

THE BARRISTER



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Annual Autumn Scramble



Columbus Day Holiday
AUTUMN SCRAMBLE
GOLF OUTING

Monday, October 8th



Join us at **Riverton Country Club** on Monday, **October 8, 2018** for the Foundation's annual Autumn Scramble.

Don't miss a great day on the course! Enjoy a day of golf, boxed lunch, snacks courtesy of Tate & Tate, open bar cocktail hour, and awards banquet with dinner (cash bar). In addition to the great prizes for top foursomes, longest drive, closest to the pin and more, we will have some fantastic basket and silent auction items available—such as tickets to the Eagles/Redskins game on **December 3rd**—with more great prizes being added all the time!

One of the Foundation's largest fundraisers, the Autumn Scramble raises money for the Foundation's many community service projects such as the upcoming Holiday Party for disadvantaged children.

Gather your friends for some fun on the course for a great cause! Use the flier in this month's issue or visit our website at <https://camden.intouchondemand.com> to register today!

Sponsorship opportunities are also available—contact Bar Headquarters at 856.482.0620 for information on how you can become a sponsor today!

NOV 13 SAVE THE DATE

CCBF's Annual **FALL frolic**

(See Page 2 for more details)

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Honorable Stephen M. Orlofsky to Receive Gerry Award October 23rd

Former U.S. District Court Judge for the District of New Jersey

Former Judge of the United States District Court for the District of New Jersey, Honorable Stephen M. Orlofsky, has been named the 2018 recipient of the prestigious Judge John F. Gerry Award. The award will be presented at the 23rd Annual Gerry Award presentation cocktail party on Tuesday, October 23rd at Tavistock Country Club. This event features a three-hour cocktail party with food stations and open bar sponsored by Law Clerks of Hon. James Hunter, III (United States Court of Appeals for the Third Circuit, 1971-1989.) Judge Orlofsky, will receive his award during a brief formal program, at which time the 2018 Judge John F. Gerry Memorial Scholarship(s) will also be presented.

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.

Steve leads the appellate practice and is the administrative partner of Blank Rome's Princeton office. He concentrates his practice in the areas of complex litigation and alternative dispute resolution, and counsels clients throughout the United States in federal and state civil and criminal courts, both at the appellate and trial level. He has experience litigating, arbitrating, mediating, and serving as a special master in a wide variety of matters.

Prior to leaving the federal bench in 2003, Steve served as one of three federal judges on a 13-member Judicial Assessment Team, which traveled to Iraq to evaluate the Iraqi judicial system to assist the Coalition Provisional Authority in reconstructing the Iraqi court system.

In 2005, he was appointed by the president-elect of the New Jersey State Bar Association to serve as the vice-chair,

South Jersey, of the New Jersey State Bar Association's Judicial and Prosecutorial Appointments Committee. He served in that capacity from 2005 to 2007. He was also appointed by the chair of the ABA Litigation Section to serve as a member of its Ethical Standards for Mediation Task Force. He currently serves on the Uniform Law Commission, the national body that considers the adoption of uniform state laws, where he is one of New Jersey's three Uniform Law Commissioners.

In 2008, Steve was honored by the Camden County Bar Association with the Hon. Peter J. Devine Award for distinguished service.

Steve served as a captain in the U.S. Army, Field Artillery, from 1966 to 1970, and was inducted into the U.S. Army Artillery OCS Hall of Fame (Durham Hall) on May 21, 1999.

The Judge John F. 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 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 Presentation are \$80 in advance and \$90 at the door, with a portion of the ticket price going to the Gerry Scholarship Fund. To make reservations for the Gerry Award presentation, use the Gerry Award flyer or reserve and pay online at <https://camden.intouchondemand.com>.

Reservations must be received by Friday, October 19th.

THE DOCKET

Tuesday, October 2nd

Young Lawyer Committee Meeting
12:30 – 1:30 pm
Bar Headquarters

Tuesday, October 2nd

An Ethics DoubleHeader
4 – 6:15 pm
Tavistock Country Club, Haddonfield, NJ

Monday, October 8th

Autumn Scramble Golf Outing
12 – 7:30 pm
Riverton County Club, Cinnaminson, NJ

Tuesday, October 16th

Students with Emotional Issues
12 – 2:15 pm
Tavistock Country Club, Haddonfield, NJ

Tuesday, October 16th

Happy Hour with the CCBA & NJCPA
5:30-9 pm
PJ Whelihan's Pub, Cherry Hill, NJ

Wednesday, October 17th

Proper Oral Arguments & Court Procedures
12 – 2:15 pm
Tavistock Country Club, Haddonfield, NJ

Tuesday, October 23rd

*Judge John F. Gerry Award
& Scholarship Presentation*
6-9 pm
Tavistock Country Club, Haddonfield, NJ

Wednesday, October 24th

How to Build a Book of Business
12 – 2:15 pm
Tavistock Country Club, Haddonfield, NJ

Thursday, October 25th

Bridge the Gap - NJ Civil Trial Preparation
3 – 6:15 pm
Bar Headquarters

Tuesday, October 30th

A Look at Filial Responsibility in PA and NJ
12 – 1:15 pm
Tavistock Country Club, Haddonfield, NJ

Tentative agenda for October 23rd 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. Approval of Minutes from Meeting
- III. Treasurer's Report
- IV. President's Report
- V. Executive Director's Report
- VI. Committee Reports
 - a. Membership Committee
 - b. Young Lawyer Committee
 - c. Standing Committee Reports
- VII. Foundation Update
- VIII. NJSBA Update
- IX. Old Business (*if any*)
- X. New Business (*if any*)
- XI. Adjournment

Save the Date!

