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Volume 8, Number 1

Winter 1989-90

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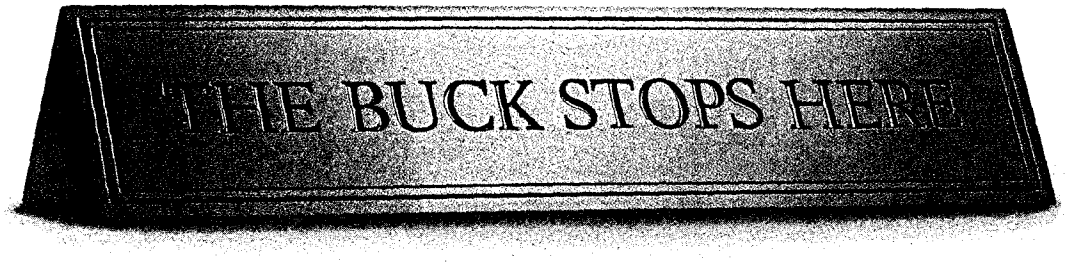

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EDITOR'S PAGE

The Bar Magazine has been interesting reading as the topics usually involve some aspect of my law practice. But, I felt that the Delaware Bar needed an issue devoted more toward what I find most exciting, which is litigation. About a year and a half ago I sat next to Bill Wiggin at the annual Bench and Bar dinner meeting at Rehobeth Beach Country Club and raised the issue of devoting a magazine to litigation. Bill appeared most responsive and asked if I would be willing to take part in creating the issue. My response was positive though I was not quite sure what he had in mind. This issue is the result.

In trying to put together a litigation issue my purpose was to involve writers from all three counties who have not submitted articles in the past. Additionally I wanted to present to our membership a nuts and bolts approach to courtroom issues. I encouraged the writers to explain how they would solve the practical problems of case presentation.

It has not been as easy as I had hoped in obtaining the articles from my fellow attorneys, however, those that did accept the challenge have done a commendable job and I truly appreciate their hard work.

A. Richard Barros

RANDOM THOUGHTS

Throughout its short life this publication has been nothing if not eclectic. We have ranged from "Law and the Delaware Environment" to "The Global Village", from "Biotechnology and the Law" to "Children at Risk". We expect that the future will encompass an even greater variety.

This is as it should be. The concerns of attorneys must be as extensive as the problems of their clients. No one of us, least of all the Chairman of the Board of Editors, is able to deal acceptably with the entire realm of human knowledge.

Many members of the Bar have given most generously — as authors, issue editors, book reviewers and in other ways. The very survival of the DELAWARE LAWYER depends upon a continuation of this commitment.

We expect the past handsome contributions of all kinds will continue. Surely, we encourage them. In particular, suggestions for themes of future issues are essential to the freshness and vitality of our publication. Eventually, the theme of "Jones v. Doe Revisited" in its many disguises becomes dreary or worse.

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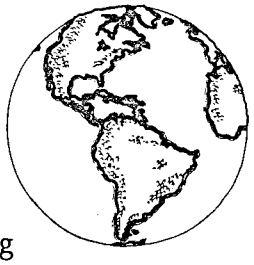

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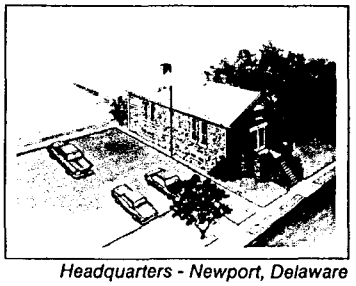

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THE CASUAL PRACTICE OF ZONING LAW — NO LONGER CASUAL

Peter B. Jones and Richard E. Berl

Beware to the casual zoning practitioner - the handling of zoning applications is not what it used to be! The increasing sophistication of community opposition groups, together with the enactment of conservation-oriented statutes such as the recent Quality of Life legislation, make zoning litigation a more technical area of practice than ever before. Attorneys who enter the zoning fray find that they are suddenly thrust into a world of comprehensive development plans, traffic impact studies, state and federal wetland lines, and technical advisory committees. The presentation of a zoning case no longer merely involves showing that your client is a "nice guy" who is deserving of a zoning change. Instead, the zoning attorney must gain at least a rudimentary familiarity with matters which were once the sole province of environmentalists and engineers. This does not mean that the attorney need become an expert in these technical fields. But he must realize the importance of addressing such subjects, often through the use of expert testimony as part of a zoning presentation.

The zoning attorney must also realize the importance of not underestimating the sophistication of zoning bodies. Whether county or municipal, elected or appointed, zoning officials who rule on such matters as changes of zone, conditional uses, special use exceptions, variances, and subdivisions, have become better educated, not only as to the substantive law of zoning, but as to the importance of their role in the zoning process. Legal counsel who advise zoning bodies would be remiss in their duty if they did not inform their clients of the increased scrutiny which courts are applying to zoning decisions. It is this scrutiny which has caused zoning officials to apply the principles of zoning more carefully to those applications which came before them.

The hallmark of the zoning process is the public hearing. It is important to note that the public hearing following the filing of a zoning application is generally the tip of the iceberg. A great deal of effort can, and should, be spent not only in preparation for the hearing itself, but also in the application process. Thus, the developer, his representatives, and his attorney, must engage in the painstaking and oftentimes frustrating practice of consulting with county or municipal planners, in order to gain some insight as to what is likely to "fly", and what has absolutely no chance of getting off the ground.

Having established the boundaries in which to operate, the zoning applicant can begin more serious planning preparation. Engineers and related experts can be engaged for preliminary studies and opinions, and potential adversaries, whether they are civic associations, business groups, or individuals, can be identified. In many instances, a conciliatory approach at the outset will yield a far more satisfactory result than will occur through the immediate establishment of an adversarial process.

Having gauged the opposition, the applicant is in a position to modify or scale down his plans if the likelihood of objection so requires. Or, the applicant may decide that concessions would be of no value, either because in his opponent he has met the "immovable object", or perhaps because a project is simply not economically feasible if scaled down. In either event, all is not lost, since the applicant has the opportunity to make additional plans to overcome the now-disclosed objections. And, of course, the applicant is now poised to exercise what is potentially a significant weapon in the zoning process - political clout.

Zoning is an area of the law where important decisions are made by elected public officials and their political appointees. It is this aspect of the process which presents the lawyer with his most difficult decisions. The lawyer must decide whether to become a lobbyist, based upon the perception of the county government as comprising elected officials ordinarily available for such contact, or to remain the client's attorney in the traditional sense, based upon the perception of the county government as comprising individuals acting in a judicial or a quasi-judicial capacity, in which case ex-parte contacts would be inappropriate. Thus the question is not simply a practical one — it has become a decision with certain ethical ramifications as well. Thus far, no situation is known in which an attorney has been subject to disciplinary action as a result of contacts with elected officials with respect to a zoning matter. If, however, the Courts expand on the view that a local government, when considering the rezoning of certain property, is acting in a judicial or quasi-judicial capacity, such concerns may be pushed to the forefront.

For those who are dissatisfied with a zoning decision, the vehicle to a judicial ruling has typically been a petition in Chancery Court seeking to enjoin a local government from giving force and effect to a zoning decision. Such an action must be filed no later than sixty (60) days from the date notice of the decision is published in a newspaper of general circulation in the County. Thus the Court of Chancery, in addition to its recognized expertise in the corporate field, is developing a similar history with respect to zoning law.

A fundamental concern in deciding whether, as a frustrated applicant, to litigate, is the prospect of success, and the possibility of having to go before the very same legislative body a second time, or, perhaps, at another time on an entirely new matter. Thus, the initial decision for the applicant is as much a practical one as a legal one. For the opponent, except in an unusual case, there is generally little to lose by litigating. The mere filing of the complaint will often stall even the most ambitious project. And whereas it was not uncommon in the past for a developer to respond to such a complaint with a monetary counterclaim in an effort to ward off the timid and faint of heart, the newly-enacted "Citizen's Bill of Rights Act"[1] now protects individuals and civic associations from retaliatory efforts, at least so long as the action passes muster under Rule 11.

Those challenging a zoning decision

must also remain cognizant of the general presumptions of validity which have been enjoyed by the County governments for years. Such decisions are presumed valid unless clearly shown to be arbitrary and capricious. In the zoning arena, arbitrary and capricious is defined as not reasonably related to the public health, safety or welfare.[2] Certain terms of art have also arisen with regard to zoning decisions. For example, even if the reasonableness of a zoning change is "fairly debatable", the judgment of the legislative body prevails, thus recognizing the traditional separation of powers and the respect of the judicial branch for its legislative compatriot.[3] The review of zoning decisions by the Courts, then, has generally been limited to whether there was a full and fair hearing, whether all elements required by statute to be considered were, in fact, considered, and whether there was sufficient evidence to support the County government's decision.[4] Like many other appellate situations, "substantial evidence" cases are the least likely to succeed, particularly in light of the presumptions favoring the legislative decision.

Since the early 1980's, however, there has existed a visible trend toward a more thorough and comprehensive review of zoning decisions by the Courts. Whereas the deference paid legislative judgments once led almost inevitably to the "fairly debatable" result, the Courts have begun to review the entire zoning process as a "quasi-judicial" function.[5] The rationale is that the County government, in exercising its zoning power, generally affects the rights of a relatively small portion of its electorate, unlike, for example, the budget-making function, in which the County affects the rights of most, if not all, of its citizens.

It was inevitable, after years of warning, that the County governments would be held to standards far more comprehensive than those to which they had historically subscribed. Those standards, including requirements that all relevant evidence be considered, that the reasons for decisions be identified by the County government, that a record be created, and the requirement that certain comprehensive development plans be adhered to by the government, offer the zoning lawyer a far more active role in representing interested parties before the County council or the Levy Court, and for the lawyer representing the County government itself.

Creating a record is, of course, fundamental to the trial lawyer. It is perhaps even more important in the context of zoning, where a remand for further findings or for supplementation of the record has been called "a dubious method of *ad hoc* after-the-fact legislation".[6] Thus, addressing, through live testimony as many factors as is reasonably possible, becomes critical. The use of real estate appraisers, economic consultants, transportation/traffic engineers land use planners, water quality specialists, and the like, are common. Anticipating the arguments and evidence of the adversary is important in light of the limited, or nonexistent, right to cross-examination during the course of a zoning hearing. And, the zoning lawyer can take advantage of the absence of evidentiary rules in order to submit and rely upon hearsay, written opinions and comments, petitions, and miscellaneous records not otherwise admissible.

One of the most confusing areas of zoning practice, not only for the occasional practitioner but for the experienced zoning attorney, is the enigma known as a variance. Although the concept behind a variance, a departure from the terms of a zoning ordinance due to a hardship, is easily understood, the standards associated with the granting of a variance are not always so clear. In Delaware, attorneys representing clients on variance applications must face such concerns as what "type" of variance is being sought, whether the application will be decided in New Castle, Kent, or Sussex counties, and whether there are local ordinances which impose requirements beyond those set further by state statute.

Variances are broadly divided into two types: area variances and use variances. An area variance permits an exception to height, area and set-back requirements. A use variance permits an exception to use limitations in a zoning district. The best known Delaware case discussing these two variance types is *Kwik-Check Realty, Inc. v. Board of Adjustment of New Castle County*, Del.Super., 369 A.2d 694 (1977), Affd. Del. Supr. 389 A.2d 1289 (1978). In that case, Judge Walsh construed 9 *Del. C.*, Section 1352, the variance provision applicable to New Castle County to mean that different standards are to be applied to area variances and use variances. Area variances may be granted upon a showing of "exceptional practical difficulty", while use variances require application of the stricter standard of "unnecessary hardship". Variance provisions applicable to Kent County (9 *Del. C.*, Section 4917) and municipal governments (22 *Del.C.*, Section 327) have similar "exceptional practical difficulty" and "unnecessary hardship" language.

Variance applicants to the Sussex County Board of Adjustment are not as fortunate as their counterparts elsewhere in the state. Statutory language references only the "unnecessary hardship" standard (9 *Del.C.*, Section 6917), omitting completely any mention of "exceptional practical difficulty". No explanation is evident for the failure of Section 6917 to provide for both area and use variance standards. To make matters more confusing, Sussex County Ordinance No. 97, the County's comprehensive zoning ordinance, references both the practical difficulty and hardship standards. Attorneys appearing before the County Board of Adjustment are understandably confused as to what standard will be applied.

The Delaware Superior Court has taken steps to eliminate the confusion. In two recent decisions, the Court determined that a variance in Sussex County could not be supported by the showing of a practical difficulty.[7] In rendering these decisions, the Court nullified practical difficulty language in the county's zoning ordinance, leaving Sussex County with a different area variance standard than that normally applied in the remainder of the state.

One final area of caution for practitioners handling variance applications. It is not sufficient to rely on the language of enabling statutes found in Title 9 (counties) and Title 22 (municipalities). Careful examination must be made of local ordinance provisions which may expand upon statutory language.

Boards of Adjustment may be inclined to grant variances even if statutorily required criteria have not been presented. Take, for instance, the case of a married couple who require an area variance to expand their home in order to provide additional bedroom space for their children. Even in the event there is no opposition to such an application, the couple may find it difficult to present evidence to sustain the strict requirements of state law or local zoning ordinances. In such cases, variances are at times granted, despite the lack of supporting evidence. Boards of Adjustment may find it difficult to refuse these variances, taking the position that the lack of opposition and the apparent need of the applicants justifies a variance approval. Counsel advising these zoning officials are placed in the somewhat awkward position of having to suggest

that a variance is inappropriate. Not surprisingly, this unpopular advice may be ignored.

Attorneys representing variance applicants are advised not to allow the willingness of zoning authorities to grant a variance to serve as a substitute for a thoroughly presented variance request. Delaware law authorizes review of Board of Adjustment decisions by the Superior Court. Petition to the Court is not limited to those who participated in the Board of Adjustment hearing. Persons aggrieved by the Board's decision as well as taxpayers and governmental officials, are authorized to seek relief from the Court.[8] An applicant for a variance may find himself in the difficult situation of having to defend in Superior Court a variance approval granted upon insufficient evidence, when proper attention paid to the initial presentation of evidence before the Board of Adjustment may have avoided appellate reversal. An attorney must avoid the inclination to make a less than complete variance presentation, just because it is believed that no opposition exists.

As with most areas of the law, zoning is becoming more and more specialized, requiring far more attention and effort on the part of the trial lawyer. Those already involved in handling zoning cases, as well as those considering the field, must keep abreast of these constantly-changing laws and procedures in order to properly advocate the intents of the client or governmental body.

Peter B. Jones is a partner in the Georgetown office of the law firm of Hudson, Jones, Jaywork, Williams and Liguori. He is Assistant County Attorney, handling zoning matters for Sussex County, and is Solicitor for the Town of Georgetown. Before entering private practice, he served as a Deputy Attorney General. He is a graduate of the University of Virginia and the Dickinson School of Law.

From the same law firm, Richard E. Berl, Jr. has been involved in numerous zoning cases, including the ***Tate*** *case referred to in the article. He is a graduate of Archmere Academy, the University of Delaware and Delaware Law School.*

1 9 *Del.C.* Section 2699
9 *Del.C.* Section 4999
9 *Del.C.* Section 6999

2 *Wildel Realty, Inc. v. New Castle County*, Del. Supr., 281 A.2d 612 (1971).

3 *McQuail v. Shell Oil Company*, Del. Supr., 183 A.2d 572 (1962)

4 *Town of Bethany Beach v. County Planning and Zoning Commission of Sussex County*, Del. Ch., No. 642-S, Hartnett, V.C. (October 10, 1980).

5 *Tate v. Miles*, Del. Supr., 503 A.2d 187 (1986).

6 Id.

7 *Grove v. Board of Adjustment of Sussex County*, Del. Super., C.A. No. 86A-MR-4, Lee, J. (November 10, 1987); *Moore v. Sussex County Board of Adjustment, Et Al.*, Del. Super., C.A. No. 88A-MR-1, Graves, J. (August 4, 1989).

