SURVEY OF RECENT DEVELOPMENTS
IN NEW JERSEY LAW

In this section, the Seton Hall Law Review presents synopses of recent New Jersey cases of interest to practitioners. In so doing, we hope to assist the legal community in keeping abreast of some of the more interesting changes in significant areas of practice.

TABLE OF CONTENTS


CRIMINAL LAW—Medical Necessity Is Not a Defense to Narcotics Possession Unless the Drug Is Obtained

877
IN COMPLIANCE WITH STATUTORY GUIDELINES—State v. Tate, 102 N.J. 64, 505 A.2d 941 (1986) ................. 895


Mrs. Norma Randolph had been actively involved in community affairs for approximately thirty years prior to becoming a court attendant in January of 1983. 101 N.J. at 428-29, 502 A.2d at 534-35. Shortly after securing this position, she informed the Monmouth County trial court administrator of her participation in a number of community organizations. At that time, she served on the boards of four public organizations (the Monmouth County Mental Health Board, the Freehold Borough Municipal Youth Guidance Council, the Freehold Borough Citizens Participation Committee for HUD, and the Freehold Borough Board of Assessment) and was an officer of two private organizations (the NAACP and the United Progressive Homeowners and Taxpayers Association). Id. at 428, 502 A.2d at 534.

The administrative office of the courts advised Mrs. Randolph that she should dissociate herself from these organizations because her participation engendered "a significant likelihood of involvement in political activity." Id. On May 6, 1983, the assignment judge of Monmouth County entered an order requiring Mrs. Randolph to comply with these restrictions as a condition of her continued employment as a court attendant. The Supreme Court of New Jersey subsequently granted a petition for review. Id. at 429, 502 A.2d at 535.

The supreme court noted that court rule 1:17-1 prohibits all court personnel from either holding "elective public office" or engaging in "political activity." Id. at 434-35, 502 A.2d at 538. In analyzing the claim that the rule violated Mrs. Randolph's first amendment rights of freedom of speech, expression, and association, the court applied a balancing test by which the rights of the individual employee were weighed against the governmental interest in an independent judiciary. Id. at 431, 502 A.2d at 536. The court took into account both the specific forms of expression involved and the availability of alternative methods of achieving the state's goal of judicial independence. Id. at 432, 502 A.2d at 537.

The court first emphatically declared that the state possessed a compelling interest in preserving an independent and impartial judiciary. Id. at 433, 502 A.2d at 537. It noted that rule 1:17-1
stemmed from the concern that political activism on the part of court employees would frustrate the judiciary’s attempt to maintain the requisite degree of independence and impartiality. *Id.* at 434-35, 502 A.2d at 538. The supreme court then considered several alternative interpretations proposed by Mrs. Randolph, such as applying the rule only to judges or only to “partisan” political activity. *See id.* at 436-42, 502 A.2d at 539-42. The court rejected Mrs. Randolph’s first proposal, refusing to limit the application of rule 1:17-1 to employees directly involved in the decision-making process, such as judges. Even the appearance of bias or impropriety, the majority reasoned, could affect the judiciary’s ability to function by lowering the public’s confidence in the court system. *Id.* at 437-39, 502 A.2d at 539-40. The court also refused to limit the rule’s prohibition to activity on behalf of a political party. The court noted that “issue activity,” as well as political activity, might weaken the public’s perception of the judiciary as an independent entity. *Id.* at 436-37, 502 A.2d at 539.

In the instant case, the supreme court found that Mrs. Randolph’s participation in outside organizations had the potential to involve her in political conflicts. *See id.* at 442-50, 502 A.2d at 542-46. Furthermore, her position as a court attendant tended to create the impression of judicial involvement in these conflicts. *Id.* at 454, 502 A.2d at 548. Because this could have “a disruptive effect on the work of the judiciary,” the majority held that Mrs. Randolph could not continue her involvement with these organizations while she served as a court attendant. *Id.* at 428, 502 A.2d at 534.

Justice Pollock agreed with the majority’s determination that Mrs. Randolph must sever her connections with any public organizations. *Id.* at 459, 502 A.2d at 551 (Pollock, J., concurring in part and dissenting in part). In contrast to the majority, however, he would have permitted her to continue her membership in the two private associations. *Id.* at 459-60, 502 A.2d at 551 (Pollock, J., concurring in part and dissenting in part). Nonetheless, Justice Pollock recognized that Mrs. Randolph’s participation in the private organizations might someday become pervasive enough to warrant her resignation from those groups. *Id.* at 460, 502 A.2d at 551 (Pollock, J., concurring in part and dissenting in part).

In a separate dissenting opinion, Justice Garibaldi criticized the majority for imposing an inflexible rule that failed to resolve adequately the conflict between the judiciary’s need to maintain
integrity and the constitutional rights of individuals. *Id.* at 471-72, 502 A.2d at 558 (Garibaldi, J., dissenting). She stated that the court had failed to consider "the least intrusive means to achieve the intent of Rule 1:17-1." *Id.* at 472, 502 A.2d at 558 (Garibaldi, J., dissenting). Justice Garibaldi pointed out that Mrs. Randolph performed only ministerial tasks in the courtroom. In addition, she questioned whether Mrs. Randolph's activities should be as severely restricted as those of judges. *Id.* at 468-69, 502 A.2d at 556-57 (Garibaldi, J., dissenting).

Throughout its decision, the supreme court emphasized the compelling interest of the state in the integrity of the judicial system. In order to protect that interest, the court not only affirmed that the first amendment rights of judicial employees may be restricted, but made clear that these employees may engage in only the most minimal level of political activity or expression. Fortunately, in so deciding, the court did not adopt a blanket rule or absolute ban on the exercise of these constitutional rights. Instead, it adopted a balancing test that was fair and reasonable as formulated. The application of this test in the instant case, however, was overly restrictive, given the limited role of the court employee and the fundamental nature of the rights at stake. If the court continues to apply this test in the future, it must give adequate consideration to these important factors.

Dominick Bratti


In 1977, the New Jersey Life Insurance Company (NJL) issued two $250,000 policies on the life of Frank Meier. 101 N.J. at 603, 503 A.2d at 864. The policies contained an automatic premium loan (APL) clause, which provided that upon default of a payment, NJL would "automatically [pay] the amount due out of the loan or cash value of the policy." *Id.*, 503 A.2d at 865. Mr. Meier discontinued the premium payments in August of 1980, when his insurance consultants recommended that he replace the NJL policies with the less expensive policies of another company.
Id. at 604, 503 A.2d at 865. NJL then activated the APL provision. One of the policies lapsed because the cash value was insufficient to cover the August 11th premium. Id. at 604 n.5, 503 A.2d at 865 n.5. With respect to the second policy, however, NJL paid the next two consecutive premiums on August 11, 1980 and December 11, 1980. The next quarterly payment was due on February 11, 1981. The policy, however, provided for a thirty-day grace period, which extended the time for payment until March 14, 1981. Id. at 604, 503 A.2d at 865.

Sometime during March of 1981, June Meier, the beneficiary and designated owner of the NJL policy issued to her husband, "commenced steps to surrender [the policy] for its cash value." Id. On March 13, 1981, NJL sent Mrs. Meier a cash-surrender form and a letter instructing her to sign the form and return it with the policy. Id. at 605, 503 A.2d at 865. NJL acknowledged receipt of the signed cash-surrender form on March 27, 1981, but again requested that Mrs. Meier forward the policy or, in the alternative, execute a Lost Policy Agreement. Id. at 605-06, 503 A.2d at 866.

On April 13, 1981, Frank Meier died. Mrs. Meier submitted a Lost Policy Agreement to NJL along with her claim for the face value of the policy. Id. at 606, 503 A.2d at 866. Litigation ensued to determine whether the NJL policy had lapsed and, if so, whether the lapse was attributable to (1) the failure of NJL to institute the APL provision on March 14, 1981, (2) an effective surrender of the policy, or (3) a "mutual consent" termination of the policy. Id. at 602, 503 A.2d at 864.

