



THE JOURNAL

OF THE DELAWARE STATE BAR ASSOCIATION

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DATE/TIME:

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ADS AND TABLES WILL ALSO BE AVAILABLE.**

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THE JOURNAL

OF THE DELAWARE STATE BAR ASSOCIATION

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PRESIDENT'S CORNER

By Richard A. Forsten, Esquire

Not Another Column About *Pro Bono*

October is National *Pro Bono* Month! But, do you really want to read another column about *pro bono*? Doesn't it seem like we are always saying the same things over and over again about *pro bono*? Are you suffering from "*pro bono* fatigue"?

Let's be honest. We *talk* about *pro bono* a lot. We acknowledge that there is a large unmet need for *pro bono* services. Yet, the problem remains. Despite all the talk, it seems as though nothing is being achieved.

Now, it is not true that nothing is being achieved. There are continual small, incremental improvements being made — it is just that the larger problem is so large that small success stories do not seem all that successful when compared to the big picture.

In this column I would like to do two things — discuss obstacles to *pro bono* as identified in a recent Access to Justice survey and then present an idea which might do more to advance the cause of *pro bono* than all of the talking we have been doing for so long.

Twenty-five hours of service a year is the aspirational goal for *pro bono* service. That breaks down to roughly one hour every two weeks, or two hours a month; yet few lawyers reach this goal. If the goal is so low, why is it so hard to meet?

There is no one single answer, although time is undoubtedly the biggest factor. It seems there are more demands on practitioners' time today than ever before — from clients (who, in the age of the internet and smart phones and increased competition among lawyers, demand 24/7 access and more attention than ever before), from family, and from the profession itself (there are more administrative burdens and requirements than ever). Roughly half of our Bar is solo practitioners and very small firms who lack the time-saving administrative support larger firms provide.

Even assuming one has the time, though, how does one find the right opportunity? A corporate litigator, IP specialist, or environmental lawyer may not feel comfortable in Family Court or dealing with a landlord/tenant dispute; although, as lawyers we are fairly bright people (we did all pass the bar exam after all) and none of this is rocket science (the only thing that is rocket science is a patent case involving rocket science).

As to opportunities, there are plenty. The Office of Child Advocacy offers training for lawyers and will pair them up with children in need. Virtually everyone who has participated feels better for having done so. The DSBA has also organized "Wills for Seniors" days, where, for four hours on a given Saturday, lawyers gather to help people with simple wills and trusts questions — yet one recently-planned session had to be cancelled for lack of attorney volunteers.

Time is always at a premium, more so, it seems, in this age of instant communications; but time has always been at a premium. Think of all the labor-saving devices and conveniences we have today — they save labor and free up time, but perversely make us feel as though there is still more we should be doing. I have been writing book reviews for the *Bar Journal* for many years now, and people always ask me, "how do you find the time?" But, the answer is something of a cliché, although like all clichés it happens to be true — you find the time to do the things that you want to do. Time is the great prioritizer.

“Twenty-five hours of service a year is the aspirational goal for pro bono service. That breaks down to roughly one hour every two weeks, or two hours a month; yet few lawyers reach this goal.”

So, there are programs and initiatives being pursued to make *pro bono* easier to do and more convenient; and time, the universal problem, is ultimately a matter of priority and value. So, what more can be done? Why do we keep talking and talking about *pro bono*, but, like Sisyphus, feel like we are pushing a boulder uphill only to see it keep rolling back down?

We need a more profound change and we have a powerful analogy from which we can draw. There is something that humans do that is very unnatural, yet we have been doing it for millennia. Something that, on a rational, self-interested level, goes against our basic instincts. And yet, we have been doing it since the dawn of time. War. Think about it. We

ask people to put themselves in harm's way. Other people will be shooting at you. Trying to kill you. End your life. Yet, people join the military. They serve their country. They die for their country. Why? How is it that human societies, for thousands of years, have been able to field armies for warfare, but we struggle to field a platoon for *pro bono*?

Let me answer that question, at least in part, with another question: what is the highest recognition that this country bestows? The Congressional Medal of Honor. It has no peer. And, it is no accident that it is a military honor.

There is a scene in the movie *Heartbreak Ridge* that encapsulates this respect powerfully. Gunnery Sergeant Tom Highway (Clint Eastwood) is attending a reception for officers and their spouses. The officers are all in dress uniform, with all their various medals and insignia on display. The base commanders are receiving the attendees as they arrive, and, as one might expect, the commanders' uniforms are heavily decorated. But, when Gunnery Sergeant Highway comes through the line,

it is the generals who are in awe and drop all pretense of superiority. Highway is a Congressional Medal of Honor recipient.

Now, I am not suggesting that we create a *Pro Bono* Medal of Honor — but, until we begin to treat *pro bono* efforts with a level of respect and reverence that approaches our respect and reverence for military service, until we are all saying “thank you for your service” to those engaged in *pro bono* efforts, and until we consider *pro bono* service as important for overall professional reputation and necessary for leadership and judicial positions, we are never going to reach the tipping point and we are always going to be pushing a boulder up hill.

As a Bar, we need to do more to honor those who engage in *pro bono*. We need to decide once and for all that *pro bono* is critical to professional success. We need a true cultural shift and, maybe, we do need a *Pro Bono* Medal of Honor after all.

• • •

Although we do not have a *Pro Bono* Medal of Honor (at least not yet), we do

have a number of awards to be presented at the Christopher W. White Distinguished Access to Justice Awards on October 29 at the Chase Center on the Riverfront. Please help us honor our very deserving awardees. Further details can be found on page 17. 🕒

Richard “Shark” Forsten is the current President of the State Bar Association, as well as President of the Appoquinimink School Board, chairman of the Board of the Everett Theatre and a member of the boards of Goodwill of Delaware and the Delaware Homebuilders Association. He has been writing monthly book reviews for the *Bar Journal* since 1998, and elsewhere in these pages you can find his latest review. In 2006, he was recognized by the Delaware Supreme Court for Exemplary *Pro Bono Publico* Service in connection with his efforts as receiver for another lawyer's practice. He is a partner with the firm of Saul Ewing, LLP, where he practices in the areas of commercial real estate, land use, business transactions and related litigation, and can be reached at rforsten@saul.com.

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EDITOR'S PERSPECTIVE

By David W. deBruin, Esquire

Pro Bono and Share

The balance between liberty and equality is an important cornerstone of a democratic government. As history has demonstrated, rule by monarchs and emperors can provide a certain level of peace and order to a society, but typically those benefits come with a high cost to personal freedoms. I think we can safely skip the cost/benefit analysis of despots. Democratic values support the belief that an orderly society can exist while important freedoms are preserved. However, order and freedom must be balanced along with a compromise between liberty and equality under the law.

“One vitally important part of the civil and criminal justice system is that individuals volunteer time and talent to provide full access to the system; not just access for those who have the resources to pay for it.”

In the late 18th century (a time in the world where freedoms were subject to the whims of a handful of monarchs and emperors), the Founders created blueprints for the United States government in an effort to achieve those delicate balances. Their success laid a solid foundation of order, liberty, justice, and equality that would guide the drafting of the Constitution.

Pro bono publico (usually shortened to *pro bono*) is a phrase derived from Latin meaning “for the public good.” The term is generally used to describe professional work undertaken voluntarily and without

payment as a public service. *Pro bono* service, unlike traditional volunteerism, uses the specific skills of professionals to provide services to those who are unable to afford them. One vitally important part of the civil and criminal justice system is that individuals volunteer time and talent to provide full access to the system; not just access for those who have the resources to pay for it.

The spirit of *pro bono* service for the public good is alive and well in Delaware today. However, we, as Delaware lawyers, must always challenge ourselves to give more. There will always be opportunities for us to volunteer our time and specific talents to support the criminal/civil justice system specifically and our community/society generally.

Pro bono service is clearly beneficial to you and the people/community you are serving. While these *pro bono* activities may be performed with the core intention of helping others, there is also a common wisdom that those who give of themselves, also receive. Over my years of *pro bono* work and volunteering, I truly feel that I have gained more from those collective experiences than anyone I have been privileged to try to help. When we do something good for others and the community, it provides a natural sense of accomplishment.

As the October issue is focused on highlighting *pro bono* service, kindly allow me to discuss a few of the *pro bono* organizations in Delaware of which I have some familiarity.¹ Delaware currently has three nonprofit organizations whose work is coordinated through the Delaware State Bar Association (DSBA) via the Standing Committee on Serving the Legal Needs of Low Income


Persons. The following organizations were all formed to address the needs of low income Delawareans: Community Legal Aid Society, Inc. (CLASI) is a private, non-profit law firm originally formed in 1946; Delaware Volunteer Legal Services (DVLS) was formed in association with the Widener University School of Law in 1981 and it matches law school clinic students with indigent clients; and the Legal Services Corporation of Delaware (LSCD) was formed in 1996 in response to Congressionally imposed restrictions on federal funding. Over the years, these agencies have provided civil legal services to thousands of Delawareans in matters of basic need — consumer protection, domestic violence, family law, landlord/tenant, and welfare rights. Applying uniform income eligibility criteria, each of the service providers concentrates on discreet areas of the law in order to promote efficiency and reduce duplication.

