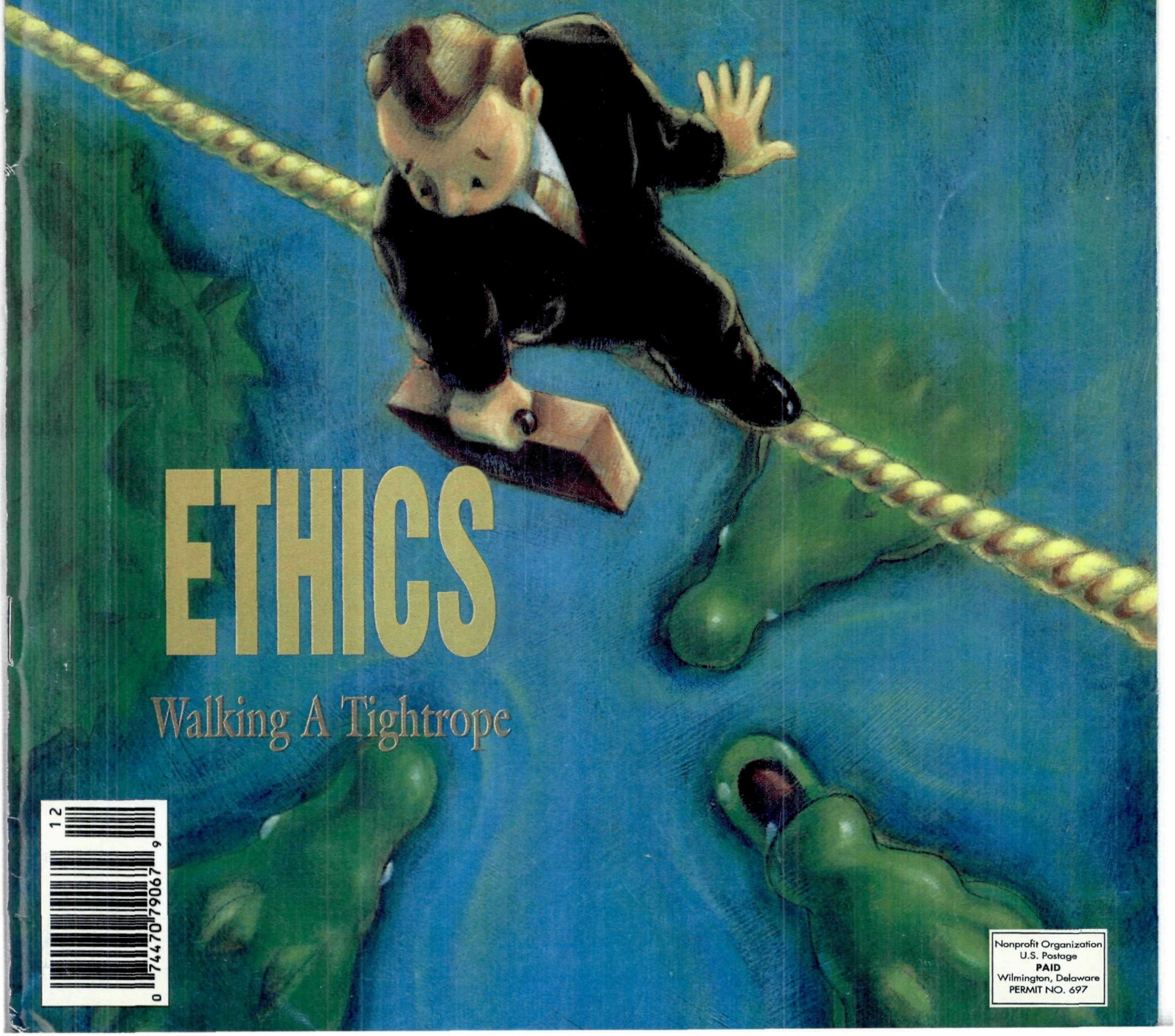
TRYING YOUR CASE IN THE MEDIA: PRE-TRIAL JURY TAMPERING?

DELAWARE LAWYER

A PUBLICATION OF DELAWARE BAR FOUNDATION

Volume 15 Number 4 $3.00 Winter 1997/1998



ETHICS

Walking A Tightrope

Nonprofit Organization
U.S. Postage
PAID
Wilmington, Delaware
PERMIT NO. 697

INVESTIGATIONS THAT WORK.

You can benefit by using S & H Investigative Services. Here's How:

INVESTIGATIVE SPECIALISTS

When you hire S & H you are hiring career investigators, not security guards. We're educated, well prepared, and will make a good impression on your client, or on a jury.

YOU WON'T BE EMBARRASSED

Recognizing that you have a client to answer to, we promise to complete your assignment promptly, and at the price quoted.

WE'RE HERE WHEN YOU NEED US

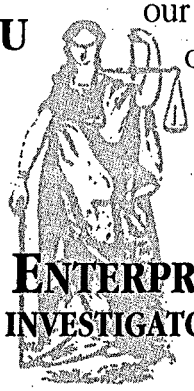
24 hours a day, 7 days a week. Whether its locating witnesses, assets, heirs, photographing accident scenes or scars, performing rush surveillances — your emergency is something we can handle. And, we've been in business 23 years (as opposed to an industry average of less than five). We'll still be here when your case comes to trial.

MORE FOR YOUR MONEY

Your reports will be well documented, and we'll send as many as you like, as often as you like, at no additional charge.

YOU'LL RECEIVE A GUARANTEE

If you're not completely satisfied with our efforts on your behalf you pay only our out of pocket expenses. We're that sure of our ability to please you and our mutual clients.



S & H ENTERPRISES, INC.
INVESTIGATORS

302-999-9911
1-800-446-9911

Wilmington - 112 Water Street, P.O. Box 12245, Wilmington, DE 19850
Eastern Shore of MD - P.O. Box 601, Cambridge, MD 21876

CONTENTS

FEATURES

28

Ethics: The Family Law Perspective

32

Excerpt from Irving Morris's "But Some Clouds Have A Gold Lining (1950-1959)"

EDITORS' NOTES

CONTRIBUTORS' PAGE

CHAIRMAN'S NOTES

BOOK REVIEW

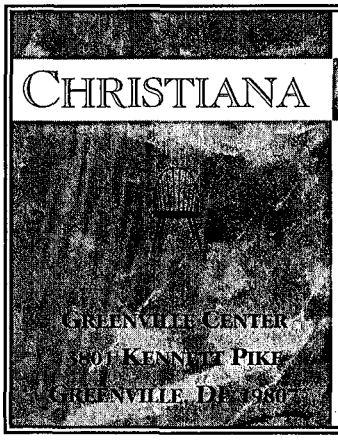
Cover Illustration by Mike Wohnoutka

Smart Business Move.

Nobody can handle your commercial moving needs better than Office Movers, Inc. We have the special equipment and trained personnel to move sensitive electronics, heavy equipment, even hazardous materials...safely and quickly. And we have 28 years' experience of doing it better than anyone else. For the kind of business move you want to make, call Office Movers, Inc. at (302) 425-5100.

OFFICE MOVERS INC.®
AN E.I. KANE COMPANY

(302) 425-5100



CHRISTIANA BANK & TRUST COMPANY

PRIVATE BANKING FOR ATTORNEYS
INVESTMENT MANAGEMENT
CUSTOM COMMERCIAL LENDING

PLEASE CALL:
BOB ELDER, PRESIDENT

GREENVILLE CENTER
3801 KENNETT PIKE
GREENVILLE, DE 19807

MEMBER FDIC

302·421·5800

EQUAL HOUSING LENDER

DELAWARE LAWYER
A publication of Delaware Bar Foundation
Volume 15, Number 4
3301 Lancaster Pike, Suite 5-C
Wilmington, Delaware 19805

BOARD OF EDITORS
William E. Wiggin, Chairman
Richard A. Levine, Managing Editor
Thomas L. Ambro
David A. Drexler
Lawrence S. Drexler
Joel Friedlander
April Caso Ishak
Hon. Jack B. Jacobs
David C. McBride
Susan F. Paikin
Karen L. Pascale
Vernon R. Proctor
Elaine C. Reilly
Helen M. Richards
Jeffrey M. Schlerf

DELAWARE BAR FOUNDATION BOARD OF DIRECTORS
Bruce M. Stargatt, Chairman
R. Franklin Balotti
Arthur G. Connolly, Jr.
Hon. Randy J. Holland
Michael J. Rich
Nicholas H. Rodriguez
Harvey Bernard Rubenstein
Mary E. Sherlock
Donald J. Wolfe, Jr.

DELAWARE LAWYER
Attention: Chairman, Board of Editors
c/o Suburban Marketing Associates, Inc.
3301 Lancaster Pike
Suite 5-C
Wilmington, Delaware 19805

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

SUBURBAN MARKETING ASSOCIATES, INC.
at the preceding address
Telephone inquiries to (302) 656-8440

Editorial inquiries should be directed to:
Margaret Gilmour, Associate Editor
(302) 656-8440

Delaware Lawyer is published by Delaware Bar Foundation as part of its commitment to publish and distribute addresses, reports, treatises, and other literary works on legal subjects of general interest to Delaware judges, lawyers, and the community at large. As it is one of the objectives of *Delaware Lawyer* to be a forum for the free expression and interchange of ideas, the opinions and positions stated in signed material are those of the authors and not, by the fact of publication, necessarily those of Delaware Bar Foundation or *Delaware Lawyer*. All manuscripts are carefully considered by the Board of Editors. Material accepted for publication becomes the property of Delaware Bar Foundation. Contributing authors are requested and expected to disclose any financial, economic, or professional interests or affiliations that may have influenced positions taken or advocated in the articles. That they have done so is an implied representation by each author.

Copyright 1997
Delaware Bar Foundation
All rights reserved, ISSN 0735-6595

In the eyes of the American public, lawyers as a group are among those least likely to Do The Right Thing. A 1996 Gallup Poll revealed that a mere 16% of Americans give lawyers high ratings for honesty and ethics. The public, no doubt, continues to focus on the clichés of real and imagined lawyerly misconduct: overbilling, ambulance-chasing, the tort litigation and punitive damages "explosion," and the hard-ball, victory-by-any-means litigation tactics which are routinely highlighted on Court TV. What strikes us as most ironic about the public's perception is that it misses the real story about the ethical challenges facing lawyers today. The vast majority of attorneys, we believe, are morally upright individuals who strive to advance the goals of fairness and justice in the legal system. Yet today, more than ever, we are all navigating through an ethical minefield. As David Glebe points out in his excellent article, a clear conscience is no longer sufficient to guide an attorney through the thicket of modern rules and standards of professional conduct.

In this issue, we focus on a variety of ethical dilemmas as to which there are no obvious solutions. Jim Semple, by way of analogy to the wave of "managed care" which has struck the health care industry, examines the insurance industry's attempts to apply the same type of cost-containment measures and addresses the ethical implications for attorneys who effectively represent both the insurance company and the insured. Charlie Brandt takes a probing look at whether a criminal defense attorney in a high profile case can afford **not** to put the best "spin" on his client's case, given that the mass media will inevitably exercise a conditioning influence on the potential jury pool. Curtis Bounds offers insight into the world of the family law practitioner who sometimes finds himself fighting an uphill ethical battle against his own client's worst instincts.

In addition, from the "Annals of Delaware Practice" we have a delightful contribution from Irving Morris, a believe-it-or-not story about what happened when an esteemed member of the Bar offered to refrain from taking an appeal — for a price. (Query whether Mr. Morris would today run afoul of Rule 8.3 for his reluctant but pragmatic decision not to report the offender's corrupt behavior to the Supreme Court!) Mr. Morris also takes a firm stance on the ethical propriety of fee awards to plaintiffs' attorneys in stockholders' derivative and class action litigation, an issue which is hotly debated to this day.

Finally, and also fitting in with our "Ethics" theme, we offer another trenchant book review by Joel Friedlander. Enjoy!

Karen L. Pascale

Karen L. Pascale

Elaine C. Reilly

Elaine C. Reilly

Contributors

Curtis P. Bounds has been associated with the Wilmington law firm of Bayard, Handelman & Murdoch since he graduated from the University of Virginia School of Law in 1990. He focuses primarily on family law matters and practices extensively in Family Court throughout the state.

Charles Brandt, Chief Deputy Attorney General of Delaware from 1974 to 1976 and past president of the Delaware Trial Lawyers Association, is now a partner in the Wilmington firm of Brandt and Dalton, P.A. He is the author of the novel *The Right to Remain Silent.*

Joel Friedlander is a partner in the Wilmington firm of Bouchard & Friedlander. He is the President of the Delaware Chapter, Lawyers Division, of the Federalist Society for Law & Public Policy Studies and the author of two law review articles: "Corporation and Kulturkampf: Time Culture as Illegal Fiction," and "Constitution and Kulturkampf: A Reading of the Shadow Theology of Justice Brennan." A new member of the Board of Editors of Delaware Lawyer, Mr. Friedlander has regularly contributed book reviews to this publication.

David Curtis Glebe was appointed Chief Disciplinary Counsel for the Supreme Court of Delaware in November 1993. He earned a B.A., M.A., and J.D. from the University of Pennsylvania and also holds an M.A. and a Ph.D. in Analytic Philosophy from Ohio State University. In his role as Disciplinary Counsel, Mr. Glebe has organized dozens of CLE presentations in Delaware and other states and has written and lectured extensively on ethics and professional responsibility.

Irving Morris, a distinguished member of the Delaware Bar and a former president of the Delaware State Bar Association, is a partner in the Wilmington firm of Morris and Morris.

James W. Semple is a partner in the Delaware law firm of Morris, James, Hitchens & Williams. He received his J.D. from the Villanova University School of Law in 1974. He was the founding chairperson of the DSBA Torts and Insurance Practice Section, and is now a member of the DSBA Long Range Planning Committee. He is a charter member of the Delaware chapter of the American Board of Trial Advocates and was founding President of the Defense Counsel of Delaware. He is also a member of the Federation of Insurance and Corporate Counsel, the American Judicature Society, the Richard Rodney Chapter of the American Inns of Court, and the Association Internationale de Droit d'Assurance.

I am very pleased with this issue of *Delaware Lawyer*. First of all, I am delighted to welcome Joel Friedlander to the Board of Editors. His beautifully crafted reviews in this and previous issues convinced us that he would be an outstanding addition to our Board.

Next, I take this opportunity to thank our fellow editors Karen Pascale and Elaine Reilly for designing an issue of exceptional interest and timely importance to the profession.

Finally, the articles themselves strike me as unusually strong. Collectively they proclaim the basic good health of the profession despite the problems the authors describe, because the intelligent grasp of a problem is the first step to a solution.

Consider David Glebe's highly useful, if somewhat chilling prescription: it is no longer enough to be merely honorable. We must understand the technical intricacies of professionalism today.

I congratulate Curtis Bounds for his remarkably penetrating inquiry into the attorney/client relationship in the nightmare world of domestic litigation.

Charlie Brandt has managed the seemingly impossible: saying something new and true about the Grossberg-Peterson contretemps.*

And I relish Irv Morris's enjoyable horror story dealing with the eventual triumph of good sense and good ethics over low conduct in high places.

Jim Semple's article gives me special pleasure — an editor's invariable delight in encountering a first-class writing talent, combining style and elegance with moral conviction.

Read on!

William E. Wiggin
Chairman, Board of Editors

*Since *Delaware Lawyer* is part of the media, I am trying to use a reasonable neutral term.

STATE-OF-THE-ART RESOURCES

⇒ New, CD-ROM Digital Video Deposition System Gives You:
⇒ Instant Access To Any Spot On Video
⇒ Text-To-Video Synchronization
⇒ Easy Editing Capability For Courtroom Playback
⇒ Two In-House Videographers
⇒ Discovery ZX
⇒ ASCII Disks On Request

DEPONET

Corbett & Associates

NATIONAL COURT REPORTERS ® NCRA ASSOCIATION

QUALITY DOCUMENTS, SERVICES AND STANDARDS

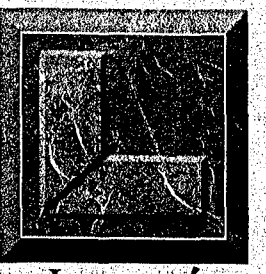
⇒ Transcripts
⇒ Video Depositions
⇒ Min-U-Script - Free With All Transcripts
⇒ Accurate And Dependable
⇒ Rapid Turnaround
⇒ Thirteen Reporters On Staff
⇒ Reporting On All Types Of Legal Proceedings
⇒ Certified Real-Time Reporting

1400 N. French St, P.O. Box 25085, Wilmington, DE 19899-5085
302 571 0510 800 462 2233 Dover: 302 734 3536 Fax: 302 571 1321

ecorbett@erols.com

CNA

Please complete the form below and return by fax or mail for a no obligation premium estimate



LAWYER'S PROTECTOR PLAN®

ROSSMANN-HURT-HOFFMAN, INC.

1447 York Road • Suite 610 • Lutherville, Maryland 21093
410-823-1080 • 1-800-345-4133 • Fax 410-823-8068

Serving the Community for Over "100" Years

1 Please provide the number of full time attorneys within your firm and their years of experience...

Years of Experience	*Number of Attorneys*
5+	
4	
3	
2	
1	
<1	

Firm:_____

Contact:_____

Street Address:_____

City:_____ State:_____

County:_____ Zip:_____

Phone:_____

Fax:_____

2 Please tell us what percentage of **Billable Hours - not Income** - you spend in the following areas of practice...
(Please express in whole numbers)

Percentage of TIME	Area of Practice
_____%	Admiralty / Marine
_____%	Anti-Trust Trade Regulation
_____%	Banking / Financial Institutions
_____%	Business Transaction / Commercial Law
_____%	Civil Litigation
_____%	Civil Rights / Discrimination
_____%	Collection & Bankruptcy
_____%	Construction (Building Contracts)
_____%	Consumer Claims
_____%	Corporate Business Organization
_____%	Criminal
_____%	Environmental Law
_____%	Family Law
_____%	Governmental Contracts / Claims
_____%	Immigration / Naturalization
_____%	Intellectual Property (Patent, Trademark, Copyright)
_____%	International Law
_____%	Labor Law
_____%	Local Government
_____%	Natural Resources / Oil & Gas
_____%	Other (describe):_____
_____%	Personal Injury / Property Damage - Plantiff
_____%	Personal Injury / Property Damage - Defense
_____%	Real Estate / Title - Commercial
_____%	Real Estate / Title - Residential
_____%	Securities (SEC)
_____%	Taxation
_____%	Wills, Estate, Probate & Planning
_____%	Workers Compensation - Defense
_____%	Workers Compensation - Plantiff
100%	

3 Please tell us about your current coverage:

_____
Number of years you have been continuously insured?

_____
Current Professional Liability Carrier/Program

_____ & _____
Current Policy Expiration Date & Annual Premium

_____ & _____
Current Limits & Deductible

4 Have you had or reported any Professional Liability claims in the last five years? ❑ YES ❑ NO

If yes, please attach details

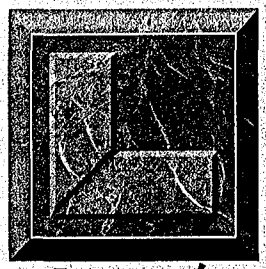
5 Have at least half of the attorneys in your firm attended some type of CLE within the past year?
❑ YES ❑ NO

PERFORATED FOR YOUR CONVENIENCE

The Lawyers Protector Plan® is a registered trademark of Poe & Brown, Inc. Tampa, Florida, and is underwritten by Continental Casualty Company, one of the CNA Insurance Companies. CNA is a registered service mark of the CNA Financial Corporation, CNA Plaza, Chicago, IL 60685

CNA

Please complete the form below and return by fax or mail for a no obligation premium estimate



LAWYER'S PROTECTOR PLAN®

ROSSMANN-HURT-HOFFMAN, INC.

