SEPTEMBER 2018 | VOLUME 42 • NUMBER 2

THE JOURNAL

OF THE DELAWARE STATE BAR ASSOCIATION

The Women and the Law Issue

Celebrating 95 Years of Women in the Delaware Bar

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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

FEATURES

The Women and the Law Issue

COLUMNS

DEPARTMENTS

Cover Photo by Antonio Byrd. Details on pg. 24.

PRESIDENT'S CORNER

By David J. Ferry, Jr., Esquire

Supreme Court Work-Life Balance

By now, all members of the Delaware Bar should be aware of the Delaware Supreme Court Order of July 18, 2018 regarding work-life balance for legal professionals. This Order follows the initiative begun by Chief Justice Strine to address work-life balance for attorneys when the Chief Justice issued his list of Judicial Branch priorities in 2014.

The Order, in simplified form, requires three things. First, the courts shall amend their rules and e-filing policies to require that e-filings in non-expedited matters, except for initial pleadings and notices of appeal, must be completed by 5:00 p.m. Eastern Time in order to be considered timely filed that day. Initial pleadings and notices of appeal and electronic filings in expedited matters must be completed before midnight Eastern Time in order to be considered timely filed that day except for expedited matters where the parties have agreed upon, or the court has ordered, a different filing deadline. This 5:00 p.m. filing deadline becomes effective September 14, 2018. Second, the trial courts are directed to consider adopting practices and policies that disfavor filing due dates on Mondays or the day after a holiday in non-expedited matters, the issuance of non-expedited opinions addressing dispositive motions or post-trial relief after 4:00 p.m. as a general matter and after noon on Fridays and the scheduling of oral arguments and trials in August, except in expedited matters or where there is an important reason for proceeding at that time. Lastly, the trial courts shall consider the remaining recommendations in the report carefully and adopt those and other practices that will improve the quality of professional practice by and the quality of life of Delaware legal professionals.

> *"When I was admitted to the Bar back in the 1980s, ambitious lawyers believed it was necessary to work 60 to 80 hours per week to climb the ladder and achieve their goals as well as the objectives of their clients."*

This order is a result of Chief Justice Strine's Judicial Branch priorities and the efforts of the Work-Life Balance Committee which was composed of members of the Supreme Court Rules Committee, the Court of Chancery Rules Committee, and the Superior Court Rules Committee. The Committee was formed to explore changes that the courts could make to create a more sensible structure for the practice of law that would improve the quality of practice and the work-life balance of legal professionals in Delaware.

When I was admitted to the Bar back in the 1980s, ambitious lawyers believed it was necessary to work 60 to 80 hours per week to climb the ladder and achieve their goals as well as the objectives of their clients. The electronic filing system that came along many years later made it possible to work more late nights, weekends, and holidays to meet filing deadlines of 11:59 p.m. Late filings then led to more pressure on the parties who had to respond to the filings that were made while they were trying to enjoy their lives with family and friends. The report of the Committee on Improving the Quality of Lawyering in Delaware made the recommendations for the Supreme Court Order. The Committee stated that their recommendations or any combination of the recommendations will not fundamentally change the practice of law or the expectation that the law is a 24/7 profession, but the Committee believes the recommendations should contribute to a more balanced structure to the practice of law in Delaware, helping both lawyers and their staff to enjoy their professional and personal lives more.

The Work-Life Balance Committee created in 2015 was divided on the issue and the results of a DSBA survey do not support the change of the current filing time. The Committee thought it was appropriate for all views to be articulated to and considered by the judiciary and the Committee has attempted to address all of the concerns that were raised. A review of the Committee's report, and the various statistics and comments is very helpful in understanding the reasoning that led to the Supreme Court Order of July 18, 2018.

It is particularly helpful to review the Committee's report, which explains the criticisms and responses to the criticisms about the various issues. The report explains why the 5:00 p.m. time is important. Data demonstrates that this time is feasible and that this filing time facilitates the ability of Court staff to accept the vast majority of filings during the same work day. It is also critical to understanding why 5:00 p.m. is important for most lawyers to pause to have dinner with their families, work out, help with homework and activities, and spend time with their spouses, children, friends, and loved ones. Furthermore, the Committee believes that filing motions or briefs in late evening hours does not promote the submission of carefully considered and edited filings.

The Committee report also covers what the Courts have done and can do to help members of the Bar. Changing the times for the Court to issue decisions in non-expedited cases, not scheduling arguments in non-expedited cases in July and August to accommodate vacation schedules and other changes are excellent ideas that the Committee and Supreme Court hope will reduce stress for everyone involved in the litigation process. I recommend that all members of the Bar review the full Committee report.

So, the question is, "What can we expect from this?" I am sure that there are already strong feelings in favor of or not in favor of the Order. Section chairs of various sections of the Delaware Bar Association, members of the Executive Committee of the Bar Association, and other lawyers are discussing and debating the Order and the implementation of the Order by the various courts. The reaction of members of the Bar is a mixed one. Many attorneys are not in favor of the Order and believe that it may be detrimental to their practices. Many attorneys are concerned that the 5:00 p.m. deadline will impose more pressure on them to meet their obligations. Attorneys who work with out-of-state counsel in other time zones in the country are concerned that they will have less time to receive pleadings from out-of-state counsel that need to be filed by 5:00 p.m. Some are concerned about needing courier services to pick up and file pleadings on a deadline date for the Family Court that does not yet use electronic filing.

There are supporters of the Order. Some believe that requiring out-of-state

President's Corner (continued on page 7)

EDITOR'S PERSPECTIVE

By Benjamin A. Schwartz, Esquire

Signs of the Times

Halfway down Clayton Street between Delaware Avenue and Gilpin Street in Wilmington, you can make a left turn and drive up onto the second-floor parking deck of the Shops of Trolley Square. (I bet you did not know that.) I have been kicking around that neighborhood for the better part of the last twenty years. I have lived in the Plaza Apartments (now the PARQ). I lived in a one bedroom apartment at the Delf (at the corner of Clayton and Delaware). I lived in a house at 1811 Delaware Avenue for about a dozen years. I had an office up on the second floor of the Trolley Square building, and now I have an office at 1525 Delaware Avenue. All this time, I have been driving past a sign for William L. Garrett, Jr., Attorney-at-Law hanging alongside the ramp up to the second-floor parking deck in the Shops of Trolley Square, and wondering why Garrett was allowed to keep his sign up for the last fifteen years. Garrett was suspended in 2003 and then disbarred in 2006. His sign fell down naturally just the other day.

The *Delaware Digest of Lawyer Discipline* contains a summary of his Disciplinary Action in Board Case No. 32, 2002. According to that document, Garrett first received a three-year suspension from the practice of law by Order of the Supreme Court dated October 23, 2003. There were nine separate violations, but interestingly no client was harmed. The case came about as the result of a random Lawyers' Fund for Client Protection audit. For those of you who do not know, the Lawyers' Fund is an arm of the Supreme Court and it conducts sixty random audits of law firms' books and records each year. The Lawyers' Fund auditor back in 2002 was a Certified Public Accountant named Martin Zukoff. Zukoff contacted Garrett to line up an appointment to review Garrett's books and records, but apparently got the run around for about six months. The Lawyers' Fund turned the matter over to the Office of Disciplinary Counsel, which arranged for an expedited audit. That revealed a number of deficiencies in Garrett's accounting practices, including commingling of funds. Garrett was depositing unearned fees into his operating account. He also failed to maintain his books and records for his escrow accounts and his operating account. He was not paying his taxes — he had not paid state or federal income taxes for 1994 through 2001. And, he filed annual Certificates of Compliance with the Supreme Court stating that he was keeping his records properly and paying his taxes, which itself is considered dishonesty, fraud, deceit, or misrepresentation.

Three years later, in October 2006, Garrett was disbarred. According to the summary of the Disbarment in the *Digest of Lawyer Discipline*, Garrett was found to have misappropriated client funds in an amount of almost one hundred twenty thousand dollars, and he was found to have concealed one of his law practice escrow accounts. This apparently was uncovered by the receivers for Garrett's law practice.

I do not want to get preachy in this column, but Garrett's case is illustrative of several principals that should be kept in mind by Delaware attorneys:

First, if you steal client funds, expect to be disbarred. That is the presumptive sanction. As the Supreme Court wrote in Garrett's disbarment decision, "Although we have not adopted a per se rule, this Court has consistently imposed the sanction of disbarment in situations where the conversion of clients' funds has been established."

Second, all money paid by clients has to be held in escrow until you can document that it has been earned, at which point you can transfer it into your operating account. If you do not handle client advance payments in this fashion, it is considered comingling and that is a violation of the ethics rules.

Third, you have to keep detailed records of all the money that comes in and all the money that goes out, by client. If you are practicing law in Delaware, you are going to be audited by the Lawyers' Fund. And, if you do not have detailed financial records, the Lawyers' Fund cannot audit you.

And finally, you should never, ever, ever make a false statement on your annual Certificate of Compliance. If you did not pay your taxes, do not say you did. Whatever problem existed before you filed your Certificate gets multiplied ten times when you lie about it on your CoC.

But, enough preaching — the point I am really interested in making here is that every time I walked or drove past that Garrett sign, I wondered to myself why the Supreme Court would permit a suspended, then disbarred attorney to keep his sign up. It is a pox on all our houses to continue to advertise the services of a lawyer who has been disbarred for stealing from his clients. Thankfully, the William L. Garrett, Jr. sign came down at some point in early July (quite possibly July 2). It appears the bolts holding it to the building must have rusted out.

Now, I wonder if the attorneys at the ODC have been kicking around the Trolley Square area, too. I wonder if they too have been bristling when they were walking home from happy hour at Kelley's Logan House and may just have happened to catch sight of that William L. Garrett, Jr. sign. Did they glimpse the hand of Father Time knocking that old sign off the building? Did they get the idea that rather than by operation of time, suspended attorneys' signs should instead be taken down by operation of law?

I ask these questions because at the same time that Garrett sign was falling off the Trolley Square building, Dover attorney Andre M. Beauregard was getting suspended from the private practice of law. On June 5, the Supreme Court issued an opinion stating that Beauregard failed to supervise non-lawyer employees who handled his firm's books and records, knew of books and records violations and failed to correct them, and improperly certified compliance to the Court. The Court suspended Beauregard for six months effective July 2, but permitted him to continue to provide criminal defense representation in court-appointed cases through the Office of Conflicts Counsel.

After the Court issued its opinion, ODC filed a Motion for Clarification asking for imposition of additional sanctions including an order requiring Beauregard take his name off his law firm's sign.

By Order of the Court dated July 2, 2018, the Supreme Court ruled in Case No. 477,2017 that Mr. Beauregard "shall cause the removal of any indicia of his membership in the firm, including the removal of his name from the firm's signage, stationary, forms, website, and other advertising media during the six-month period of suspension."

I wonder if it is just a coincidence that both Garrett's and Beauregard's signs came down around the same time, or if the former had something to do with the latter.

Bar Journal Editor **Ben Schwartz** is Managing Partner of Schwartz & Schwartz, where he helps people recover after catastrophic injuries and accidents. He is a frequent speaker, writer, and blogger. For more information, go to facebook.com/schwartzandschwartz or email ben.schwartz@schwartzandschwartz.com.

President's Corner (continued from page 5)

counsel to be aware of the 5:00 p.m. deadline will require them to submit their pleadings a day or two before the deadline so that they can be reviewed, edited, and filed by the deadline. Many members of the Bar believe the Order is particularly helpful for working parents of young children. Still others believe that although this is an admirable goal, it is not a goal that can be extrinsically enforced.

Attorneys will debate whether the Order will require more extension requests to meet deadlines. Many will consider if they can find a way to plan to meet their deadlines earlier. Many attorneys, of course, will feel that any change in the litigation process is difficult to implement and is likely to make their practice more, rather than less, stressful.

Regardless of whether you agree or disagree with the Committee and the Supreme Court Order, the new filing deadlines will go into effect on September 14, 2018. I am sure there will be problems and complaints and calls for changes in the rule. My recommendation is that everyone involved in the litigation process accept and embrace the idea of change, accept the goal of trying to provide a better work-life balance for legal professionals, and give the Order and new rules their best efforts. My hope is that this Order will achieve the goal of creating a better work-life balance for legal professionals and will show again why Delaware is the leading state in the nation for legal matters.

David J. Ferry, Jr. is the current President of the Delaware State Bar Association. He also serves as Chair of the Court of Chancery Rules Subcommittee for Guardianship, Trusts and Estates, and is a member of the Jurisdiction Improvement Committee, the Professional Guidance Committee, the Board of Directors of Legal Services Corporation of Delaware, Inc., and the Estates & Trusts Section and the Elder Law Section of the DSBA. He has been a member of the Delaware Bar since 1982, and has served on the Executive Committee of the Delaware State Bar Association since 2010. He is a founding partner of the firm of Ferry Joseph, P.A. He can be reached at dferry@ferryjoseph.com.

OF NOTE

Condolences to the family of **Charles T. Carr III, Esquire,** who died on July 29, 2018.

Condolences to **Steven R. Director, Esquire,** on the death of his mother, Judith Corbin Director, who died on August 15, 2018.

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

INBOX

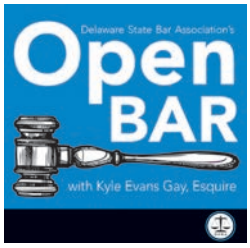
Let us hear from you! We welcome letters to the editor on issues presented in *The Bar Journal*. Email letters to rbaird@dsba.org. We reserve the right to edit letters for clarity and space. *The Bar Journal* does not print anonymous letters or more than one submission per month from the same contributor.

Announcing the New DSBA Podcast: Open Bar

Pod·cast / päd kast / a digital audio file made available on the Internet for downloading to a computer or mobile device, typically available as a series.

The Delaware State Bar Association is excited to launch *Open Bar*, the organization's official podcast showcasing members and other happenings in the Delaware legal community. *Open Bar* will feature news and discussions relevant to the practice of law in Delaware, as well as interviews with practitioners on industry trends and practice tips.

Open Bar is available to stream on demand at www.dsba.org. Listeners can also subscribe via iTunes or a favorite podcast app. Subscribe today to get notified when new episodes are available!



In the first episode, available now, Judge Jane Roth of the Third Circuit shares her reflections on the celebration of 95 years of women in the Delaware Bar. Check out the interview with Judge Roth, and in the months to come, stay tuned for more terrific content from your DSBA. Have an idea for the podcast or interested in being interviewed? Please contact Rebecca Baird at rbaird@dsba.org.

