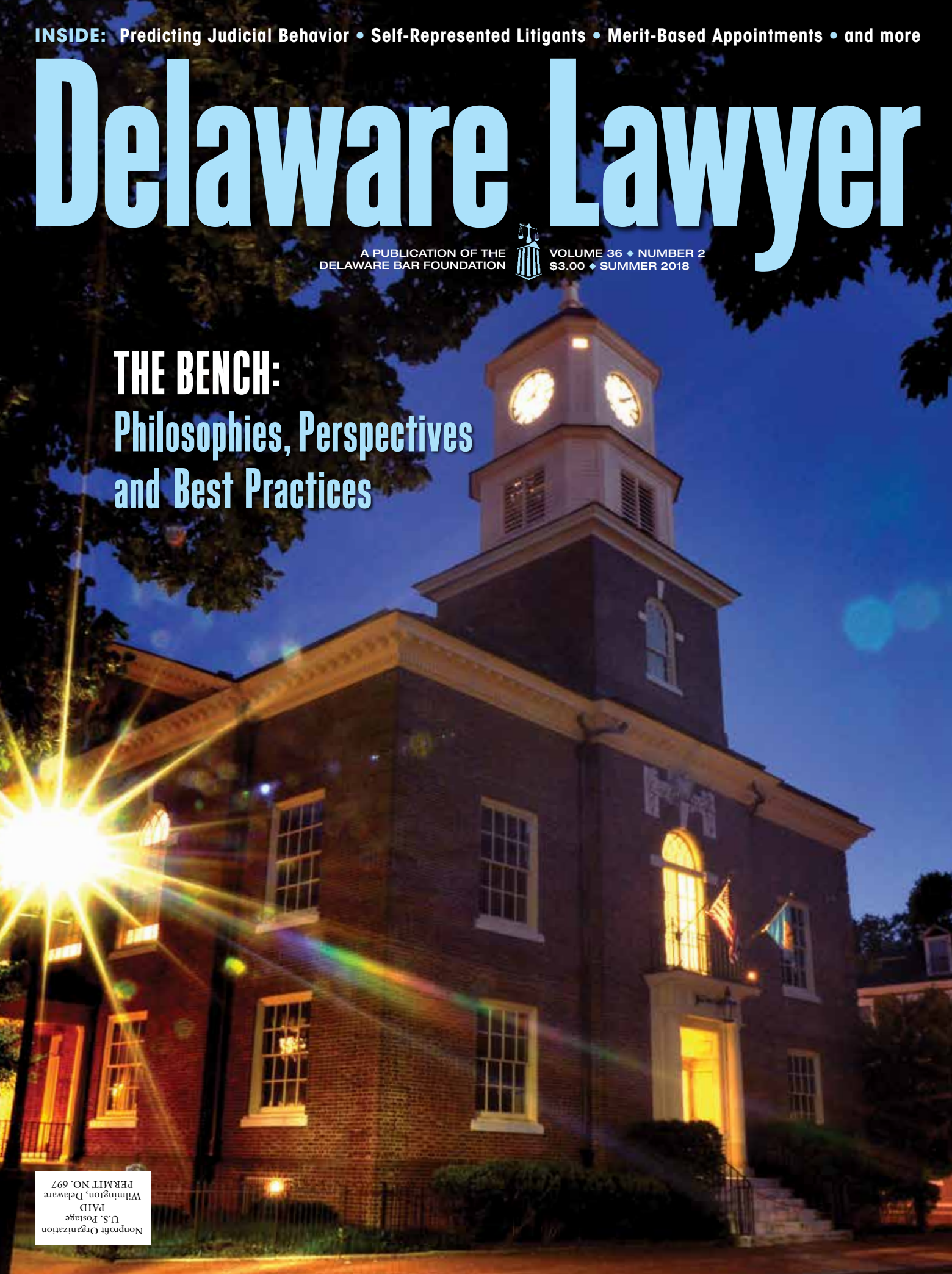
INSIDE: Predicting Judicial Behavior • Self-Represented Litigants • Merit-Based Appointments • and more

Delaware Lawyer

A PUBLICATION OF THE DELAWARE BAR FOUNDATION
VOLUME 36 ◆ NUMBER 2
$3.00 ◆ SUMMER 2018

THE BENCH:
Philosophies, Perspectives and Best Practices

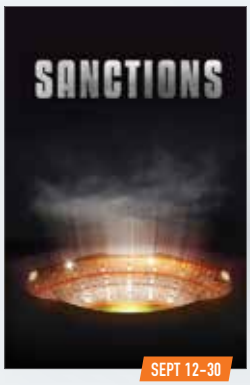


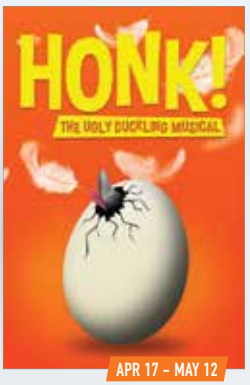
Nonprofit Organization
U.S. Postage
PAID
Wilmington, Delaware
PERMIT NO. 697

DELAWARE THEATRE COMPANY

CELEBRATING 40 YEARS OF ARTISTIC EXCELLENCE

2018/2019 SEASON TICKETS ON SALE NOW!





WANT THE BEST VALUE? SUBSCRIBERS **SAVE UP TO 20%** OFF THE PRICE OF SINGLE TICKETS AND **ENJOY ALL OF THE BEST BENEFITS**
including priority seating, free ticket exchanges, restaurant discounts, and more!

200 WATER STREET / WILMINGTON, DE 19801 / 302.594.1100 / DELAWARETHEATRE.ORG

Delaware Division of the Arts ART WORKS.

This program is supported, in part, by a grant from the Delaware Division of the Arts, a state agency, in partnership with the National Endowment for the Arts. The Division promotes Delaware arts events on www.DelawareScene.com

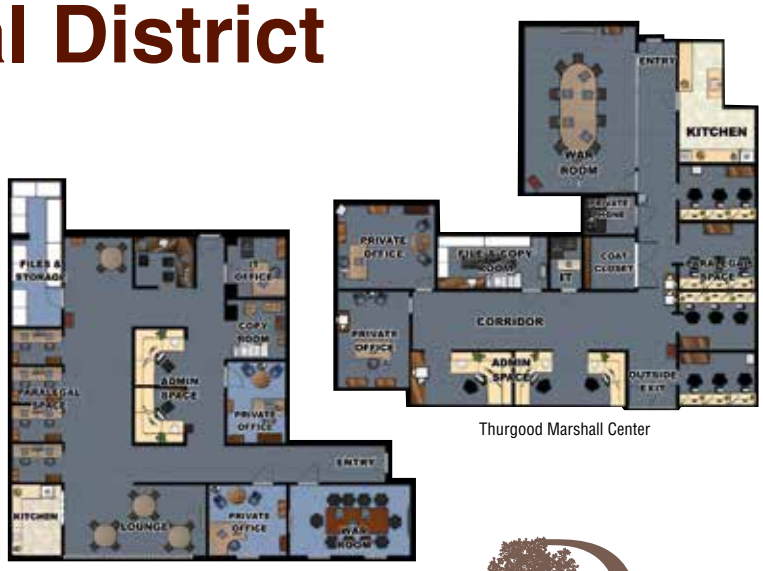
DelawareToday. PETTINARO

Freda Payne; Erika Henningsen; Jeffrey C. Hawkins; Kylie McVie and Bowdie; Maurice Hines. Photos by Matt Urban, Mobius New Media.

DoubleTree by Hilton Downtown Wilmington Legal District

Now featuring 2 fully functional law centers located within one block of both the Federal and Superior Courthouses. Our 2 turnkey centers exceed 3,000 square feet in size and incorporate all of the following features:

- 2 private lead attorney offices
- Large War Room space with 52" HD flat screens
- 3 large administrative workstations
- 4 paralegal workstations accommodating up to 8 people
- Oversized file storage rooms complete with shelving
- Kitchen areas complete with full-size refrigerator, microwave, coffee maker and water cooler
- Direct-dial speakerphones with voicemail at each workstation
- Private, secured entrances with key card access
- 100 MG dedicated Internet service in each center
- Dedicated IT locations in each center



Thurgood Marshall Center

Sandra Day O'Connor Center

For all your trial team needs contact:

Julie Shaw
302.661.4316
Julie.Shaw@Hilton.com

Hilton HHonors®

** Hilton Honors points signing bonus for Fall and Winter Trial Teams in 2018! Ask for details!*

DOUBLETREE
BY HILTON™
DOWNTOWN WILMINGTON
LEGAL DISTRICT

700 North King Street • Wilmington, DE 19801
Reservations: 1.800.222.TREE Hotel Direct: 302.655.0400
www.wilmingtonlegalcenter.com

Delaware Lawyer

CONTENTS SUMMER 2018

EDITORS' NOTE 6

CONTRIBUTORS 7

FEATURES 8 **Thoughts On Appellate Practice**
Judge Thomas L. Ambro

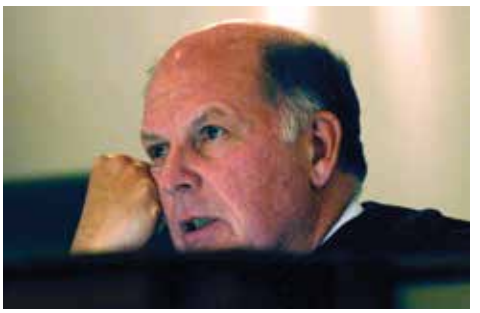
12 **Putting Your Best Foot Forward In Court**
Fmr. Chief Justice Myron T. Steele and Fmr. Justice Jack B. Jacobs

16 **Road To The Bench**
U.S. Senator Chris Coons

18 **In One's Own Behalf**
A Judicial Roundtable About Self-Represented Parties in Delaware Courts

24 **How We Select Our Judges**
Maida R. Milone and Julia Jones

28 **OF COUNSEL: Judge Sue Lewis Robinson**
Stephanie E. O'Byrne



Cover and editorial photographs by Gary Emeigh, with the exception of images for "In One's Own Behalf" and Of Counsel.

LET US CATER TO YOU

Janssen's Market offers customized, full-service catering, event planning, party rentals, floral arrangements, and more. From breakfast and lunch for 6 to a cocktail party for 50, we can deliver all of your needs to the office, hotel, or wherever you are working!

Contact our catering director today at 302.654.9941 x3

3801 Kennett Pike • Greenville, DE 19807
www.janssensfinefoods.com

GOURMET & EVERYDAY
JANSSEN'S market
SINCE 1952

2018 BEST OF Delaware
DelawareToday

Delaware Lawyer

A publication of Delaware Bar Foundation
Volume 36 Number 2

DELAWARE BAR FOUNDATION
100 W. 10th Street / Suite 106
Wilmington, DE 19801
302-658-0773 / 302-658-0774 (fax)

DELAWARE LAWYER
is produced for the
Delaware Bar Foundation by:
Today Media Custom Communications
3301 Lancaster Pike, Suite 5C
Wilmington, DE 19805

Chairman: Robert Martinelli
President: Jonathan Witty
Editor: Tina Irgang Leaderman
Art Director: Samantha Carol Smith

Subscriptions orders and address changes, call:
Jen Schuele, 302-656-1809

Advertising information, call:
Steve Lassiter, 443-909-7828
steve.lassiter@todaymediacustom.com

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

EST. LINDSAY CONSTRUCTION INC 1987

"Transforming Kitchens into the Heart of the Home – for Over 30 Years"

610.388.3202 | WWW.LINDSAYCONSTRUCTIONINC.COM

FINE CUSTOM HOME BUILDING ~ EXPANSION & RENOVATION ~ PERIOD RESTORATION

KITCHENS • BATHS • MASTER BEDROOM SUITES • CARRIAGE HOUSES

EDITORS' NOTE

Gregory Werkheiser and Jesse Noa

When several months ago we embarked upon editing this issue, we set out with the modest goal of offering our readership some insights on judicial philosophy, what it means to be a Delaware judge, best practices before the Courts, and methods of judicial selection. Then, about a week before we penned this note, the nation learned that Justice Anthony Kennedy would be retiring from the U.S. Supreme Court. Accordingly, although this issue does not speak directly to the remarkable events transpiring at the nation's highest court, we submit that these unfolding events serve to make this issue's content even more important for our readership.

