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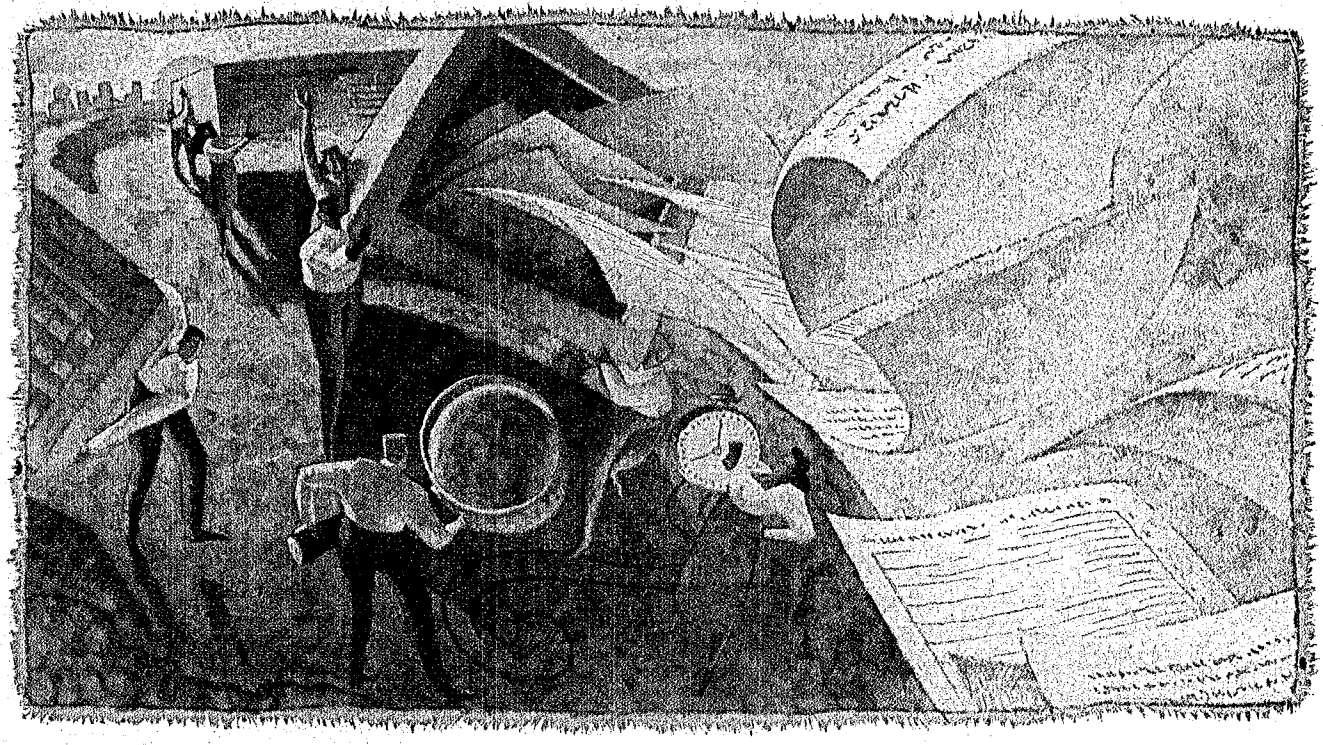

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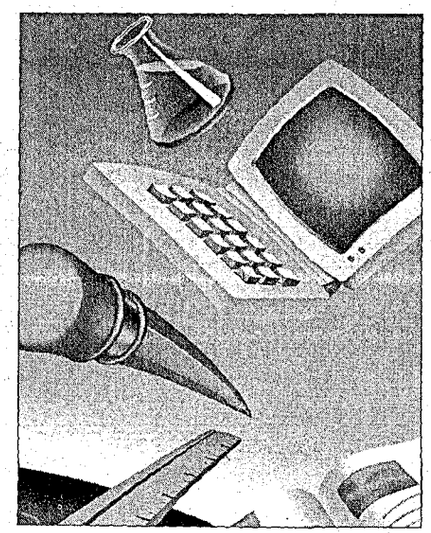

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EDITOR'S NOTES

THE PRACTICE OF LAW IN A HIGH TECH WORLD

by April Caso Ishak

While the use of technology by lawyers is not new, the avalanche of technological tools currently available for use in the legal profession might make any lawyer's head spin. Indeed, it was only 10 years ago when I persuaded the partners of a small law firm where I worked as a legal assistant to acquire a basic word processor. In a short amount of time, they realized that the word processor greatly improved the speed and efficiency of preparing real estate and trust documents wills, and pleadings.

Today, it is not just word processing capabilities that have changed the way we practice law. The introduction of online and CD ROM research tools, databases, fax machines, cellular phones, high speed copiers and laser printers, e-mail, teleconferencing, video conferencing, "real time" transcription, document imaging and scanning, the Internet and computer simulation techniques have all affected the legal profession in some way. Such advances enable attorneys and their staffs to get work done more accurately in less time, effectively increasing the amount and quality of work that can be performed in one day. In addition, scientific advances in the criminal context have improved the way crimes are solved and prosecuted.

As the articles in this issue demonstrate, the union of law and technology is not always a blissful one. There are some lawyers who readily admit their resistance to technological change: Vernon R. Proctor expresses his view of why he resists technology. Linda M. and John F. Dickey outline some problems and solutions when technology is introduced into the workplace.

When properly implemented, technology can be a useful tool. Judge Susan C. Del Pesco provides us with an example of how technology can be used creatively and effectively to present a case before a jury in Courtroom 302. Donald F. Parsons, Jr. and Lisa K. W. Crossland describe some useful technological tools available to law firms. In the criminal context, Attorney General Jane Brady surveys technology now being used to solve and prosecute crimes in Delaware. Finally, Richard K. Herrmann provides us with an interesting view of how technology, in the-not-too-distant future, might affect current notions of personal jurisdiction.

Technology, whether we like it or not, has firmly embedded itself into the practice of law and is here to stay. Ultimately, the use of technology should result in better, more effective, and more efficient legal services for the benefit of the client. This issue provides readers with an overview of some of the technological tools available to lawyers in Delaware and highlights some of the benefits and pitfalls of using technology in the practice of law.

April Caso Ishak

Richard K. Herrmann

WORLDWIDE LAWNSCAPE, INC. V. U.S. GROWERS OF AMERICA, 86 DE 4TH 267, COURT OF APPEALS OF DELAWARE, 2009

RICHARD K. HERRMANN, JUDGE. This is an appeal from an action for damages and in execution of worldwide e-cash accounts due Worldwide LawnScape, Inc. While the parties raise a significant number of issues on appeal, this opinion focuses on the most important matter of personal jurisdiction of Megacyber Corporation, which claims to have done no business in any jurisdiction in the United States or any country of the world other than the Country of Tabula Rosa, a little known island off Tierra Del Fuego, in which it is incorporated. The trial court's judgment is the largest of its kind, resulting from a consolidated damage award by a multistate jury, tried pursuant to the Uniform Interstate Internet Protection Act of 2002. Section 3(c)2 of that Act provides:

> "An action brought pursuant to this Act may be hosted in the domiciled jurisdiction of any party for or against whom the action is maintained. In the event that the action involves either plaintiffs or defendants from more than eight domiciled jurisdictions, the trial shall be simultaneously presented by means of a broadcast-quality transmission to juries in five participating jurisdictions: two jurisdictions selected by the plaintiffs, two jurisdictions selected by the defendants and one jurisdiction selected by the court. Liability shall be determined by a simple majority of the unanimous verdicts of the five juries. If damages are awarded, the total damages shall be determined by disregarding the highest and lowest awards and by calculating the average of the remaining three awards."

The plaintiff, U.S. Growers of America, brought a class action, on behalf of owners of residential and commercial properties in the United States, against Worldwide LawnScape, Inc. The United States Department of Natural Resources and the parallel departments of natural resources for each of the fifty states were represented among the plaintiffs as well.

In lieu of filing an answer to the complaint, the defendant moved to dismiss for lack of personal jurisdiction. Following two months of expedited discovery and briefing, the court denied the defendant's motion and an interlocutory appeal was denied. After trial, judgment was entered for plaintiffs, and defendants appealed.

The Facts

On September 22, 2003, a United States patent was issued to Bradley S. Stevens and assigned to the defendant Worldwide LawnScape, Inc. This was no ordinary patent. It did not deal with medical devices, technology circuitry or biochemistry, industries which largely dominated the patent field in the last half of the 1990s. The patent that was issued to LawnScape's assignor was agricultural. It was a patent for a very special kind of grass. The scientists at LawnScape had developed a grass which was green in color (with a choice of over seventy varieties of green), and which would grow in any climate. Since the grass relied upon only air and six hours of darkness per twenty-four hour cycle to flourish, there was virtually no desert or mountain on which it could not grow.

While the characteristics mentioned above were considered startling by skeptical worldwide agriculturalists and industrialists, the LawnScape-patented grass had one more incredible attribute. It grew to exactly five-eighths of an inch in height. The LawnScape grass always, without exception, would stop growing at five eighths of an inch.

You can imagine how this invention affected everyday lives. Golf course fairways did not need to be cut, median strips on national highways were always a uniform length, and homeowners worldwide no longer had to toil each summer weekend with their lawnmowers. More importantly, LawnScape grass began to grow in vast areas of the world, previously considered undesirable for development. With the design of inexpensive

water reclamation systems at the turn of the century, it was not water that prevented the rapid development of desert communities: it was the lack of vegetation. LawnScape changed all of that.

The LawnScape product was so well received worldwide that it was marketed exclusively through the Internet, in thirty-seven different languages. Individual homeowners, commercial businesses and even countries were among the consumers. Payment was made in a variety of methods, including e-cash, credit card and multinational electronic funds transfer for the large acquisitions by countries and worldwide organizations. Community Internet Barter System (CIBS) had become such a well-accepted vehicle of exchange, particularly in third- and fourth-world countries, that it was also used as a means of payment for this new miracle seed.

Within two years, more than three-quarters of the grass grown in the entire world grew to a precise level of five-eighths of an inch. As a result of LawnScape's aggressive approach in protecting its intellectual property, it had the exclusive right to develop and sell this invention worldwide. Those countries whose patent laws were less developed or were considered by LawnScape as "not acceptable" were advised that alternative arrangements for protection would have to be made or LawnScape would unleash its immense wealth to ensure that such country would "never see a blade of LawnScape grass" on its turf. This threat alone was enough to warrant parliamentary, monarchial and dictatorial guarantees of every kind. Of all inventions developed in the history of modern man, LawnScape's was the most protected worldwide.

LawnScape was not without its cynics and critics. Whole industries were in jeopardy. Within two months, national and international stocks of lawn mowing manufacturers plummeted. Whole labor forces of lawn cutters became unemployed. However, in the overall scheme of things, it was considered a small price to pay for such a magnificent contribution to global society. Worldwide LawnScape, Inc. and its corporate family group, including Megacyber Corporation, became the conglomerate of the world. Seed was distributed from one location in Tabula Rosa and shipped by barge, through several third parties, to all civilized ports.

It was not until 2006 that the proverbial bottom fell out of the LawnScape empire. No one anticipated that the incredible acceptance of this miracle grass would create a catastrophic imbalance in the world's ecosystem. Whole species of insects, needing taller grass to survive, became extinct. Birds relying upon those insects for survival began to die out. And now, species of animals preying on the birds are beginning to disappear.

The world discovered that it is difficult to control the growth of LawnScape grass. Because the grass has become so integrated in every aspect of living, it is estimated that it will take seven and a half years for the world to begin to see a reversal of the adverse effects this product has caused. By that time, it is expected that the grass will cause the extinction of many species of insects, birds and animals. Of course, whole industries, relying on these birds and animals, are also in economic danger.

On March 21, 2006, a class action was filed in Delaware against World-wide LawnScape, Inc., Megacyber Corporation and others under the Uniform Interstate Internet Protection Act of 2002 (UIIPA). The class was composed of all member organizations of the Agricultural Growers of America. The members of the class included agricultural growers of all kinds, whose industries were adversely affected by the extinction of pollinating insects, causing catastrophic losses of plants and crops nationwide. Anticipating that numerous plaintiffs in many countries would "be following suit," the Delaware Internet Court (DIC) expedited proceedings. LawnScape and Megacyber moved to dismiss on the grounds that the DIC did not have personal jurisdiction and that the Uniform Interstate Internet Protection Act of 2002 could not create jurisdiction where none existed constitutionally. The DIC summarily denied the motion and a trial was held on June 3, 2006.

The Courtroom

This multistate jurisdictional trial under the UIIPA was the first of its kind. Since the trial proceeding itself was an

historical event, a brief description of the proceedings is appropriate.

Delaware was the sponsoring state responsible for much of the drafting and promotion of the UIIPA, and it was anticipated that a number of actions brought under the UIIPA would be filed in Delaware. As a result, Delaware constructed a special courtroom to facilitate a multijurisdictional jury trial. The courtroom was designed as an amphitheatre. It is a multitiered room, with the "business end" of the courtroom at the lowest level. This lowest level is called the "Floor." The Floor contains the witness presentation platform, the Court Technologist's control desk and two attorneys' presentation podiums. A curved wall screen, twelve feet high and twenty feet long, is located to the left, and behind the witness. Projection devices are located behind the screen. A holographic projector is situated in the ceiling of the courtroom, so that holographic images can be displayed at a location between the witness presentation platform and the judge's bench. The room is arched and the seating for the judge, jury and the gallery is slightly raised. The judge's bench is located at the first level above the Floor and faces the witness presentation platform.

The judge's law clerk observes the trial from the clerk's office. This permits the clerk to work on more than one matter at a time. The judge has the capacity of maintaining communications with the court's staff by V-mail, a form of video mail that supports a number of communications such as voice, print and electronic ink.

The jury is seated directly behind and above the judge's bench. Each juror, as well as the judge and the attorneys, has a complete uninterrupted frontal view of the witness and the viewing screen. Each juror also has an individual monitor embedded in the juror's panel. When the judge's microphone is activated, the judge appears on all individual monitors in the courtroom, with the exception of those used exclusively for demonstrative evidence such as the viewing screen.

The gallery is located directly behind and above the jurors.

The Courtroom Design Philosophy

The conventional courtrooms of the 20th century were designed with the judge's bench as the focal point. It was important that the judge be capable of maintaining eye contact with jurors, the attorneys and the witness. Consequently, the functionality of the courtroom suffered, since the attorneys and jurors needed the same view of the witness as the judge. In addition, the attorneys desired unencumbered access to the jury.[1]

As the focus of the trial became more and more involved with electronic presentation tools, it became clear that the focal point ought to be an unencumbered view of the evidence in its totality by all present. In 2005,

As the focus of their trial became more and more involved with electronic presentation tools, it became clear that the focal point ought to be an unencumbered view of the evidence in its totality by all present.

Courtrooms International of Annapolis, Maryland, was commissioned to design a courtroom that would serve as the model courtroom for multijurisdictional and multimedia jury trials. Courtrooms International began with the shape of the room for optimal viewing. Using a computer model, the witness platform and the viewing screen were placed at fixed locations. All other elements of the courtroom, the judge's bench, the jury level and the attorneys' presentation podiums were independently located without regard to each other.

