INSIDE: Technological Changes, Advancements in Diversity, 25th Anniversary Roundtable

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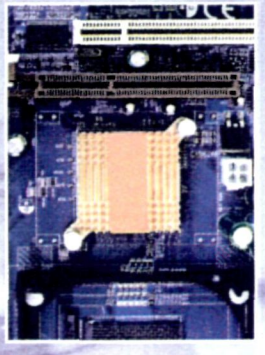
A look back – and ahead – at the legal profession in Delaware



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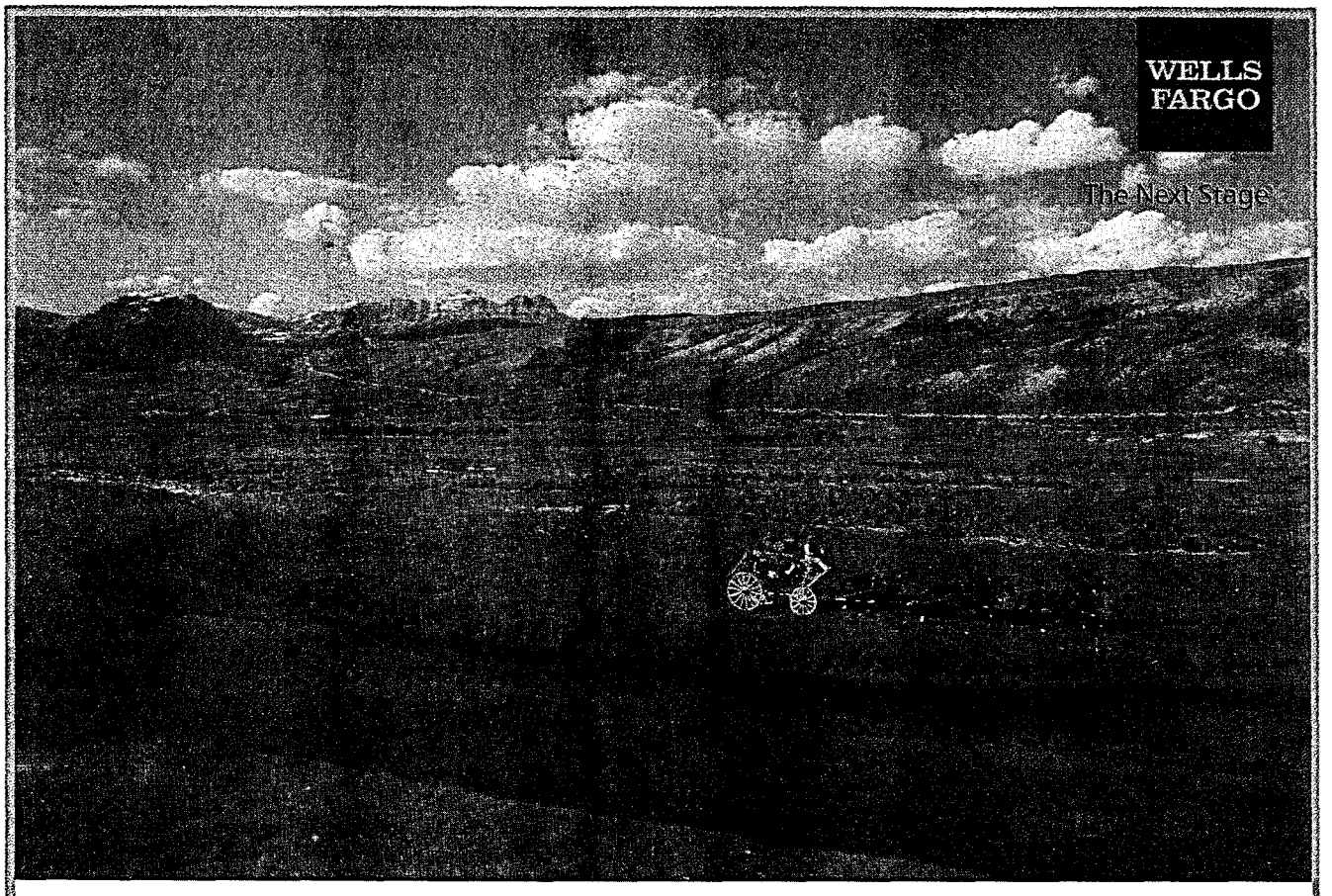

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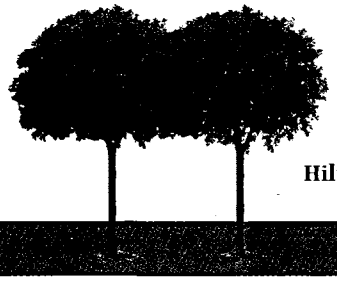

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Photo by Bud Keegan

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Jack B. Jacobs
Chuck Durante

Every decade or so, the Board of Editors devotes an issue of this magazine to what is best described as a retrospective – a look into the past. We do this not so much out of reverence for history, but to capture a sense of how far the Delaware Bar and the practice of law in Delaware have come, and how far we need to go to better achieve the demanding values and the diverse goals that membership in our profession imposes and inspires. This issue of *Delaware Lawyer*, which celebrates the 25th anniversary of this publication, is intended as that retrospective. It attempts to do that in two distinct ways.

First, it includes a roundtable discussion among a group of distinguished lawyers, each with a different practice and perspective, who were admitted to the Delaware Bar approximately 25 years ago: Richard Andrews, William Johnston, Kathi Karsnitz, Robert Krapf, Elizabeth McGeever, Kenneth Nachbar, Hon. Michael Newell, Joseph Rhoades and Stephen Spence. Hosted and moderated by Sam Nolen, the roundtable participants exchange views about how the practice of law has changed since they were admitted to practice, and assess the extent to which those changes have (or have not) been for the better.

Second, it includes articles on particular topics related more specifically to the broader retrospective issues. Josh Martin – a former Superior Court judge, Bar Association president, CEO of Verizon, Delaware, and now partner of Potter Anderson & Corroon – provides an inside view of diversity over the past 25 years and suggestions for where we should go from here. Rich Herrmann, a partner of Morris James who can be described as the Delaware Bar's dean (or, perhaps, czar) of matters technological, writes about the vast changes in technology over this period and how it has impacted law practice in Delaware. Finally, Chuck Durante, one of this issue's two editors, shares his personal insights on how the multitudinous changes over 25 years have affected both his generation of Delaware lawyers, and himself personally.

Underlying all of these expressions is a single theme: membership in the Delaware Bar is a privilege. We speak not of unearned elitism, but rather of a unique tradition of excellence of craftsmanship, generosity of spirit and soundness of judgment. Each generation has produced its own group of pre-eminent lawyers who made this state, and in some cases this nation, unalterably better than it was before.

It is important that we preserve the special uniqueness, and the responsibility that goes with it, of being a Delaware lawyer. Hence, the need for periodic retrospectives.

Jack B. Jacobs

Chuck Durante

Chuck Durante

is a partner at Connolly Bove Lodge & Hutz LLP, where he heads the Tax, Estates and Trusts Department. He is a director or officer of many civic, educational and charitable organizations. A former reporter and columnist at *The Philadelphia Inquirer* and *The Delaware State News*, he remains an active writer and commentator on legal and other matters.

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is a partner at Morris James LLP, with a practice of complex litigation, including commercial, technology and intellectual property. He teaches electronic discovery and technology related courses at William & Mary Law School, Widener University School of Law and the National Judicial College. He co-chairs the technology committees of the District Court and the Delaware State Bar Association

Jack B. Jacobs

was appointed to the Delaware Supreme Court in 2003 after 18 years as a vice chancellor on the Court of Chancery. He had practiced corporate and business litigation in Wilmington since 1968. He is an adjunct professor at New York University School of Law and Widener University School of Law; a member of the American Law Institute, where he serves as an Advisor to its Restatement (Third) of Restitution; and is a fellow of the American Bar Foundation.

Joshua W. Martin III

is a partner at Potter Anderson & Corroon LLP and his practice is focused on mediation, arbitration and business counseling, notably in telecommunications, public utilities and governmental relations. His career includes 10 years as president and chief executive officer of Verizon Delaware; eight years as a Superior Court judge; and four years on the Public Service Commission, including three as chairman. A physicist by training, Martin began his legal career as a patent attorney for Hercules.

CORRECTION

The photograph that accompanied Jeffrey M. Schlerf's article, "Delaware's Legacy in Original Bankruptcy Legislation," in the Winter 2006/07 edition of Delaware Lawyer *was incorrectly identified as James Asheton Bayard. In reality, the photograph depicted Bayard's son, who shared his father's name.* Delaware Lawyer *regrets the error.*

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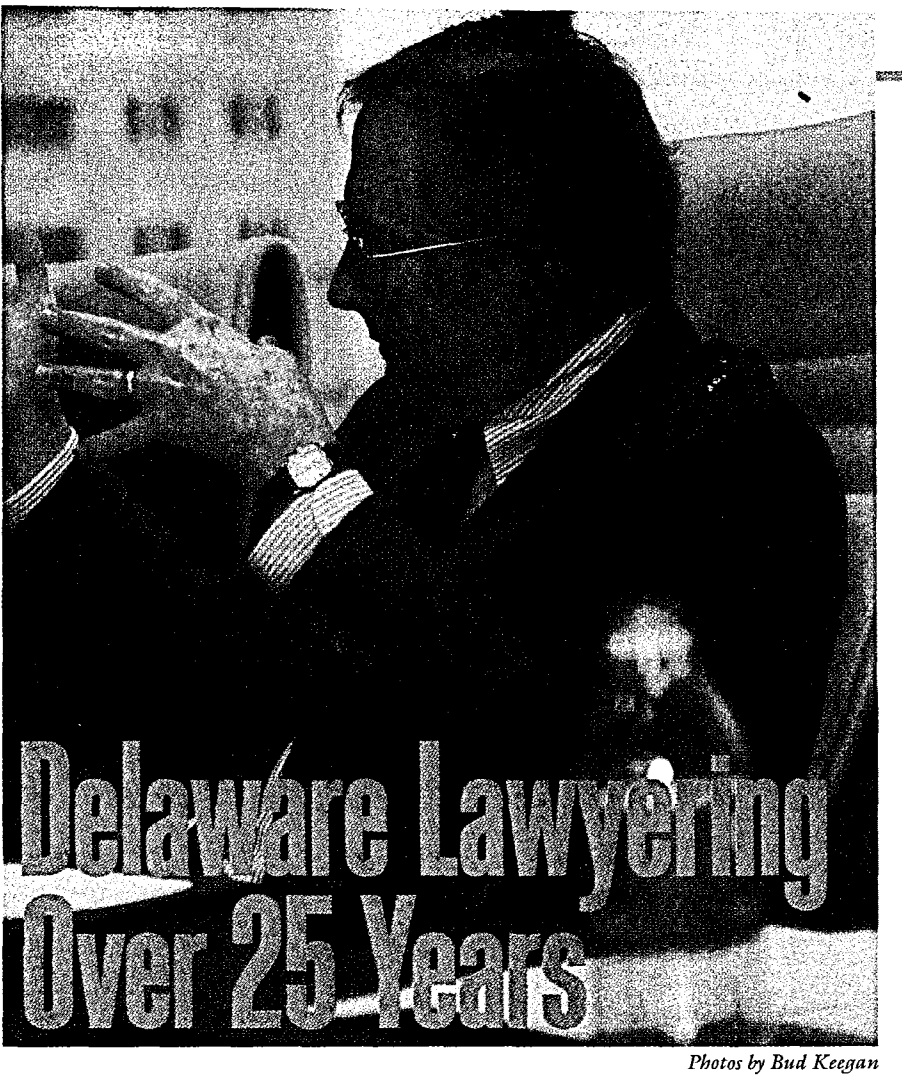


Roundtable: Changes in Delaware Lawyering Over 25 Years

Photos by Bud Keegan

"We have this continuity of purpose, to be the best and to make our Bar a shining example for other Bars across the country."

