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DEUTERONOMY, CHAPTER 1

And I charged your Judges at that time, Saying,
Hear the causes between your brethren,
and judge righteously between every man and his brother,
and the stranger that is with him.
Ye shall not respect persons in judgment;
but ye shall hear the small as well as the great;
ye shall not be afraid of the face of man;
for the judgement is God’s; and the cause that is too hard for you,
bring it unto me, and I will hear it.

SELECTED CANONS FROM THE CODE OF JUDICIAL CONDUCT

100.5 A Judge or Candidate for Elective Judicial Office Shall Refrain From Inappropriate Political Activity

(B) Judge as Candidate for Non-Judicial Office

A judge shall resign from judicial office upon becoming a candidate for elective non-judicial office either in a primary or in a general election, except that the judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention if the judge is otherwise permitted by law to do so.
In February 1972, I experienced a life-changing event. I transitioned from a career as a competent, experienced aerospace engineer who had contributed to lunar landings, to a newly-minted cub attorney who couldn’t even advise his client where the men’s room was in the county courthouse.

As Town and Village Justices, you must have had similar self-doubts as you took the bench for the first time.

This is my penultimate article for The Magistrate as NYSMA President. I call it “The Structure of a Lawsuit” and offer it to aid new judges in their understanding of the law. Judges are neither born nor made by others: they make themselves, and remain students of the law for as long as they practice it.

Law in New York State exists in two authoritative forms: case law and legislative law. Case law originates in the decisions of judges who are empowered to hear and decide particular controversies. Legislation is a general rule expressed by a law-making body or agency.

Furthermore, “substantive law” deals with “what ought to be.” “Procedural law” constitutes the mechanism through which rules of substantive law have effect.

Now let’s proceed to what actually happens in your court when a person appears wishing to sue someone else in a court case.

The Pleading Stage
A Summons and Complaint are prepared by the Plaintiff, stating the facts he/she believes entitles her/him to a judgment against the Defendant, e.g. “On February 10, 2016, Defendant sold me a lawn mower for $100 that didn’t work. I bring this action to recover my $100 plus costs.” All that is required is a statement of the allegations clear enough to enable the Defendant to prepare a defense.

Once the Petition is served, the next move is up to the Defendant. There are three (3) courses of action open to the Defendant:

1. Do nothing, in which case the Court will render a default.
2. Serve a Motion to Dismiss for Failing to State a Cause of Action.
3. Serve an Answer, which may or may not include an affirmative defense.

The Trial Stage
The overwhelming majority of cases do not raise issues of substantive law. The parties do not dispute the law, merely the facts.

We begin with the presentation of the Plaintiff’s case:

1. Plaintiff’s opening statement to the Court or jury: “I expect to prove …”

This is immediately followed by the Defendant opening statement as to what s/he expects to prove (if Defendant chooses to make an opening statement).
(1) Next comes the direct and cross-examination of Plaintiff's witnesses, who are cross-examined by the Defendant if s/he chooses to do so.

(2) At the end of the Plaintiff's evidence, the Defendant may ask the Court for a directed verdict, saying that Plaintiff has not offered adequate evidence in support of her/his allegations of fact.

(3) If the Defendant’s motions are denied by the Court, the Defendant then presents her/his evidence. This would include direct testimony subject to cross-examination.

(4) At the end of Defendant’s evidence, Plaintiff may move for a directed verdict (which is rarely granted).

(5) If all motions are denied, Plaintiff and Defendant sum up before the Court (a bench trial), or before the jury. Since the Plaintiff has the burden of proof, he/she has the right to sum up last.

(6) The next and crucial stage of the trial is the “charge to the jury.” Here the judge gives instructions to the jury as to the applicable law of the case.

As a matter of practice, the judge will utilize “pattern jury instructions” to draft her/his charge, and then conduct a conference to instruct the parties as to he/she will charge. The judge will then consider submissions by the parties and accept, modify or reject the proposed charges. Either side in the litigation may:

- Take exception to the instructions; or
- Take exception to the refusal of the judge to give his/her instructions.

After the judge delivers his/her instructions, the jury will retire for deliberation and ultimately bring in its verdict.

N.B.: In medieval England, witnesses would testify and eventually be called upon to decide the case. The word “verdict” means “to tell the truth,” as witnesses are called upon to tell the truth. That is why in early England, witnesses (not jurors) rendered a “verdict.”

**What Comes Next**

After the jury has delivered its verdict, but before the Court has rendered judgement, the party who lost may make one or more motions: judgment notwithstanding the verdict, a new trial on the grounds that the judge erred in ruling on evidence, or an error in the charge to the jury.

****

New judges who learn to read as a judge, to think as a judge, and make noise like a judge, will gain something that endures and that will equip them to faithfully discharge their duties to their communities.
Executive Committee Highlights

Highlights of the June 11, 2016 Executive Committee Meeting held at the Villa Roma Resort are presented for your information.

President Harold J. Bauman welcomed all members and guest Hon. Thomas Nuttycombe, Town Justice of Tusten, Sullivan County. He noted his numerous County Magistrates Association visits; Chemung/Schuyler County Magistrates Association meeting, he attended Tompkins County, Sullivan County, Cattaraugus County and Otsego County Magistrates Associations. Discussion was held on many of the Committee reports.

President Bauman reported on a conference call held June 1st with Chief Administrative Judge Lawrence K. Marks, Deputy Chief Administrative Judge Michael V. Coccoma, along with the Officers and Legislative Committee Members of NYSMA to discuss the off-hour arraignment bill sponsored by Senator Bonacic and Assembly Member Lentol. Hon. Karl Manne moved to pass a resolution supporting S7209A and A10360. (Resolution below)

Judge Carrie O’Hare moved to approve and accept the minutes of the previous Executive Board meeting. Motion carried.

Hon. John Teixeira presented the Treasurer’s report. Hon. Jonah Triebwasser moved to accept the Treasurer’s report. Motion carried.

Judge Carrie O’Hare moved to have President Bauman invite Claire Gutekunst, President of the New York State Bar Association, to Lake Placid to sit in on our Executive Board meeting and to be our keynote speaker for the Sunday Welcome Reception of the annual conference.

Judge Triebwasser moved that the President be authorized to write the Governor of the State of New York asking that the open position on the Committee of Judicial Conduct be filled as mandated by statute. Discussion held. Motion carried.

Site Selection Committee co-chair Judge Jowdy provided proposals for the 2018 conference for Niagara Falls, one from the Seneca Casino and the other from the Sheraton with the Conference Center. Judge Johnsen moved to accept the proposal for the Sheraton. Discussion was held. Vote taken, Motion carried.

RESOLUTION

On a motion of Honorable Karl E. Manne, seconded by the Honorable Gary A. Graber, the following resolution was adopted at a meeting of the Board of Directors of the New York State Magistrates Association on June 11, 2016:

WHEREAS the mission of the New York State Magistrates Association is to develop better methods and desirable improvements in the administration of the Magistrates Courts; to promote education and interchange of ideas and experiences of Magistrates to that end; and to promote appropriate legislation for these purposes; and

WHEREAS, the New York State Magistrates Association recognizes the obligation of its member Judges and other stakeholders in the counties in which they serve to formulate a plan to provide defense counsel at initial arraignment; and

WHEREAS, the New York State Magistrates Association recognizes that one plan may not be
practical for all counties within the State, and that the individual counties should be permitted to develop appropriate plans for themselves; and

WHEREAS, the bills currently proposed by NYS legislature (S7209A and A10360) to establish designated off-hour arraignment parts in the local criminal courts allow the individual counties broad flexibility to develop individual plans, while providing the jurisdictional means necessary to the implementation of said plans;

NOW, THEREFORE, BE IT RESOLVED, that the New York State Magistrates Association calls on the Governor and members of the State Legislature to support S7209A and A10360 to amend the judiciary law, the Criminal Procedure Law and the Uniform Justice Court Act in relation to off-hours arraignment parts in counties outside of the city of New York.

I hereby certify that the foregoing is a true and correct transcript of a resolution duly adopted by the New York State Magistrates Association on the 11th day of June, 2016.

Hon. Tanja Sirago, Executive Director / Secretary
I never intended to lead a fashion rebellion when I became the 2011 President of the New York State Magistrates Association, nor did I ever consider challenging the long-standing tradition of Judges cloaking themselves in black robes.

I simply wanted to do something a little bit different.

When Marvin Goldman initially suggested that I consider a blue robe, I can’t say I was instantly smitten with the idea. Eventually, however, I came around and I couldn’t be more pleased with my decision.

In fact, as the years have passed and I’ve worn the robe on a regular basis, two things have become apparent to me. First, the robe may be blue, but in a courtroom setting it appears dark and it becomes almost indistinguishable from my black robe.

In addition, and with the exception of one reporter and one sharp-eyed attorney, no one has ever noticed, or even mentioned the color of my robe in years.

I doubt I would have even considered the issue, again, if I hadn’t been given the honor of officiating at the recent wedding of our beloved state President, Harold Bauman, and his lovely bride, Eileen Hawkins.

It was just one of those picture perfect events set on the veranda of the Otseaga Hotel, and overlooking the beautiful Otsego Lake in Cooperstown.

And it was in that beautiful setting and against that spectacular backdrop that the true blue colors of my robe emerged for all to see.

And it was under those circumstances, that the officers and directors of the New York State Magistrates Association considered their most meaningful evaluation of my performance.

While I would like to think that I did a good job with the marriage vows, I can’t say that my performance even came close to the rave reviews given to my blue robe.

In response to all those who asked me: “where did you get that blue robe,” I wanted to let them know:

It’s simple – Craft Robe Company. I understand that Marvin Goldman will have a sample of my blue robe available to all those who may be interested in judging for themselves. They can be ordered for $395 with a 4-6 week delivery. You can see Marvin at the New York State Magistrates conference at Lake Placid in September.