1447 York Road • Suite 610 • Lutherville, Maryland 21093
410-823-1080 • 1-800-345-4133 • Fax 410-823-8068
Serving the Community for Over "100" Years

1 Please provide the number of full time attorneys within your firm and their years of experience...

Years of Experience	*Number of Attorneys*
5+	
4	
3	
2	
1	
<1	

Firm:_____

Contact:_____

Street Address:_____

City:_____ State:_____

County:_____ Zip:_____

Phone:_____

Fax:_____

2 Please tell us what percentage of **Billable Hours - not Income** - you spend in the following areas of practice...
(Please express in whole numbers)

Percentage of TIME	Area of Practice
_____%	Admiralty / Marine
_____%	Anti-Trust Trade Regulation
_____%	Banking / Financial Institutions
_____%	Business Transaction / Commercial Law
_____%	Civil Litigation
_____%	Civil Rights / Discrimination
_____%	Collection & Bankruptcy
_____%	Construction (Building Contracts)
_____%	Consumer Claims
_____%	Corporate Business Organization
_____%	Criminal
_____%	Environmental Law
_____%	Family Law
_____%	Governmental Contracts / Claims
_____%	Immigration / Naturalization
_____%	Intellectual Property (Patent, Trademark, Copyright)
_____%	International Law
_____%	Labor Law
_____%	Local Government
_____%	Natural Resources / Oil & Gas
_____%	Other (describe):_____
_____%	Personal Injury / Property Damage - Plantiff
_____%	Personal Injury / Property Damage - Defense
_____%	Real Estate / Title - Commercial
_____%	Real Estate / Title - Residential
_____%	Securities (SEC)
_____%	Taxation
_____%	Wills, Estate, Probate & Planning
_____%	Workers Compensation - Defense
_____%	Workers Compensation - Plantiff
100%	

3 Please tell us about your current coverage:

_____
Number of years you have been continuously insured?

_____
Current Professional Liability Carrier/Program

_____ & _____
Current Policy Expiration Date & Annual Premium

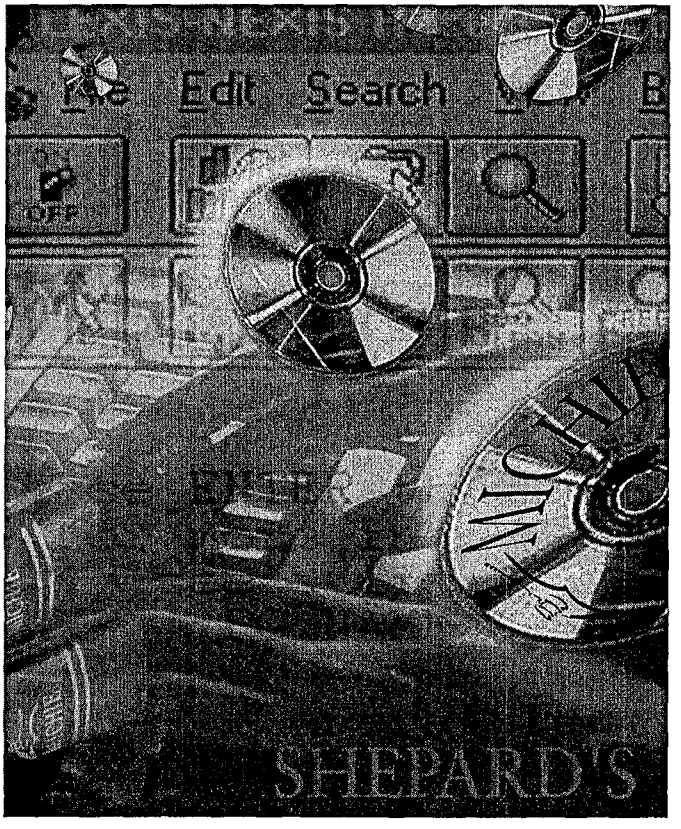
_____ & _____
Current Limits & Deductible

4 Have you had or reported any Professional Liability claims in the last five years? ❑ YES ❑ NO
If yes, please attach details

5 Have at least half of the attorneys in your firm attended some type of CLE within the past year?
❑ YES ❑ NO

The Lawyers Protector Plan® is a registered trademark of Poe & Brown, Inc. Tampa, Florida, and is underwritten by Continental Casualty Company, one of the CNA Insurance Companies. CNA is a registered service mark of the CNA Financial Corporation, CNA Plaza, Chicago, IL 60685

All Delaware CD-ROMs are not created equal.



If you thought all CD-ROMs were outdated, you haven't seen Michie's™ Delaware Law on Disc.™ Now Michie's Delaware Law on Disc includes the exclusive Online Connection™ program—at no cost—for up-to-the-minute Delaware caselaw updates directly from the LEXIS®-NEXIS® services! Get the currentness AND convenience of Michie's CD-ROM Library including:

- *Delaware Code Annotated*
- *Delaware Rules Annotated*
- *Delaware Supreme Court Decisions since 1945*
- *Delaware Court of Chancery Decisions since 1945*
- *Delaware Superior Court Decisions since 1945*
- *And more!*

Act now and you'll receive 30 days of unlimited access to the LEXIS-NEXIS services at NO additional cost!

NOW—Shepardize™ right from your MICHIE'S Law on Disc. SHEPARD'S Citations on CD-ROM and MICHIE'S Law on Disc are now linked to provide you a winning combination!

Call 1-800-356-6548 today!

All the right solutions at prices you can afford.

MICHIE™ LEXIS·NEXIS® ADVANTAGE FOR SMALL LAW FIRMS SHEPARD'S®

LEXIS·NEXIS®
A member of the Reed Elsevier plc group

LEXIS and NEXIS are registered trademarks of Reed Elsevier Properties Inc., used under license. The INFORMATION ARRAY logo, Online Connection, Michie's and Law on Disc are trademarks of Reed Elsevier Properties Inc., used under license. SHEPARD'S is a registered trademark of SHEPARD'S Company, a Partnership. Shepardize is a trademark of SHEPARD'S Company, a Partnership. ©1997 LEXIS-NEXIS, a division of Reed Elsevier Inc. All rights reserved.

AL1250

FEATURE

David Curtis Glebe

WE'RE NOT IN KANSAS ANYMORE

Observations of Current Trends and Future Possibilities in the Regulation of the Legal Profession

Having now spent the most significant part of my legal career immersed in the area of professional responsibility at the Delaware Supreme Court's Office of Disciplinary Counsel ("ODC"), I have developed a greater sense of perspective about the legal profession and how it is regulated. My intent in this article is to convey some observations from that perspective as to where we are and where we are going as a profession. My overall impression is that many aspects of the legal profession are undergoing rapid transformations, or are in need of major reforms, and that if lawyers fail to adjust to such changes they will engender an increased professional risk. In short, our professional lives are not as simple as they used to be.

Complaints, Complaints, Etc.

Take the institution of the ODC itself. Prior to 1984, there was no permanent, full-time disciplinary agency in the State of Delaware. Back then, there was only the Board on Professional Responsibility, previously called the Censor Committee, consisting of a group of lawyers and non-lawyers appointed by the Supreme Court and serving without compensation on an "as needed" basis. Disciplinary complaints were investigated by individual members of the Censor Committee or Board who would act in the temporary role of "disciplinary counsel" for the particular matters assigned to them. From the earliest days of the Censor Committee in 1952 until the creation of the ODC in 1984 – a period of over thirty years – approximately 900 disciplinary cases were evaluated, investigated, and prosecuted. By contrast, the ODC is presently handling disciplinary matters at the rate of over 500 per year. In August 1997 alone, we opened 60 new disciplinary files. And I do not see any abatement of this trend.

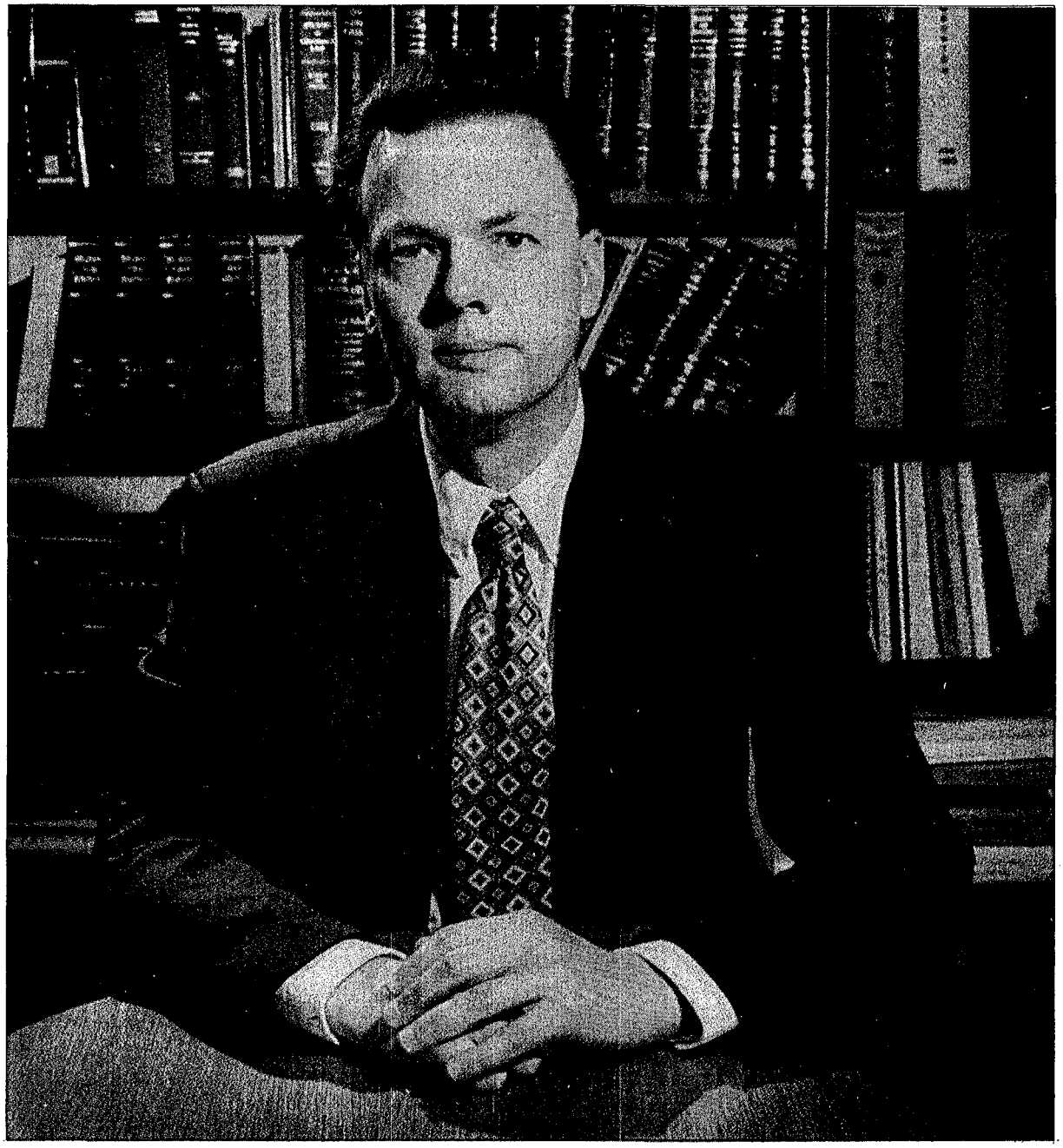
During the same decades, the number of legal malpractice cases also skyrocketed. One study of reported decisions found that there were four times as many legal malpractice cases in the 1970s as there were in the 1960s, and that there were three times as many cases in the 1980s as in the 1970s, with the trend continuing into the present decade. *See* Ronald E. Mallen and Jeffrey M. Smith, *Legal Malpractice*, at Section 1.6 (4th ed., West 1996). A very recent study also showed that legal malpractice claims relating to business transactions and commercial law practice have particularly increased in contrast to other areas such as personal injury and real estate practice. *Id.*, 1997 Supp. at pp. 1-3.

One typical explanation for these figures is that the number of lawyers has greatly increased over the years. However, even when the larger lawyer population is factored into the equation, the rise in the rate of both disciplinary complaints and legal malpractice claims is still quite dramatic. It appears that clients have greater expectations about what they want their lawyers to accomplish, that they are more demanding and less accommodating, and that they are more aware of their own rights as consumers of legal services, especially with regard to the fees they are being asked to pay.

Lawyers who do not take these trends and tendencies into account act at their own professional risk. The visionary creation of the ODC as a full-time and independent agency of the Supreme Court for handling complaints about lawyers, and the recent expansion of the ODC's professional staff to deal with the increase in cases, were therefore necessary, given these changes in the professional landscape.

A Clear Conscience Is Not Enough

One observation on the substantive rules of professional



David Curtis Glebe, Chief Disciplinary Counsel, Office of Disciplinary Counsel, State of Delaware.

conduct which needs to be articulated involves the common characterization of those requirements as "ethical rules." In my view, that is a potentially dangerous misperception. I have observed, especially among some of the older members of the Bar, the attitude that no disciplinary or malpractice consequences will ever come about as long as a lawyer remains "honest" and "ethical." Many lawyers have told me privately that they never worry about possible disciplinary action by the ODC because they know that they are morally upright in their professional lives.

The problem with this attitude is that it fails to recognize that many of the newer rules of professional conduct are simply mechanical (and often quite technical) regulations devoid of deontological content. Following one's "ethical intuitions" regarding those regulations, which may have been sufficient before the codification of professional conduct standards, is simply not sufficient now. The rules dealing with attorney books and records are one example of such technical regulations, and the rules dealing with attorney advertising are another. A lawyer who believes, however sincerely, that following the dictates of an honest conscience will always yield the correct course of action with respect to these rules is asking for trouble, since a lawyer can suffer disciplinary consequences for gross violations of the "technical" rules, which are just as serious as for violations of the "ethical" rules (e.g., dishonest conduct). Things are more complicated now than they were in the "good old days."

Changes To Come In Form And Substance

The disciplinary system now in place in Delaware, though relatively new, nevertheless appears in my view to be outdated. Even the substantive rules of professional conduct, which seem to presuppose that every lawyer acts as a solo practitioner, handling the discrete legal affairs of individual clients in a single jurisdiction, seem more adapted to the legal profession of the 1800s than that of the twenty-first century. Changes in these

Photograph by Pat Crowe, II

areas are already underway.

For one thing, the disciplinary system itself is still shrouded in a veil of secrecy. Disciplinary matters in Delaware are for all practical purposes secret until a public pronouncement is made by the Supreme Court. The trend around the country in the last decade, however, has been towards less secrecy and more public disclosure in the attorney disciplinary process. *See, e.g.*, "Lawyer Regulation for a New Century: Report on the Commission on Evaluation of Disciplinary Enforcement" (ABA, 1992) (recommending greater openness in disciplinary proceedings); *see also* The Honorable E. Norman Veasey, "The Role of Supreme Courts in Addressing Professionalism of Lawyers and Judges," *The Professional Lawyer*, Vol. 8, No. 4, p. 2, at 11 (August 1997) (suggesting need to develop uniform national standards for public disclosure of lawyer and judicial disciplinary proceedings after probable cause for misconduct is found). Delaware is presently one of a rapidly-shrinking minority of states that maintain secrecy throughout the disciplinary process until final dispositions are reached. Sooner or later the process will have to be decloaked and demystified.

Other changes taking place in the mechanics of attorney regulation include new procedural rules that will allow for disciplinary action (e.g., reprimands and fines) against law firms as well as individual lawyers. New York has recently adopted such a procedure. In addition, some jurisdictions are contemplating the complete professionalization of their disciplinary systems, in which hearing panels formerly composed of uncompensated volunteer lawyers and non-lawyers are being replaced with compensated professional hearing officers and judges. California has such a system in place now. Disciplinary agencies in several states (including Delaware) are now aggressively investigating serious attorney misconduct by means of undercover informants and sting operations. Florida and Texas have been using this method to investigate improper attorney solicitation, and New York may be using such tactics to uncover bill padding by large law firms.

As for the substantive rules of professional ethics, the Model Rules of Professional Conduct now in place in many states have been under increased scrutiny and criticism. In the past decade, for example, legal professionals have been drafting and debating a new black letter restatement of the standards dealing with the practice of law. *See* RESTATEMENT OF THE LAW: THE LAW GOVERNING LAWYERS, Tentative Draft Nos. 1 through 11 (American Law Institute, 1995). Even more recently, the ABA has created a special commission to undertake a comprehensive review of the Model Rules in order to determine how they should be changed in order to meet the demands of law practice in the next century. This commission, called "Ethics 2000," is being chaired by The Honorable E. Norman Veasey, and expects to issue its report in the year 2000.

Especially among the older members of the Bar, who began their practices before advertising was permitted, I have detected an often extreme hostility to lawyer advertising, which is normally referred to as "unprofessional" and "distasteful."

Legal Fees and Billing Practices

One area of professional conduct which has received considerable attention in recent years deals with the ways and means by which lawyers may charge for their services. In particular, there has been significant criticism of hourly billing as a method of assessing legal fees, resulting in reform proposals for alternative forms of billing. *See, e.g.*, Douglas R. Richmond, "Professional Responsibility and the Bottom Line: The Ethics of Billing," 20 S. ILL. U. L. J. 261 (Winter 1996); Lisa G. Lerman, "Lying to Clients," 138 U. PA. L. REV. 659 (January 1990). Given the ever-demanding nature of clients, as I have observed in my tenure at the ODC, it seems likely that in the years to come the debate over how lawyers may collect fees is sure to become more and more intense. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-379 (1993) (lawyers may not ethically bill same time to more than one client, nor charge client full amount for recycled work product, nor make excessive profits from overhead charges or in-house services).

For example, in the recent case of *Matter of Lassen*, Del. Supr., 672 A.2d 988 (1996), the Supreme Court suspended a Delaware lawyer for engaging in fraudulent fee practices, including what is commonly known as "bill padding," or billing clients for services not actually rendered. The Court stated its concern over "the recurring law practice problems of slavish adherence to hourly billing and lack of candor in disbursements." *Id.*, 672 A.2d at 1002, n.19. Lawyers in other states who have engaged in such practices have not only faced severe disciplinary sanctions, but criminal prosecution as well. *See, e.g.*, Darryl Van Duch, "If You Can't Trust Your Partners, Who?", *National Law Journal*, November 25, 1996, p. A5 (describing the recent indictment and conviction of two prominent Chicago attorneys on bill padding charges).

Similarly, the practice of charging non-refundable retainers has also been severely criticized. *See, e.g., In re Cooperman*, 611 N.Y.S.2d 465 (N.Y. 1994) (lawyer disciplined for charging non-refundable retainer, although clearly specified in written fee agreement). Generally, charging a non-refundable retainer is claimed to be inconsistent with the client's right to terminate a lawyer's services without penalty. In addition, circumstances may arise (e.g., where a lawyer becomes unable to render services after a short period of time) in which the lawyer's retention of a retainer is clearly inequitable. At the present time, the Trustees of the Lawyers' Fund for Client Protection are considering a proposed new disciplinary rule, which would require lawyers to supply a written statement to their clients as to when fees are considered earned and, therefore, not refundable.

The current debate about the propriety of certain forms of billing ties directly into the recent emphasis and develop-

EPLI

ALPS has done it again.

Introducing Employment Practice Liability Insurance from the one company which has always protected your interests.