**Fall Frolic set for
Tuesday, November 13th**

Join us **Tuesday, November 13** for the Camden County Bar Foundation's annual Fall Frolic! The festivities get underway at 5:30 p.m. at the Pub located at the old airport circle in Pennsauken.

Kick off the holiday season with this annual event and enjoy an evening out for a great cause. Tickets are just \$20 and include your first drink and a delicious buffet! Visit our member portal at <https://camden.intouchondemand.com> to register or use the flier attached in this month's inserts!

See you there!

THE BARRISTER

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

President

Ronald G. Lieberman
1415 Route 70 East,
Suite 205
Cherry Hill, NJ 08034

Treasurer

Dawnn E. Briddell
1940 Route 70 East,
Suite 200
Cherry Hill, NJ 08003

President-elect

Michael J. Dennin
5709 Westfield Avenue
Pennsauken, NJ 08110

Secretary

Rachael B. Brekke
46 West Main Street
Maple Shade, NJ 08052

Vice President

Michelle H. Badolato
457 Haddonfield Road,
Suite 100
Cherry Hill, NJ 08002

Executive Director

Kara Edens
1040 N. Kings Highway, Suite 201
Cherry Hill, NJ 08034

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Editorial Offices

1040 N. Kings Highway
Suite 201
Cherry Hill, NJ 08034

Advertising

856.482.0620
klw@camdencountybar.org

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June - September 2018

Active (14)**Michael Adelman, Esq.**

Law Offices of Michael Adelman
910 Kings Croft
Cherry Hill, NJ 08034

Paige M. Bellino, Esq.

Chimento McNally, LLC
One Echelon Plaza
Voorhees, NJ 08043

Joshua A. Benjamin, Esq.

The Law Offices of Joshua A. Benjamin
1236 Brace Rd, Suite F
Cherry Hill, NJ 08034

Sadye Bradley, Esq.

Housing Authority of Camden
2021 Watson Street
Camden, NJ 08105

Jose A. Calves, Esq.

Parker McCay
9000 Midlantic Drive, Suite 300
Mount Laurel, NJ 08054

Michael J. Collis, Esq.

Gerstein Grayson & Cohen & Melletz, LLP
1288 Route 73, Suite 301
Mount Laurel, NJ 08054

Jennifer Johnson, Esq.

Siciliano & Associates, LLC
16 South Haddon Avenue
Haddonfield, NJ 08033

Harry J. Kane, Esq.

Greenblatt Pierce Funt & Flores LLC
35 Kings Highway E., Suite 200
Haddonfield, NJ 08033

Arielle E. Katz, Esq.

Gibbons, P.C.
One Logan Square
130 N. 18th Street
Philadelphia, PA 19103

Melissa R. Knoerzer, Esq.

Adinolfi & Packman, P.A.
4 Kings Highway East
Haddonfield, NJ 08033

Douglas M. Nelson, Esq.

Moustakas Nelson LLC
18 Grove Street
Haddonfield, NJ 08033

Michael F. Niznik, Esq.

Law Offices of Michael F. Niznik
1500 Walnut Street, Suite 900
Philadelphia, PA 19102

Michael James Reilly, Esq.

Costello & Mains, P.C.
115 Station Ave.
Haddon Heights, NJ 08035

David F. Roeber, Esq.

Stradley Ronon Stevens & Young, LLP
457 Haddonfield Road, Suite 100
Cherry Hill, NJ 08002

Public Sector (7)**Keith S. Carmy, Esq.**

Camden County Prosecutor's Office
25 North 5th Street
Camden, NJ 08102

Gregory Console, Esq.

Camden County Prosecutor's Office
25 North 5th Street
Camden, NJ 08102

Rachel M. Conte, Esq.

Camden County Prosecutor's Office
25 North 5th Street
Camden, NJ 08102

Elizabeth F. Mielowocki, Esq.

Camden County Prosecutor's Office
25 North 5th Street
Camden, NJ 08102

Jennifer B. Pitre, Esq.

State of NJ - Office of the Attorney General
25 Market Street., P.O. Box 105
Trenton, NJ 08625

Daniel F. Thornton, Esq.

New Jersey Office of the Attorney General
20 Hillside Road
Mount Holly, NJ 08060

Kai Villemson, Esq.

Superior Court of New Jersey
Hall of Justice, Suite 640
Camden, NJ 08103

Limited Students (2)**Ryan Slocum**

1 Melodie Ct.
Hainesport, NJ 08036

Andrew Vallejo

Marshall Dennehey Warne Coleman Goggin
Suite 200, P.O. Box 5429
Mount Laurel, NJ 08054

Nominations Sought
for Devine Award*The Association's Highest Honor for Service*

The Hon. Peter J. Devine, Jr. Award Committee is accepting nominations for this year's award. The Devine Award is the highest honor afforded to the membership and is bestowed upon a member for distinguished service to the Camden County Bar Association. The Committee is chaired by Past President **Louis R. Moffa, Jr.**

Please use the Devine Award Nomination Form included in this month's Barrister inserts to nominate a colleague who has provided distinguished service to the Association and the legal community in Camden County. Nominations must be received by **October 31**, to be considered.



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Pay Your Dues, Don't Miss Out!

The Association's dues policy states: Members, whose dues remain unpaid as of **September 1**, will not be entitled to the benefits of membership. As long as dues are outstanding, unpaid members will not be able to attend member-only events, will pay non-member tuition rates for Association-sponsored CLE seminars and events, will be removed from the Barrister mailing list, will not be able to serve on committees, and will not receive discounts and services provided by Association Partners in Progress. All benefits will be restored when dues are paid in full.

