



Cocktails & Conversation Bench/Bar Cocktail Party

Members Only

If you're looking for an early springtime opportunity to relax with colleagues from the bench and bar while enjoying a two hour open bar and mouth-watering party fare, then Cocktails & Conversation fits the bill!

Scheduled for 6-8 pm, Wednesday, May 8th at Caff  Aldo Lamberti on Route 70 East in Cherry Hill, this "Members Only" event provides a terrific opportunity to mix and mingle with colleagues and Camden County judges of the Superior, US District, Bankruptcy and Workers' Compensation Courts, in a relaxed atmosphere. And, if last year's Cocktails & Conversation was any indication, we'll have another packed house!

Tickets are only \$55 (\$50 for lawyers admitted less than 5 years), with advance reservations required. Refer to the Cocktails & Conversation Bench-Bar Cocktail Party insert in this month's Barrister for additional information and to make your reservation(s). **This is a member only event and early registration is encouraged.**

Advertise in the 2013 Dinner Dance Program Book

Support the Bar Foundation's Community Service Programs

This year's Annual Dinner Dance will take place on **Friday, May 31st** At Trump National Golf Course Pine Hill. Pay tribute to the Association's incoming President, Gary Boguski, and the incoming Officers and Trustees of the Association and Foundation by placing an ad in the 2013 commemorative program book.

Proceeds from the Dinner Dance and Adbook support the Bar Foundation's many community service programs and projects that improve the quality of life for local residents, such as parties and picnics for disadvantaged kids, scholarship awards for deserving high school and law school students and scholarships for disabled students attending the Larc School.

Reserve a display ad for your firm or place your own personal display ad. To be included in this year's book, use the Adbook Flier in this month's inserts. To be included, your ad must be received by Bar Headquarters no later than **FRIDAY, MAY 17th.**

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Brew Ha-Ha

Correction: The Bar Foundation received a "cease and desist" letter from a national brewing company which claimed that our advertising of the April 5th fund-raiser as "Best of the Brew" violated its legally protected intellectual property. Foundation President Linda Eynon assigned a team of three Association members versed in the field to investigate the claim. "According to our experts, we should be protected either by a fair use doctrine or charitable immunity," reported President Eynon. "However, the Foundation Board felt that since this was the first year we were promoting such an event, we should simply change the name. In reviewing the alternatives, it was discovered that such expressions as "Beer Fest," "Beer Bash," and even "Suds Spectacular" already were in use with similar potential restrictions on their appropriation.

"We began to feel as hamstrung as an aging softball player at the beginning of the season," observed Executive Director, Larry Pelletier. "We decided the sensible thing to do was to leave the decision up to our photographer, since he would be shooting the images we would be publishing in *The Barrister*." **So, This, Bud's, For You!**

While the event is scheduled for April 5th and not the first, it should not be lost on experienced readers that this *Errata* message was authored for our April issue by Jim Hamilton, and that no legal storm is brewing.

Don't Delay, Renew Today!

Dues notices for the 2013-14 membership year should be on your desk, or soon will be, and are payable by June 1. Paying promptly ensures that your Association continues to serve you and the community with its many important programs and services.

As a CCBA member you receive numerous benefits, which more than justify the cost of dues:

- A wide array of affordable, convenient and informative CLE seminars, all offering New Jersey and Pennsylvania CLE credits. As a CCBA member, you receive a 30% tuition discount, which makes each credit almost \$11 less per credit than ICLE seminars. Additionally, our seminars are conveniently located which saves you both valuable time and the high cost of gasoline!
- Discounted tuition and special offers on the many CLE programs available online through the *Camden County Online CLE Learning Center*.
- Our monthly publication, *The Barrister* provides updates on changes affecting you, your clients and practice, as well as substantive articles written by fellow Camden County practitioners, law practice management tips, and notices to the bar.

THE DOCKET

Tuesday, April 2nd

Young Lawyer Committee Meeting
12:30 – 2 pm
Bar Headquarters, Cherry Hill

Friday, April 5th

*Camden County Bar Foundation's
Best of the Brew Beer Tasting*
6 – 9 pm
E Lounge, 807 Route 70 West, Cherry Hill

Monday, April 8th

*Brown Bag Seminar Series – New Rules of
Professional Conduct on Marketing*
Noon – 1:30 pm
Bar Headquarters, Cherry Hill

Tuesday, April 9th

*Substance Abuse Committee Seminar
The Ins and Outs of Drug Court*
4 – 6:15 pm
Tavistock County Club, Haddonfield

Saturday, April 13th

Wills for Heroes
11 am – 5 pm
Rutgers School of Law, Camden

Tuesday, April 16th

*Health Law Committee Seminar
Representing Physicians
in Today's Legal Quagmire*
4 – 6:15 pm
Tavistock County Club, Haddonfield

Wednesday, April 17th

*CLE Luncheon
The Consumer Fraud Product Labeling
Class Action Phenomenon:
Labels, Language & Lessons –
Now & The Future*
Noon – 2 pm
Tavistock Country Club, Haddonfield

Wednesday, April 17th

CCBA Board of Trustees Meeting
4 pm
Bar Headquarters, Cherry Hill

Thursday, April 18th

Debtor/Creditor Committee Meeting
8 am
Bar Headquarters, Cherry Hill

Tuesday, April 23rd

*Elder Law & Disability Committee Seminar
Respect Thy Elders*
4 – 6:15 pm
Tavistock Country Club, Haddonfield

Wednesday, April 24th

*Taxation and Probate & Trust Committees
American Taxpayer Relief Act of 2012 & Its
Effects on Individuals & Estates*
4 – 6:15 pm
Tavistock Country Club, Haddonfield

Thursday, April 25th

CLE on Tap! NJ Criminal Trial Preparation
3 – 6:15 pm
McCormick & Schmick, Town Place
Garden State Park, Cherry Hill

Tentative agenda for April 17th Trustees Meeting

A tentative agenda for this month's regular Board of Trustees meeting follows. The meeting will begin at 4 p.m., at Bar Headquarters in Cherry Hill. All meetings are open to the membership. Anyone interested in attending should notify and confirm their attendance by calling Bar Headquarters at 856.482.0620.

- I. Call to Order
- II. Minutes from Previous Meeting
- III. Treasurer's Report
- IV. President's Report
- V. Executive Director's Report
- VI. Membership Committee Report
- VII. Young Lawyer Committee Report
- VIII. Standing Committee Reports
- IX. Foundation Update
- X. NJSBA Update
- XI. New Business (if any)
- XII. Old Business
- XIII. Adjourn



"Buzz" Mingin, Ph.D., Educational Consultant and moderator/presenter **Craig David Becker, Esq.**, Parents' Special Education Attorney.

CyberBullying was the topic of a recent CLE seminar at Tavistock. This timely and important program was noticed by the ABA Young Lawyer Division and a feature story about the program and participant reaction will appear in an upcoming issue of the ABA's Young Lawyer Division Newsletter. Program presenters included **William S. Donio, Esq.**, School District Attorney; **Jeffrey Brenner, Esq.**, Computer Forensic Investigator; **Kevin M. Costello, Esq.**, Civil Rights Attorney; **Gerald**

THE BARRISTER

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**ATTEND MEETINGS
AND FUNCTIONS!**

Nominations Sought for CC Bar Foundation Board of Trustees *Lawyers Strengthening our Community*

The legal profession is committed to helping others and to further that ambition the Camden County Bar Foundation (CCBF) was created in 1986 as the Association's charitable partner. Through a wide range of annual community service programs and projects, the Foundation provides joy, comfort and hope to members of our community who most need and deserve it, while fostering a greater understanding of the legal system.

If you enjoy making smiles happen, letting others know that there are people who care about them, and helping deserving law students find the financial resources necessary to complete their education, then you should consider taking a leadership position as a Bar Foundation Trustee.

We're looking for members who want to make a difference, who have creative and new ideas to expand and improve existing programs while developing new ones, who find satisfaction in helping others and who are interested in taking a leadership position.

If this is YOU, then please submit a letter of interest and resume to Bar Headquarters by Friday, May 3. You CAN make a difference!

Working Together . . . Lawyer Referral, Law Firms & Lawyers

Open Enrollment Begins for 2013-2014 Lawyer Referral Service Panel

Enrollment is now open for the Association's popular Lawyer Referral Service (LRS) for the coming year. Panel membership is open to any lawyer who meets the necessary qualifications. The new LRS Panel will begin on June 1, and will continue through May 31, 2013.

Members serving on the current panel must re-enroll for the new LRS year.

Each year, the LRS makes more than 5,000 referrals for callers with legal problems who are able to afford a private attorney to LRS Panel members; many of them fee generating cases. You can be a part of this growing venture that helps expand your client base through pre-qualified referrals for the cost of a good dinner at one of the area's fine restaurants. This is the only Lawyer Referral Service sponsored and operated by the Camden County Bar Association, and provides a terrific community service for individuals requiring legal services.

The annual registration fee remains only \$75 for those admitted to the New Jersey Bar for up to five years or \$150 for those admitted six years or more, and \$250 for attorneys who are not CCBA members. Please note that LRS panel members are subject to a fee sharing arrangement whereby attorneys are required to remit 10% of fees in excess of \$500 for all matters received from the LRS back to the Association. The fee applies to any referral received from the LRS and is payable when the participating attorney receives payment for services rendered.

