DELAWARE LAWYER

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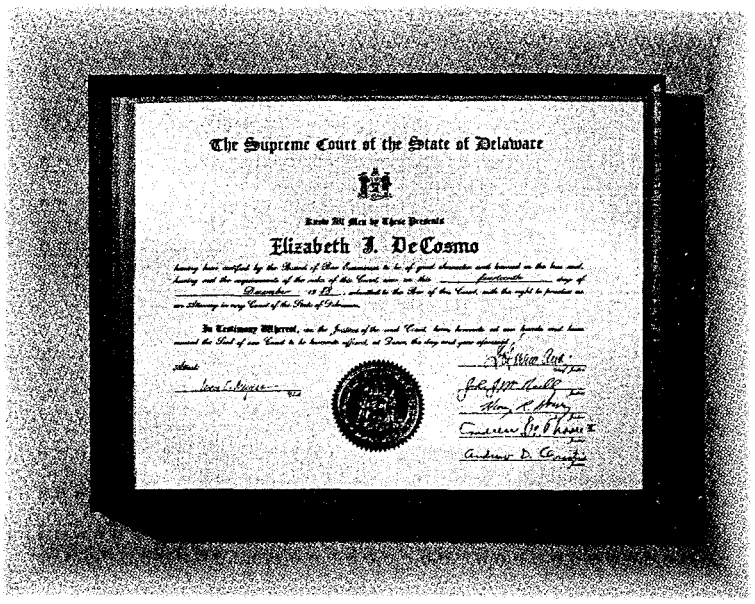

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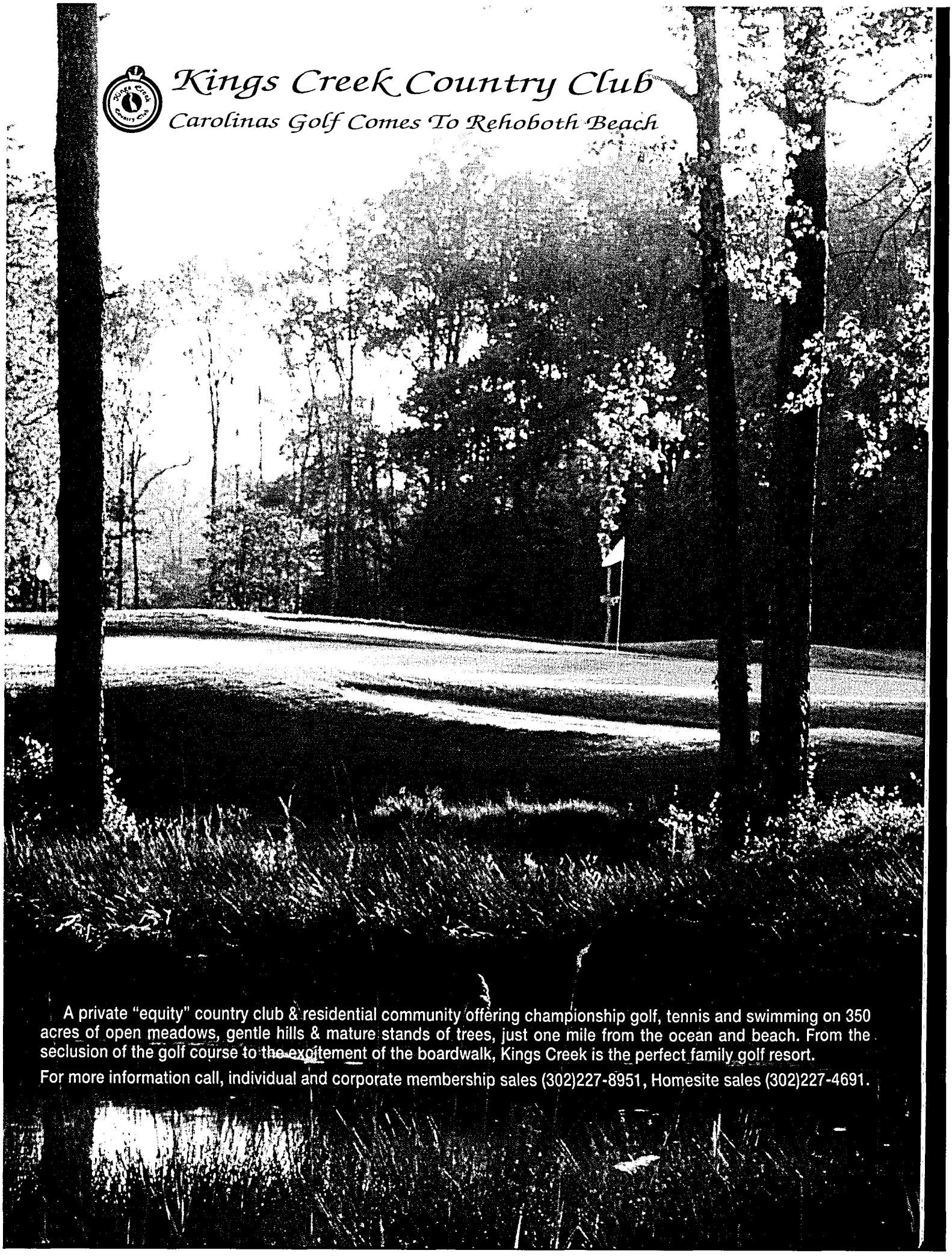
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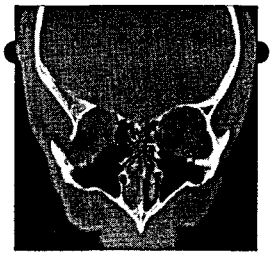
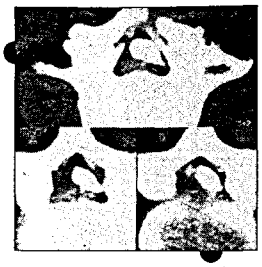
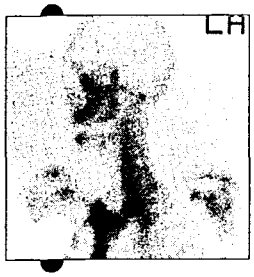

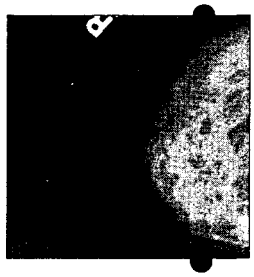

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CONTENTS

6
EDITOR'S PAGE

7
ANNIVERSARY THOUGHTS

8
THE LEGAL PROFESSION: WHERE IS IT HEADED?
THE HONORABLE ARLIN M. ADAMS

13
COURTS AND SCIENCE: THE BURDEN OF TECHNOLOGY
THE HONORABLE JOSEPH T. WALSH

18
IN THE FINAL DECADE: PREPARING FOR THE PROFESSIONAL MILLENNIUM
ANTHONY J. SANTORO

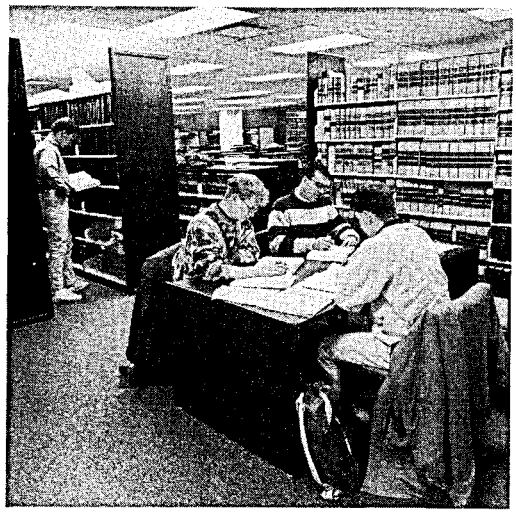
22
THE BLUE CHAIR OF THE TWENTY-FIRST CENTURY
RICHARD K. HERRMANN

27
IRREVOCABLE LETTERS OF CREDIT AND THE PROBLEM OF FRAUD
FRANCIS G. X. PILEGGI

30
POLICING PROFESSIONALISM
CHARLES SLANINA

36
A PROFESSION AT RISK
HARVEY BERNARD RUBENSTEIN

44
THE QUEST FOR JUSTICE WITHOUT UNREASONABLE DELAY OR EXPENSE
THE HONORABLE HENRY DUPONT RIDGELY



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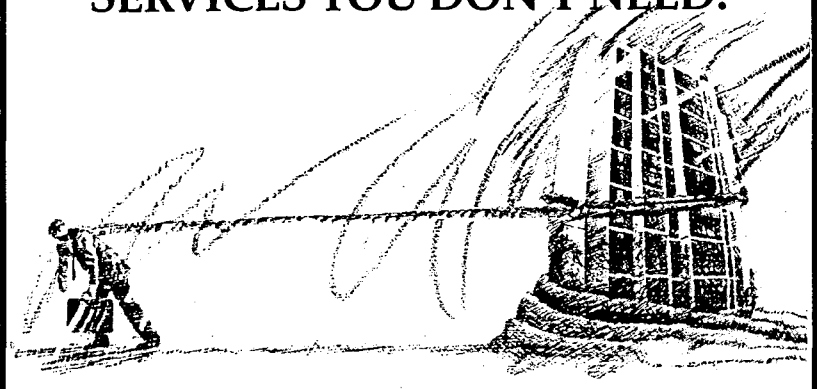

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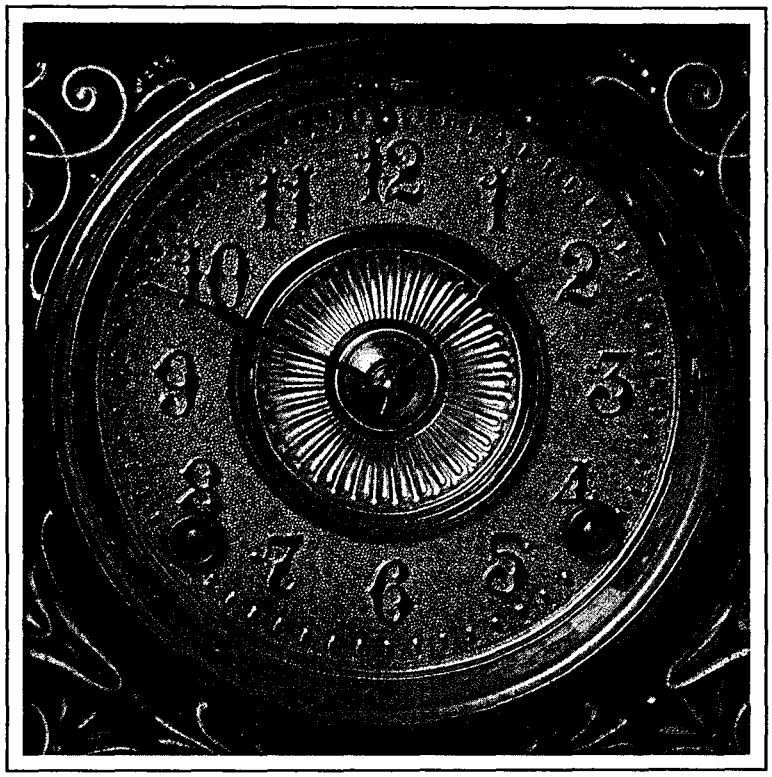

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EDITOR'S PAGE

In introducing this issue, I note an article that does not appear. Jan Bove died this fall while working on that article. It was intended to review steps taken by the Bar Association and the Delaware Supreme Court to ensure the high standards of competency to which we aspire. The article would have discussed the Court of Judiciary Rules of Procedure; Delaware Lawyers Code of Professional Responsibility; Rules for Mandatory Continuing Legal Education; the Professional Guidance Committee; and the Committee on Specialization. Jan's proposal led directly to the development of the themes in this issue. We therefore, dedicate this issue to Jan's memory.

In this Bar's tradition of introspection we look at the state of the profession today and in the future. We Delaware lawyers are proud of the collegiality and professionalism of our Bar. Yet, the growth of our Bar has left the door ajar to infiltration of tactics and demeanor we generally renounce. All too often (in fact once is too often) litigation takes the tone of a street fight in which lawyers "slug it out" as much on their own behalf as that of their clients. Behavior of this kind will force us off the pedestal to which we aspire as professionals and leaders in our community.

It is incumbent upon all of us to maintain the collegiality and cooperative nature of our Bar. The growth of our Bar, however, has created problems. No longer do we know all the lawyers at the Bar. Similarly, a host of new "professional" problems exists for the sole proprietors who are struggling daily to maintain their practice of law. We must continue to consider the full range of practicing attorneys in defining and evaluating our a profession.

We, as individuals, must cooperate; so too must the institutions that make up our profession. We are proud of the historic partnership between Bench and Bar to further the course of justice in Delaware. That partnership must continue to lead the fight for justice by developing innovative techniques to allow the efficient and just handling of the Courts' caseload.

In many ways, the "decline in professionalism" mirrors the increased divisiveness and intolerance in our society. We as lawyers and as leaders in the community must work to increase tolerance towards the viewpoint of others and acceptance of consensus and compromise.

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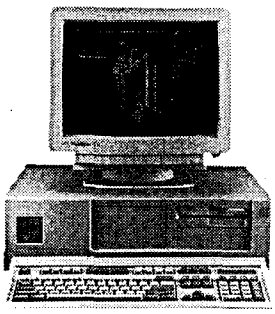

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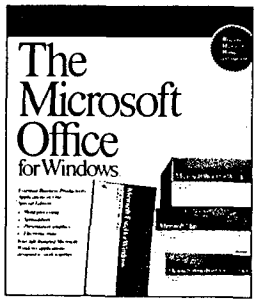

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ANNIVERSARY THOUGHTS

"D'où venons nous? Que sommes nous? Où allons nous?"

The next issue of this journal in June, Volume 10, Number 2, will mark the completion of ten years of our continued publication. That issue will be devoted to employment law, *not* labor law, for I am talking about something new and perhaps larger than that recognized and well established branch of practice.

We shall be dealing with the novel liabilities that now lurk in the improvidently managed work place. These promise to become one of the great professional growth industries of the crabbed and troubled nineties. Such a new but indisputably important subject is fitting for a tenth anniversary issue, reminding us that our profession is always in a state of impermanence in which the versatile principles of the Common Law successfully deal with social urgencies that would have seemed bizarre occasions for legal services a mere decade ago. Modern industrial society is protean and the law democratically and faithfully reflects the certainty of change. In the June issue we shall also examine what we have talked about in these pages over the past ten years, and, incidentally, thereby examine ourselves as professionals repeatedly adapting our skills to the excitement and challenge of doing justice in a volatile society.

In the Museum of Fine Arts in Boston, Massachusetts you can view what is perhaps the greatest of Paul Gaugin's Polynesian paintings, a stunning mural exploration of the human mystery, "D'où venons nous? Que sommes nous? Où allons nous?" (Where do we come from, what are we, and where are we going?) Our tenth anniversary furnishes a useful occasion for asking these questions in a self-examination that every conscientious professional must make, a deeper and more fundamental inquiry than the essentially technical ruminations about our daily work.

Where do we come from? The first ten years of this magazine have provided a considerable body of historical study about our origins as lawyers and judges and the institutions within which we function.

What are we? Consider the issue you hold in your hand.

Where are we going? We undertake to pursue that exciting exploration, just as we have done for a decade.

I should like to dwell a little on the middle question (the subject of this issue) because uncertainties about our identity as professionals or artisans arise daily.

Back in the fall of 1950 I was enrolled at Harvard Law School. At that time Harvard was playing host to a sabbatical visitor from Oxford, a lady infinitely knowledgeable about the medieval development of the common law, whom I shall call for the purposes of this account Dame Millicent Bradshaw. Although Dame Millicent was shedding her radiance on the government department, and not on the Law School, my professors cited her works in hushed reverence, excessive even for that rabidly Anglophile academic community.

Shortly after Dame Millicent's arrival I attended a reception held in her honor - oops! honour. In due time I was allowed to approach the Presence, an aged, creaking specimen, the very model of a Decayed Gentlewoman*. After genuflecting, I politely mentioned that I was attending the Law School and that several of my professors had cited her work with deep respect.

"I am surprised to hear that, because my work is scholarship, whereas law is a *trade*." This charming speech was delivered in an excruciating English accent, dripping refined contempt.

Determined to be no less courteous than she had been in her graceful tribute to my intended calling, I gallantly resisted the urge to kick the old bag down a flight of uncarpeted stairs. In all seriousness I am convinced that Dame Millicent meant no harm and was merely indulging in a bit of leaden humor typical of academics, and I accuse her of nothing worse than arthritic playfulness. Still, her remark continues to rankle because it reflects our deepest insecurity. Elsewhere in this issue Judge Adams notes the continuing tension between the idealistic and the opportunistic. It is always with us. Nonetheless I believe we continually justify our claimed status as something more than merchants of litigation, because ours is a learned and versatile discipline that separates a true profession from a mere trade and which enables us to respond and do justice in an ever changing society. And with that definition in mind, it seems to me that *every* issue of this magazine, not just this one, is about professionalism in an ultimate sense. The past, the present, and change. The one constant is our unending commitment to justice, even when that aspiration may momentarily exceed our achievement.

We shall be talking more of these topics in June. We look forward to seeing you then.

William E. Wiggin

* "decayed gentlewoman", a wonderfully odd, even eerie, English expression I treasure for its piquant aroma of well-bred putrefaction.

