The Magistrate

The Courts Closest to the People

SUMMER 2023

In This Issue:

Introducing

Hon James P. Murphy
Deputy Chief
Administrative Judge
for Courts
Outside New York City

&

Justice Courts Under Attack!

CONFERENCE INFORMATION INCLUDED

NEW YORK STATE MAGISTRATES ASSOCIATION

The Magistrate is a Publication of The New York State Magistrates Association 2023 Vol 63 No. 2

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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

Section 100.3 A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently

(A) Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. The judge's duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

(B) Adjudicative Responsibilities.
(1) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

Published by The New York State Magistrates Association
163 Delaware Ave., Suite 108 • Delmar, NY 12054
Subscriptions $25.00 per year.
Reprints of past articles are available at $4.00 per article.

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President's Message

Hon.
Dennis W. Young

My year as your President is flying by, with almost 9000 miles traveled to various county association meetings in addition to meetings in Albany.

NYSMA hs lost one of our past presidents, the Hon. Harold Bauman. Harold was a great friend and mentor to many of us and will truly be missed, especially by me. Harold wore many hats during his lifetime, from working as an engineer on NASA's Apollo project, from helping design the lunar landing module, to safely bringing back Apollo 13 to Earth. He later went to law school, practiced law and served as a Town and Village Judge for 20 years. Our sincere condolences to his wife Eileen and his entire family.

I want to assure all of you that we will diligently oppose and fight against the recently passed New York State Senate bill, which would require that judges in the 100 largest town and village courts must be attorneys. Thankfully, the Assembly has not voted on this bill. I am asking all of you to contact your Assembly member to voice your opposition and implore them to vote against this ill-advised legislation.

In closing, I hope to see many of you at our annual conference in Syracuse from October 1 through October 4, 2023.

God bless you all and God bless America.

Dennis W Young
President
NYSMA

NYSMA Officers and Directors toured the Robert H. Jackson Center, in Chautauqua-Lake Erie Region, honoring the legacy of the Hon. Robert H. Jackson, former U.S. Supreme Court Justice, Chief U.S. Prosecutor of the International Military Tribunal in Nuremberg, U.S. Solicitor General and U.S. Attorney General.

Shown in photo from left to right: Hon. Bill Franks (*Director, T/Stony Point*), Hon. Debra Kluth (*Director, T/Kendall*), Hon. Peter Bartlet (*Past President, T/ Warwick*), Hon. Alan Pohl (*Past President, T/Bristol*), Jan Peters (*wife of Hon. Paul Peter T/Schodack*), Hon. Susan Sullivan-Bisceglia (*2nd V.P., T/LaGrange*), Sharlene Sullivan, guest, Iris Barlet, Hon. Michael Fedish (*Director, T/Chenango*), Hon. David Fuller (*Past President, T/Tuckahoe*) and Hon. Dennis Young, President (*T/East Otto*).

Executive Committee Highlights

By The Hon. Tanja Sirago, NYSMA Executive Director

The Executive Committee meeting of the New York State Magistrates Association was held on Saturday, June 3, 2023, at 9:00 a.m., at the Harbor Hotel, Chautauqua Lake, New York, with the President, Hon. Dennis W. Young, being in the chair and the Secretary, Hon. Tanja Sirago, recording the minutes.

President Young welcomed Board members as well as guests Court Clerk Association President Jacqueline Ricciardi, Court Clerk Heather Blume and Court Clerk Kim Stahley, Hon. Vera Hustead, Hon. Ron Lucas, Hon. Chris Penfold and Hon. Marylin Gerace.

Hon. Thomas Sheeran moved to accept the minutes of the previous meeting. Carried.

Hon. Michael Fedish moved to accept the treasurer's report. Carried.

Discussion was held during the Site Selection Committee Report. An informal poll was taken whether we should pursue Lake Placid as a location for our 2025 conference using multiple hotels and shuttles to the conference center. 18 Yeas 7 Nays.

Discussion was held regarding negative publicity the town and village courts are receiving. Hon. David Brockway moved to explore a study using a university, NYCOM and Association of Supervisors along with NYSMA in response to recent concerns of town and village courts. Discussion, vote, carried. NYSMA participants in the study will be: Hon. David Brockway, Hon. David Kozyra, Hon. Debra Kluth, Hon. Gary Graber, Hon. Thomas Sheeran and Hon. Michael Fedish. This study should include changes OCA has made to the courts such as Raise the Age, etc., and how their changes have impacted the courts.

Discussion was held during the Judicial Wellness Committee report. Hon. Kenneth Ohi Johnsen moved to accept the retreat proposal submitted by Honors Haven for August 5th through 6th at a rate of $276.00 per person (self-pay). Discussion, vote, carried.

Old Business: None.

