

2017

The Seventeenth Annual Albert A. DeStefano Lecture on Corporate, Securities & Financial Law at the Fordham Corporate Law Center

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The Honorable Karen L. Valihura
Justice of the Delaware Supreme Court

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LECTURE

**THE SEVENTEENTH ANNUAL ALBERT A.
DESTEFANO LECTURE ON CORPORATE,
SECURITIES, & FINANCIAL LAW AT
THE FORDHAM CORPORATE LAW CENTER[†]**

**THE ROLE OF APPELLATE DECISION-MAKING
IN THE DEVELOPMENT OF DELAWARE
CORPORATE LAW—A VIEW FROM BOTH SIDES
OF THE BENCH**

WELCOME AND INTRODUCTORY REMARKS

Caroline M. Gentile^{*}
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FEATURED LECTURER

The Honorable Karen L. Valihura^{**}
Justice of the Delaware Supreme Court

[†] The lecture was held at Fordham University School of Law on April 3, 2017. It has been edited to remove minor cadences of speech that appear awkward in writing and to provide sources and references to other explanatory materials in respect to certain statements made by the speakers.

^{*} Caroline M. Gentile is one of the founding directors of the Fordham Corporate Law Center at Fordham University School of Law.

^{**} Karen L. Valihura is a Justice of the Delaware Supreme Court. The views expressed herein are solely those of the author and not of the Court.

WELCOME AND INTRODUCTORY REMARKS

CAROLINE GENTILE: Good evening. I am Caroline Gentile, and I am one of the founding directors of the Fordham Corporate Law Center. Together with Dean Diller and my colleague Sean Griffith, the current Director of the Corporate Law Center,¹ I am delighted to welcome you to the Seventeenth Annual Albert A. DeStefano Lecture on Corporate, Securities, and Financial Law. This lecture, like the preceding sixteen lectures, would not be possible without the generosity of the DeStefano family and Becker, Ross, Stone, DeStefano, & Klein, LLP.²

In many ways, Mr. DeStefano represents the best that Fordham Law School offers to its students, to the practicing bar, and to the community. He began his studies as a part-time student working during the day. By the time he finished his time here, he was a member of the Fordham Law Review³ and the top student in his class. While practicing corporate law with a specialty in mergers and acquisitions, he returned to the Law School as a tremendously popular adjunct professor, sharing his knowledge and expertise with hundreds of students.⁴ Throughout his entire life he remained active in innumerable charitable endeavors.⁵

We are honored to have with us here tonight his son, Paul DeStefano, a graduate of Fordham University, and his granddaughter, Katherine DeStefano, a recent graduate of our law school.

Like the proceeding lectures, tonight's lecture will be published in the Fordham Journal of Corporate & Financial Law, which is the single most-cited specialty journal in banking and finance and among the top ten specialty journals in corporations and business associations.⁶

1. *Sean J. Griffith*, FORDHAM U. SCH. L., https://www.fordham.edu/info/23142/sean_j_griffith [<https://perma.cc/K3J4-ZUJX>] (last visited Oct. 31, 2017).

2. *Albert A. DeStefano Lecture on Corporate, Securities and Financial Law*, FORDHAM U. SCH. L., https://www.fordham.edu/info/23050/public_lectures/6100/albert_a_destefano_lecture_on_corporate_securities_and_financial_law [<https://perma.cc/MH9M-YF4B>] (last visited Oct. 31, 2017).

3. *Masthead* to 16 FORDHAM L. REV. (1947); *Masthead* to 15 FORDHAM L. REV. (1946).

4. *Albert A. DeStefano Lecture on Corporate, Securities and Financial Law*, *supra* note 2.

5. *Id.*

6. According to the ranking system maintained by the Law Library at Washington & Lee University School of Law. *See Law Journals: Submissions and Ranking, 2009–2016*, WASH. & LEE U. SCH. L., <http://lawlib.wlu.edu/LJ/index.aspx> [<https://perma.cc/V2>]

We are grateful for the work of all of our editors, particularly Shrisha Juneja, this year's Editor-in-Chief, and Giselle Sedano, this year's Symposium Editor.⁷

We also owe a great debt of gratitude to Vera Korzun, a member of our adjunct faculty and the Administrative Director of the Corporate Law Center,⁸ for marshaling all of the information and materials for this lecture. For all the preparations this evening, we are indebted to both Julian Phillippi, our Conference Manager, and to Shanelle Holley, our Conference Administrator.

As a result of all these commitments from so many people over so many years, we are tremendously fortunate to have the Honorable Karen L. Valihura with us this evening.

When announcing her nomination to the Delaware Supreme Court, Governor Markell described Justice Valihura as “an attorney of uncommon skill, intelligence, and integrity, who has earned a well-deserved reputation for excellence in her twenty-five years of private practice.”⁹ During her investiture ceremony, Governor Markell stated that “she represents the best of the legal community in Delaware.”¹⁰

Prior to her appointment to the Delaware Supreme Court, Justice Valihura was a partner in the Wilmington office of Skadden, Arps, Slate, Meagher & Flom.¹¹ Her practice encompassed a wide range of high-profile litigation involving complex commercial and corporate issues, including mergers and acquisitions, fiduciary duties of directors, and

PS-GFTG] (last visited Oct. 31, 2017) (to replicate the search results, search “Subject: Banking and Finance;” then “Edit type: Student-edited;” and “Ranking Criteria: Case cites”).

7. *Masthead* to 22 FORDHAM J. CORP. & FIN. L. (2016–17).

8. *Vera Korzun*, FORDHAM U. SCH. L., https://www.fordham.edu/info/23646/i_k/7191/vera_korzun [<https://perma.cc/N3J7-B94A>] (last visited Oct. 31, 2017).

9. Karlee Weinmann, *Skadden Atty to Boost Litigation Prowess of Del. High Court*, LAW360 (June 9, 2014, 4:51 PM), <https://www.law360.com/articles/545907/skadden-atty-to-boost-litigation-prowess-of-del-high-court> [<https://perma.cc/Y4DH-FP84>].

10. Sean O’Sullivan, *Valihura Becomes Second Woman on Del. Supreme Court*, DEL. ONLINE, <http://www.delawareonline.com/story/news/local/2014/07/25/valihura-becomes-second-woman-del-supreme-court/13168087/> [<https://perma.cc/5KBY-429V>] (last updated July 26, 2014, 12:10 AM).

11. *Biography: Karen L. Valihura*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, http://sites.udel.edu/wccg/files/2011/10/Valihura_Karen_1.pdf [<https://perma.cc/6EUY-8PZN>] (last visited Oct. 31, 2017).

federal and state securities fraud claims as well as e-commerce issues and unfair business practices.¹²

For example, she represented the NASDAQ stock market in connection with its acquisition of Instinet Group, Inc., including the related appraisal proceeding, and she was the lead counsel representing Cantor Fitzgerald in one of the longest trials in the Delaware Court of Chancery.¹³

Among other business organizations, Justice Valihura served on the Corporation Law Council of the Corporate Law Section of the Delaware bar and on the advisory board of the John L. Weinberg Center for Corporate Governance.¹⁴

In addition to establishing the Valihura Scholarship Fund at the University of Pennsylvania Law School, from which she received her Doctor of Jurisprudence in 1988,¹⁵ Justice Valihura's charitable endeavors include serving as a member of the board of directors for the Delaware Special Olympics. She received her undergraduate degree from Washington & Jefferson College in 1985, and last year she received the Alumni Award for Achievement, which is one of the college's highest honors.¹⁶

Clearly no one is better suited to discuss "The Role of Appellate Decision-Making in the Development of Delaware Corporate Law—A View from Both Sides of the Bench."

Justice Valihura, we are truly honored to have you present these remarks as the Seventeenth Annual DeStefano Lecture.

12. *Id.*

13. *Id.*

14. *Judicial Officers*, DEL. CTS.: SUP. CT., <https://courts.delaware.gov/supreme/justices.aspx> [<https://perma.cc/C95R-EW7A>] (last visited Oct. 31, 2017).

15. *Biography: Karen L. Valihura*, *supra* note 11.

16. *2016 Alumni Award Winners*, WASH. & JEFFERSON C., <http://www.jayconnected.com/s/924/alumni/index.aspx?sid=924&gid=1&pgid=2208> [<https://perma.cc/2B3H-U6BF>] (last visited Oct. 31, 2017).

