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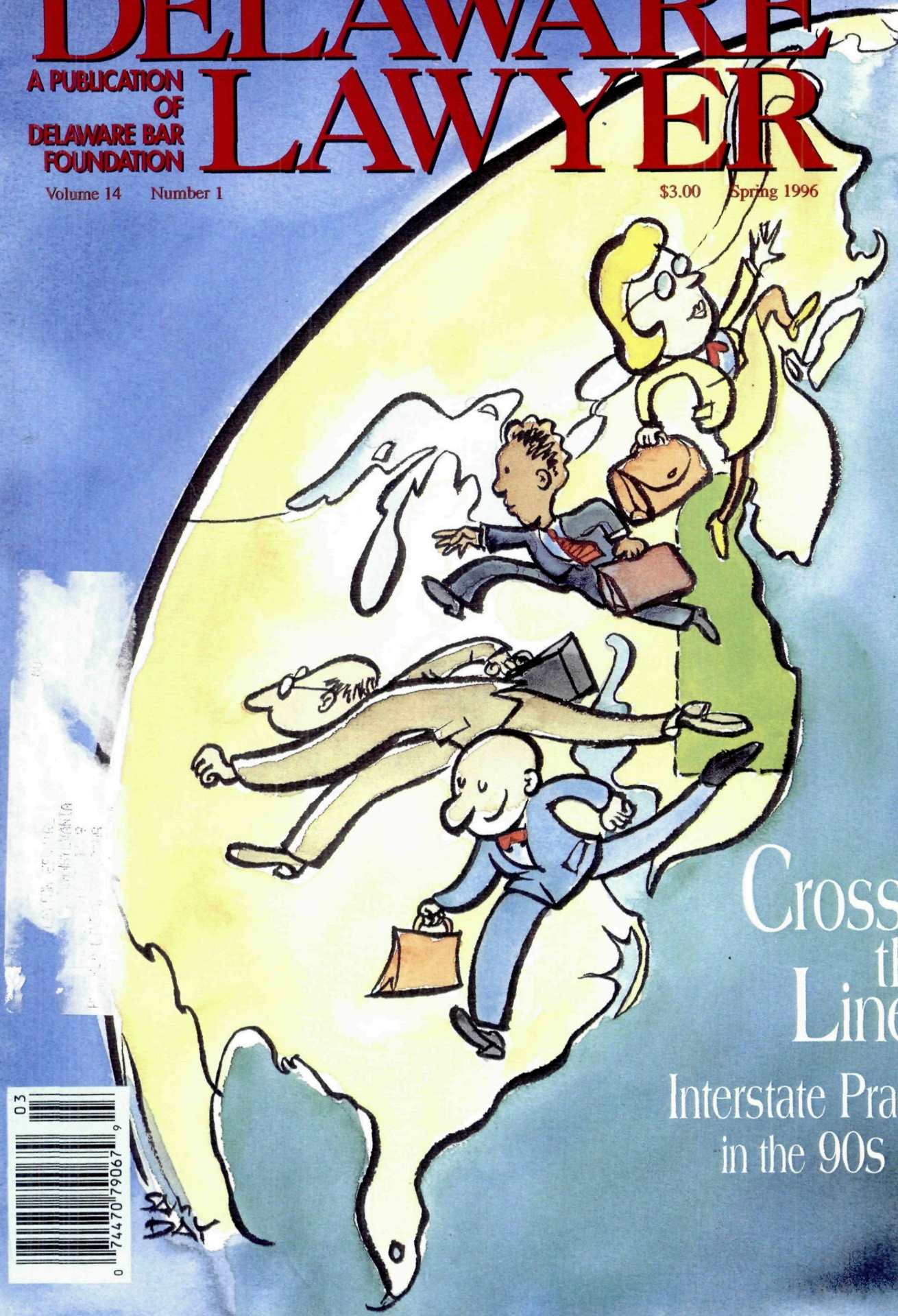

Crossing the Line:

Interstate Practice in the 90s

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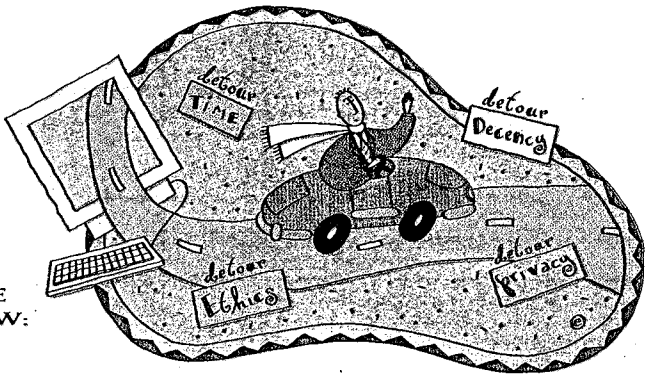

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William E. Wiggin, now happily retired to suburban Holly Oak, gets light exercise by crossing picket lines and conducting zoning fights with his neighbors. Wiggin, seen astride his Sears Roebuck lawn tractor, is every inch the bogus country gentleman.

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Susan F. Paikin is on the Editorial Board of the Delaware Lawyer. She is currently a Senior Associate with the Center for the Support of Families, a national consulting firm based in Washington D.C. She served as an official observer to the UIRSA Drafting Committee and has written entensively on child support and child custody issues.

EDITOR'S NOTES

This issue is offered as a companion to the preceding volume on the Small Wonder that is Delaware. It looks both outward at changes that affect interstate legal practice and inward at the impact of those changes on how we practice law. Take first technology. As the old song goes, "It's a Small World After All." Technology affords opportunities to address age-old legal and societal problems, such as the abandonment of parental responsibility, with new solutions. And it creates fertile ground for litigation: each advance appears also to be accompanied by new dilemmas for the law and for practitioners. Often, the legal response thereto crosses state and national borders. For some issues, such as pornography on the Internet, the entire concept of boundaries seems irrelevant. For lawyers faced with 21st-century concepts and a 19th-century approach, flexibility and creativity may prove key to continued success. Yet limits exist on the "where and how" of law practice. This volume is thus purposely entitled with a double entendre and dedicated in large part to ethical questions facing attorneys in this brave new world. Practical help is offered in responding to the demands of interstate litigation. However, careful readers will also note that many of the authors pose questions as yet unanswered.

Just as the volume's topics present a potpourri of issues of interstate interest and impact, so has *Delaware Lawyer* crossed the country for thoughtful contributors. It is a privilege to offer Dean Bayless Manning's insightful comments on the changing world of international law practice. Jeanne Rubin's practical solutions to serving successfully the out-of-state respondent are similarly welcome. For those of sufficient age or temperament to be terrified or merely overwhelmed by the intrusion of technology in our personal and professional lives, Richard Herrmann's analysis of existing and potential problems wrought by the Internet is well complemented by a Q & A with a "make it simple" intent.

Even for those lawyers well and gladly removed from the practice of family law, it is probable that a client, friend, employee or family member sooner or later will come to you with a child support problem. Given Delaware's size, that question is likely to involve at least one party who lives or works elsewhere. *Delaware Lawyer* is pleased to offer the analyses of Professor William Reynolds and Margaret Campbell Haynes, two of the foremost child support experts in the country. They address Federal and Delaware legislation having a dramatic impact on this area of the law and the accompanying practice and ethical questions now faced by lawyers as a result. David Glebe provides a thoughtful, complementary piece on the rules and problems surrounding the unauthorized practice of law.

Last, but certainly not least, Bill Wiggin rejoins these pages with an opinion piece exposing the potential hazards to the treasured civility of Delaware practice when ill-mannered outsiders come to call.

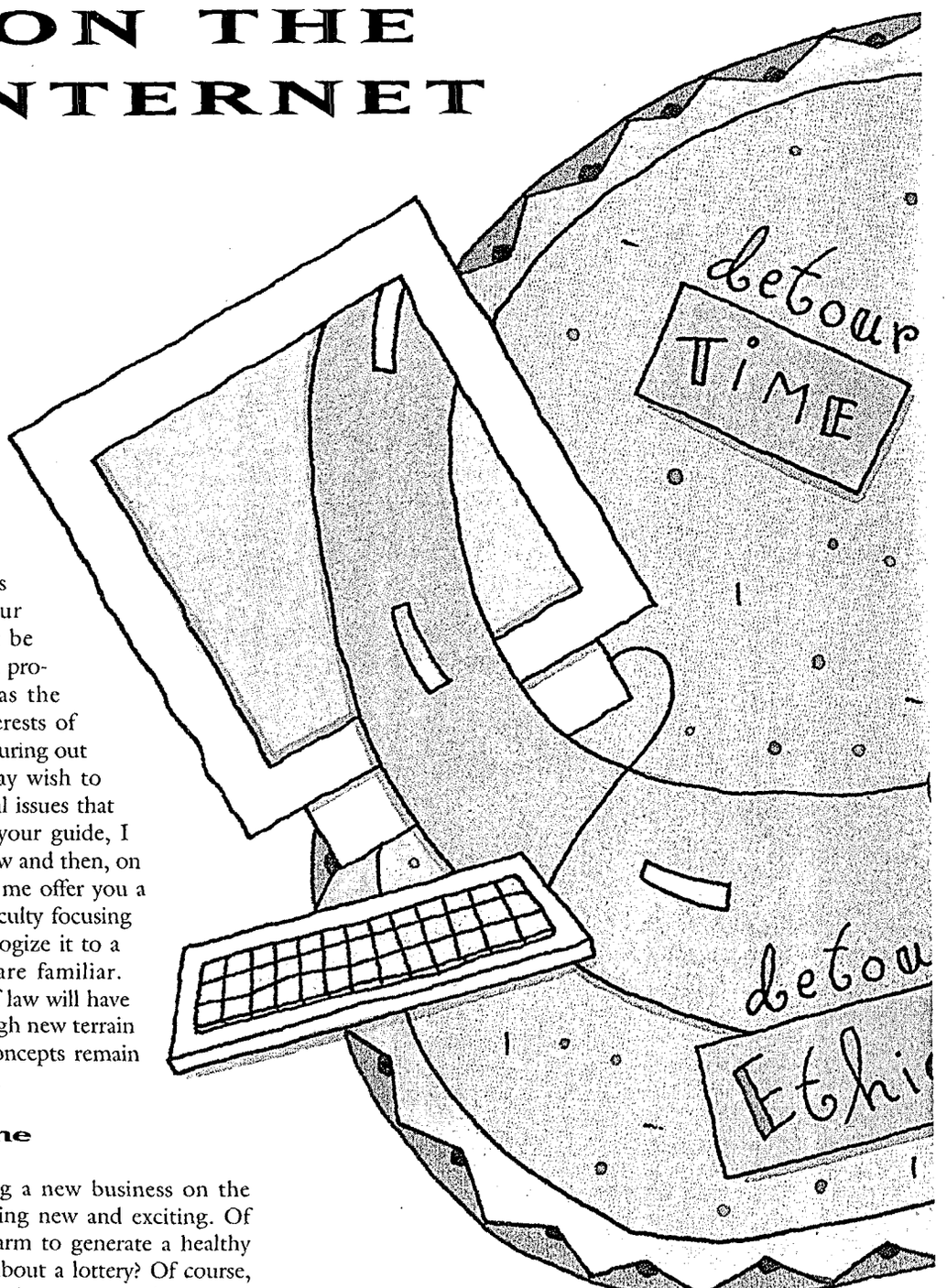
I thank all the authors for being so generous with their time and expertise. I venture to suggest that many of these topics will be revisited in future editions as law and practice evolve. For now, let the discussion begin.

Susan F. Paikin

FEATURE

RICHARD K. HERRMANN*

CROSSING THE VIRTUAL LINE ON THE INTERNET



The Internet

As we go careening down our new superhighway, it is important that we learn the rules of the road. This is particularly true in our business, since we must be concerned about our own professional safety as well as the need to protect the interests of our clients. Before venturing out on your own, you may wish to join me on a quick tour of the legal issues that have been rapidly developing. As your guide, I encourage you to take a detour, now and then, on your own. Should you do this, let me offer you a helpful hint: if you are having difficulty focusing on or framing an issue, try to analogize it to a legal principle with which you are familiar. While it is clear that a new body of law will have to be developed to traverse the tough new terrain that will be traveled, traditional concepts remain helpful in dealing with many issues.

Crossing the State Line

Crossing the Criminal Line

Imagine, if you will, beginning a new business on the Internet. You want to do something new and exciting. Of course, it also wouldn't do any harm to generate a healthy case flow at the same time. How about a lottery? Of course, you know that the State controls the lottery system by statute. 29 Del. C. §§4801 et seq. So as not to run afoul of the law, it

might not be a bad idea to set up your lottery in another jurisdiction, or in another country for that matter. Let's assume that you have a contact in Bermuda, a friend who will set up an Internet server for you. To the extent that Bermuda permits this kind of activity, it would be an easy matter to maintain the Bermuda server and to operate the lottery from your home in North Wilmington. Those wishing to purchase tickets on the Internet would contact the server in Bermuda, leaving the Delaware authorities unable to hold you responsible for violating any law in this state. Good luck: I'll come and visit you on holidays.

In addition to the dozen or so Federal statutes that you are violating, there is little question that you also are in violation of one or more of the sections enumerated in chapter 14 of title 11 of the Delaware Code. Section 1401 provides in pertinent part:

> A person is guilty of advancing gambling in the second degree when:
>
> (1) The person sells or disposes of, or has in the person's possession with intent to sell or dispose of, a lottery policy, certificate or any other thing by which the person or another person or persons promises or promise, guarantees or guarantee that any particular number, series of numbers, character, ticket or certificate shall, in the event or on the happening of any contingency in the nature of a lottery, entitle the purchaser or holder to receive money, property or evidence of debt; **or**
>
> (2) The person uses or employs any other device ...; **or**
>
> (3) The person is concerned in interest in lottery policy writing. . .

You might successfully argue that none of your activity in the State of Delaware violates the letter or the spirit of this section. You are not in possession of any lottery. Nor are you selling anything of such a nature in this state. In the event that you are not indictable under Section 1401, it is altogether likely that you risk conviction of a class A misdemeanor under Section 1402(a), in that you are engaging in a foreign lottery. That Section provides:

> (a) A person is guilty of engaging in a foreign lottery when the person brings, sends or procures to be brought or sent into this State any scheme of any lottery or any drawing of any such scheme or any ticket or part of a ticket or cer-

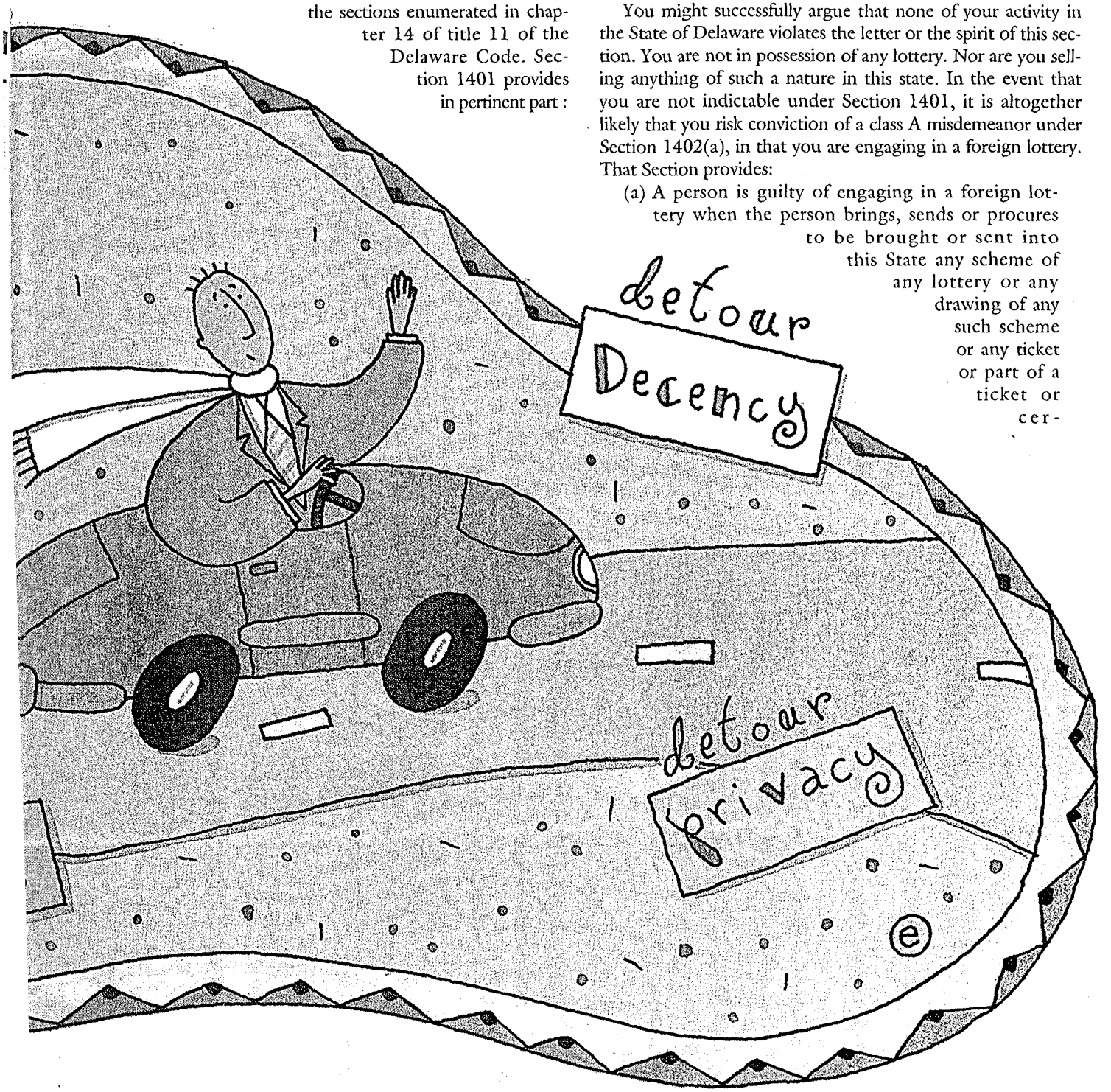


Illustration by Emily Thompson

tificate of or a substitute for any ticket or part of a ticket, and sells or offers for sale any such ticket or part of ticket or any certificate or substitute for a certificate, and circulates in any manner any scheme or any drawing.

