

## Agre Named Camden County's Professional Lawyer of the Year



Following a review of nominations received from the membership, the CCBA's Committee on Professionalism has selected **Robert N. Agre** the 2012 Camden County Professional Lawyer of the Year.

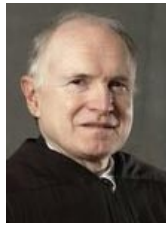
Senior Partner in the law firm of Agre and Jensen in Haddonfield, Bob will receive his award at the annual Professionalism Awards Luncheon on November 1st at the Pines Manor in Edison.

Sponsored by the New Jersey Commission on Professionalism in the Law, the award recognizes and honors attorneys who are considered by their peers to exhibit the highest professional character and competency, are respected in the community, and are considered to be models of professional behavior.

Congratulations Bob! You are truly deserving of this special award.

## Honorable Garrett E. Brown, Jr. (ret.) to Receive Gerry Award October 24

### Chief Judge, U.S. District Court for the District of New Jersey to receive prestigious award



The Honorable Garrett E. Brown, Jr. (ret.) has been named the 2012 recipient of the prestigious Judge John F. Gerry Award. The award will be presented at the 17th annual Gerry Award Dinner on Wednesday, October 24, at the Westin Hotel in Mount Laurel. Beginning with a cash bar cocktail reception at 6 p.m., the award will be presented during the dinner, which begins at 7 p.m. The 2012 Judge John

F. Gerry Memorial Scholarship recipient will also be announced and presented with a check during the dinner.

"Chief Judge Brown's long and very distinguished record of public service exemplifies the same dedication reflected in the life and times of Judge Gerry and serves as a shining example for all of us in the legal profession," said retired Superior Court Judge John B. Mariano, who chairs the Gerry Award

*Continued on Page 24*

## Autumn Scramble October 29th Experience the 2012 Autumn Scramble!

There's no better way to wind down the 2012 golfing season than the *Autumn Scramble @ Laurel Creek Country Club* in Mount Laurel! We're teaming up this year with the Burlington County Bar Foundation to create a day to remember and all members are invited to participate, whether or not you play golf.

At just \$190 per player, including greens fees, cart, gifts, lunch, happy hour and awards banquet, the **Autumn Scramble is the best golfing value in South Jersey!** With two hole-in-one prize holes featuring a two-year lease on a 2012 Lexus courtesy of Lexus of Cherry Hill, and a \$10,000 cash hole compliments of Asbell & Eutsler, you don't want to miss this exciting day on one of South Jersey's finest courses! And you don't have to make a hole-in-one to walk away with great gifts and prizes either.

Of course, the real winners are the less fortunate in the community who will benefit from the Foundation-sponsored parties and projects made possible by the proceeds from this annual rite of Fall. **Bar members are encouraged to organize firm teams or invite clients and friends to participate in this special event.**

A number of sponsorship/marketing packages, including special foursome deals and tee signs, are available. Please use the *Autumn Scramble* registration flier included with the inserts to read more about this year's outing, then sign up to participate!

Now celebrating its 21st year, the Autumn Scramble has raised more than \$230,000 to support the Foundation's many community service programs, and has something for everyone, whether you golf or not! The deadline to register is October 22nd. For additional information about the Autumn Scramble or Marketing/Sponsorship opportunities, call Bar Headquarters at 856.482.0620 or email [lbp@camdencountybar.org](mailto:lbp@camdencountybar.org).

Don't miss one of South Jersey's premier golf outings—the **Autumn Scramble at Laurel Creek!**

## Pro Bono Expungement Attorneys Needed

Because of the severity of recent budget cuts, South Jersey Legal Services, Inc. (SJLS) has significantly reduced staffing levels and its level of client services proportionately. Currently, SJLS is not assisting individuals who need expungements of their criminal records.

We would like to start a project to refer eligible individuals who need expungements

to pro bono attorneys. Many of these individuals need the expungements in order to secure employment.

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](mailto:MTWilliams@lsnj.org).



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## THE DOCKET

### Tuesday, October 2nd

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

### Wednesday, October 17th

*Professionalism Day*  
Hall of Justice, Camden

*CCBA Board of Trustees Meeting*  
4 pm  
Bar Headquarters

### Wednesday, October 24th

*Judge John F. Gerry Award Dinner*  
6 pm Cocktails, 7 pm Dinner & Program  
Regency Ballroom, The Westin Hotel  
555 Fellowship Road, Mt. Laurel

### Thursday, October 25th

*Probate & Trust Committee CLE Luncheon*  
**Disposition of Estate Realty**  
Noon – 2 pm  
Tavistock Country Club, Haddonfield

*CLE on Tap!*

*NJ Civil Trial Preparation*  
3 – 6:15 pm  
The TapRoom

427 W. Crystal Lake Avenue, Haddonfield

*Professional Networking Happy Hour*  
*Co-Sponsored by*  
*the NJSCPA Young Professionals*  
6 – 9 pm  
P.J. Whelihan's Pub  
Cherry Hill

### Friday, October 26th

*Social Security Committee Meeting*  
Noon  
Bar Headquarters, Cherry Hill

### Monday, October 29th

*CCBF/BCBF Autumn Scramble*  
*Golf Outing*  
Laurel Creek Country Club  
701 Centerton Road, Mt. Laurel

### Tuesday, November 6th

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

## Tentative Agenda for October 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 Bar Headquarters. 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. Membership Committee Report
- VI. Executive Director's 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

## THE BARRISTER

Published monthly, except July and August, by the Camden County Bar Association.

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## MEMBER ON THE SPOT

**NAME:**

**PRACTICE AFFILIATION:**

**YEAR ADMITTED TO BAR:** 2011

**OTHER BAR ADMITTANCES:**  
 Pennsylvania and New Jersey

**PRIOR OCCUPATION:** Background Screening Company  
 in NYC; also, student

**RESIDENCE:** Mount Laurel, NJ

**HIGH SCHOOL:** Moorestown Friends School '02

**COLLEGE:** NYU '06

**LAW SCHOOL:** Rutgers Camden, '11

**WHAT LED YOU TO A LEGAL CAREER:** It is a flexible and diverse field; there are many specialties and so many ways to help people and be involved, also, I wanted to do something challenging and constantly changing

**BEST PERSONAL/PROFESSIONAL ATTRIBUTE:** A constant need to know more, understand more, and get better at what I do. There's a lot to be aware of and many ways to handle matters and help people. I am driven to get to a place where I am confident to best assist my clients. The challenge, of course, is that as soon as you are comfortable with the application of a law or process, it changes on you and you have to re-learn and adapt.

**GREATEST FAULT:** A double fault. I hate those.

**WHAT I DO TO RELAX:** Mindless T.V.; sports or comedy; after a long day of focus, sometimes you just need to zone out; also, sleep.

**HOBBIES:** Sports (Tennis, Racquetball, Golf, Gym), Guitar, Piano, doing things I haven't done before

**FAVORITE RESTAURANT:** Man, the Cheesecake Factory really seems to have everything, doesn't it? That Reese's chocolate cheesecake piece is my downfall too.

**FAVORITE TELEVISION SHOW:** I am really excited about the return of *Arrested Development*. By far the funniest and smartest comedy I've ever seen.

**FAVORITE MOVIE:** *Requiem for a Dream*; *Sunshine* (such an underrated movie)

**FAVORITE AUTHOR/BOOK:** I used to read all of those Stephen King books, until my time was consumed by law books and law materials. *The Story of Stuff* is pretty good also.

**FAVORITE VACATION PLACES:** Anyplace with a nice golf course, an open tennis court and a night life within walking distance.

**FAVORITE WEBSITE:** What's the internet?

**FAVORITE MUSEUM:** I'm not a huge museum-goer, so we will go with the hometown hero: Philadelphia Museum of Art

**FAVORITE WEEKEND GETAWAY:** Sea Isle City.

**ENJOY MOST ABOUT PRACTICING LAW:** My dad and I run our own practice now and I really enjoy having a lot of control over how we do business. Being your own boss (even though we all know who the real boss is).

**MOST ADMIRER PERSON AND WHY:** Anyone who sacrifices personal time to do things for others; we need all the selfless people we can get

**David L. Hasner**

**Hasner and Hasner, PA**

**WHEN AND WHERE HAPPIEST?** When: Currently; Where: Anywhere

**CHERISHED MEMORIES:** I don't remember. I hope I don't forget to make more.

**GREATEST FEAR:** That I will die and my funeral will be like Willy Loman's.

**ALTERNATE CAREER CHOICE:** Weather Man.

**GREATEST LESSON LEARNED FROM PRACTICE OF LAW:** It is a continuing lesson: always be a skeptic. There is some value in our legal system, which requires that the facts be proved instead of merely claimed to be true. Also: Get paid up front.

**PERSON YOU'D MOST LIKE TO DINE WITH:** Gandhi.

**PET PEEVE(S):** Cars immediately behind me that pass me on the right, only to end up stuck immediately ahead of me at a red light. Studies have shown that in urban or suburban areas with many lights, you do not cut off any travel time by speeding or weaving.

