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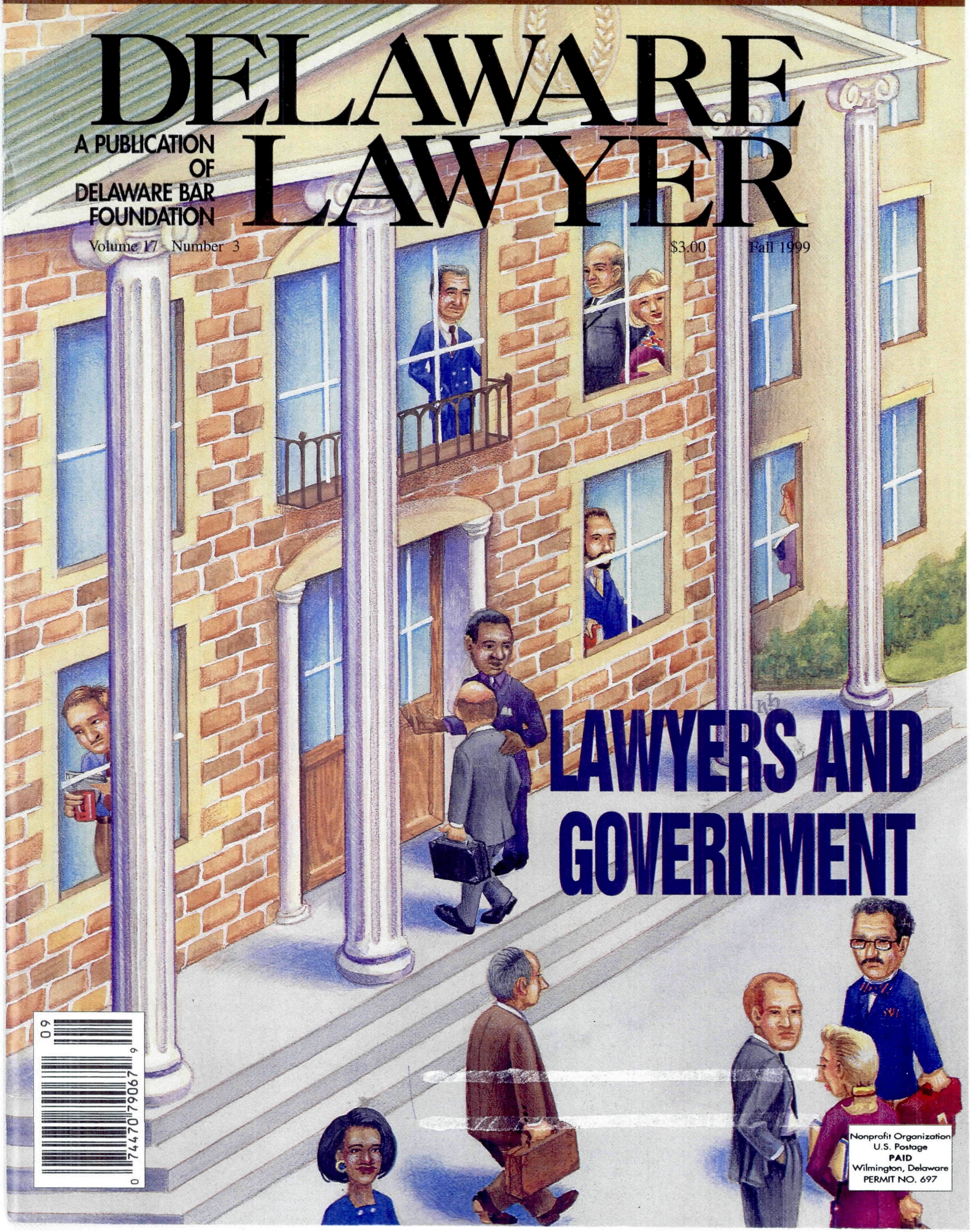

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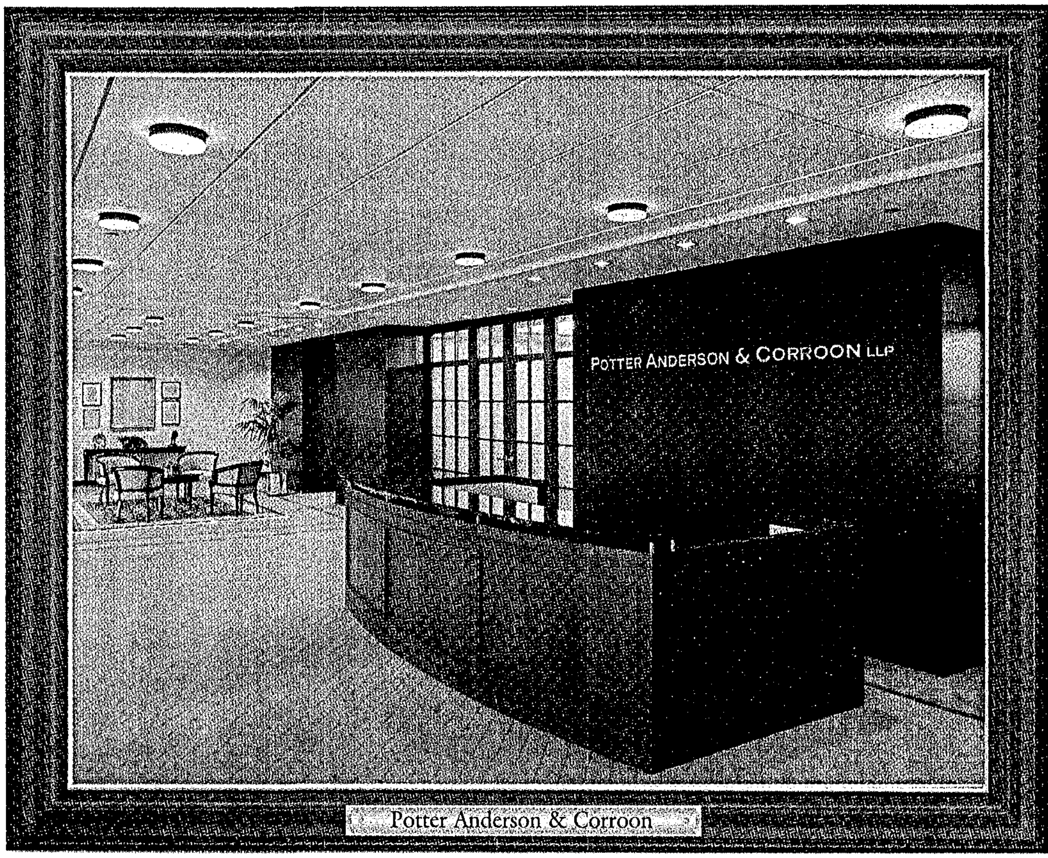

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Margaret Gilmour, Associate Editor
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EDITOR'S NOTES

Those familiar with my political side might question my decision to put together a *Delaware Lawyer* issue on "government law." After all, don't I believe in limited government? Why am I glorifying those who earn a living collaborating with the enemy? These are the kinds of questions I will surely hear.

My response is two-fold. First, as much as I have grown suspicious and in some respects downright disdainful of the bureaucratic, intrusive, and just plain condescending features of some government programs, I remain fascinated by the way our system of government works (and sometimes doesn't work).

More importantly, we still live in a country governed by the rule of law. In order to maintain that system we must have those most familiar with the law – lawyers – continually engaged with our government at every turn. This interaction will vary, from serving as a watchful eye, advising elected official on policy matters, to doing combat with an intransigent government body. And it must take place within an established framework and predictable process, otherwise the result will be arbitrary decision making and perhaps even chaos. In short, there should be openness and due process, coupled with some mutual respect and ample fairness.

This issue of *Delaware Lawyer* will illustrate how a small segment of the Bar, government lawyers, benefit the rest of us in a very profound way by their work. At the risk of being overly dramatic, I believe that without them eventually there would be little to distinguish us from the millions in this century who suffered under governments ruling with arbitrary, ruthless, and secretive hands.

Refreshingly, each of our authors is relatively young – most became lawyers within the past 10 - 11 years (I am proud to say I fall within that category). Each is a member of the Delaware Bar with one exception, and that person serves as counsel to the Senate Finance Committee chaired by Delaware Senator Bill Roth. Each of these talented lawyers (and authors, I might add) interfaces with federal and state government in his own unique way. They might not have taken the most lucrative route in their profession, but many of us will envy the immense satisfaction they seem to gain from their work.

Leo E. Strine, Jr. serves as a Vice Chancellor in the Delaware Chancery Court following dedicated service as counsel to our current Governor. He writes about the many lessons learned from that experience. W. Laird Stabler, III left a prestigious law firm to serve very capably as counsel to the previous Governor, and he describes that experience and his journey back to private practice to address administrative law and a legislative practice. I was fortunate, through the assistance of the office of Senator Roth (who is a lawyer), to include a piece by a professional working for the legislative branch who personifies the ideal government lawyer. Jeffrey F. Kupfer is someone with a respect for process and the rule of law, but always with an eye towards "doing the right thing." Finally, Richard A. Forsten has not had experience within government, but proudly bears the scars from direct conflict with it at the local level. In an entertaining way his article challenges the reader to join him in a critical examination of government regulation of something very sacred to all of us, our property.

Our nation has a rich history of government lawyers' vital contributions to our society, beginning with perhaps our most famous, Thomas Jefferson. In later eras we had Abraham Lincoln and Thurgood Marshall. How different would the most critical junctures in our history – the shaping of the Constitution, debate over slavery and state's rights, and the civil rights movement – have been without their participation? Very different indeed, and our nation and system of government would not be the same today.

On the other hand, especially in recent times our country has had lawyers at the highest levels of government with a significantly negative impact. This year marks the twenty fifth anniversary of Richard Nixon's resignation from the Presidency. This same year our current President, William Jefferson Clinton, was impeached. Ironically, the only two Presidents of this half century who were lawyers – both educated at our finest law schools – found themselves embroiled in a constitutional crisises because of conduct reflecting a lack of respect for the rule of law. Perhaps the critical distinction is that they were not true government lawyers, but rather career politicians motivated by personal ambition.

With a little understanding of the tradition of government lawyers in this country, and their impact on our lives, I hope you enjoy reading this edition as much as I did.

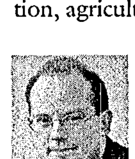
Jeffrey M. Schlerf

Contributors

Richard A. Forsten is a partner in the Wilmington office of Duane, Morris & Heckscher, LLP, where he practices primarily land use law, land use litigation, and commercial real estate development. He received his J.D. and B.S. degrees from the University of Virginia. Mr. Forsten is a frequent lecturer on land use and construction law topics, is a book reviewer for In Re:, the Delaware State Bar Association Journal, and is counsel to the Delaware Republican Party.

Jeffrey F. Kupfer currently serves as a tax counsel on the Senate Finance Committee, which is chaired by Delaware Senator William V. Roth, Jr. Before joining the Finance Committee, he spent one year as a counsel for the Senate Governmental Affairs Committee's investigation of illegal campaign fundraising. From 1993 through 1997, he was as a prosecutor in the U.S. Department of Justice Tax Division. Before that, he clerked for the Honorable Thomas P. Griesa, Chief Judge of the U.S. District Court in the Southern District of New York. He attended Yale and received his law degree at Harvard.