As for me, I am keeping that robe forever. And one thing more: the stenographer who was in the courtroom with me today, noticed my blue robe. Things are moving quickly. If you are interested, I wouldn’t wait too long.
# MAGISTRATES ORDER FORM

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**ADD: $2 for 2XL, $4 for 3XL, $6 for 4XL**

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- **NAME:**
- **ADDRESS:**
- **CITY:**
- **STATE:**
- **ZIP:**
- **SIGNATURE:**
- **CARD #:**
- **EXP:**

**S & H (SEE BELOW):**

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<td>41%-and up</td>
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</table>

**S & H**

3 DIGIT CODE ON BACK OF M/C, VISA, DEC.
4 DIGIT CODE ON FRONT OF CARD FOR AMEX

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**Fall 2016 - The Magistrate**
Answers to
Quiz of the Month

FALL QUIZ
DWI Testing and Consequent Determinations

Answers to Quiz of the Month on Page 39
Part II of Two Parts

Part I of this article, published in the Summer 2016 edition of The Magistrate, discussed some basic principles regarding judges who may have helped or hurt their own chances in responding to allegations of judicial misconduct. Part I also explained how the disciplinary system works in New York. Part II will discuss in more detail mitigating and aggravating factors that have been applied by the Commission on Judicial Conduct and the Court of Appeals to judicial disciplinary cases.

The Case Law

In Matter of Lonschein, 50 NY2d 569 (1980), the Court of Appeals reduced a censure determination to an admonition in a case in which a New York City judge spoke to a friend, an official of the New York City Taxi and Limousine Commission, about a pending application for a chauffeur’s license. The judge asked his friend at the regulatory agency whether he could check to see why the decision on the application was being delayed. He told his friend that the applicant, who was also the judge’s friend, was awaiting the agency’s decision. The Court stated:

In assessing the propriety of the sanction imposed, we note that there had been no finding that [the judge] acted under anything but a sincere, albeit misguided, desire to accommodate a dear friend. There is no suggestion of malevolent or venal motive but a strongly felt desire to remedy a perceived injustice to a friend at the hands of an administrative agency. 50 NY2d at 572-73.

In Matter of Edwards, 67 NY2d 153, 155 (1986), the Court of Appeals reasoned that a Town Justice, who had interfered in his son’s traffic case before another judge, had “cooperated with the Commission and has forthrightly admitted the impropriety of his misconduct.” That was to the judge’s credit. Another mitigating factor, said the Court, was that the judge’s “judgment was somewhat clouded by his son’s involvement” in the traffic case (Id.). The Court rejected the Commission’s removal determination and censured the judge.

At this time – 30 years later – some of these mitigating factors may not work, but contrition and cooperation with the Commission have withstood the test of time and are still often cited as mitigating factors in support of a reduced sanction.

In Matter of Rater, 69 NY2d 208, 209 (1987), the Court of Appeals held that certain conduct (related to the handling of court funds) might result in removal unless the judge could demonstrate that “mitigating circumstances accounted for such failings.” The Court then considered the aggravating factor that the Commission had censured the judge on a prior occasion for the same kind of misconduct. That clearly hurt the judge’s chances for a reduced sanction. The Court removed the judge from office.

Continued on page 10
In *Matter of Kiley*, 74 NY2d 364, 370 (1989), the Court concluded that although the judge lent the prestige of judicial office by seeking a prosecutor’s leniency in a case not before the judge, the reason for the judge’s actions was that he was trying to help his “dear friend” through “an emotional trauma.” That was the judge’s excuse, and the Court, persuaded that removal would be too harsh, rejected the sanction determined by the Commission, and censured the judge. The judge also tried to help another defendant by talking to the prosecution, and in that case there was no “mitigation.” It is doubtful that a judge would receive any leniency by the Court of Appeals today on the same facts.

In the recent Commission determination of *Matter of Landicino*, the judge’s efforts to treat his alcoholism prompted the Commission to censure the judge instead of removing him from office for driving while intoxicated and using the influence of his office (Dec. 15, 2015). The judge, who was convicted of DWI, had been driving 80 MPH while intoxicated, and he had asked the police several times for special treatment because he was a judge. The Commission stated:

> In determining the sanction here, we are also mindful of the referee’s findings that respondent has been “cooperative” and “contrite” and that his “candid” and “forthright” testimony at the hearing reflects that he “has insight into the nature of his disease” and “has taken responsibility for his actions” (Report, pp 10-11). We thus conclude, based on the totality of the record before us, that respondent should be censured.

So there is considerable recognition in the law that an important part of a disciplinary proceeding before the Commission is whether the judge who is the subject of serious charges can show that he or she is not apt to repeat the conduct, has cooperated and is contrite. In the recent case of the alcoholic judge, the defense showed that the judge had taken steps to treat the disease that led to the illegal activity. Most importantly, the judge was sincere, and the Commission decided that he should be given another chance.

In a typical case, a judge’s lack of remorse for undisputed misconduct could be seen as an aggravating factor. If the judge were to convey to the Commission that he or she does not understand that the conduct was wrong in a situation in which the Commission viewed the conduct as highly improper, it might conclude that the judge still does not understand the ethical standards, lacks good judgment and therefore will likely repeat the conduct or engage in other misconduct.

In some instances, even when there is no dispute as to the facts, a judge should not be discouraged from challenging the premise that the facts constitute a violation of the rules. It might be perfectly reasonable to defend against some charges by stating that what the judge did may have been contrary to law, or a misguided, momentary lapse, but is not judicial misconduct. But that defense should be based on good faith. If there is prior case law concluding that the conduct is improper, it might not make sense to assert such a defense.

Not all mistakes of law are judicial misconduct, although certain violations of fundamental or constitutional law clearly are misconduct (*Matter of Reeves*, 63 NY2d 105 [1984]). The Court in *Reeves* rejected the judge’s defense that his legal errors did not constitute misconduct. “A repeated pattern of failing to advise litigants of their constitutional and statutory rights, however, is serious misconduct” (63 NY2d at 109-110).
In Matter of Bauer, 3 NY3d 158 (2004), the judge failed to afford the right to counsel and misused bail to coerce guilty pleas. He set bail as high as $25,000 and $40,000 on unrepresented defendants charged with minor violations and misdemeanors, and then, after a few days of pre-trial detention, offered guilty pleas and defendants’ freedom. The conduct was egregious, but the judge’s insistence that he acted appropriately made the removal decision almost inevitable. Stating that the judge’s “apparent lack of contrition is telling,” the Court of Appeals continued:

In some instances contrition may be insincere, and in others no amount of it will override inexcusable conduct. Here, while petitioner’s conduct was far from uniformly foul, his utter failure to recognize and admit wrongdoing strongly suggests that, if he is allowed to continue on the bench, we may expect more of the same. (Id. at 165)

In Matter of Hart, 7 NY3d 1 (2006), a judge had abused his power of summary contempt by holding a party in contempt for trying to talk to the judge at a chance meeting in the court parking lot. The judge held the defendant in contempt the following day after his attorney insisted on making a record of his client’s actions. The Court censured the judge, holding that the failure to recognize “the inappropriateness of his actions” “is a significant aggravating factor on the issue of sanctions.” 7 NY3d at 10-11. The Court predicted that without a substantial sanction, “more of the same will ensue.” Id.

Conclusion

To defend against allegations of judicial misconduct requires a general understanding of how the disciplinary system works and knowledge of the risks in denying the undeniable. Looking back at disciplinary cases over several decades, it seems that more than a few judges mistakenly believed that resisting any discipline was the best course. Knowing “when to hold ‘em (the cards) and when to fold ‘em” is the key to success in the game of poker. Translating that to a situation when a judge faces an allegation or numerous allegations of misconduct requires clear thinking, recognition that there might be a sound basis for the complaint, and “knowing when to fold.” When a judge is asked to respond to allegations in a complaint, it is not too early to consider mitigating and aggravating factors that may come into play.

The NYSMA 2016-2017 Directory of Members is now available on our website at www.nysma.net

Check your email. All members will receive a digital file of the 2016-2017 Directory of Membership.

If you would like a hardcopy, please contact our office at 800-669-6247.
Law Day is celebrated on May 1st which this year fell on a Sunday. In my humble Village Court in Westbury, Long Island, I have a Law Day program each year named after two of the former Justices of my Court, the Honorable John L. Molloy and the Honorable Frank J. Santagata. I invite the community to attend. This year’s program was held on April 28th at 7:00 p.m. at Westbury Village Justice Court. Our speakers included, among others, Dean Michael Simons of the St. John’s School of Law; Martin Tankleff, a law school graduate awaiting admission who was freed after serving seventeen years in prison for a wrongful conviction; and Erica Dubno, Esq. an appellate advocate from Fahringer and Dubno of New York, New York. This year’s theme for Law Day as chosen by the American Bar Association on the Fiftieth Anniversary of Miranda v. Arizona, 384 U.S. 436 (1966) was: Miranda: More Than Words.

Miranda is the most frequently cited opinion in the history of the Supreme Court holding that: “the following procedures to safeguard the Fifth Amendment privilege [against self-incrimination] must be observed: The person in custody must, prior to interrogation, be clearly informed that he [she] has the right to remain silent, and that anything he [she] says will be used against him [her] in court; he [she] must be clearly informed that he [she] has the right to consult with a lawyer and to have the lawyer with him [her] during interrogation, and that, if he [she] is indigent, a lawyer will be appointed to represent him [her].”

Miranda was decided on June 13, 1966.

The majority opinion was written by Chief Justice Earl Warren which, together with dissenting opinions by Justices Clark, Harlan, Stewart and White, encompasses 109 pages in the official reporter. This remarkable decision represents more than words. It reminds us of the constitutional rights provided for in the Bill of Rights giving the Fifth Amendment a contemporary viability but also demonstrating our desire as a nation to preserve, expand upon and explain what our Founders intended in drafting the Fifth Amendment. The due process of law provisions contained within it where “no person shall be deprived of life, liberty or property without due process of law,” means fundamental fairness.

On its face Miranda’s words tell us that the police must, at a minimum, follow basic principles in their questioning of suspects. They cannot obtain their confessions by intimidation and tricks. If they do so, any confessions so obtained will be suppressed and not used against the defendants at the trial. All manner

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* Honorable Thomas F. Liotti ia a Village Justice and practicing attorney. He is an Adjunct Professor of Law at Nassau Community College.
of the interrogation process then comes into play in determining whether confessions were obtained fairly.