The trial court granted the plaintiff's motion for summary judgment and awarded the beneficiaries of the NJL policy its full face value plus prejudgment interest. Id. at 602-03, 503 A.2d at 864. A majority of the appellate division affirmed, holding that the policy was in force at the time of Meier's death. A dissenting judge, however, concluded that the policy had justifiably lapsed because of nonpayment of premiums, and as a result, the defendant was eligible to appeal to the Supreme Court of New Jersey. See id. at 606-07, 503 A.2d at 866. Subsequently, a majority of the supreme court affirmed the decision of the appellate division. Id. at 623, 503 A.2d at 875.

Justice Garibaldi, writing for the majority, first addressed NJL's contention that under its internal procedures, the policy had lapsed because APL provisions were not processed "until fifteen days after the expiration of the grace period." Id. at 609,
The court dismissed the assertion, emphasizing that an insurance company's failure to activate the APL provision on time cannot be used to penalize the insured. *Id.* In the absence of proper notice by the insured revoking the APL provision, NJL was required to pay the premium before the expiration of the grace period, and therefore, the policy could not lapse as a result of nonpayment of premiums. *Id.* at 611, 503 A.2d at 869.

In determining whether Mrs. Meier's submission of the cash-surrender form constituted a surrender of the policy within the terms of the contract, the court deemed the language of the insurance agreement ambiguous because it did not explicitly state whether a return of the policy by physical delivery was a prerequisite to an effective surrender. *Id.* at 616, 503 A.2d at 872. Justice Garibaldi noted that the doctrine of reasonable expectations mandates that ambiguous language be construed in favor of the insured. *Id.* at 612-13, 503 A.2d at 869-70. Therefore, she concluded that the NJL policy had not been effectively surrendered. *Id.* at 617-18, 503 A.2d at 872-73.

Finally, the court considered whether the policy had been terminated through the mutual consent of the parties. See *id.* at 618-21, 503 A.2d at 873-74. Justice Garibaldi admonished that in the absence of a provision in the contract providing for unilateral cancellation of the policy by the insured, mutual consent of the parties was the only means by which cancellation of the policy could be validly effectuated. *Id.* at 619, 503 A.2d at 873. Under the facts at bar, Justice Garibaldi observed that mutual consent could only be found if Mrs. Meier had satisfied the condition for termination imposed by NJL—physical return of the policy. Because the policy was never returned, the court concluded that "there was no meeting of the minds," and consequently, "there was no termination of the contract by mutual consent." *Id.* at 621, 503 A.2d at 874. The majority therefore held that the NJL policy was in effect at the time of Frank Meier's death. *Id.* at 622, 503 A.2d at 875.

In a dissent, Justice Clifford concluded that Mrs. Meier had effectively surrendered the NJL policy when she tendered the cash-surrender form. *Id.* at 626-27, 503 A.2d at 877 (Clifford, J., dissenting). He contended that the intent of the parties must control and that the conduct of the policyholder best reveals his intent. *Id.* at 623-24, 503 A.2d at 875 (Clifford, J., dissenting). He therefore asked, "How more plainly could [Mrs. Meier] express her earnest wish" to terminate the policy than through her
execution of the cash-surrender form? Id. at 628, 503 A.2d at 878 (Clifford, J., dissenting). Unlike the majority, Justice Clifford observed that physical delivery was "a condition precedent to payment" of the policy rather than a condition precedent to an effective surrender. Id.

The Meier controversy underscores the necessity for precise draftsmanship of insurance contracts. The possibility of a court resorting to the legal catchall of resolving an ambiguity in favor of the insured can be eliminated by precise, explicit language in the agreement. As evidenced by the majority's decision, an APL provision can be applied to enable an insured who blatantly manifests his intent to surrender a policy to recover later under that same policy. Insurance companies offering the APL option, however, can protect their interests by carefully prescribing policy surrender procedures in the insurance contract.

Mark A. Lustbader


Anne Wist, the plaintiff, and George Wist, her husband and the defendant in a divorce action, entered into an agreement concerning the custody of their children. 101 N.J. at 510, 503 A.2d at 281. According to the agreement, which the parties termed a "joint custody" arrangement, the children would live with the plaintiff, and the husband would have certain visitation rights, including weekends and alternate holidays. The agreement further provided that the husband was to be granted access to the children's school reports, that he was to be consulted with regard to medical treatment, and that he was to be given the right of first refusal as a babysitter. Id. at 510, 503 A.2d at 281-82. As later noted by the majority in the appellate division, the agreement was the "'typical one of custody in one parent, the mother, with liberal visitation and participation . . . by the other parent, the father,'" and after a hearing on the matter, it was expressly approved by the trial court. Id. at 510, 503 A.2d at 282. Because of a dispute between the parties regarding the proper form of
judgment, however, the lower court subsequently rejected the arrangement and ordered a trial on all the issues, including custody of the children. The trial court ultimately decided that the husband should have custody of the children, and absolutely no weight was accorded to the parties' prior agreement because the court did not view it as being either final or conclusive. *Id.* at 511, 503 A.2d at 282.

Finding the custody trial unwarranted, a majority of the appellate division held that the comprehensive nature of the agreement and its preliminary approval by the trial court "amounted, as a matter of law, to a final judgment for custody." *Id.* Any disputed matters, the majority held, could have been resolved by the trial court, and the mere disagreement as to the form of judgment was irrelevant. The dissent, on the other hand, found the trial court's rejection of the agreement proper. It stressed the fact that although the agreement explicitly provided for joint custody, there were disputes with respect to which parent would make "day-to-day" decisions. As a consequence, the dissent concluded that an agreement had not been reached. *Id.*

In a per curiam opinion, the New Jersey Supreme Court modified the decision of the appellate division, remanding the matter for a new trial on the custody issue. *Id.* at 514, 503 A.2d at 284. Unlike the dissenting judge in the appellate division, the supreme court believed that some deference should have been given by the trial court to the parties' agreement, despite the fact that disputes existed regarding certain material issues. See *id.* at 512, 503 A.2d at 282. The court also disagreed with the appellate division majority, however, and refused to hold that the agreement could be deemed the final judgment. *Id.* at 511-12, 503 A.2d at 282. According to the supreme court, the trial court was required to consider the agreement and to accord it only as much weight as the situation warranted. *Id.* at 513, 503 A.2d at 283. After considering the custody arrangement and the attendant circumstances, the trial judge then could either resolve the disputed matters, try them, or reject the entire agreement. *Id.* at 512, 503 A.2d at 282-83. In exercising its discretion, the trial court should determine whether the agreement would "produce a stable custodial relationship in the best interests of the children," or whether its enforcement would simply encourage further litigation. *Id.* at 512, 503 A.2d at 283.

The supreme court declared that the following reasons could lead a trial court to reject such an agreement: "the prob-
able instability of the custodial arrangements, the insufficiency of
time available to the parties in formulating the stipulation, the
relative importance of the matters remaining in dispute, [and]
the relative incompleteness of the matters covered.” Id. at 513,
503 A.2d at 283. Nonetheless, the court observed, these factors
could not justify a complete lack of consideration of the agree-
ment, but could serve only as grounds for rejecting the agree-
ment after a thorough review. Id. Thus, in remanding the case,
the supreme court held that the trial court must hold a plenary
hearing and must consider the custody agreement in addition to
all other relevant factors. The supreme court especially noted
that because of the trial court’s original determination, the chil-
dren had already been in the custody of the father for one-and-
one-half years. The court declared that this fact should also be
considered on remand in determining what would be in the best
interests of the children. Id. at 513-14, 503 A.2d at 283.

The relevance of a private custody agreement between the
parties to a divorce is indisputable; it constitutes a reference
point from which the court can glean the general intent of the
parties. Typical custody agreements provide for major condi-
tions such as living arrangements, visitation rights, and participa-
tion by the noncustodial parent in the daily activities of the child.
It would be unreasonable for a trial court to ignore such an
agreement entirely merely because some aspects of it are later
disputed. The decision of the supreme court, which requires
consideration of pretrial custody arrangements while allowing
their rejection in certain circumstances, achieves the proper bal-
ance. The opinion directs the state’s trial courts to respect the
intent of the parties, while at the same time permitting a review
of all the extrinsic factors involved.