LECTURE

JUSTICE VALIHURA: Good evening, everyone. Thank you very much for the kind introduction and invitation to deliver the Seventeenth Annual Albert A. DeStefano Lecture this evening. It is an honor for me to be here.

I am in my third year of a twelve-year term as a Justice of the Delaware Supreme Court. As Professor Gentile said, immediately prior to my investiture in July 2014,¹⁷ I had spent twenty-five years as a corporate litigator with Skadden, Arps, Slate, Meagher & Flom LLP¹⁸—the first eight years as a litigation associate, and then seventeen years as a litigation partner. I am grateful for those terrific and exciting years I had in private practice. The experience I gained as a litigator working with clients to help solve problems has served as an enormously useful foundation for my present position as a Justice.

During my career as a lawyer, in addition to client work, I served in a number of other capacities that provided me with valuable experience and insight into the nuts and bolts of the Delaware General Corporation Law (DGCL). For example, I served on the Corporation Law Council of the Corporation Law Section of the Delaware Bar Association for eight years.¹⁹ The Council is the body that assists with the continuous review of the DGCL and the drafting of amendments to that body of law.²⁰ Changes to the DGCL are subject to great study and a careful deliberative process by a group of experienced corporate practitioners in the Bar.²¹ This careful process contributes to stability in our State's corporation laws. Also, in aid of promoting stability, Article IX of Delaware's Constitution requires a supermajority vote to amend the DGCL. Section 1 of Article IX, for example, provides that "[n]o general incorporation law, nor any special act of incorporation, shall be enacted without the concurrence of two-thirds of all the members elected to each House of the General Assembly."²² As a practitioner who was deep in the corporate litigation trenches, I understood that stability and predictability in our

17. O'Sullivan, *supra* note 10.

18. *Biography: Karen L. Valihura*, *supra* note 11.

19. *Judicial Officers*, *supra* note 14.

20. *About the Section of Corporation Law*, DEL. ST. B. ASS'N, <https://www.dsba.org/sections-committees/sections-of-the-bar/corporation-law/> [<https://perma.cc/R5FW-XWKS>] (last visited Oct. 31, 2017).

21. *Id.*

22. DEL. CONST. art. IX, § 1.

corporation law are important reasons why corporations look to Delaware as a situs for incorporation.

One of the things clients seek from their litigation counsel in any litigated controversy is an informed view of the current state of the law impacting the issues that might be the subject of litigation, and how a Delaware court might analyze such issues. I am ethically constrained from discussing any pending cases or matters that are likely to come before the Court. But what I can speak about generally tonight is how the Delaware Supreme Court operates and what types of things impact the Court's appellate decision-making process.

At the appellate level, unlike the trial court level, parties typically are not told in advance who the members of the panel will be once an appeal has been filed. If the matter is heard en banc, all five members of the Delaware Supreme Court would sit—unless one or more have recused.²³ In the event of a recusal, a visiting judge, a member of our trial courts generally, would be appointed to sit by designation.²⁴ Or the case could be heard by a panel of three Justices.²⁵

If a client has a matter pending before the Delaware Supreme Court, that client naturally would want advice regarding the Court's prior rulings in that area. In addition, because the Supreme Court is often concerned about what the policy implications might be for a ruling one way or the other, a well-advised client would think broadly about the issues in her case and what the policy implications might be for various possible outcomes.

The dynamics of appellate decision-making differ from decision-making by individual trial judges at the trial court level. For one thing, the collective aspect of the decision-making process is different. In addition, an appellate court's more pronounced focus on the broader policy implications of decisions distinguishes an appellate court from a trial court.

What role does the Delaware Supreme Court play in setting the direction of Delaware corporate law? I pose that question keeping in mind that our role is to say what the law is, not to craft it, which is the role of

23. DEL. SUP. CT. R. 2(a).

24. DEL. SUP. CT. INTERNAL OPERATING PROCS. § XX, <https://courts.delaware.gov/rules/pdf/SupremeCourtIOP.pdf> [<https://perma.cc/27H7-CBYU>] (last visited Nov. 5, 2017).

25. *Id.* § IX(2).

our General Assembly.²⁶ How does the Delaware Supreme Court's deliberative process work? What are the types of events that might cause the Delaware Supreme Court to change the direction of the Delaware law, and how does the Court impact the law through its decision-making process? And finally, what might contribute to a lawyer's effectiveness in advising clients on matters that have been appealed to the Court? I will try to respond to these frequently asked questions. I present my remarks from my vantage points from both sides of the bench.

First, let me address the first two questions by giving you some background information about the Delaware Supreme Court and how the Court's deliberative process works.

Delaware has had a Supreme Court since its 1776 Constitution.²⁷ From 1897 to 1951, however, the judges who sat on the Supreme Court also regularly served as trial judges.²⁸ In 1951, amendments to the Delaware Constitution created a separate Delaware Supreme Court in its present form.²⁹

The 1951 constitutional change creating the separate Delaware Supreme Court enabled our judicial branch to function more efficiently by assigning supervisory power over the judicial branch to the new appellate Court.³⁰ Unlike most state courts of last resort, Delaware has no intermediate appellate court. As a result, our Supreme Court is required by the Delaware Constitution to review every final judgment of our trial courts where an appeal is taken. Consequently, our appellate case load is quite heavy, averaging over 700 appeals resolved during each year I have been on the Bench—and that is relatively consistent with the prior years.³¹

26. DEL. CONST. art. II, § 1.

27. DEL. CONST. of 1776, art. 12.

28. *Id.*

29. DEL. CONST. art. IV.

30. Henry R. Horsey & William Duffy, *History of the Supreme Court: The Supreme Court After 1951: The Separate Supreme Court*, DEL. CTS.: SUP. CT., <https://courts.delaware.gov/supreme/history/history3.aspx> [<https://perma.cc/3WYS-X4VH>] (last visited Nov. 5, 2017).

31. ADMIN. OFF. CTS. ET AL., JOINT STUDY OF THE DELAWARE COURTS CONDUCTED BY THE DELAWARE STATE BAR ASSOCIATION AND THE DELAWARE CHAPTER OF THE AMERICAN COLLEGE OF TRIAL LAWYERS 5 (May 2016), <https://courts.delaware.gov/AOC/docs/ACTL-DSBA-Full-Report.pdf> [<https://perma.cc/9TQ8-HUEX>] (noting over 700 appeals were filed in 2014).

The two main trial courts are the Court of Chancery (on the equity side)³² and the Superior Court (on the law side, including both civil and criminal cases).³³ The Delaware Supreme Court also hears direct appeals from civil cases in Family Court; non-juvenile criminal cases from Family Court proceed through an intermediate appeal in the Superior Court.³⁴ In 1978, the Supreme Court was expanded to five Justices.³⁵

The Supreme Court has civil appellate jurisdiction over interlocutory appeals as well as final judgments.³⁶ Interlocutory appeals are discretionary.³⁷

The Supreme Court hears appeals of criminal convictions when the fine is in excess of \$100 or the term of imprisonment is greater than one month.³⁸

The Delaware Supreme Court is in charge of regulating the practice of law, and this includes all matters concerning lawyer discipline.³⁹ In addition, it has jurisdiction for the purpose of exercising extraordinary writs, *e.g.*, a writ of certiorari—which is used to correct irregularities in the proceedings of an inferior court; as well as writs of mandamus.⁴⁰

The Supreme Court has the power to hear certified questions of law.⁴¹ Delaware Supreme Court Rule 41 provides that other Delaware courts may certify to the Delaware Supreme Court a question or questions of law arising in any case prior to the entry of final judgment.⁴² Other courts and entities may do so as well, including: the United States Supreme Court, a Court of Appeals of the United States, a United States District Court, a United States Bankruptcy Court, the United States Securities and Exchange Commission, and the Highest Appellate Court

32. William T. Quillen & Michael Hanrahan, *A Short History of the Court of Chancery*, DEL. CTS.: CT. CHANCERY, <https://courts.delaware.gov/chancery/history.aspx> [<https://perma.cc/K8Z5-9FH6>] (last visited Nov. 5, 2017).

33. Henry duPont Ridgely et al., *History: The Superior Court*, DEL. CTS.: SUPERIOR CT., <https://courts.delaware.gov/superior/aboutus/history2.aspx#sc> [<https://perma.cc/5V37-28R2>] (last visited Nov. 5, 2017).

