DELAWARE LAWYER

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Whither The Profession?

Articles By

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Joshua W. Martin, III • Samuel R. Russell • Thomas S. Neuberger

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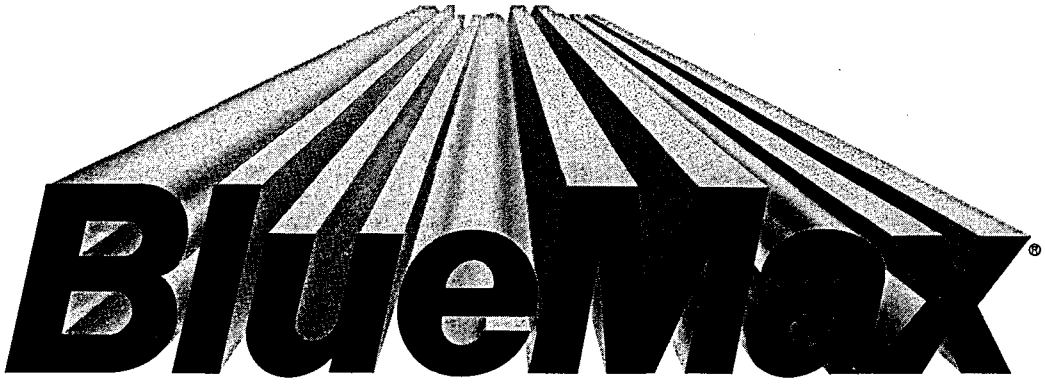

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Contents

Our cover: Behold Justice enthroned! This tough old babe, who combines the surliest aspects of Boadicea and Betty Friedan, obviously means business. There she sits armed with her terrible slow sword. Tough is the word, indeed, and tougher yet will our ministrations to this adamantine lady become, if the seers and prophets assembled in this issue are on target.

Justitia: goddess of Justice, woodcut. The Bettmann Archive
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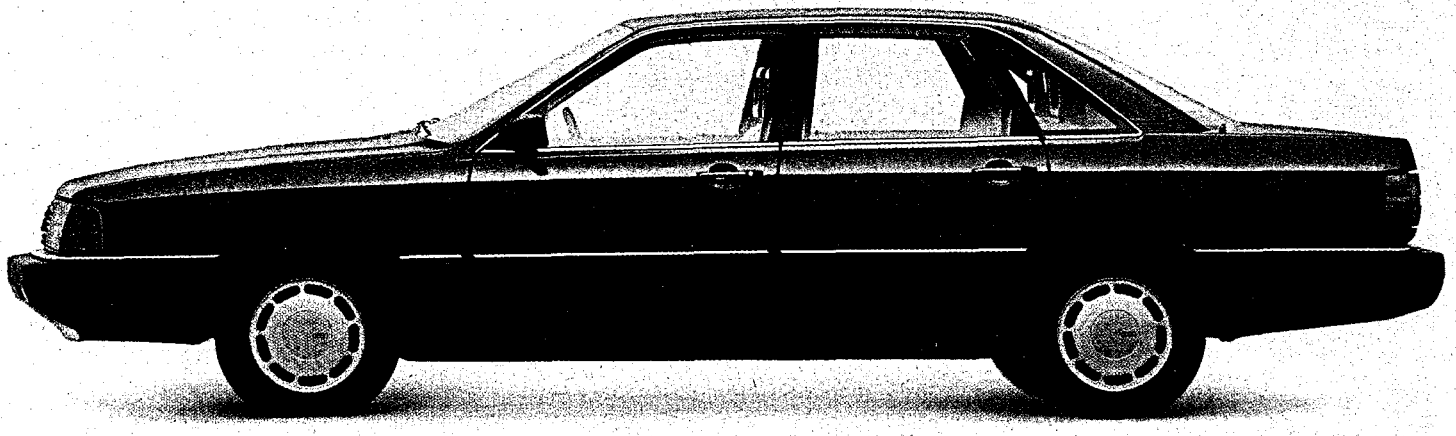

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Honorable
Andrew G. T. Moore, II

We draw to the end of the 20th century and the next decade seems almost an afterthought as the millennium looms. It is not too early for the legal community, like all society, to take frank stock of ourselves, measured against the mileposts of time and events, and to chart a course into an uncertain future.

Though our pluralistic civilization grows more interdependent, it is natural for each segment to consider itself vital to the health of the whole. Religion much affects our lives, but our country has also a unifying secular faith—the Rule of Law. While we do not presume to call ourselves priests, we are in a broad sense ministers charged with developing and applying the legal framework by which we are governed.

Major undertakings by lawyers in recent years have profoundly affected society. Legal services to the poor now are a vital force giving broader meaning to concepts of justice and fairness. Rapid changes in product liability law have emphasized safety in manufacturing and commerce. Developments in malpractice and tort litigation have had their own positive effects. The tide of civil rights cases begun in the 1960s continues to expand the rights of all Americans, as women and minorities achieve greater freedoms and rise to their attendant responsibilities. The trend of corporate takeovers and acquisitions, influenced by Delaware law, has significantly affected the nation's economy.

Naturally, these developments are not without cost. Some see increased tort, products liability, and malpractice litigation as examples of pure greed in the legal profession, detrimentally affecting industries and services vital to our society. The expansion of civil rights for some is seen as an erosion of others' prerogatives. Knowledgeable persons, concerned about our nation's economic welfare, have misgivings over the effects of modern corporate law on the economy.

Yet, no other profession exerts such a profound influence on society. Because of their traditional involvement in many other activities, such as politics, business, education, and public service, lawyers are in a unique position to fashion the future. However, to maintain this impact, we must lead the profession first, by thinking, reasoning, and acting as lawyers. Many of the beneficial developments in our society, while frequently spurred by lawyers, could not have been accomplished by bad lawyers.

One notable by-product of the profession's expanding size and role, observed by lawyers and judges throughout America, is an almost determined rejection of civility and courtesy—those smoothing forces that mark a true professional in a contentious atmosphere. It seems that the ruder or "tougher" one is, the better a lawyer one has become. The dignified presentation based on reason and logic is sacrificed on the altar of victory at any price. Defeat, while understandably bitter, cannot be borne with grace. Instead, we observe a national trend of savage attacks on opposing counsel, on the courts, and sometimes on both, by those who cannot accept an adverse result. A few lawyers, goaded by their clients or egos, indulge their narcissism by public tantrums over the loss of a case.

This cannot be the hallmark of our professional future. If human progress is to be achieved by good lawyers, as it often has in the past, then the search for justice should not be thwarted by those who bring adolescent emotions to the task. If the world is to move forward, as it has because responsible lawyers helped lead the way, then there must be a renewed emphasis on soundness of thought advanced by reason, courtesy and civility.

So it must be into the next century. Certainly, our world benefits when a good lawyer acts outside the profession as a good teacher, a good politician, a good business leader, or a good public servant. But when a lawyer acts as a member of our profession, the world benefits best when he or she performs as a good lawyer in accordance with the highest professional standards, rigorously eschewing less noble and more tempting alternatives.

Society has other resources to achieve its ends, but usually it relies on us to provide a responsible framework by which orderly progress and change occur. If we are not the best of ministers, our world cannot have the best of change. In the 21st century, as in every epoch, change will be unfailing. It is our responsibility, now, to insure smooth passage for the best of that inevitable change.

Lawyering in Delaware: Where Are We Heading?

Jack B. Jacobs

This edition of Delaware Lawyer asks several questions: As members of the Delaware legal profession, where are we collectively heading? Where will we end up in the next decade? Similar assessments are taking place throughout the country, and for good reason. Profound changes have occurred in the economy, creating new forces that have critically affected the legal profession and the private practice of law. Those changes are ongoing and the outlines of their future direction still remain unclear. What is clear, however, is that the practice of law is not what it was a decade ago, and it will be even less so a decade hence.

The thirty-year period following World War II was the golden era for the American economy and the legal profession. Between 1945 and 1975 the American economy experienced unparalleled growth. The expansion of business in all its forms created an unprecedented demand for new lawyers who would practice not only in-then-traditional areas but also in specialty areas never hitherto imagined. These expansionary forces shaped the legal profession into the structures, forms, and outlooks that prevailed when lawyers of my generation entered and established themselves within the profession.

Most prominent of those structures and forms was the proliferation of large law firms combining many specialties under one roof, as well as the creation of smaller law practices. For almost three decades this method of practicing law remained extraordinarily stable, because the economic assumptions underlying those arrangements were, by and large, constant. So long as the demand for lawyers outstripped the supply, so long as the economy continued to grow, and so long as corporate clients found it economically sensible to retain minimal in-house legal staffs and to rely upon private firms for legal services, law firms could continue to finance their growth by virtue of their relationships with corporate and institutional clients. Those relationships tended to be stable in the then-prevailing environment in which overt competition among law firms for a corporate client's business was considered to be not in good taste. General Motors might shift its advertising business from one Madison Avenue firm to another every year or so, but its legal business would tend to stay with the same Wall Street firm.

These benign conditions fostered definite, marked attitudes and behavior among lawyers. So long as there was prosperity, it could be a gentlemen's profession. It was thought to be unnecessary to promote one's self to prospective clients overtly or aggressively, because if one was a good lawyer, clients would walk through the door on reputation alone. Since each year would bring with it new business, law firms could expand indefinitely—at the top (by making new partners) and at the bottom (by hiring new associates), without fear of significant financial risk. And partner compensation in large firms could in many instances by based on seniority (as opposed to other criteria such as client origination) generally without complaint, since there was always enough money to go around.

Jack B. Jacobs

I freely admit this picture is an oversimplification. But, by and large, it was the perspective shared by many lawyers during the 1960's and 1970's. Viewed from the eyes of the youthful and inexperienced who had grown up in an expanding economy, it was only human to conclude that this happy state of affairs represented an eternal verity. In fact, as many in our profession came to find out, it was only a transient phase in an ever-changing kaleidoscope. Beginning in the late 1970's, dramatic changes began to occur, the seeds of which had been planted long before.

The developments that conspired to bring this chapter in the history of the legal profession to a close are multifold and too complex to discuss in depth in this short space. Again, with apologies for over simplifying, it can be said that the causes included an increase in the supply of lawyers, a reduction in the growth of the legal services market due to a recessionary economy, and, at the same time, a whipsaw inflation in the costs of providing legal services. These developments have affected all practitioners, large firms and small, in Delaware and in all of her sister states.

With 20-20 hindsight, it was inevitable and predictable that the "golden era" could not last forever. As stated, the expanding economy created jobs for new lawyers. In response new law schools were created and existing law schools increased their enrollments to service the demand. Once started, this dynamic created a momentum that was difficult to slow down, even when it became clear that far more lawyers were being turned out than there were positions for them. In a slowed-down economy, this would lead to increased competition among lawyers for the same finite (if not reduced) market for legal business.

The legal profession was also caught in a cost squeeze resulting from "stagflation"—a non-growth economy combined with ever-increasing costs of doing business. Like many businesses, law firms attempted to cover the increases in overhead (particularly in associates' and secretaries' salaries) by increasing their fees charged to clients. However, in this environment clients began to resist, because they too were facing the depressed economy of the 1980's, the worst since the Great Depression. Cor-▸

porate clients could no longer afford to unhesitatingly pay whatever law firms wished to charge. Instead, they responded by increasing their "in-house" legal staffs and by insisting upon competitive rates for services purchased from private law firms. This reduced the market for legal services upon which law firms had depended for their growth. No longer was the pie growing. It was either stagnating or, in the view of some, shrinking.

These changed economic conditions led inevitably to lawyers behaving more like businessmen, with increased competition for clients, and to less stability within traditional law firm structures. Firms faced with increased overhead costs will tend to maintain profitability by increasing revenues. But in a non-growth legal market served by an increased number of lawyers seeking their fair share of that market, not every law firm can succeed by that strategy. Some will win, some will lose, and some will stagnate. That is precisely what happened. Some firms grew to enormous size, some ceased to exist, and some have managed to survive, but only by changing their internal arrangements and methods of doing business. This decade has seen much more aggressive marketing by lawyers of their services in a manner almost unknown fifteen years ago. Lawyers are exerting far more effort to protect their client base from their fellow attorneys and to increase their client base, which, in this highly competitive market, can often be only at the expense of others. No longer can a good lawyer succeed merely by being a good lawyer. He or she must also be good at client promotion. Indeed, more lawyer time and a greater portion of law firm budgets are devoted to marketing, as distinguished from performing legal services. That cannot help but change the ambience (if not the ethos) of law practice as we have come to know it.

The stability of traditional law firm structures has also fallen victim. To maintain profitability, law firms are making fewer partners and stretching out the required years of apprenticeship for those who become partners. The changed economic climate has affected traditional compensation arrangements in many firms. No longer is seniority weighted as heavily as it was in the era of economic growth. The ability to obtain new clients and revenues has become a dominant factor. In many cases that has created strains and weakened loyalties, inducing some attorneys to leave their firms and to join others perceived to offer greater compensation opportunities. Increased overhead has been another factor causing strain. In some cases it has induced partners in large firms to leave and form their own smaller, specialty firms which would have lower overhead and correspondingly greater profits. And some smaller firms were put to the choice of closing down or merging with other small firms.

These are only some of the changes that have occurred in this new era of increased competition. They have had impact in Delaware, as elsewhere. But the full force of that impact has yet to be felt.

The foregoing is not intended to suggest that the news is all bad. With change comes opportunity. Clearly the public should benefit from increased competition within the profession, either by enjoying decreased costs, improved service, or both. This remarkable profession of ours will learn to adapt to these changes, as it has adapted to others throughout our country's history. Nonetheless, the basic questions still remain to be answered: Where are we heading? What will be the forms and arrangements under which law is practiced in the 1990's? Must lawyers become as skilled at marketing as at lawyering to be successful? Will the legal profession develop methods of reducing the enormous cost of delivering legal services? Those questions and others will remain high on our agenda. The articles that you will read in this edition, written by exceptional authors, will give us much to ponder as we search for answers.

EXCESS COVERAGE *on* DAMAGE CLAIMS

Like cabbage patch dolls and Bill Cosby, damage claims are in. One has only to look at last month's cover of *U.S. News and World Report* to realize just how far.

This front page features a bold blue headline reading, "What damage claims cost you." As a sub-head, the magazine which reaches over two million readers, adds, "Liability lawsuits out of control?" The accompanying drawing of blind justice with her arm in a sling completes the tableau.

The article summarizes the varied costs to consumers, business and professions of "sky high damage suits," graphically showing an increase of million-dollar verdicts from seven in 1970 to 401 in 1984.

For several thousand readers of the Madison, Connecticut edition of *The Shore Line Times*, the message is no different. "Town insurance cost could increase 42%," reads the top story of a recent front page. No one, it seems, is exempt from the damage of damage claims.

"No one, it seems, is exempt from the damage of damage claims."

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OPINION

The Sluggish Whirlwind

Two issues ago we addressed a series of emotionally charges topics that have secured an almost transfixing purchase on the public mind. (See "Courts & Constituencies: Mediating Social Controversy", Fall 1985.) In so doing we managed to offend both ends of the ideological rainbow by the manner in which we dealt with abortion and school prayer. Our critics nursed their grudges lovingly, and only after the Winter issue was closed did they voice their disapprobation. (Greg Inskip *did* send a timely letter critical of one of the abortion articles, which we published in the Winter issue—and gratefully—because we rejoice in an unconstrained exchange of views.) Some time after the Winter issue was closed we received a letter from Zenaida Otero Keil, President of the Newark Chapter of the National Organization for Women, charging us with preferential treatment of those who picket abortion clinics, and an article on church and state by Thomas Stephen Neuberger, who found the Fall issue distressingly liberal.

> *"Concerning the Fall issue, I most appreciated your commentary. I felt it and Bob D'Agostino's articles were the only redeeming qualities. I am not alone in this sentiment, others have also expressed this concern. For example, when we have several attorneys here in Delaware capable of putting together a thoughtful piece for the pro-life position, to omit something by an attorney seems to indicate that the pro-lifers are only a group of uneducated individuals."*

It would be wonderful to stage a debate between Keil, who thinks we are unkind to the right-to-lifers and Neuberger, who thinks that we degrade the pro-lifers. No matter. It pleases me to think that the Fall issue provoked intelligent dissenting commentary.

Keil and Neuberger have some very interesting things to say. We print their contributions with thanks for enriching and sharpening the quality of the debates that we attempted with originally indifferent success to spread upon the pages of this journal.

First of all Dr. Keil's letter:

Dear Mr. Wiggin:

This is in response to your article "Standing Up to Be Counted—The Price of Good Conscience" that appeared in DELAWARE LAWYER *(Vol. 4, No. 2, page 5). It is most unfortunate for the Delaware legal community that you did not verify any aspects of your story. Unwittingly, you have presented to the legal community a biased and incorrect account of the situation regarding demonstrators outside of the Women's Health Organization. Your article does not address any of the appropriate legal matters associated with the story such as trespassing, harassment, menacing, offensive touching and disobedience of a variety of City Ordinances by the demonstrators. There are a number of inconsistencies and factual errors in the article in question. I have listed the major ones below.*

- *The picture of Delaware National Organization for Women (DNOW) escorts with caption "Dialogue? NOW but not now" on page 7 as well as the text of your article mislead the reader by implying that* DELAWARE LAWYER *staff attempted to interview the escorts. In reality, no one from your staff attempted to interview the escorts. The picture shows two escorts wearing winter coats, hats, gloves and scarfs. Since you clearly state in your article that your interviews were held in June and other pictures show persons in warm weather clothing, we are most interested in the source of this photograph.*
- *I discussed this matter with the escorts in the photograph and they believe that the photograph was taken by one of the demonstrators.*

You fail to mention in your article that the demonstrators often take pictures of the escorts and attempt to tape our conversations both covertly and overtly. In addition, demonstrators have impersonated reporters on a number of occasions. If your staff did not take the photograph, it is appropriate that you credit the photographer. If you received the photograph from the demonstrators, you need to clearly state that.