8 9 *Del.C.* Section 6918

NEXT IN DELAWARE LAWYER:

Spring 1990
CORPORATIONS

Summer 1990
SUBSTANCE ABUSE AND THE PROFESSIONAL

PRELIMINARY HEARING CAN IMPROVE FINAL RESULTS IN CRIMINAL CASES

Michael J. Malkiewicz

Now that everyone from politicians to elementary school children has declared war on drugs and crime, being a zealous criminal defense attorney in today's criminal justice system is a very difficult job. Society is screaming out for relief from criminal activity. Laws and court decisions have limited search and seizure issues. Costly forensic experts have become standard fare. Arrest numbers are up and the dockets of every state court are clogged. More than ever the criminal defense attorney's role requires courage, tenacity, common sense, legal competence and imagination. Criminal clients expect their lawyers to be zealous advocates, and both the Delaware Rules of professional Conduct and the American Bar Association Standards for Criminal Justice require it.[1]

A zealous criminal defense attorney defends a client's rights during each stage of the criminal justice system, not just at trial. Every stage in the system is critical to the client. How counsel prepares for each stage means the difference between the client obtaining a proper bail, a dismissal of excessive charges, a reasonable plea offer, a fair trial, or an appropriate sentence.

The focus of this article is limited to the preliminary hearing stage of the criminal justice system in cases where a client has been charged with at least one felony level offense. The preliminary hearing stage, like all others in the criminal system, is critical to the client. If a defendant is unable to obtain bail after being arrested, a preliminary hearing date must be set within ten days of the arrest. Where a defendant has made bail, the hearing date must be set within twenty days of arrest. At a preliminary hearing, the state has the burden of proving to the satisfaction of the judge, that there is probable cause that a crime occurred, and that the arrested party committed the crime. In this writer's opinion, counsel who have reservations about the importance of a preliminary hearing perhaps do not understand the value a hearing can have to the preparation of the defense.

In the Delaware Court of Common Pleas, in all three counties, it is no secret that approximately ninety percent of the criminal defendants charged with felony level offenses, who are represented by private counsel and the Public Defenders Office, waive their right to a hearing[2]. When one considers all of the benefits that can be gained for the client at a preliminary hearing, the ninety percent waiver factor has to shock the conscience of zealous criminal defense attorneys.

A variety of reasons have been given for the advice to defendants that they should waive their right to a preliminary hearing. Some are legitimate, others are just excuses. For example, it is common knowledge that at a preliminary hearing the permissible scope of cross examination, and the volume of defense evidence that can be introduced, varies between cases and courts. In some courts any inquiry by defense counsel beyond the date and time of the offense often is ruled to be a "fishing expedition" and irrelevant. However, in other courts, defense attorneys are permitted thorough direct and cross examinations, thus fulfilling their ethical obligation of zeal on behalf of their clients.

The main reason relied upon by most defense attorneys when they advise their clients to waive a preliminary hearing is the Department of Justice's practice of providing counsel with a copy of the police report in return for the client's waiver of the hearing. At first glance, obtaining a copy of the police report may appear to be one of the best things that counsel can do in order to prepare a defense. This writer contends that a preliminary hearing properly conducted by a zealous criminal defense attorney, will provide counsel with all the information contained in a police report, and much more. In addition, counsel and client will not have to wait weeks or months to get the information after the client has been indicted.

There are other reasons that have caused criminal defense attorneys to advise their clients to waive their statutory right to a preliminary hearing, but in this writer's opinion these reasons are not legitimate. They should not be considered part of the process that counsel goes through in weighing the benefits and detriments of having a hearing. These are "excuses", and they are not legitimate reasons for advising a client to waive a preliminary hearing because:

(1) COUNSEL DOES NOT HAVE TIME TO CONDUCT A PRELIMINARY HEARING BECAUSE OF CONFLICTING PROFESSIONAL OR PERSONAL COMMITMENTS. If the hearing conflicts with a professional or personal commitment, a request for a continuance can be made to the court. If the hearing conflicts with counsel's personal plans, and a continuance request is denied, counsel should not accept the case. If counsel is retained and advises the client to waive the preliminary hearing because counsel has either a professional or personal conflict with the scheduling of the hearing, then this fact should be disclosed to the client. This may cause the client to retain another attorney, but there has been full disclosure to the client, and therefore no possible breach of any ethical duties.

(2) COUNSEL HAS NOT RECEIVED A FEE. Counsel either represents the client or does not. If counsel has not been paid a fee, and does not want to go through a hearing before being paid, then counsel should not be advising the client whether to waive or not waive a preliminary hearing. A client should never be advised to waive a preliminary hearing on the grounds that the client cannot afford to pay an attorney at that time. The person should be referred to another attorney, or the Public Defender's office. On the subject of fees, it is also important to explain to the client whether the fee covers all work in the case up through an appeal, or only covers work on the preliminary hearing. This understanding should be memorialized and made part of counsel's file.

(3) THE PERMISSIBLE SCOPE OF CROSS EXAMINATION AND THE AMOUNT OF EVIDENCE THE DEFENDANT IS ALLOWED TO PRESENT TO THE COURT IS SO LIMITED THAT A PRELIMINARY HEARING IS NOT WORTH THE TIME AND EFFORT. The rules set forth the procedure that is to be followed during a preliminary hearing.[3] The rules include the right to cross examine witnesses, and defense counsel may introduce evidence, subject to reasonable limitations imposed by the court. Furthermore, subject to the discretion of the court, inquiry can be made into the lawfulness of the means by which evidence is acquired for the purpose of determining the weight to be afforded such evidence at the hearing.

(4) THE GOVERNMENT ATTORNEY HAS TOLD COUNSEL THE GOVERNMENT WILL SEEK INDICTMENT OF THE DEFENDANT NO MATTER WHAT THE OUTCOME OF THE PRELIMINARY HEARING. The Delaware Department of Justice's success rate in obtaining indictments from the Grand Jury is unquestionable. This is understandable because only arresting officers can appear in front of the Grand Jury. However, if the government attorney has told counsel that an indictment will be sought no matter what the outcome of the hearing, what do counsel and the client have to lose by going through with the hearing?

(5) THE STATE WILL PROVIDE COUNSEL WITH A COPY OF THE POLICE REPORT IN RETURN FOR THE DEFENDANT'S WAIVER OF THE PRELIMINARY HEARING. If counsel is allowed to conduct a preliminary hearing pursuant to the procedures and scope of inquiry permitted under the court rules, all of the information contained in the police report, and more, will come out in the direct and cross examination of the witnesses. Furthermore, the police preparing the reports know that in the majority of cases the reports are going to be turned over to defense counsel when the hearing is waived. Thus the police have an incentive to prepare bare bones reports. There are also times that the police report has not been prepared at the time the preliminary hearing is held. In these instances, the testimony of the police is critical. The defendant also has the advantage because the facts that are put in the report later should not conflict with the testimony given at the preliminary hearing.

Now I want to suggest some tools or techniques counsel can use at the preliminary hearing stage, and also some reasons why counsel should advise the client to have a hearing. In making that decision he must weigh the benefits of a hearing relative to the advantages of waiver.

Let us now examine some of the tools or techniques a criminal defense attorney can use to prepare for a preliminary hearing. Obviously, the availability and necessity of these tools will be affected by the amount of time the defense attorney has to prepare the case, the seriousness of the charges against the client, and his financial resources. However the skillful use of one or more of these tools or techniques may provide counsel with a wealth of evidence that will be useful not only at the preliminary hearing stage but also at the trial. Just as any skilled craftsman must have knowledge about available tools or techniques, the criminal defense attorney must know what should be used to defend a client. In deciding whether to demand a preliminary hearing, counsel should realize that the following should or could be done:

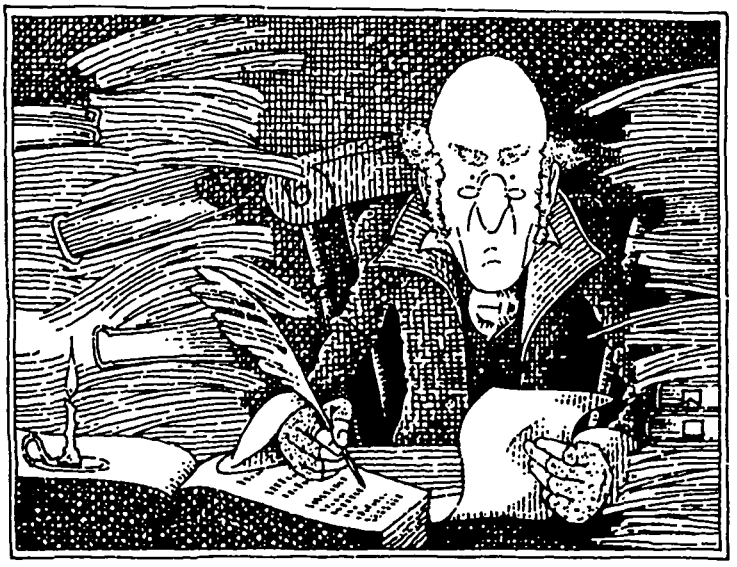
1. ACQUIRE FROM THE JUSTICE OF THE PEACE COURT AND THE COURT OF COMMON PLEAS COPIES OF ALL PAPERWORK RELATING TO THE CLIENT'S CASE. The importance of these documents should not be underestimated. These documents will not only provide counsel with the date, time and location of the alleged offenses, but also the names and addresses of potential witnesses, and the affidavit of probable cause prepared by the arresting officer. The contents of the paperwork may include information that is useful when examining witnesses.

2. COUNSEL SHOULD CONDUCT A THOROUGH INTERVIEW OF THE CLIENT AS SOON AS POSSIBLE. The client's version of the facts can be compared to the facts set forth in the court's paperwork. Most importantly, counsel is gathering facts shortly after the alleged crime has occurred. The longer the delay before the interview, the more likely the client will forget valuable information.

3. A PRIVATE INVESTIGATOR SHOULD BE RETAINED IN AN APPROPRIATE CASE. Using an investigator to interview witnesses avoids the problem of counsel becoming a witness. Counsel should meet with the investigator and explain details about the facts of the case, and theories of any defense strategy. The investigator should be instructed to take taped or written statements from witnesses, and follow up any leads provided by witnesses during the investigation.

4. COUNSEL MAY DECIDE TO PRESENT EVIDENCE ON BEHALF OF THE DEFENDANT AT THE PRELIMINARY HEARING. Although the government has the burden of proving that probable cause exists that a crime was committed, and that the defendant committed the crime, the rules of the court permit a defendant to present evidence.[4] The decision to present evidence on behalf of the client at the preliminary hearing must be weighed very carefully. Defense counsel may not want to expose any theories of defense that will be used later at trial. On the other hand, defense counsel may want to call witnesses or present evidence at the preliminary hearing. Of course, counsel should have a good faith reason to believe that the witnesses who have been subpoenaed by the defense will provide evidence that is relevant to the issue of the defendant's innocence. Finally, the client may be so adamant about his or her innocence that the client insists on testifying.

5. THE COURT'S SUBPOENA POWER CAN BE USED BY DEFENSE COUNSEL. There is nothing in the court rules that prevents defense counsel from subpoenaing the alleged victim of a crime to testify at the preliminary hearing. However, since this is a defense witness, defense counsel may be limited to a "direct" examination of the witness rather than being allowed to "cross" examine the witness. Furthermore, there is nothing in the court rules that prevents defense counsel from having the court issue a subpoena *duces tecum* to the arresting officer requiring the officer bring to court all of the materials the officer will be testifying about at the preliminary hearing. Courts may limit the scope of such a subpoena to items that would be discoverable pursuant to a request filed under Supreme Court Criminal Rule 165. For example, this could include a subpoena for copies of the defendant's statements, co-defendant's statements, photographs used during a photo line-up, and the results of any scientific tests that may be available at the time the preliminary hearing is conducted. All of these materials will undoubtedly be referred to by the arresting officer during testimony at the hearing, and therefore are



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fair game for cross examination by defense counsel. The police officer's ability to paraphrase what the defendant said will be limited if the defendant's statement is brought to court. This principle also applies to testimony about the contents of a scientific report. For example, arresting officers typically assume or estimate the type and quantity of a controlled substance, but the medical examiner's report will accurately reflect the type and quantity of the controlled substance involved in the case. This may be important for having charges dismissed or reduced, and also for setting bail.

6. COUNSEL CAN USE A POLICE REPORT FROM ANOTHER CASE AS A FORMAT TO PREPARE CROSS EXAMINATION QUESTIONS. Most of the law enforcement agencies use similar report forms. Counsel can use a copy of a report from a previous case to prepare questions that will be asked at the preliminary hearing. This should alleviate counsel's concern that some facts will not be discovered at a preliminary hearing, which could have been discovered by getting the police report in exchange for a waiver of the preliminary hearing.

7. THE POLICE OFFICER TESTIFYING AT THE HEARING SHOULD NOT BE A SUBSTITUTE FOR THE CHIEF INVESTIGATING OFFICER. Before the hearing begins counsel should make sure that the government's police witnesses have personal knowledge about the case, and are not simply filling in for someone after they have read the other officer's report. Frequently officers are not available and a continuance of the hearing should be requested until the chief investigating officer is available.

8. ALL GOVERNMENT AND DEFENSE WITNESSES SHOULD BE SEQUESTERED. All witnesses except the chief investigation officer and the defendant's investigator, should be sequestered before the preliminary hearing begins. Furthermore, defense counsel should ask the court to instruct the witness who is on the stand not to talk to anyone, including the government attorneys during any recess at the preliminary hearing.

Keeping in mind the tools and techniques available to the zealous criminal defense attorney, counsel should then weigh the pros and cons of conducting a preliminary hearing on behalf of a client. A list of some of the reasons germane to that decision include the following:

1. CHARGES MAY BE REDUCED OR DISMISSED. After hearing the evidence in the case, the judge may dismiss a charge or find probable cause for a lesser included crime. This in turn may result in a reduction of the client's bail.

2. THE CLIENT AND COUNSEL WILL BE BETTER INFORMED OF THE EVIDENCE THE GOVERNMENT WILL PRESENT AT TRIAL. After hearing the testimony the client will be in a better position to assist in the preparation of the defense. In some cases it is also important for the client's family and friends to be at the hearing and hear the government's testimony. Family members and friends may also provide counsel with evidence that contradicts the testimony of the witnesses, or aid in preparing the defense.

3. THE TESTIMONY OR PERFORMANCE OF A WITNESS MAY LEAD TO THE REDUCTION OF THE NUMBER AND TYPE OF CHARGES. The government may be inclined to strike a more agreeable plea bargain, or not seek indictment on certain charges after hearing and observing an alleged victim or witness testify. Weaknesses in the government's case may also be revealed during the testimony which may provide greater leverage during plea bargaining negotiations.

4. ALLEGED VICTIMS MAY RECANT THEIR EARLIER STATEMENTS TO POLICE OR AT LEAST GIVE CONFLICTING VERSIONS.

5. CONFLICTS IN TESTIMONY BETWEEN WITNESSES WILL BE DISCOVERED. These conflicts will have an effect on the creditability of the witnesses.

6. A RECORD OF WHAT FUTURE TRIAL WITNESSES HAVE SAID, IS BEING CREATED. Conflicts between what witnesses said at the preliminary hearing and what is said at trial can be used for impeachment purposes.

7. TESTIMONY CAN BE OBTAINED THAT IS RELEVANT TO FUTURE DISCOVERY AND SUPPRESSION ISSUES. Courts will not suppress evidence at the preliminary hearing. However, the court conducting the preliminary hearing has the discretion to determine the weight to be accorded evidence that may have been unlawfully seized. The court also can rule that the defendant's constitutional rights were violated so badly that no weight will be accorded to the unlawfully seized evidence. In some cases, if the unlawfully seized evidence is the only basis for the client's arrest, the court may dismiss the charges.