On January 5, 2007, a group of lawyers who were admitted in 1981 through 1983 — Rich Andrews, Bill Johnston, Kathi Karsnitz, Rob Krapf, Betsy McGeever, Ken Nachbar, Judge Michael Newell, Joe Rhoades and Steve Spence — met to discuss the changes in the practice of law and administration of justice over the past 25 years. The meeting was hosted and moderated by Sam Nolen, and was joined by Justice Jack Jacobs of the Supreme Court of Delaware. The meeting was transcribed by Kurt Fetzer of Wilcox & Fetzer as a service to the Bar, for which the editors of *Delaware Lawyer* and the Delaware Bar Foundation are grateful.

NOLEN: I wonder if any of you would have an observation about who makes up the Bar today and how that has changed over the last 25 years.

NACHBAR: What is striking to me more than anything is how much more diverse it has become and particularly gender diverse. When I became an associate at Morris, Nichols, there were no female lawyers at my firm at all and, I think, most of the firms in town. Occasionally, you would encounter women attorneys at other firms, but not too often.

In the first 60-some-odd years of my firm's existence, we made two women partners. In the last eight, we made five. Graduating from law school these days there are more women than men and we hire probably more women these days than men. In our profession other types of diversity, such as ethnic diversity, have been a little bit slower and I think a part of that is just the question of who's coming out of law

school and who the candidates are, but even on other types of diversity, there has been a significant shift and it is becoming more diverse.

I don't think the law profession as a profession is a leader in ethnic or racial diversity. I wish we could say that it was, but I think it has made a lot of strides in the last 25 years.

KRAPF: I think the lack of success in creating a more diverse profession in the Delaware Bar, at least in the large-firm context, comes not because of a lack of will but because of a lack of, let's call it supply. The perception is that we're not the leaders, that we're responding in some fashion because we're constantly being admonished by the corporate clients to achieve diversity and it seems as though we're being responsive to some larger social issue. But if you look back at people who were making the hiring decisions and evaluating their firms, many people in the Delaware firms were saying we need to be more diverse, we need to be leaders, but with very mixed or little success.

Are we leaders or are we just simply responding? I think we're probably trying harder to be leaders in this area over the past 20 years or so, more than the results reflect.

JOHNSTON: We, through the history of the Delaware Bar, have taken some important leadership positions in promoting diversity. In more recent years, the Redding Fellows Program was a wonderful collaboration of private law firms, government-employed lawyers and in-house lawyers. It was a very intentional effort to promote ethnic and racial diversity at the Delaware Bar.

We can recall that not too many years ago there wasn't great diversity, even in terms of religious affiliation and national origin, so those doors were opened. Besides recruitment of women and minorities, we continue to face their retention and promotion as a real challenge. It's one thing to get folks in the door, whether that be private practice or otherwise, but to retain them and to promote them to the partnership level or otherwise is also critically important.

KRAPF: It is pretty phenomenal the number of women in senior positions in law firms compared to 25 years ago. The majority of the graduates these days are female, but a majority of the associates in law firms, at least larger law firms, are not females and certainly a majority of the partners are not females or anywhere close to it, so there is work to be done.

"It's a selling point for Delaware and for lawyers coming into Delaware to practice here, that relatively speaking we're still a small Bar."

NEWELL: I've only been a judge for two years. I was admitted in 1982 and at that time Roxana Arsht was the only female judge in the judiciary. Then she retired and Peggy Ableman became a Family Court judge and she was the only female judge for a while. Now we have a number of female judges throughout our court system.

Equally important to whether we're a leader or not is our awareness of these issues over the last 25 years. I think we have become increasingly aware of the need for gender and racial diversity. Keeping that focus in the forefront is very important.

McGEEVER: When a comparable group is convened in 2032, which is 25 years from now, it's going to look a lot different from the group seated around this table. When Ken and Steve and Joe and I were admitted in 1981, I don't think there was any ethnic minority, not a racial minority, that I can recall in that class. There were plenty of women and most of us are still practicing, because our class of '81 had a 20th anniversary, the women did, a few years ago and probably had 10 people show up, all of whom are still practicing in Delaware. I think that the change is going to be radical when we see what the new classes look like and what group of women and minorities will convene down the road.

In terms of how else the Bar has changed, it seems like a younger Bar. It seems like the vast majority of people in the Bar have probably been admitted less than 10 years because of the explosion in the numbers. I also think that there are a lot more of what we would call out-of-state attorneys practicing here either because of the proliferation of the satellite offices, or just for other reasons. And we have, of course, a whole new category of members of the Bar, which are the Rule 55 lawyers who practice in-house at corporations.

NOLEN: Would anybody care to talk about how the growth, just the sheer numbers of the members of the Bar has changed, if it has changed, the way that we deal with each other and regard each other in the practice of law?

KRAPF: I'll be a naysayer on that only from the standpoint that we're still small relative to other jurisdictions. Putting on my hiring partner hat, it's a selling point for Delaware and for lawyers coming into Delaware to practice here, that relatively speaking we're still a small Bar and, relatively speaking, we know most everybody and particularly within certain practice areas.

Looking back over the past 25 years in my area of real estate law, I'm still working with the same people in other firms that I worked with 25 years ago,

having the same conversations that we have had for the past 25 years. It's almost a shorthand because it's the same people, the same issues, the same clients often and you still know the same group of people. Now there are all these young people that you don't know by sight and they look younger and younger every day, but I'm not sure that's the size of the Bar so much as age. No matter how large the Bar may become, there would be that group of young people who you wouldn't necessarily recognize even though they're practicing generally in the same area that you are. But I haven't seen that loss of whatever you want to call it, collegiality, camaraderie, knowledge.

JOHNSTON: I think it was perhaps three weeks ago today that the Delaware Supreme Court admitted the most recent group of members of the Delaware Bar. The message was sent that we continue to have the best Bar in the world. It was just a real good, positive feeling in that room. Coming out of that room, what I've seen from the more recent admittees is they have embraced what we really hold dear in terms of becoming familiar with one another, someone's word being his or her bond, promoting civility and professionalism.

That said, it's something we can't take for granted. The Bar now with about 4,000 practicing members is at least twice the size it was when I was admitted in 1982. It's becoming increasingly important to look for opportunities to introduce folks to one another, sometimes a get-together for the sake of getting together, through the Bar Association or otherwise, promoting positive relations between the Bench and the Bar. When we visit other states or talk to Bar leaders from other states, it's typical, frankly, to hear about disputes, tremendous tensions between the Bench and the Bar. That hasn't been the experience of the Delaware Bar, quite happily.

"One aspect of the growth of the legal practice in Delaware is a shift toward ever greater specialization in areas of practice."

RHOADES: I'm a small firm practitioner but in another lifetime I was a partner at Young, Conaway, Stargatt & Taylor. I'm heartened to hear that the things that we're talking about right now are things that I remember talking about on the hiring committee back in the late '80s, because it shows that we have this continuity of purpose, to be the best and to make our Bar a shining example for other Bars across the country. It's a real credit to the Bar that we do that.

NEWELL: One of the benefits is the pre-admission conference. It was called "Bridging the Gap" this past year, for those new admittees of the Bar, when they come in and have to sit through two days of people like me this past year droning on about family law practice. I think the message over the course of those two days about the civility and the reputation of our Bar helps, because when you talk to other people from other jurisdictions they don't have that. There's a swearing-in ceremony and the diploma is handed to them, and they're off on their own and without a lot of guidance in that regard. And I think we do a fairly good job of that.

NOLEN: One aspect of the growth of the legal practice in Delaware is a shift toward ever-greater specialization in areas of practice. Does anybody care to comment on whether they think that is a positive trend or a negative trend from the standpoint, first, of satisfaction in practicing law for the lawyer and, second, in client service?

KARSNITZ: I think it's a negative, not that I think it's not warranted. There are a lot of reasons why it's occurred and those are good reasons. I'm currently spending a lot of my time doing employment law, but in years past I searched titles with Rob before either one of us became lawyers and when I was with Young, Conaway. Because of the nature of opening a law firm in Georgetown, we did everything and I benefited from that a great deal.

I've noticed recently that lawyers on the other side don't have the first idea of what a deed or a mortgage is. They don't understand anything about conveyancing. I think the reason is that real estate lawyers necessarily have become specialists, because if you look at the trend of malpractice cases, real estate has one of the highest percentages of problems. That's caused people to gravitate towards specialization in real estate. The nature of the transactions, the complexity of transactions, the Unit Property Act, all have fostered specialization in real estate. But it has been damaging to new practitioners not to have the diversity of exposure

that we all had coming up, because it makes you a much narrower lawyer.

In the long run it does not benefit your client for you to have to shop out certain aspects of a case because you don't have the first idea about stuff it's based on. I don't mean that with respect to more complicated matters. For example, I don't think there's any detriment to a lawyer not understanding intellectual property law even if it may tangentially come up in an area of representation, but not to know how to prepare a will, not to understand the first thing about a note, a mortgage and a deed, not to understand even the rudiments of a criminal case, what's an arraignment, those sorts of things, makes us narrower. It may be necessary but not particularly good.

"They will be taught by the profession and in the course of working in the profession, how to actually become a lawyer."

SPENCE: When I first was admitted, it was always interesting to see a person like Victor Battaglia in virtually every court and reported everywhere. Your Honor [Justice Jacobs] was doing the same thing. You were appearing in lots of different places and doing lots of different things. My first boss, then Lt. Gov. Castle, while he was trying to phase out of the practice of law, he was doing all sorts of different things ever since he came out of the A.G.'s office.

There is still a considerable amount of that going on I think in Sussex County, a lot of people doing a lot of different things, some not so well, some so well and some very well.

For me I've kind of done a little bit of both. I was up here. I've never considered myself much more than a generalist except in the area of bankruptcy. But I've had to learn over the years it's just better to say no a lot more often than I used to.

I learned a lot working for Castle because he made me do a lot of different things and I do feel I have a fairly broad base being able to help a client to understand, do they have a legal issue, what do they need to do about it, where should they go. I try to understand who the specialists are and get them there, but I say no a whole lot more often than I used to because of the need to be specialized. I think you have no choice.

JACOBS: Can I make a perspective point? The discussion about the growth in numbers and the specialization that has gone on progressively since every one of us started practicing law leads to another subject that really cannot be ignored, and that is the problem of mentoring.

It has been an unstated assumption in the legal profession across the United States at least from the early 1900s that our way of educating lawyers and teaching them how to be lawyers is that they will develop the intellectual equipment in law school, after which they will be mentored; that is, they will be taught by the profession and in the course of working in the profession, how to actually become a *lawyer*. That is totally different, and 180 degrees removed, from the way the medical profession does it. Once you are out of medical school and finish your internship and residency, you are equipped to practice medicine. When you get your J.D., however, you are not equipped to practice law.

In Delaware, one of the unique features about being a member of this Bar, and in which we all prided ourselves, was that it didn't really matter whether you were going into a big firm or a small firm. Delaware lawyers, just because of the socioeconomics, were equipped to help anyone achieve the skills and the sense of ethics and other attitudinal imperatives that were necessary to become Delaware lawyers.

For example, if you were going to become a King Street lawyer, even with no years of practice, it wouldn't be uncommon — and we're going way before 1982 — that the King Street lawyers would take that lawyer under their wing, and would teach how to search a title or how to make an appearance in the J.P. Court or Superior Court, how to try a simple case. That was done simply because that was the culture then.

Of course, anyone who was fortunate enough to be hired by a big firm got the systematic, specialized training that was characteristic of big firms because that was the nature of the practice and the firm had to make a substantial investment to achieve that.

Since then, two trends have occurred nationally that are the enemy of that assumption. One is the increased size of the Bar. The other is the increased amount of specialization. The larger the number of lawyers and the more

specialized they must be, the greater the intensity and amount of mentoring that's required, but the problem is that increasingly scarce resource – mentoring is no longer available today as it was 25 years ago.

For lawyers who now start in small or solo practice, the disciplinary issues we are encountering are more frequent in that segment of the Bar than among those fortunate enough to be well mentored. In many cases, that is because lawyers in small practice must take whatever comes through the door, and they don't know how to handle those cases.

On the other hand, life is not always a bed of roses for young associates in the big firms either, because not all big firms are the same. Some firms, because of the economics, simply need to get those billable hours charged, and they don't really care that this comes at the expense of the professional development of the young lawyers. And so these lawyers, although well paid, are not necessarily getting the experience that they need.