While you may have your equipment in another jurisdiction and you may be maintaining it remotely, it is important not to lose sight of the fact that you are conducting yourself in Delaware. There is little doubt that, if your conduct is within a jurisdiction, you will not be able to avoid culpability by taking advantage of this new technology. It is your conduct that will get you into trouble, not the technology. Even if you electronically cross the jurisdictional line, you'll get caught.

For example, a college student was caught in the landmark case of *United States v. Morris, 928 F.2d 504 (2d Cir. 1991)*. Morris was a first-year graduate student at Cornell University in computer science. While working on his Ph.D., he decided to focus his thesis on the lack of security on computer network systems. In 1988, Morris developed an Internet "worm" or "virus." The Court distinguishes the two terms:

> In the colorful argot of computers, a "worm" is a program that travels from one computer to another but does not attach itself to the operating system of the computer it "infects." It differs from a "virus," which is also a migrating program, but one that attaches itself to the operating system of any computer it enters and can infect any other computer that uses files from the infected computer. 928 F. 2d at 505 n.l.

The Court's opinion explains that Morris's worm got away from him, wreaking havoc through the Internet. As a result of this unauthorized academic exercise, Morris was convicted of violating the Computer Fraud and Abuse Act of 1986. He was sentenced to three years of probation and 400 hours of community service and was fined over $10,000.

Crossing the Civil Line

Even more challenging are the jurisdictional issues that will arise in civil litigation regarding Internet disputes. The notion of due process contemplates that minimum contacts must exist prior to the exercise of personal jurisdiction over a party. *International Shoe Co. v. Washington,* 326 U.S. 310 (1945). While direct physical presence is not required, an intent to reach the jurisdiction in some way has always been significant. Delaware's long-arm statute, 10 *Del. C.* §3104(c), provides in pertinent part:

> (c) As to a cause of action brought by any person arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident, or his personal representative, who in person or through an agent:
> (1) Transacts any business or performs any character of work or service in the State;
> (2) Contracts to supply services or things in this State;
> (3) Causes tortious injury in the State . . .;
> (4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from services, or things used or consumed in the State . . .

The infrastructure of the Internet does not lend itself to easy application of long-arm statutes for the purposes of securing jurisdiction over an individual. Contacts are not initiated by the Internet site. Instead, the receiving party initiates the connection.

The infrastructure of the Internet does not lend itself to easy application of long-arm statutes for the purposes of securing jurisdiction over an individual. Contacts are not initiated by the Internet site. Instead, the receiving party initiates the connection. This is different from mail order catalogs or telecommunications: there is no direct connection between point A and point B. Very often, a person in Delaware may reach an Internet site in New York by way of a number of other jurisdictions. Similarly, in the event that a user has arranged for newsgroup or Usenet messages to be e-mailed to a particular local area network, it is the recipient who has made that arrangement and not the sender.

A sample of the issues raised in this regard may be found in *Pres-Kap v. System One Direct Access, Inc.,* 636 So. 2d 1351 (Fla. App. 1994). The plaintiff, a Delaware corporation, owned and operated a computer database in Florida that provided airline, hotel and car reservation systems for travel agencies. It also maintained a branch office in New York. The defendant was a New York travel agency that contracted in New York with the plaintiff, through the New York branch office, to lease computer terminals and access to the Florida database. While the lease agreement did not contain a forum selection clause, it did contain a choice-of-law provision that Florida law applied. After the lessee stopped making monthly lease payments, suit was brought in Florida. The defendant moved to dismiss for lack of personal jurisdiction.

The court found that no personal jurisdiction existed. Fortunately, the Court realized the far-reaching implication that a contrary decision would have had on the use of "on-line" computer services. "Such a result, in our view, is wildly beyond the reasonable expectations of such computer-information users, and, accordingly, the result offends substantial justice." 636 So. 2d at 1353.

Of course, a number of federal statutes, pertinent to the use of the Internet, provide for specific jurisdiction and specific venue. In all likelihood, the limitations to jurisdiction and venue will not be satisfactory. These provisions generally involve intellectual property issues such as patent, copyright and trademark. One of the more interesting areas of dispute involves the procurement and exploitation of domain names. A domain name is for all practical purposes an address or an indication of presence on the Internet. It is the "vanity tag of all vanity tags," for it indicates a

Continued on page 16

The Internet has three main areas of focus: governmental, educational and commercial. Representative view points were obtained by *Delaware Lawyer*. **M. Jane Brady**, Attorney General of the State of Delaware, **Edmond Falgowski**, Assistant U.S. Attorney, **Professor Michael I. Meyerson**, University of Baltimore Law School and author of "Authors, Editors and Uncommon Carriers," 71 Notre Dame Law Review 79 (1995), and **Ted Putkis**, owner of the Magnetic Page, a local Computer Internet access company, respond.

Q. IF YOU WERE CONCERNED ABOUT USERS CROSSING THE LINE ON THE INTERNET, WHAT LINE WOULD YOU BE REFERRING TO?

BRADY: "I would be concerned about security of and access to information that should be confidential. Examples would be victim information and criminal history information."

FALGOWSKI: "Crossing the line of legality, such as fraud, child porn distribution, hackers using the Internet in order to trespass into someone's system to download information or to destroy files with the use of viruses."

PUTKIS: "As I see it, the Internet has grown from an unregulated, grass roots communications medium with a free flow of information being passed back and forth by computer 'techies' and engineers, to a more regulated industry with the possibility of restrictions being placed by the individual or by the American media, businesses or government. Crossing the line to me would be one individual harming another individual or by having the government censoring use on the Internet."

MEYERSON: "For both the computer speaker and business, there is a virtual line -- the problem is finding out where it is. It could be established by a state, national or foreign government, or even by a private citizen. New times require brave souls. Success will come to risk takers. The lawyer's job will be to understand and explain the risks but not freeze the client out. One good motto would be: the more responsible you are as a person the better - move but don't push the limits too far. We need to strike a balance between the no-risk 50s and the no-limits 60s. In reality, this is a tough issue for lawyers that will require new ways of thinking and new skills."

Q. IN LAYMAN'S TERMS, HOW WOULD YOU DESCRIBE THE INTERNET?

BRADY: "It is a big almanac with access to information on news, sports, government and educational resources."

PUTKIS: "Being able to plug your computer into the biggest library that will ever exist and, within this library, with one click of your mouse, have access to different sources of information from around the globe including live videos, text and interactive media."

MEYERSON: "The Internet is basically nothing more that the means by which computers talk to one another. It was started by the U.S. government, spread to educators and is now used by anyone. It has grown with no plan and keeps changing in response to its users. It looks so anarchical because there has been no controlling authority, indeed no plan in its development."

Q. WHAT JURISDICTION HAS THE AUTHORITY TO DEFINE AND PROSECUTE CRIMINAL BEHAVIOR WHEN THE ACT OCCURS ON THE INTERNET?

BRADY: "Technology is advancing so quickly that it is now on a case by case analysis. States are using the access through phone companies as a focal point for limiting and preventing access to criminal activity such as gambling and pornography.

FALGOWSKI: "Federal and state statutes permit prosecution in the jurisdiction where the offense was begun or completed, or where the fraud in transmission on the Internet was initiated and where it was received."

PUTKIS: "Currently if someone is harassing me on the Internet, I would call the local police and the Computer Crimes Center gets involved."

MEYERSON: "As a starting point, the answer is undecided. There certainly have been prosecutions where the message is received. Others say, because there is currently no method to close off a given state, to avoid liability a computer speaker will have to obey the most restrictive state law."

Q. WHAT HAPPENS IF THE ACT IS COMMITTED OUTSIDE OF THE UNITED STATES BUT IS INTENDED TO CAUSE DAMAGE HERE?

FALGOWSKI: "Damage within the U.S. would be prosecuted within the U.S. or in their own country where there are relevant statutes. The United States must rely on the foreign nation to cooperate and conduct investigations. If the foreign country refuses to cooperate, the U.S. would not be permitted to conduct its own investigations. There have been cases in Switzerland where the Swiss police would not permit the F.B.I. to get involved and interview the Swiss suspects; the United States' hands were tied."

Q. ARE ANY NEW LAWS REQUIRED?

MEYERSON: "First, these issues may be addressed on a case by case basis, with judges applying the law of Thomas Jefferson to the technology of Bill Gates. Alternatively, the FCC could realize that when communications cross state lines we need an overreaching view to balance state and national law enforcement interests. Some problems, for example pornography, will be ameliorated by technology -- perhaps giving every parent the technical ability to block access to certain sites. For 70 years, there has been an international radio conference to divide up the spectrum. While not perfect, something analogous might work.

None of these solutions deals with defamation or equivalent issues. One might think of the Interment as going back to the small newspapers that existed when our country was formed. It is really democracy with a small 'd.' The problem with giving centralized control to governments is that the Internet offers the means for attacking dictators in the 21st Century.

Lawyers can play a part in creating the governing system for the Internet. However, it is an occupational hazard of lawyers to argue by analogy too often. Computers aren't just electronic printing presses; Prodigy isn't just an electronic bookstore. A new form of communication has been created and a new approach to regulating it is required. The lawyers who will be most successful in the next generation are those who know their client's technology best." ◆

FEATURE

Susan F. Paikin*
William J. Reynolds**

ETHICAL ISSUES IN INTERSTATE FAMILY SUPPORT LITIGATION

Delaware adopted the Uniform Interstate Family Support Act ("UIFSA"), effective July 1, 1995, repealing the Uniform Reciprocal Enforcement of Support Act ("URESA"). 13 *Del. C.* §§601 *et seq.* Family support issues in Delaware as well as in the 25 other states enacting UIFSA[1] are now controlled by a "one order, one time, one place" system. This policy choice is a radical change from the previous URESA standard allowing multiple, *de novo* orders in interstate support litigation. Similarly, unlike URESA, UIFSA redefines an interstate action to include any case where the individual seeking an order resides in a different state from that of the responding party. Incorporating both its own long-arm statute and unique procedural and substantive provisions available in all UIFSA litigation, the new Act's scope and applicability extend far beyond those of the uniform law it replaced.

It is beyond the scope of this article to discuss the myriad of litigation strategies, policies and procedures offered by UIFSA[2]. However, for those unfamiliar with the Act, three fundamental concepts need to be understood to place the ethical and practice concerns discussed here in context.

The first is the change to "one controlling order." Under URESA, support orders exist independently, often resulting in multiple, conflicting orders governing the same parties and children. Under UIFSA, only one order will be enforceable prospectively, even where multiple states are involved in enforcing it. Once a support order is established (or the decision is made as to which of multiple existing orders must be recognized as prospectively controlling, based on 13 *Del. C.* §617), the issuing state has continuing, exclusive jurisdiction (CEJ) to modify that order. In spousal support orders, jurisdiction may never be transferred. In child support cases, CEJ continues so long as either the child, the obligor, or the *individual* obligee resides in the state. The individual parties may take jurisdiction away from the issuing state and vest it elsewhere, provided they execute a written consent to that effect and file it with the issuing state. Regardless of such a change, the non-modifiable aspects of the original order (*e.g.,* the duration of the obligation) may not be modified in a subsequent jurisdiction.

Thus, a key decision to be made under UIFSA is which state's order controls the parties' situation. *When* this decision is made is also critical. UIFSA does not invalidate any order. States adopting the Act agree to recognize the same order prospectively. Until the controlling order determination is made, all existing orders continue to run, although payment under one acts as a *pro tanto* discharge of all others. The Full Faith and Credit for Child Support Orders Act (FFCCSOA), 28 U.S.C. §1738B, effective October 20, 1994, imposes a similar limitation on the modification of the support order of a sister state that applies to all states. [There are some critical differences that are expected to be corrected with the passage of welfare reform. Readers are urged to examine the comprehensive companion article by Margaret Campbell Haynes on this topic.]

Second, UIFSA creates a two-way street. URESA began its life as the "Runaway Pappy Act" and, generations later, still allows only obligees to initiate an action. Recognizing that parents may move for legitimate reasons and require access to the system, UIFSA remedies are offered to both obligors and obligees. Thus, litigation options are available to obligors (and, to a lesser extent, obligees) that were previously precluded.

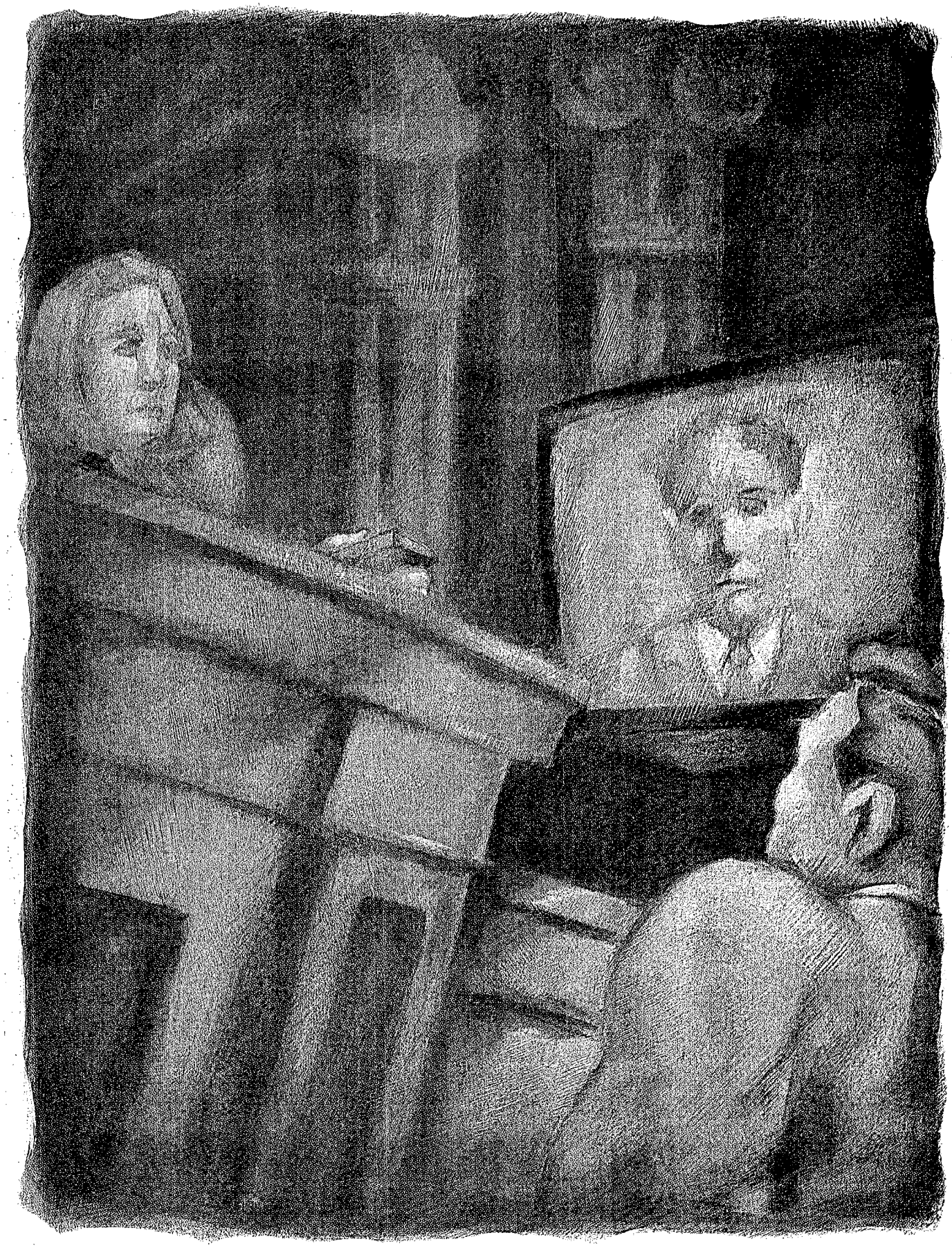


Illustration by Mike Wohnoutka

Third, recognizing the evidentiary challenges in interstate cases and seeking decisions made on complete evidence, UIFSA incorporates innovative techniques for the transmission of evidence and relaxation of the best evidence rule. These include the use of teleconferenced hearings; submission of evidence by facsimile transmission and other electronic means (13 *Del. C.* §635); and the use of the tribunal (either a court or administrative agency) of another state to conduct discovery at the behest of the jurisdiction where the case is being litigated (13 *Del. C.* §637). These evidentiary rules are available in UIFSA long-arm cases, as well as in litigation initiated out-of-state back into a jurisdiction with CEJ, and in the traditional two-state proceeding familiar to practitioners under URESA. For counsel, these rules permit participation at both the discovery and litigation stages across state lines (into and out of Delaware), raising both the opportunities and the potential pitfalls discussed below.

