# THE BARRISTER

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## Season's Greetings to You & Yours!

**The Editorial Staff of *The Barrister* joins with the Officers and Trustees of the Association, Foundation and the Headquarters Team in wishing you and yours a happy, healthy, safe holiday season and a bright and prosperous New Year.**

**We also pause to remember our neighbors who are still experiencing the destruction of Hurricane Sandy, and the courageous men and women in uniform stationed around the globe for their continued service, and wish them a safe and speedy return, and a special remembrance for those who have made the ultimate sacrifice to protect the freedoms we enjoy.**

*Happy Holidays!*

## Project COPE

Making a Difference Through Mentoring


See this month's inserts for details about this new CCBA community service project and how you can help.

**Holiday Cocktail Party**

**December 17th**

*Members Only*

## INSIDE



Chief Judge Garrett E. Brown, Jr. (ret.) was the recipient of the 17th Annual Judge John F. Gerry Award, and received his award at a dinner in his honor in October.

(l-r) Bar Foundation President Linda Eynon, Chief Judge Brown, Mrs. Jean Gerry and Gerry Award Chair Judge John Mariano, JSC (ret.).


## YLC Lobster Bake Benefits Larc School

Members of the Young Lawyer Committee presented a check for $10,543 to the Larc School in Bellmawr. The funds were raised through the YLC's 3rd Annual Lobster Bake this past September. Mike Madden displays a thank you plaque from Larc School students while Larc Executive Director Susan Weiner receives the "big" check from YLC Chair Mike Dennin. Great job guys!

## Gerry Scholarship Award

A minimum $1,000 scholarship is awarded annually to law students who exemplify the ideals held by Judge Gerry, and have a commitment to public service. Candidates for the Judge Gerry Memorial Scholarship must be currently enrolled in a New Jersey law school, demonstrate academic achievement and genuine financial need, and exhibit a history of public service and/or a desire to work in public service law.

This year the Gerry Scholarship Committee selected two $1,000 scholarship recipients who received their awards at the Judge Gerry Award Dinner. This year's recipients were Amanda N. Follett and Jordan S. Hollander, who both attend Rutgers School of Law-Camden. Congratulations Amanda and Jordan!

# THE DOCKET

**Tuesday, December 4th**
*Young Lawyer Committee Meeting*
12:30 – 2 pm
Bar Headquarters, Cherry Hill

**Wednesday, December 5th**
*Ethics Seminar: I Can't Believe I Have to Deal With This Problem!*
4 – 6:15 pm
The Mansion, Voorhees

**Tuesday, December 11th**
*Probate & Trust Committee CLE Luncheon*
*11th Annual Forum: Hot Trends in Probate Litigation*
Noon
Tavistock Country Club
Haddonfield

**Tuesday, December 17th**
*CCBA Board of Trustees Meeting*
4:30 pm
Tavistock Country Club
Haddonfield

*Holiday Cocktail Party*
6 – 9 pm
Tavistock Country Club
Haddonfield

## Tentative agenda for December 17, Trustees Meeting

A tentative agenda for this month's regular Board of Trustees meeting follows. The meeting will begin at 4 p.m., at Tavistock Country Club in Haddonfield. 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

Stacy Fols, Bill Cook & Tommie Ann Gibney presented the CLE On Tap! Seminar on "New Jersey Civil Trial Preparation" at The TapRoom in Haddonfield. The CLE On Tap! program provides the New Jersey "Bridge the Gap" courses required for newly admitted attorneys.

The CLE on Tap! program "New Jersey Real Estate Closings" for newly admitted attorneys was recently held at the TapRoom. Presenting were Jeffrey Gans, Jamie Holland Walton from Patriot Land Transfer in Turnersville & Chuck Resnick.

"Disposition of Estate Realty" was the topic of the day at the Probate & Trust Committee's CLE Luncheon at Tavistock Country Club. Brenda Eutsler presented, and is shown with Committee co-chairs Tony LaRatta & Glenn Henkel.


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**ATTEND MEETINGS AND FUNCTIONS!**

# MEMBER ON THE SPOT

**NAME:** **Harry Chung**

**PRACTICE AFFILIATION:** **Zeller & Wieliczko, LLP**

**YEAR ADMITTED TO BAR:** **2011**

**OTHER BAR ADMITTANCES:** **Pennsylvania**

**PRIOR OCCUPATION:** Worked for close to 30 years as an Information Technology Consultant at a number of very large corporations in the Delaware Valley

**RESIDENCE:** Cherry Hill since 1985

**HIGH SCHOOL:** Chunju Shinheung High School, established in 1900 by a Presbyterian missionary from America to Korea, then "Chosun Kingdom"

**COLLEGE:** Yonsei University, Seoul, Korea; after immigrating to America, I also received an M.B.A. from Drexel University.

LAW SCHOOL: Rutgers University, School of Law – Camden

**WHAT LED YOU TO A LEGAL CAREER:** In early 2007, my job was "off-shored." A few years before this, I had an opportunity to help a law student at Rutgers Law who had just moved from California. When I spoke with her after the lay-off, she encouraged me to study law and guided me through the admission process. She even helped me to get connected with South Jersey Legal Services, where I volunteered throughout my law school years.

**BEST PERSONAL/PROFESSIONAL ATTRIBUTE:** Think "why;" then improve continuously.

**GREATEST FAULT**: My wife knows many of them.

**WHAT I DO TO RELAX:** 1) Watch a movie; 2) Walk around the neighborhood.

**HOBBIES**: Sudoku; swimming; browsing through the Twitter timeline;

**FAVORITE RESTAURANT:** Crab Pot, Seattle, Washington; locally, Joe's Peking Duck in Marlton.

**FAVORITE TELEVISION SHOW:** I stopped watching TV shows while in law school, but I watch the Phillies and the Discovery Channel occasionally.

**FAVORITE MOVIE(s):** 1) Dr. Zhivago; 2) Shawshank Redemption; 3) Fiddler on the Roof.

**FAVORITE AUTHOR/BOOK:** "Tuesdays with Morrie"

**FAVORITE VACATION PLACES:** Any place where my "young friends" live.

**FAVORITE WEBSITE:** Google; can't live without it. Wikipedia comes next.

**FAVORITE MUSEUM:** The Air and Space Museum, Washington, D.C.

**FAVORITE WEEKEND GETAWAY:** The Island Beach State Park, New Jersey; a quiet heaven only a short-drive away. (Hope Sandy did not destroy it!)

**ENJOY MOST ABOUT PRACTICING LAW:** I have not practiced law that long, but what I like most about being a lawyer is that it gives me an opportunity to meet interesting people with interesting problems and, occasionally, to help them.

**MOST ADMIRED PERSON AND WHY:** Anyone who creates an opportunity for herself/himself through her/his resolve and perseverance.

**WHEN AND WHERE HAPPIEST:** Talking with my "young friends" about their life issues.

**CHERISHED MEMORIES:** Time spent at Walt Disney World and Niagara Falls.

**GREATEST FEAR:** Height; skiing comes a close second for a very obvious reason.

**ALTERNATE CAREER CHOICE:** A Pastor of college students.

**GREATEST LESSON LEARNED FROM PRACTICE OF LAW:** Listen and think before you speak.

**PERSON YOU'D MOST LIKE TO DINE WITH:** My wife, especially when she cooks.

**PET PEEVE(S):** 1) People smoking on the street; 2) People driving at the posted speed in the left lane.

**LIFE'S HIGHLIGHTS:** People tell me that getting into and graduating from a law school and passing the Bar Exam at my age should be my life's highlights. However, I am most happy when someone tells me that she/he found her/his life's goal with my help and goes for it.

**GREATEST ACCOMPLISHMENT:** Marrying my wife 30 years ago.

**#1 PROFESSIONAL GOAL:** Build and maintain a good reputation as a reliable and able lawyer.

**#1 PERSONAL GOAL:** Be a wonderful husband, a good father, and a trustworthy person;

**LIFE EXPERIENCE(S) WITH GREATEST IMPACT:** About twenty years ago, my wife and I had an opportunity to help a newly-wed, young woman put her life back together after her husband had abandoned her. From that experience I discovered the value of a life coach to young adults, and we have worked to be a good life coach (and a role model) to whoever needed our help.

