THE BARRISTER

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South Jersey Legal Services Says Thank You

South Jersey Legal Services, Inc. (SJLS) thanks Nancy Morgenstern, Esq. and Andrew L. Rochester, Esq. of Morgenstern & Rochester in Cherry Hill. Both have been enthusiastic supporters of SJLS' partnership with Providence House Domestic Violence Services of Catholic Charities. Nancy has met with many victims of domestic violence and provided consultations on issues such as custody, support and divorce. Andy has given seminars to domestic violence victims on the Prevention of Domestic Violence Act and how to present their cases in court. If you would like to assist a victim of domestic violence as Nancy and Andy have, please contact Michelle T. Nuciglio, Esquire, Director of Pro Bono Services and Centralized Intake at SJLS at (856) 964-2010 ext. 6229 or MNuciglio@lsnj.org.

NOTICE TO THE BAR

Pleased be advised that the following Municipal Courts merged on September 1, 2014: Barrington, Haddon Heights, Mt. Ephraim and Oaklyn. All court personnel and court sessions are at the Oaklyn location 500 White Horse Pike, Oaklyn, NJ (856)858-0074; (856)858-9552/fax.

Also, Barrington, Mt. Ephraim and Oaklyn have appointed The Honorable Krisden McCrink as the Judge. The Haddon Heights judge is The Honorable Edward P. Epstein.

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Honorable Judith H. Wizmur (ret.) to Receive Gerry Award October 21

United States Bankruptcy Judge for the District of New Jersey

The Honorable Judith H. Wizmur (ret.) has been named the 2014 recipient of the prestigious Judge John F. Gerry Award. The award will be presented at the 19th annual Gerry Award dinner on Tuesday, October 21, at Tavistock Country Club. This event again features a three-hour upscale cocktail party with food stations and a cash bar. Judge Wizmur will receive her award during a brief formal program, at which time the 2014 Judge John F. Gerry Memorial Scholarship(s) will also be presented.

"Judge Wizmur'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 Committee. "Knowing Judge Gerry as I did, I am certain that he would be extremely proud knowing that Judge Wizmur will receive the award that bears his name." Those words were echoed by Camden County Bar Foundation President, Brenda Lee Eutsler who stated "Judge Wizmur is one of the most respected jurists in the legal community. Anyone who knows her would certainly agree that she 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.

Judge Wizmur was appointed as a United States Bankruptcy Judge in 1985, and was reappointed to a second term in 1999, and a third term in 2013. She served as Chief Judge of the Bankruptcy Court for the District of New Jersey from August 2005 to August 2012. She retired from the bench in May 2014.

Judge Wizmur is a graduate of Douglass College, Rutgers, the State University of New Jersey, and the Rutgers University School of Law – Camden. Following a state clerkship with the Honorable Michael Patrick King, J.A.D., and several years of private practice, she served as an Administrative Law Judge and a Workers' Compensation Judge in the state of New Jersey, and as Assistant Director of the Division of Motor Vehicles.

(Continued on Page 2)

THE DOCKET

Tuesday, October 7th
Federal Practice Seminar
It There a Right Time to Settle?
4 – 6:15 pm
Tavistock Country Club, Haddonfield

Tuesday, October 14th
Superior Court Professionalism Day Seminar
2 pm
Courtroom 63, Hall of Justice, Camden

Wednesday, October 15th
U.S. District Court Professionalism Day

Thursday, October 16th
Probate & Trust Committee Luncheon
The "New" Jersey Estate Tax Statute
After the Estate of Lillian Garis Booth
Noon – 2 pm
Maggiano's Little Italy Restaurant
Cherry Hill Mall

Tuesday, October 21st
Judge John F. Gerry Award &
Scholarship Presentation
6 – 9 pm
Tavistock Country Club
100 Tavistock Drive, Haddonfield

Thursday, October 23rd
CLE on Tap!
New Jersey Civil Trial Preparation
3 – 6:15 pm
Tavistock Country Club
100 Tavistock Drive, Haddonfield

Thursday, October 30th
Elder Law Seminar
Medicare Secondary Payer Act
4 – 6:15 pm
Tavistock Country Club, Haddonfield

Gerry Award October 21

Continued from Page 1

She served as the Chair of the Bankruptcy Judges Advisory Group to the Administrative Office of the U.S. Courts and also served on the Advisory Committee on Bankruptcy Rules of the Judicial Conference as the Chair of the Business Subcommittee. She established the Bankruptcy Pro Bono Program at Rutgers Camden Law School, and chaired the Steering Committee for 15 years. Judge Wizmur was a contributor author of Collier on Bankruptcy, and is a fellow of the American College of Bankruptcy.

She is a recipient of the Equal Justice Award from New Jersey Legal Services, the Mary Philbrook Public Interest Award from Rutgers Law School, the Stanley Van Ness Leadership Award in Public Interest Advocacy from New Jersey Appleseed, the Conrad B. Duberstein Memorial Award for Excellence and Compassion in the Judiciary from the New York Institute of Credit and the Honorable Joseph M. Nardi, Jr. Distinguished Service Award from Rutgers University School of Law–Camden.

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. 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 Tuesday, October 14th.

Tentative Agenda for October 15, 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

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Be an active participant in YOUR professional organization.

ATTEND MEETINGS AND FUNCTIONS!

MEMBER ON THE SPOT

NAME: **Rachael Brekke**

PRACTICE AFFILIATION: **Candidate for Voorhees Township Committee 2014**
NJ Board of Public Utilities,
Regulatory & Policy Advisor to President Solomon

YEAR ADMITTED TO BAR: **2011**

PRIOR OCCUPATION: Foreclosure & Bankruptcy Attorney Kivitz McKeever Lee, PC

RESIDENCE: Voorhees, NJ

HIGH SCHOOL: Eastern Regional High School

COLLEGE: American University, Kogod School of Business (Finance & Management)

LAW SCHOOL: Rutgers School of Law – Camden (JD/MBA)

WHAT LED YOU TO A LEGAL CAREER: As the oldest grandchild of Judge Barry Weinberg, I quickly became his sidekick and learned the values of respect, integrity, and reputation in the practice of law. At a very young age I realized how important it is to help each other in any way we can and always give back to our community.

BEST PERSONAL/PROFESSIONAL ATTRIBUTE: Confidence and positive energy.

GREATEST FAULT: Not wanting to acknowledge that there is only so much time in one day.

WHAT I DO TO RELAX: I've been riding horses since I was a little girl.

HOBBIES: Knitting (not kidding) I'm taking requests for the winter season!

FAVORITE RESTAURANT: My kitchen table. I love to cook for friends and family!

FAVORITE TELEVISION SHOW: *House of Cards*

FAVORITE MOVIE: *Man on Fire*

FAVORITE AUTHOR/BOOK: *Divergent* by Veronica Roth

FAVORITE VACATION PLACES: Montana, where my father's side of the family lives. After the bar exam I rented a car for 3 weeks and took my Grandma on a roadtrip to visit all of our cousins. We have hundreds! I've been fortunate to travel the world as well, but I always look forward to my next trip to Montana.

FAVORITE WEBSITE: www.votevoorhees.com

FAVORITE MUSEUM: Louvre, Paris.

FAVORITE WEEKEND GETAWAY: I grew up riding bikes on the Atlantic City boardwalk with my grandfather on the weekends. Atlantic City is, and will always be, a special place in my life.

ENJOY MOST ABOUT PRACTICING LAW: Meeting so many colleagues (friends) in the bar association that also have a passion for giving back to Camden County. We can do so much more when we do it together.

MOST ADMIRED PERSON AND WHY: Judge Barry M. Weinberg (Zeyda) always encouraged me to reach for the stars and remember that it takes hard work to get there. He is the reason I want to mentor young people, because I know how blessed I was to have him as mine.

WHEN AND WHERE HAPPIEST? On a horse, in the mountains.

CHERISHED MEMORIES: Instead of day camp, I spent my summers working for my grandfather's arbitration and mediation firm. At the beginning of every mediation, he would pass me a note with his prediction of the settlement amount. He was ALWAYS right!

GREATEST FEAR: Trusting the wrong person.

ALTERNATE CAREER CHOICE: Starting a nonprofit.

GREATEST LESSON LEARNED FROM PRACTICE OF LAW: Someone will always be smarter than you, but it's up to you whether they work harder than you.

PERSON YOU'D MOST LIKE TO DINE WITH: Pharrell Williams

PET PEEVE(S): Smokers throwing cigarettes out of their car window.

LIFE'S HIGHLIGHTS: Visiting Israel was really powerful. Seeing the Indian and Atlantic Oceans collide at the Cape of Good Hope in South Africa was absolutely incredible.

GREATEST ACCOMPLISHMENT: Most young attorneys would probably say passing the bar exam, but my greatest was when I got 1st place in a big business case competition in college, judged by senior executives in Washington, DC. I'll never forget that feeling on stage when they announced the winner.

#1 PROFESSIONAL GOAL: Always keep the door open for an opportunity to touch more lives.

#1 PERSONAL GOAL: Happiness.

LIFE EXPERIENCE(S) WITH GREATEST IMPACT: The day I was studying for my first law school final exam, my best friend called and told me she was diagnosed with ovarian cancer and needed emergency surgery. I dropped everything, took the next train to NYC, and studied in the hospital until the day of my exam. No matter what we're doing, no matter how stressed we may be, our loved ones will always matter more.

ADVICE TO YOUNG LAWYER: Never lose sight of how fortunate you are, and how much responsibility we've been given to help those less fortunate.

HOPE TO BE DOING IN 10 YEARS: Raising a family.

FAVORITE QUOTATION: *Every great dream begins with a dreamer. Always remember, you have within you the strength, the patience, and the passion to reach for the stars to change the world.* — Harriet Tubman.

Nominations Sought for Devine Award

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 Louis R. Moffa, Jr., a partner with Montgomery, McCracken, Walker & Rhoads, LLP

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 17th to be considered.

The award will be presented at the Annual Devine Award Event in January.

PERSONAL INJURY LAW

The Alternative to a Special Needs Trust in Personal Injury Cases

By Thomas D. Begley, Jr., CELA

1. **Is the Trust Necessary?** Are public benefits, such as SSI and Medicaid, important to the client? The attorney must consider the restrictions on distributions. There are three important factors that must be considered before determining to use a self-settled special needs trust:

   - **Sole Benefit of Rule.** Distributions from self-settled special needs trusts must meet the "sole benefit of" rule. This means that distributions can only be made for the beneficiary of the trust. This is frequently a problem with family members who tend to look at the personal injury settlement as the family bank account.
   - **Payback Rules.** Under federal law, on the death of the beneficiary of a self-settled special needs trust, Medicaid must be repaid for all medical assistance paid on behalf of the beneficiary since birth.
   - **Payments to Third Parties.** Distributions from a self-settled special needs trust cannot be made directly to the trust beneficiary. This would be considered income and would reduce or eliminate not only SSI but Medicaid linked to SSI. A simple solution is to obtain a credit card in the name of a family member (i.e., a parent). That credit card bill can then be presented monthly to the trustee for payment.

