



THE JOURNAL

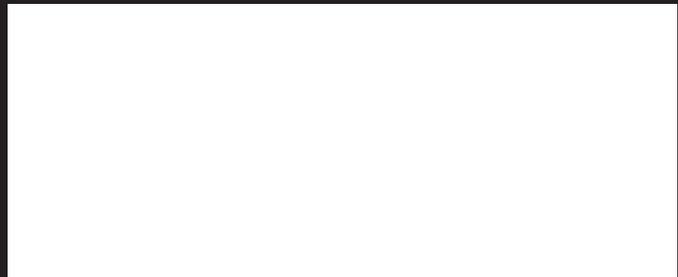
OF THE DELAWARE STATE BAR ASSOCIATION



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LAW DAY LUNCHEON 2022

MONDAY, MAY 2, 2022

HOTEL DU PONT, WILMINGTON, DE • 12:00 P.M.

KEYNOTE SPEAKER

Kermit Roosevelt III

The Nation that Never Was: The Source of American Constitutional Values



Kermit Roosevelt III is a professor of constitutional law at the University of Pennsylvania Law School, a former clerk for Supreme Court Justice David Souter, a member of the Presidential Commission on the Supreme Court, and an award-winning author. A frequent op-ed contributor, his work has appeared in *The New York Times*, the *Foreign Policy Research Institute*, *The Washington Times*, *TIME*, *Newsweek*, and *The Hill*, among many other outlets. He serves as a media expert and keynote speaker, discussing topics including the Supreme Court, civil rights, U.S. presidential history, leadership, American politics, patriotism, and U.S. current events.

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DSBA BAR JOURNAL

APRIL 2022 | VOLUME 45 • NUMBER 9

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The *Bar Journal* is the independent journal of the Delaware State Bar Association. It is a forum for the free expression of ideas on the law, the legal profession and the administration of justice. It may publish articles representing unpopular and controversial points of view. Publishing and editorial decisions are based on the quality of writing, the timeliness of the article, and the potential interest to readers, and all articles are subject to limitations of good taste. In every instance, the views expressed are those of the authors, and no endorsement of those views should be inferred, unless specifically identified as the policy of the Delaware State Bar Association.

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Letters to the Editor should pertain to recent articles, columns, or other letters. Unsigned letters are not published. All letters are subject to editing. Send letters to the address above, Attention: Editor, Bar Journal.

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THE JOURNAL

OF THE DELAWARE STATE BAR ASSOCIATION

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Cover: Photo Courtesy of Wilson Sonsini



“Some ask why we need data because one can just look around and see that Delaware has a diversity issue. While that is true, without data, we are left to some extent guessing at what is causing the diversity gap at various stages of a legal career and what may work to fill the gaps.”

As you have likely seen by now, on February 23, 2022, the Delaware Bench and Bar Diversity Project Steering Committee publicly released and sent to the Delaware Supreme Court its 101-page final report, “Improving Diversity in the Delaware Bench and Bar – Strategic Plan.”

I was honored to be a part of the Committee working on the recommendations to the Supreme Court. This Plan addresses the areas of Pre-college, College and Law School, Admission to the Bar, the Bar, and the Bench. The subcommittees were comprised of a group of Delaware lawyers, judges, educators, and community leaders, among others, dedicated to increasing Diversity, Equity, and Inclusion in our State. The project took a comprehensive approach to address DEI, recognizing that we need to engage long before admission to the Bar. We were guided by experts from the National Center for State Courts and AccessLex Institute. The Plan is the first of its kinds with NCSC and it will serve as a model for other jurisdictions to develop a plan. The Plan makes recommendations to the Supreme Court, some of which have already been implemented and others are long-term initiatives.

Among the recommendations is the collection of data. Some ask why we need data because one can just look around and see that Delaware has a diversity issue. While that is true, without data, we are left to some extent guessing at what is causing the diversity gap at various stages of a legal career and what may work to fill the gaps. Quantitative data provides a deeper understanding of the challenges faced and possible solutions.

I am proud of the work accomplished by this project and the Plan. As with any initia-

tive, there is always more that we can do. The DSBA and members of the Bar can take additional steps to increase diversity and make everyone feel welcome and included. The DSBA DEI Committee is working on several initiatives, some of which I have written about in previous columns. There are formal programs like the DSBA Diversity Clerkship program which is placing five clerks with the Delaware State Courts and the Bankruptcy Court. We’re launching *Diverse Voices*, which is a series of videos aimed at providing law students and young lawyers with the opportunity to see lawyers who look like them or have a similar background and hear their stories. The program will provide windows and mirrors — windows into how others have traversed their path and succeeded, and mirrors to reflect their own identities, experiences, and motivations.

There are also informal ways to make a difference. One theme that kept reoccurring during our Bar working group with each of the possible recommendations discussed was “connections.” Connections to others in the legal profession is important and it’s what makes us feel included. It’s hard to make connections initially, especially for a younger lawyer. The simple act of introducing yourself and spending even a few minutes with someone different than you can have a meaningful impact.

There is much work to be done. If you are interested in getting involved with any of our initiatives or have initiatives you are interested in and want to partner with us, please reach out to the DSBA.

As Maya Angelou said: “People will forget what you said, people will forget what you did, but people will never forget how you made them feel.” 🗣️

Kathy Miller is the current President of the Delaware State Bar Association. She is a partner at Smith, Katzenstein & Jenkins LLP where she focuses her practice on corporate and commercial litigation and corporate bankruptcy matters. She can be reached at kmiller@skjlaw.com.

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Spring Fever for Ukraine

Every spring I get terrible spring fever. The winter is long, the days are long, and I tire of self-induced hibernation. You won't catch me outside when it's cold.

When I think about my spring fever this time around, I must acknowledge the irony that the spring fever known by today's poets and dreamers is a mere restless get-up and go feeling and not the actual spring disease that plagued the 1700 and 1800s, while today we are faced with a different disease and pandemic, and the great unmasking and current round of ending shutdowns are very much contributing to my spring fever feeling.

An even worse irony exists that also begs acknowledgment. My annual agitated desire to relieve hibernation and leave my home because I want to and have a choice in the matter comes at a time when Ukrainians are being forced to flee their homes.

The luxury of choice compels me to focus restless energy on raising some small awareness about how lawyers have been helping our Ukrainian brothers and sisters.

The Ukrainian Advice Project, based in the United Kingdom, describes themselves as a group of legal professionals with immigration and asylum expertise providing a free service to connect Ukrainian citizens (and others fleeing Ukraine) with legal advice on "UK immigration, visas and asylum from qualified and regulated lawyers." Check out more about their projects at www.advice-ukraine.co.uk.

The winter is long, the days are long, and I tire of self-induced hibernation.

The Ukraine Justice Alliance is formed by lawyers, law firms, and non-governmental organizations to offer legal expertise and support to Ukrainian people, Ukrainian NGOs, and civil society organizations and the government of Ukraine. If you have a background in international criminal law or other relevant experience, you can get involved in their program by emailing contact@ukrainejusticealliance.com. Check out their website at www.ukrainejusticealliance.com to see how they are making a difference.

If you are in a corporate legal department you may want to look into Lawyers for Good Government. Lawyers for Good Government is a 501(c)(3) organization that works with corporate legal departments in large law firms to assist with asylum related matters and environmental



LEARN MORE

To find out more about the organizations discussed in this article, visit the websites below:

- **Ukrainian Advice Project:**
www.advice-ukraine.co.uk.
- **Ukraine Justice Alliance:**
www.ukrainejusticealliance.com.
- **Lawyers for Good Government:**
www.lawyersforgoodgovernment.org.
- **Ukrainian Legal Aid Database:**
<https://ukrainelegalaid.org/#/>
- **Ukrainian American Bar Association:**
www.uaba.org.

issues. A current need this organization has is assisting Ukrainians that reside in the United States.

Recently, the United States Department of Homeland Security Secretary Alejandro Mayorkas announced the designation of Ukraine for Temporary Protective Status (TPS), which would provide approximately 34,000 undocumented Ukrainians living in the United States an opportunity to remain in the country legally for up to 18 months. The TPS only applies to Ukrainians who arrived in the United States before March 1, 2022 — generally, those who fled Ukraine after Russia's 2014 invasion of Crimea. Most of these Ukrainians arrived in the United States after Russia's 2014 invasion of Crimea. If you are interested in learning more about the *pro bono* opportunities through Lawyers for Good Government or their programs, you can visit their website at www.lawyersforgoodgovernment.org.

The Ukrainian Legal Aid Database is a joint project of international law firms, attorneys, and legal technology providers, and any lawyer can sign up at <https://ukraine-legalaid.org/#/>.

Our neighbors in the New York State Bar Association issued a formal statement condemning Russia's invasion of Ukraine. The NYSBA directed Russia to refrain from taking further measures contrary to international law. They issued a call to their members and international legal professions to uphold their duty to promote, support, and protect international law. They are also offering a CLE on the TPS process described above.

The Ukrainian American Bar Association, in addition to condemning Russia's invasion, provides resources and updated information on its website, including updates on the Ukrainian Congress Committee of America's relief and aid efforts and needs: www.uaba.org.

The internet is flooded with ways people are putting their values into action when it comes to aiding Ukraine, and — I'm sure I'm preaching to the choir — but always be sure to do your own due diligence before donating time or money to an organization.