1. This article is by no means an exhaustive list of *pro bono* organizations/opportunities. If you have interest in providing *pro bono* services, all of the agencies mentioned in this article will gladly match your practice and/or abilities to the needs of indigent clients.

The Combined Campaign for Justice (CCJ) is a partnership of the DSBA, CLASI, DVLS, and the LSCD. These organizations joined together to directly approach Delaware lawyers and the Delaware community for financial support, in order to increase the availability of civil legal services to people of low income in Delaware.

In addition to the above mentioned non-profit organizations, the Office of the Child Advocate (OCA) is a statutorily created State agency, which among other things, is charged with providing legal representation to Delaware's abused, neglected, and dependent children. Most of these children are in the legal custody of the State and placed in foster care. OCA represents almost 700 foster children statewide through volunteer attorneys and a few full-time Deputy Child Advocates.

When considering *pro bono* service, find something that speaks to you and matches your personality and/or interests. In your search for the right *pro bono* opportunity, do not limit yourself to just one organization or one specific type of help. Sometimes an opportunity looks great on paper, but the reality is quite different. Try to visit different organizations and get a feel for what they are like and if you connect well with the staff members and other volunteers. Before starting, make sure you are comfortable with the organization, know what is expected, and understand the time commitment. The greater the satisfaction you have with the experience, the better your contributions will be, and the more likely that you'll continue.

Make a difference, meet new people, gain new skills, and add new and valuable experiences. *Pro bono* service affords us the opportunity to serve others and help improve our civil/criminal justice system, our community, our state, and our country. Thank you to all who regularly provide *pro bono* services. 

Bar Journal Editor **David deBruin** is the founder of The deBruin Firm and his practice is dedicated to representing victims of mesothelioma, dangerous drug and medical devices, and select complex litigation. He can be reached at ddebruin@thedebruinfirm.com.



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CALENDAR OF EVENTS

Remember that CLE Videos are shown for CLE credit five days a week at the DSBA in Wilmington! Call (302) 658-5279 to make an appointment.

October 2015

Thursday, October 15, 2015

Managing E-Discovery Effectively: Meeting the Expectations of Your Clients and the Court

3.0 hours CLE credit

Delaware State Bar Association, Wilmington, DE
Webcast to Tunnell & Raysor, Georgetown, DE

Monday, October 19, 2015

Office and Trial Practice 2015

7.0 hours CLE credit

Chase Center on the Riverfront, Wilmington, DE

Wednesday, October 28, 2015

Tax Issues Facing Small Businesses

3.0 hours CLE credit

Delaware State Bar Association, Wilmington, DE
Webcast to Tunnell & Raysor, Georgetown, DE

Thursday, October 29, 2015

Christopher W. White Distinguished Access to Justice Awards Breakfast

Chase Center on the Riverfront, Wilmington, DE

November 2015

Friday, November 13, 2015

Attorney Ad Litem for Guardianship Training in the Court of Chancery

4.0 hours CLE credit

Delaware State Bar Association, Wilmington, DE
Webcast to Tunnell & Raysor, Georgetown, DE

Wednesday, November 18, 2015

Understanding Social Security Disability Programs... and How the Benefits Interact with Other Claims

1.5 hours CLE credit

Delaware State Bar Association, Wilmington, DE
Webcast to Tunnell & Raysor, Georgetown, DE

December 2015

Wednesday, December 2, 2015

Memory Skills for the Successful Attorney

6.0 hours CLE credit

Delaware State Bar Association, Wilmington, DE
Webcast to Tunnell & Raysor, Georgetown, DE

Wednesday, December 9, 2015

Confidentiality in the Age of Cyber Security

2.0 hours CLE credit

Delaware State Bar Association, Wilmington, DE
Webcast to Tunnell & Raysor, Georgetown, DE

Friday, December 11, 2015

Superior Court Trial Practice and Ethics Seminar

6.0 hours CLE credit

Delaware State Bar Association, Wilmington, DE
Webcast to Tunnell & Raysor, Georgetown, DE

SECTION & COMMITTEE MEETINGS

October 2015

Tuesday, October 13, 2015 • 12:00 p.m.

Small Firms & Solo Practitioners Section Meeting

The Law Offices of Denise D. Nordheimer, Esquire, LLC, 2001 Baynard Boulevard
Wilmington, DE

Tuesday, October 13, 2015 • 12:00 p.m.

Litigation Section Meeting

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

Wednesday, October 14, 2015 • 4:00 p.m.

ADR Section Meeting

Berger Harris, LLP, 1105 North Market Street, 11th Floor, Wilmington

Thursday, October 15, 2015 • 4:00 p.m.

Elder Law Section Meeting

Kleiner & Kleiner LLC, 501 Silverside Road, Suite 46, Wilmington, DE

Tuesday, October 20, 2015 • 12:30 p.m.

Labor & Employment Law Section Meeting

Young Conaway Stargatt & Taylor LLP, 1000 North King Street, Wilmington, DE

Thursday, October 22, 2015 • 12:00 p.m.

Executive Committee Meeting

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

Thursday, October 22, 2015 • 4:00 p.m.

Family Law Section Meeting

Bayard, P.A., 222 Delaware Avenue, Suite 900, Wilmington, DE

Monday, October 26, 2015 • 4:00 p.m.

Taxation Section Meeting

DuPont Headquarters, 974 Centre Road, Chestnut Run Plaza, Building 735,
Room 1135, Wilmington, DE

November 2015

Monday, November 2, 2015 • 12:30 p.m.

Senior Lawyers Committee Monthly Luncheon Meeting

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

Wednesday, November 4, 2015 • 12:30 p.m.

Women and the Law Section Meeting

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

Thursday, November 5, 2015 • 12:00 p.m.

Litigation Section Meeting

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

Thursday, November 5, 2015 • 12:00 p.m.

Real & Personal Property Section Meeting

Tim Rafferty's Office, Artisans Bank, Centerville Road, Wilmington, DE

Tuesday, November 10, 2015 • 12:00 p.m.

Small Firms & Solo Practitioners Section Meeting

The Law Offices of Denise D. Nordheimer, Esquire, LLC, 2001 Baynard Boulevard
Wilmington, DE

Wednesday, November 11, 2015 • 4:00 p.m.

ADR Section Meeting

Berger Harris, LLP, 1105 North Market Street, 11th Floor, Wilmington

Thursday, November 12, 2015 • 6:00 p.m.

Young Lawyers Section Happy Hour

TBD

Tuesday, November 17, 2015 • 12:30 p.m.

Labor & Employment Law Section Meeting

Young Conaway Stargatt & Taylor LLP, 1000 North King Street, Wilmington, DE

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

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TIPS ON TECHNOLOGY

By Richard K. Herrmann, Esquire

Ten Office Practice Technology Tips Without Glazing Over

Law office practice evolves technologically each year. Most take it in stride, and many even look forward to the newest advancements. We have moved from mail to FedEx. We have transitioned from paper to email; many of us have replaced the significant use of the telephone with email as well. There is little question in my mind that smart use of technology creates efficiencies. There is also no doubt that the uneducated use of technology can compromise the quality of our practice. It can even create ethical issues many do not even consider.

I always believe in starting with the low hanging fruit. If you already practice these, give yourself an “A.” If you have not yet, but will now, you can thank me later.

① Your cell phone is a tool in trial. Remember to use it.

Think of the cell phone as a Swiss Army Knife. One of the most practical uses of the phone is the camera. It is always with you. If you happen to find yourself in a courtroom during a break and need to get a copy of an exhibit sitting on an easel, take a picture of it. It can be very helpful in the evening preparation or in closing argument. And if the trial is a lengthy one, ask the witnesses if you can take their photographs. Flashing their pics during closing will assist the jury in refreshing their collective memories.

② Do not “reply to all” or “forward” on your cell phone unless your scroll to the bottom of the message.

It is very convenient to keep current on your email with your cell phone. I have the iPhone 6+, which presents a large, easy to read screen. However, it does not tell me there may be three or four more screens below in the same email as part of a long thread. When I forward the email to someone outside the chain, I may very well be breaching a client confidentiality. Be sure to read the entire email before “replying to all” or “forwarding.”

③ Review all names in the “To:” and “cc:” fields carefully before you “send.”

It is very convenient to begin typing a name in the “To:” or “CC:” fields and having Outlook complete the task. Unfortunately, Outlook is not always correct. Your contact list may have two people with the same or similar string in their names. You need to take a moment and say to yourself, “Is this the person I intend to receive this email?” You do not have to actually say it out loud. But, if you do not at least think it, you are doing your client and yourself a disservice.

④ Build your “To Do” list into your daily routine.