A completed application, together with the appropriate enrollment fee and required original certificate of malpractice insurance coverage, must be returned to the Bar Association before any referrals can be made.

Applications may be downloaded from the Association's website, www.camdencountybar.org, or by calling Denise Whybark at Bar Headquarters at 856.482.0620. Questions about the LRS? Contact Denise by phone or via e-mail at dkw@camdencountybar.org.

Don't Delay, Renew Today!

Continued from Page 1

- Committees that offer opportunities to network with peers while shaping the future of your Association.
- Professional and social activities designed to enhance your law practice.
- An online Member-to-Member Referral service.
- Discounts on many legal products and services for you, your clients and your family members, and much more.

Now, more than ever, your membership in the CCBA provides the value-added benefits you need in today's economic climate.

Beyond the many tangible benefits of membership, you will also continue to enjoy the intangible benefits of supporting the CCBA. The Association has worked diligently since 1881 to improve the practice of law and Bench-Bar relations in Camden County, and to foster collegiality among its members. You, your profession, and society are better for the experience and the service you have performed.

Your CCBA membership supports these goals and benefits the entire community. Renew your membership, or join today, and support our mission to ensure that the Camden County legal community remains the finest in New Jersey.

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IN MEMORIAM

The Association was saddened to learn of the passing of the **Honorable Samuel L. Supnick, JSC, (ret.)**, on February 22nd at the age of 91.

Judge Supnick served as CCBA President in the 1973-74 year.

We extend our sincere sympathies and condolences to the family, friends and colleagues of Judge Supnick, he will be missed.

The Association was saddened to learn of the passing of **William F. Hyland, Esq.**, on March 2nd at the age 89. Mr. Hyland served as CCBA President in the 1960-61 year.

We extend our sincere sympathies and condolences to Mr. Hyland's family, friends and colleagues. He will be missed.

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NJSBA UPDATE

The Price of Admission

By Arnold Fishman
www.FishmanAndFishmanLaw.com

Enduring the “thousand natural shocks that flesh is heir to” gives one perspective and a sense of history—not because you learned it, but because you lived it. I can remember when (aside from the negligible cost of the electricity to power it) the only cost of watching TV was the purchase price of the set. Now that smarter heads than mine have figured out how to get their hands into our pockets to make us pay for the privilege of watching our own TV sets, and the choice of what to watch (with the plethora cable subscriptions and internet services) is mindboggling, my wife and I go out to the movies only during the interminable stretch between Labor Day and Memorial Day and only when we are in desperate need of a respite from the symptoms of cabin fever. However, just as I like to watch all of the NFL playoff games leading up to the Super Bowl, Temma and I try to see all of the motion pictures nominated as “best” in preparation for the Academy Awards. Since I am writing this in the week before the Oscars will be presented, we are in a frenzy trying to make up for lost time. (Tonight will be the third in a row of movie going—OMG!) Even with the senior citizens discount, the tickets are not cheap. But, as we are seeing only Academy nominated “best” films, the cost is well worth the price of admission. This cost-benefit analysis is a pervasive characteristic of human action, which brings me to the point of this article.

The cost-benefit analysis for becoming a lawyer has experienced a seismic shift. When I was grappling with the issue, tuition was cheap, and if you passed a bar exam, you got a job as an attorney. Since then, the cost of a legal education has skyrocketed, while the opportunities for the financial reward for attorneys have contracted. Jobs within the discipline are far from assured, and law school applications are at historic lows. Huge quantities of baby-boomer practitioners are on the brink of retirement, and the number of those in the pipeline aspiring to enter the profession is shrinking. At the

same time, the need for legal services is exploding. This would hardly seem like a propitious time to “up the ante”; yet, that is exactly what is going on. A committee of the New Jersey Supreme Court is poised to recommend to the Court that all candidates for admission to the Bar complete a minimum of 50 hours of *pro bono* legal services or other public service as a prerequisite to the practice of law in this State. The ostensible rationale for this suggestion seems to be to give “real life” experience to students and to instill a sense of duty to provide *pro bono* service during their careers.

The Board of Trustees of the NJSBA at its February meeting resolved to oppose any such proposal. We reasoned that citizens of this State, to whom *pro bono* services are provided, deserve and have a right to expect representation by knowledgeable, experienced, educated, licensed, practicing attorneys. Also, legal services provided by an inexperienced Bar candidate pose potential irreparable harm to the recipient and the public in general. Furthermore, law schools in New Jersey and throughout the country presently provide many clinical and public service programs, which satisfy the purported goals of the committee proposal. We were mindful that the New Jersey Supreme Court has imposed a requirement of mandatory *pro bono* upon all members of the Bar, and that the NJSBA produces programs and opportunities for service such as the Hurricane Sandy Response Program, Wills for Heroes, and the Military Legal Assistance Program. Notably, there is no evidence or data produced to demonstrate that mandatory pre-admission *pro bono* service would assist in the delivery of legal services to the citizens of this State. Finally, law school education is rigorous, costly and time consuming, and the imposition of this additional time commitment will disproportionately affect low income, older and/or “second career” individuals because it will conflict with their other obligations.

Your State Bar Association urged the Court to reject the proposal, to recognize and appreciate the extraordinary *pro bono* service provided by the Bar, and to work in conjunction with the NJSBA to identify any additional programs or services needed to guarantee the prompt and effective delivery of legal services to all the citizens of New Jersey.

Now is not the time to raise the price of admission!

Send comments to: arnold@fishmanandfishmanlaw.com



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Maybe, Just Maybe, if the Legal Fees are Deductible the Client will Feel Better (and even pay sooner)

By Martin H. Abo, CPA/ABV/CVA/CFE

Here's Abo's punch list of items you might like to discuss with that client concerning the deductibility of legal fees.

- Legal fees, depending on the factual circumstances and the ability of the client to meet the applicable legal requirements for deduction, will generally:
 1. be a deductible business expense;
 2. be one of three categories of deductible nonbusiness expenses;
 3. be a personal expense which is nondeductible;
 4. be a capital expenditure which is nondeductible, but which may be capitalized and subject to depreciation or amortization;
 5. be a deductible loss; or
 6. be some combination of the above.
- The Internal Revenue Code does not specifically address the deductibility of legal fees. Instead, they may be deductible as "business expenses" if they are paid or incurred in a trade or business. While a particular activity does not rise to the level of a bona fide "trade or business," if legal fees are paid or incurred pursuing an activity to generate a profit (i.e. such as an investment activity) the fees may be deductible as investment expenses.
- The IRS regulations state that expenses such as attorney fees "must be reasonable in amount and must bear a reasonable and proximate relation to the production or collection of taxable income or to the management, conservation, or maintenance of property held for the production of income."

- "Trade or business expenses" will typically be more beneficial than deductions for investment expenses because of the numerous percentage limitations, alternative minimum tax (AMT) or other tax law restrictions. A taxpayer is engaged in a trade or business while acting as an employee. Any legal fees incurred relating to his job or business activities are deductible. It is preferable for a legal fee to qualify as an expense that is related to a "trade or business" other than being an employee, because legal fees that are related to the trade or business of being an employee, are considered "miscellaneous itemized deductions," which are subject to a 2% floor and the overall limitation on itemized deductions. Again, taxpayers subject to the AMT are precluded from deducting certain expenses, even deductible legal fees that would otherwise be allowable as miscellaneous itemized deductions.
- One is not engaged in a trade or business if he engages in investment-management activities on a full-time basis, although such expenses, including legal fees, may be deductible under the rules for expenses incurred for the production of income. Note that legal fees paid for the management or conservation of real property held in connection with a taxpayer's principal residence, vacation home or hobby will not be deductible. If the client vacates the property and converts it to a rental property, legal fees paid

Continued on Page 21

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 - Labor & Employment Law Section of the New Jersey Bar's seminar "Use of Experts in Employment Cases"
 - The National Business Institute (NBI) at their two days of seminars entitled "Accounting 101 For Attorneys"
 - NYC, NJ, Camden County and Chester County PA Bar seminars on "Buy-Sell Agreements" (includes our 122 point checklist on buy-sells)
 - The Sharper Lawyer's seminar entitled "Practical Strategies to Improve Your Law Firm's Bottom Line"
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 - IRS Audit Technique Guide on Attorneys and Law Firms
 - Checklist for those serving as Executors
 - Sample Reconciliation of Income Tax Return with Actual Disposable Income

To learn more or to receive any of the above, please contact by phone, fax or e-mail:

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YOUNG LAWYER CORNER

Goings On

By Michael J. Dennin
mdennin@ciecka.com



YOUNG LAWYER CORNER

Now that we are thawed out, the Young Lawyer Committee is busy working and planning. The springtime is so refreshing you want to be out and about. This time of year helps recharge our batteries and gets us working even harder. We have several events happening in our group.

This past month we heard from Dennis Freedman from the Association's Partner in Progress Bire Financial Group regarding the various aspects of disability insurance and policies. Young attorneys often do not appreciate the need for disability insurance. Further, jobs are scarce and it takes a while to become stabilized as an attorney just starting out, or in the first five plus years of practice. Considering many of us have significant student loans, mortgages and associated bills, protection against loss is important.

