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# Civil Practice Update

## *All the Law That's Fit to Print*

by Michael J. Epstein

Vol. XI, No. 5  
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**Welcome back, welcome back . . . .** For those of you have not heard, Judge Lisa Firko has returned to the Law Division after a rotation in the Family Division. We were sad to see her go, but are happy to see her back in the Law Division. Also, retired Judge William Meehan has returned from golfing, vacationing, working in the private sector, and enjoying his retirement to assist in handling prerogative writs as well as some other matters. We welcome him back to the halls of the Bergen County Courthouse. In other news, Judge Carver recently retired from the bench, and Judge Rusello will be leaving in January 2014 after 22 years on the bench. We thank both for their dedicated service, and wish them well.

**Can a Texter Be Liable When the Recipient of the Text Has a Car Accident?** For those of you who said no, you would be wrong. The answer is not a definitive yes, but a maybe. In Kubert v. Best, 2013 N.J. Lexis 132 (App. Div. 2013), the Appellate Division held that

under the common law, the sender of a text can be held liable if the text distracted the driver, but only if the sender knew or had special reason to know that the recipient would review the text while he was driving. In Kubert, Best, a young male, and a female friend sent each other text messages throughout the day. Shortly before colliding with plaintiffs, who suffered leg injuries requiring amputation, Best received a text message from his friend. Although the panel seemed to create a new cause of action, it ruled that plaintiffs failed to show that the sender had knowledge that the recipient would read the text while driving. The panel explicitly ruled that sending a text message to a person driving a car does not establish liability. The Appellate Division got this one right, but we should all take note that reviewing texts and emails while driving is extremely dangerous.

**Mediation Problems.** R. 1:40-4 provides that certain cases will be referred to non-binding

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mediation in an effort to resolve cases early in their litigation lives. Unfortunately, a problem has developed with out-of-state mediators because many of them are attempting to schedule mediations at their out-of-state offices. This practice is unfair and violates the spirit of the Rule. Judge Polifroni advises all attorneys to reject any suggestion to mediate a New Jersey case out-of-state, and encourages any member of the Bar to contact him with a suggestion on curbing this practice. We continue to thank Judge Polifroni for maintaining an open door (our words, not his), and for continuing to better the practice of law.

case, rule interpretation, ethics issue, or civil-related story, please contact me at (201) 845-5962, (f) (201) 845-5973, or e-mail [mjepstein@theepsteinlawfirm.com](mailto:mjepstein@theepsteinlawfirm.com).

**PARKING.** Please remember that the PARKING LOT IS CLOSED. Parking is now at the old Record lot on River Road. Shuttle buses will take you to and from the courthouse. Leave additional time as it will take a little longer to access the courthouse.

**Contributions.** If you have an interesting

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