INSIDE: Corporation Law, Alternative Entities, the Financial Center Development Act and More

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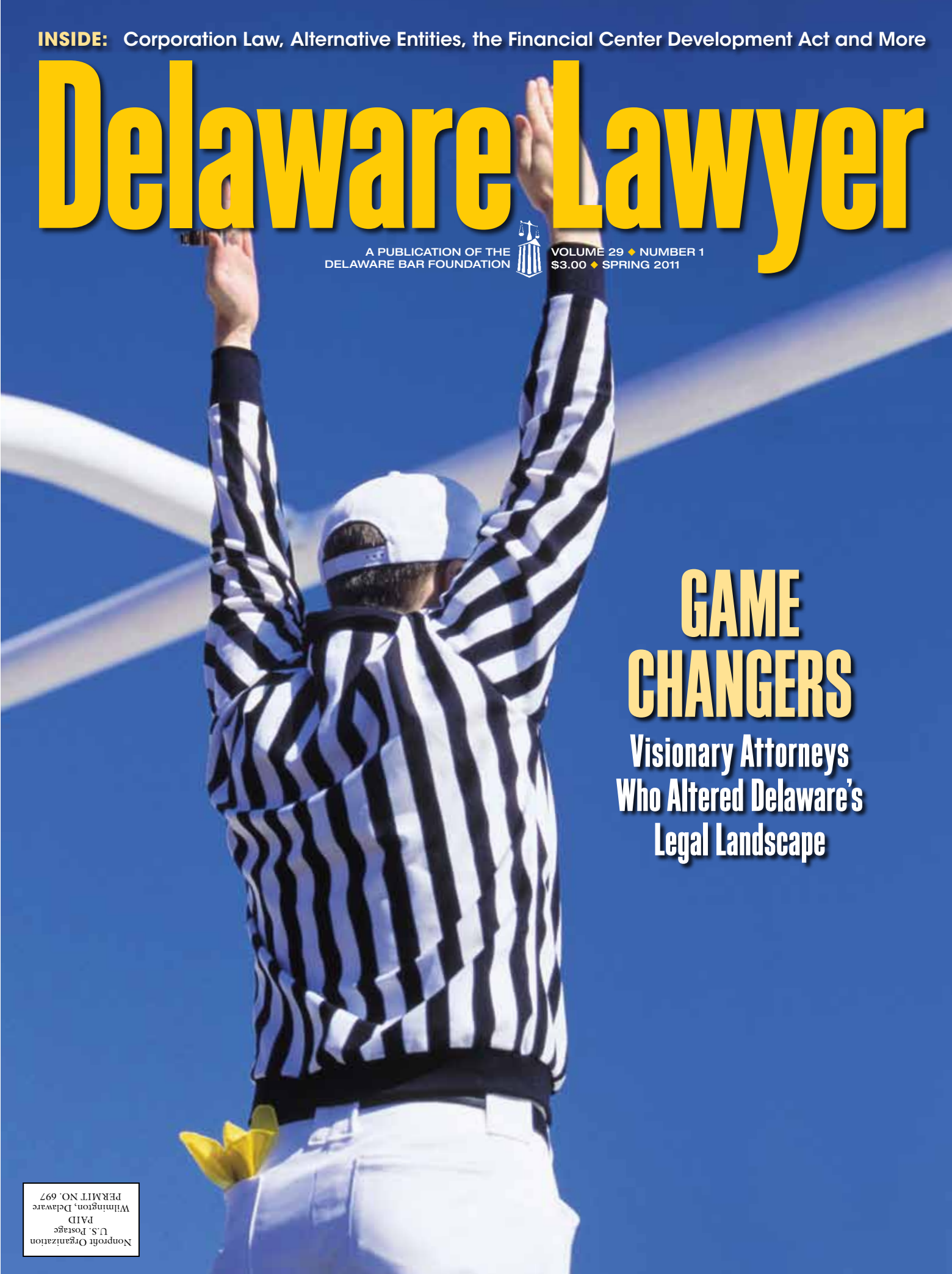

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EDITOR'S NOTE

Karen L. Pascale

In every field of endeavor, there are always those who challenge the status quo, and eventually find a way to shift the paradigm. The legal profession is no exception.

We in Delaware have been lucky over the years to enjoy the fruits of a thriving legal community, with strong and resilient practice areas such as corporate litigation, business law, intellectual property and bankruptcy. Looking back at the history and development of those spheres, however, one is led to the inescapable conclusion that there were indeed a few Delaware attorneys who were "game changers" in terms of their ability to see opportunities where others did not, and to persevere in their vision.

In the field of corporate law, the role of Sam Arsht in revising the state's corporate code and increasing Delaware's influence in that field is no secret. Yet Gil Sparks, an unabashed Arsht acolyte, describes for us in fresh and vivid detail how this father of the modern Delaware General Corporation Law worked his particular brand of legal magic.

It is an exceedingly rare lawyer who can manage almost single-handedly to create and grow a new practice area. In the area of business law now known as Alternative Entities, that lawyer was Marty Lubaroff. Judge Thomas Ambro paints an engaging, informative and entertaining portrait of Marty as a forward-thinking pioneer and "change agent."

The rise of intellectual property litigation in Delaware shows no signs of slowing. As deftly illustrated by William Marsden and Bob Oakes, the incredible success of Delaware as a forum for intellectual property disputes is a direct result of the diligent and purposeful efforts of a long line of district court judges, each standing on the shoulders of those who came before.

Few pieces of legislation have had such a dramatic effect on the fortunes of a state as did Delaware's Financial Center Development Act of 1981. Frank Biondi was truly the catalyst of that transformational statute. Mike Houghton does an excellent job of tracing the origins of the Act from the farmlands of Sussex County to the boardrooms of corporate America, and demonstrates how Frank's unique mix of legal acumen, political skills and stamina carried the day.

Although the subjects of most of the articles in this issue happen to be men (save for Judge Sue L. Robinson in the intellectual property context), there are at least a handful of women who are also widely regarded as "game changers" for their contributions to shaping the landscape of Delaware law and the Delaware bar. *Delaware Lawyer* magazine has been proud to highlight their signal accomplishments as well over the years. See Vol. 24, No. 4 (Winter 2006/07) at 12 (re: Judge Helen S. Balick); Vol. 19, No. 3 (Fall 2001) at 28 (re: Judges Jane R. Roth, Helen S. Balick, and Roxana C. Arsht) (all available at www.delawarebarfoundation.org).

We are introducing with this issue a recurring back-page feature, "Of Counsel," which will showcase a retired (or about-to-retire) member of the bar. For this inaugural column, I had the pleasure of interviewing and profiling Tempe Steen, who recently wrapped up a successful 27-year career practicing municipal law. As the fifth female member of the bar in Sussex County, she was a bit of a trailblazer in her own right.

The real proof of the strength of Delaware's legal community lies in its ability to foster new talent and create new opportunities. We at *Delaware Lawyer* look forward to chronicling the next generation of "game changers."

Karen L. Pascale

Hon. Thomas L. Ambro

is a Judge on the United States Court of Appeals for the Third Circuit. Prior to his investiture in June 2000, Judge Ambro was a member of the firm of Richards, Layton & Finger, P.A., Wilmington, Delaware, having first joined the firm in 1976. Judge Ambro was the Chair of the Section of Business Law of the American Bar Association in 2001-2002. He is also a past Editor of *The Business Lawyer*. Judge Ambro was an original member of the Board of Editors of *Delaware Lawyer* in 1982, and continues as a Board member to this day.

Michael Houghton

is a partner with the Wilmington law firm of Morris, Nichols, Arsht & Tunnell LLP. His areas of practice include administrative, banking, commercial and insurance law, escheat and unclaimed property representations, government relations and public policy advice. He is also a member of the Executive Committee of the Delaware State Bar Association. Mr. Houghton served from 2000-2005 as the Chair of the Legislative Committee of the National Conference of Commissioners on Uniform State Laws ("ULC"), served as the Vice President of NCCUSL from 2006-2007, Chair of the ULC Scope and Program Committee from 2008-2009, and currently serves as Chair of the ULC's Executive Committee.

William J. Marsden, Jr.

is the founder and Managing Principal of the Delaware office of Fish & Richardson P.C., where he also serves on the firm's Management Committee. He received his B.A. from Haverford College and his J.D. from the University Of North Carolina School Of Law. Mr. Marsden tries patent cases in the Delaware District Court and other courts around the country.

Robert M. Oakes

is an associate in the Delaware office of Fish & Richardson P.C., where he focuses on patent litigation. He holds B.S. and M.S. degrees in biology, and is a graduate of the University of Pennsylvania Law School.

A. Gilchrist Sparks, III

practices in the Wilmington, Delaware. law firm of Morris, Nichols, Arsht & Tunnell LLP. He is a former chair of the Corporation Law Section of the Delaware State Bar Association, and of the Delaware State Board of Bar Examiners. Mr. Sparks is co-author of *Delaware Corporation Law and Practice* (Matthew Bender 1988-present) and of *The Delaware Corporation: Legal Aspects of Organization and Operation*, BNA Practice Series, Vol. 1, No. 1 (Rev. 2008). Mr. Sparks is also Chairman of the Board of Trustees of the University of Delaware. He is a frequent participant in national continuing legal education programs relating to Delaware corporate law and federal securities law matters.

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A. Gilchrist Sparks, III

S. Samuel Arsht: Corporate Law Innovator

From helping overhaul the state's General Corporation Law to inspiring and mentoring a generation of attorneys, Sam Arsht left an enduring legacy.

Sam Arsht, my partner, mentor and friend, practiced Delaware corporate law for more than 45 years, from 1934 until his retirement in 1980 from Morris, Nichols, Arsht & Tunnell. Upon retiring, Sam gracefully stepped back from the practice of law, while maintaining an interest in the stewardship of the next generation over the body of law he had been so influential in shaping and which he truly loved.

Sam passed away at the age of 88 in 1999, but his influence over our corporate law remains to this day. Sam's continuing influence springs from many sources, each of which I will address.

First, Sam was the consummate corporate advisor. I had the privilege of sitting in during much of the last decade of Sam's practice on countless calls he had with Fortune 500 companies such as The Ford Motor Company and United States Steel, and their out-of-state counsel, looking to Sam for the last word on sophisticated Delaware corporate law matters.

