INSIDE: LAWYER-LEGISLATORS, LAWYER-LOBBYISTS & MORE

DELAWARE LAWYER

A PUBLICATION OF THE DELAWARE BAR FOUNDATION

Volume 21 Number 3 $3.00 Fall 2003

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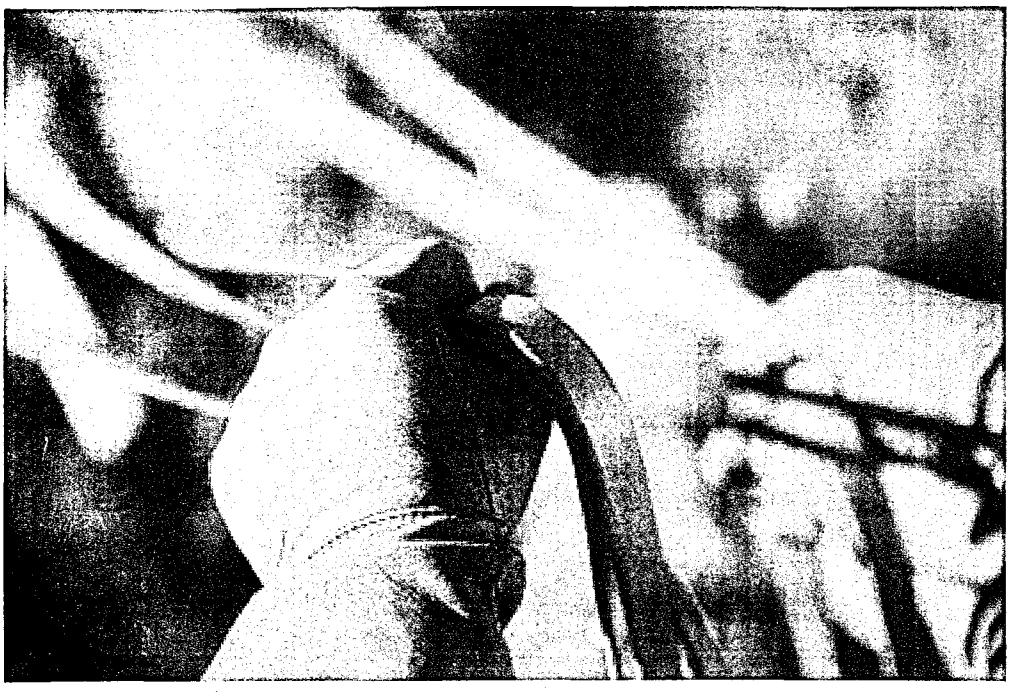

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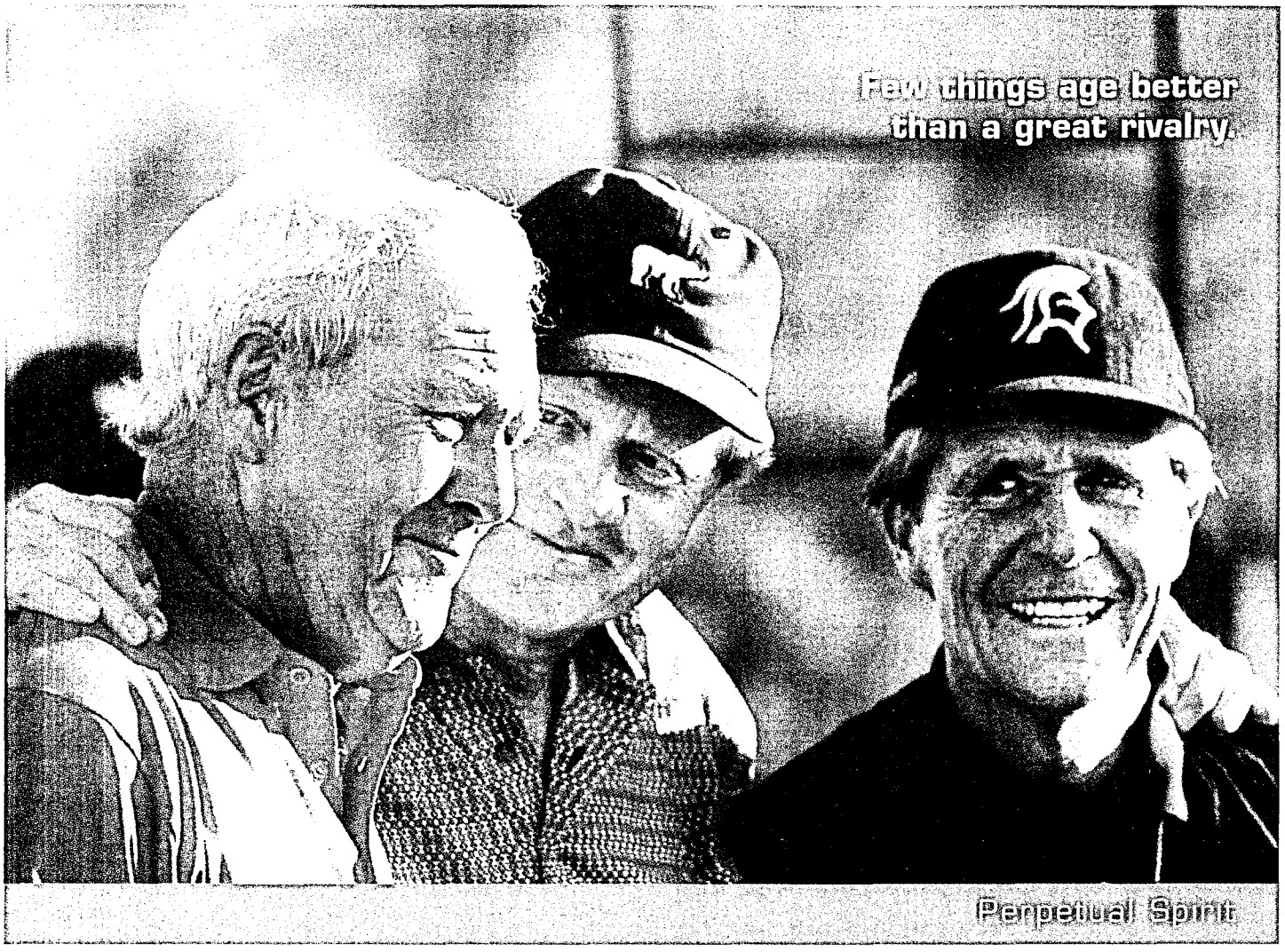

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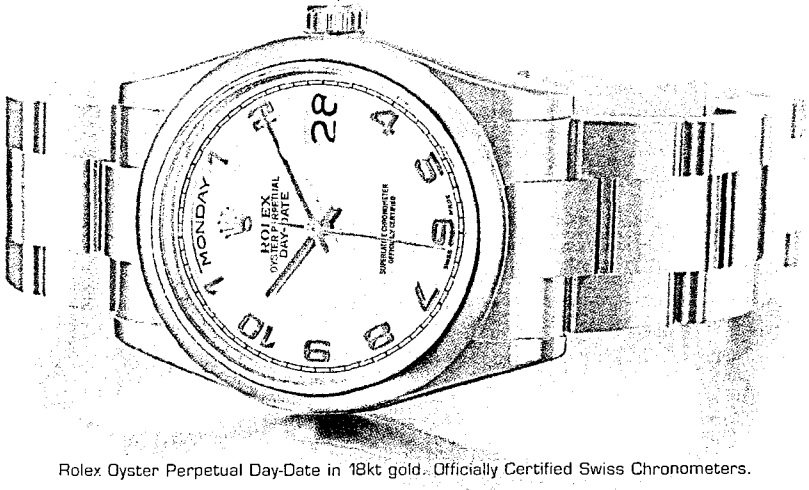

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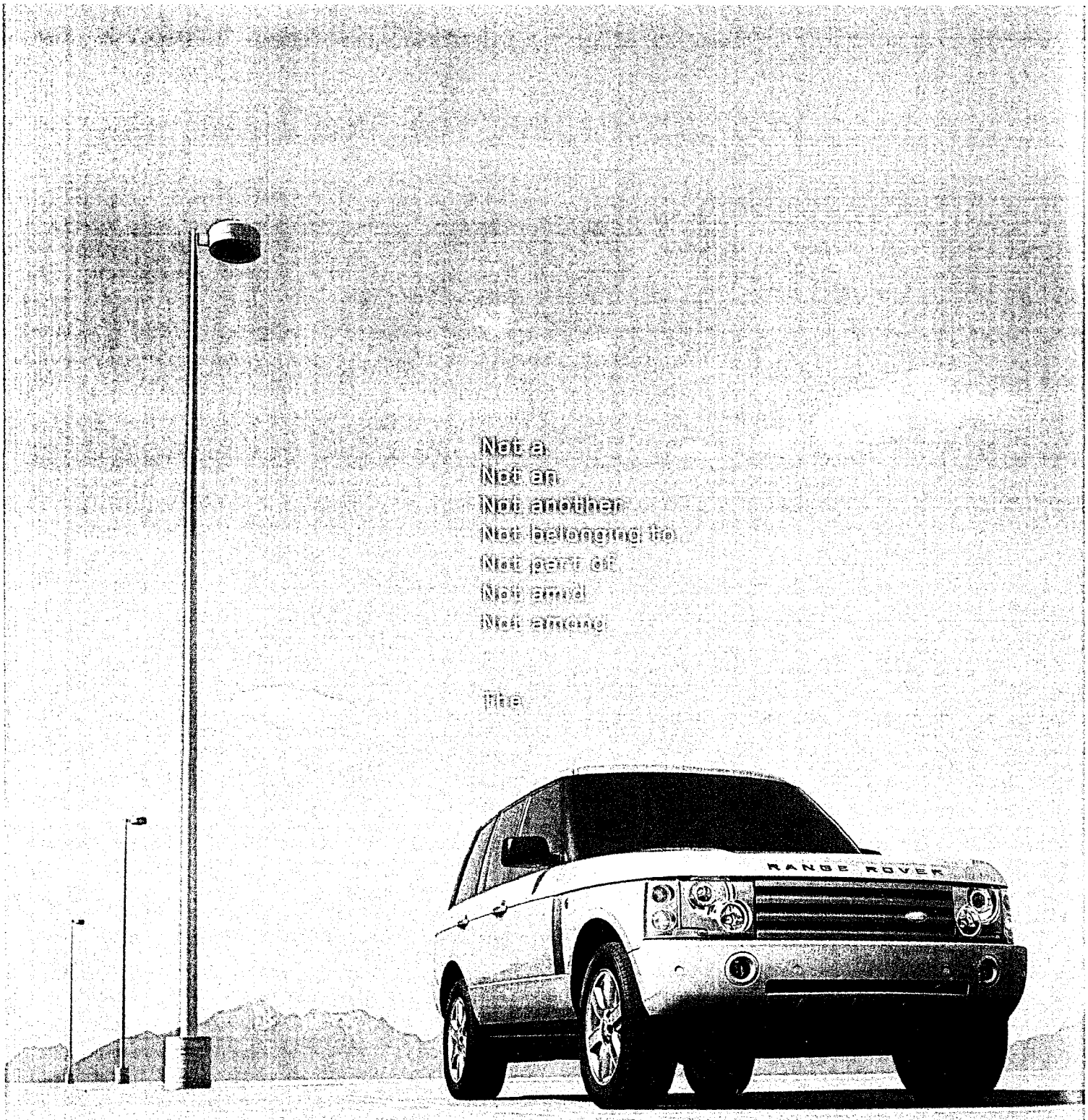

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CONTENTS

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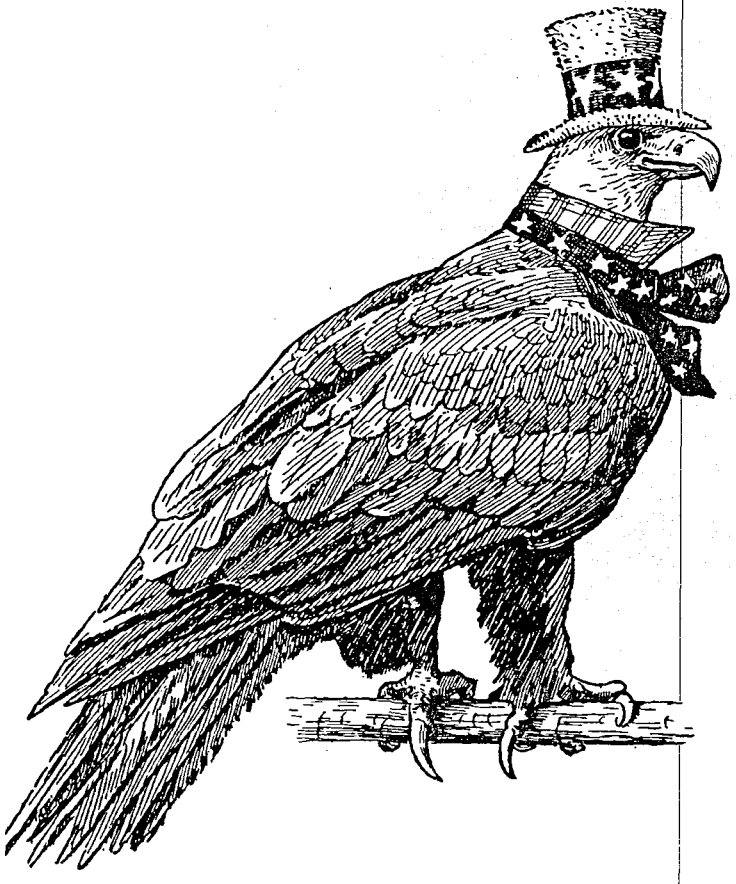

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4

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5

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10
THE LAWYER-LEGISLATOR, THE LAW AND JUSTICE

Senator Steven H. Amick
Representative Melanie L. George
Representative Robert J. Valihura, Jr.