Our first article, from Judge Thomas L. Ambro of the U.S. Third Circuit Court of Appeals, is a thoughtful rumination on judicial behavior.

Our second contribution comes to us from retired Delaware Supreme Court Justices Myron T. Steele and Jack B. Jacobs. The Justices have delivered an invaluable treatment of "best practices" for lawyers appearing before Delaware's trial and appellate courts.

We also examine different facets of how judges are selected. In our third piece, U.S. Senator Chris Coons reviews how Delaware has handled the nomination and confirmation processes for the recent vacancies on Delaware's federal bench and shares some thoughts about his efforts to bring the "Delaware Way" to Capitol Hill.

Our fourth piece, we think, should be required reading for every Delaware lawyer whose practice brings him or her in contact with the non-lawyer public. In March 2018, we were privileged to moderate a roundtable concerning self-represented litigants in Delaware's federal and state courts, with participation by Chief Judge Brendan L. Shannon of the U.S. Bankruptcy Court for the District of Delaware, President Judge Jan R. Jurden of Delaware's Superior Court, Chief Judge Alex J. Smalls of Delaware's Court of Common Pleas, and Chief Judge Michael K. Newell of Delaware's Family Court.

Next, two authors, Maida R. Milone and Julia Jones of Pennsylvanians for Modern Courts, review different judicial selection systems, including judicial elections and merit selection models. The authors also share important insights gleaned from their organization's efforts to reform Pennsylvania's system for selecting its appellate judiciary.

Finally, this issue closes with a tribute to the storied career of District Judge Sue L. Robinson, who recently retired after nearly 20 years of service as a member of Delaware's federal bench.

Gregory Werkheiser

Jesse Noa

Judge Thomas L. Ambro

Judge Ambro has served as a judge for the United States Court of Appeals for the Third Circuit since 2000 after being nominated to the bench by President Bill Clinton. Prior to his appointment, Judge Ambro practiced law for 24 years at Richards, Layton & Finger, P.A., where he distinguished himself as one of Delaware's preeminent bankruptcy practitioners. Judge Ambro received his undergraduate degree from Georgetown University and his Juris Doctorate from Georgetown University Law Center.

Senator Christopher A. Coons

Senator Coons has served as a United States Senator for Delaware since 2010. He currently sits as a member of the Senate Appropriations, Foreign Relations, Judiciary, Small Business and Entrepreneurship, and Ethics committees. Before being elected to the Senate, Senator Coons served as New Castle County Council President and as New Castle County Executive. He graduated from Amherst College and earned his Juris Doctorate from Yale Law School and a Master's in Ethics from Yale Divinity School. Senator Coons also holds two honorary degrees, a doctorate in public administration from Goldey-Beacom College and an honorary law degree from Widener University Delaware Law School.

Fmr. Justice Jack B. Jacobs

Jack Jacobs is senior counsel for Sidley Austin LLP, where he advises companies and boards of directors on Delaware law issues. Prior to joining Sidley, Justice Jacobs served as a Justice of the Supreme Court of Delaware from 2003-2014. Before that, Justice Jacobs served as a Vice Chancellor of the Delaware Court of Chancery since 1985. Prior to being appointed to the bench, he practiced corporate and business litigation in Delaware since 1968. Justice Jacobs graduated from Harvard Law School, received his L.L.D. from Widener University School of Law (now the Delaware Law School) and received his undergraduate degree from the University of Chicago.

Julia Jones

Julia Jones has been affiliated with Pennsylvanians for Modern Courts since 2014. She is currently a third-year student at the University of California, Irvine School of Law, where she serves as a policy fellow at the Center for Biotechnology and Global Health Policy, a staff editor of the UCI International Law Journal, and vice president of UCI's American Constitution Society and If/When/How: Lawyering for Reproductive Justice. Her *pro bono* work includes initiatives with the Esperanza Immigrant Rights Project, the ACLU of Oregon, and the Victim Rights Law Center.

Maida R. Milone

Maida R. Milone is the President and CEO of Pennsylvanians for Modern Courts (PMC), an education and advocacy organization committed to improving and strengthening the justice system in the Commonwealth through public education and judicial reform. Prior to joining PMC, Ms. Milone practiced law and managed for-profit organizations for nearly 20 years, with the lion's share in the pharmaceutical industry, where she served as general counsel of the DuPont Merck Pharmaceutical Company, before turning her attention full-time to nonprofit organizations. Ms. Milone has her B.A. in Philosophy and her J.D. from the University of Pennsylvania, and currently resides in Wynnewood, PA.

Stephanie E. O'Byrne

Stephanie O'Byrne is an associate with Potter Anderson & Corroon LLP. Her practice focuses on litigating patent, employment and other commercial matters. She formerly served as the permanent patent law clerk to Judge Sue L. Robinson of the United States District Court for the District of Delaware from 2006-2012, during which time Ms. O'Byrne was assigned over 450 patent cases across multiple technology areas. Prior to joining Potter Anderson and the District Court, Ms. O'Byrne was an associate at Connolly Bove Lodge & Hutz, where she litigated patent infringement and trade secret actions. Ms. O'Byrne received her undergraduate degree from The Richard Stockton College of New Jersey and her Juris Doctorate from Rutgers School of Law, Camden.

Fmr. Chief Justice Myron T. Steele

Myron T. Steele is a partner at Potter Anderson & Corroon LLP. His practice focuses on litigating corporate and commercial matters, as well as serving as a mediator or arbitrator for various commercial disputes. Before joining Potter Anderson, Chief Justice Steele served as a member of the Delaware judiciary for 25 years. He first served as a Judge of the Superior Court of Delaware and later as Vice Chancellor of the Delaware Court of Chancery. He then served as a Justice of the Supreme Court of Delaware from July 2000 to May 2004 and then as Chief Justice from May 2004 until his retirement from the bench in November 2013. Chief Justice Steele received his undergraduate degree from the University of Virginia and his Juris Doctorate and Masters of Law degrees from the University of Virginia School of Law. Chief Justice Steele also served on active duty in the U.S. Army and retired as a Colonel in the Delaware Army National Guard.

Judge Thomas L. Ambro

*A version of this article first appeared in part as a supplemental introduction in the Third Circuit Appellate Practice Manual (3d ed. 2017). It appears here with minor revisions.

Thoughts On Appellate Practice*

The purpose of appellate advocacy is best achieved by understanding how judges decide, and thus what causes them to decide.

The purpose of appellate advocacy is to persuade a judge or panel of judges that your position is more correct than that of your opponent. This purpose is best achieved by understanding how judges decide, and thus what causes them to decide. Retired Judge Richard A. Posner — in my view, a jurist in the pantheon of great legal minds in American history — sets out "nine theories of judicial behavior" in his illuminating treatment of our craft.[1] In simplistic form, they are as follows.

Judge Posner's Nine Theories of Judicial Behavior

1. The Attitudinal Theory. Judicial decisions here "are best explained by the political preferences that [judges] bring to their cases."[2] The adjective "political" is with a small "p," presumably because judicial thinking spurred by political leanings is not necessarily the same as partisan political thinking.

2. The Strategic Theory. This theory is "goal-oriented."[3] My take is that it understands judicial rationales as means to a result. In other words, the judge starts with a desired result, and the decision process is to supply the path to achieve it.

3. The Sociological Theory. Judicial decisions are shaped by "small-group dynamics."[4] Because "[a]ppellate judging is a cooperative enterprise," and judges who are collegial (most are) prefer consensus over dissent if possible, "panel composition[s] … influence outcomes."[5] Often, much depends on the panelists' "intensity of preference," but the tentative preference of a single panelist often melds into a result and rationale that would not occur were that panelist acting on her or his own.[6] If you think this theory isn't sound, think about another context — that of juries that reach a unanimous verdict despite initial splits in voting.

4. The Psychological Theory. This theory "highlights the importance and the sources of preconceptions in shaping responses to uncertainty."[7] Put another

way, decisions flow from "non-rational drives and cognitive illusions."[8]

5. The Economic Theory. In this instance the judge becomes "a rational, self-interested utility maximizer."[9] Behavior is "the product of hyperrational choice," such as wanting decisions to enhance the judge's reputation, prestige or simply self-respect.[10] Think no further than Justice Oliver Wendell Holmes, Jr., who, when nearly 70, complained that he had achieved neither the greatness nor recognition he desired.[11]

6. The Organizational Theory. I think of this as the culture of an institution influencing or constraining how in or out of lane a judge swims. She or he exercises independence and discretion within the parameters the institution tolerates.

7. The Pragmatic Theory. Decisions have consequences. They affect not only the parties but also later cases. Judges thus often base decisions on their perceived effects. Being practical is the theme, and it is counterposed by Judge Posner against the blind following of legal authorities piled on each other in briefs and opinions.

8. The Phenomenological Theory. Judicial decisions come from "first-person consciousness — experience as it presents itself to the conscious mind."[12] Stated differently, a judge's experience shapes blink responses to issues that *"feel"* right.[13]

9. The Legalist Theory. Judicial behavior follows a body of "preexisting rules stated in canonical legal materials, such as constitutional and statutory texts and previous decisions of the same or a higher court, or derivable from those materials by logical operations."[14] "The legalist slogan is 'the rule of law.'"[15] "The ideal legalist decision is the product of a syllogism in which the rule of law supplies the major premise, the facts of a case supply the minor one, and the decision is the conclusion."[16] All of this might work in routine cases, but to pragmatists like Judge Posner the theory offers cover for not thinking fully and ignoring consequences. To him, legalism "counts against" traits aspirationally sought in judges — good judgment, wisdom, the lessons gained from experience, and maturity.[17]

To be sure, Judge Posner's theories of how judges decide overlap, something he concedes readily.[18] Conjuring ways they blend is easy: a judge's attitudinal preferences may lead to a desired strategic result; the two may fit a sociological model; being pragmatic may include the impulse for recognition; applying precedents broadly may be the culture of a court. And we could go on. As a look back, however, the Posner theories are helpful.

Theories of how judges decide overlap. For example, a judge's attitudinal preferences may lead to a desired strategic result.

But are they as helpful for counsel looking forward to constructing themes of analysis for an appellate panel that counsel knows not? The answer for me is sometimes (such as when the cultural patterns of a court are pronounced), but not often enough.

Another Framework for Deciding Cases

I jump off to set out another way to decide cases. It is not my creation. Indeed, as explained below, I no longer know whose creation it is.

In July 2001, I attended a several-day symposium for new appellate judges at the New York University School of Law. It began on a Sunday evening, and the featured speaker (I believe it was to be the Solicitor General of the United States) was unable to appear. The co-director of the symposium, Professor Samuel Estreicher, by necessity stepped in. He spoke of an article he had recently read about the Supreme Court as then constituted. Neither Professor Estreicher nor I can find our notes, and neither of us recalls the author's name. So all I note now is from recall, no doubt with holes. (If the author reads or hears about this article, please call or write me.)

Yet, what this person wrote has affected to this day the process I employ to decide cases. He (I think the author was a male) noted that newspaper accounts of Supreme Court decisions speak of votes cast by "liberal" and "conservative" justices. He suggested a different viewpoint — that of "camps" at the Court that primarily affect judicial decisions, and posited that there were then 4½ camps:

1. The Textualist Camp. The first camp was that of textualism. (As we would guess, it included Justices Scalia and Thomas.) Look at the words of statutes and regulations. Do not consult legislative history, as it is not the enacted will of Congress.

