INSIDE: EDUCATION REFORM, THE FUTURE OF TAX POLICY, WELCOMING OUR NEW CHIEF JUSTICE

DELAWARE LAWYER

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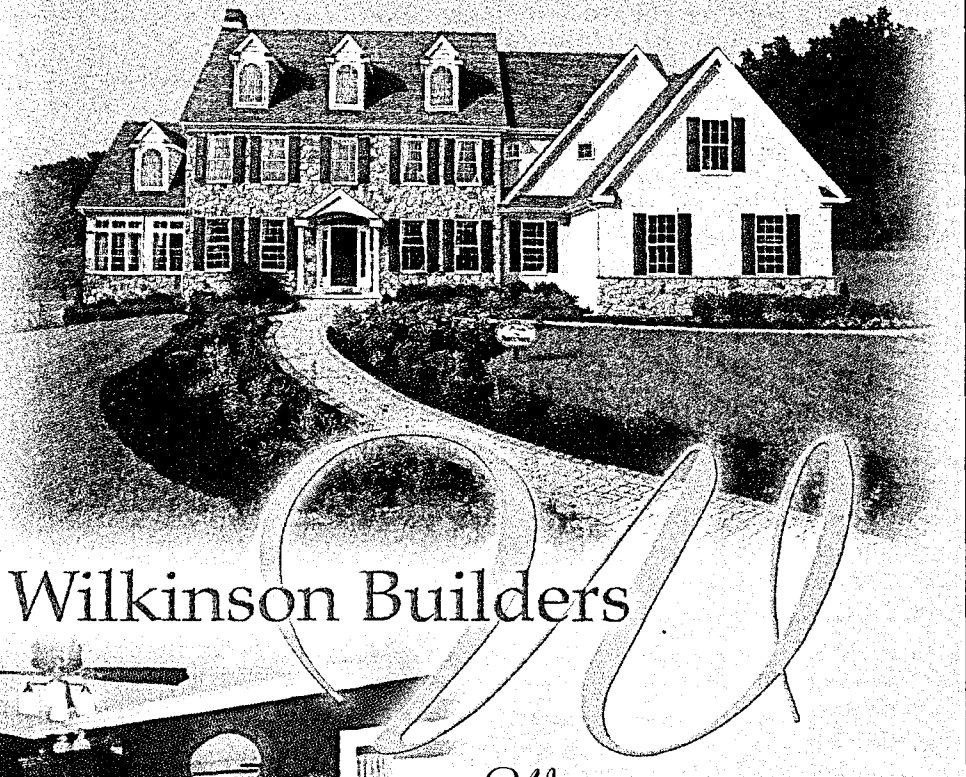

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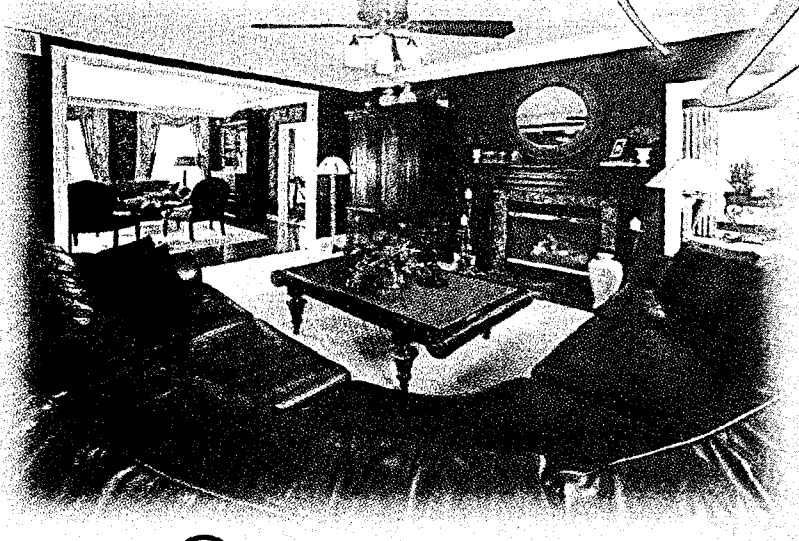

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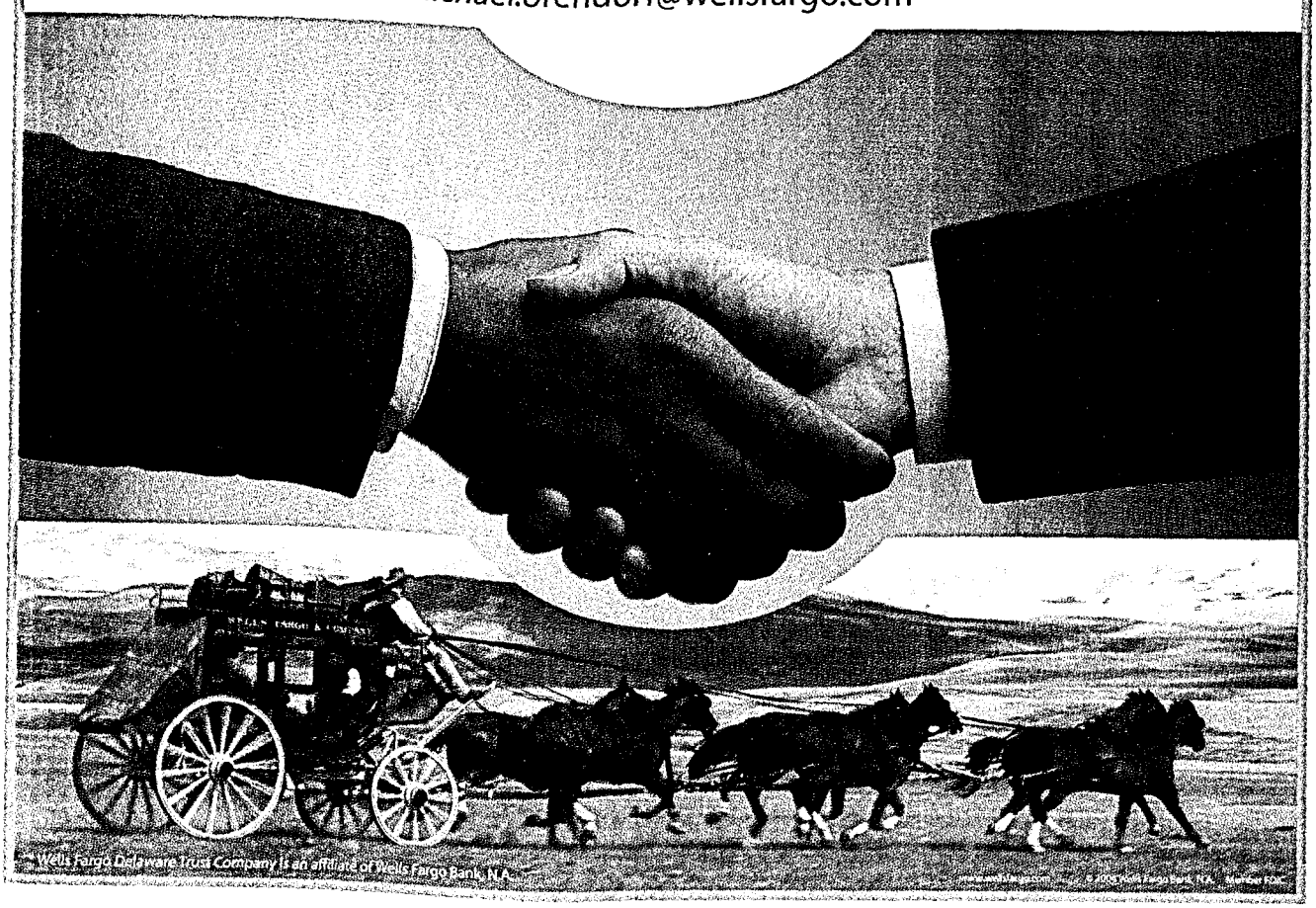

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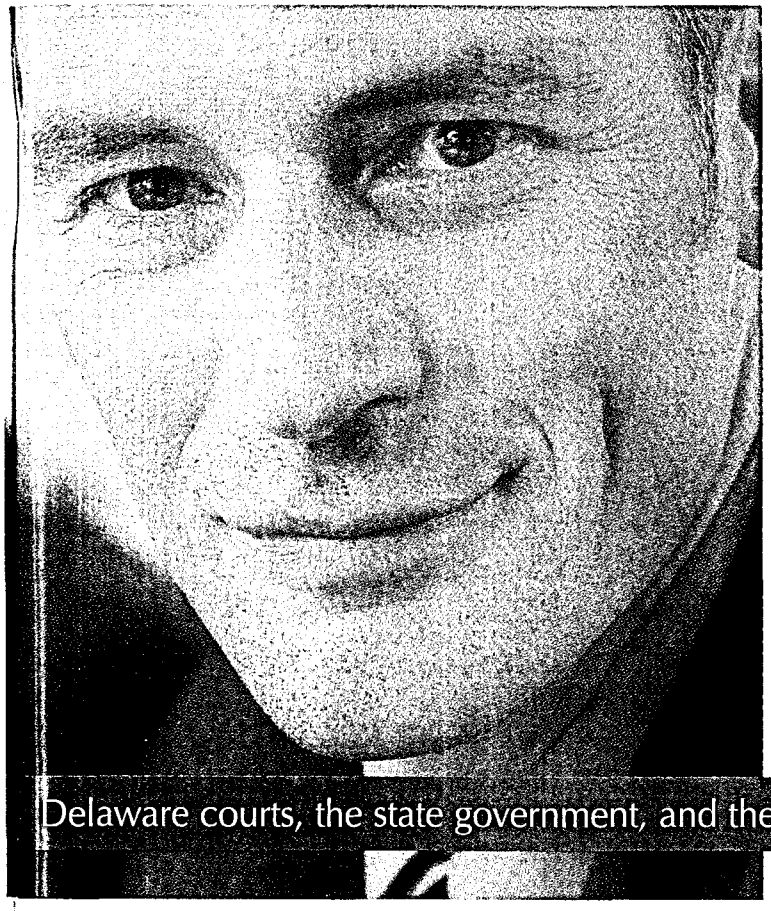

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EDITOR'S NOTE

In a state whose recent fortune has included a tradition of competent government, enviable prosperity and innovative public policy, it is easy to lose sight of the shortcomings, risks and long-term threats that Delaware faces.

This issue of Delaware Lawyer examines issues and trends of public policy in a broad array of topics. Bill Remington, who advised nine secretaries of finance over a quarter-century, offers context and warnings about the future of state tax policy. Kathi Karsnitz, much of whose practice has focused on schools, takes a critical look at the roots and future of the "education reform" movement. Ted Kaufman, this issue's non-lawyer contributor, traces how Delaware evolved within a generation from a relible Republican satrapy to a habitually Democratic state — with the same Mugwump roots. Bill Quillen surveys the three constitutional courts, on each of which he has served, as two of them change leadership. Rod McKelvie, in practice after a decade on the bench, illustrates the contributions of three outstanding citizens: a lawyer, a judge and a committed layman. Wayne Jaeschke and Kim Kluge describe a two-edged revolution in patent law, with crucial changes in the rules in the courtroom coinciding with landmark developments in nanotechology. Victor Battaglia urges returning the process of sentencing to judges, and away from published templates.

Notwithstanding the flashes of acrimony in an election year, Delaware is a land of civil public discourse, creative cooperation, and respect, indeed friendship among political rivals. This comity will be tested in the coming generation. This issue's authors show how this spirit makes Delaware special — and effective.

Chuck Durante

IN MEMORIAM

The Board of Editors of Delaware Lawyer and the Board of Directors of the Delaware Bar Foundation note with sadness the death of William E. Wiggin on August 13, 2004. The chair of this magazine's board of editors for its first ten years, Bill guided it with a rare combination of literacy, wit and sensibility, and continued to contribute mightily to this publication, through this very issue. His contributions to the bar and the community, including as executive director of the Delaware State Bar Association, were manifold and deserve gratitude, which we plan to express in a forthcoming issue.

VICTOR BATTAGLIA

Victor Battaglia has been a member of the Delaware Bar since January 1960. He has advocated for at least the past twenty years a re-assessment of policies of incarceration. He is convinced that current policies are destructive and that they weaken us as a nation, as a community and as a family. He is convinced we desperately need to focus our attention on education and treatment and away from concepts of retaliation and revenge.

WAYNE C. JAESCHKE

Wayne C. Jaeschke joined the Law Firm of Connolly Bove Lodge and Hutz LLP of Counsel in Wilmington, Delaware, in May 2002. He was the Chief Patent Counsel of Henkel Corporation and a member of the IPO Board of Directors and earlier a vice president of Stauffer Chemical Company. He is a Vice-Chair of IPO's Patent Office Practice Committee and a member of the Association of Corporate Patent Counsel. His practice includes matters before the United States Patent Office and the Federal Courts. He is admitted to practice before the United States Supreme Court and the Federal Circuit Court of Appeals. He is a member of the New York State Bar and a registered patent attorney.

KATHI A. KARSNITZ

Kathi A. Karsnitz has had a varied legal career that has included private practice with Young, Conaway Stargatt & Taylor and her current solo practice in Georgetown, Delaware largely focused on employment law, arbitration and mediation. In between, she served as Deputy Legal Counsel to Governor Carper, Director of Policy for the State Department of Transportation, Chief Legal Counsel and Director of Government Relations for the Delaware State Education Association and Chief Legal Counsel for Delaware Technical and Community College. Politics is an avocation, education law a passion.

EDWARD KAUFMAN

Edward Kaufman is President of Public Strategies, a political and management consulting firm. Since 1991, he has been Senior Lecturing Fellow at Duke University's School of Law, Fuqua School of Business, and The Sanford Institute of Public Policy, and Co-Chair of Duke Law's Center for the Study of the Congress. He is a charter member of the Broadcasting Board of Governors, which oversees all non-military U. S. Government International Broadcasting. Kaufman is on the Board of Directors of Children and Families First, WHYY, and a Trustee of Christiana Care. He was formerly Chief of Staff to Senator Joseph Biden.

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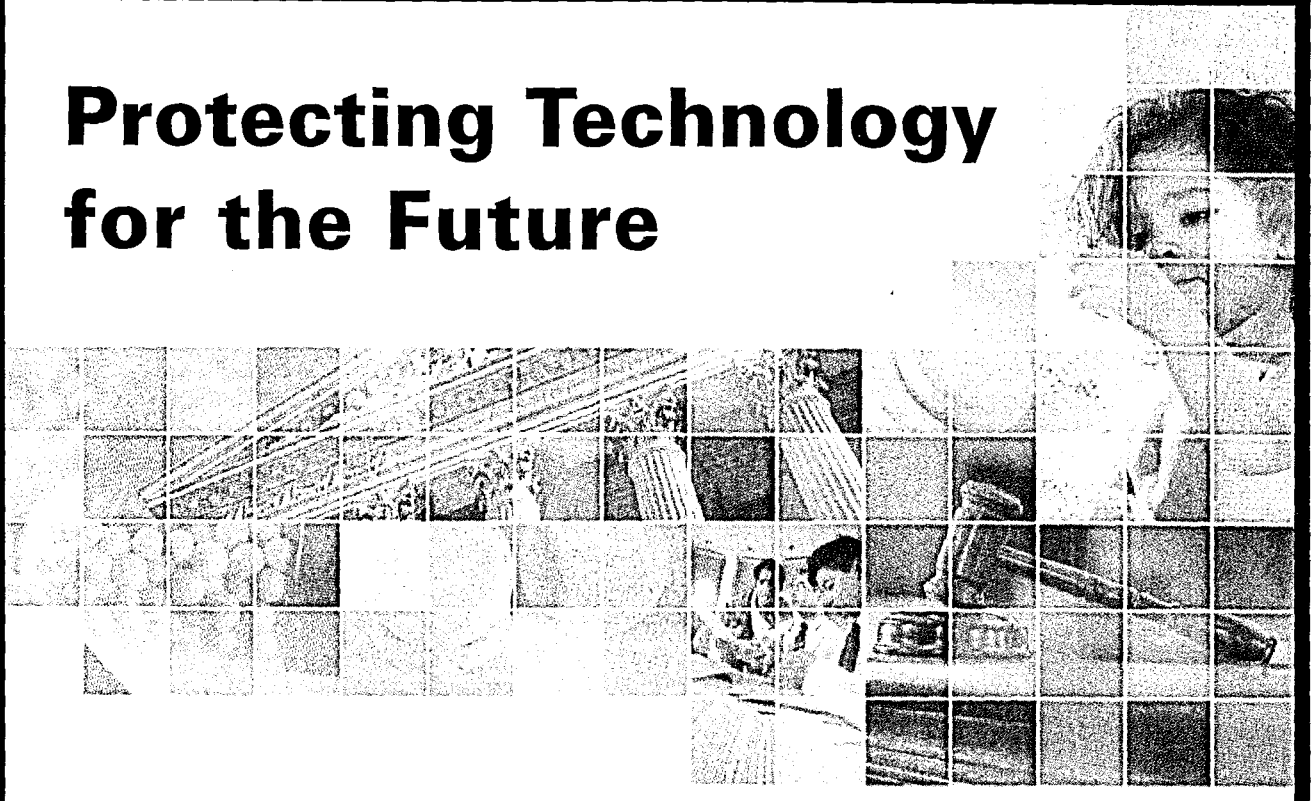

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(continued from page 8)

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Kimberley A. Kluge practices primarily in the areas of patent prosecution and freedom to operate opinions with the firm of Connolly Bove Lodge & Hutz LLP. Prior to her law career, Ms. Kluge worked as a molecular biologist with the National Institutes of Health and the Johns Hopkins University, School of Medicine. Ms. Kluge has a Bachelor of Arts degree in biology from Kent State University, a Master of Science degree in biotechnology from Johns Hopkins University, and a law degree from the University of Baltimore, School of Law.