Basically, the good mentoring resides in that group of firms that have made a judgment that it's worth investing the time of senior lawyers to train these young lawyers. I think this is the challenge that the Delaware Bar will be increasingly facing over the next 25 years. In the past we prided ourselves as a Bar in being able to solve the mentoring problem merely because of our small size, and because of the ethos that came with being a Delaware lawyer. But the question is, can that last if the Bar grows from 2,000 to 4,000 to 6,000 and where the financial pressure, even in the most successful firms, puts a premium on churning out the hours and less of a premium on lawyer training and professional satisfaction?

"It has become such a business that we're compelled, or the people in those situations are compelled, to always be concerned about the bottom line."

NOLEN: There have been a great many changes from the model that existed 25 years ago of hiring and promotion within a law firm structure. Maybe some of you in larger firms would like to comment on what changes have been made to try to accommodate different lifestyles that exist within firms today that wouldn't have existed 25 years ago.

KRAPF: There are plenty. It's kind of like the discussion that we had about diversity, in that if you lived through that period of time you notice all of the changes. Twenty-five years ago, I don't think there was any exception in any larger Delaware firm to the up-or-out model, where you are hired as a first-year associate from a law school and you go through some period of years, at the end of which you either were made a partner or you weren't made a partner. And if you weren't made a partner, generally you were shown the door. It might be a nice door. It might be a door slamming on your backside, but you were shown the door.

In the past 25 years, for each of the larger firms that I'm aware of in Wilmington, it has been again a dramatic change in having schedules that allow for different kinds of lifestyle choices, whether it's a female attorney who wants to make sure that there's time at home with a new child, whether it's an attorney that doesn't want to be on the partnership track but loves what he's doing at the firm and is willing to say, "Fine, I really want to stay and do this stuff; I don't need to be a partner, but I just want to keep doing this at your firm," and other flexible models like that to keep people doing what they like to do and what they're good at instead of saying, "Well, you have now served your apprenticeship for the past seven years and we don't think you're worthy of partnership, so here's the door." I think it's been a very positive thing because it's allowed lawyers who like what they're doing, who want to stay where they are, who want to have a different kind of life model than these type-A personalities who started the practice of law in the early '80s, and I think it's worked out well for everybody.

NEWELL: On the issue of mentoring, two things. One, what Kathi said about coming out of law school and having more of a general practice experience I think was important. Unfortunately, I only had about 10 months of that before Charlie Keil became a Family Court judge and Bayard, Brill said to me, "Do you want to do this practice?" So then I became a one-trick pony, so to speak. But mentoring over the course of years has changed because now we have the Inns of Court, so there's a chance for the younger lawyers to get in some social contact and academic contact, if you will, with the senior members of the Bar and the judiciary to talk about some of these issues. Unfortunately,

the Inns of Court have now become specialized so you don't have that cross-training anymore.

Now, downstate, Kathi, you have the Terry-Carey Inn, which is a large Inn. And I think we in New Castle County lose some of what you have down there in terms of the camaraderie and just the varied practice experiences coming together. So mentoring has changed from that offered within the law firms and by the King Street lawyers, so to speak, to the Court sponsoring the Inns of Court.

KARSNITZ: But I don't think it's replaceable. When I think about the mentoring that I got from somebody like Dick May, who had the patience and the knowledge and the time and I think saw mentoring new associates as valuable as billable hours — I don't see that happening anymore.

My personal opinion is that part of that is a function of changes in our willingness, our eagerness to market and advertise, which I think has really changed a lot in the last 25 years. It used to be that when we first started the people who advertised were, you know, their commercials were like Krass Brothers Men's Store commercials. Even the big firms weren't big.

It has become such a business that we're compelled, or the people in those situations are compelled, to always be concerned about the bottom line. The mentoring to me is an intangible. You can't put a value on it. You don't put it down on your time sheet.

I would like to think that having more women in the profession and in business in general has encouraged the adoption of a different mind set that allows men to take the benefit of flexible time, being able to work from any locale to take a greater part in their kids' activities.

On the other hand, if you're spending your time trying to get your own stuff done so that you can go see a game or take a vacation, you have less capacity to be available to younger members of the Bar. I don't know that it's necessarily a good thing, because most of us are better off learning from example and observation than we are from anything else. If we don't have, if somebody

doesn't have the wherewithal to allow us to observe and to be mentored, it doesn't happen.

I don't want to sound like an old curmudgeon, but one of my observations about the newer folks coming up is they're not as easy to talk to. I find that some of the younger lawyers that I have cases with you don't get a phone call to say, "Do you mind if I amend this pleading?" You don't get a phone call saying is there some way we can work this out? All you get is papered. And maybe that's just my experience and it's not shared by other people, but there seems to be less collegiality from some of the younger members of the Bar than from my colleagues.

I think part of that is not having a Bill Taylor to have a "dumb hour" with. Bill used to say to all of the young associates, "You need a dumb hour? Come on in." And it was great. But I don't see people taking the time to do that anymore.

McGEEVER: Related to mentoring, it's a little harder to do it now in large law firms or maybe even any size law firm because of the types of cases we used to get aren't there anymore mainly because of the Superior Court arbitration, mandatory arbitration where everything under a certain amount of dollars goes into arbitration so that you don't get those dog bite cases or minor fender-bender cases that used to be assigned to associates and tried to a jury.

I had a couple of jury trials over small car accidents in shopping malls, but at least one learned how to pick a jury and try a jury case. Those cases now go into arbitration, which is a different kind of litigation. So you don't have the opportunity.

I think firms have to create their own in-house trial practice seminars or send their associates to NITA programs to learn how to try a case. I tell some new attorneys if you really want to learn how to try a case, don't go work for a law firm out of law school; go into the Attorney General's Office or into the U.S. Attorney's Office, you will learn how to try a case then and there. If you go into a large law firm, you're going to learn how to do discovery, how to write document requests, how to object to document requests.

"If we don't train people to be new partners, our law firm will die out in a generation."

We, as senior attorneys, don't have the same opportunities to mentor the same way as some of our predecessors did where they could give you a case and talk to you about why a certain person who works at DuPont might make a better juror in this kind of case than some other type of person.

ANDREWS: I do see the change in the desirability of certain jobs. When we get a vacancy in the U.S. Attorney's Office, and we spread the word that it's there, we have gotten up to 250 applications for it. We pay a lot less than any of you all pay. But the four people whom we have hired in the last year and a half, if any of them applied to any of your law firms, you would take them as your first choice despite all the other very good applicants you have.

One of our new assistant U.S. attorneys had four trials in the last year. He just can't believe how lucky he is, because the new lawyers talk to their classmates and they see what everyone else is doing, but there's obviously a cost. Not everybody can take the pay that goes with a public lawyer's salary. A lot of people have a lot of debt coming out of college and law school, and it is a much greater amount of debt than any of us could possibly have had. So, to some extent, a lot of lawyers who would be interested in being a prosecutor have their choices limited because they need to pay off their law school debt.

NACHBAR: I want to disagree a little bit about the mentoring. I think that at least we still do a lot of mentoring, probably more because we don't have quite as many emergency preliminary injunction type actions that were a staple of the Chancery Court practice when I started. I think we mentor people really for three reasons. One maybe isn't selfish and two of them probably are selfish. One is we demand a lot of people. We expect them to work hard. We think we owe them that.

Second, if I mentor someone and teach them how to do something, they can be more helpful to me in the future. And that's sort of selfish in a sense, but I think people benefit from it.

And the third reason is if we don't have children, our species will die out in a generation. If we don't train people to be new partners, our law firm will die out in a generation. So we're training partners for the future and that's partly for self-preservation and it's something we need to do and we do it and I think

at least our firm is pretty good at it.

I think not everybody stays and becomes a partner, but a lot of people have wound up at other places and most of them reasonably successfully. So it's easy to say "Well, 25 years ago people were much better at mentoring," and I'm sure in a lot of places that may be the case. We might be better at it than we were 25 years ago. I'm not sure.

JACOBS: I think that if the mentoring, the quality of mentoring that a lawyer can get in firms like Ken's were generalized across the state or across the country, we wouldn't be talking about this problem. You're absolutely right, Ken; in my view also it's in the self-interest of the lawyers, not just at the big firms but generally, to mentor the next generation. Unfortunately, what seems to have happened is that the economic pressures which affect different segments of the Bar in different ways are basically starting to have sway over that longer-term self-interest. And I think that's what in part is eroding the quality of mentoring as a general matter.

SPENCE: I enjoy spending time trying to help a younger lawyer understand the strategies and the concepts, but during the '90s we had substantial pressure on a small-firm level being able to compete with the regional offices that were deciding to open Delaware sub-offices. In many cases, people that I had just mentored for the last three or four years I would lose to the newest Philadelphia or Pittsburgh or New York office that was coming to town.

Ultimately you're not going to change that. But I think all of us in the room have to commit to continuing to do mentoring. I'm doing it on a regular basis all the time, both with paralegals, because they're much more part of the practice than was the case 25 years ago, with the exception of real estate paralegals probably.

"The system of alternative dispute resolution has revolutionized the court system right now."

NOLEN: I think that we would all acknowledge that over the course of the last 25 years some areas of law have emerged that have become very important to our Bar that either were not terribly important to the Bar 25 years ago or didn't even exist 25 years ago.

I wonder how you perceive those areas as affecting the practice of law in Delaware. I'm thinking particularly of the bankruptcy practice, the very sophisticated intellectual property practice, the development of alternate entity law that has occurred in Delaware and has become a real driver of legal work here and there are certainly other areas that could also be brought up. How do you perceive those developments as having affected the practice of law?

RHOADES: I can tell you how it's affected people who are small and solo firm practitioners because I think there are far fewer people who are venturing into that area now than there might have been when I first started practicing law.

I was mentored at Young, Conaway and lucky for me I had the best mentoring possible. When I left and went on my own, I became a King Street lawyer and there were still King Street lawyers around, so I could knock on people's doors, and if I had a problem I would go and talk to these people.

What we're finding as an organization, the Delaware Trial Lawyers Association, is that there are far fewer young attorneys who are even venturing into that type of trial practice anymore. And I think the main reason is because some of these other areas have become such an important force that you're seeing a lot of the people migrating to that area and they think Delaware law and Delaware practice means those areas that you have described.

And so I think there are fewer people venturing into areas of family law, personal injury law or any other type of trial practice where you might find yourself in front of a Superior Court judge or a Family Court judge for that very reason.

NOLEN: Ken, you mentioned a while back that when you came to the Bar in Chancery, the bread-and-butter practice was the preliminary injunction or the temporary restraining order type of application. How have you seen the practice in that court change over 25 years?

NACHBAR: There are far fewer preliminary injunctions and there are two reasons for that. One is just changes in the federal securities laws. It used to be you would do a tender offer and it was open for 10 calendar days. We had one client who launched a tender offer on Christmas Eve and so

the 10 calendar days included a total of four business days which were between New Year's and Christmas. It was two weekends, Christmas and New Year's and that was six of the 10 days. So that got changed.

The second thing is that the two-tiered tender offers because of poison pills and other reasons have largely gone away, and the junk bond financing and all of that have largely gone away.

And then the third reason is I think the courts figured out that in a lot of those cases people are really asking for advisory opinions. There was one case, in particular, where somebody asked for a preliminary injunction so they could close their transaction, got the preliminary injunction and then didn't close the transaction because we represented the defendant and we didn't appeal. After we didn't appeal, they were saying, "Well, we only have a Chancery Court opinion. What if it gets reversed by the Supreme Court? We'll be in terrible shape." So they didn't close and it became obvious that they were just looking for an advisory opinion.

I think all of those have conspired to make expedited trials much more common and preliminary injunctions less common. There are still plenty of TROs and preliminary injunctions but not quite the way there were before.

On the other hand, my first five years of practice I never had a trial and I finally went to our practice committees and said, "Look, I need to get to court and have a trial." So I actually did the damages portion of an intellectual property case for six weeks in Philadelphia. Now we have trials much, much more frequently.

JOHNSTON: I think we have seen perhaps a couple of conflicting phenomena; on the one hand, an increased emphasis on the practical side of cases and the members of the Court of Chancery, speaking generally, becoming more active in appropriate circumstances pushing for settlement and very early on signaling preliminary judicial reaction to a case, to claims and to defenses, and then relatedly, of course, an increase in mediation in that court, one chancellor mediating another chancellor's case if the parties request that and consent to it. We have seen more and more matters successfully mediated in that court.