- *Your article implies that the demonstrators are gentle and nonviolent. You make direct reference to this on pages 5 and 6. In addition, you quote Mr. Tom Monroe on page 5 regarding the police officer guarding the clinic as follows "... You can see the policeman there—as if we were going to try and storm the place..." It would be helpful for you to report that forced entry, dismantling of equipment and throwing medicine about the clinic*

and all scheduled procedures were completed. In addition, there is no evidence to suggest that the police took longer than necessary given the circumstances during the arrests. The Wilmington police did an excellent job and we and the clinic are on record commending them for their performance.

There are complex legal and philosophical issues which your article could have addressed. For example, do people acting on their religious beliefs have a right to disrupt a legitimate, licensed business? Would Christian Scientists be justified in disrupting the operation of hospitals? Should liquor stores, bars and gun shops be targets of disruption by those who oppose their existence? As a society, what are the legal and ethical processes used to make these decisions? What are the rights of business owners, staff and clients or patients in the above situations? Finally, it is important that your readers understand that most

to pursue the matter, but we felt strongly that the article should have the immediacy of on-the-spot discussion. The picture to which you refer was furnished by a member of the Pro-Life group at the site. I don't know the name of the photographer, although I am advised that it is one of the protestors, as you correctly surmised. Frankly, I couldn't care less who took the photograph, because it is a strong, dramatic shot that commends itself to my shameless journalistic instincts.

2. The demonstrators in front of the clinic were not among the sit-ins who had been ordered to keep their distance. (We had to interview them at quite some distance from the clinic.) The people we met on the picket line seemed to us to be, just as we said, indisputably gentle and non-violent. Of course the abortion controversy has produced truly shocking violence, and this we documented lavishly in the article immediately following the interviews. See "Uncivil Disobedience" by Mmes. Jayne, Rosenthal, and Sloan. I guess our point was that all kinds of people have all kinds of differing views and engage in very diverse behavior in dealing with this difficult subject.

3. Do the escorts "take charge"? I think that is a matter of legitimate dispute. See commentary following this reply.

4. I am glad we agree that the Wilmington police acquitted themselves splendidly on the day of the sit-in.

5. You state "all decisions regarding a person's reproductive status are of a private nature..." This may well be correct, but I have a hunch it overlooks a larger, more difficult issue. A decision to abort also affects someone other than the decider, i.e., the abortee. I for one am perplexed about the abortion issue, to which there are no easy answers. I think a somewhat more refined analysis than appears in the quoted language is in order. Your unstated analogy to right of privacy would suggest that Macbeth and his good lady were within their rights in decorously slaughtering King Duncan in the privacy of their own house.

No, there are not easy answers to this excruciatingly hard question. I do look for enlightenment, and this is what we were after in presenting a variety of viewpoints in our Fall issue. I thank you again for an intelligent and useful contribution to an important debate.

Sincerely,
William E. Wiggin

More Enlightenment

Since neither Dr. Keil nor we have direct knowledge of some of the things discussed above, we print in response to her comments excerpts from a letter we received from Mrs. M. Patricia Balaguer, a Pro-Life activist familiar with the Orange Street protest.

We are called 'menacing'. The only intention we have EVER had or manifested is to inform young parents of the humanity of the unborn child they are about to have killed, the very real *'menace' to them, physically and psychologically that abortion poses, and our intention to help them, in any way we can, to avoid doing what they are sure to regret. The offensive touching' referred to could be the bodily contact made when we have had to recover from the 'body blocks' the 'deathscorts' have inflicted on us as we have walked beside young parents talking to them.*

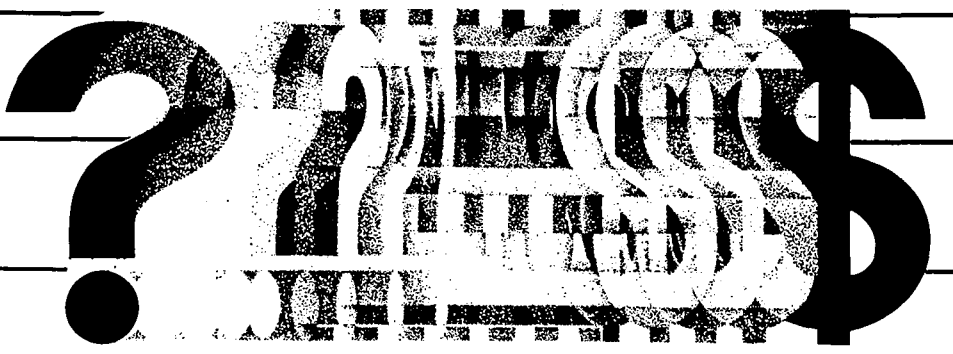
Dr. Keil has told you about our praying for the slow and painful deaths of the escorts'. No one who professes to be a Christian would dare to pray such a prayer; and in all our frustration and anger on that sidewalk, I have never known any one to confess to even being tempted *to pray that way. On the contrary, there have been fervent prayers offered up that escorts may be convinced of the evil of what they are doing. I cannot emphasize too strongly that the escorts DO TAKE CHARGE! They DO TOUCH PATIENTS (***and** demonstrators upon occasion). Some are less aggressive than others. We do not *block car doors, but we have talked to people in their cars when they will allow us. I guess a willingness to listen to us on the part of the 'patients' is interpreted as bullying on our part. Dr. Keil does not address our being spat on, or cursed, or shoved;*

The personal choice Dr. Keil keeps harping on is whether to indulge in sexual intercourse. It is not the option to have a child-in-the-womb brutally killed because it is 'unwanted'. Being wanted has never been a criterion for being allowed to live.

Former Mayor John E. Babiarz

Recognition and Thank You

The Summer 1985 issue of *DELAWARE LAWYER* has continued to cast a much longer shadow than we foresaw at the time we were putting it together. The demand for back numbers has been unprecedented among people all over the country interested in the problems of the aging. Gertrude Lowell, pictured on the cover of that issue, has reprinted part of the issue in *DELAWARE SENIOR CITIZEN,* a monthly newspaper she edits. Only recently we had a request for reprint permission for E. Jean Lanyon's poem, "Fragile Storage" and "A Lifetime of Learning" by former Mayor John E. Babiarz. Mayor Babiarz's article has proved to be remarkably (but justifiably) popular. We feel it was one of the great strengths of an issue because it spoke so eloquently with pleasing affirmation of the good life of latter maturity. By some editorial glitch this signal contribution was unaccompanied by a photograph of the author. We correct the deficiency herewith. The caption of this note, "Recognition and Thank You", should probably be merely "Thank You", because it seems superfluous to recognize the already well recognized contributor whose picture appears above.



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Practice of Law in the Next Millennium

E.N. Carpenter, II

Remarks made at the 1985 Annual Banquet of the Delaware Journal of Corporate Law.

When I received Mr. Michael White's very kind invitation to be with you this evening, I was enormously flattered. It is great to have an opportunity to speak at a banquet of an organization such as the Delaware Journal of Corporate Law.

And so I accepted with considerably more alacrity than good sense. I say that because I had not realized the difficulty of addressing a bright group of young law students and faculty and their friends. As I groped for a topic, I quickly found myself surrounded on all sides by yawning platitudes.

Think about it. What could I say to you that you have not already heard at each earlier graduation—from high school, from college, or will hear on your graduation from this law school. I could tell you that "The future is yours", or "Our country depends on its youth", or "Your horizons in this rapidly changing society are unlimited." All of these are true, but a bit threadbare.

In short, I discovered I had been left an open door to add some challenging triteness to all that.

But then it occurred to me that in choosing a practicing lawyer you must have hoped for some insights from about 40 years of doing just that. Here again, however, you already know so much of that area, and I am sure you are surfeited with war stories about cases won or lost. And I cannot add much to that. As a friend of mine likes to say, "I find myself between the blue lagoon and golden pond, and about to splash into the latter."

And so it seemed to me that perhaps what you might find most interesting would be some comments on the shape of things to come in the next millennium in the legal profession. I propose therefore to tell you not what my experience has been in the practice of law, since you will practice in a way quite different from me, and before courts that are quite different than those that I have appeared before. Instead, I will hazard a few guesses as to what lies ahead for both of us, but most particularly for you as you look ahead at the year 2000 which is rushing down the tracks straight at us, and will be here before we know it if we do not succeed in atomizing the entire planet in between now and then. This is a watershed period for the judiciary, the courts, and the legal profession.

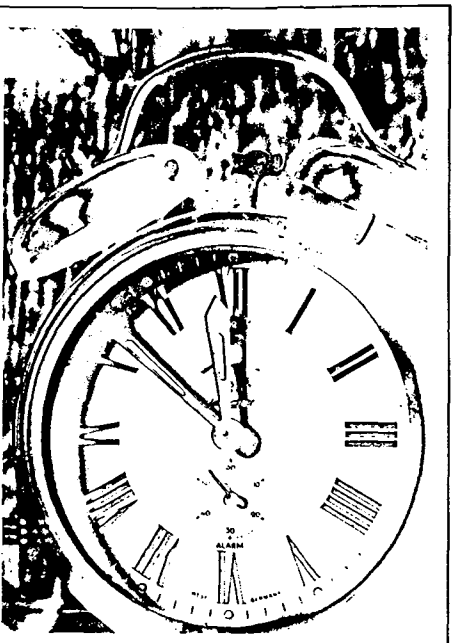
But in looking ahead, I do not mean to discuss clacking computers, advances in word processing, or how one can get Lexis to write a brief, but instead I will try to focus on more fundamental and disturbing changes that are already starting to stir and emerge. And since so many changes lie ahead and our time is short this evening, I will focus on just a few of them.

So walk with me, like Alice in Wonderland, into the glass of a crystal ball, and see if you like what you and I see. There will be, as always, good news and bad news.

First, let me immediately say, in the category of good news, that I expect the private practice of law will continue to be the most exciting and challenging opportunity that any of us could ask for. While it will certainly also always be the same demanding and jealous mistress, nevertheless, as was said of Cleopatra, "age cannot wither nor custom stale its infinite variety".

I. But as a first major change, I expect the courts and the Bar and the public will require a higher level of both ethics and competence in the years ahead than have been required in the past.

For example, twenty years ago our Delaware Supreme Court considered a case where a lawyer had undertaken to represent a client in the acquisition of a valuable liquor business. At the end of the representation, the lawyer, himself, ended up with the business and the client had nothing. The lower court had approved that result. The Delaware Supreme Court quite properly disapproved it and in effect transferred the liquor business back to the client, where it belonged. But it did nothing further to protect the public from a repetition of such an offense.



On the other hand, more recently the Delaware Supreme Court has again considered a case where a lawyer had acted unethically this time in dealing with the Family Court and his opponent. This time our court not only undid the results of that impropriety, but took steps in its opinion to refer the lawyer to the Board of Professional Responsibility for discipline, thus considering protection for the public.

And the Delaware courts are not alone in this changed approach. While in past years Courts of Appeal throughout the country have been reversing lower court judgments for prosecutorial misconduct, for grossly ineffective assistance of counsel, or for other attorney misbehavior or shortcomings and never doing anything to protect the public from the probability that that same attorney will do the same thing again, the mood has now changed and courts are willing to take steps to discipline the attorneys themselves or refer them for discipline to the appropriate organization. Recently, the American Bar Association Standing Committee on Professional Discipline has been making presentations all over the country before judicial groups urging the judges to do just that.

Further, certainly in the years ahead we are going to see courts impose stricter competency requirements. Already courts are using their discipline powers to impose fines or suspensions for matters which, just a few years ago, would certainly not have drawn those sanctions. Indeed, one court has recently imposed a fine for misciting cases for propositions for which they certainly

did not stand. That court's action reminds me of the old time lawyer who knew only two cases. One was *Marbury v. Madison* and the other wasn't *Marbury v. Madison.* That will not be adequate any more.

In addition to Court imposed sanctions, Bar Association groups are exploring the means of establishing peer review systems designed to identify and improve or remove the lawyer who is unable to perform adequately in his profession, like the system in the medical profession in some communities. No satisfactory way of doing this has been devised yet, but by the year 2000 there will be one.

Further, the public itself is reacting by bringing increased malpractice actions. I think we can all predict that this will go much further in the years ahead, and lawyers will join doctors and accountants in the dock, and take their lumps with increasing frequency.

II. A further major change is somewhat related to the requirement of a higher level of competence and morality. I also predict there will be increasing turmoil and uncertainty over the ethical standards applicable to lawyers, and this will eventually develop into a field of legal speciality of very considerable importance, and perhaps one some of you may want to consider for a future concentration.

The states across the nation, including Delaware, are considering adoption of the new American Bar Association Rules of Professional Conduct, to replace the Code of Professional Responsibility adopted a decade or so ago. However, unlike the situation when the old Code was adopted by State Courts, usually with no variations, or only a few modest changes, now the states are disagreeing with and rejecting significant portions of the Model Rules, and crafting their own versions, particularly in the area of attorney confidentiality. As a result, at the present time I understand an attorney is required to disclose in New Jersey a specific type of confidential communication from his client which in New York he is forbidden to disclose. This obviously raises the vexing problem of what happens when a New York lawyer is admitted to try a law suit in New Jersey and this type of disclosure is involved. Think not only of the discipline problems inherent in this situation, but also of the fertile field for malpractice actions by disgruntled clients.

A further cause for concern is the hiatus which appears to be opening up between what is required of the lawyer by the ethical rules and what is required of him to avoid liability. Thus in the OPM case, which you may have read about, the lawyers were confronted with the problem of what to do when they discovered their client, a large computer leasing firm, was defrauding a large number of banks in a multi-million dollar scheme involving repledging computers which had already been used as security for prior bank loans. A distinguished professor who was an authority on ethical problems of this kind advised the law firm that it must withdraw from further representation of this client, but it could not disclose the fraud, even to the successor law firm, since it involved attorney-client communications. This advice was followed, but it did not protect the law firm from subsequent claims by defrauded creditors which ultimately led it to pay out its share of a 63 million dollar settlement.

These booby traps lie ahead for you as you move on to the year 2000.

III. Next, you may take some comfort in the fact that you will have for company in threading your way through these booby traps judges who will not be immune from the rising level of expectation.

Discipline of judges for improper, or even merely incompetent performance is already increasing and will continue to increase. Dramatic cases in both the federal and state courts have led, and will continue to lead, to a public outcry for better protection from bad judges or bad courts. Particularly critical have been the situations in the Pennsylvania and Ohio Supreme Courts. And the federal system has not gone untouched. Several dramatic discipline cases are pending there.

At the present time, virtually every state has an independent judicial discipline organization. In Delaware ours is named The Court on the Judiciary. And even the federal judges, who so far have successfully fought like tigers to prevent the establishment of a separate, effective disciplinary organization for the federal judiciary, will eventually find the public demands this as a minimum, even if a constitutional amendment is required to overcome the argument that impeachment is the only method of removing lifetime judges. ▶

Finally, it is apparent that lawyers are becoming less reluctant to blow the whistle on incompetent or venal judges. The most dramatic current example is the Greylord investigation in Chicago, where already several judges have been indicted, a couple convicted, and more indictments are expected. I hope you, too, when you commence the practice of law, will be willing to act courageously to see that bad judges are weeded out.

Further, in a related development, more and more communities are setting up systems for evaluating judges. While these programs have started as a way of facilitating judicial self-improvement, they will probably become significant factors in the reappointment of judges or in retention elections.

IV. Fourth, I regretfully predict that the trend towards increased commercialization of the practice of law, of downgrading a noble profession into a trade or business, will continue, and perhaps even accelerate. Already there is a feeling that billable hours are far more important than significant achievement and service. Law firms are swelling into immense corporate enterprises themselves. And mere size alone has created its problems. No one is quite clear how to manage huge firms of attorneys, or how to cope with the new problems of quality and management that arise from size and the proliferation of branch offices resulting in the enormous spread of the power of law firms. A question might well be asked as to whether or not the professions were ever intended to be operated in this form.

Maybe the U.S. Supreme Court was right in holding that restrictions on lawyer advertising violate rights of free speech, but the practical result is a loss of dignity, a loss of a sense of service, and an accent on degrading marketing and public relations gimmicks.

It is ironic indeed to hear Chief Justice Burger deplore the hawking of legal services in the same way deodorants and soaps are sold—but what could he have expected when his Court removed the restraints from some 600,000 plus lawyers. Isn't it certain that some—perhaps many—would do just that?

Will the result be an exchange of pride in high professionalism for an accent on "the bottom line"? A change from areas of expertise to "profit centers". I think so,—and the whir of the computers, and the jingle of the cash register, may lull us into thinking this is not all bad—but it is not all good either. We seem to be forgetting that the legal system does not exist to support lawyers and judges—it exists for the benefit of the community and the nation.

V. A further change we can expect is an increased accent on specialization. This is necessary because of the complexity of our legal system today. But it does have regrettable consequences. Dean Acheson once said that the law sharpens the mind by narrowing it—and this is becoming more and more true.

VI. Further I predict that the trend toward elephantiasis of trials will continue, and cases will get bigger and bigger and longer and longer and more and more burdened with masses of documents until the absurdity of this approach will cause it to collapse of its own weight. In the recent IBM anti-trust case in New York, after the trial had already entered its second or third (or was it its fourth) year, Judge Edelstein permitted additional discovery of some five million further pieces of paper on

top of the truckloads already produced. Is it conceivable that any judge—let alone a jury—will ever be able in one human lifetime to review a significant fraction of such a pile.

Briefs in recent takeover cases here in Delaware—thanks to the supposed benefits of word processing and copying equipment—are produced at the rate of a yard of bookshelf per argument, or a five foot book case per suit. A negligence trial arising out of an auto accident and currently in progress in our Delaware District Court where the principal issue is simply whether an insurance company should have accepted an offer of settlement is expected to last five weeks. The General Westmoreland libel trial dragged on for 18 weeks and stopped without reaching a conclusion. *TIME Magazine* recently reported the commencement of a trial concerning the problem of who should bear the cost of some 25,000 asbestos related law suits. Sixty-five insurance companies are involved. As *TIME* pointed out:

> *No regular courtroom could hold the 150 lawyers who were expected to be involved in the trial, so the parties agreed to pay for the renovation of an ornate but rundown former high school auditorium. The sprucing up will cost $200,000 plus another $20,000 for a computer system to keep track of the 50,000 documents that may be introduced as evidence. Millions more, of course, will go toward the lawyers' fees.**

Judges and jurors are literally buried in words and paper and months and months of testimony in cases involving issues that would have been tried in three days when I started practicing law.