14
SERVING AS LAWYER TO THE LEGISLATURE: Drafting Laws and Giving Legal and Political Advice to Legislators

Richard A. DiLiberto, Jr.
Francis G.X. Pileggi

18
THE DELAWARE LAWYER AS LOBBYIST

Christine Schiltz
Dave Swayze

22
LAW, POLITICS AND THE JUDICIARY: Statutory Enactments and the Common Law

The Honorable Randy J. Holland

28
Law And Politics: Getting Involved In Delaware

Frederick L. Cottrell, III
John Dorsey

Our forefathers founded our country and laid the groundwork for our government in a beautifully woven constitution that has survived centuries of wear and tear, blanketing each successive generation with its protections of our fundamental rights and civil liberties. One of the most important threads of the constitution is the dynamic it weaves between the legislature and the judiciary: The legislature makes laws and the judiciary interprets those laws.

It is surprising, then, that lawyers and law schools focus almost exclusively on the judiciary and neglect the legislature. By focusing on the judiciary in law school, new lawyers develop the perspective that problems in society can and should be addressed with hindsight, after the fact.

If a client breaks a criminal law, we are taught that the most brilliant among us will be able to find a flaw in the statute, perhaps saving the defendant from a lifetime in prison. If a client hurts, we are taught that a brilliant lawyer can find somebody in society who is responsible and can make our client whole.

But we are rarely taught that in some instances, society's problems, as well as your client's problems, can be addressed in the legislature. This issue of *Delaware Lawyer* explores the impact on the law and society that a lawyer can have by getting involved in the making of laws in the legislature.

Delaware's three lawyer-legislators write about how lawyers who serve as legislators bring many advantages to the legislative process. A lawyer who drafted laws for the House of Representatives and a former state representative explain the responsibility and importance of drafting laws that are sound, technically accurate and tightly written.

Two lawyer-lobbyists describe what it means to have clients who pay you to solve their problems before a law is enacted, instead of paying you to challenge a law in court. A Supreme Court Justice examines the interplay between the judiciary's making of common law and the legislature's refinement of that common law. Finally, two leading lawyer-political strategists, one Democrat and one Republican, offer ideas to our legal community about why and how to get involved in politics.

As lawyers, we benefit from the structure of government that our forefathers established. We earn a living by taking advantage of our rights to challenge laws and fight for our clients in court. We have a corresponding duty, both as citizens and as lawyers, to be proactive and participate in the creation of good laws.

Melanie George

Melanie George

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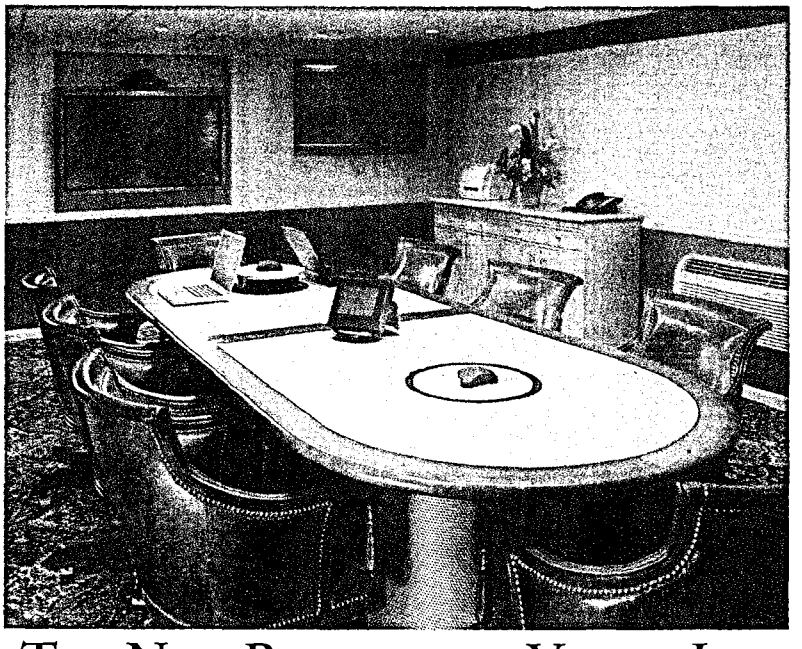

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STEVEN H. AMICK

served in the Delaware House of Representatives from 1986 to 1994, when he was elected to the State Senate. He was Senate Minority Whip from 1997 to 1998 and Minority Leader from 1998 to 2003. The Senator is a graduate of Washington College and the Dickinson School of Law. He began his legal career as an associate with Daley and Lewis in Wilmington. In 1974 he joined the DuPont legal department, focusing on commercial and industrial real estate. In 1996 he became special counsel with Cooch and Taylor. He left the active practice of law last year.

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(Continued on page 8)

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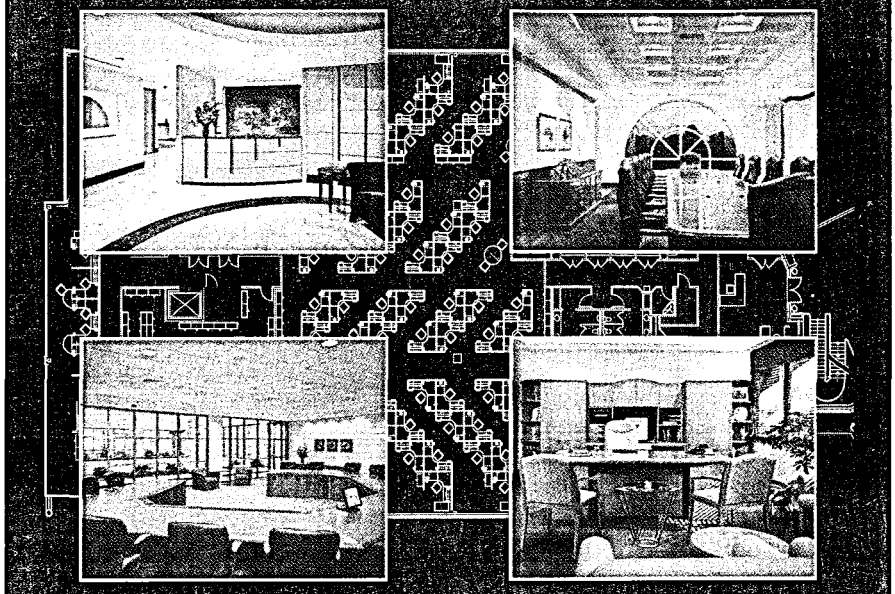

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Volume 21, Number 3

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Media Two, Inc.
22 W. Pennsylvania Ave., Ste. 305
Towson, MD 21204

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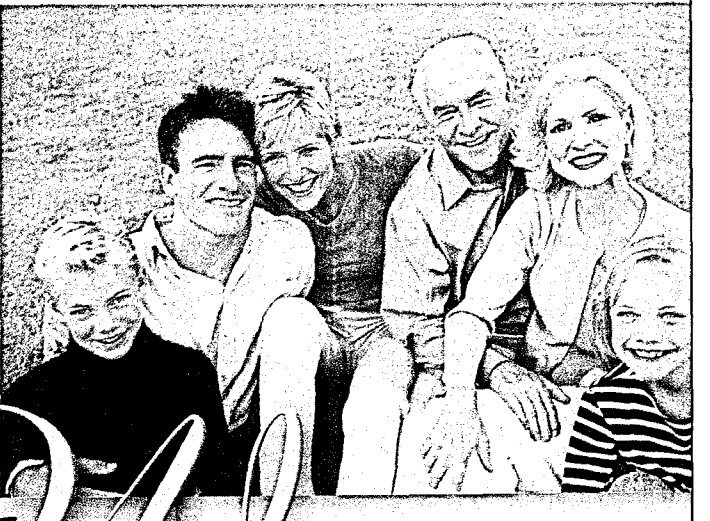

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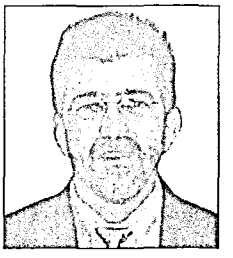

is Special Counsel to Young, Conaway, Stargatt and Taylor, where he specializes in commercial litigation. Before joining YCS&T, he was the State Director in the Wilmington office of U.S. Senator Joseph R. Biden, Jr. He previously was a litigation attorney at Richards Layton & Finger. Dorsey also is an Adjunct Professor of Law at Widener University School of Law, where he teaches pretrial methods and procedures to senior level law students. A graduate of the State University of New York at Binghamton, Dorsey received his J.D. degree from Wake Forest University.

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was elected a State Representative from the 5th District in Newark/Bear in 2002. Representative George also practices law at Richards, Layton & Finger, where she concentrates on business law and commercial financing. She currently serves as

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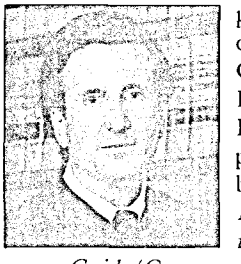
THE HONORABLE RANDY J. HOLLAND



presently serves on the Supreme Court of Delaware. Justice Holland has published three books: *The Delaware Constitution: A Reference Guide* (Greenwood Press 2002); *Delaware Supreme Court: Golden Anniversary* (2001), co-editor; and *The Delaware Constitution of 1897 – The First One Hundred Years*, co-editor.

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Justice Holland has also published several law review articles, primarily dealing with judicial ethics and legal history.

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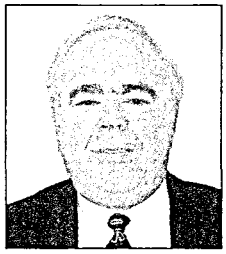
DAVID S. SWAYZE



joined Parkowski, Guerke & Swayze as a shareholder in June 2003. A former Chief of Staff and Executive Assistant to the Governor of Delaware, he specializes in financial services regulation and legislation, commercial transactions, and environmental, administrative and commercial law. He is a member of the Administrative Law Section and the Banking Law Committee of the ABA's Commercial Law Section. He also sits on the Banking, International Law and Nominations committees of the Delaware State Bar Association. Swayze is a 1969 graduate of the University of Pennsylvania Law School, and received his A.B. in politics from Princeton University.

ROBERT J. VALIHURA, JR.

was elected in 1998 as a State Representative from Talleyville. He also practices law at his own law firm, focusing on corporate litigation, and is an adjunct professor of law at Widener University School of Law. Representative Valihura graduated with a B.A. from Villanova University in 1981 and a J.D. from the University of Pennsylvania Law School in 1987. He serves as President of Delaware Greenways and is Chairman of the district finance committee for Rotary International. ◆

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THE LAWYER-LEGISLATOR, THE LAW AND JUSTICE

The lawyer in public service, particularly legislative service, has a strong and enduring image in the eyes of the American public. Despite all the negative images of lawyers that pervade current culture — some of them all too accurate — the image of the lawyer who turns his or her advocacy skills to the representation of a different kind of client, the constituents of the district, remains venerated.

Indeed, the character recently deemed the greatest hero in the history of American movies, Atticus Finch of Harper Lee's *To Kill a Mockingbird*, was a lawyer-turned-legislator. Ms. Lee made much of Atticus Finch's regular re-elections despite the unpopularity of his racial views because of the overwhelming trust his constituents placed in him — and the quality of his legal representation.

But Atticus Finch represented law as practiced very differently than it is practiced today. No specialist, he was portrayed as extraordinarily competent at criminal defense, wills and estates, and archaic real estate law. He was the "country lawyer" solo practitioner, with an office on the courthouse square and a deep familiarity with nearly everyone in the community, and they with him. Such a person would still make a sought-after political candidate today. Both parties try to find and hold such candidates, but they are rare.

Lawyers entering the political arena today suffer from comparison with this pervasive image of the ideal lawyer-legislator. Few lawyers today attempt a solo general practice with an office on the town square, handling the various areas of legal work that may arise in a community. While today's lawyers may be well known and respected in a given client community, this only rarely translates into prominence in the population as a whole. By the same token, participation in political life may not attract paying clients to the lawyer's doorstep the way it once did.