8. BY TRYING TO SHOW THAT PROBABLE CAUSE DOES NOT EXIST, COUNSEL CAN GET AN INDICATION OF THE CLIENT'S CHANCES AT TRIAL BY DISCOVERING AS MUCH INFORMATION AS POSSIBLE ABOUT THE FACTS AND CIRCUMSTANCES IN THE CASE.

9. A CLIENT IS RARELY IMPRESSED WITH THE STATEMENT THAT HE IS GOING TO GET A COPY OF THE POLICE REPORT IN RETURN FOR A WAIVER OF HIS RIGHT TO A PRELIMINARY HEARING. For all of the reasons above, clients want and need to see the zealous criminal defense attorney in action.

Realistically, not all cases can proceed to a preliminary hearing. Some of the reasons counsel may advise the client to waive the hearing include:

1. COUNSEL MAY NOT WANT TO EDUCATE THE STATE ABOUT THE DEFENSE STRATEGY.

2. A REDUCTION OF THE DEFENDANT'S BOND MAY NOT BE LIKELY AFTER THE COURT HEARS THE FACTS AND CIRCUMSTANCES IN THE CASE.

3. ACQUIRING A COPY OF THE POLICE REPORT IN A TIMELY MANNER WILL PROVIDE THE DEFENDANT WITH MORE USEFUL INFORMATION THAN A PRELIMINARY HEARING. Counsel may know that examination will be extremely limited, or the government witnesses know little about the case. In cases where a waiver is executed in return for a copy of the police report, counsel should require the government to disclose the report as soon as possible after the waiver is executed. Preparation of the defense should begin immediately after the waiver is executed.

4. THE DEFENDANT MAY BE UNDER CHARGED. Counsel may not want to have a hearing because the testimony offered either by the government or the defendant may result in the government increasing either the number or degree of charges that are presented to the Grand Jury.

After a preliminary hearing has been held or waived the zealous criminal defense attorney's work has not been completed. Counsel may have been retained to represent the client through to the Superior Court level, and not just at the preliminary hearing stage. Or, counsel may be unclear whether the defendant will retain his services at the Superior Court level. In all cases, counsel should try to assist the client's transition between the preliminary hearing stage and his arraignment in Superior Court.

Counsel should debrief the client after the preliminary hearing or its waiver. The client's views and comments about the testimony at the preliminary hearing should be documented and made part of the file. This information may include the names of witnesses who will refute the testimony that was given, and also may lead to theories of defense that were not considered by the client or counsel prior to the hearing. Counsel should also explain to the client the function of the Grand Jury and the Superior Court Arraignment. Most clients believe they will get an opportunity to appear before the Grand Jury.

If counsel for the preliminary hearing is not retained for further services, the defendant should be instructed to tell the new attorney to contact his predecessor. Counsel should then cooperate with the defendant's new attorney, and make sure the defendant's file is transferred. A brief memo to the new attorney outlining the strengths and weaknesses of the case is appropriate.

If counsel has been retained to represent the defendant throughout the Superior Court proceedings, counsel should not wait until the defendant has been indicted to begin preparation for trial. For example, if an investigator is going to be used, he should begin the investigation into the defendant's case immediately. If the availability of a witness at a later trial is questionable, then a motion should be filed with the court to take a deposition in order to preserve the testimony. Counsel cannot forget the client if he is incarcerated after the hearing. Counsel should keep the client informed of any progress in the case by visiting the client, by correspondence, or accepting telephone communications from the client. If the client is not incarcerated, then the client should assist with the preparation of the defense as much as possible.

It is expected that the Public Defender's office, which represents the majority of criminal defendants in the State, will contend that it is impossible to have a preliminary hearing in all its cases. This may be true, but there probably could be increases in the number of hearings if the Public Defender's Office was authorized to have more employees. Judges may contend that the dockets are full, and there is no time to get bogged down with preliminary hearings. In addition, judges may have become frustrated knowing that the Delaware Department of Justice on many occasions has sought indictments on charges that have been dismissed for lack of probable cause.

The factors mentioned in this article are not an all inclusive list of the reasons to waive or have a preliminary hearing. However, it is the intent of this writer to remind criminal defense attorneys practicing in Delaware that their recommendation to waive or proceed with a preliminary hearing should be made only after many factors have been carefully weighed, and only after the client has been fully advised. Counsel must carefully think about the decision to advise a client to waive or not waive a preliminary hearing. If counsel does not do so and a client waives this valuable statutory right, counsel is not carrying out his required ethical duty of being a zealous advocate for his client.

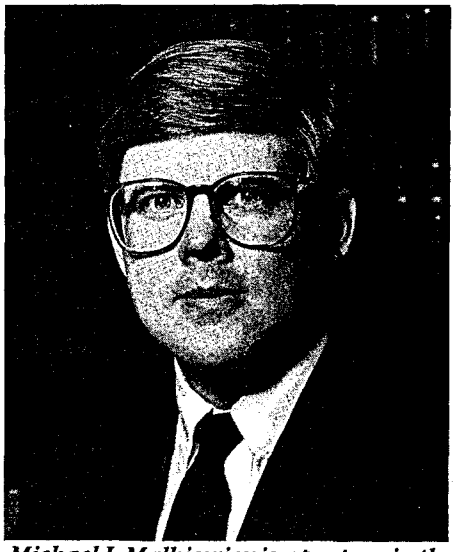
When an attorney looks at all of the things that can be accomplished for a client by having a preliminary hearing advising a client to waive a preliminary hearing should be the exception rather than the rule.

[1] Delaware Lawyers Rules of Professional Conduct Preamble; A Lawyers Responsibilities; American Bar Association Standards for Criminal Justice, Chapter 17 The Defense Function.

[2] There is no constitutional right to a preliminary hearing, and the process is created by statute or court rule. In Delaware, Court of Common Pleas Criminal Rule 5 provides that "When a person shall be brought before a Justice of the Peace charged with a felony or a crime under a statute specifically requiring a 'preliminary hearing' the Justice of the Peace shall schedule a preliminary hearing in the Court of Common Pleas in accordance with the schedule fixed by this Court." Court of Common Pleas Criminal Rule 6 sets forth the procedure to be followed at the preliminary hearing in the Court of Common Pleas.

[3] Court of Common Pleas Criminal Rule 6; see also Family Court Criminal Rule 6C.

[4] Court of Common Pleas Criminal Rule 6 allows for a defendant to introduce evidence "subject to reasonable limitations imposed by the court." But see, Family Court Criminal Rule 6C(c) which does not contain limiting language, and provides "The child charged may cross-examine prosecution witnesses and may introduce evidence in defense."



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MARITAL PROPERTY DIVISION- DELAWARE STYLE

"They're just numbers"

Gerald I. H. Street

Division of marital assets is usually the last phase in the dissolution of a marriage and because of that, it is more involved than merely an exercise in mathematics. In addition to simply dividing the assets, a domestic law practitioner must consider several other factors. For instance, the liabilities of the marital estate must be taken into account, even though the creditors are not bound by the Family Court decision nor even allowed to participate directly in the proceedings.[1] You must also consider the delicate balance between and the mixture of legality and morality found in most domestic law cases, as well as the tension that sometimes exists between these two principals. Examples of this concept may be found in the tension existing between visitation rights vs. visitation responsibility, or the obligations of custody vs. the rights associated with being a primary caretaker.

For the purpose of this article, we will assume that you have already identified the property to be divided, the relevant Delaware statutory provisions[2], the relevant tax code provisions or bankruptcy regulations, and the various aspects of common law, such as partnership law, which may be appropriate.[3] We now turn our attention to issues of case/trial strategy and preparation.

The process of deciding how best to persuade the Court, the opposing attorney or others of the reasonableness of your client's position actually begins at the initial client conference. It is during this first, and sometimes crucial meeting when you start to evaluate the client's demeanor as a potential witness, and the realism of the client's goals. It is also at this juncture when you form your first estimate of what theories or strategies the opposition might employ, and what may ultimately be expected from the Court. Finally, this initial meeting will also begin the process by which you will determine whether the client's goals would be best served by concentrating on litigation or negotiation, although both will ultimately play some, albeit different, role in every case.

While there are many practical approaches and suggestions which might be made at this point, in my experience there are three key questions which must be answered in every case and as early as possible. The answers to these questions form the basis upon which the case will be successfully developed, but the answers must also be continuously reevaluated by the practitioner throughout the process to insure that the original answer remains valid. The application of the answers to these questions will, of course, be effected by a number of other variables which will be discussed separately.

Question #1

WHAT DOES YOUR CLIENT REALLY *NEED*?

The word NEED is purposely emphasized because it is this need which must be the focus of the practitioner, rather than what the clients may say they "want". This difference between "want" and "need" exists not only in theory, but usually in fact as well, and even though this distinction also exists in other types of cases, i.e. personal injury, it is probably most evident in domestic cases due to the extreme emotional involvement of the parties.

In a song written during his own divorce, John Denver spoke of the fears that began and the hopes and dreams that were lost during the dissolution of a marriage. It is important for the practitioner to remember that even though the parties may have resolved many of those fears before reaching the property division phase of the process, in many ways this phase represents their "last stand". It is this ultimate sense of finality which leads to an emotional twist, which was not previously present in the case. The practitioner must also remember that not everyone experiences the reality and finality of a divorce at the same time, and of course some never do. In the end, however, most people will come to realize a sense of finality during the property division phase of the dissolution process.

Our laws fail to recognize these emotions as factors in the resolution of a property division case. Regardless, they can (and will) at times become extremely important in the formation of perceptions and in the thought processes of your client. To ignore the potential force of these emotions is both naive and dangerous. While the emotional attachment to the past and the perceived unfairness of the divorce process in the present may be very real to your client, the patience of the Court is certainly limited. Therefore, the challenge is to help your client to come to the realization that in the eyes of the Court, "they're just numbers". Once you have accomplished that task, your representation of this client becomes much easier.

QUESTION #2

WHAT DOES THE OPPOSITION WANT?

You are probably not in a position to know whether the opposing party's needs have been realistically assessed, therefore, you are initially left only to respond to the goals declared by that party. This does not mean, of course, that you should ignore the possibility of exploring the reality of the opposition's position, or the opposition's resolve and commitment to that position. Rather, it is important to recognize one's limitations and to concentrate your efforts and the resources of your client where they may be most effective. Such recognition will save your client from otherwise unwarranted legal expense, and save you unnecessary aggravation, thus allowing you to focus "THE SYSTEM'S" attention on your client's goals, rather than those of the opposition.

WHAT IS "THE SYSTEM" LIKELY TO CONSIDER AND ACCEPT *TODAY*?

"THE SYSTEM", of course, is made up of people. Those people include mediators, masters, judges, and anyone else who must work with thousands of divorces per year, and who try to somehow remain fair and objective throughout the process. It is important not to forget that "THE SYSTEM" always considers the requests of *both* parties and in the overall context of some subjectively felt "norm", regardless of how enamored you or your client have become with your position in the case.

Delaware law and its judges believe in and soundly support the concept of "no fault" divorce. "No fault" is not merely the law in Delaware, but the courts believe it to be a "good law". In that respect, the concept of "no fault" divorce may be treated differently than the prior Alimony or Inheritance law, which many practitioners and judges questioned the fairness of or the inherent inequity.

This does not mean, however, that the contributions of your client to the acquisition of marital property may not be argued, such as by advocating a partnership theory.[4] Nor does it mean that the opposition's dissipation of assets should be ignored. It does mean, however, that such arguments as dissipation must be made in the context of the division of marital assets and *not* in the realm of retribution for your client's present predicament. This latter approach crosses the line into a "fault" argument and you can expect the Court to react swiftly and without hesitation to stop such an argument.

The answers to these "QUESTIONS" form the axis about which all the other case "variables" revolve. Not all of those variables will be present in every case, but the answers to the three questions are always present, and will affect the significance of each of the "variables", as well as the ultimate success of your representation of the client.

VARIABLE #1 - NEED

While differentiating the "want" and "need", you will uncover several perceived needs which will impact upon your case strategy. For instance, if your clients needs the security of a monthly income because he/she is at some temporary financial disadvantage, or is in the process of gaining financial independence, then alimony may be a real need which must be entered into the strategy formation equation. Conversely, if your client is an "empire builder" who has not only the ability to acquire future assets, but also the sophistication to appreciate and advantageously use the tax laws, as well as the self-confidence to begin again, then property division will probably be your focus. This is especially true if you perceive that alimony will be the focus of the opposition's case. Similarly, if your client has the career opportunity to build his/her own solid retirement, then reducing the opposition's existing interest in pension rights to a present day value may be more valuable to your client than a division of those pension rights which *may* take place in the future if both parties live long enough and remain gainfully employed.

VARIABLE #2 - TRUST

Respect is a commodity you earn anew in each domestic case, even if you have worked with this same client in other matters. Respect is not earned quickly, nor at any one moment, but is, nevertheless, an absolute prerequisite to *TRUST*.

TRUST is the one ingredient without

which you will never motivate your client to accept a proposal which you consider to be realistic, but which may fall short of the client's expectations. It is relatively easy to "sell" a proposal which meets all of your client's wishes, but without *TRUST*, the client may find it difficult, if not impossible, to accept that piece of harsh reality which usually rears its ugly head in some form, at some point in every case. You earn both *RESPECT* and *TRUST* by keeping the client informed, by being prepared at every stage of the case, and by committing sufficient time to the evaluation, research and presentation of the client's cause.

VARIABLE #3 - OPPONENT

It is absolutely imperative that you accurately identify the opposition in order to adequately represent your client. Until you have identified who "they" really are, you can never be sure what "they" really want. You must ask yourself "who is really in charge?" Sometimes it is the opposing party and sometimes it is the attorney. However, sometimes it is an outsider such as a new spouse, a former in-law, or other influence who is really "calling the shots".

What is "their" real agenda? Are "they" truly reconciled to the emotional side of the divorce? If you are not sure of the answers to these and similar questions, then perhaps participation in, or initiation of, a joint meeting of attorneys and clients may be a viable strategy which will enable you to personally evaluate the other party, rather than relying on filtered data which you receive *via* letters, pleadings, and other mediums of communication.

Once you have determined who is really in charge of the opposition, then consider making several alternative proposals so that you may make your own evaluation as to what they *really* want. This process of negotiation may also be used to enable you to determine who is really in charge, as well as to determine the goals of the opposition.

VARIABLE #4 - NEGOTIATION

An experienced trial lawyer once warned that when you are in the courtroom, you should always be true to yourself. The same may be said of negotiations since the artificial barriers of rules of procedure and evidence are not available to mask weaknesses during negotiations. In property division negotiations, as in all other forms of negotiation, you must first "know yourself", for only then will you begin to truly understand what impact your personal strengths and weaknesses may have on the ultimate success of the case. For example, if you are a detail oriented person, then apply that talent to ensure that no semi-obvious advantage for your client has been overlooked, while at the same time never allowing this strength to turn into a weakness by loosing control of this trait and becoming a mere "bean counter" or "number cruncher".

If you are, by nature, a "numbers person," then this trait should be emphasized to the benefit of the client. The client will always benefit from, and the Court will always respect, an advocate who searches thoroughly for a better solution to the problem at hand. This is true, however, only if the advocate remains focused on finding a way to equitably help two households adjust to the increased financial demands resulting from the dissolution of the prior single marital household, as opposed to the creative manipulation of numbers to statistically support some absurd proposition which may, at best, superficially benefit the client.

You should never judge negotiations to have been a waste of time, even if the negotiations do not result in a settlement agreement. Negotiations allow you to learn a great deal about your opponent, lawyer and party alike, to narrow the issues, and to focus everyone's attention on those issues you deem important.

For example, you might consider eliminating a request for attorneys fees if the client's needs require the Court to be sympathetic to some other request, such as a disproportionate division of marital assets. Of if you need the Court to focus its attention and energy to the understanding of some detailed theoretical battle between experts, then a fresh judicial mind and the attendant patience may be more important. Or reading a long, but excellent, article may be more crucial to a favorable decision, for example when there is a viable and lucrative business which is susceptible to various methods of evaluation[5].

