly but always when you walk up to the lion and lay hold the hide comes off and the same old donkey of a question of law is underneath."

Holmes also exhibits his sense of a complete mastery over the intellectual world in his critiques of the books he read. With his self-confidence, he sets himself up as a critic-at-large of the philosophical, literary, and legal worlds. The point here is not that Holmes was unwilling to defer to someone else's learning but that he felt competent to pass judgment on whomever he read, regardless of reputation. He considered himself the ultimate audience, the learned, sophisticated reader. Hegel, he declares, cannot persuade him that "a syllogism can wag its tail;" he "can't imagine taking Bernard Shaw seriously." This is the personality— the sensibility—informing Holmes' prose style.

In probing the relationship between a writer's prose style and his personality, the continuing question is whether the writer is revealing or creating himself in his style and elsewhere, such as in his correspondence. Put differently, how do we know that the Holmes of the quotations noted above is the real Holmes, who is then reflected in his prose style?

The question of whether Holmes is revealing or creating himself in his correspondence is especially significant because Holmes was capable of writing with different tones in his letters to the five major correspondents of his life. To Pollock, he was professional and formal, offering relatively little of his personal life for comment. Theirs was a correspondence of legal giants discussing legal issues of common interest on a theoretical level. With Laski, Holmes was willing, after Laski had proven himself, to discuss personal matters. Theirs was a warm relationship, distinguished by love and admiration on Laski's side and affection and admiration on Holmes'. Holmes' greatest willingness to discuss matters close to the heart and to the soul came in his correspondence with Canon Sheehan. Law is hardly mentioned in their letters. Instead, the warm, intimate sides of both men dominate. Holmes wrote with warmth to Lewis Einstein, but with Einstein, Holmes saw himself, in the beginning at least, far more as a mentor than as a friend or colleague. The differences in their professions, backgrounds, and ages explain this. Age was also a problem in the Holmes-Wu correspondence. Holmes, the aged scholar-jurist, treated the young Wu, the aspiring law professor, patronizingly at times and with a willingness to burst Wu's inflated assessments of himself and his career possibilities.

While five different sides of the same man appear in these five correspondences, certain aspects of Holmes' personality remain constant throughout. Holmes is always willing to give his opinion on any matter, and to express that opinion with his unique brand of self-confidence.[2]

His confidence in himself and his sense of his place in the world never waiver. Moreover, his willingness to express the confidence at the center of his personality never flags. It is not surprising, then, that this self-confidence

finds expression in his prose style and lends further support to the maxim that style is the measure of the man.

The inferences we can draw from the relationship between personality and prose style are particularly valuable with respect to Holmes because he deliberately made the jobs of those writing on his life more difficult by destroying what he termed "illuminating documents." As a result, we must look to those private documents—we have his voluminous correspondence— to determine whether the private Holmes complements or contradicts the public Holmes.

To establish a connection between Holmes the private letter writer and Holmes the public jurist through the element of style enables us to state with reasonable confidence some of the personality traits defining the essential Holmes. As a result, Holmes cannot evade review, despite his destruction of illuminating private documents, because each time he wrote as a public man he did so with the influence of the private man. ■

[1]Like most good writers, Holmes relied upon a good ear rather than a mastery of the rules to get his grammar right.

[2] "The greatest bores in the world are the come-outers who are cocksure of a dozen nostrums," he writes Pollock. "The dogmatism of a little education is hopeless." To Laski, he writes that "the works of literary gents in the general field are too unquantified in premise and conclusion to suit me", while to Einstein he writes, "Lord, what a lot of time one spends in reading books to fill gaps in useless knowledge and even, as I did Hegel last summer and Karl Marx recently, merely to be able to state articulately why one doesn't believe them." To Canon Sheehan, Holmes takes on an historian of some renown, writing that "at odd moments I am reading Gibbon, more because I suppose I ought to before I die than for any great nourishment I get from him. He is easy pleasant reading enough, but I don't care for general history that written by literary men." Critiquing a Twentieth Century intellectual giant, Holmes writes Wu that "I read Bertrand Russell's *Philosophy* the other day, but without great nourishment. He argues in detail what I had taken as not needing further argument and in his general view of the universe seem to me...to wobble between sentiment and reason."