TOP 5 | UNSUCCESSFUL NOMINATIONS TO THE U.S. SUPREME COURT

As the Senate prepares for hearings and a vote on President Trump's latest nominee, Brett Kavanaugh, to the U.S. Supreme Court, here are a few of the would-be justices who didn't make it:

1. **Alexander Wolcott / 1811**
   Wolcott was nominated by James Madison, but rejected by the Senate 9-24 due to a lack of judicial experience and his strict enforcement of the Embargo Act of 1807 which was extremely unpopular.

2. **Ebenezer Hoar / 1869**
   An appointment of Ulysses Grant, Hoar was not confirmed by the Senate (24-33) due to his opposition to the impeachment of Andrew Johnson.

3. **John J. Parker / 1930**
   Appointed by Herbert Hoover, his nomination was defeated by a slim margin 39-41 due to opposition by labor groups and the NAACP for saying "Participation of the Negro in politics is a source of evil and danger."

4. **Clement Haynsworth / 1969**
   Nominated by Richard Nixon, Haynsworth was rejected 45-55 due to unproven rumors that he ruled in cases in which he had a financial interest and feelings that he was in favor of segregation.

5. **Robert Bork / 1987**
   Nominated by Ronald Reagan, Bork was perceived as too conservative and that he interpreted the Constitution too rigidly. He was voted down 42 – 58. His replacement Anthony Kennedy (whose position may go to Kavanaugh) was confirmed 97-0.

LAWYERS REACHING OUT

The DSBA realizes that practicing law is just one of the many facets of Delaware lawyers. The majority of lawyers are also heavily involved in our community making it a better place. We are interested in highlighting the community involvement of each lawyer. However, we need your help. Please take a minute to send an email to rbaird@dsba.org describing how you are involved in your community, whether it be volunteering for a non-profit, church involvement, coaching, or mentoring. Delaware lawyers are making a HUGE difference in our State and we want to acknowledge and salute your effort. Thanks for responding.

YOUR WORDS

How does the practice of law need to change in the next five years?

"In the next five years we need to dramatically expand the number of attorneys who are willing to represent criminal defendants. The need is significant and many who now perform this function are nearing retirement."

The Honorable William C. Carpenter, Jr.
Superior Court of the State of Delaware
DSBA MEMBER

"Lawyers need to step away from their devices and have more personal interaction with other lawyers. We also need more diversity in our profession, especially in leadership positions. "

Kelley M. Huff
Murphy & Landon
DSBA MEMBER

Illustrations by Mark S. Vavala

OUR NEXT QUESTION

How does pro bono work improve the profession?

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

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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DSBA/DE-LAP Liaison

*Certified Practice Monitor

CALENDAR OF EVENTS

September 2018

September 11 and 18; October 18 and 31; November 13; and December 5, 2018
Litigation Academy
3.0 hours CLE credit (per CLE / all sessions include Enhanced Ethics credit)
Delaware State Bar Association, Wilmington, DE
Webcast to Morris James, LLP, Dover, DE
Webcast to Tunnell & Raysor, Georgetown, DE

Wednesday, September 12, 2018
Fundamentals of Law Practice Management and Technology
6.0 hours CLE credit in Enhanced Ethics
Delaware State Bar Association, Wilmington, DE
Webcast to Morris James, LLP, Dover, DE
Webcast to Tunnell & Raysor, Georgetown, DE

Thursday, September 13, 2018
Movie Night at DSBA: *Confirmation*
CLE: Understanding Duties and Rights Regarding Sexual Harassment: Discussion of Film and Issues Presented
1.0 hour CLE credit
Delaware State Bar Association, Wilmington, DE

Tuesday, September 18, 2018
DE-LAP Behind the Cool Image: Lunch & Learn
1.0 hour CLE credit in Enhanced Ethics
Delaware State Bar Association, Wilmington, DE
Webcast to Morris James, LLP, Dover, DE
Webcast to Tunnell & Raysor, Georgetown, DE

Wednesday, September 26, 2018
The Opioid Epidemic and the Law with guest speaker Attorney General Matt Denn
3.3 hours CLE credit
Delaware State Bar Association, Wilmington, DE
Webcast to Morris James, LLP, Dover, DE
Webcast to Tunnell & Raysor, Georgetown, DE

Friday, September 28, 2018
Supreme Court Review 2018: A Discussion of Decisions at the Highest State and Federal Judicial Levels
3.0 hours CLE credit
Delaware State Bar Association, Wilmington, DE
Webcast to Morris James, LLP, Dover, DE
Webcast to Tunnell & Raysor, Georgetown, DE

October 2018

Wednesday, October 3, 2018
E-Discovery & Technology
3.0 hours CLE credit
Delaware State Bar Association, Wilmington, DE
Webcast to Morris James, LLP, Dover, DE
Webcast to Tunnell & Raysor, Georgetown, DE

Wednesday, October 10, 2018
Recent Developments and Legislative Changes in Commercial Law
3.0 hours CLE credits including 0.5 hour Enhanced Ethics credit
Delaware State Bar Association, Wilmington, DE
Webcast to Morris James, LLP, Dover, DE
Webcast to Tunnell & Raysor, Georgetown, DE

SECTION & COMMITTEE MEETINGS

September 2018

Monday, September 10, 2018 • 12:30 p.m.
Senior Lawyers Committee Monthly Luncheon Meeting
Delaware State Bar Association, 405 North King Street, Suite 100, Wilmington, DE

Wednesday, September 19, 2018 • 8:30 a.m.
ADR Section Meeting
Young Conway Stargatt & Taylor, Rodney Square, 1000 North King Street, Wilmington, DE

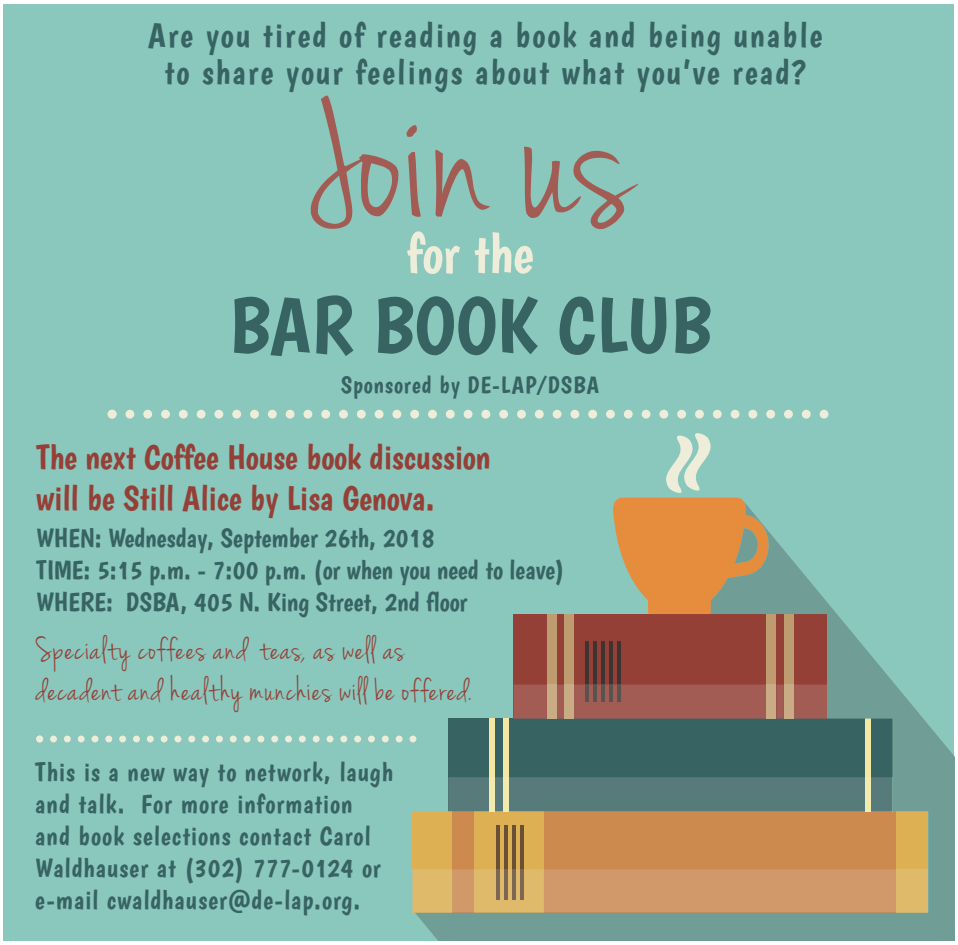
Thursday, September 20, 2018 • 3:30 p.m.
Executive Committee Meeting and Dinner
Brantywn, 600 Rockland Road, Wilmington, DE

October 2018

Monday, October 1, 2018 • 12:30 p.m.
Senior Lawyers Committee Monthly Luncheon Meeting
Delaware State Bar Association, 405 North King Street, Suite 100, Wilmington, DE

Thursday, October 18, 2018 • 12:00 p.m.
Executive Committee Meeting
Delaware State Bar Association, 405 North King Street, Suite 100, Wilmington, DE

Please contact LaTonya Tucker at ltucker@dsba.org or (302) 658-5279 to have your Section or Committee meetings listed each month in the *Bar Journal*.



TIPS ON TECHNOLOGY

By Kevin F. Brady, Esquire

Is Tracking Emails Ethically Permissible?

Businesses use "intelligence-driven messaging" such as email tracking software and marketing applications that permit the sender of an email message to monitor the receipt and subsequent handling of the message. Email tracking software uses certain features, such as "web beacons," "web bugs," or "spymail" to collect analytics such as: was the email opened (and if so what was the IP address), on what type of device was it opened, how long was it opened before it was closed or deleted, and was a link clicked from inside the e-mail?

A question arose recently about whether a lawyer may use surreptitious tracking software in emails or other electronic communications with other lawyers or clients without running afoul of the Rules of Professional Responsibility. A January 2018 Opinion issued by the Illinois State Bar Association (Opinion No. 18-01) (following similar opinions from New York, Pennsylvania, and Alaska) answered the question with a resounding "No." The Illinois Opinion explained:

> [T]racking software inserts an invisible image or code into an email message that is automatically activated when the email is opened. Once activated, the software reports to the sender, without the knowledge of the recipient, detailed information regarding the recipient's use of the message. Depending on the vendor, the information reported back to the sender may include: when the email was opened; who opened the email; the type of device used to open the email; how long the email was open; whether and how long any attachments, or individual pages of an attachment, were opened; when and how often the email or any attachments, or individual pages of an attachment, were reopened; whether and what attachments were downloaded; whether and when the email or any attachments were forwarded; the email address of any subsequent recipient; and the general geographic location of the device that received the forwarded message or attachment. At the sender's option, tracking software can be used with or without notice to the recipient. There do not appear to be any generally available or consistently reliable devices or programs capable of detecting or blocking email tracking software. Op. at 3.

Should there be a Duty on Receiving Lawyer to Prevent Tracking Email?

The Opinion also examines whether tracking software should be considered "a common functional aspect of electronic documents like metadata," which ABA Formal Opinion 06-442 (August 5, 2006), noted "[i]t is appropriate and reasonable to expect lawyers to understand metadata and other ubiquitous aspects of common information technology." The Opinion concludes that understanding tracking software is not the same because "metadata is embedded information that enables word-processing software to manage documents and facilitates collaborative drafting among colleagues. Unlike tracking software, which must be purposely, and usually surreptitiously, inserted into

an email, metadata is a universal feature of every word-processed document…. But, it would be neither appropriate nor reasonable to charge all lawyers with an understanding of the latest version of tracking software that might be chosen, and then employed without notice, at the option of opposing counsel." Op. at 6.

Even assuming that such software was readily available, the Opinion concludes that it would be unreasonable to force every lawyer to be familiar with those various tracking programs and implement them into their practice. "Given the typical rapid changes in technology, few, if any, solo or small firm lawyers could reasonably do so. Aside from creating sustained employment for IT consultants and software vendors, that approach would only precipitate an "arms race" in which the developers and users of tracking software would always be a step ahead." *Id.*

Moreover, while Comment 8 to the ABA Model Rules (adopted by the Delaware Supreme Court) requires lawyers to keep abreast of the benefits and risks associated with relevant technology, and ABA Model Rule 1.6(c) requires lawyers to make reasonable efforts to prevent inadvertent or unauthorized access to client information, the Opinion notes that "requiring the receiving lawyer to first discover and then defeat every undisclosed use of tracking software would be unfair, unworkable, and unreasonable." *Id.*

"Read-Receipt" Function is Permissible

Many email programs offer a "read-receipt" function that gives a recipient the option to notify the sender that an email was received. Because this function provides only a confirmation of receipt rather than information concerning the subsequent handling of an email, the Opinion distinguished the "read-receipt" option from the email tracking software noting that, "it does not appear to raise the client protection concerns…." Op. at 3.

Conclusion

The Opinion is clear that the *undisclosed* use of email tracking software by an attorney without the informed consent of the recipient, at a minimum, constitutes "dishonesty" and "deceit" within the meaning of Illinois Rule 8.4(c) and … "if used in email correspondence with another lawyer in the course of representing a client, covertly invades the client-lawyer relationship between the receiving lawyer and that lawyer's client." *Id.* at 3-4. While Delaware has not issued any specific guidance on this topic, Delaware lawyers should be aware of the existence of this technology and the non-binding Opinion from Illinois (which, like Delaware, follows the Model Rules of Professional Conduct) as well as the opinions from three other jurisdictions on this topic.

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.

Public "Exposure" (Pun Intended) of Lawyers:

Responding to Online Criticism

By Bruce E. Jameson, Esquire

Technology is a double edge. On the one hand, it allows lawyers and law firms to market themselves broadly through websites, social media, and other online venues at very reasonable cost. Lawyers' ability to disseminate, easily and cheaply, information about themselves also benefits the public by allowing prospective clients to obtain information about lawyers at unprecedented levels, including through online ratings and comments. When such ratings or comments are negative, lawyers may want to respond and defend themselves through the same or other online venues. Before responding to online criticism arising from specific client representations, lawyers should consider whether their proposed response is consistent with the Rules of Professional Conduct (the "Rules").

Rule 1.6 restrictions are comprehensive

Rule 1.6(a) prohibits disclosure of information relating to a representation unless the client gives informed consent, the disclosure is necessary to carry out the representation, or in seven other circumstances delineated in Rule 1.6(b). Rule 1.6(b)(5) is the subsection most likely to be relevant here. It provides that disclosure may occur to establish a claim or defense in a controversy between the lawyer and client, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Note that subsection (b)(5) speaks only to claims, defenses and proceedings. There is no express exception to respond to criticism in the absence of specific legal claims or proceedings. Further, Comment [3] to Rule 1.6 explains that the Rule "applies not only to matters communicated in confidence by the client but *also to all information relating to any representation, whatever its source*." (emphasis added). As noted in Molly DiBianca's May article in the *Bar Journal*, even publicly available information may be confidential within the meaning of Rule 1.6.