   If SSI and Medicaid are not important, then it is not necessary to be bound by these restrictions. An alternative to a self-settled special needs trust is a settlement protection trust, which is much more flexible. Other family members are permitted to incidentally benefit from the trust. There is no Medicaid payback, and distributions can be made directly to the trust beneficiary. The advantage of the settlement protection trust is it provides expert management of funds and prevents the beneficiary from squandering the settlement. Both settlement protection trusts and self-settled special needs trusts can be used in conjunction with structured settlements. The structured settlement is simply paid into the trust.

2. **Size of Personal Injury Settlement.** Is the personal injury settlement large enough so that public benefits are no longer necessary? A third party could use the transferred funds to pay the client's expenses during the lookback periods and establish a third-party special needs trust with the balance. That strategy might work like this:

   - Transfer the personal injury settlement.
   - Lose SSI for three years—calculate the value of that benefit.
   - Lose Medicaid for five years if an institutional level of care is involved, or no loss of Medicaid if an institutional level of care is not involved. Calculate the value of the lost Medicaid.
   - Advantage
     - Third-party special needs trust (TPSNT)
     - No sole benefit rule
     - No Medicaid payback

   Calculation – SSI:

	$ ________	Current SSI Monthly Benefit
x	36	Months
=	$ ________	Total Loss of SSI

   Calculation – Medicaid:

	$ ________	Average Annual Medicaid Benefit, Hospital and Physician
+	$ ________	Average Annual Medicaid Payment for Prescriptions
+	$ ________	Average Annual Payment for HCBS
+	$ ________	Other Annual Medicaid Payment
=	$ ________	Total Lost Medicaid Payment
x	5	Years
=	$ ________	Total Loss of Medicaid – 5 Years

	$ ________	Total Loss of SSI
+	$ ________	Total Loss of Medicaid – 5 Years
=	$ ________	Total Loss of SSI and Medicaid

3. **Private Medical Insurance.** Is private medical insurance available under the Affordable Care Act (ACA) or in the open market to provide the services that Medicaid would otherwise be called upon to provide? One factor that must be considered is coverage. Typically, insurance under the ACA covers hospitals and doctor visits. It is similar to typical Blue Cross or Aetna policies. Many individuals who suffer from personal injuries need additional coverage for home care or extensive therapies. Insurance policies under the ACA can limit the number of visits for such things as psychological counseling, speech therapy, etc. Medicaid has no such limits. If it is anticipated that the trust beneficiary may eventually require care in a group home, this type of care is not covered by ACA or other private insurance. It is funded with Medicaid dollars.

4. **Long-Term Care Planning.** Would long-term care planning be a better option than establishing a special needs trust? For example, if a client is in a nursing home, the Medicaid payback could be significant. If the client has a long life expectancy, would traditional Medicaid planning involving transfers of assets to third parties make more sense? For example, suppose the net recovery was $2,000,000. Let's suppose the private pay rate for the nursing home was $10,000 per month plus the client's other income. The cost would be $600,000 plus inflationary increases over five years. Would it be better to retain this sum of money, have the client private pay, and transfer the balance of the funds to other family members to either use for themselves or to establish a third-party special needs trust for the nursing home resident? Nursing home abuse cases frequently involve plaintiffs who are over age 65 and who are ineligible for a self-settled special needs trust. In those situations, long-term care planning is the only truly viable strategy.

5. **Guardianship.** Would a guardianship account be as effective as a special needs trust? The problem with a guardianship account is that the funds in that account are considered an "available resource" for public benefits purposes. It is also sometimes difficult to get a court to approve distributions from a guardianship account.

(Continued on Page 15)

They're Not Our Financials— They're Yours

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

Are your income statements providing you with a reliable measurement of the operating performance of your law firm? Keep forgetting about your most important client—YOU? You might be surprised by these questions, but frequently law firm managers obtain data that is deficient for sound decision making. For example:

- Operating statements prepared on a cash basis may be highly effective for measuring cash flow but they fail to reflect the true results of operations since they don't reflect fees and expenses that have not been paid.
- Key elements may be missing from the statements. For example, revenues/fees may only be reflected on a net basis, but the information would be far more meaningful if the statement showed gross revenues less refunds and net fee income.
- Many of the estimates used in the income statement may not be reflective of the actual economic deterioration associated with the wearing out of assets. This is often the case in terms of the depreciation that is recorded or of repair and maintenance costs that are required to keep assets such as furniture, fixtures, computers, office equipment, etc. in good working condition.
- Failure to properly take into account client costs advanced, bona fide referral fees, unbilled work-in-process or the like, can easily distort margins reflected in the income statements.
- Lapses in insurance coverage may result in significant risk exposure which would not be reflected in insurance expense or elsewhere in the income statement.
- Since the income statement may reflect a number of law firm activities or services that are producing revenue for your firm, good results in one may actually obscure negative results in another, unless the activity is separately identified and the results for each material service are measured separately to determine their contribution to your firm's income.
- Individual income statements generally fail to provide a valid measure of a firm's progress, unless a series of statements are compared and trend analysis is performed.

In short, to help you obtain reliable information about the results of your firm's operations, you must (1) use a method of accounting that truly reflects the economic events affecting your firm; (2) have a chart of accounts that provides adequate details about the revenues obtained and expenses incurred in operating the firm; (3) utilize estimates that are realistic in measuring the decline and deterioration of the assets that are used by the firm; (4) have cost measurement systems that provide revenue and cost data by service and activity, and (5) obtain operating statements with sufficient frequency to enable you to measure the trend of revenues and expenses and changes in your firm's growth momentum. The knowledge and skill of your in-house financial staff and your independent CPA are a major factor in

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Abo and Company, LLC • Abo Cipolla Financial Forensics, LLC

We are pleased to announce that Martin H. Abo, CPA/ABV/CVA/CFF and Joseph P. Cipolla, Jr., CPA/ABV/CFF/PFS/CFE are Co-Managing Members of **Abo Cipolla Financial Forensics, LLC**. This services division is an affiliate to our individual core accounting firms, exclusively providing expert witness testimony on financial matters, and other litigation support services as well as business valuations.

Through the years our clients' needs often require expanded technical expertise for complex litigation. The judicial, legal and insurance communities and their clients often demand a full range of dispute resolution, valuation, and forensic services. To meet these needs, we have added Abo Cipolla Financial Forensics to our existing but separate practices.

Marty has always honestly stated, *"he knows what he doesn't know!"* He has also confidently affirmed, *"he knows who knows what he doesn't know!"*

It is for this reason that logic demanded an alliance with a strong associate. Cipolla & Co., LLC, successful in their own right, shares Abo and Company's commitment to high ethical standards. Together we form a much larger organization with increased depth, additional skilled staff, and an extremely expanded range of expertise that complements both firms.

Abo and Company and Cipolla & Co. have shared support relationships for many years. The combination of our experience and our professional service teams makes a formidable ally in any legal scenario. Frankly, we at Abo and Company already knew what the survey of lawyers polled by the *New Jersey Law Journal* revealed in awarding Cipolla & Co. Best Economic Damages Firm, Best Matrimonial Financial Expert and Best Forensic Accounting Firm.

The **Best** just got better!

Should you wish to simply confer on an issue, we welcome the conversation. Go to www.aboandcompany.com to review the curriculum vitae of the principals of Abo Cipolla Financial Forensics as well as a general profile of the valuation and litigation support aspects of our existing practices. We are here to assist our judiciary and legal colleagues in any accounting, tax, valuation, investigative or litigation support project where our team may be of benefit.

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FOUNDATION UPDATE

The Leaves, They Are A Changing

By Brenda Lee Eutsler

Fall is upon us, and soon leaves will change to yellow, crimson and brown, and begin to fall to the ground. For youngsters, piles of crisp fallen leaves are a source of fun and laughter. For golfers, crisp fallen leaves are a source of angst—"that ball has to be in here somewhere!" For the Foundation, crisp fallen leaves usher in the season when our members join together to raise funds for our community service projects and scholarships, and spend time with Santa and local, needy children.

The Foundation's season of fun and fundraising kicked off with an extremely successful Autumn Scramble on September 8th at Tavistock Country Club. There was an autumn-like chill in the air—perfect weather for a round! The event grossed almost $29,000, due in no small part to the fantastic sponsors (see listing of sponsors in this *Barrister*) and the efforts of the committee members and Co-Chairs Alan Schwalbe and Mark Oddo.

The Foundation's 5th Annual Lobster Bake was held on September 27th at the TapRoom. With drawn butter dripping and claws a cracking, our members and friends gathered to raise funds for The Larc School and the Foundation. Our Young Lawyer Committee, the firm of Flaster Greenberg and the many sponsors who supported this event can be very proud of once again hosting such a successful and enjoyable event!

On October 21st, the Foundation will host the Judge John F. Gerry Award Ceremonies at Tavistock. The Hon. Judith H. Wizmur, U.S. Bankruptcy Judge for the District of New Jersey (ret.) will be honored for her many years of service to the bench and the bar.

Closing out the Fall lineup is the annual FALL FROLIC on November 18th at the Coastline. A couple of new fun features have been added to the event—QUIZZO (with DJ and prizes) and raffle drawings for a 40" HD LED TV and a bike, courtesy of our friends at Danzeisen and Quigley. Funds raised from this event will go towards the purchase of Christmas presents for the over 200 children who will attend the annual Christmas Party at the Coastline on December 6th. Half of the raffle proceeds will support the Foundation's Chris Mourtos Memorial Scholarship Endowment. Chris, the owner of the Coastline, hosted the Children's Christmas Breakfast for over 25 years, free of any charge and since his passing in 2012, his wife Dawn and his family have continued the tradition. This Scholarship is the Foundation's way of thanking Chris, Dawn and the Mourtos Family for their generosity for so many years.

Please join us for these Fall events so the Foundation can successfully raise the funds needed to continue the programs, scholarships and activities which have such a positive impact on the members of our community who most need and deserve our help. I encourage you to visit our website at www.camdencountybar.org for registration flyers for all of these events.

Please also check out the flyer in this Barrister for a potential new Foundation event for the Spring—Lawyers Got Talent. We need to know from our members whether there is any interest, and if so, we'll line up the judges and audition the talent.

Thank you for your support of the Foundation. Hope to see you before I lose my next golf ball in those leaves!

Todd M. Parisi has joined the Law Firm of Russell Anthony DePersia, LLC where he will be practicing labor and employment law, civil litigation, and criminal law.

According to DePersia, "We are proud to welcome Todd to the firm and are very fortunate to have such an outstanding attorney join our practice."

The Law Firm of Russell Anthony DePersia, LLC is located at 511 Market Street in Camden, New Jersey 08102. The firm has been located in Camden since 2001.