In my practice I represent individuals injured in various types of accidents, and disabled persons in general. Injuries and disabilities destroy people's lives and most time folks do not have private disability insurance. One thing I do suggest is that in terms of auto insurance is to obtain the right to sue on your policy as well as high limits and unlimited maximum income continuation benefits. Those are monetary wage substitutes, up to \$700 per week for life depending on the policy. This is a type of auto injury disability insurance that is reasonable. I diverge.

The next event was volunteering and serving at Cathedral Kitchen. The Kitchen serves homeless and foodless individuals in the Camden

area. We are provided the opportunity to don hairnets, aprons, gloves, and smiles for a few hours twice a year at a great facility. At every lunch and dinner there are 8-10 volunteers who prepare the food, set tables, clean, clear and reset the dining area as well as serve food and make everyone feel at home. The food is delicious and the staff and employees are tremendous. Over 400 people are served in any one sitting. The love for people is evident and genuine. We really respect their mission, and the facility is a true bright spot in the City and County.

We again held our Easter party at the Anna Sample House in Camden. While I have written about the Anna Sample House before, I cannot fail to mention what a great time this is. We look forward to going back and hosting our magician, serving pizza, candy and dessert, decorating and hearing the children's laughter at this time of year. The facility is a home for homeless women and their families. The party provides a time for them to see their own magic show, fully catered with the finest pizza and snacks one can consume. The kids are beautiful and love the magician and his collection of animals, tricks, and a combination of both. We can assure you no fish or birds were harmed in the making of the show!

CLE events are heating up and the Bar is providing options for many practice areas. There is nothing better than the comfort of seeing your peers and having the personal feel of the presentations. Our CLE programs are open and lively. They provide education and networking opportunities. If you are interested in presenting a seminar contact us at the Bar and we will do our best to facilitate the program. CLE tuition supports the Association's programs and activities the CCBA provides throughout the year. We are very fortunate to be members of such a large yet quaint group. Your membership and participation is what makes us an Association.

While the events are too numerous to list, I suggest you make sure you are on the bar's email list and that you check the website every week for upcoming events. Join a committee and come to an event. Come to our Young Lawyer meetings, which are held at Bar Headquarters on the first Tuesday of every month beginning at 12:30. Come to a charity event or a CLE. Attend a happy hour or social. Call or email me with any questions about becoming involved. As you can see, there is plenty to experience at the Association, and we welcome you with open arms.

Join us for . . .

Cocktails & Conversation

Bench-Bar Cocktail Party

6-8 pm
Wednesday, May 8th
Caffe Aldo Lamberti's

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LAW PRACTICE MARKETING

Early 2013 is Great Time to Set Practice Goals: Learning to Close More Sales (Part 3 of 3)



By Kimberly Alford Rice

In the first two installments of this article, we discussed valuable prospect presentation and closing techniques to win more business. The last installment of this article will highlight critical closing tips when you have been “invited to the party” and how to use rejection to grow your practice.

Prepared to Win

There are critical steps that every lawyer must integrate into her/his business development initiatives in order to advance to the next step in the sales process.

First, remember that closing starts the first time that you meet someone—wherever that may be... in the courtroom, at a conference, or even on the Little League field. Many individuals do not consider the larger picture of the possibility that a potential client may be standing right beside

you and you do not even realize it. If not a client, then a referral source. Treat every encounter as an opportunity to learn about someone’s business and how you may be potentially helpful. Again, a mindset shift.

Listen to Win

It is never more critical to listen than when in selling situations. A misstep lawyers (and all business professionals, really) make is they misread a situation by talking too much...too much about all the important matters they have handled, the amazing results they have achieved, etc.

BIG TIP: The *only* thing a prospective client cares about is what you will *do for them*. Learn as much as you can about your prospects and their business. Identify their needs and prepare for your meetings accordingly. **Practice** (yes, this requires some “pre-sales meeting” mirror work) your best moves and go into the meeting

with information that you know will win them over.

It is critically important to prompt the prospect to talk more than you. You can do that by using the research you have done on the prospect’s business, its competitors, and other information by using it to frame your questions and presentations. Remember, asking open-ended questions (refer to installment two of this article series) is one of the best ways to prompt dialogue with an individual.

Take the Lead on Follow Up

A vital component to business generation is to create an effective follow-up plan. Good follow up enables you to fully capitalize on the opportunities that are already available to you from a myriad of business development encounters such as trade events, meetings and seminars.

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CRIMINAL LAW

The Mistaken Imprisonment Act

N.J.S.A. 52:4C-1. et. seq.

By Kenneth D. Aita

The Federal Court has just wrapped up the criminal cases against a rogue gang of Camden Police officers who were responsible for various criminal acts committed against a number of Camden City residents. These five officers, including a sergeant, were responsible for illegally arresting and incarcerating a very large number of individuals in the City of Camden. The corrupt officers planted evidence, stole money, burglarized and ransacked homes looking for money, and perjured themselves repeatedly in court. It seems that these officers were motivated by pure greed, a sense of power and entitlement, and their own warped and misguided brand of street justice. Three of the five officers entered guilty pleas, one was convicted after trial, and one was acquitted. All convicted officers were sentenced to various prison terms ranging from eight months to 10 years. These cases have undermined the community's trust of the police and called into question the entire criminal justice system.

Starting in December 2009, this corrupt behavior led the Camden County Prosecutor's Office to take the inconceivable and undeniably rare step of requesting that the court dismiss over 200 criminal cases involving these officers. Those who were incarcerated were released from state prison and county jail as a result. The officers were calculating in choosing their victims by targeting vulnerable individuals that no one in authority would believe. The victims were singled out because of their prior criminal records. Most of these victims repeatedly complained to their public defenders, police, and the court, only to have their claims of innocence fall on deaf ears. It turned out they were telling the truth as admitted by the corrupt officers in their guilty pleas. It is hard to imagine the frustration these victims felt while sitting in jail for crimes that they knew they didn't commit. In addition, they were forced and coerced to plead guilty under duress when faced with the proposition of the officers maintaining their lies in court and the threat of very long prison sentences upon conviction after trial. Most did not have the financial means to post bail and many of the plea bargains allowed for release from custody well before the case would even go to trial.

This corrupt behavior was not without widespread consequences. There has been an enormous ripple effect on the courts, the city, the state, and society as a whole. Eighty-eight of the victims of these officers have filed civil suits in Federal Court for damages related to a violation of their constitutional rights pursuant to 42 U.S.C. sec. 1983. Those matters were consolidated and recently settled by the city.

Many have filed claims in Superior Court pursuant to N.J.S.A. 52:4C-1, et. seq., The Mistaken Imprisonment Act, a very seldom used, and relatively unknown statute, which entitles wrongfully incarcerated persons to monetary compensation by the State for time spent in custody. It is a remedy we should all be aware in order to ensure that we are pursuing all possible avenues of recovery for our clients should we be presented with a wrongfully convicted person. One cannot imagine a person more deserving of a monetary recovery.

In the interest of brevity, I'll outline the basics. Pursuant to N.J.S.A. 52:4C-2, the suit is required to be brought against the Department of the Treasury in Superior Court. Pursuant to N.J.S.A. 52:4C-3, the claimant must establish all of the following elements by clear and convincing evidence: (a) That he was convicted of a crime and subsequently sentenced to a term of imprisonment, served all or any part of his sentence; (b) he did not commit the crime for which he was convicted; and (c) he did not by his own conduct cause or bring about his conviction.

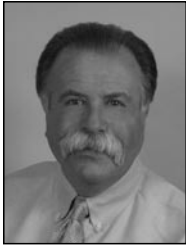
When analyzing the statute closely, a few things stand out. First, a claim must be established by "clear and convincing evidence." This is a much higher standard than a typical civil case and quite possibly an insurmountable hurdle.

The statute also requires a "conviction." Pre-trial detention without a conviction does not apply. If the claimant is charged, incarcerated and ultimately is either found not guilty, or the charges are dismissed for some other reason, i.e. no probable cause, invalid search, etc., that would not permit a claim. Under that scenario, the individual may have a suit for a violation of civil rights pursuant to 42 U.S.C. 1983, but the Mistaken Imprisonment Act would not apply. A conviction is an absolute necessity.

There are two, and only two, possible ways to get a conviction. One way would be to go to trial and be found guilty by a jury or judge. The other way would be to enter a guilty plea and be sentenced by the court. Given that those are the only possible events that could lead to a conviction, it would seem logical that there is really only one scenario that would permit recovery: when a claimant goes to trial, is found guilty, and is subsequently sentenced to a term of incarceration by the court. Think of the case where someone is exonerated many years after a conviction based on newly discovered evidence. For example DNA evidence, an unknown witness, etc. In practical terms, even then, how would one actually prove by *clear and convincing* evidence that he was not guilty of the crime when the claim is brought many years after the event? A difficult, if not impossible, hurdle to clear.

Despite the fact that it is arguable that a claimant must maintain his innocence throughout the criminal proceedings to bring a suit, the statute does not require it. The other way to get a "conviction" is by pleading guilty. This scenario would seem to preclude recovery under the statute due to the second and third elements of the statute. As required by the statute, the claimant must also prove (1) that he did not commit the crime for which he was convicted, and (2) he did not "by his own conduct cause or bring about his conviction." How can one prove by clear and convincing evidence that he did not commit the crime he was convicted, and did not bring about his own conviction, when he in fact entered a guilty plea under oath to the charge? This is an interesting quandary not easily reconciled with reality, but is an issue to be considered by the fact-finder. A guilty plea alone is not fatal to the claim.