Betty Ann Babjak

ADMINISTRATIVE LAW—Agency Regulations Providing
Procedural Safeguards Are a Prerequisite for Debar-
ring Corporate Officers Under New Jersey’s Prevailing
Wage Act—Department of Labor v. Titan Construction Co., 102
N.J. 1, 504 A.2d 7 (1985).

The New Jersey Prevailing Wage Act requires that workmen
who are employed on public-works projects be paid at least the prevailing wage, as determined by local collective bargaining agreements. Those contractors who fail to meet this requirement may be debarred from entering into public-works contracts for a period of three years. 102 N.J. at 4, 504 A.2d at 8. In October of 1982, the Titan Construction Company entered into a public-works contract with the Middletown Township Board of Education. A subsequent investigation by the New Jersey Department of Labor revealed that Titan had failed to pay the required wage to eight of its workmen, three of whom were Titan's sole owners and officers. Titan and its principals were notified of their violations and warned that if they did not file a request for a hearing within twenty days, they would be placed on a list of debarred contractors. Id. at 4-5, 504 A.2d at 8-9.

At a hearing before an administrative law judge, Titan conceded that its principals had not been paid the prevailing rate, but argued that this was not required by the New Jersey Prevailing Wage Act. Despite Titan's contention, the administrative law judge granted the Department of Labor's motion for summary judgment and debarred both the company and its officers from public contracting work. Id. at 5, 504 A.2d at 9. Both the Department of Labor and the appellate division denied motions for a stay of debarment pending an appeal by Titan. The New Jersey Supreme Court reversed, granted the stay, and instructed the appellate division to expedite its determination of the appeal. Id. at 6, 504 A.2d at 9.

In a per curiam opinion, the appellate division summarily affirmed the decision of the administrative law judge, while noting that another panel of the appellate division had arrived at a different conclusion in Department of Labor v. Berlanti, 196 N.J. Super. 122, 481 A.2d 830 (App. Div. 1984). The supreme court then granted certification in order to determine the following issues: (1) whether the term "workman" in the New Jersey Prevailing Wage Act should be construed to exclude corporate stockholders who perform labor on public-works projects; (2) whether the Commissioner of Labor has the authority to debar corporate officers when a corporation violates the Act; and (3) whether the Department of Labor properly exercised its authority in this case. Titan Construction, 102 N.J. at 8, 12, 504 A.2d at 10, 13.

In regard to the first issue, Justice Stein, writing for a unanimous court, maintained that construing the statute to exclude corporate stockholders would be a disservice to "both the letter
and purpose of the Act.” Id. at 9, 504 A.2d at 11. Such a holding, he stated, would encourage stock-ownership schemes designed to frustrate the purpose and hinder the implementation of the Act. Consequently, the court held that the prevailing wage requirement applied to all workers, including stockholders of the offending corporation. Id.

Turning to the second issue, the court admitted that the language of the Act was ambiguous regarding the Commissioner’s authority to debar individual corporate officers. Nevertheless, the court stated that such a power could be inferred from the legislative intent behind the statute. Id. at 10, 504 A.2d at 12. Justice Stein declared that the public policy expressed in the Act was “‘to protect [employees] as well as their employers from the effects of serious and unfair competition’ that result from inadequate wages.” Id. at 11, 504 A.2d at 12 (quoting N.J. STAT. ANN. § 34:11-56.25 (West 1965)). He further noted that debarment serves as a deterrent in order to ensure that contractors pay the required wages. Justice Stein reasoned that this deterrent effect would be extinguished if the Commissioner was authorized to debar only the corporate entity because the corporate officers responsible for the violations could simply start new enterprises. Thus, the court held that the Commissioner could debar individual corporate officers under the Act. Id., 504 A.2d at 12-13.

Although it resolved the first two issues in favor of the Department of Labor, the court refused to hold that the debarment of Titan’s officers in this case was valid. Id. at 18, 504 A.2d at 17. Justice Stein noted that the New Jersey Prevailing Wage Act itself set no standards for debarring corporate officers. As a result, he maintained that “basic fairness” required the Commissioner of Labor to establish guidelines and regulations if he intended as a rule to debar the officers of corporations found guilty of violating the Act. Because one or more officers in such a corporation could be free from responsibility for the violations, these officers must be afforded procedural safeguards such as “notice, [a] hearing, the right to present evidence, and the right to cross examine an adverse witness.” Id. at 17, 504 A.2d at 16. Thus, the court concluded that the Department of Labor had improperly exercised its authority because it had failed to define the conduct that would result in individual debarment. See id. at 17-18, 504 A.2d at 16-17.

In Titan Construction, the New Jersey Supreme Court noted that its conclusion was “an exception to the general rule that
courts normally should defer to an agency's discretion in determining the appropriate method of implementing its statutory responsibilities.” *Id.* at 18, 504 A.2d at 16. In this instance, however, the court declined to defer to the agency because the “lack of essential substantive standards and procedural safeguards” amounted to an abuse of its discretion. *Id.*, 504 A.2d at 17. Nevertheless, the court upheld the ruling that corporate officers who perform labor on public-works projects must be paid the prevailing wage and that the Commissioner of Labor has the authority to debar those corporate officers who violate the Act. *Id.* at 9, 11, 504 A.2d at 11, 13. In so doing, the court clarified the scope of the Act in an effort to deter future violations by corporate officers and served notice that an agency's discretion is not unlimited and must be exercised in accordance with fundamental principles of due process.

*Edward T. Kole*


In July of 1971, Gladstone Associates published a report discussing the feasibility of developing Capital Plaza Tower I (Capital Plaza), an office building owned by Capital Place Urban Renewal Associates (Capital Place) and located two blocks from the New Jersey State Capitol Building. The report indicated that Capital Plaza could be successfully developed if the State of New Jersey became the principal tenant. On his own initiative, Samuel J. Plumeri, president of the Plumeri Realty Company, succeeded in interesting Eugene M. Grant, an accomplished real estate developer, in the project. In March of 1972, Grant was given an exclusive, four-month option to undertake the development. 101 N.J. at 16, 499 A.2d at 1357.

Realizing that the project's success required that the state be a principal tenant, Grant depended on Plumeri for introductions to the appropriate state officials, with whom he could discuss leasing the office space in his proposed building. *Id.* at 16-17,
On September 21st, Grant secured a written commitment that the state would lease the office space. *Id.* at 17, 499 A.2d at 1358. On June 5, 1973, Grant and Capital Place, the owner of Capital Plaza, agreed to pay Plumeri $346,666.65 as a commission on condition that the state lease and “pay rent for approximately 100,000 square feet of office space.” *Id.* Plumeri continued to assist Grant in procuring tenants until 1979. *Id.* at 18, 499 A.2d at 1358.

After the change in the state government’s administration in 1974, Plumeri’s right to receive the agreed-upon commission was challenged. Frank M. Papale, Jr., the director of the Division of Purchase and Property, refused to pay the commission because it “appeared ‘to be violative of the provisions set forth in N.J.S.A. 52:34-15.’” *Id.* at 17, 499 A.2d at 1358. When the state and Capital Plaza entered into a twenty-five-year lease on September 12, 1975, Papale placed funds in escrow pending an adjudication of Plumeri’s right to the commission. Plumeri then sued Grant and the state in order to obtain the commission. *Id.* at 18, 499 A.2d at 1358.

