

DELAWARE LAW REVIEW

VOLUME 17

2018

NUMBER 1

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William M. Kelleher and Phillip A. Giordano

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Published by the Delaware State Bar Association

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The *Delaware Law Review* (ISSN 1097-1874) is devoted to the publication of scholarly articles on legal subjects and issues, with a particular focus on Delaware law to provide an overview of recent developments in case law and legislature that impacts Delaware practitioners.

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The *Delaware Law Review* is edited and published semi-annually by the Delaware State Bar Association, 405 North King Street, Suite 100, Wilmington, Delaware 19801. (Telephone 302-658-5279.) Manuscripts may be submitted to the Editorial Board by email or hard copy using Microsoft Word and with text and endnotes conforming to *A Uniform System of Citation* (18th ed. 2005). Please contact the Delaware State Bar Association at the foregoing number to request a copy of our Manuscript Guidelines.

Subscriptions are accepted on an annual one volume basis at a price of \$40, payable in advance; single issues are available at a price of \$21, payable in advance. Notice of discontinuance of a subscription must be received by August of the expiration year, or the subscription will be renewed automatically for the next year.

Printed in the United States.

POSTMASTER: Send address changes to the *Delaware Law Review*, Delaware State Bar Association, 405 North King Street, Suite 100, Wilmington, Delaware 19801.

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DEVELOPMENTS IN DELAWARE TRUST AND ESTATE LITIGATION

William M. Kelleher and Phillip A. Giordano*

Our last article about developments in Delaware trust and estate case law was published in early 2014.¹ A lot has happened since then.

Since early 2014, the Delaware Supreme Court and the Delaware Court of Chancery have issued notable opinions covering pre-mortem validation of trusts, the protection afforded by spendthrift trusts, capacity challenges, jurisdiction over Delaware trusts, reformation, asset protection trusts, time-barred fiduciary duty claims, reimbursement of counsel fees, and powers of appointment, among others. What follows are summaries and analysis of some of the most notable recent decisions in those areas.

I. PRE-MORTEM VALIDATION

In *IMO Restatement of Declaration of Trust Creating the Survivor's Trust Created Under the Ravet Family Trust*,² the Delaware Court of Chancery found that the petitioner's claims were time-barred for failing to contest the validity of a trust within 120 days of notice.

On January 29, 2014, the Delaware Court of Chancery, per Vice Chancellor Glasscock, dismissed the petitioner's case as untimely based on notice given under 12 DEL. C. § 3546 ("Delaware's Pre-Mortem Validation Statute"). That ruling was significant because it was the first Delaware ruling, and perhaps the first nationally, that dismissed a case based on notice pursuant to a pre-mortem validation statute. Only a small handful of states have pre-mortem validation statutes.³ The January 29, 2014 ruling was a bench ruling.⁴ After receiving that ruling, the petitioner moved for post-judgment relief seeking to have the court amend, alter, or reconsider the judgment.

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1. William M. Kelleher and Phillip A. Giordano, *Recent Developments in Delaware Trust Litigation: Notable Decisions Addressing Adult Adoptions, Migration, Modification, Construction, Payment of Counsel Fees, and Time-barred Claims*, 15 DEL. L. REV. 21 (2014).

2. Matter of Restatement of Declaration of Trust Creating the Survivor's Trust Created Under the Ravet Family Trust Dated Feb. 9, 2012, C.A. No. 7743-VCG, 2014 WL 2538887 (Del. Ch. June 4, 2014), *aff'd sub nom.* Ravet v. Northern Trust Co. of Delaware, No. 369, 2014, 2015 WL 631588 (Del. Feb. 12, 2015).

3. Alaska (AS § 13.12.530); Arkansas (A.C.A. § 28-40-201); New Hampshire (N.H. Rev. Stat. § 552:18); Nevada (5 Nev. Rev. Stat. 30.040(2)); North Carolina (N.C.G.S.A. § 28A-2B-1); North Dakota (N.D.C.C. § 30.1-08.1-01); and Ohio (R.C. § 2107.081). Notably, Delaware is the only pre-mortem validation state that has a notice statute as opposed to a filing statute. In other words, the other states on this list besides Delaware all require the testator or grantor to petition the court for a declaration that the document is valid.

4. In re Restatement of Declaration of Trust Creating the Survivor's Trust Created under the Ravet Family Trust Dated February 9, 2012, C.A. No. 7743-VCG, 2014 WL 358564 (Del. Ch. Jan. 31, 2014).

Delaware's Pre-Mortem Validation Statute allows settlors to provide notice of a trust to all interested parties, and if the noticed parties do not contest the trust within 120 days of notice, they are barred from ever contesting it. At the time, according to the Pre-Mortem Validation Statute, notice was given when received by the interested party and, absent evidence to the contrary, it was presumed that the interested party received notice if it was delivered to that person's last known address. The key language of the statute reads:

(a) A judicial proceeding to contest whether a revocable trust or any amendment thereto, or an irrevocable trust was validly created may not be initiated later than the first to occur of:

(1) One hundred twenty days after the date that the trustee notified in writing the person who is contesting the trust of the trust's existence, of the trustee's name and address, of whether such person is a beneficiary, and of the time allowed under this section for initiating a judicial proceeding to contest the trust provided, however, that no trustee shall have any liability under the governing instrument or to any third party or otherwise for failure to provide any such written notice. For purposes of this paragraph, notice shall have been given when received by the person to whom the notice was given and, absent evidence to the contrary, it shall be presumed that delivery to the last known address of such person constitutes receipt by such person.⁵

More than 150 days prior to when the petitioner first attempted to file his petition, the respondents sent packages providing notice of the trust to the petitioner by way of first class mail to the petitioner's home address and his P.O. Box, and by certified mail to both those addresses.⁶ The petitioner admitted that those addresses were correct and also that he was frequently home in the days after the mailings were sent.⁷ The petitioner also admitted that he checked his P.O. box at least weekly.⁸ The Vice Chancellor found that the petitioner's testimony was not credible when he denied receipt of any of the following: the unreturned first class mailings sent to both his home address and his P.O. box, the four certified mail notices sent to his home address and P.O. box, and a Federal Express package subsequently sent to his home address.⁹ Notably, the first notices for the certified mail were left at the petitioner's home and P.O. box about 150 days before he filed his petition.¹⁰ The petitioner also presented evidence that he was away from home when the Federal Express package arrived (which wasn't until 121 days before he filed his petition) and that he didn't arrive home from his five-day trip until 119 days before he filed his petition.¹¹ Still, even on his return, he maintained that he never saw the

5. 12 DEL. C. § 3546 (2011). Effective August 15, 2015, Delaware's General Assembly slightly revised Delaware's Pre-Mortem Validation Statute so that notice will be presumed given not just for delivery at the last known address but also when notice is mailed to the last known address. *See* 12 DEL. C. § 3546 (2015) ("For purposes of this paragraph, notice shall have been given when received by the person to whom the notice was given and, absent evidence to the contrary, it shall be presumed that delivery *notice mailed or delivered* to the last known address of such person constitutes receipt by such person.") (emphasis added).

6. *Ravet*, 2014 WL 2538887, at *1.

7. *Id.* at *2.

8. *Id.* at *1-2.

9. *Id.* at *2.

10. *Id.*

11. *Id.*

Federal Express package at any point.¹² Based on its finding that the petitioner's myriad denials of receipt of notice were not credible, and on its finding that Delaware's Pre-Mortem Validation Statute is a statute of repose with a hard and fast deadline, the court dismissed the petition with prejudice.¹³

In the post-judgment briefing, the petitioner contended that in interpreting 12 DEL. C. § 3546, the court erred by “giving the [respondents] the benefit of the statute's presumption of receipt even though the [respondents] had no evidence to prove that their alleged first class mailings were actually delivered to [p]etitioner's home or P.O. Box.”¹⁴ Responding to that argument, the court explained that “[d]espite the [p]etitioner's suggestion, however, I determined in my bench ruling that ‘the evidence [presented at trial was] overwhelming...that there was delivery....’ To the extent the [p]etitioner suggests I misunderstood the statute's presumption of receipt to require only that notice be mailed, as opposed to delivered, therefore, that argument must fail.”¹⁵

In rejecting another of the petitioner's arguments, the court explained that “I construed only the language of the statute, determining that, to the extent the statute could be interpreted, as the [p]etitioner argued, to create a presumption of delivery (or receipt) rebuttable by ‘evidence to the contrary,’ such evidence must at a minimum be *credible* evidence.”¹⁶ The court explained that it found, and continued to find, that there was no such evidence presented.¹⁷

It is notable that the court did not address a statutory construction argument that the petitioner had also raised. In that regard, the court stated “[i]mportantly, I addressed the parties' interpretations of the statutory presumption *in the alternative*: I did not determine whether ‘evidence to the contrary’ modified mailing to the last known address *or* receipt, but explained that *under* any standard, evidence must be credible, and that such evidence is lacking here.”¹⁸

The petitioner also maintained that he discovered some “new evidence” after the judgment, which he contended warranted relief from the judgment.¹⁹ The “newly discovered” evidence that he presented consisted of two first class envelopes, postmarked March 26, 2012, which date falls about a month after February 23, 2012, the first date that respondents' counsel testified he sent the first set of notice letters to the petitioner.²⁰ The petitioner stated that he located those envelopes in his own files.²¹ The court found that the petitioner's production of the March 26 envelopes provided an insufficient basis for relief from judgment for at least two reasons. First, the court found that “despite the [p]etitioner's contention that, ‘[a]s the envelopes had fallen between hanging file folders [in a box he used as a file cabinet] and out of sight, they could not in the exercise of reasonable diligence have been discovered for use at the January 29, 2014

12. *Ravet*, 2014 WL 2538887, at *2.

13. *Id.* at *1.

14. *Id.* at *2.

15. *Id.* at *2.

16. *Id.* at *3 (emphasis in original).

17. *Id.*

18. *Id.* at *3 (emphasis in original).

19. *Id.* at *2.

20. *Id.* at *4.

21. *Id.* at *2.

hearing,’ I believe that with any minimal diligence the [p]etitioner would have discovered the March 26 mailings, which had been in his possession for almost two years prior to the January hearing.”²² And perhaps more importantly, even if it were to admit the “new” evidence, the court concluded that it would not have changed the result.²³ In fact, the court found that the petitioner’s claim that he received that later set of mailings, but never opened them, only further diminished the petitioner’s credibility.²⁴

On February 12, 2015, the Delaware Supreme Court, by way of a two-paragraph order, affirmed the Delaware Court of Chancery’s June 2014 ruling dismissing the case as untimely based on notice given under Delaware’s Pre-Mortem Validation Statute.²⁵

II. FIDUCIARY BREACHES AND SPENDTHRIFT CLAUSES

In *Mennen v. Wilmington Trust Company*,²⁶ the Court of Chancery concluded that the beneficiaries were entitled to damages in the amount of \$72,448,299.93.

Then-Master LeGrow (now Superior Court Judge LeGrow) issued a Final Report in this case on April 24, 2015. Vice Chancellor Laster adopted that Final Report on August 18, 2015.

This matter involved a trust that was once valued at over \$100 million but was reduced to roughly \$25 million through a series of debt and equity investments at the direction of the individual co-trustee.²⁷ The question before the court was whether—without applying Monday-morning-quarterbacking—the challenged transactions exposed the trustee to liability.²⁸

The trust agreement modified the trustee’s default duties and exculpated the trustees from liability unless they acted in bad faith or with willful misconduct.²⁹ The court concluded that the trustee had engaged in non-exculpated breaches of trust in the vast majority of the transactions at issue.³⁰ And perhaps most notably, the court found that the bulk of the transactions made in bad faith were not the result of the trustee seeking to gain an immediate pecuniary benefit for himself, but rather most of the challenged transactions were motivated by the trustee’s pride.³¹ The trustee’s personal

22. *Id.* at 4.

23. *Id.*

24. *Id.*

25. *Ravet v. Northern Trust Co. of Delaware*, No. 369, 2014, 2015 WL 631588 (Del. Feb. 12, 2015).

26. *Mennen v. Wilmington Trust Co.*, C.A. No. 8432-ML, 2015 WL 1914599 (Del. Ch. Apr. 24, 2015), *adopted*, 2015 WL 4935373 (Del. Ch. Aug. 18, 2015).

27. *Id.* at *1.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

fortune was not accessible to him because it was locked in his own trust. As a result, the trustee turned to his brother's trust and treated it as if it was his own bank account from which he could readily withdraw funds to finance a few private companies in which he had a stake and thought would be the "next big thing."³² The court held that the trustee willfully ignored his duties to the beneficiaries so that he could subsidize his "self-aggrandized standing as a financier."³³

There was no question that the transactions were bad investments. The issue before the court was whether the trustee made the transactions in bad faith.³⁴ The trustee unsuccessfully argued that the question of whether he acted in bad faith should be determined by the subjective standard.³⁵ The court disagreed and applied the objective reasonable judgment standard.³⁶ The court also found unavailing the trustee's equitable defenses of laches and acquiescence.³⁷ The court concluded that the beneficiaries were entitled to damages in the amount of \$72,448,299.93.

In *Mennen v. Wilmington Trust Company*,³⁸ the Court of Chancery concluded that the beneficiaries could not pierce the trustee's spendthrift provision of his separate trust.

Then-Master LeGrow issued a Final Report simultaneously with the just-discussed case. Vice Chancellor Laster also adopted that Final Report on June 10, 2015. It came in the context of the plaintiff beneficiaries' summary judgment motion. As mentioned above, the beneficiaries sought the removal of the co-trustees and also damages as a result of alleged breaches of the co-trustees' fiduciary duties. The individual co-trustee has a separate trust created for his benefit. The plaintiffs sought to pierce the individual trustee's separate trust, but that trust has a spendthrift clause.³⁹ The grantor created four trusts: one for each of his four children and their issue; the defendant individual co-trustee is one of the grantor's children.⁴⁰

The plaintiffs disputed the enforceability of the spendthrift provision against them, arguing first that they are not potential creditors under the trust's terms or 12 DEL. C. § 3536, and second that, even if they are potential creditors, they may pierce the spendthrift trust because (1) public policy precludes enforcing a spendthrift trust against tort claimants of the plaintiffs' variety, or (2) the trusts at issue are essentially sub-trusts, and the plaintiffs are entitled to impound the individual trustee's interest in his separate trust.⁴¹

32. *Id.* at *1. As explained below, it was this separate trust's spendthrift clause that the beneficiaries sought to pierce in order to satisfy the \$72,448,299.93 judgment.

33. *Id.*

34. *Id.* at *22.

35. *Id.* at *23.

36. *Id.* at *23-24.

37. *Id.* at *30-36.

38. *Mennen v. Wilmington Trust Co.*, C.A. No. 8432-ML, 2015 WL 1897828 (Del. Ch. Apr. 24, 2015), *adopted*, 2015 WL 3630508 (Del. Ch. June 10, 2015).

39. 2015 WL 1897828, at *1.

40. *Id.* at *2.

41. *Id.* at *3.

The Master rejected all those arguments. In so doing, she noted that, “[a]lthough the policy arguments against enforcement of spendthrift clauses are interesting and compelling, the passage of Section 3536 made clear that this Court must enforce such clauses, subject only to the limits contained or permitted in the statute.”⁴² She went on to note that while spendthrift clauses are not “entirely unassailable,” the plaintiffs’ arguments for an exception under these facts are unavailing.⁴³ Specifically, the Master concluded that if the plaintiffs were successful at trial, they would merely become creditors of the individual trustee within the meaning of Section 3536.⁴⁴ The plaintiffs contended that as tort claimants and family members they should be entitled to pierce the trust.⁴⁵ But the Master explained that there is ample precedent that tort claimants are creditors within the meaning of Section 3536.⁴⁶ And as far as being family members, the Master noted that the claims at issue were not “support obligations” or the like, but instead traditional fiduciary breach allegations.⁴⁷

The Master further explained that Delaware law does not recognize an exception to spendthrift clauses for beneficiaries who engage in repeated acts of wrongdoing.⁴⁸ And the Master found that impoundment also isn’t applicable as the trusts at issue are separate trusts and the plaintiffs’ impoundment theory would violate Section 3536 (and in any event, would be “legally impossible” because there was no identifiable share in the separate trust).⁴⁹ For all those reasons, the Master recommended granting the individual trustee’s motion for summary judgment.

After the Court of Chancery issued its final order and judgment on December 8 2015, the plaintiffs appealed and the defendants cross appealed to the Delaware Supreme Court. By opinion dated October 11, 2016, the Delaware Supreme Court remanded the case back to Vice Chancellor Laster with instruction to consider the merits of plaintiffs’ exceptions to the Master’s spendthrift ruling.⁵⁰ The Delaware Supreme Court retained jurisdiction to consider the implications of the Court of Chancery’s report.⁵¹ On remand, the court adopted the Master’s ruling on the spendthrift issue.⁵²

The case was thereafter appealed to the Delaware Supreme Court. On April 17, 2017, by way of a one-page order, the Delaware Supreme Court affirmed the Court of Chancery’s ruling that the spendthrift trust could not be pierced.⁵³

42. *Id.* at *4.

43. *Id.*

44. *Id.* at *5.

45. 2015 WL 1897828, at *6.

46. *Id.* at *5-7 (citing *Garretson v. Garretson*, 306 A.2d 737 (Del. 1973); *Gibson v. Speegle*, C.A. No. 124 (Del. Ch. May 30, 1984); *Parsons v. Mumford*, 1989 WL 63899 (Del. Ch. June 14, 1989)).

47. *Id.* at *6.

48. *Id.* at *8.

49. *Id.* at *8-9.

50. *Mennen v. Fiduciary Trust Int’l of Delaware*, No. 1, 2016, 2016 WL 5933966 (Del. Oct. 11, 2016).

51. *Mennen v. Wilmington Trust Co.*, C.A. No. 8432-VCL, 2017 WL 751201, at *1 (Del. Ch. Feb. 27, 2017).

52. *Id.*

53. *Mennen v. Fiduciary Trust Int’l of Delaware*, No. 1, 2016, 2017 WL 2152478, at *1 (Del. May 17, 2017).

III. UNDUE INFLUENCE CONTENTIONS, CAPACITY CHALLENGES, AND EQUITABLE FRAUD CLAIMS

In *IMO the LW&T of Blanche M. Hurley*,⁵⁴ the Court of Chancery reiterated that just because a testator is old and had suffered from medical issues does not mean that the testator lacks capacity or is susceptible to undue influence.

In this case, then-Master LeGrow recommended the dismissal of a petition filed by two brothers (the “Brothers”) who alleged that their grandmother lacked capacity to execute a will in 2012 (the “2012 Will”) and that the 2012 Will was the product of undue influence.⁵⁵

Between 2003 and 2012, the decedent amended her will four times, the fourth time being the 2012 Will.⁵⁶ The Brothers petitioned the Court of Chancery to invalidate the 2012 Will in favor of the will executed six months earlier.⁵⁷ The decedent had left significantly more to the Brothers in that previous will.⁵⁸

The executrix of the estate, the Brothers’ sister, moved to dismiss the petition on the grounds that it failed to state a claim for which relief could be granted.⁵⁹ The petition alleged that the decedent lacked capacity to execute the 2012 Will because she was 96 years old, had a tumor removed above her ear in 2009, and suffered from other “serious medical problems.”⁶⁰ Then-Master LeGrow held that, even taking those allegations as true, the petitioners failed to plead a lack of capacity claim.⁶¹

In dismissing the capacity challenge, the Master stated that “[a] person who makes a will must, at the time the document is executed, be capable of exercising thought, reflection, and judgment, and must know what she is doing and how she is disposing of her property.”⁶² The Master further stated that “[t]he testator also must have sufficient memory and understanding to comprehend the nature and character of her act.”⁶³ And “in order to possess the requisite capacity, the Decedent must have known that she was disposing of her estate by will, and to whom.”⁶⁴ In short, the court explained

54. C.A. No. 8473-ML, 2014 WL 1088913 (Del. Ch. Mar. 20, 2014).

55. *Id.* at *1.

56. *Id.*

57. *Id.* at *2.

58. *Id.*

59. *Id.* at *1.

60. *IMO the LW&T of Blanche M. Hurley*, 2014 WL 1088913, at *2.

61. *Id.* at *3, *5.

62. *Id.* at *4 (citing *In re Estate of West*, 522 A.2d 1256, 1263 (Del. 1987)).

63. *Id.* at *4 (citing *Sloan v. Segal*, No. 289, 2009, 2010 WL 2169496 (Del. May 10, 2010); *In re Estate of West*, 522 A.2d at 1263)).

64. *Id.* (citing *In re Langmeier*, 466 A.2d 386, 402 (Del. Ch. 1983)).

that “only a modest degree of competence” is required for a person to have testamentary capacity and that Delaware law presumes that a testator is competent.⁶⁵

The Master found that the allegations were not colorable, especially given that the previous will—the will that the Brothers sought to enforce in the place of 2012 Will—was executed only six months before the 2012 Will and two years after the surgery that the petitioners claimed affected the decedent’s capacity.⁶⁶

In *Estate of George M. Reed, Jr. v. Lisa Grandelli*,⁶⁷ the Court of Chancery generally rejected claims to recover gifts given by a now-deceased elderly widower to a much younger girlfriend.

“Since the time of King David and Abishag—and, surely, before—certain old men have pursued an interest in certain young women.”⁶⁸ This quote from Vice Chancellor Glasscock nicely sums up the factual background of this case decided in the Delaware Court of Chancery on April 17, 2015. A “moderately well-to-do recent widower” in his mid-eighties fell for a waitress from a small Southern Delaware town, whose age was approximately that of his granddaughter.⁶⁹ During their fourteen-month relationship, the decedent gave the waitress (the “Respondent”) gifts worth hundreds of thousands of dollars.⁷⁰ After the gift-giving widower’s death, his heirs, trust and estate (the “Petitioners”) sought to recoup those gifts. What made this case rather unusual was that the Petitioners did not contend that the decedent lacked capacity, that he was vulnerable to the exercise of undue influence, or that the gifts were the product of common law fraud.⁷¹ Rather, the Petitioners argued that the Respondent committed equitable fraud or breach of trust consistent with the Court of Chancery’s ruling in *Swain v. Moore*, 71 A.2d 264 (Del. Ch. 1950).⁷² The Petitioners maintained that *Swain* dictates that when an elderly person befriends a younger individual, and acts on that affection by making gifts to her, fraud by the younger person is presumed, and the burden is shifted to the younger person to demonstrate entire fairness in the relationship.⁷³ The court held that *Swain* cannot be read “this broadly or simplistically.”⁷⁴

Despite the Petitioners’ argument that the law of gifts was inapplicable (instead being overridden by their interpretation of *Swain*) the court first analyzed the decedent’s cash transfers to Respondent.⁷⁵ The court held that these cash

65. *Id.*

66. *IMO the LW&T of Blanche M. Hurley*, 2014 WL 1088913, at *4.

67. 8283–VCG, 2015 WL 1778073 (Del. Ch. Apr. 17, 2015).

68. *Id.* at *1

69. *Id.*

70. *Id.*

71. *Id.* at *3.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

transfers were clearly gifts.⁷⁶ Delaware law holds that a gift is made by complete and unconditional delivery of property, with donative intent, and the acceptance of the property by the donee.⁷⁷ “The donee has the burden of establishing, by clear and convincing evidence, all facts essential to the validity of a purported gift.”⁷⁸ This burden arises, the court said, “out of the rebuttable presumption, often seen in the context of resulting trusts, that a purchaser of property intends that purchased property to inure to her own benefit.”⁷⁹

In rejecting the Petitioners’ argument that the law of gifts should not be applied because the facts in the case were analogous to those in *Swain*, the court distinguished this case from *Swain*.⁸⁰ The court held that the decedent in this case—unlike the elderly man in *Swain*—was not dependent on the Respondent.⁸¹ The court explained that like the Respondent, the decedent was also receiving what he wanted from their relationship (specifically, attention from a much younger partner that made him happy and fulfilled).⁸² In contrast, *Swain* involved an elderly, lonely widower, estranged from his own family, who was befriended by a young couple living nearby.⁸³ He eventually began making gifts of money to them, and even paid for construction of part of their new house with the understanding that he could live out the rest of his life with them.⁸⁴ In *Swain*, the elderly man moved in with the younger couple and, as a result, became dependent upon them, and had made gifts to the couple by which he impoverished himself.⁸⁵ But that type of scenario was not the case here.

The court explained that *Swain* was a trust case because the elderly man in that case became dependent on a younger couple and a confidential relationship arose in which the younger couple owed fiduciary duties to him.⁸⁶ Here, the decedent did not rely upon the Respondent and he remained close to his own family.⁸⁷ The decedent was not taken advantage of and knew exactly what he was doing when he gave his young girlfriend gifts. As the court put it, “[i]t would be simple paternalism, however, to suggest that solely because of advanced age, an individual may not indulge in pleasures at his own expense that he finds appropriate, even if that expense appears to others to be foolish or excessive.”⁸⁸

76. *Id.* at *4.

77. *Id.* at *3 (citing *Hudak v. Procek*, 806 A.2d 140, 150-51 (Del. 2002)).

78. *Id.* (citation omitted).

79. *Id.*

80. *Id.*

81. *Id.* at *4.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at *5.

The court further held that any transfers that were noted in writing to be loans should be paid back to the estate.⁸⁹ The court also found that one transaction amounted to fraud. Regarding that transaction, the Respondent told the decedent that she wanted to go on vacation with her family to Key West.⁹⁰ The Respondent actually went to Key West with her other boyfriend.⁹¹ The Respondent claimed that she disclosed this to the decedent.⁹² The court found that to be a lie, and consequently ordered her to refund the cost of that trip back to the estate.⁹³

IV. STANDING TO CONTEST A WILL

In *McCarty v. McCarty*,⁹⁴ the Court of Chancery found that the petitioner lacked standing to file a will contest due to her status as a contingent beneficiary.

In this case, then-Master in Chancery Kim Ayvazian recommended that one petitioner be dismissed from a case filed to contest a will. The petitioner in this case was the decedent's mother, and also the legal guardian of the decedent's daughter.⁹⁵ The petitioner did not deny that her status was only that of a contingent beneficiary in the event of intestacy should anything happen to the decedent's daughter but, nonetheless, the petitioner maintained that she had standing.⁹⁶ The Master concluded otherwise and, in so doing, cited *Conner v. Brown*,⁹⁷ which found that "no person may contest a will who has no interest in the estate which may be affected by the probate of the proposed will; and the interest must be pecuniary and one detrimentally affected by the will, and not a mere sentimental interest."⁹⁸ Here, the decedent's daughter would be the sole intestate heir of the decedent's estate, not the decedent's mother.⁹⁹ The Master further noted that should anything happen to the decedent's daughter during the course of litigation, the decedent's daughter's estate would be substituted as the real party in interest.¹⁰⁰

89. *Id.*

90. *Id.* at *6.

91. 2015 WL 1778073, at *6.

92. *Id.*

93. *Id.*

94. C.A. No. 8705-MA, 2014 WL 1995013, at *1 (Del. Ch. May 15, 2014), report and recommendation adopted, 2014 WL 2042428 (Del. Ch. May 16, 2014).

95. 2014 WL 1995013, at *1.

96. *Id.*

97. 3 A.2d 64 (Del. Super. 1938).

98. *McCarty*, 2014 WL 1995013, at *1.

99. *Id.*

100. *Id.*

V. JURISDICTION OVER DELAWARE TRUSTS

In *IMO Daniel Kloiber Dynasty Trust U/A/D December 20, 2002*,¹⁰¹ the Delaware Court of Chancery defines the extent to which Delaware has exclusive jurisdiction over Delaware trusts and found that it does not have exclusive jurisdiction when it is competing with its sister states, but that it does have primary jurisdiction over the administration of Delaware trusts.

Dan and Beth Kloiber were in the lengthy process of getting a divorce in Kentucky.¹⁰² Daniel Kloiber (“Dan”) is the primary beneficiary of a Delaware trust (the “Dynasty Trust”).¹⁰³ In the Kentucky divorce proceedings, Beth Kloiber (“Beth”) maintained that the Dynasty Trust was marital property, but the Kentucky family court had not yet ruled on that question.¹⁰⁴

The Kentucky family court had a status quo order in place.¹⁰⁵ Dan resigned as special trustee of the Dynasty Trust.¹⁰⁶ Per the terms of the Dynasty Trust, the special trustee has the authority to instruct the trustee on making distributions and on investing trust assets.¹⁰⁷ When Dan resigned as special trustee, he appointed his son, Nick Kloiber (“Nick”), to be the special trustee.¹⁰⁸ The Delaware Court of Chancery stated that, after his appointment, “Nick proceeded to take action contrary to the status quo orders” and that “[t]he Kentucky Family court issued a rule to show cause why Nick should not be held in contempt.”¹⁰⁹ The Delaware trustee filed a petition in Delaware arguing that the Delaware Court of Chancery had primary supervision over the Dynasty Trust and must intervene to enjoin Beth Kloiber from asking the Kentucky court to assert jurisdiction over the Delaware trustee and the trust.¹¹⁰ For his part, Nick sought a TRO in Delaware to prevent Beth from seeking to enforce the status quo orders, including through the pending Kentucky rule to show cause.¹¹¹

In reaching its decision denying Nick’s TRO application, the court addressed whether 12 DEL. C. 3572(a) provides that the Delaware Court of Chancery has exclusive jurisdiction over the Dynasty Trust under Delaware’s Qualified Dispositions in Trust Act.¹¹² Section 3572(a) states that “[t]he Court of Chancery shall have exclusive jurisdiction over

101. 98 A.3d 924 (Del. Ch. 2014).

102. *Id.* at 927.

103. *Id.*

104. *Id.* at 928.

105. *Id.*

106. *Id.*

107. *Kloiber*, 98 A.3d at 927.

108. *Id.* at 928.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 938-939.

any action brought with respect to a qualified disposition.”¹¹³ The court found that that language is only intended to provide which Delaware trial court—if the case is to be heard in Delaware—is to have jurisdiction.¹¹⁴ The Vice Chancellor explained that, “[w]hen a Delaware state statute assigns exclusive jurisdiction to a particular Delaware court, the statute is allocating jurisdiction among the Delaware courts. The state is *not* making a claim against the world that no court outside of Delaware can exercise jurisdiction over that type of case.”¹¹⁵ The Vice Chancellor further noted that Delaware couldn’t do that even if it so wanted as the states are peers and as there are constraints on a state within the federal republic that is the United States.¹¹⁶

The Vice Chancellor also stated that under the *Peierls* cases, the Delaware Court of Chancery does have primary jurisdiction over administrative issues relating to Delaware trusts.¹¹⁷ But the court also explained that that jurisdiction is permissive, not mandatory or exclusive. Specifically, the court noted that “[o]ther courts may still exercise jurisdiction over matters of trust administration so long as doing so would not constitute ‘undue interference’ with supervision in the primary jurisdiction.”¹¹⁸ The Vice Chancellor added that other state courts may exercise jurisdiction when they have jurisdiction over the trustee or over trust assets.¹¹⁹

Importantly, at the same time that the Vice Chancellor denied the TRO motion, he entered a status quo order.¹²⁰ The parties had agreed a status quo order should be entered, but couldn’t agree on the exact form.¹²¹ Thus, the court’s involvement was needed.¹²² All the parties had agreed that the Delaware court could exercise jurisdiction over Nick, the Dynasty Trust, and the trustee. The Delaware court saw that as an opportunity to assist the Kentucky court and a Delaware status quo order as the vehicle to do so.¹²³ Among other things, the Delaware status quo order provided that the Dynasty Trust could act only in the ordinary course.¹²⁴ The Delaware court stated that the Delaware status quo order might mitigate the need for the Kentucky family court to reach trust administration matters, including the issue of whether Dan must be placed back in charge as Special Trustee.¹²⁵

113. *Id.* at 938.

114. *Id.* at 939.

115. *Id.*

116. *Id.*

117. *Id.* at 943-44.

118. *Id.* at 946 (citing to *In re Peierls Family Testamentary Trusts* (Peierls Testamentary), 77 A.3d 223, 228 (Del. 2013)).

119. *Kloiber*, 98 A.3d at 946.

120. *Id.* at 949.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 949.

125. *Id.* at 950.

Further, the Delaware court notably wrote, “[t]he long-term interests of the two courts are the same as their short-term interests. The Kentucky Family Court needs to resolve the Kentucky Divorce Proceeding. This court has an interest in having matters of trust administration that are governed by Delaware law decided here so that the Delaware Supreme Court can ensure they are decided correctly. Just as this court has no interest in interfering in the conduct of judicial proceedings before a court of a different state, this court also has no interest in having Delaware law deployed to defeat the marital property laws of another state.”¹²⁶

In sum, the Delaware court explained, “[t]he question of whether an eventual judgment issued by the Kentucky Family Court can be enforced against the trust estate is not a matter where this court needs to act now to carve out and defend a future jurisdictional role. The Kentucky Divorce Proceeding should be completed first. If that case results in a final, non-appealable judgment against the Dynasty Trust, and if the judgment holder seeks to enforce it, then (but only then) will there be important questions of Delaware law to be decided.”¹²⁷

VI. LOST HEIRS

In *IMO the Estate of Blums*,¹²⁸ the Court of Chancery determined the decedent’s heirs after hearing testimony and reviewing an affidavit from the decedent’s long-lost European relatives.

In this case, Zigfrids Blums (“the Decedent”) died without a will, leaving a substantial estate and no readily apparent heirs. Throughout his lifetime, the Decedent repeatedly told friends he had no living relatives.¹²⁹ An extensive genealogy search by the administrator of the Decedent’s estate uncovered two possible heirs.¹³⁰ The lineage of one of those possible heirs was in dispute.¹³¹ To resolve the matter, the court had to review the family history of Decedent through the turbulent period of the 1920s to the 1950s in Latvia and determine whether the Decedent did have heirs notwithstanding the absence of complete official foreign records.¹³²

The Decedent was born in Riga, Latvia in 1926 and immigrated to the United States in 1951.¹³³ Although he married, he had no children, and his relatively short marriage ended in divorce.¹³⁴ The Decedent died in Delaware in 2011, and his estate was valued in excess of \$1.2 million.¹³⁵ He never made a will.¹³⁶

126. *Id.* at 951.

127. *Id.*

128. C.A. No 7479-ML, 2014 WL 5860376 (Del. Ch. Nov. 12, 2014).

129. *Id.* at *1.

130. *Id.* at *1-2.

131. *Id.* at *2.

132. *Id.* at *5.

133. *Id.* at *1.

134. *In re the Estate of Blums*, 2014 WL 5860376, at *1.

135. *Id.*

136. *Id.*

The estate administrator set out to search for possible heirs.¹³⁷ He took out a vague advertisement—which did not mention the possible inheritance—in a Latvian newspaper as part of the effort.¹³⁸ A Latvian woman named Vija responded to that advertisement.¹³⁹ She provided some details and claimed that her mother was the Decedent's first cousin.¹⁴⁰ Vija reported that she was born in 1944, that she and her mother fled to Germany the same year, and that the family lost touch with the Decedent sometime after he was called up for service in the Latvian SS Legion.¹⁴¹ Later, when Vija and her mother returned to Latvia after the war, the Communist government charged her mother with being a capitalist and sentenced her to 20 years in prison.¹⁴² All the family's records and photos were confiscated at the time of the arrest.¹⁴³

Eventually, the estate administrator revealed to Vija the purpose for his investigation.¹⁴⁴ In response, Vija provided a more detailed family history, which was consistent with her earlier reports.¹⁴⁵ The estate administrator was able to obtain some partial confirmation from existing Latvian archives.¹⁴⁶ But the birth certificate for Vija's mother was never located after a diligent search.¹⁴⁷

Before Vija's claim to the Decedent's estate was resolved to the estate administrator's satisfaction, a second possible heir was located.¹⁴⁸ Max S. Blum (Max), a German citizen, is the Decedent's first cousin on his paternal side.¹⁴⁹ On June 6, 2014, the estate administrator filed a Petition for Decree of Distribution, asking the court to determine the distribution of the Decedent's estate after hearing evidence presented by the estate administrator and Max.¹⁵⁰ The court held an evidentiary hearing and was convinced that Max was an heir.¹⁵¹ The only remaining question was whether Vija was also an heir.¹⁵²

137. *Id.*

138. *Id.*

139. *Id.*

140. *In re the Estate of Blums*, 2014 WL 5860376, at *1.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at *2.

145. *Id.*

146. *Id.* at *2.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

Max argued that the written records did not accurately show that Vija was a blood relative of Decedent.¹⁵³ In response, Vija offered an oral history of her mother's family as it had been reported to her in her youth.¹⁵⁴ She also offered an affidavit from a third party that tied her and her mother to the Decedent's family.¹⁵⁵ Max's counsel objected to this affidavit as inadmissible hearsay, but the court admitted the affidavit into the record on the basis that it fell within Rule 803(19) of the Delaware Uniform Rules of Evidence, which establishes an exception to the hearsay rule for "[r]eputation concerning personal or family history."¹⁵⁶ The court also indicated that the affidavit might fall within Delaware Uniform Rule of Evidence 803(23).¹⁵⁷ But upon further reflection, the court noted that that exception applies only to "judgments as to personal, family or general history, or boundaries," and the affidavit is not a "judgment."¹⁵⁸

The court issued a draft report dividing the estate equally between Max and Vija.¹⁵⁹ The Master reasoned "that although the absence of any birth certificate for [Vija's mother] was unfortunate, that gap in the record likely was explained by the turbulent period that began in Latvia in approximately 1918 and continued through the Second World War and the control of Latvia by the Soviet Union." Given all that was happening at the time, it is not surprising "that births may not have been recorded in the usual manner, or that records may have been destroyed as various forces occupied the country."¹⁶⁰ The court also identified other bases for why Vija's recounting was trustworthy, including the fact that Vija made the statements about the relationship with decedent before she became aware of any possible inheritance as a result.¹⁶¹

Max filed a timely notice of exceptions and the parties briefed those exceptions. First, Max argued that the affidavit from the third party should not have been admitted.¹⁶² The Master rejected that contention and found that it was admissible under Delaware Rule of Evidence 803(19).¹⁶³ In short, the Master found that the affidavit at issue provided sufficient detail regarding the declarant's familiarity with the family and that the statements fell within Rule 803(19).¹⁶⁴

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at *2 n.28.

158. *Id.* *2.

159. *Id.* at *5-6.

160. *Id.* at *3.

161. *Id.* at *5.

162. *Id.* at *3.

163. *Id.* at *3-4. DEL. R. EVID. 803(19) reads in pertinent part, "[t]he following are not excluded by the hearsay rule, even though the declarant is available as a witness: (19) Reputation concerning personal or family history. Reputation among members of his family by blood, adoption or marriage, or among his associates or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption or marriage, ancestry or other similar fact of his personal or family history."

164. *In re the Estate of Blums*, 2014 WL 5860376, at *4.

The court also rejected Max's contention that Vija's evidence fell short of the required preponderance standard. After going through a litany of specific reasons as to why that was not the case, the Master also pointed out that "the fact that Vija's statements regarding her relationship to the Decedent were made months before she became aware of any possible inheritance warrants considerable attention."¹⁶⁵

The Master entered a final report consistent with her draft report.

VII. ASSET PROTECTION TRUSTS

In *TrustCo Bank v. Mathews*,¹⁶⁶ the Delaware Court of Chancery, applying Delaware's Borrowing Statute, dismissed the plaintiffs' claims against three Delaware asset protection trusts as time-barred under Delaware's four-year statute of limitations for fraudulent transfer actions.

In this case, then-Vice Chancellor Parsons of the Delaware Court of Chancery dismissed as time-barred most of the creditor-plaintiffs' claims against three Delaware asset protection trusts (that one of the beneficiaries herself had created) and the trust beneficiaries.¹⁶⁷ The key issue facing the court was whether New York's longer statute of limitations controlled (which perhaps would have saved the claims) or whether Delaware or Florida's statute of limitations applied.¹⁶⁸ New York's statute of limitations for fraudulent transfers is six years or two-years-from-discovery.¹⁶⁹ But Delaware's and Florida's statute of limitations for such claims is four years after the transfer was made or one year after the transfer was or could reasonably have been discovered, whichever is longer.¹⁷⁰

The court first examined Delaware's Borrowing Statute (10 DEL. C. § 8121), which states

[w]here a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action. Where the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time limited by the law of this State shall apply.¹⁷¹

The court confirmed that the Borrowing Statute should not be allowed to be manipulated to constitute a "sword" to defeat claims that would not be otherwise time-barred.¹⁷² To try to get around Delaware's Borrowing Statute, the

165. *Id.* at *5.

166. C.A. No. 8374-VCP, 2015 WL 295373 (Del. Ch. Jan. 22, 2015).

167. *Id.* at *1.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at *6

172. *Id.* at *7.

plaintiffs claimed that this case involved an exclusively New York dispute.¹⁷³ But the court conducted a most significant relationship test and found that Florida and Delaware both had a more significant relationship to the facts of the case than had New York.¹⁷⁴ The court concluded that Florida had the most significant contacts, which contacts included that the real estate foreclosed on was in Florida and that Florida businesses were involved.¹⁷⁵ The court found that Delaware had the second most contacts; Delaware's contacts included the fact that the transfers at issue were made to Delaware trusts governed by Delaware law and that the trustee of the three trusts was a Delaware entity.¹⁷⁶ In contrast, the court found New York's contacts minimal in comparison.¹⁷⁷

Importantly, the court also wrote:

even if I did conclude that New York has the most significant relationship, the preceding analysis shows that that relationship certainly does not dominate the focus of this action. That is, the totality of the relevant factors does not reveal a strong New York-centric relationship between the parties and the dispute before this Court. Accordingly, even if I found that New York law should apply, there is nothing in this set of facts that would lead me to conclude that application of the Delaware Borrowing Statute would be inequitable.¹⁷⁸

The court then concluded that, "[r]egardless of which of these three states has the most significant relationship with this case, therefore, I conclude that Plaintiffs still would be subject to a statute of limitations equivalent to Delaware's of four years from the time the transfer was made or one year from when discovery of the transfer occurred or reasonably should have occurred, whichever is longer."¹⁷⁹

Plaintiffs had also contended that the restrictions of Delaware's Qualified Disposition in Trust Act ("QDTA") were inapplicable because the settlor had maintained impermissible control over the property transferred to the trusts.¹⁸⁰ But the court wrote that it had "concluded that Plaintiffs' claims relating [to the majority of the transfers at issue] are barred because of either the most significant relationship choice of law analysis, which points to the use of Florida or, perhaps, Delaware law, or Delaware's Borrowing Statute, which requires the application of Delaware's statute of limitations even if New York had been found to have the most significant relationship to this case."¹⁸¹ As a result, the court found that it need not resolve the first impression issue of whether the QDTA requires application of Delaware's fraudulent transfer statute of limitations without regard to the normal choice of law analysis or the Borrowing Statute.¹⁸²

173. *Id.* at *9.

174. *Mathews*, 2015 WL 295373, at *10.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at *11.

179. *Id.*

180. *Id.* at *12.

