



# THE JOURNAL

OF THE DELAWARE STATE BAR ASSOCIATION



**Gregory B. Williams**  
Delaware State Bar Association  
President, 2013-2014



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## DSBA BAR JOURNAL

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# THE JOURNAL

OF THE DELAWARE STATE BAR ASSOCIATION

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By Gregory B. Williams, Esquire

# George Zimmerman Verdict: *Right, Wrong, or Just Another Example of the Imperfect Nature of the Law?*

**O**n July 13, 2013, the jury in the murder trial of George Zimmerman acquitted the self-appointed neighborhood watch captain in Sanford, Florida, of second-degree murder and manslaughter charges arising from his shooting and killing of Trayvon Martin, a teenager who was returning home from a trip to the local store to buy candy and iced tea. Like many Americans, in the wake of the verdict, I found myself internally conflicted and somewhat frustrated. After a few days of wrestling with my feelings, questions, and internal conflict, I believed it was important enough to write about it. This is my attempt to share my internal thought progression immediately following the verdict, my research on Florida's "stand your ground" law, thoughts on how Florida's law compares to Delaware's self-defense law, and to articulate some of the questions that I struggled with following the verdict and leave them for others to think about as well.

### Initial Thoughts and Internal Conflict Immediately Following the Verdict

First, as the father of a teenage male who often wears hooded sweatshirts as a comfort article going to school, around the house, or elsewhere, my first thoughts after the verdict were feelings of sympathy and the need to pray for Sybrina Fulton and Tracy Martin, the parents of Trayvon Martin. I thought to myself that Tray-

von's parents already had to endure and deal with the tragic and sudden killing of their teenage son, but now a jury was acquitting the person that killed their baby. Any reasonable person, no matter the race or color, and no matter their opinion on the verdict, certainly could sympathize with Ms. Fulton and Mr. Martin and the pain and frustration they must have felt in that instance.

Second, like President Obama and countless other African-Americans who have had the experience of being followed, feared, or suspected of past or future criminal activity simply because of race, I thought to myself "that could have been me" or even worse "that could have been Buddy (my son)." My thoughts progressed as follows: What is wrong with those folks in Florida? Wasn't there enough evidence to at least find Mr. Zimmerman guilty of manslaughter? Did those jurors honestly believe that it was Mr. Zimmerman on those tapes yelling for help when he was the one that had the gun? Wasn't Trayvon unarmed? Wasn't Mr. Zimmerman a grown man who outweighed Trayvon by more than 100 pounds? Didn't those jurors hear that 911 tape and that 911 dispatcher tell Mr. Zimmerman not to follow Trayvon? That kid went to the store, was walking back home, and wound up dead. Are you serious — this Zimmerman guy was not even a policeman — was I missing something? How do I explain this verdict to my son?

Third, the lawyer in me began to tell myself to calm down and take the emotion out of it. Take a look at the law and analyze it objectively. Although I had not followed the day-to-day of the trial closely, the clips on the news that I had seen or heard gave me some reason to question whether the prosecution could have done a better job. I asked myself several questions along the following lines: Did the prosecution prepare their witnesses adequately (or, at all, for that matter) or did the witnesses just not perform well under pressure? Why did the prosecution allow the central issue in the case to be framed as Mr. Zimmerman's right to stand his ground? What about Trayvon's right to stand his ground and defend himself and how did that factor into the jury's analysis, if at all? How did race factor into the equation, if at all? Did money or budgetary restrictions affect the quality of the prosecution? Could Zimmerman's killing of Trayvon Martin be justified as self-defense under Delaware law?

### A Quick Look at Florida's Stand Your Ground Law and Comparison to Delaware's Self-Defense Law

After my initial thoughts and conflict following the verdict, I decided to do some research on self-defense laws around the country, get a clear definition of what exactly is a stand your ground law, identify how many states have enacted stand your ground laws, and determine how

the law in Delaware tracks or differs from Florida's stand your ground law. In doing so, I discovered that "stand your ground" laws essentially remove the duty to retreat from a person before using force in self-defense. I also discovered that at least sixteen (16) states have stand your ground laws similar to Florida's law. Florida's statute provides that a person who has a reasonable fear of imminent peril of death or great bodily harm may use defensive force that is "intended or likely to cause death or great bodily harm to another" in specific circumstances. In the case of George Zimmerman's shooting of Trayvon Martin, the pertinent section of the statute used as a defense states as follows:

(3) A person who is not engaged in unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or

*“Like many Americans, in the wake of the verdict, I found myself internally conflicted and somewhat frustrated. After a few days of wrestling with my feelings, questions, and internal conflict, I believed it was important enough to write about it.”*

another to prevent the commission of a forcible felony.

Ten (10) other states have self-defense laws similar to stand your ground laws, but limit the no duty to retreat to one's home or other real property (such as an office). These laws are generally referred to as "castle doctrine" or "defense of habitation" laws. At least eighteen (18) states have self-defense laws imposing a duty to retreat before the use of deadly force. There are some variations among the laws of those states but, generally in those states, a duty to retreat means that you are not allowed to resort to deadly force in self-defense if it is possible to safely avoid the risk of harm or death.

In pertinent part, Delaware's self-defense statute provides at 11 *Del.C.* § 464 (e) that "[t]he use of deadly force is not justifiable under this section if: (1) The defendant, with the purpose of causing death or serious physical injury, provoked the use of force against the defendant in the same encounter; or (2) The defendant knows that the necessity of using deadly force can be avoided with complete safety by retreating . . . or by complying with a demand that the defendant abstain from performing an act which the defendant is not legally obligated to perform . . . ." Under Delaware law, however, there is no duty to retreat in or from one's dwelling, and there is also no duty to

President's Corner (continued on page 5)

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By Seth L. Thompson, Esquire

# The Honorable Abby Adams

In light of the significant number of new judges in the Family Court, Court of Common Pleas, and Superior Court, the editors of the *Bar Journal of The Delaware State Bar Association* have decided to utilize their column space for profiles of all the new judges.

• • •

The Honorable Abby Adams became Commissioner of the Court of Common Pleas for the State of Delaware on July 12, 2013. Her investiture occurred on July 26 in the Sussex County Courthouse in Georgetown. Court of Common Pleas Chief Judge Alex J. Smalls presided over the special session, and Supreme Court Justice Randy J. Holland administered the oath of office. Similar to the recently appointed Sussex County Family Court Judge Paula T. Ryan, Commissioner Adams received Justice Holland's tutelage in serving as his Law Clerk.

Immediately prior to taking the bench, Commissioner Adams served over six years as a Deputy Attorney General handling criminal appeals. Her service at the Delaware Attorney General's Office also included civil matters, particularly representing the State's professional boards and commissions.

Handling appeals provided valuable preparatory experience in reviewing trial transcripts with a large amount of judge-attorney interaction. This experience has made for a great transition from in front of the bench to behind it, where Commissioner Adams has already begun handling civil calendars and will soon tackle criminal calendars in Kent and Sussex

*“While the volume of the Court will be challenging, the Commissioner is excited to get into the full swing of the post.”*

Counties. That transition also included significant time observing the workings of the Court. While the volume of the Court will be challenging, the Commissioner is excited to get into the full swing of the post. When asked about the most surprising element, Commissioner Adams identified the name change petitions that often carry great emotion for the petitioners and thus come with real relief when granted.

Before her time as a Deputy Attorney General in Delaware, Commissioner Adams spent almost eight years working at the U.S. Securities and Exchange Commission in Washington, D.C. After starting in the S.E.C.'s Division of Enforcement, the second half of her employment involved reviewing mergers and acquisitions in the Division of Corporation Finance. During her time in Washington, Commissioner Adams earned her Master of Laws in taxation from Georgetown. Years later, in the winter of 2012, Commissioner Adams returned to Washington and completed a three-month fellowship with the National Association of Attorneys General, studying practice before the U.S. Supreme Court.

For her prior education, the Commissioner completed a Delaware trifecta of Lake Forest High School, the University of Delaware, where she received an Accounting degree, and Widener University School of Law. Commissioner Adams took the Certified Public Accounting examination,

but the excitement and opportunity to help people drew her to a career in law. While at Widener, her favorite course was Professor Geoff Moulton's White Collar Crime.

After law school, Commissioner Adams began her easily-identified favorite job, that of Law Clerk for Justice Holland. When asked about her least favorite job, the Commissioner readily admitted that she was not the greatest order picker at Playtex. That candor is in keeping with the characteristics she values most: honesty and full disclosure. On the other end of the spectrum, her least valued trait is someone who cannot laugh at his or her own foibles.<sup>1</sup> In her free time, the Commissioner enjoys tennis, gardening and projects around the house. Musically, she admires singer-songwriters, especially the long-lasting, but still earnest and prolific Bruce Springsteen. Her favorite word is affirmed, and her words of wisdom to new attorneys or those first coming before her are to be sure to cite to rules and case law, and to be prepared. There should be no questions on the matter that you cannot answer. Ⓢ

*Bar Journal* Editor **Seth L. Thompson** is a shareholder with Sergovic, Carmean & Weidman, P.A., 142 E. Market Street, Georgetown, Delaware. He may be reached at [seth@scdelaw.com](mailto:seth@scdelaw.com).

1. Somewhere, James Lipton is nodding in agreement.

retreat in or from one's place of work as long as defendant was not the initial aggressor.

Given that the shooting of Trayvon Martin did not occur in his home and, arguably, Mr. Zimmerman provoked the confrontation and/or had the opportunity to retreat, self-defense may not have been available to Mr. Zimmerman or may not have resulted in a not guilty verdict by a jury in Delaware. That gives me some comfort, but should I tell my son that we should avoid Florida?

### Ending Thoughts

As President Obama said in his statement on July 14th, "we are a nation of laws, and a jury has spoken." As an attorney and a U.S. citizen, I have the highest respect for our judicial system and will abide by its rulings. However, as we move forward as a nation from this tragedy, I am also reminded again that racial profiling still exists and the law, in all of its wisdom, is imperfect. Sometimes things can be found to be legal or justified under the law, but just not feel like justice to some of us. As social engineers, we need to constantly push the law to be better. ☎

**Gregory B. Williams** is President of the Delaware State Bar Association and a Partner at Fox Rothschild LLP. He can be reached at [gwilliams@foxrothschild.com](mailto:gwilliams@foxrothschild.com).

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To volunteer to become a mentor, you must:

- be an active member of the Delaware Bar.
- have a minimum of five years of experience.
- have read the Principles of Professionalism for Delaware Lawyers and The Delaware Lawyers' Rules of Professional Conduct and agree to promote and foster the ideals of Professional courtesy, conduct, and cooperation during your practice and encourage and remind your mentee to familiarize himself or herself with and adhere to the Principles of Professionalism for Delaware Lawyers and The Delaware Lawyers Rules of Professional Conduct.
- have not been subject to any disciplinary sanctions.

Visit the DSBA website at [www.dsba.org](http://www.dsba.org) and click "DSBA Mentoring Program" under News & Events to access the volunteer form.

