DELAWARE LAWYER

A PUBLICATION OF DELAWARE BAR FOUNDATION

Volume 12 Number 4 $3.00 Winter 1994

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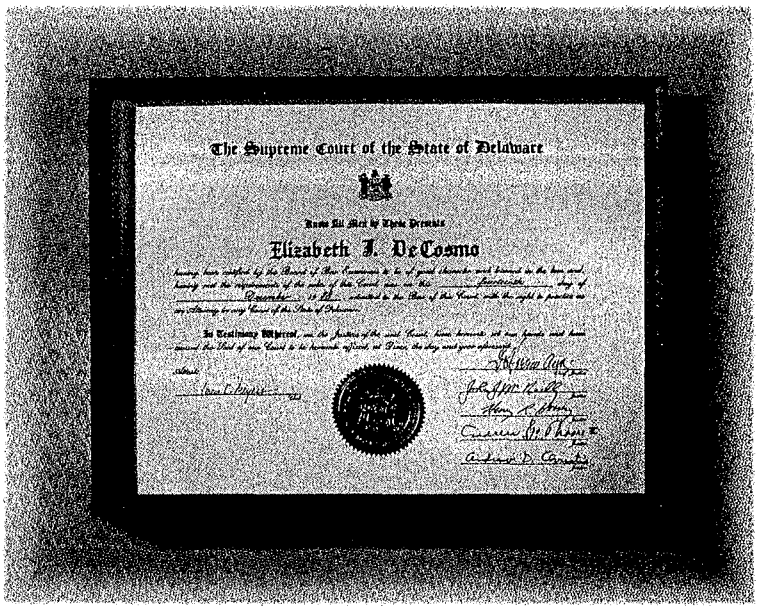

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DELAWARE LAWYER
A publication of Delaware Bar Foundation
Volume 12, Number 4
1225 King Street
Wilmington, Delaware 19801

Editorial inquiries should be directed to:

DELAWARE LAWYER
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c/o Suburban Marketing Associates, Inc.
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201 N. Walnut Street, Suite 1204
Wilmington, Delaware 19801

Address changes, subscription orders, requests for information about advertising should be directed to:

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Telephone inquiries to (302) 656-8440

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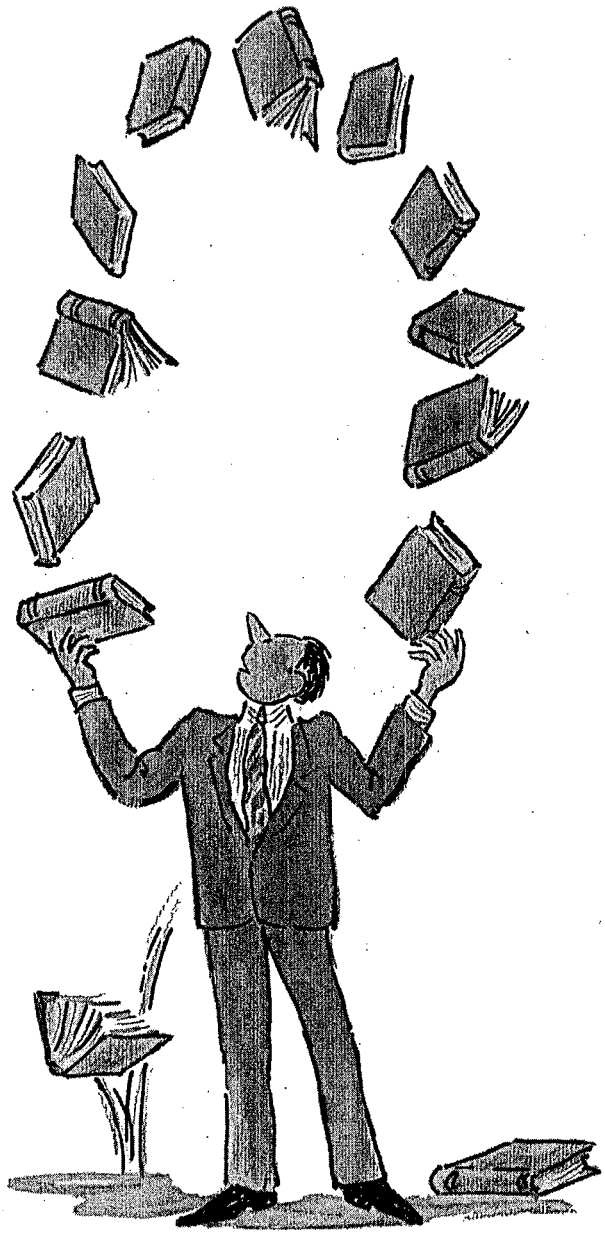

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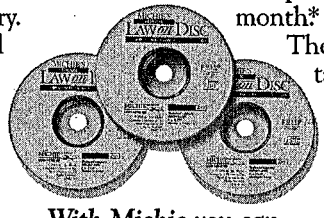

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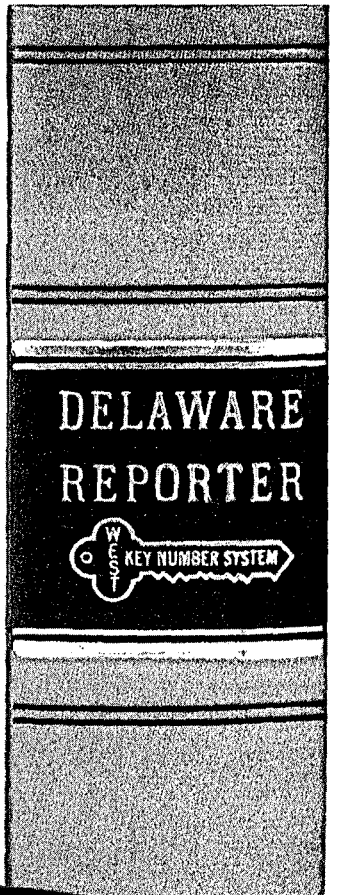

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EDITORS' PAGE

Past issues of Delaware Lawyer have been written primarily by practicing members of the Delaware bar. In the Winter 1994 edition, we decided to "turn the tables" and offer the members of the judiciary a forum to write on topics of their choosing. When we inquired about potential interest among current and former judges, the response was most gratifying. Nine members of the bench have taken the time to enlighten, inspire and entertain the members of the bar by writing articles about a variety of topics — such as the ethical foundations of our profession, an historical perspective of the judicial appointment process, the role of the judiciary in society's efforts to combat crime, and lessons that we can learn from some of the past and present luminaries of the Delaware bench.

We would like to thank each of the authors who contributed to this edition of Delaware Lawyer. We especially appreciate their contributions in light of their considerable judicial responsibilities and their pressing time commitments.

It has been a pleasure for us to work with these judges, and it gives us great pride to offer you a selection of articles that we consider to be of the highest scholarly and literary quality. Unlike judicial opinions, which by necessity must disappoint one side or the other, we believe this issue of Delaware Lawyer will satisfy our entire readership.

Vernon R. Proctor Elaine C. Reilly

CHIEF JUSTICE E. NORMAN VEASEY

IT IS TIME TO GIVE CREDIT

The editors asked members of the judiciary to write something of the author's choosing. I find myself writing so many serious pieces of ponderous prose that it was clear to me that a repeat of the same would be unwelcome and unread. We all do so much "heavy lifting" in our professional lives that I doubt anyone would be interested in a pedestrian piece from the Chief Justice as part of the special judiciary issue of *Delaware Lawyer*. We have too many "preachments" about this and that by voices from "on high." It is time that we all stepped back a little and gave some credit.

Why not give a hand to the lawyers who do all that pro bono work by slogging around the Justice of the Peace Courts, the Court of Common Pleas, the Municipal Court, the Family Court, and other courts, asserting rights of the disadvantaged? And what about the judges of our courts who listen carefully and seriously to "small" or tedious factual and legal issues which are of vital importance to the people involved in those cases? They all deserve our praise.

Why not give a hand to Deputy Attorneys General and Assistant Public Defenders who move the clanking machinery called the Criminal Justice System to achieve justice in most cases? The same is true for the judges of the Superior Court as well as the judges of the other courts already mentioned and the law enforcement agencies which are part of that system.

And what of the Court of Chancery and the Supreme Court? The Chancellor, Vice Chancellors, and Supreme Court Justices have a well-deserved, glittering national reputation for steady business law decisions. The same is true of the Superior Court. Yet, all these courts have heavy caseloads in business law and a variety of other legal fields. All of that earns for the judges of all our courts the acclaim which keeps Delaware in the forefront of the nation's judiciary.

The members of the Delaware Bar likewise enjoy a superb national reputation, not only in business law, but also for their professionalism. To be sure, we have a few lawyers who are unethical, unprofessional, or worse. But they are a small minority. The majority of competent Delaware practitioners continue to lead by example and continue to practice the art of mentoring other lawyers.

Finally, let me say that the Judicial Branch could not get the job done without the backing of the General Assembly and the Governor. I come in regular contact with judges and lawyers (distinguished and ordinary) from around the world. They universally praise the skill, civility, efficiency, and fairness of our Judiciary and our Bar. But they also admire the legislative and executive branches of Delaware government.

"Pride" is probably regarded as sinful. Yet I'll take that risk and say that I'm very proud of our state, its people, its government, its courts, and its lawyers. Delaware is a jewel. We should never forget it and never take it for granted.

We need to continue to reach out to the disadvantaged; nurture the victims; protect the rights of the accused; always seek diversity and racial and gender fairness; and keep up our skills, excellence, professionalism, and integrity.

Chief Justice Veasey, who has held his judicial position since 1992, is the current Chair of the Section of Business Law of the American Bar Association. ◆

Illustration by Elfen Santos

JUSTICE JOSEPH T. WALSH

Some Observations on a Changing Profession

Nature teaches us that change is inevitable. Whether it be the relentless aging process or the perennial change of seasons, nothing remains as it was.

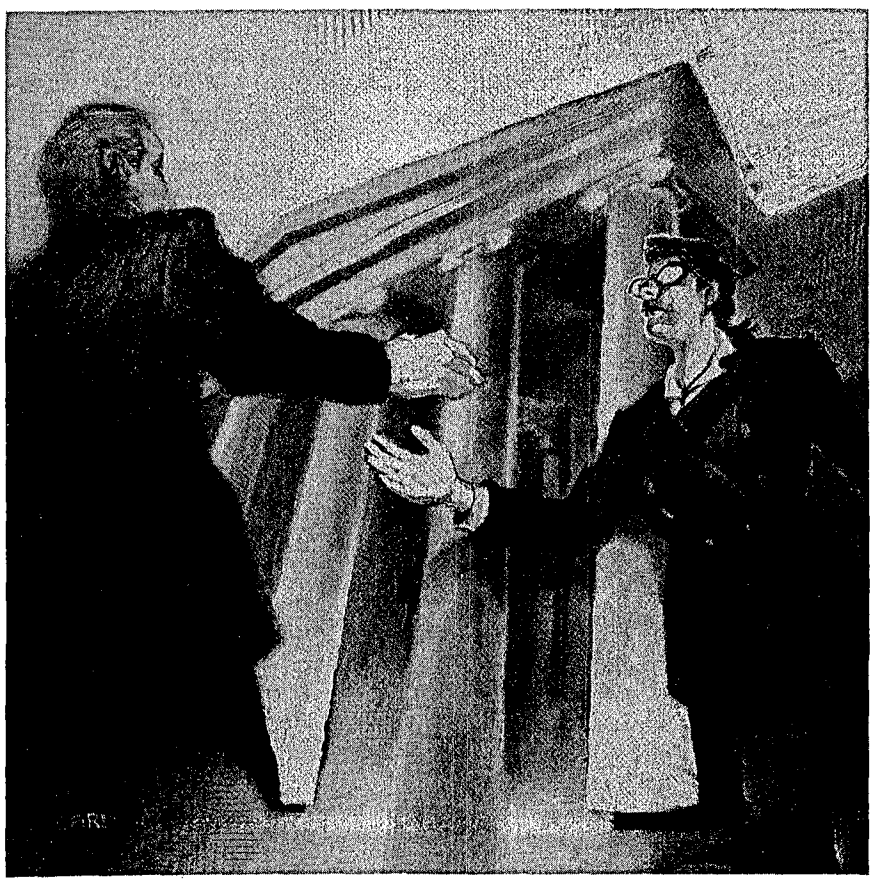

Illustration by Alan Carr

The attorney's function as "counselor" is often ignored in today's litigious society.