At trial, the jury found that although Plumeri had earned the commission, “he was not entitled to it because he was not ‘a bona fide established commercial or selling agency maintained by the developer for the purpose of securing business in addition to this one State lease.’” *Id.* at 18, 499 A.2d at 1359. On appeal, the appellate division reversed, finding “that Plumeri was entitled to his commission absent proof that he had engaged in influence-peddling.” *Id.* at 19, 499 A.2d at 1359. Thereafter, the state petitioned for certification to the New Jersey Supreme Court in order to determine whether the requirement set forth in N.J. STAT. ANN. § 52:34-15 (West 1986) that the broker be “maintained by the contractor” had been satisfied. *Plumeri Realty,* 101 N.J. at 15, 499 A.2d at 1357. The supreme court reversed the appellate division’s decision, ruling that Plumeri had not been “maintained” by the developer within the meaning of the statute. Hence, the court held that awarding him a commission would violate state law. *Id.* at 15, 499 A.2d at 1357.

Justice Pollock, writing for the majority, examined the language of N.J. STAT. ANN. § 52:34-15 (West 1986), which disallows the payment of commissions to agents employed under state contracts exceeding $2500. He noted that the statute provides an exception for those “bona fide” agents “maintained by the contractor for the purpose of securing business.” *Plumeri Realty,* 101
N.J. at 19, 499 A.2d at 1359 (quoting N.J. Stat. Ann. § 52:34-15 (West 1986)). Justice Pollock found that the legislative history did not reveal the meaning of the phrase "maintained by the contractor," and he observed that no reported New Jersey decision had construed the relevant statutory language. Id. at 21, 499 A.2d at 1360.

The majority noted that the only case that had discussed the statute, State v. Arnold Constable Corp., 138 N.J. Super. 551, 351 A.2d 771 (App. Div.), certif. denied, 70 N.J. 518, 361 A.2d 533 (1976), had held that a contingent commission was impermissible when the broker's employment was based solely on his or her accessibility to state officials. Plumeri Realty, 101 N.J. at 20, 499 A.2d at 1359. In Plumeri Realty, the state had introduced no proofs on that issue; therefore, the main concern was whether the broker had engaged in a "solitary transaction" with the contractor. See id., 499 A.2d at 1360.

In an analysis of Federal law, the supreme court determined that the Federal courts had construed a similar United States statute to require an agent to hold "a continuing relationship with a contractor" in order to be entitled to a contingent commission. Id. at 21, 499 A.2d at 1360. Applying that standard, the court concluded that the requisite continuity could be demonstrated by showing "a prior relationship or . . . an intent to engage in a future course of dealings." Id. at 22, 499 A.2d at 1360. Justice Pollock observed that Plumeri's relationship with Grant satisfied neither of these characteristics. Thus, the majority of the supreme court held that Plumeri had not been "maintained" by Grant within the statutory meaning. Furthermore, because the main objective of Plumeri's employment was to ensure that the state became a tenant in Capital Plaza, the fact that Plumeri had attempted to procure other tenants was insufficient to entitle him to a commission. Id. Acknowledging that the denial of Plumeri's commission seemed "harsh," the court reasoned that the requirement of a continuing relationship between a contractor and a broker was necessary to serve the "legitimate legislative purpose [of] forestalling influencing peddling." Id., 499 A.2d at 1361.

In dissent, Justices Clifford, Garibaldi, and Stein agreed with the majority's reading of the legislative purpose underlying the statute, but disagreed that the denial of Plumeri's commission would further that purpose. Relying on the Arnold Constable case, they reasoned that a broker's entitlement to a commission should
be determined by balancing all of the relevant factors in order to decide whether the "inherent tendency" of the promised commission was to promote either corruption or the exertion of improper influence over public officials. Id. at 23, 499 A.2d at 1361 (Clifford, J., dissenting). The dissent noted that the majority's failure to apply that standard indicated that the court had effectively overruled the Arnold Constable case. Id. at 22, 499 A.2d at 1361 (Clifford, J., dissenting).

Under the Arnold Constable approach, the dissent decided that awarding the commission to Plumeri would not be "incompatible with the statute." Id. at 23, 499 A.2d at 1361 (Clifford, J., dissenting). Reviewing the evidence, the dissent observed that Plumeri had not merely served as an influence peddler; rather, he had been "primarily responsible" for developing the project, and it was through his arrangements that Grant had procured the state as a tenant. Id. Based on the record, the dissent concluded that Plumeri's relationship with Grant had extended over several years and that his role in securing the state lease was "minor" in comparison with his other contributions to the project. Id. at 24, 499 A.2d at 1361 (Clifford, J., dissenting).

In deciding that the Arnold Constable case did not pertain to the issue before it, the Plumeri Realty court avoided the necessity of applying that decision's balancing test, a method recommended by the dissent. Instead, the majority turned to the Federal standard for help in construing the relevant statutory phrase "maintained by the contractor," and this resulted in a strict application of the statute. Under the court's "per se" rule, a broker is presumed to be an "influence peddler" and hence is denied a commission whenever he or she has neither a past relationship nor a future intention to deal with the contractor. Although such a rule may provide a convenient means of determining whether a broker is acting as an influence peddler, it may also compel many independent, bona fide brokers to shift their business from the public sector to the private sector.

Joan M. Neri
Eli Halpern and several other plaintiffs brought an action against Philip Tannenbaum and a number of additional defendants, asserting a claim based upon a promissory note. The defendants failed to raise a defense, and the plaintiffs were thus found to be entitled to summary judgment. 207 N.J. Super. at 316-17, 504 A.2d at 142-43. In a counterclaim based on an unrelated transaction, the defendants asserted that the plaintiffs had failed to effect a prompt return of loan documents. Unlike the plaintiffs’ claim, the counterclaim proved to be an improper subject for summary judgment. The defendants sought to postpone the entry of a final judgment on the plaintiffs’ claim, arguing that a final judgment should not be entered until the counterclaim had been adjudicated. In the alternative, they argued that execution on the judgment should be stayed. Id. at 315, 504 A.2d at 142.

This case presented a question of first impression in the New Jersey courts. Id. at 315-16, 504 A.2d at 142. Applying court rules 4:46-2 and 4:42-2, the court found that the mere existence of a counterclaim did not itself bar the imposition of a final summary judgment. Under the rules, should the court certify “that there is no just reason for delay,” entry of such a judgment is deemed a valid exercise of the court’s power. The issue, then, was whether the court, under the circumstances of this case, should certify the judgment as final, or whether some other disposition was possible. Id. at 316, 504 A.2d at 142.

Judge Haines noted several considerations bearing on the answer to this question. On the one hand, a defendant is authorized “to setoff the amount of any recovery” on a counterclaim against the amount of the plaintiff’s judgment. Id. at 317, 504 A.2d at 143. In addition, when a judgment is certified as final, the forty-five-day period for an appeal begins to run. Judge Haines pointed out that it would not be “in the interest of the parties, or the appellate courts, that an appeal be taken in a matter of this kind until all issues have been determined.” Id. On the other hand, when a judgment is not final, or when a stay of
execution is granted, there is the possibility that the defendants may dispose of assets, thus making the judgment uncollectible. *Id.*

In its search for a middle ground between these contending interests, the court examined a variety of approaches taken in other jurisdictions. One approach, originally applied in the Federal courts, distinguished between counterclaims that are compulsory and those that are not, permitting final judgment only in the latter case. *Id.* at 318, 504 A.2d at 143. While in New Jersey “[t]he permissive-mandatory distinction is not controlling in view of [rule] 4:46-2,” the court maintained that it was “entitled to consideration.” *Id.* at 319, 504 A.2d at 144.

In this case, Judge Haines stated that the counterclaim was of a mandatory nature because it arose from an ongoing business relationship among the parties. Furthermore, it was uncertain whether the amount of recovery on the counterclaim, if successful, would exceed the amount of the plaintiffs’ judgment. Because of these considerations, the court concluded that the plaintiffs’ summary judgment should be interlocutory.