If you are a new or recently admitted attorney and you would like to apply for a mentor, visit the DSBA website at [www.dsba.org](http://www.dsba.org) and click "DSBA Mentoring Program" under News & Events.

If you have any questions, please contact Rina Marks at [rmarks@dsba.org](mailto:rmarks@dsba.org) or (302) 658-5279.

## Professional Guidance Committee

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

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# CALENDAR OF EVENTS

## September 2013

### Tuesday, September 17, 2013

Social Security Retirement

3.0 hours CLE credit

Delaware State Bar Association, Wilmington

Webcast to Tunnell & Raysor, Georgetown

### Saturday, September 21, 2013

The #Wills Mega-Event

Brandywine Hundred Library, 1300 Foulk Road, Wilmington DE

### Friday, September 27, 2013

Technology and the Seasoned Litigator

3.0 hours CLE credit

Delaware State Bar Association, Wilmington

Webcast to Tunnell & Raysor, Georgetown

## October 2013

### Tuesday, October 1, 2013

Your Law Practice: Staying on the Right Side of the Rules (Part I)

3.8 hours CLE credit

Delaware State Bar Association, Wilmington

Webcast to Tunnell & Raysor, Georgetown

### Thursday, October 3, 2013

Recent Developments in Confidentiality Agreements in M&A Transactions

2.0 hours CLE credit

Delaware State Bar Association, Wilmington

Webcast to Tunnell & Raysor, Georgetown

### Tuesday, October 8, 2013

Reverse Mortgages

2.0 hours CLE credit

Delaware State Bar Association, Wilmington

Webcast to Tunnell & Raysor, Georgetown

### Thursday, October 24, 2013

Christopher W. White Distinguished Access to Justice Awards Breakfast

Hotel du Pont, Wilmington DE

### Friday, October 25, 2013

Supreme Court Review 2013 – A Discussion at the Highest State

and Federal Judicial Levels

3.0 hours CLE credit

Delaware State Bar Association, Wilmington

Webcast to Tunnell & Raysor, Georgetown

### Tuesday, October 29, 2013

Your Law Practice: Staying on the Right Side of the Rules (Part II)

3.5 hours CLE credit

Delaware State Bar Association, Wilmington

Webcast to Tunnell & Raysor, Georgetown

## November 2013

### Friday, November 22, 2013

Office and Trial Practice 2013

6.5 hours CLE credit

Chase Center on the Riverfront, Wilmington, DE



# SECTION & COMMITTEE MEETINGS

## September 2013

**Monday, September 9, 2013 • 12:30 p.m.**

Senior Lawyers Committee Monthly Luncheon Meeting  
Delaware State Bar Association, 405 North King Street, Suite 100, Wilmington

**Wednesday, September 11, 2013 • 12:00 p.m.**

Section Chair Meeting  
Delaware State Bar Association, 405 North King Street, Suite 100, Wilmington

**Thursday, September 12, 2013 • 4:30 p.m.**

Workers' Compensation Section Meeting and Happy Hour  
Young Conaway Stargatt & Taylor LLP, 1000 North King Street, Wilmington

**Friday, September 13, 2013 • 8:30 a.m.**

Multicultural Judges & Lawyers General Body Section Meeting  
Delaware State Bar Association, 405 North King Street, Suite 100, Wilmington

**Tuesday, September 17, 2013 • 12:30 p.m.**

Labor & Employment Law Section Meeting  
Morris James LLP, 500 Delaware Avenue, Suite 1500, Wilmington

**Thursday, September 19, 2013 • 12:00 p.m.**

Elder Law Section Meeting  
Delaware State Bar Association, 405 North King Street, Suite 100, Wilmington

**Thursday, September 19, 2013 • 3:00 p.m.**

Executive Committee Meeting and Dinner  
Buena Vista Conference Center, 661 South Dupont Highway, New Castle, DE 19720

**Friday, September 20, 2013 • 12:00 p.m.**

Corporate Council Section Meeting  
Delaware State Bar Association, 405 North King Street, Suite 100, Wilmington

**Monday, September 23, 2013 • 4:00 p.m.**

Taxation Section Meeting  
Morris James LLP, 500 Delaware Avenue, Suite 1500, Wilmington

## October 2013

**Thursday, October 3, 2013 • 4:00 p.m.**

Real & Personal Property Section Meeting  
Woloshin, Lynch, Natalie & Gagne, P.A., 3200 Concord Pike, Wilmington

**Monday, October 7, 2013 • 12:30 p.m.**

Senior Lawyers Committee Monthly Luncheon Meeting  
Delaware State Bar Association, 405 North King Street, Suite 100, Wilmington

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

*Save the Date*

## Office and Trial Practice

Friday, November 22, 2013 • Chase Center on the Riverfront, Wilmington, DE

Featuring Guest Speaker James R. Silkenat, Esquire  
President, American Bar Association, 2013-2014

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## TIPS ON TECHNOLOGY

By Richard K. Herrmann, Esquire

# The Delaware Supreme Court's New Arm of Court: The Commission on Law and Technology

**B**esides being known as the first state for ratifying the Constitution, Delaware enjoys a number of firsts in the area of law and technology. Our courts were the first in the world to conceive of and implement electronic filing in 1991. We were the first to have a state court rule relating to interactive briefs. Our district court was the first to create an electronic discovery default standard in 1995 before the amendments to the Federal Rules of Civil Procedure were adopted. And, now we are the first state to have a Supreme Court Commission on Law and Technology.

The July 1, 2013 Order creating the new arm of the Court recognized the need to provide “lawyers with sufficient guidance and education in the aspects of technology in the practice of law so as to facilitate compliance with the . . . Rules of Professional Responsibility.” The creation of the Commission follows the amendments to the ABA Model Rules of Professional Conduct in August 2012, adopting the work of the Ethics 20/20 Commission. The Delaware Rules were amended in January 2013, adopting much of the model rules. These amendments specifically focus on the need for lawyers to be competent in the technology they are using and to understand the impact the technology may have on client confidentiality.

There was a time, not many years ago, when the subject of practice management was not an approved topic to qualify for

CLE credit in many states. The times have changed, even prior to the amendments to the ABA Rules of Professional Conduct. Lawyers and courts have realized the practice of law has evolved dynamically, in no small measure, as a result of the increased importance technology has played in the daily practice and in litigation itself. The Supreme Court of Delaware was the first to realize this in the language of Rule 1 of the new Commission stating, “It is of utmost importance to the public and to members of the Bar that attorneys maintain their professional competence in technology.” The Court understands this “competency in technology is important not only in rendering legal services, but also in providing them in a manner which will not compromise privilege or confidentiality.”

Over the last decade, ethics issues relating to technology have been anecdotal. Many have been in the form of informal or advisory opinions. Others have related to specific breaches of ethical conduct. Organizations such as the ABA are fairly good at tracking certain ethical topics, such as metadata and cloud computing. But, they are all lacking two important elements, education and guidance such as best practices. It will be commissions, such as the one just created in Delaware, whose mission it is to develop and publish guidelines and best practices and to educate the members of the Bar in their use.

But, isn't there a danger here? Won't these new best practices create a minefield for those attorneys who have not followed them. Suppose in some malpractice ac-



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tion, some plaintiff attempts to establish liability on the grounds the attorney failed to follow the guidelines and best practices established in the legal community by the Supreme Court's Commission. The Court anticipated this issue and has made it clear in the Rules that it "is not the purpose of the Commission, its guidelines or best practices to mandate a standard that must be followed or to create any additional exposure to the Delaware Bar. If the creation of guidelines, or best practices could be used as evidence or support of a legal standard, there would be a tendency to create very limited or superficial guidelines or best practices. The work of the Commission needs to be useful and without fear that its work product will be used for an unintended purpose." To this end, the Rule provides that the failure of an attorney to comply with a published guideline or best practice is not admissible for any purpose in a civil action in any court.

The official effective date of the Commission is September 15, 2013. This will be an interesting year as we see the work of the Commission develop.

There is much to be done and more to talk about. For example, have you heard about the new American Inns of Court Technology University ([aictechu.org](http://aictechu.org))? The purpose of the Technology University is two-fold: (1) to confront and discuss solutions for ethical issues which arise when lawyers and judges use the latest technology in their practice; and (2) to distribute information on the latest technology available for lawyers and judges. Any of the 29,000 members of the American Inns is eligible to register and will have access to a growing body of information being developed by the deans of each college and those supporting the effort. But, that is the subject of another story. ☞

**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](mailto:rherrmann@morrisjames.com).

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

## Professor Klarman of Harvard Law to Headline New Bar Association Seminar on United States and Delaware Supreme Court Decisions To Be Held on Friday, October 25

**O**n Friday, October 25, 2013, a new Bar Association seminar will be inaugurated for those lawyers who want to be kept abreast of important United States and Delaware Supreme Court decisions. The seminar is titled "Supreme Court Review 2013 – A Discussion of Decisions at the Highest State and Federal Judicial Levels."

The seminar, to be held at the Bar Center from 8:50 a.m. to 12:30 p.m., is designed to provide lawyers with an invaluable understanding of United States and Delaware Supreme Court decisions in the previous year. All lawyers of whatever specialty who take pride in their professional credentials will want to be informed where federal and state decisional law is moving.

Professor Michael J. Klarman of Harvard Law School will review the headline decisions from the last term of the United States Supreme Court. Professor Klarman is an outstanding American

legal historian and constitutional law scholar. He holds M.A. and B.A. degrees from the University of Pennsylvania, a J.D. degree from Stanford Law School, and a D.Phil. degree from Oxford University, where he was a Marshall Scholar. Formerly, he was the James Monroe Distinguished Professor of Law, Professor of History, and Merrill Research Professor at Virginia Law School.

The discussion of the leading United States and Delaware Supreme Court decisions will be moderated by Supreme Court Justice Randy J. Holland. The Delaware Supreme Court portion of the seminar will be presented by a panel of lawyers in the civil and criminal law fields.

Justice Holland and Harvey Bernard Rubenstein, Esquire are the co-chairs of the seminar, which gives lawyers in Delaware a unique opportunity to learn about the decisions of the highest courts in the federal and state legal systems. It is a special seminar and one not to be missed. ☞

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By Charles Slanina, Esquire

# Conflict by Association

**C**onflicts of interest are a trap for the unwary. They can result in the loss of clients due to disqualification, malpractice liability, and disciplinary consequences. Most practitioners are aware of direct conflicts arising from their own involvement in a matter. Attorneys may be surprised by conflicts arising from third party involvement.

We all know that attorneys have a concurrent conflict of interest if the representation of one client is adverse to another, and such conflicts are prohibited by Rule 1.7 of the Delaware Professional Conduct Rules. Conflicts with former clients are governed by Rule 1.9, but are limited to the matters which are mostly the same or substantially related to the prior representation. Rule 1.8 details situations where issues unrelated to the representation may result in a conflict. Examples include the limitations relating to entering into a business transaction with a client, receipt of gifts from a client, sexual relations with a client, providing financial assistance to a client or receipt of compensation from someone other than a client without client consent, and prospective limitations on malpractice liability without the client being independently represented.