Slowly some in law enforcement have come to realize that the video recording of arrests and interrogations can eliminate much pre-trial litigation but also must be closely scrutinized as to whether confessions are voluntarily given. The first video statement in my county occurred in 1984 in the homicide case of People v. Curtis Harris. Mr. Harris, an African American, had a 69 I.Q. and a fourth grade reading level. He was virtually blind without glasses which he did not have when he purportedly signed a so-called rights card. On that first video he is off-camera while the prosecutor is shown making a number of self-serving statements such as: “I can see that you are obviously a very intelligent person.” Yet when Harris referred to the “jewelry” or property taken during the crime, the prosecutor did not understand what he was saying asking him three times what he meant by the word “jewry.” Harris’ confession was not suppressed although a psychiatrist testified in his pre-trial hearings that Harris could not understand the rights read to him in eighteen seconds. Harris was convicted and given a lengthy sentence which was reversed, in part, on appeal but not because of the involuntariness of his statements.

While Miranda was the law of the land, two years after it was decided, the Nixon administration proposed and Congress passed the Omnibus Crime Control Act of 1968, 18 U.S.C. §3501, which sought to legislatively overturn the Constitutional principles laid down in Miranda. The United States Court of Appeals for the Fourth Circuit in Richmond, Virginia, a rogue Court, determined that Congress had the prerogative to legislatively supersede Miranda by providing that the legal issue of the voluntariness of a statement could be determined by trial courts in the absence of the warnings provided for in Miranda.

In writing for the majority, Chief Justice Rehnquist in Dickerson v. United States, 530 U.S. 428 (2000) determined that Congress did not have the authority “to legislatively supersede the Supreme Court’s decisions interpreting and applying the Constitution” and “Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution.”

Honorable Thomas F. Liotti
The Chemung-Schuyler Magistrates Association inducted its new officers on May 28 at Lib’s Supper Club in Elmira. State SMA President Harold Bauman (r) swore in the new officers.

Left to Right:
Hon. Paul R. Hart, President (T/Big Flats-Chemung)
Hon. Lisa Hess, Secretary/Treasurer (T/Big Flats-Chemung)
Hon. Dale Partridge, Vice President (T/Orange-Schuyler).
Eileen Bauman accompanied President Bauman on his visit to Elmira.

Members of the NYSMA Board of Directors congratulate the Hon. David Sears, Town of Pleasant Valley, on his election as President of the Dutchess County Magistrates Association.

Left to Right:
Hon. Jonah Triebwasser (SMA 3rd Vice-President),
Judge Sears, Hon. Barbara Seelbach (SMA Director) and the Hon. Thomas Dias (SMA Past-President).

Hon. James Borgia-Forster, President of the Columbia County Magistrates Association headed south to Dutchess County to congratulate Hon. David Sears on his election as president of the Dutchess County Magistrates Association.

Shown in photo are Judge Sears and Judge Borgia-Forster.
The Dutchess County Magistrates Association has elected their officers for 2016-2017. They were sworn in by Dutchess County Court Judge, The Hon. Peter Forman.

*Photo: Jonah Triebwasser*

Shown in Photo, Left to Right: Judge Forman, Magistrates President Hon. David Sears (Town of Pleasant Valley), Vice-President Hon. Rick Romig (Town of East Fishkill), Treasurer Hon. John Kane (Town of Rhinebeck), Secretary Hon. Jeffrey C. Martin (Town of Red Hook) and Immediate Past President Hon. Frank T. Weber, Jr.

**Local Judge Named Magistrate of the Year**
Hon. David Sears, Judge of the Town of Pleasant Valley, has been named the Dutches County Magistrate of the Year. Judge Sears was recognized for his service to the courts and to his fellow judges.

*In the photo, left to right, Judge Sears is shown accepting his award from Dutchess Magistrate President Hon. Frank T. Weber.*

**Judges Organization Honors Long Term Treasurer**
The Dutchess County Magistrates Association honored Judge Frank Christensen of the Town of Milan for his 22 years of service as treasurer of the organization.

*Photo by Jonah Triebwasser*

*In the photo, left to right, Judge Christensen accepts his recognition from Magistrates President, the Hon. Frank T. Weber, Jr.*
Left to Right:
standing: Hon. Mark Dresser, T/Ulysses, Tompkins County M.A. Vice President, Hon Robert Mulvey Appellate Court Judge, TCMA President Hon. Betty Poole, T/Enfield, and Hon. Dewey Dawson, sec/treas TCMA, T/Groton - plaque presentation to Bob Mulvey for being the first person appointed to the Appellate Division from Tompkins County (ever) seated are attendees at the dinner and Mike Lane, Chairman of the Tompkins County Legislature, Judge Bauman.

Judge Dawson, Sandy and Judge Mulvey at the closing of the evening (seated is Judge Bauman and Betty Poole)

Arthur “Dewey” Dawson T/Groton presenting Sandy Mulvey, the Judge’s wife, with a gift for her support of her husband on his journey to the appellate court.
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NYS MAGISTRATES ASSOCIATION
ANNUAL CONFERENCE

SUNDAY, SEPTEMBER 25, 2016

1:00PM  Executive Committee Meeting   Sky Room
         • Executive Committee Members and Guest only

2:00-5:00PM  NYSMA Registration
              • Hotel Lobby Area

3:00PM  Nomination Committee Meeting   Sky Room
         • Nominating Committee Members and Candidates only

4:00-6:00PM  First Time Conference Attendees Social   Hospitality Room
             A meet and greet with refreshments with a briefing on how to make the most of the conference.
Presented by:
• Hon. David Kozyra, TJ Marcy, Oneida County
• Hon. Michael Petucci, SMA Board Member
• Hon. Kenneth Ohi Johnsen, SMA Board Member
• Hon. Vera Hustead, SMA Board Member

6:00PM  Welcome Reception and Dinner   Adirondack Great Room / Grandview Room
Welcome Speaker: Clair Gutekunst, President, New York State Bar Association
Presentation of The Eugene W. Salisbury Magistrate of the Year Award
Presentation of the Amicus Award

MONDAY, SEPTEMBER 26, 2016

7:00-9:00AM  Breakfast   Mackenzie’s

8:30 – 4:30PM  NYSMA Registration   Hotel Lobby Area

8:45-9:45AM  General Assembly   Sky Room

8:45-9:45AM  What OCA has to Offer Town and Village Courts   Mirror Lake Room
             This is an overview of information regarding the hardware, software and support that OCA offers Town and Village courts.
Presented by:
• Dawn Cota, Division of Technology, OCA

8:45-11:00PM  Legal Updates  * CLE CJE pending approval (One Credit for Each Hour)   Olympic 1
               This program will provide a comprehensive review of the most recent case law concerning Search and Seizure, Warrants, Police Interrogation, Electronic Surveillance, Warrantless Entry, Arrest/ Probable Cause, Search Incident to Arrest, Body Cavity and Strip Search, Street Encounters, Auto Stop/Frisk/Search, Consent, Plain View, Administrative/Regulatory Searches, Suppression Remedy and Procedure, and Forfeiture. The entire program will be taught over a two (2) hour period with Part 1 materials being taught in the first hour, continuing with additional and distinct Part 2 materials in the second hour. Participants may attend both or either session.
Presented by:
• Gary T, Kelder, Esq., Professor of Law, Syracuse University College of Law
• Gerard Neri, Esq., Court Attorney Referee, Special Counsel, 5th JD
• Hon. Vera Hustead, SMA Board Member Coordinator
8:45-11:00AM  **Summary Proceeding Mock Trial**  *CLE CJE pending approval  Olympic 2,3,4*
Suggested procedures for handling the typical Summary Proceedings matter will be exemplified and reviewed during this two (2) hour session. From initial appearance to conducting the hearing and rendering a decision, suggested best practices and procedures will be presented. A review of the most common paperwork submission errors will be discussed with suggestions for document review prior to the initial appearance. A question and answer period will be provided to discuss common issues encountered by audience participants throughout the state.

Presented by:
- Hon. Barbara Seelbach, SMS Board Member (Judge)
- Hon. Ryan T. Donovan, TJ Bethlehem, Albany County (Petitioner’s Attorney)
- Hon. William Hulshoff, VJ Lake Placid, Essex County (Respondent)
- Melanie Goldberg, Esq., Staff Attorney, Legal Services of Central New York, Inc. (Respondent’s Attorney)
- Hon. Peter Barlet, SMA Board Member Coordinator

9:45-10:00AM  **Break**

10:00-11:00AM  **D W I - Proper Entry of Plea and Sentencing**  *CLE CJE pending approval  Sky Room*
This program will review common problems and pitfalls encountered in the entry of a plea and sentencing involving Driving While Intoxicated cases. This class will include a review of recent appellate decisions that have complicated the already complex entry of guilty pleas and will include approaches and procedures for complying with these recent decisions.

Presented by:
- Peter Gerstenzang, Esq.
- Hon. Albert A. Raymond, SMA Board Member Coordinator

10:00-11:00AM  **Lexis-Nexis**  *CJE pending approval  Birch Room*
Presented by:
- Catherine Opela, Lexis-Nexis
- Hon. Dr. Carrie O’Hare, SMA Board Member Coordinator

11:00-12:00PM  **Skype for Business**  *Skype for Business*
Introductory to advanced course providing an overview of information regarding how to navigate Skype for business as a communication tool in many ways, allowing instant messaging with court staff as well as conducting group meetings.
- Presented by: Dawn Cota, Division of Technology, OCA

11:00-12:00PM  **Round Table Discussion**  *CLE CJE pending approval  Olympic 1*
The Roundtable Discussion is designed to provide a format whereby judges share and benefit from each other’s experience. A panel of seven (7) judges, led by a moderator, are asked to comment on a variety of issues confronting the town and village courts. This precipitates a dialogue among the judges in the audience as they begin to share their ideas and experiences in dealing with the subject issue and often results in a heightened understanding and grasp of the issues at hand.

Presented by:
- Hon. Sidney T. Farber, SMA Board Member Coordinator and panel members:
  - Hon. Dennis Quinn, Hon. Donald Buttenschon, Hon. David Brockway, Hon. Mark Farrell,
  - Hon. David Fuller, Hon. Dave Murante, Hon. Ralph Mackin

* CJE and CLE Credits are pending approval
Classes and time frames are subject to change
11:00-12:00PM  **Social Media**  * CLE CJE pending approval  *  *Olympic 2,3,4*

This program will define social media platforms in use today and outline the mechanisms and pitfalls of using social media sites in our modern day world. Suggestions for protecting oneself and others in using social media outlets will be discussed, as well as special concerns for the judiciary.