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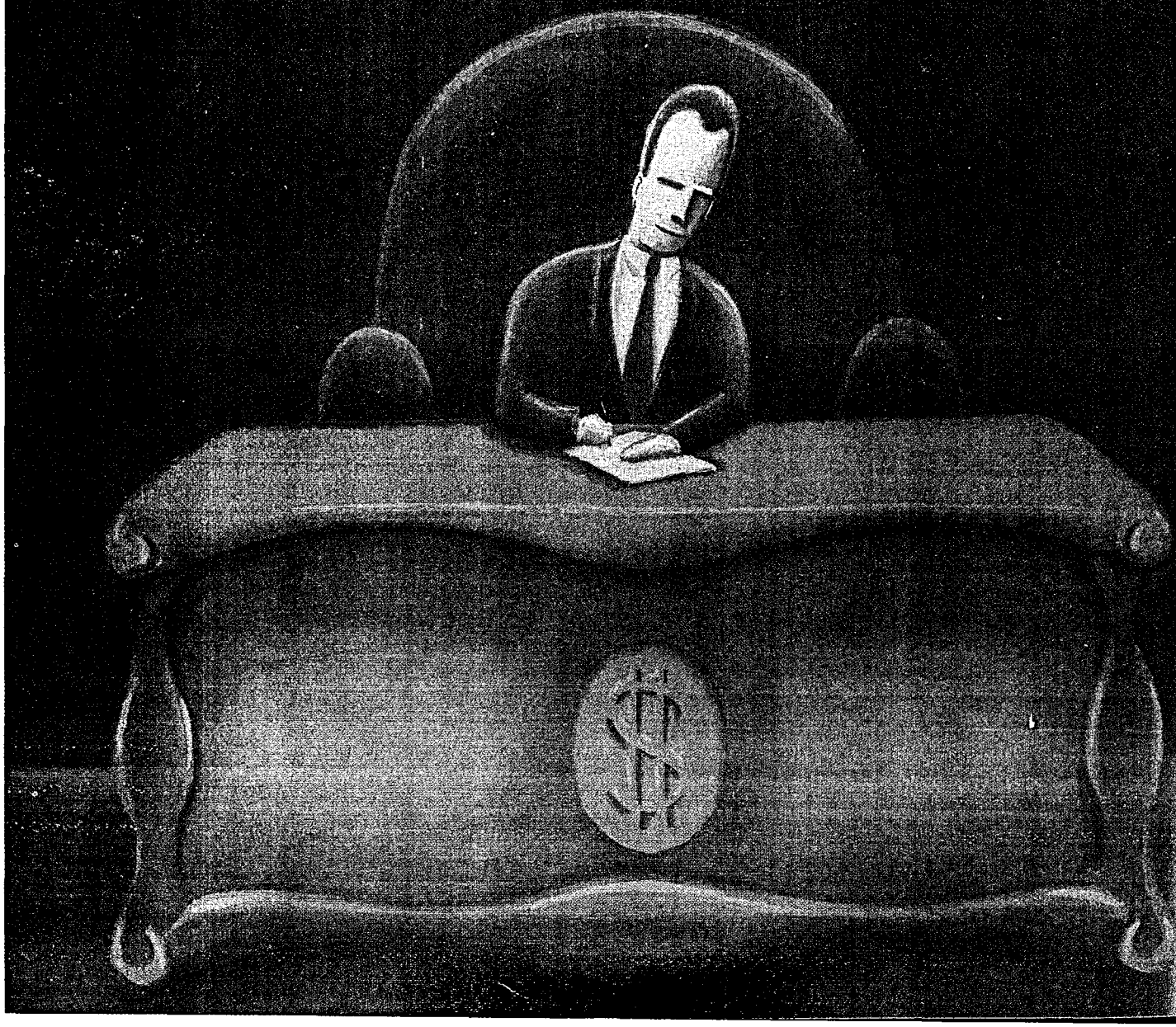

THE HONORABLE ARLIN M. ADAMS

THE LEGAL PROFESSION:
Where is it Headed?

The following speech, delivered by The Honorable Arlin M. Adams, at the November 1991 luncheon meeting of the Delaware State Bar Association is as timely and pertinent to the theme of this issue as the most fortunate editor could dare to hope for.

Judge Adams, now retired from the United States Court of Appeals, Third Circuit, serves as counsel to the Philadelphia firm of Schnader, Harrison, Segal & Lewis.

Not too long ago, I would have begun a speech discussing the future of the legal profession by denouncing the seemingly never-ending growth of the big firm, profit-oriented attitude prevailing among those practicing law. Now, the days of geometrically-growing firms that function somewhat like Fortune 500 corporations appear to be numbered. The recession is not just hitting our clients; it is hitting our practices as well. What does *not* seem to be disappearing is the single-minded attention to the bottom line that is causing our profession to neglect its duty to society.

All professions, especially one as central to American life as the legal profession, should undergo a continuing process of self-evaluation. Any group that ignores this sometimes painful exercise loses much that makes it a profession. As Webster's Dictionary describes it, a profession "has for its prime purpose the rendering of a public service." Our commitment to that purpose has changed as much in the last forty years as our practice has.

The decline in professionalism has occurred, at least in part, because of the emphasis in today's practice on large transactional matters at the expense of individual client service. This change too often undermines the values that define professionalism. The results of this transformation are readily apparent in how the typical law practice has changed.

A decade ago, single practitioners and small groups of lawyers dominated the practice. A firm with 20 or 30 lawyers was considered large. Today, firms with more than 200 lawyers are not unusual, despite the fact that firms are not expanding as rapidly as in the recent past. In 1975, only four firms with more than 200 lawyers existed in the United States, and they were viewed with skepticism. In contrast, a recent survey reported in excess of 200 firms with more than 200 lawyers, and there is far less reservation about the wisdom of the large firm as a legal institution.

Although the number of small firms is dwindling, the success of big firm practice is being brought into question. In the past two years, many large firms have been discharging associates, and something previously unheard of, terminating partners. And just last month, a prestigious Boston firm filed for bankruptcy.

In addition to the financial instability of these firms, lawyers in general are feeling unsteady. Survey after survey has told us that lawyers as a group are unhappy with their practices and their lives. A recent American Bar Association survey of the Young Lawyers' Division reported that only 20% of young attorneys are happy with their jobs. The *National Law Journal* related that lawyers at big firms in the Northeast are among the unhappiest in the country. Symptoms such as these should not be disregarded.

The expansion to large, institutionalized practice has been made possible principally by three developments in the way lawyers are trained and work.

The first is the proliferation of lawyers and law schools. The number of lawyers in the United States has doubled since 1970 and is now more than 800,000. This year, a record 96,000 students have applied to law schools across the country. Many law schools have expanded their classes in order to accommodate this increasing influx.

A second factor allowing larger firms is the fees that these firms charge. This development is especially pertinent to the transactional nature of the practice. Forty years ago, the cost and time spent on legal services were a negligible part of business decisions. Today, consideration of legal fees is a major factor in many of these transactions.

For instance, a Missouri family-owned a company that produced an ant killer. The EPA began to question its safety around children. The company hired a prestigious Minneapolis firm to represent it at hearings. Ultimately, this company that originally complained that it could not handle a bill for $100,000, was given one for $457,000, and now faces bankruptcy.

Concentration on profit-maximization

Illustration by Dan Yaccarino

provides less and less time for lawyers to spend on public and professional activities. Obligations to the community and to the profession are subordinated when constant attention must be paid to monetary concerns. And, as the economy has worsened, the result has not been a reaffirmation of the values of the profession; to the contrary, large firms have trimmed their commitment to pro bono work because of its effect on the bottom line.

The third element permitting the growth of large firms is the level of specialization now required. At one time a lawyer may have dealt with a number of different types of matters. Today's young lawyers are required to specialize almost immediately. Sizable firms generally are organized into departments practicing one type of law. Differentiation of the legal labor force is essential to sustain these large organizations. But, excessive specialization inevitably detracts from the rich legacy of the profession.

It is now appropriate to ask what effect the confluence of these pressures has had on the judicial system.

The structure of our courts and judges was shaped, essentially, for the common law practice of days gone by. The exponential growth in litigation in recent years has imposed a tension on our legal infrastructure.

The number of lawsuits filed in both state and federal courts is unprecedented. Heavier caseloads and the growing percentage of complex, multi-party actions create a burden that courts are not institutionally equipped to handle. As a result, the level of procedural abuse of pretrial procedures has risen as well.

Until very recently, the political response to the judicial crisis caused by the changing legal atmosphere has been primarily to add more judges to an overburdened system. Thus, in 1945 there were 100 federal judges; today there are over 700. To a lesser extent, the response has been to hire court administrators and to install high-tech equipment. The emergence of court administrators, whose jobs are primarily to facilitate the operation of the courts, illustrates the continuing need simply to keep traffic moving. The question then arises as to what effect a constant preoccupation with the quantity of judicial output has on the qualitative aspects of that product.

The destruction and replacement of historic doctrines of the law, I believe, is at least a partial result. The introduction of public issues into a judicial setting and increased use of class-action methodologies are symptomatic of justice dispensed in wholesale fashion. In a larger sense, the role of judges in this type of environment has changed. The gradualism and intellectual spirit of the common law, where the judge performed the passive roles of preserving legal doctrine and pursuing thoughtful objectivity, are often lost in today's courtroom.

The same "mass production" pressure that has altered the judicial system has changed the profession as well. A major consequence of the shift in the profession is the disappearance of what may be characterized as the individual legal personality. Legal relationships, whether lawyer-client or among lawyers, have become far less personal in the past few decades.

At one time, admission to the bar meant passage into a sort of egalitarian fraternity. The large firm of today, however, imposes both explicit and implicit hierarchical arrangements among its lawyers. Under these circumstances, professional alienation flourishes. Lawyers who are required, even before graduation, to focus on specialties can easily view themselves more as technicians and less as servants of the profession and its role in the larger community. Since the practice in a sizable firm necessarily involves large, institutional clients, the real sense of inclusion and obligation to the broader community is frequently lost.

Another aspect of the expansion of big firm practice is that a lawyer's day-to-day experience can be divorced from actual contact or knowledge of the client. Deprived of this, more and more lawyers must find an external reason, whether in individual achievement or money, to gain a sense of purpose.

Perhaps even more significant than the increasing formalism of lawyer-client relations is the loss of community among lawyers themselves. It is not unusual — in fact it is quite likely — for lawyers in a typical firm to be practically strangers.

The collegiality and democratic spirit that once governed relations within a firm have been replaced by bureaucratic forms of control and frequently a somewhat oppressive "up-or-out" mentality. The sense of individual legal personality is sacrificed to firm identity. Moreover, the sense of professional identity among lawyers is often replaced by the commercial exigencies of large-firm competition. Previously, firing associates was a rare occurrence. Now, large law firms have been discharging young attorneys in large numbers because they are non-remunerative and drive down profits.

The lack of governmental and political leadership to the nation that lawyers have historically provided is another disturbing sign of the transformation of our profession. The common law was an incomparable incubator for developing the qualities and dedication that we ascribe to sound, progressive civil leadership.

Scholarship, broad vision, and equanimity — elements that marked a successful common law practitioner — also defined the hallmarks of a dedicated public servant.

The large firms of today are simply not producing this type of leadership. In a recent year, of the nearly 11,000 students graduating from the top law schools, only 243 chose to begin their careers in some type of public-interest work. Plucked directly from school and dropped into lucrative positions that demand enormous commitments of time and energy, it is not surprising that these young lawyers might view public service as secondary and unrewarding.

A few law schools are initiating programs to change the impression of students that large firm practice is the only practice. The University of Pennsylvania has begun a program requiring students to participate in a certain number of hours of pro bono work in order to graduate. The goal is not only to increase the number of students choosing a public sector job, but to encourage those who enter the private sector to continue a commitment to pro bono work.

The firms themselves, however, must also share responsibility for not contributing to the leadership of their communities. As a young lawyer, I was encouraged by the senior partner at my firm to enter public life as an opportunity to serve the public. Today, the structural and financial necessities of maintaining a large firm create pressures that, in turn, deter young lawyers from entering public service. Within the business mind set of large firms, it simply is not profitable to lend talent to the community at large.

This attitude, I believe, will operate against the well-being of law firms. When lawyers toil only for profits, they ultimately will become disillusioned. Most of us began practice with the idea that being a lawyer would have some beneficial effect on society. If we wake up one day to realize that we have been side-tracked in pursuit of money, our experience as attorneys will not have proven rewarding. Perhaps that is why so

many attorneys are reporting dissatisfaction with their jobs and their lives.

The most pervasive manifestation of this change in the legal climate is the decline of professionalism and its replacement with commercialism. If one general theme could encompass the many changes in our legal environment, it would be the adoption of the mores and manners of the marketplace at the expense of expressions of professional affiliation.

One might legitimately ask: "What is wrong with this?" After all, lawyering is like any other calling: young people, it might be argued, still choose to go into law primarily for monetary reasons and, more often than not, are rewarded for that choice. I suppose that one would be hard-pressed to persuade the general public, whether on a street corner in Wilmington or Peoria, that what the practice of law is all about is *not* money. But the real danger lies when those within the profession are persuaded that what it is all about *is* money.

Our profession occupies a key position in a democratically organized society. Alexis de Toqueville called it the American "aristocracy." By this he meant that the profession was the element that balanced the competing influences of property and majoritarian politics. Lawyers, through due process, are to protect life, liberty, *and* property. In that sense, lawyers are the aristocratic component that maintains the stability of the American government, while helping those who are abused by it. Lawyers today seem to have no problem remembering their duty to protect property; the difficulty lawyers are having is recalling their duty to protect those who do not *have* property.

When the profession adopts too many of the commercial aspects of business, the civic values that lawyers should represent are in danger of being eroded. It is for this reason that mourning the decline in professionalism is not merely an exercise in sentimentality. We must not permit the practice to become just another white-collar industry.

A troubling aspect of this development is the ever-present time sheet. In large cities, some firms have begun billing on units of one-twelfth of an hour. But the commercialization of the profession runs far deeper than distracting time sheets or expense accounts.

The decline in professionalism has deprived an entire generation of lawyers of suitable role models. At the risk of sounding nostalgic, I believe that the profession has lost its grasp of the big picture and of the aspects and aspirations of the higher calling of this secular ministry. Senior partners at large firms frequently do not attempt to reach out to the firms' newer members to guide them through the unfamiliar waters of practice. Instead, new lawyers are left with time-sheets to fill and stories of unproductive fellow associates being pushed out the door.

Lawyers who are perceived as most successful today, or at least the ones gaining the most remuneration, are those who bring in the most high-profile clients. Some of these attorneys do not even practice law anymore; rather, they serve as magnets to lure in the work for other lawyers. Of course, rainmaking is necessary for any firm to survive. But when the role model for new attorneys is someone who does not practice any longer, we can tell that the profession has strayed from its original purpose. The ideal of the lawyer as vindicator of the rights vested in our civic culture is lost.

The public perception of the profession is now gained more through television shows about lawyers than through actual experiences with practitioners. Television lawyers who have such little respect for the law that they can say, "I don't care how we come up with the conviction, I'm going to see that she goes to jail," are the stereotypes of what the American public has of the typical attorney. What could be more discouraging than a generation that receives its understanding of civil rights and obligations through these spectacles?

Equally distressing is the prospect of the profession's accepting this commercialized vision of itself. Law schools, which should be the bulwark of the loftiest ideals of the profession, are frequently more hospitable to hucksters or personalities of law than to the great role models of yesteryear. When the giants of legal history are relegated to the back of the classroom or the rear of a bar association meeting, it is important to consider who is moving to the front.

This somewat disheartening picture of ourselves has lead to the acceptance of the appointment of Supreme Court Justices whose key qualification appears to be that they have expressed no opinion on germane issues of today. That the legal community, no matter what their political philosophy, has not spoken out against such nominations says much about our self-image. To be sure, not all judges in the past were the epitome of brilliance or community leadership, but we now seem to have entered an era where judicial candidates who are too intelligent are also viewed as too risky, and therefore will not be nominated. Where are young attorneys going to look for heroes when members, or potential members, of our courts have no opinion about some of the most critical legal decisions of our time?

We must be on guard, of course, to assure that the picture I have sketched regarding the state of the profession is not merely the product of an affection for days past. But even if what I have said can be attributed to generational politics, there still remains the necessity to reexamine the ideals and premises of the profession. Even if we are not in the last days of the principled practice of law, the current developments, as I have sought to describe them, deserve attention.

If there is to be a renewal of the professional ethic in the legal community, I do not believe it will come from any technical adjustment in the rules. As pointed out in many articles on overbilling, for example, the Rules of Professional Conduct already proscribe this infraction. The dramatic forces at work in the profession, both internally and externally, will not recede through administrative tinkering. That type of technocratic answer does not exist and, even if we could discover it, it recalls a solution more representative of the business culture. There simply is no quick antidote to materialism.

Rather, if a reassertion of professional faith is to occur, it must arise from a reaffirmation of our civic heritage. Members of the profession, the lawyers and the judges, must again possess a sense of their individual legal personality and faith in the ultimate mission of our calling. Additional bar programs or law school requirements may help, but by themselves they will not recapture the passion and dedication of lapsed faith. The true role of the lawyer has not changed. The members of the profession must be willing to reassume it and do so with vigor.

Law firms themselves are going to have to shoulder some responsibility for engendering among new associates a commitment to serving the public, which should be the mission of the profession. More senior attorneys should look upon their untrained associates as people to be molded into productive members of the community and not as workhorses to spew out memoranda and fill up time sheets.

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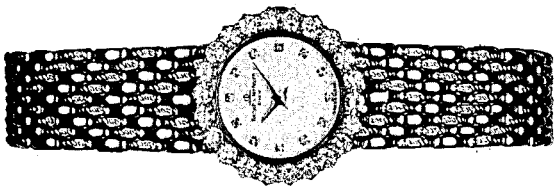

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Furthermore, there must be a renewed sense of pride in the work that lawyers do, not merely for its value in the marketplace, but for its historic function of vindicating the rights of citizens.

The changing face of the law demands that lawyers reassert their professional ties and responsibilities. Members of the bar have traditionally recognized the importance of supporting their bar associations and continuing an active role in legal education. Profit must not become the primary engine for professional success.