2. The Structuralist Camp. The second is the structuralist camp. Consider the federal-state structure we call federalism. Does the federal government, usually via the Constitution's Commerce Clause, have the power to legislate on matters states may perceive as within their province? It is the balancing of federal-state relations that underlies this camp. Examples of cases involving such relations are: *United States v. Lopez*, which held that the Commerce Clause does not authorize creating a federal offense for possessing a gun in a school zone;[19] and *United States v. Morrison*, which held that the Commerce Clause does not confer the authority to enact the Violence Against Women Act, as gender-based violence is a local issue.[20] Though they dissented in these cases, the author placed Justices Souter and Breyer in the structuralist camp for reasons I do not know.

3. The Pragmatist Camp. The third camp mirrors Judge Posner's seventh theory of judicial behavior — look at the consequences of what we decide and how they will affect future litigants and cases. Above all, be pragmatic. This camp comprised Justices O'Connor and Kennedy.

4. The Fairness Camp. The final camp is one we all understand intuitively from a young age — fairness. Is what we are deciding fair to the litigants? The quintessential case here is, of course, *Brown v. Board of Education*, outlawing racially

segregated schools as against equal protection.[21] Justices Stevens and Ginsburg made up this camp.

4½. The Borrower Camp. The author left out Chief Justice Rehnquist, as purportedly he borrowed from all four theories to get to where he wanted. Under Judge Posner's theories, my perception is that he would believe the Chief Justice followed the strategic theory.

The paradigm for the "camp theory," either according to the author or Professor Estreicher (I don't recall), was *Apprendi v. New Jersey*.[22] Mr. Apprendi shot several times into the home of an African-American family that he did not want in his neighborhood. He was charged with and pleaded guilty to, among other things, possessing a firearm for an unlawful purpose, thus allowing a sentence of five to 10 years. The sentencing judge, however, found by a preponderance of the evidence that Apprendi committed a hate crime under New Jersey law, which allowed an enhanced sentence beyond the statutory maximum. A 10-year sentence thus became 12.

Cite cases only when they are useful. Better time is spent on the argument that melds those cases into credible themes.

The Supreme Court, in a 5-4 ruling (Justices Stevens, Scalia, Souter, Thomas and Ginsburg for the majority, with Chief Justice Rehnquist and Justices O'Connor, Kennedy and Breyer in dissent), held that the Constitution demands that any fact that enhances a sentence above the statutory maximum (but for a prior conviction not relevant in that case) must be submitted to a jury and proved beyond a reasonable doubt. The lead opinion for the majority was by Justice Stevens, who deemed the holding "simple justice."[23]

Justice Scalia concurred. Though noting that Justice Stevens "sketches an admirably fair and efficient scheme of criminal justice," for Justice Scalia the principal reason for his joining the majority was that the Constitution "means what it says."[24] The Sixth Amendment's "guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to … trial, by an impartial jury,' has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally proscribed punishment *must* be found by the jury."[25]

Justice O'Connor wrote the primary dissent, noting on several occasions how

unsettling to sentencing would be the consequences of the Court's ruling.[26]

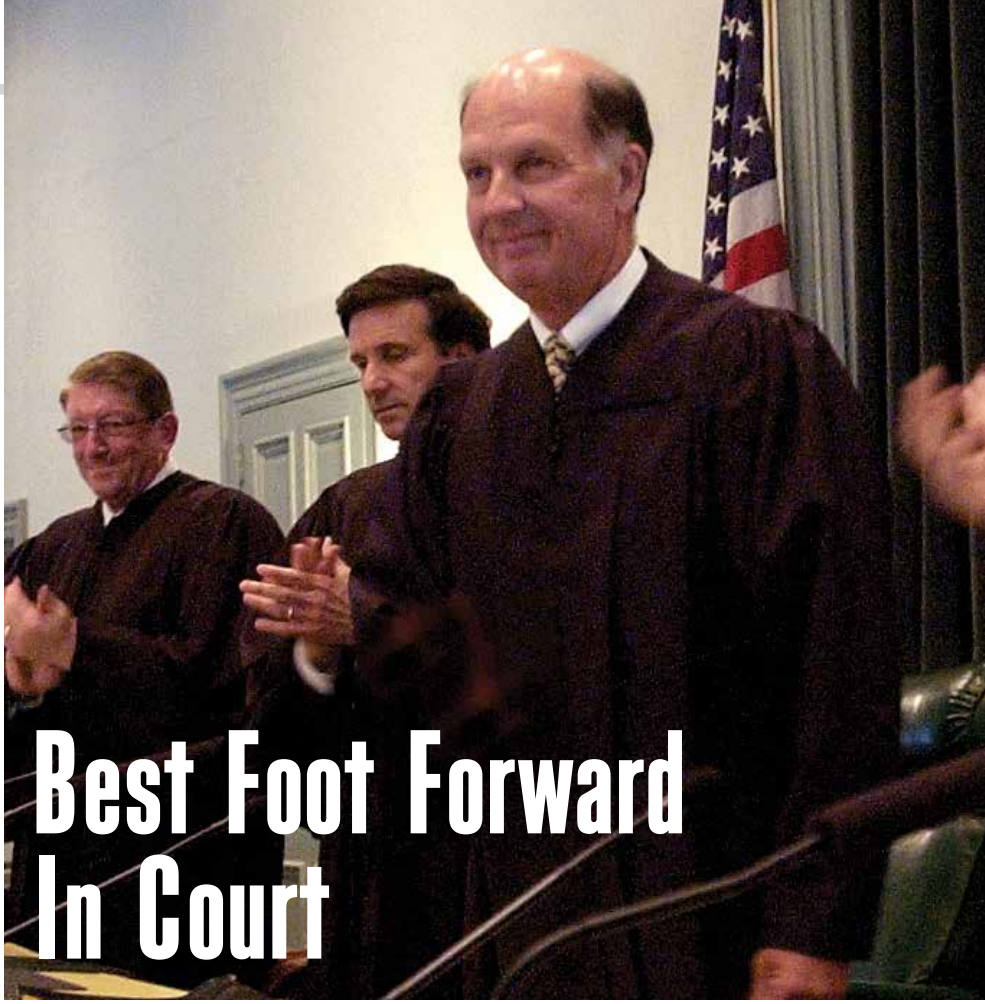
To advocates seeking cogent themes of arguments, I suggest you consider the currently unknown author's "camps" of analysis. You need not confine yourself to one. For example, in a statutory construction case, text is often paramount. And by analogy to the structure of federal-state relations, the "structure" of a statute (say the United States Bankruptcy Code) may also be helpful. For example, if the same term is used in three places in the Bankruptcy Code and it is understood the first two times to mean x, then arguably it was structured to mean x the third time as well. (In the canons of construction, this is known by the Latin phrase *noscitur a sociis* — to know by the company it keeps. In effect, you discern the meaning of a term by the context in which it appears.) The consequence of a contrary ruling may cause confusion or a precedent with unintended results in future cases, and to decide your way comports closely with fairness.

None of what I write means that you should avoid citing key cases. To know the lay of the law is expected. But cite cases only when they are useful. Better time is spent on the argument that melds those cases into credible themes that invite us to consider all aspects of whether you should win. If so, we, the appellate process and the parties it affects are much the better. ◆

NOTES

1. Richard A. Posner, *How Judges Think* 19-42 (2008).
2. *Id.* at 20.
3. *Id.* at 30.
4. *Id.* at 31.
5. *Id.* at 31 & 33.
6. *Id.* at 32.
7. *Id.* at 35.
8. *Id.*
9. *Id.*
10. *Id.* at 35-36.
11. *The Fundamental Holmes: A Free Speech Chronicle and Reader* 166 (Ronald K. L. Collins ed., 2010).
12. Posner, *How Judges Think* at 40.
13. *Id.* (emphasis in original).
14. *Id.* at 41.
15. *Id.*
16. *Id.*
17. *Id.* at 42.
18. *See, e.g., id.* at 39.
19. 514 U.S. 549 (1995).
20. 529 U.S. 598 (2000).
21. 347 U.S. 483 (1954).
22. 530 U.S. 466 (2000).
23. *Id.* at 476.
24. *Id.* at 498-99.
25. *Id.* at 499 (emphasis and alterations in original).
26. *See, e.g., id.* at 550 ("[T]he apparent effect of the Court's opinion today is to halt the current debate on sentencing reform in its tracks."; "[P]erhaps the most significant impact of the Court's decision will be a practical one — its unsettling effect on sentencing conducted under current federal and state … sentencing schemes.") and 551 ("[T]he Court's decision threatens to unleash a flood of petitions by convicted defendants seeking to invalidate their sentences in whole or in part on the authority of the Court's decision today.").

Fmr. Chief Justice Myron T. Steele
and Fmr. Justice Jack B. Jacobs



Putting Your Best Foot Forward In Court

Practical tips for attorneys appearing in Delaware courts

In the grand scheme of things, much of what we say here has been said before. The lessons of how most effectively to present your client's case, whether in a written brief or in oral argument, and whether before a judge, jury or appellate court, have always been fundamentally the same. But what has changed, in the half century since we were admitted to the Delaware Bar, is the increased pace of technology and the never-ending, relentless demands of law practice, which create not only work-life imbalances, but also pressures to cut corners to process the increasing demands of professionals who litigate in the Delaware courts.

If we have any value to add to this, it is that as lawyers who served as jurists on Delaware's major trial courts and on its Supreme Court for over three decades, we have seen it all. We therefore feel modestly qualified to share some perspectives on what ought to be "best practices" at the trial and appellate levels in Delaware.

We present our thoughts under the headings of each separate court on which we have served: the Delaware Superior, Chancery and Supreme Courts. Although this format serves organizational purposes, we point out that those categories are neither airtight nor self-contained. Indeed, there is considerable overlap. But, the different procedural requirements of each separate court may help us better focus on best practices that are unique to each.

I. THE SUPERIOR COURT

Counsel appearing before the Superior Court would do well to keep in mind the need for advance preparation on several fronts, especially because trials before the Superior Court are often before a jury.

(1) Pre-Courtroom Preparation: Learn the physical layout of the courtroom to know how you and your evidence will be oriented in relation to the jury.

Moreover, organize your presentation to make it appear seamless and effortless. All trial and witness examination (and cross-examination) notes and documents you plan to introduce into evidence should be arranged in a three-ringed binder, in chronological order of presentation. Any excerpts from videotaped depositions should be organized and easily accessible.

(2) Picking and Presenting to a Jury: Be prepared when picking and presenting to a jury. Make sure you speak with court staff to assure you understand the process to be used for selecting the jury. An attorney who stumbles through the selection process rarely favorably impresses the venire. Attorneys without jury trial experience should consult with experienced counsel about techniques for how to select jurors who will be open-minded and react well to your client and his or her cause. When presenting to the jury, avoid legalese and fancy verbiage and always err on the side of brevity. Also, never overpromise. In your opening statement, you will be suggesting to the jury what the evidence will be. Make sure that the evidence you actually introduce conforms to your promise in opening, because if you don't, the jury will remember.

(3) Make and Preserve a Record: Never lose sight of the need to assure that you have made and preserved a proper record for appeal. Although one eye must always be focused on the jury, the other must be focused on the appellate court that may review your case. Highly important in that regard is the preparation and presentation of jury instructions to the trial judge during the prayer conference. Be prepared to submit, and advocate vigorously, on the record for the instructions you will want the judge to give to the jury, and to oppose any instructions presented by your opponent that you contend are improper and detrimental to your cause. Any jury instructions that you propose that might be contested and those that you will contest should be supported by a memorandum of law prepared in advance of the conference.

