



THE JOURNAL

OF THE DELAWARE STATE BAR ASSOCIATION

THE PRACTICE OF LAW IN THE TIME OF COVID-19

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THE DELAWARE LAWYERS ASSISTANCE PROGRAM

WELLNESS WEEK

MAY 4 - 8, 2020

MONDAY 5.4

FREE WELLNESS DAY WITH ANER MARKS & YOGA

12:00 P.M. – 1:00 P.M.

Streamed live from the
Sadhana Yoga Studio via
the DSBA YouTube channel



TUESDAY 5.5

FOUR-PART SERIES: MANAGING UNCERTAINTY

TUESDAY, APRIL 28 – TUESDAY, MAY 19, 2020
12:00 P.M. – 1:00 P.M. EVERY TUESDAY

Four-Part weekly webinar with Rudhir Krishtel on resiliency and mindfulness practices for managing uncertainty — designed especially for legal professionals.

Tuesday, April 28: Part 1 - The Need for Resiliency & Basic Tools
Tuesday, May 5: Part 2 - Resiliency Tools for Staying Present
Tuesday, May 12: Part 3 - Tools for Counter-Balancing Isolation
Tuesday, May 19: Part 4 - "Turning Towards" Difficulty, Rather Than Avoiding It

WEDNESDAY 5.6

FREE LEARN TO ENGAGE AND GROW

12:00 P.M. – 1:00 P.M.

Being a lawyer is challenging. Having resilience can help us get through the difficult times and remain able to function well at home and at work. Learn the skills you need, share your own skills with others, and be part of our community.

Dr. Sarah Falgowski, MD
Rich Lombino, Esquire, LCSW
Alice R. O'Brien, MS, NCC, LPCMH

THURSDAY 5.7

CLE SEMINAR THE KEY TO GOOD HEALTH – SLEEP

12:00 P.M. – 1:00 P.M.

1.0 HOUR CLE CREDIT IN ENHANCED ETHICS
No PA credit available

Topics include: The Detriments of Sleep Deprivation and Tips and Tricks for Better Sleep with presenters Grace R. Denault, RPSGT, RST, CCSH of Academy of Sleep and Wellness and Kathe Hefner-Erickson, CRNP, Adult Health Nurse Practitioner (AHNP).



FRIDAY 5.8



FREE WELLNESS WALK: SELFIES WITH PETS



Information overload and being inside getting you down? Then join us for a fun day to get out and unplug – keeping social distance – while taking selfies of yourself or with your pets! Post your selfies on the DE-LAP and DSBA Facebook pages.

VISIT WWW.DSBA.ORG/Wellness-Week FOR MORE
INFORMATION AND TO REGISTER FOR WELLNESS WEEK EVENTS.

DSBA BAR JOURNAL

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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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THE JOURNAL

OF THE DELAWARE STATE BAR ASSOCIATION

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Cover: © istockphoto.com/Rasica



Some of you may recall that in my first “President’s Corner” article, I mentioned that I am a huge fan of music and, in particular, of classic rock and roll. While I love the work of a great many artists and bands of very different genres, since I was a small child, my favorite has been The Beatles.

In the 1960s, The Beatles enjoyed a continuous and unprecedented string of musical success. They were uniquely the most successful and most critically acclaimed musicians the world may have ever seen. By 1970, The Beatles were still the most popular band in the world. Then, in April of that year came the news that they were no longer going to record together and the individual members would, instead, pursue solo projects. The Beatles had broken up. It was shocking to the world and devastating to their fans. However, out of the ashes came an extraordinary solo album by perhaps the member most unlikely to step out on his own, George Harrison.

Harrison had been known as “the quiet Beatle,” seemingly content to let John Lennon, Paul McCartney, and Ringo Starr bask in the spotlight. While he was an exceptional guitarist and had grown to become a gifted songwriter (and was hardly shy), Harrison’s contributions to the Beatles’ albums were, nonetheless, typically limited to one or two songs each, as Lennon and McCartney’s compositions dominated the band’s output and the Billboard charts throughout the Fab Four’s unprecedented career.¹ With the release of Harrison’s solo album, *All Things Must Pass* in November 1970, he would no longer stand in his former bandmates’ shadows.

All Things Must Pass was a triple album, practically unheard of at the time for popular release, and was met with universal praise from fans and critics alike. Many of the songs had been building up in Harrison’s songwriting vault during his tenure with The Beatles. Some had been considered for the band’s albums, but had not made the cut at the time, so to speak, some had been kept in reserve, and still others were written after the band had recorded their final album in 1969.² The most well-known song on the album is “My Sweet Lord,” which had the distinction of making Harrison the first former Beatle to have a number one song on the Billboard Charts. However, the album’s title was taken from a track he wrote prior to The Beatles’ breakup, but in its wake, symbolically stood as both a eulogy to the band’s demise and a testament of hope for the future.

I often turn to music to brighten my day, whether by listening to songs by my favorite artists or just playing guitar by myself in my basement. Like all of you, the COVID-19 pandemic has changed our daily lives and we fervently hope it will quickly end, like next week. While that is far more wishful thinking than reality at present, I know that it will end and pray that will be soon. As we have seen signs of the curve flattening and optimism for the economy opening back up, I have found myself frequently coming back to *All Things Must Pass*. Its lyrics are particularly appropriate and their incorporation into the music far more uplifting than the words alone:

All things must pass
None of life’s strings can last
So I must be on my way
And face another day

Now the darkness only stays at nighttime
In the morning it will fade away
Daylight is good at arriving at the right time
It’s not always going to be this grey

All things must pass
All things must pass away³

It pains me to keep repeating the same mantra, but we will get through this crisis. To that end, I know that many of you are trying to retain some normalcy in your lives or are doing something new. I have read about people who cannot go to their offices, but are sitting in their cars for a half hour, drinking coffee and listening to the radio so as to maintain that same private time they would have had while ordinarily driving to work. Others are doing various internet “challenges” or starting projects while “working” from home. I have uploaded various photos I have taken of national parks or other locations while on vacation to serve as my virtual backgrounds for Zoom meetings to make it a little more fun, if even just for me.⁴

From the Bar Association’s perspective, while many events on the calendar have been upended or cancelled, we will move forward to present our members

with as much as we can. For example, by the time you read this, the annual Law Day Luncheon in May will have been cancelled, as will the Bench and Bar Conference in June. That is disappointing, but not unexpected, and there are far more important things to worry about. While we will be unable to hold those specific events later in the year, the Bar Association will have an event in the fall where the honorees will receive their awards and the public recognition they deserve. We will also host a virtual DSBA Annual Meeting in June so that elections can take place and, more importantly, Mike McTaggart can assume the reigns as President, because no one wants to see me hang on indefinitely in that capacity if that cannot happen.

The old saying about necessity being the mother of invention also seems to have been brought home yet again. As many of you can attest, the legal community has been forced to quickly adopt procedures to implement and accommodate a large scale remote workforce for the past two

months and into the foreseeable future and what may have been an occasionally used convenience in the past has, overnight, become practically the only way of doing business. One potential silver lining of this experience may be that innovative strategies and techniques being introduced or revised now in response to avoiding in-person interaction may become the preferred way of doing business and may even provide advantages over what has been done in the past.

In addition, the opportunity to do live Continuing Legal Education seminars for credit via teleconference has been given approval and has met with immediate success. In connection with my push to increase *pro bono* services and participation within the Bar, I was pleased to present via Zoom at a DSBA seminar recently on Landlord Tenant law in which we had approximately 150 participants. I know that other programs have seen similar results.

In closing, I do not want to keep trotting out tired clichés, but make the best of what you can under these circumstances.

Spend quality time, not just forced time, with your loved ones. Hug them a little tighter and longer. Get things done you have been putting off. Be well and stay safe. All things must pass. And so will this. ☺

Notes:

1. It is altogether fitting that the first song Harrison wrote, in 1963, was titled "Don't Bother Me."
2. Marcia, Wes, Joe, Joseph Brush, Edu Navarrete, Cheron, David Diamond, et al. "George Harrison." The Beatles Bible, April 7, 2020. <http://www.beatles-bible.com/people/george-harrison>.
3. © 1970 George Harrison. It is a great song, even with the Phil Spector Wall of Sound production. You should check it out. Bob Marley has some inspiring lyrics, as well.
4. I sincerely hope I have the foresight to turn that off when it comes time for any video Court proceedings.

William Patrick ("Bill") Brady is the current President of the Delaware State Bar Association. He is a member of the Small Firms and Solo Practitioners Section, Real and Personal Property Section, Litigation Section and ADR Section of the DSBA. He has been a member of the Delaware Bar since 1995 and has served on the Executive Committee of the Delaware State Bar Association since 2009. He is the founder and managing attorney of The Brady Law Firm, P.A. and can be reached at wbrady@bradylawde.com.

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Now More Than Ever

It is a stormy Monday, April 13. As I write this column, no one knows when our lives will return to normal. By the time you read this, will Delaware and other states have lifted “stay at home” orders? Will the curve finally have flattened? Will the courts be open? I wonder whether my trial in June will take place as scheduled. I wonder when I will be able to shake someone’s hand without worrying about COVID-19. Will I ever shave again?

Despite the uncertainty, there is no doubt that the effects of the novel coronavirus will be far reaching and long lasting. As the death toll and unemployment figures rise in Delaware and nationwide, one consequence seems inevitable in our profession: *pro bono* services will be faced with critical challenges.

We are already seeing harmful financial effects on the legal profession. Some attorneys are paid only when their cases go to court — which means with the

courts closed, their bottom line is hurting badly right now. And, because most everyone is staying at home, accidents are decreasing, home sales likely will decline, and estate planning may get put on hold. That, of course, affects the revenue at law firms across the state. Larger law firms may reduce partner distributions, could furlough staff, and lay off some employees altogether (which, as of this publication, may have already happened at some firms).

All this means that the economic downturn will prompt attorneys to ramp up their efforts for the remainder of the year and beyond, to offset the losses. And that is why I fear *pro bono* services will suffer.

Pro bono cases require attorneys to donate their valuable time at no cost. But if attorneys will have less time to donate, how can this business plan co-exist with what surely will be a significant increase in the critical need for *pro bono* services?

Even before this pandemic, there was a need for more attorneys to do *pro bono* work. Now, the need will be greater than ever. People are losing their jobs, shutting down their small businesses, and facing bankruptcy. Add to that evictions, discrimination, and unscrupulous actors in a time of crisis, and the future is clear: the request for *pro bono* services is going to spike. More need when less aid is available could lead to the possible breakdown of legal services for those who may need it most.

Understandably, this concern may not be at the forefront of your mind. But I would urge you to put it on the list of priorities. Running your law firm — your business — requires you to constantly act and react to market changes, in order to provide quality service. Your business plan is your road map.

At this dire time, as you map out the future, please consider adding a component to that plan. As you assess the status



As you assess the status of your law firm, how expenses will be met, and how additional work will be generated in the future, I ask that you also consider how to aid others.

of your law firm, how expenses will be met, and how additional work will be generated in the future, I ask that you also consider how to aid others.

It will need to be a collective effort from the Bar — large firms, solos, and retired professionals. If, for example, your caseload is down and assignments for associates are slowing, *pro bono* cases of all types and degrees are available for them to dive into. If those cases are outside their comfort zone or expertise, mentors are available. If you are retired, your talent is needed now more than ever. Consider coming back into the fold to offer *pro bono* services. If you are fortunate enough to be in a strong financial position despite the pandemic, if business is actually up, please ask yourselves how can you give to those in need, if you are not doing so already.

The solution may not be easy, or universal for every attorney or firm, but we as a profession can help ease the pain, and take pride in our efforts.

I see awesome stories every day about those working on the frontlines, and providing necessary services in this historic time. Our profession is not immune from this call. We must answer it. Tackle it like a business problem, finding a solution that fits best for you and your firm. Together, let us make it happen. Once again, make Delaware an example of how things should be done. 🌐

Bar Journal Editor **Jason C. Powell** is the managing director of The Powell Firm, LLC, in Wilmington, Delaware. He may be reached at jpowell@delawarefirm.com and more information is available at delawarefirm.com.



MEMBER Appreciation EVENTS

TESTIMONIAL TUESDAYS

HEAR FROM DSBA MEMBERS EACH TUESDAY ABOUT WHY THEY BELONG TO DSBA!

THANK YOU THURSDAYS

GIVEAWAYS EVERY THURSDAY IN MAY

TRIVIA Night

DETAILS TO FOLLOW!!


THIS JULY

TAKEOUT THURSDAYS


JULY 9 IN KENT COUNTY
JULY 16 IN NEW CASTLE COUNTY
JULY 23 IN SUSSEX COUNTY




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#DSBA #WeAreRaisingTheBar

MEMBER BENEFIT OF THE MONTH

DSBA Section Forums

If you have questions, notices, subjects of interest, or just about anything you want to ask or tell your section, DSBA has launched a Forums member benefit on its website. So far, a few of the sections have already begun asking each other questions and posting responses. Notably, President Judge Jan Jurden was the first member to post to any of the forums — the Women & the Law Section Forum. Since then, there have been questions about some of the emergency notary laws and research assistance requests. The Family Law Section had a question about whether an engagement ring is marital property, which was answered promptly and thoroughly. (Check out the forum if you want to know the answer.) The forums are meant to give all members an ability to reach out for help and for others to assist them. Now, more than ever, we need options to work with each other and help whenever we can. DSBA hopes this new member benefit will give our members new ways of doing business and interacting.