181. *Id.*

182. *Id.*

Regarding the QDTA, the court stated that “[t]he QDTA limits a creditor’s available remedies when attempting to avoid a ‘qualified disposition.’ A ‘qualified disposition’ is a ‘disposition by or from a transferor...to 1 or more trustees, at least 1 of which is a qualified trustee, with or without consideration, by means of a trust instrument.’”¹⁸³ The court also noted that “[t]he QDTA requires that any claim by a creditor—a term defined to include Plaintiffs—to avoid a qualified disposition must be brought pursuant to 6 DEL. C. §§ 1304 or 1305, Delaware’s fraudulent transfer statutes” and that “[t]he QDTA also specifically provides that a creditor’s claim will be extinguished unless, as relevant here, it is brought within the time constraints of 6 DEL. C. § 1309, Delaware’s statute of limitations for fraudulent transfers.”¹⁸⁴ But, as it was unnecessary, the court “decline[d] to reach the question of whether the QDTA requires application of 6 DEL. C. § 1309.”¹⁸⁵

The end result was that the assets in the three Delaware asset protection trusts were protected against the plaintiffs’ claims.

VIII. TIME-BARRED CLAIMS ALLEGING FIDUCIARY BREACHES

In *IMO the Thomas Lawrence Reeves Irrevocable Trust Under Agreement Dated February 26, 1997*,¹⁸⁶ the Delaware Court of Chancery found that the beneficiaries’ claims against the individual co-trustees were time-barred because of the unreasonable delay in raising those claims.

In this case, the beneficiaries of an irrevocable trust, who also were individual co-trustees of the trust (the “Beneficiaries”), contended that the corporate co-trustee mismanaged the trust over a period of fifteen years “by unilaterally making investments without the authorization of the individual trustees, failing to implement any investment strategy for the trust, and charging excessive fees.”¹⁸⁷ The corporate trustee sought to resign from the trust, but first it filed a petition seeking a court order stating that all of the Beneficiaries’ claims are barred by laches or the statute of limitations.¹⁸⁸

The record was undisputed that the individual trustees frequently complained to the corporate trustee about the issues that they contended supported their claims.¹⁸⁹ “In emails and letters dating back to 2004, the individual trustees complained that the corporate trustee invested without authorization, failed to consult the individual trustees or develop investment objectives or an investment strategy, and charged excessive fees.”¹⁹⁰ But, despite consulting counsel, other trust companies, and the corporate trustee about those complaints, the individual trustees took no other action before they filed their counterclaims in 2013.¹⁹¹ Then-Master LeGrow, in her final report in this case, granted summary judgment

183. *Id.* at *11.

184. *Id.*

185. *Id.* at *12.

186. C.A. No. 8071-ML, 2015 WL 1947360 (Del. Ch. Apr. 29, 2015).

187. *Id.* at *1.

188. *Id.*

189. *Id.* at *1-2.

190. *Id.* at *1.

191. *Id.*

to the petitioner (the corporate co-trustee) because she found that the Beneficiaries delayed unreasonably and that, as a result, their claims are time-barred.¹⁹²

The Master explained that there are two applicable statutes of limitations¹⁹³ in this case: “(1) 10 DEL. C. § 8106, which bars personal tort claims arising three years after the date of the action, and (2) 12 DEL. C. § 3585, which precludes a claim for breach of trust that occurs: (1) two years after the date the beneficiary was sent a report that adequately disclosed the facts constituting a claim;... [] A report adequately discloses the facts constituting a claim if it provides sufficient information so that the beneficiary knows of the claim or reasonably should have inquired into its existence.”¹⁹⁴ The Master concluded that the Beneficiaries’ claims were time-barred under both statutes.¹⁹⁵

After distinguishing other precedent (namely *McNeil v. Bennett*¹⁹⁶ and *Volfisun/Landy*¹⁹⁷), the Master stated that “[h]ere, the record shows the individual trustees did not repose any trust in the corporate trustee and repeatedly complained about the corporate trustee’s actions, but nonetheless took no action to pursue their claims. It is unclear what else, short of self-flagellation, [the corporate co-trustee] could have done to put [the Beneficiaries] on notice of their claims.”¹⁹⁸ Notably, the Master also explained “that the *McNeil* court did not, as Respondents argue, create a two-tiered system of liability under which professional trustees bear heightened responsibilities or under which lay trustees may avoid their own obligations by shifting blame to a professional trustee.”¹⁹⁹

The Master also held that the “continuing wrong” doctrine didn’t fit here.²⁰⁰ The Beneficiaries had alleged that the wrongdoing began from the inception of the trust at issue and because it has not yet been corrected, it qualified as a continuing wrong.²⁰¹ But the Master stated that it is well-recognized that “the failure to remedy a wrong does not mean that the wrong is continuing.”²⁰² She further explained that accepting the Beneficiaries’ reading of the continuing wrong doctrine “would frustrate the purpose behind requiring parties to bring timely claims and bring nearly every claim within the category of a continuing wrong.”²⁰³

192. *Reeves*, 2015 WL 1947360, at *1.

193. While statutes of limitations do not strictly bind the Court of Chancery as it is a court of equity, laches generally follow the statute of limitations. *Id.* at *7.

194. *Id.* at *7-8.

195. *Id.* at *9-10.

196. 792 A.2d 190 (Del. Ch. 2001), *aff’d in part, rev’d in part sub nom.* *McNeil v. McNeil*, 798 A.2d 503 (Del. 2002).

197. C.A. No. 4653–VCL (Del. Ch. Oct. 24, 2012) (transcript).

198. *Reeves*, 2015 WL 1947360, at *9.

199. *Id.*

200. *Id.*

201. *Id.* “The continuing wrong doctrine is a legal theory that applies when a series of related wrongful acts are ‘so inextricably intertwined that there is...one continuing wrong.’” *Id.* (citing *Desimone v. Barrows*, 924 A.2d 908, 925 (Del. Ch. 2007)).

202. *Id.* (citing *Desimone*, 924 A.2d at 925).

203. *Reeves*, 2015 WL 1947360, at *9.

Exceptions were initially taken to the Master's report, but those exceptions were withdrawn.²⁰⁴ The Vice Chancellor adopted the Master's report on July 2, 2015.²⁰⁵

IX. MODIFICATION OF TRUST DENIED

In *In Re Trust Under Will of Wallace B. Flint for the Benefit of Katherine F. Shadek*,²⁰⁶ the Delaware Court of Chancery denied a beneficiary's unopposed petition to modify the terms of a testamentary trust because, ultimately, the settlor's intent controls.

The beneficiary's father established the Trust Under Will of Wallace B. Flint for the Benefit of Katherine F. Shadek (the "Trust") in his Last Will and Testament (the "Will").²⁰⁷ Vice Chancellor Laster acknowledged that there is no universal agreement as to whether "the wishes of living beneficiaries should prevail over the wishes of a dead settlor," but he explained that in Delaware "the settlor's intent controls," and the policy of Delaware is "to give maximum effect to the principle of freedom of disposition and to the enforceability of governing instruments."²⁰⁸

The plain language of the Will expressed the decedent's intent to give his trustees the discretion to decide how to invest the corpus of the trust, while reserving for the beneficiary the option to invade the principal of the Trust to a limited extent.²⁰⁹ Notably, the Will did not allow for the beneficiary to obtain complete control of the corpus of the Trust, or authorize her to determine how to invest it.²¹⁰

The beneficiary and her children (contingent remainder beneficiaries) had expressed their desires that the Trust's investments remain heavily concentrated in International Business Machines Corporation ("IBM") stock, but the trustee had recommended diversifying the Trust.²¹¹ Despite the fact that the Trust is not a directed trust, the trustee allowed the beneficiaries' desires to control.²¹² Noting this, Vice Chancellor Laster wrote that nowhere in the Trust did the grantor "say that the trustees can retain an investment...even if they believe that it would be in the best interests of the Trust to sell it."²¹³ And in this case, the trustees had attempted in recent years to distance "themselves from the actual investment decisions," in-part by delegating to two of the beneficiary's adult children (the "Investment Managers") all the duties and powers related to investing the assets of the Trust.²¹⁴

204. 2015 WL 4093157.

205. *Id.*

206. 118 A.3d 182 (Del. Ch. 2015).

207. *Id.* at 183.

208. *Id.* at 194 (citing 12 DEL. C. § 3303(a)).

209. *Id.* at 184-85.

210. *Id.* at 184.

211. *Id.* at 186-87.

212. *Id.* at 186.

213. *Id.* at 187.

214. *Id.*

In October of 2014, the beneficiary petitioned to modify the terms of the Trust by asking the court to approve what the petition named the “Restated Will”, with the intention to “formalize the current investment management structure and replace the ad hoc mechanism of delegations of investment responsibilities to the Investment Managers.”²¹⁵ Vice Chancellor Laster identified the “heart of the change” in the Restated Will as an attempt to “convert the Trust from a traditional trustee-managed structure into a directed trust” by creating the position of Investment Advisor (to be appointed by majority vote by the beneficiary and her adult children), and by turning over to the Investment Advisor the trustee’s liabilities and discretion to invest the corpus of the Trust.²¹⁶

Denying the beneficiary’s petition, the court determined that the Will never established a directed trust, and that the limits placed both on the beneficiary to access the corpus, and on the trustees to invade the principal on the beneficiary’s behalf (to a limited extent), “evidences [the testator’s] intent” that “[t]he beneficiaries are not supposed to exercise the degree of control over the Trust that the Restated Will would give them.”²¹⁷

The Vice Chancellor recognized that “English law has long made the wishes of the beneficiaries paramount,” and that recent statutory initiatives in the United States have signaled a major shift away from the *Clafin* doctrine²¹⁸ towards prioritizing the wishes of beneficiaries.²¹⁹ However, the Vice Chancellor found that, according to the Delaware Supreme Court, “[t]he cardinal rule of law in a trust case is that the intent of the settlor [controls].”²²⁰

In following this rule and the policy decisions of the State, the court rejected the beneficiary’s argument that the court “should assert and exercise the...power to modify a trust instrument whenever all current beneficiaries consent,” even when “grounds for reformation do not exist.”²²¹ The Vice Chancellor explained that reformation is reserved for definite limited circumstances, and that under Delaware law “the petitioners are not permitted to rewrite [the decedent’s] Will to suit their current convenience.”²²²

Although the beneficiary’s petition was rejected, the Vice Chancellor acknowledged that Delaware law allows a testator “to create a new trust containing all of the features” that the beneficiary’s petition sought to have added.²²³ The authors of this article believe that if the testator had intended to create a directed trust, or had the instrument that he executed included language representing his intent to empower the beneficiaries with the ability to influence the assignment of investment responsibilities for the Trust or to empower the trustees to waive or transfer their duties to another party, it is likely that the court would not have rejected the beneficiary’s petition.

215. *Id.*

216. *Id.* at 188.

217. *Id.* at 193.

218. *Id.* at 193-94. The *Clafin* doctrine dictates that the settlor’s intent is paramount. *Clafin v. Clafin*, 20 N.E. 454 (Mass. 1889).

219. *Flint*, 118 A.3d at 193-94.

220. *Id.* at 194 (citing *Chavin v. PNC Bank*, 816 A.2d 781, 783 (Del. 2003); *Annan v. Wilm. Trust Co.*, 559 A.2d 1289, 1292 (Del. 1989); *Dutra de Amorim v. Norment*, 460 A.2d 511, 514 (Del. 1983)).

221. *Id.* at 195.

222. *Id.* at 198.

223. *Id.* at 194.

X. POWERS OF APPOINTMENT

In *IMO: The Estate of James Vincent Tigani, Jr., deceased, and the J. Vincent Tigani Jr., a/k/a James Vincent Tigani, Jr. Revocable Trust, U/A dtd, April 10, 1995*,²²⁴ the Delaware Court of Chancery addressed the standing of a vested beneficiary subject to divestiture to challenge the capacity of a donee to exercise her power of appointment.

In her Final Report,²²⁵ then-Master LeGrow addressed the standing of a vested beneficiary, subject to divestiture and the required capacity to execute a will exercising a power of appointment. In resolving the standing issue, the Master addressed two novel questions of law: (1) whether a contract to exercise a testamentary power of appointment is valid, thereby stripping the appointee/beneficiary of standing to challenge the trustee's fairness at the time the contract is executed (rather than at the donee's death), and (2) whether that same contract also acted as a release of the donee's power of appointment, likewise stripping the appointee/beneficiary of standing to challenge the trustee's fairness at the time the contract is executed.²²⁶

In this case, a son ("Petitioner") tried to remove his mother ("Respondent") as the executrix of his father's estate and also as the trustee of his father's trust.²²⁷ The facts revealed the deterioration of a parent-child relationship over a period of a few years amid several uncomfortable and often angry verbal exchanges between the two parties.²²⁸ Many years before his death, the decedent (who was the grantor of the estate and trust at issue) executed a pour-over will ("the Will") and revocable trust ("the Trust").²²⁹ The decedent designated Petitioner and his other two children, as residual beneficiaries of his "substantial estate."²³⁰ However, Petitioner's residual interest was subject to a limited testamentary power of appointment ("the Power of Appointment") granted to Respondent.²³¹

The relationship between Petitioner and his parents was a complicated one. Prior to the decedent's death, the decedent and Respondent were considering disinherit him.²³² However, the decedent died, never disinheriting Petitioner.²³³ After the decedent's death, the Petitioner and Respondent's relationship quickly deteriorated. Immediately following the decedent's death, Petitioner demanded information from Respondent regarding his father's estate.²³⁴ Petitioner then filed a lawsuit against his mother alleging that she was delusional and unfit to be trustee.²³⁵

224. C.A. No. 7339-ML, 2016 WL 593169 (Del. Ch. Feb. 12, 2016).

225. The court issued a Draft Report on September 30, 2015 from which it adopted all the findings in the Final Report.

226. *Tigani*, 2016 WL 593169, at *15.

227. *Id.* at *1.

228. *Id.*

229. *Id.* at *3.

230. *Id.* at *1.

231. *Id.*

232. *Id.* at *6.

233. *Id.* at *7.

234. *Id.* at *8.

235. *Id.*

The lawsuit attracted local media attention and was reported in the local newspaper.²³⁶ As a result, Respondent decided to completely disinherit Petitioner.²³⁷ Respondent then filed a motion to dismiss the petition. Respondent further amended her trust to remove Petitioner and his issues as beneficiaries of her trust.²³⁸ The Master explained that, at this point, the case “became side-tracked by issues of standing and testamentary capacity” because now Petitioner was challenging those changes to the Will and her trust.²³⁹ As such, the Master issued a draft oral report recommending that the Court deny the motion to dismiss and instructed the parties to take limited discovery regarding the changes to Respondent’s testamentary documents.²⁴⁰ The Master also stated that she would resolve Petitioner’s standing issue once the parties had completed discovery.²⁴¹

After that hearing, in July 2012, Respondent further amended her estate plan in an undisguised effort to eliminate any question regarding Petitioner’s standing.²⁴² On July 31, 2012, Respondent signed a codicil to her 2011 will (the “July 2012 Codicil”).²⁴³ In that document, Respondent “irrevocably” exercised the Power of Appointment and directed that the assets in the Trust should be distributed upon Respondent’s death in equal shares to her other two children.²⁴⁴ “The July 2012 Codicil further stated that ‘no property subject to the Limited Powers of Appointment I am now irrevocably exercising shall be distributed to my son, [Petitioner], or any of his issue.’”²⁴⁵ And finally, the July 2012 Codicil contained a contract between Respondent and her two other children stating that she was exercising the Power of Appointment in favor of them and excluding Petitioner in exchange for their promise to assist her with her car and maintenance for the remainder of her life.²⁴⁶

Respondent argued that the contract to exercise the Power of Appointment was presently enforceable, and thus stripped Petitioner of his status as a beneficiary.²⁴⁷ She further argued that the contract also acted as a release of the Power of Appointment, which also stripped Petitioner’s status as a beneficiary.²⁴⁸

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* at *1.

240. *Id.* at *9.

241. *Id.*

242. *Id.* at *9.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at *13.

248. *Id.*

Regarding whether a “contract to appoint” is valid in Delaware or not, the Master concluded that Delaware law does not recognize a “contract to exercise a power of appointment” as a presently-enforceable agreement.²⁴⁹ She stated that there is no Delaware caselaw on point and thus she had to rely on the Restatement and other secondary sources for guidance.²⁵⁰ According to the Master, those sources “indicate that contracts to exercise a testamentary power of appointment are not valid, with limited exceptions.”²⁵¹ A donor who extends to a donee a testamentary power of appointment “essentially requires the donee to ‘wait and see’ and take into account later developing facts before exercising the power.”²⁵² The Master determined that Respondent attempted to take control of the power before the donor intended for her to obtain the authority to do so.²⁵³ Additionally, the Master decided the Petitioner’s contract to appoint was invalid because it “confers a benefit on a donee when the donee is not a permissible appointee.”²⁵⁴

With regard to whether the contract to exercise the Power of Appointment also acted as a release of the power to appoint Petitioner, the Master stated that even if the contract did act as a release, the release did not change his status as default beneficiary.²⁵⁵ In other words, if in the event the Respondent did not exercise her power of appointment at all, Petitioner would still take a third of the Trust assets as a default beneficiary, and the release of her power to appoint him could not change that fact. Furthermore, the Master reasoned that “most courts in other jurisdictions have concluded that a taker in default has an interest in the property that is the subject of the power of appointment and has standing to compel an accounting from a trustee.”²⁵⁶ Consequently, the Master held that because Respondent failed to identify “any reason why Delaware should deviate from this majority rule,” and due to the risk that the adoption of the minority rule could allow Respondent to insulate herself “from any form of judicial review of her actions as trustee,” her attempt to divest Petitioner as a taker in default of the Power of Appointment did act as a “release” of the Power of Appointment over the Trust, but it did not alter the Petitioner’s position as a taker in default of the Power of Appointment.²⁵⁷

Because the release did not alter Petitioner’s position as a taker in default and the power to exercise the Power of Appointment could only be exercised at her death, the Master held that Petitioner was still a vested beneficiary subject to divestiture, and thus still had standing because he is a “beneficiary” as defined by 12 DEL. C. § 3327.²⁵⁸ The Master wrote that the “statute’s use of the general term beneficiary, without any language restricting the class of beneficiary to whom it refers, fairly encompasses” Petitioner.²⁵⁹

249. *Id.* at *15.

250. *Id.*

251. *Id.* at *17.

252. *Id.*

253. *Id.*

254. *Id.* at *18.

255. *Id.* at *16-18.

256. *Id.* at *14.

257. *Id.* at *14-16.

258. *Id.* at *14.

259. *Id.*

Regarding Respondent's capacity, the Master concluded that Respondent maintained the requisite capacity to make changes to her estate planning documents in the immediate aftermath of her husband's death.²⁶⁰ The Master—mostly relying on a comparison between the consistencies of Respondent's expert witnesses' testimony with the inconsistency of Petitioner's expert witness—concluded that Petitioner's claim did not satisfy the two-part test established by the court in *Tracy v. Prudential Life Insurance Co. of America*,²⁶¹ which requires: (1) A testator to have an insane delusion; and (2) for the testator to change the beneficiaries of the estate because of that delusional belief.²⁶² On Respondent's capacity, the Master concluded, clearly Respondent "misunderstood [Petitioner] on a number of occasions" but that those misunderstandings and the resulting prejudice didn't constitute insane delusions.²⁶³ The Master, relying on the lack of consistent evidence or testimony provided by Petitioner, determined that Respondent obviously dislikes the Petitioner, and that it "is plain that she has ample reason to be angry with him, and he with her," but that "[n]one of that rises to a level that permits this Court to substitute its judgment for that of a testator."²⁶⁴

In *IMO: Raymond L. Hammond Irrevocable Trust Agreement and PNC Bank Delaware Trust Company, as Trustee, Dated October 5, 2007*,²⁶⁵ the court concluded that the power of appointment at issue was not exercised as the required formalities to do so were not complied with.

This case concerned a power of appointment (the "Power of Appointment") included in Raymond Hammond's ("Raymond") qualified disposition trust (the "Trust Agreement").²⁶⁶ In the Trust Agreement, Raymond reserved for himself a special testamentary power of appointment, to be exercised if he specifically referenced the Trust in his will (the "Will").²⁶⁷ According to the Trust Agreement, if Raymond died without exercising the Power of Appointment and without a spouse, the trust assets were to pass to a residuary trust for the benefit of four individuals, including Kyle Kozak ("Kyle").²⁶⁸ The disagreement between the parties was whether Raymond, who failed to specifically reference the Trust in the Will, effectively exercised the Power of Appointment.²⁶⁹

260. *Id.* at *22.

261. 101 A.2d 321, 326 (Del. Ch. 1953).

262. *Tigani*, 2016 WL 593169, at *20-21.

263. *Id.* at *21.

264. *Id.* at *22.

265. C.A. No. 10463-ML, 2016 WL 359088 (Del. Ch. Jan. 28, 2016).

266. *Id.* at *1.

267. *Id.* at *2.

268. *Id.*

269. *Id.* at *1.

Before Raymond died, he and his wife, Lisa, divorced.²⁷⁰ However, they maintained a close relationship.²⁷¹ Upon separating in 2010, they entered into an agreement regarding their marital property rights and obligations.²⁷² The separation agreement stated that Lisa “shall remain, for her lifetime, the irrevocable beneficiary of [Raymond’s] [T]rust with PNC and shall remain the beneficiary even after the divorce.”²⁷³ In 2012, Raymond executed the Will and named Lisa as the executor and sole heir of his estate.²⁷⁴ However, the Will failed to reference specifically the Power of Appointment included within the Trust Agreement.²⁷⁵

Following Raymond’s death in 2014, Lisa sought an order from the New Jersey court that issued the divorce decree to declare her to be the Trust’s sole beneficiary.²⁷⁶ In response, PNC Bank Delaware Trust Company (the trustee of the Trust) filed a Petition for Instructions in its attempt to determine whether Lisa is a beneficiary of the Trust.²⁷⁷ Both Lisa and Kyle answered the Petition, and Kyle filed a motion for judgment on the pleadings.²⁷⁸

Lisa, in her motion, conceded that Raymond never complied with the “technical terms” of the Power of Appointment, but she argued that, under *Carlisle v. Delaware Trust Co.*, despite the Trust Agreement’s unambiguous terms, the court must consider extrinsic evidence to make a determination that Raymond intended to exercise the Power of Appointment.²⁷⁹ Kyle, in his motion, argued that the court should interpret the Trust “according to the settlor’s intent at the time the [T]rust was created,” and that, because the Power of Appointment wasn’t properly exercised, the court should not consider Lisa’s arguments about Raymond’s intent and whether it changed after he created the Trust.²⁸⁰ Additionally, Kyle argued that evidence of Raymond’s intent during or after the divorce was immaterial because, regardless of Raymond’s intent, the court lacked the power to modify the Will.²⁸¹

Noting the absence of any “real dispute” between the parties regarding Raymond’s intent when he settled the Trust, Master LeGrow concluded that the Trust Agreement was unambiguous.²⁸² The Master wrote that Lisa’s argument that Raymond intended for her to “continue as beneficiary of the Trust during her lifetime despite the divorce” failed for two reasons: (1) Lisa failed to point to any part of the Trust that was ambiguous so her extrinsic evidence of Raymond’s intent after creating the Trust was immaterial and; (2) Raymond’s intent at any time other than when he created the Trust

270. *Id.* at *3.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* at *4.

280. *Id.* at *3.

281. *Id.*

282. *Id.* at *4.

was irrelevant since “[a] settlor’s intent at the time a trust is established is the controlling inquiry,” and because “an intent developed after creating a trust is irrelevant for purposes of construing the trust.”²⁸³

The Master decided that Raymond failed to effectively exercise the Power of Appointment due to the formality (that he must specifically refer to the Trust in the Will) that he included in the Trust Agreement.²⁸⁴ Although Delaware law requires only that a donee’s “intention to execute the power” be “apparent and clear,” the Master pointed to a settlor’s ability to create a power of appointment which includes strict “formalities” that “the donee must observe in order to execute the power.”²⁸⁵ According to the Master, formalities “replace the judicial inquiry into whether the donee’s intent to execute the power was apparent and clear.”²⁸⁶ Therefore, the Master rejected Lisa’s argument that the court must consider extrinsic evidence of Raymond’s intent after the creation of the Trust because “where a power contains such formalities, judicial inquiry into a donee’s intent is not necessary because observance of the formalities is conclusive, and exclusive, proof of intent.”²⁸⁷

The Master concluded that the court lacked the power to reform a will and recommended that the court grant Kyle’s motion for judgment on the pleadings.²⁸⁸

XI. FIRST-FILED RULE APPLIED TO TRUST LITIGATION

In *IMO Ronald J. Mount 2012 Irrevocable Dynasty Trust*,²⁸⁹ the Court of Chancery opted not to stay a Delaware trust dispute in favor of Florida litigation that involved many, but not all, of the same parties and issues.

This case was filed on May 5, 2015, by the trust protector of the Ronald J. Mount 2012 Irrevocable Dynasty Trust (the “Dynasty Trust”).²⁹⁰ The trust protector sought a determination regarding the validity of the trust and also instructions on the proper administration.²⁹¹ The larger dispute relates to the settlor’s son’s contention that three individuals close to the settlor (including the settlor’s new wife, his daughter, and the newly appointed Trust Protector of the Dynasty Trust) exercised undue influence over the settlor in the final stages of his life in order to obtain greater control over his substantial assets.²⁹² The Dynasty Trust, established in 2012, included the settlor’s son as a lifetime beneficiary.²⁹³ The settlor’s son alleged that when the settlor’s health deteriorated, the settlor’s caregiver (who eventually became his new

283. *Id.*

284. *Id.* at *5.

285. *Id.* at *5.

286. *Id.*

287. *Id.* at *6.

288. *Id.*

289. C.A. No. 10991-VCN, 2016 WL 297655 (Del. Ch. January 21, 2016).

290. *Mount*, 2016 WL 297655, at *2.

291. *Id.*

292. *Id.*

293. *Id.* at *1.

wife), the settlor's daughter, and the newly appointed trust protector of the Dynasty Trust, acted as "allies" in an effort to gain control over the Dynasty Trust.²⁹⁴

On May 12, 2015, the settlor's new wife, the settlor's daughter, and the trust protector sought probate in Florida of the settlor's will as amended by two codicils.²⁹⁵ On June 1, 2015, the settlor's son challenged the will on grounds of undue influence and sought probate of an earlier will.²⁹⁶ He also petitioned for annulment of the settlor's marriage to his new wife, challenged the settlor's irrevocable trust on grounds of undue influence, and sought the removal of the new wife, the settlor's daughter, and the trust protector as fiduciaries for the settlor's estate and various trusts.²⁹⁷

The settlor's son filed his answer and counterclaims in Delaware. In those counterclaims, he repeated many of the allegations that he raised in the Florida matter.²⁹⁸

The Delaware Court of Chancery acknowledged that substantial pieces of the wide-ranging litigation between the parties are based in Florida "where substantial discovery has occurred and the proceedings appear to be progressing."²⁹⁹ While the court didn't expressly focus on it, it may be notable that neither the Dynasty Trust nor its trustee was a party in the Florida action.

The settlor's son moved to stay the action filed in Delaware in favor of the Florida proceedings, arguing that a stay is a "matter committed to the exercise of the court's discretion."³⁰⁰ The trust protector maintained that the son must demonstrate that litigating the case in Delaware would cause "overwhelming hardship" in order to overcome the trust protector's choice of Delaware as the forum to litigate the issues concerning the Dynasty Trust.³⁰¹

The Vice Chancellor first analyzed the stay motion under the first-filed rule.³⁰² The Vice Chancellor noted that that rule generally instructs a court to respect a plaintiff's choice of forum unless the defendant can demonstrate that litigating in the forum subjects the moving party "to overwhelming hardship and inconvenience."³⁰³ That is a high standard to overcome and—as the Delaware action was clearly first-filed—the court found that in this case the settlor's son failed to meet the burden.³⁰⁴

294. *Id.*

295. *Id.* at *2.

296. *Mount*, 2016 WL 297655, at *2.

297. *Id.*

298. *Id.*

299. *Id.* at *2.

300. *Id.* at *3.

301. *Id.*

302. *Mount*, 2016 WL 297655, at *3-4.

303. *Id.* at *3 (internal citations omitted).

304. *Id.* at *5-6.

The Vice Chancellor then analyzed the factors that could possibly warrant a stay under the *forum non conveniens* doctrine.³⁰⁵ After going through those factors, the Vice Chancellor concluded that a stay was not appropriate under that doctrine either and he denied the motion.³⁰⁶

The Vice Chancellor did, however, recognize that coordination with the Florida case made a lot of sense and he instructed the parties not to duplicate efforts needlessly.³⁰⁷ Specifically, the Vice Chancellor added a footnote saying, “[c]oordination of discovery between the Delaware action and the Florida action should be accomplished by the parties and their counsel. The Court will become involved in coordinating discovery, if necessary.”³⁰⁸

XII. MISSING WILL

In *IMO of the Last Will and Testament of Edward B. Sandstrom, Deceased*,³⁰⁹ the Master in Chancery concluded that the terms of missing will pages were to be honored.

In this case, which arose out of the unexplained disappearance of the first page of a will, then-Master Ayvazian dismissed several exceptions taken to her earlier draft report in which she concluded that the petitioners had shown by a preponderance of the evidence that (1) a valid will was executed by the decedent; (2) the terms of the missing page; and (3) the missing page was unintentionally lost or destroyed and the decedent did not alter his testamentary intent prior to his death.³¹⁰

In this case, the first page of the testator’s will (“the correct page”) was unintentionally lost or destroyed shortly after the testator, while hospitalized, signed an amended version of his last will and testament (“the Will”).³¹¹ With a different first page (“the incorrect page”) attached to the front of the Will, the document was admitted to probate by the testator’s son shortly after the testator’s death.³¹² Exactly what happened to the correct first page of the Will remained unclear. However, due to the scrivener’s error, the incorrect first page of the Will created an ambiguity as to whether the testator intended to devise his property in Lewes, Delaware to the respondent (his son) or to the petitioners (a close family friend and her husband).³¹³

Master Ayvazian recommended that the court revoke the probate of the Will and admit to probate a copy of the corrected first page as the first page of the testator’s Will. The Master’s decision was based largely on the extrinsic evidence introduced at trial, specifically, the affidavit and the testimony of the attorney who drafted the Will.

305. *Id.* at *3-4. Those factors are: (1) relative ease of access to proof; (2) availability of compulsory process for witnesses; (3) view of the premises; (4) whether the controversy involves application of Delaware law which the courts of Delaware should more properly decide; (5) pendency of similar actions in another jurisdiction; and (6) other practical considerations which would serve to make the trial easy, expeditious, and inexpensive. *Id.* at *4-5.

306. *Id.* at *4-5.

307. *Id.*

308. *Id.* at *4 n.12.

309. C.A. No. 8948-MA, 2016 WL 1304841 (Del. Ch. Apr. 4, 2016).

310. *Sandstrom*, 2016 WL 1304841, at *1, *11.

311. *Id.* at *4.

312. *Id.* at *6.

313. *Id.* at *11.

The respondent contended that an affidavit and the trial testimony of the attorney who created the Will should have been excluded from the record for violating the attorney-client privilege.³¹⁴ Additionally, the respondent argued that the petitioners failed to establish the necessary prima facie case to overcome the common law presumption of *animo revocandi* where: (1) the terms of the missing first page cannot be demonstrated because only the testator and the attorney (who, according to the respondent, was restricted by the attorney-client privilege from disclosing information) had knowledge of its terms; and (2) there was no evidence of any search for the missing first page.³¹⁵

The Master concluded that the respondent waived his right to object to the attorney's testimony and affidavit by failing to assert the attorney-client privilege before or during trial.³¹⁶ Regardless, the Master wrote that the respondent's argument was "without merit because under Delaware Rule of Evidence 502(d)(2), there is no attorney-client privilege where both parties are claiming through the same deceased client."³¹⁷ According to the Master, "Delaware courts, along with most other state courts, allow a decedent's attorney to testify to communications concerning the drafting of a will."³¹⁸

Additionally, the respondent argued that the petitioners were required to prove that they had searched for the original correct first page of the Will, and that they failed to do so.³¹⁹ He argued the petitioners' "failure to conduct a search of the hospital dooms their efforts to prove a missing will."³²⁰ However, according to the Master, because the Will was in the respondent's possession during the two days between the execution of the Will and the delivery of the Will by the respondent to a third party with the incorrect first page attached, the burden shifted to respondent to demonstrate that the missing corrected first page was destroyed by the testator or at his direction.³²¹ The Master found that the respondent failed to overcome the burden because he presented no evidence that the Will with the corrected first page was ever returned to the testator and destroyed by the testator or that the corrected first page was destroyed at the testator's direction.³²²

Lastly, the respondent argued the petitioners failed to adequately plead a missing will theory.³²³ The Master decided the respondent's argument was "too late," and that he, in accordance with Rule 15(b), had impliedly consented early on to the trial of these issues.³²⁴

Based on her findings, the Master dismissed all of the respondent's exceptions to the draft report and adopted her draft report as her final report on the matter.³²⁵

314. *Id.* at *12.

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.* at *13.

320. *Id.* at *14.

321. *Id.*

322. *Id.*

323. *Id.* at *15.

324. *Id.*

325. *Id.*

XIII. ESTATE ADMINISTRATION AND PRIORITY

In *Frederick-Conaway v. Baird, et al.*,³²⁶ the Delaware Supreme Court found that estate debts are to be paid first by estate assets before using any related trust funds to pay those debts.

Jesse Frederick-Conaway (“Jesse”) was the decedent’s adult son, and Janice Russell-Conaway (“Janice”) was the decedent’s second wife and widow.³²⁷ After disputes arose, the Court of Chancery removed them and named Kevin Baird as administrator and trustee.³²⁸ Mr. Baird then petitioned the Court of Chancery to ascertain whether certain transactions in which Jesse and Janice engaged were proper.³²⁹ The Court of Chancery merged the administration of the decedent’s estate and trust.³³⁰

On appeal, the Delaware Supreme Court partially reversed the trial court and ruled on several issues.³³¹ Most notably, the Supreme Court found that the trial court erred in merging the administration of the decedent’s trust and his estate. The Supreme Court found that the trial court incorrectly read the holding in *In Re Estate of Arcaro*³³² to allow for the reordering of priority for the payment of estate debts and honoring bequests.³³³ In short, the Supreme Court held that the proper order would have seen the debts paid first by any estate assets before using any trust funds to pay those debts.³³⁴ As such, Jesse and Janice had been incorrect to use trust assets to pay certain estate debts so that they could withdraw their bequests from the estate.³³⁵

XIV. REIMBURSEMENT OF ATTORNEYS’ FEES AND COSTS

In *IMO the Hawk Mountain Trust*,³³⁶ the Vice Chancellor discussed the various methods to evaluate a fee request in a trust dispute and awarded approximately 94% of the amounts sought in the co-trustees’ fee applications.

326. 159 A.3d 285 (Del. 2017).

327. *Baird*, 159 A.3d at 288.

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.* at 288-89.

332. C.A. No. 4725, 1977 WL 9539 (Del. Ch. Oct. 12, 1977).

333. *Baird*, 159 A.3d at 293.

334. *Id.* at 299-301.

335. *Id.*

336. C.A. No. 7334-VCP, 2015 WL 5243328 (Del. Ch. Sept. 8, 2015).

While the parties still had pending disputes between them in other jurisdictions, the Vice Chancellor found that the fee applications were ripe for review as the Delaware case was resolved.³³⁷ The Vice Chancellor approved the majority of the sought fees, but found that some deductions were appropriate.

The Vice Chancellor referenced three possible bases for fee reimbursement: (1) Delaware common law, (2) 12 DEL. C. § 3584,³³⁸ and (3) the American Rule.³³⁹ He then stated that “[b]ecause I base my conclusions primarily on the applicable principles of Delaware common law, and secondarily on 12 DEL. C. § 3584, I do not reach Petitioners’ argument for fees under the American Rule.”³⁴⁰

In sum, approximately \$1.1 million total fees were sought and the court awarded \$1,033,800 total.³⁴¹ Thus, there was about a 6% reduction. The reductions came for various reasons. The court agreed with some of the respondents’ objections, finding that certain work done did not benefit the trust and, thus, was not properly reimbursable.³⁴² That work included the filing of a dismissed Pennsylvania case (for which the court awarded reimbursement for only some of the related fees) as well as the unnecessary cancellation of an LLC.³⁴³ The court also made a small deduction for work done that benefitted a trust other than the trust that was the subject of this case.³⁴⁴ The court also ordered a partial deduction for fees incurred to obtain, and then prepare for, a deposition that was never actually taken due to the co-trustees’ own strategic choice not to take that deposition.³⁴⁵

Regarding whether the total fees sought were reasonable, the court generally concluded that they were. But the court did take a small deduction off of one fee application on the basis that the full fees were not adequately justified.³⁴⁶ In that regard, the court noted that the petitioners presented no detailed evidence on the following factors of Delaware Lawyers’ Rules of Professional Conduct Rule 1.5: “(1) ... the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;” “(3) the fee customarily charged in the locality for similar legal services;” and “(7) the experience, reputation, and ability of the lawyer or lawyers performing the services.”³⁴⁷ The court noted that

337. 2015 WL 5243328, at * 3.

338. That section provides, “In a judicial proceeding involving a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorneys’ fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.” 12 DEL. C. § 3584.

339. 2015 WL 5243328, at *4. The American Rule provides that litigants must pay their own attorneys’ fees and costs. *Id.*

340. *Id.*

341. *Id.*

342. *Id.* at *5.

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.* at *7.

347. *Id.*

in this case only one of the firms billed more than \$500 per hour for their services.³⁴⁸ Approximately 11.7% of the time spent by that firm involved lawyers charging more than \$500 per hour, with the highest rate being \$645.³⁴⁹ The court then found that “[b]ased on the limited record before me, I find that a maximum rate for reasonable attorneys’ fees in this matter is \$500 per hour.”³⁵⁰ The court therefore capped the reimbursable billing rates at \$500 per hour.³⁵¹

It does appear, however, that if all of the factors of DLRPC Rule 1.5 were covered in the application at issue to the court’s satisfaction, the court would have allowed reimbursement for hourly rates in excess of \$500.00.

In *IMO the Last Will & Testament of Wilma B. Kittila*,³⁵² the Master reduced the petitioners’ fee reimbursement because the dollar value of the sought fees was disproportionate to the size of the estate in dispute.

In this opinion, then-Master LeGrow only partially approved the amounts sought in the non-prevailing party’s fee application. The petitioners filed a fee petition, and an accompanying affidavit of fees, whereby they sought the reimbursement of \$224,565.46 in attorneys’ fees and costs that petitioners had incurred in unsuccessfully challenging the validity of two wills.³⁵³ The estate opposed the petitioners’ request and argued the requested amount was disproportionate to the total value of the estate (which was then only \$351,330.27 after deducting the estate’s attorneys’ fees and costs incurred defending the petitioners’ challenges).³⁵⁴

Upon recognizing that an award of the amount requested by the petitioners would reduce the estate “to approximately half its original size, thereby defeating the testator’s intent,” and that the additional deduction of the estate’s attorneys’ fees and costs incurred in defending the action “would leave approximately one quarter of the estate for [the] designated beneficiaries,” the Master recommended that the court “order the estate to pay [p]etitioners’ attorneys’ fees in the amount of \$88,032.65” (which was twenty percent of the value of the estate at the time of testator’s death).³⁵⁵ Simply said, the Master recognized “the importance of ensuring that an award of fees does not eviscerate the testator’s intent.”³⁵⁶

348. *Id.*

349. *Id.* at *7.

350. *Id.*

351. *Id.*

352. C.A. No. 8024-ML, 2015 WL 5897877 (Del. Ch. Oct. 9, 2015).

353. *Id.* at *1. While the challenge was unsuccessful, the Master had earlier determined that the petitioners “had met the burden of showing they were entitled to have at least a portion of their attorneys’ fees paid by [the] estate.” *Id.*

354. *Id.*

355. *Id.* at *2.

356. *Id.*

DELAWARE THIRD-PARTY LEGAL OPINIONS ON REMEDIES IN REAL ESTATE FINANCING TRANSACTIONS: A PRIMER

Robert J. Krapf and Antonios Roustopoulos*

I. INTRODUCTION

A. Purpose Of This Article

This article is intended as a primer for Delaware lawyers who render third-party legal opinions in real estate finance transactions and for use by lawyers who represent clients receiving third-party legal opinions from Delaware counsel in a financing transaction secured by real estate located in the State of Delaware. This article was informed by various reports on opinion practices that have been issued over the years by state bar associations, national bar groups and specialty associations, and, in particular, reflects the topical organization and treatment of certain opinion issues as found in the so-called Florida Report.¹ The Florida Report presents a very clear, detailed and useful approach to opinion practice and therefore can serve as a model for other states to follow should they wish to issue their own report, though of course the law of each jurisdiction may differ on specific opinion topics. This article is not intended to be a treatise on the subject of third-party legal opinions, but only to provide practical guidance. Accordingly, while the authors state certain preferences on how to address opinion topics and express opinions on how opinion practice should be, the reader should understand that some issues are open to debate among opinion practitioners across the country.

What follows in this section of the article are some of the more important basic principles and guidelines that govern opinion practice nationally and in Delaware.

B. What Is An Opinion?

For purposes of this article, a third-party legal opinion, referred to in this article as an “opinion” or an “opinion letter,” is generally understood to be a written legal opinion letter delivered in connection with a real estate financing transaction (a “Real Estate Financing Transaction”) and given by counsel representing one party (the “Opinion Giver”) on behalf of that party (the “Client”) to another party (the recipient of the opinion or a permitted assignee of the opinion recipient) that is not the client of the Opinion Giver (the “Opinion Recipient”).² The specific opinions discussed in this article are usually given with respect to the documentation exchanged in connection with the closing of a Real Estate

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1. LEGAL OPINION STANDARDS COMM., BUS. LAW SECTION OF THE FLA. BAR & LEGAL OPINION COMM., REAL PROPERTY, PROBATE AND TRUST LAW SECTION OF THE FLA. BAR, THIRD-PARTY LEGAL OPINION CUSTOMARY PRACTICE IN FLORIDA, December 3, 2011 [hereinafter FLORIDA REPORT].

2. *Id.* at 8. For purposes of this article, counsel to the Opinion Recipient is referred to as the “Recipient Counsel.” Note that in certain transactional practices (e.g., cross-border) the Opinion Giver may be issuing the opinion letter to the Client.

Financing Transaction (the “Transaction Documents”). In most cases, delivery of the opinion letter is a condition to the completion of the Real Estate Financing Transaction.

C. Background On Opinion Practice³

Over the years, several opinion projects have sought to improve and provide uniformity and guidance in third-party closing opinion practice. In 1998, the Committee on Legal Opinions of the Business Law Section of the American Bar Association issued its *Legal Opinion Principles*⁴ providing suggestions for customary practice in closing opinions. Also in 1998, the TriBar Opinion Committee issued its Third-Party Closing Opinions report,⁵ and a committee composed of members of the Real Property Law Committee of the Association of the Bar of the City of New York and the Real Property Law Section of the New York State Bar Association published their *Mortgage Loan Opinion Report*.⁶ In 2002, the Business Law Committee issued *Guidelines for the Preparation of Closing Opinions*⁷ providing further guidance on the preparation of closing opinions.

