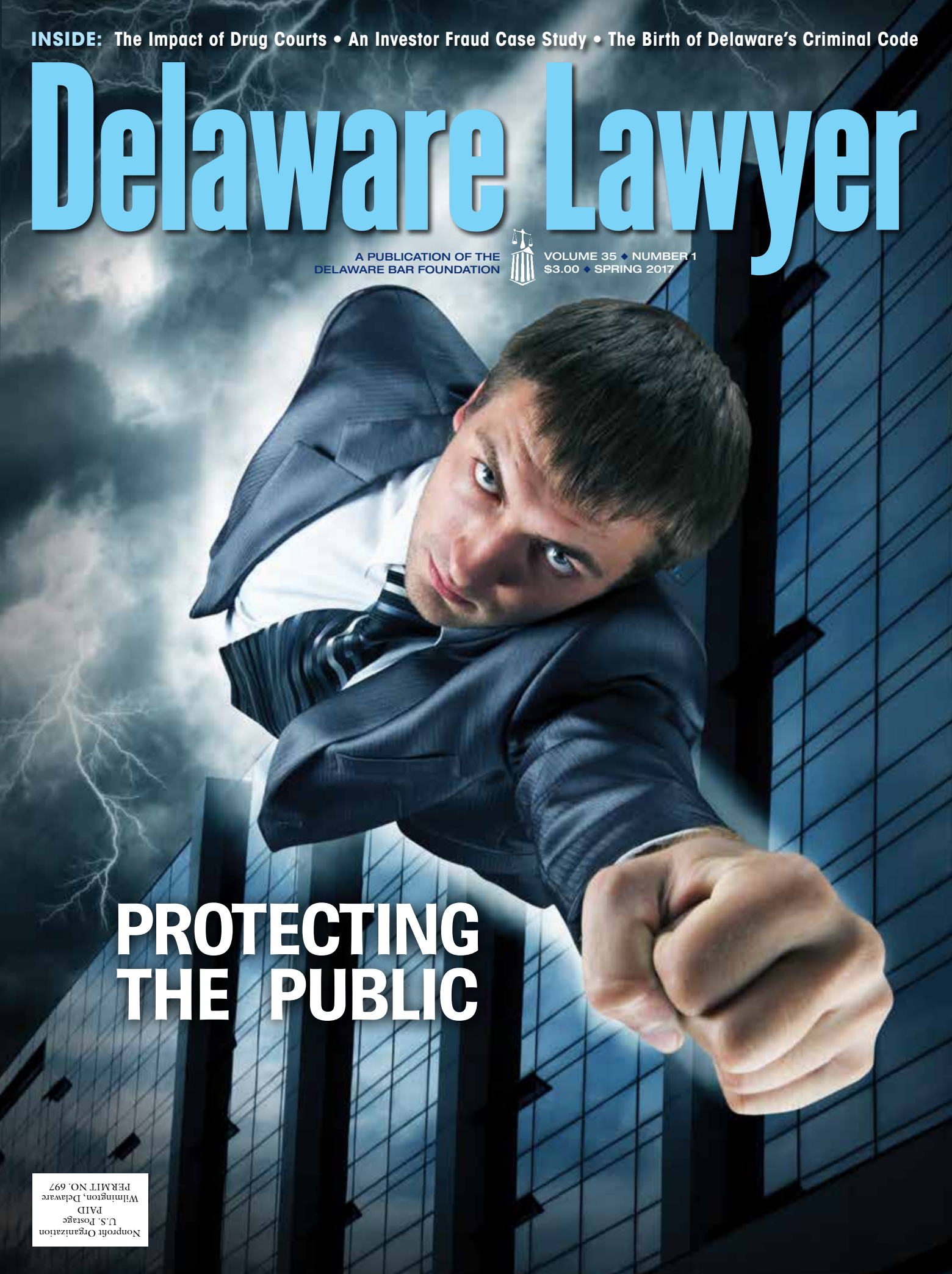
Delaware Lawyer

A PUBLICATION OF THE DELAWARE BAR FOUNDATION

VOLUME 35 ◆ NUMBER 1
$3.00 ◆ SPRING 2017



PROTECTING THE PUBLIC

Nonprofit Organization
U.S. Postage
PAID
Wilmington, Delaware
PERMIT NO. 697

“In prison, they called me Picasso.”

–John Myatt, criminal art forger

I was painted by a criminal art forger responsible for one of the biggest art cons of the 20th century. A real Master of Deceit! Convicted of forgery after an investigation by Scotland Yard, my painter went to prison—and emerged as a celebrity intent on redemption through the sale of “genuine fakes.” It sounds fantastic! Do you believe me?

What if I told you that my original hangs in the Metropolitan Museum of Art in New York? Climb into the life and mind of my artist. His artwork is in great demand! Ah, *notoriety*.

Discover how experts answer the question, **“Is it real or fake?”**

Treasures ON TRIAL
The Art and Science of DETECTING FAKES

APRIL 1, 2017–JANUARY 7, 2018 • WINTERTHUR GALLERIES

Presented by DUPONT Funded in part by FREEMAN'S

John Myatt's copy of *Oleanders*, after Vincent Van Gogh, is just one of the more than 40 examples of forgeries and counterfeit objects featured in the exhibition, many of which have been at the center of major scandals and court cases. Mixed media on canvas, 2012. Courtesy of Washington Green Fine Art.

WINTERTHUR MUSEUM, GARDEN & LIBRARY • 800.448.3883 • **winterthur.org/treasuresontrial**

Congratulations to our recognized Top Doctors!

DelawareToday TOPDOCTOR 2016

Delaware Back Pain & Sports Rehabilitation Centers

Depend on us to get you better faster.

BOARD-CERTIFIED PHYSICAL MEDICINE & REHABILITATION SPECIALISTS, INTERVENTIONAL PAIN MANAGEMENT SPECIALISTS, AND CHIROPRACTIC CARE

Physical Medicine & Rehabilitation/EMG
Barry L. Bakst, D.O., FAAPMR, FAOCPMR
Craig D. Sternberg, M.D., FAAPMR
Arnold B. Glassman, D.O. FAAPMR
Stephen M. Beneck, M.D., FAAPMR
Lyndon B. Cagampan, M.D. FAAPMR
Jeffrey S. Meyers, M.D., FAAPMR

Pain Management Counseling
Irene Fisher, Psy.D.

Physical Medicine & Rehabilitation/EMG/ Certified Brain Injury Medicine
Anne C. Mack, M.D., FAAPMR

Interventional Pain Management
Pramod K. Yadhati, M.D.

Interventional Plan Management/PMR/EMG
Rachael Smith, D.O., FAAPMR
Kartik Swaminathan, M.D., FAAPMR

Chiropractic Care
Kristi M. Dillon, D.C.
Brian S. Baar, D.C.
Marjorie E. Mackenzie, D.C.
Adam L. Maday, D.C.
Scott Schreiber, D.C., DACRB
Mark Farthing, D.C.
Hetal Patel, D.C., FIAMA
Ty Harmon, D.C.
Jennifer Walder, D.C.

Unique Services Include: Certified Brain Injury Medicine • Platelet Rich Plasma Therapy (PRP) • Acupuncture • EMG/NCS Ultrasound Guided Musculoskeletal Injections • Prolotherapy • Anti-Gravity Treadmills • Cold Laser Therapy • QFCEs Rehabilitation Therapy • Psychology/Pain Management Counseling

ACCEPTING NEW MOTOR VEHICLE & WORKERS' COMPENSATION CASES
DEPARTMENT OF TRANSPORTATION PHYSICAL EXAMS
Workers' Comp Certified Providers & Private insurances accepted

www.delawarebackpain.com

AANEM Accredited Laboratory

Foulk Road Park Office	2006 Foulk Road, Suite B, Wilmington, DE 19810 • 302.529.8783 • Fax-302.529.7470
Riverside Office	700 Lea Boulevard, Suite 102, Wilmington, DE 19802 • 302.764.0271 • Fax-302.762.4076
Omega Professional Center	87 Omega Drive, Building B, Newark, DE 19713 • 302.733.0980 • Fax-302.733.7495
Glasgow Medical Center	2600 Glasgow Avenue, Suite 210, Newark, DE 19702 • 302.832.8894 • Fax-302.832.8897
NEW!!! Middletown	124 Sleepy Hollow Dr., Ste. 204, Middletown, DE 19709 • 302.376.8080 • Fax-302.378.1684
Smyrna Office	29 N. East Street, Smyrna, DE 19977 • 302.389.2225 • Fax-302.389.1003
Eden Hill Medical Center	200 Banning Street, Suite 350, Dover, DE 19904 • 302.730.8848 • Fax 302.730.8846

Delaware Lawyer

CONTENTS SPRING 2017

Hilyard's Business Solutions

Robert Hilyard, John Collins, Michael & Charles Hilyard (3rd generation of Hilyard's family in the business) and the Hilyard's Sales Team

Hilyard's Business Solutions – Your one stop source for office equipment; including copiers, printers, wide format, premise telephones, cloud phone service, paging systems, intercom systems, transcription systems, voice and data cabling, IT services (offsite data backup and disaster recovery, cloud services, managed IT, security, remote monitoring) digital displays, shredders, folders, scanners, and work flow solutions.

Founded in1959, Hilyard's Business Solutions is proud to serve customers in Delaware, Southeastern Pennsylvania and the Maryland Eastern Shore. A family-owned business, we've built our reputation by delivering cutting-edge technology and unsurpassed service day in and day out. Hilyard's started out selling typewriters. When document management and IT solutions came out, we added those to our offerings and moved into the modern age of office integration. As technology advances so will our products and services.

In February 2017, Hilyard's Business Solutions purchased Collins Business Systems, Inc., adding offerings for voice solutions. Collins Business Systems and Hilyard's Business Solutions each built teams of specialists committed to your long-term satisfaction and will continue this tradition as Hilyard's Business Solutions. Collins recognized that it is critical for a communications company to combine leading technology with top quality service and support and knows that the purchase by Hilyard's does exactly that. With the purchase of Collins Business Systems, Hilyard's Business Solutions adds communication solutions as an exciting addition to the Hilyard's family of products, including voice and data cabling, phone solutions, paging and intercom systems and telephones along with our current product line of Sharp, Canon, Xerox copiers and MFPs, IT solutions and document management software.

No matter how we change over the years, we'll stay rooted in our tradition of working hard and putting the customer first with our reputation of excellent service. We look forward to continuing our commitment to excellence together with the ability to customize your office systems with both office equipment and voice solutions.

For your free voice, copier and work flow analysis, including voice solutions and Transcriptions Systems office equipment, contact Hilyard's Business Solutions. Special bundled programs for your financial needs are available.