VARIABLE #5 - FOCUS

One the *"needs"* of the client and the "wants" of the opposition have been determined, you then begin to develop your negotiation and courtroom strategies. It is of crucial importance that any strategy be focused! If your analysis is superficial, or your data gathering incomplete, then a coherent, organized strategy will be impossible to formulate. Likewise, if your position during either

trial or negotiations is unclear, then any chance of motivating the Court or your opponent to accept your view is greatly reduced.

One key to developing the focus and theory of your client's case is the willingness to consider new and imaginative ideas. You should begin with a broad base of ideas, but eventually narrow the scope of your theories down to a few carefully chosen case strategies and theories. An excellent way to begin broadening your idea base is to attend CLE seminars, both here in Delaware and throughout the nation[6].

VARIABLE #6 - EXPERTS

While Expert witnesses are not necessarily a part of every property division, their involvement is increasing dramatically. They are neither to be feared nor taken for granted, simply respected. If you have sufficient mental capacity to pass the bar examination, then there is no area of expertise within the realm of a property division case which is beyond your mental capacity to understand. Facing the opposition's expert witness does, however, demand preparation.

Preparing for cross-examination of an expert witness almost always requires some degree of additional education, either through the advice and guidance of your own expert, or through additional reading on your own. In any event, you must be sufficiently disciplined so as to limit your trial inquiry to those areas which are likely to be productive in the context of your case.

It is important to remember that any expert will have some points in his/her analysis which will be in your client's favor, or at the very least, points which you can raise to cast their otherwise damaging opinion in a light more favorable to your client. The keys to "expert witness damage control" are; (1) to recognize those points which may be exploited, (2) to persevere in your cross-examination until those points are conceded by the reluctant expert, and then (3) the self discipline necessary to leave the expert alone once these points have been driven home.

VARIABLE #7 - TIMING

Timing can be of great importance in both negotiation and litigation of property division issues. Proper timing of your actions and the initiation of integral parts of your strategy will initially be determined by the identity of the person whom you are attempting to motivate or influence, be that person the judge, opponent, or your client.

The timing of your "bottom line — final" proposal is also crucial. If you present your final proposal prematurely, i.e. before your opponent is ready to settle, then you may have doomed any real chance of a negotiated settlement to an early death. On the other hand, if you wait until your opponents have psychologically resigned themselves to trial, they may not give your proposal sufficient consideration to realize its potential. However, even if you perceive that your opponents will need time to understand the reasonableness of your client's proposal, that does not mean that you must delay the process of education/motivation until a formal and complete proposal may be submitted. Consider starting the education/motivation process in your letters to the opposing attorney by composing them in a way which will be understood and a motivation to his client. There are times when plain talk is more effective than eloquence.

CONCLUSION

President Lyndon Johnson once said that if you present the *same facts* to a room full of *reasonable* people, they will not disagree. With today's rules of discovery, different sets of facts should rarely exist. However, the level of emotion which exists in domestic cases may very well cause both parties to remain unreasonable, despite your best efforts. Regardless of whose client is the most unreasonable in any given situation, your challenge is to motivate and educate the parties so as to understand that a reasonable agreement usually fulfills their real needs, and is therefore in their own best interests. With this approach, the opposing attorney, Court, and even your client's former spouse are all potentially your allies, rather than your opponents. And, as icing on the cake, you may well find that you have not simply resolved a crisis for your client, but have in the process gained his respect, future business and good advertising. Not bad for a day's work.

[1] *See Joseph B.P. v. Kathleen M.P.*, Del.Supr., 469 A.2d 800, 802 (1983) (Family Court may only allocate responsibilities between parties for debt repayment, but may not eliminate or alter the rights or remedies of creditors). But other third parties may have standing to pursue certain causes of action in other Courts, see *Angelli v Sherway*, Del. Supr. 560 A.2d 1028 (1989).

[2] 13 *Del. C.* Section 1513(a)(1-13), (b).

[3] A lawyer should never forget that effectiveness requires some balancing of his responsiblity to the client and his responsibility to the Court as an officer of the Court. *See Delaware Lawyers' Rules of Professional Conduct*, Preamble. *See generally, Eberly v. Eberly*, Del. Supr. 489 A.2d 433 (1985)

[4] Foster and Freed, *Marital Property Reform Partnership of Co-Equals?*, 169 N.Y.L.J. (March 5, 1973). See also, *In Re Marriage of Komnick*, Ill. Supr., 417 N.E.2d 496, 502 (1974), and *J.v.J.*, No. 41140, slip op., (Del. Fam. Kent Co. Nov. 18, 1988).

[5] Zipp, A., *Divorce Valuations of Business Interests: A Capitalization of Earnings Approach*, 23 FAM L.Q. (No. 1) Spring 1989.

[6] Law Education Institute, Inc., sponsors semi-annual Family Law Seminars featuring noted practitioners as speakers on timely topics and held at attractive locations. The two seminars scheduled for 1990 will be held in Vail, Colorado (Jan. 6-7) and Walt Disney World (Feb. 24-27). For information write to Law Education Institute, Inc., 5555 N. Port Washington Rd., Milwaukee, Wisconsin 53217

Gerald I. H. Street is a native Delawarean. He graduated from the University of Delaware in 1969, from law school (American University) in 1972, and was admitted to practice in February, 1973. He was appointed Deputy Attorney General in 1972 with responsibility for prosecuting criminal cases ranging from traffic tickets to juvenile delinquency to murder. In 1974 he entered private practice as a general practitioner and has been involved in all aspects of Family Law as well as many other phases of practice.

Mr. Street served on the House of Representatives Family Law Committee, taught at Delaware Technical and Community College and Wesley College, and served on the Supreme Court's Board of Professional Responsibility, and the Long Range Planning Committee, the Delaware Correctional Grievance Committee and the Delaware Bar Association Family Law Section.

THE CROSS EXAMINATION OF DEFENDANT'S DOCTOR

A. Richard Barros

"Things are seldom what they seem
Skim milk masquerades as cream"
Sir William S. Gilbert

The cross examination of the Defendant's medical expert is about to begin. From the time of the opening statement until resting your case, you have tried to convince the jury that the Plaintiff sustained serious injuries and is a credible person worthy of their empathy and understanding. The defense attorney has just completed the direct examination of its medical expert who has reported that the client's subjective complaints are of minor significance and that there is little likelihood of more than minimal permanent disability. The defense has introduced a crack in the facade of what you thought was a consistent presentation through numerous corroborating witnesses and if unchallenged, your case could be ruined. After all, if your client's credibility is successfully attacked, the jury will undoubtedly reach a verdict for substantially less dollars than you anticipated.

The jury now turns and looks at you as you walk to the podium; it anticipates the clash. You may actually see facial changes of expression from several of the jurors. The body language is clear: what do you make of that testimony, Mr. Plaintiff's attorney? You have been telling us just how serious the soft tissue injuries are and how they affect your client's ability to perform her job, conduct her household duties, enjoy a personal and social life, and reduce her independence. Your stress load at this moment is about a ten!

Would it be best to just ask a few questions and then sit down? Should the attack include baring teeth and raising your voice? Does it make a difference how you walk to the podium in front of the jury? I suggest an appearance which presents strength, determination and confidence. After all, the jury will certainly be watching you.

Prior to the trial you were aware of the potential harm which would be caused by the testimony of the Defendant's medical expert after having reviewed his report. If you have not had the opportunity to examine that expert in another case, then it is best to contact another litigator who has had ample experience examining that expert. Telephone some of the other litigators who may have worked with the physician and ask about their experiences. Try to learn as much as you can about how the expert reacts in a court room or deposition setting. Does he become unglued or hold steadfast? Is he a weasel that will give each side what it wants? Will he agree that what you suggest is just as probable as what the other attorney suggests? Will the expert answer each question with a lengthy monologue in which he suggests that your question poses a possible view which in reality just does not make sense? If such is the case then be prepared for a rough fight. How do you meet this challenge to the very essence of your case?

A careful study of the expert's written report is required. Look for any positive findings of injury or comments which are favorable and match the opinion of your expert. Make sure you understand the nature of each test performed and what it was intended to produce. There is a difference between a neurological and an orthopedic examination. Analyze and comment on which aspects of the physical examination apply to your client's injuries and what negative findings are just not relevant. Check to see if the expert made a finding which suggests malingering. If so, plan your questions to minimize the impact the suggestion of malingering will have on the jury. Sometimes the finding of a quasi objective positive test may be all that you have to work with to establish the presence of continuing trauma. For example, if the report states that the patient complained when the area of the sciatic notch was manipulated, you know that the nerve plexus exits from a particular area of the buttock and runs down the leg. There is little likelihood that a patient would know how the test is performed in advance and even though there is some subjectiveness in the test, a positive finding report of sensitivity or pain in the sciatic notch area will help your client to gain credibility.

My theory is to try to obtain as many admissions from the Defendant's expert as possible. I would be ecstatic if the expert simply said "yes" to every question I asked. But, alas, it is not that easy. The object is for the jury to be able to balance the strength of the Plaintiff's medical expert who has seen the patient over a prolonged period with that of the Defendant's report who has performed one or two examinations. If the Defendant's expert in essence admits that what your expert has testified to is plausible and could occur, then your case has considerably gained in strength.

Start of by proving that the expert has had a limited role in this case.

Q. Doctor, this examination was done at the request of Mr Jones, was it not?
A. Yes, it was.
Q. Is it correct that my client did not see you for care and treatment and that you did not make any recommendations relative to those injuries?
A. Yes.
Q. Is it also correct that all you did was send the attorney a report?
A. Yes.
Q. Is it also a fact that you were paid for the examination and report by the attorney and not by my client?
A. Yes.

I now want to initiate the dialogue which, I would hope, will contain admissions by the doctor. The following are some which I suggest in a typical soft tissue lawsuit, but must be related to the facts of your particular case:

Q. Considering the nature of the motor vehicle collision which caused extensive physical damage (include a summary of the damage), do you agree that such a collision could be the competent producing cause of my client's complaints?
Q. Were you aware that my client went to the hospital after the accident (or taken by ambulance), and complained of head

and neck pain? (If the doctor is not aware of the emergency room record, then show him the document).
Q. Do you agree that the collision as I described today could produce an extension/flexion injury to the neck and back of my client which involved the muscles?
Q. Do you agree that such a collision could produce headaches?
Q. Do you agree that such a collision could produce blurred vision, nausea and dizziness?
Q. Do you agree that such a collision could produce muscle spasm?
Q. Do you agree that such a collision could produce numbness in an arm?
Q. Do you agree that such a collision could produce concussion?
Q. Do you agree that such a collision could produce cervical and lumbar strain?
Q. Do you agree that such a collision could require that medication be administered over a long period of time for pain?
Q. Do you agree that such a collision could require that medication be administered for long periods of time to relax the muscles?
Q. Do you agree that such a collision could require the use of trigger point blocks, the purpose of which is to reduce pain?
Q. Do you agree that such a collision could require physical therapy treatments over an extended period of time?
Q. Do you agree that such a collision could produce neck stiffness and loss of motion?
Q. Is it correct that a sprain is a medical word for a tearing or a pulling apart of the smaller fibers that make up the more dense ligaments or musculotendinous structures?
Q. Do you agree that such a collision could produce scar tissue in the neck and back muscles?
Q. Do you agree that such physical complaints as I have described can be aggravated by physical activity?
Q. Do you agree that if the patient performs less physical activity then there would be less physical complaints?
Q. Would you agree that when making a medical diagnosis the physician is in a better position to render that diagnosis when he has had the opportunity to review all of the medical records?
Q. Do you agree that it is better in rendering a diagnosis if the patient can be seen over the course of a prolonged period of time, at least six months to a year?
Q. Do you agree that muscle spasm is objective evidence of injury?
Q. Do you agree that when an extension/flexion injury has occurred and muscle spasms are produced, the nature of the condition is such that it is not always present in the patient, but rather he or she may have spasm on some days and no spasm at other times?
Q. Do you agree that the nature of an extension/flexion injury is that it can produce good days with little or no pain and bad days with pain and limitation of neck, shoulder, arm and back movement?
Q. Do you agree that subjective complaints can be just as real and just as painful to the patient as objective findings?
Q. Do you agree that an injury to the soft tissues of the body can be as much or even more painful than injury to bone?

Continue to ask the expert questions hoping to solicit affirmative responses about the past medical history of the client. If applicable, have him admit that the records reveal your client was first treated by her personal physician and then referred to experts because of the continuing problem. Have him admit that there were objective test findings and explain the nature of the tests and what each was designed to determine, such as MRI or EMG. Then have him admit that other therapy modalities such as the use of a TENS unit, medication, physical therapy and rest are all proper medical procedures for the treatment of injury similar to what your client has sustained.

Assuming that the expert has commented on several negative test results, ask if he agrees that x-rays are primarily designed to determine whether there is injury to bone, further, whether tests such as EEG, EMG, CAT Scan, etc. are sometimes inaccurate. I even ask if he agrees that though such testing may show a negative result, the patient may still be injured as a result of the trauma sustained in the collision. Assuming your own expert has testified that there is a permanent injury,, do not hesitate to ask the Defendant's expert if he agrees that the collision you described could produce permanent disability to the neck and back.

Usually I ask the doctor about the history which he took from my client. If she reported experiencing pain, ask whether he disbelieved her. Do not ask this question if his report suggests malingering as a result of tests performed during his examination. Also ask questions concerning his findings. They should be designed to show that he too, found evidence of injury. Typical questions are as follows:

Q. Doctor, you performed a range of motion examination and reported finding discomfort or tenderness. Is that an abnormal finding?
Q. The straight leg raising test was positive at 40 degrees. Is that an abnormal finding?

I suggest asking the doctor, assuming he is familiar with accident cases, to comment on what the mechanism is for extension/flexion injury. In other words, request that he describe what happens to your client's neck and back at the time of the collision. If he does not make a complete explanation, then I pose some questions which further emphasize how a stretching type injury to the soft tissues produces strain injury involving the muscles and even the ligaments, nerves, or discs. If the doctor in his examination found tenderness as reported by the patient, even though it may be subjective in nature, I shall certainly ask if the tenderness is also considered as an abnormal finding. I tend to stay away from questions about scarred muscle tissue, as it provides the expert with the opportunity to explain that in his opinion my client is not suffering from any serious injury.

Try for positive concessions from the Defendant's doctor. Since his opinion differs from your expert's, get him to admit that just as reasonable lawyers have differing opinions, so do physicians. As my cross examination is finished, the only thing I can hope for is to catch a friendly smile, or the favorable slight nod of a juror's head. If so, I know my job was well done.

Mr. Barros' personal injury litigation experience includes malpractice and worker's compensation and he has been

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THE PSYCHIATRIC EXPERT WITNESS

David E. Raskin, M.D.

This paper will consider certain issues surrounding the role of an expert psychiatric witness. Four topics will be addressed: 1) competency issues in the role of an expert witness, 2) ethical issues in the role of an expert witness, 3) the theater of the courtroom, and 4) the purpose of psychiatric experts.

1. Competencies of an Expert Psychiatric Witness

The following statement was taken from the workup of a psychiatric patient seen in our office. "In my opinion, one can state that this person has a depressive disorder with subjective feelings of depression along with reports of insomnia and weight loss. Etiology is unknown. Psychotropic medications are indicated for treatment purposes." Although such a statement is often found in letters from physician to physician, it would be a poor statement to present in a court of law for the following reasons: 1) there are no comments about objective signs of psychiatric disorder, 2) there are no comments about the patient's truthfulness, 3) reversibility or irreversibility are not considered, 4) there is no attempt at identifying proximate cause, and 5) the report does not speak with the weight of reasonable medical probability or certainty.

The physician's assessment and treatment of *voluntary* patients complaining of a psychiatric disorder and reaching out for treatment is different from the assessment of clients in a legal context.