Paying promptly enables your Association to continue serving you and the community with its many important programs and services, and the CCBA's member portal (<https://camden.intouchondemand.com>) makes

it easy to securely pay online. Think about the many benefits you receive, in addition to a number of reduced member tuition and informative seminars throughout the year, each with New Jersey and Pennsylvania CLE credit. There's the monthly publication, The Barrister; committees that offer opportunities to network with peers while shaping the future of your Association; numerous networking professional and social activities designed to enhance your law practice; discounts on many legal products and services; and much more.

Should you have questions or to use a credit card for payment, call 856.482.0620.



By Ronald G. Lieberman

PRESIDENT'S PERSPECTIVE

Increasing Access to Justice

Our legal system provides opportunities to seek and to obtain justice when rights have been violated and wrongs have been committed. But just because the court system is there does not mean that any person, regardless of income, has access to the justice that is there. It appears like a mirage to many people.

Equal justice under the law has been described by late Justice Lewis Powell, Jr., to mean "justice should be the same, in substance and availability, without regard to economic status." For low-income individuals and families, not to mention small businesses which make up the majority of businesses in New Jersey, lack of access to an attorney is a severe impediment to receiving equal justice. Individuals and businesses, regardless of income, look to our legal system to resolve issues such as foreclosure, domestic violence, divorce, discrimination in all forms, bankruptcy, landlord-tenant issues, and other critical legal matters. The legal system is extremely complex and can be difficult to navigate, even by an experienced attorney let alone someone who is untrained in the law and legal procedures.

Without equal access to the justice system, many low-income individuals struggled with their legal problems, which affect their livelihood and health, not to mention the effects on their children and families. Those individuals that are overlooked by the legal system become disenfranchised and fall victim to unscrupulous individuals promising "quick" relief schemes.

In sum, low-income individuals should have equal access to the legal system to protect their quality of life and to maintain the quality of justice which exists.

To that end, I ask each member of the Bar Association to join me in offering their services through the Lawyer Referral Service, which offers a discounted consult rate to individuals looking for some information on our justice system. It is easy enough for you to join. All you need to do is call Bar Headquarters, or email our Executive Director, Kara Edens, to join the Lawyer Referral Service. That type of involvement not only creates additional resources but allows members of the public that otherwise will not be able to interact with an attorney to become aware and educated as to their issues and concerns.

VERDICTS OF THE COURT *September 2018*

Superior Court of New Jersey

VERDICT: No Cause (8/9/18)
Case Type: Auto Negligence
Judge: Daniel A. Bernardin, J.S.C.
Plaintiff's Atty: Christopher Green, Esq.
Defendant's Atty: Deenah Kogan, Esq.
L-2756-16 Jury

VERDICT: No Cause (8/9/18)
Case Type: Auto Negligence
Judge: Michael J. Kassel, J.S.C.
Plaintiff's Atty: Frank Pollock, Esq.
Defendant's Atty: DF1 Manuel J. Almeida, Esq.
DF2 David Wright, Esq.
L-3372-16 Jury

VERDICT: Liability Verdict 1.6 million (8/10/18)
Case Type: Auto Negligence
Judge: Richard F. Wells, J.S.C., Ret./Rec.
Plaintiff's Atty: Scott Goldberg, Esq.
Defendant's Atty: Frank McDevitt, Esq.
L-1640-16 Jury

VERDICT: No Cause (8/14/18)
Case Type: Auto Negligence
Judge: Steven J. Polansky, J.S.C.
Plaintiff's Atty: Nicholas T. Trabosh, Esq.
Defendant's Atty: Ragged M. Allan, Esq.
L-2630-16 Jury

VERDICT: No Cause (8/15/18)
Case Type: Auto Negligence
Judge: Michael J. Kassel, J.S.C.
Plaintiff's Atty: Christopher Green, Esq.
Defendant's Atty: Anthony DiGiulio, Esq.
L-1262-16 Jury

VERDICT: No Cause (8/15/18)
Case Type: Auto Negligence
Judge: Daniel A. Bernardin, J.S.C.
Plaintiff's Atty: Michael Gallagher, Esq.
Defendant's Atty: Danielle M. Smith, Esq.
L-244-16 Jury

VERDICT: No Cause (8/22/18)
Case Type: Auto Negligence
Judge: Michael E. Joyce, J.S.C.
Plaintiff's Atty: Philip Blackman, Esq.
Defendant's Atty: Robert Kaplan, Esq.
L-4391-15 Jury

VERDICT: No Cause (8/23/18)
Case Type: Law Against Discrimination
Judge: Anthony M. Pugliese, P.J.Cv.
Plaintiff's Atty: Laura C. Mattiacci, Esq.
Defendant's Atty: Richard Harris, Esq.
L-315-16 Jury



Columbus Day Holiday AUTUMN SCRAMBLE GOLF OUTING



Monday, October 8th





FOUNDATION UPDATE

Fall, Friends & Fundraising

By Louis R. Moffa, Jr.

Happy Fall! The Camden County Bar Foundation had a busy summer with the First Tee Outing, Festivus, and most recently, the Lobster Bake hosted by the Young Lawyers Committee. The Lobster Bake was a huge success and raised over \$8,000 for the Larc School! Thanks to all who volunteered, attended and sponsored this event to make it a huge success.

