INSIDE: Court Caseloads • Insights From Judges • Briefing on Procedures and Rules

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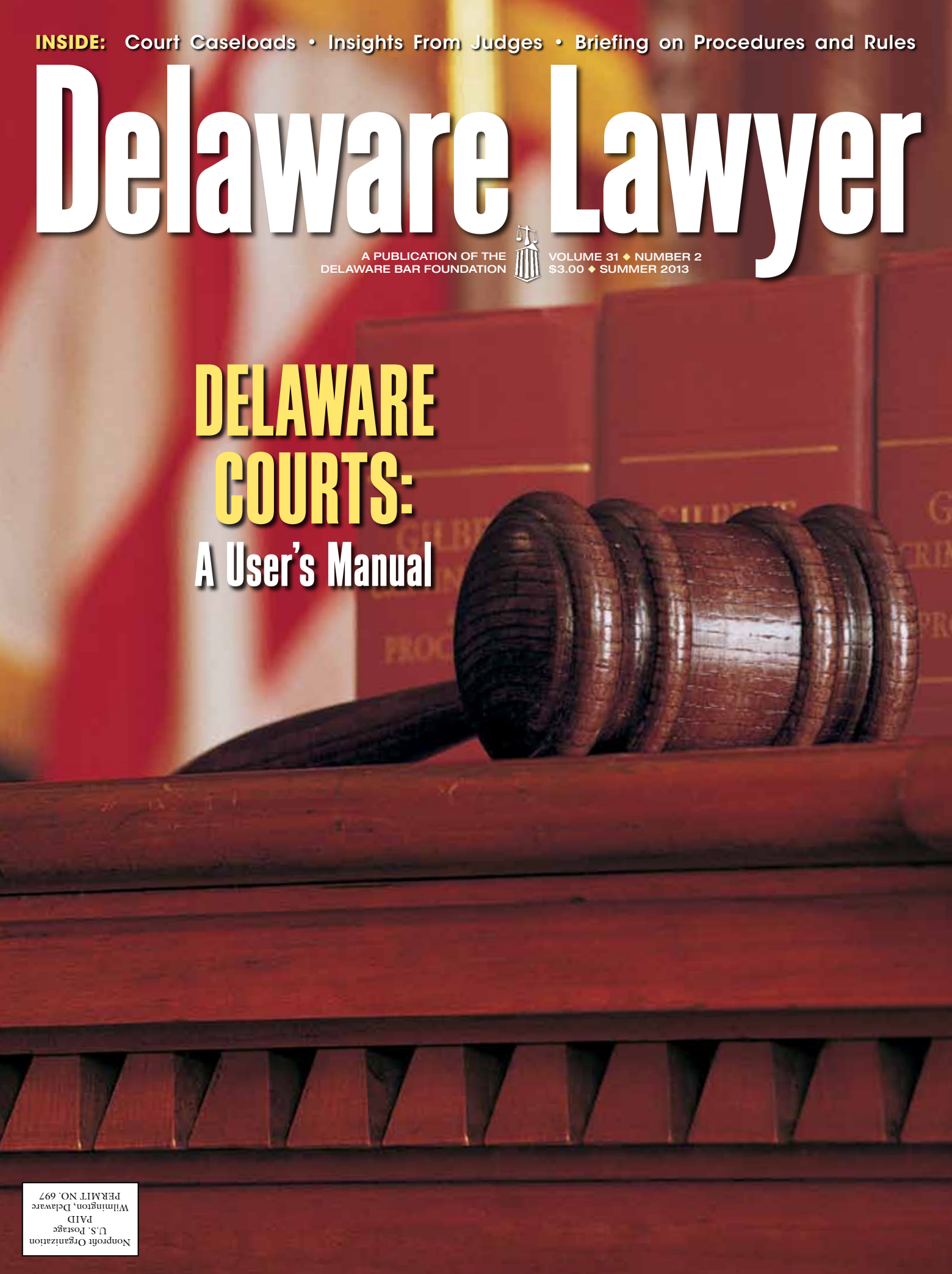
DELAWARE COURTS:
A User's Manual



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EDITOR'S NOTE

Dominick T. Gattuso

Many of us have spent time litigating in the state and federal courts of Delaware. For those who have not, it may come as a surprise that each court, and even each judge on a particular court, has different preferences, practices and procedures. However, there is one constant among the courts: the quality of the judiciary. Unfortunately for many of us, the narrow scope of our practices keeps us in one or two courts (or none at all) for most of our professional lives. The result is that many of us know little about the courts in which we do not practice and have little, if any, sense of the judges who preside over those courts. That reality gave rise to this issue.

This issue of *Delaware Lawyer* focuses on certain of our state and federal "trial" courts. Though succinct, each article offers insight into our "trial" courts and the issues the judges on those courts wrestle with on a daily basis.

Judge Joseph R. Slights, III and Judge Peggy L. Ableman write about the Superior Court of Delaware. They address the court's civil and criminal caseload, special initiatives of the court, such as the Complex Commercial Litigation Division, and their experience as judges.

Lewis H. Lazarus and Katherine J. Neikirk write about litigating in the Delaware Court of Chancery with particular attention to changes in the court's procedures following publication of the Guidelines to Help Lawyers Practicing in the Court of Chancery and the amendment of several of the Court of Chancery Rules.

Felice Glennon Kerr writes about the Family Court of Delaware. The article provides a fascinating (if not disturbing) picture of the strain on the Family Court and the State of Delaware in handling the growing number of proceedings involving parents who are unable to care for their children, and offers solid reasons why we, as members of the Delaware Bar, should stand ready to provide *pro bono* counsel to indigent parents and children in these proceedings.

Patrick A. Jackson and Justin H. Rucki write about the United States Bankruptcy Court for the District of Delaware. Their article provides sound guidance on what to do, and what not to do, in practice before the Bankruptcy Court judges.

I write about the United States District Court for the District of Delaware. As I noted above, the quality of our state and federal judiciary is exceptional. However, that reputation comes with a price. The District Court of Delaware has been handling a growing docket of largely complex civil litigation matters for more than a decade, and it appears that this trend will continue for the foreseeable future. My article looks at how the district court judges manage their burgeoning caseloads and how Delaware practitioners can assist them.

Finally, in our Of Counsel section, John P. DiTomo writes about Gilchrist A. Sparks, III, a true titan of the Delaware Bar.

Dominick T. Gattuso

Peggy L. Ableman

served for more than 29 years as a state trial judge, first on the Delaware Family Court, and ultimately on the Superior Court of the State of Delaware. At the time of her appointment to the Family Court, she was only the second woman to serve as a member of that state's judiciary. Before taking the Bench, Judge Ableman served as the first female Assistant United States Attorney for the District for Delaware from 1979 to 1983. In 1995, Judge Ableman was the first recipient of the Chief Justice's Award for Outstanding Judicial Service. Currently, Judge Ableman is special counsel with the firm of McCarter English, LLP. She is also an adjunct professor at the Villanova University School of Law.

John P. DiTomo

is a graduate of the University of Pennsylvania Law School and a partner at Morris, Nichols, Arsht & Tunnell, LLP in the firm's Corporate and Business Litigation Group. Before joining Morris Nichols, John served as a law clerk to the Honorable William B. Chandler, III, former-Chancellor of the Delaware Court of Chancery.

Dominick T. Gattuso

is a partner at Proctor Heyman LLP. His practice focuses on corporate, intellectual property and complex commercial litigation. He advises and represents Delaware corporations and alternative entities, their governing bodies and other constituencies in business litigation. He is currently a member of the Alternative Entities Subcommittee of the Delaware State Bar Association, a former Chair of the Partnerships and Alternative Business Entities Subcommittee of the Business and Corporate Litigation Committee of the Business Law Section of the American Bar Association, and a member of the Board of Editors of the *Delaware Lawyer*. He also served as a law clerk to the Honorable Henry duPont Ridgely and the Honorable N. Maxson Terry of the Superior Court of Delaware.

Patrick A. Jackson

is currently an associate in the Bankruptcy & Corporate Restructuring and Bankruptcy Litigation practice groups in the Wilmington office of Young Conaway Stargatt & Taylor, LLP. He joined Young Conaway in 2006 following a judicial clerkship with the Honorable Mary F. Walrath, then Chief Judge of the U.S. Bankruptcy Court for the District of Delaware. He graduated from Boston College in 2000 with a B.A. in English and philosophy, and from Boston College Law School, *cum laude*, in 2005.

Felice Glennon Kerr

is a partner with Macelree Harvey, Ltd. in their Centreville, Delaware office. She has been practicing in the domestic relations field since 1990. Her practice areas include divorce, support, custody, domestic violence, adoption and prenuptial agreements. She is a trained mediator and is also a parenting coordinator for high-conflict parents involved in custody disputes. She is a past Chairperson of the Board of Trustees for the Delaware Lawyers Fund for Client Protection and has served on various committees for the Delaware State Bar Association. She is a past Chairperson of the Family Law Section of the Delaware State Bar Association and is a member of the ABA, Massachusetts State Bar Association and the Association of Family and Conciliation Courts.

Lewis H. Lazarus

is a partner in the Corporate and Fiduciary Litigation Practice Group at Morris James LLP. His practice focuses on corporate and commercial litigation, special committee counseling and corporate governance matters, predominantly in the Court of Chancery.

Katherine J. Neikirk

is senior counsel in the Corporate and Fiduciary Litigation Practice Group at Morris James LLP. She focuses on corporate, alternative entity and commercial litigation and frequently practices in the Court of Chancery.

Justin H. Rucki

is currently an associate in the Bankruptcy & Corporate Restructuring and Bankruptcy Litigation practice groups in the Wilmington office of Young Conaway Stargatt & Taylor, LLP. Justin joined Young Conaway in 2009 following a judicial clerkship with the Honorable Brendan Linehan Shannon, Judge of the U.S. Bankruptcy Court for the District of Delaware. He graduated from The Florida State University in 2005 with a bachelors of science degree in economics and political science, and from the College of William & Mary's Marshall-Wythe School of Law with a *juris doctor* degree in 2008.

Joseph R. Slights, III

is a former Judge of the Delaware Superior Court, a 12-year position he assumed in 2000 by appointment of Delaware Governor Thomas R. Carper. Among other duties, Judge Slights served as a presiding judge in the Court's Complex Commercial Litigation Division and managed several other complex civil litigation cases for the Court. Having rejoined Morris James in 2012 as a partner in the Corporate and Commercial Litigation Group, Judge Slights now specializes in the litigation of complex commercial and corporate matters in Delaware's Court of Chancery and Superior Court, as well as in the United States District Court for the District of Delaware. He also chairs the firm's Alternative Resolution Practice Group and will serve as mediator or arbitrator upon agreement of the parties or appointment of the Court, and as special master upon appointment of the Court. Prior to his appointment to the bench, Judge Slights was a partner at Morris James and specialized, as he does now, in complex civil litigation.