Attorneys can also have conflicts of interest imputed to them by association. Rule 1.10 can impute a conflict to an entire firm. As the rule states, “While lawyers are associated in a firm, none of them shall knowingly represent a client when any one

of them practicing alone would be prohibited by doing so....” As a result, lawyers moving between firms bring with them conflicts created by their actual personal knowledge or involvement in matters handled by their prior firm or practice. They do not, however, bring conflicts based on the general Rule 1.10 imputation of conflicts. Until Rule 1.10 was amended in 2009, the Model Rules did not recognize screening as a way to avoid the imputation of a lateral hire’s conflicts.

“Most practitioners are aware of direct conflicts arising from their own involvement in a matter. Attorneys may be surprised by conflicts arising from third party involvement.”

Association with non-attorneys can also create conflicts. Comment [4], which was added to Rule 1.10 in 2002, reflects a majority view that conflicts of non-lawyers, as well as conflicts arising from work done before a person became a lawyer ordinarily will not be imputed to the firm if the non-lawyer is screened to protect confidential information. Screening is defined in Rule 1.0(k) and Comments [8], [9] and [10] to Rule 1.0.

But, conflicts can also arise from an attorney’s associations with those outside the firm. Three recent opinions deal with the potential for conflicts involving an attorney’s contacts with experts. A California court ruled that an attorney should not have been disqualified by hiring an expert witness for the retrial of a matter

where that expert witness had been used by the other side in the original trial. The court held that because the opinions of the testifying expert — as opposed to a non-testifying consultant — are not subject to the attorney-client privilege or work product protection, opposing counsel may freely retain an expert witness who has testified for the other side. This ruling put the burden on the party seeking disqualification to show that the expert possessed confidential information protected by the attorney-client privilege or work product doctrine. *DeLuca v. State Fish Co.*, Cal. Ct. App. 2Dis., No. B2400597, 6/27/13.


A Nebraska court reached a similar decision in *Mid-America Agra Prods./Horizon, LLC v. Rowlands*, Neb., No. S-12-473, 7/19/13 in which a law firm that hired an expert who previously spoke to the opponent about the same case was not disqualified. The firm was able to overcome the presumption that the expert shared the other side’s confidences with the firm. Under Nebraska case law, there is a bright-line rule that attorneys who change firms are prohibited from being involved in a representation against a client of the attorney’s former firm if the current and former matters are the same or substantially related. (*See* DL-RPC Rule 1.9). In addition, the attorney’s new firm is disqualified from handling the matter because there is an irrebuttable presumption that lawyers in a firm share confidences. However, the court found that

the irrebuttable presumption does not apply when an expert changes sides. The court noted that the roles of lawyers and experts are different and that a different rule should apply because experts do not have the same duty of loyalty to clients nor do they have a sustained relationship with the attorneys who hire them.

Another California opinion trended against disqualification based on an attorney's association with an outside party. The court ruled that a plaintiff's counsel in a class action would not be disqualified for talking with the defendant's consultant because the defendant was unable to meet his burden of proof that the expert had or would disclose confidential information about the defendant to plaintiff's counsel. *Kane v. Chobani, Inc.*, N. D. Cal., No. 12-CV-02425-LHK, 8/12/13. Caution should be exercised in relying on this case. Disqualification motions are largely discretionary with the trial court. Many courts opt to place the burden of proof on the would-be disqualified party to disprove receipt of confidential information.

We can reasonably expect there to be future conflict questions raised by attorney associations with outside parties. What will the outcome be when opposing counsel or firms use the same service provider for cloud storage of confidential client information, the outsourcing of discovery document review, or off-shore research services? Changing technologies coupled with a growing willingness of attorneys to seek the disqualification of their opponents make this a topic likely to see additional case law.

*"Ethically Speaking"* is available online. The columns from the past two years are available on [www.dsba.org](http://www.dsba.org).

*\*\*"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.* 

**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](http://www.delawgroup.com).

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# Exchanges... New Avenues for Health Insurance

By Aaron W. Mitchell, REBC

In four short months, Healthcare Reform will offer insurance to the uninsured. It will eliminate the ability for an insurance company to deny coverage for a medical care because it was a “pre-existing condition.” It will financially penalize those who choose to go uninsured. It will establish minimum essential benefits and establish maximum out of pocket limits. It will even limit the range of premiums. These rules will exist in any health plan available.

As employers and individuals, we have no control over the parameters that all health plans will follow. Your employees will benefit from many of these new plan requirements. Your firm’s objective will continue to be to identify the best place to secure insurance. This is where the real challenge and the real opportunity arises. Healthcare Reform has created many new places in which to purchase health insurance for your employees. These new platforms have been labeled *Exchanges*.

These Exchanges will come in many shapes and sizes. There are public exchanges for individuals and small groups. There are private exchanges for individuals and groups of all sizes. An Exchange is quite plainly “a place designed for selling insurance and other benefits.” Know that all Exchanges are not created equal and may vary greatly in the plan designs and premiums.

When we look to next year, we eagerly await the release of plans, designs and prices under the Marketplace and the SHOP exchange offered to Delaware residents and Delaware firms with 50 employees or less.

There are already private exchanges in existence and many more that will begin in 2014 and beyond. Many will present options that will feel like group plans. Others will be designed to let each employee select the health insurance company and plan that is right for them. These may be available to firms of all sizes.

The plans offered in 2014 will be the result of years of planning, yet we still are left waiting to see if we will be

paying less for more coverage, or paying more for less coverage. Insurance carriers are being asked for the first time to provide plans and prices without medical underwriting. It is inevitable that there will be many changes in 2014, 2015, and beyond as we adjust to this new world of health insurance.

Some firms will find that the new legislation will not have a significant impact on their group health insurance premiums; others may see the largest increases (or even decreases) that we have seen in decades. Individuals buying coverage will find that the rates today may be a fraction of the plans available on January 1st. October will bring the answers to many of these questions.

For those firms whose plans renew in January, February, or March, the best advice we can provide is to be patient, define your firm’s goals for health insurance, and then take the time to evaluate both the current outlets for health insurance, as well as the new Exchanges. Stay tuned in the coming months for feedback on the new rates and plans yet to be released for 2014.

*This is part one in a series of articles on the new Exchanges available for Delaware Firms and Individuals. DSBIS is a wholly owned insurance brokerage subsidiary of the Delaware State Bar Association. DSBIS serves all insurance needs for attorneys, their firms, their families, and their clients. DSBIS was formed by Delaware attorneys for Delaware attorneys.*

*Aaron Mitchell is DSBIS’ lead marketing representative, coordinating all lines of insurance. He specializes in group benefits and life insurance. Contact Aaron at (302) 397-0170.*



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By Susan Simmons

## September: Back to School



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**W**e all have probably seen the embarrassing interviews conducted by late-night talk show host Jay Leno, when he asks the most simple of questions on current events, history, and geography and people simply do not know the answers. The American Bar Association conducted its own unofficial survey, asking people at Millennium Park some basic civics questions, apparently the answers (or lack thereof) were shocking. Questions like:

- How many U.S. senators are in Congress?
- When was the Declaration of Independence signed?
- How many justices are on the U.S. Supreme Court? Name one of them. In jest, one person answered Dr. Seuss. Clearly, not funny.

And, who can forget former presidential hopeful U.S. Rep. Michele Bachmann, R-Minn., identifying New Hampshire as the “state where the shot was heard around the world.” The correct answer is Massachusetts.

The cover story of the May 2011 issue of the ABA Journal tried to address “Why America’s kids know so little” about civics. It reported that, according to a recent study published by the Thomas B. Fordham Institute, a Washington, D.C.-based educational think tank, only one state, South Carolina, received an A for its civics programs and teaching students about American history. Most states fell in the category of “mediocre to awful” when graded in categories of clarity, specificity, content, and rigor. Delaware received a grade of F in:

Content and Rigor: 0/7

Clarity and Specificity: 0/3

Total Score: 0/10

At least half of all this country’s high schools do not require students to take civics and only three states require that it be taught in middle school. Delaware’s social studies standards are divided into four strands: geography, civics, economics, and history. The history strand is divided into four standards, directing students to “employ chronological concepts in analyzing historical phenomena (Chronology); “gather, examine, and analyze historical data (Analysis); “interpret historical data (Interpretation); and “develop historical knowledge of major events and phenomena in world, United States, and Delaware history (Content).”

Past ABA President Stephen Zack made this issue a top priority during his year in office. Zack fled Cuba as a teen during the 1961 revolution. He talked about how he carried a worn version of the old Cuban constitution, which he said was “nearly identical” to the U.S. Constitution. Zack said, “As lawyers, I believe we have a fundamental responsibility to foster civic education of America’s youth.” Don’t you agree?

The latest offering from the ABA is the iCivics program, which educates students from fourth grade to seniors in high school about their rights, how to become an active member of their community, and how their national and local governments work. The iCivics program is interactive and teaches through game playing. The end result is not only to produce better-educated students, but also to make them more active participatory citizens.



Former U.S. Supreme Court Justice Sandra Day O'Connor has toured the country pushing for teaching civics in the classroom. She has spoken to the U.S. Senate Committee on the Judiciary about the necessity to better educate children and adults about our country. In March 2009, Justice O'Connor went on *The Daily Show* with Jon Stewart and promoted civics through Our Courts. Justice O'Connor was the keynote speaker at Games for Change in 2010, and iCivics was featured at the Games for Change conference in New York in 2011. The Washington Post Editorial Board highlighted the shortcomings of civics, and the efforts of iCivics. *Newsweek* featured Justice O'Connor and the iCivics initiative on Independence Day, 2011. The ABA has set up academies in various cities where lawyers teach students about the law and justice, the Constitution, rights and responsibilities, freedom and equality, and American pluralism. Our youth are taught "What does it mean to be an American?" and "What does it mean to be a citizen?"

In the *Delaware Docket*, the Newsletter of the Delaware Courts, we read: "Under the leadership of Justice Randy J. Holland, who serves as State Chair, the iCivics program in Delaware is making great strides. iCivics is a national web-based education project designed to teach middle school students. The program was initiated by former United States Supreme Court Justice Sandra Day O'Connor to ensure that students are getting the information and tools they need for effective civic participation, and that civics teachers are provided better materials and support."

The iCivics program, which is based at Georgetown University Law School, provides Internet-based games for students and materials for teachers on its web site at [www.icivics.org](http://www.icivics.org). Games include such choices as "Do I Have a Right," in which the player runs a firm specializing in constitutional law; "Executive Command," which lets students play president; and "LawCraft," which provides the player with the experience of being a member of Congress.

"We are pleased that Delaware is a leader in leveraging online civics resources to benefit Delaware's youth. Justice O'Connor's iCivics initiative provides an innovative approach to promoting civics education in Delaware," stated Supreme Court Justice Randy J. Holland.