34. *Jurisdiction of the Family Court*, DEL. CTS.: FAM. CT., <https://courts.delaware.gov/family/jurisdiction.aspx> [<https://perma.cc/U4GY-EF6Z>] (last visited Nov. 5, 2017).

35. Horsey & Duffy, *supra* note 30.

36. DEL. CONST. art. IV, §§ 11(1)(a), 11(4).

37. DEL. SUPR. CT. R. 42.

38. DEL. CONST. art. IV, § 11(1)(b).

39. DEL. SUPR. CT. R. 61–64.

40. DEL. CONST. art. IV, § 11(5)–(7); DEL. SUPR. CT. R. 43.

41. DEL. CONST. art. IV, § 11(8); DEL. SUPR. CT. R. 41.

42. DEL. SUPR. CT. R. 41(a)(i).

of any other state.⁴³ Certification is accepted in the discretion of the Delaware Supreme Court anywhere there exists important and urgent reasons for an immediate determination of the questions certified.⁴⁴ A certification will not be accepted if facts material to the issue certified are in dispute.⁴⁵

Recently, Article IV, Section 11 of our Delaware Constitution was amended to expand our Supreme Court's jurisdiction to hear and determine certified questions to now include questions certified from "the highest appellate court of any foreign country, or any foreign government agency regulating the public issuance or trading of securities, where it appears to the Supreme Court that there are important and urgent reasons for an immediate determination of such questions by it."⁴⁶ To date, we have received no such requests from foreign countries.

So how does the Delaware Supreme Court's deliberative process work? The Delaware Supreme Court has published its Internal Operating Procedures (IOPs), and they are presently available on our Court's website.⁴⁷ The IOPs were first published in 1994, and they are intended to provide the public, the practicing bar, and other courts as well as our own staff, with a general understanding of how the Delaware Supreme Court typically operates.⁴⁸ Of course, "the operating procedures are subordinate to the Court's duty to comply with the Constitution, statutes, and the Court Rules, and the overarching commitment to doing justice in the diverse procedural circumstances in which cases arise."⁴⁹

As I mentioned earlier, cases are either decided en banc (all five Justices) or by panels of three Justices.⁵⁰ Each Justice independently reviews briefs and appendices prior to oral argument or the decisional conference (if a case is not argued).⁵¹ As a general practice, neither the Justices nor their clerks discuss the merits of a matter between chambers prior to an oral argument or the decisional conference for cases submitted on briefs.⁵² In cases where oral argument is held, the first time the Justices

43. DEL. SUPR. CT. R. 41(a)(ii).

44. *Id.*

45. DEL. SUPR. CT. R. 41(b).

46. DEL. CONST. art. IV, § 11(8).

47. DEL. SUP. CT. INTERNAL OPERATING PROCS., *supra* note 24.

48. *Id.* § I.

49. *Id.*

50. *See supra* note 23 and accompanying text.

51. DEL. SUP. CT. INTERNAL OPERATING PROCS., *supra* note 24 § V(2).

52. *Id.*

exchange views concerning the merits of a case is at the post-argument conference held immediately after the argument.⁵³ As a result, each Justice is equally prepared and uninfluenced by the views of others before the Court's deliberative process begins.

The Justices typically endeavor to confer with each other simultaneously, either orally or in writing, by telephone conference, or in person—as opposed to having sidebar conversations without the full panel.⁵⁴

The composition of a Panel is not disclosed to counsel prior to argument, and the Panels are typically randomly assigned.⁵⁵

Not every case is set down for oral argument.⁵⁶ Cases not argued would be resolved on the briefs after a deliberative process by the Panel.⁵⁷ Any Justice, however, can vote for argument and, if that occurs, such a case would be set down for oral argument.⁵⁸ The Justices generally will not have oral argument when: the issue is not novel, and the briefs adequately cover the arguments; or the outcome is clearly controlled by a decision of the United States Supreme Court or the Delaware Supreme Court; or the factual state of the record will determine the outcome, and the sole issue is either sufficiency of the evidence, adequacy of jury instructions, or discretionary rulings, and the briefs adequately address the record.⁵⁹

On the other hand, the Justices typically request oral argument when: the appeal presents a substantial or novel legal issue; the resolution of an issue presented by the appeal will be of institutional or precedential value; the Justices have questions to ask of counsel to clarify legal, factual, or procedural points; a decision, legislative act, or another event that has occurred since the filing of the briefs may significantly bear on the case; or an important public policy issue is implicated.⁶⁰

53. *Id.* § XII(1).

54. *Id.* § V(1).

55. *Id.* § IX(2).

56. *Id.* § VIII(2) (noting the factors to be considered when examining the desirability of oral argument).

57. *Id.* § XII(2).

58. *Id.* § VIII(1)(c).

59. *Id.* § VIII(2)(a).

60. *Id.* § VIII(2)(b).

The Justices, at conference, comment and cast tentative votes in reverse order of seniority.⁶¹ The senior Justice on the Panel would assign the opinion writing task.⁶²

If there is a dissent in a Panel of three, the rules provide for an automatic en banc hearing in the event of any Panel disagreement.⁶³ In addition, any two Justices can vote for en banc treatment of a case.⁶⁴ As a matter of our practice, many corporate cases are heard en banc. That practice assists us in attempting to maintain consistency in our corporation law. Each Justice must decide all matters within ninety days of submission.⁶⁵ The holding of the Court en banc or a Panel in an opinion or order is binding on the entire Court and on subsequent Panels.⁶⁶ Thus, no subsequent Panel can overrule a prior holding of the Court without consideration of the Court en banc.⁶⁷

What might cause changes in our law? With that overview of our Supreme Court's jurisdiction in mind, let me now focus on the role of appellate decision-making on the development of Delaware corporate law. I want to focus on answering the question about what are the types of things that might cause shifts in our case law.

Lawyers advising clients whose internal affairs are governed by Delaware law, who have cases pending in Delaware courts, or who have matters which may eventually become the subject of litigation in Delaware, need to be able to advise their clients, whether they be directors, officers, or Special Committees, for example, regarding their fiduciary duties in structuring transactions—particularly since many transactions later become the subject of litigation.

For example, a study published by Cornerstone Research examined litigation challenging M&A deals valued over \$100 million.⁶⁸ The 2016 survey notes that “[i]n 2015 and the first half of 2016, 84 and 64 percent

61. *Id.* § XII(1).

62. *Id.* § XII(3).

63. *Id.*

64. *Id.* § X(5).

65. *Id.* § III(2).

66. *Id.* § IX(6).

67. *Id.*

68. RAVI SINHA, CORNERSTONE RES., SHAREHOLDER LITIGATION INVOLVING ACQUISITION OF PUBLIC COMPANIES: 2015 AND 1H 2016 M&A LITIGATION 1 (2016), <https://www.cornerstone.com/Publications/Reports/Shareholder-Litigation-Involving-Acquisitions-2016> [<https://perma.cc/QPJ5-ABX7>].

of M&A deals valued over \$100 million were litigated, respectively.”⁶⁹ It observes that “[t]his is the first time since 2009 that the rate has dipped under 90 percent.”⁷⁰ The article attributes the decline to rulings in Delaware “that diminished the acceptability of disclosure-only settlements.”⁷¹ So if you are doing a transaction and the deal value is over \$100 million, there is still a fairly good chance that it might be subject to litigation.

The same is obviously equally true for counsel representing stockholders who might challenge a given transaction. While each transaction is different and typically presents issues that may not neatly fall within the boundaries of case precedents, experienced Delaware practitioners rely upon the foundation of Delaware case precedents, which has been constructed over the past two centuries, to navigate clients through potential pitfalls and novel legal issues.

As I mentioned earlier, the word “predictability” often arises in discussions of Delaware corporation law as one of the benefits corporations consider in selecting Delaware as the forum for incorporation and litigation. The practitioners most immersed in matters of Delaware law keep close tabs on recent opinions issuing primarily from the Court of Chancery and the Delaware Supreme Court. The rush of client memoranda, articles, and blogs following much-watched decisions has become the norm. I know from my experience that corporate clients expect their counsel to keep pace with developments in the law on a real-time, up-to-the-minute basis.

The Delaware courts recognize the importance of predictability and stability in our law. But the law does not always develop in a “straight line.” I have identified a few types of events that might serve as catalysts for changes in the law.