Presented by:

- Special Agent Jeffrey Barrette, Federal Bureau of Investigations
- Supervisory Special Agent Eric Lurie, Federal Bureau of Investigations
- Hon. Dr. Carrie O’Hare, SMA Board Member Coordinator
- Hon. Jonah Triebwasser, SMA Board Member Coordinator

11:00-2:00PM  **Mental Illness, Drug & Alcohol Issues**  * CLE CJE pending approval  *  *Sky Room*

Order in the Court? Practical Responses to the Challenges of Mental Illness, Alcohol & Substance Abuse. Addressing how judges can effectively oversee proceedings when individuals exhibit mental health or substances abuse problems. In the first hour, the presentation will cover mental illness, including recognizing and responding to mental illness, tools to help de-escalate situations and what resources are available in the community to assist the court. The second hour will take a similar approach but with a focus on alcoholism and drug addiction.

Presented by:

- Paul Curtin, Special Projects Coordinator, OCA
- Hon. John C. Rowley, Multi Bench Judge – 6th JD
- Wendy Burch, Executive Director, National Alliance on Mental Health, NYS
- Matthew Shapiro, Public Engagement Coordinator, National Alliance on Mental Health, NYS
- Hon. Gary A. Graber, SMA Board Member Coordinator

12:00-1:00PM  **Lunch**  *Grandview Room*

1:00-2:00PM  **What OCA has to Offer Town and Village Courts**  *Mirror Lake Room*

This is an overview of information regarding the hardware, software and support that OCA offers Town and Village courts.

Presented by:

- Dawn Cota, Division of Technology, OCA

1:00-2:00PM  **Records Retention**  * CLE CJE pending approval  *  *Olympic 2,3,4*

This session will review how to properly manage court records, particularly determining how long to keep them and how to destroy them. Courts must control the quantity of records they maintain in physical or digital form to ensure that their operations run smoothly and to improve access to records for the courts themselves and those who intersect with the courts. Courts also must be sure to follow the proper procedures for destroying court records to ensure that there are no concerns about their proper disposition.

Presented by:

- Geof Huth, Chief Records Officer, OCA
- Hon. David O. Fuller, SMA Coordinator

2:00-3:00PM  **Outlook Web Access**  *Mirror Lake Room*

Introductory to advanced course providing an overview of information regarding how to navigate your Outlook e-mail account through the web (Outlook Web Application), including faxing from your e-mail.

Presented by:

- Dawn Cota, Division of Technology, OCA
Probation Procedures  * CLE CJE pending approval  * Sky Room
Participants will examine the relationship between Probation Departments and the courts in light of methods used to facilitate better communication and understanding between courts and local probation departments. This course will explore the differences between the approaches used in large urban probation departments and those used in smaller more rural departments. Each participant will be given a copy of the Probation Procedures manual created and distributed to local magistrates in Cattaraugus County. Time will be allowed for course participants to brainstorm approaches that may be used in their home jurisdictions.

Presented by:
• Gerry Zimmerman, Director of Probation, Cattaraugus County Probation Department
• Andrew Siegerman, Commissioner, Onondaga County Probation Department
• Hon. Dennis Young, SMA Board Member Coordinator
• Hon. Phil Dattilo, Jr., SMA Board Member Coordinator

DUI Mock Trial  * CLE CJE pending approval  * Olympic 2,3,4
During this two (2) hour session the proper procedures for a Bench Trial involving a DUI arrest will be exemplified as the prosecutor, defense attorney, judge, police officer and defendant will each play their respective roles with the various aspects of the bench trial being explained as it proceeds throughout its course. The presentation will present suggested best practices, including suggestions for handling some difficult situations and issues which may arise. Comprehensive written materials will be provided.

Presented by:
• Peter Gerstenzang, Esq., Gerstenzang, Oher, Sills & Gerstenzang (Prosecutor)
• Hon. Dean Dietrich, Town of North Elba Justice (Judge)
• Jeffrey S. Carpenter, Esq., Herkimer County District Attorney (Defense Attorney)
• Hon. Karl E. Manne, SMA Board Member (Defendant)
• First Sgt. Mike Minette, Town of Guilderland Police (Police Officer)
• Hon. David O. Fuller, SMA Board Member Coordinator

Break

Campaign Ethics  * CLE CJE pending approval  * Sky Room
This course will discuss the parameters of ethically permissible political activities for judges in New York State. The presenters will explain relevant parts of the Rules Governing Judicial Conduct, specifically under 22 NYCRR 100.5, and analyze relevant opinions of the Advisory Committee on Judicial Ethics.

Presented by:
• Sandra H. Buchanan, Esq., Special Counsel for Ethics, Judicial Campaign Ethics Center
• Laura L. Smith, Esq., Chief Counsel, NYS Advisory Committee on Judicial Ethics
• Hon. Thomas Sheeran, SMA Board Member Coordinator

Annual Business Meeting (Attendance Required for State Reimbursement)  * Olympic 2,3,4
BADGE REQUIRED FOR ENTRY

Dine Around in Lake Placid

* CJE and CLE Credits are pending approval
Classes and time frames are subject to change
NYS MAGISTRATES ASSOCIATION
ANNUAL CONFERENCE

TUESDAY, SEPTEMBER 27, 2016

7:00-9:00AM  Breakfast  Mackenzie’s

8:30 – 2:30PM  NYSMA Registration  Hotel Lobby Area

8:45 – 11:00AM  Small Claims Mock Trial  * CLE CJE pending approval  Olympic 2,3,4

In this session the jurisdiction of the Town and Village Courts in small claims matters, as well as the appropriate procedures for conducting a Small Claims trial will be discussed. Following an initial panel discussion and presentation reviewing the substantive and procedural law governing Small Claims matters, a mock trial proceeding will be presented, including suggestions for handling difficult litigants, attorneys and issues which may arise. The program will conclude with a question and answer period.

Presented by:
- Hon. Jonah Triebwasser, SMA Board Member (Judge)
- Hon. Barbara Seelbach, SMA Board Member (Litigant)
- Hon. Richard Carpenter, TJ/ Moriah, Essex County (Litigant)
- Hon. James F. O’Bryan, TJ/ Ticonderoga, Essex County (Attorney)
- Hon. Thomas Dias, SMA Board Member Coordinator

8:45-9:45AM  What OCA has to Offer Town and Village Courts  Mirror Lake Room

This is an overview of information regarding the hardware, software and support that OCA offers Town and Village courts.

Presented by:
- Dawn Cota, Division of Technology, OCA

9:00-5:00PM  Continuing Judicial Education  CORE B  Sky Room

- Dangerous Dogs 1.0 CLE/CJE
- Sovereign Citizens 1.0 CLE/CJE
- Judicial Opinion Writing 1.0 CLE/CJE
- Dismissal in the Interest of Justice 1.0 * Ethics CLE/CJE
- Ethics Update II 1.0 CLE/CJE
- Chemical Test Instrumentation 1.0 CLE/CJE

9:45-10:00AM  Break

10:00-11:00AM  Westlaw  * CLE CJE pending approval  Birch Room

Presented by:
- Lindsay Florek, Esq., West Government Account Manager
- Hon. Dr. Carrie O’Hare, SMA Board Member Coordinator

10:00-11:00AM  Skype for Business  Mirror Lake Room

Introductory to advanced course providing an overview of information regarding how to navigate Skype for business as a communication tool in many ways, allowing instant messaging with court staff as well as conducting group meetings.

Presented by:
- Dawn Cota, Division of Technology, OCA
11:00-12:00PM  **Outlook Client Email**  *Mirror Lake Room*

Introductory to advanced course providing an overview of information regarding how to navigate your Outlook e-mail client. This is the application that would be installed on your computer and allow you to email from courtroom programs. You will also see how to fax from your e-mail.

Presented by:
- Dawn Cota, Division of Technology, OCA

11:00-12:00PM  **SORA**  *CLE CJE pending approval*  *Olympic 1*

This program will present a “nuts and bolts” approach to the additional sentencing requirements for a SORA (Sex Offender Registration Act) registerable offense and for conducting the subsequent SORA Hearing and completion of the Findings of Fact and Order to be submitted to the SORA Registry. Emphasis will be placed upon the proper procedures with sample forms and scripts to be provided.

Presented by:
- Hon. David S. Gideon, Special Counsel to the T&V Courts 5th JD
- Hon. Vera Hustead, SMA Board Member Coordinator

11:00-12:00PM  **Pre-Trial Motions**  *CLE CJE pending approval*  *Olympic 2,3,4*

Review of common pre-trial motions and hearings likely to be seen in town and village courts. The purpose of the presentation is to familiarize the justices with the subject matter and the purpose of many of the most common pre-trial motions, as well as the relevant law, and also to familiarize the justices with the subject matter of the most common pre-trial hearings as well as procedures involved in presiding over them. Through this lecture and open discussion attendees will gain a greater level of comfort in dealing with what can at times be an intimidating and confusing part of their experience on the bench.

Presented by:
- Daniel M. Killelea, Esq.
- Hon. Dennis Young, SMA Board Member Coordinator

12:00-1:00PM  **Lunch**  *Grandview Room*

1:00-2:00PM  **Outlook Web Access**  *Mirror Lake Room*

Introductory to advanced course providing an overview of information regarding how to navigate your Outlook e-mail account through the web (Outlook Web Application), including faxing from your e-mail.

Presented by:
- Dawn Cota, Division of Technology, OCA

1:00-2:00PM  **How to Read Criminal History Reports, E-Justice Audit Procedures**  *Birch Room*

This program is designed to educate the Town and Village Court Judges and Court Clerks in obtaining criminal history reports through the e-justice portal and how to interpret the various information provided. Participants will learn the various information available based upon the different access levels; with emphasis on the information contained in each section of the different reports available. Additionally, this program will present step-by-step instructions for completion of the mandated self-audits required for continued system usage.

Presented by:
- William O’Connor, Chief of Operations, NYS Division of Criminal Justice Services
- Sgt. Barbara E. Koval, CJIS Audit and Compliance Unit, NYSP
- Hon. Phil Dattilo, Jr., SMA Board Member Coordinator

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*CJE and CLE Credits are pending approval
Classes and time frames are subject to change*
Counsel at First Arraignments  * CLE CJE pending approval  Olympic 2,3,4

This course will provide an overview of the necessity for counsel at all arraignments as declared by the Court of Appeals in its 2010 decision in *Hurrell-Harring v State of New York*. A panel discussion will be presented, outlining the latest developments for implementation and oversight by the NYS Office of Indigent Legal Services throughout the state, including qualification standards for providing counsel.