II. THE COURT OF CHANCERY

(1) Jurisdiction: The Court of Chancery is a court of limited jurisdiction. It is empowered to adjudicate only three categories of cases: (1) where the remedy being sought is equitable (*e.g.*, injunction, reformation, specific performance); (2) where the cause of action is cognizable only in equity (*e.g.*, breach of fiduciary duty, piercing the corporate veil); and (3) where jurisdiction is created by statute (*e.g.*, proceeding under the DGCL and alternative entity statutes). Bringing an action in the wrong court is not only wasteful of client resources, but also embarrassing. But fortunately, it is not fatal, since Delaware has a "transfer statute," 10 *Del. C.* § 1902, that permits a case filed in the wrong court to be transferred to the court with appropriate subject matter jurisdiction without being subject to the statute of limitations.

When presenting to the jury, avoid legalese and fancy verbiage and always err on the side of brevity. Also, never overpromise.

(2) Expedited Proceedings: In appropriate circumstances requiring a prompt hearing (*e.g.*, a preliminary injunction), the Court of Chancery will hear a case on an expedited schedule. Counsel seeking expedition must prepare and submit all of the motion papers and an appropriate form of order setting forth precisely what counsel is asking the Court to do, and giving notice to opposing counsel. Typically, that will trigger an in-chambers scheduling conference, which will be the Court's first exposure to the case and will often be the most important encounter counsel will have with the Court, given the importance of making a good first impression. In these circumstances, counsel must be able to articulate briefly and precisely what he or she wants the Court to do and be prepared to justify the request, often over the objection of opposing counsel.

(3) Discovery: Never seek discovery that you do not genuinely need and always be prepared to justify your discovery requests. Counsel should always attempt to resolve discovery disputes informally and outside of court. Only if that fails, should you ask the Court to intervene.

(4) Briefs, Legal Memoranda and Oral Argument: It is best practice in any court, especially the Court of Chancery, to support any motion or request for judicial action with a written brief or legal memorandum. Briefs should be written in plain conversational English (without legal verbalisms such as "said," "as to" and "hereinafter") and should live up to their name — *i.e.*, be short. In our experience, the power of most written expression is inversely proportional to its length. In cases where the Court grants oral argument, there are two imperatives: (i) focus only on your most important arguments; and (ii) listen carefully to the Court's questions and then answer immediately and responsively. Often, the most effective response is "yes" or "no," followed by a short explanation, or "I don't know, but will find out and communicate the answer after the hearing."

(5) Trial (Final Hearing): Court of Chancery trials are before a judge without a jury. In many cases, particularly involving breach of fiduciary duty claims, because the threshold issue is the standard of review (which can often determine the outcome), it is critical that counsel make a record to support the standard of review he or she seeks the Court to apply. Also, because many Chancery trials involve complex issues, it is sound practice to offer the Court the option of submitting a pre-trial brief in lieu of an opening statement. Where expert testimony is relied on, the testimony should center on issues of "expert" fact, and never on issues of law. Because the trial time available to judges in all trial courts is a scarce resource, counsel should take every step possible to conserve the court's trial time. That includes attempting to obtain stipulations

as to the admissibility of all documents to be introduced into evidence, and avoiding where possible witness testimony repeating what the documents themselves plainly show, except where testimony is genuinely necessary to resolve an issue in the case. Where document admissibility is contested, counsel should prepare a list of all contested documents and the basis for each objection.

(6) Re-argument: Although the Court Rules allow motions for re-argument, we suggest that in 99.4 percent of all cases, you never file one. They almost never succeed, except in the rare case of a truly demonstrable misapprehension of law or fact. Instead, counsel who genuinely believes that the trial judge committed reversible error, should appeal.

(7) Other Dos and Don'ts: Complex matters typically involve the appearance of non-Delaware counsel. That requires Delaware counsel to be especially scrupulous about educating non-Delaware counsel on each Chancellor's individual preferences and predilections. And, it cannot be said too often that it is vital for all counsel appearing before that Court to avoid earning a reputation for being unable to resolve unnecessary squabbles outside the courtroom.

It cannot be said too often that it is vital for all counsel appearing before the Court of Chancery to avoid earning a reputation for being unable to resolve unnecessary squabbles outside the courtroom.

III. THE DELAWARE SUPREME COURT

Much of what we have previously said about briefs and oral argument in the Superior Court and Court of Chancery applies equally to the Supreme Court, but with even greater rigor. The Supreme Court imposes strict word count limits on all briefs, which tests to the utmost counsel's ability to write cogently and sparingly. Moreover, in only a limited percentage of the appeals does the Supreme Court grant oral argument, which in practically all cases is limited to 20 minutes per side. With this preface, our list of "dos" and "don'ts" will be highly abbreviated, and without topic headings.

(1) Except where it is impracticable, the lawyer who tried or presented the case at the trial level should argue the case on appeal or, failing that, should be substantively involved in the preparation of the brief and present at oral argument.

(2) Although there are word count limits for briefs, that does not mean the limit must invariably (and mindlessly) be filled up. If you can present your client's position in less than the prescribed limit, you will be silently applauded. Moreover, the best briefs are often those that other lawyers in your office (not involved in the case) have reviewed and edited.

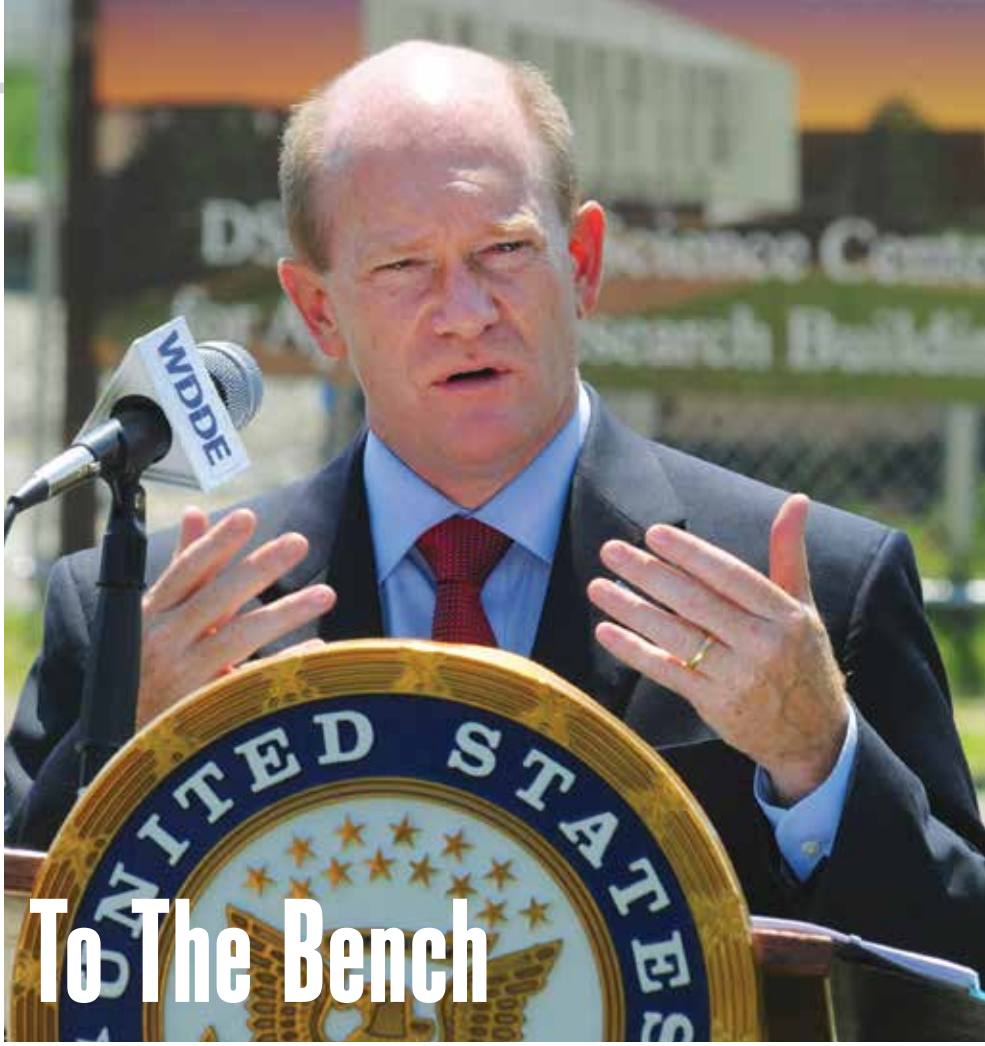
(3) At oral argument, get straight to the point by telling the panel at the outset in what respects the trial judge "got it right," how the judge committed error, and the reasons why the error merits reversal. By the same token, appellee's counsel should at the outset of his or her presentation identify and highlight the critical points of departure. Again, given the constraints, counsel should make only his or her best arguments, reserving the remainder for the briefs, unless the Court has questions about them. Often the Justices, intend their questions to be helpful to counsel, in aid of an opportunity to better explain counsel's arguments.

Given the constraints, counsel should make only his or her best arguments, reserving the remainder for the briefs.

(4) Finally, counsel should listen to the Justice's questions carefully and answer them immediately and responsively.

* * *

If any one-line summary is possible, it would be this: at all times focus on the legacy that the "Delaware Way" has for generations imparted to guide the conduct of Delaware lawyers before, during and after all court proceedings. ◆



Road To The Bench

What Washington can learn from the 'Delaware Way' when it comes to judicial nominations

It's no secret that the Trump administration has moved quickly to nominate and confirm candidates to fill judicial vacancies all around the country. President Trump assumed office with over 100 federal vacancies — twice as many as when President Obama was inaugurated. These vacancies included a U.S. Supreme Court seat, held open for nearly a year because President Obama's nominee was denied a hearing and a vote. President Obama left office with the lowest percentage of his district and circuit court nominees approved for any two-term president since 1945.

In less than 16 months, President Trump will have secured confirmation for a Supreme Court Justice, 21 circuit court nominees and 17 district court nominees. President Trump had 12 circuit court nominees confirmed in 2017 — the most in any president's first year since the circuit courts were created by the Judiciary Act of 1891. President Obama's circuit court nominees took an average of eight times as long to confirm after clearing the Judiciary Committee.

In the rush to move President Trump's judicial nominees quickly, I have seen an erosion in longstanding Senate practices. For example, over the last century, for every district and circuit court nominee, the two senators representing the state with the vacancy are separately asked to convey their views on the nominee on a blue sheet of paper. The "blue slip" consultation process ensures that home-state interests are considered in the selection of a nominee. It operates as a measure to secure thorough vetting before allowing a nominee to proceed. In the Obama administration, under chairmen of both parties, the Judiciary Committee never moved a nominee without a returned blue slip. In fact, 18 of President Obama's

nominees failed because they didn't have returned blue slips. During the Trump administration, we have had three circuit court nominees proceed to confirmation hearings over the objections of one or both of their home-state senators.

As a member of the Senate Judiciary Committee, I've had the opportunity and responsibility to closely review each of President Trump's candidates, and frankly, it's been a mixed bag. Some of the nominees we've reviewed have impressive backgrounds that earned them bipartisan support, but others have been more controversial and have sharply divided our committee. Four received "not qualified" ratings from the American Bar Association's Standing Committee on the Federal Judiciary, an exceptionally high number for the first year of an administration. Five have even had their nominations fail.

Serving on the Judiciary Committee, it is clear to me that our federal bench needs qualified judges, and it's not in any state's interest to have federal judges who ignite controversy on one side of the aisle or another. That's why I'm so proud of how Delaware has handled the nomination and ongoing confirmation processes of federal judges for our state.