Much of the innovative advice he rendered on issues such as dual class voting structures and preferred stock rights lives on today in the charters of such companies, in part because of Sam's way of addressing a corporate problem.

The most memorable advice he would give to younger lawyers working with him (of which I was then one) was to avoid if you possibly could concluding a call by simply telling a client that it could not lawfully do what it sought to accomplish, but instead to go on and offer lawful alternatives that the client

may not have considered.

Not only did this mindset encourage original thinking and maximize the likelihood that advice would be value-added, but it also portrayed a "can-do" attitude to clients that kept them coming back, even in circumstances where none of the alternatives was viable and the ultimate answer was "no."

A further source of Sam's enduring contribution to our modern corporate law was his work in various quasi-legislative capacities to improve the statutory law governing corporations both in Delaware and nationwide.

In October 1949, he accepted an appointment by Governor Elbert Carvel to be part of a three-person Revised Code Commission charged with reorganizing the entire body of Delaware statutory law. Sam served as chairman of the Commission. The product of its work was the benchmark Delaware Code of 1953, adopted on February 12, 1953, which superseded the outdated 1935 revision.[1] That, however, was just a warm-up for his greatest contribution.

In the mid-1960s, at the urging of then Chief Justice Clarence A. Southerland, Sam, together with Henry M. Canby, Jr. (of Richards, Layton & Finger) and Richard Corroon (of Potter Anderson & Corroon), and assisted by three younger lawyers who themselves went on to become prominent Delaware corporate lawyers or jurists (Walter K. Stapleton, Charles S. Crompton, Jr., and Charles F. Richards, Jr.), served as a drafting committee. This group, building upon prior recommendations of the Delaware Corporation Law Revision Commission appointed in 1963, produced a complete overhaul of the General Corporation Law.[2] The new law went into effect in 1967 and to this day serves as the backbone of our corporate statute.

The immediate effect of the modernized statute was to reverse a perceived loss of momentum by Delaware as a leading incorporation state. By 1969, *The New York Times* was reporting that new corporations were being chartered in Delaware at a record-breaking clip.[3]

Sam was one of the earliest corporate lawyers in Delaware to appreciate the importance of popularizing our law by contributing to law journals.

The Arsht/Canby/Corroon drafting committee helped renew Delaware's position as the leading corporate domicile in the United States. Their intellectual efforts and the organized input from the Delaware bar which they represented also were the impetus for what we today recognize as the Council of the Corporation Law Section of our bar association.

This section (with a name change along the way) has continuously maintained the tradition Sam and his colleagues on the drafting committee began of leaving behind particular clients' interests and recommending to the Delaware legislature necessary changes to our corporate statutes designed to assure their relevance and flexibility in a changing world — and to maintain the leadership as a corporate domicile which Delaware reinforced with the 1967 revisions.

Sam also was one of the earliest corporate lawyers in Delaware to appreciate the importance of popularizing our law by contributing to law journals and other publications designed to explicate our law and to defend Delaware's leadership position.

After the 1967 revision of the Delaware General Corporation law, Sam began a practice, carried on to this day by Morris Nichols partners, of publishing an annual critique of Delaware corporate law amendments,[4] and wrote regularly on critical corporate law topics.[5]

Indeed, one of my earlier memories of my years working with Sam was assisting him in the writing of a law review article[6] refuting Professor Cary's "race to the bottom" thesis[7] and opposing Ralph Nader's calls for federal incorporation. From that experience I came to understand my responsibility later in life to stand up for and defend what Sam believed then, and I believe now, to be a body of state corporate law second to none.

A brief excerpt from this article written by Sam 35 years ago speaks for itself in terms of Sam's "no-holds-barred" vigor in defending the law he loved:

> If Delaware's public policy is to favor management at the expense of the stockholders, as Professor Cary says it is, would Delaware have resisted, as it has, the pressure to enact a law such as some states have enacted, New York and New Jersey are two examples, which would require a stockholder bringing a derivative action to post a cost bond to pay the counsel fees of all defendants if the plaintiff stockholder does not win his suit?
>
> Or would Delaware, alone among all of the states, have continued to permit stockholders to obtain jurisdiction over non-resident directors, officers and controlling stockholders by attaching their stock without having to seize the stock certificate, thereby providing stockholders of a Delaware corporation with an effective remedy?
>
> Or again, if it is Delaware's public policy, as Professor Cary says it is, to favor incumbent management, would

Delaware have refused to adopt laws such as Ohio and Virginia have adopted, to name but two states, which virtually make impossible take-over bids that do not enjoy the blessing of incumbent management?

Cynics, like Professor Cary, say that not requiring plaintiff stockholders to file a cost bond and permitting plaintiff stockholders to obtain jurisdiction over non-resident defendant directors and controlling stockholders and not discouraging take-over attempts make for more litigation in Delaware and more business for Delaware lawyers. That may be true, but that jaundiced view of the practice of law does not alter the fact that the Delaware Corporation Law provides an effective and inexpensive means for redress to any stockholder of a Delaware corporation who fancies himself aggrieved by the conduct of his corporation's management.[8]

The last law review article Sam wrote before he retired addressed the contours of the business judgment rule.[9] Once again, it was motivated by a desire to defend Delaware against what Sam viewed as an unfair attack by Professor Cary, Ralph Nader and others upon Delaware's jurisprudence and corporate franchise:

> Notwithstanding its longevity, the business judgment rule is today misunderstood, at least if one is to judge from the comments of its critics, who are, in the main, distrustful of state corporate laws and are led to suggest that the business judgment rule promises more in the way of immunity from liability that in reality it does.[10]

Disabusing the notion advanced by the detractors of our law that Delaware courts were overly protective of management and, under the guise of the business judgment rule, would only interfere with a business judgment upon a showing of "gross and palpable overreaching," Sam distilled from the case law and common sense a succinct statement of the business judgment rule presumption that presaged later developments in landmark cases such as *Smith v. Van Gorkom*[11] and *In re Walt Disney Co. Deriv. Litig.*[12] In a precise articulation that reads as well today as in 1979, Sam stated:

> A corporate transaction that involves no self-dealing by, or other personal interest of, the directors who authorized the transaction will not be enjoined or set aside for the directors' failure to satisfy the standards that govern a director's performance of his or her duties, and directors who authorized the transaction will not be held personally liable for resultant damages, unless:
>
> (1) the directors did not exercise due care to ascertain the relevant and available facts before voting to authorize the transaction; or
>
> (2) the directors voted to authorize the transaction even though they did not reasonably believe or could not have reasonably believed the transaction to be for the best interest of the corporation; or
>
> (3) in some other way the directors' authorization of the transaction was not in good faith.[13]

"Delaware Corporation Law provides an effective and inexpensive means for redress to any stock-holder…who fancies himself aggrieved by the conduct of his corporation's management."

— Sam Arsht

While a key player in the 1967 revision, Sam also broadened his horizons by serving on the ABA's by-invitation-only Committee on Corporate Laws charged with amending the Model Business Corporation Act, which some 34 states today look to for guidance in drafting their corporate statutes.

As a pioneer Delaware representative on that committee, Sam paved the way for succeeding generations of Delaware corporate lawyers to also serve on that committee, which has not only enabled that group to benefit in its Model Act drafting efforts over the years from the insight of the Delaware corporate bar, but also has given Delaware members of that committee access to insights which they could bring to our bar for consideration with respect to the process of recommending amendments to the Delaware General Corporation Law.

Notwithstanding Sam's legacies outlined above, in my view his greatest contribution to the development of our corporate law was in his mentoring of at least two generations of Delaware corporate lawyers, who in turn have passed on Sam's passion for our corporation law and his intensely intellectual way of thinking about and addressing issues

under that law to subsequent generations of Delaware corporate lawyers.

Without purporting to be exhaustive, prior to my first arrival on the Morris, Nichols scene in 1972, Sam had already served as a corporate law mentor to the Honorable Walter K. Stapleton, who went on from Morris, Nichols to have a distinguished judicial career both on the federal bench in Delaware and then on the Third Circuit Court of Appeals, and to Lewis S. Black, Jr., who until his recent retirement was a prominent corporate lawyer at Morris, Nichols.

Sam's influence as a mentor on my career was both intense and profound, and after me he had a similar influence acknowledged by other Delaware corporate lawyers who moved on from Morris, Nichols to contribute materially to our bar, including Craig B. Smith, Thomas J. Allingham II, and Professor Lawrence A. Hamermesh.[14]

It is through these and other Delaware lawyers touched directly or indirectly by Sam's generous mentoring, intellectual curiosity, and passion for our corporate law that his legacy will continue for generations to come. ◆

FOOTNOTES

1. Adrian Kinnane, *Durable Legacy — A History of Morris, Nichols, Arsht & Tunnell* (2005) at 41.

2. For a detailed contemporaneous (and somewhat opinionated) account of the revision process, see Comment, *Law for Sale: A Study of the Delaware General Corporation Law of 1967*, 117 Univ. of PA. L. Rev. 861 (1969).

3. *Id*. at 594-95.

4. *See, e.g.*, S. Samuel Arsht & Lewis S. Black, *The 1973 Amendments to the Delaware Corporation Law*, Prentice-Hall (1973).

5. *See, e.g.*, S. Samuel Arsht, *The Delaware Takeover Statute — Special Problems for Directors*, 32 Bus. Law. 1461 (1977).

6. S. Samuel Arsht, *Reply to Professor Cary*, 31 Bus. Law. 1113 (1976) (hereinafter cited as Arsht, *Reply to Professor Cary*).

7. *See* Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 Yale L.J. 663 (1974) (hereinafter cited as Cary, *Reflections Upon Delaware*); Cary, *A Proposed Federal Corporate Minimum Standards Act*, 29 Bus. Law. 1101 (1974) (hereinafter cited as Cary, *Federal Minimum Standards*).

8. Arsht, *Reply to Professor Cary*, 1117-18.

9. S. Samuel Arsht, *The Business Judgment Rule Revisited*, 8 Hofstra L. Rev. 93 (1979) (hereinafter cited as "Arsht, Hofstra").

10. *Id*. at 93, citing R. Nader, M. Green & J. Seligman, *Constitutionalizing The Corporation* 145 (1976); Cary, *Reflections Upon Delaware*, 679-83; Cary, *Federal Minimum Standards*, 1107-08; and Schwartz, *Federal Chartering of Corporations: An Introduction*, 61 Geo. L.J. 71, 108-09 (1972).