Presented by:
- William Leahy, Director of Office of Indigent Legal Services
- Hon. James P. Murphy, District Coordinating Judge for T&V 5th JD
- Matthew Chivers, Esq., Special Counsel for T&V 4th JD
- Hon. David S. Gideon, SMA Board Member Coordinator

New York State Judicial Conduct Commission  * CLE CJE pending approval  Olympic 1

This program will cover what to do, and what not to do, if the Commission Calls. There are certain categories of conduct that come to the Commission’s attention recurrently and are likely to result in investigation and, where appropriate, public discipline. This includes delay in rendering a decision, *ex parte* communications, fundamental rights, notice and opportunity to be heard, audit/control and supervision of court staff, the public access to court proceedings, recording of court proceedings, asserting the prestige of judicial office to advance a private interest and unauthorized political activity. All are easily avoidable situations. This program will discuss these topics in greater detail and answer questions on these and other topics.

Presented by:
- Robert Tembeckjian, Esq., Administrator & Counsel, NYS Commission on Judicial Conduct
- Cathleen S. Cenci, Esq., Deputy Administrator, Albany, NYS Commission on Judicial Conduct
- John J. Postel, Esq., Deputy Administrator, Rochester, NYS Commission on Judicial Conduct
- Hon. Edward G. Van Der Water, SMA Board Member Coordinator

Break

What OCA has to Offer Town and Village Courts  Mirror Lake Room

This is an overview of information regarding the hardware, software and support that OCA offers Town and Village courts.

Presented by:
- Dawn Cota, Division of Technology, OCA

Veterans in the Criminal Justice System  * CLE CJE pending approval  Birch Room

Changing the narrative of veterans in the criminal justice system. To that end, Judges need to be aware of military culture, military training, and what the military experience of the individual veteran appearing before the Court has been. Further, the Court should be aware of the effects of this culture, training and experience on the veteran and how these factors can contribute to criminal behavior. Treatment resources and diversions will be discussed for areas not serviced by a Veterans Court.

Presented by:
- Gary A. Horton, Director, Veterans Defense Program, NYS Defenders Association, Inc.
- Kynna Murphy, Veterans Justice Outreach Coordinator, Syracuse VA Medical Center
- Hon. Vera Hustead, SMA Board Member Coordinator
3:15-4:15PM  **Presiding Over Criminal Cases Involving Non-Citizen Defendants**  *CLE CJE pending approval*

*Birch Room*

This program will outline immigration and customs issues and procedures, particularly in light of the collateral consequences to defendants in the Town and Village Courts. The considerations and consequences outlined in *Padilla v. Kentucky*, 559 US 356 and *People v. Peque*, 22 NY3d 168 (2013) will be discussed in detail. This one-hour presentation will cover basic concepts in Immigration law that affect non-citizen criminal defendants charged in the local criminal court. Best practices will be covered, with hypotheticals that explain how the process works in actual cases, the roles of the judge and counsel, with time allowed toward the end of the hour for Q & A.

Presented by:
- Sharon L. Ames, Esq., Co-Director, Regional Immigration Assistance Center, Region 2
- Robert Reittinger, Esq., Co-Director, Regional Immigration Assistance Center, Region 2
- Hon. Kenneth Ohi Johnsen, SMA Board Member Coordinator

6:30-7:30PM  **Gala Reception**  *Adirondack Great Room*

7:45PM  **Installation Banquet**  *Olympic 2,3,4*

Guest Speaker: Hon. Lawrence K. Marks, Chief Administrative Judge
Installation of Officers
A part-time justice, as counsel to an association of local government officials and employees, may advise individual members concerning local justice court operational issues, where such issues do not pertain to any pending cases, nor the court in which the judge presides.

The inquiries are not aimed at pending cases, nor to the judge’s court. He/she asks if he/she may address such issues.

A judge must always avoid even the appearance of impropriety (see 22 NYCRR 100.2) and must always act to promote public confidence in the judiciary’s integrity and impartiality (see 22 NYCRR 100.2[A]). For example, a judge must not engage in impermissible ex parte communications (see 22 NYCRR 100.3[B][6]) or publicly comment on pending or impending cases in the United States or its territories (see 22 NYCRR 100.3[B][8]). Nonetheless, a part-time judge may generally accept public or private employment not incompatible with judicial office nor conflict or interfere with judicial duties (see 22 NYCRR 100.6[B][4]), and may practice law with certain limits (see 22 NYCRR 100.6[B][2]-[3]).

The justice court operational issues the judge describes are administrative in nature, and do not involve the judge’s own court or any identifiable pending cases in any court. Answering such questions is thus unlikely to run afoul of restrictions on judicial speech and conduct, conflict or interfere with judicial duties, nor create an improper appearance. Thus, the judge may discuss such issues with association members as the association’s counsel.

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1 Officials and employees of the municipalities in which the judge presides are not eligible to join the association.
The defendant was arraigned on a felony complaint for Criminal Contempt in the First Degree (PL§ 215.51) on March 24, 2015, for allegedly violating an order of protection of this court, dated August 10, 2014. On August 4, 2015, the defendant was arraigned on another felony complaint for the same charge, Criminal Contempt in the First Degree, for allegedly violating the same order of protection and another order of protection of this court dated, March 31, 2015. No felony hearing was conducted on either complaint.

Following multiple adjournments on both felony complaints, the People, on December 29, 2015, filed two superseding misdemeanor informations; for the first felony complaint, the charges of Criminal Contempt in the Second Degree (PL§ 215.50), Stalking in the Fourth Degree (PL§ 120.45) and Harassment in the Second Degree (PL§ 240.26); for the second felony complaint, Criminal Contempt in the Second Degree, Stalking in the Fourth Degree, Aggravated Harassment in the Second Degree (PL§ 240.30) and Harassment in the Second Degree. The Court adjourned the arraignments to January 5, 2016.

On January 5, 2016, defense counsel objected to the arraignments on the ground that the provisions of CPL§ 180.50 were not being followed. The People requested that the defendant be arraigned. The Court told defense counsel that he would have to make his objections in writing and asked him if he waived a reading of the charges. With the understanding that counsel was not concurring in the proceeding, he waived a reading of the rights and charges and entered a plea of not guilty to the informations on behalf of the defendant. He also said he would file motions for February 16, 2016.

The defendant’s motions to dismiss against both informations are grounded on the prosecution’s asserted disregard of the requirements of CPL§ 180.50 for the reduction of felonies to misdemeanors, the prosecution’s allegedly not having been “ready” because of the improper attempt to supersede the felony complaints with misdemeanor informations, thus resulting in dismissals pursuant to CPL§ 30.30; and the accusatory instrument’s allegedly not complying with the requirements of the Criminal Procedure Law.

The People declined to respond to the defendant’s motions.

The People have attempted to replace two felony complaints with two superseding misdemeanor informations instead of following the procedure required by CPL§ 180.50 for reducing felonies to misdemeanors. A felony complaint cannot be superseded by a misdemeanor information under CPL§ 100.50. *(People v. Thomas, 107 Misc 2d 947; People v. Young, 123 Misc 2d 486).*

Accordingly, the superseding misdemeanor informations are dismissed, the felony complaints remain pending *(People v. Minor, 144 Misc 2d 846)*, and they are set down for hearings on July 5, 2016 at 9:30 a.m.

June 14, 2016
David Otis Fuller, Jr.
Tuckahoe Village Justice
The Benefit of Continuing Judicial Education

By: Hon. Michael T. Welsh, Town Justice LeRoy

A New York State Town Justice is given a position of immense responsibility. The decisions we make can alter a person’s life for good or bad. Since we are the “court closest to the people,” a citizen’s view and respect for the justice system will more likely be shaped by the actions we take rather than by those of courts at a higher level.

We are required to know criminal and civil law, both substantive and procedural, as well as judicial ethics and financial management. Our use of this knowledge must often be made in the middle of a busy court docket or under the pressure of a night time arraignment. Since we must arraign even the most violent cases, as I have, there is no room for error. For all these reasons, I decided it would aid me in being Town Justice to take all the courses made available by the Office of Justice Court Support. I did so and believe I greatly benefited from them.

The lectures make the courses so practical that I feel I can bring their advice to the bench with me. The Hon. David Gideon best explained the advantages of the courses. To paraphrase, he said that even if we don’t remember the exact case or procedural note, we will remember the issue and recognize it in such a way to allow us to review, research and deal with the issue effectively. I have found Judge Gideon’s observation to be correct.

News from the Resource Center

Court of Appeals Rules Digital Recorder Transcripts No Longer the Equivalent of Stenographic Minutes. Several trial level courts differed in their interpretation of whether transcripts from digital recordings were the functional equivalent of stenographic minutes, creating a different standard for appeal processes in different parts of the state and resulted in a Court of Appeals ruling in People v. Smith on June 23, 2016 (2016 N.Y. Slip Op. 04973). In Smith, the Court of Appeals found that in a criminal appeal, transcripts were not the equivalent of stenographic minutes and therefore required the filing of an affidavit of errors (the alternate procedure where stenographic minutes are not available).