Institutions and professions also change, at times gradually, almost imperceptibly, over the course of centuries, at other times in such a short span of time that the observer is startled by the "before and after" contrast. Perhaps in no other profession has change come so quickly and, to some, traumatically, as in the legal profession. As a 40-year member of that profession, with 22 years of judicial experience, I claim more than a casual interest in these changes. Some of what I see portends well for the future of the profession, but much is disturbing and cause for concern.

Much is written and discussed about the "image" of lawyers. Our detractors are legion and our defenders, outside the profession, few. To the vast majority of lawyers who work long hours to advance the interests of their clients, much of the criticism seems unfair. Critics of the profession make no effort to direct their scorn at the deserving few on an individualized basis but deal in generalities and broadsides. But however unfair the criticism, perception is important, and the common depiction of lawyers as money-grubbing ambulance chasers is difficult to dispel.

In a sense, it is ironic that the legal profession should carry the image of shabby ethics. From law school through bar admission, familiarity with ethical standards is mandatory. Once admitted to the bar, lawyers are subject to an imposing formal code of ethics, which is enforced by their peers at the Bar and on the Bench. It is fair to say that no other profession, certainly in Delaware, provides the level of promulgation and enforcement of ethical standards as does the legal profession. Yet our image continues to suffer.

Perhaps the problem is that while the ethics rules may provide a series of prohibitions with supporting sanctions, they do not serve to elevate the aspirations of the profession. Why should we be concerned with aspirational goals? Unlike other professions, such as accountants or engineers, lawyers are deeply involved in a public undertaking—the administration of justice. Even those lawyers who view themselves as serving the private interests

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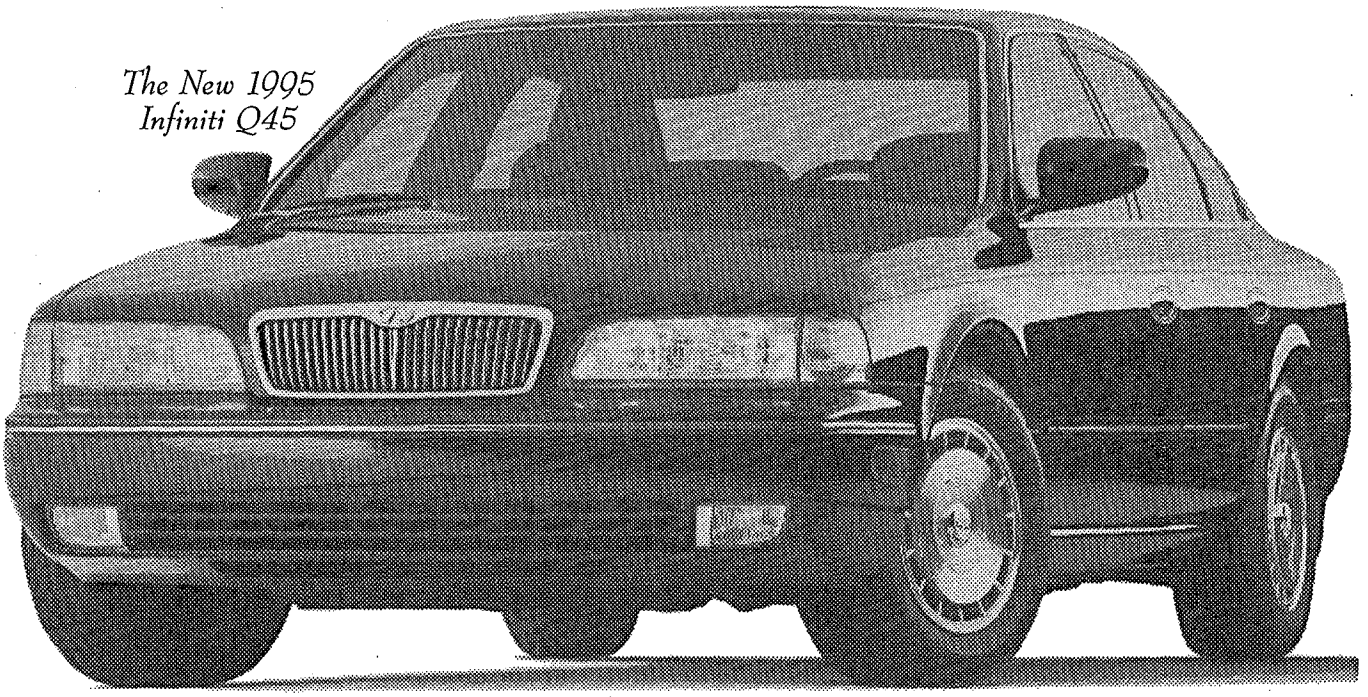

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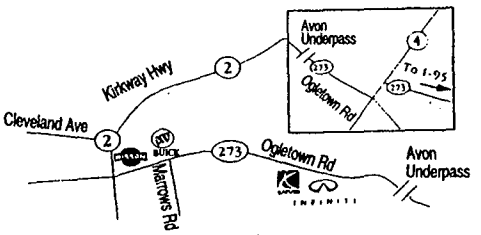

of their clients in commercial transactions ultimately must look to and apply legal standards which emanate from the justice system. Thus, all lawyers must be aware that their profession is closely related to the larger public goal of a fairly administered justice system. As a class, lawyers have been afforded the right to exercise certain quasi-governmental powers in the administration of justice. As officers of the court, they enjoy the right to plead another's cause—the right of representation which other citizens do not enjoy.

Despite the unfavorable public image, the profession continues to attract new members in record numbers and, if one were to measure the health of a profession by the affluence of its most successful practitioners, one would have to conclude that the legal profession today is fit indeed. The income of many lawyers, from partners to first-year associates, has grown to levels of genuine affluence when measured against the earnings of others in the work force.

Lawyer-bashing, of course, is not new and, historically, much of the criticism of lawyers has resulted from their necessary involvement in controversial and unpopular causes. The lawyer is often the lightning rod for the controversial cause whose spokesman he or she is. And, as lawyers, we know that there is usually a loser as well as a winner in litigation, and sometimes even the winner is not pleased with the cost and delay attendant upon the result.

But, rationalizations aside, this is not simply a public relations problem, and it surely is no answer that other professions are also suffering from tarnished images. Perhaps we are paying an ethical price for our material success. Two concepts which are embedded in the history of our profession seem to have been shunted aside today. I refer to conscience and counseling.

Although a lawyer is entitled to be compensated for his skill or knowledge and even may base his charge on the result achieved, his or her conscience is not for sale. Legal ethics is not something the profession suggests—it is demanded. But the Rules of Professional Responsibility provide a minimum standard for the formation of a lawyer's conscience. One can adhere to the letter of these Rules and still engage in sharp practices, lack of civility, minimal preparation of cases and fee abuses. Moreover, despite the vigilance of the Court and of Disciplinary Counsel, all violations will not be discovered. Each lawyer must be his or her own disciplinary guide by remembering that identification with a client's cause does not permit one to compromise a duty to the Court or to the administration of justice itself. Despite the popular impression that the most aggressive lawyer is the one most in demand, a lawyer is not free to "do anything" to advance a client's cause.

Each lawyer must be his or her own disciplinary guide by remembering that identification with a client's cause does not permit one to compromise a duty to . . . the administration of justice itself. Despite the popular impression that the most aggressive lawyer is the one most in demand, a lawyer is not free to 'do anything' to advance a client's cause.

The second neglected aspect of our profession which deserves comment is that of counseling. There was a time in the not-too-distant past, and certainly in the memory of senior members of the profession, when it was commonplace for lawyers to use the designation "ATTORNEY AND COUNSELOR AT LAW." The use of the term "counselor" implies an advisory role which some might belittle as passive and lacking market appeal in today's litigious society. A lawyer who seeks to counsel his client to avoid litigation might even be viewed as non-productive by those practitioners who measure success by hours billed and by litigation box scores.

The title "counselor" may also appear out of step with the modern trend that witnesses law firms hiring marketing advisors to guide their sales efforts in a profession which annually spends more than 90 million dollars on advertising. Yes, I know that advertising is a protected form of commercial free speech, but must the members of our profession exercise every constitutional right regardless of the image it projects? Must we resort to being just another business in order to sell our product? Since when have lawyers been more concerned about the exercise of their rights than about the resultant message of hucksterism that such activity conveys to our society? Our primary obligation as lawyers is to advance the rights of others and not to insist on advancing our own economic interests to the detriment of a noble and learned calling.

The lawyer's unique position as an officer of the Court provides a perspective which enables the lawyer to counsel concerning the avoidance of litigation. Failure to do so not only disserves the interests of the client but demeans the profession. Arbitration and mediation are as much professional undertakings for a lawyer as is litigation, and our profession owes it to our complex society to resolve disputes with a minimum of expense and acrimony.

Lest these comments be interpreted as a gloom-and-doom assessment of our profession, let me add a positive note. I still see in many young lawyers a genuine desire to become part of a helping profession, through public service and representation of those who cannot otherwise afford competent counsel. The acceptance by our profession of women into our ranks, in growing numbers and with increased responsibility in the organized bar and in the judiciary, is an affirmation that our profession is taking the lead in gender fairness. But much needs to be done in achieving greater minority participation. This may be the most daunting challenge for our profession in the next century.

Our profession is ailing, but the illness is not fatal. A good dose of conscience might just be the right medication for a return to health. If the restoration of better ethical standards and less commercialism results in a less affluent profession, the price might be well worth paying.

Justice Walsh, one of the few Delaware jurists to have served on all three constitutional courts, offers a unique perspective on the status of our profession. ◆

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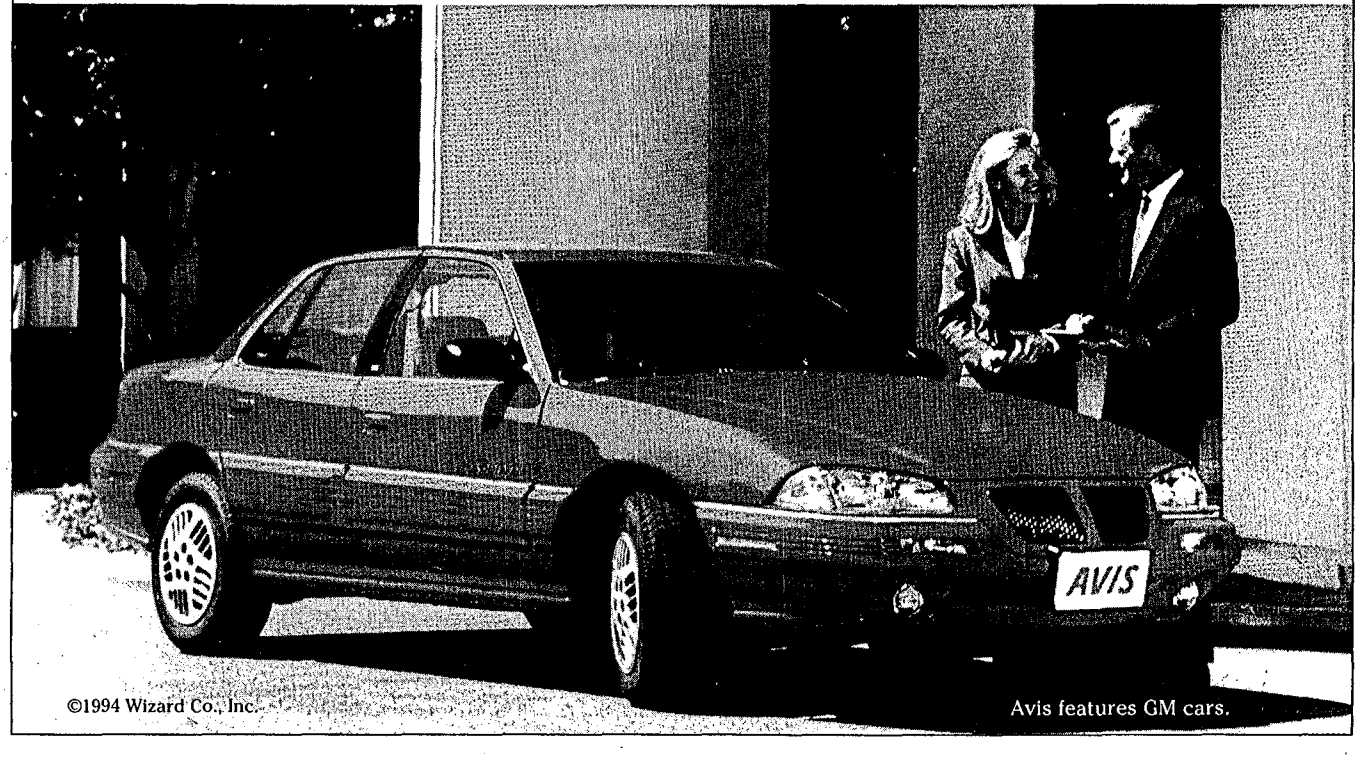

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JUSTICE RANDY J. HOLLAND

Justice Henry Ridgely Horsey

Lengthening A Legendary Legal Legacy

The Bench and the Bar will continue to applaud Justice Horsey's tenure on the Delaware Supreme Court, as well as his life of community service, for years to come.