Hilyard's INC.
Business Solutions

1616 Newport Gap Pike, Wilmington, DE 19808
1-800-247-2201 | www.hilyard.com

Delaware Lawyer

A publication of Delaware Bar Foundation
Volume 35 Number 1

DELAWARE BAR FOUNDATION
100 W. 10th Street / Suite 106
Wilmington, DE 19801
302-658-0773 / 302-658-0774 (fax)

DELAWARE LAWYER
is produced for the
Delaware Bar Foundation by:
Today Media Custom Communications
3301 Lancaster Pike, Suite 5C
Wilmington, DE 19805

Chairman: Robert Martinelli
President/Editor: Jonathan Witty
Art Director: Samantha Carol Smith

Subscriptions orders and address changes, call:
Jen Schuele, 302-656-1809

Advertising information, call:
Jessica Stryker, 302-504-1365
jessica.stryker@todaymediacustom.com

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

LET US CATER TO YOU

Janssen's Market offers customized, full-service catering, event planning, party rentals, floral arrangements, and more. From breakfast and lunch for 6 to a cocktail party for 50, we can deliver all of your needs to the office, hotel, or wherever you are working!

Contact our catering director today at 302.654.9941 x3

3801 Kennett Pike • Greenville, DE 19807
www.janssensfinefoods.com

GOURMET & EVERYDAY
JANSSEN'S market
SINCE 1952

Delaware Today 2016 BEST® OF Delaware

EDITOR'S NOTE

Kate Keller

This issue of *Delaware Lawyer* features the role of the law in protecting the public, with contributions from past and present members of the Delaware Department of Justice and Delaware judiciary. We read of an unwitting investor whose life savings were depleted by a fraudulent investment adviser, about the government's ability to recover money under the False Claims Act, how the current Delaware Criminal Code came to be, a look back at Delaware's leadership in establishing Drug Courts, and reflections from one of Delaware's most accomplished public servants.

All five authors have served in prominent roles at the Delaware Department of Justice, including former Attorneys General Richard Gebelein and Charles Oberly.

With Delaware's Drug Court nearing its 25th anniversary, Judge Gebelein, who presided over the first Drug Court, surveys the implementation of this pioneering specialty court in Delaware. Recognizing the critical link between drug addiction and crime, Delaware's Drug Court, one of the first 12 in the nation, aimed to provide Delaware's offenders with substance abuse treatment and support through the criminal justice system. A supporter of therapeutic courts, Judge Gebelein argues the need for specialty courts to treat targeted offenders.

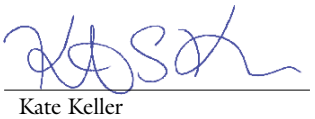
Retired Superior Court Judge Jerome Herlihy sketches how the current Criminal Code came to be. As Attorney General Laird Stabler's Chief Deputy Attorney General, Herlihy was part of an informal committee tasked with revising an antiquated Code in the early 1970s. Herlihy details the obstacles the committee faced in passing the legislation.

Enacted after the Civil War, the Federal False Claims Act (FCA) allows the government to recover civilly for the submission of false claims to the government. Tiphanie Miller discusses the theories of liability prior to the U.S. Supreme Court's recent *Escobar* decision allowing for an "implied certification theory." Miller's article highlights opinions post-*Escobar* and the likelihood of continued litigation that government and relators' counsel will face in the wake of this now-established theory in government FCA cases.

Greg Strong uses one person's story to give readers a glimpse into the world of the Investor Protection Unit's investigations. His subject receives an inheritance that she hopes will positively change the path of her family forever. However, the broker dealer whom she chooses to manage her money has a different idea. Strong details how the case was referred to his Unit, and the deceit that ultimately led to an administrative sanction under the Delaware Securities Act.

Having just completed six years as United States Attorney for Delaware, and after serving as Delaware's Attorney General for 12 years, Charlie Oberly takes readers through his career and changes in the bar and the administration of justice over the past 40 years.

We hope that readers enjoy the diverse topics and opinions presented by our distinguished authors. While the topics vary, the authors' commitment to service in Delaware is firmly established.



Kate Keller

Judge Richard S. Gebelein

received his law degree from Villanova Law School in 1970. He earned a Masters in Judicial Studies from the University of Nevada, Reno, in 2003 and a Diploma in Islamic Studies from the University of Sarajevo, Islamic Faculty, in 2006. He is also a graduate of the US Army Command and General Staff College and of the US Army War College. After clerking with the Delaware Court of Chancery, Judge Gebelin entered practice as a Deputy Attorney General, rising to the position of State Solicitor. He practiced with the law firm of Wilson and Russell and as Chief Deputy Public Defender. In 1978, he was elected Attorney General of Delaware. In 1984 he joined the Superior Court of Delaware. In 2004, he was deployed as a member of the Delaware National Guard to Afghanistan as Rule of Law Officer for Combined Forces Command. He left the Superior Court in 2005 to accept an appointment as a Judge of the State Court of Bosnia & Herzegovina, War Crimes and Corruption Chambers. In 2007, he returned to Delaware to serve as Chief Deputy Attorney General for Beau Biden. When he left that position he returned to Bosnia to head a USAID Rule of Law project to improve the performance of courts and prosecutors' offices. In 2011, he joined The Bifferato Firm in Wilmington where he specializes in ADR and continues to consult on international Rule of Law projects. He also served as a consultant to the Office of Justice Programs at American University. Judge Gebelein was chair of the Delaware Sentencing Accountability Commission for 13 years and during that time assisted in creating Delaware's first Drug Court. He was a founding member of the National Association of Drug Court Professionals (NADCP) and served on its Board of Directors for over eight years.

Judge Jerome Herlihy

is a graduate of Dartmouth College and the University of Pennsylvania Law School. He began his legal career as a Deputy Attorney General from 1966-1969. In May 1969, he was appointed legal counsel to Governor Russell Peterson. After serving as Governor's counsel, Judge Herlihy became the Chief Deputy Attorney General under Attorney General Laird Stabler from January 1971 through September 1974. Judge Herlihy worked for 15 years in private practice, including five years as a defense conflict counsel, with his brother and father until 1989 when Governor Michael Castle appointed him to the New Castle County Superior Court. Judge Herlihy would serve as a Superior Court judge from 1989 through December 2016, with a reappointment from Governor Ruth Ann Minner and a special appointment for 39 months by Chief Justice Leo Strine.

Tiphanie Miller

has been a Deputy Attorney General with the Medicaid Fraud Control Unit of the Delaware Department of Justice since November 2010. In this role, Ms. Miller criminally prosecutes cases of patient abuse and provider fraud within Delaware, while monitoring and assisting in multi-state *qui tam* civil litigation under the False Claims Act and Delaware False Claims and Reporting Act. Prior to joining the Attorney General's office, Ms. Miller worked in private practice, specializing in the formation of private equity funds, as well as complex civil litigation. She received her undergraduate degree from the University of Delaware and is a graduate of the Georgetown University Law Center.

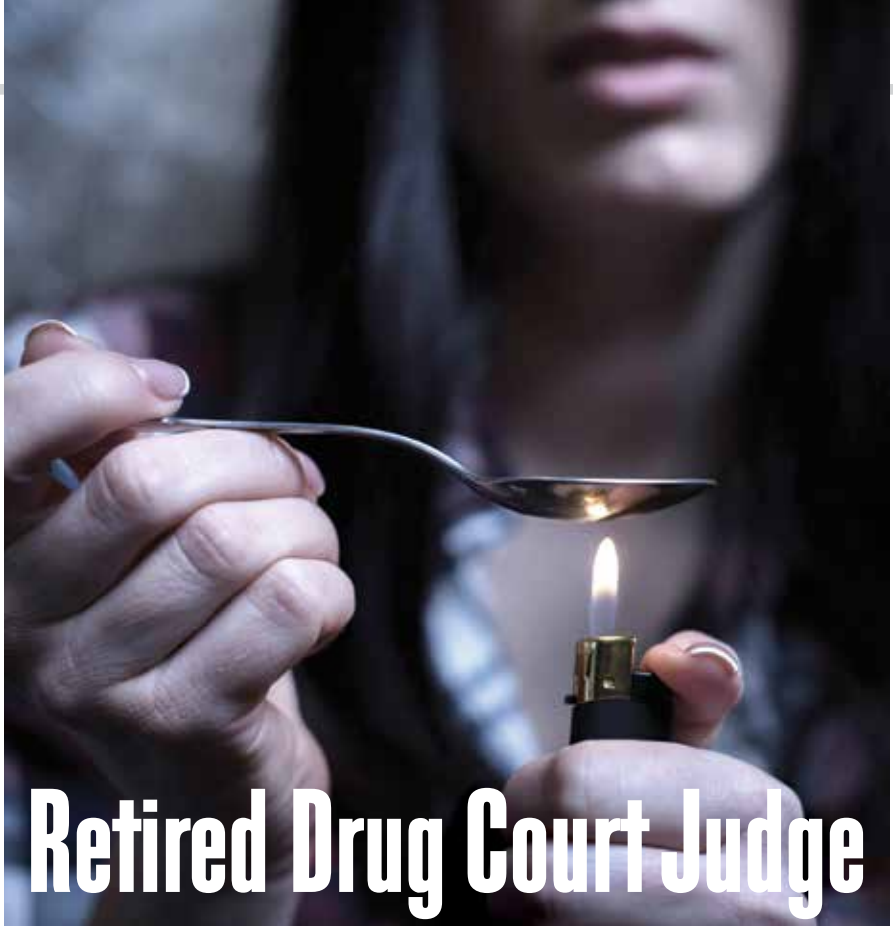
Charles M. Oberly III

has been at the forefront of criminal law throughout most of his career at the bar, as State Prosecutor (1976-79), Delaware's first three-term Attorney General (1983-1995) and U.S. Attorney for the District of Delaware (2010-2017). A graduate of Wesley College, Penn State (phi beta kappa) and University of Virginia Law School, he clerked for James L. Latchum in the U.S. District Court and then joined Morris James Hitchens & Williams, where he practiced for three years before joining the Delaware Department of Justice. Between his terms as Attorney General and U.S. Attorney, he practiced with Oberly Jennings & Rhodunda. For 30 years, he was an adjunct instructor for the University of Delaware's Criminal Justice Program. He founded and published *Delaware Law Monthly* and *Delaware Criminal Law Digest*. Married to Superior Court Commissioner Lynne Parker, he is the father of five. He received the First State Distinguished Service Award this spring, the highest award conferred by the Delaware State Bar Association.

Gregory C. Strong

is the Director of the Investor Protection Unit (IPU) in the Delaware Department of Justice, where he has worked as a Deputy Attorney General since 2003, and is responsible for administering the Delaware Securities Act. The IPU investigates investor complaints, brings legal action to enforce the provisions of the Delaware Securities Act when appropriate, registers all of the firms and individuals engaged in the securities business in Delaware, examines investment advisors and broker dealers, registers the securities offered for sale in Delaware (if they are not exempt from registration), and engages in community outreach and education to promote financial literacy and safe investing. Prior to his current appointment in July 2015, Mr. Strong was the Director of the Consumer Protection Unit for three years. He also served as a Deputy Attorney General in the Securities Unit, now the IPU, for four years. He has successfully represented the State of Delaware in many complex civil matters alleging violations of Delaware investor and consumer protection statutes. He started his career in the criminal division of the office and gained significant experience in the courtroom prosecuting criminal matters before juries in the Delaware Superior Court. Mr. Strong graduated from Lehigh University with a degree in Finance and attended Temple University Beasley School of Law, where he received a J.D./M.B.A.