You can log on to the Town and Village Courts website to see a full copy of the decision under Appeals. An online revised appeals procedures for both civil and criminal cases will be available soon on the Resource Center website.
We are about to enter the “Twilight Zone” of Constitutional Law, both New York and Federal, and cannot present all aspects of when the police may stop a citizen. *People vs. DeBour* 40 NY 2d 210 (1976) and *People vs. Moore* 6 NY 3d 496 (2006) on the State level and *Terry vs. Ohio* 392 US 1 (1968) and *Florida vs. J.L.* 529 US 266 (2000) are the bookends of law which require the court to make a dual inquiry in determining whether a search and seizure is reasonable, that is whether the officer’s action was justified at its inception and whether it was reasonably related in scope to the circumstance which justified the police interference in the first place. The Supreme Court held that reasonable suspicion requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person. Our Court of Appeals held that the tip must accurately portray the alleged criminal activity, not that the defendant matched the physical description provided by an anonymous tipster. Applying those case law tests to automobiles brings us to the Fourth Department’s Decision in *People vs. Burpee* 176 AD 2d 585 (1991) and the Court of Appeals in *People v. Rodriguez* 98 NY 2d 93 (2002).1 Critical to all of these cases are the facts. In *Burpee*, the Niagara Falls Police received an anonymous telephone tip that defendant was traveling from Buffalo, across the Grand Island Bridge on a certain day and time, in a gold car with cocaine. The Police waited at the base of the bridge and stopped the car finding cocaine in open view in the center console. The Fourth Department reversed defendant’s conviction because in order to justify the stop, the police needed reasonable suspicion based on specific and articulable facts that the defendant committed a crime. The anonymous tip provided neither reasonable suspicion nor probable cause. In *Rodriguez*, New York City Police received a radio transmission of a report that a person in their precinct described as a light skinned male, Hispanic, in his twenties, with black hair, wearing a black-and-white checkered shirt and jeans and was carrying a gun. About two hours later they saw Rodriguez, who matched the description, standing in front of a grocery store. He got into the back seat of a Lincoln Town car and drove away. The police officers activated their lights and siren and pulled the car over. Rodriguez dropped the gun out of the car window. He was searched and arrested. The Court of Appeals over turned his conviction because the only basis for reasonable suspicion advanced before the suppression court for stopping the vehicle was that Rodriguez matched the physical description provided by the anonymous tipster. Without more, the tip could not provide reasonable suspicion to stop the car.

The U.S. Supreme Court’s recent denial of a petition for certiorari in the case of *Virginia v. Harris*, No. 08-1385, 2009 WL 3348727 (U.S. Oct. 20, 2009) (mem.), has highlighted a conflict in the way that states evaluate whether an anonymous tip about a drunk driver is sufficient to make an investigative stop. In *Harris v. Commonwealth*, 276 Va 689, 668 S.E.2d 141 (2008), the Supreme Court of Virginia had set aside the defendant’s conviction for driving while intoxicated, because it found that the officer who made the arrest did not have a reasonable suspicion of wrong-doing when he stopped the vehicle after having received an anonymous tip. The facts showed that the Richmond Police Department had received a telephone call from an unknown individual, who stated that there was a drunk driver, whom the caller named, driving on a named road in an unidentified vehicle. An officer went to the area,

1 Generally cited as *People vs. Williams*, II, which does not involve an automobile, while Rodriguez does.
saw the vehicle, and followed it for a short while. The officer did not observe any traffic violations by the driver, but initiated a traffic stop when the driver drove to the side of the road and stopped of his own accord. At that point, the officer detected the odor of alcohol and arrested the driver.

The Supreme Court of Virginia ultimately set aside the conviction, finding that under the holding of *Florida v. J.L.*, 529 U.S. 266 (2000), an anonymous tip has a relatively low degree of reliability, requiring more information than contained in the tip. Because in the case before it the anonymous tip lacked sufficient information to demonstrate the informant’s credibility and basis of knowledge, the court held that the tip could not, of itself, establish the requisite quantum of suspicion for an investigative stop. Moreover, the court found that because the officer observed no erratic driving while following the driver, he saw nothing to create a reasonable suspicion of criminal activity.

The Commonwealth of Virginia appealed the case to the Supreme Court, but the Court declined to accept the appeal. However, in a written dissent from the Court’s denial of certiorari, Chief Justice Roberts criticized the lower court decision, arguing that the holding of *Florida v. J.L.* should not be applied to tips regarding drunk driving. Emphasizing the serious nature of the public safety implications of failing to apprehend drunk drivers before they cause harm to others, Roberts argued for a lesser standard for judging stops based on tips about drunk drivers. Roberts noted that other state courts have upheld investigative stops of allegedly drunk or erratic drivers, even when the police did not personally witness any traffic violations before conducting the stops. 2009 WL 3348727, at *2 & n.2 (Roberts, C.J. dissenting) (citing, inter alia, *People v. Wells*, 38 Cal. 4th 1078, 45 Cal. Rptr. 3d 8 (2006) *State v. Golotta*, 178 N.J. 205, 837 A.2d 359 (2003)). Roberts then summarized his position as follows:

> The conflict is clear and the stakes are high. The effect of the rule below will be to grant drunk drivers “one free swerve” before they can legally be pulled over by police. It will be difficult for an officer to explain to the family of a motorist killed by that swerve that the police had a tip that the driver of the other car was drunk, but that they were powerless to pull him over, even for a quick check.

The denial of certiorari over the strong objection of Chief Justice Roberts makes it clear that he could not muster enough votes on the Court to fashion a drunk-driving exception to the rule set out in *Florida vs. J.L.*² Because the Virginia Court’s rationale is the same as our courts in *Burpee* and *Rodriquez*, both the Federal and our State decisions coincide with each other at this time.

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² *Florida vs. J.L.* 529 US 266 (2000) involved an anonymous tip stating a young black male, wearing plaid shirt standing at a particular bus stop was carrying a gun. Justice Ginsburg held that the tip lacked sufficient indicia of reliability to establish reasonable suspicion for a *Terry v. Ohio*, 392 US 1 (1968) investigatory stop.
Decision and Verdict  Submitted By Hon. Leonard G. Tilney, Jr.

STATE OF NEW YORK: COUNTY OF NIAGARA
JUSTICE COURT: TOWN OF LOCKPORT

THE PEOPLE OF THE STATE OF NEW YORK,
         Plaintiff.
- against -

SEAN K. THOMSON,
         Defendant.

APPEARANCE OF COUNSEL

Hon. Michael J. Violante, Niagara County
District Attorney
(Elizabeth R. Donatello, of Counsel)
Attorney for the People

Muscato, DiMillo and Vona
(A. Angelo DiMillo, of counsel)
Attorney for the Defendant

INTRODUCTION

On March 8, 2012 the Court conducted a non-jury trial which was coupled with a probable cause hearing. The Court reserved decision and both parties submitted written memoranda by April 5, 2012. The Court will bifurcate its Probable Cause Decision and Trial Verdict, but use those facts presented at trial as a basis for both.

FACTS

On September 5, 2011, at approximately 1:49 a.m., an anonymous person called the Lockport City Police Department to report two motor vehicles in the McDonald’s parking lot on Transit Road in the Town of Lockport, where “there are numerous people sitting there drinking” and “everybody is drinking (and) they have two big cases in the back”. The motor vehicles were described in detail as a silver Ford Focus with plate number EDA3439 and an orange Z71 Chevrolet Avalanche with plate number EPC8325. New York State Trooper Aaron Wentland was dispatched and arrived at the McDonald’s Restaurant ten minutes later. He approached the Defendant who was sitting in the driver seat of the Avalanche. The Ford Focus was not present. Wentland then smelled a strong odor of alcohol and observed an open alcoholic beverage container in the center console. Defendant and his passenger were in a parked Avalanche which matched the tipster’s description. The keys to the Avalanche were in the ignition, but the motor was not running. Defendant was eating a McDonald’s food package. Trooper Wentland ordered the Defendant out of the car and conducted various Field Sobriety Tests prior to arresting him for violations of Sections 1192(2), 1192(3), 1196(7)(F) and 306(B) of the Vehicle and Traffic Law. Wentland saw no criminality taking place as he approached the Defendant. Defendant was placed under arrest at 2:15 a.m. and thereafter, but prior to Miranda/DWI warnings made admissions to Wentland.

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PARTIES’ POSITIONS

The People assert that based on the anonymous tip, Trooper Wentland had an objective credible reason to approach the Defendant’s vehicle and that, subsequently, based on his independent observation, he had reasonable suspicion that the Defendant was or was about to commit the crime of driving while intoxicated, sufficient to justify ordering the Defendant from his vehicle.

Defendant’s position states the initial encounter by the police was not justified based on an anonymous tip. Furthermore, even if the encounter was appropriate, the Defendant was “seized” or “stopped” by the police for reasons not related to the circumstances which justified the initial inquiry, he was detained too long thereafter, and, in any event, Defendant was not operating nor did he intend to operate his motor vehicle.

DISCUSSION

This Court must apply the State and Federal Constitutional protections against the police power of the State to intrude on a citizen’s life while balancing the police duty to keep that same citizen safe from the criminal elements of society. The Supreme Court has held that reasonable suspicion requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person. Florida vs. J.L. 529 US 266 (2000). Our Court of Appeals has held that the tip must accurately portray the alleged criminal activities, not that the Defendant matched the physical description provided by an anonymous tipster for reasonable suspicion to be established. People v. Moore, 6 NY3d 496 (2006).

Definition:

Probable cause …” exists where the facts and circumstances within their (the officers’) knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed” Carroll v. United States, 267 U.S. 132, 162, 45 S.Ct. 280, 288, 69 L.Ed. 543, 39 A.L.R. 790. See also People v. Oden 36 NY 2d 382, 368 NYS 2d 508 (1975)

Standard of Review:

A. Automobile Investigation

In People v. DeBour, 40 NY 2d 210 at 223, the Court of Appeals set forth a four-tiered method for evaluating the propriety of encounters initiated by police officers in their criminal law enforcement capacity. Level One permits a police officer to request information from an individual and merely requires that the request be supported by an objective, credible reason, not necessarily indicative of criminality; Level Two, the common-law right of inquiry, permits a somewhat greater intrusion and requires a founded suspicion that criminal activity is afoot; Level Three authorizes an officer to forcibly stop and detain an individual, and requires a reasonable suspicion that the particular individual was involved in a felony or misdemeanor; Level Four arrest, requires probable cause to believe that the person to be arrested has committed a crime.

B. Voluntariness of Statement

Criminal Procedure Law Section 60.45

ISSUES PRESENTED

1. Anonymous tip and legality of stop.
2. Detention after stop.
3. Operation of motor vehicle.
4. Statements of Defendant prior to and after Miranda warnings.
5. Guilt or non-guilt of the Defendant.
PROBABLE CAUSE DECISION

A. Automobile Investigation

Approaching an occupied stationary vehicle is a minimal intrusion which is not the equivalent of a stop. See, People v. Harrison, 57 N.Y.2d 470, 457 N.Y.S.2d 199, 443 N.E.2d 447 [1982]. This situation is analogous to approaching a citizen on the street to request information and therefore the courts use the same four-tiered analysis set forth in People v. DeBour, 40 N.Y.2d 210 at 223, 386 N.Y.S.2d 375, 352 N.E.2d 562 [1976] to justify the conduct of the police. See, People v. Ocasio, 85 N.Y.2d 982, 629 N.Y.S.2d 161, 652 N.E.2d 907 [1995]; People v. Harrison, supra.