All in all, the way that so many people have come together so quickly in their shared desire to help Ukrainians is nothing less than feverish — possibly even spring feverish. 🌸

Bar Journal Editor **Kristen Swift** is a Partner at Weber Gallagher and Chair of the Litigation Section. She can be reached at kswift@wglaw.com. Her full bio is available at www.wglaw.com. All opinions expressed are solely her own.

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TOP 5

LAWYERS WHO MADE THE WORLD A BETTER PLACE

1 Hugo de Groot

de Groot's *On the Law of War and Peace* (1625) is considered one of the greatest contributions to the development of international law. Obviously, there have been bad actors who have opted for war over peace, but de Groot's book helped establish parameters by which we could judge who was in violation of "international law."

2 Cesare Beccaria

Criminal law used to be brutal, used as a weapon to punish rather than attempt to reform. Beccaria's book *On Crimes and Punishments* (1764) changed the world's views on torture and, in many countries, the death penalty.

3 Francis Hargrave

Hargrave was one of five advocates for James Somerset, an enslaved African who escaped while with his captor in England and was recaptured and was put back up for sale, but a lawsuit from abolitionists resulted in the eventual abolition of slavery in England and Wales and gave inspiration to abolitionists in America.

4 Abe Fortas

Fortas was appointed to represent Clarence Gideon in his challenge to his conviction in Florida of breaking into a poolroom. Fortas chose to challenge current laws that said an attorney was only appointed in "special circumstances" and, instead, argued that a defendant has the right to an attorney for all criminal proceedings. The case *Gideon v. Wainwright* (1963) granted the right to an attorney because Fortas chose the harder path. Despite future legal entanglements that resulted in his premature retirement from the Supreme Court, Fortas's contributions to Civil Rights is indisputable.

5 Ruth Bader Ginsburg

Ginsburg's stint on the U.S. Supreme Court is "notorious" for championing a number of causes in majority opinions and in dissent, but it was her role as an advocate that earns her a place on this list. Ginsburg tenacity and intellect invigorated women in the legal profession and her success led to increased membership of women in law. As a lawyer, in 1971, she upended the notions that women could be considered weak or different as a class, using the 14th Amendment as it had never been used before, and transforming discrimination law forever.

REPORT OF THE NOMINATING COMMITTEE

The Nominating Committee met virtually on February 25, 2022 and nominated the following for officers and membership on the Executive Committee for the year July 1, 2022 to June 30, 2023:

Vice President-at-Large:	Mary Frances Dugan
Vice President, New Castle County:	David A. White
Secretary:	Francis J. Murphy, Jr.
Assistant Secretary:	Mae Oberste
Treasurer:	Jennifer Ying
Assistant Treasurer:	Ian Connor Bifferato
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	Lori A. Brewington
	Crystal L. Carey
	Alberto E. Chávez
	Denise Del Giorno
	Nordheimer
	Victoria R. Sweeney

In addition, the Committee nominated:

Rebecca A. Guzman to a four-year term as the Delaware State Bar Association representative to the Delaware Bar Foundation.

Benjamin Strauss to a two-year term as the Delaware State Bar Association representative to the ABA House of Delegates.

This report is being filed pursuant to Section 6.16(e) of the Association Bylaws. Section 6.16(f) of the Bylaws of the Association provides:

“Any ten members of the Association may nominate other members in good standing of the Association for any office for which nominations have been made by the committee by filing a signed written petition with the Secretary of the Association within ten days after the report of the Committee has been published. If a petition nominating other candidates be duly filed the Secretary shall publish notice, in a Bar Association publication or by any other reasonable means of notification, of the petition with the name(s) of the candidate(s) proposed so that the membership has notice of at least fourteen days prior to the election of the names of all candidates so nominated. There shall be no other nominations.”

OF NOTE

Condolences to the family of **The Honorable Stanley Sporkin** who died on March 23, 2020.

Condolences to **Charles J. Brown III, Esquire**, on the death of his father, Charles J. Brown, Jr., who died on March 3, 2022.

Condolences to **Thomas C. Crumplar, Esquire**, on the death of his wife and **David Thomas Crumplar, Esquire**, the death of his mother, Marion Ferriss Crumplar, who died on March 9, 2022.

Condolences to the family of **The Honorable Randy J. Holland** who died on March 15, 2022.

If you have an item you would like to submit for the Of Note section, please contact Rebecca Baird at rbaird@dsba.org. 

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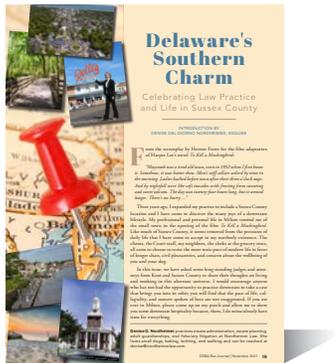
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A Perspective on Delaware's "Panhandle"

After reading with interest the "Delaware's Southern Charm" section of the November issue of the *Bar Journal*,¹ nostalgia required me to write of another quaint and oft-overlooked part of the state. I refer to the remote boreal Panhandle of Delaware, north of Odessa and east of Newark. From the age of ten on, I had lived in the heartland of the state of Delaware, just west of Lewes. After high school, I spent two years at the college in Georgetown, and two years in Newark. Then, in 1979 I accepted a job at the Prickett firm in Wilmington as a "legal assistant." For the first time, I was exposed to the Panhandle. It was an eye-opener for a Delaware boy!

In those days, before Route 1 connected the region to the rest of Delaware, the Panhandle felt especially remote. Surprisingly, nonetheless, I found there were lots of people! Just as with the Falkland Islands or the high Arctic,

WE WOULD LOVE TO HEAR FROM YOU!

The Bar Journal welcomes and encourages letters to the editor. An individual's opinion or reaction to a topic presented in the Bar Journal, as well as a dialogue among DSBA members, as voiced in a civil exchange of public letters, is valuable to the membership of the DSBA.

The Bar Journal does not print anonymous letters. Letters are published on a space-available basis and must relate to a specific topic and article that was published in the Bar Journal.

Letters to the Editor must not contain language constituting an attack upon an individual, group, or organization. Furthermore, they may not promote individual products or services, or political candidates. All letters are subject to the approval of the Editorial Board.

We reserve the right to edit letters for clarity and space. Email letters to rbaird@dsba.org.

it goes to show that people can and will live just about anywhere. Lots of lawyers, too. Lots of folks walking around in suits, and not just on Sundays! And pretty near every intersection had what I thought were uninspired and unseasonal red-and-green Christmas decorations, but these turned out to be traffic-control lights. Who knew?²

My getting used to the latter brings to mind one of the many strange folkways of the Panhandle's people. In Sussex, it was the practice for drivers to acknowledge one another with a friendly lift of the index finger from the steering wheel. Even when I was getting used to the traffic lights and one-way streets, motorists in Wilmington proved just as friendly, in fact more emphatically so. They would salute me, strangely, with the middle finger, with homespun vigor, belying

the misplaced reputation for rudeness they bore in Delaware proper in those days.³ There were other odd folkways and quirks. People talked a little funny, and a lot fast; not like regular Delawareans. Which is interesting, because it turned out that the Panhandle people thought of themselves as "Delawareans," although living far north of the center of geography in the state, which lies just west of Milford. They almost never talked about themselves as New Castle Countians, let alone Panhandlers.

In my time in the Panhandle, I got to experience the engaging folk-festivals of the local people, some dating from time immemorial, including one curious and ancient festival I believe they called the "Point-to-Point." And the Panhandle folk had unique little civic clubs. I don't remember a Ruritan or a Grange like downstate,

but there were lots of others, some quite quaint. I recollect the Wilmington Club and the Vicmead, for instance. Just like in Sussex, Panhandlers love their beaches! A sunny summer day on Augustine Beach is not to be missed.

And the wildlife! We pride ourselves on such below the canal, but when I first went to Rodney Square, why, it was a dove-hunter's paradise! Never had I seen doves, or "pigeons" in Panhandle-speak, so numerous. Nor so large, or for that matter so slow. Also, I saw numbers of scaly-tailed mammals, which I concluded were pygmy opossums. And I had never truly seen wildlife until my first St. Patrick's Day at the Logan House.

It was a charming experience to spend a couple of years in the Panhandle. It can truly change your perspective and broaden your horizons. If you are a Delawarean, I urge you to visit.

Notes:

1. Having spent more than fifty long, long years in Lewes, I can indeed confirm that Sussex has its charms. I appreciate the statements in the *Bar Journal* to that effect, which (unlike the instant submission) have the benefit of sincerity, and toward which I mean no disrespect.
2. Alas, these decorative features are now common in eastern Sussex, as well.
3. That particular gesture has migrated below the canal since, I note.

**The Honorable
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*Vice Chancellor,
Delaware Court of Chancery
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CALENDAR OF EVENTS

April 2022

Monday, April 4, 2022 • 2:00 p.m. – 3:30 p.m.

Technology, Oil, and Sharia Law: the Saga of the Exxon-Mobil vs. SABIC case

1.5 hours CLE credit

Live Seminar at DSBA with Zoom Option

Wednesday, April 6, 2022 • 9:00 a.m. – 4:00 p.m.

Day 2: Superior Court Mediation Training

Mediation Training dates: March 31, 2022; April 6, 2022; April 25, 2022; and April 26, 2022

20.0 hours CLE credit including 2.0 hours in Enhanced Ethics credit

Live Seminar at Delaware State Bar Association, Wilmington, DE

Wednesday, April 13, 2022 • 10:00 a.m. – 12:00 p.m.