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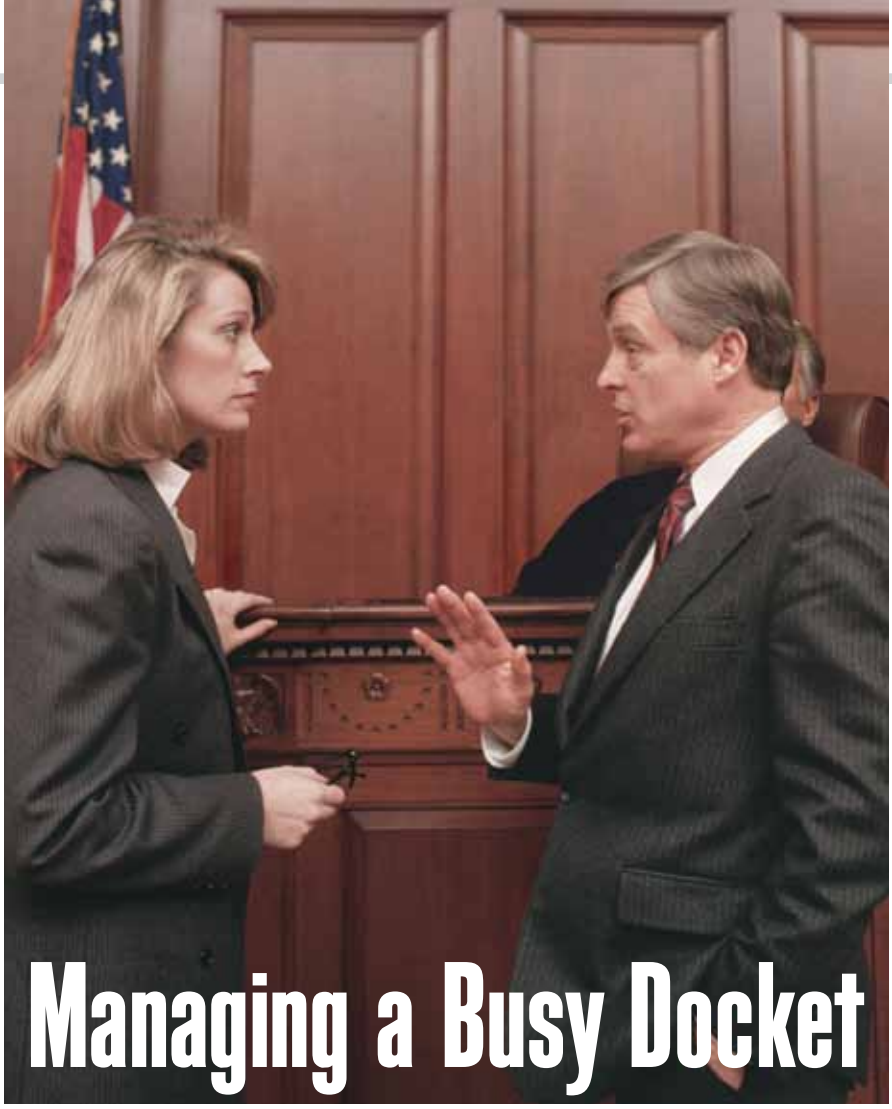


The U.S. District Court: Managing a Busy Docket

With workloads increasing, including complex civil cases, it takes teamwork and creativity to keep pace.

In February 2012, Judge Richard G. Andrews joined Chief Judge Gregory M. Sleet, Judge Sue L. Robinson and Judge Leonard P. Stark, returning the United States District Court for the District of Delaware to its full complement of four Article III judges for the first time since 2006.[1]

In 2011 and 2012, respectively, Magistrate Judges Christopher J. Burke and Sherry R. Fallon also joined Magistrate Judge May Pat Thynge as members of the federal bench. The addition of Judge Andrews and Magistrate Judges Burke and Fallon provided much-needed relief to a district court whose caseload remains one of the most demanding in the country.

Indeed, one only needs to consider the statistics. Between 2007 and 2012, new case filings increased yearly from 1,000 filings in 2007 to more than 1,800 in 2012.[2] During that period, civil case filings increased almost twofold, with 870 civil cases filed in 2007 and more than 1,700 civil cases filed in 2012.[3]

More than 50% of the civil cases filed in 2012 were intellectual property actions and bankruptcy appeals.[4] These types of cases are weighted more heavily according to a standard implemented by the Judicial Resources Committee of the Judicial Conference of the United States Courts. The heavier weighting reflects the additional judicial resources required to manage these complex civil cases. In 2012, the Delaware District Court ranked first in the nation for the number of complex civil cases filings it handled.[5]

The number of new patent cases filed in the district court continued to trend upward for the seventh straight year. As a result, the District Court of

Delaware has ranked among the top six district courts in the country for patent filings for more than a decade.[6] In 2012, the Court averaged approximately 206 patent filings per authorized judgeship, up from 95 filings per judge in 2011.[7]

The America Invents Act (AIA), enacted on September 16, 2011, is partly responsible for the significant increase in the number of new patent filings in 2012, which further taxed the already limited resources of the Court. Notwithstanding the heavy caseload, the Court has one of the fastest dockets in the country with a median average time-to-trial of 22.8 months.[8]

By contrast, the Court's new criminal case filings have trended downward since 2008. In 2012, slightly more than 100 criminal cases were filed, a marked decline from the roughly 190 cases filed in 2008.[9] Still, criminal cases frequently command significant judicial resources and place a heavy burden on the judges.

How to Tame the Increasing Caseload?

The idiom – necessity is the mother of invention – is apropos. Over the last few years, the Court has taken a number of steps to help manage the growing caseload, including, among other things, utilizing magistrate judges, refraining from adopting local patent rules, encouraging the formation of a Federal Trial Practice Seminar for young lawyers, and working closely with the Delaware chapter of the Federal Bar Association (FBA) to facilitate discourse with the Delaware bar.

Utilizing Magistrate Judges

On November 23, 2011, the Court entered the *Order Relating to the Utilization of Magistrate Judges* (the *Order*) in an effort to "promote timely and careful consideration and disposition of th[e] Court's growing and complex caseload," and to evaluate how the magistrate judges are used to ensure that the Court's judicial resources are deployed effectively and efficiently.[10]

The *Order* recites that the magistrate judges are authorized to perform all judicial duties assigned by the Court that are consistent with the Constitution, U.S. law and the federal rules. Those duties include, *inter alia*, alternative dispute resolution (ADR), civil case management and handling non-dispositive and dispositive motions as well as certain criminal matters.

> In 2012, the Court averaged approximately 206 patent filings per authorized judgeship, up from 95 filings per judge in 2011.

The *Order* also provides for the direct assignment of certain types of civil cases to magistrate judges (the Pilot Project). Where a case is not directly assigned to a magistrate judge, the parties may consent to the jurisdiction of a magistrate judge for all or limited purposes, pursuant to 28 U.S.C. § 636(c) and Federal Rules of Civil Procedure 72-73.

The Pilot Project, which was set to expire in November 2012, has been extended for an additional six months. As of early May 2013, 125 cases had been directly assigned to the magistrate judges. Of those cases, four were dismissed or transferred shortly after the complaints were filed; the parties consented to direct assignment to a magistrate judge in 15 cases; and the 60-day period to consent to direct assignment had not expired in 17 cases.

The remaining 89 cases were reassigned to an Article III judge at the request of one or more of the parties to the action, though in some instances a magistrate judge was subsequently assigned to handle the case through dispositive motions.

The Court will evaluate the Pilot Project during the next few months. Should the Court discontinue the direct assignment of civil cases to magistrate judges, these judges will remain available to assist the Article III judges with ADR and civil case management, among other responsibilities.

No Local Patent Rules

To the delight of some, and perhaps the chagrin of others, the District Court of Delaware has not adopted a set of local patent rules. Efficiency and flexibility are the primary reasons, as Chief Judge Sleet explained. The rigidity of local patent rules is simply not workable in this district, given the Court's burgeoning docket.

Instead, the Court employs a set of generic local rules for civil cases that afford the judges flexibility to adopt procedures to assist them in managing their caseloads more effectively. Thus, it is unlikely that the Court will adopt local patent rules, at least for the foreseeable future.

Educating Young Lawyers

In 2010, the Court held the first Federal Trial Practice Seminar (FTPS), which was the brainchild of then-Judge Joseph J. Farnan, Jr. FTPS provides young lawyers with a venue to learn federal practice skills from experienced professionals and the opportunity to practice those skills before members of the federal judiciary.

Perhaps the best way to describe FTPS is NITA, the National Intensive Trial Advocacy program, on steroids. The program has no counterpart in the federal court system. FTPS participants meet one night each week for nine consecutive weeks during which they participate in lectures, demonstrations and practicums with members of the Court and nationally renowned lawyers.

The program ends with participants conducting a mock trial before the federal judges and a real jury. Throughout, participants are mentored by senior members of the Delaware bar.

While FTPS demands a significant investment of the judges' time, the investment has a guaranteed return in the form of a new crop of young lawyers every two years (FTPS runs biannually) who are familiar with the procedures and practices of the district court. As Judge Burke, the chair of FTPS, explained, these young lawyers are not only prepared to litigate before the federal judiciary following the program, but they are able to share their knowledge of the federal court with other members of the Delaware bar as well as their co-counsel.

Communicating With the Delaware Bar

The Court has also made a significant effort to communicate more frequently with federal practitioners in an effort to keep these lawyers informed of changes in the judges' procedures, practices and preferences.

To that end, the Delaware chapter of the FBA hosts several continuing legal education (CLE) programs throughout the year. These programs tend to focus on court procedures, issues and practice areas of interest to federal practitioners in Delaware.

The Court communicates frequently with federal practitioners to keep them informed of changes in the judges' procedures, practices and preferences.

The Delaware chapter of the FBA also hosts a number of luncheons, dinners and informal meetings with the members of the Court. These affairs provide another venue for Delaware's federal practitioners and members of the federal judiciary to discuss the Court's procedures, explore new issues and, hopefully, find solutions.

How Can the Bar Assist the Court?

Frankly, the answer to this question could be an article in itself. Unfortunately, the word limitations here necessitate distilling the answer to its purest essence.

First, know each judge's procedures, practices and preferences, so that hearings, teleconferences and other interactions with the Court are accomplished efficiently. Second, share that information with your co-counsel. Third, manage your cases aggressively. Fourth, be actively involved in every aspect of your cases (*e.g.*, participate in meet and

confers, argue discovery disputes, discuss trial discovery and trial strategy with your co-counsel).

Finally, be prepared to take a hard line with your outside counsel when necessary. Doing so may preserve your credibility and that of your client with the Court. In a nutshell, Delaware counsel are not a "mail drop," nor should they agree to serve in that capacity.

Conclusion

The numbers tell the story. The judges are swamped and the upward trend in complex civil case filings will likely continue for the foreseeable future. Though a fifth Article III judge has been recommended by the Judicial Conference of the United States Courts, the funding for that position has yet to be approved. The addition of a fifth judge would provide welcome relief to a tremendously taxed judiciary.

In the meantime, the Court will continue to manage its caseload through existing, and possibly new, measures. And, Delaware counsel must do their part by moving their cases forward in an efficient, professional manner. ◆

The judges are swamped and the upward trend in complex civil case filings will likely continue for the foreseeable future.

FOOTNOTES

1. The author would like to thank Chief Judge Gregory M. Sleet, Magistrate Judge Christopher J. Burke and Judge Joseph J. Farnan, Jr. (retired), and the members of the Office of the Clerk of the District Court of Delaware for their invaluable assistance in writing this article.