Despite my somber tone, I am not completely discouraged. Although many of us have halting doubts about recent developments, I believe the profession can still fulfill what is highest in the yearnings of the human spirit. Practitioners still abound whose sole practice is helping those in need. Law schools are recognizing the omission of a dedication to public service in their programs and are seeking to remedy it.

There is no finer group of lawyers and judges in the nation than those represented here today. I have complete confidence that each of you, your firms and associates will continue your efforts to infuse our profession with the commitment to the public that has always distinguished our profession from merely a trade.

Arlin M. Adams, a native Philadelphian, is a graduate of Temple University and the University of Pennsylvania Law School. He practiced with the firm of Schnader, Harrison, Segal & Lewis from 1947 to 1969 when he was named to the United States Court of Appeals for the Third Circuit. In 1987 he retired from the bench and rejoined his former firm as counsel.

THE HONORABLE JOSEPH T. WALSH

Courts and Science

The Burden of Technology

A distinguished jurist considers the challenge to conventional justice posed by technological and, particularly, environmental issues and the prospect of the consequent transformation or crippling of the litigation system as we know it.

Environmental tort and product liability cases contain at least two common elements that pose special challenges to the court system: they usually involve harm to a large number of present or potential plaintiffs and their technical complexity requires factual determinations beyond the everyday experience of both jurors and judges.

As the 1990's unfold, two developments, one political and the other technical, portend significant challenges to the operation of state judicial systems. From the political or jurisprudential perspective, the "new federalism" promises to place additional dispute-resolving responsibilities on state courts. Not only has the United States Supreme Court approved, indeed encouraged, the states' experimentation in areas heretofore considered within the federal preserve, but legislative proposals under current review, particularly those seeking to narrow diversity jurisdiction, are likely to reallocate the distribution of caseload between state and federal courts. This development promises to place additional burdens on state courts, both trial and appellate, which are already facing new challenges in their traditional role as primary arbiters of substantive tort law.

Moreover, recent technological developments in both the substantive tort law and evidentiary methods will serve to complicate the increased caseload burden on state courts. This article presents an overview of some of those developments and their expected impact. These developments will be categorized as either substantive, *i.e.,* forming a basis for liability, or evidentiary, *i.e.,* affecting the method of proving underlying claims.

The Traditional Role of the Courts

Perhaps in no other area of substantive law have state courts played a larger role than in the law of torts or civil wrongs. Although statutory standards exist, principally in the area of motor vehicle operation, the bulk of tort law has its genesis in the common law and has evolved through judicial decisions. The genius of the common law is said to be its ability to accommodate its precepts of legal responsibility to changing circumstances. Principles of negligence, proximate cause, and foreseeability that evolved before the industrial revolution found ready application to claims arising out of self-propelled vehicles and even today provide guidance in cases involving mass transit and commercial aircraft. Litigation arising out of disastrous transportation accidents may involve huge damage claims but it nonetheless implicates basic principles of negligence and causation and involves a fixed number of parties; thus, it remains within the comprehension of most judges and jurors. With the advent of claims arising from product liability and toxic and environmental torts, however, tort litigation has taken on an increasingly technical aspect. The advent of these technologically-based claims has not only taxed the ability of the court system to process the sheer bulk of such litigation — consider the problems posed by asbestos claims - but it also threatens to create a knowledge gap. As emerging branches of science lead to technological applications in such arcane areas as genetic engineering and organ transplantation, the ability of jurors even to understand evidence is being called into question.

Of equal concern is the ability of judges, both trial and appellate, whose education and professional orientation may be grounded primarily in the humanities, to define the admissibility of scientific evidence and the validity of highly tech-

nical methods of proof. In particular, appellate judges, whose opinions provide the structure upon which trial judges and juries determine the merit of individual claims, have been challenged to decide legal questions in terms of scientific proof. As part of the review process, appellate judges are required to pass upon such fundamental questions as whether a given area in which experts have offered opinions is admissible under the so-called *Frye* test, which requires that scientific evidence "gain[] general acceptance in the particular field in which it belongs." A brief summary of some areas in which emerging technology has challenged the process of adjudication illustrates the scope of the problem.

The Judicial System and the Burden of Toxic Torts

By 1983, over 24,000 personal injury suits involving asbestos had been filed nationwide; by late 1988, asbestos claims were being filed at a rate of about 1,000 a month. Because of the acknowledged latency of the etiology of asbestosis-related diseases, *i.e.,* the period between exposure to the causative substance and the manifestation of ailments, it is a fair inference that there may be as many claims unfiled as there are in the adjudicative pipeline. Thus far both the Congress and the states have resisted efforts to establish non-fault compensation systems at the administrative level. In view of the current effort of the federal government to shift responsibility to the states for welfare and socially-related compensation and the revenue shortfalls afflicting all levels of government, it is likely that the court system, through application of traditional tort principles, will continue to take prime responsibility for resolving cases involving environmental liability.

Although asbestos-related cases are the best known, and because of their impact on the traditional tort system the most widely studied, they appear to be but the harbinger of a diverse class of tort claims stemming from the problems of industrialized society. Acid rain, toxic waste sites, and chlorofluorocarbons present the potential for a vast number of claims arising out of contamination or interference with the natural environment. In addition, product liability claims involving large groups of consumers, arising from the use of birth control devices, polio vaccines, and other pharmaceutical applications clog the court system with complex and time-consuming cases. Both environmental tort and product liability cases contain at least two common elements that pose special challenges to the court system: they usually involve harm to a large number of present or potential plaintiffs and their technical complexity requires factual determinations beyond the everyday experience of both jurors and judges.

The problem of identifying the group of claimants exposed to toxic torts and harmful products in wide distribution is not limited to the difficulty of determining the geographic area in which exposure may have occurred. According to the Environmental Protection Agency, there are 50,000 toxic waste sites in the United States. While the magnitude of this problem is daunting, to the extent that these sites have been identified, the proximity of a claimant to an alleged injury-causing site is verifiable. The temporal aspect of toxic exposure is another matter, however. As the asbestosis experience indicates, the latency period for harmful results of toxic exposure may not only be prolonged but difficult to isolate if other suspected carcinogens such as tobacco use or exposure to other industrial toxins are implicated. A fundamental precept of common law tort liability is the requirement that the negligence or wrongdoing of the defendant must be proved to have been a proximate cause, although not necessarily the sole cause, of the harm claimed. This principle is severely tested in toxic tort cases.

The variables that may affect recovery in toxic tort claims are well illustrated by a leading case that arose in New Jersey in 1978. In November of that year officials of Jackson Township advised residents near a landfill operated by the township that tests indicated that various toxins had leached from the landfill and contaminated groundwater in the area as well as the underlying aquifer. For the next two years, 339 residents were required to use water provided by tanker trucks for drinking, cooking, washing, and bathing.

The residents initiated a class action for damages against the township. After an extensive trial, a jury entered an aggregate award of $15,892,303.97, to be distributed among the plaintiffs in designated amounts. The award was upheld on appeal. At trial, expert witnesses identified an array of chemicals in the affected wells, including acetone, benzene, chlorobenzene, chloroform, dichlorofluoromethane, ethylbenzene, methylene chloride, and methyl isobutyl ketone. Four of the twelve identified chemicals were known carcinogens, while others were believed to be harmful to various bodily functions and organs. None of the plaintiffs claimed to have experienced direct physical harm from the contaminated water but all sought, and recovered, damages for loss of quality of life, *i.e.,* inconvenience and emotional distress, as well as the cost of medical surveillance. The trial judge, however, had refused to submit for jury determination the plaintiffs' claim for enhanced risk of future illness. This latter claim was the subject of extended discussion on appeal.

Although the *Jackson Township* case provides interesting insight into the magnitude and complexity of attempting to adjudicate environmental claims in traditional tort litigation, it also addresses two features unique to toxic tort claims: enhanced risk and medical surveillance expense. Both elements of damage may be attributed to an aspect of toxic torts already encountered in the asbestos field — the long latency of many diseases caused by exposure to toxins. Thus, in asbestos tort litigation, recovery has been sanctioned where those exposed to asbestos can demonstrate that it is more likely than not that they will develop cancer in the future.

In *Jackson Township*, the Court noted that the plaintiffs did not seek recovery "for specific illnesses caused by their exposure to chemicals." The claims instead were directed to the enhanced risk that such exposure would result in future illness. Evidence in support of the enhanced risk was presented through the testimony of a toxicologist who evaluated the levels of toxins present in the plaintiffs' drinking water, coupled with the testimony of a physician specializing in the diagnosis and treatment of diseases induced by toxins. The court described the enhanced risk claim and the opposing contention as follows:

The enhanced risk claim seeks a damage award, not because of any expenditure of funds, but because plaintiffs contend that the unquantified injury to their health and life expectancy should be presently compensable, even though no evidence of disease is manifest. Defendant does not dispute the causal relationship between the plaintiffs' exposure to toxic chemicals and the plaintiffs' increased risk of diseases, but contends that the probability that plaintiffs will actually become ill from their exposure to chemicals is too remote to warrant compensation under principles of tort law.

Although the New Jersey Supreme

Court viewed an enhanced risk of disease as a compensable "injury", it ruled that to warrant recovery, such risk, if not physically manifested, must be quantified by expert testimony and not based on mere mathematical or "reasonable" probability. In this regard, the Court was relying upon the traditional causation requirement in tort law that the alleged harm be shown to be reasonably probable or more likely than not. While the application of traditional tort causation standards has been criticized as "unduly harsh and unreasonable," it must be recognized that courts must be faithful to basic principles upon which liability is fixed. As long as such claims are adjudicated in an adversary system that imposes burden of proof in areas such as causation, the courts must enforce those standards as a matter of fundamental fairness and due process.

One aspect of toxic tort damages that received approval in *Jackson Township* and that promises to be a recurring claim in toxic tort litigation was that of the cost of medical surveillance. Medical surveillance expenses include the cost of periodic medical examinations to monitor and facilitate early diagnosis of diseases attributable to toxic chemical exposure. This element of damages is intertwined with the enhanced risk claim, but the New Jersey Supreme Court, while rejecting the former because it lacked causative proof, concluded that the claim for cost of medical surveillance was supported by competent medical testimony that such testing was reasonably necessary. The Court rejected the argument that simply because the risk of future injury cannot be quantified to the level of probability required for legal causation that compensation for reasonable and necessary medical expenses should also be denied. In addition to finding evidential support for the allowance of such damages in the case under review, the Court also noted the important public policy considerations that support an award of medical surveillance expenses:

Although some individuals exposed to hazardous chemicals may seek regular medical surveillance whether or not the cost is reimbursed, the lack of reimbursement will undoubtedly deter others from doing so. An application of tort law that allows post-injury, pre-symptom recovery in toxic tort litigation for reasonable medical surveillance costs is manifestly consistent with the public interest in early detection and treatment of disease.

The award of damages for cost of medical surveillance has raised concern about the propriety of awarding such damages in a lump sums to individual plaintiffs. Although lump sum awards to individuals were upheld in the *Jackson Township* case, the court indicated a clear preference for the establishment of a court-supervised fund to administer future payments to a class of persons who have been exposed to toxic torts. This method was employed in the Agent Orange litigation, where plaintiffs pressed claims for genetic damage as well as for conventional damages. A damage award for reasonably necessary medical monitoring costs based on standard tort principles would result in allocation of estimated future costs, discounted to present value, to a specific group of plaintiffs even though tests may in fact never be administered. Once the award is made and collected the individual plaintiffs may or may not actually undergo the testing. In fairness, it should be noted that certain individuals may experience no ill effects and decide that such expenditure would be a needless waste of money.

The use of a court-administered medical surveillance fund, on the other hand, would encourage expenditure of medical costs for those whose exposure is comparatively greater or who, because of age or condition of previous health, appear to be at greater risk. The use of a fund source would also limit the ultimate expenses to the tortfeasor and thereby prolong the life of the funding. In the absence of statutory authority, the establishment of such funds usually implicates the Court's equitable power in an area analogous to the field of trusts. Here again, the limitation of conventional tort law may create problems of both principle and application.

Scientific Evidence and the Legal Standards of Proof

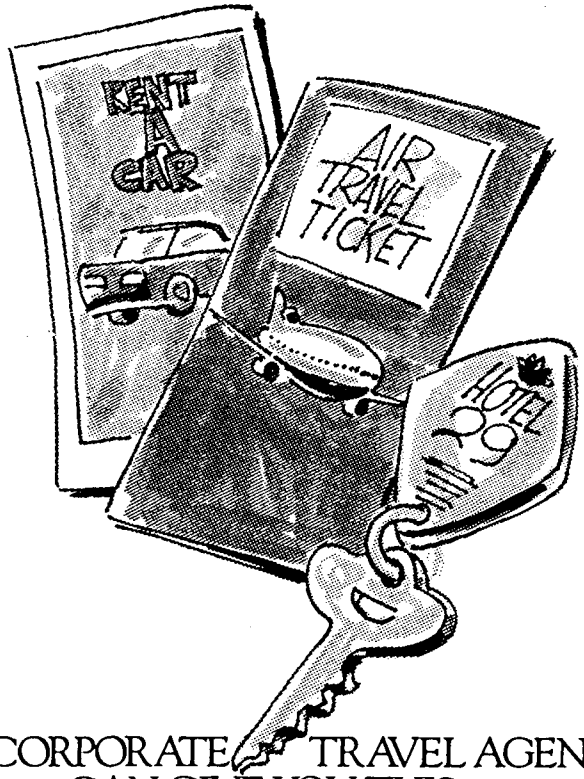
While evolving technology has significantly altered legal relationships and defined new duties, its reach has also extended to methods of proof within the litigation process itself. Of course, the presentation of evidence through technology is not new, and proven identification techniques such as photography or finger printing found early acceptance in the courtroom. In recent years, science has offered the allure of startling new techniques to provide the certitude the law seeks to attain for its processes. There is a growing concern, however, that certain techniques may have been oversold by those possessing the superior technological knowledge. More important, too often the courts have permitted the experts to define the rules in the courtroom as well as in the laboratory.

The seminal ruling that established the threshold test for the admissibility of novel scientific evidence was formulated in *Frye v. United States.* Although the *Frye* ruling concerned the admissibility of an early design of lie detector device, its holding has been applied, in subsequent years, by a majority of state and federal courts to a panoply of scientific tests and studies. Under *Frye,* scientific evidence or technique must be shown to have "gained general acceptance in the particular field in which it belongs," if it is to be admissible. Since the determination of admissibility of expert testimony is a matter of law, the application of the *Frye* test has been the responsibility in the first instance of trial courts and later, and perhaps more definitively, by appellate courts when the issue has been preserved on appeal. One of the principle difficulties encountered in evaluating new scientific techniques under the *Frye* standard is defining the "field" under review, particularly where the technique or theory may overlap several disciplines. Is acceptance measured by simple majority vote and, if so, how is such a result tabulated in a loosely defined scientific community? There is also the task of defining acceptance where the scientific community is itself not fully informed on the matter or where related studies and experimentation are ongoing.

The *Frye* rule is not without its critics. It has been criticized for relying too much on the *ad hoc* testimony of a limited number of experts, often only one, at trial. There is also a concern that the *Frye* rule imposes too rigid a standard for admissibility of scientific evidence. At least one authority on the law of evidence has urged that the standard of general scientific acceptance should be discarded in favor of a rule that would permit admissibility of "relevant conclusions, which are supported by a qualified expert witness," unless there are other reasons for exclusion.

The Jury as Decision Maker in Complex Cases

Admissibility of expert testimony in complex technological cases that tax the ability of judges to establish levels of probative value, whether under the *Frye* test or a broader standard advocated by some courts and commentators, is but one aspect of the evidentiary challenge. Equally problematic is the demand that such cases place upon the jury as the factual



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decision maker. Too often trial judges are inclined to permit the jury to decide technical issues if there is some expert evidence in support of conflicting propositions. Concern has been expressed about the ability of the average juror, who may lack a scientific background or even a post-secondary education, to weigh competing technical opinions. The result has been that in mass tort cases in which the proofs in support or defense of toxic tort claimants emanate from the same experts, jury results, both as to liability and damages, will vary between different jurisdictions.

Courts faced with conflicting scientific opinion have not always adhered to a consistent rationale for submitting disputed causation issues to juries. thus, in *Ferebee v. Chevron Chemical Co.,* the appeals court upheld the trial judge's refusal to overturn a jury verdict in favor of an agricultural worker who claimed to have contracted a fatal lung disease from exposure to a chemical defoliant. The plaintiff had presented two experts who opined that despite the extreme rarity of such cases it was probably that the defoliant caused the claimed ailment. In upholding that result, the appeals court commented that judges enjoy "no special competence to resolve the complex and refractory causal issues raised by the attempt to link low-level exposure to toxic chemicals with human disease." Regarding such technical questions, the court concluded, "if experts are willing to testify that such a link exists, it is for the jury to decide whether to credit such testimony."

Four years later, the same court adopted a more searching approach to evaluate the level of expert testimony sufficient to establish causation in a case involving the use of the controversial drug Bendectin. The D.C. Circuit upheld the trial court's setting aside of a verdict in excess of $1 million for a child who suffered congenital limb defects as a result of her mother's use of Bendectin during pregnancy. The Court refused to "accept uncritically any sort of opinion espoused by an expert merely because his credentials render him qualified to testify." In rejecting the causation opinion of the plaintiff's expert witnesses, the Court noted that unlike *Ferebee,* where the competing experts were testifying on the "frontier of current medical and epidemiological inquiry," the causal relationship of Bendectin and birth defects had been subject to twenty years of scientific study. Since the resulting extensive epidemiological data did not sup-

port plaintiff's claim of the causation, the court had an obligation not to permit the jury to speculate to the contrary. Although the results of these rulings may appear in conflict, the later decision has established the salutary principle that expert testimony will create a fact question for jury deliberation only if supported by an established quantum of scientific study and testing.