RODERICK R. McKELVIE

Roderick R. McKelvie is a partner in the law firm of Fish & Neave. He specializes in commercial litigation. From March of 1992 to June of 2002, he was a United States District Court Judge for the District of Delaware.

Prior to his appointment to the bench, Judge McKelvie practiced law at the firm now known as Ashby & Geddes. Before that, he was a law clerk in the District Court. He has a degree in economics from Harvard University and a JD from the University of Pennsylvania. He is currently a Professorial Lecturer in Law at George Washington University School of Law.

BILL REMINGTON

Bill Remington works for the U.S. Treasury's Office of Technical Assistance and presently serves as Treasury's resident advisor to the Bulgarian National Revenue Agency, having served in a similar capacity to the Ukrainian Tax Administration. He retired from State of Delaware employment having been a Deputy Attorney General, Executive Assistant to the Secretary of Finance, Deputy State Treasurer, Deputy Director of Revenue and, for his last ten years in state government, as the state's Director of Revenue. He is a past president of the Federation of Tax Administrators (the organization of top tax officials in the 50 states).

WILLIAM T. QUILLEN

William T. Quillen is a retired Delaware State Judge, currently of counsel in the Wilmington office of Drinker Biddle & Reath LLP. He served as a Superior Court Judge (1966-1973 and 1994-2000), as Chancellor (1973-1976), as a Supreme Court Justice (1978-1983) and as Secretary of State (1993-1994). Judge Quillen graduated from Wilmington Friends School in 1952, Williams College in 1956 and Harvard Law School in 1959. While on the Supreme Court, he earned an LL.M. in 1982 for participating in the graduate program for judges at the University of Virginia School of Law. Judge Quillen has taught various courses at the Widener University School of Law since 1976 and holds an honorary degree from Widener. He is a lifelong resident of New Castle where he lives with his wife Marcia. ◆

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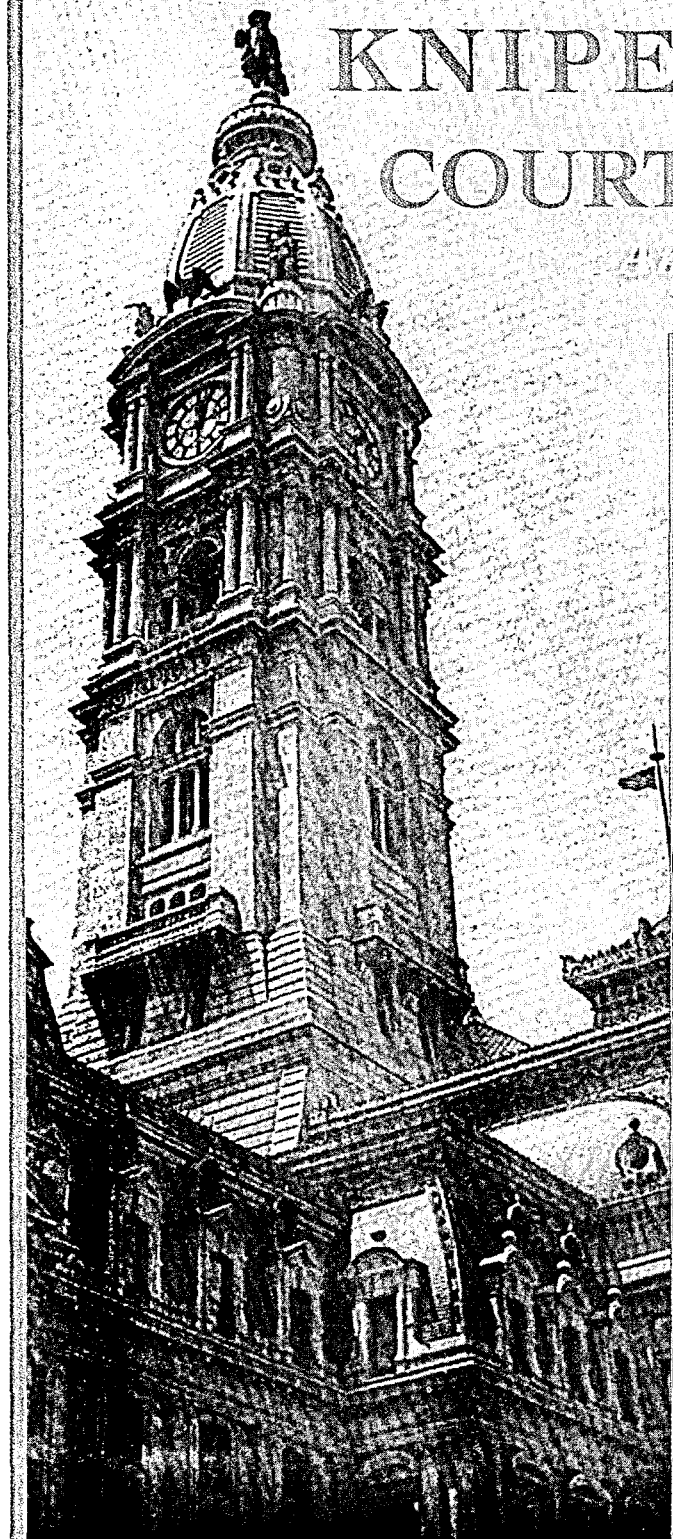

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I write to ask your help in supporting the Delaware Bar Foundation. Many of you may be unfamiliar with the work of the Bar Foundation. The mission of the Delaware Bar Foundation is to improve and to facilitate the administration of justice in Delaware. For over twenty years, the Bar Foundation has dedicated itself to providing legal services for the poor, promoting study in the field of law, fostering knowledge of citizenship rights and responsibilities and enhancing public respect for the rule of law. The Bar Foundation has assisted in funding key organizations such as Community Legal Aid Society, Delaware Volunteer Legal Services and Legal Services Corporation. These organizations help low-income people obtain legal services and enhance their ability to meet the basic needs of life that many of us take for granted such as decent housing, safety from domestic violence, protection from consumer fraud, access to medical benefits and sufficient resources to raise healthy children.

To help carry out its mission in the long term, the Bar Foundation has created an Endowment Fund and established an Endowment Committee charged with the task of raising funds through planned giving. The Committee recently has launched its *Legacy of Giving Campaign* and is now soliciting gifts. This campaign does not seek to compete with the annual Combined Campaign for Justice, which, as most of you recognize, is the annual fund-raising drive to benefit DVLS, CLASI and LSC. Rather, the emphasis on the *Legacy of Giving Campaign* is on long-term planned giving.

As you know, interest rates on Lawyers' Trust Accounts (IOLTA) have decreased dramatically over the past several years. Interest on these accounts is an underlying source of funding for the organizations served by the Bar Foundation. Contributing to the Endowment Fund *Legacy of Giving Campaign* can help ensure some much needed stability in the funding sources for the Bar Foundation's endeavors on a longer-term basis.

As the Bar Foundation's current president, Harvey Rubenstein, has said, "*the Delaware Bar Foundation is the collective conscience of the Bar, and the new endowment fund will be its strongest expression.*" Contributing to the Bar Foundation's Endowment Fund is a way to make a lasting contribution to the community as a Delaware lawyer.

I am proud to call myself a Delaware lawyer. As a group, we have always been there for those who need us. We have set the standard for excellence in our courts and in our conduct with others. Let's see to it that we create a lasting legacy of excellence for those who will come after us. Why? Because it is the right thing to do.

Karen L. Valihura

Karen Valihura

Chair, Endowment Committee
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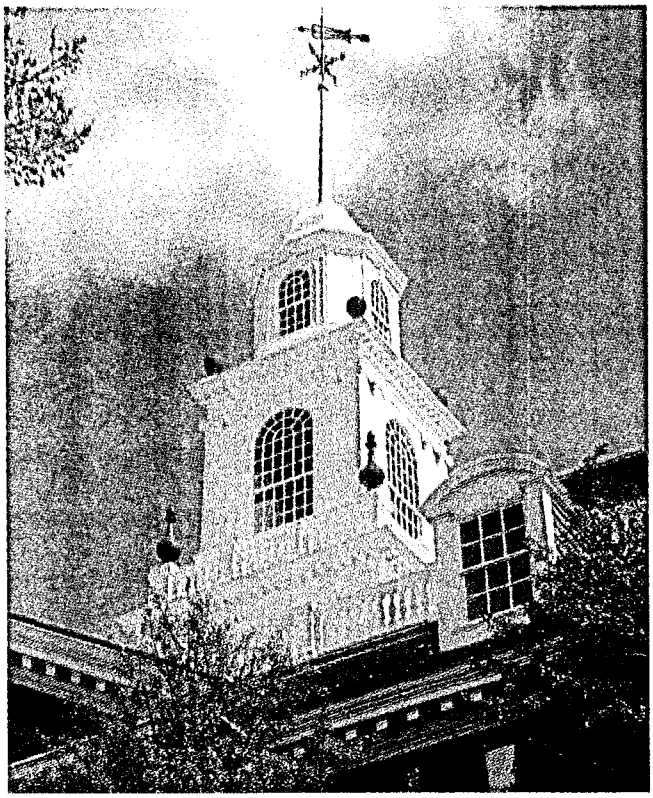
FEATURE

William M. Remington

DELAWARE'S TAX SYSTEM IN A DIGITAL AGE



Legislative Hall

Farsighted people designed a sound tax system for Delaware. It has been part of our success story. Circumstances change, though, and we need to be concerned about how the tax system will affect our future.

The commonly applied criteria for evaluating a revenue system are:

- Adequacy and certainty. Does the system provide consistent funding for the expenditures that the public, through its elected officials, desire? Are taxpayers afforded certainty about their tax liabilities?
- Fairness. Are similarly situated taxpayers treated similarly? Are the differences among taxpayers reflected appropriately in differential treatment?
- Efficiency. Is the tax system administrable at minimal expense? Can taxpayers comply with their duties with a minimum of cost and disruption? Does the application of a tax cause tax-motivated transactions and thus distort private decision-making?

I might add another: Competitiveness. Does the revenue system act vis-à-vis alternative places of residence or business activity so as to promote economic activity and generate — or at least not erode, other than by application of the tax itself — taxpayer wealth?

These criteria compete with one another. For example, a simple tax system that is easily administered and simple to follow (for example, a head tax) would probably be rejected as unfair.

The adequacy of the state's revenue sources should be evaluated from the same point of view as a portfolio intended to assure personal spending power in the present and future. A volatile portfolio is suitable only for risk-takers who can adjust spending, draw down savings or incur debt to keep revenues and spending in balance. The same is true for government. A suitable portfolio produces reasonably predictable revenues that do not require tax policy changes or wild and inefficient swings in government spending from year to year — for example, by repeatedly hiring and laying off teachers and other workers to meet constraints occasioned by volatile revenue swings.

In 1977, the year Governor du Pont declared Delaware bankrupt, the state's revenue portfolio heavily depended on

the personal income tax, which yielded about $160 million, or about 40 percent of the General Fund. Corporate and personal income tax together represented almost half of General Fund receipts.

Excessive dependence on the personal income tax was a weakness in the portfolio that a combination of good fortune and bold design — in a succession of income tax rate reductions — have helped remedy. In fiscal year 2003, personal income tax accounted for less than 30 percent of General Fund receipts. Reduced dependence on the personal income tax proved fortunate during the 1990s and early 2000s when boom and bust produced enormous (and difficult to forecast) investment and self-employment income and then rapid reductions in income from the same sources.

Dependence on personal income tax also decreased as other sources of revenues grew. In 1977 the bank franchise tax and the State Lottery together accounted for less than one percent of General Fund revenue. Abandoned property yielded insignificant revenue. In fact, but for the growth in these revenue sources, personal income tax in 2003 would still have been nearly 40 percent of the General Fund — just below 1977 levels, despite the fairly dramatic reduction in rates.

Delaware finances are considerably sounder as a result of the Financial Center Development Act and the success of the State Lottery. And there is an almost palpable connection between the growth of the financial industry and the good economic fortune of Delaware and Delawareans. But a certain amount of caution is in order.

The financial industry trades almost entirely in information. After all, banks — particularly credit card banks — dispense credit and take in payments by means of transferred credits from other institutions. They dispense and take in information, not dollar bills or bullion. Information, especially in the digital age, has no size or weight. For this reason, within limits, the industry can be fairly mobile. Further, digitalization tends to produce high economies of scale; the first "product" is very expensive, but succeeding outputs, being more or less intangible, can be produced almost without cost. Economies of scale drive consolidation. When financial institutions consolidate, it is hard to predict the resulting physical configuration of the business, but the relative mobility of the industry increases its range of possibilities. This flexibility can operate for or against Delaware, depending on its competitive position, but the flexibility of location adds risk to the portfolio. Delaware needs to continue to think ahead on how it can distinguish itself when these decisions are made. It is likely that changes to the level of taxation will not be the most significant factor; more on this subject below.

The Delaware State Lottery operates as a business, competing for the consumer dollar against other forms of entertainment, in particular, but not exclusively, with alternative gambling venues. This competition can lead to only two alternative outcomes. Once a certain number of gambling facilities are in operation, it is extremely unlikely government will take positive action to reduce the scope of the industry; everything from jobs to continuing use of valuable infrastructure depends on its viability at the previously authorized level. At the same time, pressure will continue to be applied in neighboring states to permit similar facilities; eventually the pressure will produce irreversible results. Once we face the inevitable competition from other states — Pennsylvania approved slot machine gambling as this article was being completed — the only long-term way to maintain a semblance of the status quo will be to expand the authority to conduct slots operations in Delaware or to increase the share the state takes from each legal gambling dollar, or both.

State government can become very much like an individual addicted to gambling. It "needs" the money. In the long term, that perceived need can lead to ever increased levels of state-promoted gambling. This is not a question of the state taking a libertarian stance toward gambling and placing a "tax" on the activity. On the contrary, the state, by law, tightly controls, and in that sense is involved in, operating the gambling facilities, authorizing a tiny circle of licensees to operate an enterprise of enormous potential profit, to some degree protected from the free enterprise system. That the state disallows new entrants undercuts the idea that its position is laissez faire. Ultimately, thoughtful citizens can question whether the proper role of the state is not that of establishing and reinforcing a vision of what it means to be a model citizen (whether through promotion of volunteerism, physical fitness or public service) and whether continually expanding its own gambling venues or the amount to which it relies on and promotes (in fact and in law, in a dignified way) gambling as a recreational activity is consistent with what they should expect of our government.

"Abandoned property" (also called unclaimed property or, somewhat improperly, escheat) has also become a very strong source of state revenue. Under the statute, 12 *Del. C.* ch. 11, property belonging to an "owner" that finds itself in the hands of a "holder" for more than the "dormancy period" (in Delaware, generally, five years) must be turned over to the state to be paid out upon eventual receipt of the true owner's claim. Under federal common law (applied because of the conflicting claims of states each under its own law), the state law governing abandoned property is in the first instance that of the residence of the owner, according to the books and records of the holder. If the state of residence is unknown, the property is turned over to the state of incorporation of a corporate holder. The holder of unclaimed or undisbursed dividends is typically the issuer. Thus the dividends are turned over to the issuer's state of incorporation. Amounts so received are considered part of the General Fund and available for appropriation by the General Assembly.