Perhaps these are some of the reasons why lawyer participation in state legislatures around the country has witnessed a marked decline. At one point, some legislatures averaged more than 40% lawyers and most exceeded 25%. Although no current count is readily available, these numbers have declined substantially in a high percentage of cases.

Another reason for the decline in the number of lawyer-legislators may well be the increasing professionalization of state legislatures. Many are now more or less full-time. More and more legislators find it difficult (particularly in states with lengthy sessions and distant capitals) to maintain any kind of outside professional or business interest. In these respects, Delaware is atypical. Our legislature has struggled to maintain itself as a citizen assembly in which most members are otherwise employed. Our capital is a short commute for all members. Indeed, the number of lawyers in our General Assembly has slowly and fitfully increased over the last 17 years.

Never numerous, few lawyers were members of our legislature in the sixties and seventies. Those who did participate were singularly successful as a group: witness former Congressman and former Governor Pete duPont and former Governor and current Congressman Mike Castle, both of whom served in our General Assembly. Fine lawyers and legislators like John Sinclair and Harry Terry were active, but their tenure was brief. Indeed, when DuPont left for Washington and Castle left public office to return to private practice, Sinclair and Terry declined to run for re-election. By 1981, there were no lawyers in the General Assembly.

Steve Amick ran for the State House of Representatives in 1986. Since Amick's arrival in 1986, the number of lawyer-legislators has gradually, if sporadically, increased. He has been joined by Phil Cloutier, Rick DiLiberto, Rick Hague, Dallas Winslow, and Chuck Welch, each of whom has since left, and by his co-authors and contemporaries, Robert Valihura and Melanie George. No longer does the President Pro Tempore of the Senate lament the arrival of a lawyer as having "destroyed our perfect record." The public has supported lawyer candidates, contrary to the past prevailing wisdom of our bar.

Once seated as a member of the General Assembly, Amick heard a good deal of good-natured teasing about his status as the General Assembly's only lawyer and began to encounter a problem we believe has been common among all lawyers elected since: He quickly found that there were many errors in draftsmanship in bills that are presented to the Legislature.

Legislative bills come from a variety of sources. Draft bills are prepared by State agencies, corporate interest groups, non-profits, national lobby groups, and persons in other states and countries, as well as by legislative caucus attorneys and staff attorneys responding to the occasionally inarticulate requests of their legislative clients. The result can be a statutory hodgepodge that frustrates lawyers, who typically spend

considerable time struggling to find the perfect phrase to capture the essence of a court's favorable opinion or a nuance of a client's contractual obligation. But legislators eager to capture a political issue sometimes intentionally draft a bill ambiguously as a compromise needed to achieve a majority of votes. Legislators also sometimes lack the patience to carefully craft the clear language that lawyers and judges value.

Rookie lawyer-legislators almost universally report early encounters with irate colleagues who do not appreciate the "nit-picking" changes proposed by the carefully trained and thoughtful novices. These confrontations can leave scars and long-term consequences. Some lawyers have found these pressures so difficult that they have left legislative service. Most, however, find more subtle and politically sensitive ways to deal with such issues, understanding that it is impossible for any one legislator to fix all the ills he or she may perceive in a piece of legislation.

The problem that remains is a double-edged one. First, lawyers are sometimes reluctant to run for the usual reasons: lack of spare time because of professional and family commitments, reluctance to become involved in the raucous world of politics, and disbelief in anyone's interest in electing them. Second, some lawyers who run for legislative office think they should be elected merely because they are lawyers, and that the nitty-gritty of political signs, radio spots, door-to-door and supermarket campaigning, mass-mail brochures, campaign rallies and the like should not be required of them. Brothers and sisters of the bar who exhibit any trace of such arrogance to their constituents are rarely elected.

Why Lawyer-Legislators Are Important in Our Democracy

Why does it matter whether we have lawyers serving as representatives and senators in Legislative Hall? It matters for the same reasons that it is important for farmers to have farmers represent them, the retired to have retired people represent them, the police to have police represent them, and teachers to have teachers represent them. Legislators pass bills that affect nearly every profession. It is critical that lawyers have a voice in the process for many reasons.

First, lawyers have a special interest in ensuring the preeminence of Delaware's

corporate laws and Delaware's judiciary. Our judiciary ranks among the best in the nation. Businesses and corporations incorporate in Delaware partially because of the golden reputation of its judiciary, and also because Delaware laws are business-friendly, cutting-edge, and progressive. So much of our livelihood depends on this sophisticated legal practice that the lawyer-legislators will fight to preserve Delaware's status.

Second, a lawyer-legislator will review legislation from a lawyer's perspective. While a legislator's duty is to serve his or her constituents to the best of the legislator's ability, often a legislator's constituents will not have expressed their views on the issues presented by a bill that comes up for vote. The legislator's decision must then be based on what he or she feels is in the best interests of the constituents. That's where a person's life experience comes into play. A farmer will filter legislation through a farmer's eyes, a teacher will filter legislation through a teacher's eyes, and a lawyer will filter information through a lawyer's eyes. And what critical eyes they are. Ask yourself as you read this article whether you fully absorb its content or focus more on the syntax and grammar of each sentence. Now try reviewing hundreds of pieces of legislation that come before you, many of which were drafted quickly or by non-lawyers.

While sometimes it seems a curse to have such critical eyes, our strength as lawyer-legislators is in our continual questioning of what a bill will do, who it will affect, and why we are being asked to vote on it. While we certainly do not own an exclusive license on diligence, we do our best to ensure that legislation that we support makes sense, is technically accurate and is constitutional before we vote in its favor.

Lawyer-legislators can provide unique insight to their colleagues regarding how a court might interpret a bill once it becomes law. As lawyers and law clerks, we have spent our careers arguing to a court that a particular law should be interpreted in one way as opposed to another. Ambiguous laws are more likely to face challenges in court. The free market economy suffers when information is imperfect. Poorly drafted laws, especially those addressing property rights and corporate governance, lead to market failures. Lawyer-legislators are especially cognizant of this problem.

Third, lawyer-legislators serve as particularly strong advocates for their constituents and the causes they believe in. Lawyers represent clients for a living and have been trained to advance a client's position, whether by debating an issue in a brief or in court, or negotiating a deal with a business client or a settlement in family court. As legislators, we represent thousands of constituents who need their voices heard on social issues. Often, however, the interests of our constituents will diverge or conflict. As a lawyer, when you seek to take on an additional client, you run a conflicts check to see whether the new client's interests conflict with current clients. We don't have this luxury as legislators. Often, especially on a controversial bill, our constituents will be divided as to whether they want a certain piece of legislation passed. We have to make the difficult decision of how to vote.

This poses a challenge to every legislator. Should we vote to protect the individual rights of the minority even if they seem opposed to the interests of society as a whole? If a small group of constituents cares deeply about an issue and the majority is relatively indifferent, should we vote in favor of what the

minority seeks? Should we vote based on what we think is best for our constituents, even if it is not what they proclaim they want?

A corollary to fighting for the interests of our constituents on various pieces of social legislation is fighting governmental red tape to solve our constituents' problems. These problems can range from getting a neighbor to cut his grass, to preventing vandalism in the neighborhood, to collecting child support from a deadbeat dad. As lawyers, we are used to fighting bureaucracies on behalf of clients. As legislators, we can apply the same skills to helping solve our constituents' local challenges.

Finally, lawyer-legislators have a general understanding of many aspects of the law and can offer guidance to our colleagues about the corporate code, banking law, insurance law, the criminal code, and other topics. Because legislators are asked to consider bills on all different topics, it is natural to respect the opinion of a colleague who is an expert in the area. For example, a teacher-legislator will have a greater understanding of the practical effects of a bill dealing with the schools. A nurse-legislator will have a greater understanding about health and medical issues. A police-legislator will have a greater understanding of criminal issues.

As lawyers, we help colleagues understand what a change in the statute of limitations will do for victims. We can explain what a certificate of good standing is and the impact an increase in the fee will have on Delaware businesses. We can offer direct insight into how a proposed change in the law will effect Delawareans.

Why Lawyers-Legislators are Important to Our Profession

Aside from lawyers using their skills to assist in making the State a better place to live and work through their service to the community in the General Assembly, the lawyer in the legislature makes a positive impact on our legal profession as a whole.

The lawyer-legislator serves as a *de facto* representative of the profession itself, returning to the legal community to report on those legislative issues that affect the profession or its practice areas; alerting the bar or its sections to matters of import in which they should participate, consider or promote; and providing advice and counsel on how to move the profession's issues or agenda through the legislative process.

The lawyer-legislator serves as a conduit through which important information is communicated to the profession. By serving on Continuing Legal Education panels and Committees of the Bar Association, the lawyer-legislator is able to provide a critical source of information to the bar regarding those issues that are before and have been considered by the General Assembly and keep the members of the profession apprised of new developments in their practice areas or in the profession generally.

Knowing what the General Assembly is doing is not enough, however. Often during debate or in the frenzy of last-minute bill introductions, the General Assembly considers issues with a potentially dramatic impact on the legal profession or legal practice. Lawyer-legislators can provide immediate notice to the profession, allowing the bar or its sections to take positions and advocate instead of lawyers' interests getting lost or being overwhelmed by the process.

Moreover, lawyers, trained to present facts and legal arguments in their most positive light to a neutral party, are often ill prepared to confront opposition to a legislative proposal based on politics rather than the objective merits. While it is true that a legislator in theory may be viewed as neutral fact finder, poised to make decisions on the merits of an issue alone, a legislator's views and decisions on legislation are not bound by precedent, logic, or the inherent worth of a concept. Rather, legislators' decisions are tempered and shaped by the political world in which they are enmeshed: the demands of the constituency, party interest and loyalty, personal relationships, intra-chamber politics, and their own personal political opinions and positions.

Lawyers can and do assist the profession in addressing the vagaries of the process, by communicating to the legal community the often complex inside issues — personalities, connections, issues, and biases — that drive public policy and shape the debate, and by working with fellow lawyers to address those issues in a way that furthers the agenda of the profession.

In that regard, lawyer-lobbyists, or, as they are euphemistically called in

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Dover, registered agents, recognize the minefields surrounding any good idea that the General Assembly may consider and rely on lawyer-legislators to give them a unique perspective on the pitfalls that may derail their lobbying efforts. Lawyers tend to be effective advocates for clients because of their abilities to marshal arguments and training to persuade. Lawyer-lobbyists are generally among the more effective advocates working in the General Assembly. Lawyer-lobbyists tend to observe lawyer-legislators to see what arguments are most effective and to determine which issues may be problematic for their clients.

Finally, but no less importantly, a lawyer-legislator plays a special role in interactions with the judiciary. Since the time of its creation, the position of the judicial branch of government has been somewhat awkward. Generally revered by the public, our judiciary, in addition to its adjudicatory role, must ensure that the needs of the public and itself are being met. To do so, it must advocate for those needs. Yet, to lobby our legislature or become embroiled in the politics of the General Assembly presents its own peculiar problems — real or perceived. Lawyer-legislators, however, can help address these problems.

Not only does the lawyer bring an inside understanding of the political process to assist the judiciary, but he or she serves as a conduit for communications about the needs of our judiciary and the legal justice system. The judiciary tends to look to attorneys in the legislature as allies in the effort to assist in representing its issues. Lawyers, of course, have the ability to advocate for those causes that may otherwise get lost in the legislative process. The State's obligations to fund defense counsel for the indigent and our moral responsibility for assisting those less fortunate with basic defenses in civil matters get more attention in the budgetary process through the work of lawyers in the legislature. Advocating for the needs of the judiciary, in terms of necessary services, increased staffing, user-friendly facilities, updated equipment, and better salaries, are all issues which can be and have been accomplished by lawyer-legislators.

In short, lawyers in the General Assembly profoundly impact that area of government most directly involved with the practice of law: our judiciary.

Thus the lawyer-legislator and the public not only benefit from the lawyer's education and professional experience, but the legal profession benefits by having members of its own serving as its eyes and ears during the legislative process.

Conclusion

Some may continue to take the long-standing view that Delawareans are hesitant to elect lawyers to the General Assembly. This, we are quite convinced, is a faulty opinion. Lawyer-candidates have done quite well as a whole when they have run; as well, if not better than practitioners of other professions, and there is a crying need for more members of our bar to participate.

But the days when a lawyer was elected like Atticus Finch, simply because of the status of the lawyer in a simpler and less competitive time, are over. Even Atticus would have to work hard and participate in the political process to be elected to the General Assembly today. ◆

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SERVING AS LAWYER TO THE LEGISLATURE:

Drafting Laws and Giving Legal and Political Advice to Legislators

Lawyers abound in the halls of Congress, serving as members of Congress, lobbyists, and legislative drafters. In comparison, Delaware's own Legislative Hall has a paucity of lawyers who are counted among the legislators, lobbyists, and House and Senate attorneys. Because of Delaware's small size, lawyers have discovered that they are in a unique position to make a difference in society through public service. Serving as a State Representative or Senator or a House or Senate attorney provides the Delaware lawyer the perfect opportunity to contribute. This article provides the perspective of a former legislator and former legislative counsel.