Another tool in your “Swiss Army Knife” is the “To Do” list. It is simply a thumbprint (for those who use iPhone’s

alternative to the password) away. Of course, adding something to this list is only useful if you remember to refer to it; this was a problem for me; but I practiced until I got it. Now it is part of my routine. No more slips of paper or forgotten ideas. I dictate them into my list. (And at home, I dictate them to my Amazon Echo; You have to get one. It is fabulous. <http://www.amazon.com/Amazon-SK705DI-Echo/dp/B00X4WHP5E>)

⑤ Do not engage in client work while you are driving.

Federal estimates on inattentive driving suggest that distraction contributes to more than 5,000 deaths every year. Your client requires your full attention. Your family requires your promise to work safely. Take the pledge.

• • •

I still have five more Tips to pass along, but am at the end of my column. If you do not care to wait until the next issue or would like to discuss these and more, join us during DSBA’s Office and Trial Practice 2015 seminar on October 19. 📞

Richard K. Herrmann is partner at Morris James LLP, handling many forms of complex litigation, including intellectual property, commercial, and technology. He can be reached at rherrmann@morrisjames.com.

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

COVERAGE INSIGHTS:

Employed Lawyers' Professional Liability Coverage

Presented by Kurt E. Taylor

Many in-house attorneys fail to purchase Employed Professional Liability Coverage to protect themselves against potential lawsuits. Even though most claims are brought on by clients, employed lawyers are also subject to suits from third parties, such as employees, shareholders, and government agencies. It is imperative that a successful organization and its legal staff recognize their real legal risks and then purchase coverage to protect against those risks.

Risks Facing In-House Attorneys

The following are just some of the many risks that in-house attorneys regularly face:

- Attorneys at private companies face exposures when performing contract negotiations, giving advice to Human Resources professionals, assisting with mergers, and reviewing contractual language.
- For public companies, Sarbanes-Oxley (SOX) increases potential exposure — for publically-traded companies only.
- Since electronic information is discoverable and recoverable, it must be stored and preserved just like paper documents once were. In-house attorneys should work with IT professionals to ensure compliance with this rule.
- Clients may sue over a contract that did not work in their favor in which the attorney had a hand in writing.
- Termed employees may sue the employer and name the attorney for negligence.
- Attorneys are at risk when performing moonlighting services or *pro bono* work.

Insurance Protection

To protect against these risks, it is wise to purchase Employed Lawyers' Professional Liability Insurance coverage. Typical policies may feature the following:


- Protection from demands, suits, or proceedings for damages or injunctive relief
- Policy may be written as either a "claims made" or "claims made and reported" and a "duty to defend" or "non-duty to defend" basis

- Responds to licensing proceedings for in-house attorneys to practice law
- Deals with compliance for SOX
- Provides defense against claims alleging wrongful acts
- Wrongful acts and claim definitions are expanded and broadened
- Extends to *pro bono* or moonlighting work done by in-house lawyers
- Includes full-time on-staff attorneys and contract and independent contract lawyers and support staff members
- Advance of defense costs, even if allegations are found to be groundless
- Coverage extends globally
- Coverage for non-client claims
- Coverage for SEC and regulatory claims
- Punitive damages coverage
- Covers claims from coworkers that arise out of the attorney's work at the organization
- Covers costs for claims brought by the employer, board of directors, and officers

In-house counsel should make sure they are protecting themselves from risk while they work to protect their employer from risk. Contact DSBIS to learn all about our insurance solutions for your business today.

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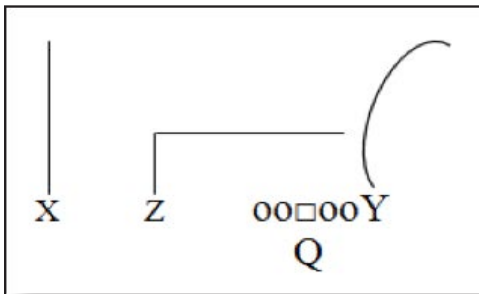
Kurt Taylor is a DSBIS Consultant specializing in professional coverages and Vice President of USI Insurance Services. He may be reached at 302-397-0332 or kurt.taylor@usi.biz.

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Spider 2 Y Banana

By Ryan P. Newell, Esquire

Now that the summer has come to an end, you may have occasion on a fall Monday night to hear someone on the television discussing “Spider 2 Y Banana.” Most likely, your reaction to either reading that here or listening to it on your television has you confused. And, even if you know *generally* what it refers to, for the majority of us armchair quarterbacks, we still do not know *exactly* what it is.



That phrase is a specific passing route that is often discussed by the excitable host of *Monday Night Football*, Jon Gruden. As a former quarterback, Gruden speaks a language foreign to nearly anyone who has not stepped inside a huddle. Without understanding the terminology, it would likely be an impossible task to hop off your recliner and into a huddle and expect to have the

ability to both understand and execute exactly what needs to happen. We may be adept at drawing plays on someone’s palm during the family Thanksgiving football game, but the sophistication of the professional game demands far greater comprehension.

For many practicing attorneys, yesterday’s discovery practices are akin to our backyard quarterbacking. In today’s discovery “huddles,” instructions such as “go pick up the bankers’ box of documents from the client” have been replaced with discussions — and most likely questions — about whether archived ESI from a noncustodial source necessitates a forensic collection.

Unfortunately, attorneys cannot just sit on the sidelines when confronted with electronic discovery issues. Rule 1.1 of the Delaware Lawyers’ Rules of Professional Conduct requires Delaware lawyers to “provide competent representation to a client,” which “requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” As comment 8 to Rule 1.1 makes clear, to maintain competence, Delaware attorneys “should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology...”

To help members of the Bar stay in stride with such advances in discovery, the E-Discovery Working Group of the Commission on Law and Technology has issued a best practice¹ to assist Delaware attorneys in understanding the terminology and basic tasks involved in e-discovery. We encourage you to visit the Commission’s website for the full leading practice, but in the limited space available here, the E-Discovery Working Group wanted to touch on some of the larger points.

Glossary of E-Discovery Terms

Whether conferring with a client, an e-discovery vendor, opposing counsel in a meet and confer, or the Court, understanding some basic terms is critical to

communication. Within the leading practice, nearly twenty commonly used e-discovery terms are explained. From “active data,” which is “information on a computer that can be immediately accessed by a user” to “volume,” which is the “amount of electronic data, usually referred to in relation to a number of megabytes or gigabytes of data rather than by a number of pages or documents,” this glossary should be an invaluable tool when having to talk the talk.

E-Discovery Products and Services

There is more to e-discovery than reviewing documents in electronic format. The critical first step and one that often endures throughout a litigation is the duty to preserve information. Only after it is preserved can it be collected, processed, reviewed, and produced. This leading practice identifies some key variables that may shape how an attorney handles each step in the e-discovery pipeline.


Considerations in Selecting an E-Discovery Vendor

E-discovery vendors often play a vital role in litigations today. Hiring a vendor raises a host of issues — from protecting confidential client information to assisting an attorney in litigating a case. Before you hire a vendor to partner with you, there are a number of questions you may want to consider asking, which may vary if you are in private practice at a firm as compared to in-house at a company. For example, what will the vendor do with your client’s information upon completion of the project? Does the vendor employ any security measures to protect

1. See <http://courts.delaware.gov/declt/blogspot/Understanding-eDiscovery.stm>.

sensitive data? Does the vendor charge a flat fee, a volume-based fee, a project-based fee, or some other type of fee?

• • •

So, the next time you are faced with e-discovery mumbo-jumbo that sounds as comprehensible as “Spider 2 Y Banana,” please consult this and other e-discovery leading practices on the Commission on Law and Technology’s website. By maintaining competence in the e-discovery arena, there will hopefully be fewer “fumbles” and more “touchdowns” for all involved.² 

2. For those who are still wondering, “Spider 2 Y Banana” is where the “Y” receiver runs a pass route that resembles, well, a banana. See, that wasn’t too hard? It is a sure bet for a touchdown this Thanksgiving morning, as unfortunately the Chief Judge of the Family Court will find out if he attempts to defend the author’s execution of the play.

Ryan P. Newell is a partner at Connolly Gallagher LLP, where he focuses on corporate and intellectual property litigation. He is the chair of the Commission on Law & Technology’s E-Discovery Working Group.

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ETHICALLY SPEAKING

By Charles Slanina, Esquire

Paper or Plastic?:

Issues When Attorneys Accept Payment of Legal Fees by Credit Card

My attorney clients (especially those with malpractice insurance policies that do not provide for payment of disciplinary defense costs) frequently ask whether I accept credit card payment of earned fees or retainers. As often as I receive this inquiry from my clients, I receive inquiries from other attorneys as to whether they are permitted to accept credit card payments from their clients and, if so, what professional responsibility requirements apply.