Changes in substantive law as well as multi-state issues often lead to significant problems in legal ethics. Child support is no exception. Practice under both UIFSA and URESA raises a number of interesting problems of practical ethics. This article identifies some of those problems and suggests a solution. Yet readers are well cautioned by the comments of Delaware Disciplinary Counsel, David Curtis Glebe, in the following article. For these purposes, UIFSA is treated as consistent with FFCCSOA to avoid more ambiguity. Until the federal law is changed, counsel must examine the practice issues raised here mindful of the existing statute and the unique problems the discrepancies create.

1. May (or must) an attorney tell former clients of these changes in the law of support? More specifically:

a. May counsel send a general letter to all former clients in whose cases child support was an issue, advising them of the changes in the law and recommending consultation with an attorney? Must the letter be directed only to present or former clients the lawyer has reason to believe will be affected by UIFSA?

•The problem here is that the letters may be treated by the Disciplinary Counsel as forbidden advertising/solicitation. Generally, informational advertising is treated as protected speech under the First Amendment, as long as it is truthful and not deceptive. *Zauder v. Ohio,* 471 U.S. 626 (1983). This protection extends to potential as well as former clients. *Shapera v. Kentucky Bar Ass'n,* 486 U.S. 466 (1988). Sending an informational letter, therefore, should be acceptable.

b. May such a general letter be directed to a former client who counsel knows now receives services for the Division of Child Support Enforcement (DCSE) under Title IV-D of the Social Security Act?

•The result should not change if the position on representation proffered by DCSE is sustained. The problem is that this letter now looks like a solicitation of someone currently represented by other counsel. However, although deputy attorneys general (DAG) file pleadings in non-welfare cases in the name of the individual client and make litigation strategy decisions, like many IV-D agencies, DCSE does not "represent" that person[3]. Thus, a solicitation mailed to a DCSE client is not a solicitation of another lawyer's clients. Note, however, ABA Informal Ethics Opinion 89-1528, issued June 5, 1989, concluding that IV-D counsel does represent the individual non-welfare client despite any assertions of the agency to the contrary.

2. Does an attorney's obligation change depending whether the impact of the law's change is favorable or unfavorable?

Lawyer Jones represented Marvin Smith in Delaware on an incoming URESA petition initiated from Texas (when that law governed both Texas and Delaware). Mr. and Mrs. Smith (Martha) were divorced in Texas in 1990. The Texas divorce order set child support at $200 per month. Martha and the parties' two daughters still live there. The Delaware Family Court hearing occurred in August 1993. After extended litigation, the Delaware URESA order set a current child support obligation for Marvin of $1050 per month. Marvin continues to live in Delaware and pays by wage attachment to his employer, DuPont. Payments go through the DCSE to the Texas IV-D agency and then to Martha.

a. Does Jones have an ethical obligation to advise Marvin that Texas is the state with continuing, exclusive jurisdiction and that the Texas order is controlling under the laws of both states?

•Yes, an attorney must always inform her client of controlling law. This is part of the duty of competence. Delaware Lawyers' Rule of Professional Conduct 1.1. Moreover, a lawyer must act within the bounds of the law. Rule 1.2.

b. Would the answer change if the Texas order were higher than the Delaware order? What if the duration of the support obligation under Texas law extends to age 24 if the child is in college?

•The answer is the same. An attorney must inform her client of governing law, even when it is very unfavorable.

c. Would the duty change if the litigation had occurred within the last 6 months? What if Ms. Jones had represented Marvin in this action 6 years ago?

•The answer does not change if the representation is a "continuing " one. Of course, that is a very fact-bound determination. If Marvin is a past client, then Jones may, but does not have to, tell Marvin of unfavorable changes in the law.

d. Does DCSE have an obligation to review Marvin's case to determine if the correct order is being enforced? Would the answer be different if Marvin changed jobs and DCSE transferred the wage attachment to Marvin's new employer? What if Marvin was in arrears and DCSE submitted his case for federal or state tax intercept?

•This question is under debate nationwide. As a purely practical view, no IV-D agency is likely to have the financial resources or manpower to do a complete census of its entire caseload and determine the controlling order for each case. Certainly, if a request for such a review is made by Martha, Marvin, Ms. Jones, or even the Texas child support agency, DCSE must respond promptly. Likewise, it is undisputed that if the agency lawyer signs a pleading, a CEJ review must take place.

The most probable compromise for those enforcement remedies that fall short of a contempt petition is that a review will take place only if hands touch the case on an individualized basis. Thus, remedies triggered by computer matches (*e.g.,* tax intercepts and, potentially, wage attachment transfers, property liens and other administrative remedies on the near horizon nationwide) are unlikely to be preceded by a CEJ evaluation.

While Marvin may assert a defense that the agency is enforcing the incorrect order, such a claim will only help him prospectively. Recall that UIFSA invalidates no order. In our case, arrears would accrue under a valid Delaware URESA order until there is a determination that the Texas order is controlling. Upon such a determination, both Delaware and Texas must recognize and prospectively enforce the $200 monthly Texas order. Further, both states must acknowledge that *only* Texas has jurisdiction to modify Marvin's obligation from this sum.

While some child support enforcement agencies eventually may elect to notify all litigants in IV-D cases of the changes wrought by UIFSA and FFCCSOA (perhaps out of concern that the ABA Informal Ethics Opinion may be proved right), private counsel should not rely on such action.

e. Is it a Rule 11 violation for either public or private counsel to file a petition for enforcement or modification without first conducting a CEJ review?

•Any filing violates Rule 11 if an adequate pre-filing investigation has not been made. A petition to enforce or modify an existing order without determining whether the request is justified under the present circumstances or whether the court in which it is filed has jurisdiction, would violate Rule 11.

f. What if private counsel representing Martha "files" a request to transfer an existing wage attachment to Marvin's new employer? Submits the case to DCSE for a tax intercept? Uses enforcement remedies such as bank levies, license revocation and property liens, available in Delaware or elsewhere?

•Same answer. These are all very effective enforcement methods. An attorney using them, however, first must ascertain that the request is justified by the law and the facts.

3. When does counsel cross the line by "appearing" in another state?

Lawyer Jones successfully petitions the Delaware Family Court to recognize the Texas order as controlling and to vacate the wage attachment issued with the Delaware URESA order. Martha then files in Texas to modify the Texas divorce order and to increase Marvin's child support obligation to an amount calculated under that state's child support guidelines based on the parties' current circumstances.

This action raises the following problems:

a. May Ms. Jones assist Marvin in completing his interstate testimony (on provided federal forms) for use in the Texas hearing? May she submit a discovery request to Martha through the Texas IV-D agency?

•In 1993, the ABA Model Rule 8.5 was amended by the House of Delegates to adopt a changed choice-of-law rule. Attorneys remain subject to the ethical rules of the jurisdiction where they are admitted. If admitted to more than one state, the rules where the attorney practices primarily control. However, if the predominant effect of the attorney's conduct is in another jurisdiction, those rules apply. Rule 8.5 (b)(2)(ii).

In this circumstance, were Amended Rule 8.5 operative, Texas's ethical rules would apply to the Smiths' Texas litigation. Appearing in a Texas forum is likely to be thought of as practicing law there, and that, of course, would require either a Texas license or an admission *pro hac vice.* Neither activity described above is likely to fall within that prohibition, however.

b. May Jones participate in the teleconferenced hearing on Martha's petition by being present to advise Marvin? By direct examination of Marvin on his income and other circumstances affecting the setting of the support obligation? By cross-examining Martha and presenting legal arguments to the Texas court?

•Unfortunately, in all these situations Jones probably is "appearing" in the Texas court and must satisfy applicable Texas admission rules. This result is flatly inconsistent with a major purpose of UIFSA: to make interstate child support litigation easier and less expensive, a goal that led to permission for the widespread use of teleconferencing. We only hope that a sensitive state court will rule that participating in the activities described above does not require expensive procedures related to admission, even temporarily, in the forum. Yet the issue of the unauthorized practice of law is an important one, to the Bar and its members. Given the substantial flow of child support litigation that is inevitable, particularly among border states, the balancing act between furthering UIFSA's intent, while maintaining control of the licensing of attorneys, may prove to be delicate. Whether special rules should be carved out for child support litigation, or the changing practice of law in all areas warrants reexamination of licensing, are open questions. The following article by David Glebe is instructive of the dilemmas raised by this issue.

c. Does the answer change if Jones files a *pro hac vice* motion in Texas? Is local counsel required to be present in Texas? May a Texas DAG serve as Marvin's local counsel or as Ms. Jones's sponsor (the Attorney General's office is the IV-D agency in Texas)?

•The answer to all three questions is a qualified "yes." The real answer depends on the local Texas rules — an understanding of which requires expensive local counsel. As to the agency attorney serving the double role of bringing the petition on behalf of Martha and moving Ms. Jones's admission *pro hac vice* to represent the opposing party, it is difficult to imagine how a lawyer can zealously fulfill both roles, even if the DAG does not consider Martha his client. It remains difficult to imagine that such a convergence of counsel would pass court muster. At a minimum, a second DAG should be involved to sponsor and assist Ms. Jones.

4. Are there other problems raised by interstate child support litigation under UIFSA?

Jenny Jones is a support obligor under an order from Massachusetts in the amount of $2000 per month for four children fathered by Jeffrey Jennings. That order was entered in 1986 when Jenny lived in Massachusetts and worked for Time-Warner. At the time, she earned $80,000 per year. Jeffrey worked part time while he finished law school and the children's day care expenses were $600 per month. In 1993, Jenny quit her job, moved to Delaware and went to work for the State at a substantially lower salary.

Jeffrey tracked her down and filed a petition for Interstate Income Withholding in 1994. Although Jenny argued at the time that the order was too high and the parties' circumstances had changed, she had no permissible defense. An income withholding order issued for the full sum: only $800 per month is being withheld due to the applicable consumer credit protection limit, Jenny's support order for another child and a federal tax lien. David Rich, her Delaware counsel, advised her to return to Massachusetts and seek a modification. She has not done so because she cannot afford the travel costs and because she fears she will end up in jail due to the accumulated arrears. Jeffrey now makes $150,000 per year as a family law attorney, the children are all teenagers, and Jenny grosses $38,000 per year. She has made the Massachusetts list of the 10 Most Wanted Child Support Delinquents.

a. May Rich advise Jenny on the completion of the federal forms (petition, testimony and exhibits) but have her sign and file the petition in Massachusetts *pro se*?

b. May Rich directly file Jenny's modification petition in Massachusetts if he is not admitted to practice there?

•Advice on federal forms does not seem to be the practice of law in another state. No special expertise in Massachusetts law is required under the facts of this case. Although UIFSA requires that a modification petition specify the basis, because the order is more than three years old it is subject to "review and adjustment" if Jenny requests. Although Rich may want to "go for it," his signa-

ture on a petition is likely to cross the line and create an unauthorized practice problem with the Massachusetts court. He certainly can help Jenny complete the forms and make the request for an administrative review of the order to determine if a modification is warranted. (This case highlights the agency's own conflicts: it is required to review the case for potential modification while simultaneously asserting the strongest possible enforcement of the original order: arrest and prosecution for contempt.)

c. When and how can Rich file a *pro hac vice motion*?

•A *pro hac vice* motion is filed by a lawyer in good standing with the bar, with the assistance of local counsel who is willing to vouch for the movant. The seriousness with which these steps are treated depends on the jurisdiction, but generally they are not very onerous. Nevertheless, when you are dealing with people with little money to spare, every little bit adds up very quickly.

d. Do any of the questions regarding participation in the hearing discussed for the last case change where the Delaware resident is the petitioner?

•Under the facts of this case, the answers are likely unchanged. The case is still solely a Massachusetts action, heard in that forum and governed by its rules.

e. Must Rich advise Jenny of the availability and nature of IV-D services before taking her case? Will the availability of IV-D services limit the ability of private counsel to recover counsel fees under UIFSA? (See 13 *Del. C.* §§632 and 624(b)(11)). May the Massachusetts IV-D attorney undertake to "represent" Jenny on her petition or assist in the presentation of her petition, given the posture of the case there?

•At a minimum, it appears to be the better practice to advise a potential client that there are public services that may be obtained at substantially lower cost, before a fee dispute arises. This disclosure (noting the advantages, limitations and constraints of those services — including the agency's position that its lawyers do not "represent" the individual client) is particularly apt under the facts of the case discussed here, where Rich is not licensed in the state where the litigation will take place. If Jenny elects to use private counsel, nothing in UIFSA would cause or authorize the court to limit fees. The Act specifically acknowledges the right of private counsel to initiate and participate in its proceedings.

As to the involvement of the Massachusetts agency, under federal regulations a state child support enforcement agency

may not impose a residency requirement for services and must accept all applicants. UIFSA also requires the "support enforcement agency" to provide delineated services to *any petitioner* under "this chapter." 13 *Del. C.* §626. The fact that Jenny is on its *10 Most Wanted* list, does not permit that state to refuse her. Jenny certainly may apply directly for IV-D services in Massachusetts: the basic concerns raised above continue unabated. UIFSA specifies that the Act does nothing to "create or negate a relationship of attorney and client or other fiduciary relationship between a support enforcement agency or the attorney for the agency and the individual being assisted by the agency." 13 *Del. C.* §626(c). The agency's rules and regulations govern its relationship to Jenny. What assistance will be provided, by whom, and what enforcement remedies the agency will also elect to use against her, should be explored by Rich when developing Jenny's litigation options.

e. May a Delaware DAG undertake to "represent" Jenny in her Massachusetts petition by directly filing a UIFSA petition for a modification decrease on her behalf and/or by participating in a teleconferenced hearing on her petition? May private counsel and a DAG work as co-counsel on her behalf?

•A local agency can always assist a qualifying individual to fill out forms in that jurisdiction. Filing them in another jurisdiction on her behalf raises once again the question of unauthorized practice of law. The status of a public attorney who "represents" the Delaware DCSE rather than the individual should have no impact. A license or a *pro hac vice* motion is required to practice in a foreign jurisdiction. Cooperation between private counsel and a DAG for DCSE is a viable option. The practice of telling a party that she has "declined IV-D services" by using private counsel to file a pleading or appear with her in court has passed in Delaware. Whether the "rules of engagement" and terms of shared responsibility have been defined is unclear.

Conclusion

The ethical and practice issues brought on by Delaware's adoption of UIFSA are new territory. This article is intended to stimulate discussion: analysis is offered, but definitive answers and resulting policy and rule changes are unknown. Care is warranted and advice should be sought. While the impetus for the ethics debate today is child support, the development of legal practice that easily crosses state, national or "virtual" borders makes the ramifications of this discussion applicable well beyond family law practitioners.

