

# PRESIDENT'S PERSPECTIVE

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## Impacting Judicial System and the Way We Practice Through Persevering Advocacy



Advocacy is at the root of what attorneys do every day. We do it with vigor, zeal, professionalism, and integrity on behalf of our clients. It is also a precept that is fundamental to the New Jersey State Bar Association's very foundation.

The Association serves as the voice of New Jersey attorneys, advocating on behalf of the profession "to other organizations, governmental entities and the public with regard to the law, legal profession and legal system; to promote access to the justice system, fairness in its administration, and the independence and integrity of the judicial branch," as our mission states.

One of the most powerful tools the Association uses to do this important work is our Amicus Committee. The NJSBA has a proud history of advocacy as a friend to the courts for over a century which has helped to shape case law and improve New Jersey jurisprudence for all those who encounter the legal system.

Our amicus efforts have focused on some of the most critical issues of our time like the constitutional right to a fair and impartial jury. Several of our most recent amicus efforts touch directly on the issues that matter to attorneys and residents in their daily lives, such as what role attorneys should play in real estate transactions, how DWI cases can proceed, what form palimony agreements must take and what kind of information clients should have in arbitration matters.

Recently, the NJSBA filed for leave to appear as amicus curiae in a matter that goes to the heart of the ability of attorneys to practice.

In the matter of *Office of Attorney Ethics v. Wade*, the OAE recommended disbarment of an attorney under Rule of Professional Conduct 1.5 for knowing misappropriation of client and escrow funds from her attorney trust account. In that matter, the NJSBA asked the Court to clarify the *Wilson* Rule and the distinction between knowing misappropriation in

circumstances where trust accounting errors or insufficiencies are alleged.

In our brief, the NJSBA agreed that public confidence is maintained with a bright-line rule requiring disbarment where there is clear and convincing evidence of an intent to steal a client's money or to defraud a client. "The NJSBA asserts this is what has historically been understood as 'knowing misappropriation' under *Wilson*. However, the NJSBA believes that absent clear and convincing evidence of theft or fraud, notions of justice and fairness based on the merits of the particular facts presented require consideration of alternative appropriate sanctions, if any, short of disbarment."

Given the severity of the state's disbarment rules, the Association is expected to file a request to be an amicus voice in the coming weeks to join *In re Lucid*, which similarly asks the Court to examine the critical balance of maintaining public trust in the profession and a disciplinary system that is not overly punitive.

In *State v. Dangcil*, the Association's advocacy left an indelible mark on the efforts of the legal system to ensure a fair and impartial jury trial—one that is truly representative of a cross-section of the community—for all future parties. The *Dangcil* case was the first in-person criminal jury trial to be held since the pandemic shut down all in-person trials in March 2020.

The NJSBA participated as amicus curiae out of concern that the selection procedures used raised constitutional concerns and should have been conducted in a more transparent way that preserved the defendant's rights to participate. The New Jersey Supreme Court's opinion reflected the Association's recommendation to collect demographic information about potential jurors to guard against the risk of unconstitutional jury selection and under-representative juries. Especially with the challenges presented by the public health pandemic, the NJSBA's advocacy increased transparency in the selection process which is critical to ensure those rights are fully protected.

Here are some additional examples of the range and impact of the NJSBA's amicus advocacy program.

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subject to various exclusions, such as those targeting the amount of marijuana dispensed or investigating whether the business is manufacturing products in violation of law, that could impede coverage for their losses. Companies are also purchasing insurance coverage to protect against liability from social media usage such as slander, libel, cyberbullying, and even intellectual property rights violations. As a result, media liability coverage has become widespread among commercial entities and is no longer affiliated just with news conglomerates or entertainment companies.

This issue further provides key insight regarding settlement concerns facing both insurers and policyholders, as well as the evolving judicial interpretation of common policy provisions. In one article, we learn of the consequences that occur when a policyholder refuses to consent to an otherwise reasonable settlement demand and how insurers can insulate themselves from excess indemnity exposure in these circumstances. In a similar vein, an article in this issue dives deep into the intricacies of the National Practitioner Data Bank, which provides information

regarding settlement decisions involving practitioners and health care providers, and how the dissemination of that information to boards and insurance carriers could impede the ability of procuring professional liability insurance in the future. Finally, we investigate whether bad faith claims should be precluded by the entire controversy doctrine as they pertain to uninsured and underinsured motorist coverage, and the significance of the actual wording used in assault and battery exclusions and how that wording can affect enforceability. ☞

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- The NJSBA is seeking amicus curiae status in a family law matter, *Moynihan v. Lynch*, which is on appeal in the state Supreme Court. The matter focuses on the enforceability of a written palimony agreement where a notarized agreement was unenforceable because the parties had not sought legal advice. The NJSBA argued that the Court has the equitable power to enforce agreements when to do otherwise would be unjust, and that while involvement of legal counsel should always be encouraged, when reviewing the totality of circumstances surrounding an agreement, the lack of such involvement should not render an otherwise valid agreement unenforceable.
- The Association took part in *Delaney v. Dickey*, in which the Court upheld the use of arbitration clauses in retainer agreements but concluded attorneys must provide clients with additional information to ensure clients are fully aware of the differences between arbitration and a judicial trial. Our involvement extended even beyond the legal briefs with the NJSBA also submitting proposed model arbitration disclosure language

to the Supreme Court's Advisory Committee on Professional Ethics recommending what those disclosures should be.

- The NJSBA was a friend of the court in *Sullivan v. Max Spann Real Estate & Auction Co.* The case centered on whether the three-day attorney review period and notice regarding the risks of not seeking an attorney should apply to private real estate auction sales. The NJSBA argued they are mandated given the importance of the protection of the public interest. It's a case that stems from the legacy of a lawsuit the NJSBA brought in 1983 to ensure all realtor-prepared real estate contracts contain an attorney review clause cautioning the parties that they had the right to seek advice of counsel within three days of signing the contract.
- Municipal court matters have long been a critical focus of the NJSBA's advocacy, especially those like *State v. Cassidy* that stem from *State v. Chun*, which is regarded as the most important DWI case in the state's history and in which the NJSBA played a pivotal role.
- Our members are volunteering their time on the Association's behalf in ongoing hearings before a special master related to *State v. Olenowski*, in

which the NJSBA was an amicus curiae party to advocate for the inadmissibility of drug recognition evaluation evidence unless a proper foundation that meets the Frye requirements is provided. The hearing is expected to last at least six weeks and include testimony from several expert witnesses discussing the validity and reliability of evidence produced as a result of drug recognition evaluations by trained police officers in New Jersey cases.

With such an extensive footprint of advocacy, it should not be overlooked who is responsible for this impressive record of amicus activity. It is with special thanks to our Amicus Committee, Board of Trustees, and volunteer members, who share their outstanding expertise and knowledge in attending hearings, researching issues, and preparing briefs on a completely pro bono basis, that the NJSBA has provided assistance and insights on issues that touch the lives of each of us in the profession and society. Please know that we will continue to advocate for you on all issues of import to the practice, the judicial system and the profession, and feel free to reach out to us if you believe there is a matter the NJSBA should review. ☞