Resourceful *Aggresive* *Determined*

LEGAL LINE TO CRIMINAL LAW

Halcyon Days Gone By

By Howard C. Gilfert, Assistant Camden County Prosecutor

Now that summer is only a fond memory, it is time to return to reality and discuss recent developments in our area of practice. Our appellate courts issued quite a few opinions in criminal cases this summer. Space prohibits an in-depth discussion of all of these opinions. You may, however, find a cursory review of several significant cases issued during the summer to be helpful.

In the companion cases of State v. Kelvin Williams, 2014 WL 3891766 and State v. Dekowski, 2014 WL 3891761, the New Jersey Supreme Court considered when a threat to use a bomb during a robbery elevates the robbery to a first degree armed robbery. In neither case did the defendant actually possess a bomb. Rather, the cases turned on whether the defendants' words and conduct amounted to simulating a deadly weapon within the meaning of N.J.S.A. 2C:11-1c.

Existing case law suggested that a defendant must possess an object fashioned to look like a deadly weapon or must accompany his threats with a gesture indicating the possession of a deadly weapon, such as reaching into his clothing.

In Williams, a Camden County case, the defendant entered the Sun National Bank in Somerdale. He was wearing a hooded sweatshirt with the hood up. His hands were in the sweatshirt pockets. He approached the head teller, said he had a bomb and demanded $7,000,000. The teller was unable to see the defendant's body at the time – presumably because of the height of the counter. The teller believed the defendant may have possessed a bomb, so she handed him $552. He departed in a cab.

The jury convicted the defendant of first degree armed robbery. The Appellate Division reversed the conviction, holding that the defendant did not display an object that looked like a bomb and did not make any physical gestures indicating he had a bomb.

The Supreme Court applied a totality of the circumstances test to determine the reasonableness of the teller's subjective belief the defendant may have possessed a bomb. The Court recognized that bombs have been attached to individuals' bodies and concealed on their person by such means as suicide vests, belts, clothing, undergarments and shoes. The Court concluded that the teller's belief the defendant may have been armed with a bomb was reasonable given his unequivocal threat that he had a bomb, combined with him wearing a baggy sweatshirt with the hood up that could readily conceal a bomb, and the fact the teller was unable to see much of his body. The Court further held that a gesture demonstrating possession of a bomb was unnecessary. Indeed, the Court questioned what form such a gesture might take. The Court therefore upheld the first degree robbery conviction.

In Dekowski, the defendant entered a bank with a briefcase or computer case in his hand. He handed the bank manager a note demanding money and claiming he had a bomb in the case. The manager, who was scared for herself, her employees and customers, gave the defendant in excess of $500 because she believed he may actually have possessed a bomb. The jury convicted the defendant of armed robbery.

The Appellate Division reversed the conviction, again due to the absence of a gesture accompanying the defendant's bomb threat.

The Supreme Court upheld the conviction, finding the bank manager's belief the defendant may have possessed a bomb to be reasonable under the totality of the circumstances. It cited cases in which bombs were hidden in backpacks, luggage, attaché cases and other containers for the proposition that the public is well aware that such items may be used to conceal bombs. The court held that when a robber carrying a container makes an unambiguous threat that he possesses a bomb, it is unnecessary for him to accompany the threat with a gesture such as patting or waiving the container.

In a trio of cases decided on the same day, the New Jersey Supreme Court addressed Confrontation Clause challenges to the testimony of State's expert witnesses who did not themselves perform all of the tests or examinations underlying their opinions. In State v. Bryden Williams, 2014 WL 3843227, the defendant was charged with murder. The county's chief medical examiner at the time conducted the autopsy. By the time of trial, the county had hired a new chief medical examiner, Dr. Hua. Dr. Hua reviewed his predecessor's report, the autopsy and crime scene photographs, a State Police Laboratory report, and the victim's clothing. Without objection, Dr. Hua testified for the State at the defendant's trial. On cross-examination, defense counsel elicited testimony from Dr. Hua favorable to the defendant's claim of self-defense. The jury convicted the defendant.

On appeal, Mr. Williams claimed that Dr. Hua's testimony violated his right to confront the witnesses against him. The Supreme Court did not address the merits of the Confrontation Clause argument, holding instead that the claim had been waived when trial counsel did not object to Dr. Hua's testimony. The Court perceived the decision to be a matter of defense trial strategy.

The Court suggested the State should notify the defense by the time of the pretrial conference if it intends to call an expert witness who did not conduct, supervise or participate in the scientific testing and the defense should notify the State of any objection within ten days thereafter. The

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One Judge's "Ten Tips for Effective Brief Writing"

*By Douglas E. Abrams**

Editor's Note: This article originally appeared in the Missouri State Law Journal and is reprinted with their permission, and the author's permission.

By the time Chief U.S. Bankruptcy Judge Terrence L. Michael (N.D. Okla.) considered whether to approve a compromise in In re Gordon in 2013, the Chapter 7 proceeding had descended into recrimination and acrimony.

To support its motion to compel discovery from the bankruptcy trustee, the lawyer for creditor Commerce Bank alleged that the trustee and the United States had engaged in "a pattern…to avoid any meaningful examination of the legal validity of the litigation plan they have concocted to bring…a series of baseless claims." "[T]hey know," the bank's lawyer wrote, "that a careful examination of the process will show the several fatal procedural flaws that will prevent these claims from being asserted." "Only by sweeping these issues under the rug will the trustee be able to play his end game strategy of asserting wild claims…in hopes of coercing Commerce Bank into a settlement (which the Trustee hopes will generate significant contingency fees for himself)."

The trustee responded that the bank's lawyer had impugned his character with accusations that he had compromised his fiduciary obligations for personal gain. Judge Michael denied the trustee's motion for sanctions on procedural grounds, but criticized the lawyer's personal attack: "If Commerce and/or its counsel have evidence of…grossly improper conduct, they have a duty to inform the United States Trustee and, possibly, the State Bar of Oklahoma…Such personal and vitriolic accusations have no place as part of a litigation strategy."

"Leave the Venom at Home"

In his fifteen years on the bankruptcy court bench, Judge Michael had read his share of briefs and other filings. Experience led him to write "Ten Tips for Effective Brief Writing," and to post them on the court's website to guide counsel. He directed the Gordon parties to Tip # 9, "Leave the Venom at Home."

"Whether you like (or get along well with) your opposition," the Tip advised, "has little to do with the merits of a particular case. The most effective attack you can make is to persuade…me that the other side is wrong. Remember, if you win, they lose." Tip # 9 concluded with an illustrative list of words not to use in brief writing: ridiculous, scurrilous, ludicrous, preposterous, blatant, self-serving, and nonsensical. Seasoned advocates could add others.

Tip # 9 makes good sense. "It isn't necessary to say anything nasty about your adversary or to make deriding comments about the opposing brief," says Justice Ruth Bader Ginsburg. "Those are just distractions. You should aim to persuade the judge by the power of your reasoning and not by denigrating the opposing side…If the other side is truly bad, the judges are smart enough to understand that; they don't need the lawyer's aid."

"All advocacy involves conflict and calls for the will to win," explained New Jersey Supreme Court Chief Justice Arthur T. Vanderbilt, but advocates "must have character" marked by "certain general standards of conduct, of manners, and of expression." More than 70 years ago, legendary Supreme Court advocate John W. Davis advised that "controversies between counsel impose on the court the wholly unnecessary burden and annoyance of preserving order and maintaining the decorum of its proceedings. Such things can irritate; they can never persuade." The Chief Justice of the Maine Supreme Court confides that "[a]s soon as I see an attack of any kind on the other party, opposing counsel, or the trial judge, I begin to discount the merits of the argument."

Another leading Supreme Court advocate concurred: "The argument ad hominem in a brief is always unpardonable, not simply because it is something no decently constituted brief-writer would include, but because, like all other faults, it fails of its purpose: appellate courts have a hard enough time deciding the merits of the cases presented to them without embarking on collateral inquiries as to the personality or conduct of the lawyers involved. They recoil from any attempt even to ask them to consider such matters, and are always embarrassed by the request."

The rest of this article profiles Judge Michael's other nine helpful "Tips for Effective Brief Writing." All ten tips warrant careful consideration from lawyers who prepare submissions for trial or appellate courts.

Tip # 1: "Your Goal is To Persuade, Not to Argue"

"Guests on the Jerry Springer show argue. Lawyers persuade," says Judge Michael. "The idea behind an effective brief is to have the audience (the judge and/or the law clerk) read the brief and say to themselves, 'why are these parties fighting over such an obvious issue?'"

Judge Hugh R. Jones of the New York Court of Appeals posited the advocate's dual objectives this way: "First, you seek to persuade the court of the merit of the client's case, to create an emotional empathy for your position. Then you assist the court to reach a conclusion favorable to the client's interests in terms of the analysis of the law and the procedural posture of the case."

Lawyers, judges, commentators, and court rules commonly label courtroom presentations as arguments. But neither objective defined by Judge Jones leaves much room for lawyers who argue (that is, bicker) in the lay sense of the word. Written and oral "persuasion" more accurately describes the advocate's goal.

Tip # 2: "Know Thy Audience"

"The first thing anyone should do when they begin writing a brief," Judge Michael continued, "is find out whether the judge that will decide their case has already written on the issue…It is extremely frustrating…to have counsel in either written or oral argument raise an issue and be completely ignorant of the fact that we decided that issue in a published opinion last week, last month or last year."

Knowing the work product of the judge or the court is easier today than ever before thanks to court websites, Westlaw and Lexis, and similar search engines that place currency only a mouse click away. Federal and state judicial directories can help lawyers get a feel for the bench they will seek to persuade, and so can informal discussion with cooperative friends and acquaintances in the local bar.

Tip # 3: "Know Thy Circuit"

"We are bound by published decisions of the United States Court of Appeals for the Tenth Circuit," said Judge Michael in the Northern District of Oklahoma bankruptcy court. "If they have disposed of

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One Judge's "Ten Tips for Effective Brief Writing"

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an issue, we must follow their lead…I can't [ignore that disposition], even if I wanted to."

First-year law students learn the distinction between binding and persuasive precedent, and the sources of that distinction in the federal and state courts' hierarchies and jurisdictional rules. "Authority based on precedent is content-independent," says Prof. Michael E. Tigar, "in the sense that the obligation to follow it does not depend upon logic or persuasiveness, but upon the authority's position as binding." Speaking about his Supreme Court colleagues, Justice Robert H. Jackson explained, "We are not final because we are infallible, but we are infallible only because we are final."

If the case does not appear controlled by binding precedent, or if a precedent's application to the facts remains open to reasonable question, persuasive precedent can influence the decision. Persuasive force depends on the precedent's logic and reasoning, and on its likely harmony with binding doctrine. Persuasiveness is a judgment call, first for the advocates and ultimately for the court.

Tip # 4: "Know the Facts of the Cases You Cite"

"Real disputes are fact driven, Judge Michael wrote. "For me, the facts of a case are at least as important as the legal analysis. Be wary of the case which is factually dissimilar to yours, but has a great sound bite. Be sure… to explain why the factually dissimilar case is applicable to your situation." Judge Michael also advises lawyers to remain "cognizant of the difference between the holding of a case and the dicta contained therein. Most judges …find little value in dicta unless we already agree with it."