In order to get the word out in local schools, each state has a chair who is a high level member of the judiciary, as well as a state coordinator, to ensure that information about the project reaches local schools. Franny Haney, of the Administrative Office of the Courts, serves as Delaware's coordinator and has been working with local schools to promote the project. She says, "Delaware's schools are making increasing use of the iCivics Program," and adds that "the Program ties together well with our 'From the Classroom to the Courtroom' Project that we hold every summer to provide middle school teachers with information about the courts."

In 2012, the initiative was sponsored by: the Delaware Supreme Court iCivics Pro Bono Project; Justice Randy J.

Holland, Delaware Chair for iCivics; the Women and the Law Section led by Laina Herbert, Esquire, 2012 Women and the Law Section Chair; Superior Court Judge Jan R. Jurden; and the Delaware Paralegal Association, with assistance from the Administrative Office of the Courts. This initiative was approved as a *pro bono* project for those members that participated.

If you or your firm is interested or already participates in *pro bono*, please let us know:

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**Susan Simmons** is the Director of Development & Access to Justice Coordination at the Delaware State Bar Association and can be reached at [ssimmons@dsba.org](mailto:ssimmons@dsba.org).



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# Report: Annual Meeting of the ABA House of Delegates

By William D. Johnston, Esquire

**T**he American Bar Association's House of Delegates, the principal policy-making body of the ABA, met August 12-13, 2013 in San Francisco during the ABA Annual Meeting. The "Delaware Delegation" included: Harvey Bernard Rubenstein, State Delegate; Justice Henry duPont Ridgely, Delegate from the Appellate Judges Conference of the ABA Judicial Division; Michael Houghton, Immediate Past President of the National Conference of Commissioners on Uniform State Laws; and yours truly, State Bar Delegate.

Per usual, the meeting of the House included remarks by the officers of the ABA and by the Association's Executive Director. In addition, President Laurel G. Bellows passed the gavel to President-Elect James R. Silkenat.

We also heard from U.S. Attorney General Eric H. Holder and from former U.S. Secretary of State Hillary Rodham Clinton. Former Secretary Clinton received the ABA Medal, the Association's highest award.

John G. Levi, Chairman of the Legal Services Corporation, thanked the ABA for its continuing support of enhanced funding of legal services for the poor. In addition, a panel of experts addressed issues of concern regarding legal education.

As is typical, certain resolutions were adopted by the House through the use of a "consent calendar." Other resolutions were adopted after presentation on the floor of the House. They included the following (with the resolution number included in the parentheses):

- Urging legislative bodies and governmental agencies to adopt laws and policies that ensure full and adequate court funding and adopting the *Principles for Judicial Administration*, dated August 2013, as appropriate guidance for those states desiring to establish principles for judicial administration in their efforts to restructure court services and secure adequate court funding (Resolution 10C);

- Supporting the establishment of access to justice commissions in all states and territories (Resolution 10D);

- Urging Congress to act expeditiously to preserve and protect voting rights by legislating a coverage formula setting forth the criteria by which jurisdictions shall or shall not be subject to Section 5 preclearance, and/or by enacting other remedial amendments to the Voting Rights Act of 1965, in response to *Shelby County v. Holder* (Resolution 10E);

- Urging courts with jurisdiction over adult guardianship and governmental agencies that administer representative payment programs for benefits to collaborate with respect to information sharing, training and education in order to protect vulnerable individuals with fiduciaries who make financial decisions on their behalf (Resolution 100A);

- Urging Congress to enact the Supplemental Security Income ("SSI") Restoration Act of 2013 (H.R. 1601) or similar legislation that strengthens SSI by updating the limits on resources to account for inflation (Resolution 100B);

- Supporting the rights of all Americans, particularly our nation's veterans, to access adequate mental health and substance use disorder treatment services and coverage, and urging states, in implementing the essential health benefits provisions of the Patient Protection and Affordable Care Act, to fully and adequately provide for mental health and

substance use disorder coverage (Resolution 101);

- Approving the Uniform Prevention of and Remedies for Human Trafficking Act, promulgated by the National Conference of Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein (Resolution 102);

- Adopting principles that should be applied in determining the availability of attorney-client privilege for law firm consultations with the law firm's in-house counsel (Resolution 103);

- Urging the highest courts of states and lawyer regulatory authorities to coordinate with their foreign regulatory counterparts and enter into voluntary arrangements to facilitate the exchange of relevant information, consistent with the jurisdictions' rules, and adopting the *Guidelines for an International Regulatory Information Exchange*, dated August 2013 (Resolution 104);

- Reaffirming the ABA's 1991 and 2003 commitments to sustainable development and defining sustainable development as the promotion of an economically, socially, and environmentally sustainable future for our planet and for present and future generations (Resolution 105);

- Urging all countries not to apply statutes of limitation with respect to 1) genocide, 2) crimes against humanity, and 3) serious war crimes (Resolution 107A);

- Encouraging the establishment of a network of U.S. federal and state judges to facilitate education and permissible communication among judges regarding the interpretation and application of the 1980 Hague Convention on the Civil Aspects of International Child Abduction (Resolution 107B);

▪ Affirming that the U.S. common law doctrine of *forum non conveniens* is not an appropriate basis for refusing to confirm or enforce arbitral awards that are subject to the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the Inter-American Convention on International Commercial Arbitration (Resolution 107C);

▪ Adopting the black letter *Standards for Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means*, dated August 2013, to supplant the Standards adopted August 1996, and recommending appropriate implementation of these Standards by entities providing civil *pro bono* legal services to persons of limited means (Resolution 109);

▪ Urging states, localities and territories to analyze their election systems and recent experiences of election delays, if any, in light of available data and scholarship, and encouraging the enactment of legislation or administrative rules to address the causes and potential remedies for election delays (Resolution 110);

▪ Encouraging governments to provide training and resources necessary to fully implement and enforce compliance with the Indian Child Welfare Act (25 U.S.C. §§ 1901-63) (Resolution 111A);

▪ Urging implementation of the December 2012 report of the U.S. Attorney General's National Task Force on Children's Exposure to Violence, entitled *Defending Childhood*, and urging governments and courts to implement promptly the Report's recommendations which call for trauma-informed approaches and practices in regard to justice system-involved children and youth who have been exposed to violence (Resolution 111B);

▪ Urging governments to take legislative action to curtail the availability and effectiveness of the "gay panic" and "trans panic" defenses, which seek to partially or completely excuse crimes on the grounds that the victim's sexual orientation or gender identity is to blame for the defendant's violent reaction (Resolution 113A);

▪ Urging governments to enact legislation relating to youth in the juvenile justice system with co-occurring mental

health and substance disorders that increases (a) grants for services for youth with such disorders which evaluate the effectiveness of prevention and treatment programs, (b) funding for local access to health care for such youth and their families, and (c) collaboration among agencies involved in juvenile justice, mental health, and substance abuse treatment in providing effective forms of locally-accessed and institutional treatment models (Resolution 113B);

▪ Urging governments to review their mandatory reporting laws for instances of child abuse or neglect to determine what changes, if any, are appropriate to better protect children and to provide appropriate sanctions for failure to report abuse and neglect (Resolution 113C);

▪ Urging governments to re-examine strict liability offenses to determine whether the absence of a *mens rea* element results in imposition of unwarranted punishment on defendants who lacked any culpable state of mind in performing acts that were not *malum in se* (Resolution 113D);

▪ Opposing plea or sentencing agreements that waive a criminal defendant's post-conviction claims addressing ineffective assistance of counsel, prosecutorial misconduct, or destruction of evidence unless based upon past conduct that is specifically identified in the plea or sentencing agreement or transcript of the proceedings (Resolution 113E);

▪ Adopting the black letter of the *ABA Criminal Justice Standards on Fair Trial and Public Discourse*, dated August 2013, to supplant the *ABA Criminal Justice Standards on Fair Trial and Free Press* (Resolution 113F);

▪ Urging Congress to amend the Electronic Communications Act to reflect the technological and societal changes which have occurred since the original passage of the statute (Resolution 114);

▪ Supporting enactment of comprehensive legislation to authorize needed permanent and temporary judgeships, with particular focus on the federal districts with identified judicial emergencies so that affected courts may adjudicate all cases in a fair, just, and timely manner (Resolution 115);

▪ Urging governments to promote the human right to adequate housing for all through increased funding, development and implementation of affordable housing strategies, and to prevent infringement of that right (Resolution 117);

▪ Condemning unauthorized, illegal governmental organizational and individual intrusions into the computer systems and networks of lawyers and law firms and urging governmental bodies to examine and, if necessary, amend or supplement, existing laws to promote deterrence and provide appropriate sanctions (Resolution 118);

▪ Supporting the authority of the U.S. Patent and Trademark Office to cancel a patent claim in congressionally-established administrative proceedings, and supporting the authority of a court to dismiss a suit based on such a claim, notwithstanding an earlier conflicting non-final court judgment relating to the claim (Resolution 300B); and

▪ Offering ABA dues pricing of \$95 to judges and lawyers in public service who establish a group as specified (Resolution 301).

Mike Houghton again did Delaware proud, speaking on the floor of the House in support of the most recent contribution on the part of the Uniform Law Commission — Resolution 102, the Uniform Prevention of and Remedies for Human Trafficking Act. Now, it is up to Delaware and other states and territories to adopt a form of this critically important law as part of the fight against the scourge of human trafficking.

Also noteworthy were two resolutions that were *not* presented during the meeting of the House, Resolutions 10B and 108. Each resolution addressed judicial disqualification issues, but with different approaches. The Conference of Chief Justices, then chaired by Chief Justice Myron T. Steele, helpfully interceded, offering to assist in the drafting of a mutually acceptable resolution. As a result, Resolutions 10B and 108 were withdrawn by their sponsors — presumably in anticipation of (what I hope will be) presentation of a single, revised resolution during a future meeting of the House.

# We hear you knocking; come on in!

By Santino Ceccotti, Esquire, and Melissa R. Allman, Esquire

*“Only when we eliminate bias and fully include people with disabilities in our profession will our job be complete.”*  
—Past ABA President Wm. T. (Bill) Robinson


According to the most recent data from the U.S. Census Bureau, nearly 54.4 million Americans reported having a disability — nearly one in five. Thus, it can easily be said that individuals with disabilities constitute our nation’s largest minority group. Medical, technological, and attitudinal advances have opened doors and eliminated barriers for individuals interested in pursuing a legal career to whom this avenue was previously closed. As more lawyers with disabilities embark on their careers and become fellow Bar members, all of us will recognize the benefits of working with and hiring individuals with disabilities.

During his tenure as DSBA President, James G. McGiffin, Jr., recognized that the time had arrived for the DSBA to seize its unique opportunity to be at the forefront in opening its doors to persons with disabilities. In an effort to encourage conversation and action on this critical issue, an ad hoc committee comprised of members of the Bench and Bar was formed to identify issues relating to lawyers with disabilities.