This article, as originally published in the Connecticut Bar Journal, *contained extensive footnotes. We will make them available to readers who wish to study the topic in greater depth.*

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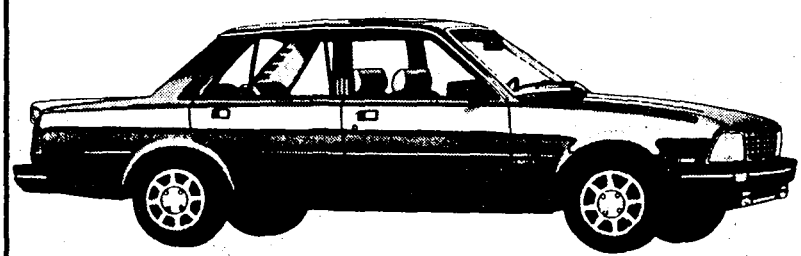

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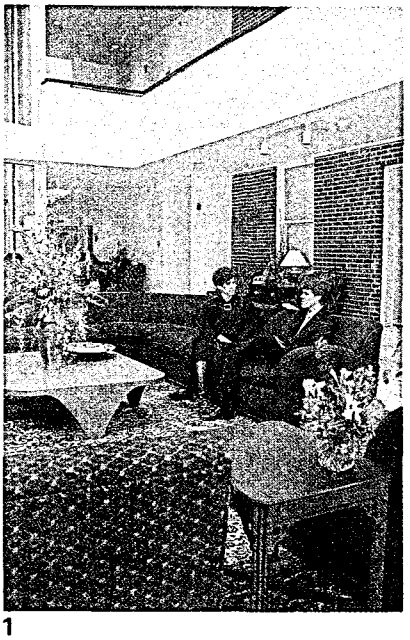
New Law And Education Center

In December 1986 the Delaware State Bar Association moved from the State Office Building to new quarters at 706 Market Street Mall. This structure, an imaginative combination of the former Braunstein Department Store, an adjoining building to the North, and a series of buildings on King Street provides space for Widener University, new quarters for Delaware Volunteer Legal Services, Inc., the Bar Association's *pro bono* arm, and a series of Bar related functions. The complex opens into a highly creative transformation of old buildings on the King Street side into a new luxury hotel, Christina House. It all makes for a remarkably apt fit.

Within the Widener and Bar Association space there are the offices of the Disciplinary Counsel, L. Susan Faw, Esquire, editorial offices for this magazine, the offices of the Executive Director of the Commission on Continuing Legal Education, a large conference room, and other rooms suitable for Continuing Legal Education programs in center city convenience. In addition the availability of the hotel staff and food service greatly increases the efficiency of the conduct of day long Continuing Legal Education programs.

Getting these diverse but related functions under a single roof and putting the Bar Association finally into adequate space are expected to have a most favorable effect upon the capacity of the Association and the related entities to deliver services to the bar and public alike.

The following pictorial study is intended as an invitation to make use of this fine new space and to acquaint our readers with significant progress in the service of professionalism. ■



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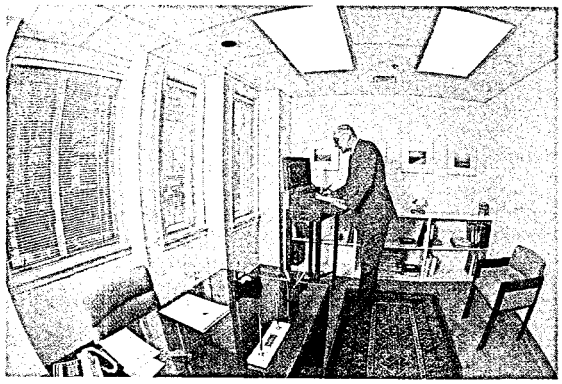
1. Kathryn S. Wharton, Marketing Director for City Systems, Inc., the developer of Christina House, confers with James D. Evans, III, General Manager of the hotel.

2. Darryl Fountain, Esquire of Delaware Volunteer Legal Services, consulting with Shirley Horowitz, DVLS Pro Bono Coordinator, and Delaware Law School student Sean Dolan. The Delaware Law School Clinic of DVLS is a vital part of that organization's services to the disadvantaged.