2. Annual Report of the U.S. District Court for the District of Delaware to the Federal Bar Association, at 8 (2012).

3. *Id.*

4. Judicial Caseload Profile for the U.S. District Court for the District of Delaware (April 2013).

5. *Id.*

6. Annual Report, at 11-12.

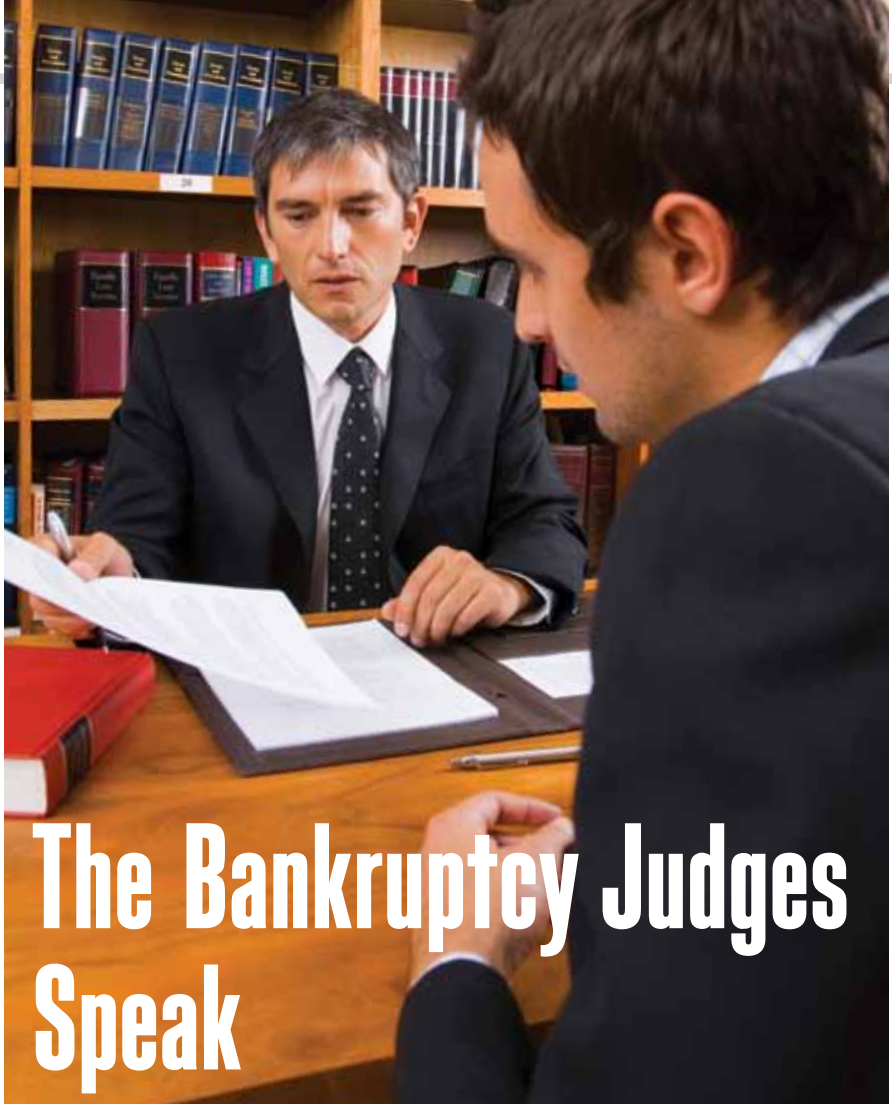
7. *Id.* at 11; *see also* Judicial Caseload Profile.

8. U.S. Courts, Federal Judicial Caseload Statistics, Table C-5 (2012), *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/C05Mar12.pdf.

9. Judicial Caseload Profile; *see also* Annual Report, at 8.

10. *In re Utilization of United States Magistrate Judges*, Standing Order-45 (D. Del. Nov. 3, 2011).

Patrick A. Jackson
and Justin H. Rucki



Chapter 11 Litigation: The Bankruptcy Judges Speak

Interviews with six District of Delaware jurists offer insights and guidance on case management and procedural preferences.

Litigators must know the procedural preferences of the judge presiding over their case. This insight can make the difference between a case that runs smoothly and one that does not.

To this end, Chief Judge Kevin Gross and Judges Kevin J. Carey, Brendan L. Shannon, Christopher S. Sontchi, Mary F. Walrath and Peter J. Walsh of the United States Bankruptcy Court for the District of Delaware graciously sat for interviews to discuss their views on case management and trial issues that are of use to attorneys appearing before them.

A Brief Overview

Litigation in chapter 11 cases can take one of two forms: adversary proceedings and contested matters. An adversary proceeding is commenced by the filing of a complaint in the Bankruptcy Court. The adversary action proceeds much in the same fashion as a civil action in the District Court of Delaware, but culminates in a bench trial before the Bankruptcy Court with a right of review by the district court.

While an adversary proceeding is necessarily related to the underlying chapter 11 case, it has its own docket and generally proceeds on its own calendar.

By contrast, a contested matter plays out entirely in the main case, usually commenced by the filing of a motion to which one or more objections are filed. By default, contested matters are subject to fewer procedural rules than adversary proceedings (*e.g.*, with respect to discovery and pretrial motion practice), though the Bankruptcy

Court can order otherwise.

The business of the main case, including the resolution of contested matters, is conducted at regularly scheduled omnibus hearings and any special hearings that may be scheduled by the Court. All substantive motions filed in the main case must be noticed for a hearing, with an objection deadline usually seven days before the hearing. In the absence of an objection, the movant may file a Certificate of No Objection (CNO) and submit it to chambers along with the motion and proposed order, which is typically entered by the Court without further notice or hearing.

Two business days prior to a scheduled hearing, counsel for the debtor(s) files and delivers to chambers an "agenda" of any matters going forward at that hearing, or for which a CNO has been filed but the order not yet entered. For any matters going forward, chambers also will receive a "hearing binder" containing all pleadings and other related documents.

The parties may then present evidence and oral argument on the various contested matters. The pace of bankruptcy proceedings and the numerous filings involved require that counsel communicate often with the Bankruptcy Court to bring chapter 11 cases to a timely resolution.

The Form and Manner of Communications with Chambers

The bankruptcy judges uniformly agree that communicating with chambers is essential to the effective management of litigation matters, though the judges differ slightly as to how frequently, and in what manner, the parties should communicate with chambers.

Reporting Major Case Developments

The judges typically eschew news coverage of their pending cases and letters to chambers are disfavored. If there has been a major development in a case and counsel wishes to apprise the Court, counsel may request a status conference at the next omnibus hearing.

The bankruptcy judges uniformly agree that communicating with chambers is essential to the effective management of litigation matters.

If more immediate action is necessary, counsel may call chambers to request a special status conference. As Judge Gross explained, "I never mind somebody calling and saying we just want to talk to the judge for five minutes to let him know what is going on in the case."

"Those kinds of calls," he said, "I will take in an instant."

Apprising Chambers of Evidentiary Hearings

Evidentiary hearings are another factor driving the need for communication with the Court. Judges do not know with certainty which contested matters are going forward at an omnibus hearing until they receive an agenda and hearing binder from counsel two days before the hearing. Even then, the Court may not know that the parties intend to present testimony at the hearing.

Because the Court typically schedules omnibus hearings for one hour, Judges Gross and Sontchi emphasized the need for counsel to apprise the Court in advance of counsels' intention to present witness testimony, including the number of witnesses and an estimate of the length of the hearing.

Advance notice permits the Court to reschedule other matters to accommodate an evidentiary hearing, to the extent possible, and to prepare accordingly in advance of the hearing. Judge Gross emphasized the importance of maintaining "very active communication" with the courtroom deputy regarding the need for evidentiary presentations.

Presenting Discovery Disputes

When asked how she prefers to be advised of a discovery dispute, Judge Walrath said, with a grin: "I don't. Work it out."

Joking aside, Judge Walrath, like the other bankruptcy judges, has preferred procedures to deal with discovery disputes that differ, at times, from the procedures set forth in the local bankruptcy rules.

U.S. Bankruptcy Court Rule 9013-1(b) provides that a party must seek relief by written motion or oral motion in open court; letters from counsel will not be considered. Discovery motions must generally be heard on at least seven days' notice per Rule 7026-1(a).

Judges Walrath and Walsh prefer that parties apprise the Court of a discovery dispute by filing a motion in accordance with the local bankruptcy rules, though both acknowledged that they would accept a telephone call to chambers if an issue arises during a deposition that requires an immediate ruling.

Judge Carey prefers that the parties present a discovery dispute through short letters, a procedure he typically builds into his scheduling orders in adversary proceedings. Under his procedure, the moving party e-files a letter discussing the dispute with supporting exhibits, if any, and provides a courtesy copy to opposing counsel. Forty-eight hours later, the non-movant e-files a short reply letter with any relevant

exhibits and provides a courtesy copy to the movant's counsel.

Judge Carey reviews the parties' letters to determine whether the dispute can be resolved by a teleconference or if further briefing is necessary in accordance with the local bankruptcy rules.

By contrast, Judges Shannon, Sontchi and Gross prefer to be informed of the dispute telephonically. After hearing from the parties, these judges either issue a ruling or instruct the parties to provide written submissions. Judge Shannon explained the evolution of his discovery dispute procedure: "I used to think I wanted short emails, and I found I was getting long emails." The number of discovery disputes dropped after he implemented his telephonic procedure.

Judge Shannon surmised that, "There are an awful lot of calls that don't come because somebody gets on the phone and says, 'Is that really your answer? Because we are going to have [the judge] on the phone in 15 minutes. You can tell *him* that.'"

One point on which the judges agree – *strongly* – is that citing bare orders as precedent in a motion or brief is not effective.

Citing Bare Orders as Precedent

One point on which the judges agree – *strongly* – is that citing bare orders as precedent in a motion or brief is not effective. Indeed, at different points, the judges described the citations as "annoying," "irrelevant," "meaningless," and "unhelpful."

Judge Shannon noted that citation to bare orders could have some utility – though he emphasized a "*very*, *very* limited utility," and then only in the context of a highly specialized request for relief.

By way of example, he offered that citing bare orders *might* be useful in connection with a motion to establish equity trading procedures to protect the debtor's tax attributes.

Trial Practice

The judges also shared a few thoughts about trial practice and procedure in Bankruptcy Court. Most agree that subject-matter expertise in bankruptcy, while important, does not necessarily carry the day at a contested evidentiary hearing. The ability to examine witnesses and raise and argue evidentiary objections effectively is equally critical.

Using Witness Binders

The judges largely agreed that witness binders – containing copies of the specific subset of trial exhibits that will be referenced in a particular witness's testimony – are helpful to the Court and should be used whenever possible.

Judge Sontchi recommended that the exhibits in the witness binder be placed in the order of presentation to the witness whenever the situation permits.

Courtroom Technology

Interestingly, the judges' views on the use of courtroom technology differed significantly. Judge Gross was the most enthusiastic about the use of courtroom technology. He recommended that "[a]ny key facts or any key documents that you might be relying

upon – put them up. It's to your advantage as well as helping me because it reinforces everything."