Next up for the Foundation is the popular Columbus Day Autumn Scramble on Monday, October 8 at Riverton Country Club. Get a foursome together and hit the links for what promises to be a fantastic day. All golfers will have a chance to win a new car, sponsored by our friends at Lexus of Cherry Hill and Woodbury Nissan, and some other fantastic prizes (Eagles tickets anyone!?!). We are still welcoming sponsors so if your firm would like to be included, please reach out to Kara Edens at kee@camdencountybar.org.

Join us on October 23 for the 23rd Annual Camden County Bar Foundation Judge John F. Gerry Award & Scholarship Presentation honoring Hon. Stephen M. Orlofsky, Former United States District Judge for the District of New Jersey. You can register using the flier in this month's issue.

The popular Fall Frolic is slated for November 13 at the Pub in Pennsauken. At just \$20 per person this is the best value around and the easiest way to support your Foundation! All are welcome for this pre-holiday networking event so invite your friends and colleagues for a great night out for a great cause.

Finally, we are in preparations for the annual Children's Holiday Party on Saturday, December 1 at the Boys & Girls Club in Camden. The event is one of the most important that the Foundation sponsors, hosting disadvantaged children from Camden, NJ and providing them with a hot breakfast, toys, fun and games. Of course no holiday party would be complete without a visit with Santa. If you are looking for an opportunity to get involved in the Foundation, look no further – this event is not to be missed!

Thanks in advance for your support and I'll see you on the golf course!

The leaders of the Association and Foundation continue to amaze me with their commitment to fulfilling the mission of those organizations, and I am humbled to be part of that team. Together with the membership at large, we can truly make a positive difference in the law, the judiciary, and the community. We must strive to bring meaningful, effective representation and access to justice to our clients; to bring a better understanding of the law to our community; and to bring our spirit of service and giving to those less fortunate. That must be our goal, our mission and our passion.

I look forward to continuing to work with all of you as Foundation President, and I urge you to participate in all of our events and be as generous with your time and money as circumstances permit.

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YOUNG LAWYER HAPPENINGS



YOUNG LAWYER CHAIR

By Neel Bhuta

Do you Vote?

October is a time of transition and change. The weather is getting colder, the leaves are changing colors, and politicians are delivering their final messages before Election Day on **Tuesday, November 6, 2018**.

Are you registered to vote?

As lawyers, we have a special obligation to participate in civic life. And that should at least extend to selecting the representatives who will write the laws that we will encounter in the court room. We cannot do that unless we are registered to vote.

The deadline to register to vote, in person or by mail, in New Jersey is October 16. For specific information on how to register, please contact your local election office, which you can find at <https://www.state.nj.us/state/elections/voting-information-local-officials.html>

The other thing to consider is that voting on a Tuesday in November is inconvenient. We often have client meetings to attend, motions to argue, briefs to write. Despite all of that, Election Day is firmly set by Congressional

statute for the Tuesday after the first Monday in November. I'm going to try to explain why that is.

Here are some initial facts. We have a uniform date for presidential and congressional elections. There is early voting in some states, both in-person and by-mail. Oregon and Washington vote almost entirely by mail, with rules requiring the ballot to either be received by Election Day (Oregon) or postmarked by Election Day (Washington).

Now let's turn to history. When we first had elections under the current constitution in 1792, states had the ability to conduct those elections anytime between the beginning of November and the first Wednesday in December. That Wednesday in December was the deadline because that was when electors would meet in their respective state capitals to select the President and the Vice-President.

Why we waited until November to hold the elections in the first place turned on more practical considerations. The advantage of November was that it was usually after the fall harvest had been completed but before the weather got really cold and snowy. Remember, it was important to wait out the harvest at the time because we happened to be mostly an agrarian society at the end of the eighteenth century. And avoiding winter storms was essential in the days before paved roads and covered automobiles and snowplows.

The lack of a uniform date for elections often caused problems. Individuals in later-voting states often voted with the knowledge of earlier vote patterns in earlier states. A given candidate's victories or losses at the beginning of November could influence elections held at the end of November. This problem only became worse with the development of the railroad and the telegraph to speed communication systems.

Congress responded to all of these problems by picking one set day on which to conduct federal elections all over the country.

Try to keep in mind that there are no constitutional requirements for this date. But Congress had already passed two laws that would set conditions on the date of Election Day: 1) electors would meet in state capitals on the first Wednesday in December to cast their votes and 2) there would be no more than 34 days between the state certification of the popular vote and the Electoral College choosing.

That 34-day rule is why Congress passed a law in 1845 to set Election Day on the Tuesday after the first Monday in November, instead of just the first Tuesday.

We've covered why they picked the month of November. But why did they pick Tuesday? Without being able to poll members Congress from the early nineteenth century, here's the best explanation that people have come up with:

In 1845, you could only vote in your county seat. Sunday was a day of rest, and farmers often needed up to a full day to travel to the county seat, because they only had horses and carriages and the roads weren't paved. They also needed to time to get back to their hometowns for market day, which was usually on Wednesday in nineteenth century agrarian America.

That left Tuesday.

So to recap. We picked a Tuesday in November because 19th century Americans were finished with their fall harvest, but it wasn't usually that cold or snowy. And because they needed time to travel after the Sabbath and still get back before market day.

We still vote on this day even though almost none of us are farmers, no one travels by horse, we have paved roads, and there is no such thing as market day.



