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TABLE OF CONTENTS

Recent Developments In Criminal Law: 2012 Delaware Supreme Court Decisions <i>Michael F. McTaggart</i>	105
Women And The Delaware Bar And Bench: It Takes Generations <i>Claire M. DeMatteis</i>	125
<i>Christian, Hill, Adams And Keener: Key Litigation Decisions Of 2013</i> <i>Douglas J. Cummings, Jr., Johnna M. Darby, Mary F. Dugan</i>	141
An Overview Of The Real Estate Finance Opinion Report Of 2012 <i>Robert J. Krapf and Edward J. Levin</i>	153

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RECENT DEVELOPMENTS IN CRIMINAL LAW: 2012 DELAWARE SUPREME COURT DECISIONS

Michael F. McTaggart*

In 2012, the Delaware Supreme Court issued thirty-two opinions that covered various criminal law issues. This article will briefly summarize some of those decisions in the areas of evidence, search and seizure, and other areas of significance or first impression. Readers are directed to the Court's opinions for the complete statement of the facts and legal analysis of the Court.

I. EVIDENCE DECISIONS

A. Officer's Overview Of Crime Testimony Admissible—*Damiani-Melendez v. State*

In *Damiani-Melendez v. State*,¹ the Court held that police officers' overview testimony about similar characteristics in defendant's robbery offenses was not objected to at trial and did not constitute plain error.²

The defendant Damiani-Melendez committed a series of robberies or attempted robberies of retail stores in New Castle County. The robberies were marked by common characteristics including the use of masks, gloves, and black clothing for the robbers and the defendant typically possessed a shotgun. The Delaware State Police in December, 2010 saw the defendant commit a liquor store robbery and he was then arrested for his three-month spree of twelve robberies and two attempted robberies.³

At trial, the investigating officers testified about the defendant's involvement with the fourteen charged offenses, based in part on videotapes and photographs that were not admitted at trial. Prior to the testimony of the chief investigating officer, defense counsel stated no objection to the officer's overview testimony about the case that would be based on some hearsay. The officer then testified without objection to an overview outlining the nature of the defendant's offenses.⁴

The Court found that the defendant failed to challenge the admissibility of the officers' testimony at trial and considered the propriety of the evidence under a plain error standard. The Court ruled that the testimony of the chief investigating officer was not cumulative as he was uniquely qualified to testify to the similar facts present in all of the robberies and provide the jury with an overview. The testimony of the one police officer touched on evidence in a videotape that was not admitted at trial. The State did call a witness who testified to the events of that robbery and even if the videotape evidence should have been excluded, the admission of this police testimony was not "clearly prejudicial" to the defendant. The Court found there was overwhelming evidence against the defendant including testimony of a number of

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1. 55 A.3d 357 (Del. 2012).

2. *Id.* at 360.

3. *Id.* at 358-59.

4. *Id.* at 359.

witnesses along with physical evidence in the defendant's possession at the time of his arrest. The Supreme Court ruled there was no plain error and affirmed the judgment of the Superior Court.⁵

B. Improper Vouching In § 3507 Statement Not Permissible—*State v. Richardson*

In *State v. Richardson*,⁶ the Court held that a CAC interviewer's testimony that contained opinion testimony about the truthfulness of the complaining witnesses constituted improper vouching.⁷

Defendant Richardson lived with his aunt in Wilmington from 2001 through 2005. During this time, his aunt's granddaughters reported that the defendant sexually assaulted them. The younger granddaughter testified that, when she was six years old and Richardson was sixteen, he forced her to perform oral sex, and that he also committed unlawful sexual contact. The older granddaughter testified that, when she was ten years old and the defendant was twenty, he forced his fingers into her vagina on two separate occasions, and also attempted to force her to perform fellatio. The younger relative first reported the sexual assault to her mother in 2009. After contact with the police, both girls were interviewed by a Child Advocacy Center ("CAC") forensic interviewer who conducted a videotaped interview. The two girls testified at trial and the State offered the recorded CAC interviews at trial without objection. Prior to the admission of the first statement, the CAC interviewer testified about the RATAC interview protocol and her special training. At the conclusion of her testimony, the interviewer stated that victims do not always tell the whole story in a consistent manner but that the interviewer was very aware when a child is telling the truth. The defendant was convicted on four of six charges and appealed his conviction.⁸

On appeal, the Court considered Richardson's challenge to the CAC interviewer's testimony about the RATAC interview techniques and her opinion that the children were truthful. The Court noted that the child witnesses had testified fully at trial and the CAC tapes appeared to be cumulative and were subject to exclusion on that ground. The Court also stated that the purpose of § 3507 was to deal with a turncoat witness and was not intended to allow for a prior statement to be admitted to buttress the testimony of a witness.⁹

The Court did find reversible error in the testimony of the CAC interviewer which was inadmissible and unfairly prejudicial. The State was limited to establishing the foundation for the statement by proving that the statement was voluntary, establishing the content of the prior statement, and by the witness being available for cross-examination.¹⁰ In this case, the witness testified in great detail about her background, training, and interview techniques. The Court ruled that the testimony amounted to improper vouching for the veracity of the two child witnesses and constituted reversible error.¹¹ In the Court's view, the case turned on the credibility of the complaining witnesses and the defendant, and the

5. *Id.* at 359-60.

6. 43 A.3d 906 (Del. 2012).

7. *Id.* at 909-10.

8. *Id.* at 907-08.

9. *Id.* at 909 (citing *Blake v. State*, 3 A.3d 1077, 1082 (Del. 2010); *Keys v. State*, 337 A.2d 18, 22 (Del. 1975)).

10. *Id.* at 909 (citing *Woodlin v. State*, 3 A.3d 1084, 1088 (Del. 2010)).

11. *Id.* at 910 (citing *Capano v. State*, 781 A.2d 556, 595 (Del. 2001); *Wheat v. State*, 527 A.2d 269, 275 (Del. 1987); *Powell v. State*, 527 A.2d 276, 279 (Del. 1987)).

CAC interviewer should not have testified about her opinion as to the truthfulness of the two children. The Court reversed the judgment of the Superior Court and remanded for a new trial.¹²

C. Hospital Blood Test Result Inadmissible Where Manufacturer's Specifications Not Followed—*Hunter v. State*

In *Hunter v. State*,¹³ the Court ruled that the BAC blood test result was inadmissible where the phlebotomist used an expired blood kit and vigorously shook the sample in violation of the approved manufacturer's specifications.¹⁴

Defendant Hunter was stopped by Smyrna Police officers for a motor vehicle violation. Hunter was later arrested for DUI after he failed several field sobriety tests, had open beer cans in his truck, and exhibited physical signs consistent with being under the influence. The defendant became combative after being transported to the police station. The police called for an ambulance after Hunter exhibited signs of going into diabetic shock. Once the EMT arrived, Hunter acted in a vulgar, combative manner and the police decided to take him to the hospital to draw blood. Before leaving the police station, the defendant kicked the EMT in the right arm and caused serious injuries. A police officer tasered Hunter to gain his compliance with orders. At the hospital, Hunter was uncooperative and refused the blood draw. After attempting to bite a police officer, Hunter was tasered and the blood sample was then taken by the hospital phlebotomist.¹⁵

After his conviction for DUI, Assault, and Resisting Arrest, Hunter filed a direct appeal to the Supreme Court. The Court first addressed Hunter's challenge to the admission of the BAC test result of 0.12%. The blood was drawn on September 2, 2009 but the blood test kit supplied by the police had an August 31, 2009 expiration date. The manufacturer's specifications provided that the blood tubes were not to be used after their expiration date. At trial, the police officer also testified that the phlebotomist sealed the tubes after the blood draw and then vigorously shook them. The manufacturer's specifications clearly instructed that the tubes were not to be shaken vigorously. The Court relied on *Clawson v. State*¹⁶ for the rule that the State must follow the manufacturer's protocol in order to establish the necessary adequate foundation for admission of a BAC test.¹⁷ In this case, the Court found there were two independent deviations from the manufacturer's required protocol which both rendered the BAC test inadmissible and the BAC test results should have been suppressed.

Hunter also sought to reverse his convictions for his conduct at the police station. The digital video recorder ("DVR") from the police station was taped over from the night of the defendant's arrest. Hunter asserted that the failure to preserve the tape should result in his acquittal on both charges. The trial judge denied Hunter's motion but did give a *Deberry*¹⁸ missing evidence instruction.¹⁹ On appeal, the Court ruled that the evidence did not support Hunter's claim

12. *Id.* at 911.

13. 55 A.3d 360 (Del. 2012).

14. *Id.* at 364-65.

15. *Id.* at 362-64.

16. 867 A.2d 187 (Del. 2005).

17. 55 A.3d at 365-66 (citing *Clawson v. State*, 867 A.2d 187, 191, 193 (Del. 2005)).

18. *Deberry v. State*, 457 A.2d 744 (Del. 1983).

19. The missing evidence instruction was based on the Court's suggested language in *Lolly v. State*, 611 A.2d 956 (Del. 1992).

that the missing tape, if preserved, would have been case dispositive. Hunter's defense at trial was that he acted without the specific intent or *mens rea* due to a combination of diabetes and PTSD. Hunter did not deny at trial that he had committed the physical acts alleged but rather offered expert testimony that his actions at the police station were involuntary. The Court ruled that the missing evidence instruction was the sufficient remedy and affirmed the Assault and Resisting Arrest convictions.²⁰

D. Indirect Hearsay Evidence May Violate Hearsay Rules And Confrontation Clause—*Wheeler v. State*

In *Wheeler v. State*,²¹ the Court ruled that a detective's testimony contained improper indirect hearsay statements of unavailable witnesses and also violated the Confrontation Clause, although the error was found to be harmless.²²

Defendant Wheeler was charged with the shooting of victim Herbie Davis. Davis was shot in the back and leg several times while in the kitchen of the home of Tricia Scott in the Dover area. Two of Scott's children, including Amber, lived with her. Wheeler was Amber's boyfriend and a frequent resident of the house. After having a disagreement, Wheeler came up behind Davis in the kitchen area and shot him several times, then stated "I really don't like you." Davis told the investigating police officer that Wheeler had shot him. Shani Scott, another daughter of Tricia Scott was also present for the shooting.²³

At trial, Davis identified Wheeler as the person who shot him from behind. Davis also testified that after the shooting, Shani Scott immediately told Amber Scott that "Daemont just shot Herbie-Mr. Herbie." The Supreme Court ruled that this statement was properly admitted as a present sense impression and excited utterance.²⁴ Davis' statement described a statement made by Shani immediately after the shooting. The statement also satisfied the three elements for admission as an excited utterance.²⁵ The shooting precipitated Shani's excitement. The statement was made during the time of the exciting event, and the statement related to the starting event. The statement was admissible as both a present sense impression under DEL. R. EVID. 803(1) and an excited utterance under DEL. R. EVID. 803(2).

The Court did find error in a portion of the investigating detective's testimony. The State indirectly introduced the substance of statements of Shani Scott, Amber Scott, and Mary Zachary. The detective testified, over objection, that after speaking with Shani Scott, he had no reason to believe there was any suspect other than the defendant. He also testified that Scott was able to hear the specific words exchanged between the victim and the defendant. The detective gave similar testimony regarding statements by Amber Scott and the landlord Mary Zachary. The Court found this portion of the officer's testimony amounted to indirect hearsay evidence and placed the substance of the unavailable witnesses before the jury. The officer was asked, with respect to each witness, whether anyone other than Wheeler was identified.

20. 55 A.3d at 368-72.

21. 36 A.3d 310 (Del. 2012).

22. *Id.* at 317-21.

23. *Id.* at 312-13.

24. *Id.* at 314 (citing Del. R. Evid. 802; Del. R. Evid. 803(1)(2)).

25. *Id.* at 314-15 (citing *Brodie v. State*, 16 A.3d 937, 2011 WL 927673, at *2 (Del. Mar. 17, 2011) (TABLE)).

The reasonable inference was that each witness had identified Wheeler as the suspect in the shooting and the testimony violated the hearsay rules.²⁶

The Court also held that the State violated Wheeler's Sixth Amendment right to confrontation when it admitted the substance of the inadmissible statements of the three witnesses. Under *Crawford*, the Confrontation Clause prohibits admission of testimonial statements of an unavailable witness.²⁷ The *Wheeler* Court noted that interrogations by law enforcement are testimonial under *Crawford* and subsequent federal precedent.²⁸ The *Wheeler* Court noted that the jury could readily infer the substance of the non-testifying witnesses even if there was no verbatim account of the statement. Finally, the Court found any error to be harmless as the defendant was well-known to the victim and the other eyewitness Shani Scott whose excited utterance was admitted at trial. The testimony by the detective about the indirect statements of the other three witnesses was at most cumulative.²⁹

II. SEARCH AND SEIZURE DECISIONS

A. Police Authority To Obtain Identification From Passengers In Vehicle—*Stafford v. State*

In *Stafford v. State*,³⁰ the Court held that the police may request a car passenger produce identification before allowing that person to drive a vehicle from the scene and police could lawfully search the suspect incident to his arrest for criminal impersonation.³¹

Defendant Stafford was a passenger in a vehicle stopped by Wilmington Police for tinted windows. The driver had a suspended license. Rather than tow the vehicle, the police were going to allow Stafford to drive the vehicle from the scene. The police officer asked the defendant for his identification. The defendant had no identification on his person. He gave the false name of "Daren Miller" along with an address of 401 Robinson Street and a birth date of November 13, 1979. The police ran the information in the Delaware Criminal Justice Information System ("DELJIS") and determined that there was no such licensed driver in Delaware. The officer tried different combinations and variations of the information but obtained no matches. The police then detained Stafford pending identification and he was handcuffed and the officer began to place him into the police car when a firearm fell out of the defendant's pant leg. Stafford was convicted on the charge of possession of a deadly weapon by a person prohibited, carrying a concealed deadly weapon, and criminal impersonation.³²

26. *Id.* at 316 (citing *United States v. Meises*, 645 F.3d 5 (1st Cir. 2011); *Mitchell v. Hoke*, 745 F. Supp. 874 (E.D.N.Y. 1990), *aff'd*, 930 F.2d 1 (2d Cir. 1991)).

27. *Id.* at 318 (citing *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004)).

28. *Id.* (citing *Crawford*, 541 U.S. at 53-54; *Davis v. Washington*, 547 U.S. 813, 822-24 (2006); *Ocampo v. Vail*, 649 F.3d 1098, 1113 (9th Cir. 2011); *Ryan v. Miller*, 303 F.3d 231 (2d Cir. 2002); *Hutchins v. Wainwright*, 715 F.2d 512 (11th Cir. 1983); *Favre v. Henderson*, 464 F.2d 359 (5th Cir. 1972)).

29. *Id.* at 320 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993); *Chapman v. California*, 386 U.S. 18 (1967); *Holmes v. State*, 11 A.3d 227, 2010 WL 5043910 (Del. Dec. 9, 2010)).

30. 59 A.3d 1223 (Del. 2013).

31. *Id.* at 1226-28.

32. *Id.* at 1226.

In his appeal, Stafford claimed that the police request for him to produce identification during the car stop was invalid. The Court stated that the police, during a traffic stop, may request that a passenger produce identification and step out of the car, and that questions to a passenger about his identity are not beyond the scope of the stop.³³ The Court found that the police properly stopped the vehicle for a tinted window violation. Under the Fourth Amendment, the Court declared that a passenger can become a suspect by his actions during a traffic stop which can provide probable cause for an arrest.³⁴ The police in this case did not search Stafford on the basis that he was a passenger, but in order to determine if he could drive the vehicle.³⁵ The police officer did frisk Stafford once there was probable cause to believe he had committed criminal impersonation. The Court found probable cause in light of the officer's unsuccessful attempts to locate any information for the name and related information in the State DELJIS system. That search included the driver's license, identification card, and criminal history databases.³⁶ Finally, the Court ruled that the police officer discovered the concealed firearm during a proper search of Stafford's person incident to arrest. Even for the offense of criminal impersonation, the Court held that the officer had the authority to conduct the search which led to the recovery of the firearm.³⁷

B. Inevitable Discovery—*Roy v. State*

In *Roy v. State*,³⁸ the Court held that a murder weapon seized from the defendant was admissible under the inevitable discovery doctrine where the police observed the defendant alone on a street and unlawfully seized him but then found the victim's body a short time later.³⁹

The police received a dispatch on February 17, 2010 to respond to an assault in progress reported at Seventh and Walnut Streets in Wilmington. A nearby resident, while in his apartment, heard a scream from outside around 5:00 a.m. About ten minutes later, the same resident left his apartment and heard a male voice state "who are you?" from across the street. The male was observed standing over a person lying in the street. The resident then called the police. When the police arrived, they first observed defendant Roy as the only person on the dark street. Roy hid his face and began to walk in the opposite direction only to be stopped by two marked cars coming down the street in the other direction. The police then asked Roy to approach the police car and he was placed in handcuffs. In response to a question, Roy

33. *Id.* at 1227 (citing *United States v. Diaz-Castaneda*, 494 F.3d 1146, 1153 (9th Cir. 2007); *Tann v. State*, 21 A.3d 23, 26 (Del. 2011); *Loper v. State*, 8 A.3d 1169, 1173 (Del. 2010)).

34. *Id.* at 1228 (citing *Holden v. State*, 23 A.3d 843, 847 (Del. 2011); *Caldwell v. State*, 780 A.2d 1037, 1050 n.33 (Del. 2001)).

35. *Id.* at 1228. The Court distinguished *Holden* where the police seized a passenger in a car that was stopped because of a fictitious tag and there was no other reason to search a passenger in the vehicle. 59 A.3d at 1228 (citing *Holden*, 23 A.3d at 845-49).

36. *Id.* at 1229-31. The Court declined to follow the decision of the Alaska Court of Appeals which was distinguishable because it was unclear in that case whether the defendant was a resident of Alaska. *Id.* at 1230 (citing *Erickson v. State*, 141 P.3d 356 (Alaska Ct. App. 2006)).

37. *Id.* at 1231-32 (citing *United States v. Robinson*, 414 U.S. 218, 234-35 (1973); *Negron v. State*, 979 A.2d 1111, 2009 WL 2581714, at *4 (Del. 2009) (ORDER)).

38. 62 A.3d 1183 (Del. 2012).

39. *Id.* at *4-6.

admitted that he had a knife. The police also observed that the defendant's hands were covered in blood. Another police officer then radioed that she had found an unconscious victim. Roy was then taken to the police station where he claimed that he and the victim had been robbed by unknown suspects, and that Roy wrestled away their knife in the altercation. Roy's clothes tested consistent with the victim's blood. Blood splatter evidence was found to conflict with Roy's version of events. Roy was also observed on a motion-activated camera. Prior to trial, the parties stipulated that the State could introduce evidence of Roy's drug usage on the day prior to the murder but not evidence of drug dealing. Roy was tried and convicted on murder and weapon charges.⁴⁰

On appeal, the Court first ruled that the police lacked a basis to conduct an investigatory stop of Roy. The defense conceded that the police had reasonable suspicion that a crime had been committed near the area but challenged the stop of Roy under the Fourth Amendment and DEL. CONST. art. I, § 6. There was no information that linked Roy to the crime as the police had no information about the suspect other than that he was a male. The Court found that the uncorroborated tip from a 911 call did not provide any specifics about the suspect or his future behavior. The Court declared that the police stopped Roy because he was the first male they saw and the defendant's close proximity to the crime area was insufficient to establish reasonable suspicion for the detention.⁴¹

The Court did find under the inevitable discovery doctrine that the physical evidence from Roy would have been obtained during the course of the routine police investigation.⁴² The police were aware of a potential assault with a person lying on the ground. The police arrived at the scene within three minutes and observed Roy walking away from the intersection in issue. Two police cars drove up to Roy as he walked up the street. The police did not intend to allow Roy out of their sight and the Court found that it was inevitable that Roy would have been detained within the few minutes that the police took to locate the victim's body. The Court also found that it would be inevitable that the police would have then been justified in patting Roy down for weapons and would have located the knife and seized the other inculpatory evidence. In ruling that the trial court properly denied the defense suppression motion, the Court stated that it had applied the inevitable discovery rule to similar facts in *Cook v. State*.⁴³

C. Sufficiency Of Search Warrant Affidavit—*Acuri v. State*

In *Acuri v. State*,⁴⁴ the Court held that the police presented sufficient evidence, including confirmed information from a past proven confidential source and a drug dog alert, in an affidavit to search the defendant's hotel room.⁴⁵

A Delaware State Police detective had received information from a confidential source ("CS") that defendant Acuri was selling marijuana in New York and Delaware. The CS told the police that defendant had more than five pounds of marijuana in his hotel room. The CS identified the defendant from a website and a driver's license picture, and provided

40. *Id.* at *1-2.