And the courts themselves are not immune to contributing to this trend toward more and more of everything. The Delaware Supreme Court recently published an opinion that was more than 80 pages long. And it is a pygmy compared to some book length effusions in other jurisdictions.

In time, but perhaps not before the year 2000, the public, including those surfeited jurors and those over-burdened judges, will rebel against this, and will make the necessary concessions to mortality by imposing some sort of limitation on the sheer quantity of proof permissible.

*TIME, March 18, 1985, p.67.

What limitations? Well this is not a new problem. Perhaps we can take a leaf from the book of Chancellor Ellesmere who first ascended to that position in 1603 under King James I. He had a demonstrated interest in shortening proceedings and preventing delay. Plucknett tells us that when one Richard Mylward, an equity pleader, drew a replication in 120 pages when 16 would have sufficed, Ellesmere ordered as follows:

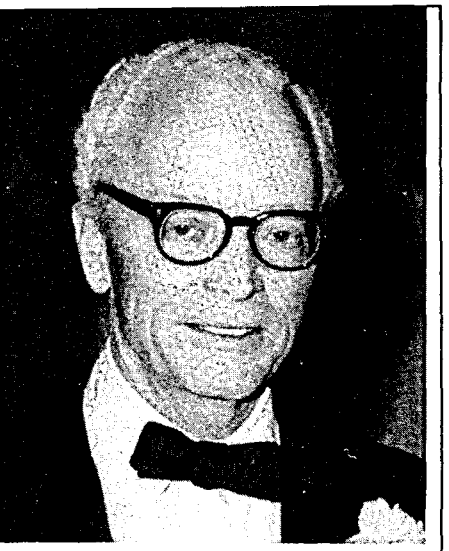
> *That the Warden of the Fleet shall take the said Richard Mylward... into his custody, and shall bring him unto Westminster Hall...and there and then shall cut a hole in the midst of the same engrossed replication...and put the said Richard's head through the same hole and let the same replication hang about his shoulders with the written side outward; and then the same so hanging shall lead the same Richard bare-headed and bare-faced round about Westminster Hall whilst the courts are sitting and shall show him at the bar of every of the three courts within the Hall.***

So it can be done, and I submit it must be done and it will be done while you are practicing law though probably not that way.

VII. Further, as a result of new amendments to the Federal Rules there will be accelerated a process which has been evident for the past decade, namely fee shifting. That is, there is in progress an erosion of the so-called American Rule where each party bears his own fees, and a tendency by courts more and more in frivolous litigation, or where unfair or bad faith positions are taken in discovery, to impose the attorney's fee of the prevailing party on the losing party. This has always been an available procedure in England, and years ago this used to be viewed with horror in this country. There were dark stories of how Professor Lasky of the London School of Economics was driven into bankruptcy by having to pay the defendant's very high legal fees in an unsuccessful libel action he had brought. Now, however, there is an acceptance of this device, at least in cases where some improper conduct by the losing party can be demonstrated,

(Continued on page 17)

**Plucknett, *A History of the Common Law*, p.248.



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and courts have seized on this opportunity to curb the expansion of litigation by at least driving some wild claims out of the courtroom.

The Talmud states: "Who can protest an injustice and does not is an accomplice in the act."

VIII. Next, public dissatisfaction with the administration of criminal justice will continue to grow and grow, as our failure to combat the drug traffic—our public enemy No. 1—leads to an ever-increasing, even more deadly surge of crime, further sparked by terrorism. Mayor Koch of New York has become so concerned about the crime situation that he has expressed a willingness to divert money from education to the construction of jails. He feels that the crime problem arises from the low chances of being caught and prosecuted.

Much of the criticism is misdirected at the courts and lawyers, who are not responsible for the early release of convicted criminals, a function of parole and probation commissions. But as lawyers we must find solutions to these intractable problems, or the year 2000 is going to find us an armed camp where self-help by self-styled vigilantes like Bernard Goetz, the subway hero, is an accepted alternative to the court system.

Perhaps closely related to that public dissatisfaction will be a shift of emphasis in a conservative direction toward protecting the victims' rights and away from protecting the defendants' rights. As you know, five of the nine justices of the U.S. Supreme Court are more than 75 years old, so we can expect very dramatic changes of personnel there in the very near future. If President Reagan appoints a majority of the Supreme Court it will set the course of constitutional law for a generation—maybe. Further, President Reagan appointed 165 Federal judges in his first term and will probably appoint many more in his current term.

IX. Finally, not unrelated to the points I have mentioned, I predict a regrettable further lessening of the participation of practicing lawyers in public affairs. Any successful active practice of law impinges on politics just as politics impinges on the law. As De Tocqueville said: "Scarcely any political question arises in the United States which does not become sooner or later a judicial question." I would have hoped, in light of this, that lawyers would continue to participate actively in the political life of their era. The *Talmud* states: "Who can protest an injustice and does not is an accomplice in the act." Lawyers certainly are in the best position to protest.

These are just a few of the changes which lie ahead. As you can see there is good news and bad news. But for you law students here tonight, there is a promise of opportunity and challenge. Welcome to an exciting and demanding profession! Even a lifetime is not nearly long enough to exhaust its charms. A true greatness of this land lies in its laws, preeminent of which is its magnificent Constitution which will celebrate its 200th Birthday in 1987. May you love the practice of law as much as we who have gone before you have loved it.

A Layperson's View of the Legal Profession: A Spectrum Ranging From "Vultures" to "Nobles"

Helen K. Foss

Helen K. Foss is currently Education Advisor to Governor Castle. Prior to her governmental service she taught in elementary schools in three states, and had served as Executive Director for the Delaware Region National Conference of Christians and Jews. Her community activities have included membership on the Delaware Judicial Nominating Commission, the Governor's Task Force for Education, and the Board of Trustees of the Medical Center of Delaware, Inc.

There is a spectrum of views of the legal profession operating within most of us, ranging from the classic "shyster" lawyers to those who carry forward the mantle of American democracy. Our views are founded occasionally on experience, but mostly by prevailing public opinion. Today's media play an important role in shaping and reinforcing such opinions as they report the variety of ways attorneys ply their trade. While a little confusing to us on the outside, both ends of this spectrum of views carry a heavy burden for the profession and simultaneously present a tremendous challenge.

For years I have been aware of the perception that lawyers played off others' misfortunes. The "ambulance chaser" image has been reinforced by ads we now see in the paper and hear on the radio. At any misfortune, the new American battle cry seems to have become "I'll sue!"

Each of our wallets has been hit hard by soaring liability insurance rates, which we perceive to be due to increasing accident suits. As much as one fourth of the cost of an American car is due to manufacturers' product liability insurance. Rising medical malpractice liability insurance has pushed doctors' fees to unthinkable heights. As a result our doctors' bills have skyrocketed. Massachusetts obstetricians made the news this month with their refusal to take any new patients, because they can no longer pay for increased insurance costs. News reports show lawyers ads inviting clients to look into possible suits: "You may have been the victim of malpractice." Many states are looking into possible legislation to place caps on malpratice suits, since the whole process has apparently gotten out of control.

News stories tell us how some attorneys have creatively discovered new territory. Attorney Marvin Mitchelson hit the headlines with the big "Palimony" suit. A tremendous new market lies ahead with so many couples choosing to live together without marriage. Rock Hudson was barely cold in the ground before it was announced his former lover was suing his estate because Hudson hadn't told him he had AIDS. Flamboyant Attorney Melvin Belli has done his bit to sustain the image that lawyers batten on human misery with his latest media event of going to India to "defend" the innocent victims of the hideous Union Carbide accident in Bhopal.

Each of these examples portrays the attorney capitalizing on the misfortune of others. While few would deny justice where there has been wrong, there is a clear public perception that courts are seeing much unwarranted litigation for money, and that suits are being filed and won for far more than actual damages. Individuals and companies with extensive assets or who are heavily insured are "deep pockets" or candidates for liability suits.

Clearly the view of the legal profession as "ambulance chasers" is based on stereotypes. But stereotypes are generally based on perceptions or misperceptions of the action of at least a few.

I hold another stereotype of lawyers. I see lawyers as the carrier of the banner of democracy. Attorneys, more than any other public servants, understand the law, the delicate nature of the rights of the individual and the responsibility each of us has to uphold those rights. No other group understands so clearly that these rights are not uniformly made available to all Americans. No other group has the opportunity as attorneys do to be the conscience of America.

My nine years of work with the National Conference of Christians and Jews and my commitment to American democracy brought me in touch with numbers of Delaware lawyers who have this vision and helped to clarify it for me. I have seen and heard many attorneys speak out through community organizations such as the Jewish Community Relations Council, American Civil Liberties Union, National Association for the Advancement of Colored People, Community Legal Aid, and others. Unlike the situations mentioned earlier, reports of these events didn't usually appear in the press.

In my brief tenure with the Judicial Nominating Commission, I had the privilege of interviewing numbers of attorneys interested in serving on the bench or as references for those who applied. I was repeatedly impressed by the level of commitment to a just system, to their respect for the people brought before that system, and to their sense of their own responsibilities as a part of the legal system.

These attorneys are a part of that broad spectrum referred to in the title of this article, but of such a different ilk that it is impossible to comprehend the range in one glance. These again are not the attorneys that make headlines short of their obituaries or an occasional testimonial event reported deep within the newspaper.

Why does the general public hear only about the horrible examples—the "vultures?" It is easy to overlook the noble contributions of many. How can we sustain, widen, and brighten this ethical band of the spectrum making it more visible to the public? It is there. And I believe the future of this country depends on it.

A Lawyer Looks at Lawyers Legal Sense and Business Cents

Michael J. Rich

For two years I took advantage of an opportunity to give up the private practice of law and accept a staff position with a privately owned, medium sized manufacturing company. As part of my duties, I advised the company on various legal aspects of its day-to-day operations and also acted as liaison with locally retained litigation counsel where appropriate. Naturally, I had to try not to act like a client when there were litigation setbacks. Discovery never came at an opportune time and budgeting for legal expense was not a popular item in spite of the necessity to do so.

To a lawyer, the denial of a TRO, the routine legal inquiry or discovery requests, and procedural delays come with the territory of private practice. It is part of the lawyer's daily routine and livelihood. For a businessman, however, the daily routine is his trade, while the legal services he needs are ancillary or supportive of his objective, namely the sale of goods or services for profit. This article examines some of the factors which are important to the relationship between a lawyer and his small to medium sized business client.

In relating to the business client, the lawyer should factor in a financial awareness of his client's business, a practical legal sense, and a fair measure of organizational and intellectual common sense. However, these basic, common sense concerns are the ones most easily overlooked by the lawyer in the routine relationship with his business client. The lawyer's concerns are usually more narrowly drawn than the client's. Moreover, the client inevitably observes that litigation expense makes no contribution to product development, manufacture or sale. Additionally, he sees such expense as not only out of pocket cost and fee expense, but the cost of employees not working because they are either searching for records to be produced, answering interrogatories, attending depositions or waiting for a long cross examination to end before they testify.

In seeking and evaluating the legal services utilized by his business, the client's priorities generally include prompt resolution of disputes, ascertainable fees, and practical and accurate case evaluation and advice. How the lawyer approaches these concerns determines the success he is likely to have in serving his client and the legal profession.

Prompt Resolution of Claims

Prompt resolution of claims is a compelling issue in the client's mind, especially when the client is an injured party. Discounting the test case or the situation where it is cost effective to protract litigation, an unresolved dispute is neither cost nor time effective in a number of ways. To the plaintiff, the high cost of borrowed money to replace the unavailable funds for which he seeks recovery speaks for itself. Increased prices to the customer to cover such expenses reduce the client's competitive abilities. Conversely, lower increases in employee benefits or deferred maintenance due to lost funds over which a suit is commenced have their own cost penalties. In the businessman's trade, a footnote on a certified financial statement can affect his ability to borrow money, obtain credit or even be able to enter into certain agreements; indeed, it can even affect the client's standing in the trade in relation to his competitors, thereby creating a several year negative ripple effect.

Contested lawsuits create intangible costs. The businessman and/or his employees are required to divert their time and attention from current productive matters to what is essentially a non-marketable commodity, i.e. a past transaction of which the client believes there is no real dispute as to his entitlement. Contested litigation involving technical legal claims and defenses is frustrating at best and incomprehensible when the client believes and/or knows that he is right in both fact and law.

Mike Rich brings an interestingly varied background to the writing of the previous article. A lawyer admitted to practice both in Pennsylvania and Delaware, Mike has practiced in Georgetown (with a brief interruption) since 1973 after his completion of a year's clerkship to the late Justice James B. Terry of the Delaware Supreme Court. In 1981 Mike had the opportunity of looking at the practice from the somewhat different angle of that of a general counsel of a corporation, an experience that flavors his article. In 1983 he returned to practice at the Georgetown office of Morris, Nichols, Arsht & Tunnell.

Even as a defendant, the businessman prefers prompt resolution of claims. He shares the same concerns over fees, lost production time, contingent liability, negative audits, etc., as the plaintiff. The lawyer's goal should be directed toward keeping the legal action in perspective for the client while assuring that the client can continue to perform his primary function, managing his business.

It is also true that the client can be the cause of his own frustration. Because he has to deal with requests for information from his lawyer at the same time he's trying to meet current business obligations, the legal obligations tend to take a back seat to current needs creating delay and frustration for his lawyer. ▶

The lawyer can best solve some of these problems by comprehensive case planning and an organizational approach to obtaining information from the client. If the lawyer organizes his facts and law into categories and objectives for a court presentation, it is logical to use the same approach to fact gathering from the client and witnesses. For instance, if the lawyer has a specific manner in which he desires to organize answers to discovery, he should ask his clients for specific raw information instead of simply sending the client a copy of the discovery with a request that the discovery be answered. Instead of receiving information which has to be reworded or reworked, the lawyer obtains the information in a form he desires so that his staff members may organize the raw information in an efficient and time saving manner. By organizing his request to the client, the lawyer benefits the client by providing an efficient manner in which to provide the information requested. A corollary is that the client is more receptive to answer the lawyer's non-routine questions concerning the fine points of the case.

Prompt resolution of cases is also dependent on how the attorney communicates with his client as to his client's side of the case and the lawyer's interpretation of the adversary's position. The client needs and wants practical, accurate and understandable advice. The lawyer's decision is when and how much of an explanation to provide for decisions made on trial strategy. Put another way, legal decisions and advice have to make business sense to the client. Like business information, the lawyer's advice has to be given and explained in an accurate and timely manner. Advice, by analogy, is a product. It must be prepared and delivered in such a way as to make the client react to it in the same conceptual manner as he markets his product or service. The client and the lawyer want the legal product to be acceptable, utilized and non-returnable for repair and/or maintenance.

Reasonable and Ascertainable Fees

The fee considerations present the diametrically opposite concerns of the lawyer and the client. Guided by the nature of the case and his obligations to the client, the lawyer will seek the highest reasonable remuneration for his

work. The client on the other hand has two objectives: fee minimization and fee ascertainment. Fees, especially litigation costs, are not directly productive expenses as are labor and resource costs for the client. In the business environment where most expenses can be accurately forecast, the prospect of open-ended legal fees and expenses is unsettling and difficult to justify when the cost may be out of proportion to the amount in controversy. This is a subjective problem since outside forces (the adversary and his lawyer) play a significant part in the outcome. However, realistic cost and fee projections are both fair and proper in terms of the client's decision making process.

In an appropriate situation the conflict between lawyer flexibility and fee ascertainment can be resolved through an agreement to charge a fixed fee based on the service as opposed to hourly billing. Like the businessman, the lawyer consciously or subconsciously makes projections and forecasts in planning the strategy of his representation. He considers whether the case can be financially productive for himself while not becoming a financial burden to the client. By analyzing his cost basis and profit margin, the lawyer can fairly accurately determine a reasonable fixed fee limit and still allow a flexibility factor for unseen developments for most of his routine and predictable cases. The lawyer serves himself by a more considered business approach to his own economics and the client is served by a realistic appraisal of his cost factors in maintaining, defending or settling a suit. Obviously not all cases lend themselves to this approach, but through his experience, an attorney can usually predict the course of events for most types of problems or cases he will face.

From the client's point of view a fixed fee is desirable. A realistic and structured fee agreement, whether set fee or hourly, is beneficial. The client will understand the lawyer's desire not to be unnecessarily limited on a fee but will appreciate the attorney's open approach and identification with the client's concerns. The lawyer should be candid with the client as to the fees in the same way the client has to be candid and forthright with his customers if he expects repeat or subsequent orders.

Employee time is as compelling a factor to the client as are fees. The lawyer does not feel the time constraints in the same way the client does. Where the lawyer may obtain the continuance, the businessman's delay in product delivery may cost him his contract and perhaps penalties. To an attorney, time spent is money earned; to a businessman time is expense. Accordingly, accurate time estimates of the work to be performed are as important as the fee to be charged, especially where the time will involve key personnel being absent from their job for lengthy periods for depositions, trials and the like.

Case Evaluation and Advice

Keeping the client informed of the progress of litigation is also important. Aside from the fact that the client is paying for and is entitled to copies of correspondence and pleadings, an awareness of the litigation process provides mutual benefits for the lawyer and the client. The client knows that he's getting the attention he wants and deserves and, if the lawyer provides the information in a sensible format, the client can use the information in planning the appearances and availability of the witnesses/employees. For the lawyer the benefits are obvious; the statements of time spent are justified and scheduling of witness interviews, on-scene observations, etc. are facilitated giving the lawyer an ordered work flow and probably more time to devote to other cases.