"Facts," said Justice Benjamin N. Cardozo, "generate the law." In one of his classic essays on advocacy, Justice Jackson confided that "most contentions of law are won or lost on the facts. The facts often incline a judge to one side or the other." After arguing dozens of appeals in the Supreme Court, Davis agreed: "[I]n an appellate court the statement of the facts is not merely a part of the argument, it is more often than not the argument itself."

Judge E. Barrett Prettyman of the U.S. Court of Appeals for the District of Columbia Circuit said this about the perils of citing precedent without appreciating the constraints imposed by the prior decision's facts: A precedent is "authority for the decision there rendered upon the question there presented in the light of the facts there involved, and it is persuasive for the validity of the reasoning used…Sentences out of context rarely mean what they seem to say."

Tip # 5: "Shorter Is Better"

Judge Michael recounted that "Thurgood Marshall once said that in all his years on the Supreme Court, every case came down to a single issue. If that is true, why do most briefs contain arguments covering virtually every conceivable issue (good, bad or indifferent) which could arise in the case. Weak arguments detract from the entire presentation."

"I have yet to put down a brief," reports Chief Justice John G. Roberts, Jr., "and say, 'I wish that had been longer.'…Almost every brief I've read could be shorter." Justice Stephen Breyer similarly says that most briefs are too long, and he urges advocates, "Don't try to put in everything."

A few months before ascending to the Supreme Court bench more than 70 years ago, Judge Wiley B. Rutledge advised advocates to be "as brief as one can consistently with adequate and clear presentation of the case." Supreme Court advocate John W. Davis said that the most effective briefs are "models of brevity," and he praised the "courage of exclusion" because "the court may read as much or as little as it chooses."

Justice Benjamin N. Cardozo warned that unduly prolix briefs threaten to distract the court because "[a]nalysis is useless if it destroys what it is intended to explain." Justice Jackson advised that, "Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases…[M]ultiplying assignments of error will dilute and weaken a good case and will not save a bad one."

Tip # 6: "Quality Is Job One"

Judge Michael turned to candor and due care. "Check your cites. Make sure they are accurate and that each case you are relying on is still good law…There is nothing more frustrating than being unable to find a case because the citation contained in the brief is wrong. There is nothing less persuasive than finding out that a case you have cited to us has been overruled or misquoted. These flaws weaken your entire presentation."

Similar advice comes from Judge Prettyman: "Whatever else you are in your brief, be accurate. Be accurate in your references to the record. Be accurate in your references to the authorities. Be accurate in your references to statutes. Be accurate in your quotations, of whatever sort they may be."

Judge John C. Godbold of the U.S. Court of Appeals for the Fifth Circuit called accuracy the advocate's "uncompromising absolute," not only because inaccuracy diminishes persuasion, but also because the lawyer's professional credibility may take an enduring hit. "Judges do not always call lawyers on what they think may be purposeful misstatements," explains Prof. James W. McElhaney, "because intent is always hard to prove. But judges talk with each other—their club is a small one."

Tip # 7: "Present the Facts of Your Case Accurately"

Judge Michael warned that "If you are submitting a pre-trial brief, don't allege facts that you cannot prove. As a corollary, don't forget at trial to prove up the facts you promised to prove up in your brief. If you are submitting a post-trial brief, make sure the facts are in the record." "Nothing, perhaps, so detracts from the force and persuasiveness of an argument," said Justice Rutledge, "as for the lawyer to claim more than he is reasonably entitled to claim."

Tip # 8: "Tell Me Exactly What You Want"

"Every brief (and motion, for that matter)," said Judge Michael, "should conclude with a statement telling the judge exactly what you want done in the particular case. We need to know."

Judge Jones advised appellate advocates to conclude with "a succinct, precisely phrased request for the exact remedial relief that you seek," rather than "leave it to the court in the first instance to fashion the remedy." "Do not simply say, 'Therefore, for the foregoing reasons, the judgment of the lower court should be affirmed (or reversed).' Almost always, you want some particular remedy within an affirmance or reversal."

Tip # 9: "Seek Reconsideration Sparingly"

The first page of this article discussed Judge Michael's Tip # 9, "Leave the Venom at Home." Tip # 10 concerns do-overs.

"If we spend 50 or more hours researching and writing an Opinion (which is not uncommon)," Judge Michael reasoned, "why would one expect us to change our mind unless there is an obvious and egregious error? Most motions to reconsider are a

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LAW PRACTICE MARKETING

Five steps lawyers can take to develop extraordinary communication skills as one of the keys to success

By Kimberly Alford Rice

Thirty-four gigabytes. That's how much data has been estimated that Americans consume every day via all forms of media: TV, newspaper, Internet, radio, you name it. How does that equate to words? Statistically, there are about 100,000 words per day, on average, that Americans consume.

This is an illustration of how noisy our world has become, even in the last 5-10 years with emerging technologies that place us in the middle of broad communication networks spanning the globe.

Recognizing that our world is indeed a very noisy place with essentially an infinite number of data and media messages bombarding our every move, requires us to be highly sensitized to our communication styles *if* we ever want to be heard and perceived as an effective communicator, persuasive, and someone others seek out.

Below are six concrete steps lawyers may take to step up their game in being heard effectively, understood and rendered successful in their communications. After all, with more than half of a lawyer's job relying upon the spoken word, perfecting your communication style is a wise investment in your future.

1. **Think before you speak. No, *really.*** Human beings have a tremendous capacity to listen, absorb, and respond to messages at a relatively high rate. Because of this, it is very tempting to get caught up in the fast-paced process (depending upon in what part of the country you live) and instead of actively listening and absorbing your audiences' message, you volley back and forth in the interaction, sometimes faster than your mind can compute.

   To become a more effective communicator, one must demonstrate a disciplined approach in oral communications. Before you pop off a quick response to anyone, stop yourself to consider the impact of your words, verifying whether or not it is in your or their best interest to respond so quickly as to either short circuit the communications process and/or suffer the consequences of an ill-timed response. We adapt a 20-second rule. Before you respond, take 20 seconds (at minimum) to consider the implications of your words. Remember, what goes around comes around, karma, you'll reap what you sow, what you give is what you get…You have a choice, make the right one.
2. **Consider your audience.** Just as important as it is to be mindful of our words, so too should we be mindful of our audience. The same message is not appropriate for every audience. What do I mean by that? As a practicing lawyer, what you say to a referral source about your practice would be different than what you would say to a client or client contact about your practice. Because we create impressions, and yes, visual images in the minds of our listeners, we must be purposeful and careful of how we relate to our audience with our words. Practice is required to perfect this skill.
3. ***Listen first and second, then speak.*** We have all heard that we have two ears and one mouth for a reason. Simply put, we do not learn when we are speaking. It is imperative that as professional services providers we actively listen to clients, colleagues, referral sources, networking partners, and so on, to learn how we may support and help them (i.e. business opportunities). Impossible as it is to spew out all the ways we are qualified to "help" others, it is just poor form to do so before understanding what the needs are. Listen up, and you'll be surprised at what you may learn and the opportunities which present themselves.
4. **Speak to be heard; message sent/message received. Mind the communications gap.** Too many miscommunications occur when we "think" we told someone (message sent) but found out later either did not and/or the listener did not remember it (message received) as we remembered sending it. It matters not where the miscommunication occurred but rather how to avoid miscommunications. First, refer to tip #1 above: think before you speak to ensure that you are in control of your message. Second, to become a more effective speaker, it is well-advised to confirm with your audience that the message received is the message you intended to send.

   How do you do this? Ask for feedback "are you with me?" "does this make sense?" Adapt these feedback questions to your natural communications style and you will likely see eyes light up when you speak.
5. **Accentuate the positive; look inside first.** Individuals who choose to lead with the negative often find they are talking only to themselves. Nobody wants to listen to negativity, especially when there is so much coming at us in the media which is negative. To become a more effective communicator, check yourself that you are not guilty of spreading negativity to others in your conversations, presentations, with clients and in networking situations. The positive approach can be learned via disciplined practice and/or having a pal to send you a signal if you "go off the 'positive' reservation.
6. **Make every word count.** KISS—keep it short and simple. Do not belabor a point. Do not offend your audience by offering too many examples when they understand your point in one. Treat words as the golden charms that they are. There is no glory in pontificating your message to feed an ego or to merely fill space. We simply have too many words in our day to waste the excess unnecessarily.

Becoming a more effective communicator requires a concerted effort on your behalf, practice and willingness to adapt to new ways of thinking. There are few things that make a greater impact than to present your well-crafted message, and to be understood through the spoken word across all platforms. Making a presentation to an audience of clients and trade contacts and moving people to action based on your words…that is success

Picture Perfect Fall Weather Greets Golfers at Annual Autumn Scramble

A mid-70s day greeted golfers at Tavistock Country Club for the annual Autumn Scramble golf outing on September 8th. Sponsored jointly by the Camden and Burlington County Bar Foundations, proceeds from the annual fall tradition support community service projects and programs sponsored by both Foundations.

Special thanks go out to our generous sponsors: **Horizon NJ Health** (golf balls), **Brown & Connery** (tee gift), **Asbell & Eutsler** (carts), **FindLaw** (cocktail hour), **DuBois, Hamilton, Sheehan, Levin & Weissmann** and **Neuner & Ventura** (golf towels), **American Executive Centers** ($10,000 Hole-in-One), **Dilworth Paxson** (golfer swag bags), **Tate & Tate**, **Ken Landis Tax Solutions** and **Wegmans**, (cart & player snacks), **Lexus of Cherry Hill** and **Cherry Hill Mercedes-Benz** (hole-in-one sponsors), and to all of our other prize, hole sponsors, and golfers.

Rick Bender, Joe Kozub, Brad Spiller

Jim Hamilton, Matt Harrison, Mark Oddo, Willie Ryan

Congratulations to the Scramble winners:

- **1st Place Team:** Joe Cipolla, Mike Friscia, Chris Gariban, Mike Kelly
- **2nd Place Team:** Alex Minelis, Earl Miller, Dan Ward, Eric Wetzel
- **3rd Place Team:** Rick Bender, Joe Kozub, Brad Spiller
- **Longest Drive Women:** Brenda Eutsler
- **Longest Drive Men:** Christopher Gariban
- **Closest to the Pin Women:** Brenda Eutsler
- **Closest to the Pin Men:** Benjamin Reich

Partners in Progress (BIRE Financial Services) Mike Craig, Dennis Freedman, Stuart Liebowitz

Mark Jacobs, Mike O'Brien, Rob Petruzzelli, Alan Schwalbe

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Joe Cipolla, Mike Friscia, Chris Gariban, Basil Kirkelis

Jerry Dropcho, Mike Hnatow, Lou Lessig, Dan Sell

WINE & FOOD

By Jim Hamilton

An Interview with Robert Panzer

One of the primary methods for communicating with readers of this column is by alerting you to particular wines worth searching out and trying based on my subjective view of the virtues the particular wines may possess (not the least of which is value). However, while wine reviews may, when those wines prove available, help advance your knowledge and, hopefully, interest in wine, they are at best a comet in wine's ever expanding universe. To gain a better perspective on the world of wine, I think it is helpful for us on occasion to enlist the insight that a wine professional can provide.