In this day and age, having Employment Practice Liability Insurance (EPLI) for your firm is a must. Now, having it through ALPS is a reality. The one organization that works exclusively in the attorney's best interest introduces EPLI protection covering discrimination, sexual harassment and inappropriate employment conduct.

Our EPLI protection includes the following features:

- No exclusion for "Failure to Make Partner" exposure
- Limits of $100,000 to $1 million
- Varying deductibles
- No co-payment
- Full risk management services
- Office staffing material available
- Local defense

This special EPLI coverage is available only to ALPS insureds. Call, fax, write or visit our website for all the details.

1-800-FOR ALPS (367-2577)
www.alpsnet.com
P.O. Box 9169 • Missoula, MT 59807-9169
Fax (406) 728-7416

ALPS
Attorneys Liability Protection Society
A Mutual Risk Retention Group

When ethics questions arise, where do leading practitioners turn?

The *ABA/BNA Lawyers' Manual on Professional Conduct*

A trusted source they consult to:

- Answer practical, every-day questions about professional conduct.
- Save hours of research time with up-to-date resource materials.
- Prevent conflicts of interest and avoid malpractice claims.
- Find out which ethics rules apply and how they are implemented.
- Stay alert to the latest court and bar association actions.
- Keep up to date on news and legal trends that affect the legal profession, with the *Manual*'s bi-weekly newsletter.

You, too, can keep this valuable resource at your fingertips. Try it as our guest for 45 days, and give yourself the information and expert advice you need to be prepared for any practice situation.

☐ YES! I accept your invitation for a FREE, 45-day guest subscription to the *ABA/BNA Lawyers' Manual on Professional Conduct*. After 45 days, I'll either accept your invoice for a one-year subscription at the first-year discounted rate of $581.60 – a savings of 20 percent – or I'll choose not to subscribe and owe nothing. BNA will arrange pick-up of the materials at no cost to me.

Name _____
Organization _____
Street* _____
*Our carrier cannot deliver to P.O. boxes.
City and state _____ Zip _____
Phone _____ Fax _____ E-mail _____
Signature _____

Three ways to order your free guest subscription:
1. Fax this ad to 202-785-8102, Attn. Kathy Kiang, or
2. Mail your order to: The Bureau of National Affairs, Inc., Attn. Kathy Kiang, 1250 23rd Street, NW, Suite 4-324M, Washington, D.C. 20037, or
3. Call BNA Customer Relations, toll free, at 800-372-1033.

MOPC271

ment of the concept of "professionalism," since fraudulent billing in particular is an example of openly dishonest conduct typically considered a cardinal offense among lawyers. If it is true, as some surveys have indicated, that phenomena such as bill padding are actually quite common among lawyers, especially lawyers at the larger, blue chip law firms, then the battle to maintain professionalism among legal practitioners may have already been lost. *See, e.g.*, Lerman, *supra*, (providing evidence of broad-based dishonest conduct by lawyers regarding billing); Carl T. Bogus, "The Death of an Honorable Profession," 71 IND. L. J. 911 (Fall 1996) (arguing that the legal profession's refusal to recognize, much less remedy, dishonest fee practices demonstrates the "death" of law as an honorable profession).

Whether lawyers like it or not, we are going to be forced in the next century to deal not only with the impact of technology, but also with ever-more-demanding clients, who will insist that our secret proceedings be opened to public view and that our billing practices be fair and honest.

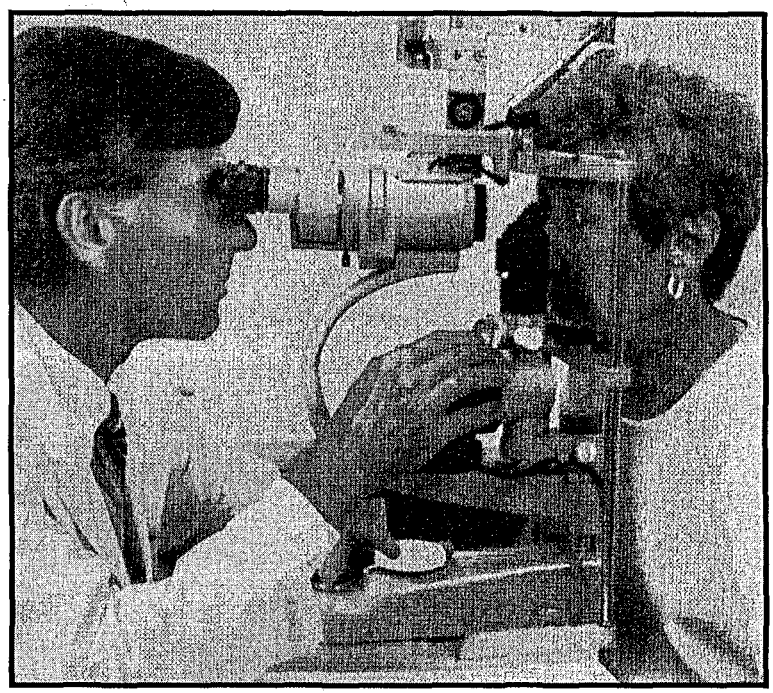
Moreover, if bill padding and other improper fee practices are prevalent even

among the most respected lawyers in the most prestigious firms, then it is no wonder that the reputation of lawyers in the general public is apparently so low. *See, e.g.*, Leslie McAneny and David W. Moore, "Annual Honesty and Ethics Poll," *Gallup Poll Monthly* (October 1994) (survey results showing that percentage of Americans giving lawyers high ratings for honesty continues to drop). Indeed, if these blatantly dishonest practices are commonplace, it is surprising that the public opinion of lawyers is not actually lower than it is. It is my hope that the present and future leaders of the legal profession, such as those who are serving on the "Ethics 2000" commission mentioned above, will examine such matters with the utmost candor and the strictest scrutiny, and take decisive remedial action.

Disseminating Information About Legal Services

In 1977, the United States Supreme Court held in the case of *Bates v. State Bar of Arizona*, 433 U.S. 350, that a blanket ban on lawyer advertising was inconsistent with federal constitutional principles. The line of cases following *Bates* in the last two decades has solidified the notion that lawyer advertising is here to stay. The question is not, therefore, whether lawyers should be permitted to advertise, but rather, what limits can be placed upon lawyer advertising which are constitutionally permissible? With respect to the legal profession in the next century, the most obvious question right now is whether information about legal services provided by on-line computer access can (or should) be regulated, and if so, by what means.

I have observed in my years at the ODC that most of the concern about lawyer advertising comes from lawyers themselves rather than the general public. Especially among the older members of the Bar, who began their practices before advertising was permitted, I have detected an often extreme hostility to lawyer advertising, which is normally referred to as "unprofessional" and "distasteful." For a lawyer "to solicit business" openly is considered by some to be degrading to the profession. What I have never understood about this attitude, however, is why some traditional activities by lawyers such as joining certain private country clubs, belonging to other gender and racially-exclusive organizations, attending certain social functions, and so on, which are often admittedly



For Over 20 Years We've Been Improving The Sights In Delaware.

At the Eye Center of Delaware you'll find a comprehensive vision center providing complete family eye care. Our doctors provide the latest in Excimer Laser surgical procedures such as PRK and LASIK. These procedures can decrease and even eliminate the need for glasses or contacts. We also offer cataract surgery without needles, stitches or patches; cornea; laser surgery; glaucoma; and an onsite optician and optical shop.

Call today 800-671-9524
213 Greenhill Avenue · Wilmington

EYE CENTER
OF DELAWARE
Change your prescription for life.

CRITERIUM
Haglid Engineers

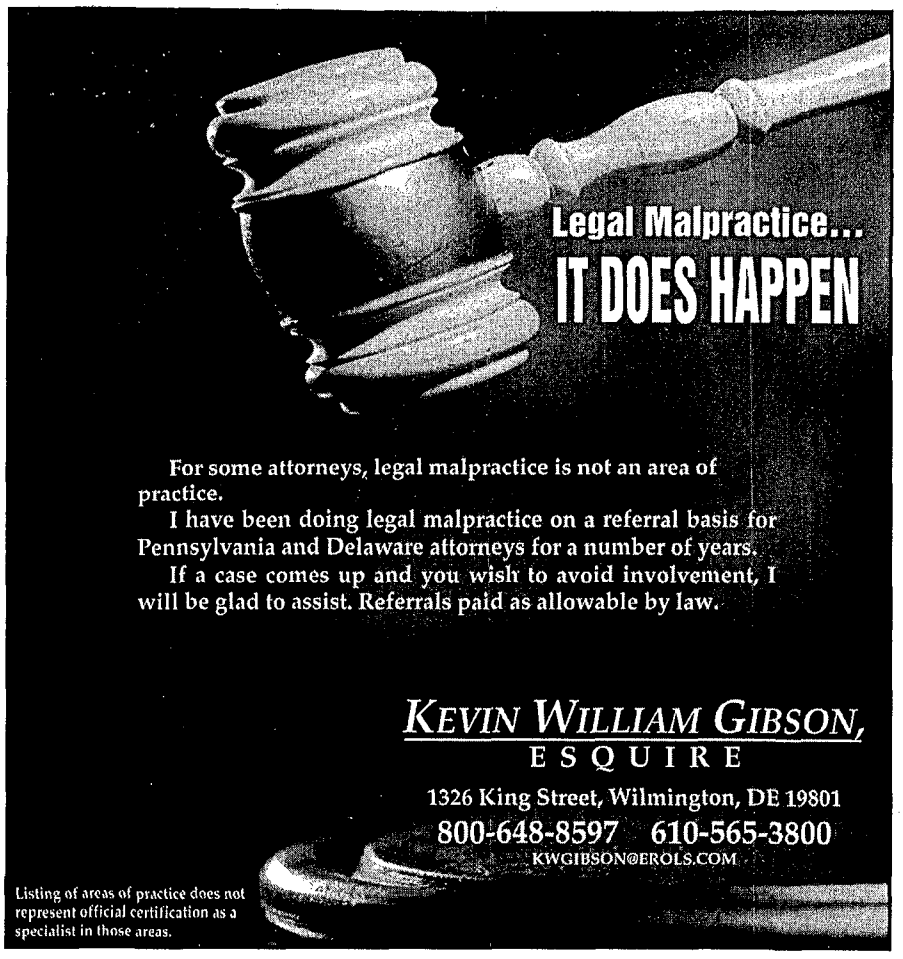
Expert Engineering Advise & Counsel on Buildings and Manufactured Equipment

- *Courtroom Experience*
- *Safety Engineering*
- *Maintenance Planning*
- *Design*

Call Klas Haglid, P.E.

1122 N. Clayton
(302) 425-5257

Wilmington, DE 19806
Fax: (302) 425-0447



done primarily for "rainmaking" purposes, were not considered just as degrading to the profession. In my view, lawyers who exercise their right to advertise as a means of soliciting business are at least being open about it.

Persons who call the ODC to file complaints about their lawyers often ask us to recommend other lawyers to them, or ask us where they can find information about obtaining legal services. These are often lower or middle income working people, with no access to the informal social and economic networks that were traditionally used for locating legal services before advertising was permitted. It has become crystal clear to me, having talked to literally hundreds of such persons over the years, that the general public needs ready access to information about available legal services. Lawyer advertising can fulfill that need. At the same time, of course, any such advertising cannot be misleading, overly intrusive, or contain false statements.

In order to remedy this situation and lay the groundwork for the future, the Supreme Court recently abolished all of Delaware's cumbersome disciplinary rules dealing with attorney advertising, and replaced them with a set of streamlined regulations patterned upon the ABA's Model Rules. *See* Delaware Lawyers' Rules of Professional Conduct 7.1 through 7.5, effective January 1, 1997. This was an enormous improvement. However, more work needs to be done, especially with regard to the possible regulation of on-line attorney advertising, which will predictably continue to grow and evolve in the years to come. *See* ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT (BNA, 1997), Section 81:551, *et seq.*, "Internet," and authorities cited therein.

The tension that appears to be developing with regard to the regulation of Internet advertising by lawyers is between the passive, and less problematic, dissemination of information about lawyers or law firms and the more active solicitation of legal business. For example, many law firms across the country have established "web pages" that provide information about the services offered by the firms and their lawyers. Since such advertising is generally passive, it is therefore no more troublesome than offering the same information through print media such as a firm brochure. The most difficult problems are going to arise when on-line advertis-

ing becomes more and more interactive.

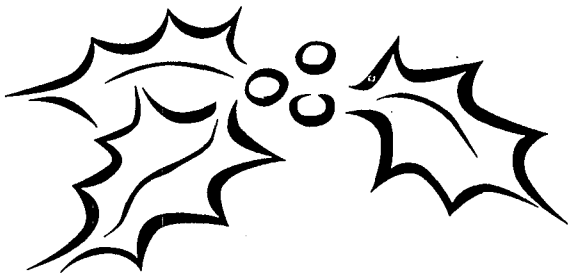
For example, suppose a "web page" allows (or encourages) potential clients to leave specific messages and ask specific questions dealing with their legal problems? Or suppose lawyers themselves send unsolicited messages seeking professional employment to particular "live" on-line discussion groups, or even directly to individual e-mail addresses? And what happens when lawyers (or non-lawyers, for that matter) begin to respond to specific on-line postings that pose legal questions? When is an attorney-client relationship deemed to exist? What if the on-line client is outside of the attorney's home jurisdiction?

As we get into the next century, the perfection and application of certain technological developments, such as virtual reality and three-dimensional holographic projection, will make things even more bizarre, since such technology will permit the appearance of face-to-face meetings between lawyers and potential clients without the actual physical presence of either. *See, e.g.*, Note, "Attorney Advertising and Solicitation on the Internet: Complying with Ethics Regulations and Netiquette," 13 J. MARSHALL J. COMPUTER & INFO. LAW 697 (1995) (suggesting that lawyer-client contacts via virtual reality should be treated the same as in-person direct contacts for purposes of regulation). Given such developments, the legal profession is likely to face regulatory problems and issues in the years to come that we cannot even imagine at present.

* * *

Whether lawyers like it or not, we are going to be forced in the next century to deal not only with the impact of technology, but also with ever-more-demanding clients, who will insist that our secret proceedings be opened to public view and that our billing practices be fair and honest. In my view, lawyers should finally realize that the "good old days" of the legal profession are gone forever, and that they must adjust and adapt to these often radical changes in the legal landscape in order to survive. As Justice Holmes might have observed, the justification of the new principles and the new perspectives we will be forced to develop in order to regulate the legal profession is not going to come from looking into our past, but from how we apply and test them in practice in our future. I think our profession could use the vision of someone like Holmes right now. ◆

Two original ideas for your holiday party.



The DuPont Country Club and Brantwyn. Two of the best ideas in the Delaware Valley for holiday entertaining. Both featuring ample parking, executive-style meeting rooms, large banquet rooms and flexible menus. Plus customized party planning. For two great choices for your next company party, call one number: **302-654-4435.**

DuPont Country Club & Brantwyn

Rockland Road Wilmington, Delaware

No membership required.

LAWYERS' PROFESSIONAL LIABILITY INSURANCE

RELIANCE INSURANCE COMPANY
SINCE 1817 ...EXPERIENCE TO KNOW

A. HORACE WERNER, INC.•302-656-8359

FEATURE

James W. Semple

THE MANAGED CARE OF INSURANCE DEFENSE LAWYERS

In contrast to the ordinary businessperson, who is free to pursue profits within the constraint of market forces, a lawyer is required to exercise independent professional judgment on behalf of the client, and to subordinate his or her own interests to that of the client. At the heart of any true "profession" lies this tension between professional responsibility and personal financial interest. Particularly fraught with this tension is the tripartite relationship found in the defense of a liability insurance policyholder. The lawyer is paid by the liability insurance company to represent the interest of the insured. Traditionally, because of the salutary social benefits of liability insurance, a lawyer in that situation has been permitted to represent both the insured and the insurer, to the extent their interests are coincidental. However, this relationship has been affected by the managed legal care that liability insurers have increasingly utilized of late. This article will examine some of the ethical issues emerging from two of these managed care approaches: the use of "house counsel;" and agreements to pay private outside counsel a fixed fee for representing an insured. [1]

For years, liability insurers have sought to reduce their expenses by using lawyers who are the insurers' own W-2 employees to defend policyholders. A review of legal decisions suggests that such an arrangement raises several serious issues under a fair reading of the Delaware Lawyers' Rules of Professional Conduct ["DLRPC"]: [1] the unauthorized practice of law; [2] the inevitable impairment of the lawyer's independent professional judgment; and [3] the misrepresentation of these employees as an independent firm. Surprisingly, several courts[2] and ethics opinions[3] have countenanced such arrangements. However, most of those decisions and opinions are long in the tooth and short on analysis. Those jurisdictions which have purportedly approved the practice rely upon either an express statutory basis, or the alleged common interest of the insured and insurer. However, the general principle is that a corporation may not perform legal services for others for a fee or profit and can be enjoined from such practices.[4] Two recent cases, and dissents in a third, provide hope that the ethical health of the profession has not been completely lost.

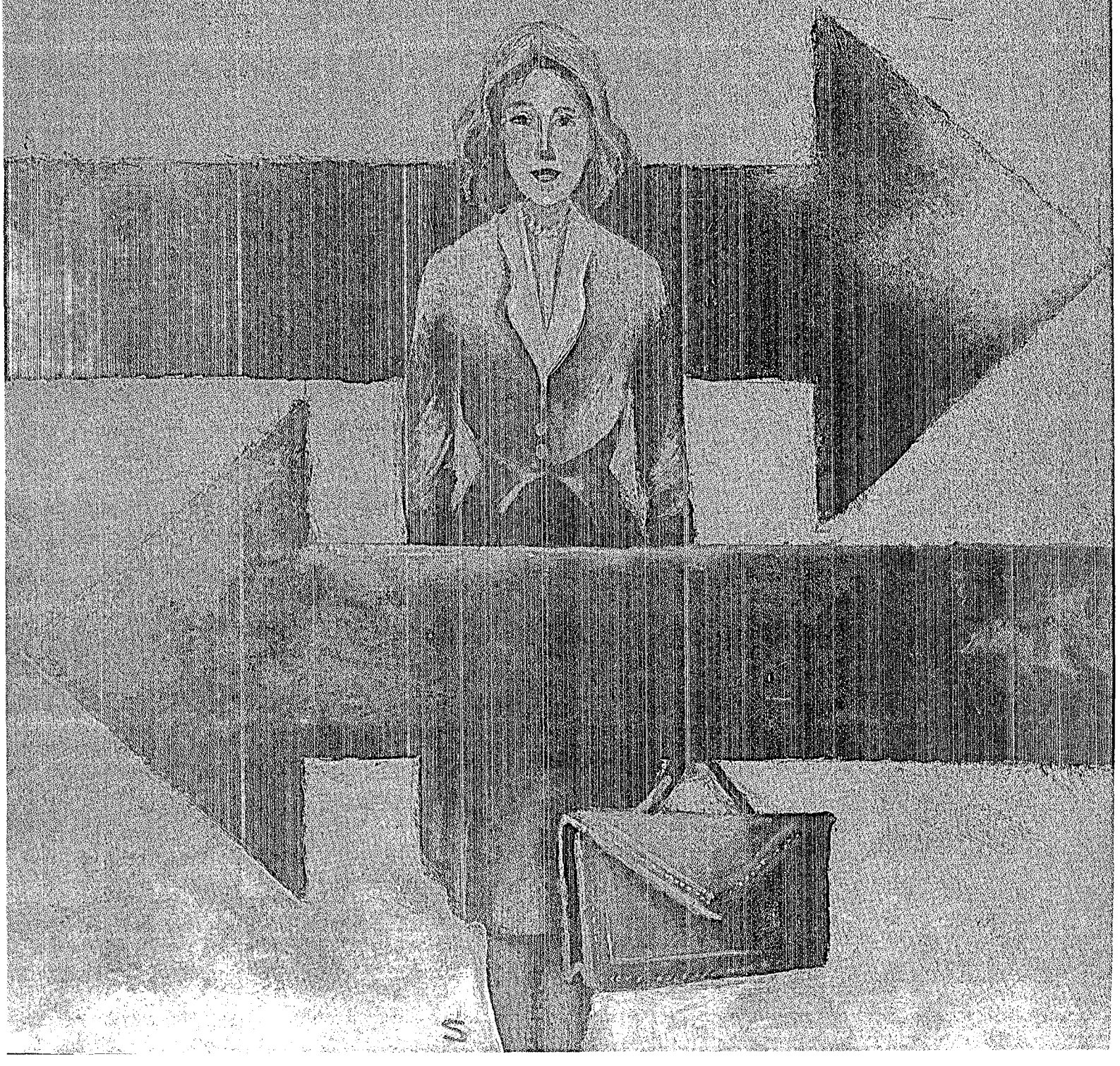
The Supreme Court of North Carolina held that using a licensed Nationwide attorney to represent the company's insured violated the state's ban on the practice of law by corporations.[5] North Carolina has since passed legislation permitting corporation lawyers to represent the corporation and its employees in North Carolina courts.[6] More recently, the Kentucky Supreme Court vigorously reaffirmed its prior ruling that house counsel programs violated the prohibitions against the unauthorized practice of law, based, in part, upon the legislative scheme enacted in Kentucky.[7]

Delaware has provided a statutory scheme for the rendition of professional services through a corporation in the Professional Service Corporation Act ("PSCA"). The W-2 schemes meet neither the legislative intent nor the legislative requirements of the PSCA. The Act's definition of professional service includes "any type of personal service to the public which requires as a condition precedent to the rendering of the service the obtaining of a license or other legal authorization, and which, by reason of law, prior to June 7, 1969, **could not be performed by a corporation.** In addition, and by way of example without limiting the generality thereof, the personal services which come within this chapter are the personal services rendered by ..., subject to the rules of the Supreme Court, **attorneys-at-law.**" (Emphasis added.) The clear import of that legislative pronouncement is that a corporation could not perform legal services prior to the enactment of that statute. The PSCA permits a professional corporation for the sole and specific purpose of rendering the professional service involved, prohibits a professional corporation from engaging in any business other than the rendition of the professional services rendered by it, prohibits a professional corporation from issuing capital stock to anyone other than a licensed professional, forbids the use of phrases and other descriptions indicating that the professional corporation is a corporation, and permits combination only with other professional corporations. In summary, the legislative framework that permits the rendition of legal services in the corporate form is explicit, unambiguous and forbids an insurance company from rendering professional services.