**LIFE'S HIGHLIGHTS:** Starting a business with my dad.

**GREATEST ACCOMPLISHMENT:** See "Life's Highlights"; also, passing PA and NJ bars in the same sitting last year.

**#1 PROFESSIONAL GOAL:** Make a decent living by earning a reputation for being a compassionate and qualified attorney

**#1 PERSONAL GOAL:** Earn respect from family, friends and peers.

**LIFE EXPERIENCE(S) WITH GREATEST IMPACT:** Living in New York City was an eye-opener. Fun also.

**ADVICE TO YOUNG LAWYERS:** Be as involved as you can be.

**HOPE TO BE DOING IN 10 YEARS:** Running a successful practice.

**FAVORITE QUOTATION:** *Be the change you wish to see in the world.*

**FAVORITE BAND:** Motion City Soundtrack

**CURRENT FAVORITE SONG:** "Some Nights" by Fun.

### New Jersey Law Journal's

### AUTUMN CLE PACKAGE

## E-DISCOVERY & ETHICS

An ALM Event

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Thursday  
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 Cherry Hill

For group registration and more information, contact Douglas Brown, at 973-854-2928 / [dabrown@alm.com](mailto:dabrown@alm.com).

For sponsorship opportunities, please contact Vivian DiStaso, at 973.854.2910 / [vdistaso@alm.com](mailto:vdistaso@alm.com).



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#### eDiscovery: What You Really Need to Know - A Practitioner's Guide to NJ State and Federal Civil Practice

Presented by: Fernando Pinguelo and Matthew Knouff

This is the six-year anniversary of the federal and New Jersey state court eDiscovery rule amendments. Join us for a two-hour program where the presenters will distill the rules and caselaw into practical application, take you through a simulated eDocument collection and review, and impart tips on how to make the process manageable.



Fernando Pinguelo is chair of the Cyber Security & Data Protection Group of Norris, McLaughlin & Marcus.



Matthew Knouff is General Counsel and eDiscovery Counsel with Complete Discovery Source, Inc., a provider of electronic discovery services and technology.

#### Ethics—Investigation, Prosecution and Discipline

Presented by: Justin Walder

An attorney has been contacted by an ethics investigator—now what?



Justin Walder, managing partner of Walder, Hayden & Brogan, is the New Jersey Law Journal's 2011 Lawyer of the Year.

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By Arnold Fishman  
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## So Many Choices

Inertia is the overwhelming force in my life. I am resistant to change. I have been in my house for more than 35 years. When we moved in, I vowed that my next move would be in a pine box. In spite of that reluctance, circumstances have conspired against me. After more than 20 years in Camden and over 25 years in Haddon Heights, we have outgrown our space, and have moved our offices. We took advantage of a buyers market and purchased a recently refurbished handsome old building on the White Horse Pike in Lawnside. It sits on a hill directly across from the Lowe's Shopping Center. If you are in the neighborhood, and the lights are on, stop in and say hello. I will give you the guided tour.

Now that the necessary renovations have been completed, and the logistics of the dreaded actual move negotiated, I have had the opportunity to reflect. There have been numerous difficult life-changing decisions

that I have been forced to make in my years, and invariably they have all worked out fine. Choices involving marriage – yea or nay; career – law or psychiatry; children, and, if so, how many; my living and working location – PA or NJ, rent or buy; regular or light – more taste or less filling; and the list goes on.

They were difficult because there were, at each junction, a number of equally attractive (or unattractive) alternatives. They were life changing because each option would put me on a path where, after a brief period, returning to the initial turning point would be difficult, if not impossible. How could I be so lucky to have chosen so well? I do not delude myself; I am not that good a chooser.

In retrospect, I have had an epiphany. It occurs to me that success in life is not so much a function of choosing well, but much more a function of exercising the discipline of refusing to look back to question your judgment until you have allowed the requisite

time to have transpired for you to have expended all of the effort that is necessary to make the decisions, that you have already made, work for you.

So too it is with the practice of law. Every case, from the initial interview to the closing letter, will at various junctures, present plausible options. Many of them will be close questions, with each selection having some benefits and some detriments. There may never be a clear answer. I can become paralyzed searching for the perfect outcome. Accordingly, when you become stuck and are in danger of an indefinite period of agonizing, my advice—easier to give than to take—is to set an arbitrary amount of time to ruminate, then just pick a solution and proceed to make it right.

Send comments to:  
arnold@fishmanandfishmanlaw.com

### Come Frolic With Us!

## Fall Frolic set for November 20th

Thanks to the unfailing generosity of our good friends at The Coastline, the Camden County Bar Foundation will be hosting two annual events there again this year.

Each year, the Coastline opens its doors to Association members, their staff, clients and friends for a happy two hours featuring a hot buffet and even hotter dance music. Once again, we will frolic at the Coastline (1240 Brace Road, Cherry Hill) between 6 and 8 p.m. on Tuesday, November 20th and **WE NEED YOU TO JOIN US!** Due to ABC regulatory changes there is now a minimal charge per drink. The ticket price of just \$15 *includes* one drink ticket.

On December 1st, 250 or more wide-eyed children from Camden will be treated to a very special holiday celebration featuring a sumptuous Coastline breakfast, an always dazzling magic show, and a visit with Santa who, with the help of his many elves, gives each child a beautifully wrapped Christmas gift and a photograph of themselves sitting on Santa's lap. While the Coastline and its employees donate the food and their time to prepare and serve it, the Bar Foundation underwrites the entertainment and, of course, the gifts. To enable us to pay the costs associated with this important and appreciated holiday celebration, the Bar Foundation turns yet again to our caring Coastline friends.

**PLEASE** understand why your support is so vital:

1. Fall Frolic proceeds will be used to purchase gifts for Santa to give our guests on December 1st, with a portion used to support the Chris Mourtos Memorial Scholarship.
2. The average cost over the past 5 years to treat the children was \$6,200.
3. Fall Frolic proceeds are used to pay for the children's presents.
4. Your staff members, clients and friends will *really* appreciate receiving tickets.
5. Besides pre-holiday networking with your colleagues and friends from the bench and bar, you will gain the satisfaction of contributing to what truly is a smile-producing day for so many delightful and deserving kids.

Thanks to The Coastline and YOU, this will be a great *FUN*draiser – fun for you and for the children who will benefit from your kindness.

To help ensure another "Merry Christmas" for those kids in need, please be sure to join us. Tickets may be reserved by sending a check to **CCBF Fall Frolic, 1040 N. Kings Highway, Suite 201, Cherry Hill, NJ 08034**. To pay by credit card or to learn more, please call bar headquarters – 856.482.0620, or email Kathy at [kdp@camdencountybar.org](mailto:kdp@camdencountybar.org).

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## YOUNG LAWYER CORNER

# Change for the Better



By Michael J. Dennin

Change of season signals renewed purpose and drive for the YLC. Many good things are happening with the Bar Association and our Young Lawyer Committee. Being able to lead our group in the past few months has provided opportunity to build on the past and move forward. While summers are often quiet and relaxing we were busy organizing our Lobster Bake and associated events. Our Lobster Bake committee of Mike Madden, Rachel Licausi, Adam Gersh, Bill Cook, Dave Hasner, Victoria Schall, Lindsey Wagner, Matt Spataro, Kathy DelPrato and Larry Pelletier formed to create a tremendous event! All of the hard work paid off and the Bake was a tremendous success. Thank you especially to all of those who came and to our sponsors. Without participation none of this would have been possible. LARC again is receiving a significant charitable scholarship from our Foundation.

The Bake is an example of what we can do as a group for the community. Membership in our Association and Young Lawyer Committee allows us to effect change. However, we are

only as strong as our members. This year we instituted our first annual clerk informational luncheon at the Superior Court in Camden. The Judges were kind enough to allow us to speak with the incoming and outgoing clerks about the benefits of joining the Bar Association. Brenda Eutsler, our President, and I discussed what gifts our association provides to attorneys in terms of charity, personal development and education. Most, if not all, signed an application for membership. The session was also a nice breather to converse with peers and have a hot lunch spread. There is no downside as membership is free to clerks, law students and first year attorneys.

We have new faces every day in our Association. I have yet to meet a person who is unhappy as a member. Young attorneys and law students often are not aware of what the Bar Association offers or how they can be helped through the Bar. One goal this year is to increase awareness among all younger and new attorneys. In addition to the clerk informational we are planning an informational luncheon at

Rutgers Law School as well so we may reach out to local law students. We had a mixer and meet and greet with the diversity group at Rutgers in Camden in September. This event was well attended and hopefully beneficial for the students. This is something we will build on and grow. These events were timely in light of the Meet the Judges and Law Clerks reception on September 19. It was a pleasure to see all of the Judges and clerks at the event at the Boathouse. The atmosphere was perfect and the food was delicious, just in time for the new Court year.

Fall brings so many great events that lead us into the holiday season. Our group is changing as well for the better. The annual Halloween party at the Anna Sample House is coming up, as are numerous CLE events and the Autumn Scramble. The Autumn season gives us reason to change for the better. We are moving forward as a group and are stronger than we were last month. Our values remain the same. The Lobster Bake was quite a spark to the giving season, and we will continue our success while building on the past.