There are several reasons why revenue from this source has grown so steadily. Aside from the resolution of some legal issues in *Delaware v. New York,* 507 U.S. 490 (1993), heightened awareness of the formerly obscure laws has increased compliance. Such awareness probably results as much from the stick of enforcement as from the carrot of amnesties and government-generated publicity. Enforcement involves high levels of activity of auditing firms, some acting for states, others for holders. Firms auditing for states in general are compensated with contingent fees, though Delaware has, uniquely, resisted this means of compensation whenever practical. Firms representing holders seek to bring about retroactive compliance (often following long periods of non-compliance) on a basis favorable to their clients. Together, these efforts have increased both retroactive, one-time revenues and increased levels of annual reporting.

The substantial past lack of awareness (and sometimes aggressive ignorance) of the unclaimed property law may keep the level of returns from compliance activities fairly high for the next few years. At some point, however, retroactive payments will decline. Moreover, the Supreme Court in *Delaware v. New York* might be said to have issued a subtle invitation to Congress to override federal common law. It is a fair guess that the "state of incorporation" rule would have difficulty surviving Congressional action. In fact, Congress nearly reversed *Delaware v. New York* after the Court's decision. States entered into an agreement that put an end to Congressional interest, but Delaware's financial leverage under this agreement is by now minimal.

In summary, decreased dependence on personal income tax may not have produced a huge decrease in the adequacy and consistency of tax receipts overall, as its substitute sources — the bank franchise tax, State Lottery, and abandoned property — are less than solidly reliable performers into the indefinite future.

Thus, it would be wise to prepare to mitigate the risk of declining revenues from gambling, banking, and abandoned property — in particular by protecting other, more reliable revenue sources and by committing our resources to assuring the long-term competitiveness of our state as a place in which to invest and remain. How might protecting existing sources be effectuated?

First, we need to consider how existing sources might evolve under current and foreseen economic and demographic circumstances. It is well known that our population is aging, our economic output increasingly composed of services, the inputs and outputs of our economy increasingly digital, and — in part a corollary of digitalization — the nation's (and state's) economy less localized and in fact more internationalized. Inputs, outputs and competition are increasingly global in source, destination and location.

Determining the ultimate effects of an aging population on Delaware's ability to provide quality public services may be difficult. It is clear though that persons over 65 years of age will, as a statistical matter, support themselves with pensions, income and principal from savings, Social Security and to a smaller extent with wages. It is also clear such persons will be an increasing share of our population. $2,000 in pension income is now exempt from taxation for those under age 60, while persons 60 years and older can exclude $12,500 in retirement income. Moreover, each person 60 or over can subtract an extra $110 from his or her tax bill, a benefit not dependent on income. Thus, a person with $1 million in income who is over age 60 can exempt from tax pension (and interest and other forms of passive income) up to $12,500 even if still employed and, on top of that, can subtract an extra $110 from Delaware taxes. Yet, ironically, elderly people who need to work because they have neither investment income nor pensions enjoy no tax preference.

It is not difficult to argue, particularly as the population over 60 quickly grows and is increasingly affluent, that, to allow benefits such as those just described, Delaware will effectively limit its ability to mitigate the tax burden on middle-class families raising children and can in fact reduce the state's ability adequately to provide for their education.

There is always interest in protecting the elderly, whom we often think of as living a precarious existence on a fixed income, from the additional burden of and worry about taxes. This concern is legitimate. With the aging population, however, we need to target these benefits to those for whom this conception fits. Tax benefits, once conferred, are seldom withdrawn even if imperfectly conceived, so great care must be taken that if any future tax benefits are to be enacted for the elderly, they be based on a clear purpose and carefully designed to achieve that purpose, to prevent their impact from exploding in future years.

We should be cautious about decreasing the gross receipts tax because its stability is part of the reason Delaware has been able to weather past economic storms. The corporation income tax, however, is a tax in trouble.

The proportion of manufacturing employment continues to decline, nationally and in Delaware. Conversely, the service component is increasing. Fortunately, in another excellent feature of its revenue portfolio, Delaware does not rely on a retail sales tax, which typically applies only to the sales of goods, not services, and often excludes sales of essentials like food and prescription drugs. Delaware instead has a broad-based tax on business gross receipts, though it does not apply to very small businesses. The tax rate is very low (0.72% for retailers, 0.384% for providers of services, 0.180% for manufacturers).

Many argue that this tax is in principle unfair because it is based on gross sales, not income. Thus, a business losing money has nonetheless to pay the tax. There are generally asserted two bases on which the fairness of a tax can be premised. First, a fair tax should be proportionate to the taxpayer's ability to pay. Second, to be considered fair, a tax should be proportionate to benefits received from the taxing government. Neither criterion is easily applied.

Though it is often argued that the gross receipts tax fails the first criterion, it is not clear this is true. The ability of a business to pay any expense is in fact roughly proportionate to its sales, since the existence of receipts from sales is the basic source of the ability to pay expenses. The fact that those making business decisions have made decisions or presented them in such a way that certain taxes are compared with profits determined after other costs (including executive compensation and depreciation) are taken into account is an artifact of presentation, not necessarily of the ability to pay. Second, though it may be difficult to determine the value of the benefits a business, including a business running a net current loss, receives from public services (like the education of its workforce and their children, police protection of the place of employment and of employees), it is clear the value is not zero. Once it is established the value is not zero, it seems like proportionality to gross income is not a terrible measure, if the measure is in any case inevitably arbitrary.

Because the gross receipts tax is so broadly based, it is in general not subject to erosion as the economy shifts to new modes of trade and production. For this very reason, the gross receipts tax is one of the state's most stable sources of revenue. We should therefore be cautious about decreasing the gross receipts tax because the stability of the gross receipts tax is part of the reason Delaware has been able to weather past economic storms. The informed public and its representatives should be aware that the asserted policy arguments for reducing this particular tax are not as weighty as they first appear. Reducing gross receipts tax revenue would also likely make the portfolio itself more volatile and increase the vulnerability of the state's revenue sources.

Some might argue that the corporation income tax is equally broad based. The corporation income tax, however, is a tax in trouble. First, it is highly volatile and fails to provide adequately consistent revenues. Because a corporation can carry losses back to previous (profitable) years, declining revenues typically combine with high refunds to produce wild swings in net taxes. Second, the increasing use of pass-through entities — especially limited partnerships and limited liability companies — have cut dramatically into the tax base of the corporate income tax. Last, the way in which a multi-state corporation calculates the amount of tax attributable to any particular state (see 30 *Del. C.* § 1903) is typically a complex audit subject, although at times a productive one. For what the tax produces, it is comparatively very cumbersome to administer and enforce — and to comply with. For instance, in 2003, the corporate income tax brought in approximately the same amount as the realty transfer tax, a tax that is simple to comply with and administer and requires little enforcement. In addition to the personal income tax, there are many reasons to consider the corporate income tax as a prime candidate for a tax cut when resources permit.

Corporate income tax and gross receipts tax do have something in common. Both are subject to reduction for companies that can show they invested in and provided jobs in Delaware. Though these "Blue Collar" credits may in fact induce some investment and expansion, they are also available for companies that would have done the same thing without the credits. I am willing to take a leap of faith on the subject, even though the benefits of these credits are unsupported by empirical analysis.

Since, however, these credits are in principle indistinguishable from state checks written to support businesses that engage in certain behavior, it might be appropriate that the identity of corporations taking these credits and a description of the activity that created eligibility — not the amount of the credits — be made public information. Then, transparency of the program will allow the public to be aware and judge whether it cares to continue, diminish or expand the program.

Digitization of products (which is one more aspect in which a "goods" economy has turned into a "service" economy) creates additional tax policy concerns. Delaware's gross receipts and corporate income taxes both are, in general, premised on the place where delivery of goods occurs but, in the case of the gross receipts tax on services, are taxed only when the service is performed within Delaware.

At the same time, the seller who delivers a product by e-mail or otherwise via the internet does not typically know the physical location of the customer. A new set of rules (ideally adopted by all states) is needed to assure that state taxes are applied to digital products as they might be to physical counterparts so that all states avoid the risk of multiple taxation. Until this occurs, the tax base can be threatened by the law not providing clear rules to this rapidly expanding form of commerce.

Further, as ones and zeros are weightless and formless, distribution can take place without the physical presence of the seller or a person acting for the seller. So far, the Supreme Court has continued to hold that physical presence is a necessary precondition for taxation. *Quill v. North Dakota*, 504 U.S. 298 (1992). Digitization facilitates commerce with minimal physical infrastructure. This means that both gross receipts tax and corporate income tax can be eroded by the conversion of physical goods into digital services — at least to the extent that Delaware has less than its proportionate share of employment and real estate devoted to production of digital products, and to the extent it, like the seller, has no ability to track exactly where delivery occurs.

Last, as commerce becomes increasingly international, both the state and federal governments, especially states, who do not have the advantage of information-sharing treaties, become much less effective in auditing, collecting and otherwise exercising enforcement jurisdiction over potential taxpayers whose records and primary operations are overseas.

Moreover, internationalization has provided a means, to some degree legitimate, for businesses to reduce U.S. taxable income in favor of income realized in low tax jurisdictions. Delaware, like other states, depends on appropriate federal tax policy and an effective, adequately resourced, internationally aware IRS.

The last note on taxation has to do with tax administration. Delaware has one of the most modern and effective tax information systems in use anywhere. The state is a pioneer in the use of imaging, e-file and bar encoding technologies. These technologies support first class taxpayer service operations and enable targeted and smart enforcement and delinquent tax collections. The state tax administration has been able to justify, through documented taxpayer satisfaction and effective enforcement, continued investment in modern technology.

This has been a sound investment for Delaware. However, Delaware's tax policy piggybacks on federal tax law. To the extent the federal government is ineffective or underfunded, the premise of the piggyback is undermined. Thus, Delaware is expected to audit only Delaware-specific entries on returns and to rely on federal audits to detect under-compliance with the starting points in the piggyback system. Federal audit rates are now historically very low, and much of the personal income tax audit activity has in recent years centered on the earned income tax credit, on which Delaware does not piggyback. Recent federal audit initiatives have to do with countering over-the-top behavior, like secreting money overseas and using foreign credit cards, bank records concerning which are difficult to investigate, to support personal expenditures. One wonders how effective the IRS is in uncovering unspectacular overstatements of itemized deductions or understatement of self-employment income. The kinds of thorough audit sampling that would help to prove or disprove effectiveness in this connection are no longer permitted, so we are left to wonder and speculate. My own speculation is that the amount of spectacular non-compliance is so high and the tax authorities so out-maneuvered by over-clever advisors that the sort of zero-tolerance approach that has been useful in fighting other types of illegal behavior, in New York City for example, is not a viable option.

In short, states may need to rethink the policy of keeping hands off federal return entries. They should team up with the IRS in a divide-and-conquer approach to tax enforcement. Some of this has already begun, and, all things being equal, if the cooperative initiative is well managed, states should be eager to engage. Doing so will assure honest citizens that they are making a sound decision to stay honest and will perhaps allow them some tax relief that otherwise would not be available.

Notwithstanding this catalog of issues, however, tax policy is ultimately not the solution to many problems that it could be shouldered with — like the concern sometimes voiced by policy makers that tax relief should be devised for preservation of agricultural lands to save us from food shortages. Delaware has one of the most sound set of tax policies anywhere, as measured by the criteria at the beginning of this article. Delaware policymakers should not turn to taxes as the instrument of first resort to improve Delaware's business or social climate. We have to understand that adjusting our tax system to promote employment and economic development can be a dangerous distraction.

It's easy to change tax law and appear to have done something important, but not so easy to assure the existence of other business needs, like a well educated, reliable workforce — competitive with the products of Asian and European education systems. My short experience overseas makes me believe our top students are as good as any in the world. But our average students spend much less time engaged in learning than those being educated in other parts of the world. Tinkering with tax policy will not keep business in the United States, or Delaware, if basic skills are higher and less expensive elsewhere. Tax policy debates can divert attention from other effective interventions — most of which are expenditure, not tax policy issues — particularly if those interventions need considerable time to be effective and thus need all the more immediate attention. ◆

FEATURE

Ted Kaufman

SOLVING A GREAT MYSTERY: HOW DELAWARE BECAME DEMOCRATIC

It all started, as most things in Washington do, with a lunch. It was 2001 and I was having lunch with a former member of Senator Bill Roth's staff. As whenever former Delaware U. S. Senate Staffers get together, we were agreeing how lucky Delaware was to have been served in the U.S. Senate by men (unfortunately no women) of integrity, intellect, and independence. I was voicing a popular sentiment in Delaware, that the race between Senator Roth and Governor Carper in 2000 would have been a cliffhanger if not for a few chance incidents.

My friend then said something that shocked me. He said he was talking to the head of one of the Republican committees in D.C. who had responded to him when he voiced the same sentiment; "Oh no, don't you realize that all things being equal, Senator Roth would probably not win that race. Delaware has become a Democratic state." I was surprised because both the Republican National Committee and the Democratic National Committees had poured a great deal of money into the race, but I was shocked by the comment that Delaware was a Democratic state. That started my search to determine if Delaware was a Democratic state and why.

I had started in Delaware politics in 1971. Back then everyone "knew" that Delaware was a Republican state, where it took almost a perfect alignment of the stars, or candidates, for a Democrat to be elected statewide. All the major statewide positions were Republican — Governor W. Russell Peterson, Lieutenant Governor Eugene D. Bookhammer, Senators J. Caleb Boggs and William V. Roth and Representative Pierre S. du Pont IV.

How had I missed it? In 2001, Democrats Governor Ruth Ann Minner, Lieutenant Governor John Carney, Senator Joe Biden, and Senator Tom Carper held practically all the major statewide offices. The lone Republican was Representative Mike Castle who had a national reputation as a leader of the small group of moderate Republicans remaining in the Congress. I had not missed that Delaware had broken an old tradition in the 2000 presidential race. Historically Delaware mirrored national results in every presidential race for the last 50 years. Not only had Delaware gotten the right result, it had fallen very close to the right percentage for each candidate. In 2000 that all went out the window. Delaware for the first time in years voted for a losing presidential candidate, Al Gore. That was not big news, as the race was so close that a few votes in Florida could have kept Delaware's streak alive.

The real news was that while the national race was a dead heat Delaware had gone for Al Gore by 13 percent. The D.C. Republican operative was right.

The big questions now were how and why? Let's start by looking at the national political landscape in 1971.

In the '60s the Democratic Party had been violently split by the Civil Rights movement and the Vietnam War. As a result all Democratic Party candidates were in danger of losing a large portion of their party support as soon as they took a position on either of these two issues. This was much less of a problem for the Republican Party candidates. The contrast was clear in the national conventions. In 1968 the Democrats had riots at their split Chicago convention, and in 1972 after bitter fights they nominated star-crossed candidate Senator George McGovern. The Republican conventions were comparative love feasts.

In the '70s the leadership and power in the congressional Democratic Party was in the hands of senior southern Democrats. The uneasy truce between southern Democrats and the rest of the party simmered until the early '90s. Then it became clear that the south was going Republican. By the mid-'90s Republican congressional leadership consisted of Trent Lott of Mississippi, Don Nickles of Oklahoma, Newt Gingrich of Georgia, and Dick Armey of Texas. The Georgia delegation in the House of Representatives, all Democratic in 1975, is now 8 Republicans and 5 Democrats.

For the Democratic Party, however, it was bad news, good news. The bad news was that the south went Republican; the good news was the south was Republican.

Surely the Democrats lost many seats in the Congress, but the southern switch allowed the Democrats to solidify, in a way not previously possible, around some core issues such as gun control, state's rights, and many social issues. At the same time, driven by the southern wing of the party, the rising influence of single-interest groups like the Christian Coalition and National Rifle Association began to split the Republican Party in many states.

Look at the battleground states in the 2004 Presidential election. They do not include safe states such as New York and California (Democratic), Texas and Georgia (Republican). The South is solid Republican — with the exception of Florida with its large number of retired Yankees.

Notably, Delaware, which was a swing state for practically all of the 20th century, is a sure state for the Democrats. Some Republican lists include it as a battleground state but only because the Philadelphia media market covers most of New Castle County. A Republican operative said, "We list Delaware because we are buying the television for Pennsylvania which covers most of Delaware." Salisbury TV can reach downstate for little cost.

In 1971, it took almost a perfect alignment of the stars for a Democrat to be elected statewide. Now, Delaware is a Democratic state.