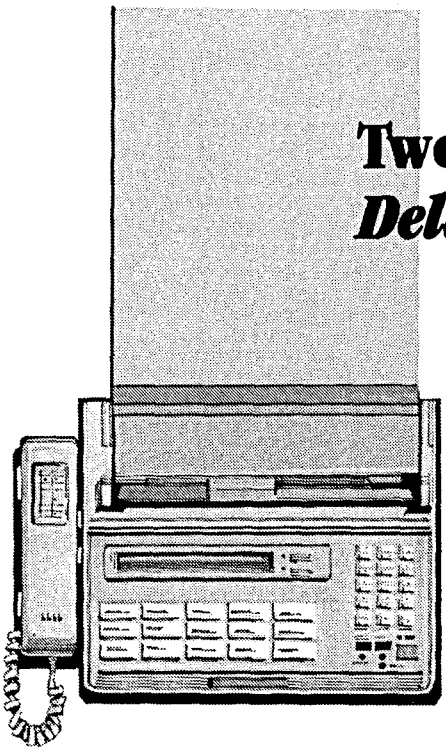
The Disillusionment of David Bazelon

There is perhaps no better description of the difficulties with finding competent expert psychiatric testimony than the series of cases heard by The Honorable David Bazelon. In Judge Bazelon's court in the District of Columbia from 1954 through 1972, a series of decisions occurred representing an attempt to modernize, streamline, and operationalize, psychiatric testimony in a way that would be helpful to the trier of fact. The high hopes ushered in with the *Durham* decision in 1954 were snuffed out in 1972 at which time the American Law Institute criteria for cognitive and volitional ways of determining criminal responsibility were adopted. If one reads the cases, the problems of nonforensic expertise in the courtroom are clearly highlighted. The following excerpts are from the *Washington v. United States* cases[1] of 1967 one of the Durham progeny. "Unexplained medical labels, schizophrenia, paranoia, psychosis, neurosis, psychopathy, are not enough. Description and explanation of the origin, development, and manifestations of the alleged disease are the chief functions of the expert witness. The chief value of an expert's testimony in this field, as in all others, rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion, in the explanation of the disease and its dynamics, that is, how it occurred, developed, and affected the mental and emotional processes of the defendant; it does not lie in his mere expression of conclusion. *Durham* was intended to restrict to their proper medical function the part played by the medical exerts," or the following: "A psychiatrist who gives a jury a diagnosis, for example, of psychoneurotic reaction, obsessive compulsive type, and fails to explain fully what this means, would contribute more to society if he were permitted to stay at his hospital post taking care of patients." "If lawyers want the views of the experts to be accepted by lay jurors, their first duty is to draw out expert testimony in terms which are intelligible and meaningful." These issues are as relevant in 1989 as they were in 1967. The psychiatric expert's testifying in the courtroom must outline in detail the data and the reasoning which leads towards answering the legal questions. Magically jumping, from poorly formulated clinical data, which are often subjective and unvalidated to the ultimate legal conclusion, is just bad clinical forensic psychiatry. To improve the competence of forensic experts, psychiatric programs have to provide teaching in the way an expert retrieves data and demonstrates his thinking processes as he uses the data to answer legal questions. In addition, attorneys need to demand this kind of skill from the experts whom they hire. Only in this manner with both the legal and psychiatric system insisting on more competent testimony, will we move away from the shadow of incompetency which so chilled Judge Bazelon.

2. Ethics in the Courtroom

Consider the two following statements: There are three kinds of liars, common liars, damned liars, and scientific experts. I would go into a law suit with an objective uncommitted independent expert as willingly as I would occupy a fox hole with a couple of noncombatant soldiers.

Forensic psychiatrists still have difficulty with the question of whether an expert is: 1) an objective describer of fact or 2) a biased member of either the prosecution or defense team. It is my contention that the overtly biased expert is of far more use to the jury than the objective expert. Later in the paper I will question the concept of an "impartial expert." I would prefer to think of, 1) overtly biased experts, 2) covertly biased but seemingly objective (court appointed) experts. The system of direct and cross-examination with competent attorneys works well with overtly biased experts and provides the trier of fact with *clear* alternatives. Experts are often considered hired guns. "Hired guns", however, relates to the material reinforcements of being a psychiatric expert witness and although this does play some role there are many other sources of bias besides this. One is termed forensic identification. This is; the experts need to identify with the attorneys for whom they work. In addition there is personal bias which is the expert's particular ideology in regard to civil commitment, competency to stand trial or criminal responsibility. These two biases, forensic identification and personal bias, are never completely eradicated from the testimony of an expert. As stated earlier even court appointed experts possess these biases.



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It is, therefore, to my mind more appropriate to think of the expert as a biased witness and a member of the legal team and to allow the procedure of cross-examination to flush out expert bias. The fantasy that there are types of ideal experts who can provide objective information without personal bias or forensic identification bias is naive.

3. The Theater of the Courtroom

An expert witness is in large measure successful because of his or her presentation of self in the courtroom. To some this sounds like a perversion of the expert's main task, which is to present data and opinion. However, it is a fact that personality and presentation of self is a major influence on another's perception of one's competence. Certainly successful attorneys become that way in part because of their presentation of self. A similar statement could be made about successful businessmen, teachers, or hospital administrators. It may be offensive to some that such factors influence a jury's perception of an expert's competence but this is a fact of life which is in no way unique to an expert psychiatric witness. Dress, demeanor, linguistic skills, interpersonal influence and teaching skills are all part of the expert's skill package. I am not worried about the dangers of experts being believed solely on the basis of personality factors if the attorneys are competent. If they are not the whole process, of course, can break down. A poorly conducted cross-examination can allow a poorly prepared but glib expert to look good.

4. Some Reflections on the Purpose of an Expert Witness

This paper has presented some information regarding the competency of experts, ethical issues in being an expert witness, and the theater of the courtroom. Another key question is what is the purpose or purposes that experts serve? Clearly, they are to be of help or assistance to the jury. Many would conceive this role to be an educational role in which the expert attempts to teach the jury his opinions and the factual basis for these opinions. Another way of thinking about the expert is to view him as a person there to highlight one way of thinking about the particular legal case. The jury then collectively has an opportunity to select that way of thinking as opposed to the highlighted position on the other side. In this way of thinking about the expert, he is there merely to underline some key issues and to allow the jury to select which story they prefer. In this view the expert is not a manipulator, persuader, or teacher, but rather a storyteller. The jury decides which story it prefers based on multiple and complicated reasons. Some have suggested that experts are really there to add some verve and spice to a usually dull proceeding. For example, what would a good murder case be without the theater of opposing experts clashing over the insanity defense.

Whatever the purpose, law and psychiatry teaching programs must carefully prepare psychiatrists and lawyers with the knowledge and skills to perform forensic examinations carefully. This chore has not been adequately performed. Members of both professions must hope future training programs will do better.

[1] *Washington v. United States*, 390 F 2d 444 (1987)

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(Continued from page 19)

a frequent lecturer and writer for the Delaware Trial Lawyers Association. In the area of criminal defense, his cases run from murder to DUI and include defending persons charged with political crimes. In the third area of his practice, domestic relations, he litigated the case of ***Eisley v. Eisley*** *in 1983. The case involved proving that a sham marriage occurred to the satisfaction of a Sussex County jury.*

Upon graduating from Dickinson School of Law in 1964, Mr. Barros practiced law and became a partner in the firm of Brown, Shiels and Barros where he remained until 1981 when he formed the law firm of Barros, McNamara & Scanlon, P.A., which has offices in Dover and Rehoboth Beach. Mr. Barros limits his practice to litigation.

A CONSUMER'S GUIDE TO EXPERT ECONOMIC WITNESSES

Samuel J. Kursh

The role of the expert economic witness at trial appears to the untrained eye to be a model of simplicity. The expert economist for the plaintiff utters some jargon, steps up to the big paper pad set on the easel and writes, in large numerals, a very large number.

Next, the defense expert economist steps up to the pad, flips the plaintiff's page over and writes a small number. Both scientists then return to their respective ivory towers to ponder gross national products and Laffer Curves.

It's not that simple, exactly.

Here, we will look at the theory and practice of forensic economic experts, what they do and under what circumstances their services are worthwhile.

Holy Macro: The Big Picture

The basic premise of tort law is compensation — the notion being that the defendant's obligation to compensate the plaintiff acts as a deterrent to negligent behavior and also (more important to an economist) makes the plaintiff "whole."

Regardless of fault, society suffers economically from accidents and injuries. Societal productivity is a function of individual productivity — the gross national product declines, however infinitesimally, when a member of society is incapacitated and cannot contribute. Losses from accident and injury that fall on the individual are counterproductive, and the national economy is enhanced when such losses are distributed amongst society at large, rather than falling to the individual victim. "The accident losses fall initially on those who are ill-equipped to meet them; and if the losses are not shifted from the initial victims, ruin and dislocation with widely unfortunate social repercussions will result," as one learned commentator observed.[1]

Prior to the Industrial Revolution, tort law was relatively unimportant.[2] Then, in the mid-19th century, the railroads expanded with much fanfare and concomitant mayhem. An explosion of tort litigation ensued — the price of economic expansion was an acceleration of serious accidents and a dramatic rise in commercial litigation. Personal injuries were the inevitable byproducts of the rapid industrial expansion. Tort law acted to distribute the costs of such injuries since companies such as the railroads compensated plaintiffs and then distributed costs to customers as, indeed, companies do today.

By the same token, commercial litigation emerged as a tool to limit excessive chicanery in business transactions. The entire rationale of contract law is to promote economic efficiency by ensuring a climate of fair dealing. Tort law regarding businesses acted in the same manner as tort law in personal injury matters. Losses are spread among many, rather than falling on the individual business.

Theory in Practice

Civil law thus increases economic efficiency.[3] That, anyway, is the theory. Few forensic economists, however, agonize over the consequences to society when evaluating damages in a litigated matter — society is rarely a claimant in a civil action. The job of the economic expert witness is to analyze and assess economic damages as precisely as possible in individual cases.

The basic tools of the forensic economic trade are (1) the facts of the case; (2) assumptions as to what would have happened absent the injury that caused the litigation; (3) economic theory; and (4) mathematics.

If calculating economic damages were as simple as multiplying the plaintiff's annual wage through the plaintiff's probable life expectancy, lawyers wouldn't need economists. Luckily enough for economists, scores of other variables have to be considered. Even the reduction of damages to present value, one of the basic calculations in litigation economics, is beyond the scope of most "non-number" people. If you fall into that category, here is the First Law of the Forensic Economics: These People Are Trained Professionals — Do Not Attempt the Calculation of Complex Damages at Home. (If, however, you are comfortable with such mathematical feats as multiple regression analyses, you may skip on to the next article.)

The Economist as Seer

When considering whether to retain an economist, bear in mind that economists are not accountants. Accountants are historians of monetary transactions. Accountants are paid to be certain. Economists are paid to look into the future. If absolute certainty in economics were possible, economists would all be wealthy and would not need to testify in court. They would not need to do anything much beyond placing orders with their brokers before heading to the golf course to take economic advantage of doctors. Alas, in economics absolute certainty is not achievable.

What forensic economists do is choose the *most appropriate* assumptions as to the future and, using the variables specific to the case, build the most-likely damages scenario.

In a personal injury matter, for example, these variables include such items as the plaintiff's actual earnings; worklife (the time the plaintiff could reasonably expect to be employed absent the injury); probable fringe benefits; the value of household services; medical costs; inflation; statutory considerations; productivity (both individual and societal); earnings of cohorts; statistical profiles; and other data relevant to earnings, loss and work capacity.

In commercial damages cases, variables can include such considerations as market share; fixed and

variable costs (i.e., overhead); production capacity; and damages to ongoing customer relationships.

Economists — the good ones, anyway — consult existing statistical resources relevant to the case and isolate the significant variables. After all relevant data are compiled by the economist, he or she makes assumptions. This is not as arbitrary as it might seem. For example, suppose the plaintiff is a member of a building-trades and union records indicate that members work, on average, seven months out of the year. This is not uncommon on the Eastern Seaboard where the weather keeps roofers off roofs and riveters off high beams for a large part of the year. It is a safe assumption in this case that the plaintiff would also work seven months of the year.

This seems quite obvious, yet attorneys often fail to recognize the fact that in many fields employment is not constant and earnings are driven by many forces beyond inflation and normal wage growth. For instance, an attorney may approach an economist and ask the economist to determine future wage loss on the basis that the plaintiff has shown the attorney a $400 weekly pay stub.

But what does "$400 a week" mean? Does it mean $400 in straight salary? An hourly salary? Piece work? Does it include overtime? The attorney hasn't done his homework. Economists need detailed data to analyze damages. The economist with the most data has the most-reasonable basis on which to formulate appropriate assumptions. As with Boy Scouts and good trial lawyers, the motto here is "Be Prepared."

So, the Second Law of Forensic Economics is: Gather as Much Information as Possible Regarding the Plaintiff's Economic Situation. The corollary: Time is Money. Get Your Economist the Information Promptly. Astute trial lawyers will, in complex cases, bring an economist into the trial preparation process as early as possible. The economist can then let the attorney know exactly what is needed by way of discovery, guide the attorney through the shoals of depositions and interrogatories, and assign a value to the case that has the virtues of plausibility, logic and fairness.

First Economic Principles

As we mentioned, economists cannot predict the future with absolute certainty and, therefore, must find honest employment. Some testify as to damages and charge money for this service. The first economic question the attorney must ask is whether the potential return justifies the investment in upfront fees charged by the economist. In many cases the attorney may feel that a homemade, ballpark damages figure could just as easily (and much more cheaply) be put before the jury during argument, saving the client significant expert fees.

When are the costs of expert advice during trial preparation and expert testimony in the awful event the case comes to trial justified?

In our expert opinion (rendered here for free) the costs are justified in cases where actual damages are significant — we think $100,000 is a significant number — or where (defense people, please note) emotional circumstances might lead the jury to throw large numbers into the pot, it is best to isolate as exactly as possible the spectrum of damages. The imprimatur of Science in the form of a learned economist holding forth from the stand has reined in many a potential runaway jury.

Several other considerations come into play when making the decision whether to send out for some economic analysis or whip something up at home. The trial attorney's first task is to determine liability. In cases where liability is unclear, the attorney does well to spend significant time and energy on the liability phase of the case. All too often, the preparation of a reasonable damages scenario takes a back seat. A qualified forensic economist can take a lot of the pressure off during the preparation of the case, allowing the trial attorney to concentrate on liability.

The trial attorney who has retained a competent economic expert also need not worry if significant damage issues are being overlooked. For instance, such arcana as lost-opportunity cost or the true value of societal productivity might escape the attorney's attention, but these details are stock items in the forensic economist's repertoire.

In the case of defense counsel, the thinking may be that putting any value at all on damages is a tacit admission of at least some degree of liability.

We think that this defense assumption is unwise. First, as happened in *Pennzoil v. Texaco*, lack of a reasonable damages scenario puts the damages ball in the plaintiff's court — the only numbers before the jury are generated by the plaintiff. If the plaintiff prevails on liability and the defense does not offer an alternative damages scenario, the plaintiff clearly has a tremendous advantage. Ask Joe Jamail.

Second, a reasonable picture of damages encourages settlement. At a settlement conference, judges will look kindly on a well-wrought, logical assessment of damages.

Third, a proper defense presentation of damages demonstrates that the defense is reasonable and objective. In fact, a thorough damages assessment may head off a bad-faith challenge. If it can be shown that the defense offer is a logical measure of damages, it is difficult to prove that an insurance company demonstrated bad faith by refusing to append a few extra zeroes to the offer.

Finally, an economist can assist the defense in rebutting the plaintiff's damage claim. Where the plaintiff uses poor assumptions, the defense expert can guide the defense attorney through cross examination. As we noted, there are no certainties in economic assumptions, just degrees of likelihood. A good defense economist will be able to demonstrate to the court and jury the existence of ambiguity — that the plaintiff's economist's number perhaps is grounded on advantageous assumption rather than hard fact.

How, then, should the plaintiff use the economist? The plaintiff's attorney's first job is to determine damages — an egregious tort or beach of contract causing significant injury will call for significant compensation and perhaps punitive or exemplary damages in addition. The tendency is to demand, at first, the moon or some other astronomical figure. Then, as negotiations progress, that number is refined to more terrestrial proportions.

