The Magistrate

The Courts Closest to the People

IN THIS ISSUE:

Spring 2018

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NEW YORK STATE MAGISTRATES ASSOCIATION

The Magistrate

The Courts Closest to the People

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 judgement;
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

100.6 Application of the Rules of Judicial Conduct

(B) **Part-Time Judge:** A part-time judge:

(3) shall not permit his or her partners or associates to practice law in the court in which he or she is a judge, and shall not permit the practice of law in his or her court by the law partners or associates of another judge of the same court who is permitted to practice law, but may permit the practice of law in his or her court by the partners or associates of a judge of a court in another town, village or city who is permitted to practice law;

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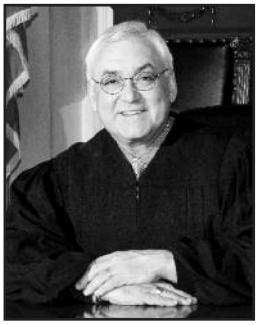
PRESIDENT'S MESSAGE

Hon.
David S. Gideon



My Fellow Judges-

Although it seems hard to believe, I am already one-third of the way through my term as president and I have not "tweeted" once. Nor have I been threatened with impeachment … yet.

In this relatively short time, our Association officers and committees have been actively pursuing several projects and furthering the goals of our Association and the membership.

I have invited all members to attend and share their ideas and concerns with our Executive Board at the scheduled quarterly meetings and I was pleased to welcome Hon. Lucy Proper, Town of Roseboom Justice, Otsego County, Hon. Kenneth Marbot, Town of Pittstown Justice, Rensselaer County and Hon. Ohi Johnsen, Town of Day Justice, Saratoga County to our December meeting in Syracuse. Their comments and participation were invaluable to the Board and it is my hope that each enjoyed the experience and came away with a new appreciation of how our Association works. The full schedule of Executive Board meetings is posted on our Association website at www.nysma.net and I welcome your participation.

On February 6th, I attended the 2018 State of Our Judiciary presentation by Chief Judge Janet DiFiore at the New York State Court of Appeals. Judge DiFiore spoke about current and future efforts to reduce delays in adjudication, provide indigent representation, improve attorney scheduling and addressing the opioid crisis. The majority of her comments were focused on the state-paid courts rather than our Town and Village Courts.

Judge DiFiore highlighted the current implementation of the four pilot Centralized Arraignment Parts in Broome, Oneida, Onondaga and Washington counties to facilitate the presence of counsel at off-hours and weekend arraignments. Judge DiFiore acknowledged the success reported thus far and indicated that budget funding requests have been made this year for four additional parts in Ontario, Warren, Otsego and Livingston Counties.

Afterwards, I had the pleasure of speaking with Judge DiFiore and presented her with a NYSMA logoed personalized coffee mug, which I understand is now proudly displayed by her on her chambers bookshelf at the Court of Appeals.

I also had the opportunity to attend the reception at the New York State Bar Association where the Chief Administrative Judge of the Courts, Hon. Lawrence K. Marks, introduced me to the co-chair of the Judicial Task Force on the New York State Constitution, Hon. Alan D. Scheinkman. Judge Scheinkman indicated that he will be inviting me to address the task force concerning Town and Village Courts, although he has assured me that the current charge of the Task Force will not involve our Town and Village Courts, but rather will focus on the labyrinth of courts, parts and procedures in the state-paid court structure.

While I was occupied at the Court of Appeals, our legislative committee members, co-chairs Hon. Robert Bogle and Hon. Gary A. Graber, Hon. Karl E. Manne and Hon. Tanja Sirago were busy on capitol hill visiting several senators, assembly members, staffers, AOT and NYCOM seeking their support for our legislative agenda items. I understand that several of the meetings were encouraging, particularly regarding our proposals for legislation to allow for at least a minimum of one-half year credit towards the retirement system, allowing for village boards to appoint a second associate village justice without going through the current legislative steps necessary, and granting enforcement powers in the adjudication of ABC Section 65 charges.

On another note, you are all probably aware by now that the disbursement of funds was finally approved for the Office of Court Administration purchase of the SEI Court Docketing Program. My understanding is that the SEI staff will become state employees and continue to support the program and answer your inquiries. It is my further understanding that the transition will not be completed until sometime in March and I would encourage everyone to be patient during this time. The end result will be an overall savings to your municipality as the annual maintenance fees for the program will no longer be incurred going forward; a savings which I hope will be passed on to the court to be used for court purposes.

On other fronts, our committee to explore a low cost insurance option to provide for legal expense coverage if confronted with charges before the New York State Commission on Judicial Conduct is progressing. Hon. Dennis W. Young and Hon. Michael Sterio are co-chairing this effort and have submitted detail requests for proposals. With regard to other aspects concerning the Commission, a discussion has begun advocating for an open file discovery procedure similar to the procedures utilized by the respective Attorney Grievance Committees.

Our Judicial Training and Education Committee, under the able guidance of co-chairs Hon. Edward Van Der Water and Hon. Jonah Triebwasser, is beginning to formulate the elective programs to be offered at our annual conference in September. If you have any suggestions for topics to be presented, I would encourage you to reach out to them with your ideas.

Hon. Sherry Davenport, Chair of the Consolidation and Court Reform, Counsel at Arraignment Committee has been working closely with Gillian Koerner, President of the New York State Association of Magistrates Court Clerks and the other committee members to develop a program to educate Town and Village municipal officials on the duties and obligations of the court and its personnel. For too long, our officials have viewed our courts as no more than "cash cows" with a minimal understanding of our obligations. We hope that this program will bridge that gap and be available for use by all of our members in their presentations before their respective boards.

Carrying that thought further, at the March Executive Board meeting, I will be presenting a proposal for retaining a public relations firm to coordinate statewide efforts in giving us greater public exposure. This greater public exposure will foster a greater public understanding of our courts and what we do in our communities. If approved, I envision the development of programs and public interest articles that will be made available for use by our membership in their municipal newsletters and newspapers, providing topics of interest to the general public and fostering a better appreciation of our judges and court staff. With a more transparent and educational approach, the general public may gain a greater appreciation of the value of their Town and Village Courts.

Finally, and most importantly, with the assistance of the County Association Committee, chaired by Hon. David Kozyra, I have begun to schedule more and more county association visits to add to the "Where's [Waldo] Gideon" map on our Association website. I thoroughly enjoy meeting with each of your associations and your membership, sharing stories and experiences that we all benefit from. If you have not scheduled a visit with me, I would ask your county association president to contact me or Hon. Tanja Sirago so that your county association can be added to my travel calendar.

Of course, if you have any ideas to share or concerns to relate, please reach out to us. Our New York State Magistrates Association is *all* of us collectively, working together, for the betterment of all.

Executive Committee Highlights

Highlights of the December 2, 2017 Executive Committee Meeting held at the Embassy Suites, Syracuse, are presented for your information.

President David S. Gideon welcomed all members to the meeting site. He asked guests Hon. Lucy Proper, Hon. Kenneth Marbot and Hon. Ohi Johnsen to introduce themselves.

The 2018 NYSMA budget was discussed and approved. Past President Hon. Sherry Davenport along with others were authorized to organize and attend on behalf of SMA training at the Southern Tier West classes.

Discussion was held on the numerous committee reports.

Hon. David O. Fuller moved to sign a contract with the Crowne Plaza in Lake Placid for the 2019 annual conference. Motion carried.

The legislative agenda was discussed with plans to meet with the Association of Towns, New York Conference of Mayors, Senate and Assembly members and staff.

The new design of the NYSMA decal was distributed and approved.

Discussion was held to explore a media relations group to help educate the public about the town and village courts and the role they play in the communities.

The next Executive Committee meeting will be held in Watkins Glen at the Harbor Hotel on March 24, 2018.

Raise the Age NY

On April 10, 2017, Governor Andrew Cuomo signed into law "Raise the Age" legislation that was included as part of the State budget. It can be found in A-3009c/S-2009c.

KEY COMPONENTS OF THE LEGISLATION

The presumptive age of juvenile accountability is raised for 16 year olds effective 10/1/18 and for 17 year olds effective 10/1/19. Except as otherwise noted, all components described below are pursuant to this timeline.

The law will change cases for 16-17 year olds in the following ways:

Parental Notification

- Parents must be notified when their children are arrested.
- Questioning of youth must take place in age-appropriate settings, with parental involvement (including in regard to waiving Miranda rights), and for developmentally appropriate lengths of time.

Court Processing

The vast majority of cases of 16-17 year olds will ultimately be heard in the Family Court, either originating there or being transferred there from the new Youth Part of the adult criminal court.

Misdemeanors:

- All misdemeanor cases (other than vehicle and traffic law misdemeanors) will be heard in Family Court pursuant to the Family Court Act. This includes Family Court Act procedures for adjustment and confidential records.

Felonies:

- All felony cases will start in the Youth Part of the adult criminal court.
- All **non-violent felonies** will be transferred from the Youth Part to the Family Court unless the District Attorney (DA) files a motion within 30 days showing "extraordinary circumstances" as to why the case should remain in the Youth Part. If the DA files a motion, there can be a hearing and the judge must decide within five days of the hearing or motions whether to prevent the transfer of the case to Family Court.
- **Violent felonies** can also be transferred from the Youth Part to the Family Court. If the charges do NOT include the accused displaying a deadly weapon in furtherance of the offense, causing significant physical injury, or engaging in unlawful sexual conduct, the case will transfer to Family Court unless the DA files a motion within 30 days showing "extraordinary circumstances" as to why the case should remain in the Youth Part. If the charge does include an element listed above, removal to Family Court is only possible with consent of the DA. Vehicle and Traffic Law cases and Class A felonies other than Class A drug offenses cannot be transferred.
- 16 and 17 year olds whose cases remain in the Youth Part will be referred to as "Adolescent Offenders." Adult sentencing will apply, but the judge must take the youth's age into account when sentencing. Adolescent Offenders are eligible for Youthful Offender treatment, as is the current law with respect to 16 and 17 year olds charged as adults.
- Adolescent offenders may voluntarily participate in services while their case is pending.

Violations:

- Violations will be heard in adult criminal/local courts, as is the current law.

Family Court:

- Youth whose cases are heard in the Family Court will be processed pursuant to existing Juvenile Delinquency (JD) laws, which includes the opportunity for adjustment. They will not have a permanent criminal record.

Youth Part of Adult Court:

- New "Youth Parts" will be created. All 13-15 year old Juvenile Offenders and all 16-17 year Adolescent Offenders will have their cases in the Youth Part.
- Family Court judges will preside over cases in the Youth Parts.

Continued on page 6

Facilities

- No 16 or 17 year old will be sentenced to or detained in a facility with adults. To the extent practicable, no youth under 18 will be held at Rikers Island by 4/1/18 and as of 10/1/18, a full prohibition against youth under the age of 18 being held at Rikers Island will be in effect
- Youth whose cases are heard in Family Court will be detained or placed in OCFS-operated, OCFS-licensed, or ACS facilities (including Close to Home), as Juvenile Delinquents currently are.
- Adolescent Offenders who are detained pre-trial will be held in a specialized secure juvenile detention center for older youth, which will be certified and regulated by OCFS in conjunction with the state commission of correction. Judges have the discretion to order that
- Adolescent Offenders who are sentenced to less than a year serve such sentences in a specialized juvenile detention center for older youth.
- Adolescent Offenders who are sentenced to state imprisonment will be placed in an Adolescent Offender facility developed by the state with enhanced security managed by DOCCS with the assistance of OCFS

Sealing

- Anyone convicted of an eligible offense in an adult court may seek to have his/her record sealed pursuant to C.P.L. § 160.59 after ten years from the imposition of the sentence or discharge from incarceration, whichever is latest. Violent felonies, sex offenses, and Class A felonies are not eligible offenses. In addition, sealing is only available for people who have no more than two convictions, one of which may be for a felony.
- The court will create a standardized form for a person to use to apply for sealing. There will be no fee for applying.

Raise the Age Implementation Task Force

- The Governor will appoint members of a task force to coordinate the implementation of these changes.
- The Task Force will issue a report on planning and implementation one year after the effective date (April 2018) and after an initial year of implementation (by August 2019).