The design created quite a commotion among the bench and the bar. Judges were concerned that they would not be able to maintain adequate controls of their courtroom without the ability to see all aspects of it. The final design incorporated TVC (Total Visual Control) technology. This system permits the judge to view any location of the courtroom, by wide angle or zoom. The judge can see the jury on his screen while the jury is being addressed. The view can be zoomed to any particular juror as well. The judge can focus the bench monitor on the attorneys or the witness. To the extent that the judge desires, a MultiView™ template can be selected, that will provide small windows of various views around the active view, which in most instances is the witness. By simply selecting a window with a touch of the finger or use of the Lite Pen, the window is enlarged and becomes active.

The attorneys have a more limited TVC capability. They cannot monitor the judge or other attorneys. The jurors have still a more limited TVC capability. Their viewing is limited to the witness, the demonstrative evidence and the TMC (Total Memory Control) exhibits which have been introduced and admitted into evidence.

The design philosophy has proven to be tremendously successful. All trial participants have a perfect view of each aspect of the courtroom and the evidence. The courtroom cameras capture a digital image of the entire courtroom at all times for appeal purposes. The same courtroom cameras permit the remote juries to have the same access to information as the jury which is actually participating in the courtroom.[2] A complete description and analysis of the design of this courtroom may be found in *The Anatomy of the Courtroom* (Courtrooms International 2004).

Personal Jurisdiction

LawnScape's position, with regard to its personal jurisdiction appeal, is not surprising. It correctly advocates that the burden is on the plaintiff to establish that the defendant and the State of Delaware are connected in such a way as not to offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The defendant argues that it has never set foot in the State of Delaware. It has supplied references in the record to support its position that no officer or director of LawnScape has ever directed any correspondence or other type of communi-

cation, written or oral, to anyone within the territory of the State of Delaware. And the plaintiffs concede that the defendant did no direct marketing into the State of Delaware.

The plaintiffs, on the other hand, persuaded the trial court that the activities of LawnScape were "worldwide" and that the defendant could certainly foresee itself being "haled into this jurisdiction," as well as any jurisdiction within the United States. In support of this position, the plaintiffs provide an exhaustive analysis of technical workings of the "Satellite Assisted Internet Network" (SAIN). They have convinced this court that the giant electronic Net that covers the globe is so vast and interwoven that it is truly global in nature. Even the most rudimentary knowledge of SAIN leaves one with a clear understanding that any communication intentionally placed on the network is available for worldwide distribution. Moreover, under the facts of this case, a corporation with the sophistication and global marketing presence of LawnScape clearly organized its marketing efforts to exploit the benefits of the Satellite Assisted Internet Network.

The parties cite numerous cases, each of which they contend is dispositive of this jurisdictional issue. For example, LawnScape argues that *Bradley v. IIMM CyberTheater*, 437 F.5th 321 (4th Cir. 2005), is the current state of the law regarding personal jurisdiction in cybertransactions and should resolve the jurisdictional issue in its favor. *Bradley* concerned a bizarre death with facts similar to an interactive murder mystery offered on the Internet. The defendant in that case produced an interactive cybertheater and distributed it on SAIN. Each week the defendant offered a new theme. The rules were published on the Internet and were well known. At 7:00 p.m. each Sunday evening, a new game would begin. Facts and clues were published and personality traits of the characters were released. Each character was portrayed by a team of three players who communicated with each other prior to publishing any graphic "comments" or "actions."

The audience was composed of the general public who tuned in to the IIMM CyberTheater at any time to follow the entire mystery or to track the movements of an individual character. The audience could communicate with any character through electronic mail. The entire play was moderated by the Director of the Week, a famous celebrity or political figure.

The game that was the subject of the litigations, involved a kidnapping of a famous figure and publication of a ransom note on the Internet. According to the story line, the ransom was to be paid by a series of convoluted e-cash transactions on the Internet.

According to the opinion in *Bradley*, a "copycat player" kidnapped a well-known religious figure in Utah, whose parishioners were users of the Internet. Ransom notes were published through the Internet to all parishioners, resulting in contributions of fourteen million dollars in electronic transfers. Notwithstanding that the demands of the kidnapper were met, the whereabouts of the victim are still unknown: it is presumed that she met an unfortunate demise, although there are still a number of cynics who believe that the victim was actually the kidnapper and that she is alive and well and enjoying an early retirement (but I digress).

The victim's family filed suit in Utah against IIMM, claiming that the publisher's conduct was culpable in that it intentionally pandered to the emotional trigger of the unbalanced to obtain higher ratings, and that it knew that those attracted to this type of psychodrama on the Internet would cross the edge of reality and enter the world of cybervirtuality. IIMM moved to dismiss on the ground that the court lacked personal jurisdiction, in that none of the events leading to the abduction of the victim occurred in Utah. Indeed, there was no way of holding in what jurisdiction the kidnapper either received the electronic transmissions or resided. The Court granted Bradley's motion to dismiss, knowing that "under the theory of purposeful availment" there was no evidence of an intent to affect the plaintiff or the victim, who was not the subject of the broadcast. Thus, the *Bradley* court distinguished cases such as *United Medical Laboratories, Inc. v. Columbia Broadcasting System*, 256 F.Supp. 570 (D. Or. 1966), where the Court found the conduct of appearing on a national broadcast was enough to subject Walter Cronkite to personal jurisdiction in the State of Oregon. As the court in *United Medical* noted, "without doubt, they know that the particular material would be broadcast in the state of Oregon. This being the fact, their activities were 'voluntary and purposeful' in causing the broadcast of such material." The court noted that the defendants could anticipate that the content would reach those affected in Oregon.

U.S. Growers of America contends that the case of *CompuServe, Inc. v. Patterson*, 1996 FED App. 0228P (6th Cir. July 22, 1996) supports its position that the lower court correctly asserted jurisdiction over LawnScape. In *CompuServe*, the Court of Appeals reversed the district court's earlier decision and ruled that a Texas resident's Internet contacts with the well-known computer information service CompuServe (headquartered in Columbus, Ohio), were sufficient to support the exercise of *in personam* jurisdiction over him.

Patterson, a resident of Texas, subscribed to CompuServe and marketed "shareware" on the CompuServe system in Ohio. Patterson notified CompuServe that it had infringed his common law trademark and engaged in deceptive trade practices. CompuServe filed a declaratory judgment action in Ohio. The court was faced with the question of whether the transaction of business in another state by the intentional use of electronic connections/means provides the minimum contacts required by *International Shoe*.

The Court of Appeals concluded that Patterson had knowingly made an effort --and, in fact, purposefully contracted-- to market a product in other states, with Ohio-based CompuServe operating, in effect, as his distribution center. Thus it was reasonable to subject Patterson to suit in Ohio, the state that is the home of the computer network service he chose to employ.

The Court employed its well-known three-part model to make its decision:

1. The defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state.

2. The cause of action must arise from the defendant's activities there.

3. The acts of the defendant or consequences caused by the defendant must have substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable.

1. *Purposeful Availment*

The Court of Appeals found that the quality of business transactions that

Patterson conducted with CompuServe were on the level of a "purposeful availment" of the privilege of acting in the forum state or causing a consequence in the forum state. Patterson regularly conducted business with CompuServe from 1991 to 1994. He also advertised his software on the CompuServe system. He consciously reached out from Texas to Ohio to subscribe to CompuServe and to use its service to market his computer software on the Internet. He entered into a contract which expressly stated that it would be governed by and construed in accordance with Ohio law.

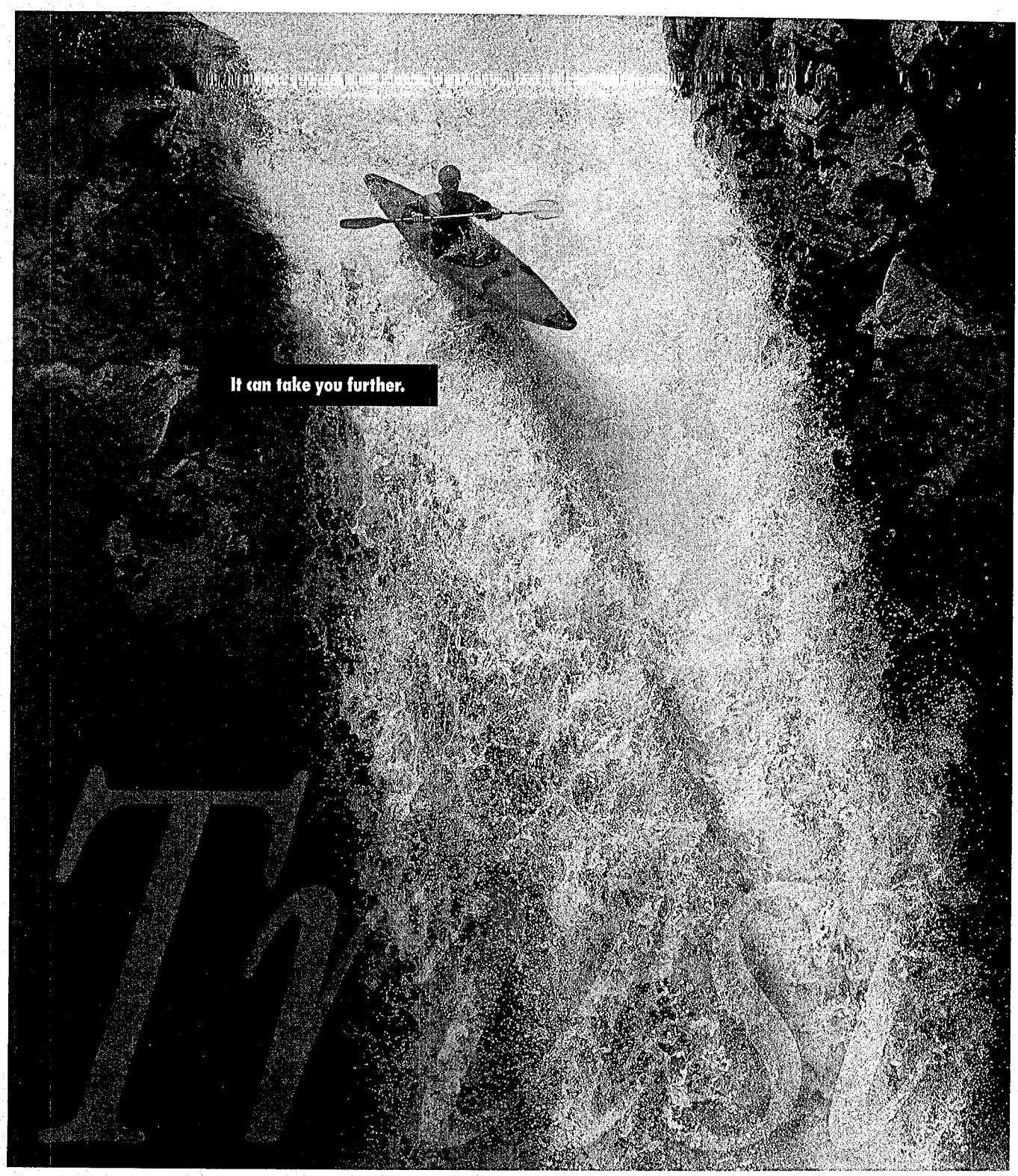
Ohio has written and interpreted its long-arm statute, and particularly its "transacting business" subsection, with the intent of reaching as far as the Due Process Clause will allow, and it certainly has an interest in providing "effective means of redress for its residents." *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1956).

2. Arising from Activities in the Forum State

The Court found that Patterson's contacts with Ohio were related to the operative facts of the controversy concerning allegations of trademark or trade name infringement and unfair competition. When CompuServe began to market a similar product, with impressions and names that Patterson saw as being very much like his own, he notified CompuServe that its marketing of the new software infringed trademark, and otherwise constituted deceptive trade practices. CompuServe filed a declaratory judgment action in the federal district court for the Southern District of Ohio after Patterson demanded at least $100,000 to settle his potential claims.

Any common law trademark or trade name that Patterson might have in his product would arguably have been created in Ohio, and any violation of those alleged trademarks or trade names by CompuServe would have occurred, at least in part, in Ohio.

In addition, with regard to the purposeful availment test, CompuServe's declaratory judgment action arose in part because Patterson threatened, via regular and electronic mail, to seek an injunction against CompuServe's sales of its software product, or to seek damages at law if CompuServe did not pay to settle his purported claim. Thus, Patterson's threats -- which were contacts with Ohio -- gave rise to the case.



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3. *Reasonable Exercise of Jurisdiction*

The Court concluded that there was a substantial enough connection between Patterson and Ohio to make it reasonable for an Ohio court to assert personal jurisdiction over him. The court found that Patterson was an entrepreneur who purposefully employed CompuServe to market his computer software product. He knew when he entered into the Shareware Registration Agreement with CompuServe that he was making a connection with Ohio, and he supposedly hoped that connection would work to his advantage.

Also, Ohio has a strong interest in resolving a dispute involving an Ohio company and Ohio law on common law trademarks and trade names.

LawnScape is quick to advise this Court that the *CompuServe* opinion is at odds with the case of *Pres-Kap v. System One, Direct Access, Inc.*, 636 So.2d 1351 (Fla. App. 1994). The plaintiff, a Delaware corporation, owned and operated a computer database in Florida that provided airline, hotel and car reservation systems for travel agencies. It also maintained a branch office in New York. The defendant was a New York travel agency that contracted in New York with plaintiff, through the New York branch office, to lease computer terminals and to obtain access to the Florida database. While the lease agreement did not contain a forum selection clause, it did contain a choice-of-law provision providing that Florida law applied. After the lessee stopped making monthly lease payments, suit was brought in Florida. The defendant moved to dismiss for lack of personal jurisdiction.

The court found that no personal jurisdiction existed. The Court realized the far-reaching implication a contrary decision would have on the use of "online" computer services. "Such a result, in our view, is wildly beyond the reasonable expectations of such computer-information users, and, accordingly, the result offends substantial justice." 636 So. 2d at 1353.

While each of these cases may be valuable for their historical significance, they provide no assistance to this Court in this age of cyberglobal presence. The answer to the quandary of personal jurisdiction regarding SAIN transmissions is clear. In its wisdom, the Supreme Court in *International Shoe* found the overriding and controlling issue to be whether the exercise of jurisdiction would offend "traditional notions of fair play and sub-

stantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). In particular, the applicable due process test is whether the conduct of the non-resident defendant in connection with the forum state is such that the defendant could reasonably anticipate being haled into court there. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

This Court finds that the structure of the globe on a commercial basis has shrunk considerably over the last five years. While we continue to enjoy our own county's culture and morals on a personal and family level, we are, after all, a global community commercially. The fiction of dividing lines and borders must cease to exist at some point in time, and that time is now. No longer should a commercial entity be able to position itself so that it is protected from the laws that govern its purchasers. No longer should a LawnScape or Megacyber Corporation be allowed to exist in the cyberworld only. There is no longer any question that those who wish to trade globally should be responsible globally. They have anticipated the scope of their market: they ought to anticipate the scope of their responsibility. There is absolutely nothing about this concept which offends "traditional notions of fair play and substantial justice." To be sure, any decision to the contrary would result in a legal system that has failed the citizens it was designed to protect, and that truly would be a travesty.

It is the ruling of this Court that LawnScape and Megacyber are, indeed, subject to the jurisdiction of the State of Delaware and, as to this issue, the decision of the lower court is affirmed.

IT IS SO ORDERED.

FOOTNOTES

[1]There has always been a debate as to whether the attorneys are more interested in viewing the jury or in being viewed by the jury.