First, practitioners of Delaware law need to keep their eyes focused on developments at the highest federal level. Last September, for example, I moderated a program in Delaware entitled “*Supreme Court Review 2016: A Discussion of Decisions at the Highest State and Federal Judicial Levels*.”⁷² I will moderate another such program in Delaware on

69. *Id.* at 1.

70. *Id.*

71. *Id.*

72. DEL. ST. B. ASS’N, SUPREME COURT REVIEW 2016: A DISCUSSION OF DECISIONS AT THE HIGHEST STATE AND FEDERAL JUDICIAL LEVELS, <http://media.dsba.org/CLEReg/>

September 29, 2017.⁷³ In this program, a distinguished panel of lawyers and scholars focuses on key decisions of the Delaware Supreme Court and the United States Supreme Court.⁷⁴ The program's great attendance suggests that lawyers recognize that changes at the highest federal and state levels are important in being able to effectively advise clients.

Much attention has been paid to the tragic passing of Justice Antonin Scalia, the vacancy created by his passing, and the process and implications involved in filling that vacancy.⁷⁵ The attention paid to filling that vacancy on the United States Supreme Court highlights the importance of our nation's highest appellate court in American society. Although obviously not of the same level of impact, our Delaware Supreme Court, as of four days ago, also now has a vacancy that will need to be filled due to the retirement of our longstanding colleague, Justice Holland, who served our great state for thirty years.⁷⁶

On a few occasions recently, our United States Supreme Court has been the impetus for change in Delaware law. To illustrate, I will mention two such examples—one in the non-corporate context and one in the corporate context.

In the non-corporate context, the Delaware Supreme Court issued an opinion in *Rauf v. State of Delaware* on August 2, 2016, declaring that Delaware's death penalty statute was unconstitutional⁷⁷ in view of the United States Supreme Court's decision in *Hurst v. Florida*.⁷⁸ In *Rauf*, the Delaware Supreme Court considered certified questions of law posed by

SupremeCourtReview2016.pdf [https://perma.cc/A5BS-JSAL] (last visited Nov. 5, 2017). The annual program was first started by Justice Randy Holland and Harvey B. Rubenstein, Esquire several years ago.

73. DEL. ST. B. ASS'N, SUPREME COURT REVIEW 2017: A DISCUSSION OF DECISIONS AT THE HIGHEST STATE AND FEDERAL JUDICIAL LEVELS, <http://media.dsba.org/CLEReg/SupremeCourtReview2017.pdf> [https://perma.cc/3PAS-WNBD] (last visited Nov. 5, 2017).

74. *Id.*; DEL. ST. B. ASS'N, *supra* note 72.

75. *See, e.g.,* Ariane de Vogue, *How McConnell Won, and Obama Lost, the Merrick Garland Fight*, CNN (Nov. 9, 2016, 5:07 PM), <http://www.cnn.com/2016/11/09/politics/merrick-garland-supreme-court/index.html> [https://perma.cc/LLW3-3DNK].

76. Jessica Masulli Reyes, *Del. 's Longest-Serving Supreme Court Justice to Retire*, DEL. ONLINE (Feb. 9, 2017, 6:55 PM), <http://www.delawareonline.com/story/news/crime/2017/02/09/supreme-court-justice-retire-march/97686050/> [https://perma.cc/593Z-ZYH8]. Since the presentation of this lecture, Justice Gary Traynor has been sworn in as the Court's newest Justice. *Judicial Officers*, *supra* note 14.

77. *Rauf v. State*, 145 A.3d 430, 433 (Del. 2016) (per curiam).

78. *Hurst v. Florida*, 136 S. Ct. 616 (2016).

the Delaware Superior Court following the United States Supreme Court's decision finding Florida's death penalty statute unconstitutional in *Hurst*.⁷⁹ The *Hurst* Court had held that the Sixth Amendment is violated where the jury's sentencing verdict is merely advisory and the sentencing judge actually makes the critical finding necessary to impose a death sentence.⁸⁰ Applying *Hurst*, the Delaware Supreme Court issued a *per curiam* opinion in which a majority of the Justices concluded that Delaware's death penalty violated the Sixth Amendment.⁸¹

Four Justices each wrote separately to share differing views on the answers to the certified questions.⁸² The *per curiam* opinion recognized the "diversity of views" and expressed the Court's "shared belief that the importance of the subject to our state and fellow citizens . . . makes it useful for all the Justices to bring our various perspectives to bear on these difficult questions."⁸³

The second example of change at the highest level being the impetus for change in our Delaware law occurred in the corporate context and involved our decision last year in *Genuine Parts Co. v. Cepec*.⁸⁴ In *Cepec*, the Delaware Supreme Court held that foreign corporations are not subject to general jurisdiction in Delaware simply because they have registered to do business and have a registered agent for service of process in Delaware pursuant to 8 Del. C. §§ 371 and 376.⁸⁵ Our holding overruled, in part, our Delaware Supreme Court's landmark decision in *Sternberg v. O'Neil* issued in 1988.⁸⁶ In *Sternberg*, the Delaware Supreme Court had held that foreign corporations could be subject to personal jurisdiction in Delaware notwithstanding the absence of the claim's connection to Delaware, on the grounds that foreign corporations have consented to jurisdiction by registering to do business in Delaware.⁸⁷

The change in our Delaware law resulted from the United States Supreme Court's decisions in *Goodyear Dunlop Tires Operations, S.A. v.*

79. *Rauf*, 145 A.3d at 433.

80. *Hurst*, 136 S. Ct. at 621–22.

81. *Rauf*, 145 A.3d at 433.

82. *Id.* at 431.

83. *Id.* at 433.

84. 137 A.3d 123 (Del. 2016) (en banc).

85. *Id.* at 127.

86. 550 A.2d 1105 (Del. 1988) (en banc).

87. *Id.* at 1107–08.

Brown,⁸⁸ and *Daimler AG v. Bauman*.⁸⁹ *Goodyear* and *Daimler* clarified the due process limitations on a state court's power to exercise general jurisdiction over foreign corporations (*i.e.*, jurisdiction over a corporation not incorporated within the forum state to adjudicate claims entirely unconnected to the corporation's relationship with the forum state).

For example, in *Goodyear*, the United States Supreme Court held that state courts "may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State."⁹⁰

In *Daimler* the United States Supreme Court emphasized the requirement that the corporation be "essentially at home" in the foreign state and held that conducting business within a state, even to a "sizable" degree, does not make a foreign corporation "essentially at home."⁹¹

Citing the United States Supreme Court's decisions in *Goodyear* and *Daimler*, the Delaware Supreme Court held in *Cepec* that Delaware's registration statutes provide a means for service of process and do not confer general jurisdiction.⁹² Our Court warned that "an incentive scheme where every state can claim general jurisdiction over every business that does any business within its borders for any claim would reduce the certainty of law and subject businesses to capricious litigation treatment as a cost of operating in a national scale or entering any state's market."⁹³

We stated further that "[u]nder a sensible goose-and-gander approach, Delaware should be prudent and proportionate in exercising jurisdiction over foreign corporations."⁹⁴ This was perhaps a more formal way of saying that we are mindful of staying in our judicial lane. Thus, the *Cepec* and *Rauf* cases are examples of how decisions by the United States Supreme Court have resulted in changes in our state law.

That the Delaware Supreme Court plays a major role in defining the reach of our law is further illustrated in the case *A&R Logistics Holdings, Inc. v. FdG Logistics LLC*.⁹⁵ There, the Court of Chancery considered, in

88. 564 U.S. 915 (2011).

89. 134 S. Ct. 746 (2014).

90. *Goodyear*, 564 U.S. at 919 (quoting *Int'l Shoe Co. v. Wash. Office of Unemployment Comp. & Placement*, 326 U.S. 310, 317 (1945)).

91. *Bauman*, 134 S. Ct. at 761–62.

92. *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 127 (Del. 2016) (en banc).

93. *Id.* at 127–28.

94. *Id.* at 144 (footnote omitted).