The one scenario not contemplated by the statute that may apply is the situation involving the victims of the Camden City Police corruption. In these corruption cases, most individuals entered guilty pleas, thereby allocuting under oath that they committed the crime. The convictions were later overturned, and the charges dismissed, but the guilty pleas still exist on record. Many of the victims of the police corruption claim to have only entered guilty pleas to minimize risk of being convicted at trial based on the perjured testimony of the officers. In a perfect



SPINNING MY WHEELS

By: Andrew Kushner

SHO Time

Sports cars, exotic coupes and high end European sedans are fun to drive and make a statement that you have arrived; sometimes that you have arrived with little to show but a much reduced bank account. Not to say that exotic or high end machinery is outside of my bucket list, of course. However, most American drivers live their lives of quiet desperation in something quite a bit more pedestrian than, say a Lamborghini Murcielago. GM, Chrysler and Ford have always produced the family hauler even if those brands have been expanded to include Japanese, Korean and some remaining Europeans.

In the mid 1980s Ford introduced the Taurus, a then “midsize” family sedan with cutting edge rounded shape and just enough glitz to sell in Peoria. Shorty thereafter Ford did something surprising and unusual for a domestic manufacturer of the day: They chose to offer the Taurus as a hot rod model even adding a manual transmission option. To power this front driver Ford called in a very off beat partner to perform the engine development. Yamaha. Yes, that Yamaha. That Japanese motorcycle maker was tasked to design and produce a V8 engine with a 7000 rpm redline that put out 220 bhp. While that power can be produced by a normally aspirated four cylinder engine today, this was big news in the 80s. They called this model the “SHO.” Over time the Taurus grew in size and weight and the SHO would ultimately shed its manual transmission option in the latest version. The fourth generation SHO was introduced in 2010 with a direct injection 3.5L twin turbo charged six cylinder engine which, for 2013 produces 365 bhp and receives AWD as standard equipment.

A short but telling drive in the new SHO was very instructive about Ford’s continuing attitude towards product and execution of their cars. First thing about the SHO is that it is big. Big and brawny, substantial in a way that many sedans today are not. I suppose that the car is a bit higher due to the AWD but I am not quite sure whether my 5’10” height was that much higher than the roof line. That is not necessarily a negative but there is no mistaking this for some delicate machine that requires gentle touches. The black on black version I had the pleasure of driving was equipped with what I expect was almost every option package available. The seats are “climate controlled”—perforated leather that both heats and cools the body. While massage is an option, I don’t know if my car was so equipped. A special SONY audio system and Ford’s MyTouch was part of the package and most of the center dash stack was operated either through the large touch screen or touch sensitive buttons embedded into a glass fascia. The steering wheel had an enormous number of controls, including left and right directional buttons to change the dash displays on each side and then to execute various commands. This was in addition to the usual radio and cell phone controls. Part way through my test drive I pulled the car over to the side of the road and took about five minutes to try to figure out all of the mysteries that the electronics held without assistance of the manual. I was only partly successful but I am sure that with time and a little familiarity I would be very comfortable. Technology not only abounds but it controls.

The audio/cell phone interface/MyTouch systems aside, the more mundane controls were easily intuited and adjusted so that I could slip the gear shift lever into D and proceed. Properly placed gear shift levers were positioned on either side of the steering wheel for up and downshifting of

the six speed automatic. At tip in, the car produces an almost V8 rumble which the ear perceives as occurring somewhere outside of the vehicle but close enough to appreciate the sound without being intrusive. Deeper engagement of the gas winds up the engine and the turbos but the sound is never disturbing. In fact, that is what is most common about this car. Although the SHO possesses all of the usual pieces which would make this a hot rod sedan, the car is so well insulated that the driver is never annoyed or bothered by the sounds. This is not Lexus type of quiet, mind you. The driver knows that something wonderful is going on under the hood, just no need to shout about it.

The largest problem I found in piloting the SHO, whether on the highway or on more local roads, was keeping the car at a reasonable, unreasonable speed. I found that once on Route 295 I could only keep the SHO under 80 mph by studiously looking at the speedometer regularly. There was little wind, tire or engine noise to cue me that we were closing in on 90 mph. Engine speed was 2200 rpm. Straight line performance was exceptional and, as I told Owner Don Slipp of Winner Ford in Cherry Hill who was kind enough to provide the SHO to me, this was a car that I could easily do 400 miles in a day without tiring. But there is no getting around the fact, again, that this is a big car. It is obedient in maintaining composure on back roads but its heft is always felt. I think that is part of the charm of this car. It is not a sumo wrestler dressed in a tutu. It is a brawling hauler that demands attention be paid.

I did take issue with a couple of small things and, perhaps, one big one. The luxury aspect of this car seems to demand materials that match the intent. To that end, the materials are of good quality. Soft touch door and dash materials and high line trim abound. The leather was soft and comfortable although the seats could have used more lateral support. Perhaps that would be out of place for the target buyer though. One of the things that luxury car makers seem to love to employ is suede-real or otherwise-in places that you just know won’t last. The SHO wraps part of the steering wheel in this material and I know after six months of sweaty palms the material is going to feel like cheap rayon. Of course I could be wrong on that score. Of more substance is the price. The base SHO (which admittedly carries with it the AWD, engine and much of the electronic wizardry) begins at \$40K. The version I drove was above \$47K. There are, I suppose, two ways to look at this price point: in comparison or in absolute dollars. In comparison to say, a BMW 528xi with all wheel drive and *some* of the options and packages on the SHO (it is difficult, if not impossible to match the content of the two) the BMW listed out at about \$62,000. On the other hand, I don’t know that Ford necessarily expects a BMW customer to cross shop the SHO. Certainly there would generally be a similar driving experience but, well, hey, why wouldn’t you want to spend the extra \$15K plus for run flat tires and the roundel on the hood and trunk? So, that is the mission that Ford has to fulfill. To educate the buying public that they can do without the *cachet* by leaving a lot of cash in their pockets. Of course there is a good part of this country that would not shop a BMW store under any circumstances and to those who can spend the better part of \$50K the Ford SHO awaits. I am happy that American manufacturers are again paying attention to product, technology, as well as style and those factors will be the ones that keep a company healthy and profitable. Bravo Ford!



How to Construe an Indemnity Clause, With the Rules or Without Them

Sayles v. G&G Hotels, Inc. (App. Div. Jan. 16, 2003)ⁱ

By William H. Tobolsky

When a claim comes over the transom in a commercial setting, usually someone rescues a dusty indemnity provision from a filing cabinet a page and a half or more, 9 point type and single spaced, and usually poorly adapted from a form book. Yet in the end this “boilerplate” is often what determines the practical outcome for your client. There are special rules of construction, even “bright line” rules, regarding indemnity clauses, and, of course, ways to get around them.

In *Sayles v. G&G Hotels, Inc.* the Appellate Division was faced with a fatal accident and an indemnity provision regarding claims arising from the indemnitee’s own negligence which was ambiguous and “unartfully” drafted.

The Facts

In 1995, Howard Johnson International (HJI) licensed G&G Hotels (G&G) to operate a hotel in Atlantic City under the Howard Johnson name. G&G was the independent owner and operator. The licensing agreement included an indemnity provision.

In 2006 two hotel patrons fell through a third-floor window of the hotel, killing one and seriously injuring the other. In consolidated litigation, the injured plaintiffs alleged negligence against G&G and HJI. HJI cross-claimed against G&G for relief under the disputed indemnity provision. The trial court granted summary judgment in favor of HJI, holding that the indemnity was “unartful[ly] drafted and “not a model of clarity,” but enforceable against G&G as a matter of law.

On the eve of trial the defendants, G&G and HJI, settled plaintiffs’ negligence claims.

G&G appealed from the trial court’s entry of summary judgment in favor of HJI enforcing the indemnification. In *Sayles* the Appellate Division affirmed the entry of summary judgment.

The indemnity clause at issue reads:

[G&G shall] *indemnify, defend and hold [HJI] harmless, to the fullest extent permitted by law, from and against all Losses and Expenses, incurred by [HJI] in connection with any...claim... relating to or arising out of any transaction, occurrence or service at*

or in conjunction with the operation of the Facility, any breach or violation of any contract or any law, regulation or ruling by, or any act, error or omission (active or passive) of, [G&G], or any of their respective owners, officers, directors, employees, agents or contractors, including when the active or passive negligence of [HJI] is alleged or proven. [Emphasis provided in Opinion.]

G&G’s Arguments

G&G argued that the indemnity was unenforceable because it was “not unequivocal” regarding the plaintiffs’ claims arising from HJI’s alleged negligence. G&G argued that this provision was unenforceable on its face because it was “equivocal and ambiguous” and “allows for at least two plausible interpretations.” The two plausible interpretations proffered by G&G were:

- The clause which provides for indemnity to HJI applies to all situations in which losses or expenses are incurred pursuant to any portion of this indemnity clause, even those situations in which HJI was negligent. Boiled down, HJI is indemnified even if it is negligent and G&G is not.
- The ending clause of the first paragraph, providing for indemnity to HJI even if it was negligent, applies only to the clause immediately preceding it, which applies only if G&G itself is determined to be negligent. In simpler terms, HJI is indemnified for its own negligence only if G&G is determined to be negligent as well.

