



THE JOURNAL

OF THE DELAWARE STATE BAR ASSOCIATION



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AS OF MONDAY, FEBRUARY 26, 2024



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The Delaware State Bar Association is looking for a number of talented members to join the 2024-2025 Executive Committee and lead the DSBA to continued success.

The following positions on the Executive Committee of the Association must be filled for the year 2024-2025:

Vice President-at-Large; Vice President, New Castle County; Secretary; Assistant Secretary; Treasurer; Assistant Treasurer; Six Members-at-Large

Note: The Vice President, Kent County and the Vice President, Sussex County will be those persons selected by, respectively, the Kent County Bar Association and the Sussex County Bar Association.

The following positions must be filled for the term as noted:

One (1) DSBA Representative to the Delaware Bar Foundation Board:
Four-year term

One (1) DSBA Delegate to the ABA House of Delegates:
Two-year term

The Nominating Committee wants to consider all interested candidates. If you are interested in serving on the Executive Committee or would like to recommend a candidate, please send your name or the candidate's name along with a CV and at least one letter of nomination to Mark S. Vavala, Executive Director, by email at: mvavala@dsba.org or by mail at: Delaware State Bar Association, 405 North King Street, Suite 100, Wilmington, DE 19801 by February 9, 2024.

**WE NEED YOUR HELP TO FIND
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Delaware State Bar Association
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(302) 658-5279

DSBA BAR JOURNAL

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The *Bar Journal* is the independent journal
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or emailed to: rbaird@dsba.org

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OF THE DELAWARE STATE BAR ASSOCIATION

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Mentorship in the New Year

BY KATE HARMON, ESQUIRE, AND JARED HOFFMAN*

Mentorship does not need to be difficult or time-consuming. It is what both the mentor and mentee make of it. Of course, an active, long-term relationship between the two will likely serve the mentee best in the long run, and may have benefits for the mentor as well.

As we begin 2024, we each have two opportunities that Janus brings around annually: to reflect on the past and to plan for the year to come. As we look back, we see clearly what went well, and even more clearly what went wrong. With those each in mind, we can plan for the future, setting ideals for ourselves both personally and professionally.

When we look back, let us all reflect on how we came to our positions as members of the Delaware Bar. No matter our fields of practice, our clients, or our employers, every one of us needs support from other attorneys to reach our goals, and mentorship early on in an attorney's career is crucial to success. For a law student or a young attorney, law can be a stressful and confusing field, and the guiding hand of someone with more experience can make all the difference in the world.

No two mentorships are alike. For some of us, support from an older attorney came early in life. Their family members, family friends, or even their parents were members of this Bar and guided them through their journey. While no one can succeed in our profession without hard work and dedication, those of us who have had such relationships throughout their lives can appreciate the benefit they received from that long-term support. For others

of us, support came only later in their journeys. Their guiding hands came from educators, co-workers, superiors, or co-counsel. That support may have come from a professor who opened their eyes to a new practice area, a partner who took them under their wing, or a fellow attorney who took the time to teach them the ropes. As we consider the past year and the years that preceded it, we should each take some time to consider who our mentors were, and how they shaped both our practice of law specifically and our lives in general.


By the same token, as we enter the new year, let us also consider what we can each do to serve as a mentor for a young or aspiring attorney. As we resolve personally to work out more, spend more time with our families, or get our finances in order, we can resolve professionally to lend a hand to a younger fellow attorney who needs it, or give a law student the guidance they need to succeed, both in school and beyond.

Mentorship does not need to be difficult or time-consuming. It is what both the mentor and mentee make of it. Of course, an active, long-term relationship between the two will likely serve the mentee best in the long run, and may have benefits for the mentor as well. However, that does not make less-active or shorter-term mentorship ineffective or worthless. As cliché as it may sound, little things do mean a lot,

* Ms. Harmon would like to acknowledge and thank Mr. Hoffman for his extensive research relative to and assistance with drafting this column.

and the right advice at the right time can make a dramatic difference for a young attorney or law student. Likewise, while an older, more-experienced mentor may have more experience and had time to develop their practice of law, younger and junior attorneys can serve as mentors too. Because they are closer in age to their mentees, and can more clearly relate to what a young attorney can expect in the near future, the guidance of a junior associate can be just as valuable to a young attorney or law

student as the advice of a name partner or general counsel.

Though the new year is already underway, it's not too late to add serving as a mentor to your list of goals for 2024. No matter your age, your experience, your branch of law, or your employer, you can help guide the career path of a younger attorney or a law student. With that, I challenge you all to serve as a mentor this year in some capacity. Your mentee, and the Bar as a whole, will thank you both now and in the years to come. 



Kate Harmon is the President of the Delaware State Bar Association. She is a partner in the Litigation Department of Benesch Friedlander Coplan & Aronoff LLP, where she enjoys helping her clients solve puzzles and identify efficient, business-focused solutions. A native Delawarean, Kate has also served as a Co-Chair of the Bar Association's Women and the Law section, and acts as a Child Attorney through the Delaware Office of the Child Advocate. She can be reached at kharmon@beneschlaw.com.



Jared Hoffman is a law clerk at Benesch Friedlander Coplan & Aronoff LLP, and a 3L at Emory University School of Law. At Emory, he serves as Managing Editor of the *Emory Bankruptcy Developments Journal*, and previously served on the executive boards of OUTLaw and the American Constitution Society. He can be reached at Jared.Hoffman@emory.edu.

Step up to the mic!



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Thanks for the Dance

January's arrival has ushered in a new calendar year and its usual accompaniment of a look back and an aspirational plan forward. The new year affords the chance to take stock, reorganize, and reinvigorate. Thus, it provides an opportune time to bid adieu and turn the reins over to a fresh voice and perspective. After all, one of my (repeat) resolutions is to talk less and listen more.

Regarding that look back, as a newbie attorney, I heard the late Bill Hudson relate that it is often better to be lucky than good. That certainly held true when Dave Weidman asked that I take the baton and assume his position on the editorial board of what was then *"In Re."* Like many of my early opportunities, I did not have a good grasp on how fortunate I was. Appreciation often takes time. Frankly, my immediate reaction was more of concern. What on Earth would I convey to the DSBA membership that would be worth a busy lawyer's time? Fortunately, I learned a

lot of feelings are near-universal though often crowded out of our industry's writings, such as the blooming optimism of spring, the enjoyment of time outdoors and unplugged in the summer, the need to live with balance year-round, and a sports family's running dialogue of frequent frustrations punctuated by moments of scream-out-loud joy over decades. If no such spark immediately lit up a given month, like relying on precedent, I turned to inspirational thinkers and artists — those who manage to convey a lot while using very little. The musicians were plentiful in that well,¹ including an entire genre discovered courtesy of a Jeep's water-logged radio.

Thank you for your patience, particularly with those initial columns that reflect someone seeking solid footing. In particular, I cannot thank my fellow editorial board members and Publications Editor Rebecca Baird enough for the patient guiding hand throughout, joined in the later years by the advisory committee members. Rather than persuasion, the goal (at least in my view) was

to be entertaining, hopefully thought-provoking, and ideally enlightening, while providing a brief departure from the formal legal writing we consume in billable hours. Two mantras from my creative writing course in college stuck out: "Write what you know" and "Show, don't tell." Thus, for better or worse, routine readers have been privy to events from my perspective — in the profession and, more often than not, in life more broadly. The pandemic, for example, was a challenge to us as attorneys, of course, but more basically to us as Delaware denizens. Some of you joined in celebrating a most improbable Eagles championship courtesy of the back-up quarterback and, before that, the Phillies ending the Delaware Valley's quarter-century major championship drought. Hopefully I properly sowed some fertile, familiar comedic ground via a high school reunion, a moment of overthinking while trying out a new activity, and a playful, rambunctious puppy — in a house with plenty to chew. A number of you had comforting words after articles following a loss — of my grandfather, both of my grandmothers, and one of my coworkers. As a fairly private person by nature, I found the lack of disclosure-reciprocity a bit daunting, but was richly rewarded.