The history of Delaware is inexorably connected to the illustrious family history of Justice Henry Ridgely Horsey. The Delaware Supreme Court sits on the Dover Green near the Ridgely House, where Justice Horsey has resided for the past thirty years. Justice Horsey's family is the seventh generation of descendants of the Ridgelys of Dover to live in that same house on the Dover Green since 1767. He has carried on a family tradition of law and public service that spans 250 years.

Justice Horsey's Ridgely ancestors who preceded him as residents of the Ridgely House include: Dr. Charles Greenbury Ridgely, son of Judge Nicholas Ridgely, a member of the Colonial and State Legislative Assemblies, and a delegate to the First State Constitutional Convention in 1776; Nicholas Ridgely (the younger), son of Dr. Charles Ridgely and a member of the convention that ratified the Federal Constitution in 1787, a delegate to the second State Constitutional Convention from 1791 to 1792, Attorney General of Delaware from 1791 to 1801, and Chancellor of Delaware from 1801 to 1830; Henry Moore Ridgely, half-brother of Nicholas, lawyer and founder of the Farmers Bank of Delaware, three times Secretary of State of Delaware, Delaware's Representative in Congress from 1811 to 1815, and Delaware's United States Senator from 1827 to 1829; Edward Ridgely, an eminent jurist and Delaware's Secretary of State from 1859 to 1863; and his son and the grandfather of Justice Horsey, Henry Ridgely Jr., lawyer and banker, President of the Farmers Bank from 1918 until his death in 1940.

The most comprehensive history of Justice Horsey's ancestors was edited by his grandmother, Mabel Lloyd Ridgely, and published in 1948. It is a compilation of letters written by the Ridgely family from 1751 to 1890. The book is dedicated to Justice Horsey and his recently deceased sister, Lloyd, whose youngest son carries on the farming tradition near Dover at "Eden Hill", founded by Judge Nicholas Ridgely and his wife, Mary Middleton Vining, in 1749. The dedication reads: "to my grandchildren, Phillipa Lloyd Horsey and Henry Ridgely Horsey, . . . who like the group growing up at Eden Hill in the 1790's have affectionate concern for those around them and reverence for the traditions of their forefathers."

The words of dedication by his grandmother accurately describe Justice Horsey's life on and off the Court. When those words were written in 1948, Justice Horsey was in his third year at Harvard College. His education had been interrupted in 1943 on his graduation from the Loomis School when he was called into military service at age 18. Justice Horsey served for three years in the United States Army, first in the infantry and later in the combat engineers, with two years in the European Theater.

Soldiers from Delaware, including others in Justice Horsey's family, had been leaving from The Green in Dover to fight for their country since the time of the Revolutionary War. After the Revolutionary War, his ancestors had returned to The Green to ratify the United States Constitution in 1787 and to write the Delaware Constitution of 1792. Thereafter, those Constitutions and Delaware's laws were interpreted and enforced by a distinguished succession of judges and

lawyers from Justice Horsey's family, including Delaware's second Chancellor, Nicholas Ridgely.

During Justice Horsey's service in World War II, Professor Daniel Boorstin, then of the Harvard Law School and later the Librarian of the Library of Congress, was compiling and editing Chancellor Ridgely's notebook, so that much of the judicial precedents established during Delaware's early statehood would be preserved.

Following Justice Horsey's discharge in 1946 as a sergeant from the U. S. Army, he resumed his formal education, attending Harvard College and Harvard Law School, from which he graduated in 1952. Justice Horsey may have been aware that his ancestor's opinions were then being collected and edited for publication by the Law School, but the thought of a judicial career did not then occur to him.

Justice Horsey was admitted to the Delaware Bar in January 1953. He practiced law in Wilmington as an associate and then as a partner of the firm of Berl, Potter & Anderson, now Potter Anderson & Corroon, from 1953 until 1962. From 1962 to 1965, Justice Horsey was a trust officer and Assistant Vice President of the Wilmington Trust Company. Following the death of his grandmother Ridgely and his inheritance of the Ridgely House on the Dover Green, Justice Horsey returned to Dover to live and practice law in 1965. He served there as a Deputy Attorney General of the State of Delaware for several years; as a sole practitioner until 1969; and then as a partner in the Dover office of Morris, James, Hitchens & Williams until 1978.

Sixteen years ago, the Delaware Supreme Court was expanded from three Justices to five. Justice Horsey began his first term as a Justice on that historic occasion in 1978. How appropriate: almost two hundred and fifty years earlier, when Delaware was known as the three lower counties, his ancestor, Nicholas Ridgely, of Eden Hill Farm, was a Judge of the Supreme Court of the three lower counties.

Justice Horsey authored more than 200 published opinions. Those opinions have been studied in law schools throughout the country, have been the subject of many law review articles, and have been cited with approval by many courts, including the United States Supreme Court. Justice Horsey has written leading opinions in all areas of the law, ranging from applications of Delaware's corporation code to its death penalty statute. His opinions reflect not only his intellect but the integrity with which he has preserved the principles which his forefathers helped to instill in both the Delaware and the United States Constitutions.

Justice Horsey has authored more than 200 published opinions, many of which have been studied in law schools throughout the country, have been the subject of law review articles and have been cited with approval by many other courts, including the United States Supreme Court. All of Justice Horsey's opinions evidence his awareness of the competing and often fundamental individual interests at issue.

Justice Horsey's opinion in *Riley v. State* became the format for the seminal holding by the United States Supreme Court which prohibits race-based peremptory challenges in criminal proceedings. See *Batson v. United States*, 476 U.S. 79 (1986), citing *Riley v. State*, Del. Supr., 496 A.2d 997 (1985). Many of Justice Horsey's opinions are landmark decisions with regard to principles of corporate governance. See, e.g., *Paramount Communications, Inc. v. Time Inc.*, Del. Supr., 571 A.2d 1140 (1989) and *Levine v. Smith*, Del. Supr., 591 A.2d 194 (1991). All of Justice Horsey's opinions evidence an awareness of the competing and often fundamental individual interests at issue. See *Garrison v. Medical Center of Delaware*, Del. Supr., 581 A.2d 288 (1989).

However, Justice Horsey has preserved family traditions in more than just a legal setting. Perhaps the foremost legacy of Justice Horsey's ancestors is a commitment to family. The Ridgely letters, compiled by Justice Horsey's grandmother, reflect lives of loving family devotion. None of his forefathers was more committed to his family than is Justice Horsey. His love is returned by all his relatives, especially his wife, Ann, his children and his grandchildren.

Justice Horsey is happiest when surrounded by family. His adult children, Henry, Jr., Edmond, Therese, Ridgely and Revell, visit many times throughout the year. Justice Horsey, Ann, and their young children, Robert and Elizabeth, are virtually inseparable. Justice Horsey also remained close to his late sister, Lloyd, and her children. Given the rich heritage, it's remarkable to be able to say that the ties of Justice Horsey's family have never been stronger in two hundred and fifty years.

Justice Horsey is likewise admired and respected by his colleagues on the bench, his law clerks, and the members of the Delaware Bar. He has supported his colleagues with his industry, integrity, intellect, and good humor. They all gathered, past and present, to honor him upon his reappointment in 1990. He has served as a tireless mentor to his law clerks, most of whom assemble periodically from around the country to honor him.

Justice Horsey's love for the law and his family has not precluded him from considering others. In her dedication, Justice Horsey's grandmother mentioned his forefathers' concerns for others. That concern, which Justice Horsey has shared, is reflected in his opinions. But his commitment to others transcends the law: it is reflected in his community involvement.

Justice Horsey has continued his family's tradition of service and generosity to the University of Delaware by establishing a charitable remainder unitrust. Justice Horsey made this gift in honor of his father, Harold Wolfe Horsey, a member of the 1917 graduating class of the University of Delaware. This gift will be used to provide scholarships for deserving students from Kent and Sussex Counties who attend the University of Delaware.

The breadth of Justice Horsey's social conscience has also been evident when the environment has been threatened in Dover and Rehoboth.

Justice Horsey has had the courage of his convictions and the strength of character to step forward to preserve the environment for future generations. His concern for the lives of others has been equal to his concern for the liberty of others.

Delaware is fortunate that Justice Horsey chose to preserve the traditions of his family. But it is even more fortunate that he chose to perpetuate those values on the Delaware Supreme Court. For sixteen years, Justice Horsey served the State of Delaware with distinction.

Justice Horsey has written leading opinions in all areas of the law, ranging from applications of Delaware's corporation code to its death penalty statute. His opinions reflect not only his intellect but the integrity with which he has preserved the principles which his forefathers helped to instill in both the Delaware and the United States Constitutions.

Justice Horsey's grandmother concluded her book with a letter addressed to Justice Horsey and his sister. It reads: "Ridgely House, Dover, The Green, January, 1948. My Dear Grandchildren, This book is for you.... I could add a moral to adorn the tale but I do not think it's the mission of elders to preach. Theirs is to sit on the spectators' bench and watch the present game. Theirs is to applaud when there is an outstanding play. So many of your age made these plays that my palms ache from so much clapping."

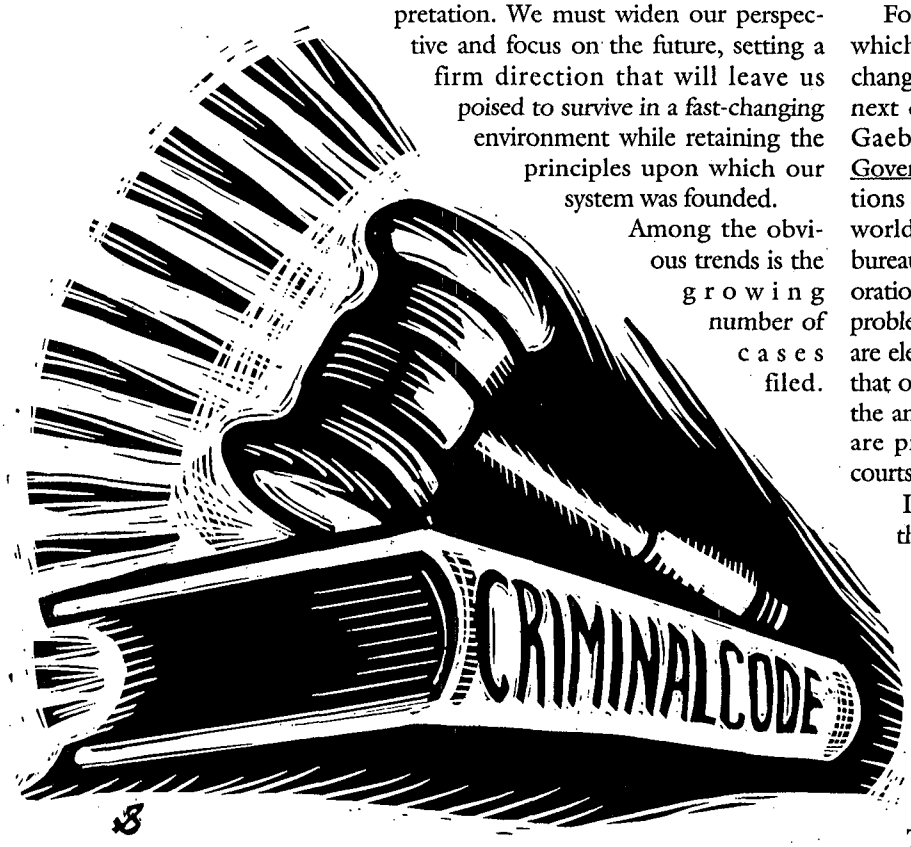
The Bench and the Bar will continue to applaud Justice Horsey's tenure on the Delaware Supreme Court, as well as his life of community service, for years to come.