Moreover, because the inherent and exclusive power to regu-

Illustration by Karen Stolper

"Anyone who believes that in conflict of interest situations, a salaried lawyer employee . . . would not place the welfare of the corporation above that of a policyholder . . . probably also believes in the Tooth Fairy and the Easter Bunny."



late the practice of law resides in the Supreme Court,[9] the PSCA is subordinated to the rules of that Court. Supreme Court Rule 61 provides that the DLRPC govern the conduct of members of the Bar of this State and of attorneys admitted *pro hac vice*. The Supreme Court Rules address corporate practice in several respects. Rule 57 permits an "artificial entity" or a "public body" *pro se* representation in Justice of the Peace Courts through its officers or employees upon appropriate certification. It does not address representation of third parties by an "artificial entity" or by a nonlawyer in other courts. Rule 67 permits practice by lawyers in the form permitted by the PSCA, and imposes joint and several liability. Rule 69 establishes four categories of Bar membership, none of which is corporate membership. The absence of such provisions cannot be considered an accident. Presumably, the Delaware Supreme Court knows how to say that a corporation, other than one formed under the PSCA, can practice law. It has not done so.

DLRPC Rule 1.7 permits a lawyer to be paid from a source other than the client, if the client is informed of that fact, consents, and the arrangement does not compromise the lawyer's duty of loyalty to the client. The comment to DLRPC 1.8(f) notes that: "For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence." (Emphasis added.) The most recent decisions find that the house counsel arrangement creates an inescapable conflict of interest under Rules 1.7 and 1.8 because the structure unavoidably impairs the independent professional judgment of the employee. The Supreme Court of Kentucky reaffirmed its longstanding view that its version of DLRPC 1.7 was violated *per se* by the providing of legal services to insureds by insurer employees.[10] Insurers argued that there was a community of interest between their employees and insureds. The court rejected that argument as a "Pollyanna postulate." The Court viewed the rule to be an effective prophylaxis needed to protect the insured client. The Court's view was that the interests of the insured and insurer, while coincidental to some extent, were not alike and likely to diverge "at any time." This reasoning echoes that employed by the Delaware Supreme Court in agreeing with an insurer's argument that it did not owe a fiduciary relationship to its insured.[11] It suggests that W-2 employees who represent insureds may be guilty of a *per se* violation of DLRPC 1.7.

The Supreme Court of Missouri has held that the use of employees did not constitute the unauthorized practice of law and did not involve an impermissible conflict of interest "where coverage was admitted and adequate." A divided Court rejected the Disciplinary Board's argument that the insurer has more control over its employees than it does over retained independent counsel. However, Judge Rendlen dissented:

Here house counsel is simply an insurance company employee on the regular payroll and paid solely by respondent corporation. He is compensated for his services exclusively by the corporation whether those services are performed directly to the corporation or for services rendered by the corporation for an insured. House counsel must answer to supervisors within the company who are not necessarily attorneys. With the corporate framework house counsel will in due course necessarily face the unenviable choice of exercising the required independent, professional judgment or risk losing his job; manifestly, the insurance company is the sole "boss" of its employees.

A second dissent flatly ridiculed the majority opinion's view:

I can only observe that anyone who believes that in conflict of interest situations, a salaried lawyer employee of Allstate would not place the welfare of the corporation above that of a policyholder, who theoretically he represents, probably also believes in the Tooth Fairy and the Easter Bunny.[14]

DLRPC 1.8(f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of DLRPC 1.6 concerning confidentiality and DLRPC 1.7 concerning conflict of interest. DLRPC 1.8(f) provides that a lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consents after consultation; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6. DLRPC 1.8(h) requires that a lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith. Query whether the W-2 arrangements, in practice, make such provision?

In addition to DLRPC 1.7 and 1.8, the W-2 structure raises serious issues under DLRPC 5.4, which forbids a lawyer from allowing a non-lawyer a financial interest in the lawyer's professional business. DLRPC 5.4(d) addresses the professional independence of a lawyer and forbids a lawyer from practicing in the form of a professional corporation or association if a non-lawyer is involved in the aspect of ownership or control. DLRPC 5.5 prohibits a lawyer from assisting a person who is not a member of the bar in the performance of an activity that constitutes the unauthorized practice of law. A lawyer employee who represents an insured of the employer would apparently assist a person, the insurance company, who is not a member of the bar, in the performance of an activity that clearly constitutes the unauthorized practice of law. According to the Comment to Rule 5.4, the purpose of the rule is to "protect the lawyer's professional independence of judgment." If a lawyer in private practice cannot permit a nonlawyer to have a business interest in that law practice, how can a W-2 employee of a corporation controlled by nonlawyers conceivably comply with this rule? The short answer is that he or she cannot. Compare *Michigan State Bar Committee on Professional and Judicial Ethics, Opinion CI-1146* (June 19, 1986) (approving such representation) with the facts recited in *Mourad v. Automobile Club Insurance Association*, 465 N.W.2d 395 (Mich. App. 1991), *appeal denied*, 478 N.W.2d 443 (Mich. 1991). In *Mourad*, a lawyer who had been the head of an insurer's in-house legal department recovered a judgment of more than $1 million for constructive discharge for his demotion, which the jury found was the result of his refusal to accede to unethical requests and demands concerning representation of the insurer's policyholders. After he was demoted, a non-lawyer claims person was put in charge of the staff counsel operation. Note that in Delaware, the legal definition of "employee" implies that the worker is subject to control by

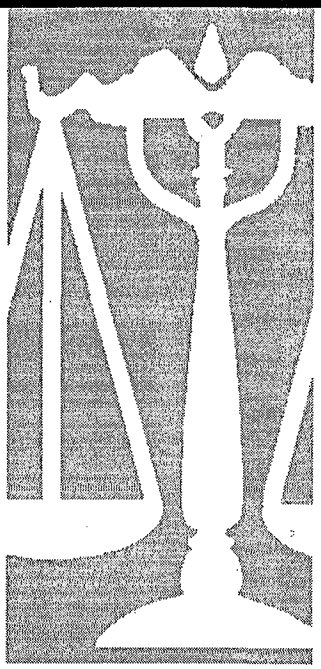
the employer in the manner, method and means used to accomplish the work.[15]

Even in those jurisdictions that permit house counsel, the decisions have made clear that the equivalent of DLRPC 7.1 forbids a lawyer from making a false or misleading communication about the lawyer or lawyer services. DLRPC states that a lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. Insurers argue that house counsel who practice in the names of the employees do so not to hide the affiliation with the insurance company, but because the insurance companies cannot engage in the practice of law. This seems an admission that insurers know they can't engage in the practice of law. In any case, the case law is crystal clear that using a name that suggests a private practice or partnership would mislead the public into believing that the lawyers were partners engaged in the general practice of law.

Another managed care device that insurers are using is the fixed fee agreement. Whether such agreements are currently affecting Delaware insurance defense lawyers' conduct is a matter of some speculation. Rumors abound that they exist. Certainly insurers have proposed them. As the decisions make clear, they are certainly being employed elsewhere. Some reportedly involve assumption by the lawyer of out-of-pocket expenses such as reporting services and expert fees. One of the many problems with fixed fee agreements in the insurance context is that neither the insured client whose defense is being provided pursuant to it, nor lawyer competitors who reject such agreements on ethical grounds, know about their existence until reading about them in a decision involving an ethical complaint, a claim for legal malpractice, or a claimed violation of the insurance contract's implied covenant of good faith and fair dealing. These agreements, when used to pay for services rendered to an insured, run afoul of the DLRPC. The insured client probably does not even know that the lawyer has made such a deal, and, even if told, is usually not in a position to finance its own defense. *See E.I. duPont de Nemours and Co. v. Pressman,* Del. Supr., 679 A.2d 436, 447-448 (1996). Certainly, a lawyer who enters into such an agreement must, at minimum, disclose the fact that he or she is being compensated by the insurer, and that that compensation is fixed. ABA Informal Opinion 96-403 concludes that the Rules of Professional Conduct, not the insurance

University of Delaware

Legal Assistant Certificate Program



Earn your certification in just twelve months!

Most courses meet 2 evenings per week on our Wilmington Campus.

- Convenient location
- Expert faculty
- Timely subject matter

For a brochure about the program, phone 302/831-3474, send a fax to 302/831-4919, or send e-mail to Tish.Szymurski@mvs.udel.edu

UNIVERSITY OF DELAWARE

Division of Continuing Education

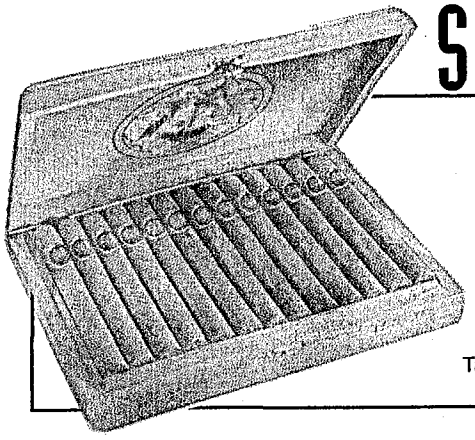
Fox & Lazo INC., REALTORS®

- Specializing in working with CASH investors who can provide your clients with a quick settlement on their home
- A great way to sell properties to settle an estate, divorce or pre-foreclosure.

CALL FOR DETAILS!
302-792-7400

Everything He Touches Turns to SOLD!

Jerry Strusowski
Realtor

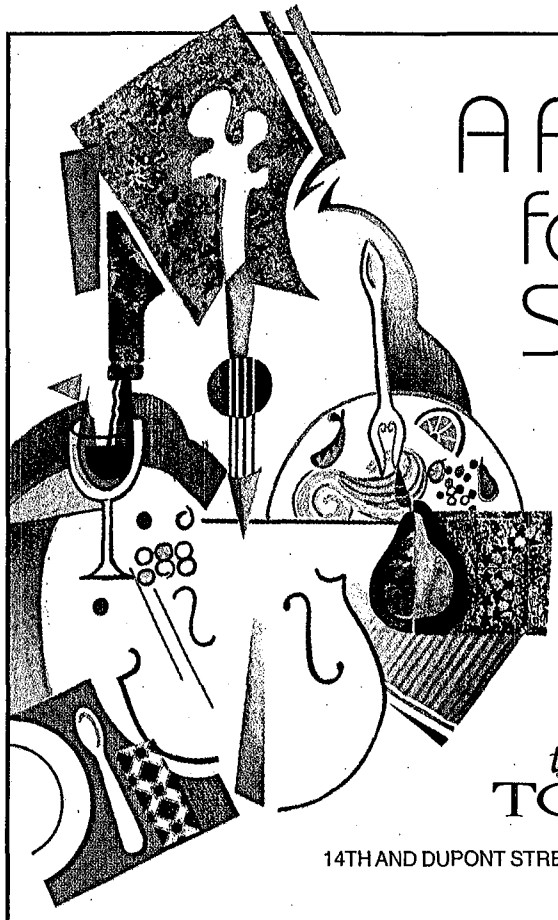


Smoke in Style

The Finest In...

Cigars • Pipes • Tobaccos
Walk-In Cigar Humidor Room
Personal Humidor Boxes
Area's Best Selection of Pipes & Accessories

Tobacco Village
4011 B Concord Pike
Talleyville Town Shoppes, Wilm., DE 19803
302-478-5075



A Feast for Your Senses

ANTIPASTI MISTI APPETIZER BAR
AUTHENTIC TUSCAN CUISINE
AWARD-WINNING WINE LIST
PARTY / MEETING SPACE
PRIVATE DINING ROOM
CORPORATE CATERING

tavola TOSCANA

14TH AND DUPONT STREETS • WILMINGTON, DELAWARE
302.654.8001

Look Your Best...

Paul Stike

Men's Fine Clothing at your Convenience!

Stike & ASSOCIATES

Call for Details:
302-292-2202 888-292-2230

FREE BUSINESS INSURANCE ANALYSIS

Nationwide's *second opinion* detects risks before they become problems.

To make sure your business is properly protected by an adequate insurance program, call us for a free second opinion. We can analyze the effectiveness of your present insurance, including pinpointing any duplication or financially damaging gaps.

Franklin T. Varone, CLU
1403 Silverside Road
Silverside Professional Park
Wilmington, DE 19810
Office: 302-475-6200 Fax: 302-475-2638

NATIONWIDE INSURANCE
Nationwide is on your side

Nationwide Mutual Insurance Company and Affiliated Companies Home Office: One Nationwide Plaza, Columbus, OH 43216 Nationwide® is a registered federal service mark of Nationwide Mutual Insurance Company

contract, govern the obligations of insurance defense counsel. Accordingly, the strictures of DLRPC 1.7, 1.8, and 1.2 are triggered. The counsel hired by the insurer must disclose the limited nature of the representation, and the insured's right to control the defense. Although that opinion did not address a lawyer hired under a fixed fee deal, the rationale underlying the disclosure requirement is to notify the client insured so that it can make an informed decision whether to accept the limited defense offered by the insurer or to retain counsel of its own.

DLRPC 1.8(j) precludes a lawyer from acquiring a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client unless the express exceptions set out in the rule are met. The fixed fee agreements in the insurance defense context are readily distinguishable from the traditional plaintiff's counsel's contingent fee agreement. In the latter, the lawyer's interest in the litigation is coincidental with his client's. Moreover, the public policy of providing access to counsel for those otherwise unable to afford it permits them. The fixed defense fee agreement has no such virtues. The lawyer's interest is furthered by doing as little as possible for the fee. To the extent that such agreements reduce insurer costs, there is no empirical data to evidence that those "savings" are being passed to the public in the form of lower premiums, or to employees in the form of higher pay, lesser workloads, or better fringe benefits. Some reports suggest they have been arrogated to upper management in the form of historically unprecedented executive compensation.

New Hampshire lawyers evidently can enter into such agreements without disclosure,[16] while Oregon requires that such agreements provide "appropriate compensation."[17] The Kentucky Supreme Court noted that its holding – that such agreements are illegal – was made in spite of such opinions.[18] The most recent authorities have clearly rejected such fixed fee arrangements as violative of the Rules of Professional Conduct.[19] The New York Appellate Court struck down a flat fee agreement as a conflict of interest with the insured client.[20] Not a single case decision can be found that approves such agreements.

One can only imagine the conversation in which the defense lawyer discloses that it has contracted with the insurer to limit the amount of money that the insurer will spend in its fulfillment of its

contractual duty to defend the insured:

"I have been hired to defend you by your insurance company. To get to do this work, I had to agree to limit what is spent to defend you. But, I'll do my best to represent your interests within the budget. You have the right to consult with and pay another lawyer who isn't connected to your insurance company and who isn't limited by the budget."

To articulate this scenario is to confront the transparency of any argument that such an arrangement complies with any credible disciplinary rule.

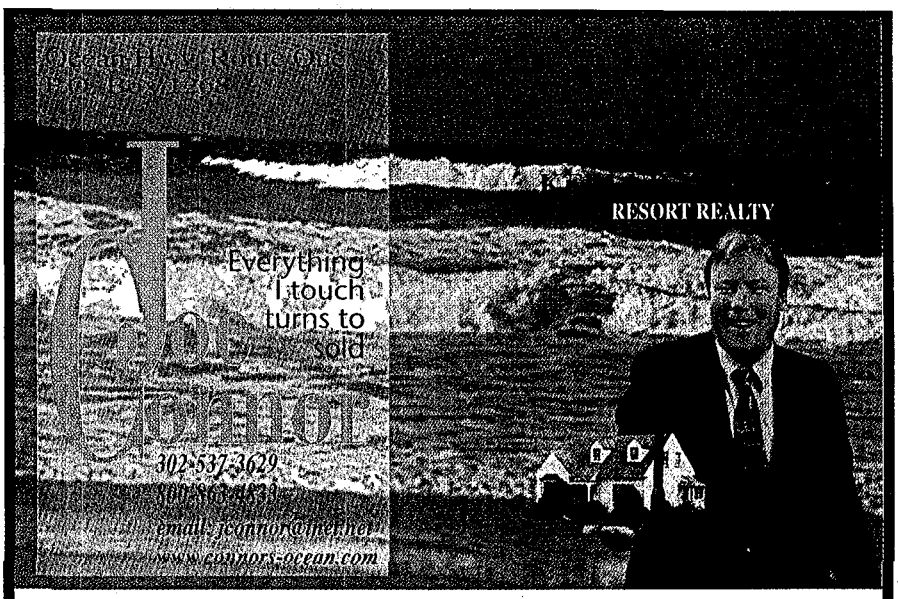
Many experienced and ethical defense counsel have concluded that the ethical and malpractice problems created by the managed care approaches have become so vexing, and the risks of ethical violation or malpractice so great, that they are withdrawing from this area of practice. A cynic might suggest this is precisely what the bean counters at the insurance companies planned, i.e., a universe of counsel, financially dependent upon insurers, ethically obtuse, and readily compliant to cost-driven instruction from the insurer. Insurance managers and auditors argue market theory that lawyers are fungible commodities, in oversupply, and must adapt their behavior to the market. Insurers insist upon their right to control the defense of litigation granted them in the insurance contract. Such observations ignore the ethical issues raised by the tripartite relationship. To explain away those ethical questions by contract law analysis, or to resolve them by market analysis, misses the point. That judges and legal ethicians attempt resolution on such bases is as troubling as the forces creating the issues.