Senator Carper and I know how particularly important our federal court is to Delaware. Judge Robinson and Judge Sleet were kind enough to give us advance notice of their respective plans to retire, so that we could move as quickly as possible to advance qualified, consensus nominees for the district court bench. Our district court is one of the busiest in the country. More patent cases are filed here than in any other district. Based on weighted case filings, both of our vacancies qualify as judicial emergencies. We have worked collaboratively, efficiently and without regard for partisanship to achieve the nominations of two excellent candidates during this Congress. Below is a brief summary of how we applied the "Delaware Way" to judicial nominations in the United States Senate.

Collaboration with the Delaware Legal Community

In early 2017, Senator Carper and I formed a bipartisan Judicial Nominating Committee to consider candidates for the two vacancies on the U.S. District Court for the District of Delaware. We made it clear to the Trump administration that our committee members were steeped in experience in the Delaware legal community, had a diverse set of perspectives and possessed extensive knowledge of the demands of the federal bench. We asked members to put politics aside and to focus on doing one thing: identifying the best candidates for the job.

Thanks to our non-partisan process, our interactions with the White House were collaborative, positive and based on a mutual desire to place qualified judges on the federal bench.

After the nominating committee thoroughly vetted qualified submissions and interviewed top candidates, Senator Carper and I conducted joint interviews with the finalists. We were pleased to recommend a set of impressive, experienced Delawareans to the White House for the President's consideration last August.

Coordination with the White House

Some people understandably doubted whether President Trump would seriously consider the recommendations of Delaware's two Democratic Senators, but thanks to our non-partisan process, our interactions with the White House were collaborative, positive and based on a mutual desire to place qualified judges on the federal bench. The White House Counsel's Office was well-aware of the non-partisan process we had run. Sure enough, with our recommendation, on December 20, 2017, President Trump nominated two well-respected, highly qualified Delawareans, Colm Connolly and Maryellen Noreika, to serve on the Delaware District Court.

Consideration of the Judiciary Committee

On February 14, 2018, I had the honor of serving as the Democratic Ranking Member at the hearing for our Delaware District Court nominees, Colm Connolly and Maryellen Noreika. It was a proud day for the First State.

After a long process of disclosures, vetting, background checks, and fielding questions in person and in writing, both Mr. Connolly and Ms. Noreika received overwhelming support from the Judiciary Committee. The Judiciary Committee voted to favorably report the nominations to the floor on March 15. I am confident the full Senate will confirm them this year.

In the midst of the partisan rancor that has become too common in our national discourse, I hope that other states will take a page from Delaware's playbook.

Unfortunately, this experience of bipartisan cooperation is not universal, and some of our Senate traditions that protected senators' ability to provide advice and consent on nominations are falling by the wayside. I am concerned about the erosion of the blue slip, and I will always work hard to ensure that the needs and concerns of the Delaware legal community are taken into account when there are judicial vacancies.

We all need to be working to promote seasoned, well-qualified, consensus candidates to the bench. I urge the administration and my colleagues to work collaboratively, to seek out common ground and to select candidates who can earn broad-based support from the Judiciary Committee. By applying the "Delaware Way" to our federal judiciary, instead of cutting corners or removing guardrails in the process, we can make progress in addressing the more than 100 vacancies that remain on our courts. ◆

With
Chief Judge Brendan L. Shannon,
President Judge Jan R. Jurden,
Chief Judge Alex J. Smalls, and
Chief Judge Michael K. Newell

In One's Own Behalf

Perspectives from the Delaware bench on self-represented litigants

Chief Justice Strine has remarked that "justice is hollow unless its promise is real for everyone." This admonition echoes the challenges that can arise in cases involving self-represented litigants, including how to maximize access to justice for persons unable to retain counsel, and how to achieve procedural fairness for both represented and self-represented litigants.

These challenges have not escaped the attention of the Supreme Court of Delaware, which, in December 2014, established the Delaware Access to Justice Commission. The Commission's Civil Subcommittees issued their final report in September 2017, a central focus of which is how to improve court coordination and availability of resources for self-represented parties.

Adding to the dialogue, *Delaware Lawyer* (hereafter, *DL*), had the privilege to sit down with an esteemed panel of Delaware state and federal judges who have agreed to share their perspectives on the involvement of self-represented parties in court proceedings, including trends, difficulties and best practices. Participants in our roundtable included the Honorable Brendan L. Shannon, Chief Judge of the U.S. Bankruptcy Court for the District of Delaware: *BLS (Bankruptcy)*; the Honorable Jan R. Jurden, President Judge of Delaware's Superior Court: *JRJ (Superior)*; the Honorable Alex J. Smalls, Chief Judge of Delaware's Court of Common Pleas: *AJS (Common Pleas)*; and the Honorable Chief Judge Michael K. Newell, Chief Judge of Delaware's Family Court: *MKN (Family)*. What follows is an edited transcript of our conversation from March 2018.

***DL:* Before we begin, on behalf of *Delaware Lawyer* and the Delaware Bar Foundation, please let us thank you all for your time and insights. Let's dive in. Over the past few years, have you seen an increase in the amount of cases involving self-represented litigants before the courts?**

MKN (Family): In Family Court, we've always had a heavy percentage of self-represented people. Probably around 2008, when the economy shifted, we saw more people handling their own property division and alimony matters. This was an eye opener for me because these cases can include complex tax consequences, pension plans and other complex assets.

JRJ (Superior): I haven't noticed an increase or decrease in *pro se* representation in Superior Court, and that is in the civil and criminal arenas.

BLS (Bankruptcy): Around and following the financial crisis until about 2011, we saw a spike because of issues with mortgages and the costs of engaging counsel. The two areas that I am focusing on are Chapter 13 and Chapter 7. So we have seen a pretty good spike, but it has since leveled off. To give some context, there are aspects of Chapter 7 bankruptcy that are designed to be user friendly, where an unrepresented party can get through with the help of the Trustee. However, Chapter 13, as a practical matter, is unworkable if you are not represented.

AJS (Common Pleas): I think the number of unrepresented litigants in criminal cases seems to be higher now because the Public Defender's office has gone to "vertical representation," meaning they only represent cases that come into the office. In the previous system, it was more "horizontal." They would pick up any case on the calendar. So they don't pick up as much as before. On the civil side, we have not seen any significant shift.

DL: **What resources are available to self-represented litigants to help them through the process?**

BLS (Bankruptcy): Because bankruptcy is a civil proceeding, we do not have federal resources available for a public defender or anything like that. We generally have not focused on requesting assistance for the Chapter 7 debtors, the overwhelming majority of whom manage to navigate the process to obtain their discharge. From our point of view, it has worked pretty well and our numbers are consistent with numbers nationally.

The Chapter 13 *pro se* issue we regard as a disaster. I work with the Chapter 13 Trustee, Michael Joseph, and we try to figure out how to deal with this because it is a practical impossibility for a person to represent themselves in Chapter 13.

> We are always mindful of that line that *pro se* litigants shouldn't get special treatment, but on the other hand, you want them to receive a fair shake.

DL: **Why is it practically impossible?**

BLS (Bankruptcy): It is a five-year plan that you perform under. If your circumstances change, you must continually update the Trustee. You need to continue to make your payments. If you get behind on payments, there will be a motion to dismiss your case. The other thing is, the mortgage companies can, to put it bluntly, be very difficult to deal with and often it takes an attorney to deal with them.

About five years ago, we created a foundation that was originally looking to organizations like the American Bankruptcy Institute and others to provide some seed money that we use with the Legal Services Corporation of Delaware. We actually just got significant funding from the Delaware Bar Foundation that came from a Bank of America settlement. And the District Court has also recently committed to support the effort as well, which is very welcome. So it's been a huge sea change because now there's significant resources and experienced attorneys at Legal Services that we push the unrepresented party to.

When someone shows up at court facing an administrative dismissal, I hand them a brochure and say, "you need to go talk to these people." So that's what we've done. It hasn't fixed everything.

The other decision we made early on is that, we all know there is a large bankruptcy bar in Delaware, and the larger firms offered for people to volunteer. But we concluded that it does not make a lot of sense. It is a different practice from corporate to consumer, and we looked at it and decided it was not an ideal use of resources. We appreciated the offer, but it was not practical. Again, Chapter 13 cases are a five-year relationship. Once you are in, I am typically not letting you out as counsel.

JRJ (Superior): We have a mortgage mediation program for those facing foreclosure and it provides an avenue by which you may be able to save your home and it has worked very well. The banks have participated in good faith and it seems to have worked very well and gets the parties to the table.

We also bend over backwards in our Prothonotary's office to provide forms. We have forms on our website and are always looking for ways to improve our website for the public. But as far as programs, we do not have anything like Judge Shannon has discussed. In the civil arena, most of the unrepresented litigants are in mortgage foreclosure actions.

In the criminal context, it is difficult to do much for *pro se* litigants that are incarcerated because the restrictions are so great. It would be nice in an ideal world to have a stable of attorneys that might be willing to take up those cases *pro bono.* But we don't have that, so we will appoint counsel.

One last comment: we have a manual on how to deal with *pro se* litigants and all of the judges are trained on that manual and take it seriously. We are always mindful of that line that *pro se* litigants shouldn't get special treatment, but on the other hand, you want them to receive a fair shake. Procedural due process is important to us and we incorporate that into any interaction with an unrepresented litigant.

MKN (Family): We would love to have attorneys in every one of our cases, but I'll break this down in terms of infor-

mational resources.

We have all of the necessary forms on our website. We have some videos on how to conduct yourself in proceedings, and the Office of the Child Advocate has been helpful putting those together with us. We have a frequently-asked-question section available as well.

From a due process and legal standpoint, we have dependency and neglect petitions filed by the Department of Justice on behalf of the Division of Family Services, which involve a parent's constitutional right to their child. We have contracts with attorneys that will represent indigent parents and the Office of the Child Advocate will represent the children. The Delaware Supreme Court issued a decision, *Walker v. Walker*, addressing the parents' rights to appointment of counsel in a private (not State-initiated) termination-of-parental-rights case. In the area of private guardianships and termination of parental rights, we do not have contracts with attorneys and we appoint from the Bar.

Some of the bigger firms have their own *pro bono* programs from which we appoint attorneys. However, the Kent and Sussex County Bars are small and not all of the larger firms have a presence there. As a result, one attorney can have multiple appointments and there is a fatigue factor that we need to consider.

We also recently revised our Rule 16 pretrial process to bring the parties in early on to discuss their case. We can provide guidance to the parties, which results in a better-prepared trial or resolution of the matter. While there may be an appearance that we bend over backwards for *pro se* litigants, it is designed to provide procedural fairness and procedural due process.

AJS (Common Pleas): I think the conflict lawyers are really limited in our court. We only have three conflict lawyers. Their caseload is extremely high, but they do a great job. From time to time, we get *pro bono* attorneys, but we don't get them on a regular basis.

Most of the individuals are not aware that you can go to Legal Services and obtain representation. I think it is about creating awareness.

While there may be an appearance that we bend over backwards for *pro se* litigants, it is designed to provide procedural fairness and procedural due process.

DL: **How do you handle cases with marginally represented parties, where people have attorneys that are not actively participating or not competent?**

MKN (Family): It is difficult. For me, I don't see that as frequently as I used to. I have had occasions where it was evident to me that there had not been communications between the attorney and the client, and that is disappointing. In those situations, it is necessary to hold attorneys accountable to the court and their professional obligation.

BLS (Bankruptcy): I have limited experience with that, particularly when I focus on the consumer bar. It is a small bar, but it is a very collegial group and they are very good at what they do. And often the issue, if there is a difficulty in the presentation of the case, is because of the client. Clients can be nonresponsive, aren't focused on issues that will be relevant to the case, and there is only so much that you can do. But again, I feel very fortunate for the bar that I have.

AJS (Common Pleas): That's rare. When you do encounter that, we will ask whether they want to continue retaining the counsel and we'll give them time to retain substitute counsel.