Judges Walrath and Carey are also open to the use of courtroom technology. Judge Carey explained that "whatever counsel thinks is the best way to tell the story is how they should tell it and I can pretty much follow anything as long as the story is well told."

Judge Walrath cautioned that the "technology is only as good as its user." Thus, counsel should use the technology only if they can do so effectively.

Judges Sontchi and Walsh were less enamored with the use of courtroom technology. Judge Sontchi did note, however, that it might be useful to present a particularly complex piece of evidence in a compelling way during trial. For his part, Judge Walsh said, "As long as it's on paper, and it's in front of me, that's all I need."

Objections to Questions

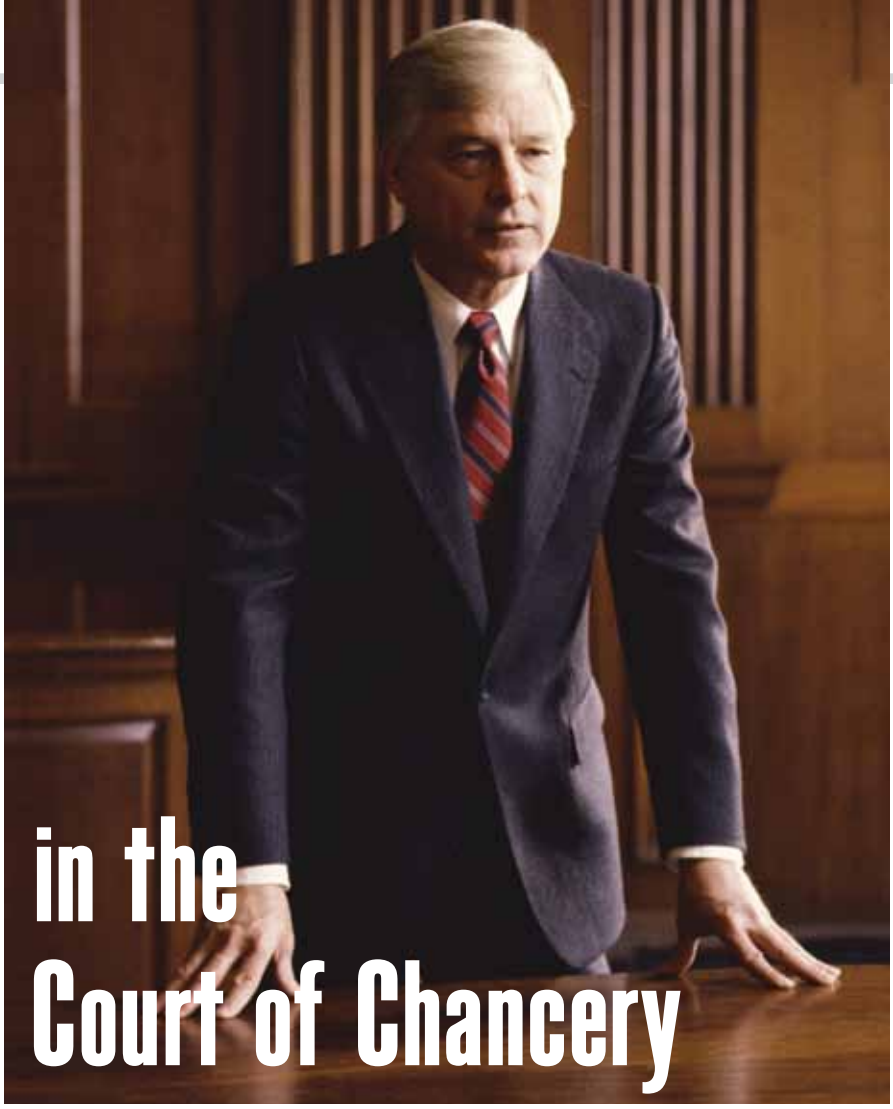
Given the limited time available for evidentiary hearings (several of which often go forward at the same omnibus hearing), one might think that time-consuming objections to questions – particularly as to form – may annoy the judges. Judge Walsh is not bothered by them, however. And Judge Carey rarely finds them annoying, given the parties' need to protect the record on appeal.

Judge Sontchi expressed some skepticism toward objections to questions, given that it is a bench trial. The bigger problem, in his view, is when counsel is unable to promptly articulate the basis for the objection after it is made.

Judge Gross noted that counsel object to questions too often. In his experience, the questions are usually harmless, and the objections are rarely sustained.

Judge Walrath agreed on the harm point: "Really, if you think about it, how many of our cases come back [on remand] because the judge didn't sustain an objection to a question?" ◆

Lewis H. Lazarus
and Katherine J. Neikirk



Litigating in the Court of Chancery

A quick guide to the sometimes arcane rules and procedures of this nationally famous venue for business dispute resolution.

The Delaware Court of Chancery is one of the leading tribunals in the nation for resolution of business disputes. Indeed, the Court's decisions are closely read by practitioners nationwide, and are often the subject of scholarly writing. However, as a court of equity, the Court of Chancery can be an enigma to some practitioners with policies and procedures that, at times, differ from a court of law.

Jurisdiction

Delaware is one of the few states in which the courts of law and the courts of equity have not merged. As a court of equity, the Court of Chancery's jurisdiction is limited to "all matters and causes in equity" and matters conferred by statute.[1] The Court of Chancery does not have jurisdiction over criminal matters or legal claims where monetary damages are an adequate remedy.

If a cause of action involves both equitable and legal claims, the Court of Chancery may exercise its discretion to resolve the legal claims under the "clean-up doctrine." The Court considers a variety of factors in deciding whether to consider legal claims under the "clean-up doctrine," especially whether the facts implicating the legal and equitable claims are so intertwined that severing the legal and equitable claims would be undesirable or impossible. Interestingly, the Court lacks subject matter jurisdiction to award punitive damages and there are no juries. All actions are resolved by a Chancellor or Vice Chancellor.

Commencement of Action and Scheduling

To commence an action in the Court of Chancery, a plaintiff must file a complaint containing a short and plain statement of the causes of action. All complaints, counterclaims, cross-claims, third-party claims and any amendments to such pleadings must be verified by the filing party or parties. If a filing party is seeking a temporary restraining order, preliminary injunction or expedited treatment, they must file a motion for expedited proceedings. The party seeking expedition must establish good cause for expedited proceedings.

If the motion is granted, the parties may have a trial on the merits in weeks or months, which means a party moving for expedited proceedings must be prepared to proceed quickly. In answering a complaint, a party should repeat the allegations of the complaint and then provide a response below each allegation.

While the Court of Chancery Rules set time periods for responding to a complaint and discovery requests (although parties will often agree to modify those deadlines), the rules set few other time periods. The Court expects the parties to agree on the appropriate schedule in expedited and non-expedited proceedings without prodding by the Court.

If those efforts are unsuccessful, the parties can then seek the Court's assistance. The Guidelines to Help Lawyers Practicing in the Court of Chancery (Chancery Guidelines) – required reading for anyone litigating in the Court of Chancery – contain sample scheduling orders for expedited and non-expedited proceedings.

The Chancery Guidelines highlight three recurring scheduling issues that parties should try to avoid. The first issue relates to depositions that occur on the eve of trial, because the parties failed to identify prospective trial witnesses earlier in the litigation at a time when depositions could have occurred on a less compressed schedule. Second, is the failure to include time for expert reports and rebuttal reports in the schedule. The Court also encourages parties to agree that draft expert reports and most attorney communications with experts are not discoverable. The third recurring scheduling issue is the parties' failure to include sufficient time in the schedule for the Court to resolve a motion for summary judgment prior to trial.

> The Court of Chancery lacks subject matter jurisdiction to award punitive damages and there are no juries. All actions are resolved by a Chancellor or Vice Chancellor.

Discovery

If there is a pending motion to dismiss, the Court of Chancery will generally grant a motion to stay discovery pending resolution of the motion to dismiss. The Court will not grant a motion to stay discovery if discovery is inevitable regardless of how the pending motion is resolved.

Like many courts, the Court of Chancery has become increasingly sensitive to issues involving electronically stored information (ESI). On January 18, 2011, the Court of Chancery issued Guidelines for the Preservation of ESI. These guidelines provide, *inter alia*, that parties have a duty to preserve potentially relevant ESI within a party's possession, custody, or control once litigation is commenced or when litigation is reasonably anticipated, and that a written litigation hold should be issued to individual custodians.

The Chancery Guidelines include recommendations regarding the collection and production of documents during discovery. The Court of Chancery appreciates the costs of modern discovery and believes that those costs should be proportionate to the amount at stake in the litigation. Although the Court is reluctant to adopt a "one size fits all" approach to document production, the Court recommends that counsel meet and confer promptly at the start of discovery to develop a discovery plan.

The Court also encourages transparency among the parties with respect to identification of custodians, date cutoffs and keyword search terms. Even if Delaware counsel does not directly participate in the collection, review and production process, the Court expects Delaware counsel to play an active role in the discovery process and to be able to answer questions concerning how documents were collected, reviewed and produced.

The Court of Chancery recognizes that the withholding of documents on the basis of attorney-client privilege and the preparation of a privilege log often lead to disputes in litigation. The Chancery Guidelines require senior lawyers, particularly senior Delaware lawyers, to provide guidance on the assertion of privilege and the description of the basis for a privilege assertion in the privilege log. If there is a hearing on documents withheld for privilege, the Court expects that a senior Delaware lawyer can explain the basis for the privilege assertion. The Chancery Guidelines emphasize that privilege log descriptions of withheld documents should be document specific and provide opposing counsel with sufficient information to evaluate the viability of the privilege assertion.

The Court of Chancery Rules place no limits on the number of interrogatories, document production requests, requests for admission or deposition notices that a party may serve. Notwithstanding this lack of numerical limits, a party may seek a protective order from the Court if the other side propounds

an unduly burdensome number of discovery requests.

Some members of the Court have become increasingly critical of general objections and parties' failure to identify more specifically what information they will or will not provide in response to discovery requests. The safer approach is for parties to be clear about what information they will provide and what information they will not provide in response to discovery requests.

With respect to depositions, a plaintiff that filed litigation in Delaware should expect to be deposed in Delaware. The parties can agree, however, that the deposition of a plaintiff will occur elsewhere. It is common for the parties to agree on deposition locations. Generally, a deposition of a witness should not exceed one day. Coaching of a deposition witness through speaking objections is strongly discouraged. Non-Delaware counsel taking or defending a deposition must be admitted *pro hac vice*.

If seeking discovery of a third party located outside of Delaware, a party will need to file a motion for commission for discovery and promptly advise the Court whether the other side opposes the motion for commission.

When discovery disputes arise, the parties should first try to resolve those disputes themselves. If those efforts are unsuccessful, the parties can seek the Court's assistance.

Motions and Briefs

A party may file a submission of less than 15 pages as a speaking motion with numbered paragraphs. If the submission is longer than 15 pages, a party should file a short motion and a brief in support of that motion. Absent a schedule or agreement to the contrary, a party may file a short motion to dismiss or for other relief, providing that a supporting brief will be filed at a later time as agreed by the parties.

Court of Chancery Rule 171 sets forth the requirements of opening, answering and reply briefs. Without leave of the Court, opening and answering briefs cannot exceed 50 pages and reply briefs cannot exceed 30 pages. After filing a brief, motion or other non-routine submission, a party should provide the Court with two courtesy copies of the filing.