Come to find out, our Bar is filled with good-hearted people, many of whom will take a moment from an inevitably busy work day to express their enjoyment of a silly anecdote, funny observation, or obscure pop culture reference. I did not keep track over the years of the positive feedback, but it is

Two mantras from my creative writing course in college stuck out: "Write what you know" and "Show, don't tell." Thus, for better or worse, routine readers have been privy to events from my perspective — in the profession and, more often than not, in life more broadly.

Thank you all for taking the time with your kind comments and with your willingness to indulge one attorney's musings while on a quarterly respite.

easy for me to count the disparaging comments I received: zilch — even though I am certain some columns missed the mark. Reflecting on that brings to my mind's ear my mother's daily admonitions in my youth, spoken in a loving but firm tone: "Be nice" and "Be kind." The direction was not one of behavior avoidance; rather, the direction called for affirmative acts. It is easy to get bogged down in the minutiae, the detritus, the jab that might justify, but does not mandate, a sharp response. Thank you all for taking the time with your kind comments and with your willingness to indulge one attorney's musings while on a quarterly respite. I know you will show the same generosity and hospitality to my successor. I am truly excited to see where others take the *Bar Journal*. 🧘

Notes:

1. Bruce Springsteen, true to his word in "Land of Hopes and Dreams," was a good companion for this part of the ride. More attune with today, though, is Hafiz: "How did the rose ever open its heart and give this world all its beauty? It felt the encouragement of light against its being, otherwise, we all remain too frightened."

Bar Journal Editor **Seth L. Thompson** joined Parkowski, Guerke & Swayze in July 2019, and he works predominantly in the firm's Wilmington office. His practice focuses on civil litigation, family law, and municipal law. For six years, he also served as a Legislative attorney for the Delaware House of Representatives. He has served on the Board of Professional Responsibility, the Board of Bar Examiners, and the Executive Committee for the Terry-Carey American Inn of Court, as well as serving as the Sussex County Bar Association President. He may be reached at sthompson@pgslegal.com.

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2024



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MEMBER BENEFIT OF THE MONTH

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TOP 5

FIVE FASCINATING FACTS ABOUT DR. MARTIN LUTHER KING, JR.'S "I HAVE A DREAM" SPEECH

The speech was delivered to an estimated 250,000 people who came to Washington, D.C., on August 28, 1963 to march for civil rights.

1 The official event was called the "March on Washington for Jobs and Freedom." On June 11, 1963, President John F. Kennedy made a nationally televised address calling for a drive for more civil rights. That same night, NAACP leader Medgar Evers was murdered in Mississippi. Kennedy met with civil rights leaders such as King, Roy Wilkins, Whitney Young, and student leader John Lewis about a proposed march and signaled his approval publicly in July when he was assured it would be a peaceful event.

2 The March was not universally supported by activists. Prominent objectors included Malcolm X and Strom Thurmond. The organizers didn't agree on all the issues, either, but they did agree that people should march together at the event.



3 Almost no one could clearly hear King's speech. An expensive sound system was installed for the event, but it was sabotaged right before it. Attorney General Robert Kennedy enlisted the Army Corps of Engineers to fix the system.

4 There were 10 speakers on the official program. All of them were men. Rabbi Joachim Prinz spoke right before King. There were no speakers after King, as organizers led the audience in a pledge and gave a benediction.

5 King almost didn't give the "I Have a Dream" portion of the speech. Singer Mahalia Jackson urged King to tell the audience "about the dream," and King went into an improvised section of the speech.



Source: <https://constitutioncenter.org/blog/10-fascinating-facts-about-the-i-have-a-dream-speech>

Condolences to the family of **Brenda J. James-Roberts, Esquire**, who died on October 18, 2023.

Condolences to the family of **Robert L. Halbrook, Esquire**, who died on November 9, 2023.

Condolences to **Lawrence S. Drexler, Esquire**, on the death of his father, David Alan Drexler, who died on November 26, 2023.

Condolences to **Jennifer M. Smolko, Esquire**, on the death of her father, Henry Alexander Wise III, who died on December 19, 2023.

Condolences to **William D. Sullivan, Esquire**, on the death of his mother, Martha Connelly Sullivan, who died on December 25, 2023.

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

MEMBER NEWS

DAGSBORO – The town has a new mayor. William B. Chandler III, a member of the council since winning election in 2014, was selected mayor during the town's December 18



reorganizational meeting. A former state Chancellor, Mr. Chandler succeeds current Councilman Brian Baull, who served as mayor for the past eight years. Councilman Norwood Truitt, who has served on the council since 2014, was selected to serve as the vice mayor during the reorganization.

Winners in the December 2 municipal election were Mr. Baull, who was first elected in 2013, and council newcomers Carol Thompson and Jason Russell. They were the top three vote-getters in the five-person election that included incumbents Theresa Ulrich and William Labor.

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*Certified Practice Monitor

CALENDAR OF EVENTS

January 2024

Wednesday, January 17, 2024 • 12:30 p.m. – 2:00 p.m.

Commercial Law 2024

1.5 hours of CLE credit

Live Seminar at DSBA and Live Webcast to Sussex Counties

Thursday, January 25, 2024 • 12:00 p.m. – 1:00 p.m.

Behind the Cool Image: Coping with Loss and Navigating the Pathways of Grief

1.0 hour of CLE credit in Enhanced Ethics

Live Seminar at DSBA

February 2024

Friday, February 9, 2024 • 12:00 p.m. – 1:30 p.m.

Tackling Access and Inclusivity: DE Bench and Bar Strategic Plan Update 2024

1.5 hours of CLE credit in Enhanced Ethics

Live Seminar at DSBA with Zoom Option

Friday, February 9, 2024 • 8:30 p.m. – 12:45 p.m.

The 29th Annual Rubenstein-Walsh Seminar on Ethics and Professionalism

4.0 hours of CLE credit in Enhanced Ethics

Live Seminar at Hyatt/Riverfront Events, Wilmington, DE

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.



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SECTION & COMMITTEE MEETINGS

January 2024

Tuesday, January 9, 2024 • 12:00 p.m.

Litigation Section Meeting

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

Tuesday, January 9, 2024 • 12:00 p.m.

Environmental Law Section Meeting

Fox Rothschild, 919 N. Market Street, Suite 300, Wilmington, DE 19801 and Zoom Meeting, see Section listserv message for link and password

Thursday, January 11, 2024 • 12:00 p.m.

LGBTQ+ Section Meeting

Eckert Seamans Cherin & Mellott, LLC, 222 Delaware Ave., Ste. 700, Wilmington, DE 19801 and Zoom Meeting, see Section listserv message for link and password

Thursday, January 18, 2024 • 12:00 p.m.

Executive Committee Meeting

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

Thursday, January 18, 2024 • 4:00 p.m.

Elder Law Section Meeting

Sergovic Carmean Weidman McCartney & Owens, P.A. / Video Conference

Friday, January 19, 2024 • 1:00 p.m.

Workers' Compensation Section Meeting

Zoom Meeting, see Section listserv message for link and password

February 2024

Wednesday, February 7, 2024 • 12:30 p.m.

Women & the Law Section Meeting

Delaware State Bar Association, 405 North King Street, Suite 100, Wilmington, DE and Zoom Meeting, see Section listserv message for link and password

Tuesday, February 13, 2024 • 12:00 p.m.

E-Discovery Section Meeting

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

Tuesday, February 13, 2024 • 12:00 p.m.

Litigation Section Meeting

Delaware State Bar Association, 405 North King Street, Suite 100, Wilmington, DE and Zoom Meeting, see Section listserv message for link and password

Thursday, February 15, 2024 • 12:00 p.m.