[2]Some critics do indicate that all juries ought to have the same access to the evidence and that there should not be a live jury panel that is permitted to view the case in the courtroom. However, a study by the Delaware State Bar Association indicated that the trial attorneys preferred a live jury at trial. The lawyers felt that the current design, which eliminates the ability of the lawyer to "play" to the jury, was enough of a culture shock for one decade. "To lose the live jury totally," one attorney argued, "was tantamount to removing the audience from the theater." Delaware Bar Advocate p.173 (Nov. 2003.) ◆

FEATURE

M. Jane Brady

THE USE OF TECHNOLOGY IN PROSECUTING AND SOLVING CRIMES

She never saw what, or who, hit her. She also, of course, had no idea that she would become part of a scientific effort that had been ongoing for several years. As soon as she opened the door, the assailant was upon her, beating her violently. She was nearly blinded by the attack. Although she ran to the front door, he chased her down, caught her in the living room, and raped her. He then stole some items from her purse and fled.

R.M., not her real initials, had become a victim of a rapist that, by the manner of his attacks and the age and other characteristics of his victims, was determined by police and prosecutors to be a serial rapist. There was a time that community hysteria and widespread fear were the only responses possible unless or until the perpetrator was caught in the act or identified by his victims. Today, there can be quicker resolution of such crimes with the aid of science. Technology allowed for the certain association of a number of the unsolved rapes in the area with a single individual. Currently, the serial rapist is in jail, serving multiple life sentences, and is no longer a risk to the community.

We leave a trail of evidence wherever we go. Our hair, fingerprints, fibers from our sweaters and carpets, and animal hairs from home go to the office and out to lunch with us. Similar "clues" follow those who perpetrate crimes upon us, and end up in our homes and cars, and on our bodies.

The use of technology in identifying offenders, or in determining the manner of death or the way in which a crime was committed, has certainly changed the way we prosecute and solve crimes. The developments have dramatically affected the capabilities of most crime laboratories to search for and detect evidence of crime, to examine that evidence, and to explain the findings in court. Here in Delaware, we are keeping current with the trends and capabilities in evidence detection and analysis.

Historically, Delaware police agencies, like their counterparts in many states, have sent the evidence they collect at crime scenes and from criminals to the forensic laboratory of the Federal Bureau of Investigation. The cost of the equipment to conduct the analysis of that evidence is significant and the training required to use it correctly is specific, and the State did not have, or chose not to spend, resources on either. Recently, however, leaders in the State have recognized that delays in the receipt of the results of that testing have become significant as Delaware waits, in turn, with all the other states that use the services of the FBI laboratory. Motions to dismiss criminal charges because of the delay have been made by defense attorneys and are considered by the courts. Judges have made it clear that more expedited examination of evidence should be a priority. Additionally, cuts in federal spending will likely make the cost of using the FBI laboratory, now free, more expensive for the states. As a result, several years ago, the Office of the Chief Medical Examiner and the Delaware State Police began efforts to bring to Delaware the evidence detection and examination capabilities that the State needs. Not only will there be less delay in receipt of the results of examinations, but all the agencies will benefit from working more closely together, and from being more fully aware of what each needs to get the best results.The precise collection and preservation of the evidence is as important as the precise testing of it.

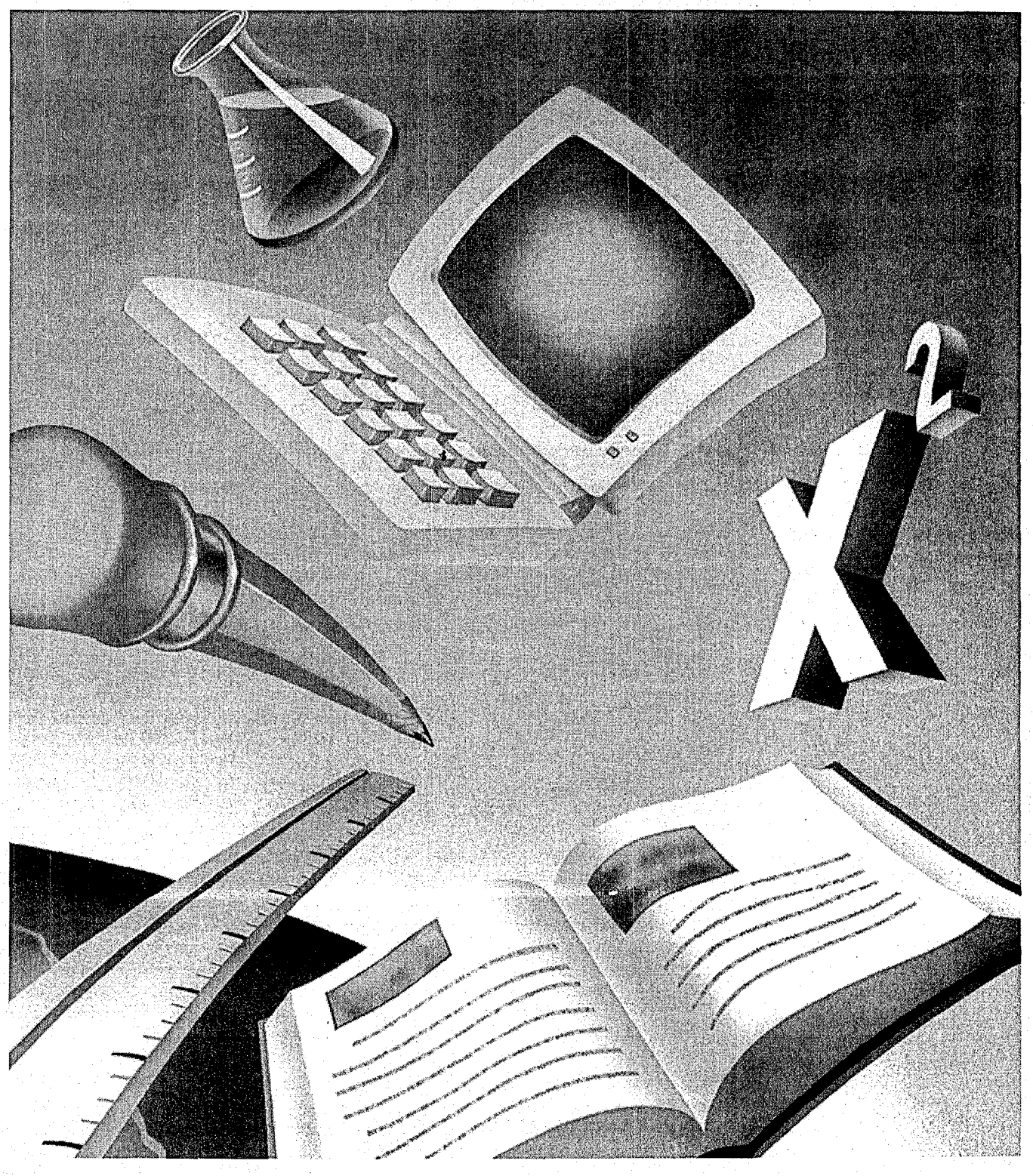
The Office of the Chief Medical Examiner (the "Office") is the forensic laboratory with which many of us are the most familiar. For years, police have taken the drugs they seize in criminal investigations to that Office to be analyzed. The staff of that Office is charged by statute to perform the autopsies upon the bodies of the victims of homicide, suicide, and unexplained or accidental deaths.

Those demands alone are significant. Last year, the Office received and examined 22,525 items in connection with 3,434 drug cases. In 1996, they already have examined over 2,000 cases and have completed their examination of the evidence in each of those cases within four weeks. In 1995, the Office conducted 800 *post mortem* investigations.

Today, it can do much more. Through grant monies and other revenue sources, the laboratory has acquired equipment to detect and examine evidence of arson. This capability already has been of great value to the Office of the State Fire Marshal in four cases in the past year alone.

Some evidence collected in death investigations has had to be sent to other laboratories for toxicology examination. Now, the Office is in the process of establishing protocols for the use of a new Atomic Absorption Spectrometer to detect heavy metals, such as arsenic and lead, in poisoning cases.

The showcase of recent technological enhancements, however, has to be the DNA capabilities of the lab. The Office has established a Forensics Science Center (the "Center") for analyzing blood, tis-



sue and other components of the human body that contain DNA. The Center is expected to be fully operational by June 1997, and is expected to reduce delays from eight (and more) months for receipt of results from the FBI laboratory for this type of testing to three months or less. The Office already has participated successfully in three proficiency testing programs, and has collected hundreds of samples for use in statistical analysis. A "bank" of DNA profiles of convicted felons and sex offenders is being established, in accordance with federal law, and will

The expanded capability of science, however, is just part of what has changed in law enforcement as a result of the technological advancements we have made.

be available for comparison of evidence from crime scenes with known data, much like the fingerprint files of the State Bureau of Identification.

The Delaware State Police have been performing certain testing and analysis in criminal cases for some time. The testing of blood and breath for alcohol content has been performed at the department headquarters in Dover for years. On October 20, 1992, the Delaware State Police Crime Laboratory opened its doors for business. Experts trained in the analysis of handwriting, questioned documents, hair and fiber analysis, and polygraph (lie detector) testing are on staff at the Delaware State Police department and have been available to all police departments throughout Delaware. They now have on staff an expert in the analysis of hairs and fibers. The State Police are preparing for the expansion of the laboratory facilities and plan to hire technicians for local comparison and analysis.

The expanded capability of science,

however, is just part of what has changed in law enforcement as a result of the technological advancements we have made. The science of crime detection starts at the scene. The location of the commission of a crime or the discovery of evidence of a crime is treated much differently today from in the past. The enhanced capabilities of evidence analysis mean that much more of what is found at a crime scene *is* evidence. More definitive microscopic comparisons mean that soil from the area may be detected on the soles of the shoes of the perpetrator, or that a penknife can be said to have cut the telephone wires to a victim's home. A specific crowbar may be connected to the pry marks on a safe door, or the hairs of a suspect's pet may be found in the victim's home. While many objects do not provide the type of surface from which fingerprints can be detected with dust and a brush, those same surfaces speak loudly if sprayed with a new "SuperGlue" that attaches itself to the previously undetectable ridges of a print.

Many clues are not able to be moved from the scene because they would be destroyed in their removal. While the police have been known to take large pieces of a wall to show the manner in which the blood splatters appear there, shoe prints, tire tracks, and other valuable evidence would be destroyed in the very lifting from the ground, which is much less stable than drywall. Those samples must be preserved by pouring plaster into the depressions of the sample. The resulting casts are so accurate that the depth of a tire's tread may be detected.

The quality of both the collection of items of evidence and the preservation of these items after collection is critical to the ability of the laboratories to examine the characteristics of the items for evidentiary value. The storage of items of evidence is critical as well. Some items, such as blood, must be air-dried, and should be stored in paper, which breathes. Other items have physical qualities that require that they be securely enclosed so as not to escape into the air, such as inhalants, some drugs, and incinerants.

The timeliness of collection and examination of evidence is sometimes critical, such as in an autopsy. The body changes after death. Aspects of forensic science deal with when and how these changes occur, in determining the time and manner of death. But certain evidence is lost as time passes. Our blood breaks down

during decomposition, and basic information about blood type and enzyme composition is lost. Evidence regarding stomach contents, and substances such as poison or drugs, may be lost. Identifying DNA is not as time-sensitive, as it is found in hair and bones, which do not dissipate in the same short time, but locating known or otherwise available samples for comparison may be more difficult.

In arson detection, which can include the detection of accelerants such as gasoline, the collection and analysis also must also be done promptly. The passage of time in the open air will allow for the dissipation of evidence. Once collected, the evidence is stored in clean containers, much like the cans you buy at the store with paint in them, which are as airtight as possible. Over time, however, the qualities of most accelerants are such that they will dissipate if not timely detected.

Parallel to the adjustments in our own lives as a result of technology (remember when there were no microwaves?), the law has had to adjust to accommodate technological advances. Before the introduction at trial of any new technology, the courts must be certain of the reliability of any testing procedure and, therefore, of the results and conclusions reached by the tests. They must be certain that the manner of collection and preservation was reliable, and that all manufacturers' instructions for the use of the equipment were met. Additionally, the courts must insure that the purpose for which the testing was done is within the capabilities of the procedures. (An extreme example might be the use of a test for DNA to analyze a fingerprint. Obviously, such a procedure would be flawed.)

Pretrial hearings in the Pennell case are illustrative of what must be done. In that case, the State sought the introduction of DNA testing of body fluid samples to establish the identity of Pennell as the perpetrator of a number of rape-murder offenses.[1]

The court held extensive hearings on the reliability of DNA testing, what procedures must be followed in the collection and preservation of the evidence, and the statistical probabilities before allowing any statements regarding the certainty that evidence would be of probative value in the identification of Pennell as the perpetrator of the crimes. In those hearings, the court declined to allow statistical probabilities regarding the certainty that Pennell was the culprit, but in a subsequent case, *Nelson v. State*, Del. Supr., 628 A.2d 69 (1993), the Delaware Supreme Court ruled that such statistical evidence was appropriate and necessary to explain the significance of such a match.

Those of us in the criminal justice system have believed for years, even before such technology was available, that the positive identification of an individual was possible by virtue of the specific personal characteristics that distinguish us from others. Today, we need only dream of the possibilities of tomorrow. Computer recreations, and computer-generated detection of crimes committed with the use of new technologies, are likely to join the efforts of good old fashioned-detective work.

FOOTNOTE:

[1]Steven Pennell was charged with and convicted of the murders of a number of women in the New Castle area. He is suspected in others. He was sentenced to death, and was executed on March 14, 1992. ◆

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FEATURE

Hon. Susan C. Del Pesco

"FACT FINDING DOWN THE DIGITAL HIGHWAY": TECHNOLOGICAL TOOLS IN COURTROOM 302

Late again. This tort claim was going to be the death of plaintiff's counsel. Why did they feel that way? Finally, they had what should have been a clear winner! Both the law and the facts were clearly on their side, but they couldn't seem to get organized. Now, they were tripping into the courtroom, notebooks in hand, depositions tabbed, and easel in tow. The Judge was already on the bench, the jury--staring down its collective nose--seated in its box, and plaintiff's prosecution team (a partner, an associate, and a paralegal) fumbled toward their chairs to begin another day in the fog that had become "the case."

By the second day of trial, a sleeping disorder had already consumed the jury. This was so notwithstanding compelling facts, a very sympathetic and believable client (the Mother Superior at the local parochial school), and only a remotely plausible legal defense. Yet every time the plaintiff's team spoke, it was as though the jury came under the spell of the sandman: glazed stares, brows creased to keep disinterested eyes opened. While some jurors fought yawns, others, including the foreperson, happily succumbed. Indeed, juror number six seemed to welcome the respite. All that was missing was the snores of deep sleep.

Something was dreadfully wrong. The witnesses were battle-tested. The economist, the vocational rehabilitation expert, the doctors, the accident reconstruction expert, and the police officer looked good on paper, each with long, distinguished careers and courtroom experience. They were savvy, every one of them. Yet the jurors just didn't seem to get it.