**ADVICE TO YOUNG LAWYER:** Take your eyes off the smart phone and other "things," and look around. You will see someone who needs your help.

**HOPE TO BE DOING IN 10 YEARS:** All the things that I am doing today, but hopefully a little better.

**FAVORITE QUOTATION:** "You gotta get off the boat to walk on the water" by John Ortberg.

**NJSBA UPDATE**

# What Happens In Las Vegas

## (Appears in the Barrister)

*By Arnold Fishman*
*www.fishmanandfishmanlaw.com*

Since I am being termed out as your representative on the New Jersey Sate Bar Association Board of Trustees this May, I thought it imperative that I attend this year's Mid-Year Meeting. The past two years the fates have conspired against me. Two years ago we went to San Francisco. No sooner had we unpacked, we were summoned home for the very premature birth of our grandson. Last year we had to cancel Dublin due to the urgent need to relocate our offices. So this year was a must. Having just returned, I can report that the staff of the NJSBA operates like a well-oiled machine. They sure know how to throw a party.

The Encore Hotel is magnificent. We had a room on the 60th floor. It had wall-to-wall and ceiling-to-floor windows. Mountains surround the Las Vegas basin. The view was stunning by day, and the lights of "Sin City" dazzling at night. Our room was plush and well appointed, the restaurants luxurious and the food expensive but delicious. I am afraid to get on a scale. Las Vegas, being located in the Mohave Desert, gets less than three inches of rain a year, so bright and shiny was our reasonable expectation. It poured almost from the time we checked in on Wednesday until the final event, the President's reception Saturday night. There was a year's worth of rain, including a hailstorm. The deluge abated only long enough to permit us to enjoy the Pink Jeep off-the-road tour of Red Rock Canyon on Friday. It was not a Jeep nor was it pink, but the canyon was spectacular. I hardly noticed the rain because I was so engrossed in the events of the meeting inside the hotel.

There were seminars amounting to ten MCLE credits. The topics ran the gamut from Prosecutorial Misconduct to the Ethics of Social Media, from Estate planning to Equity Jurisprudence, from Family Law to Workers' Compensation, and from Labor Law to Attracting and Retaining Clients. There was something for everyone and for every sort of practice. The Board meeting on Thursday set a world's record for being short. It did last long enough for us to decide to oppose the referendum (Question # 2) amending the Constitution to permit the diminution of judges' salaries and to become involved as an amicus in State v. O'Driscoll, which will determine whether a person really has to be advised of the consequences of refusing a breath test. The Board meeting was rushed so we could all attend a conference with Senator Scutari, the Chair of the Senate Judiciary Committee, discussing his view on the judicial appointments process.

There were receptions Wednesday and Saturday evenings and ample time for socializing and networking. In addition to Temma and me, Camden County was well represented by CCBA President Brenda Eutsler and first gentleman Jim Herman, Executive Director Larry Pelletier, Judges Michele Fox and Richard Wells, past NJSBA President Allen Etish and their spouses,

*Continued on Page 16*

## BANKRUPTCY CORNER

# Section 522 Exemptions

*By Ellen M. McDowell*

Individuals in Chapter 7 (liquidation), Chapter 13 ("wage earner") and Chapter 11 ("reorganization") bankruptcy cases are entitled to exercise exemptions as provided in Section 522 of the Bankruptcy Code. These exemptions permit debtors to keep certain types of property for themselves and not turn over such property or pay the equivalent of the property's value to the trustee. No doubt the policy behind this section of the Bankruptcy Code is that individuals cannot get a "fresh start" after their bankruptcy discharge if they do not have a minimum amount of clothing and household goods as well as a functional vehicle, etc.

Under Section 522 of the Code, individuals may elect to use the exemptions contained in that section or opt to utilize exemptions as provided by State statute. In New Jersey, it is almost always more beneficial to a debtor to use the federal exemptions contained in Section 522 since the State tax exemptions in New Jersey are not generous, to say the least.

Section 522(d)(10)(E) provides that the debtor's interest in "a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service" is fully exempt from the reach of creditors. Typically Chapter 7 trustees do not question the debtor's right to exempt a pension, 401(k) plan or Individual Retirement Account. But what happens if the debtor claims an exemption in a less common investment vehicle, such as an annuity? A recent opinion by the Honorable Raymond T. Lyons is instructive in this regard.

In In re Kiceniuk, Chapter 7 Case No. 12-17802, the Debtor listed as an asset her variable annuity with Prudential and claimed an exemption for the total value of the annuity. The trustee filed an objection to the claim of exemption. The only evidence presented by the trustee in support of his objection was the annuity contract itself. The trustee argued that the terms of the annuity contract constituted sufficient evidence to deny the debtor an exemption of the annuity. The basis for this argument was that the annuity was not a retirement plan in that the Debtor could withdraw the funds in the annuity at any time.

In support of her exemption, the Debtor provided a certification claiming that she purchased her annuity after she retired by rolling over money from her 401(k) plan.

Judge Lyons began his analysis with the critical question of who had the burden of proof. In an exemption dispute, he found, Fed. R. Bankr. Proc. 4003 provides that there is a presumption that the debtor's claim for exemption is valid. The objecting party has the burden of persuasion by a preponderance of the evidence that the exemption is not valid.

The court next looked closely at Section 522(d)(10)(E) of the Bankruptcy Code to determine what types of assets can be exempted under that section. The case law interpreting that statute summarized its requirements as follows: an asset may properly be exempted under Section 522(d)(10)(E) if -

(1) the right to receive payment is "under a stock bonus, pension, profitsharing, annuity, or similar plan or contract"; and

(2) the right to receive payment is "on account of illness, disability, death, age, or length of service."

Additionally, the right to receive payment may be exempted only "to the extent reasonably necessary for the support of the debtor and any dependent of the debtor."

The court noted that in 2005 the Supreme Court issued an opinion dealing with Individual Retirement Accounts and whether those can be exempted under Section 522(d)(10)(E). In Rousey v. Jackaway, 544 U.S. 320 (2005), the Supreme Court was required to interpret the words "or similar plan or contract" in order to determine whether IRA's are exempt. In doing so, the Court focused on the nature of the assets that were identified as exempt in the statute so that it could extrapolate to "similar" assets. The Court concluded that "the common feature of all these plans is that they provide income that substitutes for wages earned as salary or hourly compensation."

In Rousey, the Supreme Court's application of this test to the IRA alleged to be exempt resulted in a finding for the Debtor. The Court found that the Rouseys' IRA was a substitute for wages because: (1) it required them to begin taking distributions no later than the date they turned 70 1/2 years old; (2) taxation on monies earned in their IRA is tax deferred until distribution, which provides an incentive to save for retirement; (3) withdrawals made before age 59 1/2 are subject to a 10% penalty; and (4) if the account holder fails to withdraw the proper amounts by age 70 1/2, they are subject to a 50% penalty on funds improperly remaining in the account.

Applying this legal framework to the case before him, Judge Lyons concluded that the trustee in In re Kiceniuk did not meet his burden of persuasion in that he did not present sufficient evidence to overcome the presumption of the exemption's validity. Taking it one step further, Judge Lyons found that the annuity was exempt because (1) the money to purchase the annuity came from funds in the Debtor's 401(k) account, which were a substitute for wages; (2) her right to receive payment from the annuity was "on account of" her age since she was required to wait until age 59 1/2 to begin withdrawals or be subject to penalty; and (3) the annuity was necessary for the Debtor's support since she was unable to work due to disability. The court thus overruled the trustee's objection to the Debtor's claim of exemption.

In re Kiceniuk is instructive for reinforcing that the Debtor's claim of exemptions is presumed to be valid as well as for its thorough treatment of debtors' ability to exempt retirement assets. Bankruptcy lawyers now have a clear guide to analyze less common forms of retirement assets for their clients' right of exemption.

# Third Circuit Holds ERISA Liens are Limited by Equitable Defenses

*By Thomas D. Begley, Jr., CELA*
*www.begleylawgroup.com*

Historically, ERISA liens against personal injury settlements and awards have been difficult for Plaintiffs' attorneys to negotiate. Plan Administrators relied on contract language, which typically provided that the Plan was entitled to recover up to the entire amount of a personal injury settlement and generally did not even permit a reduction for counsel fees incurred in obtaining a settlement or judgment.