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

## Myths in Multiples: Are Rules-of-Thumb Useful?

Have you ever wondered where the actual term “*Rule-of-Thumb*” came from? Abo doesn’t want to see himself apologizing in front of the Family Court but I’ve read that the “*Rule-of-Thumb*” has been said to derive from the belief that English law allowed a man to beat his wife with a stick as long as it was no thicker than his thumb (of course, Jane, I don’t subscribe to that theory).

Regardless, many industry-specific formulas or simple calculations have arisen over the years for valuing companies. Where do they come from? Originating in industry studies or surveys, the minds of business brokers, transaction databases, cocktail conversations, publications and other even less reliable sources, these so-called “*rules-of-thumb*” are often used—and abused—in value determination. Those who invest in the stock market, for instance, immediately become analytical in discussing earnings per share multiples, the basic “rule” for pricing common stocks. Yet while using such a rule or formula can be meaningful, without a thorough financial analysis coupled with some basic business judgment and common sense, it can be dangerous as well.

Think about it. Suppose an organization compiles statistics on 100 insurance agencies. The organization then averages all of the individual selling prices and calculates that the average agency sold for 100% of one year’s gross revenue. This creates a rule of thumb for valuing insurance agencies. The problem is that one agency may have sold for twice one year’s gross while another may have sold for half of one year’s gross. Thus, rule-of-thumb formulas may be accurate for businesses whose performances are about average, but other businesses will vary. To apply a rule of thumb to a business that varies significantly from the average is not appropriate.

Let’s take this one step further and analyze two insurance agencies that provide personal and commercial policies and assume that the *rule-of-thumb* is as follows: Value = 100% of annual revenue. In this simplified example, this rule would provide the same value for both agencies even though their net incomes are substantially different.

But consider some other factors that might affect value:

1. Agency A has 125 clients, while Agency B has 75.

2. One of Agency B’s clients accounts for 25% of the agency’s fees.

3. Agency A has a long-term, noncancelable lease for its offices.

Some considerations unique to the insurance business might be:

- The size and mix of commission income from life, health and business products,
- Whether business is concentrated with a particular insurance carrier, and
- The relationship of sellers to significant customers.

How about this same insurance agency that grosses \$200,000 and is listed for sale by a broker at 1 times annual gross or \$200,000, with the seller taking back a 120 month (10 year) note with no interest. Assuming typical terms would call for a 7% interest rate per annum; this “effective” multiple would be 71.79% (i.e. present value of \$143,573).

With *Rules-of-Thumb*, the multiples used may be known but, alas, the underlying transactions are not. There typically isn’t available sufficient data to derive multiple, insufficient information regarding the terms of the sale being compared to, while such *Rules-of-Thumb* are assumed to apply to the valuation of a “typical business.” Well, exactly what is “typical?” Each industry has its own unique considerations and each business has that much more. The salient point is to proceed with caution. *Rules-of-thumb* are not always based on a sound foundation. They are generalities and must be considered as such in their use and application. While they can help you determine a general value range, it may not be appropriate to rely on them as an authoritative means of valuing a company. They can be very useful in at least assessing the reasonableness of valuations based on other reasoned methods.

Let’s see another illustration of how relying on a *rule-of-thumb* can cause us business appraisers to have a *bruised thumb*. Take two car washes in Camden County both doing \$1 million in annual sales. Assume the car wash industry’s *rule-of-thumb* for a full service operation (versus a coin operated one) has been said to be worth one times annual gross sales. Such suggests both enterprises are worth \$1 million. In fact, a seasoned business appraiser might review these two separate operations and determine that the first one is actually worth twice the second. How can this be—two establishments in the same industry, in the same county, with the

same gross sales having two different values?

Well, the first car wash is a brand new facility and is located in a more exclusive part of the county. Its first year it grossed \$250,000 in sales, its second year it did \$500,000, this year \$1,000,000, and next year it expects to do \$1,500,000. Its equipment is spanking new. It has good aggressive management. Everything about this business is trending upwards.

Carwash #2 is located in an older, less desirable part of the county. A few years ago it was doing \$2,000,000 in sales, now it is down to \$1,000,000. The roof leaks. The property, plant and equipment are old and needs repairs. Basically everything about this business is trending downwards. Two businesses, same industry, same sales—completely different values. Restricting the analysis to a mere *rule-of-thumb* just won’t pick up on that.

Our suggestion? Use Common Sense. You can use *rules-of-thumb* to corroborate value determinations derived by more traditional methods if you combine them with a thorough understanding of the business and its financial history, sound business judgment and common sense. Use common sense but you can and probably should call a credible business appraiser with any questions you may have about *rules-of-thumb* or other valuation matters. This will help you determine an appropriate means of estimating value



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# Revised FINRA Rule 2111: “Suitability Plus”

By William Tobolsky

FINRA Rule 2111 and its predecessors have long required securities brokers to make only “suitable” recommendations to their customers. This requirement is based on the fundamental principle of “fair dealing” and has been broadening over the years in response to case law and interpretive statements from FINRA. Members and firms may not disclaim their responsibilities under this Rule. Effective July 9, 2012, FINRA imposed a revised and enhanced Rule 2111, governing Suitability.

As noted in FINRA Supplemental Materials .05, “Rule 2111 is composed of three main obligations: reasonable-basis suitability, customer-specific suitability, and quantitative suitability.” These may be summarized by the four following requirements:

- Reasonable Basis to Recommend the Product

The days of the “C student” country club IR are passing quickly. An IR can no longer recommend a product based only on word on the street or a hot tip from poker buddies. The broker must understand the products and strategies she is recommending and be able to articulate the basis of her recommendation. This should be particularly true for derivative products. Even investment bank guaranteed notes may fail.

The new Rule broadens the scope of recommendations and advice covered by the suitability requirement. An “explicit recommendation to hold” as well as to buy or sell, is now considered advice which must be suitable.

- Reasonable for the Customer’s Investment Profile

What makes sense for a retired 80 year old may be too cautious for a 40 year old eye surgeon. The recommendation must fit the

particular’s “investment profile.” The new rule states a number of factors that brokers should know before formulating a recommendation tailored to a specific customer’s needs.

- Institutional customers may be excluded from suitability requirements if they provide the broker with a signed document “affirmatively indicating that it is exercising independent judgment.”

- Reasonable Amount

The amount recommended must be appropriate for the customer’s overall portfolio, particularly when the broker has discretionary trading control over the account.

- All documented by more paperwork

Is there ever a new rule without more paperwork? The broker must document compliance with all of these measures by legible, contemporaneous and detailed notes that go into the file. Get more data from existing clients. Upgrade your intake forms to elicit more customer information, especially the information relevant to the factors specified in the new Rule. Brokers should be prepared to use their notes to defend your position in a FINRA arbitration. Customers: keep your own notes. They may prove to be the winning evidence if you make a claim.

Supplemental material .03 to the Rule excludes certain recommended strategies, specifically 1) advice “general financial and investment information”; 2) “descriptive information about an employer-sponsored retirement or benefit plan; 3) “asset allocation

*Continued on next Page*

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# Effect of the Sipler Case on MSAs in Third Party Liability Cases



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

A recent case<sup>1</sup> involved the issue of Medicare Set-Aside Arrangements (MSAs) in Third Party Liability (TPL) cases. A number of commentators have opined that based on this case it is no longer necessary to consider Medicare's interest in TPL cases. Nothing could be further from the truth.

The case involved a personal injury settlement in a TPL case where counsel for the plaintiff and the defendant agreed to a settlement of \$225,000. No other terms were discussed or agreed to at that time. Subsequently, defense counsel drafted a Release that included, among other provisions: (1) that plaintiff cannot claim reimbursement from Medicare for injuries arising out of the personal injury; (2) plaintiff's private health insurance will not pay for claims arising out of accident-related injuries because those injuries are pre-existing; and (3) Medicare will not pay for any future treatment for injuries arising out of the accident. Plaintiff's counsel refused to accept any of these provisions. Defense counsel refused to consummate the Settlement Agreement and plaintiff moved to enforce the terms of the verbal Settlement Agreement. Plaintiff's counsel argued that the provisions relating to plaintiff's medical insurance and obligations to Medicare were not part of the original verbal agreement and that federal law does not require plaintiff to disqualify himself from Medicare or establish a Medicare Set-Aside for future treatment.

The court held: (1) Where the parties agree upon the essential terms of a settlement, so that the mechanics can be "fleshed out" in a writing to be executed later, the settlement will be enforced notwithstanding the fact that the writing does not materialize because a party later reneges (this is basic contract law); (2) Medicare is a secondary payer. The primary payer is plaintiff's private medical insurance. Therefore, plaintiff may not seek payments from Medicare for future expenses to the extent they are provided by his private medical insurance; (3) That the Medicare Secondary Payer Act (MSPA) does not require in a Release specifying plaintiff's obligation not to seek payments from Medicare and that a particular portion of the settlement amount be set aside for future medical expenses arising out of the accident; (4) Federal law does not require a Medicare Set-Aside Arrangement of personal injury settlements for future medical expenses unless the claim arises out of a Workers' Compensation (WC) claim, or the settlement arises out of a WC claim, or the settlement stipulates that an amount is intended to compensate the individual for all future medical expenses, or the settlement agreement allocates certain sums for future medical

services. Therefore, the court reasoned to require personal injury settlements to specifically apportion future medical expenses would prove burdensome to the settlement process and in turn discourage personal injury settlements. The court stated, "In sum, the parties in this case need not include language in the settlement documents noting Mr. Sipler's obligations to Medicare or fashion a Medicare Set-Aside for future medical expenses."

