



# THE JOURNAL

OF THE DELAWARE STATE BAR ASSOCIATION

**Commission on Law & Technology:  
Leading Practices**

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***William Penn V. Lord Baltimore*  
Goes on the Road**

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**Nominations Sought for Christopher W. White  
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# Nominations Sought for 2014 Awards

The Delaware State Bar Association and the Awards Committee are seeking nominations for the following four awards\* \*\*:

**Daniel L. Herrmann Professional Conduct Award**  
**Outstanding Service to the Courts and Bar Award**  
**Distinguished Mentoring Award**  
**Government Service Award**

These and other awards will be presented in a special Awards Luncheon on December 11, 2014 at the Hotel du Pont.

## Awards Description

### **Daniel L. Herrmann Professional Conduct Award**

Awarded to a member of the Delaware Bar who, over the course of time, has demonstrated those qualities of courtesy and civility which, together with high ability and distinguished service, exemplifies the Delaware lawyer.

### **Outstanding Service to the Courts and Bar Award**

Awarded to a Delaware lawyer or judge who, by exemplary service to the Delaware Courts and the Delaware Bar, has substantially assisted the courts and the Bar and has strengthened public trust and confidence in the courts in the state of Delaware and the administration of justice.

### **Distinguished Mentoring Award**

Awarded to a Delaware lawyer or judge who, by distinguished mentoring of other Delaware lawyers (or future lawyers) over a period of many years, has served as an inspiration to and a model for those lawyers in striving for and maintaining the highest standards in their professional careers and in their community involvement.

### **Government Service Award**

Awarded to a full-time government service employee in recognition of dedicated and distinguished contribution to the Administration of Justice.

*\* These are not necessarily annual awards. All or some of these awards will be presented only upon the recommendation of the Awards Committee and approval by the Executive Committee of the DSBA.*

*\*\* Please note that previous nominations must be renewed to be considered.*

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## **Delaware State Bar Association Awards Nomination Form**

Name of Candidate: \_\_\_\_\_

Title/Occupation of Candidate: \_\_\_\_\_

Award: \_\_\_\_\_

Date: \_\_\_\_\_

Nominator: \_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_ E-Mail: \_\_\_\_\_

Firm: \_\_\_\_\_

Address: \_\_\_\_\_

Brief statement of reasons that candidate is deserving of Award (see above Award criteria). Please attach sheet if necessary.

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Nominations should be submitted to Rina Marks, Executive Director, e-mail [rmarks@dsba.org](mailto:rmarks@dsba.org) or fax to (302) 658-5212.

## DSBA BAR JOURNAL

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# THE JOURNAL

OF THE DELAWARE STATE BAR ASSOCIATION

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Cover Photo Credit: © istockphoto.com/AWEvans

### Delaware State Dessert: Peach Pie

"On July 30, 2009, peach pie was designated as Delaware's official State dessert. Peach farming is an important part of Delaware's agricultural heritage, as the peach was introduced to Delaware in Colonial times and expanded as an industry in the nineteenth century. Delaware was the country's leading producer of peaches for part of the nineteenth century, at its peak, shipping 6 million baskets to market in 1875. The fifth and sixth grade students of St. John's Lutheran School in Dover, with the support of the entire student body, suggested that peach pie be adopted as this State's official dessert because of the historical and agricultural significance of Delaware's peach farming industry."

Delaware Code Title 29 § 321

Delaware Miscellaneous Symbols. (2014) Retrieved May 13, 2014, from <http://www.delaware.gov/topics/facts/misc.shtml>



## PRESIDENT'S CORNER

By Gregory B. Williams, Esquire

*“We change just as the seasons change, and each spring brings new growth.”*

*– Sherwood Smith, Crown Duel*

**W**hen I was sworn in as President of the Delaware State Bar Association, I proclaimed our theme for the year as “Collectively, We Can Do Great Things!” As winter gave way to spring and spring gives way to another summer, my season as President of this Association is near its end. As a few of my predecessors warned, the year has passed by quickly. However, thanks to the dedication and hard work of many, we were able to accomplish many great things this year, including, but not limited to, the following:

### **Created Delaware State Bar Association Mentoring Program**

One of the initiatives that we created this year is the DSBA Mentoring Program, which was rolled out in October. The program has two components. The first component matches newly admitted Delaware attorneys and those Delaware attorneys practicing for less than three years who choose to participate in the program with mentors in the Delaware Bar who have been practicing for more than five years based on the mentee’s substantive area of law, geographic location, or some other desired selection criteria provided by the mentee applicant. To date, we have matched ten requesting mentees with mentors through the program. Mentees and mentors are encouraged to communicate regularly and to meet in-person at least once a month during the match period. We held the first mentor/mentee training and networking luncheon at the Bar Center on May 21, 2014. All mentors and mentees matched through the program and others were invited to attend the training and networking luncheon at no cost. Werten Bellamy, President of Stakeholders, Inc., gave a one-hour presentation on how the mentees could become indispensable at their respective firms or other places of employment and how the mentors could assist them in that regard.

The second component of the DSBA Mentoring Program consists of a series of CLE programs designed to further educate Delaware lawyers on the Rules of Professional Conduct, effective law office management, best practices in running a law practice, how to avoid the most common complaints the Office of Disciplinary Counsel receives, and other pertinent topics. The DSBA, through its Professional Guidance Committee, partnered with the Office of Disciplinary Counsel and DE-LAP to develop the specific programming for this second component of the DSBA Mentoring Program. The first CLE program in the series, Office and Trial Practice, occurred in October. Others will continue to follow. Special thanks to Jennifer-Kate Aaronson (Office of Disciplinary Counsel), Carol Waldhauser (DE-LAP) and the members of the DSBA Professional Guidance Committee for your work on the CLE programs.

### **Created and Organized DSBA’s Annual Dr. Martin Luther King, Jr. Breakfast and Statewide Day of Service**

Another initiative that we created during this year is the DSBA’s Annual Dr. Martin Luther King, Jr. Breakfast and Statewide Day of Service. The inaugural event was held at the Chase Center on Monday, January 20, 2014. The event began with a breakfast that was attended by over two hundred members of our Association. The breakfast gave members of the Association an opportunity to fellowship and reflect on Dr. King’s work and dream and what we could do as Delaware attorneys to continue the dream and make it a reality. Professor Lani Guinier, a civil rights attorney and the first African-American woman tenured professor at Harvard Law School, was our keynote speaker.

Thereafter, numerous members of our Association donated portions of their day by serving as volunteers at six different service projects that we organized throughout the State to serve the citizens of Delaware. The six service projects included (1) preparing wills and aiding seniors in need of estate planning services at a Wills for Seniors Clinic; (2) serving lunch at the Sunday Breakfast Mission; (3) donating and assembling family care kits for families in need at the Ronald McDonald House; (4) donating snacks and staffing an Ice Cream Social and Bingo Night at the Ronald McDonald House; (5) donating supplies and packing bags of food to be supplied to needy Delaware families at the Food Bank of Delaware in New Castle; and (6) donating supplies and packing bags of food to be supplied to needy Delaware families at



the Food Bank of Delaware in Milford. Special thanks to all of the members of the DSBA's Inaugural MLK Breakfast & Statewide Day of Service Committee.

### **Creation of DSBA Adequate Judicial Funding Committee Which Advocated for Increased Funding for Our Court System**

We also created the DSBA Adequate Judicial Funding Committee. The Committee's purpose is to advocate for the adequate funding of Delaware's court system so that Delaware can remain a premier forum that businesses and others choose to incorporate or otherwise form their entities, locate their headquarters, do business, and resolve their disputes. The Committee had several meetings and communications with former Chief Justice Myron T. Steele, Chief Justice Leo E. Strine, Jr., Pat Griffin, and others to identify the priorities and needs of the Courts for funding purposes. The Committee also conducted an informal survey of the legal employers in Delaware to estimate the number of people working

in the legal industry in Delaware and the amount of rental space that is occupied by the legal industry in Wilmington. The Committee shared that information with the Governor's office, all of the members of the General Assembly, and others involved in the state budgeting process in two written communications from the Committee advocating for increased State funding in the three areas that were identified as priorities in the court system. The priorities that the Committee identified were consistent with and in support of three of the same priorities the Delaware Supreme Court has identified as funding priorities for the court system.

The DSBA looks forward to continuing its advocacy for and dialogue with the courts in the future. Special thanks to all of the members of the DSBA Adequate Judicial Funding Committee.

### **Organized and Hosted the Mid-Atlantic Bar Conference**

It was Delaware's turn during my presidency to organize and host the Mid-Atlantic Bar Conference. In October, we

hosted the Presidents, President-Elects, Immediate Past Presidents, Executive Directors and others from the New York State Bar Association, the District of Columbia Bar, the Pennsylvania State Bar Association, the Maryland State Bar Association, the New Jersey State Bar Association, and the American Bar Association for a three-day conference headquartered at the Hotel du Pont. We put together a conference that was thought-provoking, relevant, productive and provided our guests with a memorable experience that was uniquely Delaware. Our friends in New Jersey have a tough act to follow come this October.