The easy, partial answer is yes. Delaware attorneys have long been permitted to accept credit cards as a means of payment of legal fees and are permitted to advertise that they do so. Delaware State Bar Association Ethics Opinion 1992-6 (Sept. 1992) advises that it is permissible as long as specific guidelines are followed: (1) the client is fully advised in advance of all terms and conditions under which the charge is to be made; (2) the client understands the terms of the attorney fee agreement; (3) the lawyer explains the nature of any payment made by the client in advance of the services to be rendered or money is to be expended on behalf of the client; (4) any advance or retainer fees not earned must be properly refunded or a credit issued to the cardholder's account; (5) the lawyer preserves the client's confidences; (6) the client selects the lawyer, the lawyer remains directly responsible to the client, and the lender has no control in the case; and (7) the credit plan is otherwise formulated and administered in accordance with applicable law and ethical considerations. *See also* ABA Formal Opinion 00-419 (July 7, 2000).

While focusing on the permissibility of accepting credit card payments, the DSBA Opinion does not address many of the questions that arise as to

how to handle credit card payments of unearned retainer funds. The Delaware Lawyers' Rules of Professional Conduct only generally address these requirements.

Rule 1.5(f)(3) states, "[A]ll unearned fees shall be retained in the lawyer's trust account with statement of the fees earned provided to the client at the time such funds are withdrawn from the account." In addition, Rule 1.15(a) states, "[A] lawyer shall hold property of clients or third persons that are in a lawyer's possession in connection with the representation separate from the lawyer's own property. Funds shall be kept in a separate account designated solely for funds held in connection with the practice of law in this jurisdiction."

There is no specific provision or exception in the Rules that would permit deposit of a payment by credit card of an unearned fee into an operating account. Until earned, the credit card payment is a refundable client fund which cannot be commingled with firm funds. That opinion is shared by Michigan Informal Opinion RI-344 (2008), Ohio Advisory Opinion 2007-3 (Apr. 2007), and California Opinion 2007-172 (2007).

Attorneys are often tempted to direct credit card payments to the firm's operating (rather than trust) account to avoid the issues of credit



card chargebacks and service charges to the “merchant” attorney for the benefit of receiving the payment. Chargebacks result when the cardholder/client subsequently challenges a charge resulting in the credit card issuer reclaiming the payment. Both situations can cause accounting problems in an escrow account, including, but not limited to, the potential for overdrafts.

Some jurisdictions recommend the use of a separate escrow account solely for the purpose of depositing credit card payments of escrow funds. Those jurisdictions go on to advise that the attorney can use firm funds to replace any chargebacks. While this practice does not prevent the separate escrow account from overdraft, it does protect other clients’ funds from the lender’s invasion of the account to recoup payments on disputed charges. Other states recommend that an attorney try to reach an agreement with the lending bank that chargebacks come only from the operating account. Oregon Opinion 2005-172 (2005), Virginia Opinion 1848 (2009), and Maryland Opinion 03-06 (2003).


When attorneys surcharge the client for the lender’s fees, another problem arises. For example, when a client pays an earned legal fee or uses a credit card to make an advance payment of a retainer, the amount that the attorney receives is less than the amount paid by the client because the “merchant” attorney pays a fee for the client’s convenience of using the charge card. So, if an attorney asks the client for a \$5,000 retainer and accepts a credit card payment, the attorney must reflect in the trust accounting that the client has a credit for the full retainer of \$5,000 even though the amount received in the trust account is (typically) 3% less than that amount. Typically, this is accomplished by the attorney depositing firm funds to make up the difference. If the attorney requires the client to pay the credit card fee, the attorney may be required to provide the client with the type of disclosures that normally apply to lenders. Failure to provide these disclosures could void the payment and expose the attorney to fines and costs.

So, what is a prudent attorney who accepts credit card payments to do? Although Rule 1.15(k)(1) through (10) does not specifically apply to this situation, one option is to treat credit card payments of advance fees under the “good funds” rule.

Credit card payments of unearned fees can be placed in escrow and only transferred to the operating account when earned after the chargeback time for those funds has expired. Unfortunately, chargeback periods are generally governed by the cardholder’s agreement with the lender and vary by card. Many lenders permit a cardholder to challenge a charge for up to 120 days. While cardholders are not technically permitted to dispute a charge based on the quality of the services purchased with a card, this does occur and, unfortunately, the burden shifts to the “merchant” lawyer to defend the charge with the lender.

For many attorneys, accepting credit cards is the only way to get payment from many of their clients. In addition to the business benefit to the attorney, there is a very real access to justice component to accepting plastic payment. But, the prudent attorney recognizes both the benefits and risks involved in the transaction and discusses them with the client. For an excellent exploration of the ethics and accounting issues that result, see “Credit Cards: Service Charges and Chargebacks,” by Peter Geraghty of the ABA Center for Professional Responsibility available online at the ABA website. *Your ABA*, October 2012.

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

“Ethically Speaking” is available online. The columns from the past two years are available on www.dsba.org. 

Charles Slanina is a partner in the firm of Finger & Slanina, LLC. His practice areas include disciplinary defense and consultations on professional responsibility issues. Additional information about the author is available at www.delawgroup.com.


BAR NEWS

Seventh Annual Office and Trial Practice Seminar on October 19 at Chase Center

The Seventh Annual Seminar on Office and Trial Practice will be held on Monday, October 19, at the Chase Center on the Riverfront. The popular seminar is co-sponsored by the Bar Association and the Delaware Bar Foundation and is co-chaired by Supreme Court Justice Randy J. Holland and Harvey Bernard Rubenstein, a past president of both organizations.

An extensive program is planned this year with 7.0 hours of CLE credit including 5.0 hours of Enhanced Ethics credit. The morning segment includes Louis B. Ferrara on “The Basics in Starting Up a Law Practice,” Professor Louise B. Hill on “Common Ethics Traps,” John L. Reed on “Ethical Problems in Corporate Litigation,” Margaret M. DiBianca on “Social Media Ethics Update,” and Edmund D. Lyons, Jr. and Richard A. DiLiberto, Jr., on “The Ethics and Principles of Witness Preparation in Civil and Criminal Cases.”

The afternoon segment will include the featured speaker, Professor Thomas J. McSweeney of the College of William and Mary Law School on the subject of “Magna Carta, 1225-2015.” It will be followed by Kevin F. Brady and Richard K. Herrmann on “Learn Ten Office Practice Technology Tips Without Glazing Over,” and finally Jennifer-Kate Aaronson, Matthew F. Boyer, and Charles Slanina on “Ethics in the Office.”

Lunch and a morning break will be provided. 



By Susan Simmons

How to Work *Pro Bono* Time into Your Small Firm or Solo Practice

By Denise D. Nordheimer, Esquire

The web page for the Law Office of Denise D. Nordheimer, Esquire, LLC, tells the story of why the firm is recognized in the practice of family law and why we asked Denise to share her experiences in providing many hours of pro bono service to the underserved. The site states: ...we provide legal services to meet your needs in your estate planning, estate administration, trust, adult guardianship, or family law matter. We understand that your case requires sensitive handling and compassion during this difficult time. We will advocate powerfully on your behalf. We work to meet your needs while also preserving familial relationships to the greatest extent possible and keeping your costs low. The confidential services we provide always place the needs of our clients first.

• • •

I know many small firms and solo practitioners have anxiety about taking on any kind of *pro bono* work. They worry about losing billable time, not having sufficient expertise to deal with a matter that might be a little (or a lot) out of their wheelhouse, and just plain old anxiety that follows overachievers whenever something new is being added into the mix.

The way I have dealt with my *pro bono* duty (and I do think it is a duty) is the same way I approach every new thing — I went out and made some friends who knew more about it. I first started by attending a seminar sponsored by DVLS on “How to Handle a Protection from Abuse Case.” I got excellent materials (always a bonus in our small state where not everyone publishes guides to practice areas) and really liked the presenters, who assured me that I would never be left alone if I came down

to volunteer on the calendar and they would always be my friend. While I had my nerve up, and the promise of on-site help in case I needed to ask a “grown up” something, I volunteered for a day.

The PFA calendar is a great way to get your volunteer feet in the water, as it is usually about a five-hour commitment on a Friday and generally ends there. The presenters were as good as their word and made me feel welcome and valuable. I spent a long morning helping folks and during the long periods of waiting (there of lots of these lulls on the PFA calendar), getting to know some of the attorneys and staff that regularly work that calendar. That was a while back and I still volunteer on that calendar when I can. More importantly, I made real friends at DVLS who call on my practice when they have someone who needs help in an area in which I routinely practice. I made sure everyone knew what I did as a regular practice area while I was volunteering in a new one. Now, everyone in my office knows that “If Jacki (Chacona) from DVLS asks, we say ‘yes.’” That is simply the office policy. I never have to worry about whether or not I am fulfilling my requirement, because I do whatever I am asked, which is always totally reasonable.

“I never have to worry about whether or not I am fulfilling my requirement, because I do whatever I am asked, which is always totally reasonable.”

My advice about trying out some *pro bono* work would be to find something that has a little bit of “crash course” that some organization is offering in exchange for your participation, and try it. Generally, it will be a finite time commitment like a Saturday morning doing Wills for Seniors, and use it as an opportunity to get some good materials for your law library, network, and make new friends. Sometimes, they even have snacks.