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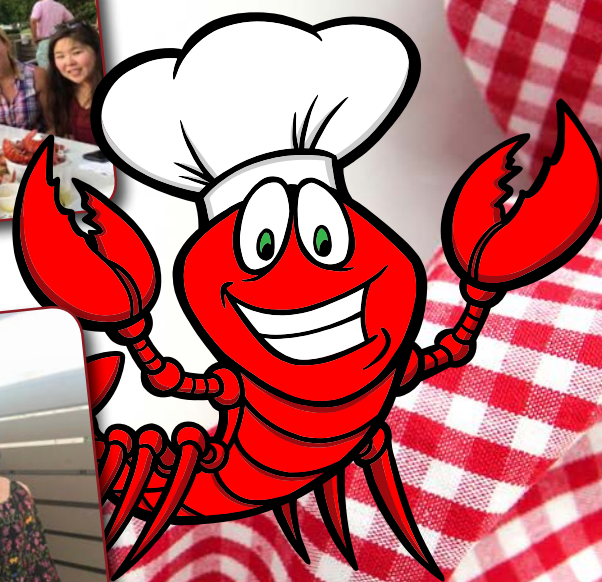
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Get involved in a Committee.

9th Annual Lobster Bake Raises over \$8,200

It was a beautiful day on the water at **LaScala's Birra** for the Young Lawyers Committee's 9th annual Lobster Bake on **September 16, 2018**. Attendees enjoyed a traditional lobster dinner, wine and beer, appetizers and dessert all while raising money for Larc School.

The popular event raised over **\$8,200** for the Larc School, a non-profit special education school serving students with a wide range of moderate to severe disabilities. **For a list of our generous sponsors, turn to page 9.** As the pictures show, a terrific time was had by all!



THANK YOU SPONSORS!

The Young Lawyers Committee thanks everyone who attended the Lobster Bake on September 16th, and especially thanks the following sponsors who ensured another successful event to support The Larc School.

We salute them and urge our members to support them!

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PERSONAL INJURY LAW

Settlement Protection Trust with Special Needs Provisions:

What is it and when should I Use it?

By Thomas D. Begley, Jr., Esquire, CELA

What is a Settlement Protection Trust?

Trusts are often useful devices in the settlement of a personal injury case. A settlement protection trust is a support trust designed to provide for the health, education, maintenance, and support of the beneficiary. Support includes buying a home, a vehicle, and arranging for a case manager as appropriate. Settlement protection trusts are generally used for plaintiffs who are not receiving means-tested public benefits, which include SSI, Medicaid, many Medicaid Waiver Programs, SNAP (Food Stamps), LIHEAP (energy assistance) and federally-assisted housing.

When to Use a Settlement Protection Trust?

Minor or Incapacitated Person— Plaintiff Not Receiving Means-Tested Public Benefits

In these situations, a settlement protection trust is ideal. If there is a minor, the monies can be deposited into the settlement protection

trust rather than a guardianship account or restricted account with the Court. In large settlements, the beneficiary may be given the right to withdraw money in stages, such as at ages 30, 35, and 40 with or without court approval. These provisions can be customized by the parents of the beneficiary.

In the case of an incapacitated person, the trust can last for the duration of the lifetime of that person. Again, the money is deposited into the trust, rather than the guardianship account or restricted account with the Court, and the beneficiary enjoys the advantages of the trust discussed below.

In cases involving a minor or incapacitated person, the establishment of the settlement protection trust must be approved by the Court.

Competent Adult Not Receiving Means- Tested Public Benefits

When a competent adult is not receiving public benefits, distributions may be made for the benefit of the competent individual. The trust serves to protect the settlement from

being squandered by the injured plaintiff or being coveted by family members and friends.

Large Settlement—Client Receiving Means-Tested Public Benefits

In many large settlements, the client may be receiving SSI and Medicaid. In some cases, the Medicaid benefit may be modest and, therefore, unnecessary. In other cases, the Medicaid benefit may be significant, but can be replaced by private insurance or a combination of Medicare and private insurance. In these cases, it is often beneficial to consider giving up the public benefits in exchange for greater flexibility and avoid the "sole benefit of" rule, the payback requirement, and the restriction that distributions must be made directly to third parties. The alternative to the settlement protection trust is a special needs trust. The special needs trust is required to maintain the means-tested public benefits; however, the requirements for a special needs trust are rigid.

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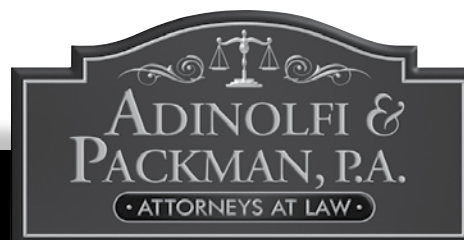
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PERSONAL INJURY LAW

Settlement Protection Trust with Special Needs Provisions: *What is it and when should I Use it?*

(Continued from Page 9)

Advantages of Settlement Protection Trusts

There are a number of advantages to establishing a settlement protection trust instead of having the injured party receive the money outright.

Asset Protection/Squandering

One of the major problems with personal injury settlements is that the average settlement lasts only three to five years, regardless of the amount of the settlement or award. Many injured parties are unsophisticated in money management, or are subject to pressure from spouses, significant others, family, and friends. A settlement protection trust will ensure that the monies are used wisely and will hopefully last for the lifetime of the injured party.

Medical Insurance

Many plaintiffs in personal injury cases are the victims of catastrophic injuries, which make it impossible for them to obtain private medical insurance on the individual market. However, under the Affordable Care Act, an

individual with preexisting conditions can still obtain private medical insurance. The trust can pay the premiums.

Money Management

The settlement protection trust can arrange for expert money management. Most individuals do not have expertise in managing money, and certain financial advisors may put themselves ahead of their clients.