Across the courtroom sat opposing counsel -- Leslie Stoner. No books. No transcripts. Not a single tabbed binder! Only a laptop computer. Plaintiff's team raised an objection. By the time they had scrambled through the Rules of Evidence, stated the basis for the objection, and sat down to rest their winded lungs, Stoner had located the Judge's most recent ruling on point and could cite it with authority. All of the lawyers were prepared, but Stoner seemed to have a crystal ball, anticipating issues that had not even been mentioned pre-trial. Once, without Stoner's leaving the courtroom to call for assistance, her office sent over a legal memorandum on an issue that had arisen since the last recess. It all occurred during her cross-examination of plaintiff's economist. Somehow, the research, the writing, and the production of a final document were accomplished even as Stoner was drawing and quartering the witness. So much for plaintiff's future wage loss claim.

The jury was hers. She talked, they listened. She moved, they followed. She leaned forward, they leaned forward. She spent half the time on her feet before the jury. While she was at the podium, plaintiff's team casually looked under the defense table. A microphone maybe? Nothing. Once, in a fit of sheer exasperation, they contemplated a sidebar to compel their adversary to divulge her nefarious technique. Finally, it hit them. THE COMPUTER . . . THE COURTROOM. Both had conspired against them. The wires, her quiet typing, all those gizmos. She used them -- every last one of them. Courtroom 302, filled with state-of-the-art communications equipment, had become the vehicle for their demise.

Stoner made it look so easy. Her authority sprung from her appearance of organization, of simplicity, of truth. She didn't need the binders, depositions or reports. They were all on CD-ROM.[1] When she wanted something, she retrieved it with a couple of keystrokes. She used the equipment in Courtroom 302 to project the documents onto television monitors. No more fumbling with transcripts of testimony. Damning testimony flashed on the screen before the

jury, leaving the witness to compose an explanation. Jurors were not frustrated by time wasted while counsel walked to and from the witness stand, reading and re-reading portions of the testimony. No one twiddled her thumbs or thought about dinner.

For their part, plaintiff's counsel had meticulously organized their notebooks and binders. Nonetheless, finding an item became something of an art. When the search went slowly, they had to kill time by telling the judge and jury what the "document will show when we find it." By the second day of the trial, the jury seemed frustrated with the wasted time.

Plaintiff's counsel hadn't paid much attention to the bailiff when he told them about the fancy equipment in Courtroom 302. They knew there were telephone lines, eight of them, but they hadn't planned to call anyone, so it didn't matter much. Unbeknownst to plaintiffs, Stoner had her computer connected by a modem to a telephone line. Through this phone line, she had e-mail and Internet access. Back at the office, a litigation support team of paralegals and associates was available to assist. Rather than sit idly in the courtroom, they were at their desks working on other matters, but available to respond to a call for help.

This was a big case for the plaintiff's counsel. They had assigned even more staff to the case than had the defendant. All to no avail. As Stoner passed her legal memorandum to the judge, one of plaintiff's attorneys dashed into the hallway and placed a call to his office. They needed two of their best paralegals to come over to the courtroom with materials responsive to the motion. The paralegals went to the wrong courtroom. They are still lost, and so was the motion.

The evidence was difficult to present. The reconstruction expert based his conclusions in large part on the physical damage done to the under-frame of the car. Based on that damage and the plaintiff's deposition testimony, he reached a conclusion regarding the speed of the cars at the time of the impact. The expert referred to a single, Polaroid photograph and described what he saw, but the jurors couldn't see the actual photo. Only the most committed among them was willing to invest any energy in following the expert's description.

Stoner skewered the expert. In a matter of seconds, she pulled out the Visual Presenter, affectionately known as ELMO, and placed the photograph on it. In large, glorious color, a battery of television monitors placed in close proximity to the jurors, the expert, plaintiff's counsel, and the judge, put the photo before all in attendance. It was as though an alarm clock sounded. Juror six snapped out of his reverie to inspect, up close, the "bent frame."

The enlargement of a small area of the photo on the

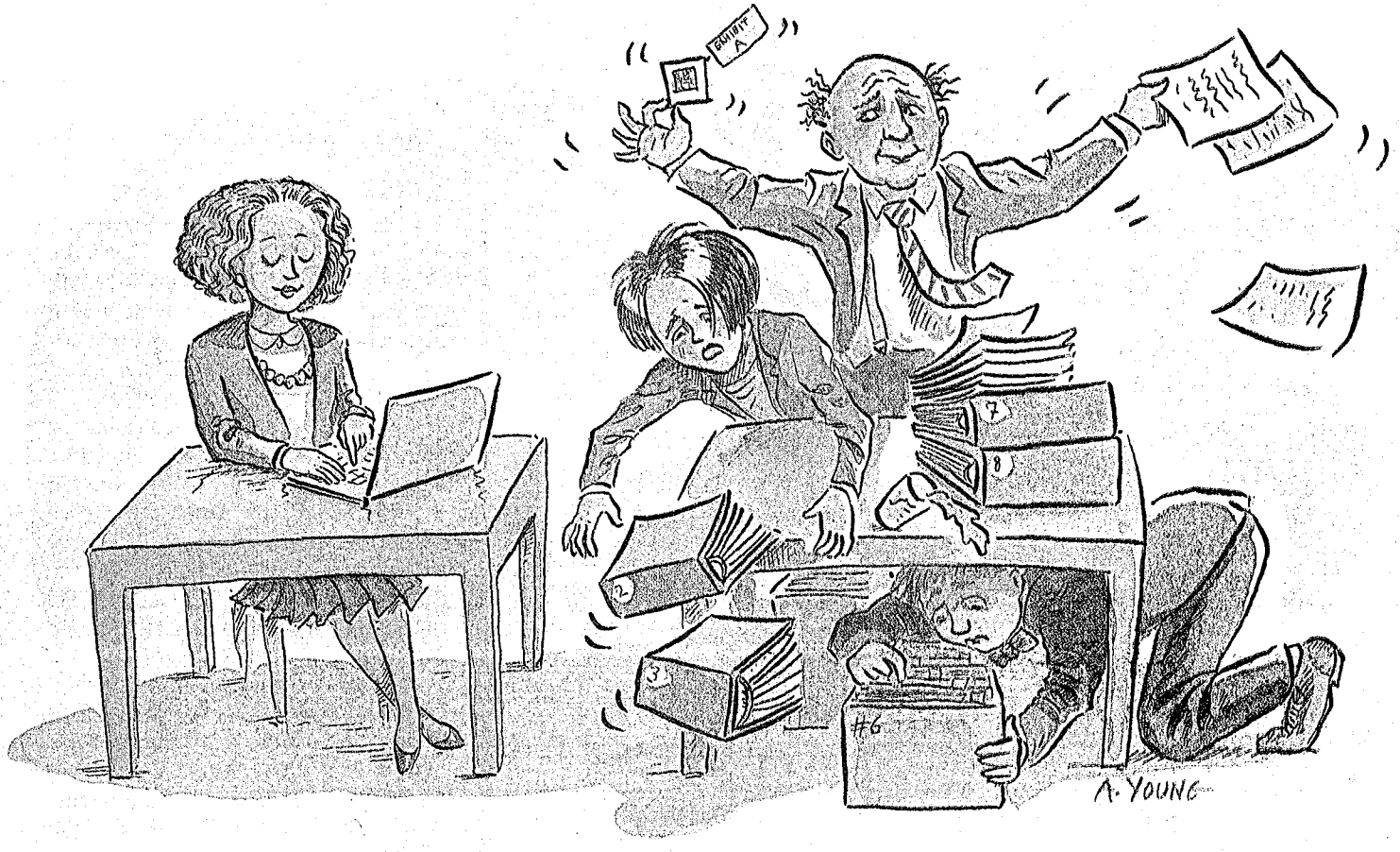


Illustration by Amy Young

TV monitor immediately brought into question whether the areas of damage arose from the collision in question or from a previous accident. And what about the lighting in the photo? The very amateurish photo was taken in light so poor that the camera angle may have recorded a shadow on the frame, rather than an actual bend. The jury understood every point raised by Stoner because they could interpret the evidence through a vary familiar medium--television. With other witnesses, she used ELMO to show x-rays, medical

The entire presentation flashed on the screens in front of the jurors and they understood every bit of it.

records, and the police report. She even was able to project a portion of the broken steering wheel on ELMO.

Stoner's entire cross-examination was recorded for future reference by the VCR built into ELMO, with the minimal effort of a tap on the remote control. This video wasn't made just for appeal purposes. Stoner replayed a portion of it for her own reconstruction expert. What had looked like a bad photo angle during cross-examination, increasingly appeared to be outright trickery. The reconstruction expert then created a computer simulation of the accident, which was also presented through Stoner's laptop computer and the television monitors in Courtroom 302. The entire presentation flashed on the screens in front of the jurors and they understood every bit of it. When Stoner's reconstruction expert finished his testimony on direct, the jurors slowly turned toward the plaintiff. One could almost hear them thinking: "Why is this case in court?"

The plaintiff's economic expert faced the same apathy from the jurors. The economist droned on about present and future values in front of an old, unstable

easel, marker flailing, numbers rambling all over the paper. When she finished the easel was put away: out of sight, out of mind. When Stoner's economist testified, he used the electronic "White Board" with a writing area about three times that of the standard easel tablet. He drew a few charts, lots of squiggly, economist-type lines and a couple of formulas. He did his best to make it interesting and, when finished, the image that he created was printed onto an 8 1/2" x 11" sheet of paper. Now the jurors could hold it, and refer to it conveniently during their deliberations.

Here personal savvy and the resourceful way in which she presented her case through the use of the latest equipment made all the difference in the case.

The case went to the jury, which promptly, and not surprisingly, returned a verdict for the defense. One surprise, however, was the cost of the trial. While both sides incurred the usual expenses, the defendant paid nothing for the use of the equipment in Courtroom 302. Her personal savvy and the resourceful way in which she presented her case through the use of the latest equipment made all the difference in the case.

In the near, future Courtroom 302 will be equipped with a 10' x 12' screen. The screen, nicknamed the I-Max-for-lawyers, when used in conjunction with the powerful and adaptable new projector in 302, will allow everything from computer images, documents, photos, exhibits, live remote video-trial testimony and ELMO images to be projected onto one screen for all to view. These high-tech presentation aids are all available for the asking.

FOOTNOTE

[1]Courtroom 302 does not have the equipment required to put an image or text on a CD.◆

FEATURE

Linda M. Dickey
John F. Dickey

TECHNOLOGY AND THE PRACTICE OF LAW — FROM WHERE WE SIT

What's one of the greatest success factors for a lawyer introducing new law firm network technological innovations for a major chemical corporation? Being married to an IS Manager overseeing the computer operations of a major law firm. As the Manager of Information Systems for Young, Conaway, Stargatt & Taylor, Linda is responsible for managing the firm's automation program. John, Manager of Law Firm Partnering for the DuPont Company, is charged with making certain that DuPont's 38 primary law firms and service providers utilize technology to the fullest in order to provide the best legal value possible to the company. Our respective job responsibilities generate lively dinner table discussions which, most of the time, result in good ideas for solutions, but sometimes end by retreating to the safe haven of agreeing to disagree. Our conversations always help us see more clearly the other's viewpoint, and we both gain important insights that would otherwise be difficult to appreciate.

We would like to address several issues about the fascinating topic of computers and how the use of technology is essential to staying competitive and abreast of swift changes in today's legal environment.

1. Where is the greatest misunderstanding between information systems (IS) managers and lawyers?

LMD: The three questions an IS manager is most likely to hear from lawyers are:

a. "We're doing okay with the equipment and programs we have in place, so why do we have to spend more money and change what we're doing?"

While staying abreast of rapidly changing technology represents significant capital investments, cost-benefit analysis confirms the potential for improved productivity and profitability. Maximizing the potential, i.e., using all of the features of a software program, is achieved through abundant training and competent user support.

Obtaining a successful result in a case is enhanced by a lawyer's ability to gather, organize and relate details about every facet of the case. Computers have reduced the size of the world, from a fact-finding, organizational and communications perspective, to the distance between a computer and the nearest network or telephone connection. Computer "electronic file drawers" never lose track of a document (well, provided one follows prudent back-up procedures). However, computer hardware and software must remain up to date in order to take full advantage of new opportunities. Unfortunately, I can appreciate that to some, it seems those updates take place just when you become comfortable with the obsolete computer programs.

b. "Technology is changing so rapidly, why don't we wait for something better."

Technology is changing rapidly, and will continue to do so. Purchasing decisions must be based on well-defined automation strategies. Programs must be implemented as quickly as possible to maximize benefits. If you wait for the next generation of equipment or ensuing revision of software, decisions will forever be postponed and benefits relinquished. "Waiting for something better" often reflects fear and procrastination rather than prudent business-decision making. One significant exception to that rule is to postpone a software purchase written for

DOS®, if you are anticipating (as you should be) a move to Windows.®

c. "The programs are too difficult to use — it was easier in the old days, why change?"

Time must be budgeted to learn new ways of doing old things. Once the learning process is complete, most users would never go back to the "good old days" especially since Windows®-based programs make computers easier to master than the older, archaic DOS®, counterparts. If well-designed and implemented, programs should be straightforward (and perhaps even fun) to learn. The key is allocating sufficient time for training and for adapting.

Computer-literate attorneys understand their clients' technology-based businesses better. For that matter, understanding news articles, national and world events, or the stock market is often contingent upon a general understanding of computers. The law business is one of knowledge and communications, and both are enhanced by adding computers to the solution mix.

JFD: I agree with Linda, particularly regarding the reluctance to change. We are all tempted to remain in our comfort zones waiting for more facts before making the financial and time commitment that new technology always demands, but more on that later.

Among the things that I wish IS managers better understood about lawyers is that:

a. We want solutions without surprises. Some people have the idea that lawyers are impatient, demanding and opinionated. Certainly no one in this

Photograph by Scott Hewitt

Re-engineering and Technology

The combination of re-engineering work practices and use of technology permits lawyers in distant offices to work more efficiently. One of our multi-defendant multi-jurisdictional litigation groups mapped its work. The group from the in-house staff, national coordinating counsel and local counsel found that, within the first five days of receipt of a new complaint, they overnighted two copies and made five other copies. Three lawyers touched the complaint and spent some time reviewing the claims. The copies found their way into five different filing systems. All of the filing systems required space and someone to maintain them. By connecting all three offices with our Wide Area Network ("WAN"), the group will be able to eliminate the faxing, copying and filing. An in-house clerk will image the complaint and e-mail it to the local counsel who could evaluate the claims and post a brief notice to the in-house attorney and the national coordinating counsel summarizing the claims and planned strategy. The in-house clerk will mail the original of the complaint to the local counsel and make the image of it available to the rest of the team on the WAN for retrieval by anyone in the team through their computer. Touches by attorneys will be cut from three to one and only one hard copy will be filed.

reading audience fits that mold, but it is likely that we have strong opinions about the end result that we want a computer solution to satisfy. Since we are lawyers and therefore can master any topic with enough study, we may also believe that we know exactly what form that solution should take. For that reason, IS managers must recognize that they need to talk to us about solutions to our problem, not about bits, bytes and baud rates. We also want direct answers to our questions at a level that we can understand (no "technogarble," please).

Once the solution is defined and the budget and deadlines are set, please don't surprise us on either. We live in a deadline-oriented world fraught with contingencies which we have to manage, and we expect those we deal with to be able to manage their commitments as we must manage ours. Whether we are in-house or in private practice, we are all controlled by budgets, so do your homework up front and stay on time and on budget.

b. We don't want to be oversold. Linda mentioned the need to manage expectations. My issue is similar. Tell us what you can do with realistic human and financial resources. You understand the limitations inherent in any technical project, but we don't. When you finally get us to believe that technology can make a real difference in our practice, don't let us lose sight of the reality you know so well but which we likely do not. Dan Mahoney, DuPont's convergence pioneer and fly fisherman extraordinaire, coined the term "technolust" to describe the eager desire to have technology do everything and anything imaginable. We new converts to technology are very susceptible to technolust. Don't let us fantasize that we will be able to fax from the john only to learn three months into the design that to do so will take an army of consultants and the budget of Desert Storm.