Justice Holland, a member of the Supreme Court since 1986, formerly practiced law in Sussex County. ◆

HONORABLE MYRON T. STEELE
& THOMAS J. QUINN

Trends Toward Community Justice

There are a number of trends affecting our system of justice which will converge before the year 2000. Unfortunately, jurisprudence takes its direction from the past, from case precedents, legislative intent, and constitutional interpretation. We must widen our perspective and focus on the future, setting a firm direction that will leave us poised to survive in a fast-changing environment while retaining the principles upon which our system was founded.



Among the obvious trends is the growing number of cases filed. The fear of crime and violence is expected to continue, and more arrests mean more cases placed on the judicial threshold. This trend will run headlong into the resource limitations that will be required by budget constraints. No longer can the courts or other agencies of justice expect to take greater than their share of the modest growth available in the state coffers (from FY1987 to FY1994, the Delaware general fund budget increased 46 percent, while the judiciary budget increased 52.9 percent). The public will demand greater efficiency, requiring fundamental changes in the way justice is dispensed.

Fortunately, other trends are surfacing which should help progressive judicial change agents meet the demands of the next century. David Osborne and Ted Gaebler, in their book Reinventing Government, predict that the organizations that survive in this fast-changing world will reflect more flexibility, less bureaucracy, more interdisciplinary collaboration, and greater emphasis on solving problems closer to the source. These traits are elements of community justice models that offer hope for dealing effectively with the anticipated caseload growth, and they are principles which should drive the courts' preparation for the future.

In the restorative model, the victim is the paramount concern and the process is geared to making the victim whole, using the offender as the vehicle wherever possible. Ancient cultures, as shown by such statutes as the Babylonian Code of Hammurabi (1700 B.C.) and the Laws of Ethelbert in Kent, England (c. A.D. 600), viewed crime as an intensely personal event. The offense was considered principally a violation against the victim. Thus, ancient cultures held offenders and their families responsible to settle accounts with victims. Justice aimed to restore relationships.

The Norman invasion of Britain in 1066 marked the beginning of a paradigm shift, a turning away from the understanding of crime as a victim-offender conflict within the context of

Illustration by Stephanie Shieldhouse

the community. William the Conqueror and his descendants found the legal process an effective tool for centralizing their own political authority. They effectively replaced local systems of dispute resolution: anything that violated the peace was interpreted as an offense against the king, and offenders were thus subject to royal authority. Under this new approach, the king became the paramount "victim" and denied the real victim any meaningful place in the justice process. The system focused on upholding the authority of the state — a system that survives today.

Despite more punishment, more prisons, and harsher laws, the public today remains frustrated and fearful. We must recognize that justice is more than punishment, and we must create a new foundation upon which to build our future system of justice. We may find that foundation in the principles of restorative justice, or community justice.

Advocates of restorative justice propose a new approach that 1) defines crime as injury to victims, 2) includes all parties in the response to crimes, and 3) addresses the injuries experienced by all parties as well as the legal obligations of offenders. Preliminary research suggests that "restorative" approaches to justice may serve as effective alternatives to incarceration. Alternatives, which often cost far less than prison, hold offenders accountable to repair damage to both victim and community. According to Dr. Mark Umbreit of the University of Minnesota, victim-offender mediation results in higher levels of victim satisfaction; increased payment of restitution; increased perception of fairness; and reduction of fear among crime victims.

Victim-offender mediation began anew in the United States in Elkhart, Indiana, in 1978. By 1989, there were at least 171 such programs in the United States. Some states have systematically attempted to divert cases from the formal court process. In 1981, the New York State Legislature established the Community Dispute Resolution Centers Program (CDRCP). Currently, there are dispute resolution centers in all 62 New York counties, through contracts with non-profit agencies. Tennessee has also recently attempted to institutionalize community-based mediation. Tennessee's Victim-Offender Mediation Center Act of 1993 makes appropriations to victim-offender mediation centers to provide forums in which people may voluntarily participate in the resolution of disputes in an informal and less adversarial atmosphere. There have been recent initiatives in a number of states (Florida, Montana, Idaho, Wisconsin, Oregon) to establish restorative justice initiatives within their juvenile justice systems, and the Minnesota Department of Corrections has hired an advocate for victim-based restorative justice.

Despite more prisons and harshers laws, the public is frustrated and fearful. We must recognize that justice is more than punishment and create a new foundation upon which to build our future justice system. We may find that foundation in the principles of "restorative" or "community" justice.

The traditional legal institutions are beginning to take notice as well. An ABA "Forum on Just Solutions" was held in May 1994. It included a number of panels and discussions that included restorative and community-based approaches to justice.

In Delaware, there have been a number of initiatives in place for some time, and a few noteworthy additions of late:

• Community Work Service has been a sentencing option for both juvenile and adult offenders for over 20 years. Convicted offenders perform work for non-profit community or governmental agencies. Offenders placed in these programs are generally charged with misdemeanor crimes, although some may be charged with non-violent felony crimes as well.

• In 1981, a law required a judge to order restitution unless he or she stated on the record that it was not appropriate. The collection system, however, was and continues to be problematic, though significant steps have been taken in the last year. A Committee of the Sentencing *Accountability Commission* (SENTAC) determined, after a year of planning and testing, that a Centralized Collection System should be developed to have responsibility and authority over collection of all court-ordered payments. A test project completed with the help of the MBNA Corporation indicated that use of a computerized, proactive collection effort could increase the amount of collections as much as threefold. A manager has been hired and funds have been appropriated to automate the system.

• The goals of SENTAC include restoration of the victim as nearly as possible to his or her pre-offense status.

• A Family Court Victim-Offender Mediation Program in New Castle County officially began taking cases in spring 1992. The Delaware Council on Crime and Justice, a long-time advocate in the criminal justice system, administers the program. Since then, the program has received nearly 60 referrals. More than one-third have resulted in mediation and all of the mediated cases have been successfully completed, meaning that the agreement reached in the mediation has been fulfilled by the offender.

• The Kent County Community Justice Center is now operational. Funding provided through the Criminal Justice Council allows a coalition of community-based agencies (People's Place II, Inc., Dover Educational Center and Catholic Charities), working in conjunction with criminal justice agencies, to operate the pilot Community Justice Center. The staff has been hired and trained, 16 volunteer mediators have been trained, and the first cases were referred in September 1994. Cases are referred by the prosecutor as a form of "AG's Probation." That is, the defendant, by agreeing to enter this mediation process, waives "speedy trial" and is referred to the mediation center. The victim has to agree to this process. The case is initially referred by the police or the prosecutor and is then screened by the trained staff before the mediation process begins.

• This past spring, the Delaware Council on Crime and Justice received a grant from the Welfare Foundation to create a statewide center to advocate and to provide technical assistance to community-based programs addressing these

goals. This new capability should encourage the establishment of additional programs throughout the state.

• HB488 was introduced late in the legislative session. It is based on a Tennessee statute that provides funding to community-based, non-profit agencies to develop conflict resolution and victim mediation programs. It was too late in this session to act on this bill, but the bill may appear again next session, and should be supported.

Public Agenda Foundation completed a study entitled "Punishing Criminals: The People of Delaware Consider the Options." The specific alternative for community service was well-liked because it is seen as a way for offenders simultaneously to learn job skills; internalize the work ethic; benefit the community; provide symbolic restitution; and pay back the community. Similar studies in Minnesota and Canada have documented the public's willingness to accept increased community service and restitution.

The need for such community-based, informal mechanisms to resolve disputes and settle some crimes will become increasingly important as our state becomes more diverse and more densely populated, as is predicted. Further, the process empowers the victim to play a meaningful role in determining the outcome and will help address the legitimate demands of victim advocates in Delaware.

Many more victims and offenders must be given access to mediation if victim-offender mediation is to fulfill its well-documented potential and move from the margins to the mainstream of how we understand and respond to crime in our society. We must better educate the criminal justice system, the legislature, and the general public about this concept, assuring them that it is not inconsistent with incapacitating violent offenders. Through community-based infrastructure to support victim mediation, we can improve our ability to provide and manage community service by offenders. Such service is a logical extension of community policing. By integrating all elements of the community into the justice system at an early stage, we can expect more creative solutions, less costly processing, and improved justice. Delaware can be a leader in synthesizing these concepts in the immediate future.

Vice Chancellor Steele, who formerly sat on the Superior Court bench in Kent County, was a member of SENTAC. Mr. Quinn is the staff coordinator of SENTAC. ◆

JUDGE JOHN E. BABIARZ, JR.

Who's on First?

As lawyers vigorously representing our clients' interests, it is easy to become immersed in the heat of battle and to lose sight of the humor in a situation. Judge Babiarz offers this portion of an actual deposition transcript that came before him recently to remind us that sometimes we just have to laugh at ourselves.

By Mr. Costello:

Q. Can you point me to a particular provision in the insurance contract that supports that?

By Mr. Abbott: Which is the **"that"** in the question, that supports **what**? Unless we know what the **"that"** is, she can't answer the question.

Q. Do you understand the question?

By Mr. Abbott: Do you know **what** he's referring to when he says **"that"** in his question?

A. I assume it to be **this**.

By Mr. Abbott: Is **that** correct?

By Mr. Costello: I think the witness understands perfectly well. I think everybody in the room understands perfectly well **what** the question means.

By Mr. Abbott: Oh I don't think so.

By Mr. Costello: I think you're just being an obstructionist quite frankly.

By Mr. Abbott: Well I'm not and I think the record ought to reflect **that** for the past half an hour the tone **that** you've taken with this witness has been increasingly loud and hostile, and I think **that's** in an effort to intimidate the witness because you're not getting the kind of answers **that** you'd like, and I don't think **that** the witness deserves to be treated in **that** way. She's been very forthcoming, she's done a good job of telling you **what** she recollects and **what** she doesn't recollect, and you just have to live with **that**. I don't think you ought to be trying to intimidate the witness.

By Mr. Costello: I'm not trying to intimidate the witness and I'm sure if the witness felt intimidated she would say so.