The other thing about volunteering is that sometimes these cases are the ones that are far more satisfying than anything you have gotten paid to do. There is nothing like helping someone less fortunate to put your own problems in perspective. You just have to trust me on that part until you find it out for yourself. ⚖️

Denise D. Nordheimer practices estate administration, estate planning, adult guardianships, and fiduciary litigation at Nordheimer Law and can be reached at denise@nordheimerlaw.com.



DELAWARE STATE BAR ASSOCIATION



2015 Christopher W. White Distinguished Access to Justice Awards Breakfast



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Legal Services for the Poor Improves the Health of Low-Income Communities

By Daniel Atkins, Executive Director
Community Legal Aid Society, Inc.

Poverty makes you sick, literally. We have known for quite awhile that our genetics and behaviors — whether we smoke, exercise, and diet — impact our health. But, we also now know that when the social determinants of health — whether we have adequate access to health care, housing, income, and food — are not remediated, we will be sicker. Scientific studies are demonstrating consistently that the health consequences of poverty are severe, long standing, and perhaps irreversible.

The precise scientific mechanisms are unclear, but a critical mass of research has been focusing on the deleterious health impact of toxic stress. In fact, an excellent article appeared recently in *Delaware Lawyer* magazine reviewing the groundbreaking ACE (adverse childhood events) study and the long-term impacts of childhood trauma on health.¹ Researchers have studied people whose homes were being foreclosed and discovered significant rates of major depression,

anxiety, and hospitalizations.² Health economists found children with poor health have lower educational attainment, poorer health, and lower economic status as adults.³ Another study concluded that poverty impedes cognitive functioning — it is so taxing mentally, that it leaves less energy and attention to deal with other tasks.⁴ Perhaps most alarming was a study of poverty's impact on children's brains. Magnetic resonance imaging revealed that poverty is associated with smaller white and cortical gray matter and hippocampal and amygdala volumes. The researchers concluded that exposure to poverty early in childhood "materially impacts brain development at school age."⁵ A pediatrician recently wrote about poverty as a childhood disease — how it damages their dispositions and blunts

their brains and how it defines so many children's life trajectories — poor schools and achievement, health problems, and low earnings as adults. He notes that with Medicare and Social Security only 9% of older people live in poverty, but 25% of children under five live below the federal poverty level.⁶

Why should we as lawyers care? Public health colleagues and I recently published an article empirically linking investment in civil legal services for the poor with public health indicators.⁷ We found a significant correlation between the availability of civil legal aid attorneys and health and social well-being on the state level. We looked at indicators including obesity, hypertension, diabetes, low birth weight infants, pre-term birth rates, food insecurity, and school and work attendance. Delaware is somewhere in the middle of the pack nationwide. At the risk of appearing self-serving, I would

1. J. Stevens, Childhood Trauma: Root Causes of a Public Health Crisis. *Delaware Lawyer* (Winter 2014-15).

2. Craig Pollack and Julia Lynch, Foreclosures Are Killing Us, *The New York Times* (October 2, 2011).

3. A. Case, A. Fertig, C. Paxson, The Lasting Impact of Childhood Health and Circumstance. *Journal of Health Economics* 24 (2005) 365-389.

4. A. Mani, S. Mullainathan, E. Shafir, J. Zhao, Poverty Impedes Cognitive Function. *Science* 341 (2013).

5. J. Luby, A. Belden, K. Botteron, N. Marrus, M. Harms, C. Babb, T. Nishino. The Effects of Poverty on Childhood Brain Development, *JAMA Pediatrics* (2013).

6. Perry Klass, Poverty as a Childhood Disease, *The New York Times* (May 13, 2013).

7. J. Teufel, S. Mace, J. Mickman, D. Atkins, D. Dausey, Legal Aid Inequities Predict Health Disparities. 38 *Hamline Law Review* 329 (2015).

like to see Delaware be a national leader in terms of our commitment to funding legal services and remediation of the conditions of poverty. Lawyers, along with community supports and interventions, can be an important antidote to poverty.

This is far from a radical idea. The inspiration for Legal Aid in the United States, and in Delaware, can be traced back to Harrison Tweed, the iconic New York corporate lawyer who co-founded the venerable firm Milbank, Tweed, Hadley & McCloy. It was in a 1945 speech to the American Bar Association that he implored his colleagues to “...engage more wholeheartedly, and perhaps even a little dangerously, in things which concern the public good and are — and this is important — things of which lawyers possess special knowledge.” Tweed argued that Legal Aid was essential to the achievement of equal justice, the Bar is obligated to provide legal services to the poor, and equal justice is essential to our adversarial system. Present that day were Delaware legal giants Collins J. Seitz and William Poole. On the plane back from the meeting, they conceived of a plan to create the Legal Aid Society in Delaware.⁸

At Community Legal Aid Society, Inc. (“CLASI”), we help victims of domestic violence and violent crime escape their abusers, tenants avoid homelessness, and children with disabilities get the medical and educational services they need. Our advocacy reduces institutional abuse and neglect of people with disabilities, uncovers housing discrimination, and challenges capricious government and insurance company actions. We help people who are poor, with disabilities, or who are elderly maintain employment, put food on their table, and live more safely and comfortably in their homes. Our newest project at CLASI involves a unique partnership with the Delaware Division of Public Health where we provide free legal assistance to low income pregnant women across the state with the goal of reducing their stress and improving their birth outcomes. Fortunately, we at CLASI are not alone in our work advocating for

vulnerable populations. Our colleagues at the Legal Services Corporation of Delaware (“LSCD”) help low-income homeowners deal with foreclosure actions, tenants improve the conditions of their apartments, consumers combat fraud and exploitation, and debtors obtain a fresh start in bankruptcy. At Delaware Volunteer Legal Services (“DVLS”), staff attorneys and volunteer lawyers from the Bar help victims of domestic violence obtain Protection from Abuse orders, children and adults in Family Court matters, and many other low income Delawareans in a variety of legal disputes.

Nevertheless, because of the justice gap — the difference between the need for our services and our ability to meet the need — more than 80% of the civil legal needs of poor people throughout the country are going unmet.⁹ There is no reason to think that Delaware is an exception to this rule. Through the mid-2000s, Interest on Lawyer Trust Accounts (“IOLTA”) provided CLASI with up to \$1,200,000 per year. After the recession and the collapse of interest rates, CLASI’s IOLTA contribution was reduced to a little over \$200,000. All three legal services programs in Delaware have strict priorities and limitations on the kinds of cases we will handle because we have to ration our services. We simply do not have the resources to help everyone who needs our assistance. Unfortunately, we cannot even come close. There are structural fixes to this problem, more dedicated and generous funding streams

9. *Legal Services Corporation* (2009). Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans. Available at: <http://www.lsc.gov/sites/deafault/files/LSC/images/justicegap.pdf>

for one, and some actions members of the Bar who do not normally represent poor people can take individually.

In July, after nearly 25 years representing clients at CLASI, I began a new role at CLASI, executive director. I have been reflecting on the irony of this career change. As a legal services lawyer, I rarely had to think about money at all — not when selecting cases, not when representing my clients. Now, as executive director all I can think about is money — mostly about how we do not have enough of it and how I can help us get more. I am embracing being the money guy because I know the work we do at CLASI, LSCD, and DVLS is so important. The work is meaningful to the thousands of people we help each year, to the health of the Delaware community, and to our justice system. Making the justice system better makes us all better. We benefit from a system that is more just and gives meaning to the last phrase of our pledge of allegiance — “and justice for all.”

Please consider helping us narrow the justice gap by dedicating your time through DVLS and by donating your money to the three legal services organizations through the Combined Campaign for Justice at www.delawareccj.org. Thank you to all of our supporters who value the work we do and the clients whom we serve. 🕒

Daniel Atkins is the Executive Director of Community Legal Aid Society, Inc. Dan has worked at CLASI since graduation from law school in 1990. He also co-teaches poverty law and disability law at the Delaware Law School. He can be reached at datkins@declasi.org.

CALL FOR VOLUNTEERS | Saturday, October 17

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8. *The Delaware Bar in the Twentieth Century*, Delaware State Bar Association (1994) at p. 243.



DE-LAP ZONE

A Message from the Delaware Lawyers Assistance Program

By Carol P. Waldhauser, Executive Director

Getting Your MoJo Back Fighting Lawyer Fatigue

“The greatest thing in this world is not so much where we are, but in what direction we are heading.”

– Oliver Wendell Holmes

John is sitting at his handsome, cherry desk feeling both physically and emotionally drained. Zoning out, John’s mind wonders to when he first started to practice law. Of course, practicing was different 20 years ago, but so was his stamina. Earlier, John deleted all the emails that were clearly junk, but then felt paralyzed to answer most of what is left in his inbox. Also emotionally daunting was that John needed to address immediately discovery pleadings that had been on the corner of his desk for weeks. Today was the deadline for filing; if not, John risks the wrath of his client, the Court, and perhaps even disciplinary counsel.