These national trends interacted with developments in Delaware. Historically, many people who moved to northern Delaware in the '60s to work had registered as Republicans. They agreed more on the issues with Northern Democrats, but were turned off by the conservative bent of the Delaware Democrats. Before Baker v. Carr mandated reapportionment, Delaware in general and the Delaware Democratic Party in particular were dominated by Southern Delaware. In 1968 Democratic Governor Terry, as a reaction to the riots in Wilmington, had the National Guard patrol Wilmington long after any other city in the nation. The initial result was a Republican sweep in the 1968 elections, including Governor Terry's loss and the election of Hal Haskell, the only Republican mayor of Wilmington in modern times. A secondary result was the continuation of "Northern Democrats" registering and voting as Republicans in Northern Delaware.

In 1972, the Delaware Democratic Party was as split as the national party. Delaware Democratic Party conventions were full of fights, mostly splitting north and south. In the Democratic convention that year there were fights for just about every party post and nomination. A good example of how convention fights lead to electoral losses was a hard fought battle for the nomination for lieutenant governor between State Senators Clifford Hearn of Wilmington and Allen Cook of Kent County. Hearn won the nomination, but lost the general election because of massive Democratic defections in Kent and Sussex.

These fights have receded. A major statewide primary has not occurred in the Democratic Party in years. Democratic conventions are boring but united. Conversely, the 2000 Republican gubernatorial nomination followed a suicidal primary between John Burris and William Swain Lee. Even convention decisions on party offices mirror the party changes since 1971. The most recent Republican convention had a major fight for the largely ceremonial position of national committeeman. The battle was characterized by Celia Cohen of the Delaware Grapevine, as a battle over whether the party would move rightward, "even though the voters here favor statewide candidates who are centrist and pragmatic."

Over the last 30 years there has not been much of a change in a statewide strategy for candidates. The change has been in the results. In 1971, the Republican candidate needed to hold onto the registered Republicans in New Castle County and convince the Democrats in Kent and Sussex Counties to vote on their conservative leanings. This strategy was verbalized in the popular political rule of the time that "a Republican candidate had to cross Duck Creek up 10,000 votes to win."

Obviously the Democratic candidate's strategy was to do the opposite.

What has changed is the ease of implementing the strategy. National trends have made downstate Democrats much more comfortable voting Republican, while upstate Republicans are voting Democrat much more often.

One of the first steps in a statewide campaign is to get a computer and do "targeting" — the process of determining from past election returns where the "persuadable" candidates live. This data is essential because it is axiomatic that the major objective of a successful campaign is to spend the vast majority of its resources on persuading the persuadable. The location of the persuadable districts has markedly changed in the last 30 years. The least persuadable districts of an earlier era have now become the most persuadable. The ring along the Pennsylvania line from Brandywine Hundred through the city of Newark used to be solidly Republican. Kent County used to be solidly Democrat.

When I examined this data with some friends in 2001, we were sure the data were wrong. We contacted the firm that does this nationally and the expert sounded like he knew Delaware intimately, even though his only visits to the state were driving on I-95 on the way from Washington to New York. He said the districts that used to be solidly Republican are in an affluent suburban area outside a major metropolitan area. He said the districts that used to be solidly Democratic are in a rural area. This was happening everywhere in the country, he said.

After the 2000 election, much was written about the split between red (Republican) and blue (Democratic) states. It is true, as far as it goes, but much of the split is intra-state. The best way to visualize the phenomenon is to pretend you are flying over the northern United States on a clear night at 60,000 feet. The large clusters in and around the cities are where most Democrats live. Everywhere else is predominantly Republican. The cities were always predominantly Democratic; it is the suburbs that have changed to vote more Democratic. The states, except some in the Deep South, with the large cities will be going Democratic in a big way. As I write this the presidential race is nearly a dead heat but Senator Kerry leads in California 51 to 39.

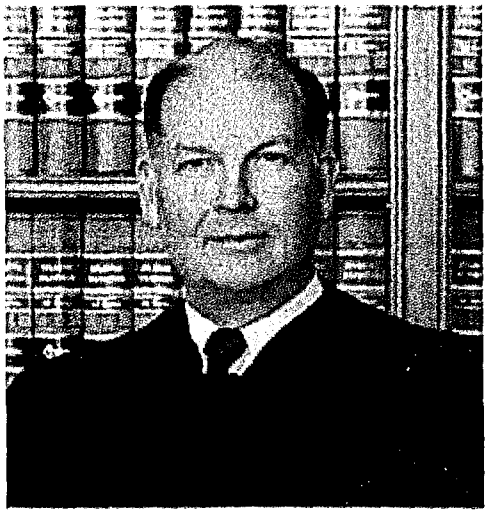
What does all this mean? It means that right now Delaware is a Democratic state. Does that mean Republicans cannot win the major statewide offices? No. Campaigns are still about candidates. When and if the Republicans run moderate, center of the road candidates like Mike Castle they will be competitive. However, they face two obstacles. One is that moderate candidates can only get the Republican nomination after a bruising intra-party fight with the ideological right. Two, and partially because of one, the Republican party is not attracting moderate candidates. Most knowledgeable observers say that it is the Democratic Party of Delaware that now has the long bench of attractive potential major statewide candidates.

Winston Churchill's comment, "It has been said that democracy is the worst form of government except all the others that have been tried" is truer than ever. One of democracy's greatest strengths is its ability to change. This brings to mind another Churchill quote: "It is a mistake to try to look too far ahead. The chain of destiny can only be grasped one link at a time." ◆

FEATURE

William T. Quillen

MR. CHIEF JUSTICE AND THE THREE-COURT EXPERIENCE



Chief Justice Myron T. Steele

The appointment of a new Chief Justice is always an exciting milestone. The well-received appointment of Myron T. Steele as the seventh Chief Justice since the formation of the separate Supreme Court in 1951 has given rise to particular enthusiasm among the bench and bar.

Part of the reason for the favorable response has been the Chief Justice's broad spectrum of experience — extensive private practice with the outstanding Prickett firm, unusual professionalism in his service as a deputy attorney general, and dedicated service on the state's three constitutional courts as a Superior Court judge, a vice chancellor and a Supreme Court justice. His exceptional service and intimate friendships were well-reflected at his Dover swearing-in ceremony on May 26, a gem among such events, wherein every court, every county and many bar and community groups touched by the Chief Justice's 34-year legal career participated with obvious joy. From my limited exposure, never has an appointment of a Chief Justice generated such positive expectations from such a broad spectrum of constituencies, expectations which may not be a total plus to the Chief Justice as he undertakes his difficult constitutional responsibility as the presiding justice of the Supreme Court and "the Administrative head of all the Courts in the State."

Beyond the immediate rite of passage, the ceremonial transition touches me in two respects, perhaps tangentially related. First, any lawyer newly admitted in the 1950s nostalgically focuses on the office, its prior occupants and its personal nature over the last half century. Many older lawyers cherish significant relationships with each of our seven chief justices. Second, I am drawn to the nature of Chief Justice Steele's three-constitutional court experience (one shared only by the late Chief Justice Daniel F. Wolcott, the late Justice William Duffy, retired Justice Joseph T. Walsh and me). I am curious if that experience by way of background or foresight is helpful in making the best state court system in the country even better.

The Chief Justice assumes his high office at a time when the national perception of Delaware Courts, both at law and equity, is incredibly favorable. But the Chief Justice has said everything is on table and we should welcome his invitation and the transparency being graciously tendered. My view of the current nature of the three constitutional courts comes from a personal perch that already runs the risk of being distant and stale in today's changing environment. But after more than 20 years as part of the Delaware judicial enterprise and over 40 years as a Delaware lawyer, one has thoughts, even if the existence of an audience is doubtful. First, some personal inkling of seven good men, only to illustrate by a single person's experiences the warm relationships that have characterized Delaware's bench and bar.

I remember Chief Justice Clarence A. Southerland (1951-1963), a Victorian gentleman born in 1889 who had served in World War I, for his selfless service to our state, bench and bar. In his 60s he left his senior partnership at Delaware's oldest law firm to head the newly separate Supreme Court and, in his 70s, after his 12-year term as chief justice, he headed the blue ribbon commission that rewrote the Delaware cor-

porate law. That is pretty good senior lawyering. But my fondest recollection focuses more narrowly on two personal events. In 1959, he graciously, in advance of the regular bar admission ceremony, invited Larry Fenton and me to his chambers for admission to the Delaware Bar because he had learned we (strangers to him) were not eligible to begin our JAG service duties before admission. Ten years later, a rather immobile Chief Justice Southerland, years after his retirement and shortly before his death, with the help of his special friend, then-Vice Chancellor William Marvel, courageously appeared as the featured guest at our home for a party honoring his judicial soul mate, then-Chief Justice Wolcott. A seated, immaculately tuxedoed Southerland, with all his physical limitations, appeared to enjoy the occasion as the other guests, female and male, each in turn, would kneel before the large wing chair for a moment of joyful conversation and intellectual stimulation. He literally held court with more grace than ever. We forget the "good years" of the early 20th century, when the service performance of a gentleman extended to cultivated manners and social responsibilities to the mutual pleasure of all.

Southerland's successor, Chief Justice Charles L. Terry, Jr. (1963–1964) was a joyful, fun-loving man with a heart of gold, kind to strangers as well as friends. Terry was my mentor, whom I loved and whom I served as a part-time Superior and Supreme Court law clerk in Kent County in 1961–1962 and as administrative assistant in 1965 during his first year as governor. Wherever Terry was, he readily accepted responsibility for the task at hand as if nature had ordained his leadership role. He was at home in organizing the national trial judges, at the conference of chief justices or in your living room. But it never went to his head. When Terry was first appointed as a justice on the Supreme Court, my wife Marcia addressed him as "Judge Terry" and then immediately realized his title had changed and apologized. "That's all right," Justice Terry replied, "I'm not that kind of a justice." You could not be with Judge Terry and not have fun.

Chief Justice Daniel F. Wolcott (1964–1973) was a New Castle intimate, perhaps the town's most notable citizen and a member of my father's poker club. In 1966, he took the time to encourage a somewhat anxious me at 31 to accept Governor Terry's offer to submit my name to the State Senate as a nominee for the Superior Court. Wolcott, like his father-in-law, Judge Richard S. Rodney, always supplied historic perspective sometimes to deflate the "grandeur" of a current event. He told me: "In 1830, Harrington was appointed to the bench at 27."

I served under Chief Justice Daniel L. Herrmann (1973–1985) on the judiciary for many years beginning in 1966 and particularly appreciated his energetic leadership as chief justice when I was a Supreme Court justice in the 1978-83 period. I did not always please the chief justice and I have seen him turn a distinct shade of purple in response to my remarks; I feared for both our lives. But I like him more all the time. He was perhaps the most visionary among the seven as best illustrated by his undertaking, with limited success, of constitutional reform. Reform was in his blood; he never tired.

Chief Justice Andrew D. Christie (1986–1992), with chambers next to mine, was my conscientious judicial tutor in my first stint on the Superior Court from 1966 to 1973. A Superior Court judge for over a quarter of a century, he had unusually outstanding academic credentials and had served as a law clerk for the legendary Chief Judge John Biggs of the Third Circuit. As his colleagues and law clerks will attest, Christie was a much warmer human being than his Presbyterian judicial demeanor would permit on court display. He once downplayed the importance of expert testimony as to why two teenagers had sex by noting that "it feels good." From him, I learned the satisfaction that comes from persistence in one's occupation. I was elated when he, my senior in every respect, received a long overdue promotion to the Supreme Court to fill the vacancy caused by my departure in 1983.

The 21st century chief justices are known to all of us. I have known, admired and leaned upon Chief Justice E. Norman Veasey (1992–2004), Delaware's foremost goodwill ambassador in corporate law and legal ethics, as a close friend and confidant since our Richards Layton & Finger days in 1963. Veasey achieved much for Delaware on the international stage and much for the courts, particularly in new facilities. Yet, the hallmark of his tenure was its emphasis on civility.

Among Chief Justice Steele's less prominent accomplishments was his practice as a deputy attorney general, with extraordinary skill and tact, before me during my Superior Court rotation to Dover in the early 1970s. Our new Chief Justice, with a keen sense of Anglo-American history, has labored in the vineyards for a long time and my guess is that he will be remembered for cultured professionalism resulting from broad experience and historic perspective.

Does Chief Justice Steele's road to the top suggest a future trend? With only one prior example, the three-court experience as background for chief justice is obviously not a time honored prerequisite. Two chiefs, Southerland and Veasey, had no prior judicial experience; three, Terry, Herrmann and Christie, had only Superior Court experience before being elevated to the post-1951 Supreme Court. There are explanations for all of this, of course, including a smaller bench in the early years, the once relative equality of law and equity for promotion purposes (a state happily renewed by the latest appointment to the Supreme Court), and matters as lofty as politics and personal friendships.

The explanations, however, do not create a pattern and indeed one can readily add to the unclear picture. The chancellor generally considered our best since 1951, Collins J. Seitz, was never promoted to the Supreme Court, probably because he was deemed too valuable as chancellor; he was ultimately lost in 1966 to the feds. The justice with the best judicial background and perhaps our best overall judge in the post-1951 period, William Duffy, was never chief justice. There have been six post-1951 justices, a talented lot, with no prior judicial experience: Randy J. Holland; Henry R. Horsey; Andrew G. T. Moore, II; Clarence A. Southerland; James M. Tunnell, Jr.; and E. Norman Veasey. The past tells us that circumstance and timing will continue to be crucial in the appointment process, which is, after all, political in nature.

Judges, of course, tend to think all high judicial appointments should come from the bench, and the current governor, with her own up-the-ladder Horatio Alger story, seems to prefer promotions through the ranks. With an ever growing state judiciary and an even more (perhaps geometrically more) growing interest of excellent young

lawyers in being career judges, it seems likely we will have more promotions, including promotions of judges from the Family Court, Municipal Court and the Court of Common Pleas, in the tradition of William G. Bush, Carl Goldstein, Grover C. Brown and Peggy L. Ableman. Corporate specialization as background for chancery may limit the multi-court experience; only the chancellor among the current five chancery judges has Superior Court background. While there will likely continue to be special times when a governor will reach out to tap a Southerland or a Veasey, judicial experience, as a positive differentiating factor, is likely to become more significant, not less.

People frequently ask which of the constitutional judgeships was my favorite and I am reminded of Audrey Hepburn at the end of Roman Holiday when the princess on tour was asked at a press conference which was her favorite city and she began her response diplomatically: "Each in its own way. ..." The truth is that each judgeship in its own way is a very different job and they do not compare easily. From a personal perspective, the biggest advantage of serving on three courts is the fresh invigoration that almost always comes with change. But the immediate question is how much does the experience contribute positively to the background of a chief justice. My answer to that question is "a lot," both in terms of understanding immediate problems and achieving general preparation. A mere description of the offices speaks volumes for their background value to a new chief justice, and a current description might suggest some potholes in the immediate future, bearing in mind that future potholes lie in the eye of the beholder.

A good Superior Court judge is the host of the courthouse. The judge deals with lawyers, prosecutors, public defenders, litigants, criminals, police, witnesses, expert witnesses, jurors, fellow judges, spectators, the press, crime victims, bailiffs, court reporters, court clerks, court staff, administrators, secretaries, receptionists, librarians, correction officers, and security officers. It sure helps if the Superior Court judge likes people and if he can work in an open public forum with diverse groups, as well as individuals, on a daily basis. The judge's confident presence should give comfort, not add anxiety. And, in my view, the good Superior Court judge needs to be visible, a presence in his home, the courthouse. In short, the Superior Court judge, regardless of gender, needs to be an old-fashioned small town businessman secure in his shop, well-founded in his background, clear in his purpose and kind to his employees and guests.

It helps, of course, if the Superior Court judge can do his legal job as a competent lawyer. The judge should not be immobilized by the availability of appeal but he should be conscious of it as he makes a record in every case. The Superior Court judge has wide discretion in making his record, written or oral, by motion or at trial, by opinion or order. But, however made, the record should reflect care in decision-making and care in judicial demeanor. Decisions can be unnecessarily reversed, not because of the result, but because of a failure to explain adequately the factors that produced the result. The most significant compliment I ever received about my legal work was from a Supreme Court justice who said only five of us really know how good you are. The job of a Superior Court judge is hard, the time and people pressures are real and daily, not imaginary and sporadic, but a competent Superior Court judge can make a good record in each case if the judge cares enough. Competent Superior Court judges in Delaware have largely negated any reason for "tort reform" as that term is currently being used.

The Superior Court judge, regardless of gender, needs to be an old-fashioned small town businessman secure in his shop, well founded in his background, clear in his purpose and kind to his employees and guests.