> *"Several lawyers were publicly reprimanded for posting responses that contained personal and confidential information about their clients in response to the client's negative social-media reviews."*

Delaware lawyers' rights to respond to online criticism are circumscribed

While I am not aware of any Delaware authorities addressing a lawyers' ability to respond to online criticism, other states have issued decisions and opinions on this topic. Several lawyers were publicly reprimanded for posting responses that contained personal and confidential information about their clients in response to the client's negative social media reviews.

For example, in *In re Tsamis*, an Illinois lawyer was reprimanded after responding to a negative online review by a former client because the lawyer revealed client-confidential information in her response. Several jurisdictions, including the District of Columbia, Los Angeles County, Minnesota, San Francisco, and Texas have issued advisory ethics opinions that caution lawyers about the risks of violating Rule 1.6 when responding to online reviews.

Rule 1.6 in the District of Columbia contains an exception that appears broader than that provided for in Delaware Rule 1.6(b)(5). It permits a lawyer to reveal client confidences "… to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client …" Notwithstanding that the exception appears broader than Delaware's, Opinion

370 notes that the exception does not apply to "general criticisms of an attorney" by a client and that under the exception, disclosures must be no greater than necessary to respond to the specific allegations.

Further, the District of Columbia exception does not allow an attorney to disclose client confidences "in response to specific or general allegations regarding an attorney's conduct contained in an online review from a third party." Because Delaware's exception is narrower than the District of Columbia exception, lawyers should expect that they have little leeway to use information obtained in the course of a client representation to respond to online criticisms by former clients.

New York issued an opinion that directly addressed the "self-defense" exception of New York Rule 1.6(b)(5) and opined that lawyers cannot rely on that exception when responding to a former client's online criticism of the lawyer. New York State Opinion 1032 (Oct. 30, 2014). New York's Rule 16(b)(5) permits use of client information to "defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct." Again, Delaware's rule appears to be more restrictive than New York's by tying disclosure to "claims" or "defenses" in "proceedings" as opposed to general "accusations."

Consistent with the restrictions on a lawyers' ability to respond to online criticisms, courts have limited the right of lawyers to compel identification of anonymous online critics. In a 2015 defamation suit brought by a lawyer in a Washington court, that court denied a request to compel disclosure of the identity of the anonymous poster holding that the third-party website (Avvo.com) was not required to reveal that person's identity absent evidence of defamation. *Thomson v. Doe*, 356 P.3d 727 (Wash. Ct. App. 2015). The Washington court relied on similar precedents from, among others, the Delaware Supreme Court in *John Doe No. 1 v. Cahill*, 884 A.2d 451 (2005).

Conclusion

It is unrealistic, and probably undesirable, for lawyers to avoid all online commentary about their services. Given that Delaware lawyers are severely restricted in their ability to respond factually to negative comments, lawyers should think carefully about the use of web sites, blogs and other online sites that encourage reviews and ratings. The marketing exposure that comes from utilizing such sites must be weighed against the reality that the lawyer's ability to respond to specific accusations contained in negative online reviews will be limited.

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From 1923 to 2018:
Women in the Delaware Bar

By Kyle Evans Gay, Esquire, and Kathleen A. Murphy, Esquire
Co-Chairs of the Women and the Law Section

This year marks 95 years of women in the Delaware Bar. In 1923, the same year the Delaware State Bar Association was founded, and three years after the 19th Amendment granted women the right to vote nationwide, Evangelyn Barsky and Sybil Ursula Ward became the first women to be admitted into the Delaware Bar. Delaware was the last state to admit women to the Bar, and the act required an amendment to Delaware's Constitution, which now reads: "No citizen of the State of Delaware shall be disqualified to hold and enjoy any office, or public trust, under the laws of this State, by reason of sex."[1]

It was not until 54 years later, in 1977, that The Honorable Aida Waserstein and Mary C. "Mimi" Boudart founded the Women's Rights Committee, which would later become the Women and the Law Section of the Delaware State Bar Association.[2] The founding members included The Honorable Peggy L. Ableman, The Honorable Helen S. Balick, Christine McDermott, Marsha Kramarck, Nan Mullen Perillo, The Honorable Mary Pat Thynge, Fritz Haas, and Julianne Hammond. Last year, the Women and the Law Section celebrated its 40th anniversary as well as the 25th anniversary of its annual retreat.

Over the past 41 years, the Women and the Law Section has endeavored to carry out its purpose to: (1) address the effect of laws upon women in Delaware and the delivery of legal services to them and (2) further the role of women in the Delaware legal community. Mere months after the Section was established in early 1977, its members began lobbying for amendments to Delaware's alimony laws, and in 1979, members drafted an amicus curiae brief to the Delaware Supreme Court in support of the constitutionality of the General Assembly ratifying the then-proposed Equal Rights Amendment.

Flash forward to today, and the Women and the Law Section is true to its roots. This past legislative session, the Section supported two key pieces of legislation affecting the lives of women in Delaware. The Section supported HB399, the first leg of a constitutional amendment that would ensure equal rights regardless of sex, and SB139, which will mandate insurance coverage for fertility care services in Delaware. The Section worked closely with elected officials, community organizers, and patient advocates, as well as the newly constituted Office of Women's Advancement & Advocacy ("OWAA"), to bring attention to these important issues. (You can read more about the OWAA and the work it is doing to advocate for the advancement of women in Delaware on page 20.)

Today the Women and the Law Section continues as well to work to further women in the profession by connecting women to mentors and by providing training and CLE opportunities. One of the most successful events in recent years was the "Path to the Judiciary" programming, a joint effort with the Multicultural Judges and Lawyers Section that worked to demystify the judicial application process. Perhaps one of the most important functions of the Section is to identify women for leadership and service awards. In this way the Section works to ensure that women in the Bar are recognized for their contributions within the profession and work on behalf of the greater Delaware community.

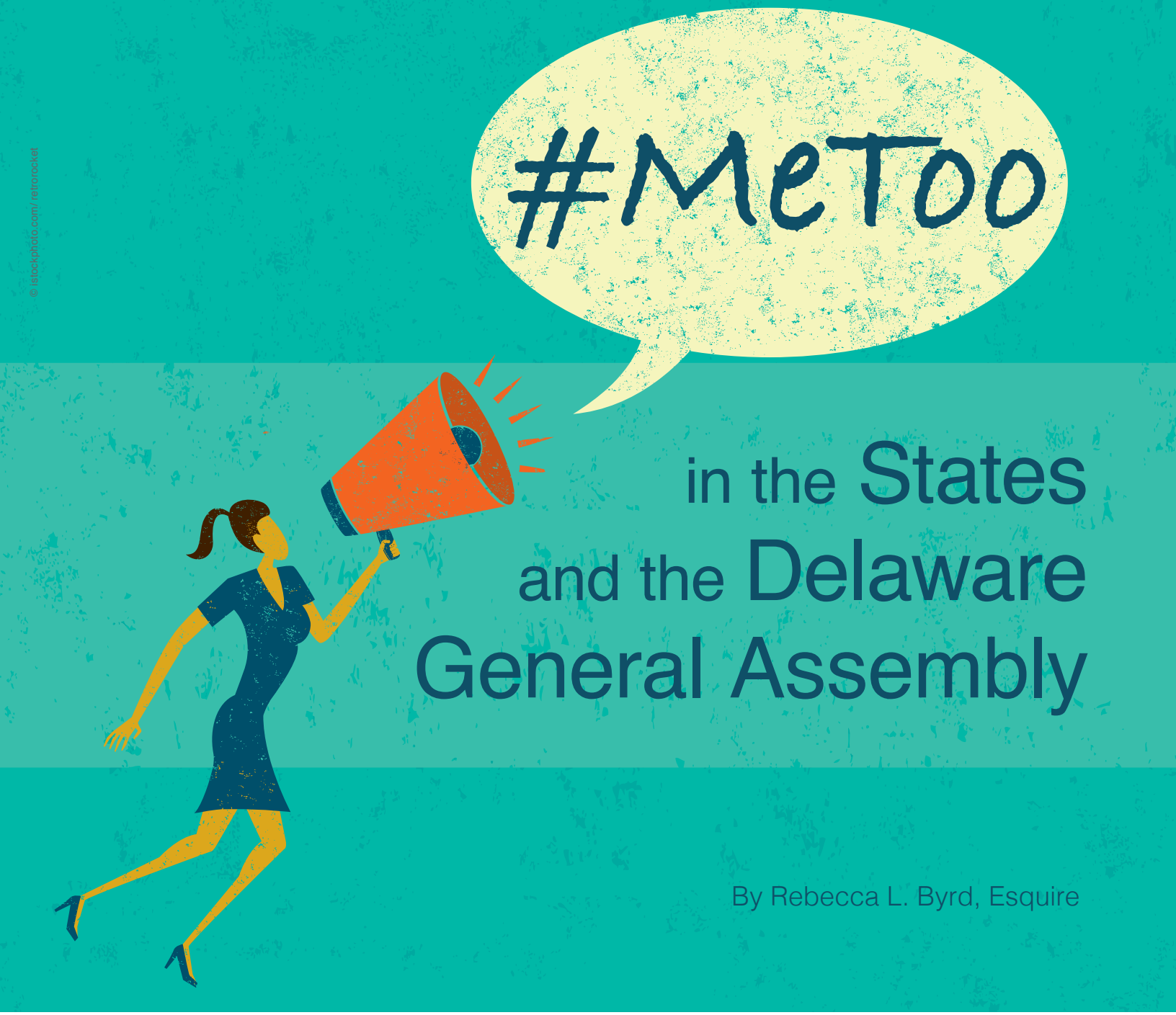
Even today, 95 years after the first women were admitted to the Delaware Bar, the Bar is still celebrating female firsts, like Kathleen Furey McDonough, Esquire, who in 2018 became the first woman to lead a major Delaware law firm. (For more Delaware "firsts," see page 22.)

Yet, despite the many accomplishments, challenges remain, as women continue to face barriers to professional success in Delaware and beyond. For example, studies still reflect that fewer women than men are equity partners, and that the pay gap continues to disadvantage female attorneys. The experience of women in the profession is no longer exclusively a women's issue. As younger generations join the ranks of Delaware attorneys, more attention is being paid to issues like family leave. And greater societal shifts reflected in movements like #MeToo have caused both men and women to take a second look at how women are treated in the workplace. (For insight into how one workplace, the Delaware General Assembly, addressed the issue, see page 17.)

So, as we celebrate 95 years of women in the Delaware Bar, it is important to look back at how far we have come, and to celebrate those who have blazed the trail for others to follow. It is also critical to look to the future, to consider how the legal profession will continue to grow and change, and to be deliberate in planning a way forward that continues to further the role of women in the Delaware legal community.

Notes:

1. Del. Const. art. XV, § 10.
2. The authors are grateful for the excellent history of the Women and the Law Section compiled by Ellen Meyer, Esq. and published in the Fall 1993 Edition of the *Delaware Lawyer*.



#MeToo in the States and the Delaware General Assembly

By Rebecca L. Byrd, Esquire

I first heard about what would become the #metoo movement a few weeks before the first allegations against Harvey Weinstein were published. I was at a lobbyist conference for one of our national clients, and several lobbyists were discussing a young lobbyist from their state who had recently spoken out about sexual harassment in their capitol. At the time, I thought this would be an isolated event (not the harassment, but the speaking out about it). But as the allegations about Harvey Weinstein started to emerge, similar allegations came from state houses all across the country. In the past year, most state legislatures have addressed the issue of sexual harassment both for themselves by passing new rules and requiring training, and for the general business community by passing legislation. While I am not personally aware of any incidents of sexual harassment in the Delaware legislature, the General Assembly did take the initiative to address the issue both amongst themselves and for the Delaware business community.

I have spent most of my life, in one way or another, in Delaware's Legislative Hall. I have also known legislators and lobbyists in many other states. As a work environment, state capitals are unique places. For example, during the month of June in Delaware's Legislative Hall, the

busiest time, there are legislators, legislative staff, Governor's staff, staff from other State departments, college and high school interns, lobbyists, and many citizens who are there to advocate for themselves. The work hours are long, and the nights are late. The power dynamics among those various groups are also frequently shifting, whether it is between a lobbyist who is trying to count votes on an issue, a staff member working for a legislator, or a newer legislator who needs help on a bill from a more seasoned legislator. And, while every workplace has social events, in state capitals socializing is its own form of work. There are lunches, cocktail parties, fundraisers, and sometimes dinners. The socializing is a good thing. It is one way things get done; but it does provide more opportunities for harassment. Finally, if you are victim of sexual harassment you cannot work from another location or home. Working in or with the General Assembly happens at the capital. To be successful you have to be there on a regular basis. And, while there are lots of different kinds of people there, it is still a small community. So, avoiding your harasser or a predator is impossible. This unique work environment makes combatting the issue that much more difficult.

Over the last nine months sexual harassment allegations have been made in over a dozen state capitals.[1] In some states the reports have been of one or more women detailing specific instances, like in Rhode Island where a female Representative revealed that a government official said her legislation would go further if she was willing to perform "sexual favors."[2] But, in many other state capitals including California, Illinois, Massachusetts, and Ohio, women have come forward detailing thriving cultures of sexual harassment.[3] In Maryland, the Women's Caucus of the Maryland General Assembly issued a report detailing personal stories of women from the capital and demanding a sexual-harassment-free workplace.[4]

In the wake of these complaints, as well as the general #metoo movement, many legislatures have changed the way they deal with sexual harassment. Many state legislatures had some sort of sexual harassment policy prior to the Fall of 2017. However, in the wake of these new complaints almost all states have created or enhanced policies. The National Conference of State Legislators (NCSL), developed a list of policy elements that legislatures should consider:

- A clear definition of "sexual harassment."
- Examples of what behaviors are considered inappropriate in the workplace.
- A policy that applies to legislators and staff, as well as nonemployees, such as lobbyists and outside vendors.
- A diversity of contacts within the legislature to whom sexual harassment can be reported, allowing the complainant to bypass reporting to his or her direct supervisor.
- A clear statement prohibiting retaliation for the filing of any claim.
- A statement providing for confidentiality, to the extent possible, for all parties involved.
- Specific examples of potential discipline, if warranted.
- The possibility of involving parties outside the legislature to assist in the investigation, if it is warranted or requested.
- An appeal procedure.
- A statement informing the complainant that she or he can also file a complaint to the Equal Employment Opportunity Commission and/or the state's Human Rights Commission.[5]

Many states also either instituted or updated sexual harassment training for both members and staff.