Naturally HJI stood by the first interpretation. Just as predictably, G&G argued that the second interpretation reflected the true intention of the parties. Moreover, G&G argued that any ambiguity should be construed in its favor, especially an ambiguity related to the language of an indemnity to HJI for HJI’s own negligence.

The Accepted Rules of Construction of Indemnities: Kieffer v Best Buy

The first and foremost rule of interpretation of an indemnity is stated in *Kieffer v. Best Buy*, 205 N.J. 213, 224 (2011)ⁱⁱ is simple: to determine the parties’ intent.

The objective in construing a contractual indemnity provision is the same as in construing any other part of a contract — it is to determine the intent of the parties. *Mantilla v. NC Mall Assocs.*, 167 N.J. 262, 272, 770 A.2d 1144 (2001) (citation omitted). The judicial task is simply interpretative; it is not to rewrite a contract for the parties better than or different from the one they wrote for themselves. See *Zacarias v. Allstate Ins. Co.*, 168 N.J. 590, 595, 775 A.2d 1262 (2001) (citation omitted). Thus, we should give contractual terms “their plain and ordinary meaning.” *M.J. Paquet, Inc. v. N.J. Dep’t of Transp.*, 171 N.J. 378, 396, 794 A.2d 141 (2002), unless specialized language is used peculiar to a particular trade, profession, or industry, see *VRG Corp. v. GKN Realty Corp.*, 135 N.J. 539, 548, 641 A.2d 519 (1994) (citation omitted); see also *N.J.S.A. 12A:1-205*. If an indemnity provision is unambiguous, then the words

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Back in the Day



By Hon. Richard S. Hyland (ret.)

From time to time I compose a "gratitude list," and my first entry is always my great parents who, inter alia, raised six children during the Depression, all of whom have had successful careers. Professionally, I'm grateful for being able to practice here in NJ and not PA I'm reminded of this when learning of the recent indictments of nine Philadelphia Traffic Court Judges and other judicial scandals ranging up to the PA Supreme Court, where a Justice and her family are involved in a case of campaign financing abuses. Justice Melvin and her sister (Yes, her sister!) were convicted of corruption and conspiracy on Feb. 21, 2013, stemming from electioneering efforts. Also, a District Court Judge was found to have dismissed her own traffic tickets on the Court's computer during the same week.

Some persist that the election of judges gives the public a voice in their selection. In Philadelphia, the recommendations of the media and Bar Association as to the merits of the candidates are of no moment. Rather, success depends more on: (1) the position on the ballot at or near the top by lottery drawing; (2) sufficient funds for "ward heelers" to insure "bullet" voting on election day and (3) more money for TV ads always claiming the candidate is "tough on crime" with the sound of clanging jail doors in the background.

My first semester at Penn Law School included Civil Procedure where we were told that claims in PA were either in trespass or case, and if you pleaded the wrong one it could be fatal. Fortunately, in 1948 our Supreme Court essentially adopted the Federal Rules of Civil Procedure. My professor was the brilliant A. Leo Levin who skipped over this PA pettifoggery, and took us helpfully and humorously through the Federal Rules. I still remember some of his gems. For instance, in our morning class after Russia had launched "Sputnik" into space hours before, he used that to discuss *in rem* jurisdiction.

In the days before multiple choice bar exams, I don't remember that any of us took both essay exams after graduation, so I can't say which was supposed to be harder. However, I had a friend who "choked up" when taking our exam and flunked several times, and to change his luck he took the PA exam. Afterwards, he thought he had flunked again, but was ecstatic to learn he passed. It seems the powers to be concluded that the poor showing by minority applicants was due to the exam being skewed. The remedy was to pass virtually everyone who sat. Is that not a great judicial system or what?

Although I never had any contact with the PA Supreme Court, a bizarre decision it made caused me grief on my honeymoon. In the week before I was married, I had concluded a major trial seeking to enforce restrictive covenants against my client's departed insurance agents. In my initial research, I discovered a PA Supreme Court case decided a few years earlier which was identical factually to my case. I used it to obtain injunctive relief and rode it throughout the proceedings and in my trial brief. We honeymooned in New England and while in Vermont I called my office to check up on things. I was shocked to learn that the judge sent a letter stating that my case had been reversed. I was bewildered because I had as usual, diligently Shepardized all of my cases and there had been no change. I told my beautiful bride I had to leave her on that perfect Vermont summer day and track down the nearest law library and applicable Shepard's (No Westlaw then). She told me later that she learned I was very dedicated to my clients, but a little "crazy" and that the law is indeed a "jealous mistress."

When I got back, I again checked the latest Shepard's only to find no change, and according to them it was still good law. Thankfully, the judge accepted my explanation and ruled in my favor based on my citation of good NJ law. When I caught up to my adversary, he explained that when he was attending a deposition in Philadelphia, he overheard the lawyers discussing my case and marveling over the fact that the Court on its own motion had reversed itself. He obtained the Order of reversal and I found out the Court had never filed it on its docket so that Shepard's was never the wiser. This was my wife's first taste of being married to a busy lawyer and there was more to come.

When going to Court, I would spread my file out on our large kitchen table and review my preparation in the early hours. I would ask her and the children to make themselves scarce. One day I was almost to the Courthouse for a jury trial and realized I had forgotten my suit jacket. I doubled back to home and startled her on my return. Now that I'm still doing arbitrations, I'm back to the kitchen table when writing opinions.

In closing, my wife is on my gratitude list for putting up with me for 44 years!

Please send any comments or feedback to rhylandatlaw@aol.com

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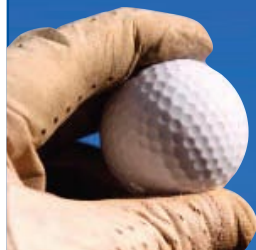
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PRESIDENT'S PERSPECTIVE

by Brenda Lee Eutsler

Life's Unexpected Pleasures

As my Presidency winds down, I have been wondering what I will do with my "spare" time after June 1st. There are many possibilities.

I could spend more time with my hubby, a/k/a Jimmy Herman, who has indulged my absences and supported my bar activities for many years. In fact, Jim and I will be heading to Paris on June 1st to celebrate our 25th anniversary which occurred on February 14, 2010 (a bit overdue). I could work on my golf game (do I even have game?) so I can meet the challenge of playing at Tavistock Country Club at the Foundation's Autumn Scramble on September 9, 2013 (mark your calendars). I could take more walks, use my treadmill more often and dust off my weights in order to tone this aging body (no easy task).

I could join a book club and immerse myself into the fictional lives of persons whose days and nights are filled with intrigue, suspense, romance and humor. Admittedly, the storyline of a feuding family in a probate litigation matter can often be very compelling and extremely entertaining, a "reality show" in the making. However, it may be time for me to expand my entertainment beyond reading probate appellate decisions.

There was one possibility which I would never have imagined was a possibility at this point in my life. But, life is filled with unexpected pleasures, and my time after June 1st will be spent preparing for the birth of my second child!

Overcoming the shock of my OB-GYN giving us this news in mid-February (just before our anniversary) was not easy for Jim and me. We had my doctor re-test me three times before we would accept the news. I commented to her that "I thought menopause was nature's contraceptive," to which she responded, "you're as naïve as a pregnant teen." My doctor expressed concerns about me carrying a child at my "mature" age but she is confident that if I take it easy (what does that even mean?), and rid my life of time demands and stresses, I should have a good pregnancy and a healthy baby.

Now that reality has set in, Jim and I are ecstatic. Even though he did not say it, I sensed Jim was pleased that my due date is not until mid-September which gives him the entire summer to fit in as much golf as possible. He has assured me that next year, he will walk the golf courses with baby in tow (yeah, right).

The one major obstacle which is going to be most difficult for me to overcome is wearing flat shoes! My doctor has admonished me about wearing heels, particularly when I get to my second trimester.

There are very few people who have ever seen me in anything but heels. Sure, I have sneakers and walking shoes for down time but for work and evening, it's always heels. When you are 5'1" (almost), heels are a necessity. I know this will sound crazy but one of my burial instructions is that I must be buried in my highest heels—no little white slippers for me. My BFF is well aware of this directive and she is responsible for making sure that Jim abides by it. Otherwise, as I have told her on more than one occasion, "I will come back to haunt you!"

So far, no weird cravings and my baby bump is easily hidden under my business suits. Jim and I are taking it one day at a time. Brian is adjusting to the prospect of having a sibling 26 years his junior. We are all very excited about the future.

Who would have thought that Kate Middleton and I would be having babies in the same year. Life's unexpected pleasures!!!!

Continued on page 19



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WINE & FOOD

By Jim Hamilton



There is a lull before a storm of upcoming wine tastings so I thought it might be time to talk a little about accessories for the wine you purchase. There are catalogs devoted to wine paraphernalia of mostly doubtful utility. However, there are a few essential things one simply cannot do without in order to enjoy most wines. Among the first (after disposable income, of course) is a corkscrew.