By Mr. Abbott: Well I don't know **what** your basis is for **that**. If you can remember the question and if you think you know **what** he was referring to when he used

Illustration by Rick Altergott

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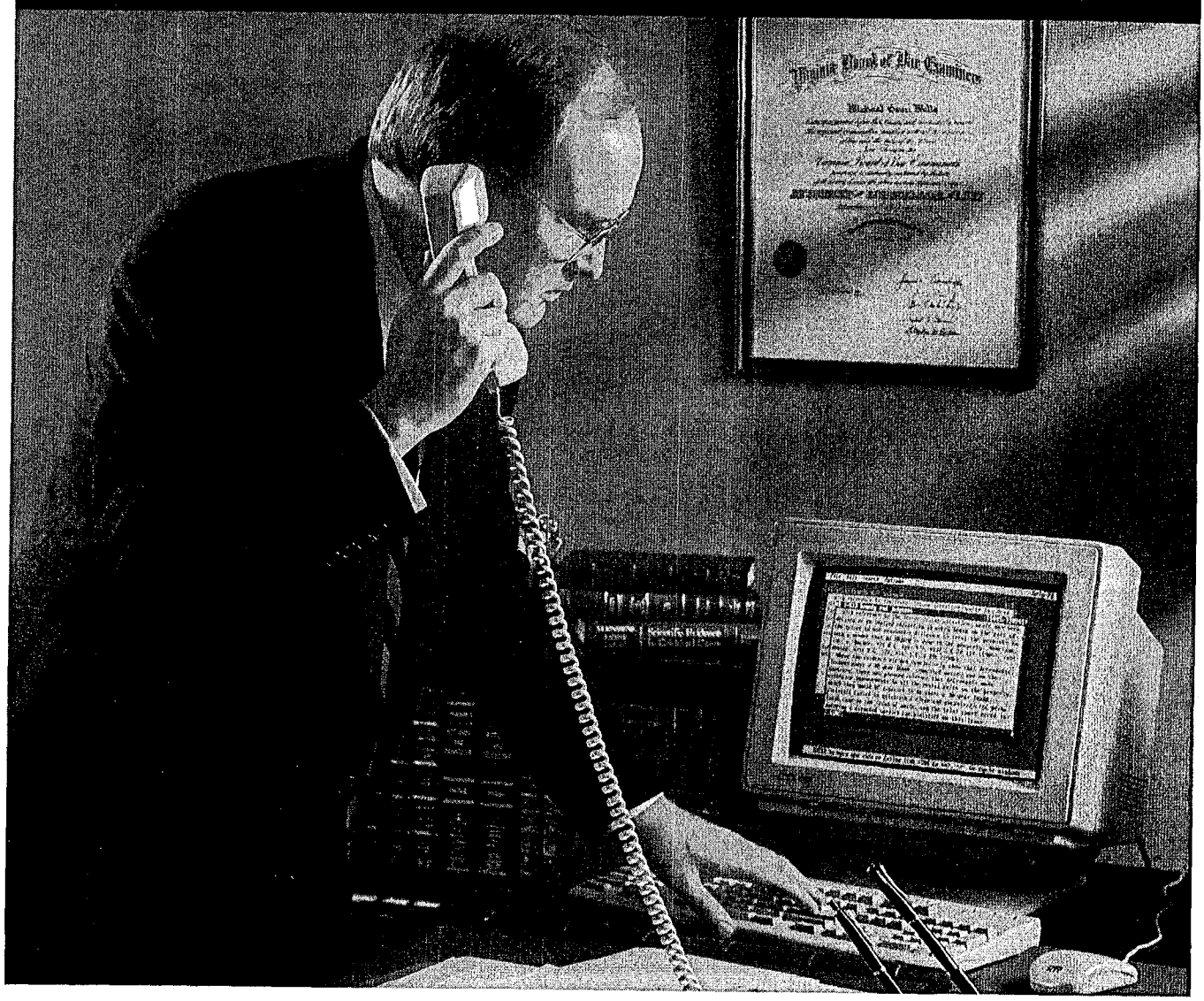

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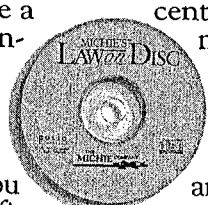

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the pronoun **"that"** then I'm not instructing you not to answer the question.

By Mr. Costello: Can you play back the tape so we can try and get **that** question please?

By Court Reporter: Sure.
(Off record - to play back question):

Q. And can you point me to a particular provision in the insurance contract **that** supports **that?**
(Back on record)

Q. Can you point me to the language in the policy **that** supports your view?

By Mr. Abbott: Now I'm going to object to **that.**

By Mr. Costello: In view **that** the witness just expressed an answer to my previous question; now she knows **what** I mean, you know **what** I mean, everybody in the room knows **what** I mean. I don't have to repeat every question in a series of questions every word **that** was said in the prior question.

By Mr. Abbott: Nobody is asking you do **that.**

By Mr. Costello: You are asking someone to do **that** when you won't let them use a pronoun to refer to the previous response.

By Mr. Abbott: As long as we know **what** the referent is I have no objection.

By Mr. Costello: I'm talking about the witness's view **that** she said **that** she had in answer to the previous question. I'm saying where is the language in the policy **that** supports **that** view, **that's** the question — and the witness was looking in the policy to try to identify **that.**

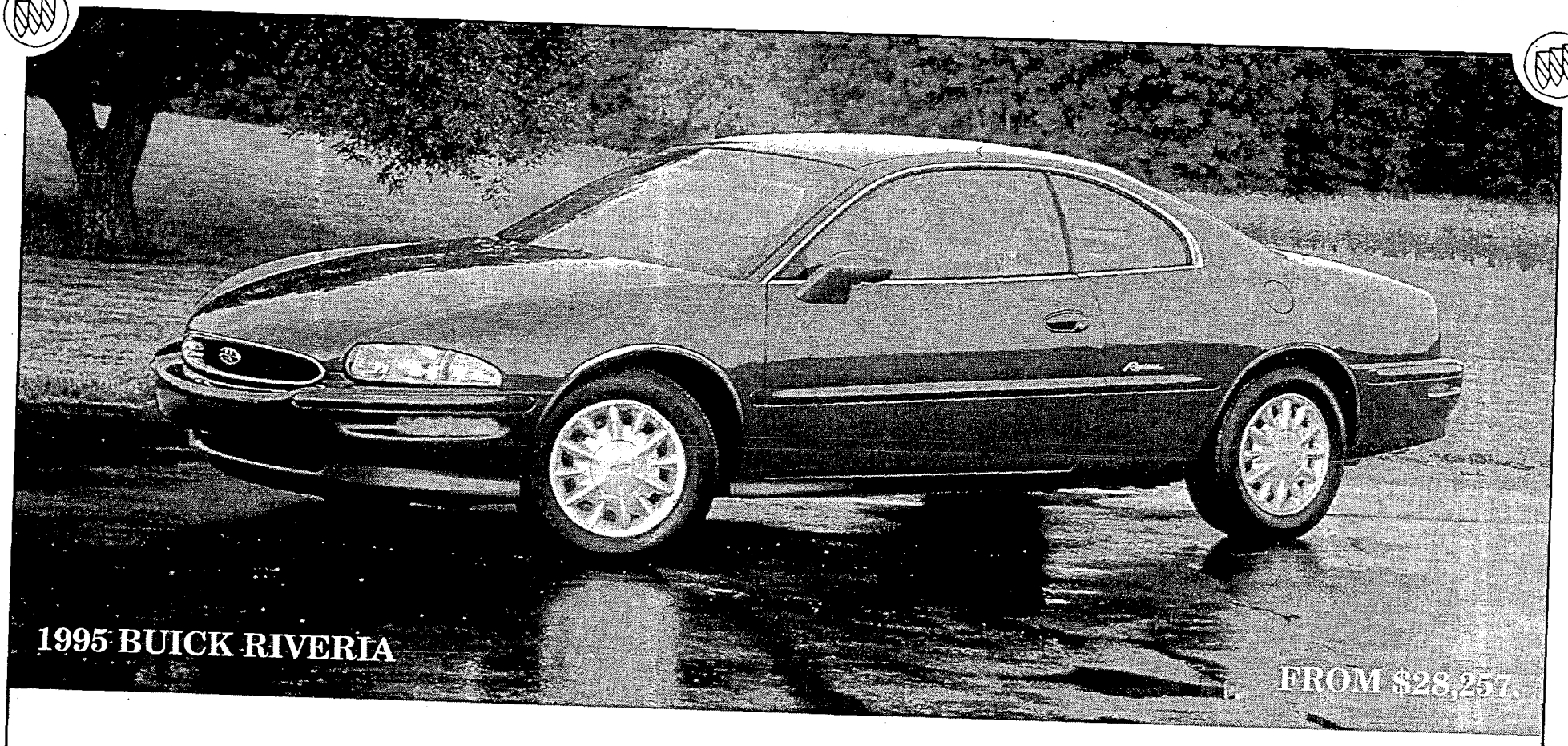
By Mr. Abbott: I think the question is ambiguous, I don't think there is any way to be able to tell what the referent was in the question, but if she can understand the question, if she has some idea **that** by **"that"** you meant her answer and not your predicate of using only renewal premiums, then she can give an answer **that** incorporates **that.** I think it's unintelligible.

By Mr. Costello: Actually given the answer **that** she gave it refers to **both,** they're one and the same.

Q. Do you understand the question?

A. I'm thoroughly confused now.

Judge Babiarz, a former trial lawyer, said he was laughing too hard to award sanctions when he ruled on the motion involving this convoluted transcript. ◆



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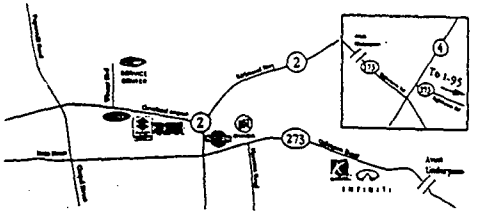
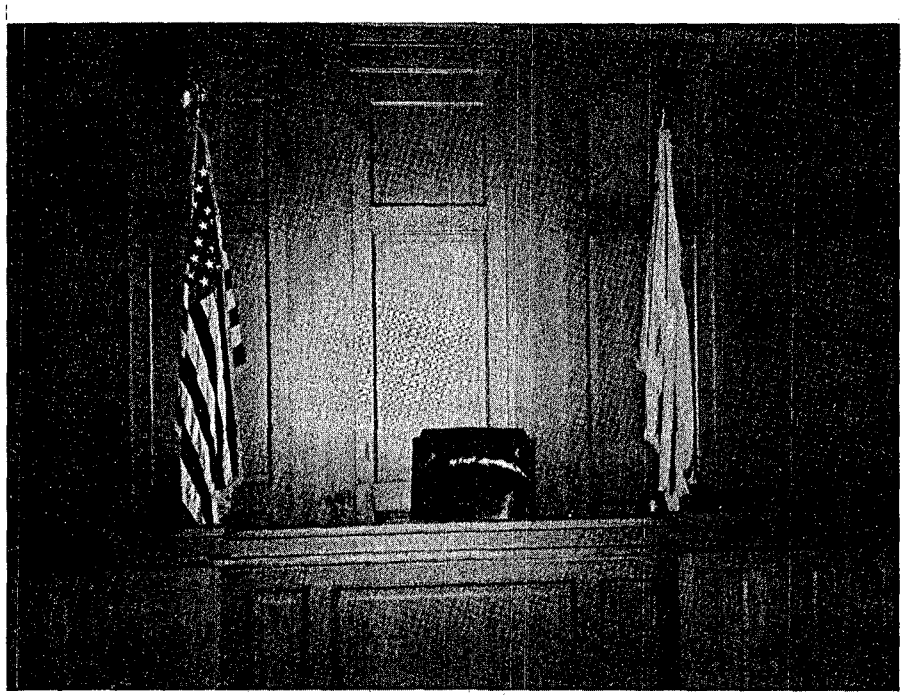


JUDGE RICHARD R. COOCH

Some Random Observations of a (Relatively) New Superior Court Judge

Why did I want to go on the bench?

It was not an easy decision to leave the private practice of law at Cooch and Taylor, with which I had been associated since about 1968 (as a summertime employee during college). Although I had very much enjoyed the private practice of law, I had particularly liked "public service" assignments or projects such as serving part-time as attorney for the Delaware House of Representatives (1979-1981), serving as Treasurer of the Delaware State Bar Association and working on various Bar Association Committees. I had found my experience as a Deputy Attorney General in the criminal division of the Delaware Department of Justice (1974-1977) particularly rewarding, and I had always liked being an arbitrator or mediator in legal disputes. Additionally, I had found experiences such as being Chair of the Reconstruction Committee of Immanuel Church in New Castle (after its 1980 fire) very satisfying.



Two flags in Courtroom 302 lying in wait for a new judge.