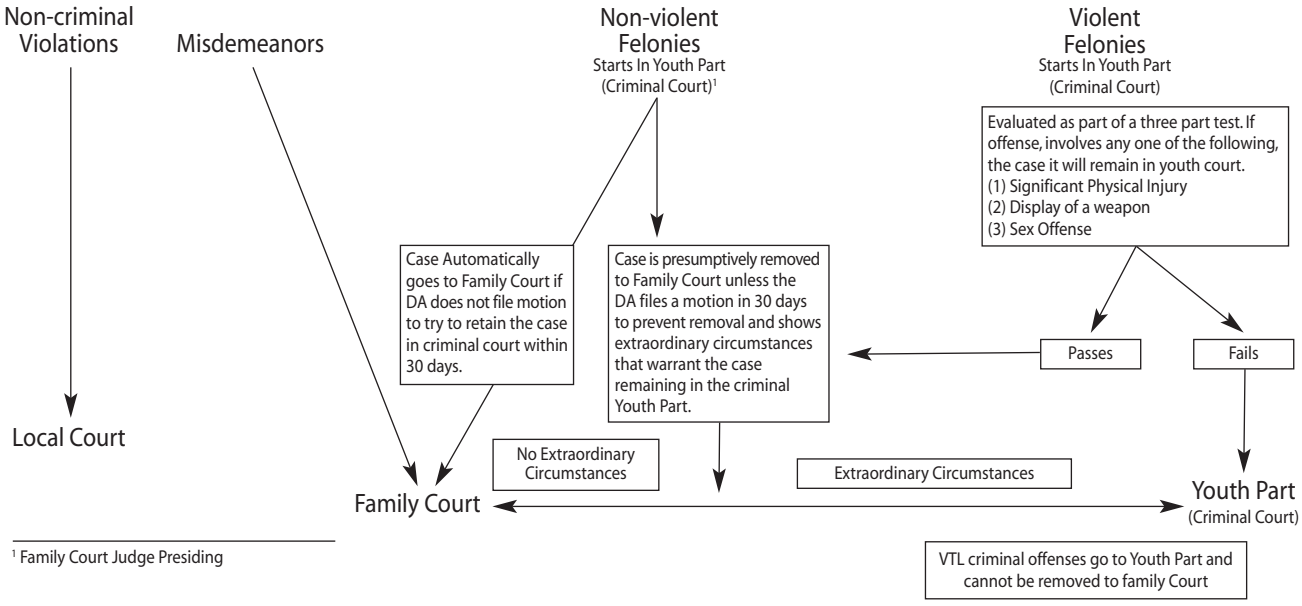
Effective Dates

- Sealing Provisions: People may begin to apply for sealing 180 days after enactment (10/6/17).
- Raise the age for 16 year olds: 10/1/18
- Raise the age for 17 year olds: 10/1/19
- Sections related to state reimbursement to the counties for probation are effective 4/1/18
- Sections related to reimbursement for detention and alternative to detention are effective 10/1/18.
- Elimination of state support for detained PINS will start 1/1/2020.
- Youthful Offenders

The Youthful Offender (YO) laws remain the same.

New York State Assembly Chart Summarizing Court Processing

Raise the Age Flow Chart



[1] Family Court Judge Presiding

Guest Speaker Hon. David Gideon

On January 30th, 2018 the Saratoga County Magistrates and Court Clerks Association held its annual banquet at the Fairways at Halfmoon Golf Course in Mechanicville, Saratoga County, NY.

In attendance were NY Magistrates Association President Judge David Gideon, NY State Magistrates Association Board of Directors Judge Donna Yeardon of Middlefield Town Court, Judge James Evans of Northumberland Town Court, NY Magistrates Court Clerks Association Assistant Treasurer Jennifer Miller, of the Moreau Town Court, and NY Magistrates Court Clerks Association 2nd Vice President Jane Curtiss, of Malta Town Court.

The Association's guest speaker was Judge Gideon.

Judge Gideon is currently a sitting judge in the Town of Dewitt, Onondaga County, NY. He has been instrumental in having training for both our Judges and Court Clerks throughout the State of New York.

Judge Gideon spoke about assigned counsel at arraignment, consolidation of services and the protection of the Town and Village Courts, Taking the Bench Training for new Judges and Court Clerks. He also mentioned many other topics including, and most importantly, the unity of both the Magistrates Association and the Magistrates Court Clerks Association. Strength in numbers was his message, and what a strong message it was.

Judge Gideon was truly inspiring and declared to our association that he is working to support our town and village courts and our staffs.

Judge Gideon was presented a unique Saratoga Tradition: A Peppermint Pig made by the Saratoga Sweets Company. This tradition of the Peppermint Pig dates to the 1880s, when Saratoga Springs was a thriving resort town with two of the world's largest hotels and lively casinos. It is believed that chefs from Europe who came to work at the hotels influenced Jim Mangay, the originator of the pigs, to make something that approximated marzipan candy. But marzipan was not readily available, so Mr. Mangay adapted, using peppermint oil from his father's apothecary.

Judge Gideon used the State Magistrates gavel to break the Peppermint Pig into small pieces and the entire association took a piece to give good luck for the foregoing year.

Thank you Judge Gideon and Director Yerdon for coming to break bread and candy in Saratoga County and share your thoughts and ideas to make our Town and Village Courts stronger!

The Future Of Bail?

By Hon. Jonah Triebwasser[1]

New York Governor Andrew Cuomo has proposed substantial changes in how courts handle applications by the People for bail on defendants. The bail law can currently be found in Section 510.30 of the Criminal Procedure Law. The criteria include (but are not limited to):

- The defendant's character, reputation, habits and mental condition;
- His employment and financial resources;
- His family ties and the length of his residence if any in the community;
- His criminal record if any;
- His record of previous adjudication as a juvenile delinquent, as retained pursuant to section 354.2 of the Family Court Act, or, of pending cases where fingerprints are retained pursuant to section 306.1 of such act, or a youthful offender, if any;
- His previous record if any in responding to court appearances when required or with respect to flight to avoid criminal prosecution.

In his State of the State message for 2018, Governor Cuomo has suggested changes in the laws regarding bail. The Governor stated:

"New York's jails are currently filled with an alarming majority of individuals who have not been convicted of any crime and are simply waiting for their day in court. In fact, in New York City, more than 75 percent of people held in jail last year were pretrial defendants. Throughout the rest of the State in 2016, more than 60 percent of people were held pretrial. This is unacceptable and blind to justice."

To address this perceived problem, the Governor will advance legislation to accomplish the following:

- First, the law will create a presumption that people facing misdemeanor and non-violent felony charges must be released, and they must be released without cash bail. People will be released either on their own recognizance or with non-monetary conditions imposed by the court, such as reporting to a pretrial services agency.

- Second, monetary bail would be permitted, but not required, in remaining cases, after an individualized assessment of the nature of the case and the defendant's personal and financial circumstances. If a judge does set bail, the court must give the defendant a choice between cash or bail industry bonds and an alternative form of bail that the judge will set, such as an unsecured or partially secured bond.

- Third, in cases involving domestic violence or other serious violence, or if, while on pretrial release, a defendant commits a crime or willfully fails to come to court, a judge could order a defendant to be held in jail pretrial if the court finds, after due process, that the defendant poses a high risk of not returning to court or poses a current threat to the physical safety of a reasonably identifiable person or persons.

DAs Weigh In

After the release of the Governor's bail proposal, district attorneys in New York, Kings, Dutchess and Westchester counties had differing points of view.

Manhattan (New York County) District Attorney Cyrus R. Vance, Jr., and Brooklyn (King's County) District Attorney Eric Gonzalez announced together that they will no longer request that bail be set in most misdemeanor and violation cases.

Both prosecutors claimed that bail has a disproportionate impact on low income people of color, who are more likely to be sent to jail while awaiting trial because they can't afford even a few hundred dollars for bail or a bond. Going to jail can affect their ability to hold down a job and take care of their children.

"The goal is to continue to reduce the inequality or the appearance of inequality in our justice system, and at the same time responsibly reduce the number of pretrial detainees . . . ," said Vance.

Under new misdemeanor bail guidelines, the DA's offices will operate from the presumption that no bail is to be requested in misdemeanor and violation cases. The offices will continue to ask for bail in certain cases involving violence, including domestic violence, sex crimes and injury to a police or peace officer.

The office might also continue to request bail in additional cases, including those in which the defendant has been convicted of a violent felony or other serious felony (e.g., sex trafficking, robbery in the third degree) within the past 10 years, convicted of a sex crime, has a pending felony case or multiple pending

misdemeanor cases or is on parole, probation or supervised release.

Calling it "discriminatory," Westchester County District Attorney Anthony Scarpino said his office will also no longer seek bail in most misdemeanor cases. Scarpino said the move was done to promote fairness and end unnecessary incarceration for impoverished defendants.

"The District Attorney's Office has issued guidelines for local court branches to ensure all defendants are treated fairly and equally while providing adequate assurance that he or she will return to court when required," Scarpino said. "While our current policy has not resulted in a large number of defendants being detained on misdemeanor charges, it is essential that we revisit these policies from time to time."

Dutchess County District Attorney William Grady was quoted in the New York Law Journal as calling Cuomo's proposals "somewhat misguided," and said that prosecutors in his county will not be joining their counterparts in such a shift.

"I'm not about to endorse the plan put forward by [Manhattan] DA [Cyrus] Vance [and Brooklyn DA Eric Gonzalez], because I think we [prosecutors] must be able to argue for bail wherever we feel it's appropriate, in each and every case," Grady said. "It is somewhat misguided to assume that you can come up with this rule and a list of exceptions to the rule."

"Each case is different, of course," he continued, "and there are any number of extenuating circumstances that must justify the court setting the bail that would not be contained in the so-called rule and its list of exceptions." He also said, "There are other ways to address the issue [of cash bail leading to the poor being disproportionately kept behind bars], other than an across-the-board mandate that bail cannot be set in all misdemeanor cases."

Among the alternatives named by Grady were pretrial "diversion" programs, such as Dutchess County's Alternatives to Incarceration Program, which he said evaluates alleged offenders who can't make bail for recommended release; electronic monitoring outside of incarceration; and release to the supervision of the probation department.

Meanwhile, New York State Supreme Court Justice Maria Rosa issued a decision from her chambers in Poughkeepsie, Dutchess County,[2] ordering that when bail is imposed "the court must consider the defendant's ability to pay and whether there is any less restrictive means to achieve the State's interest in protecting individuals and the public and to "reasonably assure" the accused returns to court. *Pugh v. Rainwater*, 572 F2d 1053, 1057 (1978)."

Defendant Kunkeli was arraigned on a charged of petit larceny for allegedly stealing a vacuum cleaner from a local department store. He was committed to the Dutchess County Jail on $5,000.00 cash bail over $10,000.00 secured bond. Defendant had a record of not appearing in court and had a history of past bench warrants. Judge Rosa held "[i]t is clear to this court that a lack of consideration of a defendant's ability to pay the bail being set at an arraignment is a violation of the equal protection and due process clause of the Fourteenth Amendment and of the New York State Constitution. Clearly, $5000.00 bail to someone earning $10,000.00 per year, like the petitioner, without significant assets, is much more of an impediment to freedom than $5000.00 bail would be to a defendant earning substantially more and/or with significant assets. Setting that sum as to both such individuals would not be equal treatment. Yet, the Fourteenth Amendment and the New York State Constitution both require that individuals under such circumstances be treated equally. 'No person shall be denied the equal protection of the laws ...because of race, color, creed or religion ...' (New York State Constitution Article 1 Section 11). Perhaps it needs to be said that discrimination on any basis, including on the basis of how much money someone has, is a violation of the equal protection clauses and due process clauses of the New York State and United States Constitutions. Freedom should not depend on an individual's economic status. *Bearden v. Georgia*, 461 US 660 (1983); People *ex rel. Wayburn v. Schupf*, 39 NY2d 682 (1976)." District Attorney Grady has vowed to appeal Judge Rosa's decision saying "I don't think legislating from the bench, which this judge did, is the correct way to handle an issue as significant as this in that it could have potential statewide implications."

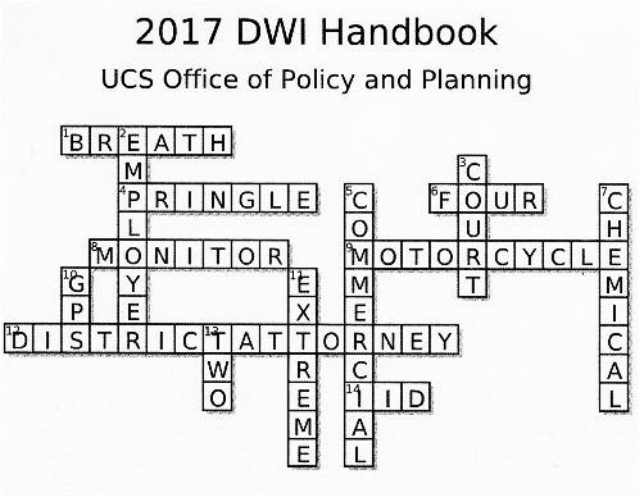
What is the future of bail in our courts? As former U.S. Attorney Preet Bharara says: "Stay tuned!"

[1]Hon. Jonah Triebwasser is Town and Village Justice in Red Hook, Dutchess County, New York. He is first vice-president of the New York State Magaistrates Association and editor of Magill's Manuals for Penal Law and Vehicle and Traffic Law for Local Courts.

[2]*People ex rel. Kunkeli v. Adrian Butch Anderson, Dutchess County Sheriff*, Index 90/2018.

Answers to

Quiz of the Month



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What To Watch For In VTL Cases in 2018

By Hon. Jonah Triebwasser

Since most (if not all) of us have more vehicle and traffic cases than any other matters in our courts, I thought that it would be helpful to review what new or unusual items we should all look out for in 2018 in VTL cases.