New Business: Hon. Michael Petucci moved to accept the renewal of the SMA Store contract for three years, starting June 13, 2023. Discussion, vote, carried.

Discussion was held regarding regional agreements of Off Hour Arraignments. It was agreed upon that Hon. Susan Sullivan-Bisceglia would try to find a contact for the acting city court judges and advocate for pay increases.

Hon. Kenneth Ohi Johnsen moved to increase the NYSMA Executive Committee reimbursement rates from $25.00 for dinner to $35.00 and increase the second night stay for travel over 200 miles from $75.00 to $125.00. Discussion, vote, carried. Effective immediately.

Hon. Gary Graber moved to accept an addendum to the Onondaga County Bar Association's ongoing agreement with NYSMA to offer CLE credits to NYSMA members seeking CLE credits through a County Association training program for a one-year term at a rate of $10.00 per person receiving the credit. Discussion, vote, carried.

Hon. Kenneth Ohi Johnsen moved to adjourn. Motion carried.

The next Executive Committee meeting will be held on October 1, 2023, at the Marriott Downtown Syracuse in Syracuse, NY.

Hon. James P. Murphy Named Deputy Chief Administrative Judge for Courts Outside NYC

Chief Administrative Judge Joseph A. Zayas announced the appointment of Hon. James P. Murphy as Deputy Chief Administrative Judge for Courts Outside New York City. The appointment was made with the approval of Chief Judge Rowan D. Wilson and in consultation with the Presiding Justices of the Second, Third and Fourth Departments of New York State's Appellate Division. He succeeds Hon. Norman St. George, who was appointed First Deputy Chief Administrative Judge in May.

In his new capacity, Judge Murphy will manage the day-to-day operations of the trial-level courts outside of New York City, which include over 640 State-paid judges and 6,000-plus non-judicial employees. He will work with local Administrative Judges in overseeing the implementation of court system programs and protocols, and the allocation of personnel and other court resources, in meeting the justice needs of those served by the courts outside New York City. He will also be responsible for oversight of New York's local Town and Village Courts.

"Judge Murphy is an energetic leader with a keen intellect and a passion for the law and public service. An effective administrator, he has led the Fifth Judicial District with distinction over the past four years, deftly overseeing the District in navigating the myriad operational and other challenges posed by the pandemic and guiding the District forward in its transition to today's 'new normal.' I am pleased that he will be taking on this critical administrative post and look forward to working with him in his new role," said Chief Administrative Judge Zayas.

"I am deeply honored that Chief Administrative Judge Zayas has entrusted me with this awesome responsibility. I have spent almost 40 years inside all of the Courts in New York, in one role or another, and I am excited to use that experience to make our Courts work more efficiently and equitably," said Judge Murphy. Prior to his appointment, Judge Murphy served as Administrative Judge for the Fifth Judicial District, which comprises Herkimer, Jefferson, Lewis, Oneida, Onondaga and Oswego counties in Central New York.

Judge Murphy began his judicial career upon his 2005 election to the State Supreme Court, Fifth Judicial District, to which he was re-elected in 2019. He served in the Court's matrimonial, general civil and commercial parts. From 2007 to 2019, he was the Supervising Judge for the Town and Village Courts in the Fifth Judicial District, overseeing over 200 Town and Village Justices. Before his ascension to the bench, Judge Murphy was a member of the Onondaga County Legislature, where he served as Chair of the Ways and Means Committee. Previously, he served as an Assistant District Attorney in Onondaga County and was in private practice for 20 years, with an emphasis on civil litigation and municipal law. Judge Murphy is a Syracuse native and graduate of the Syracuse University College of Law.

The New York State Magistrates Association congratulates Judge Murphy on his appointment, and looks forward to working with him.

State Bar Attacks Justice Courts

The New York State Bar Association is recommending that the state's town and village courts be consolidated into district courts and that non-lawyers no longer be allowed to serve as judges.

"It is necessary for our legal system to be constantly re-evaluated," said Richard Lewis, president of the New York State Bar Association. "We need to continue to adapt to our changing society and improve our system so that all stakeholders, plaintiffs' attorneys, prosecutors, defense attorneys, and of course, the parties can achieve justice."

The association, which by its own figures represents less than 20 % of the lawyers in New York State, is urging the state Legislature to set new qualifications of a law degree and five years of practice in the state for town and village justices. If adopted, non-lawyer justices would be phased out as their four-year terms expire.

In following the New York State Constitution, a district court would need to be established through a request from the county government to the state Legislature. The county leaders would determine a central location for the court with a full-time staff.