95. 148 A.3d 1171 (Del. 2016) (unpublished table decision).

the first instance, whether the Delaware Securities Act⁹⁶ applies to a securities contract that includes a Delaware choice-of-law clause. The parties' Merger Agreement provided that "all issues concerning" it would be governed by Delaware law.⁹⁷ A&R (the Buyer) argued that this provision required application of the Delaware Securities Act.⁹⁸ However, the Chancellor concluded that the A&R's claim under the Delaware Securities Act failed to state a claim for relief because it had not established the requisite factual nexus between the challenged merger and Delaware to trigger application of the Act.⁹⁹ The Chancellor observed that "such an interpretation would lead to the bizarre result of converting a blue-sky statute that the Legislature intended to regulate *intrastate* securities transactions into one that would regulate *interstate* securities transactions."¹⁰⁰

In analyzing the nexus to Delaware, the Chancellor summed up the contacts as follows:

Turning to that analysis, the merger here was negotiated on the buy side by Mason Wells, a private equity firm, and on the sell side by FdG Logistics, the majority owner of Old A&R. Mason Wells is based in Milwaukee, Wisconsin. FdG Logistics is a subsidiary of FdG Associates, which is based in New York City. The headquarters of Old A&R at the time was in Morris, Illinois. No negotiations concerning the merger are alleged to have taken place in Delaware, and none of the allegedly underlying fraudulent business practices or violations is alleged to have occurred in Delaware. The sole connection that A&R can draw to Delaware—that the merger parties were incorporated here—is insufficient under *Singer* and its progeny to demonstrate the required nexus.¹⁰¹

Accordingly, the Chancellor found that there was an insufficient nexus to sustain a claim under the Delaware Securities Act.¹⁰² Our Court affirmed that result.¹⁰³

96. DEL. CODE ANN. tit. 6, §§ 73-101 to -704 (West 2017).

97. FdG Logistics LLC v. A&R Logistics Holdings, Inc., 131 A.3d 842, 854 (Del. Ch. 2016), *aff'd*, 148 A.3d 1171 (Del. 2016) (unpublished table decision).

98. *Id.* at 845.

99. *Id.* at 846.

100. *Id.* (emphasis in original).

101. *Id.* at 856–57 (citations omitted).

102. *Id.* at 857.

103. A&R Logistics Holdings, Inc. v. FdG Logistics LLC, 148 A.3d 1171, 2016 WL 5845786 (Del. Sept. 30, 2016) (Table).

The Delaware Supreme Court's issuance of reasoned, written opinions, particularly in complex areas of corporation law, as well as alternative entity law, contributes to the vast body of case law already in existence and facilitates case law development incrementally with the consideration and resolution of each issue.

The Delaware Supreme Court recently has addressed significant corporate issues in various of areas of law, including aiding and abetting liability, post-closing damages, direct/derivative claims, and cases involving master limited partnerships, to name just a few.

On November 30, 2015, for example, the Delaware Supreme Court unanimously affirmed the Court of Chancery's decision in *In re Rural Metro Corporation Stockholders Litigation*, which held a financial advisor liable for aiding and abetting a board's breaches of fiduciary duty.¹⁰⁴ I will not spend a lot of our time on the *Rural Metro* case as it has already been the subject of much commentary. But here are just a few high-level points about that decision.

First, the facts in this case were rather extreme, and the appellant chose not to challenge on appeal any of the Court of Chancery's detailed fact findings. The Court of Chancery had found that the financial advisor knowingly induced a breach of fiduciary duty on the part of the Board by exploiting the advisor's own conflicted interests to the detriment of the Board and by creating an informational vacuum.¹⁰⁵ The claim of aiding and abetting was, in essence, premised on the advisor's fraud on its own client's Board.¹⁰⁶ In affirming a liability award against a financial advisor on the basis of aiding and abetting a breach of fiduciary duty, our Supreme Court stressed that the requirement of establishing scienter on the part of the alleged aider and abettor is "among the most difficult to prove."¹⁰⁷ But it held that the stringent standard "was satisfied by the unusual facts proven at trial and which have not been seriously challenged on appeal."¹⁰⁸

Second, the Supreme Court commented that the relationship between a financial advisor and the Board is typically a contractual one. It is not one in which the financial advisor can be deemed to be a "gate keeper"

104. *In re Rural Metro Corp. Stockholders Litig.*, No. 6350-VCL, 2015 WL 725425, *1 (Del. Ch. Feb. 19, 2015), *aff'd sub nom*, RBC Capital Markets, LLC v. Jervis, 129 A.3d 816, 822 (Del. 2015) (en banc).

105. RBC Capital Markets, LLC v. Jervis, 129 A.3d 816, 862 (Del. 2015) (en banc).

106. *Id.* at 865.

107. *Id.* at 865–66.

108. *Id.* at 866.

responsible for ensuring that members of the Board fulfill their fiduciary duties. Footnote 191 in the opinion addressed this point specifically.¹⁰⁹

Third, the opinion sets forth some important takeaways for Boards dealing with potential advisor conflicts of interest. While a Board may be free to consent to certain conflicts, directors need to be active and “reasonably informed when overseeing the sale process, including identifying and responding to actual or potential conflicts of interest.”¹¹⁰ However, consent to a conflict does not give the advisor a “free pass” to act in its own self-interest and to the detriment of its client.¹¹¹ “Because a conflicted advisor may, alone, possess information relating to a conflict, the [B]oard should require disclosure of, on an ongoing basis, material information that might impact the [B]oard’s process.”¹¹² In sum, although the Supreme Court’s *Rural Metro* decision on appeal is significant in many respects, the opinion itself describes its holding as a “narrow one” arising from the “unusual facts” of the case.¹¹³

Another important decision in the area of post-closing damages was *Corwin v. KKR Financial Holdings LLC*¹¹⁴—a unanimous, en banc decision that has impacted deal-related litigation. There, the Delaware Supreme Court affirmed the Court of Chancery’s dismissal of claims and its holding that the business judgment rule is the appropriate standard of review in post-closing damages suits involving mergers that are not subject to the entire fairness standard and that have been approved by a fully informed, uncoerced majority of disinterested stockholders, even where the vote is statutorily required.¹¹⁵

In *Corwin*, the Delaware Supreme Court stated that “[f]or sound policy reasons, Delaware corporate law has long been reluctant to second-

109. *Id.* at 865 n.191. There, we stated that, “[t]he banker is under an obligation not to act in a manner that is contrary to the interests of the board of directors, thereby undermining the very advice that it knows the directors will be relying upon in their decision making processes.” *Id.* We stated further that, “[a]dhering to the trial court’s amorphous “gatekeeper” language would inappropriately expand our narrow holding here by suggesting that any failure by a financial advisor to prevent directors from breaching their duty of care gives rise to an aiding and abetting claim against the advisor.” *Id.*

110. *See id.* at 855 (citing *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1283–84 (Del. 1989)).

111. *Id.*

112. *Id.* at 856.

113. *Id.* at 865.

114. 125 A.3d 304, 305 (Del. 2015) (en banc).

115. *Id.* at 306.

guess the judgment of a disinterested stockholder majority that determines that a transaction with a party other than a controlling stockholder is in their best interest.”¹¹⁶ In rejecting the claim that application of the business judgment rule would undermine *Revlon*¹¹⁷ and *Unocal*,¹¹⁸ the Court stated that *Unocal* and *Revlon* were intended to provide the basis of obtaining pre-closing injunctive relief in merger transactions and were not intended to address post-closing claims for money damages.¹¹⁹ We held that, “where the stockholders have had the voluntary choice to accept or reject a transaction, the business judgment standard of review is the presumptively correct one and best facilitates wealth creation through the corporate form.”¹²⁰ We emphasized that this rule applies only to fully informed and uncoerced votes of disinterested stockholders.¹²¹ If material facts were not disclosed, for example, the *Corwin* rule would not apply. It applies outside the context of controlling stockholder entire fairness transactions.

Corwin was followed by our decision in *Singh v. Attenborough*,¹²² in which *Corwin* was applied. The Delaware Supreme Court observed that “[w]hen the business judgment rule standard of review is invoked because of a vote, dismissal is typically the result . . . because the vestigial waste exception has long had little real-world relevance, [and] because it has been understood that stockholders would be unlikely to approve a transaction that is wasteful.”¹²³

Our certification procedure helps to achieve stability and consistency in our law by allowing us to assist our sister courts, upon their request, with questions of Delaware law pending before them.¹²⁴

Since I have been on the bench we have issued a number of recent opinions responding to requests for certification, many of them dealing with Delaware’s approach to distinguishing direct and derivative claims in corporate law. For instance, in *NAF Holdings, LLC v. Li & Fung (Trading) Limited*,¹²⁵ we answered a certified question from the United

116. *Id.*

117. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

118. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

119. *Corwin*, 125 A.3d at 312.