We new converts to technology are very susceptible to technolust. Don't let us fantasize that we will be able to fax from the john only to learn three months into the design that to do so will take any army of consultants and the budget of Desert Storm.

2. Does implementing a sophisticated technology program automatically guarantee success within an organization?

LMD: No matter how sophisticated and advanced a computer operation might be, the most important element in its success is the manner in which it is managed. Without clear direction from a strong, literate, committed technology committee comprised of lawyers, conflict and unnecessary expense inevitably arise. In the absence of confident, solid leadership by lawyers willing to stay abreast of rapid, complex technical changes, an automation program cannot grow. This hampers services to clients and costs the firm more money to operate. The committee must have the support of the firm's central governing body *and* of the partners.

An IS manager must function within a matrix reporting structure, depending on the particular task at hand. While formally reporting to the partner charged with overseeing the technology program is practical, the IS manager must also interface effectively with the entire organization. Having the respect and support of the attorneys and staff, the authority to carry out programs and policies, and the ability to influence people positively is essential. The IS manager must possess overall knowledge of every facet of the firm's computer operations, but be supported by a good technical staff who handles the specifics of everyday technical issues. Helping administer a technology program is first and foremost a "people" job.

The IS department should have as its fundamental mission increasing the firm's resourcefulness by constantly re-evaluating and enhancing the way people work together.

JFD: We absolutely agree on the points Linda has expressed. I would only add one comment about the relationship between the IS staff and lawyers. If technical people are to add value to the organization, they must be *proactive.* We must encourage and expect them to learn the business and to bring creative, time-saving work practices to the table. An IS staff that just keeps the hardware running and, when asked, only responds with reasons why something new can't be done is a drag on creativity and on the entire organization's ability to stay competitive. The flip side of this is that we must be proponents of change, but more on that topic later.

But let's assume you are blessed (as Brother Joseph of Saint Edmond's Academy in Wilmington would say) with a sophisticated computer system and a *proactive* IS manager. Are you guaranteed success? For sure, you will be more successful than most of those who aren't so blessed. But if you really want to make a quantum leap at reducing cost for you and your client, take a bottoms-up look at how you, your support staff and your clients do the work.

Our friends from Arthur Andersen's Legal Business Consulting Group taught us how to "re-engineer" our work processes using a technique called work process mapping. The goal is to be better, faster and cheaper, and it works whether you are a corporate client intent on reducing your docket and litigation cost, a plaintiff's attorney working on contingency fees, or outside defense counsel who wants to be known for bringing the greatest value to your clients. We place such value on re-engineering that we require our practice groups and their outside lawyers and staff to go through the process as part of the training for our new technology tools.

The mapping technique helps the work groups eliminate duplication of effort by more clearly defining roles and responsibilities, identifying unnecessary delays and roadblocks, eliminating procedures put in place in the past which serve no current purpose and considering new creative methods of working.

The IS staff needs to participate in the re-engineering process. Not only will they learn your business but they can identify processes that might be simplified by use of computers. They should also be there to remind those of us who might be smitten with technolust that some tasks are best left to be done the old-fashioned way.

3. What are the key ingredients to effectively managing technological changes in an organization?

LMD: Lawyers must participate in the nuts and bolts of the process and expect to invest significant time in learning computers in order to assist IS staff in developing solutions. They must lead by example, not by directive.

Interviewing lawyers (especially those who are more technologically literate) about what they are trying to accomplish, or need to streamline, is necessary in order to evaluate solutions thoroughly. If the framework of a solution is not founded in fact, the solution will not solve the problem or achieve the objec-

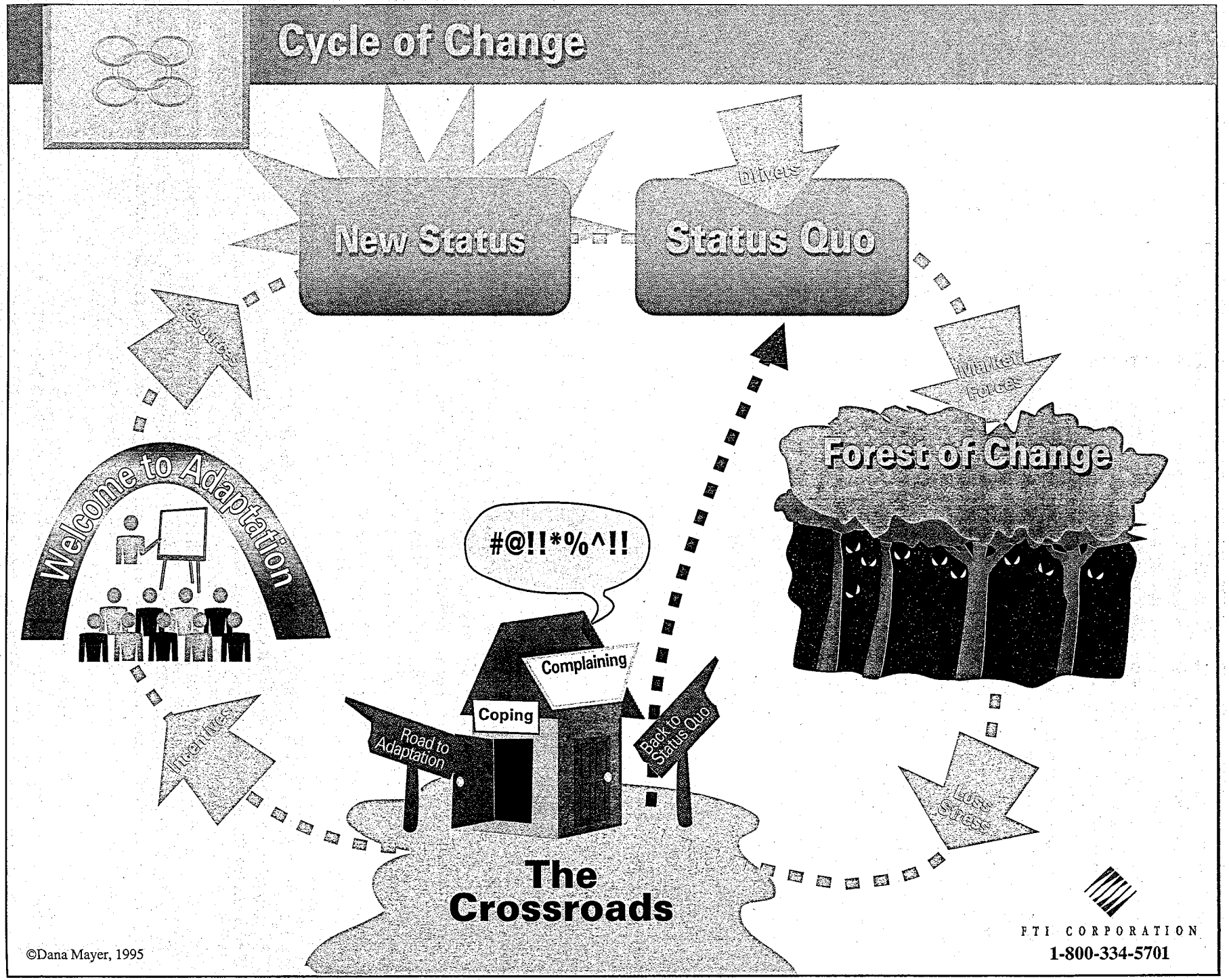
Cycles of Change

Our response to change is predictable. While acceptance of change is influenced by our personality, a better understanding of the typical human response to change can make our adaptation much less traumatic. Some people thrive on change but most of us have some fear of it. If we can learn to overcome the fear and look at change as opportunity, then we can manage change rather than being managed by it.

Lawyers are perhaps more resistant than others. After all, what other profession is so based on precedent? Only a crisis will drive us into the forest of change (where all the gremlins lurk), e.g., noticing that you are the only lawyer in town not carrying a laptop; that task-based billing will permit the direct comparison of your efficiency to other lawyers; that the firm is losing more beauty contests than it's winning; that your general counsel has told you to cut your docket and your budget in half; or realizing that you can't make a profit at the fixed fees that other firms are charging for similar work. These are the drivers that move you to change. Change is not comfortable and the typical response is to complain.

Complaining and condemnation of offered solutions is normal and is indirectly proportional to our tolerance of change. Knowledge is the key to getting through this stage — knowledge of the benefits of the offered solution and knowledge that others have successfully moved through the change and prospered. If you are leading change, it is comforting to know that a period of complaining is the normal way that people must cope with change. Have patience, give them the information and the incentives they need to move through this stage and don't get too discouraged.

As we absorb knowledge, we find ourselves at a crossroads. If complaining is converted to coping and adaptation, change is possible. If complaining continues, it is likely that we will return to the status quo and suffer the consequences of ignoring market forces. Coping and adaptation lead to a new status which soon becomes a comfortable status quo, where you can remain until the next set of drivers causes the cycle to begin again.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tive. IS must "know its customer" and "know the business" they're in before recommending solutions.

When integrating new programs, a major task is managing expectations and communicating clearly about how a process is going. Gaining "buy-in" support through involving the computer users in the decision-making process is a key ingredient to the success of any new program. After all, people are more likely to support that which they help create.

It is important to educate lawyers and staff thoroughly on the extent to which productivity will lag during a re-learning curve and to provide adequate support during the transition period.

JFD: Understanding how people respond to and cope with any change, not just technological changes, is very important to the success of any new program. The changes that have taken place in the DuPont legal department over the last three years and which are continuing are substantial. In many states we are working with new law firms. We are learning new case management, early case assessment, budgeting, e-mail and a computerized document retrieval system, all while feeling the threat of corporate downsizing.

Faced with the need to implement these changes at a faster rate, we asked our friends in the Business Development Division of Forensic Technologies, International (FTI) for help. They developed a half-day seminar to help us understand the dynamics of change and to learn to manage it rather than be managed by it. The response to the seminar was sufficiently promising that we repeated it for a group of lawyers from our primary law firms. We have seen a much healthier response to the changes we are facing, and we attribute at least some of this reduced stress to their better understanding of the dynamics of change.

4. What are the trends in technology?

LMD: The trends in technology are towards more "user friendly" software solutions to the management of information. However, no matter what the trends are, computer systems must exist for the purpose of making a lawyer's practice more proficient. They should not create an additional burden.

Expect to see expert systems combined with artificial intelligence employed to evaluate cases and predict outcomes.

Electronic exchange capabilities with outside law firms and clients are expanding. That means IS staff have to figure out seamless methods of interfacing with many different computer operating systems and protocols. In other words, the days of understanding one primary operating system are over. The staff must have a working knowledge of all the major systems in order to resolve conflicts.

Clearly the Internet ("Net") will change the way we manage and exchange information. Internet E-Mail provides a seamless method of communicating with people around the world.

Lawyers can expand their skills by using the vast pool of research material on the Net, as well as using it to communicate with others who are working on similar issues.

Courts are re-evaluating how to handle paper, some opting for electronic rather than hard-copy filing of documents. Opinions and dockets are available electronically. Law book publishers are eliminating print media in favor of CD-ROM technology, with future plans to replace CD-ROM with publication updates posted to the Internet, ready for "downloading" to local computers or networks.

File cabinets are being replaced with computer disks which hold images or searchable full-text of documents, making review and retrieval quite simple. The "paperless" office is closer to reality.

Electronic information sharing via telephone lines and satellite communications opens a whole new domestic and international practice opportunity. This technology will permit law firms to serve broader client bases, communicating with outside computer systems to share critical case information.

Lawyers can expand their skills by using the vast pool of research material on the Net, as well as using it to communicate with others who are working on similar issues.

Finally, multimedia computers, which visually simplify complex concepts and facts, will play a greater role in courtroom proceedings. Winning a case against an opponent armed with such persuasive "weapons" will be difficult if not impossible.

JFD: Linda is the expert on trends in technology but I have observed that what was on the leading edge two years ago is now passé. Being a part of technology decision making is not for the "fainthearted" — you must gather the best data possible, analyze it as efficiently as possible, and integrate solutions in a timely fashion. You must anticipate emerging needs, always buying flexible systems which make modifications possible. Custom-developed proprietary software solutions rarely satisfy these conditions. Off-the-shelf software with a large customer base and open architecture have a lot more probability of remaining useful and expandable than any custom software. Perhaps the off-the-shelf solution doesn't exactly fit the way I work, but I will likely be better served by changing the way I do things a bit if my "square habits" are close to fitting into a slightly smaller square "off-the-shelf hole."

5. What is the real goal of technology?

Both agree: ADDING VALUE TO SERVICES PROVIDED TO THE CLIENT.

LMD: There are many fundamental goals and benefits of a technology program. Productivity and profits are increased. Work product is more accurate. Faster client response time results in higher quality service at lower cost. Peak load production capability is escalated through word processors, laser printers and the ability to parcel work to a number of people. Better decisions are made because more information is readily accessible to facilitate conclusions.

In the "old days" a simple contract might have taken a lawyer four hours to research and draft, including the time it took to rifle through a file cabinet, or find the right forms book,

searching for a similar contract previously drafted. A secretary had to spend several hours typing and proofreading the contract before it could be delivered to the client. At a billable rate of $125 per hour, the contract cost the client $500+. Today, with boilerplate contract forms readily available on word processors, retrieval and research time is drastically reduced. The lawyer can produce basic text changes, with final cleanup procedures performed by an assistant. The entire process can take one-half as long. A client who is charged $300 for a contract that cost $500 before automation feels she has received a good value for an excellent work product, while the practice generates more profit.

Technology must be enthusiastically adopted into the practice of law: it is no longer optional.

JFD: Corporate clients no longer want to pay for hours spent, but for the value added. For all the reasons that Linda has listed, technology can greatly reduce the time spent in gathering and disseminating knowledge. In my view, these are the tasks that should be automated, freeing the lawyer to focus on strategy and creative approaches to the case.

In closing, computers have forever changed the way lawyers manage knowledge, make decisions and communicate. Technology must be enthusiastically adopted into the practice of law: it is no longer optional. In the immortal words of Lee Iacocca, "keep up or get out of the way." Those who opt to "keep up" by incorporating automation into their practices will move into the 21st century with more success, confidence and most importantly, enjoyment of their profession. ◆

FEATURE

Donald F. Parsons, Jr.
Lisa K. W. Crossland

TECHNOLOGICAL TOOLS FOR CIVIL LITIGATION

Advances in technology during recent years have dramatically changed the face of civil litigation. Through appropriate use of available technology, trial lawyers can not only increase their efficiency, but also can produce higher quality work product and even potentially increase their chances for success in the courtroom. The term "technology" is used in its broadest sense in this article, encompassing products and methods already widely used by most litigators, including faxes, voice mail, and computerized on-line research services, as well as those methods and products whose potential is not yet fully realized in litigation, such as the Internet, computerized animation and simulation, and use of CD-ROM and laser discs as multimedia devices. Such technology, both the new and the familiar, affects all stages of litigation: institution and filing, discovery and trial preparation, and presentation of your case in the courtroom.