In an effort to protect the plaintiffs, however, the court gave them leave to demonstrate a need to secure their judgment. If the plaintiffs could show that the amount of recovery on the counterclaim would be “substantially less than the amount of the summary judgment,” or that the defendants’ assets might be dissipated before the counterclaim could be resolved, the court would consider revising its interlocutory order. *Id.* at 320, 504 A.2d at 145. In such circumstances, the court could issue a restraining order that would prevent the dissipation of assets, or it could “make the interlocutory judgment a lien upon” the defendants’ real and personal property. *Id.* at 321, 504 A.2d at 145. This would make the interlocutory judgment “similar to a final judgment,” without precluding a setoff or making the judgment appealable. *Id.*

The court in *Halpern v. Tannenbaum* arrived at a construction of New Jersey’s court rules that does justice to the language of those rules, protects the interests of the parties, and preserves the integrity of the judiciary. A major advantage of this decision is that it will prevent untimely appeals. A potential problem, however, which may cast a shadow upon the court’s approach, is that it places a burden on the plaintiff to come forward with evidence or information that he may not possess. In addition, it assumes that actions taken by the court to modify an interlocutory
SURVEY

judgment will have the intended effect. Without doubt, the situation presented by this case will arise again, and the court's ruling will be tested by repeated practical application. Once the scope of the decision has been more completely defined, an addition to the court rules may be necessary.

Jean L. Meyer

CRIMINAL LAW—MEDICAL NECESSITY IS NOT A DEFENSE TO NARCOTICS POSSESSION UNLESS THE DRUG IS OBTAINED IN COMPLIANCE WITH STATUTORY GUIDELINES—State v. Tate, 102 N.J. 64, 505 A.2d 941 (1986).

On March 29, 1983, acting on an informant's tip, the Manalapan police searched the home of Michael Tate, a quadriplegic, pursuant to a valid search warrant. This search revealed "a large amount of marijuana, a scale, paraphernalia, and money." 102 N.J. at 67, 505 A.2d at 942. Subsequently, Tate was charged with possession of more than twenty-five grams of marijuana. Tate's attorney notified the county prosecutor that he would rely upon the defense of "justification" premised on "medical necessity" at Tate's trial. Tate contended that he used the marijuana to ease the spastic contractions he regularly suffered as a quadriplegic and that no other prescription drug afforded him the same relief. Id. The state moved to strike Tate's defense, arguing that his claim of "medical necessity" did not satisfy the definition of justification contained in the relevant New Jersey statute. Id. at 67-68, 505 A.2d at 942.

The trial court denied the motion to strike the justification defense, ruling that the circumstances of the present case allowed Tate to assert the defense of necessity. The appellate division, with one judge dissenting, affirmed the lower court's ruling. After an appeal by the state, the supreme court reversed. Id. at 67, 505 A.2d at 942.

Justice Clifford, writing for the majority, observed that the legislature, by enacting the New Jersey Penal Code, had attempted to limit the courts' wide discretion and codify the criminal law. Thus, Justice Clifford maintained, the legislature had appropriated the responsibility "for defining the scope of former common-law defenses," including necessity. Id. at 68-69, 505
A.2d at 943. The majority noted that the relevant statute contains three limitations governing the defense of necessity. First, conduct is justifiable under the section only to the extent that it is permitted by law. Second, the defense is not available when the Code or another statutory provision defining the substantive crime provides an exception or defense applicable to the specific situation. Finally, the defense is not available if it is clear that the legislature intended to preclude a claim of justification. See id. at 69-70, 505 A.2d at 944 (citing N.J. STAT. ANN. § 2C:3-2(a) (West 1982)).

Based on these standards, the court concluded that the necessity defense was unavailable to Tate in this case. Justice Clifford noted that the possession of marijuana was clearly "not 'permitted by law.'" Id. at 70, 505 A.2d at 944. Furthermore, he pointed out that three specific provisions in title 24 of the New Jersey statutes demonstrate that the legislature had rejected the possibility that marijuana had some medical use. For example, Justice Clifford stressed that possession of a controlled dangerous substance is not a crime if the drug was obtained under " 'a valid prescription or order from a practitioner.' " Id. at 71, 505 A.2d at 944-45 (quoting N.J. STAT. ANN. § 24:21-20(a) (West Cum. Supp. 1986-1987)). The court reasoned that because Tate lacked the required prescription, he could not resort to the statutory exception. Id.

The court also noted that the state had recognized some potentially beneficial medical uses for marijuana when it had enacted the Controlled Dangerous Substances Therapeutic Research Act (TRA). See id. at 72, 505 A.2d at 945 (citing N.J. STAT. ANN. §§ 26:2L-1 to -9 (West Cum. Supp. 1986-1987)). Justice Clifford observed that the TRA permits the use of marijuana for the purposes of scientific study and experimentation. Because Tate had not applied under the TRA for the use of marijuana, the court held that the Act afforded him no protection. See id. at 74-75, 505 A.2d at 946. Thus, Justice Clifford concluded that the legislature had contemplated the defense sought by the defendant, had inserted specific provisions covering it, and had made clear "'its intent to exclude the defense except as specifically provided.'" Id. at 72, 505 A.2d at 945. Additionally, the court maintained that there would be no defense of necessity under the common law because the defendant would be unable to show the absence of an available legal alternative to procuring the drug from an illegal source. Justice Clifford reasoned that Tate could
have obtained the marijuana under the TRA. *Id.* at 74-75, 505 A.2d at 946-47.

Justice Handler, joined by Justice Stein, dissented, noting that the infrequency of the defense and the unusual facts under which it normally arises require that the courts define and apply the defense "on a case-by-case basis." *Id.* at 77, 505 A.2d at 947 (Handler, J., dissenting). The dissent observed that the defense is described only "by its own labels, i.e., 'justification' and 'necessity'"; hence, the legislature clearly intended the defense to retain the broad scope it had been given at common law. *Id.* at 80, 505 A.2d at 949 (Handler, J., dissenting).

Because of the TRA's "extremely limited scope," Justice Handler rejected the argument that the Act provided a real exception to criminal liability for the use of marijuana. *Id.* at 85, 505 A.2d at 952 (Handler, J., dissenting). He reasoned that the majority's analysis of title 24 and the TRA had imposed an unwarranted "interpretive strait-jacket" on the medical-necessity defense. *Id.* In addition, Justice Handler suggested that use of a controlled substance could be medically necessary under certain circumstances and yet not satisfy the standard of an "accepted medical use." See *id.* at 83-84, 505 A.2d at 951 (Handler, J., dissenting). In his view, the defense of medical necessity would be available if the defendant could demonstrate the following elements: the health-threatening nature of the condition, a high level of suffering, the absence of some other legal treatment, a good-faith effort to alleviate the suffering with conventional medical treatment, a lack of contribution to the health-threatening condition by the defendant's own action, and a resulting benefit to society. See *id.* at 90-91, 505 A.2d at 954-55 (Handler, J., dissenting). Justice Handler stressed that the defendant must establish these elements through the use of competent expert testimony. See *id.* at 91, 505 A.2d at 955 (Handler, J., dissenting).

Justice Garibaldi also dissented, noting that the state's interest in forbidding the use of marijuana would not be furthered by prohibiting its use in exceptional cases. She reasoned that "exceptional cases" should include cancer victims, quadriplegics, and multiple sclerosis victims. *Id.* at 95, 505 A.2d at 957 (Garibaldi, J., dissenting). Furthermore, she suggested that requiring a defendant to seek expert medical advice prior to taking the prescribed drug, in addition to the other criteria proposed by Justice Handler, would reduce the potential abuse of this defense by
those who use illegal narcotics. *Id.* at 95, 97, 505 A.2d at 957, 958 (Garibaldi, J., dissenting).

In *Tate*, the supreme court correctly noted that the legislature had specifically limited the medical use of marijuana to situations arising under the TRA. To allow the use of marijuana in other circumstances would open a “Pandora’s box” of problems for police departments already overburdened in their attempts to enforce our drug laws. Furthermore, if the court permitted the type of use practiced by Tate, it would give at least implicit approval to the users’ suppliers, who usually obtain the drug illegally. *See id.* at 73, 505 A.2d at 945.