The essence of a professional is the ability to exercise independent professional judgment and subordinate one's interest to the client's. If the Supreme Court determines that lawyers are to abdicate their independence and subordinate ethical considerations to commerce, it will do so forthrightly through well reasoned decisions or clearly stated and publicly debated changes in the DLRPC. Until the Supreme Court does so, let's not pretend these ethical issues do not exist.

FOOTNOTES

1. It will not discuss the many issues raised by another managed care device, the litigation and billing guidelines that purport to govern lawyer conduct.

2. California – Mullin-Johnson Co. v. Penn Mut. Life Ins. Co., 9 F. Supp. 175 (N.D. Cal. 1934). Connecticut – King v. Guiliani, No. CV92 0290370 S., 1993 WL 284462 (Conn. Super. Ct. July 27, 1993). Florida – In re Rules



KW
KELLER WILLIAMS
Resort Realty

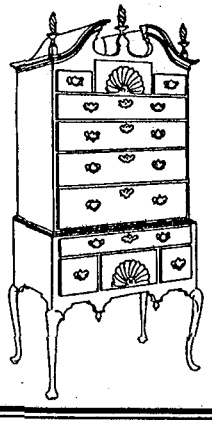
NOW OPEN IN BETHANY BEACH!

IF IT'S REAL ESTATE
"I DO IT!"

BETHANY
SEA COLONY
JEFFERSON BRIDGE ROAD
FENWICK

Our customers are our most valuable asset!

(800) 863-4833
(302) 537-3629
www.connors-ocean.com



Antique Restorations & Custom Refinishing

All Types of Wood Furniture ~ Stripping ~ Caning

FREE Pick-up and Delivery
Over 37 Years of Experience ~ Family Owned and Operated

Smitty's Furniture Repair
227 Money Road, Townsend • 378-7779
Newark • 738-6966 • Call for an Appointment

The Way it is...
staggeringly, in the Information Age 90% of the documents handled daily in the workplace are...

Still on Paper!

PC MAGAZINE EDITORS' CHOICE

Paper. It's the curse of the modern workplace. You stack it, sort it, shuffle it, file it... and eventually lose it. And the whole time you mutter, "there's got to be a better way." There is; File Magic Plus. It's award winning, Windows-based document management system that les you conduct business without handling paper. At last.
File Magic Plus works by scanning and storing any document, with text and graphics, so that you can find it or fax it in a snap with simple keywords or phrases.
Call **Hilyard's at 1-302-995-2201** to find out how you can end the paper curse. Then, like PC Magazine, you'll believe in magic too.

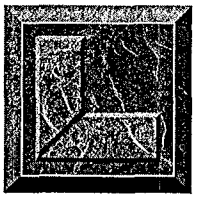
file magic!

Hilyard's INC.
BUSINESS MACHINES FOR EVERY PURPOSE

1616 Newport Gap Pike
Wilmington, Delaware
(302) 995-2201

Call Today for a File Magic Demonstration!

CNA LAWYER'S PROTECTOR PLAN®



More Lawyers in the entire United States and Delaware, purchase CNA Lawyers Protector Plan Professional Liability Policy than any other policy

"Why Settle For Less"

Call us for new & renewal quotations
'No Obligation'

Rossmann-Hurt-Hoffman, Inc.

Insurance since 1871

1-800-345-4133

Governing Conduct of Attorneys in Florida, 220 So.2d 6 (Fla. 1969). Georgia – Coscia v. Cunningham, 299 S.E.2d 880 (Ga. 1983). Michigan – Mourad v. Auto. Club Ins. Ass'n, 465 N.W.2d 395 (Mich. Ct. App.), appeal denied, 478 N.W.2d 443 (Mich. 1991). Missouri – In re Allstate Ins. Co., 722 S.W.2d 947 (Mo. 1987); Liberty Mut. Ins. Co. v. Jones, 130 S.W.2d 945 (Mo. 1939) (authorizing legal activities by lay adjusters). Ohio – Strother v. Ohio Cas. Ins. Co., 14 Ohio Op. 139 (Ct. Common Pleas 1939), aff'd without opinion. Texas – United States Auto. Ass'n v. Zeller, 135 S.W.2d 161 (Tex. Civ. App. 1939).

3. Federal – ABA Comm. on Professional Ethics and Grievances, Formal Op. 282 (1950). Alabama – Alabama State Bar Ethics Opinion 81-533 (1981). Arizona – Arizona State Bar Ethics Committee, Opinion 75-4 (1975). California – California Standing Committee on Professional Responsibility and Conduct, Formal Op. No. 1987-91. Michigan – Michigan State Bar Committee on Professional and Judicial Ethics, Opinion CI-1146, June 19, 1986 (as long as attorney withdraws if prevented from exercising independent professional judgment); State Bar of Michigan Committee on Unauthorized Practice of Law, Opinion, Sept. 22, 1969. New Jersey – New Jersey Supreme Court Committee on Unauthorized Practice, Opinion No. 23, 114 N.J.L.J. 421 (Oct. 25, 1984), and Supplement to Opinion No. 23 (Aug. 26, 1996) (use of house counsel to defend insureds not wrongful practice of law). New York – New York State Bar Association Unlawful Practice of Law Committee, Opinion 13 (1970); New York State Bar Association Professional Ethics Committee, Opinion 109 (1969). Virginia – Virginia State Bar Standing Committee on Legal Ethics, Opinion 598 (1985).

4 See Mullin-Johnson, supra note 4; Stewart Abstract Co. v. Judicial Commission of Jefferson County, 131 S.W.2d 686 (Tex. Civ. App. 1939); Pacific Employers Ins. Co. v. Carpenter, 52 P.2d 992 (Cal. Ct. App. 1935).

5. Gardner v. North Carolina State Bar, 341 S.E.2d 517 (N.C. 1986).

6. 97 N.C. Sess. Laws 1997-203.

7. American Ins. Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d 568 (Ky. 1996).

8. *Del. C.* §601 et seq.

9. Kosseff v. Board of Bar Examiners, Del. Supr., 475 A.2d 349, 352 (1984).

10. American Ins. Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d 568 (Ky. 1996).

11. Corrado Bros., Inc. v. Twin City Fire Ins. Co., Del. Supr., 562 A.2d 1188, 1192 (1989).

12. In re Allstate Ins. Co., 722 S.W.2d 947 (Mo. 1987).

13. Id. at 956.

14. Id. at 958 (Greene, Special Judge, dissenting).

15. Loden v. Getty Oil Co., Del. Super., 316 A.2d 214, aff d, Del. Supr., 326 A.2d 868 (1974).

16. Ethics Committee of the New Hampshire Bar Association, Opinion 1990-91 (1990).

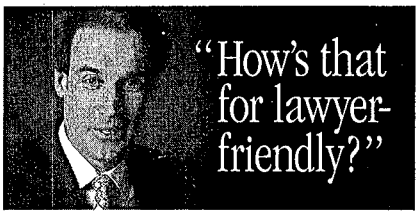
17. Oregon State Bar Association Board of Governors, Formal Op. No. 1991-98 (1991).

18. American Ins. Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d 568, 573 (Ky. 1996).

19. "Flat Fee Ethics Opinion Rejected By State Bar," MICHIGAN LAWYERS WEEKLY, January 27, 1997; American Ins. Ass'n v. Kentucky Bar Ass'n, 717 S.W.2d 568 (1996).

20. Bryan v. State-Wide Ins. Co., 533 N.Y.S.2d 951 (N.Y. App. 1988). ◆

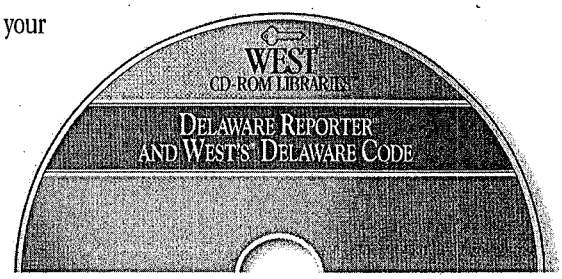
Natural Language searching comes to CD-ROM.



West CD-ROM Libraries™ now offers the efficiency of Natural Language searching—just like WESTLAW®. Simply type in your legal issue, using the same terms you would employ in a brief or memo. In seconds, your search results appear, with query terms highlighted and citations prominently displayed.

Additional West features include personal notation capabilities, built-in legal thesaurus and more printing options than ever. And now online updating assures that your research is absolutely current.

Still intimidated by the technology? Practical tips and personalized help from West Group Reference Attorneys are just a phone call away. In less than one hour, you can learn all the essentials you need to begin efficient, timesaving CD-ROM research.



Smooth the bumps in your library budget with West's Level Charge Pricing Plan. Your expenses remain constant—with no large initial payment! Just finance your subscription to any Level Charge West CD-ROM Library and make equal monthly payments over the term of your contract. Call today to learn what West CD-ROM Libraries qualify for this easy payment plan.

Call 1-800-255-2549.

WEST
GROUP

Bancroft-Whitney • Clark Boardman Callaghan
Lawyers Cooperative Publishing • WESTLAW® • West Publishing

© 1997 West Group

8-9467-3/7-97

729528
1-493-640-8

FEATURE

Charles Brandt

PRE-TRIAL JURY TAMPERING

A Jewish friend of mine from New York City, while buying a paper in Wilmington's train station, overheard a man and woman talking about Amy Grossberg and the Barbara Walters interview. At one point the woman said, "I'm a Christian." The man asked what that had to do with the case. The woman answered, "Well, I don't know how Jews raise their kids."

Among other things, this comment illustrates that potential jurors are discussing the pending case. They are forming opinions. They are solidifying their biases and prejudices.

In Delaware trials, jurors are daily admonished not to discuss the case they're on, not even with each other, until the case is submitted for their deliberations. They're admonished to avoid all news accounts. Yet potential jurors are devouring this case in advance. In a real sense, they are already deliberating.

True, before a single juror is sworn, the trial judge will attempt to weed out anyone who has formed an opinion that will interfere with his or her ability to fairly decide the facts. Still, we know that this is a subjective process, and relies upon a potential juror's intellectual honesty and self-awareness of his or her own psychology.

We also know that advertising exercises power over that psychology. It subtly influences people's decisions on a deep and often subconscious level. To buy. To vote. To hate an enemy. The same conditioning influence comes from press conferences, p.r. campaigns and news stories, especially those that are repetitive.

Those of us who truly value fair trials and our jury system should not want to see potential jurors exposed in advance to unsworn testimony, to argument, and to repetitive word images. Pre-trial, we certainly wouldn't want to see lawyers traipsing door to door, introducing their clients, humanizing them and putting a spin on their "facts." We wouldn't want lawyers and clients "working" a shopping center or a factory gate the way politicians do, shaking hands and passing out brochures. We wouldn't want defense "Dream Teams" or victims' families slipping flyers under windshield wipers. We wouldn't want T.V. ads or infomercials using actors to re-create a crime to depict one side's version of events.

Unfortunately, this is not far from what we have. The only difference between the press conferences and interviews in vogue today and my tacky examples is that the media p.r. approach is more efficient. It reaches and influences more potential jurors – and it is free.

A p.r. campaign may backfire, but that's no solace. We who value our system wouldn't want an innocent person convicted of a crime because his own press conference hurt him, because the camera didn't love his 5 o'clock shadow.

In certain high profile criminal cases, defense attorneys have openly admitted they conduct media campaigns aimed at prospective jurors. Stephen Jones, Timothy McVeigh's lawyer, hired a political consultant and permitted press interviews of McVeigh for the express purpose of humanizing him to prospective jurors in advance of jury selection. Robert Shapiro wrote an article, "Using the Media to Your Advantage," for a defense publication, in which he provided tips for successful media manipulation, again, aimed at prospective jurors. Gerald Lefcourt, President of the National Association of Criminal Defense Lawyers is quoted in a recent *New Yorker* article: "I am totally convinced that judges and jurors are human beings and they are as much affected by the

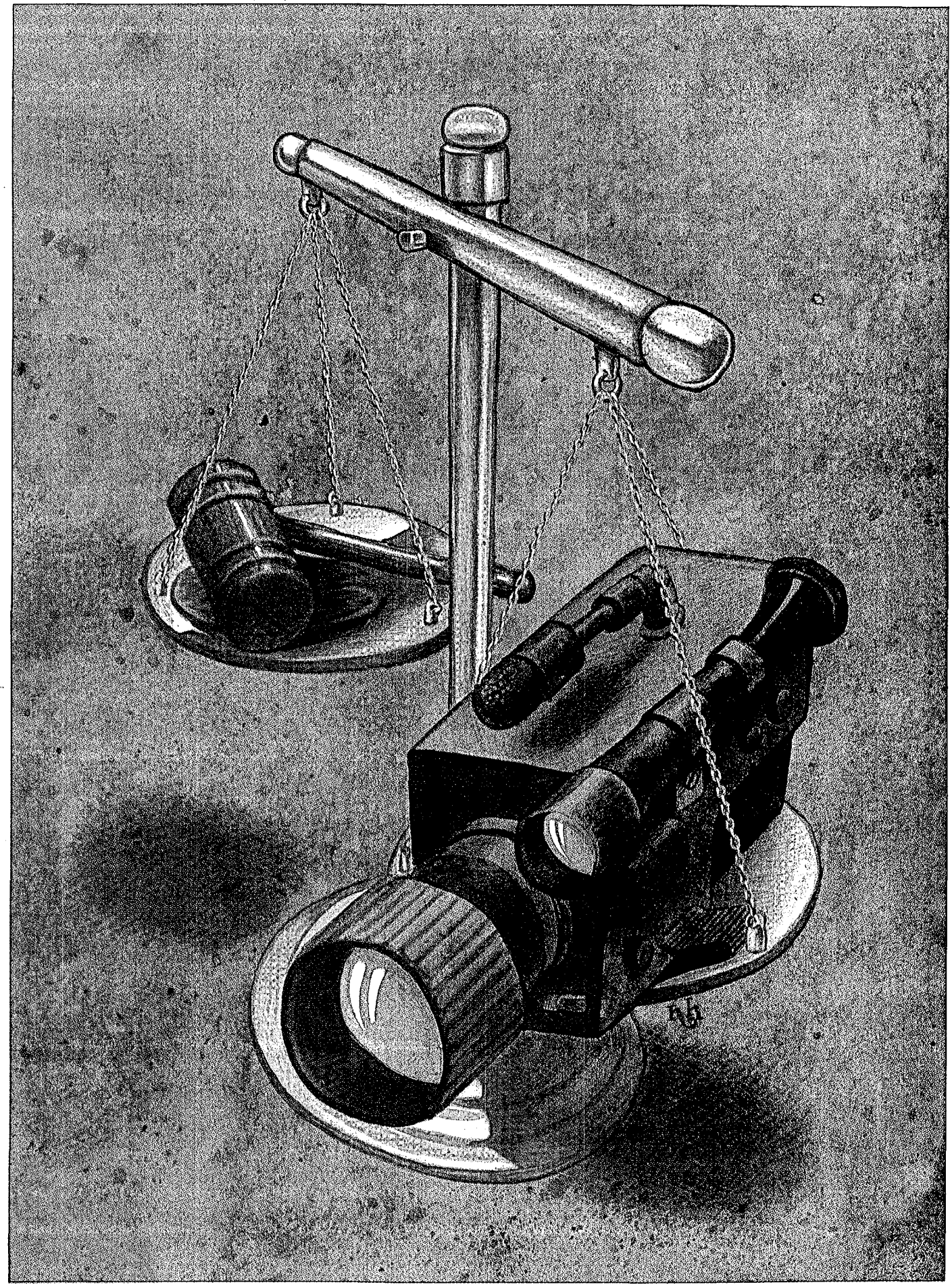


Illustration by Nancy Harrison

press as anyone. Sometimes you have to fight back."

In Delaware and in Federal Courts lawyer *voir dire* of prospective jurors is not permitted. Trial lawyers may only address jurors in opening and closing statements and clients only by testifying under oath. Yet before trial, defense lawyers conduct a kind of global *voir dire*. They speak openly and directly to jurors through a more-than-willing media, and do so, I believe, often justifiably.

"Sometimes you have to fight back," Lefcourt says. Virtually every Wilmington *News Journal* article on the Grossberg/Peterson case, for example, says: "...the 19 year olds are charged with killing their newborn son." Surely, the defense cringes at that. There will apparently be an issue for the jury in this capital case as to whether there was a "newborn son" who was killed, or a stillbirth. Meanwhile, prospective jurors continue to be conditioned by repetition to lean toward the State's medical experts' conclusions on this central issue of guilt and innocence.

Whenever the prosecution files a motion, the State's "facts" are rehashed and the "newborn son" makes the front page. Ironically, even when the Grossberg defense team attempts to "fight back" and files or answers a motion and tries to argue its "facts" on the front page, "the newborn son" also rises. Recently, letters about the case began appearing in the Wilmington *News Journal* with phrases like "the more her defense speaks out the worse it looks," and "we are now asked to believe..." Pre-trial juror deliberations have by now gone from the news stand to the newspaper. Can the internet be far behind? Even if they have no feelings about the case themselves, can the jurors who eventually will sit be totally unaware of or unaffected by how large or vocal segments of the population feel?

All this hubbub has occurred in a case where the Trial Judge is trying to insulate prospective jurors and thereby preserve the integrity of a fair trial on the merits by use of a gag order. One lead defense attorney has been dismissed from the case for orchestrating the Barbara Walters interview. However, he was on the case *pro hac vice*, and as such, practicing in Delaware only with the permission of the judge. Notwithstanding Grossberg's right to counsel of her choice, her lawyer from Long Island had an Achilles's heel that a member of the Delaware Bar would not have had.

Well then, how far can lawyers go to "fight back" in pre-trial publicity? How can trial judges ensure a fair trial based only on competent evidence? As lawyers bound by ethics, we turn for guidance to Rule 3.6 of the Model Rules of Professional Conduct (Trial Publicity) and the U.S. Supreme Court case of *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

In *Gentile* the U.S. Supreme Court looked at then – Rule 3.6 and by two separate 5-to-4 votes overturned disciplinary action against Mr. Gentile for violation of Rule 3.6 in a pre-trial press conference. One majority found that "an attorney may take reasonable steps to defend a client's reputation." Neither majority attempted to delineate the boundaries of a rule the Court would sanction which sought to control pre-trial publicity. A new Model Rule 3.6 has been drafted, hoping to satisfy *Gentile's* broad language. It is a watered-down version of its former self, allowing for a retaliatory exception, but Delaware has yet to adopt it and the U.S. Supreme Court has yet to rule on it. If the new rule has any teeth at all, they are infirm and unstable. Further, no one knows for sure whether other forms of restraint are constitutional, such as judicial gag orders or judicial attempts to restrict media access to police reports and court filings. There's a split of opinion, with most legal scholars favoring freedom of the press over fair trials.

In certain high profile criminal cases, defense attorneys have openly admitted they conduct media campaigns aimed at prospective jurors.

Former Disciplinary Counsel Charles Slanina said, "I think the Office of Disciplinary Counsel would have a tough time prosecuting anyone for pre-trial publicity in Delaware at the present time." Justice Randy J. Holland noted in a 1995 DTLA seminar on lawyers and the media that "Courts have had a difficult time ascertaining the proper standards to apply to the different issues." Justice Holland concluded: "Future court decisions will hopefully bring more certainty to this complex area of the law." This vacuum created by the Supreme Court is why lawyers like Jones, Shapiro, and Lefcourt can do what they do and urge other lawyers to grab a mike and work the crowd.