"The number of younger lawyers practicing in our court seems to be declining and that concerns me."

At the same time, we have seen less reliance on dispositive motion practice, in particular summary judgment practice. We have seen a greater inclination at least on the part of certain members of the court, but I think generally, to move a matter to a final hearing. In those instances, there can actually be a greater opportunity in a sense for practitioners to get trial experience. On the one hand, we have a certain number of matters being resolved through alternative dispute resolution, mediation in that court but, on the other hand, there can be something of a greater opportunity for in-court trial experience in certain matters before certain judges.

NOLEN: One of the possible levers, I suppose, that the Chancery judges seem to be wielding before settlement is the risk that "if you take the case any further, I'll issue an 85-page opinion that you'll have to spend three days digesting and trying to understand so you can explain it to your client." Has the extraordinary trend toward academic opinions coming out of that court had any effect, either positively or negatively, on either the practice of law in Delaware or how Delaware is perceived as a jurisdiction?

JOHNSTON: I think there can be a positive effect to the extent that many of the opinions can provide some helpful guidance and so can assist practitioners in counseling and trying to predict. On the other hand, if a matter is addressed in an opinion that was not briefed, perhaps was not even raised during argument, it can present special challenges to Delaware counsel in explaining to the client and perhaps out-of-state counsel just why that has happened. And it can present the need for trying to address the situation through a motion for reargument, which we all know has a very, very high standard attached to it.

NOLEN: I think you must have gone to the school of diplomacy. Ken suggested that in Chancery Court there's actually more trial practice now than there once was. But one of the trends that certainly is a national trend and I think is also a trend in our other trial courts is a trend away from resolution of matters by trial, either to a jury or to the Bench. Would anybody care to comment on the effect of that change?

RHOADES: I practice in Superior Court exclusively. The system of alternative dispute resolution has revolutionized the court system right now. I think that young attorneys coming up are much more adept at dealing with arbitrations and mediations than they are with jury trials which they rarely get to have. In general, it's good because trial is the ultimate resolution of everybody's problems, but our goal is to resolve problems. If we can resolve problems in other ways without having to resort to the ultimate resolution, there's nothing wrong with that. Going through the different processes educates the client. When you have a client who at the beginning is looking for his or her pound of flesh and doesn't see the other side of the story, if they go through an arbitration proceeding or if they get in a room with Judge Bifferato, who is the mediator extraordinaire of the trial Bar right now, they will walk out and feel as if justice has been done. Yet, they didn't have to step into the courtroom. I think it's great for the client. It's not so good for lawyers honing in on their trial skills, but we have become facilitators a lot more in that area and it's a positive thing.

NOLEN: Since we have the honor of having Justice Jacobs and Judge Newell here with us, I wonder if you can comment on how you as judges perceive the lawyers that are appearing before you as having changed. Are they more sophisticated, less sophisticated? Are they better-rounded, able to present better arguments now than 25 years ago or otherwise?

I know that you haven't been on the Bench for 25 years, but —

NEWELL: I feel like it.

KRAPF: In dog years.

NEWELL: First, the number of younger lawyers practicing in our court seems to be declining and that concerns me. And it's the type of practice that people run away from because of the problems, the issues that you deal with, the emotions that you deal with.

The nature of the Family Court practice has become more complex, in the property division cases that I was trying and that I'm hearing, in terms of business valuations and issues like that. It used to be when I first started practicing – it didn't happen at Bayard, Brill – the rumor was that's how you trained a new lawyer. You just said, "Here, you go to Family Court because it really doesn't matter what happens down there." I know from my professional experience that's not true because very serious issues are tried in our court day in and day out.

And it's largely a reputation-based practice. So when people have a big case, they're going to do it by word of mouth. They're going to talk to people and say, "Who should I go to?"

The other part is that it's not the kind of practice that you can have a second chair usually because of the expenses that are attached to it and you don't find many firms who have a family law department where they are training those younger lawyers.

But I can tell you that by and large the attorneys who want to practice in our court are serious about our jurisdiction and that's why I said earlier that the Inn of Court that we have I think is really valuable in terms of training those people as well.

"Before, the larger firm used to have the assets available to it to basically put on a better presentation than you could."

JACOBS: It's a hard question to answer. I've been at the business of judging a little longer than Judge Newell, not quite 25 years but 21, and 18 of those were at the Court of Chancery. And it may be a little helpful to break out those two experiences because they are different.

By and large, the quality of the lawyering in the Court of Chancery has been high and to the extent there were variations it wasn't so much on the basis of young lawyer/old lawyer. It may have had more to do with how well the lawyer was paid and, therefore, prepared.

Generally, the nature of the Chancery practice was such that the lawyers and the firms that sent their lawyers in to practice in Chancery had a high stake in making sure that they were adequately prepared to present the case and so as a general matter we got high-quality representation.

Admittedly, there were variations. Not everybody is a superstar, but I could not detect any change over time, over the 18 years in the quality of the lawyering.

In the Supreme Court, there is a greater or a wider variation in the quality of the lawyering. And the younger lawyers, I mean to the extent that quality is on the low side or lower side, that does tend to get associated with younger lawyers, but I can't say it's a product of any fundamental changes that have taken place over the last 25 years. I think, once again, it's a matter of how well the lawyers are compensated, what incentives they have to prepare.

In my own personal view, any lawyer that appears before any court, whether they are well paid or not, should as a matter of professionalism and professional pride prepare and do whatever preparation is necessary to make the best presentation of which they are capable. The fact that it's not happening is a subject that we could spend hours talking about, but not here.

The short answer is that to the extent there are variations in the level or quality of practice, it has more to do with the economics than it does with changes that have taken place over time.

NOLEN: I suspect everybody would be able to contribute on the effect of change in technology on the practice of law.

KRAPF: It's the devil's work.

SPENCE: Yesterday I sent a note around — I now work most of the time in Dewey — that next summer we have to figure out how we can get out there with our PDAs and our cell phones and work on the beach one hour a week at least. You couldn't stray 10 feet from your office if you wanted to get anything done when I first got admitted because you had to handwrite it, then get a typist to type it or maybe dictate it into one of those box dictators about as big as both of my hands together. It's just amazing what you can accomplish now. I'm also old school in that I refuse to get a PDA because I figure once I have left the office, I probably need a few minutes to just power down.

RHOADES: It's a blessing and a curse. For a small-firm practitioner, it's the extra associate or the silent partner. It's a great equalizer, if you are trying a case against a larger firm. Before, the larger firm used to have the assets available to it to basically put on a better presentation than you could.

They usually were representing the client with more money and so they would go out and they would get those large exhibits and do all the things that would impress a jury and you would be there cringing with your yellow pad and trying to make your point.

Now I can pretty much do anything that a larger firm can do in making a presentation to a jury, so I can come off as being just as professional as a small firm practitioner as the larger firm practitioner.

Another great aid for small firm practitioners is that as a member of the Delaware Trial Lawyers Association we have a very active listserv. There's online mentoring that's taking place in my office right now because I know when I go back there will be 25 messages from members of the Delaware Trial Lawyers Association asking questions about various matters. You would be surprised how much information is exchanged among attorneys.

Obviously, the curse is that everybody wants everything done yesterday. It used to be you would get this letter and you would sit there and ponder about it and you would think about it for a day or so and then you would pick up your dictating machine and maybe you would draft it and four, five days later that letter would go out the door. Now it's, "You've got my e-mail three minutes ago. Why don't I have an answer?"

McGEEVER: It's made easier research a lot easier. Somebody in the Court of Chancery practice, someone reading this, might be shocked to read that 25 years ago one had to memorize the unreported opinions. You had to know the unreported opinions. You had to read them and, not memorize them word for word, but you had to know what they were because there was no way of researching them until the early '80s, when LexisNexis became more widely available.

"Now lawyer advertising is everywhere — Internet advertising — and I think unfortunately that has cheapened the profession."

NOLEN: On the other hand, some people might suggest that by having to go repetitively through the cases and read the case from the beginning to end you were a much better lawyer than one who simply reads the surrounding 50 words of a phrase that he or she happens to have selected. You have a more universal knowledge of the law.

NEWELL: When I first started practicing, I had the benefit of working with Rich Herrmann, who is always dealing with the technology issues. He suggested that he wanted to get to a point in our firm that rather than a receptionist that we would have a robot that would actually go out and greet the client and bring the clients back to the attorney's office.

I always wanted to be in the office of Howard Handelman that day when Richie proposed that, but I was a first-year associate and I didn't have the benefit of that.

NOLEN: I would be curious as to whether anybody believes that there's been a change in the public perception of law or the practice of law or the integrity of lawyers or the integrity of the system over the 25 years. How has that evolved?

ANDREWS: Well, it affects prosecutors a lot more than you might think because basically, when you go to court, everybody expects CSI to show up, and it doesn't. It doesn't happen in the federal system. It doesn't happen in the state system. And a lot of juries probably correctly hold that against the prosecution.

RHOADES: When we were in law school we were reading the first lawyer advertising cases in our constitutional law class. The Bar associations were forbidding the use of lawyer advertising and then some lawyer would take them up. We learned that it was part of their freedom of speech and that's what we knew about lawyer advertising when we were going to law school.

Now lawyer advertising is everywhere — Internet advertising — and I think unfortunately that has cheapened the profession to some extent and I think that lawyers are looked upon a little bit differently because they are sort of selling their wares like that. And just open the Yellow Pages and you can see what's going on.

Unfortunately, it's happening with doctors, too. It's not just our profession. I mean, you look at the yellow pages for physicians and now everybody is advertising their particular specialties also. But I think that's had an adverse effect on the way the public perceives attorneys.

KRAPF: I think historically lawyers have always been the target of all sorts

of hostility for various reasons, but the one difference we have now, and I certainly see it in real estate work where it happened very dramatically, is turning the profession of law into the business of law. Instead of providing legal services and advice and judgment and value of your service, it's producing widgets. That creates this perception in the public that it's what lawyers do. Lawyers produce this widget that you have to buy for some reason and you don't really want to buy it but you've got to buy it and so since all lawyers are fungible, since they generally are just producing the widget and all you really want is the widget, you don't care who produces it, and go to the cheapest widget producer. That's created a very bad perception as to what a lawyer does in a transactional setting.

It might spill over to litigation. I don't know. It is so in the transactional setting, which I think has been unfortunate and unintentional by the folks who were involved in that kind of practice. They didn't start out trying to do it that way, but I think that has been a byproduct.

JOHNSTON: I think awareness is particularly important of the good that lawyers are doing. I'm sure all of us around the table have dedicated countless hours to nonprofit work, to one form or another of *pro bono* work. And that word doesn't get out and may not get out because of modesty or whatever it might be, but I think we've got to trumpet that sort of volunteerism as a profession, and let people know that the lawyers in a very real sense or the legal community has provided the backbone of so much of what our society is about.

I agree, Joe, that the advertising really has probably been the most problematic aspect of this. Happily, I think it's fair to say if we think about Delaware as opposed to some surrounding areas we're still in better shape. Still, it's something that we have got to guard against.

"Access to a lawyer for a middle-class person is so expensive. They can't pay $400 an hour."

NOLEN: The last question, and it feeds a little bit into *pro bono* but I don't mean to have it apply only to *pro bono* work, is: How are we doing serving the less fortunate in our communities compared to 25 years ago? Does anybody have a perspective on that?

RHOADES: I think as a Bar we're doing better. Because of some of these institutionalized programs that we have, I think as a Bar we're actually doing better.

I was in Family Court this morning because when Tania Culley calls, I listen. We have a lot of really fine institutions as part of our Bar that people are really anxious to get involved in and I think it's terrific that we do have it. I don't remember any institutionalized programs like that when I first started practicing law, so I think as a Bar association I think we're doing quite well. Could we do better? Sure, but I think we're doing well.

NOLEN: How are we doing in terms of making legal services accessible to people who can pay for them, who don't require *pro bono* services but nevertheless need legal services at some level?

McGEEVER: I think that's much more difficult because it's become so expensive. Access to a lawyer for a middle-class person is so expensive. They can't pay $400 an hour, which is the going rate in a lot of places for a lawyer. It's that category of people who are hindered in terms of access to justice because it has become so expensive. The average person can't afford to pay a lawyer.