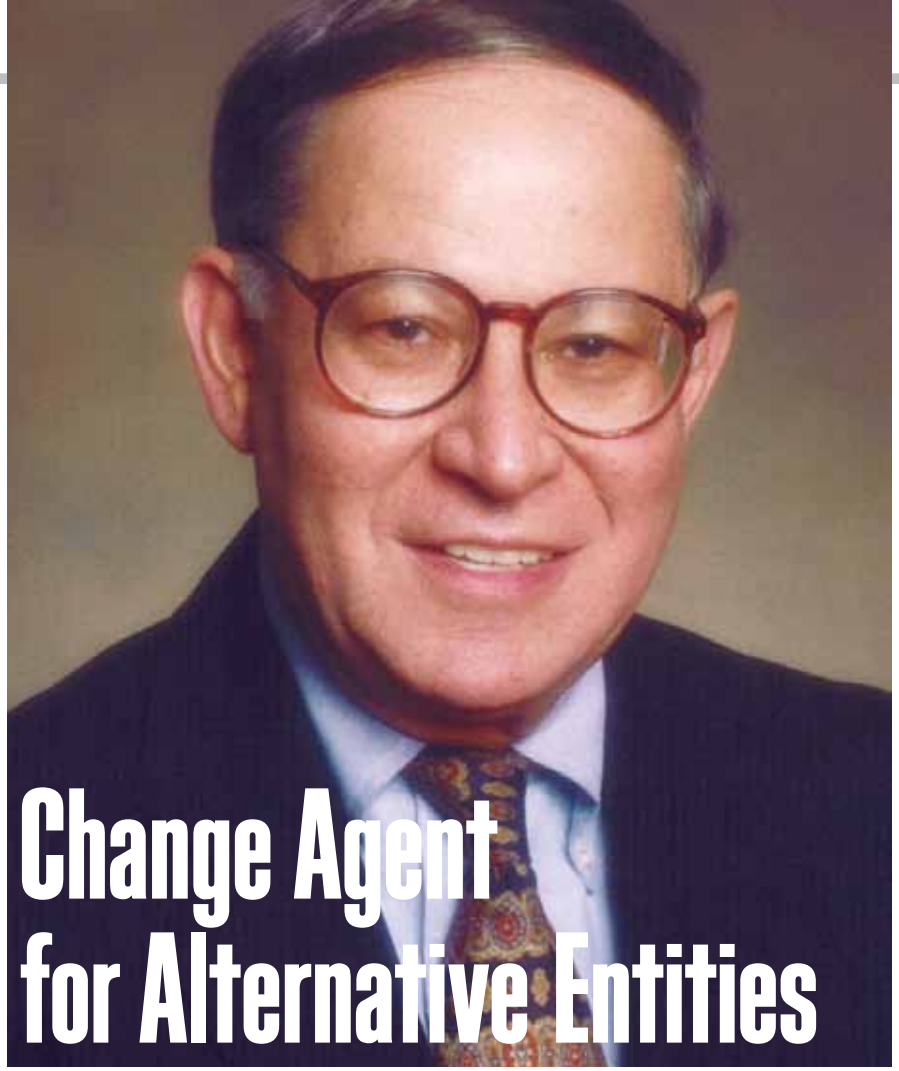
11. 488 A.2d 858 (Del. 1985).

12. 907 A.2d 963 (Del. 2005).

13. Arsht, Hofstra, 111-112.

14. *See* Craig B. Smith, *Remembering Sam Arsht: A Master Lawyer, A Patient Teacher*, Delaware Law Weekly, Vol. 2, Issue 12 (March 23, 1999); Lawrence A. Hamermesh, *Friends, Family Celebrate Life of S. Samuel Arsht*, Delaware Law Weekly, Vol. 2, Issue 14 (April 6, 1999).

Thomas L. Ambro



Martin I. Lubaroff: Change Agent for Alternative Entities

With a laser-like focus, Marty Lubaroff was that rare attorney who, through imagination and intellectual force, influences a major area of the law.

This is a short story about Martin I. Lubaroff and the role he played in making alternative (that is, non-corporate) entities Delaware-centric. Indeed, many believe Marty came up with the term "alternative entities."

I write this story not because I had any role in that process. I did not, and observed only from afar the efforts of Marty and those with whom he worked in this once (but no more) somnolent area of law.

They included: Paul M. Altman of Richards Layton & Finger (where Marty worked for over three decades before his death, at age 59, from leukemia in January 2001), who co-authored a book and numerous articles with Marty; John H. Small, Walter C. Tuthill and Craig B. Smith on the Alternative Entities Subcommittee of the Corporation Law Section of the Delaware State Bar Association; and Robert R. Keatinge, Harry J. Haynesworth IV, George W. Coleman, William H. Clark, Jr., Allan G. Donn, and Larry Ribstein of the Committee on LLCs, Partnerships and Unincorporated Entities of the American Bar Association's Section of Business Law.

What, then, was my involvement with Marty? I was the second associate at Richards, Layton & Finger (Michael A. Meehan was the first) to be assigned exclusively to Marty. (Alesia Ranney-Marinelli, later a nationally recognized bankruptcy partner at the Skadden Arps firm in New York City, and David B. Stratton, who heads up the bankruptcy practice in Delaware for Pepper Hamilton, succeeded me.)

Though Marty, as someone said of

experience, gave the test first and the lesson later, Alesia remarked to me the night before Marty's burial, "Looking back, I realized that he was my best teacher." I agree, and would not be surprised if Messrs. Meehan and Stratton believe the same.

Yet none of us thought that when we worked for Marty. I certainly did not. In the summer of 1976 when I first joined Richards, Layton & Finger, I already knew of Marty's reputation as a tough teacher, and found out after my first month that I was assigned to work for him. I went to Norm Veasey, then the managing partner of the firm. I started off, "Mr. Veasey." He said, "Call me Norm." "Alright," I replied, "Mr. Norm. I understand that I have been assigned to work for Marty Lubaroff and that he works on things like the Uniform Commercial Code.

"Well," I continued, "I just want you to know that I thought I was hired to litigate. In fact, I took a UCC course pass/fail in law school, and dropped it for lack of interest."

Norm responded, "Give it a shot. You may come to enjoy it."

That was the start of my relationship with Marty. From it I learned more than I have time to tell. And what I relate concerns not the UCC but an area Marty dealt with sparingly in the 1970s. Change was underway, and Marty's slow start did not foretell the finish.

Agents of change are few. Rare is the person with the intellectual talent, foresight, flexibility, focus, drive, organization, precision, persistence and persuasive power to affect significant progress in an area of law. Marty Lubaroff was one of that select group.

Most of us are, to make up an oxymoron, sidelined to the center. We swim in lanes not of our choosing but roped out by others. Our herd instinct makes it easy to follow. All too often we do so; all too seldom we stray across our assigned lanes.

His personal goal was to be so good at something that others would remember him. Once found, the subject of that goal became the object of his focus.

Marty Lubaroff was different. What others did within their lanes was for him but a starting point. His perspective was unusual. And his personal drive was to be so good at something that others would remember him. Once found, the subject of that goal became the object of his focus. And that focus was searing.

Warren Buffett and Bill Gates, when once asked what is genius, are reported to have replied independently that the key component is focus. Few issues, no matter their seeming simplicity, are better resolved without it.

Marty could focus. He did so — in part, I believe — because his work defined him and gave his talents meaning. But that alone is not why we remember him. Marty's talents needed a topic that, once chosen, created its own market. And that leads to alternative entities.

Delaware and Alternative Entities

Mention Delaware in the legal or business world and the blink response for decades has been corporate law. That still comes to mind instantly, but alongside are alternative entities. Though they technically comprise limited partnerships, limited liability companies, limited liability partnerships, limited liability limited partnerships, general partnerships, and statutory business trusts, the first two receive the most attention and are the most pervasive. (Statutory business trusts are also in significant use, but Marty had little involvement in their legislative authorization.) Hence I center on limited partnerships and LLCs.

Limited Partnerships

Limited partnerships are a 19th-century creation. By 1916 the National Conference of Commissioners on Uniform State Laws proposed the first Uniform Limited Partnership Act. Delaware was not the "First State" to adopt that Act: in fact, it was the 49th, finally following suit in 1973. (For trivia buffs, Louisiana was the lone holdout.)

What Delaware did was significant, however. The national Act provided that limited partners had only limited liability if they did not "participate in the control" of the limited partnership. Delaware included a non-uniform provision — a forerunner of the flexibility to come — that gave a non-exclusive list of limited partners' activities that sheltered them from general liability.

Those sheltering, or safe-harbor, activities included consulting with and advising the general partners on the conduct of the entity's business, and "approv[ing] or disapprov[ing] such material matters related to the business of the partnership as shall be stated in the certificate [of limited partnership] and in the partnership agreement."

This change by Delaware of the Uniform Limited Partnership Act, among other changes, spurred the Uniform Law Commissioners to propose in 1976 a Revised Uniform Limited Partnership Act ("RULPA"). Delaware still moved cautiously.

Only in the early 1980s did the Delaware State Bar Association form a group within the Corporation Law Section to

revise the Delaware Uniform Limited Partnership Act. Marty was not its chair, but soon became its dominant member. The bill the group proposed passed into law in 1982, with an effective date of January 1, 1983. Non-uniform changes to the national RULPA were made, but none was as significant as those made in 1985 and 1990.

The Corporation Law Section group did not disband after 1982. Instead, it changed its name to the Alternative Entities Subcommittee of that Section, and Marty became its head. The result was a significant amendment in 1985 of the recently passed Delaware RULPA. The changes were both many and significant. Among them were the following.

(1) Certificates of limited partnership, on file with the Delaware Secretary of State, no longer had to list the names and business addresses of limited partners.

(2) Section 17-211 gave explicit authority to merge and consolidate Delaware limited partnerships with themselves and with other states' limited partnerships.

(3) Section 17-302 clarified and expanded the voting rights of limited partners.

(4) Section 17-303 expanded substantially the activities of limited partners sheltered from liability, including the safe harbor that a limited partner does not participate in controlling the limited partnership if the right to propose, approve or disapprove a matter was stated in the partnership agreement.