In a significant case,[1] the facts were that James McCutchen was involved in an automobile accident in which he suffered serious injuries leaving him functionally disabled. McCutchen's Health Benefit Plan was administered and self-funded by U.S. Airways. The Plan paid medical expenses on behalf of McCutchen in the amount of $66,866.

McCutchen filed an action against the driver of the car that caused the accident. That driver had limited insurance coverage and McCutchen settled for $10,000. Through his personal injury lawyer's assistance he obtained another $100,000 in underinsured motorist coverage for a total third party recovery of $110,000. After payment of 40% contingency attorneys' fees and expenses, his net recovery was less than $66,000. U.S. Airways demanded reimbursement for the entire $66,866. The personal injury firm placed $41,500 in a trust account, reasoning that any lien found to be valid would have to be reduced by a proportional amount of legal fees and costs.

U.S. Airways then filed suit seeking appropriate equitable relief in the form of a constructive trust or an equitable lien in the amount of $41,500 on the monies held in trust by the law firm and sought to recover the remaining $25,366 personally from McCutchen. Under the Plan Description, a beneficiary is required to reimburse the Plan for any amounts it has paid out of any monies the beneficiary recovers from a third party. U.S. Airways argued that the Plan language specifically authorized reimbursement in the full amount of benefits paid, out of any recovery.

McCutchen's position was that it would be unfair and inequitable to reimburse U.S. Airways in full when he had not been fully compensated for his injuries, including pain and suffering. He also argued that U.S. Airways made no contribution to his attorneys' fees and expenses and would be unjustly enriched if it were now permitted to recover from him without any allowance for these fees and costs. If legal fees and costs are not taken into account, U.S. Airways would effectively be reaching into the beneficiary's pocket, putting him in a worse position than if he had not pursued a third party recovery at all.

The court analyzed the ERISA statute and pointed out that Congress gave Plan beneficiaries greater rights than Plan fiduciaries to enforce the terms of a benefit Plan. A beneficiary has a general right of action to enforce his rights under the terms of the Plan, while a fiduciary is limited to injunction or other appropriate equitable relief. McCutchen argued that the phrase appropriate equitable relief means more than just the relief U.S. Airways seeks. Such relief must be of an equitable type and must be subject to equitable defenses. Courts may exercise their discretion to limit that relief to what is appropriate under traditional equitable principles.

The court found that Congress intended to limit the equitable relief available under §502(a)(3) of ERISA through the application of equitable defenses and principles that were typically available in equity. The court noted that written benefit plans are not inviolable, but are subject to equitable doctrines and principles. The court, therefore, held that the District Court judgment requiring McCutchen to provide full reimbursement to U.S. Airways constitutes inappropriate and inequitable relief. The court did not decide on appeal what would constitute appropriate equitable relief, but remanded the case to the District Court suggesting that the court engage in additional fact finding and that it consider factors such as the distribution of the third party recovery between McCutchen and his attorneys.

Clearly, the Court is suggesting that legal fees and expenses may be deducted from the ERISA lien. If legal fees and costs equal 40% of the total claim, then the ERISA lien must be reduced by 40%.

Based on this Opinion it may be possible to make an *Ahlborn*-type argument in negotiating an ERISA lien. It would seem fair and equitable that the ERISA Plan should be authorized to recover only a pro rata share of its lien if the Plaintiff recovers less than the full value of the case. The Plan's recovery should be based on the ratio which the amount recovered by the Plaintiff bears to the true value of the case. If the Plaintiff recovers only 50% of the true value of the case because of liability issues, limited insurance or some other reason, the ERISA Plan should be limited to recovering only 50% of its lien after an appropriate reduction for attorneys fees and costs.

1 U.S. Airways, Inc. v. McCutchen, 663 F.3d 671, 2011 WL 5557411 (C.A.3 (Pa)) (Nov. 16, 2011) rehearing denied Jan. 4, 2012

**Stay Involved...**
**Attend Events!**

## LAW PRACTICE MARKETING

# How Committed Are You?

*By Kimberly Alford Rice*

In over 20 years of partnering with law firms and lawyers to support their business development goals, I have witnessed some of the same (unproductive) behaviors over and over, and just shake my head thinking to myself, "my dear clients just will not get out of their own way."

Below you'll read a few questions in which readers may see themselves and instructively consider for greater business development success.

**I. What is your marketing mindset?** Do you recognize that working "on" your practice is as important as working "in" your practice? Do you proactively carve out time to work "on" your practice through high impact business development efforts?

Clients often ask "how many hours do I need to market?" First, I would respond by saying that's not a question a lawyer who is serious about growing her practice should even pose. The more productive question would be "Am I being as strategic as I possibly can be and, if so, am I properly following through on all my action steps?"

Action steps, what action steps? Savvy lawyers know that to truly excel at almost anything, having (and executing upon) a plan is vital. That is one of the reasons that we consistently work with law firms and their lawyers to develop an integrated marketing plan which includes specific action steps by which to measure progress and results.

Successful rainmakers recognize that marketing and business development are not "one and done" propositions but rather required components for your practice throughout your entire career. The differences that will shift according to the particular phase of your practice are the specific tactics upon which you will focus your efforts.

For example, in the early days of a legal practice, young lawyers must focus on learning their craft, on how to become a top notch technician and on how to develop a broad and deep network of relationships. As a lawyer matures in her practice, more focus is directed towards developing a reputation as an expert in a chosen niche area of law and getting in front of qualified targeted prospects WHILE she continues to build a solid network. As a lawyer nears the last third of his practice, learning how to leverage the relationships he has cultivated over many years should be a focus of particular concentration. In the end, through all the phases of a legal career, it is the relationships that are the constant thread.

**II. Attitude is EVERYTHING.** Do you believe in what you are doing? Are you resentful that you are placed in "selling situations?" Do you begrudgingly attend networking events?

What I see very often is that lawyers frequently behave from a position of f-e-a-r, not confidence. If I had a nickel for every time I've heard, "I'm not good at xxxx," I could buy an island in the Pacific somewhere. The question is not whether you are "good" or "bad" at any particular behavior or action, but rather whether you are WILLING to work at it.

This reminds me of a great quote, *"If you think you can do a thing or think you can't do a thing, you're right." – Henry Ford.*

It's all in the attitude. No question, lawyers are intelligent folks but building a successful, profitable practice requires much more than being smart.

**III. What Drives You to Engage in Business Development?** Is it the journey or the destination that motivates and inspires you?

Too often I have seen lawyers become impatient with the process of developing a profitable practice. Then, the excuses start flying, "I don't have time to xxxxx;" "I don't feel comfortable when I xxxxx;" "I tried xxx and it didn't work"...sound familiar?

What law firm clients often neglect to realize is that it is not 'enough' to go through the motions of executing upon an action step (say, to present an educational program before an audience of qualified prospects) in order to plant productive seeds of high impact business development value. No, there must be adequate planning and preparation prior to the event, certain action steps executed during the event, and targeted activities following the event in order to maximize the activity. Merely showing up, reading through a presentation (or off of a Power Point presentation) and leaving does not qualify as a high impact business development initiative.

So, where does this leave us?

As we stand at the turning point of another year, may I suggest you carve out some "noodling" time over the next month to ask yourself some of the questions I have posed above and then get real with yourself by looking deep within.

Ask yourself, "what motivates me?" "How committed was I really in 2012 to the growth of building my practice?" "What am I willing to do differently or more of in 2013?" What should I cut back on and/or eliminate from my action steps in 2013?" "Is what I'm doing working (according to some measurement metric)?"

Only you can answer these questions though we work with clients to help guide them to the answers.

What I know for sure: we ultimately engage in activities that provide some sort of "pay off" for us. Are your business development mindset, attitude and efforts working for you?

## Volunteer Tax Attorneys Needed

The Low Income Taxpayer Clinic at South Jersey Legal Services, Inc. (LITC) assists taxpayers who have controversies of less than $50,000 with the Internal Revenue Service and taxpayers for whom English is a second language. Because of funding cuts and staff reductions, our clinic is staffed by only one attorney. We are seeking attorneys willing to (1) accept case referrals for representation to assist in the overflow of cases, cases where the amount in controversy exceeds $50,000 and those of a more complex nature than we are able to handle and (2) be available when needed to briefly consult on cases when the matter is beyond our expertise as tax is not the primary practice of SJLS. The majority of the referrals will be overflow cases of a routine nature.