Judge Richard S. Gebelein



Reflections From a Retired Drug Court Judge

What we have learned about drug treatment courts in the past 25 years.

As Delaware approaches the 25th anniversary of its drug courts, it is important to recall how these courts came into being and briefly review what we now know about this therapeutic model of criminal justice.[1]

The term "drug court" or "drug treatment court" does not relate to a separate specialty court; rather, it relates to a special docket or calendar within an existing court in most jurisdictions. Briefly described, a "drug court" uses the coercive power of the court to encourage criminal offenders to stay sober and engage in treatment. The court does not act in a traditional adversary fashion; but rather, it acts in a team fashion to support success for the participants and involves frequent contact between the offender and the drug court judge.[2]

The first drug court in the United States started in 1989 as a diversionary program for low-level drug offenders in Miami, Florida. At that time, low-level drug cases in Miami included many cases that would have been considered very serious in other states.

At about the same time, the Delaware Sentencing Accountability Commission was studying the issue of substance abuse addiction/dependence among criminal offenders within the Delaware Correction System. That study confirmed the generally known fact that a large percentage of offenders in the criminal justice system suffered from serious substance abuse problems. The Commission was looking for ways to approach these problems, as it was clear that addressing addiction was critical to reducing the criminal activity of the dependent or addicted offenders.[3] One experiment undertaken as a result of that study was the creation of the then-novel "drug court."

The special-calendar drug court designed for Delaware included two separate tracks: one track for low-level offenders, patterned after the diversionary drug court as existed in Miami, Oakland, Portland and a few other cities; and a track for serious repeat offenders who were serving a felony probationary sentence and were accused of a new felony or drug offense, a track unique to Delaware.

This second, unique track was designed to address individuals entering prison because of probation violations; those individuals were evaluated as hav-

ing the most serious substance abuse problems, with over 80% evaluated as needing long-term intensive treatment.

At the time, we were unaware of what would become a science-based "best practice," i.e., not to mix sentenced high-risk/high-need offenders with those diagnosed as low-risk/low-needs. Procedural considerations alone caused us to have the two target populations placed in separate tracks.[4] The Delaware "Drug Court" began operation in October 1993.

On a national level, the judges and other professionals involved in the 12 active drug courts met in 1994 to discuss their programs and see how they could assist the many other jurisdictions that were considering this promising addition to the criminal justice system. The result was the creation of an organization that would include judges and all other professionals involved in operating drug courts, The National Association of Drug Court Professionals (NADCP).

The organization and its founding members recognized that for the model to succeed, it would need to be proven to work, including evaluation of the program. Likewise, some common characteristics that define a "drug court" would need to be agreed upon, as there existed numerous expedited dockets that were called drug courts but did not involve treatment and/or the non-adversary team concept. Finally, it would be necessary to obtain federal recognition of these courts as a legitimate tool to be used to fight the scourge of drug abuse and the crime it engenders.

During the next few years, due in large part to the energy and vision of NADCP's President Jeff Tauber from Oakland, as well as the efforts of the founding members[5] who became spokespersons and lobbyists, federal recognition for the model and initial grant funding for new courts and research was obtained. One of the early supporters of drug courts in the Senate was Joe Biden, who had early on visited Delaware's Superior Court drug court. In speaking on this issue, one of his favorite phrases was, "Drug courts fight crime smart." Then-Senator Biden was key to getting the drug court model recognized in federal legislation.

Drug courts, however, proved to be a bipartisan effort. The first federal funding for establishing drug courts was granted during a time when the newly elected Republican Congress had vowed no funding for new programs.[6] Nationally, the drug court movement began to grow exponentially, from 12 operational courts in 1994, including Delaware's court, to approximately 3,000 such courts today. In 1996, Delaware's Superior Court obtained a federal grant to establish its drug court in all three counties, thereby becoming the first state with a statewide drug court.

Substance abuse treatment for offenders arose from the clearly established link between substance abuse and criminal activity; continued substance abuse meant continued criminal activity.

That same year, NADCP sponsored a national dialogue on what constituted a "drug court" and, after much debate, published a document in 1997 titled *Defining Drug Courts: The Key Components.* During the dialogue, it was accepted that the drug court model would not be limited to the initial diversionary model, although that was not a unanimous consensus. This was a victory for a few states, such as Delaware, that included high-risk/high-need sentenced offenders in the program.

After 10 years of experience with drug courts, in 2004 I wrote an article for the *Delaware Law Review* discussing the promise and perils of the drug treatment court movement – and Delaware's leadership in that movement – as well as treatment for offenders.[7] The article was optimistic and touted Delaware's role in spearheading the provision of treatment to offenders suffering from substance abuse addiction or dependence.

It specifically mentioned the achievements of the Delaware Department of Correction, which, working with the University of Delaware, had developed a therapeutic community long-term treatment program, Key, at the Gander Hill prison. That program also included a halfway house component, Crest, and aftercare treatment in the community. Likewise, a therapeutic community treatment program for long-term inmates had been established at the Smyrna (now Vaughn) Correctional Center, Greentree. The Key program was extensively studied with positive results[8] and served as the basis for programs initiated in other states.

The article also discussed the Superior Court establishment of the first drug treatment court in the state in New Castle County and its subsequent expansion to cover the entire state.[9]

Substance abuse treatment for offenders arose from the clearly established link between substance abuse and criminal activity;[10] continued substance abuse meant continued criminal activity. While treatment was known to reduce and, in some cases, eliminate substance abuse, the issue that remained was whether coerced or compelled treatment worked. The answer to that question has come in the past 25 years. Long-term therapeutic communities in a custodial setting, followed by continued treatment in a halfway house setting, followed by continuing treatment in the community is successful.[11] Drug treatment courts operating with respect to the "key components" reduce both substance abuse and criminal activity.[12]

According to a Multi-Site Adult Drug Court Evaluation, drug courts with the best results take into consideration the following:

- The role of the Judge is a key factor in successful results.
- Drug courts that allow Non-Drug Charges had 95 percent greater reductions in recidivism.
- A Treatment Representative attending Drug court proceedings increases success.
- Drug courts where the Judge spends

an average of three minutes or greater per participant during court hearings had 153% greater reductions in recidivism.

• Drug courts where participants are expected to have greater than 90 days clean (negative drug tests) before graduation had 164% greater reductions in recidivism.

• Drug courts work better with high-risk/high-needs offenders.[13]

In relation to the critical role of the drug court judge, the study suggested:

1) *If the jurisdiction allows it, choose drug court judges carefully. Not all individual judges are suited to the drug court model in terms of disposition and attitudes toward offenders and the judicial relationship. Thus, drug courts will be best served if administrators intentionally assign judges to the drug court docket who are committed to the problem-solving court model and interested in serving in this role. Assigning judges who fundamentally do not believe in engaging offenders in an interpersonal relationship or who do not support the concept of therapeutic jurisprudence virtually ensures a lack of success for the drug court.*

2) *Give them time. Judges may take some time developing effective approaches to the drug court bench, and therefore, a reasonable period of program leadership may be needed before their style affects change in offender behaviors. For this reason, routinely rotating judges on and off drug court benches will likely decrease not only judges' ability to successfully implement their roles, but also the overall success of drug court programs in jurisdictions that circulate judicial assignments to drug court.* [14]

Drug courts will be best served if administrators intentionally assign judges to the drug court docket who are committed to the problem-solving court model and interested in serving in this role.

NADCP used the findings of the Multi-Site Study to convene a committee to develop a set of Adult Drug Court Best Practice Standards. That committee considered the multi-state study as well as the plethora of articles, studies and evaluations of drug courts. The panel's intent

was to provide guidance as to those practices that lead to success of drug court programs as measured by the success of participants.

This long-term project ended with the publication of two volumes of standards of best practices with Volume II of the best practices released in 2015.[15] These two volumes will prove invaluable to drug court professionals of the future.

One of the best practices that is now supported by extensive evidence from multiple studies relates to using separate tracks for different target populations:

> The Drug Court targets offenders for admission who are addicted 1) to illicit drugs or 2) alcohol and are at substantial risk for reoffending or failing to complete a less intensive disposition, such as standard probation or pretrial supervision. These individuals are commonly referred to as high-risk and high-need offenders. If a Drug Court is unable to target only high-risk and high-need offenders, the program develops alternative tracks with services that are modified to meet the risk and need levels of its participants. If a Drug Court develops alternative tracks, it does not mix participants with different risk or need levels in the same counseling groups, residential treatment milieu, or housing unit.[16]

If a Drug Court is unable to target only high-risk and high-need offenders, the program develops alternative tracks with services that are modified to meet the risk and need levels of its participants.

This standard was serendipitously adopted when we first designed Delaware's two-track system. We certainly had no knowledge at that time of the now-established negative effects that result from mixing low-risk/low-needs participants with serious offenders, and those offenders with serious mental health problems with those not having those issues, etc.

The explosive growth of the drug court movement is, I believe, based on two factors: 1) the strong desire to implement "what works" to address the underlying causes of criminal activity, and 2) the satisfaction gained from having success.[17]

As I noted in an article in the early days of drug court expansion, there are perils in success.[18] In particular, while the drug

court model or methodology has been validated as one of the important contributors to success for drug-involved offenders, we must remember that it addresses a known problem, addiction or dependence. The court, through coercion, persuasion, praise and attention keeps people in the treatment they need, thereby addressing a known problem with a known solution. Best practices require individualized treatment plans, frequent interaction with the judge, effective substance abuse monitoring, and a team committed to the participant's success. Will there be sufficient resources to provide these practices? Will the methodology work where problems are less easily diagnosed and solutions not so clearly evident?

Other treatment courts or therapeutic courts have developed. These include Mental Health Courts, Veterans Treatment Courts, Reentry Courts, Family Treatment Courts, Trauma Treatment Courts and others. Will the drug court model work for these courts addressing different problems?

As a consultant for American University, Office of Justice Programs, I have had the opportunity to evaluate many of these courts. Most are loosely based on the drug court model. There are also significant differences. For instance, in the drug court model, sobriety is strictly enforced. Use of any mind-altering substance is discouraged, and treatment personnel are frequently on the team and attend court sessions. In Mental Health Court, participants are encouraged to be on their prescribed medications and their treating doctors are rarely at court hearings. In Veterans Treatment Courts, each veteran is assigned a mentor who has shared military service and, frequently, some trappings of the military profession are incorporated into court proceedings. Since many of the participants in Veterans Court suffer from PTSD, that must be understood and addressed. Veterans may have access to treatment resources through the VA that drug court participants do not.