Structured Settlement

If a structured settlement is involved, the settlement protection trust can be designed so that the payments from the structured settlement go into the trust. Often parties involved in the settlement believe that if a significant portion of the settlement is structured, the plaintiff will be protected from squandering the money. However, the injured party is able to sell the structured settlement at a deep discount in the future. The result of these factoring transactions is that the client usually satisfies an emergency that would not have been created had there

been a settlement protection trust in place, and then subsequently runs out of money when the funds received from the factoring transaction are exhausted.

Tax Preparation

Usually the injured party can arrange for the trustee to either prepare or supervise the preparation of tax returns for the injured party.

Distributions

Under a settlement protection trust, distributions can be very flexible. In some instances, a budget is prepared, and the trustee simply writes the beneficiary a check every month to pay all of his or her monthly bills. In other instances, the beneficiary prefers to submit the bills to the trustee, and the trustee then pays the third party provider of goods and services directly. If there are needs for money beyond that which is budgeted, arrangements can be made for the trustee to send the beneficiary additional money or to pay the additional bill directly to the third

(Continued on Page 11)

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PERSONAL INJURY LAW

Settlement Protection Trust with Special Needs Provisions: *What is it and when should I Use it?*

(Continued from Page 11)

party. Generally, one of the objectives of the settlement protection trust is to ensure that the money in the trust lasts as long as possible. If there is sufficient money, the goal is usually to ensure that the money lasts for the lifetime of the injured plaintiff. Therefore, a discussion should be held as to some restrictions on distributions which will ensure that the money is not squandered.

Who Should Serve as Trustee?

A professional trustee should always be considered for a settlement protection trust. The professional trustee has expertise in investment management, taxation, and navigating the system to support the injured party. Courts rarely require a bond for a professional trustee.

Settlement Protection Trusts/Special Needs Trust/ Medicare Set-Aside Arrangement

Settlement Protection Trust/Special Needs Trust

In many cases, an individual may not need public benefits or may not even be eligible for public benefits at the time the trust is established. However, the nature of the injury or the amount of the trust may indicate that public benefits could be required in the future. In most cases, consideration should be given to establishing a settlement protection trust with special needs provisions. Under this arrangement, one trust document is established with two subtrusts. Initially, the settlement protection trust is funded with all of the flexibility outlined above. If, in the future, the injured party requires public benefits, the

trustee can transfer the trust assets from the settlement protection subtrust to the special needs subtrust. At that point, the injured party is willing to accept the restrictions required by a special needs trust because of the importance of the public benefits. That decision can be deferred until some future time.

At such time as the special needs subtrust is funded, the Trust must become irrevocable.

Medicare Set-Aside Subtrust

If there is any possibility that the assets in the settlement protection subtrust will be transferred to a special needs trust in the future, and if there is a requirement for a Medicare Set-Aside arrangement (MSA), the MSA must be wrapped into the special needs trust. In those situations, the settlement protection trust should be designed with three subtrusts: one for the settlement protection trust, one for the special needs trust, and a third subtrust for the MSA.

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WINE & FOOD

By Jim Hamilton

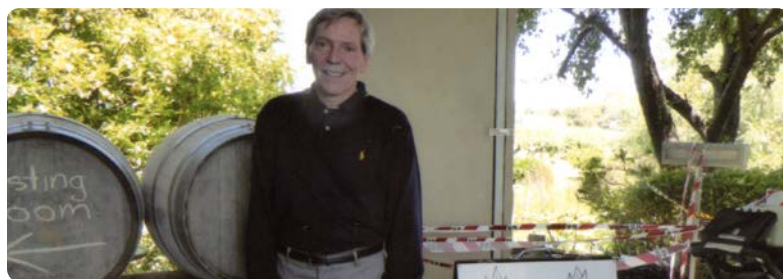
Mergers and acquisitions. It is a specialty area of the law that developed and expanded to accommodate businesses that see external growth as a wise course of action. We see the outcome of this approach to expansion very vividly, and locally, with the actions of accounting firms, banks, hospitals, medical groups and, yes, law firms. Well, the business of wine distribution has seen considerable activity as companies choose to get bigger and often to expand their geographic reach, an important consideration given state-by-state regulation of the field.

Martin Scott Wines was established in 1990 by Martin Gold and Scott Gerber and they built a company that enjoyed considerable success distributing the wines of many sought after producers in New Jersey, New York and Connecticut. In 2013, Martin Scott Wines was acquired by The Vintner Group, a Virginia based wine distribution company founded in 1980. In 2014, The Vintner Group and The Winebow Group, a successful New York based distributor also founded in 1980 by Leonardo LoCascio, joined forces. David Townsend of The Vintner Group became CEO and Mr. LoCascio continued his role as chairman emeritus.

While the big get bigger, this has not meant that a once stand-alone entity like Martin Scott has gone all corporate. Rather, considerable control over its roster was retained, and I was fortunate recently to attend its portfolio tasting and search for wines that I hope will be of interest to you. Again, I offer my suggestions with the *caveat* that wines I feel merit buying may not, often for reasons other than their intrinsic value, be purchased by your favorite local retailer.

In the far northeastern corner of Italy known bordering Slovenia is the wine region known as Friuli Venezia Giulia (often shortened to just "Friuli"). Roberto Felluga makes wines there under a few labels. His Marco Felluga Pinot Grigio Mongris is a wine discussed here in the past, although at this tasting I preferred the **2016 Marco Felluga Collio Bianco Molamatta**. This wine is a field blend of white grape varieties, meaning that the vines of different varietals are integrated in one vineyard. Collio, loosely translated to mean "hill," is considered one of the best areas of Friuli for making wine. This wine offers the impression of bread, perhaps from extended lees contact (lees are the remains of the yeast used to initiate fermentation). The fruit is round and ripe, resembling stone fruits and pear, conveyed in a medium body that holds one's attention through an enduring finish.