* * *

The increase in the number and complexity of scientific and technological controversies has placed upon the Court system, both at the trial and appellate levels, the requirement of being knowledgeable in disciplines sometimes foreign to a judge's background and training. As the keeper of the door of admissibility, the judge must be both informed and discerning if the traditional legal rules for fixing guilt and establishing liability are to be maintained. The common law has proven resilient and responsive over the course of several centuries as society has become industrialized and legal relationships more complex. But the scientific and technological changes witnessed in the past twenty years may pose the most serious challenge to the ability of the judicial system to remain the primary forum for dispute resolution.

Some have questioned the competence of the judicial system to continue in its traditional role and have urged that specialized agencies should replace both judge and jury in resolving disputes of a technical nature. Even if such solutions were adopted, however, there would continue to be the need for some form of judicial review; the focus would again be placed upon judicial competence at the appellate level. If the judicial system, particularly at the state level, is to maintain its traditional definitional authority, it is necessary that, at a minimum, judges be scientifically literate. Continued judicial education and special assignment of knowledgeable judges to complex cases are two obvious methods for increasing judicial competence. Efforts should also be undertaken to reexamine established standards that govern substantive liability as well as evidential methods to insure the continued ability of the judicial system itself to accommodate the common law to modern events. If the judicial system does not keep pace with the scientific community, it may find itself functionally obsolete, a forum limited to commonplace disputes while the technocrats become their own decision makers.

(*see* WALSH *page 35*)

If Your Haven't Done Anything About Financial Planning, Then Chances Are Your Money Hasn't Done Much, Either.

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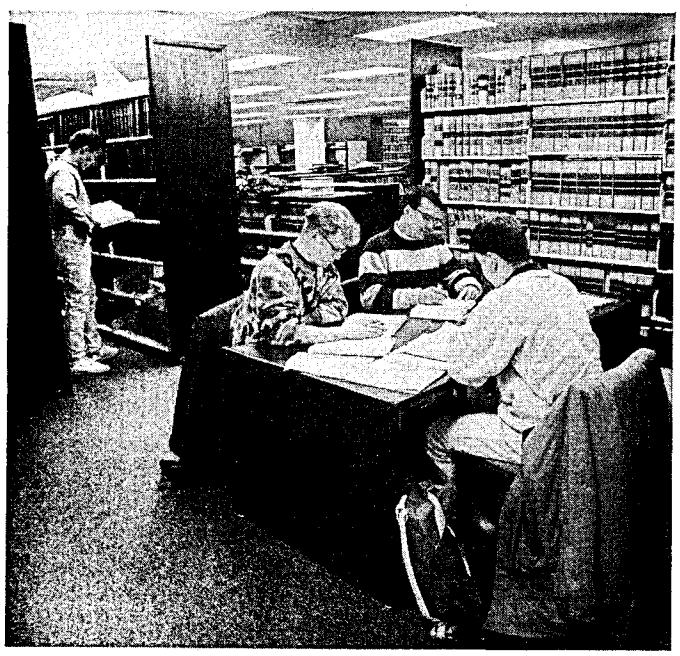
ANTHONY J. SANTORO

In the Final Decade

Preparing for the Professional Millennium

When Larry Drexler invited me to write a brief article on the challenges facing legal education during the waning years of the 20th Century, I enthusiastically agreed. After all, few law deans can resist the temptation to pontificate on any subject, much less one with which they wrestle every day and can be expected to wrestle with for the immediate future. The only truly formidable task is to limit these comments without diminishing the critical importance of the topic in the mind of the reader.



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As I considered the matter, the daunting size of the task before me became apparent. The list of challenges is seemingly endless. Arraying them in some order of importance is not feasible. Each affects law schools with varying degrees of intensity, but all have the potential to dramatically alter the configuration of American legal education and, perhaps, the practice of law. However, almost all the current and prospective challenges can be placed in three fundamental groups, each of which represents a conflict between the academy and other forces within the legal profession. The manner in which these conflicts are resolved will implicate the profession and the life of the law for many years to come.

> Increased lawyer compentency may be hazardous to the wealth of a client.

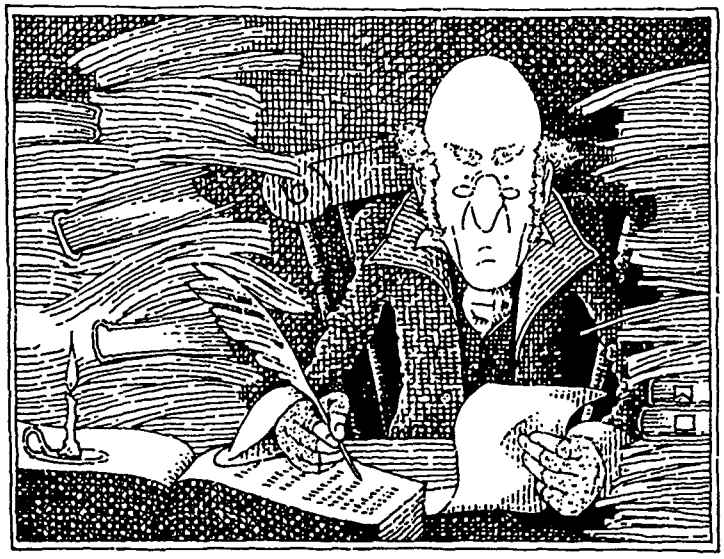
While these challenges will be felt initially by the law schools, each represents an opportunity for institutions within the legal profession — the bench, the bar, and the academic community — to come together to improve the profession. Effective response to each is vital to the well-being of the profession and, for the most part, can be achieved if the institutions within the profession stop thinking of themselves as discrete components and start behaving like partners with a vested stake in helping one another accomplish their respective missions. They must also recognize that the partners are not always equal in all matters.

Costs and Resources of Educating Competent Lawyers

One of the major challenges affecting law schools is the matter of rising costs, coupled with the problematic future of federal financial aid. Rising costs, of course, are endemic to education generally and would have no remarkable significance in the context of law schools except for the fact that much of the costs are driven by the hopes and aspirations of the bench and bar. If the upward spiral continues and the prospect of diminished federal financial aid materializes, many Americans will be priced out of a legal education, and those who are not so deprived will be unable to deliver affordable services to middle class and poor clienteles.

Many lawyers and lay persons tend to think that the history of American law schools is static, unchanged from the days of Dean Langdell. Quite the opposite is true.[1] Tracing the role of law schools in the education of lawyers, is a bit like a roller coaster ride. The nonacademic institutions within the legal profession have alternated between trust and

Photograph by Carl Kleinschmidt



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mistrust of law schools. The modern era for legal education did not begin until after World War II. Except for some minor aberrations, the standard track for becoming a lawyer is now four years of college, followed by three years of law school and a bar examination.

From World War II to the 1960's, the pressure to improve law school quality came from the academy, where objective standards for the admission and graduation of students were gradually applied. The basic mission of most law schools was seen as preparing students for becoming lawyers. The actual task of training for the practice of law fell to experienced practitioners to whom the newly-minted lawyers would attach themselves. Aspiring lawyers learned to "think like a lawyer" in law schools, but the route to the courthouse door was learned from experienced practitioners.

The social turmoil of the 1960's and the 1970's brought about great change. The once elite profession began to suffer a serious identity crisis. Even the most venerable of legal institutions, the United States Supreme Court, pointed out that the practice of law was not above trade. Beset with criticism, the bar responded by pleading for lawyer competency. The bar aspired to create a profession of honest and competent lawyers.

Legal education underwent a very costly transformation. Previously concerned with preparing students to become lawyers, law schools responded to the pressure of the practicing bar by preparing students to be almost ready to practice upon graduation. Gone were large classes and the Socratic Method of instruction. In were clinics, seminars, and skills courses. Gone were theoretical courses. In were doctrinal and practical courses. Gone also was the historical notion that young lawyers were trained for the practice of law by senior lawyers.

The transformation achieved its objectives. Law graduates are now more competent to practice law than ever before in the history of legal education. However, the price tag has been staggering. Approximately 90% of all law students are on some form of financial aid. Approximately 10% of a law school budget is devoted to scholarships and loans. The typical law student graduates with thousands of dollars of debt.

Nonetheless, the pressure to improve the competency of law school graduates continues without reference to the economic consequences to the delivery of legal services. As law students pay more for their education, the middle class is squeezed out of legal services. Burdened by heavy debt, law graduates necessarily seek the deep pocket clients. Pleas by deans and faculty for graduates to seek public interest work fall on receptive ears but empty pockets.

The relationship between improved lawyer competency and the profession's ability to serve all Americans has never been explored. Improved lawyer competency as an aspirational goal is highly desirable. However, it flies in the face of economic reality and may actually stimulate competition for business. As someone once noted, increased lawyer competency may be hazardous to the wealth of a client.

Calls to improve lawyer competency also failed to take into consideration the nature of the profession. The legal profession is not homogeneous. It is pluralistic. It is hierarchical. Over the recent years, the cries for lawyer competency have come, in the main, from large firm lawyers with corporate and other deep pocket clients. Some lawyering tasks are common to all lawyers; many are not. There are tasks that some lawyers never perform. Some tasks are repetitive and can be performed by any reasonably educated individual without extensive legal training. Many clients simply do not need the level of competency to which the bar seemingly aspires but, nonetheless, pay the price for such competency or go unserved.

Law schools cannot possibly meet the demand to educate all their students to take on all lawyering tasks immediately upon graduation. Some tasks can only be learned through experience.

Racial, Gender, and Cultural Diversity

Another challenge facing American law schools is the need to continue efforts to diversify faculties and student bodies amidst sharp attack. Again, the challenge is common to education. However, it bears a special relationship to legal education. The legal culture of the United States cannot be enhanced unless racial, gender, and cultural diversity exists in the profession. Not only must we provide equal and fair access to legal education for all Americans, we must also take care that the law is developed upon the *experiences* of all Americans.

The life of the law as Justice Holmes noted is not logic; it is experience. The only way to keep the law vital for all segments of society is to make certain all segments are represented within the legal profession.

The record of the legal profession is far from perfect, but it is better than most. For forty years, law schools in cooperation with the other institutions of the profession, especially the American Bar Association and the Association of American Law Schools, have labored hard to open the doors to the profession. When women demanded access, legal education responded by expanding to meet the demand. Most law schools opened their doors to underrepresented minorities well before *Brown v. Board of Higher Education.*

These efforts are now under attack, primarily by the United States Department of Education. Funding for the Council on Legal Education Opportunity has been cut, challenges to minority-designated scholarships have been mounted and the practices of accrediting agencies designed to encourage diversity have been questioned.

Defending against the attack will occupy much of the attention of faculty and deans for the remainder of this century. Unfortunately, both sides in the controversy have been guilty of excess. Diversity has been unfairly characterized as a dichotomy based on race, gender, or culture. The true dichotomy is based on disadvantage. Race, gender, and cultural background are only factors *suggesting* disadvantage.

Some accrediting agencies unfairly insist on diversity despite the mission of the academic institution. For example, gender diversity is critical to law schools because it is critical to the life of the law. Gender diversification at a seminary sponsored by a religious group that only ordains men is less critical.

It is very important that law schools not slacken in their attempts to diversify. A homogeneous or nearly homogeneous bar will be aloof from mainstream American society; a pluralistic profession will be sensitive.

Moral Fitness for Practice

No one would argue with the proposition that all lawyers must be morally fit to assume the unique privilege that admission to the bar accords them. Few would argue against the notion that filtering out morally unfit persons is a responsibility shared by all institutions within the profession. Fixing the precise role in this matter for each of the institutions, especially law schools, is the only controversial issue.

On the one hand, the bench and bar tend to believe law schools are the "gate-

keepers" of professional morality, and that they must be more vigorous in denying admission to unsavory applicants. On the other hand, the academy believes it has neither the authority nor the practical ability to interdict aspiring lawyers on the basis of moral fitness.[2]

Hovering over the conflict is the basic tension that exists between the mission of bar examiners and that of law schools. The unrestrained expression of thought and exchange of ideas encouraged by the academy and protected by the very strong traditions of academic freedom are neither encouraged nor protected for persons licensed as officers of the court and charged with a special responsibility to uphold the laws of the United States. The state has an important interest in protecting the public.

While most law schools make an earnest effort to deny admission to applicants evidencing bad character traits, most such cases involve deception related to admissions, such as fraudulent letters of reference, cheating on entrance examinations, or the failure to reveal pertinent facts. In such cases, the integrity of the admissions process has been assaulted, and law schools act as much to protect the process as they do to protect the profession. Rarely do law schools deny admission for activities unrelated to the admissions process unless they fall within the realm of serious crime.

The reason for this is simple. Jurisdictions do not agree on the standard of moral fitness necessary for admission to the bar, and law schools cannot predict the jurisdiction or jurisdictions in which a particular student may seek admission. For example, some jurisdictions treat alcohol dependency far more severely than others. The application of the standards appears to be equally uneven with respect to drug dependency, juvenile offenses, and even some minor felonies.

The challenge for a law school may be illustrated by a hypothetical. Suppose a resident of state X applies to a law school located in state Y, acknowledging a conviction for an activity treated as a misdemeanor in state X. State Y characterizes the activity as a felony. Should a student, otherwise admissible to the law school, be denied admission on the basis of the acknowledged activity? How should the activity be characterized? Should it be characterized differently if the school learns that the student intends to apply for admission to state Y? Does it matter if the applicant is seeking a law degree for the benefit such education is perceived to have in advancing his or her future as a senior vice president of a Fortune 500 company, intending never to seek bar admission?

Even where law schools have identified potential problems in the records of applicants, it is not possible in most, if not all, jurisdictions for the applicants to obtain a binding opinion on their admissibility. If bar examiners refuse to interdict candidates before they obtain law degrees, it is even more difficult for law schools to do so.

The conflict gets somewhat more curious. Presumably, the strength of the academy is its ability to teach, yet few within the academy and almost no one outside the academy would suggest that bar examinations should be abolished. How is it that the law schools can be the "gatekeepers" of moral fitness if they are not the "gatekeepers" of academic fitness, the area of their acknowledged expertise?

In addition to practical inability to determine moral fitness or the application of any specific standard, there is the simple question of authority to preclude admission to an otherwise qualified applicant on the basis of moral fitness. The authority to develop and apply standards for admission usually rests with the supreme court of a state, delegated to some extent to a board of bar examiners. Except for the increasingly rare case of the diploma privilege, no law school has been granted the authority either to develop or to apply the standards. Indeed, law schools are subject to federal legislation limiting their ability to gather facts suggesting unfitness for the practice of law. That limitation does *not* apply to boards of bar examiners exercising what appears to be state authority. Without the ability to ascertain the facts, law schools cannot be the ultimate "gatekeepers."

It may be argued that authority to ask some questions denied to some academic institutions cannot be denied to law schools because of their greater need to know: a need in turn derived from the authority of state supreme courts, which generally admit only graduates of ABA-approved schools. However, the federal government has yet to be persuaded by such arguments.

Another problem relates to a law school's inability to obtain information declared sealed by a competent court. For example, assume the record in the prior hypothetical had been sealed in state X. Must the applicant disclose the incident on his or her law school application? How does he or she know that there is a responsibility to disclose in the face of almost universal advice from judges and lawyers that the records are sealed for all purposes including job and school applications? When they start to complete the bar admission questionnaire, the issue of whether to report the events is again raised. Not sensitive to the interests of the profession, some do not report the offense and are never uncovered. Others, sensitized by three years of law school, do, only to find themselves with an added problem. Some bar examiners compare the bar admissions questionnaire with the law school application and treat the failure to report the offense to the law school as a second, more serious and more recent indication of moral unfitness.

The foregoing remarks were intended solely to raise some of the more delicate challenges currently facing legal education and which are likely to occupy much attention in the future. The brevity with which they were discussed should mask neither their importance nor their complexity. The issues are interrelated. Any forthcoming solutions are likely to alter our current perceptions of the profession.

The issue of lawyer competency, for example, also relates to the stratification of the bar. Until such time as we admit that the bar is stratified, we can never achieve a true consensus on minimum competency for certain tasks. It may no longer be heresy to suggest that there should be different levels of licenses for lawyers, depending upon the tasks they perform. If diversity and moral fitness are to loom large in the admissions process, we must acknowledge that there are factors other than academic merit, which are important to a vigorous bar.

There are no simple solutions. Indeed, we must avoid simple solutions. There are even no simple ways to articulate the problems. However, the need for dialogue among the institutions of the profession has never been greater.

(FOOTNOTES)

1. For an excellent review of legal education see Robert Stevens, *Law School, Legal Education in America from the 1850s to the 1980s* (The University of North Carolina Press 1983).

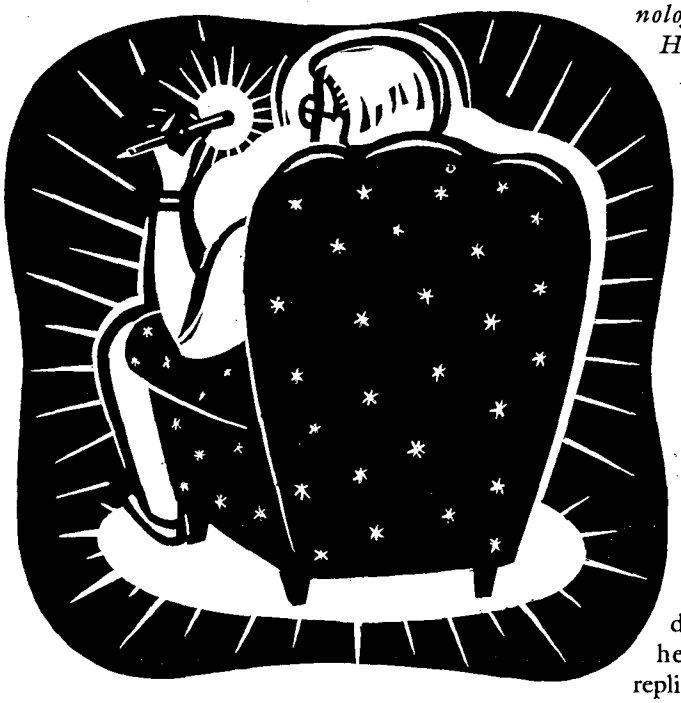
2. An extensive analysis of bar admission information is found in Rhode, *Moral Character as a Professional Credential,* 94 Yale L.J. 491 (1985). *See also* Newton, *Law School Role and Fitness of Graduates Revisited,* 60 B. Examiner 12 (1991).