While waiting for "more certainty" from the ruling courts, trial judges are every day trying to conduct fair trials. Exactly what are *Gentile's* permissibly "reasonable steps to defend a client's reputation"? Disciplinary Counsel David Glebe, who is promoting the adoption of the new Model Rule 3.6, acknowledges that "the trouble with definitions" such as these is that "words only point one in a direction." He says, "This is a real line-drawing question to be decided case by case."

The only guidance one *Gentile* majority gave the rest of the judicial community is that "reasonable steps" embraces "an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried."

Lynch mobs get created by people riling each other up, usually pre-trial and always "in the court of public opinion." While the courts begin to draw lines in this new "complex area" of modern Supreme Court constitutional law, we have the luxury of living in a period free of lynch mobs. (These periods come and go in history.) The anti-semitic remark that opened this article is, one hopes, not a precursor of a new electronically riled-up lynch mob – the jury that is influenced by unsworn, improper, and irrelevant material before it is even empaneled. ◆

The Meeting Market

Planning a meeting can be more time-consuming than you think. Luckily, the area offers a number of resources that will help make planning a lot easier.

It's just a meeting — set up a few chairs, order some coffee and pencils, talk about the company's goals. No big deal. At least that's what everybody thinks. What they don't know is how much planning a meeting can take — especially if you want to make it effective and productive.

In many cases, planning a meeting can be like planning a wedding. What kind of food should we have? How many people will attend? Where should we hold it? Who'll provide the audio-visual equipment? How long should it run? What time will it start? A breakfast meeting? Lunch? Dinner? Do we need accommodations for out-of-town attendees? The list seems to never end — especially for the person responsible for producing a memorable meeting.

Luckily for Delawareans, there are hundreds of locations and service-providers that can make your meeting do what it's supposed to — satisfy the needs and goals of the attendees.

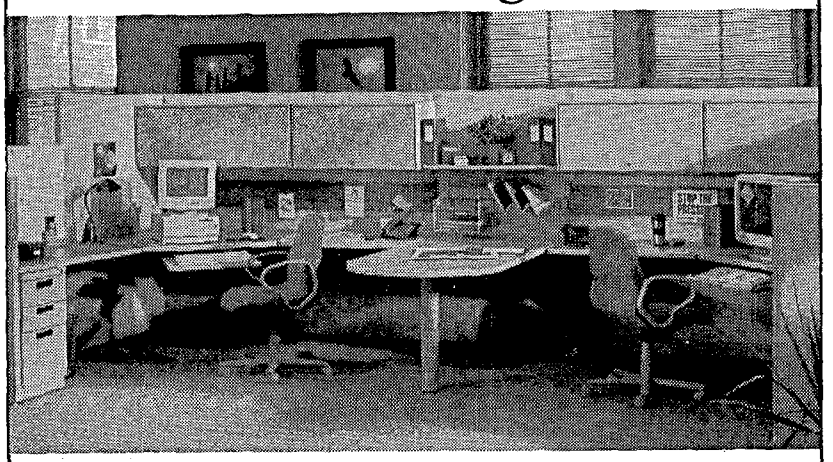
One such location is Cavalier Country Club. General manager Don Young, C.C.M., points out that Cavalier's location along I-95 between Newark and Wilmington makes it a perfect spot for attendees coming from all directions. The country club has all sizes of rooms, including a newly renovated ballroom that can hold up to 400 people for a meeting. And the beautifully appointed board room is the perfect place for a formal board meeting. The fancy room often accommodates organizations that don't have board rooms of their own, Young says.

Along with ample parking, food and an assortment of other services, Young says, Cavalier serves as an excellent centerpiece for a meeting.

More options include hotels, country clubs and many restaurants that have quality meeting facilities. But don't rule out other places — like the Delaware Academy of Medicine in Wilmington, which has ample meeting facilities and an auditorium perfect for presentations for up to 200 people.

Of course, a meeting is more than just location. Some locales do not have access to some of the sophisticated audio-visual equipment needed in today's high-tech business world. Or perhaps you have a room — and no furniture. Berger Brothers in Wilmington sells and rents a selection of tables, chairs and lecterns to accommodate any kind of meeting — formal or informal. Many companies also have the ability to support your meeting with an array of

How To Look Good On A Budget.



Trendway.

BERGER BROS. INC

Office Experts Since 1919

655-7166 3rd & Market St., Wilm., DE

Introducing Basic Choices®. All the functionality and good looks of Trendway's Choices® office furniture. But value-priced for tight budgets. Best of all, the two are part of one integrated system ... so you can mix-and-match elements as your business grows. Give us a call for a free consultation.

www.trendway.com

audio-visual equipment that can enhance presentations and make meetings more successful.

Tom Poppert of Personal Computer Rental (PCR) in King of Prussia, Pennsylvania, says, "We utilize only name-brand, state-of-the-art, show-quality computers, and we change them all the time. We don't use clones. You want the best, and you want the warm, secure feeling only the best can give you. If the thing works well but the stand is wobbly, that's unacceptable."

Through rentals, PCR can help anyone deal with an overflow of work, peak job loads (the legal equivalent of an accountant's job at tax time), complete special projects or enhance a meeting.

"For some people, renting is a viable alternative," Poppert says. "If there's no ongoing need for a computer, there's no need for a capital expen-

A Variety of accommodation choices . . . plus a panoramic view of one of the finest golf courses . . .

when you select Cavalier's Country Club for your next meeting facility.

- Totally renovated elegant facilities
- Banquet, meeting, and ballrooms for up to 300
- Luncheon and dinner menu selections prepared on premise in our kitchen
- Seconds from I-95
- Minutes from prominent area hotels

(Private country club. Inquire about memberships.)

Cavalier's Country Club

Addison Drive at Churchman's Road, Newark

302-737-1200

Donald J. Young, C.C.M., General Manager

Marge S. Trimarco, Assistant Manager & Banquet Coordinator

MEETINGS & RESEARCH MADE EASY

- Auditorium & Conference Centers
- Audio-Visual Equipment

Lewis B. Flinn Library

- Research Information
- Computerized Literature Searches

We belong to The National Library of Medicine

The Delaware Academy of Medicine

1925 Lovering Ave., Wilm, DE 19806

(302) 656-1629

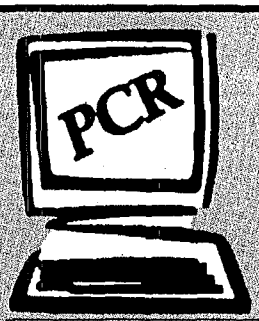
e-mail: wts@delamed.org

diture. And there's nothing to sell."

PCR also provides monitors, printers and high-resolution projection devices that will transmit the image from a monitor directly to a larger screen. It sure beats a tripod with a flip pad and markers in the courtroom or the meeting facility.

PCR will install, free of charge, any software provided by the customer, and the company provides 24-hour emergency service. "In a pinch, you can acquire a complete system, installed and demonstrated in less than 24 hours," Poppert says. "All of our personnel are technicians. They can make any adjustment and put together custom configurations. And they're all in touch with mobile phones and beepers."

No matter your needs for location and services, there's somebody who can help you plan the perfect meeting — one that'll be remembered for a long time. ◆



Computer and Peripheral RENTALS

Why buy it only for one meeting?
RENT IT!

- Notebook Computers
- Large Monitors
- Laser Printers
- Projection Devices
- Business Meetings
- Depositions
- On Site Due Diligence
- Editing Legal Documents
- Court Appearances
- Dynamic Presentations

Corporate Computer Rentals
(302) 652-3393 (800) 947-4727

PCR PERSONAL COMPUTER RENTALS®

Created exclusively for Big Brothers/ Big Sisters of America by Charles M. Schulz
Copyrighted 1950, 1958, 1960 United Features Syndicate, Inc.

VOLUNTEER NOW!
CALL YOUR
LOCAL BIG BROTHERS/
BIG SISTERS AGENCY

AFFILIATED
BIG BROTHERS/BIG SISTERS OF AMERICA

BREITLING
1884

At a time when instruments unerringly cope with Mach 1 flight data, continued improvements to the mechanical chronograph simply underscore that there's more to time than technology. A movement's intricate beauty or a hand-polished case's lustrous gleam do put technological progress in a broader perspective. Like the *Concord*, the world's first but surely not last supersonic transport, CHRONOMATS draw time and space ever closer with aesthetic excellence as well as outstanding technical performance.

INSTRUMENTS
FOR PROFESSIONALS


CHRONOMAT

A.R. MORRIS Jewelers
GEMOLOGISTS • DIAMOND IMPORTERS • FINE TIME PIECES
802 Market St. • Wilmington, DE • (302) 658-4013

FEATURE

Curtis P. Bounds

ETHICS: THE FAMILY LAW PERSPECTIVE

"Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to a lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts." Preamble to the Delaware Lawyers' Rules of Professional Conduct (hereinafter the "Rules").

So many people have come into contact with the law through domestic disputes, and so few seem to be completely satisfied with the way the legal system handles such disputes. It is no surprise that the public, and even some attorneys, view this area as full of obstacles to the ethical and upright practice of law.

First, domestic relations clients never present themselves at their best. At the core of most family law proceedings is the disintegration of a family. Short of the death of a loved one or a grave illness, there is no greater trauma. Individuals who are level-headed, successful, and healthy often fall to pieces in anticipation of a divorce.

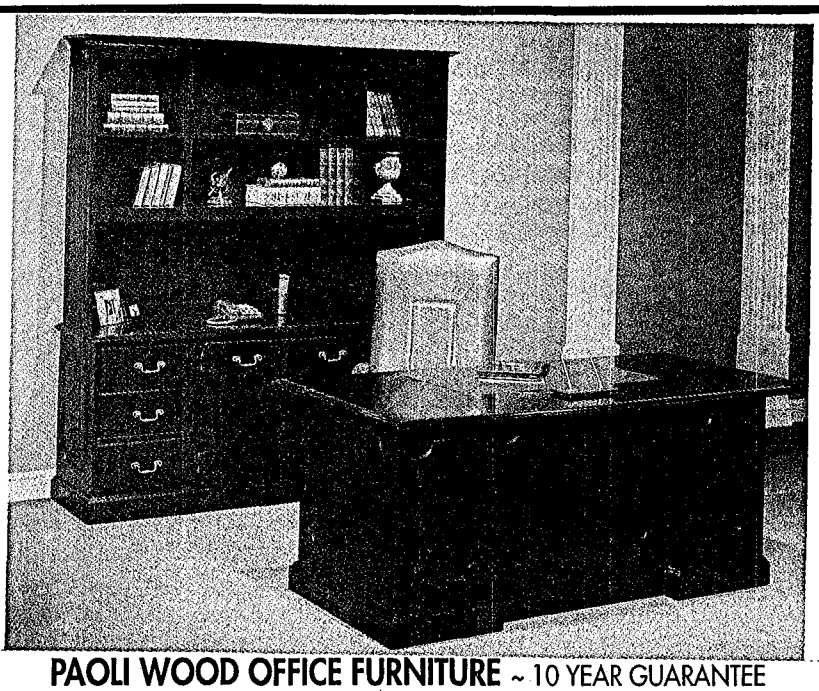
Second, unlike business clients, most of whom have a fair notion of the business law precepts and procedures that will guide the representation, family law clients are generally not familiar with the practice of domestic relations. They are primarily interested in the outcome, and do not always recognize the wisdom of the law's means to reach it. Family law clients may be hyper-moral; that is, they will assert their particular view of morality as it applies to the wrongs done to them, and elect vengeance on the earth. They may not appreciate the long-term benefits of honesty, integrity, and fairness to the opposing party. In short, they are not repeat players in the legal system and do not think they need to build trust among the participants in order to obtain an optimal result.

And if that were not enough to foster ethical dilemmas, discovery in Delaware family law begins (and often ends) with the **voluntary** exchange of information and documents. *See* Fam. Ct. R. 26(a). For example, this writer recently filed a motion in Family Court for leave to take third-party discovery. The Court denied the motion without prejudice to renew if I could state with specificity what persons I wanted to depose and what documents opposing counsel had refused to provide. In addition, the lawyer's obligation under Rule 3.4 – not to participate in the alteration, destruction or concealment of potential evidence – is expanded by Family Court Civil Rule 16(c), which imposes an **affirmative** duty to assist the client in making a voluntary disclosure of all assets and income. (There is seldom a reticence to disclose debts!) Although the Family Court rules are designed to help make the system more accessible to all litigants (with the secondary aim of keeping legal fees within reason), the informal nature of those rules can broaden the temptation to hide assets or income. Surely every family law attorney in Delaware has faced the question "Can I not disclose this asset?" or "Do I have to report my cash income?"

The Rules are not silent on these issues. While competency in the law is always a prerequisite, see Rule 1.1, the Rules offer additional guidance concerning the lawyer's role in addressing non-legal issues affecting the domestic relations client. Under Rule 2.1, the family law attorney may go beyond the black letter law, and give advice based on "moral,

economic, social and political factors, that may be relevant to the client's situation." The reader should pay special attention to the Comment to Rule 2.1, which states the lawyer must give candid advice, undeterred by the prospect that the client might find that advice unpalatable. It also notes that where a client is "inexperienced in legal matters," Rule 2.1's advisory duties might require the lawyer to explain that the issue at hand involves more than strictly legal considerations. The Comment further indicates that there are circumstances in which a family law attorney should recommend that a client seek the professional assistance of a psychiatrist, psychologist or social worker. In other words, the fully competent family law attorney will not shy from offering temperate advice on non-legal issues as they arise in the context of a client's case.

Rules 3.3 and 3.4 set forth a duty of complete candor. Under the Rules, an attorney must avoid complicity with a client's desire to conceal assets, dispose



PAOLI WOOD OFFICE FURNITURE ~ 10 YEAR GUARANTEE

TAB OF DELAWARE

• Fine Wood Furniture • Legal Shelving • Lateral File Cabinets
• Movable File Systems • Computer Furniture • Letter/Legal File Supplies
• System Furniture • File Indexes • Fire-proof Files • Bar Code Systems

(302) 764-9036 • FAX (302) 764-7749

McBride Shopa &company

Certified Public Accountants and Management Consultants

Providing support services to the legal community for almost 20 years

- Litigation support
- Valuations
- Expert testimony

For your clients:

- Advise on new tax legislation
- Accounting, tax and consulting services
- Estate and tax planning

Our mission is to recognize our clients wants, determine their needs, and support them in achieving ongoing success

Reach us at:
Tel: 656-5500
Fax: 656-8024
eMail: mcbrideshopa.com

OPEN LETTER TO ALL ATTORNEYS

Pettinaro Developers took over the Paladin Club Condominium complex on Edgemoor Road in North Wilmington in 1995. Since that date close to 100 singles and married professionals have purchased here.

My invitation to you and your staff is to tour our 56 acres at your convenience, bring some workout clothes and a swimsuit because we have a 27,000 square foot clubhouse complete with racquetball courts and an indoor pool. Phone 764-2500.

With generations growing older, scaling down to maintenance free living is most appealing. This is also true for the newly divorced person. 1, 2 and 3 bedrooms available.

Thank you for your anticipated future referrals.

Sincerely,
James M. Hayes
Vice President
Sales and Marketing

of assets during the pendency of the litigation, or testify or aver falsely as to unreported income. *See also* Rule 4.1. For example, family law attorneys must sign their client's Rule 16(a) and Rule 16(c) Financial Reports. Both forms require voluntary disclosure of income from all sources. Although not governed by Rule 11, these disclosures are governed by the Rules of Professional Conduct. Rule 3.3(a)(4) states that "A lawyer shall not knowingly offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures." Thus, if the lawyer knows the client has unreported cash income,

Family law clients may be hyper-moral; that is, they will assert their particular view of morality as it applies to the wrongs done to them, and elect vengeance on the earth.

it is a violation of the ethical rules to submit (or fail to correct) a Rule 16(a) Financial Report that fails to disclose that income.

Family law also has that special arena, where the duty to one's client may prove inimical to the health and welfare of its subject: custody of the children. In cases involving children, the Court's primary duty is to the children and not to the parties. The law requires the Court to weigh a series of factors to determine the best interests of the children. *See* 13 *Del. C.* § 722. Only one of those factors takes into account the desires of the parents. Since an attorney's duty of loyalty runs to one of the parents, it is not always apparent

how to exercise that duty and at the same time uphold the law.

In most cases it is easy to take up the standard on your client's behalf. Seldom is the desire of the client clearly at odds with the best interests of the children. Nevertheless, the attorney often sees how the client's behavior, even if well intentioned, affects the health and stability of the children. It is also difficult to speak with any persuasion to opposing counsel about the other party's behavior if there is no check on one's own client. Here, again, the force of moral persuasion is necessary for the family law attorney to discharge his or her role. It is not right to willingly participate in the destruction of a child's relationship with one parent, even if that act benefits the other parent's case.

It is not right to willingly participate in the destruction of a child's relationship with one parent, even if that act benefits the other parent's case.

The Rules, by definition, must be interpreted to harmonize with the attorney's duty of loyalty to the client. But the Rules point to other loyalties as well: to the tribunal, to what is true, to oneself. The Rules are boundaries within which the attorney has the freedom to make moral choices when the duty of loyalty to the client is at cross purposes with other duties. Ultimately, the family law practitioner must seek the guidance of other lights, not found in the Rules, to make choices about what is right, true and good. ◆

VEHICLE LEASING

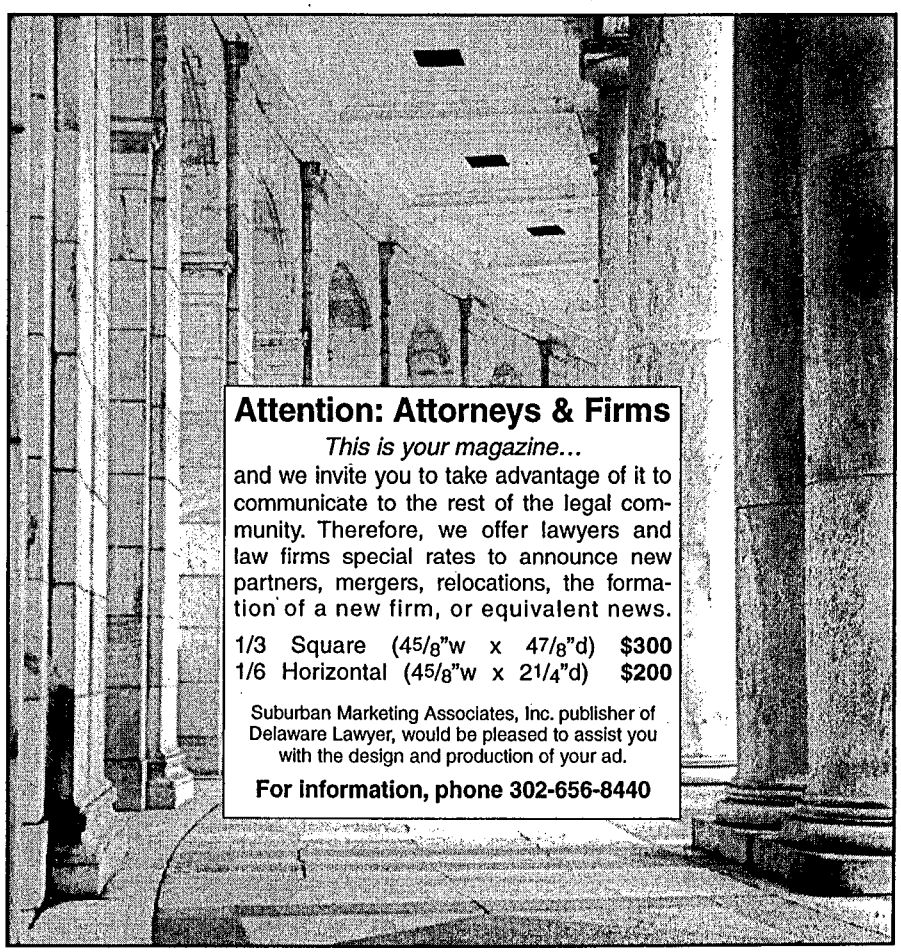
PERSONAL SERVICE IS OUR BUSINESS

We Cater to:
- Small Businesses
- Professionals
- Car & Truck Fleets

Benefits of Leasing Your Next Car:
• No Capital Investment • Lower Monthly Costs
• Drive More Car For Your Money
• A New Car Every 2-3 Years
• No Resale or Trade-in Hassle

Call the Leasing Professionals At: (302) 656-4977

WINNER Group Leasing
Offices in Downtown Wilmington, Delaware



Attention: Attorneys & Firms

This is your magazine...

and we invite you to take advantage of it to communicate to the rest of the legal community. Therefore, we offer lawyers and law firms special rates to announce new partners, mergers, relocations, the formation of a new firm, or equivalent news.