120. *Id.* at 314.

121. *Id.* at 312.

122. 137 A.3d 151 (Del. 2016) (en banc).

123. *Id.* at 151–52 (citations omitted).

124. *See supra* notes 41–45 and accompanying text.

125. 118 A.3d 175 (Del. 2015) (en banc).

States Court of Appeals for the Second Circuit.¹²⁶ The Second Circuit asked whether, under Delaware law, a plaintiff can bring a direct claim for breach of contract against its contracting counterparty for failure to render a benefit to a third-party “notwithstanding that (i) the third-party beneficiary of the contract is a corporation in which the plaintiff-promisee owns stock; and (ii) that the plaintiff-promisee’s loss derives indirectly from the loss suffered by the third-party beneficiary corporation;” or if such suit must be brought derivatively, on behalf of the third-party beneficiary corporation.¹²⁷

In response, the Supreme Court stated that, under Delaware law, “a party to a commercial contract may sue to enforce its contractual rights directly, without proceeding by way of a derivative action.”¹²⁸ To answer otherwise would be inconsistent with “fundamental principle[s] of contract law” and Delaware’s policy to “promote reliable and efficient corporate laws in order to facilitate commerce.”¹²⁹

In so holding, the Court clarified that the familiar *Tooley*¹³⁰ test Delaware courts use to distinguish between direct and derivative actions “do[es] not, and [was] never intended to, subject commercial contract actions to a derivative suit requirement.”¹³¹ Instead, *Tooley* was intended to facilitate “determining the line between direct actions for breach of fiduciary duty suits by stockholders and derivative actions for breach of fiduciary duty suits subject to the demand excusal rules.”¹³² The Court reasoned that, before reaching that analysis “a more important initial question has to be answered: does the plaintiff seek to bring a claim belonging to her personally or one belonging to the corporation itself?”¹³³

Following the *NAF Holdings* case, we received another certified question from the Second Circuit concerning the distinction between direct and derivative claims. This case, *Citigroup Inc. v. AWH Investment Partnership*,¹³⁴ offered an “opportunity to reaffirm our explanation in

126. *Id.* at 176.

127. *Id.* (quoting *NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 772 F.3d 740, 750 (2d Cir. 2014), *certified question answered*, 118 A.3d 175 (Del. 2015)).

128. *Id.* at 179.

129. *Id.* at 180–81 (citations omitted).

130. *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004).

131. *NAF Holdings*, 118 A.3d at 179 (citations omitted).

132. *Id.* (citing *Tooley*, 845 A.2d at 1033) (additional citations omitted).

133. *Id.* at 180.

134. 140 A.3d 1125 (Del. 2016) (en banc).

NAF Holdings of *Tooley*'s limited scope."¹³⁵ The Second Circuit asked whether "the claims of a plaintiff against a corporate defendant alleging damages based on the plaintiff's continuing to hold the corporation's stock in reliance on the defendant's misstatements as the stock diminished in value [are] properly brought as direct or derivative claims[.]"¹³⁶ Following the Second Circuit's lead, we referred to these claims as "holder" claims.¹³⁷

The parties and the Second Circuit agreed that the plaintiff's holder claims would be governed by New York or Florida state law.¹³⁸ We determined that, under New York and Florida law, holder claims "belong to the holder, not the issuer."¹³⁹ Accordingly, an analysis under *Tooley* was unnecessary because, "as we explained in *NAF Holdings*, when a plaintiff asserts a claim based on the plaintiff's own right, such as a claim for a breach of a commercial contract, *Tooley* does not apply."¹⁴⁰ The Court observed that "Delaware law cannot convert a direct claim that another state's law has granted to securities holders by deciding that it actually belongs to the corporation that the securities holder is suing."¹⁴¹ Because under New York and Florida law the holder claims "could not possibly belong to the corporation, Delaware law ha[d] nothing to do with what type of claims the [plaintiffs] [we]re asserting."¹⁴²

In *Culverhouse v. Paulson & Co.*,¹⁴³ the Delaware Supreme Court was presented with another question of direct-versus-derivative standing. The Eleventh Circuit certified a question concerning whether an investor in a limited liability company (LLC) could maintain a direct action against the general partner of a limited partnership (LP) where the LLC acted as feeder fund to the LP.¹⁴⁴ The Eleventh Circuit specified that the feeder fund and the partnership "allocate losses to investors' individual capital accounts and do not issue transferrable shares and losses are shared by

135. *Id.* at 1139.

136. *Id.* at 1126 (quoting *AHW Inv. P'ship v. Citigroup, Inc.*, 806 F.3d 695, 705 (2d Cir. 2015), *certified question answered*, 140 A.3d 1125 (Del. 2016)).

137. *See, e.g., id.* at 1133.

138. *Id.* at 1137.

139. *Id.* at 1140.

140. *Id.* at 1139–40 (footnote omitted).

141. *Id.* at 1140.

142. *Id.* (footnote omitted).

143. 133 A.3d 195 (Del. 2016) (en banc).

144. *Id.* at 196.

investors in proportion to their investments[.]”¹⁴⁵ Importantly, the investor in question was not a limited partner in the LP.¹⁴⁶ Nevertheless, he sought to assert breach of fiduciary duty and other claims against the LP’s general partner following a transaction in which the LP lost \$460 million.¹⁴⁷

The Supreme Court found that the investor’s claims failed under both prongs of *Tooley*. The Court noted that the investor had invested only in the feeder fund, “which in turn invested in the” LP.¹⁴⁸ Accordingly, the alleged harm “would not in the first instance be suffered by” the investor.¹⁴⁹ Likewise, the investor “would in the first instance receive the benefit of any recovery.”¹⁵⁰ Accordingly, the investor’s claims were derivative.¹⁵¹

Are there other catalysts for changes? There has been much change in the composition of our Court during my short tenure. But the Court has endeavored to conduct business as usual (and in my view it has). The Court’s respect for its own precedents and principles of *stare decisis* contribute to the Court’s stability during times when its composition changes.

I was appointed to the bench at a very unique time in the Supreme Court’s history. My appointment came during the midst of a number of impending retirements on the court. I was sworn in on July 25, 2014 and was the second woman to be appointed to the Delaware Supreme Court in its history.¹⁵² Due to various retirements and new appointments on the Court, I now occupy the second senior-most position on our Supreme Court. At this point, the four current Justices were all appointed in or after 2014.¹⁵³

One thing that has changed, at least to a limited degree, is the increase in the number of separate opinions. In state and federal courts, including the United States Supreme Court, it is not uncommon for three or more separate opinions to be written in a single case, especially when

145. *Id.*

146. *Id.* at 199 n.15.

147. *Id.* at 197.

148. *Id.* at 198–99.

149. *Id.* at 199.

150. *Id.*

151. *Id.* Our court has also certified questions to other courts if their statutory scheme permits. *See e.g., In re Viking Pump, Inc.*, 148 A.3d 633, 642 (Del. 2016).

152. O’Sullivan, *supra* note 10.

153. *Judicial Officers*, *supra* note 14.

important issues of public policy are involved. However, the Justices of the Delaware Supreme Court historically rarely issued separate opinions, even on controversial issues.¹⁵⁴ In fact, until recently, over the past six decades, nearly all of our Court's decisions were unanimous.¹⁵⁵ The Justices' tendency to issue unanimous opinions has been referred to as Delaware's "unanimity norm."¹⁵⁶

During the past couple of years, the Delaware Supreme Court Justices have issued separate opinions (mostly dissents) more frequently. During the years 2006 to 2014, the Court averaged approximately five dissents per year. In 2015, Justices of the Court issued eleven dissents.¹⁵⁷

154. Randy J. Holland & David A. Skeel, Jr., *Deciding Cases Without Controversy*, in DELAWARE SUPREME COURT GOLDEN ANNIVERSARY 39, 40 (Randy J. Holland & Helen L. Winslow eds., 2001) (citing David A. Skeel, Jr., *The Unanimity Norm in Delaware Corporate Law*, 83 VA. L. REV. 129 (1997)).

