BARNSTABLE COUNTY BAR ASSOCIATION
P.O. Box 718
Barnstable, MA 02630



# BARRISTER

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HOLIDAY 2007

## INTER ALIA
### *(Certain Courts' Holiday Schedules)*

**Barnstable County Superior Court**. There will be no jury trials from 12/19/07 through 01/04/08. There will be only one judge available from 12/26/07 to 12/31/07. There are no dispositive motions for hearing on 12/27/07, only emergency motions (TRO's, trustee process, attachments etc.). The court is closed on 12/25/07 and 01/01/08. The Court and Clerk's office have regular hours otherwise. Per Scott Nickerson, Clerk of Courts, the Clerk's office would appreciate it if practitioners would not wait to file papers at the last minute on 12/24/07 or 12/31/07, due to the reduced holiday staffing on those days.

**Barnstable District Court**. The Court will be closed on December 25, 2007 and January 1, 2008. During the week of December 24, 2007, and on December 31, there will be no jury trials, criminal or civil. There will be jurors commencing Wednesday, January 3, 2008.

**Falmouth and Orleans District Courts**. The Courts will be closed on December 25, 2007 and January 1, 2008.

## NO, LAWYERS AREN'T SCROOGES

'Tis the Season to be jolly. 'Tis also the Season to remember and assist those less fortunate than the large majority of members of the bar. In keeping with that spirit, on December 2, 2007, attorney Michael Princi of Wynn & Wynn, P.C., of Hyannis hosted the seventeenth annual gathering at the Hyannis Golf Club for participants in a program to deliver baskets of gifts to unfortunate families in the Housing Assistance Corp.'s sheltered family program. These are families who are in transitional housing and who otherwise frequently would be living on the streets. Under Michael's guidance, wish lists are received from the families, and his friends, family, other attorneys, and members of the community purchase gifts from those lists and deliver them at the Hyannis Golf Club function. Housing Assistance Corp. then delivers the baskets of gifts to the families. This year, the group provided gifts for 63 families. Numerous local attorneys participate in this gift-giving group, bringing Holiday cheer to children who otherwise might have none. Anyone interested in participating in next year's program should contact Michael Princi, Esq. at 508-775-3665.

-The Editor

# A TRIBUTE TO JUSTICE ROGER B. CHAMPAGNE

The Barnstable Bar Bar and Bench has lost one of its stalwarts. Sadly, the Honorable Roger B. Champagne departed this life on September 27, 2007, at the age of eighty-six. Towering in integrity as well as stature, he was an outstanding member of our legal community.

Born and raised in Taunton, he served his country valiantly as a decorated veteran of World War II, retiring with the rank of captain. He graduated from Boston University School of Law in the class of 1949, with former Supreme Judicial Court Justice Edward Hennessey and many others who became judges including our own, the late Honorable John V. Harvey. In the fifties he was an Assistant United States Attorney in the Boston Federal Court, and he was appointed a Special Judge in the Taunton District Court in 1961 by Governor John A. Volpe.

When Paul A. Ryan was appointed as a judge to the Barnstable District Court in 1981, Judge Champagne, who lived in North Falmouth, exchanged places with him and thus became a judge of the Barnstable District Court. Though assigned to the Barnstable District Court, he sat throughout southeastern Massachusetts and was known throughout the system for his never failing good humor and affability. He was especially noted for his considerate and patient relationship with jurors in jury sessions, and it was said, "He deserved high marks for his work with juries". Now retired First Justice of the Barnstable District Court, Honorable John P. Curley, Jr., remarked of Judge Champagne, "I knew Judge Champagne as an attorney, judge and friend over forty-seven years. He always had the quiet dignity needed on the bench. An extraordinary man who loved his job".

After mandatory retirement from the bench in 1992, Judge Champagne maintained a busy schedule to the end of his life, doing mediation and arbitration, handling Probate Court guardianships and estates, and volunteering in charitable organizations. Included in his charitable work was board membership at Gosnold, Treasurer of the Cape Cod Boston University Alumni Club, the Cape Cod Symphony, our own bar association, and others.