### **Conducted a Survey and Some Strategic Planning through the DSBA Strategic Planning Committee**

We also impaneled a DSBA Strategic Planning Committee. That Committee, which was co-chaired by the DSBA's next two incoming Presidents, Yvonne Takvorian Saville and Richard Forsten, conducted a survey of the members of

**President's Corner** (continued on page 7)

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## EDITOR'S PERSPECTIVE

By Seth L. Thompson, Esquire

### Eying the Line

“**R**espectfully, I do not believe that’s a legal issue for an attorney, but rather a policy decision for the elected body.” I hear and say some iteration of this sentiment on a regular basis, whether it is in Legislative Hall or a Town Hall-style municipal meeting. This distinction is incredibly important in keeping with our government’s framework, including the inherent accountability elements. It is especially necessary in our State, given the extra weight an attorney’s word carries. Witnesses taking the floor in the House of Representatives typically introduce themselves by name and firm or agency. Legislators frequently introduce a witness by name and the simple statement that he or she is “a Delaware lawyer.”

Discussions of estate planning occasionally involve the distinction’s cousin, “Those are not purely legal decisions, but more so personal decisions.” The statement is often in response to a debate as to which relative might best serve as a trustee or executrix, when selection of the lawyer in the extended family comes up for discussion. Follow-up questions include: How well do they know you; and how strong is their sense of fairness? Unless the curriculum has changed significantly since my time, law school 1Ls do not spend a lot of sleepless nights pouring over outlines of policy and personal preferences.

The same sounds true of my father’s time in law school. He cites one of his law professors for noting a large source

“*Attorneys tell you what you could do, not what you should do. Such is the nature of legal advice and the division of decision-making authority.*”

of people’s general skepticism of lawyers: Attorneys tell you what you could do, not what you should do. Such is the nature of legal advice and the division of decision-making authority. Life outside the attorney-client relationship occupies murkier waters.

My 93-year-old grandmother had her second stroke this year. Subsequently, she went in for testing on a mass, an infuriatingly non-descript medical term, and came out with a choice.

Seeing her now, it is borderline unfathomable that she went in the ocean during her visit with my parents last Labor Day. At the time, I was unwilling to verbalize how reckless I thought that was, given the shore break and her age. Sure enough, I ended up having to carry her out of the surf. But, now I cannot imagine if I had interfered and bucked the unspoken family principle of unconditional love and ever-present support in reserve, coupled with latitude to make one’s own decisions and mistakes. I suppose she and my parents knew somehow that it was very likely the last time.

That quick swim was not skydiving or Rocky Mountain climbing, and it certainly was not 2.7 seconds on a bull named Fu Man Chu. (She would be more likely to identify Tim McGraw as Tug’s kid rather than as a musical art-

ist.) All of which is fine, and probably more appropriate for a woman who took pleasure in more simplistic pursuits like teaching her grandkids how to float in the rolling ocean or spending a summer learning how to dive off of the diving board well after she had reached retirement age. Reflecting her life experience through the Great Depression and her work at the IRS, happiness often came in the form of efficiency — a salad grown in the sustenance garden and thus not tarnished by salad dressing; or a dinner plate that spent a few moments on the radiator to warm up as the final dinner preparation wound down; or a home-made dress in the style of a designer, but created in compliance with her mantra of “better, faster, cheaper.” (Her reaction was feigned horror upon noticing that my 6th grade self’s ultra-cool Jamz pattern did not match up at the seams.)

Plus, country music is “not her speed”; her preferences are hymns, as well as a good read. And, as Whitman’s powerful play goes on, she has contributed a beautiful verse. 🎵

Bar Journal Editor **Seth L. Thompson** is a shareholder with Sergovic, Carmean & Weidman, P.A., 142 E. Market Street, Georgetown, Delaware. He may be reached at [seth@scdelaw.com](mailto:seth@scdelaw.com).

our Association to be used to put together a strategic plan to meet our members' unmet needs and to continue to keep the DSBA relevant to Delaware attorneys throughout the state. One of the initiatives that has already come out of the survey and strategic planning of the Committee to date is the need to bolster the support of our solo and small firm practitioners throughout the State. In response, incoming President Yvonne Takvorian Saville formulated the idea to add three new positions to the Executive Committee during her presidency exclusively for solo and small firm practitioners. We fully support the incoming President in her agenda to advocate for solo and small firm practitioners throughout the state. Special thanks to all of the members of this year's DSBA Strategic Planning Committee.

### Special Thanks and Departing Words

There were several other events and projects that were held or completed during my presidency that I would like to discuss, but space limitations do not allow me to give them all the special attention they deserve. Suffice it is to say that, in addition to the above, we accomplished many other great things during this year that were started during the terms of prior Presidents or that carry on as tradition or annual events of the Association. We were delighted to continue those events and traditions during my year as President.

Of course, no President leads alone and nothing can be accomplished as a Bar President without the dedication and devotion of a committed Executive Committee and others who buy into and support the President's vision. I was fortunate enough to have both of those present during my presidency and would like to take this opportunity to thank a number of people that I must single out for their support and hard work during my year as President.

First, let me start by thanking all of the dedicated members of our Association that served with me on the DSBA Executive Committee during my presidency. Those

individuals are Yvonne Takvorian Saville, Richard A. Forsten, Miranda D. Clifton, Mitchell William May, Michael Ryan Smith, David J. Ferry, Jr., Michael F. McTaggart, David A. Felice, William Patrick Brady, Theresa V. Brown-Edwards, the Honorable Alex J. Smalls, Mary I. Akhimien, Michael Houghton, Santino Ceccotti, Johnna M. Darby, Reneta L. Green-Streett, Laina M. Herbert, Brenda James-Roberts, Christopher L. Kenny, Robert J. Krapf, Thomas P. McGonigle, David C. Shelton, Monté T. Squire, and David A. White. Every member of this year's Executive Committee was assigned to a project committee and contributed to one of our major initiatives described above in some manner.

Next, I want to thank Rina Marks, Executive Director of the DSBA, and all the members of the outstanding staff at the DSBA — Alison Macindoe, Janice Myrick, Rebecca Baird, Sorelis Duran, Susan Simmons, Eric Robbins, Antonio Byrd, Diana Ryan, and Carol Waldhauser (DE-LAP) — for all of their hard work and dedication this year.

Next, I want to thank my partners and colleagues at Fox Rothschild for their support during my presidency. Special thanks to my assistant, Brenda Rayford, and my colleague, Wali Rushdan, for all of their assistance during my presidency.

Next, I want to thank my wife, Terina, my children, Amirah and Greg, my parents, my siblings, and the rest of my family for all of their support during my presidency.

Finally, let me end by thanking my brothers and sisters of the Delaware Bar for allowing me the privilege of being the Association's 66th President. I hope that I have represented you well as President and I take comfort in leaving you in the very capable and able hands of President Yvonne Takvorian Saville. It has been a pleasure. God Bless! ☸

**Gregory B. Williams** is President of the Delaware State Bar Association and a Partner at Fox Rothschild LLP. He can be reached at [gwilliams@foxrothschild.com](mailto:gwilliams@foxrothschild.com).

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## Professional Guidance Committee

This committee provides peer counseling and support to lawyers overburdened by personal or practice-related problems. It offers help to lawyers who, during difficult times, may need assistance in meeting law practice demands. The members of this committee, individually or as a team, will help with the time and energy needed to keep a law practice operating smoothly and to protect clients. Call a member if you or someone you know needs assistance.

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## SECTION & COMMITTEE MEETINGS

### June 2014

**Thursday, June 12, 2014 • 12:00 p.m.**

Executive Committee Meeting

Delaware State Bar Association, 405 North King Street, Suite 100, Wilmington

**Thursday, June 12, 2014 • 4:00 p.m.**

Real & Personal Property Section Meeting and Social

Delaware State Bar Association, 405 North King Street, Suite 100, Wilmington

**Thursday, June 12, 2014 • 6:00 p.m.**

Young Lawyers Section Happy Hour

Cafe Mezzanotte, 1007 North Orange Street, Wilmington

**Wednesday, June 18, 2014 • 12:00 p.m.**

Alternative Dispute Resolution Section Meeting

Marshall Dennehey Warner Coleman & Goggin, 1220 North Market Street, 5th Floor, Wilmington

**Thursday, June 19, 2014 • 12:00 p.m.**

Elder Law Section Meeting

Delaware State Bar Association, 405 North King Street, Suite 100, Wilmington

**Monday, June 23, 2014 • 4:00 p.m.**

Taxation Section Meeting

Morris James LLP, 500 Delaware Avenue, Suite 1500, Wilmington

### July 2014

**Monday, July 7, 2014 • 12:30 p.m.**

Senior Lawyers Committee Monthly Luncheon Meeting

Delaware State Bar Association, 405 North King Street, Suite 100, Wilmington

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# The Delaware Supreme Court Commission on Law and Technology: A Monthly Update

By Richard K. Herrmann, Esquire, and Kevin F. Brady, Esquire  
Co-Chairs of the Commission on Law & Technology

**W**elcome to the Delaware Commission on Law and Technology monthly column. This is a new addition to the *DSBA Bar Journal*. Each month, we will share with you some insight, leading practice, or ethical issue related to the practice of law and how it is impacted by technology. Since this is the first column, we thought it would be helpful to briefly summarize the history of the Commission, its mission, structure, and plans.