(*see* SANTORO *page 26*)

RICHARD K. HERRMANN

The Blue Chair of the Twenty-First Century

The very idea of professionalism carries with it the ability to deliver services promptly and efficiently in a manner cost effective to the client. This in turn entails resort to the advanced technology described in Mr. Herrmann's article. Although it presupposes seemingly fantastic advances in law office equipment, the technology is already here or within easy reach. Verb. sap. to the managing partner!



Law office decor in 2002 — On the west wall was a portrait of Ronald Reagan and directly across from it in a matching frame was a picture of the current president, Sonny Bono.

As the elevator door closed, a friendly, well-modulated female voice inquired from the quadrophonic speakers, "What floor, please?". Raymond Tankersly looked down at the letterhead he was holding and replied, "Twelfth floor." The friendly voice responded, "Thank you. When you exit the twelfth floor, the law firm of Rogers, Thomas and Riddle will be to your left. The consulting firm of Gotrick and Crawford will be to your right."

Raymond straightened his dark blue double-breasted Brooks Brothers and Sons* pinstriped suit and fluffed the kerchief in the left breast pocket. The letter he was holding was from his lawyer. It read:

September 12, 2002
Mr. Raymond Tankersly
Senior Vice President
Graystone Keyboard Industries
127 Broadway
New York, New York 10006

Re: Martin v. Graystone Keyboard Industries

Dear Raymond: Your deposition in the cumulative Trauma Disorder litigation is now set for Wednesday, September 25th in our offices. Please be in my office at 10:00 a.m. on Tuesday the 24th so that we can prepare you for the ordeal.

Very truly yours,
William R. Baronet

As the elevator door opened, Raymond stepped out and noticed a young, well-dressed associate of the firm head toward a nondescript door, which contained a palm pad about four feet above the floor. The young man placed his hand on the pad, so that his fingers rested in contours molded into the wall. As he pressed against the pad, a blue light scanned his hand and the door slid into the recesses of the wall so that he could enter.

Raymond smiled, as he marveled at the technology. Although he had been in the computer business for fourteen years, he and could not get over the strides made in the last half of the nineties. He entered the archway of the law firm's main entrance and was greeted by the bright smile of Ms. Bradley, the receptionist. "Good morning Mr. Tankersly. I will let Mr. Baronet know that you have arrived."

She turned to her CRT (cathode ray tube) and looked at the firm's electronic appointment calendar. As Ms. Bradley touched the screen on the postage stamp size image of Bill Baronet, his appointment diary for the day appeared. There it was: "10:00 a.m. Raymond Tankersly". The receptionist once again touched the screen on this entry and, at that very

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Illustration by Paul Dolan

moment, Bill Baronet heard a soft beep coming from his computer. He turned toward the credenza where it was located and watched as a digitized image of his client and his September 12th letter appeared on the screen. Raymond Tankersly was here. Bill pushed a button on the keyboard which contained the word "Confirmed". This let Ms. Bradley know that he was in his office and had received the message. Bill was just putting the finishing touches on a brief he had been working on for some time. He had the conclusion to write and he would then be done. As he finished dictating the remaining two paragraphs, he returned the microphone to its handle. This would cause the transcription process to begin.

The firm had recently purchased the new Voiceograph dictating equipment. Bill wasn't sure that he liked it. He had spent four hours in the Training Booth, reading aloud so that the computer could learn and analyze the phonics and inflections of his voice. The system wasn't foolproof. In fact, its accuracy was only 93 percent. This meant that when the computer translated his voice into electronic form there would be a fair amount of "cleanup" necessary. The technology was still about two years away from perfecting the error rate. And if you had an accent, you might as well forget it. However, the cost efficiencies of such a system were well proven. Even with the cleanup time, the law firm was about to save 187 typing days within the first year.

Bill left his office, nearly tripping over Abercrombie, the electronic mail carrier. "ABE" had been created for no purpose other than to distribute and retrieve mail to and from a law firm spread over 65,000 square feet. It was an ingenious little device. It was guided by an invisible beam of light emitted from a track in the ceiling. The 27 inch high robot would circle the floor every half hour, stopping at designated stations so that the secretaries could pull their folders containing new deliveries and insert outgoing mail, which would be taken to the document processing department.

Bill followed ABE down the hall and watched it turn into the document processing room. This was the operations center of the office. Attached to each letter or pleading was a multipurpose "Document Processing Form" to show whether the document needed copying, faxing, imaging, or any combination thereof. The only machine in the Department was the Document Processor XL2000. It appeared to be about the size of the antiquated Xerox 8200 of the 1980's. However, the XL2000 had a CRT and a formidable control panel. In fact, this system was so complex that the operator generally came equipped with a BS in electronics and a one year minimasters certification in Document Processing.

Joe Flowers had been the Document Handler for about eighteen months. He came recommended by the vendor of the System and he knew it inside out. In fact, you might say that Joe had a special relationship with the XL2000. He could make it sing. When a document was placed on the "launch pad", Joe would set it for MAIL LETTER. As the letter traveled through the machine, several things happened. The scanner would read the information from lines 7 through 12, which contained the name and address. This would be copied onto the envelope, which was simultaneously fed by the electronic envelope feeder. Similarly, the scanner would pick up the names on the "cc's" and compare them with those in its database for that client number. The envelope would be processed accordingly. If the word "FAX" appeared on line 7 or on the "cc" line, the XL2000 would create a fax cover page and dial the fax number from the same database. The machine would fold and insert the letter into the envelope, stamp, and seal it. An image of the letter and any attachment would be retained in the XL2000 as the firm's file copy for subsequent full text or image retrieval.

Bill watched as ABE passed Joe Flowers and the XL2000 . The little robot headed straight for its power supply it did an about face and plugged itself in for a fifteen minute recharging. It was just at that time that the strobe on Bill's silent Paging Pen. began to pulse. Bill remembered the antiquated paging systems of the 1990's which constantly disrupted everyone's train of thought. In 1997, Evermax. introduced the Paging Pen . It was an instant success. When the receptionist or Bill's secretary wanted to reach him, they simply pushed the "Page" buttons on their telephones and then dialed his extension. This activated the strobe, resulting in the incessant bursts of blue light from Bill's shirt pocket, which continued until deactivated by a touch on the pen.

Bill tapped on the clip of the Paging Pen. to stop the strobe and picked up Shirley Owens's phone as he passed her desk. He returned the page by pressing the page button and his extension. A voice mail message announced that Bill's partner, Howard Rogers, wanted to see him in Reading Room C before Bill went into conference.

Howard Rogers was seated in the soft overstuffed brown leather chair when Bill entered the 12 x 14 foot room. The warm yellow glow of the incandescent light was so much easier on the eyes than the white fluorescent. On the west wall was a portrait of Ronald Reagan and directly across from it in a matching frame was a picture of the current president, Sonny Bono. The reading table was situate in the center of the room and contained a crystal Mont Blanc pen set, a yellow pad, and seven Compubooks , each hosting an entire regional reporter series. Law libraries rarely existed in the larger firms now that West had reduced the price on its Compubook series.

Howard stood and walked to the reading table. He selected the West Atlantic 3rd from the Compubook series and opened the cover. It looked like a book and had all the texture and feel of a conventional West volume. However, this was not a book at all. Howard had opened the cover to a computer that housed two facing screens. Inside this volume was a micro laser disc, which contained the equivalent of one hundred and twenty five million pages captured as images of information. These frames were indexed by volume and page number just as the conventional West Regional Reporter Series. On the inside front left cover appeared a white translucent screen with the typical copyright, patent, and trademarks for the West Compubook series. The screen on the right side of the volume displayed an image of a ten key pad and insertion point for the citation:

Rogers tapped 286 A.3rd 367 into the ten key. Instantly, the case of *Promer v. Graystone Keyboard Industries* appeared. "It looks like our client has been sandbagging us," said Howard, rather agitated. "This is a cumulative trauma disorder case almost identical to ours." Bill sat down and began to scan the pages. At the bottom of each page were three touch sensitive buttons *Previous Page, Next Page, New Case.* Bill leafed through the screens, pressing the *Next Page* button. When he finished, he closed the book and frowned. The Compubook automatically powered off as the lid closed. "I don't know what to make of it," Bill mused. "I've worked with Tankersly for at least four years, and we have successfully defended several Cumulative Trauma Disorder claims together."

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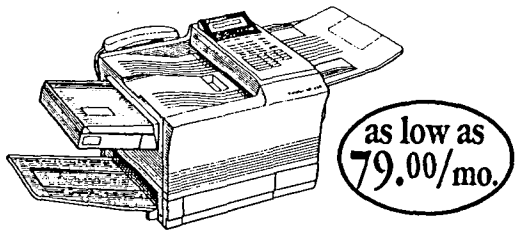

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CTD claims had developed into the most popular kind of products liability case. It began as a form of class action in the late 1980's. More often than not, the plaintiff classes consisted of newspaper reporters or secretaries who spent several hours a day in one position "banging away" at a keyboard. The constant compression of the fingers on the keyboard resulted in such maladies as carpal tunnel syndrome, causing a numbness or loss of feeling in the hand. In addition, neck and back strains were also commonplace. the most famous CTD suit involved an action brought by the NALSS, the National Association of Legal Support Staff, in 1996. The litigation was immense. NALSS had successfully named the American Bar Association as a representative defendant for all of its member lawyers. the litigation had been settled about three years before with a consent decree, which included (1) a one hundred percent medical reimbursement plan, (2) a maximum four day week, six hour day, at the same rate of compensation, and (3) a profit sharing plan based on the number of cumulative hours behind a CRT. It was for this very reason that the Voiceograph, dictating equipment was created.

According to the *Promer* case, Graystone Keyboard Industries had been a party to the NALSS consent decree. This would have a significant effect on the manner in which the deposition would be defended; and Tankersly had, in all these years, never said a word. Howard turned his back on Bill and sighed, "It looks like you will have to prepare Tankersly in the 'Blue Chair'."

The Blue Chair was on the cutting edge of technology. Thus far, the firm had limited its use to clients involved in white collar crimes. Since Bill did not handle that type of law, he had never used the Blue Chair before. The Blue chair looked innocent enough. In fact it was quite beautiful, with its soft Queen's Quilt upholstery. Few easy chairs were made in the Federal period, since the style came out of fashion by the late 1700's. However, an eastern shore chair builder banded the heavy lines of the skirt with wood of the English yew inlaid in mahogany, creating a pleasing, lightening effect.

The esthetics covered the almost magic-like quality of the chair, which was created by a fiber optic mesh weaved into the material. A light current flowed effortlessly through the arms, seat and back of the chair, creating a disquieting effect on the occupant, if even a hint of perspiration was transmitted from the skin. As a result, a client seated in the Blue Chair was faced with an almost irresistible impulse to tell the truth. The propriety or ethics of its use in law offices was a matter of much debate among the delegates of the American Bar Association. However, it was a very valuable tool if appropriately used.

After much discussion, the decision on whether or when to use the Blue Chair was left to Bill's better judgment. He left the reading room and made his way toward reception.

"Good morning Raymond", Bill began, apologizing for his tardiness. "There just don't seem to be enough hours in the day".

He then led Tankersly away from the client seating area. As he passed Ms. Bradley's desk, Bill inquired as to which conference room he had been assigned. The receptionist allowed that the Barristers Room had been set aside for the entire day. Bill thanked her, continued walking, and then stopped. "Any chances on moving me to the Treowth Room?" he asked. "Certainly sir," she replied,

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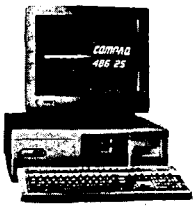

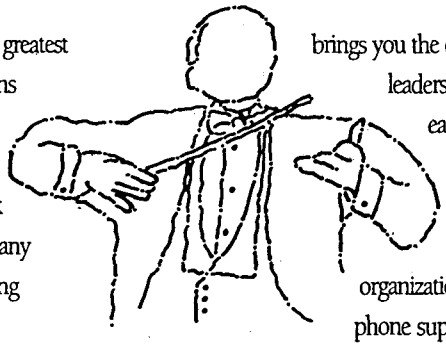

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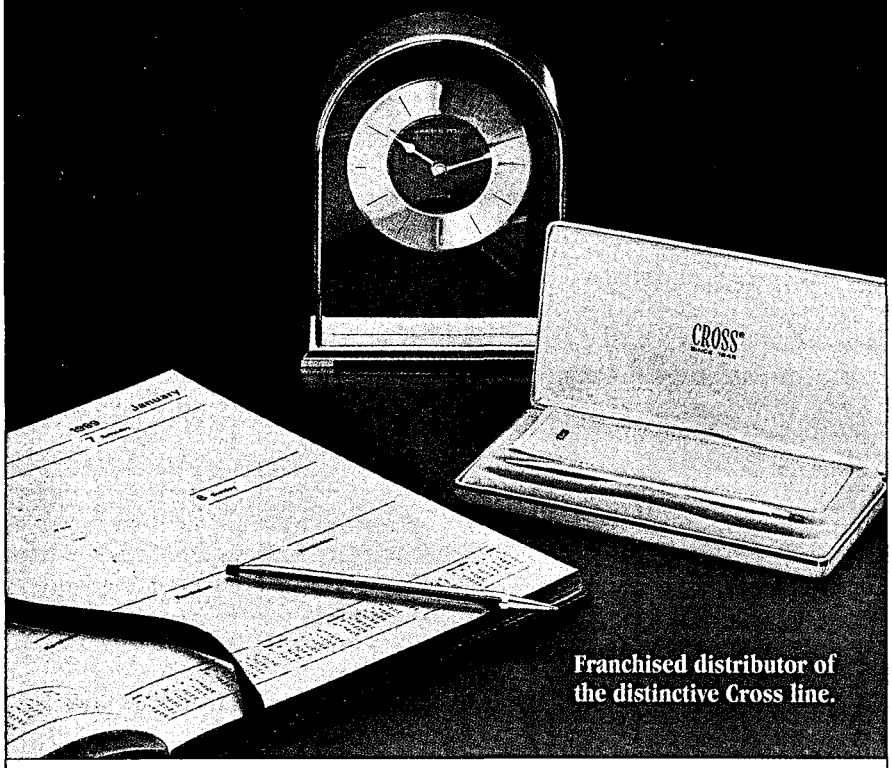

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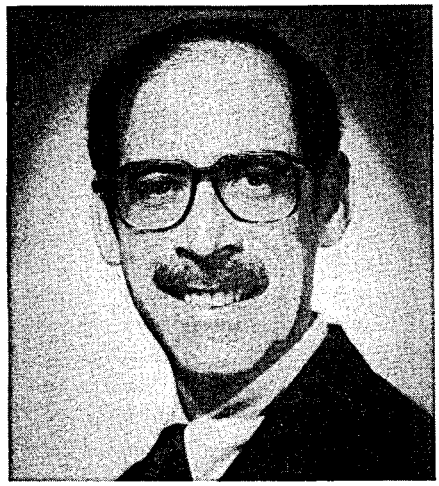
noting the change on the computer.

Tankersly followed his attorney into the conference room, swept the room with his eyes and then whistled. "Now this is what I call a room. I love the heavy wood paneling; and that blue chair is beautiful."



Richard Herrmann, from time to time a contributor to this magazine, is a member of the firm of Bayard, Handelman & Murdoch, P.A. Like his previous contributions, this not so fantastic fantasy is marked by imagination and wit, even unto the slightly disturbing Orwellian conclusion.

SANTORO *(cont. from page 21)*

During Anthony Santoro's tenure as Dean of the Widener University School of Law that institution has become an active and highly respected part of the Delaware legal community and a continuing source of able additions to the Delaware bar. During Dean Santoro's term, the school has attained membership in the Association of American Law Schools and, in duplication of its importance to the profession in Delaware, it has expanded its services by opening a second campus in Harrisburg, Pennsylvania.

FRANCIS G. X. PILEGGI

Irrevocable Letters of Credit and the Problem of Fraud

Letters of credit can be either revocable or irrevocable. A revocable letter of credit can theoretically be terminated at any time. Such an instrument does not appear very helpful. Understandably, one of the leading experts in the field has written that no beneficiary who wants or needs a letter of credit should accept anything other than one denominated as irrevocable.

The letter of credit, in its basic form, is a document issued by a bank at the request of its customer, that evidences the commitment of the bank to honor the request for payment of the beneficiary. A common use of a letter of credit is in connection with an agreement of sale. The buyer obtains a letter of credit from his bank for the benefit of the seller in the amount of the sales price. When the seller presents the documents required in the letter of credit to the issuing bank, usually certifying full compliance with the seller's obligations under the agreement of sale, the seller is paid.

One advantage of a letter of credit is that it substitutes the credit of the issuing bank for the credit of the buyer, also called the "account party". Thus, the seller, also called the "beneficiary" in this context, need not be troubled with a customer's solvency. This transfer of risk facilitates commercial transactions by providing for safer payment methods, and it may also serve as a guaranty of performance in some instances.[1]

There are at least three major reasons why letters of credit are especially useful in international transactions. First, banks need only be concerned with documents presented to them pursuant to the letter of credit; second, the documents presented need only comply with the requirements contained in the letter of credit; and third, the letter of credit is completely independent of the underlying contract.[2] This last factor, called the "independence principle", is especially useful in long-distance transactions between parties who may be unaware of each other's credit worthiness and where a determination of compliance with the underlying contract would be cumbersome. With a letter of credit, the banks need not become involved in contractual disputes between the buyer and the seller, and, therefore, the seller can be assured of prompt, reliable payment upon presentation of the documents called for in the letter of credit.