It is this last provision that was the most startling, and controversial. Partners could craft by contract veto rights by limited partners over major decisions without risking liability. Put generally, there was freedom of contract, and this became explicit in 1990 when Delaware enacted § 17-1101(c), which stated explicitly that "[i]t is the [Act's] policy . . . to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements."

> The marketplace favored the approach of Delaware, and showed that favor by choosing it overwhelmingly for limited partnership formation.

Contractual creativity replaced rules that theretofore could not be varied by the parties because they were set out in the statute or decided by courts as a part of common law. This was Delaware's breakthrough (or, in today's argot, "sea change"). And the principal ideas for this breakthrough were Marty's. He convinced others to follow, but did so in a way that made them a meaningful part of the process. John Small, a member of the Subcommittee then (and for many years after), writes:

> I admired (sometimes grudgingly) Marty's way of bringing me and others around to his point of view. He was not a bully and did not patronize. He would endeavor to understand my point of view. He would not force the issue. Frequently, if agreement could not be reached, he would back off and defer more discussions until later. However, more often than I care to acknowledge, I came around to his point of view, or at least a point of view that was a lot closer to his original position than mine. And what was especially telling was that I would often feel that I was an important part of the process and that the final resolution was my idea!

The marketplace favored the approach of Delaware, and showed that favor by choosing it overwhelmingly for limited partnership formation. As other states moved to mimic Delaware, it amended its Act continually to stay steps ahead. Though membership on the Alternative Entities Subcommittee changed, its core members (John Small, Walt Tuthill and Craig Smith) and chair (Marty) did not.

The mindset was that Delaware would foster flexibility that allowed for private ordering. This occurred not only with respect to limited partnerships, but other alternative entities (even those ideas for entities not yet put into statute). Things would get even better.

Limited Liability Companies

Most corporations are taxed on their profits and their shareholders are taxed as well on dividends or other distributions made to them by the corporate entity. This is called "double taxation." The object obviously is to avoid twice-taxed treatment, in effect to have income earned by the entity passed through to its owners and be taxed only on what they receive.

Partnerships and certain types of corporations (so-called Subchapter S corporations) could achieve pass-through tax treatment for their owners at the cost of forgoing shareholder shields for liability (in the case of partnerships) or significant restrictions on the number of shareholders and their activities (in the case of Subchapter S corporations).

Could there be a form of entity that allowed the contractual flexibility of partnerships, the liability protections available to corporate shareholders, and but one level of taxation? The answer turned out to yes.

The State of Wyoming, in response to interest group action, passed in 1977

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a law creating what was called a Wyoming limited liability company. Borrowing from Wyoming's corporate and partnership (both general and limited) statutes, the law melded the member protections of corporate shareholders with the tax treatment of partnerships.

Fast forward several years to 1988, when the federal Internal Revenue Service, at the request of Wyoming, ruled that its limited liability company could qualify as a partnership for tax purposes. The "best of both worlds" in entity structuring had occurred.

States rushed to investigate the Wyoming model and what would be the form of LLC most appropriate for their jurisdictions (keeping in mind that the Wyoming LLC was not initially prepared as uniform legislation).

Delaware, as usual, lagged back at the outset. The same Alternative Entities Subcommittee that drafted the Delaware limited partnership provisions turned to drafting an indigenous LLC bill. The Wyoming statute was but a beginning — a template that, with changes, would make Delaware the preferred place of formation.

After more than one year of work, the Subcommittee proposed legislation, approved by the Corporation Law Section and the Executive Committee of the Delaware State Bar Association, that adopted the same private-ordering-by-contract model used in Delaware's Revised Uniform Limited Partnership Act.

Marty was at the forefront of that effort, which in 1992 resulted in the first Delaware Limited Liability Company Act. Like the Delaware RULPA, the Delaware LLC Act has been revised repeatedly. It has become so popular that, beginning in 2001, more LLCs were formed annually in Delaware than corporations. More than a half-million Delaware LLCs currently exist, doubling the aggregate number of Delaware corporations.

Because there was no model law, the American Bar Association and the National Conference of Commissioners on Uniform State Laws became involved. A subcommittee (with Marty integrally involved as Delaware's representative) of the ABA's Section of Business Law's Committee on Partnerships and Unincorporated Business Associations prepared a prototype of an LLC Act. That was followed by the National Conference of Commissioners on Uniform State Laws approving in 1995 a model LLC Act. (Marty was an ABA Advisor to NCCUSL with respect to limited partnerships but not LLCs.) His role within the ABA was so significant that, after his death in 2001, the Committee on Partnerships and Unincorporated Business Organizations (now the Com-

mittee on LLCs, Partnerships and Unincorporated Entities) of the Business Law Section has named after Marty its annual award to attorneys who have made exceptional contributions to alternative entity law.

* * * * *

Were there a Hall of Fame for transactional lawyers, Marty Lubaroff would be in it. Doing deals was Marty's métier. Doing them better, while involving Delaware more, was his delight.

What we know in Delaware became known nationally because of Marty's reimagining how the traditional way of approaching an old-style business form (limited partnerships) could be better — from one where statutes and court common law decisions supplied the rules to where private contractual ordering became the rule — and then engrafting this rule revolution onto LLCs.

The New York Times' obituary in 2004 for Francis H. C. Crick, who along with James D. Watson won the Nobel Prize for their discovery of the structure of DNA, concluded as follows:

> What is the nature of scientific genius? Dr. Crick was perhaps offering an answer in his response to a different question, that of whether he enjoyed his life.
>
> "I cannot do better," he said, than to quote from a lecture by the painter John Minton "in which he said of his own artistic creations, 'The important thing is to be there when the picture is painted.' And this, it seems to me, is partly a matter of luck and partly good judgment, inspiration and persistent application."

The small niche of legal affairs that deals with alternative business entities reposes silently in a corner of the shadow cast by the Crick/Watson discovery, but substitute "legal" for "scientific" and "Mr. Lubaroff" for "Dr. Crick," and the sentiment expressed is apt for Marty Lubaroff. ◆

William J. Marsden, Jr.
and Robert M. Oakes

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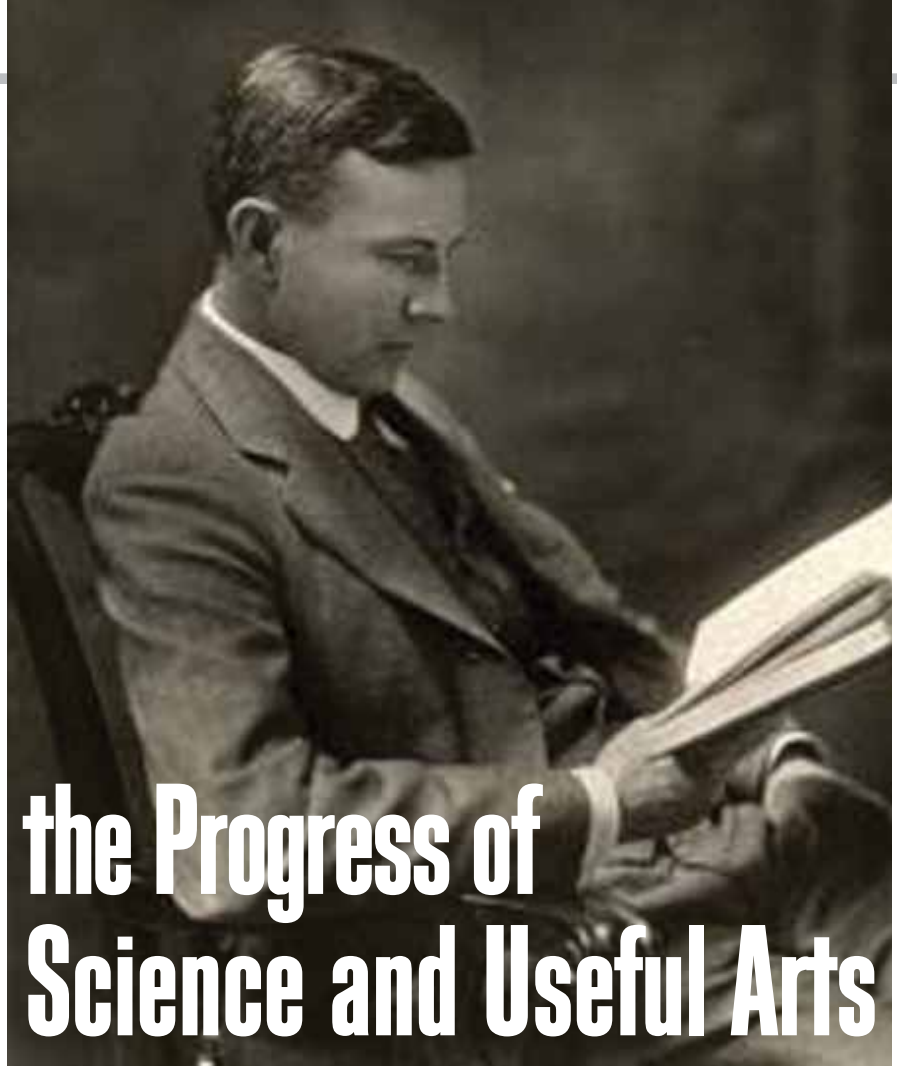


Judge Hugh M. Morris

Delaware is a leading venue for patent cases, thanks to the judiciary's expertise, innovation and commitment to providing a fair forum for litigation.

The U.S. District Court for the District of Delaware has been regarded as one of the nation's premier trial courts for patent disputes[1] since the early 20th century. A few private practitioners warrant mention in any history of patent litigation in the District of Delaware, but there is no question that it is the judges of that Court, beginning nearly a century ago and extending to the current day, who have given the Court its well-earned reputation.

Although enshrined in the Constitution,[2] patents get little respect from many federal judges. Whether it is the often complex science, or the highly developed and specialized patent case law they did not learn in law school, many federal judges avoid patent cases like the plague.

In contrast, Delaware's judges have never been afraid to roll up their sleeves and do the hard work required to master patent cases. The Court's consistent commitment to its patent docket has ensured that Delaware's judges have always been regarded as among the most experienced and sophisticated in the country when it comes to handling patent matters. As the law has changed, and trial practice has evolved, they have been in the vanguard of innovating to ensure that patent cases filed here are handled fairly and efficiently.

The Early Years: Judge Hugh M. Morris

One of the earliest high-profile cases involving patents in the Delaware District Court was not a traditional patent infringement case. In *United States v. Chemical Foundation,* 294 F. 300 (D.