Special responsibility by a Superior Court judge must be taken in criminal law. As lawyers, criminal law is our peculiar enterprise, and the Superior Court is our forum to punish those proven guilty and to vindicate the victims of human indecency. So far, we in Delaware have been spared newspaper exposure of a notorious capital conviction of an innocent person but we should not be smug or complacent; special case-by-case responsibility and courage must be assumed by the Superior Court judge to preserve the reasonable doubt standard in practice as well as form. At the same time, the criminal court must play its societal role as the dispenser of justice. The good judge knows his courtroom is society's substitute forum for the human battlefield and appreciates that society must perceive that the courtroom is adequately performing its function of enforcing the criminal law. Sometimes, in our defense of defendant's rights since the Warren Court, we lawyers have forgotten our legitimate and necessary "law and order" role in society. But a Superior Court judge cannot.

Today's challenge for the Superior Court is litigation volume and its own growing court size. Before President Judge Terry's reign (1957-1962), the Superior Court, with only five judges, was somewhat notorious for the judges not speaking to each other. By various means, Terry molded the court into a smoothly working statewide court, unusually collegial for a trial court with a one-judge quorum. The court now has 19 judges, 13 in New Castle County; it has, at least de facto, largely eliminated the unifying practice of county rotation and of course has a staggering caseload, particularly so on a per judge basis in New Castle County.

Without leadership in place on a daily basis, there is an almost natural setting for judicial fragmentation, inconsistency, frustration, idiosyncrasy and possible deterioration of quality. This is true of all large courts and we are not immune. With the departure of President Judge Henry du Pont Ridgely by promotion, after the loss by retirement of Resident Judges Vincent A. Bifferato and William Swain Lee, the Superior Court has perhaps lost its greatest adherents to the Terry statewide trial court tradition. The new president judge needs to be a strong, persuasive leader. When then-Governor Elbert N. Carvel elevated William Duffy to succeed Terry, Terry gave Duffy surprisingly brief advice: "Be president judge." The management issues facing the Superior Court loom large and, if initiative by the court is not boldly taken, the new Chief Justice will face additional burdens and the Superior Court might suffer a loss of its proud autonomy. (As we go to press, the governor has nominated as President Judge James T. Vaughn, Jr., a judge of incredible good will who fully appreciates the role of the Superior Court including the subtleties of the criminal law.)

The Court of Chancery is a wonderful goldcoast perch for a judge. When pushed, I have said the position of vice chancellor (no administrative responsibility) is the best job in the system and, if one maintains a fondness for modern corporate law, that still is true. Indeed, being in chancery can be a heady experience. When I was chancellor, I sometimes thought we chancery judges should be required to recite daily a humility pledge designed to remind ourselves that we are merely part of a judicial system — that judges who hear death penalty cases, hear family violence matters, repair personal injuries and protect us against drunken driving are really running the world while we are luxuriously playing and continuously creating an ever increasingly complex version of Monopoly. The management problems of the Court of Chancery are minimal — only five chancellors, no juries, small staff, little security worries, and lawyers who are paid and thus thoroughly prepared. The chief jobs are to service the almost always polite corporate bar and to do equitable justice in accordance with high sounding historic maxims.

Our chancellor must know corporate law and provide an immediately available, first class national forum for major corporations and prominent out-of-state law firms and chancery corporate litigators. The highlight of my stint as chancellor was the appearance of Cyrus Vance, a reminder of the West Virginia legacy of John W. Davis and our own William S. Potter. Our own corporate bar is better than most of the transients and the ability of Delaware lawyers to produce briefs overnight and prepare corporate arguments is still a wonder to behold. The judges of the Court of Chancery carry the reputation of the state and by excellent performance protect our state's interest. They also excel in the unheralded non-corporate equity cases, often quite sensitive and deeply personal. Obviously our chancellors and vice chancellors have to have unusual ability to write clearly about complex matters with a confident, creative sense of equity. As one who used to read every chancery opinion in order to teach equity for the bar review course, I am always overwhelmed by the writing dedication of our equity judges. I would be surprised if there is another trial court in the country that can match chancery in its demand for professional judicial writing. The easy familiarity with and ready citation of each other's opinions also suggest a court that is in harmony.

The chancellors have undertaken more jurisdiction recently and it will be interesting to see how it plays out. But the current chancellor, with his Delaware roots, hometown patriotism and scholarly manner, personally embodies well both the Delaware chancery tradition since 1792 and the modern cutting edge corporate judge. The chances are Chancellor Chandler knows well what he is doing. If I have any worry, it is a narrow one about an "activist" judiciary in other than normal modern use of that word. As hinted above, generally I confess a concern about judicial celebrity and particularly the celebrity status that chancery judges are assuming in their out-of-court commentary on the state of the law, a status of which I had only a tiny inkling as chancellor in the 1970s. In this regard our chancery judges are not unique; judges countrywide are writing and speaking on all sorts of subjects, suggesting, I suspect, a dissatisfaction with their sense of judicial isolation and the limitation imposed by the judicial function. But, with the recent attention directed to the activities of Justice Antonin E. Scalia (and others over time), some caution may be due. The Court of Chancery generally is in grand condition, grand enough to be left to its own devices and skills, and with the current chancellor, smart enough to realize it is part and not the whole of the state judiciary.

The Supreme Court, as a five-member body, of course requires direct communication on a regular basis among the justices in its daily judicial business. It is by definition a collegial court and harmony is an absolute prerequisite for success. When the court was expanded to five in 1978, we had a wonderful, congenial group and, while Chief Justice Herrmann had a very close relationship with Justice Duffy, he generally shared Supreme Court administrative issues as well as judicial matters with the whole court. We in general decided to treat all cases the same with randomly assigned three justice panels hearing oral argument in every case unless argument was waived. This is an isolated, judge-focused court involving five specific human beings and its routine requires close-knit, swift group response work habits and mutual respect. Chief Justice Herrmann was very conscious of the court's image as an institution and would not infrequently, after doing battle, subordinate his views to achieve consensus. There is every reason to believe that the new court, given the background and friendships of the justices, will be a highly cohesive unit almost by nature.

Time, caseload and philosophy have obviously dictated some changes, particularly with regard to the frequency of oral argument. But, because Delaware has no intermediate court of appeals and there is in general an appeal as of right to the Supreme Court, our Court is somewhat unique. I personally relish that uniqueness. Our Supreme Court is in effect the final arbiter of Delaware, and thus national, corporate law and a county court of appeals for three county jurisdictions. This means our justices get a full spectrum of state law. That constant exposure is not only educational at the most practical level, but it also tempers the natural tendency of other high courts toward ivory tower aloofness through self-proclaimed philosopher kings. I remember Chief Justice Herrmann saying he did not think the Supreme Court should have to decide who gets the piano. I replied I thought it was neat that we did. Time may be on his side, but I hope not. Our system is great. Moments of glorified national spotlight; moments of humility, no cause too small; each justice a mere tenant, none a permanent fixture. It's a great court.

Our Supreme Court has broad discretion in exercising its appellate power. On occasion, I think we who have served as justices have exercised the power too broadly. *See*, e.g., *Zapata v. Maldonado*, 430 A.2d 779 (Del. 1981). If more responsibility were placed on the trial courts to develop the criminal law or the corporate law, it may be a boom to the system. The primary job of any judiciary is to resolve individual cases, one at a time, day after day; if one does not like the privilege of that level of problem solving, one should not be a judge. When I hear appellate judges talk about giving guidance, the advisability of advisory opinion jurisdiction, creating through opinions a treatise on criminal law, I confess I shudder — slightly. I have thought on occasion that national conferences of appellate judges should be illegal. I worry that we are drifting afar from determining if there is error serious enough to require reversal. Part of the issue could be addressed simply by applying the scope of review rule strictly and consistently. Another tack would be discretionary policy deference to the trial court as the court that has to regularly deal with the problem even in some areas of legitimate policy dispute (e.g., the Melson formula in Family Court).

A good judicial system might be helped by what the Supreme Court does not decide. There will be times when even a conservative Supreme Court must be the policy maker, frequently triggered by lack of action by the legislature or the lower judiciary. I do not believe anyone wants to return to days when our courts suggested even recent common law rules were not open to judicial policy review. There are also times when the pressure to have a decision is as important as the decision itself or when the lower court decision is so clearly wrong that immediate detailed correction is demanded or when the trial courts are not stepping up. Nor does the position of Supreme Court justice lack for heady moments of its own. Our Constitution permits broad appellate review and I am sure our Supreme Court justices will want to venture forth on occasion. It is their choice to make and we are lucky in having a good experienced five as decision makers.

Mere talk about the prior chief justices and constitutional courts shows how the heritage of the office and the nature of the job of each court can contribute mightily to the background of a good chief justice. In large part, the thing speaks for itself. I am going to leave it at that without relating the job duties of the three constitutional courts to the job duties of the chief justice under his constitutional mandate and thus without completing the circle. The Chief Justice and his court will develop their own identity by their own review of the law and their own choice in the exercise of discretion. While each of us gets our little piece of the Chief Justice, none of us can ever know the office. It is a fourth level, a city on its own hill. If you recall, Audrey Hepburn did not complete her diplomatic answer; rather she said, "Rome, by all means Rome!" Welcome to Rome, Mr. Chief Justice. Hopefully, we will all be around in twelve years to pay tribute to your sense of history, your persistence, your civility, your service, and your vision. Above all, let us look forward to telling each other how much fun it was when Myron T. Steele (2004-2116) was Chief Justice. ◆

FEATURE

Kathi A. Karsnitz

DELAYED GRATIFICATION? EDUCATION PER THE FREE-MARKET THEORETICIANS

The recent death of former President Ronald Reagan generated inevitable comparisons between the conservative avatar and his current successor. Conclusive comparisons must await the perspective of additional years. At this stage, though, at least on the surface, there appears a striking difference in their approaches to public education. In his 1980 campaign, Reagan promised to disassemble the nascent U. S. Department of Education. A year after taking office, in his 1982 State of the Union address, President Reagan announced he would deliver on his campaign promise by dismantling the Departments of Energy and Education.

Twenty years and $147.9 billion later, President George W. Bush signed into law the No Child Left Behind Act of 2001 (NCLB). Crowning years of educational "accountability" efforts, the law promised "to close the achievement gap with accountability, flexibility and choice, so that no child is left behind." It envisions that through annual testing in reading and mathematics between grades 3 and 8 ("accountability") to assess proficiency measured by state-developed standards ("flexibility") and the promise of parental choice (perhaps in vouchers) all students will reach high standards by 2013-2014 and all students will graduate from high school.

Notwithstanding its laudable purpose of addressing the educational needs of the nation's most disadvantaged, the law has generated vociferous detractors from both the left and right. How did the public education arena morph from one largely funded and managed by local and state government to a behemoth federal showground? Conservatives are quick to point out that the U.S. Constitution does not oblige the federal government to provide a education. Progressives, on the other hand, many of whom initially supported NCLB, are now crying foul.

Since President Kennedy first proposed federal aid for education in 1961, most Democrats have not opposed a federal role in education — if supported with sufficient funding. What has driven the GOP into the fray that has generated such an expanded and expensive education bureaucracy?

The answer may lie in a long-standing but relatively obscure end-game grounded on a pillar of conservative thought: free enterprise. Privatization of public functions has been a goal of Republican administrations since the Reagan era. Privatizing education is particularly attractive for several reasons, not the least of which is obviation of the National Education Association and its state affiliates. While the notion of privatization as the ultimate goal of NCLB may seem counterintuitive in light of the overwhelming weight of its regulatory scheme, the "choice" aspects of the law and parallel developments occurring as a result of previous education reform efforts signal an environment more likely than ever before to support privatization of public education. A look back over the federal role in public education is instructive.

Education Reform: A Nation at Risk

The modern era of education reform — culminating in the "accountability" movement — began with the publication in April 1983 of A Nation at Risk by a National Commission on Excellence in Education, chartered in 1981 by Reagan's first

secretary of education, Terrel Bell, just months before Reagan's promise to abolish the Department of Education. With rhetoric worthy of the Cold War era, the commission pronounced:

> What was unimaginable a generation ago has begun to occur — others are matching and surpassing our educational attainments. If an unfriendly foreign power had attempted to impose on America the mediocre educational performance that exists today, we might well have viewed it as an act of war. As it stands, we have allowed this to happen to ourselves. We have even squandered the gains in student achievement made in the wake of the Sputnik challenge. Moreover, we have dismantled essential support systems that helped make those gains possible. We have, in effect been committing an act of unthinking, unilateral educational disarmament. Our society and its educational institutions seem to have lost sight of the basic purposes of schooling, and of the high expectations and disciplined effort needed to attain them. This report, the result of 18 months of study, seeks to generate reform of our educational system in fundamental ways.

The report generated the dawn of modern education reform and increased federal activity in public education. Before 1983 federal education legislation consisted largely of the 1958 National Defense Education Act, and the Elementary and Secondary Education Act of 1965. In addition, the Civil Rights Act of 1964 and the Education for All Handicapped Children Act reflected vast changes in the nation's psyche that would significantly affect the business of the public schools.

After 1983, a plethora of federal education legislation was enacted, culminating in the 1994 passage of Goals 2000: Educate America Act and another amendment to the Elementary and Secondary Schools Act of 1965. Goals 2000 provided the springboard from which standards-based reform leapt into the mainstream of public education. Although it was couched in terms of support for voluntary standards, the federal presence nevertheless stood for the "standard" to which each state should aspire formulating the measure of what children should know and be able to do.

Goals 2000 was the outgrowth of the 1989 Education Summit held in Charlottesville. Richard Elmore writes that during the 1980s, the National Governors' Association, then headed by Governor Bill Clinton, agreed to a "horse-trade: greater flexibility and less regulation for schools and school systems in return for more tangible evidence of results, reckoned mostly in terms of student achievement." The most obvious vehicle for the trade took the form of charter schools, defined in 1994 legislation as a "public school operated under public supervision and direction, that is non-sectarian, provides elementary or secondary education or both, does not charge tuition and complies with relevant federal education law."

The trade proposed by Democratic interests may have been a form of garlic to ward off the free-market vampires who found a voice in both the Reagan and first Bush administrations. William Lloyd Boyd has observed, "The growing ascendancy of the conservative belief in individualism, competition and market forces has forced both the Labour and Democratic Parties to rethink their philosophies and to try to reinvent themselves to compete more effectively for middle-class voters." While charter schools do not provide the type of school choice favored by proponents of vouchers and tuition tax credits, they are a departure from traditional, centrally-controlled public schools. A primary difference between school choice through the use of vouchers or tax credits and the charter school model, however, is that the latter must be a "public" school and the former clearly need not.

As Goals 2000 played out in America, the political tensions began to mount. The Republicans had enjoyed three straight terms in the White House between 1980 and 1992. The stain of Watergate had begun to fade but the economy hit the skids and a new Democrat in the form of Bill Clinton crashed the party in the 1992 election, pledging among other things to reinvent government. Clinton championed using a variety of school "choices" including magnet schools, charter schools and choice of public schools across district boundaries, at the risk of alienating a core constituency, the politically powerful and ever-present National Education Association.

Throughout the early years of education reform the NEA and its local affiliates were frequently accused of opposing education reform and indeed being a cause of the need for reform. Seniority, a mainstay of traditional collective bargaining, was viewed as a means by which ineffective teachers could impede students' educational progress. Whatever the merits of the accusation, the influence of the NEA over education reform is inescapable. What is less clear is whether some proponents of reform and its brain-child, choice, support school choice as a means of dismantling, as opposed to reforming, public education or whether the real goal is to eliminate public school teachers as collective bargaining units, thereby disemboweling the NEA and its allies.

Cause or Effect

During the 1996 election, while states were developing and implementing the new educational standards and accountability requirements, school choice continued at the forefront of the national debate over education reform. The NEA continued to be a lightning rod. "Unions: Part of the Problem or Part of the Solution?" asked Education Week. Candidate Bob Dole blamed the NEA for "not only being the single biggest obstacle to school reform, but also for being the original cause of the nation's education decline ... constantly [thwarting] the will of parents and consumers." Clinton, on the other hand, was an early and strong supporter of charter schools and school choice, two issues the unions have voiced concern with or opposed. Regardless of the NEA's disquiet over school choice, it continues to be a formidable Republican foe. In the 1993-1994 election cycle, NEA contributed $2.2 million to Democrats, just $26,000 to Republicans.