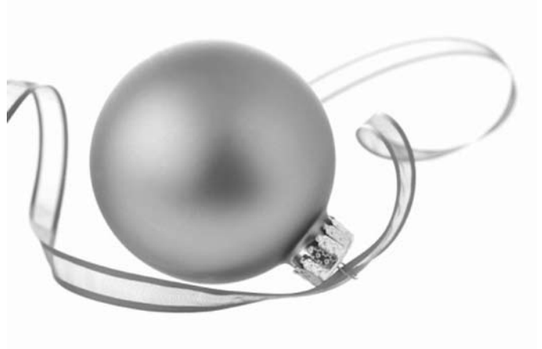
With all of his activities, he still found time and enjoyed gourmet cooking for his wife Eleanore, who survives him.

Though sometimes appearing haughty with the mien of General DeGaulle, Judge Champagne had the gift of congeniality and thus had legions of friends. He will always be remembered as one who upheld and carried out the highest traditions of the great Massachusetts Court system.

- Mr. Richard Staff









The next deadline to submit articles for the Barrister is February 15, 2008 for the Winter 2008 edition. Please send materials as e-mail attachments to attorney Dan Neelon at dneelon@neelonwilder.com.

**The Barrister** is a publication of the Barnstable County Bar Association and it is intended as an informational tool to its attorney members. The information and opinions expressed in this publication are those of the authors and not the BCBA.

# LAW FIRM RETIREMENT PAYOUTS AND BUYOUTS: WHERE COMMON SENSE BUSINESS AND PROFESSIONAL ETHICS CLASH

One of the most common arrangements to compensate anyone in the business world is the percentage fee arrangement. Investment banks receive percentage-based finder's fees or securities transaction commissions. Real estate brokers receive percentage-based commissions upon sale consummations. Business development consultants receive percentages of gross sales generated for their clients. Companies involved in mergers and acquisitions frequently make a portion of the transaction consideration dependent upon the level of revenues or profits actually achieved in the future, effectively paying some percentage of actual performance. From the perspective of the business party obligated to pay, the percentage arrangement offers a compelling logic: the party only pays when it has received value itself, thus eliminating the risk of paying for non-existent value or unrealized expectations; and the amount paid is directly related to, and usually a tolerable fraction of, the value received, thus ensuring a reasonable and affordable relationship between value received and costs incurred to generate that value. From the payee's perspective, the percentage arrangement provides assurance that the more value the payee brings to the paying party, the better compensated the payee will be.

Using this same logic, many law firms utilize internal profit-sharing formulas that allocate profits based on each partner's contributions to client originations and to fees generated directly by a partner's work, either directly on an ongoing basis or indirectly based on more generalized annual re-evaluations. This approach can reduce arguments that a partner is being compensated more than he or she is worth to the firm. Thus, it might also seem fair and reasonable that a law firm would agree to pay a retiring partner a percentage of the firm's billings from that partner's originated clients for a specified period after retirement, rather than agreeing to a payment arrangement divorced from the real value of the retiring partner's client base being realized by the firm going forward. The percentage arrangement eliminates the common complaint that senior or retiring partners receive too large a portion of the firm's profits relative to their current, as opposed to past, contributions to firm revenues. Unfortunately, while making clear business sense and being fair to both firm and partner, such an arrangement in the context of a retiring partner (even one who retains his law license while being paid) can be a violation of the Rules of Professional Conduct, "unethical", and legally unenforceable. What?