Robert Panzer is a true wine geek who, to the envy of many fellow wine enthusiasts, has been able to transform a wine passion into a wine career. After developing an inside view of the industry in wine retail, Rob, with the increasing help of his wife, Amber, has successfully made the transition into wine distribution with his company, Down to Earth Wines. While Rob works hard to cultivate relationships with wine estates in whose product he believes and wants to bring to area consumers, his approach for making the connections between producer and consumer is a bit more intimate than most wine distributors. Rob has cultivated a growing legion of fans by sitting down with them at dinners in area restaurants and sharing his wines and knowledge. As you know, while reading a critical review of a wine may assist one's buying decision, there really is no better way to determine prior to purchase whether you like a wine than by tasting it.

With this necessarily brief background, let's ask Rob Panzer a few questions:

Q. *Has your perspective on wine and wine production changed since you moved from the retail part of the trade to sourcing and distributing wine?*

A. Certainly. The deeper down the rabbit hole I go, the more I understand how little I understand. The subtleties of how soil types impart certain qualities in the resultant wines continues to fascinate me in a way that I understood far less in retail. This comes from spending more time with the growers, who universally espouse the "great wine is made in the vineyard" mantra. Their insights into the web of interconnected qualities of Nature and their own role within this web are an incredible and humbling fountain of folk agricultural wisdom that I cherish.

As an importer, the scope of what I'm trying to communicate is far broader reaching, an attempt to recontextualize as much as possible all aspects of the collision between humanity, geology, and oenology into a reverent, fun, and delicious narrative. Too often wine is stripped of its context, just a beverage in a bottle, as though it emerged from the ether.

I'm increasingly invested in the SOUL of it all, the amazing people and places. I'm convinced that the better I serve this end, the more successful I will eventually be.

Q. *Many people entering the field of wine distribution seem to search for the relatively unknown producer that is unrepresented, or underrepresented, in our region, but you have managed to bring some of the top wine estates into your growing portfolio of producers. While I suspect that favorable mark-up percentages may help, how do you establish the confidence needed for them to entrust you with their wines and, perhaps more importantly, their reputations?*

A. Quite simply, I ask. In the ensuing dialogue, it's readily apparent that I'm a ga-ga passionate dude with a good combo of genuine reverence for their craft and business go-getter grit. I speak French, Italian, and Spanish fluently, which helps growers feel more at ease as well earns me some respect for being a more worldly American.

Spending time together face to face can't be underestimated, as instincts can tell you a lot about people. I ALWAYS visit my producers, so that we can continue over the years to build personal bonds which only enrich my ability to represent their families and vision.

Endorsement by proxy is also an invaluable force in earning growers' trust. My list of players reads like an insane all-star team of artisanal greats, so naturally producers feel ok joining the team.

Q. *Over the 18 years or so this column has been published, I have learned that readers prefer to know about value priced wines that are available in our marketplace and are ready to drink on purchase. While such a view long has been common among casual wine consumers, the recent recession seems to have caused even more serious wine drinkers to reevaluate their price comfort levels. Since you took the plunge into the wine distribution stream at a time when our economy was less than robust, has this shaped in any way how you have built your portfolio of producers? Perhaps more importantly for our readers, where should they look for wine values in 2014 and beyond?*

A. I didn't consider the economy one bit. Value is an entirely relative proposition, and I don't think it is necessarily tied to value=inexpensive. I start with singularity and raw quality, and then measure how a particular producer's wines stack up against other producers from their region because you have to compare apples to apples. There will always be room at the table for singular raw quality; it can't be replaced.

As to where to look for value, it is EVERYWHERE. We're in an insane Golden Age of Wine with more great wine being produced in more places than ever before. My first question to someone would be: Are you shopping by price point or by place? If someone says that they'd like to get to know a particular region, you then try to choose wines that best express the unique qualities of that place most affordably. If that happens to be $15, great. $30? Ok. $100? If that's what it takes. That is where value lies to me: getting at the substance of what makes a wine from a particular place great. If they're a price point shopper, you can gear things that way too. But it seems as though the majority of "serious" wine folks out there are into the singularity of place encompassed in the term TERROIR, not just what quaffable wine costs $15.

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PRESIDENT'S PERSPECTIVE

The Illusion of Knowledge

By Casey Price

"The greatest obstacle to discovery is not ignorance—it is the illusion of knowledge." ~ Daniel J. Boorstin

• • •

One of the most challenging scenarios attorneys encounter is the client who comes to a meeting thinking he already knows the answer. That client wants assistance with an issue but when the application of the law to his facts is explained he declares that the answer provided is not what he thought and then becomes combative in defense of his preconceived belief. The client will defend his belief with a story about what a friend or family member experienced at some point in the past and why he expects the same result. Unfortunately the client fails to realize that there are a number of reasons why his situation, although appearing similar to the one he described, is unique and will yield a different result.

What can the attorney do when confronted with that situation? Sometimes the law is the same but the facts are different. In those situations the factual discrepancies—which may be subtle to a lay person unfamiliar with this area of the law—need to be explained. Sometimes the facts are identical but the law has changed. There the client needs to know that the law evolved since the other situation took place and the result will be different. Sometimes what the friend or family member experienced—the solution provided to them by their research or an attorney—was just plain wrong. That frequently arises when the friend or family tries to do it on their own—they "research" the situation by watching various "experts" on TV or reading do-it-yourself legal guides. Regardless of why the client thinks what he thinks the attorney's first job is to help the client unlearn what he believes to be the answer. The attorney who is successful in doing this will develop a strong relationship with the client where the level of trust is high. The attorney who is unsuccessful in doing this will either lose the client or their relationship will be marred by a client who is constantly second guessing the attorney's position.

A Sense of Community and the Knowledge it Provides

I believe a sense of community is a great thing. Personally it is always a relief when other people are struggling with the same things I struggle with. The feeling of being isolated in my struggles is a lonely place where a community of people all struggling with the same issues is—while still frustrating—much more comfortable. Whether it is to lament the situation together or work together to discuss various approaches to solving the common problem it is always a great comfort to know there are others also dealing with the issue.

So, prior to this tangent about community I was discussing the difficult situation of a client who thinks he knows the answer. I run into that situation a lot. I have people who sit across from me and pay fees for assistance who, at the outset of our relationship, have to unlearn what they came in knowing. Many years ago I was with a friend who is also an attorney and I had just come out of an initial consultation with a client who presented me with this scenario. I told my friend how I thought this situation was unique to me and couldn't understand why it happened. He shared that the same thing happens to him a lot—clients come in for consultations already knowing the answer. I was stunned. And relieved. It's not just me. Knowing that—knowing it isn't just me—gave me the power to deal with the situation with new confidence. It felt like I walked off a deserted island and into civilization because I didn't feel alone any more.

Now, many years later, I no longer suffer alone. When something novel happens that could put me back on that deserted island I reach out to my network of attorney friends—the network I built through my CCBA membership—and find that there is a community that previously experienced or is currently dealing with the same situation. That community brings me a great comfort. I hope you have that sense of community in your practice. If you don't then I challenge you to use your CCBA membership to build one. We have committees that touch on almost every subject and situation. We are your community. Leave your island and join us in the fantastic community we are building.

Are You That Client in Other Areas of Your Life

So I was discussing that client who comes to a meeting thinking he already knows the answer. Sometimes when I talk to people about the CCBA they tell me they know what the CCBA is and what it provides to their members. When I press them to elaborate they often reveal —albeit unintentionally—that their information about the CCBA is extremely limited (all we do are CLE's or all we do is charitable events) or misplaced (our seminars aren't as good as those given by other providers or there is no practical value to the substantive committees) or flat out wrong (they will describe events or benefits that we don't even offer).

The bottom line is that I started this article with a quote by Daniel J. Boorstin – who happens to be very interesting in a historian sort of way if you look him up. He said, "the greatest obstacle to discovery is not ignorance—it is the illusion of knowledge." I challenge the members of the CCBA who think they know what the CCBA is—those who have that illusion of knowledge—to forget what you already know and look at the CCBA again with an open mind. You might find that we are a lot more than you thought and discover that preconceived beliefs have been holding you back. Invest some time and see what the CCBA is today in 2014. You are writing checks and paying dues. As a member of the CCBA you deserve to receive the full value of your membership. Come on out and discover what that is. You might be very surprised.

Thank you very much for taking time out of your life to read this and until next month—all the best.

~ Casey

YOUNG LAWYER HAPPENINGS

YOUNG LAWYER CHAIR

The Upside of a Down Economy for Active Young Lawyers

By Matt Rooney

To put things in perspective, the U.S. economy hasn't been this consistently sluggish since most current young lawyers' grandparents were our age. Getting acclimated to a new profession is tough enough; fighting historically-bad crosswinds while you're doing it just seems cruel!

Things have gotten better since the financial crisis but we still have a long way to go. Supply remains a problem, too, exacerbating the flooded, 40,993 active lawyer-strong New Jersey legal job market despite a recent and precipitous drop in law school enrollment. It's no secret that attorneys generally abhor complex mathematics; the equation at work here is pretty simple: a superabundance of lawyers + (- less jobs) + (- delayed retirements) = thousands of 20-somethings with their juris doctorates packed away in boxes and Ramen noodles cooking in the microwave of their parents' basement for a few extra years.

The underlying numbers read like a horror novel assuming, of course, you just spent tens of thousands of dollars for an upwardly-mobile future. A recent survey found that while 77% of 2007 law school graduates were employed in a job requiring bar admission subsequent to leaving law school; that number fell to 65% by 2011. The median salary for new lawyers—which includes high-range big firm city jobs held by a minority of law students—plummeted from $72,000 in 2009 to $60,000 in 2012. That might be a decent statistic if it were the median income, as opposed to the mean, and the average student was not saddled with hundreds of dollars in monthly loan obligations.

Sorry to be such a downer. But here's the good news: there's opportunity in adversity, and a new generation of attorneys is finding no way around getting out from behind their desks and engaging the broader legal community. It's no longer simply a good idea. It's a necessity!

Unsurprisingly, I'm a big believer that bar membership is more important now than ever. Billable hours will always be superiorly important to partners for equally obvious reasons. However, in 2014, cleaning and cooking the fish is not enough at most small and medium firms. You need to learn how to fish for yourself to thrive. Even larger firms see little value in keeping associates around for long when the going gets tough unless they can build their own book of business or, at the very least, add value to the firm by engaging the community and acting as a positive, living and breathing asset for the firm's brand. There's no better way to make that happen than getting active in the bar association and taking advantage of the opportunities afforded members.

Personal happiness isn't unimportant either! It's a jungle out there. Developing a network of young professional friends who can help you make the most of your "busy years" is definitely worth the effort.