## Analysis

1. Nothing in the MSPA requires a Medicare Set-Aside in any WC or TPL case. What is required is that Medicare's interests be considered. CMS has issued a Notice of Advance Rule Making clearly indicating that Medicare's interests must be considered in TPL cases and soliciting input as to guidance to be issued in connection with TPL cases;
2. Under basic contract law, once the plaintiff and the defendant reached an agreement to settle the case, the defendant cannot later introduce a new term in an agreement related to Medicare;
3. Personal injury settlements need not apportion future medical expenses (that is not to say that an outside expert should not do that in order to protect Medicare's interest); and
4. The plaintiff's Medicare obligations need not be addressed in the Release (that doesn't mean the obligations don't exist).

## What Does It Mean?

1. *Releases.* This opinion holds that Releases need not contain language pertaining to the handling of future medicals that constitute a part of the TPL settlement. This appears to be a correct analysis in that it is the Medicare beneficiary's duty to consider Medicare's interest.
2. *Notice of Advance Rule Making.* CMS has always taken the position that the MSPA requires that Medicare's interest be considered in TPL cases. The recent Notice of Advance Rule Making strongly reinforces this notion. In fact, AAJ is actively engaged in developing a process under the Advance Rule Making to determine how Medicare's interests must be considered in TPL cases. In the meantime, CMS has suggested that Worker's Compensation Guidance be followed in TPL cases.<sup>2</sup>

1 Sipler v. Trans Am Trucking, Inc., United States District Court, District of New Jersey, Civ. No. 10-3550 (DRD) July 24, 2012.

2 www.federalregister.gov/articles/2012/06/15/2012-1468/Medicare-Program-Medicare-Secondary-Payer-and-FutureMedicals.

## Revised FINRA Rule 2111: "Suitability Plus"

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models" based upon "generally accepted investment theory." Did anyone mention a particular security or company while the Modigliani-Miller Capital Structure Theorem was debated over Scotch? As with all exceptions: proceed with caution.

Brokers should be sure to understand their recommendations, the customer's needs and investment profile, and appropriate

amount for a buy, sell and now even a "hold" recommendation. Be prepared to justify your recommendation to your customer, and in a FINRA arbitration. Prepare more comprehensive Intake templates to gather more information about your Customers, especially information related to the factors which the new Rule wants Brokers to consider. Document contemporaneously and

confirm via email or letter.

Customers should probe IR recommendations more carefully. When a losing investment seems odd or unsuitable to the rest of the portfolio, or too complex for the customer's age and sophistication, the Customer or his lawyer should consider an unsuitability claim under the new more Customer-friendly Rule 2111.

*Note: The following was forwarded by a member who attended the swearing-in and thought it would be appropriate to reprint in The Barrister for our newly admitted and young lawyers. – Editor*

## Message to Newly Admitted Lawyers

# Practice Law With Purpose, Integrity, and Civility

Good morning, I understand there are a number of candidates with their sponsors seeking admission to the practice of law in the United States District Court for the Eastern District of Pennsylvania.

### Admission:

Will everyone please rise? Will the applicants please place their left hand on the bible and raise their right hand. You do swear that you will demean yourself uprightly and according to law as an attorney in the United States District Court for the Eastern District of Pennsylvania, and that you will support and defend the Constitution of the United States, so help you God? "I do."

It is for me an honor and a privilege to welcome you to the practice of law in our district. This is a District Court with a long history and tradition of excellence. The oath you took a few moments ago is the same oath lawyers seeking admission to our court have been taking since our court was established in 1789.

This oath is your promise to our courts and the public that you will demean yourself uprightly according to law. Implicit in this oath is your promise to act with honesty, candor, trustworthiness, and obedience to our laws. I ask that you remember these promises as you begin to practice law in our world. Because, in our world, you will face many challenges from the pressures imposed by your future employers to increase profits or a client's demands or your own personal difficulties. In confronting these challenges, your personal values of honesty and integrity will be tested.

As you begin the practice of law in this district, DO NOT COMPROMISE YOUR INTEGRITY because your character will be DAMAGED—and your reputation FOREVER TARNISHED. STAND LIKE A ROCK—unbending to pressure or compromise in matters of character and reputation. Character matters in life, BUT NOWHERE DOES IT MATTER MORE THAN IN THE PRACTICE OF LAW. I want you to understand practicing law with honesty and integrity is consistent with good advocacy and essential to restore the public's confidence in our legal profession.

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In our profession these days, lawyers too often forget something SO SIMPLE as being POLITE AND COURTEOUS. Advocates who are polite to other lawyers, parties, witnesses and the court are more persuasive than rude and uncivil lawyers. Civility in advocacy is effective and persuasive for two reasons: 1. the advocate exudes confidence in the merits of his/her position or case, and 2. the court's focus is on the issue or argument instead of the two combatants. Uncivil and disrespectful behavior whether inside or outside the courtroom does not serve your client's interest and undermines our system of justice. ALWAYS BE MINDFUL ONE OPPONENT TODAY MAY BE AN ALLY TOMORROW ON ANY ISSUE, CAUSE OR CASE.

So, in conclusion, I ask of you two things: 1) Practice law with integrity and 2) Treat others with courtesy and respect. Thank you.

## Judge M. Allan Vogelson (Ret.)

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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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Members of the planning committee and special guests (l-r) LARC School Trustee Surrogate Jones, Adam Gersh, Rachael Licausi, Mike Dennin, LARC School Executive Director Susan Weiner, Mike Madden, LARC School Trustee Jim Rhodes.

# Lobstermania!

## 3rd Annual YLC Lobster Bake an overwhelming success!

Warm and muggy air with overcast skies and the threat of damaging storms greeted nearly 200 guests for the Young Lawyer Committee's Lobster Bake presented by Flaster Greenberg on Saturday, September 8th at the TapRoom in Haddonfield. Even Mother Nature couldn't dampen the spirits of the crowd of Lobster enthusiasts who had a great time in support of the YLC's Scholarship Fund for disabled students attending the Larc School in Bellmawr. "The response was awesome" said YLC President Mike Dennin.

If you didn't attend this year's event, talk to someone who did and you'll probably want to be there next year!



Jim & Michele Badolato, Bar Foundation President Linda Eynon



Doreen & Maury Cutler



Jenifer Fowler, Nona Ostrove, Chris Fowler



Robert Kelley, Joe Corroda, Rick Brown from Evesham Mortgage, an event sponsor.



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Mike Pinsky & the "guests of honor"



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## BANKRUPTCY

# Use of Rents in Bankruptcy

By Ellen M. McDowell



Most mortgages contain a clause whereby any rents derived from the property serving as the collateral are assigned to the mortgagee. The mortgage typically states that the borrower has permission to use the rents, but that permission is rescinded in the event of a default under the terms of the mortgage. This is known as an “absolute” assignment of rents.

In 1995, the Third Circuit Court of Appeals, in *In re Jason Realty, L.P.*, 59 F. 3d 423, issued an opinion that effectively made single asset real estate Chapter 11 cases in New Jersey impossible, because the court held that in this State, assignments of rent are indeed absolute such that upon default, rents are not property of the borrower, or by extension the bankruptcy estate, if the borrower files for protection under the Bankruptcy Code. Accordingly, any income derived from the property may not be used by the debtor to fund operations or a plan of reorganization without the consent of the mortgagee.

Recently, Judge Stern, writing for the Bankruptcy Court for the District of New Jersey in the context of a Chapter 13 case, opened the door just slightly for mortgagors who require the use of rents to confirm a plan.

The Debtor in *In re Brenda Parks*, Case No. 12-13045 (letter opinion dated August 16, 2012), owns a two family house. She lives in one unit and rents the other. Her bankruptcy schedules list the fair market

value of the house at \$180,000, a valuation which the mortgagee did not contest. As of the filing of the bankruptcy case, the amount owed on the mortgage was at least \$362,846. The Debtor’s plan sought to “cram down” the mortgage loan to the value of the property under Section 506 of the Bankruptcy Code. While a cram down is usually not permissible under a Chapter 13 because of the provisions of Section 1322 (b)(2) (“a Chapter 13 plan may modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor’s principal residence”), in this case cram down was possible because the mortgagee had a lien not only on the debtor’s principal residence but also on the rental unit, which was not the debtor’s principal residence.

Because of the additional collateral, Judge Stern held that the anti-modification language of Section 1322(b)(2) did not apply, and the Debtor’s plan to cram down the loan to the present value of the property, \$180,000, was acceptable. The court thus held that the Debtor would be permitted to pay \$180,000 plus interest over the five year length of the plan. This would require a plan payment of at least \$3,000 (\$180,000/60 months).