If a letter of credit requires certain title documents in addition to a demand for payment (called a "draft"), it is referred to as a "documentary commercial letter of credit."[3] If no documents other than a demand for payment are required, it is referred to as a "clean letter of credit."[4] A standby letter of credit is one that requires a demand for payment along with a statement of default or noncompliance.

Letters of credit can be either revocable or irrevocable. A revocable letter of credit can theoretically be terminated at any time.[5] Such an instrument does not appear very helpful. Understandably, one of the leading experts in the field has written that no beneficiary who wants or needs a letter of credit should accept anything other than one denominated as irrevocable.[6]

A letter of credit often includes a four-party transaction. As a first step usually the buyer requests his local bank to issue a letter of credit for the benefit of a seller or beneficiary. In many instances a second bank is involved. In that situation, the issuing bank asks another bank, commonly chosen by the seller, to "confirm" or "advise" the letter of credit. The seller is then informed by the confirming or advising bank that the credit has been issued.[7] If the second bank confirms, and does not merely advise, this confirmation of the letter of credit binds the issuing and confirming banks to the transaction, independent of the obligation between the buyer and seller; and entitles the beneficiary to be paid by the confirming bank upon presentation of the documents required in the letter of credit.[8]

Since a bank may be required to pay the seller upon presentation of the documents required by the letter of credit, even if the buyer maintains that the seller has not fully complied with the underlying agreement of sale, great care must be taken in drafting a letter of credit. One method of reducing the risk of improper payment is to insist upon detailed documentary requirements and certifications that all conditions of payment have been satisfied. A corollary to this approach would be to make as a condition of payment the independent confirmation of an auditor's report, or arbitrator's ruling, and the letter of credit could be extended until the completion of those proceedings.[9] In order to avoid wrongful demand, the documents required should be as detailed and extensive as possible. Compliance with the documentary requirements must be strict and even minor variations will justify dishonor.[10] Substantial case law has been developed to address issues of wrongful demand and dishonor arising in connection with letters of credit, which are governed largely by a body of law that straddles the boundary between contract law and the law of negotiable instruments.[11]

One must also be aware of the defenses that a holder in due course may assert. The Uniform Commercial Code provides that an issuer "must honor the... demand for payment [or draft] if honor is demanded by a negotiating bank or other holder... which has taken the... demand [or draft] under the [letter of] credit and under circumstances which would make it a holder in due course."[12] This situation may be addressed by requesting that the issuing bank merely issue a "straight" letter of credit payable only by the issuing bank.[13] Potential assignees may also be discouraged by detailed documentary requirements such as a certification of inspection prior to shipment.[14]

Another safety feature that may help in the event of fraud would be to include express language in the letter of credit that it shall expire no later than the termination of the underlying contract; provided that the letter of credit itself contains a definite expiration date.[15] If, however, the letter of credit is extended until the completion of an arbitrator's decision, for example, the account party may condition payment upon receipt of that decision, as long as there is an appropriate amendment to the letter of credit.[16]

An important provision that will provide an opportunity to detect fraud is a requirement that notice of demand be given several days prior to payment,[17] although most major banks will refuse to agree to this provision. This would allow for a period of investigation as well as the institution of legal proceedings for injunctive relief, if necessary.[18]

Choice of law must also be carefully described. The convenience of a home court advantage will often be a determinative factor in the brief time during which injunctive relief may be possible. Even in subsequent, protracted legal proceedings, it is usually less expensive to litigate in a closer forum.

Where the choice of law is unclear, the law of the place of performance generally governs.[19] Most cases reflect the concern that letters of credit not suffer from the possible inconsistencies in the law of various foreign jurisdictions in which they usually operate, although the issue "does not arise often, in part because so many international credits are subject to the Uniform Customs [and Practice for Documentary Credits] and in part because all American jurisdictions have adopted Article 5 of the Code."[20] Also, as in any contract, most parties are careful to specify the law that will govern the credit.

The Uniform Customs is a "written compilation [of]...the expressed understanding of international...bankers in the United States and abroad as to practices prevailing in their trade."[21] The Uniform Customs was a project of the International Chamber of Commerce and the original version was completed at Amsterdam in 1929. Although it has not been enacted in the United States, it often is incorporated into letters of credit by express provision and through U.C.C. Section 1-205(3), which allows for "usages of trade" to supplement or qualify the parties' agreement.[22] Nonetheless, express terms of the letter of credit will prevail over usage of trade, many U.C.C. provisions, and the Uniform Customs.[23]

One must juxtapose the independence principle with the attempt to circumvent unscrupulously the obligations in the underlying contract, in order to understand the problem of fraud. U.C.C. Section 5-114(1) provides that an issuer must honor a demand that complies with the credit "regardless of whether the goods or documents conform to the underlying contract for sale or other contract... between the customer and the beneficiary." This codifies the independence of the issuer's duty to the beneficiary in relation to the underlying transaction. However, U.C.C. Section 5-114(2) provides for an exception to this principle when an unscrupulous party attempts to defraud the account party and the issuer.[24] This exception has been described as the most "heavily litigated provision in Article 5."[25]

The most common procedure that account parties employ to prevent improper payment under a credit is the attempt to secure in injunction.[26] Nothing in letter of credit law, however, suggests that anything less than the traditional requirements for an injunction must be satisfied.27 The hardest requirement to satisfy for parties seeking injunctive relief in letter of credit cases is that they have no adequate remedy at law, and failure to cross this threshold "often serves to bar the account party's relief".[28] In most letter of credit transactions, the account parties' losses are financial - not appropriate for injunctive relief, as they can seek money damages for a beneficiary's misconduct in the underlying transaction.[29]

In order to understand the fraud exception to the independence principle, one must be familiar with the decision in *Sztejn v. J. Henry Schroder Banking Corp.*,[30] on which U.C.C. Section 5-114(2) was based. In *Sztejn*, the court upheld the right of an issuing bank to refuse a demand in the event of fraud. Although recognizing that the letter of credit is independent of the primary contract between the buyer and seller, the *Sztejn* court reasoned that "the principle of the independence of the bank's obligation under the letter of credit should not be extended to protect the unscrupulous seller."[31]

The seller in *Sztejn* was obligated to ship fifty crates of bristles from India to New York, but instead "filled the crates with worthless material with the intent to simulate genuine merchandise and defraud plaintiff..."[32] The seller presented documents to the issuing bank, claiming to have shipped the genuine bristles. The court found that notwithstanding the independence of the letter of credit from the underlying contract between the buyer and seller,

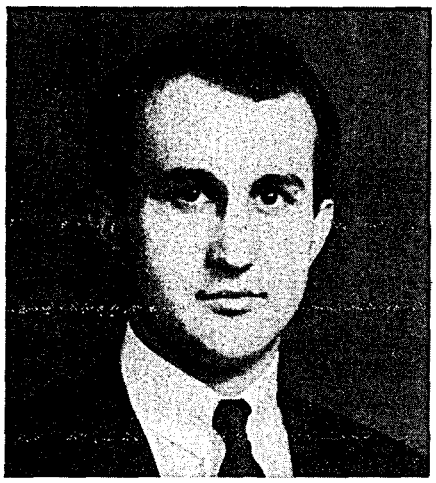
> No hardship will be caused by permitting the bank to refuse payment where fraud is claimed, where the merchandise is not merely inferior in quality but consists of worthless rubbish, where the draft and the accompanying documents are in the hands of one who stands in the same position as the fraudulent seller, where the bank has been given notice of the

fraud before being presented with the drafts and documents for payment, and where the bank itself does not wish to pay pending an adjudication of the rights and obligations of the other parties. While the primary factor in the issuance of the letter of credit is the credit standing of the buyer, the security afforded by the merchandise is also taken into account. In fact, the letter of credit requires a bill of lading made out to the order of the bank and not the buyer. Although the bank is not interested in the exact detailed performance of the sales contract, it is vitally interested in assuring itself that there are some goods represented by the documents.[33]

Letters of credit will continue to enjoy a hallowed reputation as vehicles for the advancement of commerce. Lawyers cannot prevent others from engaging in the fraudulent behavior which reduces the effectiveness of letters of credit. However, an attorney's careful attention to the terms constituting the letter of credit, as discussed in this article, can provide a measure of protection against unscrupulous parties.

* * *

Constraints of space make it impossible to include the author's extensive footnotes, but the numbers to these footnotes appear. The full footnotes will be available upon request to the offices of this magazine.



Francis G. X. Pileggi, a frequent contributor to this magazine, received his B.A. from St. Joseph's University and his J.D. degree from Widener University School of Law. Mr. Pileggi is a member of the Delaware, Pennsylvania, and New Jersey Bars and practices with the Wilmington firm of Pileggi, Pileggi & Pileggi.

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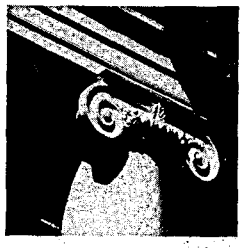

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CHARLES SLANINA

Policing Professionalism

Webster's defines "professionalism" as "the conduct, aims, or qualities that characterize or mark a profession or a professional person."[1] However, it is not Webster but the Delaware Supreme Court that defines the profession and practice of law in Delaware. "This Court, alone, has the responsibility for licensing and disciplining persons admitted to practice law in Delaware. This tenet is of historic proportions, having been transplanted to Delaware by the colonists. It is based on the concept, taken from England, that the courts possess the exclusive right to govern the practice of law."[2]

The practice of law requires hard work and effective management of the two resources the profession has to offer: time and knowledge.

The Court exercises this authority through its regulatory arms. These include the Commission on Mandatory Continuing Legal Education, the Trustees of the Clients' Security Trust Fund, the Board of Bar Examiners, the Board on the Unauthorized Practice of Law, and the Board on Professional Responsibility. These agencies, all funded by assessments levied on the bar by the Court, effect the Court's governance of the profession. Without the use of any state revenue, the profession makes reasonably certain that the public is served by competent counsel operating within the ethical and procedural guidelines created by the Court.

The price for this privilege of self-regulation is a duty to perform these policing functions in such a manner as to instill and maintain public confidence. In states where the bar has not been successful in maintaining this trust, that role has increasingly been assumed by the legislature. In California, state judges preside in a state-run disciplinary system enforcing disciplinary rules enacted by the legislature. "Lawyer self-regulation has been defended both as traditional and as necessary for effective service to the public. The primary argument is that lawyers, like physicians and others in the specialized professions ..., practice in a highly technical and esoteric area. Moreover, nonlawyers should trust lawyers to exercise broad perspective and a public spirit when engaged in self-regulation. Because lawyers themselves are uniquely qualified to bring their specialized knowledge to bear in diagnosing professional problems and applying effective cures, any attempt by outsiders to share in professional regulation dooms the public service of lawyers to arbitrary and probably hurtful regulation."[3]

Perhaps no regulatory function of the Court receives more public attention than the disciplinary system. The investigatory and enforcement arm of the Court and the Board on Professional Responsibility is the Office of disciplinary Counsel. As a successor to the volunteers of the former Censor Committee, the Disciplinary Counsel and Deputy Disciplinary Counsel handled over 500 complaints in 1990. This figure increases each year as the bar approaches 2,000 members and the public grows both more litigious and consumer rights oriented. As a quantitative measure of the Court and the bar's commitment to the process, the annual assessment for the

Illustration by Kevin Plottner

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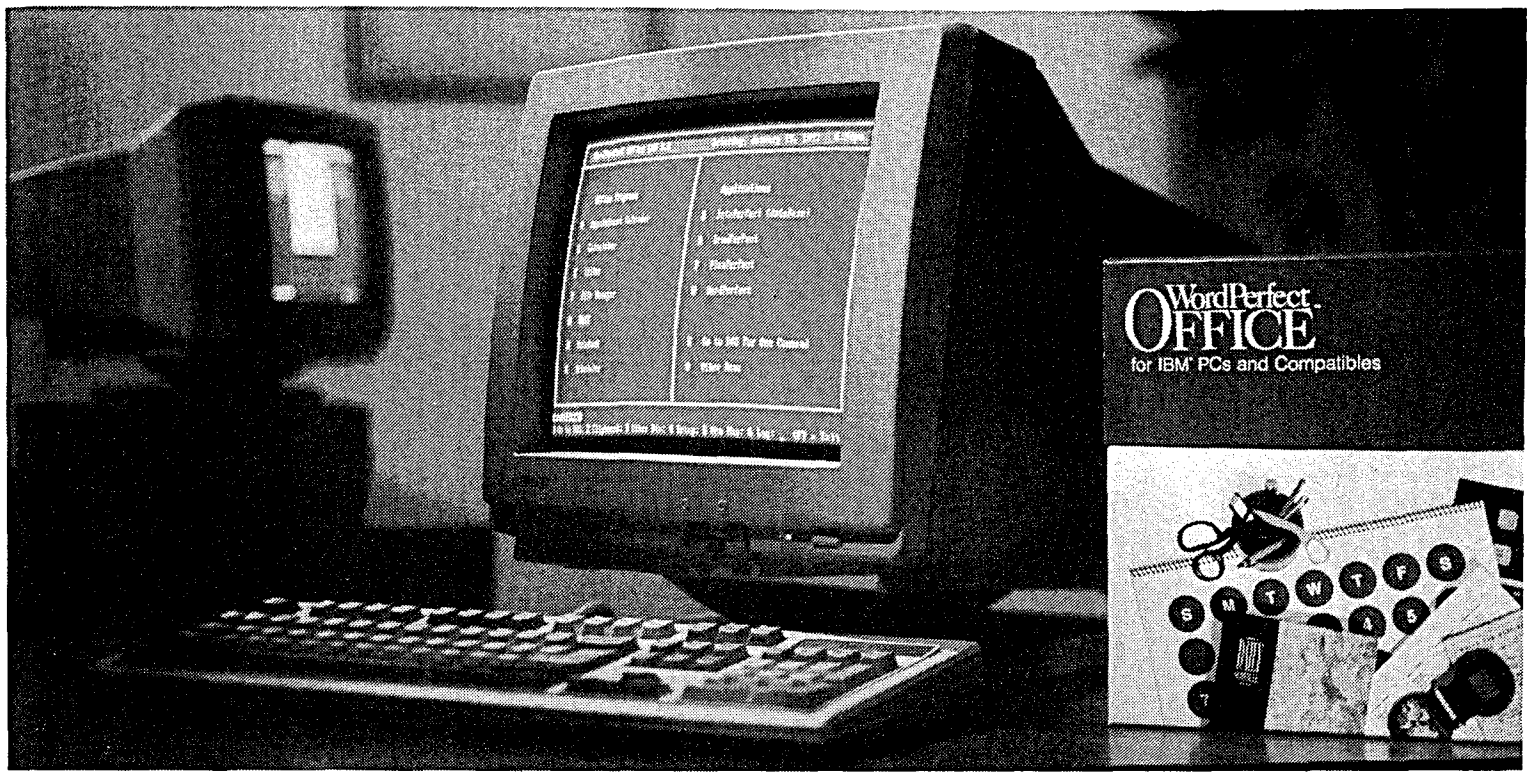

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Board on Professional Responsibility was recently increased to afford the Office of Disciplinary Counsel an operating budget of approximately $225,000.00. In addition, a full-time Deputy Disciplinary Counsel was hired.[4]

The procedure for the handling of these complaints is found in the Rules of the Board on Professional Responsibility. The substantive rules enforced by the Office of Disciplinary Counsel are the Delaware Lawyers' Rules of Professional Conduct. Those rules, practically speaking, require little of attorneys that is not already required by other law — the law of crimes, torts, contracts, property, agency, evidence. They do however, contain some additional requirements, serve an educational function, and impose an entirely new sanction for violations of other laws.[5] Complainants are requested to reduce their grievances to writing, using a form provided. Special arrangements are made for complainants under a disability, including physical limitations or English illiteracy. Pursuant to Board Rule 9(a), allegations are treated as true and evaluations are made as to whether they constitute violations of the Delaware Lawyers' Rules of Professional Conduct. If so, matters are docketed as Rule 9(b) investigations. Any matter so docketed must be presented to a panel of the Preliminary Review Committee for dismissal, approval of a Petition to Discipline, or authorization for a private admonition. The respondent, as the accused attorney is then called, can reject such a private admonition and demand a hearing before the Board on Professional Responsibility. Both the Preliminary Review Committee and the Board on Professional Responsibility sit in panels including two (2) attorneys and one (1) non-attorney. All members of both panels are appointed by the Court.[6]

From the Respondent's point of view, the first notice of a complaint is often a letter from the Office of Disciplinary Counsel. Unless the circumstances suggest other means, the accused attorney is provided with a copy or synopsis of the complaint and requested to submit a written response within a given time. A copy of that response is sent to the complainant for comment. Quite often, this attorney-client communication, albeit forced, is enough to resolve the complaint. If not, the office can and does take whatever steps necessary to conduct an evaluation or investigation. They have included, but are not limited to, interviews of the complainant, attorney, and witnesses, subpoenae for documents, records, or the client file, review of the court record, and in the rate instance, the hiring of private investigators or accountants.[7]

Should the Board on Professional Responsibility conclude by clear and convincing evidence after a hearing that misconduct has occurred, a panoply of sanctions is available.[8] Those sanctions, provided for by Rule 8(a) of the Rules of the Board on Professional Responsibility, can include private and public admonitions, probation, suspension, disbarment, restitution, assessment of costs, and imposition of conditions. Various factors are weighed in imposing sanctions for attorney misconduct. The Court has cited with approval the use of the ABA Standards for Imposing Lawyer Sanctions.[9] Standard 3.0 states that the court should consider the duty violated, the lawyer's mental state, the actual or potential harm to the client, and the existence of aggravating or mitigating factors. Aggravating circumstances can include prior disciplinary offenses, lack of cooperation with the disciplinary proceedings, lack of contrition, failure to make restitution, and substantial experience in the practice of law. ABA Standard 9.2. Mitigating circumstances can include the absence of a prior disciplinary records, absence of a dishonest or selfish motive, physical, emotional, or mental problems, restitution, remorse and rehabilitation, and inexperience. The Court has specifically recognized alcoholism as a mitigating factor. *In Re Clyne,* Del. Supr., 581 A.2d 1118 (1990).