In 2012, the newly formed DSBA Committee on Legal Professionals with Disabilities collaborated with the University of Delaware Center for Community Research and Service (CCRS) on a study aimed at understanding the extent to which Delaware attorneys face barriers, impediments, or disabilities that hinder their practice of law. As part of the research project, a survey was fielded to the entire DSBA membership encouraging respondents to participate regardless of whether they felt they had some type of condition that hindered their ability to engage in the practice of law. The survey instrument used the term “condition” rather than “disability” so as not to discourage responses from those who may not consider themselves to be people with disabilities in the traditional sense and to cover a broad range of obstacles faced by Delaware lawyers. It was also designed to generate recommendations as to how the DSBA could help reduce or eliminate obstacles and facilitate a greater degree of participation in professional practice among attorneys with disabilities.

Following the collection of the data, a survey report was published providing analysis and discussion of the survey’s findings and recommendations for future action. 22% percent of all DSBA members responded to the survey, and 11% indicated they have a disabling condition that hinders their ability to practice law. Most of the respondents who reported disabling conditions or impediments experienced a negative impact on their employment opportunities, and nearly a third said they received negative comments from supervisors or co-workers about their condition. There was, in fact, a higher rate of unemployment among respondents with disabling conditions and a possible correlation between lower annual earnings and the presence of a disabling condition. Respondents said they were reluctant to disclose disabling conditions that were not apparent to others for fear of stigma and negative professional repercussions, in particular where substance abuse or mental health conditions were involved. Respondents who requested reasonable accommodations for their disabilities reported that they were generally granted, but only 25% of those who responded to the survey actually requested accommodations, possibly because they were unaware that an accommodation could be made or feared drawing attention to a disabling condition.

The survey report recommended several actions the DSBA could take in an effort to increase awareness and sensitivity toward Delaware attorneys with disabilities. The report suggested that the DSBA offer complementary continuing legal education concerning protections and resources for practicing Delaware lawyers with disabilities. The report also recommended that the DSBA provide links on its website to legislation concerning disabilities and governmental entities with the authority to address employment discrimination. The report further urged the DSBA to explore the possibility of establishing a peer support system for Delaware attorneys with disabling conditions and an immediate response system to provide advice for attorneys who believe they have experienced employment discrimination. The survey results also demonstrated a need for increased accommodations at DSBA functions, including special seating and dietary options. The over-arching theme throughout the recommendations was a need for increased awareness and sensitivity to fellow practitioners with conditions or obstacles that hinder their practice of law.

The DSBA has already begun its efforts to act on the survey’s recommendations, and we fully expect to report on those tangible steps in the near future. Our discussion of the survey’s findings and recommendations is not exhaustive. To view the full report, go to <http://www.dsba.org/index.php/news/348-final-report-of-survey-of-dsba-members-to-assess-the-presence-of-conditions-that-hinder-their-practice-of-law.html> 

**Santino Ceccotti** is in the Appellate Unit with the Office of the Public Defender. He chairs the DSBA Committee on Legal Professionals with Disabilities and can be reached at [Santino.Ceccotti@State.de.us](mailto:Santino.Ceccotti@State.de.us).

**Melissa Allman** is a staff attorney at Community Legal Aid Society, Inc. She represents clients who have claims of discrimination under the Fair Housing Act. She can be contacted at (302) 575-0660 ext. 223.

• • •

The House of Delegates will next meet on February 10, 2014 during the ABA Mid-year Meeting in Chicago. As always, please let me hear from you with any comments, questions, or concerns (wjohnston@ycst.com or (302) 571-6679).

Many lawyer and judge members of the DSBA enjoy active involvement in the ABA's sections, divisions, and forums. If you are not currently involved, please check out the ABA website (www.americanbar.org) to review and consider the many opportunities offered.

It continues to be my privilege and pleasure to serve as your representative in the House of Delegates. Many thanks to all. ☺

**Bill Johnston** is a partner with Young Conaway Stargatt & Taylor, LLP and is a Past President of the Delaware State Bar Association. He serves as State Bar Delegate to the ABA House of Delegates, elected by members of the DSBA.

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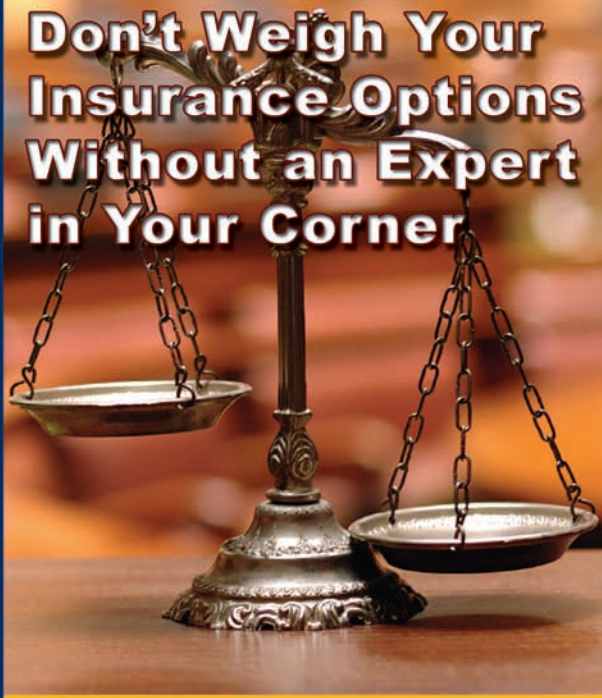
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## DE-LAP ZONE

A Message from the Delaware Lawyers Assistance Program

By Carol P. Waldhauser, Executive Director

# A Lawyer's Fractured Fairy Tale

**J**ohn Doe's rise in the legal profession was so rapid that even his peers described both his personal and professional life as full of hard work accompanied with good fortune, good timing, and a bit of luck. Many see John as living the American Dream. So, why is John's family worried that his fairy tale life is about to become a fractured fairy tale? Could it be they know John is a high-functioning alcoholic?

A high-functioning alcoholic is someone who is an alcoholic but is able to maintain his/her outside life, i.e., career or home or family and friendships, all while drinking alcoholically. This type of alcoholic has the same disease as the "skid-row" alcoholic, but shows different signs of the disease. And, the disease itself progresses differently within the individual.

Ironically, many high-functioning alcoholics are not seen as being alcoholic at all because most have succeeded and/or overachieved academically, professionally, and personally. Unfortunately, this success can, and often does, increase the symptom of denial in the high-functioning alcoholic. Accordingly, it is their denial that makes them less apt to feel they need treatment for the disease of alcoholism.

It is a well-known fact that many people, including those in the legal profession, find themselves struggling with unhealthy, expensive, and often life-threatening addictions, and/or other compulsive behaviors. And, if asked, many other individuals might tell you that they know someone — family, friend, and/or peer — that they believe has a drinking problem or is a high-functioning alcoholic.

Alcoholism is an equal-opportunity destroyer. It can affect anyone regardless of race, ethnic background, socioeconomic status, profession, and/or station in life. It is a common saying in the field of alcohol counseling that the alcoholic is the last person to know that he or she has a problem with alcohol. Rather, an individual's family, peers, partners, and friends often know before the alcoholic admits they are drinking alcoholically.

Needless to say, most individuals do not intend to become addicted to alcohol. However, mirroring our fictitious character John, there comes a point when some people begin to depend on the alcohol not just to feel good, but to feel normal. Gradually, the occasional use of alcohol may turn into weekly use, then daily use, and eventually the user comes to the distressing realization that he or she is addicted to alcohol.

### The Facts

A landmark study in 2007 by the National Institute on Alcohol Abuse and Alcoholism (NIAAA) categorized alcoholics into five subtypes: 19.5 percent of alcoholics are the "functional" subtype; 31.5 percent are the "young adult" subtype; 21 percent are the young antisocial subtype; 19 percent are the intermediate familial subtype (middle-aged with mental illness); and only 9 percent are the "chronic severe" subtype that fits the stereo-type of the low-bottom alcoholic. A little known statistic is that other addiction experts estimate that between 75 percent and 90 percent of alcoholics are high-functioning.

Additionally, excessive alcohol consumption causes more than 100,000 deaths annually in the United States, with 24

percent of these deaths due to drinking and driving, 11 percent to alcohol-related homicide, and 8 percent to alcohol-related suicide.

It is important to realize the legal profession is vulnerable to this disease. According to Douglas B. Marlowe, Ph.D., and J.D. in *Alcoholism: Symptoms, Causes & Treatments, And Stress Management For Lawyers*:

Alcoholism exacts an exorbitant toll on lawyers, the legal system, and consumers of legal services. In a 1990 study, conducted by the North Carolina Bar Association, a staggering 17 percent of the 2,600 attorneys surveyed admitted to drinking 3-5 alcoholic beverages per day. In the state of Washington, another study found that 18 percent of the 801 lawyers surveyed were problem drinkers. It is estimated that the number of lawyers in the United States actively abusing alcohol and drugs is twice that of the general population. Approximately 40 percent to 70 percent of attorney disciplinary proceedings and malpractice actions are linked to alcohol abuse or a mental illness. p. 240

Dr. Marlowe states further that "despite this high incidence, lawyers suffering from alcoholism often feel painfully alone. Fearing discovery or retribution, they are reticent to ask questions or attempt to learn more about their problem."

As members of the legal profession, most lawyers spend their time dealing with other people's problems, often ignoring their own. The day-to-day pressures and deadlines of practice sometimes cause lawyers themselves to succumb to substance abuse, addiction,



or other compulsive behaviors. Even for the high-functioning alcoholic, without treatment, the suffering lawyer's family and work can be drastically affected.

### Why Do Some People Get Addicted While Others Do Not?

While many individuals do not become addicted, some people do because of their vulnerability. Genetics is a big contributor to the risk of addiction, and the nature of this contribution is extremely complex. Remember, too, that addiction is a disease. More specifically, addiction is a brain disease characterized by compulsive behavior, continued abuse of drugs despite negative consequences, and persistent changes in the brain's structure and function. Also, addiction is similar to other chronic illnesses because it has biological and behavioral components, both of which must be addressed during treatment. Like other diseases, however, it is preventable and treatable. It changes biology, and if untreated, it can last a lifetime.

In fact, the disease model of alcoholism contains three core components that are frequently utilized in the discussion of any addiction:

**Tolerance.** This is said to be evident when, after exposure and repeated use, an increased amount of the drug is needed to produce the same effect.

**Withdrawal symptoms.** These are experienced when the effects of the drug wear off, and they vary according to the substance taken. Common withdrawal symptoms include tremors, hot flushes, and nausea

— these are typically relieved by another dose of the drug.

**Craving.** This is the addict's overwhelming desire to take the particular drug of choice even in light of persistent problems caused by the substance.

Furthermore, this disease develops in stages, and denial is a major symptom. Recovery from it (protracted abstinence and restored functioning) is often a long-term process requiring repeated episodes of treatment. Plus, relapses can occur during or after treatment, and signal a need for treatment adjustment or reinstatement. Participation in support programs during and following treatment can be helpful in sustaining long-term recovery. Therefore, full recovery is a challenge, but it is possible.

### Is Someone You Know A High-Functioning Alcoholic?

If you, or someone you know, can check any of the symptoms listed below — they may suffer from a serious health problem.