41. *Id.* at *3-4 (citing *Lopez-Vazquez v. State*, 956 A.2d 1280 (Del. 2008); *Jones v. State*, 745 A.2d 856, 870 (Del. 1999); *Bradley v. State*, 976 A.2d 170, 2009 WL 2244455 (Del. 2009)).

42. *Id.* at *4-6 (citing *Thomas v. State*, 8 A.3d 1195 (Del. 2010); *Cook v. State*, 374 A.2d 264 (Del. 1977)).

43. *Id.* at *6 (quoting *Cook*, 374 A.2d at 268).

44. 49 A.3d 1177 (Del. 2012).

45. *Id.* at 1179-80.

the license plate and vehicle description for the defendant's vehicle. Another agency supplied a drug detection dog which the police walked by the defendant's hotel room and the defendant's vehicle in the parking lot. The dog alerted to the presence of drugs in both the hotel room and the vehicle. The police obtained a search warrant and the execution of the warrant uncovered drugs in the hotel room and the defendant's vehicle.⁴⁶

On appeal, defendant challenged the sufficiency of the search warrant affidavit. The Court noted that the affidavit contained a conclusory statement that the CS was past proven reliable and also did not describe that the drug dog was properly trained. The Court stated that the better practice is for the affidavit to contain "a brief statement about the accuracy of the CS's past tips" and to describe whether the police dog is "certified" or a "fully trained" dog for detecting drugs. The Court still concluded that the affidavit was sufficient to establish probable cause. The police received information from a CS who was not anonymous, and who had prior police dealings and was able to confirm the defendant's identity from a photo. The police were able to verify specific information that they received from the CS including the location of the hotel room and the defendant's vehicle. The magistrate could have reasonably concluded that the dog brought in by the other agency was a narcotics dog trained to detect drugs. The Court found that the drug alert on the identified hotel room confirmed the information from the CS and provided probable cause for the warrant and affirmed the ruling of the Superior Court denying defendant's motion to suppress.⁴⁷

D. Sufficiency Of Facts In Search Warrant For Search For Patient Files And Scope Of Warrant—*State v. Bradley*

In *State v. Bradley*,⁴⁸ the Court held that the police presented sufficient facts to support a search of the defendant's property for patient files pertaining to the commission of a crime or crimes, and ruled that the police did not exceed the scope of the warrant in searching a white outbuilding which was described in the warrant.⁴⁹

Defendant Bradley appealed from convictions on fourteen counts of Rape First Degree, five counts of Assault Second Degree, and five counts of Sexual Exploitation of a Child for crimes of sexual and physical abuse of young children. Bradley was convicted in a non-jury trial and part of the State's evidence included video evidence made by Bradley of sexual assaults against his child patients.⁵⁰

In December, 2009, a retired Delaware State Police officer received a report from a mother that her daughter had been touched on the vagina during a routine medical visit by then Dr. Bradley. The information was reported to the police and the victim gave an interview to the Child Advocacy Center. In 2008, the police had tried unsuccessfully to obtain a warrant to search Bay Bees Pediatrics for child pornography evidence. The police had received a 2008 complaint that Bradley had conducted a full vaginal examination on a twelve year-old girl who reported a sore throat and pink eye. This exam lasted for several minutes and the victim cried to her mother after and stated that she felt "dirty" about the incident. The police also had information that the defendant had caused a six year old girl with Attention Deficit Disorder

46. *Id.* at 1178-79.

47. *Id.* at 1179-80 (citing *United States v. Rivera*, 347 Fed. Appx. 833, 837-38 (3d Cir. 2009)).

48. 51 A.3d 423 (Del. 2012).

49. *Id.* at 427.

50. *Id.*

to disrobe during an office visit and the defendant attempted to perform a vaginal examination on the patient. There was also a case involving a seven year old girl who reported complaints of excessive urination and was subjected to two vaginal exams by Bradley outside the view of the victim's mother. The police were also aware of a 2005 investigation by the Milford Police Department.⁵¹

The search warrant application sought to search for “[f]iles to include medical files relating to the treatment and care” of the child victims, including paper files. The warrant also sought to seize “[v]ideo and photographs.” The property was described as “[a] two story residence style building, white in color, located at 18259 Coastal Highway, Lewes, DE...” The police affiant in the affidavit of probable cause detailed the reports of inappropriate touching and examinations as well as Bradley kissing patients on the mouth, performing vaginal exams for no apparent medical reason, and carrying patients around the office. The affiant cited to reports of other doctors who began seeing patients who had transferred from Bradley's office after he performed improper vaginal examinations. The police detailed Bradley's practice of using cameras in his office to take and manipulate pictures of patients. The affidavit described the property and also contained reference to Dr. Bradley's conduct of carrying a patient to the outbuilding behind the office. Bradley was also described as having access to the computer images via his home computer. The police noted that, in seeking to seize Bradley's computers and electronic storage devices, Bradley could use deceptive file names which could require the police to search the stored data.⁵²

When the police executed the warrant, they found four buildings, including the main building (Building A) and a white outbuilding (Building B). There was also a white garage (Building C) and a tan shed (Building D). In Building A, the police seized a video camera on the exam table in the first exam room. The police also seized a digital camera from the office area near the reception area. The police found paper files for seven of the eight victims listed in their search warrant with the exception of the 2005 victim identified by the Milford Police Department. In Building B, the police found an office with a desk and shelves. They seized numerous digital recording and storage devices including thumb drives, hand-held records, a Sony Handycam, a Sony Net Share camera, a DVD, two pen cameras, and a Dell computer with a HP 4G thumb drive. No evidence was seized from Building C and thirty-four memory cards, a thumb drive, and a desktop computer were seized from Building D.⁵³

On December 17, 2009, the day after execution of the search warrant, a police detective began to view the digital evidence seized from the Building B computer. The 4G thumb drive contained an image of Bradley reaching to remove the diaper of a three year old child who was facing the camera. The detective immediately stopped the video and obtained a new warrant to search all of the digital media for evidence of sexual exploitation or child pornography.⁵⁴

Prior to trial, Bradley moved for suppression of all evidence seized in the December 16 and 17th searches. The Superior Court denied the suppression motion after a two day hearing, followed by briefing by the parties. Bradley was convicted in a non-jury trial at which videotape evidence seized in the searches was used by the State. The videos contained some images of the defendant carrying young children to the basement in Building A. The police had also obtained evidence that Bradley used a hidden pen camera while performing vaginal examinations. The video evidence showed violent, forcible rapes of young toddlers in Building B.⁵⁵

51. *Id.* at 428.

52. *Id.* at 428-29.

53. *Id.* at 429-30.

54. *Id.* at 430.

55. *Id.* at 430-31.

On appeal, the Supreme Court ruled that the search warrant alleged sufficient facts to support a search of the “white outbuilding” (Building B).⁵⁶ The Court found that the affidavit clearly described that Bradley used the white outbuilding on the property and had been observed by the father of one patient carrying the patient to that outbuilding. The affidavit also referenced other witnesses and complainants who stated that Bradley had carried patients around during their medical examinations.⁵⁷ The Court concluded that there was a reasonable basis to find that Bradley had carried patients to Building B for medical examinations. There was a reasonable inference that a search would locate patient files, in either documentary or photographic form, in Building B.⁵⁸ The Court also rejected Bradley’s argument that there was an insufficient link between the patient files to be searched and the patient reports of inappropriate examinations. The Court noted that the affidavit described a number of the defendant’s vaginal examinations that occurred during routine medical visits and the reasonable inference was that Bradley was using the improper examinations for the purpose of sexual contact. The Court ruled that the patient files would be relevant to determine if the examinations were appropriate and also to corroborate or contradict any timeline for the treatment.⁵⁹

The Court also rejected the argument that the warrant was defective for failing to specifically state that the defendant kept his patient files in electronic format. The Court again declared that the affidavit did detail Bradley’s use of video recording equipment in his office and his manipulation of digital pictures on his computer. The affiant also stated his knowledge that doctors store patient records in computer form. The Court concluded that the digital images and videos could properly be considered medical files and could be used to determine the appropriateness of medical treatment and corroborate the date of the child’s treatment.⁶⁰

The Court also held that the police did not exceed the scope of the search warrant when they searched Building B.⁶¹ The warrant was issued for the search of “BayBees Pediatrics, 18259 Coastal Highway” and included a reference to “a white outbuilding” on the property. The warrant did not limit the search to any particular part of the property, and the officers could and did reasonably conclude that they were authorized to search Building B, the white outbuilding.⁶² The defendant challenged the search of Building B which was where the police located the key video evidence used against him. The Court found that the warrant specifically mentioned that Bradley used video equipment to manipulate patient images from “his office” and from his personal computer. The Court concluded that the warrant clearly authorized the police search of Building B. The challenges to the search of Building C and D were found to be immaterial as the police did not collect any evidence from those buildings.⁶³

56. *Id.* at 431-33. The Court reviewed the sufficiency of the warrant under the totality of the circumstances test in *Illinois v. Gates*, 462 U.S. 213, 238 (1983). 51 A.3d at 431.

57. *Id.* at 432.

58. *Id.*

59. *Id.*

60. *Id.* at 432-33.

61. *Id.* at 433 (citing *Marron v. United States*, 275 U.S. 192, 196 (1927); *Cooke v. State*, 977 A.2d 803, 854 (Del. 2009)).

62. *Id.* at 434.

63. *Id.* at 434-35.

Finally, the Court rejected the challenge to the seizure of the computers, digital storage devices, and recording equipment in Buildings B and D. The Court again stated that a doctor's recording of a patient is a form of a patient "file" and the police were authorized to search for those files on the computers and electronic storage devices at the property.⁶⁴ The police were not limited to only the seizure of paper patient files under the search warrant. There was also no requirement that the police only search for digital files that were clearly labeled by patient name or exact date of visit. The Court found that the trial court "properly found a sufficient nexus between the conduct alleged and the file searched for" that supported the police detective's decision to open the seized electronic file and further found that the detective properly closed the file when he identified evidence of crimes outside the scope of the warrant.⁶⁵ The Court concluded that the challenges to the search warrant and scope of the search lacked merit and affirmed the judgment of the Superior Court.⁶⁶

III. OTHER SIGNIFICANT DECISIONS

A. Defendant Not Entitled To Offset In Restitution Hearing For Amounts Claimed To Be Owed By Victim—*Mott v. State*

In *Mott v. State*,⁶⁷ the Court held that a defendant at a restitution hearing was not entitled to claim a set off for debt owed by the victim when the claim was barred by *res judicata*.⁶⁸

Defendant Mott, operating a company Pulse Construction, entered a 2005 contract to build a new home. The homeowners, the Littletons, agreed to a draw schedule for the defendant to receive payments. Two mechanics liens were subsequently posted on the property by subcontractors who were not paid by Pulse Construction. Mott was charged and convicted of New Home Construction Fraud for diverting the funds paid by the homeowner. The trial judge then ordered that the defendant pay restitution of \$68,567.89 to the Littletons for the principal amount of the liens, attorney's fees, interest, and costs. Mott claimed that the Littletons owed him \$20,000 and he should be entitled to a set off of that amount. The trial court ruled that the dispute over the \$20,000 was a civil issue and could not be used to reduce defendant's restitution obligation.⁶⁹

In a prior mechanics lien action, subcontractor CRM had sued Mott and the Littletons for unpaid payments for masonry work. Littleton crossclaimed against Mott for failing to pay the money owed to CRM. In this mechanics lien action, the trial court found the work to be satisfactory and ruled in favor of CRM.⁷⁰ On appeal, the Court noted that Mott should have raised the issue of any set off from the Littletons as a counterclaim in the mechanics lien action. Mott's

64. *Id.* at 435 (United States v. Giberson, 527 F.3d 882, 886-87 (9th Cir. 2008); United States v. Reyes, 798 F.2d 380, 383 (10th Cir. 1986)).

65. *Id.* at 436.

66. *Id.*

67. 49 A.3d 1186 (Del. 2012).

68. *Id.* at 1189-91.

69. *Id.* at 1187-88.

70. Constr. Resource Mgmt. v. Littleton, C.A. No. 06L-03-031-RFS, at *5, 2008 WL 4117186 (Del. Super. Aug. 28, 2008).

counterclaim was compulsory under SUPER. CT. CIV. R. 13(a) and his claim for set off was barred by the doctrine of *res judicata*.⁷¹ The Court did state that the public policy behind *res judicata* barred the defendant from raising the claimed prior debt in the restitution hearing. The Court did state that it was not holding that “no viable claim [could] ever be asserted to offset a claim of entitlement to restitution.” The Court noted that the primary purpose of the restitution hearing was to make the victims whole and the trial judge did not commit error in excluding testimony about the set off in this case.⁷² The trial judge also did not commit error in awarding attorney’s fees, interest on the liens, and other related costs as such an award was permissible under 11 *Del. C.* § 4106.

B. Possession Of Concealed Deadly Weapon Inside Defendant’s Own Residence—*Griffin v. State*

In *Griffin v. State*,⁷³ the Court adopted a three part test to determine whether the CCDW statute was unconstitutional as applied to the defendant’s possession of a weapon in his residence.⁷⁴

The defendant Griffin and his girlfriend were present in their house when the police responded to the residence due to a domestic dispute. Griffin was packing and unpacking boxes due to a split from his girlfriend when the police arrived. Griffin had a steak knife on his person and was seated in the basement with the lights out. Griffin’s girlfriend told the police that he was in the basement, had been drinking, and may have a knife. Griffin refused to immediately come upstairs despite calls from the police. When he did go upstairs, Griffin had an open beer can in his hand. Griffin was “mouthy” with the police and there was a scuffle during which the defendant bit an officer. Griffin was taken to the hospital for treatment and the police discovered the knife on Griffin’s person. Griffin testified that he told the police about the knife as soon as he was handcuffed. Griffin was convicted of resisting arrest, carrying a concealed deadly weapon (“CCDW”), and one count of criminal mischief.⁷⁵

The Supreme Court considered whether the CCDW statute, 11 *Del. C.* § 1442 was unconstitutional as applied to the facts of Griffin’s case. Under DEL. CONST. art. I, § 20, a person “has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use.” The Court had previously ruled that DEL. CONST. art. I, §20 did not entitle a person to conceal a weapon.⁷⁶ The Court relied on *State v. Hamadan*⁷⁷ that held the Wisconsin CCDW statute was unconstitutional as applied to a store owner who kept a gun under the counter of his liquor store near the cash register.⁷⁸ The Court adopted a three part test from *Hamadan*:

71. 49 A.3d at 1189 (citing *Rumsey Elec. Co. v. Univ. of Del.*, 334 A.2d 226, 228 (Del. Super. 1975); *Epstein v. Chatham Park, Inc.*, 153 A.2d 180, 183 (Del. Super. 1959)).

72. 49 A.3d at 1190 (citing *Blake v. Myrks*, 606 A.2d 748, 750 (Del. 1992)).

73. 47 A.3d 487 (Del. 2012).

74. *Id.* at 491-92.

75. *Id.* at 489.

76. *Smith v. State*, 882 A.2d 762, 2005 WL 2149410, at *3 (Del. Aug. 17, 2005) (TABLE)).

77. 665 N.W.2d 785 (Wis. 2003).

78. *Id.* at 490.

First, the court must compare the strength of the state's interest in public safety with the individual's interest in carrying a concealed weapon. Second, if the individual interest outweighs the state interest, the court must determine "whether an individual could have exercised the right in a reasonable, alternative manner that did not violate the statute." Third, the individual must be carrying the concealed weapon for a lawful purpose.⁷⁹

Applying the *Hamandan* test, the *Griffin* Court first found that the defendant had an interest in using a knife in his house to open a box. Second, the Court found that it would be unreasonable to restrict the manner in which a person could carry a legal weapon from room to room in his own house.⁸⁰ Thirdly, the Court stated that Griffin was carrying the knife for a lawful purpose, to open boxes in his house and did not attempt to use it as a weapon. The Court concluded that the defendant's CCDW conviction must be reversed. The Court ruled that Griffin had a constitutional right to bear arms which authorized his possession of a concealed knife. The Court then declared that once the police confronted the defendant and asked if he had a knife, the balance of interests shifted and there was a disputed issue on whether Griffin advised the police that he was armed. Griffin said he told the police immediately about the weapon while the police testified that Griffin said the weapon was in the basement. The Court ordered a new trial for the jury to determine if the police version was credible and if so, the defendant could be convicted of CCDW. If the jury believes the defendant's version, he could not be convicted.⁸¹

C. Automatic Expungement Of Juvenile Record For Person Obtaining Gubernatorial Pardon—*Arnold v. State*

In *Arnold v. State*,⁸² the Court held that a person who obtained a gubernatorial pardon for an adult conviction was entitled to an automatic expungement of his juvenile record under 10 *Del. C.* § 1013.⁸³

Defendant Arnold was charged with ten separate offenses as juvenile between the ages of 13 and 15, and was adjudicated delinquent of seven offenses.⁸⁴ Of the other three charges, Arnold was found not guilty of one, one was dismissed and one was *nolle prossed*. As an adult at age 20, Arnold was charged and pled guilty to Terroristic Threatening. In 2010, Arnold successfully obtained a Pardon from the Governor on the Terroristic Threatening conviction. The Pardon application was not opposed by the State. Arnold sought the Pardon in part to allow him more employment opportunities. Arnold then filed a Petition of Juvenile Expungement Record which sought an "automatic expungement" under 10 *Del. C.* § 1013. The Family Court denied the petition based on 10 *Del. C.* § 1001(a)(b) and the extent of Arnold's juvenile record.⁸⁵

79. 47 A.3d at 490-91 (citing *State of Wisconsin v. Hamdan*, 665 N.W.2d 785 (Wis. 2003)).

80. 47 A.3d at 491 (quoting *State v. Stevens*, 833 P.2d 318, 319 (Or. App. 1992)).

81. *Id.* at 491.

82. 49 A.3d 1180 (Del. 2012).

83. *Id.* at 1185-86.

84. Arnold was a pseudonym assigned by the Court for the appellant. Arnold was adjudicated delinquent of charges of Assault in the Third Degree, Felony Receiving Stolen Property, Felony Theft, Unlawful Sexual intercourse in the First Degree, Attempted Unlawful Sexual Intercourse in the First Degree, Unlawful Sexual Contact in the Second Degree, and Receiving Stolen Property. *Id.* at 1180-81 n.1-2.

85. *Id.* at 1181-82.

The Supreme Court found that § 1013 unambiguously provided that an individual who obtained a pardon shall automatically have any juvenile record expunged. The Court rejected the argument that the provisions of the section should be limited to a pardon for a juvenile offense. The Court found that the statute applied without qualification to the individual's "juvenile record" and ruled that the literal meaning of the statute supported an automatic expungement for Arnold.⁸⁶

The Court noted that the synopsis of the original bill enacting § 1013 did not limit the expungement to cases where the individual obtained a pardon for juvenile offenses.⁸⁷ There was also no conflict between the Court's interpretation of § 1013 and 10 *Del. C.* § 1001(a) which allows for discretionary expungements. Finally, the Court declared that its interpretation of § 1013 was consistent with the public policy of the General Assembly to promote a clear social policy of rehabilitation for juvenile offenders.⁸⁸ The Court reversed the judgment of the Family Court and ordered that Arnold's record be expunged pursuant to § 1013.