The Camden County Bar Association's Young Lawyer Committee is doing its part to open up these opportunities to as many new South Jersey attorneys as possible. We successfully signed up approximately 250 new members in August 2014 alone. Many of our new recruits joined us for our charity Lobster Bake at the TapRoom in Haddon Township on September 27th, an annual event responsible for raising thousands of dollars for the Larc School in Bellmawr, a school for severely and moderately disabled children. We've also scheduled a series of happy hours, lunch meetings, brewery tours, wine tastings, legal seminars, charity holiday parties and other solid events (including a second annual chili cook-off) in the coming months. Each event, as I explained above, serves dual purposes: to engage the community and to serve the individual attorney by incorporating him or her into the community and, in so doing, strengthening it.

Now THAT is a winning equation! And it's never too late to get in on the fun. Interested in learning more about the Young Lawyer Committee? Shoot me an email at matt@southjerseylawfirm.com, find us on Facebook (www.facebook.com/camdencountyyounglawyers) and follow us on Twitter via our handle @CCYoungLawyers. Remember: your career is nothing more—and nothing less—than what you make of it! So make it a good one. We're here to help.

LEGAL LINE TO MUNICIPAL COURT

State v. Roger Paul Frye

By Gregory P. DeMichele.

The New Jersey Supreme Court in State v. Roger Paul Frye (070975) finally and unequivocally resolved the issue as to whether or not a prior DWI conviction can be used to enhance the penalty(ies) for a subsequent breath-test refusal conviction. It has always been clear that a prior breath-test refusal conviction cannot be used to enhance the penalties for a subsequent DWI conviction. However, the opposite has been debated for quite some time amongst municipal court practitioners.

The source of this confusion in large part was the Courts ruling in State v. Ciancaglini, 204 N.J. 597 (2011). In this case the Defendant had previously been convicted of refusal under N.J.S.A. 39:4-50.4a. Id. at 600. He was subsequently convicted of DWI and the issue was whether, based upon the prior refusal conviction, he should be sentenced as a first or second offender under N.J.S.A. 39:4-50, which provides for enhanced penalties for repeat offenses. Ibid. The New Jersey Supreme Court agreed with the Defendant and ruled that a Defendant's prior refusal conviction cannot be considered as a prior DWI violation for enhancement purposes. State v. Ciancaglini, 204 N.J. 597 (2011)

However, in State v. Roger Paul Frye (070975), the Defendant, who had two prior DWI convictions, plead guilty to a refusal charge. Based on his two prior DWI convictions, he was sentenced as a three-time offender and his driver's license was suspended for 10 years. Defendant, thereafter, filed a motion for reconsideration of the sentence and argued that his prior DWI convictions could not be used to enhance his guilty plea to the refusal charge. The judge denied Defendant's motion, concluding that Defendant's two prior DWI convictions could be considered in imposing the sentence.

Defendant argued to the New Jersey Supreme Court that the Court imposed an illegal sentence when he was sentenced to a ten year loss of driving privileges based upon the Supreme Court's decision in State v. Ciancaglini, 204 N.J. 597 (2011), which held that the penalty provisions in N.J.S.A. 39:4-50 and 39:4-50a are not interchangeable. He argued that although Ciancaglini addressed a factually opposite case, (there, the prior conviction was for refusal, not DWI) the Court's decision in Ciancaglini supports the proposition that, for sentencing purposes, the refusal and DWI statutes are separate and distinct statutes.

The State took the position that Defendant was properly sentenced as a third-time offender under the refusal statute. The State also argued that Ciancaglini is inapplicable because it addressed a factually inverse situation involving the DWI statute rather than the refusal statute and that this very issue was previously addressed in In re Bergwall, 85 N.J. 382 (1981), rev'g on dissent, 173 N.J. Super. 431 (App. Div. 1980)

According to the Supreme Court the Defendant's appeal centered in large part upon the Legislature's intent in enacting the refusal statute, N.J.S.A. 39:4-50.4a, which requires municipal courts to revoke the driving privileges of drivers who refuse to submit breath samples to be tested for their blood alcohol content. In relevant part, the law provides:

> "the municipal court shall revoke the right to operate a motor vehicle of any operator who, after being arrested for a violation of R.S.39:4-50 or section 1 of P.L.1992, c. 189 (C.39:4-50.14), shall refuse to submit to a test provided for in section 2 of P.L.1966, c.142 (C.39:4-50.2) when requested to do so, for not less than seven months or more than one year unless the refusal was in connection with a second offense under this section, in which case the revocation period shall be for two years or unless the refusal was in connection with a third or subsequent offense under this section in which case the revocation shall be for ten years."
> [N.J.S.A. 39:4-50.4a.]
> State v. Roger Paul Frye (070975)

The Court stated that the amendments made to the refusal statue after the Court's ruling in In re Bergwall reveal that the refusal statute has maintained language that is nearly identical to the language at issue in In re Bergwall. State v. Roger Paul Frye (070975) Despite having opportunities to change the refusal statute, the Legislature has not made any significant changes to the statute since this Court's 1981 In re Bergwall decision. Consequently, the Supreme Court found that this legislative acquiescence reflects the Legislature's agreement with this Court's interpretation of the refusal statute. State v. Roger Paul Frye (070975) See State v. Wilhalme, 206 N.J. Super. 359, 362 (App. Div. 1985), (recognizing that "an examination of the legislative history in chronological juxtaposition with the litigation history of Bergwall" supports the conclusion that statutory amendments do not change application of In re Bergwall to refusal statute), certif. denied, 104 N.J. 398 (1986); see also State v. Fielding, 290 N.J. Super. 191, 193 (App. Div. 1996).

The Court next addressed the Defendant's argument that the sentence was improper in light of the decision in Ciancaglini. The Court found that the Defendant's reliance on Ciancaglini was misplaced.

The Supreme Court noted that nothing in the DWI statute suggests that its references to prior violations refer to anything other than DWI convictions, and because the Legislature did not amend the DWI and refusal statutes to express an alternative intent, the Court found that the references to prior violations only refer to DWI convictions and not to refusal convictions. State v. Roger Paul Frye (070975)

Given the distinction between the DWI statute and the refusal statute, the Supreme Court found that In re Bergwall, rather than Ciancaglini, controls the outcome of the case. State v. Roger Paul Frye (070975) Consequently, based on the foregoing analysis, the New Jersey Supreme Court re-affirmed In re Bergwall and held that that the Defendant's prior DWI convictions were appropriately considered for purposes of his subsequent refusal conviction. State v. Roger Paul Frye (070975) This issue has presumably now been settled.

The Alternative to a Special Needs Trust in Personal Injury Cases

Continued from Page 4

In almost every instance, a settlement protection trust is a better alternative than a guardianship account.

6. **Alternatives to Public Benefits.** While public benefits may be the immediate source of medical treatment, food, or housing, are there other alternatives that could be found to obviate the need for a special needs trust? Where the settlement is large, public benefits may be unnecessary. Depending on the type of coverage the plaintiff needs, private insurance may be available, either on the open market or through the ACA. The monthly SSI payment may not be important.
7. **Cost.** Costs of drafting the trust and administering it must be considered. The cost of drafting a trust is usually very modest in comparison to the total value of the personal injury settlement. The cost of administering the trust is also minimal.
8. **Transfer of Assets.** Can the beneficiary transfer assets to a third party, wait for three years for SSI, or five years for institutional Medicaid? See item #2 for a calculation as to how this may work.

A VIEW FROM THE BENCH

Choose Civility

By Marie E. Lihotz, J.A.D.

It is hard to say exactly when I noticed or how long it has taken place, but acceptance of the crudeness of general public discourse has inched its way into our legal profession. Recent developments illustrate it is not just a few, but many who now adopt an unwelcomed rude style in their professional dealings, including when addressing the court. It is much more than elevated tones or occasional witty sarcasm. It includes yelling, belittling, and snide name-calling. New lawyers and established ones have slipped into behaviors that in the recent past would never have been contemplated, let alone tolerated. It happens during telephone calls, depositions, emails, in hallways, and in the courtroom. It permeates papers and thwarts transactions. More disheartening, instances are reported showing it has infected members of the judiciary.

Consider these recent headlines from the ABA Journal on line:

- "Courtroom 'shoutfest' over scheduling conflict results in $200 fine for lawyer."
- "Lawyer charged with felony intimidation over Facebook message to client's ex-husband."
- "Provocation isn't an excuse for lawyer's F-word email, judge says."

Although those examples emanated from our sister states, New Jersey is not above serious displays of bad behavior. Just last week I reviewed an appellate brief that contained this gem:

> While plaintiff's assertions regarding defendant's administrative ignorance and inference that defendant's pleadings lack procedural follow through, plaintiff's position displays his counsel's smug, sanctimonious attitude.

Also, the Law Journal recently downplayed the "extreme and personal hostility" exhibited by a municipal court judge toward an attorney, merely reporting: "Judge faces ethics charges over clash with lawyer."

Lawyers and judges are stressed by a myriad of demands. Lawyers must meet client expectations while maintaining required productivity goals. The bench struggles to accomplish more and more with less and less. But these pressures cannot justify the devolving trend toward vituperative conduct. Accordingly, I ask bench and bar to conscientiously decide incivility must stop, in favor of a very conscience choice to CHOOSE CIVILITY when conducting daily interactions.

Civility serves as the foundation of our profession. Our code of behavior must emulate respect and assume accountability for our actions and inactions. Nothing impresses more than prepared counsel, who argues the law as applied to the facts of the case, without resort to disparaging the position or person of an adversary or challenging the intellect of the judge. On the other hand, incivility diverts attention to matters other than the issues of a case, disrupts common sense, and thwarts future ability to associate and negotiate.

The practice of law is demanding and difficult. We put in long hours and wait extended periods for a final result. Understandably, basic human nature causes people to respond to each other in kind: if yelled at, one yells back; derision begets belittling; if confronted aggressively, push back is pretty much guaranteed. While no lawyer wants to be a pushover, remember no action is without consequences. Frankly, I believe restraint and redirection demonstrate strength and self-confidence, not weakness.

In an effort to effect a change in perspective and assure our professional interactions with one another remain at all times professional, the Thomas S. Forkin Family Law American Inn of Court, in cooperation with Rutgers Law School – Camden, will launch a civility project. Over the next several months, members of our bench and bar, along with the Rutgers Camden Law School community will offer articles addressing issues of civility in the practice of law.

Please join our Inn and Rutgers Law School and CHOOSE CIVILITY by committing to:

1. Display civility in your public discourse and behavior. Emulate those you view as pillars of professionalism. When confronted with "one of those lawyers," strike through the form and address the substance.

   Judges must not directly or indirectly tolerate this manner of "advocacy." Counsel should not be permitted to attack each other, but rather instructed to direct arguments to the court. Swift attention to incivility should be expected; if the court ignores and proceeds, then the message is such conduct "is okay."
2. Respect each other's time. Time is precious and none of us has the luxury of just wasting it. Don't file frivolous motions when a phone call may resolve the dispute. (And, by the way, take the call or promptly return it). Don't schedule depositions without at least checking to assure your adversary or his or her client is available. Be punctual. If you are running late, be courteous enough to notify everyone involved.