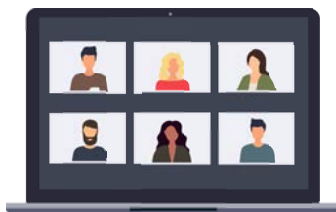
To access the forums, just log into www.dsba.org and you will see Forums listed at the top of the Members Area page. Just click there and it will take you to the list of potential forums. Most will want to select from the list of sections, each of which has its own. Posting and responding is fairly easy to do. Enjoy connecting! 🗣️

TOP 5

FIVE THINGS LAWYERS SHOULD AVOID IN ZOOM MEETINGS (AND OTHER VIDEOCONFERENCING)

1 Avoid Looking Unkempt

Wear what you would wear if you were at the meeting or in court. Make sure you are wearing pants if there is ANY chance you will get up to get something. One Florida judge was dismayed when a lawyer showed up without a shirt and another was still in bed.



2 Do Not Talk Too Much

Speak when you have something to say and communicate your points, but do not hog the screen. Pause for a couple of seconds to let people know you are finished so they know when they can speak up to respond.

3 Do Not Leave Your Microphone On

If you are not speaking, turn it off. No one wants to hear your dog barking, baby crying, or doorbell ringing. If there is a presentation, you might consider turning off video so as not to distract others from the speaker.

4 Be Mindful of Your Background

Avoid places in your house with family members milling about or provocative paintings. A blank wall is probably the best background. Even though Zoom offers the ability to set a wallpaper background, remember to select something that will not detract from the proceeding or meeting.

5 Limit Participants

If you are setting up the meeting, keep the number of people to as few as necessary. Too many voices could make the experience chaotic and challenging.

Source: www.forbes.com

YOUR WORDS

WHAT'S YOUR BEST WORK FROM HOME TIP?



"Start your work day at the same time you ordinarily would. Also, make a concerted effort to get up and away from your work space for at least a few minutes throughout the day. The home setting has a way of being much more sedentary without one even realizing it."

SEAN A. DOLAN, ESQUIRE

Mintzer Sarowitz Zeris Ledva & Meyers LLP
DSBA MEMBER



"Working from home with a toddler has been challenging. The biggest tools in our home have been daily schedules, Sesame Street, and not being too hard on ourselves for not getting work or parenting perfect on any given day."

STEPHANIE S. RILEY, ESQUIRE

Connolly Gallagher LLP
DSBA MEMBER



"Subject to the demands of family and children, get up at your regular time, dress for work, have a schedule, and go to a designated place in the house to work as time permits."

RANDY J. HOLLAND, ESQUIRE

Wilson Sonsini Goodrich & Rosati
Former Delaware Supreme Court Justice
DSBA MEMBER

Illustrations by Mark S. Vavala

FOR NEXT MONTH...

What insights have you gained that you are grateful for?

Email Rebecca Baird at rbaird@dsba.org and your response could be in the next Bar Journal.

DSBA'S COVID-19 RESPONSE

In response to the situation surrounding COVID-19, the DSBA offices will remain closed until it is determined to be safe to return to work. However, while the DSBA offices are closed, the DSBA staff is busy working from home and may be reached by email (listed below) or by phone at (302) 658-5279. All DSBA meetings and CLEs will be offered as live webinars through through May 2020. Additionally, the 2020 Bench and Bar Conference scheduled for June has been cancelled with an awards event and annual meeting to occur later this year. For the most up-to-date information, please visit www.dsba.org and refer to the COVID-19 Resource Page or the News & Links page.

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Delaware State Bar Association
March 25 at 4:22 PM · 🌐



#DSBA member Hayley M. Lenahan's new co-worker is Lydia (a four-year-old black lab) who helps her out with some doc review! #DSBApets #FurryCoWorker



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Learn more about a [#Delaware](#) bankruptcy judge's opinion holding that increased Chapter 11 U.S. trustee fees pass constitutional muster in Matt Harvey's new [@DelStateBar](#) Bar Journal magazine article [#BankruptcyLaw](#)



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BECOME A DSBA SECTION MEMBER



Section Membership provides the chance to exchange ideas and get involved.

For information on how to join a Section, call DSBA at (302) 658-5279.

Professional Guidance Committee

This committee provides peer counseling and support to lawyers overburdened by personal or practice-related problems. It offers help to lawyers who, during difficult times, may need assistance in meeting law practice demands. The members of this committee, individually or as a team, will help with the time and energy needed to keep a law practice operating smoothly and to protect clients. Call a member if you or someone you know needs assistance.

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CALENDAR OF EVENTS

May 2020

Monday to Friday, May 4 – 8, 2020

DE-LAP Wellness Week: Various Webinar Workshops

Live Webinar via Zoom

Tuesday, May 5, 2020 • 10:00 a.m. – 10:30 a.m.

Understanding the Governor's Order Permitting

Remote Notarization and Witnessing

0.5 hour CLE credit

Live Webinar via Zoom

Tuesday, May 5, 2020 • 3:30 p.m. – 4:30 p.m.

Maintaining Mental Health and Wellness

1.0 hour CLE credit in Enhanced Ethics

Live Webinar via Zoom

Thursday, May 7, 2020 • 12:00 p.m. – 1:00 p.m.

DE-LAP Wellness Program: The Key to Good Health – SLEEP

1.0 hour CLE credit in Enhanced Ethics

Live Webinar via Zoom

Tuesday, May 12, 2020 • 10:00 a.m. – 1:00 p.m.

Understanding the Protection From Abuse (PFA) Process

3.0 hours CLE credit

Live Webinar via Zoom

Thursday, May 14, 2020 • 9:00 a.m. – 4:00 p.m.

Fundamentals of Law Practice Management and Technology 2020

6.0 hours CLE credit in Enhanced Ethics

Live Webinar via Zoom

Friday May 15, 2020 • 2:00 p.m. – 3:00 p.m.

The Impact of the COVID-19 Crisis on Vulnerable Populations:

How Delaware's Civil Legal Aid Agencies Are Responding

1.0 hour CLE credit

Live Webinar via Zoom

Wednesday, May 27, 2020 • 10:00 a.m. – 11:45 a.m.

The Disproportionate Rate of the Effects of COVID-19 on Minorities and Their Ability to Work from Home

1.5 hours CLE credit

Live Webinar via Zoom

June 2020

Wednesday, June 3, 2020 • 10:00 a.m. – 11:45 a.m.

Bankruptcy in the Age of Coronavirus and Beyond

1.5 hours CLE credit

Live Webinar via Zoom

Thursday, June 4, 2020 • 2:00 p.m. – 3:45 p.m.

The Effects on the Hospitality Industry During the COVID-19 Pandemic: A Roundtable Discussion with Sector Leaders

1.5 hours CLE credit

Live Webinar via Zoom

Tuesday, June 16, 2020 • 10:00 a.m. – 11:45 a.m.

Labor & Employment Law in Delaware and How It Has Been Affected by the Pandemic

1.5 hours CLE credit

Live Webinar via Zoom

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

SECTION & COMMITTEE MEETINGS

May 2020

Wednesday, May 6, 2020 • 12:30 p.m.

Women & the Law Section Meeting

Zoom Meeting, see Section listserv message for link and password

Wednesday, May 13, 2020 • 4:00 p.m.

Real and Personal Property Section Meeting

Zoom Meeting, see Section listserv message for link and password

Monday, May 18, 2020 • 9:00 a.m.

Taxation Section Meeting

TBD

Wednesday, May 20, 2020 • 9:00 a.m.

ADR Section Meeting

Zoom Meeting, see Section listserv message for link and password

Thursday, May 21, 2020 • 12:00 p.m.

Executive Committee Meeting

Zoom Meeting, link will be sent via email

Thursday, May 21, 2020 • 4:00 p.m.

Elder Law Section Meeting

Conference Call Meeting, see Section listserv message for call-in information

Thursday, May 28, 2020 • 4:00 p.m.

Family Law Section Meeting

Zoom Meeting, see Section listserv message for link

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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DURING THE COVID-19 CRISIS

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Managing Digital Assets During the Coronavirus Pandemic

In a recent *Law360* article, David Kessler and Andrea D'Ambra, partners at Norton Rose Fulbright, adroitly describe ten challenges attorneys and parties are likely to face when dealing with digital information during the COVID-19 pandemic. Their messages are vitally important, so I use their categories but, due to space limitations, only highlight key points of the article, which can be found in full at the citation in the notes.¹

① "WORK FROM HOME" WILL LIKELY CREATE NEW DATA SOURCES FOR PRESERVATION AND COLLECTION

Employees working remotely may transmit and store documents locally (either on work laptops or personal devices). Employees may also be using non-standard or non-enterprise communication tools to discuss business (*e.g.*, text or other messaging technologies). Going forward, this may add to the preservation and collection burden parties face when responding to discovery requests for information created during this time period.

② BECAUSE OF LOCKDOWNS AND SOCIAL DISTANCING, FORENSIC COLLECTIONS, EXCEPT THOSE THAT CAN BE DONE REMOTELY, WILL NOT BE POSSIBLE

It may be difficult, or even impossible, to have in-house or third-party forensic vendors collect many types of relevant

digital information that require physical access to the device (such as with most mobile device data). Parties may need to find different vendors or tools that allow remote forensic collections or defer the collection of devices where remote collections are not possible.

③ COLLECTION AND DATA TRANSFER OPERATIONS MAY BE INTERRUPTED

Even for organizations that can handle internal data collections, processing, and transfers to hosting vendors, the work-from-home model may pose new hurdles because many organizations configure their IT systems to prohibit or limit remote data collection or transfers without certain authorizations. These configurations may block collections or delay transfer to hosting and reviewing vendors.

④ HOSTING VENDORS MAY BE DELAYED IN INGESTING, PROCESSING, AND PRODUCING DATA

While small data volumes may be transferred over the internet using FTP sites, larger data volumes must be sent via encrypted media such as a thumb drive or external hard drive. Processing those drives requires that the receiving vendor have personnel onsite to open, log, load, and process the data contained thereon. Thus, parties should anticipate delays in getting their data uploaded and published for review.

⑤ THERE ARE SIGNIFICANT DATA SECURITY CONSIDERATIONS THAT MUST BE ADDRESSED AROUND PERMITTING REVIEWERS TO ACCESS A PARTY'S DATA REMOTELY

To address discovery deadlines, many vendors have had to transition quickly from on-site review to remote review. As Kessler and D'Ambra state, it is simply not accurate to say that remote review is as secure as review done in a dedicated facility of a reputable vendor. The individual reviewers working from home might inadvertently expose confidential information to family members or have malware or viruses sitting undetected on their operating systems. Moreover, the reviewers likely are using untested (and possibly insecure) home internet systems; thus, absent a VPN tunnel or Citrix-type portal, there is risk that bad actors could intercept the data.

⑥ UNIVERSAL WORKING-FROM-HOME ARRANGEMENTS MAY STRESS THE CAPACITY OF REMOTE ACCESS PORTALS TO REVIEW SYSTEMS

A vendor's remote access system originally intended to provide access to a limited number of reviewers at any given time may not have adequate bandwidth to handle bandwidth demands for all the vendor's review teams to work remotely. These bandwidth issues can lead to slower

performance and lost productivity, and in some cases, denial of access if too many users attempt to log in at once.

7

PERFORMANCE OF INDIVIDUAL REVIEWER'S PERSONAL COMPUTERS AND INTERNET WILL BE SIGNIFICANTLY DIMINISHED FROM THAT OF THE REVIEW VENDOR'S NORMAL OPERATIONS SITE

Vendor review sites have robust internet connections that can handle hundreds of reviewers simultaneously connecting to a variety of internet-based document review hosting platforms. An individual's home internet connection, on the other hand, is likely more modest — *e.g.*, intended to accommodate downloading videos, gaming, and internet surfing — and even the available home bandwidth may be subject to greater current demands such as home-schooling or entertaining children who are now at home during the day.

8

DECENTRALIZED REMOTE WORKING WILL POSE ADDITIONAL CHALLENGES

Managed review and eDiscovery vendors have successfully solved the communications challenges of hosting data in one location while reviewing it in another, neither of which is where the client or the lawyers are located. However, it will be far more difficult with remote reviewers to communicate changes in a review protocol quickly, provide reviewer feedback, or get a sense of the overall review progress that often comes from “walking the floor.”


9

REMOTE WORKING CREATES NEW CYBER VULNERABILITIES

Hackers know well both the potential vulnerabilities in remote working configurations and that eDiscovery vendors and reviewers have access to some of their clients' most valuable, confidential, and important data. This makes such vendors and their reviewers (as well as law firms) attractive targets for hackers looking to make a quick score.

10

ALL OF THESE PROBLEMS WILL BE WORSE OUTSIDE THE U.S.

Parties should expect that each and every one of these issues will be exacerbated if a party needs digital information from outside the U.S. As discovery is far less common and more unfamiliar outside the U.S., it is less likely that the data systems and eDiscovery vendors will be nimble enough to alter operations quickly to enable remote preservation, collection, processing, review, and production of digital information for discovery purposes. 

Notes:

1. For the full article, see David Kessler and Andrea L. D'Ambra, *10 E-Discovery Challenges Caused by COVID-19*, LAW360 (Mar. 25, 2020, 4:36 PM ET), available at <https://www.law360.com/articles/1256759/10-e-discovery-challenges-caused-by-covid-19>.

Kevin F. Brady is Of Counsel at Redgrave LLP in Washington D.C. and can be reached at kbrady@redgravellp.com.

“Tips on Technology” is a service of the E-Discovery and Technology Law Section of the Delaware State Bar Association.