Executive Committee Meeting

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

Thursday, February 15, 2024 • 4:00 p.m.

Elder Law Section Meeting

Sergovic Carmean Weidman McCartney & Owens, P.A. / Video Conference

Friday, February 16, 2024 • 1:00 p.m.

Workers' Compensation 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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Cybersecurity

THREATS, RESPONSE, AND SOLUTIONS

BY JOSEPH LEONARD, ESQUIRE

Cyber-attacks become more common with each passing year, and the increased number of attacks means more protected data is vulnerable to data breach. As more and more business has moved online in the twenty-first century, criminals have shifted their activity online as well. Companies must respond to safeguard not only their own data but also the data of their clients and customers.

While it is difficult to determine the exact number of cyberattacks in a given year, the FBI Internet Crime Complaint Center reported over 800,000 incidents in 2022, collectively resulting in a loss of over 10 billion dollars.¹ This number is certainly underinclusive because not all incidents are reported to authorities. Whenever an entity experiences a data breach or ransomware attack, they should alert their local FBI field office to report the incident.

Federal and state rules include requirements regarding notice to authorities, the public and, when such incidents result in the exposure of protected personal information, to the specific individuals affected. These regulations continue to expand. In 2024, the Securities and Exchange Commission will mandate that publicly traded companies notify the SEC of material cybersecurity

incidents.² Additionally, revised Federal Trade Commission rules, originally applicable to banking institutions, now extend to include non-banking financial entities such as mortgage companies, accountants, and car dealerships. The revised rule stipulates breach notification to the FTC.³

Key components of a successful cybersecurity program are prevention and response. To mitigate the threat of data breaches, companies should employ a multifaceted approach to bolster their cybersecurity defense. A comprehensive risk analysis will achieve dual goals of identifying and evaluating potential vulnerabilities, while also assessing the sensitivity of data on the system.

The human element is critical to cybersecurity prevention and response. Phishing attacks and identity spoofing (creating the appearance that a communication is sent from a trusted party) are commonly used tools by hackers that succeed when the target makes a poor decision. In the past, phishing attempts might be flagged by the presence of spelling errors, typos, or stilted phrasing, but hackers can now use generative artificial intelligence programs to draft very realistic phishing emails. To the extent that these attacks are reliant on human decisions, employee education programs are critical to facilitate

a company's secure navigation of the online environment. Ongoing training in cybersecurity best practices ("don't click that link!"), and education around phishing, social engineering attacks, and multifactor authentication provide a key layer of protection from ongoing breach attempts.

On the technology side of the prevention equation, regular software updates and patching are critical, and companies should monitor network activity and regularly review activity logs for signs of unusual behavior. While cybersecurity is best understood as "everyone's job" and not the discrete responsibility of an IT department, a robust incident response plan with clearly defined roles and responsibilities allows for a swift and coordinated breach response. Security audits and third party assessments are particularly helpful to identify potential weaknesses. File encryption should also be considered for both active and stored data. Current regulations already require encryption of certain classes of protected data, and it's possible that full encryption will eventually become the standard, if security breaches and cyberattacks continue to rise.

No matter how rigorous the prevention program, data breach is always a possibility. Therefore, breach response is



just as important as breach prevention. Although many attacks involve ransomware, which extorts a ransom by holding data hostage, others may result primarily in data breaches and exposure. In these situations, companies may be required to notify individuals whose personal data was affected in the breach. Entities operating in the financial and healthcare sectors are undoubtedly familiar with regulations requiring them to notify customers whose data is exposed in a cyberattack or data breach. Additionally, state law governs notice requirements to individuals whose data is included in a breach. In Delaware, Del. Code Ann. Tit. 6 § 12B-101 requires any entity which conducts business in Delaware to provide notice of breach to Delaware residents whose personal data has been exposed, if it is likely that those individuals may be harmed by the breach.⁴

Personal information is defined to include identification numbers, account numbers with passwords, usernames or security questions, medical history,

health insurance information, passport numbers, and biometric data.⁵

Cyber-attacks pose numerous challenges, the first of which is that such attacks may go undetected for an extended period. To mitigate this risk, companies should monitor their systems and conduct regular audits. Once detected, another challenge arises in determining which data was exposed in the breach. Depending on company information governance practices, it may not be immediately clear where protected data exists on the system. This necessitates a thorough search and analysis of large data sets to identify specific material.

Understandably, companies want to be sure that personal data was exposed before alerting individual customers of a data breach. Despite the increasing prevalence of such attacks, the mere fact of an attack can undermine customer confidence. Therefore, correctly identifying the scope of personal data affected by the breach is critical step in the response plan.

There are now many useful tools developed in the eDiscovery context which can be applied to evaluating cybersecurity breach. Modern data practices mean that implicated volumes can be quite large, and legal notice requirements may impose a tight window for review and evaluation of affected data.

eDiscovery practices such as application of search terms, analytic tools, and machine learning can be employed to great effect to reduce the overall boundary of data requiring review. Attorneys with little experience in this area can partner with technology vendors which provide cybersecurity response services.

Companies should remain informed about the latest cybersecurity threats and trends, and consider collaboration with cybersecurity professionals or consultants. Compliance with data protection regulations is non-negotiable and requires a thorough understanding of and adherence to applicable law. In adopting and continuously refining these measures, companies can significantly reduce the risk of successful data breaches and strengthen their overall cybersecurity posture. ⚖️

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Joe Leonard is an attorney at Morris James, LLP in Wilmington, with over ten years of experience in the field of eDiscovery.

He has practiced in Pennsylvania and New Jersey, and was recently admitted to the Delaware Bar in 2022. He can be reached at jleonard@morrisjames.com.



User Beware

Continued Concerns About Attorney Use of AI

The September column of “Ethically Speaking,” entitled “Intelligent Use of AI,” detailed the first case of attorney discipline for the use and misuse of ChatGPT, an Artificial Intelligence resource to generate legal pleadings. As previously noted, a New York federal judge sanctioned lawyers who submitted a legal brief created by ChatGPT which included citations to non-existent court cases including fake quotes. As those attorneys later realized, even the creators of that program admit that ChatGPT has a tendency to hallucinate content.

That column also noted that other jurisdictions were quick to follow with standing orders regulating the use of AI to generate pleadings. The United States District Court for the Eastern District of Pennsylvania issued a standing order requiring disclosure that AI had been used “in any way” in the preparation of the filing and certification and that all citations to the law and record have been verified as accurate. The United States Court of International Trade and a federal trial court judge in the Northern District of Texas followed suit.

Since the last column a Colorado attorney was disciplined for misuse of ChatGPT. Zachariah C. Crabill was suspended for using sham case law in a pleading generated by that program. His misconduct was compounded by an initial attempt to blame an intern for his failure to confirm the citations he himself described as “garbage” in an email to his paralegal. Mr. Crabill received a two-year suspension. That suspension will be suspended after 90 days for a period of probation.

The 5th Circuit is considering a requirement of an affirmative statement that pleadings were not generated by AI with a further pledge that if they were, that they were reviewed by humans for accuracy. The proposed court rule has

been submitted for public comment which closed on January 4, 2024. It is widely expected that other judges and courts will follow with similar standing orders containing the same disclosure and confirmation requirements.

Even Michael Cohen, Donald Trump's former attorney and fixer, recently admitted he used Google Bard to produce non-existent case law which he provided to his attorney. That attorney, David Schwartz, then used those citations without checking them in a motion filed on Cohen's behalf. This information is reported to have come to light after Judge Furman of the U.S. District Court for the Southern District of New York advised in a December 12, 2023, Order that he could not locate any of the three decisions cited by Schwartz.

Schwartz was ordered to provide copies of the cases. If he could not, he was ordered to provide a "thorough explanation of how the motion came to cite cases that do not exist and what role, if any, that Cohen played in drafting or reviewing the motion before it was filed." Schwartz was also ordered to show cause why he should not be sanctioned for citing the non-existent cases.