Notwithstanding the increasing use of screw cap closures (yeah!), the most common way of preserving a wine's vitality is the cork. Yes, they can be synthetic, although after an initial surge of interest, they remain a minor player. Whether real or artificial, when a cork is used to keep the wine in the bottle, it needs to be removed to enjoy the wine within. Probably the most common removal device is the one used by most wait staff folks at restaurants, often called a waiter's or sommelier's corkscrew. Whether you purchased your wine at the restaurant or brought it there (yeah #2), "professionals," i.e. people paid to serve you your wine, typically employ this type of corkscrew, and since most are inexpensive and compact, their widespread use is understandable. Unquestionably, experienced waiters or sommeliers will handle the device effortlessly. However, many times the leverage required to pull the cork can result in the cork snapping or fragmenting or otherwise result in a frustrating experience.

Alternatives to waiter's corkscrews exist that, while often pricier, can be easier to use. One leading brand is Screwpull. While there are various models, a versatile one is the travel Screwpull. This involves placing the spiral screw (a/k/a work or augur) through a fork-like base and turning a handle to allow the spiraling screw to penetrate the cork. As you twist or spin the handle, the screw goes in and the cork comes out. I keep a two piece, fold-up model in my wine bag and use it frequently. Many is the wait person who, seeing how effortlessly a cork is removed using a Screwpull, expresses envy and laments being required by the restaurant to use the traditional waiter's device.

For home use, a lever pull is handy to have. While there are many versions of this device, Metrokane's Rabbit is among the most popular. One simply removes the foil (or not—the leverage usually suffices to extract the cork through the capsule) and like an old well pump, pushes down to insert the screw and then lifts the handle up, muscling the cork from the bottle. Repeating the action will free the cork from the screw.

Whether you are old school (including the "wing" corkscrew—usually chrome), new-fangled or go electric with one of those rechargeable cork extractors where one puts the mouth of the device over the bottle and pushes a toggle button to lift out the cork and then again to unscrew the cork from the screw, there is another corkscrew you should consider owning. The so called

Ah-So is a simple device consisting of two thin metal blades of different lengths attached to an open, rectangular shaped pull handle. It can take time to develop an Ah-So aptitude, but believe me, for stubborn corks, there is no substitute—indeed, there often is no alternative. Corks, i.e. the ones made from tree bark and not chemicals, can deteriorate, especially with age or improper storage. If your regular corkscrew causes the middle of the cork to crumble, gaining insufficient traction for extraction, how can you remove it? Well, one way would be to pick it to death until you drive the remains into the wine and then pour using a filter to avoid having cork dust with your wine. Or, you can pull out your Ah-So and remove that stubborn cork by the sides. You insert the longer of the two blades between the outer edge of the cork and the inner edge of the bottle neck. Wiggle it in until the shorter blade has reached the insert point opposite the other blade. Engage the shorter blade as you did the other one and now rock the Ah-So back and forth, longer to shorter blade, until you force both blades as far into the neck as you can. Once you have adequate depth, you then rotate the Ah-So in a clockwise and/or counterclockwise motion while gently applying a pulling force to ease the cork out of the bottle. The Ah-So can be used on perfectly intact corks as well, but the alternatives usually are easier. However, it can be a wine saver when properly used on a difficult cork. However you open your bottle—enjoy it!





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Continued from Page 8

Preparation:

- Organize the follow up before the meeting. Who in the group will take the lead, what kind of follow up will be taken, when and how? May seem obvious but how many times have you “intended” to follow up and then didn’t because “life just got in the way.”
 - Calendar follow up with prospect. Often, a phone call is the preferred manner of initial follow up (though it is best to actually ask prospect their preferred method of communication). If you reach voicemail, leave a detailed message that you are eager to learn about any decisions the prospect may have made.
 - During a call, be sure to mention a specific date/time you will follow up again and request that if this time does not work for the prospect, they

have their assistant follow up with you for a better date/time. This reduces the back and forth of actually speaking with the prospect.

Make Rejection Work for You

If you do not win a proposal or are not awarded new client work, do not be discouraged. Below are some suggestions for pressing through initial rejection:

- If another firm has been selected, do not cross this potential work off your “new business target list.” Instead, reach out to your main contact in 3-4 months. Remind your contact that you still look forward to working with her/him sometime in the future. You may politely inquire if she/he is satisfied with the level of service and work product she/he is receiving from the new firm that was retained.

- Keep prospects to which you have submitted proposals on your “contact” list and make sure to follow through with them several times a year. Plot it out on your calendar immediately after learning the results of legal services selection.

The Sum Game

Winning work from existing clients is more challenging than ever. Landing new work from new clients requires a smarter approach with innovation and extra effort. And, client retention becomes even more critical to maintaining a pipeline.

Being a rainmaker is not for the faint hearted. Get serious in 2013 in building and growing a client base and immerse yourself with the proper tools to help you be successful. These sales tips are just the beginning, but it’s a start.

How to Construe an Indemnity Clause, With the Rules or Without Them

*Sayles v. G&G Hotels, Inc. (App. Div. Jan. 16, 2003)*ⁱ

Continued from Page 11

presumably will reflect the parties’ expectations. See Zacarias, supra, 168 N.J. at 595, 775 A.2d 1262.

However, there are certain special rules which apply to the construction of indemnity clauses. First, any ambiguity is to be construed against the indemnitee.

If the meaning of an indemnity provision is ambiguous, the provision is “strictly construed against the indemnitee.” Mantilla, [v. NC Mall Assoc.] supra, 167 N.J. [262] at 272, 770 A.2d 1144 [2001] (quoting Ramos v. Browning Ferris Indus. of S. Jersey, Inc., 103 N.J. 177, 191, 510 A.2d 1152 (1986)).

Ibid. The reasoning is two-fold: 1) Since a party is ordinarily responsible for its own negligence, shifting liability requires “express and unequivocal language.” Ibid., c.f. Marshall v. Klebanov, 188 N.J. 23, 37 (2006) (statutes in derogation of the common law are to be strictly construed). Secondly, since under the American Rule each party bears its own expenses of litigation, an indemnity for litigation expenses requires similarly express language. Ibid.

Finally, and perhaps redundantly, an indemnity clause purporting to shift liability for one’s own negligence to an indemnitor is especially narrowly construed. Ramos and Azurak, cited by the Sayles court, impose a “bright line” rule requiring “explicit language” to include losses within the scope of the indemnity if they arose from the proposed indemnitee’s own negligence. Azurak v. Corporate Property Investors, 175 N.J. 110, 112 (2003); Ramos v. Browning Ferris Indus. of S. Jersey, Inc., 103 N.J. 177, 191 (1986).

It appears that a “plausible” interpretation of G&G’s indemnity could be that found in alternative #2, above, that the indemnity for claims arising from HJI’s negligence are limited to those where G&G is also negligent. It’s a strained or interpretation, but a colorable one nonetheless, colorable enough to dim the Ramos “bright line.”

Applying the black letter principles of construction above, it would appear that any ambiguity in the indemnity, especially regarding claims arising from the indemnitee’s (HJI’s) own negligence, would preclude a finding that the relevant language is “unequivocal” or “express.” As a result, the indemnitor (G&G), would win.

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Continued on Page 19

VERDICTS OF THE COURT

Superior Court of New Jersey

VERDICT: Mistrial (2/4/13)
Case Type: Auto Negligence
Judge: George S. Leone, J.S.C.
Plaintiff's Atty: Andrew Ballerini, Esq.
Defendant's Atty: Raymond Danielewicz, Esq.
L-5306-10 Jury

VERDICT: Damage Verdict Against Defendant: \$163,984 (2/6/13)
Case Type: Whistleblower
Judge: Louis R. Meloni, J.S.C.
Plaintiff's Atty: Latonya Tull, Esq.
Defendant's Atty: Ivo Becica, Esq. and Rema Razhba, Esq.
L-1224-11 Jury

VERDICT: No Cause Liability Verdict: Defendant 40% Liable, Plaintiff 60% Liable; Damage Verdict: \$0 (2/7/13)
Case Type: Auto Negligence
Judge: Lee A. Solomon, J.S.C.
Plaintiff's Atty: Andrew Spirit, Esq.
Defendant's Atty: Rachel Haniczek, Esq.
L-3272-11 Jury

VERDICT: No Cause (2/12/13)
Case Type: Auto Negligence
Judge: Lee A. Solomon, J.S.C.
Plaintiff's Atty: Michael Madden, Esq.
Defendant's Atty: Everett Simpson, Esq.
L-1552-10 Jury

VERDICT: No Cause (2/13/13)
Case Type: Auto Negligence
Judge: Deborah Silverman Katz, J.S.C.
Plaintiff's Atty: John Borbi, Esq.
Defendant's Atty: Stephen Wolf, Esq.
L-447-11 Jury (7)

VERDICT: Liability Verdict: 70% Against Plaintiff, 30% Against Defendant (2/13/13)
Case Type: Auto Negligence
Judge: Robert G. Millenky, J.S.C.
Plaintiff's Atty: Robert Porter, Esq.
Defendant's Atty: Robert Kaplan, Esq.
L-5924-10 Jury (8)