While the Legal Opinion Principles and Business Law Guidelines are invaluable resources for real estate practitioners, closing opinions in real estate secured loan transactions present opinion issues not addressed in either document. For that reason, a joint subcommittee of the Attorneys Opinion Committee of the American College of Real Estate Lawyers (the “ACREL Committee”) and the Committee on Legal Opinions of the Real Property, Probate and Trust Section (now the Real Property, Trust and Estate Law Section) (the “RPTE Committee”) of the American Bar Association undertook a number of years ago to adapt and expand the Business Law Guidelines to provide guidance with respect to closing opinions in real estate secured loan transactions, resulting in the issuance of the Real Estate Opinion Letter Guidelines.⁸

In 2008 and thereafter, a number of major national and state bar associations (including the Delaware State Bar Association), committees and groups adopted the *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Opinions*.⁹

3. For a general treatment of opinions in real estate transactions, see R. THOMPSON, REAL ESTATE OPINION LETTER PRACTICE (ABA Book Publishing, 2d ed. 2009).

4. Comm. on Legal Opinions, Section of Bus. Law of the American Bar Ass’n, *Legal Opinion Principles*, 53 BUS. LAW. 831 (1998) [hereinafter “*Legal Opinion Principles*”]. Of course, opinion literature predated these Legal Opinion Principles. See, e.g., Special Committee on Legal Opinion in Commercial Transactions, New York County Lawyers’ Ass’n, *Legal Opinions to Third Parties: An Easier Path*, 34 BUS. LAW. 1891 (1979).

5. TriBar Opinion Comm. (Special Comm. on Legal Opinions in Commercial Transactions, New York County Lawyers’ Ass’n; Corp. Law Comm., the Ass’n of the Bar of the City of New York; and Special Comm. on Legal Opinions of the Bus. Law Section, New York State Bar Ass’n), *Third Party Closing Opinions*, 53 BUS. LAW. 591 (1998) [hereinafter “*TriBar 1998 Report*”].

6. Subcommittee on Mortgage Loan Opinions, Comm. on Real Property Law, the Ass’n of the Bar of the City of New York & Attorney Opinion Letters Comm., Real Property Law Section, New York State Bar Ass’n, *1998 Mortgage Loan Opinion Report*, 33 REAL PROP. PROB. & TR. J. 552 (1998) [hereinafter “*1998 Mortgage Loan Opinion Report*”].

7. Section of Bus. Law of the American Bar Ass’n Comm. on Legal Opinions, *Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 875 (2002) [hereinafter “*Business Law Guidelines*”].

8. Attorneys’ Opinion Comm., American College of Real Estate Lawyers & Comm. on Legal Opinions in Real Estate Transactions, Section of Real Property Probate & Trust Law, American Bar Association, *Real Estate Opinion Letter Guidelines*, 38 REAL PROP. PROB. & TR. J. 241 (2003) [hereinafter “*RE Guidelines*”].

9. See generally 63 BUS. LAW. 1277 (Aug. 2008) [hereinafter “*Statement on the Role of Customary Practice*”]. The Commercial Law Section and the Real & Personal Property Law Section of the Delaware State Bar Association have endorsed the *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*.

In 2012, the ACREL Committee, the RPTE Committee and the Opinion Committee of the American College of Mortgage Attorneys published the first national report on real estate opinions.¹⁰ Following that, the same groups published a supplement on local counsel opinions in real estate financing transactions.¹¹

D. Purpose Of Third-Party Legal Opinions

The type of opinion letter discussed in this article is a written letter stating the Opinion Giver's reasoned conclusions on the application to certain stated, agreed or assumed facts of certain Delaware laws and legal principles applicable to the Client, the Transaction Documents or the Real Estate Financing Transaction, and subject to the exceptions, qualifications and other limitations expressed in the opinion letter or otherwise implied based on customary practice.¹² An opinion is a reasoned professional judgment of how a Delaware court "should" decide the legal issue considered in the opinion if the court were properly presented with that issue as of the date of the opinion.¹³ Importantly, an opinion is a professional judgment, but not a guarantee, that the Delaware Supreme Court would make this decision.¹⁴

E. Customary Practice In Opinions

Inherent in the giving and receiving of opinions is the customary practice of Delaware lawyers regarding the way certain words and phrases commonly used in opinions are understood and the diligence the Opinion Giver is expected to perform to give those opinions.¹⁵ This customary practice is based on the understanding of lawyers who regularly give

10. Committee on Legal Opinions in Real Estate Transactions, the American Bar Association Section of Real Property, Trust and Estate Law, Attorneys' Opinions Committee, the American College of Real Estate Lawyers & Opinions Committee, the American College of Mortgage Attorneys (the "Real Estate Opinion Committees"), *Real Estate Finance Opinion Report of 2012*, 47 REAL PROP. TR. & EST. L. J. 213 (2012) [hereinafter the "2012 Report"]. See also R. Krapf and E. Levin, *An Overview of the Real Estate Finance Opinion Report of 2012*, 14 DEL. L. REV. 153 (2014).

11. The Real Estate Opinion Committees, *Local Counsel Opinion Letters in Real Estate Finance Transactions: A Supplement to the Real Estate Finance Opinion Report of 2012*, 51 REAL PROP. TR. & EST. L. J. 167 (2016) [hereinafter the "LoCo Report"].

12. *TriBar 1998 Report*, *supra* note 5, § 2.1.1 at 608.

13. Restatement of the Law (Third) of the Law Governing Lawyers § 95 cmt. c (2000) [hereinafter the "Restatement on Lawyers"] ("Unless effectively stated or agreed otherwise, a legal opinion or similar evaluation constitutes an assurance that it is based on legal research and analysis customary and reasonably appropriate in the circumstances and that it states the lawyer's professional opinion as to how any legal question addressed in the opinion would be decided by the courts in the applicable jurisdiction on the date of the evaluation."). It is generally viewed that notwithstanding the wording of the Restatement on Lawyers, an opinion does not provide "assurance" that a particular legal issue "will be decided" in a certain way by the Delaware Supreme Court, but rather reflects how the Delaware Supreme Court "should" decide the legal issue based on the facts, law, assumptions and other matters relevant to the opinion as interpreted under customary practice in Delaware. Note, however that the Restatement on Lawyers has not been adopted or cited by any Delaware court relating to third-party opinion practices in Delaware.

14. *Legal Opinion Principles*, *supra* note 4, § I.D at 832.

15. *Statement on the Role of Customary Practice*, *supra* note 9, at 1277. See also *Legal Opinion Principles*, *supra* note 4, § I.B at 832; RESTATEMENT ON LAWYERS, *supra* note 13, at §§ 51 cmt. e & 95(2) cmt. b. The Business Law Guidelines state, "An opinion giver is entitled to assume, without so stating, that in relying on a closing opinion the opinion recipient (alone or with its counsel) is familiar with customary practice concerning the preparation and interpretation of closing opinions." Business Law Guidelines, *supra* note 7 at 876.

these opinions and lawyers who regularly review them for clients. Customary practice can be described as both a sword and shield for the practitioner – a sword in that the opinion will be read to incorporate what is meant by the opinion among practitioners in the applicable legal community for similar third-party legal opinions under similar circumstances, and a shield in that, whether or not expressly incorporated into the opinion, the assumptions, exceptions, qualifications and limitations inherent in Delaware customary practice will be part of the opinion. Unless the Opinion Giver states otherwise in the opinion letter, Delaware customary practice should be understood to govern every opinion letter delivered by a Delaware lawyer even if the phrase “customary practice” is not mentioned in the opinion letter.

F. The “Golden Rule”

The so-called “golden rule” applies to opinion practices.¹⁶ Simply put, do not request an opinion you would not be prepared to give if you were the Opinion Giver and possessed the requisite expertise to give the opinion.¹⁷ Similarly, do not refuse to give an opinion that lawyers with requisite expertise would give, assuming you have the requisite expertise.¹⁸

G. Standard Of Care

The standard of care for the Opinion Giver in rendering an opinion in a Real Estate Financing Transaction is generally explained by reference to the Restatement on Lawyers. The Restatement states that a lawyer who provides an opinion to a party other than the client “must exercise care with respect to the nonclient to the extent stated in §51(2) and not make false statements prohibited under §98.”¹⁹ The Opinion Giver has a duty of care to the Opinion Recipient comparable to the duty the lawyer owes to his or her client.²⁰ Reasonable care or competence depends upon the circumstances and the character of the information.²¹ For instance, Section 98 of the Restatement on Lawyers provides, in part, that a lawyer communicating on behalf of a client with a non-client may not “knowingly make a false statement of material fact or law to the non-client.” If the Opinion Giver does not know the information is false, the Opinion Giver is entitled to rely on the information; but if the Opinion Giver knows the information is outside the informant’s expertise, the Opinion

16. See *RE Guidelines*, *supra* note 8, at 248.

17. *Id.*

18. *Id.*

19. RESTATEMENT ON LAWYERS, *supra* note 13, at § 95. For a discussion of the professional liability and ethical issues for the Recipient’s Counsel, see R. Ryan, *Recipient Counsel Responsibilities and Concerns*, 62 BUS. LAW. 401 (2007).

20. RESTATEMENT ON LAWYERS, *supra* note 13, at § 51(2). See also RESTATEMENT (SECOND) OF THE LAW OF TORTS § 552 (1977); *Guardian Constr. Co. v. Tetra Tech Richardson, Inc.*, 583 A. 2d 1378 (Del. Super. 1990).

21. See RESTATEMENT ON LAWYERS, *supra* note 13, at § 51(2) cmt. e. Juries are often given an instruction similar to the following: “In providing services relating to plaintiff a lawyer must possess and apply knowledge and use the skill and care ordinarily used by a reasonably well-qualified lawyer under the circumstances similar to those shown by the evidence. A failure to do so is professional negligence.” Illinois Pattern Jury Instructions, Instruction 105.01, *quoted in* William Freivogel, *The Ethics and Lawyer Liability Issues Raised by Closing Opinions*, LOSS PREVENTION J. 7 (1998).

Giver might not reasonably rely on it.²² If the Opinion Giver is not initially aware but later learns the information is untrue, the Opinion Giver should include the new information in any subsequent opinions or documents to avoid liability.²³

In the absence of any Delaware cases, and although the Restatement on Lawyers has not been adopted by any Delaware court relating to Delaware opinion practices, a cautious lawyer might assume that a Delaware court could hold that the Restatement on Lawyers articulates the standard of care to which Delaware lawyers who render opinions would be held.

H. No Implied Opinions

Customary practice provides that no implied opinion should be read into an express opinion.²⁴

I. Ethical And Professional Issues²⁵

Rule 2.3 of the Delaware Rules of Professional Conduct (the “RPC”) applies to giving legal opinions as stated in Rule 2.3:

- a. A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer’s relationship with the client.
- b. When the lawyer knows or reasonably should know that the evaluation is likely to affect the client’s interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent; and
- c. Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

A full review of the ethical issues involved in giving opinions is beyond the scope of this article; however, it is obvious there is an inherent, ethical tension between the duty of the Opinion Giver to the Client and the giving of an opinion to the Opinion Recipient on which it may rely. The duty of loyalty, client confidentiality, conflicts, client consent, good faith, and candor are all implicated in opinion practice. At a minimum, the Opinion Giver should issue an opinion only with the Client’s consent, however that consent may be given. It is generally understood that if the Client is

22. *Id.*; see also Model Rules of Professional Conduct § 4.1, Cmt. (attorney may not “knowingly make a false statement of material fact or law to a third person” while representing a client, including “incorporat[ing] or affirm[ing] a statement of another person that the lawyer knows is false”); *id.* (if attorney knows certificate is false or unreliable or that the facts under the circumstances make reliance unreasonable, attorney may not reasonably rely on the information without further investigation).

23. Freivogel, *The Ethics and Lawyer Liability Issues Raised by Closing Opinions*, LOSS PREVENTION J. 7. See, e.g., Klein v. Boyd, C.A. No. 97-1143, 1998 WL 55245 (3d Cir. Feb. 12, 1998).

24. *RE Guidelines*, *supra* note 8, § 1.5a at 246.

25. For a more detailed discussion, see C. McCallum and B. Young, *Ethics Issues in Opinion Practice*, 62 BUS. LAW. 417 (2007). See also FLORIDA REPORT, *supra* note 1, § M at 15; 2012 Report, *supra* note 10, § II at 218-220.

proceeding with a Real Estate Financing Transaction for which an opinion is required, the Client's consent is implied and may be relied on by the Opinion Giver.²⁶

An interesting ethical issue peculiar to Delaware law practice is whether a lawyer who is not licensed in Delaware may ethically issue an opinion on Delaware law. The best example is if such a lawyer issues an opinion on the status of a Delaware corporation or limited liability company. Historically, it is not unusual for lawyers in corporate transactions to issue opinions on Delaware corporations, expressly limiting those opinions exclusively to the Delaware General Corporation Law and without regard to case law on Delaware corporations. This practice has been accepted by Delaware lawyers as customary in the world of opinion practice and has been accepted by various opinion authorities.²⁷ With the advent of the limited liability company, many lawyers around the country became uncomfortable with giving similar opinions on Delaware limited liability companies, especially given the importance of contract law principles, and not statutes, in how limited liability companies are formed, governed and empowered. This unease was compounded by cases that extended Delaware long-arm jurisdiction over out-of-state lawyers representing Delaware clients in Delaware law matters.²⁸ Some authorities in Delaware responsible for supervision of lawyers have expressed the belief that because issuing opinions constitutes the practice of law, the issuance of an opinion on a Delaware entity (i.e., a Delaware "person") by a lawyer not licensed in Delaware constitutes the unauthorized practice of law if not within the permissive bounds of RPC Rule 5.5. Accordingly, that lawyer may be subject to the jurisdiction of the Delaware Supreme Court and its Board on Unauthorized Practice and subject to disciplinary sanctions by the court, either in Delaware or, by way of comity, in the lawyer's licensing jurisdiction, and those lawyers may be subject to the long-arm jurisdiction of Delaware courts.²⁹

J. Law Governing The Opinion Letter

Although this subject has not been well explored in the reports and other authorities, it is arguable that the law governing the interpretation and enforcement of an opinion letter given by Delaware counsel in a Real Estate Financing Transaction involving Delaware real property is, and should always be, the laws of the State of Delaware without regard to conflicts of law principles. However, there is no apparent consensus on this point, especially with respect to possible claims against an Opinion Giver, which are likely to be tort rather than contract claims.

II. BASIC ELEMENTS OF OPINIONS

What follows is a summary of the various basic elements of an opinion letter for a Real Estate Financing Transaction.

A. Date

The date of an opinion letter is generally the date on which it is delivered, usually the closing date of the Real Estate Financing Transaction for which the opinion letter is given. Except if expressly stated otherwise in an opinion letter,

26. *RE Guidelines*, *supra* note 8, § 2.4 at 247.

27. *TriBar 1998 Report*, *supra* note 5, § 4.1 at 631 n.85; *1998 Mortgage Loan Opinion Report*, *supra* note 6, at 574 n.31.

28. Michael McGinniss, *Five Years Later: The Delaware Experience with Multi-Jurisdictional Practice*, 10 DEL. L. REV. 125 (2008). *See also Beverage v. Pullman & Comley, LLC*, 306 P.3d 71 (Az. Ct. App. 2013), *aff'd*, 316 P. 3d 590 (2014).

29. McGinniss, *supra* note 28, at 139-43; *See also* M. Johnson, *Multi-Jurisdictional Practice: Emerging Issues from a Delaware Perspective*, 5 DEL. L. REV. 67 (2002) for an analysis of the more rigorous standards for admission to the Delaware Bar, which,

the opinions included in the opinion letter are statements made as of the date of the opinion letter. As the practice of real estate finance has transitioned to where face-to-face closings occur with declining frequency, opinion letters sometimes are dated with the closing date and submitted in advance with an appropriate transmittal letter or e-mail authorizing release upon satisfaction of certain conditions. Some Opinion Givers prefer to deliver their opinion letters only upon closing. Regardless of when it is delivered or released, the opinion letter speaks only to matters as of its date.³⁰ Accordingly, for example, the Opinion Giver has no duty to update an opinion based on subsequent changes in the law upon which the opinion was based or if the Opinion Giver subsequently discovers facts unknown to the Opinion Giver at the time of issuance of the opinion that would modify the conclusions set forth in the opinion.³¹ This limitation need not be stated in the opinion letter, as the limitation is implicit in all Delaware opinions.³²

B. Addressee And Reliance

The opinion letter will generally be addressed to the Opinion Recipient, usually one or more lenders in the Real Estate Financing Transaction. Except if expressly stated otherwise in the opinion letter, the only person entitled to rely on the opinions is the Opinion Recipient identified in the opinion letter, usually as the addressee.³³ There is no need to state this limitation in the opinion letter, as the limitation is implicit in all Delaware opinions.

Requests are sometimes made to include credit rating agencies (each more formally identified as a “nationally recognized statistical rating organization” or an “NRSRO”) as addressees or persons expressly entitled to rely on the opinion letter. Rating agencies have confirmed³⁴ they should be included as persons to whom the opinion letter may be furnished and by whom the opinion letter may be reviewed, but should not be included as addressees or reliance parties. Requests for inclusion of rating agencies formally as reliance parties (addressees or otherwise) are inappropriate and appear to be based on a misunderstanding of the NRSRO’s requirements. Because reliance may indicate legal recourse against the Opinion Giver, reliance could imply that rating agencies are parties to the transaction, which is inconsistent with their role and function.

Access to the opinion letter, however, is important, and rating agencies should be added to the list of those to whom an opinion letter may be delivered and reviewed when the transaction is one in which a rating agency will be relevant. As the non-reliance/disclosure-only discussion has evolved recently, one solution in particular emerged to address this. Many

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the article argues, may limit the competence of out-of-state lawyers on matters of Delaware law.

30. *Legal Opinion Principles*, *supra* note 4, at 833-34; *TriBar 1998 Report*, *supra* note 5, at 597; *2012 Report*, *supra* note 10, §§ 0.2 [seems incorrect] at 227 and 5.2 at 259.

31. *TriBar 1998 Report*, *supra* note 5, at 596 n.11.

32. *Legal Opinion Principles*, *supra* note 4, at 833-34.

33. *2012 Report*, *supra* note 10, § 0.3 [is this correct?] at 227.

34. See DUNN, WILLIAM B. & FORTE, JOSEPH PHILLIP, *Loan Closing Opinions and Rating Agencies: Disclosure Not Reliance*, CRE Finance World, Winter 2016, p. 58. <https://crefc.wordpress.com/2016/01/10/loan-closing-legal-opinions-and-rating-agencies-disclosure-not-reliance/> (last visited March 16, 2017); see also *LoCo Report*, *supra* note 11, § 0.3 at 181.

legal opinions now refer to allowing the posting of the opinion on a website maintained to fulfill certain of the requirements under SEC Rule 17g-5.³⁵ The Commercial Real Estate Finance Council has published a best practice proposing that all CMBS pooling and servicing agreements allow for the delivery of documents and materials such as legal opinions directly to the credit rating agencies so long as such documentation is also posted on the 17g-5 website within a set timeframe.³⁶

The Opinion Recipient also often requests that the Opinion Giver permit future lenders and assignees to rely upon the opinion letter. Many Opinion Givers are reluctant to agree to this request because of various concerns including that (i) successors and assigns may not understand Delaware customary practice and therefore may not appreciate the assumptions and qualifications that limit the scope of the opinion letter, (ii) the opinion may be deemed reissued as of the date a future lender or assignee acquires its interest in the loan, (iii) claims may arise in multiple jurisdictions or under the laws of multiple jurisdictions, or (iv) claims may be brought by “rogue” or “vulture” lenders or assignees that buy loans with a view to suing the opinion giver, among others.³⁷

Opinion practice varies considerably among Opinion Givers – some refuse to allow any future parties to rely on the opinion letter, some allow reliance but qualify it in different ways and some permit reliance. When reliance is permitted but with limitations, those limitations generally make clear that the new lender or assignee has no greater rights than the original addressee and has those rights only as of the original date of the opinion letter. An example of such a provision is:

Without our prior written consent, this Opinion Letter may not be used or relied upon by the Lender for any other purposes whatsoever or relied on by any other person, except that this Opinion Letter may from time to time be delivered by the Lender to an assignee for value of all right, title, and interest in and to the Transaction Documents, and such assignee may rely on this Opinion Letter as if it were addressed and had been delivered to it on the date hereof. Nothing in the preceding sentences, however, shall give any person entitled to rely upon this Opinion Letter any greater rights with respect to this Opinion Letter than those of the Lender as of the date hereof, or shall provide or imply any opinion being given with respect to an assignee that depends on the identity or characteristics of the named assignee or other circumstances than those of the original Opinion Letter.³⁸

Finally, an Opinion Recipient might also request that Recipient Counsel or purchasers of loan participation interests be permitted to rely upon the opinion letter. Most commentators believe that such requests are inappropriate under customary practice and should be refused.³⁹

35. 17 C.F.R. § 240.17g-5. This is a rule on conflicts of interest promulgated under the Securities Exchange Act of 1934, adopted in November 2009 by the Securities and Exchange Commission (the SEC) under the Credit Rating Agency Reform Act of 2006.

36. Accessed at http://www.crefc.org/CREFC/Industry_Standards/CREFC_IRP/CREFC_IRP_7.1.aspx?WebsiteKey=148a29c3-4a5a-4a0d-98a7-70be1a37d5a7 (last visited March 16, 2017).

37. FLORIDA REPORT, *supra* note 1, § B at 19.

38. This sample reliance language along with the sample opinions in this article are provided only as examples to illustrate the nature of the particular opinion. In practice, the specific language that Opinion Givers use can vary greatly.

39. See 2012 Report, *supra* note 10, § 5.1(c) at 258; LoCo Report, *supra* note 11, § 0.3 at 181; see also FLORIDA REPORT, *supra* note 1, § B at 19.

C. Role Of Counsel As Opinion Giver

Typically, the opinion letter will identify the Opinion Giver as the Client's counsel. At a minimum, the statement makes clear to the Opinion Recipient that the Opinion Giver is not representing the Opinion Recipient, who should look to its own counsel for advice on the adequacy and meaning of the opinion.⁴⁰

At times, such as when acting as local counsel, the Opinion Giver will characterize its role in some way, such as "special" or "local" counsel. While probably harmless to include, these terms have no settled meaning and are not an appropriate substitute for properly describing the Opinion Giver's relationship to the Client and the Real Estate Financing Transaction. Certainly, the use of these terms does not qualify the diligence required of the Opinion Giver to give the opinions nor the duty of the Opinion Giver to the Opinion Recipient. If the Opinion Giver's limited involvement with the Client warrants a limitation on the Opinion Giver's responsibilities or level of care, such limitations should be expressly stated in the opinion letter through appropriate qualifications or assumptions relating to the facts upon which the opinions are based. Moreover, the absence of words like "special" modifying the word "counsel" should not be construed to imply a broader role, or greater expertise or knowledge, than that stated in the opinion letter. In addition, any such statement of the Opinion Giver's relationship to the Client should be consistent with the lawyer's engagement by that person.⁴¹ Other than in instances where specialized limited legal issues are being considered in the opinion letter, there is no apparent reason, other than psychological comfort for the Opinion Giver, to use labels such as "special counsel" or "local counsel." As one commentator has suggested, the facts defining the Opinion Giver's role are more important than the label.⁴² Indeed, current practice seems to be toward the unqualified label of "counsel" or "counsel in Delaware" for the Opinion Giver.

At times, the Opinion Giver may give opinions with respect to persons other than its Client involved in the same Real Estate Financing Transaction. For example, when the Opinion Giver is representing the borrower in a loan transaction, the lender may also request opinions regarding the guarantors, the guaranty and other guarantor-related documents signed by the guarantors, and the Opinion Giver may agree to render such opinions even though the Opinion Giver is not otherwise representing the guarantors. In that situation, the opinion letter should state the Opinion Giver is not representing those persons; alternatively, the Opinion Giver might agree to represent those persons for the limited purpose of rendering the opinions on behalf of such persons, but not for any other purpose, in which case this should be stated in the opinion letter. Of course, if the latter arrangement is made, the Opinion Giver should also address the potential conflicts of interest inherent in performing even this limited representation on behalf of persons who are not clients of the Opinion Giver.⁴³

The opinion letter often will contain a statement that the Client has consented to issuance of the opinion letter.⁴⁴

40. DONALD W. GLAZER, SCOTT T. FITZGIBBON & STEVEN O. WEISE, *GLAZER AND FITZGIBBON ON LEGAL OPINIONS: DRAFTING, INTERPRETING, AND SUPPORTING CLOSING OPINIONS IN BUSINESS TRANSACTIONS* 73 (3d ed. 2008) [hereinafter "GLAZER"].

41. *2012 Report*, *supra* note 10, § 1.0 at 227.

42. M. JOHN STERBA, JR., *DRAFTING LEGAL OPINION LETTERS* 22 (2d ed. 1988).

43. *See 2012 Report*, *supra* note 10, at 219 & §0.4 at 227.

44. *See* Section I.I *supra* for a discussion regarding the Client consent.

D. Transaction Documents

An opinion letter typically includes a list of the Transaction Documents about which the opinions are given.⁴⁵ For example, the opinion letter might identify a loan agreement, a security agreement, a mortgage, or a promissory note. The important point in most opinions is that the key Transaction Documents are contracts made by the parties to the Real Estate Financing Transaction. Sometimes other Transaction Documents are reviewed for the opinions even though not contractual in nature – for example, UCC financing statements, organizational documents, resolutions, incumbency certificates, and the like. If these differing types of documents (contracts and non-contracts) are to be identified, the Opinion Giver should delineate between the documents about which legal opinions, such as an enforceability opinion, are being given and other documents that are necessary for giving the legal opinions but are not documents about which legal opinions are being given.⁴⁶

On occasion, the Opinion Recipient might request that the Opinion Giver list in the opinion letter, as reviewed, Transaction Documents as to which the Opinion Giver is not providing any opinions and that are not otherwise necessary to support the express opinions given. Such a request is inappropriate.⁴⁷ The Opinion Giver should not be expected to identify as reviewed any documents that are not intended to be the subject of the express opinions in the opinion letter or that are not necessary to support such opinions. However, if any such documents are so identified and reviewed, whether at the request of the Opinion Recipient or at the election of the Opinion Giver, and whether or not identified in the opinion letter as reviewed, the Opinion Recipient should not infer from such review or identification that any opinions on those documents are implied by the opinion letter.⁴⁸

The opinion letter generally will state the meaning of terms used in the opinions, either by defining those terms in the opinions or by referring to definitions found in one or more of the Transaction Documents (e.g., the mortgage). If incorporated definitions are included in Transaction Documents that are not governed by Delaware law, which is increasingly common in Real Estate Financing Transactions, the Opinion Giver should determine that incorporated definitions are used in a manner consistent with Delaware law, take any differences into account, or assume such consistency of meaning. In other words, if the term used in the opinion is defined in the loan agreement, and the loan agreement is governed by New York law, how does the Delaware lawyer know for sure the meaning of that term, in that New York law may affect its meaning?

E. Reliance On Certificates And Other Statements Of Fact Or Laws

The Opinion Giver often obtains from appropriate persons certificates covering factual matters and upon which the Opinion Giver bases its legal conclusions. For example, the Opinion Giver might ask the Client to provide a certificate

45. 2012 Report, *supra* note 10, §1.1 at 228.

46. *Id.* § 1.1(c) at 228.

47. *Id.* § 1.4 (c) at 232.

48. In particular, the limitation to the identified documents is appropriate where the Opinion Giver is local counsel without a long-standing client relationship with the borrower or first-hand involvement in the negotiation of transactional documents. Committee on Legal Opinions, *Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association*, 47 BUS. LAW. 167, 183 (1991) [hereinafter the “Accord”]; see also 2012 Report, *supra* note 10, §1.4 at 231.

identifying any overtly threatened litigation. The Opinion Giver may rely, without further investigation, on information provided in such certificates unless the Opinion Giver has actual knowledge the information is false or the Opinion Giver does not reasonably believe the source is appropriate.⁴⁹

Opinion letters often include statements to the effect that, in addition to identified Transaction Documents, the Opinion Giver has reviewed such matters as are necessary in the professional judgment of the Opinion Giver to render the opinion. Customary practice requires that the Opinion Giver has undertaken a review of what is necessary to render the opinion letter;⁵⁰ therefore, such a statement need not be included in the opinion letter. The Opinion Giver may limit the scope of inquiry to specific documents or other specific items, but such a limitation is effective only if it is explicit. For example, the opinion letter might state, “we have reviewed only the following documents and made no other investigation or inquiry.” Recitation of a list of documents without an express limitation as to the scope of review should not be relied upon by the Opinion Giver as being effective to limit the scope of review. However, limitation of the scope of review as to a given issue – such as “relying solely on our review of the good standing certificate of the Client issued by the Office of the Secretary of State of Delaware, the borrower is in good standing under the Delaware General Corporation Law” – is effective as a limitation of the Opinion Giver’s duty as to the stated issue.

A certificate used for opinion purposes should usually be signed by an individual who is an officer or other representative of the entity as to which the certificate is being given, but not signed by or on behalf of the entity. This is because a certificate signed by or on behalf of the entity would merely be a reiteration of representations made by that entity in the relevant documents.⁵¹

Although the Opinion Giver should not usually rely on certificates that are statements of legal conclusions, rather than facts,⁵² the Opinion Giver may rely on certificates of public officials that are legal conclusions – for example, a good standing certificate issued by the Delaware Secretary of State.

49. 2012 Report, *supra* note 10, § 1.5(a) at 232. Sources vary in their descriptions of what information should not be relied upon, and some appear to expand the field of unjustified reliance to information the user should deduce to be unreliable even when furnished by an otherwise reliable source. Accord §3 states that an Opinion Giver may rely without investigation on information provided by others only if (among other things) the provider of the information “is reasonably believed by Opinion Giver to be an appropriate source for the information” Accord §5 states: “As a general and overarching principle, the Opinion Giver may not rely on information (including certificates or other documentation) or assumptions, otherwise appropriate in the circumstances, if Opinion Giver has Actual Knowledge that the information or assumptions are false or Opinion Giver has Actual Knowledge of facts that under the circumstances would make the reliance unreasonable.” *Legal Opinion Principles, supra*, provides: “Customary practice permits such reliance [on factual information obtained from others] unless the factual information on which the lawyers preparing the opinion letter are relying appears to be irregular on its face or has been provided by an inappropriate source.” *Legal Opinion Principles, supra* note 4, § III.A at 833. The difference between having knowledge that would make reliance unreasonable and the facial appearance of irregularity may be significant.

50. See *RE Guidelines, supra* note 8, § 3.3a at 249 (“Absent qualification, the opinion giver may be presumed to have undertaken such legal research, reviewed such documentation, and investigated such matters as is professionally appropriate to render the opinions given (see BLS Accord § 2). However, any expressly stated limitations as to documents reviewed or the scope of legal and factual inquiry will be given effect.”). Accord, Section 2 says, “[t]he Opinion Recipient may assume that the Opinion Giver has reviewed such documents and given consideration to such matters of law and fact (in accordance with the principles set forth in this Accord) as the Opinion Giver has deemed appropriate, in its professional judgment, to render the Opinion.” Accord, *supra* note 48, at 183.

51. 2012 Report, *supra* note 10, § 1.5(e) at 233; GLAZER, *supra* note 40, § 4.2.3.8 at 618; *Tribar 1998 Report, supra* note 5, at 618.

52. FLORIDA REPORT, *supra* note 1, § G at 23.

Certificates generally should be dated contemporaneously with the closing and, therefore, the date of the opinion letter. At times, however, certificates may have been obtained prior to the issuance of the opinion letter, and the Opinion Giver needs to consider if those certificates should be updated or assumptions added to the opinion letter. Although not every certificate needs to be updated for purposes of issuing the opinion letter, most of the steps to update are easy to take and provide greater comfort to the Opinion Giver that material facts have not changed during the course of preparation, but prior to issuance, of the opinion letter.⁵³

F. Opinions Under Delaware Or Federal Law

An opinion letter in Delaware typically will state it is limited to Delaware law and includes this limitation in the text of the opinion. There is a trend in real estate secured financing opinion letter practice to exclude coverage of federal law except where expressly identified federal law is relevant to the Real Estate Financing Transaction or the parties.⁵⁴ In particular, a request from the Opinion Recipient to include federal law when the Opinion Giver's role is limited to serving as local Delaware counsel is inappropriate.⁵⁵ Federal law sometimes is stated in opinion letters to be included even though, after taking account of the broad exclusions of the kind set forth in most opinion letters, it is difficult to identify any federal law that would be relevant in opinion letters given in most Real Estate Financing Transactions. For these reasons, a request to include federal law in a standard opinion for a Real Estate Financing Transaction is inappropriate.⁵⁶ If any federal law is to be considered, it should be identified and covered expressly; otherwise no coverage of federal law should be implied or generally referred to.

The laws of multiple jurisdictions may need to be considered in the opinion letter, as appropriate. Opinions with respect to entity, transactional or other issues governed by the law of jurisdictions in which the Opinion Giver does not practice may need to be covered by an appropriate assumption as to such law or, if necessary, by engaging other counsel to opine as to such law.

Under customary practice, an opinion letter covers only law that a lawyer in the jurisdiction whose law is being covered by the opinion letter, exercising customary professional diligence, would reasonably be expected to recognize as being applicable to the entity, transaction or agreements to which the opinion letter relates.⁵⁷

If the Client is a regulated entity or participates in government programs, additional limitations may be appropriate if the need for governmental consents or approvals is the subject of an opinion or a necessary predicate to an opinion contained in the opinion letter.

53. See Committee on Corporations, *1989 Report of the Committee on Corporations of the Business Law Section of the State Bar of California Regarding Legal Opinions on Business Transactions*, 45 BUS. LAW. 2169, 2189 (1990) (“[R]easonable prudence does not require that every certificate be updated for purposes of rendering an opinion.”).

54. See *RE Guidelines*, *supra* note 8, § 1.2a at 245.

55. *LoCo Report*, *supra* note 11, § 1.3 at 183; *RE Guidelines*, *supra* note 8, § 1.2a at 295.

56. *2012 Report*, *supra* note 10, § 1.3(b) at 229.

57. This statement of what law is covered follows the formulation set forth in *Legal Opinion Principles*, *supra* note 4, at Section II.B.

G. Assumptions⁵⁸

An Opinion Giver will generally derive the facts that go into a particular opinion from one or more of the following sources: facts identified by the Client or other person in a certificate, facts derived from representations and other statements in the Transaction Documents, and facts assumed by the Opinion Giver. Assumptions are often used because efforts of the Opinion Giver to elicit those facts would not be cost-effective given the relative unimportance of those facts, or the facts would be beyond the professional competence of counsel to know (e.g., the legal capacity of an individual).

Assumptions are made “without investigation,” whether or not the opinion letter so states.⁵⁹ The same principles governing justifiable reliance discussed above with respect to certificates apply as well to assumptions, which form additional factual bases for the opinions expressed in the opinion letter. That is, the Opinion Giver may rely, without additional investigation, on assumptions unless the Opinion Giver has actual knowledge the assumed information is false or will materially mislead the Opinion Recipient. The Opinion Giver may rely on assumptions or statements that are known by the Opinion Giver to be incorrect, but only where the reliance is with the express consent of the Opinion Recipient. For example, for an enforceability opinion on Transaction Documents governed by the laws of a jurisdiction other than Delaware, at times the Opinion Recipient may request that the Opinion Giver assume Delaware law governs notwithstanding the express choice of another governing law in the Transaction Documents.

A related concept addresses misleading opinions.⁶⁰ Section 1.5 of the Real Estate Opinion Guidelines⁶¹ states:

An opinion giver should not render an opinion that the opinion giver recognizes will mislead the recipient with regard to the matters addressed by the opinions given.

There are several assumptions that appear to be generally accepted in customary practice and therefore do not need to be stated in the opinion letter.⁶² Customary practice views these assumptions as implicitly included in opinions rendered by Delaware counsel. However, as with other aspects of opinion practice, many Delaware counsel will expressly state these implicit assumptions in the opinion letter, viewing this as the more cautious approach given that a court outside Delaware might disregard customary practice and look only to the express language of the opinion letter.⁶³

Here are a few (but not all) of what are generally viewed to be implicit assumptions included in all Delaware opinion letters applicable to Real Estate Financing Transactions:

- a. all signatures on documents examined by the Opinion Giver are genuine;

58. For a good discussion of the cost-benefit analysis in opinion practice, see generally, Jonathan C. Lipson, *Cost-Benefit Analysis and Third-Party Opinion Practice*, 63 Bus. Law. 1187 (2008).

59. *2012 Report*, *supra* note 10, §2.3(b) at 234.

60. *Id.* §1.5(b) at 233.

61. *RE Guidelines*, *supra*, note 8, § 1.5 at 245.

62. *See infra* note 120.

63. *2012 Report*, *supra* note 10, §2.1(c) at 234.

- b. all documents submitted to the Opinion Giver as originals are authentic;
- c. all documents submitted to the Opinion Giver as copies conform with the original copies of the documents;
- d. each document reviewed by the Opinion Giver has not been amended or modified in any respect;
- e. any remedy set forth in the Transaction Documents will be availed of in accordance with applicable procedures of law (including sales procedures), in a commercially reasonable manner, and without a breach of the peace;
- f. the legal capacity of all natural persons who are parties to the Transaction Documents; and
- g. any assumptions that are within the scope of customary practice.

Some Delaware Opinion Givers may include some but not all of the implicitly included assumptions in their opinion letters; even so, all implied assumptions should nevertheless be deemed included in the opinion letter.

One assumption attracting increased attention is the assumption of the genuineness of signatures. Most opinion letters assume all signatures are genuine. Opinion Recipients occasionally request that an assumption that signatures are genuine not apply to signatures on behalf of the Client or certain other parties to Transaction Documents. In effect, such a request might be construed to require the Opinion Giver to assure that the signatures of the Opinion Giver's client are not forgeries and that the persons signing are in fact the persons they purport to be. Such an assurance is not an opinion of law but, rather, is a factual matter generally outside of the knowledge and professional competence of the Opinion Giver; and most opinion authorities view such request to be inappropriate.⁶⁴ Even familiarity with the signatory over years of representation may not necessarily support a factual determination that, as a legal certainty, the person is who the person purports to be. As noted above concerning assumptions generally, assuming that the signatures are genuine would be inappropriate if the Opinion Giver knows otherwise, and this should be sufficient comfort to the Opinion Recipient. As a practical matter, however, in Delaware intrastate transactions, some Opinion Givers are willing to exclude the Client from this assumption based on having taken reasonable steps to assure themselves that the signer is the person he or she is represented to be.

Note, too, that assumptions are made "without investigation," meaning those matters within the knowledge of the Opinion Giver without any inquiry or investigation.⁶⁵ This limitation is implicit in all assumptions.

H. Limitations On Delaware Laws And Exceptions To Those Laws

An opinion issued by Delaware counsel addresses only those laws, rules and regulations a Delaware lawyer exercising customary professional diligence would reasonably be expected to recognize as being applicable to the Client, the Transaction Documents or the Real Estate Financing Transaction to which the opinion relates (referred to in this article as the "Applicable Laws").⁶⁶ As discussed elsewhere in this article, if the Client's business is regulated (e.g., a public utility), the Applicable Laws may include laws, rules and regulations related to the regulated business.

64. *Id.* § 2.1(d) at 234; GLAZER, *supra* note 40, at 29.

65. *2012 Report*, *supra* note 10, § 2.1 (b) at 234.

66. *Id.* § 1.3(e) at 231.

Under customary practice, a Delaware opinion is generally held not to cover any federal law⁶⁷ or any laws or ordinances of a subordinate jurisdiction, such as a county or municipality. Moreover, the scope of Applicable Laws will not cover certain specified areas of law, such as securities, bankruptcy, insolvency, tax, admiralty and the like.⁶⁸

At times, the Opinion Recipient will request an opinion that assumes Delaware law will apply to a Transaction Document even though that document expressly elects the governing law of another jurisdiction. Such an opinion should only be requested, and given, when there is reason to believe application of Delaware law is possible or when Delaware counsel is the only counsel for the Client in the transaction and the Opinion Recipient is willing to accept such an opinion rather than requiring the Client to engage counsel in that other jurisdiction. In this case, the assumption is a hypothesis that Delaware law will apply as if the parties had elected substantive Delaware law to govern. This is a so-called “as if” opinion. If providing such an opinion, the Opinion Giver should make clear that no opinion is being given that Delaware law actually could or would apply.

Sometimes the Opinion Recipient will ask the Opinion Giver to hypothesize that the law of another jurisdiction is identical to Delaware law. Such an opinion is essentially meaningless and is not favored in opinion practice.⁶⁹

I. Knowledge

It is appropriate for an Opinion Giver to qualify certain factual components of the opinion analysis by the extent of the Opinion Giver’s knowledge. Typical phrases include “to our knowledge,” “to our current actual knowledge,” “to the best of our knowledge,” “known to us,” “we are not aware of” or “nothing has come to our attention that.”

Current opinion practice recommends that the Opinion Giver define in the opinion letter what is meant by “knowledge”; otherwise, the definition may be left to the imagination of the Opinion Recipient.⁷⁰ In addition, current practice for such a definition focuses on the concepts of “conscious awareness” and on an identified set of persons, often referred to as the “primary lawyer group,” who may have that conscious awareness – for example, the lawyer who signs the opinion letter, together with the lawyers actually working on the transaction. Some Opinion Givers provide for a narrower group and some a larger group. By limiting the scope of the knowledge qualification to the “primary lawyer group,” no additional inquiry should be required beyond the members of that group unless the Opinion Giver is requested, and undertakes, to conduct an inquiry of other lawyers in the Opinion Giver’s firm.⁷¹ By incorporating the knowledge qualification into an opinion, it will not be necessary for the Opinion Giver to undertake an investigation of all other lawyers in the firm or to review all of the firm’s files, nor will it be necessary for the Opinion Giver to undertake an investigation with the Client or with any third parties (e.g., searches of governmental databases).⁷² Generally, the literature suggests that

67. *RE Guidelines*, *supra* note 8, § 1.2a at 245.

68. *2012 Report*, *supra* note 10, § 4.6 at 256.

69. *FLORIDA REPORT*, *supra* note 1, § M at 32.

70. *RE Guidelines*, *supra* note 8, § 3.4 at 249.

71. *2012 Report*, *supra* note 10, § 1.5(c) at 233 & § 4.7 at 257.

72. Keep in mind that generally the knowledge of the partnership is that of the partner acting in a particular matter or other partners who could or should have communicated with that partner. *UNIFORM PARTNERSHIP ACT* § 12. *See also Legal Opinion Principles*, *supra* note 4, § III.B at 833.

“knowledge” is understood by both Opinion Givers and Opinion Recipients not to mean everyone in the firm.⁷³ However, given possible uncertainty, best practice is to define “knowledge” in the opinion letter itself.⁷⁴

Further, as a matter of prudent practice, the Opinion Giver should consider inquiring with the lawyers within the Opinion Giver’s firm who serve as the principal relationship managers for the Client (regardless of whether or not such lawyer otherwise falls within the purview of the “primary lawyer group”) in order to avoid any claims in the future regarding the diligence undertaken in rendering the subject opinion.⁷⁵

J. Signatures

Opinion Recipients anticipate that an opinion is the expression of the professional judgment of the firm issuing the opinion letter, not of the individual lawyer or lawyers who prepared the opinion letter. Accordingly, the opinion letter is signed in the name of the Opinion Giver firm or on its behalf. Of course, if the Opinion Giver is a sole practitioner, the Opinion Giver signs an opinion letter in the Opinion Giver’s own name.