## The History

In August of 2012, the American Bar Association amended the Model Rules of Professional Conduct. The amended rules and comments clearly state that lawyers are ethically responsible for the consequences of inadequate or inappropriate use of technology in the practice of law. On January 15, 2013, the Delaware Supreme Court adopted, in large measure, those amended rules relating to technology.

On July 1, 2013, the Delaware Supreme Court created The Commission on Law and Technology, a new Arm of Court. Justice Ridgely has been the Commission's liaison Justice and has provided critical guidance and support. The Commission is composed of judges from a variety of Delaware courts, as well as lawyers in private practice from various sized law firms, the Department of Justice, in-house corporate counsel and information technology officers.

## The Mission

The Commission was created to develop and publish guidelines and leading

practices regarding the use of technology in the practice of law. The Commission is currently meeting monthly to discuss technology trends and issues affecting lawyers' ethical obligations. It is in the process of creating a knowledge bank of opinions and articles relating to these ethical issues. As part of this effort, the Commission has created and is presenting a number of educational programs for Delaware lawyers and judges on ethics and technology. It is the Commission's goal to become a valuable resource not only to all Delaware judges and lawyers for issues related to technology, but also to serve as a model for other states who are interested in assisting their judges and lawyers in maintaining their professional competence in technology.

## The Structure

The Commission is composed of a number of working groups. Each working group is developing leading practices regarding the use of technology. The purpose of these leading practices is to provide the Delaware Bench and Bar with an understanding of the appropriate manner in which this technology may be used. The Bench and Bar are cautioned that the leading practice discussed might not be appropriate for a specific purpose. It is up to the individual to use well-reasoned judgment in making that decision. The working groups include the areas of basic skills, the cloud, courtroom technology, data security, eDiscovery, email, mobile technology, social media, and a view from the Bench.


## The Commission Plans

Consistent with its mission, the Commission plans to provide as much informa-

tion as possible in the form of CLE and written materials. The Commission's website would be a fine place to visit to be kept informed of its progress. You can reach it directly at <http://courts.delaware.gov/declt> or through a link on the Supreme Court's page. In terms of written materials, you will find leading practices on the website; this column will be produced monthly and the Commission will be responsible for an upcoming issue of the *Delaware Lawyer*. You will find a number of CLE offerings including the Bench Bar Conference, the Delaware iPad Lawyer User Groups (iPlugs), and Bifferato Law Forums.

## The Commission Is Interactive

In addition to the written and CLE information indicated above, the Commission website provides Delaware lawyers with an opportunity to contact its Help Desk. This is an online resource center designed to answer technology questions and provide training materials and tutorials.

We hope you will find the Commission to be a valuable resource and we look forward to your comments on the upcoming monthly columns. 

**Richard K. Herrmann** is partner at Morris James LLP, handling many forms of complex litigation, including intellectual property, commercial, and technology. He can be reached at [rherrmann@morrisjames.com](mailto:rherrmann@morrisjames.com).

**Kevin F. Brady** is a litigation member at Eckert Seamans Cherin & Mellott, LLC and can be reached at [kbrady@eckertseamans.com](mailto:kbrady@eckertseamans.com).



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- 6 lg BRs, all w/private BAs & walk-in closets.
- 3 frpls, custom millwork & cabinets throughout.
- Sunroom, Library, & Den/office.
- Fin walkout Lower Level w/Game rm, bar, wine rm, exercise rm & Nanny Suite.
- Custom Salt water pool with whirlpool.
- Oversized 4 car garage.

*Call for more information  
or an appointment*

### 116 Chandler Lane CHERRINGTON



**\$ 1,950,000**

**NEW LISTING!**

- 8060 sq ft. Magnificent Custom home backing to woods.
- Expansive home with 5 bedrooms and 6.2 baths.
- Au Pair Suite, media room and library.
- Six car garage.
- Professional Gourmet Kitchen.
- Custom millwork & mahogany flooring.
- Custom lighting and sound system.

*Call for more information  
or an appointment*

### 2104 Kentmere Parkway WILMINGTON



**\$1,525,000**

**NEW LISTING!**

- Stunning 5BR brick manor home across from the Delaware Art Museum.
- Completely renovated including large addition, built by Montchanin Builders, creating open kit & family rm, master suite & finished LL.
- Kitchen features custom cabinetry, granite counters, Wolf commercial range, Subzero fridge, GE profile wall oven and microwave
- MBR suite w/lg walk-in closet with built-in cabinetry & private bath with 2 vanities

property website: [www.psre.com/2200](http://www.psre.com/2200)

### 135 Augustine Cutoff ALAPOCAS POINTE



**\$575,000**

**NEW LISTING!**

- Beautiful 4BR Stone Home w/great curb appeal & beautiful landscaping.
- Large family rm w/stone fireplace open to large eat-in kitchen boasting skylights and rear Andersen sliders open to back patio.
- First floor office and laundry room.
- MBR is peaceful w/bright windows, vaulted ceiling & separate dressing area offering 2 walk-in closets, 2 vanity areas & large master bath w/jetted tub & shower.
- Full finished basement.

property website: [www.psre.com/2041](http://www.psre.com/2041)

For expanded information & additional photos regarding any of these fine properties, please visit my website at: <http://scrifasi.psre.com>



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By Charles Slanina, Esquire

# Liability of Non-Lawyer Ads

**L**awyers are permitted to advertise. Some jurisdictions, including Delaware, place minimal restrictions on those advertisements. Delaware has adopted the ABA Model Rules dealing with attorney advertising which include Rule 7.1 which prohibits false or misleading statements and Rule 7.2 which prohibits giving anything of value to a person for recommending a lawyer's services except for payment of the reasonable costs for advertisements or

services through a third-party promoter is accountable for content on the company's web page that violated lawyer advertising rules. *In re Anonymous*, 2014 BL 102325, Ind., No. 45S00-1301-DI-33, (4/11/14). The attorney received a private admonition as a result of his relationship with "Law Tigers," a website that solicits clients who have been injured in motorcycle accidents.

Law Tigers is operated by the American Association of Motorcycle Injury Lawyers (AAMIL), a for-profit corporation that so-

lawsuits." The hearing officer found that the testimonials were misleading under Rule 7.1 because they were likely to create an unjustified expectation on the part of the clients. The Law Tigers website also contained a list of settlements of verdicts under the title "Past Accomplishments." The hearing officer concluded that those lists of verdicts and settlements were factually unsubstantiated comparisons with other lawyers and also violative of Rule 7.1. Finally, the hearing officer concluded that the advertisements for Law Tigers failed to include the name and address of at least one lawyer or law firm responsible for the content of the ad as required by Rule 7.2(c).

Similarly, lawyer advertising via social media can result in attorney liability for violation of the advertising rules. California recently advised that a lawyer who posts comments about her practice on her personal profile page must comply with the advertising rules if the post constitutes information concerning her availability for employment. California Formal Ethics Op. 2012-186 (2012).

Also implicated are lawyer-rating websites such as Avvo.com which provide lists of attorneys from publicly available information. The public, clients, peers, friends, and others are then invited to post comments and to rate the attorney. Attorneys can become responsible for the content of those listings, including the testimonials, reviews, or endorsements if they "claim" those personal listings. Connecticut Informal Ethics Op. 2012-03 (2012).

State Bar Ethics Committees continue to be divided as to whether or not at-

*“Lawyer advertising and referral services on the internet and on other media broadcast across state lines may expose the attorney to liability for advertising rules beyond those found in the state in which the attorney practices.”*

charges of a lawyer referral service. Other jurisdictions heavily regulate attorney advertising with content-specific rules prohibiting the use of actors, testimonials, sound effects, music, and more.

What liability does an attorney have for the conduct of a third-party marketing services? Not to pick on anyone in particular, but we have all seen the television and print ads inquiring if you have been injured at work or in a car accident, bought a lemon automobile, or whether you or a loved one suffer from mesothelioma. Attorneys have been held accountable for the content of such marketing services even where the attorney was not initially responsible for the content.