VERDICT: No Cause (2/14/13)
Case Type: Auto Negligence
Judge: Stephen Holden, J.S.C.
Plaintiff's Atty: Anthony Almeida, Esq.
Defendant's Atty: Tanya Riotta Seybold, Esq.
L-4294-10 Jury

VERDICT: Liability Verdict: \$9,500 Against Plaintiff, Damage Verdict: \$23,260 Against Both Defendants (Emotional & Lost Wages), and \$11,740 Against Both Defendants (Punitive) (2/14/13)
Case Type: LAD
Judge: George S. Leone, J.S.C.
Plaintiff's Atty: Kevin Costello, Esq.
Defendant's Atty: Jeffrey Resnick, Esq.
L-409-11 Jury

VERDICT: No Cause (2/21/13)
Case Type: Medical Malpractice
Judge: John T. Kelley, J.S.C.
Plaintiff's Atty: Adam Starr, Esq.
Defendant's Atty: Jay Blumberg, Esq.
L-2262-09 Jury (8)

VERDICT: No Cause (2/21/13)
Case Type: Auto Negligence
Judge: Robert G. Millenky, J.S.C.
Plaintiff's Atty: Scott Goldberg, Esq.
Defendant's Atty: Thomas Grimm, Esq.
L-4229-10 Jury (8)

VERDICT: Damage Verdict: \$250,000 Against Defendant (2/26/13)
Case Type: Auto Negligence
Judge: Louis R. Meloni, J.S.C.
Plaintiff's Atty: Reno Coccotta, Esq.
Defendant's Atty: Rodd DeWitt, Esq.
L-1087-11 Jury

VERDICT: No Cause (2/27/13)
Case Type: LAD
Judge: John T. Kelley, J.S.C.
Plaintiff's Atty: Samuel Fineman, Esq.
Defendant's Atty: Laura Ruccolo, Esq.
L-1750-11 Jury (7)



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by Thomas D. Begley, Jr.

Issues Arising in the Settlement of Wrongful Death Cases

Wrongful Death cases are generally brought by family members surviving the decedent who died as the result of a personal injury. Generally, there are two components. One is the Wrongful Death action itself. This is designed to compensate surviving family members for their loss of consortium. In addition, there is usually a Survival Claim brought by the personal representative of the decedent's estate. This money is paid to the beneficiaries of the estate. If there is a Will the Will controls, in the absence of a Will the state's intestacy statute controls.

Issue #1 - Apportionment Between Wrongful Death Claim and Survival Claim

The apportionment between the Wrongful Death claim and the Survival Claim is important, because the payments made to the Wrongful Death claim plaintiffs are tax-free as a personal injury settlement. The Wrongful Death apportionment maintains its tax-free status, because the underlying claim is for the physical injury to the decedent. On the other hand, the Survival Claim is subject to estate and inheritance taxes. For 2013, the exemption from federal estate tax is \$5,250,000. The New Jersey estate tax exemption is only \$675,000 for persons inheriting that are not the spouse. In Pennsylvania, the Department of Revenue must approve any such allocation between Wrongful Death and the Survival claim.

Issue #2 - Allocation Among Wrongful Death Plaintiffs

In New Jersey, the allocation between Wrongful Death plaintiffs is governed by statute. The statute says, "The amount recovered in proceedings under this chapter shall be for the exclusive benefit of the persons entitled to take any intestate personal property of the decedent, and in the proportions in which they are entitled to take the same, except if there is a surviving spouse of the decedent and one or more surviving descendants of the decedent, they shall be entitled to equal proportions for purposes of recovery under this chapter notwithstanding the provisions of Title 3B of the New Jersey statutes."

If the Wrongful Death plaintiffs were dependent on the decedent, they take in a matter that results in a fair and equitable apportionment. Factors to be considered are the age of the dependents, their physical and mental condition, the necessity or desirability of providing them with educational facilities, their financial condition and the availability to them of other means of support, present and future, and any other relevant factors that would contribute to a fair and equitable apportionment of the amount recovered.

Issue #3 - Minors and Incapacitated Persons

If the plaintiffs are minors or incapacitated persons, a Friendly Hearing must be held in New Jersey or a petition for approval of a compromise must be filed in Pennsylvania. In these proceedings the plaintiffs must justify to the court the intended allocation to or for the benefit of the minor or incapacitated persons.

In these situations a trust should be considered. If the minor or incapacitated plaintiff is disabled as determined by the Social Security Administration (SSA), then a Special Needs Trust should be considered. If there is no Determination of Disability by SSA, a Settlement Preservation Trust should be considered. It is always helpful to avoid having funds placed into a surrogate's account or the court for a minor or incapacitated person. In fact, in Pennsylvania any settlement in excess of \$25,000 must be placed in a restricted account or in the hands of a corporate fiduciary. Under these arrangements a minor is able to access the funds at age 18 and withdraw the monies for any purpose. In New Jersey, courts typically will approve Settlement Preservation Trusts that protect the minor beyond age 18. In Pennsylvania, some counties will approve delayed withdrawal rights and others will not. Prior to the minor attaining age 18, it is easier and less expensive to utilize a trust rather than request or petition the court or surrogate's office for withdrawals. Trust investment results are almost always better than those obtained by the surrogate's office or a court.

CRIMINAL LAW

The Mistaken Imprisonment Act

N.J.S.A. 52:4C-1. et. seq.

Continued from Page 9

world, a trial is supposed to lead to a fair, just result, but that process gets distorted and skewed against the defendant if a sworn police officer is willing to commit perjury and lie to the judge and jury. These victims were faced with a horrible dilemma: plead guilty to a crime they didn't commit, or face an unfair trial with untruthful witnesses. Many were also subject to extended term sentences due to their prior records. When facing the possibility of very lengthy prison sentences, one can certainly understand how and why these victims entered guilty pleas despite actual guilt or innocence. The pleas allowed for much lesser periods of incarceration. In many cases they were released from jail the same day if they agreed to plea bargains.

Should the Mistaken Imprisonment Act apply under these circumstances? The statute obviously did not contemplate the police corruption present in Camden, and doesn't offer any guidance with regard to guilty pleas. Pleas are not mentioned anywhere in the statute, and even if they did preclude recovery, the legislature certainly could not have meant to preclude a claim based on a guilty plea entered when it was later learned that the charges related to systematic police corruption. In addition to the statute's ambiguity, the appellate courts have never interpreted the statute and don't offer any guidance in this area.

Assuming you can get past the requirements to prove the case, N.J.S.A. 52:4C-5 allows damages in the amount of twice the claimant's yearly income for the year prior to the incarceration, or \$20,000 per year, whichever is greater. Reasonable attorney fees are also recoverable. When broken down, that amounts to \$54.79 per day. According to the State, that's the value of freedom.



LEGAL BRIEFS

We rely on members to provide announcements for the Legal Briefs section. If you have a new member of the firm, you've moved or you or a member of your firm has received an award or recognition for a professional or community activity, we want to know and share it with fellow bar members. Please email your submissions to lbp@camdencountybar.org.

Capehart Scatchard Executive Committee Member, **Betsy G. Ramos** spoke on the "Law of Torts" at a recent CLE seminar sponsored by the South Jersey Claims Association. The presentation focused on the law of negligence and intentional torts in New Jersey. Certified by the Supreme Court of New Jersey as a Civil Trial Attorney, Ms. Ramos is a Shareholder of Capehart Scatchard's Litigation Department in its Mt. Laurel office. She concentrates her practice in business litigation, estate litigation, tort defense, employment litigation, insurance coverage, and general litigation.

Christopher M. Howard has joined the law firm of Parker McCay P.A. as an Associate in the Foreclosure and Bankruptcy Department. He is based out of the Mount Laurel office. Prior to joining Parker McCay, Howard was an associate with Powers Kirn, L.L.C., where he represented residential and commercial lenders in foreclosure and eviction actions. He also served as law clerk for the Honorable Louise DiRenzo Donaldson, J.S.C. in the Superior Court of New Jersey, Camden County, Criminal Division. Howard earned his law degree from Rutgers University School of Law and his bachelor's degree from the York College of Pennsylvania. He is admitted to practice law in New Jersey and Pennsylvania.



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Prior to joining the bench, Judge Uhrmacher served as the Chief of the Civil Division of the U.S. Attorney's Office for the District of New Jersey. Additionally, she was Attorney-in-Charge of the Trenton U.S. Attorney's Office, and appointed to a Senior Litigation Counsel position. She also served as an Assistant U.S. Attorney for the District of New Jersey.

Throughout her career, Judge Uhrmacher has been active in Teaching and Continuing Legal Education programs. Currently, she serves as Chair, Haydn Proctor Inn of Court, Monmouth County and will be teaching a Trial Advocacy course in the Fall.

Judge Uhrmacher has received consistently high ratings from attorneys appearing before her in each of the New Jersey Law Journal surveys of the Judiciary.

Judge Uhrmacher received a JD from the University of Texas at Austin and a BS from Simmons College, Boston, Massachusetts.