W. Laird Stabler, III is a partner at the law firm of Potter Anderson & Corroon LLP in Wilmington, Delaware. He received his undergraduate degree from the University of Pennsylvania and law degree from the Marshall-Wythe School of Law at the College of William and Mary. From 1987 to 1988 he served as Assistant Counsel to Governor Michael N. Castle, and from 1988 to 1990 as Counsel to the Governor. He practices primarily in the areas of administrative law and legislative matters, focusing on insurance, telecommunications, transportation, agriculture and health related issues.



Leo E. Strine, Jr. is a Vice Chancellor of the Court of Chancery. Previously, he was Counsel to Governor Thomas R. Carper after serving as a corporate litigator with Skadden, Arps, Slate, Meagher & Flom and as clerk to Judge Walter K. Stapleton and Chief Judge John F. Gerry of the U.S. District Court for New Jersey. He is a graduate of the University of Pennsylvania Law School, and the University of Delaware.

FEATURE

Richard A. Forsten

IF ONLY IT WERE THAT SIMPLE: LAND USE AND GOVERNMENT REGULATION

(Author's Note — As with each Dragnet episode, the stories you are about to read are true, only the names have been changed to protect the innocent).

In many ways, land use is one of the most straightforward yet contradictory, satisfying yet frustrating areas of the law. Start with a simple premise — you own land, the underlying resource for virtually our entire economy. Without land there could be no farming, no housing, no industry, no shopping — in short, no economy. Now, assuming that you own some piece of land (and, assuming that you aren't otherwise independently wealthy), it is probably safe to assume that you will want to do something with the land you own (i.e. farm it, build a house, etc.). The question then becomes how do you go about making some productive use of your land? At its core, this is the question which permeates land use law and provides the backdrop for a regulatory system which at times works elegantly and efficiently, and at other times can be maddening and disheartening.

Let's start with a seemingly simple example. Suppose you want to build a small hotel. If your property is in the middle of a residential neighborhood, then you can probably already guess that the applicable zoning laws would prohibit such a use. On the other hand, assume your property is on a commercial thoroughfare which already has two or three motels or hotels in the area. You would think that if other property in the area is being used for hotels and motels, then your property should also be appropriate for such use. Indeed, a little more competition might even be good for the public. Lower prices. Better service. More choice. But not so fast.

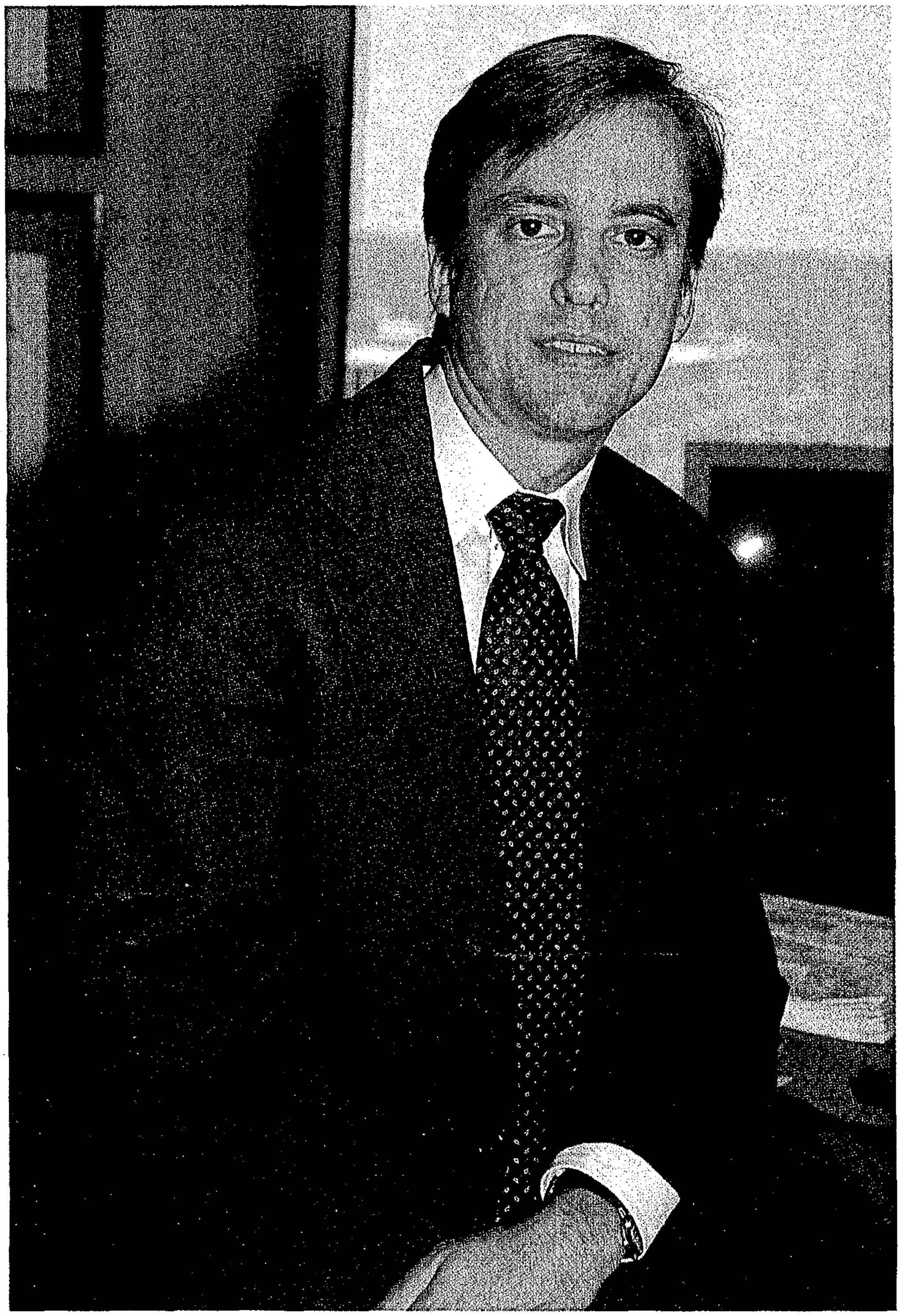
Further suppose that the zoning code requires a "special permit" for a hotel and that the grant of a "special permit" is discretionary, based upon the character of the neighborhood, traffic, safety, etc. In response to your request for a special permit, assume even further that the other area motels and hotels form a "trade association" to lobby against you, the newcomer — after all, more competition might put one of them out of business and would certainly hurt their profits. So, the local hotel association starts to lobby against the potential newcomer. A new hotel will cause more traffic (even though the existing hotels cause traffic). A new hotel will cause a loss of open space (even though the existing hotels once too caused a loss of open space). Finally, a new hotel might be more attractive to the public and cause one (or more) of the existing hotels to go out of business, resulting in a loss of jobs and a rundown, potentially abandoned old building (even though, of course, competition is supposed to be at the heart of the free enterprise system and the existing hotels can modernize and upgrade if they think it necessary to compete).

Surely, you might think, local officials will see through the trade group's position — but, unfortunately, such is not always the case. Sometimes (perhaps too often) zoning and subdivision laws designed to protect the public health, safety, and welfare are turned on their heads and used for purposes unrelated to their original intent.

It is one thing to have laws subverted in an effort to stop a project. It is even worse, though, to have the rules changed *after* you have started pursuing an otherwise legal project. Suppose you want to construct a factory. After several months, you find a site, in an industrial park, zoned to allow what you want to build. You talk with local officials, who confirm that what you want to do is legal, and, indeed, they are excited about the prospect of a new employer. Sounds good, doesn't it? But now what happens when, after you apply for approval, have ordered equipment (due to long lead times) for your factory, and have invested substantial time and money, the local government, in response to nearby residents (who otherwise live near an industrial park — what did they think would happen there?), proposes and passes an ordinance specifically prohibiting your intended use (as well as a plethora of other uses)?

Consider one final example. Suppose you seek to rezone your property (say it's a farm) so you can build something on it. Your proposal is opposed by many in the community and supported by some as well. There are numerous newspaper articles about the proposal. The public hearing on the rezoning is well-attended and goes several hours. After the hearing, the property is rezoned. Later, someone discovers that a required notice was not posted on your property, although it was properly posted elsewhere and published as required in the newspaper. Opponents of the rezoning threaten to sue to overturn the rezoning. Meanwhile, an election is held and new decision makers are elected who are opposed to your project. Should the rezoning be set aside because a notice was not posted properly on your property — even though it was properly posted everywhere else and the well-attended public hearing demonstrates that the community was well aware of the rezoning?

The foregoing three hypotheticals (hotel, factory, rezoning) are all drawn from real cases, and each highlights a different facet and concern of land use practice. The first example, the hotel opposed by other hotels, cuts to the very core of land use regulations — what is



their purpose? The second example, that of changing the rules on a property owner after the property begins work on a project, addresses the level of protection afforded property owners from changes to the rules, a concept sometimes referred to as "vested rights." The final example, the mis-posted notice, deals with the extreme emphasis often placed on procedural issues because of the extreme deference courts otherwise show local governments on the substantive merits of their land use decisions. Each of these is discussed further below.

With respect to the hotel case, the question is whether competitors may use zoning and subdivision codes to stifle competition. Intuitively, this does not seem proper, and, indeed, a history of how zoning developed supports this conclusion. Modern land use law has its roots in the common law doctrine of nuisance. While a landowner had the right to use his land, the common law would not allow him to use his land in such a manner as to injure the land of another. Each case was fact specific. Growing out of the common law doctrine of nuisance, municipalities began to enact ordinances under their police power designed to protect the public health and safety. For example, brick kilns (to manufacture bricks) were prohibited in residential areas. Stables were prohibited in commercial districts. Courts generally upheld these restrictions because the restrictions could be clearly linked to concerns about public health and safety. In 1916, the City of New York became the first city to adopt a comprehensive zoning ordinance; and, in 1926, the United States Supreme Court upheld zoning ordinances, largely by analogizing to the law of nuisance:

[t]he ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. . . . the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality . . . . A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.

Euclid v. Amber Realty Co., 272 U.S. 365, 387-88 (1926). Given the roots of modern zoning law, then, with its basis in the common law doctrine of nuisance, which in turn prohibits injury to another's land and the ability to use the land, Delaware courts and the courts of other states have, not surprisingly, expressed the view that competition is not a proper factor to consider in a land use decision. In *Mobil Oil Corp. v. Board of Adjustment*, Del. Super., 283 A.2d 837 (1971), Mobil Oil appealed the denial of a variance and building permit to construct a gasoline station on commercially-zoned land. In reversing the Board's denial, the Superior Court stated:

[t]he Board worried about economics. It made a finding of fact that there were sufficient stations already in the area. But the need or lack of need of gasoline stations in the area is not relevant . . . . It may be that older gas stations may benefit from the absence of a new modern station in the area but the public interest is not served. The petitioner is entitled to the best use of its land in a commercially zoned area.