To date, attorneys who have been disciplined for misusing AI were also found to have been less than candid with the court when confronted. This will likely change as the issues and risks of using Chat GPT become more widely known and court rules and standing orders governing the use of AI become more widespread. We are likely to see attorneys disciplined for misuse of AI on its merits even without the attendant candor issues involved in failing to acknowledge that misuse when confronted.

The previous "Ethically Speaking" on this topic noted the possible application of Rule 1.1 Duty of Competence, including Comment [8] which requires

that a lawyer keep abreast of changes in the law and its practice, including the risks and the benefits associated with relevant technology; Rule 4.1 and the Lawyers Duty of Truthfulness in Statements to Others as well as Rules 5.1 and 5.2 governing the Responsibility of Lawyers in Supervisory and Subordinate Positions and the lawyer's responsibilities regarding the Supervision of Assistants by Non-Lawyers.

Adding to that list of potential liabilities, lawyers misusing AI in jurisdictions, even where such use is neither prohibited nor regulated, may also face scrutiny under Rule 5.5 as a result of assisting in the Unauthorized Practice of Law by the AI program itself. Rule 1.6 is also implicated where attorneys responding to the ChatGPT or similar prompts provide confidential client information to the program in order to direct the program's response to the inquiry. Finally, the Rule 3.3(a)(2) Duty of Candor may also apply. That Rule requires attorneys to disclose legal authority which is directly adverse to the position of the client. Would you trust your AI program to do that and how would you know if it didn't if you didn't confirm the research?

It is important to understand that ChatGPT and its kin are essentially word processing programs and not yet a legal research tool. In response to the users' prompts, it will cut and paste information scoured from the Internet. That process is not yet sophisticated enough to deal with the nuances of the users' professional responsibility obligations or other concerns, such as plagiarism or copyright infringement. Until that point is reached, User Beware.


If you choose to use AI as part of your practice, especially in the preparation of pleadings, there are steps that you can take now:

- Choose the right AI program. Be wary of free services and those not specifically targeted to the legal profession.
- Know the rules of the judge, court, or jurisdiction in which the AI generated product will be used. Don't use if prohibited. Disclose use of AI when required. If permitted, follow all court directives governing such use.
- Confirm everything that the program reports to tell you. Every citation to the record, all case law, Rule and Statute cited and any other facts produced by the AI must be confirmed. But also ensure that the AI didn't omit unfavorable case law which you need to disclose or which should be distinguished.
- Be candid and transparent with both the court and the client about your use of AI as part of your practice.

Continued vigilance will be required to monitor both the development of the AI itself as well as the professions' response to the use of these programs.

Happy New Year!

"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. 

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Navigating THE PATHWAYS OF GRIEF

*"You care so much you feel as though you will
bleed to death with the pain of it."*

- J.K. Rowling
Harry Potter and the Order of the Phoenix

Grief is a human reaction to loss or the threat of failure. Sigmund Freud wrote that "we not only mourn for the loss of tangible bonds, such as the loss of people, but we also grieve for the loss of such intangibles as self-image, dreams, and health. (Freud, 1917) Moreover, we begin to grieve as soon as there is a hint that a bond is threatened.

What Is Grief?

Grief is how we feel when we lose a person, place, and/or thing. It involves mixed emotions: sorrow, anger, shock, fear, distress, etc. Grief is not a disease. Instead, grief is a process — dealing with the emotions that are a direct result of experiencing a loss.

This process is universally recognized across all cultures. Furthermore, although grief usually occurs when the loss involves a death, the grief model may also be applied to other situations, including the breakup of a relationship or divorce, loss of job, or loss of license to practice law, and/or coming to terms with the loss of health through an illness or a disability.

Unfortunately, we cannot know how a particular loss will feel until that loss occurs. One of our first reactions, however, is to shut down. In other words, we react to our loss with shock, numbness, and disbelief. Fortunately, this reaction cushions us from overwhelming feelings during the first hours or even weeks of the loss. How long it takes an individual to come

out of their numbness to the loss depends on the particular circumstances surrounding it.

At some point, however, the individual realizes that the loss is real. As the numbness wears off, they begin to recognize what the casualty will mean. This explains why many individuals feel worse after a few months have gone by and the reality of this loss starts to sink in. Generally, the most difficult grieving begins here because the support we receive immediately after the loss has tapered off. Grief will not diminish until we travel through it by experiencing it fully.

Therapists use different models — some suggest four stages to grief, while others suggest five stages. Here are the major stages:

1. STAGE ONE: Shock/Denial

The reality of the loss often takes time to sink in. One of the first reactions is denial, wherein the individual imagines a false, preferable reality. Similarly, your initial reactions may vary from numbness, denial, disbelief, and hysteria to not thinking straight. These all-natural emotions cushion us against the loss and allow us to experience it more slowly and cope better.

2. STAGE TWO: Protest/Anger

At this stage, it is normal to protest that loss cannot be real, even though you are being confronted with the evidence that it is. When individuals recognize that denial cannot continue, they

may become frustrated. As one struggles between denying and eventually accepting the reality of what has happened, the individual experiences waves of strong and powerful feelings such as anger, guilt, sadness, fear, yearning, and searching. Certain psychological responses of a person undergoing this phase would be: “Why me? It’s not fair!”; “How can this happen to me?”; and “Why would God let this happen?”

3. STAGE THREE: Bargaining

With bargaining, there is a sense that we want life back to the way it used to be. Usually, the negotiation (bargaining) for an extended life is made with a higher power in exchange for a reformed lifestyle. Other times, one may use anything valuable against another human agency to extend or prolong the life. People facing less serious trauma can bargain or seek compromise.

4. STAGE FOUR: Depression

Eventually, grief will enter on a deeper level, bringing intense feelings of emptiness and sadness. One may feel like they do not care about much of anything and wish life would hurry up and pass on by. Getting out of bed can be a considerable burden. Exhaustion and apathy can set in, and we may wonder about the point of life itself.

5. STAGE FIVE: Acceptance

“It’s going to be okay.” “I can’t fight it; I may as well prepare for it.” In this last stage, individuals embrace mortality or an inevitable future; the loss of a loved one; or another tragic event. People dying may precede the survivors in this state, which typically comes with a clear, retrospective view for the individual and a stable condition of emotions.

What Is the Correct Way to Cope with Grief?

There is no right or wrong way to grieve — only your unique path. Whatever one’s gender, culture, or perspective, your way of coping with the emotions resulting from the loss may be positive or negative. Grieving is like a roller coaster — one day, you may feel up, the next down. Therefore, it is important to come to terms with your grief:


1. Accept loss
2. Feel the pain
3. Talk about it
4. Take one day at a time
5. Take care of yourself
6. Adapt to change
7. Let go

SIDEBAR

POSITIVE TOOLS FOR COPING WITH A LOSS

- Allow yourself time to grieve.
- Accept that you will have bad days and good days
- Don’t let others tell you how you should feel or just get over it. Grief is different for everyone.
- Use a support system. Let family, friends, and co-workers help you. Tell them what you need — it is okay.
- Do positive things that bring you comfort.
- Move a muscle — change a mood.
- Let your feelings out: talk, cry, pray, write.
- Try not to get caught up in your thinking.
- Don’t play the “if only” or “I wish I had” game.
- Grow in a positive direction and volunteer.
- Seek professional grief counseling.
- Eat healthily.
- Limit the use of alcohol, caffeine, sugar, and tobacco.
- Get rest.

Sadly, we must remember, in life — loss is inevitable. It is up to us to use positive coping skills to deal with the change that arises from a loss. Going through the above stages and using most of the above tools allow hope to break through the dark waves in the normally calm seas. Slowly new life incorporates both the loss and the change and has the strength to go on.

