

# Criminal law Update

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The comments contained in this publication are not necessarily those of the Bar Association. If you disagree with them, they are not even necessarily those of the author.

Edited by  
Joseph P. Rem Jr.  
201-488-1234  
jrem@remzeller.com

Most municipalities have part-time judges who, when not dispensing justice from the bench, are engaged in private practice. What happens when a judge has an attorney before her who is an adversary in the judge's law practice? The Supreme Court has answered that question in *State v. McCabe* (January 25, 2010). Whenever an attorney who is the judge's adversary in another open case appears before the judge, the judge *must* recuse herself. A case is "open" if it is pending, or has reached final judgment but the 45-day appeal period has not yet passed. The Court did not state whether the appearance of an adversary from a completed case would require recusal from the judge, leaving that to a case by case consideration. In such cases, the Court reminded us, the standard for recusal is not actual prejudice, but whether a reasonable, fully informed person would have doubts about the judge's impartiality. The message to the private bar is that we must advise our clients whether we are currently or have previously opposed the judge in prior cases, the decision seemingly being the client's, not the attorney's. Given the logic of the holding, it is not unreasonable to err on the side of caution and extend that to transactional matters, such as closings, leases or business deals, which can often be more acrimonious than litigated matters. If your conversation with the client opens with, "do you know what that SOB did to me in my last case?" a recusal request might be provident. . . .

The legislature has *substantially* amended the expungement statute, and except for some additional crimes of terrorism and child sexual activity now being barred, the changes overwhelmingly favor defendants by, among other changes, adding to the list of expungible offenses many formerly barred common drug crimes, and generally reducing the eligibility time period to apply for expungement from ten to five years, so long as certain conditions are met. Specifically, *N.J.S.A. 2C:52-2* now:

- imposes a 10-year waiting period for expunging indictable offenses, and that period ordinarily

**THE LEGISLATURE HAS, IN ITS INFINITE WISDOM, ACTED TO MORE FAIRLY, MORE QUICKLY AND MORE OFTEN REMOVE THE SCARLET "A" FROM THE CHESTS OF THE CONVICTED.**

does not *begin* to run until all sentence requirements have been met, including finishing probation, community service and payment of all fines. Now such an individual who did not pay his fines in full at

sentencing will be allowed to apply *10 years after the conviction itself, rather than when the fines were paid in full*, so long as all other requirements have been satisfied;

- makes eligible for expungement *all* third and fourth degree distribution and posses-

sion with intent to distribute drug crimes, provided that the expungement is consistent with the public interest, taking into account the nature of the offense and the petitioner's character and conduct since conviction. Note, however, that there is some sloppy drafting which may well lead to confusion. The statute continues to specifically allow expungements for distribution of up to 25 grams of marijuana, which standing alone would seem to set a cap on the quantity. However, distribution of up to *five pounds* of marijuana is still only a third degree offense, which should, under the new, more expansive paragraph of the statute, make it (being a distribution offense of the third or fourth degree) eligible for expungement. It is inconceivable that the legislature intended to make all such third or fourth degree offenses eligible except for marijuana. It is consistent only if you read "under 25 grams" as vesting automatic expungement without application of the qualifying criteria;

- makes juveniles eligible after five years, and periods of post-incarceration supervision shall *not* be counted in determining that period;
- shortens the eligibility waiting period for all crimes from ten years to five from the later of the date of the conviction, the payment of fine, completion of probation or parole, or release from incarceration, where the person (1) has not since then been convicted of a crime, DP or PDP and (2) the court finds that expungement is in the public interest, giving consideration to the applicant's character and conduct since the conviction.

**T**he Drug-Free School Zone Law, N.J.S.A. 35-7, imposing substantial mandatory minimum prison sentences, has

been amended, and the changes are effective immediately. The amendments provide that a judge may exercise discretion to reduce the mandatory minimum or to place the defendant on probation pursuant to the following considerations: (1) the extent and seriousness of any prior record; (2) the specific location of the offense in relation to school property, including distance and the reasonable likelihood of exposing children to drug related activity; (3) whether school was in session at the time of the offense; and (4) whether children were present or in the immediate vicinity when the offense occurred. The law bars application if the offense actually occurred on school property, or the defendant threatened violence, had a firearm or resisted arrest. The law allows those now serving a mandatory minimum to file a motion for reduction of sentence.

**D**iscovery in PIP cases that is not yet in Judge Lipton's courtroom may be obtained in Room 116 (by the Finance Division Office).

**I**f you want to be known as being excellent at what you do, you can do it, but not just occasionally. *We are what we repeatedly do. Excellence then, is not an act, but a habit.* Aristotle.

**T**here is no substitute for hard work in achieving excellence. Genius is just another title awarded to those who strive mightily. *Genius is one percent inspiration and ninety-nine percent perspiration.* Thomas Alva Edison. You too have genius within you, if you have the will and self-discipline to unleash it.

**F**amed race car driver Geoff Brabham was on the same wavelength when he described racing, although it is equally applicable to last minute trial preparation: *Racing is 99 percent boredom, 1 percent terror.* If you have been there, you know what this means.