The Indiana Supreme Court recently ruled that a lawyer who marketed his

solicits cases to a network of attorneys. Those attorneys pay to use the "Law Tigers" name within a certain geographic area. Calls and online inquiries made to Law Tigers are routed to those license-holding lawyers.

The attorney was found to have violated Indiana's Rule 7.1 because the Law Tigers website made misleading claims about affiliated attorneys' services and that those false or misleading statements were imputable to the lawyer. The specific Rule 7.1 violations referenced in the opinion were contained in the "client testimonials" from unidentified persons. They included the statements, "Law Tigers changed my life in a big way and my family received our fair share of justice." Another was, "The legal services were fast and painless and the best experience I have ever had with lawyers and



torneys can participate in Groupon and "Daily Deal" websites. Where discouraged or prohibited, Ethics Committees have noted that such attorney participation could include improper fee sharing with non-lawyers because the soliciting/advertising company is paid whether or not the purchaser actually claims the legal service. Other jurisdictions which have disapproved of this marketing strategy have noted that participation in such programs does not give the lawyer the opportunity to check for conflicts in advance of the payment of the fee.

Finally, lawyer participation in third-party marketing also has cross-jurisdictional implications. Lawyer advertising and referral services on the internet and on other media broadcast across state lines may expose the attorney to liability for advertising rules beyond those found in the state in which the attorney practices. In addition to violations of the advertising rules, there can also be an issue as to whether or not the attorney is engaging in the unauthorized practice of law by soliciting clients in a jurisdiction in which they are not admitted.

Rule 5.5(b) prohibits a lawyer from practicing law in a jurisdiction where the attorney is not admitted. Rule 5.5(b)(2) prohibits the attorney from holding out to the public or otherwise that the lawyer is admitted to practice in a jurisdiction where the attorney is not admitted.

Think before you market. Make sure you control the content of advertisements before they are broadcast on your behalf. Think of the marketer as your agent and make sure that they are not doing anything that you are not permitted to do and that the ad includes all the informa-

tion the applicable rules require. Enjoy the summer!

*"Ethically Speaking" is intended to stimulate awareness of ethical issues. It is not intended as legal advice nor does it necessarily represent the opinion of the Delaware State Bar Association. "Ethically Speaking" is available online. The columns from the past two years are available on [www.dsba.org](http://www.dsba.org).*

**Charles Slanina** is a partner in the firm of Finger & Slanina, LLC. His practice areas include disciplinary defense and consultations on professional responsibility issues. Additional information about the author is available at [www.delawgroup.com](http://www.delawgroup.com).

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# Balancing Youth vs. EXPERIENCE

By Aaron W. Mitchell, REBC

**T**he expression of “Age Before Beauty” is easy to abide by when it is as simple as allowing someone onto an elevator before you. When it comes to running a business, older employees often bring perspective and experience to a company and a position. However, for many companies, these same employees (current or prospective) will now have a much larger price tag for health insurance.

The Patient Protection and Affordable Care Act brought about this change. This portion of the legislation specifically affects the small group health insurance market. In many states, small group is defined as companies with less than 50 employees. However, by 2016 all states must consider any company with fewer than 100 employees to be a small employer. Small employer health premiums are now based solely on the age and tobacco status of each employee, not their health.

Delaware law firms have been accustomed to composite premiums that average the age of all employees. As of the first of this year, health insurance companies are assigning an independent premium to each age. What makes this most significant is the variance between the youngest age category and the oldest age category. For example, your firm may be billed \$365 for a 25 year-old, but nearly \$1,100 for a 64 year-old. The decision to make is how a firm handles any contribution from employees towards the cost of the premium for themselves and any dependents they cover.

## Strategy #1: Charge Everyone the Same Dollar Amount

This may be the easiest way to avoid charging the older employees a much greater contribution. It means that every employee pays the same amount towards the firm’s premium, regardless of how much the insurance company bills. The drawback is the lack of parity in what the firm is paying for each person. If all employees are required to contribute \$175 per month towards their coverage, someone in their 20s would be paying nearly 50% of their premium. If an employee in their 60s pays the same \$175, that employee is only paying 16% of their cost.

## Strategy #2: Charge Everyone the Same Percentage of their Premium

This second strategy may be viewed as the least discriminatory because the all employees are paying the same percentage of their health insurance costs. However, even if your

employees pay the same percentage, older employees would pay a much greater dollar amount towards premiums. If your older workforce has substantially higher incomes, this may be a good solution. For example, if the firm pays 80% of the single premium, a 64 year-old would pay \$220 per month (3 times the \$73 premium of a 25 year-old).

## Strategy #3: Contribute the Same Dollar Amount to Each Employee

The final strategy favors the young employees the most. The premiums for the highest age category have a premium that is 300% that of the youngest age category. If your firm chooses to pay a fixed dollar amount (such as \$350 per month), your youngest employees may not pay anything towards their premium, while older employees could be paying 60-70% of their premiums.

## Additional Concerns

This new premium structure will challenge law firms and all employers in determining a strategy that is both fair and allowed. The main concern we are hearing is “What would be considered age discrimination?” When you have candidates for a position, will you be able to prevent yourself from weighting the fact that a 60 year-old potential employee may cost your firm \$6,000 - \$8,000 more per year than someone in their 20s or 30s? Furthermore, if a prospective employee asks what they would pay for health insurance, and you are not permitted to ask their age in an interview process, how do you answer that question?

There are solutions to treat employees equitably. It takes more energy and discussion to choose what strategy or strategies are right for your firm. Looking at your turnover, needs of future positions, and your budget will be the best way to determine a strategy that will keep your firm both compliant and attractive to your current employees and whomever you may need to hire in the future.

*Aaron Mitchell is DSBIS’s lead Human Capital Consultant, coordinating all lines of insurance. He specializes in group benefits and life insurance. Contact Aaron at (302) 397-0170 or [aaron.mitchell@willis.com](mailto:aaron.mitchell@willis.com) to find out how DSBIS can assist you with your Human Capital needs.* ☎





# William Penn V. Lord Baltimore Goes on the Road

By The Honorable Barbara D. Crowell

Justice Randy J. Holland's historical book, *Delaware's Destiny as Determined By Lewes*, has become a theatrical production in the form of a short play entitled *William Penn v. Lord Baltimore*. Presented at the Terry Carey American Inn of Court in Milford on January 15, 2014 and again at the Melson-Arsht Inn of Court in Wilmington on April 8, 2014, the play, written by Justice Holland, traces the historical events that led to Delaware becoming a separate state.

Complete with costumes and musical interludes performed by Superior Court Judge Robert B. Young, Justice Holland narrated, as members of the respective Inns reenacted scenes described in his book.

David A. Boswell, Esquire, John F. Brady, Esquire, Nicole M. Faries, Esquire, Zach Greenberg, (Supreme Court law clerk), Shaun Kelly, Esquire (Supreme Court law clerk), David N. Rutt, Esquire, Judge Paula T. Ryan, Lauren Sanders, (Family Court law clerk), and Elizabeth L. Soucek, Esquire, participated in the play at the Terry Carey Inn as members of the William Storey Pupilage Group.

The Crompton Pupilage Group, performing as the Crompton Colonial Criers, in the production at the Melson-Arsht Inn of Court included Bonnie E. Copeland, Esquire, Edward (Mike) F. Eaton,

Esquire, Kathryn J. Laffey, Esquire, Andrew Meyer, Esquire (Family Court law clerk), Staci Pesin, Esquire (Family Court law clerk), Shana A. Pinter, Esquire, Phyllis R. Scully, Esquire, and Judge Barbara D. Crowell. 📷

*Back Row:* Judge Robert B. Young, Mike Eaton, Esq., Andrew Meyer, Esq., Justice Randy J. Holland, Kathryn Laffey, Esq., and Kemp Vye, Esq..

*Front Row:* Shana Pinter, Esq., Bonnie Copeland, Esq., Staci Pesin, Esq., Judge Barbara D. Crowell, and Phyllis Scully, Esq.



*Back Row:* Judge Robert B. Young, John F. Brady, Esq., Justice Randy J. Holland, Judge Paula T. Ryan, Lauren Sanders, David A. Boswell, Esq.

*Front Row:* Elizabeth L. Soucek, Esq., Shaun Kelly, Esq., Zach Greenberg, Nicole M. Faries, Esq., and David N. Rutt, Esq.