III. DELAWARE ENTITY OPINIONS

In an opinion letter for a typical Real Estate Financing Transaction, the Opinion Giver is usually asked to opine with respect to the Client’s creation, existence and current status as a business entity under the laws of the jurisdiction where the Client is organized. In deference to our colleagues in the Delaware corporate bar, it is beyond the scope of this article to address such opinions in any detail; however, the following observations are offered for some general guidance, particularly as to the opinions or assumptions that are the necessary building blocks for issuing a remedies opinion.⁷⁶

A. Status

In most Real Estate Financing Transactions where the Opinion Giver is acting as local counsel with respect to the Transaction Documents (as opposed to lead counsel with respect to the Client itself or as local counsel giving entity opinions where the Client is a Delaware entity), it is unnecessary to opine about initial filings of documents with public authorities to create the Client entity (a duly formed opinion) or the initial organizational matters relating to events and circumstances at the time the entity was formed (a duly organized opinion), as opposed to its current existence.⁷⁷

73. GLAZER, *supra* note 40, at 530 n.31.

74. The *Dean Foods* case in Massachusetts underscores the need to take certain actions and not simply to rely on definitions but to make a reasonable and prudent inquiry of lawyers in the firm who are actually undertaking litigation for the company. *Dean Foods Co. v. Pappathanasi*, 2004 WL 3019442 at *17-18 (Mass. Super. Dec. 3, 2004); *see also Legal Opinion Principles, supra* note 4, § III.B at 833; *Tribar 1998 Report, supra* note 5, at 664; Georgia Report Section 15.04B cited at GLAZER, *supra* note 40, app. 13 at 13:167.

75. *Legal Opinion Principles, supra* note 4, § III.B at 833.

76. *See infra* Section V (“Remedies Opinion”).

77. *See RE Guidelines, supra* note 8, § 1.5.b.

However, when the Delaware lawyer is acting as lead counsel for the Client, the lawyer is usually requested to give an opinion as to the Client's status where the Client is an entity created under Delaware law. This opinion typically includes three components: the Client has been formed, incorporated or otherwise created *de jure*; the Client validly exists on the date of the opinion; and the Client is in good standing under the applicable requirements of the Delaware Secretary of State. An example of a due formation opinion is:

Borrower has been duly formed and is validly existing and in good standing as a limited liability company under the Delaware Uniform Limited Liability Company Act, 6 Del. C. §18-101, *et seq.*

The first component is the initial creation of the Client under Delaware law. For example, a corporation will have been incorporated by the filing of a certificate of incorporation.⁷⁸ A limited liability company will have been formed by the filing of a certificate of formation. A limited partnership will have been formed by the filing of a certificate of limited partnership. In each case, the Opinion Giver needs to check with the Delaware Secretary of State for the initial filing document in order to determine that the document and the filing comply with the requirements of Delaware law.

The "validly existing" opinion also goes beyond that initial creation filing to opine that as of the date of the opinion the Client still exists in a "valid" way. In other words, the Opinion Giver opines that the Client has not dissolved, consolidated or merged with or into another entity. Accordingly, the Opinion Giver must check with the Delaware Secretary of State for all other filings relating to the Client to make sure no such event has occurred in the life of the Client. The Constituent Documents⁷⁹ of the Client also must be examined to determine whether the Client has a limited duration (often the case for limited partnerships). The Constituent Documents may also identify circumstances under which the Client can be dissolved by the action of its Owners,⁸⁰ (often the case for limited partnerships). To support its opinion, the Opinion Giver may obtain from the Client a certificate stating that the Client has not dissolved, its Owners have not taken any action to dissolve the Client, and no proceeding for involuntary dissolution has been initiated.⁸¹

In addition, certain events can occur during the life of the Client that result in the dissolution of the Client by operation of law. In a partnership, limited partnership, or limited liability company being treated as a partnership for income tax purposes, assignment of more than 50 percent of the interests of the Owners can effect a dissolution for federal income tax purposes.⁸² Of course, the dissolution of a general partnership, limited partnership or limited liability company does not terminate the Client, absent a provision to the contrary in its Constituent Documents. Rather, the Client continues to exist during a winding up of its affairs.⁸³ The Client may therefore continue to validly exist even after dissolution

78. This article does not cover the more involved "due organization" opinion for entities. See Scott FitzGibbon and Donald W. Glazer, *Legal Opinions on Incorporation, Good Standing, and Qualification to do Business*, 41 BUS. LAW. 461 (1986) for a discussion of that opinion.

79. Throughout this article, the term "Constituent Documents" is used to identify the certificate of incorporation, by-laws, partnership agreement, limited liability company agreement or similar governing documents of the Client.

80. Throughout this article, the term "Owners" is used to identify the shareholders, partners, members, beneficiaries or other owners of the beneficial interests in the Client.

81. Some commentators argue that these non-public activities go beyond the scope required for a validly existing opinion, which should be able to be based on public filings alone. See GLAZER, *supra* note 40, at 162-63.

82. Internal Revenue Code § 708.

83. See, e.g., 6 DEL. C. §§ 17-803(b) & 18-803(b); 8 DEL. C. § 278.

but before its affairs have been wound up. On the other hand, the occurrence of dissolution frequently limits the ability of the Client to continue certain undertakings, as its activities are then limited to winding up its affairs. Moreover, the Constituent Documents or Applicable Laws may direct one of the Owners or some other person to be responsible for the winding up, thereby limiting the scope of the authority of the Owners.⁸⁴

For purposes of most of the opinions discussed in this section, the Opinion Giver may confine the opinion to those Constituent Documents known to and reviewed by the Opinion Giver. Otherwise, the Opinion Giver will want a certificate from the Client specifically identifying the Constituent Documents being reviewed for purposes of the opinions and certifying they have not been amended.

Although the “good standing” of the Client will have different meanings in different jurisdictions, in Delaware, good standing relates to the status of the Client’s payment of applicable taxes or other fees and does not relate in any way to the validity of its existence or its due organization.⁸⁵ The Opinion Giver should obtain from the Secretary of State a certificate of good standing, which will be issued as of a particular date. Because of the nature of the good standing certificate and its source, this only applies to those types of business entities that have made a filing or registration with the Secretary of State. Typically, general partnerships, joint ventures, sole proprietorships and grantor trusts do not require such a filing, and a good standing opinion is irrelevant. Note, however, that limited liability partnerships will generally have a filing.⁸⁶ In addition, in states like Delaware where a general partnership can merge with another business entity, a filing is necessary for the general partnership for that purpose.⁸⁷

Because the good standing certificate generally relates to the tax status of the Client, it is important to know on what basis a business entity can lose its good standing status. In Delaware, the entity pays a tax or fee and files an annual report. Accordingly, the Opinion Giver needs to keep in mind that the failure to carry out these actions will cause the entity to lose its good standing status. In that instance, knowing the date by which payments are due is a material concern to the Opinion Giver. For example, if the good standing certificate of the Secretary of State is issued prior to the date by which such performance is due and the opinion is issued after that date, the Client might lose its good standing in the interim. It is for this reason that best practices for Opinion Givers include obtaining the good standing certificate dated as close as possible to the date of the opinion letter. In Delaware, the Opinion Giver can have direct access to the office of the Secretary of State and obtain a good standing certificate dated the same day as the closing of that transaction and the issuance of the opinion. If there is any concern by the Opinion Giver about a possible change of status of the Client, the Opinion Giver should state in the opinion that the good standing opinion is given as of the date of the good standing certificate or include an assumption that there has been no change to the Client’s status since the date of the good standing certificate.

An opinion regarding good standing should be given only in reliance on a public authority document confirming good standing. Such an opinion often is given solely in reliance on public authority documents. Such phrasing limits the duty of the Opinion Giver to make further inquiry. For that reason, many question the value of, and need for, such an opinion.

An opinion that the Client is qualified to do business in Delaware is often requested if the Client is not formed in Delaware.⁸⁸ If the issue of existence is to be addressed in the opinion letter and the Client is not formed in Delaware, it

84. See, e.g., 6 DEL. C. §§ 17-803(a) & 18-803(a); 8 DEL. C. § 279.

85. In some states, e.g., Pennsylvania, the Good Standing Opinion does not go to the tax status of the Client. GLAZER, *supra* note 40, at 168.

86. See, e.g., 6 DEL. C. § 15-1001.

87. *Id.* § 15-902(c).

88. Some of the authorities oppose the request for a qualification to do business opinion as it is not a legal opinion but a factual determination. See GLAZER, *supra* note 40, at 184-85.

may be appropriate to include a statement in the opinion letter as to qualification to do business in Delaware. As a matter of customary practice, the Opinion Giver may rely solely on a certificate of qualification provided by the Delaware Secretary of State, again raising the question of the value of, and need for, such a legal opinion.

B. Power

Opinion letters often include opinions as to the corporate (or other type of entity) power of the Client. An example of a power opinion is:

The Borrower has the limited liability company power to execute and deliver the Transaction Documents.

Such an opinion on corporate (or other type of entity) power supplements, or may even be implicit in, other opinions, such as the authorization opinion. However, it is useful to state the power opinion expressly as a reminder to the Opinion Giver to check applicable organizational documents and law (particularly in the case of certain regulated entities) and as comfort to the Opinion Recipient that the Opinion Giver has considered these issues. This opinion addresses only the legal power of the Client under its Constituent Documents and Applicable Laws and not the financial or other ability to perform. Some commentators have interpreted this as meaning the specified actions are not *ultra vires*.⁸⁹ However, the power opinion does not assure there is no impediment to performance under law.⁹⁰

Some Opinion Recipients request the power opinion include, more broadly, the power of the Client to carry on its business wherever conducted. This is not an appropriate opinion request in a Real Estate Financing Transaction.⁹¹ If such an opinion is given, the Opinion Giver will need to identify the “business” of the Client, usually by reference to a description of the “business” in the Constituent Documents or in a certificate obtained from the Client.

Because commercial real estate secured financings most often involve entities other than corporations, some Opinion Givers refer to “limited liability company power,” for instance. Some practitioners use the phrase “power and authority” instead of just “power.” These phrases generally are interpreted to have the same meaning.⁹²

The power opinion does not mean the transaction or execution of applicable documents has been authorized by the board of directors or other appropriate persons. It does not mean that entering into the transaction by the Client does not violate some law. It simply means the Client has the inherent ability to take the specified actions. Because the power opinion should be viewed in this manner, it is important for the Opinion Giver to draft the opinion appropriately so that the Opinion Giver is limiting this opinion to the Constituent Documents and the Applicable Law giving the Client existence.

Some Opinion Recipients request a statement that the Client has “full power.” This statement should not be given, as “full” may need a review of every conceivable statutory basis for the Client to take the particular action.⁹³

Corporations often have broad powers, making the power opinion relatively easy to give.⁹⁴ However, there may be situations in which an entity’s Constituent Documents limit the entity’s power to a particular project or business. Further,

89. GLAZER, *supra* note 40, at 192.

90. 2012 Report, *supra* note 10, §3.2(a) at 238.

91. *Id.* §§ 3.2(b) at 238, 3.7(b) at 244; *LoCo Report*, *supra* note 11, § 3.2 at 194.

92. 2012 Report, *supra* note 10, § 3.2(c) at 238.

93. *Id.*

94. See, e.g., 8 DEL. C. § 121.

if the entity has been organized as a “special purpose entity” (an “SPE”), there may be further limitations on the power of the entity to act in certain circumstances.

SPE provisions are often encountered in financing transactions where the lender desires to isolate the assets that serve as collateral for the financing from the assets and liabilities of an affiliated parent entity. SPE provisions are also encountered where a pool of loans is being sold to investors as part of a “securitized” financing (whether the pool contains residential or commercial mortgages or other types of financial assets).

In connection with the formation of an SPE, the lender or investors often will require that the entity’s Constituent Documents include SPE provisions. These provisions generally purport, among other things, to deprive the SPE of the capacity to take certain actions (such as engaging in activities other than those specifically authorized) without consent of some third party, such as a lender or an independent director.

If the entity’s Constituent Documents limit its power to a particular project or business, or if the Constituent Documents contain SPE provisions, the Opinion Giver must carefully review the Constituent Documents to determine whether such provisions affect the power of the entity to undertake the Real Estate Financing Transaction. If such provisions disable the entity’s ability to engage in the Real Estate Financing Transaction and such disability cannot be resolved (for example, by elimination of the limitations from the Constituent Documents in accordance with the entity’s Constituent Documents), an opinion regarding the power of the entity to complete the Real Estate Financing Transaction should not be given.

Another instance where power may be constrained is when the Client is governed by some specialized statute applicable to a particular class of business, such as a bank, a utility or an insurance company. Those statutory schemes may circumscribe the power to enter into particular kinds of transactions. Another instance may be where the transaction is of the type that can be *ultra vires*, such as where the Client is guaranteeing another entity’s obligations. In those cases, the Applicable Laws must be analyzed carefully to determine whether applicable tests have been met such that the Client has the corporate power to enter into that guarantee transaction.

C. Authorization

Opinion letters usually include opinions that the necessary corporate (or other entity) actions have been taken and approvals have been received. An example of an authorization opinion is:

All limited liability company actions or approvals by the Borrower necessary to bind the Borrower under the Transaction Documents have been taken or obtained.

Such actions or approvals include any necessary actions taken by the Client’s governing body, such as the board of directors of a corporation.

Two aspects of due diligence are necessary as a threshold matter for giving an authorization opinion: first, identifying the persons who authorize the Client to undertake the transaction; and second, identifying what steps are necessary to carry out the authorization. In both cases, a review of the Client’s Constituent Documents is necessary in order to address these issues.

Once the Opinion Giver has identified the persons who carry out the authorization and the steps for the authorization, the Opinion Giver must examine what actions have been taken to authorize the Client to undertake the transaction in question. In other words, was there a meeting of the board of directors? If so, was it duly noticed and held? Was there a quorum? Were the other formalities in adopting a resolution carried out? Is the resolution part of the minutes of the

corporation? Was the resolution of the directors instead adopted by consent of the directors? Did that process satisfy the requirements under the Constituent Documents and Applicable Laws for adoption by consent? Similar investigation would be undertaken for the authorization activities of a limited liability company, limited partnership or other business entity.

Often, the Client may be owned by one or more other business entities and each of them perhaps owned by one or more business entities, and so on until individuals, whether members, partners, shareholders, or the like, are the owners. Where there are tiers of ownership, the Opinion Giver should make clear the extent to which it has or has not reviewed and verified any necessary consents throughout the tiers of ownership or at specified levels of the organizational hierarchy. In the absence of clarifying language in the opinion letter,⁹⁵ it may not be clear to the Opinion Recipient whether the Opinion Giver is opining only on the authorizing actions taken by the direct Owner of the Client, having assumed the requisite authorizations by all indirect Owners, or has reviewed the authorizations by all indirect Owners. The same issue arises concerning the power opinion discussed above. Unless the opinion is expressly limited, the Opinion Giver must review what is necessary to render the authorization opinion.⁹⁶

In those instances where there are multiple tiers of ownership of the Client, the due diligence discussed in this article with respect to the Client applies equally to direct or indirect Owners that are business entities.

Finally, the Opinion Giver needs to review the authorizing resolution or other action taken to authorize the transaction in question and needs to determine such authorizing action has not been rescinded or revoked in any way. In most instances, the Opinion Giver will obtain from the Client an appropriate certificate certifying the occurrence of the authorizing action in question, such as a certified resolution, and certifying that the authorizing action has not been modified or rescinded and there are no other resolutions relating to the transaction.

The authorization opinion does not apply to third-party or governmental approvals, but only to internal company or other entity approvals regarding the Client.⁹⁷

Some jurisdictions may also have criminal laws that affect the ability of the business entity to undertake actions on its own behalf. In Delaware, for example, the state law version of the RICO Act requires a foreign corporation (meaning a corporation not incorporated in Delaware) to register in Delaware.⁹⁸ Filing under the Delaware General Corporation Law as a foreign corporation is sufficient as a filing under this act.⁹⁹ A foreign corporation that does not file as required by this act may be legally prohibited from owning property in the State of Delaware.¹⁰⁰

95. For example, the opinion letter might list the entity documents for the Client as the only entity documents reviewed for giving the opinions.

96. 2012 Report, *supra* note 10, § 3.3(b) at 239; LoCo Report, *supra* note 11, § 3.3 at 195. The view of the level of required diligence of remote tiers of owners is not uniform. For a statement that authorization at remote tiers may be assumed, see TriBar Opinion Committee, *Third-Party Closing Opinions: Limited Liability Companies*, 61 BUS. LAW. 679, 689 n. 52 (2006):

[T]he opinion preparers may assume, without so stating, that when an approval is given by a member or manager that is not a natural person, the member or manager is the type of entity it purports to be, that it was authorized to approve the transaction, and that those acting on its behalf had the approvals they required. As with any unstated assumption, opinion givers may not rely on this assumption if reliance is unreasonable under the circumstances in which the opinion is given or they know it to be false. [citation omitted] To avoid any misunderstanding, some opinion givers choose to state the assumption expressly.

97. 2012 Report, *supra* note 10, § 3.3(c) at 239.

98. 11 DEL. C. § 1501 *et seq.*

99. 11 DEL. C. § 1510.

100. *Id.*

IV. EXECUTION AND DELIVERY

As discussed in Section V below, the remedies opinion is inherently an opinion that a Transaction Document is enforceable as a contract between the Client and, usually, the Opinion Recipient. Accordingly, all of the requirements necessary for contract formation must be determined to exist or be assumed. One of the essential elements of contract formation is that the Transaction Document has been executed and delivered by the parties. Therefore, the Opinion Recipient will often want an opinion that the Client has executed and delivered the Transaction Documents. An example of an execution and delivery opinion is: “The Borrower has duly executed and delivered the Transaction Documents.”¹⁰¹ Because execution and delivery are formal requirements of contract formation, the “execution and delivery” opinion along with opinions on entity status and organization, entity power, authorization of the transaction, no violation of laws and no required government consents are the building block opinions for the remedies opinion.¹⁰²

For purposes of a Delaware execution and delivery opinion, “execution” means that, to the extent Delaware law governs the execution of the Transaction Documents, the proper Client party, whether an individual or the officer or manager or other person who has signed the Transaction Documents on behalf of a Client entity, has signed the Transaction Documents and, if the Client is an entity, that such person was authorized to execute the Transaction Documents on behalf of the Client.¹⁰³

For purposes of a Delaware execution and delivery opinion, “delivery” means that, to the extent Delaware law governs the delivery of the Transaction Documents, the Client has in some manner given the executed Transaction Documents to the Opinion Recipient with the intent to create a contract. The use of the phrase “execution and delivery” is likely redundant as delivery is a component of execution, but use of the phrase continues.

The execution opinion must be analyzed to assure, as a matter of contract law, that the Transaction Documents have been signed by the party to be bound by the documents. This is a matter for the substantive laws governing the documents and not the law governing the Client.¹⁰⁴ However, given the components of “execution,” such as authorization, the laws governing the Client may also apply, and those laws may differ from the laws governing contract formation. For example, the Transaction Documents might be governed by Delaware law, but the Client is a Pennsylvania entity and the documents might be physically executed in New York. In that case the Opinion Giver must determine the extent to which Delaware law governs the execution component of contract formation.

If the Opinion Giver is present when the Transaction Documents are executed and delivered, giving these opinions is easier, but that often is not the case in Real Estate Financing Transactions. Increasingly, documents are signed and transmitted by electronic mail or other methods, typically outside the presence of the Opinion Giver. Accordingly, the Opinion Giver must use other means to confirm execution and delivery have taken place – for example, the Client could

101. The opinion regarding execution and delivery covers only the execution and delivery of the Transaction Documents by the Client and not by any other parties to the Transaction Documents. In Delaware, it is customary practice for the Opinion Giver to assume execution and delivery with respect to all parties signing the Transaction Documents other than the Client.

102. See *infra* Section V (“The Remedies Opinion”).

103. Execution implicitly incorporates authorization when the signer is an entity. *2012 Report, supra* note 10, § 3.4 at 240; *LoCo Report, supra* note 11, § 3.4 at 196. Note that the implicit assumption of the genuineness of signatures applies to execution by the Client.

104. GLAZER, *supra* note 40, at 227. Section 10.4(i) of the Accord Commentary states that the Opinion Giver should also establish that the applicable state’s laws for the formation of a contract have been met.

deliver a certificate stating the actions taken by the Client to sign and transmit the Transaction Documents to the other party or its agent.

Recording of the Transaction Documents, alone, may not be sufficient to evidence delivery. With respect to execution and delivery in the context of a Delaware Real Estate Financing Transaction, Delaware cases hold that the recordation of an instrument merely creates the “presumption” of delivery.¹⁰⁵

Although the Opinion Giver must review copies of the Client’s signature pages for each of the Transaction Documents opined upon to confirm the Transaction Documents reflect what purports to be a signature by the Client, the Opinion Giver does not need to compare the Client’s signatures on the Transaction Documents to the Client’s signatures contained in a certificate of incumbency or other such certificate provided as part of the closing of the Real Estate Financing Transaction. Rather, the Opinion Giver may assume the genuineness of the signature of the individual who signed the Transaction Documents as the Client or on behalf of an entity Client unless the Opinion Giver has factual knowledge to the contrary. Under customary practice, an assumption to this effect is implicitly included in the “execution and delivery” opinion rendered by Delaware counsel whether or not such assumption is expressly stated in the opinion letter.¹⁰⁶

V. THE REMEDIES OPINION

A. Overview Of The Remedies Opinion

The “remedies opinion,” often referred to as the enforceability opinion, is the key opinion for most Real Estate Financing Transactions. An example of the remedies opinion is: “The Transaction Documents are enforceable against the Borrower in accordance with their respective terms.”¹⁰⁷ This opinion tells the Opinion Recipient that the Transaction Documents are enforceable against the Client.¹⁰⁸ But what does “enforceability” mean in the context of opinions? When

105. *See* *Smith v. May*, 50 A.2d 59, 60 (Del. Super. 1901).

The mere fact that a deed has been recorded is not conclusive evidence of its delivery. *Pennel v. Weyant*, 2 Har. 508; *Guest v. Beeson*, 2 Houst. 267. But generally, in the absence of evidence to the contrary the fact that a deed has been recorded is prima facie evidence of delivery. This, however, may be rebutted by satisfactory evidence that it was not delivered. 9 Am. & Eng. Enc. Law, 159, 160. It was held in *Jamison v. Craven*, 4 Del. Ch. 327, that a different degree of proof of delivery is required in case of a voluntary conveyance from that required in case of a conveyance upon a valuable consideration; that in the former case greater strictness of proof of delivery is required, and that in such case, the recording of a deed is not alone sufficient proof of delivery.

Id. In *Pennel’s Lessee v. Weyant*, 2 Harr. 501 (Del. Super. 1838), the court considered the adoption of such a standard, where a grantor who records a deed is estopped from denying its delivery, absent fraud. *See generally* 2 Harr. 501 (Del. Super. 1838). However, the court ultimately rejected such standard. *Id.* at 508 (“... nor is the fact of recording a deed *conclusive* evidence of the delivery”). Several other 19th century cases also expressly rejected such a standard. *See, e.g.*, *Guest v. Beeson*, 2 Houst. 246, (Del. Super. 1860) (“The mere recording of a deed in the office of the Recorder of Deeds for the county, even by the authority of the grantor, is not of itself, evidence of its delivery.”)

106. *2012 Report*, *supra* note 10, § 2.1 (d) at 234; *LoCo Report*, *supra* note 11, § 3.4 at 197.

107. Note that if the Transaction Documents are not governed solely by Delaware law (e.g., New York law governs all aspects, other than the creation, perfection and enforcement of the mortgage lien), the opinion should take into account that it is only being given to the extent Delaware law applies.

108. It is implicit that the enforceability of the subject documents refers to enforceability against the borrower and not against any other party to the documents.

applied to the Transaction Documents, “enforceability” provides certain assurances that, under the terms of the document and the law of the jurisdiction stated in the opinion, a remedy is available for a breach by the Client of an undertaking in that document.¹⁰⁹

Some hold the view that the remedies opinion need not be given, and should not be requested, in purely intra-state transactions.¹¹⁰ This view is not uniform, however, and while a request for a remedies opinion in an intra-state Real Estate Financing Transaction should not be necessary and is disfavored, it is not an unreasonable request.

The remedies opinion may often state that the Transaction Documents are “legal,” “valid,” “binding” and “enforceable” against the Client. Opinion practice varies in respect of these word choices, but customary practice is that no words other than “enforceable” are necessary for the remedies opinion.¹¹¹ Some commentators have observed that the “valid” or “binding” opinion is actually a separate opinion that is, for the most part, governed by the laws of the jurisdiction governing the Client, while the “enforceable” opinion is governed by the laws of the jurisdiction chosen by the parties in the Transaction Documents.¹¹² While that view may not be shared by most Opinion Givers, it is true the concepts of “valid” and “binding” support the assurance that a contract has been formed.

It is important for the Opinion Giver to keep in mind that while the remedies opinion will almost never¹¹³ be implied in an opinion letter merely because of the inclusion of the so-called “building block” opinions,¹¹⁴ a remedies opinion implies the issuance of the “building block” opinions. If the Opinion Giver is not intending to give each of these opinions, the Opinion Giver should expressly assume the particular opinions not given.

Opinion authorities disagree over the scope of a remedies opinion. At the risk of oversimplification, there are two broad views of the scope of a remedies opinion. One view, held by those subscribing to the so-called “Tribar” approach, believe the remedies opinion means that “each and every” provision of a Transaction Document is enforceable as written.¹¹⁵ The other view, held by those subscribing to the so-called “California” approach, believe the remedies opinion means that the “essential provisions” of a Transaction Document are enforceable.¹¹⁶ In the authors’ estimation, the prevailing view taken in Delaware is the Tribar “each and every” provision approach recommended in the 2012 Real Estate Report.

109. See ARTHUR NORMAN FIELD & JEFFREY M. SMITH, 1 LEGAL OPINIONS IN BUSINESS TRANSACTIONS §6.7 at 127 (3d ed. 2014) [hereafter “FIELD”].

110. See, e.g., *RE Guidelines*, *supra* note 8, § 1.2 (“In particular, opinions from borrower’s counsel in intrastate transactions (or in a multistate transaction for which the lender has retained its own local counsel for the purposes of advising it) with respect to the enforceability of loan documents prepared by the lender normally should not be necessary and may not be cost justified.”).

111. *2012 Report*, *supra* note 10, § 3.5(a) at 241 n.28.

112. See Laurence G. Preble, *The Remedies Opinion Revisited: A Primer for Real Estate Lawyers*, 33 REAL PROP. PROB. & TR. J. 63 (1998).

113. However, see *infra* Section VIII (“Mortgage Lien Creation”), a creation opinion may be viewed as including an implied, though limited, remedies opinion.

114. The “building block” opinions are generally understood to include the entity opinions discussed in Section III above, the execution and delivery opinions discussed in Section IV above, and the no violation of laws opinion discussed in Section VI below.

115. *Tribar 1998 Report*, *supra* note 5, at 619-621; *1998 Mortgage Loan Opinion Report*, *supra* note 6, at 153.

116. State Bar of Cal., Real Prop. Law Section & L.A. Cnty. Bar Ass’n, Real Prop. Section, *Legal Opinions in California Real Estate Transactions*, 22 REAL PROP. PROB. & TR. J. 373, 393; see also *Toward a National Legal Opinion Practice: The California Remedies Opinion Report*, 60 BUS. L. 907 (2005).

That said, the authors believe it would be preferable for the scope of a remedies opinion, at least with respect to opinions in Real Estate Financing Transactions, to cover the “essential provisions” in the Transaction Documents, and not each and every right and remedy. Certainly this represents the correct approach in the cost-to-benefit analysis described in the Guidelines.¹¹⁷ However, in the absence of clear guidance either nationally or for Delaware, an Opinion Giver should cautiously approach this issue of the scope of a remedies opinion.

Although the remedies opinion provides assurance the contractual provisions are enforceable under Applicable Laws, thereby affording the legal right to pursue a given remedy, the remedies opinion does not address procedural actions necessary to enforce a remedy.¹¹⁸ For example, the remedies opinion does not address the need of the Opinion Recipient to take certain actions to comply with applicable court rules or law at the time of exercising a remedy.

B. The Elements Of The Remedies Opinion

The remedies opinion implicitly includes three elements: (i) a contract has been formed, (ii) a court will give effect to the stated remedies in the event of a breach by the Client of at least “essential” undertakings, and (iii) certain laws will qualify the extent to which a court will enforce those remedies.¹¹⁹

First, the Opinion Giver must be satisfied the contracts represented by the Transaction Documents have been formed.¹²⁰ Of course, this means the remedies opinion should only be given with respect to Transaction Documents that are in the nature of contracts. As discussed in Section II.D above, some documents – UCC financing statements, certificates, affidavits and the like – are not contracts and therefore not the proper subject of certain opinions.¹²¹ Accordingly, the Opinion Giver will analyze the relevant laws governing whether a contract has been formed under Delaware law and whether, based on the facts expressed or assumed, those legal requirements have been satisfied.

Second, the Opinion Giver must be satisfied a court will give effect to the remedies stated in the Transaction Documents if the Client breaches at least the “essential” undertakings in those Transaction Documents. Accordingly, the Opinion Giver will review the stated remedies and make a legal determination of whether those remedies will be available against the Client.

Third, as discussed further below, the remedies opinion addresses the scope to which remedies will be enforceable. The remedies opinion will be limited by certain qualifications, both expressed and implied, that may render as unenforceable by a court an undertaking or a remedy contained in the Transaction Documents.

The remedies opinion for the Delaware opinion letter discussed in this article is given on the basis of Delaware law; but that does not mean the Opinion Giver must consider every law in effect in Delaware on the date the opinion is given. Keep in mind the laws in question are those that lawyers who render legal opinions with respect to the type of transaction involved would reasonably recognize as being applicable to transactions of the nature covered by the Transaction Documents and the role of the Client in the Real Estate Financing Transaction (for example, a borrower). As discussed

117. *RE Guidelines*, *supra* note 8, § 1.2 at 244.

118. *2012 Report*, *supra* note 10, § 3.5(a) at 241.

119. *FIELD*, *supra* note 109 at 125.

120. Note that the Opinion Giver will have already determined or assumed the “building block” opinions. *See supra* notes 102, 114 and accompanying text.

121. *See supra* Section II.D (“Transaction Documents”).

elsewhere in this article, certain types of laws are generally excluded in this analysis, and others will be included only under certain circumstances (e.g., the borrower is a regulated entity such as a public utility).

Some laws, however, are implicitly excluded from the scope of an opinion of Delaware counsel unless such laws are specifically addressed in the opinion letter.¹²² Opinion Recipients should consider whether under their particular circumstances they want to require coverage in an opinion as to the impact of any excluded law. However, the Opinion Recipients should only request comfort regarding implicitly excluded laws that is reasonable under the circumstances. The Opinion Giver should exercise diligence and do what is reasonably necessary to provide coverage of requested excluded laws, including consultation with lawyers with relevant experience or expertise, as appropriate, in cases where the Opinion Giver does not otherwise have the expertise to render such opinions. The Opinion Giver should not generally be required to seek guidance from experts in every specialized field of law that might be implicated by the undertakings in a Transaction Document-- such an effort would never be cost-justified (even in very large transactions). Furthermore, the Opinion Giver may wish to exclude other areas of law from the opinion by expressly excluding them in the opinion letter. For example, the Opinion Giver may wish to specifically exclude from the scope of the opinion certain laws that may affect the Client's business, such as (for example) laws, rules and regulations overseen by the Delaware Bank Commissioner.¹²³

Although, as discussed earlier in this article, implied opinions should not be read into an express opinion, the opinion authorities generally agree that some opinions will be implied as part of the remedies opinion. The two most important opinions potentially implied in a remedies opinion are usury and choice of law. Most authorities agree the remedies opinion always covers usury except (i) when usury is expressly excluded from the scope of the remedies opinion, (ii) where usury is expressly addressed in a separate opinion, or (iii) if compliance with usury laws is assumed. If there is a separate usury opinion, the remedies opinion will be read as having excluded any opinion on usury.¹²⁴ On the other hand, an opinion on the effectiveness of the choice of the law governing the Transaction Documents being opined on is generally not implied in a remedies opinion unless otherwise expressly stated.¹²⁵

Note that the remedies opinion addresses "undertakings" in the Transaction Documents. These can mean many things, but fundamentally the undertakings to which the remedies opinion refers are those affirmative actions the Client is required to take and those prohibited actions the Client is not to take. Because undertakings are affirmative (or negative) acts or omissions, provisions in a Transaction Document that are not "undertakings" (e.g., representations or warranties) are not the subject of the remedies opinion.

C. Qualifications For Narrowing The Scope Of The Remedies Opinion

All remedies opinions are qualified by certain limitations and exclusions ("Qualifications"), whether implied or expressly stated in the opinion letter. An entire article could be written on the topic of Qualifications and the competing authorities on the "proper" way to approach these in the opinion letter. Such a discussion is beyond the scope of this article, which addresses the basics.

122. See *supra* Section II.H ("Limitations on Delaware Laws and Exceptions to Those Laws") for a list of laws that are not covered under customary practice by an opinion issued by Delaware counsel unless such laws are expressly addressed in the opinion letter.

123. See *infra* Section V.F ("Additional Qualifications").

124. 2012 Report, *supra* note 10, §§ 3.5(d) at 242, 3.10(a) at 248.

125. *Id.* §§ 3.5(c) at 241, 3.9(c) at 246; cf. RE Guidelines, *supra*, note 8, § 4.9 at 257.

The Opinion Giver should, as a general rule, expressly state the Qualifications in the opinion letter. However, customary practice implicitly includes certain Qualifications in all opinion letters, whether stated or not.¹²⁶ The two most important of these implicit Qualifications are the bankruptcy exception¹²⁷ and the equitable principles limitation.¹²⁸ Nevertheless, most Opinion Givers follow customary practice and expressly include the bankruptcy and equitable principles Qualifications when giving a remedies opinion.¹²⁹

Also, the Opinion Giver can follow a few different approaches with respect to inclusion of qualifications. Until fairly recently, most opinion practitioners would list each Qualification to be included – the so-called “laundry list” approach. More recently, opinion practice has incorporated the so-called “generic” Qualification, which attempts to subsume all potentially listed qualifications into one general Qualification. Not surprisingly, many Opinion Givers include both the “generic” Qualification and a “laundry list” of Qualifications in the same opinion letter.

D. The Bankruptcy Exception And The Equitable Principles Limitation

1. The Bankruptcy Exception

The bankruptcy exception excludes from the scope of the remedies opinion the effects of bankruptcy and similar creditor’s rights laws. The Qualification therefore is less about the enforceability of particular Transaction Documents than about the effect on the Transaction Documents if these laws apply, even if the laws are applied to persons other than the Client. For example, the bankruptcy of another person could affect the Client. Whether or not expressly stated, and whether or not the wording of the exception includes reference to any or all of these issues, this exception includes (to the extent these issues otherwise might be covered in the opinion letter): (i) the federal Bankruptcy Code, including, among others, matters of turnover, automatic stay, avoiding powers, fraudulent transfer, preference, discharge, conversion of a non-recourse obligation into a recourse claim, limitations on *ipso facto* and anti-assignment clauses, and the coverage of prepetition security agreements applicable to property acquired after a petition is filed; (ii) all other federal and state bankruptcy, insolvency, reorganization, receivership, moratorium, arrangement and assignment for the benefit of creditors laws affecting the rights and remedies of creditors generally (not just creditors of specific types of debtors); (iii) all other federal and state bankruptcy, insolvency, reorganization, receivership, moratorium, arrangement and assignment for the benefit of creditors; (iv) state fraudulent transfer and conveyance law; (v) state insolvency law; and (vi) judicially developed doctrines relevant to any of the foregoing law, such as substantive consolidation of entities.

126. For a general discussion of including exceptions, see TriBar Opinion Committee, *Special Report of the TriBar Opinion Committee: The Remedies Opinion - Deciding When to Include Exceptions and Assumptions*, 59 Bus. L. 1483 (2004); see also, G. Merel, et al., *Common Qualifications to a Remedies Opinion in U.S. Commercial Loan Transactions*, 70 Bus. L. 121 (2014/2015).

127. An example of the bankruptcy exception is: “The effect of bankruptcy, insolvency, fraudulent transfer, reorganization, receivership, moratorium, and other similar law affecting the rights and remedies of creditors generally.”

128. An example of the equitable remedies exception is: “The effect of general principles of equity, whether applied by a court of law or equity.”

129. *2012 Report*, *supra* note 10, §§ 4.1(b) at 251, 4.2(a) at 252.

Although Delaware customary practice does not generally include federal laws within the scope of an opinion, the bankruptcy exception is included as a matter of customary practice and because the bankruptcy exception also applies to state insolvency laws. In referring to federal law concerning bankruptcy and related matters, an opinion letter should not be read to limit the exclusion of federal law stated elsewhere in the opinion letter.¹³⁰

2. The Equitable Principles Limitation

The equitable principles limitation addresses the fact that while particular provisions of a Transaction Document may be enforceable under Delaware law, a court may not give effect to those provisions in certain factual circumstances where the interests of equity dictate otherwise. For example, a court may determine, in certain circumstances, equity dictates that the withholding of consent is unreasonable, even though the Transaction Documents provide that consent may be given or withheld in a party's sole and absolute discretion. As another example, a court may decline to give effect to a contractual provision, such as when the alleged breach is not material and has not resulted in sufficient damage to the party seeking enforcement.

Whether or not expressly stated, and whether or not the wording of the exception includes reference to any or all of the listed items, this limitation includes principles: (i) governing the availability of specific performance, injunctive relief or other equitable remedies that generally place the award of such remedies in the discretion of the presiding court; (ii) affording equitable defenses (e.g., waiver, laches and estoppel) against a party seeking enforcement; (iii) requiring reasonableness, diligence, good faith and fair dealing in the entering into, performance and enforcement of a contract by the party seeking its enforcement; (iv) requiring consideration of the materiality of (a) the Client's breach and (b) the consequences of the breach to the enforcing party; (v) requiring consideration of the impracticability or impossibility of performance at the time of attempted enforcement; (vi) affording defenses based upon the unconscionability of the documents or the enforcing party's conduct; and (vii) limiting the effectiveness, validity or enforceability of waivers of any of the foregoing. This exception states an expansive concept, not limited to the Transaction Documents themselves or to acts and omissions occurring at any particular time, whether at, before or after formation of the contract.

E. The "Generic" Qualification

1. What Is The "Generic" Qualification

The so-called "generic" Qualification is better understood if called a "general" Qualification. An example of the generic Qualification is:

Certain provisions of the Transaction Documents may not be enforceable; nevertheless, subject to the other limitations set forth in this opinion letter, any such unenforceability will not render the Transaction Documents invalid as a whole or preclude (i) the judicial enforcement in accordance with the applicable law of the obligation of the Borrower to repay as provided in the Note the principal, together with interest thereon (to the extent not deemed a penalty); (ii) the acceleration of the obligation of the Borrower to repay such principal, together with such interest, upon a material default by the Borrower in the payment of such principal or interest; and (iii) the foreclosure in accordance with applicable law

130. *Id.* § 4.1(b) at 252.

of the lien on and security interest in the collateral created by the Security Documents upon maturity or upon acceleration pursuant to clause (ii) above.

This Qualification generally covers laws that may prevent one or more (or even all) of the remedies in the Transaction Documents from being enforceable as written. The obvious concern of the Opinion Recipient would be there is no meaningful remedies opinion remaining after applying this Qualification. Therefore, the generic Qualification goes one step further and gives assurance to the Opinion Recipient that certain remedies remain available despite this Qualification. In the context of a Real Estate Financing Transaction, the generic Qualification assures the Opinion Recipient of the ability (i) to obtain judicial enforcement of the Client's obligations under the Transaction Documents to repay the principal and interest of the loan; (ii) to accelerate principal and interest in the event of a material default under the Transaction Documents; and (iii) to foreclose on the real property security under those circumstances.¹³¹

Importantly, however, even these assurances remain subject to other Qualifications, such as the bankruptcy exception and the equitable principles limitation, as well as other Qualifications the Opinion Giver may specify. Implicit in the generic Qualification is that it is subject to the bankruptcy exception and equitable principles limitation, whether expressly stated or not. This understanding of the Generic Qualification has been adopted generally by the national real estate bar.¹³²

The principal rationale for the generic Qualification is that most Opinion Recipients and Recipient Counsel already understand that not every contractual remedy will be enforced as written and that these remedies have been drafted by them for their own benefit. It is therefore not cost-effective to require the Opinion Giver to parse through each and every stated remedy for specific enforceability as written, so long as certain essential remedies are available.

The statement that foreclosure is an available remedy provides assurance that some type of foreclosure will be available, but not assurance that any particular type of foreclosure (such as through a scire facias proceeding) will be possible. In addition, assurance that the security instrument may be foreclosed relates to the content of the security instrument. It does not assure that any particular holder of the instrument, whether the addressee or a person permitted to rely on the opinion letter as an assignee or successor of the addressee, satisfies requirements of applicable law to pursue the remedy. Thus, for example, if the Opinion Recipient is not a proper assignee of the mortgage, the assurance that the instrument can be foreclosed should not be read as meaning that the purported holder of the mortgage is qualified to foreclose it. The Opinion Giver also should be aware of the ethical issues attendant to disclosing remedies not covered properly in Transaction Documents as initially drafted by counsel for the Opinion Recipient.¹³³ For example, if a mortgage does not have requisite language to permit it to be foreclosed, which could be a material advantage to the mortgagor Client, the Opinion Giver's ethical duties to the Client may not allow the Opinion Giver to raise this deficiency in the opinion without the Client's consent.

The Opinion Giver should consider separate treatment in the generic Qualification of any guaranty. The language of the generic Qualification intends to give comfort to the Opinion Recipient with respect to certain basic

131. The "generic" Qualification is sometimes confused with the "practical" realization Qualification. But the latter is out of favor among opinion practitioners largely because it is too broad and without settled meaning. *2012 Report*, *supra* note 10, § 4.3 (g) at 254-55. For a broader discussion, see Kenneth P. Ezell, Jr., et al., *The Remedies Opinion and Customary Diligence - The Real Estate Secured Transaction Approach: Is It Consistent with Customary Non-Real Estate Legal Opinion Practice?* 43 REAL PROP. TRUST & ESTATE L.J., 1 (Spring 2008).

132. *2012 Report*, *supra* note 10, § 4.3 at 252-255.

133. See *RE Guidelines*, *supra* note 8, § 1.1.b.

remedies available in the event of a “material breach” by the Client. However, a “material breach” standard does not adequately address exceptions to enforcement of a guaranty (e.g., an unenforceable waiver of the defense of material modification of the underlying debt), which can result in the complete exoneration of the guarantor, leaving nothing to enforce. As a result, such exceptions, where they exist, should be separately stated to the extent not otherwise covered by the bankruptcy exception and equitable principles limitation.