I felt myself ready in 1992 for a new professional challenge, and I hoped that my service to the justice system as a judge would, when all was said and done, have made a difference. So I threw my hat into the ring when a vacancy occurred on the Superior Court. The planets lined up: I was appointed by Governor Castle in June 1992, confirmed by the State Senate and sworn in on August 31, 1992.

An aside: my father and various family members are or were lawyers or judges in Delaware. I remember, very vividly, a dinner conversation when I was a junior in high school. My mother suddenly said to me, with complete earnestness and open-mindedness, that if I wanted to become a doctor, "that was perfectly all right with your father and me." Ultimately, however, I elected not to betray the family and thus decided upon a career in the law.

It is wiser to try a case than to observe one

The volume of cases in the Superior Court did not leave much time for apprenticeship or training after I was sworn in and, as I expected, I found myself quickly thrown to the wolves. One morning, as I was observing Judge Gebelein preside at the criminal trial calendar, a defense attorney requested at sidebar that his client's drug case be given the highest possible priority for trial that day, telling Judge Gebelein and the Deputy Attorney General, "We'll even take Judge Cooch." Thus it came about that I presided over my first criminal trial.

Not long after that, Judge (now Vice Chancellor) Balick suggested that I observe motor vehicle habitual offender hearings with him. As we solemnly and magisterially ascended the bench in Courtroom 302, my chair managed to bump the American flag, which toppled into the Delaware flag, and a few seconds later both flags were on the floor. I remember thinking that at least this wasn't my investiture ceremony.

I thereupon decided to cease observing cases, rolled up my judicial sleeves and got to work.

The warmth, friendliness and collegiality among the Superior Court judges must be actually experienced truly to be understood and appreciated. Indeed, the camaraderie of all the judges on the courts of this State is one of the most pleasant and rewarding aspects of judicial service.

"Judicial Wellness" can be hazardous to a judge's health

Some advice to new (and veteran) judges: don't take judicial wellness too seriously. About one year after I was sworn in, I participated in the three-week course for new judges at the National Judicial College in Reno, Nevada, which is attended by many new judges in Delaware. Interspersed with various lectures and workshops on civil procedure, the Code of Judicial Conduct and the like was a lecture by the coach of the U.S. Olympic ski team on "judicial wellness." He exhorted us judges from all over the country to get exercise, reduce stress, lose weight, etc. I took his advice seriously (other than losing weight) and, the next day, went jogging. It was wonderful exercise, and my jogging expedition was marred only

by the fact that, a mere two blocks from my hotel, I tripped over a lump in the asphalt at the intersection of 12th and Virginia Streets, completely dislocating my shoulder. My arm was in a sling for three weeks, and I then undertook three months of physical therapy (at 7:00 a.m.). I have since resolved to limit my wellness activities to games of "Chutes and Ladders" with my children.

"Civility" is alive and well in the Superior Court

Chief Justice Veasey (among others) is promoting civility in all aspects of the practice of law, including courtroom practice. I am now assigned to the Criminal Division of the Superior Court but have also had a significant number of civil cases (trials, appeals, motions, etc.). My impression is that civility is definitely not extinct in the Superior Court. The practice of law, as I have observed it from the bench in the last two years, is very much characterized by civil, cordial and friendly relations among the members of the Bar, even as attorneys aggressively represent their clients' interests. Perhaps that reflects the relatively small, active trial bar in this Court. To be sure, I have seen instances of incivility, but these are definitely the exceptions which to me prove the rule that the practice of law in the Superior Court is carried on in a very "civil" manner, befitting the finest traditions of our bench and bar.

The collegiality of Delaware judges

Although I knew I would be associating with a very collegial group of judges, nevertheless the warmth, friendliness and collegiality among the Superior Court judges must be actually experienced truly to be understood and appreciated. I have never found a judge of this Court too busy or indifferent to assist me or to answer a question. (On that latter point, I have followed Vice Chancellor Balick's early and sage advice: never ask two judges the same question unless you are prepared for two different answers.) The camaraderie of all the judges on the Superior Court (and indeed, on all courts of this State) is one of the most pleasant and rewarding aspects of judicial service on the Superior Court.

Judge Cooch is the most recent in a long line of distinguished New Castle attorneys to serve on the Delaware bench. ◆

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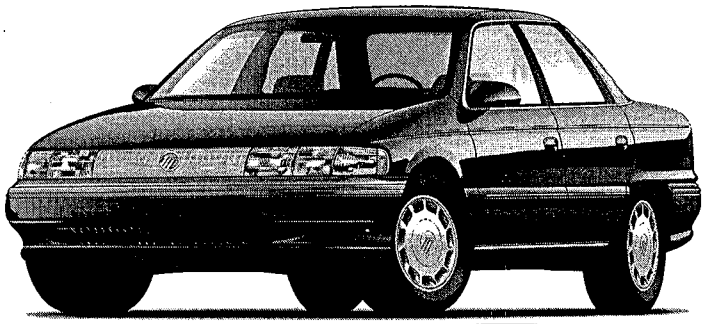

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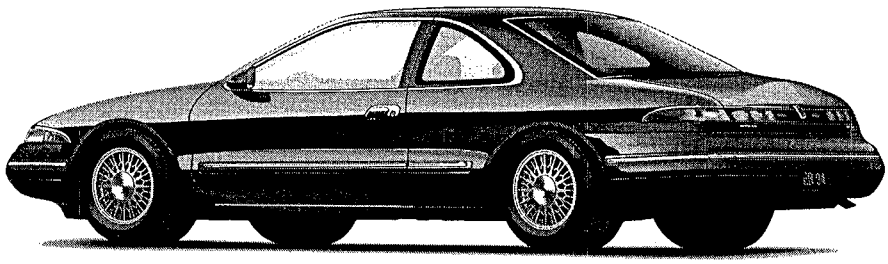

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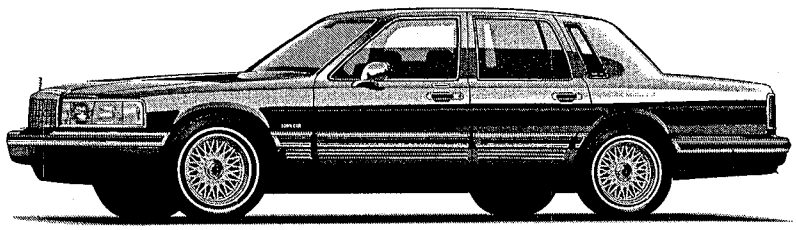

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HONORABLE WILLIAM DUFFY

Judicial Appointments — and Disappointments

The judicial selection process in Delaware has oten bypassed qualified sitting judges — resulting not only in personal distress and disappointment to a judge not selected, but also in some surprising consequences.

Thankfully, Delaware has been spared much of the acrimony and bitterness often associated with judicial selection and retention in other states. But it by no means follows that our selection process has been without controversy or pain. During the past fifty years we have had both, but public controversies about appointments have been few. The selection process, however, has often bypassed qualified sitting judges when a vacancy occurred. When that happened, it obviously resulted in personal distress and disappointment to a judge not selected, but some surprising consequences have followed in a number of situations.

Consider, for example the case of Chief Justice Daniel J. Layton, a brilliant but controversial judge who wrote (between 1933 and 1945) many of the opinions which remain basic Delaware corporation law. But, in 1945, Layton was denied confirmation by the Senate for the political reasons discussed in Dr. Carol Hoffecker's study of Federal Justice in the First State (1992), pp. 136-139, and in The Delaware Bar in the Twentieth Century (1994), pp. 362-365. Surely that was a bitter personal disappointment to Layton, and the State Courts lost his judicial expertise. However, the compromise by which the vacancy on the Supreme Court was filled led to the appointment of Judge James B. Carey, a wise and careful judge who served the State with great distinction for 29 years.

And that was not the end of the Layton episode.

The next year, 1946, an angry Governor Bacon avenged the rejection of Layton on Judge Richard S. Rodney, who had served with quiet dignity and abundant learning for 24 years on the Supreme Court. The Governor flatly refused to reappoint Rodney — undoubtedly a painful injustice to Rodney after all he had given to the State. Vice Chancellor George Burton Pearson was appointed to fill the vacancy and that created an opening on the Court of Chancery. Collins J. Seitz was appointed as Vice Chancellor and that brought him into the judicial system which he has served with distinction (in the State and Federal Courts) from 1946 to this date in 1994. In sum, out of the Layton-Rodney turmoil came Judge Seitz who is, in my opinion, the greatest judge in the history of Delaware.

Sad to say, Chancellor Seitz himself was considered but not appointed on two different occasions when there was a vacancy on the Supreme Court: first in 1954 and again in 1965. And here I add a personal recollection based on a 1954 Bar Association committee meeting discussing the earlier vacancy. Chancellor Seitz was regarded as "too valuable" in that position to send him to the Supreme Court! In short, Seitz's brilliance worked to the State's advantage but was counterproductive to his own.

Life, while seldom fair, often has a way of working things out. Thus, in 1966, Seitz was appointed to the Third Circuit Court of Appeals, where he has served a vastly larger jurisdiction. If he had been appointed to the Delaware Supreme Court in December 1965, he might never have been offered (and if offered he might not have accepted) the federal appointment which was made just a few months later.

In recent years, the appointment process has not had the kind of political firestorm which surrounded the Layton controversy. And patience frequently has been a rewarding virtue outside the

courtroom as well as in it. For example, after Daniel L. Herrmann was confirmed to the Supreme Court in 1965 by the Senate, he gave some eight years of loyal and energetic service as an Associate Justice and then was quickly appointed and confirmed as Chief Justice. Andrew Christie served almost 26 years as a Superior Court Judge, without a word of complaint, while others on and off the bench were appointed to the Supreme Court. Then, in 1983, he was appointed

Denial of an appointment or retention to a sitting judge is an agonizing personal experience for the judge (and his family), but the public consequences have not always been all bad. On the contrary, judges who filled the vacancies have served with great distinction.

to the Court and, two years later, he became Chief Justice.

There were often similar experiences in the trial courts. Judge Albert Stiftel was initially by-passed for appointment as President Judge but, four years later, he took that office and served in it for 24 distinguished years. William Marvel, the son of a lawyer who was the only Delawarean ever to serve as President of the American Bar Association, grew up with the ingrained idea that the office of Chancellor was the best and most desirable judicial office in the State. It was denied to him while he served twenty-two years as Vice Chancellor and watched his juniors appointed over him. But he finally realized a personal aspiration when he was appointed as Chancellor in 1976, and he held that office until he retired in 1982.

Earlier this year there were echoes of the Layton conflict when Justice Andrew Moore was not reappointed to the Supreme Court. The personal pain for Moore must have been profound. A small consolation, perhaps, but the Governor's decision did give Moore an opportunity to use his acknowledged

legal and judicial skills in a larger venue than Delaware.

The Governor filled the vacancy by appointing Vice Chancellor Carolyn Berger to the Supreme Court. That is a desirable consequence, not just for Justice Berger or for feminists, but for all Delawareans: 200-plus years was a long, long time to wait for a woman to join the highest Court in our State.

My purpose here is not to critique any of the appointments that I have dis-

In recent years, the appointment process has not had the kind of political firestorm which surrounded the Layton controversy. And patience frequently has been a rewarding virtue both inside and outside the courtroom.

cussed. I merely want to point out that denial of an appointment or retention to a sitting judge is an agonizing personal experience for the judge (and his family), but the public consequences have not always been entirely bad. On the contrary, judges who filled the vacancies have served with great distinction.

I add one final comment. Since the earliest days of our Republic, an independent judiciary has been an essential part of government. Life tenure for judges removes them from political issues and helps to assure the independence which is so necessary. Indeed, prior to 1897, Delaware judges had life tenure (subject to good behavior), but under the present Constitution, tenure is limited to twelve years. I think that most people would agree that, generally speaking, Delaware has had good judges. If we are to have them in the future, we cannot depend on continuing good luck. We should rely on an established process for the merit selection of judges and for the merit retention of judges. Both are basic building blocks for the continuing vitality of a truly independent judiciary.