It is surprising that so few Delaware lawyers have chosen public office as a means to contribute to their community since, as lawyers, we occupy a central role in our political and judicial systems. According to the Preamble to the Rules of Professional Conduct, "as a public citizen, a lawyer should seek improvement of the law ... [and] devote professional time and resources and use civic influence to ensure equal access to our system of justice for all."

The General Assembly provides a forum to effect positive legislative change in Delaware to improve societal resources for those less fortunate, to enact public service initiatives through legislation, to develop and maintain community relationships, and to improve the legal community's standing as a whole.

For those lawyers who do not have the desire to serve as a legislator, serving as a House or Senate attorney can allow one to be involved in politics and have a hand in shaping our laws, serve our community and "make a difference" in society with a lesser time commitment. Serving the role of legislative counsel gives one the best insight, other than a legislator, into the procedural and substantive law-making process during the approximately 15 weeks that the legislature is in session from January to June each year. During those 15 weeks, they are in session three afternoons each week.

The Democratic caucus and the Republican caucus in both the Senate and the House of Representatives each hires its own group of attorneys, each of whom plays an important part in making new laws. Other than the legislators themselves, the legislative attorneys are usually the only other persons allowed in the sacrosanct caucus meetings, where the members of the respective political parties in each chamber discuss their views and votes on pending legislation each day

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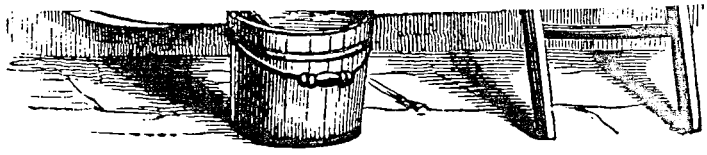

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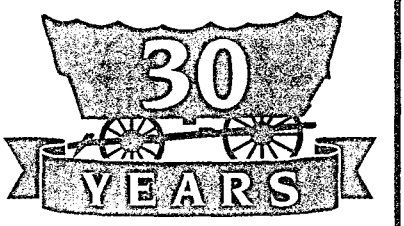

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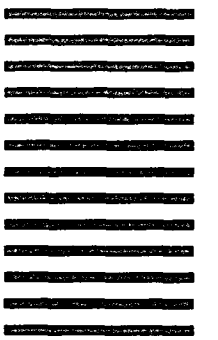

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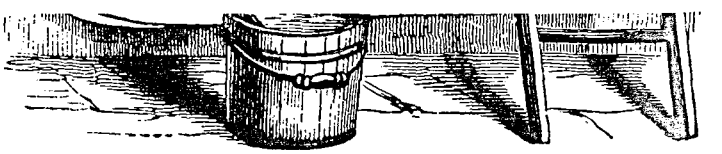

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the legislature is in session. These caucus meetings are confidential and closed to the public; nothing that is said in these meetings can be disclosed.

The legislative attorneys are present in the caucus meetings to summarize legislation that is on the day's agenda and to answer questions from legislators about the impact of the legislation. Sometimes legislative attorneys are asked whether a bill on the agenda is constitutional or technically correct. Sometimes the legislators ask how the proposed law would render an outcome under a hypothetical set of facts. It is not uncommon, especially in the last few days of June, for a legislator to ask a legislative attorney to summarize proposed legislation that may be 10 to 20 pages long or longer, and the attorney may be given only a few short minutes to summarize it and discuss its merits.

In addition to summarizing bills on a day's agenda, a legislative attorney spends the majority of his or her time drafting bills or amendments for the legislators. Legislators get ideas for bills from many sources, although the legislative attorney is tasked with fleshing the ideas out and preparing tightly written, well-drafted, legally correct pieces of legislation. If a bill is not carefully drafted and there are technical inaccuracies, opponents of the bill may use these errors as a way to defeat the bill. Furthermore, a poorly drafted bill that becomes law only lays the groundwork for future litigation over what a particular word or phrase means in the Delaware Code.

Not all bills that the legislative attorney drafts see the light of day. Sometimes a constituent asks a legislator to propose legislation that would resolve that constitutent's problem or concern. In some cases, legislation is drafted for purposes of satisfying a constituent, with the understanding (at least on the part of the legislator) that the bill will not proceed beyond its introduction due to lack of political support or other reasons.

One of the most important parts of the bill that a legislative attorney must carefully draft is the synopsis. The synopsis of the bill is all that some people will read and understand. The actual substance of a bill is usually too cryptic and arcane for a non-lawyer to understand. Thus, it is critical that the synopsis accurately reflect what the bill purports to do, so that the legislators know what they are voting on, and others can know what the bill purports to do.

Unfortunately, the synopsis frequently does not adequately describe the complete import of the bill or the consequences on a practical level. Because a bill may have been amended, or because a particular legislative attorney wrote his or her own opinion as to why a given bill is being introduced, the synopsis is not always a reliable source for the intent or accurate summary of a bill. Sixty-two members of the legislature may have voted in favor of a bill, and each may have had their own reasons why, not just the one that the legislative attorney wrote into the synopsis.

If the bill is not drafted by a legislative attorney and is being submitted by a particular organization, such as the Attorney General's Office, or it is a bill sponsored by the Delaware State Bar Association, that fact alone is often a shortcut method to understanding the goal of the legislation. Many bills are introduced and sponsored by law enforcement agencies in the state and it is usually very apparent what the intent of those bills might be. The bottom line: do not rely on a synopsis at the end of the bill to determine its complete purpose or full meaning.

Once the legislative attorney drafts a bill, the normal procedure for proposed legislation to become law is as follows. The bill is introduced by a legislator, given a number and assigned to a committee. After it is reviewed at a committee hearing, if the bill is released by the committee, the bill is placed on the agenda for a particular legislative session. The majority of bills that are introduced never proceed beyond the committee stage. If the bill "makes it" onto the agenda for a legislative session and passes, it is then referred to the other chamber, which must also hold committee hearings, after which it must also find its way onto the agenda of that chamber and garner a sufficient number of votes to pass in that chamber. The legislation that has passed both houses is then sent to the Governor's desk for signature.

At any stage along that process, the bill can languish. For example, a bill may never be scheduled to be heard by a particular committee or it may never receive a sufficient number of votes to be released from the committee. Even if released from the committee, it may never be scheduled for the agenda of a

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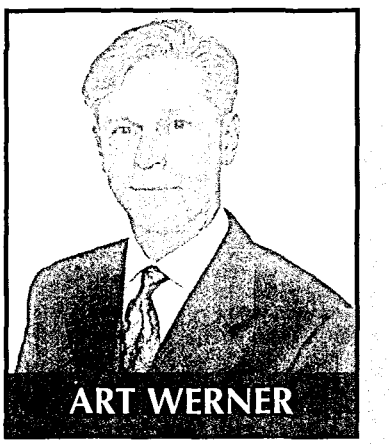

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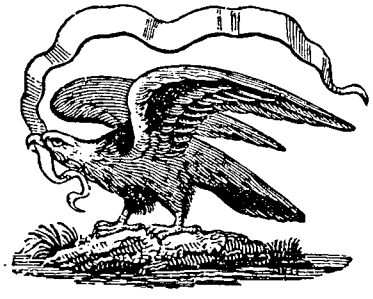
legislative session. Often, a bill passes one chamber but either does not pass or is amended in another chamber. If a bill is amended in one chamber, the bill must be returned to the originating chamber which must also approve the amendment. Attempting to add multiple amendments is one method to kill a bill. The entire process takes a great deal of time, but with sufficient votes, the process can be expedited by waiving the normal rules.

The legislative attorneys serve a third role in Legislative Hall. Toward the end of session, as it gets closer to June 30, noncontroversial bills are lumped in groups of five or ten bills and placed on a "consent agenda," which means that they are not debated or discussed on the floor of the chamber. The legislation on these consent agendas are either voted up or down without discussion. Typically, bills on such agendas are predetermined to be noncontroversial, and typically the attorneys for each caucus must agree that a particular bill belongs on a consent agenda.

If there are any issues with such a bill, the attorneys for any caucus or any legislator can ask to have the bill removed. If the bill is removed from a consent agenda, especially toward the end of legislative session, usually the bill will not be passed because there is not sufficient time for it to be debated on the floor, or there would be insufficient time to add it to one of the normal agendas for regular consideration. If a bill reaches and remains on the consent agenda for both chambers, passage is certain.

The House or Senate attorney plays an invaluable role in drafting legislation, reviewing legislation, and advising legislators about particular pieces of legislation and their constitutionality, advisability and impact to Delawareans. Serving in Legislative Hall while practicing law provides unique insights and advantages that fulfill the highest aspirations of our profession and also generates practical benefits. ◆



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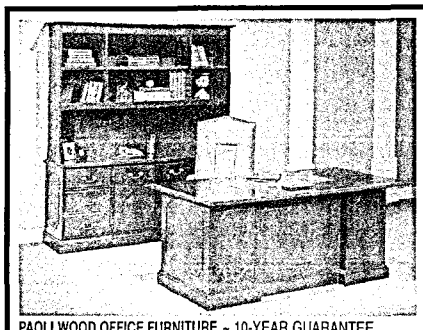
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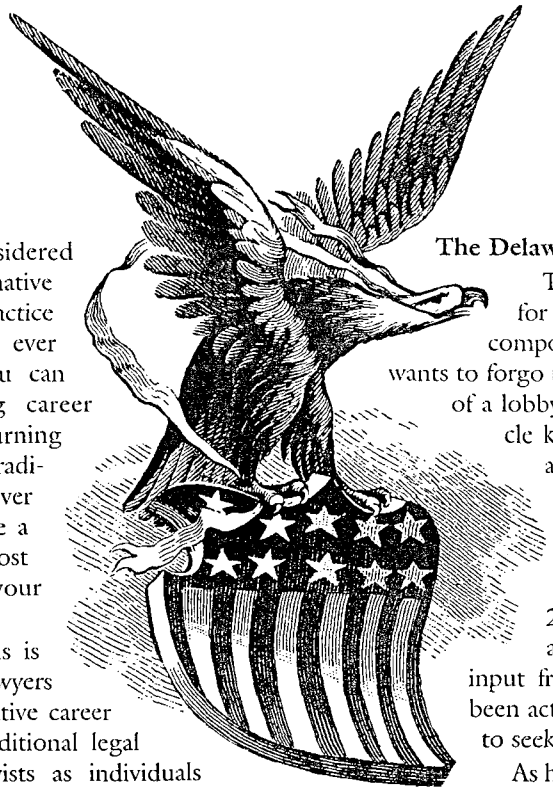
THE DELAWARE LAWYER AS LOBBYIST



Have you ever considered lobbying as an alternative career path to the practice of law? Have you ever considered that you can pursue a lobbying career without entirely turning your back on a traditional legal practice? Have you ever considered that lobbying to change a law or regulation might be the most effective method for resolving your clients' legal needs?

If the answer to these questions is "no," you are not alone. Many lawyers do not view lobbying as an alternative career path or a way of enhancing a traditional legal practice. Rather, they view lobbyists as individuals armed only with the right political connections, perhaps former elected officials or individuals with close ties to political parties, whose learnedness in the law is of secondary importance.

While this stereotypical lobbyist may have existed in years past, today's lobbyist must possess substantive knowledge of the law in order to be effective. Lobbyists are called upon to inform, advise and influence legislators and other government officials on complex issues. As such, the profession is ideal for attorneys who possess in-depth knowledge of state and federal laws and regulations, and who have honed skills advocating and negotiating for clients.

The lawyer as lobbyist can also offer a unique service to his or her clients to help them achieve their goals. Instead of engaging in a costly litigation battle which may take years to resolve, a lobbyist can help a client resolve an issue from the inside out, by working to enact or amend a law or regulation so that the client is favorably impacted. There are also times when a legislative or regulatory change is the only alternative to solve a client's legal problem or when lobbying in opposition to a proposed change in the law is the only way to prevent a legal problem from arising.