> Generally, there are no opening or closing statements at a Court of Chancery trial. The lack of a jury generally reduces the amount of hearsay and relevance objections.

The standard briefing schedule in a non-expedited case is to a file an opening brief 30 days after the filing of the motion, an answering brief 30 days after the filing of the opening brief and a reply brief 15 days after the filing of the answering brief.

Oral Argument

The Court of Chancery generally hears oral argument on non-routine motions. If an oral argument date is not set by the schedule, the parties can call the Court to obtain a date for oral argument.

A party seeking to use technology in connection with an oral argument or other hearing, such as a PowerPoint presentation or video deposition clips, should contact the Court approximately a week before the hearing in order to make the appropriate arrangements. Before the hearing, counsel should test the equipment to make sure it is functioning properly.

Trial

Trial dates are set by the Court. As a general rule, the parties will file pre-trial briefs and a pre-trial order. The parties are also expected to submit joint trial exhibits in chronological order. Between the filing of a pre-trial order and the trial, the Court will hold a pre-trial conference. The pre-trial conference may be held telephonically or in person.

Generally, there are no opening statements or closing statements at a Court of Chancery trial. The lack of a jury generally reduces the amount of hearsay and relevance objections. Trial time is divided equally by the parties and the parties must track their time usage.

Unless the Court rules from the bench at the conclusion of trial (which is not common), the parties will engage in post-trial briefing. After post-trial briefing is completed, the Court usually hears oral argument. The Court typically issues written decisions in non-expedited proceedings within 90 days of the date of the post-trial argument.

Representative Actions

Derivative and class actions raise special issues. First, it is not uncommon for there to be a derivative or class action in Delaware at the same time litigation involving the same challenged transaction is pending in other state or federal courts. The Court of Chancery expects the parties to inform the Court of the litigation pending in other jurisdictions and to keep the Court apprised of the status of those other litigations.

Second, representative litigation cannot be dismissed absent court approval. According to the Chancery Guidelines, the scheduling order for approval of a representative litigation settlement should provide for: (i) mailing of a notice at least 60 days before the hearing date; (ii) the filing of a brief in support of the settlement 15 days before the hearing date; (iii) the filing of objections 10 days before the hearing date; and (iv) the filing of a response to any objections five days prior to the hearing date.

Filing Confidential Information

Generally, documents filed with the Court of Chancery are public. Court of Chancery Rule 5.1, which became ef-

fective on January 1, 2013, sets forth the procedures for filing documents confidentially. With Rule 5.1, the Court intended to make it clear that only limited types of information are to be treated as confidential. The Court takes seriously the public's right of access to information about court proceedings. A party must establish good cause for confidential filing. Good cause exists "only if the public interest in access to court proceedings is outweighed by the harm that public disclosure of sensitive, non-public information would cause."[2]

The mere fact that information is not publicly available – such as three-year-old financial statements of a non-public company – does not necessarily mean that information merits confidential treatment by the Court. Examples of confidential information include trade secrets, sensitive financial information and personal identifying information such as social security numbers or bank account numbers.

To file a complaint confidentially, a party must include a letter with the complaint certifying that the complaint contains confidential information. The filing party must notify each person who might have an interest in designating information in the complaint confidential of the filing of the complaint and provide a proposed public version of the complaint with the confidential information redacted.

The filing party must also inform each interested person that the proposed public version of the complaint will be filed at 3 p.m. on the third day following the filing of the complaint, unless interested persons request that additional information be redacted from the public version of the complaint. If no public version of the complaint is filed with confidential information redacted, the Register in Chancery will automatically make the complaint public.

To file documents confidentially in an ongoing matter, a party must first obtain a court order. Once such an order is obtained (usually it is part of a stipulation and order negotiated by the parties), parties may file documents confidentially.

> The Court takes seriously the public's right of access to information about court proceedings. A party must establish good cause for confidential filing.

No later than 3 p.m. on the next business day following a confidential filing, the filing party must provide a proposed public version of the complaint to all parties who designated information in the filing confidential and inform those parties that they have until 3 p.m. on the fifth day following the confidential filing to designate additional information confidential.

If no public version of the confidential filing is filed by the deadline, the Register in Chancery will automatically make the confidential filing public.

Anyone may challenge a confidential filing or a public filing with confidential information redacted by filing a notice with the Register in Chancery. The party seeking to maintain the confidentiality of the filing must establish good cause.

An order providing for confidential treatment of filings expires three years after final disposition of the action. A party wishing to maintain the confidentiality of filings thereafter must file a motion, briefs and affidavit in support of continued confidentiality and identify, on a document by document basis, the basis for continued confidentiality.

Arbitration and Mediation

Members of the Court of Chancery are available to mediate or arbitrate certain disputes. There are two types of mediation available in the Court of Chancery: mediation of a pending Court of Chancery litigation pursuant to Court of Chancery Rule 174 and mediation of a dispute not already pending in the Court of Chancery pursuant to 10 *Del. C.* § 347 and Rules 93 to 95 (Mediation Only Program).

In a Rule 174 mediation, the Chancellor or Vice Chancellor presiding over the action may refer it, with the consent of the parties, to another Court of Chancery judge or master for mediation.

In the Mediation Only Program, a member of the Court of Chancery will act as a mediator in disputes where one of the parties is a Delaware entity or has its principal place of business in Delaware, no party is a consumer with respect to the dispute and, if the matter solely involves damages, those damages exceed $1 million.

Conclusion

It should be plain from the discussion above that the hallmark of Court of Chancery litigation is flexibility. By choosing not to prescribe rigid rules for every aspect of litigation and by enabling parties to agree on the best way to litigate their matter, the Court sets itself apart.

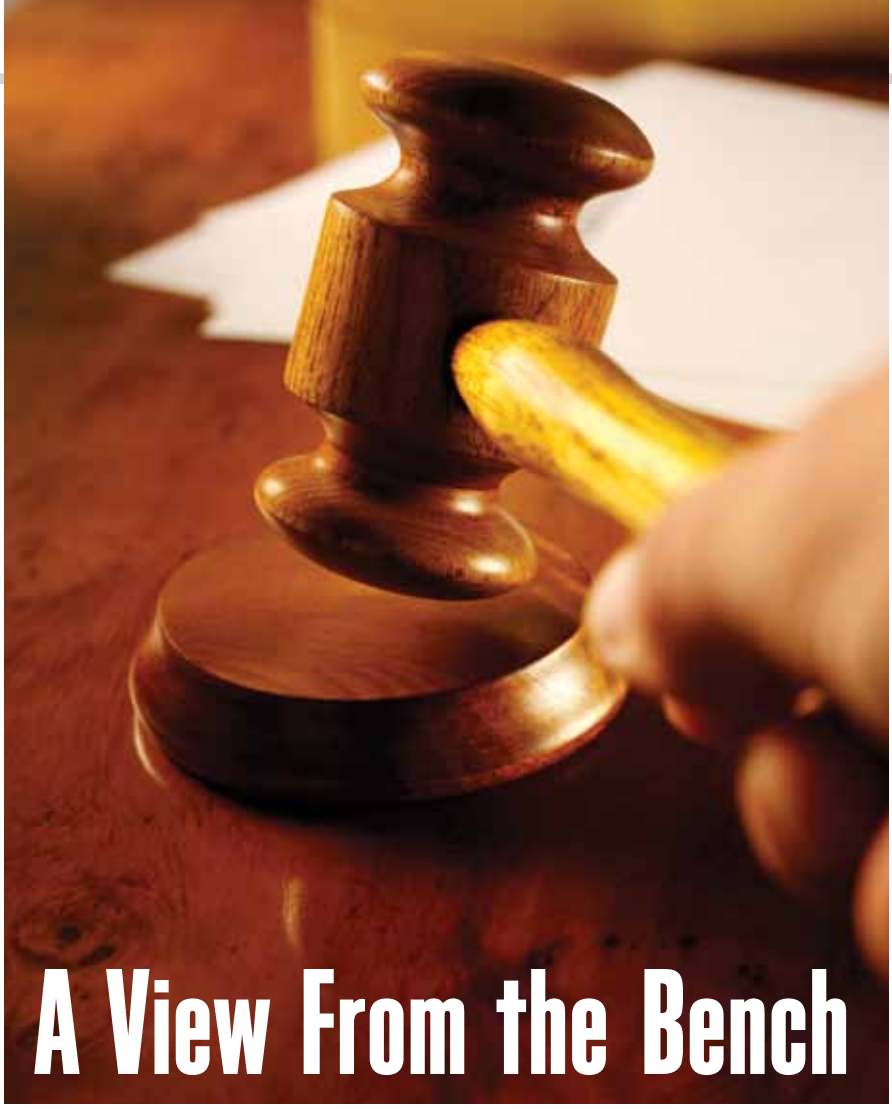
Parties should take advantage of the flexibility offered by the Court of Chancery Rules and the Chancery Guidelines to litigate their actions in the most advantageous and efficient manner possible.

The freedom and flexibility offered to parties litigating in the Court of Chancery does impose certain obligations. The parties cannot sit and wait for the Court to act for them, but must instead act proactively to litigate their matter. ◆

FOOTNOTES

1. 10 *Del. C.* § 341.
2. Ct. Ch. R. 5.1.

Joseph R. Slights, III
and Peggy L. Ableman



The Superior Court: A View From the Bench

Two former judges provide an insider's view of the court, its creative approach to problem-solving, and changes seen over the last decade.

We are pleased and honored to have the opportunity to write about the Superior Court of the State of Delaware for this special edition of the *Delaware Lawyer*. Both of us were confirmed by the Delaware Senate on the same day and thereafter were privileged to serve together as judges on the Court over the past 12 years.

In this article, we will first address the jurisdiction and operations of the Superior Court. We will then turn to a discussion of the people who serve within the Court and enable it to maintain its reputation for excellence.

Finally, we will offer some observations regarding the manner in which the practice of law within the Court has changed over the past 12 years and how we, as lawyers, might improve upon those areas where the practice has changed for the worse.

History and Current Jurisdiction

The Superior Court's history can be traced back nearly 350 years. It became known as the "Superior Court" by virtue of the Constitution of 1831.

In 1951, the Courts of Oyer and General Sessions were abolished and exclusive jurisdiction over felony crimes was vested in the Superior Court. In 1970, the Orphans Court was abolished and its jurisdiction was divided between the Superior Court and the Court of Chancery.

Subject to equitable and statutory exceptions, the Superior Court now has general jurisdiction over all civil and criminal cases.

The Court's Composition

As of 1951, five judges sat on the Superior Court statewide. The Court has steadily expanded over the years to its current complement of 21 judges (ex-

panded, as of January 2013, from 19).

The Court is fortunate to enjoy the distinguished service of five Commissioners statewide, also appointed by the governor and confirmed by the State Senate.

The Court's Caseload

The 2012 Annual Report of the Delaware Judiciary reports that 2012 civil case filings numbered 12,490 with 14,423 reported dispositions. Criminal case filings statewide for 2012 numbered 8,816 with 8,223 reported dispositions.