KARSNITZ: On the other hand, the kinds of bread-and-butter cases are to some degree more accessible because of alternative dispute resolution. You can expect that you're not going to be sinking a ton of money into a case that is likely to resolve before it gets to trial, when you're talking about less than a $100,000 P.I. case or property damage case or something like that. So to some extent, some mechanisms make legal representation more accessible.

NEWELL: The biggest eye-opener for me going onto the Family Court Bench was the level of *pro se* litigation that goes on and people who do not qualify for Delaware Volunteer Legal Services. When I first started practicing, Community Legal Aid did a little bit of this practice, which helped out and they still do some of it, but funding sources have dried up. I'll conduct calls of the calendar just to try to screen cases and see if in some way we can resolve them or whatever. When you ask people if they are going to have a lawyer, usually the response is, "No, because I can't afford one." And these are people, as

Betsy said, that are in the middle-income strata that you can't refer them to Delaware Volunteer Legal Service. So I see a lot of it and I'm not sure what the answer is, but there's a large portion of our population in our court that go unrepresented because of that.

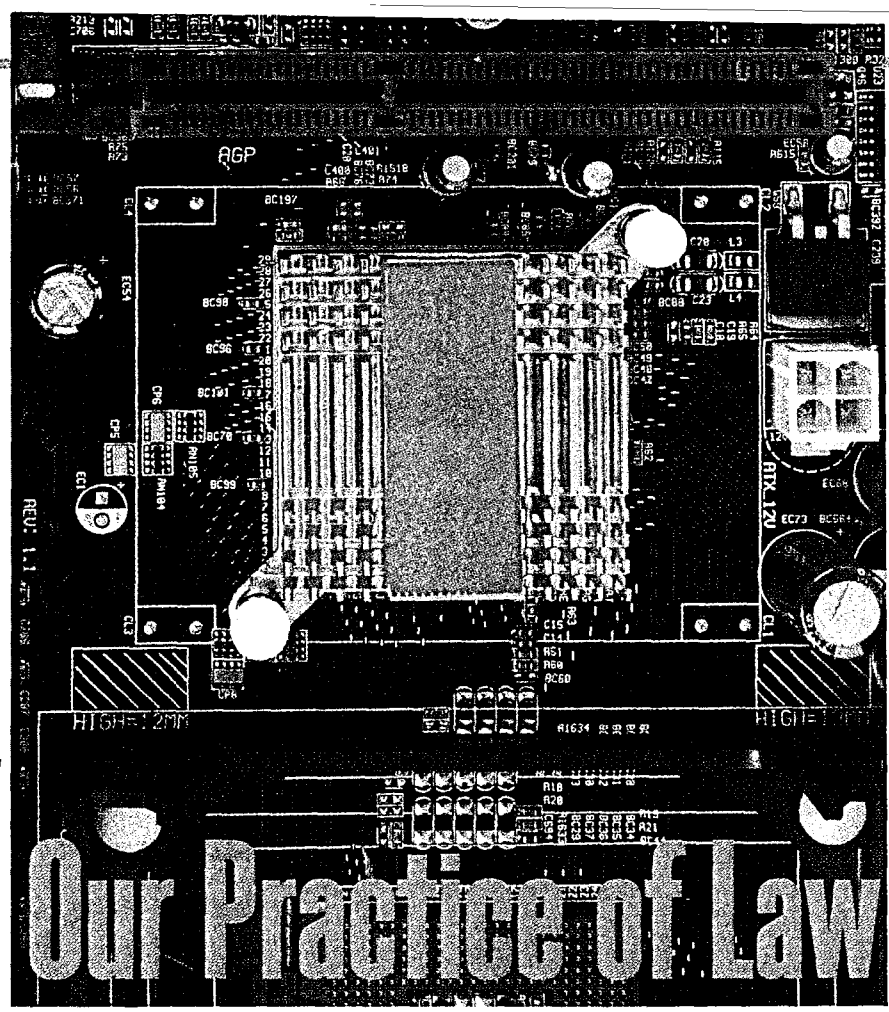
JOHNSTON: There's a related phenomenon that some people have called disintermediation and others call the Home Depot phenomenon. I refer to the type of person who could afford a lawyer at some level but chooses not to, and wants to pursue the matter himself or herself. Unless we're going to bar that kind of self-representation, which probably would be unconstitutional, we've got those folks in the system as well. I think, Your Honor, in Family Court, at least the last I heard, something like 75 percent of the matters have one or both parties unrepresented.

NEWELL: Yes. It was staggering. I used to think that judges were exaggerating when they would describe the level of *pro se* litigation that we have down here. Then probably the fifth week of my calendar, I finally had two lawyers on a case, two lawyers known for very aggressive representation. Others said, "Oh, you poor man." And I said, "Do you know what? I would take that." And I say this in all due respect to *pro ses* because a lot of them do a good job, but a lot of them are just floundering so I have to play the role of the lawyer as well as judge and make sure I have a balanced record and make sure I'm asking the same questions to each party. Some people are going to want to represent themselves. I think we see more, though, of the people who probably would want to have a lawyer because of the issues that they're presenting and just can't afford it.

NOLEN: I want to thank all of you for having come and shared your historical perspective and your perspective on how things are today, so thank you.

A transcript of the roundtable discussion in its entirety is available online at www.delawarebarfoundation.org.

Richard K. Herrmann



How Technology Has Changed Our Practice of Law

During the last 25 years, we have invited technology into our practice and into the courts, to solve problems and to provide solutions.

It is quite an honor to be asked to contribute an article on the growth of technology in the Delaware legal community over the last 25 years. After all, no matter what our practice, technology is the one common thread that has caused us all to change. It is not our culture that changes how we practice law; it is technology. During the last 25 years, we have invited technology into our practice and into the courts, to solve problems and to provide solutions. We have embraced it to create efficiencies and to permit changes in lifestyle.

In approaching this article, I have decided not to recite a history of technology and the practice of law. This would interest only a few. Instead, I offer vignettes of actual scenes from the past. I have changed no names; nor have I created fictitious locations. There is no need. The situations are real. The dates are approximate. Some of you will read this as history. Others will look back at it as reminiscent of the past.

Time and Billing

The scene is the bookkeeping office of a well-known Delaware law firm. The time is 11:59 p.m. on Friday, Feb. 29, 1980. Attorney Robert J. Katzenstein of Richards, Layton & Finger, looks on earnestly as the Olivetti computer continues chugging away, after hours and hours of attempting to run a simple monthly report. This is no late-night computer user group meeting. Katzenstein is representing Olivetti in a products liability case.

According to the complaint, Bayard, Brill and Handelman leased a computer from Olivetti for the express purpose of performing legal time and billing and other related accounting functions. It

is alleged the system is programmed defectively, in that it does not accept more than 5,000 clients. In other words, once the law firm reached client No. 5,001, the computer stopped. It is also claimed the length of time it takes for the computer to perform its functions is unreasonably slow and it does not perform in a commercially reasonable manner. I am the lawyer for the plaintiff.

After several months of litigation, the parties agree that Olivetti will have a reasonable period of time to resolve the alleged complaints. If the computer fails to perform reasonably by midnight February 29, 1980, Olivetti will take back its computer and terminate the lease. The time has come and the lawyers for the parties look on. Olivetti can just not make it happen.

The firm now has 90 days to cover. We could return to a manual system or join the other large law firms performing their billing functions by "time sharing." A bookkeeping department of a law firm keys time entries into a terminal. Those entries are transmitted electronically to a computer belonging to a vendor. On a given date, billing drafts are mailed to the law firm for editing and review. The drafts are mailed to the vendor for final printing. The finished bills are mailed back to the law firm for invoicing. This is a reasonably effective service provided by a number of vendors. It is certainly better than a manual system but it does have its obvious shortcomings.

The notion of a law firm having its own computer, with a legal time and billing system, is unique in 1980. Olivetti tried to get into the marketplace, but cannot make it work. The only other vendor offering such a system is IBM, and it wants to place one in Delaware badly. So it is, on March 15, 1980, IBM sends me to an all-expense-paid, one-week class on computing in Boca Raton, Fla. The class is offered to senior management of medium-sized businesses. We are provided rooms at the Boca Raton Hotel & Club, and are shuttled to class each day. The weather is wonderful, but we are inside and the sessions are grueling.

During the hourly pastry and coffee breaks, we have an opportunity to meet the trainers on a one-to-one basis. The trainer for my group, Chad, somehow has magically discovered I am a "Star Trek" fan. Each break, during the next four days, I take the opportunity to play a wonderful "Star Trek" game on an IBM System 34 mini computer, killing Klingons and protecting the Neutral Zone. There is no doubt Chad knows exactly what he is doing. I am hooked. By week's end, I have to have that computer.

The notion of a law firm having its own computer, with a legal time and billing system, is unique in 1980.

Computerized Legal Research

The scene is a conference room in the Market Tower Building. The time is 9:45 a.m. on Thursday, Jan. 10, 1980. A sales representative from a company called Lexis/Nexis places a case, looking very much like a sewing machine, on the conference room table. The table belongs to the law firm of Bayard, Brill and Handelman. I look on with a sense of both curiosity and skepticism.

The sales rep, Diane Bradley, unlatches the clips of the shell case cover, unveiling a portable computer with a small screen. The name on the box is Compaq. She then attaches a small box, which she calls a modem, to the telephone jack and begins her demonstration. It is quite obvious she is selling a service called computerized legal research. Diane performs some word searches and runs the system through its paces. At a speed of 300 baud, the Hayes modem is incredibly fast, and my interest is piqued. Of course, it is quite obvious computerized research could be helpful under the right circumstances, but the concept appears awfully trendy.

It is then, seeing a slight gleam in my eye, Bradley poses the challenge: "Give me a fact pattern, a real case. Let's research something you are currently working on." she says. It just so happens, I am involved in a products liability case captioned *Laird v. Murphy*. The plaintiff, a 17-year-old girl from Brandywine High School, was tragically injured while diving into an above-ground swimming pool. I represent the seller of the pool. I want to file a motion for summary judgment, and I am looking for sound authority that the plaintiff had assumed the risk of her injury, thus barring her claim.

I have spent hours culling through the *Atlantic Digest*. Using the *West Keynotes*, I have exhaustedly searched sports, pools and athletic activities to no avail. It is quite frustrating, and I am somewhat convinced there is no good authoritative or persuasive law on point. I explain the facts of the case to Bradley and she types, "accident injury w/5 pool and 'above ground' and dive diving."

Without exaggeration, within one minute, the search returns the Third Circuit Opinion, *Colosimo v. May Dept. Store Co.*, 466 F.2d 1234 (3rd Cir. 1972). In that case, the Court found a 15-year-old who jumped head-first into an above-ground swimming pool assumed the risk of his injuries as a matter of law. The relevant *West* headnote was "entertainment," and that is the reason I could not find it manually. On that same day, Bayard, Brill and Handelman became the first Delaware law firm to have computerized research. For a while, the skeptics are saying, "Can a law firm afford to have computerized

research?" It is not long before the mantra changed to "Can a lawyer afford not to have computerized research?"

Desktop Computing

The scene is a lawyer's office in downtown Wilmington. The time is 11:20 a.m. on Tuesday, Aug. 21, 1984. An electrician is completing the cabling for the first local area network in a Wilmington law firm. It is a pilot program to see if it is possible for lawyers to build the use of desktop computers into their practice. Because office computing in 1984 is based on an awkward operating system known as DOS, the computers being networked are manufactured by Apple; yes, they are Macintosh computers.

Secretaries can send messages to their lawyers letting them know who has called. These are known as "mail messages." Soon calendars are added. Some lawyers buy into the system and some don't. But it grows, and before long, everyone has a computer on his or her desk. Those who can type find the quality of writing increases when drafts are created on a screen rather than by dictation. Others doggedly clutch their portable Dictaphones.

In 1985, Microsoft will introduce its Windows product. But it will be a number of years before Delaware law firms react. In 1993, the Internet experiences tremendous growth; in 1995, Microsoft releases Windows 95 and sells more than one million copies in four days. Local area networks become common through the New Castle County law community. Sussex County holds out for the next millennium.

Electronic Filing

The scene is the Chambers' Library for the Delaware Superior Court. The time is 8:30 a.m. on Wednesday, May 2, 1990. Seated at the table are members of the Complex Litigation Rules Committee, chaired by the Hon. Susan C. Del Pesco. The issue involves how to control the growing paper problem that is literally paralyzing the Prothonotary's Office.