Id. at 840. In *New Castle County Council v. BC Development Associates*, Del. Supr., 567 A.2d 1271 (1989), the Delaware Supreme Court remanded a denial of a rezoning application because the New Castle County Council had not clearly articulated its reasons for the denial. In doing so, the Court implied that it would look unfavorably upon the consideration of competition in a zoning decision. After reviewing several reasons which would support a denial, the Court went on to state:

[t]he record also reveals that some discussion at the hearing focused on the competitive impact of new development upon existing businesses. While we have no occasion to consider whether limiting competition is an appropriate basis for denying a zoning application, the record does not dispel the impression that Council may have relied upon this as grounds for rejection of rezoning.

Id. at 1277. The import of the Supreme Court's statement is clear — Delaware law does not allow governments to suppress competition through the use of zoning. Yet notwithstanding that suppressing competition, or protecting older, established businesses, is not a legitimate concern of zoning, the issue is present in many cases. What makes the competition argument especially frustrating is that it is often raised, and decision makers may be heavily influenced by it, yet the decision makers will state that they are basing their decisions on other, legitimate grounds for denial.

Of course, when decision makers are pressed to deny a pending land use project and they lack any legitimate grounds, creative decision makers (and opponents) often try to change the rules so that an otherwise legally permitted land use can then legitimately be denied. Standing in the way of such after-the-fact prohibitions, though, stands the common law doctrine of vested rights. Essentially, this doctrine holds that where a property owner has made substantial expenditures in good faith reliance on existing provisions, he will be allowed to proceed with his project notwithstanding a subsequent change in the law. The Delaware Supreme court has articulated this test as follows:

[a]s to the time of the zoning change, there must have been a substantial change of position, expenditures, or incurrence of obligations, made lawfully in good faith under the permit, before the landowner becomes entitled to complete the construction and to use the premises for a purpose prohibited by a subsequent zoning change.

Shellburne v. Roberts, Del.Supr., 224 A.2d 250, 254 (1966). In establishing a vested right, the central focus is on the amount of good faith expenditures. There is no pre-set minimum which guarantees a finding of vested rights. Each case is fact specific and takes into account all of the relevant circumstances. Unfortunately, in Delaware, there seems to be some confusion as to whether a property owner must receive a permit or approval before rights will vest. *Shellburne* is the only Delaware Supreme Court decision to discuss vested rights, and, in doing so, used the phrase "substantial change . . . made lawfully in good faith under the permit." The inclusion of the words "under the permit" has suggested to many that a permit is required, although in Shellburne, the property owner had received a permit, so there is no indication that the issue was considered. Moreover, several lower Delaware court decisions have found vested rights absent receipt of a permit. There is a split of authority among the states. Given the cost, complexity and length of time associated with obtaining land use permits under today's more modern and complex land use statutes, the better rule regarding the vesting of rights would seem to be that no permit should be required so long as there as been substantial reliance in good faith.

Cases explicitly requiring a permit for rights to vest, as well as the *Shellburne* case (which did not directly address the issue), were decided in a far simpler era of land use regulation before traffic impact studies, wetlands delineations, and a host of other, often expensive studies were required to even apply for a permit. As one commentator modestly put it, "[m]ost vesting rules fail to recognize trends toward a longer development process with larger 'front-end' costs." Rinaldi, "Virginia's Vested Property Rights Rule: Legal And Economic Considerations," 2 Geo. Mason L. Rev. 77, 95 (1994). Moreover, in that simpler era, a permit could be issued and work often begun before many in the community even realized what was going on. Thus, there really would have been little or no opportunity for a change in the rules prior to obtaining a permit, nor an opportunity to make substantial expenditures prior to the issuance of a permit. None of that is necessarily true any more, calling into question the rationale of those decisions requiring a permit. A rule which vests rights at the time of application (assuming substantial reliance in good faith) is far more equitable and fair in today's modern land use regulatory environment. This issue, though, remains open and of concern as Delaware property owners attempt to make plans to use their land.

But while the finer points of vested rights may not be completely clear under Delaware law, one thing is crystal clear — all procedural requirements must be strictly followed or the land use approval is subject to reversal. The strict enforcement of procedure, though, is somewhat ironic. When reviewing rezoning decisions, as well as other discretionary land use decisions, a Delaware court is very deferential when it comes to the merits of the decision. A reviewing court will not substitute its judgment for that of the decision-making body. The court will only reverse the decision on the merits if the decision is clearly arbitrary and capricious, or is not otherwise supported by the record — a very difficult standard for someone challenging the decision to meet. But while Delaware courts may be deferential on the merits, they strictly insist that procedure be followed. In *Carl M. Freeman Assoc., Inc., v. Green*, Del.Supr., 447 A.2d 1179 (1982), the Supreme Court held that "[b]ecause zoning ordinances are in derogation of common law property rights, [there must be] strict compliance with the [legislated] procedures." *Id.* at 1182 (citation omitted). In doing so, the court rejected the

FEATURE

Jeffrey F. Kupfer

WHEN THE NATION IS YOUR CLIENT

The pay is not great. The working conditions are not ideal. The hours, in some cases, are long and erratic. But even so, you hear the same refrains from people time and again. "It was the best job I ever had." "It was a great experience." "I got a chance to do some really interesting things." "I never thought I'd have so much responsibility so quickly."

What makes so many people say such good things about their experience in government service? While there are undoubtedly many answers to that general question, I think that it comes down to two separate but related principles – one narrow and personal, the other broader and societal.

The first principle revolves around the government lawyer's unique role in our system. Unlike a private sector attorney, the government lawyer is not confined to being an advocate for a particular party or cause. Instead, the government lawyer has the freedom to look beyond a paying client and to try to achieve what he or she believes is the "correct" result. This is not to say, of course, that a private sector lawyer always acts as a hired gun, maximizing financial gain without any sense of personal commitment or belief in the issue. There are countless private sector attorneys who passionately believe in their work. The difference, however, is that the sole duty of the private sector attorney is to promote that cause or client, to act as the best possible advocate for his or her client. The government attorney, on the other hand, has the ability to weigh additional factors, to judge both sides of an issue, and to reach his or her own conclusions.

In making this point, I am not suggesting that there is some objective "right" answer to the questions facing every government lawyer. Reasonable people can – and do – disagree about the wisdom of many judicial decisions, executive branch practices, or legislative policies. Moreover, the freedom to do what one perceives is "right" has its inherent constraints; nevertheless, it is what sets government work apart and makes it a rewarding personal experience.

The second principle has to do with the effect of the government lawyer's action. By its very nature, governmental action has a broad scope. Some decisions are obviously big picture – they clearly affect numerous people. Other decisions seem smaller – they may only directly affect a few people. But even in these latter cases, there is some precedent or policy that is being created or executed. Because one is acting as a public official rather than as a private citizen, the implication of every action is magnified. There are important ramifications in every decision made by a government official. This means that the government lawyer has a real opportunity to make a difference, to leave an impact on society as a whole.

During the past seven years, I have had the privilege of serving in all three branches of the federal government – the judiciary, the executive, and the legislative. While the responsibilities are different in each branch – and the constraints and factors vary – my experience in each place has reinforced my feeling that a government lawyer has a unique and important role in our society.

Perhaps more than any of the branches of government, people associate the judicial branch with serving the public interest. The defined role of law clerks and judges is to resolve disputes between contesting parties. The nature of the job, therefore, lends itself most closely to the first principle of being a government lawyer – the ability to sift through competing presentations and then to arrive at the "right" result.

The role of the law clerk or judge becomes even more important owing to the nature of our judicial system – which is confrontational. We do not ask the contesting parties in a lawsuit to step back and to temper their arguments so as to serve the public interest. We all understand that the litigants are looking out for their own interests and presenting their best case to the court. They are advocates for a position and they are supposed to do their best to present that case. It is in this way that ideas and positions are fully developed, and one hopes it leads to the most thoughtful and considered result.

The job of a law clerk – who in most cases takes the first crack at drafting a resolution to the dispute – has its inherent constraints. The most obvious constraint is the law – the statute and binding judicial precedent. In a few situations, the law clerk may find himself or herself with no choice but to recommend a decision that he or she finds completely inequitable and unreasonable. In the majority of situations, however, the law and the precedents allow the law clerk – and the judge – to render a judgment that is fair and reasonable – to do what he or she believes is "right."

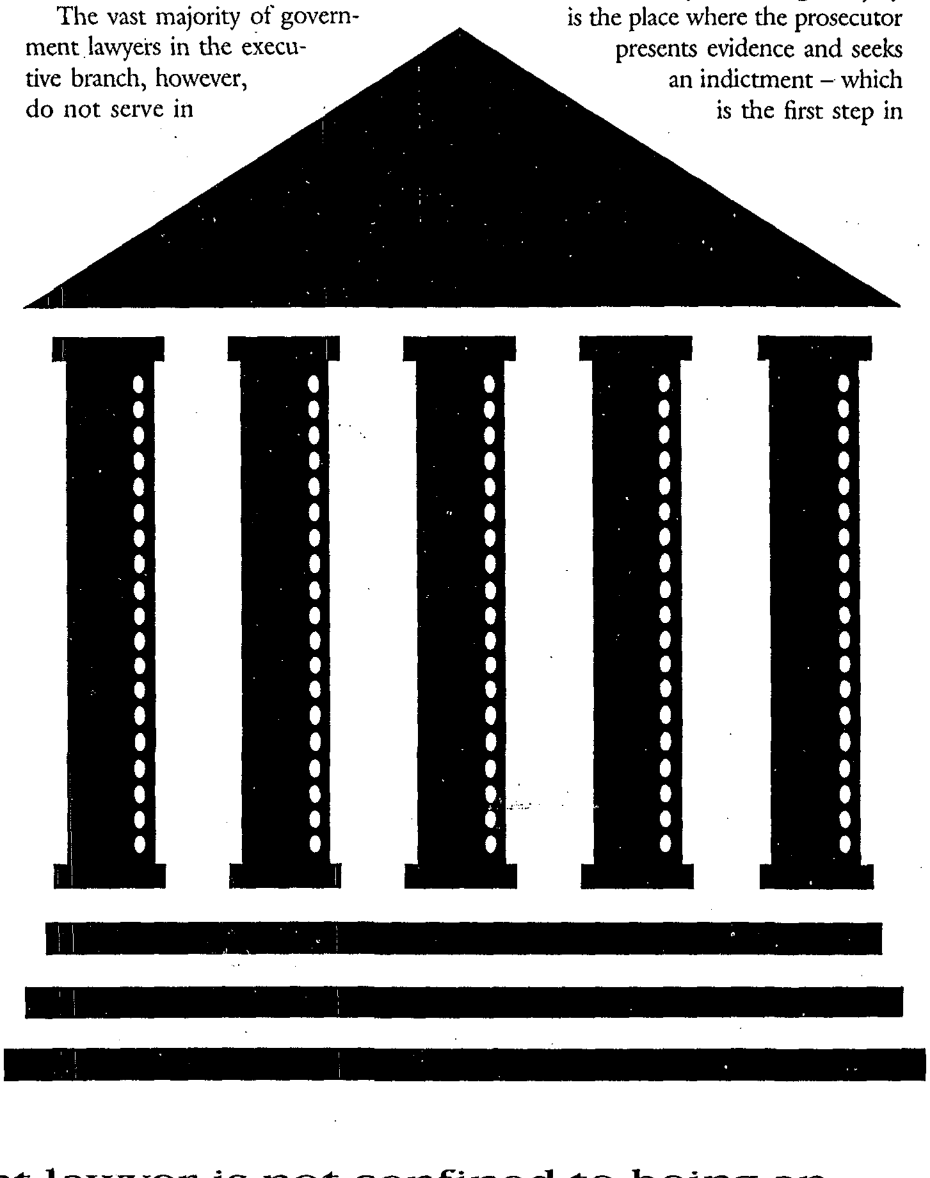
I know of one case, for instance, where a young man was paralyzed as a result of a terrible accident that occurred while he was riding on a "four wheeler" recreational vehicle. He sued the manufacturer, claiming that the vehicle had malfunctioned. The manufacturer responded that it should not be liable because the man had assumed the risk – he had never ridden a "four wheeler" before, he was riding it in a very dangerous place, and he knew that the vehicle was prone to malfunction. Both sides presented the case as strongly as possible from their perspectives. The jury ultimately sided with the plaintiff and awarded him tens of millions of dollars. The manufacturer appealed and the case went to the circuit court where it was heard by a two judge panel.