In 2005, the Massachusetts Supreme Judicial Court decided Eisenstein v. David G. Conlin, P.C., 444 Mass. 258, 827 N.E.2d 686 (2005), a case that addressed primarily the flip side of such an arrangement-namely, a law firm's partner entities seeking to enforce a partnership agreement under which departing partners were obligated for "four (4) years…[to] pay to the partner… who is credited with the client…and with whom said each partner is no longer practicing, fifteen percent (15%) of receipts…for such client…"

The Court's analysis turned on Mass.R.Prof.C. Rule 5.6, which provides in pertinent part: "A lawyer shall not participate in offering or making…a partnership… agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement…" The Eisenstein Court noted that Rule 5.6 "exists to protect the strong interests clients have in being able to choose freely the counsel they determine will best represent their interests"





and "furthers the client's right freely to select counsel by prohibiting attorneys from engaging in certain practices that effectively shrink the pool of qualified attorneys from which clients may choose." Not surprisingly, the Eisenstein Court held the 15% provision to be unenforceable, because it erected "obvious economic disincentives to competition that cannot reasonably be justified by any legitimate interest [the firm] had in its own survival."

Less intuitive (and completely absent from at least one major legal publication's summary of the case at the time) was the Court's holding that a provision requiring payment to a retired partner by the remaining partners of 10.5% of billings for the retired partner's originated clients likewise was unenforceable, a violation of public policy, and a violation of Rule 5.6. Given that Rule's explicit exception for retirement benefits, and the law firm's representation that such provision was the only retirement benefit provided to retiring partners, the Supreme Judicial Court's holding may seem somewhat surprising. Indeed, on its face, the payment of a fee percentage to a retired partner by partners continuing the practice does not suppress competition. However, the Court determined that the required payment to a retired partner "discourages a departing partner from accepting the former clients of a retired partner, who by definition is no longer available to represent them, even though the clients are in need of new counsel." Accordingly, the Court also rejected the law firm's argument that such an arrangement qualifies as "an agreement concerning benefits upon retirement" (although factually it was), because "the exception does not permit an agreement that provides benefits to a retired attorney that also restricts the right of an attorney who has not retired to practice, which is what [the subject provision] does." In other words, the Eisenstein Court determined that if an attorney can represent one client and keep 100% of the fees or represent another client and keep 89.5% of the fees, the attorney would be "restricted" from representing the latter by financial considerations.

One can certainly question the adequacy and accuracy of the Supreme Judicial Court's theoretical determination in the setting of real world business and practical motivations. If numerous partners agree on a 10% formula in connection with reaping the benefits of a continuing client base that one of their group has built, haven't they already decided that the 10% is justified by the accretion or continuation of a client base? How many lawyers really would cease representing an existing firm client because 10% of the fees would be paid to the originating partner who was already receiving a portion of the fees, directly or indirectly, while a profit-sharing partner, anyhow? Once lawyers join together in a firm, aren't they implicitly but necessarily acknowledging that they are willing to share, by some method, in the benefits of fees received from each other's clients in order to grow, or at least maintain, the aggregate fee base?

Regardless of one's view of Eisenstein's nullification of retirement arrangements based on a percentage of originated clients' fee payments, we all have to abide by the prohibition. However, unless a law firm is particularly large or has an administered retirement plan funded by ongoing contributions, the Eisenstein prohibition requires partners continuing a law practice to assume a greater risk when determining how to compensate a retiring partner than a non-legal business would have to assume. Retirement payments unrelated to billings to any particular clients may avoid the Eisenstein problem, but the continuing partners then assume the risk that the retiring partners' specific client contributions may provide little future value relative to the amounts of the payments to the retiring partner.

Given the Supreme Judicial Court's reasoning, a careful lawyer also should avoid making any arrangement in connection with purchasing a retiring/selling lawyer's practice that would include compensating that selling lawyer with a percentage of fees collected from his/her client base; Eisenstein suggests that a Massachusetts court could determine that the percentage payable to the selling attorney would "restrict" the purchasing attorney from working for the selling attorney's former clients in the face of opportunities to perform services for the purchasing attorney's newly originated clients. Although business common sense suggests agreeing to a percentage payout in order to reduce the risk that a law practice proves to be worth less than what the buyer is paying, the Rules of Professional Conduct as interpreted by the Supreme Judicial Court create a true "buyer beware" situation for any such arrangement.

- Daniel P. Neelon, Esq.