The types of cases we regularly handle include controversies related to identity theft problems, Earned Income Tax Credit, Child Tax Credit, Employee/Independent Contractor Issues (SS-8 petitions), preventing or manage liens, levies and collections, challenges to tax liability, correcting improper filing status (erroneous HoH filing amended to MFJ, etc.), Innocent Spouse Relief, installment agreements, offers in compromise, hardship waiver for senior citizens, representation in U.S. Tax Court. We do not generally prepare tax returns. If a taxpayer has never filed a tax return, we will refer the individual to have the return prepared elsewhere (at a VITA site or IRS Service Center) free of charge.

If you are willing to assist, please contact Michelle T. Williams, Esquire, Director of Pro Bono Services and Centralized Intake, at (856) 964-2010 ext. 6229 or MTWilliams@lsnj.org.

# Why I Love Doing Pro Bono for South Jersey Legal Services—Especially When I Win

*By Donna Freidel, Esq.*

I submit that there is no greater satisfaction as a lawyer than winning a case for a client. Getting that order and decision in the mail that says "you won"—it's still a thrill after almost 30 years of doing this work. But I can tell you that the feeling is multiplied tenfold when your client is a child whose life will be changed forever for the better as a result of the case you took on as a pro bono attorney for the Children's Supplemental Security Income Project for South Jersey Legal Services (SJLS).

I've been fortunate, each of the cases I've accepted from SJLS since volunteering for the Children's SSI Project, has resulted in a "win." This does not mean that I am such a brilliant lawyer; what this means is that they screen their cases well. It also means that there is a crying need for decent lawyering for these kids. What I would consider to be basic thorough handling of a case is something new for my clients. The "Moms" as my clients' main advocates are generally known in the system, do their best—and you can check any assumptions you want to make about them at the door. These ladies without exception fight very hard for their children—but the system is very difficult for even a lawyer with their many years of schooling and court and administrative experience to navigate. Petitions and requests for reconsideration are lost. A child who has six kinds of disabling conditions is almost invariably and without fail listed as only having asthma on the disability application. (That crippled leg? The hearing loss and blindness in one eye? Forgot to list them despite the medical records documenting those conditions up the wazoo! But we got the asthma!).

My most recent case, for "N," was the one I was sure would be my first defeat, and I told "Mom" not to get her hopes up, even as we documented the lost request for a reconsideration, and won the right to a hearing. Despite misgivings, we went about obtaining all of the records we could, interviewing family members and checking with the schools. There was a real disconnect between Social Security's evaluation—an "expert" who found absolutely nothing wrong with my young client, and family and teachers who all documented significant problems that interfered with this young man's ability to achieve, to socialize, to thrive. I had fallen into the trap of comparing him to my other clients, who were indeed, *more* disabled, to some degree, but when one considered this client to other students, as his school records revealed, and as a fresh look at the Social Security standards reminded me—he was indeed disabled. That was the key to the case, focusing on this one child—and when he appeared before the ALJ, who had the chance to read his school records and the evaluations of his teachers and his school counselors, and see how "N" interacted with the adults in the hearing room as a result of his complex of disorders. Seeing was believing, and the ALJ specifically found the Social Security expert's opinion that my client had no disability to lack credibility. We won a ruling of full disability, dating back to the time of the original filing—the one that had been misfiled by the S.S.A.!

These cases require that you put in the same type of effort you would for any other client—you need to read over the records, talk to witnesses, sometimes think outside the box—but the rewards are astronomical. Sometimes you are changing the life of a little boy or girl for the better. For a lawyer, it doesn't get better than that. If you or your firm would like to volunteer with the Children's SSI Project, please contact Michelle T. Williams, Esquire, Director of Pro Bono Services and Centralized Intake at SJLS at (856) 964-2010 ext. 6229.

## OUT AND ABOUT

### Gerry Dinner

Jim Waldron & Hon. Mark Falk

Frank Dee & Frank Allen

Chief Judge Simandle & Joe McCormick

### Autumn Scramble

Bryan Eberle, Chris Pitts, Phil Saunders & Mike Dennin

Art Abramowitz, Harold Cohen, James Langdorf & Jerry Grossman

Partner in Progress Paul Dilks (Genworth), Chris Bratton, Rich DeGrace & Mark Lose

# Time to Consider Those Overlooked Tax Deductions

*By Martin H. Abo, CPA/ABV/CVA/CFF*

It's criminal to take business-tax deductions to which your practice/company is not entitled, but it's a darn shame to miss those that are lawful. Following, in no particular order of priority, are some guidelines to help you record the proper tax deductions for such items as travel, entertainment and business meals. These would be useful in the case of unreimbursed employee business expenses or if you're self-employed. The endless tampering by Congress with tax deductions, credits, capital gains taxes and income tax rates makes it more essential than ever to have tax planning reviewed by your professional tax advisor to determine whether such deductions are permitted or entirely new strategies need to be employed. To make sound income tax planning decisions and to implement such tax minimizing strategies, it is important to engage in periodic tax planning with a competent professional tax advisor. The virtually endless number of items that can be "business expenses" make it difficult to list each one as well as separate expenses that serve a bona fide business purpose from those that do not.

## Travel, Entertainment and Business Meals

- The law requires you to maintain records supporting deductions for business travel, entertainment and gifts. Generally, *estimation* of these expenses is not permitted. A summary of the information that must be recorded is as follows:
  1. The amount of the expenditure for travel, meals, lodging, entertainment or gifts.
  2. The time and place of the travel and entertainment, or the date and description of the gift.
  3. The business purpose of the expense, or the business benefit derived or expected to be derived as a result of the expenditure.
  4. The business relationship with the person entertained or receiving the gift.
- As long as it is an ordinary and necessary business expense, the cost of entertainment may be deductible if it is "directly related" to business or if it directly precedes or follows a bona fide business discussion and was "associated with" the conduct of your trade or business. An exception is made for a taxpayer traveling away from home on business, in which case the cost of a meal alone or with persons who are not connected with his business will qualify as a business meal.
- Business gifts are deductible only to the extent of $25 per year per donee and to claim that deduction you should have the substantiation listed previously. All travel and entertainment should be recorded in your diary or account book "at or near the time" when it occurs. Records and receipts should be retained for at least three years after the due date for filing the tax return on which you claimed the deduction (six years even preferred). Except for expenditures for lodging and transportation, receipts are not required, although suggested, for expenses up to $75.
- Deductions are not allowed for lavish or extravagant meals. The cost of beverages served apart from meals is covered by the rules for business meals. Meals or beverages served in a taxpayer's residence

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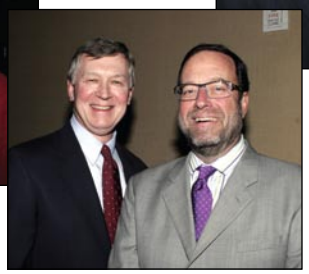
# A Truly Deserving Recipient

Following a networking cocktail hour there was laughter and applause as guests and speakers gathered to honor Chief Judge Garrett E. Brown, Jr. (ret.), United States District Court for the District of New Jersey at the Bar Foundation's 17th Annual Judge John F. Gerry Award Dinner at the Westin Hotel in Mt. Laurel.

The Gerry Award is presented in recognition of continuing outstanding contributions of a member of the Bar of the State of New Jersey or a member of the State or Federal Judiciary in New Jersey who exemplifies the spirit and humanitarianism that marked Judge Gerry's life and career.

Judge Rodriguez, Chief Judge Simandle, Jane Darton & Clerk of Courts William Walsh

Gerry Award Committee Chair Hon. John Mariano (ret) & Mrs. Jean Gerry



John Kearney & Allen Etish

Judge & Mrs. Brotman

Jeff Smith & Gerald Krovatin

Andy Kushner, Foundation President Linda Eynon, Debbie & David Simon

Corinne McCann & Suzanne O'Gara

# Not So Picture Perfect Fall Weather Greets Golfers at Annual Autumn Scramble

Brenda Eutsler & Al Schwalbe "Uhm! Fire Good!"