Del. 1924), Judge Hugh M. Morris decided a suit brought by the United States government to set aside the sale and subsequent licensing of patents that had been seized as enemy property under the Trading With the Enemy Act during World War I.

The seized patents were sold by the government's Alien Property Custodian to a Delaware-chartered entity called the Chemical Foundation, which then licensed the patents to American chemical companies. Because the terms of the licenses were perceived as very generous to the licensed companies, there were charges that the companies had engaged in "war profiteering."[3]

Following a trial that lasted almost six weeks, Judge Morris ruled against the government, finding no evidence to support the allegation of a conspiracy by American manufacturers to effect a monopoly through the Foundation. His decision was later affirmed by both the Third Circuit and the United States Supreme Court, bringing national attention to the case.[4]

Judge Morris also tried one of the most important cases involving the patents covering early radio technology. In the so-called "Feed Back" litigation between AT&T, Westinghouse, GE and the United States government over who was first to invent the feedback circuit, Judge Morris found for Lee De Forest of AT&T.[5] Again, he was affirmed by both the Third Circuit and the U.S. Supreme Court.[6]

Judge Morris' expert handling of these complex matters put the Delaware District Court on the map as a sophisticated forum for resolution of patent disputes, and judges in the eras to follow have maintained that tradition.

The Era Before The CAFC: Caleb M. Wright

Although the Delaware District Court's reputation as a sophisticated forum for litigating complex patent disputes was established by early in the

Judge Caleb M. Wright

20th century, the number of patent filings in Delaware was small compared to the volume of such cases the Court handles today. One reason for this was the lack of a central court of appeals for patent disputes.

The United States Court of Appeals for the Federal Circuit ("CAFC") was established on October 1, 1982, and it is now the sole appellate court for patent cases. Before the CAFC, patent appeals were handled by the various regional circuit courts, and each circuit court had developed its own body of patent law, which often differed between circuits.

Further, some of the circuit courts had developed reputations as either pro-patent, or as hostile to patents. As a result, a party looking to file a patent infringement action often focused on the circuit court — not on the trial court — as a primary consideration in deciding where to file suit.

The Third Circuit was not perceived as overtly "pro-patent" like the Fifth and Seventh Circuits, but was also not perceived as outright hostile to patents, as the Eighth Circuit was. This relatively balanced reputation, combined with the more restrictive patent venue requirements then in effect,[7] meant that Delaware, which had by the 1950s emerged as the preferred state for incorporation for many of America's major companies, received a modest but steady number of patent filings. The Court continued to build its reputation in this area of the law because many of the most important patent cases were filed in Delaware.

During this era, Judge Caleb M. Wright emerged as arguably the leading patent jurist in the country. Judge Wright, who was appointed to the Court by President Eisenhower in 1955 and served as Chief Judge from 1957 to 1973, handled over 100 patent cases during his 30-year career on the bench.

Judge Wright made many contributions to patent jurisprudence,[8] but is probably best known for his handling of the *Standard Oil v. Montedison* case, a dispute involving crystalline polypropylene technology used in everything from packaging materials to plastics to automotive parts. The *Montedison* case was one of the largest patent cases in history at that time, beginning in the 1950s with a proceeding at the Patent and Trademark Office to determine who was the first inventor, known as an interference, that was subsequently appealed to the District of Delaware.

Judge Wright presided over a lengthy discovery period involving four multinational oil companies, including personally flying to Italy to preside over depositions, before conducting a trial in the matter in 1977-1978.

In 1980 Judge Wright issued a decision overturning the Patent and Trademark Office and directing the Commissioner of Patents "to issue to Phillips [Petroleum] the patent for solid crystalline polypropylene."[9]

Although the *Montedison* litigation spanned several decades, it was not the most protracted patent case over which Judge Wright presided. That distinction belonged to the *Devex Corp. v. General Motors Corp.* case,[10] which involved a process for cold-forming au-

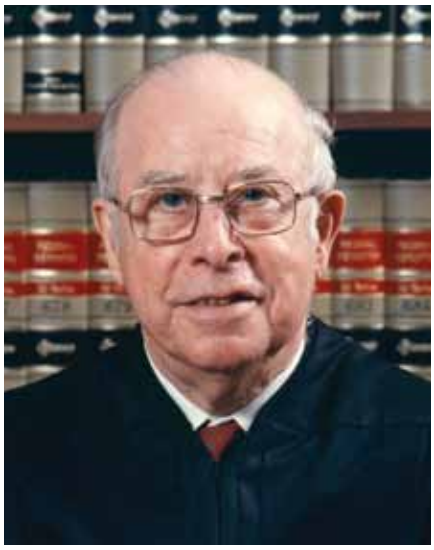
tomobile bumpers. The *Devex* case began in 1956 and lasted over 30 years, prompting Judge Wright to remark in one of his many written decisions in the case that it "threatened to outlast all human participants."[11]

Although Judge Wright assumed senior status in 1973, he continued to handle an active caseload, including many patent cases, well into the 1980s. In recognition of Judge Wright's contributions to the development of patent law and practice, he was appointed to serve a two-year term on the Advisory Committee to the United States Patent and Trademark Office.

As important as his widely cited written decisions and public service on the Advisory Committee were, Judge Wright's more important legacy to patent law and the Delaware District Court may be the example and encouragement he gave to the next generation of Delaware judges to embrace these cases.

Judges James L. Latchum, Walter K. Stapleton, Murray M. Schwartz, and Joseph J. Longobardi each went on to write careful and thorough opinions in a number of important patent cases. In keeping with Judge Wright's example of service to the national patent bar, when the Federal Judicial Center published a monograph on patent law and practice to educate federal judges about the basics of patent law, the author noted that he was "particularly indebted" to the comments of Judge Stapleton.[12]

Patent litigation in the era before the CAFC was almost exclusively a bench practice, and as the cases noted above indicate, often took many years to resolve, including significant discovery and motion practice that was less common in other types of litigation. The sheer size and importance of the cases often caused the lead lawyers, many of whom were patent attorneys with little courtroom experience, to enlist the aid of Delaware's leading corporate trial lawyers to argue



Judge James L. Latchum

motions in the District Court.

Another reflection of the importance of the Delaware District Court in patent matters was the decision by Arthur Connolly Sr., a patent attorney who had worked for the Universal Oil Company in Chicago before joining the patent department of the DuPont Company, to start his own patent law firm in Wilmington in 1944 and to later invite a colleague from New York, Werner "Dick" Hutz, to join him.

Although the firm, now known as Connolly Bove Lodge & Hutz, soon branched into other areas of the law, patent law remained one of its core specialties, and it was soon involved in several major patent cases of the day, including cases filed in the Delaware District Court. Mr. Connolly was one of the first lawyers in this field to make the transition from patent lawyer to trial lawyer, eventually becoming one of the first Delaware lawyers invited to join the American College of Trial Lawyers.

According to a video history the firm prepared at the time of its 60th anniversary, by the late 1960s the firm Mr. Connolly had founded had grown to be the largest private law firm in Delaware.

The Modern Era: Trial Judges

The creation of the CAFC in 1982 was intended to bring uniformity to patent law by doing away with the conflicts that had developed in the various regional circuit courts. This shifted the focus of patent plaintiffs' choice of forum from the circuit court to the trial court, and paved the way for explosive growth in the Delaware District Court's patent filings that has continued to present day.

With the focus on the trial court, the District of Delaware, with its sophisticated and experienced bench and reputation for handling patent cases fairly and efficiently, became a popular choice among patent litigants.

Several other developments coincided with the establishment of the CAFC and also contributed to the growth in popularity of the Delaware District Court as a forum for patent cases. As corporate America began to more fully appreciate the importance of intellectual property to the value of publicly traded companies and to the competitiveness of U.S. companies in the global marketplace, there was an overall increase in the volume of patent litigation, and this began to attract trial attorneys to the practice who were not patent attorneys and had developed their skills trying other types of cases.

These attorneys recognized the importance of choosing a court that could get their client's case to trial relatively quickly and efficiently. The Delaware District Court was attractive because of its relatively light criminal docket and the Court's established reputation as a sophisticated patent and trial court.

The influx of general trial lawyers to patent litigation also undoubtedly contributed to the trend, starting in the early 1980s, for patent owners to request jury trials. Jury trials had certain built-in advantages to a patent owner. For example, because a patent is presumed valid, a defendant seeking to invalidate it must prove invalidity by clear and convincing evidence, rather than the lower preponderance of the

evidence standard.[13] By the mid to late 1980s, jury trials were requested in almost all patent cases.

The increase of jury trials in patent cases also worked in favor of the Delaware District Court. Delaware's diverse and relatively well-educated jury pool made the Court attractive. When those juries returned an unbroken string of more than a dozen plaintiffs' verdicts in Delaware patent trials beginning in the mid-1980s and extending to 1994, the forum's popularity with patent holders was reinforced.

The shift in focus to trial courts, and more specifically to jury trials, also coincided with the appointment of Judge Joseph J. Farnan, Jr., to the Court by President Ronald Reagan in 1985. Judge Farnan, more so than many of his predecessors, came to the Court with a wealth of jury trial experience, having served as both a Public Defender, and later U.S. Attorney. His obvious enthusiasm for trials, his faith in the jury system, and his deep knowledge of evidentiary issues fit well with the patent bar's newfound enthusiasm for jury trials.

At the time of his retirement in 2010, Judge Farnan had presided over approximately 170 patent trials, more than any other judge. To put this number in perspective, a *Delaware Law Review* article published in 2004 reported that from 1997-2000, Judge Farnan held more patent trials than all but one judicial district in the entire country.[14]

While Judge Farnan's contributions to the efficient trial of patent cases to juries were many, his written opinions also demonstrated his mastery of the complex issues unique to patent cases. One of his more widely cited cases was one his earliest. In *RCA v. Data General Corporation*. Judge Farnan found an RCA patent that claimed a system for decoding digital computer symbol codes, which had been the subject of a series of cases litigated in the Delaware

Judge Joseph J. Farnan, Jr.

District Court in the 1970s and 1980s, invalid because RCA had placed its invention "on sale" prior to applying for the patent.[15] This decision was affirmed by the CAFC, and has been widely cited in the over two decades since it issued.