PREPARING AND FILING A COMPLAINT

Generally speaking, technology enables lawyers to develop pleadings both more rapidly and more thoroughly than can be achieved without the use of technology. The almost-universal use of computerized word processing and availability of telecopiers, secure forms of e-mail, and modems for circulating drafts among the client and co-counsel serves to maximize the opportunity for prompt filing of documents that are both persuasive and accurate.

Technological resources can also affect the actual content of complaints and filings, by allowing lawyers better to evaluate viable claims, defenses and chances for success. Legal research databases, such as LEXIS/NEXIS and WESTLAW, as well as CD-ROM libraries, can be used not only to evaluate causes of action and defenses of which the lawyer is aware, but also to locate case law and journals or articles on new causes of action being entertained in other states that potentially may be viable in Delaware.

Another source of useful information is the Internet. The growing importance of the Internet to the legal practice is evidenced by the efforts of the Computer Law Section of the Delaware State Bar Association in arranging Internet access and e-mail accounts for DSBA members through a local provider. Richard K. Herrmann, Esq., *Internet Electronic Mail Comes to the Delaware State Bar Association*, IN RE:, May 1996, at 16. Through legal discussion groups, Internet mailing lists and Web sites, lawyers may stay up-to-date on claims, defenses and new cases in their field of practice, and obtain suggestions and counsel from other practitioners. *See* Peter W. Martin, *Prospecting the Internet*, ABA Journal, Sept. 1995, at 52. There are so many sources of information available on the Internet, and the sources change so rapidly, that it is becoming increasingly important to enlist the assistance of either staff members or guidebooks to determine how and where to best discover relevant information.

Just as technology may be used to generate legal theories, it also provides an invaluable resource to develop fully the facts of your case. By searching through available computerized databases, one can discover articles and other publications, as well as public records, about the opposing party. These facts may indicate possible bases for a cause of action or defense. They may also provide information about an opponent's assets or net worth, to allow evaluation of possible approaches to the litigation, the potential for settlement, and the ability to satisfy a successful judgment should one be obtained. Such facts may be invaluable to your own client's determination of whether to pursue a claim or counterclaim.

Once the complaint has been drafted to the lawyer's and client's satisfaction, it can be filed with the court. The Delaware Superior Court Rules allow electronic filing "if permitted by these Rules, by administrative order, or by a Judge." Del. Super. Ct. Civ. R. 5(e); see also Del. C.C.P. Civ. R. 5(e) (same). The Superior Court Civil Rules provide, by Interim Rule 79.1, for a pilot program known as CLAD -- Complex Litigation Automated Docket. Through CLAD, as set forth in Interim Rule 79.1 and the CLAD Administrative Procedures,

filing in certain toxic waste actions and in asbestos cases is generally made by electronic transmission of the document to the court. The document is either deemed served upon filing, or the assigned judge may require service by hand or by fax of a notice of filing. The other parties in the action can review the docket on-line, retrieve any documents filed, and print at their own firms a hard copy for their files.

The Federal Rules of Civil Procedure, as well, authorize electronic filing of documents where provided by local rules. Fed. R. Civ. P. 5(e). In fact, the United States Supreme Court has approved the proposed amendment of Rule 5(e) to broaden the circumstances in which electronic filing of documents may be used with local court authorization. Absent Congressional action to the contrary, the proposed amendment will become effective on December 1, 1996. The local rules in the District of Delaware do not provide for electronic filing of documents, but docket information is available on-line through the PACER system.

DISCOVERY AND DOCUMENT MANAGEMENT

Discovery and management of evidence are at the heart of any case. In complex, document-intensive cases, this is particularly true, and increasing numbers of lawyers have begun using electronic methods to ensure proper handling of such cases.

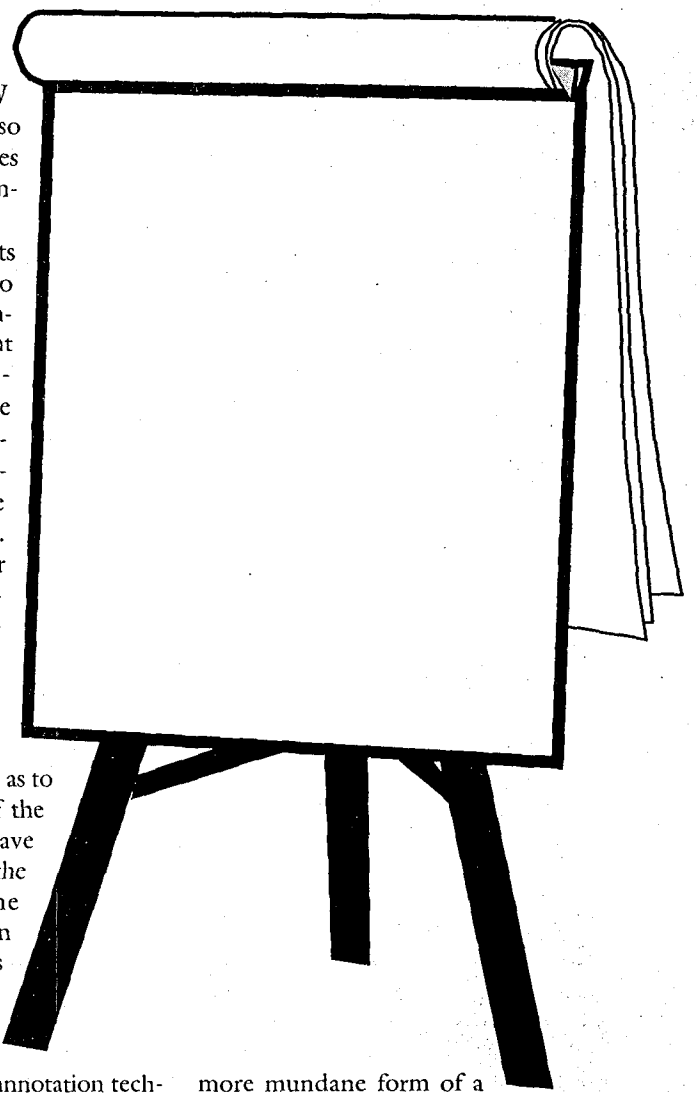
Discovery and Investigation

While it is unlikely that traditional means of discovery and investigation will be fully replaced by more novel, technologically-oriented means in the near future, the newer methods nevertheless can help attorneys and their clients collect information during discovery.

Information may be obtained through the Internet from independent sources, unrelated to either party to the litigation. While the admissibility of such information is questionable, at a minimum it may suggest possible areas of investigation or cross-examination. Moreover, the Internet may contain submissions made by the opposing party itself, potentially admissible at trial as admissions. In a recent patent case, the plaintiff obtained up-to-date descriptions of the defendant's relevant product offerings from the Internet and used them to evaluate possible infringements.

Technology may also help in seeking out and selecting expert witnesses. In identifying and preliminarily evaluating potential experts, some trial lawyers find the Internet useful. The primary legal research databases, WESTLAW and LEXIS/NEXIS, also represent valuable sources of information on potential experts.

Depositions, of experts and others, have also been made easier by technology. While overnight transcription of depositions has been available for many years, "real-time" display of deposition testimony is a more recent development. Some attorneys prefer having immediate on-screen transcription during a deposition, finding it helpful in formulating pointed and complete follow-up questions. To assist in this effort, as well as to facilitate later analysis of the testimony, programs have been created that allow the lawyer to annotate the deposition transcript on his or her computer, as the deposition takes place. While some attorneys find "real-time" transcription and annotation technologies extremely helpful, others find it distracting, believing that they spend too much time reading the testimony, and not enough time thinking and analyzing the issues. As with all technological (and non-technological) litigation accessories, everyone must decide what works best for them.



"Real-time" transcription provides an accepted method of complying with the Americans with Disabilities Act to accommodate the needs of hearing-impaired witnesses, enabling them to read the question on screen without the use of an interpreter. Similarly, "real-time" transcription is also beneficial in deposing a non-English-speaking witness. Computer-aided transcription enables the lawyer to state an entire question, even if it is complicated, which the translator can then read on-screen and translate as a full, uninterrupted thought. This lessens confusion for counsel, translator and deponent alike. To make sure you capture the entire foreign language answer, technology is important again, albeit in the more mundane form of a tape recorder.

Where depositions are not videotaped, but the lawyers and parties want to provide a sense of the passage of time during the deposition, software is available that will provide a time stamp on deposition or trial testimony. This may be key to resolving disputes regarding the length of time taken for breaks and, more substantively, the amount of time taken by witnesses to answer the questions posed.

Document Management

Once the documentary evidence begins arriving from your own client and from the opposing party, and as the pleadings, motions, and interrogatories mount, a variety of software is available to facilitate the thorough and efficient processing and later retrieval of the information.

One of the more simple means of processing documentary evidence is

through document coding. Software programs allow the attorney (with assistance from the law firm's computer staff or an outside consultant) to establish categories of information, known as fields, that will be entered for each document. The fields may be objective, with some common fields being Bates numbers, author, type of document, date, and pre-determined key words appearing in the document. The fields may also be subjective, such as the subject matter of the document and its relative importance. The lawyers or paralegals then review and code each document as to each established field. The coding may also be conducted by outside vendors -- obviously more appropriate for the objective than for the subjective criteria.

While the coding process may be lengthy and thus expensive, the resulting database allows for rapid identification of documents based on the information in the fields. For example, a search could be run for all documents authored by Smith prior to 1995. Although it would then be necessary to collect manually the responsive documents for review,the mere ability to conduct such a search and print the results in chronological or other formats is a vast improvement over a manual review. The search capability may be used for a wide variety of purposes. In preparing for a deposition, for example, use of document coding software would facilitate review of all documents either authored by, received by, or referring to the deponent, or involving subject matters about which deposition testimony is anticipated.

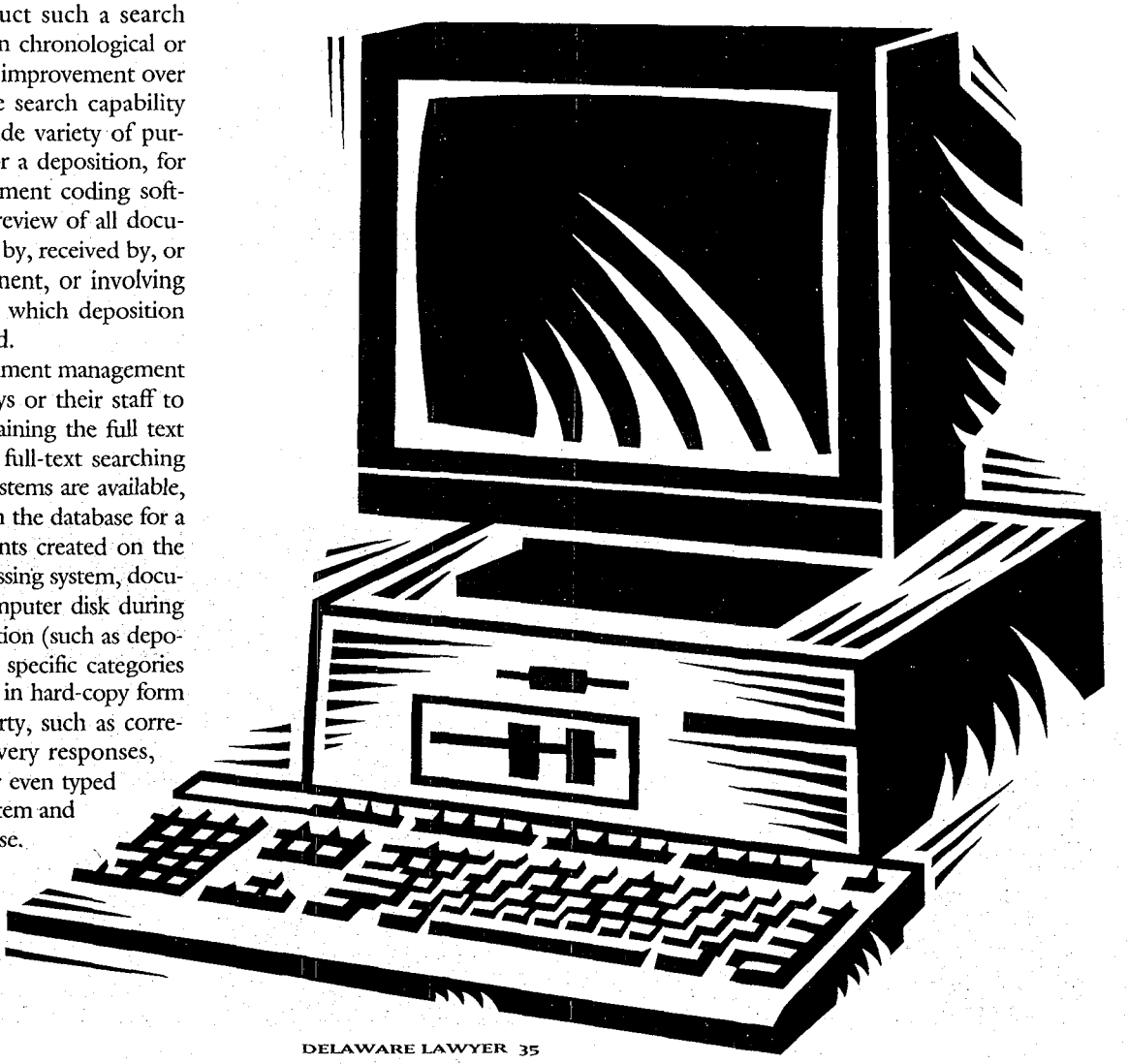
Other existing document management systems allow attorneys or their staff to create a database containing the full text of documents, with a full-text searching feature. Where such systems are available, a lawyer may include in the database for a given case all documents created on the firm's own word processing system, documents received on computer disk during the course of the litigation (such as deposition transcripts), and specific categories of documents received in hard-copy form from the opposing party, such as correspondence and discovery responses, that can be scanned or even typed into the firm's own system and loaded onto the database.

Once created, the database may be searched on a full-text basis using search strings similar to those utilized in computerized legal research, including Boolean connectors. Searching might be useful, for instance, to ascertain quickly the scope of discovery requested and responses received concerning a particular topic, in order to determine whether follow-up requests or motions are required. The documents may then be pulled up on screen, full-text, eliminating the need to retrieve the documents manually as is the case in a coded, "field only" search database. In some systems, the full-text information can be manipulated as any word processing document would be, in terms of copying the pertinent portion of the document and pasting it into a brief or letter. Similarly, an attorney reviewing deposition testimony to create an outline for cross-examination at trial can simply mark the testimony from the deposition and copy it, *verbatim,* into the outline.

Certain premium software applications on the market allow document management through a combination of document coding and full-text searching, as described above, combined with document imaging. Imaging allows the user to see the document on his or her computer screen, exactly as it appears, even if it is handwritten. Document imaging essentially involves taking a picture of a document, and loading that picture or bit map onto a computer. The picture can later be retrieved on the computer, and printed to yield a duplicate copy off the original document. A document image, however, cannot be searched, and the text generally cannot be copied as text into a word processing document.

Although image-only documents cannot be searched on a full-text basis, an image file can be linked to another database or full-text file, such as a document index or a deposition transcript. Thus, if a search done through the document coding program directs the attorney to a specific page of a deposition which, in turn, refers to an exhibit, the attorney using a linked system could simply click on an icon associated with the exhibit and display it on the computer monitor.