1/3 Square (4 5/8"w x 4 7/8"d) **$300**
1/6 Horizontal (4 5/8"w x 2 1/4"d) **$200**

Suburban Marketing Associates, Inc. publisher of Delaware Lawyer, would be pleased to assist you with the design and production of your ad.

For information, phone 302-656-8440

Irving Morris

ANNALS OF DELAWARE PRACTICE

Excerpt From "But Some Clouds Have A Gold Lining (1956-1959)"

Irving Morris, a distinguished member of the Delaware Bar and a former President of the Delaware State Bar Association, has accumulated a body of fascinating professional experiences over a career of more than forty-five years. To the ultimate benefit of his fellow lawyers, he has written extensively about his work. The following, an excerpt from one of his stories, fits in nicely with the theme of this issue, a lawyer's ethical obligations. Mr. Morris's account deals with court room decorum and truthfulness, placing a client's interests above self-interest, and the balancing of those interests with the practical necessity of paying attorneys enough to justify their giving time and talent hostage to the uncertainties of contingent fee litigation.

By way of explanation: Mr. Morris and his colleague, the justly celebrated Milton ("Mike") Paulson of the New York Bar, had vigorously prosecuted a stockholder's derivative action to the point where the defendants abandoned their efforts to dismiss the complaint and agreed to a settlement advantageous to the corporation and a fee to the plaintiff's counsel. Now, in Irving Morris's own words:

We eventually achieved a benefit of approximately $500,000 in settlement of our claim that one of the defendants, E.C. Rhoden, so dominated the directors of National Theatres that they diverted corporate opportunities to him. At the outset of the litigation all of the defendants moved to dismiss, attacking the plaintiff's standing to sue. They claimed she was not a stockholder at the time of the wrongdoing and thus she could not comply with 8 *Del. C.* §327 requiring a plaintiff in a derivative action to be a stockholder continuously from the time of the wrongdoing through the course of the litigation. In the alternative to their standing attack, the corporate defendants moved to dismiss as to all claims occurring more than three years before the filing of the complaint. In addition, Rhoden moved to dismiss, claiming the complaint failed to meet the requirements of Rule 9(b), one of which compelled a plaintiff to plead fraud "with particularity." Finally, all of the then appearing defendants moved for a more definite statement of the issues we alleged in the complaint.

Vice Chancellor William Marvel held the plaintiff did have standing to sue. She had not purchased her shares in order to bring the action, the "evil" 8 Del. C. §327 was enacted to prevent. *Helfand v. Gambee*, Del.Ch., 136 A.2d 558, 561 (1957). The Court, however, found the complaint "so loosely drawn that the appearing defendants should not be forced at this juncture to file a responsive pleading." Id., 136 A.2d at 562. He directed the plaintiff "to state her complaint more definitely" and concluded: "If justified, the motions based on the statute of limitations and Rule 9(b) may be renewed after the filing of a more definite statement." Id.

To comply with Vice Chancellor Marvel's ruling, since the defendants already had the factual information they wanted us to allege, I urged we first direct interrogatories to secure the information we needed to respond to the more definite statement the defendants sought. It was an artful position for us to take. Edwin deHaven Steel, Jr., of Morris, Steel, Nichols & Arsht, represented Rhoden. Mike Paulson did not have as much confidence in the move as I did. He thought Steel would use the filing of our interrogatories to argue the Court should revisit the motion to dismiss. Mike was right. In objecting to our interrogatories Steel's argument, in essence, was if we did not have the facts, the Court should dismiss our complaint — an argument he had not made on the motion to dismiss which Vice Chancellor Marvel had denied. Mike asked me to argue our case against Steel's objections. My recollection is Mike said he had another commitment preventing him from coming to Delaware that day. It could have been he thought so little of our chances it was not worth his time to make the trip. Then again, to explain his absence, he may have thought our position so strong even I could argue it to a successful conclusion without his making the trip. In any event, Mike entrusted making the argument to me.

At the argument on April 25, 1958, when Vice Chancellor Marvel ruled in my favor, Steel was back on his feet to repeat his

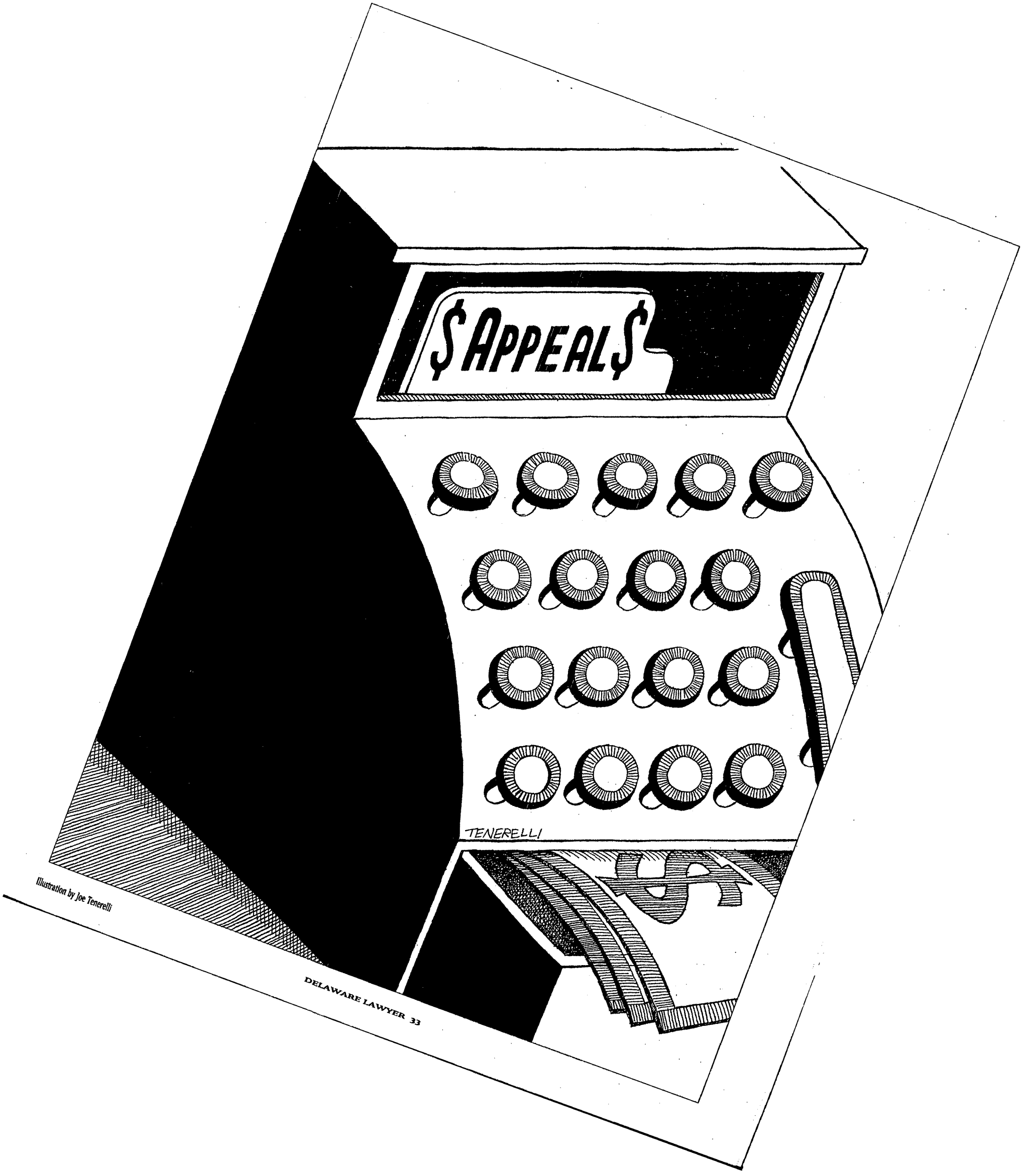


Illustration by Joe Tenerelli

opposition. In response, I argued persuasively and again the Vice Chancellor ruled in my favor. Still not content to accept defeat, Steel rose to argue a third time claiming he was right and I was wrong. After I argued a third time Steel was wrong, the Vice Chancellor for the third time agreed I was right and ordered Steel's clients to answer the interrogatories. To win once, I had to best Steel three times. On April 23, 1958, two days before the argument, President Eisenhower had nominated Steel for appointment to the United States District Court for the District of Delaware and submitted his name to the Senate for confirmation. I think *Helfand v. Gambee* was Steel's last argument before his departure from practice to go on the bench. He obviously hated to lose. So did (and do) I.

The answers of Steel's clients to our interrogatories led to discussions and negotiations (Mike conducted all of them for our side) resulting in the settlement. At the settlement hearing, Henry Krinsky, a New York attorney, representing a relative, Berdye Krinsky, appeared and objected to the settlement consideration ($500,000) as insufficient and the fee sought ($100,000) as excessive. Vice Chancellor Marvel approved the settlement and allowed the fee over the objections.

Before the thirty day time to appeal expired, Russell J. Willard, Jr., of Hastings, Taylor & Willard of the Delaware Bar, called me and told me "the Senator" wanted to see me. I needed no explanation who "the Senator" was. Willard's senior partner and founder of the firm, Daniel O. Hastings, was a living legend by the time I came to the Bar in 1951. He had years earlier served as a judge of the Superior Court and for a term as a United States Senator from Delaware. He was a stalwart of the Republican Party and probably as conservative as anyone I ever knew. It was said of him he made his creditors happy twice, once when he bought from them and six years later when he paid them. When I clerked for Paul Leahy, then Chief Judge of the United States District Court for the District of Delaware, Senator Hastings was the only attorney who escaped unscathed despite violating four of the Judge's rules (and all at one time to boot): the Senator, wearing his hat and smoking a cigar, came late into Judge Leahy's courtroom shortly after Court had convened for an argument, placed his lit cigar at the corner of the counsel table and, when he subsequently rose to argue, proceeded to read at length to the Judge from cases.

At the adjournment of the argument, I could hardly wait to protest in chambers to the Judge his failure to put the Senator in his place for arriving late, wearing a hat, smoking in court and, the worst sin of all, reading to the Judge. "Don't you think I can read, counsel?" was the Judge's invariable question to the attorney who would "argue" by reading at length from cases. The Judge's dispositive response quickly ended the discussion: when I reached the Senator's age I, too, could come before him late, wear a hat, smoke a cigar and proceed to read to him. The Judge's description of Senator Hastings was memorable. He called Hastings "the lovable rogue." I never saw the lovable side of him.

Without any social palaver, the Senator went directly to the point of his invitation. He asked me how much of my fee I would pay him not to take an appeal.

In response to Willard's call, I immediately went to the Senator's office in the Continental American Building diagonally across Rodney Square from my then office in the North American Building. (Both buildings were known by the shortened names of the life insurance companies that had their main headquarters in the respective buildings. Neither building still stands.) When I sat across the desk from him in his tiny office with Willard sitting off to his right, Senator Hastings told me he now represented Berdye Krinsky. Without any social palaver, the Senator went directly to the point of his invitation to visit with him. He asked me how much of my fee I would pay him not to take an appeal. I told him, "Nothing." He told me not to act so "hastily" (no pun intended; it was his word) and urged me to speak to my forwarder. I told him he would receive nothing and he should do whatever he thought was in his client's interest.

I left the Senator's office and went directly to see James M. Tunnell, Jr., who had succeeded Steel as the lead attorney for the defendants in the firm renamed Morris, Nichols, Arsht & Tunnell when Tunnell joined it. Jim Tunnell was one of the best lawyers at the Bar, if not the best. He had had a great career as a trial lawyer downstate before going on the Supreme Court as one of the first three members of the separate Supreme Court created in 1951. After a short stay on the Supreme Court, he resigned in 1954 to seek the nomination of the Democratic Party as its candidate for the Senate. His father, James M. Tunnell, Sr., had served in the Senate from 1941 to 1947. In a floor fight at the State Democratic Convention, Jim lost to the incumbent, J. Allen Frear, a conservative Democrat.

He returned to practice in Georgetown with his brother, Robert. When Steel departed for the District Court in 1958, Tunnell moved upstate to join Steel's former firm to lead its lucrative corporate practice. I had gotten to know Jim during his service for two years as President of the Delaware State Bar Association (1958-1960) during part of the time I served as Secretary. Jim Tunnell was a class act all the way.

In Jim's office, I told him of Willard's call and my visit to Senator Hastings. I was outraged. I urged we bring Hastings' conduct to the attention of the Supreme Court. I wanted Hastings formally disciplined. To my disappointment Tunnell recommended we do nothing, since the Supreme Court "knew the Senator." Hastings, Taylor & Willard filed an appeal for Krinsky.

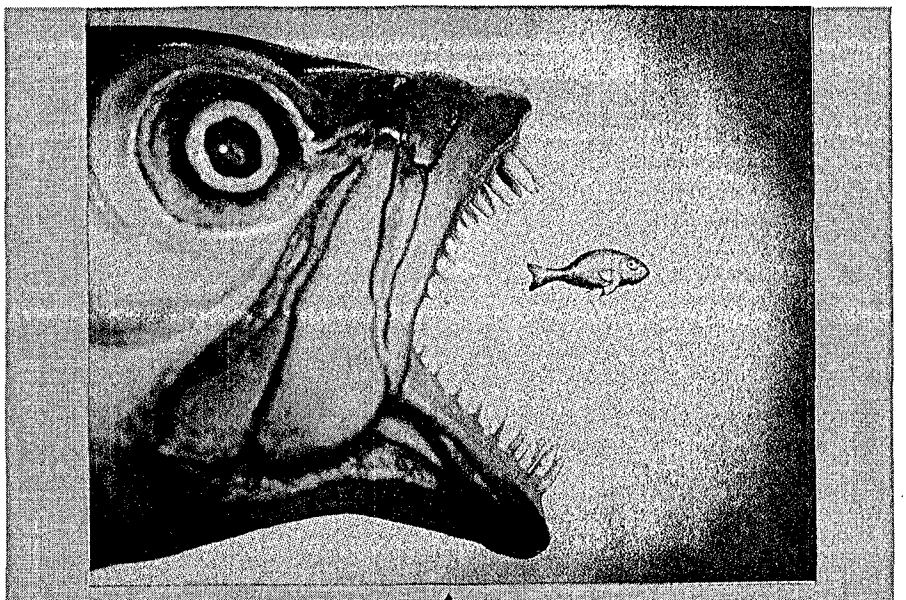
Before the argument took place, William S. Potter of Berl, Potter & Anderson, representing National Theatres, called and raised with me paying money to Hastings to get rid of the appeal and the threat it posed to the implementation of the settlement. I asked Bill Potter, a physically slight man

with a suave, smooth style, how much he and his client were going to pay Hastings. "Nothing" was the prompt response I expected. "That's the same amount I'm going to pay him," I told him. Neither on Hastings' demand nor on Potter's inquiry did I check with Mike Paulson before I responded, although I did report both incidents to him. He did not question my judgment.

In due course, after briefing, the day for argument on the appeal arrived. Willard arrived terribly late to make the argument for the objecting stockholder, delaying the start of the argument. He made the mistake of telling Chief Justice Southerland he had had a flat tire on the way down from Wilmington as his excuse for his late arrival. The Chief Justice's dramatic, "Oh," without any further comment, should have alerted Willard the Chief Justice knew more. I later learned during the time we waited for Willard that the Chief Justice had called Willard's office and was told the truth: he had just left for Dover and would arrive late.

When Willard concluded his argument, Mike Paulson urged affirmance of Vice Chancellor Marvel's approval of the settlement. He spent the bulk of his time analyzing the claims we had asserted and the benefits the proposed settlement would secure for the stockholders of National Theatres, demonstrating the exercise of the Vice Chancellor's discretion in approving the settlement was most reasonable and thus the appeal was without merit. At the conclusion of his substantive arguments, Mike finally turned to the matter of our fee application of $100,000 Vice Chancellor Marvel had also approved and Willard had vehemently attacked in his brief and oral argument to the Supreme Court. Mike first noted the $100,000 fee was a reasonable allowance given the standard the Delaware courts had set and followed, a standard basing fees upon a percentage of the benefit achieved in representative litigation taken on a contingent basis. Mike then said he had undertaken the case on contingency, the customary practice followed by lawyers who brought representative actions.

In speaking of the contingency factor, Mike referred to the *Airfleets* case, *Johnston v. Greene*, Del. Supr., 121 A.2d 919 (1956), rev'g sub nom., *Greene v. Allen*, Del Ch., 114 A.2d 916 (1955), as an example of the chanciness of litigation, especially in the securities field. He told the Court he did not mind telling the Justices he would have received a fee



[Second Place, Food Chain]

Nobody wants to finish second. That's why IKON Office Solution℠ helps you compete better. By offering copier systems and integrated computer networking solutions. By managing your company's mailroom and copy center. And by handling your imaging and file conversion needs. We'll use the latest technology from companies like Oce, Canon, IBM, Microsoft, Novel, Sharp, Ricoh and Compaq. And all designed to help your company do one thing. Win. To help your company come in first, see your white pages under IKON.

IKON Office Solutions | Work to Win.

Local Office: (302) 323-0300
www.IKON.com

Microsoft is a registered trademark of Microsoft in the U.S. and other countries. IBM is a registered trademark of International Business Machines Corporation. Novell is a registered trademark of Novell, Inc. Compaq is a registered trademark of Compaq Computer Corporation. All other brand and product names are the trademark of their respective holders.

THE POWER OF TWO.

Custom Designs, Remounts & Repairs

Minsters Jewelers

A tradition since 1895. For the most unique and creative designs handmade in our shop.

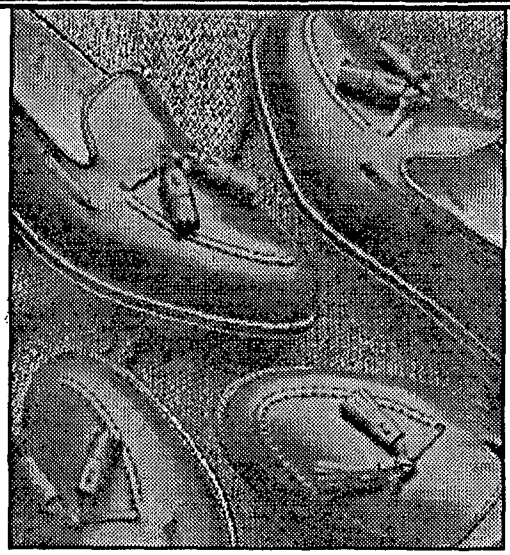
Newark Shopping Center
Newark, DE 19711 (302) 737-5947

The Jeweler

Delaware's leading repair service for jewelers & customers alike. Specializing in custom designs.