Although Super Storm Sandy forced a one week postponement of the Foundation's annual Autumn Scramble golf outing, 94 hearty golfers from Camden and Burlington Counties showed up on a cold, overcast November 5th to test their skills on the Laurel Creek course to benefit the Camden & Burlington County Bar Foundations.

Special thanks go out to golf towel sponsors Neuner & Ventura and Brown & Connery LLP; Cocktail Hour Sponsors Kulzer & DiPadova, P.A. and Advanced Spine & Pain; Umbrella Sponsor Susquehanna Bank; Golf Ball Sponsor DuBois, Sheehan, Hamilton, Levin & Weissman, LLC; $10,000 Hole-in-One Sponsor Asbell & Eutsler, P.A.; Cart Snack sponsor Ken Landis Tax Solutions; Lexus of Cherry Hill & Mercedes-Benz of Cherry Hill, and all of our other prize and hole sponsors, and players.

Jim Hamilton, Matt Harrison, Mark Oddo & Milind Patharkar

Mike Bryan, Matt Conley, Maury Cutler & Bob Harbeson

Jenifer Fowler, Greg Sutphin & Kelly Walenda

George Beppel, Barbara Riefberg, Sal Siciliano & Matt Taylor

Adam Bracy, Jack Hall, Doug Mocham & Nick Rounds

# Time to Consider Those Overlooked Tax Deductions

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qualify as business meals on a clear showing that the expenditure was commercially, rather than socially, motivated.

- Business meals and entertainment are only deductible to the extent of ***50%*** of the cost.
- Expenses for recreational, social or similar activities for employees, such as Christmas parties or summer outings, remain fully deductible
- The cost of a meal or an entertainment activity is fully deductible if such expense is treated as compensation to the recipient. When an employer provides meals or expenses to an employee, the employer's expenses are not subject to the percentage reduction rule if such amounts are reported as compensation and treated as wages for income-tax withholding purposes. Similarly, if an independent contractor has rendered services to a taxpayer, the taxpayer is not subject to the 50 percent disallowance if the expenses are includible in the independent contractor's gross income as compensation and the taxpayer reports such expenses on Form 1099 (unless the aggregate amount paid to the recipient is less than $600 and therefore not required to be reported).
- Pay particular attention to properly identifying the type when recording the expense or before submitting it to the employer for reimbursement. Firms typically set up appropriate general ledger accounts but we hate to see a fully deductible expense (i.e. hotel) be inadvertently lumped together as a 50% deductible item (i.e. meals & entertainment).
- We frequently suggest the use of a "Petty Cash Reimbursement Sheet" or other type of report adapted to one's specific needs. The sheets are useful in that they allow for the reimbursement through cash disbursements for all out-of-pocket expenditures of a business owner or for employees where applicable. They serve a dual purpose in not only providing adequate substantiation

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# PRESIDENT'S PERSPECTIVE

by Brenda Lee Eutsler

## A Dramatic Change of Perspective

Except for a few minor touches, my December Barrister article was ready five days in advance of the 10/31/12 submission deadline. Figuring I had plenty of time to finish it, I directed my attention to other matters. However, Mother Nature had other plans and, in the aftermath of the devastation caused by Hurricane Sandy, my perspective for this article was changed dramatically.

It is extremely difficult to express the intense sadness I feel, and which I know all New Jerseyans feel, over the destruction to our beautiful shore communities. Fortunately, few lives were lost, but many lives have lost much. The sadness is greatest for people I have never known, and will probably never know, who have lost their homes and all of their belongings. Yes, in time, homes and furnishings will be restored or replaced. But family heirlooms and memories captured through photographs, videos, charms, cards and letters are now gone forever. These items often evoke intense emotions, and often fiercely contested battles, for my estate clients because of the tremendous sentimental value attached to them. I am sure family law attorneys have had similar experiences with their clients.

Many of us and our family members, friends and neighbors lost power here in Camden County for several days. Jim and I maneuvered through the house with flashlights and huddled in bed with our two hot water bottles – our miniature dachshunds, Raptor and Jezebel – keeping us warm. Our loss of power was a mere inconvenience and paled in comparison to the trauma faced by thousands along the shore who were evacuated or had to be rescued from their flooded homes, having no means of communicating with their family and friends once their cell phone batteries died out, and wondering when they would go home, what they might find when they did and if their home would even still be there.

When I eventually was able to again watch TV, I was shocked by the aerial views—the Ferris Wheel from the pier in Seaside Heights rising from the ocean, only the rooftops of houses showing above the water level on Long Beach Island, boats on streets and on top of houses, houses in streets, and downed trees and wires everywhere! The scenes from Manhattan and from nearby towns in PA were just as shocking and sad. Subways closed, stock markets closed, courts closed, schools closed, marathon canceled, gas rationing. A true widespread disaster.

Throughout the crisis, Governor Christie demonstrated strong leadership and concern for the safety and welfare of our citizens, as did President Obama, state, county and local officials, and, as always, our courageous first responders. But it was our native New Jerseyans, reaching out to help their fellow residents, who showed the world why Jersey is such a great place to live. It may take a while before someone can again propose marriage at the top of the Ferris Wheel in Seaside Heights. That day will come, as will the sunburns on the beaches on Long Beach Island, Cape May, Margate and Avalon, and as will the strolls along the boardwalk in Atlantic City, Ocean City and Wildwood on our warm Jersey shore summer nights!

My thoughts and prayers remain with my colleagues, family, friends, neighbors, clients, students and the citizens of New Jersey who have been affected by Hurricane Sandy. May their recoveries be speedy, complete and as painless as possible.

# WINE & FOOD

Now that the commercials highlighting the shortcomings of candidates on the other side of the political aisle once again can yield to those promoting the virtues of the drug *du jour*, and advertisements for the holiday season's "must" purchases plead to our acquisitive instincts, it is time that we give some serious thought to our wine needs for this most festive of seasons.

December is a month when people who rarely consider buying sparkling wine will reach for bottles of bubbly to share with friends or present as gifts. Notwithstanding its versatility and the many affordable options now available, many wine drinkers, including those who are relatively serious consumers, restrict their sparkling wine purchases to such special occasions as birthdays, weddings, dissolutions and, yes, holiday celebrations. While we *could* revisit the debate about why such views are short-sighted, since this is a time for good will and peace, let us simply consider sparkling wine options that may be available.

While we have shied away from offering thoughts of the "real" sparkling wine—that which is grown and bottled in the Champagne region of France—the slight uptick in our economy might cause some of you to feel flush enough to splurge. Many will feel safer buying Champagne "brands" such as Veuve-Clicquot, Mumm, Taittinger or Moët-et-Chandon, especially if the wine is a gift for someone for whom label recognition is important. Certainly, there is a reason the "big house" Champagnes are popular, including their ability to maintain a house style each year for their non-vintage wines. However, during the past decade or more, sparkling wine fans have had the option of discovering and purchasing wines from small, grower producers. Indeed, whether it is cheese, butter, produce or poultry (think farm-to-table), there has been a definite trend toward the artisan production of consumable goods. With this in mind, let us talk about some of the more affordable (usually non-vintage i.e. "NV") grower Champagnes you might want to search out and buy. Since the distributor of these wines is well-represented in our area, do not hesitate to speak with your favorite retailer about their availability even if you do not find them on the shelf.

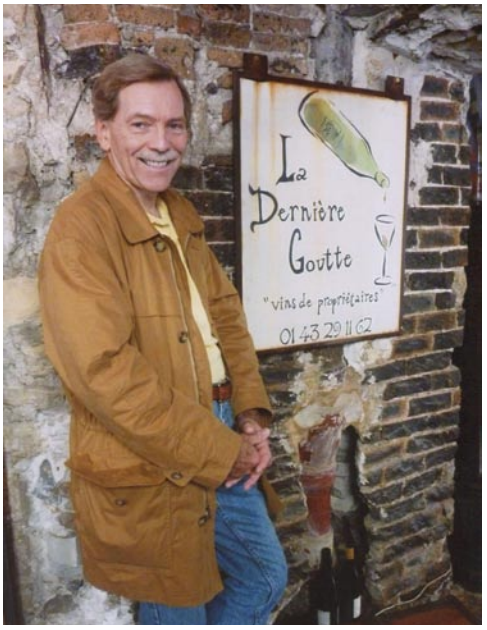
**NV Marc Hèbrart Blanc de Blancs** is a very showy wine made from 100% Chardonnay grapes (hence the "blanc de blancs" designation). The mousse (foamy bubbles) is mouth-filling and cloaks the palate, with spices such as nutmeg and cinnamon dusting apple flavors that are both penetrating and persistent.