In cases involving section 375(12)(a) [Windows with less than 70% light transmission] if the defendant can prove to DMV's satisfaction that he or she has an allergic reaction to sunlight, they will be issued a certificate of exemption from the requirements of the statute which must be attached to the defendant's vehicle.

In section 1102, it will be a violation to ignore the lawful orders of a fire police officer as well as a police officer or a flag person.

You may see an enforcement initiative involving section 1229(c)(13) for those school bus drivers who operate their busses without having the students in seatbelts. The violation carries a civil fine between $25.00 and $100.00.

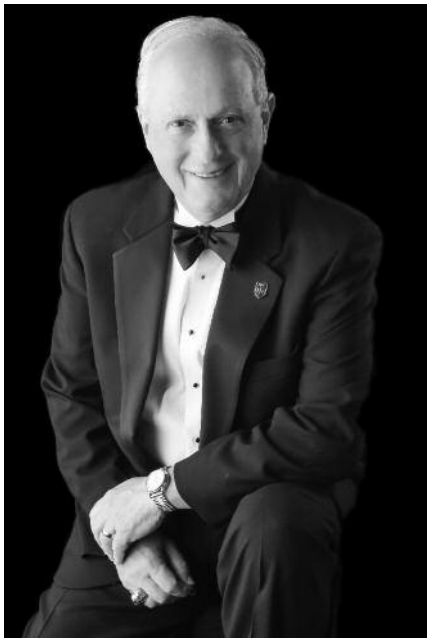
There is a new Article 44 regulating "Transportation Network Company Services" which is a fancy name for the on-call private cabs running under Uber, Lyft or Juno. It will be a violation under section 1696(1)(e) to operate such a vehicle without the required permit.

In Article 47, regarding the registration of snowmobiles, the minimum fines have been reduced from $200.00 to zero, allowing the court more flexibility to show leniency where appropriate.

As more changes come from DMV or the legislature, we will bring those to your attention.

Hon. Jonah Triebwasser

Judge Elected to State Bar House of Delegates



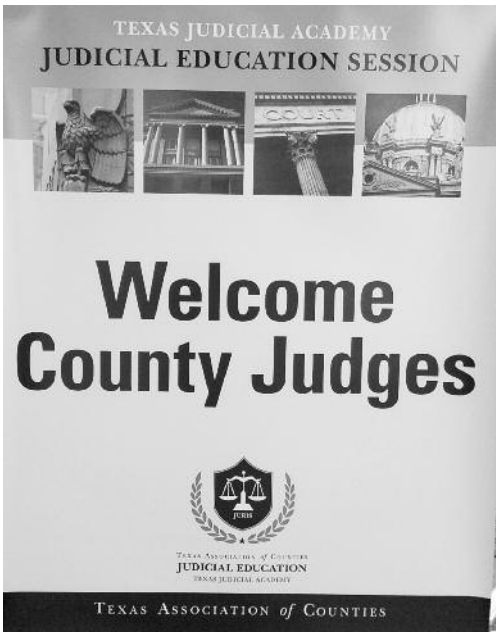
Hon. Jonah Triebwasser, Town and Village Justice for Red Hook, Dutchess County, New York, has been elected as a representative to the New York State Bar Association's House of Delegates for the 9th Judicial District.

The House of Delegates is the State Bar's policy making body. The 9th judicial district encompasses the Hudson Valley counties of Dutchess, Orange, Putnam, Rockland and Westchester.

Judge Triebwasser is a graduate of the John Jay College of Criminal Justice (Class of 1972) and the New York Law School (Class of 1979.) He is first vice-president of the New York State Magistrates Association and past president of the Dutchess County Bar Association and the Dutchess County Magistrates Association.

NYSMA Past-President Hon. Gary Graber Lectures at Texas Judicial Academy

Hon. Gary A. Graber spoke at classes held for the constitutional county court judges within the state of Texas during their recent training session in Galveston. Judge Graber lectured on the role of the judiciary in commercial drivers cases.



Judge Graber pointed out that one of the most important assets of being a judge is to bolster the public's trust and confidence in the courts. Each judge handling traffic court cases must be aware of how the federal law is adopted and applied by the states and appreciate stakeholder responsibilities insuring safe operation of trucks and busses by those possessing a commercial driver's licenses.

Justice Graber, a member of the faculty at the National Judicial College, Reno, Nevada, has been lecturing extensively on commercial motor vehicle subjects to criminal justice personnel both within New York and throughout the country since 2008.


Hon. Gary Graber

Since its founding more than 50 years ago, The National Judicial College has been the nation's premier judicial education institution. The NJC pursues its mission of *education | innovation | advancing justice* with the support of individuals and organizations dedicated to preserving and improving the rule of law. Its supporters include scores of active and retired judges and attorneys along with government agencies and private foundations. Teaching at the NJC is a high honor, and most NJC courses are taught by judges who volunteer their time. The same is true of the members of the NJC's boards of trustees and visitors.

Spring Necrology Report

Whereas, Almighty God has called from our midst a number of treasured associates, and bowing in humble obedience to his will, we honor and remember the following magistrates who have passed away recently.

We remember them as fond friends, loyal servants, and staunch exponents of democracy and our judicial system. We enjoyed their friendship and helpful contributions in our work as Magistrates, in business and in social hours.

We honor their memory and salute their virtues.

Respectfully Submitted,
Hon. Vera L. Hustead

Name	Town/Village	County
Hon. Eugene O. Corey	Town of Shawangunk	Ulster
Hon. Robert Eick	Town of Alabama	Genesee
Hon. Charles D. Fallon	Town of Lumberland	Sullivan
Hon. Darwin V. Fleury	Town of Westville	Franklin
Hon. John C. Ingraham	Town of Marshall	Oneida
Hon. John R. Jarosz	Town of Paris	Oneida
Hon. Robert W. Jordan	Town of Esopus	Ulster
Hon. Henry V. Kensing	Town of Mount Kisco	Westchester
Hon. Eli Lambert	Town of Altona	Clinton
Hon. Edward P. Loux	Town of Richmond	Ontario
Hon. Dennis E. Martin	Town of Guilford	Chenango
Hon. Peter Margolius	Town of Catskill	Greene
Hon. John J. Mattio	Town of Wheatfield	Niagara
Hon. Daniel R. Mitchell	Town of Plattsburg	Clinton
Hon. K. Barry Neal	Town of Yates	Orleans
Hon. Carmen Orlando	Town of Phelps	Ontario
Hon. Patrick J. Pietropaoli	Town of Chili	Monroe
Hon. James G. Rhoades	Town of Fort Covington	Franklin
Hon. Diana Roberts	Town of Kirkwood	Broome
Hon. Rose M. Spann	Town of Martinsburg	Lewis
Hon. Howard Stettinger	Town of Charleston	Montgomery
Hon. William P. Tully	Town of Windsor	Broome
Hon. Richard K. Whitenack	Town of West Sparta	Livingston
Hon. Richard Woolever	Town of Erin	Chemung
Hon. Patricia H. Yarina	Town/Village of Lowville	Lewis

"Masking" of Truckers' Driving Record Threatens Highway Safety

Federal law provides a process to remove unsafe commercial motor vehicle operators from the road. Drivers are supposed to lose their commercial driving privileges when they are convicted of certain major traffic related offenses or repeated moving violations. Unfortunately, the legal system itself may prevent these convictions from ever appearing on the driver's record. This failure to report convictions is known as "masking."

THE NATIONAL JUDICIAL COLLEGE
Est. 1963

The National Judicial College, the nation's oldest and largest educational institution for judges, has hosted classes on their Reno, Nevada campus, as well as a nationwide series of webcasts to judges under a grant from the Federal Motor Carrier Safety Administration. The goal: to make sure judges are aware of the federal and state mandates to report convictions for traffic violations in a timely manner and not mask worrisome driving records.

What is masking?

Masking refers to any action taken by a court that keeps a conviction for a moving violation from appearing on the driving record of a commercial motor vehicle operator.

Sometimes judges and prosecutors agree to erase the conviction from the driver's record if the driver completes traffic school or goes a period of time without committing another offense. While such arrangements are common – and legal – for non-CDL holders, they violate federal regulations governing CDL holders and those driving commercial motor vehicles.

Why do courts agree to obscure driving records this way?

Often convictions are deferred or diverted in some manner out of sympathy for the driver whose lawyer may plead that the loss of a commercial driver's license will make it all but impossible for the driver to find work and support his or her family.

Why should we care?

Because commercial motor vehicles are substantially larger and heavier than other automobiles, unsafe truck and bus drivers are that much more dangerous. Studies show that accidents involving commercial motor vehicles are nine times more likely to result in a serious injury or death. A 2005 study by the American Transportation Research Institute found that drivers convicted of violations ranging from speeding to reckless driving were up to three times more likely to be involved in future crashes. Too many crashes involve drivers whose licenses should have been revoked. For example, in 2014 a truck driver with 11 traffic violations since 2005 sped through a construction zone, hitting three cars and killing five people.

What's the punishment for masking?

In accordance with Federal statutes, the Department of Transportation can withhold up to four percent of a state's federal highway funds the first year after masking is discovered and up to eight percent in subsequent years of noncompliance. For a large state, that could amount to tens of millions of dollars in the first year.

What is the trucking industry's position on this?

Rich Pianka, deputy general counsel for the American Trucking Association, issued this statement:

"ATA believes that comprehensive, accurate records of a commercial driver's infractions are critical to highway safety. Only if those records convey a complete and accurate picture of a driver's history can enforcement authorities and motor carriers ensure that only safe and responsible drivers end up behind the wheel. Given the high stakes, the federal 'masking' regulations play an important role in highway safety by prohibiting states from practices that would obscure a commercial driver's violations."

What is the federal government doing to curb masking?

The Federal Motor Carrier Safety Administration has provided grant funding for educational programs for judges through The National Judicial College for the past eight years. FMCSA also works with the National District Attorneys Association and National Center for State Courts to promote awareness of these issues to prosecutors and court clerks.

For more information, visit the NJC website at www.judges.org

More News From the NJC THE NATIONAL JUDICIAL COLLEGE Est. 1963

The National Judicial College in Reno, Nevada, recently welcomed 18 judges from across the country for their faculty development workshop. Among those 18 were our own New York Judges Hon. Roger Forando and Hon. Jonah Triebwasser.

During the week-long training, the judges explored adult-learning techniques, creating power point presentations and drafting educational program plans.

For more than 50 years, the National Judicial College has been the leader in judicial education. The first to offer programs to judges nationwide, the NJC continues to work with the judiciary to improve productivity, challenge current perceptions of justice and inspire judges to achieve judicial excellence.

Shown in the photograph, from left to right, are William Brunson, Esq., NJC Director of Special Projects, Hon. Jonah Triebwasser (Town and Village of Red Hook - NYSMA 1st Vice-President), Hon. Roger Forando (Town and Village of Granville - NYSMA Director), University of Nevada Prof. Kelly Tait and NJC Director of Distance Learning, Technology and Faculty Development Joseph Sawyer.

photo by Bryan Walker, NJC

The Benefits Of Having Your Court Clerk Become A Member Of The NYS Association of Magistrate Court Clerks, Inc.

By Annie Raskoskie[1]

The mission of the NYSAMCC has always been education and training for all Town and Village court clerks throughout New York State. The Executive Board of the NYSAMCC is launching a membership campaign to reach all court clerks and encourage them to become a member of our association. We are looking for your help as justices to make sure that your clerk(s) are members and are receiving all of the benefits that come with joining an association made up of over 1,100 court clerks across the State! That in itself is a benefit, having the ability to network with clerks who have tremendous knowledge and experience in helping to maintain our Justice Courts in an accurate efficient and professional manner. Not only will the court clerk benefit but so will the judge and the communities we serve.

Our new endeavor this year is to put in motion a mentoring program for newly appointed court clerks. A board member will contact the new hire shortly after appointment and match them with a seasoned clerk. That clerk will set up a visit to their court to assist him or her in any procedure of the court. They will also be scheduling a day the new clerk could sit in a court session with an experienced clerk.

With mandatory training now a reality, the NYSAMCC needs to have strength in numbers. The Office of Justice Court Support has been very understanding and cooperative. We are working together to develop the presentations and making sure the content is what your clerks need to know. Having the presentations pertain to the clerk's duties allows the court clerks to become confident in completing the task at hand accurately and efficiently. This could be from reporting CDR'S, DMV dispositions, WebDVS, running rap sheets, to maintaining accurate financial records for your court. As you know, there is so much for us to know! With strength in numbers, our associations will continue to have a say in the education programs offered under the mandatory training program.

Our association acts as a liaison with the Office of Court Administration, Office of Justice Court Support, Office of the New York State Comptroller, law enforcement agencies, the NYS Department of Motor Vehicle, Department of Criminal Justice and the NYS Magistrates Association. These agencies are all integral parts of our training and educational programs. Our goal is to give all clerks access to agencies/people who are part of our everyday court operations so that they may obtain the information that is required to do their jobs. Our executive board is available and encourages court clerks to contact us with questions or inquiries on how to obtain information.

If your town/village board is not forthcoming with the means to pay for your clerk to go to a conference and you feel your clerk would benefit from attending, please have them apply for one of our scholarships. They are given out for the Potsdam training in July and our annual fall conference. Information about applying for a scholarship is available in *The Docket*, which is provided to all paid members, and is also on our website.