After hearing oral argument, the two judge appeals panel split down the middle – one judge felt that the fact that the man had been paralyzed and that the vehicle had malfunctioned was enough to sustain the verdict; the other felt that the man was "interminably stupid" and should not receive this windfall. Faced with this impasse, and not wanting to add a third judge to the panel, the two judges told the law clerk to come up with an answer. The clerk's answer was to draft an opinion that would achieve what was probably the right result – a damage award somewhere in the middle. The opinion, which was issued by the judges, overturned the district court on liability grounds but retained the damage component. The effect was to send the case back for a new trial, and in doing so prompted the parties to settle the case for a few million dollars. Reasonable people may disagree about whether this result was "right" – about whether the court should have decided squarely for one side or the other – but the fact of the matter is that the government lawyer was able to do what he or she believed was fair, equitable, and ultimately in the public interest.

Whereas a lawyer in the judicial branch occupies a fairly defined role, the government lawyer in the executive branch can serve in a few capacities. Some lawyers serve as high level political appointees. Acting in this arena, they make or carry out policy decisions that have a wide effect on numerous citizens.

The vast majority of government lawyers in the executive branch, however, do not serve in those high level, inherently political positions. Instead, they represent the government in litigation or in other disputes with private parties. As such, they are one player in our adversarial judicial system. But unlike the private sector lawyer, whose role in that system is clearly defined and limited by his or her duty to the client, the executive branch lawyer retains the ability to make a broader assessment of the particular issue. In fact, the government lawyer not only may – but should – consider additional factors such as the public interest.

The grand jury context provides a good example of this dynamic. In our federal criminal system, the grand jury is the place where the prosecutor presents evidence and seeks an indictment – which is the first step in



The government lawyer is not confined to being an advocate for a particular party or cause. Instead he has the freedom to look beyond a paying client and to try to achieve what he believes is "correct."

the formal, public criminal process. For historical and practical reasons, only the prosecutor has the right to call witnesses and present evidence to the members of the grand jury. Moreover, the targets of the inquiry do not have a formal role monitoring the grand jury proceedings and witnesses cannot be accompanied by lawyers when they testify to the grand jury. In short, it is structured as an inherently one-sided procedure. But while there are inevitably some cases of abuse, the vast majority of grand jury proceedings are conducted in a fair manner.

The reason that the grand jury process works – and why Americans continue to have faith in it – is that while a prosecutor ostensibly represents just one side of the case, he is also charged with making sure that the process is fair. The goal is not simply to win at all costs. The United States Attorney's Manual makes that precise point in reminding federal prosecutors that in dealing with a grand jury, the prosecutor must always conduct himself or herself "as an officer of the court whose function is to ensure that justice is done and that guilt shall not escape nor innocence suffer."

As in the other branches, executive branch lawyers work under certain constraints. In general, those limitations are the priorities set by their departments and the scarcity of available resources. It is not possible to pursue every case where there is a violation of the law and you believe that someone is culpable. But even with that caveat, there is usually enough leeway for the government attorney to concentrate on the cases that he or she deems are the most valuable – the ones that he or she feels are the "right" ones to pursue.

One case that crossed my desk, for example, involved an individual who had been convicted of tax evasion about 15 years ago, and had been ordered to pay a large amount of back taxes. Instead of paying what he owed, however, he lied to an IRS collections officer and then began sheltering his money in offshore bank accounts. The case got lost in the shuffle and by the time a colleague and I saw it, the individual was nearing seventy years old, and much of the evidence against him was going to be difficult to gather. It would have been reasonable to ignore the case – the age of the target made him less menacing and proving the violation was going to be troublesome. Nonetheless, we determined that the case was worth our time and effort. We felt that the facts in this case made it an important prosecution, that it was in the public interest to pursue it. It took some time, but the individual was ultimately convicted and sentenced to prison. The case only directly affected a few people, but one can argue that its message created a larger indirect impact on society. Similar considerations abound in almost every case.

Whereas the executive branch lawyer acts as a party in the system and the judicial branch lawyer acts as an arbiter, the legislative lawyer occupies yet another role. In some ways, the legislative lawyer can be viewed as combining the qualities of lawyers in both of the other branches. For instance, the legislative lawyer often begins by weighing competing presentations from advocates of various positions. These presentations may be from other lawmakers, from hired lobbyists, or from regular citizens who call to complain or offer suggestions. In any event, the lawyer needs to formulate the correct response – to examine the arguments and decide what is the proper conclusion. In that respect, at least, the legislative lawyer is acting like a judicial law clerk. Once this decision is made, however, the legislative lawyer puts on a different hat – the hat usually worn by a lawyer in the executive branch. The legislative lawyer becomes an advocate for the position. The job becomes trying to convince other lawmakers (and sometimes other interest groups) of the correctness of your position.

Just as in the other branches, the government lawyer in the legislative branch does not have unfettered room to do what he or she believes is "right." In Congress, the obvious constraint is politics. The mere fact that one believes that a certain result is the right one does not always mean that one can get there. This is especially true in the Senate where one member can wield tremendous individual influence.

Last year, for example, Congress passed the Internet Tax Freedom Act. It provides a good example of the role of a lawyer in the Senate and the factors that go into passing legislation.

The overall purpose of the proposed legislation was to call a time-out in the taxation of electronic commerce. Private sector businesses were concerned that states and localities would view the tremendous growth of electronic commerce and the Internet as a new and untapped revenue source. Since electronic commerce passed through many areas, it was unclear how a myriad of new taxes could be applied and what effect that would have on the growing industry. At the same time, states and localities had a legitimate concern that their sales tax base was drying up, and that they needed to establish a system to collect revenue from this new industry. And of course, there was politics. Many lawmakers had high technology industries as constituents. Others simply wanted to be associated with this cutting edge issue.

In July 1998, the Finance Committee was granted a short window to modify the proposal before it was sent to the full Senate for consideration. Since the committee had not received jurisdiction until this point, proponents and opponents of the bill had not focused on us. That all changed in a hurry. Once the referral was made, the phone started ringing and the fax machine began humming as lobbyists on both sides of the issue swung into action. They provided us with background, and they also presented their version of the case. Much like private litigants in a lawsuit, they did their best to advocate their positions.

As part of this process, the committee also scheduled a public hearing. The purpose was to provide a public forum to discuss the legislative proposal and to make a record of the varying viewpoints. We heard from officials of the Clinton Administration, from private sector business representatives, and from state and local officials. We also heard about a compromise version of the legislation that had just been passed by the House of Representatives. Armed with all that information, we began drafting the Finance Committee version of the Internet bill.

As we pieced together the legislation, there was the inevitable interaction between policy and politics. We recognized the political constraints on our ability to do whatever we thought was "right." For instance, most people accepted in principle that there should be a temporary moratorium on state and local taxation of the Internet. The questions revolved around the length of the moratorium and whether to grandfather certain existing state taxes. As for the length, we felt that the existing Senate language, which called for six years, was simply too long. While many of our members would have been content with a one or two year moratorium, we started with three years, which was also the length called for in the House bill.

As for the grandfather component, we took a different tack. In the House, the parties worked out a compromise whereby state taxes were grandfathered throughout the moratorium period. We saw that as philosophically inconsistent. If the federal government was going to step in and decide that Internet taxes were inappropriate, we thought that you should not reward certain states who had just moved quicker than others. Accordingly, we proposed that there be no grandfather provision – that states could collect taxes that were imposed before the date of the bill, but could not impose new taxes afterwards. We knew that both these positions could change in light of political reality (and they later did), but we thought it was the right place to start.

Another contentious piece of the bill was the creation of a commission to study taxation on the Internet. The House bill created a 31 person commission, with specific rules identifying industry groups and associations to be represented on it. We agreed that it made sense to have a formal body, and to make sure that different viewpoints were represented, but 31 members jumped out at us as an unwieldy and unworkable number. Accordingly, we proposed that the commission have 16 members, of which four would be from the federal government, six would be from the private sector, and six would be from state and local governments.

The other issue for the commission was defining its areas of study. The existing Senate bill had a general focus, and did not mention anything about mail or phone order sales. The House bill, on the other hand, had a specific and heavy focus on that point. It was a key issue for state and local governments, many of whom felt that their tax base was being seriously eroded by their inability to effectively tax these "remote" sales. We thought that the issue should be studied, though we did not necessarily see it as the focal point of the commission's work. Accordingly, we proposed a general focus, but with a clear direction to include the study of remote sales. Our language provided that the commission would study and recommend rules for international, federal, state, and local taxation of Internet transactions, as well as for comparable sales activities (like these remote sales).

We put all of this into what is called the "Chairman's mark," which is the starting point for committee consideration of the bill. The members of the committee then considered, or "marked-up" the bill. They made one change – lowering the moratorium period to two years – and then approved the bill with only one dissenting vote.

A few months later, the full Senate considered the bill. We call this going to the "Senate floor." It is the time when all Senators have a chance to offer amendments, seek changes, and then to vote up or down on the bill. It is also another place where a lawyer in the legislative branch is guided by principle, but constrained by political realities. The Senate conducts much of its business by what is called unanimous consent. That means that any member of the Senate, if he or she is determined enough, has the power to grind the process to a halt. To make progress, compromises have to be struck and strong interests need to be accommodated.

By the time the Internet bill emerged from the Senate floor, the two year moratorium was back to three years, certain state and local taxes had received full grandfather treatment, and the commission membership had increased to nineteen from sixteen. On the other hand, important components such as the commission focus remained intact. In speaking in favor of the bill, Senator Roth noted that there had been some changes from his original bill, but that the "central thrust of the legislation" remained and so he would vote for it. Senator Moynihan, the ranking member of the Finance Committee, made a similar point, stating that the bill was "not perfect" but still deserved his support. The bill passed 96-2 (two Senators did not vote).