Case evaluation and advice are direct functions of an attorney's communication skills. The jargon of the law is convenient when talking to other lawyers but not necessarily an effective mode of communication between the lawyer and the client. A phrase such as "the preliminary objection was denied without prejudice and we have twenty days to file a responsive pleading and initiate discovery" makes perfect sense to the lawyer but not necessarily to the client. Yet the client needs to know what the implications of that phrase are. When was the last time an attorney said there was a lack of consideration and meant that someone had failed to act sympathetically?

What the attorney says and how he says it to the client or the opposing attorney can affect the length and/or nature of the proceeding. If the client has to cut his business loss by settling he deserves to know it. He has to be able to evaluate the cost-benefit ratio of settling versus continuing the case. The same is true when his case is strong and he expects to prevail. Even if it were

economically sound to press the issue and recovery was likely, the client might still have to consider how such a course of action would affect his ultimate relation with his adversary (is he an adversary whom he will need as a future resource). Indeed, the client might have to consider how other companies in the trade might view the confrontation (the nature of the contest meaning more than the outcome).

The lawyer's ability to frame legal issues into a business perspective for the client is a valuable asset. While the business client can forecast the effect of a price increase on his resources, his abilities to forecast the effect of a lawsuit on his business are probably not as well honed. A problem more evident to the lawyer than to the client is the spectre of a precedent set in a case that might have been better settled than fought.

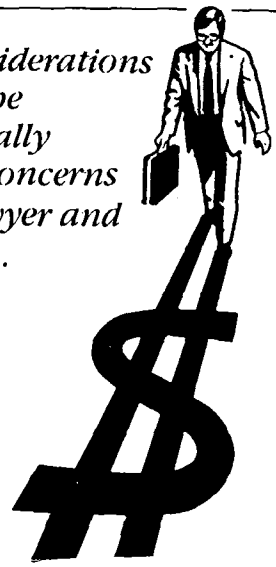
The Bottom Line

While the lawyer's case handling ability is crucial to the relationship with his client, there is a tangential matter of concern which underlies a lawyer's ability to be as responsive as he or his client may wish. That factor is the inertia of the legal system which builds into each case a sense of delay and frustration. These delays can be voluntary or imposed without choice. They can include such matters as a court ordered briefing schedule when a bench order might suffice, a discovery request filed before a pretrial conference, defenses or claims which create tangential issues not relevant to the actual controversy, late filings, and other similar delay factors apparently inherent in the legal system. A business client knows that his customer would not tolerate the excuse, much less the delay, given for nonperformance. Is legal delay more tolerable because the business client cannot exert direct control over the process of issue resolution? To the business client, a valid claim is a straightforward factual matter. Arcane evidentiary and procedural rules do not make the claim any less factual to the client. Rules, delays, briefs, etc., because of their appearance from a time and cost point of view, tend to undermine the legal system as well as erode the client's confidence in his lawyer. If law is a service profession and the court is the marketplace where that service is delivered, is it wrong for the client to expect delivery of the product consistent with the fee obligation he incurs rather than consistent with what is convenient to the attorneys and/or the courts?

Streamlined fact finding and substantial pretrial stipulations of fact would reduce court time at trial and provide for a more frank approach to discovery. Obviously a court can cut off discovery or limit the number of interrogatories to be filed, but there are other methods by which the system can be more commercially credible. Testimony in cases can be video-taped and edited to delete objectionable matter to accommodate business schedules in non-jury cases. The client benefits because he would probably have less interference with his work flow and will minimize lost time. Where the issues are primarily legal, fact stipulations could avoid significant or all witness time altogether.

Compulsory arbitration and/or the use of masters to determine certain fact issues or for cases under specific dollar amounts is required and has proven successful in certain states for non-personal injury or contract cases. Settlement conferences could be required and if no settlement could be reached, the judge or master would be disqualified from further consideration of the case. Enforcement of existing sanctions for dilatory tactics or vexatious pleadings can be applied. While case scheduling has contributed to speedier case resolution, the fact remains that clients

...fee considerations present the diametrically opposite concerns of the lawyer and the client...



are increasingly turning to arbitration and other extrajudicial methods of controversy resolution. Indeed, commercial businesses have begun marketing dispute resolution services to satisfy this need.

Endispute, Inc. is a Washington-based company which specializes in the arbitration of commercial and insurance claims. Judiciate is a Philadelphia-based, private court system handling business disputes, domestic relations cases and insurance claims. Unlike other dispute resolution services, Judiciate uses only former judges to hear disputes. The American Arbitration Association is perhaps the best known non-judicial dispute resolution forum having its greatest impact in the commercial and industrial areas. Judicial dispute resolution in the form of settlement conferences was preferred in a survey conducted by the Judicial Administration Division of the American Bar Association. In the fall 1984 edition of *The Judges' Journal*, 85 per cent of the responding attorneys agreed that the involvement by federal judges in settlement discussions were likely to significantly improve the prospects for settlement. The lawyers preferred the active participation of the judges with the caveat that different judges would hear the case from those who conducted the settlement conferences. The common thread in the question of dispute resolution is client pressure to resolve cases favorably at the lowest possible cost.

These alternative methods of case resolution are more in line with the facts of the controversy and are not tied to the procedural points which clients regard more as traps than guidelines for case conduct. If a $10,000 arbitration claim can be initiated after a $2,000 judicial claim, and be commercially arbitrated more than a year before the smaller claim is set for trial, all at a significantly lower out-of-pocket cost than the lower claim, there is certainly no question about which prospect would hold more appeal to the business client.

In short, the experience of having been a lawyer/client seemed to highlight the commercial deficiencies in the legal system. If it is a valid observation that a legal or governmental system is an arena in which commercial activity can be exercised along some generally recognized and accepted guidelines, then the question is whether the administrators of the guidelines (courts and their officers) should be required to perform with the same sense of time and cost efficiency that the commercial marketplace demands of its participants. The answer is emphatically yes.

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Given the attention which is currently being paid to continuing legal education, it is as well to be reminded from time to time that "education" is the reciprocal of both teaching and learning. It is not solely the attorneys who need to be instructed. To the client an involvement with the realm of the law is, more often than not, a particularly daunting experience. Thus, it becomes the duty of the attorney to be a teacher as well as a student.

It is so easy for the busy attorney to think only of the tight schedule requiring attention for the remainder of the day, and to overlook the need of the current client for at least a minimum of explanation of his or her special problem and of the probable course of future proceedings. While avoiding a rash guaranty of ultimate result, it is the obligation of the professional to provide each client with the comfort of a brief forecast of the action which that client should expect to follow.

In one sentence—the true professional is an instructor as well as a learner.

"Lack of knowledge is dangerous in a legal system that requires public confidence—built on public understanding—to function fairly and effectively."

Morris Harrell
President of the American Bar Association
1982-1983

Is Rodney Dangerfield a Lawyer?

Just one more sharp jab to the solar plexus: Harte-Hanks Communications, Inc. has recently published the results of still another survey of the public's perception of the professions. Again, we are at the bottom of the list; only labor union leaders ranked below us. This, of course, is not a new phenomenon. As we come to the end of another year, this Texas poll confirms that our stock as a profession remains low.

This disappointing public image is most distasteful to me. I hope you agree. There is further frustration: *what, if anything, can you and I do* to stem the tide of unfounded and unflattering barbs and stereotyping? Does the adversary system by its nature preclude any effective response?

I believe not. I believe that there are several valid approaches to this problem, and I believe that you and I can play a meaningful role in modifying the present trend.

I have come, more and more, to accept Morris Harrell's view that the core of our problem is in the public's *lack of understanding:* of our system of justice, of the means of establishing an appropriate relationship with lawyers, of the procedural aspects of our system and of the controlling consideration in reaching a result.

Those of us in private practice may deal with several clients each day. There is an opportunity to affect their attitude toward lawyers. Our stock-in-trade is *communication.* It appears to me that although we effectively use our communication skills in dealing with legal issues, the courts and our brother lawyers, we rarely expend the effort to thoroughly and expertly apply those skills in our lawyer-client relationships.

I earnestly believe that at the outset the client is entitled to know the salient details of his legal engagement: the expected procedural steps and their timing as well as a reasonable idea of the cost of the undertaking. We should be as specific as possible as often as possible. Basically, it is the client's future which is at stake. His perception that he has no real understanding of legal machinations nor control over his own destiny can only breed suspicion and distrust. On the other hand, society is unlikely to "bad-mouth" a transaction it understands. Holiday Inns developed an effective television campaign focusing upon a claim of *"no surprises"* while using its accommodations. When our legal engagement is concluded, the *unsurprised client* is likely to be *uncritical.*

I am persuaded that we can change some of the knee-jerk responses, at least of the people we serve. We need to take the time to carefully explain. They need to understand. You and I can be the source of understanding.

Rodney seems unable to generate respect, but I believe we can.

Tom Ramey

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Tomorrow's Corporate Lawyer

John F. Schmutz

In a broad sense, law is the will of the majority at any particular time. In much the same way, the work of a corporate lawyer is governed by the opinion and will of the public. They set the climate in which his or her client, the corporation, operates.

For example, as public concerns about the environment grew in the late '60's and '70's, the environmental staff in Du Pont's Legal Department grew from one lawyer half-time to more than a dozen lawyers working full-time. Therefore, to forecast changes in corporate legal departments one must look to the public climate of the future. Although I do not presume to have unusual insight into what is to be, I should like to comment on two trends, which I believe will shape the future of the practice of law in corporations as well as the work of the bar generally: the need to be internationally competitive and growing public pressure for lawyers to help improve our legal system.

Let us first turn to international competition. America no longer has the technological lead it had following World War II. Western European countries as well as Japan and many other Asian countries have technology fully competitive with that of the United States. In recent years, high real interest rates and the resulting strong dollar have further weakened the American competitive position. American industry also grew fat. The companies who will survive the onslaught of our foreign competitors are learning to run leaner and harder. Productivity is the buzz word in corporations. Need for and cost of services are receiving much attention. I see nothing in the near term that indicates less emphasis on improved competitiveness. Our American corporate clients will insist upon value for every cent they spend on legal services and will pay for only that which they really need. They must if they are to compete successfully with their foreign counterparts, most of whom benefit from much lower legal costs.

In that setting, the excessive emphasis in our society and by lawyers on litigation is particularly inappropriate from a corporate perspective. And that relates to the second trend, the growing public demand that legal services be delivered in a more efficient, predictable, timely and fairer manner.

Product liability litigation is a case in point. In the last ten years product liability cases in the Federal courts have increased by a factor of five. In my own company we have more pending product liability cases today than we had pending in 1976. Not only that, but the complexity of cases and size of awards seem beyond control and fuel our clients' demand for change. Similarly the time required from beginning of litigation to final decision is excessive, absorbing corporate talent and other resources which can ill be spared. The problem is not only in product liability, but many other areas of the law such as personal injury, corporate governance and the environment.

To be sure, Americans now increasingly understand their rights. They should and must have resort to a legal system which treats all even handedly and justly. But the excesses are hurting society, generally, not only corporations. Last year, for example, the United States had a shortage of DPT vaccine, in part because manufacturers no longer would accept the legal risks associated with the few adverse reactions that the vaccine can cause out of thousands treated. That vaccine had almost eliminated dyptheria and whooping cough, scourges of my childhood. Insurance in many areas is becoming increasingly expensive or unavailable. This shortage prevents some small businessmen from continuing operations, increases municipal taxes and doctors fees. This shortage also makes it increasingly difficult for corporations to persuade competent officers and directors to serve. In some jurisdictions, civil suits take six or more years to come to trial. Transactional costs frequently exceed successful plaintiffs' recoveries.

The public will demand changes in response to these two related concerns: the need for international competitiveness and the need to curb excesses in the legal system. Those changes will help shape the practice of law in corporations. Let us look first at the interface between the corporation and the private bar.

Corporations will look very carefully at each aspect of their legal business to discover the most cost efficient manner of operation. In their work with the private bar, corporate lawyers will focus more on cost control and budgets, on the use of teams of trial lawyers and experts to try families of cases, and on the sharing of counsel in cases with multiple parties on their side. The private firms that do not respond to the need for cost effectiveness will not be retained. I have had my corporate clients ask me whether in some less important cases it might be desirable to retain less experienced trial counsel to reduce costs, albeit at the risk of a somewhat poorer trial record.

The drive for improved productivity will lead corporations to emphasize professionalism in their lawyers. They will use internal resources where repeated issues or familiarity with the clients' business makes such use cost effective. Except for litigation, most Du Pont legal work is done internally—and we are also doing selectively more of our litigation. On the other hand, there will be areas where outside counsel has expertise that it is not efficient to develop internally, such as trial experience in antitrust and unfriendly takeovers. It is inefficient to increase legal staff to accommodate large surges in demand for services as in major acquisitions or some complex major litigation. This response to the external climate may not bode well for small firms which cannot afford to develop large staffs or the expertise in specialty areas that corporations may need.

In their frustration with high costs, uncertainty and seeming irrationality of the legal system, there will be a renewed emphasis by both corporations and the general public on ways to reduce litigation. This change is not only a matter of cost, but also relates to the second public trend—the demand for a fairer, more predictable, prompter legal system.

Solvers not suers will be in demand in the future. Corporations will turn more to Lincoln's words:

> *"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time. As a peace-maker, the lawyer has a superior opportunity of being a good man."*[1]

How rational that is in light of the fact that more money often goes to lawyers and others in transactional costs than goes to plaintiffs in many cases where plaintiffs win!

I also see more use of alternate dispute resolution (ADR) techniques—arbitration, the mini-trial and other structures yet to be devised—to help resolve disputes ouside the formal legal process, thus reducing costs, curbing excesses and improving the rationality of decisions. The recent growth in the teaching of ADR at our law schools supports that trend. In one recent survey the responses of four hundred professors teaching civil procedure, contracts, environmental law, family law and international law, subjects particularly amenable to ADR, showed that nearly 75% taught some form of ADR. Our own former Chief Justice, Daniel Herrmann, taught a course last fall on that subject at the Delaware Law School of Widener University. More than 160 of the major companies in the United States signed a pledge to consider ADR in any dispute with another signator. The Asbestos Claims Facility is in part a response to a legal system that could no longer adequately handle asbestos cases.

The same pressures will force changes in the more traditional procedures—fast-track litigation such as that proposed by McMillian and Siegel,[2] more compulsory arbitration before trial and more curbs on discovery. The public and corporations will also continue to push for changes in the law, such as those in the field of product liability.

The public may also demand, with my support, a more fundamental look at the way in which our society handles competing claims. Nowhere is the need better illustrated than in the case of toxic torts. A recent Rand study states:

> *"We need to clarify our objectives regarding deterrence, compensation, and punishment. We must determine how we want to treat victims and defendants and how we want to discriminate among them. We must decide upon the costs that we are willing to bear and how we wish to allocate them. We must go about these difficult tasks with a sensitivity to the traditions of our legal system even as we consider arrangements beyond the conventional set of responses."*[3]

What will these changes mean to the internal operations of corporate legal departments? Corporate legal departments have learned much from their business clients: personnel management, business analysis, and a practical approach to problems, all subjects of importance in bringing cost efficiency and rationality to legal services. They will also make more use of some of the techniques of their private colleagues. There will be less management and more emphasis on professionalism and training in corporate legal departments, reducing reporting and internal bureaucracy and freeing lawyers to do what they are trained to do: handle problems. Increased professionalism will also allow lawyers in corporations to deal with frequently faced issues internally. With better understanding of their clients' business, they are able to dispose of many matters more efficiently than outside counsel. Corporate legal departments will also make more use of paralegals and other support staff, thus freeing lawyers in corporate legal departments to use their professional skills. This should enhance the challenge and job satisfaction of support personnel, paralegals and lawyers alike.

Any discussion of cost effective delivery of legal services would be incomplete without mention of computers. Beyond question the computer will become a primary means of communication. This year in my company we project that all legal secretaries will have computers and forty lawyers will have their own personal computers. Most lawyers have computer driven telephonic mailboxes. Lawyers communicating directly with their clients via computer—exchanging, commenting and correcting draft documents electronically—have proven very cost effective. In the next ten years, use of computers will expand greatly as access to both external and internal data bases expands. It will be important for private firms to communicate by computer with corporate counsel if they are to compete. It is well within the scope of current technology to do legal research, document creation and amendment, scheduling, filing and file retrieval, searching for critical statements and facts in records, and much more with a computer on the credenza. The librarian and file clerk of today may well be the computer system analyst of the future.

Lawyers in corporations also have a particular challenge and obligation to the legal system and society. They are in a unique position to help their corporate clients understand the problems of the system, analyze proposed changes and generate support for those changes that make sense. They are in the best position to analyze objectively the merits of litigation and the feasibility of alternatives to it. With outside trial counsel they have an obligation to prosecute litigation in a balanced and sensible manner, free from harassment, unjustified delay, and cost to all parties.

In summary, society has and will continue to change the legal practice in corporations and the legal profession as a whole. Our clients and society will demand that we become more productive and improve society's system for administering justice.

John F. Schmutz, senior vice president and general counsel of the Du Pont Company's Legal Department, joined the company in 1955 as a patent trainee. He was named patent attorney in 1958 and senior patent attorney in 1964. In 1970, he was appointed senior attorney, handling the general legal work for several Du Pont industrial departments.

In November 1973 Mr. Schmutz was given responsibility for providing legal counsel on all aspects of the company's energy activities. He became chief counsel of the newly created Energy and Environment Division in April 1974 and became assistant general counsel October 1, 1975. He assumed his present post on January 1, 1979.

[1] Abraham Lincoln, *Notes for Law Lecture,* 1 July 1850. Stern, *Writings of Lincoln,* p. 328.

[2] 60 Notre Dame Law Review, 431 (1985).

[3] *Asbestos in the Courts, The Challenge of Mass Toxic Torts,* Hensler, D.R., W.L.F. Felstiner, M. Selvin and P.A. Ebner, The Institute for Civil Justice (1985).