Another Roberto Felluga wine from this region to consider is **2016 Russiz Collio Sauvignon**. This may be a good option for those who prefer their Sauvignon Blanc more in the Sancerre or Pouilly Fume style than many we find from New Zealand. While it offers some of the Sauvignon herbal characteristics, it is not aggressively grassy and any of the boxwood (or "cat pee") notes are muted by the chewy texture of the fruit.



If we venture southwest from the Friuli region and west of that part of Tuscany made famous by its Chianti production, we will be in the coastal areas of Bolgheri and Maremma. While this region is home to some of the big name "Super Tuscans," there happens to be a lot of value to be mined as well. One such wine is **2016 Aia Vecchia Lagone**, a blend of popular Bordeaux varietals often found in wines from this area. The fruit is red—cherries and currants—with a clean penetration of the palate fostered by good acidity. While not made from the Tuscan workhorse grape, Sangiovese, the wine has the grip that will enable it to pair well with Italian dishes.

If it is Chianti you prefer, one to search for is **2015 Falchini Chianti Colli Senesi Titolato Colombia**. As is legally required, the wine is crafted using primarily Sangiovese grapes, and for a value priced wine it offers considerable complexity. The fruit is sanguine red with healthy veins of graphite and minerality. While not overly big in its structure, it has a meaty quality that will stand up to many bigger dishes.

If like many wine fans over the past decade you have been taken by the affordable accessibility of Pinot Grigio wines from Italy, and you are not wed to the more popular brands that have placed the varietal into the American consciousness, an option to consider is **2017 Di Leonardo Pinot Grigio**. While many of the mainstream Pinot Grigios are made in the Alto Adige region, this version, like the Felluga wines above, is from a producer located in Friuli. The impression conveyed is one of broad red apples dusted in talc. It is not so much crisp as soft, and has a sinewy quality that balances the fairly substantial body with the focused fruit.

If we travel further still—*much* further—we will eventually find our way to New Zealand. Located (since 1916) in one of the preeminent wine regions of this island country, Marlborough, is Babich Wines. I tasted through the lineup of 7 wines being poured and thought all were very good. The wine I feel offers the best value is **2017 Babich Black Label Sauvignon Blanc**. While the wine is hardly subdued or elegant, it is lush and riper than many of its competitors. There is forward fruit that leans toward grapefruit and barely ripe apples and a streak of minerality that is moderated by the fruit's persistence. While appropriately this is more New Zealand in style than the Russiz wine described above, it lacks the vegetative approach one often finds from Kiwi versions.

Staying in the southern hemisphere, the Badenhorst family fashions some affordable wines in the Swartland region of South Africa. While the Chenin Blanc is nice enough and offers its typical good value, I preferred the **2016 Secateurs Red Blend**. The grapes—Shiraz, Grenache and Cinsault—are expressed as at once sumptuous and earthy, with the fleshy black fruit framed by sprinkles from a spice box.


I was pleased to spend some time at the table of Mel Master, whose Tortoise Creek label from the Lodi region of California is one we discussed here years ago (I was impressed then by the Viognier) but then I did not encounter again. Well, Mel is doing well and continues to operate on two continents, now with the help of his son, Charlie. They have different labels for different wine projects, including Tiamo for Italian wines and Le Charmel and Mont Gravat for southern French wines. The three wines that I found most engaging deserve attention. The **2016 Tortoise Creek Sauvignon Cuvée Jeanne** is a New World styled wine that eschews the aggressive herbal qualities of the grape for a clean, ripe grapefruit and spice driven approach. **2017 Tortoise Creek Pinot Noir Mission Grove** provides a glimpse of a grape that often requires more money to find a wine that acquit itself well, but here is found in a very affordable bottle. The fruit is black cherry in nature with hints of cola that, while ripe, avoids the syrupy quality that can be found in inexpensive renditions of the grape. Finally, Charlie poured a nice red wine composed from Syrah and Grenache grapes grown in the region not far from the southern Rhone in which Chateauneuf-du-Pape is produced. **2015 Le Charmel Costieres de Nimes** is a fairly sizeable wine presenting bold, black fruit that is hefty and long but is framed by what the French call garrigue, a notion of aromatic underbrush.

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FINANCIAL FORENSICS

Use Earnouts to Facilitate a Business Sale

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

What happens when a buyer and a seller can't agree on the business's value? This question is critically important in a business acquisition. If you're a seller, you'll seek a higher price for your business to make up for taxes on the sale. If you're a buyer, you'll want a lower price to recoup your costs.

Obviously, you can't both win this dispute—or can you?

When a buyer and a seller can't agree on an equitable price for the business, an earnout may offer a solution that benefits both sides—and that could even save the deal.

• What is an Earnout?

As Wikipedia points out: an earnout refers to a pricing structure in mergers and acquisitions where the sellers must “earn” part of the purchase price based on the performance of the business following the acquisition. In an earnout, part of the purchase price is paid after closing based on the target company achieving certain financial goals.

We've seen earnouts often employed when the buyer(s) and seller(s) disagree about the expected growth and future performance of the target company. Earnouts are popular among private equity investors, who do not necessarily have the expertise to run a target business after closing, as a way of keeping the previous owners involved following the acquisition. Moving the decimal point over a bit will account for many of the transactions we at Abo and Company see occurring in the

closely held business marketplace we find ourselves. It's clearly a way for the business owner to extract a larger selling price but not always easy to monitor and enforce post-sale, especially for companies with “loose” accounting.