As demands and offers are traded back and forth, a well-wrought report by an expert economist becomes a powerful tool. It demonstrates to the defense that the plaintiff is deadly serious in the pursuit of compensation. It demonstrates to the judge or arbitrator in settlement hearings that the demand is an intelligent assessment of actual damages.

Hence, the Third Law of Forensic Economics: Saving Money on Expert Advice proves to be a False Economy Where Damage Issues are Complex and Potentially Huge. The corollary: If the Other Side Has an Economist, Get One.

Onward and Upward

As we discussed at the beginning of this exercise, one theory holds that tort law leads to overall economic efficiency.

As you know, this theory is being challenged vigorously by the insurance industry and business interests, which hold that in its present form tort law not only leads to gross inefficiency but will usher in the economic equivalent of nuclear winter unless legislatures and courts put punitive damages, strict liability, joint and several liability and the like on deep hold.

Whether or not the insurance crisis is real or imagined is not within the scope of this treatise. Regardless of the realities, perception in many sectors is that the time is ripe for "tort reform." Certain decisions from California, that most trendsetting of jurisdictions (and recent decisions in other states) indicate that the pendulum is swinging toward limitations on recovery.

For example, the California Supreme Court knocked the stuffing out of the bad-faith damages concept last December in the wrongful-discharge case *Foley v. Interactive Data Corp.* 254 Cal.Rptr. 211. (This, ironically, from the same state that gave us the bad-faith theory to begin with.) The Oklahoma Supreme Court has denied punitive damages for bad-faith breach of contract in cases involving commercial loan agreements. Cases pending in other states may wipe out tort remedies in any type of case that could conceivably sound in contract.

And, as successful as the trial-attorneys' lobbies have been in blocking tort reform by legislatures, it is clear that the insurance and manufacturing industries have not yet conceded defeat in their campaign to limit punitive damages and joint and several liability. Even if no concrete steps are taken toward legislated "reform" of the tort system, proponents of tort reform have been making enough noise to affect public perception.

The massive public-relations effort by insurance companies bent on demonstrating the evils of huge jury awards could have some effect on a jury's willingness to assign big numbers to punitive damages and pain-and-suffering claims.

In this climate, economic damages take on great significance. Damage claims based on logical, rational assessments of true economic loss should prove more palatable to judge and juries than demands for nebulous special damages. Provable, concrete damages may be all that will be available if the "reform" movement prevails and litigation reverts to the pre-1950's model of tight, rather than deep, pockets.

In any event, tort reform or no tort reform, logic, precision and credibility at trial shouldn't go out of style in the near future. Good expert economists, used wisely, can provide those qualities to the astute litigator.

[1] James Fleming Jr., "Damages in Accident Cases," 41 *Cornell L.Q.* 582-619 at 583 (1956).

[2] William M. Landes and Richard A. Posner, *The Economic Structure of Tort Law*, (Cambridge: Harvard University Press, 1987), p.2.

[3] Ibid. Anyone wishing to pursue the nexus between economic theory and tort law is urged to read this fascinating, albeit academic, volume. Judge Posner, of the U. S. Court of Appeals for the Seventh Circuit and a lecturer at the University of Chicago Law School, has written extensively on economics and law.

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THE CPA'S ROLE IN LITIGATION SUPPORT

William H. Master, CPA and Frank R. Sidlow, CPA

Today more accounting firms than ever are offering litigation support services to attorneys. The term "forensic accountant" is in vogue. Attorneys recognizing the complexities of business, tax and accounting issues are searching for the right consultants or "experts" to assist them in preparing and presenting their cases. A CPA who understands complex business issues and can convey them in laymen's terms coupled with the ability to be creative can be an invaluable asset.

The term "litigation support services" includes any professional assistance that accountants provide to attorneys during the litigation process. Many attorneys think of using an accountant as an expert witness or consultant only when the case involves taxes or another accountant. Because of their education and experience, accountants are able to address a multitude of complex business and economic issues. Accountants have the training and ability to understand and interpret financial data, to analyze the financial aspects of contracts, and through auditing skills, to do investigatory work.

In cases that involve reviewing and summarizing data or reconstructing records, the accountant can provide the manpower necessary to efficiently gather evidence. Accountants who are proficient with calculators and computers can make the attorney's job easier. With computers, using spreadsheet or database programs, the accountant can capture data and reproduce it in various formats. Using computers the accountant can create models based on hypotheses and calculate the effects of changes in assumptions quickly and relatively inexpensively compared to performing these tasks manually. Historically, accountants have worked with business clients in establishing and reviewing values to be used when buying or selling businesses and in connection with buy-sell agreements. In addition, CPA's have been instrumental in developing projections and forecasts of financial information based on hypothetical situations. Transferring this knowledge and ability to litigation that requires valuation services or presentation of data in hypothetical situations is both logical and advisable.

CPAs provide litigation support services primarily in the area of civil litigation involving disputes between business entities, governments or individuals. There are also certain types of criminal cases that may require the services of a CPA such as price-fixing, bid-rigging and tax fraud. The CPA's training and experience, as an auditor and business consultant provides assistance to the attorney in many types of business related litigation. Accountants can also help in developing an automated or manual document retrieval system for cases that require organizing and summarizing a large volume of documents.

When the CPA is engaged as a consultant or as an expert witness it must be determined whether he has the experience to participate in the case. The attorney and the accountant must make certain that there are no conflicts of interest. If the attorney's client is also a client of the accountant the appearance of objectivity must be considered. While there are no ethical restrictions that would prevent the accountant from providing litigation services for an existing client, questions regarding the size of fees generated from accounting and auditing services and a perception that the CPA may be biased must be considered. The CPA must determine that the items he will be consulting on, or testifying about, are consistent with what he currently does. The attorney must consider the effect, if any, of positions that the CPA has taken with respect to his current clients and previous testimony the CPA has given in similar cases on the case at hand. Litigation support services are more demanding than most engagements undertaken by CPAs and are prone to postponement. Because of this the attorney must be certain that the CPA can devote the time required to his case.

The CPA will ascertain whether the client is the attorney or the attorney's client. The CPA must then determine whether there are funds to pay for his services regardless of the outcome of the litigation. If it appears that there will not be sufficient funds, the engagement may be viewed as one involving a contingent fee. Attorneys often work on a contingency basis which is entirely proper. CPAs, however, are prohibited from working for a contingent fee under rule 402 of the Professional Rules of Conduct. Most canons of the bar prohibit an expert witness from being party to a contingent fee arrangement.

Litigation services require significant involvement by the individual who will be the expert witness. For this reason any assistants that might be used in the preparation of exhibits, charts and analyses must be directly supervised and controlled by the individual who will ultimately testify. If the CPA cannot devote substantial time to the engagement it should be declined.

The decision to utilize the services of an accountant should be made early in the case. The accountant can be of significant assistance in the preliminary stages by evaluating the facts and reviewing the financial and business issues pertaining to the case. Together the accountant and attorney can plan the best use of the accountant's services in the case. The CPA's business knowledge or special knowledge of a specific industry can be beneficial in drafting interrogatories. This knowledge is also helpful in drafting requests for documents and in assisting the attorney's client in preparing to respond to requests for documents. While only the attorney can ask questions at a deposition, the accountant can be a valuable assistant during the examination of business people. This is particularly true when questions involve financial or accounting areas. The CPA is usually present during the deposition of the opposition's expert. Even if the attorney decides not to have the CPA present at the deposition the CPA will often assist in drafting questions to be asked.

There are benefits to engaging a CPA as a consultant in a case even though a decision has been made not to use a CPA as an expert witness. As a consultant the accountant can review the case and

advise the attorney about facts and issues. He can develop various scenarios and explore many different theories attempting to prove a point. He can also develop the same assumptions that he would develop if he were actually testifying in the case and present his opinion to the attorney. In this capacity the work performed by the accountant is usually privileged and the results would not be disclosed to the opposing side. The attorney would use the CPA consultant in the same way he uses paralegals and consulting attorneys. The CPA would assist the attorney in structuring the case.

Some of the areas in which accountants provide advice and assistance are damage cases involving lost profits,, revenue or cost overruns; areas of accounting such as bankruptcy, family law, contract disputes and claims, civil and criminal fraud; valuations of businesses and professional practices, pensions and intangibles; and general areas of consulting such as statistical analyses, projections or forecasts and computer consulting.

Accountants can assist in establishing the cause of damages in business transactions. Once the cause of damages has been established, the CPA can quantify the amount of the damages. Often the attorney is engaging the accountant to prepare or review a damage study for the plaintiff or to rebut a damage study prepared for the defendant. A CPA may also be engaged by the attorney for the defendant to prepare an independent calculation of damages to be considered at trial. The CPA can prepare pro forma financial statements representing the expected financial results. By using a spreadsheet model, he can compare actual results with the pro forma results that were expected absent the alleged acts set forth in the case. Use of a damage model quantifies the damages. Spreadsheet software is especially useful since it enables assumptions to be changed and provides recalculations quickly. The CPA can use various assumptions to test their validity and to determine the effect of modifications of them on the amount of the claim. Software is also available that allows the accountant to consider econometric and statistical approaches to calculating damages.

In the areas of bankruptcy, family law, and fraud, the more traditional accounting and auditing services come into play. The CPA can assist in determining whether the company can be turned around and how much debt is needed. Decisions regarding the possible restructuring of existing debt and the implementation of cost saving strategies should not be made without consulting a CPA. Accountants are often engaged by the trustee in bankruptcy to prepare financial statements, verify creditor claims and to develop other financial analyses. The accountant can also prepare forecasts of financial statements for use in preparing the plan of reorganization. Identification of assets, sources of income and assistance in drafting a property settlement are the primary focus for accountants in divorce actions. The availability of funds and the income tax effects of alimony and child support payments are another area where the accountant can be of valuable assistance to the attorney. Fraud cases draw upon the CPA's expertise as an auditor. These cases are usually time consuming and detail oriented requiring a concentration of manhours which the CPA can supply. Unlike traditional audits where CPAs rely on tests of transactions and documents, a fraud investigation requires each transaction or document to be examined. If documents have been destroyed, the accountant must reconstruct them by confirmation or interviews with third parties.

Determining the value of a closely held business or professional practice in divorces or in dissolutions of corpora-

tions or partnerships is an area where the CPA's expertise and practical experience can be of great benefit to the attorney. Many accountants perform valuations of businesses for estate and gift tax purposes and also for clients where by-sell agreements call for annual valuations. Experience in assisting clients in purchasing or selling businesses also provides the accountant with knowledge that can be used in the valuation process. An attorney may engage an accountant to prepare a valuation report or to review and comment on a valuation report prepared by another expert. Since financial statements reflect assets at their historic values, appraisals of real or personal property at current worth may have to be obtained. The accountant will also focus on the income and expenses of the company and may make adjustments for personal expenses or perks that may not be considered ordinary and necessary. There could also be adjustments to owners' salaries or to rents paid to owners if either are considered excessive or not high enough compared to market rates and similar expenses of comparable companies. The accountant is concerned with arriving at a true picture of earnings to be used in the valuation process.

Accountants can also provide insight into statistical data that may be presented in a case and can test the validity of the statistical assumptions. In the case of forecasts and projections, the accountant can review the assumptions and rationale and test the computations that have been presented. If the client's records are maintained on a computer, the CPA may be able to design time saving methods of extracting data essential to the case.

In selecting an accountant to serve as an expert witness the attorney must evaluate the accountant's knowledge of the business or industry and his prior experience. The attorney must also weigh the potential expense of using an expert and the expected results. Because the services needed can usually only be performed by the "expert", fees add up quickly. Inquire about the accountant's familiarity with computers and his ability to prepare or review computer prepared models. The academic community and state accounting and legal associations are good sources of referrals for individuals willing to work in the area of litigation support. Review the qualifications of the expert to determine his educational background and experience and the number of times the expert has testified in similar cases. It may

be a plus if the expert has authored articles or given speeches related to the area in which he will testify. Avoid professional expert witnesses and those who testify only for plaintiffs or defendants. Local experts may be perceived as more credible than experts from out of town. Consider the impression the expert will make on a judge or jury. Determine that the expert will be able to present his testimony in a clear and concise manner that laymen will be able to understand. Talk to other attorneys who have used the expert. An expert who has testified in other cases for opposing counsel has instant credibility.

Once you have made the decision to engage an accountant as an expert witness and have made a preliminary selection, you need to determine that his opinions and conclusions will support your position in the case that you are preparing. Have the expert evaluate the case and discuss his potential testimony. It is important to review any testimony that the expert may have given in other similar cases to determine that prior testimony was not in any way contrary to the testimony that will be presented in your case. An expert should be able to tell you when his training or practical experience is not sufficient to assist you in the case or if he believes that he will reach a conclusion that will be different than the position you are trying to support.

When the accountant that you have engaged as your expert has completed his analysis and review of the case and has formulated his opinion, you must review and evaluate it. As you prepare to go to trial, you and the expert need to prepare and review the questions that you will pose so the expert's testimony is properly introduced. Both the expert and the attorney need to discuss the possible questions that will be asked by opposing counsel during cross examination. It is appropriate for both the expert and the attorney to think as opposing expert and opposing counsel to determine how the opposition will attempt to counter your expert's testimony. Cross examining your expert can be a valuable exercise. It enables the expert to respond to possible questions that will be asked and gives both you and the expert an opportunity to determine whether or not the answers are brief, to the point and in language that will be understood by a jury.

As with all witnesses, the CPA who has the requisite education and experience and can convey his opinions in a concise manner, treat everyone with respect, listen attentively and answer responsively will make a good impression. The CPA should be used as a sounding board while the attorney is developing and exploring ideas and strategies. Proper use of the accountant in litigation involving business issues can make the attorney's job easier and should have a positive effect on the outcome of your case.

The authors, William H. Master, CPA and Frank R. Sidlow, CPA are directors of the Wilmington accounting firm of Simon, Master & Sidlow, P.A.

CLASSICAL MEANING OF STARE DECISIS

Harvey Bernard Rubenstein

In the beginning, a litigator faces at least two essential questions - what are the facts, and what is the law. While the process of discovery aids in establishing the facts, the doctrine of *stare decisis* may control what law will be applied, and what law will be applied could be determinative of the litigation. The critical question to be faced is which meaning of *stare decisis* will prevail.

The doctrine of *stare decisis* requires, of course, a judicial opinion deciding a point of law expressed in a final decision, which usually is reported. Where underlying facts are different, *stare decisis* does not apply since a legal principle "applied to one set of facts may be entirely inappropriate when applied to slightly varied set of facts." *State of Delaware v. Phillips*, Del.Ch., 400 A.2d 299, 308 (1979). The doctrine also "has little application to a case in which an appellate court is examining a decision of a lower court." *Santow v. Ullman*, Del.Supr., 166 A.2d 135, 140 (1960); *American Insurance Co. v. Iaconi*, Del.Supr., 89 A.2d 141, 152 (1952).

The acknowledged basis for *stare decisis* is found to rest in a judicially declared public policy that certainty and stability are necessary if society's affairs are to be conducted properly. The doctrine is particularly applicable to those areas of litigation dealing with real property and commercial interests. *State of Delaware v. The Pennsylvania Railroad Company*, Del.ch., 228 A.2d 587, 598 (1967). Thus, in one case, it was held that a long-accepted rule of property law would not be disturbed "even if defendants' arguments were found to be persuasive and their conclusions logical," the theory being that "it is almost as important that the law be settled as it is that the law be right." *Abbott Supply Company v. Shockley*, Del.Supr., 128 A.2d 794, 798 (1956).

Nevertheless, we think that one assumption that could be made is that, by the exercise of its own judicial power, the court that creates a rule of law to apply to a set of facts could, if it wished, change that rule of law. Would we be assuming too much? Have Delaware courts readily acknowledged their responsibility, in applying *stare decisis*, to evaluate and sometimes change a given rule of law over the passage of time? Do Delaware courts agree with and, moreover, apply what was expressed in *Carroll v. Local No. 269*, N.J.Ch., 31 A.2d 223, 225 (1943):

> It is the peculiar genius and strength of the common law that no decision is stare decisis when it has lost its usefulness in our social evolution; it is distinguished, and if times have sufficiently changed, overruled. Judicial opinions do not always preserve the social status of another generation.