Stamina is essential in life, and perhaps more so in the legal profession — where stressful situations, emotional challenges, and even personal tragedies can and often do take one’s passion and enthusiasm for being a lawyer away. If you feel like John — that you have lost that sparkle — or that your lawyer “mojo” is dissipating fast, here are some helpful tips in get back in the game while strengthening your defenses against lawyer fatigue (burnout).

Change the Focus from Burnout to Lawyer Wellness

According to the Rules of Professional Conduct, an attorney must be fit. The astute attorney understands, however, that fitness means more than just fitness of legal expertise; it also means those qualities of physical, mental, and psychological health that enables a lawyer to carry out the demands and the responsibilities to their clients and to their profession.

More specifically, the fit attorney practices law while practicing personal wellness. We know that being a lawyer is a tough job because for the most part, as a lawyer, you are dealing with perpetual stress. Needless to say, chronic stress is not only unhealthy; it will zap your stamina and mojo. So, what is a lawyer to do?

Begin a Cultural Change

Stress. Learn to change it or accept it, own it and deal with it. Otherwise, the effect of professional stressors can and will make you physically sick, emotionally tired, and simply “burned out” — if you let them.

At the same time, understand how wellness and health are interrelated and are distinct concepts. On one hand, health is considered to be freedom from disease; it is the condition in which people are able to do their most constructive work, provide the best possible service to their clients, and experience the highest possible enjoyment in leisure-time experiences.

In contrast, Wellness is much more complex than basic physical health. Wellness is the ability to fully integrate physical, mental, emotional, social, and spiritual well-being into an effective lifestyle. Optimum wellness balances the following five basic dimensions:

- **Physical Dimension:** This dimension is related to sound nutritional practices, maintaining proper weight, participating in regular exercise, getting enough sleep, engaging in physical activity, avoiding risky behavior, and restricting intake of harmful substances.
- **Career Dimension:** This dimension is related to finding balance among various life roles as people engage in fulfilling work and related activities, and identifying leisure activities that will provide a sense of life satisfaction.
- **Emotional Dimension:** This dimension is related to understanding personal feelings, maintaining a relatively even emotional state, accepting one’s own limitations, expressing emo-

tions effectively, adjusting to change, and maintaining good, healthy relationships with other people.

▪ **Social Dimensions:** This dimension is related to sharing friendships, family relationships, and group memberships. It entails using empathy and active listening skills, caring genuinely about other people, being open to care from other people, and committing to the common good of the community, the legal profession, the nation, and the world.

▪ **Spiritual Dimension:** This dimension is related to maintaining a sense that life is meaningful, employing a continuing quest for value and purpose, searching for clarity, committing to peace and contentment in life, and developing the fortitude to continue in the face of obstacles. (*The Wellness Lifestyle Workbook: Self-assessments, Exercises and Educational Handouts.*)

As Andy Clark, who practiced law in both law firm and corporate settings for over a decade, so simply put it in his book *Lawyer Wellness is Not an Oxymoron*:

Now more than ever, lawyers who fail to invest consistently in their personal wellness are at a competitive disadvantage in their legal career — and in their lives as a whole. Lawyers who do not adopt a wellness lifestyle today will fall further behind in the coming years as the legal services business rapidly evolves.

Subsequently, wellness is lifestyle — one that can and will change the lawyer's professional culture and can even get the "burned-out" lawyer his/her mojo back!

Simple Starter Tips to get On the Wellness Wagon

Habits

Mix it up and find something that will contribute to your overall wellness. Then, give it routine status. Start slow. Once it becomes habit, it will be automatic. Stick with it for three weeks, which is how long it takes for something to become a habit. For example, apply the "stretch and set" before you get out of bed — stretch and set an intention for your day.

Reactions

There are many situations with people, places and things during the day that can set you off and/or create drama in your life. We know what and who they are! Reacting to all of these things takes energy and can cause bad stress.

When this occurs, your reactions should be to:

1. Take a deep slow breath;
2. Count to 10;
3. Get oxygen to your brain by walking — it can be as short as your hallway or as long as a few blocks, but remember — move a muscle; change a mood.

These simple reactions will make a difference.

Learn How to Say "no"

Learn to say "no" to commitments that cause you distress and contribute to an already full daily schedule. Rather, learn to "pick" and "choose."

Action Steps

When in a funk, take a small, baby step. Decide to do one small action on those discovery pleadings or that Memorandum of Law. Once you start moving, it will make it easier to continue the momentum. When you feel overwhelmed and break the task down into baby, action steps — before you know it, you will be motivated to go further.

We cannot change the past, and we are not guaranteed the future; so focus on what you are doing at the moment — give it your best shot! So start small, but start.

At The Delaware Lawyers Assistance Program (DE-LAP), your well-being really matters to us. In fact, part of our mission is to assist all Delaware lawyers in being a healthier, happier lawyer. We want you to get your mojo back and fight lawyer fatigue (burnout). Also, the DSBA and DE-LAP want you to understand that wellness is much more than just eating right and exercising, it is really about expressing health and vitality across the whole spectrum of your life: physically, mentally, socially, emotionally, spiritually, and professionally.


For that reason, our weekly Wellness seminars are scheduled to return in January 2016 with more information to assist you with health, wellness, and stamina and yes even your mojo! For more information, call (302) 777-0124 or e-mail cwaldhauser@de-lap.org or Rina Marks at rmarks@dsba.org. We want to hear from you!

REFERENCES:

Stress Management for Lawyers, How to Increase Personal & Professional Satisfaction in the Law, Amiran Elwork, Ph.D., Vorkell Group, Third Edition,

A Profession In Distress, p. 25.

The Wellness Lifestyle Workbook: Self-Assessments, Exercises and Educational Handouts. John J. Liptak, EdD; Ester A. Leutenberg, Whole Person Associates, Dulth, Minnesota, Instruction.

Lawyer Wellness Is Not An Oxymoron. Andy Clark, www.wellnesslawyer.com. 


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

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BOOK REVIEW

Reviewed by Richard A. Forsten, Esquire

Should There Be Sequels?: *Go Set a Watchman*

By Harper Lee (HarperCollins, 2015)

For some books and movies, it is impossible to imagine a sequel. For those works, the tale is complete, with no need for a subsequent story or further adventures. For those works, a sequel could never hope to achieve the success or artistic triumph of the original, no matter how well-crafted. And, for some of those works, a sequel may even tarnish the original. *The Great Gatsby*,

announced that a sequel to the book was going to be published. The characters are memorable and the prospect of reading more about them exciting; but, would the new novel be as good? What could readers expect? And why, after more than 50 years, was a sequel being published? The short answers to the foregoing questions are: (i) no, the new book is not as good, (ii) readers can expect a less polished, more nuanced book that

Scout's older brother is now dead (it is never fully explained why). Her retired uncle now lives in town and her widowed aunt has moved in with her father, Atticus. Calpurnia is no longer her father's housekeeper. Scout has a beau and the two cause a mild scandal in town when they go skinny dipping one night.

To Kill a Mockingbird is told from the point of view of a child. *Go Set a Watchman* is told from the point of view

“Ultimately, it is difficult to judge *Go Set a Watchman*. Had the book been published substantially in the form it is in, it is doubtful that it would be remembered today. It was only in the editing and rewriting process, when it became *To Kill a Mockingbird*, that the book became a classic.”

Casablanca, and *Uncle Tom's Cabin* are but three works where no sequel could do justice to the original.

To Kill a Mockingbird is one of the great novels of the twentieth century, and arguably the greatest. It is required reading for almost all high school students throughout the country, and it is beloved and admired by virtually all who read it. In Atticus Finch, it creates one of the great role models for lawyers everywhere. And, it tells a complete tale without creating the need or expectation of a sequel or further story.

And so, both excitement and trepidation arose earlier this year when it was

is different in many ways from *To Kill a Mockingbird*, but still worthy of being read, and, (iii) as to why the novel is being published now, the complete manuscript was thought lost and only recently discovered.

Make no mistake, *Go Set a Watchman*, Harper Lee's "new" book, is a different book than *To Kill a Mockingbird*. Scout, the young narrator of the original, is now a 25-year-old woman returning to her fictional hometown of Maycomb, Alabama from New York City, shortly after the Supreme Court's decision in *Brown v. Board of Education*. Some of the characters are the same, some are new.

of a 25-year-old returning to her rural southern hometown from New York City. *Watchman* is a coming of age story. A story of disillusionment. A story of someone becoming their own person. The 25-year-old woman of *Watchman* still idolizes her father as she did when she was a child, but the Atticus Finch of *Watchman* is not the same man he was in *Mockingbird*. And, *Watchman* is not the same kind of book as *Mockingbird*. The themes are different. The ideas are different. The structure is different.

As it turns out, *Go Set a Watchman* was written before *To Kill a Mockingbird*. It was the novel that Harper Lee

first submitted for publication. And, in this regard, it is a fascinating read. One can see how the author worked one story into another that became a classic. Vignettes and incidents mentioned in passing in *Watchman* became full plot points in *Mockingbird*. Minor characters in *Watchman* are fully-developed in *Mockingbird*. And, of course, the message of *Mockingbird* is stronger, better, and more direct than the less powerful, more shaded themes of *Watchman*.