Confessions of an Unreal Lawyer

Christine Waisanen

My legal specialty is government relations. Everyone in Washington knows what that means. I am a Federal lobbyist. I thrive on it. It's a real challenge. In fact, I enjoy it much more than traditional legal specialties I have practiced, such as litigation.

I spend, however, considerable time in Wilmington, Delaware. That area is known for another legal "specialty", mainly corporate litigation. The most frequent comment I hear from these Delaware lawyers is, "Why are you not practicing real law?" or even "Don't you enjoy the practice of law?" Clearly, they consider corporate law to be "real", not federal legislation.

Now, let me be the first to admit that my profession is at times delightfully "unreal". Being a diplomat, I refuse to debate whether "Delaware law" is more real than "Washington law". My lawyer's instincts, however, told me to take issue. What, indeed, *is* "real law"?

I proceeded, as Diogenes, with my lantern of midnight oil to find the truth. I started with Black's Law Dictionary. That publication describes a lawyer as "a person learned in the law, as an attorney, counsel or solicitor; a person licensed to practice law...any person who, for fee or reward, prosecutes or defends causes . . . or whose business it is to give legal advice in relation to any cause or matter whatsoever." Clearly, I am "real" in the plain meaning of the term.

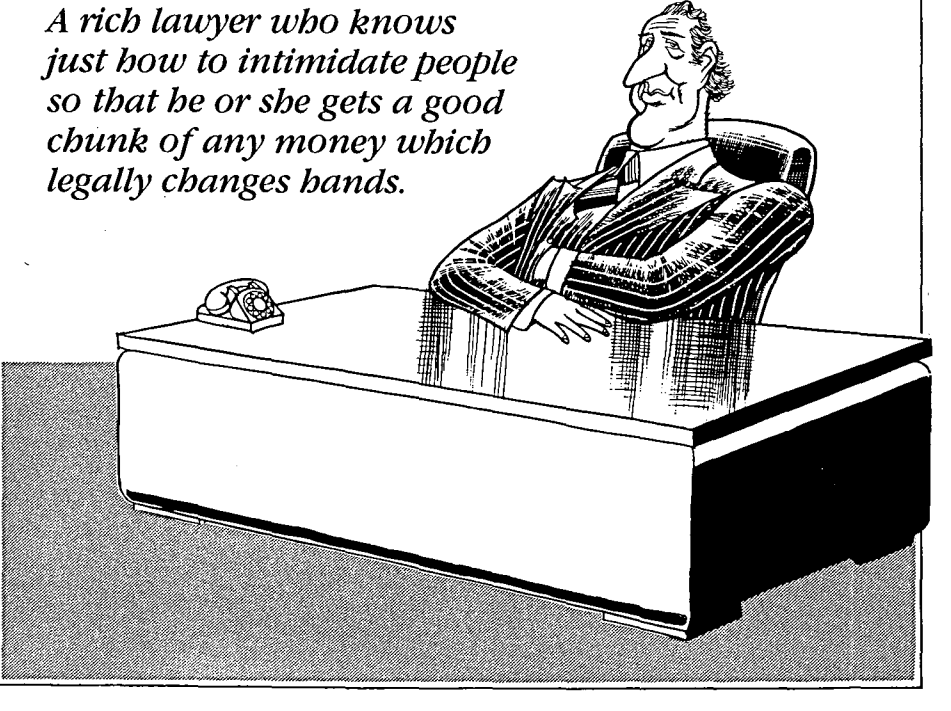
Having spent so much time in Washington, I decided the next course of action should be to conduct an informal public opinion poll. After all, perception may be reality. I heard the joke about a shark's professional courtesy a significant number of times—all five versions. I also, however, received the following interesting definitions among them as to what is a "real lawyer" in the public's mind.

- Someone who can do a simple will without calling a golfing buddy.
- Someone who sets the guilty free, then sends a bill so large that the client must return to crime to salvage his credit rating.
- A rich mouthpiece, bloodsucker or shyster.
- Someone who can right an injustice quickly, and communicates well with non-lawyers.
- Anyone but their nerdy cousin Edmund in Chicago.
- Someone officially empowered to get things hopelessly tangled, confused and immobilized, although not necessarily an insurance adjuster or government bureaucrat.
- A middle-aged white male with a paunch who wears glasses and a three-piece suit, smokes profusely and has no sense of humor whatsoever.
- A rich lawyer who knows just how to intimidate people so that he or she gets a good chunk of any money which legally changes hands.
- Someone who stirs strife for profit, and profits.
- Anyone who gets credit for a big trial, then gets described in the newspapers as expensive and slick.
- Someone who can spot the silver lining to a crisis, and takes at least a third of it.

My next approach was to go right to the horse's mouth. I asked several lawyers in Delaware and Washington, D.C. (admittedly at a few cocktail parties where I could get a large sample) how they would describe a "real lawyer" as opposed to other persons with law degrees. I was given some of the following as answers.

- Someone who has a complete wardrobe of vests, and wears them even in Rehoboth. A middle-aged male who wears a vested suit and frequently uses terms such as "equity" and "torts", but who is not necessarily a member of the local bar. Only rarely do blacks or pretty women lawyers count.
- Any licensed attorney working for a law firm, even a document carrier, proofreader or greeter.
- A lawyer having at least a "B" rating in Martindale-Hubbell, and who does not deal on a regular basis with nonlawyers unless they are clients or paid consultants.
- A lawyer who has appeared before a judge in a courtroom on several occassions, especially one who has "paid dues" by losing a jury or celebrated criminal trial.
- A tour guide for visiting Wall Street attorneys, who has special knowledge of courthouse gargoyles and overpriced lunch spots.

A rich lawyer who knows just how to intimidate people so that he or she gets a good chunk of any money which legally changes hands.



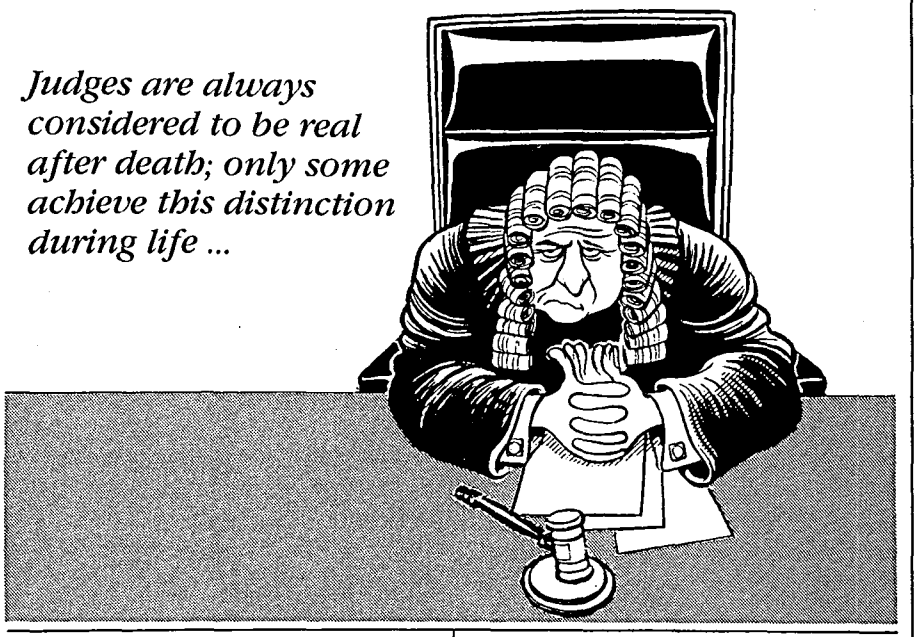
- A lawyer who has never worked full-time for the public or public interest sector, a manufacturing or service corporation, or academia, and who never would (or could?)
- A lawyer who is well-known to a self-described group of "real" local lawyers, most of whom are in semi-retirement.
- Anyone who has ever hung out a "shingle". (I was told by more than one Delaware lawyer that a person cannot practice law anywhere in the country if he or she had not passed the Delaware Bar.)
- A lawyer active in the local bar association who is seen regularly at "the club" (the name changes with the domicile of the lawyer defining the term).
- Someone who has been praised by a favorite judge.

Several lawyers said they "know one when they see one". I am not really sure if they were referring to "real lawyers" or obscenity. Surely, some would argue that the distinction between those terms is at best negligible.

Now, I do not think that the particular lawyers in the geographical vicinity I "sampled" were unique in any way. Nor do I kid myself that the typical definition of "lobbyist" would fare much better. But the point of this article is to discover the meaning of "real lawyer". I decided on a vodka tonic before proceeding further.

Clearly, I had to hone this definition down a bit. In doing so, I discovered the substrata of "real lawyers", sometimes mutually-exclusive categories. Some interesting samples are the following.

- Corporate lawyers referred to themselves as "real" if they were located in a legal department, but not if they were in senior management or running the company.
- Attorneys for law firms considered themselves particularly successful "real lawyers" if they advised corporate lawyers (particularly the New York offices) as local counsel, but said they would not refer to themselves as real lawyers if they were working full-time in that corporation's legal department.
- Lawyers for law firms considered those who conducted lawsuits more "real" than those who were responsible for attracting clients to the firm, even if those "rainmakers" had done so based on a past reputation of courtroom excellence.
- Brilliant courtroom advocates were not acknowledged to be "real" unless they regularly publicized their expertise, but if they published too frequently, they lost their edge.
- Associates in law firms sometimes referred to semiretired senior partners as "real" while those senior partners waxed nostalgic about their days as associates when they practiced "real" law.
- Counsel for plaintiffs were usually considered to be real, but counsel for the defense were not necessarily so. Having worked both sides, however, was considered especially "real".
- Those who make public policy are not "real", but those who find loopholes in insurance policies are.
- Lawyers who appear to be having fun or to be doing glamorous work are not considered to be "real" members of the profession.
- Judges are always considered to be real after death; only some achieve this distinction during life. The distinction appears to be whose ox is being gored.



Clearly, if one puts these definitions together, there are very few of us who could be considered "real lawyers" at anyone time, let alone for our entire professional careers. We lawyers have certainly fuzzied-up the definition of the term.

In comparing the two "polls", it appears that the public tends to see a "real lawyer" as someone who gets results. Lawyers tend to place a higher value on status among their peers. Also, the lawyer's role models are more frequently local figures, as opposed to television heroes.

Enough of this, I thought. What about the other professions—medicine, the clergy, college-level teaching, for example. What is considered "real" there? There did not appear to be a clear counterpart, other than that "hands on" work was always considered to be a little more "real" than purely administrative work.

In medicine, one does not normally find general practitioners described as anything other than one species of a class. The profession appears to respect, perhaps even exalt, specialists. Moreover, new specialties and technologies appear to be treated with more awe than suspicion. While one sees considerable professional jockeying (i.e., brain surgeons are more sophisticated than proctologists), there is not as strong a real/not real counterpart. At least there is not one apparent to an outsider, as it appears to be in our profession.

In academia, I found more suspicion of newer fields, and again, jockeying among those having different areas of expertise. But there was little real/not real counterpart, even among teachers and consultants. Corporate and government Ph.D.s were considered more "on loan" than "not real".

The clergy seemed especially wary of any feather-ruffling, even among members of the same denomination. I guess in God's eyes we are all real. ▶

Ms. Waisanen has been a lobbyist for a Delaware-based chemical company since 1979. Her responsibilities include Federal safety, health and environmental legislation. She spends approximately two days a week in Washington, D.C.

Previously, she was a labor relations attorney for the Chamber of Commerce of the United States, a trial attorney for a Federal agency and an intern with a Member of the U.S. Congress. She has written several publications and appeared on national TV to discuss legislative issues.

She received her J.D. from the University of Denver in 1975 and her B.A. (honors) from the University of Michigan in 1971. She is a member of the District of Columbia Bar, and has resided in Wilmington since 1979.

Several lawyers said they "know one when they see one".

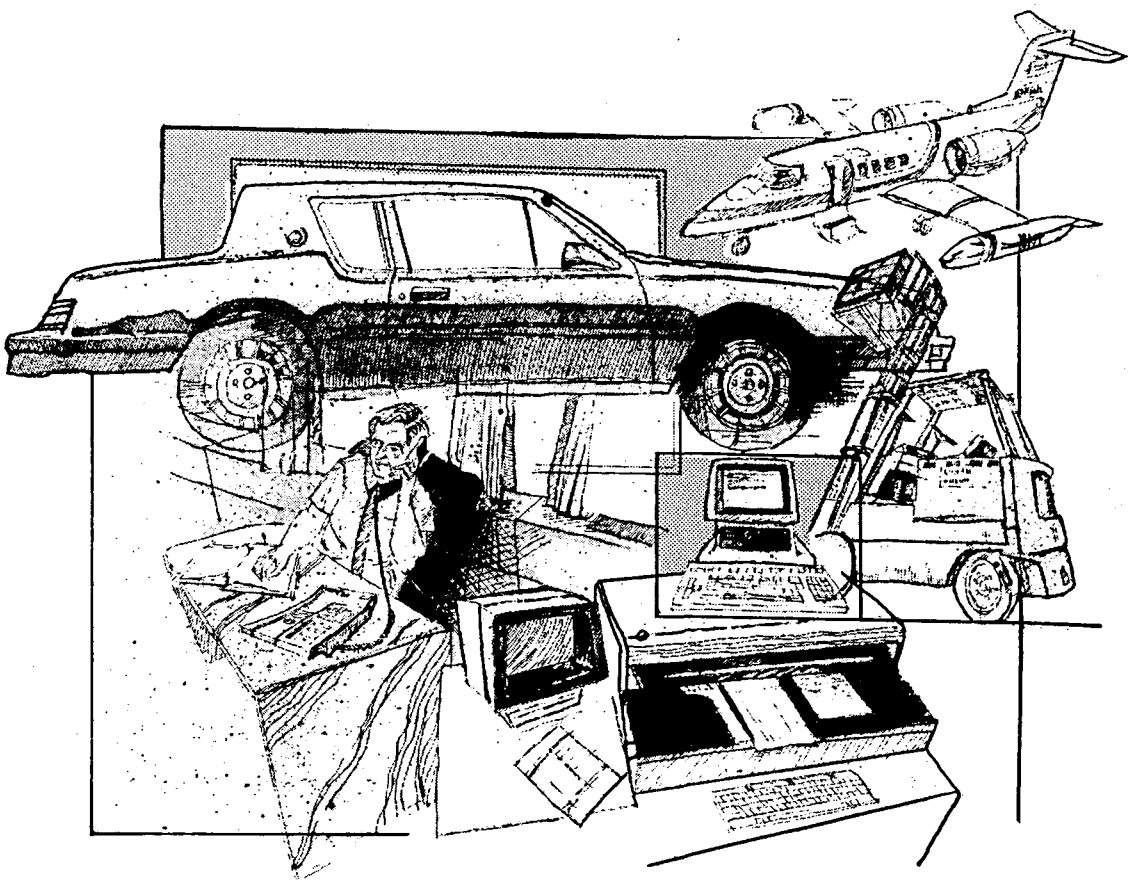
Speaking of God, why are we lawyers here anyway? To build a wardrobe of vests, make money intimidating people, needle our peers and hopelessly tangle issues (out of respect for our profession, please do not say yes)? Now I was really getting confused. I simply had to made up my own mind, based on the research and my instincts. There was no easy answer.

I came away from my "polls" deciding that there was more than a bit of truth to the adage that, with one lawyer in a town, there is little business. With two, business booms. We are, indeed, trained competitors, perhaps born advocates. Even though we can now advertise, there is still an undercurrent of "unwritten advertising" in prolonging any real/not real distinction. While it is simply an annoyance to me, it may be of greater frustration to the public, our source of clients. Do we only show professional unity when there is economic advantage to us? Why the proliferation of shark jokes?

In terms of our profession, I, for one, am excited by and proud of the many uses to which traditional legal training can be put today. Instead of simply conducting lawsuits, we have moved in large numbers into the mainstream of organized society to advise clients on how to avoid unnecessary litigation yet correct any perceived wrongs. We have become leaders in virtually all areas of commerce and industry, as well as human rights and personal dignity. We help to focus when litigation may be necessary, or what aspects of society may need to be changed. That is to the long-term benefit of society and the profession—real law based on real life.

I confess that the jury is still out on the definition of "real law" as far as I am concerned. Personally, I still consider my specialty to be "real" most of the time, sometimes delightfully "unreal", at moments boringly real. But rarely "not real". Let he or she who has never ventured outside the purity of "real" legal practice throw the first stone.

I also confess that I have decided not to care much anymore about this supposed real/not real distinction. It does, however, appear to be mighty important to some respected colleagues. After more ten years in the profession, I would like to know the "real" definition . . . from a "real" lawyer.



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The Role of Arbitration in the Practice of Law in Delaware

Joshua W. Martin, III and Samuel R. Russell

The inclusion of arbitration as an alternative to traditional adjudication signals a significant change in the practice of law in Delaware. There is no guarantee that adjudication will always provide the best approach to the solution of a legal problem. A traditional court judgment may render the truth and it may achieve justice, but in a significant number of cases it may lead to neither.

Addressing the needs of the people intended to be served requires a system where courts handle matters most appropriate for the full adversary process, while other less formal, less costly and more efficient mechanisms buttress and complement the traditional approach.[1]

We predict that in the foreseeable future courts will define the parameters of many alternative dispute resolution approaches while remaining the cornerstone of our nation's judicial system. Courts are realizing that justice is more likely to be obtained in a court system where judges handle cases that they are uniquely equipped to handle. Other cases may deserve a less costly and less time-consuming approach.