- Have you ever felt you should cut down on your drinking or drug use?
- Have people annoyed you by criticizing your drinking or drug use?
- Have you ever felt guilty about your drinking or drug use?
- Have you ever had a drink or other drug to steady your nerves or relieve a hangover?
- Have you ever broken a promise to reduce your drinking or drug use or to quit altogether?
- Has drinking or drug use interfered with your work, marriage, or other commitments?

- Have you ever lied to cover up your drinking or drug use?

- Are you drinking or using drugs during the workday?


- Are you coming to work after a long night of drinking or drug use and then counting the hours until the end of the workday to have a drink or use again?

### Attendance Problems

- Arriving late
- Leaving early
- Taking “long lunches”
- Not returning to work after lunch
- Missing appointments
- Unable to be located
- Ill with vague ailments
- Absent (especially Mondays/Fridays)
- Improbable excuses for absences
- Last minute cancellations

### Trust Account

- Checks not deposited
- Debit card withdrawals
- Incomplete or irregular records
- Pay office expenses from trust
- Pay personal expenses
- “Borrowing” from trust
- Failure to timely disburse
- Incomplete accounting for receipts & disbursements

Remember John? This illness can ruin marriages and careers, break up families and law firms, undermine financial security, destroy a person's physical and mental health, and may lead to incarceration and sometimes to premature death. All of this is avoidable if the illness can be identified and treated in time. If you are concerned about someone and do not know what to do call the Delaware Lawyers Assistance Program (DE-LAP) (302) 777-0124 or e-mail [cwaldhauser@de-lap.org](mailto:cwaldhauser@de-lap.org) for confidential, free help. 

**Carol P. Waldhauser** is the Executive Director of the Delaware Lawyers Assistance Program and can be reached at [cwaldhauser@de-lap.org](mailto:cwaldhauser@de-lap.org).



# Voluntary Good Practices Guidance for Lawyers: *Our Role in the Fight Against Crime and Terrorism*

By Robert J. Krapf, Esquire

## Background

The Financial Action Task Force on Money Laundering (“FATF”) is an inter governmental body created by the G-7 Summit in 1989. In 1990, FATF issued the so-called “Forty Recommendations,” which represent the core principles of anti-money laundering. In June 2003, FATF amended the Forty Recommendations to extend their application to include lawyers. The Forty Recommendations were further revised in 2012, and can be found at “International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: the FATF Recommendations,” [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf).

In 2006, FATF completed its evaluation of the USA and as a result:

1. determined that U.S. lawyers are “non-compliant” in the areas of:
  - a. customer due diligence,
  - b. monitoring of customers, and
  - c. filing of suspicious activity reports (an “SAR”); and
2. recommended that the U.S. government create regulations requiring anti-money laundering obligations to apply to “persons involved in real estate closings and settlements.”

The American Bar Association (“ABA”) created the Task Force on Gatekeeper Regulation and the Profession (the “Task Force”) in 2002 to address a number of perceived threats to the legal profession arising from anti-money laundering efforts, and the ABA House of Delegates vigorously opposed any regulation of lawyers that could adversely affect the attorney-client privilege. The Task Force opposed the 2006 recommendations of FATF, as they threatened the independence of the

profession and its self-regulation through the states and threatened to erode the attorney-client privilege. In 2008, the ABA House of Delegates ratified its support of the Task Force’s position. Eventually the Task Force, incorporating participation from the American College of Mortgage Attorneys (“ACMA”), the American College of Real Estate Lawyers (“ACREL”), and the American College of Trust and Estate Counsel (“ACTEC”), as well as other specialty bar associates, prevailed in defeating SAR-based regulation (referred to internationally as a “suspicious transaction report” or “STR”), persuading the U.S. Treasury Department (“Treasury”) to agree to a position aligned with the ABA’s position, and, together with other bar groups from around the world, negotiating successfully with FATF to create a set of risk-based guidance for legal professionals entitled “RBA Guidance for Legal Professionals” (“Lawyer Guidance”). A copy of the Lawyer Guidance can be found on the FATF website at <http://www.fatf-gafi.org/dataoecd/5/58/15842211.pdf>. For a more thorough summary of the evolution of this process, see Kevin L. Shepherd, “Guardians at the Gate: The Gatekeeper Initiative and the Risk-Based Approach for Transactional Lawyers,” *Real Property, Trust and Estate Law Journal* (Winter 2009).

The Lawyer Guidance contains 126 separately numbered paragraphs. It is a complex document that addresses different audiences (e.g., private sector and public authorities), undertakes to identify the money-laundering and terrorist financing issues specific to the legal profession, and outlines the risk factors that lawyers need to consider in developing a risk-based system.

The Lawyer Guidance is high-level guidance intended to provide a broad framework for implementing a risk-based

approach for the legal profession. It does not offer detailed direction on the application of this approach to specific factual situations, nor does it attempt to address jurisdictional variations among the FATF member countries, but it does implicitly recognize the practical realities of the practice of law in an increasingly complex environment. For those reasons, the Lawyer Guidance urges the legal profession generally, or in each country, to develop “good practice in the design and implementation of an effective risk-based approach.”

After the issuance of the Lawyer Guidance, the Task Force, with input from several sections of the ABA as well as ACMA, ACREL, ACTEC, and the American College of Commercial Finance Lawyers (“ACCFL”), drafted a voluntary good practices guidance. The intent of this voluntary set of good practices is to create a general teaching tool that lawyers across the country can use to learn about money laundering and terrorism financing issues and threats and to create due diligence procedures for their own practices in order to avoid providing legal services to persons or entities where the engagement might involve those illegal activities.

In 2010, representatives of these U.S. professional organizations, with input from Treasury representatives, finalized their proposed guidance in a document titled “Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing” (“Voluntary Good Practices Guidance”). A copy of the Voluntary Good Practices Guidance can be found on the Delaware State Bar Association’s website at <http://www.dsba.org/index.php/news/350-voluntary-good-practices-guidelines.html>.

The Voluntary Good Practices Guidance is risk-based and not rule-based. Rather than imposing a specific standard of care on lawyers, the Voluntary Good Practices Guidance provides a resource for lawyers and law firms to develop risk-based approaches tailored to the work of the individual lawyer or firm. Those approaches may vary from law firm to law firm based on factors such as geography, type of practice, size of firm, and types of clients. Because the Voluntary Good Practices Guidance is risk-based, simpler protocols can be used for lower-risk situations and more rigorous protocols for higher-risk situations.

The Voluntary Good Practices Guidance touches a large number of lawyers, not just those involved in real estate transactions. Lawyers who “prepare for or carry out” one or more of five “specified activities” are covered by the Voluntary Good Practices Guidance. These specified activities include buying and selling real estate, commercial real estate financings, managing client accounts, managing client assets, managing contributions to companies, and creating companies.

The focus of the risk-based approach is the due diligence for evaluating a client or a transaction, whether a new client or an existing client. Under the Voluntary Good Practices Guidance, different levels of client due diligence can be used depending on the applicable risk factors for the client and the transaction. For example, if the lawyer is contacted by a new client from out of state who wants the lawyer to help close the purchase of a convenience store with the client’s winnings from Las Vegas, the lawyer might do more inquiry than merely run a conflict search. Most of the risk factors are intuitive and consistent with most firms’ existing client intake procedures.

The individual task force members of the professional organizations involved in this effort have sought the endorsement by their respective organizations of the Voluntary Good Practices Guidance. This process is important, as successful endorsements by the major professional groups in the legal community will demonstrate to Treasury and Congress that

the legal community takes seriously the threats of money laundering and terrorist financing and the role of the profession in helping to combat those risks within the bounds of our professional responsibility to our clients. This effort then allows the ABA to resist the pressures from FATF, Treasury, and Congress, to impose a federal regulatory scheme on the legal profession. Among other groups, ACMA, ACREL, ACTEC, ACCFL, the ABA Taxation Law Section, the ABA Real Property, Trust and Estate Law Section, and the Delaware State Bar Association, among other state bars, have endorsed the Voluntary Good Practices Guidance.

### **ABA Takes Action**

The final step in having the Voluntary Good Practices Guidance receive the broadest possible endorsement was for the Guidance to be endorsed by the ABA itself. Although the ABA House of Delegates previously adopted resolutions supporting the principles behind the Voluntary Good Practices Guidance, the Guidance itself had not been presented to the House of Delegates. But, on August 10, 2010, the House of Delegates approved Resolution 116 adopting the Voluntary Good Practices Guidance. This action of the House of Delegates means that the Voluntary Good Practices Guidance is now official ABA policy.

Recently, the ABA Standing Committee on Ethics and Professional Responsibility issued its Formal Opinion 463 on the Voluntary Good Practices Guidance. Periodically, this ABA Committee issues ethics opinions to guide lawyers, courts and the public in interpreting and applying the ABA Model Rules of Professional Conduct to specific issues of legal practice, client-lawyer relationships, and judicial behavior. Formal Opinion 463, issued May 23, 2013, finds that the model rules and the Voluntary Good Practices Guidance are consistent in their ethical principles, including loyalty and confidentiality. By implementing the risk-based measures set out in the Voluntary Good Practices Guidance, where appropriate, a lawyer can avoid aiding illegal activities in a manner consistent with the model rules. Moreover, the opinion states

that “lawyers should be conservative with the risk-based measures and controls . . . and use these for guidance” as the lawyer develops client intake and client monitoring processes.

### **What’s Next**

The next task of the profession is to educate the legal community in the Voluntary Good Practices Guidance. For the Delaware State Bar Association, that will mean having CLE programs and pursuing other means of educating our fellows as to the Guidance and the risks it is designed to minimize. The Delaware State Bar Association expects to remain at the forefront in these efforts and will be launching various initiatives to educate our lawyers about the Guidance and how best to manage the risks to our society of money laundering and the financing of terrorism. ☰

**Robert J. Krapf** is a director and the president of Richards, Layton & Finger, P.A., and can be reached at [krapf@RLF.com](mailto:krapf@RLF.com).

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## BOOK REVIEW

Reviewed by Richard A. Forsten, Esquire

# The Agony and the Ecstasy: *The Roberts Court, The Struggle for the Constitution*

By Marcia Coyle (Simon & Schuster, 2013)

Time flies when you are having fun, or so the old saying goes. In that regard, it seems hard to believe John Roberts became Chief Justice of the Supreme Court some eight years ago. In her book, *The Roberts Court, The Struggle for the Constitution*, National Law Journal correspondent Marcia Coyle looks back at the first seven terms of the Roberts Court (through June 2012), with a primary emphasis on four cases: *Parents Involved In Community Schools v. Seattle School District No. 1*, regarding the use of race as a basis for school assignment in public schools, *District of Columbia v. Heller*, concerning the Second Amendment and gun rights, *Citizens United v. Federal Election Commission*, concerning campaign finance laws, and *National Federation of Independent Business v. Sebelius*, regarding the constitutionality of Patient Protection and Affordable Care Act (more generally called “Obamacare”). While more than 50 percent of the Court’s decisions have been decided unanimously, or by 8-1 or 7-2 counts, the four cases featured in Coyle’s book (as well as numerous others she discusses) were all decided by a 5-4 count. Coyle focuses on these 5-4 decisions for two reasons. First, they are, in her view, “landmark” decisions. And, second, she believes it is with the closely-divided decisions that one learns the most about the individual justices and their views. Her book, like any book, has its strengths and weaknesses.