In Delaware, leadership and upper level staff in both the House and Senate began discussing how to deal with the issue in the late Fall in preparation for the 2018 legislative session.

"And, while every workplace has social events, in state capitals socializing is its own form of work. There are lunches, cocktail parties, fundraisers, and sometimes dinners. The socializing is a good thing. It is one way things get done; but it does provide more opportunities for harassment."

Unlike other States which have a non-partisan organization which deals with human resources and other functions, in Delaware they are handled by the majority caucus of each chamber. Therefore, each chamber adopted a workplace harassment policy (which includes sexual harassment). The two policies, found in the rules for each chamber, are virtually identical.[6] Employee handbooks which govern the staff of each chamber were also updated to reflect the policy and process outlined in the adopted rules. Additionally, in January, both members and staff attended an in-person training which will be presented yearly.[7]

The revised rules are clear and address most of the considerations listed by NCSL. They address a situation where a member of the Delaware House or Senate is the harasser. The policy clearly contemplates the victim being an "employee" which is defined broadly including per-diem staff and unpaid interns. The policy is less clear for a victim who is outside of that employee scope, for example a lobbyist or vendor. However, the language in the policy states that "…members of the Senate [or House] are expected to conduct themselves in a manner that is free of harassment…"[8] This language indicates that the complaint process could be open to victims other than employees of the House or Senate.

The main difference between the policies adopted in Delaware and the NCSL suggestions is that they do not address a harasser who is a lobbyist or outside vendor. This was a consideration during the discussions of the rules, but it was not addressed in part because it is a complex problem. Anyone can hold themselves out as a lobbyist whether they ever come to Legislative Hall or not. Legally, lobbyists in Delaware are regulated under the Public Integrity Commission (PIC). The PIC has a very specific mandate in the Code: they register all lobbyists whether paid or not. A lobbyist has to report all legislative or administrative issues they are working on and file quarterly reports on their spending for legislators or other governmental officials. The PIC ensures the reports are filed and accurate.

While all lobbyists register with the PIC, there are several kinds of lobbyists. There are contract lobbyists, like myself, who have a firm, with generally fewer than five employees that contracts with other businesses to provide government affairs services. There are in-house lobbyists who work for one specific client, generally a major corporation. Many smaller companies or non-profits may have a person who works on government affairs as part of their job, usually an executive director, V.P. of External Affairs, or similar title. There are also many volunteers who lobby on behalf of non-profits or personal causes. Some of these lobbyists are probably covered by a workplace policy regarding sexual or workplace harassment and may have participated in training. But, knowledge of that policy or procedure would be very limited for a victim in Legislative Hall. Sexual harassment might also violate a contract lobbyist's contract. However, those contracts are not public knowledge.

Part of the solution may be found in House Substitute 1 for House Bill 360 passed at the end of legislative session. This is the second part of most states' response to the #metoo movement, strengthening the law on sexual harassment. This bill makes sexual harassment an "unlawful employment practice" which would be investigated by the Delaware Department of Labor (DOL).[9] Additionally, all employers will be required to distribute a DOL fact sheet on sexual harassment and employee protections under this bill to employees. It is important to note that this requirement is made of all employers, regardless of size. It also requires employers with 50 or more employees to provide training on sexual harassment prevention and additional training to supervisors. These trainings have to be completed on an on-going basis every two years.

> *"The stigma attached to talking about, reporting, and stopping sexual harassment allows harassers to thrive."*

HS 1 for HB 360 is an important bill and required a lot of hard work by Representative Helene Keeley, the bill's primary sponsor, and Natalie Woloshin, the House attorney who drafted the bill. As one can imagine, a bill creating a new prohibited employment practice (even one already illegal) and adding requirements for employers was not popular among some in the business community. But, those stakeholders were able to work through issues and to streamline the requirements for employers, while still creating important protections for Delaware employees. The bill in its final version easily passed both chambers and is expected to be signed by the Governor. The bill will take effect on January 1, 2019.

One of the main goals of HS 1 for HB 360 is to provide a common knowledge base for all employees in Delaware. The fact sheet will teach employees that sexual harassment is both illegal and can be investigated by the DOL. While employers may have their own process in place, if there is not one or it is lacking, then a victim can still turn to the DOL. If the harasser and the victim are not employed by the same organization as in the case of a vendor, contractor, or lobbyist, the victim still has some power to complain to her superiors or to the DOL. With this new legislation everyone in that situation should be educated on what the law is in Delaware.

The Delaware General Assembly's reaction to the #metoo movement was a good one that produced results in the form of new rules and laws for themselves and the entire State; but until all of us, victims or not, are willing to do something about this issue these changes are insufficient. When I heard about the lobbyist who had exposed the environment in her state capital, my first thought was, "Well, I hope she knew it could affect her career." I am ashamed of that response. First, because I am sure she knew it could. Second, because it is that thinking that kept her, other victims, and everyone else who surely knew what was going on from speaking out. The stigma attached to talking about, reporting, and stopping sexual harassment allows harassers to thrive. Unfortunately, a change in culture cannot be legislated or court-ordered. Instead, we all have to step up when we see something inappropriate or illegal regardless of the consequence.

Notes:

1. Adam K. Raymond, *Sexual-Harassment Scandals Rock More Than a Dozen State Capitols*, New York Magazine (Nov. 10, 2017 at 6:22pm),http://nymag.com/daily/intelligencer/2017/11/sexual-harassment-scandals-rock-state-capitals.html.
2. *Id.*
3. *Id.*
4. Sexual Harassment Policy Recommendations, Women's Caucus of the Md. Gen. Assemb. (2018).
5. *Sexual Harassment Policies in State Legislatures*, Nat'l Conf. of State Legs. http://www.ncsl.org/research/about-state-legislatures/sexual-harassment-policies-in-state-legislatures.aspx. (last visited Aug. 3, 2018).
6. S.R. 17, 149th Gen. Assemb., Reg. Sess (Del. 2018), H.R. 21, 149th Gen. Assemb., Reg. Sess (Del. 2018).
7. Matt Bittle, *Legislature Updating Sexual Harassment Policies*, Del. State News, Dec. 4, 2017.
8. S.R 17, H.R. 21.
9. H.S. 1 for H.B. 360, 149th Gen. Assemb., Reg. Session (Del. 2018) (will be placed in Del. Laws upon signature by the Governor).

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A Year for the Record Books for Delaware Women

By Melanie Ross Levin

Just one year ago this past July, Governor John Carney signed House Bill 4 of the 149th General Assembly, creating the State of Delaware's new Department of Human Resources (DHR). Within DHR, the Division of Diversity & Inclusion was established based on the recommendations from an independent organization that provided an analysis of state government employment practices. But, House Bill 4 did not stop there — it went a step beyond the recommendations and also established the Office of Women's Advancement & Advocacy (OWAA).

The need for an office that focused solely on women's advancement was evident; in legislative sessions prior to OWAA's founding, almost a dozen bills addressing equality for women were introduced. Bills ranged from ensuring fair wage practices, to requiring sexual assault training for Delaware's law enforcement community and a sexual assault kit audit, to expanding breastfeeding accommodations. It was clear there was real need for more consistent policymaking around women's advancement in Delaware. By establishing the Office of Women's Advancement & Advocacy, lawmakers and Governor Carney took a critical step in ensuring that the fight for equality for women had a permanent place in the First State.

The office has a very clear responsibility of promoting the equality of women in all areas of society. This includes eliminating gender-based bias and discriminatory policies and practices, making legislative proposals, advising executive and legislative bodies on the effect of proposed legislation on women, and researching and reporting on the status of women in the state. While OWAA is housed in the state's Department of Human Resources, it is uniquely charged with advocating for all women in Delaware, not just those who are state employees.

The Office of Women's Advancement & Advocacy is taking steps to engage and educate the public about the office's work and about issues affecting gender equality. Through social media channels including Facebook, Instagram, and Twitter (@DelawareWomen), OWAA has launched a cost-effective way of interacting with the public. This will increase educational opportunities and civic participation in its work and in the work of three public bodies: an advisory council, the Commission for Women, and two new groups, the Delaware Women's Workforce Council and the Delaware Women's Hall of Fame Committee.

Before hiring for the office was complete, work had already begun. A mantra of the Department of Human Resources' cabinet secretary, Saundra Ross Johnson, is "we are building the plane as we are flying it," and that could not be more true. Eager to make its mark on public policy for women,

OWAA worked diligently to meet with legislators to provide research and testimony about legislation during the 2018 session, and to introduce the public to OWAA and its mission.

OWAA hosted "Redefining Women in the Workplace" to honor Senator Margaret Rose Henry for her years of service in the Delaware State Senate and provide attendees with an understanding of the importance of paid parental leave and equal rights in Delaware. OWAA's movie screening of *RBG*, a documentary about the trail-blazing life of U.S. Supreme Court Justice Ruth Bader Ginsburg, and the panel discussion following, highlighted how Delaware's legal community, including the Department of Justice, is advocating for women.

In less than six months, OWAA worked with legislators and supported several advancements for Delaware women this legislative session, including:

- Providing full-time state employees 12 weeks of paid parental leave (for mothers and fathers) for births and adoptions (HB 3)
- Passing the first leg of a constitutional amendment to ensure equal rights regardless of sex (HB 399)
- Mandating insurance coverage of a 12-month supply of birth control to reduce unintended pregnancies, and codifying current federal birth control coverage requirements (SB 151)
- Protecting children from forced child marriage by becoming the FIRST STATE to ban marriage under 18 years of age — no exceptions (HB 337)
- Ensuring that women in detention facilities have access to free tampons (SB 166)
- Clarifying that a person cannot consent to sexual relations while in law enforcement custody (SS 1 for SB 169)
- Mandating insurance coverage of fertility care services (SB 139)
- Requiring that Delaware employers (public and private), with 50 or more employees, provide sexual harassment training to their employees and supervisors (HS 1 for HB 360).

> *"The need for an office that focused solely on women's advancement was evident; in legislative sessions prior to OWAA's founding, almost a dozen bills addressing equality for women were introduced."*

The positive impact of these bills on Delaware women is already being realized. There are many achievements to celebrate this year, but there is still plenty of work to do in Delaware to support women. The next legislative session is only six months away. OWAA is eager to partner with organizations such as the Delaware State Bar Association, especially the Women and the Law Section, to combine areas of expertise to further advance gender equality in Delaware.

To learn more about the Office of Women's Advancement & Advocacy visit de.gov/women.

Melanie Ross Levin is the Director, Office of Women's Advancement & Advocacy, State of Delaware, Department of Human Resources and can be reached at Melanie.RossLevin@state.de.us.

"The most heartening thing about seeing women rise in the power structure is not

DELAWARE FIRSTS FOR WOMEN

1883
Mary Ann Shadd Cary, a Delaware native, becomes the second African American woman in the United States to attend law school (Howard University).

1923
Evangelyn Barsky and Sybil Ursula Ward become the first women to be admitted into the Delaware Bar.

1925
Sybil Ursula Ward is the first female elected to Wilmington City Council. She is also the first female lawyer at Ward and Gray, now Potter Anderson & Corroon.

1933
Marguerite Hopkins Bodziak becomes the first female prosecutor in Delaware when she was appointed Assistant City Solicitor in charge of prosecution.

1962
Ruth Farrell becomes the first woman appointed as Deputy Attorney General of Delaware.

1971
Battle R. Robinson becomes the first female attorney in Sussex County. After she had her first child, the Delaware State Bar Association sent roses and a card stating, "To the first lawyer in Sussex to ever have a baby."

1971
Judge Roxanna C. Arsht becomes Delaware's first female judge when she was appointed by Governor Peterson to Delaware's Family Court.

1973
Judge Jane Richards Roth becomes the first woman to be named partner at a major Delaware law firm (Richards, Layton & Finger).

1974
Judge Helen S. Balick becomes the first woman to sit on the U.S. Bankruptcy Court for the District of Delaware.

1976
Judge Aida Waserstein becomes the first Hispanic woman to be admitted to the Delaware Bar.

1977
Paulette Sullivan Moore becomes the first African American woman admitted to the Delaware Bar.

1979
Judge Peggy L. Ableman becomes the first female Assistant U.S. Attorney for the District of Delaware.

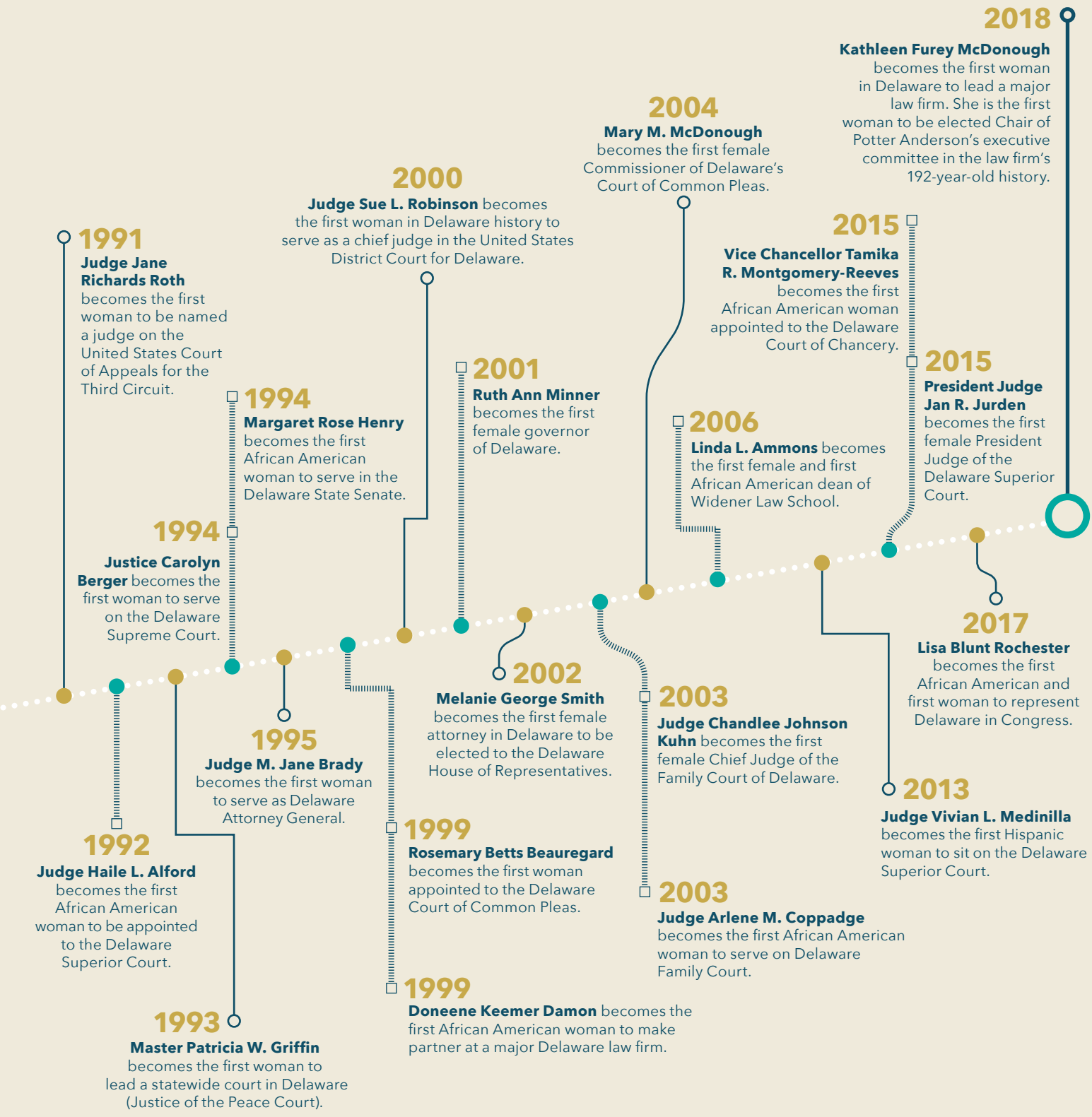
1984
Justice Carolyn Berger becomes the first woman to serve as vice-chancellor on the Delaware Court of Chancery.