Justice Duffy himself served Delaware with distinction for over twenty years as Justice, as Chancellor, and as Superior Court Judge. ◆

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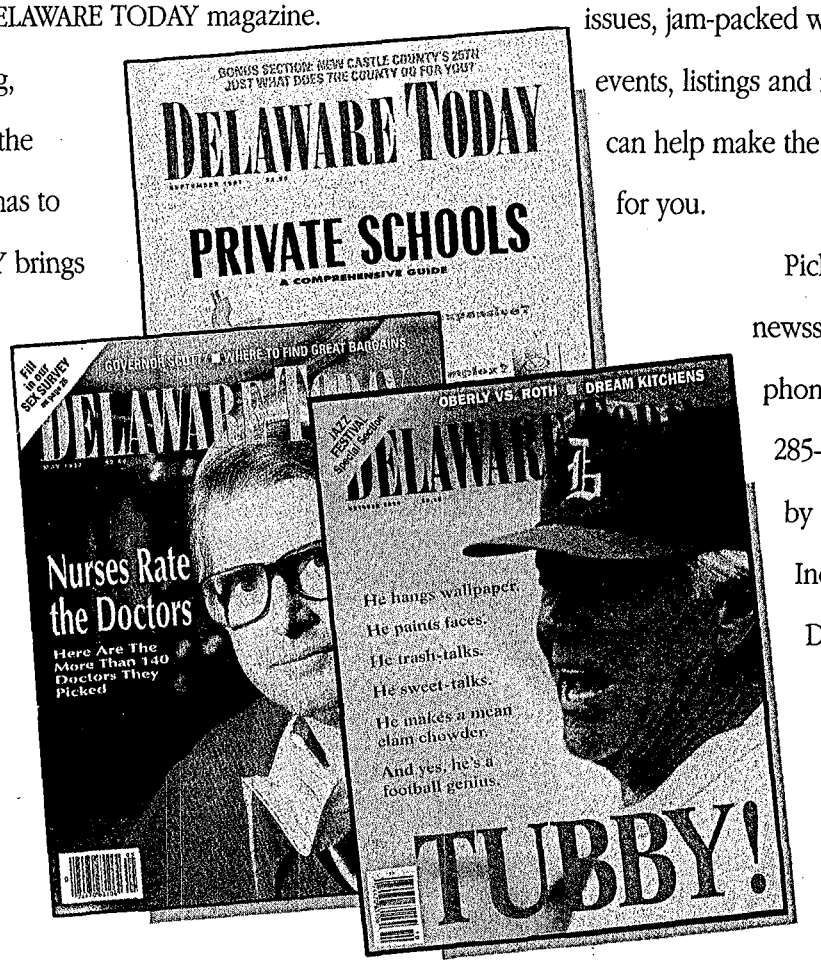

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DELAWARE TODAY

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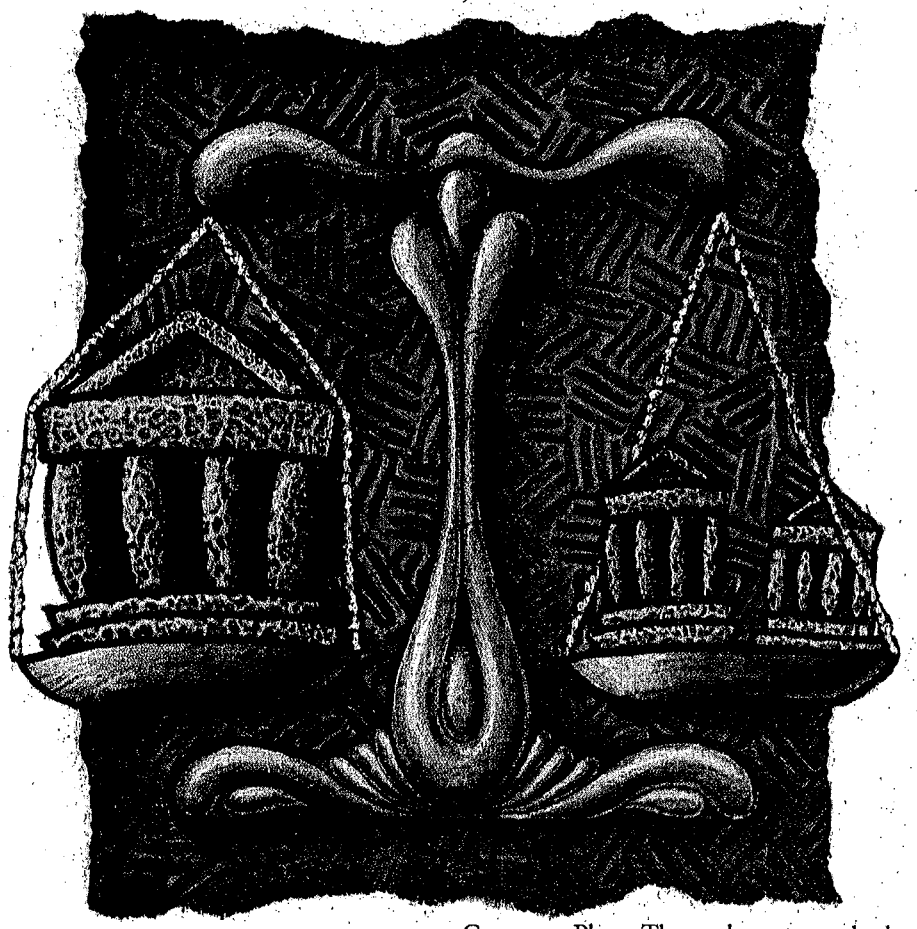
JUDGE ARTHUR DISABATINO

The Coming Changes in the Court of Common Pleas



All practitioners in the Court of Common Pleas, as well as in the Superior Court, will be affected by the recently enacted jurisdictional changes.

During the recent legislative session which closed on June 30, 1994, a number of changes were made to the jurisdiction of the Delaware Court of Common Pleas. Those changes resulted from recommendations made by the Delaware Commission on Courts 2000, a planning commission created by resolution of the Delaware General Assembly in cooperation with the Executive and Legislative branches.

The jurisdictional changes will affect all courts, but no court will be altered as much as the Court of Common Pleas. In addition to the jurisdictional changes already made, it is possible that there will be additional legislation in the coming year that may have further impact on the Court. The effective date of the jurisdictional changes is January, 1995. Thus, with the transition about to take place, the lawyers who practice before the Court of Common Pleas, as well as before the Superior Court and the Justice of the Peace Courts, should reflect on how the new changes will affect the way they practice before those courts.

Increased Civil Jurisdiction

The civil non-jury jurisdictional limit of the Court of Common Pleas, previously $15,000, has been raised to $50,000. At the same time, the civil jurisdiction of the Justice of the Peace Courts, previously $5,000, has been raised to $15,000. The Justice of the Peace Courts also have a new statutory requirement that defendants must file a responsive pleading, so that pretrial default judgment procedures can be implemented.

For the plaintiff's attorney, another way of looking at the jurisdictional changes is that if the amount claimed is $15,000 or less, the plaintiff will have a choice of three courts in which to file a case. In cases where the demand is between $15,000 and $50,000, the plaintiff will have a choice of two courts.

The Court of Common Pleas will adopt a civil rule, paralleling the Superior Court Rule, requiring arbitration of cases between $15,000 and $50,000. Cases requiring arbitration will be forwarded to the Superior Court's Arbitration Program, where the arbitration fee will be

Illustration by Sam Hill

collected and the arbitrator assigned. Thus, the only changes that the plaintiff's attorney will notice are that the filing fee in the Court of Common Pleas will be less than the Superior Court filing fee and, in those cases where the arbitrator's award is appealed, the trial will be before a Common Pleas judge.

For cases where the demand is $15,000 or less, the plaintiff's attorney will also have to decide whether a trial before a law-trained judge in Common Pleas is preferable to a trial before a lay judge in the Justice of the Peace system and whether a trial without arbitration in the Justice of the Peace system is preferable to the arbitration route required in Common Pleas and the Superior Court. Because of lower filing fees and the opportunity to secure default judgments at the Justice of the Peace level, it is likely that many of the $15,000-and-below cases will now be filed in the J.P. Courts.

Since civil cases in the Court of Common Pleas are not backlogged, there should be no significant delay in getting to trial after arbitration. When coupled with lower filing fees, this should increase the number of filings in Common Pleas, thereby decreasing the number of filings in the Superior Court.

Civil Appeals

The General Assembly has also expanded the civil jurisdiction of the Court of Common Pleas by making it the appellate court for the Justice of the Peace system. Thus, civil appeals from decisions of Justices of the Peace will be to the Court of Common Pleas and will be non-jury trials de novo.

If the defendant is the appellant, a supersedeas bond will be required to stay execution on the judgment in the Justice of the Peace Court.

Motor Vehicle Habitual Offenders Hearings

The Delaware General Assembly further amended the jurisdiction of the Court of Common Pleas by giving the Court jurisdiction over Habitual Offender Petitions brought under the Motor Vehicle Code. The hearings, which are essentially civil in nature, are brought by the Attorney General and, where successful, result in a license revocation for a period of three or five years.

In addition, the General Assembly has also conferred jurisdiction on the Court of Common Pleas over the criminal offense of driving after being declared an habitual offender, an offense for which the sentence is one to five years incarceration.

It is expected that both the civil hearings to determine habitual offender status and the criminal prosecutions for driving after being declared an habitual offender will proceed exactly as they did previously in the Superior Court. Although these are not cases in which the defendant will have a choice of courts, the transfer of jurisdiction to the Court of Common Pleas should result in more prompt disposition of such cases.

The Court of Common Pleas will adopt a civil rule, paralleling the Superior Court Rule, requiring arbitration of cases between $15,000 and $50,000. Thus, the only differences for the plaintiff filing in the Court of Common Pleas instead of Superior Court are the filing fee, and, in those cases where the arbitrator's decision is appealed, the trial will be before a Common Pleas judge.

Criminal Appeals

The General Assembly has also conferred criminal appellate jurisdiction on the Court of Common Pleas over some, but not all, appeals from criminal convictions in the Justice of the Peace Courts. The most significant such appellate jurisdiction is over appeals from convictions in the Justice of the Peace Courts for motor vehicle offenses. The Court's new criminal appellate jurisdiction also includes violations of municipal ordinances and a variety of miscellaneous offenses. However, the General Assembly did not take any action to repeal Article IV, Section 28 of the Delaware Constitution, which provides for appeals to the Superior Court in criminal cases in which the sentence exceeds one month or a fine of $100. The failure to include criminal appeals in the appellate jurisdiction of the Court of Common Pleas may result in some initial confusion on the part of lawyers seeking to appeal such convictions. All that can be said at this point is that Common Pleas has not been given criminal misdemeanor appellate jurisdiction. Therefore, the practitioner may assume that such appeals must still be made to the Superior Court.

Jury Trials in New Castle County

After years of discussion within the legal community, the General Assembly conferred criminal jury trial jurisdiction on the Court of Common Pleas in New Castle County. Except for a change in the judges, the bar is unlikely to notice much of a change in such jury trials. It is anticipated that jurors will be selected from the Superior Court master list and that Superior Court courtrooms will be used for the trials. The expansion of criminal jury trial jurisdiction brings uniformity of jurisdiction throughout the State for the first time.

Are More Changes Coming?

The Commission on Courts 2000 has made several other significant recommendations for expanding the jurisdiction of the Court of Common Pleas. Very likely, the General Assembly will be considering some of them in the coming year. Among the more significant proposals are: (1) merger of the Wilmington Municipal Court into the Court of Common Pleas and expansion of the Justice of the Peace Court jurisdiction into Wilmington, (2) six-person juries for traffic and misdemeanor cases, (3) raising the jurisdictional amount of misdemeanor theft (currently $500) to a much higher amount (possibly $2500), and (4) expanding the Common Pleas and Justice of the Peace Courts jurisdiction to include all misdemeanor drug offenses.

Under the recently enacted jurisdictional changes, a plaintiff with a demand between $15,000 and $50,000 has a choice between two courts, and a plaintiff with a demand of $15,000 or less has a choice of three courts.