The Delaware Experience

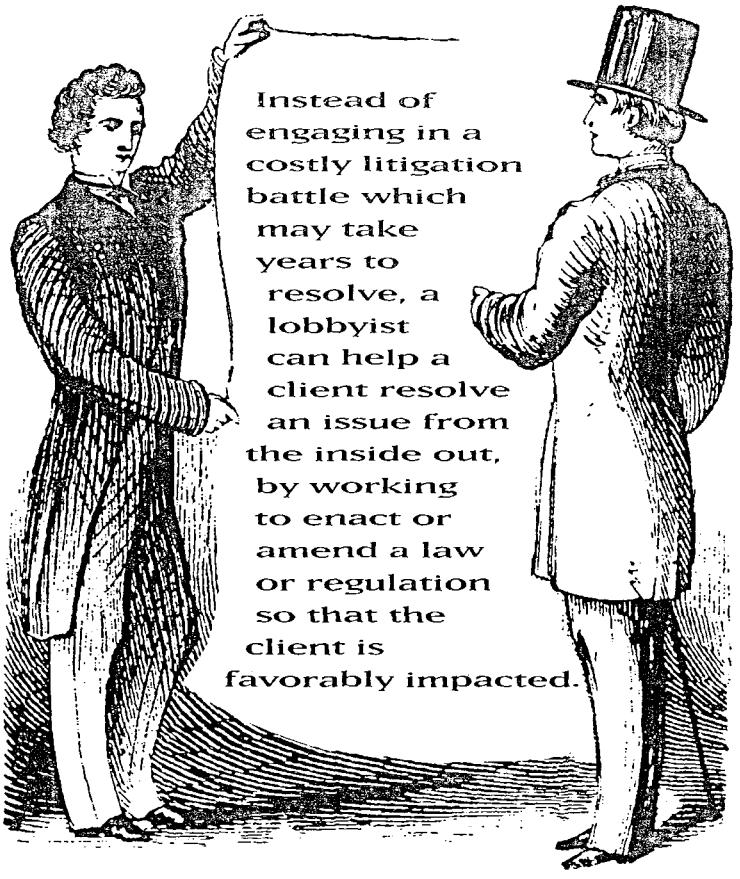
The Delaware political climate is ideal for a lawyer who wants to add a lobbying component to his or her practice, or who wants to forgo the traditional practice of law in favor of a lobbying career. Anyone reading this article knows that the Delaware Bar is small and congenial, and the same can be said for its state government. The Delaware General Assembly consists of only 62 elected officials (41 in the House of Representatives and 21 in the Senate). These individuals are friendly, accessible and receptive to input from the public and have themselves been active members of the community prior to seeking elected office.

As holds true with Governor Minner, traditionally the Governor and members of his or her administration are very approachable, and anyone who has been in Delaware for any length of time knows it is not unusual to run into our United States Senators or Congressman at a local restaurant or community event. These factors make it relatively easy for the motivated lawyer to build relationships with key policy-makers in the State.

Lawyers also bring a unique skill set to Delaware state government, particularly the Delaware General Assembly. Unlike larger states or the federal government, Delaware legislators have relatively small staffs and limited research tools at their disposal. As such, a lawyer-lobbyist can serve as a primary resource for a public official seeking information about a particular piece of legislation and its potential legal impact. Additionally, with limited staff attorneys, members of the General Assembly will often turn to lawyer-lobbyists to help draft or revise legislation.

The climate in Delaware state government can be beneficial to your clients. Delaware public officials are receptive and act quickly, when necessary, to enact legislative or regulatory changes. This environment affords lawyers the opportunity to resolve clients' issues in a prompt and cost-effective manner.

Two legislative matters in which your authors served as lobbyists help illustrate the value a lawyer-lobbyist can bring to his or her clients. In 1997, the Campus Community School applied to the State Board of Education to receive a charter to operate an elementary school in Kent County under the State's recently enacted charter school law. The school intended to lease space from Wesley College in Dover to house its new charter school.



As the application process progressed, the school quickly realized it had a problem. Section 504A of the charter school law specifically prohibited a charter school from contracting with a religious entity, and Wesley College was affiliated with the Methodist Church.[1] While the intent of the law was to prohibit religious-based schools from operating public charter schools and preserving the First Amendment's distinction between church and state, without the ability to lease affordable space from Wesley College, the Campus Community School would not be a reality.

The Campus Community School had two options to solving its lease dilemma. First, it could pursue litigation to clarify the intent of the legislation arguing that the lease of space from a Methodist-affiliated college for a non-religious purpose did not violate the Delaware statute or the First Amendment. Second, it could lobby the General Assembly to change the charter school law to permit such contracts.

The school chose the latter option, and in a matter of months, it was able to persuade the General Assembly to adopt legislation permitting a charter school to contract for buildings or space in buildings with a sectarian or religious college or university incorporated in the State and with approval of the Secretary of Education and the State Board of Education.[2]

With that, the Campus Community School was able to lease the Wesley College space and open its doors in the fall of 1998. The client achieved the optimum result without the risks and delay attending litigation, and at a fraction of the cost.

Prior to 1995, banks around the country, including Delaware, were prohibited with rare exceptions from underwriting insurance. Because the prohibition against federally chartered banks or bank holding companies engaging in the business of insurance was imposed by Congress, the only legislative alternative was to change the law regulating state-chartered banks' insurance powers in at least one state to permit the business. Citibank and Chase Manhattan Bank, already residents of Delaware, chose the First State as the venue to seek this change. Both banks retained lawyer-lobbyists to draft and advocate the adoption of permissive legislation. In 1995, the General Assembly adopted, and Governor Carper signed, the Bank Insurance Powers Act (70 Del. Laws, c. 112), and Citibank and Chase Manhattan (among others) joined the ranks of the nation's insurers.

Lawyers can also be successful in working on behalf of their clients or trade association memberships to help defeat proposed legislation that would negatively impact their interests. The Delaware Trial Lawyers Association aggressively and effectively lobbies the Delaware General Assembly on behalf of their clients in opposition to the many tort reform efforts. Their belief is that such tort reform efforts would greatly hinder their clients' fundamental right to access the state's civil justice system.

The Demographics

While many lawyers do not consider lobbying as a career path, a number of lawyers have joined the ranks of lobbyists in Delaware. Some of these attorneys maintain a traditional legal practice with a Delaware law firm and incorporate lobbying into the general legal services offered to their clients. Some lawyer-lobbyists work for trade associations or corporations primarily representing their employer before the Delaware Legislature, while others have abandoned their traditional legal practices in favor of full-time lobbying. Of the 239 lobbyists currently registered with the State Public Integrity Commission, approximately 30 are lawyers, most of whom are admitted to practice law in Delaware.

The lawyers who have joined the ranks of lobbyists in Delaware generally are not strangers to the legislative or regulatory process. While a lawyer-lobbyist need not necessarily have a background in state government, an aspiring lobbyist must develop relationships with public officials. As such, a background in state government is helpful and most lawyer-lobbyists have some experience in this area.

For example, some of the current lawyer-lobbyists served as Counsel or Chief of Staff to former Delaware governors, while others got their start as attorneys to the Delaware State Senate or House of Representatives. A few lawyer-lobbyists served a stint working for state agencies or the Attorney General's office. Still others served as elected officials in a former life or were involved in Delaware politics prior to representing clients before the Delaware Legislature.

An Anecdotal History Of Modern Lawyer-Lobbying

The emergence of lawyers as a lobbying force in Dover is about 25 years old.

Before that, the relationship between the Delaware Bar and the Delaware General Assembly might best be described as a disconnect. For example, only a handful of lawyers have chosen to serve in the Assembly in the past 40 years and, until recently, very few have chosen to stay. The historical landscape is similarly bereft with respect to the presence of lawyer-lobbyists. While a few corporations have traditionally selected lawyers as their Dover representatives (Bob Kelly and his successors at Dupont, and Joe Kwiatkowski and Cliff Hearn on behalf of various insurance interests, come to mind), few lawyers roamed the corridors of Legislative Hall until the mid-1980s.

Reasons for the paucity of lawyer-lobbyists abound. Certainly the near absence of lawyer-legislators created the perception among the Bar of an unreceptive environment. But the waters run deeper than that. Historically, members of the Delaware Bar viewed the General Assembly with either disinterest or disdain. With the exception of the annual tweaking of the Delaware Corporation Law — with which the Assembly did not tamper — the Legislature was not viewed as a body which had much impact on the practice of law.

Also, it was, in the view of many lions of the Bar, the duty of the Governor to keep an eye on General Assembly goings-on, and most of the major firms had at least one senior partner who had the ear of the chief executive. Besides, the prevailing notion among Delaware lawyers was that the resolution of issues among disputants was the proper and exclusive province of the courts, not the Legislature.

But, all this was about to change. At first slowly, but then with a rush during the Reagan administration, the 50 states accreted power from the federal government over a broad range of critical social, commercial and fiscal issues. The Delaware General Assembly, and its counterparts in the other states, became the cauldron for new policy direction, new regulatory controls and new commercial initiatives that, among other things, attracted the attention of a new cadre of lawyers to Legislative Hall, ready and eager to give direction on behalf of their clients to this explosion of state legislative and regulatory powers.

As with most dramatic change, there were change agents. First among them in Delaware was O. Francis Biondi, a partner at Morris Nichols Arsht & Tunnell.[3] Frank Biondi, more than any other lawyer, gets the credit for introducing the Delaware Bar to the Delaware General Assembly, and vice versa. He showed the way for today's phalanx of lawyer-lobbyists.

While Frank Biondi's hoary political reputation grew out of his mastery of the rough and tumble Wilmington political scene, he made it a point early in his legal career to reach out to the politically well connected throughout Delaware. In that process, he counseled and befriended scores of elected officials, including both well-established and newly emerging legislators.

Biondi understood from the beginning how effective and powerful an energized General Assembly could be as an instrument of change, and he employed a stratagem that succeeding generations of lawyer-lobbyists — your authors among them — would embrace:

1. Respect the legislative process as the ultimate engine of representative government.
2. Respect those who have chosen to serve in the General Assembly. With few exceptions, they merit that respect.
3. Prepare and advocate your case, whether one-on-one with a legislator, before a committee, or on the floor of the House or Senate, as thoroughly as you would prepare and present oral argument before a Delaware court.
4. Act in bipartisan fashion and with the utmost integrity. Each legislative encounter demands that the lobbyist demonstrate anew his or her commitment to truth and candor.

Frank Biondi's seminal role in securing passage of the Financial Center Development Act in 1981 (63 Del. Laws, ch. 2) is well documented. In the context of the Delaware lawyer as lobbyist, however, that important milestone is best recognized as the talisman for a new era, where influencing the course of legislative and executive decision-making by members of the Bar has become an accepted and potent resource in advancing a client's cause.

Ultimately, Frank Biondi taught us this simple lesson: What makes an effective and respected Delaware lawyer also makes an effective and respected Delaware lobbyist.

The Rules

If this article has convinced you to take the "lobbying plunge" there are a number of rules you must follow. All Delaware lobbyists must register with the State Public Integrity Commission pursuant to chapter 58 of title 29 of the Delaware Code. The law[4] defines lobbyists as follows:

> "Lobbyist" means any individual who acts to promote, advocate, influence or oppose any matter pending before the General Assembly or any matter pending before a state agency by direct communication with that state agency, and who in connection therewith either:
>
> a. Has received or is to receive compensation in whole or in part from any person; or
>
> b. Is authorized to act as a representative of any person who has as a substantial purpose the influencing of legislative or administrative action; or
>
> c. Expends any funds during he calendar year for the type of Expenditures listed in §5835(b) of this title.

In addition to the lobbyist registration form, which must be submitted to the Public Integrity Commission pursuant to section 5832, every employer or client who retains you to lobby on his or her behalf must submit to the Public Integrity Commission a signed authorization as set forth in section 5833. Both of these forms are available from the Public Integrity Commission. Finally, lobbyists must file quarterly statements with the Public Integrity Commission for each employer or client he or she represents outlining the total amount of monies expended on members of the General Assembly or employees or members of any state agency during the prior quarter. It is important to note that campaign contributions are not considered "expenditures" under the lobbyist registration law. 29 *Del.C.* §5835.

While lawyer-lobbyists representing clients before the Legislature or state agencies must register with the Public Integrity Commission, section 5831(b) contains some exceptions to this registration requirement for persons who perform services such as drafting bills or legislation who do not otherwise act as lobbyists. The section also exempts from registration attorneys representing

clients in administrative proceedings where ex parte communications with the state agency with authority over the matter are prohibited. The section also exempts from registration attorneys representing clients with regard to criminal or civil law enforcement proceedings, or in any judicial proceeding.

In addition to the lobbyist registration requirements, it is important to remember that lawyer-lobbyists are also bound by the Delaware Rules of Professional Responsibility in the conduct of all aspects of their lobbying practice.

Conclusion

Choosing to represent clients as a lawyer and lobbyist has unique advantages for both you and your clients. As outlined in this article, a legislative or regulatory solution to your clients' problems may be the most cost-effective, timely and complete. Further, the skills developed as an attorney are beneficial to the legislative and regulatory process. Lobbying also adds an exciting element to a lawyer's traditional legal practice. A trusted lawyer-lobbyist may oftentimes be viewed as one of the primary resources for a public official, particularly in a state like Delaware where legislative staffs are small and stretched thin.

As a lobbyist, the Delaware lawyer has the unique opportunity to advocate on behalf of his or her client while helping to shape public policy before a body of individuals who are trying to balance diverse and competing interests. It is an exciting opportunity, and there is no better venue than Delaware state government to seize it. ◆

FOOTNOTES

1. The initial charter school law provided, in relevant part, that a charter school could, "Contract with any school district, or any other public school or private, nonsectarian, non-religious entity also empowered to enter into contracts, for any real property, equipment, goods, supplies and services, except that a school district must make unused buildings or space (defined as space no longer needed, permanently or temporarily, for non-charter school purposes) buildings or space in buildings available to a charter school, and shall bargain in good faith over the cost of rent, services and maintenance related to such space." 70 Del. Laws, c. 179.