Lead counsel for *Data General* was another patent attorney who moved his practice from New York to Wilmington, Douglas E. Whitney of Morris Nichols Arsht & Tunnell, who went on to handle a number of patent cases as first chair in this and other districts.

As a result of all of these developments, patent filings in the Delaware District Court had increased dramatically by the end of the 1980s. In the 1970s, each of the three District Court judges may have handled approximately a half dozen patent cases at any given time, for a total of less than 20 pending cases in the District. By 1990, more than twice that many patent cases were being filed in the District annually.

While the addition of a fourth judgeship in 1985 helped with this growing docket, the Court also lost Judges Stapleton and Jane R. Roth to the Third Circuit, and Judges Latchum and Schwartz to senior status. The situation improved markedly in 1991 and 1992 with the appointments of Judges Sue L. Robinson and Roderick R. McKelvie by President George H.W. Bush.

Judges Robinson and McKelvie enthusiastically joined Judge Farnan in embracing the Court's growing reputation as a sophisticated patent trial forum and in searching for ways to more efficiently manage and try these complex cases. Collectively, they embarked on a path of continual trial-focused innovation and experimentation that continues to this day and has kept the District in the forefront of national patent litigation.

They were later joined in these efforts by Judges Gregory M. Sleet (1998), Kent A. Jordan (2002 - 2006) and, most recently, Leonard P. Stark (2010). Like Judge Farnan, Judge Sleet had been U.S. Attorney, and Judges Robinson, Jordan, and Stark had been Assistant U.S. Attorneys, making them all familiar and comfortable with jury trials in the federal court. Judge McKelvie had extensive jury trial experience prior to joining the Court, and his private practice included serving as Delaware counsel in a number of patent cases.

Among the more important trial innovations the Court introduced to patent cases during this period was relatively short trials, which were initially generally limited to no more than two weeks. Each side was given strict hours limits enforced by a chess clock kept by the judge's clerk who charged each side for all time on its feet, whether for openings, closings, objections, direct examination or cross examination.

By strictly limiting the length of these trials, the pool of potential jurors who could serve was expanded, and the inconvenience to the jurors was reduced. By forcing trial lawyers to focus more tightly and prioritize their presentation of evidence, it also improved the quality of advocacy.

A series of additional jury-friendly innovations followed, which included limited or no side bars, strict limitations on lengthy speaking objections,

and the encouragement of non-argumentative "transition statements" to explain to the jury how the testimony of the witness about to be called related to the issues they were to decide.

To enhance the depth of the jury venire for patent and other complex cases, the Court also amended its plan for the random selection of jurors, bringing back into the pool many occupations previously exempted, including lawyers, dentists, pharmacists, and teachers.

The Court also made administrative changes during the 1990s that contributed to the more efficient management of its docket generally. Under the Civil Justice Reform Act of 1990, the Delaware District Court was named one of 10 pilot districts. The Court responded to the Act's mandate by adopting a local rule, since amended, which set early and firm trial dates "within 12 months, if practicable, and no later than 18 months, after the filing of the complaint."

Although the rule provided an exception for complex cases, the Court quickly made clear that traditional patent infringement cases were not so complex as to fall within the exception. The potential of getting to trial within 12 to 18 months of filing, combined with the growing string of plaintiffs' victories in Delaware patent jury trials, made the District enormously popular with patent owners.

Also, in 1992 the Court began to assign cases randomly to the Judges as they were filed, rather than have cases assigned by the Chief Judge. This change brought objectivity and predictability to the process that was also well received.

While these jury innovations and administrative changes brought a higher level of efficiency to the Court's entire docket, the Judges did not stop there. The Court established an Advisory Committee on Intellectual Property Litigation, composed of judges and experienced patent litigators from around the country, to discuss in an informal setting how the Court could try patent cases more efficiently. At a dinner twice a year, the judges would hear from national trial lawyers and their clients about changes they felt could improve the quality of justice in patent cases.

The judges prefer to decide cases on the merits based on a full record with the opportunity to see and hear witnesses to judge their credibility.

One of the early projects spawned by this dialog was the drafting of a set of Uniform Jury Instructions for Patent Cases by a group of local and national practitioners. Although never formally adopted by the Court, they were widely cited and followed by other District Courts.

Another idea sparked at one of these dinners gave rise to a Federal Judicial Center project to create a short instructional video called "An Introduction to the Patent System" that is still used today to educate jurors in patent cases. The video has largely replaced the former reliance on patent law expert testimony which was disfavored because it interfered with the Court's role in instructing the jury on the law.

Unlike many other districts, the Court consciously chose not to make superficial changes like adopting rigid Local Patent Rules. Instead, the Court manages its cases through Scheduling Orders tailored to patent cases, which can be freely updated as needed based on experience.

Each of the Delaware District Court judges in the modern era has also been active in speaking on intellectual property topics at events throughout the country. These appearances have increased awareness of the District Court's innovations and expertise in handling patent cases among the national patent bar and their clients.

Finally, the Court has recently reinstituted the practice of inviting national practitioners to meet with the Court in an informal setting, now under the auspices of the Delaware Chapter of the Federal Bar Association, which has formed a practice section on Intellectual Property Litigation.

Through its substantive decisions on routine procedural motions in patent cases, and its handling of alternative dispute resolution, the Delaware District Court has consistently sent the message that it is a trial court that views its primary mission as providing parties the opportunity to get to trial as quickly and efficiently as possible. Motions to transfer and motions for summary judgment are rarely granted.

In the case of the former, among the many good reasons frequently cited are deference to the plaintiff's legitimate choice of forum, modern tools of discovery that have reduced the importance of the physical location of witnesses and evidence, and the fact that many defendants are incorporated in Delaware and therefore should not be heard to complain about being sued here.

With respect to the latter, the judges prefer to decide cases on the merits based on a full record with the opportunity to see and hear witnesses to judge their credibility. Consistent with this preference, when confronted with a motion for preliminary injunction, the Court on more than one occasion has instead offered a trial on the merits on

a very short schedule, in one case only four months from when the case was filed.[16]

Finally, the judges do not try to manage their docket by strong-arming litigants into settlements. Instead, the Court has implemented a highly regarded parallel but independent ADR program using the services of Magistrate Judge Mary Pat Thynge. Judge Thynge, who was appointed in 1992, is formally trained in mediation techniques, and had extensive trial experience before joining the bench. She has set up procedures for mediation, including the preparation of confidential mediation statements which, together with her thorough preparation and indefatigable determination to look for creative business solutions short of trial, have enabled her to help many parties settle their patent disputes.

In addition, during the long periods when the court has been without its normal complement of judges, Judge Thynge has very ably stepped up to handle all pretrial matters in patent cases, and in several cases has presided over patent trials with the consent of the parties.

The Court's commitment to its patent docket as reflected in the numerous administrative and trial innovations described above led to a doubling in the number of patent filings from 1990 to 2000. Despite not having its full complement of judges for long stretches, patent filings in the Delaware District Court doubled again from 2000 to 2010.

In an interesting twist, a relatively high percentage of the patent cases tried in recent years have been bench trials. This is not because patent owners have lost faith in Delaware juries, but rather, because the cases have been filed under the Hatch-Waxman Act, which has been interpreted as providing no right to a jury trial.

The Court has become a forum of choice for litigation between branded pharmaceutical companies and generic drug manufacturers under the Hatch-Waxman Act. These cases can involve multibillion-dollar products, and for a branded company represent the difference between maintaining its position in the market and losing 80-90% of its market share. The collective experience of the Court has led to Delaware's recognition as the leading forum for this specialized type of patent litigation in recent years.

Despite not having a full complement of judges for long stretches, patent filings in the Delaware District Court doubled from 2000 to 2010.

Conclusion

No other judicial district can match the number of patent trials held, or the level of institutional knowledge of patent law and procedure possessed, by the judges of the Delaware District Court. With the strong commitment of Delaware's federal judges, the Delaware District Court is poised to continue its role as the nation's trial court of choice for the efficient and fair enforcement of patent rights for the next century. ◆

FOOTNOTES

1. Patents are often grouped together with trademarks and copyrights under the rubric "intellectual property." Although the Delaware District Court has handled some high-profile copyright and trademark cases over the years, its reputation in the field of intellectual property is based principally on its handling of literally thousands of the country's most complex and important patent cases. For that reason, this article focuses on the Court's role as a forum for patent litigation.

2. Art. 1, Sec. 8, Par. 8. "The Congress shall have Power …To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

3. Carol E. Hoffecker, *The Judicial Career of Hugh M. Morris*, in Remembering Judge Morris, Collections Vol. VIII (Newark, DE: University of Delaware Library Associates, 1993).

4. *United States v. Chemical Foundation, Inc.*, 272 U.S. 1 (1926).

5. *United States v. De Forest Radio Telephone & Telegraph Co.*, 18 F. 2d 338 (D. Del. 1927); *Langmuir v. De Forest*, 18 F.2d 345 (D. Del. 1927).

6. *Westinghouse Electric & Mfg. Co. v. De Forest Radio Telephone & Telegraph Co.*, 21 F. 2d 918 (3d Cir. 1927); *United States v. De Forest Radio Telephone & Telegraph Co.*, 278 U.S. 562 (1928).

7. The patent venue statute allows suit "in the judicial district where the defendant resides or where the defendant has committed acts of infringement and has a regular and established place of business." 28 U.S.C. § 1400(b). Historically, the Supreme Court defined "resides" narrowly to refer only to the defendant's state of incorporation. In 1989, Congress broadened the definition of a defendant's "residence" to include any jurisdiction where the court has personal jurisdiction. 28 U.S.C. § 1391; *see also* David D. Siegel, *Venue In Patent Infringement Suits: Expanded By The New 'Residence' Definition of 28 U.S.C.A. § 1391*(c)?, 1 Alb. L.J. Sci. & Tech. 271, 273 (1991).

8. *See* Arthur G. Connolly, Sr., and Donald F. Parsons, Jr., *Senior Judge Caleb M. Wright's Contributions to the Trial of Complex Patent Cases*, in Delaware Lawyer Vol. 7, No. 3 (March 1989).

9. *Standard Oil Co. v. Montedison S.p.A.*, 494 F. Supp. 370 (D. Del. 1980).

10. C.A. No. 3058.

11. *Devex Corp. v. General Motors Corp.*, 638 F. Supp. 940, 941-42 (D. Del. 1986).