3. L. Susan Faw, Disciplinary Counsel of the Board on Professional Responsibility, seen in her office at the new Bar Center.

4. A fish-eyed view of the Executive Director of the Bar Association scratching out notices of delinquent dues at his Ebenezer Scrooge writing desk.

5. Carol Burg—Bar Association bookkeeper, Sylvia Johns—Manager of Administrative Services, and Patricia Milewicz of the Association's Lawyer Referral Service in an uncharacteristic moment of inactivity. Mrs. Milewicz is speaking with Joyce Reed, first Executive Director of the Commission on Continuing Legal Education.



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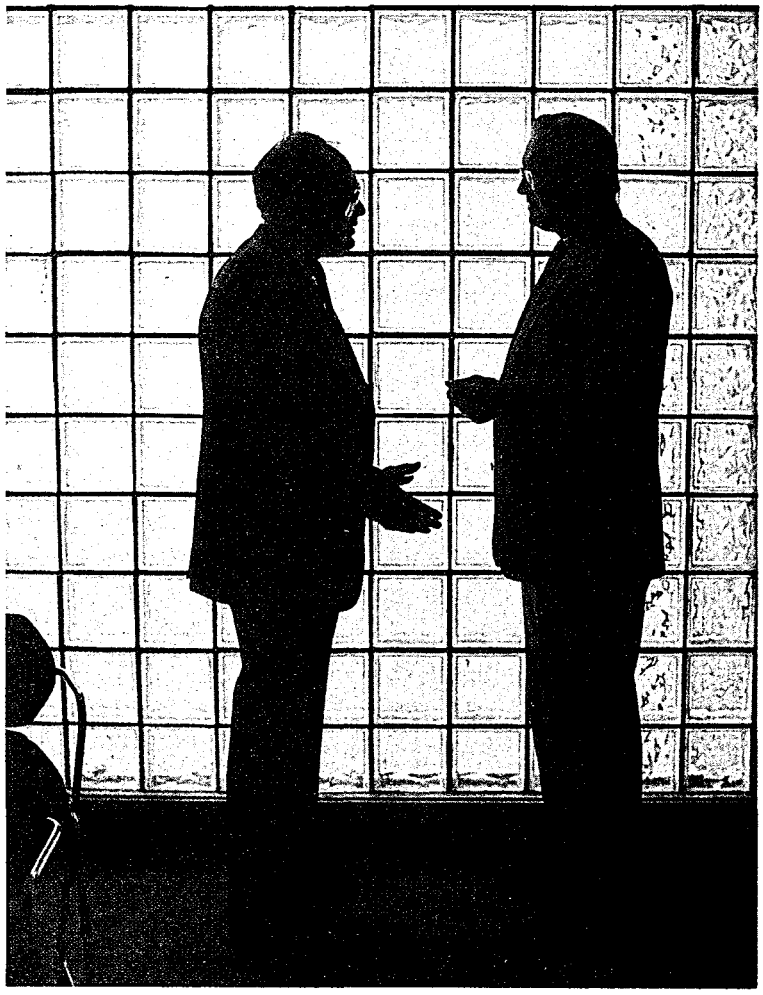

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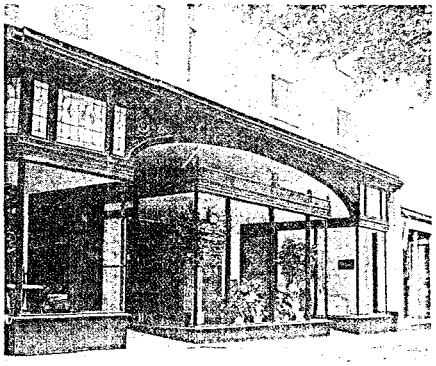

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6. DELAWARE LAWYER Editor Carroll Poole scrutinizes a manuscript in a room devoted largely to this publication.

7. Delaware Law School Dean Anthony J. Santoro and DSBA Immediate Past President Joseph M. Kwiatkowski silhouetted against the back wall of a Widener University classroom in the new Law and Education Center.

8. Bonnie Curtin (Mrs. Christopher J. Curtin) prepares for the annual May Day student essay and poster contest, a program of the Delaware Legal Auxiliary, of which she is president. Scene: the DSBA Presidents Room.