Join us in January for “Behind the Cool Image: Coping with Loss. Navigating the Pathways of Grief,” as well as our new monthly online, “Navigating the Pathways of Grief” workshop and support group, facilitated by Alice O’Brien, LPCMH. Remember too, if you, or someone you know, would like additional information on this topic or help, call The Delaware Lawyers Assistance Program (DE-LAP) at (302) 777-0124 or email cwaldhauser@de-lap.org. 

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The Fight for Equity in Delaware Sports Continues 50 years After Title IX

Title IX Roadmap Drafted to Strengthen Protections in Delaware

BY KATIE PREVOST, ESQUIRE, ACLU-DE STAFF ATTORNEY
AND MARIA FERNANDA ALMANZA-MORALES

Title IX was passed 50 years ago, but our journey to realize its goals continues. Prior to 1972, 3.6 million boys participated in high school sports, but only around 300,000 girls participated.¹ Fortunately, since the passage of Title IX, participation by girls in high school sports has increased by over three million.² The ACLU of Delaware is committed to continuing the fight for the advancement of women in athletics, as one pillar in the larger battle for gender equity.

In recognition of the 50th anniversary of the enactment of Title IX, interested parties in Delaware³ and throughout the country⁴ are investigating whether athletic programs are complying with the law's requirement that, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance..."⁵

To comply with Title IX, Delaware schools that receive federal funding must provide female athletic programs equal opportunity regarding: publicity, scheduling of games and practice times, equipment and supplies, coaching, locker rooms, practice and competitive facilities, access to tutoring, travel and daily per diem allowances, recruitment, medical and training facilities and services, housing and dining facilities and services, and support services.⁶

The ACLU of Delaware, in conjunction with the University of Delaware Department of Women & Gender Studies, recently examined whether high school girls' athletic programs in the State of Delaware are receiving equal opportunities in compliance with Title IX. Current and former high school student-athletes were interviewed and had the option to fill out a confidential questionnaire about their experiences in high school regarding publicity, scheduling of game

The ACLU of Delaware, in conjunction with the University of Delaware Department of Women & Gender Studies, recently examined whether high school girls' athletic programs in the State of Delaware are receiving equal opportunities in compliance with Title IX.

times, coverage of games, and access to college scouts. The results suggest that boys' athletic programs continue to receive more benefits and opportunities than girls' athletic programs.

For example, the research identified a boys' high school football program which receives a disproportionately high amount of publicity. One football player revealed that he routinely enjoyed the privileges of being recognized at school rallies and having packed crowds during prime-time games with the band, cheer, and/or dance teams performing. He also admitted having easier access to college scholarships because the majority of his high school games were recorded and his high school coaches helped him make highlight reels and connect him to college scouts. The findings were similar for boys' basketball teams. Our research found high school boys' games in general are more frequently advertised on school websites, posters, YouTube, National Federation of High Schools Network, daily announcements, and Instagram.

Soccer players reported that girls' games were often scheduled during school hours or immediately after school, making it difficult for working parents or any fans to attend. A female soccer player, when interviewed, disclosed that her games were not routinely announced on the daily announcements, were not regularly recorded, and she had to make her own highlight reel to try and get noticed by colleges. She revealed that the cheerleading team hardly ever

performed at any of her games, even at the rarely scheduled prime-time games, nor when they qualified for tournament finals. Worse, the female student-athletes interviewed repeatedly stated they did not know where to go for help remedying these inequities. This must change.

Fortunately, the Delaware Department of Education (DDOE) and the Delaware Office of Women's Advancement and Advocacy (OWAA) have spent the last several months developing a plan to strengthen Title IX in the State of Delaware.⁷ The plan strives to:

- 1. Increase public awareness** with the inclusion of Title IX information and resources on the website of the Delaware Department of Education with encouragement for schools and districts to do the same. Easily accessible information allows for students and families to know their rights under Title IX and keeps the process for remedying issues clear. To maintain this clarity, the DDOE will add information related to Title IX, including the names and contact info for each [charter school and] school district's Title IX Coordinator, to the DDOE website. DDOE also will make a recommendation to school districts that they include Title IX information on their websites in a place easily accessible by students and parents.

- 2. Increase Title IX training.** A state effort to provide timely, regular, Title IX training for all relevant staff can help schools, athletic directors, administrators, and others, such as the DIAA [Delaware Interscholastic Athletic Association which is part of the DDOE] with the necessary guidance to comply with Title IX and promote gender equity.

- 3. Increase data collection and reporting** to provide transparency on Title IX compliance. The Delaware Department of Education, in conjunction with the Delaware Office of Women's Advancement and Advocacy, will collaborate with Delaware public school districts and charters to consider a survey related to Title IX compliance. Such a survey would be completed by every public school providing middle and/or interscholastic athletic opportunities in Delaware.⁸

Additionally, in February 2023, the U.S Department of Education Office for Civil Rights (OCR) published a Resource for Students, Parents, Coaches, Athletic Directors, and School Communities which explains the rights that K-12 students have to participate in interscholastic, intramural, or club athletic programs free from discrimination based on sex and to help these parties evaluate whether their school's athletic program is providing equal opportunity consistent with Title IX.⁹ OCR explains, for example, that schools must provide equivalent coverage for boys' and girls' teams and athletes on its website, social media sites, and any other publicity.¹⁰ The OCR also states that cheerleaders, pep bands, and drill teams must be provided equivalently for girls' and boys' teams.¹¹

CONTINUED >

2024

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The Delaware Legal Directory is the only comprehensive up-to-date listing of all Delaware attorneys and judges with contact information for the Delaware Court System, Firm Administrators, and related offices frequently contacted by legal professionals.

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CREATING SPACE

CONTINUED >

Even where there are patterns of discrimination, connecting with plaintiffs is key to establishing standing and allowing us to drive the case home.

Additionally, OCR guidance makes clear that boys' and girls' teams must both have a reasonable opportunity to compete before an audience — including the balanced scheduling of games on Friday nights versus weekend mornings.¹²

The edict is clear: state officials, administrators, athletic directors, and the entire school community must rethink the norms of sports in Delaware. No longer should "Friday Night Lights" be synonymous with boys' football games. There is no reason why a high school girls' game in any sport cannot be publicized and held during prime time with the band, cheerleaders, and dance squad all performing. Title IX demands as much. Pinpointing the crux of the matter, one legal scholar stated, "Opponents of such an interpretation may argue that men's sports have a larger following, with higher rates of viewership, and thus generate more revenue. But the preference for men's sports derives from the history of inequality in women's and men's athletics."¹³

ACLU-DE is poised and ready for action. Casey Danoff, a Penn Legal Fellow, recently joined the ACLU-DE team, with a focus on advocating for gender justice in Delaware. As a part of her work, she has taken on Title IX monitoring to ensure that schools are upholding their legal responsibilities to provide equal opportunities for their students on the basis of sex. Amidst the new and supportive legal backdrop bolstering Title IX, the ACLU is prepared to take on future cases that help further secure the objectives of Title IX in Delaware.