So what are you waiting for…have your court clerk become a member today! Applications are available in this magazine, on our website - www.nysamcc.com, or in our publication, *The Docket*.

[1] Annie Raskoskie is 1st Vice-President of the NYS Association of Magistrate Court Clerks and is a court clerk in the Town of Ulster

NEW YORK STATE ASSOCIATION OF MAGISTRATES COURT CLERKS, INC.

www.nysamcc.com

INVOICE

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If you are a new clerk, please indicate the Name of Clerk you replaced: _____

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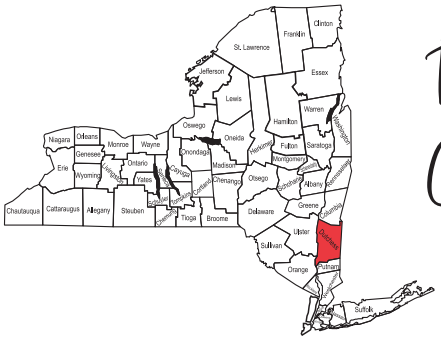
For questions or information please contact:

Membership Chair..... Annie Raskoskie .....845-382-1737 ..... araskoskie@nycourts.gov
Treasurer ..... Dora Richter..... 315-769-5431 .....drichter@nycourts.gov

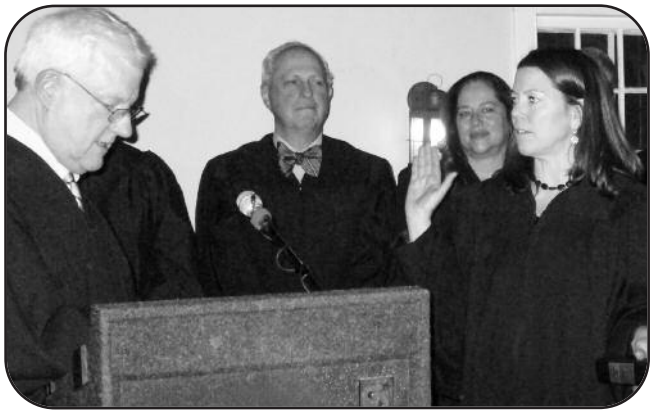
Payment of dues will be accepted from Jan 1, 2018 through the "fixing of the record date". August 3, 2018.
Your access to the password protected portion of NYSAMCC.com will be good until April 1st , 2018.
At that time, your website access will be denied if your dues are not received.

IF YOUR TOWN OR VILLAGE REQUIRES A VOUCHER ONE MAY BE PRINTED ON OUR WEBSITE WWW.NYSAMCC.COM

About My County Association



Dutchess County



The Hon. James T. Rooney, Putnam County Court, administers the oath of office to Judge Acker while NYSMA 1st Vice President Hon. Jonah Triebwasser and NYSMA Director Hon. Susan Sullivan-Bisceglia look on.

Members of the Dutchess County Magistrates Association and other members of the judiciary were out in force for the swearing in of Town of Pine Plains Justice Hon. Christi J. Acker as Justice of the New York State Supreme Court.

Shown in the photo, from left to right, are: Magistrates Vice-President Hon. Jeffrey C. Martin (Town and Village of Red Hook); Hon. Joseph Egitto, Dutchess County Family Court; Thomas Morris, Deputy Director, Dutchess County Probation; Mary Ellen Still, Director, Dutchess County Probation; Magistrates President Hon. Rick Romig (Town of East Fishkill); Magistrates Secretary Hon. Susan Sullivan-Bisceglia (Village of Wappingers Falls); and Magistrates Treasurer Hon. John Kane (Town and Village of Rhinebeck.)

Members of the Dutchess County Magistrates Association welcomed Mary Ellen Still, Director of Dutchess County Probation, and Thomas Morris, Deputy Director, to their recent dinner meeting at Copperfield's in Millbrook, New York.

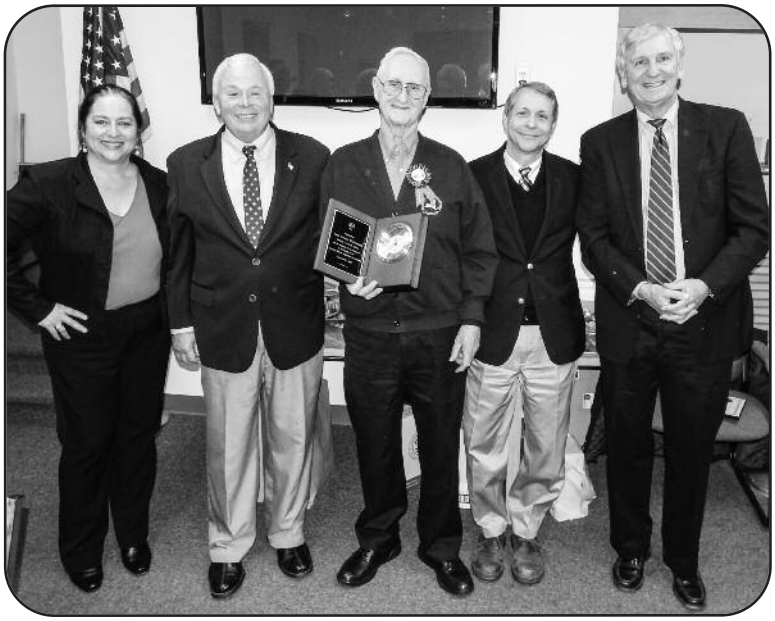
Ms. Still and Mr. Morris spoke about the services offered to local courts by the Probation Department.

In addition, the Honorable Joseph Egitto spoke about the new raise the age law in New York, which (in many instances) will divert offenders under the age of 18 to the Family Court.

Dutchess County Continued

It was a full house at the Milan fire company as magistrates, troopers, deputies, attorneys, family and friends feted the Hon. Frank Christensen on the occasion of his retirement after 24 years on the bench in the Town of Milan, Dutchess County. Before becoming judge, Judge Christensen was a New York State Trooper for over three decades.

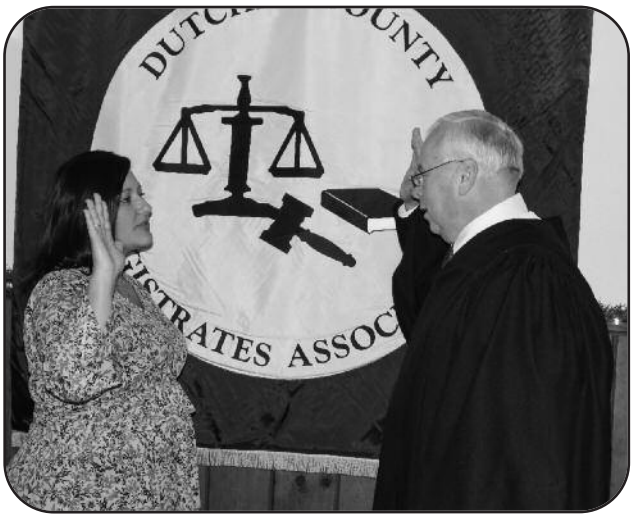
Photos by Andrew Martin

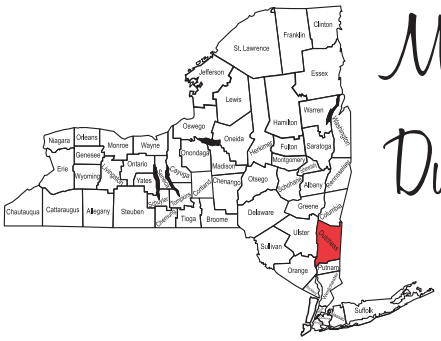


Judge Christensen was presented with an engraved clock by the Dutchess County Magistrates Association. Shown left to right are: DCMA Secretary Hon. Susan Sullivan-Bisceglia (Village of Wappingers Falls), DCMA President Hon. Rick Romig (Town of East Fishkill), Hon. Frank Christensen, DCMA Vice-President Hon. Jeffrey C. Martin (Town and Village of Red Hook) and DCMA Treasurer Hon. John Kane (Town and Village of Rhinebeck.)

Directors of the New York State Magistrates Association congratulated Judge Christensen and presented him with a certificate of recognition. Shown left to right are: NYSMA Past-President Hon. Thomas Dias (Town of Ancram-Retired), NYSMA Director Hon. Susan Sullivan-Bisceglia (Village of Wappingers Falls), Hon. Frank Christensen, NYSMA Director and party organizer Hon. Barbara Seelbach (Town of Clinton) and NYSMA First Vice-President Jonah Triebwasser (Town and Village of Red Hook.)

About My County Association





More from Dutchess County

Officers of the Dutchess County Magistrates Court Clerks Association were sworn in at the recent dinner of the Dutchess County Magistrates Association. Hon. Rick Romig, President of the County Magistrates, administers the oath of office to Clerks President Dawn Marie Klingner, who is clerk in the Town of Amenia Court. Magistrates Secretary and NYSMA Director Hon. Susan Sullivan-Bisceglia, of the Village of Wappingers Falls, swears in her court clerk Cindy Paraggio as Clerks Association Vice-President.

Photos by Andrew Martin

Town of LaGrange Judge Hon. Michael Hayes was the guest speaker at the recent dinner of the Dutchess County Magistrates Association. Judge Hayes gave a legal update on "Pending Hot Topics" such as counsel at arraignment, plea allocutions and discovery orders.

Shown in the photograph are (left to right): Hon. Jeffrey C. Martin, Vice-President, Judge Hayes, Hon. Rick Romig, President and Hon. Susan Sullivan-Bisceglia, secretary.

Photo by Andrew Martin

Red Hook Court Obtain Grants

The Town and Village of Red Hook Justice Courts have received grants of over $19,000.00 in 2018 to pay for court improvements.

Town Justice and Associate Village Justice Jeffrey Martin said: "We are deeply gratified that we were able to obtain the funds for these important court enhancements at no direct cost to the Red Hook taxpayers."

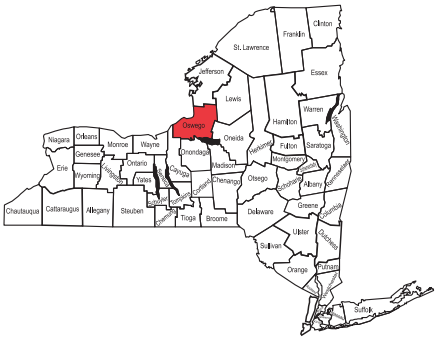
Town and Village Justice Jonah Triebwasser went on to say that "these grants were a team effort. I thank the court staff Court Clerks Kathy Fell, Nancy Roberts and Elizabeth Young as well as the town and village boards, and various members of the town and village staffs for their invaluable assistance in obtaining these funds."

This is the tenth year that Justices Martin and Triebwasser obtained court grants. Since 2007, they have obtained more than $100,000.00 in grants, furniture and equipment for the Red Hook Courts from sources outside of direct Red Hook taxpayer funding.

Shown in the photograph are (left to right): Village and Town Judge Jonah Triebwasser, Court Clerks Kathy Fell and Nancy Roberts and Town Justice Jeffrey C. Martin.

About My County Association

Oswego County

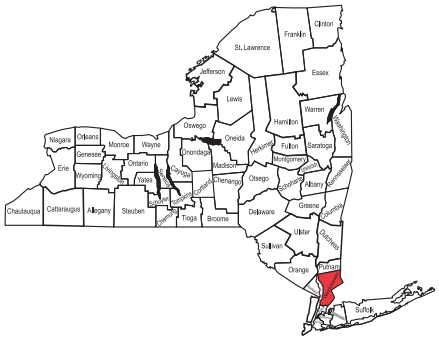


The Oswego County Magistrates Association honored two retiring justices, who have over fifty years of combined service on the bench. Justice Edwin Winkworth T/ Granby court is retiring after 35 years on the bench. During his time, he served as President of the Oswego County Magistrates Association (OCMA), President of the NYS Magistrates Association (NYSMA) and as President of the National Judges Association. Justice Patricia Kerfien, T/Volney, served the Volney residents as Judge for 17 years and served as court clerk for 15 years prior to being judge. Judge Kerfien served many years as treasurer of the OCMA. Both judges were presented with certificates of recognition and a gift card from the OCMA. NYSMA President-elect Michael Petucci, (T&V Herkimer) presented certificates of recognition on behalf of the NYSMA. Shown from the left: are Judge Winkworth, State Supreme Court Justice and 5th District T& V Supervising Judge James P. Murphy, Judge Kerfien, OCMA President Karen Brandt-Brown, T/Schroeppel and President-elect Petucci.

The Oswego County Magistrates Association officers inducted their offor 2018. The officers were sworn in by State Supreme Court Justice and 5th District Town and Village courts Supervising Judge James P. Murphy. Shown from the left are Judge Murphy, Treasurer Judge Jon Moretti T/ Mexico, President Judge Karen Brandt-Brown T/Schroeppel, Vice-President Judge Michael Sterio T/Oswego and Secretary Judge Lesley Schmidt T/ Granby.