Arbitration Training Certification in Domestic Relations

2.0 hours CLE credit including 0.5 hour in Enhanced Ethics credit

Live Webinar via Zoom

Wednesday, April 20, 2022 • 10:00 a.m. – 12:00 p.m.

Arbitration Training Certification in Commercial Litigation

2.0 hours CLE credit

Live Seminar at DSBA with Zoom Option

Thursday, April 21, 2022 • 8:30 a.m. – 4:15 p.m.

Animal Welfare and Family Law 2022

6.8 hours CLE credit including 0.5 hour in Enhanced Ethics credit

Live Seminar at DSBA with Zoom Option

Monday, April 25, 2022 • 9:00 a.m. – 12:15 p.m. and

Tuesday, April 26, 2022 • 9:00 a.m. – 2:45 p.m.

Days 3 and 4: Superior Court Mediation Training

Mediation Training dates: March 31, 2022; April 6, 2022; April 25, 2022; and April 26, 2022

20.0 hours CLE credit including 2.0 hours in Enhanced Ethics credit

Live Seminar at Delaware State Bar Association, Wilmington, DE

Friday, April 28, 2022 • 12:00 p.m. – 1:00 p.m.

What Non-Bankruptcy Attorneys Need to Know About Bankruptcy

1.0 hour CLE credit

Live Webinar via Zoom

Friday, April 29, 2022 • 2:00 p.m. – 3:00 p.m.

Attorney Client Privilege

1.0 hour CLE credit

Live Webinar via Zoom

May 2022

Monday, May 2, 2022 • 12:00 p.m.

Law Day Luncheon

Hotel du Pont, Wilmington, DE

Tuesday, May 3, 2022 • 8:30 a.m. – 4:30 p.m.

Workers' Compensation 2022

6.8 hours of CLE Credit including 1.8 hours of Enhanced Ethics

Live at Riverfront Events in Wilmington

Friday, May 6, 2022 • 8:30 a.m. – 2:15 p.m.

2022 Small Firms and Solo Practitioners Conference

4.5 hours of CLE Credit including 3.5 hours of Enhanced Ethics

Live Webinar via Zoom

Dates, times, and locations of Events and CLEs may occasionally change after time of press. Please consult the DSBA website for the most up-to-date information at www.dsba.org.

SECTION & COMMITTEE MEETINGS

April 2022

Wednesday, April 6, 2022 • 12:30 p.m.

Women & the Law Section Meeting

Zoom Meeting, see Section listserv message for link and password

Friday, April 8, 2022 • 4:30 p.m.

Workers' Compensation Section Meeting

Heckler & Frabizzio, P.A., 800 Delaware Avenue, Suite 200, Wilmington, DE

Tuesday, April 12, 2022 • 12:00 p.m.

Litigation Section Meeting

Delaware State Bar Association, 405 North King Street, Suite 100, Wilmington, DE

Thursday, April 14, 2022 • 12:00 p.m.

Executive Committee Meeting

Delaware State Bar Association, 405 North King Street, Suite 100, Wilmington, DE

Wednesday, April 20, 2022 • 9:00 a.m.

ADR Section Meeting

Zoom Meeting, see Section listserv message for link and password

May 2022

Wednesday, May 4, 2022 • 12:30 p.m.

Women & the Law Section Meeting

Zoom Meeting, see Section listserv message for link and password

Tuesday, May 10, 2022 • 12:00 p.m.

Litigation Section Meeting

Delaware State Bar Association, 405 North King Street, Suite 100, Wilmington, DE

Wednesday, May 18, 2022 • 9:00 a.m.

ADR Section Meeting

Zoom Meeting, see Section listserv message for link and password

Thursday, May 19, 2022 • 12:00 p.m.

Executive Committee Meeting

Delaware State Bar Association, 405 North King Street, Suite 100, Wilmington, DE

Tuesday, May 24, 2022 • 4:30 p.m.

Multicultural Judges and Lawyers Section Meeting

Zoom Meeting, see Section listserv message for link and password

Refer to the DSBA Section Listserv messages for the most up-to-date information on Section Meetings. Please contact LaTonya Tucker at ltucker@dsba.org or (302) 658-5279 to have your Section or Committee meetings listed in the *Bar Journal*.

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TIPS FOR HANDLING TEXT MESSAGES IN DISCOVERY

BY IAN D. MCCAULEY, ESQUIRE



Ian McCauley is a director in Bayard's litigation group and leads the firm's eDiscovery practice. He can be reached at imccauley@bayardlaw.com.

Non-email electronic forms of communication have been with us for quite some time. The text message was first invented in 1992. AOL Instant Messenger was released in 1997, and Blackberry Messenger followed in 2005.

The release of the iPhone in 2007, coupled with the rise of cheaper (or free) text messaging greatly increased the adoption of these types of communications. Since that time, adoption and usage of text and instant messaging have increased exponentially. In some cases (and particularly among Millennials and members of Generation Z), texting and instant messaging have come to augment or even replace email as the primary method of communication.

More recently, the rise of remote work in the face of the pandemic has made text messages (along with instant messages, direct messages, and every other type of electronic communication) a ubiquitous feature of business communication. Text messaging already posed significant challenges in the litigation context; its increase usage, combined with the pandemic and its implications for how individuals work and communicate, has brought those issues to a fever pitch.

Are Text Messages Discoverable?

Like all new electronically stored information ("ESI"), text and instant messaging have resulted in unique challenges in

the discovery context. Most jurisdictions have ruled that these types of communications are discoverable. The Court of Chancery has made it clear in a series of decisions that not only are text messages discoverable, but that they often have heightened importance. The Court in *Kan-Di-Ki, LLC v. Suer*, C.A. No. 7937-VCP (Del. Ch. July 22, 2015) found that text messages were subject to discovery when it ruled that a party spoliated evidence when he lost his cell phone. The Court reiterated its position in *In Re Oxbow Carbon LLC Unitholder Litigation*, C.A. No. 12447-VCL (consol.) (Del. Ch. June 2, 2017) when it ordered Delaware counsel to oversee the identification and collection of potentially relevant text message data.

Finally, the Court in *In re Appraisal of Kate Spade Company*, C.A. No. 2017-0714-AGB (Del. Ch. June 21, 2018) raised a key point regarding the importance of text messages when then Chancellor Bouchard mused whether parties should collect and review potentially relevant text messages as a matter of course.

While this article primarily focuses on text messages, it is important to note that other mobile data, including photos, notes, and instant messages from apps such as WhatsApp and Facebook messenger are also generally discoverable.





Preservation

Text messages are, by definition, ephemeral. Law Insider defines ephemeral data as “information that change rapidly over time and may be lost if not collected immediately (e.g., within days or weeks).”¹

There are different degrees of ephemerality; text messages fall on the less ephemeral end, while instant messages sent on Snapchat would be at the extreme end of ephemerality. Regardless, the automatic or accidental deletion of texts is a constant challenge of which lawyers must be aware.

A combination of forced obsolescence and the insatiable need to upgrade to the most recent cell phone pushes individuals to constantly replace their cell phones. Cell phone contracts last two or three years, and often a new contract comes with a new phone. This has led to a culture of disposability surrounding cell phones, thus resulting in more challenges.

Further, iPhone settings make it easy to set text messages to automatically delete after a certain period of time. Users often are not even aware that this setting is even in effect, as it may have been set up when the phone was activated at the local cell phone store or by a company’s IT professionals.

Clients must be informed of their preservation obligations early and often, and they must be armed with the appropriate information to ensure that accidental destruction does not occur.

Finally, discovery is typically stayed at the start of litigation, sometimes for months or years. This means that an individual may receive a litigation hold that details his or her preservation obligations, but then is not contacted by counsel to identify and collect relevant text messages until far in the future. This causes even more delay and chances for accidental destruction of cell phone data.

These various factors lead to one simple conclusion: clients must be informed of their preservation obligations early and often, and they must be armed with the appropriate information to ensure that accidental destruction does not occur. It may even make sense to take the additional step to collect the cell phone data if a lawyer is fairly certain that discovery will ultimately ensue.

Control, Identification, and Location

In the employment context, many companies do not issue cell phones to their employees, but they do allow their employees to use their personal devices for business purposes (also known as Bring Your Own Device, or BYOD). This can lead to custody challenges, and often leads to a conundrum (akin to issues surrounding personal email) in which relevant information related to a company may exist on an employee’s cell phone, thus leading to a potential subpoena if the determination is made that the employee, rather than the employer, has possession, custody, or control of the cell phone data.

Cell phone users are often under the mistaken impression that their texts are not discoverable, which can lead to several challenges, including the decisions they have made on how to use that cell phone. It can often be shocking for an individual to be informed that his or her phone is now discoverable and that the data will need to be collected and reviewed for production.

CONTINUED >

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This can be a difficult conversation and, because of this, it is one that should occur very early in the litigation.

It is a challenge to even identify “where” text message and other cell phone data may reside. In addition to being stored directly on the device, cell phone data could be in the cloud, backed up to a computer, or even printed out to hard copy. Custodians of these records often do not even know exactly where the records are stored, as the cloud backup may have been activated by company IT or the person who sold them the phone. They may be unaware that a backup of their phone exists on their computer if they often plug their phone into a laptop or desktop.