D. Guilty Plea Bars Subsequent Challenge To Sufficiency Of Underlying Evidence—*Panuski v. State*

In *Panuski v. State*,⁸⁹ the Court held that a defendant was precluded from raising a due process or sufficiency of the evidence challenge to his conviction once he entered a guilty plea to those offenses.⁹⁰

Defendant Panuski had filed a DEL. SUPER. CT. CRIM. R. 61 motion in Superior Court challenging his conviction in Superior Court. Defendant pled guilty to two of the twenty counts in his indictment for Dealing in Child Pornography ("DCP"), a class B felony. Prior to sentencing, Panuski filed a motion to merge or downgrade his offenses so that he would be sentenced on the charge of Possession of Child Pornography, a class F felony. This motion was denied by the Superior Court and the defendant was sentenced to eight years in jail, suspended after four years. The Supreme Court affirmed on the direct appeal. The Superior Court also denied defendant's Rule 61 motion attacking his plea and sentence.⁹¹

On appeal, Panuski first argued that his conviction was in violation of due process because the State did not prove the elements of DCP as the evidence was that he only possessed the pornographic images knowingly, not intentionally. The Supreme Court first ruled that this claim was barred under Rule 61(i)(3) as the defendant did not raise it on direct appeal. The Court also ruled that by pleading guilty, the defendant was foreclosed from challenging the sufficiency of the evidence of the underlying charges.⁹² The Court next found that the defendant's double jeopardy claim was barred as it had been considered and decided against the defendant on direct appeal.⁹³

86. *Id.* at 1183 (citing *Lexecon Inc. v. Milberg Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall' ... normally creates an obligation impervious to judicial discretion."); 10 *Del. C.* § 1013).

87. 49 A.3d at 1184 (citing 75 *Del. Laws* ch. 146, synopsis (2005)).

88. *Id.* (citing *In re Request of Governor*, 950 A.2d 651, 656 (Del. 2008); 10 *Del. C.* § 1013).

89. 41 A.3d 416 (Del. 2012).

90. *Id.* at 420-21.

91. *Id.* at 418-19.

92. *Id.* at 420 (citing *Fink v. State*, 16 A.3d 937, 2011 WL 1344607, at *1 (Del. Apr. 7, 2011) (TABLE)).

93. *Id.* at 421 (citing *Del. Super. Ct. Crim. R.* 61(i)(4)).

On the third claim, the Court did not find evidence to support defendant's claim of ineffective assistance of counsel. His defense counsel pursued a reasonable defense strategy even if he was unable to obtain a reduced plea from the State, and defense counsel provided competent representation at the sentencing hearing.⁹⁴ The Court also found no basis for defendant's claim that the State abused its discretion in charging DCP as opposed to Possession of Pornography. The State had probable cause to support the DCP charges based on statements obtained from the defendant about the accessibility of other users to child sexual abuse videos on his computer.⁹⁵ Finally, the Court found no support for the claim that the trial court "misled" the defendant during the plea colloquy. Defense counsel represented that Panuski understood the plea to two counts of DCP and Panuski so stated on the TIS Guilty Plea form. Panuski also admitted to possessing two images at the sentencing hearing and understood from advice of counsel that mere possession subjected him to conviction under the DCP statute. The Court affirmed the judgment of the Superior Court.⁹⁶

E. Mandatory Accomplice Testimony Jury Instruction—*Brooks v. State*

In *Brooks v. State*,⁹⁷ the Court held that it was plain error for a trial judge to not give a jury instruction on accomplice testimony when an admitted accomplice testifies and further held that trial judges must give a modified *Bland* instruction when the State offers accomplice testimony.⁹⁸

In *Brooks*, the Court consolidated two appeals that presented questions regarding accomplice testimony. The Court declared that trial judges must give a modified version of the *Bland*⁹⁹ instruction, regardless of a request by defense counsel or the presence of any evidence corroborating the witness' testimony. The Court reached this ruling after tracing the recent decisions regarding the need for accomplice witness instructions and overruled those cases that deviated from the rule in *Bland*.¹⁰⁰ The modified *Bland* instruction must be given when an accomplice witness testifies, whether charged as an accomplice or not.¹⁰¹ The new mandatory accomplice instruction approved by the Court is:

A portion of the evidence presented by the State is the testimony of admitted participants in the crime with which these defendants are charged. For obvious reasons, the testimony of an alleged accomplice should be examined by you with more care and caution than the testimony of a witness who did not participate in the crime charged. The rule becomes particularly important when there is nothing in the evidence, direct or circumstantial, to corroborate the alleged accomplices' accusation that these defendants

94. *Id.* at 421-22 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Swan v. State*, 28 A.3d 362, 383 (Del. 2011)).

95. *Id.* at 422 (citing *Albury v. State*, 551 A.2d 53, 61 (Del. 1988) (citing *Wayte v. United States*, 470 U.S. 598, 607 (1985); 11 Del. C. § 1109(4)).

96. *Id.* at 423.

97. 40 A.3d 346 (Del. 2012).

98. *Id.* at 348.

99. *Bland v. State*, 263 A.2d 286 (Del. 1970).

100. 40 A.3d at 349-50.

101. *Id.* at 350 (citing *Erskine v. State*, 4 A.3d 391, 394 (Del. 2010)).

participated in the crime. Without such corroboration, you should not find the defendants guilty unless, after careful examination of the alleged accomplices' testimony, you are satisfied beyond a reasonable doubt that it is true and you may safely rely upon it. Of course, if you are so satisfied, you would be justified in relying upon it, despite the lack of corroboration, and in finding the defendants guilty.¹⁰²

The Court next applied the new rule to the individual appeals. Appellant Owens was tried and convicted on crimes related to one robbery but acquitted on another robbery. At trial, the State called a charged accomplice who testified to the defendant's involvement in the offenses. Defense counsel did not request a *Bland* instruction but the trial court gave a model accomplice instruction. The Court ruled that the new required *Bland* instruction will be applied to future cases and the trial judge correctly instructed the jury on the law at the time of the 2007 trial.¹⁰³

The Court next considered appellant Brooks' claim of ineffective assistance of counsel. Brooks was convicted on drug charges after police executed a search warrant at a townhouse leased by the defendant and his girlfriend Rose Epps. Epps testified at trial against Brooks and the State offered other significant independent evidence to support the drug charges. Brooks was convicted of a number of drug and weapon offenses and sentenced as a habitual offender. Brooks' trial attorney did not request an accomplice testimony instruction and the trial judge did not give one. The Court affirmed Brooks' convictions for drug and weapon offenses which were supported by independent evidence, and reversed his conspiracy second conviction that was based solely on accomplice testimony.¹⁰⁴

F. Bifurcation Of § 777A Unlawful Contact By A Sex Offender Charges—*Monceaux v. State*

In *Monceaux v. State*,¹⁰⁵ the Court held that, in all cases involving charges of Unlawful Sexual Contact by a Sex Offender, the issue of the defendant's sex offender status must be bifurcated and decided in a separate proceeding after the jury trial.¹⁰⁶

The defendant Monceaux was indicted on three counts of Unlawful Sexual Contact in the Second Degree, one count of Offensive Touching, and three counts of Sex Offender Unlawful Sexual Conduct Against a Child. Monceaux moved to sever the Unlawful Sexual Contact charges on constitutional grounds. The State filed an amended indictment that charged three counts of Unlawful Sexual Contact in the Second Degree and one charge of Offensive Touching. The amended indictment did not reference the defendant's sex offender status. At a jury trial, Monceaux was convicted on all charges. He then waived a jury trial on the sex offender status issue and the trial judge, in a bench trial, found Monceaux was a registered sex offender at the time of the offenses. Monceaux was sentenced on the charges of Unlawful Sexual Contact by a Sex Offender and on the offensive touching charge.¹⁰⁷

102. *Id.* (citing *Bland*, 263 A.2d at 289-90).

103. *Id.* at 350-52.

104. *Id.* at 352-55.

105. 51 A.3d 474 (Del. 2012).

106. *Id.* at 478.

107. *Id.* at 476-77.

On appeal, Monceaux challenged the constitutionality of his conviction for Unlawful Sexual Contact by a Sex Offender, in violation of 11 *Del. C.* § 777(a). The Court found that any due process issue under the statute was moot due to the bifurcated procedure conducted by the Superior Court. The jury did not hear any evidence regarding the defendant's sex offender status. This procedure eliminated the potential *Getz* issue from the introduction of a defendant's prior sex offender status in a trial that also includes other charges.¹⁰⁸ The Court noted that any introduction of the sex offender status evidence was arguably inconsistent with the defendant's presumption of innocence. The Court held that bifurcation is required for all future trials under § 777A. The Court noted that its ruling was limited to § 777A charges which require proof of a showing of the element of sex offender status as an element of the criminal offense. Because the trial judge followed the bifurcation process approved by the Court, there was no legal error and the defendant's conviction was affirmed.¹⁰⁹

108. *Id.* at 478 (citing *Getz v. State*, 538 A.2d 726, 731 (Del. 1988)).

109. *Id.* at 479.

APPENDIX

DELAWARE SUPREME COURT 2012 CRIMINAL LAW OPINIONS

Acuri v. State, 49 A.3d 1177, 1179-80 (Del. 2012) (probable cause existed for search warrant affidavit based on information from past proven reliable informant that was confirmed by police and a drug dog alert on suspect's vehicle and outside of hotel room).

Arnold v. State, 49 A.3d 1180, 1184-86 (Del. 2012) (petitioner had the right to expungement of his juvenile record under 10 *Del. C.* § 1013 where his subsequent adult conviction was pardoned).

Bradley v. State, 51 A.2d 423, 432, 435 (Del. 2012) (affidavit of probable cause to search doctor's property supported a reasonable inference that patient files, documentary or photographic, could be found in a white outbuilding B; police did not exceed the scope of the warrant in searching building B for individual files on computers and related equipment).

Brooks v. State, 40 A.3d 346, 350 (Del. 2012) (trial judge was required to give a modified *Bland* instruction when a self-identified accomplice testifies at trial).

Brown v. State, 36 A.3d 321, 325-26 (Del. 2012) (Family Court lacked jurisdiction to sentence seventeen year old defendant to a period of adult probation after a twelve month sentence at Glen Mills).

Brown v. State, 49 A.3d 1158, 1160-61 (Del. 2012) (trial judge's supplement to jury instructions on delivery of drugs which was based on a portion of the defendant's testimony was a correct statement of the substantive law).

Collins v. State, 56 A.3d 1012, 1015 (Del. 2012) (testimony of turncoat witnesses was properly admitted under § 3507; trial court did not err in giving *Allen* charge where jury had deliberated for eleven hours in complex, circumstantial case, and had indicated they were deadlocked).

Damiani-Melendez v. State, 55 A.3d 357, 360 (Del. 2012) (police officers' overview testimony about defendant's pattern of multiple robberies was proper to highlight similarities in the offenses).

Davis v. State, 38 A.3d 278, 281 (Del. 2012) (trial court properly denied untimely suppression motion where counsel failed to demonstrate exceptional circumstances for the delay).

DiDomenicis v. State, 49 A.3d 1153, 1157 (Del. 2012) (prosecutor's improper comments in opening statement did not deprive defendant of a fair trial).

Drummond v. State, 51 A.3d 436, 440 (Del. 2012) (admission of defendant's testimony from first trial while unrepresented at second trial was at most a harmless error).

Drummond v. State, 56 A.3d 1038, 1040-41 (Del. 2012) (trial court was required to sever defendant's Unlawful Conduct Against a Child by a Sex Offender charge from Rape charge based on decision in *Monceaux v. State*).

French v. State, 38 A.3d 289, 290 (Del. 2012) (defendant's conviction for Possession of a Deadly Weapon by a Person Prohibited was a violent felony for purposes of sentencing under the habitual offender statute).

Griffin v. State, 47 A.3d 487, 491 (Del. 2012) (defendant's constitutional right to bear arms authorized his carrying of a concealed knife in his house).

Hunter v. State, 55 A.3d 360, 364-68 (Del. 2012) (hospital BAC test result was inadmissible because phlebotomist failed to follow manufacturer's specification for the taking of the sample).

Kirkley v. State, 41 A.3d 372, 377-78 (Del. 2012) (prosecutor committed improper vouching in rebuttal argument by stating that State brought attempted robbery charge because that is what defendant did).

Kostyshyn v. State, 51 A.3d 416, 419-20 (Del. 2012) (defendant forfeited his right to counsel due to his abusive behavior toward his court-appointed attorney).

Monceax v. State, 51 A.3d 474, 478-79 (Del. 2012) (trial court properly held a separate trial on defendant's charge of Sex Offender Unlawful Conduct Against a Child after defendant had been convicted by a jury on a charge of Unlawful Sexual Contact in the Second Degree).

Mott v. State, 49 A.3d 1186, 1190-91 (Del. 2012) (trial judge did not err at restitution hearing in excluding evidence of a loan of \$20,000 made by defendant to victim of Construction Fraud).

Murray v. State, 45 A.3d 670, 678 (Del. 2012) (police lacked authority to continue to detain occupants of a car for the purpose of asking questions when there was no reasonable suspicion of criminal behavior).

Panuski v. State, 41 A.3d 416, 420-21 (Del. 2012) (defendant's due process challenges to his conviction for two counts of Dealing in Child Pornography were barred under Rule 61(i)(3) as defendant admitted his guilt by way of plea).

Powell v. State, 49 A.3d 1090, 1097-99, 1100, 1101-04 (Del. 2012) (trial court properly denied defense motion for change of venue; trial court did not err in denying defense request for lesser-included negligence instruction where no evidence supported the defendant's accident theory; State did not commit *Deberry* violation in failing to collect shirt of other occupant of vehicle; imposition of death penalty did not violate the Eighth Amendment).

Richardson v. State, 43 A.3d 906, 909-11 (Del. 2012) (trial court erred in allowing Child Advocacy Center interviewer to opine on truthfulness of a § 3507 statement and on the reliability of the interview protocol used to obtain the statement).

Robertson v. State, 41 A.3d 406, 409-10 (Del. 2012) (sufficient evidence supported flight instruction which did not violate DEL. CONST. art. IV § 19).

Rose v. State, 51 A.3d 479, 481-84 (Del. 2012) (defendant's conviction for Maintaining a Dwelling for Keeping Controlled Substances was supported by sufficient evidence including cocaine from back of the house and in vestibule, and digital scale, empty smaller bags, a cutting agent, and surveillance equipment).

Roy v. State, 62 A.3d 1183, 1187-90 (Del. 2012) (although police lacked reasonable suspicion to stop defendant, the stop and seizure evidence was admissible under the inevitable discovery doctrine as defendant was the only person present when police discovered murder victim's body).

Small v. State, 51 A.3d 452, 459-63 (Del. 2012) (prosecutor's references to defendant's mitigating circumstances as excuses during penalty hearing constituted reversible error requiring remand for new penalty hearing).

Stafford v. State, 59 A.3d 1223, 1229-31 (Del. 2012) (police had probable cause to arrest passenger in vehicle who provided false information and could handcuff and pat down the suspect).

State v. Abel, C.A. No. 68 A.3d 1228, 1238-239 (Del. 2012) (police lacked reasonable suspicion to further detain and frisk biker wearing motorcycle gang colors who was stopped for speeding).

Wallace v. State, 62 A.3d 1192, 1196-98 (Del. 2012) (codefendant's minor son implicitly consented to search of house by probation officer who had reasonable suspicion of probation violation by defendant).

Wheeler v. State, 36 A.3d 310, 314, 317, 321 (Del. 2012) (witness statement naming shooter made immediately after the event qualified as a present sense impression and excited utterance; detective's testimony that witness did not identify any other suspect was impermissible indirect hearsay that violated the Sixth Amendment although error was harmless).

Williams v. State, 56 A.3d 1053, 1056 (Del. 2012) (defendant's right to self-representation denied by trial court's failure to conduct a proper waiver colloquy).

WOMEN AND THE DELAWARE BAR AND BENCH: IT TAKES GENERATIONS

Claire M. DeMatteis*

Despite the pride Delaware rightly claims as “The First State¹,” it was the last state to admit women to the bar. That was nearly a century ago, in 1923. Today, more than one-third of all attorneys in Delaware are women². Yet, on our world-renowned business courts – the Supreme Court and the Court of Chancery – exactly one woman has served on either bench. She is the same woman. She was first appointed and confirmed nearly thirty years ago.

Notwithstanding Delaware’s late admittance of women attorneys and lack of women’s representation on our “corporate courts,”³ female attorneys have made significant strides serving on Delaware’s Superior Court, Family Court and Court of Common Pleas; and as practicing attorneys in the areas of criminal, corporate, family, gender equality, disability rights, environmental, employment, bankruptcy and health care law.

This article will explore the progress and impact women have made in Delaware on the bench, as members of the bar, in private practice and in elected office. It also will provide perspective of how Delaware courts compare with other states and the federal bench. Finally, we examine potential reasons why more women are not yet as well represented on our corporate law courts, in the practice of corporate law and in elected office.

I. WOMEN AS “OFFICIALS OF THE STATE”

In 1923, the Delaware General Assembly approved a constitutional change that, without using the word “woman”, removed gender as a barrier to service as “officials of the State.” Section 10 of Article XV, titled “Miscellaneous,” of the Delaware Constitution as amended in 1923 states: “No citizen of the State of Delaware shall be disqualified to hold and enjoy any office, or public trust, under the laws of this State, by reason of sex.”

So, 54 years after the first woman was admitted to any state Bar,⁴ two women attorneys joined the Delaware Bar in March 1923: Sybil Ursula Ward and Evangelyn Barsky.

Sybil Ursula Ward worked for her family’s law firm Ward & Gray, which has evolved into today’s Potter Anderson & Corroon. Significantly, she also was the first woman elected to the Wilmington City Council, serving from 1925 to 1929 as the City Council member for the 12th Ward. Ms. Ward was the first of just seven women attorneys to serve in an elected office in Delaware’s history

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1. On December 7, 1787, Delaware became the “first state” to ratify the United States Constitution.

2. According to the Delaware State Bar Association, in 2013 there are 4,978 people licensed to practice law in Delaware. Of them 1,759, or 34 percent, are women.

3. References herein to Delaware’s “corporate” or “business” courts refer to the Court of Chancery and State Supreme Court.

4. The first woman was appointed to the Iowa bar in 1869. C.V. Waite & Company, Chicago, CHICAGO LAW TIMES , 1887, at 76-77.

Evangelyn Barsky practiced law with her brother Victor and in 1935 was appointed Assistant City Solicitor in Wilmington. Regrettably, her tenure was short-lived as she was killed in an automobile accident on September 13, 1936.

In 1926, Annie Miles Saulsbury was the third woman admitted to the Delaware bar. Little is known about her career, and there is no record that she practiced law in Delaware.

In 1931, Marguerite Hopkins Bodziak was the fourth woman admitted to the State bar and became the first female state prosecutor. She was elected to the Democratic National Committee and served as Delaware's Democratic National Committeewoman until 1944.

In 1941, Roxanna Cannon Arsht became the fifth woman admitted to the Delaware Bar. She was born in Wilmington and attended Wilmington public schools. After earning an undergraduate degree from Goucher College in Baltimore, Maryland, with a major in chemistry and a minor in mathematics, she attended the University of Pennsylvania Law School, graduating in 1939. After passing the Delaware bar examination in 1941, she applied for numerous jobs in Wilmington but received no offers. She turned her attention to being a wife to Wilmington attorney Samuel Arsht, a mother to two daughters and a community leader.⁵

In 1962, Judge Arsht began working as a volunteer master in the Family Court. She received no salary for nine years. In 1971, at the age of 56, she made history when she was appointed by Gov. Russell W. Peterson to be the first female judge on the Family Court. The year of her appointment was significant because it was the year the Delaware General Assembly passed a law establishing a statewide Family Court system.⁶

After serving for 12 years, Judge Arsht retired from the bench in 1983. Despite the inauspicious start to her legal career, she blazed the trail for women attorneys to serve on the bench. Until her death in October 2003, she served as a mentor, role model and friend to other women who would aspire to follow in her footsteps.

Following Judge Arsht, ten women have served or currently serve on the Delaware Family Court Bench.

- Chief Judge Chandlee Johnson Kuhn (Chief Judge 2003 to present, first appointed to Family Court Bench in New Castle County in 1998)
- Judge Barbara A. Crowell (New Castle County, 2008 to present)
- Judge Aida Wasserstein (New Castle County, 2007 to present)
- Judge Mardi Pyott (Kent County, 2000 to present)
- Judge Arlene Minus Coppadge (New Castle County, 2003 to present)
- Judge Joelle Hitch (New Castle County, 2005 to present)
- Judge Paula T. Ryan (Sussex County, 2013 to present)
- Judge Peggy Ableman (New Castle County Family Court 1983 to 2000, then Superior Court 2000 to 2012)
- Judge Alison Tumas (New Castle County, 1991 to 2004)
- Judge Jean Crompton (New Castle County, July 1992 until her death on June 15, 1995)

5. In 1966 — twenty-five years after her admission, Judge Roxanna Arsht's daughter, Adrienne Arsht, was the 11th woman admitted to the Delaware bar.