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Zooming In on the Security Risks of Videoconferencing

BY KEVIN M. LEVINE, ESQUIRE

During these days of self-isolation and social distancing, many attorneys have turned to online videoconferencing as a way to get face-to-face interaction when interpersonal connections seem otherwise impossible. Zoom videoconferencing has outpaced its rivals and become the most used platform, through both paid and free versions of the application. As attorneys, we have an obligation to maintain the confidentiality of our client's privileged statements. Security concerns surrounding Zoom should not be taken lightly, particularly if using the program for confidential discussions.

What Rules Apply to Maintaining Client Confidentiality?

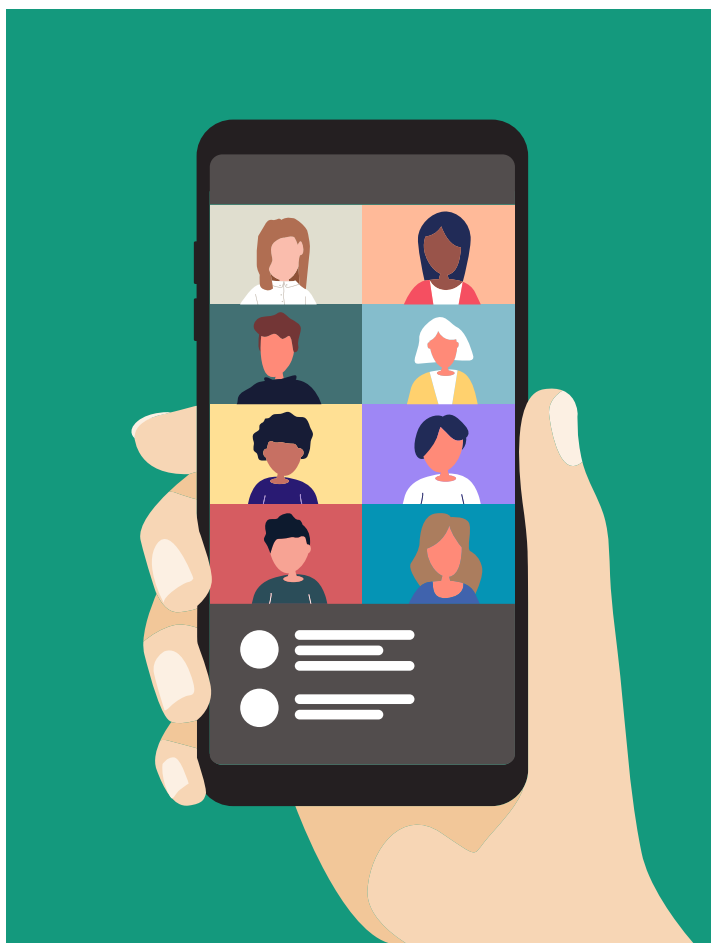
Considering the "Client-Lawyer Relationship," the Delaware Lawyers' Rules of Professional Conduct state that a "lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."¹ Whether a "reasonable effort" has been taken to prevent unauthorized access to client information — *i.e.* privileged conversations or statements — includes considering "the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients."²

And lawyers must also take "reasonable precautions to prevent [client] information from coming into the hands of unintended recipients."³ But this duty "does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy."⁴

What Are the Security Concerns Associated with Zoom?

The nearly overnight necessity for millions of American workers to meet or conference remotely due to the global pandemic has exponentially ballooned the usage of Zoom to a degree that even the company's founder acknowledged was beyond the company's expectation.⁵ A number of cybersecurity experts have been critical of Zoom as ill-equipped to handle the attendant security risks surrounding the widespread increase in use of the software. These concerns include recorded Zoom conferences being made public on the internet, unwanted sharing of user data, and even secretly installed software that can turn on a user's webcam without consent.⁶

But the security risk receiving the most media attention is the new phenomenon known as "Zoombombing." A Zoom video conference is "bombed" when an uninvited user joins a



Zoom meeting, hijacks the video or audio, and begins speaking or sharing images on the attendee's computer screen in a process known as "screensharing." This may sound relatively harmless, but many Zoombombers engage in hate speech or screenshare pornographic imagery, which is a matter serious enough for the FBI to issue a press release.⁷ Apart from sparing yourself and your client from an unpleasant Zoombomb, preventing this intrusion is critical to ensuring the confidentiality of your privileged attorney-client conversations.

What Should I Do to Address These Concerns and Comply with the Rules?

Every Zoom meeting has a "Meeting ID." It should go without saying, but do not publicly share or post this number. Only send this number in the Zoom invitation to the client with whom you will be conferencing. Zoom accounts can also have a "Personal ID" that serves as an always available meeting room for each user. You should not use this for

conferences with clients. Instead, use Zoom's randomly generated "Meeting ID" feature for your client meetings.

Set a password for your meetings. Zoom enables you to protect the privacy of your Zoom conference by creating a password that you distribute to invited participants. This form of "encryption" greatly enhances the security of your Zoom conference, but just make sure your client has enough tech savvy to figure out how to enter a password. And, in an abundance of caution, you may want to change the "screensharing" settings to "host only." This way, even if a Zoombomb does occur, the hijacker will not be able to overtake the screen and share unwanted images.

Finally, all Zoom calls have a recording feature that can be enabled by the host. As unlikely as it may seem, the last thing you want is for your privileged conversations to be hacked or disseminated. The best way to protect recordings of your client conversations is to not record them in the first place. Simply make sure the "record" feature

is disabled on all of your Zoom client meetings.

These measures should not only ensure that your Zoom conferences with clients will remain confidential, but should also constitute the sort of additional "safeguards" against invasion of client privacy envisioned by the Delaware Lawyers' Rules of Professional Conduct. ⚖️

Notes:

1. DLRPC 1.6(c).
2. DLRPC 1.6(c), Cmt. 18.
3. DLRPC 1.6(c), Cmt 19.
4. *Id.*
5. "A Message to Our Users." Zoom Blog, April 15, 2020. <https://blog.zoom.us/wordpress/2020/04/01/a-message-to-our-users/>.
6. Harwell, Drew. "Everybody Seems to Be Using Zoom. But Its Security Flaws Could Leave Users at Risk." The Washington Post. April 2, 2020. <https://www.washingtonpost.com/technology/2020/04/02/everybody-seems-be-using-zoom-its-security-flaws-could-leave-people-risk/>.
7. "FBI Warns of Teleconferencing and Online Classroom Hijacking During COVID-19 Pandemic." FBI, March 30, 2020. <https://www.fbi.gov/contact-us/field-offices/boston/news/press-releases/fbi-warns-of-teleconferencing-and-online-classroom-hijacking-during-covid-19-pandemic>.

Kevin Levine is an Associate in the Labor & Employment Business Unit of Clark Hill, PLC. He can be reached at klevine@clarkhill.com.

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Ten Things You Can Do in Quarantine to Improve Your Practice

Best wishes to everyone affected by the social distancing, shutdown, and quarantine that are wreaking havoc with most law practices. Here is a list of things you can do to improve your practice when we all get back to normal.

1 Review and Revise Your Fee Agreements

If you use a form fee agreement as a starting point, make sure that it contains the language required by Delaware Professional Conduct Rule 1.5(f) that all retainers are “refundable if not earned.” Also, if it does not already contain a provision that any fee dispute will be submitted to the Delaware State Bar Association Fee Dispute Committee or other arbitration, consider doing so. It is also a good time to check out the American Bar Association website and/or contact members of your DSBA practice sections to find sample fee agreements specific to your area of practice.

2 Reconcile Your Law Practice Accounts

It is a great time to address three of the most frequent non-compliance findings in the random Lawyers’ Fund for Client Protection Audits.

Have you issued checks drawn on your escrow account which remain uncashed for six months or more? If so, contact the payees to confirm that the checks were received and reissue checks where appropriate. Escheat funds if the payee cannot be located.

Confirm that your accounts are properly titled. Review Rule 1.15A of the Rules of Professional Conduct for the permissible account titles. Confirm that your checks, deposit slips and bank statements all contain the permitted titles.

Review your client subaccount listings of funds held in escrow. Are there any funds that should have been disbursed but have not? Are there any earned fees which should be swept?

3 Review Your Partnership and Associate Agreements

If you do not use associate employment or partnership agreements, consider doing so now. Again, there are lots of samples available on the ABA website. Having an agreement in place can avoid many partner and associate departure issues as well as provide succession planning.

4 Catch Up on Continuing Legal Education

There are many online CLE offerings. It is a great time for self-improvement by attending practice specific CLEs, training to handle a new practice area, or even to pick up tips about how to practice from home during times of crisis. You can binge CLE at www.dsba.org/cle.

5 Join and Explore the American Bar Association as well as the Delaware State Bar Association Practice Sections

Both organizations provide access to a wealth of materials, forms, and practice guides specific to your practice areas as well as networking opportunities.

6 Explore Practice Management Software

No matter your need, there is likely an app for that. There is practice management software available for time-keeping, billing, trust accounting, and calendaring. While software companies often have a website with examples, you can also find YouTube videos demonstrating what the applications can do to determine if any of them are right for you.

It is a great time to address three of the most frequent non-compliance findings in the random Lawyers’ Fund for Client Protection Audits.

7 Learn How to Use Video-conferencing Services such as Zoom or Video-Calling Programs like Skype

There is a learning curve involved, but it is a great way to keep your practice going during a crisis. Zoom has some security issues and should be carefully considered before using for confidential communication (Research “Zoombombing”). There is also an expected social etiquette. A judge of the family court in Broward County, Florida, issued a request that attorneys dress appropriately (or at least dress at all) for Zoom appearances after a male attorney participated shirtless and a female attorney appeared while still in bed. Alternatives include Google Hangouts, Discord, Zoho Meeting, and Go To Meeting. You may find they are such useful tools that you will continue to use such services even after a return to our offices.

8 Network

Now that you have the time, go through your contact list and send out a

brief note to your current or even former clients. It is also a great time for collegiality. Reach out to colleagues. Remember, we are all in this together.

9 Review your File Retention Policies

If you do not already have a file retention policy or practice, now might be a good time to start. Develop an archival system which permits you to locate and retrieve files for a predetermined period of time before those files are pulled for destruction. Better yet, avoid having to unnecessarily store closed files by providing a copy of the file to the client at the termination of the case while maintaining an electronic copy.

10 Deal with Your Own Health While Dealing with the Health of Your Practice

The gyms are closed but you can still exercise mental health. Reconnect with your family. Stay in touch with friends, relatives, and colleagues. Do not forget

that you can use the aforementioned video calls to span social as well as professional distancing. With a bit of effort, we can all get through this better than we started.

Stay Well!

“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 seven 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.



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The Delaware Lawyers Assistance Program: Annual Report 2018-2019

THE DELAWARE LAWYERS ASSISTANCE PROGRAM (DE-LAP), established in 2006 as a 501c6 wholly-owned subsidiary of the DSBA, is a confidential program established at the direction of, and funded by, the Delaware Supreme Court to assist the Delaware Bar's lawyers and judges who may be struggling with mental health, substance abuse and/or quality of life/wellness issues.

MISSION STATEMENT

The Mission of DE-LAP is to provide confidential assistance to judges and lawyers in order to help them identify and address problems such as depression, stress, substance abuse/dependence, gambling addiction, and other mental health illnesses and to assist them in developing effective solutions that culminates in a workplace atmosphere that encourages professional growth, excellence, and maintains the integrity of the legal profession.

PROGRAM DESIGN

DE-LAP provides a free, non-disciplinary, confidential way for Delaware's judges and lawyers to seek appropriate help for problems before they sabotage an individual's career and/or quality of life. Referrals are confidential.

Any legal professional that seeks assistance can be assured that their information will be held in the strictest confidence. (Go to www.de-lap.org confidentiality Rule 8.3.) Those who are concerned about a co-worker, peer, or other legal professional are guaranteed the same confidentiality. (Professional Rules of Conduct, Rule 8.3.)

PROGRAM GOALS

1. DE-LAP is dedicated to helping judges and lawyers, while protecting the public and maintaining the integrity of the legal profession. DE-LAP encourages treatment and change as indicated and promotes the ethical practice of law and the highest standards of professionalism by members of the Delaware Bar.
2. To assist in the identification of legal professionals who may be in trouble. DE-LAP receives many new referrals each year and investigates each report confidentially. Moreover, the greatest of sensitivity for privacy is used to safeguard both the legal professional and the concern for client interests.
3. To assist DE-LAP clients in their personal recovery from addiction, physical or mental (cognitive) health conditions that has affected both their quality of life, and quality of work and/or professionalism.
4. To educate the legal community on identification, assessment, referral (facilitation of treatment), and community-based resources that are available to meet the needs of both judges and lawyers. DE-LAP offers resource information to judges and lawyers on behalf of family members and/or clients.
5. To monitor and assist clients while they work to rehabilitate and return to the practice of law, to the bench, or for a better transition and/or quality of life.
6. To provide a network of trained volunteers who are available to respond to the needs of DE-LAP clients through a peer assistance model, *i.e.* The Lawyer Assistance and Judicial Assistance Committee, The Professional Guidance Committee, The Wellness Initiative/Sub-Committee, and the SOLACE Committee.
7. To establish and maintain a cooperative administrative relationship with the Supreme Court of Delaware, the Delaware State Bar Association, and the legal community at large.
8. To establish and maintain, in partnership with the Lawyers Assistance Committee, a separate treatment fund for judges/attorneys in need of mental health counseling, inpatient treatment for substance abuse/dependence, therapy/evaluations for cognitive/mental and other health problems.

YEAR IN REVIEW: 2018-2019

DE-LAP had a busy and productive 2018 and 2019. We responded to over 325 telephone calls, emails, and/or texts specifically from, or regarding, attorneys, judges, law students, family members, and peers. Of these contacts, 151 formal cases were opened.