Another prospect to consider is **NV A. Margaine Brute Cuvée Traditionelle.** This is not a wine for those seeking elegance, which is a characteristic many enjoy in their sparkling wine. Rather, this wine offers bold melon and apple fruit that is virtually propelled onto the palate by a frenetic froth that, when it finally subsides, reveals a wine of substantial weight. It has the structure to outlast even the most deliberate, leisurely consumption.

Let us next talk about a small producer that also may be unfamiliar to you but is worthy of introduction. **NV L. Aubry Fils Champagne Brut** is an entry-level sparkler made from a substantial percentage of red grapes. There is a decided muscularity to the wine, with a round ripeness that features flavors that are mostly citric, albeit creamy in profile. There is also a nice toasty (from the "lees") quality that adds to the wine's heft.

René Geoffroy is a similarly small producer whose wines I long have enjoyed. The latest **NV René Geoffroy Expression Brut** offers a good glimpse into this estate's style. There is a real intensity to the wine, and while it is not a heavyweight, it conveys a nice sense of breed that features lemon curd and sourdough bread taste sensations.

If your search for these wines is in vain, or you were unable to justify the cost, but you still want to pop a cork or give a sparkling wine as a gift, what is Plan B? Two Champagne houses to consider that are more widely distributed but still relatively affordable are Nicolas Feuillatte and Pol Roger. However, if you want or need a bubbly priced less than $25 per bottle, you may want to look south of




Champagne. Since we have covered many of the now popular alternatives such as Prosecco from Italy or Cava from Spain, I do not want to revisit recommendations you undoubtedly already are considering, so let me offer a new option to weigh.

A Prosecco producer whose wines I recently re-tried and enjoyed is Bortolotti. The **NV Bortolotti Prosecco Brut** conveys its chalky, quinine edged fruit in a relatively aggressive and expressive manner. The wine shows the mineral linearity of Prosecco from the Valdobbiadene part of this northern Italian wine area (the wines from the eastern hub, Conegliano, tend to be rounder in style) without forsaking the body that can provide versatility. Meanwhile, two very inexpensive Cavas to try if you have not already are **Kila** and **Rigol**, each of which can be found for under $10.

As we face winter's chill, however, many wine drinkers will want a red wine to enjoy with the heartier food they cook or will enjoy at a favorite BYOB restaurant (aren't we fortunate to have so many!). Let us then highlight a few value-priced red wines meriting consideration. **2010 Domaine de Fontenille** is an estate just east of the southern Rhone region of France where Chateauneuf du Pape casts an increasingly formidable shadow. As in the southern

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# Time to Consider Those Overlooked Tax Deductions

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for IRS purposes but also make sure legitimate deductions do not "slip through the cracks."

- We believe one should adopt a simple record keeping system which suits their purposes. We strongly advise clients to maintain a diary which details any expenses incurred as well as the information necessary to support the deductions. Many already maintain some sort of appointment book anyway so that they may be able to merely re-indoctrinate themselves to jot down the information needed. Then, on a periodic basis (i.e. weekly or monthly), they can complete an expense report for future accumulation or submit it for reimbursement by their employer with the receipts and other documentary evidence attached to it. The individual's business (or employer) would then pay this bill as it would with any independent, third party.
- Even if not required, we suggest retaining documentary evidence which can serve to substantiate other (than the cost) elements of the expenditure or possibly elements of related expenditures. For example, a receipted restaurant bill is not required where the expenditure is less than $75. Nevertheless, such a bill establishes the time and place elements of the meal, and supports the related parking and transportation costs.
- We typically suggest minimizing the use of cash to pay for deductible expenses. A canceled check or a credit card slip can do something that cash can't—refresh one's recollection of unrecorded elements of an expenditure.
- We often suggest clients subscribe to at least two (2) credit cards limiting the use of a given card(s) to business expenditures and the other card(s) to personal expenditures. Thus, they would have to sift through only the "Business Credit Card" slips for reimbursement (or deduction).
- Employees' non-reimbursed business expenses are deductible only to the extent that they exceed 2% of adjusted gross income reflected on their personal income tax returns. Thus, an employee with adjusted gross income of $100,000 and no other miscellaneous itemized deductions will lose the first $2,000 of such "unreimbursed employee business expenses." The employer (or your business), however, is not subject to these limitations, and can claim the entire deduction as long as the business purpose is properly documented. This is a strong reason I might suggest business owners submit such items for reimbursement by their business (even if it means reducing their regular draws or compensation).

Please understand that what's outlined above is meant to serve as a mere guideline in making sure you get every legitimate deduction to which you are entitled. In other words, what is one person's pleasure may be another's business!

# WINE & FOOD

*Continued from previous Page*

Rhone, the Grenache grape plays a starring role, but in this wine shares the spotlight with Syrah. The latter grape adds some real heft and structure to a wine offering waves of wild strawberry and tart, brambly, blackberry fruit. There is a sinewy muscularity to the wine, with a loamy texture and the underbrush quality the French call "garrigue" adding a nice counterpoint. This wine is a less costly alternative to Chateauneuf-du-Pape.

Venturing south of the Rhone we find the Languedoc, a region Linda and I explored in depth this year. There are many up-and-coming producers taking advantage of the more affordable land, and one appellation to look for is Corbières. **2011 Chateau Montfin Corbières Cuvée Pauline** is a winner. There are many old Carignan grape vines in this region that are being employed to good effect, whether standing alone or, as in this case, in a blend. This is a serious tasting wine, presenting blue fruit that melds with cassis impressions. The fruit is held together nicely by a frame of slate, graphite and gentle earth notes. There is a level of concentration that belies the wine's affordability.

Finally, staying in southern France, the **2010 Domaine des Soulanes Cuvée Jean Pull** offers a more fruit forward approach to satisfying one's red wine thirst. The blend is 60/40 Grenache to Carignan, and the wine was raised in tank rather than oak barrels. It is a reasonably plump compote of black raspberries and blackberries, with traces of coffee grounds and black tea flecking the fruit. It has the virtues of being both easy on the palate and the wallet.

I hope 2012 concludes on a high note and that 2013 will be a lucky year in wine and life. Happy holidays!

## WELCOME NEW MEMBERS

*October 2012*

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**NJSBA UPDATE**

# What Happens In Las Vegas

## (Appears in the Barrister)

*Continued from Page 5*

Eric Fikry, Anthony LaRatta, Judy Charny, and Meghan Bradley—apologies to anyone I missed. After the final reception Temma and I were invited to join the South Jersey contingent for drinks in NJSBA President Kevin McCann's suite. I thought our room, which had a two sofa sitting area, was nice until I saw his suite. I toured a living room, bedroom, two baths, a room just devoted to the massage table, and there may have been more. We then adjourned to a scrumptious six-course dinner at another fine restaurant —just what I needed.

Temma and I had planned to stay in Las Vegas for a couple of days following the meeting. The weather turned sunny and hot. We rented a car for Sunday and Monday. We drove to the top of Mount Charleston, the highest peak in the area, to have lunch at the lodge. We had both expected a serene rustic setting with a sleeping Basset Hound and rocking chairs on the porch. We found a bustling, put-your-name-in and wait-for-a-table restaurant with the Squeeze Box Band wearing leather shorts with lederhosen and Alpine hats playing oompah music—it was fun. We visited the Old Mormon Fort, which was the first permanent structure in the Las Vegas basin—it was fascinating. We went to the National Atomic Bomb Testing Museum —it was a somber, sobering experience. We gambled on the old strip where you can still find a five-dollar craps table and a nickel slot machine. And we enjoyed the frenetic Freemont Experience where the street is closed to traffic and has a dome over it with hourly light shows and a zip line running its length. There are several loud bands competing for attention along with "gentleman's clubs," stores and casinos. Among the throng, are people in every conceivable kind of costume, who, for a tip, are ready to pose for pictures—with you or not.