2. *See* 71 Del. Laws, c. 82.

3. Mr. Biondi is currently Of Counsel to the Firm.

4. 29 *Del.C.* §5831(a)(1).

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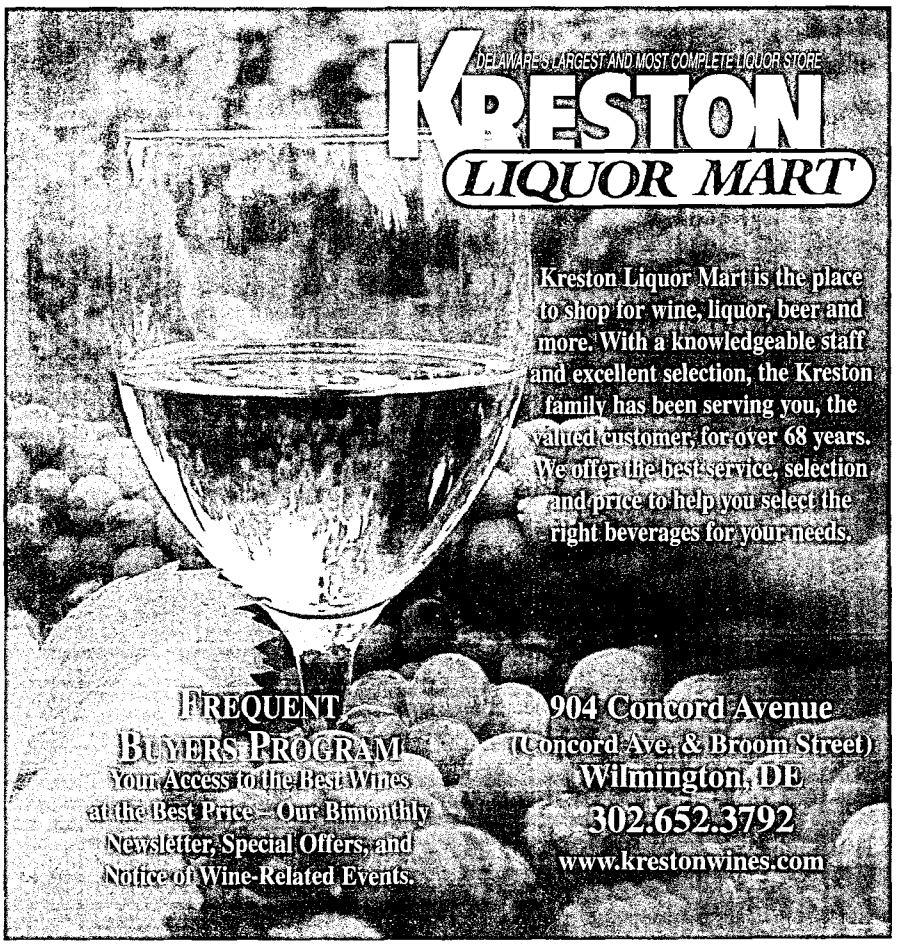


The Honorable Randy J. Holland

LAW, POLITICS AND THE JUDICIARY: Statutory Enactments and the Common Law

This article will examine the development of the law by the judiciary in the context of deciding cases and by the legislature through statutory enactments. A comprehensive analysis of that interactive process would require a treatise. The combined operation of judicial and legislative influences on the evolution of the law can be illustrated, however, by briefly examining how a few of the rights to bring private causes of action for negligent conduct — generally known as "torts" — have been recognized at common law by the judiciary and refined through statutory enactments by the legislature.

The common law is developed by judges as individual cases are decided. Statutory enactments reflect the legislature's response to political and public policy considerations with regard to a general subject area. When the 20th century began, the common law was the principal basis for both defining and recognizing negligence actions. When negligence cases are litigated today, however, statutes frequently play an important role. Accordingly, judges now must consider both the operation of statutes and the application of traditional common law principles in nearly every negligence case.

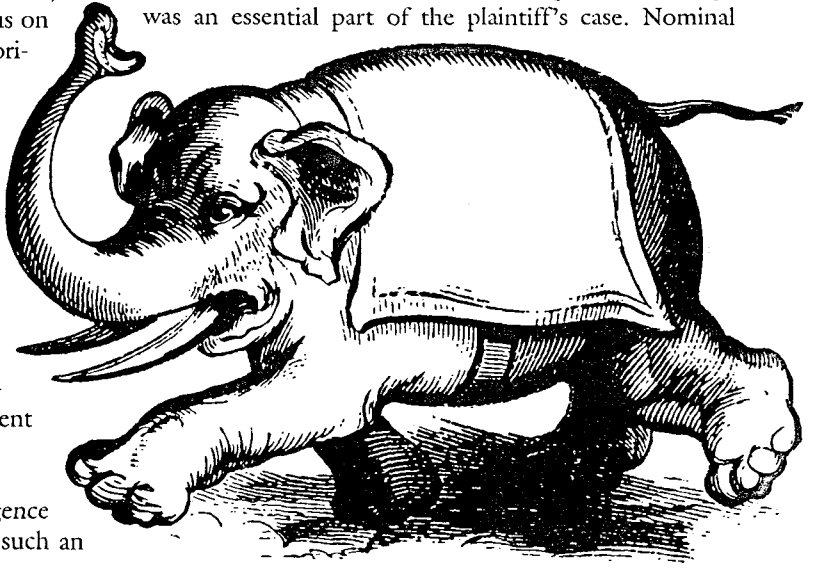
The origins of common law have been traced to Aristotle and Cicero. Common law is frequently called "judge-made" law in an effort to differentiate it from statutes, regulations, and ordinances, which are enacted by legislatures, agencies, or political subdivisions. Although this article will focus on causes of action for negligence, common law has historically also dominated the law of property and contracts.

The term "common law," meaning general, rather than local, law and custom, was taken from the canonists in the 13th century. The recognition that there could be a cohesive generalized theory of the common law dates back to the second half of the 18th century when William Blackstone wrote his *Commentaries on the Law of England*. In that treatise, Blackstone demonstrated that, beginning in the 16th century, the royal courts of England had developed, on a case-by-case basis, a coherent body of legal principles that could be applied and extended in subsequent cases.

Actions for Negligence

As the common law developed, actions for negligence became known as torts. The traditional elements of such an action required the plaintiff, or injured party, to demonstrate that the defendant, or tortfeasor, owed a duty of care to the plaintiff, breached that duty of care, and proximately caused an injury to the plaintiff that resulted in damages. The elements necessary to establish a common law action for negligence have been summarized in *Prosser and Keeton on The Law of Torts*, as follows:

1. A duty, or obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
2. A failure on the person's part to conform to the standard required: a breach of the duty. These two elements go to make up what the courts usually have called negligence; but the term quite frequently is applied to the second alone. Thus it may be said that the defendant was negligent, but is not liable because he was under no duty to the plaintiff not to be.
3. A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as "legal cause," or "proximate cause," and which includes the notion of cause in fact.
4. Actual loss or damage resulting to the interests of another. Since the action for negligence developed chiefly out of the old form of action on the case, it retained the rule of that action, that proof of damage was an essential part of the plaintiff's case. Nominal



damages, to vindicate a technical right, cannot be recovered in a negligence action, where no actual loss has occurred.[1]

The alleged tortfeasor could defend against an action for negligence at common law by demonstrating that the plaintiff failed to prove one or more of the elements of the tort paradigm. Alternatively, the alleged tortfeasor had a complete defense to the plaintiff's otherwise successful allegations by affirmatively proving that the plaintiff was either contributorily negligent or assumed the risk of injury.

Even after the categories of actions for negligence became established and the proof needed for either bringing or defending those actions was settled as a matter of common law, the statutory responses to the categories of actions for negligence, each element of such an action, and the nature of each defense were not uniform in the United States. The variety of legislative responses reflects the political considerations or public policy concerns that prevailed in each specific context and in each state. This article will discuss a few illustrative statutory responses by the General Assembly to the common law developments in Delaware with respect to certain tort actions.

Recognizing Legal Duties

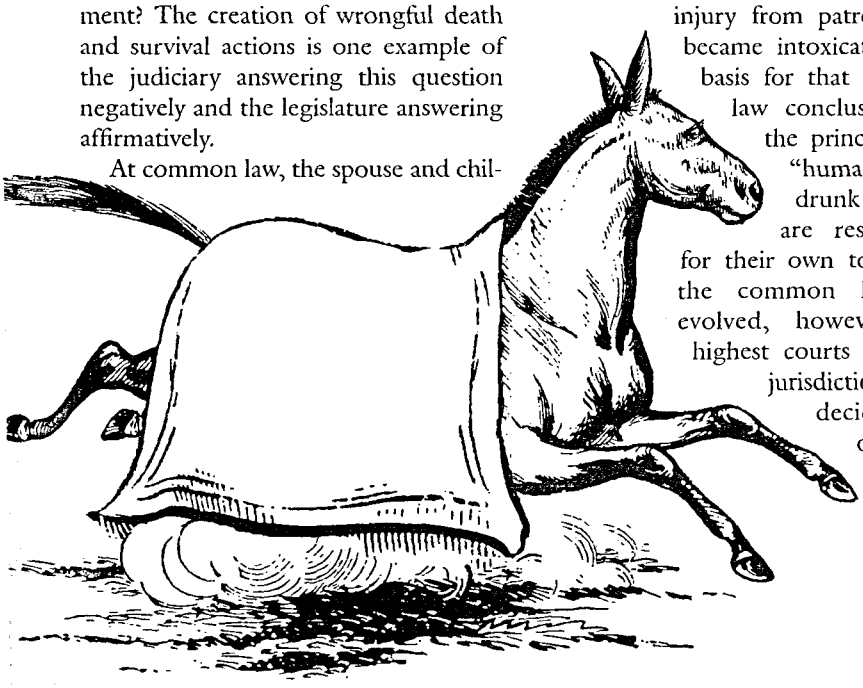
The first question presented in an action for negligence is: "Was there a duty?" In other words, is the cause of action already cognizable in the common law and, if not, should it be recognized at common law by the judiciary or by the legislature in a statutory enactment? The creation of wrongful death and survival actions is one example of the judiciary answering this question negatively and the legislature answering affirmatively.

At common law, the spouse and children of the injured party could not bring a direct action against the tortfeasor. Any negligence claim died with the plaintiff. The Delaware General Assembly, in response to the plight of widows, widowers and orphans, enacted a wrongful death statute. This statute, explicitly for the benefit of the "spouse, parent, child or siblings of the deceased person,"[2] extinguished the common law barrier to recovery. The pertinent Delaware survival statute now insures that "all causes of action" are assertable by the estate of a deceased tort victim and, in addition, may be asserted against a decedent tortfeasor's estate:

> All causes of action, except actions for defamation, malicious prosecution, or upon penal statutes, shall survive to and against the executors or administrators of the person to, or against whom, the cause of action accrued. Accordingly, all actions so surviving may be instituted or prosecuted by or against the executors or administrators of the person to or against whom the cause of action accrued. This section shall not affect the survivorship among the original parties to a joint cause of action.[3]

Claims may be asserted regardless of whether the plaintiff dies before or during the litigation. There are three specifically noted exceptions to survival claims: defamation, malicious prosecution, and actions based on penal statutes.[4]

As a matter of early common law, sellers of alcoholic beverages had no duty to protect third parties against injury from patrons who became intoxicated. The basis for that common law conclusion was the principle that "human beings, drunk or sober, are responsible for their own torts." As the common law has evolved, however, the highest courts in many jurisdictions have decided to overrule their own precedents and now recognize a common law cause of action against a seller of alcoholic beverages for "causing" the intoxication of the person whose negligent conduct resulted in injury to a third party.