JRJ (Superior): I agree with the approaches discussed by my colleagues.

DL: **What training, if any, do new judges receive for interacting with self-represented litigants?**

JRJ (Superior): All Superior Court judges attend the general jurisdiction course in Reno, Nevada, which is two weeks long and has a session concerning *pro se* litigants. We also have in our bench books a document for dealing with *pro se* litigants, and then each judge is assigned a mentor. So I think we're pretty good on the training of our judges.

BLS (Bankruptcy): In bankruptcy, judges go to what's called "baby judge school." It's two sessions for a total of two weeks. There are sessions for dealing with *pro se* litigants. So there are a lot of resources devoted to training. We don't have a formal mentor system, but my greatest resource is my colleagues. It's a constant learning process for us.

MKN (Family): In Family Court, we used to send new judges to Reno, but we've gotten away from that because some of the courses there were more specialized or unrelated to our jurisdiction. There are guidelines for dealing with *pro se* litigants promulgated by the Delaware Supreme Court. Our judicial officers spend time observing cases before sitting on the bench. We assign mentors to our new judges and commissioners as a resource. We also have ongoing training and annual retreats.

AJS (Common Pleas): We send our new judges to Reno as well. Also, there are a series of courses that deal with *pro se* litigants, and we encourage our judges to review those. When they come onto the court, we assign them to a mentor and we will rotate the judge through the counties before they hear the cases by themselves.

DL: **What are some difficulties that you see in cases involving self-represented litigants?**

AJS (Common Pleas): It's the issue with the rules. They're not familiar with the rules of pleading. What we've done is we've developed a series of forms that we put on our website. Here is how you file a complaint, answer, etc. When they appear before the court, there always is the issue of how they frame what they are asking the court to do. We try to operate on the basic principle in Delaware of resolution of the case on its merits. So if the *pro se*

litigant does not properly frame the issue, we will try to have them reframe it and have it resolved on the merits.

BLS (Bankruptcy): I would like to echo Chief Judge Smalls' comments. I keep on the bench with me a stack of cases that stand for that proposition that the Third Circuit has instructed trial courts to avoid technical and procedural defaults and to rule on the merits where possible.

So going back to the comment about bending over backwards, I will read a filing and try to determine if there is a request for relief and take the necessary steps to communicate to the other side to explain, "this is how I read this, this is a request for payment, a request for some sort of relief, and we're going to have a hearing on that." And I feel pretty strongly about that. I think we all have a mission and part of the mission is to afford parties their day in court. You're not entitled to a win. You're entitled to a hearing.

MKN (Family): One of the challenges is not just the rules of pleading, but the rules of evidence, especially when you have the imbalance when one side is represented. There can be constant objections to hearsay and relevance, and that can create a disruption in the proceedings. I tell the parties that I am able to discern the evidence and decide what is relevant.

Also, some of our proceedings are private because they're closed by statute. One of the issues that we face is when one side is represented and the other is not, either by choice or because they cannot afford an attorney. We implemented a procedure to allow a support person to attend a hearing with a party upon request. These are stressful proceedings, particularly when you are not represented. The other piece is educating the unrepresented litigant. I mentioned our Rule 16 earlier. I'll have a case management conference to determine what the case is about. Not every case needs to wait a year or longer to get to a final determination. If it is a limited-issue case, I can say, "you know what, if I have time on my calendar, why don't we put this on in 30 or 45 days?" Sometimes they come to that conference and they have a basis for settlement, but don't know how to get to a conclusion.

I think we all have a mission and part of the mission is to afford parties their day in court. You're not entitled to a win. You're entitled to a hearing.

It can be a dicey area, but for example, in custody or visitation cases, there may be a limited issue and I'll give the parties some guidance and at times you can get a settlement right at the case management conference.

I do think it is daunting to go through security, enter a large courtroom, and face someone in a black robe who will decide some of your most personal and intimate issues. The education and information that the court can provide about the proceedings and to advise what the judge needs to hear can assist the parties and make for a more meaningful hearing.

JRJ (Superior): In the criminal context, the defendants who represent themselves, and are deemed competent to do so, tend to do very long direct and cross-examinations and I'm reluctant to stop them unless they go very far overboard. I want them to feel like they had a fair trial. So it can be difficult to corral them, and you don't want to do it too much in front of the jury.

In mortgage cases, it is difficult because there is an emotional factor, and they don't understand that, because they did not respond to a petition, it now doesn't matter what the reasoning was. It is hard for them to swallow and there is no way to stop the train in most cases. Our role can be more difficult in those cases because we are not allowed to give legal advice, but you really want to explain to people how they found themselves there and be tempted to tell them to work it out with the bank. It is a really fine line to walk as a judge.

BLS (Bankruptcy): Regarding foreclosures, the Superior Court mortgage mediation program has been a godsend. The program has made an enormous difference. But nevertheless, people sometimes don't respond and it's the Sheriff's sale.

Chapter 13 gives them an opportunity to stop the sale and hopefully come up with a plan to pay the arrearage and get current. We've devoted some resources to hiring a third-year law student from Widener and they have a table in the Clerk's office and they have a stack of brochures and phone numbers. When someone comes in with a *pro se* petition for Chapter 13, the Clerk says, "you should talk to that person." That person will give them a list of phone numbers, for example, for the reduced-fee panel of attorneys.

These folks are at a stress point in their lives. Many never imagined they would be in a position like this. In Chapter 13, you must have a regular income. So these are people with jobs, income, homes and degrees. One of the challenges is it typically costs about $4,000 to get an attorney, but it's money well spent.

One of the frustrations is, a *pro se* filer has managed to stop the Sheriff's sale, for that month, but there are significant consequences in the Bankruptcy Code for being a repeat filer. What happens is, the Sheriff's sale gets rescheduled, and the case was dismissed because their filings were deficient and they come in and file for bankruptcy again. At that point, you're an abusive filer and the burden becomes more significant. If you get an attorney, you can probably navigate that, but if it is your second or third bankruptcy without an attorney, your chances are zero. And the Code is designed to punish that kind of behavior.

DL: **We've discussed the importance of everyone having their day in court, but where is the line for judges between ensuring that goal and ensuring impartiality?**

MKN (Family): Where's the line? I

think it's like Justice Potter Stewart said, "I know it when I see it."

JRJ (Superior): Yes, that's where we draw it.

MKN (Family): Every case is different. When *pro se* litigants examine witnesses, sometimes it is an interesting show and other times it's not that bad. As a trial judge without a jury, you need to direct the parties in a straightforward way, while explaining why you are "interrupting" them.

I actually had a case, and it was a high-conflict case, where the *pro se* father did not do well because of his actions. At a law firm opening many years later, he was there and I thought, oh wow. And he came up and said, "I know I can't talk to you, but I just wanted you to know that you gave me an opportunity to be heard, we're not going to talk about the results, but I did appreciate my time in court."

To a large extent, the people need to have that sense that they had the opportunity to speak. That concept of access to courts and procedural fairness is important. We're trying to balance it, but we want to make sure that the person has had their say.

AJS (Common Pleas): In my court, especially with debtors, it is the opportunity to be heard and sometimes vent their frustration. "Yes, it is my debt; yes, there are problems, but I want an opportunity for the court to hear me," and they appreciate having that opportunity. I think that is critical.

BLS (Bankruptcy): I've had precisely the same experience. If I can divide up your question, when it is a consumer and a *pro se* claimant, whether the debtor is represented or not, I don't really feel that I have an issue with constraining the process. The parties have the opportunity to be heard, and if I feel that they are not, and I have that kind of a docket, I will often say, "I'm going to deal with the other more routine matters first, but we'll get to your matter and I want you to have time to be heard."

Now, we haven't talked about the corporate side of the docket. We have a lot of *pro se* claimants. These are large companies with thousands of employees, pensioners, vendors, etc. Some of them hire lawyers, some of them don't. Our practice has been that they can participate by phone free of charge if they want to participate.

To a large extent, the people need to have that sense that they had the opportunity to speak. That concept of access to courts and procedural fairness is important.

I generally will be as flexible as I can, but it becomes a challenge. Directly to your point, issues can come up when you've got a corporate case and a *pro se* claimant, who has a limited claim or doesn't have an issue but is angry with the debtors. The resources that become necessary to respond to a claimant who starts objecting to everything the debtor does can be staggering. Just because much of what we do is on a consent basis, if anyone objects, it goes to a hearing. So a small army of attorneys can come into court.

And again, you are entitled to your day in court, but we've all had experience in practice and on the bench when we've had claimants that are "out of the money" or their prospects are dim, but they are entitled to file pleadings. If these *pro se* pleadings are not responded to, they are often granted and odd things can then happen. We try to manage that process.

And I completely agree with Chief Judge Smalls. These people need to feel that they've been heard. You're not entitled to a win, but you're entitled to a day in court. And we do rely, to an extent, on counsel to interact with the *pro se* litigants in an appropriate way. If someone files a response and they say, "nobody from the debtor's firm contacted me"— that's not a good start for the debtor. While technically they're not required to make that call, we expect it. It's really the Delaware way and we have that expectation.

DL: **What advice do you have for counsel in balancing their duty to advocate zealously for their client, but also ensuring that they are not being perceived as over-lawyering or bullying a self-represented litigant, and what best-practice tips do you have for these cases?**

AJS (Common Pleas): I remind lawyers that they are members of the Bar. The goal is to achieve a result that is supported by justice. They would be mindful in representing their client that they ethically put forth what are the best principles of law. I think once you have that discussion with them, you don't have any issue going forward.

I also remind them that their behavior represents what the practice of law in Delaware ought to be. If you behave well, then the unrepresented litigant will usually mirror that behavior. If not, then there will be more problems. At the end of the day, if your client's position has merit, you will win and the court will rule appropriately. You need not engage in any behavior or tactics that prolong or cause the court to engage in additional activity.

MKN (Family): If the other side is unrepresented, it doesn't mean that you are prohibited from contacting them. It's a bit of a mine field — you have to say, "I'm not representing you or giving legal advice" — but it does not prohibit you from saying, "can we work this out?"

If you set the stage with what the expectations are and you hold the *pro se* litigant accountable the same way you hold the attorney accountable — that goes a long way. So the advice is that it is going to be the same kind of proceeding, maybe a little bit longer or different in the method of presentation, but we're going to try to hold both sides to the same standard as much as we can.

JRJ (Superior): I agree with everything that they said, and I want to say that I am impressed and enheartened by the level of patience exhibited by Superior Court practitioners when there is a *pro se* litigant, whether it be civil or criminal. I think they understand the importance of making sure the litigant feels they are receiving respect and procedural fairness. I've never had an issue with an attorney taking inappropriate advantage or mistreating the *pro se* party. In fact, I've always marveled at their patience. I've had no issues there, and it speaks to the high quality of Delaware lawyers and the professionalism of our Bar.

BLS (Bankruptcy): I'd like to echo those comments. I'm always impressed by how patient counsel is, and it is rare to see gamesmanship or hyper-technical lawyering versus a *pro se* claimant.

Chief Judge Smalls is right. If you have a case and the facts, be confident that you will prevail. You don't need to bully someone or behave badly. One of the risks of that is, at some point, you will stop litigating with the *pro se* claimant and you'll be litigating with me, and I like my odds. [Everyone chuckles.]

DL: **In what ways have you seen self-represented litigants outperform opposing counsel?**

JRJ (Superior): I have seen it in some criminal cases. The criminal defendants have clearly done their homework and they impress the jury sufficiently, and they've won acquittals, even against a state prosecutor. It doesn't happen often, but when it does, it is noteworthy.