Document management systems certainly are no substitute for the attorney's



judgment, review and analysis of evidence on both sides of a case. Nevertheless, they represent tools that allow attorneys to focus their attention on tasks that require precisely those lawyerly skills and to exercise greater control over even the most voluminous document cases.

CONDUCTING LITIGATION FROM DISTANT LOCATIONS

As most attorneys have learned, their practice does not always involve a client next door and opposing counsel across the street, in a case pending in the courthouse on the next block. Moreover, virtually all attorneys work outside their offices periodically. The use of technology allows trial attorneys to manage their caseload in such circumstances with minimal inconvenience. The Delaware District Court has noted this fact in denying motions to transfer cases involving distant litigants, observing that "technological advances have made it more difficult to establish that litigating in Delaware is inconvenient for the parties and the witnesses." *Joint Stock Soc'y v. Heublein, Inc.*, No. 95-749-RRM, 1996 WL 471198, at *10 (D. Del. Aug. 2, 1996) (McKelvie, J.).

As discussed above, the ability to fax draft documents for review by out-of-town counsel and clients, or to send and receive documents by modem for filing, enables rapid action in cases regardless of where the parties, counsel and the court are located. In addition, voice mail and cellular phones allow attorneys to communicate from almost anywhere. The widespread use of intra-firm and Internet e-mail, combined with easily portable laptop computers, enables ready access to messages from any phone jack. Alternatively, any attorney who can connect into a firm's word processing system through a telecommunications program can retrieve, review and edit a document created by someone hundreds, or even thousands, of miles (and many time zones) away. Because the use of such methods for remaining in contact poses some interesting issues regarding confidentiality of attorney-client communications and security of a firm's computer system, attorneys have begun to consider the need for scrambling and encryption devices, and other forms of protection.[1]

Teleconferencing is by now old-hat. Nevertheless, its increasing use by the courts has helped tremendously to

reduce unnecessary litigation costs, especially where out-of-state counsel are involved. Videoconferencing, while currently not widely used, may be the wave of the future as the quality of the technology increases and the price drops. For example, Judge Bifferato recently allowed remote testimony by videoconferencing in *North American Philips Corp. v. Aetna Casualty & Surety Co.*, Superior Court 88C-JA-155. Richard K. Herrmann, Esq., Video Conferencing and Courtroom Technology at Its Finest, IN RE:, Dec. 1995, at 15, 16.

USE OF TECHNOLOGY IN THE COURTROOM

Over the last decade, technology has seen increased use not only for pre-trial preparation, but also in the courtroom. Certain methods are relatively standard practice today, while others have not yet come into full use.

One of the more common courtroom uses of technology is attorneys' use of full-text searching and search databases via laptop computer. Ready accessibility to documents for the lawyer's own review at counsel table (as opposed to retrieval of evidence for presentation to the court and jury, which is discussed below) can be important to find documents or deposition testimony easily on which to cross-examine a witness, or respond to inquiries from the court regarding the record.

Also important are the wide variety of aids to assist in presenting the case to the judge or jury. The significance of "visual aids" in presenting a case cannot be underestimated, as experienced trial lawyers know. Studies have shown that after 12 hours people retain only 10% of information that is presented to them orally, whereas they retain 65-85% of information that is presented to them both orally and visually. Jonathan D. Kissane-Gaisford, Note, *The Case For Disc-Based Litigation: Technology & The Cyber Courtroom*, 8 Harv. J. Law & Tech. 471, 476 & n.12 (1995). While the use of "visual aids" is certainly nothing new, technology provides novel, flexible tools to assist an attorney in presenting the case in a competent, persuasive manner.

This is not to say, of course, that a lawyer always should use any and all technological tools available rather than more traditional methods of presenting evidence, such as posterboards. Careful consideration must be given to the selec-

tion of methods that will enhance, not disrupt or dilute, the presentation of the case and the relationship among the parties, counsel, witnesses and the judge and, most importantly, the jury.

One of the relatively simple technological innovations that can be used in the presentation of evidence is a device known as the ELMO, which is available for use in the District Court and in the Superior Court. The ELMO allows a regular document or object to be placed in a light box, viewed by a video camera and displayed on television monitors throughout the courtroom. The attorney can use a pointer to indicate specific portions of the page, or if the court allows, witnesses may approach the ELMO and indicate portions of the page as they testify.

At the advanced end of the spectrum in presentation of evidence to a jury are computer animations and computer simulations. While these two terms are often used interchangeably, they each refer to a distinct process: "Computer animation is nothing more than a drawing tool used to explain, illustrate and highlight a witness's testimony and opinion. In a computer simulation, the computer is actually used to 'figure out' what might have happened [based on the parameters that are input and the software's calculations]." Michael G. Karnavas & Alexander Jason, *Courtroom Computer Animation & Simulation: Selling Your Case With High-Tech Persuasion*, THE CHAMPION, Jan./Feb. 1996, at 5, 6.

Thus, because computer animation can be used to depict anything described or opined to by a witness, it has a wide variety of potential uses: to illustrate the inner workings of a product in a patent or product liability case, or the scene of an accident and location of vehicles, or the layout of a plant from which toxic gases escaped, or the flow of pollution through watercourses. Computer simulation can be used in a broad array of cases as well. One interesting example of the use of simulation in a Delaware court involved a wrongful death case based on a seaman's fall from his ship. In connection with the plaintiffs' case for damages based on the decedent's pain and suffering, a factual issue arose regarding precisely where and how the decedent had died. The path that his body would have taken after leaving the ship was relevant to this determination. Defense counsel located an expert who had previously developed a computer program which, when parameters were entered regarding the topography of the watercourse and

the speed of the current at the time in question, calculated the course and final location of the body. This program was used in court to show visually, and apparently persuasively, the watercourse and path of the body.

The purposes for which computer animations and simulations are introduced in a case can vary. They may be used to illustrate an expert's opinions about an event, or to demonstrate to the judge and jury the events or objects being described orally by witnesses. In the case of a computer simulation, an attorney can illustrate a version of events based on an expertly-created program. Admissibility of computer animations and simulations varies widely, based on the purpose and method for its use and the facts and circumstances of each case. *See, e.g.*, Karnavas & Jason, *supra*; Kissane-Gaisford, *supra*.

Perhaps the present culmination of technology in the courtroom is the use of CD-ROM (compact disc - read only memory) and laser discs. Through the use of such discs, a variety of forms of evidence can be presented with a single machine: moving pictures and words, like a videotape; evidentiary documents and photographs; static demonstrative exhibits; and computer animations and simulations. The use of discs eliminates the need for a VCR, slide machine, overhead projector, documents and posterboards. Instead, all information can be presented through the discs, tied in to a computer and television monitors in the courtroom.

The competent use of CD-ROM and laser discs can substantially speed up presentation of a case, and enhance credibility in front of a jury. Evidence can be retrieved from the discs by passing a light pen over a bar code that has been assigned to the desired piece of evidence. This makes it possible to move from document to document, or from exhibit to exhibit, or from one portion of a video deposition to another, without fumbling with documents, or the easel and poster board, or fast-forwarding through a videotape. With all of these methods, however, it is important to try them out extensively ahead of time. Many practical difficulties can arise that will waste time and distract the judge and jury, if the attorneys do not plan ahead to avoid these problems.

Speed and ease of movement may be particularly important where the court has imposed a time limitation on the presentation of a case. One author has recounted that during a 2 hour, 45 minute clos-

ing argument pursuant to court-imposed time limitations, the party that used CD-ROM was able to review 80 items of evidence. Its opponent, using traditional methods, was able to review only 12 pieces of evidence. Kissane-Gaisford, *supra*, at 486.

As any trial lawyer knows, that statistic alone certainly does not prove which side presented the more persuasive closing. Nevertheless, the new technologies present new opportunities to communicate more effectively. Jurors, too, are more sophisticated. From their own day-to-day exposure to technology in their workplaces and homes, and in viewing celebrated trials on Court TV, jurors' expectations have been

The competent use of CD-ROM and laser discs can substantially speed up presentation of a case, and enhance credibility in front of a jury.

raised. It is up to us as trial lawyers to meet and exceed those expectations whenever possible, but most importantly, to persuade our audience and serve our clients. In some cases, the easel or poster board still might be most effective.

FOOTNOTE

[1]See, e.g., ABA Comm'n on Ethics & Professional Responsibility, *Unsolicited Receipt of Privileged or Confidential Materials*, Formal Op. 94-382 (July 5, 1994); ABA Comm'n on Ethics & Professional Responsibility, *Inadvertent Disclosure of Confidential Materials*, Formal Op. 92-368 (Nov. 10, 1992); Association of the Bar of the City of New York Committee on Professional & Judicial Ethics, *Confidentiality: Use of Cellular & Cordless Telephones*, Formal Op. No. 1994-11, 1994 WL 780798 (Oct. 21, 1994); WHAT LAWYERS NEED TO KNOW ABOUT THE INTERNET 1996 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series Order No. G4-3976); Robert W. Martin, Jr., *Hold the Phone*, IN RE:, Sept. 1995, at 32-33; Charles R. Merrill, *E-mail for Attorneys from A to Z*, N.Y. St. Bar J., May/June 1996, at 20; Charles Slanina, *More Stuff to Worry About*, IN RE:, Dec. 1994, at 7, 7-8. ◆

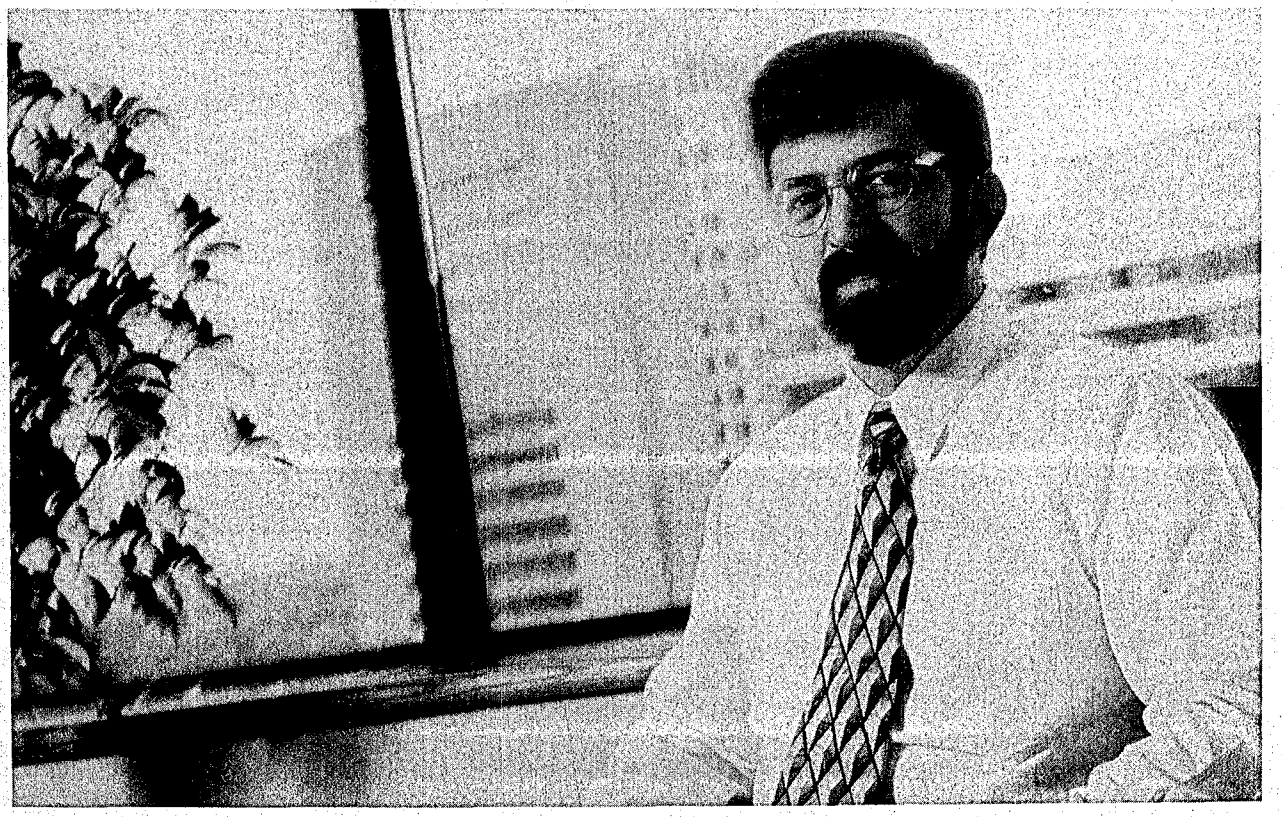
THE NON-TRADITIONAL CAREER PATH

April Caso Ishak Interviews John Dorsey

John Dorsey, Esquire, practices general litigation with the law firm of Richards, Layton & Finger, where he has been employed since 1991. The following interview describes Mr. Dorsey's unique, non-traditional career path.

Ms. Ishak: *Mr. Dorsey, I understand that you graduated from Wake Forest Law School in 1991 at the age of 32. However, yours was not a traditional path from high school to college to law school. Could you give me a brief time-line of what you did prior to going to law school?*

Mr. Dorsey: I graduated from high school in 1977 and decided to enlist in the Army. I spent a year as a military police officer and then moved up to become a military police investigator. After three years, I left the Army and decided to see some of the country, so I drove myself out to Nevada where an Army buddy of mine lived, and I obtained a job working for a casino as an "observer." As an "observer," I was supposed to catch card counters and



Photograph by Phil Flynn

cheaters and so forth. After a year of that, I decided it was time to go to college. At the time, I wanted to be an FBI agent, so I got a job working for the FBI as a fingerprint examiner in Washington, D.C. I worked for the FBI at night and went to school during the day. I then went back to my home town of Binghamton, New York, where I finished up my undergraduate degree at the State University of New York.

I felt I didn't have enough of the military, I guess, and in 1986 I decided to join the Air Force, where I became a nuclear missile launch officer. I did that with the intention of eventually going to law school. I knew the Air Force had a program where they would send certain officers to law school and pay their full tuition while still paying their salary in exchange for a certain time commitment afterwards. Since I was already married and had children, it seemed like a good opportunity. Unfortunately, the year I applied for the program the Air Force cut the budget, had a record number of applicants and only ended up sending a few officers to law school. Fortunately, I was offered a scholarship at Wake Forest. Because of budget cuts, the Air Force was looking for officers who were willing to resign their commissions. I decided to resign my commission and take the law school scholarship at Wake Forest.

In 1986 I decided to join the Air Force, where I became a nuclear missile launch officer. I did that with the intention of eventually going to law school.

MS. ISHAK: *What factors made you decide to go to law school?*

MR. DORSEY: Because of my background in law enforcement, I wanted to do something related to law. I was unable to become an FBI agent because

my eyesight disqualified me. I decided law school would allow me to still be involved with the legal profession.

MS. ISHAK: *What was your experience as a Nuclear Launch Officer?*
MR. DORSEY: I was stationed in Cheyenne, Wyoming, at F.E. Warren Air Force Base, which has the distinction of being the only Air Force base without an air strip. It was an old cavalry post, and now is a nuclear missile base.

As a launch officer, I would go out with a crew to a command and control site, eight times a month. The shifts turned out to be about 36 hours long by the time we arrived for a briefing at 7:00 a.m., picked up a vehicle, and drove to the site, which could be anywhere from 25-100 miles away from the base. We also had to meet with the crew that was on duty who had been there the day before, and go through a change-over procedure that would take an hour or so, and then take over the shift. We would stay there until the next morning, when the next crew showed up, and then we would drive back to base and do it all over again eight times a month.