2. Inappropriate Modifications Of The “Material Default” Language

Sometimes an Opinion Recipient, faced with numerous opinion exceptions that significantly diminish the strength of the remedies opinion, will respond with a request that the “material default” language discussed above be modified to include the following: “Notwithstanding the exceptions noted above, the Opinion Recipient will achieve the practical realization of the benefits intended to be conferred by the Transaction Documents.” This broad “practical realization” language is wholly different from the more limited version described above. Unlike the more limited version, which is subject to the bankruptcy exception and the equitable principles limitation, this version of the “practical realization” Qualification seeks to override *all* Qualifications, requiring the Opinion Giver to conclude there are no Qualifications preventing the Opinion Recipient from enjoying the “benefits” of the Transaction Documents. This form of opinion request is inappropriate and should not be requested or given.¹³⁴

F. Additional Qualifications

As mentioned, when the remedies opinion includes the “generic” Qualification, an Opinion Giver also might include specific exceptions and qualifications. Often these are included either to bring some peculiarity of Delaware law to the attention of the Opinion Recipient (e.g., the limitation of attorneys’ fees to reasonable fees not to exceed 20 percent) or simply out of caution. As discussed earlier, a court outside Delaware might interpret the opinion letter differently from Delaware customary practice, notwithstanding the implicit election of Delaware law as governing interpretation of an opinion letter applicable to a Delaware Real Estate Financing Transaction. Accordingly, most practitioners will list these additional Qualifications in the opinion letter rather than rely on customary practice.

Other Qualifications one might see in the opinion letter relate to any provision of the Transaction Documents that:

- a. is unenforceable as a result of public policy;¹³⁵
- b. purports to treat as conclusive those certificates, determinations and other matters which the Transaction Documents state are to be so treated;
- c. purports to affect persons who are not parties thereto;
- d. purports to entitle lender to apply payments to liabilities as lender may determine;

134. 2012 Report, *supra* note 10, § 2.3(b) at 253.

135. Most Opinion Givers include among the Qualifications an exception to the remedies opinion for matters that violate public policy. Under customary practice, such a Qualification is implicit in the opinion letter and, whether or not stated expressly, will be read into the Qualifications.

- e. purports to appoint attorneys-in-fact;
- f. purports to apply any lien or other security interest to after-acquired property;
- g. purports to require prepayment prohibitions, prepayment fees, prepayment penalties, exit fees or similar fees or penalties ;
- h. purports to grant powers of sale or rights to partial foreclosures or non-judicial foreclosures;
- i. purports to make the terms and conditions of the Transaction Documents covenants running with the land;
- j. purports to establish a definite time period as reasonable notice to the Client in connection with the notice of sale, disposition or other intended action by any secured party under the Delaware UCC; or
- k. purports to create an absolute assignment of rents and leases, rather than a collateral or conditional assignment.

Obviously, each Opinion Giver will analyze what additional specific Qualifications should be included in a particular opinion letter.

VI. NO VIOLATION

Other opinions given in the world of corporate finance could be requested by Opinion Recipients in Real Estate Financing Transactions, although most of these are practically valueless given both the other opinions already included in the typical opinion letter and the nature of borrowers in Real Estate Financing Transactions. One example is the “no violation” opinion to the effect that execution, delivery and performance of the Transaction Documents by the Client does not violate other agreements of the Client, the Constituent Documents of the Client, or Applicable Laws. An example of the no violation opinion is:

The execution and delivery by the Borrower of, and performance of its payment obligations in, the Transaction Documents, do not: (i) breach any existing obligation of the Borrower under any of the agreements and documents [specified in Attachment [___] hereto] [known to us] or (ii) violate the Borrower Organizational Documents. The execution and delivery by the Borrower of, and performance by the Borrower of its payment obligations in, the Transaction Documents, neither are prohibited by applicable provisions of law comprising statutes or regulations duly enacted or promulgated by the State (“Statutes or Regulations”) nor subject the Borrower to a fine, penalty, or other similar sanctions, under any Statutes or Regulations.

In the past, such opinions were designed for large corporate financings and were rarely requested in Real Estate Financing Transactions. As with other opinions that seem inappropriate or inapplicable for most Real Estate Financing Transactions, these opinions now are requested routinely in Real Estate Financing Transactions, notwithstanding that they originated in transactions involving public companies and frequently seem like odd requests in the Real Estate Financing Transaction context.

A. No Violation Of Other Agreements

If given, a no violation opinion as to other agreements of the Client should be limited to written agreements and amendments or modifications that are reflected in written documents, as the Opinion Giver is unable to review oral contracts and unwritten amendments.¹³⁶ Various authorities give some guidance on what aspects of the specified other agreements are material to this particular opinion. For example, the Accord provides that a no violation opinion “does not extend to any action or conduct of the Client that a Transaction Document may permit but does not require, except to the extent that such action or conduct takes place simultaneously with, and the Opinion Giver has actual knowledge that it constitutes part of, the consummation of the Transaction.”¹³⁷ Similarly, while a no violation opinion as to other agreements of the Client might make sense in a corporate setting (e.g., the borrower has agreed to a negative pledge in another agreement), where the borrower in a Real Estate Financing Transaction is likely to be a newly formed SPE, one is hard pressed to determine what “other agreements” would be relevant.

B. No Violation Of Constituent Documents

A no violation opinion with reference to the Client’s Constituent Documents is unnecessary and therefore inappropriate to request if the opinion letter also includes opinions on power and authorization. In other words, if the Opinion Giver is already opining that the Client has the necessary power to enter into and perform the Transaction Documents and has authorized such execution, delivery and performance, there is no independent purpose served by an opinion that these actions do not violate the Client’s Constituent Documents. Although this position is sound and defensible, the no violation opinion with respect to Constituent Documents has, unfortunately, become customary in Real Estate Financing Transactions and is generally not objected to by most Opinion Givers.

C. No Violation Of Laws

Although requested less frequently than opinions on no violation of other agreements or Constituent Documents, Opinion Recipients occasionally request an opinion to the effect that the execution and delivery of the Transaction Documents do not violate laws. Such an opinion seems on the one hand duplication of the remedies opinion (could a Transaction Document be enforceable if it violates Delaware law) and on the other hand overly broad. It is therefore appropriate to limit any no violation opinion to violation of laws with respect to “performance” of payment obligations under the applicable documents. In a typical Real Estate Financing Transaction, it is not at all obvious which laws are, in practice, relevant to overall performance of each and every covenant in a loan document. Limiting the opinion analysis to the payment obligations therefore is consistent with both practice and expectations.¹³⁸

Opinions stating the Client is in compliance with laws are infrequently requested or given in Real Estate Financing Transactions. The Business Law Guidelines provide that the Opinion Giver should not be asked for a comprehensive opinion that the Client is not in violation of any applicable laws or regulations.¹³⁹ The Real Estate Opinion Guidelines

136. *Accord*, *supra* note 48, Commentary § 15.3.

137. *Id.* § 15(d).

138. *2012 Report*, *supra* note 10, § 3.7(b) at 244; *LoCo Report*, *supra* note 11, § 3.13 at 222.

139. *Business Law Guidelines*, *supra* note 7, § 4.3 at 880 (2002).

take the concept further and provide that “any legal compliance opinion should be expressly and specifically limited to specific laws.”¹⁴⁰ If requested, these opinions should be limited in scope to specific statutes, such as healthcare licensing requirements or specific permitting laws.

D. “No Conflicts” Opinion Contrasted

Sometimes an Opinion Recipient, in addition to a no violation opinion, also requests a “no conflict” opinion. A “no conflict” opinion states that the execution, delivery and performance by the Client of the Transaction Documents do not conflict with other agreements, Constituent Documents or laws. Under customary practice, it is unreasonable for the Opinion Recipient to insist that a no violation opinion be expanded to include a “no conflict” opinion. This is because the concept of “no conflict” is unreasonably broad; it arguably extends to implicit or indirect conflicts, which are essentially unknowable by the Opinion Giver. Under customary practice, use of the term no conflicts should be read as meaning “no violation” or “no breach or default.”¹⁴¹

VII. NO GOVERNMENTAL APPROVALS REQUIRED

Another accretion onto opinion practice for Real Estate Financing Transactions has been the “no governmental approvals required” opinion. This opinion addresses whether there are governmental consents, approvals, authorizations, actions, filings or registrations that must be obtained or made in order to make effective the Client’s execution and delivery of the Transaction Documents.

The “no governmental approvals required” opinion is fundamentally an opinion concerning contract formation and should be limited to those governmental approvals necessary for the execution and delivery of the Transaction Documents by the Client. In this context, “execution and delivery” means the signing and delivery of the Transaction Documents sufficient to meet the applicable law for the formation of a contract. Although occasionally the Opinion Giver is asked to include in this opinion a reference to “performance of the Client’s obligations under the Transaction Documents,” this request is not favored as it is tantamount to a “compliance with laws” opinion. Such a request should be avoided except in circumstances where the Opinion Recipient has reason to believe the subject entity is a regulated entity, in which case the request should be limited to certain specified laws likely to have a material effect on the entity’s ability to perform its obligations under the Transaction Documents.¹⁴²

Some Opinion Givers seek to limit the “no governmental approvals required” opinion to the Opinion Giver’s knowledge. However, because this opinion is solely a conclusion as to an issue of law, a knowledge qualifier, if included, will not have the effect of limiting this opinion in any manner. As a result, under customary practice, if this opinion is limited to the knowledge of the Opinion Giver, it has the same meaning and requires the same diligence as if it were not limited to the knowledge of the Opinion Giver. This does not mean, however, that the Opinion Giver should not, when appropriate, rely on assumptions and certificates, or even its own knowledge, regarding facts necessary to give the opinion.

140. *RE Guidelines*, *supra* note 8, § 4.3 at 254.

141. GLAZER, *supra* note 40, at 493-96 (including discussion of TriBar view that “no conflict” should be deemed to mean “no breach or default”).

142. *RE Guidelines*, *supra* note 8, § 4.3 at 254.

Finally, as with the “no violation of law” opinion (see discussion in Section VI), when the particular Client is governed by some unique set of laws, an analysis of the Client itself may be necessary to determine whether any such governmental approvals are needed. For example, the Client may be a bank, an insurance company, or a utility subject to regulations that could affect its right to enter into a specific transaction.

VIII. MORTGAGE LIEN CREATION

With increasing frequency, Opinion Recipients request opinions in Real Estate Financing Transactions with respect to the creation of the mortgage lien by the mortgage included in the Transaction Documents. It is generally understood that opinions on title, creation, perfection and priority of liens are not appropriate opinion requests, and of course those aspects of the mortgage are adequately covered by title insurance in Delaware. On the other hand, even though title insurance addresses the issue, it is not necessarily unreasonable (at least when the Opinion Giver is acting as local Delaware counsel and the lender does not have Delaware counsel) to request an opinion on the legal sufficiency of the security document, as a form, to create a lien and that the security document is in proper form to be recorded in the Recorder of Deeds office.¹⁴³

The mortgage lien creation opinion includes more or less three components: (i) the mortgage is in proper form for recordation in the land records; (ii) the particular mortgage satisfies requirements to create a mortgage lien on the real property collateral; and (iii) proper recording of that mortgage is sufficient to establish notice to third parties of the lien on the real property collateral and that other recordings are not necessary for that purpose.

A. Proper Form Of Mortgage Instruments For Recordation

The mortgage lien creation opinion states that the mortgage is in proper recordable form under Applicable Laws. In other words, strictly speaking, does the mortgage comply with the applicable legal requirements of the Recorder of Deeds in the applicable county of the State of Delaware where the Opinion Giver understands or is advised by the Opinion Recipient the document will be recorded? The difficulty with such an opinion is that many of the requirements for recordable form are set forth in local, uncodified rules and often depend on variable facts. For example, if a Recorder of Deeds in Delaware requires a certain font size or certain margins in documents to be recorded, the font or margin size of the document the Opinion Giver reviews for the opinion may change when the same document is reproduced for execution and recording. However, for purposes of a Delaware opinion letter, local laws are excluded from the applicable Delaware laws on which the Opinion Giver is opining.¹⁴⁴ Accordingly, the review for purposes of issuing the opinion should be limited to the requirements of state law; the particular requirements of a Recorder of Deeds, if not part of state law, may be disregarded. For this reason, title insurance is the more appropriate method of giving comfort to the Opinion Recipient on the issue of proper form for recording.

B. Creation Of A Mortgage Lien

The second component of the mortgage lien creation opinion addresses the creation of the mortgage lien on the real property collateral. Many authorities on national opinion practice for Real Estate Financing Transactions believe it is

143. *2012 Report*, *supra* note 10, § 3.6(a) at 242.

144. *LoCo Report*, *supra* note 11, § 3.6(b) at 211.

inappropriate to request an opinion that the mortgage actually creates a valid lien.¹⁴⁵ In part, this is because of the belief that, as noted above, matters concerning the creation, perfection and priority of a lien on real property interests are covered by title insurance in most states, including Delaware. These authorities believe the more appropriate request is for an opinion focusing on the legal sufficiency of the form of the mortgage to “create” a lien. While these authorities are correct in stating what should be the better practice, it is possible to give an opinion on the actual creation of the lien provided that appropriate assumptions are made by the Opinion Giver and the mortgage in question satisfies all of the necessary requirements. For example, if the mortgage is governed solely by Delaware law and the Opinion Giver assumes that the mortgagor has a sufficient interest in the real property collateral for a security interest to attach and therefore be created, the Opinion Giver could proceed to opine that, upon proper execution and delivery, the mortgage in question creates a mortgage lien on that real property collateral. In addition, it would not be controversial for the Opinion Giver to opine further that the proper recording of that mortgage in the applicable Recorder of Deeds office provides notice to third parties of the existence of that lien. On occasion Opinion Recipients (particularly those who are not real estate lawyers but live in the world of commercial finance) will request an opinion that the recordation “perfects” the lien. Because there is no statutory basis in Delaware (or in most jurisdictions) to “perfect” the lien of a mortgage, this opinion is generally phrased with respect to “notice” of that lien. Of course, even if the term “perfect” is used, it will be read to mean that “notice” has been given by recordation.¹⁴⁶

C. Sufficiency Of Recording

A third component of a mortgage lien creation opinion may address the sufficiency of recording the document. In other words, recording the mortgage in the applicable Recorder of Deeds office is the only recording necessary to publish notice of the lien, and no additional recordings, including future recordings, would be necessary to “perfect” and maintain that lien. If the Opinion Giver includes this third element in the opinion, the Opinion Giver should keep in mind some aspects of the applicable collateral. If the subject real property collateral includes fixtures under Delaware law, the opinion given applies equally to the mortgage as a lien on those fixtures. Accordingly, any applicable aspects of Article 9 of the Delaware Uniform Commercial Code should be examined by the Opinion Giver. In addition, the Opinion Giver should consider that while no further recording may be necessary to maintain the lien on the identified real property, the mortgage may contain provisions to spread its lien to after-acquired property, as to which additional recordings might be necessary under Delaware law. Likewise, applicable statutes of limitations may inhibit what otherwise appears to be the perpetual nature of this particular opinion.

IX. NO LITIGATION

The “no litigation” opinion is a statement to the effect there is no outstanding litigation involving the borrower, the collateral or both.¹⁴⁷ It is a controversial opinion for many reasons, not least of which is that it is not actually a legal

145. 2012 Report, *supra* note 10, § 3.6(a) at 242.

146. FLORIDA REPORT, *supra* note 1, § C at 156.

147. For a general discussion, see Donald W. Glazer and Arthur Norman Field, *No-Litigation Opinions can be Risky Business*, 14 BUS. L. TODAY 37 (July/August 2005). See also R. THOMPSON, REAL ESTATE OPINION LETTER PRACTICE § 4.17 at 141 (ABA Book Publishing, 2d ed. 2009).

opinion. Rather, it is a statement of fact intended to give assurance to the Opinion Recipient of the absence of certain events. As with any other negative assurance statement contained in an opinion letter, opinion authorities view such a request as inappropriate.¹⁴⁸ The request is especially inappropriate where the Opinion Giver serves as local counsel in Delaware and is opining on certain security documents involving Delaware property.¹⁴⁹ Notwithstanding its inappropriateness and essential meaninglessness, Opinion Recipients often request it. In essence, this opinion makes the Opinion Giver a party to the transaction by providing factual representations to the lender, even though the borrower will be making the same representations in the loan Transaction Documents.

In any event, opinion practice has evolved over more recent years such that the “no litigation opinion” is usually stated as a confirmation of the results of a search performed by the Opinion Giver of applicable court records. This makes the opinion no more than a statement of search results that the Opinion Recipient or Recipient Counsel could undertake themselves or that could be given to the Opinion Recipient by the Client and therefore seems meaningless.

Finally, opinion practice has developed to the point where this “no litigation” statement is expressly phrased as a factual confirmation and often placed in a separate section of the opinion letter rather than included among the opinion paragraphs. However, it is not clear whether such phrasing or placement changes the liability of the Opinion Giver should the confirmation be incorrect.

X. CONCLUSION

As detailed at the beginning, this article serves as an introduction to opinion practice for Real Estate Financing Transactions in Delaware and to give guidance on how to determine which opinions are appropriate to give (or request) and the diligence necessary to give them. In addition, this introduction serves to guide recipients of such opinions from Delaware counsel in how to read and interpret the opinions under Delaware customary practice. Although not the purpose of this article, perhaps it may initiate further discussions among Delaware opinion counsel and result in the Delaware State Bar Association taking action to memorialize what is customary practice in Delaware, thereby providing a persuasive Delaware-centric statement of policy counsel may rely upon in giving and interpreting Delaware opinions.

148. See FIELD, *supra* note 109, at 231 (“The initial position of many opinion preparers is that the subject should be covered by company representations and not by an opinion There is sensible concern that an opinion that merely repeats a client’s representation may appear to a court to provide more information than is intended and thereby unfairly increase the opinion giver’s exposure to claims.”). See also The Corp. Comm. of the Bus. Law Section of the State Bar of Cal., 1989 *Report of the Comm. on Corp. of the Bus. Law Section of the State Bar of Cal. Regarding Legal Ops. in Bus. Transactions*, §§ IV.B at 2177-78, IV.D.4 at 2196 (1990); *TriBar 1998 Report*, *supra* note 5, at 665.

149. *LoCo Report*, *supra* note 11, § 3.11 at 217.

DELAWARE'S ACCESS TO JUSTICE COMMISSION: PROGRESS OF THE CIVIL COMMITTEES

The Honorable Karen L. Valihura, Amy A. Quinlan and Katherine J. Neikirk,*

I. BACKGROUND AND FORMATION OF THE DELAWARE ACCESS TO JUSTICE COMMISSION

A. Why Have A Commission?

Access to Justice Commissions have been formed nationwide to provide a coordinated approach to addressing issues that may impede accessing justice.¹ Through collaboration and the sharing of assets and information, Access to Justice Commissions, comprised of different stakeholders, can develop a comprehensive understanding of the barriers to accessing justice that arise in states' civil justice systems.

Over the past two decades, Delaware has had a number of access to justice initiatives, although minimal cohesion between those initiatives has resulted in a patchwork of varied approaches to address the access to justice issues. Many of these initiatives focused on the gap in legal services available to address the needs of Delaware's lower income citizens. This gap often is referred to as the "justice gap."² Recognizing the need for leadership and effective coordination of efforts in Delaware to respond to the unmet legal needs of low and moderate income people, the Supreme Court of the State of Delaware established the Delaware Access to Justice Commission.³ The Commission's mandate is to identify barriers to the judicial system in Delaware and to develop recommendations to improve access to justice for Delaware's citizens.

1. Early Efforts To Address The Justice Gap

Delaware has a strong history of support for access to justice. Efforts such as the Delaware Supreme Court Fairness for All Task Force and the Delaware State Bar Association's Access to Justice Committee have done important work

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1. The number of ATJ Commissions nationwide continues to grow with currently 39 in existence including Virgin Islands, Puerto Rico, and D.C. A.B.A., *ATJ Commissions Directory and Structure*, ABA, https://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/atj-commissions/commission-directory.html (last visited Aug. 30, 2017).

2. SUBCOMMITTEE ON THE EFFICIENT DELIVERY AND ADEQUATE FUNDING OF LEGAL SERVICES TO THE POOR, REPORT OF THE SUBCOMMITTEE ON THE EFFICIENT DELIVERY AND ADEQUATE FUNDING OF LEGAL SERVICES TO THE POOR 7-8 (Delaware Access to Justice Commission 2017) [hereinafter *Funding Report*].

3. Amended Administrative Order, *In re Delaware Access to Justice Commission*, Strine, C.J. (Del. Dec. 15, 2014), <http://courts.delaware.gov/supreme/docs/ATJ-Order-2014Dec15.pdf> [hereinafter Amended Order].

on issues related to *pro se* litigants' ability to access the courts, funding for civil legal aid service providers, and support for *pro bono* initiatives. The lack of resources to serve adequately those in poverty has been a problem for decades. More recently, concerns have spread to the unmet need of those who are above the federal poverty guidelines, but who do not have the means to afford legal assistance.

Studies done to measure the unmet need for legal services demonstrate that, despite great effort, states, including Delaware, have failed to meet the needs of their lower income citizens. For example:

- The Legal Services Corporation's ("LSC") 2009 report, "Documenting the Justice Gap in America," found that of those who sought legal assistance from LSC grantees, 50% were turned away due to a lack of resources. That same LSC report found that state studies completed from 2000-2009 consistently show that 80% of the eligible population's civil legal needs are not being met;⁴
- The 2013 Current Population Survey, a joint effort by the U.S. Bureau of Labor Statistics and the U.S. Census Bureau, estimated Delaware's poverty population to be approximately 123,000. In 2015, the three organizations that are supported by the Combined Campaign for Justice —Community Legal Aid Society, Inc. ("CLASI"), Delaware Volunteer Legal Services ("DVLS"), and Legal Services Corporation of Delaware ("LSCD")—provided services to more than 10,000 individuals;⁵
- In 2013, CLASI sought to collect data on unmet legal needs with the patient population of Westside Family Healthcare. Those patient surveys revealed that a large proportion of respondents have unmet legal needs that may have adverse impacts on their health. In this survey, 60.6% of survey participants reported housing concerns (similar to the 2008 survey), but only 1.5% reported meeting with an attorney to discuss these concerns;⁶ and
- A 2009 Delaware Supreme Court Fairness for all Task Force report found that the majority of self-represented litigants surveyed in Delaware's Justice of the Peace and Family Courts reported that they could not afford an attorney.⁷

2. The Current Landscape

More recently, the Commission's Subcommittee on the Efficient Delivery and Adequate Funding of Legal Services to the Poor (the "Funding Subcommittee") estimates that from a total population of just under 946,000 in 2015,

4. LSC, *Documenting the Justice Gap in America. The Current Unmet Civil Legal Needs of Low-Income Americans* 12 (2009), http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

5. Delaware Bar Foundation 2018 IOLTA Grant Application, CLASI Application 3, 5-7, 13 [hereinafter CLASI Application]; Delaware Bar Foundation 2018 IOLTA Grant Application, DVLS Application 21-22 [hereinafter DVLS Application]; Delaware Bar Foundation 2018 IOLTA Grant Application, LSC Application 24-25 [hereinafter LSC Application].

6. CLASI, *Medical-Legal Partnership Pilot Project. Project Pilot Period: April 1, 2013-September 30, 2013. CLASI's Final Report to the Delaware Healthy Mother and Infants Consortium* 5, <http://www.declasi.org/wp-content/uploads/2015/04/2013-MLP-Pilot-Study-Final-Report.pdf>.

7. DELAWARE SUPREME COURT, DELAWARE COURTS: FAIRNESS FOR ALL TASK FORCE 22 (2009), <http://courts.delaware.gov/docs/FAIRNESSFINALREPORT.pdf>.

approximately 140,000 Delawareans were eligible for free legal services under the 125% poverty level standard, while over 260,000 Delawareans would be eligible for free legal services applying the 200% poverty level standard.⁸ This does not include the number of people who are above the federal poverty level guidelines, but do not have the resources to afford legal assistance.⁹ Yet, the Funding Subcommittee concluded that Delaware's legal aid organizations have the resources to serve the civil legal needs of only one-eighth of Delaware's low-income population.

Delaware's current fiscal landscape suggests that the situation is not likely to improve in the near future. The longstanding appropriation for Delaware's legal aid service providers was eliminated in the FY 2018 Budget Act, but other funding was earmarked for fiscal year ("FY") 2018 only. Future appropriations are uncertain. In addition to the operating budget appropriation, the State has provided funding through the Grant-in-Aid Act ("GIA"), which funds non-profit agencies and other non-state entities. Unfortunately, there were 20% across-the-board budget cuts in the FY 2018 GIA. While funding has decreased, the need for legal services has not. The recently released 2017 Justice Gap Report found that low income Americans are receiving inadequate or no legal help for 86% of their civil legal problems.¹⁰ We have no reason to believe that Delawareans are faring better.

B. Establishment Of The Delaware Access To Justice Commission

1. Background

The Delaware Access to Justice Commission (the "Commission") was created on the recommendation of an exploratory committee convened by Justice Jack B. Jacobs. The exploratory committee, comprised of judicial officers, representatives of civil legal aid organizations and the Bar, and private attorneys, met for the first time in September 2013 and agreed that there was a need for a statewide, coordinated effort to combat the barriers Delawareans face to accessing justice.

The Delaware Supreme Court entered an order on November 13, 2013 establishing the Commission, effective as of January 1, 2014 (the "Order"), for an initial two-year period.¹¹ The Commission was charged with providing a coordinated approach to investigating and addressing gaps and critical needs related to accessing justice in Delaware. With Justice Jacobs' retirement in 2014 and the appointment of Chief Justice Leo E. Strine, Jr. in that same year, the Commission's development temporarily was suspended as leadership transitioned.

2. The Amended Order

Once Chief Justice Strine and Justice Karen L. Valihura were appointed to the Supreme Court in February and July of 2014 respectively, the momentum for establishing the Commission was re-established. On December 15, 2014, Chief Justice Strine signed an amended order (the "Amended Order"), bringing together a group of private citizens who could bring an independent perspective on important issues of justice and to make valuable recommendations to all

8. *Funding Report*, *supra* note 2, at 8.

9. *Id.*

10. LSC, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans* 6 (2017), <http://www.lsc.gov/media-center/publications/2017-justice-gap-report>.

11. Administrative Order, *In re Delaware Access to Justice Commission*, Jacobs, J. (Del. Nov. 13, 2013).

relevant stakeholders. The Amended Order charged the Commission with initially studying and making recommendations to address:

Whether resources devoted to providing legal services to the poor are deployed effectively, whether there would be gaps in funding regardless of whether resources are deployed optimally, and creative means to close any gaps;

The difficulties that confront lawyers who wish to provide legal services to clients of ordinary means and to do so in a manner that enables them to run their law firms in a profitable, ethical, and sane manner;

Means to increase the pool of qualified legal advisors to help litigants of limited means, such as increasing pro bono service by in-house counsel and by members of the Bar who are not litigators, and considering whether forms of limited representation should be authorized in critical areas of need;

Rationalizing and coordinating the efforts of the various Courts in helping pro se litigants, including by considering broadening the role of the law libraries to make them a central resource in the provision of services to pro se litigants in all courts; and

Identifying the causes of the stark disparity between the percentage of Delawareans who are black and the percentage of those incarcerated in Delaware's prisons who are black, and recommending measures to ensure that this disparity does not result from racial discrimination and to reduce any inequities that are not justified as a matter of sound criminal justice policy.¹²

The Amended Order required the Commission to establish the following subcommittees to assist in carrying out its mission and operations on the civil side:

- (i) the Subcommittee for the Efficient Delivery and Adequate Funding of Legal Services to the Poor;
- (ii) the Subcommittee on Judicial Branch Coordination in Helping Pro Se Litigants; and
- (iii) the Subcommittee on Promoting Greater Private Sector Representation of Underserved Litigants.¹³

The work of each of these Subcommittees is described below. To avoid conflicts of interest, the Amended Order provided that judges, staff, and employees of the State could participate on the Subcommittees, but solely as non-voting members.¹⁴ Further, the Amended Order provides: "Any recommendations by the Commission shall be made in the name of the Commission only, and not of the individual members or the institutions by which they are employed."¹⁵

The members of the Commission and its Subcommittees attended a kickoff meeting on December 15, 2014. At the meeting, Chief Justice Strine, Justice Valihura, and Commission co-chairs, Yvonne Takvorian Saville, Esquire and

12. Amended Administrative Order, *supra* note 3. This last area concerns the Criminal Justice System and is not addressed in this article, which concerns only the Commission's work as it relates to the civil justice system in Delaware.

13. *Id.* § 4.

14. *Id.* § 5.

15. *Id.* § 7.

Gregory B. Williams, Esquire, made introductory remarks. Those remarks were followed by an overview of other states' commissions, provided by Steve Grumm, American Bar Association Director of the Resource Center for Access to Justice Initiatives. Bryan A. Stevenson, Executive Director of the Equal Justice Initiative, also discussed racial disparities in criminal justice systems, as Delaware's Commission, unlike most states, also considers criminal, in addition to civil, issues.

3. The Process

Immediately following their formation, the Subcommittees started gathering information, focusing on the availability of resources and identifying any gaps in services. Each Subcommittee targeted its approach based on its mission. Over the past two years, the groups conducted their analysis, met to discuss their findings, and debated issues to reach their recommendations. The three civil Subcommittees have completed their analysis and their final recommendations have been submitted to the Commission, which issued a report to the Supreme Court this summer.

II. THE FUNDING SUBCOMMITTEE

The Funding Subcommittee extensively studied the justice gap in Delaware.¹⁶ Many of its findings are discussed in the Introduction. Its report observes that the “justice gap is more than a philosophical ideal.”¹⁷ Rather, “[t]he legal issues that people face can have life altering implications.”¹⁸ These real life issues may include rental, eviction, and housing issues, domestic violence, child custody, support and alimony issues, and issues relating to government benefits, to name just a few.

A. Funding Subcommittee Goals And Objectives

The scope of this Subcommittee's charge was:

- Analyze the efficiency of the delivery of legal services by Delaware organizations that provide such services to low-income people;
- Suggest areas where that efficiency might be improved;
- Determine whether there would be funding gaps even if existing resources were used in the most efficient manner; and
- Identify and recommend sources of increased funding for Delaware's legal aid organizations.

16. The Members of this Subcommittee were: (i) Voting Members—Suzanne Grant (Co-Chair), Donald J. Puglisi (Co-Chair), Rick Alexander, Esq., Richard Heffron, the former Honorable Jack Jacobs, Fred Sears, and Vincent Thomas, Esq.; (ii) Non-Voting Members—the Honorable Karen Valihura, the Honorable Tamika Montgomery-Reeves, William Sudell, Jr., Esq., Tom Cook, Jamie Johnstone, Kyle Baranski, Brian Maxwell, Michael Morton, and Spencer Price; and (iii) Reporters—Evelyn Nestlerode, Nathan Emeritz, Esq., Katherine Neikirk, Esq., and Wali Rushdan, II, Esq.

17. *Funding Report*, *supra* note 2, at 5.

18. *Id.*

B. Background—Delaware’s Legal Aid Network

By way of background, a fundamental part of Delaware’s legal aid network is its three non-profit legal service organizations: CLASI, LSCD, and DVLS. In addition, the Delaware Courts’ Online Citizen Help Center and the Legal Help Link provide general guidance and information about access to legal representation through the legal aid organizations.

CLASI is a private, non-profit law firm established in 1946 by members of Delaware’s legal community in response to the need for civil legal services for people unable to afford private attorneys. CLASI provides legal services in each of Delaware’s three counties to low-income clients and assists them with housing, public benefits, consumer, immigration, and family law problems. CLASI staff also assist elderly and disabled people, as well as those who have been victims of housing discrimination. CLASI also engages in community outreach by making legal services available in institutions, shelters, hospitals, nursing homes, senior centers, and client’s homes if they are unable to travel to a CLASI office.

In 2015, CLASI handled 2,729 cases and presented 103 legal education workshops to approximately 4,300 citizens.¹⁹ Also in 2015, CLASI:

- Assisted 159 clients, affecting at least 474 household members in housing matters, including evictions, access to housing programs, and housing quality issues;
- Prevented eviction for 50 households, keeping 157 people, including 88 children, from becoming homeless;
- Provided advice or representation to 305 victims of domestic violence;
- Represented 15% of the victims who filed for Protection From Abuse (“PFA”) orders (and those clients were successful in 85% of their trials);
- Assisted 210 clients with public benefits problems, providing help to 295 children living in client households; and
- Assisted 108 clients with Medicaid and Medicare problems, helping 288 household members.

This is not an exhaustive list of CLASI’s 2015 activities.

In 2016, CLASI handled 2,705 cases.²⁰ Among them, CLASI attorneys and paralegals assisted 277 clients, affecting at least 687 household members in housing matters, including evictions, access to housing programs, and housing quality issues. CLASI represented 461 households headed by single women with children. This figure represents 31% of CLASI’s total client caseload.²¹ Also in 2016, CLASI assisted 69 clients with Medicaid and Medicare problems, helping 162 household members. CLASI assisted 367 elderly clients with housing, consumer, and income maintenance matters. In 2016, CLASI provided advice or representation to 336 victims of domestic violence in Kent and Sussex Counties, and

19. *Funding Report*, *supra* note 2, at 11.

20. CLASI Application, *supra* note 5, at 13.

21. *Id.* at 6.

CLASI's assistance affected 916 household members, including 523 children. In 2016, CLASI conducted 124 community legal education presentations and reached approximately 8,712 people throughout Delaware.²² Again, this list is not an exhaustive description of CLASI's work in 2016.

LSCD assists Delawareans with bankruptcy petitions, consumer finance problems (including repossessions, deceptive trade practices, fraud, debt collection activities, and fair credit reporting actions), housing problems (including eviction, foreclosure, unsafe conditions, code violations, and utility cut-off), and unemployment benefit programs. LSCD receives a grant from the Legal Services Corporation through an appropriation from Congress. LSCD initially was created to receive federal funding that, because of federal restrictions, would not have been available to other legal aid organizations. In 2015, LSCD provided legal services in over 1,420 cases, helping over 3,850 people.²³ Roughly one-third of these cases involved consumer finance issues, with the remaining two-thirds involving housing issues, including many landlord-tenant cases and mortgage foreclosure cases.

In 2016, LSCD provided services in almost 1,400 cases (cases that were both open during and closed in 2016), assisting over 4,000 Delawareans.²⁴ Services were provided in an additional 356 cases that were open in 2016 and which remained open at year-end.²⁵ More than 41% of the cases handled in 2016 were in the consumer or finance area. Of these, more than 68% involved bankruptcy, collections, or repossessions.²⁶ Approximately 55% of the cases involved housing issues, with the overwhelming majority of those being private landlord-tenant cases or mortgage foreclosures.²⁷ LSCD attorneys have provided mortgage foreclosure assistance to Delawareans and have attended every mediation session in New Castle, Kent, and Sussex Counties since the mandatory Superior Court Mediation Program's inception. LSCD has provided direct representation to homeowners at these mediation sessions—to over 1,200 individuals. The remainder of the cases were of the income maintenance variety.

In 1981, the Delaware State Bar Association established DVLS to fill a void created by severe cutbacks in the federally funded LSCD. DVLS began accepting cases in April 1982. Today, DVLS pro bono volunteers total approximately 900.²⁸ DVLS assists with: PFA and other family law matters for domestic violence victims, private housing matters, custody, visitation, divorce cases, and estate planning. In 2015, 3,396 individuals received representation, advice, or referral through DVLS and the Legal Help Link.²⁹ In the same period, pro bono attorneys closed 538 cases and provided more than 2,300 hours of service. DVLS staff attorneys closed 219 cases and logged over 2,000 hours of service. In calendar year 2016, 3,826 individuals received representation, advice, or referral through DVLS programs and the Legal Help Link.³⁰

22. *Id.* at 11.

23. *Funding Report*, *supra* note 2, at 12.

24. LSC Application, *supra* note 5, at 24-25.

25. *Id.* at 25.

26. *Id.*

27. *Id.*

28. DVLS Application, *supra* note 5, at i.

29. *Funding Report*, *supra* note 2, at 13.

30. DVLS Application, *supra* note 5, at 21.

DVLS manages the Legal Help Link, a telephone call center with a centralized intake system designed to serve Delaware's indigent population. Created in 1997, the Legal Help Link allows clients to call one telephone number to determine if they qualify to receive legal services from Delaware Law School's Civil Clinic or one of Delaware's three primary legal service providers: DVLS, CLASI, or LSCD.³¹

The introduction of the Legal Help Link constituted a significant improvement for Delaware residents seeking legal advice. Today, the Legal Help Link receives approximately 30,000 calls each year and completes between 2,000 and 4,000 referrals annually. While those numbers are impressive, they mask the Legal Help Link's steadily increasing costs, inefficiencies in delivering legal services to qualified Delaware residents, and the inability to provide Delaware-specific online legal services to an increasingly connected world.

In FY 2015, the Legal Help Link sought additional funding due to a dramatic increase in employing law clerks to answer calls and complete intakes and referrals and a decrease in the availability of work-study law students to assist. DVLS reduced the Legal Help Link's staffing. DVLS has spent significant time exploring ways to use technology to supplement the Legal Help Link, increase access to justice, and eventually provide cost efficiencies to the Legal Help Link.

Two other organizations play an important role in Delaware's legal aid network—the Delaware Bar Foundation (the “Bar Foundation”) and the Combined Campaign for Justice (“CCJ”). The CCJ, which began in 1999, is a coordinated effort by the three legal aid organizations to raise contributions from Delaware's legal community. The CCJ has been successful, as the total annual giving in recent years is in excess of \$1 million.

The Bar Foundation is a non-profit Delaware corporation which receives both IOLTA and non-IOLTA funding. Funds derived from the Interest on Lawyers' Trust Accounts (“IOLTA”) program support legal services to the indigent in Delaware.³² The program is administered by the Bar Foundation and governed by the Delaware Supreme Court. Contributions to the Bar Foundation outside of the IOLTA program fund all aspects of its mission.

The Bar Foundation evaluates grant applications from legal aid organizations and makes funding recommendations to the Delaware Supreme Court. For fiscal years 2013-2017, the Bar Foundation received \$600,000.00 from the State through a line item in the State Budget. The Bar Foundation awarded these funds to Delaware's three legal aid organizations. The longstanding appropriation for Delaware's legal aid service providers was eliminated in the FY 2018 Budget Act, but other funding (\$540,000.00) was earmarked for FY 2018 only.³³

The Bar Foundation has been working with its legal service provider partners and an outside vendor to address the issues the Legal Help Link faces. The Bar Foundation is now in the early stages of designing a Delaware-specific web portal with an online intake system to allow Delaware residents to determine whether they qualify for legal aid by answering a series of questions online. The web portal also will provide additional information about Delaware legal services, links to the existing websites of Delaware's legal services providers, and useful references to forms and content available from the Delaware Court System, as well as other helpful information.

31. The authors thank Ryan C. Cicoski, Esquire for providing this information on the Legal Help Link.

32. The IOLTA program was first authorized on September 29, 1983 by an Order of the Delaware Supreme Court. The program's success depends upon the close cooperation of Delaware's legal and financial communities. The IOLTA fund is comprised of interest accruing on lawyers' aggregated escrow accounts that contain client deposits which are small in amount or held for a short period of time. The interest collected on participating accounts is transferred to the Bar Foundation and then distributed in the form of grants to agencies that promote and improve legal services to the poor.

33. Fiscal Year 2018 Appropriation Act, H.S. 1 for H.B. 275, Gen. Assemb. § 58(b) (Del. 2017).

A review of an initial prototype of this system has occurred, and it is anticipated that a basic version could be launched before the end of the year on both computers and mobile devices. After launch, a marketing campaign will roll out to create awareness of the new system and how qualified Delaware residents can access it. In the years ahead, the Bar Foundation will work closely with the Delaware Courts, Delaware's legal services providers, and many others to add additional capabilities, content, and functionality. In the end, the hope is to create a much improved service for those who desperately need it.

C. Funding Subcommittee Findings

The Funding Subcommittee concluded that, given their resources, the three legal service organizations are effective and efficient due to a high degree of coordination that has eliminated duplicating services. Any consolidation among the three legal service providers will not likely result in any cost savings due to their already high level of coordination. In addition, the Bar Foundation, in conjunction with its annual grant application process, has sought to ensure that there are no overlapping services or other inefficiencies in the provision of services. On the other hand, it concluded that it may be possible to achieve certain operational efficiencies through common payroll, accounting, technology support, grant writers, and fundraising efforts.

Even with improvements on efficiencies in the legal aid system, the Subcommittee believes "the justice gap will remain large."³⁴ In a May 2017 report to the Bar Foundation, DVLS stated that in FY 2017, it was forced to turn away 2,073 cases for indigent Delawareans due to a lack of resources.³⁵ DVLS faces serious need, particularly in the family law area (including custody cases).

Funding sources have been stressed. For example, interest on lawyers' trust accounts is an important source, but record low interest rates and variability in rates make it an unpredictable source of funding. Delaware law firms and individual Delaware Bar members, through their contributions to the CCJ, already are among our nation's leaders in providing funding to Delaware's legal service organizations. The CCJ recently has added a full-time development director with the goal of increasing funding.

Delaware's legal aid organizations have worked hard to secure other public funding, including federal funding. Delaware's legal aid organizations actively have sought funding from grants, contracts, and pass-throughs provided by various State agencies. Delaware's \$12.00 per capita legal aid funding is in excess of the national average.³⁶

The report notes that compared with other states, Delaware's funding sources are more limited.³⁷ It observes: "Sources of legal aid funding that have been successfully tapped in other states but are either untapped or used to a minimal extent in Delaware include: court filing fees or fines; *pro hac vice* fees; *cy pres* rule or statute; annual Bar dues; and foundation and other private support."³⁸

Finally, the report observes that legal aid to low-income people is a societal issue, requiring support beyond members of the legal community.

34. *Funding Report*, *supra* note 2, at 2.

35. DVLS, address to the Board of the Bar Foundation (May 24, 2017).

36. *Funding Report*, *supra* note 2, at 19.

37. *Id.* at 21.

38. *Id.*

D. Funding Subcommittee Recommendations

The Funding Subcommittee's recommendations include:

- The legal aid providers may derive operational efficiencies by using a common party for payroll, accounting, technology support, grant writing, and fundraising;
- Consideration should be given to selecting the best-in-class portal triage system and best-case management system for use across all three service providers;
- While improvement of the current system is under review, the pace of that consideration and technology implementation needs to be accelerated greatly;
- The Delaware Courts should establish internet portals and stand-alone kiosks to facilitate litigant access to court services and provide real-time assistance for navigating the litigation process;
- With the addition of a full-time development director, the CCJ should be able to increase its funding support to legal aid organizations by increasing the percentage of Delaware Bar members who contribute to the campaign, improving the retention rate of those who currently contribute and increasing the average contribution made by contributing members;
- Untapped sources of funding to support Delaware's legal aid organizations include an increase in *pro hac vice* fees; allocation of class action residual ("*cy pres*") funds to legal aid organizations, and foundation and other private sector support for funding legal aid organizations; and
- To improve the efficiency of and increase funding available to organizations that provide legal aid to low-income Delawareans, coordinated and effective leadership will be required from the legal aid organizations themselves, the Courts, the Delaware Bar, and the Commission.

III. SUBCOMMITTEE ON JUDICIAL BRANCH COORDINATION IN HELPING PRO SE LITIGANTS³⁹

A. Pro Se Subcommittee Objectives

The objectives of the Subcommittee on Judicial Branch Coordination in Helping Pro Se Litigants ("Pro Se Subcommittee") were:

39. The members of this subcommittee were: (i) Voting Members—Lewis H. Lazarus, Esq., (Chair), I. Connor Bifferato, Esq., Curtis P. Bounds, Esq., Bernice Edwards, Jason C. Jowers, Esq., Leslie C. Leach, Claudia Pena Poretti, and Gerald I. H. Street, Esq.; (ii) Non-Voting Members—the former Honorable Kim E. Ayvazian, the Honorable Kenneth S. Clark, Jr., the Honorable Peter B. Jones, the Honorable Bonita Lee, and the Honorable Lynne M. Parker; and (iii) Reporters—Addie P. Asay, Esq., Kathryn Coombes, Jody Jacobetz Huber, Esq., Alda Monsen, Amy A. Quinlan, Esq., and Kara M. Swasey, Esq.