2018 74 FORMAL CASES
WERE OPENED

2019 77 FORMAL CASES
WERE OPENED

DE-LAP PRINCIPALS

1. DE-LAP is motivated by a humanitarian concern for the legal community and the public;
2. DE-LAP is motivated to fostering wellness within the legal culture through education (i.e. seminars, CLE events, Podcasts, and columns);
3. Addiction, mental health concerns and physical disabilities should not be ignored, nor discriminated against, and are in most cases treatable conditions;
4. Impaired judges and/or lawyers are obligated to seek assistance and to participate in services necessary to renew their full effectiveness as a judge and/or lawyer; and
5. Both judges and lawyers have the ethical responsibility to recognize the signs and symptoms of a colleague who may be impaired (physically/mentally) and to assist them in accessing appropriate services and/or help.

IDENTIFICATION, EVALUATION AND FACILITATION OF TREATMENT IN 2018 AND 2019

DE-LAP provides initial evaluations and facilitates treatment for legal professionals who may have problems due to burnout, lack of balance/wellness, anxiety, alcohol/drug abuse disorders, mental health issues, distress, grief, transition/retirement, and disciplinary/legal issues.

In the 2018-2019 period, the most common presenting problems for services rendered were mental health issues that included: depression, bipolar disorder, distress, burnout, and anxiety, followed by alcohol abuse/drug abuse disorders, general wellness, and law office management and transition. Of all the outreach and referral calls, approximately 90 percent received treatment, and/or support.

Most of the referrals were self-referred. Other referrals were confidentially received through concerned attorneys, supervising/management attorneys, the Bench, the Office of Disci-

plinary Counsel (ODC), family, or others. DE-LAP receives formal monitoring from the Delaware Supreme Court.

Other statistical data shows that more male attorneys seek assistance from DE-LAP. However, more female attorneys are contacting DE-LAP. Data shows that the vast number of cases are from New Castle County, followed by Kent, and then Sussex counties. Generally, DE-LAP sees age ranges from 30 to 70 years of age with statistics indicating the shift of attorneys seeking assistance at a younger age.

In addition to referring to counselors (in some cases paying for therapy services) DE-LAP has instituted a Wellness Program as a prevention measure. Moreover, the majority of outreach and/or referral cases dealt with mental health issues, alcohol abuse, drug abuse, stress management, and transition (both mandatory and voluntary).

WELLNESS COACHING

The Lawyers 12 Step Support Group meets weekly and provides a resource for assisting legal professionals and provides for some legal professionals a mechanism for on-going monitoring, recovery and/or support. In 2018 a weekly Resilience/Reinstatement Support Group was started.

COUNSELORS AND THERAPISTS

Dr. Carol Tavani, M.D.
Dr. Sarah Falgowski, M.D.
Dr. Amy Dwinnell Gulino, Psy.D
Alice R. O'Brien, MS, LPCMH
Steve Parker, MS
Richard Lombino, Esquire, LCSW

THE DELAWARE LAWYERS ASSISTANCE FUND (A 501C3)

DE-LAP, in conjunction with the DSBA's Lawyers Assistance Committee, has formed The Delaware Lawyers Assistance Fund, securing support and funding from the Delaware Judiciary, DSBA, and individual donations. The Delaware Lawyers Assistance Fund is a nonprofit corporation (501c3) under the management of an elected Board of Directors. The goal of the Fund is to work with DE-LAP to ensure lawyers the help necessary to secure treatment.

MONITORING

There is a structured Rehabilitation Program within DE-LAP. DE-LAP's monitoring is recognized by the Delaware Supreme Court who makes DE-LAP a part of a lawyer's reinstatement process. In cases involving formal action against the legal professional, or a supervisory referral, DE-LAP will implement a structured rehabilitation program that can document a judge's or lawyer's recovery efforts and success. DE-LAP provides letters and/or reports of support, treatment contracts, on behalf of participating legal professionals who are complying and remain stable in recovery.

Carol P. Waldhauser is the Executive Director of the Delaware Lawyers Assistance Program and can be reached at cwaldhauser@de-lap.org.

IT'S OKAY TO ASK FOR HELP

YOU ARE NOT ALONE. YOU CAN TALK TO US.



In this period of monumental change, both professionally and personally, the Delaware Lawyers Assistance Program (DE-LAP) understands that the culture of the legal community makes it difficult to ask for help.

For that reason, DE-LAP, together with the Delaware Lawyers Assistance Fund (DELAF), have developed a **free, confidential call-in service for Delaware's legal professionals**. This service is a free and confidential way for Delaware judges, lawyers, and legal professionals to discuss their anxieties with DE-LAP'S core team of licensed health-care professionals during the COVID-19 crisis and time of upheaval.

If you or someone you know needs to talk, please take advantage of DE-LAP's new mental health call-in service to our team of licensed health-care professionals, designed especially for the legal culture.

Call DE-LAP's core licensed team directly, or for more information call DE-LAP's confidential line at (302) 777-0124 or email cwaldhauser@de-lap.org.

DE-LAP'S CORE LICENSED TEAM IS:

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Email: aliceob@comcast.net

WE DO TOGETHER WHAT NEED NOT BE DONE ALONE!



Pro Bono Help Needed Now More Than Ever

BY JANINE N. HOWARD-O'RANGERS, ESQUIRE,
THOMAS V. MCDONOUGH, ESQUIRE, AND JACQUELYN A. CHACONA, ESQUIRE

The impact that the coronavirus outbreak has had on our society is unprecedented in our lifetime. It has affected work and daily life for everyone. These are difficult and uncertain times for all of us. However, for those who struggle to afford basic necessities like food and shelter, victims of domestic violence who may now be confined to their homes with their abusers, and those who have lost their jobs because of the pandemic, the situation is worse.

There are still ways for *pro bono* attorneys to help at this time and when the state of emergency is lifted the *pro bono* opportunities will likely be almost limitless. The volunteer opportunities are essentially the same as before, but what has changed is the manner of delivering that help and the timing of cases. We need attorneys to assist victims of domestic violence with family law matters, tenants with landlord-tenant cases, the elderly and terminally ill with estate planning, and low income caregivers with guardianships.

Delaware Volunteer Legal Services ("DVLS") is still placing cases with *pro bono* attorneys. The need for help with representation for Protection From Abuse (PFA) matters is constant. The Family Court has worked tirelessly to keep victims safe and is scheduling PFA matters twice a week primarily through telephonic hearings. The Court is also working towards conducting virtual hearings via videoconference as well. The Court has set up an email to receive evidence in those cases that have such a need.

Landlord-tenant cases are still coming in and we are still placing cases for people facing evictions and other landlord tenant matters. Though a suspension of evictions is in place

now, once the Court begins to schedule those matters again we know the legal services agencies will be overwhelmed with cases. The Justice of the Peace Courts have indicated that eviction matters will receive scheduling priority when the courts re-open to the public.

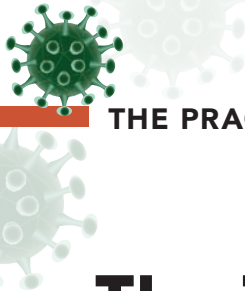
The great need for representation of victims of domestic violence in custody and visitation cases continues. Much of the preparation in these cases can be done remotely so if your practice has slowed you can prepare the case now while you wait for a hearing date in the coming months. The same situation applies to representation in adult guardianship cases, with the ability to prepare now for a later hearing.

Legal Services Corporation of Delaware is preparing for a flood of unemployment benefit appeals which may exceed their capacity for representation. If that occurs, there may be an urgent need for volunteer attorneys to represent claimants.

There is much uncertainty about the long term effects of this pandemic on our communities. I think we can anticipate, however, that there will be a growing need for free legal services in many other areas as well such as bankruptcy and mortgage foreclosure. Given the high level of unemployment, there will be many more individuals eligible for free legal services. The legal services agencies are already only able to meet the legal needs of about 20 percent of the eligible population. We need your help now and for the foreseeable future more than ever. Please contact Tom McDonough at tmdonough@dvls.org to register as a volunteer and Jacki Chacona at jchacona@dvls.org if you are a current volunteer who wishes to accept a case. 🕒

Janine N. Howard-O'Rangers is the Executive Director at DVLS. She can be reached at jhoward@dvls.org. **Thomas V. McDonough** and **Jacquelyn A. Chacona** are Staff Attorneys at DVLS and can be reached at tmcdonough@dvls.org and jchacona@dvls.org.





The Time Is Now: Planning for Your Death or Disability

BY PATRICIA BARTLEY SCHWARTZ, ESQUIRE

Seven months ago, in September 2019, the *Bar Journal* contained the article “Planning for Your Death or Disability: Why a Little Action Now Is Better than a Lot of Anxiety for Others Later” as part of the Office of Disciplinary Counsel: Quarterly Corner column. The article highlights why it is important for lawyers to protect their law practice in the event of incapacity or death. A copy of the article is reprinted below. As promised at the end of the article, in late January 2020, the ODC began its series of free CLEs about succession planning. For those of you who read the article and/or attended the CLE, hopefully, you started your succession planning. If not, the time is now. The following link is an excellent resource to assist in your succession planning: https://www.americanbar.org/groups/professional_responsibility/resources/lawyersintransition/successionplanning/. In addition, please feel free to contact me at patricia.schwartz@delaware.gov or (302) 651-3931.

Regardless of age, health, or wealth, an unplanned event such as injury, illness, incapacitation, disability, or even death can make it temporarily or permanently impossible to continue the practice of law. Such an interruption or cessation of practice, voluntary or otherwise, carries with it the substantial risk clients will be abandoned by their chosen lawyer in the middle of representation.

In an effort to mitigate the possibility of client abandonment, the Delaware Supreme Court’s Annual Registration Statement asks Delaware lawyers, whether “[I]n the event of my death or incapacity” they have “made arrangements for another Delaware lawyer who is capable of conducting [their] legal practice to protect the interests of [their] clients.” Although most attorneys designate a Delaware lawyer on their Annual Registration Statement, many fail to make necessary arrangements with the lawyer to assume responsibility for the law practice. In more than a handful of cases over the last few years, the Delaware Supreme Court had to call on

members of the Delaware Bar to step in as receivers for attorneys who died or became disabled. In those matters, although the attorneys designated a Delaware lawyer on their Annual Registration Statement, they failed to make appropriate arrangements with the lawyers to assume the responsibility of the practice and, in some instances, never even notified the lawyer who had been so designated. Even more concerning, the lawyers failed to take any specific steps to protect their clients. These failures place a significant burden on the Delaware Bar. Moreover, control of your law practice may be turned over to another lawyer with whom you have had no prior professional relationship.

Given a lawyer’s obligation under the Delaware Lawyers’ Rules of Professional

Conduct to exercise diligence, safeguard client’s property, and ensure client’s interests are protected when the representation ends, it is ethically incumbent on you to take affirmative steps to ensure your clients are protected in the event you are unable to continue the practice of law due to disability or death. Failure to do so can have serious consequences for you, your clients, and your family. Family members often do not have access to crucial information, including your client lists, court calendaring, and law practice bank account information.

Although the Delaware Supreme Court does not require you to designate a person or engage in succession planning, creating such a plan is essential to protect your clients and your estate. There are a


Regardless of age, health, or wealth, an unplanned event such as injury, illness, incapacitation, disability, or even death can make it temporarily or permanently impossible to continue the practice of law.

number of steps to consider in preparing for others to carry on without you.

The first step is to select someone to take charge. If you are in a firm, the logical person would be a partner or associate of the firm. If you are a sole practitioner, or do not have an associate who can or will manage your practice, consider finding a colleague with a comparable practice. You should select someone you trust, who understands the issues of managing a law practice, and is willing to assume the managing of your practice. You should also annually assess who your designee is because circumstances may have changed.

Consider whether your designee will take over the representation of your clients or simply inventory your files and funds and distribute them to the clients and substitute counsel and close your practice. If your successor will take over your practice, are there any things you can do now to make the transition easier? For example, what legal documents are needed to execute in order for the person taking over to sign on your bank accounts? What sort of written agreement do you need to have with the person taking over? How will clients, courts, and opposing counsel be notified? Is your will up to date and does your personal representative know about the plans for your law practice?

The second step is to ensure your client list and contact information is up to date and your designee knows, at a minimum, where your passwords and list of client matters are located, as well as how to access your computer, calendar, billing system, client ledgers, and bank accounts.

The Office of Disciplinary Counsel in 2020 will offer a program on succession planning in each county. You can also find additional resources through the following link: www.americanbar.org/groups/professional_responsibility/resources/lawyers_intransition/successionplanning/. 

Patty Schwartz has been Deputy Disciplinary Counsel for the Office of Disciplinary Counsel of the Supreme Court of Delaware since 2004. Patty currently serves as President Elect for the National Organization of Bar Counsel. She can be reached at patricia.schwartz@delaware.gov.

FROM THE DSBA SECTIONS

ELDER LAW SECTION

By Tanya S. Sellers, Esquire, Chair

The most significant and problematic change for the members of the Elder Law Section is access to our clients. Many of our clients reside in long-term care facilities, which have strict no visitor policies. As the pandemic continues and nursing homes are forced to create separate "Covid Units" the restrictions continue to increase. Our Section members are extremely concerned about this issue and have been discussing ways to increase awareness, so the emotional and legal needs of this vulnerable, underserved population do not get ignored. The virtual notary act put in place by our governor has been of great value. Through intense coordination with the employees of the facilities, we are now able to have virtual meetings with clients to review and execute legal documents. While this serves the legal needs of most, it does not help those who are extremely ill or lack the competence to attend a virtual meeting. It also does not address the loneliness and isolation occurring because family members have little or no access. Obtaining guardianships of incapacitated individuals continues to be a problem. This is an ongoing discussion of our members.