Collection and Searching

Like all other aspects of discovery and cell phones, effectively capturing data from a device and ensuring that it can be searched and reviewed is challenging. While eDiscovery in the context of email and traditional non-email electronic files has become more widely available and less expensive for a variety of litigants, the same cannot be said for the collection of cell phone data. Almost assuredly a litigant will need to hire a vendor to use special tools to capture and then actually search and review the data.

It is important that text messages are “processed” and searched in a logical way. Individuals speak differently over text than they do over email. An individual text message is usually going to be much shorter than an individual email. Many single text messages may be between 5 to 10 words. Usually, text messages will make more sense when the conversations themselves are grouped together, and vendors and litigators need to be mindful of this when processing the collected data.

This also means that standard search terms are not always appropriate or

effective. Often, parties will agree to review entire conversations with relevant recipients or senders or key time frames rather than using traditional search terms when deciding what to review.

Finally, it is important to speak with any vendor regarding how the texts will be rendered in a review tool. Emojis and emoticons have become common place in text message communications and have become important in litigation. Several recent Chancery matters have dealt with emojis and emoticons being highly relevant in determining the intent of the sender of the text.

Review and Production

Reviewing and producing text message communications also pose unique challenges. Attorneys are used to providing estimates to clients based on the number of documents to be reviewed. Text messages, however, by their very nature, are reviewed at a much higher speed than traditional ESI. This can impact burden arguments during discovery disputes.

Finally, it is important that parties meet and confer to ensure that the text messages are ultimately produced in a manner that is usable by the receiving party and that can easily be referenced at deposition and court filings.

Summary

The world of ESI is constantly shifting, and this is particularly true with text messaging and cell phone data. It is important that litigators continue to educate themselves regarding these new technologies and the challenges they pose, while understanding that an experienced vendor will be of great use in navigating these issues. ⚖️

Notes:

1. “Ephemeral Data Definition.” Law Insider. Accessed March 16, 2022. <https://www.lawinsider.com/dictionary/ephemeral-data>.

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A Low-Tech Solution to High-Tech Discovery

BY RYAN P. NEWELL, ESQUIRE

The following article was previously posted in the October 2019 edition of the *DSBA Bar Journal*. With an ever-increasing reliance on new forms of technology — including the personal devices and messaging platforms that many of us had to rely upon during the pandemic — the sources of relevant discovery have continued to expand. Discovery plans remain an excellent resource in managing discovery in litigation.

The requirement to collect and produce electronic documents will elicit a variety of reactions from clients and attorneys alike.

Clients may fear a perceived invasion of privacy and a distraction from their lives or businesses. Undoubtedly, they do not like the exorbitant costs that often correspond with discovery.

Attorneys themselves have an ambivalent relationship with electronic discovery. Many will claim they do not get involved with electronic discovery.¹

Others suggest their matters do not involve electronic documents. (While theoretically possible, any case where parties use computers, email, or mobile devices likely involves some electronic documents.) For those who do roll-up their sleeves to engage in good faith discovery, they are likely all too familiar with the typical tension between clients who protest an attorney's attempt at complying with discovery obligations and opposing counsel who will scrutinize every decision along the way. Waiting in the background, should that tension result in dispute, is a busy court.

The court understandably may not have the time nor inclination to delve into the minutia that is typical in electronic discovery disputes.

Finally, to compound matters, there are parties and attorneys who seek to impermissibly exact leverage from discovery. Unfortunately, some engage in the self-selection of helpful discovery and the intentional disregard of damaging, but relevant discovery. Others serve abusive discovery requests and initiate motion practice when there is a substantial disparity in resources and capabilities.

For those wary of wading into electronic discovery waters, the foregoing is incentive enough to stand ashore.

The most common reaction to these issues is for attorneys to unilaterally conduct discovery as they or their clients see fit. Disputes raised by one side are often met with return fire in the



For those doubting the utility of showing your cards to the other side, engaging in such a transparent and cooperative exercise has numerous benefits.

form of competing deficiency letters or discovery motions. But, most hope that their efforts in the discovery process never come to light.

Fortunately, there is a low-tech solution to these “high-tech” electronic discovery concerns — discovery plans. Stated simply, they represent an agreement among parties as to how discovery will be conducted and they can be entered by the court as an order. In that vein, they are no different than routine confidentiality or scheduling stipulations that govern the conduct of litigating parties. Such discovery plans have been in use in our Superior Court for a number of years. In the Court of Chancery, discovery plans have become more prevalent in recent years. For example, in 2016, the parties in *Partner Investments, L.P. v. Theranos, Inc.* entered into a discovery plan modeled off of samples from courts across the country and our Superior Court.

Since then, Vice Chancellor J. Travis Laster has encouraged parties to use a similar form of order that, in my estimation, is the gold standard for discovery plans. Spanning nearly thirty pages, it is hard to contemplate an issue that counsel should not consider in discovery — *e.g.*, the amount of written discovery to be served, litigation hold notices, the scope and sources of discovery, the identification of custodians, search protocol, form of production, privilege logs, motion practice, etc.

What makes this discovery plan or any similar plan so appealing is that they are customizable. For massive cases, the Vice Chancellor’s discovery plan allows the parties to identify in detail precisely how discovery will be conducted. But it also affords parties an opportunity to reach agreements on what will not be subject to discovery. For example, parties can elect that data from mobile devices or personal computers will not be subject to discovery.

For those doubting the utility of showing your cards to the other side, engaging in such a transparent and cooperative exercise has numerous benefits.

First, parties can take control of discovery, including discovery-related costs. Instead of letting discovery run amok, the limitations and guidelines in a discovery plan can control costs and make discovery proportional to the issues at stake. Without discovery plans, often such limits are achieved through

court orders resulting from motion practice. Discovery plans give the parties the power to set such limits before costly disputes arise.

Second, such plans provide security. If there are disputes about what should have occurred in discovery, the parties can look to their court-ordered discovery plan to determine if discovery was conducted as agreed.

Finally, discovery plans help focus litigation. By engaging in a thorough self-analysis of one’s case and then a meaningful meet and confer with the other side, parties should begin to identify the key issues in their case, the key witnesses, and the costs that it will take to litigate the case.

For sample discovery plans, please feel free to email me. 

Notes:

1. Because “electronic” is essentially a superfluous adjective given the abundance of electronic documents in today’s practice, litigators cannot truly avoid electronic discovery. Trying to ignore it stands in direct contrast to the competency requirement of Rule 1.1 of the Delaware Rules of Professional Conduct. See cmt. 8 (“To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”).



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Ethics Quiz

In honor of Spring, “Ethically Speaking” offers its first true/false pop quiz. Of course, the honor system will apply to your self-grading.



1 Written fee agreements are recommended but not required for all matters.

Answer: False. Written fee agreements are definitely recommended for all matters. Rule 1.5(b) states that the scope of the representation and the basis or rate of the fee and expenses from which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. (Emphasis added.) However, subsection (c) to this Rule requires that a contingency fee agreement “shall” be in writing, signed by the client. In addition, the often overlooked subsection (f) requires a lawyer upon receipt of a retainer to provide the client with a written statements that the fee is refundable if not earned and that this writing also state the basis under which the fee shall have been considered to have been earned, whether in whole or in part — essentially a written fee agreement requirement but without a provision for the client’s signature.

2 An attorney is prohibited from accepting payment for legal services from anyone other than the client.

Answer: False. Rule 1.8(f) does state that a lawyer shall not accept compensation for representing a client from one other than the client UNLESS: the client gives informed consent, there is no interference with the lawyer’s independence, and information relating to the representation is protected as a Rule 1.6 attorney-client confidence.

I recommend the inclusion of language in your fee agreement which notes that by entering into the fee agreement, the client consents to any third-party payment of legal fees and that the non-client payor also sign the fee agreement acknowledging that they are not entering into an attorney-client relationship with the attorney and that their payment of the legal fees does not entitle access to any client confidences.

3 Attorneys are prohibited from settling malpractice claims against themselves unless both sides are represented by counsel.

Answer: False. Rule 1.8(h)(1) does prohibit an attorney from prospectively limiting the attorney’s liability for malpractice unless the client is independently represented in making the agreement. However, subsection (2) permits an attorney to settle a claim or potential claim for malpractice with an unrepresented client or former client if that person is advised in writing of the desirability of seeking counsel and has been given a reasonable opportunity to do so.

4 Attorneys do not have a duty to report their own misconduct.

Answer: False. While it is generally true that the Rule 8.3 duty to report misconduct refers to the conduct of other attorneys and there is not a general duty to self-report, there is one important exception. Rule 16(k) of the Rules of Disciplinary Procedure provides that “any lawyer subject to the disciplinary jurisdiction of the Court who is charged with or convicted of a felony, whether within or without of this State, shall within ten days of such charge or conviction report the matter to

the ODC.” While not otherwise required, there may be sound reasons for self-disclosure. The ABA Standards for Imposing Lawyer Sanctions recognizes self-reporting as a mitigating factor which could result in the imposition of a lesser discipline.

5 I reviewed both the Rules of Professional Conduct and the Rules of Disciplinary Procedure and found no reference to the *bona fide* office requirement. I can safely conclude that there is no longer such a requirement.