The Westchester County Magistrates Association held its annual holiday dinner at the Bronxville Field Club. The event was attended by 40 member town and village justices and their invited guests, and celebrated the association's 33 years of operation. Member judges were honored to have Chief Judge Janet DiFiore participate in the event, and presented her an honorary membership in the association. In her remarks, the Chief Judge offered an overview of ongoing and proposed initiatives for the New York court system, and recognized village and town justices for their service. The association also honored two former presidents of the WCMA, Hon. Walter Schwartz (Ardsley) and Hon. George McKinnis (Bronxville), for their many years of service to their communities.

Westchester County



In the photos members of the Westchester County Magistrates Association welcome guest of honor, Chief Judge Janet DiFiorie (second row center) and the Chief Judge addresses the assembled group.

Advisory Committee on Judicial Ethics

ADVISORY COMMITTEE ON JUDICIAL ETHICS
c/o OFFICE OF COURT ADMINISTRATION
25 BEAVER STREET, SUITE 866
NEW YORK, NY 10004

Opinion 17-110

October 19, 2017

Digest: A judge may suggest alternatives to a plea agreement offered by a defendant and prosecutor, provided the judge does so non-coercively and is careful not to create an impression he/she has prejudged the case's merits. Prior opinions are modified to clarify that a judge may, subject to significant ethical, constitutional, and statutory limits, initiate, suggest, or facilitate plea agreements.

Rules: 22 NYCRR 100.1; 100.2; 100.2(C); 100.3(B)(6); 100.3(B)(7); 100.3(C)(1); Opinions 17-34; 16-92; 16-09; 15-197(A); 15-56; 15-34; 14-175; 14-152; 14-12; 13-33; 12-68; 10-196; 10-177; 10-170/11-03; 10-114; 10-113; 10-32/10-48; 09-216; 09-118; 09-105; 08-11; 07-22; 04- 95; 00-95; 99-148; 99-82; 98-58; 98-57; 96-132; **Matter of Mulroy**, 94 NY2d 652 (2000).

Opinion:

The inquiring judge wishes to be more active in plea negotiations, beyond only approving or rejecting a proposed plea. Often, an accused charged with a Driving While Intoxicated (DWI) misdemeanor agrees to a guilty plea to a Driving While Ability Impaired (DWAI) infraction, with a short jail term and fine. The judge believes an alternative agreement could allow a defendant to avoid jail and reduce recidivism.[1] The inquirer knows of our prior opinions stating judges may not initiate, encourage, or suggest plea agreements, and thus asks if he/she may suggest alternatives after a defendant and prosecutor have agreed to a plea.

A judge must uphold the judiciary's integrity and independence (*see* 22 NYCRR 100.1) and must always avoid even the appearance of impropriety (*see* 22 NYCRR 100.2). A judge must not convey an impression that others are specially positioned to influence the judge (*see* 22 NYCRR 100.2[C]) and must avoid any improper *ex parte* communications (*see* 22 NYCRR 100.3[B][6]). Also, a judge must dispose of all judicial matters promptly, fairly and efficiently (*see* 22 NYCRR 100.3[B][7]) and diligently discharge his/her administrative duties without bias or prejudice (*see* 22 NYCRR 100.3[C][1]).

Plea Bargaining - Background and Reconsideration of Prior Opinions

We recognize, given New York's court case volume, plea bargaining is common, even necessary (*see* Opinion 96-132; *cf.* Opinion 04-95 [judicial candidate may not promise to abolish "the awful and accepted practice of plea bargaining in criminal cases" in his/her court]).[2]

[1] The defendant would plead guilty to the original DWI misdemeanor with the sentence adjourned for one year and agree to complete a drinking drivers' program and other conditions. If all conditions are satisfied, the original DWI charge would be reduced to DWAI at the time of sentencing.

[2] A "blanket refusal ... to consider a plea bargain proposal under any circumstances" suggests an impermissible predisposition "to decide matters in a certain way, without consideration of all factors permitted by law" (Opinion 04-95).

While some aspects of plea bargaining raise primarily legal questions,[3] we have nonetheless addressed "the permissible scope of judicial participation in settlement conferences" (Opinion 99- 148), following a judge's highly publicized removal from office for attempting to coerce a plea offer and other misconduct (*Matter of Mulroy*, 94 NY2d 652 [2000]).[4] We concluded that judges may hold or otherwise facilitate settlement conferences, as long as their efforts are "not intended to (1) further the judge's convenience or personal interests; (2) coerce a disposition, or (3) otherwise give an appearance of impropriety" (Opinion 99-148).

We have also advised a judge may "explain to the parties why the judge has rejected a proposed plea agreement, as long as the explanation is based on legitimate concerns and does not involve the judge in improper *ex parte* communications" (Opinion 09-216).

Conversely, we have consistently advised that judges must maintain their independence from prosecutors and not participate or assist in "what is essentially the work of the prosecutor's office" (Opinion 00-95; *accord* Opinion 10-113). Therefore, a judge or court clerk may not distribute the prosecutor's printed materials to defendants, advise defendants of a specific plea agreement the judge anticipates the prosecutor will offer and explain its purported advantages, or otherwise assist the prosecution in implementing its plea reduction procedures (*see e.g.* Opinions 14-12; 13-33; 12-68; 10-177; 10-113; 08-11; 00-95; 96-132).

We stated in other opinions, "the court should not be the source or inspiration for a plea agreement as it would create an appearance of partiality and an indication that the judge is predisposed towards the defendant's guilt" (Opinion 09-118; *accord* Opinions 16-09; 14-175; 14-12; 13-33; 96-132). Also, we suggested, sometimes in passing or when describing prior opinions, that judges cannot "initiate," "facilitate," "encourage, suggest, or request" a plea agreement and must not be seen as "advocating a negotiated plea" (Opinions 17-34; 16-09; 15-56; 14-175; 10-196; 10-170/11-03; 10-32/10-48; 09-105; 07-22; 96-132).

On further consideration, we believe some of this language in prior opinions, if interpreted too strictly, could undermine a judge's ability to handle a heavy criminal caseload. Might a judge be seen as impermissibly initiating, suggesting, or inspiring a plea agreement if he/she asks if the prosecution and defense have consulted about possible voluntary resolution of the case? A judge must, of course, proceed with caution when discussing negotiated pleas in a criminal case, mindful of defendant's constitutional rights and the prosecution's burden of proof. The judge must take care not to give the impression he/she "is predisposed towards the defendant's guilt" (*e.g.* Opinions 16-09; 14-175; 14-12; 13-33; 10-196; 09-118), or is acting as an agent or intermediary for the prosecution (*see e.g.* Opinions 16-09; 15-197[A]; 14-12; 12-68; 10-196 [judge may not accede to prosecutor's request that judge conduct plea allocutions in a particular manner or distribute notices furnished by the prosecutor]; 10-177; 00-95; 98-57). The judge must avoid any appearance he/she is attempting to coerce a disposition or acting in furtherance of his/her own personal convenience or interests (*see* Opinion 99-148). In general, to avoid any possible appearance of impropriety or coercion, the judge should satisfy him/herself that the defendant is aware of all his/her options, including the right to plead not guilty and go to trial before a fair and impartial arbiter (see Opinions 14-12; 13-33; 00-95; 99-82).

However, we wish to emphasize our belief that a judge may - consistent with the judge's neutral role and subject to cautions noted above - take reasonable steps to initiate, suggest, or facilitate plea agreements

Continued on page 26

[3] For example, questions about the proper procedure for allocution (*see* Opinions 10-196; 10-114) and the permissibility of specific plea agreements (*see e.g.* Opinions 16-92; 15-34; 14-152; 07-22) often turn on resolution of legal issues.

[4] The inquiry was submitted in 1999, in reaction to the Commission's determination, but we did not decide it until after the Court of Appeals decided the matter.

in criminal cases, provided the judge does not coerce a disposition or act to further his/her own personal convenience or interests. For example, a judge should not "indicate a [personal] preference" that a defendant plead guilty nor "singl[e] out a negotiated plea as the appropriate way to proceed in disposing of the defendant's case" (Opinion 99-82).

It is critical to distinguish between permissible and impermissible judicial involvement with initiating pleas, considering both the practical and daily realities in criminal courts and the strong administrative guidance of the Chief Judge's Excellence Initiative. We firmly believe a judge must not simply distribute written forms or instructions prepared by a prosecutor, or other documents that encourage defendants to plead guilty (*see e.g.* Opinions 13-33; 12-68; 10-177; 00-95; 98-58; 98-57; 96-132), including a form requiring him/her "to 'check-off,' [a] preference" from a list of all legal options (Opinion 99-82). We distinguish between written and oral communications here, as we believe face-to-face discussions in open court, with both the prosecution and defense represented, provide significant protections against possible misunderstandings and/or perceptions of unfair treatment.

When initiating talk of a possible plea, a judge must carefully avoid threats and coercion. For example, a judge must not say "I insist you plead guilty," or "I prefer you plead guilty," or "I will punish you if you don't plead guilty," or "I will set bail if you don't plead guilty." All these are coercive and forbidden. But, we believe a judge may, in open court, advise a defendant of his/her initial assessment of the strength of the proffered evidence, as well as the likely range of sentence if the prosecution sustains its burden to prove a defendant's guilt after trial. The judge may then use this to suggest a defendant should very seriously consider a particular plea bargain the prosecution has offered (if any). Moreover, even if the prosecution has not offered a plea, a judge may still take the initiative to let the defendant know what sentence the judge would be willing to consider or impose ***if*** the defendant decided to plead guilty.[5] Making clear what the disposition would be if the defendant decided to plead guilty does not, without more, demonstrate any predisposition toward guilt or any prejudgment on the case's merits. Indeed, the current focus on speedier case resolution central to the Chief Judge's Excellence Initiative speaks to this model: A decision should be made early whether an accused will plead guilty, necessarily requiring a discussion of terms; absent a plea, the case should move rapidly to trial. It is fitting for a judge to say a failure to plead guilty will not create endless adjournments, but will instead result in a prompt trial subject to applicable constitutional and statutory provisions.

Our prior opinions are thus modified to conform to this opinion.[6] We note the outcome of Opinions 17-34; 16-09; 13-33; 12-68; 10-177; 00-95; 99-82; 98-58; 98-57; 96-132 remains as is, while Opinions 14-12 and 07-22 are partially overruled. A portion of the conduct in Opinion 14-12 remains impermissible, as a judge must not create an impression he/she is speaking for the prosecutor and/or aligned in interest with him/her, but the judge may describe a sentence he/she would be willing to impose if the defendant were to plead guilty; and explain its advantages in a non-coercive way consistent with this opinion.

The Present Inquiry

Turning to this inquiry, it appears the judge's suggestions are based on his/her observations and experience as a judge, and presumably other legally appropriate criteria. Just as the judge may explain to both sides in open court why a proffered plea bargain is unacceptable (see Opinion 09-216), we believe he/she may also suggest alternative terms or conditions for the parties' consideration, once the defendant has affirmatively manifested his/her willingness to plead

[5] Of course, the judge must be careful to frame his/her comments in terms of his/her own judicial role, rather than purporting to speak on behalf of the prosecutor (*see* Opinion 14-12 [judge must not predict that the prosecutor "will, I believe, offer you a plea bargain," describe the anticipated terms, and then "ask the prosecutor to confirm whether the plea described is being offered"]).

[6] We will add a note to affected opinions referring readers to the present opinion for a discussion of a judge's ability to initiate, suggest, or facilitate a plea agreement in criminal cases.

to a lesser charge.[7] Further, such suggestions for amending a agreed plea *already submitted* for an approval cannot reasonably create an impression the judge is predisposed to the defendant's guilt (*cf.* Opinions 09-118; 96-132). The judge, of course, must: non-coercively present any alternative plea agreement terms (Opinion 99-148); not act to further the judge's convenience or personal interest (*see id.*); avoid an appearance of impropriety (*see id.*); satisfy him/herself a defendant knows all options, including the right to plead not guilty (*see* Opinions 13-33; 09-118), and avoid improper *ex parte* communications (*see* Opinion 09-216).

[7] We anticipate that a defendant's interest in a negotiated plea will ordinarily come to the judge's attention when the defendant and prosecutor present a negotiated plea to the court for judicial approval.

OCA Connection

JusticeCourtTechSupport@nycourts.gov or 1-800-622-2522

Some helpful information from Justice Court Technical Support office.

Microsoft Office Windows 10 has been released July 29, 2015. Please do NOT install this update on any town and village desktops and/or laptops. The Office of Court Administration does not support this version of Windows at this time.

Bitdefender is the New Virus protect for OCA computers in the Town and Village Courts. If you have not installed Bitdefender on your desktop/laptops please contact OCA at 1-800-622-2522.

All Town and Village Judges and Clerks have an **OCA email address**. If you do not know your email information, please call 1-800-622-2522. OCA uses this email address, exclusively, to provide information. It is also available to configure your smartphones for OCA email access.

You can now change your OCA email password, through this site: **https://iapps.courts.state.ny.us/sspr** if you do not know your password or you use CDR/WebDVS, please call OCA at 1-800-622-2522.