In *Wright v. Moffitt*,[5] the Delaware Supreme Court refused to recognize a common law cause of action against a tavern owner and held that the creation of such a claim must be left to the legislature. The Supreme Court concluded that "the empirical data on which state policy should be based can best be evaluated by the General Assembly and then reflected in its legislation."[6] To date, the General Assembly has not enacted a dram shop liability statute. In 2003, however, a dram shop statute was passed in the Senate and forwarded to the House of Representatives for consideration.[7]

Standards of Care

Whether the duty to prevent injury is recognized by statute or the common law, the second element in a common law tort action requires the plaintiff to prove that the duty imposed by law was breached by the tortfeasor. The standard of care to which the tortfeasor is generally held by the common law is an objective standard of ordinary negligence, known as the reasonable person standard. According to that standard: "negligence is the failure to do what the reasonable person would do 'under the same or similar circumstances.'"[8]

Whether the duty is imposed by statute or common law, the General Assembly is periodically persuaded on public policy grounds to enact statutes that require certain plaintiffs to prove that the alleged tortfeasor's actions were willful, grossly negligent, or wanton rather than merely negligent. For example, in Delaware the former automobile guest statute and current premises guest statute provide for no recovery to a guest without payment unless the conduct of the alleged tortfeasor is either intentional or caused by a willful or wanton disregard for the rights of others. The General Assembly's legislative intent with such statutes is to frustrate collusive lawsuits between hosts and guests based on "simple acts of negligence."[9] Public policy considerations also persuaded the General Assembly to enact a Good Samaritan Statute to protect heath care providers from actions for ordinary negligence if they responded to a medical emergency.[10]

Statutory enactments in derogation of the common law are strictly construed by the judiciary, in Delaware and elsewhere, against the party for whose benefit the law was passed.[11] For many years, the Delaware courts struggled to strictly construe the automobile guest statute in the interest of justice. Nevertheless, judicial applications of the Delaware automobile guest statute frequently resulted in what were described as harsh, unfair, and unreasonable outcomes. The General Assembly was eventually persuaded to repeal the automobile guest statute on the ground that the better public policy was to compensate injured guests for damages caused by the negligent driving of their hosts.

The General Assembly also was persuaded by public policy reasons to make changes to the premises guest statute after its enactment. The General Assembly decided to restrict its application to residential and farm premises. Accordingly, commercial and industrial uses are once again subject to traditional common law ordinary negligence principles.[12] The Delaware Supreme Court has held that the General Assembly did not intend for the Guest Premises Statute to eliminate the common law doctrine of attractive nuisance.[13]

Proximate Cause and Comparative Negligence

If an injured party proves that the alleged tortfeasor owed him or her a duty and also breached the statutory or common law standard of care, the third element in a common law action for negligence is proof that the breach of duty proximately caused the plaintiff's injury. The time-honored common law definition of proximate cause in Delaware is the "but for" rule: the direct cause without which the accident would not have occurred.

For many years, the Delaware Supreme Court recognized the traditional common law doctrine of contributory negligence. Pursuant to that doctrine, "the contributory negligence of a plaintiff evidencing a proximate cause [of the plaintiff's own injury] is sufficient to defeat a recovery on [the plaintiff's] part."[14] Accordingly, at common law, contributory negligence was an absolute bar to any recovery by a plaintiff in Delaware.

The Delaware Supreme Court was asked to modify the common law doctrine of contributory negligence and to recognize the doctrine of comparative negligence as the Florida Supreme Court had done in *Hoffman v. Jones*.[15] The Delaware Supreme Court, however, held that "the contributory negligence rule has always been the law in this State; and change therein must find its origins in the legislature."[16]

In 1994, the Delaware General Assembly enacted a modified comparative negligence statute permitting a plaintiff whose contributory negligence was 50% or less to recover, although the recovery is reduced in proportion to the degree of the plaintiff's own negligence. If the plaintiff's negligence is 51% or greater, the Delaware statute bars any recovery. The Delaware Supreme Court has held that the comparative negligence statute "does not reflect any legislative intent to change Delaware's heretofore common law determination of proximate cause with respect to either the defendant's negligence or the plaintiff's contributory negligence."[17] Therefore, Delaware continues to adhere to the common law "but for" rule of proximate cause.

The Delaware Supreme Court was subsequently asked to decide whether the common law doctrine of last clear chance was abrogated by the legislative adoption of comparative negligence in Delaware.[18] The last clear chance doctrine was a common law principle designed to ameliorate the harsh consequences of a strict application of the contributory negligence rule. The last clear chance doctrine permitted a plaintiff to recover full damages, notwithstanding his or her contributory negligence, if the defendant had the last opportunity to avoid the accident.

In *Laws v. Webb*, the Delaware Supreme Court held that the last clear chance doctrine was fundamentally incompatible with Delaware's statutory comparative negligence system.[19] The Supreme Court determined that an application of the last clear chance doctrine within a comparative negligence system "would completely contravene the intent of the statute to the extent that the doctrine provides a complete recovery to a negligent plaintiff regardless of relative fault."[20] The Supreme Court concluded that there was "no logical basis to retain the all or nothing doctrine of last clear chance in light of the General Assembly's rejection of the all or nothing common law rule of contributory negligence."[21]

In *Moffit v. Carroll*,[22] the Delaware Supreme Court examined the effect of the comparative negligence statute on another aspect of the common law. The court held that Delaware's comparative negligence statute does not reflect an intent by the legislature to change the common law rules governing the standard of care for children under *Pokoyski v. McDermott*.[23] As a result, Delaware still adheres to the common law standard of care for determining a child's negligence; the negligence of a child will be determined by a standard of care based on an evaluation of the age, intelligence and maturity of the child.[24]

State Constitutional Provisions

It is generally agreed that the public policy of a state should be determined by the legislature. The statutory power of the legislature to modify the common law is limited, however, by the provisions of the state constitution. For example, because the United States Supreme Court has never held that the Seventh Amendment applies to the states by virtue of the Due Process Clause in the Fourteenth Amendment, state constitutions are the sole source of civil jury trial rights in state court proceedings.[25] In 1972, the Delaware General Assembly enacted a Landlord and Tenant Code that eliminated the right to trial by jury in an eviction proceeding. The Superior Court held that the Delaware Constitution guaranteed the right to a jury trial in a common law action for ejectment and that the statute violated that right.[26] In response, the General Assembly amended the Landlord and Tenant Code to include the right to a jury trial that is guaranteed by the Delaware Constitution.

Several states now have statutes modifying the common law on damages by limiting the amount of damages that certain tortfeasors must pay. At common law, the tortfeasor was responsible for paying the plaintiff the full amount of monetary damages awarded by a jury for any injury that was proximately caused by the tortfeasor's negligence. The highest courts in several states have reached varying conclusions regarding whether statutes limiting the amount of damages that can be recovered from a tortfeasor violate state constitutional jury trial rights.[27] To date, the Delaware General Assembly has not enacted a statutory limit on the amount of damages that can be recovered from a tortfeasor.

Although the legislature can modify

the common law by statutory enactments that are compatible with the state's constitution, in most states the legislature is precluded from enacting a statute that completely abolishes a common law right or remedy without providing an adequate substitute. This limitation on legislative power is known as the "quid pro quo rule," a principle that has been invoked by the judiciary in many states in upholding the validity of worker's compensation statutes against a wide variety of state constitutional challenges.

In Delaware, the Supreme Court has upheld the General Assembly's decision to make the Worker's Compensation Act an exclusive remedy barring common law claims for negligence by employees against employers for work-related injuries.[28] The Delaware Worker's Compensation Law was enacted for two public policy reasons.[29] First, it provides a process that assures compensation for work-related injuries without regard to fault.[30] Second, it relieves both employer and employee of the uncertainty and expense of litigation.[31] Although the General Assembly has chosen to differentiate between degrees of negligence in some contexts, there are no such differentiations in the Worker's Compensation Law. The Delaware Supreme Court accordingly has held that all common law employee actions against employers for work-related injuries based on any degree of negligence are barred by the Worker's Compensation Law.[32]

On the other hand, an employer that intentionally injures an employee cannot claim the benefit of the Worker's Compensation bar against common law claims. The Delaware Supreme Court has held that intentional torts fall outside the scope of the Worker's Compensation Law and hence remain actionable as tort claims under the common law rules.[33]

Conclusion

Common law is developed as judges either apply or extend established principles retroactively. Statutory enactments are prospective applications of public policy in response to widespread societal concerns. In Delaware, the interactive development of the law by two branches of government — the judiciary in common law decisions and the General Assembly through statutory enactments — demonstrate the vitality of our constitutionally-based representative democracy.

FOOTNOTES

1. Prosser and Keeton on The Law of Torts: Lawyer's Edition 164-65 (W. Page Keeton et al. eds., 5th ed. 1984).
2. Del. Code Ann. tit. 10, § 3724(a).
3. Del. Code Ann. tit. 10, § 3701.
4. In 2001, the Delaware Supreme Court decided that there is no basis to ban recovery for punitive damages against the estate of the deceased tortfeasor unless a specific statutory restriction exists. *Estate of Farrell v. Gordon*, 770 A.2d 517 (Del. 2001).
5. *Wright v. Moffitt*, 437 A.2d 554 (Del. 1981).
6. *See DiOssi v. Maroney*, 548 A.2d 1361 (Del. 1988).
7. S.S. 1 to S.B. 51, 142nd Gen. Assembly (Del. 2003).
8. *Prosser* at 175.
9. *Pietuszka v. McTaggart*, 333 A.2d 164, 166 (Del. 1975).
10. Del. Code Ann. tit. 16, § 6801.
11. *See Stratford Apartments, Inc. v. Fleming*, 305 A.2d 624 (Del. 1973).
12. *See generally Porter v. Delmarva Power*, 547 A.2d 124 (Del. 1988).
13. Del. Code Ann. tit. 25, § 1501; *See Porter v. Delmarva Power*, 547 A.2d 124.
14. *Samson v. Smith*, 560 A.2d 1024, 1026 (Del. 1989), *citing In re Hatfield*, 78 A.2d 754 (Md. 1951).
15. *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973).
16. *McGraw v. Corrin*, 303 A.2d 641, 644 (Del. 1973).
17. *Culver v. Bennett*, 588 A.2d 1094, 1097 (Del. 1991), *citing James v. Krause*, 75 A.2d 237 (Del. Super. 1950).
18. *See Laws v. Webb*, 658 A.2d 1000 (Del. 1995).
19. *Id.*
20. *Id.*
21. *Id.*
22. *Moffit v. Carroll*, 640 A.2d 169 (Del. 1994).
23. *Pokoyski v. McDermott*, 167 A.2d 742 (Del. 1961); *Compare Culver v. Bennett*, 588 A.2d 1094, 1098 (Del. 1991).
24. *See Pokoyski v. McDermott*, 167 A.2d at 745.
25. *See Johnson v. State*, 711 A.2d 18, 22 (Del. 1998); *McCool v. Gehret*, 657 A.2d 269, 281 (Del. 1995).
26. *See Hopkins v. Justice of the Peace Court*, 342 A.2d 243 (Del. Super. 1975).
27. Alabama, Florida, Ohio, Oregon, and Washington State Supreme Courts have struck down statutes limiting damages because they violated the state constitutional jury trial protections. Conversely, Alaska, Idaho, Kansas, Maryland, Virginia, and Wisconsin rejected challenges to damage limitations based upon jury trial guarantees embodied in their respective state constitutions.
28. *Id.*
29. *See Kofron v. Amoco Chemicals Corp.*, 441 A.2d 226, 231 (Del. 1982).
30. *Id.*
31. *Id.*
32. Del. Code Ann. tit. 19, § 2304.
33. *See Rafferty v. Hartman*, 760 A.2d 157 (Del. 2000).

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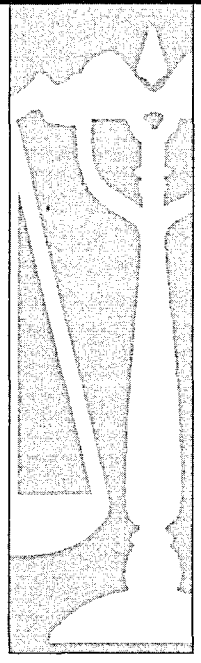

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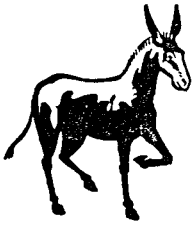
Insurance Commissioner. Steve Amick serves in the Delaware State Senate. Chris Coons recently was elected the New Castle County Council President. Bob Valihura took office in the House of Representatives after defeating several Republican opponents in the primary. Melanie George was elected to the House in 2002 at the age of 29. Both balance their lives as State Representatives with their private practices as attorneys. As discussed below, two of the three members of our Congressional delegation are lawyers — Senator Joe Biden and Congressman Mike Castle.

Finally, don't be afraid to take on campaign tasks that may seem mundane. Running a telephone poll, organizing a literature drop, or driving to an elderly person's home on election day are not only essential to the political process, they can get you noticed. Like anything else, a small task done well and with enthusiasm can lead to bigger and better things.

The authors wish to thank David Felice and James McMackin, associates at Richards, Layton & Finger, for their valuable assistance, particularly with their interviews of Senator Biden and Congressman Castle.

The Democratic Experience

John Dorsey



No democratic lawyer in recent years has garnered more respect and generated more enthusiasm than Senator Joe Biden. Biden became involved in politics within two years after graduating from law school when he ran for and won a seat on the New Castle County Council. Two years later, at the age of 29, he ran for United States Senate against an icon of Delaware politics, J. Caleb Boggs. No one gave Biden a shot. Since he was not even old enough to take the seat as Senator until after the election, people said there was no way he was going to beat one of the most respected members of the Senate. Everyone figured wrong.