To be sure, school choice was a hot issue in 1996. "Choice," however, was no longer a question of choosing among public schools. In a July 1996 interview with Jim Lehrer, William Bennett, secretary of education under President Reagan and education advisor to Senator Dole, argued for "scholarships," public funds paid to parents directly for use as tuition at private schools, to "create a supply of schools unlike anything you've ever seen, and you will then see competition." Richard Riley, Clinton's secretary of education, on the same program, insisted that pub-

lic dollars have no place in private pockets. Here lies a fundamental difference between old-school Democrats and new-breed Republicans: free enterprise or government.

The free-market approach to public education has a long history in conservative political thought. In a 1955 essay, "The Role of Government in Education," Milton Friedman, Nobel laureate and dean of free market economic theory, argued, "Government's primary role is to preserve the rules of the game by enforcing contracts, preventing coercion, and keeping markets free." In support of universal education, he accepts the premise that a literate and educated citizenry sharing common values is a predicate to a stable and democratic society and accordingly, the federal government may legitimately require its citizens to obtain an education measured by minimum standards. "For the lowest levels of education, there is considerable agreement, approximating unanimity, on the appropriate content of an educational program ... the three R's cover most of the ground."

Thus, at the elementary school level, Friedman appears to support both government imposed standards and tax dollars to ensure compliance. He expressed doubts, however, as to the propriety of regulation and subsidy beyond the early grades. "At successively higher levels of education, there is less and less agreement. Surely, well below the level of the American college, one can expect insufficient agreement to justify imposing views of a majority, much less a plurality, on all."

Friedman further argued against the justification for government-administered school systems, recognizing, it seems, the additional expense entailed in such operations. He surmised that the arrangement was the necessary by-product of the decision to subsidize education. But, he argued, financing the administration of public schools places other schools at a disadvantage because non-public schools get little or no benefit of the dollars spent on education. A man ahead of his time, Friedman proposed the use of vouchers to address the dilemma presented by the desirability of an educated citizenry and the need to subsidize education to secure it and the perceived objections to nationalized education. In addition to halting the "indiscriminate extension of government responsibility" into places where it does not belong, a voucher system would have the added benefit of improving the quality of available offerings. "Let the subsidy be made available to parents regardless where they send their children — provided only that it be to schools that satisfy specified minimum standards — and a wide variety of schools will spring up to meet the demand. Parents could express their views about schools directly, by withdrawing their children from one school and sending them to another, to a much greater extent than is now possible. ... Here, as in other fields, competitive private enterprise is likely to be far more efficient in meeting consumer demands than either nationalized enterprises or enterprises run to serve other purposes." Even if a mix of schools, some public some private, all eligible to receive government subsidies, existed, the quality of education would improve due to increased competition. "Not least of its benefits," he argued "would be to make the salaries of school teachers responsive to market forces. It would thereby give governmental educational authorities an independent standard against which to judge salary scales and promote a more rapid adjustment to changes in conditions of demand or supply."

Friedman has continued to press for privatization. By 1995, perhaps emboldened by rising support for school choice, initially championed by the first President Bush in 1989, Friedman called for a "radical reconstruction of the educational system" to stave off "serious social conflict arising from a widening gap between the incomes of the highly skilled (cognitive elite) and the unskilled." Recalling his call for vouchers 40 years earlier, Friedman blamed teachers unions ("the strongest political lobbying body in the United States") for thwarting his dream. Calling the need for vouchers in 1995 far more compelling than when he first raised the issue in 1955, Friedman contended that the quality of schooling deteriorated over the last half-century partly because of urban decay and partly because of the increased centralization of school systems. "Along with centralization has come — as both cause and effect — the growing strength of teachers' unions. ... The system over time has become more defective as it has become more centralized. Power has moved from the local community to the school district to the state, and to the federal government. About 90 percent of our kids now go to so-called public schools, which are really not public at all but simply private fiefs primarily of the administrations and the union officials."

While many classroom teachers would agree that central offices of large districts often interfere with educational quality, Friedman lumps those teachers' professional associations, their bargaining units, into the problem. Thus, Friedman sees a need to wrest control of public education from school districts and unionized teachers by denationalization of — dismantling — public education. Widespread implementation of a voucher system then, whether intended to cause the erosion of the teachers' unions, would nevertheless have such an effect.

The Big Picture

Throughout the debate leading to the passage of NCLB, vouchers have spread, Friedman's lament notwithstanding. After a 1995 Federal District Court order placed the entire Cleveland School District under state control because it failed to meet any of the 18 state standards for minimal acceptable student achievement, Cleveland instituted a "Pilot Project Scholarship Program," authorizing the issuance of vouchers "to provide educational choices to families with children who reside in the Cleveland City School District." Vouchers are paid directly to parents of children enrolled in the failed school system and in turn are used to pay for tutoring of the parent's choice or tuition at non-public schools. Parents may also choose to enroll an affected student in another participating public school. Aid is distributed to parents according to financial need.

Payment of public funds to religious schools drew an Establishment Clause challenge. Citing a line of cases rejecting challenges to the use of public dollars to pay for private-sector provided services, the Supreme Court upheld the use of vouchers to facilitate parental school choice. *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002). Chief Justice Rehnquist wrote for the majority, "Where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religions schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause."

In other jurisdictions — Lillian

Omand, in a 2003 article for the Cato Institute, has identified programs in 15 states — public funds offset the cost of private tuition. Some subsidize private tuition by providing tax credits to donors who provide funding for "scholarships" or providing tax credits for individuals who pay for private school tuition. Support for federal scholarship and tuition tax credits continues to grow among Republicans. Parental choice is a lynchpin of NCLB, including vouchers for tutors and the eligibility of faith- and community-based providers as supplemental school service purveyors. As Americans become more accustomed to designer education, and possibly convinced that competition necessarily results in quality, and as the public school system labors under the weight of layers of standards and accountability generated by the reform movement, is it hard to imagine that it may collapse under the weight of federal regulatory control?

Such commentators David Berliner and Peter Schrag have suggested that A Nation at Risk was deceptive and unnecessarily alarmist. Whatever its accuracy and the possible hidden agenda of its authors, the report spurred a reform movement. With a timeout for the Contract With America and after frustration with the effort of developing education standards directed from Washington, the states settled down to the business of attempting to reform education. Delaware's own efforts took shape with student accountability legislation enacted in 1997 and teacher accountability legislation in 2000. Then along came NCLB. In spite of bi-partisan support it continues to generate angst, heaping on as it has, new layers of accountability on an already burdened system hardly alive long enough to be dry behind the ears. Should we be surprised if the system is, rather than strengthened, crushed beneath the behemoth. Or might the architects of NCLB have had a different kind of reform in mind, one which reforms public education into a different organism all together, one in which teachers' salaries are market driven, one in which the federal government's role is limited to the point where it needs no bureaucracy and many fewer dollars to support it.

Maybe, President Reagan's promise will be kept after all. ◆

FEATURE

Victor F. Battaglia, Sr.

IT ONLY GETS WORSE IF YOU DON'T FIX IT

Chief Justice Daniel Hermann vigorously spurred us to improve the administration of justice. He reminded us that reform is not an exercise for the short-winded. He played an enormous role in making a great court system the best in the country, but his interest was not limited to the court, courtrooms or the courthouse. He urged us to search out defects in the law and fix them. He preached we have a moral obligation not to turn away from inequities in the law just because they do not touch us personally or professionally.

A serious inequity keeps Delaware's legal system from its proper excellence. The imposition of mandatory sentences is shameful and commands lawyers to action.

Service in the House of Delegates for the ABA for more than a decade provided an insight into the broader view of the legal landscape. Our legal training is based on what has been the norm in the past: *stare decisis*, precedent, case in point.

Adherence to the past has its benefits, yet can be like driving while blindfolded. Just as 60 years as governing precedent did not make *Plessy v. Ferguson* right, so also the practice of mandatory sentences must be jolted from being the norm. Treating human beings as indistinguishable from one another is as evil a practice as treating people differently solely because of their race.

Returning from an ABA meeting in the South in 1990, I happened to sit with members of the Florida delegation. They were excited because one of their judges had established a concept — with the cooperation of the prosecutors — which they called the "drug court." It was in its early stages, but the results looked promising. It would slow the reckless speed at which young people were felonized; it would ensure treatment for addicted arrestees; it would encourage education; it would keep families together; but most importantly, it would enhance public safety.

Upon my return home John Taylor of the *News Journal* agreed to publish a plea for what was most certainly a more enlightened way to handle a large number, but not all drug cases. I did not invent the concept. It originated in Florida, shared with me by colleagues whose names, I am embarrassed to say, I no longer recall.

My op-ed piece in the July 1, 1990 *News Journal* described the Florida concept:

> The great number of drug-related convictions is largely responsible for the explosion of the prison population. It seems we are creating felons out of our young people at a historic rate. Is there some comfort to be taken from that fact? I suggest not.
>
> We need desperately to take an enlightened look at that situation. We need to save our young people when we can.
>
> Drug offenders should be divided into three basic categories: drug users, those who sell drugs to support a habit and those who sell drugs for a profit. Those who sell drugs for profit belong in the criminal justice system; the others do not.
>
> We ought to try to save our young people from the

criminal justice system and themselves, if necessary.

It can be done.

Following a pilot project initiated in Florida, a separate Drug Court is initiated. We need not spend the money to actually set up a new court. We could simply designate one of our judges as the Drug Court.

When arrests are made, the individual appears in the Drug Court. He is asked if he wishes to avoid the criminal justice system. If he does, he waives his right to a speedy trial and he is required to accept a list of conditions that are appropriate to his situation. If he fails to substantially comply, he goes back into the criminal justice system.

As conditions, he may be required to continue his college education, to work without interruption, to provide for his family, to report to the court weekly, monthly or daily, if necessary. Most important, he is required to have weekly or bi-weekly urine tests. He is required to comply with psychiatric or psychological treatment.

He gets all of the things that support rehabilitation, most of which are not available in jail. His family life is improved; his future is not destroyed. We hope the habit is terminated. And we get to spend public funds for public good.

Don't tell me that substance abusers can't be cured. Look around at how many of you smoked habitually five years ago. There is no more addictive habit than the deadly cigarette. I gave it up two years ago, and most of my friends have given it up. It is true that there are still a few diehards, but the numbers are with us. Addiction can be cured.

In April 1994, Delaware's Drug Court began full operation. It functioned remarkably like the Florida Drug Court. What have been the results? Thanks to Judge Richard Gebelein and Judge Carl Goldstein, our Drug Court has realized the benefits anticipated by Florida. The Superior Court website lists some of the benefits:

1) Less recidivism, which means more public safety

2) Reduction in the number of drug addicted babies

3) Placing more substance abusers

in drug treatment programs

4) Through 1999, over 1,700 persons had entered the Drug Court Diversionary Program

The court does not comment on the obvious. It does not mention the families held together, jobs not interrupted, educations completed. You have to take your hat off to those Superior Court judges who made it work and to the police and prosecutors who helped to make it work.

I write about that article not to boast of a victory, but to lament a defeat.

The main purpose of 1990 article was a plea for Delaware to discard the mandatory minimum sentence, to place discretion for sentencing once again in the hands of the Delaware judiciary — the nationally acclaimed Delaware judiciary.

Statistics believed to be reliable suggested we were spending public dollars unnecessary for incarceration, which were then not available for desperately needed public services. At that time, it was obvious we needed assets to improve police services; we were desperately looking for a way to finance medical care for the elderly and the for indigent; we were embarrassed by our homeless problem and needed funds for better prenatal care and to protect the environment.

The plea was not that prison be abolished, but only that mandatory sentences be abolished. Trust the Delaware judiciary. Does anybody think that public safety requires mandatory sentences? Does anybody think there is a Delaware judge who would not impose imprisonment on someone who was a threat to public safety? I have not heard that suggestion.

It is sad to compare the cost of our obsession with incarceration in 1990 with current costs. It was then projected that our prison bill would be $74 million in 1991, $86 million in 1992 and $100 million for 1993. Those projections were stated not to include the "bill for new facilities which will cost an estimated $22.5 million."

Currently, it is estimated each prison bed costs more than $26,000 per year. The Department of Corrections bill for 2004 is estimated to be almost $190 million. The latest prison expansion costs more than $180 million by itself. Delaware currently has 6,600 persons serving prison time — an increase of 360 percent over the past 20 years. It is estimated that 80 percent of incarcerated offenders have a substance abuse problem, but fewer than half receive treatment.

The United States has achieved the distinction of imprisoning a greater percentage of it citizens than any other country in the world. We have replaced the Soviet Union and South Africa in that regard. Delaware, according to recent reports, has an imprisonment rate that is among the highest in the country.

While we have maintained our leadership positions in the numbers of our citizens we incarcerate, how are we doing in the other areas? Sadly, not so well!

A 2003 report of the U.S. Health Foundation ranks Delaware as the 34th healthiest state. Almost 12 percent of Delawareans lack health insurance, 7.5 percent of Delaware's kids are without health insurance. It is estimated that during 2000-2002, 6.7 percent of Delaware's adult and 16.4 percent of children lived in poverty. Some of that prison money would help improve those problems.

Without endangering public safety, we can reduce the cost of our prison system by returning to judges the responsibility to determine appropriate sentences.

I remain passionately committed to the concept that mandatory sentences are cruel, inhuman, needless expenditures and an ineffective tool in the effort to reduce crime.

I am sorry that we have been so ineffective in the effort to correct Delaware's sentencing policies. This past spring, we could not get approved even a "safety valve" bill that would allow the court to deviate from a mandatory sentence where the interest of justice required it. Stand Up for What's Right and Just (SURJ), an organization engaged in the effort to improve Delaware's sentencing concepts, has a distinguished leadership who board includes retired Supreme Court Justice Joseph Walsh, Rodman Ward, Jr., Carl Schnee, Tom Foley, O. Francis Biondi, Ned Carpenter and as chairman, former Governor Dale Wolf. The board includes many other distinguished citizens such as former Governor Russell W. Peterson, Joe Dell'Olio, Marlene Liechtenstein, Janet Leban, Judy Mellon and others. Many of us have hoped that SURJ would lead the way to this needed reform.

The Delaware State Bar Association, Chief Justice Veasey and President Judge Ridgely have urged review of the sentencing process, but the call for modifying harsh sentencing practices is not limited to Delaware. Michigan recently abolished its mandatory laws. Federal judges have been vocal in their protests. A number of federal judges have even given up their judgeships because of the limitations of federal sentencing guidelines. Justices Kennedy and Souter of the United States Supreme Court have joined the call for reform, as has last year's ABA president, Dennis Archer.

You have the feeling that there is an inexorable wave building for reform of this ineffective and oppressive system. It is going to come! The nagging concern is how many more people are going to be victimized by mandatory sentencing before the corrective force occurs. We must remind ourselves that these are not numbers with which we deal, but people. People with wives, kids, fathers and mothers. How many more must be written off before correction?

I am sorry to say it will only get worse until it is fixed. ◆

Without endangering public safety, we can reduce the cost of our prison system by returning to judges the responsibility to determine appropriate sentences.

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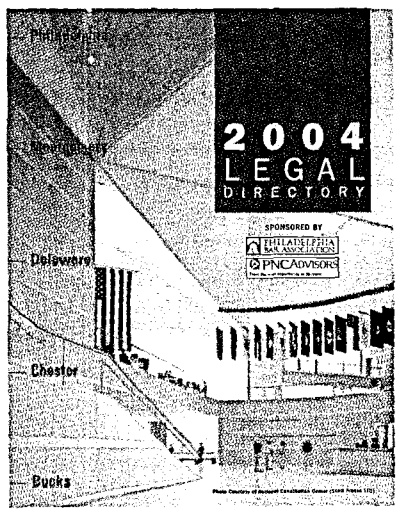

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FEATURE

Wayne C. Jaeschke and Kimberley A. Kluge

INNOVATING FROM PUMPS TO GENES INTO THE "NANO-DIMENSION":

The Legal Consequences of the Insatiable Urge to Build a Better Mousetrap

Introduction

The patent system, one of the critical, meritocractic provisions of the U.S. Constitution, is facing stresses that the founders never imagined. While human ingenuity develops inventions approaching the size of the carbon atom, rules of engagement in patent cases have been roiled in ways that are creating enormous uncertainty for inventors — and those who seek to turn those patents into fortunes.

The grant of a patent is often accompanied by controversy. In 1594, the Doge of Venice granted a 20-year exclusive privilege to Galileo for his invention of a pump that transported irrigation water to crops in the Venetian fields. Debate continues to this day over whether Galileo's innovation was an obvious variation of the Archimedes Screw patented in 1567 or whether the pump was truly original.