Answer: False. The definition of a *bona fide* office can be found in Supreme Court Rule 12(d). Technically, Rule 12 is titled “Attorneys of Record: Withdrawal.” Subsection (a) requires that all papers filed with the Court be signed by an attorney who is an active member of the Bar who maintains an office in Delaware for the practice of law. Subsection (d) defines what constitutes an office for the practice of law. That definition requires that it be “an office maintained in this State for the practice of law in which the attorney practices by being there a substantial and scheduled portion of time during ordinary business hours in the traditional work week. An attorney is deemed to be in an office even if temporarily absent from it if the duties of the law practice are actively conducted by the attorney from that office. An office must be a place where the attorney or a responsible person acting on the attorney’s behalf can be reached in person or by telephone during normal business hours and which has the customary facilities for engaging in the practice of law. A *bona fide* office is more than a maildrop, a summer home which is unattended during a substantial portion of the year, or answering, telephone forwarding, secretarial or similar service.”

This rule may appear on its face to be non-disciplinary and only govern the filing of pleadings. However, the case law reflects that violators may find themselves charged with disobeying an obligation to the tribunal. Rule 3.4(c).

6 Law firms are prohibited from maintaining non-IOLTA trust accounts.

Answer: False. While Delaware did revoke the ability to opt out of IOLTA entirely, Rule 1.15(f) does both permit and require a lawyer holding client or third-party funds

to determine whether the funds should be placed in an interest-bearing account for the benefit of the client or third-party. In considering whether recommending a special purpose escrow account should be opened, the lawyer must consider the financial interests of the client including the costs of opening and maintaining an account, any tax reporting procedures, the length of time that the funds will be held, and the amount to be deposited. The lawyer must then, at reasonable intervals, consider whether a change in circumstances would warrant a new determination with regard to the deposit.

7 In providing legal services to clients, a lawyer should exercise independent professional judgment and render candid advice but must limit themselves to the law governing such issues.

Answer: False. Rule 2.1 provides that a lawyer, in rendering legal advice, should refer not only to the law but to other considerations, such as moral, economic, social and political factors that may be relevant to the client’s situation.

8 A lawyer can advance settlement funds to a needy client, give funds to a client as a gift, or make a personal loan to a client in the course of litigation as long as the lawyer’s intent is charitable.

Answer: False. Rule 1.8(e) states that a lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation. The only exception to this Rule is the lawyer’s advancement of costs in a contingency matter or the lawyer’s payment of costs for an indigent client. Any payment directly to the client, whatever the intent, is prohibited.

9 An attorney can hold themselves out as a specialist or expert in the practice of a particular field of law as long as there is a factual basis to do so.

Answer: False. Rule 7.4 provides that an attorney can communicate the fact that they do or do not practice in a particular field of law. The Rule goes on to note that patent and admiralty attorneys may hold themselves out as practitioners in those fields. However, subsection (d) states that a lawyer shall not state or imply that the

lawyer is certified as a specialist unless they have been certified by an organization approved by an “appropriate state authority” or the American Bar Association, and the name of the certifying organization is clearly identified in the attorney communications. The Catch-22 here is that there aren’t any organizations approved by the undefined “state authority” in Delaware.

10 If a lawyer can’t provide financial assistance to a client in connection with pending or contemplated litigation, the lawyer can assist the client by purchasing the literary or media rights relating to the representation.

Answer: False. Rule 1.8(d) prohibits a lawyer from making or negotiating an agreement giving the lawyer literary or media rights prior to the conclusion of the representation.

Scoring

The correct answer for each question is “false.” If you scored 9 or more correct answers, you should consider applying for a position at the Office of Disciplinary Counsel. If you scored 6-9 correct, congratulations. You have probably been attending one of the many excellent Continuing Legal Education ethics seminars sponsored by the Delaware State Bar Association, and you have received excellent value for your membership. Five or fewer, you may want to take a copy of the Professional Conduct Rules to the beach or pool with you this summer for a refresher. It’s an excellent read. There are only 151 pages including the Index, Preamble, and Interpretive Guidelines.

As always “Ethically Speaking” advises Read it, Learn it, Live it.

“Ethically Speaking” is intended to stimulate awareness of ethical issues. It is not intended as legal advice nor does it necessarily represent the opinion of the Delaware State Bar Association.

“Ethically Speaking” is available online. Columns from the past five years are available on www.dsba.org.

Charles Slanina is a partner in the firm of Finger & Slanina, LLC. His practice areas include disciplinary defense and consultations on professional responsibility issues. Additional information about the author is available at www.delawgroup.com.



What Makes a Hero?

April is a time of growth and moving forward in new and positive ways. With psychic energy in abundance, it is the ideal month to start meditating for the purpose of healthier living and raising consciousness. Moreover, April is named after the Greek goddess of love, Aphrodite. So, what better time to celebrate heroism?

The definition of a real life every day hero is much like that of a literary hero. It is a person that puts oneself before others for a good cause. They typically exhibit characteristics of selflessness, bravery, compassion, and courage.¹

In past years, the mass media has changed the meaning of hero. The media, often referred to as the great equalizer, exhibited no room for the extraordinary person. All too often, the extraordinary person was made to look ordinary. Moreover, the hero who was always just a little bit larger than human, was all too often reduced to the commonplace. As a result, the public would yawn and look for someone else to stimulate their dulled sensitivity.

Assuming that modern heroes are either shallow or vanishing from the modern scene, one may be inclined to say, “So what? Do we really need heroes today?”

Using the words of Viktor E. Frankl, in his famous writing, *Man’s Search for Meaning*: “Life is not primarily a quest for pleasure, as Freud believed, or a quest for power, as Alfred Adler taught, but a quest for meaning. The greatest task for any person is to find meaning in his or her life.”²

The need for heroism is real and being dramatized today. An example are the recent current events unfolding that have united the world and produced an unlikely hero, in the face of a brutal Russian invasion. President Volodymyr Zelensky, a true modern hero, has inspired Ukraine and galvanized democracies around the world. We wonder what characteristics or qualities make such an unlikely individual a hero? Is there a hero gene or is it a learned skill?

According to a paper published in 2010, researchers have found that people who had engaged in one-time acts of bravery (like rushing into a burning building or saving someone from the path of an oncoming train) are not

SIDE BAR

CENTRAL CHARACTERISTICS OF HEROES

Researchers do not necessarily agree about the central characteristics that contribute to the making of a hero. One study published in 2015 in the *Journal of Personality and Social Psychology* suggested that heroes have 12 central traits which are:

- Bravery
- Conviction
- Courage
- Determination
- Helpful
- Honesty
- Inspirational
- Moral integrity
- Protective
- Self-sacrifice
- Selflessness
- Strength

The psychology of heroism might have a variety of characteristics to understand, but many experts do believe that it is possible for people to learn to be heroes.³

The need for heroism is real and being dramatized today.

necessarily that much different from control groups of non-heroes. Conversely, people who engaged in lifelong heroism (such as professional nurses who regularly comfort the sick and dying), do share a few important personality traits such as empathy, nurturance and need to live by a moral code.⁴

In “Heroism: A Conceptual Analysis and Differentiation between Heroic Action and Altruism,” researchers Zeno E. Franco, Kathy Blau, and Philip G. Zimbardo suggest that heroism involves more than just this. In their definition, heroism is characterized by:

- Acting voluntarily for the service of others who are in need, whether it is for an individual, a group, or a community.



Within each of us are abilities that we may typically underestimate and that are waiting to be used.

- Performing actions without any expectation of reward or external gain.
- Recognition and acceptance of the potential risk or sacrifice made by taking heroic actions.

One of the biggest questions researchers faces is the debate on whether we are born to be a hero or is it a learned skill. It depends on what research you read.

“Some people argue humans are born good or born bad; I think that’s nonsense,” explain Franco, Blau, and Zimbardo.

We are all born with this tremendous capacity to be anything, and we get shaped by our circumstances — by the family or the culture or the time period in which we happen to grow up, which are accidents of birth; whether we grow up in a war zone versus peace; if we grow up in poverty rather than prosperity.... So each of us may possess the capacity to do terrible things. But we also possess an inner hero, if stirred to action, that inner hero is capable of performing tremendous goodness for others.⁵

Scott T. Allison and George R. Goethals, in “Our Definition of Hero” explain:

We’ve found that people’s beliefs about heroes tend to follow a systematic pattern. After polling several people, we discovered that heroes are perceived to be highly moral, highly competent, or both.

SIDE BAR

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- Start every morning strong
- Avoid spreading gossip
- Crack more jokes
- Be kind
- Laugh
- Embrace those heroic powers within you

More specifically, heroes are believed to possess eight traits, which we call The Great Eight. These traits are smart, strong, resilient, selfless, caring, charismatic, reliable, and inspiring. It is unusual for a hero to possess all eight of these characteristics. But most heroes have most of them.⁶

Within each of us are abilities that we may typically underestimate and that are waiting to be used. Like our unlikely hero, a former actor and now President of Ukraine, Volodymyr Zelensky, individuals who risk their lives in the service of another are naturally more likely to take greater risks while possessing a great deal of compassion, kindness, empathy, and altruism. You too can find your hidden superpowers — and do things simply out of a desire to help — not because you feel obligated to out of duty, loyalty, or religious reasons, but because of your sincere wellbeing and freedom for others.

If you, or someone you know, needs help, call DELAP’s free, confidential service at (302) 777-0124 or email cwaldhauser@de-lap.org.

Notes:

1. “Literary vs. Real Life Heroes.” Bartleby. Accessed March 19, 2022. <https://www.bartleby.com/essay/Literary-Vs-Real-Life-Heroes-F36ANETZAEPF#:~:text=A%20hero%20is%20usually%20seen,that%20people%20see%20as%20heroic.>
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Carol P. Waldhauser is the Executive Director of the Delaware Lawyers Assistance Program and can be reached at cwaldhauser@de-lap.org.