1985
Judge Jane Richards Roth becomes the first woman to sit on the District Court for the District of Delaware.

1987
Judge Susan C. Del Pesco becomes the first woman president of the Delaware State Bar Association.

1988
Judge Susan C. Del Pesco becomes the first woman to sit on the Superior Court of Delaware.

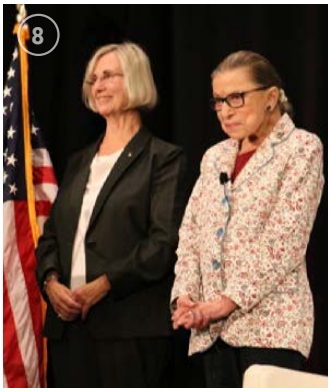
seeing them perform like powerful men, but like powerful women." – *Deborah Blum*



Celebration of 95 Years of Women in the Delaware Bar

with special guest

The Honorable Ruth Bader Ginsburg



1. The Honorable Ruth Bader Ginsburg speaking before a full house of mostly women judges and lawyers at the Hyatt Regency in DC on August 23, commemorating 95 years of women in the Delaware Bar.

2. One highlight of the event was a question and answer session between Justice Ginsburg, Vice Chancellor Tamika R. Montgomery-Reeves and President Judge Jan R. Jurden.

3. Delaware Firsts with Justice Ginsburg: *Front Row L to R*: The Honorable Aida Waserstein, first Hispanic female judge; The Honorable Arlene Minus Coppadge, first African American woman to serve on the Family Court; Justice Ginsburg, The Honorable Jan R. Jurden, first female President Judge of the Superior Court; The Honorable Vivian L. Medinilla, first Hispanic female judge of the Superior Court; The Honorable Peggy L. Ableman, first female assistant U.S. Attorney for the District of Delaware. *Back Row L to R*: The Honorable Jane R. Roth, first female partner of a major law firm and the first woman to sit on the District Court of the District of Delaware; The Honorable Tamika R. Montgomery-Reeves, first African American female vice chancellor of the Court of Chancery; The Honorable Susan C. Del Pesco, first woman on the Superior Court and first female president of the DSBA; Kathleen Furey McDonough, Esquire, first managing partner of a major law firm; The Honorable Patricia W. Griffin, first female presiding judge of a court.

4. The Women and the Law Event Committee: *L to R:* The Honorable Natalie J. Haskins; Rebecca L. Byrd, Esquire; Kathleen A. Murphy, Esquire; Justice Ginsburg; Kyle Evans Gay,Esquire; Kelley M. Huff, Esquire; and Kate Harmon, Esquire.

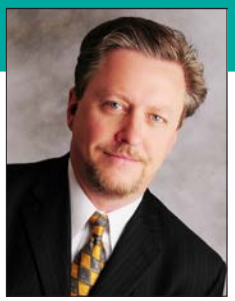
5. Justice Ginsburg poses among all the Delaware female judicial officers in attendance. *Front Row L to R:* The Honorable Peggy L. Ableman; The Honorable Andrea L. Rocanelli; The Honorable Aida Waserstein; The Honorable Arlene Minus Coppadge; Justice Ginsburg; The Honorable Natalie J. Haskins; The Honorable Mary M. Johnston; The Honorable Vivian L. Medinilla; and The Honorable Sherry R. Fallon. *Back Row L to R*: The Honorable Morgan T. Zurn; The Honorable Patricia W. Griffin; The Honorable Susan C. DelPesco; The Honorable Tamika R. Montgomery-Reeves; The Honorable Karen L. Valihura; The Honorable Jane R. Roth; The Honorable Jan R. Jurden; The Honorable Abigail M. LeGrow; The Honorable Samantha J. Lukoff; and The Honorable Barbara D. Crowell.

6. The Honorable Aida Waserstein and the Co-Chairs of the Women and the Law Section (Kathleen A. Murphy, Esquire, and Kyle Evans Gay, Esquire) present a certificate to Justice Ginsburg, making her a lifetime honorary member of the Women and the Law Section.

7. Mark S. Vavala, Esquire, DSBA Executive Director, presents a caricature to Justice Ginsburg.

8. The Honorable Susan C. Del Pesco and Justice Ginsburg during the presentation of gifts.

9. The Honorable Karen L. Valihura's introductory remarks provided a background of Delaware history and the slow progress in advancing the rights of women in the first state.



ETHICALLY SPEAKING

By Charles Slanina, Esquire

Is Discrimination Disciplinary?

After two years of discussion, the American Bar Association amended Model Rule 8.4 on August 8, 2016 to add subsection (g). That amendment states that:

> it is professional misconduct for a lawyer to engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

The response to the amendment has been underwhelming. Vermont became the first state to adopt Rule 8.4(g) in August 2017. Since then, Tennessee has twice proposed adoption only to have it denied both times. While no other state has fully adopted the rule, in May 2018, California adopted a version of the rule which may be as strict. Several states are reported to be considering adoption, including Arizona, New Hampshire, Idaho, Pennsylvania, Illinois, Montana, New Jersey, and Utah. Other states have considered and rejected it, including Louisiana, Nevada, and South Carolina, while 36 jurisdictions prohibit lawyers from discriminating against certain classes of persons while engaged in the practice of law either by rules or comments to the rules.

The attorneys general for both Louisiana and Texas issued opinions that the rule is unconstitutional, a violation of the First Amendment. In Montana, the state legislature passed a resolution stating that the amendment violates both the state and federal constitutions, and the rule would permit or require their Supreme Court to improperly regulate free speech. While Illinois and Minnesota also declined to adopt the amendment, those states already have their own anti-discrimination rules.

> *"Case law already suggests that the existing rules can be successfully applied to discipline attorneys' discriminatory behavior."*

In case you were wondering, Delaware has not adopted the amendment. However, Comment [3] to Delaware Professional Conduct Rule 8.4 already includes the language struck by the ABA Model amendment:

> A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

Does that mean that discrimination is not disciplinary? No. Case law already suggests that the existing rules can be successfully applied to discipline attorneys' discriminatory behavior. Repeated "disparaging misconduct" got a Florida lawyer disbarred. Having previously received a sixty-day suspension, public reprimand and two years' probation, attorney Robert Joseph Ratiner was found, among other things, to have loudly called his female opposing counsel a "dominatrix" who "must enjoy dominating people." The referee's report found that Ratiner's comments "whether knowingly or with callous indifference, did disparage, humiliate, and/or discriminate against another lawyer" in violation of Florida Rules 3-4.3 (actions unlawful or contrary to justice), 4-4.4(a) (cannot embarrass third party), 4-8.4(a) (cannot violate ethics rules), and 4-8.4(d) (conduct prejudicial to the administration of justice). *Fla. Bar v. Ratiner*, 238 So.3d 117 (Fla. 2018).

Colorado attorney Robert Gilbert was publicly censured for calling a female judge "an intrinsically degrading 'highly

pejorative taboo' term." Colorado adopted its own version of Rule 8.4(g) which states that it is professional misconduct for a lawyer to engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process…" Interestingly, Gilbert was found guilty of the Rule 8.4(a) violation but not guilty of violating Colorado's Rules 4.4(a) (respect for rights of third parties), 3.5(d) (decorum of tribunal), and 8.4(d) (conduct prejudicial to the administration of justice). *People v. Gilbert*, Colo. No. 10PDJ067 (Colo. Jan. 14, 2011).

An attorney in Puerto Rico received a public censure and $1,000 sanction after he remarked that the discomfort of his opposing female counsel from the heat at a deposition might be due to her menopause. The U.S. District Court for the District of Puerto Rico applied the ABA Model Rule 4.4(a) (respect for rights of third persons), finding that the discriminatory behavior "tarnishes the image of the entire legal profession and disgraces our system of justice." *Cruz-Aponte v. Caribbean Petroleum Corp.*, 123 F. Supp.3d 276 (D.P.R. 2015).

The Indiana Bar Association issued an advisory opinion which concluded that a lawyer who occupies a leadership role in an organization that has a gender, religious, or racial requirement for membership may be subject to discipline under Indiana's version of Rule 8.4(g) which incorporates some but not all of the language of the ABA Model. Op. 1 of 2015.

Finally, a Delaware criminal defense lawyer's sexually provocative emails to female prosecutors and derogatory emails to male prosecutors, including Semitic references, was found to have violated Rules 4.4(a) (using means that have no substantial purpose other than to embarrass, delay or burden a person) and 8.4(d) (conduct prejudicial to the administration of justice) only with regard to the offending correspondence that was copied to the court. *Matter of Member of the Bar* (name omitted), 2018 WL 1319010, *reported at* 183 A.3d 703 (Del. 2018) (Table).

Statistics do not paint a very pretty picture with regard to attorney discrimination either. The American Bar Association's Presidential Initiative on Achieving Long-Term Careers for Women in Law conducted a survey which found that while fifty percent of law students are women and forty-five percent of associates at law firms are female, less than twenty percent ever make partner. The survey also found that forty-nine percent of the women surveyed reported unwanted sexual contact during their careers. Only six percent of men had the same experience. More insidious possible discrimination was also reported.

Civil cases for damages could also be disciplinary matters if the ABA amendment was widely adopted. Three former Chadbourne & Parke partners settled a claim for more than $3 million in damages after alleging that the firm systematically paid female partners less according to an article by Stephanie Russell-Kraft in 34 Law. Man. Prof. Conduct 164 (Mar. 21, 2018).

Morrison & Foerster was the subject of a class action by three associates alleging discriminatory retaliation for taking maternity leave as reported in another article by Stephanie Russell-Kraft in 34 Law. Man. Prof. Conduct 252 (May 16, 2018).

Ending on a more positive note, in an August 8, 2018 article in *Texas Lawyer*, John Council reported that Houston State District Judge Ravi Sandill issued a standing order granting expecting lawyers an automatic continuance of any trial in his courtroom for up to 120 days before or after the birth or adoption of a child. Judge Sandill is reported to have come up with the idea after reading about opposing counsel objecting to a pregnant Florida lawyer's motion for a continuance. The article went on to note that not all Texas judges have been as accommodating to pregnant lawyers. In 2015, a Dallas County judge received a public reprimand after asking the bailiff to handcuff an eight-months pregnant prosecutor into her chair to prevent her from leaving the courtroom. And, an El Paso County judge received a public reprimand for issuing an arrest warrant for a lawyer who failed to appear for jury duty while on leave to give birth.

Non-discrimination (a.k.a. fairness and respect for others) is not just the right thing — it is the rule(s) even if it is not Model Rule 8.4(g).

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

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

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By Carol P. Waldhauser, Executive Director

Stay or Go?

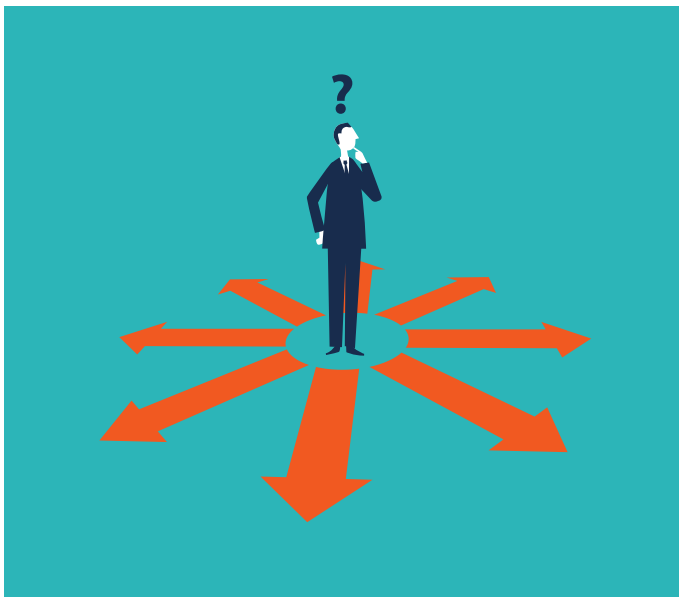
Lawyer #1 is constantly miserable and stressed about his/her work and it is spilling into his/her life — personally and professionally.

Lawyer #2 does not feel that he/she fits in the firm and repeatedly procrastinates suiting up for the office.

Lawyer #3 has experienced verbal abuse in the firm and is constantly humming the song: "Should I Stay or Should I go?"

• • •

Much is written about lawyer wellbeing. All of this data makes the point that it is imperative for lawyers to maintain their resilience and experience success. The Commission on Lawyer Assistance, along with other divisions within the ABA, have written a guide to implement a culture of wellness within the law office called the *Wellbeing Toolkit for Lawyers and Legal Employers*.[1] This column, however, is addressing a different issue and perhaps the elephant in the room. Is being a lawyer a good fit for you?