12. Herbert F. Schwartz, Patent Law and Practice (3d ed. 2001).

13. Herbert F. Schwartz, Patent Law and Practice (3d ed. 2001).

14. Donald F. Parsons, Jr., Jack Blumenfeld, Mary B. Graham, and Leslie Polizoti, *Solving the Mystery of Patentees' "Collective Enthusiasm" for Delaware*, 7 Del. L. Rev. 145, 155 (2004).

15. *RCA Corp. v. Data General Corp.*, 701 F. Supp. 456 (D. Del. 1988).

16. *Seachange Int'l., Inc. v. nCube Corp.*, 313 F. Supp. 2d 393, 395 (D. Del. 2004).

Michael Houghton

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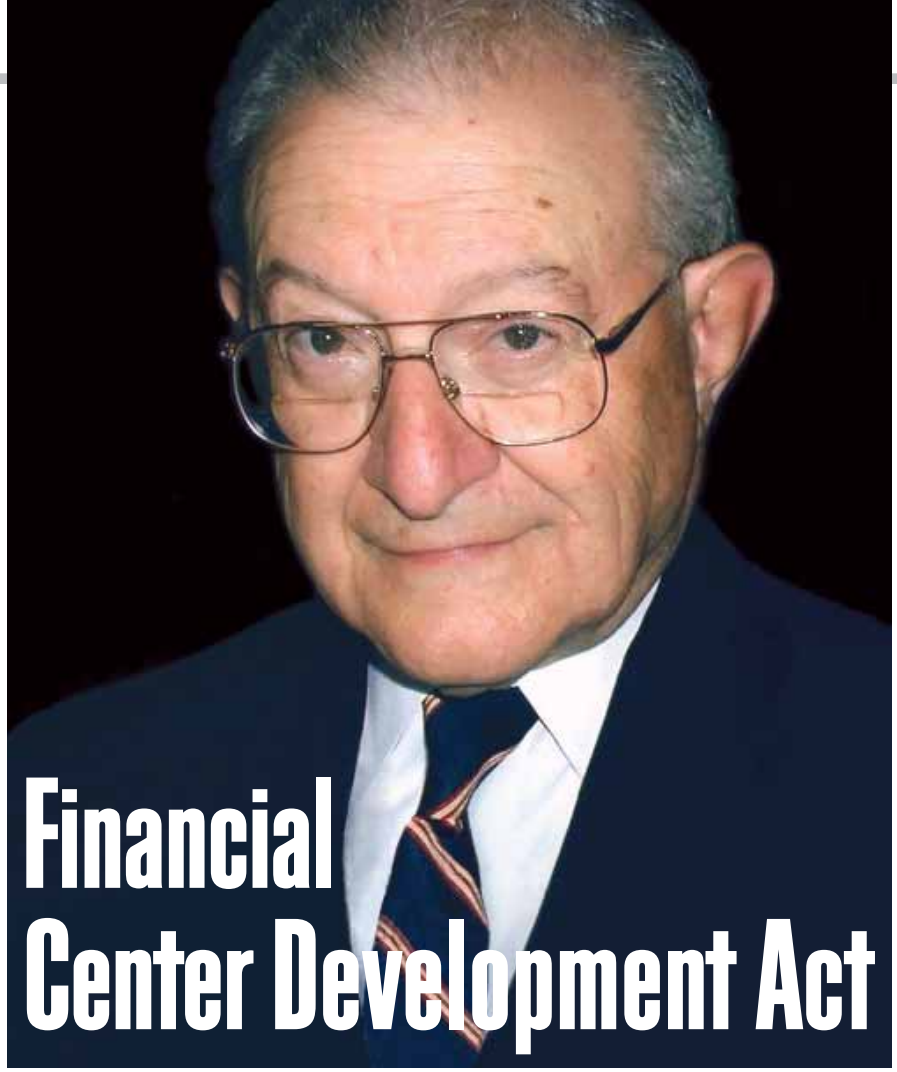

Frank Biondi and the Financial Center Development Act

How one man's vision, political experience, legal ability, trusted relationships and knack for negotiation helped transform Delaware's economy.

It was not a common occurrence in the early 1980s for a helicopter to weave its way from the skies above Wilmington to those above Bridgeville. It was even more uncommon for a helicopter making that trip to have the general counsel of DuPont — Chuck Welch — and the preeminent deal-maker and public policy attorney of his generation — Frank Biondi — as passengers headed to meet with two senior and powerful Delaware state senators: Senator Richard Cordrey, President Pro Tempore of the Delaware State Senate, and Senator Thurman Adams, Chair of the Senate Executive Committee.

As the helicopter touched down near Senator Thurman Adams's home — where peach packing was in process on the farm — the upstate visitors threw a cloud of dust and dirt from the neighboring fields through the open windows of the Adams house. It was a messy arrival — but the discussions about how to make Delaware a preeminent financial services center with the help of the legislature went well, and the visitors even left with bags of peaches, courtesy of the Adams orchards.

There was nothing really ordinary about that day, or many days in 1980 and 1981. Not for O. Francis "Frank" Biondi. And not for the entire state of Delaware, whose economy Frank helped to reshape and revitalize by playing a leading role in the drafting and passing of Delaware's Financial Center Development Act of 1981.

The story of the FCDA begins long before Frank literally descended upon Senator Thurman Adams's farm. In many ways, the story of the FCDA begins when the United States Supreme Court issued its ruling in *Marquette National Bank of Minneapolis v. First of Omaha Service Corporation* (439 U.S. 299), a 1978 decision which held that federal law trumped state usury statutes, and that a national bank could export to other states the interest rates allowed by the laws of the state in which the national bank was located.

This ruling paved the way for individual states' efforts to forge legal frameworks that would attract financial companies and foster the creation and development of financial centers. But we need to go back further to understand how Frank Biondi's own background prepared him to play a critical role in the process of Delaware reinventing itself and its economy in what has become the quintessential "Delaware way": through the amicable coordination and collaboration — and sometimes bare-knuckled negotiations — of diverse stakeholders, with an ultimate focus on common ground rather than on rocky terrain.

In 1972, the economic future of Delaware was in doubt. Months earlier, in June 1971, Governor Russell Peterson had signed the Delaware Coastal Zone Act into law. A benchmark piece of legislation for environmentalists, the Coastal Zone Act drew the ire of important elements in both the labor and business communities, who viewed the Act as "anti-development." The president of one major Delaware corporation even urged people not to move to Delaware.

What is now viewed by many as an example of successful environmental stewardship was, at the time, a source of tension with significant business interests in the state. Prevented from expanding up and down the coast or into deeper waters, some Delaware industries were frustrated. There were fears of economic stagnation, at a time when economic concerns were already heightened nationally. Development and economic growth had to turn inward. But inward to what? Growth on what basis?

Frank learned that if you put people across the table to discuss contentious matters, they may not be as difficult as when lobbing shells from a distance.

At that time, not even 40 years old, Frank had already established himself as a significant player in public affairs in the state of Delaware. More importantly, Frank had gained experiences and perspectives that would prove essential to his work on the FCDA. Born to a father who had immigrated from Italy at the age of 14 and a mother who was born in Massachusetts just two weeks after her parents arrived in the United States from Italy, Frank graduated from Salesianum School in Wilmington and then returned home to Delaware after completing his undergraduate studies at LaSalle College, graduate studies at Boston College, and law school at the University of Pennsylvania.

Frank joined the Wilmington City Solicitor's office as a law clerk. After two years, he became First Assistant Solicitor and, after another two years, Frank became the City Solicitor. Five years later, when he left his public office, Frank had gained direct insight into the value of coalition-building, face-to-face discussions — and back-room deal-making — that were made possible through fighting, and working with, the Democratic political machine of the City of Wilmington.

He also had designed the first housing code in Delaware history, rezoned much of the City of Wilmington, and — after being thrown out of a Wilmington restaurant with several of his black friends — drafted Delaware's first civil rights ordinance prohibiting racial discrimination.

From these experiences in Wilmington, Frank learned that it was often difficult to get people to agree on things. He also learned that if you put people across the table to discuss contentious matters, they may not be as difficult or obstreperous about issues as they would when lobbing shells from a distance.

Drawing on this lesson in 1972, and in the atmosphere following passage of the Coastal Zone Act, Frank suggested to new Democratic Governor Sherman Tribbitt — to whose campaign Frank had lent considerable support — that the Governor establish a "Delaware Tomorrow Commission."

Frank believed the Governor should appoint a diverse group of representatives — labor leaders, business leaders, farmers, developers, and others — to serve Delaware by together generating and examining potential areas of economic growth and development.

Governor Tribbitt followed Frank's suggestion. By 1976, the Commission, which Frank chaired for three years, had issued a series of reports. From those reports came the idea for an Intergovernmental Task Force to examine the role of State and local governments in planning and in the provision of services.

In 1977, Delaware's new Republican Governor, Pete du Pont, established Delaware's Intergovernmental Task Force, which Frank — a leading and partisan Democrat — was asked to co-chair. From this Task Force sprang a committee of people, which included

Frank, who began to search for opportunities for new economic development initiatives in Delaware.

One year later, the United States Supreme Court issued its decision in *Marquette National Bank*. The importance of that decision to economic development was not immediately evident to Delaware or to other states. Two years passed. Then, in response to banks' promises to relocate their credit card operations to South Dakota from out-of-state, South Dakota enacted legislation that eliminated caps on interest rates charged on credit card purchases. Banks began moving operations — and jobs — to South Dakota, first among them Citicorp. America's banking landscape was poised for change.

Frank and others in Delaware were aware of these developments. When banks from New York began searching for a state much closer than South Dakota — and when those banks approached their Delaware counterparts — Frank was positioned to help spearhead the initiative both as a partner at Morris, Nichols, Arsht & Tunnell familiar with banking law and as a well-connected dealmaker and political force in the State.

In the early months of 1980, New York bankers made the quick trip to Delaware to gauge business interest and legislative possibilities here. The initial interest among a handful of Delaware bankers, lawyers and political leaders quickly grew into a group that included the du Pont administration and Wilmington's and New Castle County's elected leadership.

The opportunity for sustainable economic development in Delaware was clear and the planning process commenced. At an early meeting, an executive from a New York bank began to explain the relevant laws to the Delawareans present, noting that the issues were complicated. Frank quickly asked to offer his own concise interpretation, and then proceeded to do so. After a moment of semi-stunned silence, the bank executive said, "I wish our lawyers in New York had been able to explain it to us that simply and succinctly!"