*Peter P. Feeley*


On December 1, 1978, Lucrezia Viviano’s left hand was mangled when she was unable to withdraw it from a malfunctioning industrial press. 101 N.J. at 542, 503 A.2d at 298. Immediately following the accident and without Viviano’s knowledge, her employer, Columbia Broadcasting Systems, Inc. (CBS), removed a timer from the press. Three days later, an internal memorandum identified the timer as the defective component and further identified the Taylor Instrument Company as its manufacturer. *Id.* at 543-44, 503 A.2d at 298-99. Unaware of these facts, Viviano instituted suit on July 2, 1979 against CBS, as well as against a fictitious manufacturer, installer, and distributor of the machine. No manufacturer of a component part of the machine was named either specifically or fictitiously. *Id.* at 542-43, 503 A.2d at 298. Subsequently, on June 30, 1980, CBS furnished Viviano with a list identifying several component-part manufacturers. Thereafter, Viviano filed an amended complaint naming A & M Tool & Die, Inc. as the maker of the press and deleting the fictitious-party designation. Despite continuing discovery, the internal
CBS memorandum dated December 4, 1978 was not produced until the deposition of a CBS vice president on June 2, 1982—after both the expiration of the statute of limitations and the deletion of the fictitious-party designation from the original complaint. *Id.* at 543, 503 A.2d at 299. On July 30, 1982, Viviano filed another amended complaint naming Sybron, which had acquired the Taylor Instrument Company, as the manufacturer of the defective timer. *Id.* at 544-45, 503 A.2d at 299.

The trial court denied the timer manufacturer’s motion to dismiss the cause of action. Applying the discovery rule, the court determined that Viviano’s cause of action against the timer manufacturer had accrued on June 2, 1982, when the internal CBS memorandum mentioning the Taylor timers first became known to the plaintiff. The appellate division reversed with one dissent, concluding that the discovery rule failed to preserve Viviano’s claim, which clearly arose on December 1, 1978. *Id.* at 545, 503 A.2d at 300. The supreme court, although agreeing that the discovery rule was inapplicable, nevertheless reversed and relaxed the rule governing fictitious-party procedure in the “interests of justice.” *Id.* at 546, 503 A.2d at 300. Thus, the court held that the amended complaint related back to the date of the original complaint. *Id.*

Justice Pollock, writing for a unanimous court, noted that the discovery rule, an equitable doctrine created by the courts, provides that a cause of action does not accrue until the plaintiff knows or reasonably should know that an actionable claim exists. *Id.* Observing that Viviano was aware “of facts that equated with a cause of action” on December 1, 1978, the day of her accident, the court determined that her cause of action had accrued on that date and that the statute of limitations had simultaneously begun to run. Therefore, it held that Viviano could not rely upon the discovery rule to preserve her belated claim against the timer manufacturer. *Id.* at 546-47, 503 A.2d at 300.

Justice Pollock then examined the fictitious-party procedure authorized by New Jersey’s court rules, stating that when the alleged defendant’s true identity is not known to the plaintiff, the rules permit process to “[issue against the defendant under a fictitious name, stating it to be fictitious and adding an appropriate description sufficient to identify him.’” *Id.* at 548, 503 A.2d at 301 (quoting N.J. Ct. R. 4:26-4). He further noted that the rule “expressly contemplates the filing of an amended complaint.” *Id.* at 552, 503 A.2d at 304.
Emphasizing the necessity and utility of the fictitious-party procedure in the context of complex cases involving industrial machinery, Justice Pollock determined that prior decisions construing rule 4:26-4 had allowed a plaintiff whose timely initial complaint included an appropriate fictitious-party designation to amend the complaint and name a specific defendant after the statute of limitations had run. The amended complaint was then deemed to relate back to the time of the filing of the initial complaint. *Id.* at 548-49, 503 A.3d at 301-02. Justice Pollock observed, however, that if the fictitious-party designation were eliminated, the plaintiff could not thereafter identify a specific defendant if the period of limitation had lapsed. *Id.* at 549, 503 A.2d at 302. Because Viviano had amended her complaint to name the manufacturer of the press and had deleted the corresponding fictitious-party designation, the court concluded that a strict application of rule 4:26-4 would prevent a subsequent amendment naming the manufacturer of the component part from relating back. *Id.* at 550, 503 A.2d at 302.

Justice Pollock determined, however, that the judiciary possessed the power to relax or to dispense with any court rule when compliance with it would result in injustice. *Id.* at 550-51, 503 A.2d at 302-03. Therefore, the court relaxed rule 4:26-4 and held that the amended complaint naming the manufacturer of the defective timer related back to the time of filing of the initial complaint. Justice Pollock reasoned that Viviano would have named the component-part manufacturer in a timely fashion if CBS had produced its 1978 internal memorandum in discovery proceedings during the statutory period of limitation. The court further noted that the timer manufacturer had not been prejudiced by the delay. *Id.* at 556, 503 A.2d at 305-06. Consequently, the court liberally interpreted the fictitious designation “JOHN DOE COMPANY, Manufacturer of Record Press Machine” to extend to the manufacturer of the component part. Justice Pollock cautioned, however, that future plaintiffs injured in accidents involving industrial machines should designate as fictitious parties those entities associated with the machine’s component parts. In addition, he observed that the complaint should specify the causes of action asserted against those defendants. *Id.* at 555, 503 A.2d at 305.

The *Viviano* court based its holding upon its conviction that “concealment and technicality” should not “triumph over the interests of justice.” *Id.* at 556, 503 A.2d at 306. The court’s deci-
sion, although limited to the facts of the case, provides some guidance to attorneys representing plaintiffs injured by industrial machines. Justice Pollock's opinion urges practitioners to designate the manufacturers of a machine's component parts and to describe the causes of action alleged against these fictitious defendants. Only through such specificity can an injured plaintiff take full advantage of New Jersey's fictitious-party procedure.

Catherine A. Kiernan


In 1981, Wilford Gantt participated as an unarmed accomplice in an armed robbery. Although his armed companion was never apprehended and the gun was never recovered, Gantt was nonetheless convicted of armed robbery. This was his second conviction under similar circumstances. 101 N.J. at 577, 503 A.2d at 851. Pursuant to the Graves Act, which mandates extended terms of imprisonment for second offenders "'who used or possessed a firearm during'" the commission of a crime, Gantt was sentenced to a twenty-five-year term. Id. at 578-79, 503 A.2d at 851-52 (quoting N.J. STAT. ANN. § 2C:43-6(c) (West 1982)). Additionally, under the same statute, he was sentenced to a minimum of eight-and-one-third years of parole ineligibility. Id. at 578, 503 A.2d at 851.

Gantt appealed the trial court's decision on two grounds. He contended that a Graves Act sentence should not be imposed because he had never been in possession of the gun. In addition, he argued that an extended sentence was unwarranted because there was some doubt about the gun's operability. The appellate division, however, affirmed the trial court's decision on both issues. In rejecting Gantt's contentions, the appellate court emphasized that a weapon need not be operable in order for it to fall within the Graves Act's definition of a "firearm." Id. at 578, 503 A.2d at 851. The New Jersey Supreme Court granted
Gantt’s petition for certification, limiting its review to the issue of whether a firearm need be proven operable in order for a Graves Act sentence to be imposed. *Id.*

In his majority opinion, Justice O’Hern noted that the Graves Act had adopted its definition of “firearm” directly from the state’s Gun Control Law. *Id.* at 582, 503 A.2d at 853 (citing N.J. STAT. ANN. § 2C:39-1(f) (West Cum. Supp. 1986-1987)). The court explained that the statute does not define a firearm “in terms of its capability of discharging a projectile, but in terms of its design.” *Id.* at 584, 503 A.2d at 854. The court further observed that toy guns and similar devices, unlike real guns, are not covered under the Graves Act because they are not originally designed to be lethal weapons. *Id.* at 584-85, 503 A.2d at 855. Thus, the court held that proof of operability is not required to show that a weapon is a “firearm” under the Graves Act. The only requirement is that the instrument be “designed to deliver a potentially-lethal projectile and hence ‘real.’” *Id.* at 589, 503 A.2d at 857.