However, our Court of Appeals in Moore cited supra said:

“Although we agree with the Appellate Division that the anonymous tip authorized only an inquiry, the police here failed to simply exercise their common-law right to inquire. Instead – in ordering him at gunpoint to remain where he was – the police forcibly stopped defendant as soon as they arrived on the scene. Because the officers did not possess reasonable suspicion until after defendant reached for his waistband, however – by which time defendant has already been unlawfully stopped – the gun should have been suppressed. Defendant’s later conduct cannot validate an encounter that was not justified at its inception (see People v. DeBour, 40 NY2d 210, 215 [1976]; People v. William II, 98 NY2d 93, 98 [2002].

In DeBour, we set forth a graduated four-level test for evaluating street encounters initiated by the police: level one permits a police officer to request information from an individual and merely requires that the request be supported by an objective, credible reason, not necessarily indicative of criminality; level two, the common-law right on inquiry, permits a somewhat greater intrusion and requires a founded suspicion that criminal activity is afoot; level three authorizes an officer to forcibly stop and detain an individual, and requires a reasonable suspicion that the particular individual was involved in a felony or misdemeanor; level four, arrest, requires probable cause to believe that the person to be arrested has committed a crime (DeBour, 40 NY2d at 233; see also People v. Hollman, 79 NY2d 181, 184-185 [1992]). The Court’s purpose in DeBour was to provide clear guidance for police officers seeking to act lawfully in what may be fast-moving street encounters and a cohesive framework for courts reviewing the propriety of police conduct in these situations. Having been the basis for decisions in likely thousands of cases over the past 30 years, DeBour has become an integral part of our jurisprudence.

Here, the gunpoint stop unquestionably constituted a seizure of defendant’s person – DeBour’s level three – and required reasonable suspicion (see People v. Chestnut, 51 NY2d 14 [1980] [where police draw their firearms and order a suspect to “freeze,” this is a seizure, the propriety of which is measured by the reasonable suspicion standard]; People v. Townes, 41 NY2d 97 [1976] [ordering a suspect to “freeze” with guns drawn amounts to a seizure of the suspect by police]).

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An anonymous tip cannot provide reasonable suspicion to justify a seizure, except that tip contains predictive information – such as information suggestive of criminal behavior – so that the police can test the reliability of the tip (see Florida v. J.L., 529 US 266 [2000]; People v. William II, 98 NY2d at 99). Indeed, in J.L., a unanimous United States Supreme Court held that an anonymous tip regarding a young Black male standing as a particular bus stop, wearing a plaid shirt and carrying a gun, was insufficient to provide the requisite reasonable suspicion to authorize a stop and frisk of the defendant.”

Likewise, the Fourth Department, in People vs. Layou, 71 AD3d 1382 (2010) added:

“In any event, we further conclude that the court erred in refusing to suppress the tangible property seized, i.e., the cocaine, and defendant’s statements to the police. As defendant contends in his pro se supplemental brief, suppression was warranted because the police lacked reasonable suspicion to justify the initial seizure of his vehicle. Here, a police officer effectively seized defendant’s vehicle when he pulled into the parking lot behind defendant’s vehicle in such a manner as to prevent defendant from driving away (see People v. Solano, 46 A.D.3d 1223, 1225, 848 N.Y.S.2d 431, lv. denied 10 N.Y.3d 817, 857 N.Y.S.2d 50, 886 N.E.2d 815; People v. Nicodemus, 247 A.D.2d 833, 835, 669 N.Y.S.2d 98, lv. denied 92 N.Y.2d 858 677 N.Y.S.2d 88, 699 N.E.2d; cf. People v. Ocasio, 85 N.Y.2d 982, 984-985, 629 N.Y.S.2d 161, 652 N.E.2d 907; People v. Black, 59 A.D.3d 1050, 1051, 872 N.Y.S.2d 791, lv. denied 12 N.Y.3d 851, 881 N.Y.S.2d 663, 909 N.E.2d 586). Defendant’s presence in a vehicle at 3:40 a.m. in a parking lot located in the general vicinity of a burglary that the police were investigating did not provide the police with reasonable suspicion that defendant had committed, was committing, or was about to commit a crime (see People v. May, 81 N.Y.2d 725, 727-728, 593 N.Y.S.2d 760, 609 N.E.2d 113). It is well settled that “innocuous behavior alone will not generate a founded or reasonable suspicion that a crime is at hand” (People v. De Bour, 40 N.Y.2d 210, 216, 386 N.Y.S.2d 375, 352 N.E.2d 562).

In this case, the arresting officer did not observe any conduct indicative of criminal activity at the time he seized the vehicle, the complainant who has reported the burglary did not mention that the burglars fled in a vehicle, and the officer had no other information tending to connect defendant or the occupant of his vehicle with the reported burglary (see Nicodemus, 247 A.D.2d at 835, 669 N.Y.S.2d 98; see generally People v. Taylor, 31 A.D.3d 1141, 1142, 817 N.Y.S.2d 88). Thus, even if there had been sufficient chain of custody, we nevertheless conclude that the judgment must be reversed in its entirety, including those parts convicting defendant of resisting arrest and obstructing governmental administration (see Matter of Marlon H., 54 A.D.3d 341, 862 N.Y.S.2d 570; People v. Lupinacci, 191 A.D.2d 589, 595 N.Y.S.2d 76), inasmuch as the police acted without the requisite reasonable suspicion to justify the initial seizure of defendant’s vehicle.”

Although the issue was disputed at Trial, the Court credits the testimony of Trooper Wentland and his supervisor Sgt. Dischner, that Wentland did not block Defendant’s car. Here, the anonymous tip was coupled with Trooper Wentland’s own observations of an open alcoholic beverage container and a smell of a
strong alcoholic odor. But for this corroboration, this Court would conclude that he acted without the requisite reasonable suspicion to justify the initial seizure of defendant’s vehicle.

Trooper Wentland acted reasonably and responsibly when he directed the defendant to exit the car. The officer’s action forestalled the operation of the vehicle by one who may have been drinking. The intrusion was, at most, de minimus, and not violative of defendant’s Fourth Amendment rights. See, Pennsylvania v. Mimms, 434 U.S. 106, 111, 98 S.Ct. 330, 333, 54 L.Ed.2d 331 [1977]; People v. Key, 81 A.D.2d 805, 441 N.Y.S.2d 390 [1st Dept. 1981], app. dismissed 54 N.Y.2d 813, 443, N.Y.S.2d 652, 427 N.E.2d 949 [1981].

The crux of the matter before this Court is whether the defendant, who was legally parked, sitting behind the wheel of a car, with the engine not running, but keys in the ignition and eating food, was engaged in the operation of a motor vehicle, while under the influence of alcohol, within the meaning of the Vehicle and Traffic Law §1192 justifying his arrest.

The crime of operating a motor vehicle while under the influence of alcohol in violation of Vehicle and Traffic Law §§ 1192(2) and 1192(3) requires that the vehicle be operated by a driver who is intoxicated. Operation may be established by direct evidence or circumstantial evidence. Whereas, here, Trooper Wentland did not actually see the car in motion, the proof of “operation” must be based on circumstantial evidence. See, e.g., People v. Booden, 69 N.Y.2d 185, 513 N.Y.S.2d 87, 505 N.E.2d 598 [1987]. Our Appellate Courts have indicated the question of operation of the automobile is one that should be left for trial and not decided on a probable cause hearing [See People vs. Khan (2d Dept. 1997) 182 Misc 2d 83, 697 NYS2d 457].

Probable cause existed to arrest the defendant. Trooper Wentland met the four step procedure of Debour. Wentland was permitted to request information (license, registration, identification, etc.) from the defendant based on the credible reason of smell of alcohol and alcoholic drink in the car. Once Trooper Wentland had a founded suspicion that defendant was intoxicated (blood shot eyes, slurred speech etc.), Wentland had a right to stop and detain the defendant for sobriety tests. Failing those tests, Trooper Wentland had probable cause to believe the defendant had committed the crime of driving while intoxicated and could arrest him for it.

B. Voluntariness of Statement

Admissibility of Defendant’s statements regarding consumption of beer and operation of his automobile is dependent upon if they were voluntarily given to Trooper Wentland. Huntley (People v. Huntley, 15 NY2d 72 255 NYS 2nd 838) requires the People to establish, beyond a reasonable doubt, that a statement was voluntarily made. Miranda (Miranda vs. Arizona 384 US 436, 86-S.Ct. 1602) requires custodial interrogation for involuntariness of the statement. Both cases require defendant to be under arrest and questions being asked to illicit an incriminating response. Trooper Wentland observed that the defendant bore common indicia of intoxication. He then had Defendant do field sobriety tests, after which the Defendant was arrested. Only after the arrest did Wentland ask the Defendant if he had been drinking and driving his motor vehicle. Defendant admitted as much. This was a custodial interrogation and the defendant was entitled to Miranda warnings prior to being questioned. See, Miranda v. Arizona, 384 U.S. 436, 86 S.Ct.1602, 16 L.Ed2d 694 [1966]; People v. Yukl, 25 N.Y.2d 585, 307 N.Y.S.2d 857, 256

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1 Whether or not the People can prove beyond a reasonable doubt that the defendant operated a motor vehicle on a public highway while in an intoxicated condition caused by the voluntary consumption of alcohol should be left for the trier of fact to decide not as a matter of law for the court on motions. [See this Court’s Decision in People v. Balcom, 22 Misc. 3d 1137(A).]
N.E.2d 172 [1969]. Wentland admits not Mirandizing Defendant until his arrival at the State Police barracks. His Bill of Particulars filed with Court bears this out.

Trooper Wentland made no threats of physical force, nor applied any undue pressure, nor made any promises to the defendant to make his statement involuntary. [CPL § 60.45(2)].

Defendant’s motion to dismiss the accusatory instrument is denied. Defendant’s motion to suppress his statements is granted.