These proposals are designed to promote centralized and uniform management of misdemeanor and traffic offenses, to simplify jury trials and to reduce the burden on the Superior Court in order to enable it to focus on more complex cases.

If all of these changes occur, the net effect will be one less court, the Municipal Court, and an expanded role for both the Court of Common Pleas and the Justice of the Peace Courts. Each of the courts will have a more clearly defined role in Delaware's justice system. Clearly, the work of the Commission on Courts 2000 has had an impact on the judicial system as it approaches the twenty-first century.

Judge DiSabatino has served on the Court of Common Pleas since 1971. ◆

HONORABLE WILLIAM T. QUILLEN

Remembrances and Prayers

"The judge is the embodiment of the law and, if the personification does not reflect the best of the subject, we cannot expect society's perception to be favorable." Thankfully, each of us has many remembrances of "individual judicial behavior which makes the law stand tall."

We, the legal profession, judges and lawyers, may decry the lawyer jokes directed at us. But behind the humor is genuine frustration and a real substantive issue. Are we and the legal system any longer up to the job that American society has traditionally entrusted to us, or should society look for alternatives to solve its crime problems and to resolve civil disputes? This ultimate substantive issue for our profession is really quite scary as we confront the overwhelming masses of our society's ills and as we view our Anglo-American legal heritage in the greater context of Western Civilization and world history. The truthful answer, it seems to me, is an uncertain punt — "Time will tell."

But, on a comparatively pedestrian preliminary point, I am not uncertain. We are not going to succeed if we join the whiners of the world and see ourselves as among the world's self-anointed and self-pitying victims. If the rule of law is to fail, let it fail because of proved inadequacy. Let it not fail because its warriors, its judges and lawyers, lacked the will to invest in its noble cause.

Moreover, I am certain on a second point. The lead in our effort must come from the bench because the judge is the embodiment of the law and, if the personification does not reflect the best of the subject, we cannot expect society's perception to be favorable. Even the best bar needs to be able to point with pride to its bench in order to advocate well the rule of law. Strangely, such prideful pointing requires more than intellectual judicial craftsmanship. There is a vital behavioral aspect. Each of us has remembrances of individual judicial behavior which makes the law stand tall. Here are just a few of the many that give me comfort and the principles I draw from them.

CAMARADERIE

It's been almost twenty-five years since the day Judge Bifferato, kindly in order to soften the blow, called me personally to tell me of the death of Charles Layman Terry, Jr. But my picture of Terry — Secretary of State, Judge, President Judge, Justice, Chief Justice, Governor — is as vivid as ever.

Judge Terry was a big man and he thought big and he accomplished much. He was a doer on a grand scale. But, he always remained "small town" — Kent County, Dover, Camden. Indeed, it was his small-town sense of fellowship that was his natural tool to success — fellowship among the judges; fellowship between Kent County and the United States Air Force; fellowship between the county governments and the judiciary; fellowship between the courts and the General Assembly; fellowship with a younger generation through law clerks; and fellowship with all governmental employees regardless of rank. Terry would tell you a seeming secret, "in the lodge" as he would say pointedly, but it didn't take long for a newcomer to learn that Terry's lodge was quite inclusive.

Judge Terry's fellowship was more than organized fun. It was deeply personal and directed. He was political, in the broad civic, as well as the narrow partisan, sense. Terry learned early on, from his college baseball coach, that each person was an individual and, to get the best from each, you had to approach that person particularly with the individual personality in mind.

Judge Terry was at his finest on the Superior Court, where he served from

1938 to 1962. He presided over the whole courthouse — every office, every employee, every visitor. When Judge Terry learned one day of the pregnancy of a young Kent County woman without significant means, he called the Air Force Major involved and had him come to the Kent County Courthouse and told the Major his duty. The Major that day signed an acknowledgment of paternity and made arrangements to support the child. It never occurred to Judge Terry that somehow his extrajudicial action was not judicially appropriate. Problems were not sources of despair or cause for endless contemplation. They were the inevitable challenge of life. Problems existed to be fixed. What he had done was right for the child, right for the mother, right for the Major, right for the Air Force and right for the State. And it was done.

My wife, Marcia, called Terry shortly after he was elevated to the Supreme Court and greeted him with "Hello, Judge Terry - I mean Justice Terry. I'll never get used to your new title." He responded, "That's all right, I'm not that kind of Justice."

It was *camaraderie* that made it work. He loved people and he loved being with them at lunch, at dinner, at the card table, in the duck blind, at the ball game, at the officers' club, at the race track, in Legislative Hall, in the courtroom. Mrs. Terry called him "The Pepsi Kid." As others have fondly recalled, I can see him yet, big as life, robe open, stomach out, leaning over the rail of the New Castle County Courthouse waving and greeting people in the long corridor below. Seeing him made you proud to be a lawyer and gave everyone confidence in the system. The system was personal and everyone was a participant. *Camaraderie*, fellowship, law as part of life. That was Judge Terry.

COURAGE

And then there is "The Chancellor." If Josiah Oliver Wolcott (Chancellor 1921-1938) is that memory for those of the first half of the twentieth century, surely Collins Jacques Seitz, Sr. (Vice Chancellor 1946-1951; Chancellor 1951-1966), will be the embodiment of the historic role of Chancery for the second half of the century. I still call him Chancellor, both out of deep affection and my peculiar personal sense of propriety, recognizing the highest office held during a distinguished career. But clearly the trait that Seitz symbolizes is not rank

but *courage*. He brought to the Court in 1946 an advantage of youth: vision. His city background gave him an instinctive understanding of the diversity and the mobility of twentieth century America. He understood the territory and the tensions being created. He could foresee the needs of tomorrow, and he acted in accord with his vision.

As a new Chancellor on April 1, 1952, the first Chancellor not to be the State's chief judicial officer and still a youthful thirty-seven years old, Seitz had every reason to play the role of the dutiful state trial judge. Not so this judge. Conscious of his equitable fact-specific role, he made a particular factual finding based on the testimony:

> ". . . State-imposed segregation in education *itself* results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated.... I believe the 'separate but equal' doctrine *should* be rejected. . . . It is for [the United States Supreme Court] to re-examine its doctrine in the light of *my* finding of fact." (Emphasis added.)

But not stopping there, Seitz went on to hold, in the same painstaking factual detail, that the separate public schools in question were not equal. And, most importantly, he ordered immediate integration. "To postpone relief is to deny relief." The defendants appealed the case to the United States Supreme Court as part of the four-case litigation encompassed in *Brown v. Board of Education*. The Delaware case was the only one in which the trial court's judgment was affirmed.

Since Seitz had earlier, as an even younger Vice Chancellor, enjoined the University of Delaware, then exclusively white, and its trustees, including none other than the chief judicial officer of the State, Chancellor William Watson Harrington, from considering race in processing applications for admission, perhaps his *courage* on this occasion should have been anticipated. There is a delightful simplicity in the best of Seitz. His actions remind us that the rule of law exists to combat the prejudice of humankind and, while custom has a vital role in the social fabric, custom is not always correct and can be fundamentally flawed. The genius of great equitable judging is not to be bold in every cause but to have the wisdom to distinguish the rare case when principle must override the accepted and to have the confident *courage* to act in the finest tradition of "The Chancellor."

CIVILITY

Chief Justice Clarence A. Southerland learned that my high school classmate, Larry Fenton, and I could not go into the military service as JAG officers until we were admitted to the Bar. So, on a November day in 1959, the Chief Justice graciously admitted us ahead of our class in chambers. The next day, my preceptor, William H. Foulk, a brilliant individual practitioner at the time, took me to the District Court and the Third Circuit for additional admissions. And it must have been the next day after the federal admissions that Judge Caleb Merrill Wright appointed me to represent an indigent defendant charged with interstate auto theft, having "purchased" a car in Philadelphia with a bad check. My client wanted to plead guilty and be sentenced in Delaware rather than return to Philadelphia for trial. So my first appointment as a lawyer was to work up matters of extenuation and mitigation for sentencing. Regretfully, it would be

my only appearance as an advocate before Judge Wright.

I worked very hard and I daresay knew, or at least felt I knew, more about my client than my client did. The day before sentencing Judge Wright called and asked me to come to his chambers. We met, just he and I. He asked me what I had done and I told him at great length. When I finished what was probably not a rare story for the patient Judge, he told me that I had done everything I possibly could have done for my client and that I should ask for probation. Then he added: "You're not going to get probation but you should ask for it."

The next day went as foretold, with the distinguished United States District Court Judge repeating in open court his praise for the fledgling lawyer, praise that the press picked up in an article featuring the first courtroom appearance of a new lawyer. Not by chance, the new lawyer was not surprised by his client's prison sentence and therefore did not suffer the pangs of inadequacy endured by some less fortunate than he.

The canons are pretty clear on judicial demeanor, but Judge Wright's lesson on *civility*, one on one, has stayed with me. The lesson is related to something that your mother might have said: "Praise in public, criticize in private." It helps to have a touch of Sussex County in the high halls of national justice. Incidentally, I don't think Judge Wright worried too much about his *ex parte* meeting with defense counsel. After all, it wasn't the prosecutor's first case. Thanks again, Your Honor.

CHARACTER

There is something cosmic about Bill Duffy. One properly, and complimentarily, associates Terry with Dover and Kent County, Seitz with Wilmington and New Castle County, Wright with Georgetown and Sussex County. But Duffy's compliment is different. There is no provincialism, only a universal sense of order, a catholic quality that transcends political boundary and thereby transcends issues of political expediency. He has a presence that is both humble and regal, a reserve that quietly commands attention. It seems natural even in writing to call him Bill instead of William. And yet he has a casually formal presence, even in a blue button-down and sports coat, because everything, body and clothes, is handsomely in place. One wonders how it can possibly be that this President Judge and Chancellor was never offered the Chief Justiceship. Perhaps it was because he did not have to have it.

Chancellor Seitz's actions remind us that the rule of law exists to combat the prejudice of humankind and, while custom has a vital role in the social fabric, custom can be fundamentally flawed. The genius of great equitable judging is not to be bold in every cause, but to have the wisdom to distinguish the rare case when principle must override and to have the courage to act accordingly.

No single trait captures the essence of Justice Duffy. Rather, it is *character*, the aggregate of morals, ethics and honesty, an undiminished integrity of the whole. As Vice Chancellor Steele said, Justice Duffy "epitomizes all that's best in the Delaware Judiciary." And Justice Duffy, by his personal life, devoted to church, family and friends, reminds us that *character* is reflected twenty-four hours every day. He is at one with his title — Justice.

It was my privilege to sit with Justice Duffy in two courts and to follow him in a third. Two impressions stand out in my mind.

First, Justice Duffy was never separated from the War. Like Holmes and the Civil War, the experience of World War II molded the *character* of Bill Duffy. When speaking of his warm associations on the bench, Justice Duffy, preserving integrity, would say, "except for his wartime friendships," the fellowship of the bench was most important in his "non-family" life.

My second impression came as a surprise to me, given Justice Duffy's competent presence. He labored with significant mental anguish at his work because he viewed each exercise of judicial power as a solemn trust. While judicial decisions would weigh heavily on Justice Duffy, he never ducked the responsibility. And he performed marvelously. He could be decisive without being judgmental. Particularly admirable was his Supreme Court decision in *Severns v. Wilmington Medical Center, Inc.*, wherein he upheld a duly appointed guardian's power to exercise a comatose patient's right to remove life support systems. One can only imagine the pain in that balancing for Justice Duffy. His integrity, his faithfulness to duty and his tolerance of the views of others are what the rule of law is all about. Justice is he.

PRAYERS

So, in my prayers for the bench, I pray: for judges who love life and their fellow human beings and who, in their work as well as their private life, foster a *camaraderie* of humankind; for judges who have the *courage* to see the true principle when custom would deny it; for judges whose *civility* is individual as well as corporate; and for judges whose *character* transcends the expedient and reflects the universal, tolerance as well as truth. To such a bench, the bar can surely point with pride. With such a bench, surely there is yet hope for the rule of law.

By the time this article appears, Judge Quillen will have rejoined the Superior Court bench. ◆

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