Tuesday, our last day, we spent relaxing. Our quandary was which one of the many pools at the hotel to choose. We followed our day of leisure by watching the second Presidential Debate in our room, which, due to the time differential, ended at seven thirty, and then to dinner and a show. We violated our "don't go back" rule by returning to the Lake Side Restaurant that Temma fell in love with. We ate on a terrace overlooking the lake with a waterfall displaying a different, incredibly imaginative light show every half-hour. The show *Le Rev* (The Dream) was an extravaganza above, on, and below the water.

Our trip home on Wednesday was just as we like them—uneventful. Thursday was back to reality, with court appearances in Evesham in the morning, Brigantine in the afternoon, and Pennsauken at night and appointments sandwiched in between—not to mention a week's worth of unread mail and unanswered telephone calls. The scheduling department (aka my secretary) is trying to kill me. Oh well, such is the price to be paid for such an excellent vacation.

Next year ROME - November 9 to 16, 2013 — mark your calendar!

Send comments to:
arnold@fishmanandfishmanlaw.com

# Back in the Day

*By Hon. Richard S. Hyland (ret.)*

Newspapers recently carried an obituary for Richard Hyland of Cherry Hill, survived by brother William. Close enough that I had to pinch myself and then fielded calls and indicated that the reports of my demise were greatly exaggerated. The mandatory daily reading of "obits" is a compulsion from an Irish gene on my mother's side. Almost every day I note the passing of World War II veterans, members of "The Greatest Generation;" but now also see the passing of Korean War vets who served during "The Forgotten War."

While attending Hatch Junior High in Camden I had a classmate who was quite older than the rest of us and who wanted to drop out and join the Army. He did so and only a few months later we learned he was killed in Korea. This was shocking since my only concerns were avoiding another adolescent skin eruption, getting up enough courage to ask a pretty classmate to the "Spring Frolic;" and if successful, learning how to dance for the Frolic. His death still haunts me, so I thought I would write about the so-called U.N. "police action" to remember him and the approximately 54,000 Americans who died as a result.

In June 1950 the fearsome North Korean Army crossed the 38th parallel into South Korea, captured Seoul and advanced down the peninsula. President Truman ordered the occupation troops in Japan into battle, but they were no match. They had been enjoying the fleshy pleasures of Japan and learning how to walk in sandals we later adopted and called "flip-flops." However, they didn't learn how to stop T-34 Russian tanks with our outmoded weapons.

More troops were called up, including the Oklahoma National Guard Infantry Division which included a teen-aged kid from a small town by the name of James David Ryan.

You know him as "Buddy" Ryan, the colorful former Eagles coach. He emerged as a sergeant because of his leadership qualities and toughness. When the team had suffered several losses, he was asked how difficult it was. He replied it was nothing compared to having the Chinese trying to kill you in weather 40 degrees below zero.

Our Mike Matteo and my friend served there after Temple ROTC and told me it was so cold he never got warm again.

Another hero was Boston Red Sox slugger Ted Williams who hit an amazing .406 in 1941 and then went to war as a fighter pilot, returning to baseball in 1946.

He was called up for Korea, this time as a jet fighter pilot. Although he was robbed of his prime and record-setting years, he never complained and was proud to serve.

I wonder how many of our present "stars" would do the same.

What little some would know about the war would be from the TV program "MASH." It was based on a book by H. Richard Hornberger, a surgeon from Trenton who served there in such a unit and was the model for "Hawkeye" as played by Alan Alda. Although I enjoyed the characters and humor, I felt there was more anti-war sentiment portrayed for that era. My suspicions were confirmed by an interview with the author who "almost never watched it ... because of the liberal tendencies that Alda portrayed." It was shown during the Vietnam era and scripted by liberal Hollywood screen writers who were opposed to that war and let their views come through to an unsuspecting audience.

When in Washington you should visit the Korean War Memorial. It portrays 39 larger than life stainless steel soldiers on a patrol wearing their helmets and ponchos. The fear on their faces is almost palpable as they move on guard against a possible ambush. It is so eerie and moving that I got goose bumps and remember it because it captures the essence of the war so well.

Please forward any comments to rhylandatlaw@aol.com.

# VERDICTS OF THE COURT

*Superior Court of New Jersey*

VERDICT: Liability Verdict: 100% Against Defendant, Damage Verdict: $850,000 Against Defendant (9/21/12)
Case Type: Medical Malpractice
Judge: Lee A. Solomon, J.S.C.
Plaintiff's Atty: Frank Allen, Esq.
Defendant's Atty: Gregory Giordano, Esq.
L-4938-10 Jury

VERDICT: No Cause Liability Verdict: 100 % Against Plaintiff (10/25/12)
Case Type: LAD
Judge: Stephen M. Holden, J.S.C.
Plaintiff's Attys: Jamie Epstein, Esq. and Jeffrey Hark, Esq.
Defendant's Atty: Patrick Carrig, Esq.
L-1418-10 Jury

VERDICT: No Cause (10/2/12)
Case Type: Auto Negligence
Judge: George S. Leone, J.S.C.
Plaintiff's Atty: Brian Jacobs, Esq.
Defendant's Attys: Kira Feeny Spaman, Esq., Anne Walters, Esq. & Howard Goldberg, Esq.
L-4401-10 Jury

VERDICT: No Cause Damage Verdict: $0 Against Defendant (10/2/12)
Case Type: Auto
Judge: Deborah Silverman Katz, J.S.C.
Plaintiff's Atty: David Paul Daniels, Esq.
Defendant's Atty: Lisa Green, Esq.
L-4793-10 Jury (6)

VERDICT: Liability Verdict: 100% Against Defendant, Damage Verdict: $100,000 Against Defendant (10/10/12)
Case Type: Auto Negligence
Judge: Lee A. Solomon, J.S.C.
Plaintiff's Atty: Robert Greenberg, Esq.
Defendant's Atty: Everette F. Simpson, Esq.
L-5381-10 Jury

VERDICT: Liability Verdict: 55% and $8250 Against Defendant, 45% Against Plaintiff (10/16/12)
Case Type: Auto Negligence
Judge: Lee A. Solomon, J.S.C.
Plaintiff's Atty: Daniel B. Zonies, Esq.
Defendant's Atty: Colleen Ready, Esq.
L-5757-10 Jury

VERDICT: Damage Verdict: $40,671 Against Defendant (10/17/12)
Case Type: Construction
Judge: Deborah Silverman Katz, J.S.C.
Plaintiff's Atty: Richard Nocello, Esq.
Defendant's Atty: Anthony Bezich, Esq.
L-845-09 Bench

VERDICT: No Cause (10/17/12)
Case Type: Auto
Judge: John T. Kelley, J.S.C.
Plaintiff's Atty: Anthony Granato, Esq.
Defendant's Atty: Scott Sheldon, Esq.
L-2041-10 Jury (7)

VERDICT: Damage Verdict: $31,000 Against Defendant (10/18/12)
Case Type: Auto Negligence
Judge: George S. Leone, J.S.C.
Plaintiff's Atty: Robert Grossman, Esq.
Defendant's Atty: Jacquelin McDonald, Esq.
L-3205-10 Jury

VERDICT: Damage Verdict: $380,000 Against Defendant (10/24/12)
Case Type: Auto Negligence
Judge: Robert G. Millenky, J.S.C.
Plaintiff's Atty: David Cuneo, Esq.
Defendant's Atty: Mary Brennan, Esq.
L-6138-10 Jury

VERDICT: No Cause (10/23/12)
Case Type: Slip and Fall
Judge: John T. Kelley, J.S.C.
Plaintiff's Atty: David Kwartler, Esq.
Defendant's Atty: Kevin Mulligan, Esq.
L-3464-10 Jury (7)

VERDICT: No Cause (11/1/12)
Case Type: Auto Negligence
Judge: George S. Leone, J.S.C.
Plaintiff's Atty: Mark Molz, Esq.
Defendant's Atty: Charles Blumenstein, Esq.
L-2893-09 Jury

# When a Traffic Violation Becomes a Felony

*By Robert C. Wolf Esq.,*
*Liebling, Malamut & Sunkett*

Driving while suspended, in some cases in New Jersey, is no longer a traffic violation. In fact, fairly common instances of N.J.S.A. 39:3-40, New Jersey's statute punishing Driving While Suspended, are now being treated as fourth degree indictable offenses in violation of N.J.S.A. 2C:40-26. Not only does the offender receive a felony conviction, but they also face a minimum of 6 months jail and a maximum of 18 months State Prison. Added enhancements in sentencing come as no real surprise considering the trends, but I **am** shocked that the first traffic offense in New Jersey to graduate from Municipal to Superior Court is abbreviated, DWS and not DWI.