## Healthcare Reform Tip #14

**Many health insurance companies will now allow Firms to offer up to 5 different health plans to their employees. This gives each employee more opportunities to find a plan suited to his or her family's needs.**

2014 is an important year for Healthcare Reform! For an overview of your benefits options, please contact your **DSBIS Human Capital Consultant:**

**Aaron Mitchell, REBC**  
Employee Benefits  
302.397.0170 *direct*  
570.847.1885 *cell*  
[aaron.mitchell@willis.com](mailto:aaron.mitchell@willis.com)



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By Susan Simmons

## The 2014 Christopher W. White Distinguished Access to Justice Awards

I decided to devote this month's DSBA Bar Journal "Access to Justice Spotlight" article to October's National Celebrate *Pro Bono* Week and our own Christopher W. White Distinguished Access to Justice Awards in hopes of getting you all to start thinking about this honor. The service awards are given in the name of Christopher W. White, a long-time attorney with the Community Legal Aid Society of Delaware, who died in April 2010 at the age of 48. Chris was widely known and respected for his advocacy work on behalf of the poor, homeless, disabled, elderly, troubled, and down-trodden people of Delaware. It is not too early to begin thinking about those who are deserving of this honor. The Delaware State Bar Association began recognizing those members who have made significant contributions to *Pro Bono* in 2014. Descriptions of categories for the nominations and previous recipients follow. Please think back on those members of DSBA who you admire for working towards his or her aspirational goal of helping the underserved in our community achieve Access to Justice and nominate them for the 2014 Christopher W. White Distinguished Access to Justice Awards. The awards will be presented at DSBA's annual Celebrate *Pro Bono* Awards Breakfast on Thursday, October 23, 2014 at the Hotel du Pont.

### The Leadership Award

This award is presented to a legal organization (legal department or law office) that has demonstrated outstanding leadership in the field of *pro bono* service to Delaware's indigent population based on the following criteria:

- The number of *pro bono* hours the organization contributes to the direct representation of indigent clients.
- The number of cases the organization accepts for *pro bono* representation.
- Flexibility and accessibility in accepting cases.
- The organization's commitment and service on committees dedicated to promoting and supporting the provision of legal services to those in need.

- Financial support to agencies providing legal services to Delaware's indigent population.
- The percentage of attorneys in the organization who accept *pro bono* cases.
- Fostering a culture, which recognizes the value of *pro bono* service.

### Previous Recipients

2007	Young Conaway Stargatt & Taylor LLP
2008	Doroshow Pasquale Krawitz & Bhaya
2009	Fox Rothschild LLP
2010	McCarter & English LLP
2011	Richards, Layton & Finger, P. A.
2012	DLA Piper LLP
2013	DuPont Legal

### The Commitment Award

This award is presented to a member of the Bar who has demonstrated a sterling commitment to *pro bono* work throughout his or her career by dedicating time and energy to the support and provision of legal services. The criteria include but are not limited to:

- The number of *pro bono* hours devoted to legal representation of indigent clients over the lawyer's career.
- The number of cases accepted for *pro bono* representation over the lawyer's career.
- The lawyer's commitment and service on committees dedicated to promoting and supporting the provision of legal services to those in need over the lawyer's career.

### Previous Recipients

2007	David J. Haley, Esquire
2008	Christine M. McDermott, Esquire
2009	Kathryn J. Laffey, Esquire



2010	Suzanne I. Seubert, Esquire
2011	William H. Sudell, Jr., Esquire
2012	Matthew M. Greenberg, Esquire
2013	Shauna T. Hagan, Esquire, and David B. Brown, Esquire

### The Achievement Award

This award is presented to a member of the Bar who has shown an exemplary recent contribution to *pro bono* services (generally in the past one to three years) and stands as a role model to other attorneys. The criteria include, but are not limited to:

- The number of *pro bono* hours recently devoted to legal representation of indigent clients.
- The number of cases accepted for *pro bono* representation.
- Consistency, flexibility, and accessibility in accepting cases.
- The lawyer's commitment and service on committees dedicated to promoting and supporting the provision of legal services to those in need.

### Previous Recipients

2007	Curtis J. Crowther, Esquire
2008	Stephen Smulowitz, Esquire
2009	Arthur G. Connolly, Jr., Esquire
2010	Andrew G. Golian, Esquire
2011	Kimberly E. Connolly Lawson, Esquire
2012	Carl ("Chuck") Norman Kunz III, Esquire
2013	Lt. Col. Roy A. ("Drew") Hilferty, Staff Judge Advocate

### Service to Children Award

**Established in 2003, Awarded at the Access to Justice Breakfast (previously awarded at the Awards Luncheon)**

Awarded to an individual lawyer, legal professional, or organization principally including lawyers, which demonstrates outstanding commitment to, and work for, children in the provision of legal or community services. It may be given to volunteers or those employed in the provision of legal services for children. This award is given as warranted, not necessarily annually. The sculpture reflecting this award was created by Charles Allmond, Esquire, and shall be available for display by the award recipient during the year following receipt. Otherwise, it shall be displayed in the offices of the Delaware State Bar Association.

The Charles Allmond sculpture was donated by the former and current partners of the Wilmington office of Duane Morris and in support of the creation of this award.

### Previous Recipients

2004	Fox Rothschild
2008	Morris James LLP
2011	Dean Linda L. Ammons, Esquire
2013	Young Conaway Stargatt & Taylor, LLP

Mark your calendars, this year the DSBA and DVLS will hold our popular Wills for Seniors event at the New Castle County Library Kirkwood Highway location on Saturday, October 18, 2014 during National Celebrate *Pro Bono* Week. DVLS will also hold their annual 5K Run/Walk on the following Sunday, October 19, 2014, so come out and show your support!

If you or your firm are interested or already participates in *pro bono*, or if you have a comment on this article, please share.

Susan Simmons  
 Director of Development  
 & Access to Justice Coordination  
 Delaware State Bar Association  
 405 North King Street  
 Wilmington, DE 19801  
 ssimmons@dsba.org  
 (302) 658-5279 ext. 101

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# Nominations Wanted for the Delaware State Bar Association's 2014 Christopher W. White Distinguished Access to Justice Awards

The DSBA and the Awards Committee are seeking nominations for the 2014 Distinguished Access to Justice Awards formerly known as the Distinguished *Pro Bono* Service Awards. The change in name is based on a desire to be more inclusive in designating those deserving of recognition. The awardees will be announced during Celebrate *Pro Bono* Week.

## The Christopher W. White Distinguished Access to Justice Awards Ceremony Thursday, October 23, 2014, Hotel du Pont

**There are four categories for which individuals, firms, or organizations can be nominated.**

### The Leadership Award

This award is presented to a legal organization (legal department or law office) that has demonstrated outstanding leadership in the field of *pro bono* service to Delaware's indigent population based on the following criterion:

- The number of *pro bono* hours the organization contributes to the direct representation of indigent clients.
- The number of cases the organization accepts for *pro bono* representation.
- Flexibility and accessibility in accepting cases.
- The organization's commitment and service on committees dedicated to promoting and supporting the provision of legal services to those in need.
- Financial support to agencies providing legal services to Delaware's indigent population.
- The percentage of attorneys in the organization who accept *pro bono* cases.
- Fostering a culture, which recognizes the value of *pro bono* service.

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- The number of cases accepted for *pro bono* representation over the lawyer's career.
- The lawyer's commitment and service on committees dedicated to promoting and supporting the provision of legal services to those in need over the lawyer's career.

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## Delaware State Bar Association Awards Nomination Form

Name of Candidate: \_\_\_\_\_

Title/Occupation of Candidate : \_\_\_\_\_

Award: \_\_\_\_\_

Date: \_\_\_\_\_

Nominator: \_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_ E-Mail: \_\_\_\_\_

Firm: \_\_\_\_\_

Address: \_\_\_\_\_

Brief statement of reasons that candidate is deserving of Award (see above Award criteria). Please attach sheet if necessary.

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**Nominations should be submitted to Susan Simmons, Director of Access to Justice Coordination, e-mail [ssimmons@dsba.org](mailto:ssimmons@dsba.org) or fax to (302) 658-5212. The deadline for nominations is July 9, 2014.**



# LAW DAY 2014



## 2014 LAW DAY LUNCHEON

Friday, May 2, 2014 • 12:00 noon  
Hotel du Pont • Wilmington, Delaware



The Honorable Chris Coons delivering the keynote address.



Liberty Bell Award recipient, Deborah L. Murray-Sheppard (center) with award presenter, Kathi A. Karsnitz, Esquire (left), and DSBA President Gregory B. Williams, Esquire (right).



(L to R) DSBA President Gregory B. Williams, Esquire, Community Service Award presenter Mark L. Desgrosselliers, Esquire, and award recipient Matthew P. Ward, Esquire.

### — OF NOTE —

Condolences to the family of **Palmer L. Whisenant, Esquire**, who died on April 11, 2014.

Condolences to **Gregory B. Williams, Esquire**, on the death of his mother, Olivia Williams, who died on April 17, 2014.

Condolences to the family of **James W. Brown, Esquire**, who died on April 24, 2014.

Condolences to the family of **William Taylor Wood, Esquire**, who died on May 2, 2014. ☹

### — DISCIPLINARY ACTIONS —

#### INTERIM SUSPENSION

**Supreme Court No. 231, 2014**

**Effective Date: May 9, 2014**

By Order dated May 9, 2014, the Delaware Supreme Court suspended Daniel G. Simmons from the practice of law pending the disposition of pending felony criminal charges and disciplinary proceedings.