- Examine whether the judiciary effectively is coordinating its approach to helping pro se litigants;
- Explore ways the Courts can coordinate their pro se assistance efforts more effectively and consider conversion of currently underutilized law libraries into pro se assistance centers; and
- Consider whether Delaware should allow limited legal representation in specific areas where litigants have difficulty obtaining affordable legal services and there is a compelling human need, such as cases involving evictions or family law.⁴⁰

B. Pro Se Subcommittee Findings

Pro se litigants represent themselves in court without the assistance of an attorney. This means they must determine, without a lawyer, how to file or respond to a case, where to file a case, how to obtain or respond to discovery, and how to try a case. Pro se litigants pose challenges for not only themselves, but also the judicial system.⁴¹ The number of pro se litigants in certain types of cases, especially family law matters, exceeds cases where both parties are represented.⁴²

To obtain information about pro se litigant needs, the Pro Se Subcommittee utilized a variety of different methods, including meeting with individuals from each court, staff surveys, public surveys, and visits to Delaware and Maryland resource centers.⁴³ As to whether the judiciary effectively is coordinating its approach to helping pro se litigants, the Pro Se Subcommittee found that each court has responded to the increasing needs of pro se litigants with the creation of both on-site and online materials.⁴⁴ According to the *Pro Se Report*, the courts' efforts include making staff available to assist pro se litigants in person and creating user-friendly materials.⁴⁵ The courts have utilized similar strategies in responding to pro se litigants' needs, but each court develops and executes its own strategy separately. An employee of one court is not expected to know a different court's procedures.⁴⁶ Thus, a pro se litigant who has an issue involving two courts will have to visit both courts' locations or websites to obtain information and forms.⁴⁷

The Pro Se Subcommittee found there is a large quantity of information available to pro se litigants on the Courts' website (<http://courts.delaware.gov>), but recognized that it can be difficult to locate necessary information.⁴⁸ The Pro Se

40. Amended Order, *supra* note 3, ¶ 4(b).

41. Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 384 (2005) (describing how pro se litigants often require more time and assistance in litigation because they are unfamiliar with the law and legal procedures).

42. *Id.* at 376.

43. SUBCOMMITTEE ON JUDICIAL BRANCH COORDINATION IN HELPING PRO SE LITIGANTS, REPORT OF THE SUBCOMMITTEE ON JUDICIAL BRANCH COORDINATION IN HELPING PRO SE LITIGANTS 8 (Delaware Access to Justice Commission 2017) [hereinafter *Pro Se Report*].

44. *Id.* at 11.

45. *Id.*

46. *Id.* at 13.

47. *Id.*

48. *Id.* at 14.

Subcommittee believes a recent website redesign should make the website easier for pro se litigants to use.⁴⁹ The pro se litigant information offered on the website mostly is in text format, which can be lengthy, and perhaps not understood easily by all pro se litigants, especially litigants whose first language is not English.⁵⁰ The Pro Se Subcommittee found more on-site and online resources are needed to meet the needs of pro se litigants, especially in the Justice of the Peace Court, Court of Common Pleas, and Family Court, where most litigants are self-represented.⁵¹ Needed resources include assistance in presenting a case at trial and completing forms.⁵²

As to ways the courts can coordinate their pro se assistance efforts more effectively and the possible conversion of law libraries into pro se assistance centers that are not court specific, the Pro Se Subcommittee found the Delaware law libraries are used infrequently.⁵³ Lawyers and judges, for example, rarely use the law libraries due to the availability of online databases.⁵⁴ According to the Pro Se Subcommittee, the law librarians already offer assistance to pro se litigants and view the addition of a Pro Se Center within the library as a natural development.⁵⁵ Each county's law library readily can be converted into a pro se assistance center because they already have the physical space and some of the resources necessary for a Pro Se Center.⁵⁶ Pro Se Centers must offer certain services, including computers to access court forms, hard copies of court forms, and some staff guidance on completing forms, to meet the needs of pro se litigants.⁵⁷ The Pro Se Subcommittee found some investment will be necessary for converting the law libraries into Pro Se Centers.⁵⁸

As to whether Delaware should allow limited legal representation in areas where litigants have difficulty obtaining affordable legal services and there is a compelling human need, a Bench Bar Committee on Limited Scope Representation presented certain changes to the Delaware Lawyers' Rules of Professional Conduct in 2010.⁵⁹ The Delaware Supreme Court's Permanent Advisory Committee on the Delaware Lawyers' Rules of Professional Conduct (the "Advisory Committee") was asked by the Court for its recommendation on the Bench Bar Committee's proposals. The Advisory Committee studied the proposals and, on October 19, 2011, issued a report recommending certain changes, but not others. To date, the Court has not adopted any changes that were studied.

49. *Id.* at 14-17.

50. *Id.* at 17-18.

51. *Id.* at 18.

52. *Id.* at 18-19.

53. *Id.* at 20.

54. *Id.*

55. *Id.*

56. *Id.* at 20-21.

57. *Id.* at 21.

58. *Id.* at 21-22.

59. *Id.* at 23.

C. Pro Se Subcommittee Recommendations

The Pro Se Subcommittee recommended creating an independent website, accessible from the Delaware Courts' website and focused solely on providing information, resources, and assistance to pro se litigants.⁶⁰ Because it would be difficult to achieve this immediately due to the necessary time, collaboration, and funding, the Pro Se Subcommittee recommended simple modifications to the Courts' current website to better serve pro se litigants in the short-term.⁶¹

The Pro Se Subcommittee also recommended converting the law libraries in each county into Pro Se Centers.⁶² Self-represented parties can obtain court forms and other assistance at Pro Se Centers. The Pro Se Subcommittee identified the resources that would be necessary for a successful resource center. These resources include:

- Computers to access court forms;
- Hard copies of court forms;
- Research materials in English and Spanish; and
- Sufficient staff to serve the needs of pro se litigants.⁶³

Optional, but preferred, Pro Se Center resources the Pro Se Subcommittee identified include:

- Interpreter services;
- Limited legal representation programs;
- The ability to e-file;
- Information from community and social service programs; and
- Training seminars on different topics of interest to pro se litigants.⁶⁴

The Pro Se Subcommittee especially emphasized the importance and benefits of offering e-filing services in the Pro Se Centers.⁶⁵ Pro se litigants would be more likely to use the Pro Se Centers if, in one location, they could find

60. *Id.* at 24.

61. *Id.* at 24-25.

62. *Id.* at 32.

63. *Id.* at 32-33.

64. *Id.* at 33-34.

65. *Id.* at 36.

information, obtain assistance, and e-file.⁶⁶ As the Delaware courts move to one type of e-filing system, e-filing should become easier for both Pro Se Center staff and pro se litigants.⁶⁷

The Pro Se Subcommittee also recommended that a single person oversee all three Pro Se Centers.⁶⁸ The Pro Se Subcommittee further recommended that a partnership with Delaware public libraries, which already partner with state agencies and non-profit organizations, could be beneficial.⁶⁹ Benefits of a partnership could include:

- Joining the library partners' listserv, which would allow the Courts to share relevant court information and receive useful information from other partners;
- Using libraries' meeting space and videoconferencing equipment for community outreach programs by the Courts and possibly for pro se litigants to meet with attorneys; and
- Posting information for pro se litigants in libraries.⁷⁰

Finally, the Pro Se Subcommittee recommended that the Courts follow the example of other states and provide information to the public through social media.⁷¹ Courts in states such as Florida, Michigan, and New Jersey have Facebook pages.⁷² States including Maryland, New Jersey, and Pennsylvania use Twitter to distribute information.⁷³ The Pro Se Subcommittee recognized that the Courts could share basic information, as well as feature useful information for pro se litigants, through social media accounts.⁷⁴ Social media also could provide opportunities for the Courts to collaborate with legal aid agencies, the Delaware State Bar Association, and state agencies and ensure that pro se litigants have opportunities to find helpful resources.⁷⁵ The Pro Se Subcommittee indicated that it would continue exploring the expansion of limited legal representation in Delaware.⁷⁶

66. *Id.*

67. *Id.*

68. *Id.* at 34.

69. *Id.* at 38.

70. *Id.*

71. *Id.* at 37.

72. *Social Media and the Courts*, NATIONAL CENTER FOR STATE COURTS, <http://www.ncsc.org/Topics/Media/Social-Media-and-the-Courts/Social-Media/AOC%20and%20High%20Courts%20on%20Social%20Media.aspx> (last visited Aug. 29, 2017).

73. *Id.*

74. *Pro Se Report*, *supra* note 43, at 37.

75. *Id.*

76. *Id.* at 39.

IV. SUBCOMMITTEE ON PROMOTING GREATER PRIVATE SECTOR REPRESENTATION OF UNDERSERVED LITIGANTS⁷⁷

A. Promoting Representation Subcommittee Objectives

The objectives of the Subcommittee on Promoting Greater Private Sector Representation of Underserved Litigants (“Promoting Representation Subcommittee”) were:

- Examine the impact of revenue challenges on small firms and solo practitioners representing clients of limited means, and identify ways to support these practices, such as by providing free or more affordable continuing legal education (“CLE”) in key areas like management of small legal practices, the creation of a Law Office Management Assistance Program (“LOMAP”) to provide consulting services, whether free of charge or at a fee substantially lower than market rate, and the creation of a statewide clearinghouse for law office management materials and services geared toward solo and small firm practitioners;
- Determine whether there are private sector businesses, similar to healthcare management service organizations, that could help small legal practices in Delaware operate more effectively; and
- Explore ways to increase the level of pro bono legal services provided by the Bar such as training for lawyers who do not practice litigation as their specialty and in-house lawyers, increasing awareness of available pro bono opportunities, enhancing training resources for practitioners taking on pro bono representation in new subject areas, and encouraging law firms and corporations to communicate the expectation that pro bono work is part of a lawyer’s professional obligations.⁷⁸

The Promoting Representation Subcommittee decided these objectives fell into two categories (solo and small firm issues and pro bono service issues) and divided the work accordingly.⁷⁹

77. The members of this subcommittee were: (i) Voting Members—Yvonne Takvorian Saville, Esq. (Co-Chair), Richard Forsten, Esq. (Co-Chair), Adam Balick, Esq., Crystal Carey, Esq., Tabatha Castro, Esq., Charlisha Edelin, Esq., Kathi Karsnitz, Esq., Mary MaloneyHuss, Esq., Luke Mette, Esq., and Richard Rowland; (ii) Non-Voting Members—the Honorable Alan N. Cooper (1952-2015), the Honorable Michael Newell, the Honorable Sheldon Rennie, and Representative Melanie George-Smith, Esq.; and (iii) Reporters—Jennifer-Kate Aaronson, Esq., Jackie Mette, Esq., Katherine Neikirk, Esq., Susan Simmons, and Ashley Tucker, Esq.

78. Amended Order, *supra* note 3, ¶ 4(c).

79. SUBCOMMITTEE ON PROMOTING GREATER PRIVATE SECTOR REPRESENTATION OF UNDERSERVED LITIGANTS, REPORT OF THE SUBCOMMITTEE ON PROMOTING GREATER PRIVATE SECTOR REPRESENTATION OF UNDERSERVED LITIGANTS 4 (Delaware Access to Justice Commission 2017) [hereinafter *Promoting Representation Report*].

B. Promoting Representation Subcommittee Findings

1. Solo And Small Firm Findings

To identify ways to assist solo practitioners and small law firms, the Promoting Representation Subcommittee utilized a variety of methods.⁸⁰ These methods included a survey of attorneys, an analysis of certain statistical records by the Office of Disciplinary Counsel (“ODC”), a survey of other states’ LOMAPs meetings with the Delaware State Bar Association (“DSBA”) about its planned LOMAP, and research regarding the existence of private sector businesses that could handle the back office functions of small legal practices like healthcare management service companies.⁸¹

As a result of this work, the Promoting Representation Subcommittee discovered most solo and small firm practitioners are satisfied with their practices, but do confront challenges in practice management.⁸² The ODC’s analysis of its statistical records showed that the majority of sanctioned violations between January 1, 2013 and July 31, 2015 were attributable to solo practitioners, with most of those violations relating to law practice management.⁸³ The Promoting Representation Subcommittee’s research did not reveal many companies, similar to healthcare management service organizations, that could offer a complete back office solution for small legal practices in Delaware.⁸⁴

2. Pro Bono Service Findings

In examining ways to increase the level of pro bono service provided by the Bar, the Promoting Representation Subcommittee considered how to define pro bono.⁸⁵ Pro bono is a shortening of the Latin phrase *pro bono publico*, which means for the public good.⁸⁶ The term pro bono typically is associated with the donation of free legal services to those in need. Under the Delaware Lawyers’ Rules of Professional Conduct, lawyers may fulfill their voluntary responsibility to provide public interest legal service “by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.”⁸⁷ This definition obviously is broader than the donation of free legal services to those in need. Because the goals of the Commission were more focused on the needs of individuals of limited means, rather than activities or organizations for improving the legal system or profession, the Promoting Representation Subcommittee used “free or reduced fee legal

80. *Id.*

81. *Id.* at 4-5.

82. *Id.* at 5-6.

83. *Id.* at 6.

84. *Id.* at 6-7.

85. *Id.* at 12.

86. *Pro bono*, MERRIAM-WEBSTER’S ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/pro%20bono>.

87. DEL. LAW. R. PROF. CONDUCT R. 6.1.

services provided to persons of limited means or organizations that address the needs of persons of limited means” as the pro bono definition throughout its work.⁸⁸

To increase pro bono representation, the Promoting Representation Subcommittee identified the areas of greatest unmet need for pro bono service and barriers to the provision of pro bono service.⁸⁹ The Promoting Representation Subcommittee analyzed information the Pro Se Subcommittee already collected from the Courts, reviewed pro se filings in the Courts for FY 2014, and met with Delaware legal service providers to determine the areas of greatest need.⁹⁰ To identify what stands in the way of attorneys providing pro bono service, the Promoting Representation Subcommittee employed various methodologies, including a survey, focus group sessions with attorneys in different types of practices, and meeting with the organizations that rely upon a large number of volunteer attorneys.⁹¹ The Promoting Representation Subcommittee also met with subject matter experts, including the chair of the Washington Limited License Legal Technician Board and the executive director of the Washington State Bar Association, regarding Washington’s new limited license legal technician program.⁹²

The Promoting Representation Subcommittee determined that family law and consumer law are the areas with the greatest need for pro bono service from the Bar.⁹³ According to the Promoting Representation Subcommittee’s survey, many attorneys perform pro bono work, but fewer attorneys provide more than twentyfive hours of pro bono service a year.⁹⁴ The ABA Model Rules of Professional Conduct recommend that lawyers aspire to provide at least fifty hours of pro bono legal service per year.⁹⁵

Lack of available time or prioritized time is the main barrier to Delaware attorneys performing pro bono work.⁹⁶ And this also is the case for attorneys nationwide.⁹⁷ Other barriers identified by Delaware attorneys include fear, a perceived lack of expertise, and a lack of awareness of the available pro bono opportunities and resources.⁹⁸ Attorneys also may face additional barriers to pro bono service depending on their area of practice.⁹⁹

88. *Promoting Representation Report*, *supra* note 79, at 12 (quoting DEL. LAW. R. PROF. CONDUCT R. 6.1).

89. *Id.* at 12-13.

90. *Id.* at 12-14.

91. *Id.* at 15-16.

92. *Id.* at 16.

93. *Id.* at 14-15.

94. *Id.* at 17.

95. Model R. Prof. Conduct R. 6.1.

96. *Id.* at 18-19.

97. See A.B.A. STANDING COMMITTEE ON PRO BONO AND PUBLIC SERVICE, SUPPORTING JUSTICE III: A REPORT ON PRO BONO WORK OF AMERICA’S LAWYERS 29 (2013) (noting that “[a]ttorneys overwhelmingly mentioned time constraints as the top factor that most discouraged them from providing more pro bono service in 2011”), https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/lr_pb_Supporting_Justice_III_final.authcheckdam.pdf.

98. *Promoting Representation Report*, *supra* note 79, at 19-20.

99. *Id.* at 20-21.

C. Promoting Representation Subcommittee Recommendations

1. Solo And Small Firm Recommendations

The Promoting Representation Subcommittee recommended that the DSBA continue to work on its LOMAP.¹⁰⁰ LOMAPs are intended to help lawyers with the business aspect of his or her practice and offer information and assistance with law practice management. Examples of states with robust LOMAPs include Maryland¹⁰¹ and Massachusetts.¹⁰² The Promoting Representation Subcommittee recommended that, among other things, the DSBA LOMAP:

- Offer information and advice to solo and small firm practitioners through a website and consultations with DSBA staff or experienced, volunteer attorneys;
- Hold monthly luncheon series on solo and small firm issues and have a website with checklists, sample forms, and helpful articles;
- Contract with vendors to collaborate with solo and small firm practices to provide discounted services on insurance, software, copying, and service of process.¹⁰³

The Promoting Representation Subcommittee also recommended that the ODC continue to offer free CLEs on useful topics for solo and small firm practitioners. Since 2014, the ODC has organized and offered free CLEs with helpful information for solo and small firm practitioners.¹⁰⁴ The purpose of the CLEs is to offer useful and practical advice for solo and small firm practitioners.¹⁰⁵ The ODC recruits attorneys to address various law firm management topics, including information technology issues and staff supervision.¹⁰⁶ The ODC also offers free CLEs providing practical guidance to practitioners on how to maintain their firm's books and records in compliance with Rule 1.15 of the Delaware Lawyers' Rules of Professional Conduct.¹⁰⁷

Finally, the Promoting Representation Subcommittee recommended that law school students and new solo and small firm attorneys be given the opportunity to take classes on law firm management.¹⁰⁸ In the past, Delaware Law

100. *Id.* at 7-9.

101. *See Practice Management*, MARYLAND STATE BAR ASSOCIATION, <http://www.msba.org/practicemanagement/default.aspx>.

102. *See* <http://masslomap.org/>.

103. *Promoting Representation Report*, *supra* note 79, at 7-8.

104. *Id.* at 9.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 10-11.

School has offered a class on law office management and may do so again in the future.¹⁰⁹ The Promoting Representation Subcommittee also discussed a fundamental course on law office management for solo and small firm practitioners in light of the recently reinstated fundamentals requirement for newly admitted attorneys.¹¹⁰ Under Rule 4(D) of the Delaware Rules for Continuing Legal Education, attorneys admitted after December 1, 2015 must attend (within four years from that January 1st), among other fundamental courses, Fundamentals of Law Practice Management and Technology. The first Fundamentals of Law Practice Management and Technology was offered on May 10, 2017.¹¹¹ Topics included law office practice recommendations and lawyer-client relations.

2. Pro Bono Service Recommendations

The Promoting Representation Subcommittee recommended creating a standing pro bono leadership committee.¹¹² The committee would educate and challenge leaders of the Bar to create, support, and sustain both existing and new state-wide infrastructures needed for a high level of pro bono participation from Bar members.¹¹³ Committee members would include judges, leaders of law firms and law departments, and service providers (DVLS, LSCD, and CLASI). The committee would focus on pro bono family law representation issues in 2018 and pro bono consumer law representation issues in 2019.¹¹⁴ This focus would include identification of already existing training materials, preparation of additional training materials as needed, establishment of a system of resource attorneys to answer questions, pro bono representation training, meeting with firm leaders about increasing representation in the designated area of law, encouraging the participation of transactional attorneys, and setting goals for representation.¹¹⁵

Beginning in the first half of 2018, the Promoting Representation Subcommittee recommended holding an annual event for organizations, law firms, law departments, and individual lawyers providing pro bono services.¹¹⁶ At this annual event, attendees could share ideas, identify upcoming needs and opportunities for service, create teams to work on specific pro bono matters, and recognize individuals and organizations who are leaders in creating a culture of pro bono service.¹¹⁷ The pro bono summit could focus on family law in 2018 and consumer law in 2019.¹¹⁸ The Promoting Representation Subcommittee also recommended developing pro bono practice groups, networks, and listservs through which lawyers in different law firms and law departments easily could contact each other to share ideas and information.¹¹⁹

109. *Id.*

110. *Id.*

111. *Id.* at 11.

112. *Id.* at 22.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 22-23.

117. *Id.* at 23.

118. *Id.*

119. *Id.*

The Promoting Representation Subcommittee recommended setting a clear, measurable, and collective pro bono target for Bar members.¹²⁰ Law firms, law departments, and individual attorneys wishing to participate in the challenge voluntarily could report their hours to the Supreme Court or the Pro Bono Committee.¹²¹ Progress could be shared annually at the annual pro bono event and Bench and Bar.¹²²

The Promoting Representation Subcommittee also recommended creating an online database of helpful information for attorneys performing pro bono work similar to existing databases in Massachusetts and Minnesota.¹²³ Attorneys who perform pro bono work would have free access to this database.¹²⁴ The database could include, among other things, a calendar with upcoming pro bono training sessions, information about the different types of pro bono opportunities available, and forms and templates.¹²⁵

The Promoting Representation Subcommittee emphasized that it would be important to make Delaware lawyers aware of the existence of such a database and the related opportunities and resources.¹²⁶ This would include increasing awareness of the variety of pro bono opportunities available, the quantity of reference resources, and the availability of experienced people with OCA and DVLS to answer volunteer attorney questions.¹²⁷ There also needs to be increased awareness that there are ways for attorneys to provide pro bono legal services without the risk of malpractice liability, even in the absence of malpractice insurance from an employer.¹²⁸

The Promoting Representation Subcommittee recognized that even with increased pro bono service, there still will be people with legal needs who cannot afford an attorney.¹²⁹ To address this justice gap, the Promoting Representation Subcommittee investigated Washington's legal technician program.¹³⁰ Legal technicians have been compared to nurse practitioners in the medical profession.

The Supreme Court of Washington adopted Admission to Practice Rule 28, the Limited Practice Rule for Limited License Legal Technicians ("LLLTs") in 2012.¹³¹ Washington LLLTs presently are limited to certain types of family law

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 24.

127. *Id.*

128. *Id.*

129. *Id.* at 25.

130. *Id.*

131. *In re the Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians*, No. 25700-A-1005, Order (Wash. June 5, 2012).

matters, but in the future may be able to work in other areas of law such as elder law and landlord-tenant law.¹³² In family law matters, LLLTs may, among other things, obtain facts and explain the relevancy of those facts to the client, inform the client of documents that must be filed and how the matter is likely to proceed, and complete and file approved forms.¹³³ LLLTs cannot represent clients in court or negotiate on behalf of their client with another party.¹³⁴ LLLTs cannot work in a law firm, open their own office, or own a minority interest in a law firm with a lawyer.¹³⁵

The educational requirements for LLLTs include:

- An associate level degree or higher;
- 45 credit hours of core curriculum instruction in paralegal studies as approved by the LLLT Board with instruction to occur at an ABA approved law school or ABA approved paralegal education program; and
- Completion of the practice area curriculum.¹³⁶

LLLTs also must:

- Be at least eighteen years-old;
- Pass a legal technician exam;
- Pass a character and fitness review;
- Complete 3,000 hours of paralegal experience involving substantive legal work in any practice area under a lawyer's supervision;
- Demonstrate financial responsibility (professional liability insurance or proof of indemnification if an employer is a government entity);
- Pay an annual license fee; and
- Complete ten hours of approved continuing education each year.¹³⁷

132. *Promoting Representation Report*, *supra* note 79, at 25.

133. *Id.* (citing Admission to Practice Rule 28(F)).

134. *Id.* at 26 (citing Admission to Practice Rule 28(H)).

135. *Id.* at 26.

136. *Id.* (citing Admission to Practice Rule 28(D); Regulation 3(B)).

137. *Id.* (citing Admission to Practice Rule 28(D); Regulation 5(D), 11(A), 12(A), 14(A)).

In light of the recent establishment of the Washington LLLT program, the current lack of data on the program's effectiveness, and the Bar's potential concerns, the Promoting Representation Subcommittee recommended further study of a legal technician program.¹³⁸

The Promoting Representation Subcommittee's recommendations did not include mandatory pro bono service or a mandatory pro bono hour reporting requirement as part of Delaware attorneys' annual registration.¹³⁹ Some states either have required or voluntary pro bono reporting policies.¹⁴⁰ According to the Promoting Representation Subcommittee's research, many Delaware attorneys have a negative view of a mandatory pro bono requirement.¹⁴¹ There also was concern about forcing attorneys to perform pro bono work and the negative impact that could have on the clients of unwilling pro bono attorneys.¹⁴²

V. THE PATH FORWARD

A. The Draft Implementation Plan

The Commission met on June 21, 2017 to begin prioritizing the Subcommittees' recommendations and pairing those recommendations with the actions needed to accomplish them. While there is much to be done, several of the recommendations already have been addressed. For example, changes already have been made and continue to be made to the Courts' website to make resources easier to find and more accessible. Materials are being translated into Spanish to improve accessibility of resources for Spanish-speaking people, and these materials also will be added to the website in the near term. Additionally, the ODC is offering free CLE programming on useful topics for solo and small firm practitioners.

The Commission reconvened in the Fall and began implementing several priority recommendations, including:

- The Court will partner with Delaware public libraries to improve pro se services by creating programming and outreach materials;
- Planning will begin to convert the law libraries in each of Delaware's three counties into pro se assistance centers;
- The DSBA will continue working on establishing a LOMAP to assist solo and small firm practitioners;
- Plans are underway to promote pro bono service provided by Delaware law firms, initially focusing on family law representation in the upcoming fiscal year through the development of pro bono practice groups, and other projects will include increasing awareness of pro bono opportunities and an annual summit or fair at which legal aid organizations, law firms, law departments, and individual lawyers can gather to share best practices, identify needs and opportunities for service, and celebrate pro bono successes; and

138. *Id.* at 27-28.

139. *Id.* at 21.

140. *See Pro Bono Reporting*, A.B.A., https://www.americanbar.org/groups/probono_public_service/ts/pbreporting.html#noreport.

141. *Promoting Representation Report*, *supra* note 79, at 21-22.

142. *Id.*

- The Pro Bono Subcommittee will create a pro bono challenge for attorneys to meet a clear, measurable, and collective pro bono target. Additional focus will be placed on providing pro bono consumer law representation and continued improvement in data collection and analysis to identify successes in providing services as well as identifying future needs.

B. Implementation Challenges

Funding will continue to be a challenge, particularly given the fiscal issues facing the State. Federal funding is also at risk as the President's budget proposal to Congress would eliminate funding for the LSC in FY 2018. The Chief Justice and other key people wrote to Delaware's congressional delegation to oppose these cuts. LSCD relies heavily on these funds, which constitute a significant portion of the overall funds legal service providers receive.¹⁴³ On July 27, 2017, the Senate Appropriations Committee passed the FY 2018 CJS Appropriations Bill, which would fund the LSC at the current FY 2017 level.¹⁴⁴

1. The History Of Funding Legal Services In Delaware

The first State appropriation to support civil legal services for the poor was in FY 2006 in the amount of \$275,000.00.¹⁴⁵ Funding remained stable between fiscal years 2007-2011, with the exception of FY 2010 when the appropriation dropped slightly to \$233,700.00.¹⁴⁶ In FY 2012, the annual allocation was increased to \$400,000.00 and rose again to \$600,000.00 in FY 2013.¹⁴⁷ The longstanding appropriation for Delaware's legal aid service providers was eliminated in the FY 2018 Budget Act, but other funding (\$540,000.00) was earmarked for FY 2018 only.¹⁴⁸

In addition, the State has provided additional funding through the GIA. The allocation is a "one-time contingency" and must be renewed each year by the General Assembly. Since 2006, the amount has been between \$101,500.00 and \$200,000.00. But, cuts to the FY 2018 GIA reduced funding to all agencies by 20%.¹⁴⁹

143. OFFICE OF MGMT & BUDGET, AMERICA FIRST: A BUDGET BLUEPRINT TO MAKE AMERICA GREAT AGAIN 5 (2017).

144. *Latest Developments*, A.B.A., https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/access_to_legal_services/legal_services_corporation/latest_developments.html (last visited Aug. 30, 2017).

145. Fiscal Year 2006 Appropriation Act, H.B. 300, 143th Gen. Assemb. § 48 (Del. 2005).

146. Fiscal Year 2007 Appropriation Act, S.B. 350, 143th Gen. Assemb. § 52 (Del. 2006); Fiscal Year 2008 Appropriation Act, H.B. 250, 144th Gen. Assemb. § 50 (Del. 2007); Fiscal Year 2009 Appropriation Act, S.B. 300, 144th Gen. Assemb. § 54 (Del. 2008); Fiscal Year 2010 Appropriation Act, H.B. 290, 145th Gen. Assemb. § 48 (Del. 2009); Fiscal Year 2011 Appropriation Act, S.B. 310, 145th Gen. Assemb. § 46 (Del. 2010).

147. Fiscal Year 2012 Appropriation Act, H.B. 190, 146th Gen. Assemb. § 47 (Del. 2011); Fiscal Year 2013 Appropriation Act, S.B. 260, 146th Gen. Assemb. § 43 (Del. 2012).

148. Fiscal Year 2018 Appropriation Act, H.S. 1 for H.B. 275, Gen. Assemb. § 58(b) (Del. 2017).

149. FY 2018 Grants-in-Aid Act, H.B. 281, 149th Gen. Assemb. § 2 (2017).

2. Proposed Cuts To LSC At The Federal Level

Congress appropriated \$375 million to LSC nationwide for FY 2015, \$10 million more than the previous year.¹⁵⁰ LSC's largest appropriation of \$420 million was in FY 2010; funding has since decreased by 11%.¹⁵¹ LSC's funding request for FY 2016 was \$486,900,000.00, as it was for fiscal years 2015 and 2014.¹⁵² The LSC has requested an increase of a little over \$25 million from their FY 2017 budget.¹⁵³ Their FY 2018 budget has proposed funding for Delaware field grants increasing to \$1,079,092.00 from \$774,187.00 in FY 2017, an increase of 39%.¹⁵⁴ The White House has proposed eliminating funding for LSC in FY 2018, but on July 27, 2017, the Senate Appropriations Committee passed the FY 2018 CJS Appropriations Bill that would fund the LSC at the current FY 2017 level.¹⁵⁵ Much of the LSC field grants go directly to the LCSD which will further reduce the amount of legal assistance to those in need.

3. Greater Pressures On The Court And The Bar To Bridge The Gaps

As State and federal funding wane, there is increased pressure on the Court and the Bar to bridge the gaps. While the Court cannot solve the problem alone, we continue to look for ways to assist where we can. But increased pressures on court operating budgets amidst a struggling state economy means that the courts are also concerned about the ability to manage effectively core functions with diminishing resources.

Notwithstanding those struggles, the Court recognizes that the unmet civil legal need is growing, and Delaware Courts, like courts throughout the nation, are facing the consequences of a system struggling to handle increasing numbers of pro se litigants. In 2013, the Council of Chief Justices and the Council of State Court Administrators released a white paper on LSC funding, describing the impact courts nationwide felt as a result of increased, unrepresented litigants. In addition to slowed court procedures resulting in a backlog of court cases, the white paper noted the difficulty faced by judges across the nation trying to maintain impartiality while trying to ensure justice for the pro se litigant.¹⁵⁶ The impact to the nation's legal system is highlighted in the *Pro Se Report*, which similarly found that, in Delaware, front line court staff report spending more time with pro se litigants without any break in their other duties.¹⁵⁷

150. All LSC budget request information contained in this section can be found at: *FY 2016 Budget Request*, LSC, <http://www.lsc.gov/media-center/publications/fy-2016-budget-request>.

151. *Id.*

152. *Id.*

153. LSC, FISCAL YEAR 2018 BUDGET REQUEST 1 (2017), <https://www.lsc.gov/media-center/publications/fiscal-year-2018-budget-request>.

154. *Id.* at 12.

155. *See supra* notes 144-45.

156. THE CONFERENCE OF CHIEF JUSTICES AND THE CONFERENCE OF STATE COURT ADMINISTRATORS, THE IMPORTANCE OF FUNDING FOR THE LEGAL SERVICES CORPORATION FROM THE PERSPECTIVE OF THE CONFERENCE OF CHIEF JUSTICES AND THE CONFERENCE OF STATE COURT ADMINISTRATORS 3-4 (2013), http://ccj.ncsc.org/-/media/Microsites/Files/CCJ/Web%20Documents/LSC_WHTPR.ashx.

157. *Pro Se Report*, *supra* note 43, at 18-19.

Recognizing the systemic impact and the important and necessary work done by the legal aid organizations in Delaware, the Delaware Supreme Court recently took several steps to improve legal services to the poor:

- The Delaware Supreme Court has contributed \$150,000.00 to the Annual Campaign of the Combined Campaign for Justice; and
- The Randy J. Holland Family Law Chair Endowment Fund (“RJH Endowment Fund”) has been created to honor Justice Holland’s legacy and to give meaning to his deeply held belief that access to justice must not depend on one’s ability to pay. This Endowment Fund will secure funding in perpetuity for an attorney at one of the three legal aid agencies (DVLS, CLASI, or LSDC) to provide legal services relating to family law matters, including domestic violence and abuse and other civil legal problems encountered by indigent families in Delaware. The RJH Endowment Fund has been established at, and will be managed by, the Delaware Community Foundation.

VI. LOOKING INTO THE FUTURE FOR ACCESS TO JUSTICE ON THE CIVIL SIDE

The Commission reconvened on September 18, 2017 during an event hosted by the Delaware Supreme Court to honor the work of the Commission members and to begin the next phase of implementation. The Commission added new membership to lead Access to Justice objectives. CLASI recently worked with James Teufel, Director and Assistant Professor of Public Health at Moravian College, to conduct a study regarding the need for indigent legal services here in Delaware. The study was comprised of two components: (1) an analysis of cases from the perspective of social return on investment—attaching a monetary value to the work done by CLASI; and (2) an analysis of unmet legal needs in the Delaware community, based on a sampling conducted this spring at federally qualified health centers (where poor people often get their medical care). The study should offer helpful guidance as we move forward.

DELAWARE'S CONSTITUTIONAL MIRROR TEST: OUR MORAL OBLIGATION TO MAKE THE PROMISE OF EQUALITY REAL A REFLECTION ON THE RESEGREGATION OF OUR SCHOOLS

The Honorable Leo E. Strine, Jr.*

**Seventh Annual James R. Soles Lecture
On The Constitution And Citizenship September 22, 2017
Roselle Center For The Arts
The Department Of Political Science And International Relations
University Of Delaware**

Foreword

Delaware, although a part of the Union, was a slave state and it was slow to embrace the ruling in *Brown v. Board of Education*. Ultimately, a metropolitan desegregation remedy in northern New Castle County was put in place by the federal courts in the late 1970s, after state officials dragged their feet and failed to implement an effective plan for desegregation. In the 1990s the State sought and obtained freedom from court supervision, arguing that it had gone beyond the court's mandate in desegregating schools and could be trusted to ensure the rights of all children, especially black children in Wilmington.

In this article, adapted from a lecture delivered as the 2017 James R. Soles Lecture on the Constitution and Citizenship at the University of Delaware, Chief Justice Leo E. Strine, Jr. examines the re-segregation of Delaware schools, particularly elementary schools, and addresses whether Delaware has lived up to the constitutional principles of equality in the years since Delaware was released from court supervision.

Chief Justice Strine asks whether Delawareans, having told court officials that the state could protect the rights of our black children, are prepared to face the constitutional mirror test, and to recognize that kids who have less, need more — especially kids and families who have been victimized by hundreds of years of discrimination.

Rather than just identify the problem, Chief Justice Strine outlines a potential reform plan that, among other reforms, would reorganize the New Castle County schools so that Wilmington was part of one well-resourced and geographically compact Northern New Castle County school district.

This is a very special occasion for me. This lecture is dedicated to one of the finest people I was ever privileged to know, and has been shepherded by the person—Ed Freel—who best fulfills Professor Soles' legacy of caring for our society

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and the students at this University, and marrying those commitments by nurturing students of all political persuasions who have an interest in public service. I owe much of whatever success I have had to Dr. Soles and Ed Freel, and others, like Dr. Pika, who instilled in University of Delaware students a sense that we could make a difference and who helped us find the diverse paths that worked best for each of us. I hope to do justice by them and by the spirit of this lecture series by talking directly about justice, and the role of the citizen in giving life to one of our core constitutional ideals.

I am going to address that topic head on and in a way that is very personal to those of us who call Delaware our home. The most famous words of the Declaration of Independence say: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”¹

As all of us know and most of us acknowledge, our nation did not come close to living up to this ideal. Many were not treated equally, and were considered lesser or even worse, to be the “other” and less than fully human. No group more so than Americans who were black. Sitting alongside the inspiring words of the Declaration of Independence were provisions of the Constitution that recognized the legitimacy of slavery, and that accorded states with slaves credit toward having three-fifths of a person for each slave for purposes of representation in Congress.² “WE THE PEOPLE” did not include black people as equal.³

Eventually, a bloody civil war was fought for one reason and one reason only. A group of states were so committed to enslaving black people and extending that subjugation to other states that they turned traitor to their nation, and turned their guns on their American brothers and sisters. The confederacy existed for one singular reason: to create a nation where white people could continue to own black people.⁴

1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

2. U.S. Const. art. IV, § 2, cl. 3; id. art. I, § 9; id. art. I, § 2, cl. 3.

3. Id. pmbl.

4. See, e.g., Confederate States of America - Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union (adopted Dec. 24, 1860), Yale L. Sch., http://avalon.law.yale.edu/19th_century/csa_scarsec.asp (“[A]n increasing hostility on the part of the non-slaveholding States to the institution of slavery, has led to a disregard of their obligations, and the laws of the General Government have ceased to effect the objects of the Constitution. The States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, Pennsylvania, Illinois, Indiana, Michigan, Wisconsin and Iowa, have enacted laws which either nullify the Acts of Congress or render useless any attempt to execute them.”); Confederate States of America - A Declaration of the Causes Which Impel the State of Texas to Secede from the Federal Union (adopted Feb. 2, 1861), Yale L. Sch., http://avalon.law.yale.edu/19th_century/csa_tessec.asp (“The States of Maine, Vermont, New Hampshire, Connecticut, Rhode Island, Massachusetts, New York, Pennsylvania, Ohio, Wisconsin, Michigan and Iowa, by solemn legislative enactments, have deliberately, directly or indirectly violated the 3rd clause of the 2nd section of the 4th article [the fugitive slave clause] of the federal constitution, and laws passed in pursuance thereof; thereby annulling a material provision of the compact, designed by its framers to perpetuate the amity between the members of the confederacy and to secure the rights of the slave-holding States in their domestic institutions—a provision founded in justice and wisdom, and without the enforcement of which the compact fails to accomplish the object of its creation. Some of those States have imposed high fines and degrading penalties upon any of their citizens or officers who may carry out in good faith that provision of the compact, or the federal laws enacted in accordance therewith. In all the non-slaveholding States, in violation of that good faith and comity which should exist between entirely distinct nations, the people have formed themselves into a great sectional party, now strong enough in numbers to control the affairs of each of those States, based upon an unnatural feeling of hostility to these Southern States and their beneficent and patriarchal system of African slavery, proclaiming the debasing doctrine of equality of all men, irrespective of race or color—a doctrine at war with nature, in opposition to the experience of mankind, and in violation of the plainest revelations of Divine Law. They demand the abolition of negro slavery throughout the confederacy, the recognition of political equality between the white and negro races, and avow their determination to press on their crusade against us, so long as a negro slave remains in these States.”).

As we know, the union won out and our nation began a second rebirth. President Lincoln consecrated the sacrifice required for that new founding in the Gettysburg Address, where he made clear his view that the central tenet of our constitutional form of government was the principle of human equality in the Declaration of Independence. As the President famously said, "Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal."⁵

After President Lincoln lost his life to a person whose hateful descendants just marched on Charlottesville, Virginia, the nation struggled to live up to his words. The Thirteenth Amendment was adopted, abolishing slavery.⁶ The Fifteenth Amendment was adopted, protecting the voting rights of the freed slaves and black Americans.⁷ And the Fourteenth Amendment was added to the Constitution, applying the principles of equality in the Declaration of Independence to the states by providing: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws."⁸

But, as we know, that promise of equality was hollow, and extinguished by a racist backlash, which is fairly embodied in two words: Jim Crow.⁹ Instead of the candid subjugation of slavery, there was the less honest, but hardly less brutal and less soul-destroying system of separate but equal: phony systems of voting eligibility designed to weed out black voters,¹⁰ and a systemic pattern of laws that made the words of the Fourteenth Amendment hypocritical, and made a mockery of our supposed commitment to the idea that all of us are equal under the law.¹¹

Where was Delaware in this mix? Sadly, among the worst. Delaware was a union state but took no action to emancipate slaves within its borders. Emancipation came only in December 1865 with the adoption of the Thirteenth Amendment, which Delaware waited until 1901 to ratify.¹²

5. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863); *see generally* GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 26 (1992), <http://srnteach.us/portfolio/projects/Gettysburg/pdf/Wills.pdf> ("The tragedy of macerated bodies, the many bloody and ignoble aspects of this inconclusive encounter, are transfigured in Lincoln's rhetoric, where the physical residue of battle is volatilized as the product of an experiment testing whether a government can maintain the proposition of equality.").

6. U.S. CONST. amend. XIII (ratified Dec. 6, 1865).

7. *Id.* amend. XV (ratified Feb. 3, 1870).

8. *Id.* amend. XIV (ratified July 9, 1868).

9. *See generally* Jim Crow America: A Documentary History (Catherine M. Lewis & J. Richard Lewis eds., 2009) (using primary source materials to document the creation and effect of Jim Crow); Hugh H. Smythe, The Concept 'Jim Crow', 27 Soc. Forces 45 (1949) (documenting the development and usage of the term Jim Crow).

10. *See* F. MICHAEL HIGGINBOTHAM, GHOSTS OF JIM CROW: ENDING RACISM IN A POST-RACIAL AMERICA 91 (2013) (describing tactics used to prevent blacks from voting, such as grandfather clauses, poll taxes, literacy tests, and, when those failed, violence).

11. *See generally* ERIC FONER, THE STORY OF AMERICAN FREEDOM 131 (1998) (describing the racial subordination of blacks in the early twentieth century, characterized by "Exploitation, Disenfranchisement, Segregation, Discrimination, Lynching, Contempt" and noting that "[S]outhern whites did not create their new system of white supremacy alone. The effective nullification of the Fourteenth and Fifteenth Amendments occurred with the full acquiescence of the North.").

12. Eric Foner, *Abraham Lincoln, the Thirteenth Amendment, and the Problem of Freedom*, 15 GEO. J.L. & PUB. POL'Y 59, 67 (2017) ("Delaware, the border state where Lincoln had begun his emancipation initiative in 1861, became the first to reject the amendment; not until 1901, long after it had become part of the Constitution, would it gain Delaware's approval.").