Below is a model one of our firms has adopted in order to continue to serve the needs of the elderly living in the community:

With the arrival of COVID-19, our firm reacted swiftly so all employees WOULD — not could — work remotely. We set up out-of-office phone and email messages. We took a "no client in the office policy." It remains our priority to make ensure all clients and staff are safe.

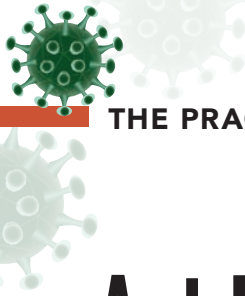
Now, our days begin with a daily Zoom staff meeting. For initial and routine client meetings, we offer Zoom or a conference call. The biggest question became, "How to execute Wills and Trusts?" We implemented "drive-by signings." After our attorneys have a Zoom meeting, the client drives to our office to sign, but never leaves their car. We bring the signature pages out on clipboards, which are disinfected after each appointment. We offer unused pens, but most clients bring their own. We have had a few hiccups, but the overwhelming response from our clients is gratitude!

TOURISM AND HOSPITALITY SECTION

By Ciro C. Poppiti III, Esquire, Chair

Sad irony — that is the overwhelming emotion the Section is feeling. Yes, we are sad that it took a pandemic to make palatable what we attorneys have long been preaching: The tourism-and-hospitality sector is the backbone of the Delaware economy, employing, or better put, providing a safety net, for tens of thousands of our neighbors. That point has now been scarred into our collective memory, with theaters, hotels, bars, and restaurants shuttered (or nearly shuttered). Proprietors say aloud that they just hope to weather through the pandemic, but what is not said is that they fear their doors may never open again.

Despite the societal convulsion, we attorneys are busy, lending our clients an ear as business analyst ("Do you think I should furlough my employees?"); negotiator ("Can we convince my Landlord to postpone the rent?"); and psychologist ("When do you think things will be normal again?"). Sadly, this is not the kind of busy we want to be. Bar President Bill Brady has strongly advocated for *pro bono* service. I think he would be proud indeed if we could tally all the no-fee hours being contributed by the Section to help businesses now so at risk.



Act Now: When Looking in the Rearview Mirror Is Not an Option

BY JENNIFER SMUTS

As the world started to learn about the coronavirus, law firms dusted off crisis plans the same way individuals might pull out insurance policies — you invest in these tools with the hope of never having to rely on them. By the week of March 15 it became clear as to which law firms had crisis communication plans in place because website posts went live, media statements were issued to both business and industry publications and managing partners became spokespeople and their statements were issued to staff, clients and co-counsel alike.

Crisis Communication Plans

The most effective crisis communication plans are built around a team of people who have a track-record of getting things done. Being a cross-functional team, they will effectively cover fact-gathering, provide timely responses, develop substantive communications, and have a strong spokesperson. Nothing is left to chance! From something as basic as providing the receptionist the media protocol (so they do not inadvertently give the wrong message to a hungry journalist) or being prepared for the question: “How is the firm operating in this environment?” to the more difficult development of protocol related to the complicated issue of contraction of the virus by a member of the firm — always remember that your most important audience are your employees.

The normal model of crisis communications is “Prepare, Respond, Recover.” Law firms are now in the “Respond” phase and beyond.

Susan Freeman, CEO of Freeman Means Business states, “Remember, during a crisis, people take in information differently, process it differently, and act on it differently. People latch onto the information that makes the most sense to them. People filter what they hear through their beliefs, values, behavioral patterns and current physical and emotional states. Communication doesn’t take place until the recipient filters and decodes the message. In other words, communication takes place in the mind of the receiver. During a crisis, the current physical and emotional state of our audience is key.” Well-thought out messages delivered effectively will dispel panic versus create it.

Business as Usual?

As much as you want things to go back to normal — that does not exist anymore. “Don’t use the term ‘business as usual’ when describing how your law firm continues to meet client needs,” states Gina Furia Rubel, Esquire, CEO of Furia Rubel Communications “because it’s just not true!” Law firms are in the business of providing insight on how breaking news affects clients. Call your clients and ask them what they want and need and if you can, afford them information that is relevant to the problems they are trying to solve.

Law firms manage multi-prong challenges and the communication of important facts is not only important — it is imperative! New York Governor, Andrew Cuomo, is a commendable example for law firms. He is taking responsibility for an action plan, he provides assurance of survival (although we will experience pain), he is present via regular press conferences and Q&A sessions, and he is a human being. He openly talks about his brother contracting the virus and being scared.

Resilience

The capacity to recover comes from being able to see our way through a difficulty, a hard time, or problem. The illumination of a plan and the articulation of how individuals will play a role affords invaluable transparency that aids resiliency. Rubel states, “When the thought process behind a decision isn’t articulated and there is lack of transparency even reasonable people will develop their own story.”

From firm solutions for the challenges clients face to the issues individual lawyers are having in the shift to a “work from home” environment, sharing information that can be helpful to others in the firm is important. “As everyone is adjusting to working more virtually, it is more important than ever for practices to continue to hold regular practice group meetings,” states Susan Raridon Lambreth, Esquire, co-founder of LawVision. “These (practice group) meetings will provide

security and stability, maintain a sense of connection, continue to work on projects that contribute to the group's success and allow members a chance to share concerns or question about work matters."

Now Is Not the Time

Keep in mind that clients may be facing information overload. "Consider creating a list of FAQs you know will help clients and put your answers alongside them," states Kevin O'Keefe, CEO, Lexblog, "and make a phone call — there's comfort in hearing your voice, offer to help, then follow up by sharing the FAQ you drafted for them." Personal outreach is often the differentiation that clients remember long after a crisis ends.

Outlets such as *Law.com* and *Law360* are sharing what most consumers of legal services worry about — remember to balance your client outreach while allowing your clients some breathing room. However do not let your "marketing fitness" fade. Use this time to be more active on LinkedIn. LinkedIn is a critical source of news and insight for clients. Improve your LinkedIn bio, join groups, and show how your experience addresses the needs of clients and potential clients in the current climate.

You are growing a network of relationships by developing your reputation as a "go-to" lawyer in your industry, practice or geography. No, you should not expect to land a new client the moment you make a post. Relationships do not come overnight. Your effort today is your work tomorrow.

In responding to a pandemic, the way law firms manage and communicate these next steps may be both a market differentiator and a determinant of how clients view the firm. Be empathetic, be human! We are in this for the long haul, so preserving stamina is critical. And for what it is worth, I believe we will look in the rearview mirror and see that lawyers and law firms played an essential role in making sense of the COVID-19 disruption. 🍷

Jennifer Smuts is the Chief Marketing Officer at Connolly Gallagher LLP. She can be reached at jsmuts@connollygallagher.com or (302) 888-6206.

WORKERS' COMPENSATION LAW SECTION

By Andrew J. Carmine, Esquire, Chair

During this unprecedented time of separation, the different entities of Delaware's Workers' Compensation system are experiencing an encouraging sense of community. In an effort to ensure that hearings addressing injured workers' benefit entitlements continue to take place, the Industrial Accident Board is offering the option, at the discretion of the parties, of virtual hearings through the platform WebEx. While utilization of this process will not be possible in all circumstances, it will no doubt mitigate the enormous difficulty of rescheduling all of the suspended and postponed litigation once the quarantines are lifted.

This endeavor requires communication and cooperation amongst the Board members, hearing officers, medical experts, and attorneys. Working together towards this singular goal of continuing to litigate workers' compensation cases while quarantined in our separate locations has strengthened the comradery amongst these entities at this most unusual time. It has also brokered the prospect of increased focus on settlement and voluntary compromise. But perhaps most importantly, it has highlighted the deep-rooted civility for which Delaware's Workers' Compensation Section is known, as practitioners solve issues concerning deadlines, remote depositions, and creative forms of discovery.

In continuing to fulfill its mission to promote unity and civility amongst the judges, Board members, hearing officers, and attorneys practicing workers' compensation law, The Randy J. Holland Delaware Workers' Compensation American Inn of Court is hosting a virtual meeting with Richard Herrmann providing a tutorial of the WebEx program as well as information on how to enhance the virtual proceedings taking place before the Board.

These strange and unwanted times have indeed reminded all who practice law in Delaware just how fortunate we are.

GOVERNMENT & CONSUMER LAW SECTION

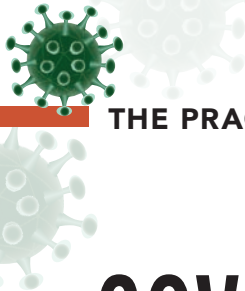
By Jaclyn L. Quinn, Esquire, Chair

The practice of law during the COVID-19 crisis has raised unique challenges for our profession, but those same challenges are experienced 10 fold for some of our most vulnerable clients. My perspective comes as an attorney at DCRAC Law, a nonprofit law firm that offers free and low cost representation in various civil legal matters.

Some of us were already mobile in our daily practice — a home office with a printer, strong internet connection 24/7, and a phone that can handle almost anything. For our clients, those same aspects of technology are absent or unattainable due to cost, illiteracy, disability, etc. Phone calls are long, and we are mailing letters and forms to our clients with prepaid, addressed return envelopes to conduct transactions seamlessly.

For other subsets of our community, there is a great deal of fear, especially among vulnerable populations. Those with unstable living conditions are facing severe challenges, as shelters are maxed out and couch surfing during a pandemic is not feasible. Those who were barely scraping by are now lacking essentials. They are seeking advice for matters such as: Can I be evicted? Can my employer fire me? Will the IRS come after me?

In this crisis, there is a ray of light in the way the private sector stepped up: utilities are not disconnecting or charging late fees, internet is available to those in need, banks are waiving fees, and corporations have quickly put together funds to keep nonprofits open and able to serve. Government has also been proactive to provide relief, such as pausing foreclosures and evictions, waiving fees, extending due dates, and the CARES Act. We are all adapting and pivoting quickly during this time to meet the urgent needs while looking to the near future to anticipate unforeseen issues that will surely emerge.



COVID-19:

Risk Management Strategies for Small and Mid-Sized Law Firms

BY MIKE MOONEY

The COVID-19 crisis has changed the way law is practiced. Small and mid-sized law firms need to prepare and transform in these uncertain times. There are four key areas that small firms and practitioners should focus on from a risk management perspective. The benefits of effective risk management procedures include: the avoidance of surprises, improved planning, improved information for decision making, and the enhanced reputational/personal well-being for lawyers.

Legal Malpractice

Bad things can happen to good lawyers. With that said, a legal malpractice policy protects your assets and your billable hours and provides a safety net if you make a mistake. Since a legal malpractice policy is written on a claims made and reported basis, meaning that you have to have coverage in place when the alleged act occurred and the act is reported, it is very important to not cancel or make changes to your policy limits during this time. It may be tempting to cancel your policy in order to save money, but this decision is fraught with issues related to risking the exposure of past acts that will go uncovered. Also, it is even more important to be insured with a strong carrier and have a robust policy form.

Legal malpractice claims have a direct correlation to the economy. When the economy is good, claims frequencies are down. When the economy is bad, claims frequencies go up. While we do not know what lies ahead, we do know that the current situation is unstable at best and could increase claims.



RISK MANAGEMENT TIP

Do not touch your malpractice insurance during this time!

Virtual Notary Work

The way we practice law is evolving almost daily during this current crisis. One new aspect is the acceptance of virtual notary work. Essentially, notary work has moved away from needing to be done in-person, allowing the work to be done electronically on platforms such as FaceTime, Zoom, Skype, etc. Typically, in-person notary work is excluded from your professional liability policy to prevent coverage for a notary that made no effort to confirm the identity of the signor. Since this is new and is in somewhat uncharted waters, some carriers are taking the position that, if the notary is in compliance with state requirements for remote notarization, the policy would respond.



RISK MANAGEMENT TIP

Contact your Insurance Broker to see what position your carrier is taking. Get this opinion in writing!

Suing for Fees

With the current economic climate providing some unexpected challenges, attorneys may find themselves faced with clients who may not be willing and/or able to pay their outstanding bills. This is where you need to decide what to do with regards to suing your client for unpaid legal bills. Here are some things to think about as you evaluate this option:

1. 40 percent to 50 percent of the time, a fee suit results in a counter claim for malpractice.
2. It is important to re-evaluate the reasonableness of the fees you are seeking to recover. You cannot recover excess fees and therefore you may need to reduce the amount of your fees accordingly.



RISK MANAGEMENT TIP

Contact your insurance broker to see if a counterclaim for malpractice is excluded on your policy. Also, check with your broker regarding your deductible. If you are seeking to recover \$5000, but your deductible is \$5000, is it worth it if you are sued for malpractice?

Cyber Liability

Cyber criminals will try to turn this crisis to their advantage. We have already seen some sophisticated malware and phishing scams come through recently. Below are some tips for both employers and employees to prevent such scams from being successful:

Employers:

1. Require two-factor authentication.
2. Engage in regular security updates.
3. Back up systems and data regularly.
4. Advise employees to be wary of everything they click on.
5. Use call back verification for vendor or client account changes and fund transfers for any amount above a predetermined threshold (*i.e.* \$25,000).

Employees:

1. Keep computers and other devices in a secure place.
2. Log out when you are not using your computer or system.
3. Have strong passwords.
4. Back up/save data and change passwords regularly.
5. Access corporate information with a VPN especially if you are accessing on a public network. 🌐

Mike Mooney is the Senior Vice President and Professional Liability Practice Leader at USI Affinity. He can be reached at mike.mooney@usiaffinity.com or (610) 297-0061.