But in order to pay over \$3,000 each month toward her plan, the Debtor would need to use the income from the rental unit. Wouldn’t Jason Realty prevent her from doing so? Not in Judge Stern’s opinion. In an interesting analysis, the Court noted that if the rent payments were collected by the mortgagee instead of the Debtor, who would otherwise collect the rents and pay them over to the mortgagee under

*Continued on next Page*



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# PRESIDENT'S PERSPECTIVE

by Brenda Lee Eutsler

## No More Sightings of Summer

The sights as I peer out my office window confirm that the “lazy, crazy days of summer” are gone, for now. Gone are the sightings of children splashing in the pool, shooting hoops or chasing each other on the grounds of the Downs Farm Swim Club. Gone are the sightings of moms and dads basking in the sun and laughing with their friends as they watch over their floating flocks. Now, there are sightings of deer grazing on the hills behind the swim club and of children harnessed to backpacks waiting in front of their houses for the caravans of yellow buses to take them to school. I now look forward to the afternoon sightings of “my friends” on the school buses who wave to me or make funny faces at me, as well as some unmentionable gestures, as their buses are stopped at the corner traffic light.

Our Association and Foundation members enjoyed some great moments this summer. We played, danced and ate with over 200 children at Campbell's Field for our annual children's picnic, attended the swearing in of our friend and former Trustee, Steven Polansky, as a Superior Court Judge in Camden (congratulations Your Honor) and traveled to Washington, DC for admissions to the US Supreme Court (congratulations Michael Berg, Gary Boguski, Abigail Green, Michael Miles and Katrina Vitale). We welcomed John Kahn of Archer & Greiner as our new Trustee to fill the unexpired term of Judge Polansky (congratulations John). We also held several meetings with our committee chairs to plan for our Fall lineup of great CLE programs and numerous upcoming events.

Yes, the hustle and bustle of Fall is here and I say “bring it on!”

I encourage you to visit our website at [www.camdencountybar.org](http://www.camdencountybar.org) for a listing of all committees and chairs and details on all programs and events which are also found in the monthly fliers in *The Barrister*. You can also view our gallery of photos beyond those published in *The Barrister*. Members give of their time and talents to write the wonderful articles in our Barrister. If you have an idea for a Barrister article, please contact Larry who will be more than happy to include your article in a future issue.

Please join us for the Foundation's Autumn Scramble on October 29th at Laurel Creek Country Club, a private, 18-hole course, designed by Arnold Palmer. The course is beautiful and challenging. You could take home \$10,000 or a new car—or both. You will have to beat me as I am a “lip” away from sinking my first hole in one!!! Funds raised from this event help to purchase presents for the nearly 300 children who will attend the annual Christmas Party at the Coastline on December 1st. The outing is always a fun day for a great cause!

Your continued support of our Association and Foundation is much appreciated by our headquarters staff and the Officers and Trustees who serve you. I look forward to seeing you throughout the Fall and beyond.

## BANKRUPTCY

### Use of Rents in Bankruptcy

*Continued from previous Page*

the plan, the mortgagee would have a requirement under the law to account for those rents and to credit the mortgage debt “to the extent the accounting reflects fund availability after deducting reasonable expenses.” Therefore, the Court reasoned, the Debtor's plan could be confirmed if it provided that the rents were to be paid directly to the mortgagee as long as the rents combined with other monies paid by the Debtor to the trustee allowed the mortgagee to be paid the value of the property over five years.

The mortgagee disagreed with this analysis. It argued that even if the secured mortgage debt was crammed down to \$180,000, the value of other collateral for the mortgage, i.e. the rents, should not be similarly crammed down. Thus, the mortgagee contended, any rents collected should be applied to the total debt of over \$300,000, not the \$180,000 to be paid through the plan. If this were the result, of course, the Debtor's plan would not be feasible, because the plan required all of the rent payments to be applied to pay off the value of the property through the plan.

The Court rejected the mortgagee's argument, finding that Section 506(d) of the Bankruptcy Code “requires avoidance of both the

mortgage lien and the assignment of rents to the extent both interests are not supported by the value of the collateral.” As a result, all of the rent collected by the mortgagee, less reasonable expenses, would have to be applied to pay off the \$180,000 loan amount. This cleared the way for the Debtor to pay off her mortgage over the course of her five year plan, even though the rental income will be used to do so.

This use of the mortgagee's collateral to fund the Debtor's plan is a new spin on Jason Realty. It is a creative way to solve the dilemma facing borrowers who rely on rental income to restructure their debts.

The Debtor in the Parks case is not out of the woods yet. Under the Court's decision she must modify her plan to provide that the income she would otherwise receive for the rental unit be paid directly to the mortgagee, and she must negotiate a fair interest rate to be applied to the payment of the \$180,000 payoff of the mortgage loan. She must also account for any rents she received after she filed her bankruptcy petition. Fortunately for her, however, the Court has found a way for her to keep her home despite precedent that many attorneys would have thought impossible in the wake of Jason Realty.

# WINE & FOOD

By Jim Hamilton

In the calm before the pre-holiday season, when wine distributors bring in many of the producers they represent to pour wine for those who make or influence wine buying decisions, I shall turn to notes taken in June of wines in the Michael Skurnik Wines portfolio I felt value-minded consumers might find worthy of consideration.

As you may know, Austria is by far the leader in producing wines made with the Grüner Veltliner grape. Indeed, this varietal is that country's most widely planted wine grape, which can be found in entry level bottlings, often in the one liter format, as well as in pricier single vineyard wines that, to use Emerilise, kick it up a notch.

One of the larger Austrian producers represented by Michael Skurnik is Willi Bründlmayer, who is one of the best producers of Austrian sparkling wine ("sekt"). His recent releases are exceptional, but fall outside most people's idea of value since they are priced closer to Champagne than to Cava or Prosecco, wines turn to for inexpensive bubbly. However, if you want a nice, affordable, dry Grüner Veltliner, consider **2011 Bründlmayer Grüner Veltliner Berg Vogelsang**. This wine does not exhibit much of the white pepper characteristics commonly displayed by this grape. Rather, it offers more of a mineral salinity that is driven to the wine's finish by a penetrating, seltzer-like crispness.

I long have been a fan of the Jurançon wine region of southwestern France, particularly for the dessert wines which often can be a nice, and sometimes more affordable, substitute for Sauternes. While the grapes are different than those grown in the Sauternes section of France's famed Bordeaux region, the balance and texture these



wines can achieve often are similar. Many Juraçon producers also make dry wines, and if there is one producer from this region that can be considered a star it is Domaine Cauhapé. Indeed, I purchased Cauhapé wines at the stylish Lavinia wine store in Paris and brought them back to enjoy with others because the wines were not being distributed in our marketplace. Hopefully, since Michael Skurnik began representing the estate the wines will be *somewhat* more available. A wine to consider when looking for a nice, unoaked dry white wine is **2011 Domaine Cauhapé Chant des Vignes**. This wine provides a grassy impression that should appeal to fans of Sauvignon Blanc or Verdejo-based wines. It possesses a medium body, notes of artichoke, grapefruit and Granny Smith apples, and a nice intensity. Perhaps because the producer and region remain largely undiscovered, the price of this wine actually has decreased.

Let's next look at an Italian wine, but one which probably is far removed from those with which you are most familiar. In the Valle d'Aoste region of northern Italy, located between Turin and Geneva,

Switzerland, the small and fairly new winery, Lo Triolet, is fashioning some nice wines at their high altitude winery. **2010 Lo Triolet Pinot Gris Valle d'Aoste** is a lovely wine that uses the Pinot Gris rather than Pinot Grigio name for the grape variety. The wine exhibits melon, peach and quince fruit in a nicely textured, medium weight frame. It is clean and round with an enduring palate presence.

Let's stay in Italy but shift our focus from white to red grapes. The Dolcetto grape is versatile and the wines made from it usually are quite affordable. However, perhaps due to the familiarity many consumers have with the word "dolce," some may think wines made with this grape are sweet. They are not, but rather are pleasant wines that will have varying degrees of body and structure depending upon the style, or some might say "seriousness," of the producer. **2010 Paolo Conterno Dolcetto d'Alba** is a fine example of the virtues of the Dolcetto grape. It displays ripe, unadorned red fruit with vibrant acidity that carries the flavor profile well across one's palate. While there is a short period of oak aging, it offers refinement rather than being an intrusion on the fruit. The wine should be a good match for many meat or pasta

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# WINE & FOOD

Continued from Page 14

dishes, and won't be very costly, particularly when compared with other Piedmont wines like Barolo or Barbaresco.

Among the many grape varieties that have gained popularity as more consumers seek out wines that are unoaked and affordable is the Albariño grape. The region where many of the best renditions of this variety are found is northwestern Spain. One of the more favorably priced Albariños is **2010 Tricó Tabla de Sumar Albariño**. This is a

pretty, clean wine exhibiting chalky lime and melon fruit, faint green olive and nut nuances, all in a substantial body. This is a "second" wine from this producer, and while it may lack the brisk delivery of the lead wine, it has more amplitude and a gentler price.