These courts are being evaluated and eventually will have their own best practices validated. Whether they will be as successful as drug courts is not yet clear. What is clear is that each target population – the mentally ill, veterans, drug addicts and DUI offenders – should be treated in a distinct track with procedures specifically designed to address their needs, and using practices that have proven successful with those participants.

Each target population – the mentally ill, veterans, drug addicts and DUI offenders – should be treated in a distinct track with procedures specifically designed to address their needs, and using practices that have proven successful with those participants.

It is my hope that the legislature, the courts and the community will continue to "fight crime smart" and support the efforts that save peoples' lives, bring families together and make the community safer. ◆

NOTES

1. I disclose at the onset that I am a supporter of "drug courts," drug treatment and therapeutic jurisprudence. Through NADCP I have had the privilege to participate in one of the most exciting and historic movements in criminal justice. As a drug court judge, I have had the privilege of assisting hundreds of individuals as they addressed their addiction and reclaimed their lives.

2. This contact takes place at status conferences during which the judge is updated on the offender's progress in treatment, as to maintaining sobriety and reaching other established goals. These conferences, at which the participant and the judge converse directly, take place frequently at the start of the program and are reduced in number as the offender progresses.

3. *Effective Management of Drug Involved Offenders—A Report to Governor Michael Castle*, Wilmington, DE: Drug Involved Offender Coordination Committee, 1992.

4. The two tracks did allow for those who were originally placed in the diversionary track to fail into the more intense track.

5. Here I think especially of fellow pioneers and friends such as Judges Robert Russell of Buffalo, John Schwartz of Rochester, Harl Haas of Portland, Louis Presenza of Philadelphia, Jamey Hueston of Baltimore and other professionals such as Lars Levy of Louisiana, Hank Pirowski of New York, Elizabeth Peyton of Delaware and many others.

6. This was the time of Newt Gingrich's "Contract with America." Remarkably, an exception was made and a small grant program was established.

7. Gebelein, Richard S., *Delaware Leads the Nation: Rehabilitation in a Law and Order Society: A System Responds to Punitive Rhetoric*, 7 Del. L. Rev. 1 (2004).

8. *See*, Martin, Steven S., Clifford A. Butzin, Christine A. Saum, and James A. Inciardi, "Three-Year Outcomes of Therapeutic Community Treatment for Drug-Involved Offenders in Delaware: From Prison to Work Release to Aftercare," Prison Journal 79 (3) (September 1999): 294–320.

9. The Delaware drug treatment court was one of the first 12 in the nation and the first that employed two tracks, one for serious repeat offenders and one for first-time offenders.

10. *See* for example, Wish, E.D., and B.D. Johnson, "Impact of Substance Abuse on Criminal Careers," in Criminal Careers and "Career Criminals," vol. II, ed. Alfred Blumstein et al., Washington, DC: National Academy Press, 1986: 52–88.

11. *See*, FN.6

12. Shelli B. Rossman, Michael Rempel, John K. Roman, Janine M. Zweig, Christine H. Lindquist, Mia Green, P. Mitchell Downey, Jennifer Yahner, Avinash S. Bhati, Donald J. Farole, Jr., *The Multi-Site Adult Drug Court Evaluation: The Impact of Drug Courts*, Volume 4, The Urban Institute, 2011.

13. *Id.*

14. Shelli B. Rossman, John K. Roman, Janine M. Zweig, Michael Rempel, and Christine H. Lindquist (Editors), *The Multi-Site Adult Drug Court Evaluation: The Impact of Drug Courts*, Volume 4, Final Version, p. 260 (2011).

15. Volume I was completed in 2013.

16. *Adult Drug Court Best Practice Standards*, Volume I, NADCP (2013), Standard I, B.

17. To this day, 10 years after leaving the court, I run into people who thank me for "saving their lives." I remind them that they are responsible for their success; all the court can do is give them a chance to succeed.

18. Richard S. Gebelein, *The Rebirth of Rehabilitation: Promise and Perils of Drug Courts*, National Institute of Justice, Papers From the Executive Sessions on Sentencing and Corrections No. 6 (2000).

DoubleTree by Hilton Downtown Wilmington Legal District

Now featuring 2 fully functional law centers located within one block of both the Federal and Superior Courthouses. Our 2 turnkey centers exceed 3,000 square feet in size and incorporate all of the following features:

- 2 private lead attorney offices
- Large War Room space with 52" HD flat screens
- 3 large administrative workstations
- 4 paralegal workstations accommodating up to 8 people
- Oversized file storage rooms complete with shelving
- Kitchen areas complete with full-size refrigerator, microwave, coffee maker and water cooler
- Direct-dial speakerphones with voicemail at each workstation
- Private, secured entrances with key card access
- 100 MG dedicated Internet service in each center
- Dedicated IT locations in each center

Second Floor
Sandra Day O'Conner Legal Suite

First Floor
Thurgood Marshall Legal Suite
Newly renovated!

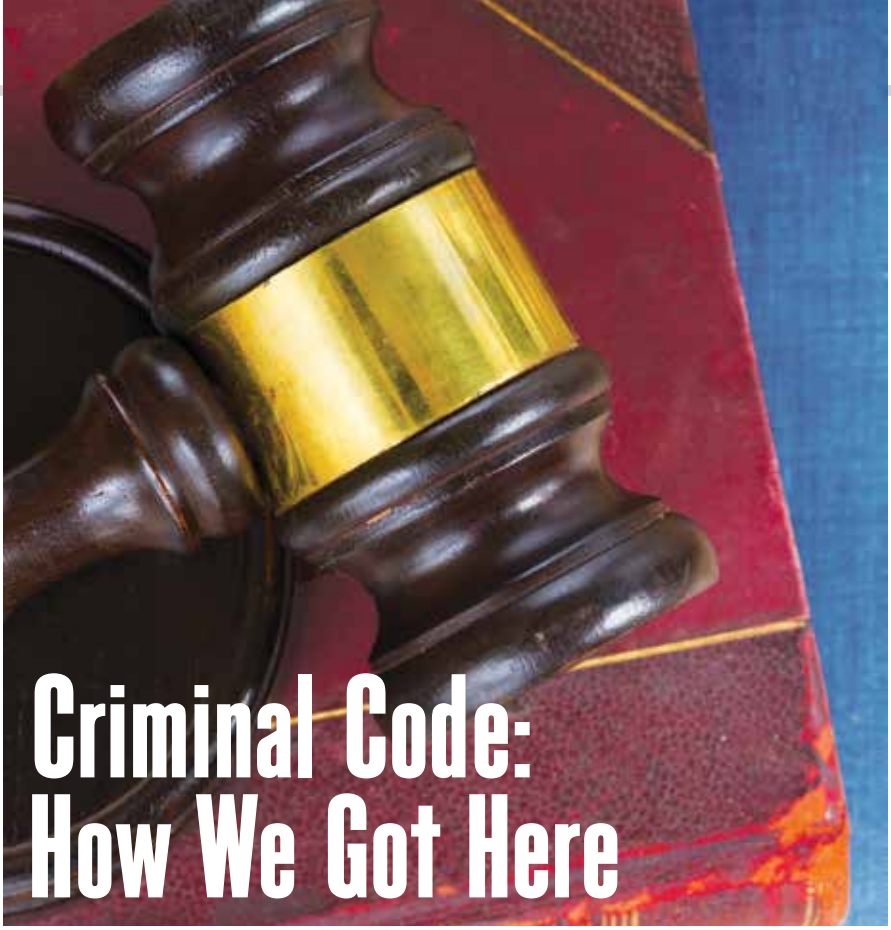
For all your trial team needs contact:
Doubletree Sales Department
302.655.0400

Call to schedule a site tour today!

DOUBLETREE
BY HILTON™
DOWNTOWN WILMINGTON
LEGAL DISTRICT

700 North King Street • Wilmington, DE 19801
Reservations: 1.800.222.TREE Hotel Direct: 302.655.0400
www.wilmingtondowntown.doubletree.com

Judge Jerome O. Herlihy



The Delaware Criminal Code: How We Got Here

A veteran attorney who was present at the birth of the state's criminal code revision recounts its genesis.

"Whoever commits or is guilty of an assault, battery, cheat, conspiracy or any other offense indictable at common law for which punishment is not specifically prescribed by statute shall be fined in such amount, or imprisoned for such term, or both, as the court, in its discretion, may determine."[1]

This provision was continuously part of the Delaware criminal law since at least 1827.[2] It was repealed when the new Criminal Code became effective on July 1, 1973, which also did not contain anything remotely like it. That new Code finally abolished whipping as a punishment.

To those who know and practice with the current Criminal Code, such a provision must come as a surprise, if not a shock. Besides assault and battery, the crimes of conspiracy and attempt, for instance, were "105" (as we called it) common law crimes. Their elements were defined by court decisions, not statutes, but the most glaring void was that there was nothing between the felony of assault with intent to commit murder and misdemeanor assault and battery under "105."

To be read with Section 105 was 11 *Del. C.* §101(b), which provided that a crime or offense was either a crime or misdemeanor. If the statute did not provide that the crime or offense was a felony, it was automatically a misdemeanor.

Defenses, particularly self-defense, were not defined by statute. They, too, were all "common law." There was no equivalent, for instance, to the current 11 *Del. C.* §§ 461-471.

For those who have practiced under a Code that has so many specific provisions, it is hard to grasp a criminal code or criminal law that was so wide open. For purposes of this article, I had the misfortune or "fortune" of prosecuting under the old law and practicing and defending under the current code. This is not intended to be a scholarly review of Delaware criminal law but is intended to provide some context as to how we got to where we are.

The background to reaching this point is important and instructive.

Charles L. Terry served as a judge on the Superior Court for 24 years, the last few years as President Judge. He then

became an Associate Justice of the Supreme Court where he served for two years. He was Chief Justice for two years in 1963-64. He was elected Governor in 1964. Undoubtedly, presiding over many criminal trials in his more than two decades on Superior Court gave him direct and repeated exposure to the gaps and shortcomings of the criminal law, including the statutory provisions and/or lack thereof.

Appreciating that it was an executive branch function to propose a full revision of the criminal law, seven months after becoming Governor, he appointed a panel of distinguished lawyers to develop a proposed revision. It was titled the Governor's Committee for the Revision of the Criminal Law. No judge served on the Committee and none were "advisors" to it.

The Committee spent two years on its task, delivering a report to Governor Terry in 1967.[3] That report reflected the enormity of its task, not the least of which was filling in statutory provisions to allow Section 105 to be repealed. With the help of University of Pennsylvania Law School Professor Frank Baldwin, the Committee took most of its proposal from two basic sources: The New York Penal Law and the Model Penal Code.[4]

The value of identifying these sources is apparent in the Committee's comment about listing its sources:

> The following table of sources is offered to assist the Bench and Bar in interpreting the provisions of the Code. We expect that case law in other jurisdictions using similar sources will be helpful aids in construing the proposed revision. It should be noted that in many cases substantial changes have been made in the original, and the reader is cautioned to compare the provision of this Code with the original before relying heavily on cases decided under the original.[5]

The Terry Committee's report was converted to legislation in late 1967. There were eight public hearings on it and some of the provisions were controversial.[6] While the legislation was still before the legislature in 1968, other events took precedence. Nineteen sixty-eight was a tumultuous year, nationally and locally; Martin Luther King, Jr.'s assassination and the subsequent riots in Wilmington overshadowed any further effort to gain passage of the proposed new Code.