155. Robert H. Edmunds Jr., *An Interview with Justice Randy Holland*, JUDGES' J., Summer 2014, at 4 (2014).

156. *Id.*

157. *Siga Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1139–54 (Del. 2015) (Valihura, J., concurring in part and dissenting in part), *as corrected* (Dec. 28, 2015); *E. Sav. Bank, FSB v. Cach, LLC*, 124 A.3d 585, 594–604 (Del. 2015) (Seitz, J., dissenting); *Murphy & Landon, P.A. v. Pernic*, 121 A.3d 1215, 1226–33 (Del. 2015) (Vaughn, J., dissenting); *In re Favata*, 119 A.3d 1283, 1293 (Del. 2015) (Vaughn, J., dissenting); *Hecksher v. Fairwinds Baptist Church, Inc.*, 115 A.3d 1187, 1209–13 (Del. 2015) (Vaughn, J., dissenting); *LG Elecs., Inc. v. InterDigital Commc'ns, Inc.*, 114 A.3d 1246, 1259–70 (Del. 2015) (Valihura, J., dissenting); *Bell Helicopter Textron, Inc. v. Arteaga*, 113 A.3d 1045, 1060–67 (Del. 2015) (Vaughn, J., dissenting); *Corvel Corp. v. Homeland Ins. Co. of N.Y.*, 112 A.3d 863, 870–78 (Del. 2015) (Strine, C.J., dissenting), *reargument denied* (Apr. 2, 2015); *First Health Seulement Class v. Chartis Speciality Ins. Co.*, 111 A.3d 993, 1001–08 (Del. 2015) (Strine, C.J., dissenting); *Sykes v. State*, 147 A.3d 201, 220–26 (Del. 2015) (Strine, C.J., dissenting), *reargument denied* (Mar. 19, 2015); *Flonnory v. State*, 109 A.3d 1060, 1066–75 (Del. 2015) (Strine, C.J., dissenting).

In 2016, the Court had eight dissenting opinions.¹⁵⁸ In 2017, there are already a few.¹⁵⁹

Separate opinions might indicate possible shifts in the law. Here is a recent example. On December 20, 2016, the Delaware Supreme Court issued an important decision in *El Paso Pipeline GP Company, L.L.C. v. Brinckerhoff*.¹⁶⁰ The *El Paso* case illustrates a number of important points in the alternative entity context and, in particular, in dealing with conflict transactions in the master limited partnership (MLP) context.

In *El Paso*, the Delaware Supreme Court considered whether the Court of Chancery had erred as a matter of law in holding that the plaintiff had standing to maintain his claims following the merger.¹⁶¹ The Court of Chancery had characterized the plaintiffs' claims as "dual" claims, meaning they were both direct and derivative in nature.¹⁶² We reversed, finding that the Court of Chancery had erred as the claim that the MLP had overpaid in the transaction at issue was purely derivative.¹⁶³ The harm was to the Partnership, not to individual limited partners.¹⁶⁴

The claim centered on the limited partnership agreement's contractual duty of good faith. The duty was owed, under the limited partnership agreement (LPA), to the Partnership—not to the Limited Partners.¹⁶⁵ The claim was that the Partnership had overpaid in the transaction was classically derivative.¹⁶⁶

We said that the "trial court treated the governing instrument of the Partnership as if it were a separate commercial contract, rather than it

158. *Sandys v. Pincus*, 152 A.3d 124, 134–39 (Del. 2016) (Valihura, J., dissenting); *Bon Ayre Land, LLC v. Bon Ayre Cmty. Ass'n*, 149 A.3d 227, 238–40 (Del. 2016) (Vaughn, J., dissenting); *Rauf v. State*, 145 A.3d 430, 487–501 (Del. 2016) (Valihura, J., concurring in part and dissenting in part); *id.* at 501–07 (Vaughn, J., dissenting); *Enrique v. State Farm Mut. Auto. Ins. Co.*, 142 A.3d 506, 516–18 (Del. 2016) (Strine, C.J., dissenting); *CDX Holdings, Inc. v. Fox*, 141 A.3d 1037, 1042–58 (Del. 2016) (Valihura, J., dissenting), *reargument denied* (June 13, 2016); *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 148–49 (Del. 2016) (Vaughn, J., dissenting); *McCaffrey v. Wilmington*, 133 A.3d 536, 551–57 (Del. 2016) (Strine, C.J., concurring in part and dissenting in part).

159. *See, e.g., Shawe v. Elting*, 157 A.3d 152, 169–87 (Del. 2017) (Valihura, J., dissenting).

160. *El Paso Pipeline GP Co. v. Brinckerhoff (El Paso II)*, 152 A.3d 1248 (Del. 2016).

161. *Id.* at 1249–51.

162. *Id.* at 1251.

163. *Id.*

164. *Id.* at 1261–62.

165. *Id.* at 1257–65.

166. *Id.* at 1251.

being the constitutive contract of the Partnership.”¹⁶⁷ “The reality that limited partnership agreements often govern the territory that in corporate law is covered by equitable principles of fiduciary duties does not make all provisions of a limited partnership agreement enforceable by a direct claim.”¹⁶⁸

The result of the decision was that the damage award of \$171 million issued in the Chancery Court’s liability decision was reversed.¹⁶⁹ In reversing, we applied the continuous ownership requirement and held that the merger had extinguished the plaintiff’s standing.¹⁷⁰

The decision highlights the difficulty of developing and discerning general principles in this complex area of the law involving MLP. Notably, these MLP agreements (and in particular, the “Conflicts of Interest” provisions) may contain common features, but are often different in nuanced ways. Thus, writing for the Majority, I observed that “the prevalence of entity-specific provisions in an area of law defined by expansive contractual freedom requires a nuanced analysis and renders deriving ‘general principles’ a cautious enterprise.”¹⁷¹

The *El Paso* decision also highlights that not every breach of a LPA is “dual”—meaning both direct and derivative. The *Gentile v. Rosette* case,¹⁷² as the Court of Chancery observed, had been somewhat controversial and had been the source of some confusion in the Bar.¹⁷³ The Delaware Supreme Court in *Gentile* had found certain “dual” claims to be both direct and derivative where there was a transfer of both voting power and economic value to a controlling stockholder.¹⁷⁴ The *El Paso* Majority “decline[d] the invitation to further expand the universe of claims that can be asserted ‘dually’ to hold here that the extraction of solely economic value from the minority by a controlling stockholder constitutes direct injury.”¹⁷⁵

In following on the Majority’s reluctance to expand that universe of “dual claims”, the short concurrence by Chief Justice Strine goes even

167. *Id.* at 1260.

168. *Id.*

169. *Id.* at 1250–51.

170. *Id.* at 1252; *see also* *Lewis v. Andersen*, 477 A.2d 1040, 1049–50 (Del. 1984).

171. *El Paso II*, 152 A.3d at 1257.

172. 906 A.2d 91 (Del. 2006).

173. *In re El Paso Pipeline Partners, L.P. Derivative Litig.*, 132 A.3d 67, 82 (Del. Ch. 2015).

174. *Gentile*, 906 A.2d at 99–100 (citations omitted).

175. *El Paso II*, 152 A.3d at 1264.

further and suggests that *Gentile v. Rossette* “cannot be reconciled with the strong weight of our precedent and it ought to be overruled.”¹⁷⁶ Thus, the *El Paso* Majority sent a signal that it did not wish to expand the *Gentile* holding, and the Chief Justice indicated his desire to overrule it altogether.

Our recent decision (March 20, 2017, as revised on March 28, 2017) in *Brinckerhoff v. Enbridge Energy Co., Inc.*¹⁷⁷ illustrates the rare case where the current Delaware Supreme Court reversed course on one of its prior decisions (from 2013) in an effort to address a point in a prior opinion that had caused some confusion. In *Enbridge*, the Court clarified the pleading standard applicable to a general partner’s breach of a master limited partnership agreement.¹⁷⁸ There, the plaintiff argued that the general partner had breached the limited partnership agreement (the Enbridge LPA) by approving a significant internal business transaction on terms he contended were not fair and reasonable.¹⁷⁹ The *Enbridge* plaintiff also argued that the general partner breached the Enbridge LPA by amending it “to effect a ‘Special Tax Allocation’ whereby the public investors would be allocated items of gross income that would otherwise be allocated” to the general partner.¹⁸⁰ The Court of Chancery dismissed the complaint, finding that plaintiff had failed to plead bad faith as required by the Enbridge LPA.¹⁸¹

On appeal, the Supreme Court reversed in part, stating that:

The Court of Chancery cannot be faulted for faithfully applying our earlier decision in *Brinckerhoff III*, and its rigorous pleading standard

176. *Id.* at 1266 (Strine, C.J., concurring).