   Judges too must be concerned. Impose realistic time constraints and goals. Your lapses should not cause inordinate delays in other matters.
3. When a situation presents itself, mentor our newest colleagues, whose possible missteps should be discussed not exploited. Consider whether your colleague's conduct was a reaction to his or her perception of your treatment. Whenever possible, avoid making things personal.

Our relationships with our colleagues, the judiciary and court staff matter. The Bench-Bar Compact speaks volumes to the type of professional relationships we want. In launching this civility project, we seek to continue the development of good – will among each other and, in doing so, we hope civility becomes contagious.

They're Not Our Financials— They're Yours

Continued from Page 5

the accuracy, reliability and usefulness of the accounting data you are able to obtain and analyze for effective decision making.

As an aside, if you would like a copy of our customized "law firm chart of accounts" and other handout materials from Abo's seminars on Law Firm Accounting & Profitability, just shoot us an email at marty@aboandcompany.com.

Martin H. Abo, CPA/ABV/CVA/CFF is a principle of Abo and Company, LLC and its affiliate, Abo Cipolla Financial Forensics, LLC, Certified Public Accountants – Litigation and Forensic Accountants. The firm is a Partner in Progress of the Camden County Bar Association. With offices in Mount Laurel, NJ, Morrisville, PA and Franklin Lakes, NJ. Marty can be reached at marty@aboandcompany.com or by calling 856-222-4623.

One Judge's "Ten Tips for Effective Brief Writing"

Continued from Page 9

waste of everyone's time. If you don't like the decision, appeal."

Court rules permit motions for reconsideration, but one leading Supreme Court advocate disparages these motions as "the losing lawyers' last gasp and, most often, little more than that. The vast majority have no chance of success and little reason for being filed except for the belief that nothing will be lost by a final effort to avoid defeat." Professor Tigar advises that before pursuing a vain attempt, counsel should make a "searching inquiry into whether it would waste the client's money and—in an extreme case—subject the lawyer to sanctions for dilatory tactics."

Tip # 10: "Comprehensive Briefs and Powerful Arguments"

As Justice Louis D. Brandeis ascended to the Supreme Court bench in 1916, he observed that "[a] judge rarely performs his functions adequately unless the case before him is adequately presented." Justice Felix Frankfurter later concurred that "the judicial process [is] at its best" when courts receive "comprehensive briefs and powerful arguments on both sides." Adequate presentation depends on comprehensive, powerful, yet dignified give-and-take about the procedural and substantive law that determines the outcome.

** Douglas E. Abrams, a University of Missouri law professor, has written or co-authored five books. Four U.S. Supreme Court decisions have cited his law review articles.*

ENDNOTES

1 484 B.R. 825 (N.D. Okla. 2013).

2 *In re Gordon*, 484 B.R. 825, 827 (N.D. Okla. 2013).

3 *Id.*

4 *Id.* at 827-28.

5 *Id.* at 828 (N.D. Okla. 2013).

6 Terrence L. Michael, Ten Tips for Effective Brief Writing (At Least With Respect to Briefs Submitted to Judge Michael), http://www.oknb.uscourts.gov/sites/default/files/JMFiles/briefwritingtips.pdf.

7 *In re Gordon, supra* note 1, at 830-31.

8 *Id.* at 830.

9 *Id.* at 830-31.

10 *E.g.*, James W. McElhaney, *Twelve Ways to a Bad Brief*, in II MCELHANEY'S LITIGATION 142, 144 (2013): (adding "manifestly, clearly, fatal, clear beyond peradventure, logic that is fatally flawed, egregious, contumacious, mere gossamer, must necessarily fail, totally inapposite").

11 *Interviews with United States Supreme Court Justices: Justice Ruth Bader Ginsburg*, 13 SCRIBES J. LEG. WRITING 133, 142 (2010) (quoting Justice Ginsburg) (italics in original).

12 Arthur T. Vanderbilt, *Forensic Persuasion*, 7 WASH. & LEE L. REV. 123, 130 (1950).

13 John W. Davis, *The Argument of an Appeal*, 26 A.B.A.J. 895, 898 (1940).

14 Leigh Ingalls Saufley, *Amphibians and Appellate Courts*, 14 MAINE B.J. 46, 49 (Jan. 1999).

15 FREDERICK BERNAYS WIENER, BRIEFING AND ARGUING FEDERAL APPEALS § 83, at 258 (1961); see also, e.g., John C. Godbold, *Twenty Pages and Twenty Minutes – Effective Advocacy on Appeal*, 30 SW. L.J. 801, 817 (1976) ("Reflections on the adversary throw a shadow on a spokesman's own standards and on the strength of his presentation... [F]irmness, and preservation of one's own points and rights, seldom necessitate strident accusations or even discourtesy.").

16 Michael, *supra* note 6.

17 Hugh R. Jones, *Appellate Advocacy, Written and Oral*, 47 J. MO. BAR 297, 298 (1991), reprinted in 7 PRECEDENT 20 (Winter 2013).

18 Michael, *supra* note 6.

19 *Id.*

20 MICHAEL E. TIGAR, FEDERAL APPEALS: JURISDICTION AND PRACTICE § 1.05, at 12 (2d ed. 1993).

21 *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J.) (opinion concurring in result).

22 Michael, *supra* note 6.

23 *Id.*

24 LLOYD PAUL STRYKER, THE ART OF ADVOCACY 11 (1954) (quoting Cardozo).

25 Robert H. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations* 37 A.B.A.J. 801, 803 (1951).

26 Davis, *supra* note 13, at 896.

27 E. Barrett Prettyman, *Some Observations Concerning Appellate Advocacy*, 39 VA. L. REV. 285, 295 (1953).

28 Michael, *supra* note 1; *see also, e.g.*, John W. Davis, *The Argument of an Appeal*, 26 A.B.A.J. 895, 897 (1940) ("More often than not there is in every case a cardinal point around which lesser points revolve like planets around the sun, or even as dead moons around a planet; a central fortress which if strongly held will make the loss of all the outworks immaterial.").

29 *Interviews with United States Supreme Court Justices: Chief Justice John G. Roberts, Jr.*, 13 SCRIBES J. LEG. WRITING 5, 35 (2010) (quoting Chief Justice Roberts).

30 *Interviews with United States Supreme Court Justices: Justice Stephen G. Breyer*, 13 SCRIBES J. LEG. WRITING 145, 167 (2010) (quoting Justice Breyer).

31 Wiley B. Rutledge, *The Appellate Brief*, 28 A.B.A.J. 251, 254 (1942).

32 Davis, *supra* note 13, at 895.

33 Quoted in George Rossman, *Appellate Practice and Advocacy*, 16 F.R.D. 403, 407 (1955).

34 Davis, *supra* note 13, at 897.

35 BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 127 (1921).

36 Jackson, *supra* note 25, at 803.

37 Michael, *supra* note 1.

38 Prettyman, *supra* note 27, at 295.

39 John C. Godbold, *Twenty Pages and Twenty Minutes – Effective Advocacy on Appeal*, 30 Sw. L.J. 801, 816-17 (1976).

40 McElhaney, *supra* note 10, at 143.

41 Michael, *supra* note 1; *see also*, *e.g.*, Raymond S. Wilkins, *The Argument of an Appeal*, 33 CORNELL L.Q. 40, 42 (1947) ("Nothing will forfeit the confidence of the court more effectively than the misstatement of the record or the statement of a fact off the record.").

42 Rutledge, *supra* note 31, at 254.

43 Michael, *supra* note 1.

44 Jones, *supra* note 17, 47 J. MO. BAR at 304.

45 *Id.* at 300.

46 *Id.*

47 Michael, *supra* note 1; *see also, e.g.*, ROBERT L. STERN ET AL., SUPREME COURT PRACTICE §§ 15.5-15.6, at 726-27 (8th ed. 2002) ("[T]he Supreme Court seldom grants a rehearing of any kind of order, judgment, or decision...[A] rehearing attempt by the losing party to present the same arguments anew, even in improved fashion, has hardly any chance of success.").

48 ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES § 16.1, at 441 (2d ed. 1989).

49 Tigar, *supra* note 20, § 11.01, at 418 & n.15.

50 Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 461, 470 (1916).

51 *Adamson v. California*, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring).

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VERDICTS OF THE COURT

Superior Court of New Jersey

VERDICT:	No Cause (8/12/14)
Case Type:	Personal Injury
Judge:	Anthony M. Pugliese, J.S.C.
Plaintiff's Atty:	Laurence P. Bafundo, Esq.
Defendant's Atty:	Charles Lanzalotti, Esq.
L-4118-12	Jury

VERDICT:	No Cause (8/12/14)
Case Type:	Auto Negligence
Judge:	David M. Ragonese, J.S.C.
Plaintiff's Atty:	Jeffrey Hark, Esq.
Defendant's Atty:	Everett Simpson, Esq.
L-45-13	Jury

VERDICT:	No Cause (8/25/14)
Case Type:	Auto
Judge:	Michael J. Kassel, J.S.C.
Plaintiff's Atty:	George G. Horiates, Esq.
Defendant's Atty:	Raymond F. Danielewicz
L-4174-12	Jury (7)

VERDICT:	No Cause Liability Verdict: 60 % Against Plaintiff, 40% Against Defendant (8/21/14)
Case Type:	Auto Negligence
Judge:	Anthony M. Pugliese, J.S.C.
Plaintiff's Atty:	John Klamo, Esq.
Defendant's Atty:	Patrick Reilly, Esq.
L-2208-12	Jury

VERDICT:	Found to be Binding Contract (8/25/14)
Case Type:	Contract
Judge:	Nan S. Famular, P.J.Ch.
Plaintiff's Atty:	Jack Phillips, Esq.
Defendant's Atty:	Robert Greenberg, Esq.
L-12-13	Bench

VERDICT:	Liability Verdict: Judgment for Plaintiff (8/25/14)
Case Type:	Foreclosure
Judge:	Nan S. Famular, P.J.Ch.
Plaintiff's Atty:	Douglas McDonough, Esq.
Defendant's Atty:	Edward Okebiorum, pro se
L-20616-13	Bench

VERDICT:	No Cause (8/28/14)
Case Type:	Auto Negligence
Judge:	David M. Ragonese, J.S.C.
Plaintiff's Atty:	Nicholas Jayco, Esq.
Defendant's Atty:	Bill Hanifen, Esq.
L-5044-12	Jury

VERDICT	Damage Verdict: $1,300 Against Defendant/Economic Damages only (8/28/14)
Case Type:	Auto Negligence
Judge:	Anthony M. Pugliese, J. S.C.
Plaintiff's Attys:	Andrew Wenker, Esq. and Michael J. Glassman, Esq.
Defendant's Attys:	Tanja Riotto-Seybold, Esq. and Robert Raskas, E sq.
L-6208-11	Jury (7)

LEGAL LINE TO CRIMINAL LAW

Halcyon Days Gone By

Continued from Page 7

Court referred the subject to its Committee on Criminal Practice to fashion an appropriate rule.