THE 2022 COMBINED CAMPAIGN CUP: WE'RE BACK!

—
BY KEVIN G. COLLINS, ESQUIRE,
ANDREW C. DALTON, ESQUIRE,
AND JASON D. WARREN, ESQUIRE

After more than two years of canceled events due to COVID, we are pleased to announce that the Combined Campaign Cup to benefit the Combined Campaign for Justice (CCJ) is back! The golf tournament will take place at the DuPont Country Club on Monday, August 8, 2022. All members and friends of the Delaware State Bar Association, supporters of the Combined Campaign for Justice, and the general public are welcome and encouraged to join us for a beautiful day on the golf course.

Registration begins at 9:30 a.m. and Golf (shotgun start, scramble format) will start at 11:00 a.m. All golfers will have access to DuPont's driving range and putting green to warm up before playing. When you are finished on the course, or if golf isn't your thing, there will be a cocktail party on the terrace beginning at 4:00 p.m. This is a great opportunity to socialize and network with friends and colleagues and to

Delaware's Legal Aid Agencies:



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- are victims of domestic violence and need protection from abuse orders;
- have problems with public benefits or subsidized housing;
- have disabilities or are elderly, immigrants, or victims of housing discrimination.

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- have private housing issues;
- want help removing barriers to employment, with adult guardianships, or with estate planning



Represents people who:

- need to file for bankruptcy;
- are experiencing consumer fraud;
- need assistance with mortgage foreclosure;
- have private landlord/tenant issues;
- need assistance with unemployment compensation claims.



Monday, August 8th, 2022
We are Back!



enjoy live music from Rob and the Youngsters.

Firms, businesses, and individuals can support CCJ and the Combined Campaign Cup by sponsoring the event, registering to participate, or purchasing tickets to the cocktail party.

The Combined Campaign for Justice is a joint fundraising effort for Delaware's three civil legal aid organizations: Community Legal Aid Society, Inc. ("CLASI"), Delaware Volunteer Legal Services, Inc. ("DVLS") and Legal Services Corporation of Delaware, Inc. ("LSCD"). For more than 75 years,

Delaware's legal aid agencies have helped ensure fairness for Delaware's most marginalized residents — particularly those who are poor, people with disabilities, older adults and people experiencing homelessness. Additionally, investing in legal aid makes good business sense: a study commissioned by the Longwood Foundation found that every \$1 invested in civil legal aid in Delaware returns \$7.23 in economic and social benefits to Delaware and its communities.

We are honored to chair this event and are excited to bring it back as an

opportunity for us all to gather after two long years. We hope that many of our friends, colleagues, and fellow members of the Delaware legal community will join us in sponsoring and attending the Combined Campaign Cup.

To sign up or sponsor, please follow this link: <https://delawareccj.org/our-events/>.

If you have any questions, please contact Molly McPheeters at mmcpheeters@delawareccj.org.

We look forward to seeing you on August 8th! 🍷

CCJ GOLF TOURNAMENT CHAIRS



Kevin G. Collins, Esquire



Andrew C. Dalton, Esquire



Jason D. Warren, Esquire

GOLF ISN'T YOUR THING?

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Dave Baumberger – vocals
Jim Drnec – drums
Brad Goewert – drums

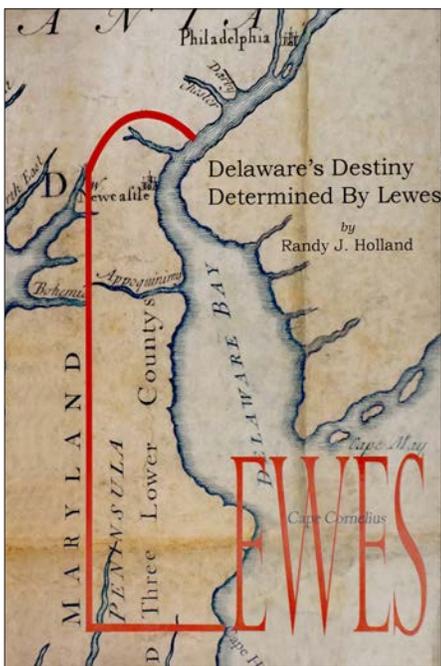
Aaron Goldstein – bass & vocals
Leroy Jett – piano, vocals
Greg Johnson – guitar, vocals

Mary Johnston – piano
Victoria Lodge – vocals
Jim McGiffin – bass, vocals, convener

Selena Molina – vocals
Tom Walsh – guitar



The Most Important Delaware Case You've Never Heard Of



Delaware's Destiny Determined By Lewes

By Randy J. Holland
Del. Heritage Press, 2013

Reviewer's note: It is still difficult to imagine the Delaware Bar without Justice Holland; but he will live on in his opinions and other works; and his book on the Delaware Constitution will be a standard for years to come; but, for me, my favorite work has always been this book.

History has many turning points. Some well-known. Others obscure or forgotten. In *Delaware's Destiny Determined By Lewes*, Justice Holland told the little-remembered story of the highly-contested 1683 lawsuit between William Penn and Lord Baltimore as to who had title to the land that is now Delaware. It is no spoiler to say that Penn won in the end, as, after all, Delaware is not a part of Maryland, but the issue was far from clear in the 1680s, and, as is often the case, lawyers and legal proceedings were needed to resolve a dispute, the resolution of which has important ramifications to this day.

Although the proceedings that would decide Delaware's fate were not instituted until 1682, the dispute traced back to 1632. In that year, King Charles I granted lands in the New World to George Calvert, the first Lord Baltimore. In 1682, William Penn was deeded land along the eastern side of Delaware Bay by the Duke of York (King Charles II's younger brother). Penn wanted additional land along Delaware Bay, as he did not believe "Pennsylvania" (the land he had been granted by King Charles II in 1680) had sufficient access to the bay. The Calvert family believed this land was part of its 1632 grant.

In 1683, Lord Baltimore wrote Lord Halifax, the Lord Privy Seal of the Privy Council asking for hearing on "my Right to Delaware." Baltimore's and Penn's lawyers made arguments to the Council, and the matter was referred to a Council committee, the Committee of Trade and Foreign Plantations. Continuances were requested (and further requested), so that the actual hearing did not begin until September 2, 1685.

Ultimately, the case turned on certain language in the original 1632 grant to the Calverts. It contained, as a condition of the grant, the phrase "*hactenus inculta*," which was commonly understood (at least by those familiar with royal grants) to exclude from the grant any lands which were already inhabited by or in the possession of Christian peoples. So, the question boiled down to whether "Delaware" was inhabited at the time of the 1632 grant, and, if so, how much of "Delaware" would be excluded from the 1632 grant. If "Delaware" was subject to the "*hactenus inculta*" language, it would not have been granted to the Calverts, but retained by the kingdom, meaning such land was properly deeded to William Penn under his 1682 deed from the Duke of York (in one of many twists to the case, King Charles II died unexpectedly

in early 1685, meaning that his brother, the Duke of York, succeeded to the throne as James II — if the Committee of Trade and Foreign Plantations ruled in favor of Lord Baltimore, they would be ruling that King James did not have title to the land he deeded in 1682 to Penn).

Penn gathered evidence concerning the original Dutch settlement of Lewes. In 1629, the Dutch purchased certain lands from three native chiefs “on the south side of the said Bay, called by the Bay of the South River, stretching, in length, from Cape Hinloop, to the mouth of the said South River, about eight large miles.” Penn’s attorneys also introduced evidence of another purchase in 1629 of land around Lewes. And, Penn’s attorneys were able to demonstrate the first Dutch settlement of Lewes in 1631 — just one year before the 1632 grant of Maryland to the Calvert family. Lord Baltimore countered, however, that the Lewes settlement was only temporary, as the original settlers had all been killed by the natives in 1632. The Dutch did not try to recolonize until the 1660s, and so, Lord Baltimore argued, the temporary 1631 settlement was not sufficient for purposes of “*hactenus inculta*.”

The Committee ruled in favor of Penn. Because the land had been inhabited, even temporarily, it was excluded from the 1632 grant, and therefore retained by the Crown. Accordingly, the Duke of York had been within his rights to deed Delaware to William Penn. But the story was not quite over.

Although his victory was clear, William Penn sought further assurances from the King as to his rights to Delaware, and so a charter was prepared which confirmed the original 1682 deed. However, on the day the charter was set to be signed (in 1688), King James received word that Prince William of Orange, who had landed in England, refused any negotiated settlement, and so the King fled to France, and William and Mary became the new monarchs of Great Britain in the Glorious Revolution. Friends of the former King fell out

of favor, and William Penn himself was arrested three times (and always released on bail). In 1692, Penn’s authority over Delaware (and Pennsylvania) was revoked, and Lord Baltimore saw another opportunity to take Delaware.

Baltimore’s efforts failed, and Penn successfully petitioned William and Mary for restoration of his rights to Delaware and Pennsylvania. When Queen Anne succeeded William and Mary, Baltimore tried again to undo the 1685 decision, and was again rebuffed.

Further litigation between Penn’s heirs and the Calvert family would take place in the English Court of Chancery from 1735 to 1750, before the Court ruled once and for all that the 1685 decision was controlling. The two families continued to squabble over the boundaries, which led to Mason and Dixon’s famous survey to settle the dispute.