Let us close with another Iberian wine, this time from Portugal. **2010 Afros Vinhão** (Vinhão is the grape variety) possesses a medium weight, tart apple and melon fruit, with veins of prickly quinine running from start to finish. The wine is crisp and refreshing.



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# Back in the Day

By Hon. Richard S. Hyland (ret.)

One of my early heroes was Eagles Hall of Fame running back Steve Van Buren who passed recently and it reminded me of many things we had back in the day, but no longer have. When my father took me to Philly to visit and appreciate the various historic sites, we would eat at the Horn & Hardart automat in center city. Behind an array of small glass doors would be soups, entrees, side dishes and desserts. After inserting the right coinage, the doors would pop open and you could retrieve your selections. It was “fast food” at its finest and has never been surpassed for quality and value. Camden also had a retail outlet and mothers could bring home for dinner creamed spinach (still a favorite), Harvard beets (still not a favorite), pumpkin pie etc. Its motto was “Less work for mother” which was indeed true.

Another motto was “Nearly everybody reads the Evening Bulletin.” Unfortunately, not enough did and it folded years ago. It was a fine newspaper and a needed counter to Annenberg’s Morning Inquirer. Over the years I have watched the latter’s editorials morph from slamming Pres. Truman to those swooning over and shilling for Pres. Obama.

The City has not had a movie theater for many years and I can count at least ten back then, including the Towers which also had live vaudeville acts. Just outside the city limits on Route 70 was one of the country’s first, if not first “drive-in” movies.

At Broadway and Cooper was the Walt Whitman Hotel which was the finest on this side of the river. The Brown & Connery law firm had a suite of offices there and the lawyers ate lunch at a reserved table. It was the venue for many senior proms (Camden High ‘53) and weddings.

There were many places in the suburbs for fine dining and romantic dancing to live acoustic music. The Embers, Marlton Manor, the Rickshaw, the Sans Souci, Henry’s, the Hawaiian Cottage (the place to go after the prom), Cherry Hill Inn and Cinelli’s. Sorry to say that none remain.

The “Bullets” were Camden’s entry in the Eastern Basketball League with “Big Five” college standouts and where “defense” was a lost art with scores like 163 to 148. Before the NFL and TV took over Sunday afternoons we watched from high school bleachers the Zuni A.A. Indians play semi-pro football against teams like the Hammonton Bears. I never could spot a Native-American on the team which was manned mostly by high school stars from South Camden with names ending in a vowel.

There were only three commercial TV stations, namely, channels 3, 6, and 10 which featured more local programming, including one just for farmers at 6 am. Newscaster John Facenda was a fixture with his beautiful voice first heard on the WIP radio “Bulldog Edition.” My favorite sportscaster was and still is Bill Campbell (the father of our Christine) whose literate and fair commentary is in stark contrast to the present day snide arrogance of Howard Eskin and the strident



Harvey Mitnick, Ted Adourian, William Hyland, Sr., Richard Hyland, William Hyland, Jr.

rants of Angelo Cataldi. The City had its own municipal radio station (WCAM 1310 on the dial) high atop City Hall. Bill Deal (the father of our trusty court reporter) was the DJ on the morning shift and I would wake up to his good taste in records and “off-beat” humor. There was a cadre of announcers who went on to bigger things on TV like Dave Neal (Gomberg) and Lou Elliot (Pappas).

They were more innocent and civil days, but not without their fears. Polio was the scourge of the summer and parents forbade their kids to go swimming or mix with crowds. Thank you Dr. Jonas Salk!

In closing, I must sadly note the passing of Bob McGroarty who was a bright and engaging lawyer and who once made the most bizarre request for a postponement in one of the oldest cases I had. He had a plaintiff’s case where he had joined about 8 defendants. I had a heckuva time setting a date for him when all counsel would be available and finally did so for early December. Much to my surprise he came in with a request. The reason? — he had bought several truckloads of Christmas trees and had to sell them or suffer a financial disaster if he had to try the case before then. With a chuckle, I gave it to him because he was a straight and honest guy. RIP Bob.

Please send any comments to me at: [rhylandatlaw@aol.com](mailto:rhylandatlaw@aol.com)



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## LEGAL LINE TO CRIMINAL LAW

# Firearms Seized While Executing a Valid TRO Search Warrant May Be Used in a Criminal Prosecution

By Assistant Camden County Prosecutors  
Michael J. Block, Jr. and Michael A. Mink

On August 16, 2012, the New Jersey Supreme Court announced that evidence seized during the execution of a search warrant issued under the Prevention of Domestic Violence Act may be used in a criminal prosecution so long as the criminality of the evidence seized is readily apparent. This holding, announced in *State v. Harris*<sup>1</sup>, represents the logical extension of two long-recognized exceptions to the warrant requirement: the plain view doctrine and the emergency aid exception. To better understand how this rule may impact proceedings in the future, it is important to understand the origin and progression of the Prevention of Domestic Violence Act.

In 1991, New Jersey enacted the Prevention of Domestic Violence Act<sup>2</sup> to protect individuals who have suffered abuse from spouses, cohabitants and family members. The statute was amended in 1994 to include people with whom the victim engages in a dating relationship. The Legislature provided the Act to include a wide range of remedies and encouraged its "broad application."<sup>3</sup> Moreover, our Supreme Court has consistently remarked upon the importance of the Act, noting that "the law was meant to 'ensure [ ] that spouses who were subjected to criminal conduct by their mates had full access to the protections of the legal system.'"<sup>4</sup>

The Act also provides a mechanism for police officers to deal with the presence of weapons, as weapons may heighten the risk of harm associated with domestic violence. An officer responding to a scene of domestic violence has "authority to seize any weapon that is contraband, evidence, or an instrumentality of crime."<sup>5</sup> Another section of the Act deals with weapons where a plaintiff specifically files a complaint seeking the protection of a temporary restraining order and alerting the court that the alleged abuser may have weapons. In that case, the trial court may order "the search for and seizure of any such weapon at any location [it] has reasonable cause to believe the weapon may be located."<sup>6</sup> This leads to the issuance of what is commonly referred to as a "TRO search warrant."

The practical problem created by this TRO search warrant is that it is based on reasonable cause, as opposed to the probable cause standard required by the U.S. Constitution as well as the New Jersey Constitution. The question raised therefore is whether the evidence seized as a result of a lawfully executed TRO search warrant can be admitted as evidence by the State in a subsequent prosecution of a defendant for possession of those weapons. In *Harris*, the Supreme Court answered that question in the affirmative under certain circumstances. Borrowing from the emergency aid exception to the warrant requirement, as established in *State v. O'Donnell*<sup>7</sup>, the Court found that the inherent exigency of having weapons within the grasp of someone who has allegedly committed an act of domestic violence justifies police entry into a home to secure those weapons. Furthermore, borrowing from the plain view exception to the warrant requirement, as established in *State v. Bruzzese*<sup>8</sup>, the Court held that where the police are executing a TRO search warrant, any contraband seized may be used in a subsequent prosecution if its criminality is immediately apparent.

In *Harris*, the Court was confronted with a situation in which the victim, W.J., had a dating relationship with the defendant, and had been abused by the defendant.<sup>9</sup> The defendant had allegedly stalked, harassed, and beaten the victim, and had recently entered the victim's home by kicking in the victim's front door.<sup>10</sup> The victim in the case gave sworn testimony before the court, the conclusion of which led the court to issue a TRO with an accompanying search warrant.<sup>11</sup> The search warrant was served later that day on the defendant's residence.<sup>12</sup> During the search, the officers recovered three weapons, which were a Cetme .308 caliber assault rifle, a Colt Anaconda .45 caliber revolver, and a Ruger P89 handgun.<sup>13</sup> After recovering the weapons, the serial numbers were run through the NCIC computer to determine if any of the weapons were stolen; the Colt Anaconda registered as a stolen weapon.<sup>14</sup>

Having already found that the TRO search warrant was properly issued, the Court found that whether the weapons could be admissible as evidence turned on the question of whether the criminality of the weapons was readily apparent.<sup>15</sup> Despite the fact that the stolen nature of the Colt Anaconda could not be determined without the aid of a computer, the Court nevertheless held that searching the NCIC database for that serial number was not an additional search or seizure for Fourth Amendment purposes.<sup>16</sup> The Court analogized the serial number with an automobile's license plate and found that a firearm's owner has no greater expectation of privacy in the gun's serial number than any motorist has in his/her license plate.<sup>17</sup> Accordingly, the Colt Anaconda was allowed into evidence.<sup>18</sup> The Court also noted that "[i]f the illegal nature of that revolver were immediately apparent, as if, for instance, the serial number had been defaced, no further search would be required to determine that the weapon was illegal. We perceive no logic or policy that would preclude prosecution of the holder of that weapon; no further invasion of a protectable privacy interest would occur as a result of that prosecution."<sup>19</sup>

The Court maintained its previous holding in *Dispoto* holding that an invalid domestic violence search warrant may not be used as a bootstrap mechanism to obtain evidence to sustain issuance of a criminal search warrant.<sup>20</sup> However, the Court clarified that *Dispoto* was not meant to be read as establishing a bright-line rule that evidence seized pursuant to a valid TRO search warrant was never admissible in subsequent criminal proceedings. Therefore, where there is a properly issued TRO search warrant based on reasonable cause and the illegal nature of the seized weapons is immediately apparent, that weapon is admissible in a subsequent criminal proceeding against the defendant.