During the period of suspension, Mr. Simmons shall not (a) share in any legal fees arising from clients or cases referred by him during the period of suspension to any other lawyer or (b) share in any legal fees earned for services by others. Mr. Simmons is further prohibited from having any contact with clients or prospective clients or witnesses or prospective witnesses when acting as a paralegal, legal assistant or law clerk under the supervision of a member of the Delaware Bar. ☹



## DE-LAP ZONE

A Message from the Delaware Lawyers Assistance Program

By Carol P. Waldhauser, Executive Director

# The Walking Dead: Burnout and a Way to Combat It

**J**ohn Doe lacked enthusiasm in his professional and personal life. On a crisp April day, as John walked from the parking lot to the office, he saw his reflection in the storefront window and thought: “I could be an extra in the television series *The Walking Dead*! What happened to my enthusiasm, the bounce I once had in my walk and where is my job satisfaction?”

Unfortunately, while looking for answers, John soon realized that he was experiencing burnout. Fortunately, however,

John found hope for himself, as well as other lawyers who may feel that they too are part of the walking dead. This hope was a toolbox filled with awareness of the trait —



emotional intelligence (EI). What you know about emotional intelligence may play a significant role in protecting you from burnout and job dissatisfaction and actually enhance lawyer job satisfaction.

### Nuts & Bolts of Burnout

Being a lawyer is hard work. The practice of law continues to be an increasingly difficult occupation. The evidence for this claim is overwhelming. According to the Bureau of Labor Statistics, 33% of full-time attorneys work 50 or more hours a week and solo practitioners even more.<sup>1</sup> Long working hours, difficult clients, other difficult attorneys, and family issues all can and do lead to chronic stress. This chronic stress not only has the effect of damaging lawyers and their families, but also affects their ability to serve clients effectively.

It has been estimated that 40-75% of the disciplinary actions against lawyers involve practitioners who are experiencing mental health issues including: depression, substance abuse, or burnout. Most attorneys never experience serious impairment from the stress of being a lawyer. However, we know today that even medium levels of chronic stress can and often do lead to burnout having a deleterious effect on a lawyer's ability to work at peak effectiveness.

The burned-out — or for the purposes of this article, the walking dead — may suffer one or more of the three components of the burnout caused by the long-term involvement in emotionally stressful situations:

1. Physical exhaustion (fatigue, feeling drained)
2. Emotional exhaustion (feeling emotionally overextended and drained by intense contact with clients and colleagues)
3. Mental exhaustion (nothing left to give, detachment, boredom, cynicism, irritability, reduced sense of accomplishment)

### A Way to Prevent or Combat Burnout: Emotional Intelligence

Emotional intelligence (EI) refers to the ability to perceive, control, and evaluate emotions. Leading researchers on the subject, Peter Salovey and John D. Mayer, define emotional intelligence as “the subset of social intelligence that involves the ability to monitor one's own, as well as others' feelings and emotions; to discriminate among them; and to use this information to guide one's thinking and actions.”<sup>2</sup> Salovey and Mayer go on to identify four facts of emotional intelligence, also known as emotional competencies:

1. **Perceiving Emotions:** The first step in understanding emotions is to accurately perceive them. In many cases, this might involve understanding nonverbal signals such as body language and facial expressions.
2. **Reasoning with Emotions:** The next step involves using emotions to promote thinking and cognitive activity. Emotions help prioritize what we pay attention and react to; we respond emotionally to things that garner our attention.



3. Understanding Emotions: The emotions that we perceive can carry a wide variety of meanings. If someone is expressing angry emotions, the observer must interpret the cause of their anger and what it might mean. For example, if your boss is acting angry, it might mean that he is dissatisfied with your work; or it could be because he got a speeding ticket on his way to work that morning.

4. Managing Emotions: The ability to manage emotions effectively is a key part of emotional intelligence. Regulating emotions, responding appropriately, and responding to the emotions of others are all important aspects of emotional management.<sup>3</sup>

Psychologists refer to this ability as emotional intelligence, and some experts even suggest that it can be more important than IQ.

### How Does EI Affect Lawyers Who Feel Like the Walking Dead?

First, you do not have to be born with emotional intelligence — a person's social and emotional functioning or "soft skills." With proper training, you can develop it and by keeping your awareness of EI alive, you can enhance your job satisfaction and even run your personal and professional life more smoothly.

Emotional intelligence can prevent burnout and enhance personal, as well as professional, relationships in a number of ways. According to Feeley & Driscoll, P.C.:

"Lawyers with self-awareness are better able to detect their stress cues and effectively manage them. Those with social awareness are able to recognize when others are emotionally uneasy — such as a nervous client, an emotionally charged colleague or a difficult judge — and are better equipped to respond. Overall, when lawyers are able to manage their emotions and assess and respond to the emotions of those around them, they're less susceptible to becoming drained and are better able to perform. This helps increase their confidence and feelings of achievement as well as productivity."<sup>2</sup>

Do not become a member of the walking dead. To learn more about this

subject, or to sharpen your skills, be aware of your behavior patterns used to respond to people, events and circumstances. Ask yourself: How well do I understand my emotions? How well do I perceive the emotions of others? Feelings, beliefs, and behaviors related to your job or work environment constitute job satisfaction, which in turn can prevent burnout. For more information on this subject, or if you or someone you know, needs help call the confidential line of DE-LAP (302) 777-0124, 1-877-24DELAP or e-mail [cwaldhauser@de-lap.org](mailto:cwaldhauser@de-lap.org)

#### References:

1. Bureau of Labor Statistics, *Occupational Handbook*. 2010-2011 Edition.
2. *Why Emotional Intelligence is Just as Important as Legal Skills and Experience*, Feeley & Driscoll, P.C., <http://www.fdcpa.com>
3. About.com Psychology: *What Is Emotional Intelligence?* by Kendra Cherry, Page 1: <http://psychology.about.com/od/personalitydevelopment/a/emotionalintell.htm> ⓘ

**Carol P. Waldhauser** is the Executive Director of the Delaware Lawyers Assistance Program and can be reached at [cwaldhauser@de-lap.org](mailto:cwaldhauser@de-lap.org).

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## BOOK REVIEW

Reviewed by Richard A. Forsten, Esquire

# A Book to be Read by Everybody: *The Rule of Nobody*

By Philip K. Howard (Norton & Co., 2014)

Philip Howard has written a number of interesting and thought-provoking books over the years, including *The Death of Commonsense* and *The Lost Art of Drawing the Line*; yet his latest book, *The Rule of Nobody* may very well be his best. Howard's thesis is simple: America has become so caught up in following rules and regulations that it has become impossible to get anything done, as bureaucrats and government officials insist on following the rules, no matter the result, at the expense of the common good.

He begins his short work with but one of many examples. In February, 2011, a tree fell into a creek in Franklin Township, New Jersey, during a storm. The tree blocked the creek causing flooding. The Township was about to have a tractor pull the tree from the creek when someone remembered that the creek was classified as "C-1," meaning that certain environmental approvals were required before any natural condition of the creek could be altered. The flooding continued for twelve days while Township officials spent \$12,000 to obtain the necessary permit to do what should have been done all along: pull the tree from the creek.

The Franklin Township example may seem silly or relatively trivial (unless, of course, you were a resident suffering from twelve days of flooding), but there are many more examples, many with more dire consequences. Howard

tells the story of a seventh-grade girl in Indiana, suspended under the school district's "zero tolerance" drug policy for "possession" of a controlled substance. The girl had been handed a pill (for attention deficit disorder) by another student. She was suspended even though she immediately handed the pill back to the student who gave it to her. The principal said he had no choice but to suspend her because she had possession of the controlled substance, even if just for a few seconds.

In 2012, a Florida lifeguard was fired for leaving his designated zone on the beach and rescuing a man just over the line. When the lifeguard radioed in that he was going out to rescue the man, his manager told him not to go, but to call 911 instead. After public outcry, the lifeguard was offered his job back, but he declined.

But, while the drowning man in Florida was saved, a drowning man in California was not. As Howard recounts:

"In 2011, firefighters stood on the beach in Alameda, California, and watched a suicidal man flailing in water 150 yards offshore. None made an effort to rescue him because the municipality, dealing with budget cutbacks, hadn't 'recertified its firefighters in land-based water rescues.' The firefighters were told there might be unspecified 'legal

liability' to unspecified parties for uncertified rescues. Out of concern for doing something 'illegal,' they watched for an hour until the man finally succumbed in the 60-degree water and drowned. A woman passing by on the beach swam out to rescue him, but too late, and ended up bringing in his body. The Alameda fire chief, asked the next day if he would have saved a drowning child, said, 'Well, if I was off duty I would know what I would do, but I think you're asking me my on-duty response and I would have to stay within our policies and procedures because that's what's required by our department to do' The firemen are not bad people. This is a bad public culture because it looks to law instead of basic values. We no longer believe in our beliefs."