Delaware was a Jim Crow state, host to hollow promises of separate-but-equal and some of the worst incidents of mob violence against black people—lynchings.¹³ The Delaware Constitution required “separate schools for white and colored children”¹⁴ and Delaware criminalized marriage between a white person and a “negro or mulatto.”¹⁵

Simply put: Delaware denied black people equal rights. And there was nothing equal about the separate facilities Delaware provided to black people.

Nothing. Many black children could not go to high school because there were not high schools for black kids in each county.¹⁶

Now, of course, we in Delaware like to remember, and we should, the 1952 ruling of Chancellor Seitz in *Belton v. Gebhart*.¹⁷ In that case, he held that as a state trial judge he could not deviate from the separate but equal doctrine of *Plessy v. Ferguson*, even though he wanted to do so.¹⁸ But as a judge in equity, he did know what was equal and what was not, and he held that the schools made available to black children were not equal and that they therefore should be admitted

13. EQUAL JUSTICE INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR (3d ed. 2015), <https://lynchinginamerica.eji.org/report/>; see, e.g., *One Arrest Made for Delaware Lynching*, N.Y. TIMES (Jun. 23, 1903), <http://query.nytimes.com/mem/archive-free/pdf?res=9E02E2D7143AE63AA15757C2A9609C946297D6CF> (“The excitement attending the gruesome tragedy enacted last night outside the city limits when George F. White, the negro murderer of seventeen-year-old Helen S. Bishop, was burned at the stake, has subsided. The swift and dire punishment meted out to the perpetrator of the terrible crime is the sole topic of conversation, but to-night the details are calmly rehearsed. Public sentiment appears to deplore the resort to mob violence, but the consensus of opinion is that summary vengeance alone could atone for the brutal outrage upon the life and honor of the young girl.”); Yohuru Williams, “*Revenged in the Most Terrible Manner*”: *The Lynching of African American Civil War Veteran William “Obie” Evans*, 34 DEL. HIST. 33 (2013).

14. Del. Const. of 1897, art. X, § 2.

15. PAULI MURRAY, STATES’ LAWS ON RACE AND COLOR 71–72 (1951).

16. See ROGER C. MOWREY, DEL. STATE DEP’T PUB. INSTRUCTION, DELAWARE SCHOOL DISTRICT ORGANIZATION AND BOUNDARIES 5–6 (1974) (noting that “[b]efore the early 1950’s, secondary education for blacks was neglected, and a complete high school education was almost impossible” and reporting the school years in which high schools for black children opened as 1951–1952 (William C. Jason Comprehensive High School District 192 in Sussex County), 1952–1953 (William W.M. Henry Comprehensive High School District 133 in Kent County), and 1953–1954 (Louis L. Redding Comprehensive High School in New Castle County)).

17. *Belton v. Gebhart*, 87 A.2d 862 (Del. Ch. 1952), *aff’d*, 91 A.2d 137 (Del. 1952), *aff’d sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955).

18. *Id.* at 865 (“In other words, by implication, the Supreme Court of the United States has said a separate but equal test can be applied, at least below the college level. This Court does not believe such an implication is justified under the evidence. Nevertheless, I do not believe a lower court can reject a principle of United States Constitutional law which has been adopted by fair implication by the highest court of the land. I believe the ‘separate but equal’ doctrine in education should be rejected, but I also believe its rejection must come from that Court.”).

to the schools for white kids.¹⁹ His ruling was in one of the cases that went to the Supreme Court as part of what became known as *Brown v. Board of Education*.²⁰

Although we celebrate Chancellor Seitz's ruling in Delaware now, we did not honor it as a state after it was issued. Less acknowledged in our history are the brakes that the court I sit on, the Delaware Supreme Court, put on desegregation in its ruling in *Steiner v. Simmons*.²¹ Delaware was in no hurry to desegregate and it did not.

Too often forgotten in our consideration of this period and of the reasons why economic inequality persists is that many widely celebrated programs, such as the minimum wage provisions of the New Deal, the G.I. Bill, and federal housing legislation that helped many working class Americans into the middle class and to a university education, were not administered equally.²² Black people were denied many of the benefits of these programs, as they either could not use the benefits at all because of continued segregation, or could only use them in a much more constricted way.²³ Segregation in housing was particularly egregious and extended to things such as real estate codes, which made it a violation of

19. *Id.* at 869–71 (“It seems to me that when a plaintiff shows to the satisfaction of a court that there is an existing and continuing violation of the ‘separate but equal’ doctrine, he is entitled to have made available to him the State facilities which have been shown to be superior. To do otherwise is to say to such a plaintiff: ‘Yes, your Constitutional rights are being invaded, but be patient, we will see whether in time they are still being violated.’ If, as the Supreme Court has said, this right is personal, such a plaintiff is entitled to relief immediately, in the only way it is available, namely, by admission to the school with the superior facilities. To postpone such relief is to deny relief, in whole or in part, and to say that the protective provisions of the Constitution offer no immediate protection.... I conclude that the State’s future plans do not operate to prevent the granting of relief to these plaintiffs by way of an injunction, preventing the authorities from excluding these plaintiffs, and others similarly situated, from admission to Claymont High School on account of their color.... For the reasons stated in connection with Claymont I do not believe the relief should merely be an order to make equal. An injunction will issue preventing the defendants and their agents from refusing these plaintiffs, and those similarly situated, admission to School No. 29 because of their color.”).

20. *Brown v. Board of Ed. of Topeka, Kan.*, 347 U.S. 483, 487 (1954) (describing the action as originating from cases in Kansas, South Carolina, Virginia, and Delaware and noting that Delaware “adhered to [the] doctrine [of separate-but-equal], but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools” whereas the other three states denied plaintiff schoolchildren admission to public schools on the basis of the separate-but-equal doctrine).

21. *Steiner v. Simmons*, 111 A.2d 574, 583 (Del. 1955) (describing the State Board of Education’s go-slow approach to implementing desegregation as “reasonable, and (if we may say so) embody[ing] a commendably wise and cautious approach to a problem of great delicacy and difficulty”).

22. See generally Ira Katznelson, Opinion, *Who Really Got Handouts*, N.Y. TIMES, Aug. 13, 2017, Sunday Rev., at 2; Michael Tonry, *The Social, Psychological, and Political Causes of the Racial Disparities in the American Criminal Justice System*, 39 CRIME & JUST. 273, 298 (2010) (citing DOUGLAS S. MASSEY & NANCY DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993); Richard Rothstein, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods: A Constitutional Insult*, 7 RACE SOC. PROB. 21, 22 (2015) (citing P.A. Jargowsky, *Concentration of Poverty in the New Millennium: Changes in the Prevalence, Composition, and Location of High-Poverty Neighborhoods*, CENTURY FOUND. & RUTGERS CTR. URB. RES. & ED. (2013), http://www.tcf.org/assets/downloads/Concentration_of_Poverty_in_the_New_Millennium.pdf).

23. See generally Ira Katznelson, *When Is Affirmative Action Fair? On Grievous Harms and Public Remedies*, 73 SOC. RES. 541, 545–46 (describing the exclusion of blacks from public policies through “racially laden” legislation and the administration of social programs by “local officials who were deeply hostile to black aspirations”).

professional ethics for real estate agents to sell houses to black people in white neighborhoods.²⁴ As in the post-Civil War era, Delaware did not lead the way toward a more equal nation, it was dragged along.

Eventually, in New Castle County Delaware, another lawsuit was filed to eliminate segregation in our schools. For nearly a decade, the federal courts all but begged the state to remedy the problem itself. The state failed to do so, and a remedy that included busing was put in place.²⁵ Ninety percent of suburban parents opposed busing.²⁶ They opposed busing even though before the court order, many suburban students went to schools that were not the closest to their home.²⁷ They did so even though the major burden of busing under the court's ruling was on the children of Wilmington. The "9-3" plan required suburban children to spend just three consecutive years in the city schools, but required city children to spend up to nine years in suburban schools.²⁸

Under the Court's original remedy, it ordered the creation of one school district for all of northern New Castle County, as that was what educational experts said was best for children and allowed for the most coherent approach.²⁹ State officials, however, wanted more districts and got the court's approval to create four school districts. If you imagine a pizza cut into four pieces, Wilmington was at the narrow end of each slice, where the round plastic thing is put. There is

24. See generally *Evans v. Buchanan*, 393 F. Supp. 428, 434–35 (D. Del. 1975) (subsequent history omitted) (describing racially restrictive housing covenants, which, although found to violate the Fourteenth Amendment in *Shelley v. Kramer*, 334 U.S. 1 (1948), were recorded in New Castle County deeds until 1973 and the Code of Ethics of the National Association of Real Estate Boards, which instructed that realtors "should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality, or any individuals whose presence will clearly be detrimental to property values in that neighborhood"); see also BRETT GADSDEN, *BETWEEN NORTH AND SOUTH: DELAWARE, DESEGREGATION, AND THE MYTH OF AMERICAN SECTIONALISM* 189–92 (2012) (describing witness statements offered in *Evans* to establish the link between housing segregation and school segregation, which included testimony that "the state's real estate primer advised agents to follow the National Association of Real Estate Boards (NAREB) code of ethics that counseled—at least formally through the late 1950s—against introducing blacks into white residential areas," that "only 7 percent of the listed properties in the Multiple Listing Service (MLS) of the Greater Wilmington Board of Realtors were designated as 'open' and thereby available to prospective minority buyers," and detailed the experience of municipal court judge Leonard Williams who, in order to buy a property in Rockford Park, asked a white lawyer friend to inquire about the home, posed as an electrician's helper working for the lawyer in order to view the house himself, and had the lawyer negotiate the sale of the property and then transfer the deed to him and his wife).

25. See generally *Evans v. Buchanan*, 379 F. Supp. 1218, 1220 (D. Del. 1974) (subsequent history omitted) (describing the history of New Castle County's desegregation litigation).

26. JEFFREY A. RAFFEL, *THE POLITICS OF SCHOOL DESEGREGATION* 174 (1980).

27. See CAROL G. HOFFECKER, *CORPORATE CAPITAL WILMINGTON IN THE TWENTIETH CENTURY* 246 (1983) ("[A]s recently as a decade before, some suburban children had attended city public schools, because the city schools were then perceived to be superior to the schools in the suburb. Now that the situation was reversed and the suburban schools were better equipped and had fuller programs, especially for college preparatory students, city people were prohibited from enrolling their children in public schools outside the city limits.").

28. *Coalition to Save Our Children v. State Board of Ed.*, 90 F.3d 752, 757 (3d Cir. 1996) ("The 1978 Order required a 9-3 student assignment plan, which provided that all students would attend formerly predominantly 'white' suburban school districts for a maximum of nine years and would spend at least three years in the formerly 'black' school districts.").

29. See BRETT GADSDEN, *BETWEEN NORTH AND SOUTH: DELAWARE, DESEGREGATION, AND THE MYTH OF AMERICAN SECTIONALISM* 183–84, 190–92 (describing sociological evidence presented at trial, including testimony of sociologist Karl Taeuber who justified a metropolitan remedy with the fact that achieving racial balance in only the city schools "would do nothing to end the pervasive area-wide segregation between black Wilmington schools and white suburban schools") (citing PAUL R. DIMOND, *BEYOND BUSING: INSIDE THE CHALLENGE TO URBAN SEGREGATION* (1985)).

a caveat to this though. One of the districts, Christina, has its narrow end of the pizza in the same box as the other four districts. But its bigger end piece is in a box of its own, separated by 15 to 20 miles of I-95.³⁰ Yes, the small end of the pie slice and the bigger end do not connect geographically at all.³¹ A supermajority of voting power in each of the districts rested firmly in the suburbs.³²

Whatever one otherwise thinks of the remedy, one thing it did for sure was to greatly reduce racial and economic segregation. By contrast to many other urban areas, neither Wilmington nor its suburbs was characterized by high-poverty, highly-segregated schools. Although there were specific challenges, such as concerns about the viability of Wilmington High School, the overall result was a desegregated school system,³³ with a reasonably equalized funding formula.³⁴

But, all of this was under dint of court order, and in the early 1990s, the state sought to be relieved of federal court supervision and succeeded in that effort in 1996.³⁵ In seeking a declaration that it had proven that it could operate its school system consistently with constitutional principles of equality, the state argued:

- “[T]he 1978 Order had created schools with near-perfect student and faculty racial balance and had desegregated classrooms two to three times more effectively than a national sample of comparable districts.”³⁶

30. WILMINGTON EDUC. IMPROVEMENT COMM’N, 1 SOLUTIONS FOR DELAWARE SCHOOLS 69 (2016) (“The Christina School District is one of a small number of school districts across the nation that is discontinuous. The western segment of the district is separated from the eastern segment by 16 to 20 miles, with parts of the Red Clay Consolidated and Colonial School Districts occupying the space between the two Christina segments.”).

31. ARIELLE NIEMEYER ET AL., THE COURTS, THE LEGISLATURE, AND DELAWARE’S RESEGREGATION: A REPORT ON SCHOOL SEGREGATION IN DELAWARE: 1989–2010 18 (2010) (“State officials found it difficult to deal with a single district that had a substantial majority of all the state’s students. In 1980, legislation permitted the New Castle County School District to be divided into smaller districts, which would be easier to manage and more responsive. The state Board of Education created four pie-shaped areas where each incorporated a portion of both the city and suburban areas.”).

32. Jeffrey A. Raffel, *After the Court Order: The Changing Faces of School Desegregation in the Wilmington Metropolitan Area*, 9 WIDENER L. SYMP. J. 81, 104–05 (2002) (“The school districts in the desegregation area elect their school boards by nominating areas. The electorate of the entire district elects board members within nominating districts. This balances the need for city board members with district-wide goals.... Of course, there is no ‘black control’ as had developed in the city prior to the desegregation order.”).

33. *Id.* at 93 (“By the 1990s, with a new generation of students since school desegregation was ordered in the Wilmington metropolitan area, the positive effects of the plan were quite clear. ‘Black’ schools and ‘white’ schools had become ‘just’ schools. Gary Orfield, a leading scholar of school desegregation, had identified this metropolitan area as one of the most desegregated in the nation. Based on the Interracial Exposure Index, (the average percentage of white students in the average black student’s school) an analysis of school enrollment data indicated that the degree of desegregation had increased from 25% to over 70% in the desegregation area. That is, the average black student had well over twice as many white students in their school 17 years after the desegregation order was implemented than before the order. Schools in the city increased on this index from 7.3 to 65.6%, an amazing change.”).

34. *Id.* at 87–88 (identifying as one of the benefits of a metropolitan desegregation plan that “the resources of the entire metropolitan area are available to the district, both financial and cultural or educational that may be the foundation of magnet schools or an enhanced curriculum”).

35. *Coalition to Save our Children v. State Board of Ed.*, 90 F.3d 752 (3d Cir. 1996).

36. Answering Brief of Appellees at 7–8, *Coalition to Save Our Children v. State Board of Ed.*, 1995 WL 17145650, at *8 (3d Cir. 1995).

- “[A]n average of 80% of the students in the Four Districts attended classes that were 10–49% minority ... [and] classroom imbalance in the Four Districts was ‘[one-third] to [one-half] of the imbalance in a national sample of schools collected by the Office of Civil Rights in the United States Department of Education.’”³⁷
- “[T]he Four Districts went far beyond constitutional requirements by continually readjusting attendance zones to maintain racial balance long after the 9-3 Plan had desegregated the schools in September 1978.... The result was unprecedented and sustained racial balance for seventeen years.”³⁸
- “It cannot be sensible to assume—let alone find, after contrary proof—that present performance differences in New Castle County result from the long-abandoned segregated school system.”³⁹

The state got what it sought, which was the freedom to run the schools in New Castle County without federal monitoring.⁴⁰ In other words, “WE THE PEOPLE” of Delaware took into our hands responsibility for giving life to our society’s commitment to equality. What did we do with that responsibility?

I am not going to get into a detailed historical examination of how we got to where we are now. Certainly, the so-called Neighborhood Schools Act, however, accelerated the resegregation of city schools.⁴¹ There is plenty that could be said about that. But we all—I emphasize, all—have a share in it.⁴²

So, what have “WE THE PEOPLE” of Delaware done with that responsibility?

By any objective measure, we have resegregated our school system.

Remember how we bragged in that brief in 1995?

Well, here is where we are in 2017.

37. *Id.* at *11 (internal citations omitted).

38. *Id.* at *43 (internal citations omitted).

39. *Id.* at *53 (internal citations omitted).

40. *Coalition to Save Our Children v. State Board of Ed.*, 90 F.3d 752 (3d Cir. 1996).

41. *See, e.g., NIEMEYER ET. AL., supra* note 32, at 9 (“[The Neighborhood Schools Act] virtually guaranteed that patterns of neighborhood segregation would be replicated in Wilmington area schools. Basically, state law required the resegregation of schools regardless of the desires of educational leaders or local communities.” (discussing The Neighborhood Schools Act of 2000, 72 Del. Laws ch. 287 (2000) (codified at 14 DEL. C. § 220)).

42. We includes me. Given how things have turned out, I have often reflected back on whether I made the right decision in *Harden v. Christina School District*. 924 A.2d 247 (Del. Ch. 2007).

Inside the Wilmington city limits, there are 13 elementary schools.⁴³ More than 60% of the students at each of these schools are low income and fewer than 25% of the students at these schools are white.⁴⁴

At the same time that we have resegregated our elementary schools, we have left in place a system where city kids have to travel to the suburbs for their middle and high school years. As of today, no academic high school in the City of Wilmington exists that is open to all kids from all districts.⁴⁵ Putting pressure on the idea that opposition to busing was about the length of bus rides, the old Wilmington High School is now the Charter School of Wilmington. I take a certain amount of pride in that school, having worked with Governor Carper, Paul Fine, and Red Clay to write the charter school law and help that school succeed. And succeed it has. It has the highest test scores in the state.⁴⁶ But instead of becoming a model for how an urban school could serve all, it is itself largely segregated.⁴⁷ In a city that is 58% black and has 25.4% of kids 5 to 17 living below the poverty level,⁴⁸ only 6.3% of the Charter School of Wilmington's students are black and only 4.5% are low income.⁴⁹

43. There are eight elementary schools with grades K–5 and five elementary schools with grades K–8 inside Wilmington's city limits. WILMINGTON EDUC. IMPROVEMENT COMM'N, 1 SOLUTIONS FOR DELAWARE SCHOOLS 59 (2016).

44. For example, Warner Elementary in the Red Clay District is 75% black and 83% low income and Elbert-Palmer Elementary in the Christina School District is 78% black and 89.3% low income. *Warner Elementary School*, DEL. DEP'T EDUC. (2017), <http://profiles.doe.k12.de.us/SchoolProfiles/School/Default.aspx?checkSchool=266&districtCode=32>; *Elbert-Palmer Elementary School*, DEL. DEP'T EDUC. (2017), <http://profiles.doe.k12.de.us/SchoolProfiles/School/Default.aspx?checkSchool=356&districtCode=33>. Because of their similar socioeconomic characteristics, white and Asian American students share the label "white" throughout this speech's discussion of school demographics. Asian American Delawareans are 1.3 times less likely to be in poverty than white Delawareans and 2.7 times less likely to be in poverty than black Delawareans. CTR. COMM. RES. & SERV., AN OVERVIEW OF POVERTY IN DELAWARE 2 (2014). Asian American Delawareans are two times more likely than white Delawareans and three times more likely than black Delawareans to have a bachelor's degree or higher. U.S. CENSUS BUREAU, *2011–2015 American Community Survey 5-Year Estimates*, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>.

45. Matthew Albright, *A Vision for Wilmington Schools*, DEL. ONLINE, <http://www.delawareonline.com/story/news/education/2015/03/06/vision-city-school/24534621/> ("Since desegregation spurred the splitting of districts, high school students who don't attend charter, magnet, vo-tech or private schools have been bused out of the city into high schools located in the suburbs. Wilmington residents have long decried this system, saying it has sundered any sense of community.").

46. THE CHARTER SCHOOL OF WILMINGTON, *2015–2016 Awards*, <http://charterschool.org/2015-2016-awards/> ("The Charter School of Wilmington continues to have the highest high school scores on every Delaware State Assessment Test for 10-12th grade. The Charter School of Wilmington continues to have the highest SAT scores in the State among all public high schools.").

47. A fairly large number of city students now attend a variety of charter schools. However well-intentioned these schools are, none have been given extra resources, they have not served as a model for systemic change, and they have not driven outcomes that have closed the wide disparities this lecture addresses. In fact, there is an argument that the proliferation of uncoordinated charter schools in Wilmington that do not provide a viable model to serve all kids with similar needs is a symptom, not a cure, to the basic illness of inequality we face. For a consideration of some of the issues raised by having four districts and a bunch of charter schools in Wilmington, see WILMINGTON EDUC. IMPROVEMENT COMM'N, 1 SOLUTIONS FOR DELAWARE SCHOOLS 15–17, 97, 115, 144, 167–68 (2016).

48. THE CITY OF WILMINGTON DELAWARE, *Demographic Profiles: City of Wilmington*, <https://www.wilmingtonde.gov/home/showdocument?id=336>.

49. CHARTER SCHOOL OF WILMINGTON, DEL. DEP'T EDUC., <http://profiles.doe.k12.de.us/SchoolProfiles/School/Default.aspx?checkSchool=295&districtCode=32>.

For the most part, city kids therefore have to go outside the city for their middle school and high school years. They now come to those schools out of high poverty, highly racially concentrated schools, meeting classmates who have come from elementary schools with very different characteristics, and who can more easily take advantage of afterschool activities as they live closer to school.

We have built schools, though. Two are familiar to me. I was a kid when the desegregation order came. The elementary schools in my community were closed, as those were the ages where kids in Hockessin went into the city. So Hockessin and North Star elementary schools were closed.⁵⁰ And so was the nearby Brandywine Springs Junior High School.⁵¹

A new North Star School and a revived Brandywine Springs, now serving students in kindergarten through fifth grade, were reopened in 2005 and 2000, respectively.⁵² Within its first year, Brandywine Springs leapt to 13th highest of sixty-seven elementary schools in the state for student achievement in math and 12th highest in the state for student achievement in reading.⁵³ North Star in its first year was ranked second highest in student achievement for both math and reading out of sixty-four elementary schools in the state.⁵⁴

Why might that be so?

Well, let's start with demographics. North Star's student body is 88% white and less than 4% black.⁵⁵ Brandywine Springs' student body is 78% white and only 6% black.⁵⁶ Less than 5% of North Star's student body is low income and less than 15% of Brandywine Springs' student body is low income.⁵⁷

Now, given that these schools vaulted to near the top in their first year, we have to acknowledge the strong probability that demographics drove these results.

50. See Maureen Milford & Jane Harriman, *15 More Schools to Close?*, EVENING J., May 21, 1981, at A-1 (noting that Hockessin and North Star elementary schools will close and those students will instead attend H.B. DuPont Elementary School).

51. *Id.* (reporting the closing of Brandywine Springs Junior High School and noting that those students will attend Skyline Junior High, Stanton Junior High, Thomas McKean High, or John Dickinson High).

52. NORTH STAR ELEMENTARY SCHOOL, DEL. DEP'T EDUC. 1 (2006) (noting that North Star Elementary reopened in 2005); BRANDYWINE SPRINGS ELEMENTARY SCHOOL, DEL. DEP'T EDUC. 1 (2005) (noting that Brandywine Springs reopened in Fall 2000).

53. Rankings based on Grade 3 DSTP reading and math mean score for the 2000 school year. Underlying data, compiled and analyzed by the author, is available at DEL. DEP'T EDUC., DELAWARE STUDENT ASSESSMENT REPORTING & ANALYSIS (ver. 2017), https://pubapps.doe.k12.de.us/DSARA_Public/GeneralSummary.aspx.

54. *Id.*

55. *North Star Elementary School*, DEL. DEP'T EDUC. (2017), <http://profiles.doe.k12.de.us/schoolprofiles/School/Default.aspx?checkSchool=270&districtCode=32>.

56. *Brandywine Springs School*, DEL. DEP'T EDUC. (2017), <http://profiles.doe.k12.de.us/schoolprofiles/School/Default.aspx?checkSchool=261&districtCode=32>.

57. *Id.*; *North Star Elementary School*, *supra* note 56.

But, let's look at their staffs. Approximately 81% of the teachers at both North Star and Brandywine Springs are "veterans" with ten or more years of teaching experience.⁵⁸

Now, let's compare the demographics of these schools to two of their counterparts in Red Clay in the city: Shortlidge Elementary and Warner Elementary.

Shortlidge's student body is 77% black and less than 4% white.⁵⁹ More than 86% of Shortlidge's students are low income.⁶⁰ Warner's student body is 76% black and 3% white.⁶¹ More than 83% of Warner's students are low income.⁶² The majority of the teachers at both of these schools have less than ten years of experience: 60% at Shortlidge and 54% at Warner.⁶³

Now, is this just a Red Clay dynamic? No, it is not. In the Christina School District, Stubbs Elementary's student body is 85% black, 1% white and almost 89% low income.⁶⁴ Only 13.6% of its teachers have more than ten years of experience.⁶⁵ Downes Elementary has a student population that is 63.9% white and 20% black—31% of its students are low income.⁶⁶ And 77% of the teachers at Downes have more than ten years of experience.⁶⁷

Likewise, in Brandywine School District, Harlan Elementary's student body is 90% black, less than 3% white, and over 67% low income.⁶⁸ Fifty-six percent of Harlan's teachers are veterans with ten or more years of experience.⁶⁹ By

58. Author calculations from school profiles available at: *State of Delaware*, DEL. DEP'T EDUC. (2017), <http://profiles.doe.k12.de.us/SchoolProfiles/State/Default.aspx> [hereinafter Education Calculations].

59. *Shortlidge (Evan G.) Academy*, DEL. DEP'T EDUC. (2017), <http://profiles.doe.k12.de.us/SchoolProfiles/School/Default.aspx?checkSchool=248&districtCode=32>.

60. *Id.*

61. *Warner Elementary School*, DEL. DEP'T EDUC. (2017), <http://profiles.doe.k12.de.us/SchoolProfiles/School/Default.aspx?checkSchool=266&districtCode=32>.

62. *Id.*

63. *Id.*; *Shortlidge (Evan G.) Academy*, *supra* note 60.

64. *Stubbs (Frederick Douglass) Elementary School*, DEL. DEP'T EDUC. (2017), <http://profiles.doe.k12.de.us/SchoolProfiles/School/Default.aspx?checkSchool=362&districtCode=33>.

65. *Id.*

66. *Downes (John R.) Elementary School*, DEL. DEP'T EDUC. (2017), <http://profiles.doe.k12.de.us/SchoolProfiles/School/Default.aspx?checkSchool=362&districtCode=33>.

67. Education Calculations, *supra* note 59.

68. *Harlan (David W.) Elementary School*, DEL. DEP'T EDUC. (2017), <http://profiles.doe.k12.de.us/SchoolProfiles/School/Default.aspx?checkSchool=156&districtCode=31>.

69. Education Calculations, *supra* note 59.

contrast, Forwood Elementary has a student body that is 66% white, 22% black, and 28% low income.⁷⁰ A strong supermajority—84% or nearly 30% more than Harlan—of Forwood teachers have more than ten years of teaching experience.⁷¹

There are essentially only two middle schools in the City: P.S. duPont Middle School and Bayard Middle School.

P.S. duPont Middle School is the home of the “gifted” program for the Brandywine School District,⁷² is much closer to the suburbs it serves, and has demographics closer to the other middle schools outside Wilmington’s city limits. P.S. duPont Middle School’s student body, for example, is only 46% black, is 44% white, and is 35% low income.⁷³ But the racial composition of the gifted program suggests that P.S. duPont is in some ways two schools: one serving an 80% white and 4% low income honors program, and one serving a 46% black and 35% low income general population.⁷⁴ This divide is also visible in P.S. duPont’s test scores: while less than 10% of both low income and non-low income 6th graders at Bayard scored proficient on their English exams, 35% of low income students at P.S. duPont scored proficient and 76% of non-low income students scored proficient on that same test.⁷⁵ At the same time, it is also the case that the school overall is less segregated by race and poverty, and the data suggests this greater diversity is likely to benefit its black and poor students.⁷⁶

Christina’s Bayard Middle School has demographics like the city elementary schools in the districts that precede it: 68% of Bayard’s student body is black, less than 3% is white, and almost 79% is low income.⁷⁷

More than 90% of Bayard’s students scored less than proficient on their sixth, seventh, and eighth grade English and Math exams. Put another way, fewer than 10% of these kids scored proficient.⁷⁸

70. *Forwood Elementary School*, DEL. DEP’T EDUC. (2017), <http://profiles.doe.k12.de.us/School>

[Profiles/School/Default.aspx?checkSchool=124&districtCode=31](http://profiles.doe.k12.de.us/SchoolProfiles/School/Default.aspx?checkSchool=124&districtCode=31).

71. Education Calculations, *supra* note 59.

72. *The Gifted Program*, P.S. duPont Middle School, <https://www.brandywineschools.org/Page/3012> (“P.S. duPont Middle School is proud to be home to The Brandywine School District Middle Level Gifted Program. The program offers specialized programming to meet the individual needs of the gifted learner. The Gifted Program is not a separate entity unto itself, students are actively engaged with whole-school activities and related arts courses.”).

73. *DuPont (Pierre S.) Middle School*, DEL. DEP’T EDUC. (2017), <http://profiles.doe.k12.de.us/>

[SchoolProfiles/School/Default.aspx?checkSchool=124&districtCode=31](http://profiles.doe.k12.de.us/SchoolProfiles/School/Default.aspx?checkSchool=124&districtCode=31).

74. *Id.*; select gifted program demographic information provided by Delaware Department of Education.

75. DELAWARE STUDENT ASSESSMENT REPORTING & ANALYSIS (ver. 2017), *duPont (Pierre S.) Middle School (170) Smarter Summary - ELA (2017 Smarter) By Low Income (Direct Cert)*, https://pubapps.doe.k12.de.us/DSARA_Public/DisaggSummary.aspx (last visited Sept. 6, 2017).

76. *See infra* note 125 and accompanying text.

77. *Bayard Middle School*, DEL. DEP’T EDUC. (2017), <http://profiles.doe.k12.de.us/SchoolProfiles/>

[School/Default.aspx?checkSchool=352&districtCode=33](http://profiles.doe.k12.de.us/SchoolProfiles/School/Default.aspx?checkSchool=352&districtCode=33).

78. Eight percent, 6%, and 8% of sixth, seventh, and eighth grade students at Bayard Middle School, respectively, scored proficient on the ELA exam in the 2016–2017 school year. Six percent, 2%, and 0.89% of sixth, seventh, and eighth grade students at Bayard Middle School, respectively, scored proficient on the Math exam in the 2016–2017 school year. *Bayard Middle School*, DEL. DEP’T EDUC. (2017), https://pubapps.doe.k12.de.us/DSARA_Public/SchoolSumMenu.aspx?s=352.

Comparatively, more than 22% of sixth through eighth grade students in the Christina School District overall scored proficient on their math exams, and more than 31% did so on their English exams.⁷⁹ Honestly, the statistics for the Christina School District, regardless of which school you look at, are concerning. Even as worrying as the Christina results are, it appears the middle school students outside of Bayard did at least 4 times better (and as much as 31 times better, in the case of 8th grade math proficiency).⁸⁰ To be fair, from the time the state divided New Castle County in four and gave Christina a portion of the city that had no geographic or otherwise natural connection to the city, that district has faced perhaps the most difficult challenge of any in balancing the needs of all its students.

Take George V. Kirk Middle School in Newark, for example. Kirk Middle School lies in the bigger piece of the Christina School District, which as mentioned is not contiguous with the City and is separated from the city portion of the district by 20 or so miles of I-95.⁸¹ Kirk Middle School's student body is 34% black, 40% white, and 40% of the students are low income.⁸² More than 40% of sixth, seventh, and eighth grade students at Kirk demonstrated proficiency in English, and more than 23% demonstrated proficiency in math.⁸³ More than half of the teachers at Kirk Middle School—63%—have ten or more years of teaching experience.⁸⁴

Now, you ask, surely there was some tradeoff when these changes were made. It must have been recognized that if kids who had less were all put in the same school, they and their teachers would need more. More days of learning? More hours in the day? More experienced teachers? More school-annexed activities to give kids struggling with academics a sense of belonging and self-esteem that would help them persevere in their studies?⁸⁵

The only fair answer to that is no. And it is likely worse than that. Put aside for a moment the reality that sweat and effort matter and that these kids who come to school with less preparation and whose parents cannot afford the extra academic enrichment that so many upper-middle class parents give their children are at a disadvantage.⁸⁶

79. Thirty-one percent, 31%, and 36% of sixth, seventh, and eighth grade students in the Christina School District, respectively, scored proficient on the ELA exam in the 2016–2017 school year. Twenty-two percent, 23%, and 24% of sixth, seventh, and eighth grade students in the Christina School District, respectively, scored proficient on the Math exam in the 2016–2017 school year. DEL. DEP'T EDUC., *Christina School District Smarter Summary*, https://pubapps.doe.k12.de.us/DSARA_Public/GeneralSummary.aspx.

80. Author calculations based on data available at DEL. DEP'T EDUC., *Christina School District Smarter Summary*, https://pubapps.doe.k12.de.us/DSARA_Public/GeneralSummary.aspx.

81. WILMINGTON EDUC. IMPROVEMENT COMM'N, 1 SOLUTIONS FOR DELAWARE SCHOOLS 69 (2016) ("The Christina School District is one of a small number of school districts across the nation that is discontinuous. The western segment of the district is separated from the eastern segment by 16 to 20 miles, with parts of the Red Clay Consolidated and Colonial School Districts occupying the space between the two Christina Segments.").

82. *Kirk Middle School*, DEL. DEP'T EDUC. (2017), <http://profiles.doe.k12.de.us/SchoolProfiles/School/Default.aspx?checkSchool=374&districtCode=33>.

83. 41.94%, 40.68%, and 45.38% of sixth, seventh, and eighth grade students at Kirk Middle School, respectively, scored proficient on the ELA exam in the 2016–2017 school year. 23.42%, 30.93%, and 34.5% of sixth, seventh, and eighth grade students at Kirk Middle School, respectively, scored proficient on the Math exam in the 2016–2017 school year. *Kirk (George V.) Middle School*, DEL. DEP'T EDUC. (2017), https://pubapps.doe.k12.de.us/DSARA_Public/SchoolSumMenu.aspx?s=374.

84. Education Calculations, *supra* note 59.

85. See generally Richard Rothstein, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods: A Constitutional Insult*, 7 RACE SOC. PROB. 21, 22 (2015) (describing how social and economic disadvantages depress school performance).

86. See generally Daniel T. Willingham, *Why Does Family Wealth Affect Learning?*, 36 AM. EDUCATOR 33 (2012) (describing two theories—the family investment theory and the stress theory—that explain the effect of socioeconomic status on learning).

Let's focus on the most expensive input into the education budget: the teaching staff.⁸⁷ Our state provides higher pay to teachers with more years of experience, with more years of education, and with Professional Board certification.⁸⁸

The premise of this is rational: we want to encourage teachers to become better at their jobs and we recognize that more experienced teachers tend to be more effective at their jobs.⁸⁹

So, of course, it must be that the most experienced, most highly-qualified teachers are assigned to the kids who need them most. We should expect that we would find the schools we outlined to have the most experienced, most highly degreed staffs.

Our commitment to equality, especially if we are going to resegregate, must surely be strong enough to insist that we put our dollars where our principles are. And surely, our most experienced, best qualified teachers should predominate at the schools with the hardest jobs to do.

Well, no. As we have seen, that is not the case.⁹⁰ And what starts as a state funding formula that is equal, actually turns at the district level into one that is anything but.⁹¹

I suppose none of this would matter, if the overall outcomes for black and white students in New Castle County were somehow nearly equal.

But, they are not.

Dropout rates for black students are nearly three times as high as dropout rates for white students in New Castle County.⁹² As problematic, black students drop out earlier. In Delaware, of all four years of high school, the dropout rate

87. *Finance*, DEL. DEP'T EDUC. (2017), <http://profiles.doe.k12.de.us/SchoolProfiles/State/Finance.aspx>

(noting that Instructional Service accounted for 57% (approximately \$1.2 billion) of state expense allocation for the 2015–2016 school year and that teacher salaries made up 63% of the Instructional Service salary allocation).

88. 14 DEL. C. § 1305.

89. LINDA DARLING HAMMOND, *THE FLAT WORLD AND EDUCATION* 108 (2010) (“[C]ontrolling for student characteristics, schools with the greatest proportions of [novice] teachers lost more than 20 percentile points in achievement relative to those with a more senior teaching force.”).

90. STRATEGIC DATA PROJECT, *SDP EDUCATOR DIAGNOSTIC: DELAWARE DEPARTMENT OF EDUCATION 4* (2015) (“Specifically, over one quarter of public school teachers in Delaware have taught for five or fewer years, and 8% of teachers are novices with no prior teaching experience. How these new and early-career teachers are distributed across schools and students in the state is an important policy question; both national evidence and Delaware-specific findings reveal that novice teachers tend to be less effective than those with more years of teaching experience. Related to this, we find that in Delaware, students in high-poverty schools are more likely to be taught by newly hired teachers, and that Delaware’s new and early-career teachers typically teach students who are further behind academically than the students their veteran colleagues teach.”); cf. *‘The Set’: What Are the Most Significant “Teacher Equity” Gaps in Delaware?*, DEL. DEP'T EDUC. TEACHER AND LEADER EFFECTIVENESS UNIT 1 (2015) (“Schools with the greatest shares of minority students have higher turnover: In schools with the greatest share of minority students (top quartile) the turnover rate was 18.6 percent compared to 10.7 percent in schools [in] the bottom quartile.”).

91. There are other reasons, too. See DEL. DEP'T EDUC., *DELAWARE EDUCATION FUNDING: A SUMMARY OF THE CURRENT SYSTEM AND RECOMMENDED CHANGES 2* (2015), <https://www.doe.k12.de.us/cms/lib/DE01922744/Centricity/Domain/366/Delaware%20Education%20Funding%20Matrix.pdf> (“Equalization funding does not make up for the significant differences in school districts’ ability to raise enough funds to educate all students. The majority of states [other than Delaware] provide adequate operational funding levels to all districts to ensure that every district can meet the needs of its students regardless of local property values.”).

92. 2015–2016 DELAWARE DROPOUT SUMMARY STATISTICS 6 (2017).

for black high school students is highest in the ninth grade.⁹³ And during this first year of high school, the dropout rate for black ninth graders is twice the dropout rate for white ninth graders.⁹⁴

In the 2015–2016 school year, there was a 28 percentage-point achievement gap between the number of black students and white students that were proficient in English.⁹⁵ The achievement gap was even larger for the number of black students proficient in math—31 percentage points—as compared to white students.⁹⁶

I suppose, again, that none of this would matter as much if somehow these realities translated into equal outcomes among adults.

But they do not.

Nearly 60% of black families in Delaware are at or below 200% of the federal poverty level, as compared to 26% of white families.⁹⁷

In a state where 22% of the population is black, black people comprise 57% of our prison population.⁹⁸

And things are getting worse, not better, if one focuses at the younger level. Although black children comprise only 26% of all children in Delaware, they comprise 64% of young people arrested for crimes and 68% of those under the supervision of Youth Rehabilitative Services (“YRS”).⁹⁹

Worst of all is the sickening and disheartening level of violence that has characterized our community. Don’t tell me the *Fresh Prince*, but heck, I would love to spend some time with Jada Pinkett Smith. But, I didn’t like hearing she might be the lead in a TV series about our community called *Murder Town USA*,¹⁰⁰ a series that would have largely been about young black males engaged in the drug trade who end up shooting each other and other members of their own community.¹⁰¹

93. *Id.* at 3.

94. *Id.*

95. RODEL FOUND. OF DEL., *DELAWARE PUBLIC EDUCATION AT A GLANCE* (2017), <http://www.rodelfoundationde.org/ata glance/#student-achievement>.

96. *Id.*

97. NAT’L CTR. CHILD. POVERTY, *Delaware: Demographics of Low-Income Children* (2015), http://www.nccp.org/profiles/DE_profile_6.html.

98. JOHN M. MACDONALD & ELLEN A. DONNELLY, *EVALUATING THE ROLE OF RACE IN CRIMINAL JUSTICE ADJUDICATIONS IN DELAWARE* 11 (2016).

99. KIDS COUNT IN DELAWARE, 2017 FACT BOOK 138 (2017), <https://www.sppa.udel.edu/ccrs/SitePages/KCDE2017/default.aspx>; Andrew Cohen, *Race and Ethnicity by Program*, DIV. YOUTH & REHAB. SERV., <https://public.tableau.com/profile/andrew.cohen#!/vizhome/DemographicData by Program and Year/Total Clients Served by Fiscal Year> (reporting that for fiscal year 2016, 68% of program clients were black and 31% of clients were white); *see also* DIV. YOUTH & REHAB. SERV. OFFICE OF DIR., *POPULATION STATISTICS SNAPSHOT 3* (2014) (reporting that 75% of clients were black).

100. *See* Ryan Cormier, *New ABC Drama ‘Murder Town’ Set in Wilmington*, USA TODAY, Nov. 11, 2015, <https://www.usatoday.com/story/news/nation-now/2015/11/11/tv-wilmington-murder-town/75601032/>; Ryan Cormier, *‘Murder Town’ TV show ‘probably dead at this point’*, NEWS J., Aug. 12, 2016, <http://www.delawareonline.com/story/entertainment/2016/08/12/murder-town-tv-show-probably-dead-point/88614690/> (discussing why ABC “passed on the project”).

101. *Id.* (describing the plot line as “Delaware’s first African-American district attorney,” played by Jada Pinkett Smith, who “finds herself confronted by old loyalties and loves, a shocking revelation about her murdered husband and a polarizing, racially charged case that threatens to burn her and her city to the ground”).

A series of that kind would make even more obvious a reality that every day is limiting our attractiveness to businesses seeking to locate new operations and thus our ability to create the job growth that is critical to lifting people out of poverty. It would have underscored the fact that the major city in an affluent state has a violent crime rate exceeding that of cities like New York and Los Angeles.¹⁰² And it would have highlighted the statistics that suggest that kids are more likely to be shot in Wilmington than in any other city in the United States, including Chicago.¹⁰³

For our law enforcement and corrections community, these circumstances are maddening. They find themselves at the crosscurrents of two converging floods of justified public sentiment. On the one hand, there is the urgent concern that something is wrong when it is so much more likely that a black person will end up incarcerated than a white person.¹⁰⁴ How can it be fair, for example, when white people generate so much of the demand for illegal drugs, that it is the black people who get caught up in the commerce of drugs who end up in prison?¹⁰⁵ How can it be fair that so many black teenagers find themselves facing sentencing as an adult and generations of imprisonment?¹⁰⁶

102. FBI, *Table 8 Offenses Known to Law Enforcement by City by State* (2015), https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.2015/tables/table8/table_8_offenses_known_to_law_enforcement_by_state_by_city_2015.xls/view (documenting 25,156 violent crimes in Los Angeles, which has a population of 3,962,726; 50,088 violent crimes in New York City which has a population of 8,550,861; and 1,231 violent crimes in Wilmington, which has a population of 72,078. These figures result in violent crime rates, defined as the number of violent crimes per 100,000 people, of 634.8 for Los Angeles, 585.7 for New York City, and 1,707.8 for Wilmington; *see also* NIC, CORRECTION STATISTICS BY STATE: DELAWARE, <https://nicic.gov/statestats/?st=de> (“The crime rate in Delaware (2015) is about 13% higher than the national average rate.”); ALL THINGS CONSIDERED, *Wilmington, Del., Struggles With Outsized Murder Rate*, NPR (Jan. 1, 2014), <http://www.npr.org/2014/01/01/258889969/wilmington-del-struggles-with-outsized-murder-rate> (“The city of Wilmington, Delaware has a problem: gun violence. It has just 71,000 residents but if its homicide rate were compared to larger cities, it would rank fourth behind Flint, Michigan, Detroit and New Orleans.”).