Chief among its strengths is that it provides an excellent primer on the four

“While more than fifty percent of the Court’s decisions have been decided unanimously, or by 8-1 or 7-2 counts, the four cases featured in Coyle’s book (as well as numerous others she discusses) were all decided by a 5-4 count.”

featured cases and does a very nice job describing the issues, the parties and the holdings of these cases. In particular, Coyle provides much background to the cases not gleaned from the opinions themselves. She traces each of the cases from the initial facts giving rise to the case, through the District and Circuit Courts, to the briefs and arguments before the Supreme Court. Along the way, she introduces the parties and their lawyers, their goals and strategies. And, of course, she provides the legal background and arguments made in each case. For anyone looking to become more familiar with the issues and the cases, the book is quite helpful and most interesting.

Coyle also presents a fair amount of “behind the scenes” information about the Court and the decisions. She interviewed six of the Justices (mostly on background), and quotes them (mostly anonymously) from time to time, giving another perspective on the Court and its work. One aspect that comes through from her discussions with the Justices is that they all strive to get along and for the most part they do. One Justice tells her that “When you arrive, it’s

apparent they’re all friends. They disagree passionately sometimes, but they don’t take it personally.” Another Justice explains, “Who on the Court is the sort of person who is going to carry a grudge? Nino Scalia isn’t going to carry a grudge. Clarence Thomas is going to pat you on the back and give you a hearty laugh all the time.”

Coyle’s book, though, is not straight reporting, much as it tries to be. She clearly dislikes the Court’s decisions in *Seattle School District No. 1*, *Heller*, and *Citizens United*, while she appreciates the Court’s decision upholding Obamacare. She divides the Court into the “conservative” wing and the “moderate-liberal” wing. When the conservatives dissent (as they did in Obamacare), it is “an angry dissent,” but when the “moderate-liberals” dissent, it is a “passionate” dissent.

Coyle closes her work with a reflection on Chief Justice Roberts’ confirmation hearings. During those hearings, he was asked what kind of Justice he would be, and whether he would be a truly modest, temperate, careful judge in the tradition of Harlan, Jackson, Frankfurter, and Friendly. Coyle concludes: “at least for the one term

Book Review (continued on page 31)



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## A PROFILE IN BALANCE

By James G. McGiffin, Jr., Esquire

# Everything is better with Salsa: Tabatha Castro

**I** f 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 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

• • •

Tabatha Castro is a busy woman. She is a trail blazing lawyer. She is a business owner. She is a community leader. She is a role model. She is a mother. And, she is grateful for the opportunities she has to be all of these things.

Born in Brooklyn and raised by her Puerto Rican parents, Tabatha is a proud New Yorker. She placed a premium on education as a young adult, and secured two undergraduate degrees from the University of Buffalo (in Legal Studies and Latin American Studies) and a Master of Science degree from Buffalo State College (Criminal Justice). She then trained her sights on law school.

As life would have it, Tabatha was blessed with the birth of her son during the last semester of her master's degree program. The event inspired Tabatha to choose Widener Law School so that she could be close to her sister, who had relocated to Delaware. While in law school and parenting her child, Tabatha also worked for the law library and for

Doroshow Pasquale Krawitz Siegel & Bhaya. She founded the Latin American Law Student Association and joined the Moot Court Honor Society Executive Board. Clearly, she likes to keep busy.

Doroshow, et al., took on Tabatha as an associate when she graduated in 2002. She moved to Marshall Dennehey Warner Coleman & Goggin, and thought she might stay there, but she was approached by Vivian Rapposelli with the idea of forming a completely bi-lingual law firm. The appeal was irresistible, and Rapposelli Castro & Gonzales was created. She was grateful for this experience and,

subsequently, Tabatha started her own firm, The Castro Firm, in 2006. Located in the Trolley Square area of Wilmington, she and her associates handle all family law matters, personal injury, worker's compensation, corporations, DUI cases, and immigration work. Tabatha has held the dependency and neglect contract with Kent County Family Court since January 2007. The firm has a diverse client base, but Tabatha advertises herself as Tu Abrogada Latina (your Latina lawyer) and her staff is Spanish-speaking.

Tabatha candidly admits that she feels the pressure of owning a business. She must set an example for her employees. She has substantive legal and administrative work to juggle at all times. But, she enjoys the feeling of walking into an office that is really her office, and she is proud of her success.

Balancing family and work is always a challenging problem, and Tabatha tackles it head on. She added a daughter to her family six years ago, and she often brings her children to the office, where they will read or watch movies while she works. She encourages her 14-year-old son to do her filing and he reluctantly complies. They also take advantage of a nearby park for recreation. Tabatha enjoys cooking for the family, which now includes her fiancé, and they are all film fans. She even set up a small theater in her home.



At movie premiere of "To Be King." Courtesy of Falling Leaves Films, LLC

To keep pace with this busy life, Tabatha takes care of herself. She tries to work out routinely each week, often in zumba or body combat classes. She also keeps culturally stimulated, traveling to New York City monthly for film premieres (her fiancé is a New Yorker, an actor, and an independent film maker) and sporting events. She loves the New York Knicks, Jets, and Yankees and gets to a few Knicks and Jets games every year.

Tabatha values her place in the Delaware legal and social communities and takes very seriously her obligation to contribute. She is a sponsor of the annual Girls Can Do Anything Conference, providing role models and positive messages for girls. She is a long time board member of the Latin American Community Center. She serves with the United Way of Delaware and recently helped to establish their affinity group called Latinos Unidos. Her Bar activities include working with the Multi-cultural Judges and Lawyers Section as Vice Chair of Legislative Affairs, and being one of the first members and Vice

President of the Delaware Hispanic Bar Association.

She is also the Wilmington Chapter President of the National Association of Professional Women. Tabatha started a Delaware Divorce Blog with fellow attorney, Drew Gonser to help individuals with their domestic matters ([www.delawaredivorceblog.com](http://www.delawaredivorceblog.com)).

Delaware might have been the last place this New Yorker would have predicted to be her chosen home, but 15 years later, Delaware is the place where she has been able to make a difference in her community, raise a family, and become successful as a lawyer. Tabatha calls living in Delaware “a blessing.” It is clear that this is a mutual blessing. Delaware has gained much with the addition of this Latina lawyer. ⚖️

**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](mailto:jmcgiffin@declasi.org).

**Book Review** (continued from page 28)

that will be known always for its historic, landmark health care decision, Roberts could answer that senator’s long ago question about whether he would be a moderate, temperate judge like Harlan, Jackson, Frankfurter, and Friendly, with a simple ‘Yes.’”

Of course, no author (nor any reviewer for that matter) is free from bias. And, while Coyle’s own biases and preferences may surface from time to time, those biases do not detract from the otherwise fine job she does telling the stories of these cases. Timing, of course, is everything, and so Coyle’s book does not include any discussion or analysis of the most recent term of the Roberts Court; but, perhaps in another seven years or so, she will write another engaging look at the Court’s work. That book should be worth reading as well. ⚖️

**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](mailto:rforsten@saul.com).

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# The 2013 Combined Campaign Cup Results

By Makenzie Windfelder, Esquire, and Charles B. Vincent, Esquire

The First Annual Combined Campaign Cup was an overwhelming success. Thanks to the efforts of many members of the Litigation and Young Lawyers Sections of the DSBA, including Sean Brennecke, Charlie Vincent, Jason Warren, and Makenzie Windfelder, the inaugural event and silent auction netted more than \$16,000 in proceeds to benefit the Combined Campaign for Justice. More than 120 golfers and volunteers braved ninety degree temperatures to compete in the golf tournament at Deerfield and attend the dinner and silent auction. With a combined score of 56, the foursome of David J. Soldo, Russ Manel, David A. Dorey, and Mike Trudgeon won the 2013 Combined Campaign Cup.

Thank you to the event's sponsors listed below, and a special thank you to Just Legal Inc., the course beverage sponsor, who kept golfers hydrated throughout the day, and to Wilcox & Fetzer, who ran the \$10,000 putting contest. Pictures from the event will be posted online this month. We look forward to seeing you in 2014 at next year's tournament! 🏆

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The co-chairs of the 2013 Combined Campaign Cup: Charles B. Vincent, Makenzie Windfelder, Sean Michael Brennecke, and Jason D. Warren.



The winning foursome with a score of 56: David J. Soldo, Russ Manel, David A. Dorey, and Mike Trudgeon.



Ed Jarosz took the shot for \$10,000, but will have to try again next year!

Photos courtesy of CCJ



**PRIVATE ADMONITION**

**Effective Date: July 2, 2013**  
**ODC File No. 2012-0297-B**

An attorney received a private admonition with conditions for violation of Rule 1.3 (“a lawyer shall act with reasonable diligence and promptness in representing a client”), Rule 3.3(b) (“A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal”) and Rule 8.4(d) (it is professional misconduct for a lawyer to “engage in conduct that is prejudicial to the administration of justice”) of the Delaware Lawyers’ Rules of Professional Conduct (“Rules”). A Panel of the Preliminary Review Committee offered the sanction of a private admonition to which the attorney consented.

The attorney entered an appearance in Superior Court in a civil case. A Motion for Pro Hac Vice for an out-of-state attorney was filed and granted by Superior Court. The Delaware attorney and the out-of-state attorney were members of the same firm. The Delaware attorney remained “local counsel” in the litigation.

Discovery responses prepared by out-of-state counsel were reviewed by the Delaware attorney “for form” but not content. The Delaware attorney did not attend depositions.

At a deposition, the out-of-state attorney learned of the existence of an original document that was altered by the client. Out-of-state counsel discussed the issue with the Delaware attorney. The document was not produced to opposing counsel prior to trial. The Delaware attorney failed to take remedial measures when it came to his attention and made no effort to determine whether the document was produced to opposing counsel.

**PRIVATE PROBATION**

**Board Case No. 108190-B**  
**Effective Date: July 17, 2013**

An attorney received private probation for violation of the Delaware Lawyers’ Rules of Professional Conduct. A Panel of the Preliminary Review Committee offered the sanction of a one (1) year private probation to which the attorney consented.

The attorney was retained to represent a client in a criminal matter. The attorney deposited the retainer into the operating account prior to being earned, failing to safeguard his client’s funds in violation of Rule 1.15(a) (“A lawyer shall hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property”).

Further, the attorney failed to provide a written statement to his client that the fee was refundable if not earned, failed to provide a written statement explaining the basis under which the fee shall be considered and failed to retain the fee in your escrow account until such time as the funds are earned in violation of Rule 1.5(f) (“In circumstances in which a lawyer requires a client to pay some or all of the fee in advance of the lawyer undertaking the representation, the lawyer shall provide the client with a written statement that the fee is refundable if not earned; the written statement shall state the basis under which the fee shall be considered to have been earned and all unearned fees shall be retained in the lawyer’s trust account”).