The source of the paper is the growing insurance coverage practice that came to Delaware in the late 1980s, the first being *Monsanto v. Aetna*. A typical civil action in Delaware is resolved before the number of docket entries reaches 25. In the coverage cases, the docket runs into the thousands. The committee decides to journey into the yet uncharted world of electronic filing.

The concept is a simple one. The court will find a vendor to operate an electronic bulletin board for each case. Any party registered in the case can upload a document in WordPerfect, the word processing standard in the Delaware legal industry. Once a Notice of Electronic Filing is served, the opposing party can download the document. While most law firms have computers for electronic research, many do not. A decision is made to move forward. Funding is arranged to obtain computers for the court, and Complex Litigation Automated Docket (CLAD) is conceived. There are many real concerns: "Will it really work?" and "Will it destroy revenue streams created by the copy centers of the law firms?"

Once CLAD is established and working well, it is expanded in 1994 to include the asbestos litigations. The question then arises as to whether a court can statutorily require a party to participate in electronic filing. This query is raised in the form of a Writ of Prohibition in the matter of *Petition of the White Lung Association*. As one might guess, the Delaware Supreme Court determines that electronic filing is in fact appropriate and denies the writ.

It takes several years for the rest of the country to catch up to Delaware. Now all federal district courts are engaged in electronic filing, as are most of the bankruptcy courts. While other state courts are now engaging in this practice, none has outpaced Delaware. Not only do two of our civil trial courts (Superior and Chancery) require electronic filing, but also our Supreme Court has now directed all matters, civil and criminal, shall be filed electronically.

Our Supreme Court has now directed all matters, civil and criminal, shall be filed electronically.

Handheld Computing

The scene is the Federal District Court for the District of Delaware. It is 2:30 p.m. on Thursday, May 11, 1995. The Hon. Joseph Longobardi is presiding over the case of *Interdigital v. Motorola*. Six lawyers are seated at counsel table. A staff of associates is working in Suite 1140 in the Hotel DuPont, researching and preparing witness notebooks. There are no computers on counsel table; after all, it is a jury trial and lawyers are not sure how jurors will react to computers in the courtroom. But this does not mean counsel cannot communicate with others outside the courtroom.

With the permission of the court, a telephone line has been installed in the courtroom. Connected to one end of the wire, nestled in a lone lawyer's hand is a handheld computer, an Apple Newton. Fax inquiries for computerized research and documents are sent to what will one day be called the War Room at the Hotel. While the system is several years ahead of its time in Delaware, it sets the stage for the Palm and the Blackberry.

Video Teleconferencing

The scene is Courtroom Number 1 in the Superior Court of the State of Delaware. The trial of *North American Philips v. Aetna* is ongoing and the Hon. Vincent A. Bifferato Sr. is presiding. It is an insurance coverage

dispute and an important witness from California is testifying live in the courtroom. However, due to medical issues, the witness is not able to appear in Delaware. He is testifying in the first trial in the State of Delaware to permit video teleconferencing.

Video teleconferencing was first introduced in the legal community in Delaware in 1993, when MCI hosts a live feed between William & Mary's Courtroom 21 in Williamsburg, Va., and Widener University School of Law. In 1998, the courts in Delaware engage in another first when the Hon. Peter J. Walsh of the Delaware Bankruptcy Court presides over a joint hearing with a Canadian Insolvency Court in the matter of *Lowenstein*. Counsel in two countries present to the judges in both courts presiding over related actions. Video teleconferencing is also used frequently in the Court of Chancery, as well, for oral argument.

eCourtroom

The scene is the Superior Court eCourtroom on the second floor of One Rodney Square. The time is 1:30 p.m. on Wednesday, Oct. 13, 1999, and the Hon. Fred S. Silverman is presiding. He is conducting a sidebar in a civil jury trial. The court reporter is creating the record using "real time" transcription. He is listening to the Judge with the aid of an earphone connected to the microphone on the bench. The discussion between the Judge and counsel is being filtered from the jury with the aid of white noise.

The eCourtroom is created as a joint project between the Delaware State Bar Association and the Delaware Superior Court. Its purpose is to experiment with various aspects of court technology prior to the court's investment in courtroom technology in the soon-to-be built New Castle County Courthouse. As a result of this experiment, the Delaware courts standardize a number of technologies, including real time transcription, digital recording and SmartBoards in many courtrooms.

Interactive Briefs

The scene is the Court of Chancery in the Daniel L. Herrmann Courthouse. The case is *Merck v. SmithKline*. It is a 10-day trial and the parties agree an eleventh day is needed to present a final witness. The Hon. William B. Chandler III is not opposed to the additional day, but cannot attend. He agrees to permit the parties to videotape the witness in the courtroom with cameras on the bench and at the podium.

Video clips of the transcript are linked to the briefs in the first CD briefs permitted in the State of Delaware. The CDs include all trial exhibits and links to all cited cases. This practice expands to the Superior Court and leads to the adoption of Superior Court Civil Rule 107(h), setting standards for the filing of CD-ROM briefs.

Virtual Reality

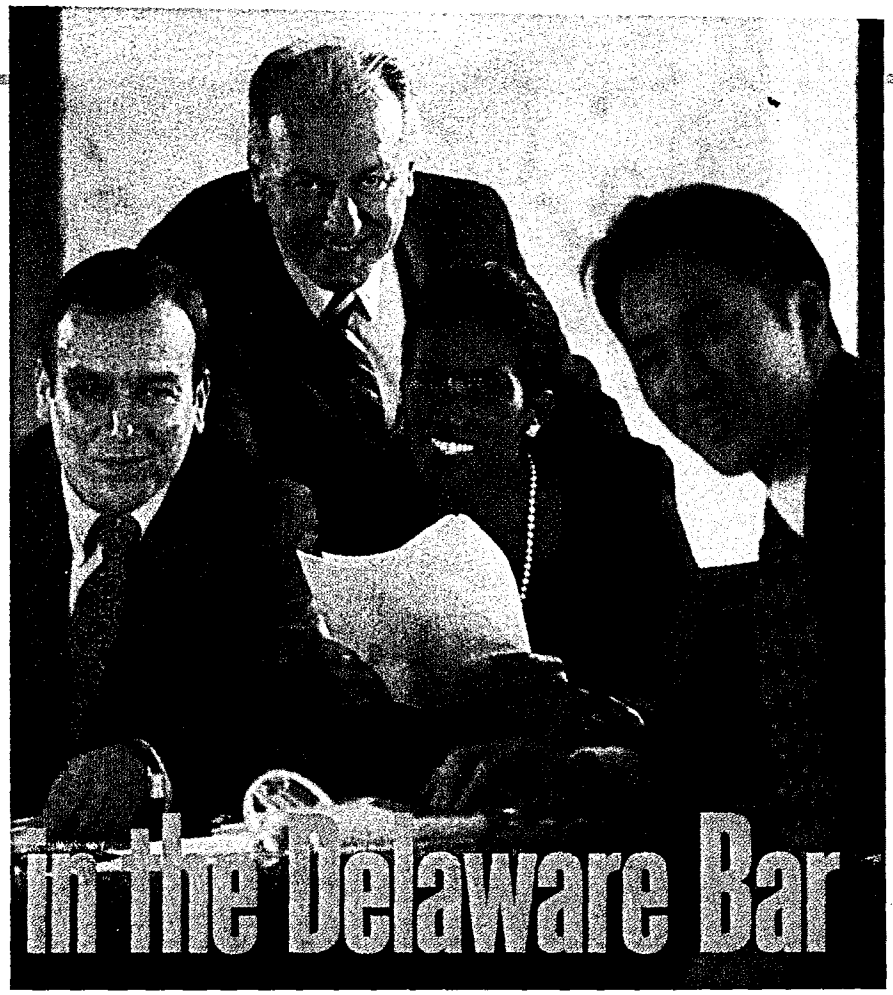
The scene is Courtroom 8B of the Superior Court of the State of Delaware. It is Thursday, April 8, 2032. The jury is viewing a medical procedure with the aid of Virtual Reality Glasses. The medical expert on the stand is explaining how a particular medical device is inserted into the patient.

Will we be seeing this kind of technology in our courts in years to come? Absolutely. Will the judges be presiding from the courtroom or from chambers by desktop video teleconference? Will the tools available permit judges to preside over more than one civil case at the same time? Will a computer read the instructions to the jury? Who knows?

The practice of law in Delaware has evolved incredibly over the last 25 years, as a result of advancements in technology. Only our imaginations will limit its growth during the next 25 years. By then, we might even be able to write about events a year or two before they happen. I hope all of you will be able to read my article on technology in the Spring 2032 issue of *Delaware Lawyer*.◆

FEATURE

Joshua W. Martin III



Diversity in the Delaware Bar

Over the Last 25 Years

The current generation of lawyers of color in Delaware has used the past as a platform to fashion change.

Truly examining the landscape of minority lawyers in Delaware requires a look back at where it all started. The Delaware State Bar Association published the book "The Delaware Bar in the Twentieth Century" in 1994. Chapter 60, entitled, "Minorities in The Delaware Bar," provides an excellent history about how minority or racially diverse attorneys have fared in Delaware since the first person of color to be admitted, Louis L. Redding, was licensed in 1929. Redding remained the sole minority attorney in Delaware for 27 years, until 1956. Reviewing the travails of those lawyers was a poignant reminder of the struggles of those pioneers and the rich groundwork that they laid for future generations and the future of our bar.

When data was collected for the book, there were fewer than 60 members, or 2 percent, of the Delaware Bar, who would be considered members of minority groups. Against this backdrop, it was clear 25 years ago that there was much work to be done.

Indeed we have seen progress over the last 25 years. The current generation of lawyers of color in Delaware has used the past as a platform to fashion change. There has been a significant increase in the number of diverse lawyers practicing in Delaware. For example, as of this writing, approximately 150 lawyers have been admitted to practice in this state, representing about 3 percent of our total bar.

These lawyers can be found in a

number of different practice areas, working for federal, state and local governmental agencies, in private practice, working for nonprofit and public interest entities. Over the last 25 years, many diverse attorneys have been elevated to the bench and distinguished themselves at the federal, state and local levels. Lawyers of color have seized opportunities to become involved in the full fabric of law practice. Although admittedly progress has been made, the number of attorneys of color is still too low. We still have much work to do.

One area where the progress has lagged is in Delaware law firms. The percentage of minority partners and associates at Delaware law firms trails the region and the nation. Based on 2006 National Association for Law Placement statistics, in Wilmington, minority partners represent 2.3 percent of all partners, compared to 2.67 percent for Philadelphia firms and 5.01 percent nationally, without regard for size of the firm. Wilmington minority associates represent 10.56 percent of all associates, compared to 10.16 percent for Philadelphia firms and 16.72 percent nationally. By comparison, women partners represent 14.47 percent of all partners in Wilmington, 18.52 percent in Philadelphia and 17.90 percent nationally. Women constitute 37.27 percent of all associates in Wilmington, 45.74 percent in Philadelphia and 44.33 percent nationally.

Law firms across the country have recruited attorneys of color aggressively, but the problem has been retention. Progress over the last 25 years in Delaware law firms has not matched the pace across the country.

My law firm, Potter Anderson & Corroon LLP, provides an excellent example of a firm in Delaware that is overcoming diversity challenges and offers an interesting case study as we track recent progress with diverse attorneys.

Potter Anderson, the sixth-oldest continuously operating law firm in the nation, prides itself on providing a wide range of quality legal services to its local, national and international clients. The firm has enjoyed a leadership role in improving diversity in the legal profession in Delaware. Nevertheless, like many other law firms in the country, it has recognized the need to improve its diversity.

Diversity has long been considered a desired goal because it was the right thing to do. In addition, it has become apparent that there is a business case for diversity. Many of Potter Anderson's clients have expressed a strong interest in diversity, an interest that extends to requiring diversity at the law firms that provide those clients' services. The DuPont Company Legal Department has provided significant leadership in this area.

Law firms across the country have recruited attorneys of color aggressively, but the problem has been retention.