At least one could look at Galileo's device. Consider Patent 6,685,841, issued early this year, in which advanced imaging techniques are required to depict channels etched in a substrate at dimensions approaching one-billionth of a meter, or a nanometer. That's 1/25,400,000 inches. The average human hair is about 40,000 times wider than a nanometer.

Technology is by its nature difficult to understand and interpret. Current courtroom practice is adding to the difficulty, as federal courts struggle with the interpretation of the words and phrases that are used to define inventions in patent claims. In this process of "claim construction," the role of the jury has been eroded. Since the 1995 watershed decision of the U. S. Court of Appeals of the Federal Circuit, *Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (en banc), *aff'd*, 116 S. Ct. 1384 (1996), judges, not juries, have the job of construing the technical terms in a patent, and deciding the ultimate boundaries of the claims.

An inventor — or an investor — might be excused for suspecting that vesting such decisions in the judiciary would yield more predictability, and reduce reversible error, in patent litigation. Yet, since the *Markman* decision, the Federal Circuit has reversed the decisions of district courts in the construction of patent claims with an unusual frequency. Various authorities have estimated the reversal rate at 33 percent to 47 percent.[1]

Such high rates of reversal are cause for concern. If, after all, the technical terms can be interpreted in effectively opposite ways in nearly half the cases by different federal judges based on the same record, how can lawyers provide reliable advice about the likely outcome of litigation?

Inventors need to be advised, with better than coin-flip certainty, whether their patents are valid and likely to be infringed. Their financial angels need clearer basis for risking fortunes on development and commercialization of new drugs, computers, and other enterprises.

Is the high reversal rate inevitable, given the inherent difficulties of accurately explaining technical concepts to judges and jurors? Is it a byproduct of an adversarial system that tempts litigants to confuse, rather than illuminate, when they

argue technical points before non-scientist judges and jurors? Or is it a plausible, even natural consequence of the inherent uncertainties of expert jargon and newly minted terminology? Must resolution await further guidance from the Federal Circuit?

These uncertainties arise in an era in which patents are being granted and litigated over nano-designs that make a DNA helix look like the Ponderosa, using descriptive terms that are seemingly being coined on the run.

The descriptive terms of a patent run to the heart of their value. A patent must contain 1) a written description sufficient to enable a person skilled in the art to make and use the invention, and 2) at least one claim. 35 U.S.C. §112. The *claim* of a patent is like a metes-and-bounds description of real property. Instead of specifying trees, fences or surveyor rods, a patent's claims demarcate the subject matter claimed to be inside the boundaries of the invention as distinct from neighboring property that may be part of the *prior art*, as found in pre-existing patents and literature.

An inventor is free to be his own lexicographer, and define his terms in the written description and claims of a patent. The terminology is intended for "those skilled in the art to which [the invention] pertains." Most patents are written with the expert examiner at the U.S. Patent and Trademark Office in mind, in hopes of avoiding rejection on grounds that the technical terms are "vague and indefinite."

Federal district courts have jurisdiction over patent infringement suits. The Federal Circuit, however, has the final say on the rules of construction for the words used in the written description and claims of a patent, subject to occasional review on certiorari. The Federal Circuit was created in 1980, with appellate jurisdiction over appeals from patent litigation in all district courts by a Congress seeking more uniform, predictable results in infringement cases.

A court's construction of the terms in a claim is critical to the outcome of patent litigation. The question might be whether a claim is too broad, therefore invalid, because it includes prior art, or the issue might be whether a claim is sufficiently narrow that it does not encompass the accused process or product and, hence, does not infringe it. Until the last decade, courts seldom held a patent invalid on grounds that §112 was violated, but with the advance of technology into the new field of molecular genetics, the courts have taken a fresh look at §112. While terms applied to chemistry, for example, have been developed and used for decades, some biotech language is less defined.

In the pivotal 1995 *Markman* decision, the Federal Circuit acknowledged the importance — and difficulty — of interpreting the language of patent claims. In holding that construction of the language and contours of claims is a judicial function, the court emphasized that the patentee's terminology in defining an invention, and statements made during "prosecution" to obtain the grant of a patent, are the key sources for interpreting the scope of the claim. Dictionaries and treatises are extrinsic evidence.

The *Markman* ruling increased the focus on interpretation of the technical terms and phases of patent claims. Pretrial "*Markman* hearings" are frequently scheduled to interpret claim language.

Markman was controversial within the court that issued it. Concurrences and dissents questioned the wisdom of treating claim construction, including the interpretation of individual claim terms, entirely as an issue of law subject to *de novo* review on appeal.

Judge Pauline Newman, dissenting, observed that the terms in patents are directed to those skilled in the art; the trial court makes findings of fact that depend on the "weight, credibility, and probative value of conflicting evidence;" and "by redesignating fact as law the court has eliminated the jury right for most trials of patent infringement." She predicted, accurately, the uncertainty that would result from the procedures adopted by the court in *Markman*.

Judge Haldane Robert Mayer's concurrence said that the majority eviscerated the role of the jury in patent cases. While claim construction is ultimately a question of law for *de novo* review, he said, individual findings of fact should be subject to the standard of "clear error" for reversal.

Is the high reversal rate a reflection of increasingly complex technology and terminology? Is there an inevitable gulf of understanding between the perception of the person skilled in a specific technology and a different perception held by judges or jurors based on conflicting presentations by adversaries in litigation? These factors should not matter if the construction or interpretation of the technical words and phrases in patent claims is principally a question of law!

Practitioners suggest various reasons for the high reversal rate in claim construction cases: a) unclear rules laid out by the *Markman* majority; b) changing ground rules in the court's subsequent opinions; c) the specialized focus and familiarity of the Federal Circuit with patent cases, compared with the less frequent patent experience in many district courts; d) whether or not judges have advanced technical degrees; and e) the *de novo* standard of review itself.

Proposed solutions include changing the legal standards of review, establishing patent trial courts or permitting greater flexibility in assigning judges to patent cases at the district level. Whatever the outcome, as technology becomes more complex, even greater difficulties loom.

The Landscape of Technology

The succession of technological advances over recent decades has numbed us to surprise. A retrospective look may be useful.

Many basic inventions occurred in the 19th century, including the light bulb, telephone and internal combustion engine. In 1837, the PTO granted 435 patents; by 1899, when 25,527 patents were issued, the commissioner of patents in 1899 recommended closing the patent office because "everything that can be invented has been invented."

The 20th century saw remarkable advancements in chemistry, wonder drugs such as penicillin and tetracycline, and plastics like nylon. Electronics advanced based on etching ever-smaller circuits on silicon and capturing the power of new materials such as gallium arsenide to make increasingly powerful computers. A revolution in biology included manufactured proteins like insulin and human growth hormone. By 1999, the PTO was granting 200,000 patents per year.

Striking as these developments are, nanotechnology takes precision to another level. Jonathan Swift's six-inch Lilliputians were 14,400,000 times larger than a nanometer.

Nanotechnology is small in size only. The future course of biotechnology already operates on this scale.

Biotechnologists keenly study molecules with dimensions in the nanotechnology range. Proteins and DNA are generally 5 to 200 nm. Blood cells, somewhat larger, run 5,000 to 10,000 nm. Advanced sieve-like devices with channels or tunnels in the nanometer range have already proven useful in separating biomolecules. They have helped in the development of advanced drugs and medical devices.

The concept of nanotechnology was foreseen by Nobel laureate physicist Richard P. Feynman in a 1959 speech, "There's Plenty of Room at the Bottom." Eric Drexler, chairman of the Foresight Institute, proposed in 1981 that molecular objects could be mechanically positioned to atomic precision to effect controlled site-specific synthetic reactions to build complex objects. In 1986 he gave the name "assembler" to devices that "will be able to bond atoms together in virtually any stable pattern." By 1992, Drexler presented a detailed technical analysis of the process of molecular manufacturing that the assemblers would make possible.

Controversies rage over the feasibility of nano-scale manufacturing. Noted scientist Richard Smalley, disputing Feynman's vision, argues that molecular assembly requires tools that will forever be impossible: "There's plenty of room at the bottom, but there's not that much room, [because] to put every atom in its place ... would require magic fingers." Yet, Georgia Tech nanotechnology pioneer Ralph Merkle has demonstrated the feasibility of molecular manufacturing using standard quantum chemistry methods.

Vindicating the more optimistic visionaries are dozens of recent patents for nanofluidics, nanofiltration, even nanomachines, coining colorful jargon like buckyballs and fullerenes. They illustrate another wave of complex, innovative terms that may require presentation by litigants and translation from expert jargon to layman's terms as nanotechnology disputes inevitably arise.

An eye-catching example is a patent issued last year, and assigned to Cornell, for "Entropic Trapping and Sieving of Molecules," used for separating mixtures of molecules and proteins of differing sizes using nanofluidic channels as small as 50-200 nm. Using fascinating terminology, the patent describes a way to harness responses to electrical stimuli so that larger molecules pass downstream through the nanochannels while smaller ones are trapped upstream. The process can be likened to cleaning vegetables in a kitchen strainer where the spinach is washed through the strainer while the dirt is left behind. It is an example of the counterintuitive behavior of matter in the "nanodimension."

Another example "tweaks" the imagination: Patent 6,669,256, granted last year, for "Nanotweezers and Nanomanipulator." The tweezers are useful for manipulating "nanosubstances" such as semiconductors in nanodimensional manufacturing. (The nanotweezers might be useful for plucking the eyebrows of nanobots or nanoscale beings of imaginative science fiction.)

These examples illustrate wide-ranging innovation in the nanodimension, including nanoscale machines — as predicted by the visionaries. The accurate presentation and translation of language and new concepts into words and pictures that will help jurists resolve disputes will be an added challenge for the courts, as well as intellectual property lawyers.

While we are already overwhelmed by advanced technology, patents from the nanoland of buckyballs and fullerenes will only further exacerbate our circumstances. As a preview of emerging technology, scientists already have named the measure of matter a million times smaller than a nanometer as a "Fermi" or 10^{-15}. One could ask, how low can we go and how fast can we get there?

A Basis for Optimism?

While there may be reason for pessimism in the near term, historically Congress and the courts, energized by the watchdogs of intellectual property law — notably groups such as Intellectual Property Owners, the American Intellectual Property Law Association, the Association of Corporate Patent Counsel, and the American Bar Association — have adapted the laws to accommodate the evolution of technology for the public good. Yet, adaptation follows a slow pace, proceeding case-by-case in the courts, and sporadically in Congress.

The founders provided the basis of our patent system in the Constitution. Article I, §8, cl. 8 gives Congress the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and inventors the exclusive Right to their respective Writings and Discoveries." Thomas Jefferson wrote, "Ingenuity should receive a liberal encouragement." Abraham Lincoln — the only president to hold a patent — called the patent system one of the three most important developments in world history — with the discovery of America and the development of the printing press.

As the demands of inventors and complexity of their science grew, the patent statutes were comprehensively revised three times during the 19th century. The law was recodified and updated in 1952, when Congress added an important sentence to 35 U.S.C. §103, that "patentability shall not be negatived by the manner in which the invention was made."

This statute clarified that a "flash of genius" is not required for patentability. It recognized that many significant developments deserving of patent protection were the product of a research team working toward a common goal. In other words, a series of small lamps that light the path should be treated the same as a floodlight that does the same thing. Patent claims no longer could be rejected on the basis that the invention was based on a series of small steps, each obvious from the other, as long as the final product or the invention, itself, was not suggested by the prior art.

In *Graham v. John Deere* 383 U.S. 1 (1966), the Supreme Court considered whether certain innovations should be refused patent protection as being "obvious." Laying down guidelines that still govern, the Court required judges and jurors to ponder "such secondary consideration as commercial success, long felt but unsolved needs, failure of others, etc. [that] might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or non-obviousness, these inquiries may have relevancy."

The decision recognized that many important inventions in evolving technologies, when expressed in available language, might seem to be close to or obvious from the starting point in the prior art; therefore, factors such as commercial success and the prior failure of others may be relevant to decide whether or not new subject matter is obvious. The holding was an important extension of Jefferson's "liberal encouragement" to the burgeoning ingenuity of the 20th century.

Again in 1980, the Supreme Court supported fledgling biotechnology research, holding in *Diamond v. Chakrabarty*, 447 U.S. 303, that microorganisms produced by genetic engineering are not excluded from patent coverage — despite the strong resistance of the PTO, which contended that such living organisms did not come within the statutory classes of subject matter enumerated in the 1952 Patent Act. The Court's 5-4 decision gave expansive interpretation to the statutory terms "manufacture" and "composition of matter." The Court cited Committee Reports to the 1952 Act that showed that Congress intended patentable subject matter to "include anything under the sun that is made by man."[2] Newly discovered natural minerals and natural phenomena like gravity are not patentable, but the Court concluded, any material living or not, was patentable if it was made or altered by human invention. Thus, bacteria containing genes altered by human endeavor may be patentable even though the subject matter is living.

Patent 4,736,866, issued in 1988, the "Harvard Mouse" patent, is an example of a patent on living subject matter, a mouse that is the result of man-made genetic manipulation.

The Court recently advanced the Jeffersonian principle of liberal encouragement further. *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*, 525 U.S. 1093 (1999). Facing a difficult decision resulting from advances in computer technology coupled with business method innovations, the Court decided that the claimed process produced a "useful, concrete and tangible result" and therefore was a patentable invention. On the other hand, manipulation of abstract ideas or algorithms would not be patentable subject matter.

The *State Street* holding confirmed patent protection for a wide array of financial and internet businesses. Amazon's 1-Click® patent, issued several months later, is an example of a computer and business method patent. In *Amazon.com, Inc. v. Barnesandnoble .com, Inc.*, 239 F.3d 1341 (2001), after the Western District of Washington granted a preliminary injunction, holding that Amazon presented a case showing a likelihood of infringement by Barnes & Noble, the Federal Circuit vacated and remanded, holding that B&N had mounted a substantial challenge to the patent's validity.

Markman and Beyond

The Federal Circuit has correctly recognized the importance of interpretation of words to the outcome of technical litigation. Yet, the decision to review each and every technical term in a patent claim on a *de novo* basis may be viewed as an aberration. One could argue that as patent terms become more complex, increased deference should be accorded the findings at trial. The Federal Circuit, though, has reiterated and recast its *Markman* holding under a variety of fact patterns since.

In *Texas Digital*, 308 F.3d 1193 (Fed. Cir. 2002), the court emphasized a new source of information for claim construction — your dictionary! The court held that the proper construction of claims requires that a court first determine the ordinary and customary meaning of the words and terms used in the claims. Second, a court determines whether the written description or prosecution history is consistent with or varies that customary meaning. Under *Texas Digital*, a court should presume the inventor intended the ordinary meaning.

The decision in *Texas Digital* was true to *Markman* in treating all the technical terms of the claims as issues of law and not fact, but veered from precedent by placing more emphasis on evidence outside of the patent such as dictionaries and treatises.

The impact of the *Texas Digital* was illustrated in two 2002 *Inverness* decisions[3] in which the Federal Circuit reversed the New Jersey District Court over the interpretation of words in patent claims for advanced pregnancy tests that use capillary immunoassays with mobilizeable particulate labeled reagents. In applying the phrase "mobility of said labeled reagent," both the trial and appellate courts tracked first the ordinary meaning of the term "mobility," only to find that dictionaries give multiple meanings. The courts then looked to the patent specification to determine which of those meanings might apply; and finally reviewed the prosecution history for possible disclaimers of meaning.

While the Federal Circuit's analyses may be correct, they are primarily technical analyses of the terms based on facts, not interpretation of the law. Selecting a correct meaning from multiple options in an English dictionary and refining these choices by reviewing the technical language of the written description of a patent and its prosecution history is technical analysis. Would the Federal Circuit's result have been different on appeal in the *Inverness* cases if the Federal Circuit had used a standard of clear error as it does for §112 issues?

In *Amgen, Inc. v. Hoechst Marion Roussel, Inc.*, 314 F.3d 1313 (2003), the Federal Circuit affirmed the district court on all of the complex issues of claim construction, but said, "The reader's familiarity with the fundamentals on molecular biology, genetics and recombinant DNA technology necessary to this appeal is presumed." The comment is curious when contained in an opinion of the court where the main issues of interpretation are to be reviewed *de novo* by the court as legal, not factual issues.

The Federal Circuit's majority opinion in *Housey Pharmaceuticals, Inc. v. AstraZeneca UK Ltd.*, 2004 WL 1005573, affirmed the Delaware District Court's construction of the term "inhibitor or activator of a protein" as a matter of law based on *de novo* review. At a *Markman* proceeding, the district court construed five claim terms disputed by the parties, one of which determined the case.