6. Prior to 1971, the creation of Family Court was piecemeal. Its origins date back to 1911 with the creation of the Juvenile Court for the City of Wilmington. That Juvenile Court was expanded to New Castle County in 1923. In 1933, the Juvenile Court for Kent and Sussex Counties was created. In 1945, the Delaware General Assembly statutorily created the Family Court for New Castle County. Kent and Sussex Counties maintained a Juvenile Court System with jurisdiction over family matters until 1962, when the name of the Juvenile Court for Kent and Sussex Counties was changed to the Family Court for Kent and Sussex Counties. The unified, statewide Family Court was finally established in 1971.

Judge Arshnt lived to see her legacy enhanced in the next generation of women attorneys. Fully 32 years after the statewide Family Court was established and Judge Arshnt, as its first female member was appointed to the bench, Chandlee Johnson Kuhn was sworn in as Family Court's first female Chief Judge in 2003. Judge Kuhn, who was first appointed to the Family Court bench in 1998, is the only female among all of the senior presiding and chief judges on any of Delaware's courts in all three counties.

As we will examine in more detail herein, it is worth noting that Judge Kuhn's nomination and confirmation as Chief Judge defied an intricate balancing act of politics and geography among our three counties. It is a credit to Judge Kuhn's experience, relationships on both sides of the political aisle and support among members of the Delaware Bar that she succeeded in her nomination and confirmation as Chief Judge despite the fact that she is a Republican female attorney from New Castle County. Indeed, she was nominated by a Democratic Governor, Ruth Ann Minner, who was a native of Milford, which straddles Kent and Sussex Counties. Moreover, Judge Kuhn was confirmed by a Democratic-controlled State Senate, led by the Democratic Chairman of the Senate Executive Committee, Thurman Adams, the longest-serving member of the Sussex County delegation.

II. 1977: DELAWARE REFORMS ITS JUDICIAL SELECTION PROCESS

Since the first term of Governor Pete du Pont in 1977, Delaware governors have established by executive order a judicial nominating commission.⁷ This Commission consists of eleven members. The governor appoints ten members, which must include at least four attorneys and at least four nonlawyers. The president of the Delaware State Bar Association nominates, with the governor's consent, the eleventh member, who is then appointed by the governor. The governor designates the commission's chairperson. Commissioners serve staggered, three-year terms and may be reappointed by the governor. No more than six commissioners may be members of the same political party at the time of their appointment. Currently, three of the eleven members of the Delaware Judicial Nominating Commission are women; however, none of these women is an attorney.

The Commission nominates judges of the Supreme Court, the Superior Court, the Court of Chancery, the Family Court, and the Court of Common Pleas, and the chief magistrate of the Justice of the Peace Courts.⁸ When a judicial vacancy is created, interested Delaware attorneys submit a detailed application to the Commission. Members of the Commission review the applications and interview applicants and then submit the names of at least three candidates to the governor. The governor may decline to nominate someone from this list and may request a supplemental list of no fewer than three names. The governor must nominate a candidate from one of these lists. Sitting judges apply to the commission for reappointment. The commission must recommend their reappointment unless at least two thirds of the members of the commission object.

III. DELAWARE'S "CONSTITUTIONAL COURTS" SUPREME COURT, COURT OF CHANCERY, SUPERIOR COURT

Today, only seven of the 31 members of Delaware's three original constitutional courts are women. Of these seven female judges, six serve on the Superior Court.

7. Prior to 1977 there was no formal judicial selection process in Delaware. Beginning with the Delaware Constitution of 1792, judges of all levels of courts were appointed by the governor to life terms, except for justices of the peace who were appointed to seven-year terms. In 1831, judges of all levels of courts were appointed by the governor to life terms. In 1897, judges of all levels of courts were appointed by the governor with senate confirmation. Tenure was changed from "good behavior" to twelve-year terms.

8. A magistrate screening committee is used for associate magistrates of the Justice of the Peace Courts.

Although women attorneys currently comprise 34 percent of the Delaware Bar⁹, women comprise just 22 percent of judges on the Supreme Court, Court of Chancery and Superior Court. The disparity is even starker when you consider that all six women who serve on the Superior Court sit in New Castle County. There is not now – nor has there ever been – a single female judge from Kent or Sussex Counties on any of the state’s three constitutional courts with jurisdiction over major criminal and corporate matters.

In its 221-year history, Delaware’s Court of Chancery has had one female judicial member, Carolyn Berger, who served from 1984 to 1994. The generation of attorneys admitted to the Delaware Bar after 1994 and who practice in the Court of Chancery has never argued a case before a female chancellor or vice chancellor.

Even before her judicial service, Justice Berger was one of the pioneers among women in the Delaware corporate bar. She was an associate at Prickett, Ward, Burt & Sanders before joining Skadden, Arps, Slate, Meagher & Flom from 1979 to 1984. From 1976 to 1979, Justice Berger was a Deputy Attorney General with the Delaware Department of Justice. In 1994, Governor Tom Carper nominated Carolyn Berger to the Supreme Court to fill the vacancy created when Justice Andrew Moore was not reappointed. Justice Berger has since been re-confirmed by the Delaware State Senate to a second 12-year term. Her current term expires in July 2018.

At her investiture ceremony, former Chancellor William T. Allen, who served with Carolyn Berger on the Court of Chancery, described her as “all hard substance and no frill.”¹⁰ He spoke eloquently of her fortitude, character, courage, independence, respect for others and capability of “greatness” as a jurist. Justice Berger will mark her 20th year as a Supreme Court Justice in 2014.

As for Superior Court, 171 years after it was created by the Delaware Constitution of 1831, the first woman judge was appointed: Susan Del Pesco in 1988. It may have taken almost two centuries for that milestone, but in the 25 years since Judge Del Pesco’s appointment, eight other women have followed in her path. The current and former female judges for Superior Court are:

- Judge Jan R. Jurden (2001)
- Judge Mary M. Johnston (2003)
- Judge M. Jane Brady (2005)
- Judge Diane Clarke Streett (2010)
- Judge Vivian Rapposelli (2013)
- Judge Andrea L. Rocanelli (2013)
- Judge Peggy Ableman (2000-2012)¹¹
- Judge Haile Alford (1992-2004)

Further, it is noteworthy that Judge Halie Alford was the first African-American woman to serve on the Superior Court bench. She was appointed by Governor Mike Castle in 1992. Judge Vivian Rapposelli is the Superior Court’s first Hispanic member – male or female. She was appointed by Governor Jack Markell in 2013.

9. Delaware State Bar Association statistics, 2013 membership data.

10. Transcript, Investiture of Carolyn Berger as Associate Justice of the Supreme Court, July 22, 1994.

11. Judge Ableman was first appointed to the Family Court in 1983 and served on that court until 2000.

IV. SUPERIOR COURT AND THE ROLE OF WOMEN JUDGES “PROBLEM-SOLVING COURTS”

It did not take long for the women on the Superior Court bench to make an impact. Judge Susan Del Pesco initiated the court’s e-filing system for complex civil litigation matters. Under her leadership, Delaware was the first state in the nation to implement an electronic docketing and filing system for civil cases. That system, called the Complex Litigation Automated Docket or CLAD, went into effect in 1991. Thanks to this e-filing system, more than 1.8 million court documents were converted from paper filings to electronic filings.¹²

Thirteen years after Judge Del Pesco was the first woman to serve on the Superior Court bench, Judge Jan Jurden joined the court in 2001. In 2008, Judge Jurden led an initiative to establish the Mental Health Court, now one of Superior Court’s so-called “Problem-Solving Courts¹³.” Based on Delaware’s nationally-acclaimed Drug Court, the model brings together representatives from the Department of Justice, the Public Defender’s Office and the Probation and Parole Office and Treatment Care Specialists. Judge Jurden also initiated a Mental Health Court after a defendant appeared on the weekly court calendar for violating his probation for the eighth time due to mental health issues. As Judge Jurden describes it, the pattern was always the same cycle: the defendant would stop taking his medications, get into trouble, get arrested, get convicted, get placed on probation, violate that probation, and end up in prison. Today, the Mental Health Court ensures regular review through a bi-weekly calendar of cases. Defendants understand their requirements and status conferences are held to keep defendants on track toward treatment, employment, housing, meals and clothing.

The same model is used in the newly-created Veterans’ Court, which was initiated by Judge William Witham in Kent County and expanded to New Castle County with Judge Jurden presiding. Both Judge Witham and Judge Jurden are military veterans.

V. COURT OF COMMON PLEAS WOMEN JUDGES IN ALL THREE COUNTIES

The Court of Common Pleas was originated in 1917 with the creation of “The Court of Common Pleas for New Castle County.” CCP, as it is commonly called, was funded and operated by county governments until 1969. In 1973, the three courts were merged into one statewide Court of Common Pleas¹⁴. A quarter century later, in 1999, the first woman was appointed as a judge to the CCP: Rosemary Betts Beauregard in Sussex County. Ten years later, in 2009, two more women were appointed as judges to the Court of Common Pleas: Andrea Rocanelli in New Castle County and Anne Hartnett Reigle in Kent County. Thus, CCP is the only court in Delaware that, from 2009 to July 2013, had a woman judge who is a member of the Delaware Bar serving on the bench in each of the State’s three counties. Currently, the Court, which

12. In 2003, the Court transitioned its e-filing processes to LexisNexis™ File & Serve; the existing CLAD files were imported into LexisNexis™. In 2007, the Court expanded the use of e-filing in Superior Court to all major categories of civil cases; again Delaware was the first state in the nation to do so.

13. Problem-solving courts accommodate offenders with specific needs and problems that were not or could not be adequately addressed in traditional courts. Problem-solving courts seek to promote outcomes that will benefit not only the offender, but the victim and society as well. Problem-solving courts were developed nationally as an innovative response to deal with offenders’ problems, including drug abuse, mental illness, and domestic violence.

14. The New Castle County CCP was established in 1917; Kent County in 1931; Sussex County in 1953.

consists of nine judges, is one of the busiest courts in the State of Delaware, exercising jurisdiction over: misdemeanor criminal offenses; traffic violations; civil matters where the amount in controversy does not exceed \$50,000; preliminary hearings in felony matters; and appellate jurisdiction for Justice of the Peace Court and motor vehicle hearing appeals.

With Judge Rocanelli's elevation to the Superior Court in July 2013, just two of the CCP judges currently are women. As more women serve on the CCP bench, gaining critical experience in criminal and civil cases, this may prove to be an opportunity for women judges to advance to the Superior Court in Kent and Sussex Counties.

VI. JUSTICE OF THE PEACE COURTS: A NOTABLE "FIRST"

There are 60 Justice of the Peace (JP) judges, with jurisdiction over civil cases in which the amount in controversy does not exceed \$15,000, certain misdemeanors and most motor vehicle cases, excluding felonies. By statute, these judges are not required to be attorneys. In total, six of the 26 women on the JP Court are lawyers, while just two of the 34 men on the JP Court are lawyers.

One other significant point is that the JP Court was the first statewide court in Delaware to be led by a female attorney. Patricia Griffin served as Chief Magistrate of the JP Courts from 1993 to 2005, before moving on to serve in her current position as State Court Administrator for all Delaware Courts.

VII. WOMEN JUDGES SERVING ON OTHER STATE COURTS VS. DELAWARE

The percentage of women serving on Delaware courts is consistent with the national average of female state court judges. According to national statistics by the National Center for State Courts (NCSC), 26 percent of all state judges are women, while 28 percent of the judges on Delaware courts are women. Delaware's percentage is slightly skewed, however, because as noted earlier there are only seven women serving on Delaware's constitutional courts. The remaining women judges serve on the Family Court and Court of Common Pleas.

In a record number of *twenty* states across this country, a woman now serves as the Chief Justice of the state supreme court.¹⁵ Southern states in particular show strong gains in gender diversity. Four southern states – Florida, Georgia, Kentucky and South Carolina – have as high or higher percentages of women on their state courts as do California, Connecticut, Illinois, Michigan and New Jersey. Nine of the 13 state supreme courts in the South have multiple women as justices, as does the District of Columbia. Five states have three or more women justices. In Texas five of the nine judges on Texas' highest criminal court – the Texas Court of Criminal Appeals – are women. Tennessee, Michigan and Wisconsin have a majority of women on their supreme courts. Two states have no women as justices—Idaho and Indiana.

Importantly, most states with a female chief justice have some form of an *elected* system for judicial candidates, rather than Delaware's *appointed* system. For example, in Florida and Tennessee, justices were appointed by the governor, ran in retention elections, and then were elected chief by their colleagues. In Louisiana, the chief justice was elected by a district in the state and then promoted to chief due to seniority on the supreme court. The Alabama chief justice and Texas Court of Criminal Appeals presiding judge were chosen directly by the citizens in statewide partisan elections. North Carolina's chief justice was initially elected to the state supreme court and was then appointed chief justice by the governor. The South Carolina legislature appoints its chief justice.

15. National Center for State Courts <http://www.ncsc.org/>.

Nationwide, 39 states elect judges in some form – either partisan elections, non-partisan elections or to continue after a judicial appointment. Delaware is among the remaining 13 states that appoints its judges. As noted above, in Delaware attorneys apply to a judicial nominating commission comprised of members of the bar as well as non-lawyers appointed by the Governor. The judicial nominating commission recommends the top candidates to the Governor for his or her review and nomination. The governor's judicial nominees must then be confirmed by the Delaware State Senate.

In Delaware, there currently are 16 female judges spanning the Supreme Court, Superior Court, Family Court and Court of Common Pleas. With 58 judicial positions on these four Delaware courts, including the Chief Magistrate of the Justice of the Peace Court, the number of women judges tracks national statistics at least for our most northern and most populous county, New Castle County. Significantly, there has never been a single female judge from Kent or Sussex County on the Supreme Court, Court of Chancery or Superior Court.

One other unique feature of Delaware's judicial system is its commissioners, whose jurisdiction includes the power to accept pleas, appoint counsel for indigent defendants and determine pre-trial matters.¹⁶ This has proven to be another opportunity for women to serve in our judicial system. In Delaware, the Governor nominates commissioners to serve on the Superior Court, Family Court and Court of Common Pleas for a term of six years and the nominations are subject to State Senate confirmation. Currently in Superior Court, three of the five commissioners are women, including notably, a female commissioner in Kent County and a female commissioner in Sussex County. In Family Court, 11 of its 16 commissioners are women, including representation from all three counties. On CCP, both of its commissioners are women, one for New Castle County and one who serves both Kent and Sussex Counties.

One final note is that Delaware also now has two Masters in the Court of Chancery. Masters hear and adjudicate cases assigned to them by the Court. They also play an important administrative role in ensuring that the Court handles its case load in a timely manner, particularly in the sensitive areas of trusts and estates and guardianships. Masters are appointed by the Chancellor and are *not* subject to Senate confirmation. For the first time both Masters in the Court of Chancery are female attorneys, one serving New Castle County and one for both Kent and Sussex Counties.

VIII. THE FEDERAL BENCH: TWO IN 224 YEARS

While Delaware's first female state court judge was appointed in 1971, a woman did not reach the Delaware federal bench until 1985.

The U.S. District Court for the District of Delaware was created in 1789 by the First Judiciary Act. In the 224 years since, there have been 25 federal district court judges in Delaware. Only two of these 25 judges have been women: Jane Richards Roth, who served from 1985 to 1991, before her elevation to the U.S. Third Circuit Court of Appeals, and Sue Robinson, who was nominated and confirmed in 1991 to fill the vacancy created by Judge Roth's promotion to the Court of Appeals. Judge Robinson continues to serve on the District Court today. In the 22 years since Judge Robinson joined the federal bench, five judges have been appointed to the Delaware District Court – all men. Delaware's U.S. District Court does have three Magistrates, two of whom are women. Magistrate judges generally oversee first appearances of criminal defendants, set bail, mediate cases and conduct other administrative duties.

The trailblazer on the federal bench was Jane Richards Roth. In 1985, four years after Sandra Day O'Connor became the first woman to sit on the U.S. Supreme Court, Jane Roth was nominated to the U.S. District Court for the District of Delaware by President Ronald Reagan. In 1991, she was nominated by President George H.W. Bush and confirmed to the U.S. Third Circuit Court of Appeals. After 21 years on the bench, Judge Roth elected to take senior status

16. 10 *Del. C.* § 512.

in May, 2006. With Judge Roth's retirement, the two current judges from Delaware who sit on the U.S. Third Circuit Court of Appeals are men. In fact, today women judges comprise just 16 percent of the Third Circuit Court of Appeals, which includes the states of Pennsylvania, New Jersey, Delaware and the U.S. Virgin Islands. That 16 percent is well below the national average of 32 percent of women judges on the U.S. Courts of Appeal.¹⁷

Moreover, nationwide about 30% of all Federal District Court judges are women.¹⁸ In Delaware just one of four of its current District Court judges is a woman, Judge Robinson. She joined the court in 1991, after serving as a magistrate judge for that court and as an assistant U.S. Attorney in Delaware for five years. Judge Robinson served as the Chief Judge of the court from 2000-2007. It is significant to note that even though all of Delaware's current District Court judges once served in the U.S. Attorney's Office, there has never been a female U.S. Attorney in Delaware.

If currently pending judicial nominees are confirmed, the number of women in the federal judiciary would increase. Of President Obama's 251 judicial nominees to date (including his nominees to the Supreme Court), 109 are women.¹⁹ Thirty-nine of these nominees have been women of color (20 African-American women, 10 Hispanic women, seven Asian-American women, one woman of Hispanic and Asian descent, and one woman of African-American and Hispanic descent).

According to the Alliance for Justice, about 41 percent of President Obama's confirmed nominees have been women. This has increased the number of women on the First, Second, Third, Fourth, Sixth, Eighth, Ninth, Eleventh and Federal Circuits as well as on a number of district courts. Nine judges have been confirmed as the first woman judge in their district; six more as the first woman circuit court judge in their state.

The number of women of color on the federal bench nationally has increased dramatically as well. The number of Asian-American women judges has more than tripled from just three to now 10, and includes the first Asian-American circuit court judge, Jacqueline Hong-Ngoc Nguyen who was confirmed in May, 2012. Seven states have their first African-American female judges, and three states have their first Hispanic female judge.

While examining the history of women serving on the federal bench in Delaware, it is important to include the congressionally-created U.S. Bankruptcy Court for the District of Delaware. Again, women judges, one in particular, have played a major role on that court. From 1974 to 1999, Judge Helen Balick presided over the Delaware Bankruptcy Court, which grew exponentially in national stature and importance during her tenure. Several national publications, including *Businessweek*, referred to her as the most "powerful woman judge in America"²⁰. She successfully handled numerous high-profile cases, including the bankruptcies of Continental, TWA, and Columbia Gas Transmission. While bankruptcy courts in New York handled similar high-profile cases, the difference was that New York had five bankruptcy court judges, Delaware had just Judge Helen Balick.

Considering her national stature, perhaps Judge Balick's lasting distinction among the Delaware Bar is the fact she was the first and only woman attorney or judge in Delaware who was admitted to law school without ever attending college. She earned her degree from the Dickinson School of Law in 1966 and was the thirteenth woman admitted to the Delaware Bar in 1969.

17. National Women's Law Center, based on data from the biographical directory of judges, Federal Judicial Center, U.S. Courts <http://www.nwlc.org/>

18. National Women's Law Center, based on data from the biographical directory of judges, Federal Judicial Center, U.S. Courts <http://www.nwlc.org/>

19. Alliance for Justice <http://www.afj.org/>

20. BUSINESSWEEK, NOVEMBER 29, 1992, *BAILIWICK IS A BACKWATER NO MORE*, HELEN BALICK.

On September 9, 1998, Judge Mary Walrath was appointed United States Bankruptcy Judge for the District of Delaware. So it took 24 years after the first female Bankruptcy Court Judge was appointed in Delaware for a second woman to serve on this federal bench. Judge Walrath is a member of the Pennsylvania Bar, however, not the Delaware Bar. Judge Walrath served as Chief Bankruptcy Judge from September 9, 2003, until June 30, 2008. She is a founding member and co-president of the Delaware Bankruptcy American Inn of Court. There currently are six judges on Delaware's U.S. Bankruptcy Court. Judge Walrath remains the only woman.