These are impressive numbers. Suffice it to say, the fact that case dispositions exceed case filings reflects that the Court works hard and works well. It is a tribute to dedicated judges and dedicated staff.

The Court's Criminal Docket

The Superior Court's criminal cases are, of course, managed in accordance with the Federal and Delaware constitutions, Delaware statutes and the Delaware Superior Court Rules of Criminal Procedure.

In addition to these authorities, the Court in each of the three counties has adopted separate Criminal Case Management Plans. They address – at times differently from county to county – such matters as case reviews, criminal motions, violation of probation hearings, the special assignment of cases to individual judges, and other procedural matters that affect the processing of a case from its entry into the Superior Court through trial.

The Court's website hosts the Criminal Case Management Plans and many other valuable resources, including links to a set of Pattern Criminal Jury Instructions and the SENTAC bench book.

Generally, criminal cases within the Superior Court are managed on a "master calendar" system meaning the case is not individually assigned to a particular judge until shortly before trial. This case management system is necessary to coordinate the high number of cases being handled by a relatively few number of attorneys.

Notwithstanding the master calendar system, certain complex or particularly serious cases (*e.g.*, Murder First Degree) are specially assigned to individual judges for handling from indictment through trial.

> Subject to equitable and statutory exceptions, the Superior Court has general jurisdiction over all civil and criminal cases.

The Court also dedicates substantial resources to addressing matters relating to defendants who have been convicted of crimes and sentenced. For instance, the Court adjudicates hundreds of applications for post-conviction relief and even more applications to modify already-imposed sentences. The Court also conducts thousands of violation of probation hearings each year.

The Court's Civil Docket

As with the Court's criminal docket, the Superior Court has adopted a Civil Case Management Plan. Here again, these documents are roadmaps to the Court's processes and protocols in the management of civil cases, addressing such matters as routine and case dispositive motions, trial scheduling orders, mandatory alternative dispute resolution, and pretrial conferences.

In addition to the Case Management Plans, the Court's website offers links to useful resources such as Pattern Civil Jury Instructions, form pleadings and motions, jury information, daily court calendars, and helpful contact information.

Recently, the Court has experimented with posting the preferences of individual judges with respect to such matters as scheduling, motion practice and contact with Chambers to facilitate more efficient and effective practice within the Court.

While the Court in each county strives effectively to manage its civil cases, the Court approaches civil case management differently county to county. For example, in Sussex County, civil cases generally will not be assigned to an individual judge until the case approaches trial. In New Castle County, on the other hand, civil cases generally are assigned to individual judges soon after the complaint is filed and stay with that judge through trial.

Special Initiatives of the Court

The Superior Court has long been regarded as dynamic and innovative. This spirit of innovation continues today in the form of several noteworthy initiatives on both the criminal and civil sides of the Court's docket.

Criminal "Problem-Solving" Courts

The Superior Court was one of the first trial courts in the country to dedicate resources to a special calendar of cases comprised of offenders who had documented problems with substance abuse.

The so-called "drug court" paired a specially assigned judge, who became personally familiar with each "client" within the program, with specially trained prosecutors, defense lawyers, probation officers and other professionals to provide resources and strategies for the client to address addiction issues and, in turn, to avoid repeat criminal behavior.

Currently several Superior Court judges and commissioners in each of the three counties expertly preside over drug courts and each achieve remarkable results.

Judge Jan R. Jurden observed that an alarming number of offenders that come through our criminal justice system have obvious but undiagnosed or untreated mental health disorders that likely contributed to their criminal behavior. She, along with a dedicated staff of court employees and other constituent agencies established one of the first "mental health courts" in the country.

Modeled after the drug court, the mental health court provides continuity, stability and invaluable resources to

eligible offenders with mental health disorders. Superior Court mental health courts are now in operation in each of the three counties.

Resident Judge William L. Witham, Jr. (a.k.a. Colonel Witham), himself a veteran of the armed services, has established one of the first "veteran's courts" in the country. The Superior Court "veteran's court" employs the drug court problem-solving model to address the particular needs of veterans who find themselves in the criminal justice system.

Resident Judge Witham is able to draw on his experiences as an Army officer and as a judge to relate to these veterans (and they to him) in his efforts to put them back on the right path.

Last but by no means least, Judge Charles H. Toliver, IV, has presided over the Superior Court's "reentry court" in New Castle County for several years and, in that capacity, supervises a population of offenders recently released from incarceration to assist them in their "reentry" into society.

A dedicated team representing multiple constituencies provides assistance to program participants with housing, employment and, at times, reconnections with family.

Complex Commercial Litigation Division

By Administrative Directive, President Judge James T. Vaughn, Jr., created the Superior Court's Complex Commercial Litigation Division (CCLD). This division utilizes specially designed case management practices to manage and facilitate the litigation of particularly complicated commercial disputes where the amount in controversy exceeds one million dollars. The goals of the CCLD are efficiency and predictability in complex civil litigation before the Court.

Residential Mortgage Foreclosure Mediation Program

Since 2009, the Superior Court, with the assistance of the Department of Justice, has offered a program by which residential mortgage foreclosure cases are automatically referred to mediation, the goal of which is to reach a mutually satisfactory resolution of the dispute that will allow the homeowner to continue to own the home. This is a mandatory program and it is achieving impressive results.

Project Rightful Owner

Near the end of her term on the Court, Judge Susan C. Del Pesco, with the assistance of Sandy Autman and others in the Prothonotary's office, developed a program called Project Rightful Owner through which the Court identified individuals who had gone through mortgage foreclosure proceedings and returned to them previously unclaimed monies that had been collected by the Court as a result of forced sales of their homes.

In 2012, 22 orders were processed and $379,634.75 was disbursed to the rightful owners of these funds.

Asbestos and Toxic Tort Litigation

Prior to 2005, the Delaware Superior Court had maintained a sizable asbestos docket, typically comprised of cases filed by Delaware residents alleging exposure within our state. Beginning in 2005, however, a large influx of out-of-state law firms began to file a significant number of cases on behalf of plaintiffs with no connection to Delaware, as they neither lived in this state nor were they exposed to asbestos in Delaware.

Following this trend, other mass tort products liability plaintiffs have sought out Delaware as a preferred jurisdiction, largely because of Delaware's highly-respected judiciary and efficient case management procedures.

The significant impact of these cases on the strained judicial resources cannot be overestimated. Yet the Court, as always, has stepped up by assigning judges to the docket who are willing to work twice as hard to ensure that the remaining civil and criminal cases on their dockets are not short-changed and are given the same level of attention that the mass tort docket demands.

The Superior Court Staff

In our experience, court staff are, without exception, dedicated, hard-working, decent individuals who care deeply about the importance of their role in the court system and about the awesome responsibility of dispensing justice that all of us share. Court employees may have an extra holiday or two, but they make up for it by often working way beyond normal business hours and reporting on weekends or holidays, if necessary.

Even when forced to accept a pay cut during the financial crisis of 2008 and 2009, court employees remained loyal to the judges and to the Court.

It is easy to forget that employees who work in the courthouse are often placed in tense and explosive environments as individuals involved in litigation are frequently under stress and act accordingly. The bailiffs, court reporters, Prothonotary clerks, sentencing officers and administrative assistants must often work in rooms filled with dozens of emotionally-charged people; this high level of tension adds an additional layer of hardship to these jobs.

Lawyers must be mindful of the challenges faced by court staff when interacting with them day-to-day. Show them the respect and courtesy that is owed to the institution of the court and they will respond in kind.

The Judges: A Motley Crew

Unlike law firms, who hire attorneys with the expectation that they will be a good "fit," judges are never selected by reference to the group dynamics as a whole. Each judge – and his or her distinct personality – is thrust upon the Court, without regard to whether he or she will fit in or adapt to the vast assortment of characters that already comprise the Superior Court bench.

Notwithstanding all of these variables, without exception, every new member of the Superior Court is welcomed, accepted, and embraced with warmth and collegiately. When we first joined the Court, the more senior members of the Bench went out of their way to assist us in making the transition and we, in turn, had several opportunities to ease the overwhelming burden that other new judges faced.

Given this rather haphazard mixture of personalities and perspectives – and the big egos that generally distinguish those who aspire to be judges – it may surprise some to learn that the bond

among the judges of the Superior Court is a powerful one.

The exchange of ideas at Superior Court judges' meetings is often spirited and, at times, sharp. Nevertheless, regardless of how vehemently the differences of opinions were expressed, the dinners following our meetings could not have been more enjoyable or collegial.

Erosion of Respect and Civility

Because the Bar has grown dramatically in the past few decades, and the number of out-of-state lawyers practicing in Delaware has correspondingly increased, the Bench and Bar are no longer able to self-regulate the behavior and ethics of lawyers as in the past.

Regrettably, the respect and dignity formerly accorded to the judiciary by all Delaware lawyers, as well as the respect accorded one another, has diminished with the increase in the size of the Bar. In Superior Court, much of this can be attributable to the influx of litigation from other jurisdictions where standards imposed upon lawyers are not as exacting.

Superior Court judges are increasingly reliant upon Delaware counsel to assure that lawyers from other states conduct themselves appropriately, making the job of local counsel more demanding and even somewhat risky. Both of us have had situations where the unprofessional behavior of *pro hac vice* counsel nearly prompted us to revoke their admission and thereby force an unprepared Delaware lawyer to accept full responsibility for representation at trial.

Judges are also more likely to require Delaware counsel to accept responsibility for poorly researched, inflammatory or misleading submissions that have been authored by out-of-state attorneys, with little or no oversight by Delaware counsel. Delaware counsel are increasingly "on the hook" in these circumstances and should thus be wary of submitting anything that they have not personally reviewed and blessed.

While the courtroom is certainly the most visible arena for observing incivility, particularly insofar as the general public is concerned, the decline in professionalism has also crept into counsels' written submissions as well.

Increasingly, words such as "ridiculous," "absurd," or "ludicrous" are being used in briefs to describe an opponent's argument or position. While these words may satisfy a client's desire to "win at all costs," hyperbole does nothing to enhance one's effectiveness as an advocate or one's reputation with the Court. Indeed, the use of such terms more often suggests counsel's laziness in abandoning a search for precision or more persuasive language.

When young attorneys play "hard ball" and litigate in "attack mode," by assailing the opposition or the Court rather than concentrating on the substantive issues of a case, it is incumbent upon senior lawyers to remind them that this behavior is unbecoming of a Delaware attorney.

Now that we are both in law firms as senior lawyers, we are particularly attuned to reversing this erosion of civility among lawyers, probably because our experience as judges makes us more acutely aware of the damage to the profession caused by this disrespectful behavior.