The current Criminal Code has been in effect for nearly five decades. There have been amendments along the way but the basic structure remains. While there has been a lot of litigation about some of its provisions, there is now a settled, accepted body of case law.

Governor Terry lost re-election and his successor, Russell Peterson, had other priorities. The effort to reform the Criminal Code was revived by Attorney General candidate Laird Stabler in 1970. Getting the proposal passed was one of his campaign plans. Upon taking office in January 1971, he set about promoting passage of the bill to create the new Code. An informal committee was formed, comprised only of lawyers, which undertook to make changes in the proposal; I was one of those lawyers, as Laird's Chief Deputy Attorney General. A new bill was introduced encompassing the changes recommended by the *ad hoc* committee.

Prior to becoming Attorney General, Laird Stabler had served in the State House of Representatives, the last two years as Majority Leader. He knew the effort that was needed to pass legislation, especially a bill dealing with a subject of this magnitude and complexity. Laird always took me to Dover to work on passage. We spent many hours and days in Legislative Hall, as personal interaction with legislators is a quintessential ingredient to "working" a bill. The office had other legislative proposals but the proposed Criminal Code was always the top priority.

Not unlike 1968, however, 1971 was another tumultuous year. But this time it was due to a major looming budget deficit. Budget cuts and tax increases needed to fill the deficit gap pushed the Criminal Code revision into the background.

Our effort to obtain passage resumed in 1972. Again, many hours and days were spent in Legislative Hall.[7] Success was achieved in late June 1972, and along the way further changes had to be made to reach that point.

We had several important things going for us. One was the widespread knowledge in Dover and among Bar members that a major Criminal Code revision was needed. That need, to say the least, was compelling, and yet it still took much work to move the bill through the legislative process. Another major factor was that we had the enthusiastic backing of law enforcement, whose members acknowledged and supported the importance of Code revisions. This support was known in Dover.

In addition, we could point to the well-respected and well-thought-out sources behind our proposals – the Model Penal Code and many of the proposed provisions having already been enacted in New York. In short, the proposal was not made out of whole cloth. A more intangible factor was that Laird was well-known and highly respected by all of the legislators.

The current Criminal Code has been in effect for nearly five decades. Of course, there have been amendments along the way but the basic structure remains. While there has been a lot of litigation about some of its provisions during those years, there is now a settled, accepted body of case law.

Is the current code perfect? Of course not. Some of the amendments to it were not made with sufficient care and do not always coordinate with other parts of the Code. These and other issues need to be

addressed in a surgical way – not by repeal and replace and certainly not by something that cannot match the broad, widely accepted sources of the underlying provisions of the current Code. And anything new, massive and substantive will necessarily cause new litigation, arguably unnecessary.

There was a compelling need years ago to reform Delaware's criminal law. That need is reflected, in part, by Governor Terry's appointment of the Revision Committee, its 1967 report to him, the revisions made in 1971 to reflect suggested changes in its proposal, and the extensive efforts made in 1971-72 to achieve passage. The need was far greater than shrinking the number of pages of the Criminal Code.

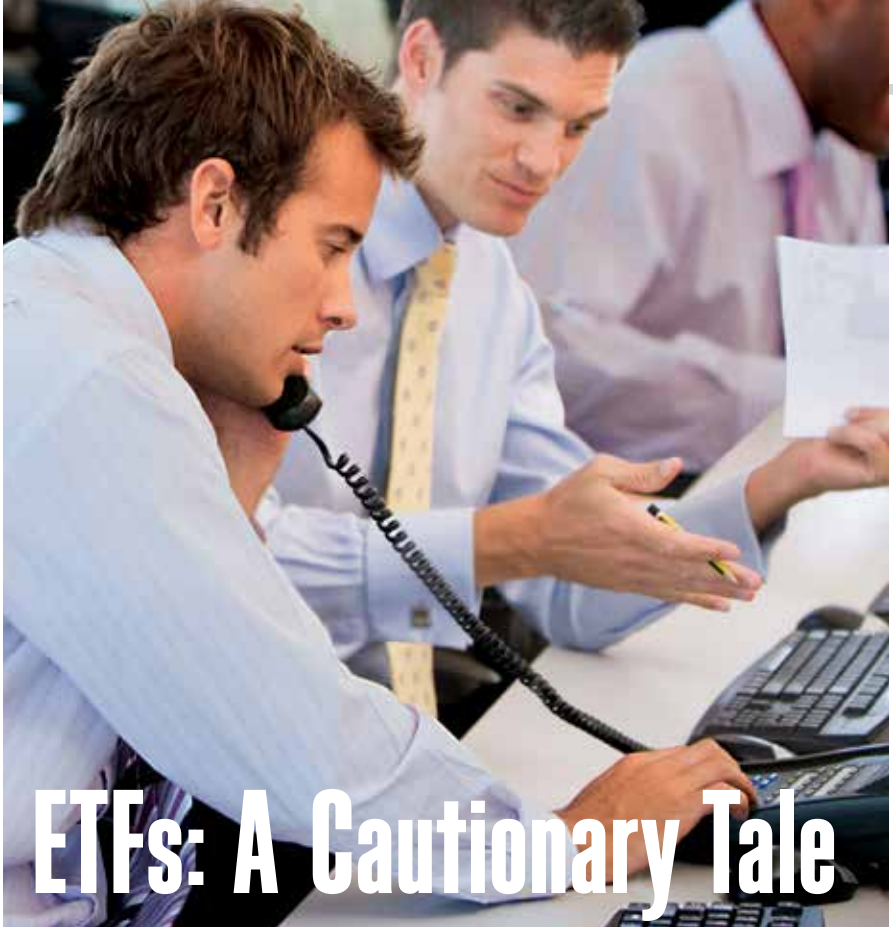
Absent a compelling need for a massive revision, and understanding the likelihood of much new litigation and change resulting from a whole new Criminal Code, one can readily appreciate the position of those who might oppose any such proposal. ◆

Any new, massive and substantive changes to the Criminal Code will necessarily cause new litigation which is arguably unnecessary.

NOTES

1. 11 *Del. C.* §105, repealed as of July 1, 1973.
2. It is found in the Delaware Codes of 1809, 1852, 1879, 1915, 1935 and 1953.
3. The 1967 Committee report to Governor Terry provides valuable source material. It deserves noting that Governor Terry sought and obtained other reform legislation, such as creating the Merit System, making reforms in the Justice of the Peace System, providing new consumer protection law and outlawing racial discrimination.
4. 1967 Terry Committee Report, Appendix C, "Table of Sources of Proposed Delaware Criminal Code."
5. 1967 Terry Committee Report, Appendix C.
6. The 1973 Delaware Code with Commentary provides further valuable information.
7. The need to be in Dover on a frequent basis is illustrated by one experience we had when we appeared in Legislative Hall to work on another bill the office was proposing (not the Criminal Code). That bill was on the House agenda to be voted on that day. But shortly after arriving in Legislative Hall, Laird was told it was off the agenda for that day and would also not be considered for the rest of the legislative session. It was removed to obtain votes for a ¼% increase in the Wilmington Wage Tax; Laird was furious but understood the ways in Dover.

Gregory C. Strong



Options, Margin and Leveraged ETFs: A Cautionary Tale

The Delaware DOJ helps protect consumers from unscrupulous and predatory investment advisors.

Debra Anderson still remembers how excited she was when she first met with her financial consultant, Thomas Albert at XYZ Investments*. She had just inherited a large sum of money that she hoped would change her family's life. She explained to Albert that she would be getting out of the real estate business and her goal was to generate income through investments to finance her daily expenses.

Albert suggested she think of her account as a business, and that together they would be business partners. He asked what her goals were for the account: "How big did she want to go?" When Anderson jokingly replied, "$50 million," Albert said that he could help her do that. Anderson could not have been more thrilled.

In the three years that followed, Albert placed more than 3,400 trades in Anderson's account that generated more than $300,000 in commissions. During that same time period, however, Anderson suffered losses of approximately $2.3 million and her account was completely wiped out. The business Anderson and Albert were running had failed. And although Anderson's inheritance was gone, Albert personally profited.

XYZ Investments learned about the fraud Albert perpetrated on Anderson and he was fired for failing to administer accounts in accordance with their policies and procedures. As a result of the firing, Albert's registration as a broker dealer agent in Delaware was terminated. However, Albert was quickly hired by another broker dealer firm and re-applied for registration as a broker dealer agent in Delaware.

The Delaware Investor Protection Unit ("IPU"), within the Delaware Department of Justice (the Attorney General's Office), is the state securities regulator in Delaware. The IPU is responsible for administering and enforcing the Delaware Securities Act, which includes reg-

** This article is loosely based on an actual matter investigated by the Investor Protection Unit of the Delaware Department of Justice. The names of the participants have been changed.*

istering investment firms and individual investment professionals, registering the securities offered for sale in Delaware, and investigating complaints regarding investment professionals, investment products or other alleged violations of the Delaware Securities Act.[1]

When the IPU received Albert's application for registration with his new firm, it became aware of his termination from XYZ Investments and opened an investigation into the circumstances leading to that termination. This investigation brought the trading activity in Ms. Anderson's account to light. As IPU staff obtained and reviewed account statements, interviewed witnesses and analyzed the data, they saw Anderson's investment horror story take shape.

From the moment Anderson walked in the door to meet with Albert that first time – full of hope and excitement at the possibilities – Albert began systematically developing and nurturing a relationship with her that went beyond a normal business relationship. Anderson would later describe the connection as a brother-and-sister-type bond. Albert told Anderson that they would talk every day about the account and he would explain to her what he was doing with her money. In fact, Albert and Anderson did speak on a regular basis. The calls generally started with friendly chat in which Albert referred to Anderson as "buddy" and "family" and they discussed personal issues before the conversations turned to business.

Consequently, Anderson trusted Albert not only because of his purported financial expertise, but also like a member of her own family. Albert always repeated the mantra, "We are running a business together." When the conversations did turn to actual business, Albert generally provided investment recommendations to Anderson, which she regularly accepted.

To further cultivate a familial bond with Anderson and foster her trust, Albert brought his family on vacation with the Anderson family two years in a row. During one of those vacations, when Anderson expressed concerns about her XYZ Investments account and asked Albert to get her out of the market, Albert responded by saying that they were running a business together, that they were family, and that he would not let her lose all of her money.

When a security purchased on margin decreases in value, the brokerage can demand a margin call, subjecting an accountholder to losses beyond the value of their account.