**PRIVATE ADMONITION**

**ODC File No. 2012-0055-B.**  
**Effective Date: July 23, 2013**

A Delaware lawyer was privately admonished 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 (“PRC”), and imposed with the consent of the lawyer. The lawyer admitted violations of Rule 1.15(d), Rule 8.4(c) and Rule 8.4(d). The Lawyers’ Fund for Client Protection conducted audits in 2010, 2011, and 2012, all of which revealed deficiencies in the books and records. The lawyer also made misrepresentations as to the status of the books and records to the Supreme Court on his 2010 and 2011 Certificates of Compliance.

**PRIVATE PROBATION**

**ODC File No. 108222-B.**  
**Effective Date: July 29, 2013**

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 (“PRC”) and imposed with the consent of the lawyer. The lawyer admitted violations of Rule 1.15(d), Rule 8.4(c) and Rule 8.4(d). The Lawyers’ Fund for Client Protection conducted an audit in 2012 which revealed deficiencies in the books and records. The lawyer also made misrepresentations as to the status of the books and records to the Supreme Court on his 2011 and 2012 Certificates of Compliance. ⚖️

# Make Sure Your Expert is Really an Expert - Passing the Daubert Test

By William A. Santora, CPA, Director, Santora CPA Group

**W**hen business valuation issues are at the heart of the matter, a qualified, experienced valuator is a tremendous asset. Valuation professionals can do everything from providing well-researched and reasonable appraisal opinions, to critiquing opposing experts' conclusions, to helping attorneys draft deposition and cross-examination questions.

But, courts increasingly hold expert witnesses to a higher standard — considering, among other things, the expert's education, experience, and credentials. An expert who fails the court's admissibility standards may be completely or partially excluded from testifying, putting the party that's retained the expert at a significant disadvantage. That's why attorneys need to be familiar with the guidelines for admitting expert witnesses when using a valuator in a legal context.

## Understand the Daubert Effect

According to Federal Rule of Evidence (FRE) Rule 702, if scientific, technical, or other specialized knowledge will help a judge or jury make sense of evidence or understand facts, an expert witness may testify. In 1993, a U.S. Supreme Court case, *Daubert v. Merrell Dow Pharmaceuticals Inc.*, affirmed judges' roles as gatekeepers against "junk science."

In an important distinction, rather than addressing the accuracy of an expert's opinion, Daubert focuses on the reliability and relevance of an expert's analyses. The *Daubert* test includes the following criteria:

**Testing:** Has the opinion been tested?

**Peer review:** Has it been reviewed by other practitioners? Has the methodology been published in professional journals?

**Error rate:** What is its known rate of error? Has the expert's profession established standards to control its use? If so, has the expert complied with these standards?

**Acceptability:** Is it generally accepted among members of the scientific community?

The Supreme Court intended courts to apply these factors with flexibility and consider the method's replicability. For example, a new method might pass muster if another expert can replicate the expert's analyses — and if the expert can persuade the court that the method is appropriate for the case.

Because the original *Daubert* case dealt specifically with medical testimony, the legal community initially questioned whether it applied to technical or specialized expert testimony. But in 1999, *Kumho Tire Company v. Carmichael* ended this debate, extending the scope of *Daubert* beyond scientific testimony to other academic disciplines.

## Review Daubert Criteria

When assessing an expert's chances of withstanding a *Daubert* challenge, it's important to look beyond education, professional designations, industry experience, and reputation for qualities that could lead to exclusion during a *Daubert* challenge. These include mathematical errors, of course.

Courts have disqualified experts for cherry-picking documents and data sets that supported their side's financial interests. And courts often expect a high level of due diligence concerning the company's operating history and its financial projections. For instance, a disclaimer that the valuator accepted a company's projections at face value (without assess-

ing reasonableness) might raise a red flag during a *Daubert* hearing.

In addition, ongoing professional relationships or contingent fees may impair an expert's perceived objectivity. Reliable experts maintain independence and avoid acting as advocates for their clients. Obviously, an expert's testimony shouldn't extend beyond his or her area of expertise. Make sure to review relevant *Daubert* case law when challenging opposing experts or defending your expert.

## Survive Daubert Challenges

Before motioning for a *Daubert* hearing, realize that the opposition will likely fire back with a similar motion. So, first consider your own expert's reliability and the relevance of his or her methodology.

An objective review by a third expert to reveal both experts' mistakes and weaknesses could be helpful. In some cases, your expert's methodology may be sound, but his or her report may require minor improvements. For example, it might be a good idea to ask your expert to explain why he or she rejected alternative methods or excluded specific documents — before you launch an attack on the opposition.

## Be Daubert-Smart

In addition to assessing an expert witness's qualifications, a *Daubert*-savvy attorney reviews the valuator's report and evaluates whether the underlying methodology conforms to academic literature and professional standards. Doing so can help the attorney identify "junk science" before it has a chance to waste resources and cause courtroom blunders.

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*The views expressed in the article above are not those of the DSBA, its officers, employees, or editors of the DSBA Bar Journal.*

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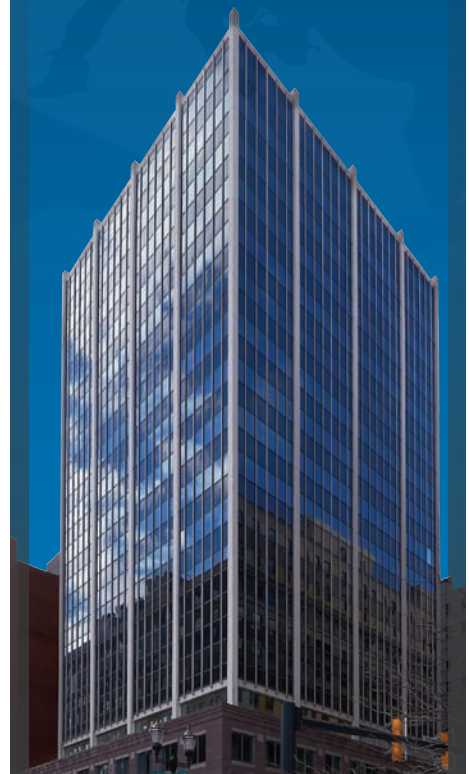
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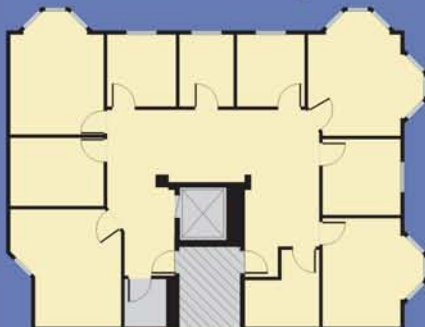
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The Deputy Alderman is a part-time judicial position requiring 16 to 20 hours per month consisting of one to two mornings per week depending on the Court's schedule. It is preferred that applicants shall have practiced law for at least five years, with some criminal practice. Judicial experience or quasi-judicial experience in the form of mediation, arbitration and other forms of dispute resolution is a plus.

The Newark Alderman's Court has a unique subject matter jurisdiction. The court docket includes violations of City ordinances, including criminal misdemeanors, motor vehicle violations and building code violations.

Compensation is set by City Council. Interested applicants should send letters of interest and resumes for receipt not later than **September 30, 2013** to: Renee Bensley, City Secretary, City of Newark, 220 S. Main Street, Newark, DE 19711, Phone: 302-366-7070, Fax: 302-366-7067, Email: rbensley@newark.de.us.



# Kitchen Supply List

One of the most exciting things about the start of a new school year, for me, was shopping for school supplies — clean spiral notebooks, colorful folders, and florescent highlighters. Sometimes, there were even specialty items on a teacher’s list such as a protractor and compass.

This September, while students are shopping for back to school supplies, you should consider investing in some new kitchen supplies. Below is a list of gadgets and electronics that I use on a regular basis. They would make worthwhile additions to your kitchen cabinets and drawers.

▪ **Ice Cream/Sorbet Maker** – I recommend the Cuisinart ice cream maker that comes with an extra freezer bowl. When I conduct a cooking lesson or host a dinner party, an ice cream, gelato, or sorbet is likely to be on the menu, whether as a dessert or a palate cleanser. This is the most expensive item on the list, running about \$70, but it is well worth the variety of frozen treats that it will generate.

▪ **Microplane Zester/Grater** – This is a versatile tool that serves two main purposes in my kitchen. One is to zest lemons, which involves removing the outermost rind of the fruit for use in baking or seasoning. One of my favorite recipes calling for lemon zest is for the famous French tea cakes – Madeleines. The other function of this tool is to grate cheese, such as Locatelli or Parmesan, over pasta or into a meatball mix.

▪ **Tapered French Rolling Pin** – This type of rolling pin has no handles; rather, it is a solid piece of wood that is tapered at the ends. These pins are narrower and lighter than the more common roller roll-

ing pins. As a result of their distinct shape, these pins are easy to maneuver to round your pastry and to lay the pastry into a tart pan or pie dish.

▪ **Ceramic Quiche Dish** – This is a shallow dish traditionally used by the French to make quiche; however, I typically use it for tarts, both savory – tomato or mushroom – and sweet – pear or apricot. I also use this dish to make flan, my favorite Spanish dessert, as it distributes the heat to the custard more evenly than any other baking dish.

▪ **Nested Glass Bowl Set** – My stack-able glass



bowl set is from Williams Sonoma and contains ten bowls. The larger ones are perfect for mixing batters and dough while the smaller ones are ideal for separating eggs and collecting ingredients to assemble into the larger bowls. I also enjoy using my set of brightly colored vintage Pyrex nesting bowls, which my husband Vincent gave me, and my retro “Cinderella” nesting bowls which have a pouring spout on one side and a handle on the other. The latter are the most useful for beating eggs and then pouring them into your batter of choice.

▪ **Stainless Steel Strainer** – The scoop on this strainer has a five-inch diameter (although you could find larger ones) and has a bamboo handle. It is perfect

for scooping foods from boiling water or hot oil. I use it most frequently to scoop gnocchi from boiling water as they float to the top and then transfer the gnocchi to whatever sauce is waiting for them in the pan on the neighboring burner – usually butter sage sauce or marinara.

▪ **Salt Keeper** – These containers are wood with a swivel top or ceramic with an open side. Using one of these vessels to store salt permits this favorite mineral to remain in easy reach on the counter at all times. As I cook, I am constantly reaching into my wood salt keeper for a pinch to add to a recipe.

▪ **Wood Grilling Planks** – These planks are made of maple, cedar, or alder and add an interesting twist to grilling fish. Soak the plank in water and then place your fish, along with lemon, extra virgin olive oil, and herbs on top of the wood. I prefer to enclose the plank and fish in aluminum foil to prevent drying, although you could put the wood directly on the grill. These planks keep the fish moist and add a unique smoky flavor.

▪ **Tomato Knife** – This knife has a serrated edge enabling you to slice through the tomato without “smushing” the tomato or indenting the skin without actually cutting through it. The blade also permits you to make very thin slices, an effect that regular knives will not accomplish.

Happy shopping...and cooking! 🍴



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