Ultimately, it is difficult to judge *Go Set a Watchman*. Had the book been published substantially in the form it is in, it is doubtful that it would be remembered today. It was only in the editing and rewriting process, when it became *To Kill a Mockingbird*, that the book became a classic. On its own, *Watchman* is a coming of age story about a young woman realizing that her father is not the man she idolized as a child. But, when read after *Mockingbird*, that loss of idolization, or innocence, becomes more palpable and jarring, and the reader experiences Scout's feelings much more powerfully. *Watchman* "works" only because of *Mockingbird*, which is somewhat ironic given that *Watchman* was written first. On its own, without *Mockingbird* as a precursor, it simply would not have the same impact.

Some stories are not meant for sequels. *To Kill a Mockingbird* is a great novel that tells a complete story and does not lend itself to a sequel. In that regard, *Watchman* is not a worthy sequel to *Mockingbird*; but then, it was never meant to be a sequel — it was Harper Lee's first attempt, and served as the first draft of what would become *Mockingbird*. When read with that understanding, *Watchman* is a fascinating look at the creative process and the writer's craft. The story of *Watchman* is not necessarily bad either, it is just no *Mockingbird*. Ⓢ

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



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A PROFILE IN BALANCE

By James G. McGiffin, Jr., Esquire

Gerry Spadaccini

He's Proud. They're Loud.

If I aspire to be the best lawyer I can be, I must first try to be the best person I can be. I am fortunate to know many lawyers who have succeeded in their work, in part, because they are excellent people. This column in the Bar Journal will feature an article on one such lawyer. Each featured lawyer will exemplify the art of balance in life. I have learned much from these people. Perhaps readers will also benefit.

- Jim McGiffin

• • •

Assistant Public Defender Gerry Spadaccini works in the fast-paced, high-volume world of the criminal docket at the Court of Common Pleas in New Castle County. Interestingly, court is his refuge from the joyful chaos he experiences at home, where he and his wife live with four daughters.

A native of the North Wilmington suburbs, Gerry is the middle child of five. His parents migrated down to Delaware from South Philadelphia as housing was first developed along the Route 202 corridor.

Gerry came to the law through science. When he graduated from Salesianum he was thinking seriously about a medical calling, so he pursued a biology degree at Ursinus College in Collegeville, Pennsylvania. Ursinus is a school known for producing physicians. He earned his degree, but was still discerning his life's direction, so he took a job on the line at the local General Motors plant. Gerry took a couple of graduate courses at the University of Delaware and then accepted a job with the Medical Eye Bank of Delaware, a nonprofit organization that recovered donated eyes and corneas for transplant and research.

Ready to further his education, but not ready to commit to medical school, Gerry searched for a course of study that would help him grow. In a time before *CSI* shows dominated television, Gerry ran across a Forensic Science program at George Washington University in Washington, D.C., that looked interesting. For much of the time that he worked on his Masters Degree, Gerry lived in the Wilmington area and took the train to our nation's capitol. He also met and married Stephanie and they



Gerry with his wife and daughters.

started their family. Gerry, having studied some criminal law in his Forensic Science program, decided that a law degree was a better fit for him and his new family than a medical degree. He enrolled at Widener in the extended program.

During his law school years, Gerry changed his day job and went to work with the Delaware Medical Examiner's Office, where he did administrative and program work. He stayed with the ME's office after graduation, and through that job he met Larry Sullivan, then Delaware's Public Defender. Larry saw something in Gerry that he liked, and talked with Gerry about a move to the PD's office once a hiring freeze was lifted. Sure enough, when Larry was free to hire, he hired Gerry. There was the matter of Delaware Bar admission to address. Gerry had been admitted to practice before the United States Patent and Trademark Office, and in New Jersey and Pennsylvania, but had to sit for the Delaware exam. He passed.

Initially, Gerry was called upon to consult with colleagues on forensics issues and handle cases in the Court of Common Pleas. Eventually, Gerry became the supervisor of the CCP unit, though he remains a forensics resource and continues to assist colleagues on a wide range of forensic science issues. He likes the work very much. He always has a good (and sometimes amazing) group of colleagues with whom he works. He likes the variety of

situations he confronts and the fact that he is in a position to help a great number of people because of the great volume of cases.

When Gerry is not at work he is attending to something with one or more of his children. Gerry and Stephanie are blessed with four daughters. In January 2016, all four girls will be teenagers for five months, until the oldest turns 20 years old. Gerry has been a dad longer than he has been a lawyer. In fact, when he started at Widener (now the Delaware Law School) his family included a 14-month-old and a 3-month-old. A third daughter was born during his time in law school. It was a challenge sometimes to study in such a loud house.

Gerry has learned a lot by living in a house full of females. Always an athlete, he grew up wrestling and playing football. His father was one of his football coaches.¹ Gerry also wrestled in college. The girls are athletes, too, but their interests have been in basketball, soccer, and especially, running. So, Gerry learned soccer, track, and cross country, and he has been a coach to the girls in these sports. Living

1. And he is still coaching at Sallies, at 80 years of age.

in a house full of females has taught him about diplomacy. In his house there is almost always at least one angry female, and he has to keep track of the alliances formed and alliances broken in the course of very little time. Somebody has to keep the peace (though it is usually his wife).

The pride Gerry expresses in his girls is genuine and considerable. He is proud of their accomplishments on the field of athletic competition and in the classroom. He is proud that they are all self-starters, very smart, and motivated. He is proud that each one has a sense of humor. He is proud of the women they are becoming and proud to be an important part of that development. With two daughters at college, the joyful chaos is a bit more manageable. But, when all four daughters are home, sometimes it can still be very loud. ⚖️

James G. McGiffin, Jr. is a Senior Staff Attorney with Community Legal Aid Society, Inc. and a former President of the Delaware State Bar Association. He can be reached at jmcgiffin@declasi.org.

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Course: Dravo Plaza at Riverfront Wilmington

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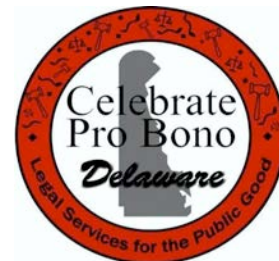
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By Chris Mourse

Law as a Business

It Is Not Just about the Numbers

My recent articles have been mostly about the numbers in your law practice.... financial statements, budgets, and accounts receivable. I have to say, it is difficult to succeed without taking the time to understand the critical numbers of your practice. But, the business side of your practice is not just about the numbers. And many, maybe most, lawyers prefer words to numbers. So, this article will talk about the non-financial aspects of your law practice that should be part of your strategies and objectives as they are just as important to your success.

In the 1990s, Robert Kaplan and David Norton developed a new set of measures called the *Balanced Scorecard* that organized the objectives and strategy of a business around four distinct perspectives: Financial, Customer (Client), Inter-

nal, Innovation and Learning. The name reflected the “balance” between short-term and long-term objectives, financial and nonfinancial measures, and internal and external performance. It was designed to be more than a measurement system, but a way to communicate and align an organization to new forward focused strategies and improved services and value to clients. (*Kaplan* p. vii-viii).

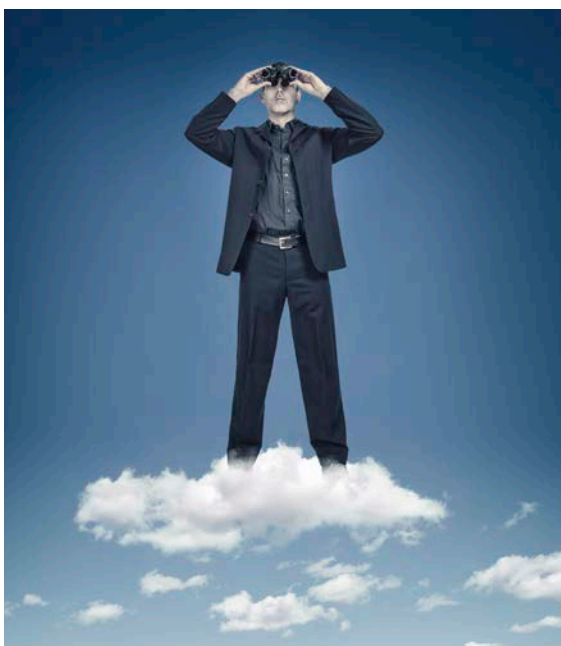
The measurement of these perspectives is important to any business entity and, be it a large entity or a small firm or solo practitioner, the principles of a balanced scorecard can be utilized to drive success.

The following are just some examples of how you might measure each balanced scorecard perspective:

1. The Financial Perspective: Prepare a budget and operational objectives and monitor them both monthly. The key is to make sure your financial measurements align with your operational objectives. A new pricing strategy, perhaps flat fee-based, for your core legal activities might generate more profit than your hourly-based system and be more appealing to a new set of clients that desire more control over their legal spend. Or, if a firm is focused on growth, it is probably more important to measure market share than it might be to measure expense reduction activities.