Pursuant to Rule 9(e), the Respondent may file objections to the Board's report. Actions of the Board, including dismissal of the complaint are reviewed by the Court and briefing and oral arguments are common. With respect to factual matters, the Court determines whether the record contains substantial evidence to support the Board's findings.[10]

Without question, the most common complaints relate to attorney-client communication. Approximately half of the 500 complaints a year include client laments that "My attorney won't return my phone calls!" or "It's been months since I heard from my attorney and I don't know what's going on in my case!" While these complaints on the surface might constitute violations of DLRPC 1.4, (requiring reasonable and adequate attorney-client communication), experience has shown that this infraction can be a "red flag" to additional concerns over the attorney's conduct. All too often, the investigation of complainst about inadequate communication uncovers underlying lack of diligence.

In 1990-1991, there were six (6) public disciplines imposed. Three (3) attorneys were sanctioned for neglect. *In Re McCann,* Del. Supr. No. 235, 1991 (7/5/91), public reprimand. *In Re Tos,* Del. Supr., 576 A.2d 607 (1990), 1 year suspension; and *In Re Clyne,* 581 A.2d 1118 (1990), neglect and misrepresentation to the Court resulted in disbarment. Three other attorneys were sanctioned for criminal conduct. *In Re Brewster,* Del. Supr., 587 A.2d 1067 (1991), disbarred after a federal conviction and imprisonment for fraud; *In Re Higgins,* Del. Supr., 582 A.2d 929 (1990), disbarred after conviction and imprisonment for theft of client funds; and *In Re Christie,* Del. Supr., 574 A.2d 845 (1990), three year suspension after convictions for sexual offenses.

In the same period, ten (10) private admonitions were imposed. Six (6) attorneys were sanctioned for, among other offenses, neglect. In all, sixteen (16) attorneys were sanctioned for thirty-two (32) violations of ten (10) disciplinary rules reflected in the list below:

Rule 1.3 Diligence ... 10 violations
1.4 Communication ... 6
8.4 Misconduct ... 7
8.1 False Statement or Failure to Respond to Disciplinary Counsel ... 3
3.4 Fairness to Opposing Party or Counsel ... 2
1.15 Safekeeping Property ... 2
5.5 Assisting in the Unauthorized Practice of Law ... 2
5.3 Supervising Nonlawyer Assistants ... 1
1.1 Competence ... 1
1.16 Declining or Terminating Representation ... 1

Nine (9) sanctioned attorneys were practicing in small firms (1-4 attorneys). Three (3) were working in medium sized firms (4-12 attorneys), and one (1) was in a large firm (12 or more attorneys). Two (2) attorneys were not practicing law at the time of their misconduct.

The reasons given by sanctioned attorneys for their lack of diligence or neglect of client matters are harder to quantify. In some instances, the excuses tendered include the inability of the attorney to effectively manage the demands on his or her time or the sheer

volume of client matters that the attorney was asked or compelled to handle. A depressed economic climate and increased competition only exacerbate a reluctance to turn away clients and potential income. Similarly, attorneys take on client matters outside of their usual area of practice solely for business reasons. Not knowing how to proceed, and not having the time to learn or the willingness to ask, the attorney lets the "problem file" find its way further and further toward the back of the credenza. By the time a complaint is filed and the Office of Disciplinary Counsel subpoenas the file, I suspect that the file has required both a retrieval from under the credenza and a good dusting.

The practice of law, whether as a solo practitioner, or member of a law firm, government or corporate service, requires hard work and the effective management of the two resources the profession has to offer: time and knowledge. While some attorneys undeniably err simply out of greed, ignorance, and mistakes in judgment, most enter the disciplinary process because of personal factors that interfere with attorneys' ability to apply time and knowledge in the practice of their profession. Emotional illnesses and substance abuse problems are the most frequently claimed factors cited in mitigation of attorney misconduct involving neglect of client matters.

The Delaware State Bar Association sponsors the Lawyer Assistance program to assist impaired attorneys. The Delaware Supreme Court, evidencing a proactive concern for maintaining the integrity of the profession, has afforded the members of this committee the privilege of confidentiality by exempting them from the requirements of Rule 8.3 of the Delaware Lawyers' Rules of Professional Conduct.[11] In addition, the Court has created a revolving fund to loan impaired attorneys the funds necessary to seek treatment.

"To declare yourself a lawyer is to profess more than knowledge or experience of legal work. It is, in effect, to claim that you have the education lawyers are supposed to have, passed the tests lawyers are supposed to pass, that you have made the commitments lawyers are supposed to make. Among those commitments is the commitment to act in accordance with a code of ethics...."[12]

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Court has set those standards, established those tests, demanded that commitment, and created such a code. As the Scope note to the Delaware lawyers' Rules of Professional Conduct states, "Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings." In the final analysis, the duty of policing professionalism individually and collectively rests upon each of us.

For further reading on the topic of Professional Responsibility, the following texts are available:

1. *Modern Legal Ethics,* Charles Wolfram, West Publishing Company, 1986.
2. *The Law of Lawyering,* Geoffrey Hazard, Jr. and W. William Hodes (2 volumes), Prentice Hall, 1990
3. *ABA/BNA Lawyer's Manual on Professional Conduct,* 1991.
4. *Problems in Professional Responsibility.* Andrew L. Kaufman, Little Brown and Company, 1984.
5. *Legal Ethics,* Raymond Wise, Matthew Bender, 1970.
6. *Digest of Delaware Disciplinary Cases,* Office of Disciplinary Counsel, 1991.

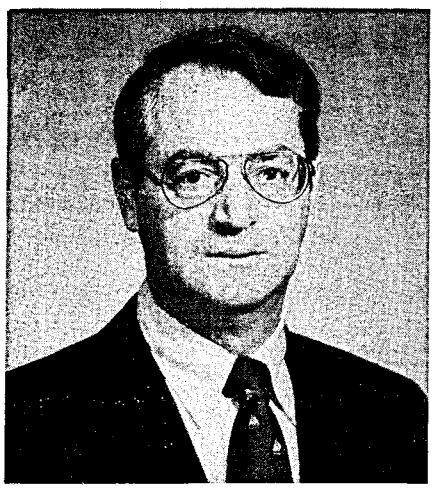
(FOOTNOTES)

1. *Webster's Seventh New Collegiate Dictionary,* Merriam Webster (1967).
2. *Delaware Optometric Corp. v. Sherwood,* Del. Supr., 128 A.2d 812, 816 (1957); *Delaware State Bar Association v. Alexander,* Del. Supr., 386 A.2d 652, 654 (1978); *In Re Green,* Del. Supr., 464 A.2d 881, 885 (1983).
3. *Modern Legal Ethics,* Charles W. Wolfram, West Publishing Company, 1986 (Page 20).
4. Supreme Court rule 62.
5. *Modern Legal Ethics,* Charles W. Wolfram, West Publishing Company, 1986 (Page 49).
6. Supreme Court Rule 62.
7. Board on Professional Responsibility Rule 3(b).
8. Board on Professional Responsibility Rule 15.
9. *In Re Br[illegible]* Del. Supr., 587 A.2d 1067, 1070 (1991).
10. *In Re Higgins,* Del. Supr., 565 A.2d 901, 906-907 (1989); *In Re Lewis,* Del. Supr., 528 A.2d 1192, 1193 (1987); *In Re Kennedy,* Del. Supr., 472 A.2d 1317, 1326, *cert. denied,* 467 U.S. 1205 (1984); *In Re Reed,* Del. Supr., 429 A.2d 987, 991 (1981); *In Re Clyne,* Del. Supr., 581 A.2d 1118 (1990). On questions of law, the Court's scope of review is plenary. *In Re Berl,* Del. Supr., 540 A.2d 410, 413 (1988); *In Re Clyne,* Del. Supr., 581 A.2d 1118 (1990).
11. DLRPC Rule 8.3. Reporting Professional Misconduct.
12. Michael Davis, "Professionalism Means Putting Your Profession First", 1988 *Georgetown Law Review* 342, Summer 1988.

Charles Slanina became Disciplinary Counsel in October, 1989. His previous experience in the Office of the Attorney General has served him well in his performance of this important professional office, essential to public confidence in the integrity of the bar and its members' commitment to preserve that integrity. Mr. Slanina graduated from the University of Delaware in 1976 and from Columbus School of Law, Catholic University in 1979. We hope that this, his auspicious first appearance in these pages, will be one of many.

WALSH *(continued from page 17)*

NOTE: This article originally appeared, in expanded form, in the October, 1990 issue of *Courts, Health Science and the Law*, a collaborative publication of the Georgetown University Medical and Law Centers.



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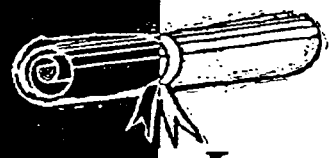

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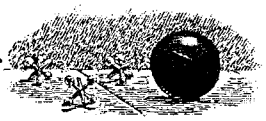
invaluable information. Like your  biggest hope, worst nightmare, and just about everything in between. And whether we're using this particular

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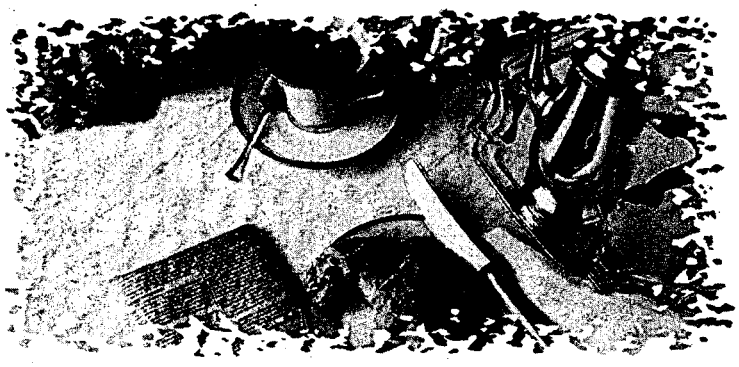

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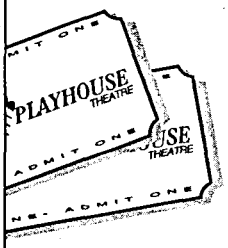

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leaves little time or incentive to develop friendships, either within or without the law firm. Many lawyers feel that they have become cogs in a legal assembly line, with little opportunity to demonstrate either their learning or their initiative.

In addition, great demands are being made by law firms on the personal time of their lawyers, and these demands are causing serious strain upon their family life. According to surveys of the Young Lawyers Division of the American Bar Association, job dissatisfaction of lawyers in private practice rose dramatically between 1984 and 1990, and especially so among female practitioners. However, the stress and strain of law practice has affected all lawyers. A study published in 1990 by Johns Hopkins University reported that lawyers have the highest depression rates of any group in the work place — 10%, which is more than twice the rate in the general population.

Older lawyers recall the time when lawyers viewed themselves as officers of the court, when it was rare to challenge a lawyer's integrity, and when personal attacks seldom were heard no matter how hard cases were fought. It was a time when it was unusual for lawyers to move from one firm to another. It was a time when the law firm acted more as a family unit than as a business enterprise. It was a time when the underlying interest in the study of law was one of public service and when the extent of the lawyer's financial return was incidental to the profession.

The air of professional antagonism and hostility has affected no less than this land's highest court. One would think that the Justices of the United States Supreme Court would demonstrate the epitome of correct behavior, content to meet intellectual challenges with persuasive and reasoned opinions, employing logic and clarity. At times, however, the Justices of the Court cannot resist exhibiting ridicule and scorn in opposing the points of view of other Justices of the Court.

Thus, in *Federal Energy Regulatory Commission v. Mississippi,* 72 L.Ed.2d 532, 561 (1982), Justice O'Connor found the majority's legal analysis to be an "absurdity". In *Webster v. Reproductive Health Services,* 106 L.Ed.2d 410, 445, 448, 463 (1989), Justice Scalia said that Justice O'Connor's position "cannot be taken seriously" and was "irrational", and Justice Blackmun responded that not in his memory had a

plurality on the court "gone about its business in such a deceptive fashion" and that the plurality had invited "charges of cowardice and illegitimacy". In *Burnham v. Superior Court of California,* 109 L.Ed.2d 631, 641 (1990), Justice Scalia "could only marvel at Justice Brennan's assertion". In *Harmelin v. Michigan,* 115 L.Ed.2d 836, 877 (1991), Justice White questioned whether Justice Scalia "really means what he says", and in *McNeil v.*

If our United States Supreme Court Justices deem cutting criticism to constitute acceptable comment, then lawyers can hardly be censured for their uncivil behavior toward each other.

Wisconsin, 115 L.Ed.2d 158, 175 (1991), Justice Stevens complained that the majority, "of course", was "quite wrong" and its fears were "grossly exaggerated".

These judicial references are hardly a model of courtesy and decorum for either young or old lawyers to emulate. If our United States Supreme Court Justices deem cutting criticism to constitute acceptable comment, then lawyers can hardly be censured for their uncivil behavior toward each other. Somewhere, the cycle must be broken.

In Delaware, the legal community historically has enjoyed a tradition of a close and warm professional relationship. Nevertheless, the adverse effect of the behavioral revolution in this country has not stopped at state lines. For that reason, and in an effort to prevent or at least arrest any deterioration in professional relations here, a Bar Association committee, chaired by Edmund N. Carpenter, II, was appointed to develop a Statement of Principles of Lawyer Conduct. The statement was drafted, endorsed by the Bar Association Executive Committee, and, on Nov-

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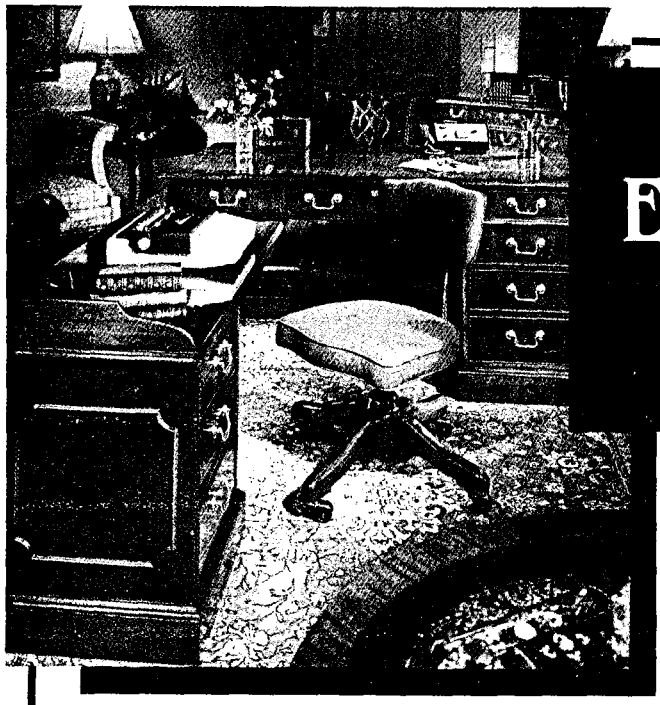

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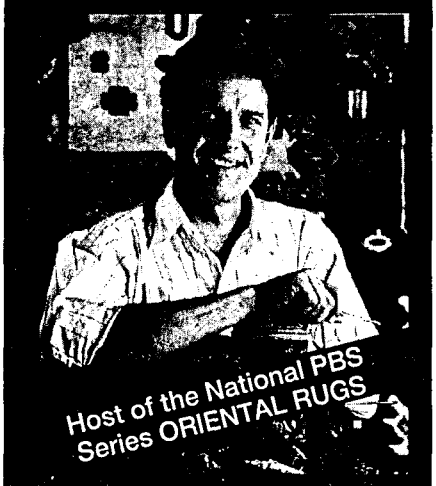

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ember 15, 1991, adopted by the Bar Association membership.

The statement is for the guidance of Delaware lawyers and of those out-of-state lawyers associated with them. Since it is aspirational, the statement does not impose formal standards of professional care or competence. Rather, it seeks "to promote and foster the ideals of professional courtesy, conduct and cooperation." It encourages general principles of integrity, compassion, learning, civility, diligence, and public service, qualities that mark the most admired members of the profession. It also discusses the responsible choice of forum and content of papers, pre-trial procedures, settlement, appeal, and out-of- state associate counsel. The statement is a start and a useful point of reference.

If the legal profession is to continue to set high standards for the society in which we live, it is the mandate placed upon each lawyer to demonstrate a firm commitment to public service and to advance those qualities of character long identified with our profession. While the Courts, the Bar Association, and other legal organizations can assist in the effort to develop and promote those standards, only the sum of our own individual actions will, in the final analysis, be effective in restoring and retaining full public confidence.

Mr. Rubenstein, President of the Delaware State Bar Association, and a Director of Delaware Bar Foundation, has been a contributor to this magazine for many years. His most recent appearance in these pages was as guest editor of the December 1991 issue celebrating the Bicentennial of the Bill of Rights.

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2 Trust your instincts. If you're being asked to do something that doesn't seem just right, turn down the business.

3 Be careful who you hire. You are responsible for the acts of your partners, associates, and employees. Period!

4 Don't keep a client you can't handle. If your client has outgrown your capabilities, be smart enough to recommend another firm. And, if you can no longer trust a client—withdraw!