In State v. Roach, 2014 WL 3843763, the defendant was charged with aggravated sexual assault, robbery, burglary and other crimes in connection with the home invasion and rape of a 64 year old woman. Specimens recovered from the victim during the post-event sexual assault examination were submitted to the State Police Laboratory. A scientist at the lab developed a male DNA profile from the specimens. The scientist compared the DNA profile to the DNA profile of a suspect in the investigation, E.A., and eliminated E.A. as a possible DNA contributor.

When the defendant became a suspect, his DNA sample was sent to the lab for analysis and comparison. By this time, the original DNA scientist had relocated to another state and no longer worked at the lab. A second DNA scientist, Jennifer Banaag, developed a DNA profile from the defendant's sample. She reviewed the original scientist's report and all of the underlying data. She compared the defendant's DNA profile to the male DNA profile recovered from the victim and issued her own report. The defense objected to Ms. Banaag testifying to work done by the original scientist. The trial judge overruled the objection. Ms. Banaag testified there was a highly significant statistical match between the defendant's DNA profile and the DNA profile developed from specimens recovered from the victim. The jury convicted Mr. Roach of all counts.

On appeal, the defendant argued that Ms. Banaag's testimony violated the Confrontation Clause of the Sixth Amendment. The Supreme Court held that the defendant's rights were not violated by Ms. Banaag's testimony because Ms. Banaag did not merely read and vouch for the first scientist's report, she conducted an independent review of the test data and procedures which she was qualified to do.

The third case in the trio of decisions was State v. Michaels, 2014 WL 3843299. Ms. Michaels was the driver of a vehicle that struck another vehicle causing the death of one person and serious injuries to another. A sample of her blood was sent to NMS Labs, a private facility in Pennsylvania. Fourteen analysts and technicians at NMS Labs were involved in handling the sample and performing scientific testing on the sample. The testing produced close to 1,000 pages of data which was provided to Dr. Edward Barbieri, a forensic toxicologist and pharmacologist who held the position of Assistant Laboratory Director. Dr. Barbieri reviewed all of the data, concluded that appropriate procedures had been employed and correct results obtained, and certified the results. He issued a report concluding Ms. Michael's blood contained specified quantities of various drugs. He opined that the quantity of those drugs in her blood rendered her impaired and unfit to drive at the time the blood sample was collected.

Over defense objections, Dr. Barbieri testified at the defendant's trial on vehicular homicide, assault by auto and other charges. His report was admitted into evidence. The jury convicted the defendant.

On appeal, the defendant argued that the admission of Dr. Barbieri's testimony, without the testimony of the analysts and technicians who performed the actual testing, violated her Confrontation Clause rights. The Appellate Division affirmed the conviction. The Supreme Court agreed with the Appellate Division, for reasons similar to its opinion in Roach.

The marital privilege was the issue in State v. Savoy and Terry, 218 N.J. 224 (2014). Defendants Savoy and Terry were married. Mr. Savoy was the target of a narcotics distribution investigation. During court approved wire taps of Mr. Savoy's telephones, State investigators intercepted incriminating conversations and texts between Mr. Savoy and Ms. Terry. They were both indicted. The trial court denied the defendants' motion to suppress the evidence on marital privilege grounds under Evid. R. 509. The defendants appealed the ruling.

Both the Appellate Division and the Supreme Court ruled the evidence to be subject to the marital communications privilege and therefore inadmissible. However, the Supreme Court stated that New Jersey should have a crime-fraud exception to the marital communications privilege and it submitted a proposed amended Evid. R. 509 to the legislature which would create a crime-fraud exception.

For a broader review of significant cases decided in 2014, you are cordially invited to the *Black Letter Law Blast* CLE on February 5, 2015 at Tavistock Country Club.

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Wine & Food

An Interview with Robert Panzer

Continued from Page 10

Q. *We seem to be seeing more value priced wines from Bordeaux and Burgundy, two of the more venerable wine producing regions in the world, as producers from outside the hallowed grounds from which the more collectible wines are produced increasingly fashion quality wines. Are these regions viable sources for those who favor the Cabernet and Merlot found in Bordeaux or the Pinot Noir and Chardonnay for which Burgundy is known?*

A. Again, if we equate value with cheap, not really. McDonald's is not going to add Chambolle Musigny to their Extra Value Menu offerings. But if by value we mean getting at the guts of what makes Burgundy and Bordeaux singular and wonderful at more affordable prices than the trophy bottlings fetch, then absolutely. It is just a matter of finding a source who is sorting through all of the details to find those producers that are delivering on both substance and affordability.

Q. *Many wine drinkers are content to order wines made from grape varieties with which they are familiar, such as Pinot Grigio, Chardonnay, Cabernet Sauvignon and Zinfandel, among others. What are some less popular grape varieties consumers should consider when they buy a bottle or order a glass of wine?*

A. There are precisely one bigillion interesting grape varieties on Planet Earth, and they all have some interesting things to say. You just have to be willing to listen. Just try any grape varieties that you don't already know, and enjoy the exploring.

Q. *It appears that German wine importers either are able to acquire more dry Rieslings or, perhaps, believe American consumers really do like dry white wines. Do you see an expanding market for dry Rieslings?*

A. Absolutely. The versatility, value, and complexity of Riesling is mind boggling. Once people see how much food friendly substance and complexity that Riesling offers in both dry and off-dry versions, it's hard not to love it. The greatest hurdle has traditionally been the educational one. But America is slowly growing a more sophisticated wine culture with ever increasing access to info and markets thanks to ye olde interweb. I'm not sure how much the Riesling market will grow, but it certainly will do just that.

I thank Rob for sharing his insight and passion with us this month. Should you want to know more about Rob or his wines, his website is www.downtoearthwines.net. If you want to contact Rob to inquire about his wine dinners, just email him at rob@downtoearthwines.net.

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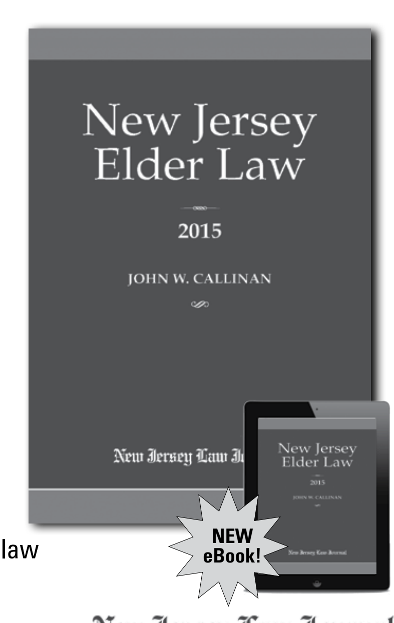

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Lloyd Freeman, an attorney with Archer & Greiner has been appointed to the New Jersey Supreme Court Civil Practice Committee, which reviews civil court rules and procedures and recommends amendments and enhancements. The Supreme Court relies on the Committee to provide it with advice on matters within the Committee's area of responsibility. Freeman practices litigation in state and federal courts in New Jersey and Pennsylvania. He has experience in complex commercial litigation, litigation related to intellectual property and real estate transactions, and consumer fraud actions.

Peter Kober is pleased to announce the reopening of his office for the practice of law, **Kober Law Firm, LLC**, a general practice law firm with a concentration in estate planning, elder law, family law, immigration, debtor's rights, personal injury and workers compensation. He is also a R. 1:40 Qualified Mediator. Reopening October 1, 2014, with offices at 1876 Greentree Road, Cherry Hill NJ 08003. Tel: (856) 761-5090. Email: pkober@koberlaw.com.

Christine S. Baxter, an attorney with Archer & Greiner in Haddonfield was recently selected to serve as a member of the Board of Trustees of the Women in the Profession Section of the NJSBA. She specializes in the practice of commercial litigation with an emphasis on intellectual property disputes, business torts litigation, and disputes involving corporate ownership and management.

Capehart Scatchard Executive Committee Member **Betsy G. Ramos** was recently appointed to the board of governors of the YMCA of Burlington and Camden Counties. Certified by the Supreme Court of New Jersey as a Civil Trial Attorney, Ms. Ramos is a Shareholder and Co-Chair of Capehart Scatchard's Litigation Department in its Mt. Laurel office where she concentrates her practice in business litigation, estate litigation, tort defense, employment litigation, insurance coverage, and general litigation.

Anthony R. La Ratta, partner at Archer & Greiner in Haddonfield, has been reappointed as Chair of the Probate & Fiduciary Litigation Committee of the ABA. He concentrates his practice in the area of commercial litigation with an emphasis on probate matters, estates, trusts, guardianships and fiduciaries.

Steven K. Mignogna, Chair of the Estate and Trust Litigation Practice at Archer & Greiner, has been reappointed to a second term as Chair of the Litigation, Ethics and Malpractice Group of the ABA. He focuses his practice on commercial litigation, with a concentration on probate matters, estates, fiduciaries, guardianships and real estate. He has lectured and published extensively both locally and nationally. Mr. Mignogna is principal author of the treatise, *Estate and Trust Litigation*, and editor and contributing author of *The New Jersey Estate Planning Manual* and *The New Jersey Probate Procedures Book*, all published by the New Jersey Institute for Continuing Legal Education.

Michelle H. Badolato has joined the firm of Stern & Eisenberg, PC as their New Jersey Lead Attorney. Ms. Badolato continues to practice in the areas of creditors' rights, financial services, bankruptcy and foreclosure. The New Jersey office is located at 1040 Kings Highway, Suite 407, Cherry Hill, New Jersey 08034. The phone number is (609) 397-9200. Ms. Badolato is a trustee of the Camden County Bar Foundation, and previously also served as a trustee for the Bar Association.

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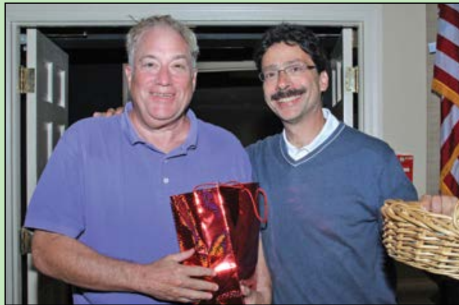

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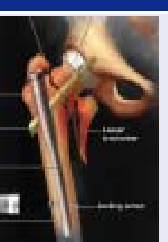

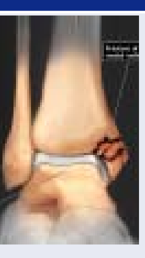

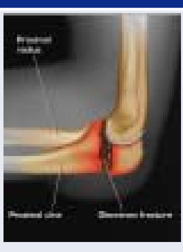

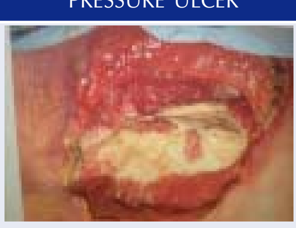

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