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PRESIDENT'S PERSPECTIVE

Life's Unexpected Pleasures

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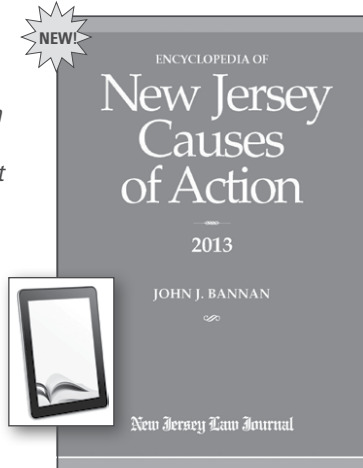
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How to Construe an
Indemnity Clause, With the
Rules or Without ThemSayles v. G&G Hotels, Inc. (App. Div. Jan. 16, 2003)ⁱ

Continued from Page 15

Were the Appellate Division in this case to have blindly followed the language of Ramos and Azurak and the bright line rules, it would have been bound to find in favor of G&G. The rules of indemnity construction repeatedly expounded by our highest court would have boxed the Appellate Division into reaching a result contrary to the most likely intent of the parties.

Rules, however, grow from roots and live and breathe within contexts and underlying principles.ⁱⁱⁱ The most fundamental rule of contractual construction is to ascertain the intention of the parties. The Appellate Division discarded the subsidiary rules regarding indemnities, applied the central rule instead, and proceeded to reach the logical result.

Of course Sayles didn't say directly that the Opinion was going to ignore repeated Supreme Court precedent. They cited it, but overruled it in essence by citing to more general rules of contractual interpretation. When overruling your own Supreme Court, courts often resort, as did the Sayles court, to search the archives for a quote from Judge Learned Hand (the St. Anthony of jurisprudence), Cabell v Markham, 148 F.2d 737, 739 (2d Cir., aff'd 326 U.S. 404 (1945)) ("a mature and developed jurisprudence does not make a fortress out of the dictionary.") and the U.S. Supreme Court (the Vatican of American law, whose whispered and most oblique aside moves ideational mountains), United States v. Brown, 333 U.S. 18, 25-26 (1948) (do not apply "magnified emphasis upon a single ambiguous word...").

The Sayles case therefore is less an example of the application of the rules of indemnity construction than a fine example of ducking out from under substantial, but bad, precedent, and inventing a rule of reason to temper the brightest and clearest of case law commands.

Comments and criticisms may be directed to the author at wtobolsky@tobolskiylaw.com or 856-428-5700 (Cherry Hill, NJ).

i Superior Court of New Jersey, Appellate Division, A-2926-1T1, approved for publication 1/16/2013, 2013 N.J. Super. LEXIS 5.

ii Not cited in Sayles, but clearly well-established and controlling law.

iii See Georgia v. Randolph, 547 U.S. 103, 125 (2006) (Breyer, J., concurring) ("no single set of legal rules can capture the ever-changing complexity of human life.") (4th Amendment case).

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Maybe, Just Maybe, If the Legal Fees are Deductible the Client will Feel Better (and even pay sooner)

Continued from Page 6

in its management as a rental property will now be deductible. No deduction is permitted for legal fees incurred for a purely personal matter (that would include client who files for personal bankruptcy).

- Fees paid for tax advice will be deductible as investment expenses, even if they are incurred pursuant to a divorce or some other personal matter. The expense to be deductible must be "ordinary, necessary and reasonable." For the most part, an expense is "ordinary" if a taxpayer commonly incurs it under the particular circumstances.
- Taxpayers often confuse the "ordinary" requirement assuming that a particular expense should occur repeatedly. It ain't necessarily so! A good example of this was in one case where legal fees were considered "ordinary and necessary" where engaging a lawyer was something a reasonably prudent man in the same circumstances might do. The critical question is the *nature* of the lawsuit (NOT considered personal). The "ordinary and necessary" nature of legal fees in this context may not be challenged where the requisite nexus can be established between the suit and the investment/business activity.
- Legal fees incurred in connection with a divorce are generally considered personal expenditures even if an adverse decision would be catastrophic to a client's business. The origin of the claim dictates the deductibility. The Supreme Court held that if a case and corollary legal expenses have their origin in personal activity (in this case a divorce) just because severe business consequences would flow from that matter does not convert the origin of the claim from a personal one to a business or investment one. There, a car dealer, Mr. Gilmore, was advised by the car manufacturers

that if his divorcing spouse got control of any of his dealerships they would cancel his franchise agreements. Even with these significant business motives requiring extensive litigation to save his businesses, the Supreme Court held Gilmore's divorce fees nondeductible. Thus, most pleadings, court appearances and non-tax related negotiations, custody, visitation and child support fees will be considered personal.

- Only the allocable fees for actual tax advice and/or advice that gives rise to taxable income will be deductible. Legal fees incurred to collect alimony in arrears or in seeking an increase in taxable alimony will be deductible. Legal fees to seek a reduction in alimony will not be deductible as with fees incurred to collect child support.
- The cost of disciplinary proceedings in connection with a business/profession may be deductible if the conduct stems from the client's business. The nature of the proceeding controls (i.e. whether it originates from professional vs personal actions). Thus, a deduction for legal fees incurred by a lawyer in defending a legal malpractice case or an ethics violation should be allowed.
- Legal fees paid to form a business can be amortized along with other incorporation type expenses paid. The client can elect to deduct up to \$5,000 of business start-up and \$5,000 of organizational costs paid (including your legal fee). The \$5,000 deduction is reduced by the amount total start-up or organizational costs exceed \$50,000. Any remaining costs must be amortized. Similarly, legal fees used in the purchase of a business or an asset are typically capitalized and added to the basis for that asset.
- Attorneys billing for estate planning may wish to provide the client an itemization of their fees. Break out the portion of such charges attributable to tax planning, advice and document preparation concerning "property management, conservation and maintenance." Assuming the allocation is reasonable, such legal fees for non-personal matters should be deductible as miscellaneous itemized deductions (subject to the 2% threshold).
- A fundamental requirement for deductibility is that in order to deduct legal fees, they must be those of the taxpayer and not of someone else. Generally, a business must incur legal and other professional fees for its own benefit and cannot deduct fees incurred only for the benefit of its stockholders. Legal expenses, however, and amounts paid by a business defending or settling suits against employees arising out of the business are deductible by the business since such expenditures are deemed to be for the benefit of the business.

If the transaction in which a legal fee is incurred is partially attributable to a "trade or business" or a nonbusiness activity and is partially for personal activities or capital expenditures, the client cannot deduct the entire fee but should allocate the fees between deductible and nondeductible portions. Fees do not have to be allocated exactly in proportion to the underlying claims. We've seen the IRS consider factors such as the following in their determination of what a "reasonable" allocation might be:

- Complexity of tax issues involved;
- Time required; amount of tax involved; fees customarily charged in that region for the kind and extent of services performed; and
- Results obtained.

Conclusion?.....It depends.



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Camden (NJ) Housing Authority seeks a General Counsel to report to the Executive Director and be responsible for performing all legal services associated with the operation of its housing programs. The position represents the HACC on specific legal matters, including but not limited to, "tenant selection and assignment", lease enforcement, grievance procedures, evictions and judgments for possession and garnishments; negotiates settlements with opposing counsel; and directs outside counsel on the development of all legal documents and subsequent closing of mixed-financed deals and other litigation beyond the General Counsel's capacity. Should have experience in labor relations, real estate financing matters, creation of legal contracts/briefs and landlord/tenant relations along with compliance with agency personnel policies and contract agreements to minimize litigation. Prepares all legal documents, review and approve all contracts, policies and agreements to ensure the legality and compliance with all applicable local, state, and federal laws and regulations and compliance by HACC personnel and all HACC's contractors to minimize liability; Candidate must hold a Juris Doctor degree from an accredited school and admission of the practice of law in the State of New Jersey with required state and city business licenses, registrations and in good standing with the Supreme Court of New Jersey. The person must have two to five years' experience in working with either a Public Housing Agency or the United States Department of Housing and Urban Development and in housing related law or civic law practice or equivalent combination of education, training and experience that provides the knowledge, skills and abilities to successfully perform the duties of the position. The position is open until filled and salary is based upon experience and education. Job description sent upon request. Submit cover letter and resume to Leo Dauwer, Search Consultant, 20 Shady Lane, Needham, MA 02492. Attn: Camden Search. Email: dowerassociates@comcast.net. No faxes, please. EOE.

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Small Haddonfield Law Firm seeks a part-time Legal Secretary/Paralegal with at least 5 years legal experience. Exceptional clerical and organizational skills required. Candidates should have experience with NJ Court filing procedures and E-filing. Bankruptcy experience preferred, but not necessary to apply. Email resume and cover letter to Ginger@mccormicknjlaw.com or fax to 856-795-6578.

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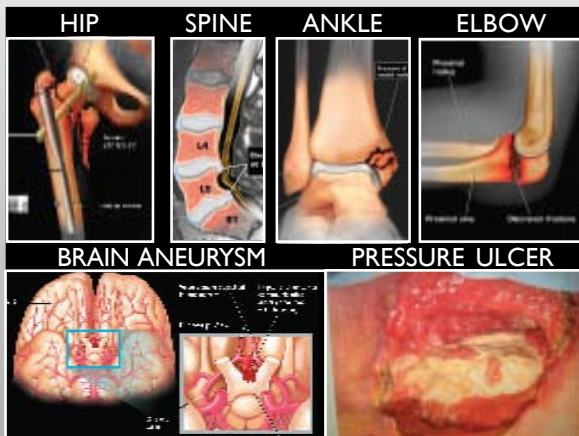
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