9. Facade of the Law and Education Center—a tactful transformation of what was once the Braunstein department store.

Photo credits: photographs 1-8, Eric Crossan; photograph 9, Albert C. Johns.

American Warriors— Goin' for Gold

Harrison Street Publishing Company

Thomas Little, Esq.

Fellow lawyer Tom Little has written a book. *American Warriors - Goin' For Gold,* Harrison Street Publishing Company, now on sale at $20 a copy, is initially available at Stan's Y.W.C.A. Restaurant on King Street.

Thomas L. Little, Esquire is a talented and complicated man who has brought great energy to a variety of pursuits: he has been a legislator and a lawyer, a teacher and a coach, lifeguard and mystic, Democrat, Republican, and once again Democrat, baptized believer and closet pantheist, Marine drill instructor and anti-war activist. He is also an impressive self-taught water colorist and an accomplished practitioner of judo. Confronted by this body of achievement, the average reader inclines to flabby regret. "Oh, gee, why didn't I keep up my piano lessons?"

American Warriors, a courageously naked self-examination, records the author's pursuit of wholeness of body and spirit. Little wrote it during two five-day sessions "under self-hypnosis during meditation". The book speaks forcefully if not always clearly, and shows no sign of mischievous editorial interference. As a rule this sort of exercise is more rewarding for the writer than for his audience, but Little gives a lot of good value. While the semi-mystical element commands a sort of baffled respect, the account becomes highly enjoyable when Little unleashes his large, flamboyant cast of characters. (The book is filled with prominent Delaware names, local color, and local dirt.)

There are sharp portraits of both our United States Senators, two former Governors, many politicos and prominent lawyers. Also there is a splendid anecdote about that grand old Republican spider, Mr. Clayton Harrison (see page 121).

Furthermore, I suspect that there is nothing like this book for an inside account of the tensions within the Delaware Republican party during the 1960s and the zestful gutter fighting those tensions provoked. Names are named. No holds are barred. But actions for defamation seem unlikely. The treatment of friends and foes is for the most part good natured and balanced.

Readers born before 1950 should be warned of some very rough, even scatological, language. (Readers born *after* 1950 probably couldn't care less.) *Apologia Pro Vita Sewer?* But the use of such language is for the most part legitimate: Little is recreating the cloacal flavor of male speech when the ladies aren't around, and especially the casually copulative argot of Parris Island. It rings true, as do lots of other things, such as his account of growing up in Mt. Airy, Pennsylvania in a large belligerently affectionate Irish-American family. Since Little has an eye for telling detail, that account is very good indeed.

American Warriors is not exactly hammock reading. I was frequently slowed down by infuriatingly odd punctuation that forced me to retrace my steps in search of the thought intended to be conveyed. I also found the repeated and gratuitous use of quotation marks jarring.

Would tactful editing have helped? Yes and no. It would surely have done something about that grotesque punctuation, but it would probably have weakened the staccato force of a style harnessed to an urgent task of self-appraisal.

One regret: I am sorry the book does not end with a good index, because it is great fun to poke around, reading about the people you know. All in all this is an impressive account. It might well make a most entertaining film.

WEW

Delaware Calendar of Bicentennial Events

September through December, 1987

September: Special Constitutional Bicentennial Convocation, Delaware Law School of Widener University

September to November, 1987: Delaware State Bar Association Speakers' Bureau presentations on Bicentennial subjects to State schools and civil groups; Bar sponsored radio spots celebrating the Bicentennial

September 1: Special Bicentennial edition of *DELAWARE LAWYER* call 658-8045 to reserve copies

September 1: Milford bicentennial celebrations begin, call 422-5026. September 12, 13, 18-20: Milford Sound and Light Show, Parson Thorne Mansion, 5 p.m.; Sept. 27: Tour of Historic Homes

September 3: 210th Anniversary of the Battle of Cooch's Bridge, Newark, call 652-3641

September 12: (Raindate Sept. 13) Town Festival, including a farm wagon ratification debate by Whig and Federalist partisans in costume, bonfire, ox roast, fife and drum music, tradesmen of the period in colonial dress, Odessa