All Town and Village Judges and Clerks have a license for **Microsoft Office 365**, which includes the full **Microsoft Office 2013 suite**.

ADVISORY COMMITTEE ON JUDICIAL ETHICS
c/o OFFICE OF COURT ADMINISTRATION
25 BEAVER STREET, SUITE 866
NEW YORK, NY 10004

Opinion 17-30

October 19, 2017

Digest: A village justice may permit the court clerk to complete a college internship for a district attorney's office located in a different county

Rules: 22 NYCRR 100.2; 100.2(A);100.3(C)(2); Opinions 17-68; 16-142; 09-04; 01-35; 99-166; 99-10.

Opinion:
A part-time village justice asks if he/she may permit his/her full-time court clerk to complete a college internship in a district attorney's office located in another county.

A judge must always avoid even the appearance of impropriety (*see* 22 NYCRR 100.2) and must always act in a manner that promotes public confidence in the judiciary's integrity and impartiality (*see* 22 NYCRR 100.2[A]). A judge also must require his/her staff to observe the standards of fidelity and diligence that apply to the judge (*see* 22 NYCRR 100.3[C][2]).

Nevertheless, the limitations on a judge's extrajudicial conduct do not automatically apply to the judge's court clerk (*see* e.g. Opinion 17-68). For example, we have advised that a judge's law clerk, unlike a judge, may serve on a town council (*see* Opinion 01-35) or a public school board (*see* Opinion 99-10) and may engage in fund-raising activities for a not-for-profit organization on his/her own time and away from court premises (*see* Opinion 17-68). Moreover, we have, for some purposes, distinguished between a student's temporary employment through an internship or externship and more permanent post-graduation employment (*see e.g.* Opinion 09-04).

Further, although a town or village justice may not permit a part-time court clerk to accept outside employment as assistant to the local prosecutor that regularly appears in his/her court (*see* Opinion 16-142), we have advised that a village justice may permit the village court clerk to accept appointment as a state certified police officer in a different locale (*see* Opinion 99-166).

Here, we can see no impropriety in allowing the court clerk for a village in one county to complete a college internship with a district attorney's office located in a different county. This temporary unpaid employment, even if it involves collegial working relationships with prosecutors and law enforcement officers in the other county, cannot reasonably create an appearance of impropriety with respect to cases and issues that come before the village justice.

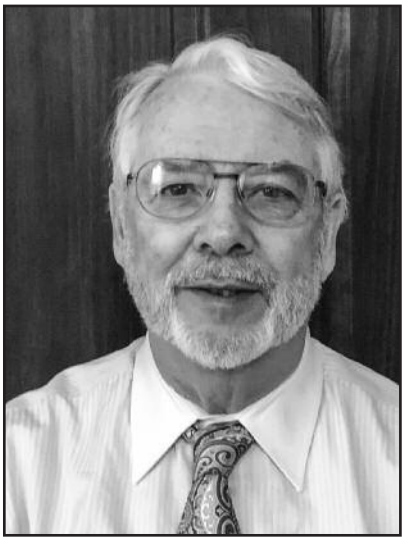
Tilney Tidbit #37 Time To Issue Verdicts

By Hon. Leonard G. Tilney, Jr. [1]

One of our fellow town justices has inquired as to what is a reasonable time to publish a decision, (judgment or criminal verdict) in any given case. One would assume that the Legislature has defined those time limits as to help our justice courts. Fortunately, the Legislature has acted regarding civil or small claims judgments which must be decided within 30 days. See Uniform Justice Court Act §1304 which simply indicates that the Court must render judgment within 30 days from the time when the case is submitted for that purpose except when further time is given by the consent of the parties. Not to confuse you, but the CPLR §4213(c) gives the State Supreme Court trial justice 60 days. Of course we should render our decision as soon as possible and if the trial issue depends entirely on a disputed question of fact our decision can often be rendered as soon as the trial is completed. This section of the Uniform Justice Court Act only applies to civil cases and there is no like direction given to us in the Criminal Procedure Law.

Accordingly, we must turn to Court decisions and hopefully our appellate courts will give us that bright red line we look for in their decisions to guide us appropriately. What's that you say? The appellate courts must have run out of red paint. It would appear that issuing a verdict for violations or misdemeanor cases are somewhat different under the criminal law. In *People vs. O'Brien*, 86 Misc. 2d 139 (1976), the Wayne County Court (Appellate Term) determined that a delay of 35 days to find the defendant guilty of disorderly conduct was unreasonable and that the Village Justice of Newark should have rendered a verdict within a few hours after conclusion of summation [CPL §350.10(3)(d)], but a closer look of that section shows no time period. *O'Brien* was cited with approval by the Fourth Department in *People vs. Hryn*, 144 AD 2d 961 (1988). What about misdemeanor cases? In *People vs. South*, 41 NY 2d 451 (1977), the Court of Appeals held the delay of 58 days for a verdict in an assault third degree case was unreasonable. There, the local Town Justice from East Greenbush found the defendant guilty and then granted him youthful offender status. The Court of Appeals reversed, vacated the youthful offender status, and dismissed the information. The Court of Appeals also cites favorably the *O'Brien* case. Looking to the Fourth Department for guidance we have cited *People vs. Hryn* above and mentioned *People vs. Munn*, 184 AD 2d 1061 (1992), which indicates the Erie County Court non-jury trial delay of verdict convicting the defendant of rape of 18 days is not unreasonable, citing *People vs. South*. In the final issue of what could possibly go wrong if you do delay in your criminal verdict for an unreasonable time not only will you lose jurisdiction of the case, any verdict rendered will be reversed, and the information dismissed with prejudice. Therefore, decide every case you have ASAP, but no later than thirty (30) days for civil and "in a relatively short time" (*i.e.* as soon as your mind is made up on guilt or non-guilt of the defendant) for criminal and you will comply with statutory and decisional requirements.

[1] Hon. Leonard G. Tilney, Jr. is a Justice in the Town of Lockport.



Decision & Order

TOWN OF WEBSTER
STATE OF NEW YORK

COUNTY OF MONROE

PEOPLE OF THE STATE OF NEW YORK,

DECISION AND ORDER
Case # 17030175

- vs -

ERICA E. ROSSI,
Defendant,

Appearances:
Jessica A. Wagner, Esq., Assistant District Attorney
Christopher Schiano, Esq., Attorney for the Defendant

History of the Case.

Thomas J. DiSalvo, J. The defendant was charged with common law driving while intoxicated, VTL § 1192 (3), consumption of alcohol in a motor vehicle, VTL 1227(1), and refusal to take the roadside breath test, VTL 1194 (1) (b) on March 21, 2017. Subsequent to the arraignment of the defendant, defense counsel submitted omnibus motions with the court seeking, among other things, *Huntley, Wade* and probable cause hearings. Said hearings were granted and took place on October 27, 2017.

Facts of the Case.

The People called one witness at said hearings, to wit: the arresting officer, Alex Kirkpatrick of the Webster Police Department. Officer Kirkpatrick testified that on March 21, 2017, at approximately 8:10 P.M., he received a dispatch relative to a motor vehicle accident near the entrance to the Target store off of Ridge Road in the Town of Webster. Upon arriving at the scene he observed a white pickup truck on its side. Also at the scene were the fire department and a crowd observing the scene. When the officer approached the vehicle he was met by the fire chief, who handed him a purse containing a driver's license belonging to Erica E. Rossi. Attached to the purse was a bottle. No evidence was produced that indicated what was in the bottle or how it was attached to the purse. The fire chief reportedly told the officer that he was advised that the driver of the vehicle was helped out of the vehicle by a couple of people on the scene, and that the said items were left in the car. The chief was further told that the driver left the scene and went into the Target store. Officer Kirkpatrick then went into the store in search of the owner of said license. Once in the store, the officer observed the individual depicted in the picture license. He then approached the individual and asked her if she was Erica Rossi, to which the individual acknowledged that she was. However, the defendant was on her cell phone at the time the officer first observed her. When the officer approached the defendant, she advised him that she was speaking to an attorney. The officer continued to try to speak to the defendant. However, the defendant ignored and walked away from the officer. In any event the officer testified that he noticed a laceration on the defendant's nose. The officer further testified that he observed the defendant to have glassy, bloodshot, watery eyes, that she was hesitant and was swaying a little bit. The officer attempted to determine if the defendant wanted to speak to an emergency medical technician, but the defendant continued to ignore the officer. She eventually did sit down and spoke to an E.M.T. while still in the store.

Officer Kirkpatrick testified that the defendant did agree to perform some field sobriety tests. The officer initiated the performance of same in the seating area of the Starbucks, which was inside the Target store. The first such test was the Horizontal Gaze Nystagmus test. However, the test was not performed because the defendant would not get in the starting position and kept raising her arms. The officer testified that the defendant told him that she could not drive her truck home, so she did not have to take the field sobriety tests. The defendant then refused to take the walk and turn test, the one leg stand test and finally the alco-sensor test.

Officer Kirkpatrick testified that during the discussion of the said field sobriety tests, the defendant admitted to driving. She further admitted to leaving the scene because she was embarrassed and ashamed. The officer indicated that the defendant told him that her vehicle tipped over when she struck a curb, and that she went into the store to get away from the incident. The defendant was then arrested for driving while intoxicated.

The Officer testified that he gave the defendant the commissioner's warnings at the scene. He gave the defendant the *Miranda* warnings subsequently at the police department. At that point, the defendant refused to speak further to the officer. The officer identified the individual in court as the individual he confronted in the store.

On cross-examination the defense confirmed that the defendant was on her cell phone when Officer Kirkpatrick initially confronted her. The officer admitted that the defendant told him she was on the cell phone with an attorney at that time. The officer stated that during that phone call another Webster Police officer entered the store as the defendant was walking away. The phone was then taken away from the defendant while she was still having a conversation with the said attorney. However, the officer could not remember if it was he or the other unidentified officer who took the cell phone from the defendant. Nevertheless, the officer testified on cross-examination that the defendant was unsteady on her feet "standing up or sitting down," but she did not fall down. He further testified that the defendant's speech was not slurred, mumbled or fast, nor did he have a problem understanding what was said by the defendant.

Issues Presented.

Should the statements of the defendant be suppressed?

Should any identification testimony of a third party to the police be suppressed?

Did the Officer have probable cause to arrest the defendant for a violation of VTL§1192?

Legal Analysis.

Suppression of Statements. A *Huntley* hearing was conducted to determine if the statements made by a defendant to the police were made voluntarily. (*People v. Huntley*, 15 N.Y.2d 72, 255 N.Y.S.2d 838 [1965]) The People have the burden of proving said voluntariness beyond a reasonable doubt. In this case, incriminating statements were made by defendant to the arresting officer during the attempted administration of the field sobriety tests. However, before the court can reach the voluntariness issue posed by a *Huntley* hearing, it must deal with the fact that one of the Webster Police officers on the scene of the arrest took the defendant's cell phone from her while she was apparently speaking to an attorney. There is established caselaw relative to the limited right of a defendant, arrested for driving while intoxicated, to speak to an attorney before deciding whether to take a chemical test. (See *People v. Smith*, 18 N.Y.3d 544, 942 N.Y.S.2d 426 [2012] and *People v. Gursey*, 22 N.Y.2d 224, 292 N.Y.S.2d 416 [1968]).

Continued on page 32

> "In *People v. Gursey*, 22 N.Y.2d 224, 227, 292 N.Y.S.2d 416, 239 N.E.2d 351 (1968), we held that if a defendant arrested for driving while under the influence of alcohol asks to contact an attorney before responding to a request to take a chemical test, the police 'may not, without justification, prevent access between the criminal accused and his lawyer, available in person or by immediate telephone communication, if such access does not interfere unduly with the matter at hand.' If such a request is made, and it is feasible for the police to allow defendant to attempt to reach counsel without unduly delaying administration of the chemical test, a defendant should be afforded such an opportunity. As we explained in Gursey, the right to seek the advice of counsel—typically by telephone—could be accommodated in a matter of minutes and in most circumstances would not substantially interfere with the investigative procedure."[1]

The Court of Appeals went on to say: "Where there has been a violation of the limited right to counsel recognized in *Gursey*, any resulting evidence may be suppressed at the subsequent criminal trial."[2] In the instant case, one is left wondering why the defendant was not allowed to finish her phone call. Even if it was necessary to secure the presence of the defendant in the store, the defendant should have been offered the opportunity to complete the phone call or redial the attorney once her presence was secured by the police. Thus, based on the rulings in the *Gursey* and *Smith* cases, all evidence obtained by the police subsequent to the taking of the defendant's cell phone by the police, including any statements made by the defendant and the defendant's performance of any field sobriety tests, including the breath test, is hereby suppressed.

Wade Hearing. The People did not present any evidence of an identification procedure executed by the police on March 21, 2017.