Potter Anderson has been a leader among Delaware firms in promoting women in the legal profession, including at the executive committee and practice group leadership levels. Not many years ago, however, it was less successful with respect to attorneys of color. Although the firm has aggressively recruited lawyers of color, many of these attorneys left after the first few years. It became apparent that at Potter Anderson, retention was the real issue.

Notwithstanding its corporate-friendly and "great place to live" image, Delaware has not been near the top of the list of destinations for lawyers of color seeking employment immediately after law school. Although Wilmington is a family-oriented city, with easy access to New York and Washington and closer still to Philadelphia and Baltimore, it has a reputation as a difficult place for single people to flourish. In addition, relatively few law school graduates of color have passed the Delaware Bar exam, which is one of the most difficult bar exams in the nation.

At this writing, there are fewer than 10 partners of color at major law firm offices in Delaware, most of whom became partners during the last few years. Potter Anderson has two partners who are lawyers of color, the first elected in 2004. In all, there are eight lawyers of color at our 78-lawyer firm.

Only about 140 lawyers of color are members of the Delaware Bar, in which 4,000 lawyers now practice. Given the small number, candidates are somewhat reluctant to come to Delaware, in part because they do not necessarily want to be trailblazers. As simple as it sounds, they just want to come and practice law.

One of the significant challenges is to create an inclusive environment where lawyers of color have the opportunity to flourish professionally and socially, and assimilate into the fabric of the Delaware community. Recruiting quality attorneys is not enough. They must be welcomed into a nurturing environment, with appropriate mentoring and professional development. One of the most important elements to Potter Anderson's strategic diversity initiative was to make a strong statement to the firm and to the public about the importance of diversity at the firm.

I was elected to partnership at Potter Anderson early in 2005 with the expectation that I would become chair of the firm's Diversity Committee. A key focus of my duties at the firm includes participation in recruiting, mentoring and other activities designed to improve significantly our diversity profile. A part of my role is to use my experience as

a former judge, corporate counsel and chief executive officer, utility regulator and bar association president to advance our diversity initiative.

To have a diverse lawyer pool at Potter Anderson, we recognized we needed a structured, inclusive plan. Our Diversity Committee adopted a mission statement committing "to providing and promoting a diverse and inclusive environment for all, within which each person can succeed professionally regardless of race, ethnicity, culture, nationality, gender, religious beliefs, sexual orientation or disability." This statement reflects the breadth of our diversity focus. By including staff in many of our activities, we promote the idea of inclusiveness. Appreciation and respect for differences are fundamental concepts in our programs.

Potter Anderson sends partners and associates to interview students at selected law schools, principally in the Northeast and Middle Atlantic states, including at historically black universities. Experience has shown that by focusing on students from these parts of the country we will have a higher probability of success. Repeat visits create an opportunity to develop relationships with counselors and placement officials who can be very helpful in making students aware of our firm and its opportunities.

Our firm has also been active in supporting many job fairs, including the Delaware Minority Job Fair, the DuPont Minority Legal Job Fair and the Sadie T. Alexander Job Fair at University of Pennsylvania. Potter Anderson was the only Delaware-based law firm to participate in the 2006 Vault/MCCA Job Fair in New York, where firms from all over the country interviewed more than 1,000 minority law students and law school graduates. These job fairs expose our recruiters to many highly qualified students and lawyers with outstanding academic credentials and work experience. These appearances are marketing opportunities for our firm, by conveying our commitment to hiring from minority groups.

We also participate in orientation programs at law schools in our area to make students aware of our firm. These appearances do not include interviews, but do give our representatives a chance to talk about our firm's practice areas, culture, summer associate programs and associate development programs. Several other law firms in our area are also participating in these types of programs.

In all of our recruiting initiatives, we demonstrate the diversity of lawyers in our firm in the teams that we send to do the interviewing. This gives candidates opportunities to probe their areas of interest with lawyers from our firm with whom they can identify. One should not assume that a law student of color necessarily wants to interview only with lawyers of color. The better approach is to expose that candidate to as much diversity as possible and let the candidate probe the issues in which he or she may have a special interest.

Besides recruiting, our Diversity Committee has focused on retention, through mentoring, recognizing that we needed to revise our mentoring program, not only for our minority lawyers but also for all our associates. The program now includes, for each associate, a developmental mentor accountable to the practice group leader to support an assigned associate's development. This developmental mentor is a partner from the associate's practice area who meets periodically with the associate to ensure that the associate is getting proper assignments, demonstrating proficiency and growing in responsibility. After being at the firm for six months, each associate chooses another partner as a personal mentor, whose role is to help the associate progress, and provide a sounding board for issues that the associate may be uncomfortable bringing to even a developmental mentor. Having the new associate choose a personal mentor adds accountability, requiring associates to take initiative in their own development. The firm provides training for all mentors, critical for the program to be successful.

We have supplemented this mentor program with formation of an affinity group of associates of color, who meet periodically to discuss items of interest and to support each other. This affinity

group is really open to anyone at the firm and is supported by the firm. We also have a women's affinity group. There may be others in the future. Affinity groups reinforce the associates' feeling that someone cares about their success at the firm.

Our firm has hosted programs with a focus on diversity, including a series of panel discussions, held by the Multicultural Judges and Lawyers Section of the Delaware State Bar Association, on topics aimed at minority attorneys, such as how to make partner and how best to prepare a path to a judicial appointment. One of our partners is the immediate past chair of the Section. Our Diversity Committee presented a speaker on disability-related issues and sponsored the showing of a film on the 50th anniversary of *Brown v. Board of Education* and the role that Delaware played in that decision. We held a Diversity and Inclusion Week, each day highlighting elements of our diversity mission statement and sharing important information with the entire firm. The closing event included a speaker on gender communication, a subject also relevant outside the law firm environment. These programs demonstrate the breadth of diversity in a firm and promote the inclusive environment that is the ultimate goal of any diversity initiative. They also demonstrate that this subject called diversity has something in it for everybody.

Anticipating the need for diversity training, we retained a diversity consultant and conducted a survey to provide a baseline of attitudes concerning diversity — including focus group sessions to give partners, associates and staff a chance to discuss diversity issues. More than 90 percent of both attorneys and staff participated. We also solicited input from former associates.

With results of the assessment phase in hand, we embarked on the first phase of diversity training, designed to help participants gain an awareness of differences and commonalities. The program addressed such issues as diversity as a business necessity, understanding diversity and the impact of diversity on the workplace. Training was mandatory for everyone. The overwhelming assessment is that this training was valuable in destroying some myths, establishing a basis for creating or improving relationships within our firm, increasing sensitivity to the feelings of others and developing an appreciation for the business case for diversity.

Our Diversity Committee is now completing a strategic planning process to provide structure for our diversity activities during the next few years. This plan will provide a framework for any additional training that is required, recruiting and retention activities, marketing, and programming.

Any diversity committee must include leaders in the firm and cannot consist solely of people of color. Potter Anderson's Diversity Committee includes the chair and former chair of the Executive Committee; partners who chair major committees and functions in the firm, such as business development, recruiting and associates; other partners and associates; as well as staff support. The Diversity Committee meets quarterly; the chair makes monthly reports to the executive committee and periodic reports to the partnership. The Committee works closely with other committees and task forces in related areas such as recruiting, business development, associates and mentoring.

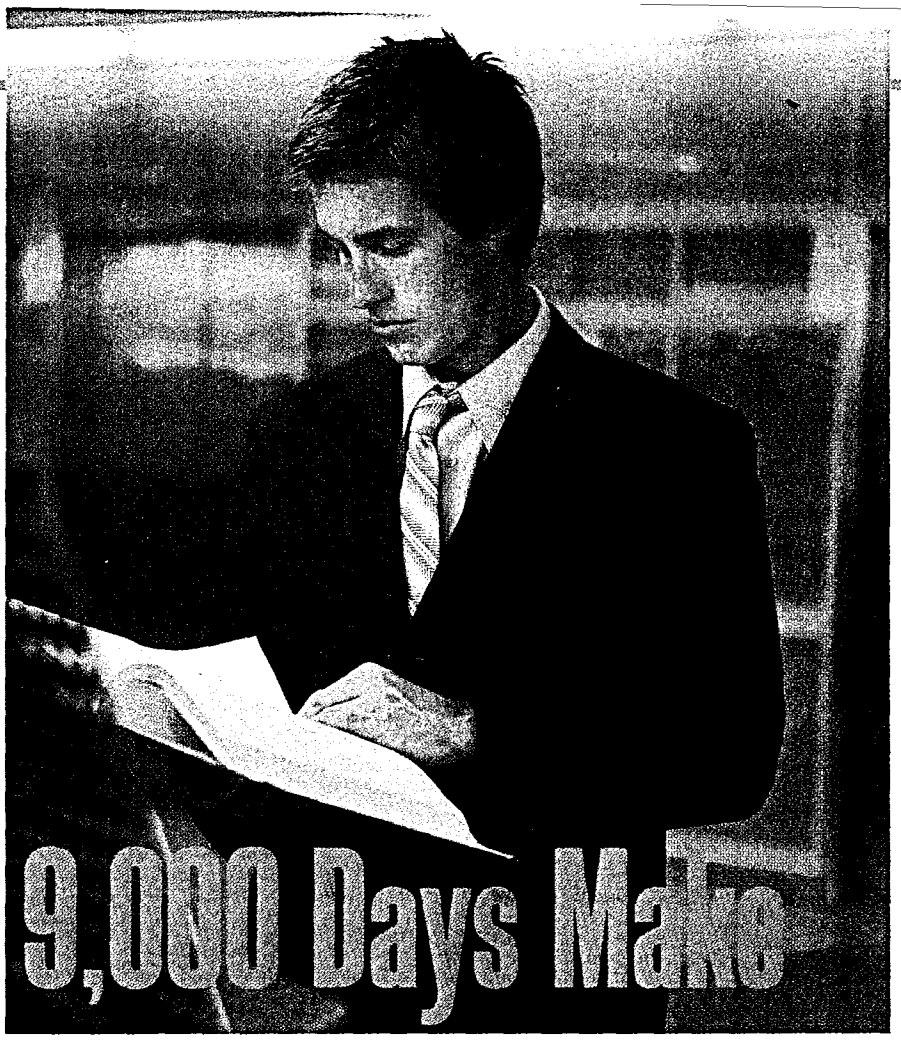
Marketing of a firm's diversity program is equally important in the quest for highly qualified minority law students and lateral candidates who are looking for a career with a law firm. The Web site is one of the best vehicles to advertise a firm's diversity program. Publicizing successes in retaining qualified minority lawyers enhances a firm's reputation and makes recruiting easier. Law students of color will be much more comfortable where there already is a critical mass of minority lawyers being mentored in an inclusive environment where they can develop professionally and assimilate into a firm's culture.

The challenge to our law firm is to attract top law school graduates and lateral candidates of diverse background. Compensation is not a major issue since our starting salaries are competitive with major law firms' in neighboring cities. Although we certainly have advantages, we cannot offer certain amenities that mega-firms in larger cities provide, such as a vibrant after-metropolitan work atmosphere. We, of necessity, must be more creative in our marketing approaches. One approach is to broaden our search as we compete for top law school graduates and those who fall just below the top tier. Having a critical mass of lawyers of color already in the firm is also important, in my opinion, to give any marketing thrust real credibility.

My hope is that, with added emphasis on diversity and increased awareness of the value of diversity, Potter Anderson and other Delaware firms will become increasingly attractive to minority law school graduates and lateral candidates.◆

This article includes excerpts from a paper presented at the 2nd National Forum on Law Firm Diversity, presented by the American Conference Institute on Sept. 25-26, 2006, in San Francisco, Calif.

Chuck Durante



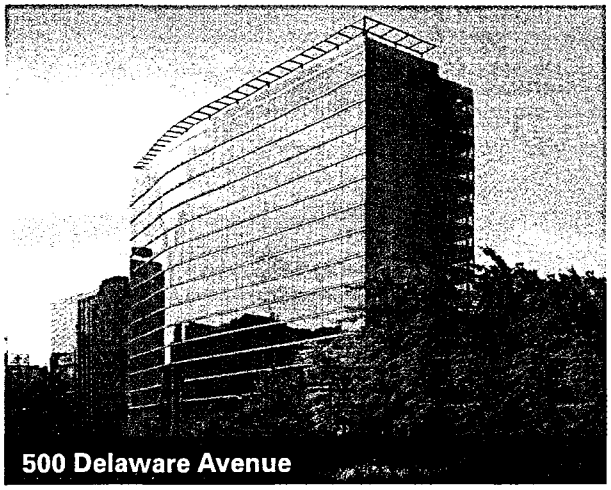
What a Difference 9,000 Days Make

Few accurately foresaw where the transformations would lead. Lifestyles were changing, as a new generation numerically overran the profession.