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FOOTNOTES:

1. As of 1/1/96, UIFSA has been enacted in Alaska, Arizona, Arkansas, Colorado, Delaware, Idaho, Illinois, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Virginia, Washington, Wisconsin and Wyoming.

2. For more detailed discussion of UIFSA and interstate child support litigation in general, the reader is referred to two recent publications: Marian Dobbs, Margaret Campbell Haynes and Marilyn Ray Smith, **Enforcing Child & Spousal Support Orders** (Clark Boardman Callahan, 1995); and " Interstate Support Proceedings," by Susan F. Paikin, Chapter 48 in **Family Law and Practice** (Matthew Bender, 1996) (April). The ABA Center on Children and the Law, in conjunction with the Center for the Support of Children, presented a training seminar specifically designed for Delaware attorneys, "How to Use UIFSA to Collect Interstate Child Support." Limited copies of the conference notebook are available for purchase.

3. More specifically, the agency has taken the position that the DAG for DCSE represents DCSE itself. Agency counsel should take special care to inform the individual receiving services that he or she is not the "client." ◆

Continued from page 8

global existence. Disagreements have developed as far-thinking profiteers have secured domain names such as mcdonalds.com or mtv.com. *See, MTV Networks v. Curry,* 867 F. Supp. 202 (S.D.N.Y. 1994). An Internet Registry has been created to curtail the problems inherent in the acquisition and protection of this type of property right. As the electronic transmission and retransmission of information becomes more common, both nationally and internationally, significant issues will arise regarding the protections to be afforded to intellectual property available globally.

Crossing the Line of Privacy

A number of interesting privacy issues arise in connection with the Internet. It is important for us as employers, and as counselors, to know that many electronic privacy issues are controlled by The Electronic Privacy Act of 1986, 18 U.S.C. §§2510 *et seq.* This Act significantly affects the *do's* and *dont's* of access to e-mail. The statute prohibits invasion of communications from a sender to a recipient, barring any person from intentionally "intercept[ing] any wire, oral, or electronic communication."

So, before you cross the line of invading someone's privacy, take a careful look at this Act.

Crossing the Line of Decency

The most notorious development about the Internet is free and easy access to smut and violence. The most prominent example is the conduct that led to the prosecution of Jake Baker, a student at the University of Michigan, in 1995. In the fall of 1994, Baker wrote a graphic article involving the rape, torture and murder of a couple and posted it on the Internet. After receiving a number of appropriately outraged reviews, he posted a second, similar article. The articles caught the eye of another Internet user who possessed similar fantasies. The two men began communicating on the Internet, sharing stories, plots and fantasies. Now encouraged, Baker posted yet another article of similar content in January 1995. In this piece, however, the name of the victim was coincidentally the same as that of a coed at the University.

Once the University officials were notified, Baker was confronted: he consented to a room search and was suspended. During the search, the University security found private communications between Baker and his Internet

friend, detailing horrific crimes and torture. The federal authorities were notified and the material was confiscated. Baker was arrested for violation of 18 U.S.C. §875(c) for transmission of communications containing threats to kidnap or injure another. Baker took the position that the writings were merely fiction and fantasy and that no "real" person was threatened. The case was ultimately dismissed. In its opinion, the court noted: "The government's enthusiastic beginning petered out to a salvage effort, once it recognized that the communication which so much alarmed the University of Michigan officials was only a rather savage and tasteless piece of fiction." The dismissal is on appeal.

Obscenity and pornography are equally troublesome. There are hundreds, if not thousands, of sites dealing in sex, porn and obscenity. Since the access to information is available internationally, the development and enforcement of laws is problematic. It may very well be that the availability of sexually explicit material is the catalyst that draws many adults and children onto the Internet. Thousands of hard-core images are available to be viewed or retrieved. *See* Reuters, "Two Employees at Nuclear Lab Face Pornography Charges, Washington Post", August 19, 1994, at A20. Hundreds of discussion groups (newsgroups) have been created for the sole purposes of drawing readers and participants into their dens of pornographic iniquity.

The electronic on-line service organizations have been the focus of media and court attention regarding their delivery of sexually explicit information. In December 1995, the German government pressured CompuServe to block worldwide Internet access to hundreds of sexually oriented Internet sites. Information service providers are subject to criticism both for providing their subscribers with access to sexually offensive materials, on the one hand, and for limiting individual First Amendment rights, on the other hand. Of course, the threat of prosecution under state or federal obscenity laws is also present. In 1994, one such provider, the operator of an electronic bulletin board service, was convicted of violating Federal law by transmitting pornographic images from California to Tennessee. Landis, "*Regulating Porn: Does it Compute*"? *USA Today,* August 9, 1994. In 1994, Carnegie Mellon University restricted student access to pornographic material on the Internet, setting off a barrage of

debates. Branscomb, *Internet Babylon*, 83 Geo. L.J. 1935 (1995).

Legal opinions involving sexually explicit material on the Internet are not difficult to locate. A recent copyright infringement opinion relates to centerfold images that were scanned onto a local electronic bulletin board system. *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993). Or, if you are interested in Howard Stern's anatomy, take a look at *Stern v. Delphi Internet Services Corp.*, 626 N.Y.S. 2d 694 (N.Y. Supr. Ct. 1995), in which Stern claimed that Delphi misappropriated his buttocks.

More troubling than the legal aspects of these matters are the practical problems, as children spend more and more uncontrolled time on the Internet.

Crossing the Line of Ethics

As the use of the Internet in the practice of law develops, it is obvious that ethical issues concerning that use will follow. To what extent can a lawyer advertise on the Internet? Is there any impropriety in designing and maintaining a Home Page — an electronic brochure, if you will — for all to see? Hundreds of firms are experimenting with the potential use of this application. How about forwarding an electronic advertisement that will reach millions of users who have absolutely no need or desire to contact a lawyer? States are reviewing the current practices of attorneys in this regard. Taylor, *"Eyes of Texas Are Upon Internet 'Ads,'" National Law Journal*, November 6, 1995. There is little question that lawyers are already "crossing the line."

One of the significant uses of the Internet involves discussion groups that focus on specific areas of interest. Many such groups discuss legal issues. As opinions and information regarding such issues are transmitted to the public on the Internet, questions will no doubt develop over the potentially unauthorized practice of law. Since there appear to be no geographical boundaries, other restrictions may be needed to regulate the practice of law on the Internet. It is foreseeable that, someday, the Internet may take on the characteristics of a global community with its own government and laws. Those laws will be interpreted by the Internet Court and advocated by the Internet Bar. I do hope that Delaware has reciprocity: I really do not relish the idea of taking another bar exam.

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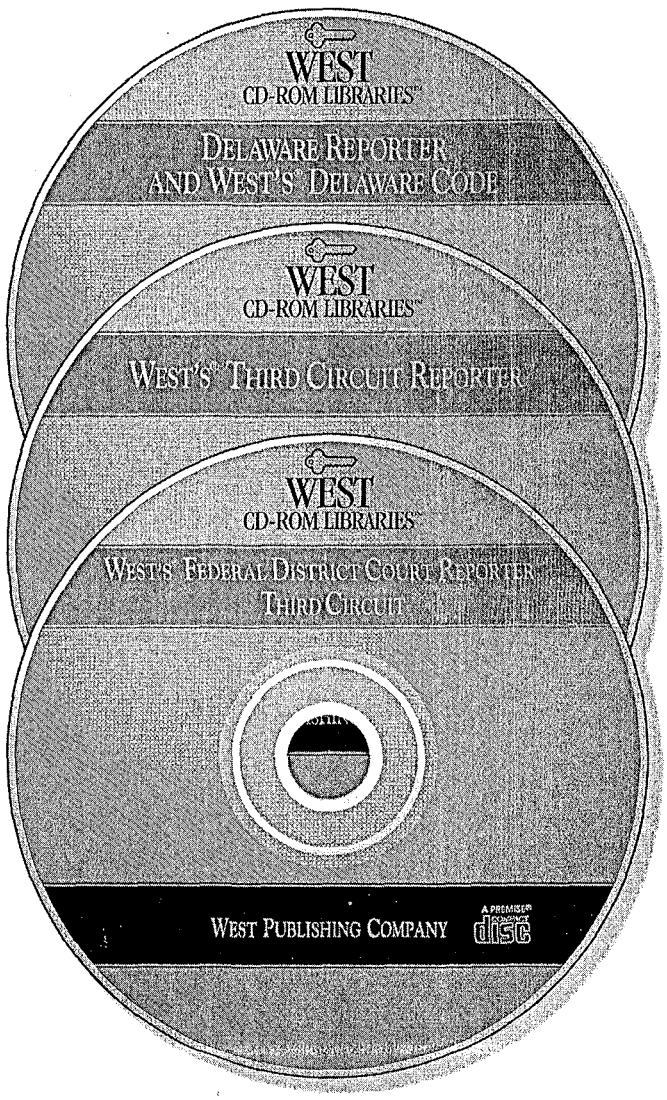

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FEATURE

David Curtis Glebe*

INTERSTATE PRACTICE AND THE UNAUTHORIZED PRACTICE OF LAW: UNCERTAINTIES MANDATE PROFESSIONAL CAUTION

The problem of defining the standards of the unauthorized practice of law is not new, since it has traditionally been a difficult task to define what the "practice of law" is in the first place. The beginnings of the concept of "unauthorized practice" in the Anglo-American tradition can be traced as far back as A.D. 1215 in the Great Charter of King John (known as the "Magna Carta"), which states at Article 45 that the Crown "will not make any justices, constables, sheriffs, or bailiffs, but of such as know the law of the realm and mean duly to observe it." Presumably, if you did not know "the law of the realm," then you should not be undertaking to administer it in any official capacity. This is roughly equivalent to saying that if you act as an officer of the court, as a lawyer does, then you need to have been authorized in some way.

The typical kind of "authorization" to practice law, of course, comes from being officially admitted to practice in some jurisdiction, normally after receiving training in a law school, passing a bar examination, and satisfying character and other requirements. If you wanted to practice law outside of your jurisdiction, however, you were venturing into "unauthorized" territory, and risking disciplinary action against you in your home jurisdiction. *See, e.g.*, D.L.R.P.C. 5.5(a) ("a lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction"). Therefore, you still had to be authorized, at least on a temporary basis, in that "foreign" jurisdiction. This is generally the simple model upon which legal practice and its regulation in this country have developed.

Unfortunately, the simple regulatory model has become outdated. The "practice of law" in many ways has become too complex and sophisticated to be regarded as an activity that is always contained within the bounds of any one jurisdiction. Natural persons and other legal entities have become increasingly mobile and, so, less likely to reside in one jurisdiction alone. And with the amazing advances of computer technology it is becoming harder and harder to determine such a simple thing as one's "location," one of the primary concepts upon which the notion of "jurisdiction" is based.

For example, when a law firm establishes a "web site" on the Internet, which is accessible not only in every jurisdiction across the country but around the world, it is not even intuitively apparent how the firm's location in cyberspace is supposed to translate into the firm's location in plain-old-ordinary space. We are consequently going to have to change our traditional concepts of the regulation of the practice of law in order to accommodate and address the new problems arising in the real world, especially with regard to interstate practice.

For these and other reasons, the status of the law with respect to "unauthorized practice" has been in a state of flux, although we have made some progress. In Delaware, problems dealing with the unauthorized practice of law ("UPL") had for many years been investigated by a committee of the Delaware State Bar Association. In fact, the leading UPL case in Delaware to the present day arose out of an action by the Bar Association to prohibit a local non-lawyer, Thomas Alexander, Jr., from engaging in certain activities said to constitute UPL. *See Delaware State Bar Ass'n v. Alexander*, Del. Supr., 386 A.2d 652 (1978). One of the procedural issues that used to arise, however, was the standing of the Bar Association to bring such actions in the first place, since in Delaware the Bar Association has no "official" status, but is merely a professional society.

In 1991, pursuant to its Rule 86, the Delaware Supreme Court clarified and improved this situation with the creation of the Board on the Unauthorized Practice of Law. The Board was thereby established as an official arm of the Court with the standing and authority to issue orders affecting the practice of law in Delaware. The Office of Disciplinary Counsel ("ODC") was charged by the Court with the tasks of investigating and prosecuting UPL cases before the Board, thus broadening its scope of activity beyond the discipline of Delaware lawyers alone. The ODC also performs both intake and administrative functions for all matters involving UPL:

docketing new matters, retaining all files and documents, compiling statistical reports for the Board and the Court, and so on.

In the few years since the Board's creation, the ODC has docketed close to 120 UPL cases. As of this date, the great majority of those matters have been resolved, either through dismissal by the Board, through the voluntary agreement to "cease and desist" by the person or entity being investigated, or through a Board order following a formal proceeding. Since relatively few UPL cases have been resolved by an official order of the Board, however, we are still not as close as we would like to be to a practical definition of "UPL." In other words, there is still a substantial degree of uncertainty.

This uncertainty in the law goes beyond Delaware, and has recently been the subject of a comprehensive study by the American Bar Association. Last August, the ABA finally published a report called "Nonlawyer Activity in Law-Related Situations," which contains several recommendations regarding UPL. That report has been criticized, however, for its use of broad generalities rather than specific and practical proposals. There were also strong dissents among the ABA Commission members on some of the fundamental issues considered. Consequently, it would appear that even a comprehensive and nationwide study of UPL has not yielded ready answers.

In the course of handling UPL cases, both the Board and the ODC have routinely referred back to *Alexander* for guidance in trying to set the limits on "UPL," as applied to specific circumstances. A broad, working definition of UPL that has evolved over the last few years encompasses any or all of the following four general indicia:

(1) holding oneself out to third parties as authorized to practice law when one is not so authorized,

(2) representing a person (other than oneself) in a Delaware legal tribunal,

(3) preparing legal documents for use in a Delaware legal tribunal for a person (other than oneself), except when supervised by one who is authorized to practice law, and

(4) giving legal advice pertaining to Delaware law.

In addition, the acceptance by a nonlawyer of "legal fees" may also be considered an aspect of UPL although, without any other indicia present, it may only be a matter of characterization.

The problem with these general guidelines, as is the problem with any working definition, is in the application to specific circumstances. Accordingly, many areas of the law relating to UPL remain unsettled, especially in connection with the interstate practice of law by "real" lawyers. While it is not that difficult to order a person who has never been admitted to practice law in any jurisdiction to "cease and desist" doing so in Delaware, it is not that easy to regulate conduct when the person *has* been admitted to practice law, perhaps even in Delaware itself by the *pro hac vice* procedure. In fact, many of the most difficult UPL cases handled by both the Board and the ODC over the years do not involve non-lawyers, but involve non-Delaware lawyers whose interstate legal practices affect Delaware and its residents in one way or another.

For example, the ODC reviews, monitors, and maintains all of the *pro hac vice* motions that are filed in the Delaware courts. We have even developed a special computer program to track these motions, in order to determine whether attorneys are potentially abusing the *pro hac vice* privilege. Over the past few years, the Board has asked the ODC to investigate several non-Delaware lawyers who have been admitted *pro hac vice* to Delaware legal proceedings. If an attorney is specially admitted to Delaware tribunals repeatedly, on a virtually routine basis, that is a possible UPL problem. If the attorney has an office in Delaware but is not a Delaware lawyer, and practices only through *pro hac vice* appearances, that is a possible UPL problem. If an attorney's *pro hac vice* application is misleading to the court or to the Delaware lawyer who moved the attorney's admission, that can be both a UPL problem and a disciplinary problem. *See, e.g., Matter of Kennedy*, Del. Supr., Misc. No. 273, 1993 (6/28/93) (when lawyer admitted *pro hac vice* in Delaware court was suspended in home state and failed to inform Delaware court of suspension, lawyer's *pro hac vice* privilege in Delaware was suspended for three years).

The ODC routinely receives many telephone calls, from both Delaware lawyers and non-Delaware lawyers, asking for guidance as to what they can and cannot do either in or out of the state. Can a non-Delaware lawyer perform a real estate settlement in Delaware? Can a Delaware lawyer draft a contract for a non-Delaware client, where the contract is not governed by Delaware law? Can a non-Delaware lawyer draft a will (or some other legal instrument) in another state for use by a Delaware resident? Can a non-Delaware lawyer participate in a civil proceeding by conference call without being admitted *pro hac vice*? What about an out-of-state deposition? Can a non-Delaware lawyer outside of Delaware give his or her client a formal legal opinion on Delaware law, or can a Delaware lawyer similarly opine (while in Delaware) on non-Delaware law? In many of these situations, a common practice has developed among lawyers whose work crosses jurisdictional boundaries. But until the case law develops further in order to legitimize and "authorize" such practices, there can obviously be professional risks.