Frank and his team examined the banking laws of all 50 states to understand ways in which Delaware's law could be improved.

With key business and political leaders interested in working with New York banks to establish credit card operations and other financial activities in Delaware, Frank began a series of trips to New York and meetings with New York attorneys. With the assistance of Morris Nichols associates Walter Tuthill (now a Morris Nichols partner) and Bill Allen (later Chancellor of the Delaware Court of Chancery, and now a professor at New York University), Frank completed the bulk of the drafting efforts for the legislation that was to become the Financial Center Development Act.

Seeking a foundation for jobs and economic growth in Delaware, Frank sought to expand the Act beyond the scope of South Dakota's legislation. In Frank's own exacting and inimitable style, Frank and his team examined the banking laws of all 50 states to understand ways in which Delaware's law could be improved.

He prepared a broad piece of legislation that would apply a free-market philosophy to every classification of consumer and commercial lending, and he balanced the need to adopt the suggestions of New York banks' attorneys with the need to avoid overreaching, which could cause substantive and political problems.

Frank's political experiences — and relationships — were as critical as his legal ability. New York bankers, along with Delaware bankers initially interested in bringing financial development to Delaware, worked to bring on board other Delaware bankers who initially felt threatened by changes to Delaware's banking and legal landscape. Frank began contacting and persuading individual legislators to consider the merits of the Act and the ways in which the Act could promote jobs and growth in Delaware.

With a Republican governor, a Republican House, but a strong and assertive Democratic Senate, Frank paid special attention to the Delaware Senate. Frank's interactions with legislators included far more than the helicopter trip down to Sussex County with Chuck Welch. Frank also spent hours individually with many state legislators, including Senate Majority Leader Tom Sharp, who worked as a sheet metal union worker for a company on South Market Street in Wilmington, just blocks away from Frank's offices. Dressed in his work clothes, Senator Sharp arrived at Frank's law offices for a one-on-one session lasting hours, during which Frank went through the proposed legislation line by line with an attentive Senator Sharp.

Beyond these individual sessions, Frank also was point person on testimony before Delaware's General Assembly. He testified on behalf of the banks before both House and Senate committees and in each chamber (an executive vice president of a New York bank was waiting in a rented Dover office, on hand to give approval for any major changes to the proposed legislation, but also safely hidden away).

At times, the testimony was grueling, lasting for over six hours in one stretch. Freshly armed from his meetings with Frank in Wilmington, Sena-

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tor Sharp asked, as to each section of the proposed legislation, "Well, what is the current law on this topic, and why should we change it?"

Frank responded to every question posed to him. He had read every article or analysis available on the issue, whether in legal journals, economic journals, or elsewhere. He attempted to give the same answer to a state legislator that he would give to an economist. Never one to hide the ball from the legislators, he tackled the most difficult issues first. He explained both the substance and the economic development benefits of the proposed legislation.

But Frank did not promise — nor could anyone have imagined — that passage of the Financial Center Development Act would reshape the Delaware economy as dramatically as it did.

It was Frank's no-nonsense style and his ability to relate to and treat equally Delaware CEOs, New York bankers, and Delaware legislators that made him perhaps the only person in Delaware who could have played such a central advocacy role for the FCDA. It was more than his education and experience as a lawyer-advocate that enabled Frank to help bring the legislation into law — it was his personal history and experiences in the Delaware community.

Based on his own history — putting himself through school, working in local businesses as a young man, organizing initiatives for St. Anthony's Parish, running political campaigns for local or statewide candidates — Frank understood what working people thought of the banks and of government. He respected the individual perspectives and experiences people brought to issues. And he also had a strong belief that by making consumer and commercial lending more readily available, Delaware would create jobs — how many, no one really knew.

After its passage by the Delaware General Assembly (first 33-3 by the House, and then 14-7 by the Senate), the Financial Center Development Act was a "game changer" and did indeed reshape the face of the Delaware economy, particularly in New Castle County.

The FCDA itself was not the end-all and be-all of relevant or controlling banking legislation. Subsequent legislation further developed Delaware's banking framework — and subsequent federal legislation eventually altered the playing field more in favor of federally chartered institutions. Through these ebbs and flows, at its zenith the banking industry provided more than 30,000 jobs in Delaware and an annual bank franchise tax to the State of more than $175 million.

Even after the significant impact of recent economic events on the banking and financial industry and on consumer and commercial lending, the industry remains one of the largest segments of Delaware's economy, and a provider of livelihoods for thousands of Delawareans.

Long before New York bankers traveled from New York to Wilmington to ask about the possibility of Delaware revising its banking laws in the post-*Marquette National Bank* world, Frank Biondi had learned how to forge — and sometimes force — agreement and compromise when people of diverse interests and backgrounds would come together and work face-to-face.

Long before passage of the FCDA, Frank also had sought to use the powers of collaboration and hard-nosed negotiation as key means of achieving sustainable economic growth in Delaware. And now, long after Frank's helicopter ride to Sussex County, his efforts — and those of the many others involved in the drafting and passage of the FCDA — continue to bear fruit, evidence of how the "Delaware way" can lead to seizing opportunities for our State in a manner that keeps Delaware at the forefront of American commerce. ◆

OF COUNSEL: Tempe Steen

Steen makes a point of acknowledging the invaluable support of her assistant, Wendy Herman. "We worked together for 20 years. She made the practice of law so much easier for me!"

Why retire? "I realized that as much as I loved the practice of law, I no longer had the stamina to continue, based on the way the practice is evolving," she explains. "With the rise of technology, responses and decisions are required much faster. And everything has to be documented, all the time."

Coming from a family history of lawyers, Steen had always looked to the profession of law with respect and awe. "The profession of law is a 'helping' profession in my mind – or at least, it should be. Now, it seems the profession is becoming more aggressive and less civil and personal, which makes me sad."

Steen plans to continue many of her community activities, including serving as Vice Chancellor of the Episcopal Diocese of Delaware, and a board member of The Way Home, an organization devoted to reducing the recidivism rates of ex-offenders. She also notes that her emeritus member status with the Delaware Supreme Court allows her to represent non-profit and religious organizations without compensation.

Although Steen doesn't have any firm plans for the next chapter in her life, she observes that "no lawyer is ever not a lawyer any more." She recalls giving a speech to a group of young lawyers and telling them, "You don't know yet what people think you know. You will forever be asked questions on topics you might not know anything about." With a wealth of knowledge and experience at her disposal, Steen can expect to keep getting those questions for a long time to come. ◆

Karen L. Pascale

OF COUNSEL: Tempe Steen

When she retired in 2010 after a 27-year legal career in Sussex County focusing largely on municipal law, Tempe Steen had all sorts of plans to catch up with old friends. Instead, she found herself spending the first year of retirement as something of a recluse.

"A counselor friend advised me, 'Plan to give yourself a year before you feel adjusted,' and that turned out to be true. Now, I'm really feeling ready to see people and get out and do things."

Her year of kicking back was certainly well deserved.

Having grown up in the Washington, D.C. area, she jokes that she "married into" Sussex County. "My parents had a house in South Bethany and I met my husband, Ron, on the beach there," she explains. "Ron's family had deep roots in Sussex County. I knew he wasn't ever leaving, so I moved there when we married in 1967."

After graduating from Duke University and earning a graduate degree from George Washington University, Steen taught for 10 years in the Indian River School District. "I think I learned more in my first couple of years living and teaching in Sussex County than I had in all my years of schooling," she says.

One of her more promising high school students was William B. Chandler, III, who was destined to serve as Chancellor to the Delaware Court of Chancery from 1997 to 2011. Legend has it that Steen told the future judge, "Bill, you should think about going to law school, because all you want to do is argue all the time. At least that way, you'd be paid for doing it."

Steen eventually followed her own path to law school, graduating *magna cum laude* from Delaware School of Law, Widener University, in 1983. "I loved teaching, but didn't feel I could do it for 25 more years." She briefly considered seeking an advanced degree in educational administration, but instead enrolled in law school. "I took the LSATs, went to law school for a year to prove to myself I could do it, and then went back to teaching for a year," she recalls. "My husband urged me to go back [to law school] and finish up."

Steen was already the mother of a 9-year-old daughter, Paige, when she started law school, and spent much of her time commuting. "My husband and daughter found their way through it. They bonded, and are very close to this day," operating a beach concessions business together.

Steen always knew she'd be coming back to Sussex County to practice. Upon graduation, she clerked for then-Superior Court Judge Claud L. Tease in Georgetown. "I was the fifth female member of the bar in Sussex County, and I thought he was very courageous to take me on," she says.

But the judge was in poor health that year, so the other Superior Court judges rotated service in Sussex County. "It was a great opportunity for me. I got to work with nearly every Superior Court judge, and learned something from each one of them. The visiting judges were terrific. They took the time to explain to me how they liked to do things and why."

She was introduced to an important mentor when she was interviewed by Randy Holland, now a Delaware Supreme Court justice, for her admission to the Delaware Bar. "I was so impressed by his professionalism. I wanted to take the same approach to the profession as he did: civil, serious, and ethical."

Longtime Family Court judge Battle Robinson was also a source of inspiration. "I always admired her lovely manners, gentility and strength – even when I disagreed with her in family court. She was a wonderful role model for women in the bar."

Steen recalls meeting another lawyer when she was still a teacher at Indian River. "Sheldon Sandler represented the teachers' union. There was an important hearing at the school, and I watched as Sheldon shredded the opposition. I thought, 'That was cool!'" Sandler later acted as an important sounding board with whom she could consult on employment law questions in her municipal law practice.

Eventually, with the guidance of Jack Messick of Tunnell & Raysor, P.A., Steen's practice focused on representing the local governments of several Sussex County towns. She had also been associated with Hudson Jones Jaywork & Fisher. Prior to retirement, she worked with two well-respected and talented lawyers, Jim Waehler and Mary Schrider-Fox, with whom she founded the firm of Steen, Waehler & Schrider-Fox, LLC.

"My favorite part of practice was representing municipalities," she says. "I loved the issues, the people, and building relationships." She worked in other areas as well, including family law, small claims, homeowners associations, and real estate. "I also enjoyed working on commissions and meeting people all across the state."

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