BLS (Bankruptcy): I've certainly seen it, more so in the corporate side. They have the contract, say here are the terms, and the debtor has a defense presented by the lawyer, but many of the issues we deal with are driven by the document. A lot of these people know precisely what the relationship was, what they did for the company, and so I've certainly seen that plenty of times. To me, that's not an indictment of the lawyer, it is an indication that, hopefully, the system is working.

> Take time to listen to a *pro se* litigant because, while their argument may not be artful, there is probably an essential argument there that needs to be addressed.

MKN (Family): From my standpoint, I've seen *pro se* litigants fare very well when the other side is represented. And again, Judge Shannon just said, it's not because someone got out-lawyered, but if we have the information and I have the facts, we will get the right result.

I will tell you where I've seen an advantage for *pro se* litigants — first, they're very diligent about their representation, they're going to listen to you at the scheduling conference, read the statute, and if the other side is not as well prepared, guess what, that's how that matter is going to go.

DL: **What do you think counsel can learn from self-represented litigants?**

JRJ (Superior): They can learn that, sometimes, maybe when you don't have the facts on your side, passion can carry you. No one is more passionate than an unrepresented litigant, and sometimes it can be to their great benefit. It can affect how well they represent themselves — controlled passion — in front of a jury; that really resonates I think.

AJS (Common Pleas): Take time to listen to a *pro se* litigant because, while their argument may not be artful, once you peel away the rough parts, there is probably an essential argument there that needs to be addressed.

BLS (Bankruptcy): I would not underestimate the *pro se* litigant. Know your case. One thing for certain is that when the individual claimant comes in, they're going to have all of the documents. They will be completely conversant with every payment.

It is easy to underestimate them because they can be inartful. So I think it is very easy to underestimate that claimant and it is also easy to get lit up by them. And part of the responsibility we have is to have the patience to peel through all of that and give them a hearing on the questions they've raised.

MKN (Family): I agree with everything that my colleagues have said. The one tip I have is that proceedings should be respectful. Self-represented parties are entitled to respect. Sometimes you might see an eyeroll or the court might appear to be bending over backwards for the *pro se* litigant, but at the end of the day, have faith in the judicial system. We have the facts, and we'll try to do the best thing. ◆

FEATURE

Maida R. Milone and
Julia Jones

How We Select Our Judges

A comparative look at how judges are selected in Pennsylvania, Delaware and beyond

Questions about judicial independence and accountability seem to be on just about everyone's mind these days. Our hope for this article is to contribute to this critical national dialogue by taking a hard look at the processes by which judicial officers are selected and sharing some thoughts about how best to ensure the legitimacy of those selection processes. In particular, we examine here how "appointive systems" function and suggest ways in which they might bolster public confidence in their choices.

A word about us. Judicial selection systems are of particular interest to us. We are both associated with Pennsylvanians for Modern Courts (PMC). In the 1980s, public confidence in the Pennsylvania judiciary sank to an all-time low following a series of public judicial scandals. To restore citizens' faith in the courts, then-Superior Court Judge Phyllis W. Beck joined with other respected civic leaders to form PMC. Established as a non-partisan, nonprofit organization dedicated to promoting judicial ethics, PMC has functioned as Pennsylvania's only official "court watchdog" for nearly 30 years.

One of PMC's core missions is merit selection reform, including amending Pennsylvania's constitution to establish a merit-based appointive process for selecting its appellate judges and justices. To develop a model for a proposed appointive system for use in Pennsylvania, we surveyed a variety of appointive systems from across the country. We draw on that knowledge base here.

In this article, we first examine the perils of influence-seeking money in judicial elections in Pennsylvania and nationwide. Second, we briefly sketch various approaches to appointive judicial selection systems in use throughout the nation. Third, we review Delaware's judicial appointment process and compare it with the model we have developed for merit-based selection of appellate judges and justices in Pennsylvania. Fourth, we take a look at some of the criticisms that have been leveled against merit selection processes. Finally, we share some thoughts on best practices for implementing a merit selection system to ensure public confidence in the quality and independence of jurists seated through that process.

Big Money's Influence in Judicial Elections

To one extent or another, Pennsylvania has relied upon an elected judiciary since 1850. Today, even the most qualified judicial candidates for statewide appellate judgeships are dependent on campaign contributions from individuals and special interest groups with business before the courts. This dependency creates an appearance of impropriety that ultimately undermines public confidence in Pennsylvania's courts and potentially threatens judicial independence. As of 2001, 90 percent of voters nationwide believed that special interest groups attempt to shape policy by contributing to judicial campaigns.[1] Eighty percent of judges reported

having the same concerns.[2] As one Texas judge memorably said, calling judicial electoral systems "'imperfect' is a G-rated description," and noted that he and every member of his court "aggressively" favors replacing them.[3] Recognizing that judicial elections would also eliminate the need for aspiring judges to fundraise, PMC has been a longtime supporter of merit selection reform.

As recently as November 7, 2017, Pennsylvanians voted to retain two sitting Supreme Court Justices and elected one for a 10-year term, all of whom were required to raise some amount of money in order to be competitive candidates. One of the candidates for the open seat on the bench raised significant dollars from an interest group that were used to fuel a last-minute television ad blitz against the candidate's opponent that some people viewed as unfairly slanted. This election, not unlike others in the past, resulted in candidates who were deemed "unqualified" for the bench by the Commonwealth's bar associations defeating candidates who were deemed "highly qualified."

According to the Brennan Center for Justice, a nonpartisan nonprofit that tracks court issues, Pennsylvania's 2015 Supreme Court election "cost" nearly $16 million dollars, including $12 million in television spending — a form of advertising that often disseminates negative or inflammatory information about judicial candidates and their past decisions.[4] Moreover, voters usually had no idea who was paying for this advertising. The Center found that only 3 percent of the organizations that funded television spending in the race did so transparently — the identities of most donors were undisclosed.[5]

While the most recent Pennsylvania Supreme Court elections have placed in stark relief the major issues raised by judicial elections — extreme campaign fundraising, perceptions of decreased judicial independence, reduced governmental transparency and negative "attack ads" that decrease public confidence in the courts while damaging civil political discourse. Such problems are not unique to Pennsylvania. Between 2000 and 2009, judicial campaign fundraising in state elections more than doubled[6] and indicated a substantial relationship between campaign contributions and judicial decision-making by the judges who were the recipients of such largesse.[7]

The National Landscape

Not all appointive judicial systems look alike, and no one is a panacea. State court judicial selection methods are incredibly complex, and most states employ different selection methods for different types of courts. Given our space constraints, we focus here on a few representative examples. For a more detailed breakdown of each state's selection methods, we recommend consulting data and analysis compiled by the Brennan Center for Justice and the National Center for State Courts.

Debating the best way to select judges is not a new practice — judicial selection methods have undergone numerous shifts throughout this country's history. Both elective and appointive systems have been subject to criticism for various reasons. While all states in the union originally selected state judges through some type of appointment process,[8] a populist shift in the 1830s prompted many states to adopt judicial partisan elections.[9] By 1860, most of the Union's 33 states elected judges.[10] However, growing dissatisfaction with judicial elections, brought about by decreased faith in the "intensely partisan" contests that featured "special interests taking an active role in party nominations," inspired many states to reconsider judicial elections.[11] In 1860, Missouri became the first state to adopt a modern merit selection mechanism for selecting state judges.[12]

State judicial selection methods vary wildly. Some states even select local court judges differently in different districts or counties.[13] The most common type of judicial selection for state supreme courts is nonpartisan elections, which are used by 15 states.[14] The least common selection method for state supreme courts is partisan elections, which are practiced in six states, including Pennsylvania.[15] Many states, however, employ some type of appointive or hybrid merit selection system.[16]

These appointive systems are varied. At least one state favors a strict gubernatorial appointment system, whereby the governor has the authority to appoint judges unilaterally.[17] Others have a series of complex appointment rules. For example, in New Hampshire, the governor chooses a state supreme court candidate from a list provided by a judicial nominating commission. The nominee must then be approved by a five-person "Executive Council," whose members are chosen in biannual partisan elections.[18] In California, the governor appoints a candidate who must then be confirmed by the Commission of Judicial Appointments, a three-person panel composed of the Chief Justice of the California Supreme Court, the state's Attorney General, and the most senior presiding judge of the state's appeals court.[19] South Carolina and Virginia have dispensed entirely with gubernatorial appointments in favor of conferring on their legislatures the exclusive power to appoint and confirm judicial candidates.[20]

The oldest appointive method remains the most popular: 14 states currently practice some form of what has come to be referred to as the "Missouri Plan."[21] Under the current Missouri Plan, a state bar association-appointed panel of lawyers, together with residents selected by the governor, evaluate the applications of potential judges and then submit three names to fill each vacancy.[22] The governor makes the ultimate selection. Judges then stand for retention elections at the end of each term.[23]

The Delaware and Proposed Pennsylvania Takes on Appointive Systems

Both Delaware's existing judicial selection system and the system embodied in the proposed amendments to Pennsylvania's constitution supported by PMC draw from aspects of the Missouri Plan. Both of these approaches represent contemporary views of the Missouri Plan, and both aspire to resolve some of the issues with judicial elections, while ensuring the integrity of their appointive systems.

Delaware employs an intricate "assisted appointment" system for selecting state court judges. Delaware relies on an 11-member Judicial Nominating Commission to evaluate candidates for judicial vacancies.[24] Ten Commission members are appointed by the Governor and consist of a mix of Delaware attorneys and lay person citizens. The final Commission member is the President of the Delaware State Bar Association. No more than six Commis-

sion members may be from the same major political party. This Commission is tasked to submit to the Governor at least three qualified persons for each judicial vacancy.[25] Unlike the Missouri Plan (but more akin to the federal process for confirming judicial appointments), Delaware's model also requires Senate approval for each of the Governor's selections.[26] Contrary to many states' methods, which employ merit systems for appellate and supreme court elections, Delaware favors an appointive system for local courts as well.[27] Additionally, Delaware's Constitution includes a requirement that judicial appointments be balanced between the major political parties, though the future of this requirement is in doubt in light of a recent federal court ruling holding that this provision violates the First Amendment by placing a restriction on governmental employment based on an applicant's political affiliation.[29]

Pennsylvania's pending legislation also provides for a qualified judicial nominating commission composed of both lawyers and non-lawyers. The proposed commission would have 13 members, consisting of five appointed by the Governor and eight appointed by the General Assembly. The Pennsylvania legislation additionally prioritizes the appointment of commission members who are geographically, racially and experientially diverse. The bill also offers the type of bipartisan safeguard featured in the Delaware system — of the five judicial nominating members that are appointed by the Governor, only three can be from the same political party. Like the Delaware system, the bill provides that judicial candidates must be selected by the Governor and approved by the State Senate by a two-thirds majority.

Perceived Soft Spots

There are valid criticisms of judicial merit selection systems, and they should not be ignored. Eighty percent of the public favor judicial election systems, believing elections promote democracy and accountability.[30] Appointive systems, however, are viewed as overly politicized and lacking transparency.[31]

We recognize that merit selection systems have the capacity to overly politicize the process. For example, in a four-year period, Florida's governor rejected 83 percent of all judicial candidates that the state's nominating commission referred to him.[32]

These concerns need to be balanced, however, against the well-established risks of judicial election systems. First, judicial elections heighten the potential for unqualified individuals to ascend to the bench through the electoral process, in which few informed voters participate. Only 20 percent of registered voters participate in judicial elections; and only 20 percent of those who do vote can identify the candidates for whom they voted.[33] Second, judicial elections create the potential for even the most highly qualified jurists to be perceived as tainted by the campaign process, in which they are often forced to raise funds from those who will appear before them.

We also need to keep in mind that appointive systems have the ability to better ensure that judges represent the demographics of the people they serve.[34] To the extent people are concerned about diversity on the bench, appointive systems, not elective systems, tend to be more democratic.