While the ODC cannot give legal advice, we normally inform such inquisitive persons of the general indicia of UPL that we have garnered from *Alexander* and other cases, as listed above, and suggest that they do some legal research on their particular situation. We also strongly urge caution in this area because of the developing nature of the law. If a lawyer is not certain as to his or her course of action with respect to a question of interstate practice, the best course will probably be the most cautious one. As we frequently tell people who call the ODC, making the wrong move in this situation will not only make it more likely that a UPL investigation could be initiated, but that a corresponding disciplinary matter might be opened as well. Neither prospect is very pleasant, even if your conduct is not ultimately found to have been improper.

The "bottom line" for now with respect to interstate practice is, therefore, to be as professionally cautious as possible. Until the law and the everyday legal practice customs fully develop in this area, there will still be uncertainty. A lawyer who needs a definite answer in a specific situation should not hesitate to obtain a formal legal opinion, such as is available to Delaware lawyers through the Professional Ethics Committee of the Bar Association. If you can afford to pay a legal fee, it is advisable to obtain a formal legal opinion on your situation from another lawyer.

In light of the foregoing, I strongly suggest that the lawyer giving you that opinion be admitted to the jurisdiction as to which you inquire.

*Chief Disciplinary Counsel, Office of Disciplinary Counsel, State of Delaware. ◆

FEATURE

Bayless Manning*

NEW PATTERNS IN INTERNATIONAL LAW PRACTICE

"The old order changeth, yielding place to new." (Tennyson)

The sum of published literature under the rubric of "international law" has multiplied geometrically in the past decade. This mass of commentary attests to the sea change that has occurred so quickly in the patterns of international law practice.

The term "international law" continues of course to be fork-tongued. In one of its two meanings, the phrase refers to that amorphous accretion of traffic rules that have been (more or less) acceded to out of self-interest by princes, principalities, states and nations and that are (more or less) honored by them in the conduct of their interrelationships. It may be that this bundle of "public international law" is significantly more developed and operational than it was 50 years ago (as libraries of law texts on the subject and their authors contend). But the sea change to which I refer lies not in that area but in the area of transnational private business transactions.

I. U.S. International Business Law Work, 1900-1980.

The institutional history of international business law work in the United States in this century displays a clear progression. Throughout this period, some U.S. law firms, some transactions, and some client relationships have steadily been becoming more "international."

By 1900, a handful of lawyer specialists had emerged who were called by themselves or others "international lawyers." Probably each of these lawyers was a unique and idiosyncratic instance — an unusual fellow who possessed some personal linkage or background that put him in a position to serve as a connector between locations in two different countries. A paradigm was the Coudert Freres firm, with its inborn twin identities in Paris and New York.

In the 1950s — the era of world economic vacuum and overwhelming U.S. economic dominance — many large American companies for the first time went abroad and established manufacturing plants, sales and sub-headquarters facilities and raw material resource operations in other countries. That development posed a direct challenge for the big-city U.S. law firms that were general counsel to those companies — general counsel in a sense largely forgotten today, for the day of sophisticated, large-scale, in-house counsel offices had not yet dawned. The law firm had little choice: it had to follow the flag of its clients or lose the client to a more nimble competitor U.S. firm. Overnight, it seemed, U.S. law firms opened overseas branch offices, usually only one and usually located in the new European Economic Community. By the 1960s, parallel activities were under way in parts of Asia. Client profile changed little. But lawyer specialists were recruited or trained for the overseas offices of these new "international" law firms.

In the 1970s and '80s, ambitious firms increasingly began to think of attracting client sources that were not U.S.-based. They felt compelled to consider establishing overseas branches —- not only to follow existing clients but to compete in places (such as Hong Kong) that were perceived to be promising for client development.

As in so many other respects, Japan was a special case. In the 1970s, a U.S. law firm could envision a Tokyo office as a search party or marketing vehicle — working in Japan to generate Japanese clients that would be served by the law firm's U.S. office in respect of the Japanese client's investments or operations within the U.S.

So matters stood in the mid-1980s — a very different picture from that of 1900.

II. The 1990s Environmental Shift

In and since the late 1980s, still further macro-change has come to the field. The underlying source of that change is worldwide and generic. It lies in the sudden globalization of trade and capital markets. This incredible and unprecedented event has been brought about by the convergence of several seismic forces in a few brief years: the collapse of the Cold War, the explosion of communication technology, the opening of closed economies, the deregulation of fund flows and the replacement

of U.S. economic dominance by the emergence of multiple capital centers.

Capital transfers, transactional agreements and informational access today have no geography. Electrons do not care where they go, and everywhere in the world a debit in one place is a speed-of-light credit in another. Increasingly, major economic activities — stock and gold markets, for example — have no locus or have simultaneous multiple loci.

With this new open environment in place, transactions of a wholly new character become possible. Business transactions in the former compartmented world — to the extent permitted at all — were forced to be essentially bilateral in character. To work out a three-party countertrade deal was an extraordinary and creative event. Supplementing — even supplanting — that binary world of commerce has come a world of multilateralized transactions. As in the other aspects of today's communications, it is becoming possible and is often more efficient to replace the bilateral with the network.

III. U.S. Intermestic Practice

Before moving on to consider the 1990's and their aftermath, it is convenient to pause for brief comment on an arena of U.S. international business practice in which the state of affairs prevailing for the past decade will predictably continue to prevail for the foreseeable future.

In the U.S. today, one need only glance anywhere to sense the ubiquity of goods, services and enterprises from abroad. In every case, those evidences reflect the earlier occurrence of some form of international business law transaction. In the main, those transactions are essentially binary in character. A foreign enterprise buys or rents property or acquires a local U.S. company; a U.S. lender finances a foreign borrower in the U.S.; or U.S. importers or exporters deal with counterparts abroad. Where the transaction is binary or nearly so, where one of the parties is a U.S. enterprise and where the transaction itself has in some sense a U.S. presence, there was law work to be done in the U.S., and it was nearly always done either in-house or by a U.S. law firm.

But what kind of U.S. law firm? A variety of permutations exist.

In instances such as representation of a large Japanese automobile manufacturer, a large U.S. "international" law firm will have been selected to represent the client in the U.S. generally. If local counsel is needed, it is selected by the lead firm.

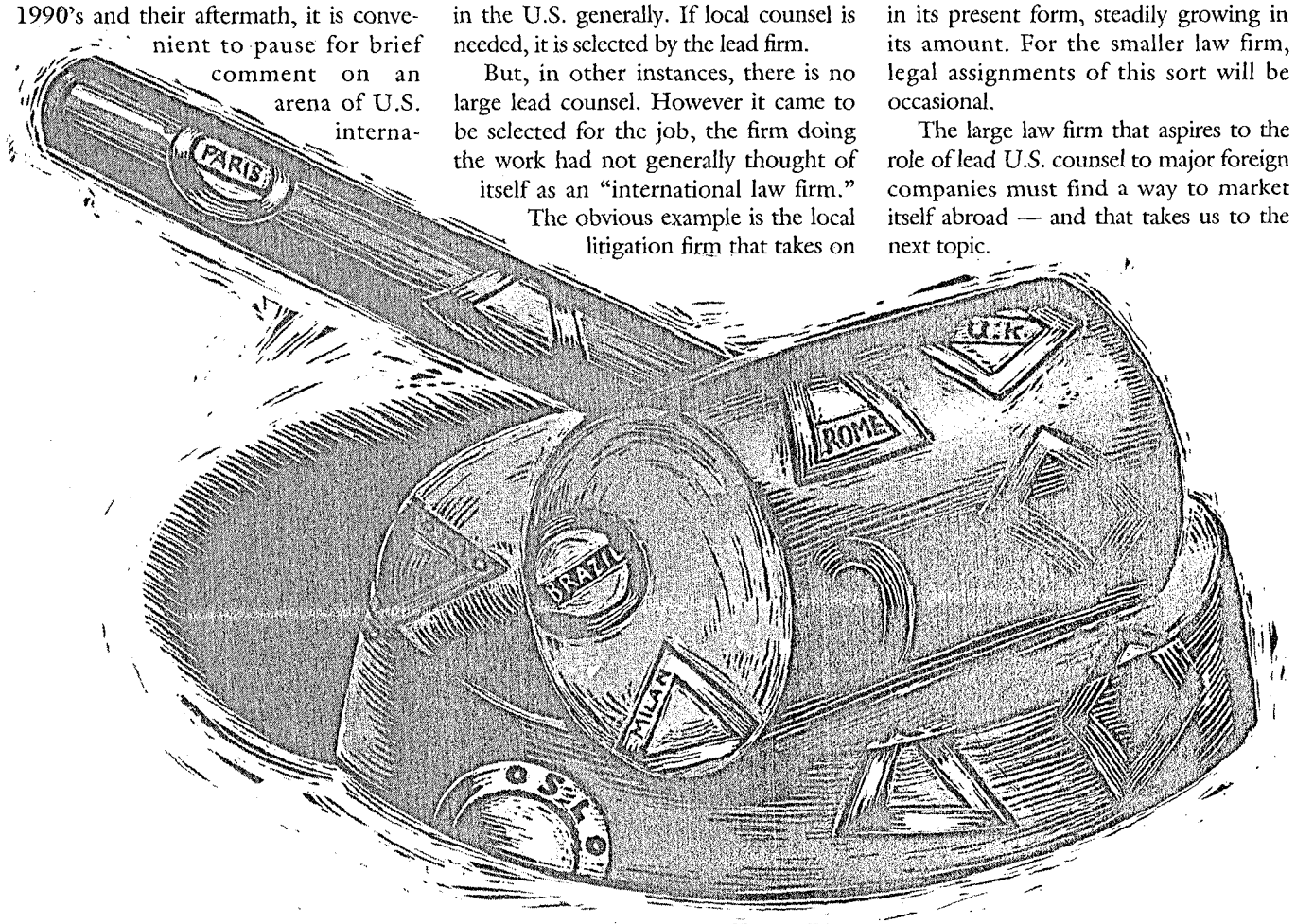
But, in other instances, there is no large lead counsel. However it came to be selected for the job, the firm doing the work had not generally thought of itself as an "international law firm." The obvious example is the local litigation firm that takes on representation of a foreign company in local court proceedings. Another example is the local firm specializing in labor relations that helps its non-U.S. client comply with state antidiscrimination laws. Increasingly, even the most local firm will on reflection recognize that it has — almost without knowing it — begun to be involved in some degree in "international law practice."

Perhaps there are and will continue to be in the United States some local law firms made up of local lawyers practicing only local law in local transactions involving exclusively local clients and other local parties. But as one spells out all the ingredients of pure domestic commercial practice, it becomes apparent that local practice in a strict sense is not easy to find.

Law work becomes a mix of domestic and international-just as a century ago local firms became "interstate" law firms as, with the growing integration of the national economy, they worked on transactions that crossed state lines.

The U.S. firm engaged in intermestic practice becomes the norm. International law practice in this subcategory can be expected to continue indefinitely in its present form, steadily growing in its amount. For the smaller law firm, legal assignments of this sort will be occasional.

The large law firm that aspires to the role of lead U.S. counsel to major foreign companies must find a way to market itself abroad — and that takes us to the next topic.



IV. The 1990s Competitive Shift

Returning to the wider implications of economic globalization, it is evident that the developments of the most recent decade present immense opportunities for international business law practice. Other happenings are afoot, however, that are, from the perspective of the great U.S. international law firms of the 1980s, less cheerful.

1. The institution of the large scale, business-based law firm is an American invention. But successful inventions tend to be adopted and copied by others. Not yet sufficiently noted in the U.S. is the fact that business law firms outside the U.S. are shedding their past and improving dramatically. Functional approximations of U.S. business law firms can be found today not only in England, the Netherlands, Germany and other European capitals, but also in Mexico City, Buenos Aires, Tokyo and elsewhere. Yet another arena of former, comfortable U.S. monopoly has become a competitive arena.

2. In the new open lattice network international setting of the 1990s, U.S. law firms suffer from several serious competitive disadvantages.

- Most U.S. law firms radiate the cultural parochialism and weltschmerzlichkeit characteristic of Americans generally. Very few lawyers in these U.S. firms have language competence other than English. As in much of corporate America, the "international practice section" of the law firm has with rare exception been perceived as a special, even slightly exotic, inviolate in the corpus of the firm — not rejected, but not wholly integrated either.
- Few U.S. lawyers have a familiarity with Continental or other legal traditions. And fewer still are familiar with the radically different institutional structures of non-U.S. business enterprises.
- The hyper-lawyered, mega-documentational style of American business law practice is not only unique in the world, it is despised elsewhere in the world.
- However abstractly admirable the exalted ethical standards demanded by top U.S. law firms of themselves and their clients, rigorous application by U.S. law firms of those standards outside the U.S. infuriates non-U.S. clients or, at a minimum, strikes them as intrusive and unnecessary.
- And then there is the little matter of expense, as the uniquely high internal cost levels of U.S. law firms drive their pricing into realms only dreamed of by their non-U.S. law firm competitors.

3. In the corporate business world, cost pressures are forcing — and the development of strong in-house counsel capacity is enabling — major enterprises to do more of their business law work in-house, to shop for outside legal services more discriminatingly and to do so with greater bargaining power.

> **Law work becomes a mix of domestic and international—just as a century ago local firms became "interstate" law firms as, with the growing integration of the national economy, they worked on transactions that crossed state lines.**

4. International law firms everywhere are faced today with the imperative need for capital investment to supply the communications, documentational versatility and database capacity required for sophisticated global law practice. Whether the collegial — not to say Athenian — decisional style of most U.S. law firms can summon the resolve to make those up-front capital commitments is an open question.

5. The expertise that is necessary to these types of transactions is no longer just knowledge of the applicable law. Also required — perhaps even more important than knowledge of "the law" — are knowledge of the business issues (financial, operating, risk, marketing, etc.) posed by the transaction and the skill to identify, negotiate and document them to the client's advantage. Those skills will often be more critical to the success of the transaction (or at least to the client's definition of "success") than ensuring that all applicable laws and regulations have been complied with.

The consequences of these new realities will in time be severe. Until the mid-1980s, an "international" U.S. law firm that had successful experience in representing a U.S. client in its binary transactions centered outside the U.S. could be reasonably confident of the continuity of the representation. That day is passing. As noted earlier, that sense of comfort can continue with respect to transactions that have a U.S. party and where the locus of the transaction is within the U.S. (or nowhere, as in the case of an electronic transfer). But the new competitive developments just listed will combine to mean that U.S. companies will increasingly turn to non-U.S. law firms for their legal work in respect of transnational transactions centered outside the U.S.

V. The Global Transaction

A South American country undertakes to privatize its electrical utility system, opening it to bidders and financing from around the world. The ensuing process will demand the participation of bankers, consultants of many kinds, corporations and institutional investors from Europe, Asia, the U.S. and more. The transaction will require enormous quantities of sophisticated legal work. Assuming (as will almost certainly be the case) that no law firm in the country of the transaction will have the needed qualifications and connections, who will be called upon as the lead firm for this gigantic legal task?

On the face of it, the law firm that will be best equipped for tasty global legal assignments of this nature will fit one of three institutional models, or a combination of them:

(i) It can have built itself into a worldwide organization with offices everywhere and internal reservoirs of experience, as the giant accounting/management consulting firms have done.

(ii) It can have joined itself as a major player in a worldwide networked federation of law firms whose aggregated experience can be drawn upon.

(iii) It can have constructed itself into some form of new institution that is essentially a project manager specializing in analyzing, identifying, assembling and running teams of lawyers shaped to the particular project.

Who can or will do these things?

That question is posed melodramatically in contexts like the utility privatization example, but it has equal application in simpler transactions of the new global economy. A Hungarian company, with financing through a consortium of banks from many countries co-led by two Swiss and Japanese banks, is establishing a new manufacturing facility in Paraguay, to be constructed by a joint venture of Japanese and Finnish contractors. Will the U.S. law firm that is fully competent to do the law work choose not to compete for it because no American enterprises are involved — and cede the work to a London law firm, though there are no British companies in the deal either?

And the same issue arises in yet one more context. The U.S. law firm that achieves truly global recognition will, as a dividend, discover that it has a big competitive advantage in marketing itself to major non-U.S. companies as the firm to be selected as ongoing lead U.S. counsel, as discussed at III above.