Strangers entered the DuPont Building throughout 1982. Neither employees, vendors nor deliverymen, these outsiders wore business suits, unimpeded by badges or security guards as they rode elevators to the eighth floor.

They were headed to the Du Pont Company's law library. As the Public Building on Rodney Square underwent its decennial do-over, Wilmington lawyers who needed to consult the regional reporters or tax regulations, and who had no libraries of their own, were welcomed by the DuPont legal department to consult the company's law library. In DuPont's culture of discretion, the aphorism "Proprietary Information Protection" could be found on Post-It notes, bulletin boards and washroom walls. Still, DuPont decided that it could trust Delaware lawyers to observe propriety, and shared its resplendent collection of treatises.

To those who experienced it, 1982 seemed modern. Yet, Delaware had changed little in 20 years. A big company dominated an industry and the modest city that housed its headquarters. Among the upper middle class, the GOP was the default setting. Sensible adults carried change for a pay phone. In all three counties, law was practiced largely as it had been at mid-century. Briefs were typed on typewriter models introduced a decade earlier, by secretaries whose desks contained a two-sided cardboard listing of



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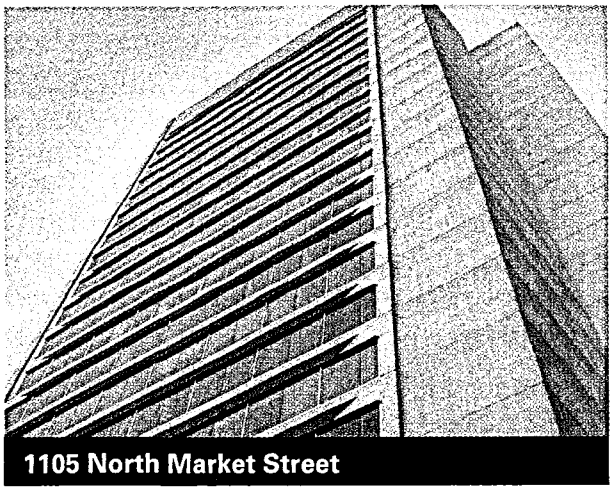

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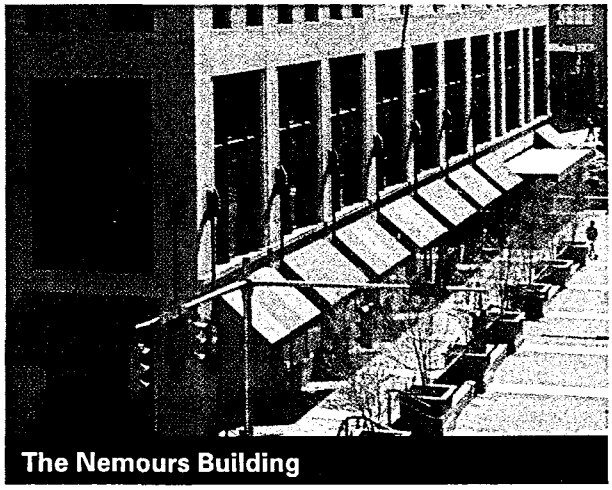
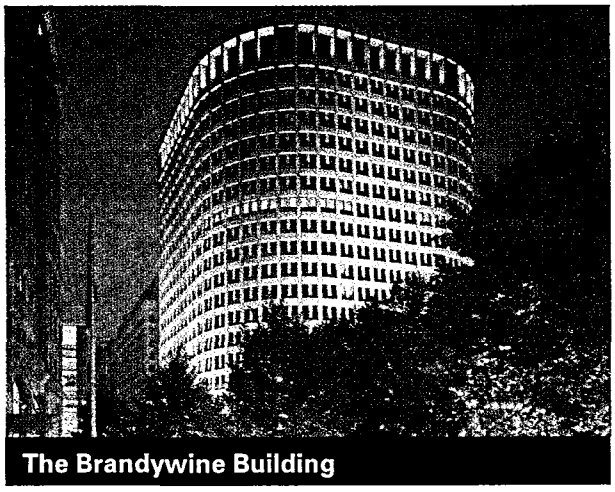


The Nemours Building



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all attorneys in the county.

Although evolution to a new age had begun, few accurately foresaw where the transformations would lead. Lifestyles were changing, as a new generation numerically overran the profession. Yet, trends became quickly obsolete. Harbingers led to cul-de-sacs. Innovations proved transient. The expectations of Delaware lawyers in 1982 now seem as quaint as the thick oval eyeglasses that they wore.

The Delaware Bar, which added 20 to 30 lawyers each year in the 1960s, was by 1982 absorbing 90 new resumes annually. For many, the most desirable destination was a corporate payroll. DuPont, in particular, had dozens of the best lawyers in town, often laterals who forsook promising careers at law firms in search of management opportunity and stock options — or, at least, security through retirement.

A modest proportion of the era's apprentices latched onto small offices, sometimes due to family connection, and became presumptive heirs to those practices. The half-dozen large law firms, each numbering about 30 lawyers, hired one to three associates each year, with starting salaries climbing past $30,000. The wisest were those firms that didn't bestow all those positions on sons of clients.

With a crush of new lawyers finding limited outlets to practice, the public sector teemed with top young attorneys who got first-chair experience that made their big-firm friends jealous — at least until the financial gap eventually widened. The Attorney General's office was enjoying the fruits of the 1970 legislation creating a full-time department; its lawyers were maturing to match the talent in the Public Defender's office and the private bar.

Although hanging a solo shingle was intimidating to offspring of a generation whose earnings appeared on W-2s, striking numbers of young downstate lawyers undertook entrepreneurial practice, opening their own offices after brief apprenticeships. Sussex County loomed particularly alluring, with an unprecedented 75 lawyers by 1981.

Bored with the suburbs in which they were raised and chastened by gas prices that doubled over the previous four years, young upstate lawyers flocked to the city. Real estate developers and urban planners foresaw an urban renaissance. Outside of newly built Trolley Square, that hope proved evanescent once the young lawyers themselves became suburban parents.

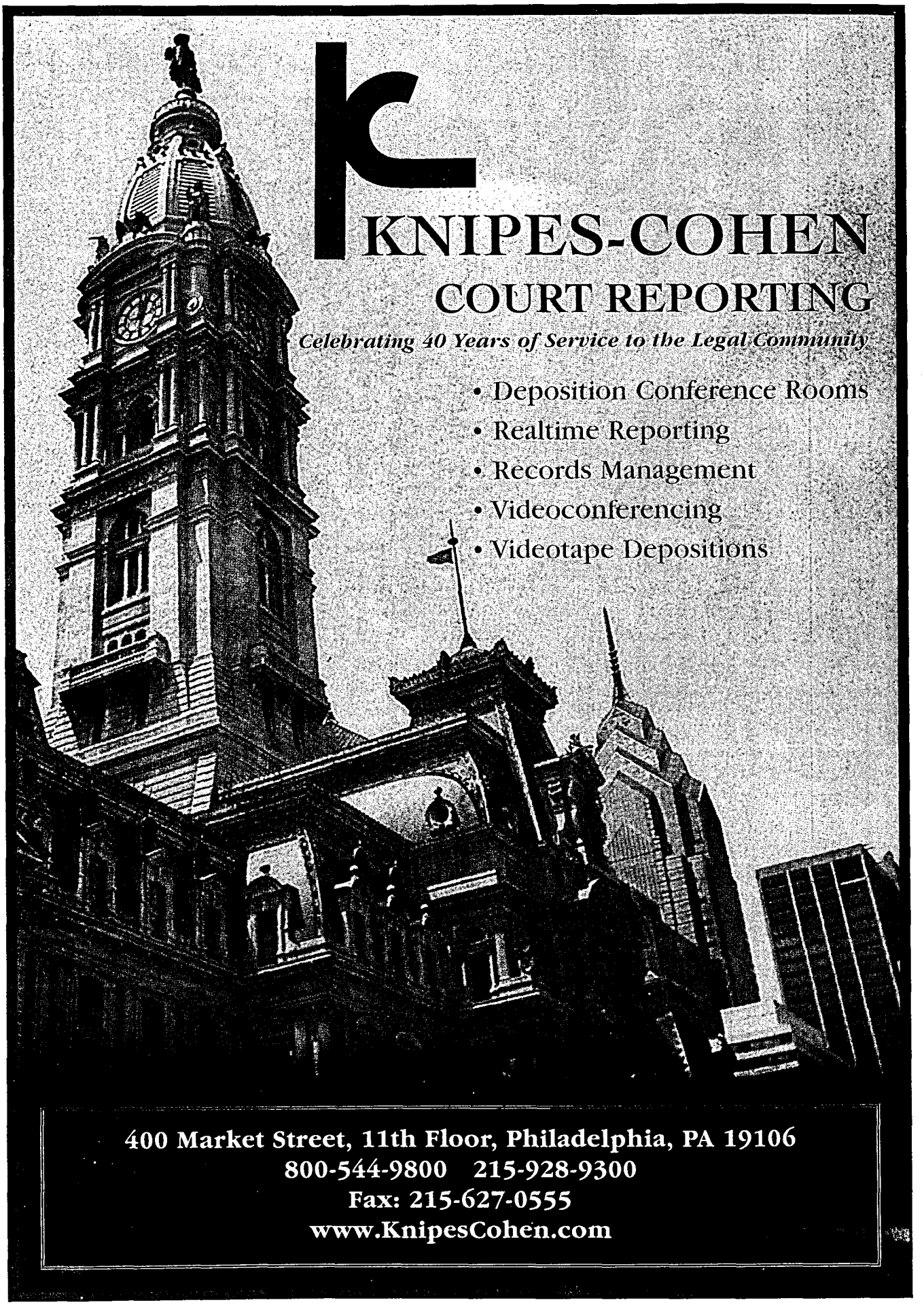
Striking numbers of young downstate lawyers undertook entrepreneurial practice, opening their own offices after brief apprenticeships.

Restaurants proliferated in downtown Wilmington and Dover, but with minimal variety. Roasted peppers were several years away. Fresh herbs were uncommon even on Union Street. Delaware was a stuffed flounder and steak jurisdiction, enlivened by crab imperial at the Towne Wharf, salads at the Greenery, the raw bar at Constantinou's and Delmarvelous Fried Chicken at Truxon's in Ellendale. There was one Indian restaurant at 40th & Market Street — in West Philly.

Liquor remained almost sacramental in Delaware adult life. Lunch cocktails were not unknown. Lawyers would swarm to the Bench and Bar Conference by late afternoon to lubricate at Michie's open bar. Celebrity Bartender Night was a marketing tool. Interrupting the wassail, Mothers Against Drunk Driving began its first Delaware chapter in 1982, quickly stirring enough public support to change the law, its enforcement, prosecution and public attitudes about undisciplined tippling. The Bar established its Professional Guidance Committee by 1984.

The Court of Chancery's long-established stature captured the attention of the national commercial press, as shareholders, directors and investors jousted in waves of litigation that substantially altered how many lawyers would work and live. Chancery practice was never a profession of convenience. The 1973 Christmas Day depositions in *Gimbel v. Signal* foreshadowed the brisk demands of the equities market, but 1982 saw a succession of high-intensity cases that made unprecedented demands on practitioners, "a seven-day, all-waking-hour chore," as Frank Balotti described it. Some firms reacted by stepping up their hiring, others stepped up the hours. Some did both.

The three-member Court itself was overwhelmed. Beyond the tired facilities and limited pay, there was indignity in operating without such basics as a photocopier that could collate or a typewriter with memory. The situation incited the formation of a task force, headed by recently retired Justice Duffy, to advocate for attention to the crucial Court. Within 18 months came pay raises and a full-time Master. Not taking its judiciary for granted is just one lesson that Delaware lawyers have had to learn over 25 years. As the state and the nation have changed, the Bar has grappled with maintaining its integrity and civility, and applying those traditions in a radically different world.◆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