TRIAL VERDICT

The long and short of this entire intellectual exercise is to determine guilt or non-guilt of the Defendant. The key to this Verdict is operation of a motor vehicle and/or intent to do the same. The People presented no testimony that the Defendant did not operate a motor vehicle as a reasonable and prudent driver to sustain a conviction under the common law theory of VTL §1192(2) [See People v Cruz 48 NY 2d 419, 423 NYS 2d 625 (1979)]. Previously, the Court had issued a decision in People vs. Balcom, 22 Misc 3d 1137(A), 881 NYS2d 365 (2004) in which operation of a motor vehicle was generally discussed. This Court did not grant Balcom’s request to dismiss as it held operation is a triable issue of fact. In Balcom, the Defendant’s car engine was running, here it was not. This Court finds that to be a key element of operation. [See People v. Alamo 34 NY 2d 453, 358 NYS 2d 375(1974); 2008 revision to Criminal Jury Instructions on VTL §1192(2) and (3); and 2011 update to Parts 2.3 and 2.4 of Handling the DWI Case in New York]. Accordingly, this Court finds, as a matter of fact, that the People have not sustained their burden of proof to prove Defendant’s guilt beyond a reasonable doubt of operating his motor vehicle on a public highway while being intoxicated by the voluntary consumption of alcohol under VTL §1192(2) and §1192(3). Because operation was not established, proof is also lacking to sustain a conviction under VTL §1196(7)(F). The People have sustained necessary proof to establish that Defendant’s car was parked without a proper inspection certificate under VTL §306(B) as the statute says “no motor vehicle shall be operated or parked (emphasis added) on the public highways … unless a certificate … of inspection … is … displayed …”. Accordingly, it is the VERDICT of the Court that the Defendant is NOT GUILTY of violating Sections 1192(2), 1192(3) and 1196(7)(F) of the Vehicle and Traffic Law. Defendant is GUILTY of violation Section 306(B) of the Vehicle and Traffic Law.

Dated: April 9, 2012
Lockport, New York

Hon: Leonard G. Tilney, Jr.
Lockport Town Justice
Decision Submitted By Hon. David Otis Fuller, Jr.

STATE OF NEW YORK: COUNTY OF WESTCHESTER
JUSTICE COURT: VILLAGE OF BRONXVILLE

PAMELA M. O’NEILL, Plaintiff.

- against -

BARHITE & HOLZINGER, Defendant.

The Plaintiff, Pamela M. O’Neill, is the owner of apartment 4F in a cooperative building referred to as the River House and located at 72 Pondfield Road in Bronxville, New York. The defendant, Barhite & Holzinger is the managing agent of the cooperative.

Both parties agree that the hot water to the apartment is regulated by a valve that is located in the “shower body” which is inside the wall of the shower. The valve is adjusted and the temperature is increased or decreased by a faucet which is outside the “shower body” and wall. This valve has to be replaced. The question is who is responsible. It is either the Lessor or the Lessee.

It is commonly thought that the Lessee is responsible for pipes outside of the wall and the cooperative is responsible for pipes in the wall. But this may vary depending on the proprietary lease and bylaws. The proprietary lease for the ‘River House – Bronxville Inc.’ states in substance as follows:

Article 1. First: “Lessor shall keep in good repair__ all main and principle pipes for carrying water__except__which it is the duty of the Lessee to maintain__as provided by Paragraph SEVENTH of Article II hereof and subject to the provisions of Paragraph Sixteenth of Article II__.”

Article II. Seventh: “The Lessee shall keep the interior__ and shall be solely resposible for the maintenance, repair, and replacement of plumbing__as may be in the apartment. Except as provided in next sentence, the term “plumbing”__shall include__water pipes serving the apartment and accessible within the apartment without breaking into a wall__and exposed__.”

The next sentence states that “such term__“(i.e. plumbing)__shall not include water or other pipes__within the wall__that are part of the standard building equipment. The Lessee shall be solely responsible for risers running into or through apartment or exclusively serving the apartment.”

The above states that Lessor is responsible for all main and principle pipes, that Lessee is responsible for plumbing which is defined as accessible without breaking into a wall and is exposed. The term plumbing shall not include water and other pipes within the wall and part

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of the standard building equipment. Finally, it goes on to say Lessee is responsible for the risers running into and through exclusively serving the apartment. Risers are pipes that extend vertically from one floor level to the next for the purpose of conducting water, steam or gas.

The Court interprets Article II, Paragraph Seventh as saying that the Lessee is responsible for pipes in the apartment that exclusively serve the apartment and are accessible without breaking into a wall. Further, Lessee is responsible for riser pipes serving its apartment. The complaint of malfunction is neither a pipe in the apartment or a riser. Therefore, the Plaintiff should prevail. See Franklin Apartment Associates, Inc. Respondent v. Westbrook Tenants Corp., Appellate 43 A.D. 3d 860, 841, N.Y.S 2d 673. Judgement for the Plaintiff in the amount of $2200.00 upon the proof of a paid receipt or two estimates. If the paid receipt or estimates are less than $2200.00 this judgment will be reduced accordingly.

So Ordered.

George R. Mayer
Village Justice

Dated June 10, 2016
Bronxville, N.Y.
Quiz of the Month  Submitted By Hon. Richard M. Parker

DUI Testing and Consequent Determinations

ACROSS

2  If the courts finds that there is a valid accusatory charging VTL 1192-2 and that the BAC was .08 or higher, the defendant has this recourse.

3  What form AA-134 is used to report.

6  Bureau within DMV which gets both the AA-134 and AA-137/AA-137V. (2 words)

8  The DataMaster DMT is used to perform this type of test. (2 words)

9  Agency responsible for conducting refusal hearings. (abbrev.)

10  What there is in your breath that a Draegar Alcotest 9510 measures. (2 words).

12  Commissioner who approves breath test instruments for use in New York State.

13  Type of suspension imposed for failure to submit to a chemical test.

15  The court should not suspend a defendant's license if the only accusatory instrument charging a felony VTL 1192-2 is this (2 words)

DOWN

1  Part of ensuring that the breath test instrument is working properly is the use of a substance of known value known as this. (2 words).

4  A “contaminant” in the room air can cause a breath test instrument to record a “blank error” during one of these cycles.

5  The court fills out Form AA-137V when scheduling a refusal hearing for defendants who were driving either a boat or this at the time of arrest.

7  Name associated with the prompt suspension of a defendant's license for VTL 1192-2.

11  If the antenna in the instrument's breath tube detects this, the test is immediately terminated and no BAC is reported. (abbrev.)

14  Roadside test used by police to establish probable cause that a defendant is driving while his abilities are impaired by alcohol. (abbrev.)

Answers on Page 8
At Duffy & Duffy, our mission is to advocate for patients who are harmed by medical malpractice, negligence or personal injury and to help our clients “and their families” receive justice. We bring to each client engagement years of legal experience, Unprecedented knowledge of trying medical malpractice and negligence cases and a passion to defend and fight for patients’ rights.

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Our cases are pending from Long Island to all parts of New York City, as well as other New York and out-of-state locations at times. All initial appointments and meetings are free and our fee is based on a contingency at arrangement.

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Cell: 516.551.5503  Office: 516-394-4200 • 516-746-2840

* Admitted to practice in the states of Massachusetts, New York, and New Jersey

* Provided pro bono representation to the SMA & Justices in matters with their respective municipalities
Point and Insurance Reduction Program

If you take the NYSP's DMV-approved Point and Insurance Reduction Program (PIRP) course, you can reduce your point total by four points AND save 10% on your automobile liability and collision insurance premiums. Take the course online: available 24 hours / 7 days a week / 365 days a year. If you have no points, you still get the insurance discount – it’s the law!

NYSP provides feedback to the court!

For years NYSP has provided information regarding violator participation in the classroom. This feedback is provided at no cost to municipalities. For more information on how to enroll in NYSP’s Court Referral Program contact us and start to participate now!

Proof of effectiveness
65% fewer violations - 35% fewer accidents as a result of taking the NYSP 6 Hour driver improvement course

How to enroll?

Classroom info call 718-748-5252
Or go to www.NYSP.com
Online course go to www.NYSPonline.com
Leaders in Service & Training since 1974

The National Traffic Safety Institute not only offers the NY DMV approved 6-hour defensive driving/traffic safety course, we also provide effective and cost efficient educational solutions to courts, probation departments and individuals.

**Court Diversion – Awareness Programs**

Our programs/workshops can be used as a sentencing alternative or court avoidance tool. In addition employers can use our training materials as a valuable in-house employee training and development program.

<table>
<thead>
<tr>
<th>Program</th>
<th>Focus</th>
<th>Duration</th>
<th>Note</th>
</tr>
</thead>
<tbody>
<tr>
<td>Theft/Consumer Awareness Workshop (Adults &amp; Youth)</td>
<td>Important information on alcohol and other drugs.</td>
<td>4-6-8 hour class.</td>
<td>Completion certificate available</td>
</tr>
<tr>
<td>Anger Awareness Workshop Level 1 (Adults &amp; Youth)</td>
<td></td>
<td>6-8-16 hour class.</td>
<td>Completion certificate available</td>
</tr>
<tr>
<td>Alcohol/Drug Awareness Education Program (Adults Only)</td>
<td></td>
<td>8 hour class.</td>
<td>Completion certificate available</td>
</tr>
<tr>
<td>Civic Responsibility Life Skills Program (Adults Only)</td>
<td>Personal Choices; Values; Action Planning &amp; more</td>
<td>6 hour workshop.</td>
<td>Completion certificate available</td>
</tr>
<tr>
<td>Youth Success Workshop (Youth Only)</td>
<td>Peer Pressure, Self-Image, Goal Planning &amp; more</td>
<td>4 hour workshop.</td>
<td>Completion certificate available</td>
</tr>
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<td>Personal Choices; Values; Action Planning &amp; more</td>
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**6 Hour Defensive Driving Classes**

6 Hour Defensive Driving Classes (Available online or classroom)

NTSI’s New York Defensive Driving course contains the most current information on defensive driving, traffic laws, collision avoidance, and the affects of alcohol and drugs on drivers. NTSI is a DMV-licensed Sponsoring agency approved since 1979. Attendees can receive 10% on liability insurance, reduce up to 4 points on their license (if applicable) and certificate is good for 3 years.

For more information visit our website WWW.NTSI.COM or contact us at 1.800.733.6874, email at ntsine@ntsi.com or fax us at 718.720.7021

201 Edward Curry Avenue, Suite 206, Staten Island, NY 10314