As noted earlier, U.S. law firms have certain inherited competitive disadvantages in the new global economy. Important as these points are, they have secondary significance to the fundamental question:

> Can U.S. law firms generate a psychological perspective of themselves as players in a global world, as transnational citizens with access to worldwide professional expertise and a worldwide clientele?

The investment bankers and some commercial banks of the world have been able to do that. The managers of large-scale institutional investment funds are today not far behind. Parallel development has taken place in the oil industry, in engineering construction, and in many areas of consumer production and retail marketing. Vanguard fractions of the communications industry are nearly there. The big accounting firms, management consulting firms and advertising firms have made the leap. And now one can see — particularly in Great Britain — the emergence of a few truly globally oriented law firms.

Are there U.S. law firms with the desire, the will and the capacity to achieve that metamorphosis?

Have many yet seen the issue?

*The Ruby R. Vale Distinguished Scholar for the 1994 Widener University School of Law Moot Court Corporate Competition. ◆

FEATURE

Margaret Campbell Haynes[1]

FEDERAL FULL FAITH AND CREDIT FOR CHILD SUPPORT ORDERS ACT

Since 1986, federal law has required states to recognize past-due child support installments as final judgments, entitled to full faith and credit.[2] However, there was no similar requirement for ongoing child support payments. The Constitution did not require such recognition since ongoing child support orders are not final, but subject to modification.[3] As a result, custodial parents seeking enforcement of a support order in a second state often found themselves subject to a new order in a different amount — frequently, a lower amount.[4]

In order to prevent the proliferation of conflicting orders, the U.S. Commission on Interstate Child Support made two significant recommendations to Congress: (1) require states to enact the Uniform Interstate Family Support Act *verbatim*; and (2) require states to give full faith and credit to ongoing child support orders.[5]

The Uniform Interstate Family Support Act (UIFSA) was drafted by the National Conference of Commissioners on Uniform State Laws, and was approved by the American Bar Association in 1993.[6] To date, it has been enacted in 26 states.[7] There is pending federal legislation that would require all states to enact UIFSA and implement it by January 1, 1998.[8] UIFSA contains jurisdictional rules that establish one controlling order (where there are currently multiple conflicting orders) and severely restrict a state's ability to modify another state's order.

The Commission's second recommendation noted above recently became federal law. On October 20, 1994, President Clinton signed into law the Full Faith and Credit for Child Support Orders Act (FFCCSOA).[9] In order to improve interstate enforcement of child support orders and to clarify jurisdictional rules, it requires states to recognize and enforce valid ongoing child support orders. A state cannot modify another state's order unless certain conditions are present. The intention was that the jurisdictional rules of the FFCCSOA would be consistent with UIFSA. As enacted, there are a few inconsistencies that pending legislation would remedy.[10]

This article summarizes the FFCCSOA and analyzes recent decisions under it. It also addresses the Act's impact on states that are still operating under the Uniform Reciprocal Enforcement of Support Act (URESA) or the Revised Act, rather than UIFSA.[11] Although Delaware has enacted UIFSA, many nearby jurisdictions — including Pennsylvania, Maryland and New Jersey — have not. Practitioners will thus have to master the FFCCSOA's impact under both interstate Acts.

The Act's Requirements

In 1980, Congress enacted the Parental Kidnapping Prevention Act (PKPA), which requires states to give full faith and credit to child custody orders issued by courts of other states.[12] It is this section of federal law that Congress amended with its enactment of the FFCCSOA. Citing its authority under Article IV, section 1 of the Constitution, as well as its authority under the Interstate Commerce Clause (Article I, section 8) and section 5 of the Fourteenth Amendment, Congress required the appropriate authorities of each state to "enforce according to its terms a child support order made consistently with this section by a court of another state" and prohibited a state from seeking or making "a modification of such an order except in accordance with subsection (e)." The FFCCSOA is federal law and does not require state enabling legislation. It therefore has been effective in every state since October 20, 1994.[13]

Definitions

Before summarizing the Act, it is important to understand its definitions. The FFCCSOA applies to child support orders, which it defines to mean "a judgment, decree or order of a court requiring the payment of child support in periodic amounts or in a lump sum" — regardless of whether such order is permanent or temporary, the initial establishment of an award or the modification of an award. It includes orders for arrearage payments on children who are past the age of majority or orders for post-secondary support, since a child includes "a person 18 or more years of age with respect to whom a child support order has been issued pursuant to the laws of a State." The Act also broadly defines support: "a payment of money, continuing

Illustration by Nancy Tobin

support, or arrearages or the provision of a benefit (including payment of health insurance, child care, and educational expenses) for the support of a child." Although the Act refers to court orders, "court" is defined to include quasi-judicial and administrative decision-making bodies. Therefore, although Delaware is a judicial state, it must give full faith and credit to administrative orders issued by other states.

Enforcement of a Sister State Order

The FFCCSOA requires a state to give full faith and credit to any order that was issued by a court (as defined by the Act), pursuant to the laws of the state in which the court is located; that has subject matter jurisdiction to hear and resolve the matter; and that has personal jurisdiction over the contestants, provided the contestants had reasonable notice and an opportunity to be heard. In other words, a court must give full faith and credit to valid child support orders.

Modification of a Sister State Order

The Act limits a state's jurisdiction to modify a sister state's support order. A court may modify a sister state child support order only if (1) the court has jurisdiction to issue such a child support order; and (2) the court of the other state no longer has continuing, exclusive jurisdiction (CEJ) of the order because that state is no longer the child's state (*not* the same thing as the child's "home state" under UIFSA) or the residence of any contestant, or each contestant has filed a written consent to that court's making the modification and assuming continuing, exclusive jurisdiction over the order.

What is meant by the phrase "continuing, exclusive jurisdiction"? That is the key concept of UIFSA. Under UIFSA, a state has continuing, exclusive jurisdiction over an order if it issued the order and one of the individual parties or the child continues to reside there. As long as there is a CEJ state, no other state can modify the order unless the parties agree in writing for another state to assume jurisdiction. The FFCCSOA slightly changes the definition since it refers to contestants, which includes the state child support agency, rather than to individual parties as does UIFSA. The FFCCSOA also sets a different location for where any agreement between the parties should be filed. Both of the inconsistencies with UIFSA are corrected in pending federal legislation.

If there is no CEJ state, both UIFSA and FFCCSOA allow another state to assume modification jurisdiction. Once a second state has issued a new order, that order becomes controlling between the parties. The original issuing state no longer has CEJ status. In fact, it no longer can prospectively enforce its old order. It may only enforce the old order with respect to "nonmodifiable obligations and unsatisfied obligations that accrued before the date on which a modification of the order" was made.

Choice of Law

UIFSA and the FFCCSOA include consistent choice of law rules, although UIFSA's rules are slightly more detailed. In general, the forum state's law applies with two exceptions: (1) the law of the issuing state governs interpretation of the child support order: UIFSA makes it clear that this means the issuing state's law governs the amount of current support and any arrearage payback, the duration of support[14], and the definition of what is considered child support[15]; and (2) the law of either the issuing state or the forum state applies regarding the statute of limitations applicable for enforcement of the order, whichever state has the longer statute of limitations.

Questions and Issues Under the Federal Law

The most obvious question is "How does the FFCCSOA affect *URESA* states?" The simple answer is that, as a federal statute, it supersedes any state law to the contrary.[16] However, in reality the answer is a bit more complicated.

URESA provides for two enforcement routes: filing a petition and registering a foreign support order. Under the petition route, an obligee files a petition, seeking enforcement of an existing order. The petition is forwarded to the responding state, which is usually the state where the obligor resides. Although the petition may request the responding state to enforce the existing order, in most states URESA proceedings are considered *de novo* hearings.[17] Therefore, the responding state will apply its support guidelines to the parties' current financial circumstances and enter an award that it considers appropriate. The award may be the same, higher, or lower than the obligee's existing order. The second enforcement route is through registration of a foreign support order. Under this procedure, the obligee registers the existing order in the responding state. The responding state files the order in a registry of foreign support orders. If there is no objection after notice to the obligor, the order is confirmed. A registered order is in effect a domesticated order. It can be enforced like a local order, and may also be reopened like a local order.

How do these procedures relate to the FFCCSOA? Let us first address modification of a registered order. Although it is unclear from the wording of URESA, most practitioners and judges interpret the registration provisions of URESA to authorize the registering court subsequently to modify the order, if circumstances so warrant. In their opinion, any modification also modifies the underlying support order. Assuming a registered order remains an order in effect in the original issuing state, it is this author's opinion that subsequent to October 20, 1994, a registering court cannot modify that order unless the conditions of the FFCCSOA are met. For example, let us assume that the obligee lives in Delaware and has a Delaware divorce decree that includes a support order. The obligor lives in Florida. On December 30, 1994, the obligee registers the Delaware order in Florida. In January 1996, the obligor petitions to modify the registered order. Since the obligee continues to reside in the state that issued the order, Delaware has continuing, exclusive jurisdiction to modify the order (absent an agreement of the parties). Therefore, pursuant to the FFCCSOA, Florida does not have jurisdiction to modify the Delaware order.[18] The obligor will need to seek modification in Delaware. Since Delaware has enacted UIFSA, the obligor can probably participate in the Delaware hearing by telephone.

Oppositionally, some states hold that once an order is registered in their state, the order no longer exists in the original issuing state.[19] Therefore, according to at least one author, it can be argued that when a registering state modifies an out-of-state order that has been registered in the state, it is modifying one of its own orders, rather than the child support order of another state. Under this argument, the FFCCSOA's prohibition against modification of a sister state's order does not apply to the modification of a foreign support order that has been domesticated under URESA registration.[20] We will likely see appellate cases in the near future addressing this issue of a court's authority

to modify registered orders.

On the other hand, let us assume that rather than registering her Delaware order in Florida, the obligee in January 1996 files a petition under URESA, seeking enforcement of the existing order. As noted earlier, prior to the FFCCSOA, courts in most URESA states — such as Florida — considered URESA proceedings as *de novo* hearings in which they could issue a new order. Pursuant to URESA, that URESA order does not supersede any other court order, unless expressly so provided.[21] The result is two conflicting support orders. Will the FFCCSOA allow a URESA court to conduct "business as usual" and issue a new, independent, conflicting order when the obligee had sought enforcement of an existing order? Some argue that the answer is "Yes." Since the URESA order does not nullify the existing support order in the sense of replacing "its amount, scope, or duration," it is not considered a modification and therefore there is no violation of the FFCCSOA. Others argue that the answer is "No." Although the URESA order does not nullify the existing support order, the reality is that the obligor's state has disregarded that existing order and will only enforce its new order.[22] Again, it is likely that appellate litigation will address this issue. In this author's opinion, it is, at a minimum, contrary to the stated purpose of the FFCCSOA for a URESA state to issue an order in a different amount when there is an existing support order that the obligee is trying to enforce.

A second question is "Does the FFCCSOA significantly affect UIFSA states?" Again, the simple answer is "No." There are, however, inconsistencies between the FFCCSOA and UIFSA that may result in litigation. For example, the FFCCSOA defines determination of CEJ based on the residence of "contestants." The Act defines "contestant" to include an individual obligee, an obligor, and a state or state child support agency to which support rights have been assigned. Let us assume that there is a South Carolina child support order that was obtained by the IV-D agency when the obligee was on public assistance. There are arrears owed to the state under that order. Everyone has *now left South Carolina. With such a* definition of CEJ, it is possible to consider South Carolina as the CEJ state since there is still a contestant (the state agency) in the state. Obviously, with such a defini

tion, a state agency could hold a case "hostage" in a state— even unknowingly — as long as there is past public assistance owed under the guise of child support, despite the fact that no individual party now lives in the state. UIFSA would not allow such a result. It expressly defines CEJ in terms of individual parties and the child. Pending federal legislation would amend the FFCCSOA to be consistent with UIFSA.

Another inconsistency is that the FFCCSOA does not address multiple order situations, as does UIFSA. The goal of both Acts is a "one-order world." However, UIFSA contains Section 207, which provides detailed rules for deciding which order is entitled to recognition and which state has jurisdiction subsequently to modify the order. The FFCCSOA lacks language similar to Section 207.

Pursuant to its current provisions, the FFCCSOA requires recognition of multiple, conflicting orders so long as they were issued by a court with subject matter and personal jurisdiction, following notice and an opportunity to be heard. Similarly, the FFCCSOA does not address which state has jurisdiction to modify when there are two "CEJ" states. Assume that our South Carolina petitioner continues to reside in South Carolina, the state that issued the divorce decree. As a result of a 1992 URESA petition, Florida issued a URESA order in a different amount. The obligor continues to reside in Florida. The obligor seeks modification of the Florida order. Does Florida have jurisdiction to hear the modification request? As enacted, the FFCCSOA does not provide the answer. Both the Florida and South Carolina orders are valid orders, which the Act would require states to recognize. Both states are also CEJ states, since both states have issued an order and an individual party or child continues to reside in the state. There seems to be an impasse. There is pending federal legislation that would remedy these problems by amending the FFCCSOA to incorporate Section 207 of UIFSA. By incorporating Section 207, the same rules that apply in determining which order to enforce also govern the determination of which state has jurisdiction to modify. Applying Section 207 to the present fact pattern, where there are two CEJ states, the state with jurisdiction to modify is the child's home state. "Home state" is defined under UIFSA as the state where the child has resided for six consecutive months prior to the filing of the pleading. Therefore, South Carolina would be the state with jurisdiction to modify the order. Until such time that the FFCCSOA is amended to be consistent with UIFSA, this author encourages decision-makers and lawyers to interpret the FFCCSOA in conjunction with UIFSA when resolving cases with multiple support orders.[23]

A third question is "What constitutes written agreement between the parties so that jurisdiction to modify can be shifted from the CEJ state to another state?" Two trial courts have recently addressed this issue. In *Bednarsh v. Bednarsh*,[24] there was a New Jersey support order. Subsequently, a Florida court entered an order, enforcing the New Jersey order by establishing a plan for payment of arrears. Without knowledge of the Florida order, in December 1994 the New Jersey court ordered a different arrearage payback plan. Prior to the finalization of that order, the husband moved for reconsideration of the New Jersey's court order based on the FFCCSOA. One issue addressed by the court was whether the absence of any mention of the Florida order by the parties, including their failure to mention the

order to motions filed with the court, constituted a "written consent" to the New Jersey court to exercise jurisdiction to modify. The court concluded "No." Although the New Jersey court stated that the parties' failure to mention the Florida order was inexcusable, it held that the parties' lack of diligence or candor could not overcome the jurisdiction problems: "In this court's view, consent to a subsequent court's modification of another state's child support order should be found only upon a clear showing that the parties knowingly and voluntarily desired that result. . . . Courts should view the 'written consent' requirement strictly. . . ." The court concluded that the parties' silence did not constitute a clear, knowing waiver of Florida's continuing, exclusive jurisdiction to modify.

In *DCSS ex rel. Michele Degolier v. Crum*,[25] the Vermont court addressed whether the petitioner's registration of a support order under URESA and the respondent's failure to object to the registration constituted implied consent to Vermont's assuming jurisdiction to modify. It concluded that even if the court accepted the petitioner's argument that her registration constituted consent to Vermont's modification of the order, "it is less clear that respondent has, by telephoning His lack of objection to registration, satisfied the FFCCSOA's requirement that he file express written consent to Vermont's assumption of continuing, exclusive jurisdiction."

A final question to ponder is the following: if a court modifies an order when it lacks jurisdiction to do so under the FFCCSOA, is the modified order void, voidable, or *res judicata* between the parties if not appealed within a certain time period? This issue is under discussion nationwide.

Conclusion

It is incumbent upon every lawyer and decision maker to become familiar with the Federal Full Faith and Credit for Child Support Orders Act. Delaware lawyers are fortunate in that UIFSA is already effective in Delaware. You are therefore already operating under rules that are, for the most part, consistent with the FFCCSOA. While the inconsistencies are likely to engender litigation, it is hoped that the differences between UIFSA and the FFCCSOA will be short-lived. If you practice family law in other states as well, especially in URESA states, it may be necessary for you to educate the court about the existence of this law and its impact on your case. The Act should greatly facilitate interstate enforcement and modification of orders. However, until people become more familiar with the Act and its relationship with UIFSA and URESA, we are likely to see an increase in appellate litigation.

FOOTNOTES

1. Margaret Campbell Haynes is director of the American Bar Association Child Support Project, Center on Children and the Law, Washington, DC. This article reflects her personal opinions and does not necessarily reflect the views of the American Bar Association.

2. 42 U.S.C. §666(a)(9).