913 N. Market Street
Wilm., DE 19801 (302) 428-6060

A CLASSIC SHOE



Alden
NEW ENGLAND

Traditional patterns, crafted with extraordinary attention to detail.

GREAT SHOES THAT FIT EVERY FOOT AND LIFESTYLE
We specialize in hard to fit sizes, 6-15, AAA-EEE. If your size isn't in stock, we'll order it. No sales tax on shoes.

Sherman Brothers
Fine Men's Shoes since 1953

CENTER CITY PHILADELPHIA • 215.561.4550 / ROSEMONT • 610.527.2323
QUAKERTOWN • 215.536.5511 / CHADDS FORD • 610.558.1700, 302.656.9389

Put our environmental professionals on your legal team...

- EXPERT REPORTS & TESTIMONY
- NCP ALLOCATIONS AND COST RECOVERY
- ENVIRONMENTAL INSURANCE
- UNDERGROUND STORAGE TANKS
- HAZARDOUS WASTES— SITE INVESTIGATION & REMEDIATION
- GROUNDWATER (DNAPLS) CLEANUP
- ENVIRONMENTAL AUDITS, PHASE I&II
- URBAN BROWNFIELDS RESTORATION

THE WHITMAN Companies, INC.
Professionalism and integrity in environmental engineering and hydrogeology

HEADQUARTERS:
44 West Ferris Street
East Brunswick
NJ 08816
TEL: 908 390-5858

DELAWARE OFFICE:
307A Street
Wilmington
DE 19801
TEL: 302 656-5549

Visit us on the World Wide Web:http://www.whitmanco.com

TRADEMARK
& COPYRIGHT SEARCHES

TRADEMARK - Supply word and/or design plus goods or services.

SEARCH FEES:

COMBINED SEARCH - $260
(U.S., State, and Expanded Common Law)
U.S. TRADEMARK OFFICE - $120
STATE TRADEMARK - $125
EXPANDED COMMON LAW - $165
DESIGNS - $145 per U.S.class (minimum)
COPYRIGHT - $155
PATENT SEARCH - $390 (minimum)

INTERNATIONAL SEARCHING

DOCUMENT PREPARATION
(for attorneys only - applications, Section 8 & 15, Assignments, renewals.)

RESEARCH- (SEC - 10K's, ICC, FCC, COURT RECORDS, CONGRESS.)

APPROVED - Our services meet standards set for us by a D.C. Court of Appeals Committee.

Over 100 years total staff experience - not connected with the Federal Government.

GOVERNMENT LIAISON SERVICES, INC.
3030 Clarendon Blvd., Suite 209
Arlington, VA 22201
Phone: (703) 524-8200
FAX: (703) 525-8451
Major credit cards accepted.

TOLL FREE: 800-642-6564
Since 1957

in six figures had the Supreme Court affirmed Chancellor Collins J. Seitz in *Airfleets*, a case, in Mike's view, with merit he had won at the trial level. Mike went on to tell the Court its reversal on the appeal in *Airfleets* not only wiped out the recovery, it wiped out his fee given the contingent arrangement governing his undertaking of the case. "Now, of course, I do not say you should give me here what you took away from me in the *Airfleets* case," Mike said, and a smile broke through the stern visage Chief Justice Southerland maintained at arguments. By his reference to *Airfleets*, Mike quite clearly had driven home not only the hazards of undertaking derivative litigation for stockholders on a contingency and the reasonableness of the fee allowance under attack, but the fact the Supreme Court, did, indeed, "owe him one." Mike later told me he had not planned the comment, but it had occurred to him as he was speaking and he proceeded to share his honestly held view with the Supreme Court. Mike Paulson was a straightforward person.

As Jim Tunnell rose upon the completion of Mike's argument, the Chief Justice noted the appellees had only five minutes of their joint argument time remaining. Jim assured the Court there was no problem, since Mr. Paulson had covered all the points he had intended to make and he had no need to argue. By not making an argument Jim had accorded Mike Paulson the highest tribute one able lawyer could make to another able lawyer. Mike deserved the honor.

In short order the Supreme Court, in an opinion Associate Justice Daniel F. Wolcott wrote, turned back the Hastings-Willard-Krinsky appeal and unanimously affirmed Vice Chancellor Marvel's rulings approving the settlement and allowing the fee of $100,000. *Krinsky v. Helfand*, Del.Supr., 156 A.2d 90 (1959). From the dark cloud of *Airfleets*, Mike had plucked the golden lining.

In passing upon and approving the $100,000 fee award, Vice Chancellor Marvel had taken into account the National Theatres Board of Directors' action in approving the fees. The Supreme Court rejected Willard's attack upon the fee award holding:

It was also quite proper for the Vice-Chancellor to give considerable weight to the fact that the amount of fee had been approved in advance of the settlement by an independent board of directors of National.
Id., 156 A.2d at 95. Giving credence to

what an independent board of directors in a derivative case has done, particularly in approving fees, always seemed to me to be of great weight, as the Supreme Court held. Too frequently, however, courts in making fee awards never mention, let alone respect, the judgment of the independent board. Many judges speak of their obligation to review fee allowances, masking what really drives them to cut requests reached in arm's length bargaining between plaintiffs' attorneys and counsel for the board, namely, jealousy of the fees plaintiffs' attorneys earn as a percentage of the benefits they achieve in the contingent cases. Why a judge should consider his or her judgment superior to that of the independent board members who must answer to the stockholders is explainable once one recognizes the envy many judges harbor when they compare their compensation with that of the plaintiffs' attorneys. Regrettably, there is a paucity of citations to the holding of the Supreme Court in *Krinsky v. Helfand* on the importance of an independent board's approval.

Derivative cases are different from class action cases. In a derivative case, any recovery goes to the corporation for whose benefit the representative stockholder plaintiff and his lawyer filed the case, less the amount the court awards for fees and expenses from the total "financial gain" recovered or allows for the "needed protection" the lawyers' efforts have achieved. *See Gottlieb v. Heyden Chemical*, Del.Supr., 105 A.2d 461 (1954). In a class action, on the other hand, any recovery goes to the class members on behalf of whom the lawyers for the representative plaintiff have filed and prosecuted the action. Judges justify their role in supervising fees in class actions because of a perceived "conflict" between the successful lawyers and the beneficiaries of their success, the class members. My experience and observation of other cases through the years is that, although there are instances of overreaching by some attorneys whose greed supplants good judgment, there are by far many more instances where judges cut the fee allowances successful lawyers justifiably seek, giving the appearance the judges use their role as the protector of the class members to mask their envy of the plaintiffs' lawyers just as much as they do in derivative actions. ◆

©Copyright owned and retained by Irving Morris.

Voted #1 in "Best of Delaware" every year for

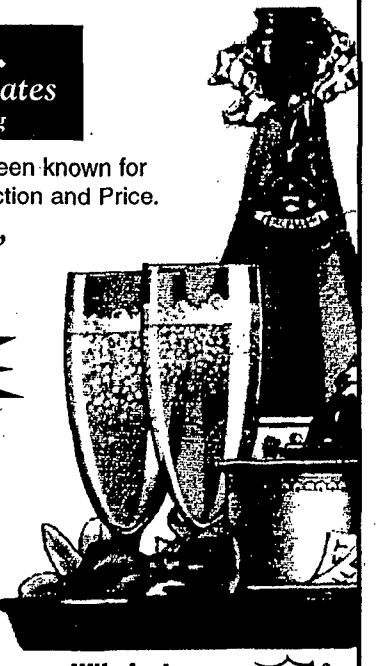
"BEST LIQUOR STORE"
AND
"BEST WINE SELECTION"

For the Holidays...
Gift Baskets & Gift Certificates
Available with FREE Giftwrapping

For over 63 years Kreston Liquor Mart has been known for Service, Courtesy, Knowledgeable Staff, Selection and Price.

"SEEING IS BELIEVING"

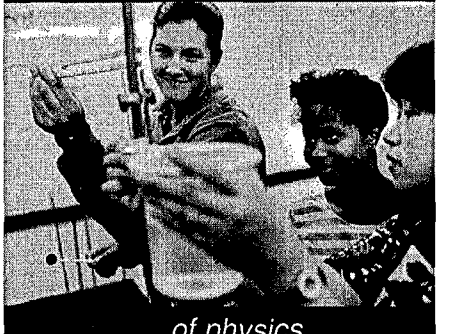
A TOUR OF OUR WINE CELLAR IS LIKE A TRIP AROUND THE WORLD



DELAWARE'S LARGEST AND MOST COMPLETE LIQUOR STORE
KRESTON LIQUOR MART

904 Concord Ave. (Concord Ave. & Broom St.) **Wilmington**
Major Credit Cards & MAC Accepted **652-3792** Fax **652-3725** Mon.-Sat. 9-9

Learning the law ...



... of physics

Tatnall

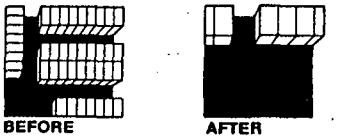
THE TATNALL SCHOOL
A COLLEGE PREPARATORY SCHOOL
AGE 3 TO GRADE 12

1501 BARLEY MILL ROAD
WILMINGTON, DE 19807

ALL-SCHOOL OPEN HOUSE
SUNDAY, JANUARY 11, 1998
1 P.M. TO 4 P.M.

FOR ADMISSIONS INFORMATION
CALL MICK FERRUCCI AT
(302) 892-4285

Mobile Storage Systems



BEFORE AFTER

You can mobilize your cabinets and shelving for greater space savings. Adding wheels and tracks creates high-density filing by eliminating useless aisles. Store your records, supplies, data media, reference materials... anything worth keeping in an orderly fashion. TAB offers a wide choice of styles including Electric, Mechanical and Manual.

Call for a free brochure or survey.

TAB of Delaware
222 Philadelphia Pike
Wilmington, DE 19809
Phone: 764-9036
Fax: 302-764-7749

BOOK REVIEW

THE ETHICS OF ELITE LEGAL PRACTICE

Joel Friedlander

PROFIT AND THE PRACTICE OF LAW: WHAT'S HAPPENED TO THE LEGAL PROFESSION

By Michael H. Trotter

(University of Georgia Press, 221 pp.)

A critic of mandatory continuing legal education once told me that if the purpose of CLE is to enhance competence and professionalism then credit should be given for reading a book. That argument struck me as a bit cheeky, but it would make good sense if the book lawyers read was Michael H. Trotter's *Profit and the Practice of Law: What s Happened to the Legal Profession.*

Trotter has practiced corporate and securities law in Atlanta since the early 1960s at several of its major law firms, including two that he founded in the 1980s. In his book Trotter discusses the much-lamented decline of professionalism in the bar. Why is it that legal practice is perceived by lawyers as less professionally satisfying, and by the public as less respectable, than it was a few decades ago, and what can be done about it?

Trotter's answer is not flattering. He argues that major law firms have traded professionalism for wealth. Over the past 35 years, firms have transformed themselves from small groups of homogeneous professionals, whose practices were tightly circumscribed by unwritten codes of conduct, to large business organizations, in which the drive to maximize profits per partner has led to the delivery of legal services in a manner that breeds excessive lawyering, overbilling, self-promotion, and callous behavior.

Trotter traces the many ways in which Atlanta's major law firms have changed since 1960. Among other things, partner and associate compensation have risen faster than the rate of inflation; the ratio of partners to associates has declined, as have lawyers' average age and educational qualifications; and the number of billable hours per lawyer and per task have each increased. Trotter asks where did all of that billable time come from? and concludes that much of it has been expended by inexperienced lawyers who are billed at excessive rates. He states:

It has become commonplace to say about many investment bankers that they work not for their clients but for themselves. Unfortunately,

Photograph by Pat Crowe, II

read it

live it

www.delawaretoday.com

hit it!

the same can often be said about major law firms today. . . . In most cases, very high average partner income is one measure of the extent to which a firm is committed to its partners more than its clients.

Trotter's indictment raises a profound question of professional ethics. Corporate lawyers are encouraged to find every applicable case, to uncover every fact and to revise every document until it is as good as it can be. To the extent we do these things, we are thought to be fulfilling our professional obligations. Trotter points to the self-interest of expanding billable hours and asks whether we are performing a disservice to our clients. Would clients be surprised to learn that the principle of cost-effective lawyering is not found in the Delaware Lawyers' Rules of Professional Conduct or the Delaware State Bar Association Statement of Principles of Lawyer Conduct?

Given the incentives to overbill, Trotter's examination of staffing and billing practices is well worth pondering. To take but one mundane example, do you begin billing when you arrive at a meeting or when the meeting has actually convened? Billing by the hour means that every aspect of law firm management has an ethical dimension.

Trotter has not established, however, that the increase in law firm profits represents a large-scale breach of trust. Trotter's description of the evolution of the relationship between lawyer and client actually lends itself to the interpretation that lawyers' behavior has been driven by clients' demands.

In 1960, a large percentage of law firm revenues was derived from retainers, and the prohibition against solicitation of clients was strictly enforced. Trotter reports that it was the clients who demanded the shift to time-based billing and decided to employ multiple law firms. These are the innovations that made legal practice less stable and more competitive. Classical economic theory suggests that the replacement of guild standards with market incentives inures principally to the benefit of customers, in the form of better service and lower prices.

The fact that the price of legal services has increased is chiefly attributable, in my opinion, to the instability of the law and the increased cost of compliance with it. Unstable and potentially expensive legal rules place a premium on finding the best possible representation. Trotter notes the proliferation of law, but his two proposed reforms to the legal system – the adoption of a federal corporate code and a prohibition against citing cases from other jurisdictions are unlikely to make the law more certain or less expensive.[1]

The most important lesson of *Profit and the Practice of Law* may be that market forces can be expected to continue transforming the practice of law. If clients increasingly demand cost-effective legal service, law firms will have no choice other than to adapt, perhaps by making more efficient use of technology and changing billing practices. As the law becomes more like a business, and incentives to overbill decrease, we may then see new conflicts between economic self-interest and the duty to provide top-flight legal counsel.

FOOTNOTE

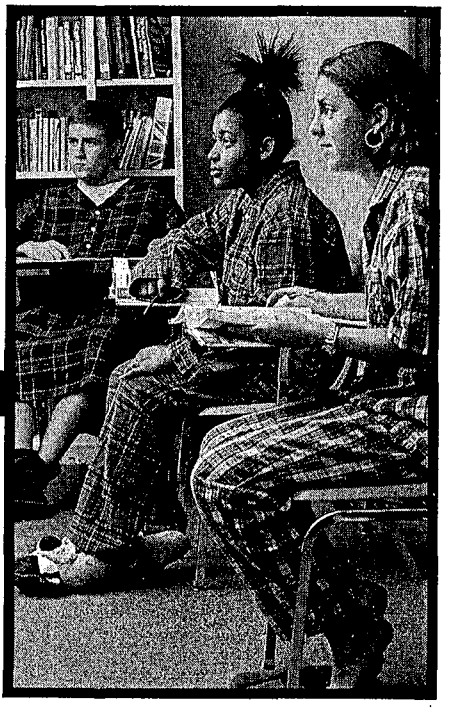
1. Interestingly enough, both of Trotter's proposals would prevent the widespread adoption of Delaware corporate law, which Trotter appears to resent as much as New York lawyers. Delaware lawyers will have particular difficulty accepting Trotter's position that lawyers have unconscionably driven up the costs of selling business by advising clients nationwide to conform their conduct to *Smith v. Van Gorkom*. Trotter labors under the misimpression that the enactment of statutes permitting exculpatory charter provisions has rendered *Van Gorkom* bad law. ◆

We know

what you've heard about

Tower Hill...

and we want to show you what it's **really** like.



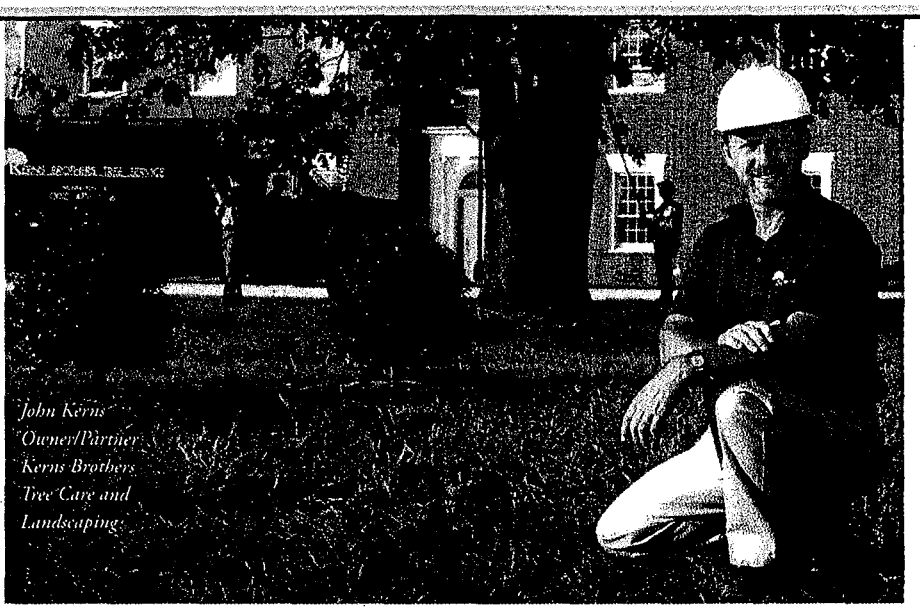
Yes, our senior class has the highest percentage of National Merit Semi-Finalists in Delaware, but that doesn't mean it's all work and no play. Call us to arrange for a tour. You'll see that while our students might not wear pajamas to school every day, they do face the challenges of each day with a touch of humor.

That's what Tower Hill is really like.

Tower Hill School

2813 W. 17th Street · Wilmington, DE · 302-657-8350

Pk-12, co-ed, college preparatory



"For a 401(k) Plan My Small Company Can Afford, *the Delaware State Chamber Works for Me.*"

"In a small family-owned and operated company such as ours, keeping good employees is crucial to our success. That is why we work hard to create a positive atmosphere and encourage people to submit their ideas and suggestions. Recently we received a request for a 401(k) retirement plan. A reasonable idea—everyone should have one. On the other hand, I thought how can we afford it? Even if we find the money, no one in our company knows anything about managing a retirement program. Then I heard about the new 401(k) small businesses member benefit available through the Delaware State Chamber of Commerce. Designed specifically for small companies like ours, the plan is straightforward, easy to implement and we pay no administrative fees! This benefit alone makes membership worth the price. As a small business, I am convinced, the Delaware State Chamber works for me."

IT WORKS FOR ME!

SMALL BUSINESS ALLIANCE
DELAWARE STATE CHAMBER OF COMMERCE

Put the Delaware State Chamber to Work for You!
Call Today 1 · 3 0 2 · 6 5 5 · 7 2 2 1

Professional Liability Insurance

Our Professional community has relied
on PLI's insurance expertise for nearly a quarter century.
As an independent broker, we offer a variety
of innovative programs that provide stability in the face
of highly volatile coverages and rates.
For coverages that are tailored to meet your specific
professional, business or personal needs,
count on PLI.

Committed to Creative Insurance and Risk Management Solutions

PLI

Professional Liability Insurance, Inc.

an affiliate of Harry David Zutz Insurance, Inc.

300 DELAWARE AVENUE • P.O. BOX 2287 • SUITE 1700 • WILMINGTON • DELAWARE 19899
(302) 658-8000 • (800) 441-9385 • FAX (302) 658-8015 • www.zutz-pli.com