FAMILY LAW SECTION

By Megan A. McGovern, Esquire, Chair

Like many practice areas, we are taking advantage of technology to help move our cases forward. However, unlike other courts, the Family Court does not have an e-filing system and did not have e-filing procedures in place prior to the pandemic. The Court worked diligently (and quickly) to institute an electronic filing system which permits filing by email for emergency and other time-sensitive filings.

The Court has also implemented procedures for judicial officers to continue hearing matters remotely where practicable. Litigants may submit their evidence via email in advance of the hearing, and judicial officers are able to use Skype or Zoom to hold hearings by phone or video.

In addition, the Court began triaging Protection from Abuse ("PFA") cases days in advance of the scheduled hearings — this allows domestic violence advocates and volunteer attorneys to continue working with victims of domestic violence involved in PFAs as they can participate in telephonic mediation to resolve PFA matters. The Court is also working with the Division of Services for Children, Youth and their Families to certify an online parenting education course, a required class for litigants involved in divorce and custody cases.

Practitioners have also adjusted to a new "normal." Many are using Zoom or similar platforms to communicate with clients. Some of the Family Court private mediators are offering their mediation services over Zoom, too.

In terms of substance, custody cases have presented to be the most challenging during this time. Many parents are concerned about whether visitation should continue to occur and to what extent. This becomes more complicated where one or both parents may not be able to maintain social distancing because they are working, or if a third-party supervisor is required. The Family Court issued a statement on April 1, 2020 confirming that custody and visitation orders should continue to be followed during the State of Emergency unless altered by mutual agreement of the parties or subsequent order of the Family Court.

REAL & PERSONAL PROPERTY LAW SECTION

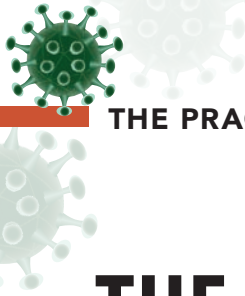
By Stephen A. Spence, Esquire, Chair

The Real & Personal Property Law Section has been actively discussing and dealing with the impact of COVID-19 on the practice of law and our community.

For many section members who handle transactions, one of the best parts of the practice is directly interacting with clients and others at the settlement table. But the pandemic has transformed that often joyous moment into something to avoid. Even so, section members and their staff continue their hard work and dedication to help their clients move forward and keep the Delaware economy going.

The Real Estate Section has been very proactive. We held a conference call devoted to COVID-19 that was attended by over 75 members. This included hearing from the County Recorders' offices about their efforts, restrictions, and changes. We also discussed best practices dealing with settlement logistics, handling paperwork, remote working and technology, office hygiene, and other issues. Section members have kept the conversation going on our active email listserv. In addition, section members have been helping their clients and organizations understand actions by the state and federal governments related to the crisis. And the section worked together with the Estates & Trusts Section to draft an executive order addressing notarization and witnessing requirements to limit the spread of the virus.

The Real Estate Section will continue to work together to address the ever-evolving challenges presented by COVID-19, including helping the Bar, our firms and staff, our clients, and the Delaware community endure and overcome these unprecedented challenges.



THE PRACTICE OF LAW

During the COVID-19 Crisis in the United States District Court for the District of Delaware

BY THE HONORABLE CHRISTOPHER J. BURKE


As it has for nearly every other place of work in Delaware, the COVID-19 crisis has changed the day-to-day life of the United States District Court for the District of Delaware. Since the Governor of Delaware declared a State of Emergency in mid-March 2020, the District Court has taken a number of steps designed to protect the health of its employees and the public, while also respecting the rights of litigants. Among those steps were the following:

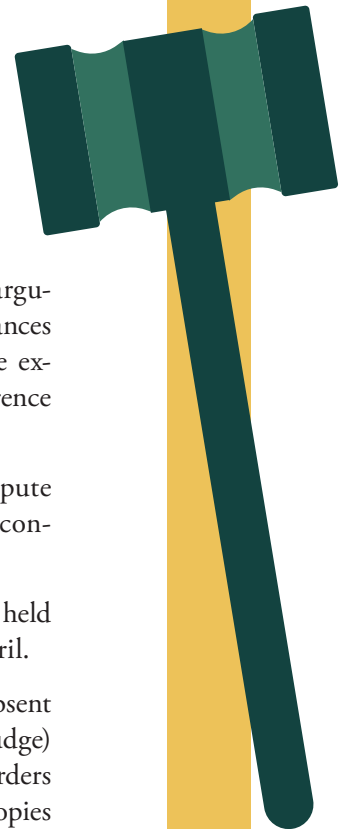
- ▶ All civil and criminal jury trials scheduled to begin prior to May 31, 2020 have been continued.
- ▶ All deadlines set by rule or Court order have remained in effect. But the Court remains flexible and will consider the grant of joint or individual party requests for relief from certain deadlines due to the crisis.
- ▶ Pursuant to the passage of the federal Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), the Court has developed procedures designed to handle initial criminal proceedings (such as initial appearances, detention hearings, preliminary hearings and arraignments) by videoconference, if the defendant consents to doing so. By early May, other criminal hearings, such as change of plea hearings or sentencings, will begin to take place via videoconference if consent is given.
- ▶ Individual Judges remain free to schedule hearings, oral arguments, bench trials and other proceedings in the exercise of their discretion. But uniformly, the District Court Judges have

been converting in-person hearings and arguments into telephonic proceedings. In instances where more substantial presentations are expected, the Judges have held videoconference proceedings.

- ▶ Mediation and other alternative dispute resolution proceedings are now being conducted telephonically.
- ▶ The District’s Re-entry Court will be held by videoconference, beginning in late April.
- ▶ The Court suspended in civil cases (absent any further order from an individual Judge) provisions of its Local Rules and other orders that required the submission of paper copies of filings.

Despite all of these changes, the Court remains open for official business. As before, it continues to resolve all manner of pending disputes. And it will continue to monitor developments and alter its procedures as events warrant.

In these difficult times, the Court is particularly grateful for the efforts of those who work at or with the Court, including its Clerk’s Office staff, members of the United States Marshals Service, Court Security Officers, representatives of the United States Probation Office, in-Chambers staff, information technology staff, custodial staff, and other members of the District Court community. A small number of those persons have continued to work in the Courthouse during these last few months, while the remainder are working from home. With the help of its dedicated personnel, the Court will continue to administer justice during these difficult times. 



Christopher J. Burke is a United States Magistrate Judge on the United States District Court for the District of Delaware.

BANKRUPTCY LAW SECTION

By Jeffrey R. Waxman, Esquire, Chair; Joseph Michael Barry, Esquire, Vice Chair; and Erin R. Fay, Esquire, Secretary*

The novel coronavirus (or COVID-19) pandemic has become a global issue affecting each of us personally and professionally. The pandemic has affected virtually every court — federal and state — in Delaware and elsewhere around the country. Like other courts, the Delaware Bankruptcy Court and the practitioners appearing before it have had to adjust. Even as this is written on April 10, 2020, those changes and practices continue to evolve.

The Local Rules of Bankruptcy Procedure

By way of background, the Delaware Local Bankruptcy Rules provide for procedures that include filing an agenda and delivering pleadings to the Court two days prior to a hearing. Hearings under the Local Rules are generally in-person, although non-local parties are permitted to attend hearings telephonically using CourtCall. In most cases, parties arguing a motion are not permitted to appear telephonically, but are required to attend a hearing in person. Other than in rare exceptions, all evidentiary hearings and trials require directly participating counsel and all witnesses to be physically present in the Courtroom.

Changes Since March 12

On March 12, 2020, the United States District Court and the Bankruptcy Court issued a joint announcement that the Courts were monitoring the outbreak of COVID-19. Among other things, the Courts advised that they were encouraging employees and practitioners to telework. The Courts also announced that they would conduct conferences and hearings telephonically when it is practicable and efficient to do so and would promptly consider any request to change a conference or hearing from being held in-person to via telephone. A day later, the Bankruptcy Court issued an interim order stating that, effective March 16, the Bankruptcy Court would no longer accept hand delivery of any documents, and modified the chambers procedures to provide for the delivery of documents electronically, including that all agendas for hearings include hyperlinks to docketed pleadings.

On March 16, the Bankruptcy Court issued a general order that all hearings, status conferences, trials, and any other matters scheduled to be held in open court that are not deemed time-sensitive by the presiding judge would be continued until a date to be determined on or after April 15, 2020. All hearings held prior to April 15, 2020, were to be telephonic and/or by videoconference, unless otherwise determined by the presiding judge. That order was subsequently amended to extend the continuance of all non-time-sensitive matters through May 1, 2020.

The Bankruptcy Court has also entered orders closing its intake counter (although the drop box in the lobby of the Bankruptcy Court building remains available), and suspending the requirement that counsel obtain original signatures from debtors.

The Bankruptcy Court's orders have also affected the Court's consumer docket, as the intake is closed, thereby

requiring that *pro se* parties file pleadings electronically. Hearings to consider confirmation of Chapter 13 plans and other hearings in Chapter 13 cases are also being heard telephonically.

Open Communications From and With the Court

The Bankruptcy Court has been very transparent with all of the practitioners. Among other things, the Bankruptcy Court has promptly issued orders, which are available on its website, and has requested that each of those orders be distributed by the listservs of the DSBA's Bankruptcy Section and the Federal Bar Association. On March 16, the Bankruptcy Court held a teleconference for paralegals and attorneys to provide guidance and address any questions on how to handle the new policies and operations. The Bankruptcy Court also held its regularly scheduled bench and bar on April 21 by Zoom to give the Bankruptcy Court an opportunity to provide practitioners with an update, and for practitioners to raise issues or ask questions of the Bankruptcy Court.

The Bankruptcy Court's Preparedness

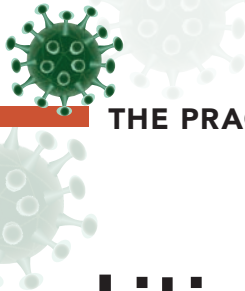
The Delaware Bankruptcy Court was extraordinarily prepared for this sort of crisis. Over the last several years, the Bankruptcy Court's technology was prepared for video hearings (a change that was welcome from the nascent days of cross-border cases that required hearings jointly conducted in real-time with courts in other countries). Further, the Bankruptcy Court's employees were issued computers by the Bankruptcy Court to enable them to work remotely. That does not mean that everything can be done remotely, as a few employees need to appear at the Bankruptcy Court once or twice a week in order to pick up certain items that cannot be checked remotely. But from our perspective, the Bankruptcy Court (including staff) has done very well under these unprecedented circumstances.

Looking Ahead

We are now in a period when hearings are being conducted telephonically or by video through either Zoom or Skype. At least one Bankruptcy Judge has established a procedure for "first day" hearings by which blacklines of orders must be sent to the Court at least an hour prior to the hearing, with a clean copy of all orders to be uploaded prior to the hearing. This is, at least for now, the new normal.

But even during what we hope is the worst of times, it has been refreshing to witness the collegiality of the Delaware Bankruptcy Bar (and of our colleagues elsewhere) at its finest. To be certain, the bankruptcy process is inherently adversarial; the parties are all fighting for their piece of the same pie. As the Bankruptcy Court's and the parties' resources have been curtailed during this process, everyone is working together to move expedited matters forward while pressing pause on less critical issues. 🍷

* Thanks to Chief Bankruptcy Judge Sontchi for his assistance.



Litigating Intellectual Property Rights Created in Response to COVID-19

BY FREDERICK L. COTTRELL III, ESQUIRE, AND VALERIE CARAS, ESQUIRE

As companies race to develop vaccines, medical products, and other treatments to combat the COVID-19 pandemic, these advances will likely engender litigation related to the protection of intellectual property rights. Given the District of Delaware's national prominence as a preeminent patent litigation venue, a sizeable portion of such litigation may proceed in a Delaware courtroom. A few of the IP issues that may arise in the pandemic's wake are previewed below.

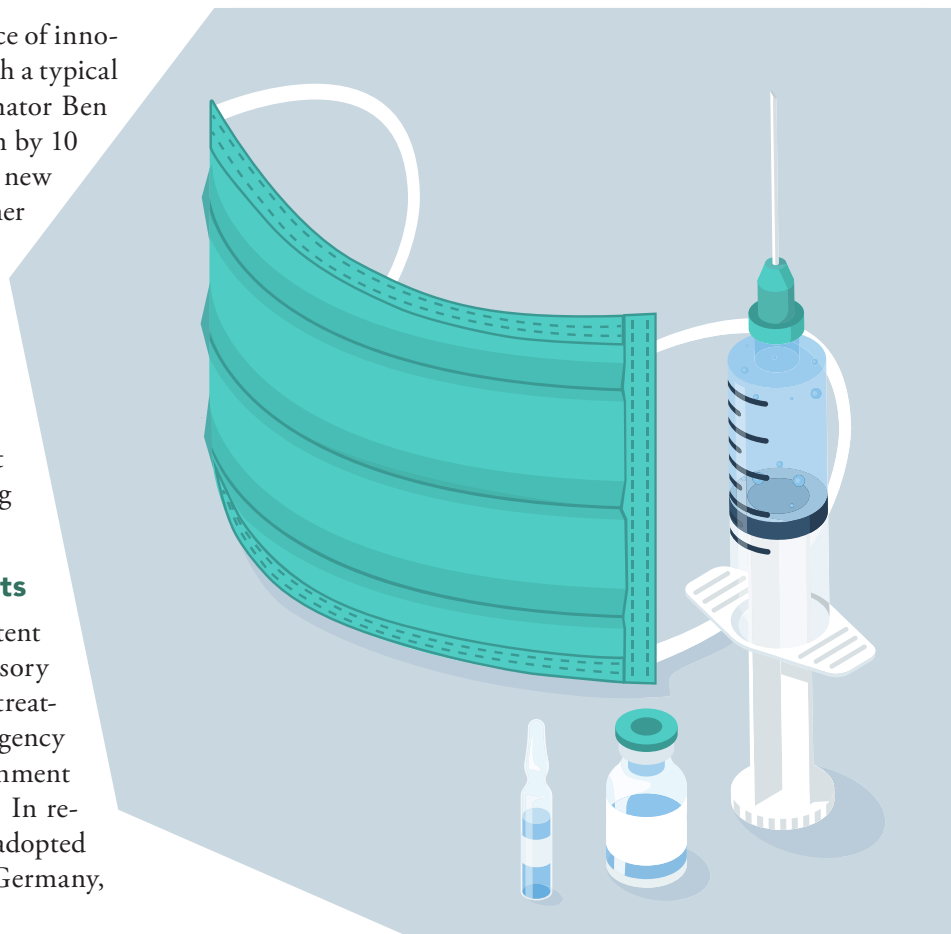
Exclusivity Terms

Under the United States' patent regime, the price of innovation is rewarded by the promise of exclusivity, with a typical patent term lasting 20 years.¹ In March, U.S. Senator Ben Sasse (R-NE) introduced a bill extending that term by 10 additional years for patent owners who develop "a new or existing pharmaceutical, medical device, or other process, machine, manufacture, or composition of matter, or any new and useful improvement thereof used or intended for use in the treatment" of COVID-19.² The patent term for such an innovation would not begin until the national emergency concludes.³ Such a bill could, at a minimum, spawn litigation as to what constitutes an improvement of an existing product for purposes of treating COVID-19.