3. Article IV, section 1, United States Constitution. See *Sistare v. Sistare*, 218 U.S. 1 (1910), cited in [4].

4. See Ch. 6, "Interstate Enforcement of Support," Marian Dobbs, Margaret Campbell Haynes and Marilyn Ray Smith, *Interstate Child & Spousal Support Orders* (Clark Boardman Callahan 1992).

5. The Commission was created by the Family Support Act, Pub. Law No. 100-485, 102 Stat. 2343, 2344-2355. The Commission's final report and recommendations are contained in U.S. Commission on Interstate Child Support, *Supporting Our Children: A Blueprint for Reform* (Washington, DC: U.S. Govt. Printing Office, 1992). Delaware Family Court Judge Battle Robinson served on the Commission.

6. See John J. Sampson, "Uniform Interstate Family Support Act with Unofficial Annotations," *Family Law Quarterly*, American Bar Association Spring 1993.

7. Alaska, Arizona, Arkansas, Colorado, Delaware, Idaho, Illinois, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Montana, Nebraska,

New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Virginia, Washington, Wisconsin and Wyoming.

8. Conference Report to HR 4, 1995, and the Balanced Budget Act of 1996, §12321.

9. Pub. Law No. 103-383, 108 Stat. 4063, codified at 28 U.S.C. §1738B, Supp. 1995.

10. Conference Report to HR 4, 1995, and the Balanced Budget Act of 1996, §12322.

11. *See* Haynes, "The Uniform Reciprocal Enforcement of Support Act," in Margaret Haynes with Diane Dodson, eds., U.S. Dept. of Health and Human Services, *Interstate Child Support Remedies* (1989).

12. Pub. Law No. 96-611, 96 Stat. 3369, codified at 28 U.S.C. §1738A.

13. "State" is defined by the Act to include "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and Indian Country."

14. In this author's opinion, the court in *In re Lane*, 58 Cal. App. 4th 668, 39 Cal. Rptr. 2d 835 (1995), inconsistently interpreted the FFCCSOA to authorize a state's modification of the duration of support under an existing support order. See Official Comments to UIFSA on which the FFCCSOA is based.

15. Section 604 of UIFSA provides that: "The law of the issuing state governs the nature, extent, amount and duration of current payments and other obligations of support and the payment of arrearages under the order."

16. U.S. Const. art. VI. *Anonymous (Isabel M.) v. Dennis M.*, 164 Misc. 2d 420, 624 N.Y.S.2d 586 (1995); OCSE ex rel. Michele Degolier v. Crone, Chittenden Family Court, No. F61-12-92 CnVt (1995).

17. *See, e.g., Roberts v. Katz*, 609 P.2d 1121 (Colo. App. 1980); *Anonymous v. Anonymous*, 344 A.2d 268 (Del. Super. Ct. 1975); Com. of Virginia ex rel. Halsey v. Nutter, 293 Md. 58, 441 A.2d 1036 (1982).

18. *See OCSE ex rel. Michele Degolier v. Crone*, Chittenden Family Court, No. F61-12-92 CnVt (1995).

19. In *Allen v. Allen*, 88 N.C. App. 553, 363 S.E.2d 885, *aff'd*, 323 N.C. 603, 374 S.E.2d 123 (1988), the North Carolina Court of Appeals held that when an out of state support order is registered in North Carolina under URESA, the order "does not identify as an order of the foreign court and becomes an order of the North Carolina court for all purposes." But see OCSE ex rel. Michele Degolier v. Crone, Chittenden Family Court, No. F61-12-92 CnVt (1995): "Petitioner argues that by registering the decree in Vermont, she has divested the Florida forum from its exclusive, continuing jurisdiction. However, it is not clear that registration under URESA does anything more than give the responding forum concurrent jurisdiction with the rendering jurisdiction."

20. Saxon, "The Federal 'Full Faith and Credit for Child Support Orders Act,'" Family Law Bulletin, No. 5, Institute of Government, the University of North Carolina at Chapel Hill (1995).

21. Section 30 of the 1958 version of URESA; Section 31 of the 1968 Revised URESA.

22. *See Isabel M. v. Hanna M.*, 164 Misc. 2d 420, 624 N.Y.S.2d 586 (1995).

23. One inconsistency that may not be resolved so easily is enforcement when there are multiple orders but no O-J state because the obligor, individual obligee, and child have left the issuing states and reside elsewhere. As long as they are valid orders, the FFCCSOA would require a state to recognize each of them. However, under Section 207 of UIFSA, another order would be controlling since neither is issued by a state of continuing, exclusive jurisdiction. In such a circumstance, Section 207 of UIFSA directs the responding state to issue a new order which must be subsequently recognized as the controlling order. See Section 207 of UIFSA and Official Comments.

24. 1996 N.J. Super. LEXIS 284 (1995).

25. Chittenden Family Court, No. F61-12-92 CnVt (1995).

continued from page 40

that fool blackboard to write down exactly four words of such thundering banality and unimportance to his spoken message that I can't remember a single one of them. Nearly a century ago, Thorsten Veblen pointed out the use of "conspicuous consumption" to draw attention to one's imagined grandeur. Rudeness and the calculated imposition of difficulty on others have replaced showy expenditure as a form of self-celebration in the current bad-mannered age.

Archy, mollified by the provision of a useless blackboard, commenced his remarks. In the meantime Harvey Rubenstein, determined to be the gracious host, went about the room, planting questions with members of the bar to be asked of Archy with the object of making him look good. Instead, Archy chose to self-destruct: he made a fool of himself. It seemed he disapproved of corporation law. He embroidered his theme with the charming suggestion that a Harvard Law School graduate encouraging a lady lawyer to practice in this branch of the law was no better than a procurer luring innocent virgins into a life of shame! In a bar where Harvard Law graduates have long been outstanding ornaments of the profession, Archy's remarks struck many as gratuitously offensive. Worse yet, in Delaware an attack on corporation law is like spitting on the flag.

Actually, I rather enjoyed this preposterous performance. Bad taste can often be very funny. (I am still chuckling over the recent announcement that the Fall River, Massachusetts, homestead where Lizzie Borden is thought to have slaughtered her parents is to be transformed into a bed and breakfast for whodunit fans.) But a little of Archy goes a long way. As Archy droned on, bewitched by his own oratory, one of the guests who accompanied him was heard to remark, "If Archy don't hurry up and finish, Ah'm gonna wet mah pants." And so ended this feast of wit and elegance.

I still believe that, in the long run, good behavior wins the day. Judge Quillen once wisely remarked that "good manners cost nothing and buy everything." And, as the *QVC* decision cited above makes clear, incivility may offend the civil, but it ultimately punishes the uncivil — at least in the courts of Delaware. Let's keep it that way.

*We must be grateful to our highest court for saving us from maidenly blushes by this tasteful resort to euphemism, a practice once well described as "the Victorian habit of draping our thoughts with verbal fig leaves." ◆

FEATURE

Jeanne M. Rubin*

INTERSTATE SERVICE OF PROCESS

INTRODUCTION

As individuals become more mobile, and as businesses expand from local concerns to regional and national enterprises, it becomes increasingly likely that litigation will involve parties residing in different states. As a result, the need to exercise long-arm jurisdiction on behalf of our clients is likewise increasing. This is especially true in Delaware, where the state's incorporation policies and statutes attract numerous non-resident businesses that become Delaware corporations. In this milieu, understanding the legal requirements and practical considerations of interstate process service has become increasingly important to a successful litigation practice. This article provides a brief overview of the legal requirements for interstate process service in state and federal court actions in Delaware, and addresses some of the practical considerations to help you locate out-of-state process servers and ensure effective out-of-state service.

DELAWARE REQUIREMENTS

Delaware's long-arm statutes provide some of the most liberal requirements for out-of-state service in the country. Pursuant to 10 *Del. C.* § 3104, any non-resident who commits any of the enumerated acts establishing minimum contacts with the state submits to the jurisdiction of the state and is deemed to have appointed the Secretary of State as his agent for service of process. Such process becomes effective by the timely mailing to the non-resident defendant, by registered mail, of a copy of the process and complaint served upon the Secretary of State and a statement explaining that service upon the Secretary of State constitutes personal service within the state upon the non-resident. The return receipt constitutes presumptive evidence of service and a notation of refusal on the return receipt constitutes presumptive evidence that the refusal was by the defendant or his agent. These procedures for service of process also apply to a non-resident owner, operator or driver of any motor vehicle. (10 *Del. C.* § 3112). Similar procedures apply to non-resident directors, trustees or members of the governing body of Delaware corporations, although without the explicit presumptions regarding delivery or refusal of delivery. (10 *Del. C.* § 3114).

Delaware's passage of the Uniform Interstate Family Support Act ("UIFSA"; 13 *Del. C.* §§ 601 et seq.) adds an extremely expansive long-arm statute (§ 610) covering litigation of child and spousal support and determination of paternity. This Act likely will increase dramatically the pool of cases to be litigated against non-residents, as its jurisdictional model incorporates virtually every basis believed to be constitutionally valid for asserting long-arm jurisdiction. As no particularized rules have been enacted by the Family Court, service requirements to effectuate long-arm jurisdiction over the out-of-state party should parallel those of the Superior Court. UIFSA also incorporates innovative techniques for the transmission of evidence, including teleconferenced hearings, available to the non-resident litigant. These amendments to local law should encourage participation by the out-of-state party in the proceedings. The clear goal is to foster decisions based on evidence, rather than to procure support and paternity orders by default. It is probable that the Court will be scrupulous in obtaining proof on the record that personal jurisdiction has been obtained and that the respondent has received adequate notice and an opportunity to be heard in proceedings under the Act.

Given the apparent ease of serving non-resident defendants by registered mail, one might wonder why it would ever be necessary or desirable to arrange for personal service on a non-resident. Personal service will be necessary in a number of circumstances. First, where defendants do not file an answer or where registered mail delivery of process is refused, plaintiff's counsel may want to effect personal service to avoid vacation of a default for failure to serve the proper defendants. Second, some attorneys suggest that if you think that scenario is likely and that the defendant may try to evade service, you may not want to tip your hand by alerting the defendant to the pending action by sending the registered notice. Finally, once a case is commenced, subpoenas must be personally served on non-residents. *See, e.g.*, Super. Ct. Civ. R. 45; Ch. Ct. R. 45; Fam. Ct. Civ. R. 45.

FEDERAL REQUIREMENTS

The Federal Rules of Civil Procedure provide for personal service of the summons or for service by mail of the notice of the litigation with a request for waiver of service. If service is voluntarily waived, the defendant has additional time to respond. If service is not waived, the defendant is liable for all costs of service subsequently incurred. Fed. R. Civ. P. 4. Litigation strategy may encourage you to effect personal service to obtain the earlier answer date. Of course, a defendant's refusal to waive service will reinstate the need for personal service, albeit at the defendant's expense.

Rule 4.1 of the Local Civil Rules of the United States District Court for the District of Delaware provides for service of process by registered mail, if pursuant to the state's long arm statutes, 10 *Del. C.* §§ 3104, 3112 and 3113. The circumstances noted above that require personal service pursuant to those statutes in state court apply equally to actions in federal court. Service of subpoenas is, likewise, required to be by personal service. Fed. R. Civ. P. 45.

PRACTICAL TIPS

Even with the availability of service by registered mail, there will be situations in which personal service is required or a prudent precaution. The following suggestions are designed to streamline your search for an out of state process server and the mechanics of getting the party served.

How to locate an out-of-state process server. Without the proper resources, locating an out of state process server can be a frustrating, time consuming and costly proposition. Many attorneys spend countless hours making calls to colleagues in other states seeking a referral to a local process server. The result is much wasted, and likely unbillable, time.

One method of serving out of state papers is through a brokerage or clearinghouse service. These services act as middlemen who forward your papers to a process server where service is needed. These services are significantly more expensive than dealing directly with a local process server, but may meet your needs if cost is not a concern. They can also result in delay, as all papers are routed through the broker rather than directly between you and the process server.

An effective resource for locating out of state process servers is the National Directory of Process Servers, which provides listings of private process servers and county sheriffs throughout the United States. The Directory lets you locate process servers anywhere in the country by the city in which they are located or by the counties in which they can provide service. One of the advantages of contacting process servers directly is the opportunity to convey your special instructions directly to the process server who will be handling the service. It also allows you to eliminate middleman fees and to shop for the best available price among the various process servers covering a particular locale. Direct access to the process server is also an advantage where service must be effected within a short period of time.

Who can serve. Under Delaware law, service of a summons must be made by the sheriff, or if disqualified, by the coroner, by a deputy of either, or by a person specially appointed by the Court. Super. Ct. Civ. R. 4; Ch. Ct. R. 4; Fam. Ct. Civ. R. 4. If you plan to use a private process server for your out of state service, request a special court appointment in advance. Otherwise, you risk a ruling of improper service in the event there is no answer and you move for a default judgment. Having a standard Motion for Special Appointment for Service of Process in your files will expedite the process, should you require a special appointment. The following language provides a basic format that can be modified to suit your particular court. "Pursuant to Rule [cite applicable court rule re: service of process], plaintiff moves the court for an order specially commissioning [name of process service company] to serve the summons and complaint in the above action on the defendant [name]. Plaintiff states that process will be served in accordance with Rule [cite applicable court rule re: service of process]." A conforming court order, captioned "Commission" should be submitted to the court with the motion.

Maintain control of the service. Remember that the process server must comply with your state's rules, not his. Any requirement unique to Delaware must be explained. One of the best examples of the hazards of failing to explain your local rules of service is provided by John J. Sampson, Professor of Law, University of Texas at Austin and co-reporter for the UIFSA Drafting Committee of the National Conference of Commissioners on Uniform State Laws. Since UIFSA's adoption, he has been a national lecturer on the requirements of the Act and frequently tells a story that reinforces the "local law" rule. It seems that Texas counsel sought to obtain jurisdiction over a California resident to litigate a particularly contentious support matter. Pursuant to the Texas long arm provision, counsel hired a process server in California and sent detailed information about the defendant. After an apparently extensive effort, the respondent was served. However, Texas counsel failed to inform the server that Texas law contained a small quirk that precluded service on Sundays. Knowing of no such restriction, the sheriff served process on the respondent the very day he finally caught up with him: Sunday, perfectly valid in California. The respondent successfully quashed service and promptly moved.

Another area in which rules of service vary considerably

TECHNOLOGY AND LOCATE RESOURCES

The following is excerpted with permission from the 12/19/95 ABA Child Support Project fax network transmission and is based on information from James Minitz in the January 1995 issue of Corporate Legal Times.*

"There are a number of public records databases that are helpful for locating obligors, their employers, or their income and assets. According to James Minitz, ... 'What is out there? Everything from Swiss corporate records to the name of the golf club to which a Japanese executive belongs; from yacht registrations to Nevada divorces; from magazine subscription change-of-address forms to the Social Security Administration's death records.' Mr. Minitz runs a corporate investigations firm that specializes in cost-effective investigations for in-house and law firm litigators.

"The contents of all or most of Information America, Prentice-Hall On-Line Public Information Services, Dialog, Datatimes, and Dun & Bradstreet are accessible via WESTLAW. Lexis/Nexis also has an extensive collection of public records databases.

"To date, searching one or more of these databases ensures 50-state coverage of the following types of records: business bankruptcy, liens and judgments, OSHA inspections, real estate, UCC filings, and Social Security (deceased records only). Professional licensing information, motor vehicle registration, voter registration, and credit bureau headers (not the actual credit information — just the credit holder's address and SSN) are available for many states. Twenty-seven states have released information from their voter registration files on 56 million voters. Such information often includes a person's date of birth. This can be used, in turn, to access driver's license information and determine an individual's current address; or in a IV-D case, conduct a search using the Federal Parent Locator service. Searching these public records online is legal. However, as you know, there are federal restrictions governing access to consumer credit records.

[Mr. Minitz provided several examples.]

"CDB Infotek is a major public records information vendor. It offers access to motor vehicle registration records. These searches cost an average of $13. Driver's license records include physical descriptions. CBD also offers an address change index, which searches 12-year history of national publishers' change of address files, as well as other forms filled out when people move. ... Digital Directory Assistance offers 81 million people's telephone numbers and addresses on CD ROM, for which it charges $79. ...Prentice-Hall has bankruptcy records from 42 states, going back in some cases 10 years, and tax liens from 25 states, going back 6 years. Prentice-Hall also operates Universal Search. You type in the name to be searched, and PH responds in less than a minute with a list of 'hits' where that name appears among its 500 million records. The charge is $15, with additional charges for exploring the hits. [Mr. Minitz is reported to recommend the Prentice-Hall service as better and more cost-effective than others.]