From the time Albert first became Anderson's financial consultant on her account to the time he was terminated by XYZ Investments, Anderson was a single mother of two children, one age 12 and one in college, and the sole financial provider for the family. Anderson was responsible for all household finances, including her daughter's college tuition payments. Anderson had a 12th-grade education and completed one year of college focusing on criminal justice; she did not have any formal education in the area of finance or investing.

Prior to opening her XYZ Investments account, Anderson had minimal investing experience, contrary to what was indicated on her account opening form. Anderson never had a prior personal brokerage account. The only investing experience she had at that point was in her capacity as power of attorney over her mother's brokerage account years earlier. During that time, the level of trading activity in that account was extremely minimal. Anderson did not actively follow the stock market at the time she opened her XYZ Investments account, nor did she regularly read or watch financial news.

Anderson told Albert that it was especially important to her to make sure that she did not lose the money she invested, as she was a single parent. Additionally, Anderson planned to get out of the real estate business and rely solely on investment income from her XYZ Investment account. She hoped she could grow her holdings to generate enough income from the considerable assets in the account to live comfortably. Anderson explained this to Albert when they discussed her investment objectives and the level of risk she was willing to take on to achieve those objectives.

Margin[2]

Albert convinced Anderson to trade on margin. Opening a margin account allows the accountholder to borrow money from the brokerage to purchase stock. Margin accounts typically permit the accountholder to borrow up to 50% of the purchase price of a security. For example, an accountholder who has funded a margin account with $2,000 in cash can purchase a maximum of $4,000 in stock by borrowing $2,000 from the brokerage.

When a security purchased on margin decreases in value, the brokerage can demand that the accountholder deposit additional money or securities into the account. This is called a margin call. Consequently, trading on margin can subject an accountholder to losses beyond the value of their account. For example, if an investor purchases $4,000 of stock, half on margin, and the stock goes to zero, they will have lost their $2,000 and will owe the brokerage $2,000 plus applicable interest.

At the time that her XYZ Investments account was opened, Anderson did not have prior experience with a margin account. She did not understand how a margin account worked and relied on Albert to explain margin and provide her with updates on the equity in her account.

Exchange Traded Funds[3]

Exchange traded funds (ETFs) are investment funds designed to track an index or a benchmark that trade on a stock exchange like a common stock. Investors can buy or sell an ETF throughout a trading day. Leveraged Exchange Traded Funds use derivative investments to amplify the daily returns of an underlying index. They are designed to return twice or three times the index they are referencing, or sometimes to move two or

three times in the opposite direction of a particular index in the case of inverse leveraged ETFs.

The use of leverage to amplify returns, or losses, results in highly volatile movements on an almost daily basis in these securities. This volatility is exacerbated in times of overall market volatility.

At the time that her XYZ Investments account was opened, Anderson did not have prior experience with Exchange Traded Funds or leveraged ETFs. She did not understand how these complex products worked and relied on Albert to explain them to her.

Options

Similarly, Anderson had minimal experience with options, having sold covered calls on a very limited basis as a means to generate income in her mother's account. Anderson did not have any other options experience when she opened her account.

The options strategy that Albert employed was to sell "naked puts" in order to generate income.[4] The seller of a put contract gives the purchaser of that contract the right to sell you 100 shares of the underlying stock at a specified price, the strike price, before a specified date in the future, the expiration date. In return, the buyer pays the seller an option premium.

The use of leverage to amplify returns, or losses, results in highly volatile movements on an almost daily basis in these securities. This volatility is exacerbated in times of overall market volatility.

If the market value of the underlying stock remains above the strike price of the put, the put seller keeps the option premium and the put expires worthless.

If the market price of the underlying security falls below the strike price of the put, the put seller will suffer a loss. The seller can either 1) buy back the put option for more than what they sold it for and close out the position, or 2) allow the holder of the put to assign the option at any time prior to expiration, forcing the account holder to buy the underlying security at the strike price of the put, which would be above the market price of the security.

This is a bullish strategy that is typically employed when the put seller believes that the price of the underlying stock will appreciate. If the price of the underlying stock goes down however,

losses can be unlimited for the put seller in this strategy.

Anderson incurred significant losses writing naked puts on many financial securities, and, in particular, sustained large losses selling puts on a leveraged financial ETF designed to produce investment results corresponding to twice the daily performance of the Dow Jones US Financials Index. This was, and is, a highly volatile security, and it was not uncommon to see the security price move 10% in a day. The Anderson account experienced significant losses on the sale of these puts. She was repeatedly forced to purchase puts at a loss to close out positions or to allow puts to be assigned to her, requiring her to purchase shares of the underlying security at a strike price well above market.

As the losses mounted, Albert soon began using margin to finance these transactions, continuing to sell put contracts on leveraged ETFs and bet on the appreciation of the underlying securities.

As the losses mounted, Albert soon began using margin to finance these transactions, continuing to sell put contracts on leveraged ETFs and bet on the appreciation of the underlying securities.

He continued to be wrong about the direction of the market, and the Anderson account had several margin calls requiring Anderson to continually deposit new funds into the account.

The margin calls were often precipitated by opening a short position in an uncovered put and then being forced to either: 1) buy the put to close the position at a loss, or 2) assignment, at which point Anderson would be responsible for purchasing the underlying security at the specified strike price.

In either scenario, additional cash was required to complete the transaction. Anderson was forced to use a Home Equity Credit Line ("HECL") and sell some real estate to cover margin calls.

Anderson was soon tapped out as a result of the margin calls and was no longer able to deposit additional funds into her account. It was then that Albert took the unconventional step of linking the Anderson account with an account held by a relative. This provided an equity cushion to the Anderson account preventing further margin calls, but at the same time exposed the relative's account to all the risks

associated with trading and positions in the Anderson account. The speculative options trades and positions undertaken in the Anderson account were not only unsuitable for Anderson, but were also unsuitable for the now-linked account.

Not only was the strategy Albert employed unsuitable and ineffective, there were an excessive number of trades in this account. During a nine-month period, the account turned over 640 times, averaging around 70 option trades and 24 equity trades per month. During this time, the trading in this account generated $162,957.06 in commissions, of which Albert received approximately 35-40%. It is estimated that the commissions generated from the trading in the Anderson account comprised 25% of the total commissions generated by all of Albert's accounts. The evidence indicated that this tactic was used to generate commissions, rather than with the best interests of Anderson in mind.

To recap: trading on margin is risky – you can lose all of your money and more if you are not careful. Selling uncovered, or naked, put options is also extremely risky and can result in unlimited losses. Leveraged ETFs are risky and extremely volatile and can expose investors to significant losses in a short period of time.

Albert's strategy for Anderson involved not just one of these risky elements, but all three, with disastrous results. This strategy was only suitable for investors with an incredibly high risk tolerance – a willingness to lose everything – and a desire to engage in the most speculative trading. This strategy was not suitable for Anderson and clearly inconsistent with her stated objective of long-term growth to provide income for living expenses.

The evidence indicated that the trading tactic was used to generate commissions, rather than with the best interests of the client in mind.

At the conclusion of the investigation, the IPU declined to approve Albert's application for registration as a broker dealer agent with the new firm and instead filed an administrative complaint against Albert alleging multiple violations of the Delaware Securities Act, as follows:

- Albert engaged in fraud by willfully failing to state a material fact necessary in order to make his recommendations to purchase certain exchange traded funds not misleading, in light of the circumstances under which the recommendations were made.[5]
- Albert engaged in excessive trading in the Anderson account for the purpose of enriching himself at the expense of his client, which constituted both Securities Fraud, engaging in a course of business that operated as a fraud, and dishonest and unethical practices.[6]
- Albert engaged in dishonest or unethical practices when he willfully sold numerous securities to Anderson, without a reasonable basis for believing that they were suitable for her. Specifically, each option transaction was unsuitable as was every transaction in an exchange traded fund.[7]
- Albert engaged in dishonest or unethical practices when he sold numerous securities to Anderson without:

  1) conducting a reasonable inquiry into the risks of those securities, or

  2) communicating those risks to Anderson in a reasonably detailed manner and with such emphasis as to make the disclosure meaningful.[8]
- Albert engaged in dishonest or unethical practices when he willfully exercised discretion over the Anderson account without first obtaining written authorization from Anderson.[9]
- Albert engaged in dishonest or unethical practices when he willfully executed securities transactions on

behalf of Anderson without her prior authorization to do so.[10]

Separately, the IPU determined it would pursue an action against XYZ Investments for failing to reasonably supervise Albert.[11]

The IPU settled with both Albert and XYZ Investments. Albert agreed not to apply for registration as an investment professional in Delaware for seven years, which effectively ended Albert's career as an investment professional. XYZ Investments agreed to reimburse Anderson for her losses, pay a substantial fine to the IPU, and make significant changes to their supervisory and compliance procedures to prevent similar misconduct in the future.

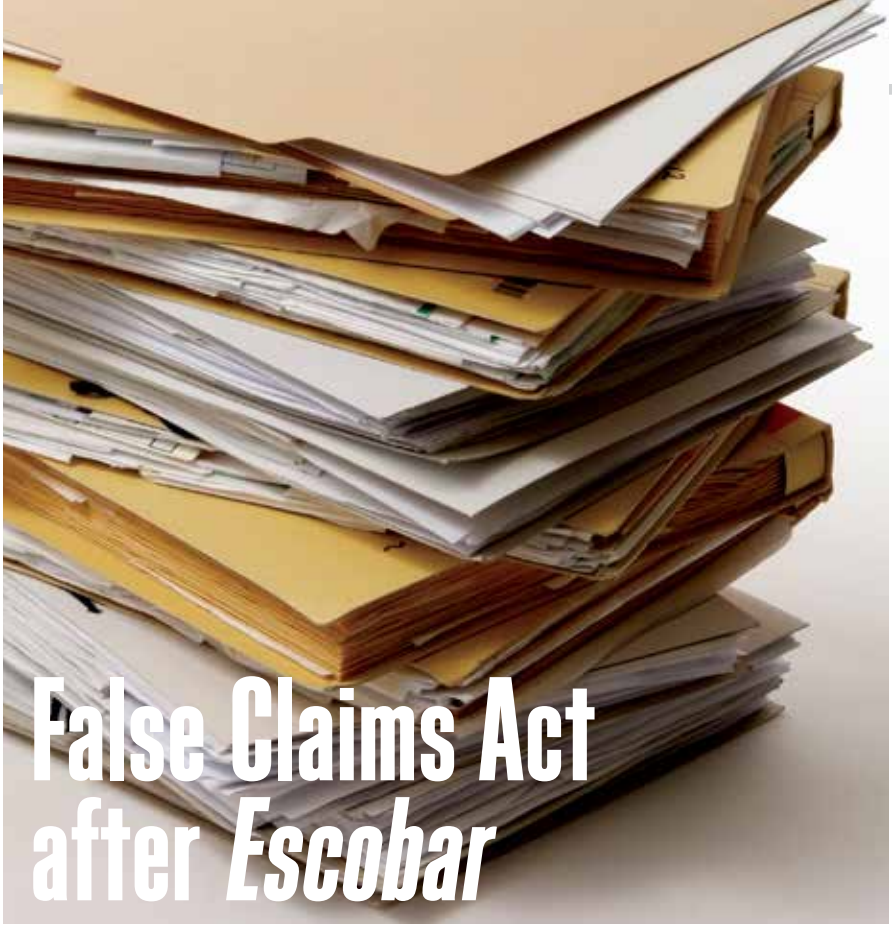
Choosing a financial adviser and an investment strategy can be difficult and complicated. Those choices can have a dramatic impact on the future financial security of investors. The Investor Protection Unit investigates complaints like the one described in this article regularly and can provide information and resources to the investing public to assist investors making these choices and to investigate complaints of misconduct if needed. ◆

The Delaware Investor Protection Unit ("IPU") determined it would pursue an action against XYZ Investments for failing to reasonably supervise Albert.