Considering that one-third of the U.S. Supreme Court now consists of women justices, Delaware's District Court and Third Circuit Court of Appeal lag behind even this most modest of national standards. Only one woman currently serves on the District Court of Delaware, no female judge from Delaware serves on the Third Circuit Court of Appeals and not a single minority woman from Delaware has ever served on either court.

IX. WOMEN IN THE DELAWARE BAR: PROGRESS, SLOW BUT SURE

Moving on from a review of Delaware women judges on the bench to women attorneys in the Bar, a review of Court of Chancery and Supreme Court opinions from the early 1980s lists just a handful of women attorneys who argued cases before these courts – and all appeared as associates or government attorneys –not as partners of a law firm. The corporate takeover era that began in the mid-to-late 1980s and continued through the 1990s, provided more women attorneys the opportunity to argue cases with their male colleagues in these two corporate courts. While there were fewer than 10 women attorneys practicing corporate law in the early 1980s, their numbers are increasing. Today, an estimated 70-80 women partners and associates in the Delaware Bar have a corporate law practice, which is about 1.6 percent of all Delaware attorneys.

The rigors of a corporate law practice – with court filing deadlines, emergency hearings and expedited litigation deadlines that require attorneys to work around the clock for days, even weeks and months on end – is not family friendly for attorneys, regardless of gender. With family dynamics, and work-life issues, the reality and requirements of a corporate practice pull many women out of this area of the law. For women attorneys who maintain a corporate law practice, surveys by the American Bar Association, the National Association of Women Lawyers (NAWL) and interviews with seasoned Delaware female corporate attorneys indicate that women attorneys must confront male-dominated business clients who second-guess their advice, seek a male partner's opinion instead, or openly prefer a male litigator to take the lead role. Furthermore, after female associates with a corporate law practice attain the rank of partner, they confront the challenges of business development required to build their own book of business for the firm and attain executive management leadership positions.

Nationwide, the number of women partners at law firms has held steady at 15% since 2006, despite the fact that about half of all law school graduates are women.²¹ The statistics show that women leave law firms disproportionately more than men, at every stage of practice; staff attorneys are predominantly female; and, the majority of attorneys who hold the title "of counsel" are off partnership track.²²

If Delaware is to increase the number of female applicants to judgeships and the number of women judges, it is imperative to attempt to level the gender parity playing field within law firms because that is where most qualified judicial applicants gain the needed experience. If Delaware has fewer female partners, especially at the equity partner level,

21. National Association of Women Lawyers Survey 2012 <http://www.nawl.org/p/cm/ld/fid=82#surveys>

22. *Id.*

inevitably there will be fewer qualified female judicial applicants – especially for Delaware’s major corporate courts – either because women attorneys left firm practice too early or because they are not perceived as “qualified” if they are not equity partners and/or do not serve in leadership positions. Thus, if women attorneys lag behind at the firm level, it will cascade to a lack of opportunities for service on the bench.

Beyond corporate law, examining the role and number of women in other areas of the law shows women have made their mark – in New Castle, Kent and Sussex Counties. For example, in 1979, when Kathleen Jennings joined the Delaware Attorney General’s office, she was one of only three women prosecutors. Today, fully half of the 203 deputy attorneys general in the Delaware Department of Justice are women. And Kathleen Jennings is now the department’s chief criminal deputy attorney general. In areas ranging from criminal law to environmental law, disability rights, gender equity and health care law, women attorneys in Delaware have been a leading voice for change. Before 1976, the number of women admitted to the Delaware Bar could be counted in single digits. Starting in 1976, the number of women admitted has been counted as a “percentage” of the total number of admittees. From 14 percent in 1976, today 34 percent of Delaware attorneys are women. In fact, since 1987 when Susan Del Pesco became the first woman to serve as President of the Delaware Bar, five other female attorneys have been elected to serve in this prestigious position. Moreover, five of the six women Presidents of the Delaware State Bar Association have been partners in their respective law firms.²³

In Delaware, there are no firm statistics on the number of female partners, but a cursory analysis of the major Delaware law firms show women partners consist of at least 10 to 12 percent of partners.²⁴ There is no doubt that woman attorneys have come a long way since 1960 when Brereton Sturtevant was named the first female partner of the firm formerly known as Connelly Bove Lodge and Hutz, LLP. But our numbers still lag significantly and stubbornly behind our male counterparts.

While more women are gradually becoming partners and being selected to law firm management positions, pay inequity between male and female partners remains a persistent problem. Numerous national studies show that origination of clients, allocating credit, and the disparity caused by more male lateral hires at higher salaries than women are some of the persistent reasons causing this continued gender pay inequity.

In August 2012, American Bar Association (ABA) President Laurel Bellows appointed a blue-ribbon Task Force on Gender Equity to recommend solutions for eliminating gender bias in the legal profession, with a principal focus on the disparity in compensation between male and female partners. The Task Force report was issued earlier this year. It found that for a variety of reasons – chiefly among them the allocation of credit for sharing clients and equity versus non-equity partners – women partners still earn significantly less than their male counterparts.²⁵

For example, a 2013 analysis by the ABA of the legal market reported that equity partners now average about 2.5 times the total compensation of their non-equity partners. During the past year, the compensation of equity partners jumped some 11 percent, while the compensation of non-equity partners was essentially flat. The ABA report on “Closing the Gap” documents that women make up a majority of non-equity partners. The ABA Report concludes that the slow progress for women in attaining equity partner parity is as much a compensation issue as it is a leadership concern.²⁶

23. One of the female presidents of the DSBA was an Assistant U.S. Attorney.

24. The cursory analysis involved a firm-by-firm review by the author, which resulted in this conclusion.

25. Closing the Gap: A Road Map for Achieving Gender Pay Equity in Law Firm Partner Compensation, presented by the ABA’s Gender Equity Task Force and the Commission on Women in the Profession.

26. *Id.*

A survey released in October 2012 by the National Association of Women Lawyers (NAWL) confirmed this continued gender inequality that begins at the associate level and widens with experience and stature. At the associate level, for example, the NAWL survey reported that women constitute nearly 45 percent of the associate pool, yet they receive only 40 percent of the bonuses.²⁷ And although the data showed the gap narrowing for women income partners, the gap is still large at the equity partner level.²⁸

The NAWL 2012 report also concludes that:

- Average compensation for male partners in 2011 was about 30 percent higher than women partners.
- In 2011, women equity partners were significantly LESS likely than their male peers to receive credit for a \$500,000 book of business.
- Women equity partners received only 75 percent of the amount credited to their male colleagues for business generation.²⁹

The ABA Report on Closing the Gap to achieve gender pay equity included 12 recommendations which all firms, including those in Delaware, might consider. The recommendations include:

- Build transparency into the compensation process
- Include a critical mass of diverse members on the Compensation Committee
- Develop systems to promote fair and accurate allocation of billing and origination credit
- When making presentations to potential new clients, require diversity in “pitch teams” and related business development efforts
- Implement formal client succession protocols
- Measure and report results
- Develop a process to resolve allocation disputes promptly and equitably
- Implement systems to ensure equitable compensation for partners on a reduced-hours schedule
- Maximize the effectiveness of Women’s Initiatives Groups within firms

There are some encouraging developments that demonstrate how women attorneys in Delaware are determined to secure, sustain and grow their ranks. Women practitioners in the Court of Chancery have formed their own networking group to help build their practices, refer cases to one another, share experiences and ultimately demonstrate that women can have a thriving corporate law practice, while maintaining a semblance of balance with a stable family life and community involvement. This new Court of Chancery women’s attorney group was founded in the last year, modeled after a similar group of female bankruptcy attorneys and the umbrella group of the Women and the Law Section of the Delaware State Bar Association.

The Women and the Law Section was founded in 1978 and was originally called the “Women’s Rights Committee.” It was founded by a group of newly-admitted women attorneys, including Mimi Boudart and now Judge Aida Wasserstein, who recognized that for women to succeed in this male-dominated profession, they needed to support one another. In 1979, just one year after its creation, this new women’s committee submitted an *amicus curiae* brief to the

27. The National Association of Women Lawyers, *Report of the Seventh Annual National Survey on Retention and Promotion of Women in Law Firms* 6 (2012).

28. *Id.*

29. *Id.*

Delaware Supreme Court in support of the constitutionality of the Equal Rights Amendment. Throughout the 1980s, this group became active in supporting legislation impacting women on the state and local levels. During the 1990s, the Women and the Law Section led the effort on the Gender Fairness Task Force chaired by Judge Susan Del Pesco; created model policies to motivate law firms to establish alternative work schedules and promote more women to partner; led workshops to encourage more women to seek appointment to the bench; and encouraged women attorneys to apply for openings on state boards and commissions to achieve more gender balance among the hundreds of members appointed by the Governor to serve on these state boards and commissions.

The Women and the Law Section also has initiated numerous statewide projects, including the Governor's Awards for Excellence in Early Care and Education; the Roxanna C. Arsht Scholarship to help new women attorneys pursue careers in the public sector; and initiatives to help female juvenile delinquents, domestic violence victims and female prisoners climb out of the cycle of crime and poverty. The Women and the Law Section remains a vibrant part of the Delaware State Bar Association, 35 years after its initial founding by a group of women, who admit their first order of business was to "throw a party." That spirit of camaraderie is stronger than ever as more women join the Delaware Bar.

X. WOMEN ATTORNEYS AS DELAWARE ELECTED OFFICIALS

In addition to reviewing the rank and role of women on the Delaware bench, bar, among law firms and government offices, we should consider the impact of women serving as elected officials. No woman – regardless of whether she is an attorney by profession – has ever been elected to serve as one of Delaware's two United States Senators or lone member of the U.S. House of Representatives. Although not an attorney, we have elected one female governor and lieutenant governor – Ruth Ann Minner. Since women were first admitted to the Delaware Bar 90 years ago, seven female attorneys have been elected to office. Their service ranges from local government to statewide office, from so-called county "row" offices to the state's chief law enforcement officer and leader of the powerful state legislative budget-writing committee.

- Sybil Ward – Wilmington City Council, Republican (1925 to 1929)
- Mimi Boudart – New Castle County Council, Democrat (1983 to 1987)
- M. Jane Brady – Delaware Attorney General, Republican (1994 to 2005). Jane Brady was confirmed as a Superior Court Judge in 2005.
- Paulette Sullivan Moore – New Castle County Recorder of Deeds, Democrat (1991-1994). Paulette Sullivan Moore was the first African-American woman admitted to the Delaware Bar in 1977.
- Donna Lee Williams - Delaware Insurance Commissioner, Republican (1993 to 2005)
- Diane Clark Streett – Register of Wills for New Castle County, Democrat (2001 to 2010) In 2010, Diane Clark Streett was confirmed as a Superior Court Judge for New Castle County
- Melanie George Smith – State House of Representatives, Democrat, first elected in 2002. Chair of the Joint Finance Committee. She maintains an active legal practice at Richards Layton & Finger.

Although not elected to office, it is important to note the accomplishments of two other women attorneys: Battle Robinson and Rebecca Walker. Battle Robinson, who was the first woman to practice law in Sussex County in 1971, was also the first female candidate for Lieutenant Governor. She ran for office on the Republican ticket with gubernatorial candidate Mike Castle in 1984.³⁰ In 1985, Battle Robinson went on to become a Family Court Judge in Sussex County,

30. Delaware elects its Lt. Governor and Governor separately. In 1984, the Democratic Lt. Governor candidate, S.B. Woo was elected to serve with Republican Governor Mike Castle.

serving a 12-year term. State Representative Rebecca Walker (Democrat-Townsend) was elected in 2010. She is a member of the Pennsylvania Bar, in addition to being a registered nurse.

Currently, three members of the 62-member Delaware General assembly are attorneys, but only one is a female member of the Delaware bar, Melanie George Smith (Democrat-Bear).³¹ In 2002, Representative Melanie George Smith was the first Delaware woman attorney ever elected to the State House of Representatives. She now serves as the co-chair of the powerful Joint Finance Committee, which has jurisdiction over all budget matters for the General Assembly.

It is worth noting that the overall percentage of women in the Delaware General Assembly – nearly 26 percent – is higher than the national average of 24.2 percent. And women legislators in Delaware hold at least one leadership position in both the State House of Representatives and the State Senate.

- State Senator Patricia Blevins - President Pro Tempore – the highest ranking member of the State Senate
- State Senator Margaret Rose Henry – Majority Whip
- State Representative Valerie Longhurst – House Majority Leader
- State Representative Deborah Hudson – House Minority Whip

In fact, Delaware ranks eighth in the nation in the number of women legislators who chair committees. Currently, a female legislator chairs both the State House and State Senate Judiciary Committees, Representative Rebecca Walker and Senator Patricia Blevins, respectively. Moreover, for the first time, a woman legislator – Senator Blevins – chairs the powerful Senate Executive Committee, with jurisdiction over all judicial nominations.

Therefore, while it has taken generations, women are making steady, significant strides among Delaware's elected leaders, among law firm partners, government attorneys and within the Delaware Bar.

XI. EXAMINING THE REASONS FOR LACK OF PROGRESS ON THE CONSTITUTIONAL COURTS

Over the past three decades, an increasing number of women have joined the legal profession. Since 1992, women's representation in law school classes has approached 50 percent.³² Yet, the number of women judges on the federal bench and on Delaware's constitutional courts remains stubbornly low and below the national average.

As noted earlier, Delaware is one of 13 states that appoints, rather than elects, its judges. Delaware's Judicial Nominating Commission, gubernatorial nomination process, and Senate confirmation process, have served Delaware well. But this system, along with the state constitutional requirement that each court maintain a balance of Democrats and Republicans, plus the geographic representation among the Delaware's three counties inherent in the General Assembly's consideration of state court judges may, in fact, contribute to the lack of women on Delaware's two renowned corporate law courts.

As a society and as members of the Delaware legal community, it is incumbent upon us to explore why more women either do not apply for, or are not nominated to, state judgeships. For federal judgeships, there is no formal judicial nominating commission. Instead, Delaware's two U.S. Senators have an opportunity to recommend potential judicial

31. The others are State Representative Rebecca Walker and State Senator Bryan Townsend (Democrat - Newark).

32. American Bar Association, "First Year and Total J.D. Enrollment by Gender, Section of Legal Education and Admissions to the Bar", 2013.

candidates to the President. Such recommendations may carry more weight if the Senator and President are of the same party, since the President is not bound in any way by a senator's recommended nominee.

For all that is good about Delaware's judicial nominating process, it also carries the risk that qualified women either are not applying for or are boxed out of being nominated for judgeships on Delaware's renown Supreme Court and Court of Chancery because of the state's rigid political and geographic requirements. To be clear, this is not to suggest women are being intentionally disregarded for such judgeships. It is clear, however, that from the very beginning of our judicial history, gender disparities have been pervasive. That is why enhanced vigilance is needed to secure a more balanced representation of women from each of the State's three counties on all Delaware courts.

The purpose of highlighting the gender disparities within our judicial selection system is not to advocate for an elected system. Rather, by acknowledging the lack of women on Delaware's Court of Chancery and Supreme Court, perhaps members of the judicial nominating commission, the governor and state senators who ultimately confirm state court judges will recognize in the future that a woman candidate may in fact be the most qualified person for the job — even if her party affiliation does not match that of the Governor. And, even if her county of residence does not square with the traditional rigid geographic considerations which implicitly mandate that Delaware's corporate courts have at least one judge who resides specifically in New Castle, Kent and Sussex Counties.

Ninety years after women were first authorized to serve as "Officials of the State," our ranks among the federal and state judiciary still do not reflect our potential. Nor is the number of women judges in Delaware representative of our status within the Bar. It is of critical importance to increase the representation of women on the federal and state court bench. A goal to increase the number of women represented on Delaware's three original constitutional courts in each county is not meant to criticize the professionalism, expertise, dedication and courage of the many male judges who have and who currently serve on these courts. It is, rather, a simple recognition that when women are more fairly represented, these courts reflect our diverse population, diversity of experience, perspective and perception.

XII. CONCLUSION

By starting a dialogue about the need to continue to improve the representation of women attorneys as judges, perhaps by the 100th anniversary of women admitted to the Delaware Bar in the year 2023, more women attorneys will apply for judgeships in all three counties and more will be selected to serve on Delaware's corporate courts in particular. With Delaware Supreme Court Chief Justice Myron T. Steele's announcement that he will retire three years before his term expires, effective November 30, 2013, this presented the most immediate opportunity. It was an opportunity lost, however, when Delaware Governor Jack Markell nominated, and the State Senate confirmed the Honorable Leo Strine to the position, despite reports in the Wall Street Journal and Delaware News Journal that the other two jurists who applied and were considered for the position were sitting Delaware female judges.

In addition, within the next three years, the terms of two other Delaware Supreme Court justices will expire: Justice Jack Jacobs (June 4, 2015), and Justice Henry duPont Ridgley (July 22, 2016). Considering that these men have had long and distinguished careers on either the Court of Chancery or Superior Court before their confirmation to the Supreme Court, there may well be an opportunity for Governor Markell, to appoint at two new members of the Supreme Court before his second, four-year term ends in January, 2017.³³

33. The terms of the other two Supreme Court justices expire in 2018 (Justice Carolyn Berger) and 2023 (Justice Randy Holland).

On the Court of Chancery, there exists a vacancy to fill the seat of Chancellor or Vice Chancellor if a current member of that Court is elevated to the Chancellor position. In addition, Vice Chancellor Donald Parson's term expires in October, 2015. The remaining terms expire from 2021 to 2024.

The reality of maintaining politically and geographically-balanced courts in Delaware means that within the next three years, the Court of Chancery *may* have an opening to be filled by a Republican corporate attorney in New Castle County. On the Supreme Court, there currently are three members from New Castle County, two Democrats and one Republican; one member from Kent County, who is a Democrat; and, one member from Sussex County, who is a registered Republican. The purpose of this discussion is not to portray the future potential court vacancies in strictly political terms. Rather, it is to recognize the opportunity at hand: to afford women the chance to finally make their mark on Delaware's two major corporate law courts, nearly a century after being granted the opportunity to serve as "Officials of the State."³⁴

34. A sincere thank you to the many distinguished members of the Delaware Bench and Bar who provided background and context for this article, including: The Hons. Randy Holland, William Chandler, Jan Jurden, Susan Del Pesco, Chandlee Johnson Kuhn; and, Betsy McGeever, Ann Foster, Karen Valihura, Mimi Boudart, Melanie George Smith, Patricia Griffin, Patricia Enerio, Patricia Unhlenbrook, Elizabeth Wilburn Joyce, Kim Ayzavian, Shannon German and DSBA Executive Director Rina Marks and Rebecca Baird.

CHRISTIAN, HILL, ADAMS AND KEENER: KEY LITIGATION DECISIONS OF 2013

Douglas J. Cummings, Jr., Johnna M. Darby, Mary F. Dugan*

On January 2, 2013, the Delaware Supreme Court issued four decisions in which it dealt with the trial court's dismissal of a plaintiff's claims that were not heard on their merits.¹

I. SUPREME COURT DECISIONS OF JANUARY 2, 2013

A. *Christian v. Counseling Resource Associates, Inc.*

In *Christian v. Counseling Resource Associates, Inc.*,² the Delaware Supreme Court was faced with balancing the "strong policy in favor of deciding cases on the merits against the need to resolve the trial court's high volume of cases in a timely manner."³ As it did in *Hill* and *Keener* (both discussed below), relying on *Drejka v. Hitchens Tire Service, Inc.*,⁴ the Court reversed the trial court's dismissal.

Plaintiff Joann Christian ("Christian"), individually and on behalf of the estate of her deceased husband, Bruce, filed suit in October 2009 against mental health counselor J. Roy Cannon and his professional practice, Counseling

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1. *Christian v. Counseling Resource Assoc., Inc.*, 60 A.3d 1083 (Del. 2013); *Hill v. DeShuttle*, 58 A.3d 403 (Del. 2013); *Adams v. Aidoo*, 58 A.3d 410 (Del. 2013); *Keener v. Isken*, 58 A.3d 407 (Del. 2013) (collectively referred to hereinafter as "*Christian*"). Of these four decisions, *Adams* is the only case where the Supreme Court affirmed the lower court's dismissal. This may be due, in part, to the degree of detail in which the Court directly communicated with a *pro se* plaintiff to encourage meaningful participation in discovery and compliance with scheduling deadlines. Conversely, the three remaining decisions were reversed, in part, to the Court's desire to preserve the plaintiff's claims because they were not heard on the merits. Notwithstanding, *Hill*, *Christian* and *Keener* each were reversed for different reasons.