Where Best Practices Can Help

Three operating principles go a long way to addressing concerns with merit selection, while eliminating the need for judicial elections. First, we believe that a robust merit selection system should provide some avenue for voter participation in the process to ensure judicial accountability and maintain people's faith in the system. Second, merit selection systems ought to provide for bipartisanship and diversity of nominating commissions. Third, a neutral method of judicial performance evaluation can increase transparency regarding judges' competency and decision-making.

The Delaware system provides avenues for voter participation in the judicial selection process in at least two ways. Because both potential judges and potential judicial nominating commission members must be approved by the state's Governor, voters have an opportunity to impact the selection of judges in their choice of Governor. Similarly, Delaware requires that local judges be confirmed by the Senate, which is comprised of elected legislators.

Pennsylvania's proposed legislation offers three ways in which voters can be involved in this process. First, it stipulates that local judges must continue to be elected directly. Second, the bill provides for judicial retention elections after judges have been on the bench only four years. At that point, voters will be able to evaluate a judge's track record while on the bench and decide based on that whether to retain the judge. Not only does this feature encourage citizen involvement, but the timing of the retention elections ensures that voters will have access to a judge's performance before making a choice — a level of information that is currently absent in most low-information judicial elections. Since citizens can participate directly by voting not to retain judges whom they consider to be unrepresentative or incompetent, they can continue to shape the judiciary despite not voting in judicial appellate elections. Third, because Pennsylvania's judicial election system can only be abolished by amending the state constitution, Pennsylvania citizens will have their say in a multi-step, years-long process that ultimately requires voter approval via ballot referendum.

As discussed above, with respect to bipartisanship, both the Delaware system and the proposed Pennsylvania system offer different variants of bipartisan safeguards. Notably, the proposed Pennsylvania system, by requiring that at least 10 of the 13 commission members must agree on a candidate before that candidate's name is placed on a list of five candidates for any open position sent to the Governor, ensures a level of bipartisanship in the development of that list.

Further, an optimally designed merit selection system should prioritize transparency in judicial retention processes. For example, the Institute for the Advancement of the American Legal System has endorsed a novel method for promoting judicial transparency and accountability:[35] the adoption of a neutral judicial performance review commission. Under this approach, a judge is evaluated by a neutral performance review body, which then releases its findings on the judge's performance to the public prior to judicial retention elections. The evaluation process is intended to address judges' skills at judging — not the popularity of the rulings they make.[36] Several states use judicial evaluation commissions to increase transparency about judicial processes and trans-

mit "comprehensive information about each judge's performance to the public."[37] Since judicial processes are often inaccessible to many citizens, widespread use of judicial performance review commissions could help ensure that people can obtain information about judges' performance in a transparent way.

Together, these practices can help ensure continued civic participation in merit selection systems, strengthen the integrity of judicial appointment bodies, and offer increased transparency about judicial performance. ◆

NOTES

1. Joanna Shepherd, *Justice at Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, Am. Constitution Society for Law & Pol'y, 1, 1 (2013).
2. *Id.*
3. Andrew Cohen, *An Elected Judge Speaks Out Against Judicial Elections*, Atlantic (Sep. 3, 2013).
4. Alicia Bannon, *et al.*, Who Pays for Judicial Races? at 50 (Brennan Ctr. for Justice, 2015-16 ed.)
5. *Id.*
6. Shepherd, *supra* n.1, at 1.
7. *Id.*
8. James Sample, *The Agnostic's Guide to Judicial Selection*, 67 DePaul L. Rev. 219, 222-23 (2018).
9. *Id.* at 223.
10. *Id.* at 224.
11. *Id.*
12. *Id.* at 226.
13. Brennan Ctr. for Justice, *Judicial Selection: Significant Figures* (Mar. 8, 2015), at https://www.brennancenter.org/rethinking-judicial-selection/significant-figures.
14. Brennan Ctr. for Justice, *Judicial Selection: An Interactive Map*, at http://judicialselectionmap.brennancenter.org/?court=Supreme.
15. *Id.*
16. Sample, *supra* n.8, at 226.
17. Brennan Ctr., *supra* n.13.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. Editorial, *Missouri Plan is a Model for Choosing Judges*, St. Louis Post-Dispatch (Mar. 8, 2017).
23. *Id.*
24. *See* Del. Const. Art. IV, § 3; Del. Exec. Order No. 4 (March 26, 2009).
25. *Id.*
26. Del. Const. Art. IV, § 3
27. Brennan Ctr. For Justice, at http://judicialselectionmap.brennancenter.org/?court=Trial.
28. Del. Const. Art. IV, § 3.
29. *See Adams v. Carney*, C.A. No. 17-181 (MPT) (D. Del. Dec. 6, 2017), *appeal filed* Jan. 5, 2018.
30. Charles Gardner Geyh, *Judicial Selection and the Search for Middle Ground*, 67 DePaul L. Rev. 333, 340 (2018).
31. *See, e.g.* Chris Bonneau & Melinda Gann Hall, In Defense of Judicial Elections 137-38 (2009).
32. L. Lay Jackson, *Governors Battle to Shape the Judiciary Without Merit Selection*, ABA Journal (Feb. 2014).
33. Geyh, *supra* n.30, at 340-42.
34. *See, e.g.* Tracey E. George & Albert H. Yoon, The Gavel Gap: Who Sits in Judgement on State Courts? 1 at 9 (2016).
35. Inst. for the Advancement of the Am. Legal System, *A Blueprint for Judicial Performance Evaluation* (2006), at http://iaals.du.edu/sites/default/files/documents/publications/tcq_blueprint_jpe2006.pdf. (hereafter "IAALS Blueprint").
36. *Id.* at 1.
37. *Id.* at 6.

Stephanie E. O'Byrne

OF COUNSEL: Judge Sue Lewis Robinson

As a young girl in Illinois, Sue Lewis Robinson skated on the lake each winter. While her father, a commercial pilot, enjoyed the wide-open space of the skies, so too was there a peace and freedom about the lake. Amongst the children, there was a balance to the yearly ritual of returning outgrown skates for a new pair. In life as it was on the ice, you got what you gave; the harder you pushed off the old blades, the faster you'd go.

Judge Robinson brought those Midwestern values with her when her parents moved their family to Montgomery County, Pennsylvania, and eventually to Wilmington in 1971, while she attended the University of Delaware. At UD, Judge Robinson met her later-to-be husband, Rodney Robinson, for a first date — ice skating at the Fred Rust Ice Arena. She and Rodney both went on to the University of Pennsylvania — Sue to study law, and Rodney, landscape architecture.

After they graduated in 1978, it was only natural to relocate to Wilmington, where Rodney would begin what became nationally-recognized work for Delaware's historic gardens and urban spaces. Judge Robinson began her career as an associate in a busy commercial and corporate litigation practice. Before long, she was even busier with two beautiful children. Judge Robinson epitomized the successful and hard-working supermom in the male-dominated 1980s legal world. Yet she may be more apt to recall the stress of dropping off tearful children at daycare, while Rodney picked up joyful ones, due to those demands. She pressed on, achieving balance through the strength of her family, and conviction to keep her classic Volkswagen beetle on the road for at least 10 years beyond any reasonable expectation.

In 1983, Judge Robinson became an Assistant United States Attorney under then-Chief Joseph J. Farnan, who was immediately impressed by her sharp writing skills — and possibly more so, her ability to politely out-maneuver any type-A litigator in the room (all the while probably planning out a grade-school project in the back of her mind). Judge Robinson had all the raw talent for trial work, and a passion for public service. For a time, she tried cases before a District Court panel that included Judge Farnan, who took the bench in 1985.

The quintessential call to service would come in 1988, when Judge Robinson was tapped to become the District of Delaware's second female Magistrate Judge. Three short years later in 1991, Judge Robinson was nominated by President George H. W. Bush to the District Court. Almost immediately, she earned a reputation for possessing a stellar intellect and being a pragmatic disciplinarian. In 1994, the *News Journal* reported that Judge Robinson would be the "tough judge" to take on the final stage of the New Castle County school desegregation case — the closing chapter of Judge Seitz's determination that had since become a precursor to *Brown v. Board of Education*.

Between her confirmation in November 1991 and her retirement, Judge Robinson presided over hundreds of proceedings (and nearly a dozen ice-skating parties): from billion-dollar patent cases between coronary implant manufacturers — now known as the "stent wars" — to a case about a postal worker's mishandling of a woman's holiday fruitcake shipment. And while the judicial caseload snowballed uncontrollably over the years, Judge Robinson never lost sight of the fact that each case was equally important to the litigants, and deserved equal attention and respect.

Upon her retirement, a reoccurring theme in the remarks of Judge Robinson's colleagues was that she was the "model judge." She would disagree, but that is exactly why she was especially fit to lead. Judge Robinson served with class. She spent countless hours pining over answers to the difficult questions, from obscure facets of patent law to the sentencing of criminal defendants, making the tough calls, without presuming to get it right. She accepted disagreement with grace, even when the news was not delivered gracefully. She worked from early morning to late night without grievance, tirelessly serving the community that she loved, and inspiring others through her example.

And occasionally, as the saying goes, she remembered to dance. Quite literally (and, quite well). In July 2017, she put the skates back up on the shelf, with the confidence that the next judge will do them justice. In the meantime, she has achieved her new balance as private mediator and grandmother of five. She remains one of Delaware's finest. ◆

BANKRUPTCY

DISABILITY LAW

DOMESTIC VIOLENCE

FAMILY LAW ISSUES

HOUSING

IMMIGRATION

ISSUES WITH AGING

PUBLIC BENEFITS

Looking for legal help?

A legal aid agency may be able to help!

DELegalHelpLink.org

DELAWARE BAR FOUNDATION

Delaware LegalHelpLink

Delaware Back Pain & Sports Rehabilitation Centers

Depend on us to get you better faster.

DelawareToday TOPDOCTOR 2017

YOUR DEDICATED CLINICAL LEGAL CONCIERGE

- Medical Report Narratives & Disability Requests
- Deposition (In-Person / Video)
- In-Office / Telephone Conferences
- Medical Records Requests
- Permanency Evaluation / Report

Barry L. Bakst, D.O. FAAPMR, FAOCPRM

Craig D. Sternberg, M.D. FAAPMR

Arnold B. Glassman, D.O. FAAPMR

Anne C. Mack, M.D. FAAPMR

Stephen M. Beneck, M.D. FAAPMR

Rachael Smith, D.O. FAAPMR

Lyndon B. Cagampan, D.O. FAAPMR

Kartik Swaminathan, M.D. FAAPMR

Pramod Yadhati, M.D.

Jeffrey S. Meyers, M.D. LAC, FAAPMR

Irene Fisher, PSY.D.

Brian S. Baar, D.C.

Kristi Dillon, D.C.

Marjorie E. Mackenzie, D.C.

Adam L. Maday, D.C.

Mark Farthing, D.C.

Hetal Patel, D.C. FIAMA

Ty Harmon, D.C.

Jennifer Walder, D.C.

MULTIDISCIPLINARY CLINICAL TEAM PATIENT SAFETY & QUALITY ASSURANCE | ADVANCED NON-SURGICAL TREATMENTS

- Guaranteed appointments within two business days
- Interventional procedures
- Comprehensive and timely work status reports
- Work restrictions and light duty assignment evaluations
- Quantitative Functional Capacity Evaluations (QFCEs)
- Independent medical evaluations (IMEs)
- Complete rehabilitation programs on site

SEVEN CONVENIENT LOCATIONS

Foulk Road Office
Riverside Medical Arts
Omega Professional Center
Glasgow Medical Center
Middletown Office
Smyrna Office
Eden Hill Medical Center (Dover)

AANEM Accredited Laboratory

302-529-8783
delawarebackpain.com

twitter.com/DeBackPain

facebook.com/delawarebackpain