That perspective of *stare decisis* is well-established in Delaware and stems, interestingly enough, from an 1899 Supreme Court decision. In *Truxton v. Fait & Slagle Co.*, Del.Supr., 42 A. 431, 437-438 (1899), Judge Ridgely stated what appears to be the judicially prevailing view of *stare decisis*. He quoted, with favor, from the Indiana Supreme Court's decision in *Paul v. Davis*, Ind. Supr., 100 Ind. 422, 426-428 (1844):

> ... Consistency purchased by adherence to decisions at the sacrifice of sound principle is dearly bought. ...
>
> Much as we respect the principle of *stare decisis*, we can not yield to it when to yield is to overthrow principle and do injustice. Reluctant as we are to depart from former decisions we can not yield to them, if, in yielding, we perpetuate error and sacrifice principle. We have thought it wisest to overrule outright rather than to evade, as is often done, by an attempt to distinguish where distinction there is none. ...

Citing authority, the Indiana Supreme Court made the point that a judicial decision is not "the" law, that is, it does not announce "unalterable" law. It is only evidence of the law and, as evidence, it is not conclusive but *prima facie*. "The law," concluded that court, "is a science of principles, and this can not be true if a departure from principle can be perpetuated by a persistence in error."

Judge Ridgely also approved the views of chancellor Kent, enunciated over six decades earlier in 1 Kent's Commentaries 47 (1832):

> But I wish not to be understood to press too strongly the doctrine of *stare decisis*, when I recollect that there are one thousand cases to be pointed out in the English and American books of reports, which have been overruled, doubted, or limited in their application. It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed, by the perpetuity of error. ...

Notwithstanding this early traditional view of *stare decisis*, it was half a century later in *Flait v. Mayor & Council of Wilmington*, Del.Supr., 97 A.2d 545, 546 (1953), that "perpetuity of error" actually was preferred over a change in a long-standing rule of law. In that case, the Delaware Supreme Court considered the issue of judicially created immunity from suit of a municipality for the torts of its employees. In upholding immunity for negligent acts committed by municipal employees performing governmental but not corporate functions, the Supreme Court found that immunity based upon that distinction, although roundly criticized by legal writers, had been applied by Delaware courts in numerous cases, and, therefore, "we are not at liberty to ignore or overturn it. it is established by too long a series of judicial decisions."

The Supreme Court conceded that, as a matter of common justice, it would have ruled otherwise if the question was one of first impression but felt bound by the unanimity of the Delaware cases. Although the Supreme Court

acknowledged that the governmental - corporate distinction "is at best unsatisfactory", the court announced that it was resigned to the view that "the courts must cope with it." The Supreme Court then made this trailing observation: "Any change must be made by the Legislature" since "requests for a change of policy involving an overthrow of long settled rules of law should be addressed to the Legislature rather than to the courts." In ignoring traditional *stare decisis*, the Supreme Court never considered other options, for example, overturning the immunity rule and letting the legislature decide whether to re-impose it.

The Supreme Court's invitation to the legislature, as the only body to correct the perpetuation of judicial error within the common law, represents an unacceptable abdication of historic judicial power undermining the foundation of a separate and independent branch of government. The growth of an energized common law has been a major contribution of our judicial system since this nation was founded, a precedent which no court should renounce. While the judicial branch should be sensitive to the independence of the executive and legislative branches, it should be no less sensitive to its own independence.

Yet, it was evident at that time that the Supreme Court favored a restricted version of *stare decisis*. It was said that when a rule of law "has been once settled by decision it forms a precedent which is not afterwards to be departed from or lightly overruled or set aside even though it may seem in later years archaic." *Oscar George, Inc. v. Potts,* Del.Supr., 115 A.2d 479, 481 (1955). The language emphasized that "however subject to criticism a law may be, the courts are seldom at liberty to disregard or set aside a rule of long standing settled by a series of decisions. The courts are bound to apply the law as it is, and the power to remake it along lines thought to be more modern in concept should be exercised with great restraint". *Shellhorn & Hill, Inc. v. State of Delaware,* Del.Supr., 187 A.2d 71, 74 (1962).

From these Supreme Court decisions, some unanswered questions are presented:

1. When does a rule of law become so firmly fixed by court opinion that it forms an unalterable precedent?

2. At what point does judicial reluctance eventually give way to judicial change? What are the standards utilized by the courts in making that determination?

3. Is there any special significance to the language that long-standing precedent should not be overruled "lightly"? If we assume that all courts do not act "lightly", then can we assume that a change in a rule of law, when made, is not one made "lightly"? If we cannot assume that all courts do not act "lightly", then how are courts to decide whether a change, contemplated or when made, is or is not one made "lightly"? Are we to assume that courts intend that "archaic" rules of law are preferable to judicial efforts to change them? If not, when are they not preferable?

Recently, however, the Supreme Court appears to have returned to the traditional understanding of the court's role in preserving a vibrant common law.

Justice Moore's comments in *Mr. Pizza, Inc, v. Schwartz*, Del.Supr., 489 A.2d 427, 433 (1985), may have been the catalyst.

For over twenty-five years, in worker's compensation law, the Supreme Court adhered to the judge-made rule that, in determining whether an "accident" is compensable in a case where the employee has a pre-existing physical condition or weakness, the evidence must establish "unusual exertion". It was said that the employee must have engaged in exertion which was more than that ordinarily required in the performance of the employee's duties. Although some of the sting in the rule had been softened by the development of the "cumulative detrimental effect" theory, Justice Moore, in a concurring opinion, met the issue directly, taking exception to the continuation of the "unusual exertion" rule in these terms:

> Because of the inequities that requirement imposes on many injured workers, I respectfully suggest that the time has come for its total abandonment. ...
>
> In my view the unusual exertion rule, being entirely the product of judicial decisions, and not the result of legislative action, should be abandoned. its continued viability places Delaware in the backwaters of jurisprudence. ...
>
> While I accept the principle that stare decisis is a vital stabilizing force in the law, I also adhere to my previously expressed view that "[t]he law should be an ever developing body of doctrines, precepts, and rules designed to meet the evolving needs of society ... While stare decisis has its place, the strength of the Common Law is its ability to grow and respond to the realities of life. Absent this, the law fails in its vital purpose. *Monroe Park v. Metropolitan* Life Insurance Co., Del.Supr., 457 A.2d 734 738 (1983).

Aside from which rule — "unusual" or "usual" exertion — was the more desirable, what was significant was that Justice Moore would have distanced the court from *Flait* and applied the classical meaning of *stare decisis*, one which respected the need for certainty but balanced it with ultimate fairness and principle. While courts should not change established rules of law "lightly", when it becomes apparent that change will advance the common law, courts should not be timid about it either. We are reminded of what Justice Oliver Wendell Holmes had to say in his "Path of the Law" address, delivered in 1897:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting long since, and the rule simply persists from blind imitation of the past.

Then in the late summer of 1989, the Supreme Court, in a unanimous en Banc decision, picked up the thread of *Mr. Pizza* and abandoned the "unusual exertion" rule "and its patent inequities" in favor of a rule of "usual exertion", providing "that irrespective of previous condition, an injury is compensable if the ordinary stress and strain of employment is a substantial cause of the injury." *Duvall v. Charles Connell Roofing*, Del.Supr., 564 A.2d 1132 (1989). In a return to classical *stare decisis*, Justice Moore, who authored the decision, cited "two primary reasons for this shift in the law, one theoretical, the other practical."

As litigators make their arguments, and as our courts go about the business of deciding cases, it is well to remember that *stare decisis* casts an unfriendly shadow upon the perpetuity of error and that there is a place for the impact of experience upon the law, as was so convincingly proclaimed many years ago by Mr. Bumble in Charles Dickens' "Oliver Twist":

> "That is no excuse," replied Mr. Brownlow. "You were present on the occasion of the destruction of these trinkets, and indeed are the more guilty of the two, in the eye of the law; for the law supposes that your wife acts under your direction."
>
> "If the law supposes that," said Mr. Bumble, squeezing his hat emphatically in both hands, "the law is a ass — a idiot. If that's the eye of the law, the law is a bachelor; and the worst I wish the law is, that his eye may be opened by experience — by experience."

Harvey Bernard Rubenstein, a long time member of the Delaware Bar is well known as the Editor of the Bar Association newsletter known as IN-RE:. He is presently Vice President at Large of the Association. This magazine is fortunate in having yet another contribution from him.

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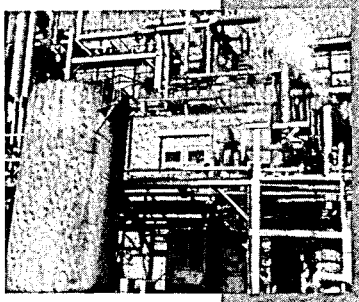

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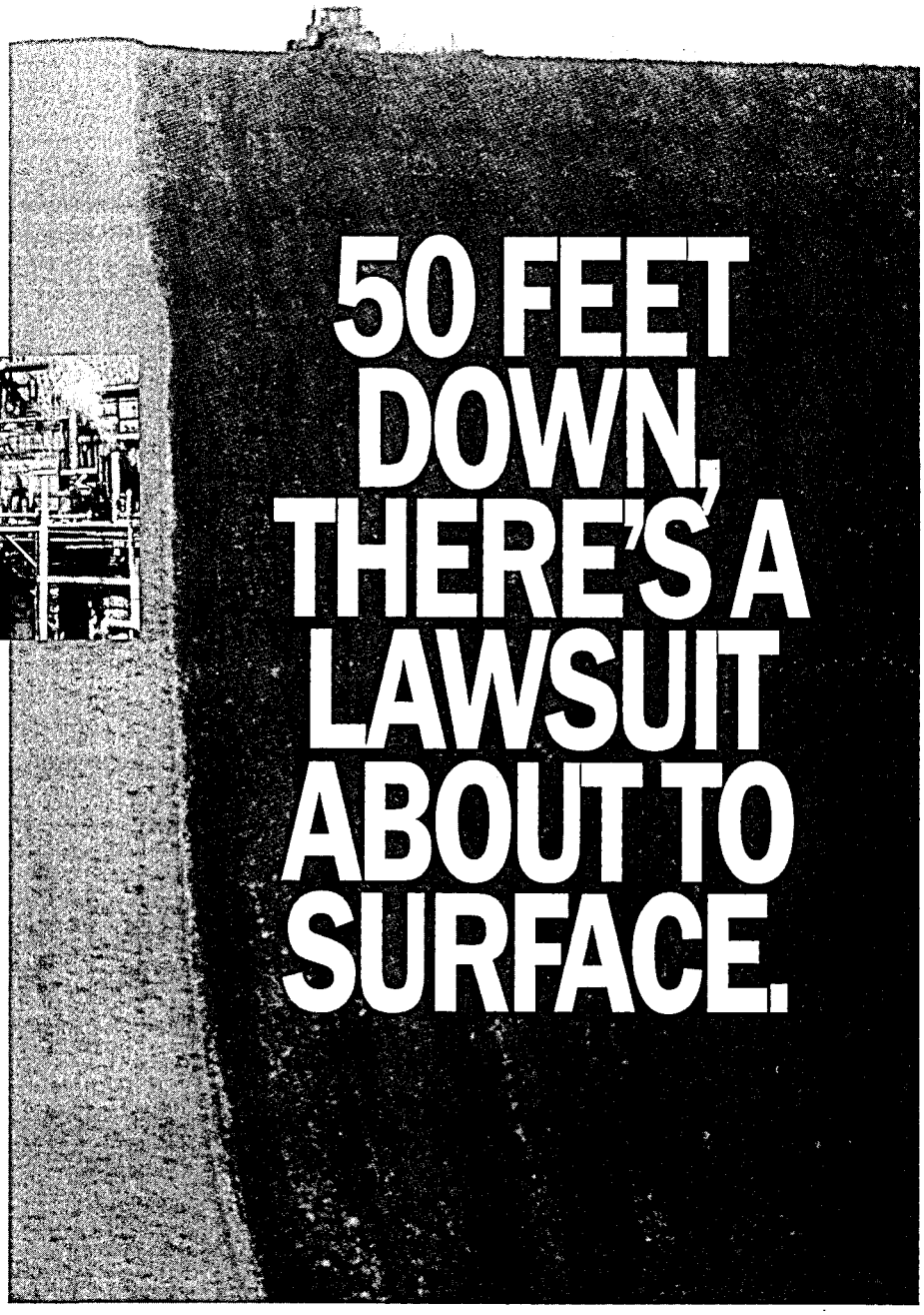

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DELAWARE CORPORATION LAW AND PRACTICE

Book Review

By: David A. Drexler, Lewis S. Black, Jr. and A. Gilchrist Sparks, III
Matthew Bender & Company (1988)

As recently as 17 years ago there was no single treatise devoted exclusively to Delaware corporation law. The most widely-used law school textbooks relied heavily on Delaware decisions and usually even included the Delaware General Corporation Law as an appendix. The standard multi-volume encyclopedias of corporation law also frequently contained specific discussions of Delaware law in recognition of its unique status among the corporation laws of the fifty states. Nonetheless, Folk, *The Delaware General Corporation Law* (Little, Brown, 1972) was the first of its kind in focusing exclusively on Delaware corporation law.

In the last few years, however, several valuable works on Delaware corporation law have been published. Each has its own style, approach and scope. Thus, Professor Folk with two Delaware lawyers as co-authors, has updated his famous treatise to two volumes in *Folk on the Delaware General Corporation Law,* by Ernest L. Folk, III, Rodman Ward, Jr. and Edward P. Welch (Little, Brown, 1988). As in its prior edition, "Folk II" is organized by each section of the DGCL, treating each separately. Its discussion of the legislative history behind the DGCL is unsurpassed.

Equally helpful is *The Delaware Law of Corporations and Business Organizations*, by R. Franklin Balotti and Jesse A. Finkelstein (Prentice Hall, 1986). It departs from the *Folk* section-by-section approach in favor of grouping related topics into a single chapter, for example by discussing directors and officers and Sections 141-145 of the DGCL in a unified, comprehensive Chapter 4. Of all these recent books, this has by far the widest scope, covering not only corporations but also limited partnerships, business trusts and special purpose banking corporations as well. It also has the most comprehensive set of Delaware forms available in all these and other recent works. *See, e.g., The Delaware Corporation Legal Aspects of Organization and Operation*, Drexler and Sparks (Bureau of National Affairs, 1988) for basic and very useful forms, but which is limited to corporate entities.

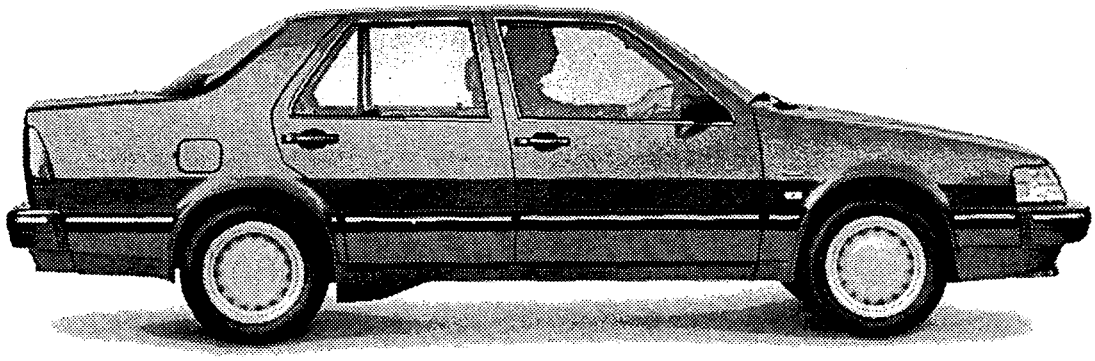
The most recent of the new publications is *Delaware Corporation Law and Practice*, by David A. Drexler, Lewis L. Black, Jr., and A. Gilchrist Sparks, III (Matthew Bender, 1988). Messrs. Drexler, Black and Sparks are all partners at one of the leading Delaware corporate law firms, Morris, Nichols, Arsht and Tunnell, and are all widely-recognized for their expertise as corporate lawyers. While the *Delaware Corporation Law and Practice* single volume is the shortest of the recent litter (*Folk* has two volumes, *Balotti and Finkelstein* has five volumes including forms), in many respects it is the best of the group. For what it lacks in detailed tracing of legislative history section-by-section or in forms and scope, it more than compensates for in its thoughtful analysis and willingness to question existing precedent.