2. 60 A.3d 1083 (Del. 2013).

3. *Id.* at 1085. As the Court noted, *Christian* was one of four cases it considered together.

4. 15 A.3d 1221 (Del. 2010). In *Christian*, the Court noted that it held in *Drejka* that a trial court should balance six factors when confronted with the issue of dismissing a case other than on its merits:

(1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal...; and (6) the meritoriousness of the claim or defense.

Christian, 60 A.3d at 1087.

Resource Associates, Inc. (“Cannon”). In March 2010, Christian filed a separate suit against Dr. Arlen Stone and his professional practice, The Family Practice Center of New Castle, P.A., (“Stone,” with Cannon, collectively “Defendants”). Both cases alleged claims for failure to timely diagnose, treat and monitor Bruce Christian, which allegedly caused his death by suicide on January 8, 2008.

Prior to Christian’s filing of suit against Stone, the trial court entered a trial scheduling order setting an August 1, 2011 trial date, with a December 3, 2010 deadline for producing expert reports. By order dated June 24, 2010, the trial court consolidated the two cases, but did not issue a new scheduling order.⁵ As discovery progressed, Christian’s counsel became aware that he had a conflict in continuing to represent her and, in September 2010, notified defense counsel that substitute counsel was reviewing the case to take over Christian’s representation. Before incoming counsel appeared and the deadline for Christian to produce expert reports expired, Christian’s counsel requested and was granted an extension of that deadline until January 3, 2011. The parties memorialized this extension in an amended scheduling order entered by the Court. On December 20, 2010, Christian’s counsel requested that Defendants further extend the deadline for the production of expert reports until January 31, 2011, and Defendants agreed. This time, however, the parties did not take steps to amend the trial scheduling order to reflect this second extension or otherwise notify the court. Just days later, Christian’s new counsel entered his appearance.

In February 2011, Christian’s new counsel wrote to the trial court requesting a scheduling conference and alerting the court to potential conflicts with the trial date. In a letter response, the trial court denied this request and notified the parties that the trial date would not be moved.⁶ In May and June 2011, Christian produced disclosures and reports for four separate experts and offered dates for the depositions of these experts to occur in June and July 2011.

The Defendants filed a motion *in limine* to preclude Christian from offering expert testimony at trial based upon the argument that Christian’s production of the reports in May and June was untimely. The trial court granted Defendants’ motion in a telephonic hearing prior to the pretrial conference. The Defendants then moved for summary judgment because, as a matter of law, they argued, Christian could not prevail in a medical malpractice case absent the introduction of expert testimony. The trial court granted the Defendants’ summary judgment motion.

In the trial court’s opinion, which discussed its rulings granting Defendants’ motions *in limine* and for summary judgment, the court found that Christian had “not offered an explanation amounting to good cause or excusable neglect that would justify excusing them from [the] extended scheduling order deadline” for producing expert reports.⁷ The trial court further noted that the court would have granted reasonable extensions if any had been requested, but none were.⁸ The trial court applied the six *Drejka* factors and found the exclusion of Christian’s experts was a “proper consequence” even though it “would render summary judgment a foregone conclusion.”⁹ Although Christian’s failure to meet the deadlines in the scheduling order appeared to be the fault of counsel rather than *Christian* herself, and notwithstanding a lack

5. *Christian v. Counseling Resource Associates, Inc.*, C.A. No. 09C-10202, 2011 Del. Super. LEXIS 342, at *6 (Del. Super. July 28, 2011), *rev’d and remanded*, 60 A.3d 1083 (Del. 2013).

6. *Id.* at *9-10. The trial court noted that the trial date had been in place for more than a year prior to the parties’ notification that there may be a conflict with the date, and that a trial pending before another Superior Court judge had been moved to a different date in order to accommodate counsel’s schedules in the instant case.

7. *Id.* at *19.

8. *Id.* at *23.

9. *Id.* at *26.

of evidence of bad faith, the trial court found that the other four *Drejka* factors favored the Defendants. The trial court reasoned that Defendants would be at a severe disadvantage if Christian's experts were not excluded and the Defendants were forced to address the complexities of Christian's expert's opinions within the short time period remaining prior to trial.

On appeal, the Delaware Supreme Court reversed, holding that the trial court abused its discretion by refusing to meet with counsel or change the trial date when approached by counsel five months beforehand. While the Supreme Court agreed that, applying *Drejka*, no less appropriate sanction was available, and "dismissal was the only remaining choice" at the time when the Defendants' motions were pending and trial was imminent, dismissal could have been avoided had the trial court agreed to "step in when asked to resolve discovery difficulties."¹⁰

The Supreme Court noted that while trial courts apply the *Drejka* factors to determine if dismissal is warranted for an attorneys' failure to obey scheduling orders, it determined that a refinement was necessary to eliminate similar attorney failures:

Henceforth, parties who ignore or extend scheduling deadlines without promptly consulting the trial court, will do so at their own risk. In other words, any party that grants an informal extension to opposing counsel will be precluded from seeking relief from the court with respect to deadlines in the scheduling order. By the same token, if the trial court is asked to extend any deadlines in the scheduling order, the extension should not alter the trial date.... In the unusual circumstance where the trial court does decide to postpone the trial date, litigants should expect that the trial will be rescheduled after all other trials already scheduled on the court's docket.¹¹

The Court commended the tradition of civility cherished by the Delaware bar and its members who informally grant extensions without "bothering" the court.¹² However, it cautioned litigants if they do that, "they do so at their own risk," and set out the process by which counsel should address an opponent's failure to meet a discovery deadline.¹³ The Court went on to further warn that parties who "choose[] not to involve the court [] will be deemed to have waived the right to contest any late filings by opposing counsel from that time forward."¹⁴ This waiver would mean "no motions to compel, motions for sanctions, motions to preclude evidence, or motions to continue the trial" for the party who failed "to promptly alert the trial court when the first discovery deadline pass[ed]."¹⁵

B. *Hill v. DuShuttle*

In *Hill v. DuShuttle*, the Delaware Supreme Court reversed and remanded the trial court's dismissal of plaintiff's claims, relying on its earlier decision of *Drejka v. Hitchens Tire Services, Inc.*,¹⁶ finding that, dismissal was too severe a sanction which should be imposed only as a last resort.

10. *Christian*, 60 A.3d at 1087.

11. *Id.* at 1085.

12. *Id.* at 1087.

13. *Id.* at 1087-88.

14. *Id.* at 1088.

15. *Id.*

16. 15 A.3d 1221 (Del. 2010).

Hill allegedly injured his left knee when he stepped into a pothole located in a parking lot owned by the Defendants. In December 2010, the trial court issued a trial scheduling order setting forth various deadlines, including the deadline by which expert reports were due. On the date that Hill was required to provide expert disclosures in accordance with Rule 26, his counsel sent an email to defense counsel identifying Hill's treating physician as his only expert and referenced the medical records that had already been produced. After defense counsel objected to Hill's counsel's failure to provide any further disclosure or report, Hill's counsel conceded that, within two weeks, he would "go through the exercise."¹⁷ Despite Hill's counsel's acquiescence that he would supplement his expert discovery, he never did. Defendants then filed a motion to compel Hill to provide an expert report. The trial court granted Defendants' motion after Hill failed to respond. Despite the trial court's order specifically warning Hill that he "would be barred from providing expert testimony at trial if his expert discovery was not so produced,"¹⁸ he never complied. Approximately two weeks after the court-ordered date to produce an expert report had passed with no response, Defendants filed a motion (1) to preclude Hill from introducing expert testimony at trial and (2) to dismiss because, without a medical expert to opine about the cause of Hill's injuries, he could not establish a *prima facie* case against Defendants as a matter of law. At oral argument on the Defendants' motion, Hill's counsel argued that in a straightforward slip and fall case like Hill's, additional expert discovery was not warranted, and that Hill's discovery responses, coupled with the production of his medical records, were legally sufficient.¹⁹ Indeed, Hill's counsel stated that he "never ended up fussing about these issues."²⁰

The trial court granted the Defendants' motion to preclude Hill from introducing expert testimony at trial. Relying on Superior Court Rule of Civil Procedure 26, the trial court concluded that Hill was required to produce an expert disclosure, but that he would be precluded from doing so due to his repeated failure to "comply with the requirements of Court's orders and the case law."²¹ The trial court refused to "retrospectively reward [Hill's] non-compliance with a third extension of his expert discovery deadline." Hill's subsequent inability to call an expert to establish causation entitled Defendants to judgment as a matter of law.²²

The trial court also granted Defendants' motion to dismiss the Plaintiff's complaint as a sanction for failure to comply with discovery obligations.²³ Applying the *Drejka* factors, the trial court noted that although dismissal was an "extreme remedy," it was warranted.²⁴ The trial court emphasized Hill's counsel's "conscious disregard" for discovery deadlines and court orders, noting that Hill had not offered any explanation and, therefore, no "good cause" could be

17. Hill v. DuShuttle, C.A. No. N10C-05-178, 2011 Del. Super. LEXIS 285, at *3 (Del. Super. July 5, 2011) *rev'd and remanded*, 58 A.3d 403 (Del. 2013).

18. *Id.* at *4.

19. *Id.* at *7-9, 12.

20. 58 A.2d at 405.

21. *Hill*, 2011 Del. Super. LEXIS 285, at *12.

22. *Id.* at *16.

23. *Id.* at *18.

24. *Id.* at *21. Similar to the trial court's analysis in *Christian*, the result reached by the trial court in *Hill* rested upon its application of the *Drejka* factors.

established.²⁵ Even though there was no evidence of bad faith by either Hill or his counsel, and responsibility for the dilatory behavior fell to Hill's counsel (rather than Hill), the trial court concluded that no less severe sanction was appropriate.

The Delaware Supreme Court disagreed and reversed on appeal.²⁶ Relying on its opinion in *Drejka*, the Court held that the trial court had abused its discretion by precluding expert testimony and dismissing Hill's complaint. It reasoned that the trial court could have imposed a less severe sanction, and there still was time before the scheduled trial date for the parties to complete expert discovery.²⁷ The Court acknowledged the trial court's "frustration over [Hill's] counsel's cavalier attitude" but declined to punish Hill for his counsel's inadequacies.²⁸ While Hill's "counsel's conduct was unacceptable" and he "should be severely sanctioned," the case "should not have been dismissed."²⁹

C. *Adams v. Aidoo*

On the same day it issued its opinion in *Hill*, the Supreme Court decided the case of *Adams v. Aidoo*.³⁰ Dissimilarly, however, the Supreme Court concluded that the trial court did not abuse its discretion by dismissing with prejudice plaintiff's complaint for failure to provide discovery and comply with court orders.

On December 22, 2007, *pro se* plaintiff Ashley Adams ("Adams") filed suit against defendants, Yaw and Ninette Aidoo ("Defendants"), asserting thirty-one causes of action sounding in tort and sought \$3.1 million in damages.³¹ On January 28, 2008, Defendants served their answer to the complaint and included various counterclaims. On June 4, 2008, Adams served an amended complaint that asserted twenty tort claims and sought damages totaling \$2.1 million.³²

Throughout the discovery process, Adams refused to comply with basic discovery requests. On January 29, 2009, the trial court held a hearing on Defendants' motion to compel the outstanding discovery.³³ As Adams objected extensively, the trial court went through the outstanding interrogatories, number by number, and explained to Adams that her objections were overruled and why she had to respond. The trial court made like efforts regarding unanswered requests for document production before granting Defendants' motion.³⁴

25. *Id.* at *20-21, 26-27.

26. 58 A.2d 403 (Del. 2013). While the Court noted its inability to understand "[c]ounsel's stubborn refusal to appreciate that an expert report had to be filed," it concluded that the sanction of dismissal was not warranted. *Id.* at 404.

27. *Hill*, 58 A.2d at 406.

28. *Id.*

29. *Id.*

30. 58 A.3d 410 (Del. 2013).

31. *Adams v. Aidoo*, C.A. No. 07C-11-177, 2012 Del. Super. LEXIS 135, at *1 (Del. Super. Mar. 29, 2012), *aff'd*, 58 A.3d 410 (Del. 2013).

32. Yaw Aidoo received an unsolicited and disturbing text message, which was traced by the police to Adams' phone number. After obtaining an arrest warrant, the police confronted and handcuffed Adams. This event apparently precipitated the litigation, but the parties' relationship, despite living two doors apart in the same housing development, had become far less neighborly some time before. *See id.* at *1-6.

33. *Adams*, 58 A.3d at 412.

34. *Id.*

Adams failed to comply with that order. On April 2, 2009, the trial court held a hearing on Defendants' second motion to compel. Again, the Court explained to Adams her obligation to respond to discovery. The trial court ordered Adams to provide the outstanding discovery in 10 days, and warned that the complaint would be subject to dismissal if Adams again ignored the Court's order.³⁵ Still, Adams failed to meaningfully respond to the discovery.

On April 16, 2009, Defendants moved to dismiss the complaint. On May 5, 2009, the trial court held a hearing and again told Adams that she had to respond to Defendants' discovery requests. The Court then postponed consideration of the motion and allowed Adams three days to comply with outstanding discovery orders. On May 15, 2009, the Court heard from the parties on Defendants' motion. By then, Adams was represented by counsel, who agreed that Adams had been non-compliant and requested the Court enter an Order of dismissal without prejudice. The Superior Court instead dismissed the complaint *with* prejudice as a result of Adams' failure to comply with discovery.³⁶ In June 2010, following a trial solely on Defendants' counterclaims, the jury returned a verdict in favor of Defendants and awarded \$250,000 in damages. Following the Superior Court's denial of Adams' various post-trial motions,³⁷ Adams raised on appeal, *inter alia*, the issue of whether dismissal of her complaint for failure to provide discovery was appropriate.

In applying the multi-factor test set forth in *Drejka*, the Supreme Court found that the trial court did not abuse its discretion in dismissing Adams' complaint.³⁸ The Court reasoned that Adams was personally responsible for her failure to provide discovery, because Adams, despite being *pro se*, received careful explanation from the trial court that she was not free to ignore interrogatories.³⁹ Also, despite receiving numerous extensions to provide discovery, Adams had no reasonable excuse for her non-compliance, which the Court found demonstrated a history of dilatoriness. Finally, after noting how Adams' refusal to provide discovery was willful, it appeared to the Court that no lesser sanction would have induced Adams' compliance.⁴⁰

D. *Keener v. Isken*

The *Keener* matter is somewhat different from the others discussed herein.⁴¹ The Supreme Court in *Keener* reversed and remanded a dismissal by the trial court, which was based upon non-compliance with a motion practice deadline, as opposed to a scheduling order.

35. *Id.*

36. Adams' interlocutory appeal of the trial court's dismissal was refused by the Supreme Court, which, in its discretion, found the appeal wanting of "exceptional circumstances." *Adams v. Aidoo*, C.A. No. 07C-11-177 (Del. June 29, 2009) (ORDER) (citing DEL. SUPR. CT. R. 42(b), (d)(v)).

37. *Adams*, 2012 Del. Super. LEXIS 135, at *62-63 (denying plaintiff's motions for new trial, new trial on damages, or remittitur), *aff'd*, 58 A.3d 410 (Del. 2013).

38. *Adams*, 58 A.3d at 413-14 (citing *Drejka*, 15 A.3d at 1224).

39. The Court noted that Adams' failure to provide discovery was due to her belief that the subject matter of Defendants' interrogatories was irrelevant and personally invasive and that "this is not a situation where a *pro se* litigant did not understand what was required." *Id.* at 413.

40. "Adams simply did not think she should have to reveal information that she considered to be private and irrelevant." *Id.*

41. 58 A.3d 407 (Del. 2013). Justice Berger referred to this case as a "slight variation" on the same theme that runs through the four decisions decided by the Supreme Court on January 2, 2013. *Keener*, 58 A.3d at 409 (citing *Hill*, 58 A.3d 403; *Adams*, 58 A.3d 410; *Christian*, 60 A.3d 1083). That theme is "the strong policy in favor of deciding cases on the merits, as well as the importance of maintaining scheduled trial dates." *Id.* at 408.

On May 9, 2011, plaintiffs James H. Keener and his company, Xtreme Construction, Inc. (“Keener”) filed suit against defendants Paul and Joan Isken (“Defendants”).⁴² Keener’s complaint alleged claims of breach of contract and tortious interference with contract arising out of Defendants’ failure to pay Keener for services rendered. On July 21, 2011, in lieu of an answer, Defendants moved for summary judgment on grounds that Keener’s claims were barred by the applicable statute of limitations. Defendants, however, inadvertently omitted affidavit exhibits from their motion filings with the Court. On August 11, 2011, Defendants filed those exhibits. As Defendants’ motion was scheduled to be heard on August 29, 2011, Keener should have filed a response by August 23, 2011, but did not.⁴³ On August 25, 2011, the Superior Court granted summary judgment to Defendants due to Keener’s failure to respond in a timely manner.⁴⁴

On September 2, 2011, Keener moved for reconsideration on grounds he “misapprehended the filing deadline due to receipt of supplemental exhibits on August 11, 2011,” as “[c]ounsel assumed that the supplemental filing had the effect of extending the responsive pleading deadline by an additional twenty (20) days....”⁴⁵ Keener further asserted that material facts were in “sharp dispute.” Along with the motion for reconsideration, Keener also attempted to file the untimely response to Defendants’ motion for summary judgment.⁴⁶

On October 10, 2011, at the hearing on the motion for reconsideration, Keener could not identify a court rule in support of the belief that Defendants’ supplemental filing automatically extended the time to respond. The trial court found that Keener’s belief was mistaken, there was no ambiguity in the court rules that could support Keener’s position and Keener had not made a sufficient showing of excusable neglect under Superior Court Rule of Civil Procedure 60(b) that justified his late response.⁴⁷ Without considering Keener’s untimely affidavit, the trial court also concluded that Keener was unable to defeat the statute of limitations defense presented in Defendants’ motion for summary judgment. Following the denial of Keener’s motion for reconsideration,⁴⁸ Keener appealed to the Supreme Court.

The Supreme Court began its discussion by echoing the theme set forth in *Hill, Adams and Christian*: a “strong policy in favor of deciding cases on the merits....”⁴⁹ Unlike *Hill, Adams and Christian*, however, Keener did not ignore

42. *Id.*

43. *Id.* at 409 (citing Superior Court New Castle County Civil Case Mgmt. Plan § IV(A)(3)(b)). That provision provides that “[a] [r]esponse [to a motion] is due no later than **4 days** prior to the hearing date. If no response is filed by the due date, the motion will be deemed unopposed.” Superior Court New Castle County Civil Case Mgmt. Plan § IV(A)(3)(b) (emphasis in original).

44. *See Keener v. Isken*, C.A. No. N11C-05-079 (Del. Super. Aug. 25, 2011) (ORDER) (reasoning that Keener’s failure to respond constituted a waiver of defense and compelled judgment in favor of Defendants pursuant to SUPER. CT. CIV. R. 56(e), 107(e)) (citations omitted) *rev’d and remanded*, 58 A.3d 407 (Del. 2013).

45. *Keener*, 58 A.3d at 409 (citations omitted). While not clear from the opinion, it appears that SUPER. CT. CIV. R. 60(b) served as the basis for his motion for reargument. *See Keener*, 58 A.3d at 409 (counsel “acknowledged that, if his motion for reconsideration **had** been filed under Rule 59....;” “The trial court ... [found] no excusable neglect....”) (emphasis supplied).

46. Keener’s response, which included an accompanying affidavit, was rejected by the Court’s electronic filing system because the case was listed as “closed.”

47. *Keener*, 58 A.3d at 409.

48. During the motion hearing, it was clarified that if Keener’s motion for reconsideration had been filed under SUPER. CT. CIV. R. 59, then it should have been filed within five, not six, days after the Court’s decision on summary judgment. *Id.* “A motion for reargument shall be served and filed within 5 days after the filing of the Court’s opinion or decision.” SUPER. CT. CIV. R. 59(e).

49. *Id.*

a scheduling order. In addition, only two months had passed since the complaint was filed when Defendants moved for summary judgment, in lieu of an answer, and during the pleadings stage of this litigation. Similar to those same cases, however, Keener did miss a deadline.