Today, no one much remembers the Committee on Trade and Foreign Plantations, let alone the legal dispute that it considered for several years before ruling

in 1685 that Delaware was not a part of Maryland. Nor do many realize that the original and quite temporary (less than two-year) Dutch settlement of Lewes is what carried the day for the Penn family. And yet that settlement has made all the difference, as a world without the State of Delaware would be a poorer one in so many ways. Wilmington is our state’s largest city, and Dover the capital, but a strong argument can be made that Lewes may be the most important. Sometimes, great historical events happen and no one remembers them, but thanks to Justice Holland, the otherwise forgotten story of a 1680s dispute between two wealthy families over largely unsettled land, and the meaning of the phrase “*hactenus inculta*,” will live on and their significance understood. ⚖️

Richard “Shark” Forsten is a partner with Saul Ewing Arnstein & Lehr LLP, where he practices in the areas of commercial real estate, land use, business transactions, and related litigation. He can be reached at Richard.Forsten@saul.com.



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Michael P. Kelly, Esquire

1956 - 2022

BY DAVID A. WHITE, ESQUIRE

On January 10, 2022 our friend and colleague, and my former law partner, Michael P. Kelly, Sr. (“Mike”), died at age 65, after fighting a courageous and tenacious four-year battle against gall bladder cancer. His was a life well-lived. Mike left behind a devoted and loving family. He had an amazing sense of humor, a brilliant and engaging legal mind, and a thriving law practice of which many Delaware lawyers were envious. Like many of you, I loved Mike, and I’m sure I speak for many members of the Delaware Bar when I say it feels like I lost my best friend with his passing. Yes, Mike had that rare ability to connect to everyone, literally everyone, regardless of station, and make them feel like he was their best friend.

For 22 years, Mike worked at McCarter & English, LLP. I shared 13 of those years with him. In 2008, Mike literally pulled me out of Superior Court and asked me to join him at McCarter. My office was two-doors away from Mike’s, on the eighth floor of the Renaissance Center. And for all of those 13 years we shared stories, both personal and professional, of life, the practice of law, sports, politics, and family. Mike, of course, did it with an uncompromising sense of humor. Those were the best years of my professional life. I first met Mike in 1995, when he was working with Fritz Haase at Haase & Kelly at 824 Market Street. I was a young-ish lawyer at Murphy Welch & Spadaro (now Murphy & Landon). Even back then, over 25 years ago, we spoke often about the practice of law, being a Delaware lawyer, and our



families. We connected over our shared Irish heritage and our shared humble and modest upbringings. I knew then that Mike, like an aspiring boy scout, possessed all of the qualities that we, as privileged members of the Delaware Bar, should strive to achieve: Mike Kelly was trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean, and reverent. He was also ornery as hell... and we all loved it!!

Mike Kelly was, indeed, the epitome of high morals, ethics, and professionalism and those qualities enabled him to achieve more in one lifetime than most lawyers could hope to achieve in five. Mike was the quintessential, engaging and eloquent trial lawyer, a member of the prestigious American College of Trial Lawyers, an equity partner in

10-office, 400-lawyer regional law firm, and he was the Chairman of the firm’s Executive Committee. Aside from his law practice, Mike was the gregarious and generous owner of Kelly’s Logan House, that perfect Irish Bar located in the heart of Trolley Square in Wilmington owned by the Kelly family for over 150 years. He was also a star athlete at Tower Hill (football, wrestling, track) and at Columbia University. As successful as he was, Mike also understood what was most important: his family. He lived his life accordingly. Mike loved his wife, Deanna, a member of the Delaware Bar. Theirs was a magical romance and partnership; a relationship we should all pray to have with the person we love. He also loved his daughter, Joanna Girard Kelly, the newest member of the Kelly family to

the Delaware Bar (and quite a runner!!), his equally brilliant and athletic son, Michael Patrick Kelly, Jr. ("Patrick"), his sister, Mary Ann Kelly MacDonald, also a member of the Delaware Bar, and his identical twin brother, John D. Kelly, IV, a "good looking guy" and an amazing, funny, and accomplished orthopedic surgeon in his own right. Mike also left behind a host of loving nieces, a nephew, and cousins.

Mike's illness caused me to re-read Mitch Albom's novel, *Tuesdays With Morrie*, a touching and true story of friendship between a retired Brandeis University professor suffering from a terminal illness and one of his promising, former students. The book beautifully explores issues of life, feeling sorry for yourself, the fear of aging, money, death, family, regrets, forgiveness, and how love endures through it all. As difficult an exercise as it was, I found one passage, from the eighth Tuesday, that beautifully summarizes Mike Kelly's life. In it, Morrie talks about what gives a person real satisfaction: "But giving to other people is what makes me feel alive. Not my car or my house. Not what I look like in the mirror. When I give my time, when I can make someone smile after they were feeling sad, it's as close to healthy as I ever feel. Do the kinds of things that come from the heart. When you do, you won't be dissatisfied, you won't be envious, you won't be longing for somebody else's things. On the contrary, you'll be overwhelmed with what comes back." Simple and beautiful. That was my friend, Mike Kelly.

Please think about Mike and his family often. Remember his courage, faith, passion, wit, charm, grace, legal ability, ethics and his professionalism. Let's all work harder, in Mike Kelly's memory, to be better lawyers, to be better people, to serve those in need, and to be more like Mike. ⚖️

Dave White has been a member of the Delaware Bar for nearly 35 years and became Chief Disciplinary Counsel at ODC in March 2021. He can be reached at David.White@delaware.gov.

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The Honorable Randy J. Holland

1947 - 2022

BY THE HONORABLE COLLINS J. SEITZ, JR. AND GAYLE P. LAFFERTY, ESQUIRE

Offering his coat to a homeless person on the way to a winter lecture at Harvard University. Hand-writing welcome letters to new judges. Mentoring judicial colleagues. Sitting on the Delaware Supreme Court for over 30 years. And serving on or leading some of the most prestigious law-related committees, boards, and institutions in the country and beyond. The world is a lesser place with the loss of Justice Randy Holland, one of Delaware's true public servants.

Justice Holland was recognized internationally as an expert and legal scholar in corporation law and corporate governance, legal and judicial ethics, constitutional law, and common law. He was a self-confessed anglophile and historian. Among his prolific legal writings, he co-authored a book on Middle Temple Lawyers and the American Revolution and edited a book about Magna Carta. In 2004, he became only the third American — behind United States Supreme Court Justices John Paul Stevens and Ruth Bader Ginsburg — to be elected as an Honorary “Bencher” of Lincoln’s Inn, London. He served as the National President of the American Inns of Court Foundation from 2000-04 and was the only state court judge of a nine-person Anglo-American Exchange, which included United States Supreme Court Justices Breyer and Scalia. He



worked tirelessly with the Chief Justice of Taiwan to train its judiciary to handle complex corporate and commercial litigation. With Justice Holland’s encouragement, Taiwan adopted the ABA’s Model Code of Judicial Conduct.

His profound impact on and contributions to the practice of law and the legal profession can be traced back to his deep roots and humble upbringing in Milford, Delaware. After serving as the quarterback and captain of the football team and catcher on the baseball team at Milford High School (where he met his true love, Ilona), Randy earned a scholarship to Swarthmore College. After graduating with a B.A. in Economics in

1967, he went on to Penn Law School, where he graduated *cum laude* in 1972 and received the Henry C. Loughlin Award for legal ethics. While he could have pursued a legal career with a Wall Street law firm, Randy chose to return to his rural roots in Milford, where he married Ilona in 1972, and began his law practice in Georgetown with the firm Faulkner & Dunlap (which by 1974 had become Dunlap & Holland). Not long after, Randy and Ilona welcomed their son, Ethan, who would join his parents as distinguished alumni of both Milford High and Swarthmore College.

Randy’s reputation grew as a lawyer of great skill and integrity. As a practitioner, he appeared in every Delaware court and argued before nearly every Delaware judge in a variety of civil, criminal, and family law matters. In 1981, he successfully argued for the reversal of a client’s first-degree murder conviction with assistance on appeal from his friend and former chief counsel of the Senate Watergate Committee, Sam Dash. By the time of his client’s retrial, Randy had become a partner in the Georgetown office of Morris Nichols Arsht & Tunnell. Following conviction of his client upon retrial, Randy again argued successfully in the Delaware Supreme Court to reverse his client’s murder conviction. Not long after, in 1986, Governor Mike

Photo Courtesy of Wilson Sonsini

Castle appointed Randy to become the then-youngest member of the Delaware Supreme Court. He fulfilled that role faithfully for 30 years, as the longest-serving Justice and the author of more than 700 reported opinions and several thousand unreported decisions. Upon his retirement in 2017, he joined the Delaware office of Wilson, Sonsini, Goodrich & Rosati as a Senior Of Counsel. In 2020, Randy served as part of the legal team that successfully defended Delaware's political balance requirement for judicial appointments before the United States Supreme Court.

Throughout his career as both lawyer and judge, Randy gave of his time and talents energetically and unselfishly in support of legal education, the legal profession, and the public good. He authored, co-authored or edited ten books (including a treatise on state constitutional law that is taught in law schools around the country) and countless scholarly articles on wide-ranging topics. He taught as an adjunct professor at several law schools, including Iowa, Vanderbilt, Washington in St. Louis, Penn, and Widener. He also worked to promote public trust and confidence in the administration of justice through law-related public education. He helped to bring his friend Justice Sandra Day O'Connor's iCivics program to Delaware school children to ensure that the practice and privileges of American democracy are taught to each new generation.