103. Brittany Horn et al., *Wilmington: Most Dangerous Place in America for Youth*, NEWS J., <http://www.delawareonline.com/story/news/crime/2017/09/08/our-babies-killing-each-other/100135370/>.

104. Although blacks are 22% of the Delaware’s population, blacks make up 42% of arrestees, 42% of criminal dispositions, 51% of incarceration sentences, and 57% of the incarcerated population. JOHN M. MACDONALD & ELLEN A. DONNELLY, *EVALUATING THE ROLE OF RACE IN CRIMINAL JUSTICE ADJUDICATIONS IN DELAWARE* 11 (2016).

105. THOMAS P. EICHLER, DEL. CTR. FOR JUSTICE & METROPOLITAN WILMINGTON URBAN LEAGUE, *RACE AND INCARCERATION IN DELAWARE* 6 (2005), [https://static.prisonpolicy.org/scans/Race Incarceration.pdf](https://static.prisonpolicy.org/scans/Race%20Incarceration.pdf) (“Whites are an estimated 73% of those [in Delaware] using illicit drugs, [b]ut Blacks are 86% of those doing time for drug charges.”); NAACP, *Criminal Justice Fact Sheet*, <http://www.naacp.org/criminal-justice-fact-sheet/> (“African Americans represent 12.5% of illicit drug users, but 29% of those arrested for drug offenses and 33% of those incarcerated in state facilities for drug offenses.”).

106. Nar’l Juv. Defender Ctr., *Delaware: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings* 57 (July 2017), http://njdc.info/wp-content/uploads/2017/07/Delaware-Assessment_NJDC.pdf (finding in 2014, children of color in Delaware were “prosecuted in adult court 1.92 times more than white children”). Twelve percent of black children, 6% of white children and 8% of all children in Delaware had a parent who was ever incarcerated in a data sample from 2011–2012. Kids Count, *Children Who Had a Parent Who Was Ever Incarcerated by Race and Ethnicity*, <http://datacenter.kidscount.org/data/tables/8978-children-who-had-a-parent-who-was-everincarcerated-byraceandethnicity?loc=9&loct=2#detail> ed/2/any/false/1021/10,11,9,12,1,13 /17930,17931; NAACP, *Criminal Justice Fact Sheet*, <http://www.naacp.org/criminal-justice-fact-sheet/> (“Nationwide, African American children represent 32% of children who are arrested, 42% of children who are detained, and 52% of children whose cases are judicially waived to criminal court.”); Benjamin H. Harris & Melissa S. Kearney, *The Unequal Burden of Crime and Incarceration on America’s Poor*, Brookings Inst.: Up Front (Apr. 28, 2014), <https://www.brookings.edu/blog/up-front/2014/04/28/the-unequal-burden-of-crime-and-incarceration-on-americas-poor/> (“Sadly, having an incarcerated parent is a fact of life for 2.7 million American children.... [F]or an African American child whose father does not have a high school diploma, there is roughly a 50 percent chance that his or her father will be in prison by the time of the child’s fourteenth birthday.”).

On the other hand, there is the legitimate demand to take the shooters off the streets, and that our police will identify them and employ strategies to make our communities safer.¹⁰⁷ That, of course, involves more intensive policing of the communities where violence is occurring and more arrests.¹⁰⁸ That involves prosecuting the people caught and incapacitating them for some period of time. And if the supply of crime does not abate, those charged with enforcing the law are required to do their jobs.

Wanting to do the best we could to take a hard look at ourselves, we as a criminal justice system commissioned a study of the causes of disparities at the sentencing stage of the criminal justice system. We asked: What explains why black offenders were more likely to be sentenced to a prison term than white offenders?

We got one of the most respected criminal justice experts in the nation, John MacDonald, Professor of Criminology and Sociology, and the Penny and Robert A. Fox Faculty Director for the Fels Institute of Government, at the University of Pennsylvania,¹⁰⁹ to lead the study. He engaged as his co-researcher, a terrific young post-doc named Ellen Donnelly, who I am proud to say has now joined the University of Delaware as an assistant professor. They started with a large nominal disparity: a black defendant in Delaware is nearly 1.6 times more likely to receive an incarceration sentence than a white defendant.¹¹⁰ They then examined what explained that difference. What they found was revealing, which is that when one looked at certain criteria, the disparities that existed tended to dissipate.

That is, the more the white offenders and the black offenders shared certain characteristics, the more equally they were treated. And what were these characteristics?

The key ones were things like: whether the defendant had been arrested as a kid, the nature of the current case and charges the defendant faced, whether the defendant spent time in jail before trial, and how many times the defendant had been arrested before.

Using factors like these, the researchers were able to explain over 70% of the disparity.¹¹¹ Three factors—whether the defendant had a juvenile record, whether the defendant had prior arrests, and whether the defendant was able to post

107. See, e.g., *Purzycki to Get Help from State and County in Crackdown on Violent Gun Crime*, DEL. BUS. NOW (Jan. 24, 2017), <http://delawarebusinessnow.com/2017/01/purzycki-gets-help-from-state-and-county-in-crackdown-on-violent-crime/> (noting that even though the city police force will be increased by 19 officers, the Mayor is also seeking assistance from federal, state, and county agencies to address violent gun crime in known crime areas and stating that people who live in high crime areas are eager to “stop the relatively small number of criminals who are obtaining guns and shattering lives and communities”).

108. See Trey Popp, *Black Box Justice*, PENN. GAZETTE, Sept.–Oct. 2017, at 38, 43 (referring to “evidence that rates of drug use and selling are comparable across racial lines,” David Rudovsky, civil rights lawyer and senior fellow at the University of Pennsylvania law school observed that “[b]lack kids get arrested a lot more frequently for drugs—not because they use drugs more frequently, but because that’s where the cops are”).

109. U. PENN., *John MacDonald*, <https://crim.sas.upenn.edu/people/john-macdonald>.

110. JOHN M. MACDONALD & ELLEN A. DONNELLY, *EVALUATING THE ROLE OF RACE IN CRIMINAL JUSTICE ADJUDICATIONS IN DELAWARE* 25 (2016).

111. *Id.*

bail or had to spend time in jail—account for approximately 40% of the nominal disparity.¹¹² And, these three factors are all correlated with poverty and educational failure.¹¹³

Although the professors will be following up their study in detail, I would summarize my intuition from the initial study thusly: the more a white offender tends to have been in poverty and gotten in trouble early in life, the more the outcomes look exactly like the black offenders, most of whom share these attributes.

Police, prosecutors, and correctional employees are rightly frustrated at being the focus of a problem that they are dealing with long after it should have been addressed. By the time someone has dropped out of school, committed youth offenses, and been caught using a weapon in a drug crime, there are no easy answers, and there is no answer that does not involve some aspect of punishment.

And it is neither rational nor fair to believe that the answers to the deeper inequality in our state can be found in the criminal justice system itself. We should do better, and that is why there are major efforts going on to: improve the fairness of our criminal code and our bail system; reduce the effects of any form of bias, implicit or explicit, on decision-making by judges, lawyers, police, and correctional officials; and deepen our efforts to help offenders rehabilitate and become productive members of society.

But everything we know about crime suggests that the agriculture industry in our state extends north and that it involves the cultivation of continuing crime.

Why do I say so?

Well, we know that someone who grows up in poverty is much more likely to engage in crime than someone who does not.¹¹⁴ Social science research confirms that assertion, but if you don't believe it, perhaps you might believe Aristotle, who once said: "Poverty is the parent of crime."¹¹⁵

We also know that a person's earnings affect their likelihood of going to prison. For example, one study shows a \$100 increase in weekly pay reduces the chances of going to prison by about one-quarter.¹¹⁶ That same study estimates the

112. *Id.* (finding that detention accounted for 19.94% of the difference, juvenile record accounted for 5.78% of the difference, and number of prior arrests accounted for 14.62% of the difference, for a total of 40.34%). The other factors identified by the researchers that explain the balance of the 70% difference are arrest charge type, most serious arrest charge, violation of probation case, whether the defendant is male, age at arrest, county in which the defendant was sentenced, whether the defendant used a public defender, and the number of prior violent convictions, drug convictions, and felony convictions. *Id.*

113. *See, e.g.,* Tamar R. Birkhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J.L. & POL'Y 53, 108 (2012) (noting that "[l]ongitudinal studies demonstrate that arresting children and placing them in the juvenile justice system increases the likelihood of their continued involvement in the courts both as youths and adults"); Liana M. Goff, *Pricing Justice: The Wasteful Enterprise of America's Bail System*, 82 BROOK. L. REV. 881, 912 (2017) (summarizing the links between poverty and pretrial detention and noting that "[s]tudies spanning six decades have firmly established that the denial of liberty pretrial has plea-inducing and criminogenic effects; that pretrial incarceration as a result of poverty alone 'so pervades our system that for a majority of defendants accused of anything more serious than petty crimes, the bail system operates' as an outright denial of liberty; and, that 'there is an extraordinary correlation between pretrial status (jail or bail) and the severity of the sentence after conviction'" (citations omitted); Francisca D. Fajana, *The Intersection of Race, Poverty, and Crime*, 41 CLEARINGHOUSE REV. 120, 124–25 (2007) (chronicling the "long tradition of intertwining race, poverty, and crime" and noting that incarceration results in reduced social capital, "lost work experiences, diminished skills, severed social networks, irregular employment, and depressed wages"); *see also infra* n.115 and accompanying text).

114. Research supports "a policy of saving children from a life of crime by intervening in childhood to tackle key risk factors." Poverty is a "key risk factor" inducing future criminal behavior. U. MINN., SOCIAL PROBLEMS: CONTINUITY AND CHANGE 358 (2015), <http://open.lib.umn.edu/socialproblems/> (citing Welsh & Farrington, *Save Children From a Life of Crime*, 6 CRIMINOLOGY & PUB. POL'Y 871, 871–79 (Nov. 29, 2007)).

115. ARISTOTLE, POLITICS, Book 2 § 1260(b).

116. BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 78 (2006).

declining wages and employment rates for young black dropouts during the 1980s and 1990s increased those men's chances of imprisonment by 20%.¹¹⁷ This relationship between poverty and imprisonment is mirrored in the median income data for prisoners: "[I]n 2014 dollars, incarcerated people had a median income of \$19,185 prior to their incarceration, which is 41% less than non-incarcerated people of similar ages."¹¹⁸

We know that someone who drops out early is more likely to engage in crime than someone who does not.¹¹⁹

We know that someone who does not get a high school degree is much more likely to engage in crime than someone who does not. Black high school graduates or recipients of GEDs born between 1965 and 1969 were more than three times less likely than black dropouts to be imprisoned between the ages of 30 and 34 (3.6% versus 11.2%).¹²⁰

We know that someone who lacks a college degree is more likely to engage in crime than someone who does not. In fact, high school dropouts 16–24 years old are more than 63 times more likely to be incarcerated than college graduates.¹²¹

We know that the difference in average education between blacks and whites can explain up to 23% of the black-white gap in incarceration rates.¹²²

What we also know is that the difficulties of being poor are compounded by economic and racial segregation. Poor kids who live in socioeconomically diverse neighborhoods and go to socioeconomically diverse schools do better.¹²³ Concentrating all the kids and families with the most need in the same communities and neighborhoods limits their chances to escape poverty and increases the likelihood that children will fail in school and get involved in crime. Students who go to high-poverty, high-minority segregated schools are far more likely to have poor educational outcomes than students who go to desegregated schools,¹²⁴ and thus are at a greater risk of being involved in crime. Now, let's look at the realities in Delaware.

117. *Id.*

118. Press Release, Prison Policy Initiative, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned* (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html>.

119. An additional year of schooling reduces the annual probability of incarceration by 0.6 percentage points for whites and 2 percentage points for blacks. Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests and Self-Reports*, 94 AM. ECON. REV. 157, 180 (2004). A one-year increase in average education levels is estimated to reduce arrest rates by 11%. *Id.* at 175.

120. Andrew Sum *et al.*, *The Consequences of Dropping Out of High School*, CTR. LAB. MKT. STUD., NORTHEASTERN U. 27 (2009).

121. *Id.* at 9, 12.

122. Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests and Self-Reports*, 94 AM. ECON. REV. 157 (2004).

123. See, e.g., LINDA DARLING HAMMOND, *THE FLAT WORLD AND EDUCATION* 36 (2010) ("A number of studies have found that [the] concentration of poverty [in racially segregated schools] has an independent influence on student achievement ... confirming the 1966 Coleman Report finding that 'the social composition of [a school's] student body is more highly related to student achievement, independent of the student's own social background, than is any other factor. All kinds of students, both poor and nonpoor, have lower achievement in high-poverty elementary schools.'") (citing JAMES COLEMAN, *COLEMAN REPORT* 325 (1966)).

124. See, e.g., GOV'T ACCOUNTABILITY OFF., *K–12 EDUCATION BETTER USE OF INFORMATION COULD HELP AGENCIES IDENTIFY DISPARITIES AND ADDRESS RACIAL DISCRIMINATION* 42 (2016), <http://www.gao.gov/assets/680/676745.pdf>. ("More than 60

- A black person is 4.8 times more likely to be in prison than a white person.¹²⁵
- A black youth is more than twice as likely to be under the supervision of YRS than a white kid.¹²⁶

How surprising is that in light of these realities:

- A black person in Delaware is more than twice as likely to be in poverty than a white person.¹²⁷
- A black person in Delaware is almost twice as likely to be unemployed as a white person.¹²⁸
- And let's not forget the profound educational disparities that I already highlighted.

So, here, my fellow Delawareans is a question for us on the week of Constitution Day.¹²⁹

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years after the *Brown* decision, our work shows that disparities in education [in the United States] persist and are particularly acute among schools with the highest concentrations of minority and poor students.”); John R. Logan, Elisabeta Minca, & Sinem Adar, *The Geography of Inequality: Why Separate Means Unequal in American Public Schools*, 85 SOC. ED. 287, 289 (2012) (finding that black students are concentrated in high-poverty schools and that the racial and ethnic disparities in educational achievement are related to poverty level); Gregory J. Palardy, *High School Socioeconomic Segregation and Student Attainment*, 50 AM. ED. RES. J. 714, 732 (2013) (finding that students at schools with a low socioeconomic composition earn lower GPAs, score lower on math and reading achievement tests, and experience disruptions to learning due to poor facilities and inadequate equipment); Roslyn Arlin Mickelson & Damien Heath, 68 J. NEGRO ED. 566 (2012) (examining educational outcomes from the Charlotte-Mecklenburg, North Carolina school district and finding that many schools remain segregated at the district level and within academic tracks, that blacks are disproportionately assigned to lower level academic tracks, and that both forms of segregated schooling had negative effects on educational outcomes, whereas black students who experienced desegregated schooling had better educational outcomes).

125. Studies show that 2,002 of every 100,000 blacks in Delaware are incarcerated, and 414 of every 100,000 whites in Delaware are incarcerated. PRISON POL’Y INITIATIVE, *Delaware Profile*, <https://www.prisonpolicy.org/profiles/DE.html>.

126. Andrew Cohen, *Race and Ethnicity by Program*, DIV. YOUTH & REHABILITATIVE SERVICES, <https://public.tableau.com/profile/andrew.cohen#!/vizhome/DemographicDataByProgramandYear/TotalClientsServedbyFiscalYear> (reporting that for fiscal year 2016, 68% of program clients were black and 31% of clients were white); see also DIV. YOUTH & REHAB. SERV. OFFICE OF DIR., POPULATION STATISTICS SNAPSHOT 3 (2014) (reporting that 75% of clients were black); Jessica Masulli Reyes, *Six in Ten Delaware Inmates Are Black*, DEL. NEWS J. (Oct. 19, 2015), <http://www.delawareonline.com/story/news/crime/2015/10/17/six-10-delaware-inmatesblack/73585456>.

127. CTR. COMM. RES. & SERV., AN OVERVIEW OF POVERTY IN DELAWARE 5–6 (2014).

128. DEL. DEP’T. LAB., DELAWARE ANNUAL ECONOMIC REPORT 62 (2016), <https://lmi.delawareworks.com/Content/Publications/Documents/Delaware%20Annual%20Economic%20Report%202015.pdf>.

129. LIB. CONGRESS, *Constitution Day and Citizenship Day*, <https://www.loc.gov/law/help/commemorative-observations/constitution-day.php> (noting that Constitution Day is observed on September 17th of each year to commemorate the signing of the Constitution on September 17, 1787).

Have we lived up to our own responsibilities to make real the concept that all of us are created equal? Have we truly come close to overcoming over 300 years of racial oppression that preceded the adoption of the Civil Rights Act of 1964?¹³⁰ What have we done with the responsibility we asked the federal court to return to us in the 1990s?

If you are like me, you find it unsatisfying for someone to identify a real problem, but then leave it to others to identify how to tackle it.

Consistent with my message that we all have a responsibility in Delaware to honor by our actions our constitutional commitment to equality, I will venture some thoughts on a way forward.

In doing so, I acknowledge that there have been important efforts to improve the realities I have addressed. In particular, the citizen leaders of the Wilmington Education Improvement Commission have worked tirelessly for many years, both as members of that Commission, but even before then, to do something substantial about our decline into a resegregated school system. Most recently, having been urged by political leaders to come up with a solution that the existing bureaucracies in the four northern New Castle County school districts would accept, a plan was developed that would have given Christina's part of the city to Red Clay, along with some additional resources.¹³¹ That well-intentioned plan was a step forward, but as a plan that had as its pre-condition the acceptance of each school district, it left city kids divided among three districts and put almost all of the new burden of the plan on Red Clay.

When push came to shove, the school districts' supposed support was not accompanied by any concerted effort or ability by them to get legislative support. The nascent effort died, and lest the opposition to the plan be seen as based solely on a lack of concern for city kids, a reality about that plan has to be acknowledged. Precisely because the plan was a political compromise involving groups with a vested interest in the status quo, there was a good faith concern that one district was being saddled with more than it could handle, without the resources or guiding vision to serve the additional students in any better way. Without the vision or the necessary resources, there was a concern that a bad situation would just get worse.

No doubt there were diverse motivations and reasons for the lack of support the plan ultimately generated. Nor is there any doubt that after a generation of freedom from court supervision, the children of Wilmington find themselves under the governance of four school districts that no longer make any effort to desegregate schools.¹³² When the desegregation case was being litigated, there was a debate among black leaders in Wilmington. Many believed that desegregation was vital and had to involve city kids having access to suburban schools. Others feared, however, that school districts

130. The time span of racial oppression measured here begins with the slave trade in the United States and ends with the Civil Rights Act of 1964. See NAT. GEO., *A History of Slavery in the United States*, <https://www.nationalgeographic.org/interactive/slavery-united-states/> (estimating the American slave trade spanned from 1619 to 1807).

131. WILMINGTON EDUC. IMPROVEMENT COMM'N, 1 SOLUTIONS FOR DELAWARE SCHOOLS 3 (2017) (summarizing the redistricting recommendation that "[e]ffective July 1, 2018, the boundaries of the Christina School District should be altered so that it no longer services the City of Wilmington ... [and e]ffective July 1, 2018, the boundaries of the Red Clay Consolidated School District should be altered to include the portion of the City of Wilmington now served by the Christina School District").

132. In fairness, the school districts can no longer make these efforts under state law because they would be inconsistent with the Neighborhood Schools Act. See The Neighborhood Schools Act of 2000, 72 Del. Laws ch. 287 (2000) (codified at 14 DEL. C. § 220).

dominated by a suburban electorate would leave city residents powerless and without the ability to do what was right by their children.¹³³ While the Courts oversaw the four districts, the city's relative lack of voice in those districts was at least balanced by a high degree of desegregation, both by race and by poverty.

Since the court got out of the picture, city kids have the worst of all worlds. The city as a voting base is divided among four districts where city residents are a minority and not the driving force.¹³⁴ And there is no compensatory commitment to desegregation and equal opportunity.

So, what might be a strategy for realizing the promise of equality, and as important, creating the kind of educational and economic opportunity that will make our state more prosperous and safer in the long run?

I am going to begin by stating a stark reality: there ain't no way legislation will be passed that makes suburban kids in New Castle County go to school in Wilmington again. Just ain't going to happen. A mandatory desegregation plan will not happen, and under current U.S. Supreme Court doctrine,¹³⁵ it is not even clear that school districts could do that if they wanted to, and the majority of their electorate doesn't want them to. Not only that, but current state law limits their ability to do so anyway.¹³⁶

Rather, we are going to have to deal with the reality that schools will be more segregated than they were under the court order. But with that should come an acknowledgment of a corresponding moral duty to make the conditions for students in city schools ones that give them an equal opportunity to thrive. That moral duty has been ignored, and it cannot be fulfilled unless fundamental change is undertaken that puts kids first, and recognizes that kids who have less, need more.

A vision for doing that logically starts by identifying a first-best, uncompromised vision that puts children, families, and the community first, and that does not fear taking on entrenched interests.

It is not rocket surgery or brain science to create a school district that would serve all the children of Wilmington. A northern New Castle County school district could be easily drawn that would be geographically compact, would take in the entire city and the Red Clay and Brandywine School Districts, and that would make sense to any planner or educator who wanted to do right by kids and match a district naturally with communities. That district could also take

133. JEFFREY A. RAFFEL, *THE POLITICS OF SCHOOL DESEGREGATION* 65–66 (1980) (“The Wilmington School District was chiefly interested in maintaining control over the city schools Its representatives opposed plans that would divide the district, especially if no other district was dismantled.... It was becoming obvious that the Wilmington Board’s desire for desegregated education was in direct conflict with a strong black interest in maintaining the Wilmington School District. The Wilmington school system was the only power base that local black leadership possessed.”); see also Antonio Prado & Andréa Miller, *The 40-Year Legacy of Evans v. Buchanan: A Struggle over Education, Race, Power*, HOCKESSIN COMTY. NEWS (Oct. 21, 2008), <http://www.hockessincommunitynews.com/article/20081021/NEWS/310219952> (“Still others thought interfering with the [Educational Achievement] Act would damage the black community’s newly gained political power, since by 1971 the seven-member Wilmington Board of Education had gained a black majority for the first time ‘For the first time, blacks had their own school board and many blacks felt they should build up the schools’”) (citing Dr. Raymond Wolters, University of Delaware history professor); Robert Taggart, *The Failure of Apparent Successful School Desegregation: Wilmington, Delaware, 1954–1978*, 32 AM. ED. HIST. J. 94, 99 (“Many black community leaders and educators opposed the combination of the Wilmington school district with surrounding suburban districts because blacks finally had a majority on the school board and feared that a white majority would not treat them or their children well.”).

134. See INST. PUB. ADMIN., U. DEL., *DELAWARE SCHOOL DISTRICT ORGANIZATION AND BOUNDARIES* (Mar. 2004), <https://www.doe.k12.de.us/site/handlers/filedownload.ashx?moduleinstanceid=3431&dataid=10922&FileName=DelSchDistOrg-Boundaries.pdf>.

135. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 735, 770 (2007) (distinguishing elementary and secondary schools from the “unique context of higher education,” finding no compelling interest in attaining a diverse student body at the primary and secondary level, and striking down a school district’s procedure for racially balancing school-level demographics through student assignment).

136. The Neighborhood Schools Act of 2000, 72 Del. Laws ch. 287 (2000) (codified at 14 DEL. C. § 220).

in parts of the suburban part of Colonial that are closest to the city and logically a part of a Northern New Castle County school district.

This new district would be one of the wealthiest in the state with nearly \$10 billion in assessed property value to support its students.¹³⁷ The new district would no longer be forced to share revenue with districts who are no longer charged with educating city kids. And as part of meeting the needs of its low socio-economic status children, consideration should be given to letting it raise revenue more flexibly.

The new District would therefore make geographic and economic sense. City kids should continue to have a right to go to a suburban school, but those schools would all be relatively close to the city and part of a coherent community. As important, it must be remembered that it is not COINCIDENTAL that Red Clay and Brandywine are affluent districts. It is because they are annexed to Delaware's economic engine, the city of Wilmington. It is therefore fitting for them to be together.

There should be special governance provisions to ensure an adequate voice for city residents in a district that will be majority suburban. A single northern district with the city as a component will improve the lack of voice city residents now have, but it is not a sufficient answer.

The governance provisions should also provide a model that could be used in other challenging parts of the state. To that end, consideration should be given to establishing Wilmington as an innovation zone, with the new District given the flexibility to be innovative within the zone to address its special needs.

The funding provisions should also provide a model that is scalable statewide to address the needs of all Delaware's children who have less and thus need more. From the get-go, an explanation should exist of how this can go statewide.

Now, it is also vital that this change in structure not be seen as an end in itself. It is not. But structural change is vital to giving kids and their families what they need. Kids on the west side of Wilmington do not have different needs from kids on the east side. Kids in Brandywine Hundred don't need to learn different things than kids in Westover Hills. The current lack of coherence and focus that comes from divided governance is costly to effectiveness and especially harmful to kids at the narrow end of the pizza slices, who can move a few blocks and find themselves in an entirely different school district.

Creating one high quality district would cut down on the school-by-school, district-by-district tinkering approach, and allow for the selection of a highly qualified educational leader to implement a consistent, well-thought-out approach that recognizes that kids and families who have less need more, and that address the realities of twenty-first century families who are economically challenged.

What would such a vision involve? How about this?

- A 220-day school year, starting at kindergarten and extending upward over a number of years. This could start with low socio-economic status schools but spread to all schools eventually.¹³⁸

137. Based on available statistics, it appears that a combined district of this kind would have over one third of the state's assessed value and about 28,000 to 29,000 students. The entire state, minus assessed value going toward vo-tech schools, has \$26.1 billion in assessed value to cover 114,000 or so students in the public schools that are not vo-tech or charter schools. DEL. DEP'T EDUC. & STATE BOARD EDUC., SEPTEMBER 30TH STUDENT ENROLLMENT AND UNIT ALLOTMENT REPORT 1-24, 70 (2016), [https://www.doe.k12.de.us/site/handlers/filedownload.ashx?moduleinstanceid=2782&dataid=19000&FileName=2016Enrollment and Unit Allotment Report.pdf](https://www.doe.k12.de.us/site/handlers/filedownload.ashx?moduleinstanceid=2782&dataid=19000&FileName=2016Enrollment%20and%20Unit%20Allotment%20Report.pdf).

138. Instructional time of at least 300 hours more than the conventional district calendar is one of the strongest predictors of higher achievement. Moreover, more time in school can help mitigate the effects of poverty on learning, such as poorer health, less stable home lives, and fewer out-of-school learning opportunities. DAVID A. FARBMAN, NAT. CTR. TIME & LEARNING, THE CASE FOR IMPROVING AND EXPANDING TIME IN SCHOOL: A REVIEW OF KEY RESEARCH AND PRACTICE 3 (2015) (citing Will Dobbie & Roland G. Freyer, Jr., *Getting Beneath the Veil of Effective Schools: Evidence from New York City* (NBER Working Paper No. 17632, 2011); see also Caroline Hoxby and Sonali Murarka, *New York City Charter Schools: How Well Are They Teaching Their Students?*, ED.

- A full day, including after-school homework time, nutritious snacks, and activities.¹³⁹ And an early arrival option, with breakfast.
- A requirement that all students grade seven and up engage in an after-school activity all year round, like the independent schools in our state do.¹⁴⁰
- The restoration of some city middle and high schools, so as to foster community pride, parental participation, and important things like theatrical events and sports games within the city. Special efforts should be made to ensure that these schools are high quality, safe, and desegregated to the extent feasible.
- More opportunities to allow kids to approach school earlier through the prism of real world jobs, including consideration of creating grade seven to twelve vocational models. Effective vocational and career oriented high schools have been shown to decrease dropout rates and increase attendance rates.¹⁴¹

Think of how this plan would address what we know are hard truths about the families with children in our public school system who live in Wilmington:

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NEXT, Summer 2008, at 54–61 (concluding from the same data set used by Dobbie & Freyer that learning time is one of the strongest predictors of student outcomes).

139. Jill K. Posner & Deborah Lowe Vandell, *Low-Income Children's After-School Care: Are There Beneficial Effects of After-School Programs*, 65 CHILD. & POVERTY 440 (1994) (“When maternal education, race, and family income were controlled, attending a formal after-school program was associated with better academic achievement and social adjustment in comparison to other types of after-school care... Children in formal programs spent more time in academic activities and enrichment lessons and less time watching TV and playing outside unsupervised than other children. They also spent more time doing activities with peers and adults and less time with siblings than did other children. The time that children spent in these activities was correlated with their academic and conduct grades, peer relations, and emotional adjustment.”).

140. See generally Ralph B. McNeal, Jr., *Extracurricular Activities and High School Dropouts*, 68 SOC. EDUC. 62 (1995) (“[P]articipation in athletics and in fine arts serve as key intervening variables in the dropout process, magnifying the direct relationships between race, gender, academic ability, and dropping out. These findings persist even after crucial ‘dropout’ forces (such as race, socioeconomic status, and gender) and ‘pull out’ forces (such as employment) are controlled.”). Year-round activities are required at independent schools in Delaware. See, e.g., WILMINGTON FRIENDS, *Athletics at Wilmington Friends*, <https://www.wilmingtonfriends.org/page/our-programs/athletics> (“All upper school students (grades 9–12) are required to participate in one sport per school year; many of our students play two or three sports each year.”); SANFORD SCHOOL, STUDENT/PARENT ATHLETIC HANDBOOK 2017–2018, https://sanfordschool.myschoolapp.com/ftpimages/572/download/download_1827639.pdf (“All 7th and 8th graders are required to participate in each of the three sports seasons. In grades 9–12, students are required to accumulate a total of four athletic team credits, and earn an additional four co-curricular credits, prior to graduation.”); TOWER HILL SCHOOL, *Athletics*, <https://www.towerhill.org/page/athletics/athletics/athletics-handbook> (“We believe it is clear that individual high school athletes and athletic programs in general make significant contributions to the vitality of life in the school and its larger community. Therefore ninth and tenth graders are expected to participate in one of the after-school athletic activities offered during each season of the first two years of Upper School. Eleventh and twelfth graders may take one season off.”).

141. Students at career and technical schools in New York City, for example, “have proven to have higher graduation rates and are four times less likely to dropout than students who attend academics-only institutions. These schools even boast attendance rates which are above the high school city average.” SHARNELL CREARY, A CASE FOR CAREER AND TECHNICAL EDUCATION IN REDUCING HIGH SCHOOL DROP OUT RATES AND YOUTH UNEMPLOYMENT AMONG URBAN YOUTH 17–18 (2016), https://www.fordham.edu/download/downloads/id/5794/sharnell_creary__a_case_for_career_and_technical_education.pdf.

- 23.5% of Wilmington residents (as compared to 10.7% of New Castle County residents) live in poverty.¹⁴²
- 33% of children in Wilmington (as opposed to 14% in New Castle County) live in poverty.¹⁴³
- Many kids have parents who both must work.¹⁴⁴
- Many kids have a single parent who must work.¹⁴⁵
- Many families are unable to afford afterschool care or extra tutors.¹⁴⁶
- Many families are unable to afford summer camps.¹⁴⁷
- Kids often are unsupervised when out of school as a result.¹⁴⁸
- Kids often enter the school system less prepared and thus need more time to catch up.¹⁴⁹

142. CTR. COMTY. RES. & SERV., AN OVERVIEW OF POVERTY IN DELAWARE 2 (2014).

143. *Id.* at 5–6.

144. Seventy-three percent of Wilmington families with children of the householder aged six to seventeen have all parents in the family in the labor force. United States Census Bureau, *Selected Economic Characteristics 2011–2015 American Community Survey 5-Year Estimates: Wilmington City, Delaware*, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>.

145. *Id.* Over 60% of black children in New Castle County live in single-parent families. In Wilmington, 84% of black children live in single-parent families. DEL. COMTY. FOUNDATION, *Family Support*, <http://delawarefocus.org/children-youth/family-support/single-parent-families-by-race-ethnicity>.

146. 29.9% of Wilmington families with children under eighteen related to the head of household had incomes below the poverty level in the past twelve months. U.S. CENSUS BUREAU, *2011–2015 American Community Survey 5-Year Estimates*, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>. On average, before and after school care in a childcare center in Delaware costs \$3,495 and full-time summer care costs \$1,631 for a school-aged child. Similar care in an unaccredited family childcare home costs \$2,731 for before and after school care and \$1,343 for full-time summer care. CHILD CARE AWARE OF AMERICA, 2017 STATE CHILD CARE FACTS IN THE STATE OF: DELAWARE 2 (2017), http://usa.childcareaware.org/wp-content/uploads/2017/07/DE_Facts.pdf.

147. *Id.*

148. “By 2006, in poor families, 7.5% of children aged 5–8 were home alone; nearly 14% of kids 9–11 were.” JOAN C. WILLIAMS, WHITE WORKING CLASS 23 (2017).

149. See, e.g., NAEYC, BRIDGING THE VOCABULARY GAP (2010), <https://www.naeyc.org/files/lyc/file/201007/ChristWangOnline.pdf> (discussing low income children’s vocabulary gap upon entering school—3 year old children from low income families know 600 fewer words than children from families with higher incomes, and this gap grows to 4,000 words by second grade).

- Kids are more likely to need nutrition, which relates to achievement.¹⁵⁰
- Short school schedules endanger parental employment because they make it more difficult for parents to balance their need to earn wages to support their family with their obligation to make sure their kids are safe.

Think of how this plan would address the root causes of crime in our community:

- Kids who don't achieve in school can't make a good living and end up at high risk of creating crime.
- At worst, this behavior starts before they are adults.
- Kids without options are more likely to create new kids before they are ready, and kids they cannot support.¹⁵¹
- When parents and relatives think their children have no hope, they also have less reason to sacrifice and to focus on constructive behavior to ensure that their kids' fate is better than their own.
- Kids who are unsupervised are unsupervised. They do stupid stuff and worse.

Note that this model is one that would serve all kids well, regardless of race. For all poor kids, these policies would allow them the extra learning time and other support they need. And for all kids, this model would better fit with the realities of family life for all families in the twenty-first century, and also recognize that if American kids are going to compete in a global economy, they need to spend more time on academics.¹⁵²

For far too long we have failed to give poor kids and the good people who work hard to teach them the main thing that they both need: more time with each other to help these kids catch up and keep up and learn the skills they need to be effective citizens and productive workers in a globalizing, competitive world. In every other context, we recognize that sweat—time on task—matters. But, we have yet to take that seriously in this most important of all realms: the education of our children.

150. 19.4% of Delaware children under eighteen experience limited or uncertain availability of nutritionally adequate and safe foods at some point during the year. NO KID HUNGRY, *Hungry Kids Aren't Getting the Resources They Need*, <https://www.nokidhungry.org/problem/hunger-facts>; NO KID HUNGRY, *HUNGER DEVASTATES CHILDREN 2* (2016), https://www.nokidhungry.org/pdfs/Fact_Sheet-2016.pdf (“Undernourished children don’t learn as fast or as well as nourished children.... Lack of healthy food can impair a child’s performance in school.... Teens who regularly face hunger are more likely to be suspended & have difficulty getting along with others.”).

151. See, e.g., DEL. HEALTH & SOC. SERV. DIV. OF PUB. HEALTH, *DELAWARE ADOLESCENT SEXUAL HEALTH STATE PLAN 11* (2010), http://bidcondocs.delaware.gov/HSS/HSS_11020_HealthyOutcomes_Add1A.pdf. (“In Delaware, in 2004, annual taxpayer costs associated with children born to teen mothers included: \$5 million for public health care (Medicaid and SCHIP), \$5 million for child welfare, \$12 million for incarceration, \$7 million in lost tax revenue, due to decreased earnings and spending.”).

152. In 2012, the United States ranked 27th in mathematics, 17th in reading and 20th in science out of the 34 OECD countries that administered the PISA test. Compared to the top overall PISA scoring nation (South Korea), the United States has approximately 20% fewer days in its school year. Compared to the top PISA scoring nation in the European Union (the Netherlands), the United States has approximately 10% fewer days in its school year. OECD COUNTRY NOTE: UNITED STATES, *Programme for International Student Assessment (PISA) Results From PISA 2012*, <https://www.oecd.org/unitedstates/PISA-2012-results-US.pdf>; OECD, *EDUCATION AT A GLANCE 481* (2012), https://www.oecd.org/edu/EAG%202012_e-book_EN_200912.pdf.

Furthermore, by focusing on addressing the needs of the impoverished, we can reduce racial inequality, but by race-neutral means. Precisely because black kids are poorer on average, anything that targets poverty will help reduce racial inequality but in a way that provides an equal opportunity to all kids in poverty. The opioid crisis is showing again how views change when a problem hits people who look like them. One hopes that all of us can have the empathy to recognize that kids who have less, need more.

At this point, the hard-boiled among you are saying, sure Strine, that sounds good but how can we afford to pay for it?

My first answer is how can we afford not to if we really care about our constitutional commitment to equality?

My second answer is how can we afford not to if we want our state to be safer and to be a place where businesses want to locate and create jobs?¹⁵³ Anyone who thinks that the facts I have outlined about crime, poverty, and our educational system do not cost our state jobs every day must think that businesspeople are stupid. They are not, and they have plenty of choices.

My third answer is that we are already paying in other dumber ways. Money that could be spent on giving kids more learning time, a safe place to be when their parent is working, and on long-term hope and independence is now going into youth detention centers, prisons, and constant demands on police. Our antiquated school year and day causes us to spend money on a patchwork of after-school programs and summer programs. Frankly, even affluent parents know the silliness and cost of finding camps, childcare coverage, and other ways to ensure that children in school for too little of the year get the enrichment and supervision they need. Kids with parents who can't afford it have time to get in trouble, and time to fall even further behind in their studies.

You pay one way or another, and instead of paying to deal with the wreckage resulting from not addressing economic and educational inequality, we should pay by investing in a better future for our children and our community.

My final answer is that the question is not whether we can afford to do this, but whether we choose to do it. During the same period, we have resegregated our schools, we have stopped asking ourselves to do a central thing necessary to being citizens of a community that cares about reducing inequality. That is paying taxes.

During the past twenty years, we have relied on ephemeral sources of revenue like slots and escheat more and more, and less on taxes we ourselves pay. One industry I know a lot about—entity formation and legal services—has been asked to generate more and more of our state revenue, shifting our tax base from our human citizens to our voluntary corporate citizens.

Three of the most popular and effective governors in our state's history were Pete DuPont, Mike Castle, and Tom Carper: two Republicans and one Democrat. All were excellent governors and all were respected by the business community for their skills at economic development. If you look at the tax rates we paid when each of them was twice-elected as Governor, you will find that those rates were higher than those we now pay.¹⁵⁴ But when we did that, we were happy to

153. "In the U.S., high school dropouts commit about 75% of crimes." Keenan D. Dorsey Sr., *A Proposal for Implementation of a Dropout Prevention Program for Students Ages 16–21 in a Delaware Public School District 2* (executive position paper for Doctor of Education in Innovation and Leadership, Wilmington University), <http://delaware.contentdm.oclc.org/cdm/ref/collection/p15323coll5/id/30224> (citing C. Amurao, *Fact Sheet: Is the Dropout Problem Real?*, TAVIS SMILEY REP. ON PBS 1 (2013), <http://www.pbs.org/wnet/tavissmiley/tsr/education-under-arrest/fact-sheet-drop-out-rates-of-african-american-boys/>).

154. Under Governor Carney's recent proposal to raise personal income taxes to a level well below most of these time periods mentioned, over \$200 million would have been raised. Moreover, if the General Assembly took action to liberalize the uses for fuel taxes and increased our fuel tax to the regional average—the region including Maryland, New Jersey and Pennsylvania—nearly \$100 million a year could be raised. These revenues would also not include any additional funds that could be raised by adjusting gross receipt taxes to be more in line with past levels.

do so, because our state was in good shape, crime was under control, and we knew that those taxes went to services and infrastructure that benefitted us all.

Perhaps it is time for us to face the constitutional mirror test and ask ourselves whether we can make the same sacrifice we made during those years of prosperity. And lest some of my Republican friends think I am leaving something important out, perhaps we can also address the reality that the public deserves a government that spends money wisely and not on costly overhead.

If having nineteen school districts with nineteen costly superintendents gave us the number one results, perhaps we should stick to the status quo. But it doesn't. There is no reason we could not have three New Castle County districts (a northern, middle, and southern district), one Kent County District, two Sussex County Districts, and one—yes, one—statewide vo-tech district that puts the needs of kids who need vo-tech the most first. The reductions in overhead and duplicative costs, and the increase in coherence in approach, would result in more impact at the classroom level.¹⁵⁵

Likewise, remember those school level experience absurdities I mentioned? How about we insist, as a matter of law, that any teacher who gets paid more by the state for experience, degree, or certification agree to serve in the school selected by their district on the basis of where the teacher is needed most?

Put simply, we need to invest both more and more wisely. The public will support that if leaders put the served ahead of the vested interests.

This vision is one that would serve not just Wilmington students but all Delaware students. The sad reality is that profound racial inequality pervades our entire state and is a direct legacy of our history of racial oppression. By sensible school district consolidation statewide, we could reduce non-classroom spending, increase the coherence of curriculum and teaching strategies, and give our teachers more resources to do their jobs. By giving all kids who have less, more, we tackle racial inequality in a race-neutral way. And by creating a school calendar and school day that is based on what families and children in the twenty-first century need, we will give all our kids a better chance to succeed, and make our state a place where high quality businesses want to locate.

We have a governor who cares a great deal about the kids of Wilmington and our state. He showed a willingness this spring to talk about hard issues like this. I have no doubt he is thinking deeply about how to tackle the problems I have been discussing.

But he cannot tackle these problems unless we all recognize as citizens our obligation to make our constitutional ideals come alive in reality, and not just as rhetoric on patriotic occasions.

Precisely because the situation is so urgent, one could imagine it being sensible to take immediate action to address the dire problems in the city's elementary schools, while getting the legal and fiscal authority to make the larger structural changes that are vital to lasting progress. But it is difficult to get to a destination if you don't have one in mind, and it is important that the emergency actions that may need to be taken are recognized as just that, what is needed to stabilize a desperate situation. The need for emergency measures makes plain the requirement for more fundamental, structural reform to give Wilmington kids the educational opportunities they deserve.

The only way to make the promise of equality in our constitution genuine is for us to be willing to fight for what is right. That means matching the boldness of our actions to the size of the problem. There is no shame in losing a fight in the name of a good cause, as that is often necessary to beat down the barriers to long-term progress. But it is now over a generation since the courts left the scene and trusted us with the responsibility to guarantee the constitutional promise of equality. The time for excuses, for delay, and for a lack of action has run out. It's damn sure time we do something, and do something big.

155. See, e.g., Nikole Hannah-Jones, *A Dream Deferred*, N.Y. TIMES MAG., Sept. 10, 2017, at 39, 48 (noting that smaller school districts tend to have fewer resources and administrative costs "up to 60 percent more per pupil" than their larger counterparts.).