The adversarial process of litigation formally pits disputants against one another. With alternative forms of dispute resolution, an attempt can be made to settle conflicts as quickly as possible. Such agreements should reflect the best interest of all parties, preserve relationships and avoid the permanently damaging effects that mark some litigated settlements.[2]

Any advocacy for alternatives should not ignore the premise that traditional adjudication must be reserved and preserved for a significant percentage of cases, including those involving complex issues and matters of first impression in the jurisdiction. Furthermore, courts must continue as the protector of basic and fundamental human rights.[3]

In the keynote address to the First National Conference on Court-Ordered Arbitration, Chief Justice Robert N. C. Nix, Jr., of the Pennsylvania Supreme Court noted: "Whether perceived as good or bad, we cannot escape the fact that America is a litigious society and that our state and federal judicial systems are viewed as the primary forms for dispute resolution. In spite of the numerous shortcomings of the modern court systems—high costs, undue delay, lack of access for the poor, inflexibility-one cannot deny that conceptually, the judicial system lends stability to our society. The courts are regarded as the ultimate champions of justice, interpreters of constitutions and laws, grantors of rights and preservers of law, order and equity. Yet, it has become evident that the courts do not have the capacity to resolve all disputes. Moreover, some disputes by their nature, are more suited to resolution by means other than the traditional adversary process. Hence, although the courts may be legitimately viewed as the ends of justice, they should, by no means be considered the only mechanism."

Currently there is a full spectrum of third party intervention approaches to alternative dispute resolution, which have been attempted with some success across the country. Lawyers have been actively involved in proposing and implementing these systems. Certain approaches are particularly suited to certain types of problems, as well as to a particular facet of a court's jurisdiction, and to the particular needs and goals of that jurisdiction. In addition to the involvement of sitting judges as facilitators during judicial settlement conferences, the following approaches are examples of complementary dispute resolution: conciliation, mediation, binding arbitration, court-annexed non-binding arbitration, masters or referees, privately hired judges, mini-trials, summary jury trials, and neighborhood dispute resolution centers. Some definitions and examples may be helpful.

Conciliation in its purest form merely involves bringing the disputants together for negotiation. Where the conciliator is asked to render advice, the approach is technically a mediation program.

In **mediation,** the mediator provides non-binding active participation in the dispute resolution process and may provide a broad range of services such as enhancing communication, presiding over meetings, suggesting solutions, and exerting pressure on the disputants to compromise and reach some type of agreement.

Binding arbitration, typically based on a stipulation by the parties and used extensively in the labor and commercial area, includes numerous variations and is often utilized as a last resort in a settlement process.

Court-annexed arbitration is a mandatory, non-binding approach, requiring referral of disputes, usually involving a fixed range of monetary claims, to be considered by an arbitrator or by an arbitration panel. Such programs usually include some disincentives to de novo trial requests.

Neighborhood dispute resolution centers use non-lawyer facilitators who hear evidence from the parties, usually without a lawyer, and render decisions in minor matters, thereby resolving disputes for the litigants.

Privately hired judges, with or without special juries, are used typically in complex cases where specific expertise and experience is desired.

Masters and referees, as examples on non-judge judicial officers, are available for a number of potential functions, including ruling on motions and making findings of fact.

The **mini-trial,** which is amenable to many variations, may include a presentation before a privately hired judge and representatives of the parties, e. g., corporate executives. As an example, after some limited discovery, a presentation lasting no longer than a few days is presented to the presiding judge. If the matter is not settled after the presentation, the judge-adjudicator then submits a non-binding opinion to the parties, reflecting the relative strengths and weaknesses of their presentations, including a prediction of the likely out-

come of a trial. Neither the adjudicator nor his/her appraisal is available for use at any subsequent trial.

A **summary jury trial** is a vehicle where the parties each make presentations to a sample jury including opening statements, summations of evidence and closing statements. There is no live testimony and the presiding judge resolves any evidentiary questions before the presentations. After receiving an abbreviated charge, the jury deliberates and renders a non-binding verdict. The parties consider the verdict and may then proceed to a trial de novo if they both or either one of them so desire.

Court-annexed arbitration, which is one form of alternative dispute resolution being used in Delaware, is a mandatory but non-binding hybrid of mediation and adjudication. Arbitration should achieve the following goals: reducing court congestion, saving taxpayers money, expediting cases, serving diverse users and saving litigants money. If a significant percentage of the court's civil litigation can be diverted into an arbitration program, with a substantial portion of the matters being disposed of in that forum, then there is the potential for reducing court congestion by reducing the backlog of cases awaiting trial. The potential exists to save taxpayers money through such a diversion program, but more statistical information will be required to quantify the actual dollar savings. In arbitration, the cases can be processed in less than six months. There is the potential for substantial improvement over the traditional adversary process, where average times, from complaint to trial court disposition, in excess of three years are not uncommon.

An arbitration program can accommodate many types of cases such as tort, contract, collection, and consumer disputes, which may involve both individual and institutional litigants reflecting a representative cross section of the population. Where a program provides early disposition of disputes, especially without substantial discovery, there can be substantial savings to litigants through reduced attorney fees. It is at least plausible that the decreased income an attorney receives from an individual case might be offset by the increased time available to him to devote to more complex matters requiring greater attention. The status of research on this issue nationwide suggests that more information is needed before a definitive assessment can be made on whether court-ordered arbitration saves litigants money.[4] As corollaries to the aforementioned goals, any arbitration system should simplify the process through less formality and insure fairness to litigants. Any suggestion that a court-ordered arbitration program provides second class justice requires immediate attention. Programs must be scrutinized to insure that the quality of justice is as good if not better than that provided through the traditional litigation approach.

Court-annexed arbitration also serves as a basis for settlement. Settlement itself has some of the following theoretical advantages over litigation: (1) it costs the litigant and the court less money and time; (2) it avoids the mental anguish typical of litigation; (3) it allows attorneys to handle more cases and to operate more efficiently; (4) it allows both sides to gain something from the dispute; and (5) it makes a final disposition, since there is no appeal.[5]

An arbitration program either provides an early award in a case or it induces settlement by providing an earlier time table for case preparation and negotiation. Case preparation, in certain matters, often requires extensive discovery for which it is necessary to expend considerable time before the matter is ready for trial. Nevertheless, many matters can be resolved with less formal discovery. Theoretically, a case is ripe for resolution when: enough basic information is available to enable parties to evaluate their respective strength and weaknesses; counsel or other agents have authority to accept certain proposals; and the parties have a concurrent willingness to resolve the case before trial.[6]

In the Delaware Superior Court, arbitration became mandatory for all cases where the damages sought are $30,000.00 or less by an amendment to Superior Court Rule 16. The Rule was formulated by a small group of Delaware lawyers and was later adopted by the full Court. No legislative action was required.

The Superior Court program began on September 4, 1984. In its first year, 1,391 cases or 54% of the Court's civil actions state-wide were subject to the new arbitration procedure. ▶

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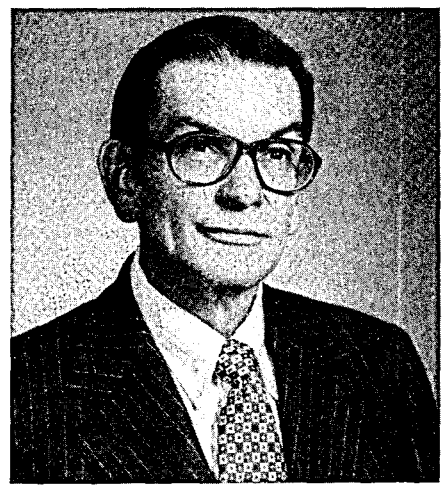

Samuel R. Russell is that rare breed—a native Delawarean. He graduated from Columbia University school of Law in 1948 and practiced law in Delaware from 1948 to 1985. Now retired, he is Assistant Arbitration Coordinator of Superior Court and also serves as staff assistant to the Court Consolidation Committee, recently appointed by the Chief Justice.

It is perhaps too soon to reach final conclusions as to the effectiveness of the program in reducing caseloads or judicial workloads. This is so because the true measure of effectiveness will be revealed only by the de novo trial experience. A true measure of effectiveness will be "if" and "when" civil cases are removed from the Court's docket before trial as a result of arbitration. This will not be known until after the second year of the program, or even later.

Of the 181 cases that actually went to hearing before an arbitrator in the first year of operation, 95 cases or 52% were "appealed" de novo. As of this writing, only a few of these 95 cases have actually been tried by the Court. Presumably, more of these cases will be tried by the Court in the future, but the experience in other jurisdictions with arbitration programs has been that the number of de novo trials is in fact minimal because most cases are settled after the de novo application is made. There is no reason to assume that Delaware's experience will be different in any significant way from that of other jurisdictions. Although the information is not quantified, it is already apparent that many cases have been settled fairly soon after a request for trial de novo.

Delaware's program does, however, differ from those in other jurisdictions in certain aspects. Delaware's monetary level of $30,000.00 is higher than the limit in most other state jurisdictions. Perhaps the most important difference is that in Delaware there is very limited discovery as compared to arbitration programs elsewhere, where full discovery prevails as in non-arbitration cases.

From what can be gleaned from the comments of arbitrators and attorneys who have participated in arbitration proceedings, there seems to be general satisfaction with the program to date. This is not to say that it cannot be improved. It can be said, nevertheless, that, because of the preliminary indications of success in Delaware, and because the number of jurisdictions throughout the country adopting arbitration programs is increasing, the arbitration program in our Superior Court is likely to continue indefinitely.

What does this mean for the practicing Delaware attorney in the years to come? Because arbitration is mandatory for all cases under $30,000.00, nothing is to be gained by a Delaware attorney adopting a "head-in-the-sand" attitude on the misconception that arbitration is a passing fancy or unimportant to his client's cause. It is apparent that mandatory, court-annexed arbitration is to continue in Delaware indefinitely, and it would seem that any lawyer who chooses to ignore that fact is endangering the rights of his clients and perhaps his own reputation.

Obviously, a Delaware attorney should be familiar with the rules and procedures governing arbitration proceedings and be in a position to advise his clients concerning procedures and their effect. To the attorney who most frequently represents plaintiffs, arbitration provides a more speedy and less formal forum to achieve resolution of a dispute. To the attorney who most frequently represents a defendant (or his carrier), arbitration makes possible a more speedy, less costly, and uniquely independent evaluation of a plaintiff's claim. Since a de novo application is

available to any losing party, no fundamental rights are forgone by participating fully in the arbitration program.

To be ill-prepared for an arbitration hearing, or to approach an arbitration hearing in a half-hearted manner, is an infringement upon a client's rights and possibly a violation of an attorney's duty to his client and to the Court. Court-annexed arbitration is here to stay. Arbitration programs are being adopted by more and more states, large municipalities, and even in some federal districts. A large body of legal literature exists on the subject of arbitration. Law schools, including Delaware Law School, are offering courses in alternative dispute resolution.

The purpose of a complementary dispute resolution program is to enhance the administration of justice. By decreasing civil caseloads and, we hope, reducing judicial workloads, the courts can better handle their criminal case responsibilities and their more important civil case responsibilities.

The role of the practicing lawyer, as an officer of the court and in consideration of his duty to his client, is to participate in this process in a responsible and enthusiastic manner. In the absence of that level of participation, arbitration cannot succeed and the effectiveness of the justice system is correspondingly diminished.

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[1]See Dispute Resolution: A Complimentary Approach to Justice, University of Wisconsin-Madison Law School, Madison, Wisconsin, Sanford Jaffe.

[2]See Annual Report-1984, National Institute for Dispute Resolution.

[3]"The Priority of Human Rights in Court Reform", A. Leon Higginbotham, Jr., 70 R.F.D. 134 (1984).

[4]Dispute Resolution Forum, August, 1985-National Institute of Dispute Resolution.

[5]"Unsettling issues about settling civil litigation", Howard Bedlin and Paul Nejellski, *Judicature* June-July 1984, Vol. 68/1 page 11.

[6]*Id.* page 11.

Separation of Church and State: Historical Roots and Modern Interpretations

Thomas Stephen Neuberger

We hear much these days about "separation of Church and State." Although it is not found in the United States Constitution, this phrase has taken on the same reverence as "freedom of speech" and "freedom of the press." While separation of Church and State is used in many different contexts, it is most often invoked whenever religious belief and expression escape the four walls of a Church and are injected into the public arena. Remarks such as "religion is purely a private concern" and "a person's religion should not be forced upon another" are then often interwoven with cries for separation of Church and State. Moreover, when individuals call for a public policy, such as a ban on abortion, that is also the logical extension of the religious tenents of certain Christian and Jewish faiths, the doctrine of separation of Church and State is again raised against them. This is especially true when those faiths are traditionalist or fundamentalist. But those who are quick to invoke Church-State separation whenever religion goes public should ask themselves the following questions.

Was it a violation of the separation of Church and State for Quakers to call for the abolition of slavery through legislation at the time of the Civil War, for the Reverend William Sloan Coffin and Reverend Daniel Berrigan to lead the opposition to the Vietnam War, for the Reverend Martin Luther King and whole Churches to push for the Civil Rights Act of 1964, for the Reverend Jerry Falwell to form the conservative political action organization—the Moral Majority, or for the Roman Catholic Bishop of Delaware to urge legislators to pass laws regulating abortion? Did Reverend Jesse Jackson violate Church-State separation when he ran for president in 1984? What about Reverend Falwell's public endorsement of George Bush for president in 1988? Was it a Church-State violation for our early legislatures to pass laws, drawn from the Judeo-Christian *Bible,* against murder, rape, child abuse, incest, cannibalism, and theft? No doubt there are murders, rapists, child abusers, etc., who are upset that their "rights" are denied whenever they are prosecuted under these laws. Can they claim that because most supported such laws for religious purposes that the separation of Church and State was breached and that those laws should be struck down as unconstitutional? Under modern theories of the separation of Church and State, the answers to the above questions often become difficult and even inconsistent. Often times the answers appear to depend more upon the particular political agenda embraced by a religious leader, than any neutral constitutional principles.

This seems especially to be the case whenever the conservative Christian community becomes involved in the political arena or Christian students seek the right to gather voluntarily to pray before or after school. In these instances the hue and cry has been: "This is a violation of the First Amendment. This disrupts the separation of Church and State." However, the so-called wall of separation is an arbitrary phenomenon. If a student wants to pray, the State often presents an absolute separation of Church and State argument. However, when the State is attempting to interfere with and regulate the Church, such as tell it who to ordain or who it has to employ, the State argues there is no absolute separation of Church and State. To say the least, the State and its attorneys argue both sides of the coin well. In the eyes of State officials, there may be a wall of separation, but it is a wall they can move and cross at will.

Separation of Church and State as it is bantered about today is a false political dictum. At a time when government has become bigger and bigger and necessarily impacts itself more and more on religious institutions, this arbitrary division between Church and State is now a ready excuse, an easily identifiable rallying point, to subdue the opinions of that vast body of citizens who represent those with traditional religious convictions. It has become a means to deny them free speech, to disarm them politically, and to assure that they stay out of the political fray. In sum, separation of Church and State has lost its historical meaning and instead has become an ideological tool for displacing the values espoused by traditional religions and replacing them with the values of a new religion of secularism. As Harvard theologian Harvey Cox has noted, secularism is an "ideology, a new closed world-view which functions very much like a new religion...it is a closed "ism."...it is a menace to freedom because it seeks to impose its ideology through the organs of the State."[1]

I. A Look at History

The popular insistence that separation of Church and State mandates a secular culture and government is refuted by the understanding our nation's founders had of this concept.[2] Religious liberty was a prime issue in the colonial dispute with Great Britain. John Adams cited the attempt by parliament to force the establishment of the Church of England on the colonies as being as responsible "as any other cause for the break."[3] Historian Carl Bridenbaugh has written "it is indeed high time that we repossess the important historical truth that religion was a fundamental cause of the American revolution."[4]

The framers of the Constitution well understood the danger of the expansive State and provided that the First Amendment specifically limit the power of the federal government in several areas of man's basic rights: freedom of religion, speech, press, and assembly. It is not surprising that religion was listed first, since the guarantees of religious freedom were seen as paramount to the framers. Religious freedom formed a base for the exercise of other freedoms. This heritage came from the Reformation in the 16th century, and is known as liberty of conscience—freedom to be-

lieve and act on beliefs without government coercion.

Roland Bainton has written in *The Travail of Religious Liberty* "that all freedoms hang together...civil liberties scarcely thrive when religious liberties are disregarded, and the reverse is equally true. Beneath them all is a philosophy of liberty, which assumes a measure of variety in human behavior, honors in integrity, respects the dignity of man, and seeks to exemplify the compassion of God."[5] The eminent jurist James Kent, a giant of early American law, in his classic *Commentaries On American Law*, wrote: "The Free Exercise and enjoyment of religious profession and worship may be considered as one of the absolute rights of individuals, recognized in our...law."[6] The religion spoken of by these men was Judeo-Christian theism. (Other religious faiths were virtually nonexistent in colonial America.[7]) And Judeo-Christian theism was considered the basis of freedom. It was the glue that held liberty and society as a whole together. George Washington in his farewell address said,

> *Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports...*

And again he stated,

> *Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.*[8]

When the United States constitution was adopted in 1789 the principle of faith in God was presumed to be universal and necessary for healthy civil government. The Declaration of Independence of 1776 is specifically based upon "the laws of nature and of nature's God" and recognizes that our unalienable rights are given by our Creator. All the states of the United States at that time expressed either in the preambles or the body of their State Constitution dependence on God. (This is even true of all fifty states today.) The Delaware Constitution of 1792 states that "through Divine goodness" all men possess the right to serve their Creator, enjoy and defend life and liberty, and acquire and protect property.[9] The text of the United States Constitution makes no reference to God. However, the Constitution is a technical document, a contract between the federal government and the people through their States. The framers left religion out of the contract because they did not want the federal government to have any authority over Church and religion. John Witherspoon and other Christian leaders, having observed British monarchy and hierarchy as both the head of the Church and the State, did not want a connection between their Church and the new federal government.[10]

Various factions were not satisfied with the Constitution as originally drafted. They feared too powerful a government had been created. In particular, the clergy demanded a specific limitation or amendment concerning religion.[11] This was incorporated in the First Amendment.