As in *Markman*, Judge Newman dissented, pointing out that the use of common dictionary definitions makes no sense in interpreting the complex technology of a patent. "It is time to restore the law of claim construction to a more apt wisdom and more usable simplicity. The only issue in this case is the construction of the phrase 'inhibitor or activator' of a protein. My colleagues' approach to construction is based on confusing recent pronouncements of panels of this court, contravening earlier statements of precedent, thus adding to the confusion."

Judge Newman does not argue that Housey should win by fiat at the Federal Circuit, but rather, that the technical conflicts between the warring adversaries should be remanded for resolution in a proper factual context at the trial court.

In *Novartis v. Eon*, 363 F.3d 1306 (Fed. Cir. 2004), affirming the District of Delaware's construction of "hydrosol" in a 2-1 decision, both the majority and Judge Raymond Clevenger's dissent applied the same rules of construction, relying primarily on dictionary definitions, but effectively came

to opposite conclusions on the meaning of the claimed term "hydrosol" based on the battle of dictionaries.

Help on the Way?

In *Phillips v. AWH Corporation*, 2004 WL 1627271, the Federal Circuit granted an *en banc* rehearing and agreed to review the issues of claim construction, including the proper roles of dictionaries and of the patent and its prosecution history.

Technology is already complex enough and it will be even more complex in the future. Whether to treat matters of highly complex facts as if they were ultimate questions of law and whether claim construction justifies *de novo* review by the Federal Circuit deserve examination in the *Phillips* rehearing. Clear guidance as to proper interpretation is needed because the issues are critical to the outcome of most patent cases. The predictable determination of patent scope is critical to restore a reasonable measure of consistency to claim construction.

One could speculate whether the term "trap," if interpreted by the Federal Circuit, should have the same common and ordinary meaning regardless of the technical context. Take, for example, "trap," as used in the phrase "nanofluidic entropic trap" in the Cornell patent. The term is also used in a quite different setting in Patent 6,655,077, "Trap for a Mouse," issued last year.

Interpretation of "trap" one day might require Federal Circuit intervention where the outcome is uncertain. We can predict, however, with reasonable certainty that the learned Harvard Mouse mentioned above, for all his erudite background and unique genetic makeup, would fall for the same "cheesy" bait used in the "Trap for a Mouse" as have his more humble predecessors since the time of Galileo's "pump." Some things never change. ◆

FOOTNOTES

1. *Keeping Current with the Chair*, IPL Newsletter (The ABA Section of Intellectual Property Law) Summer 2003, at 2.

2. S. Rep. No. 1979, at 5 (1952); H.R. Rep. No. 1923, at 6 (1952).

3. *Inverness Medical Switzerland GmbH v. Princeton Biomeditech Corp.*, 309 F.3d 1365 (Fed. Cir. 2002), *Inverness Medical Switzerland GmbH v. Warner Lambert Co.*, 309 F.3d 1373 (Fed. Cir. 2002).

(Continued from page 44)

on the commission, it was his threshold criteria for candidates and it was his contribution to the commission, to the bench and to our legal community.

Most of us who have taken on the role of judge have found that for the first few months we wonder about and struggle with the assigned power. How does it fit? Where are the boundaries? I can recall judges asking me: "How am I doing?" And after six months on the bench, I did the same. The advice I got was: "Just keep calling balls and strikes."

What we see is that for some judges the issue disappears. Exercising power is incidental to the job. For others, the issue does not disappear. I expect the senior member of the commission would say it is these judges who are not comfortable with the power that comes with the job and are not able to hold power lightly.

Having taken a turn at judging, and having poked at the boundaries of the role, I might identify and state this issue differently. But by pressing the issue at each meeting of the Judicial Nominating Commission for ten years or so, and by capturing it in words that convey a simple and strong visual image, this member of the commission helped set a basic criterion the commission applied in recommending candidates to the governor. He helped define a common character trait for our judges and consequently helped set the tone for how we resolve disputes in our courts.

A Judge

In Delaware, judges have a head start on the road to receiving a lifetime achievement award because it is a part of our culture that we honor our judges. We treat them with respect as they serve. And ask a judge about being honored and there is a good chance he or she will say, "I was just doing my job."

If you dissect the job, you see it is lots of jobs, including presiding in court, making evidentiary rulings, resolving issues, writing opinions, imposing sentences, managing cases, and mediating disputes. Each aspect of the job draws on different skills.

I have a few comments on one judge and one aspect of his work.

First, a little context. Each year my new clerks arrived from law school ready to make the law (and write opinions full of the latest clichés, such as where we are "informed" by things and "cabin" ideas that are, "to be sure," "robust" and "muscular"). I spent time working with them on what we are doing and how we are doing it. One aspect of that training was the "power must be held lightly" speech. Another was how we should go about writing opinions. Who is our audience? Why do we write? How do you work through the resolution of the issues?

We regularly read and discussed opinions by judges, not so much for the law, but for their style and approach. I used as a model for my law clerks the opinions of a particular state court judge. He had a wonderful style of identifying and addressing issues that pulled the audience into the process. He described the dispute and the matters in issue, reviewed each party's contentions, weighted the conflicting interests and told you what he was deciding and why. It was as if you were sitting in a chair next to him and he was talking the problem through with you.

What he did was simple and straightforward and appeared to open a window to this aspect of his job. What he did not do was just as important. He did not string together citations to cases and their holdings as if he were a mason, laying flagstone in a path from issue to result. He was not pulled into the lawyer's advocacy, turning out an opinion that looked like part of a three-way rumble, with the judge joining the lawyers in the fray, throwing punches, and rejecting arguments as "specious" "unfounded" or "unreasonable." Nor did he write as if he was on a soapbox with an eye to publication, legal history or tomorrow's newspaper.

Actually, his opinions are a wonderful model for judges. They sit there as a reminder that for this aspect of the job, he has shown us how to do it. Reading his opinions is like watching Ted Williams bat. Part of the reason he was so good is that his judging looks so comfortable, so natural.

A Lawyer

My third candidate is a great lawyer. I know he is a great lawyer because I have worked with him. I have also watched him try cases.

At this point, people may expect a description of the man who thinks like Oliver Wendell Holmes, looks like Robert Redford and acts like Francis of Assisi. Actually, my candidate is far from perfect. He is a difficult guy. He can be single minded. He whines when he doesn't get his way. And he is sufficiently demanding that associates don't even try to take a vacation when they are working on a project with him. He is a sweet guy, but not a pretty package to sell to Hollywood.

He is, however, a very talented litigator. He has brains and talent. He has worked hard and exercised his talents to become a skilled advocate. He knows the law. He writes well. He is a good speaker. He is a thinker, a planner and a tactician.

Like most good lawyers, he attracts interesting work, wins his share of cases and gets his share of awards. What makes him relatively unique is that in the push and pull of litigation, where the pressure from shifting risks can be intense, he maintains an absolute integrity to the truth. That sounds simple, but it is not. And that comment may sound disheartening, but it should not be.

We see that for lawyers good and bad, litigation affords tremendous pressure to cut an argument here, shade a fact there. Given the contention, pressures and limitations on accountability, it can be temptingly easy to occasionally stray from what we know to be the truth.

The very best trial lawyers demonstrate the confidence to work within the rules with absolute integrity. From their perspective, it may be very simple. They do it because they feel no temptation and see no other way to be a lawyer.

My guess is that a large percentage of litigators struggle with this issue of honesty and integrity in how we litigate and despair that our system seems to allow or even encourage dishonesty. Each time this lawyer opens the door to a courtroom he is demonstrating to us that you can build a practice around simple honesty and be very effective. He shows younger lawyers how to do it. And just by exercising his talents in our court he is preserving the integrity of our system.

When we give lifetime achievement awards we should recognize lawyers for their achievements as lawyers. And when we recognize people who are great lawyers, we are recognizing that they are very good at what they do, that by being so effective they inspire us to be better lawyers, and they demonstrate to us that although we may work in an environment of dispute, contention, risk, and pressure, we benefit from their presence and participation of great lawyers (and great judges). They make our work more interesting and rewarding. ◆

FEATURE

Roderick R. McKelvie

HONORING LAWYERS

At a recent dinner honoring a number of lawyers with lifetime achievement awards, I was reminded how difficult it is to identify and articulate exactly what it is that makes a lawyer great.

For those of us who litigate, we see great lawyering in the way a brief or oral argument is structured, or in a pattern of questions on cross examination that may lead to one, two or three answers that set a case on the course for a particular result.

For those of us who observe lawyers at work, we know it takes some time and context to describe exactly what we saw and heard in a way that recreates the brilliance. We also know that it is what we did not see — the legwork done and the potholes avoided — that reveals what the lawyer has accomplished. We know that what we do see is just one small part of one case, and one window on a career of cases. In conferring lifetime achievement awards, we recognize that certain men and women have the skill and talent to build a career of great lawyering. We see enough of what they accomplish here and there to know that this is a great lawyer. The awards are appropriate, in the sense that we are honoring the right people. What is harder to capture is what the honoree has done as a lawyer. It is hard to describe a lawyer's achievements without getting caught up in the web of facts that set the context for the lawyer's challenge and how it was met.

So we give the awards, but in making the presentations we recognize that we may miss the mark on describing the achievements we are honoring. Instead we end up honoring the lawyers by listing other achievements — chairman, director and contributor — that are more like the by-products of a great career than examples of the lawyering. It may just be too hard to describe the lawyering.

The awards dinner reminded me that we should try to take a smaller bite and be a more specific in recognizing exactly what that talented lawyers do. If we do that, we can see a part of what makes them great lawyers, and what we want to recognize and honor. I have three examples.

A Member of the Judicial Nominating Commission

When I was first appointed to the Governor's Judicial Nominating Commission in the 1980s, it had been in place for several years. It had relatively settled procedures for reviewing and recommending candidates for the bench and a relatively stable membership, including a man I had never before met, a senior member of our community with a reputation as a distinguished, practical person committed to working to make Delaware a better place.

As the newest member, I spent the first meeting listening and watching, getting the pace of the group and the contribution I could make.

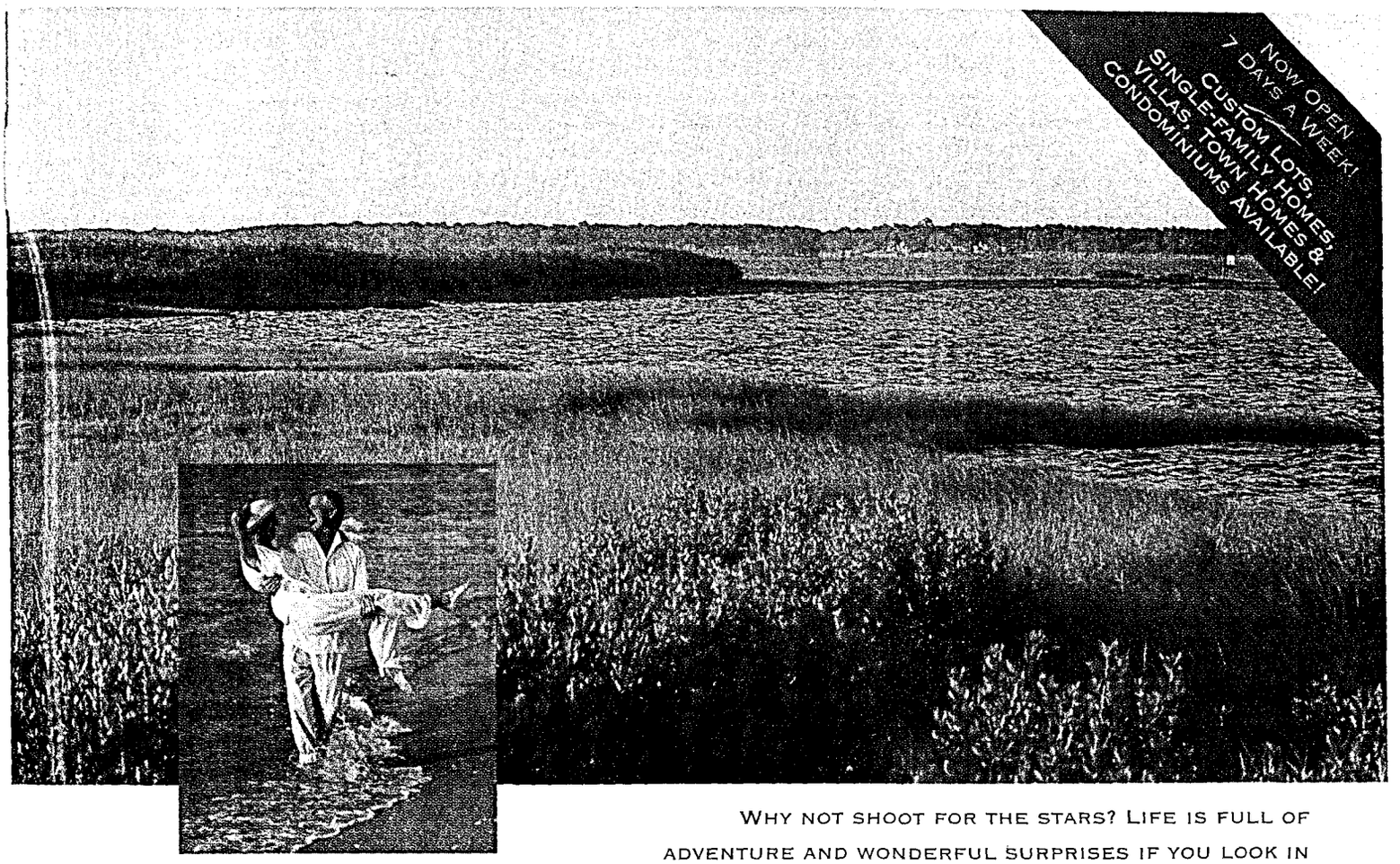
At one point, in describing the qualities we should be looking for in the character of a candidate for the bench, that senior member said: "Power is a very special thing. It should be held lightly." This came from a man who had held considerable power in our community — at a time when Delaware lawyers were anxious about what seemed to be a trend toward an adversarial relationship between certain judges and the lawyers who practiced before them. So, I listened. And as I started the process of participating in selecting the type of people who should serve on the bench, I took it to heart.

At my second meeting, as we were reviewing particular candidates, our senior member said, "Power is a very special thing. It should be held lightly." This is not meant to read like a fairy tale with a surprise ending. The point is, this was his point. Character was as important a consideration in selecting a judge as intelligence, energy and judgment. In reviewing and recommending candidates for the bench, we should look to see if the candidate will exercise power with restraint. I recall that he made this point at every meeting. For the years he was

(Continued on page 43)

"Destiny is not a matter of chance, it is a matter of choice; it is not a thing to be waited for, it is a thing to be achieved."

–William Jennings Bryan



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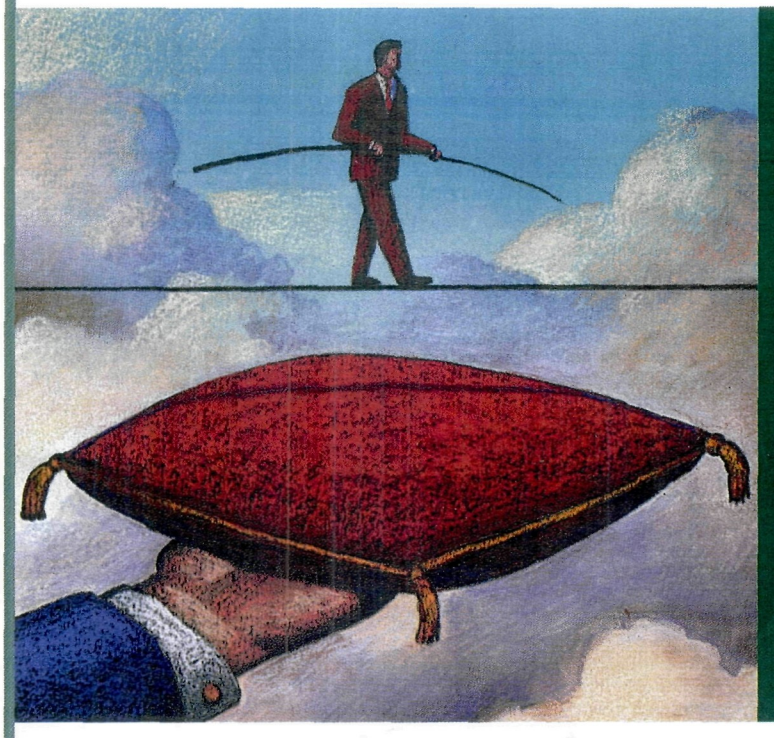

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