In support of its decision, the majority argued that designating a weapon’s operability as an element of proof would create unnecessary and undesirable problems. *Id.* at 585-86, 503 A.2d at 855-56. At best, the court noted, it would result in protracted inquiries into collateral issues not readily susceptible of proof. *Id.* at 586, 503 A.2d at 856. At worst, it would “effectively eliminate the application of the Graves Act in” those cases in which the firearm had been discarded or hidden by the defendant. *Id.* at 585, 503 A.2d at 855. The court stated that the legislature had never intended that such issues enter into the sentencing process. *Id.*

Rather, the court opined, a weapon’s operability should become an issue only if it relates to the weapon’s design. *Id.* at 590, 503 A.2d at 858. The court declared that if evidence is introduced showing that the weapon’s original design was “innocuous” or that the instrument had been altered to the extent that it had “completely and permanently lost the characteristics of a real gun,” then the trier of fact must “determine whether the State has sustained its overall burden of establishing . . . that the instrument used or possessed was a ‘firearm.’” *Id.* Additionally, the majority emphasized that an examination of the weapon is not necessary to establish its authenticity because a gun’s original “design may be inferred from appearance or based on lay testimony.” *Id.* at 589, 503 A.2d at 857.
In a concurring opinion, Justice Handler maintained that a weapon's operability should be considered an essential element in defining a firearm for purposes of the Graves Act. He observed that the element of operability "may be established by direct evidence or evidence founded on reasonable inferences." Id. at 595, 503 A.2d at 860 (Handler, J., concurring). Referring to the concerns expressed by the majority, Justice Handler asserted that the burden of proving operability would not necessarily compromise the effectiveness of the Graves Act, even if a weapon were discarded by an offender. He suggested that this could be accomplished by employing a rebuttable presumption of operability in determining whether a weapon is a "firearm" within the meaning of the Graves Act. Id. at 596, 503 A.2d at 861 (Handler, J., concurring).

In Gantt, the Supreme Court of New Jersey held that a weapon's operability need not be proven in order for it to fall within the meaning of "firearm" under the Graves Act. In so holding, the court demonstrated its continued concern for the safety of the state's citizens, who have been victimized continually by armed offenders and their accomplices. By focusing on a weapon's design, the court substantially strengthened the deterrent effect of the Graves Act. Nevertheless, new issues will be raised when defendants attempt to prove a weapon's innocuous or altered design in order to avoid sentencing under the statute.

Alberto Romero


In 1981, John and Nina Gonchar of Northvale, New Jersey obtained a permit to build a "mother and daughter" addition to their home in order to house Mrs. Gonchar's widowed mother. 101 N.J. at 47-48, 500 A.2d at 382. Their neighbor, Carl Rowatti, advised Mr. Gonchar of his belief that the construction plans violated local side-yard requirements. After the Gonchars received a side-yard variance from the Northvale Board of Ad-
justment, the Rowattis objected further, claiming that the addition violated Northvale’s zoning ordinance by creating a multi-family dwelling. *Id.* at 48, 500 A.2d at 382. At a subsequent hearing, the board of adjustment concluded that the addition, which included a separate kitchen, bedroom, living room, bathroom, and entrance, was prohibited by the ordinance. *Id.* at 49-50, 500 A.2d at 383.

Both parties subsequently appealed to the Law Division of New Jersey Superior Court. The law division affirmed the board’s grant of the variance and held that the addition did not convert the Gonchars’ house into a multi-family dwelling. The appellate division affirmed the lower court’s decision on the variance issue, but reversed the trial judge’s conclusion that the Gonchars’ home had remained a single-family structure. *Id.* at 50, 500 A.2d at 384. The Supreme Court of New Jersey then granted the Gonchars’ petition for certification and affirmed the appellate division’s judgment. *Id.* at 47, 500 A.2d at 382.

The only issue before the supreme court was the proper interpretation of the term “multi-family dwelling.” In deciding this question, the court first noted that the addition possessed all the characteristics of a completely self-sufficient apartment. *Id.* at 51, 500 A.2d at 384. The court then observed that the relevant zoning ordinance defined a multi-family dwelling as a structure either occupied by or designed for more than a single family. In addition, the court stated, the ordinance defined family “as one or more persons ‘living and cooking together as a single housekeeping unit.’” *Id.* at 53-54, 500 A.2d at 385-86. Because the addition constituted an entirely separate dwelling, the court concluded that the building had become a multi-family home. *Id.* at 53, 500 A.2d at 386. Furthermore, the court reasoned, the opportunity for Mrs. Gonchar’s mother “to live and cook separately from the rest of the family” precluded a finding that the Gonchars were living together as one family. Indeed, the Court determined that the Gonchars had “envisioned . . . something beyond a single housekeeping unit.” *Id.* at 55, 500 A.2d at 386.

In reaching its decision, the court also relied on the factual findings of the board of adjustment. The court noted that the board’s decision—like that of an administrative tribunal—would “not be disturbed unless it [was] unreasonable, arbitrary, or capricious.” *Id.* at 52, 500 A.2d at 385. In this case, the court observed, the record contained ample evidence supporting the board’s finding that the Gonchars had changed their home into a
multi-family residence. *Id.* Consequently, the court declared that local interpretations of zoning ordinances "must be accorded great latitude" and affirmed the decisions of the board and the appellate division. *Id.* at 55, 500 A.2d at 386. Finally, the court refused to consider any constitutional issues because the Gonchars had failed to raise these contentions in the lower courts or during oral argument. *Id.* at 55-56, 500 A.2d at 387.

In a dissenting opinion, Justice Stein asserted that the Northvale ordinance was "facially inconsistent" because a one-family dwelling was defined as a house occupied by or designed for a single family, while a multi-family dwelling was defined as a house occupied by or designed for more than a single family. Thus, he observed, a structure built for two families but occupied by only one would fall within either definition. *Id.* at 60-61, 500 A.2d at 390 (Stein, J., dissenting). Justice Stein maintained that this lack of clarity raised a significant constitutional issue: the ordinance might be impermissibly vague and thus violative of the Gonchars' due process rights. *Id.* at 62-63, 500 A.2d at 391 (Stein, J., dissenting). He would have remanded the case to the law division for a consideration of the validity of the underlying zoning ordinance. *Id.* at 62, 65-66, 500 A.2d at 391, 393 (Stein, J., dissenting).

The predicament faced by the Gonchars is not uncommon today. People are living longer and housing is becoming a major concern for the elderly. Municipalities have a legitimate interest, however, in maintaining residential areas and in dealing with the problems created by additions to single-family dwellings. When first erected, such a structure may be intended for use only by family members. Unfortunately, once the original house is sold, the addition may serve different purposes. Although the Northvale ordinance was imperfectly drafted, it was essentially a fair and reasonable means of preserving single-family residential areas. Therefore, the supreme court correctly upheld the municipality's right to maintain the integrity of its housing patterns.

*Maria A. Wuss*

Lawrence Brunson was indicted on two counts of sexual assault and one count of kidnaping. New Jersey law entitled the state to twelve peremptory challenges and the defendant to twenty challenges in the course of selecting a jury. 101 N.J. at 134, 135, 501 A.2d at 145, 146. The trial court deviated from the customary method of allowing peremptory challenges on a one-for-one basis and stipulated that "for the first eight sets of challenges" the state would assert the first challenge and the defense would then be required to exercise the next two successive challenges. As a result of this procedure, each side would have the same number of challenges remaining after the initial eight sets of challenges. Brunson's counsel objected, arguing that the court's chosen procedure was inconsistent with New Jersey's court rules and that his client's right to maintain a numerical advantage in "the final stages of jury selection" had been circumvented. The trial judge rejected these arguments. Id. at 135, 501 A.2d at 146.