As Howard makes clear, our love of rules and regulations did not start out this way, or with the intention of absurd results. Rather, the idea was (and to many still is) that only with clear and precise rules and regulations can we avoid tyranny of petty bureaucrats and inspectors. Only by removing discretion can we achieve fairness and uniformity. The problem, of course, is that in trying to regulate to such detail, we produce mountains of regulations that become impossible even for the most knowledgeable to follow one hundred percent of the

*“Howard’s solution is to replace many detailed regulations and rules with more open-ended goals and principles.”*

time, and, worse still, we create a culture that focuses on strict compliance with rules, and loses sight of the goals and aims we set out to achieve.

Howard’s solution is to replace many detailed regulations and rules with more open-ended goals and principles. He also proposes four amendments to the Constitution, including a proposal that every law automatically sunset after fifteen years, unless Congress finds the law continues to meet the needs of the public and affirmatively votes to extend the law. He would also give Congress the power to invalidate any regulation by simple majority vote, without presentment to the President. No reader is likely to agree with all of Howard’s specific proposals, but they do present a good starting point for debate and discussion.

While the examples presented above may seem to border on the absurd, Howard begins the first chapter of his book with the story of the Bayonne Bridge, which spans the Kill Van Kull, a narrow channel that connects New York Harbor to the port of Newark, the largest port on the East Coast. Opened in 1931, the bridge no longer offers enough clearance to accommodate the newest generation of container ships. In order for the port of Newark to remain competitive, something must be done about the Bayonne Bridge.

The Port Authority of New York and New Jersey initially proposed either a new bridge or a tunnel, either project estimated to cost more than \$4 billion. The project manager, though, was not satisfied, and asked the engineers to see if the existing bridge could be retrofitted by raising the roadway between the arches. It turns out that it could, at an estimated cost of only \$1 billion or so, and without altering the bridge’s footprint. The new proposal was presented in 2009. But, making a sound proposal for needed in-

frastructure and getting approval are two different things. Forty-seven permits from nineteen different governmental agencies were required.

A historical survey of every building within a two-mile radius was required (at a cost of \$600,000), even though no building was going to be impacted by the elevated roadway. Finally, in 2013, the environmental assessment was completed and preliminary construction work commenced. Environmental groups sued, though, claiming that the larger ships in the port of Newark would lead to more truck traffic in Newark and adversely affect the quality of life of Newark residents. The lawsuit remains pending. As Howard points out, though, the Bayonne Bridge approvals came through in record time compared to many other large scale projects. The average time for environmental review of highway projects is eight years according to one study cited by Howard.

Meanwhile, officials at the Federal Aviation Administration have not promulgated a lengthy set of regulations regarding new airplane designs (i.e., so many rivets per linear foot, so much engine capacity, etc.). Rather, they simply determine whether a proposed aircraft is “airworthy” or not. The officials have discretion and the process seems to be working just fine. Howard would welcome more such discretion aimed at a goal or standard, rather than lengthy codes that remove responsibility and may lead to unintended results.

As with all his books, Howard has interesting things to say, and says them well. In an age when frustration with government seems to be at an all time high, the reforms he proposes deserve serious attention. We need a government designed to solve problems, rather than government designed to follow mindless rules regardless of their real world consequences. ④

**Richard “Shark” Forsten** is a Partner with Saul Ewing LLP, where he practices in the areas of commercial real estate, land use, business transactions, and related litigation. He can be reached at [rforsten@saul.com](mailto:rforsten@saul.com).

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## A PROFILE IN BALANCE

By James G. McGiffin, Jr., Esquire

# Drew Hilferty: It's a Soldier's Life for Him

**I**f I aspire to be the best lawyer I can be, I must first try to be the best person I can be. I am fortunate to know many lawyers who have succeeded in their work, in part, because they are excellent people. This column in The Journal will feature an article on one such lawyer. Each featured lawyer will exemplify the art of balance in life. I have learned much from these people. Perhaps readers will also benefit.

- Jim McGiffin

• • •

Lieutenant Colonel Roy A. Hilferty is very serious about his work, but one would never know that from casual conversation. His demeanor suggests more of mischief than of military deportment, at least to an observer who understands the military only from watching movies and TV and not from personal experience. Drew, to his friends, is serious about his fun, too.

Growing up in the Philadelphia area (Drexel Hill), Drew imagined for himself a career in law enforcement. He studied Criminal Justice at West Chester University, worked as a summer cop, and interned with a police agency. Unfortunately, an auto injury and several related surgeries to an injured shoulder closed to him the opportunity for police work. Drew pursued a Masters Degree in Criminal Justice and thought enough about a Ph.D. in the field to apply to programs when the idea of law school came to him. Drew enrolled at Widener.

As Drew approached graduation, he found appealing the idea of work with the Judge Advocate General Corps of the



Picture from Lieutenant Colonel (LTC) Bobby Hoof's final formation. *Standing up:* Major (MAJ) Kathleen Amalfitano. First Lieutenant (1LT) Emeka Igwe, MAJ Stephen Artymowicz, MAJ Joseph Biden, III, LTC Robert Surles, LTC (Ret.) Kemp Vye, LTC Carl Danberg. *Kneeling:* MAJ Scott Earle, LTC Roy Hilferty, Staff Sergeant Nicole Williams, LtCol. Cynthia Thornton Landis and LTC (Ret.) Bobby Hoof. *Not pictured:* Captain Elio Battista and 1LT Ciro Poppiti, III. Photo by Veronica Blackston

United States Army. Drew was aware that his grandfather served in the military and died in Brittany, France, during World War II. Drew also knew that his grandmother never received all of the benefits to which she was entitled after her husband's death. He also liked the wide variety of work available to JAG lawyers. Upon graduation, Drew accepted a job with the JAG Corps. Upon graduation, Drew passed the Pennsylvania and New Jersey Bar Exams and accepted a job with the JAG Corp.

In July 1999, Drew reported to Fort Lee, Virginia, and then Charlottesville, Virginia, for his training, and then was assigned to the Aberdeen Proving Grounds for the first stop of an eventful career. When his active duty commitment was satisfied, Drew joined the reserve. Drew

looked at a variety of options, including private practice with a Philadelphia firm, but ultimately decided to stay with the military, although in a civilian lawyer capacity. Drew worked in the Administrative/Civil Law Division with a concentration in labor and employment law and government contracts.

When his reserve unit was mobilized, but without the JAG office, Drew felt compelled to volunteer for a mobilization, to demonstrate solidarity with his fellow reservists. He was sent to Walter Reed Army Medical Center for a three-month stint that became nearly three years. During his time at Walter Reed, Drew represented injured soldiers in front of the Physical Evaluation Board (PEB). While stationed at Walter Reed, Drew pursued



his Masters' of Law in Law and Government from American University. Upon demobilization, Drew resumed his civilian employment at Aberdeen.

In 2007, a job opened which greatly appealed to him — Deputy Staff Judge Advocate with the Delaware National Guard. He took that job, leaving the reserves to work for the National Guard, and he now serves as the Staff Judge Advocate, the only full-time attorney for the organization. In addition to providing advice to the command on day-to-day legal issues, he provides legal assistance to service members, dependents, and retirees. He helps with wills, powers of attorney, family law issues, contracts, and leases. He deals with landlords who fail to abide by the terms of the Servicemembers Civil Relief Act. Even though Drew's position does not require him to be a member of the Delaware Bar, Drew decided to take it in 2010 to better assist his clients and other Delawareans in need. In addition to serving the men and women in uniform, Drew is an adjunct professor at Widener University School of Law.

Although his employment situation has changed frequently and dramatically since law school graduation, his life at home has been a constant. Drew met his wife when they were both Widener law students, standing in a long line to add/drop classes at the start of the semester. They had 90 minutes of waiting in line to chat that day, and they have yet to stop. Jacquelyn Chacona is a Delaware lawyer who has spent most of her career with Delaware Volunteer Legal Services. In fact, Drew frequently volunteers to assist with DVLS cases and events. Drew and Jacki have two children, and spend much of their free time engaged in family activity. They make frequent trips to Disney World (even honeymooned there), and usually bring along some members of the extended family. They also spend many weekends at Jacki's parents' place on a Pennsylvania mountain lake.

Fitness and sport also have a place in this family. Drew, a regular runner, is only too happy to coach youth soccer for his children. He and his oldest child get to several Philadelphia Flyers games each season. Drew holds season tickets

to the Eagles' games, and he never misses the annual Army-Navy football game with friends from the JAG Corp.