> "On a motion to suppress eyewitness identification testimony, the defense bears the overall burden of proof to establish that a pretrial identification procedure was unduly suggestive (see *People v. Sutton*, 47 A.D.2d 455, 366 N.Y.S.2d 500; *People v. Carter*, 117 Misc.2d 4, 13, 457 N.Y.S.2d 695; see, also, *People v. Berrios*, 28 N.Y.2d 361, 367, 321 N.Y.S.2d 884, 270 N.E.2d 709), once, ..., the People have met their initial burden of going forward to establish the reasonableness of the police conduct and the lack of suggestiveness of the pretrial identification procedures." (*People v. Jackson*, 108 A.D.2d 757, 757-758, 484 N.Y.S.2d 913, 915 (App. Div. 2nd Dept.) [1985])

In this case, the People failed to meet their initial burden of going forward on the issue of the reasonableness of the police conduct and the lack of suggestiveness relative to any identification process. Thus, the defendant's motion to suppress the identification procedure is hereby granted.

Probable Cause. Defense counsel also moved to suppress any evidence stemming from the arrest of the defendant. A probable cause hearing was conducted to assist the court in deciding that issue. The testimony at said hearing has been set out above. The final question that the court must decide is whether said facts were sufficient to provide the officer with probable cause to arrest the defendant. The Court of Appeals has stated "In determining probable cause, the standard to be applied is that it must 'appear to be at least more probable than not that a crime has taken place and that the one arrested is its perpetrator, for conduct equally compatible with guilt or innocence will not suffice' (*People v. Carrasquillo*, 54 N.Y.2d 248, 254, 445 N.Y.S.2d 97, 429 N.E.2d 775 [1981])." (*People v. Vandover*, 20 N.Y.3d 235,237, 958 N.Y.S.2d 83,84 [2012]). Initially, the Hamptonburgh Justice Court, referring to the testimony of the arresting officer, held "...that defendant had glassy bloodshot eyes, breath that

[1]Smith at 549, 429.

[2]Smith at 550,430.

smelled of alcohol and a generally fatigued demeanor, found that this was insufficient to establish probable cause to arrest defendant and accordingly dismissed the charges."[3] The Justice Court's findings where upheld by both the Appellate Term and the Court of Appeals.[4]

In a case similar to the instant case, involving a single car accident, the trial court found that the People established probable cause to arrest the defendant for a violation of Vehicle and Traffic Law § 1192. (See *People v. Jace*, 55 Misc.3d 1207 [A], 2017 N.Y. Slip Op 50450 [U] [2017]). In that case only the arresting officer testified at the probable cause hearing. It was the arresting officer who investigated the accident scene and who initially confronted the defendant walking near the scene of the accident. He relied on the notes of another officer who administered the field sobriety tests in making the arrest.[5] The arresting officer testified to "... the defendant's admission that he had been driving and had consumed a quantity of alcohol, the defendant's watery eyes and the odor of an alcoholic beverage on the defendant's breath."[6] The officer who administered the field sobriety tests, i.e. the horizontal gaze nystagmus test, the walk and turn test, the one leg stand test, indicated in her notes that the defendant failed each of those tests. Furthermore the defendant's breath tested positive for alcohol upon taking the preliminary breath test.[7] The court stated that, without the testimony of the officer who conducted the field sobriety tests, it would have to decide the issue of probable cause based on the arresting officer's "observations alone."[8] The court stated

> "These observations consist of a significant accident scene, where the Defendant's vehicle mounted a sidewalk, damaged a utility pole support wire, struck a stationary vehicle sitting in the driveway of a private home, pushed that vehicle into a support beam of the residence which was damaged, continued onto the adjacent property, and landed in a flower bed, the defendant's admission that he had been driving and had consumed a quantity of alcohol, the defendant's watery eyes and the odor of an alcoholic beverage on the defendant's breath. Relying on *People v. Vandover*, 20 NY3d 235, 958 N.Y.S.2d 83 (2012) the defendant argues that these observations are insufficient to support a finding of probable cause to arrest the Defendant. The defendant's reliance on *Vandover*, id., is misplaced."[9]

The court in *Jace*, in finding that there was probable cause to arrest the defendant, held that

> "While the Court of Appeals affirmed the Appellate Term's decision, finding "support in the record for the Appellate Term's determination that the facts did not support probable cause to arrest defendant[,]" *People v. Vandover*, 20 NY3d 235, 237, 958 N.Y.S.2d 83, 84 (2012), the court further noted that the Appellate Term's "determination, based on a mixed question of law and fact, is beyond our further review." (*People v. Vandover*, id. at 237, 958 N.Y.S.2d 83, 84 [2012])"[10]

The court was attempting to distinguish the holding in *Vandover* from its finding in *Jace*, based on the ability of the Court of Appeals to review the holding of the lower court. Nevertheless, it did not hold that the Court of Appeals disagreed with the standard applied by the lower courts in *Vandover*.

"There were three main principals to which the *Jace* court adhered in establishing probable cause. First "A person may be arrested for violating Vehicle and Traffic Law § 1192(1) if it is more probable than not that he or she exhibits 'actual [ ] impair[ment],

Continued on page 34

[3] Id. at 238, 85.
[4] Id. at 239, 85.
[5] 2017 N.Y. Slip Op 50450 [U], *2
[6] Id. at *5.
[7] Id. at *2.
[8] Id. at *5.
[9] Id,
[10] Id.

to any extent, [of] the physical and mental abilities which [a person] is expected to possess in order to operate a vehicle as a reasonable and prudent driver' (citation omitted). It is irrelevant that defendant was ultimately arrested and charged with common-law driving while intoxicated."[11] Second that "... the fact of an accident may be construed to circumstantially suggest diminished motor control or impaired driving judgment by reason of alcohol consumption, without regard to proof of fault ...."[12] Third "... in making the determination to arrest, an officer is not obligated to eliminate all possible innocent explanations for incriminating facts ...."[13]

In this case, the court is left with the following facts to consider. The defendant was uncooperative with the officer. The defendant had a lacerated nose, presumably suffered as a result of the single car accident. Upon the initial encounter with the defendant, the officer noticed that the defendant had glassy, blood shot, watery eyes and was hesitant and swaying. There was no testimony as to any odor of an alcoholic beverage emanating her breath. A bottle was recovered from the defendant's vehicle, but there was no testimony as to what was in said bottle. There was no testimony as to any admissions made by the defendant to the officer during their initial encounter. In addition, Officer Kirkpatrick testified that the defendant's speech was not slurred, mumbled or fast, nor did he have a problem understanding what was said by the defendant.

At what point does the "more probable than not standard" line up with the definition of reasonable cause as set out in CPL § 70.10 (2)?[14] Certainly, the arrest of an individual for a violation of a VTL § 1192 subsection must be based on something more than a mere supposition. The evidence presented must be at least "legally sufficient" as defined by CPL § 70.10 (1) that the defendant was driving while her ability was impaired by alcohol.[15] This is not to discount the two principles set out in *People v. Jace*. In this case the defendant is reported to have been unsteady, hesitant and swaying with a head injury after a motor vehicle accident. The defendant's eyes were described as bloodshot and watery. Based on the evidence presented, this court cannot conclude that it is more probable than not that the defendant's condition was based on alcohol consumption or that a single motor vehicle accident is of itself evidence of intoxicated driving. Nor is this court saying that the officer had a duty to eliminate every possible innocent explanation for the cited incriminating facts. However, probable cause for an arrest on a violation of Vehicle and Traffic Law § 1192, also known as reasonable cause, must be based on articulated facts leading to the logical conclusion of impairment, not guesswork on the part of the police. No issue was raised relative to the ability of the police to approach and make an inquiry of the defendant in the Target store. Nor would it have been improper to prohibit the defendant to remain in said store until the completion of her phone call, so the police could make the appropriate inquiries. However, the situation went downhill once the defendant's phone was taken from her. If the defendant in this matter was allowed to finish her phone call, she might have been more cooperative with the police. Finally, the Court finds as significant that there was no allegation of an odor of an alcoholic beverage emanating from the defendant's breath. In addition, the officer did not testify as to any problems with the defendant's

[11] Id. at *6.

[12] Id.

[13] Id.

[14] "Reasonable cause to believe that a person has committed an offense" exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it. CPL § 70.10 (2).

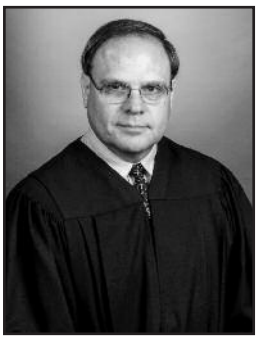
[15] "Legally sufficient evidence" means competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof; except that such evidence is not legally sufficient when corroboration required by law is absent. CPL § 70.10(1).

speech. Thus the court finds that the People have failed to meet its burden to show probable cause for the arrest of the defendant for a violation of any subsection of Vehicle and Traffic Law Section 1192 or for consumption of alcohol in a motor vehicle, VTL 1227(1).

Conclusion.

Defense counsel's motion for suppression of statements made after the taking of the defendant's phone is granted. For reasons stated above, any evidence relative to the defendant's performance on any roadside tests is also suppressed. Defense counsel's motion to suppress any third party identification of the defendant is granted. Finally, the motion to suppress the arrest of the defendant for lack of probable cause for said arrest is hereby granted. As a result, the charges of common law driving while intoxicated, VTL § 1192 (3), consumption of alcohol in a motor vehicle, VTL 1227(1) and refusal to take the roadside breath test, VTL 1194 (b), are hereby dismissed.

Date: November 14, 2017
Webster, New York



Hon. Thomas J. DiSalvo
Webster Town Justice

Decision & Order

TOWN OF RED HOOK / CIVIL PART
STATE OF NEW YORK

COUNTY OF DUTCHESS

JACQUELINE LOMBARDO,
a/k/a JACQUELINE MARTIN
Petitioner,

- vs -

HENRI MARTIN,
Respondent,

DECISION AND ORDER
OF THE COURT
Case # C-42-17

HON. JONAH TRIEBWASSER, J., Presiding

This proceeding, brought by petition dated August 25, 2017, pursuant to section 711 of the Real Property Actions and Proceeding Law (RPAPL), seeks to have Respondent evicted from premises at 129 Orlich Road in the Town of Red Hook, Dutchess County, State of New York. Respondent filed an answer on September 27, 2017 raising the affirmative defenses of *res judicata* and collateral estoppel referencing this Court's decision of October 17, 2016, *Martin v. Martin*, 53 Misc.3d 1014 (2016)

Respondent further avers as affirmative defenses that he has rights to the tenancy though his familial relationship to his late wife who was petitioner's mother and a life tenant of the premises. Finally, Respondent make a counterclaim in the amount of $3,000.00, alleging harassment and abuse of process.

Respondent filed a Memorandum of Law dated October 11, 2017 in support of his contention that the instant proceedings are barred by the doctrine of *res judicata*. Respondent did not address his arguments regarding collateral estoppel or the counterclaim.

Petitioner filed her memorandum of law on October 26, 2017, maintaining that *res judicata* does not apply here as the only issue raised in the earlier proceeding was whether or not Respondent was a tenant of the life tenant, and that the new issue to be addressed here is whether or not Respondent is a tenant at will or a licencee of Petitioner and, therefore, subject to possible eviction in this matter.

Respondent filed a reply memorandum of law dated November 2, 2017 and received by this Court on November 30, 2017, taking the stance that Petitioner can not relitigate this claim due to the identity of parties, issues and forum, and that - even if the issues were not identical - she can not now litigate new issues that could and should have been aired in the first proceeding.

As neither party requested oral argument, this matter was marked fully submitted on November 30, 2017.

Petitioner is represented by Glen P. Malia, Esq., Peekskill, New York. Respondent is represented by Jeffrey Rothschild, Esq., of Cappillino and Rothschild, Esqs., Pawling, New York.

This Matter is Barred by the Doctrine of *Res Judicata*

Our State's highest court, the Court of Appeals, was clear and unambiguous when it held in *Matter of Hunter*, 4 N.Y.3d 260 (2005):

> Under the doctrine of *res judicata*, a party may not litigate a claim where a judgment on

the merits exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation. The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again (*see O'Connell v Corcoran*, 1 NY3d 179, 184-185 [2003]; *Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]). Additionally, under New York's transactional analysis approach to *res judicata*, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981], citing *Matter of Reilly v Reid*, 45 NY2d 24, 29-30 [1978]). "*Res judicata* is designed to provide finality in the resolution of disputes," recognizing that "[c]onsiderations of judicial economy as well as fairness to the parties mandate, at some point, an end to litigation" (*Reilly*, 45 NY2d at 28).

In the case at Bar, as well as in the earlier litigation before this Court, the parties were the same and the object of the litigation was the same, namely the eviction of Respondent from the subject premises. Even a cursory examination of the Real Property Law and the Real Property Actions and Proceedings Law should have revealed to Petitioner that she had alterative theories under which to proceed besides seeking to label the Respondent a tenant of the life tenant. She could have also sought relief under the theories that Respondent was a tenant at will or a tenant at sufferance. Having failed to do so in 2016, she is now barred from doing so in 2017 by *res judicata* as interpreted by the Court of Appeals in *Hunter*. Therefore, the Court hereby dismisses the petition herein, without prejudice to bring an action of ejectment in the New York State Supreme Court. Having determined that this matter is barred by the doctrine of *res judicata*, there is no need for the Court to reach the other affirmative defenses. Counsel are to appear before me on Thursday, January 18, 2018 to pick a trial date on the counterclaim.
SO ORDERED.