NOTES

1. 6 *Del.C.* §§ 73-101, *et seq.*
2. For more information on investing on margin, see: *SEC Investor Bulletin, Understanding Margin Accounts*, SEC Pub. No. 156 (8/13), https://www.sec.gov/servlet/sec/tm/investor-alerts-bulletins/ib_marginaccounts.pdf.
3. For more information on investing in exchange traded funds, see: *Informed Investor Advisory: Exchange Traded Funds*, http://www.nasaa.org/2639/exchange-traded-funds/ (last visited May 9, 2017).
4. For more information on this strategy, see: *Naked Put (Uncovered Put, Short Put)*, https://www.optionseducation.org/strategies_advanced_concepts/strategies/naked_put.html (last visited May 9, 2017).
5. 6 *Del.C.* § 73-201.
6. 6 *Del.C.* §§ 73-201 and 73-304(a)(7).
7. 6 *Del.C.* § 73-304(a)(7).
8. 6 *Del.C.* § 73-304(a)(7).
9. 6 *Del.C.* § 73-304(a)(7).
10. 6 *Del.C.* § 73-304(a)(7).
11. 6 *Del.C.* § 73-304(a)(10).

Tiphanie Miller



Materiality and the False Claims Act after *Escobar*

While the Supreme Court has clarified some aspects of the FCA, lower courts remain split on other issues.

Since the enactment of the Federal False Claims Act ("FCA")[1] in the wake of the Civil War, the statute has been an essential and effective tool in combating fraud against the government in areas as diverse as construction, defense contracting and the provision of Medicare and Medicaid services.

Congress enacted the Federal False Claims Act in reaction to rampant fraud and graft in the supplies sold to the government during the Civil War, but the statute has since evolved to touch every aspect of the provision of government services. The FCA creates civil liability for the submission of false claims to the government,[2] and permits third-party relators to file a civil action on behalf of the government in return for a portion of whatever recovery is obtained as a result of the suit.[3] The government may file its own action or intervene in an action filed by the relator.[4] A person found liable pursuant to the FCA is subject to a civil monetary penalty for each violation, in addition to treble damages.[5]

Case law has greatly expanded in the century since the initial implementation of the FCA.[6] One of the most significant recent developments is the Supreme Court's June 16, 2016, decision in *Universal Health Services, Inc. v. U.S. et al., ex rel. Escobar, et al.* [7] The Court in that decision recognized, at least in some situations, a cause of action alleging liability under an "implied certification" theory. The potential impact upon cases, particularly in the health care context, is far-reaching.

Theories of Liability Before Escobar

As case law developed under the FCA, three distinct theories of liability for the submission of false claims emerged.[8] First, claims that are literally false on their face are clear violations of the FCA. For example, a claim would be literally false if a provider submitted a claim requesting payment for a service or product that the provider had not actually conducted or delivered.

Second, claims that include an express certification that the submitter was compliant with certain conditions, when the submitter was not actually compliant, also became actionable. If a provider submitted a claim that included a certification that the service provided was compliant

with a set of regulations, such as the complicated regulations governing the operation of the Medicaid system, or perhaps FDA regulations, but the provider knew that it was not compliant with that set of regulations, then such a claim would be actionable under an "express certification" theory.

Yet a third category, based upon an assumption that the submission of bills in certain contexts "implied" that the submitter was compliant with certain conditions or certain regulations, when the submitter was not actually compliant, has proven more controversial. This scenario occurs when a provider does not explicitly certify that the provider is compliant, but there is some other indication that the provider submitted the claim knowing that the provider violated some regulation and does not disclose that violation.

Some courts, such as the Seventh Circuit, rejected the theory of "implied certification" liability wholesale.[9] Other courts permitted claims under the implied certification theory to move forward, but only if the certification related to conditions of the actual payment of a claim, and not solely conditions placed on participation in the program itself.[10] Finally, some courts permitted implied certification claims for violations of any regulation, statute or other rule implemented by the government, even if they were not expressly designated as conditions of payment.[11]

The Supreme Court granted *certiori* in *Escobar*, in part, to resolve the circuit split over the viability of the implied certification theory, eventually holding that certain claims based upon an implied certification theory are viable under the FCA.[12]

In *Escobar*, relators alleged that Arbour Counseling Services, operated by Universal Health Services, Inc., submitted claims for specific services provided by specific types of professionals, but did not disclose violations of Medicaid regulations pertaining to qualifications and licensing requirements for the staff conducting those services.[13]

The Court held that the implied certification theory of liability was a valid basis to state a claim under the FCA,[14] but that the misrepresentation about compliance with a statutory, regulatory or contractual requirement must be material to the decision to pay the claim.[15] However, the express identification by the government that a regulation is a condition of payment, or the government's failure to do so, is not dispositive in determining whether the regulation is material to the payment decision.[16]

Unsurprisingly, Escobar resulted in widespread adoption by the government and the false claims bar of implied certification theories of liability under the FCA.

Furthermore, the Court held that any statutory, regulatory or contractual violation is not material solely because the government has reserved the right to refuse payment if it were aware of the violation.[17] However, the Court expressly did not resolve whether "all claims for payment implicitly represent that the billing party is legally entitled to payment," leaving that question for another day.[18]

Materiality After Escobar

Unsurprisingly, *Escobar* resulted in widespread adoption by the government and the false claims bar of implied certification theories of liability under the FCA. *Escobar* eliminated the need to distinguish, in some circuits, between a condition of payment and a condition of participation.[19] According to the Court's holding in *Escobar*, implied certification of compliance with a condition of payment or a condition of participation could both conceivably form a viable basis for a claim. Ultimately, so long as a condition is material to the government, whether it is a condition of payment or a condition of participation is a distinction without a difference.[20]

The Court, however, refused to identify a bright-line test to determine whether the violation was sufficiently material to the government's payment decision. Decisions since the *Escobar* ruling bear this out. Materiality is a case-specific and fact-intensive inquiry, with no one factor dispositive in making that determination.[21]

In its ruling, the *Escobar* Court stated *in dicta* that "if the Government regularly pays a particular type of claim in full despite its actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that those requirements are not material."[22]

This guidance from the Court raised concerns for government plaintiffs, particularly where the agency that has knowledge of the violation is not the same as the agency that makes the payment, and is separate altogether from the agency that brings the false claims action. Since the *Escobar* decision, four courts have addressed this particular factual situation, with two finding the violation immaterial on this basis and two finding that the violation was still material despite some government knowledge of the violation.

First, the First Circuit, in *U.S. ex rel. D'Agostino v. EV3, Inc., et al.*,[23] noted that the "fact that [Centers for Medicare and Medicaid Services] has not denied reimbursement for Onyx in the wake of [the relator's] allegations casts serious doubt on the materiality of the fraudulent representations that [the relator] alleges."[24] The First Circuit then explicitly quoted the language from the *Escobar* opinion to support its position.[25] Defendants had not alleged that the government had knowledge of the violations prior to the filing of a third-party whistleblower complaint. Instead, the court inferred that because the government did not immediately terminate the provider or stop payments based solely on the allegations filed by a third party, the violations were not material.

The Northern District of Illinois reached a similar conclusion, holding that the City of Chicago's continued payment of claims after the filing of a *qui tam* suit undermined any allegation that the violations were material to the payment decision.[26]

However, two district courts in other circuits have taken the opposite approach.

In *Rose, et al., v. Stephens Institute*,[27] the Northern District of California held that "the [Department of Education's] decision to not take action against [the Academy of Art University] despite its awareness of the allegations in this case is not terribly relevant to materiality."[28] The court instead looked at the DOE's pattern of enforcement for violations, including corrective actions, fines and settlement agreements, to determine that the violations were in fact material to the government.[29]

Similarly, in *U.S. et al., ex rel. v. The Public Warehousing Company, et al.*,[30] the Northern District of Georgia enumerated several situations where a decision not to stop payments after notice of violations would not render the violations immaterial to the government. Notably, the court held that "just because one agency within the vast bureaucracy of the federal government has knowledge of a contractor's wrongdoing does not mean that the Defendants have a general 'government knowledge' defense. The issue is whether the actors actually involved ... are aware of the alleged fraud."[31]

Additionally, the court held that knowledge of the fraud cannot be imputed to the government until the investigation of allegations is complete.[32] Finally, the court noted that there are situations where the government may decide to continue to make payments despite earlier wrongdoing, holding that the "more essential the continued execution of a contract is to an important government interest, the less the government's continued payment weighs in favor of the government knowledge defense"[33] to materiality.

Conclusion

After the Supreme Court's decision in *Escobar*, there is no longer a question as to whether the implied certification theory of liability is viable. Even more, plaintiffs are no longer required to allege that a specific express condition of payment is implicated by the defendant's fraudulent scheme.

However, the Court's emphasis on the demanding and rigorous materiality requirements of the FCA has opened several new areas for disagreement between the courts. Clearly, the government's continued payment of claims after the filing of a *qui tam* suit has become a major issue of contention.

The materiality standard will be the subject of substantial litigation under the FCA and will most likely lead to the next Supreme Court decision related to the statute. ◆

NOTES

1. 31 *U.S.C.* § 3729 *et seq.*
2. *Id.*
3. 31 *U.S.C.* § 3730 (b) & (d).
4. 31 *U.S.C.* § 3730.
5. 31 *U.S.C.* § 3729 (a).
6. Delaware enacted its own version of the statute in 2000, the Delaware False Claims and Reporting Act, to protect government funds and property from fraudulent claims. H.B. 543, 140th Gen. Assem., Reg. Sess. (Del. 2000). The DFCRA, like its federal counterpart, permits causes of action both by the State itself, and

by third-party relators on behalf of the State, for violations of the statute. 6 *Del. C.* § 1201, *et seq.* The statute permits both a civil penalty and treble damages sustained by the State, for each violation. Courts in Delaware have recognized the paucity of case law interpreting the DFCRA; however, due to the similarities between the FCA and the DFCRA, Delaware courts look to federal case law for guidance. *State ex rel. Higgins v. SourceGas, LLC*, 2012 WL 1721783, at *4 (Del. Supr. 2012).