The terms and conditions of an earnout are largely dependent on which party will actually manage the business following the closing. If the buyer will manage the business, the seller may be concerned with mismanagement by the buyer which causes the company to miss targets, hide income or “pad” expenses. On the other hand, if the seller will manage the business, the buyer may be concerned with the seller either minimizing or understating expenses or overstating revenue so as to manipulate the earnout calculation.

The financial targets used in an earnout calculation may include revenue, net income, EBITDA or EBIT targets, and the selection of metrics also influences the terms and conditions of the earnout. Sellers tend to prefer revenue as the simplest measurement, but revenue can be boosted through business activities that hurt the bottom line of the company. On the other hand, while buyers tend to prefer net income as the most accurate reflection of overall economic performance, this number can be manipulated downward through extensive capital expenditures and other front-loaded business expenses. Some earnouts may be based on entirely non-financial targets such as the development of a product or the execution of a contract.

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FINANCIAL FORENSICS

Use Earnouts to Facilitate a Business Sale

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Earnouts have several fundamental limitations. They generally work best when the business is operated as envisioned at the time of the transaction, and are not conducive to changing the business plan in response to future issues. In some transactions, the buyer may have the ability to block the earnout targets from being met. Outside factors may also impact the company's ability to achieve earnout targets. Because of these limitations, sellers often negotiate earnout terms very carefully.

• Here's how we've seen an Earnout work:

The buyer purchases a corporation's assets but doesn't pay a premium over book value in the purchase price. As a result, the seller doesn't pay taxes on a large gain and incur double taxation. Instead, the premium is included as an earnout, contingent on the future performance of the company.

The buyer avoids the risk of paying a price based on an overly optimistic estimate of future earnings. The buyer also can reduce its taxable income because earnouts, when included in an employment agreement, are deductible—as long as the Internal Revenue Service (IRS) considers them reasonable compensation.

An earnout can be a bonus paid to the seller for staying actively involved in the business and is pegged to future earnings performance. For example, the agreement may specify that the seller will receive 25% of the next four years' profits.

• What Marty Buyer needs to Determine

Before deciding whether to use an earnout, a buyer needs to consider these questions:

- Is he or she willing to commit part of future company earnings to the seller, based on higher prospects?
- Is the size of the earnout reasonable?
- Will the earnout reduce up-front exposure to risk and allow the buyer to conserve cash?
- Will the earnout attract Internal Revenue Service questions about unreasonable compensation if deducted from the company's income?
- Will the buyer be able to motivate the seller-manager when the earnout period is over? Will the seller continue to be involved?

• What Janie Seller needs to Determine

To make sure an earnout will be beneficial, a seller needs to ask:

- Is he or she willing to continue in the business?
- Will he or she earn more from an earnout than from a simple purchase?
- Are the business's prospects strong enough to achieve the earnout?
- Will the earnout be linked to net profits, sales, performance improvements or other measures?
- Is he or she confident of the buyer's ability to manage the business?

• Strategy for Success

With a little willingness to compromise on both sides and advice from a competent valuation consultant and other advisors, the buyer and the seller can negotiate an agreement that will achieve their goals.

• Think It's Much Different in Trying to Extract Value from your Law Practice

I just had to get it in, but part of the exhaustive handout from my recent 3-hour CLE program for ICLE entitled "Valuation of a Law Practice—What You Need to Know" we even addressed this issue in structuring the outright sale of a law firm, buying into a practice, merging, etc.

Earn-outs are attractive to the buyer but, while they often can generate a higher "price" to the seller, there are considerable risks to evaluate. Future practice revenues are often affected as much by the quality and efficiency of the buyer of the practice as they can be by the seller's historical performance for periods prior. In addition, an earn-out lengthens the time to receive the sales price.

To really understand a final "price," one generally needs to review the interrelationship of six key variables: the down payment at closing; the length of the payout period on the remaining balance due; the profitability of the deal; the tax aspects; the duration of the post-closing retention period with possible adjustments for lost clients or major reductions; and perhaps a multiple being used on a gross billing metric.

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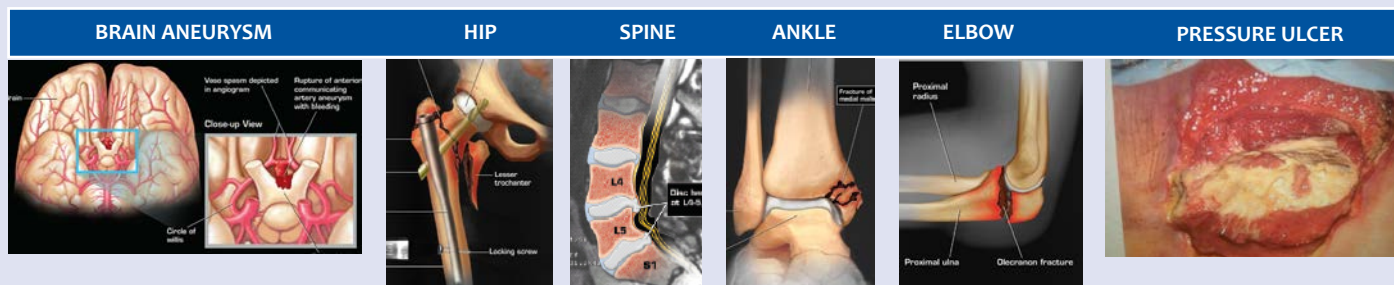
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