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## LAW PRACTICE MANAGEMENT

# 7 Steps to Become a PR Rock Star



By Kimberly Alford Rice

An effective public relations program is but one tool in your toolkit to increase business development results, enhance a firm's position and perception in its marketplace and promote firm growth. In the sense that public relations is not paid advertisements (and is therefore, priceless) it can be a very affordable option

in your comprehensive marketing plan provided it is strategically developed and executed.

## 1. Clearly Defined Goals

My professional services clients often share that they "want to get in the papers" as a result of something they consider "news worthy" but frequently they don't understand the overarching goals and objectives to a well-defined public relations program. This is key to undertaking efforts to increase awareness and creating a certain perception in front of your "publics." Examples of this may be the "aggressive litigators who fight for a company's rights" or "the innovative problem solvers who stay a step ahead to prevent business issues," etc.

Before embarking upon a variety of possible public relations tactics, ensure that your firm is clear on its stated objectives and how it will measure success of its pr efforts.

Outlined below are a few ways firms can build awareness among key target audiences, generate ongoing pr buzz, and build a strong reputation as experts in a firm's chosen areas of practice.

## 2. The Essential Press Release

Creating a press release and distributing it through many media channels (print and online) can be a very simple way to develop a higher sense of awareness for a firm's services and lawyers. Ways to leverage a well-crafted press release include the following:

- Share it with free press release listing sites
- Post it to YouTube identifying it with strategic keywords
- Add it to firm website under "News"
- Post it on the firm's blog and under relevant practice area news
- Post it on other relevant blog sites
- Link to it on your social media channels (LinkedIn and Facebook) and share it with others
- Send it to trade associations and other business and legal publications (print and online)

## 3. Media Pitches

Similar to the press release, pitching the media (print and online) on firm news or breaking stories can be a very effective way to garner press coverage. Pitches should be concise, developed from the readers' perspective of "why should this matter to me," and be directed to the appropriate media contact. Handled any other way and the firm will look amateurish and sloppy. Often, if you clearly outline your case for covering a story and provide only the pertinent information, it is more likely to be covered. Given the way of our fast-paced media environment, reporters/editors do not have time (nor patience) to educate on how to appropriately "pitch" them.

## 4. Proactive Media Relations

Different from the media pitch is the submission of op-ed and byline columns. Op-ed and byline articles can contribute significantly to increasing a firm's visibility, name recognition and credibility. They are cost-effective and underutilized ways to reach newspaper and website readership. As with the media pitch, submitting an op-ed or byline article can sometimes be tricky. By following such simple steps as focusing on one topic which has a local flavor and outlining how your topic is relevant to a publication's readers will increase having your op-ed piece published.

## 5. Media Sourcing

Selecting key lawyers to be an on-call media resource can be an effective means to heighten a firm's public relations program. Print, online, and broadcast media are always seeking sharp, media-savvy lawyers who can aptly discuss issues occurring in the 24/7 media.

Send news producers, editors (print and online), and blog moderators an email with your bio to inform them that you are interested to discuss topics within your specific practice areas. Provide them with your office and cell phone numbers and e-mail address, and follow up with a phone call. By leaving a detailed, concise message outlining the key points of your "pitch," you will likely receive a return call if the media contacts have a need for your information and like what they hear. Brevity is key here.

## 6. Social Media Tools

If your lawyers do not already have a properly populated LinkedIn profile, participate in practice-specific listservs and LinkedIn groups, blog with some frequency and contribute to your firm's Facebook Community page, your firm is missing the proverbial Web 2.0 public relations boat. Yes, it matters if your objective is to stay "top of mind"

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The **Law Office of Grayson H. Heberley, III, Esq.**, announces its move to a new location. They are now located at 24 Wilkins Avenue – First Floor, in Haddonfield. Phone: 856.795.1100; Fax: 856.795.1111.

Capehart Scatchard is pleased to announce that **Charles F. Holmgren** has joined its Litigation Department. Mr. Holmgren handles defense litigation in the federal and state courts of New Jersey and Pennsylvania, with a concentration on premises liability, products liability, construction, estates, employment and professional malpractice. He is a member of the Camden and Burlington County Bar Associations.

**Joseph Stringfellow** of the Law Office of Joseph C. Stringfellow has been appointed a Trustee for the Camden County Hero

Scholarship Fund the purpose of which is to render financial and educational assistance to the surviving spouse and children who are left with little or no support when a law enforcement officer, firefighter or emergency medical person loses his/her life, or is totally and permanently disabled in the line of duty.

Capehart Scatchard is pleased to announce that **Kurt E. Kramer** has recently joined its Litigation Department as a shareholder. Mr. Kramer has over 25 years of experience in commercial, tort, professional liability, premises liability, employment, and insurance coverage litigation, with particular emphasis on the representation of commercial and business clients in complex litigation. He received his B.S. degree, *cum laude*, from LaSalle University and his J.D., *cum laude*, from Villanova University School of Law. Mr.

Kramer is admitted to practice in New Jersey, Pennsylvania and New York.

Del Duca Lewis announces that **Hunter S. Kintzing** has joined the Firm as an associate in its Cherry Hill office. Mr. Kintzing focuses his practice on a wide range of commercial and residential real estate matters in which he represents purchasers, sellers, landlords, tenants, lenders, borrowers and developers in all aspects of their transactions and land use projects. He has also represented local municipal governments and planning boards, and represents clients in the negotiation of complex purchase and sale agreements for commercial and residential properties. He received his law degree from Rutgers University School of Law – Camden and his B.A. from Bucknell University. He is admitted to practice in New Jersey and Pennsylvania.

## Firearms Seized While Executing a Valid TRO Search Warrant May Be Used in a Criminal Prosecution

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Although the *Harris* Court definitively tells us whether contraband seized during the execution of a validly issued TRO search warrant may be used as evidence, the Court left open some interesting questions. For instance, one may ask if it makes sense to continue to treat a search conducted with a TRO search warrant as a “warrantless” search within the context of a suppression motion. Another issue raised by this case is how far its holding reaches. Under the *Harris* rule, the test to see if an item’s criminality is “readily apparent” is not solely based upon whether an officer can detect criminality just by looking at the item.<sup>21</sup> Rather, the test is whether the officer can determine criminality through a means that does not intrude upon a person’s Fourth Amendment rights, such as by running a serial number through the NCIC database.<sup>22</sup> That raises the question of what other types of ways officers could determine the criminality of an item without crossing the

line into becoming a search in the context of the Fourth Amendment. One would think that testing a physical characteristic of a firearm, such as measuring one to see if it falls within the definition of a “sawed-off shotgun,”<sup>23</sup> would pass constitutional muster in the same way that a person does not have a reasonable expectation of privacy in a firearm’s length. Likewise, where a police officer needs to make the firearm safe by unloading it, the discovery that the weapon had been loaded with hollowpoint bullets would arguably be a justifiable revelation rather than an additional Fourth Amendment search.

It remains to be seen just how far that holding will go, but what is clear is that contraband seized in the course of executing a validly issued TRO search warrant may be used as evidence in a subsequent criminal prosecution so long as the criminality of the evidence is readily apparent.

- 1 *State v. Harris*, \_\_\_ N.J. \_\_\_ (2012) (slip op. at 25).
- 2 N.J.S.A. 2C:25-17 to –35.
- 3 N.J.S.A. 2C:25-28 and –29.
- 4 *Cesare v. Cesare*, 154 N.J. 394, 399 (1998) (quoting *Corrente v. Corrente*, 281 N.J. Super. 243, 248 (App. Div. 1995)).
- 5 N.J.S.A. 2C:25-21(d)(1).
- 6 N.J.S.A. 2C:25-28(j).
- 7 *State v. O'Donnell*, 203 N.J. 160, cert. denied, 131 S. Ct. 803, 178 L.Ed. 2d 537 (2010).
- 8 *State v. Bruzzese*, 94 N.J. 210, 237-38 (1983), cert. denied, 465 U.S. 1030 (1984).
- 9 *Harris*, (slip op. at 3-4).
- 10 *Id.* (slip op. at 5).
- 11 *Id.* (slip op. at 6).
- 12 *Ibid.*
- 13 *Ibid.*
- 14 *Ibid.*
- 15 *Id.* (slip op. at 25).
- 16 *Ibid.*
- 17 *Id.* (slip op. at 28).
- 18 *Ibid.*
- 19 *Id.* (slip op. at 25) (internal citations excluded).
- 20 *State v. Dispoto*, 189 N.J. 108, 123 (2007).
- 21 *Harris*, (slip op. at 25).
- 22 *Ibid.*
- 23 N.J.S.A. 2C:39-1(o).

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## LAW PRACTICE MANAGEMENT 7 Steps to Become a PR Rock Star

*Continued from Page 19*

in front of clients, prospects, referral sources and your key influencers in your broad network.