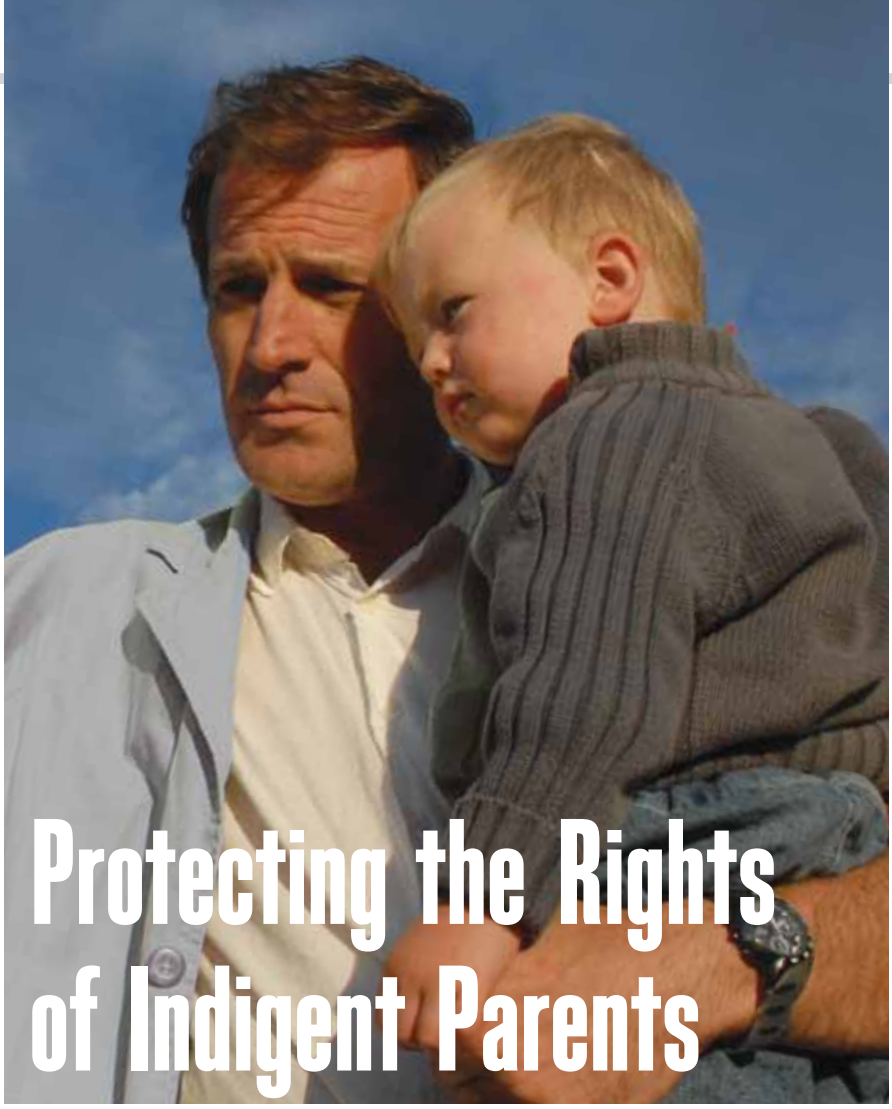
Impact of Technology

In the past 12 years we also have experienced a dramatic decline in personal contact among attorneys and between the Bar and the Superior Court. Technology has made it easy for all of us to hold up in our offices each day without communicating on a personal basis with anyone. We can go about our business without eye contact, personal conversation, or even experiencing the beneficial effects of laughter or a smile.

If we could choose one reason to turn back the clocks by 12 years (besides reversing the aging process) it would be to reduce the number of e-mails in favor of face-to-face or, at least, telephone contact. Perhaps we would even give up smart phones for an hour or two so that when we are in a meeting, we are focusing straight ahead rather than downward to send or receive a text or email.

See SUPERIOR COURT
Continued on page 27

Felice Glennon Kerr



Family Court: Protecting the Rights of Indigent Parents

With the future of their family at stake, too many parents and children still struggle to find qualified, committed counsel.

The termination of parental rights is never easy, not for the parents, not for the children and not for the courts. Indeed, the decision to separate parents and children is one of the most difficult a family court judge will face. Thus, it should go without saying that parents and children should be represented by able-bodied counsel throughout the process to protect their interests, constitutional and otherwise.

Unfortunately, that has not always been the case. Even today, finding counsel able and willing to represent indigent parents in termination proceedings can be a struggle.

For those new to the process, State-initiated dependency and neglect proceedings are divided into three stages.

In the first stage, Delaware's Division of Family Services (DFS) initiates a dependency and neglect proceeding by petition, alleging that the child is dependent or neglected in the care of the parents. At the initial probable cause hearing DFS must establish probable cause to remove the child. An adjudicatory hearing is held within 30 days of the probable cause hearing at which point DFS must establish that the child is dependent, abused or neglected in the parents' care.

In the second stage, DFS typically enters into a case plan with the parents with the goal of reunification. Common elements of case plans are substance abuse treatment, mental health treatment, employment, obtaining housing, parenting classes and domestic violence counseling. Parents are required to attend multiple appointments at various

agencies on different days, which, for some parents, may be difficult.

In the final stage of the proceedings, parents are either successfully reunited with their children or a decision is made that it is in the best interests of the child for the parental rights to be terminated, in which case DFS will file a petition to terminate the parents' parental rights.

Parental rights also may be terminated through an action brought by a private party. These private party cases are generally commenced through a guardianship petition, which is currently the private party equivalent of a dependency and neglect proceeding.

In either case, the standards and burden of proof are largely the same. One key difference, however, is the availability of counsel to indigent parents.

Today, indigent parents in State-initiated dependency and neglect proceedings are entitled to the appointment of counsel on a case-by-case basis, though that was not always true. By contrast, indigent parents are not entitled to State-funded attorneys in proceedings brought by private parties, even though those proceedings may culminate in the termination of parental rights.

That gap is filled by Delaware attorneys in private practice appointed on a *pro bono* basis by the Family Court.[1] The practice is not without controversy. However, to fully understand and, therefore, appreciate the practice, one needs to consider both the history of the appointment of counsel in dependency and neglect proceedings and what is at stake for the indigent parents and children.

The History of Family Court Appointments

In *Lassiter v. Dep't. of Social Services*,[2] the United States Supreme Court determined that indigent parents have the right to counsel in termination of parental rights proceedings brought by the State, and acknowledged that the best course of action is to appoint counsel for indigent parents at the earliest stage of dependency and neglect proceedings to protect their interests. However, the Supreme Court begrudgingly approved the appointment of counsel for indigent parents on a case-by-case basis, as was done in Delaware.

In 1997, the Family Court released the findings of a study, dubbed the Delaware Court Improvement Project, which recommended that counsel should be appointed for indigent parents and children at the inception of child welfare proceedings. That year, the United States Congress passed the Adoption and Safe Families Act of 1997 (ASFA), which mandated that state courts conduct a permanency hearing for any child in foster care for 12 months and develop a program to provide legal representation for children in dependency and neglect proceedings.

Implementation of the AFSA's mandates left parents with considerably less time to successfully complete case plans in dependency and neglect proceedings, which increased the likelihood that their parental rights would be terminated.

In 2002, the Delaware Supreme Court decided *Brown v. Division of Family Services* and *Watson v. Division of Family Services*, directing a change in how the Family Court handles the appointment of counsel to indigent parents in dependency and neglect proceedings initiated by DFS.[3]

In *Brown*, the court held that a notice of the right to counsel at State expense must accompany a Petition for Termination of Parental Rights initiated by DFS to protect the parents' constitutional rights. Prior to *Brown*, indigent parents were not required to be advised of their right to appointment of State-funded counsel until the termination hearing. If the parents failed to attend the hearing, they were not advised of their right to counsel and, more often than not, a petition to terminate their parental rights was granted.

> In *Brown v. DFS* the Delaware Supreme Court recognized that a majority of states automatically provided counsel to indigent parents in child welfare proceedings.

Though the issue of whether the Delaware Constitution requires the appointment of counsel for all indigent parents in termination proceedings was not squarely before the Delaware Supreme Court in *Brown*, the court took the opportunity to acknowledge the need for a change in how these proceedings are handled.

First, the court recognized that a majority of states automatically provided counsel to indigent parents in child welfare proceedings, whereas Delaware did so only on a case-by-case basis.[4] Second, the court acknowledged that the Delaware Court Improvement Project and Delaware's Office of the Child Advocate (OCA), in its *amicus curiae* brief, recommended that all parties to dependency and neglect proceedings should have counsel.[5]

Less than a year later, in *Watson*, the opportunity arose for the Delaware Supreme Court to decide whether indigent parents have a constitutional right to State-funded counsel in dependency and neglect proceedings.[6] The Delaware Supreme Court answered the question in the affirmative. In doing so, the court recognized that if indigent parents are appointed counsel after the termination petition is filed, rather than at the start of the dependency and neglect proceedings, the result in most instances is the termination of parental rights.[7]

The Delaware Supreme Court's decisions in *Brown* and *Watson* brought Delaware in line with the practice of family courts in most other states, but a gap remained. The decisions in *Brown* and *Watson* did not address the appointment of counsel to indigent parents in proceedings brought by private parties.

The Delaware Supreme Court took the first step to close that gap in *Walker v. Walker*,[8] wherein the court addressed an indigent parent's right to have counsel appointed in a termination of parental rights proceeding initiated by a private party without State involvement. In *Walker*, the child's father was incarcerated and the mother was unable to provide adequate care. The child's aunt filed a guardianship petition. The Family Court awarded guardianship of the child to the aunt over the parents' objections. Subsequently, at the aunt's request, the Family Court terminated the parents' parental rights despite their objections.

The parents had no right to counsel under Delaware law at the time and thus were not advised by the Family Court that they could request the appointment of counsel. Recognizing the compelling interest in maintaining the parental relationship between parents and children whenever practicable, the Delaware Supreme Court held that the Family Court must advise indigent parents of their right to request court-appointed counsel and must determine whether such counsel will be appointed in all termination proceedings whether initiated by the State or a private party.[9]

In *dictum*, the court expressed its view that indigent parents' right to the appointment of counsel should be extended to privately initiated dependency and neglect proceedings. "Father's appeal did not raise the issue of right to counsel in a privately initiated dependency and neglect proceeding. Thus, the fact that our holding does not address that question should not be read as an indication that this Court takes a different view of the right to counsel at that stage."[10] Family Court however has interpreted this *dicta* as a directive to appoint counsel to indigent parents in all privately initiated guardianship proceedings.

Consistent with *Brown*, *Watson* and *Walker*, the Family Court appoints counsel to indigent parents at the early stages of all dependency and neglect proceedings and termination proceedings. That practice, however, places a significant burden on the State, which has limited resources. With only a few State-funded attorneys available and no funding available to hire more, the State must look to the Delaware Bar to fill the gap.

The need for counsel easily outstrips the State's resources. The ensuing hole can only be filled by members of the Delaware bar acting in a *pro bono* capacity.

Indigent parents are provided counsel by State-funded attorneys only in dependency and neglect proceedings and termination proceedings initiated by DFS. However, indigent parents must rely on Delaware attorneys to provide *pro bono* legal representation in proceedings initiated by private parties.

A similar gap exists with respect to children. The State lacks the resources to provide children with State-funded attorneys in all child welfare proceedings. Instead, Delaware's Office of the Child Advocate provides children with volunteer attorneys in child welfare proceedings.

The Need for Delaware Bar Involvement

In 2011, 1,667 private guardianship petitions were filed in Delaware, and DFS filed 460 dependency and neglect cases. In 2012, DFS filed 398 dependency and neglect cases and there were 1,629 private guardianship petitions filed. Many of the proceedings filed in 2012 involve indigent parents, and all of them involve children. The need for counsel easily outstrips the State's resources. The ensuing hole can only be filled by members of the Delaware bar acting in a *pro bono* capacity.