A central concern here was to prevent the federal government from establishing a national denominational Church, as in England.[12] This protected the state established or state preferred Christian denominations that existed in many of the colonies at that time. Supreme Court Justice Hugo Black acknowledged in 1962, in the prayer ban decision, that at the time the Constitution was written and ratified at least eight of the thirteen colonies had established Churches (and there were established religions in at least four of the other five.)[13] In James Madison's words, the First Amendment was prompted because "the people feared one sect might obtain a preeminence, or two combine together and establish a religion to which they would compel others to conform."[14] Thus the philosophical base of the First Amendment was that of denominational pluralism—healthy coexistence between the various Christian denominations.

The existence of the State Churches did not mean that their governments were theocracies. But it did mean that their laws and civil governments were based upon principles derived from their religion. As noted by Justice William O. Douglas, "we are a religious people whose institutions presuppose a Supreme Being."[15] The Constitution, then, separated the institution of Church from the institution of the State but not religion from government or religious individuals from any meaningful activity within the state and society at large. At that point in our history, the idea that a Christian or Jew should be excluded from practicing his or her religious principles and acting on them except in Church or at home was unthinkable. Supreme Court Justice Joseph Story, a leading Unitarian of his time who served on the Supreme Court from 1811 to 1845, wrote

> *Probably at the time of the adoption of the Constitution and of the* ▶

First Amendment to it...the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the states so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation...the real object of the Amendment was to...exclude all rivalry among Christian sects, and prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.[16]

In particular the First Amendment states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This was intended to mean that the federal government shall make no law having to do with supporting a national denominational Church.[17]

II. In God We Trust

The phrase "wall of separation" as it is used today, to require total indifference by government toward religion, is a recent development beginning in the 1930's and is described in Frank Sorauf's *Wall of Separation.* [18] Professor Sorauf had access to the files and archives of the American Civil Liberties Union, the American Jewish Congress, and Americans United For Separation of Church and State. His scientific study of the cases over a thirty year period established that in the Church and State area law is simply politics by other means, a politics designed to disarm traditional religious believers. However, contrary to the trend today, the purpose of the First Amendment was to provide freedom for religion, not freedom from religion. There are numerous examples among the writings and actions of our nation's founders to demonstrate that separation of Church and State did not mean that government should be hostile to religion as Justice Oliver Wendell Holmes stated: "A page of history is worth a volume of logic."[19] These examples bear recounting.

After the election of George Washington as our first president, Congress declared that a "divine service" should be held in St. Paul's Chapel in the District of Columbia to be performed by the chaplain of Congress "following the administration of the oath of office."[20] Washington upon assuming office stated, "It would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe."[21] Presidents Washington, Adams, and Madison issued presidential Thanksgiving proclamations.[22] James Madison, when serving in Congress, was a member of the congressional committee that recommended the chaplain system, even voting for the Bill authorizing payment of chaplains for their services.[23]

In 1803, President Jefferson proposed, and the Senate ratified, a treaty with the Kaskaskia Indians in which the federal government agreed to pay money for the support of a priest and erection of a Church for the Indians.[24] President Washington previously had entered into a similar treaty with the Oneida, Tuscorora, and Stockbridge Indians.[25] Jef-

(Continued on page 40)

Thomas Neuberger was admitted to the Delaware Bar in 1974 and to the Bar of the Supreme Court of the United States in 1978. Prior to his admission to the bar he had been a law clerk for John H. Pratt, U. S. District Judge for the District of Columbia. He received his law degree from Georgetown University Law Center where he had been editor of the Law Journal. One of his major interests has been First and Fourteenth Amendment litigation involving freedom of speech and religion. He has been in independent general practice since 1981.

ferson himself, as founder of the University of Virginia, recommended that students be allowed to meet and pray with their professors on campus.[26] He was the author of the first plan of public education adopted for the City of Washington.[27] It included the *Bible* and the *Issac Watts Hymnal* as the principal books to teach reading to students.[28]

The tradition of government acknowledgement of the role of religion in public affairs has continued to the present. Our national motto is "in God we trust", which is inscribed on our currency and the entrance to the Senate chambers.[29] The pledge of allegiance contains the words, "one nation, under God, with liberty and justice for all."[30] Even the United States Supreme Court, which recently has made some overly restrictive interpretations of Church-State relations, begins each session with the cry, "God save the United States and the Honorable Court" and sits in a courtroom decorated with a notable religious symbol—Moses with the Ten Commandments.[31]

III. Secularism vs. Traditional Values

These examples illustrate that modern secularist perceptions of separation of Church and State have no roots in American history and do not warrant the constitutional status they claim for themselves. Indeed they are instead a threat to the constitutionally protected freedom of religion. Modern application of a rule of strict separation has had the effect of limiting the exercise of religious faith into ever smaller private spheres. In nations where this approach has reached its logical conclusion, the result has been a reduction of religion to something which can only be done behind locked doors.

As recently observed by Edwin Meese, the Attorney General of the United States:

> *By gradually removing from public education and public discourse all references to traditional religion and substituting instead the jargon and ritual and morality of the cult of self, we run the risk of subordinating all other religions to a new secular religion which is a far cry from the traditional values which have been successful and which have nurtured the morality and the values which underlie the American people. As the Lutheran writer Richard Neuhaus has observed, there is no such thing as a "naked public square." As religion is pushed out of that square, other value systems will rush in to occupy it. The American constitution makes no guarantee that the public square should be protestant, Catholic, or Jewish; Muslim or Buddhist; or religious or non-religious for that matter. But it does provide that the American people should be able, within the limits of the First Amendment, to determine the values of the public square. And it begs credulity to argue that the value system most reflecting the beliefs and sentiments of the American people has to be primarily secular and cannot be religious in nature.*[32]

As traditional religion is forced from the "market place of ideas" by the arm of the state and prevented from competing with all other value systems on an equal basis, the noble principles of free

speech and freedom of religion are seriously abrogated to the detriment of all citizens.[33] An unconditional right to say what one pleases about public affairs, be the motivation for that speech religious or secular, is what I consider to be the minimum guarantee of the First Amendment. Separation of Church and State is simply a catch phrase used in political debate to disarm opponents who take a view on political issues supported by the Judeo-Christian scriptures. As such this argument is without constitutional or historical support.

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[1]Harvey Cox, *The Secular City*(N.Y.: Macmillan, 1965) p. 18.

[2]See Louisell, *Does The Constitution Require A Purely Secular Society?* 26 Cath. U.L. Rev. 20 (1976). J. Whitehead and J. Conlan, *The Establishment Of The Religion Of Secular Humanism And Its First Amendment Implications,* 10 Texas Tech L. Rev. 1 (1978).

[3]Rouses J. Rushdoony, *This Independent Republic* (Fairfax, Va.: Thoburn Press, 1964) p.97.

[4]Carl Bridenbaugh, *Mitre and Sceptre* (N.Y.: Oxford University Press, 1962) p.xiv.

[5]Roland Bainton, *The Travail of Religious Liberty* (Hamden, Conn.: Shoe String Press, 1971) p.26.

[6]James Kent, *Commentaries On American Law,* Vol. II (Boston: Little, Brown, 1858 pp. 35-36.

[7]John Whitehead, *The Second American Revolution* (1st ed.; Elgin, Ill: David C. Cook, 1982) p.95.

[8]Quoted from An Address Of The Honorable Edwin Meese, III, Attorney General of the United States, August 7, 1985, p.8.

[9]Whitehead, p.95.

[10] *Ibid.*

[11]Whitehead, p.96.

[12] *Wallace v. Jaffree,* 105 S.Ct. 2479, 2512, (1985) (Rehnquist, J. dissenting); *Lynch v. Donnelly,* 104 S.Ct. 1355, 1361 (1984) *citing* 2 J. Story, *Commentaries On The Constitution Of The United States* 593-595 (2d ed., 1851).

[13] *Engle v. Vitale,* 370 U.S. 421, 427-28 (1962).

[14]Jonathan Elliot, *The Debates of the Several State Conventions on the Adoption of the Federal Constitution,* vol. III (N.Y.: Burt Franklin, 1888) p.45.

[15] *Zorach v. Clauson,* 343 U.S. 306, 313 (1952).

[16]Joseph Story, *Commentaries on the Constitution of the United States,* vol. II, (2d ed.; Boston: Little Brown, 1905) p. 593-595.

[17]See *Wallace v. Jaffree,* 105 S.Ct. 2479, 2512. There Justice Rehnquist also notes that this was undoubtedly the meaning intended by James Madison, "the most important architect among the members of the House of the Amendments which became the Bill of Rights."

[18]Frank J. Sorauf, *The Wall of Separation, The Constitutional Politics of Church and State* (Princeton, N.J.: Princeton University Press, 1976).

[19] *New York Trust Co. v. Eisner,* 256 U.S. 345, 349 (1921).

[20]P. Stokes and L. Pfeffer, *Church and State in the United States,* (1964) p.87.

[21] *Engel v. Vitale,* 370 U.S. at 446 (Stewart, J. dissenting).

[22] *Marsh v. Chambers,* 103 S.Ct. 3330, 3334 (1983); R. Cord, *Separation of Church and State: Historical Fact And Current Fiction,* (1982) pp. 28,29.

[23]2 *Reports Of Committees of the House of Representatives 4* (1854); 1 *Annals of Cong.* 891 (J. Gales Ed. 1834); *March v. Chambers,* 103 S.Ct. at 3333.

[24] *A Treaty Between the United States of American and the Kaskaskia Tribe of Indians,* 7 Stat. 78-79 (Peters Ed. 1846).

[25] *A Treaty Between the United States And The Oneida, Tuscorora, and Stockbridge Indians, Dwelling In The Country Of The Oneidas,* 7 Stat. 47-48 (Peters Ed. 1846).

[26] *Regulation of the University of Virginia,* October 4, 1824, Chap. 2, Sec. 1.

[27] *J. O. Wilson Public Schools of Washington,* vol. 1, (Washington D.C.: Columbia Historical Society, 1897), p.5.

[28] *Ibid.,* p.9.

[29] *Joint Resolution To Establish A National Motto Of The United States,* Ch. 795, pub. L. No. 84-851, 70 stat. 732 (1957); *Engle v. Vitale,* 370 U.S. at 440, 449.

[30] *Joint Resolution, etc.,* Pub. L. No. 94-344 Sec. 1 (19), 90 stat. 810, 813 (1978) *codified* 36 U.S.C. sec. 172 (1978).

[31]C. Warren, *1 The Supreme Court in United States History* 496 (1922); *Lynch v. Donnelly,* 104 S.Ct. at 1361.

[32]Meese, *Ibid.* p.13.

[33]For additional information about the religion clauses of the First Amendment, see C. Antieau, A. Downey and E. Roberts, *Freedom From Federal Establishment* (1964); W. Bird, *Freedom From Establishment and Unneutrality in Public School Instruction and Religious School Regulation,* 2 Harvard J. of Law and So. Pol. 125 (1979); Comment, *Secularism in theLaw: The Religion of Secular Humanism,* 8 Ohio U.L. Rev. 329 (1981); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*—part I and II, 30 Harv. L. Rev. 1381 (1967), 81 Har. L. Rev. 513 (1968).

The Division of Consumer Affairs, An Overview

Donald E. Williams

Raiding the fridge: the article below was intended for the Winter issue on Consumerism. When we ran out of space, we sacrificed it on the altar of advertising revenue. Now, as any thrifty housewife knows, fish chowder and baked beans are much better reheated for a second meal. Bon appetit!

Few Delawareans know what consumer rights the law bestows, much less how to seek redress. That is why the staff of the Division of Consumer Affairs will field more than twelve thousand requests for help this year.

In an impersonal, "off the rack" marketplace, troubled consumers turn to us for custom fit solutions to every imaginable difficulty. And we are thankful for their patronage. Consumer complaints are the lifeblood of consumer protection agencies, alerting us to new consumer frauds and marketplace inequalities.

Traditionally, the Division has responded to complaints through a process of fact finding and mediation. As a matter of policy, we pursue the facts of every complaint. Where consumer fraud or other unlawful conduct is undiscoverable or not in issue, we advocate reconciliation through negotiation.

By attempting mediation in each case, we can often revive complaints that would otherwise perish in the maw of corporate bureaucracy. Once unmasked before conciliatory executives, complaint letters usually produce favorable results. Some businesses go to great lengths to satisfy a customer. Others claim "satisfaction guaranteed", but need prodding. Under the skillful urging of a consumer protection agency, most companies respond to consumer snafus with reasonable offers and settlements.

Occasionally, however, disputed facts make reconciliation impossible. When both parties remain firm in their positions and mediation fails to bridge the gap, a private legal remedy may still be available. In Delaware's Magistrate Court, consumers will find a user friendly environment programmed to reach speedy decisions. Damaged consumers should not be hesitant to use this forum, yet as often as we recommend it, the Court is probably used too infrequently as an avenue of consumer redress.

Although it is widely known that the Division administers the "Landlord-Tenant Code" and the "Mobile Home Lots and Leases Act", people are surprised to learn that landlord-tenant squabbles generate the most questions and complaints. Withholding from security deposits, notice requirements for rent increases and lease termination, maintenance obligations, and the legality of certain provisions of rental agreements are perennial sources of irritation to tenants and landlords, alike.

Every year the Division devotes considerable time and effort to landlord-tenant disputes. It is time well spent. A constant dialog with landlords and tenants not only yields successful resolution of disputes, but promotes uniform observance of the law and prevention of violations.

Although we frequently find cause to investigate alleged violations, enforcement by cease and desist order has been used sparingly. Again, the Division has emphasized mediation together with large doses of information and education. Because of the steady stream of questions and complaints, the Division monitors rental practices closely and can foresee potentially troublesome or unlawful trends.

By maintaining daily contact with agents and influential property managers, we encourage voluntary adherence to both the letter and spirit of the law. As a result, a high level of awareness and compliance with the law is evident at professionally managed properties. Private landlords should take more notice of our services, which include providing written summaries of the landlord-tenant code and copies of pertinent sections of the law upon request.

Certainly the most talked about source of consumer frustration is the automobile. The American love affair with the automobile may be everlasting, but consumer tolerance for shoddy repair service, factory defects, and empty promises of reliability and performance has been pushed to the breaking point.

Automobile warranty statutes known as "lemon laws" are the latest outgrowth of consumer dissatisfaction with the car industry. They take aim at manufacturers who fail to adequately correct mechanical defects reported during the warranty period.

Delaware's lemon law (6 *Del. C.*, Ch. 50) imposes on manufacturers a statutory obligation to repair any "nonconformity" reported under warranty. It defines "nonconformity" as a defect or condition which substantially impairs the use, value, or safety off the automobile. If the same "nonconformity" has been subject to repair four or more times and continues to exist; or if the dealer has kept the car under repair for a cumulative total of more than thirty business days in order to repair a "nonconformity", the obligation has not been met. Accordingly, the manufacturer must replace the automobile with a comparable new model or refund the purchase price.

The next hurdle between a consumer and his remedy is an arbitration process established by the manufacturer. We urge consumers with lemon claims to consider seeking legal counsel before applying for arbitration. If a thorough review of documented repair history reveals a strong claim, a consumer should file for arbitration. In fact the lemon law requires a consumer to submit his claim to the arbitration procedure established by the manufacturer.

When applying for arbitration, a consumer should declare that a refund or a replacement is requested. If those remedies are not awarded, and the arbitrators instead decide to order yet another attempt at repair of the "nonconformity", legal counsel should be sought, again, before accepting or rejecting the decision.

Here is another bit of unsolicited advice: At this stage one might consider a letter of demand to the manufacturer. If the demand is refused or ignored, the Division of Consumer Affairs may be interested in reviewing the complaint in its entirety. Violations of 6 *Del. C.*, Ch. 50 may be addressed by the Division under its authority to issue cease and desist orders. Although this test of enforcement is without precedent, it is nonetheless compelling.

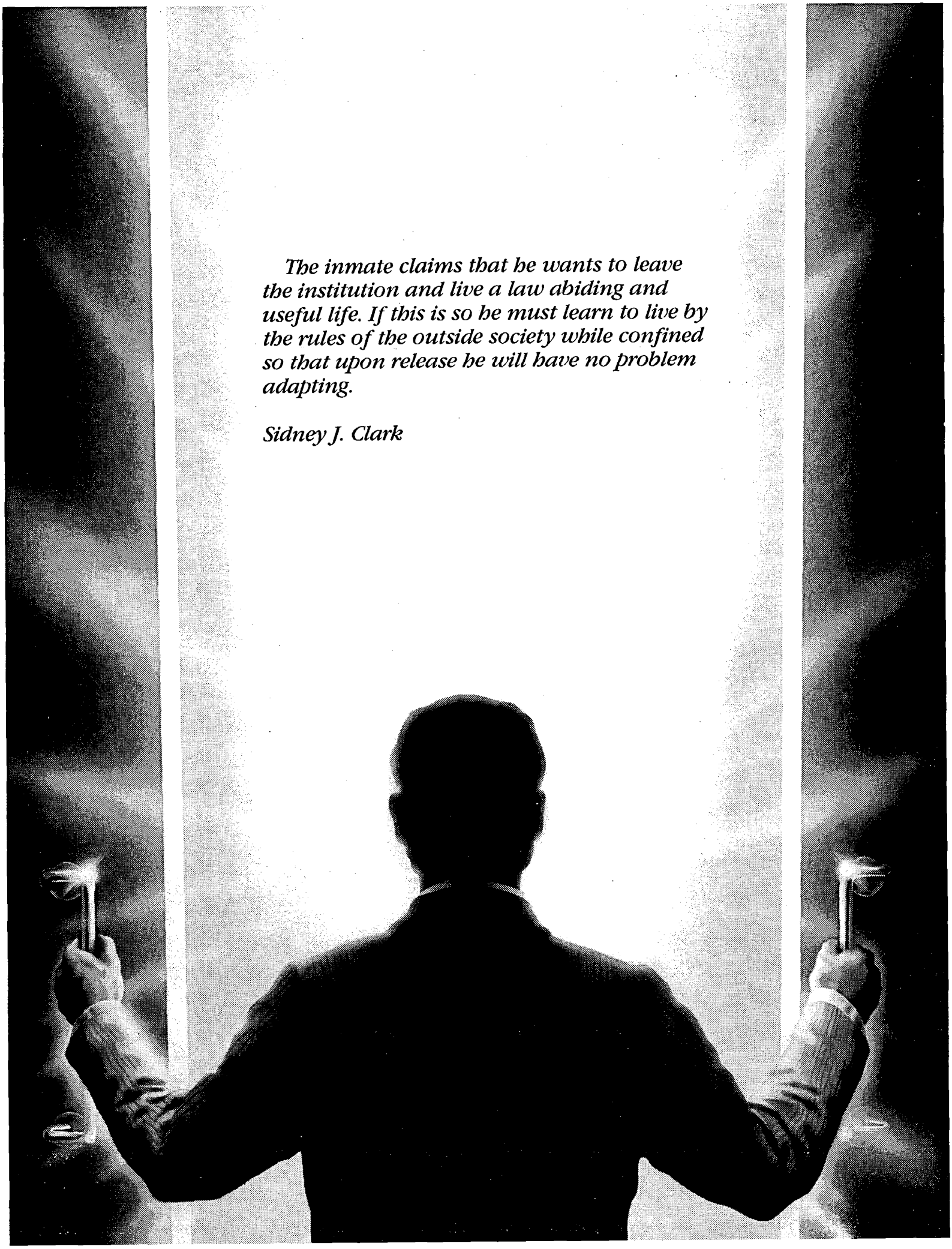
Currently, the Division is evaluating the three arbitration procedures available to Delaware residents—Chrysler's, Ford's and the Better Business Bureau's Auto Line system for General Motors

and the major foreign producers. Our goal is to establish whether these dispute settlement mechanisms are being conducted in compliance with the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. 2301, et seq. Additional input from consumers who have used these procedures would be welcomed by the Division.