All government lawyers have their own reasons for why they entered into government service and why they have remained in it. Among those varied reasons, the two principles described earlier – the ability to draw your own conclusions within certain constraints and the opportunity to make a difference – figure prominently. Unlike a private sector attorney, whose duty is to his or her client, the government lawyer in all three branches of government has an additional responsibility – to the public. In one case I prosecuted, the judge summed this up in his jury instructions. While he made the comments in the context of a criminal trial, they are applicable to all branches of government. He reminded the members of the jury that in reaching their verdict, they should not consider whether the government was going to win or lose the case, because "the government always wins when justice is done." ◆

FEATURE

W. Laird Stabler, III

FROM PRIVATE PRACTICE TO PRIVATE PRACTICE

(The Governmental Round Trip)

When I first was asked to prepare an article about how one becomes involved in a legislative practice (a thinly veiled way of describing the activities of a lobbyist) and in particular what the life of a lawyer/lobbyist entails, I feared that my story would interest few of you. However, on reflection I believe that since only a handful of Bar members engage in this type of practice, it may indeed be of some interest to other attorneys.

First, I must explain briefly how my career path has brought me here by turning back the clock to events that occurred in the late 1980s. In the fall of 1987 I had been an associate at Potter Anderson & Corroon LLP approximately six years when one of the junior partners at the firm entered my office to inquire whether I might be interested in the then vacant position of Assistant Counsel to the Governor. After recovering from the initial apprehension that the firm might be politely offering a convenient and easy method of getting rid of a senior associate, I decided to at least seek an interview. Having considered the idea of entering into the public sector on several occasions before, it seemed that if I were to make such a move, it was now or never. After meeting with then Counsel to the Governor Tony Flynn and Governor Castle, I was offered and accepted the new job, commencing January 1, 1987.

As I soon found out, the practice of law in the Governor's office bears little resemblance to the practice of law in the private sector. At the time I left Potter Anderson, the majority of my practice involved general litigation. Drafting and filing pleadings, taking and defending depositions and writing briefs were the core of that practice. Conversely, during my three years with Governor Castle, I perhaps collaborated on only one legal brief and recall that I participated in only one deposition.

Instead, practice in the Governor's office centers around interpreting Delaware constitutional and statutory provisions regarding gubernatorial powers and authority, providing input to the Governor regarding policy and budgetary matters related to the Judiciary and Attorney General, reviewing all bills passed by the General Assembly, and providing evaluations of legislation to the Governor. The practice also entails working with the members of the General Assembly to assist in the passage of the Governor's yearly legislative package. Additionally, Counsel to the Governor traditionally serves as the Governor's liaison to the Attorney General and the Chief Justice on issues of common concern.

The Governor's annual legislative package would begin to be put in place in the fall. Cabinet Secretaries and Division Directors would meet with the Governor's legal staff and legislative liaison to present their legislative needs, whether they be simple "housekeeping" bills or major legislative initiatives. I would then review those initiatives to ensure they were properly drafted to achieve their intent. Senior staff and the Governor would then review all of these requests and put in place the legislative package for the upcoming year's legislative session.

During the session, the Governor's legislative liaison would take the primary responsibility in shepherding that package through the legislative process, and legal counsel's role would be focused on reviewing each piece of legislation sent to the Governor's desk for signature. A detailed report on each of these legislative initiatives would be prepared, followed by regular meetings with the Governor to recommend whether he should sign or veto the legislation or permit it to become law without his signature.[1]

Returning to the story line, after spending three years as a member of Governor Michael N. Castle's senior staff (one year as Assistant Counsel and two years as Counsel to the Governor), I received an offer I could not refuse. The Chairman of the Executive Committee at my former employer, Potter Anderson & Corroon LLP, asked me whether I would like to return to the firm as a partner. Since the attainment of a partnership at Potter Aderson had been a goal for many years, the answer was an easy one. But then the more difficult question arose-what type of practice would I engage in upon my return?

As I described earlier, my "practice" for the previous three years was completely different from that in the private sector. Further, the clients for whom I had been working three years ago were now being served by other attorneys in the office. And because they were not clients that I had brought to the firm, stepping back into that practice would not be easy. So after several conversations with the Chairman of the Executive Committee, I came up with the crazy idea of trying to start a legislative practice upon my return to the firm.

Actually, it made some sense. Potter Anderson has always prided itself as being a full service firm able to meet any of its clients' needs. But we never had established a real presence in the legislative arena. With the experience I had gained over the preceding three years, which included a good working relationship with many members of the General Assembly and the Governor's cabinet secretaries, I felt I could hit the ground running.

The experience factor is vitally important to the establishment of a lobbying practice. A working knowledge not only of the legislative process but of legislative personalities is tremendously important. Another critical factor was the support of my firm, for at the beginning business was very slow and, were it not for their support, I would have starved on my own. One of the early issues I faced for a firm client was a landlord tenant dispute that had found its way into the legislative drama. Our client, a large shopping mall tenant, had been engaged in a major piece of litigation with his landlord over the method his electric bills had been calculated. The tenant's claim was based upon a statutory provision that, he asserted, the landlord had violated. During the course of the litigation, the landlord had legislation introduced in Dover which would have amended that statute to make it clear that the landlord's method of calculation would be prospective. Fearing that this amendment could be relied upon to establish "legislative intent" behind the statute at issue in the ongoing litigation, I was authorized by the client to try to kill the bill.

The practice of law in the Governor's office bears little resemblance to the practice of law in the private sector.

Unfortunately, 1990 was the second year of the legislative session (each legislative session is for a two year period) and this bill had already passed unanimously in the House and had failed by only one vote in the Senate. It had been "laid on the table" and was, therefore, ready at any time for consideration by the Senate as soon as its sponsor gathered that one needed voted. And to make matters even more precarious, the landlord had retained a former Speaker of the House to assist in getting the bill passed.[2]

To make a long story short, the legislation did not pass the Senate. And because of my visibility in legislative hall wearing a private sector hat, it gradually became known to those who occupy "the hall" that I was available to provide assistance in legislative matters. Much to my delight, shortly after the end of the session, I was retained by a major corporate client to do all of its legislative and regulatory work in Delaware. My legislative practice had now commenced.

As one would surmise, a legislative practice is sometimes completely different and at other times very similar to a "normal" private practice. It does not involve writing briefs or closing transactions in the traditional legal sense. But it does require the ability to convey effectively your client's position on matters (sometimes of considerable complexity and technicality), in writing or by oral presentation, to lay people serving broad constituencies. Thus, the presentation must be clear, to the point, and persuasive. In the case of a written submission to legislators, brevity is a must. Otherwise, because of a legislator's extraordinarily busy schedule, your work may not be read. Effective oral advocacy is another vitally important component of a successful legislative practice. The ability to communicate clearly and effectively, both one on one with a legislator, at committee hearings or during debate on the floor of the House or Senate, is of tremendous value to the clients a lobbyist serves.[3] (Thus, the formal training in the art of effective oral and written communication, as well as legal analysis, is a tremendous asset.)

Another similarity to the more traditional practice areas is the need to prepare thoroughly for any oral presentation. Complete familiarity with the impact a bill would have on a client is essential. A lobbyist must zealously represent the interests of a client. In doing so, however, you must understand that

Legislators, like Judges, are keenly aware that a lobbyist is an advocate for a client. Thus, while being an advocate, a lobbyist must always remember that the statements he or she makes concerning legislative initiatives must be accurate or the lobbyist will lose credibility. A lack of credibility is certain to destroy a good working relationship with the members of the General Assembly, as it would with a Judge. And with a relatively small legislature, the word that someone was less than truthful spreads quickly.

While advocacy before the legislature is similar to the traditional practice of law in some respects, in others it is completely different. Appearing before 41 members of the House or 21 members of the Senate may be one of the most unnerving experiences an advocate may encounter. It is virtually impossible to anticipate the questions you may receive. One never knows what particular issue, related or unrelated to the legislation at hand, may be on a legislator's mind. And if a lobbyist is testifying against legislation that a member feels is the best bill ever debated on the floor (not to mention a bill sponsored by that same legislator), it can sometimes be taken personally. You may incur the wrath of that member. From personal experience, I can tell you that it is an extraordinarily lonely and uncomfortable position to be lectured before the members of the House or Senate. Having said that, it is part of a lobbyist's duties and I bear the "scars" to show for it.

One of the principal duties of the lawyer/lobbyist is to be the eyes and ears for a client in legislative hall. Thus, I became convinced at an early stage of developing this practice that regular attendance in Dover on legislative days was critical. As an "early warning system" for the client, the lobbyist can provide invaluable service by being on top of a legislative issue at its earliest stage.

Consequently, an early reading of local newspapers such as the *News Journal* and *Delaware State News* becomes part of a lobbyist's job description. This exercise allows you to be familiar with current events which may lead to a legislative initiative which could affect a client. Knowing the underlying rationale for legislation can go a long way towards working with its sponsor to amend a bill, so that it will be more palatable or beneficial to the client. Another part of the job description is that each and every piece of legislation introduced into the General Assembly must be reviewed as soon as possible. That way, any bill of interest to a client can be reviewed and discussed at an early stage. And should there be a problem from a client's perspective, I have found that legislators generally can be more receptive to changes to their bills at an early stage than after they have spent considerable time and energy garnering support from their colleagues.

After a piece of legislation has been introduced, it is assigned to a committee. Traditionally, both House and Senate committees convene on Wednesday afternoon. As a result, another extraordinarily important part of a lobbyist's job is monitoring all committee agendas because most committee hearings provide an opportunity to articulate the client's position on legislation. And it is even more significant to be in attendance when a client opposes a bill, for if that legislation fails to receive votes necessary to release it from that committee, it cannot be placed on an agenda for consideration by the full House or Senate.

Like other lawyers with numerous clients, you must have the ability to juggle many matters for those clients. It is not unusual to have bills on the agendas of the House and Senate on the same day. Similarly, several bills of interest may be scheduled for various committee hearings on a Wednesday afternoon. This causes plenty of running from hearing to hearing, but I am pleased to note that I have been able to cover any hearing where bills of importance to one or more of my clients were being discussed.

Now having stressed the importance of being aware of all legislation of interest to your clients on committee agendas and attendance at these hearings, I can remember back to a time when the House provided advance notice of committee hearings and agendas, but the Senate did not. Thus, even the most diligent lobbyists were routinely surprised to learn that a Senate committee had met and released a bill of interest to them. From personal experience I can tell you that this method of conducting hearings without notice was not only frustrating, but also strained relations with clients. They would have to be called and informed that a bill they opposed had been released after a committee hearing that I did not attend. Fortunately, those days in the Senate are over. Notices of Senate committee hearings and their agendas are now the rule and not the exception. And while not perfect (I recently had an important bill released from a committee, which had noticed its meeting but had not stated that that particular bill would be considered), the process is much more orderly and open.