We greatly encourage those in the legal community to reach out or direct

others to us who may have Title IX concerns. Even where there are patterns of discrimination, connecting with plaintiffs is key to establishing standing and allowing us to drive the case home. No violation is too small to get in touch with us — the law is the law. No one should sit quietly and allow 50 more years to go by before these wrongs get righted. The ACLU of Delaware will continue to fight to end discrimination on the basis of sex and to ensure the State of Delaware's plan to strengthen its female athletic programs happens without delay. ⚖️

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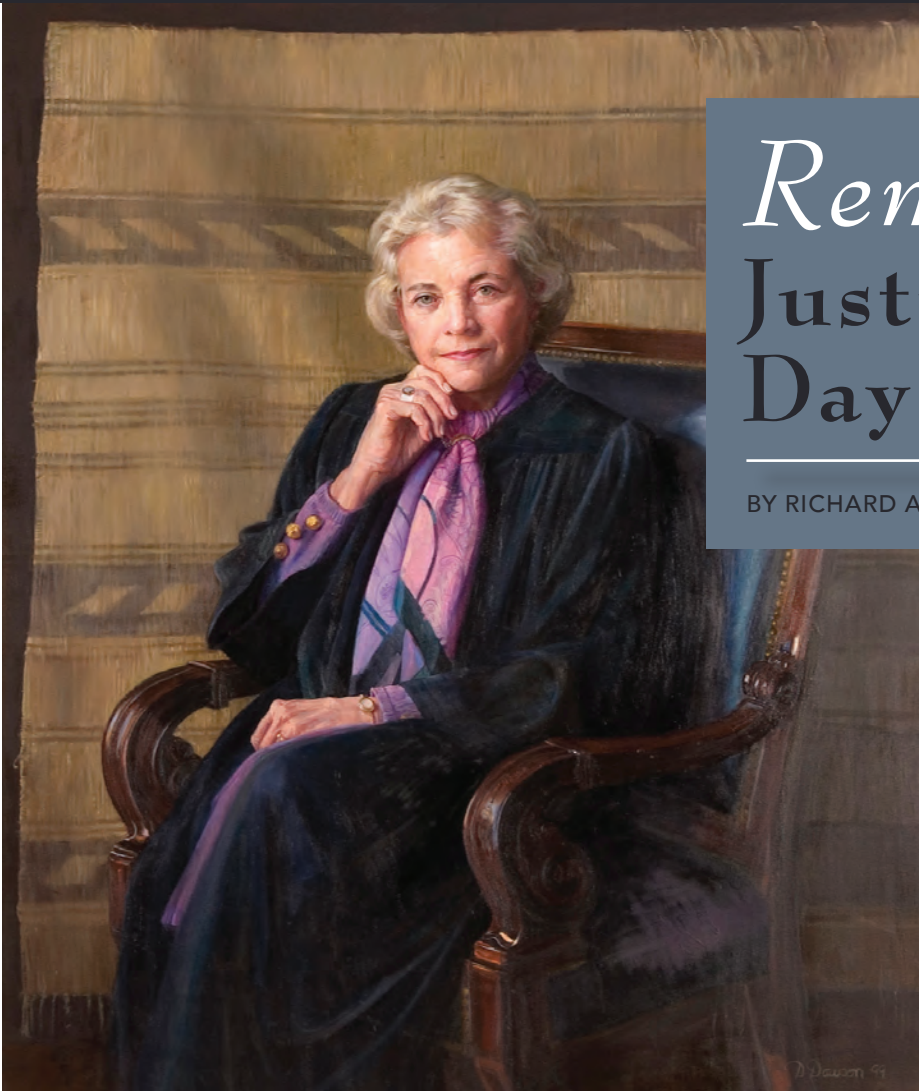
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Remembering Justice Sandra Day O'Connor

BY RICHARD A. FORSTEN, ESQUIRE



Portrait of Justice Sandra Day O'Connor by Danni Dawson, 1999.
Collection of the Supreme Court of the United States

Justice Sandra Day O'Connor passed away this last December. The first woman Supreme Court Justice (O'Connor was a trailblazer her entire life), she was also the last Justice to hold elective office before ascending to the Court (she was the majority leader of the Arizona State Senate).

Although perhaps overshadowed by Justice Ruth Bader Ginsburg in more recent years, O'Connor helped Ginsburg in Ginsburg's early years on the Court, and, in an interview, Ginsburg praised O'Connor for that help:

At the end of the October 1993 sitting, I anxiously awaited my first opinion assignment, expecting — in keeping with tradition — that the brand-new justice would be slated for an uncontroversial, unanimous opinion. When the list came around, I was dismayed. The chief justice gave me an intricate, not at all easy, ERISA case, on which the court had divided 6-3. (ERISA is the acronym for the Employee Retirement Income Security Act, candidate for the most inscrutable legislation Congress ever passed.) I sought Justice O'Connor's advice. It was simple.

"Just do it," she said, "and, if you can, circulate your draft opinion before he makes the next set of assignments. Otherwise, you will risk receiving another

tedious case." That advice typifies Justice O'Connor's approach to all things. Waste no time on anger, regret, or resentment, just get the job done.

Justice O'Connor was a dissenter in that case. As I read the Bench announcement summarizing the court's decision, she gave an attendant a note for me. It read: "This is your first opinion for the Court, it is a fine one, I look forward to many more." (Remembering how good that note made me feel, I sent similar notes to Justices Sonia Sotomayor and Elena Kagan when they announced their first opinions for the court.)

For those looking to remember (or to discover) Justice O'Connor, here are two excellent books:

First, Sandra Day O'Connor, by Evan Thomas (Random House, 2019) — a superb biography that covers both her personal life and judicial career. The book runs from the Justice's early childhood through her time at Stanford Law School (famously, no law firm in San Francisco would hire a woman as an attorney and so she and her husband ultimately moved to Arizona). In Arizona, O'Connor became Assistant State

NOMINATIONS SOUGHT FOR LAW DAY AWARDS

Attorney General, before becoming a State Senator. From the State Senate, she was elected a Superior Court Judge and then appointed to the Arizona Court of Appeals. O'Connor was there when President Reagan nominated her for the Supreme Court, and the rest, as they say, is history. Twenty-five years later, she left the Bench to care for her husband (who was diagnosed with Alzheimer's). Later, the Justice herself would be diagnosed with Alzheimer's, and she retired from public life. Thomas's book paints a very human portrait, but also takes the time to analyze and explore O'Connor's judicial philosophy and legacy.

Lazy B: Growing Up on a Cattle Ranch in the American Southwest, by Sandra Day O'Connor and H. Alan Day (Random House, 2002) — this is the Justice O'Connor's own story of growing up on the 200,000-acre Lazy B Ranch in Arizona and New Mexico, and the self-reliance, grit, and determination that upbringing forged. It is very well-written and describes a childhood like no other. Reading this book you understood just how O'Connor was able to succeed in an era where women were treated so very differently than they are today.

When asked her secret to developing strong, decades-long working relationships with peers, Justice O'Connor replied, "Treat people well. Don't mislead them. Don't be prickly. Don't say things that are aggravating. Try to be as agreeable as you can be. Try to be helpful rather than harmful. Try to cooperate." Words to live by. 🏴‍☠️



Richard "Shark" Forsten is a Partner with Saul Ewing 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.

The Delaware State Bar Association and the Awards Committee are seeking nominations for the Liberty Bell Award, the Community Service Award, and the Myrna L. Rubenstein Professional Support Recognition Award to be presented at the 2024 Law Day Luncheon in May 2024. Below are the criteria for these awards.

LIBERTY BELL AWARD

The Liberty Bell Award is given annually to an individual, who is not a judge or lawyer, who has rendered outstanding service to his or her community. The award is designed to promote a better understanding of government, a greater respect for the rule of law or a deeper sense of individual responsibility which contribute to the effective functioning of our governmental institutions.

COMMUNITY SERVICE AWARD

The Community Service Award recognizes annually a member of the judiciary or the Delaware Bar who has rendered meaningful service to the community and who has contributed significant time and effort to the greater Delaware community. Nominees should have demonstrated a commitment to leadership and service in activities that enrich and strengthen our community over a substantial period of time.

MYRNA L. RUBENSTEIN PROFESSIONAL SUPPORT RECOGNITION AWARD

This Award recognizes long and dedicated service to the Bench and Bar of the State of Delaware, to the Bar Association, and to the Members thereof, which has contributed in a significant way to them and to the high ideals of the legal profession.