The *Delaware Corporation Law and Practice* is organized on the basis of specific topics, such as "The Proper Exercise of Director's Responsibilities", with discussion of particular sections of the DGCL included when relevant to that topic. This approach serves to avoid one problem with the section-by-section of the DGCL approach of *Folk,* the uncertainty that the discussion under any single section has included all the pertinent decisional law including that precedent dealing with other parts of the DGCL but which also applies to the problem at hand. For example, the decisional law under Section 251 dealing with mergers is often relevant to an understanding of directors' duties, a subject *Folk* properly addresses under Section 141 of the DGCL. By treating each topic thoroughly in one chapter without regard for the divisions inherent in the separate sections of the DGCL, *Delaware Corporation Law and Practice* is more coherent in its presentation.

Perhaps the most helpful aspect of the *Delaware Corporation Law and Practice* is its ability to put seemingly complex issues in their true perspective. For example, many practitioners are troubled by the uncertainty left by the recent decisions in *Rabkin v. Philip A. Hunt Chemical Corporation*, Del. Supr., 498 A.2d 1099 (1985) (holding that some "unfair dealing" claims arising out of mergers may be litigated as class actions) and *Cede & Co. v. Technicolor, Inc.*, Del. Supr., 542 A.2d 1182 (1988) (holding that a stockholder may simultaneously litigate a *Rabkin* class action and an appraisal action after a merger). They wonder if this means that even the best-intentioned board of directors may be held liable for rescissory damages if it turns out years later at the end of long litigation that they set the merger price a few dollars too low and thus are guilty of "unfair dealing". By pointing out these precedents may actually encourage conservative merger valuations (to leave a margin to negotiate a settlement with the inevitable class representative), the authors raise more basic issues concerning the purposes of the corporate law of fiduciary duty. Presumably, all agree that fidelity to stockholder interests is the core goal, but how to encourage that fidelity is still debatable. In focusing on these broader policy concerns, the authors escape the confines of dogma that even if endlessly repeated cannot take the place of real analysis.

This dose of reality extends to their treatment of the judicial process. For example, the authors state that on occasion "the courts will utilize whatever adjectives are necessary to support their conclusions." (*Id.* at 15-31). This, of course, is a sentiment felt by many lawyers when

As nice as the new Saab 9000 CD looks, it can be mean if it has to.



Test drive the new Saab 9000 CD at a leisurely pace and you'll find it's a paragon of esthetic delights. After all, the 9000 CD has the handsome lines of a classic European touring sedan. It also has the interior comfort you'd expect in a world-class luxury car.

Drive a little faster and you'll discover delights of a more primal nature. The 9000 CD has front-wheel drive, rack-and-pinion steering, front and rear stabilizers and gas shock absorbers. It also has a 16-valve, intercooled, turbocharged engine.

The point is, instead of having to choose between luxury and performance, you can now have both...in the new Saab 9000 CD.

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their passionate belief in a client's cause is met with judicial disdain. Nonetheless, this concern over the proper use of the power of the judiciary is particularly acute where, as in Delaware, there are no jury trials in corporation law litigation. Thus, it is critical how a case may appear to a single human being, faced with a lengthy paper record, demands for instant justice and, in preliminary injunction cases, deprived of the benefits of cross examination. It is only realistic to point out that under these circumstances it is a marvel how little criticism is heard about Delaware corporate decisions, even from the losing litigant.

Perhaps one reason for this difference is that there really is no alternative to the present system. Someone must decide these hard cases. Either the disputes will be judicially determined or the legislature will dictate what is acceptable conduct by passing rigid legislation. Delaware has wisely opted for the flexibility of the Delaware General Corporation Law, which permits innovation, but still deals with the potential for abuse by remitting aggrieved parties to the courts.

Certainly these authors argue strongly that the long term benefits of this approach warrant the rare, unfortunate decision. Unless, of course, you are talking about my case.

Finally, some words of caution are in order. On occasion, the authors' biases are apparent. For example, references to the "many lawyers available to represent minority stockholders ... on a contingent basis" and the "enormous settlement leverage inherent in the class action device", reflect their role on the defendants' side of the courtroom. There is another side of the story, but sadly plaintiffs' lawyers have yet to write their version of "Corporation Law and Practice".

On a consoling note to the less advanced practitioner, it is also noteworthy that these authors do not always agree. *Balotti and Finkelstein* contends that "under Section 144, the business judgment doctrine applies and a showing of fairness is not required if there has been proper disclosure ..." (*Id.* Vol. 1 at 126). In contrast, *Drexler, Black and Sparks* state that "even where there is compliance with Section 144, such compliance does not immunize transactions from challenge by stockholders as unfair to the corporation". (*Id.* at 15-18). In short, as good as all these authors are (and they are very good indeed) sometimes any one of them may be wrong.

Despite these minor cautions, all these books are real bargains. Together (with also the New Model business Corporation Act) they provide an excellent library on what has become the nation's corporation law.

Edward M. McNally

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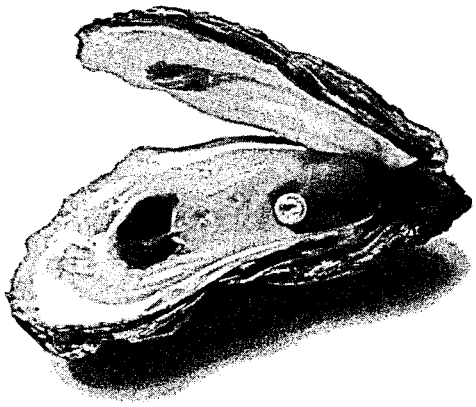

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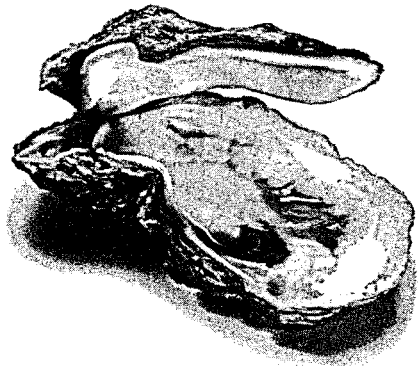

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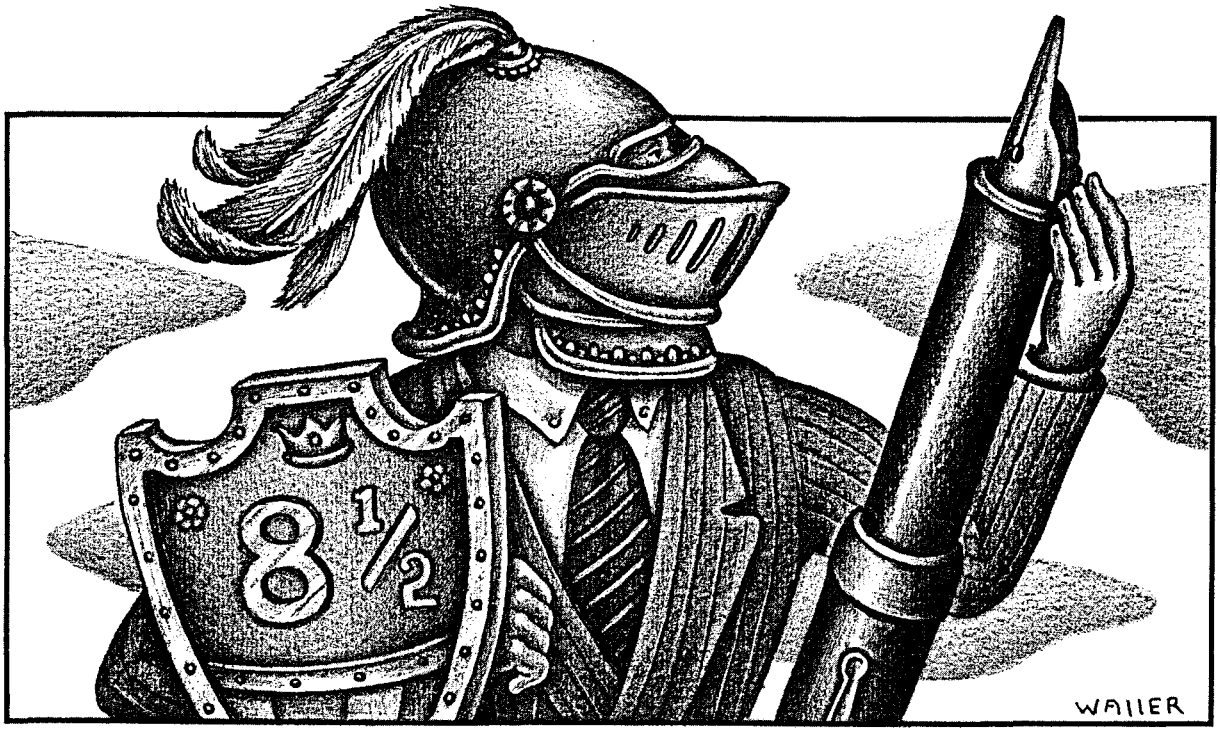

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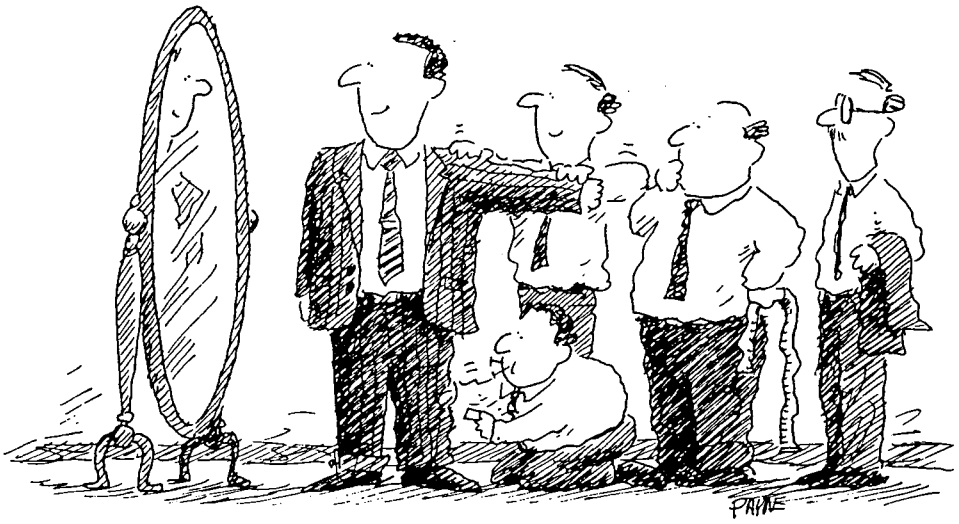

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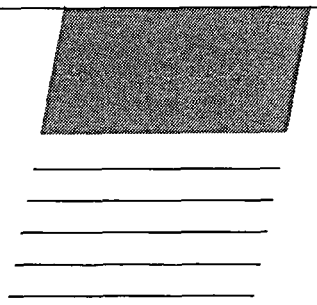

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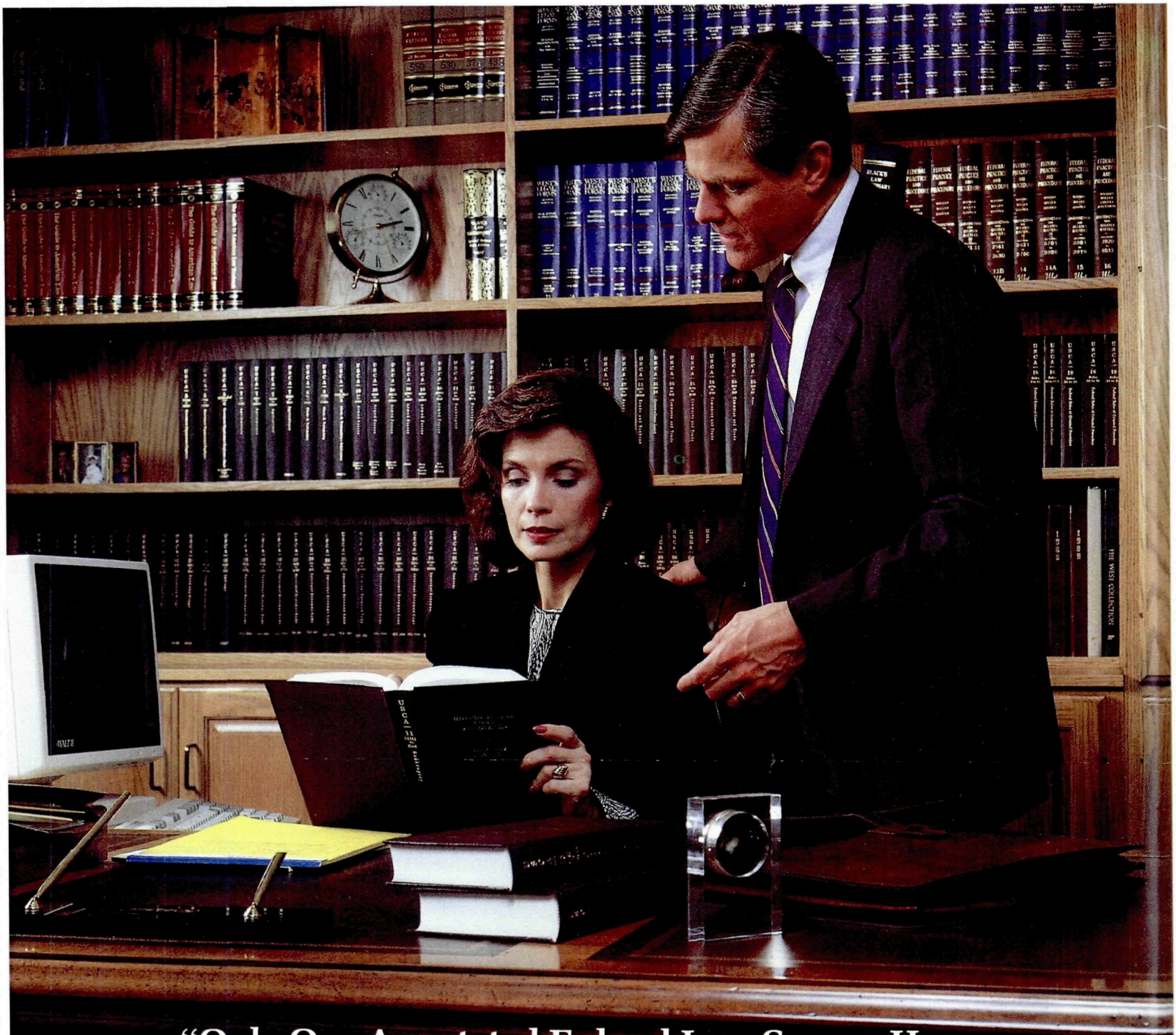

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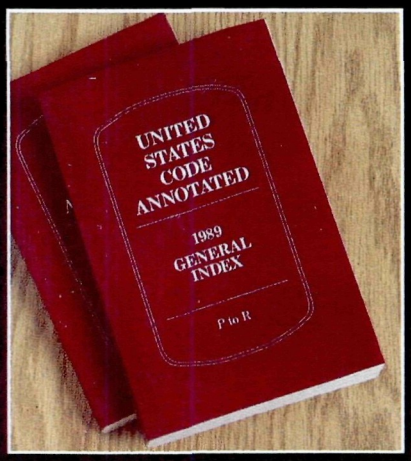

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