He led or served on countless national committees for the ABA, the American Judicature Society, and the National Center for State Courts. For his hard work and dedication, he received numerous awards, including the 2014 American Inns of Court Powell Award for Professionalism and Ethics, the 2011 Dwight D. Opperman Award for Judicial Excellence, and the 1992 Judge of the Year Award from the National Child Support Enforcement Association. To recognize his tireless support of the American Inns of Court movement, a group of Delaware lawyers honored him by naming their Inn the

Randy J. Holland Delaware Workers' Compensation American Inn of Court. In 2017, Governor John Carney awarded him the Order of the First State, and the Delaware Combined Campaign for Justice created the Randy J. Holland Family Law Chair Endowment Fund to honor his legacy and give meaning to his deeply held belief that access to fair and impartial justice should not depend on one's ability to pay. It is a testament to the high regard in which he was held that the legal community contributed over \$2 million to the fund in the first five months after its creation.

All of these accomplishments and accolades do not paint the truest picture of who Randy was — a devoted husband and father who rarely missed a family dinner and was the biggest cheerleader for his wife's, son's, and granddaughters' accomplishments and careers; a dear friend who never missed the opportunity to write an encouraging note or make a congratulatory phone call; a trusted teacher and mentor who gave advice freely and patiently when asked and who sought to develop the talents of young lawyers and to connect them to other Delaware lawyers and institutions he cared about; a giant of the legal profession who gave generously of himself in service to the profession and the democracy that he loved; and, above all, a kind, thoughtful, gracious man who gave his full and undivided attention and respect to those who asked for his help. ⚖️

The Honorable Collins J. Seitz, Jr. is the Chief Justice of the Supreme Court of the State of Delaware.

Gayle Lafferty is the State Court Administrator and a former Law Clerk for Justice Holland.

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Spring into Green with a Cod Curry

A

pril ushers in the season of greens and has us set aside those hearty cold-weather dishes until next year. From asparagus to watercress, vibrant greens fill our plates. One of my favorite fish dishes to feature the bright colors and flavors of the season is my take on a cod curry. It's easy enough for a weeknight but elegant enough for company. The lemongrass gives the coconut milk a lovely hint of green — actually, more chartreuse — while the ginger, curry, and watercress provide a nice kick. The quantities below are intended to serve four.



Season the cod with sea salt and pepper and set aside. Heat the olive oil in a flat casserole pot over medium-low heat. Add the caraway seeds and cook, moving them around with a wooden spoon, for about one minute. Turn the heat to low and add the garlic, ginger, and lemongrass pastes. Stir and sauté for another minute. Then add the coconut milk and the coconut cream, which, like regular cream, is a bit thicker than its milk counterpart. Simmer for two minutes before whisking in the turmeric and curry powder. Add the tomatoes and continue to simmer on low heat for five minutes.

Prepare jasmine rice according to the package instructions. About five minutes before the rice is finished, add the cod pieces to the coconut milk mixture and poach until a fork goes through the fish easily. This should only take a few minutes.

Plate the rice in a pasta bowl. Top with several pieces of cod along with the broth. Garnish with several sprigs of watercress, a lime wedge, and a few shakes of Aleppo pepper.

For a refreshing and crisp wine pairing, choose a Sauvignon Blanc. I enjoy Arona Sauvignon Blanc (2021) from Marlborough, New Zealand, with this dish. The nose and palate of citrus and peach, along with a hint of green bell pepper, complement the coconut broth's moderate spice.

Welcome spring...bring your taste buds to the table. 🍴

Cod Curry Recipe

Ingredients

- 1½ pound cod loin, cut into 1½ inch cubes
- Sea salt
- Fresh ground pepper
- 2 tablespoons extra virgin olive oil
- 1 tablespoon caraway seeds
- 1 tablespoon garlic paste (the stir-in paste in a squeezable tube is very convenient)
- 1 tablespoon ginger paste (again, I recommend the tube)
- 1 tablespoon lemongrass paste (a tube, yet again)
- 14-ounce can unsweetened coconut milk
- 2 6-ounce cans unsweetened coconut cream
- 1 teaspoon turmeric
- 2 teaspoons curry powder
- ½ pint heirloom cherry or grape tomatoes, halved
- 1½ to 2 cups jasmine rice
- 1 bunch fresh watercress
- 1 lime
- Aleppo pepper



Susan E. Poppiti is Associate Faculty in Mathematics at Immaculata University and a math coach for middle school, high school, and college students. To further her commitment to mathematics education, she also serves as a math content expert for UPchieve, an ed-tech nonprofit providing free, online STEM tutoring to high school students. Susan can be reached at spoppiti@hotmail.com.



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LOST WILL: DEBORAH A. MAYS. Wilmington, DE. Died 12/6/2021. Looking for original or copy of a Will or Codicil. Please contact Kari Clifton at (302) 898-1409 or nk.clifton24@gmail.com.

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From the DSBA Archives

GEORGE GRAY: LOST TO THE AGES

BY MARK S. VAVALA, ESQUIRE
EXECUTIVE DIRECTOR, DELAWARE STATE BAR ASSOCIATION

Few Delawareans know the name of George Gray. His service to Delaware and the country spanned 35 years of his life. He was praised by President Cleveland, honored by President McKinley, and had dinner with President Wilson at his home in Wilmington. He was a Democrat, but had the respect of Republicans. In every way, he was the quintessential Delawarean lawyer. And yet, his name has become lost to the ages.

George Gray was a member of DSBA at its infancy in 1923. But long before, in 1885, was elected to the U.S. Senate to fill the remaining two years of his predecessor's term. His predecessor, Thomas Bayard, had been appointed Secretary of State by Grover Cleveland. Bayard has a statue on Kentmere Parkway and a school named after him. Gray's only tribute, an elementary school,¹ closed in the early 1960s and ultimately became the Thomas Edison Charter School.

Gray was reelected to a full six-year term in 1886 and again in 1893. People took notice of George Gray. He was seen as an honest, humble man, having once turned down an insurance company job that would have paid him \$200,000 because he did not believe anyone should be paid more than the President of the United States.²

In 1888, President Cleveland took notice of his ethical dealings, his intelligence, and his ability to work with either party in Congress. Cleveland wanted to appoint Senator Gray as the New Chief Justice of the United States Supreme Court upon the death of Chief Justice Remick. It is said Cleveland wanted a young man, in good health, who was not from the North, the South or the West. Cleveland noted, "I do not believe I ever came across a better man fitted for the chief justiceship than George

Gray of Delaware."³ However, in April 1888, Gray's own party, the Democratic Party, sabotaged his appointment and urged Cleveland not to appoint him. They were worried that the vacuum Gray would leave in the Senate would cause the Democratic factions led by the Bayards and the Saulsburys to go to war over who would replace Gray. They believed this war would ultimately transcend Delaware to other Democratic elections in the country.⁴ Cleveland listened and appointed Melville Fuller, an Illinois Democrat, to serve as Chief Justice. Gray was said to be crushed by this decision. Cleveland did, however, say that Gray would be the perfect choice to succeed him as President of the United States.

But Senator Gray would ultimately find his way to the Bench. In 1899, the new president, William McKinley, a Republican, possibly to stave off a future challenge for the presidency from George Gray, named him to a new position created by Congress on the Third Circuit Court of Appeals.

In 1904, many Democrats endorsed him for President. Similarly, in 1908, Democrats (including Democratic President Cleveland) and Republican President Teddy Roosevelt endorsed Gray for President. He came in second on the ballot that year to William Jennings Bryant who lost. Senator Cushman Davis (R-Minn.) once remarked "For personal reasons, the Republicans in the Senate would rather see George Gray President than any Democrat. For political reasons they would rather have any other Democrat in the White House. For if Mr. Gray should be elected President, in their opinion, he would gain such a hold upon the people that his re-election would be almost a certainty."⁵

Gray served 15 years on that court before retiring at the age of 73. But he



did not truly retire. He went on to serve on the Court of International Justice for the League of Nations, as a Peace Commissioner to resolve disputes with Great Britain, Canada, and Spain, and as a neutral officer in significant labor disputes and border disputes with Mexico. He helped negotiate the end to labor strikes in 1915 using a new legal device known as "arbitration." Judge Gray's expert use of arbitration to settle the anthracite mine wage disputes helped usher in the acceptance of arbitration as a reasonable means to resolve disputes.⁶ He was even named a member of the permanent court of arbitration at The Hague.⁷

As DSBA begins the building of its Legacy Wall, a permanent way to honor those who have distinguished the association and the profession in their service to the practice of law, we note that this Delaware attorney's memory will be permanently honored as one of the first to be so honored. 

Notes:

1. Frank, Bill, "Judge Gray," *The Morning News*, Dec. 11, 1977, p. 22.
2. Frank, Bill, "A Man Forgotten," *The Sunday News Journal*, July 4, 1982, p. H5
3. *Id.*
4. *Id.*
5. "George Gray: An Appreciation," *Every Evening*, May 3, 1919, p. 11.
6. "Drift of Opinion," *The Morning News*, April 7, 1915, p. 6.
7. "Judge Gray," obituary, *Every Evening*, August 13, 1925, p. 6.

Mark S. Vavala is the Executive Director of the Delaware State Bar Association. He can be reached at mvavala@dsba.org.

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