The Supreme Court noted that Superior Court Rule of Civil Procedure 60(b) is underpinned by a public policy favoring trials on the merits.⁵⁰ Further, the Court noted that “excusable neglect exists if the moving party has valid reasons for the neglect – reasons showing that the neglect may have been the act of a reasonably prudent person under the circumstances.”⁵¹ Additionally, the Court explained that it may consider all surrounding circumstances in deciding whether the conduct at issue was excusable.

Ultimately, the Supreme Court concluded that Keener’s noncompliance with the deadline to respond to Defendants’ motion for summary judgment was excusable neglect. After noting that “a person can be reasonably prudent yet still be mistaken,” the Court accepted as reasonable, albeit mistaken, Keener’s belief that Defendants’ supplemental filing, which occurred twenty days after Defendants originally filed their motion, extended in equal measure Keener’s time to respond. Upon consideration of all surrounding circumstances, the Court remarked how, despite missing the deadline, Keener promptly attempted to file the response, which could have rendered the matter ready for a decision on the merits long before the hearing on the motion for reargument. In other words, as Justice Berger highlighted, “the case was not languishing.”⁵²

The Court further noted, however, that to obtain relief under Superior Court Rule of Civil Procedure 60(b), two additional findings were required: (1) that the outcome may be different if the motion were heard on the merits; and (2) that Defendants would not suffer substantial prejudice.⁵³ The Supreme Court remanded with instruction to the trial court to consider Keener’s response (and accompanying affidavit) to Defendants’ motion for summary judgment within its findings.

II. POST-CHRISTIAN, ET AL. DECISIONS

Since its issuance, courts have relied on *Christian* to support their refusal to dismiss cases without a hearing on the merits.⁵⁴

A. *Bernice’s Educ’l School Age Ctr., Inc. v. Cooper*

Bernice’s Educ’l School Age Ctr., Inc. v. Cooper involved an appeal from the Justice of the Peace Court to the Court of Common Pleas.⁵⁵ The appellate court reversed and remanded the trial court’s denial of a motion to vacate a default judgment under an abuse of discretion standard.

50. *Keener*, 58 A.3d at 409-10 (citing *Tsipouras v. Tsipouras*, 677 A.2d 493, 496 (Del. 1996)).

51. *Id.* (citing *Dishmon v. Fucci*, 32 A.3d 338, 346 (Del. 2011)).

52. *Id.* at 410.

53. *Id.* (citing *Schrader-VanNewkirk v. Daube*, 45 A.3d 149 (Del. 2012)).

54. This is so, even when the court acknowledged that “dismissal is within the sound discretion of the court” and Super. Ct. R. 41(e) allows the court to dismiss *sua sponte* for, among other things, a plaintiff’s failure to prosecute. See *Dickinson v. Sopa*, C.A. No. K10C–10–035, 2013 Del. Super. LEXIS 272 (Del. Super. June 20, 2013).

55. C.A. No. CPU4–12–003634, 2013 Del. C.P. LEXIS 5 (Del. Com. Pl. Feb. 18, 2013).

Cooper filed a complaint to recover an overpayment of money to Thomas for services rendered. Cooper named Thomas as an individual defendant.⁵⁶ Thomas answered the complaint. The Court noted the answer included a provision at the bottom of the page indicating that corporations and like entities needed either to be represented by counsel or file a Form 50 certificate of representation. Inexplicably, on June 7, 2012, the trial court entered a default judgment against Thomas for failure to answer or otherwise appear.⁵⁷ On June 29, 2012, the trial court vacated the judgment and ordered Cooper to investigate whether she named the proper party and, if necessary, file an alias summons naming the proper party. The trial court also scheduled trial for August 17, 2012. On June 29, 2012, Thomas filed a counterclaim against Cooper. On July 11, 2012, Cooper filed the alias summons naming Bernice's Educational School Age Center, Inc., (the "School") as a defendant, after which the Court issued summonses to Cooper, Thomas and the School.

At trial on August 17, 2012, the court entered judgment in favor of Cooper as a result of Thomas' failure to file a Form 50 Certificate of Representation. Thomas filed a motion to vacate the judgment.⁵⁸ The trial court denied that motion. Its order indicated that

The principal issue was the correct party and the Form 50 issue, while it never became part of the order, was discussed. Even if it were not, the Court notes that there is no requirement that the Court advise. There is no excusable neglect in this matter and the default judgment stands.⁵⁹

On appeal, the Court of Common Pleas disagreed, finding that the trial court abused its discretion by failing to apply the excusable neglect standard. The court cited *Keener* for the proposition that "the requirements to gain relief from a final judgment are to be liberally construed in favor of deciding cases on the merits."⁶⁰ The trial court's failure to apply any standard to this case, the appellate court suggested, placed it in the category of cases favoring "the speedy resolution ... that procedural rules provide."⁶¹

After setting forth the standard to be applied when deciding a motion to vacate a default judgment, the appellate court concluded the trial court's reasoning was arbitrary and capricious because it found no excusable neglect in Thomas' conduct, despite the fact that: (1) she made timely filings; (2) at the time she filed her answer, the corporate defendant had not yet been added as a defendant to the case and, upon its addition, the notice received by Thomas did not include the Rule 50 notice language; and (3) she appeared for trial – all of which demonstrated her diligent defense. Citing to *Keener*, the appellate court noted "[a] person can be reasonably prudent yet still be mistaken."⁶² The appellate court found Thomas' conduct to be that of a reasonably prudent person under the circumstances, and reversed and remanded the trial court's decision.

56. Thomas operated the School but, when Cooper initially filed the complaint, she named only Thomas and not the School. *Id.* at *1-2.

57. *Id.* at *2.

58. It is not clear the basis upon which Thomas relied for her motion to vacate the default judgment (i.e., Rule 59 or Rule 60), but the Court of Common Pleas pointed out that the trial court referred to the excusable neglect standard. *Id.* at *3.

59. *Id.*

60. *Id.* at *7.

61. *Id.* at *8.

62. *Id.* at *11-12.

B. *Tsakalas v. Hicks*

In *Tsakalas v. Hicks*, the Superior Court was faced with Defendants' motion for summary judgment for Plaintiff's failure to produce a medical report.⁶³ The case involved a May 2010 automobile accident from which Plaintiff claimed he received permanent injuries to his neck. After suit was filed in April 2012, the Court issued a scheduling order that set a discovery deadline of November 12, 2012 for liability and expert issues and a deadline of December 11, 2012 for dispositive motions.⁶⁴ Plaintiff identified three doctors to testify regarding causation and permanency and attached the notes of one of the doctors to his Form 30 interrogatory answers.⁶⁵ At no time did Plaintiff produce any medical reports. At no time did Defendants file a motion to compel.⁶⁶

Instead, Defendants filed a motion for summary judgment in which they argued that Plaintiff must prove negligence and that the negligence was the proximate cause of Plaintiff's injuries. This could not be done, Defendants argued, because Plaintiff failed to produce evidence of causation through medical reports and testimony. Consequently, according to Defendants, Plaintiff's claim must fail. Counsel for Plaintiff, on the other hand, contended that the scheduling order did not contain a trial date and, as such, there was no prejudice to the parties if the Court were to allow for additional time for Plaintiff to be examined by another doctor.⁶⁷

Even though the Superior Court noted the Defendants were correct that plaintiff must (1) prove negligence, (2) show that the alleged negligence was a proximate cause or causes of his injuries, and (3) establish causation by expert medical testimony,⁶⁸ it denied their motion for summary judgment. While acknowledging the Delaware Supreme Court's recent pronouncements in *Hill*, *Keener* and *Christian*, the Court indicated that the instant case was similar to *Christian*. The Court quoted the Delaware Supreme Court at length regarding the difficult application of the *Drejka* factors and the addition of "practical guidelines that will afford great predictability to litigants and the trial courts."⁶⁹ The Court took note of Plaintiff's counsel's inability to obtain a medical report during the three years the case was pending.⁷⁰ It also commented on defense counsel's failure to file a motion to compel prior to filing the summary judgment motion.⁷¹

63. *Tsakalas v. Hicks*, C.A. No. 12C-04-270, 2013 Del. Super. LEXIS 35 (Del. Super. Feb. 22, 2013). The Defendants relied on the Court's decision in *Hill v. DeShuttle*, 58 A.3d 403 (Del. 2013) for its contention that dismissal was appropriate. However, because the Delaware Supreme Court had since reversed the lower court's decision in *Hill*, the *Tsakalas* Court concluded that "dismissal [was] not the option here." *Tsakalas*, 2013 Del. Super. LEXIS 35, at *1.

64. *Id.* at *1-2.

65. *Id.* at *2.

66. In *dicta*, the Court noted that counsel should not be concerned about "bothering" the court with motions to compel, because the Court is there "to be 'bothered' with such things." *Id.* at *10. Indeed, the Court suggested that it would rather be "bothered" with motions to compel than be faced with the situations faced by the Court in *Drejka*, *Hill*, *Keener* and *Christian*.

67. Counsel for Plaintiff contended that he attempted to obtain medical reports prior to the discovery cut-off but was unsuccessful. *Id.* at *3.

68. *Id.* at *4.

69. *Id.* at *7.

70. *Id.* at *12.

71. The Court indicated that it would have been helpful had the Court had at its disposal the information required by SUPER. CT. R. 37(e)(1) either in a motion to compel or in Defendants' motion for summary judgment, however, it suggests that the answers would not have changed the Court's holding.

The Court concluded that

[d]ismissal is now clearly, the very disfavored remedy. *Drejka* and the January 2, 2013 trilogy [of the decisions in *Hill*, *Keener* and *Christian*] provided a clear, unmistakable signal about what counsel and this Court must do or not do. They may represent a sea change, especially for counsel, and set now, clearer steps to be undertaken *before* dispositive motions are filed.⁷²

C. Dickenson v. Sopa

The most recent decision dealing with the implications of *Christian* is *Dickenson v. Sopa*,⁷³ which involved a medical malpractice claim filed on October 22, 2010. The Court issued a scheduling order on April 24, 2012. In it, the Court established a deadline of October 15, 2012 by which Plaintiff was to identify experts. Three days prior to the deadline, Plaintiff requested, and Defendants granted, an extension of the deadline. The extended deadline came and went, but Plaintiff failed to identify experts and failed to contact defense counsel to request an additional extension. On November 16, 2012, Defendant filed a motion to dismiss pursuant to Superior Court Rule of Civil Procedure 41(b).⁷⁴ The Court noted that Plaintiff claimed in his response to the motion that he submitted a supplemental expert report. Defense counsel responded that Plaintiff's efforts to comply with the expert disclosure requirements and deadlines were insufficient and requested dismissal for failure to comply with the Court's scheduling order.

The Court acknowledged that Superior Court Rule of Civil Procedure 41(b) allows a movant to seek dismissal for failure to prosecute or comply with the Court's rules and/or orders, and Superior Court Rule of Civil Procedure 41(e) allows the Court to dismiss *sua sponte*. Though the Court noted that "dismissal is within the sound discretion of the Court," it held that Plaintiff's failure to identify experts by the deadlines contained in the scheduling order did not warrant dismissal.⁷⁵ The Court based its analysis on the *Drejka* factors. Specifically, the record did not contain any facts to suggest that the Plaintiff himself was responsible for the failure to identify experts timely, the continuance of the trial date cured any prejudice to the Defendant, and, while Plaintiff's counsel had demonstrated a history of dilatoriness *vis a vis* discovery deadlines and extensions thereof, the Court noted that the delay was due to Plaintiff's expert and not Plaintiff's counsel.⁷⁶ The Court also cited *Christian*, noting that "[p]arties who ignore or extend scheduling deadlines without promptly consulting the trial court do so at their own peril. That is, 'any party that grants an informal extension to opposing parties counsel will be precluded from seeking relief from the court with respect to any deadlines in the scheduling order.'" ⁷⁷ The Court denied Defendant's motion to dismiss, holding:

72. *Id.* at *14.

73. 2013 Del. Super. LEXIS 272 (Del. Super. June 20, 2013).

74. Defendant moved not only to dismiss, but also moved in the alternative for summary judgment. On the same day but after the filing of Defendant's motion, Plaintiff's counsel faxed an expert report to defense counsel but explained that it needed certain clarifications. *Id.* at *2-3.

75. *Id.* at *4, 7.

76. *Id.* at *8.

77. *Id.* at *5. The Court included a lengthy footnote citing not only to *Christian* but also to *Hill*, *Keener* and *Adams*. See *id.* at n. 7.

The dictates of *Christian* are clear. By granting [an extension to produce an expert report], Defendant has waived his right to contest any late filings from that point forward. This includes a waiver of the right to move to dismiss the case pursuant to Rule 41(e). Accordingly, I find that dismissal of Plaintiff's complaint for failure to timely file an expert report is too harsh a sanction.⁷⁸

78. *Id.* at *8-9. The Court then turned to Defendant's alternative motion for summary judgment, which the Court granted. As the Court pointed out, a plaintiff must present expert medical testimony regarding standard of care and causation, without which a plaintiff cannot survive a summary judgment motion. *Id.* at *10. The Court noted that the expert in this case did not offer an expert opinion "with any degree of certainty" that Defendant proximately caused Plaintiff's injuries and, as such, found Plaintiff could not establish causation. The Court rejected Plaintiff's argument that the jury could draw an inference of causation from the expert's opinion, noting that 18 Del. C. § 6853 requires a plaintiff to establish causation by expert medical testimony, not by "a jury ... connect[ing] the dots between a bare allegation of medical negligence and an injury." *Id.* at *12. As a result, the Court granted Defendant's motion for summary judgment. *Id.* at *11-12.

AN OVERVIEW OF THE REAL ESTATE FINANCE OPINION REPORT OF 2012

Robert J. Krapf and Edward J. Levin*

Many state bars and other professional groups have provided reports on opinion practices, both general and specific. Although the Delaware State Bar Association has not yet produced such a report, a recent report by three national lawyer associations should be of interest to lawyers in Delaware who issue opinions in Delaware real estate transactions.

The Real Estate Finance Opinion Report of 2012¹ is a joint project of the American Bar Association (ABA) Section of Real Property, Trust and Estate Law, Committee on Legal Opinions in Real Estate Transactions; the American College of Real Estate Lawyers Attorneys' Opinions Committee; and the American College of Mortgage Attorneys Opinions Committee. The 2012 Report intends to give guidance to lawyers serving as borrowers' lead counsel in mortgage loan transactions, but the extensive background material and guidance in the 2012 Report are useful to all lawyers involved in the opinion process.

I. BACKGROUND

To fully understand the purpose of the 2012 Report, some background is necessary. The project started in 2009 to update the *Inclusive Real Estate Secured Transaction Opinion* (the "Inclusive Opinion"), which was published in 1998 as a joint project of the ABA RPTE Committee and ACREL.²

The Inclusive Opinion was based on the ABA Legal Opinion Accord (the "Accord").³ The Accord included a short form opinion letter that incorporated the rest of the Accord report by reference. Although very important from a normative perspective, the Accord suffered from several problems. It was difficult to master because most of the content of an Accord-based opinion is in the report rather than in the body of the opinion letter itself. Also, the Accord omitted coverage of many substantive areas common to legal opinions in real estate transactions.

To make the Accord usable for real estate lawyers, the ABA and ACREL prepared the *2012 Report on Adaptation of the Legal Opinion Accord* (the "Adaptation").⁴ But in fixing one problem, the Adaptation exacerbated another one. Now

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1. http://meetings.abanet.org/webupload/commupload/RP213000/newsletterpubs/Real_Estate_Finance_Opinion_Report_of_2012_Final.PDF. See also, Edward J. Levin, *The Real Estate Finance Opinion Report of 2012* 27 PROB. & PROP., January/February 2013.

2. See <http://apps.americanbar.org/dch/committee.cfr?com=RP213000> and <http://www.acrel.org/Documents/Public-Documents/InclusiveRealEstateSecuredTransactionOpinion.htm>.

3. *Third-Party Legal Opinion Report, including the Legal Opinion Accord, of the Section of Business Law, American Bar Association*, 47 BUS. LAW. 167 (1991) (reprinted in 29 REAL PROP. PROB. & TR. J. 487 (1994)).

4. *Report on Adaptation of the Legal Opinion Accord of the Section of Business Law of the American Bar Association for Real Estate Secured Transactions of the Section of Real Property, Probate and Trust Law of the American Bar Association and the American College of Real Estate Lawyers*, 29 REAL PROP. PROB. & TR. J. 569 (1994).

practitioners who wanted to issue an Accord-based real estate opinion needed to master two reports, the Accord and the Adaptation, both of which were incorporated by reference in an opinion letter issued under the Accord model.

To make Accord-based real estate opinions user-friendly, the ABA and ACREL collaborated on the Inclusive Opinion, which provides a form of opinion letter that has all of its terms and provisions within the four corners of the opinion letter itself. The Inclusive Opinion does not include by reference any report or other source.

The 2012 Report was undertaken initially to develop a form opinion letter that reflects current national real estate financing practice and that is not limited to the Accord and its offspring. In this way, current customary practice in the giving and receiving of opinion letters is reflected in the work product. The project originally focused on the Illustrative Opinion Letter that is part of it, and the opinion was heavily footnoted to explain many of the terms and provisions included, or not included, in the opinion. Because of these footnotes, the project was called the Annotated Real Estate Finance Opinion. Over time, however, the drafting committee, with input from members of the three constituent organizations, changed the focus from an opinion form to an opinion report.

The 2012 Report contains three chapters. Chapter One is the introduction and general discussion of the scope and purpose of the 2012 Report. Chapter Two discusses in more detail key components and issues of an opinion for a real estate secured transaction. Chapter Three is an illustrative opinion, designed not to serve as model opinion but merely to illustrate in opinion language and format the components addressed in Chapter Two. As discussed below, the 2012 Report is written for the borrower's lead law firm in a mortgage loan transaction and not for local counsel. Like the Adaptation and the Inclusive Opinion, the 2012 Report is limited to financing transactions that are secured by real estate located in the United States.

The 2012 Report can serve as an educational tool and a starting point for discussion and consideration by those who are involved in the opinion process.

II. SUMMARY OF ISSUES IN THE 2012 REPORT

Because the Guide (Chapter Two of the 2012 Report) is a discussion of the issues raised in the Illustrative Opinion Letter (Chapter Three), and the Illustrative Opinion Letter reflects the 2012 Report's analysis of the pertinent issues that are considered in the Guide, the section numbers of Chapters Two and Three of the 2012 Report are parallel. Unless otherwise noted, the section numbers below refer to Chapter Two, the Guide.

A. General Opinion Matters

1. Professional Responsibility. The 2012 Report highlights some of the professional responsibility issues involved in the rendering of third-party opinion letters, but does not thoroughly examine each of these issues. Although the 2012 Report notes that “[r]ules in several jurisdictions require consent of the client ‘after consultation’ to any evaluation by a lawyer of a matter for someone other than the client,” the 2012 Report also observes that Rule 1.2(a) of the Model Rules of Professional Conduct also permits a lawyer to take such action “as is impliedly authorized to carry out the representation,” premised on the lawyer’s having consulted with the client about the means by which the client’s interest is to be pursued.⁵ The 2012 Report also observes, however, that Model Rule 2.3(b) requires the lawyer to obtain the

5. See also The Delaware Lawyers’ Rules of Professional Conduct, § 1.2(a).

client's informed consent if the lawyer "knows or reasonably should know" that providing the opinion would materially and adversely affect the client's interests.⁶

Also, the 2012 Report refers to but does not explore the issues that relate to representation of more than one party in a transaction, such as the borrower and a guarantor.⁷

2. Customary Practice. The 2012 Report recognizes the current role of "customary practice" in the giving and receiving of legal opinions. Customary practice considers the custom and practice of lawyers involved in this area of practice. This statement on customary practice was endorsed by the Section on Real and Personal Property of the Delaware State Bar Association in 2008.⁸ The Guidelines are built around the Business Law Section Guidelines, which includes the Legal Opinion Principles by the Committee on Legal Opinions of the ABA's Section of Business Law.⁹

3. Lead Counsel, Not Local Counsel. The 2012 Report focuses on the borrower's only counsel in a mortgage loan transaction if the borrower has one counsel, or on the lead counsel for the borrower if the borrower has more than one counsel on a transaction. The 2012 Report addresses some issues that local counsel are not generally asked to opine on (such as entity organization and authorization), and it does not address a number of the issues about which local counsel are frequently asked to render opinions (such as certain state-specific matters).