Nominations should be submitted to Mark S. Vavala, Executive Director, DSBA at mvavala@dsba.org. **EXTENDED DEADLINE:** The new deadline for nominations is February 29, 2024. Please include: The name, firm, and title/occupation of the Candidate; name and contact information (firm, address, email, phone, and fax) of the individual nominating the Candidate; and a brief statement of the reasons the Candidate is deserving of the Award.

2023 Awards Luncheon

Tuesday, December 5, 2023 | Riverfront Events, Wilmington, DE

The Annual Awards Luncheon was held at Riverfront Events in Wilmington, Delaware on December 5, 2023 where over 100 DSBA members and guests celebrated the presentation of the awards. Congratulations to all the award recipients! 🏆



1. DSBA President Kate Harmon, Esquire, welcoming guests to the event. **2.** Attendees at the 2023 Awards Luncheon. **3.** Young Lawyers Distinguished Service Award recipient Alanna R. Farber, Esquire, of Office of Defense Services (L) with presenter Dawn M. Williams, Esquire (R). **4.** Women's Leadership Award recipient The Honorable Kathleen M. Miller of the Superior Court of the State of Delaware (R) with presenter Julie M. O'Dell, Esquire (L). **5.** Government Service Award recipient Tanisha L. Merced, Esquire, of Delaware Department of Insurance (L) with presenter Aaron R. Goldstein, Esquire (R). **6.** Distinguished Mentoring Award presenter Lisa Marie Zwally, Esquire, of Greenberg Traurig, LLP who accepted the award on behalf of award recipient Diane N. Ibrahim, Esquire. **7.** Outstanding Service to the Courts and Bar Award recipient Patricia Bartley Schwartz, Esquire, of the Board of Bar Examiners of the State of Delaware (R) with presenter The Honorable Andrea L. Rocanelli (L). **8.** Daniel L. Herrmann Professional Conduct Award recipient The Honorable Richard R. Cooch (R) with presenter The Honorable Henry duPont Ridgely (L).

Breakfast with Santa

Saturday, December 16, 2023 | The DSBA, Wilmington, DE

On Saturday, December 16, DSBA held its fourth annual "Breakfast with Santa." The DSBA staff transformed the upstairs conference rooms into a winter wonderland where DSBA Members and their families enjoyed a delicious breakfast, a holiday craft, and, most importantly, a chance to sit beside an authentic St. Nick. DSBA provided photos with Santa to those in attendance and everyone who attended seemed genuinely merry. Thank you to DSBA's Executive Director, Mark S. Vavala, Esquire, and our event sponsors for helping to make this event truly magical. 🎅



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Will It End Well?



Purchasing Submission: Conditions, Power, and Freedom

By Philip Hamburger
Harvard Univ. Press, 2021

Every high school civics class teaches its students about “the separation of powers” as well as federalism. The Founders, in particular, were careful to create three independent branches of government (the legislative, executive and judicial branches), each with its own sphere of duties and responsibilities. In particular, the Founders recognized the potential for tyranny if those who made the laws could also administer and adjudicate those laws. The Founders also created our system of federalism, with certain powers assigned to the federal government, and all remaining power left to the states and the people.

But, somewhere along the line, the strict separation of powers and the strict observance of federalism broke down. We now have executive agencies that appoint their own administrative judges and have those judges hear and decide enforcement matters with only limited judicial review of those decisions. We now have federal agencies affecting state and local actions even though the use of conditions to funding and grants might otherwise be outside the scope of federal authority if the agencies tried to act directly.

In *Purchasing Submission: Conditions, Power and Freedom*, Professor Philip Hamburger examines these questions of administrative legitimacy in a very thought-provoking, interesting, and highly readable way.

Years ago, after the disaster of Prohibition, the Eighteenth Amendment was repealed by the Twenty-First, and the power to regulate the sale and consumption of alcohol was left to the individual states. Nevertheless, in 1984, Congress passed a law withholding five percent of federal highway construction funds from a state which was otherwise entitled to receive such funds if the state did not raise the minimum drinking age for beer, wine, and liquor to 21. South Dakota did not, and brought a suit challenging the five percent reduction as unconstitutional. The Court, in a 7-2 opinion, upheld the condition noting that “the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution” and that grant funding was only subject to the limitation that “the exercise of the spending power must be in pursuit of ‘the general welfare.’” Justice Brennan dissented, stating: “Since States possess this constitutional power [to set the minimum drinking age], Congress cannot condition a federal grant in a manner that abridges this right.” Justice O’Connor also dissented, explaining her view that “Congress simply lacks power under the Commerce Clause to displace state regulation of this kind. . . . The immense size and power of the Government of the United States ought not obscure its fundamental character. It remains a Government of enumerated powers.” And so, despite Brennan and O’Connor’s dissents, Congress was able to establish a national minimum drinking age, notwithstanding the lack of any enumerated or fairly implied power to do so.

Many might, of course, applaud Congress’ actions with respect to the drinking age, or with respect to other conditions for other federal funds (education, housing,

If Congress can evade the limitations on its enumerated powers by simply conditioning federal funds and grants on policy objectives which a majority in Congress prefer, is the federal government still one of enumerated powers?

etc.); but, suppose Congress had passed a law withholding a portion of transportation funds to any state that legalized the recreational use of marijuana? (Note — under federal law, use of marijuana is already prohibited, but 24 states have legalized recreational use; currently, that legalization comes with no penalty, but imagine if it did). Justice Marshall famously wrote that “the power to tax is the power to destroy.” If Congress can evade the limitations on its enumerated powers by simply conditioning federal funds and grants on policy objectives which a majority in Congress prefer, is the federal government still one of enumerated powers?

Similarly, if administrative agencies are free to promulgate their own regulations, hire their own administrative law judges, and then bring enforcement actions (with substantial financial and other penalties) before the administrative law judges they hired, is there separation of powers as contemplated by the Constitution? And, if the review of administrative enforcement proceedings is limited, as most judicial review of administrative actions is, can a regulated party, or a party against whom an enforcement action is brought, be assured of procedural due process? For example, hearsay rules are typically not applied in administrative proceedings. Suppose that the only evidence for an administrative fine, or revocation of a license, depended entirely on hearsay not otherwise permissible under the Rules of Evidence — should the fine or revocation be upheld?

We teach the concepts of separation of powers and federalism presumably

because we believe them important. Yet if we are willing to forego these concepts, at least some of the time, do we really believe? Hamburger closes his book as follows:

One of the dangers, as Tocqueville observed, is that government command and largess, though designed with benevolence, can lull the people into acquiescence, leaving them enervated and no longer capable of political self-government....

In departing from the Constitution’s pathway for regulation, this system of control displaces the satisfactions of political participation and self-government. It thereby, moreover, tends to short-circuit the very mechanism that ordinarily gets the government to recognize and avoid popular discontent. And in circumventing the Constitution’s route for judicial decisions, this mode of power supplants adjudication

by independent judges — leaving Americans with a sense that they cannot get unbiased resolutions of their controversies with the government.

Not only the people but also the government are therefore ill-served by the purchase of submission. And the collision between a people with high constitutional ideals and a government that purchases its way out of representative law-making, unbiased judging, and constitutional rights is not apt to end well for anyone.

One might think the issue of “purchasing submission” has long been settled and might question the need for a book on the subject, but Hamburger’s arguments are well-presented and thought-provoking. Even if federal grants with conditions not supported by a specific federal power are permitted, should the government continue to attach such conditions? Even if agencies may employ all three governmental powers (legislative, executive, and judicial), should they? These questions are certainly worthy of further thought — if only because we do want things to end well for everyone. 🏠

Richard “Shark” Forsten is a Partner with Saul Ewing 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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Chestnuts Still Roasting



During the holiday season, I stock up on several specialty items with the hope that they last well into the New Year. A prime example is Williams Sonoma's jar of whole roasted chestnuts by Clement Faugier. These sweet, nutty delicacies are grown and harvested in Portugal, then prepared and roasted in France. In my family, chestnut season begins at Thanksgiving when we incorporate them into our cornbread and sausage stuffing. Then, throughout the winter months, chestnuts enhance the flavor and texture of dishes like sautéed Brussels sprouts and mushroom risotto.