177. 159 A.3d 242 (Del. 2017) (en banc).

178. *Id.* at 253–54. In recent years, the Delaware Supreme Court has decided a number of cases in the Master Limited Partnership context. *See, e.g.*, *Dieckman v. Regency GP LP*, 155 A.3d 358 (Del. 2017); *El Paso II*, 152 A.3d at 1248; *Emps. Ret. Sys. of St. Louis v. TC Pipelines GP, Inc.*, 152 A.3d 1248 (Del. 2016) (unpublished table opinion); *Haynes Family Tr. v. Kinder Morgan G.P., Inc.*, 135 A.3d 76 (Del. 2016) (unpublished table opinion); *Allen v. El Paso Pipeline GP Co.*, No. 399, 2014, 2015 WL 803053 (Del. Feb. 26, 2015); *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93 (Del. 2013); *Gerber v. Enter. Products Holdings, LLC*, 67 A.3d 400 (Del. 2013), *rev’d on other grounds*, *Winshall v. Viacom Int’l, Inc.*, 76 A.3d 808 (Del. 2013); *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354 (Del. 2013); *Brinckerhoff v. Enbridge Energy Co. (Brinckerhoff III)*, 67 A.3d 369 (Del. 2013).

179. *Enbridge*, 159 A.3d at 246.

180. *Id.*

181. *Id.* at 247.

for bad faith. But we now change course from our earlier decision and adhere to the more traditional definition of bad faith utilized in Delaware entity law.¹⁸²

In the earlier *Brinckerhoff III* decision, the Supreme Court held that “to state a claim based on bad faith, the decision to enter into [a contested transaction], under the circumstances, must be ‘so far beyond the bounds of reasonable judgement that it seems essentially inexplicable on any ground other than bad faith.’”¹⁸³

In the recent March 20, 2017 *Enbridge* decision, however, the Supreme Court “change[d] course” from *Brinckerhoff III* in favor of a contractual “definition of bad faith that is commonly used in our entity law and incorporated into the Enbridge LPA.”¹⁸⁴ In doing so, our Court reverted to a more traditional definition of bad faith than the one a prior Court had employed in *Brinckerhoff III* (which more resembled principles similar to pleading waste).¹⁸⁵

Let me turn briefly to the last point, namely, what might contribute to a lawyer’s effectiveness in practicing and appearing before our Court?

182. *Id.*

183. *Brinckerhoff III*, 67 A.3d at 373 (Del. 2013) (quoting *Parnes v. Bally Entm’t Corp.*, 722 A.2d 1243, 1246 (Del. 1999)). The pleading standard for bad faith in *Brinckerhoff III* mirrored the pleading standard for corporate waste. See *Brehm v. Eisner*, 746 A.2d 244, 263 (Del. 2000) (“Roughly, a waste entails an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade.” (quoting *Lewis v. Vogelstein*, 699 A.2d 327, 336 (Del. Ch. 1997))).

184. *Enbridge*, 159 A.3d at 247. Citing our decision in *Norton v. K-Sea Transp. Partners, L.P.*, 67 A.3d 354 (Del. 2013), in which we construed a LPA provision materially identical to the one in the Enbridge LPA, we held that a plaintiff alleging bad faith under the Enbridge LPA must plead facts supporting an inference that the general partner did not “reasonably believe that its action [was] in the best interest of, or not inconsistent with, the best interests of the Partnership.” *Enbridge*, 159 A.3d at 253 (quoting *Norton*, 67 A.3d at 362). We then applied the contractual standard and held that plaintiff “pled sufficient facts leading to an inference that the [contested] transaction was not ‘fair and reasonable to the Partnership’ [as it was] ‘less favorable to the Partnership than those generally being provided to or available from unrelated third parties.’” *Id.* at 257.

185. *Brinckerhoff III*, 67 A.3d at 373 (stating that *Brinckerhoff* had failed to allege that “the decision to enter into the JVA, under the circumstances, [was] ‘so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith’” (quoting *Parnes*, 722 A.2d at 1246)).

Knowledge of the case law impacting the issues in your case is obviously paramount. As you can understand from my remarks thus far, corporation law is far from static. New and different types of transactions constantly are being devised and effectuated. The body of corporate and alternative entity case law is continuously being developed in nuanced ways with each new opinion. Keeping up with recent cases in real time is a challenging endeavor for already busy practitioners. But it is an inherent part of the fast-paced cadence of corporate practice, and it is absolutely essential in order to be able to guide clients effectively in the transaction and litigation context.

I submit to practitioners that even our Supreme Court opinions relating to non-corporate matters may offer useful insight into such matters such as interpreting contracts, statutes, legislative history, and application of different standards of review.¹⁸⁶

Our Court has tried to make it easier for the public to understand what we do and how our Court functions. In March 2016, for example, we revised our Court's website to make it more user friendly.¹⁸⁷ In addition, our oral arguments are, for the most part and with limited exceptions, live-streamed.¹⁸⁸ Briefs in argued cases are available on our website free of charge¹⁸⁹ as well as our opinions.¹⁹⁰ Some law and college professors have told me that they have had their classes watch certain arguments as part of their study of a certain corporate or criminal law topics.

In addition to case law developments, it is also important to stay abreast of developments in statutory changes to the DGCL. Recent amendments to the DGCL have addressed such important topics as: forum

186. See, e.g., *Terex Corp. v. S. Track & Pump, Inc.*, 117 A.3d 537, 543–47 (Del. 2015) (discussing principles of statutory construction), *as revised* (June 16, 2015).

187. Jessica Masulli Reyes, *Check Out the New Delaware Courts Website*, DEL. ONLINE (Mar. 16, 2016, 11:59 AM), <http://www.delawareonline.com/story/news/local/2016/03/16/check-out-new-delaware-courts-website/81818980/> [<https://perma.cc/G2V9-WCR7>].

188. *Delaware Supreme Court Oral Arguments*, LIVESTREAM, <https://livestream.com/DelawareSupremeCourt> [<https://perma.cc/6E33-6RN6>] (last visited Nov. 6, 2017).

189. *Oral Arguments*, DEL. CTS., <https://courts.delaware.gov/supreme/oralarguments/> [<https://perma.cc/4LTV-E4AX>] (last visited Nov. 6, 2017).

190. *Opinions and Orders*, DEL. CTS., <https://courts.delaware.gov/opinions/index.asp?ag=supreme+court> [<https://perma.cc/94BS-HCEX>] (last visited Nov. 6, 2017).

selection bylaw provisions,¹⁹¹ fee-shifting bylaws,¹⁹² and important amendments to the appraisal statute.¹⁹³

Finally, time prevents me from going into an extended discussion of appellate brief writing or oral argument best practices. But I leave with just a few points that have some bearing on the points I have been discussing tonight. First, arguments not fairly presented to the trial court will generally not be considered on appeal, unless our “interest of justice” exception applies.¹⁹⁴ Thus, it is important to make and preserve your arguments in the trial court. This rule assists in allowing the law to be developed in a more orderly fashion by giving trial courts a fair opportunity to consider issues first.

Second, a well-written brief with a candid treatment of the important aspects of the record is very helpful to the Court. It is also very important to address relevant and controlling cases in a candid manner.

Third, you can safely assume that the Court is thoroughly familiar with the record in the case. Oral argument is really most useful to the Court as a means to have counsel respond to particular questions the Justices have. Being able to respond to those questions effectively is important. Rather than planning to give a prepared oral presentation, a moot court session might be a more effective way to prepare for an appearance before our Court.

Finally, the Court appreciates counsel who are able to answer hypothetical questions. The Justices are well aware that the facts presented in a hypothetical question are “not your case.” However, the Justices are likely thinking more broadly about the law and the potential policy implications presented by issues in your case.

In closing, I would be remiss if I did not say how privileged and humbled I am to be able to serve as a Justice on the Delaware Supreme Court. I am grateful for the opportunity to serve my State, and finally, I am especially appreciative of your kind attention this evening.

With these comments, I conclude my prepared remarks and, if time permits, will answer a few questions. Thank you very much.

191. DEL. CODE ANN. tit. 8, § 115 (West 2017).

192. *Id.* §§ 102(f), 109(b).

193. *Id.* § 262(g)–(h).

194. Delaware Supreme Court Rule 8 provides: “Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.” DEL. SUP. CT. R. 8.