5 Avoid misunderstandings. Use engagement and disengagement letters. Agree on what has to be done and what it will cost. Once fees have been established bill regularly.

6 Know your client's problems. You are trained to ascertain the facts and analyze them. Use this skill *before* accepting representation.

7 Go back to school. Continuing education courses can be very important to you.

8 Don't be a nice guy. It is not a required standard in your profession to be nice. Be professional. Even when it involves giving the client unhappy news.

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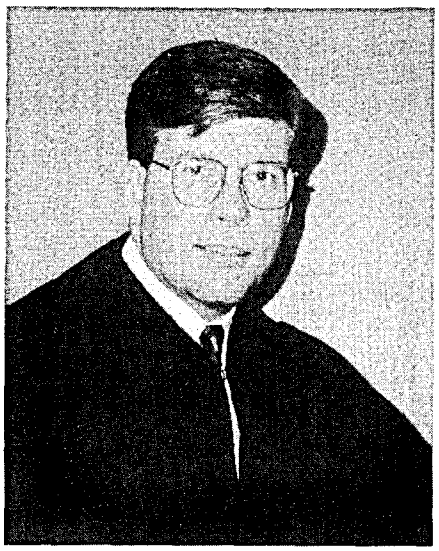

Henry duPont Ridgely is the President Judge of the Superior Court of Delaware, and, in that capacity, must lead that vital institution to ever higher levels of expedition in doing justice.

(FOOTNOTES)

1. *Declaration of Rights and Fundamental Rules of the Delaware State*12 (September 11, 1776).
2. Delaware Constitution, Art. I, 9 (1792)(1831)(1897).
3. Supreme Court Rule 54.
4. Delaware Lawyers' Rules of Professional Conduct Rule 3.2.
5. Delaware Judges' Code of Judicial Conduct Canon 3A(5).
6. Lawyers Conference Task Force on Reduction of Litigation Cost and Delay, *Defeating Delay: Developing and Implementing a Court Delay Reduction Program*, xiii (1986).
7. The January 16, 1991 Criminal Administrative Order was effective April 1, 1991. The April 11, 1991 Civil Administrative Order was effective June 1, 1991.
8. *Trial Court Performance Standards With Commentary* (NCSC, 1990). Standard 2.1 articulates the following performance standard: "The trial court accepts and complies with recognized guidelines for timely case processing while, at the same time, keeping current with its incoming caseload."
9. Projections by the Administrative Office of the Courts of caseload trends for Superior Court through FY 1996 are as follows:

	Criminal	Civil	Total
FY 1992	7,829	6,665	14,494
FY 1993	8,585	7,092	15,677
FY 1994	9,342	7,520	16,862
FY 1995	10,099	7,947	18,046
FY 1996	10,856	8,375	19,231

By 1996, the total caseload is projected to be double what it was in FY 1988 (then it was 9,340).

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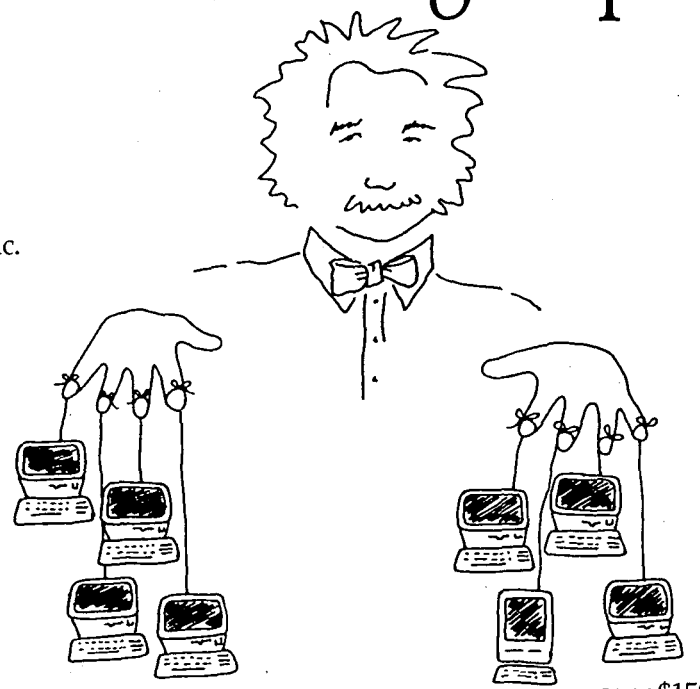

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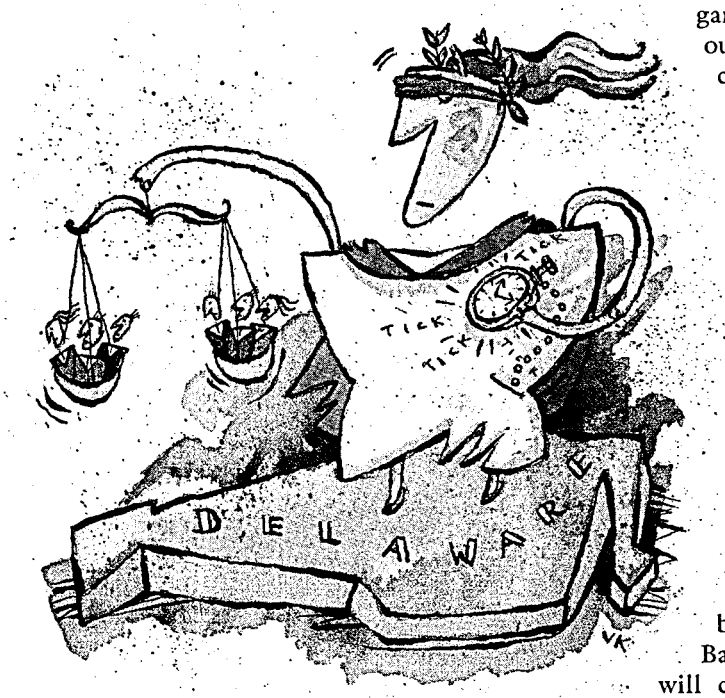

As officers of the court, members of the Delaware Bar have played and will continue to play active roles in each of these important initiatives, each of which is premised upon or individual obligations as lawyers and judges to expedite litigation and to hold its cost to a reasonable level. By reducing delay and expense consistent with the circumstances of each case, Delaware judges and lawyers assure the equal treatment of litigants, timely dispositions, an improved quality of the litigation process, and a higher level of public confidence in the court system.

A measured expansion of judicial resources is essential if we are to keep pace with the number of cases requiring trial.

I. Our individual obligation to defeat unreasonable delay and expense finds its roots in the Delaware Constitution, our official oaths, and our professional ethics. Since at least 1776 the people of Delaware have recognized the basic right to justice "speedily without delay according to the law of the land."[1] Each succeeding Constitution of Delaware has guaranteed each person's right to have "justice administered according to the very right of the cause and the law of the land without sale, denial, or unreasonable delay or expense."[2] All new Delaware lawyers at the time of their admission to the Delaware Bar swear or affirm to support these important rights within our Constitution and further not to "delay any person's cause through lucre or malice."[3] As lawyers we have an ethical obligation to "make reasonable efforts to expedite litigation consistent with the interests of [the] client."[4] The Delaware Judges' Code of Judicial Conduct obliges judges to "dispose promptly of the business of the court."[5]

Lay persons may not know the citations for these rights and our individual obligations to honor them, but unreasonable delay and expense directly bears upon their confidence in the courts and in lawyers generally. The Lawyers Conference Task Force on Reduction of Litigation Cost and Delay has observed:

> In the minds of most of the general public, lawyers and the law are closely associated with the actions of the courts. Excessive costs and delay in the disposition of civil cases devalue judgments, cause the memories of witnesses and parties to fade, cause litigants to accept less than full value for their claims, prolong and exacerbate differences between people or entities, and make pursuing legal remedies prohibitively expensive for many people. In a word, the

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public's perception is that excessive costs and delay render the law and lawyers incapable of performing the basic services for which they exist.[6]

By choosing to be legal professionals we commit ourselves to providing what the public expects of us — prompt and affordable justice.

II. Superior Court has acted upon its resolve to provide prompt and affordable justice by establishing sustained criminal and civil case delay reduction programs through two administrative orders.[7] Each contains our statement of policy:

> From the commencement of a civil action (or a criminal action) to its resolution by trial or settlement, any elapsed time other than reasonably required for pleadings, discovery, and court events is unacceptable and must be eliminated. To enable just and efficient resolution of cases, the Superior Court shall control the pace of litigation.

Our administrative orders correctly presume that delay is neither inevitable nor an unsolvable problem for the courts.

Goal setting comes before any achievement. Case delay reduction is no exception. Delay can be eliminated by a constancy of purpose to meet reasonable goals and time standards for each stage of litigation. Consistent with the Chief Justice's *Speedy Trial Directive* for criminal cases and to expedite both criminal and civil cases, the Superior Court has adopted within the administrative orders the American Bar Association's *Standards Relating to Court Delay Reduction* (1984). These standards provide in part that:

> 90% of all criminal cases shall be adjudicated or otherwise concluded within 120 days from the date of arrest, 98% within 180 days, and 100% within one year of arrest; and 90% of all civil cases should be settled, tried, or otherwise concluded within 12 months of case filing, 98% within 18 months, and the remainder within 24 months except for individual cases in which the Court determines that exceptional circumstances exist. At least 23 other states have adopted time standards. I believe this trend will continue. The adoption of recognized time standards has been proposed nationally as one measure of a trial court's performance.[8] We should and can comply with Delaware's time standards in individual cases by early and continuous control by the judges, the adoption of realistic schedules for the completion of case events through differentiated case management, and the setting of firm trial dates.

III. Experienced practitioners recognize that many disputes can and should be resolved without the filing of a lawsuit. The settlement of disputes without litigation has been promoted at least since Abraham Lincoln advised his fellow lawyers: "Discourage litigation. Persuade your neighbors to compromise whenever you can." Anecdotal evidence suggests that settlements without a court filing are now more rare than they used to be. A prospective litigant's first line of alternative dispute resolution is negotiation and settlement between the parties before litigation is commenced. Lawyers can affect the flow of litigation by heeding Mr. Lincoln's advice and by employing their individual settlement skills before commencing a lawsuit.

For those cases that must be filed, court-annexed alternative dispute resolution provides the opportunity for early, economical resolution of cases. Since 1984, the Superior Court's arbitration program has afforded an alternative to traditional litigation. The success of Civil Rule 16.1, "Compulsory Arbitration," is apparent from its record. Since the program began through fiscal year 1991, a total of 4,727 arbitration hearings have been conducted, and of these, 2,080 were concluded by the arbitrator's order. Of the 2,647 appeals *de novo*, 1,632 settled within six months of the appeal. During fiscal year 1991, 5,197 civil cases were filed. Sixty-three percent of these were processed through the arbitration program. Of the 975 arbitrators' orders filed during FY 91, 423 — 43 percent — were accepted as final dispositions. The average elapsed time from filing to disposition by arbitrators' orders was only 255 days. Because arbitration has worked so well, an expansion of the arbitration program to controversies over amounts up to $100,000 makes good sense.

Another form of ADR is mediation. Voluntary mediation is now available within a court-annexed program through Superior Court Interim Civil Rule 16.2. Mediation is a low-cost, no-risk alternative dispute resolution tool that has succeeded in other jurisdictions in a broad range of cases. Unlike arbitration, the mediator does not decide the case; he assists the parties in reaching a mutually acceptable settlement. "Settlement Week" is the popular name for a court-directed mediation program in which the bench and bar work together for a set period to reduce the backlog of pending civil cases. Mediators help the parties state their points of view, determine the issues, explore options for resolution, negotiate, and reduce any settlement to writing. Settlement Week conferences are unique opportunities to resolve cases. They should not be viewed as an extra hurdle or burden before trial. A Settlement Week program educates the public by encouraging early resolution of differences. It also may eliminate the reluctance of some to engage in open settlement discussions for fear of appearing weak. Even cases that do not settle during Settlement Week will benefit from the process. The parties may be more predisposed to settle later, and the case is better prepared for trial. Trial dates are more credible as the result of a reduced backlog.

IV. Many technologies commonplace in the business world have not been fully adapted for use in the court house. This must change. Innovative tools save everyone's time and money, increase productivity, and enable lawyers and judges to manage their caseloads better without diminishing the quality of justice.

An example of the adaptation of technology to our needs is the pilot project known as the Complex Litigation Automated Docket (CLAD), developed through a cooperative effort of judges and lawyers on the Superior Court Complex Litigation Committee. Documents, opinions, and orders are served and filed electronically without the need to photocopy, collate, bind, or physically serve them by mail or by messenger. *See* Superior Court Interim Civil Rule 79.1. The docket is available for on-line access by personal computer modems anywhere LEXIS is available. The cost savings for the litigants in these complex cases will be significant. The success of this innovative pilot project will prove invaluable to future efforts to expand remote access to court records and to reduce the cost of all litigation.

Other improvements already in place include the automation of the court's docket, expanded use of personal computers, and video arraignments. Within several months, local area personal computer networks within judges' chambers and other strategic offices are expected to be in place. These will improve our

access to case information, enhance case management by judges, improve case scheduling, and expedite the processing of court orders. Further techniques under consideration include courtroom administrative data input, filing by facsimile transmissions, bar-coded data entry, the expanded use of video technology, voice-processing technology, and improved telecommunications between the court, the bar, and the public. All have the potential to improve the administration of justice by reducing delay and expense. To assist the Superior Court in achieving its goal of adapting emerging technologies for courthouse use, I intend to appoint a court technology advisory committee consisting of members of the bar and other knowledgeable persons.

V. No matter how effective a court becomes in managing its docket, there will always be cases that must be tried before a judge and a jury. As our total caseload grows,[9] so will the need for judges and juries to try them, even with the availability of alternative dispute resolution methods. The superior Court was last enlarged in 1988 when two judges were added. Since then, our criminal case filings have grown by 61 percent, and our civil case filings are up by 27 percent. If the number of judges were indexed to case filings, Superior Court would now have 21 judges instead of 15. In addition to our case delay reduction programs, a measured expansion of judicial resources is essential if we are to keep pace with the number of cases requiring trial. Additional judges will permit the credible scheduling of more trial dates for more cases. The Delaware Superior Court Study Committee has reported to the Long Range Courts Planning Committee that the General Assembly should authorize two additional judgeships immediately, in light of Superior Court's current and projected workload. This sound and conservative recommendation should be followed. These additional judges will help the Court fulfill its responsibility to try the cases which must be tried without unreasonably delay.

* * *

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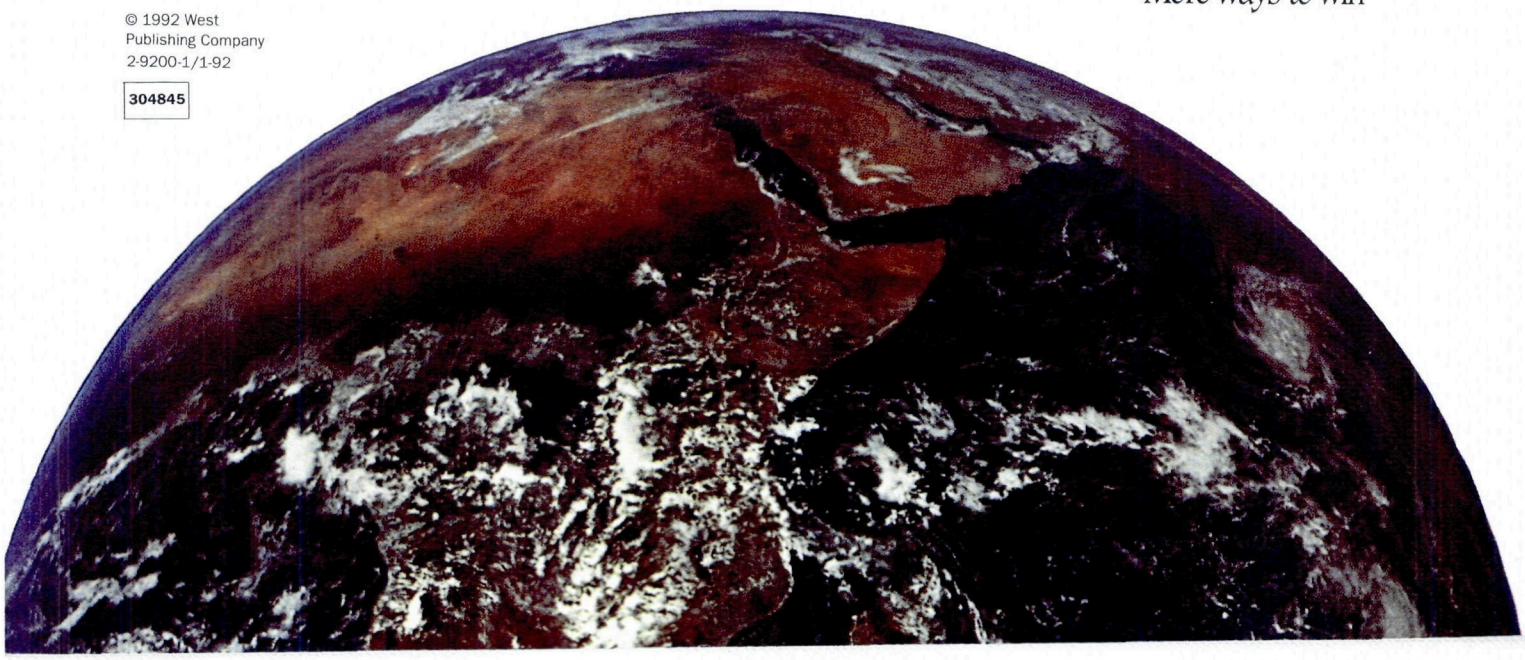
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