Prior to selection of the jury, the trial court also announced that it intended to impanel sixteen jurors. Before all the peremptory challenges could be exercised, however, the jury pool was exhausted. As a result, when the defense asserted its last three peremptory challenges and reduced the panel to thirteen, no pool members were available to complete the jury. Id. at 136, 501 A.2d at 146-47. The trial judge then decided to begin the trial with only thirteen jurors. The defense maintained that it had exercised its peremptory challenges on the assumption that sixteen jurors would be chosen. Therefore, the defense asserted, the court's failure to replace the final three jurors had effectively deprived his client of the right to exercise three peremptory challenges. Brunson's attorney claimed that a mistrial had occurred. Alternatively, he sought an adjournment until more jurors could be pooled. The trial court denied both motions. Id. at 136, 501 A.2d at 147.

Brunson was subsequently convicted on all three charges. The appellate division affirmed the conviction in an unpublished opinion. The New Jersey Supreme Court then granted certifica-
tion and upheld the judgment of the appellate court. *Id.* at 134-35, 501 A.2d at 146.

Writing for a unanimous court, Justice Stein first acknowledged that the right to peremptory challenges was intended to benefit the defendant by ensuring a fair and impartial jury. Although it was guaranteed by neither the state nor the Federal constitution, it was nonetheless "a right with deep historic roots." *Id.* at 136-37, 501 A.2d at 147. The court also noted that peremptory challenges were widely used in other jurisdictions. *Id.* at 143, 501 A.2d at 150. Therefore, Justice Stein observed, the issue before the court was whether the defendant's substantial right of peremptory challenge had been prejudicially impaired by the trial court's adoption of the one-for-two challenge procedure. *Id.* at 143-44, 501 A.2d at 151.

Justice Stein recognized that New Jersey law provides the defendant with a numerical advantage. Nonetheless, he reasoned, this advantage does not automatically extend to the final stages of jury selection because the prosecution may refrain from exercising its peremptory challenges in the early rounds. *Id.* at 144, 501 A.2d at 151. Therefore, the court concluded, the trial court's procedure had "not impermissibly curtail[ed]" the defendant's "full exercise of his right to challenge jurors peremptorily." *Id.* at 145, 501 A.2d at 151. In an effort to avoid further controversy, however, the court urged the state's criminal practice committee to implement a standardized procedure for the exercise of peremptory challenges and instructed trial courts to adhere to the customary method of alternating the challenges on a one-for-one basis. *Id.*, 501 A.2d at 151-52.

Justice Stein also rejected the argument that the impaneling of only thirteen jurors had unfairly diluted the defendant's right to exercise peremptory challenges. The court stressed that a defendant has a right to be tried by twelve jurors; any jurors impaneled beyond the requisite number serve merely to ensure the availability of twelve jurors to deliberate at the trial's end. *Id.* at 145-46, 501 A.2d at 152. Any dilution of the right to exercise peremptory challenges, Justice Stein asserted, actually occurs in the court's initial decision to impanel sixteen jurors. He maintained that such a dilution was authorized by New Jersey's court rules, which expressly permit the trial judge to impanel additional jurors. Consequently, the court concluded, the defendant had not been prejudiced by the subsequent reduction of the jury panel. *Id.* at 146-47, 501 A.2d at 152.
The Brunson court correctly emphasized that protection of a defendant’s right to peremptory challenges extends only to the defendant’s ability to exercise those challenges and not to the sequence in which they are exercised. In restraining lower courts from deviating from the customary practice, however, the court places an unfair restriction upon a trial judge’s use of discretion in appropriate circumstances. The criminal practice committee should accept the “challenge” and should resolve the tension between judicial discretion and a criminal defendant’s right to a fair trial by clarifying the procedure to be followed in the exercise of peremptory challenges. One possible solution would be to provide the prosecution and the defense with an equal number of challenges at the outset.

Terence Sweeney


In an attempt to investigate the Monmouth County Prosecutor’s use of confidential, petty-cash, and confiscated-moneys accounts, Larry S. Loigman, a practicing attorney in Monmouth County, requested a copy of the attorney general’s audit of these accounts. Funds from these accounts are used by the prosecutor to perform “sensitive law-enforcement functions,” such as conducting undercover operations and rewarding informers. The attorney general refused to surrender the material, claiming that the audit was part of a confidential internal investigation and was privileged from disclosure. 102 N.J. at 101, 505 A.2d at 960.

Loigman brought suit in the superior court in an attempt to compel the attorney general to turn over the material. Id. Loigman asserted that he had a right of access to the information under New Jersey’s Right to Know Law, N.J. STAT. ANN. §§ 47:1A-1 to -4 (West 1985), which permits any citizen to inspect documents that are a matter of public record without dem-
onstrating standing or any particular need for the information. 102 N.J. at 101, 505 A.2d at 960. The attorney general moved for summary judgment, alleging that the documents were not "public records" under the statute because they were not "required by law to be maintained or kept on file." Id. at 101-02, 505 A.2d at 960. At oral argument on the motion, Loigman asserted for the first time a common law right of access to the information. The trial court granted the defendant's motion for summary judgment on both the statutory and the common law grounds. Id. at 102, 505 A.2d at 960.

On appeal, the appellate division affirmed the lower court's holding that the documents were not "public records" under the Right to Know Law, but held that Loigman had a right of access under the common law. Id. The appellate court remanded the case and instructed the trial court to decide whether the materials were public records under the common law and, if so, to review the documents in camera to determine whether they should remain confidential or be made available for inspection. Id., 505 A.2d at 961. The supreme court granted certification to consider "whether the Appellate Division opinion calls for an automatic in camera review at the request of any claimant alleging citizen status, no matter how confidential the material" may be. Id. at 103, 505 A.2d at 961.

Writing for a unanimous court, Justice O'Hern affirmed the decision of the appellate division. Id. at 114, 505 A.2d at 967. The court noted that the general rule is that a person need establish only citizen status and that he is seeking the information in good faith in order to warrant the production of public records. Id. at 104, 505 A.2d at 962. Nevertheless, access to public records may be limited. Justice O'Hern asserted, when the need for confidentiality outweighs the citizen's interest in disclosure. Id. at 105, 505 A.2d at 962. In determining whether a person should have access to public records, the court ruled that a trial judge must balance the individual's interest in acquiring the material against the state's need to keep the information secret. Id. at 106, 505 A.2d at 963.

Addressing the issue of whether an automatic in camera review is warranted whenever a trial judge applies this balancing test, Justice O'Hern noted that such a review creates a dilemma—the in camera inspection itself might adversely impair the state's legitimate interest in confidentiality. Id. at 108, 505 A.2d at 964. Reasoning that disclosure of some information, even to a judge,
might discourage informers from coming forward or inhibit "the flow of ideas [among] legislative policymakers," the court concluded that "a right to automatic in camera inspection is not warranted." Id. at 108-09, 505 A.2d at 964. Instead, the court mandated a two-step process. As part of this process, the court noted, the state must classify and index the material sought, specifying the particular reasons for confidentiality. Id. at 109, 505 A.2d at 964-65. After evaluating the detailed description furnished by the state and weighing the countervailing interest of the party seeking disclosure, Justice O'Hern observed, the trial court must determine whether the document-production issue can be resolved with or without an in camera review. Id. at 112-13, 505 A.2d at 966. He noted, for example, that a state-prepared index may indicate that the documents contain evidence of official misconduct, thus warranting an inspection by the trial judge. Id. at 113, 505 A.2d at 966. In conclusion, Justice O'Hern suggested that the state legislature conclusively resolve the question of the scope of a citizen's access to public records. Id. at 114, 505 A.2d at 967.

In its decision, the Loigman court acknowledged the importance of the individual's right of access to public records. It also recognized that to safeguard this right from conclusory claims of confidentiality by the state, a trial judge may need to conduct an in camera review of the documents in question. The court's primary concern, however, was with the potential impairment to the state's legitimate interests inherent in such a review. By mandating a two-step procedure rather than an automatic review, the court attempted to eliminate the possibility of irreparable damage to the government's permissible confidential operations. It remains to be seen whether the procedure devised by the court will prove sufficiently flexible to protect both the state's interest in confidentiality and the individual's right to know.

Scott N. Rubin