Engaging in these types of activities is a new reality of the 21st century. Jump on board and develop a coordinated plan to launch and maintain a strong online firm presence. Often, social media initiatives may be managed in house but if not, there are outside resources which will deftly handle these important tasks for the firm.

### 7. Podcasts and Webinars

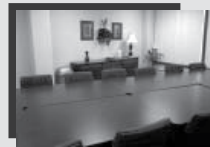
It has never been easier and more affordable to connect with and inform your clients and prospects than by leveraging technology. Instead of hosting a practice seminar at a local facility with a reception following, plan and schedule a podcast or webinar right on your target audiences' desktop. You can reach and engage a wider audience, reduce out-of-pocket costs, and deliver an impressive presentation (with creatively-produced handouts) by never leaving your office. The message sent is powerful and speaks to your regard for your audiences' time. Even invite the media and cross-post the podcast or webinar file to your website and LinkedIn profile.

### Bottom Line

Given the emerging technologies of the new millennium, solo, small and mid-size firms have leveled the public relations playing field with larger firms to promote themselves in today's increasingly competitive market. Commit to leveraging these simple public relations techniques in 2012 and beyond to enhance your firm's visibility and boost awareness of your business development strategies and results.

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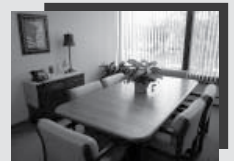


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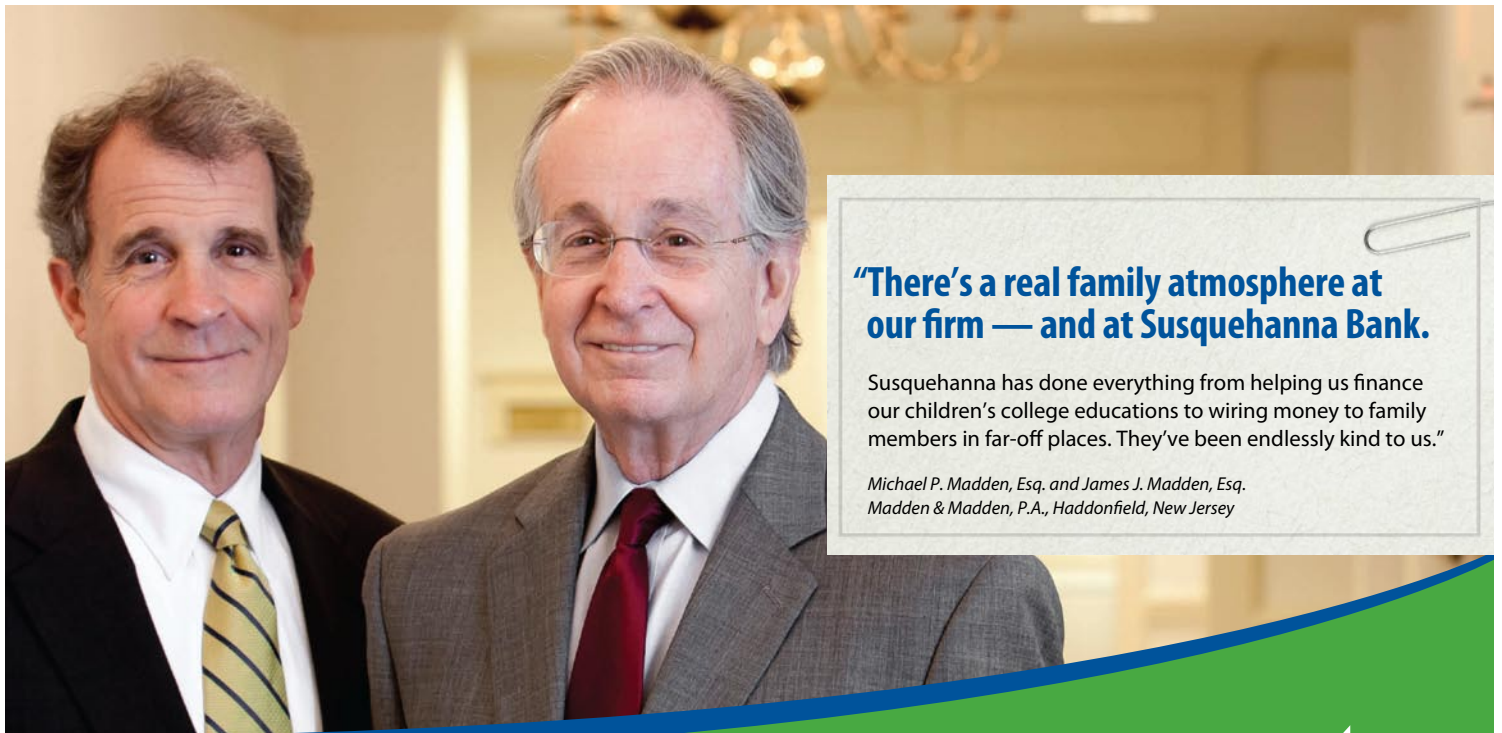


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## Honorable Garrett E. Brown, Jr. (ret.) to Receive Gerry Award

Continued from Page 1

Committee. "Judge Gerry would be delighted to know that he will receive the award that bears his name." Those words were echoed by Camden County Bar Foundation President, Linda W. Eynon who stated "Chief Judge Brown is universally respected, throughout the legal community. Anyone who knows Judge Brown would certainly agree that he is most deserving of this prestigious award."

The Judge Gerry Award is presented annually by the Camden County Bar Foundation to recognize the continuing outstanding contributions of a member of the Bar of the State of New Jersey, or a member of the State or Federal Judiciary, who exemplifies the spirit and humanitarianism for which Judge Gerry is remembered.

Now in its 17th year, previous recipients include: Donald A. Robinson, 1996; Judge William Lipkin, 1997; Judge Dickinson Debevoise, 1998; former Attorney General George F. Kugler, Jr., 1999; Ambassador and former Congressman William J. Hughes, 2000; Judge Stanley S. Brotman, 2001; Judge John B. Mariano, 2002; Judge Joseph Irenas, 2003; Judge Michael P. King, 2004; Chief Judge John W. Bissell, 2005; Joseph H. Kenney, Esq. and posthumously to Chief Judge Edward

R. Becker, 2006; Hon. Joseph H. Rodriguez, Senior Judge, United States District Court, District of New Jersey, 2007; Hon. Joel B. Rosen, former United States Magistrate, 2008; Thomas R. Curtin, Past State Bar President, 2009; Justice John E. Wallace, Jr., New Jersey Supreme Court (ret), 2010; and Hon. Maryanne Trump Barry, Senior Judge, U.S. Court of Appeals, Third Circuit, 2011.

A New Jersey native, Judge Brown graduated from Lafayette College in 1965 with his Bachelor's Degree and from Duke University School of Law in 1968 with his Juris Doctorate Degree.

He started his legal career as a law clerk for former New Jersey State Supreme Court Justice Vincent Haneman from 1968 to 1969, and later joined the U.S. Attorney's Office as an Assistant U.S. Attorney serving out of the Newark branch from 1969 to 1973. From 1973 to 1981, Judge Brown served as a private practitioner, later moving to Washington, D.C. as General Counsel for the U.S. Government Maritime Administration until 1986.

On October 23, 1985 President Ronald Reagan nominated Judge Brown to a new seat created by 98 Stat. 333, which was approved by Congress. He was confirmed by the U.S.

Senate on December 16, 1985 and received his commission on December 17th of the same year.

Judge Brown became Chief Judge of the Court in 2005, assuming senior status on January 2, 2012. He retired on January 26th of this year.

The Judge John E. Gerry Memorial Scholarship Award, established in 2002, will also be presented at the dinner. The award is available to students enrolled at any New Jersey law school. Scholarship recipients must have demonstrated academic achievement and a genuine financial need, coupled with a verifiable history of and/or a desire to practice in the public service sector.

Tax deductible donations to support the Gerry Memorial Scholarship may be sent to the Camden County Bar Foundation, 1040 N. Kings Highway, Suite 201, Cherry Hill, NJ 08034.

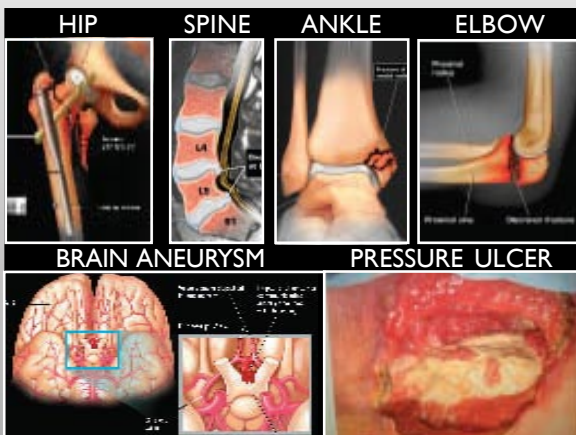
Tickets for the Award Dinner are \$75 in advance and \$85 at the door, with a portion of the ticket price going to the Gerry Scholarship Fund. Reservations may be made by calling Bar Headquarters at 856.482.0620, or by using the flyer insert in this issue of the Barrister. Reservations must be received by Wednesday, October 17.

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