Although he won his first election with only a couple of thousand votes to spare, he has gone on to win five re-election bids with wide margins. He has now served more than 30 years in the United States Senate — more than half his life. He has also been the source of opportunities for many young lawyers seeking to participate in the political process. As a long-time member of both the Senate Judiciary and Foreign Relations Committees, Biden has hired many fellow Delaware lawyers as members of his committee staffs. Working with Biden in Washington gives young lawyers the opportunity to be exposed to cutting-edge legislative and foreign policy issues. The work includes researching policy issues, drafting legislation, compiling information on judicial nominees, and negotiating with other members' committee staff personnel, just to name a few.

A number of lawyers have also worked for Biden in Delaware, acting as legal counsel and running his Delaware offices. For those interested in grassroots politics, there are opportunities to work on Biden campaigns. Indeed, if you like to roll up your sleeves and do real politics, the opportunities to help candidates abound. Although these are generally nonpaying positions, they are rewarding for those who really love politics. They also give younger lawyers a chance to learn the political process and to become known in the party. This in turn leads to other opportunities and perhaps a request from the party to run for office yourself.

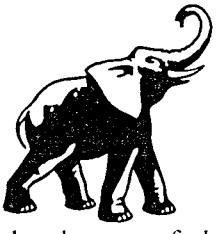
I was fortunate enough to have such an opportunity when I ran for Attorney General in 1998. A political novice who had just come to Delaware out of law school only seven years before, I found myself in a party primary before undertaking a statewide general election. Although I lost the election, the exposure provided me with the opportunity to get even more involved with the Democratic party.

Two years later, I went to work for Senator Biden as his State Director, managing his two offices in Delaware. I was also asked to act as the chair of the Democratic party's coordinated campaign that year, coordinating the efforts of all the national, state, county and local candidates in an attempt to achieve the best results for the party. I served as chair of the coordinated campaign again in 2002. Although I returned to private practice earlier this year, I intend to remain active in the Delaware Democratic party.

Democratic lawyers can find plenty of ways to be involved in the state, county or local party. Rick Bayard, for example, a New Castle County attorney, serves as the State Chair of the Delaware Democratic party. Other lawyers offer their services as officers or parliamentarians of the party. The party always needs help with legal issues on a wide range of topics, including election and filing laws and ethics rules. The bottom line is, I can't think of a better place to get involved with the political process.

The Republican Experience

Frederick L. Cottrell, III



One need look no further than our current Congressman for how to get involved at a young age and take advantage of what Delaware has to offer. Mike Castle attended Tower Hill High School and went on to graduate from Hamilton College and Georgetown University Law School. While a practicing attorney in Delaware, Castle had a general practice ranging from domestic and real estate work to business advice. He also served as a Deputy Attorney General, then a part-time position.

Castle initially became involved in politics as a member of the Young Republicans. He then ran for and won a seat in the General Assembly. At that time there were few, if any, members of the bar who were members of the General Assembly. This allowed the Congressman to use his expertise as a former deputy Attorney General and private practitioner in the legislative process.

The Congressman successfully ran as Lieutenant Governor with Pete du Pont and thereafter served two terms as Governor. He was first elected to the United States House of Representatives in 1992 and has been elected by wide margins ever since. A product of the Delaware political climate, Mike Castle has brought the common-sense approach of Delaware bipartisan legislating to Washington. He is sought out by the leadership of both parties for both his legal analysis of issues and his moderate views on controversial issues before Congress.

Castle offers young attorneys many opportunities to work on his staff. As

chair of the Subcommittee on Education Reform and member of the House Financial Services Committee, which regulates banking and the securities and insurance industries, he relies upon attorneys to help him analyze bills before the committees and issues surrounding education and financial services.

Getting involved as an attorney, however, does not stop at running for office, as Congressman Castle, Senator Biden, Attorney General Brady, Insurance Commissioner Williams, Senator Amick, Council President Coons, Representative Valihura, Representative George and so many others before them have done. Other young attorneys have worked behind the scenes as campaign chairpersons, committeepersons, election officials and, of course, fundraisers. Until recently, Everett Moore, an attorney from Sussex County, served as chair of the Delaware Republican party. Numerous attorneys serve the party at the committee level.

Attorneys in the political process occasionally need to bring their assistance to the courtroom. When Representative Bob Valihura first ran for office, he faced a Republican primary in the 10th Representative District. While winning that primary by a comfortable margin, Valihura then went on to face a tough challenge from his Democratic opponent. Of the votes cast, Valihura received less than 10 votes more than his opponent. As was expected, a legal challenge was mounted to the outcome of the election. Valihura assembled a team of volunteer Republican attorneys to help him in the cause and prevailed in the court challenge. He has gone on to win subsequent elections by large margins and he has been recognized in the House not only for his legal ability but for his constituent services.

Other attorneys have faced difficult courtroom challenges on political issues. A few years ago, Republican attorney volunteers represented an employee of the Delaware State Police in his attempt to run for the State House of Representatives. Republican attorneys also stand ready to assist on election with voter qualification and polling place disputes.

In the end, a lawyer who is interested in participating in Republican politics has many options, including working for Republicans in office like Congressman Castle, volunteering to campaign for Republican candidates for office, running for office yourself, joining your local committee, volunteering legal advice to candidates and the party, raising money from other lawyers for candidates, and researching laws and policy issues for candidates, the party or elected officials. There is so much you can do. Just get involved. ◆

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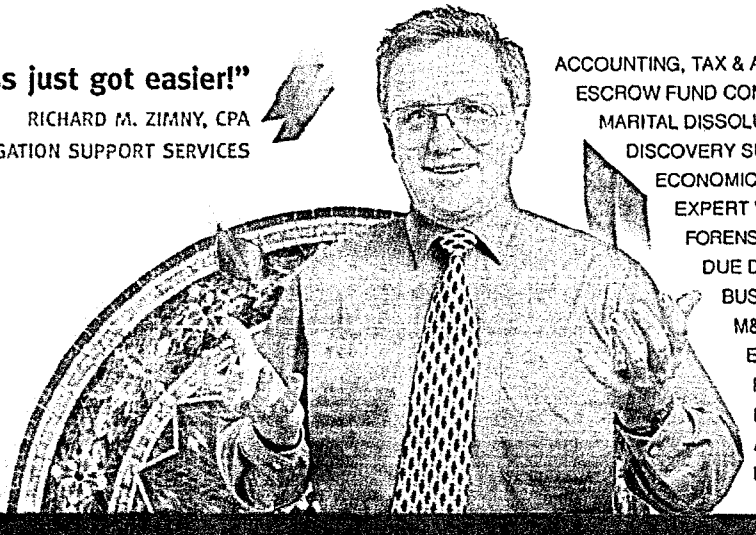

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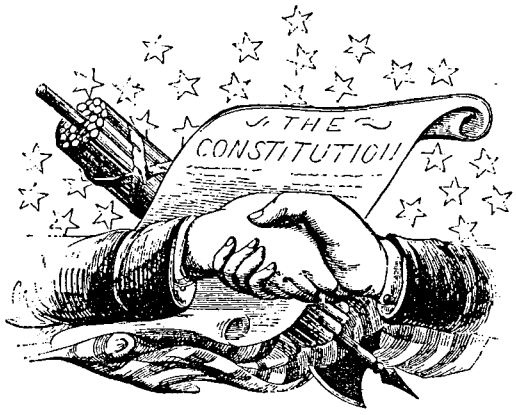
LAW AND POLITICS: Getting Involved In Delaware



Delaware, perhaps more than any other state in the country, presents opportunities for a young attorney to find a place in the political system, either as an elected official or with a more behind-the-scenes approach. The advantage to living in a small state is that you can get to know your elected officials, both local and statewide, on a first-name basis, and participate in the political process to whatever extent you wish.

Moreover, Delaware provides opportunities to young attorneys on both sides of the aisle. A moderate political climate and a "split-the-vote" approach by the voters result in a fair balance in the number of elected Republicans and Democrats. While the political system attracts persons from many professions and vocations, young attorneys traditionally have been well represented in Delaware's political arena.

Before exploring how you can get involved in politics, there are many reasons why you should want to get involved. First, campaigns, elections and politics can be a fun extracurricular activity. You meet lots of exciting, dynamic people who are passionate in their common beliefs and are joined together by their common support of a party, an ideal or a candidate. Getting involved can break up the monotony of your professional job and jumpstart your interests in what goes on outside the four walls of your office or courtroom.

Second, getting involved gives you an opportunity to give back to the community. By helping elect a candidate, or by becoming a candidate yourself, you are taking part in our democracy, which will help keep the institution alive and responsive. Candidates need your help and the parties need qualified candidates. Delaware attorneys fill both roles.

Third, getting involved allows you to advance your own beliefs on the government's social contract with its people. Do you believe the government should regulate smoking or do you believe people should be left to their own choices without government interference? If so, then support a candidate who will fight to regulate smoking — or run yourself on a platform to ban smoking.

Fourth, being involved can be good for business. It is a great networking experience. The more people you meet in the community, the more business and referrals you will receive. Moreover, if you help a winning candidate, you will have access to an elected official with whom you will be able to discuss issues pertaining to trial lawyers, defense lawyers, corporate lawyers, etc.

Finally, while many professions contribute to Delaware's political landscape, attorneys bring an understanding of the law, which assists not only in the drafting and introduction of new laws by the General Assembly but also in candidate selection, campaign structure, contribution rules, and election day issues and disputes.

Embracing politics in Delaware is as easy as calling your party's state headquarters (Republican HQ: 651-0260; Democratic HQ: 328-9036) and volunteering to help. At the grassroots level, a political novice should first consider joining a representative district committee, which is comprised of people who reside in a particular representative district. Those committee persons then elect a leadership. These local committees are responsible for helping elect candidates from their party to office, including their state representative or senator. Each local committee also tries to support the statewide and countywide candidates in the district. Thus, on election day, the committee will help turn out either the Democratic or Republican vote in an effort to help their candidates on the ticket.

On a state level, each party has a state committee primarily constituted by committee persons from the representative districts. These are the "front-line troops" in the political battle who lend assistance to candidates, raise money and get out the vote.

Maybe instead of volunteering for a party or a committee, you would rather support an individual candidate. Both elected officials and their challengers are always looking for lawyers to serve on their campaign committees and offer legal advice. Or if you are a good writer, you could draft speeches, help set the policy and message of a candidate, research policy issues, or prepare a candidate's brochure. All you have to do is offer to help.

If running for office is your goal, put your name on the ballot. You never know what might happen. Pete du Pont is fond of telling young attorneys in Delaware on both sides of the aisle that all you need to do to become a candidate here is to let the party leadership know, and in a couple of years, your name will be on the ballot. The nature of Delaware politics often makes it just that easy.

With determination and hard work, you can run an effective campaign. Ask yourself whether you have the "fire in the belly," the passion to run. If you don't think you can handle six months of knocking on doors for three to five hours a day, five to seven days a week, including all day on the weekends, then you might not want to run. Also, while most firms encourage their attorneys to get involved, you need to make sure you can balance your professional and personal life with the demands of a political campaign. Even campaigns for local office create a huge strain on personal and professional resources.

Delaware has a fair share of elected officials who are lawyers. Jane Brady is Attorney General and Donna Lee Williams is the

(Continued on page 26)

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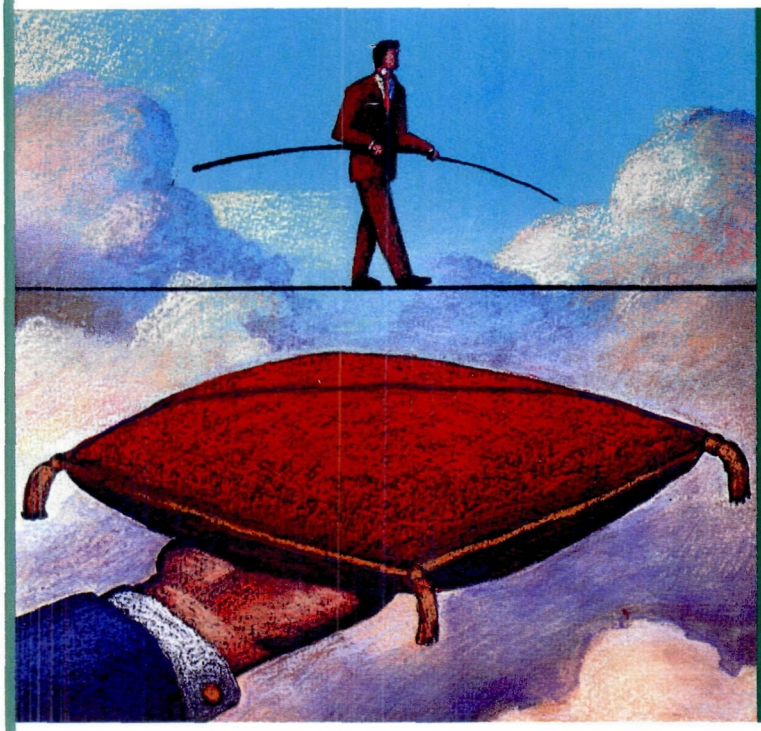

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