MS. ISHAK: *What did you do between these shifts at the command and control site?*
MR. DORSEY: In between the shifts, we would attend mandatory training four or five days a month. We were tested constantly. The Air Force actually had simulators for the launch officers to practice on, similar to aircraft simulators pilots use. The simulators were replicas of the rooms we sat in at the command and control site. We would spend three hours in the simulators. About half of the time was spent dealing with equipment repair and other matters. The other half of the time was spent on wartime simulation. We would do these simulations two days a month.

MS. ISHAK: *Can you describe for me the command and control site?*
MR. DORSEY: A two-person crew would go to the command and control site, which would be located several miles from the silos where the missiles were housed. The command and control sites were small buildings that looked like houses. The two member crew would descend 90 feet down an elevator shaft and then go through a giant blast door made of solid steel that was eight feet thick. The underground structure actually looked like a capsule. The crew would enter a small, metal, box-like room that was about twelve

feet long and three feet wide, with two chairs and a cot, where one of the two crew members could sleep. The room was filled mostly with computer and communications equipment.

MS. ISHAK: *What did you do during the shift at the command and control site?*
MR. DORSEY: During the shift, we would be involved with maintenance of

I think all of my experiences up until the time I went to law school eventually helped in my legal career.

the missiles, security clearance for the maintenance crews, and responding to security breaches. Mostly, however, we were prepared to "push the button," so to speak, in the event of wartime. Actually, there is no button to push.

MS. ISHAK: *You must have felt an enormous sense of responsibility while working as a launch officer?*
MR. DORSEY: Yes, it was probably the most stressful job I ever had. Although it sounds simple because we just sat there and nothing ever really happened, it was always in the back of our minds that something could happen.

Also, the testing was incessant. We never knew when they were going to test us. I might show up in the morning thinking it was just going to be another day, and then would be told to go get an evaluation done. Obviously, the testing was something that had to be done to ensure that everyone knew what they were doing. The testing required passing scores of 95 or above. If you got below that, you failed, and it could adversely affect your career as an Air Force Officer. So that, along with the responsibility of knowing that with the turn of a key you could cause a lot of destruction, was very stressful. It can wear on you.

MS. ISHAK: *Has your experience as a Nuclear Launch Officer had an effect on your law practice?*
MR. DORSEY: I think all of my experience up until the time I went to law school eventually helped in my legal career.

Obviously, it allowed me to mature a lot more than someone who just went from high school to college to law school.

I had a lot of other jobs, and saw a lot of other situations, especially when I was in the army as an investigator dealing with people on a day-to-day basis who were in crisis situations. Being able to maintain your own decorum and your own sense of self, so you can control the situation, is important. And I think that helped me a lot in being able to stand up in front of a judge or a jury, or take a deposition. I think all of those things helped me to be more responsible and calm, even when I do not feel like I should. I think they were all good experiences. I look at some of my contemporaries in my age group who are now junior partners or partners in law firms, or other higher positions in the law, and I am not jealous of their achievements. I would not have given up what I did for anything. I think all of my experiences have contributed to who I am, and it was fun -- and still is.

MS. ISHAK: *Do you have any words of wisdom for people who decide later in life to go to law school, as you yourself did?*

MR. DORSEY: I think it is an advantage actually to have waited to go to law school. It helped me mature somewhat and understand that everything, including the practice of law, is not what you see on television or read in books. I knew that there would be aspects of practicing law that would be drudgery or mundane, but you accept those and move on to the things that are exciting, like when you get to argue a case in front of a jury. I also felt that employers looked at me more favorably because I did have some experience: they knew I was able to do a job and perform well.

Preparing for a legal career takes a lot of work, a lot of time and a lot of discipline. You need to make the decision that it is what you want to do -- not based on the fact that you think you're going to make a lot of money, or that it's just something else to do, another career path to take. Going to law school later in life helped to discipline me to do well, because I knew I couldn't take an afternoon off just because I felt like it. Being married with children, I wanted to get my studying done so I could spend time with my family. All of this, together, helped me a lot.

I think it's great if somebody wants to go to law school later in life. I don't think anyone should not go because they think it's too late. ◆

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with a keyboard. Back in college, with my sturdy Smith-Corona (manual, of course) in tow, I still paid a classmate to type any term paper over ten pages long. My senior thesis, which ran about 140 pages plus footnotes, kept some starving graduate student "in good beer" for about two months. As a result, I was short of cash for four years – a trend that persists to this day.

In short, I am big on tradition and durability. Computers have none of those advantages and are, hence, devoid of appeal to me and to those similarly situated.

My Scarlett O'Hara approach to poverty ("as God is my witness, I'll never be hungry again"), coupled with my three-fingered typing style, causes me to avoid computers like presidential candidates avoid the truth. One of my digitally-impaired partners defends his acquisition of a PC by claiming that, notwithstanding his inability to type a brief on it, it is still indispensable for keeping his calendar. I respond with an eight-letter expletive meaning "nonsense": nothing works better than a good old-fashioned tickler system that won't "crash" when you need it most. Always keep a written calendar as a cross-check.

3. TECHNOLOGY IS TOO DAMNED EXPENSIVE.

Nothing wastes more time at partners' meetings – with the possible exception of compensation – than debates

about office technology. No sooner have you acquired one system than you need to upgrade it or acquire another one altogether. My office still uses one computer system that, unfortunately, is not compatible with almost anything else on the planet today. Our firm finally acquired a couple of terminals from the "number one brand" when it became clear that no client could transmit documents to us without a lot of cursing, teeth-gnashing and clean-up work.

All kidding aside, given the boundlessness of human ingenuity and rampant technological advances, the bottom line for a firm that is determined to "keep up with the Skaddens" on computers can be truly staggering. The endless variations of systems software could bankrupt a practice in minutes if it were compulsive enough to buy them all. I'd rather help my corporate colleagues make money by buying their treatises for the library shelves. The so-called advantages of CD-ROM are totally lost on me – just another touch of glitz, for my money. Print is not dead.

4. I LIKE OLD STUFF ANYWAY.

As a conservative, I tend to shun anything that remotely smacks of "progress." I am a lifelong Republican; I like to drive cars until they fall apart under me (well, not quite); fine wines are invariably aged; I have a thirty-year-old house, an 18-year marriage, and several nice antiques. The older my kids get, the better I like them. In short, I am big on tradition and durability. Computers have none of those advantages and are, hence, devoid of appeal to me and to those similarly situated.

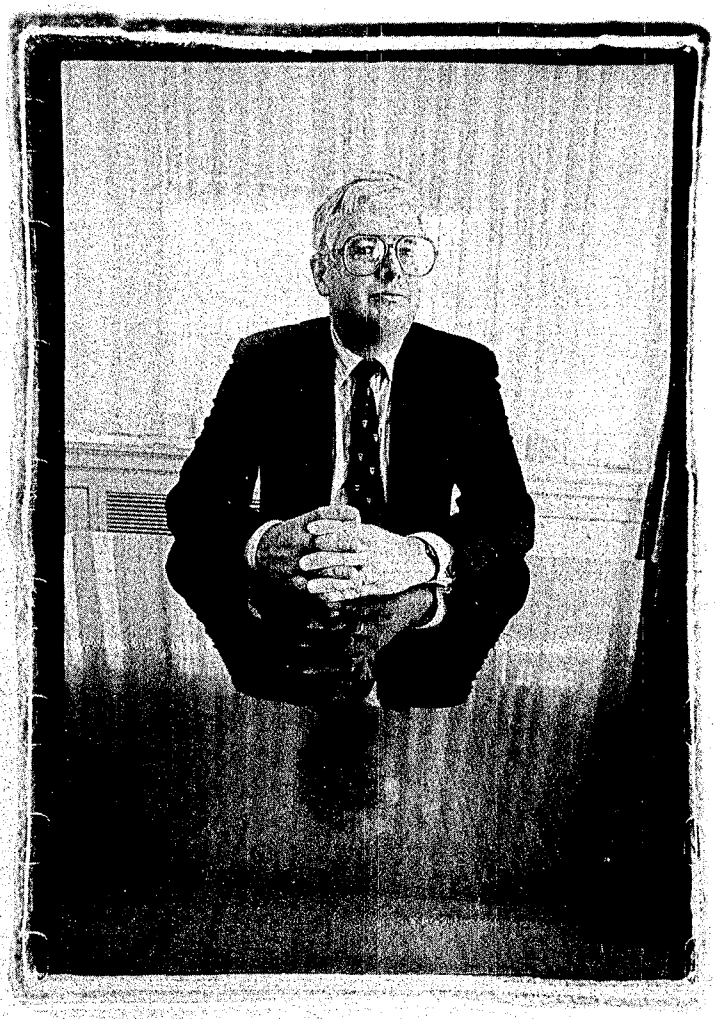
My *Webster's Collegiate Dictionary* defines "Luddite" as "one of a group of early 19th century English workmen destroying labor-saving machinery as a protest." (Coined after the hapless Ned Ludd, who was a "half-witted Leicestershire workman" *circa* 1779.) I have yet to witness, or to cause, the defenestration of a "Windows 95" PC. But I have punched, cursed and otherwise abused various "miracles of modern technology." Besides, it's easier to work out your anger through a Dictaphone: you can't get an instant hernia by throwing it across the room.

All things considered, I've survived nicely in this practice for over seventeen years without a computer and, God willing, I'll go on for another generation or so in that lack of capacity. Query: is there a "chat room" for lawyers like me? ◆

REALITY BYTES: A LUDDITE LAWYER LOOKS AT LEGAL TECHNOLOGY

by Vernon R. Proctor

I am a cyberphobe and proud to admit it. I have no use for laptops, powerbooks or any other type of computer (except LEXIS, which I grudgingly use about twice a month). For all the palaver about "the revolution in legal technology that is transforming practices across the country," yadda, yadda, yadda, I still stick to the basics: a Lanier Dictaphone, a battered hand-set telephone with a primitive conference feature, and (gulp) voicemail. I am now the only lawyer in my office without a PC – a distinction that I wear as a badge of honor. What follows are my reasons for my once and future aversion to technolaw.



Photograph by Pat Crowe, II

1. IF ANYTHING CAN GO WRONG, IT WILL.

Computers seem to freeze up at the worst possible moment – like the day a Supreme Court brief is due, or just before an important closing. Worse yet, an improper keystroke could send your complete archives into La-La Land. I burn out six or seven sets of batteries a year on my Lanier, but it has never let me down in the clutch.

What about laser printers, you say? Well, they seem to work with glacial rapidity when you need a document quickly. What is more, they seem to "streak" about as regularly as an unprotected windshield on Pigeon Alley. Too much ballyhoo for the buck, in my opinion.

Finally, anyone who trumpets the virtues of voicemail, e-mail and similar wireline gadgetry should think twice before spreading such fertilizer again. Murphy's Law Number 23: when you really need to get your messages, the blasted system won't kick on. And everything's discoverable anyway. Enough said.

2. I CAN'T TYPE, SO WHY BOTHER?

As a lifelong "huntinpecker," I have a natural reluctance to tackle anything

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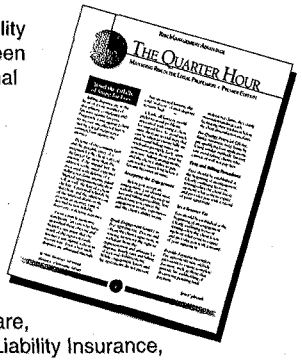

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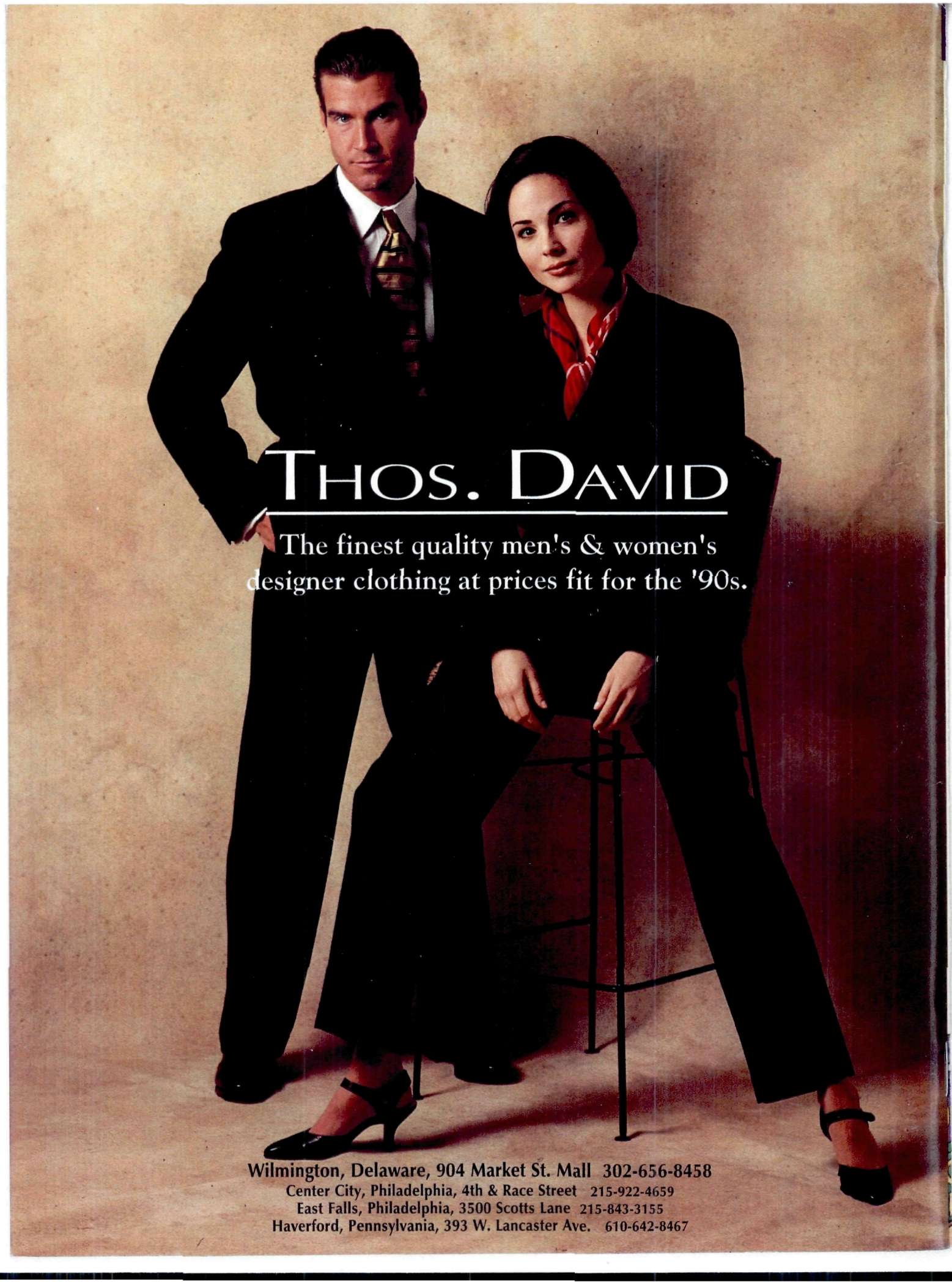
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