Assuming legislation is released from a committee, it is then put on a "ready list" and is available for placement on an agenda for full debate. Thus, adding to the responsibilities described above, careful monitoring of House and Senate agendas is crucial to an effective legislative practice. Not only does the client need to know when legislation of importance is being debated in the House or Senate, this affords the lobbyist (and client) an opportunity to participate in the debate by providing testimony. If, after debate in one of the chambers, a bill receives less than the votes necessary for passage, the bill then dies. If passed, then the process repeats itself in the other chamber, with assignment to committee, etc.

While this is happening during the session, there is a constant need to advocate your clients' positions one-to-one with legislators. Naturally, this can be extraordinarily time consuming, not only because of numbers (there are 62 legislators), but tight schedules. I spend countless hours each session just waiting to get into legislators' offices. And many times after a long wait, I can only have a few minutes to articulate my clients' position. Otherwise, it can involve lengthy waits in the lobby of legislative hall[4] to get a few words in when a legislator takes a break from session. In fact, I have observed some lobbyists follow legislators from the chamber into the restroom (a custom to which I do not subscribe or recommend) in a desperate attempt to make their cases.

It is my hope that by describing some parts of the legislative process and the role of a lobbyist, I have conveyed a situation of orderly chaos. Often with very little advance notice I have to be prepared to lobby for or against legislation at a hearing or during full debate. I have, on countless occasions, found that a bill of interest is scheduled for a committee hearing (or on an agenda) on the morning of the hearing. Let me assure you that getting written correspondence to 21 Senators or 41 Representatives on such short notice is a real scramble.

And speaking of chaos, now that I have described the more orderly part of the legislative process, let's turn to the last few days of the year's session. They can only be described as frenetic. Not only are the last big picture items (tax cuts, budget, bond bill) being decided, but literally hundreds of bills will be passed by both chambers. And any piece of legislation, even one which you were absolutely sure was dead, can become a part of big picture deal-making. These sessions last into the late hours of the evening and on June 30 into the wee hours of the morning. Exacerbating the situation is that all rules in the House and Senate are suspended, thereby permitting the introduction of legislation on the floor for an immediate vote without prior notice or any committee's consideration. Obviously, this is a situation that must be watched extremely closely or your clients can get hurt without ever knowing what hit them.

The differences in my practice and the traditional practice areas are gargantuan in many respects. For example, a litigant who is trying to convince a Judge of the merits of his or her case (or in lobbyist terms is trying to get the Judge's "vote") would never, one hopes, be seen entertaining that Judge at a meal or round of golf. Obviously, that does occur in connection with a lobbying practice and it is perfectly legal and ethical.[5] And this form of entertainment is often the only practical opportunity to spend time with legislators to apprise them of the issues significant to your clients. This type of entertainment also allows you to build relationships with legislators that are essential to an effective legislative practice. Another striking dissimilarity is the requirement of attendance at the numerous fund raising events for legislators throughout the year, many of which are held at the end of legislative days. While I do not mean to insinuate that attendance by lobbyists is "mandatory" as some may assume, attendance does allow access to legislators to discuss issues or simply have a personal conversation to get to know one another better. The only real problem with events after session is that they add additional time in Dover to what has usually already been a long day.

The legislative practice is at some times frustrating and other times very fulfilling. When the legislature is in session, it is fast-moving, demanding long hours and an ability to carefully juggle many issues simultaneously while giving each client the type of service it expects. At the end of every session a part of me asks why I put myself through this when a more traditional practice would be more lucrative. But when the next session arrives, because of close relationships and friendships with legislators and fellow lobbyists, I am eager for the process, however chaotic or imperfect it may be, to begin anew. ◆

FOOTNOTES

1. Pursuant to the Delaware Constitution, the Governor has 10 days from receipt of legislation within which to sign or veto it. If the Governor does nothing within that period, legislation automatically becomes law.

2. An interesting side note – the former Speaker was a Republican. Members of the Senate Republican Caucus observed that it was unfortunate to have two well-known Republican lobbyists in disagreement over the merits of this legislation.

3. Delaware, I am told by lobbyists who work in other States, is unique in the number of opportunities to testify before legislators. At most committee hearings, after the members have had an opportunity to speak or ask questions about legislation being considered, the committee chair will ask for public comment. Also, during debate of legislation on the House or Senate floor, a lobbyist can provide testimony on a bill by obtaining the "personal privilege of the floor" from a House or Senate member.

4. Thus, the origin of the name "lobbyist."

5. Under Delaware law, a lobbyist must report quarterly to the Public Integrity Commission every cent spent on behalf of a legislator, elected official, or state employee.

FEATURE

Leo E. Strine, Jr.

MY RANDOM OBSERVATIONS ON ADVOCATING BEFORE THE GOVERNMENT

I have had the good fortune to spend most of my career advising important government decision makers – as counsel and chief policy advisor to Governor Thomas R. Carper and as a law clerk to two superb federal judges. While in private practice, I worked as a litigation associate with one of this State's finest law firms.

I have lobbied and been lobbied. I have written briefs and read briefs designed to persuade me or the judges for whom I worked. As Joni Mitchell sang about more important subjects (life and love), I've seen advocacy from "both sides now" and in each of the primary government forums where advocacy occurs. I've had my share of victories and defeats.

These experiences have taught me some basic rules (some hard learned) about what it takes to advocate effectively before a government entity. Although some of these rules have more applicability to certain contexts than in others, many of them apply equally well to civil litigation, administrative practice, and legislative lobbying. While adherence to the rules may not guarantee your clients victory, it will, in general, maximize your clients' chances of success and, as important, solidify your reputation as a straightforward, effective advocate whose word can be trusted.

None of them are novel. At the risk, therefore, of sounding trite or preachy, I will set them forth as plainly as I can. The frequent use of the words "for example" is intentional, since I approached the writing of this article from a practical perspective informed by my own experiences in government service. At this point, I recognize that many of you will prefer to flick on an Ally McBeal rerun, crack open (or chill) a cold one, and read no further. Trust me, if that's your view, I can relate. For the rest of you, I hope you will find some of my observations helpful to you in your practices.

Understand the institution, how it works, and its perspective – Whenever you are trying to persuade a governmental entity to assent to your position, it is advisable to understand its institutional perspective: know the process by which its decisions are made and the interests that its decision-makers serve.

For example, in pushing a piece of legislation, a lobbyist must, among other things, consider: how the General Assembly works; which legislators make it work and their likely positions on the issue; when it works; and which of its committees are likely to have jurisdiction over the bill. If the bill is a controversial one, the lobbyist must consider how to influence and manage public opinion. If the bill is being pushed during an election year, this consideration is even more important.

Even if you consider all that, you have not even begun to do your job unless you consider what position the governor and the relevant executive agencies may have on the bill. As the person responsible for managing state government, the governor's perspective on particular bills is often different from those of individual legislators. Governors are often the bad guys of the legislative process, vetoing bills that legislators know are ill-advised but pass anyway because of constituent demands. In particular, governors closely scrutinize bills that make exceptions to a general rule for a particular individual or business (such as a special pension or tax exemption bill). Governors are also keenly interested in whether a bill, if enacted, can be administered effectively without undue interference with other government priorities. The generally bigger picture perspective of the governor must be considered by the lobbyist. Otherwise, the veto pen might undo all the lobbyist's good work on behalf of his client.

An important part of knowing the institution which you are trying to persuade is understanding who is involved in its decision-making process. Attempts to bypass the institution's decision-making process by avoiding discussions with or attempting to endrun key staff are unlikely to meet with success. Few sophisticated government decisionmakers will make a commitment without input from key advisors. Successful advocates recognize this and make it a point to brief all key advisors likely to be involved in the decision-making process. By interacting with and showing respect for all persons likely to have influence, the advocate not only generates goodwill, he discovers critical information about the factors most likely to influence the determination of the issue.

Whenever I pushed major bills in the General Assembly, for example, I always made it a point to discuss the bills with the legislative attorneys. By taking the time to provide the legislative attorneys with drafts of bills and explanatory materials, I made their jobs easier. For my part, I was able to work out technical issues in advance of floor consideration, to help these key legislative advisors understand what our bills were intended to do (thus putting them in a position to convey that understanding to their clients), and to better anticipate objections to our bills – invaluable benefits in the legislative context.

Litigators must consider similar institutional factors. For example, the Court of Chancery's willingness to adjudicate matters on an expedited basis is well-known. However, so is the Court's unwillingness to do so *ex parte*, except in the most exigent circumstances. Yet, where there is time for proper notice to be given, there are lawyers who still attempt – unsuccessfully – to obtain temporary restraining orders and to schedule important proceedings without promptly advising their adversaries. By knowing the Court's perspective on this and other issues, you will better serve your clients.

It's your cause, act accordingly – It is maddening to be the subject of advocacy by a lawyer who doesn't appear to want to do the necessary work. On occasions too numerous to count, lobbyists called me up in the governor's office and asked to meet regarding their bills. In such circumstances, it was typical for me to agree but to ask to receive a copy of written materials explaining the bill in advance of the meeting.

Frequently, this request was met with resistance. Often I was told that nothing explaining the bill had been prepared. Sometimes I was told that the bill itself had not yet been drafted. "Couldn't we must meet and I'll get you the stuff later?" When I scheduled a meeting with a lobbyist or advocate, I wanted materials to read in advance so that I could reflect upon what the advocate was proposing, obtain advice and input from others in the Administration, and prepare myself to make the meeting with the advocate meaningful.

Governors, cabinet secretaries, and legislators frequently distrust anything that is not in writing and that is not subject to scrutiny by their professional staffs. Even if they are not big readers, they often turn to staff members who are. They will often not make a commitment without input from others. Nor are they likely to sign on to a non-existent piece of paper.

Aides to governors, cabinet secretaries, and legislators *invariably* distrust anything that is not in writing. I know for a fact that this one did. After five and a half years of working for Governor Carper, I never discovered how to fax an oral presentation to the Budget Office, Finance Department, or other agency for their comments. To the extent that an advocate gave me his oral eloquence only, he imposed upon me to do his work for him by distilling that eloquence into a memorandum to others in the decision-making process. An effective advocate wants staff aides to write their briefing memoranda using the advocate's written presentation as their primary source.

Governors are often the bad guys of the legislative process, vetoing bills that legislators know are ill-advised but pass anyway because of constituent demands.

Similarly, litigators need to put their hours where the mouth is. In the short time I have been a Vice Chancellor, I have experienced some surprising situations in which proponents of expedited action by the court seemed reluctant to file timely papers. In once instance, a lawyer submitted an order to my Chambers that would have set an expedited trial date and have enjoined certain individuals from representing themselves as the directors of a corporation. When my secretary called to ask whether the lawyer was going to be submitting a brief in support of his application, the lawyer said he didn't know he needed to submit a brief and didn't know when he would be able to get one filed. In another case, a lawyer who was seeking a preliminary injunction on a very compressed time schedule expressed concern that the briefing schedule might require members of his firm to work on the weekend.

When you are asking a government tribunal to act – pass a bill, grant an injunction, or approve a license – you should present the tribunal with timely and persuasive documents in support of your position. Don't look at this requirement as a burden – view it as an opportunity to have your work frame the tribunal's actions.

Get to the point and use decision-maker's time wisely – Government decision-makers are busy people. Your advocacy materials need to be crafted with that in mind. Many lawyers, myself includes, tend to be, to put it nicely, overly thorough, or to put it less nicely, fulsome.