[Several other sources are discussed as noted below. Some lesser known sources are highlighted.]

"CBD Infotek provides UCC searches in 17 states, which verify that specific assets of an individual or business are secured by a bank or party.

"PACER (Public Access to Court Electronic Records) retrieves case information from bankruptcy and other federal courts. It provides the SSNs of parties.

"Information America has census data to provide an estimate of an area's median household income and median home value. Such information can be useful, especially against a self-employed individual who is claiming no or little income.

How to Contact the Databases
CDB Infotek 800-427-3747
DataTimes 800-642-2525
Dialog 800-334-2564
Digital Directory Assistance 800-284-8353
Information America 800-235-4008
Lexis/Nexis 800-346-9759
PACER 202-273-2748
Prentice-Hall On-Line Public Information Services 800-333-8356"

*American Bar Association Center on Children and the Law
Child Support Project
740 15th Street, N.W.
Washington, D.C. 20005
202-662-1751
202-662-1755 FAX

from state to state is with respect to who may accept substituted service at the defendant's residence. Be sure your process server knows your precise requirements. A good rule of thumb is to provide your instructions in writing to avoid misunderstandings. Requirements for the return of service also vary from state to state. You should provide the form for the return of service to ensure that all required information is included.

Agree on fees and services in advance. It is important to reach agreement on the fees and the level of service authorized in advance. Process servers' policies, procedures and fee structures vary considerably. Many process servers require a fee in advance for out-of-state clients. Determine if an advance fee is required in the initial telephone call, as this will avoid later delays. Find out what a standard service costs and what it includes (*e.g.*, the number of attempts that will be made before additional charges are levied).

Remember that fees are negotiable. You may be able to get a reduced rate if you have multiple pleadings served on the same party (*e.g.*, when serving a party in multiple capacities) or served at the same address (*e.g.*, when serving all of the officers of a company).

Finally, limit the process server's authority to incur costs. You can cap the fees and services at a specific level contingent upon your further authorization in the event the service proves to be difficult. Other cost-related matters should be determined in advance. If the address is no longer good, do you want the process server to attempt to locate a new address? If three attempts yield no result, do you want the process server to keep trying, or to contact you first? If a stake-out is necessary to effect service, has that been authorized in advance, or does that require specific approval from you? Discussing these issues in advance, or simply instructing the process server to contact you if the service proves to be difficult or reaches a predetermined cost, enables you to keep control of your service costs.

Provide as much information as possible. The more information your process server has, the more likely the service will be successful. Always provide a good physical description of the individual to be served, as well as all known identifying statistics (*e.g.*, birth date, Social Security number), as these can be helpful in tracing a person. If the person is difficult to locate at home or office, it

can be helpful for the process server to have a description of the person's automobile (and license plate number, if known), recreational places the person frequents, the names and addresses of relatives in the vicinity, and the spouse's name and place of business. Often this information is easily obtained from your client. It can be particularly cost-effective if the process server is traveling long distances to locate the individual and has the opportunity to attempt service at several locations on one trip.

SPECIAL CIRCUMSTANCES: MILITARY INSTALLATIONS, INDIAN RESERVATIONS, FOREIGN COUNTRIES

Service of process on military installations, on Indian reservations and in foreign countries raises unique challenges.[1]

Military Installations. The need for service on members of the military often arises in the context of child support enforcement proceedings or paternity establishment. To locate a member of the armed forces, you will need the individual's Social Security number. If you know the installation to which the individual is assigned, call the central locator office for that installation and simply provide the party's name and Social Security number to get his or her military unit address. This will allow you to send service by registered or certified mail, should you want to proceed with service by mail, or to proceed with personal service. If you do not know the installation, you can attempt to locate the person using the Worldwide Military Locator service.[2] Requests must be in writing and cost $3.50 each, although for spouses and children the fee is waived. Unfortunately, the locator records run 60-90 days behind reassignments, most of which occur in the summer, so you may have difficulty using this system from May to October.

Once the person is located, service may be made by mail if state law permits. If personal service becomes necessary, it is recommended that you contact the company (unit) commander to request assistance. Although military authorities have no responsibility for serving process, they will generally give the military member the opportunity to accept service voluntarily, and may encourage the member to cooperate. If the company commander is not cooperative, you can take your request up the military hierarchy to the battalion, brigade and post commanders.

The authority of state sheriffs to serve process on military installations varies with the installation and sometimes with the papers being served. If you cannot get voluntary service, these issues must be investigated with respect to the specific military installation. Military legal assistance attorneys on the installation may provide some insights.

Military personnel stationed abroad may be served by mail if state law permits, via their APO or FPO addresses. Personal service on military personnel stationed abroad should be in accordance with the Hague Convention, discussed below.

Foreign Service. Fed. R. Civ. P. 4(f) provides for service upon individuals in foreign countries. Service abroad requires compliance with the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Convention) for service in signatory nations. If the Hague Convention does not apply, service can be made in accordance with the law of the foreign country, as directed by the foreign country in response to a letter rogatory, or through certain enumerated procedures if not prohibited by the foreign country. Fed. R. Civ. P. 4(f). The complete text of the Hague Convention, which details the procedures to be followed and the foreign addresses where service is to be sent, is found in the West editions of the Federal Rules of Civil Procedure and in the Martindale-Hubbell Law Directory. The required forms for service are available from your local U.S. Marshal's office. Addresses and other information on completing the forms can also be obtained from the Department of Justice, Office of Foreign Litigation (202-514-7455). Information on service in non-signatory countries can be obtained from the Department of State, Office of Citizens' Consular Services (202-647-5225). If you use a process service company for your foreign service, be sure this is an area in which they specialize.

Indian Reservations. Service of process on Indian reservations has its own unique problems that vary by state and by reservation, and may depend on whether the person to be served is a tribal member. State sheriffs, for example, may not have authority to serve civil papers on a particular reservation. The recommended approach is to contact the tribal chairman's office or the tribal court to ascertain who has authority to effect service on the reservation. This will often be a tribal police officer. A larger prob-

lem is whether the Indian tribe will recognize the validity of the papers being served. For example, a state court modification of a child support order or a garnishment to enforce a state court judgment will likely not be recognized absent an authorizing tribal court order. Again, you should contact the tribal chairman's office or the tribal court to ascertain the need to obtain a tribal court order and the procedures to be followed.

CONCLUSION

Effective service of process is a critical step in litigation. Careful attention to the selection of an out-of-state process server, detailed instructions and prudent monitoring of the process should ensure that this phase of your litigation is handled properly and without unnecessary expense.

*President, NDPS, Inc., and private practitioner in Colorado. Inquiries about the information in her article can be directed to Ms. Rubin at NDPS, Inc., 444 South Emerson Street, Denver, CO 80209; tel: 303-722-0308, or via e-mail at Jrubinndps@aol.com.

1. For child support cases, a 2/27/95 Executive Order issued by President Clinton should markedly improve service of process on federal employees and uniformed services members. Each agency is required to designate an official responsible for facilitating the employees' or members' availability for service in civil child support actions. Consult the Federal Register for this list, updated annually.

2. Addresses for Worldwide Locator Services (for member's military address):

Army Active Duty:
Army Worldwide Locator
USAEREC
Fort Ben Harrison, IN 46249
(317) 542-4211

Navy:
Bureau of Naval Personnel
P-324D2
Navy Annex
Washington, D.C. 20370-3240
(703) 614-3155/5011

Coast Guard:
Commander (MPC-52)
U.S. Coast Guard Headquarters
2100 2nd St. S.W.
Washington, D.C. 20593-0001
(202) 267-1340

Army Reserve/Retired:
Commander
ARPERCEN
9700 Page Blvd.
St. Louis, MO 63132
(314) 538-3777

Air Force:
Headquarters
AFMPC/RMIQL
500 C St. West, Suite 50
Randolph AFB, TX 78150-4752
(210) 652-5774/5775/6377

Marine Corps:
Headquarters, U.S.M.C.
Code MMSB-10
2008 Elliot Rd., Rm. 201
Quantico, VA 22134
(703) 640-3942

Note: Civilian requesters, including state and local officials and agents, must submit requests in writing, preferably on office letterhead. ◆

Uncivil Procedure

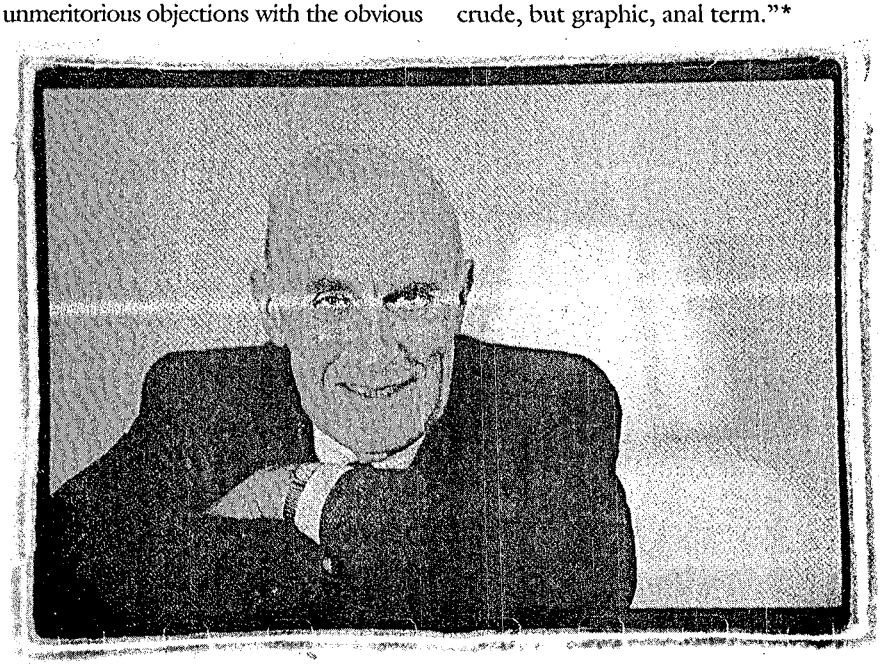
by William E. Wiggin

Writing of professional civility in the aftermath of the O.J. Simpson trial seems like an archeological inquiry into vanished splendors. That trial, a festival of bad taste and bad manners, displayed our well-loved and frequently noble profession at its rude, arrogant and semi-literate worst. The injury to our image as professionals is incalculable.

Consider the spectacle of Mr. Cochran who, on losing a motion before Judge Ito, held a press conference to accuse the judge of conspiring to railroad his client. Contemptible in every sense of the word! Or consider yet another of his amateur theatricals, his appearance in a snowy white suit, as if to suggest that he was one of Aimee Semple McPherson's angels and that the purity of his convictions should somehow rub off on his client.

As this ugly, farcical proceeding drew to a close, defense counsel, openly contemptuous of the court and its pertinent rulings, made a succession of patently unmeritorious objections with the obvious goal of disrupting the prosecution's closing statement. So much for civility in the courts of California.

I do not believe that this unseemly spectacle could take place in a Delaware court, although there are some of our members who, I suspect, may give it the college try. Surely no member of our bench would permit anything more than the initial misconduct, the first headline-hunting piece of insolence, before laying down the law and the prospect of swift sanctions. Furthermore, our bar is made up overwhelmingly of ladies and gentlemen. The really consummate practitioners I have known, the likes of Ned Carpenter, Bruce Stargatt, and Andy Kirkpatrick, have always conducted themselves with scrupulous courtesy towards opposing counsel, and have won their points by the exercise of reason and eloquence. There are, of course, isolated exceptions. See *Matter of Ramunno,* Del. Supr., 625 A.2d 248, 249 (1993), in which our scandalized Supreme Court reproved a practitioner for using "a crude, but graphic, anal term."*



Out-of-state incivility is, however, a much greater problem. Delaware practice, especially in corporate law, is increasingly national and, it appears, subject to increasingly abrasive behavior by out-of-town lawyers. See addendum to our Supreme Court's opinion in *Paramount Communications Inc. v. QVC Network Inc.,* 637 A.2d 34 (1993), at pp. 51-57.

On one memorable occasion, out-of-state incivility came to visit us here in Delaware, in response to *our* invitation. In the late 1980s, a nationally active tort lawyer, whom for the purposes of this account I shall call Archy Loutworth, had attained a degree of celebrity through his indisputable professional skills, buttressed by sonorous delivery, an eye-catching costume, and a real talent for histrionic fireworks. In short, Archy put on a terrific show.

Harvey Rubenstein, then climbing the Delaware State Bar Association ladder to an eventual presidency, had pulled off a real coup in persuading Archy to be the principal speaker at the Association's annual Bench and Bar Conference. The preparations for Archy's coming (one is almost tempted to say "Advent") were carried out with the deepest respect for his wishes, and bar association personnel consulted with his secretary to learn of and honor his every requirement.

Well, the great day came. Archy arrived and, followed by a small entourage, made his way to the head table. Looking displeased, he demanded a blackboard (which had not been mentioned during our consultation with his secretary). This delayed his remarks by five or ten minutes while Clayton Hall personnel scurried around for a blackboard. It is my firm belief that his demand was made for the purpose of demonstrating his importance by the device of inflicting inconvenience on his hosts. He used

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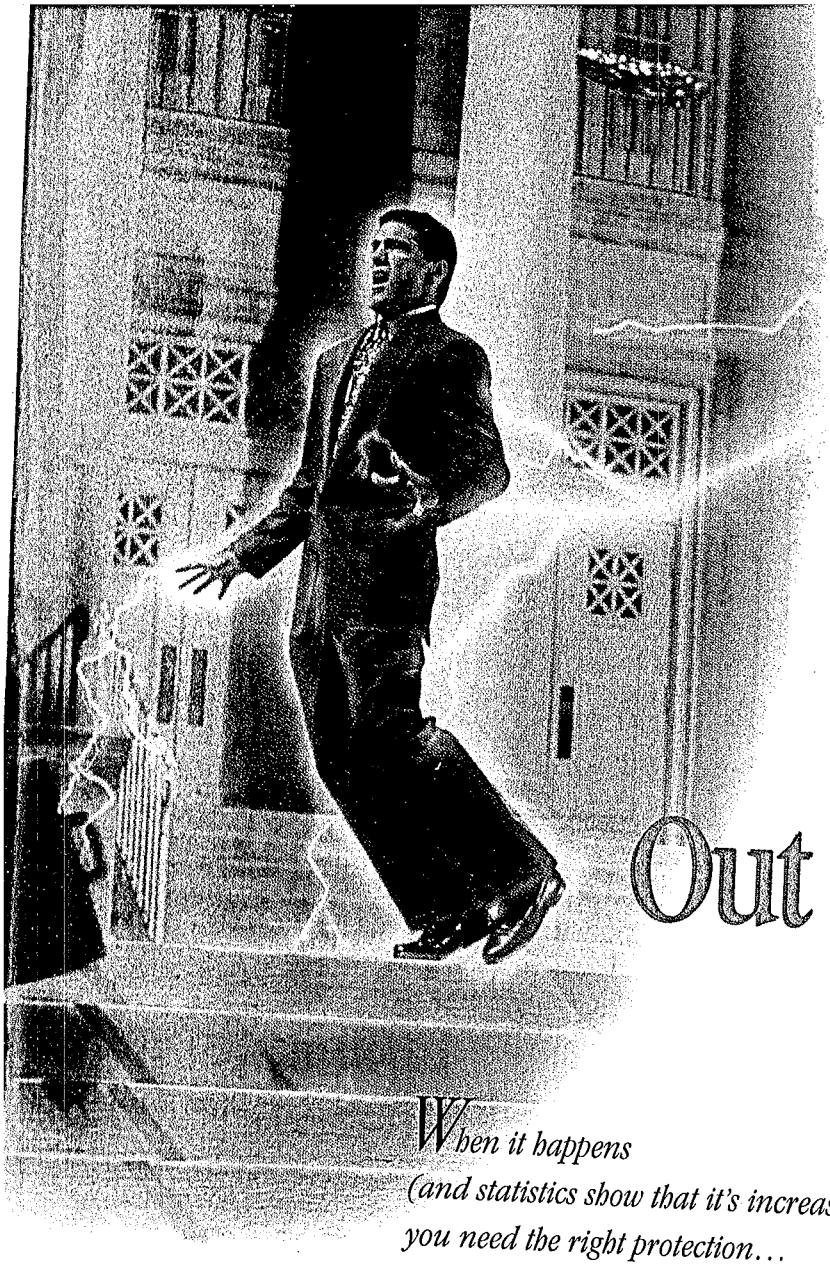
Photography by Pat Crowe



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