The simplest of these chestnut dishes truly epitomizes winter for me: candied chestnuts over polenta.

My grandmother's Italian tradition was to make polenta at the first frost. She prepared what some refer to as cornmeal mush over the stove, stirring and scraping with her long wooden spoon for nearly an hour. Serving us family-style, my grandmother spooned the polenta onto a wooden board and made a well in it for the meat sauce. We dug in right off the board, using crusty bread to sop up the red sauce. For us, this was the ultimate old-school comfort food. So, in the late 80s when my grandmother spotted polenta on an upscale Italian restaurant menu, she had a good chuckle.

My recipe for candied chestnuts over polenta makes for a very simple, and rich, appetizer or side dish.

Authentic polenta from scratch requires time and attention – as I mentioned, about an hour's worth. That's why I like the convenience of Bellino's instant polenta, precooked cornmeal that comes vacuum sealed. It's ready in under 10 minutes, and I recommend following the package instructions with two exceptions. Instead of water, I use chicken stock for deeper flavor. Also, just before turning off the heat, I add several tablespoons of Parmigiana Reggiano for some sharpness and creaminess.

As both components cook rather quickly, I suggest preparing the chestnuts before you turn to the polenta. Quarter them, and for each cup add

two tablespoons of salted butter and two tablespoons of brown sugar to a nonstick saucepan over medium heat. Stir in the chestnuts with a wooden spoon. The idea is to caramelize them as you would candied sweet potatoes; but, unlike the potatoes, the jarred roasted chestnuts will only take a few minutes. So that everything is served hot, keep the chestnuts on a low simmer while you cook the polenta.

To plate, spoon the candied chestnuts and their sauce over the polenta. Garnish with a spring of thyme, and season with fresh ground pepper or red pepper flakes to taste. The candied chestnuts would also go well with a vanilla bean gelato dessert.

If you're interested in a wine pairing, I recommend a young red, such as a Barbera from Italy's Piedmont region. With low tannins and high acidity, a young Barbera has notes of red berries. This very reasonably priced red, especially compared to Nebbiolo wines from the same region, is a nice counterbalance to the nuttiness of the chestnuts and Parmigiana Reggiano.

Wishing you a Happy and Healthy New Year, filled with comforting foods. 🍷



Susan E. Poppiti is the owner of Susan Poppiti Math Tutoring LLC. Susan holds a WSET (Wine and Spirit Education Trust) Level 3 Award in Wines with Merit. You can contact Susan at spoppiti@hotmail.com and find a searchable collection of her Judicial Palate articles at www.cucinadipoppiti.com.

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SEEKING NOMINATIONS

The Delaware State Bar Association and the Awards Committee are seeking nominations for the First State Distinguished Service Award to be presented at the 2024 Bench & Bar Conference. The award is described below:

This award is given annually at the Bench & Bar Conference to a member of the Delaware Bar who, by exemplary leadership and service dedicated to the cause of good citizenship in civic and humanitarian service over a period of many years has maintained the integrity and honored recognition of the legal profession in community affairs and who, as an outstanding Delawarean, unceasingly advances the ideals of citizen participation and community accomplishment, thus reflecting high honor on both country and profession.

SUBMIT NOMINATIONS BY MARCH 4, 2024 TO:

Mark S. Vavala, Executive Director
Email: mvavala@dsba.org

Please include: The name, firm, and title/occupation of the Candidate; name and contact information (firm, address, email, phone, and fax) of the individual nominating the Candidate; and a brief statement of the reasons the Candidate is deserving of the Award.



10 DSBA EVENTS

to Put on Your Calendar in 2024

BY THE STAFF OF THE DELAWARE STATE BAR ASSOCIATION

1 DR. MARTIN LUTHER KING, JR. BREAKFAST AND STATEWIDE DAY OF SERVICE: On Monday, January 15, 2024 at 8 a.m., members of the Delaware Legal Community will gather for the Dr. Martin Luther King, Jr. Breakfast and Statewide Day of Service at the Chase Center on the Riverfront, Wilmington, DE featuring keynote speaker Desmond Meade, Best-Selling Author, Social Justice Activist, Executive Director of the Florida Rights Restoration Coalition.

2 TACKLING ACCESS AND INCLUSIVITY: DE BENCH AND BAR STRATEGIC PLAN UPDATE 2024: Chief Justice Collins J. Seitz, Jr. has declared his commitment to make the Bench and Bar reflect the diversity of the community that it serves. Come and hear a candid conversation with the Chief Justice, Nicole M. Mozee, Esquire, of Wilmington University School of Law, and Betsy Renzo, Esquire, Executive Director, Delaware Law Related Education Center about the implementation of the recommendations of the Strategic Plan to improve the diversity of the Delaware Bar.

3 THE DELAWARE STATE BAR ASSOCIATION RELOCATION TO A NEW OFFICE: At the end of February, the DSBA will be moving to 704 N. King Street in Wilmington, DE. This building, known as One Customs House, will be the new location for DSBA meetings, CLEs, events, and more. We can't wait to host you in our new space!

4 CLE SEMINAR AT THE DELAWARE CONTEMPORARY: On Wednesday, March 13, 2024, the DSBA will host an engaging CLE at The Delaware Contemporary in Wilmington Delaware. After the CLE, attendees will be able to visit the museum and view the current exhibits. More information to come soon!

5 THE ANNUAL WOMEN & THE LAW RETREAT: From Wednesday April 3, 2024 through Friday, April 5, 2024, the Women & the Law Section will host their annual retreat at Hyatt Place Dewey Beach in Dewey Beach, DE. More details on the program and how to register to follow.

6 MEMBER APPRECIATION MONTH: We can't wait to celebrate our members this May during Member Appreciation Month! This year will once again feature a Spring Festival; food trucks throughout the State; and more.

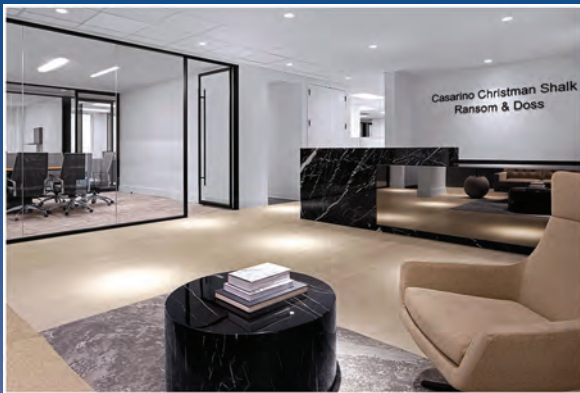
7 SMALL FIRMS AND SOLO PRACTITIONERS CONFERENCE: Last year's event at Dover Motor Speedway was a tough act to follow but we rose to the challenge and are excited to host this year's event on Friday, May 17, 2024, at Blue Rocks Stadium. Stay tuned for details!

8 BENCH AND BAR 2024: The 2024 Bench and Bar Conference will be back in Wilmington this year on Thursday, June 6, 2024, at the Chase Center on the Riverfront. You can expect engaging programming, delicious food, time to catch up with friends and colleagues, sponsors and vendors, and more.

9 DIVERSITY, EQUITY, AND INCLUSION BENEFIT EVENT: Last year, the Delaware State Bar Association held its 100th Year Gala with proceeds from the celebration being donated to the DEI Scholarship Fund. Going forward, the DSBA will be hosting an annual Gala to ensure there are necessary funds to sustain our DEI initiatives. Stay tuned for details about this September 2024 event.

10 FALL FESTIVAL: The plans are underway after a washed-out event in 2023 and we're excited to bring the friends and family of the DSBA together to celebrate fall with even more fun activities. 🍂

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