As a result of the change, at least three questions have topped the courtroom discussions. If the offender has no indictable record, are they eligible for PTI? If the enhancement is triggered by prior offenses that occurred before the law was enacted, is the law ex-post facto? And, should Laurick-type warnings have been read to the offender at the sentencing of the predicate offenses? (even worse, what if the Court misinformed the client regarding future penalties?)

For those unfamiliar with the change in law, there are two situations where Driving While Suspended will be charged as a fourth degree indictable offense. The first occurs when the offender is caught driving while suspended twice during a suspension that resulted from their first DUI or Refusal. In that case, the second violation for Driving While Suspended is charged as a fourth degree offense. The second occurs when the offender is charged with Driving While Suspended, where the suspension was imposed for a violation of a second or subsequent DUI or refusal. The charge then too becomes a fourth degree indictable offense.

**Should Pretrial Intervention be available to applicants charged with 2C:40-26?** The answer is not clear. When I employ my own personal screening test for a possible PTI diversion, my answer is yes. The charge is not of a violent nature. No weapon is involved. It is a fourth degree crime. Lets face it, of all the charges allowed into the PTI program, a driving offense certainly would not shock the conscience to say the least. If the applicant has no prior indictable or non-indictable convictions, they would seem to be a good candidate for PTI. On the other hand, I as well as many other criminal defense attorneys with whom I discussed this issue, cannot imagine the New Jersey Courts allowing an applicant that faces a mandatory six months in jail being allowed to participate in a diversionary program. But why should this be?

Subsection (e.) of N.J.S.A. 2C:43-12, Supervisory Treatment- Pretrial Intervention, lists 17 criteria on which the decision to either grant or deny PTI is to be based. None of the criteria speaks directly to this issue. Tenuous arguments can be made that some criteria do apply, depending on the point of view of the person reviewing the application. For instance, number 8, "the extent to which the applicant's crime constitutes part of a continuing pattern of anti-social behavior", could be loosely argued to apply, since the offender may have driven their automobile twice while on the revoked list. Number 14 examines "the public need for prosecution". I suppose it could be argued that the Legislature has determined that this behavior requires a minimum of six months in jail without parole "for the good of the public", but I think the argument is rather circular.

This new law is unique in the sense that it is one of only two fourth degree charges that require mandatory jail time on a first indictable conviction, the other being the graves act offense for pointing a gun. The latter has historically disqualified a PTI applicant for reasons irrespective of the mandatory prison sentence, which means the new offense presents a novel question in the department of Pretrial Intervention.

**If the predicate offenses occurred prior to the enactment of the new law, is the statute operating ex-post facto?** The new statute became effective on August 1, 2011. Many of those who are currently charged with N.J.S.A. 2C:40-26, were convicted of the predicate offenses prior to the effective date of the new law. I have heard some argue that this fact implies that the law is operating ex-post facto.

The statute as it is currently written, has the predicate offenses written into the language as elements of the offense. Presumably, they will be questions written into the verdict sheets to be decided by a jury, beyond a reasonable doubt. I could not locate the model jury charge on the New Jersey Judiciary website but I imagine the Jury will be instructed by the Judge to make a decision regarding whether the State has proven that the defendant was previously

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# 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.

Madden & Madden, P.A. is pleased to announce the addition of **Dennis Blake** and **Regina McKenna** to the firm.

Mr. Blake joins the firm following his service as a Judge in the Office of Administrative Law. Prior to appointment as an Administrative Law Judge, Dennis served as a civil litigator for 25 years specializing in personal injury and wrongful death litigation, particularly in complex construction accident claims. He was certified by the Supreme Court of New Jersey as a Civil Trial Attorney in 1991. He will be utilizing his Administrative Law Judge experience in serving as a mediator and arbitrator for employment, education and personal injury claims.

Ms. McKenna graduated cum laude from Rutgers University School of Law, Camden in 2011. Regina was a recipient of the 2011 James J. Manderino Award for Trial Advocacy issued by the Philadelphia Trial Lawyers Association, is a trained court-appointed mediator, and will be concentrating her practice in public entity and insurance defense as well as civil rights and employment claims. She joins the firm following her service as a law clerk to the Honorable Heidi Willis Currier of the Superior Court of New Jersey.

Both Dennis and Regina will be practicing in the firm's Haddonfield office.

Capehart Scatchard shareholder **Helene R. Leone** recently spoke at the Burlington County Chamber of Commerce luncheon in Mt. Laurel, participating in a panel discussion concerning the impact of the looming expiration of the Bush-era tax cuts. Additionally, the panel addressed the tax implications for businesses under the new healthcare reform legislation. Ms. Leone is a member of the Firm's Business and Tax Department and its Real Estate and Land Use Department. She concentrates her practice representing closely held businesses and entrepreneurs in a variety of corporate and business matters as well as, real estate and related transactions.

# When a Traffic Violation Becomes a Felony

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convicted of the predicate traffic violations. Therefore, one can argue that, at least in part, the elements of the offense were committed prior to the effective date of the statute.

The State will conversely argue that the offense that is proscribed by N.J.S.A. 2C:40-26 consists only of the most recent act of Driving While Suspended, and not the previous traffic violations. Or they may argue that the Statute is a penalty enhancement rather than a new law (despite the fact that it is now a felony offense in the 2C code). Either way, I think the Courts are unlikely to grab hold of this ex-post facto argument.

**Should Laurick-type warnings have been read to the offender at the sentencing of the predicate offenses? (even worse, what if the Court misinformed the client regarding future penalties?)** Attorneys who routinely handle DUI cases are aware of State v. Laurick, 120 N.J. 1 (1990). The question in Laurick was "whether the assertion that a prior guilty plea to a charge of driving while intoxicated (DWI) was without the advice of counsel, prevents the imposition of enhanced penalties on a second DWI conviction." Laurick, 120 N.J. 1, 4. The Court ruled that it was Constitutionally permissible to treat an offender as a repeat offender even if the predicate offenses were uncounseled, but not when it comes to an increased period of incarceration. What this commonly means in the DUI world, is that a client who is facing a third conviction can avoid the mandatory six months in jail but not the 10 years loss of license or increased monetary penalties, if they can prove that one of their previous DUI convictions were uncounseled. This is done by filing a Post Conviction Relief motion in the court where the original uncounseled conviction occurred.

In keeping with the ruling in Laurick, at sentencing, Judges state wide have been informing defendants who plead guilty to Driving Under the Influence, regarding the penalty enhancements for future DUI convictions. They are also informing the same defendants of the enhanced consequences for future offenses for driving while suspended. So the question is whether a Post Conviction Relief motion would have the same result for defendants that face the enhanced periods of incarceration under the new fourth degree charge of Driving While Suspended. The six month jail sentence imposed for violating the new fourth degree offense, mirrors the six months imposed for a third conviction for Driving While Intoxicated. Additionally, the offender receives a felony conviction under the new law.

Moreover, most of the defendants currently facing charges under the new statute were actually misinformed of the future consequences by a Judge at the sentencings of their predicate offenses. Ignorance of the law is generally not a defense, notwithstanding the ruling in Laurick. However, what of the situation where Judges, through no fault of their own, gave defendants bad information about the consequences of future violations for Driving While Suspended? I think it would be hard to deny this type of PCR and still remain consistent with the ruling in Laurick.

The arguments laid out above are not going to exist forever. Eventually, the PTI matter will be resolved, and the predicate offenses will have occurred after the new Statute became effective, and the defendants will have been accurately informed of their future exposure at the sentences of their predicate offenses. Until that time, attorneys around the state will be arguing these and other motions. The success of those motions may depend on the test cases that attorneys from either side choose to take up on appeal.

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