Dated: Red Hook, New York
January 4, 2018

JONAH TRIEBWASSER,
Justice, Town of Red Hook

Decision & Judgement

VILLAGE OF MONTEBELLO
STATE OF NEW YORK

COUNTY OF ROCKLAND

GIRISH RANADIVE and SUCHITA RANADIVE,
Plaintiffs,
- vs -
RONALD M. HARVEY and DEBORAH J. JINDELA,
Defendants,

DECISION AND JUDGEMENT

JUDGE ARNOLD P. ETELSON

In this small claims action, Plaintiff has sued for reimbursement of the $595.00 he spent for an inspection in connection with the prospective purchase of a home. Plaintiff's broker prepared a binder to purchase defendant's home for $725,000.00. The seller defendant held out for $750,000.00 which plaintiff agreed. A new binder was prepared, each having been signed by plaintiff. Defendant signed neither. Defendant's attorney, however, followed up with a contract and mailed it to plaintiff's attorney who had plaintiff sign it and returned it to defendant's attorney who became very busy with some litigation and eventually turned it over to another attorney to represent defendant. The situation dragged on for several weeks during which time defendant's broker found another buyer willing to pay $765,000.00 in a cash deal. During this time plaintiff attempted to contact defendant's broker but received no answer. The deal with the new buyer who obtained his own inspection consummated with its closing.

Plaintiff, through his attorney, requested that defendant reimburse him for the $595.00. Defendant refused based upon the fact that no contract between the parties was ever signed.

Section 1804 of the Uniform Justice Court Act states that the "court shall conduct hearings upon small claims in such manner as to do substantial justice between the parties according to the rules of substantive law …"

My research in this case came up with no case describing substantial justice and perhaps there isn't one. Most of the Appellate decisions describe what is not substantial justice. *Lockwood v. Niagara Mohawk Power Corp.,* 112 A.D.2d 495 states that a trial court's decision in a Small Claim action can only be reversed if it was "clearly erroneous" and the deviation from substantive law is "readily apparent."

When considering substantial justice the words that come to my mind are fair, right, common sense, just, correct, moral, good, proper, appropriate, practical, ethical, suitable, reasonable, etc.

Roscoe Pound, former Dean of Harvard Law School and jurist wrote in 1935, "Some twenty years ago I pointed out two ideas running through definitions of law: one an imperative idea, an idea of a rule laid down by the lawmaking organ of a politically organized society, deriving its force from the authority of the sovereign; and the other a rational or ethical idea, an idea of a rule of right and justice deriving its authority from its intrinsic reasonableness or conformity to ideals of right and merely recognized, not made, by the sovereign." Roscoe Pound, "More About the Nature of Law," in Legal Essays in Tribute to Orrin Kip McMurray at 513, 515 (1935).

It is so obvious that defendant would not turn down an offer providing for an additional $15,000.00 in a cash deal. Plaintiff's deal would have been contingent upon him obtaining a mortgage in order to close. Having received the benefit of a higher price and presumably a quicker closing date, defendant

was very comfortably enriched with a better deal. Any reasoned prospective purchaser of a home in this price range would be well advised to order an inspection before contract or as a subject to condition in the contract.

Any of the words I mention above it seems to me demand that plaintiff be reimbursed for his inspection fee legitimately expended in seeking the purchase of defendant's home.

Plaintiff shall have judgment against defendant for the sum of $595.00, plus interest from April 30, 2017, in the sum of $31.24, plus the $10.00 filing fee, a total of $636.24.

The aforesaid is the Judgment of the Court.

HON. ARNOLD P. ETELSON
MONTEBELLO VILLAGE JUSTICE

Dated: Montebello, New York
December 11, 2017

2017NY Slip Opinion 51742(u)
58 Misc 3rd page 1202(a)

An FYI on Court Fees

COURT FEES			
Civil Part	Initial Filing Summons/Complaint	**$20.00**	UJCA § 1911(a)(1)(a)
	Issuing a Requisition of Seizure	**$20.00**	UJCA § 1911(a)(1)(b)
	Issuing an Infant's Compromise	**$20.00**	UJCA § 1911(a)(1)(c)
	Appeal, Filing Notice of	**$5.00**	UJCA § 1911(a)(1)(e)
	Jury Demand	**$10.00**	UJCA § 1911(a)(1)(g)
	Subpoenaed Witness Per Diem	**$15.00**	CPLR § 8001(a)
	Subpoenaed Witness Mileage	**$0.23**	CPLR § 8001(a)
Criminal	Certificate of Disposition	**$5.00**	CPLR § 8020(g) & Judiciary § 255
	Two Year Search	**$5.00**	CPLR § 8020(g) & Judiciary § 255
	Certificate of Conviction	**$5.00**	CPLR § 8020(g) & Judiciary § 255
	Jury Demand	**No Charge**	
	Appeal, Filing Notice of	**No Charge**	
Interpreters	County Per Diem	**$25.00**	Judiciary Law § 387 & § 390
	(For Foreign Language and Sign Language Interpreters - T&V's Pay Additional Amount)		
Judgment Fees	Transcripts of Judgment	**$2.00**	UJCA § 1911(a)(1)(f)
	Satisfaction of Judgment	**$2.00**	UJCA § 1911(a)(1)(f)
	Judgment by Confession	**$20.00**	UJCA § 1911(a)(1)(d)
Miscellaneous Fees	Copying of Papers For Public - Copies Provided By A Court Outside the Context of A Court Proceeding	**$0.25**	22 NYCRR § 124.8(a)(1)
	*Digital Copies Made With Personal Device	**No Charge**	
	Reimbursement Fee For Court For Furnishing Copies of Papers In Any Proceeding	**$0.25**	GML § 99-1(1)(f)
Small Claims	Small Claims (For Money Damages Of $1 to $1000)	**$10.00**	UJCA § 1803(a)
	Small Claims (For Money Damages Of >$1000 to $3000)	**$15.00**	UJCA § 1803(a)
	Counterclaims in Small Claim ($3.00 Plus Cost Of Mailing)	**$3.00**	UJCA § 1803(c)
	Jury Demand	**$10.00**	UJCA § 1911(a)(1)(g)
	Undertaking	**$50.00**	UJCA § 1806
	Appeal, Filing Notice of	**$5.00**	UJCA § 1911(a)(1)(e)
	Subpoenaed Witness Per Diem	**$15.00**	CPLR § 8001(a)
	Subpoenaed Witness Mileage	**$0.23**	CPLR § 8001(a)
	Issuing an Information Subpoena	**Nominal Cost**	UJCA § 1812(d)
Summary Proceedings	Initial Filing Fee (First Paper)	**$20.00**	UJCA § 1911(a)(1)(a)
	Issuing Fee	**$20.00**	UJCA § 1911(a)(1)(j)
	Appeal, Filing Notice of	**$5.00**	UJCA § 1911(a)(1)(e)
	Jury Demand	**$10.00**	UJCA § 1911(a)(1)(g)
	Subpoenaed Witness Mileage	**$0.23**	CPLR § 8001(a)
Transcribers	See http://www.nycourts.gov/howdoi/See_Atta.pdf	**No Set Fee**	

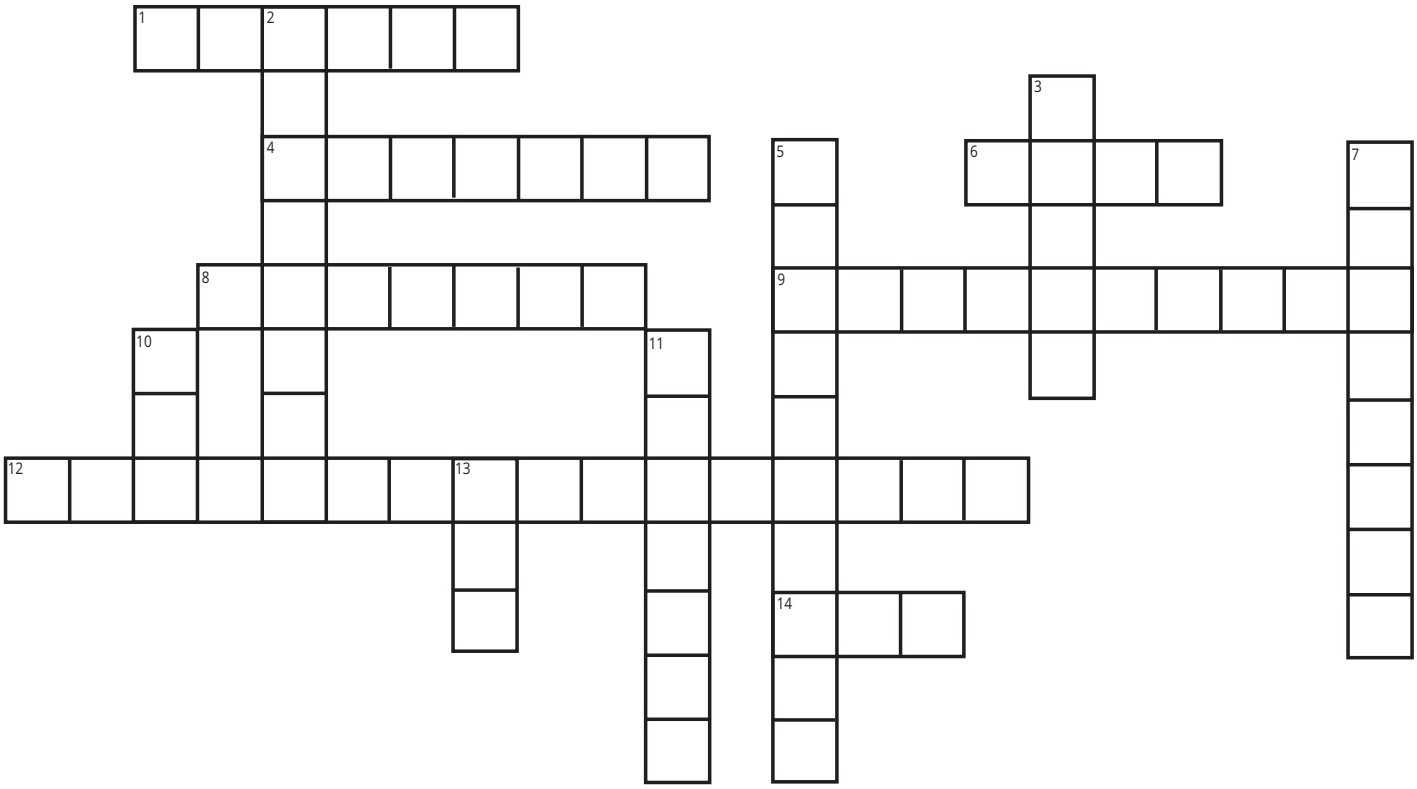
Please Note The Following Exemptions - These Entities Should Not Be Assessed Fees:

County (1965 Op Atty Gen 151); (CPLR § 8017(a))	**State (CPLR § 8017)**
Justice Court's Town (UJCA § 1911(a)(3)(a))	**Federal Government FBI Criminal Records (5 USCA § 9101(b)(1))**
Village Within Town (UJCA § 1911(a)(3)(a))	**Poor Persons (CPLR § 1102)**
Justice Court's Village (UJCA § 1911(a)(3)(b))	**Employee Actions (UJCA § 1912)**

Quiz of the Month

By Judge Richard M. Parker

2017 DWI Handbook–UCS Office of Policy and Planning



ACROSS

1 Type of test provided for under VTL 1194 to detect the presence of alcohol.

4 Hearing which a defendant arrested for 1192-2 is entitled to in order to determine whether or not to suspend his driver's license pending prosecution.

6 Conviction for this section of 1192 does not require installation of an IID.

8 Chooses what class of an IID which a defendant has installed on his vehicle.

9 Since IID's are not designed for installation on this type of motor vehicle, it is recommended that the court completely prohibit operation of said type of vehicle during the IID period.

12 Who besides the court and defense counsel, gets a copy of the financial disclosure report. (2 words).

14 What an adjudication of YO following conviction for 1192-2 requires the youthful offender to install on any vehicle he owns or operates. [abbrev.]

DOWN

2 Whose vehicle the defendant may operate without an IID provided tht certain conditions are met and that it is driven only for business purposes.

3 May determine that the defendant pay only part of the cost for installing and maintaining an IID.

5 Type of motor vehicle which may not be operated by a defendant with a hardship privilege.

7 Refusing to take this type of test triggers a proceeding before and Administrative Law judge.

10 Feature of a Class II IID not found on Class I IID's which makes it possible to locat the vehicle at any time. [abbrev.]

11 Degree of hardship which a defendant charged with 1192-2 must show in order to receive a hardship privilege.

13 Section of VTL 1192 which is known as "per se" DWI.

Answers on Page 11

NYSP
NEW YORK SAFETY PROGRAM

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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. I you have no points, you still get the insurance discount – it's the law!

NYSP provides feedback to the court!

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