7. 136 S. Ct. 1989 (2016).

8. This article addresses causes of action under 31 *U.S.C.* § 3729(a)(1)(A), but does not address causes of action under other subsections of the FCA, including reverse false claims.

9. *United States v. Sanford-Brown, Ltd.*, 788 F.3d 696, 711-712 (7th Cir. 2015).

10. *Mikes v. Straus*, 274 F.3d 687, 700 (2nd Cir. 2011). Conditions of payment are requirements that must be met before the government will pay a claim. Conditions of participation are requirements that must be met before the government will permit an entity to participate in a government program, thereby allowing the entity to submit claims to that program.

11. *United States v. Science Applications Int'l Corp.*, 626 F.3d 1257, 1269 (D.C. Cir. 2010).

12. *Escobar*, 136 S. Ct. at 1998.

13. *Id.* at 1997-98.

14. *Id.* at 1995 ("Specifically, liability can attach when the defendant submits a claim for payment that makes specific representations about the goods or services provided, but knowingly fails to disclose the defendant's noncompliance with a statutory, regulatory, or contractual requirement. In these circumstances, liability may attach if the omission renders those representations misleading.").

15. *Id.* at 1996.

16. *Id.* at 2001-02.

17. *Id.* at 2004.

18. *Id.* at 2000. The Court also held that "the implied certification theory can be a basis for liability, at least where two conditions are satisfied…" without discussing whether the theory would be a basis for liability in other scenarios. Id. at 2001. These will likely both be areas for additional litigation in future FCA cases.

19. *Escobar*, 136 S. Ct. at 1996.

20. *Id.*

21. *U.S. ex rel. Johnson v. Golden Gate National Senior Care, L.L.C., et al.*, --- F.Supp.3d ---. 2016 WL 7197373 at *7 (D. Minn. 2016).

22. *Escobar* at 2003-04.

23. 845 F.3d 1 (1st Cir. 2016).

24. *Id.* at 7.

25. *Id.*

26. *City of Chicago v. Purdue Pharma L.P., et al.*, 211 F.Supp.3d 1058, 1079 (N.D. Ill. 2016).

27. 2016 WL 5076214 (N.D. Calif. 2017).

28. *Id.* at 6.

29. *Id.*

30. 2017 WL 1021745 (N.D. Ga. 2017).

31. *Id.* at *6.

32. *Id.*

33. *Id.*

FEATURE continued

Delaware Attorney Looks Back *continued from page 28*

Advances in computer technology have likewise profoundly impacted the practice of criminal law, both positively and negatively. In 1974, the AG's office had no computer terminals, there was no Internet, and cell phone technology was in its infancy. Records were not e-filed; paper records were the norm. Now, criminal investigations routinely utilize social media to gather evidence. Searches of computers and cell phones frequently result in finding incriminating evidence, and cell towers can determine the proximity of a defendant to a particular geographic area.

While technology has greatly assisted the prosecution of criminals, it has also created new crimes. For example, perhaps the fastest-growing crime, identity theft, has for the most part been largely made possible by the increased use of computerized record keeping. Child pornography cases, almost non existent during my 20 years with the AG's office, are now routinely investigated, leading to numerous prosecutions. It is not at all unusual to find defendants in these most disturbing cases to have in their possession literally thousands of images involving children being sexually exploited. Child predators lurk in chat rooms looking for vulnerable children to abuse.

The online world, despite all of its positive features, can be an extremely dangerous place for children. Parents have a new set of responsibilities to watch over their children as they access the Internet, where inappropriate pictures last forever. Similarly, cyber-bullying has become a serious problem for both children and adults.

Delaware's United States Attorneys successfully prosecuted the first cyber-stalking-resulting-in-death case in the United States. David Matusiewicz, his sister, and mother were found guilty of the brutal murder of David's ex-wife and her friend in the lobby of the Leonard Williams Justice Center.

Many other crimes, including the sale of illegal drugs and painkillers, use the Internet as a platform for transactions. To meet the challenges of the computer age, both police agencies and prosecuting offices have personnel specially trained to investigate and prosecute these cases.

During my 45-plus years as a member of the Delaware Bar, its complexion also has dramatically changed. In New Castle County, where I have spent my career, the once all-male Superior Court bench now is almost equally divided between men and women, including persons of color, although, unfortunately, the same cannot yet be said for Kent and Sussex counties. All of the State's lower courts have both men and women dispensing justice.

In looking back over my career, I do so with a sense of nostalgia, yet I am extremely pleased that Delaware has become a much more inclusive state. While not all vestiges of discrimination have been eliminated, the rights of racial minorities, the LBGTQ community, the disabled and other minority groups are recognized and protected as never before, and our society is better for it.

My reminiscing would be incomplete if I failed to acknowledge one segment of the Delaware legal community that has consistently strived to ensure justice. The men and women who are deputy attorneys general, Assistant United States attorneys, public defenders and attorneys with the Community Legal Aid Society of Delaware deserve accolades for their dedication and hard work on behalf of all Delawareans. These men and women are burdened with crushing caseloads, inadequate compensation and, oftentimes, inadequate resources as they pursue justice.

I am now in the twilight of my legal career and do not yet know how I will spend the next several years. Hopefully I will be able to continue practicing in some capacity. I am confident, however, that the current generation of Delaware attorneys will continue to enhance the state's national reputation as a leader in the administration of justice. ◆

Charles M. Oberly III

A Distinguished Delaware Attorney Looks Back

A street-corner meeting changes a career – and leads to a life of service that has benefited all Delawareans.

Early in 1975, I made a decision that forever altered my career. Having spent nearly three and a half years as a federal court law clerk and associate at a prestigious local law firm, I was disillusioned with my work. I had never tried a case in court. Isn't that what lawyers were supposed to do?

On a mid-January afternoon at 11th and Market Streets, George Seitz, a classmate of mine at the University of Virginia School of Law, asked me how I liked my job. I told him I was not satisfied with it. By then, George was the State Prosecutor with the Delaware Attorney General's Office. He asked if I would like to be a deputy attorney general in the criminal division. The next day, an interview took place and I accepted the position on the spot.

In the 1970s and earlier, it was common for Wilmington law firms to encourage their young associates to spend a couple of years as a prosecutor and then return to the law firm as an experienced trial attorney. My own firm advised me not to stay longer than two years, as remaining with the AG's office longer would not advance my legal career.

Taking a cut in compensation, I joined the criminal division in mid-February of 1975 as its most inexperienced deputy. It was my hope and anticipation that I would spend the next several weeks watching others try cases and then assume my own caseload. Little did I know just how soon my trial experience would commence.

Shortly after entering the office, I was told I would have my first felony trial after lunch before a grizzled, senior, no-nonsense Superior Court judge. I was unnerved, but fortunately, my trial was non-jury and I was able to obtain a guilty verdict against a member of the Pagan Motorcycle Club for carrying a concealed deadly weapon. Elated, I knew I had found a new, exciting career representing the people of Delaware victimized by criminal behavior.

Over the next 12 months I tried two dozen cases. While I had notable success, I did suffer the ultimate embarrassment of losing one case – a traffic case – to a *pro se* defendant. I survived that inevitable experience and was promoted in June 1976 to the position of State Prosecutor, in charge of all criminal prosecutions in the state.

In four decades, the Delaware Attorney General's Office has undergone dramatic change. The interview process no longer occurs from spontaneous street corner conversations. There now exists a formalized hiring process. No longer are Delaware law firms the primary source of deputies. Women now hold at least half of the 200-plus positions in Delaware's Department of Justice. New attorneys do not start out trying felony cases on their first day.

In November 1982, after having spent nearly eight years in the AG's office, I was elected to be the Attorney General for the first of three four-year terms. During those 12 years, numerous changes took place. One of them altered forever the handling of criminal cases.

The victims of crime had previously been permitted to express their views to the sentencing judge by letter. They did not speak at sentencings; yet the defendant and any number of his or her supporters were afforded the opportunity to speak as to the appropriate punishment.

With the cooperation of the Superior Court, victims were permitted to speak in court to explain the impact of the criminal acts upon their own lives. The AG's office created a position for a victim's rights advocate, as a vibrant victims' right movement spread throughout the country. Today the victims of crime are fully integrated into the process, given full opportunity to express their views, and can receive compensation for their injuries from the victims' compensation fund administered by the state.

Advancements in the areas of science, technology and computers have had a profound impact upon the criminal justice system. DNA identification has been the most important scientific advancement. Delaware's first successful use of DNA evidence led to the conviction of Steven Pennell for serial murders and his execution in 1992, the first in Delaware since 1946. Today it is difficult to imagine a criminal justice system without the availability of DNA testing.

See **Delaware Attorney Looks Back** *continued on page 27*

5TH ANNUAL COMBINED CAMPAIGN CUP
GOLF, TENNIS & LAWN GAMES TOURNAMENT

To benefit the Combined Campaign for Justice

MONDAY, JULY 17, 2017

DuPont Country Club

To Register visit
www.delawareccj.org

Sponsors registration deadline: July 11, 2017
Individual registration deadline: July 14, 2017

Golf Registration:
Individual Player: $200
Foursome: $700 (save $100)

Tennis or Lawn Games Registration:
Individual Player: $100
2 Players/doubles: $175 (save $25)

Dinner/Silent Auction Only (per person): $60

Registration Fee Includes:

- 18-hole golf scramble, competitive & social tennis, or lawn games tournament
- Lunch & 2 drink tickets
- Dinner with cash bar, prizes for winners and silent auction
- Access to the driving range
- Swag bag from our sponsors

Registration: 9:00 a.m.
Golf tournament: 10:30 a.m.
Tennis tournament/Lawn games 12 p.m.
Dinner/Silent Auction: 4 p.m. to 6 p.m.

COMBINED CAMPAIGN Cup
TO BENEFIT COMBINED CAMPAIGN FOR JUSTICE

Sheraton Suites is where colleagues *gather.*

Bring the best minds together in our Full-Service Legal Suites & Meeting Facilities. Located in downtown Wilmington within minutes of the Courthouse, the beautiful Wilmington Riverfront & Amtrak Station. Easily accessible to the I-95 Corridor and the Philadelphia Airport.

We are the experts in handling all Mock Trials. The Sheraton Suites offers 3 fully furnished Legal Office Suites with 3,900 SF that feature: 21 Workstations • Voicemail & T-1 Connections • LAN Network Capabilities • 2 Conference Areas • Storage Space • Built-in Kitchen Areas

Sheraton.com/suiteswilmington

Sheraton®
SUITES
WILMINGTON
DOWNTOWN

Amenities:

- 223 Spacious Suites
- 7,600 SF of Flexible Meeting Space
- Customized Catering Menus
- On-Site Parking
- Shuttle Service
- Full Service Restaurant & Lounge
- Indoor Pool & Fitness Center

422 Delaware Avenue Wilmington, DE 19801
P 302.576.8040 | E ltreu@sheratonwilmington.com