Compulsory Licensing and March-In Rights

Related to the question of exclusivity is the extent to which governments may require the compulsory licensing of patents to make medical devices and treatments widely available so long as the national emergency persists. Such schemes typically permit the government or private entities to produce patented inventions. In response to the pandemic, this approach has been adopted internationally by countries including Canada, Germany, France, and Israel.⁴

To date, the United States has not taken such an approach. To the extent statutory authority for compulsory licensing exists, 28 U.S.C. § 1498 permits the federal government to produce a patented invention without a license so long as it provides "reasonable and entire compensation for such use and manufacture" to the owner.⁵ Additionally, 35 U.S.C. § 203 gives the federal government so-called "march-in rights": if the patented invention was developed with federal dollars, the government may either take a license on the patented invention, or otherwise grant a license to a third-party.⁶ Against a 200-year-old backdrop reinforcing IP



as a constitutional property right, the government's use of compulsory licenses has been called "rare" by the Supreme Court,⁷ and it does not appear that the federal government has ever used its march-in rights.

The recently-passed COVID-19 relief bill — the CARES Act — does not address compulsory licensing or march-in rights, but rather broadly permits the Secretary of the Department of Health and Human Services to "take such measures authorized under current law to ensure that vaccines, therapeutics, and diagnostics developed from funds provided in this Act will be affordable in the commercial market."⁸

PREP Act Immunity from Patent Infringement Claims

Another issue that could be litigated in the pandemic's wake is the extent to which the Public Readiness and Emergency Preparedness ("PREP") Act creates immunity for patent infringement claims arising from products used in fighting COVID-19.⁹ The PREP Act generally immunizes "from suit and liability under Federal and State law" losses incurred by "entities and individuals involved in the development, manufacture, testing, distribution, administration, and use of medical countermeasures."¹⁰ The Secretary of the Department of Health and Human Services recently invoked the PREP Act to fight COVID-19, conferring immunity upon companies for losses arising from producing qualifying medical devices and treatments.¹¹ No court has addressed whether "losses" under the PREP Act include patent infringement claims.

Why Delaware?

Given that the judges within the District of Delaware have accumulated the kind of expertise in patent litigation respected by both sides of the bar, and given that multiple pharmaceutical, medical device, and life sciences companies are incorporated in Delaware, it is unlikely that patent litigation will slow in the First State any time soon. As the fight against COVID-19 concludes, new fights related to IP rights are likely to begin. ⚖️

Notes:

1. U.S. CONST. Art. I, § 8; 35 U.S.C. § 154.
2. *A Bill to provide certain limitations on liability for actions taken by health care providers to combat COVID-19*, 116th Cong. (2020).
3. *Id.*
4. Adam Houldsworth, *The key covid-19 compulsory licensing developments so far*, IAM (Apr. 7, 2020), <https://www.iam-media.com/coronavirus/the-key-covid-19-compulsory-licensing-developments-so-far>.
5. 28 U.S.C. § 1498.
6. 35 U.S.C. § 203 (the "Bayh-Doyle Act.").
7. *See, e.g., Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 215 (1980).
8. The CARES Act, H.R. 748, 116th Cong. (2020).
9. PREP Act Q&As, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, <https://www.phe.gov/Preparedness/legal/prepact/Pages/prepqa.aspx> (last updated Sept. 5, 2019).
10. *Id.*
11. *Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19*, 85 Fed. Reg. 15198 (March 17, 2020).

Frederick L. Cottrell III is a director and **Valerie Caras** is an associate of Richards, Layton & Finger, P.A. The views expressed herein are the views of the authors and are not necessarily the views of the firm or its respective clients. Frederick L. Cottrell III can be reached at Cottrell@RLF.com and Valerie Caras can be reached at Caras@RLF.com.

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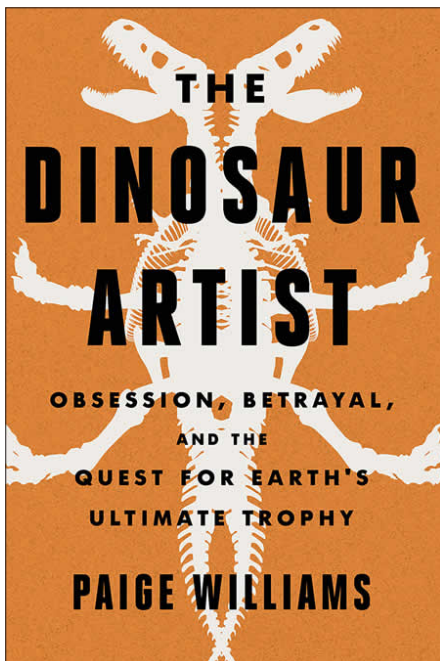
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Do What You Love, but Know the Law



The Dinosaur Artist: Obsession, Betrayal, and the Quest for Earth's Ultimate Trophy

By Paige Williams
Hachette Books, 2018

There is an old saying that if you do what you love, you will never work a day in your life. And, there is another old saying that if you do what you love, the money will follow. Eric Prokopi was proof that both sayings can come true. Growing up as a shy, quiet youth in Florida in the 1980s, Eric became hooked on fossils. It started with shark's teeth and grew from there. He liked everything about fossils. Hunting (*i.e.*, searching for) them. Cleaning them. Identifying them. Learning about them. He started selling his finds at fairs and trade shows. When he started college in 1992 at the University of Florida, he had grants and scholarships that paid his tuition (he was third in his high school class with high SAT and ACT scores), and he paid his living expenses with his fossil money. After college, he never sought a "regular" job; instead, he pursued his fossil business — and he was good at it. He could make enough money to support himself and he was doing what he loved. He got married, had two kids, and was living a comfortable, but not extravagant life. But in 2012, it would all come crashing down.

Journalist Paige Williams tells Eric Prokopi's tragic story in *The Dinosaur Artist: Obsession, Betrayal, and the Quest for Earth's Ultimate Trophy*. Along the way, she also recounts the growth of the fossil trade industry, from a somewhat quaint hobby enjoyed by millions of amateur enthusiasts in the 60s and 70s, to a much bigger trade industry with auction houses selling million dollar fossilized skeletons to private collectors.

Florida is rich in fossils, and, Prokopi was able to find plenty of good fossils in Florida river beds and other places, including giant armadillos, giant sloths, and other mammal fossils — but really nothing in the way of dinosaurs. Prokopi began attending the Tuscon Gem and Mineral Show, the largest show of its kind in the world, which also includes fossils, to sell his own goods. He started buying unfinished dinosaur fossils (that is, fossils which still needed to be cleaned and prepped for display) from other dealers and middlemen, "finishing" them for sale, and then selling them to collectors. Prokopi soon started making more money from these dinosaur fossils than the rest of his business.

In 2007, Prokopi consigned the skull of a *Tarbosaurus bataar* to the I.M. Chait auction house (the *T. bataar* was the Mongolian cousin of the T. Rex, which was native to North America). Prokopi and his wife watched in amazement as the bidding soared and came down to two phone bidders — with a winning bid of \$276,000. The Prokopis later learned that Nicolas Cage had outbid Leonardo DiCaprio.

Shortly thereafter, Prokopi was contacted by a broker who had a client that also wanted a *T. bataar* skull. Eric did not have one, but knew someone who did; so Eric purchased the unfinished skull, cleaned it up and was flown to Hollywood to install the skull — in the home of Leonardo DiCaprio. In the space of just a few months, Prokopi had sold two skulls for nearly half a million dollars.

When Prokopi's main middleman stopped working with him, Prokopi decided he needed to deal directly with the source — folks in Mongolia. Eric was given a

Prokopi's story, ultimately, is a cautionary one. Do what you love, but make sure to do it legally.

contact and ended up making three trips to Mongolia. He managed to cut a deal for a nearly complete *T. bataar* skeleton, which was shipped to a dealer in Great Britain and then, from there, to Prokopi in Florida. Prokopi cleaned the skeleton, supplemented its missing bones with some of his own fossils which were close in size/appearance to the missing bones (this practice is common in museum displays as 100 percent complete skeletons are never found), and put the skeleton together for display.

The *T. bataar* was pictured in a special centerfold of the Heritage Auctions' May 20, 2012 Natural History auction catalog. Auction houses naturally want to generate as much publicity as possible for their auctions, and, in this case, those efforts led the auction to come to the attention of a Mongolian paleontologist working in New York City. Mongolian law prohibits the removal of dinosaur bones without the government's permission and, knowing that the government had never granted such permission, the paleontologist contacted a friend in the Mongolian government who persuaded the Mongolian President to take action. For the first time in its history, Mongolia sought the return of Mongolian fossils illegally taken from the country. Despite a court injunction, the auction proceeded, and the *T. bataar* sold for just over \$1 million; but, on that day, Eric Prokopi's life started to unravel.

Paige Williams chronicles it all. She tells not only the story of Eric Prokopi, but the history of Mongolian dinosaurs, the scientific expeditions to Mongolia in the early twentieth century (which brought back lots of Mongolian fossils to the United States), the growth of the commercial fossil market in the late twentieth and early twenty-first centuries, the story of *Tyrannosaurus Sue*, and a host of other related stories and incidents.

Before the auction of Prokopi's *T. bataar* skeleton, Mongolia had never sought repatriation of any Mongolian fossils, but things quickly changed.

Mongolia sought the return of as many fossils as it could locate. Nicolas Cage voluntarily agreed to return his skull. Leonardo DiCaprio, though, had already traded away his skull, parlaying it into a *T. Rex* skull (which is legal to own). All in all, Mongolia recovered some three dozen Mongolian dinosaurs.

Did Eric Prokopi deserve his fate? Arrested and facing 17 years of jail time, he pled and served three months. In Williams' telling, Prokopi comes across as a likable guy; but certainly Prokopi knew

he was doing something wrong in his dinosaur dealings, at least at the end with the big *T. bataar* skeleton. His decision to falsify custom reports demonstrates that. Prokopi's story, ultimately, is a cautionary one. Do what you love, but make sure to do it legally. If only Prokopi has stuck to his Florida roots, and not sought out the more lucrative, but illegal, trade in Mongolian dinosaurs, he would still be doing what he loved. 🐾

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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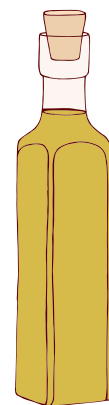
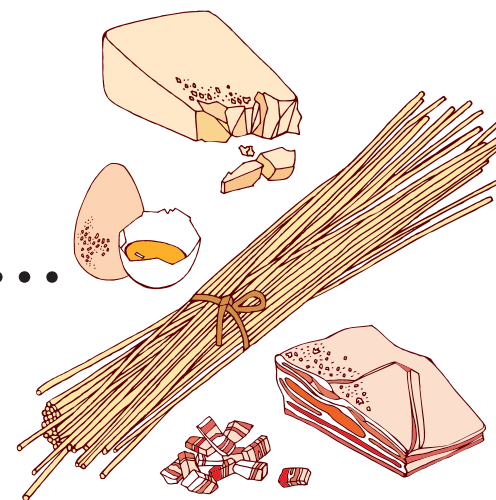
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Soothe Me with Spaghetti... and a Show



The coronavirus pandemic has created much uncertainty in our day to day lives. While we are on “pause,” we can find comfort in certain constants. Now, perhaps more than ever, the quote by author, educator, and entrepreneur Stephen Covey rings true: “There are three constants in life...Change, Choice, and Principles.”

CHANGE

As I write, restaurants are open for take-out only or closed indefinitely. Theaters and concert venues have suspended their seasons. Two sources of inspiration, fellowship and solace — food and performing arts — are not accessible in the ways they were just weeks ago. Expecting this may continue through publication, I offer some ideas as restaurant seats are empty and stages are dark. And, I will tuck away my Kentucky Derby and Point-to-Point themed recipes until next year.