Every morning most of us wake up and head off to the office. We mentally imagine the day, review our emails and messages even before we get to the office, then start our commute. Day after day. Week after week. Year after year. We accept these rituals as part of our life.

One day, however, the schedule and the traffic is especially bad. Your mind starts to race and ponder, "Why am I doing this?" Of course, the "why" is easy. For most of us we need money to pay student loans, to pay bills, and to live. But, what happens when you are just not into it anymore? When the fire in your belly has been extinguished, your professional life no longer has meaning and you feel that it is a daily drain on your emotional and physical wellbeing.

A 2015 Gallup Poll found that 67 percent of Americans come to work disengaged. And, research shows that when we are checked out at work, we are more stressed, less productive, and less willing to offer an innovative idea.

In his book *Lawyer Wellness is not an Oxymoron*, Andy Clark writes "If wanting or seriously considering a change in careers is evidence that many lawyers are not fulfilled, then there is no dearth of evidence to be found. Here's a sampler of statistics that point to a crisis of career fulfillment among lawyers: Seven in ten lawyers responding to a *California Lawyers* magazine poll said they would change careers if the opportunity arose…. And, only half of lawyers are very satisfied or satisfied with their work."[2]

Michael Carroll, a regular contributor to the magazine *Mindful* on work-life issues states, "It's understandable how passion even for a career that once felt exciting can fade. The looming threat of downsizing that makes you feel expendable; having too much to do and not enough time to do it; constant financial pressure — the list goes on."[3] For lawyers, billable hours, deadlines, and perfectionism are known to drain the passion.

Lawyers might even experience verbal abuse, sexual harassment, or know of illegal behavior or behavior in violation of the Rules of Professional Conduct, in which case no amount of money is worth it. If you are the victim of bullying, sexual harassment, or other egregious behavior, you should address it. And, it is advisable to keep an

eye out for other positions — update your resume and seek career guidance.

Transition and change is difficult for most of us. Once you realize it might be time to leave your job, you will first want to think about baby action steps, as well as goals, in what I refer to as a "blue-print for change." In other words, and according to Ryan Kahn, a career coach cited in the *Forbes* article, "14 Signs It's Time To Leave Your Job" by Jacqueline Smith: "Once you realize it might be time to leave your job, you'll first want to set goals for yourself detailing what you are looking for in terms of responsibilities, company (firm) culture, compensation and benefits."[4]

Moreover, you will want to consider your options: Can you quit and then find a new job, or do you need to job search while you are still at your current job? Consider what a "better" or "ideal" job would look like, and what factors are important in your next job.

Ask yourself whether you want to stay, or go, within your current field or if you are interested in exploring a career change. Is being a lawyer a good fit for you?

For more information on this, or other topics, call DE-LAP. This is your program and it is not only free; but it is confidential. Call Carol Waldhauser at (302) 777-0124 or email cwaldhauser@de-lap.org. Also, visit our website at www.de-lap.org and join us for our many upcoming events!

Notes:

1. Brafford, Anne M. *Wellbeing Toolkit for Lawyers and Legal Employers*. ABA. August 2018. Accessed August 13, 2018. https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_well-being_toolkit_for_lawyers_legal_employers.authcheckdam.pdf. (Also available on www.de-lap.org.).
2. Clark, Andy. *Lawyer Wellness Is Not an Oxymoron: Why Tomorrows Top Lawyers Must Embrace Wellness Today and What You Need to Do to Be One of Them*. Fredericton, N.B.: Andy Clark, 2013.
3. Carroll, Michael. "When Work Is... Meh." Mindful. February 2018. Accessed August 13, 2018. https://www.mindful.org/when-work-is-meh/.
4. Smith, Jacquelyn. "14 Signs It's Time To Leave Your Job." Forbes. September 03, 2013. Accessed August 13, 2018. https://www.forbes.com/sites/jacquelynsmith/2013/09/04/14-signs-its-time-to-leave-your-job/#6266e9c11da8.

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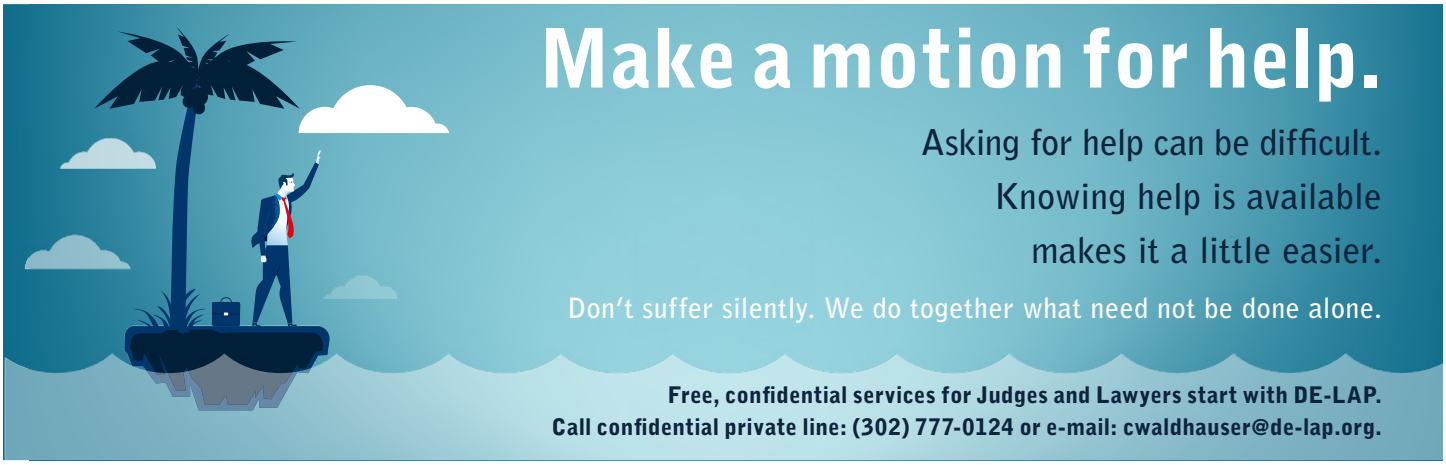
14 SIGNS THAT YOUR JOB IS NO LONGER A GOOD FIT:

- You lack passion.
- You are miserable every morning and dread going to work.
- Your company (or firm/office) is sinking.
- You really dislike the people you work with and/or your boss (some things do not change).
- You are consistently stressed, negative, and/or unhappy at work.
- Your work-related stress is affecting your physical health.
- You do not fit in with the corporate/office culture and/or do not believe in it.
- Your work performance is suffering. (You no longer are productive at work even though you are capable of performing the work).
- You no longer have good work-life balance.
- Your skills are not being tapped.
- Your pay or draw has not increased, or maybe it has decreased.
- Your ideas are not being heard.
- You are bored and stagnating at your position/job.

Source: Smith, Jacquelyn. "14 Signs It's Time To Leave Your Job." *Forbes*.



The 2018 Combined Campaign Cup Results

By Kevin G. Collins, Esquire, and Charles B. Vincent, Esquire

Thank you to all who contributed to the Sixth Annual Combined Campaign Cup. Each year since its inception, net proceeds from the Cup have increased. This trend continued in 2018, as proceeds from the Cup reached approximately $40,000 (after expenses) to benefit the Combined Campaign for Justice. More than 200 golfers, tennis players, attendees, and volunteers participated in the golf & tennis tournaments, dinner, and silent auction. We thank the many members of the Bar, volunteers, and this year's planning committee, including co-chairs William Alleman, Kevin Collins, Shauna Hagan, Kelley Huff, Karla Levinson, Jaclyn Quinn, Jennifer Rutter, Charles Vincent, Jason Warren, and Julie Yeager. We also recognize and thank Jerry Hyman, Esquire, for his support and donation of two Hawaii resort weeks for our raffle and silent auction.

The winners of the 2018 Combined Campaign Cup competitions are:

DuPont Course

Team Parcels (Tim Kady, Tom Mendola, Kevin Oakes, Joe Giannatassio)

Nemours Course

Team Greg Williams (Tyler Cragg, Chase Miller, Chris Lee)

Tennis Tournament

John Balaguer

Hawaii Resort Raffle Winner

Richard Abrams

A big thank you to this year's sponsors, listed below. Pictures from the event are available on the Combined Campaign for Justice website. If you would like to help plan next year's tournament, please contact Charlie Vincent at charlie@innovincent.com or Jason Stoehr at jstoehr@declasi.org. Please save the date for next year's Cup, which is scheduled for July 15, 2019 at DuPont County Club.

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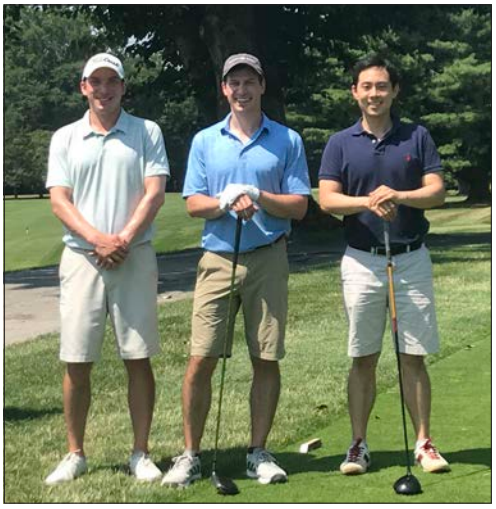
Team Parcels


Team Greg Williams

Ben Potts and John Balaguer

Photo Credit: Combined Campaign for Justice

BOOK REVIEW

Reviewed by Richard A. Forsten, Esquire

The Case for Consistency:

The Case Against Impeaching Trump

By Alan Dershowitz (Hot Books, 2018)

Reviewer's Note: Ordinarily I would not review a book as "political" as this. After all, as President of the Bar Association I once wrote a column that we should all check our politics at the door and recognize that as an association we are made up of lawyers of all political stripes. But, there are exceptions to every rule, and, as the following review demonstrates (I hope), Mr. Dershowitz's new book is not so much about politics as it is about civility and consistency.

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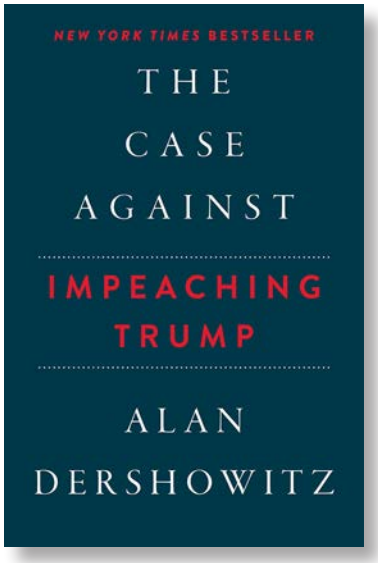

Alan Dershowitz has been and is many things. Harvard law professor. Criminal defense attorney. Outspoken civil libertarian. A devout Democrat who has voted for every Democrat candidate for president since he was old enough to vote. And yet, despite all his liberal credentials, Dershowitz has been under attack by those on the left who should ostensibly be his friends. Friends now refuse to speak to him and attack him in print.

And what, you may ask, is Dershowitz's crime? Simple. He has argued against the appointment of a special counsel to investigate Russian collusion, arguing instead that a bipartisan commission should have been created along the lines of what was done for 9/11. Worse still, he has argued that, based on the evidence to date, there is no basis to impeach Donald Trump. In his short, timely book *The Case Against Impeaching Trump*, following an introductory chapter on impeachment, Dershowitz collects a number of columns he has written over the last year or so on the subject, as well as transcripts from a number of media appearances.

Dershowitz's book is titled *The Case Against Impeaching Trump,* but that is the title and focus of the book not because Dershowitz is a fan or supporter of Trump; rather, it is the title and focus because, as Dershowitz puts it, he is a firm believer in the "shoe on the other foot" test.

In his opening essay, Dershowitz observes:

"Had Hillary Clinton been elected president, Republican partisans would be doing and saying about President Clinton what Democrat partisans are now saying about Trump. … There would be efforts to reopen the email investigation… There would be demands to appoint a special counsel. There would be claims that foreign contributions to the Clinton foundation and other entities were 'emoluments.'… If President Hillary Clinton had fired FBI director James Comey — as she might well have done — there would have been allegations of a cover-up. There would be calls for her impeachment and prosecution.

"My partisan Democrat friends would be appalled at these efforts to undo the election of their candidate. They would be railing against expanding the criminal law to target a political opponent. They would be dismissing the emoluments argument as the stretch that it is. . . .

"In other words, Democratic partisans would be making exactly the same arguments in relation to a President Clinton that I am now making in relation to President Trump.

"I would be joining them in making these arguments, because they are the right arguments for any civil libertarian to make regardless of which foot the shoe is on. But for partisans on both sides, everything depends on which foot the shoe is on. They remind me of my immigrant grandmother. When I would excitedly announce that the Brooklyn Dodgers had won a ballgame, she would ask rhetorically, 'Yeah, but is it good or bad for the Jews?'

"For her, everything was measured by its influence on the Jews. Similarly, today, partisans measure everything by whether it's good or bad for the Democrats or Republicans — for Clinton or Trump.

"Now that it is President Trump who is being targeted, my partisan Democratic friends are vociferously rejecting these neutral civil liberties arguments, because they do not serve their partisan political interests. Nor do they seem embarrassed by their apparent hypocrisy and double standards. Hypocrisy is a small price to pay for partisan political victories.

"For me, the primary test for whether an argument is principled or partisan is 'the shoe on the other foot' test. . . .

"The time has come for all Americans who believe in enduring principles of morality and justice to insist on consistency. . . .

"Consistency of principles is neither foolish nor small-minded. It is the essence of any moral system. Principled consistency may be difficult to achieve, especially in our current hyper-partisan atmosphere. But if we are ever to end the partisan bickering and name-calling that is coarsening dialogue and making reasoned compromise impossible, we must insist on a single standard of legality and morality that applies equally to Democrats and Republicans. We are far from that in the current shouting match in which each side calls the other 'criminal,' 'racist,' or worse.

"We must declare an armistice in this divisive war of words and agree to do unto your political opponents what you would have your political opponents do unto you. That golden rule of consistency should be as applicable to political debate as it is to personal morality."

From this opening statement explaining his "shoe on the other foot" theory, Dershowitz goes on to look at the various arguments that have been made to impeach Trump, as well as the various twists and turns of the Mueller investigation. Not everyone will agree with all of Dershowitz's arguments, but that is not the point as he explains in his final few paragraphs:

"I welcome criticism of my views on their merits and demerits, but I am appalled at the personal *ad hominem* attacks that have often substituted for critical analysis of my positions. The emails that I receive hourly from cranks and extremists don't surprise me. What does surprise me is that so many serious academics and pundits prefer to attack my motives than to criticize my analysis in a reasoned way.