Through information and awareness campaigns, consumer protection agencies help the public avoid the common pitfalls. Through educational campaigns, we alert the public to unlawful practices. But the path to greater protection against fraudulent practices and the means to recovery begin with faithful reporting and investigation of complaints.

Don't just fume and mutter, "There oughta be a law." There probably is one!

Donald E. Williams has served as Director of Consumer Affairs since 1983. Prior to becoming Director, Don was Director of Communications and Deputy Press Secretary to Governor Du Pont from 1981-1983. He also served as Governor DuPont's Special Assistant for Constituent Services from 1979-1981, and Administrative Assistant to Secretary of State, Glenn C. Kenton from 1978-1979. Donald attended Trinity College in Hartford, Connecticut and the University of Delaware, Newark.



The inmate claims that he wants to leave the institution and live a law abiding and useful life. If this is so he must learn to live by the rules of the outside society while confined so that upon release he will have no problem adapting.

Sidney J. Clark

Both Sides of the Bench

Sidney J. Clark

The article that follows consists of portions of a speech prepared for delivery by Sidney J. Clark. As Mr. Clark points out in the introduction to the speech, he has had the unique experience of having been a former member of the Delaware Bar, a prosecutor, judge, criminal defendant, and inmate of a correctional institution.

I hope I will be able to make you aware of some of the problems that exist in the criminal justice system that may not be covered in the textbooks. This presentation is based on my personal experience as judge, prosecutor, defendant, and inmate. I hope you will gain an appreciation of the problems that exist and be more successful than my generation has been in solving some of them.

I have found no academic definition for "the criminal justice system" that might not be somewhat misleading, therefore I define it as "When the man get hold of you because of a commission or alleged commission of a crime until you are no longer in his jurisdiction." The components of "the man" are the arresting officer, the court, warden, and parole officer.

I propose to point out to you how the system actually works—to quote a phrase of Howard Cosell "to tell it like it is". An awareness of the realities of the system is a necessity as you study it with the hope of improving it. I was fortunate in my experiences because they gave me an awareness of things of which I was ignorant. However, when I was learning I was not so pleased.

Among the powerful influences that affect the quality of justice are political pressure, public opinion, the social status of the individuals involved, and economics.

To suggest that economics does not play a major role in determining the quality of justice is to bury your head in the sand. There is a grave misconception about its actual role. Many times we hear people say that someone got off because he had money. The impression is that money, *per se,* got him off because he paid and got favored treatment. Certainly we hear of bribery, jury tampering and other forms of corruption, but these instances are few and far between and when discovered are dealt with severely.

Let us talk about the lawful use of money to obtain a better justice, starting at the time of the arrest. Most criminal charges are bailable, allowing one to remain free after an accusation until the day of trial. Only the amount of bail necessary to assure that the defendant will appear in court when required is proper. However, the system plays a few games and the blind lady of justice takes a peek. To keep someone in prison, judges often set bail so high that an individual cannot obtain it. This makes bail punitive.

After the arrest one needs a lawyer. This can be one of the most expensive costs in the proceedings. Today's system is such that if one cannot afford an attorney, the state will appoint one, usually from the public defender's office. Lawyers who are prominent in the field of criminal justice and come from highly prestigious law firms are expensive and are out of reach of the average defendant. It is not always true that the most expensive is always the best but I think it is fair to say in most cases it is. One of the advantages enjoyed by these high powered lawyers, although it will probably be denied, is they are received better by the courts. In some cases courts pay closer attention to their presentations than to arguments made by lawyers of less stature. In my own case I felt a little more comfortable having a former state supreme court justice and senior member of one of the state's leading law firms arguing that the statute I was indicted under was unconstitutional, than I would have represented by a young lawyer with no reputation.

Money is an important factor in the preparation of a case. The more money available to an attorney the better his preparation. Investigation often gets good results if funds are available. A fruitful investigation goes into the background of a jury panel and can often reveal things that no *voir dire* would reveal.

Research can affect the outcome of a case and the party who has funds can do the most research. Especially in the case of expert witnesses, the state often has unlimited money to obtain the best available experts. The public defender has some funds but nothing like the state's.

The fairness and quality of the trial or disposition of a case is determined by the sitting judge. There can be no fair trial unless the intellectual integrity and sense of fairness of the sitting judge is of the highest quality. In my opinion one of the greatest prostitutions of justice is a judge's refusal to take time to research a controversial issue and make a sound ruling, instead of summarily dealing with the issue and forcing the defendant to appeal in order to obtain a quality decision. If the defendant is not able to ▶

Sidney Clark has a story that very few others, if anyone, could tell. He was admitted to the Delaware Bar in 1957 and served as Assistant City Solicitor until 1961, when he was appointed the first black judge in Delaware history. He sat on the Wilmington Municipal Court until 1966 when he resigned. He also engaged in the private practice of law from the time of his admission to the Bar until 1967 when he was disbarred for converting clients funds to his own use. He was prosecuted and convicted and jailed in January 1973, where he remained until he entered a work release program in August of that year. In July 1974 the U.S. Court of appeals for the Third Circuit nullified his conviction inasmuch as it had been secured under a statute repealed in the late 1930's. Since he was disbarred, Mr. Clark has worked with Matlack, a transportation company, and with E.I. duPont de Nemours & Co., Inc. He now plans to take to the lecture circuit to bring to students of criminal jurisprudence the remarkable story he tells.

appeal he is stuck with inferior justice. It is my belief that a defendant in his first appearance in a courtroom should get the highest quality justice available and not be required to have to go expensively to a higher court if the matter can be fairly resolved in the first instance. I suspect the judge who passes matters on to an appellate court would be the first to deny he did not have the intellectual distinction and courage to be on an appellate court when an opening occurred.

Another controversial area of criminal justice is the types of prisons we have and the purpose they serve. First I would like to discuss the most misunderstood prisons, the minimum security ones, particularly the federal ones that are often referred to as country clubs. There are no such things as country club jails. All prisons have one thing in common...restraint and loss of freedom. When one is sent to a minimum security prison it is after there is a determination that he will respect the boundaries of his confinement and not require strong physical restraints to comply with the rules. The inmate in the minimum security is under the same restraint of not going home to see his family or whatever as the inmate in maximum security...Both have to receive permission. So why spend precious money to house an inmate in a type of security that is not needed?

Why are people sent to jail? Despite what we say the real motivating force is punishment. However, in many cases, society would best be served if some transgressors were not jailed but allowed to be a contributing force to society, particularly those we feel are one-time offenders who have not committed crimes of violence. Let us deal with some of the reasons people are imprisoned.

First there are some that are sent for the protection of society...those who have shown an inability to conform to its rules and have constantly inflicted physical and emotional harm on others. There is a group that is sent to jail solely for retribution...to satisfy the need of society for vengeance. This group is usually composed of people who have committed a non-violent crime that has gained wide publicity or the person involved is well-known. People are also sent to prison as a deterrent to others, this is not too successful because most people who commit crimes do not consider the possibility of being caught.

We have come to realize that sending someone to jail for rehabilitation is of little value because jail alone will not do the trick. Rehabilitation must come from within the inmate and not from an outside force. All that the prison system can offer is support mechanisms. Rehabilitation must be a conscious decision of the person involved and not something forced upon him. People often say that services should be provided in prisons such as schools and skill training programs. These things sound good but they are not as effective as we would like to believe. From my observation, the main ingredient in rehabilitation is the mind of the prisoner. Can the mind develop an appreciation for conformity to the rules of society and a discipline to live by the rules? Perhaps the main emphasis should be put on psychological counseling and less on teaching earning skills and academic courses, because these services are available. If one is truly committed to going straight he will seek out the tools necessary to accomplish his goals.

Perhaps the first step to rehabilitation is the inmate's acceptance of the fact that he has done wrong and society has a right to punish him. Although I had had experience as a judge, prosecutor, and defense attorney, it was not until I went to jail that I learned there was a charge called "BS". I would talk to many of the inmates and would ask what they were in for and the most frequent answer was "some old BS". Seldom would anyone admit to robbery, murder, assault and battery or other well-known charges. The inmate transforms himself into the victim once he is being punished. While he is robbing or raping, he is the victor and you are the victim at his mercy. But once he's caught he becomes the victim and feels very much put upon by the sanctions the authorities impose.

One of the biggest problems I had while confined was to maintain my acknowledgment that I had done something wrong. I did not want to develop a mindset that I had done nothing wrong and get out and commit the same offense and again lose my freedom.

One of the problems the public has in evaluating a sentence given by a court is separating the crime itself from the effect of the crime. To pick up the paper and read one has been given ten years for robbery of two dollars we may have a tendency to think it was a little too harsh. But after we consider that the little old lady is now afraid to walk to weekly bingo that she enjoyed so much we realize that the real crime was not the taking the two dollars but the taking away from someone a way of life that she so much enjoyed. When my children first started visiting their grandparents on their bikes they were robbed. It was a long time before they would go again without someone accompanying them.

Another hinderance to rehabilitation may well be the so-called good time rule: A sentence is shortened because of good behavior. In the outside world good behavior a prerequisite of staying free, you do not get a bonus for obeying the law. Instead you get penalized if you break it. In jail you may get punished for rule violation but your sentence is not extended. If you do not violate the rules your sentence is shortened. If one has been conditioned to be rewarded for conformity and then is placed in a society where there is no reward for conformity but punishment for violation, there may be frustration. Conditioning in prison leads one to expect something when he has been good. Why not give a sentence that can not be shortened but could be extended for bad behavior. I believe that this type of system would best serve the inmate as he prepares himself for the outside world.

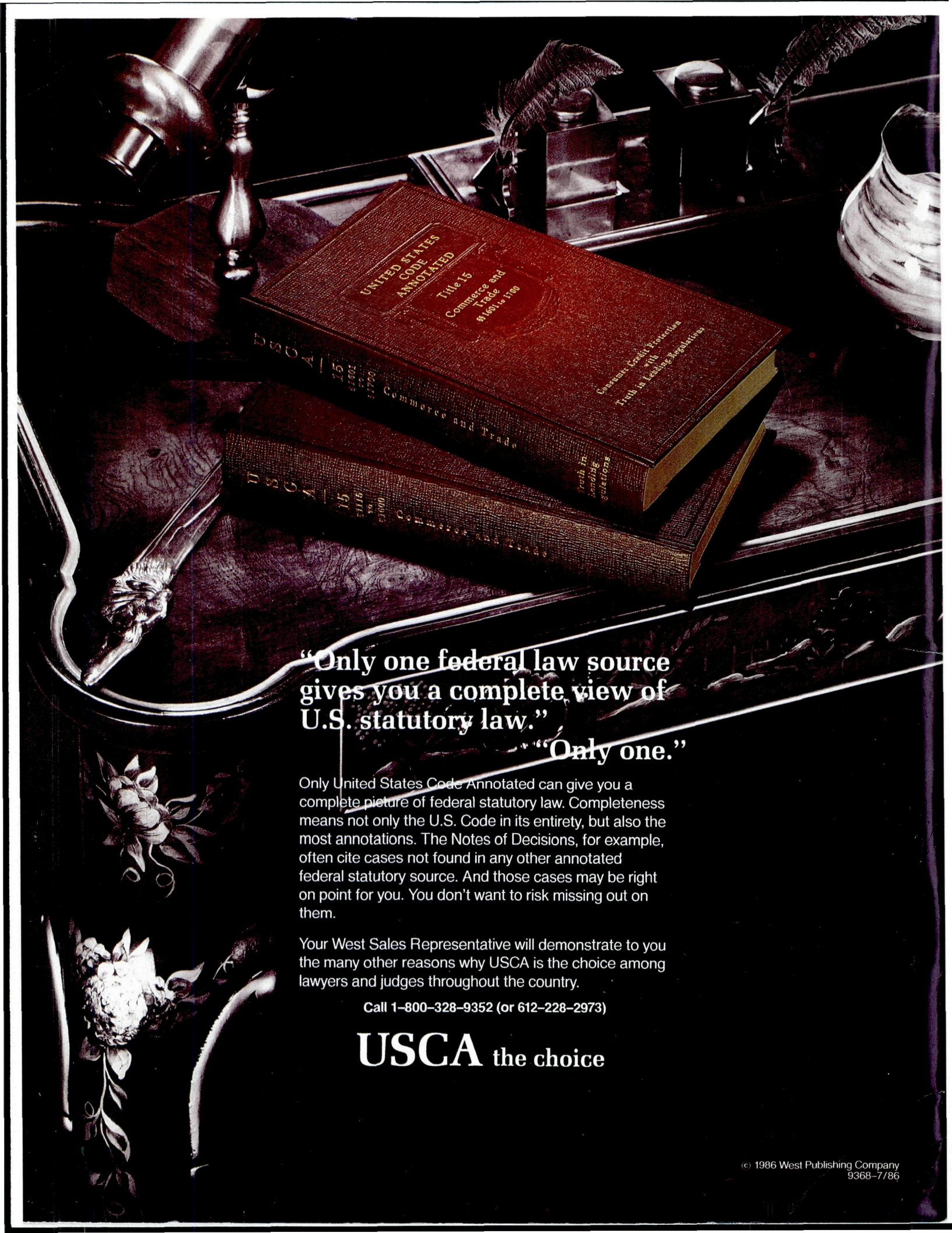
We should also look at the so-called programs offered in prison to determine their real value. Do they serve as vehicles for the inmate to get over on the authorities or do they really help ▶

him become a better person. Too much weight is given to program participation by an inmate when he is being evaluated for release. Many times the programs such as community service outside the prison are more for the inmate's personal survival than the receiver despite the fact that the receiver indeed obtains some benefit. The same applies to participation in in-house programs such as sports, crafts, and academic courses. During my stay in prison one who participated always referred to his participation as helping in getting parole, furlough or some other benefit. Never did another inmate refer to his participation as making him a better person regardless of whether there were rewards or not.

I would like to be able to say that I was different, but to say so would be untrue. When I first went to prison I was placed in a cell made for four with about ten or twelve other inmates. The cell had a commode and the rule was that the last person in the cell had to lie the closest to the commode. In all fairness to the institution the stay was usually limited to twenty four hours, but during that stay it was in constant use and the flushing and its use often had spillover effects. When I became aware of the unpleasantries of my position I immediately began to think of a way out. I signaled for the guard and suggested that the hallways needed cleaning and I would be glad to perform the service. I do not believe any hallways in Buckingham Palace received the attention I gave those halls. Word got out that I started out on a good foot and would probably be no trouble. True, I did not intend to cause any trouble, but my volunteering was strictly for my survival.

One of the biggest deterrents I observed to rehabilitation was an inmate's unwillingness to change his values in prison to conform to those necessary for success outside of the institution. For instance the so-called code of prison calls for inmates to remain silent when one inmate is transgressing against another. In other words if one observes one stealing from another and is questioned by the authorities he remains silent and goes to dumbsville. This may be all right for prison but it does not work in an orderly society. The inmate claims that he wants to leave the institution and live a law abiding and useful life. If this is so he must learn to live by the rules of the outside society while confined so that upon release he will have no problem adapting. Training is tailored to meet the ultimate goal. When you practice football during the week you practice by the rules you will need on Saturday for the big game. It should follow that if you want to be a success outside of jail, you must practice while in jail the rules that will make you a success outside.

A very important segment of the criminal justice system is one that is not controlled by any civil authority. That is the role of society. A very high percentage of all inmates, will eventually leave the institutions. It is my contention that there are three types of punishment. One by civil authorities that is fixed by law. After it is over there is no follow-up, it is finished. The second is self-punishment which can be more severe or of no consequence. It often depends on one's religious or moral belief. Regardless of what the influences are it is a personal one. Third, there is the punishment by society which often can be the most complex because it is dictated by so many people with so many different prejudices or morals. Some segments of society will accept that which the civil authorities have given and demand no more. There is the segment that wants more and there is the group who never forgives. Until society accepts the phrase "Once a person has complied with all sanctions of the civil authorities he has paid his debts to society" and permits the individual to start over without an albatross around his neck, there will continue to be a high rate of repetition because not all men are strong enough to withstand the sanctions of society. The individual will usually revert to a society in which he feels comfortable...the one that allowed him to become a transgressor. Society must be sincere in its role of assisting the former inmate to obtain rehabilitation.



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