4. Parties. The 2012 Report is based on a loan to a borrower that is guaranteed by a separate guarantor. The Illustrative Opinion Letter never refers to those parties collectively so that it is clear that the opinion giver and the opinion recipient should separately consider the opinions about them and limitations applicable to each of them.¹⁰

5. Authority Documents. The 2012 Report notes that it is a matter of personal preference as to whether the opinion giver refers to each document examined individually or in general terms. If direct or indirect owners of the borrower or guarantor are entities and are to be covered by the opinion letter, the opinion giver must review their organizational documents as well. Although the 2012 Report suggests that an opinion giver can deviate from the practices, it is best to say so explicitly.¹¹ See further discussion in Section B.3 below.

6. Opinion Jurisdictions. In the 2012 Report, the term "law" means the statutes, judicial and administrative decisions, and policies, rules, and regulations duly promulgated by applicable governmental agencies and instrumentalities. Covered law normally would include the law of the state that governs the transaction documents and the state or states of formation of each of the borrower and the guarantor. However, the 2012 Report notes that "Local Law" is generally excluded from the scope of opinion letters. The term "Local Law" is defined as the statutes and ordinances, administrative decisions, and rules and regulations of counties, towns, municipalities, and special political subdivisions, and judicial decisions to the extent that they deal with any of the foregoing matters.¹² The 2012 Report notes that federal laws are

6. See also *id.* § 2.3(b).

7. 2012 Report at 2-3.

8. See *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*, 63 BUS. LAW. 1277 (2008). The 2012 Report notes the importance of the Real Estate Opinion Letter Guidelines, 38 REAL PROP. PROB. & TR. J. 241 (2003).

9. See 53 BUS. LAW. 831 (1998).

10. 2012 Report, ¶ 0.4.

11. *Id.* ¶ 1.2.

12. See ¶ 4.6(g) of the *Illustrative Opinion Letter*.

typically not addressed in opinion letters except in situations where certain expressly identified federal law is relevant to the transaction parties. The 2012 Report provides that if any federal law is to be deemed covered by an opinion letter, that law should be specifically identified. Note that even though bankruptcy law is federal law, out of caution the 2012 Report does include a bankruptcy exception that refers to federal law.¹³

7. Scope of Review. A statement that the opinion giver has reviewed what is necessary in order to render the opinion is not necessary because it is implicit in opinion letters.¹⁴

8. Reliance on Other Sources Without Investigation. An opinion giver may rely on certificates and other information obtained from others unless the opinion giver has actual knowledge that the information is not accurate or the opinion giver does not reasonably believe that the source is appropriate. An opinion giver should not render an opinion that the opinion giver recognizes will be misleading about the subject matter of the opinion. It is preferable for an opinion giver to include as an assumption a legal conclusion or opinion that is rendered by other counsel involved in the transaction, instead of for the opinion giver to rely on the opinion of the other counsel or for the opinion giver to render a pass-through or “conduit” opinion.¹⁵

9. Assumptions - Generally. The 2012 Report notes that there is not a consistent practice about implicitly stating all assumptions that are part of an opinion letter or deeming certain assumptions to be implied as a matter of customary practice. The 2012 Report states that each of the assumptions that is set forth in the Illustrative Opinion Letter is deemed to be implicit as a matter of customary practice. Excluding the implicit assumptions makes the opinion letter more streamlined and enables the parties to focus on the opinions and specific limitations relevant to the particular transaction. On the other hand, many opinion givers feel more comfortable with opinion letters that specifically include the assumptions that they are making. They think that it is one thing to believe that counsel for the opinion recipient will understand that all of the assumptions that the opinion giver considers to be implicit are intended to be (and are) part of the opinion letter, but it is an altogether different matter to have confidence that a judge or jury will reach the same conclusion in a lawsuit about the opinion letter. The lawyers who advocate stating explicitly the assumptions that may be considered implicit find support for their position in *Fortress Credit Corp. v. Dechert LLP*,¹⁶ in which the court in New York looked to particular language in the opinion letter regarding the authenticity of the signatures on the loan documents when it dismissed the plaintiff’s complaint.¹⁷

10. Genuineness of Signatures. One of the assumptions included in the Illustrative Opinion Letter is that the opinion giver assumes that all signatures are genuine. This is considered to be an implicit assumption that need not be expressed in an opinion letter. This assumption extends to the clients of the opinion giver, including the borrower and any guarantor. It is typical that opinion letters include an assumption that the signatures of parties are genuine notwithstanding that it is implicit, but opinion recipients sometimes request that this assumption be limited to the signatures of the parties that the opinion giver does not represent. If an opinion giver were to limit the extent of the assumption to nonclients, the opinion giver would essentially be giving an assurance that the signatures by the borrower and guarantors

13. 2012 Report at ¶ 1.3.

14. *Id.* ¶ 1.4.

15. *Id.* ¶ 1.5.

16. *Fortress Credit Corp. v. Dechert LLP*, 89 A.D.3d 615, 934 N.Y.S.2d 119 (N.Y. 2011).

17. 2012 Report at ¶ 2.1(c).

are not forgeries and that the individuals who signed are actually the persons that they purport to be. These are factual, not legal, opinions and should be beyond the scope of third-party legal opinions. An example of the problems that might arise if the signatures on the loan documents are not those of the borrower, are the facts in *Fortress Credit Corp. v. Dechert, LLP*, discussed above.¹⁸

11. Assumptions - Different Types. The 2012 Report points out the distinction between those assumptions that actually apply to the particular transaction that is the subject of the opinion letter and those assumptions that are applicable to the way that the parties have dealt, and are expected to deal, with each other on the subject transaction or any other transaction. The 2012 Report notes that a number of opinion givers are concerned that inclusion of the latter assumptions may imply a greater breadth to the opinion letter than intended by the opinion giver.¹⁹

B. Core Opinions

The first five opinions in the Illustrative Opinion Letter are considered to be the core opinions of the opinion letter. They are: status, power, authorization, execution and delivery, and enforceability.

1. Status. The Illustrative Opinion Letter includes opinions that the borrower is in good standing and is qualified to do business in the named state. Because these opinions are given solely in reliance on certificates of public officials, the Guide points out that many practitioners question the value of and the need for such opinions. Opinion recipients can read those certificates just as well as opinion givers can. The 2012 Report also questions the need for a formation opinion in most real estate secured transactions.²⁰

2. Power. This opinion refers to the legal power of an entity under its organizational documents and applicable law to enter into the loan transaction or to guaranty the loan, as applicable. It does not relate to the entity's financial ability to fulfill its legal obligations.²¹

3. Authorization. The Illustrative Opinion Letter includes the opinion that all actions or approvals that are necessary by the borrower to be taken or obtained have been taken or obtained in order to bind the borrower under the transaction documents. When there are tiers of ownership of the borrower entity before the ultimate individual owners are reached, it is necessary that the entity at each level properly have the power to enter into the transaction and authorize the transaction in order for the documents to be enforceable against the borrower. However, it is not always clear after reviewing an opinion letter whether the opinion giver is providing a power opinion or an authorization opinion that extends through all of the levels of ownership, or if the opinion is limited to the borrower (or guarantor) entity itself. Unless an opinion giver intends to render power and authorization opinions that extend through all levels, the 2012 Report advises opinion givers to expressly limited the scope of these opinions. The 2012 Report does note that the TriBar Opinion Committee has taken the position that opinion givers need only focus at the level of the entity about which they are specifically opining and that they may assume that the member or manager of the borrower is authorized to approve the transaction.²²

18. 89 A.D.3d 615, 934 N.Y.S.2d 119 (N.Y. 2011). *See also* the discussion on the execution and delivery opinion at ¶¶ 2.1 and 3.4(a).

19. 2012 Report at ¶ 2.1.

20. *Id.* ¶ 3.1.

21. *Id.* ¶ 3.2.

22. *Id.* ¶¶ 1.2(b) and 3.3.

4. Execution and Delivery. In order to render an execution and delivery opinion, the opinion giver must be satisfied that an authorized person has both executed and delivered the loan documents, as permitted under applicable law. This may include use of electronic means. As noted in paragraph 2.1 of the 2012 Report, the opinion giver is entitled to assume that all signatures are genuine.²³

5. Enforceability. Although the Guidelines suggest that in purely intrastate transactions, enforceability opinions should not be requested or given, enforceability opinions are often given in connection with such transactions, and they are normally given in interstate or multi-state transactions. Because an opinion recipient may believe that an enforceability opinion means that not just material remedies provisions but each and every provision of the transaction documents is enforceable, the 2012 Report suggests that a prudent opinion giver will prepare an enforceability opinion as if it means that each and every provision of the documents addressed in the letter is enforceable.²⁴

6. Enforceability - No Implicit Assurance. Although enforceability opinions give assurance that the transaction documents are sufficient to meet their basic purposes, including that the form of the mortgage complies with the applicable legal requirements to be a mortgage on the subject real property, the enforceability opinion does not provide that the mortgage actually encumbers the property, creates a lien, or has any particular priority.²⁵

C. Other Opinions

The following opinions, which are frequently also requested, are not endorsed by the 2012 Report even though the Illustrative Opinion Letter contains forms of them: form of security documents, status, no breach or violation, no violation of law, choice of law, usury, and legal proceedings confirmation.²⁶

1. Form of Security Documents. Instead of providing an opinion that the mortgage creates a lien on real property, which is generally covered by title insurance, opinion givers typically opine that the security instrument is in form to create an encumbrance and is in form to be recorded in the applicable records. The 2012 Report mentions that opinions may be given that the filing of a mortgage may create a lien on fixtures, but the Illustrative Opinion Letter does not refer to fixtures. The 2012 Report notes that it does not address UCC perfection requirements or security interests in personal property.²⁷

2. No Breach or Violation. A no breach or violation opinion relates to internal organizational documents or certain obligations that the borrower has to other persons. It should be read to apply to the date of the closing of the transaction and not relate to future performance of any party. Consistent with the Adaptation, the 2012 Report limits the no breach or violation opinion to the payment obligation of the borrower, as the opinion does not extend to the future performance obligations of the borrower.²⁸

3. No Violation of Law. The 2012 Report limits the no violation of law opinion to statutes and regulations in the relevant state and to judicial interpretations of those statutes and regulations, but common law generally is not

23. *Id.* ¶ 3.4.

24. *Id.* ¶ 3.5.

25. *Id.* ¶ 3.5(b).

26. *Id.* at . 24-33.

27. *Id.* ¶ 3.6.

28. *Id.* ¶ 3.7.

included in the scope of the opinion. Further, the law of counties, towns, municipalities, and special political subdivisions or other local laws are not included in a no violation of law opinion. Also, the reach of the opinion should be limited to the borrower's payment obligations and should not include its other agreements about future performance. The 2012 Report observes that the violation of law opinion may include usury by implication.²⁹

4. Choice of Law. A choice of law opinion may seem to be part of an enforceability opinion unless the choice of law opinion is specifically excluded. The 2012 Report takes the position that a choice of law opinion should not be implied as part of an enforceability opinion, but it advocates adding specific language to an opinion letter to deal with choice of law issues. This is a complex area, and when choice-of-law opinions are given they are reasoned opinions that are accompanied by a number of assumptions. Although the Guide includes a discussion of choice of law issues, the Illustrative Opinion Letter excludes a choice of law opinion.³⁰

5. Usury. The 2012 Report takes the position that usury opinions are implied in both the enforceability opinion and the no violation of law opinion. If an opinion giver does not want to give an implied usury opinion when giving either of these two typical opinions, the opinion letter should expressly exclude such an opinion. Usury issues are state-specific, so the relevant issues and assumptions that are important will differ from state to state.³¹

6. Legal Proceedings Confirmation. A statement that the borrower is not involved in litigation is not a legal opinion, but instead it is a factual confirmation. In light of cases such as *Dean Foods Company v. Pappathanasi*,³² and the vagaries related to the knowledge of the opinion giver and its lawyers, many counsel are reluctant to give such a statement. The Illustrative Opinion Letter includes only a confirmation relating to cases on which the opinion giver has worked.³³

D. Limitations

The 2012 Report addresses the standard limitations on the opinions express in an opinion letter. Some of these limitations apply only to the core opinions,³⁴ some apply to specific transactional considerations,³⁵ and some apply generally to all opinions.³⁶ Note that the definition of "limitations" in the 2012 Report is broad and includes assumptions, qualifications, and exclusions.³⁷

1. Bankruptcy. All opinion letters exclude bankruptcy and similar laws. This is an implicit exception if not stated. The bankruptcy exception applies to all opinions, not just the enforceability opinion. Any reference to bankruptcy

29. *Id.* ¶ 3.8.

30. *Id.* ¶ 3.9.

31. *Id.* ¶ 3.10.

32. *Dean Food Co. v. Pappathanasi*, 18 Mass. L. Rep. 598 (Mass. Super. Ct. 2004),

33. *Id.* ¶ 3.11.

34. *Id.* ¶¶ 4.1--4.3.

35. *Id.* ¶ 4.4.

36. *Id.* ¶ 4.5.

37. *Id.* at 5 and 33.

law or other federal law in connection with this exception should not be deemed to limit the exclusion of federal law stated elsewhere in the opinion letter.³⁸

2. Equitable Principles. All opinions, not just the enforceability opinion, exclude “equitable principles.” This is an implicit exception even if not stated explicitly. The 2012 Report includes an expansive definition of equitable principles.³⁹

3. Generic Enforceability Qualification with Assurance. This limitation is often referred to as the “generic qualification,” but the 2012 Report refers to it as the “generic enforceability qualification.” The limitation is in two parts. The first is a statement that not all provisions in the loan documents may be enforceable. Because this could be read broadly to render the enforceability meaningless, it is followed with the second statement, an assurance that certain specified remedies will be available. The assurance is made specifically subject to all of the other limitations in the opinion letter. Moreover, the assurance in the generic enforceability qualification about the ability of the lender to foreclose under certain circumstances does not implicitly furnish any other opinions.⁴⁰

The Illustrative Opinion Letter provides the lender assurance that it will have its remedies when there is a material default in a payment provision, and the Illustrative Opinion Letter includes optional language that provides the assurance upon a material default in any other material provision in the documents. The vagueness of the term “material” in this context could require the opinion giver to give careful consideration to what defaults might or might not cause acceleration of the indebtedness and invocation of the lender’s remedies, and, if appropriate, to include state-specific exceptions to the assurance.⁴¹

The language in the generic enforceability qualification should be amended for application in states that have particular laws limiting the enforceability of certain provisions of the documents, such as single form of action rules, limitations on deficiency judgments, and limitations on late fees.

The 2012 Report identifies particular problems with respect to giving assurances about the enforceability of guaranties, because a failure of the loan documents to include an effective waiver of rights of guarantors, such as the defense of material modification of a guaranty, can release a guarantor from all liability. The Illustrative Opinion Letter, therefore, provides that the assurance relating to guaranties is limited “to the extent not deemed a penalty and subject to the defenses of a surety that have not been or cannot be waived.”⁴²

The 2012 Report notes that the assurance provides that upon material default, the lender will be able to foreclose, but it does not indicate the method of foreclosure. The assurance so given is not an opinion that the loan documents include “all customary provisions and remedies,” an opinion that is discouraged by the 2012 Report.⁴³

The 2012 Report disapproves of the use of the traditional practical realization assurance in real estate secured transactions because of its “apparent ambiguity and subjectivity.”⁴⁴

38. *Id.* ¶ 4.1.

39. *Id.* ¶ 4.2.

40. *Id.* ¶ 4.3(b).

41. *Id.* ¶ 4.3(e).

42. *Id.* ¶ 4.3.

43. *Id.* ¶ 4.3(f).

44. *Id.* ¶ 4.3(g).

Other Transaction-Related Qualifications. This is a placeholder for matters that may be relevant under state law, such as issues relating to usury, prepayments, indemnification, and assignment of rents.⁴⁵

4. Other General Qualifications. The Illustrative Opinion Letter includes seventeen “other general qualifications” (many of which relate to the method or means of pursuing remedies), but there is no clear consensus as to how many, if any, of the specific other general qualifications are necessary in light of the bankruptcy, equitable principles, and generic enforceability qualifications.⁴⁶

5. Exclusions. The exclusions are a listing of types of law that are not included in the Illustrative Opinion Letter. The exclusions include local law (*i.e.*, laws of counties, cities, towns, and other subdivisions), zoning law, land use law, and environmental matters. Federal law is not listed as an exclusion in this section because the law covered by the opinion letter is only the law of the jurisdiction or jurisdictions listed in Section 3.1 of the Illustrative Opinion Letter. All of the exclusions that are specified in the Illustrative Opinion Letter may be implied as exclusions as a matter of customary practice.⁴⁷

6. Knowledge. Even though the term “knowledge” of the opinion giver is not used in the Illustrative Opinion Letter, the Guide contains a formulation of “knowledge” that can be used if the concept of the knowledge of the opinion giver is applicable to an opinion letter. The term is limited to the conscious awareness of facts by a person included within the “primary lawyer group,” which includes the lawyers involved in the transaction or in preparing the opinion letter.⁴⁸

E. Scope and Use of the Opinion Letter

The 2012 Report addresses certain specific limitations and understandings on the scope and use of an opinion letter.

1. Use. The Illustrative Opinion Letter contains two alternatives about use of the opinion letter. In the first, only the original lender may rely on the opinion letter without the opinion giver’s consent. In the second, an assignee of all of the interest of the lender in the loan may also rely on the opinion letter. The Illustrative Opinion Letter makes it clear that no subsequent beneficiary of the opinion letter may have any greater rights under it than the original addressee. The 2012 Report states that it is not appropriate for an opinion letter to provide that counsel to the opinion recipient may rely on it. The 2012 Report does not discuss the possible reliance on opinions letters by other parties, such as rating agencies.⁴⁹

2. Effective Date; No Obligation to Update. An opinion letter is effective as of its date only, and the opinion giver has no obligation to update the letter. This is implicit even if not stated.⁵⁰

3. Governing Law. The opinion letter itself should be governed by the law of the state where the opinion giver practices. Opinion letters typically do not include a governing law provision that applies to them.⁵¹

45. *Id.* ¶ 4.4.

46. *Id.* ¶ 4.5.

47. *Id.* ¶ 4.6.

48. *Id.* ¶ 4.7.

49. *Id.* ¶ 5.1.

50. *Id.* ¶ 5.2.

51. *Id.* ¶ 5.3.

4. Disclaimer of Implied Opinions. As a matter of customary practice, opinion letters relate only to the issues specifically mentioned in them. It is not necessary to state this in an opinion letter.⁵²

5. Expression of Professional Judgment. As a matter of customary practice, legal opinions are expressions of the opinion givers' professional judgment and are not guaranties of particular results as a matter of customary practice. This is considered to be the case whether or not the opinion letter states this. The Illustrative Opinion Letter does not include such a statement.⁵³

6. Signatures. The opinion may be signed in any of several different ways, including by the firm or by an individual lawyer, and it may be signed manually or electronically. A recipient typically expects that the opinion letter is from the firm as a whole rather than only from an individual lawyer.⁵⁴

7. No Incorporation by Reference. Some state bar reports provide that an opinion delivered in that jurisdiction is deemed to incorporate that report by reference.⁵⁵ The *Illustrative Opinion Letter* does not include a statement that the 2012 Report is included in the opinion by reference.

III. CONCLUSION

The 2012 Report is intended to be a resource for lawyers practicing in the area of secured real estate finance transactions by synthesizing the current state of opinion practices. It can guide both opinion givers and opinion recipients in how best to address important opinion issues and therefore should make the opinion process more efficient for all. There is presently no comparable report exclusively describing best practices for opinions in secured real estate finance transactions specific to Delaware. Moreover, opinion practice varies greatly among the law firms involved in such transactions in Delaware. As Delaware has no independent opinion reports of its own, lawyers can look to the 2012 Report, including the Illustrative Opinion Letter, for helpful guidance in navigating opinion drafting and negotiation.

52. *Id.* ¶ 5.4.

53. *Id.* ¶ 5.5.

54. *Id.* ¶ 5.6.

55. See, e.g., 2007 Report On Lawyers' Opinions in Business Transactions by the Special Joint Committee of the Section of Business Law and the Section of Real Property, Planning and Zoning of the Maryland State Bar Association, Inc. dated June 14, 2007, revised as of October 6, 2009, posted at <http://msba.org/docs/opinionmatters.asp>. Also, the Accord opinion incorporates the entire Accord by reference.