The advocate should present only substantial arguments and do so clearly and concisely. The nature of the materials presented should be tailored to the decision-makers who will receive them, the precise decision to be made, and the context and time in which the decision will be made. For example, an advocate should never present a governor, a cabinet secretary, or legislator with a twenty-five page memorandum in advance of a meeting and expect it to be read. Rather, the advocate should present a short (preferably no more than two pages) overview that the key decision-maker can digest and a more detailed memorandum (if necessary) for consumption by staff advisors.

Nor are courts and administrative tribunals hungry for prolix documents. Pointed briefs that make only strong arguments are much more likely to carry the day than weighty tomes that include every conceivable argument, however insubstantial. Again, the procedural context is critical to consider. To be effective, a brief must be read. If the TRO hearing is at 3:00 p.m. and you file a 30 page brief at 1:30 p.m., can you reasonably expect the judge to absorb it?

Always imagine yourself in the decision-maker's position as you determine how and what information to present. The need to get to the point also applies to meetings and hearings. Face time with government decision-makers is precious. The advocate needs to prepare carefully for the encounter, do the necessary spade work in advance, and get right to the point. The advocate should not expect a leisurely opportunity to make a ninety minute "power point" presentation to a room full of government decision-makers. This rule bleeds into the next.

Welcome questions and answer them directly and promptly – Most good advocates obey this rule instinctively and seize the opportunity to grapple forthrightly with a question posed to them by a key government decision-maker. When they don't have the answer at their fingertips, such advocates obtain the information promptly and put a direct and well-reasoned response in the decision-maker's hands.

Unfortunately, certain advocates seem to think of questions as intrusions on their opportunity to make an oral presentation. If the oral presentation is the only opportunity for an advocate to make his case, that perspective is understandable. Where, however, the advocate has had the opportunity to provide the government decision-maker with lengthy written materials (e.g., 80 pages of briefing) in advance of a meeting or hearing, this perspective is misguided. By the time a decision-maker has read 80 pages of your writing, he, I assure you, has heard you argue at length.

After digesting your written materials, the government decision-maker will have formed an initial impression of the key issues. At a face-to-face meeting or hearing, the decision-maker will not desire a rehash of your written work product. Rather, the decision-maker will want to ask you the questions he needs answered to make his final decision – outcome-determinative questions. The advocate should jump at the chance to provide the decision-maker with direct, informative answers that support a decision in his client's favor. Recognizing that the time for oral advocacy is limited, the advocate must master the skill of giving direct answers while also respectfully, but clearly, steering the government decision-maker towards important considerations the advocate believes the decision-maker might be slighting. The advocate who gives such skillful answers instills confidence in the decision-maker that a ruling for the advocate's client will make sense. The advocate who evades or belittles the decision-maker's questions has the opposite effect.

Follow-up promptly on requests for further information. During my tenure with Governor Carper, I remember many situations in which the Governor told an advocate that he would not make a decision until he knew the answer to a question or until the advocate had touched certain bases. On more than one occasion, the advocate dillydallied and failed to follow up promptly on the Governor's requests. This suggested a lack of seriousness and purpose, and impeded the decision-making process.

Be candid about what you want and be candid about whether the current state of policy or the law supports your position or whether you are seeking a departure from current practice – Nothing is more injurious to an advocate before the government than a lack of candor. For example, every time you cite a case for a proposition it does not support, you damage your reputation. It's that simple. Judges and law clerks read briefs and cases carefully. Few things are more annoying in that process than pulling a case and finding that it provides little or no support for the proposition for which it is cited. Anytime that happened to me as a law clerk, I thought "[insert frustrated word of your choice], what if I had cited that in my draft for the judge?" As a judge, my reaction is probably even stronger. When judges sense that your beliefs do not reliably cite the law, they will begin to more closely scrutinize your arguments. They have to because they can't rely on you.

If existing case law does not support your position, you must be bold enough to craft a persuasive argument as to why the law should recognize your client's position as the correct one (or, if not, to advise your client not to proceed). While you might not prevail at the trial court level (see the rule on understanding the institution before which you are advocating) with this approach, your chances of obtaining a victory through the misleading quotation of excerpted portions of off-point cases are even dimmer.

Candor is even more important in the legislative process. In late June in particular, things happen at lightning speed. Even the best of legislators or governors can't keep track of all that is happening. In the governor's office, we tried to do our best to know what was going on in every committee and on each floor as to each bill about which we harbored concerns. However, in the last few days of the General Assembly, it was humanly impossible to do so. Instead, we concentrated on those bills we needed passed and on those we most opposed.

In the late June melee, bills are sometimes passed that are poorly understood. It is not unknown for an advocate to take advantage of this possibility by introducing and obtaining passage of a bill with a synopsis that does not clearly state the public policy implications of the bill. The impression such a tactic makes on those in the Administration who deal with legislation is quite negative. They – who have literally hundreds of bills to review in July – rightly wonder – as they help the governor craft his veto message for the bill – whether the advocate was trying to put one over on them. They will remember the next time the advocate pushes something and they will look at what he is proposing much more carefully.

The administrative and legislative processes often tempt advocates to try to be all things to all people. It is nice to think that public policy issues can be resolved on a "win-win" basis; most important ones cannot. Advocates who lead divergent interests to believe they will each get what they want play a very dangerous game. Advocates, like Gregg Brady, can't take two dates to the prom. Government decision-makers talk with one another. Advocates who promise too much are quickly found out.

Understand and explain the public policy implications of your position – There is no rule more important than this if you are seeking to prevail on a matter of major public policy significance. You must identify why the world will be a better place if the decision-maker adopts your position.

A great deal of cynicism exists about how governmental decisions are made. I will not pretend that much of that cynicism is unjustified. Still the advocate who ignores the fact that most government decisions-makers strive to do the right thing is unlikely to be very effective.

Even if you believe in your heart of hearts that government decisions turn on illicit factors, only a fool acts on that belief in professional practice. Believe it or not, there are government decision-makers whose principal concern in addressing an issue is in knowing "what is the right thing to do." Unless you have thought through that issue and are able to articulate a concise reason, you have not done your job as an advocate. If you must maintain your cynicism at all times, think of yourself as providing the decision-maker with a plausible fig leaf for taking self-interested action in your client's favor.

Too often, advocates are so intent on what their clients want, that they ignore the inconvenient fact that the government decision-maker cannot accord special treatment to their clients without justification. Too often, advocates believe that if their client is important enough, then the government decision-maker will believe the client's happiness is sufficient justification for the measure proposed.

The government decision-maker will consider how a ruling for your client will affect others. The government decision-maker will also consider what effect the precedent set by a ruling for your client will have on the decision-maker's flexibility to make future decisions. If the good that a decision will do for your client is far outweighed by the problems it will create for other citizens and the problematic precedent the decision will set, the decision is not likely to go your way. To prevail, you must make a persuasive case that a decision in your client's favor is fair, is the type of decision that should be rendered as to all citizens in similar circumstances, and will, if followed in future cases and circumstances, produce desirable public policy outcomes.

In formulating your arguments, you should consider the questions that will be on the minds of government decision-makers. As a result of adopting your client's position: Will citizens be treated more or less fairly? Will citizens be encouraged to act in more or less socially productive a manner? Will the community experience benefits or detriments? Will the cost of delivering government services increase of decrease? If the costs increase, do the expected benefits justify the increased costs?

Even if you can't rid yourself of skepticism, remember: Few things are as off-putting to a government decision-maker concerned with policy merits as to be confronted with an advocate who premises his argument on the fact that the decision-maker's personal political interests will be served by agreeing with the advocate. Such arguments make decision-makers uneasy and implicitly suggest that the advocate's position has so little substantive merit that he must resort to crassness.

Although public policy concerns might seem to loom somewhat larger in the legislative and administrative context than the judicial one, that perception is, I think, exaggerated. Judges frequently confront cases which are difficult not because the cases hinge on disputed facts, but because the cases turn on the legal implication of undisputed facts in contexts where the law is undecided. Although judges owe a duty to decide these cases within a framework shaped by the Constitutions and statutes of nation and state and judicial precedent, an important realm of discretion remains in which judges must make decisions about how the law should be applied. In that realm, judges must consider the policy ramifications of their choices carefully, lest they set socially harmful precedents which make it more difficult to do justice in future cases.

The very best advocates realize this and devote attention in their briefs to the larger implications of what they ask courts to do. But other highly competent advocates are content to write solid briefs correctly citing existing precedent, without setting forth persuasive reasons why the court should adopt the view of the law they advocate. In a case involving an important question of unsettled law, this type of advocacy is likely to be inadequate to carry the day. A trial court in particular may well feel that you have not given it adequate information for it to adopt a position that requires an evolution or innovation in the law. *See, e.g., Mentor Graphics v. Quickturn Design Sys., Inc.*, Del. Ch. 728 A.2d 25, 52 n.105 (1998), *aff'd*, Del. Supr., 721 A.2d 1281 (1998).

Maintain your integrity and sense of humor – Being an advocate in the public realm can be extremely rewarding. But it can also be exhausting, dispiriting, and disillusioning. Don't forget to laugh: there is no conflict between being serious about your purpose and having a sense of humor. Both are vital to the good advocate. Most of all, remember who you are, why you decided to become an advocate, and act accordingly.

If you do that you'll always be able to take pride in your work – and you just might maintain your sanity. ◆

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peared was the best-selling issue in its history, not because of anything I had written, but because it contained "An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague," written by A. Leon Higginbotham, Jr., Chief Judge Emeritus of the U.S. Court of Appeals for the Third Circuit.[2]

Describing Thomas's public comments in prior years as "flashy one-liners to delight the conservative establishment" which "convey a stunted knowledge of history," Judge Higginbotham took it upon himself to lecture the former chairman of the U.S. Equal Employment Opportunity Commission about how civil rights lawyers and the Supreme Court had affected Thomas's life, by striking down school segregation, racial barriers to voting, racially restrictive deed covenants and anti-miscegenation laws. Expressing consternation that Thomas described himself as a black conservative, Higginbotham wondered what "so-called black conservatives" were anxious to conserve "other than their own self-advancement," and suggested that Thomas reflect on how white conservatives had fought to uphold state-imposed segregation and private race discrimination. Higginbotham's letter inspired a torrent of essays, and Higginbotham himself later wrote in 1994 that Justice Thomas's views "are for the 1990s at times the moral equivalent of the views of the shameful majorities in the nineteenth century Supreme Court cases of *Plessy and Dred Scott.*"

If Higginbotham thought Justice Thomas could be swayed by external pressure, he misjudged him. In his early years on the Court, Justice Thomas wrote significant opinions on affirmative action, school desegregation and voting rights that broke sharply with the dogma of the civil rights establishment. Many of these opinions were concurrences in which Justice Thomas wrote for himself alone. Whether or not one agrees with President Bush's assessment that Judge Thomas was "the best person for the position," no other person could have written them.