Unlike other practice areas, the number of family law practitioners in Delaware is quite small. According to the Delaware State Bar Association (DSBA), there are only 128 registered members of the Family Law Section of the DSBA. Delaware's family law attorneys cannot satisfy the overwhelming need for *pro bono* legal services to indigent parents and children in guardianship proceedings and termination proceedings initiated by private parties.

Cognizant of this reality, the Delaware Supreme Court and the Family Court have worked together to expand the list of court-appointed counsel available to indigent parents in privately initiated child welfare proceedings to include all active members of the Delaware Bar with the exception of those attorneys employed by the State and the federal government.

Expanding the appointment list resolves one problem, but creates another. Many attorneys have never practiced in Family Court and some have little, if any, litigation experience. With so much at stake, is it fair to indigent parents and children to be appointed counsel that lack family law or litigation experience?

The short answer is that difficult times make for difficult choices. History has shown that indigent parents are better off working with appointed counsel than proceeding *pro se*. Further, numerous resources are available to educate these attorneys and prepare them to assist their *pro bono* clients.

First, family law practitioners are readily available to provide these attorneys with answers to questions, forms and other advice in the course of representing their *pro bono* clients. Indeed, many family law practitioners are eager to assist *pro bono* counsel.

Second, the DSBA routinely holds continuing legal education programs on family law. These materials are often available to watch on DVD at the convenience of counsel and provide helpful information.

Third, participation in the OCA's volunteer attorney pool is yet another avenue to gain a better understanding of the practices and procedures in Family Court. While OCA volunteer attorneys represent children in child welfare proceedings, they attend the same hearings and review many of the same pleadings and other filings. This experience will prove invaluable if called upon to represent an indigent parent.

Why should we stand ready to provide *pro bono* services? Harper Lee's fictional attorney Atticus Finch answered the question in a manner that should resonate with all of us:

> There is one way in this country in which all men are created equal – there is one human institution that makes a pauper the equal of a Rockefeller, the stupid man the equal of an Einstein and the ignorant man the equal of any college president. That institution … is a court…. Our courts have their faults, as does any human institution, but in this country our courts are the great levelers, and in our courts all men are created equal."[11]

There are also tangible benefits to counsel in providing *pro bono* services. Two of the most significant are 1) learning how to interact with clients with exceptional needs, and 2) trial experience.

Many civil practitioners' clients' do not face the loss of parental rights as a potential outcome of litigation. It should go without saying that counseling a client with so much at risk can test, and indeed hone, even the best lawyer's skills.

Similarly, trial experience can be difficult to come by these days. Civil cases routinely settle, often at an early stage. Providing *pro bono* legal services in Family Court offers attorneys, young and old alike, an opportunity to sharpen their litigation skills. In other words, it is a win-win for counsel and client alike. ◆

FOOTNOTES

1. The author would like to thank Judge Michael K. Newell and Judge Alan N. Cooper of the Delaware Family Court for their significant contribution to this article.
2. 452 U.S. 18, 68 L.Ed. 2d 640, 101 S. Ct. 2153 (1981),
3. 803 A. 2d 948 (Del. 2002); 813 A.2d 1101 (Del. 2002)
4. 803 A.2d at 956-57.
5. *Id.*
6. 813 A.2d at 1102.
7. *Id.* at 1106.
8. 892 A.2d 1053 (Del. 2006)
9. *Id.* at 1055.
10. *Id.*
11. Harper Lee, To Kill a Mockingbird 100 (1960).

FEATURE

SUPERIOR COURT *Continued from page 23*

In the last 12 years technology has streamlined our tasks and organized our lives, but at great expense to the sociability and fellowship within the profession.

Farewell

It is difficult to characterize our time on the Superior Court in any more glowing terms than to say, for both of us, it was the best 12 years of our professional lives. Even though we joined the Court from very different places and perspectives – Judge Ableman having spent 17 years as a Family Court judge and Judge Slights from a private litigation and trial practice – the sentiments we feel about our experience there are equally positive.

It was a distinct honor and a genuine privilege to sit on such a highly respected court, to enjoy the collegiality and friendship of highly qualified, spirited, and caring brother and sister judges, and to make our own individual contributions to Delaware and to its jurisprudence. ◆

FEATURE

OF COUNSEL *Continued from page 28*

client call, Gil offered me advice that he attributed to Sam Arsht: We serve our clients by focusing not on what can't be done, but by working to identify alternatives.

Gil's advice has stayed with me, but so has the subtler teachings at work that day. Gil is a great lawyer because he pored through his case materials, he had a command of the Code, and he reasoned through issues methodically.

At the height of Gil's practice, he was the consummate corporate advisor and litigator, moving seamlessly between the boardroom and the courtroom, earning the respect of judges, fellow lawyers and boards of directors of Fortune 500 companies alike. Indeed, among the many accolades, Gil is the Chairman of the ABA's by-invitation-only Committee on Corporate Laws, while also a Fellow of the American College of Trial Lawyers. Few Delaware lawyers can claim such distinctions.

Now Of Counsel to the firm, Gil continues his ABA work and is Chairman of the University of Delaware's Board of Trustees. Hopefully, Gil now has more time for his beloved Phillies, sailing, or watching his grandchildren play with his model trains. For us, Gil's legacy endures. ◆

FOOTNOTES

1. I thank Mimi Sparks, Larry Hamermesh, Alan Stone, Bill Lafferty, Mark Hurd, Jim Honaker and Lynn Goldberg for their invaluable contributions.
2. Adrian Kinnane, A Durable Legacy: A History of Morris, Nichols, Arsht & Tunnell (Inland Press 2005) at 74.
3. *Id.*
4. Hamermesh Interview (4-12-2013).
5. *Id.*
6. Subramanian, *et. al.*, *Is Delaware's Antitakeover Statute Unconstitutional? Evidence from 1988–2008*, 65 BUS LAW 685 (2010).

John P. DiTomo

OF COUNSEL: A. Gilchrist Sparks, III

In 1973, A. Gilchrist Sparks, III, a graduate of the University of Pennsylvania Law School, *magna cum laude*, and his wife, Mimi, were living in Claymont, Delaware contemplating their future. Raising a young family, the couple was weary of moving again, having moved so often while Gil served as an officer in the U.S. Coast Guard Reserve, including a tour in Vietnam.

The choice to stay in Delaware was a practical one. Morris, Nichols, Arsht & Tunnell had extended a job offer; he was a native Delawarean; and Delaware was a good place to raise children. So Gil accepted the job not knowing he would become one of the most prominent Delaware corporate lawyers of our time.[1]

Early in his career, Gil gravitated toward S. Samuel Arsht, the "Dean of the Delaware Corporate Bar"[2]—a moniker earned partly for having served on the three-member drafting committee that produced a complete overhaul of the General Corporation Law. Gil says that working with Sam Arsht provided the "best grounding in Delaware corporate law,"[3] and Gil speaks freely of the profound influence Sam Arsht had on him.

Gil became a partner of the firm in 1979 and was already "a stand-out presence in the field."[4] But when the takeover battles of the 1980s introduced its new brand of "bushfire" litigation, Gil saw an opportunity. The personal sacrifices were great. Family dinners were cut short to return to the office. An unexpected phone call often meant catching the next flight out of town. But Gil emerged as a preeminent corporate litigator, having argued bedrock Delaware cases still taught in law schools across the nation.

Although *Revlon* and *QVC* come to mind, it was *Unocal* where Gil successfully argued that a board of directors has the power to interpose defensive measures to protect stockholders in a transaction that did not contemplate board action (*i.e.* tender offers). *Unocal* laid the foundation for the *Moran* decision, which upheld the poison pill, and it set the framework still applied when assessing the propriety of defensive measures used in mergers.

As a steward of our corporate law, Gil understood the importance of maintaining Delaware's preeminence in the field and the benefit of popularizing our law. To that end, he wrote prolifically on important matters of Delaware corporate law and co-authored an authoritative treatise on the subject.

For more than 20 years, Gil also served on our Bar Association's Council of the Corporation Law Section, which annually reviews the DGCL to ensure it remains optimal. For instance, when the *Van Gorkom* decision created risk of liability for a director's breach of the duty of care, corporations faced a crisis in their ability to attract and retain directors. Gil, as chairman of the Council, helped draft Section 102(b)(7), which permits exculpating directors for monetary liability for duty of care violations.

Similarly, when states began adopting statutes to deter coercive tender offers, Gil liaised directly with our State Legislature to adopt a new business combination statute. The drafting process inspired impassioned debate among attorneys, academics, corporations, the SEC, and institutional shareholders. Personifying Delaware's deliberate approach whenever amending its corporate statute, Gil resisted reacting rashly and refused to "adopt proposals that would have been damaging to our law."[5]

The result was Section 203, which prevents abusive takeover tactics, but also avoids chilling tender offers altogether. The staunchest critics have acknowledged Section 203 as "the most important antitakeover statute in the United States."[6] It survived constitutional attacks in the 1980s, and when critics reemerged in 2010, Gil co-authored a powerful rebuke.

As a mentor, Gil gave freely of time he often did not have. Although the full measure of his contributions to each crop of Delaware lawyers is too great to recount here, for me, his greatest lesson came during my second year. Our client, a Delaware corporation, wanted to stave off a lawsuit in the Cayman Islands brought by a Liberian receiver, purporting to act for the company. We considered bringing an action in Delaware to adjudicate what rights the receiver had outside of Liberia. My feeble keyword searches found no case supporting personal jurisdiction.

When I made the trip to Gil's office defeated, he was immersed in the Code and had clearly been through a box of case materials. He asked whether I thought a Section 225 proceeding would work, seemingly dismissing the idea as soon as he had said it. But we discussed it, and together concluded the argument to be credible. After the

See OF COUNSEL *Continued on page 27*

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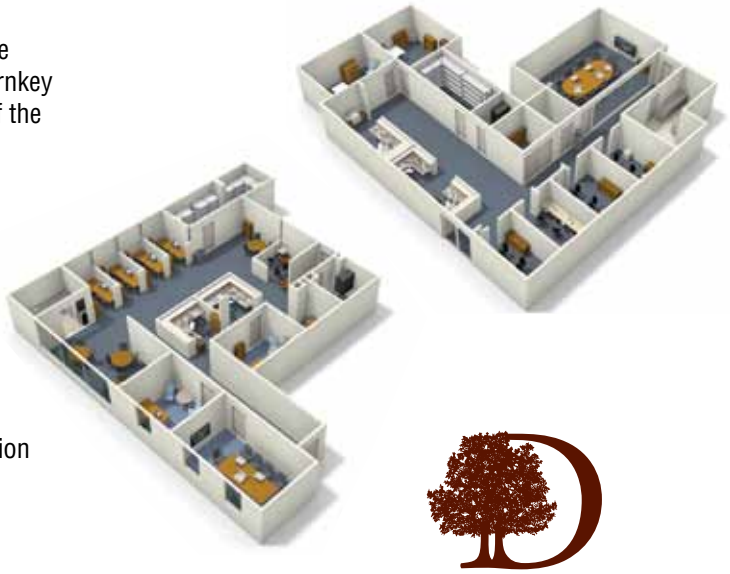

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