"What also upsets me is that old friends — in New York and Martha's Vineyard — have written to me saying that I have 'crossed a line' and they can no longer speak to me. Others have threatened to walk out if I am given a platform from which to express my constitutional views. These fair-weather civil libertarians — who defend only the civil liberties of those whose ideology they favor — are intolerant of nonpartisan defenders of the civil liberties of their ideological opponents. I joke that I have lost seven pounds on the Trump diet because my wife and I are no longer invited to dinner parties, but my being shunned for expressing politically incorrect legal opinions is a dangerous sign of our increasingly intolerant times. It may be understandable, if still wrong, when immature college students demand 'safe spaces' to protect them from views that offend them, but more is expected of mature adults who should be willing to engage with those who express principled positions with which they strongly disagree. I can understand the fear that some people experience from the policies and actions of the Trump administration — some of which I also disapprove of. But the answer to fear should never be repression of unpopular ideas or denial of due process of law.

"I hope this short book will provoke debate, not name-calling. The issues I raise are serious and their discussion is essential to democratic discourse. So please respond to my positions. Disagree with me; propose better arguments; defeat me, if you can, in the marketplace of ideas.

"So let the debate continue. I am ready to respond to my critics in print, in the media, and in the courts of public opinion. But let's keep the debate civil and on the merits."

> "Not everyone will agree with all of Dershowitz's arguments, but that is not the point."

And so, Dershowitz closes his case against impeaching Trump. Whatever one may think of its arguments, however, Dershowitz's book is important more for what it says at its beginning and end. The "shoe on the other foot" test is important and so is civility. We in Delaware, and especially those of us at the Bar, are able to practice these two principles because we are so small in number that we have to be civil and consistent in order to prosper. But, Delaware is not immune to the national trends, and with the ever-increasing nationalization of our day-to-day lives and our politics, sometimes a reminder on the importance of civility and consistency is a helpful thing.

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Reviewer's End Note: As should be evident, my purpose in reviewing this book was not to argue the merits of impeachment itself, but to focus on the need for civility and consistency in any discourse on that subject, and in our politics in general. In this age of the internet and 24/7 news, events are always moving faster than the printed word. This review is being written roughly a month in advance of seeing print, and so some facts may change before it does see print — but the message of civility and consistency is timeless, regardless of when this review sees print.

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

Report: The 2018 Annual Meeting of the ABA House of Delegates

By William D. Johnston, Esquire

The 2018 Annual Meeting of the American Bar Association's House of Delegates took place August 6 and 7 in Chicago, Illinois during the 2018 ABA Annual Meeting. The highlight of the ABA Annual Meeting, from my perspective, was remarks from Milton, Delaware native Bryan Stevenson as he accepted the highest award of the ABA, the ABA Medal.

The Delaware Delegation

As I have noted in previous reports, the House of Delegates is the principal policy-making body of the ABA. For the most recent meeting, the Delaware Delegation again included The Honorable William C. Carpenter, Jr., member of the ABA Board of Governors; Ben Strauss, DSBA Bar Delegate; Mary I. Akhimien, DSBA Young Lawyer Bar Delegate; and yours truly, State Delegate. At the conclusion of the meeting, Judge Carpenter completed three years of distinguished service on the Board of Governors, a seat that rotates amongst Delaware and three other states. Also at the conclusion of the meeting, The Honorable Calvin L. Scott, Jr. completed three years of distinguished service as Chair of the National Conference of Trial Judges of the ABA Judicial Division (a position previously held by Judge Carpenter). Judge Carpenter will continue to serve in the House of Delegates as an elected At-Large Delegate. Please join me in congratulating and thanking Judge Carpenter and Judge Scott for their service and for making Delaware proud!

Remarks from ABA Officers and Others

During the session of the House, we heard from ABA officers and others. Speakers included Chair of the House Deborah Enix-Ross, ABA President Hilarie Bass, ABA Treasurer Michelle Behnke, ABA Secretary Mary Smith, ABA President-Elect Bob Carlson, ABA President-Elect Nominee Judy Perry Martinez, ABA Executive Director Jack Rives, and Legal Services Corporation Chairman John Levi. Also, during the ABA Annual Meeting, in addition to numerous CLE presentations, speakers included Deputy Attorney General of the United States Rod Rosenstein, Chicago Mayor Rahm Emanuel, Illinois Attorney General Lisa Madigan, and Illinois Supreme Court Justice Anne M. Burke. Bryan Stevenson, Founder and Executive Director of the Equal Justice Initiative and a Professor at New York University School of Law, received the ABA Medal. Eric H. Holder, Jr. was honored at the Thurgood Marshall Award Dinner. Five women lawyers were recognized with the Margaret Brent Women Lawyers of Achievement Award: Patricia Kruse Gillette, Eileen M. Letts, The Honorable Consuelo B. Marshall, Cynthia E. Nance, and Tina Tchen.

As I noted at the start of this Report, Bryan Stevenson's remarks in accepting the ABA Medal were for me the highlight of the ABA Annual Meeting. I had heard him previously in Delaware during a visit to his home state. In Chicago, what he had to say was again moving and memorable. The author of New York Times bestseller *Just Mercy* recounted his career-long mission of helping the poor, the incarcerated, and the condemned. He shared stories of winning historic court rulings and of calling his Death Row client to tell him that the final stay application had been denied by the United States Supreme Court. Fittingly, the ABA has recognized Bryan Stevenson for his lifetime of excellence in the cause of justice.

Resolutions Adopted by the House

The House adopted the following resolutions (with numbers as indicated), and in so doing articulated as ABA policy the substance of each resolution:

- Urging Congress to enact legislation to provide a permanent exemption for the Commonwealth of Puerto Rico from the requirements of the Jones Act, 46 U.S.C. §§55101 et seq. (10B);
- Urging Congress to enact immigration reform addressing children separated from their parents at the United States border (10C);
- Urging bar associations, law schools, and other stakeholders to develop and increase curricular offerings through which law students provide *pro bono* representation of incarcerated individuals and those re-entering society (100A);
- Urging Louisiana and Oregon to require unanimous juries to determine guilt in felony criminal cases and reject the use of non-unanimous juries where currently allowed in felony cases (100B);
- Amending Model Rules 7.1 through 7.5 and their related Comments of the *ABA Model Rules of Professional Conduct* regarding lawyer advertising (101);
- Urging tax code provisions that allow the alimony deduction for payors and treat alimony as taxable income to payees (102A);
- Supporting an interpretation of Section 1557 of the Affordable Care

Act, 42 U.S.C. § 18116(a), that its prohibition on sex discrimination by covered health programs or activities includes but is not limited to discrimination on the basis of sexual orientation and gender identity (104C);

- Urging governments to enact legislation providing employees with job-guaranteed paid sick days and job-guaranteed paid family and medical leave (104D);
- Urging governments and international institutions to adopt and implement legislation and regulations to eliminate, prevent and provide remedies for gender-based violence in the workplace, including sexual harassment, based on their actual or perceived sex (including pregnancy), family responsibilities, sexual orientation, gender identity, gender expression, the intersectionality between race and sex or status as a victim of domestic or sexual violence (104E);
- Urging providers of domestic and international dispute resolution to expand their rosters with minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities ("diverse neutrals"), and to encourage the selection of diverse neutrals (105);
- Reaffirming the ABA's commitment to advance the rule of law and condemning the harassment, arbitrary arrest and detention, arbitrary disbarment, denial of due process, other ill-treatment, and killings of judges, lawyers, other members of the legal profession, and their extended families throughout the world for serving in their designated capacities (106A);
- Recognizing the important role that non-lawyer human rights defenders, journalists and others play in protecting justice and the rule of law, and deploring attacks on those professions, as well as on individuals, aimed at silencing or intimidating human rights voices (106B);
- Urging all emergency management agencies to provide proper training to staff and volunteers to respond to unique needs of intimate partner violence and sexual violence victims during and after a disaster (107A);
- Amending the *ABA Guidelines for Approval of Paralegal Education Programs*, dated August 2018 (110B);
- Supporting in principle the Inter-American Convention on Protecting the Human Rights of Older Persons, and encouraging the United Nations to draft a convention on the rights of older persons (112);
- Adopting the *ABA Model Code of Judicial Conduct for State Administrative Law Judges*, dated August 2018, and urging governments to enact and adopt the Model Code (113);
- Adopting the black letter and commentary to the *ABA Ten Guidelines on Court Fines and Fees*, dated August 2018, and urging governmental agencies to promulgate law and policy consistent with the Guidelines (114);
- Urging governments to: 1) enact laws and adopt policies that prohibit the use of out-of-school suspension and expulsion of pre-kindergarten through second grade students; 2) require ongoing training of teachers, administrators, and other school staff on alternatives to school exclusion; and, 3) provide sufficient funding and resources to ensure the provision of alternatives to school exclusion (116B);
- Urging all courts and other appropriate government entities to interpret Titles II and III of the Americans with Disabilities Act to apply to technology, and goods and services delivered thereby, regardless of whether it exists solely in virtual space or has a nexus to a physical space (116C);
- Urging Congress to approve appropriations to the Library of Congress necessary to enable the United States Copyright Office to adequately staff, maintain, modernize, and enhance its services, facilities, databases, studies, and digital projects (117);
- Urging the federal government to recognize that service by persons who otherwise meet the standards for accession or retention, as applicable, in the United States Armed Forces should not be restricted, and transgender persons should not be discriminated against, based solely on gender identity (118);
- Adopting the 2018 *ABA Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States*, to replace the 2004 Standards (119);
- Amending the dues structure for the American Bar Association effective with FY2020 and each year thereafter (177); and
- Urging legal employers not to require mandatory arbitration of claims of sexual harassment (300).

For a detailed description of each resolution (and of other resolutions considered by the House or withdrawn from consideration at the Annual Meeting), please see www.americanbar.org.

As I have noted previously, the practical effect of the House of Delegates adopting policy, as reflected in the above resolutions, is that elected officers of the Association, staff, and volunteer leaders are then authorized to advocate those policy positions — whether with legislators, courts, or others. This, importantly, can translate into grassroots advocacy in Washington (such as the annual ABA Day on Capitol Hill) and in state legislatures to urge, for example, increased funding of legal services for the poor.

Membership

Resolution 177, described above, was proposed by the Standing Committee on Membership ("SCOM"). SCOM led a broad-based effort over the last two years to study how best to deliver value to ABA members. The thoughtful, resulting recommendation, embraced by the Board of Governors, included simplifying dues-paying categories and reducing dues effective 2020, and other benefits.

Annual Meeting (continued on page 36)

Annual Meeting (continued from page 35)

In particular, the new dues structure will have new admittees through fourth year attorneys paying $75, fifth through ninth year attorneys paying $150, tenth through fourteenth year attorneys paying $250, fifteenth through nineteenth year attorneys paying $350, and twenty-plus year attorneys paying $450. At the same time, government, solo, and small firm attorneys, as well as retirees, will pay $150. Paralegals will pay $75, affiliated professionals will pay $150, and international lawyer members will pay $150.

I am hearing that I have been appointed by new ABA President Bob Carlson as a member of SCOM, which will be responsible for implementing the changes I have described. Needless to say, I welcome any and all suggestions on the part of fellow ABA members in Delaware!

As I have urged before, if you currently are an ABA member but are not yet engaged in the work of sections, divisions, or forums (and their respective committees and subcommittees), please consider increased involvement. And, if you currently are not an ABA member, please consider joining as a complement to your DSBA membership. I and other members of the Delaware Delegation would be delighted to discuss with you all of the opportunities that ABA membership presents.

• • •

It continues to be my privilege and pleasure to serve as State Delegate to the ABA House of Delegates. The House will next meet January 28 in Las Vegas, Nevada during the 2019 ABA Mid-year Meeting. If you have any questions or comments at any time, please let me know at wjohnston@ycst.com or (302) 571-6679.

Bill Johnston is a partner with Young Conaway Stargatt & Taylor, LLP. He is a Past President of the Delaware State Bar Association, serves in the ABA House of Delegates as State Delegate from Delaware, and is Immediate Past Chair of the ABA Business Law Section.

Former Delaware Justice Forges Bridge with Leading London Chambers

Last month, 3 Hare Court (3HC) announced that a distinguished American was joining its ranks: former Justice of the Delaware Supreme Court, Randy Holland became a door tenant. To have international lawyers and former judges as door tenants is not unusual: Australian, Singaporean, South African, and Indian nationals are common at many of the larger commercial sets. Not so Americans. Holland, therefore, is breaking fresh ground — something he has a track record of doing. At the age of 39, Holland was appointed as the youngest ever Supreme Court Justice in Delaware, a position he held for 31 years before retiring from the bench last year. A self-confessed anglophile and a huge admirer of the English Bar, he is an Honorary Bencher at Lincoln's Inn — one of only three Americans.

Photo Credit: 3 Hare Court

"The advantage of the split profession in England is the teamwork that you see between barristers and solicitors," says Holland. "I have always been impressed by it. What I like about it is the litigation: how everyone tries their best to be helpful to the court, even though you're an advocate in an adversarial system."

Joint Head of Chambers, Jeffrey Golden, adds: "I have known Randy Holland for nearly two decades and have admired him, his work and his tireless efforts to promote access to and public confidence in the administration of justice for even longer. We look forward to this new relationship, which is certain to foster a wider appreciation internationally of the English Bar, as well as special opportunities for collaboration between a jurist of his broad experience, and the skilled advocates and experts here in Chambers."

According to Joint Head of Chambers Simon Davenport QC: "Having appeared in Delaware myself, possibly the world's senior corporate and insolvency court, I am delighted to welcome into our midst this legendary judge and jurist. It is a significant message of our intent and reach at 3 Hare Court that we would attract someone of his calibre and standing to our Chambers."

Sexual Orientation Discrimination Under Title VII:

The Looming Supreme Court Battle

By Katherine M. Devanney, Esquire

In the fifteen years since the landmark decision of *Lawrence v. Texas*,[1] the United States Supreme Court has done much to improve the lives of LGBT Americans. First, it struck down the federal prohibition against gay marriage,[2] and then invalidated the state bans, too.[3] But, while marriage equality was climbing the appellate ladder, a new question arose: does Title VII of the Civil Rights Act ("Title VII") prohibit sexual orientation discrimination? Until last year, the answer was a resounding "no."[4] But, in April 2017, the *en banc* Seventh Circuit reversed course in *Hively v. Comm. College of Indiana*,[5] holding for the first time that sexual orientation discrimination is unlawful under Title VII.[6] Less than a year later, the Second Circuit decided *Zarda v. Altitude Express*,[7] overturning its own precedent and agreeing that discrimination on the basis of sexual orientation violates Title VII.