September 17: Constitution signed, Philadelphia, 1787

September 24: Constitutional Lecture, Historical Society of Delaware, 5:30 p.m., Wilmington

September 28 to October 2: Performances of a play specially commissioned by the Delaware Bar Foundation in honor of the Constitutional Bicentennial, to be presented to secondary school students in New Castle County at 10:00 a.m. and 12:30 p.m. at the Delaware Theatre Company

October 1: Annual legislative elections prevented by riots, Sussex County, 1787

October 1: Constitutional Lecture, Historical Society of Delaware, 5:30 p.m., Wilmington

October 2-4: Dagsboro Bicentennial Celebration includes issuance of newly written Dagsboro town history, crafts, pictures and document display, call 934-7976

October 5-9: Performances of a play specially commissioned by the Delaware Bar Foundation in honor of the Constitutional Bicentennial, to be presented to secondary school students in Kent and Sussex Counties at 10:00 a.m. and 12:30 p.m.

October 8: Constitutional Lecture, Historical Society of Delaware, 5:30 p.m., Wilmington

October 10: 18th Century Fair and reenactment of Sussex County Election Riots by the Possum Point Players and Delaware Technical and Community College, Georgetown

October 11 to November 30: "Great Concepts of the U. S. Constitution," a competitive collegiate art exhibition. Clayton Hall, University of Delaware, free, call 451-8841

October 15: Election for legislature, Sussex County, 1787

October 15 to February 15: "Creature of Their Own Will: The Formative Years of the Constitution," exhibition at 1988 Morris Library, University of Delaware, special collections, call 451-2965

October 24: U. S. Constitution read to Delaware House of Assembly, 1787

November 6-7: "Philadelphia as Cultural Capital: 1750-1800," a conference at Winterthur, call 656-8991, ext. 249

November 7: Sussex County election voided, 1787

November 26: Delegates elected to state ratifying convention. Election riots in Sussex County, 1787

November 30: Bicentennial Celebration Luncheon sponsored by Delaware State Bar Association. Hotel Du Pont, 1:00 p.m. Benno Schmidt, President of Yale University, Guest Speaker

December 2; Send-off of 30 delegates from their local towns to the ratification convention in Dover.

December 3: Ceremonial arrival of delegates in Dover. Reenactment of the ratification drama.

December 3: Delaware ratification convention meets in Dover, 1787

December 4: Delaware Symphony Orchestra Bicentennial Concert, Sussex County, 8 p.m.

December 6: Delaware Symphony Orchestra Bicentennial Concert, Kent County, 8 p.m.

December 7: Delaware Day, Celebrations in Dover.

- 10:00 a.m. Dedication of a plaque on the site of Battell's Tavern followed by dedication of the major artwork on Constitution Place
- 11:00 a.m. A parade
- 12 noon Church bells rung all over the state. A public program with color guard, choir and band
- 8:00 p.m. Dinner and Ratification Ball

December 7: Delaware Convention ratifies U.S. Constitution, 30-1, 1787, as The First State

December 12: Pennsylvania ratifies U.S. Constitution, 1787, The Second State

December 18: New Jersey ratifies U.S. Constitution, 1787, The Third State

Ongoing Exhibitions

"Miracle at Philadelphia": Constitutional Convention exhibition at the Second Bank of the United States, 420 Chestnut Street, Independence National Park, Philadelphia, now through December 31, 1987, 9-5 daily.

"Delaware's Constitutional Heritage": An exhibition of ratification documents, Visitors' Center, The Green, Dover, call 736-5314

"The First Signal": travelling documents exhibition, sponsored by the Delaware Division of Historical and Cultural Affairs, 736-5313. Opening dates at the following locations:

- August 3 Clayton Hall, University of Delaware
- August 24 ICI Americas, Wilmington
- September 28 Milford Museum
- October 12 Delaware Trust, 900 Market St., Wilmington
- November 2 Wilmington Trust, N. Rodney Square
- November 30 Old State House

For more information on **Bicentennial Activity in Delaware** write or call:

Delaware Heritage Commission
Carvel Building, 3rd Floor
820 N. French Street
Wilmington, DE 19801
(302) 652-6662

For information on **Delaware** write or call:

Delaware Dept. of Tourism
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