CHOICE

I choose to cook and share recipes with family and friends. My go-to comfort food is pasta of all shapes and sizes. I prefer the twirling types, like bucatini and spaghetti. This recipe for Pasta Carbonara is simple to prepare and requires a few basic ingredients — eggs, bacon, and grated cheese. The quantities are intended for four.

PRINCIPLES

Finally, a message of gratitude...Thank you to the doctors, nurses, healthcare workers, military, first responders, pharmacists, grocers, chefs, truckers, transit workers, sanitation workers, and all who carry out essential roles in support of our community and country. We appreciate and honor you.

DINNER — PASTA CARBONARA

Ingredients:

- 6 slices of bacon (preferably thick cut)
- 4 jumbo or large eggs
- Grated Pecorino, Parmesan, or Romano cheese
- Extra virgin olive oil
- 1 pound pasta (preferably bucatini or spaghetti)
- Freshly ground black pepper

Bring a large pot of water to a boil. With kitchen scissors, cut the bacon into strips (or cubes for thicker bacon) of about 1/3 inch. Set aside. Whisk the eggs in a medium bowl, and stir in 1/2 cup grated cheese. Add pepper to taste.

Heat three tablespoons of olive oil in a heavy pot (preferably a Dutch oven) over medium heat. Add the bacon, moving it around a bit, and cook until golden and slightly crisp. Remove the pot from the heat. Transfer the bacon to a small bowl and discard all but four tablespoons of the bacon fat.

Cook the pasta according to the package instructions. Just before the pasta is finished, scoop about 1/4 cup of the pasta water into the pot with the bacon fat, keeping on low heat. Drain the pasta in a colander, then transfer to the pot with the bacon fat and pasta water. Remove the pot from the heat and whisk in the egg mixture, stirring constantly, so that the egg and cheese coat the pasta. Also stir in the bacon. Transfer to a large pasta bowl or serve in individual pasta bowls.

Top with red pepper flakes and more grated cheese. If you have frozen peas on hand, add some as you finish browning the bacon. Or, if you have cherry tomatoes, half them and cook with the bacon.

A SHOW

Until orchestras, opera companies, and dance troupes are able to safely return to the stage, many are offering live-streams and recordings to their supporters and the general public. Take in a virtual show by artists here in Delaware or in Philadelphia, New York City, or Boston. Below are just a few suggestions:

- Met Opera: www.metopera.org
- Philadelphia Orchestra: www.philorch.org
- Boston Symphony Orchestra: www.bso.org
- Alvin Ailey American Dance Theatre: www.alvinailey.org
- Opera Delaware: www.operade.org

As you tune-in, consider making a donation to help these non-profits strengthen their financial positions as we move through these challenging times. 🎧



Susan E. Poppiti is a mathematics teacher at Wilmington Friends Upper School and provides cooking instruction through La Cucina di Poppiti, LLC. Susan can be reached at spoppiti@hotmail.com.

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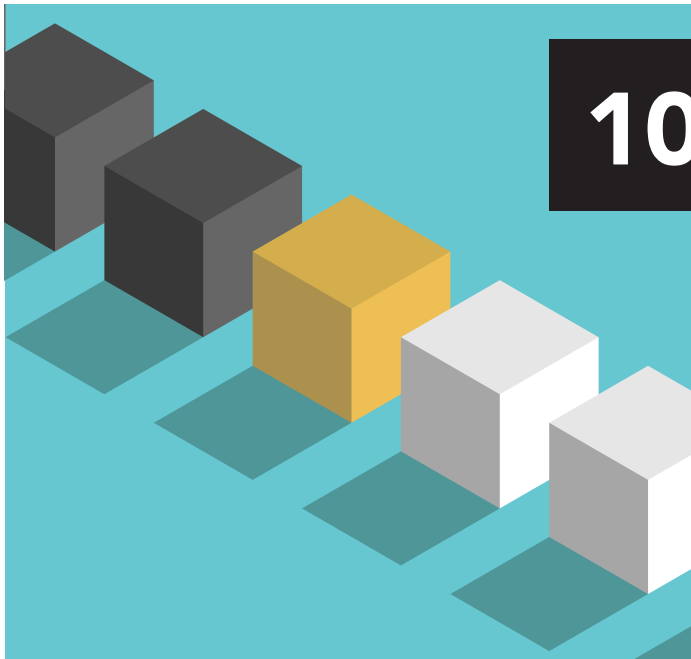
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10 TIPS

FOR MEDIATION

BY YVONNE TAKVORIAN SAVILLE, ESQUIRE

As we all know, alternative dispute resolution is prevalent in just about every legal practice area and is a very effective tool in resolving cases in Delaware. When I was approached by the DSBA to offer my Top 10 tips for mediation, I thought our membership might appreciate hearing insight from a number of leaders in our field. Many thanks to my friends and colleagues who have provided an excellent list of best practices in mediation: The Honorable Joseph R. Slights, III, The Honorable Mary Pat Thyng, The Honorable Sherry R. Fallon, The Honorable William L. Chapman, Jr., The Honorable Joshua W. Martin, III, Francis J. "Pete" Jones, Jr., Esquire, Tiffany Q. Friedman, Esquire, David A. White, Esquire, Bernard G. Conaway, Esquire, and Keith E. Donovan, Esquire. In no particular order, we offer the following:

1 It is essential that trust develops between the parties and the mediator. Part of building this trust is for the attorney to pick the right mediator. Not every mediator is right for every litigant. Given the complexity of personalities, compatibility varies and cases vary. Counsel should know what their client is like and pick a mediator who will work well with their client. If the mediator has earned the trust of all parties and counsel, he/she will be able to provide evaluative guidance.

2 Litigants have to take the time to prepare the mediator. This includes not only educating the mediator about the facts of a particular case and the law that applies, but also about the personalities of the litigants involved and what their goals are for mediation. In some instances, money is not the ultimate goal of the litigant. An apology may be the goal. Finding out what actually caused the parties to be in litigation in the first place may

be the goal. Properly educating the mediator before the mediation about the goals and the personalities increases the chances of a successful mediation. In the same vein, litigants need to prepare their clients about the mediator and how a particular mediator goes about his/her business and what process he/she follows.

3 Litigants need to be prepared for mediation. This means that the parties need to be prepared by their attorneys for the process. The talk needs to have occurred. The talk includes giving the litigants clear guidance on the strengths and weaknesses of their case and the likely outcome before the decision maker. Align the clients' expectations with what is reasonable based on what a group of 12 jurors is likely to do if the case was presented to them and in light of verdicts that have been issued in your client's type of case. Set realistic goals with a plan on how to achieve those goals.

Remember that the purpose of mediation is to resolve a case and to get the other side to want to compromise. Compromise is difficult when one side gives the other side its closing argument either in an open session or during the course of exchanges. Use the words you want to convey very carefully, be respectful to the parties, and remember you are there to get a deal done.



4 Litigators are advocates. It is hard for litigators, especially younger ones, to tone it down. Leave the trial posturing for another day. That unnecessarily complicates the process. Remember that the purpose of mediation is to resolve a case and to get the other side to want to compromise. Compromise is difficult when one side gives the other side its closing argument either in an open session or during the course of exchanges. Use the words you want to convey very carefully, be respectful to the parties, and remember you are there to get a deal done.

5 In the Fisher and Ury book, *Getting To Yes*, a good mediator will ascertain and focus on what the parties are really interested in rather than what they ask for. Caucus sessions are critical for exploring this and in most cases, is different from what is in the pleadings, if they exist. Exploring the parties' real needs can often direct the mediator to creative solutions.

6 Use the mediator. If you are having difficulty with your client because the client has unreasonable expectations, tell the mediator that beforehand. If you need creative solutions to get past impasse, ask the mediator for ideas. Candidly (and privately) share with the mediator the issues in conflict so that he/she can help the parties bridge the gap to a reasonable compromise. With the trust of both sides, the parties may abide by the mediator's advice as he/she attempts to nudge/push them closer together.

7 Both sides can and should be given a full opportunity to be heard. The mediator will listen and ask the pertinent questions. Do not allow fear or emotion to control you or your client's decision making. Make sure your client feels engaged in the process and understand that they have the power to make the decisions that are best for them.

8 The plaintiff should come prepared with other obligations resolved. That can include health insurance liens, Medicare liens, outstanding bills from medical providers, and sample disbursement statements with firm costs listed. It is frustrating for the opposing side to work for a few hours and be told, "Oh. I can't officially settle today. We need to work on the other lien providers." This also applies to the defendants. They should have the appropriate people with authority engaged before and during the mediation hearing.

9 Clarity. There needs to clarity in the settlement discussions to insure that issues do not pop up at the end of the mediation to derail it. A discussion of the non-cash material terms of the settlement should take place as early as possible in the mediation process. For example: Who is going to deal with what liens? Is confidentiality an issue? Is time of the essence? Will there be a no rehire? How will payment be handled? Is Court approval required? Will there be indemnification and hold harmless terms? These material and critical issues should not come up as a surprise after the cash consideration has been agreed upon because it could potentially unravel the hard work expended to reach an agreement on the settlement value.

10 Do not provide new factual information at the time of the mediation. This does not allow the other side time to review, digest, and analyze how that information might change their view of the case. By not providing the relevant information beforehand, you are potentially preventing a successful resolution of the matter. ⚖️

Yvonne Takvorian Saville is a director with Weiss, Saville & Houser, P.A. where she practices plaintiff's civil litigation and ADR. She has been appointed as a Special Master for complex civil cases in Delaware's District Court and is an adjunct professor at the Delaware Law School. Given her extensive ADR practice, she was named a "Friend of the Court" by President Judge Jurden. She is also a Fellow with the American College of Civil Trial Mediators. She is a Past President of the Delaware State Bar Association and the Delaware Trial Lawyers Association. She can be reached at ytsaville@mweissesq.com.

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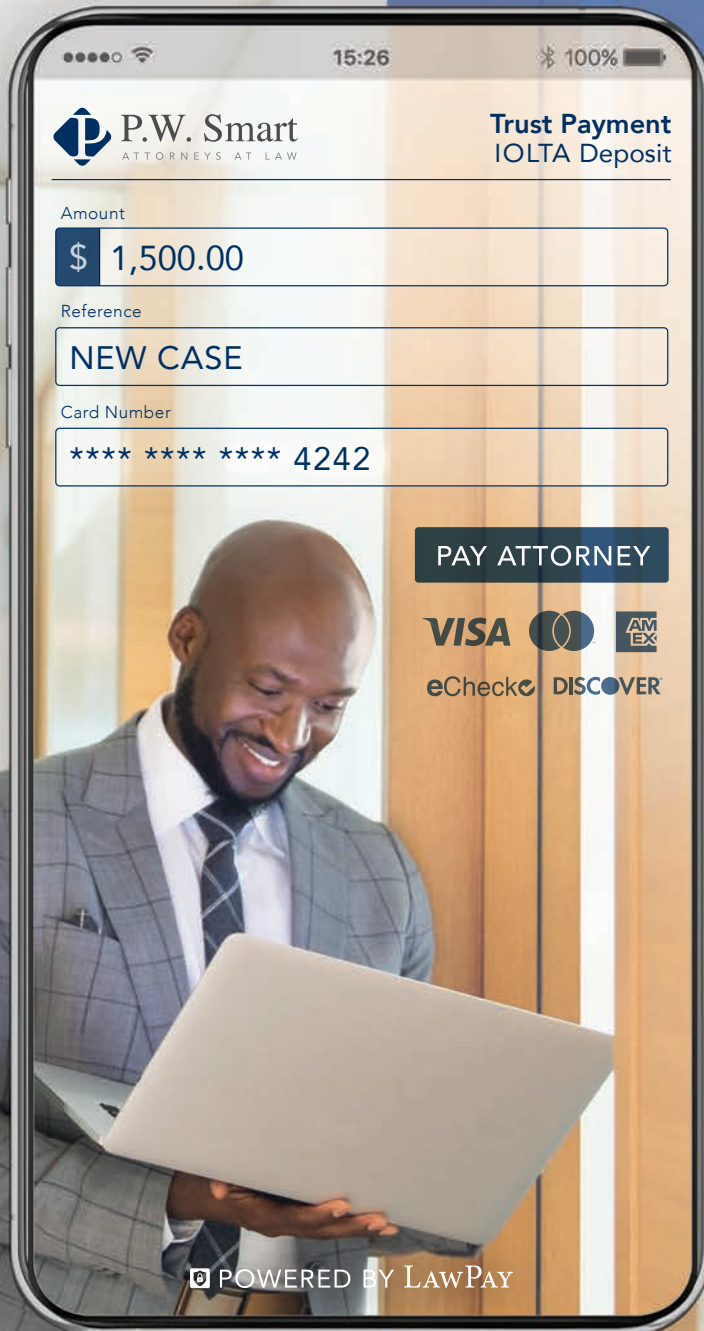
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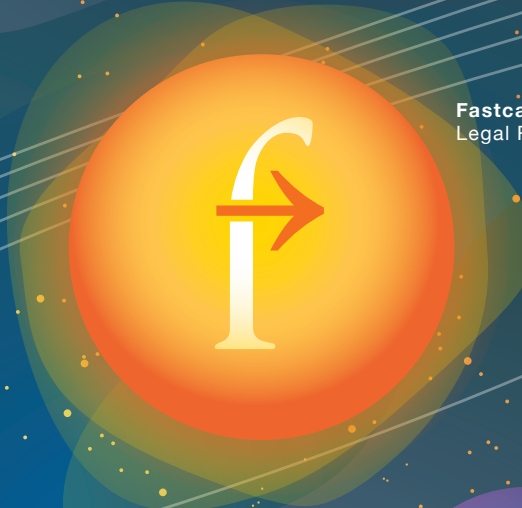
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