Judge Katzmann, writing for the five-judge plurality,[8] held that sexual orientation discrimination is a "subset" of sex discrimination — and therefore prohibited under Title VII — for three reasons: (1) sexual orientation is a "function of sex";[9] (2) sexual orientation discrimination relies on impermissible gender stereotyping;[10] and (3) sexual orientation discrimination is a form of associational discrimination.[11] The remaining judges filed an assortment of concurring, partially concurring, and dissenting opinions. But when the dust settled, it was the final rationale–associational discrimination — that garnered the most support from the Court. With two courts of appeal breaking from the rest, the issue is now ripe for review by the Supreme Court.

The Zarda Decision

After he was fired from his job as a skydiving instructor, Donald Zarda ("Zarda") brought state and federal employment discrimination claims against his employer, arguing that he was fired because he was gay.[12] The District Court granted summary judgment against Zarda on his Title VII claim, but permitted the state law claim to proceed to trial, where Zarda lost before a jury.[13] Post-trial, Zarda appealed the summary judgment ruling, and the Second Circuit convened *en banc* to consider the case in light of its previous rulings that Title VII does not prohibit sexual orientation discrimination.[14]

The *en banc* court overturned *Simonton and Dawson*, noting the myriad ways the legal landscape had changed since *Simonton* was decided in 2000.[15] Among these changes was the 2008 decision of *Holcomb v. Iona College*,[16] where the Second Circuit held that when an employer takes action against an employee because of his or her interracial association, the employee "suffers discrimination because of the employee's *own* race."[17] Noting the numerous cases that have expanded this "associational discrimination" principle to all of Title VII's protected classes, the plurality analogized a gay relationship to the interracial marriage in *Holcomb*.[18] Three more judges joined in this holding, with Judge Jacobs colorfully describing the rest of the opinion as "woke dicta."[19]

In fact, Judge Lohier was the only concurring judge *not* to join the associational discrimination rationale, instead resting his concurrence exclusively on the plurality's first holding: that there is "no reasonable way to disentangle sex from sexual orientation."[20] For Judge Lohier and the plurality, Title VII's prohibition against discrimination "[b]ecause of… sex" necessarily includes sexual orientation discrimination because it is impossible to "fully define a person's sexual orientation without identifying his or her sex."[21]

> *"Though Delawareans can be proud that they live in a state that bans both sexual orientation and gender identity employment discrimination, leaving such a critically important issue to the states alone is not sufficient."*

No judge wrote to concur with the plurality's "gender stereotyping" rationale, which applied the Supreme Court's seminal holding in *Price Waterhouse*[22] to sexual orientation discrimination. For the plurality, sexual orientation discrimination is rooted in an employer's stereotypical beliefs about the gender to which an employee *should* be attracted.[23] Therefore, just as an employer may not take adverse employment actions "based on the belief that a female…should walk, talk, and dress femininely,"[24] they may not so act on the basis of her attraction — or relationship with — a member of the same sex.[25]

Zarda's Future at the Supreme Court

Should *Zarda* reach the Supreme Court, Judge Lynch's dissent will almost certainly take center stage. Drawing heavily from Judge Sykes' dissenting opinion in *Hively*, the dissent focused on Title VII's "central public meaning" at the time it was enacted.[26] For Judge Lynch, it was "clear that the prohibition of discrimination 'based on sex' was intended to secure the rights of women to equal protection in employment."[27] While acknowledging that sexual harassment and hostile work environment claims have become common under Title VII, the dissent would have refused to "extend[] Title VII by judicial construction to protect an entirely different category of people."[28]

Nevertheless, predicting how a hypothetical Supreme Court may rule is putting the cart before the horse. Indeed, just last December, the Supreme Court denied *certiorari* in a case where the Eleventh Circuit reached the opposite conclusion.[29] And, while much has changed since then, it is entirely possible, perhaps even likely, that the high court will wait for another circuit — or two or three — before answering the question once and for all.

Though Delawareans can be proud that they live in a state that bans both sexual orientation and gender identity employment discrimination,[30] leaving such a critically important issue to the states alone is not sufficient. A federal prohibition against sexual orientation employment discrimination is the only way to ensure that *all* Americans, in Delaware and elsewhere, maintain their fundamental right to earn a livelihood. The only question is whether such protections will come from the Supreme Court or Congress.

Notes:

1. 539 U.S. 558 (2003).
2. *United States v. Windsor*, 570 U.S. 744 (2013).
3. *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015); *see also Hollingsworth v. Perry*, 570 U.S. 693 (2013).
4. See, e.g., *Higgins v. New Balance Athletic Shoes, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 290 (3d Cir. 2009); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979); *Kalich v. AT&T Mobility, LLC*, 679 F.3d 464, 471 (6th Cir. 2012); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1510 (11th Cir. 1997).
5. 853 F.3d 339 (7th Cir. 2017).
6. *Id.* at 341.
7. 883 F.3d 100 (2d Cir. 2018).
8. Judges Hall, Chin, Carney, and Droney joined the plurality opinion.
9. *Zarda*, 883 F.3d at 113-19.
10. *Id.* at 119-123.
11. *Id.* at 124-28.
12. *Id.* at 109.
13. *Id.*
14. *See Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *Dawson v. Bumble*, 398 F.3d 211, 217-23 (2d Cir. 2005).
15. *Zarda*, 883 F.3d at 107-108.
16. 521 F. 3d, 130 (2d Cir. 2008).
17. *Id.* at 139.
18. *Zarda*, 883 F.3d at 124-125.
19. *Zarda*, 883 F.3d at 134 (Jacobs, J. concurring).
20. *Id.* at 136.
21. *Id.* at 113.
22. 490 U.S. 228 (1989).
23. *Zarda*, 883 F.3d at 123.
24. *Id.* at 120 (citing *Price Waterhouse*, 490 U.S. at 250-252).
25. *Id.* at 120-121.
26. *Id.* at 144 (Lynch, J. dissenting).
27. *Id.*
28. *Id.* at 145.
29. *Evans v. Ga. Regional Hosp.*, 138 S.Ct. 557 (2017)
30. 19 *Del. C.* § 711.

Katherine Devanney is an associate at Cole Schotz P.C. and a member of the National LGBT Bar Association and the LGBT Section of the Delaware State Bar Association. She can be reached at kdevanney@coleschotz.com.

POSITIONS AVAILABLE

MCCOLLOM D'EMILIO SMITH UEBLER LLC (www.mdsulaw.com) is seeking an attorney to join its fiduciary and corporate litigation practice. Candidates should be licensed to practice in Delaware; have at least 2 years of litigation experience, preferably in the Delaware Court of Chancery; and have strong writing and communication skills. Please send resumes to jkeating@mdsulaw.com.

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All Bulletin Board ads must be received electronically and prepayment is required. Submit the text of the Bulletin Board ad and payment to rbaird@dsba.org. For more information, contact Rebecca Baird at (302) 658-5279.

DISCIPLINARY ACTIONS

PRIVATE PROBATION

ODC File No. 113609-B
Effective Date: July 18, 2018

An attorney received a sanction of a one-year private probation with conditions for violation of Rules 1.3 (diligence), 5.3 (supervision of non-lawyer staff) and 8.4(d) (conduct prejudicial to the administration of justice) of the Delaware Lawyers' Rules of Professional Conduct.

The attorney was the managing partner of a firm and responsible for office management, including the filing and service of complaints. The attorney delegated responsibility for the filing and service of complaints to a paralegal acting under the attorney's direction. The attorney failed to adequately supervise the paralegal resulting in dismissal of a complaint for failing to serve the defendant with the time prescribed by a Court Rule. A panel of the Preliminary Review Committee ("PRC") offered the sanction of a one-year private probation with conditions to which the attorney consented. In determining a one-year private probation with the condition of reimbursement of costs to the Office of Disciplinary Counsel ("ODC") was appropriate, the PRC considered the lawyer's lack of prior disciplinary history, lack of dishonest or selfish motive and cooperation with ODC.

Open Call for Articles!

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SATURDAY 27 OCT
Pro Bono Celebration 5K Run/Walk
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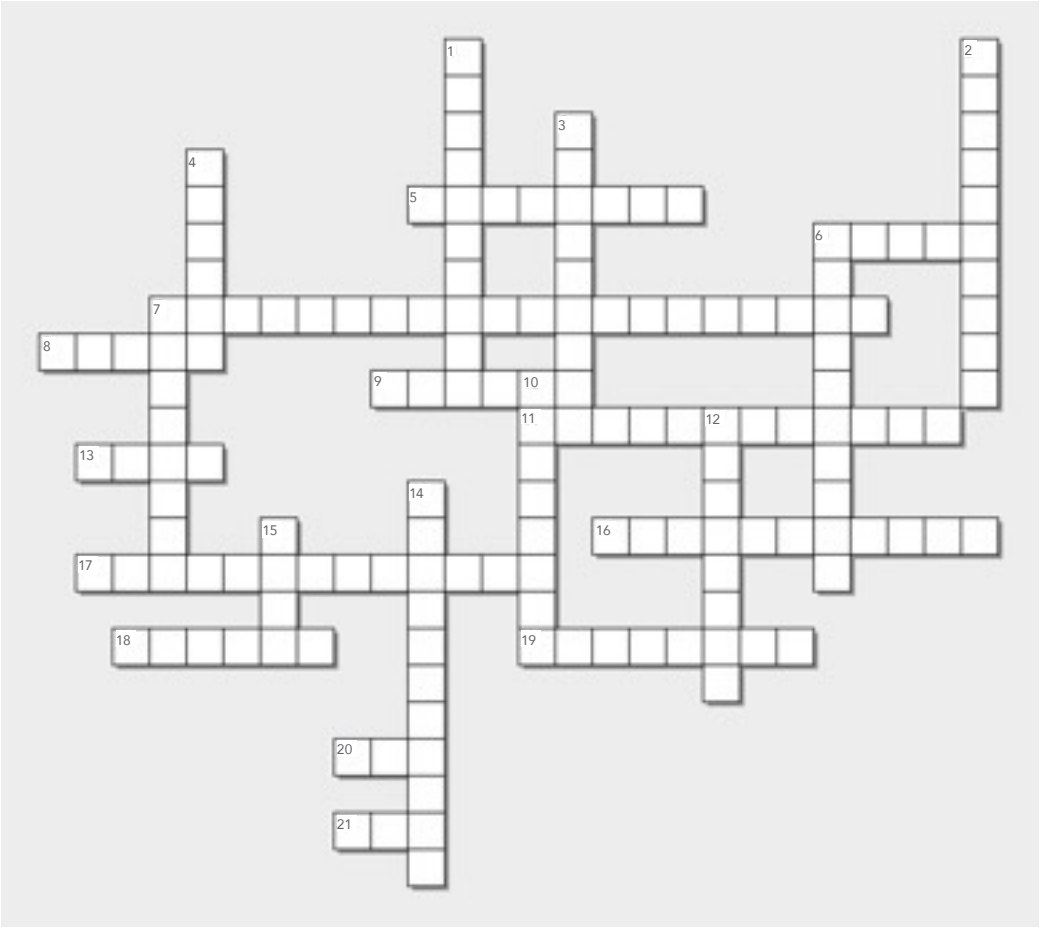
SUNDAY 28 OCT
DSBA's Wills For Seniors
Elsmere Fire Hall, 1107 Kirkwood Highway, Elsmere, DE

THE JUDICIAL *Palate*

By Susan E. Poppiti, Esquire

September: A Summer and Autumn Sandwich

Now that school is back in session, I anticipate seeing a sandwich — the ultimate mobile meal — at every turn. All of the clues to this crossword describe sandwiches. Some require you to think outside the lunch box. The first reader to email me with the correct answers will receive a bottle of wine to pair with their favorite sandwich from this puzzle. I'll give you a hint — one clue pays homage to the women of the Delaware Bench and Bar.



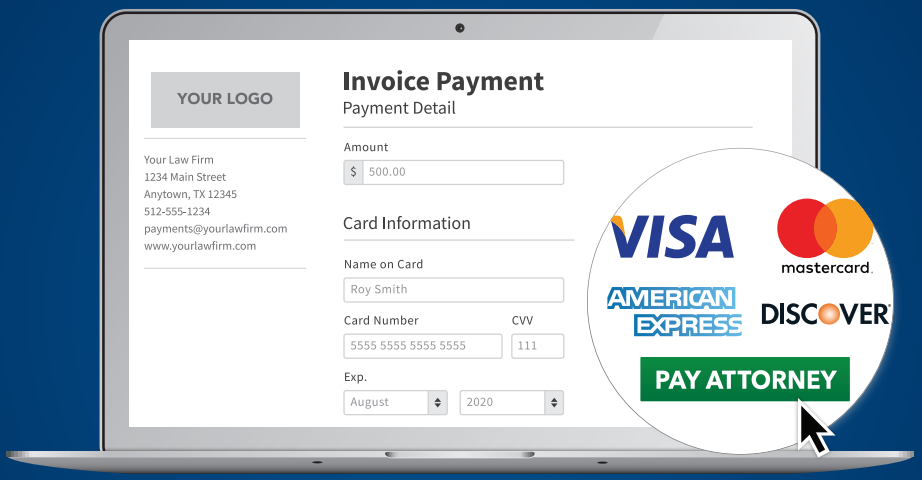
ACROSS

5. Charlie is getting warm!
6. Modest mollusk
7. A youngster's favorite
8. Pickle inside, not alongside
9. Philly sub
11. Mister, may I have an egg?
13. Presented on a pita
16. Maine mainstay
17. Cheddar, Provolone, Swiss?
18. "Take Me Out to the Ball Game"
19. One of the best things about leftover sauce (or gravy)
20. Best with beefsteak
21. Cute and crustless

DOWN

1. Sicilians love their olives
2. Served in quarters
3. Fast food fave
4. Russian or Thousand Island?
6. Stressed swine
7. Classic of Kosher delis
10. Mister Softee specialty
12. Packed with protein
14. Pat's or Geno's
15. NYC sub

Susan E. Poppiti is a mathematics teacher and director of the legal shadowing program at Padua Academy High School. She is also the "head chef" of the school's culinary club "The Hungry Pandas." Susan can be reached at spoppiti@hotmail.com.



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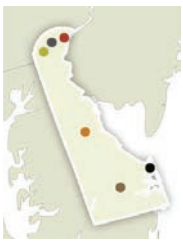

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