Gerber is sympathetic to Thomas's opinions on race, because he sees in them his own political philosophy, which he calls "liberal originalism." As defined by Gerber, liberal originalism "maintains that the Constitution should be interpreted in light of the political philosophy of the Declaration of Independence," unlike "conservative originalism," which "maintains that the Constitution should be interpreted as the Framers themselves would have interpreted it." Gerber believes that the former approach leads to color-blind constitutionalism. On two separate occasions, Gerber quotes with approval the following passage from *Adarand Constructors, Inc. v. Pena*,[3] in which Justice Thomas explained in a short concurring opinion why strict scrutiny must be applied to all racial classifications, including affirmative action programs:

> **There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution. See Declaration of Independence ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness").**

This passage leaves me cold. It is not implausible to me that a line can be drawn connecting the Declaration of Independence, the original constitutional text and then the 14th Amendment, and that these authorities require the invalidation of not just slavery and segregation, but also racial preferences in any form. To make the leap in one step, however, without legal or historical analysis, strikes me as dangerous judicial craftsmanship. It risks rendering the corpus of constitutional law a nullity.

But Justice Thomas is no simple liberal originalist. His jurisprudence finds it fullest expression not in *Adarand*, but in a much longer concurring opinion handed down the same day, in the school desegregation case of *Missouri v. Jenkins*.[4] In Jenkins, the Court held that the district court overseeing the desegregation efforts of the Kansas City, Missouri, School District (the "KCMSD") had exceeded its authority in ordering salary increases and the funding of educational programs for the purpose of reversing "white flight" and increasing student test scores. Justice Thomas wrote separately "to add a few thoughts with respect to the overall course of this litigation."

Justice Thomas began by identifying two threads in the Court's jurisprudence since *Brown v. Board of Education*[5] that produced "this unfortunate situation, in which a District Court has taken it upon itself to experiment with the education of the KCMSD's black youth." First, the District Court misinterpreted *Brown* as resting on the theory that "black students suffer an unspecified psychological harm from segregation that retards their mental and educational development." Second, the Supreme Court "permitted the federal courts to exercise virtually unlimited equitable powers to remedy this alleged constitutional violation." In untangling these two jurisprudential threads, Justice Thomas explained how constitutional law must be based on moral and political principles informed by a close reading of the historical record, not on contemporary notions of what is best for that group of people a civil rights organization claims to represent.

On the first point, Justice Thomas interpreted *Brown* as resting on the "simple, yet fundamental truth that the Government cannot discriminate among its citizens on the basis of race." Citing a law review article that gathered the historical evidence that the framers of the 14th Amendment opposed segregated schooling, Justice Thomas suggested that the *Brown* Court should have looked to that history rather than citing psychological studies about the impact of *de jure* segregation on black student achievement. Justice Thomas faulted the district court for indulging sociological or psychological theories linking racial isolation, attitudes of inferiority and low student achievement. He wrote that *de facto* segregation unaccompanied by racial discrimination is not a constitutional wrong, and that the idea that black students cannot achieve without the presence of white students must be based upon a theory of black inferiority.

On the subject of remedy, Justice Thomas wrote that federal courts did not have the authority to issue injunctions ordering the expenditure of funds for the purpose of decreasing racial isolation or increasing student achievement. Justice Thomas compared the wide-ranging "structural injunctions" used to implement *Brown v. Board of Education* with the Framers' far narrower conception of the equity power. Justice Thomas discussed a debate between the Anti-Federalists and the Federalists about the equitable powers of the federal courts and applied his own interpretative principle: "When an attack on the Constitution is followed by open Federalist effort to narrow the provision, the appropriate conclusion is that the drafters and ratifiers of the Constitution approved the more limited construction offered in response." Originalism, federalism and the separation of powers all weighed against structural injunctions designed to achieve abstract goals and in favor of precise decrees designed to benefit only those who have been victims of *de jure* segregation.

I have discussed *Jenkins* at length because it illuminates the type of reasoning employed by Justice Thomas in *Adarand* and in many of the other cases discussed in Gerber's book, whether the subject matter be voting rights, prisoners' rights or the allocation of powers between the states and the federal government. Justice Thomas strives to locate a moral truth that is reflected in the constitutional (or statutory) text, structure and history, and then distinguish that operative principle from those underlying the legal claim being pressed in the case at hand.

Justice Thomas's approach magnifies the constitutional stakes. It shows little deference to the motivations behind a contemporary legal claim or governmental action, and does not lend itself to creating rules of decision that turn on close analysis of the judicial precedents, which may minimize the tension between legal text and modern sensibility. In *United States v. Lopez*,[6] Justice Thomas wrote a concurring opinion in which he stated that the Court "must modify" its Commerce Clause jurisprudence of the past 60 years, and that "he might be willing to return to the original understanding," although "[c]onsideration of stare decisis and reliance interests may convince us that we cannot wipe the slate clean." His is a conservative jurisprudence for an ideological age. In that sense, Act One of Justice Thomas's confirmation hearings was an apt prelude for all that has followed. ◆

FOOTNOTES

1. I would add to that catalogue an unpublished manuscript written in 1992 by the sociologist Philip Rieff, bearing the unfortunate title, "*se offendendo*: The structure of a narrative never to be written; in seven speech-acts."
2. 140 U.Pa.L.Rev. 1005 (1992).
3. 115 S. Ct. 2097 (1995).
4. 115 S. Ct 2038 (1995).
5. 347 U.S. 483 (1954).
6. 115 S. Ct. 1626 (1995).

BOOK REVIEW

JUSTICE THOMAS: AN EARLY RETROSPECTIVE

Joel Friedlander

FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS

By Scott Douglas Gerber

(New York University Press, 215 pp.)

Do you remember Act One of the Confirmation Hearings of Clarence Thomas, those early scenes in the Fall of 1991 before Anita Hill was plucked from obscurity and asked to make her debut on the world stage? To summarize that overshadowed opening act, Senator Biden engaged the nominee in colloquies on natural law, Judge Thomas dodged 71 inquiries about abortion, and when answering a question about why he wanted to serve on the Supreme Court, the nominee described how he often watched busloads of criminal defendants from his office window and said to himself "but for the grace of God there go I."

Scott Douglas Gerber is the rare scholar who thinks that Act One was more compelling than the drama that followed. By Gerber's count, there have been fifteen books, seventeen law review articles, and two symposia about the Thomas-Hill confrontation.[1] Gerber's book is different. It originated as an essay that he wrote as a graduate student in 1991, when Gerber discovered that the newly announced nominee was articulating the same theory of constitutional interpretation that Gerber was developing in his doctoral dissertation, but reaching different conclusions. Having examined Justice Thomas's voting record, speeches, and judicial opinions from his first five years on the Supreme Court, Gerber now attempts to explain Justice Thomas's jurisprudence and "move beyond Anita Hill."

Gerber aims to be fairminded in his treatment of Justice Thomas, itself a rarity. In accumulating the commentary about the Justice and his opinions, Gerber shows how moving beyond Anita Hill is not the same thing as moving beyond the unceasing attacks on the legitimacy of Clarence Thomas as an Associate Justice of the United States Supreme Court.

I remember the opening salvo. In the Fall of 1991, I had been intrigued by Judge Thomas's nomination because I was then finishing a student comment on the jurisprudence of Justice Brennan, in which I concluded that a true conservative jurisprudence would have to be built on natural law foundations. The issue of the *University of Pennsylvania Law Review* in which my article ap-

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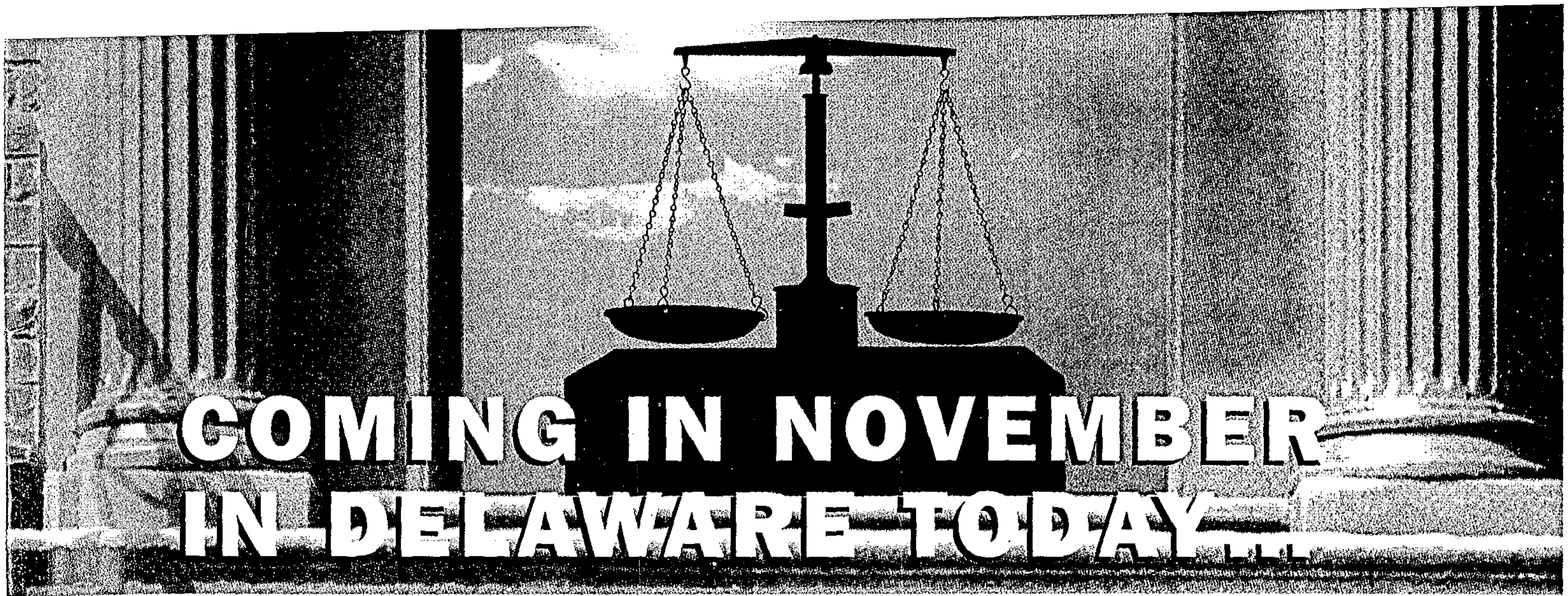
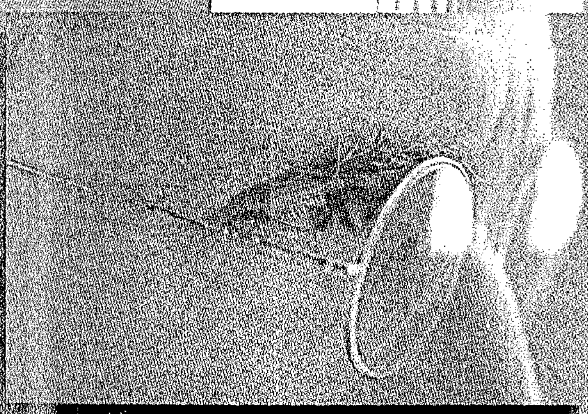


TOP LAWYERS



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