LTC Hilferty has a fierce commitment to military service members. He considers it a matter of duty to serve our men and women in uniform in the best way possible. He approaches his job, and the rest of his life, not only with a sense of commitment, but with a sense of real joy. When asked about the source of this joy, Drew reflected that he was raised with the belief that he is here to help others, and

now he has a job where he does just that. His family is the other source of joy — his wife and children, especially. He is easy to recognize in a room full of lawyers. He is the one with the biggest smile, and the silver oak leaf insignia. ⚖️

**James G. McGiffin, Jr.**, is a Senior Staff Attorney with Community Legal Aid Society, Inc. and a former President of the Delaware State Bar Association. He can be reached at [jmcgiffin@declasi.org](mailto:jmcgiffin@declasi.org).

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# Race Judicata 2014

By Pat Quann, Executive Director  
Delaware Law Related Education Center

Over 200 people participated in the 9th Annual Race Judicata 5 K Walk/Run which was held on April 5, 2014 at the Wilmington Riverfront. The event was sponsored by the Young Lawyer's Section of the Delaware State Bar Association. We are grateful to Joe's Crab Shack, who served as our host again and to the Honorable M. Jane Brady, Judge of the Delaware Superior Court and President of the Board of Trustees for the Delaware Law Related Education Center, Inc., who served as the starter for the race.

Race Judicata 2014 was organized by Michael Hoffman, Esquire, of Baird Mandalas Brockstedt, LLP; with the support of John Cordrey, Esquire, of Reed Smith, LLP; Evan Miller, Esquire, of Bayard, P.A.; Andrew Carmine, Esquire, of Elzufon Austin Tarlov & Mondell, P.A.; Joshua J. Inkell, Esquire, of Marshall Dennehey Warner Coleman & Goggin; and Amanda R. Steele, Esquire, of Richards Layton & Finger, P.A.

We thank our Business Sponsors: Caffè Gelato, DLS Claims Administration, LLC, The Starboard, and the University & Whist Club for their support. We are grateful to all the volunteers who helped with registration and other activities at the event, including members of the Delaware High School Mock Trial teams from the Charter School of Wilmington and Howard High School of Technology, Dave Tancredi, and Susan Simmons and Sorelis Duran from the Delaware State Bar Association.

Funds and donations raised by the race will benefit the programs of the Delaware Law Related Education Center, Inc. Race Judicata raised over \$11,000 for the Center. We deeply appreciate the generous support from the following firms and individuals:



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**The Young Lawyers Section has renamed next year's Race Judicata to "The Art Connolly Race Judicata" in honor of the late Arthur G. Connolly, Jr.**



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## Delaware's Bar at the Grill

Let me begin with a very simple equation. Summer cooking = grilling. There is nothing like the taste or aroma of fresh ingredients prepared on a grill. The flavor and scent produced by a grill are synonymous with summer. So, for this month's issue, I feature recipes for the grill from a few friends in the Delaware Bar.

• • •

When I think of Bill Manning, co-managing partner of the Wilmington office of Saul Ewing, LLP, his perfectly executed Veal Bolognese comes to mind. But, that is a veal for another season. Bill and his wife Martha have another favorite veal dish — grilled veal chops. Below is Bill's recipe for Grilled Veal Chops, Grilled Asparagus with Hollandaise Sauce, and Grilled Polenta.

### Ingredients:

Veal chops  
 Lime juice  
 Olive oil  
 Rosemary  
 Asparagus  
 1 tube of polenta  
 3 egg yolks  
 Salt  
 Pepper  
 1 stick of butter  
 Lemon

Marinate the veal chops (very briefly) in fresh lime juice, a little olive oil and a whiff of rosemary. Caution — veal accepts flavors quickly, so easy does it. Grill to suit, but veal should not be served as rare as steak, nor should it ever be grilled to the point of being dry.

While you are at it, grill some asparagus. You can par boil the asparagus first, but most prefer it *al dente*. Head inside to spruce up the asparagus with a hollandaise sauce. My father taught me how to do that

when I was about 12 years-old, and each of the Manning kids must pass this test.

You must have a double boiler (does anyone have them anymore?). Fill the bottom pot to just below the top pot, bring to a gentle boil and let the top pot warm. Add three egg yolks; a pinch of salt and pepper; and, melt a stick of butter 1/3 at a time constantly whisking. Before the second or third 1/3, squeeze a 1/2 lemon into the pot. Whisk gently but constantly, making sure the water is just below the point of boil. As soon as the sauce peaks, pour/scrape it into a pre-warmed server/pitcher. This is the last thing, and must go right to the table.

For more grilling, how about serving wedges of polenta off the grill as an accompaniment? The simplest way to execute this is to use a tube of polenta rather than make it from scratch to ensure that the polenta stays intact. Cut the polenta into 3/4 inch slices and drizzle with olive oil, salt and fresh ground pepper. Grill the slices until browned on each side and cooked through.

• • •

Juicy grilled steaks are an integral part of criminal defense attorney Eugene Maurer's summer menu. While many enjoy the ease of cooking on a gas grill, Eugene and his wife Carol Rendé are proponents of the charcoal grill — for the traditional grilling experience and for the taste only achieved by cooking over coals. Their recipe for Grilled Ribeye and Asparagus is below.

### Ingredients:

Asparagus  
 Extra virgin olive oil  
 Balsamic vinegar  
 Sea salt  
 Pepper  
 Crushed red pepper  
 Grated Parmesan cheese  
 Ribeye steaks (bone in)

Cut off any hard ends of the asparagus stalks and discard. Mix together the extra virgin olive oil, a dash of balsamic vinegar, sea salt and pepper in a pan, and marinate the asparagus in the refrigerator for an hour or so.

Grill the asparagus directly on the grill grate for 5 to 10 minutes, until nicely charred and fork tender, turning them every few minutes so that they brown evenly. Transfer the asparagus to a serving dish and sprinkle lightly with crushed red pepper and grated parmesan cheese for some extra kick.

We do not do anything to prepare the steak — just cook it on the grill for 5 to 8 minutes per side, until medium rare. We use ribeye steaks because they have a fair amount of fat marbling, which adds a lot of flavor.

• • •

Thanks to my friends Bill and Martha and Eugene and Carol for sharing their grilling recipes.

For other grilling ideas, my husband and I frequently refer to: *Bobby Flay's Boy Meets Grill*, *Mario Batali Italian Grill* and *How to Grill* by Steven Raichlen. Happy grilling! ☺



**Susan E. Poppiti**, is a mathematics teacher at Ursuline Academy High School and managing member and cooking instructor for La Cucina di Poppiti, LLC and can be reached at [spoppiti@hotmail.com](mailto:spoppiti@hotmail.com). Other recipes and cooking tips are available on Susan's new food blog at [www.cucinadipoppiti.com](http://www.cucinadipoppiti.com).



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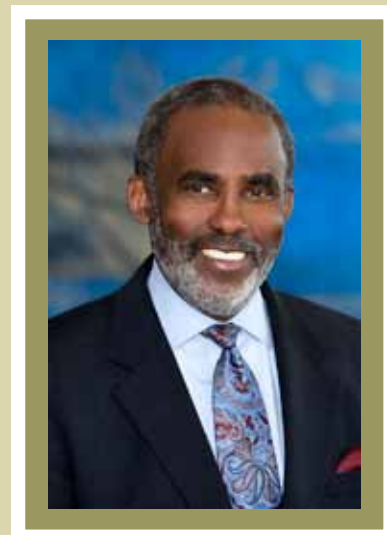
# Morris James LLP

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As a member of Morris James' ADR Practice, Judge Toliver will focus his practice on civil, corporate and domestic relations mediation, arbitration and case analysis. He is a former two-term Judge of the Delaware Superior Court, having been appointed in 1990 by Governor Michael N. Castle, and reappointed in 2002 by Governor Thomas R. Carper. Judge Toliver formerly served as Assistant City Solicitor for the City of Wilmington from 1975 to 1978. From 1978 until his appointment to the Superior Court, he was engaged in the private practice of law. He is a member of the Board of Directors of the Lincoln Club of Delaware and the Greater Wilmington Convention and Visitors Bureau. He is also a former Chairman of the Wilmington Housing Authority and has served as a member of the Delaware Public Employment Relations Board, the Delaware Violent Crimes Compensation Board, the Wilmington Pension Arbitration Board, and St. Anthony's Community Center. In 2003, President Bush appointed Judge Toliver as one of the two representatives from the State of Delaware on the Brown v. Board of Education 50th Anniversary National Commission. Before being appointed to the Superior Court, he served as Treasurer and Assistant Treasurer of the Delaware State Bar Association and as an associate member of the Board on Professional Responsibility of the Delaware Supreme Court. Judge Toliver received his law degree from the University of Virginia Law School after obtaining his undergraduate degree from Hampton Institute (now Hampton University) in Virginia. He can be reached at 302-888-6941 or [ctoliver@morrisjames.com](mailto:ctoliver@morrisjames.com).

## **Wilmington**

Downtown  
Morris James LLP  
500 Delaware Avenue  
Suite 1500  
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