2. The Client Perspective: Strong and effective client relationships are the backbone of a successful law firm. A law firm can gain some very valuable information from their clients by measuring their engagements from the start to the finish. The core outcome measures according to Kaplan and Norton are client satisfaction, client retention, new client acquisition, and client profitability. You should understand where your clients come from, break them into customer segments and evaluate the revenue each segment brings you. Develop your marketing plans around developing the more profitable segments.


3. Internal Process Perspective: In addition to improving existing business processes, this perspective focuses on creating new and innovative processes based on your feedback from your clients and your goals to attract new clients and retain your existing ones. If you believe you are losing clients to alternative legal operating models, perhaps internet based, what can you do to create a value proposition that will be more



attractive to your clients? Mapping your internal processes and evaluating what can be done more efficiently is a good start. But, evaluating your internal processes and determining if there are opportunities to be truly different from your competition might be more rewarding.

4. Innovation & Learning Perspective: Attend CLEs that will increase your knowledge in the areas of law that you practice or wish to practice. Do not just attend CLEs that are convenient to your schedule. And, if you have partners, associates, and other staff, align and invest in them from a learning perspective so they are gaining knowledge that will be helpful to the future of your firm. When you attend a CLE or send staff or subordinates to any learning activity, always establish objectives as to how you or they will use their learning in your practice. Document and monitor these objectives. Too often individuals return to a busy practice after an interesting CLE or other learning experience and do not take the time to reflect on how they will utilize this new knowledge, much less to write it down and establish written objectives.

• • •

In summary, the balanced scorecard can allow you to establish and link strategies around the four perspectives. It can provide you with the ability to improve and manage the results of your practice because it focuses on the drivers of future success, not on the historical financial results of your past efforts. Implementation of a balanced scorecard is not a simple exercise, but it can be truly inspirational to the growth of your practice. 

Chris Mourse is the Law Practice Management Advisor for the DSBA. He can be reached at cmourse@dsba.org.



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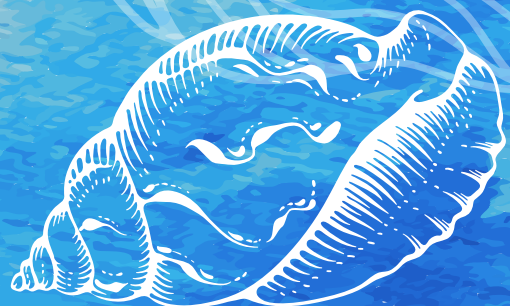
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Condolences to the family of **Charles E. Whitehurst, Jr., Esquire**, who died on September 13, 2015.

Condolences to the family of **Laura M. Nolte, Esquire**, who died on September 20, 2015.

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

-DISCIPLINARY ACTIONS-

PRIVATE PROBATION

ODC File No. 112460-B

Effective Date: August 12, 2015

A Delaware lawyer was placed on private probation for two years for violations of the Delaware Lawyers' Rules of Professional Conduct ("Rules") in connection with his failure to maintain his law practice's books and records. The private sanction was offered by a Panel of the Preliminary Review Committee and imposed with the consent of the lawyer. The Lawyers' Fund for Client Protection conducted an audit in 2014 which revealed deficiencies in the books and records. The lawyer also made misrepresentations as to the status of the firm's books and records to the Supreme Court on the 2013 and 2014 Certificates of Compliance.

DISABILITY INACTIVE

Jeffrey P. Wasserman, Esquire

Supreme Court No. 443, 2015

Effective Date: August 19, 2015

On August 18, 2015, the Delaware Supreme Court transferred Jeffrey P. Wasserman to disability inactive status, pursuant to Rule 19(b) of the Delaware Lawyers' Rules of Disciplinary Procedure. ☎

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Fall for Nuts

At the end of every holiday or celebratory meal, my grandfather would place a basket of mixed nuts — almonds, hazelnuts, walnuts, pecans, and Brazil nuts — in the center of the table along with some decorative metal nutcrackers. Thinking back on this tradition, I suppose that my grandfather considered the nuts a palate cleanser/digestive as well as a way to extend the conversations and stories beyond the antipasti, pasta, meats, and desserts. As we are in the midst of nut harvesting season with the holidays quickly approaching, I offer several nut dishes in this October issue. (The quantities below are intended to serve two, with the exception of the cookies, of course.)

APPETIZER: PEANUTS EGGPLANT AND PEANUT SPRING ROLLS

INGREDIENTS

1 pint fairy tale eggplant or 1 Sicilian eggplant
Extra virgin olive oil
1 tablespoon balsamic vinegar
6 to 8 spring roll wrappers (I recommend Blue Dragon brand.)
Salted, roasted shelled peanuts
2 scallions, thinly sliced
Red pepper flakes

DIRECTIONS


Slice the eggplant into strips. Heat several tablespoons of olive oil over medium high heat. Add the eggplant and vinegar and cook until browned and tender, stirring frequently. Remove the eggplant from the heat and let cool in a colander to drain any liquid. Prepare the wrappers according to the package instructions; this will involve placing each wrapper in water for several seconds until soft. For each wrapper, place a spoonful of eggplant in the center. Add as many peanuts, scallions, and red pepper flakes as you desire. Fold over the bottom and sides, then roll. Repeat and serve immediately with some duck sauce for dipping.

DESSERT: PINE NUTS PIGNOLI COOKIES

INGREDIENTS

1 8 ounce can almond paste
½ cup sugar
½ cup confectioner's sugar
¼ cup flour
2 - 3 medium egg whites slightly beaten
1½ cups pine nuts

DIRECTIONS

In a food processor, break up the almond paste into small pieces and mix in the sugars and flour. Once the mixture is finely ground, add the egg whites a little at a time until the dough comes together. Let the dough rest 15 minutes. Wet your hands, scrape a small spoonful and roll in the nuts. Bake 20 - 25 minutes at 300 degrees on parchment lined cookie sheets. 

MAIN COURSE: PISTACHIOS AND CHESTNUTS QUAIL WITH PISTACHIO STUFFING

INGREDIENTS

4 semi-boneless quail
½ cup dried cranberries, blueberries, and cherries
¼ cup salted, roasted shelled pistachios
2 tablespoons panko breadcrumbs
Extra virgin olive oil
Juice of one lemon
Sea salt
Fresh ground pepper

DIRECTIONS

Preheat the oven to 425 degrees. In a small bowl, mix the dried berries, pistachios, breadcrumbs, and a tablespoon of olive oil. Stuff the quail with the berry and nut mixture and place in a baking dish. Drizzle with additional olive oil and lemon juice, and season with salt and pepper to taste. Bake for about 20 minutes until the quail are golden brown.

BRUSSELS SPROUTS WITH CHESTNUTS

INGREDIENTS

1 pint brussels sprouts, stem ends cut off and sliced in half (or in thirds, depending on size)
Extra virgin olive oil
Sea salt
Fresh ground pepper
5 slices crystallized ginger, sliced in thin strips
6 to 8 roasted chestnuts, sliced in half (You can purchase these in a jar from Williams-Sonoma or your local grocery store.)

DIRECTIONS

In a large nonstick pan, heat several tablespoons of olive oil over medium heat. Add the brussels sprouts and season with salt and pepper. Stir in the ginger and chestnuts. Cook over medium high heat until the brussels sprouts are browned and caramelized, which will take about 12 to 15 minutes. Serve alongside the quail.



Susan E. Poppiti, is a mathematics teacher at Padua Academy High School

and managing member and cooking instructor for La Cucina di Poppiti, LLC and can be reached at spoppiti@hotmail.com. Other recipes and cooking tips are available on Susan's new food blog at www.cucinadipopppiti.com.

2ND ANNUAL DELREC CASINO NIGHT FUNDRAISER

TO BENEFIT ESSENTIAL LEGAL PROGRAMS INCLUDING THE DELAWARE HIGH SCHOOL MOCK TRIAL PROGRAM, LAW DAY, AND WE THE PEOPLE

FRIDAY, NOV. 6, 2015 🎰 BARCLAYS BANK DELAWARE 🎰 125 S. WEST STREET 🎰 WILMINGTON 🎰 CASINONIGHTDELREC@GMAIL.COM

6:30 PM REGISTRATION 🎰 CASINO NIGHT FROM 7 PM – 10 PM 🎰 SILENT AUCTION FROM 7:00 PM – 9:30 PM

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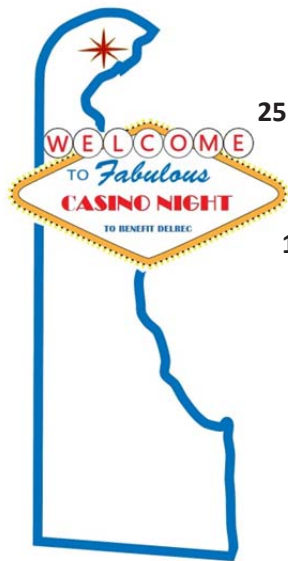
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