In opposition to the report, NYSMA Past-President Hon. Jonah Triebwasser (*T/V Red Hook*) and Hon. James Bacon (*T/New Paltz*), submitted a written dissent to the State Bar that said: "It has been the long-standing policy of the State Bar Association to seek ways to expand the public's access to justice. The State Bar's recommendations substantially restrict the public's access to justice. Instead of being able to go to their local justice court to adjudicate a traffic ticket or pursue a small claims case at convenient evening hours, the public in rural New York will have to drive long distances, perhaps in inclement weather and in dangerous conditions, to go to a daytime only, distant, district court, losing time from work and having to cover the expense of daycare.

NYSMA Past-President Hon. Peter Barlet (*T/Warwick) said in his written dissent:*

"The New York State Bar Association does nothing to enhance its reputation for independence and objectivity by ignoring the long, successful, and indisputable respect that New Yorkers hold for their Town and Village Courts by advocating for their elimination. In an era in which our courts are losing the respect of the People in their role as neutral arbiters of the law, our town and village courts continue to provide all New Yorkers with a front row seat to their own democracy; and, for that fact alone, the Town and Village Court should not only continue, but be given credit for the truly valuable role they play in our system of justice."

Judge Barlet went on to say: "Having a law degree is great, but it has little to do with preparing an individual for the wide-ranging and intellectual challenges required to properly adjudicate a difficult case. Justice requires an inquiring mind, intellectual curiosity, patience, and a desire to come to a fair and just determination of the issues in accordance with the law. Having a law degree is no guarantee that those essential values will be met. The New York State Bar Association's belief that justice and a law degree are one and the same – is sadly misguided, and should be soundly rejected."

NYSMA President Hon. Dennis Young (*T/East Otto*) said: "The vote by the House of Delegates of the New York State Bar Association is an affront to the "Courts Closest to the People" whose dedicated judges serve the people of their respective communities 24 hours a day, 365 days a year."

The State Bar's position will be vigorously opposed by the NYSMA Board of Directors and our Legislative Committee.

Please see more on this recommendation on the next few pages.

Statement of The New York State Magistrates Association in Response to the Report and Recommendations of the New York State Bar Association Task Force on Modernization of Criminal Practice

The New York State Bar Association has produced a report (the "Report") that, among other things, purports to analyze the operations and performance of New York's long-standing system of local courts that serve the State's Towns and Villages. Written over the sharp dissent of two of its members, that report is deeply flawed conceptually, is ill-informed, and is riddled with factual errors.

The Report's failings began with its deliberative process, which, while purporting to represent the opinions of all stakeholders in the system, omitted any substantial input from the parties most affected by the proposals: the Town and Village courts themselves, their judges, their administrative supervisors in the various Judicial Districts, and this association, which represents the judges of these courts. Nor, apparently, was any account taken of the comprehensive study of the Justice Courts undertaken by Kress & Stanley ("*Justice Courts in New York State: The Courts Closest to the People" [1976]*). As a result, the Report badly misunderstands the jurisdiction of the Justice Courts, their history of service to the public, their operations, training, and responsibilities, and their reporting to administrative authorities at both the local and State level. Perhaps most damning, the Report entirely fails to address the extremely high costs to the State of assuming the costs of operating 1200 courts that serve the municipalities of the State.

The lack of impartiality in the Report is further shown by its recommended implementation, which calls for a study of the issues and then prescribes that study's foreordained conclusion. Even more stunning, the Report proposes that, if its recommendations are not adopted by the affected municipalities, the counties unilaterally impose them.

The principal recommendations of the Report are more properly seen as a complaint against the existence of the multiplicity of towns and villages in New York State, a system rooted in the long history of the State and its Constitution. Each of those municipalities has its own executive and legislature, yet the Report seeks to strip them of their judiciaries. Those courts have a tradition of service as old as the State itself. They know their localities and their differences best – better than any consolidated or district courts, which will be farther away electorally, physically and philosophically. The Report's suggestion that this local knowledge is a handicap, and its scandalous speculation that familiarity with local conditions breeds corruption, are unworthy of a professional report.

Moreover, unlike State-paid judges who serve lengthy terms in office, Town and Village judges are regularly answerable to the electorate every four years or less, and may be turned out of office if their performance is deemed unsatisfactory for any reason. They are also, of course, like all judges, subject to the standards of the New York State Commission on Judicial Conduct ("CJC").

The Report reflects significant input from District Attorneys and Legal Aid organizations, who support recommendations to compensate for their well-known staffing insufficiencies. While Town and Village judges are the only judicial officers in the State on call twenty-four hours a day, and 18-b lawyers regularly appear to provide counsel at first appearances regardless of the hour, District Attorneys refuse to attend off-hour arraignments, and Legal Aid attendance and promptness at first appearances also suffer from their own staffing problems. Rather than directing their attention to improving the performance

of local courts by recommending adequate funding for District Attorneys and public defenders, those stakeholders illogically suggest that the courts be abolished to mitigate their own staffing problems.

A major flaw in the Report is its failure to account for differences throughout the State. While paying lip service to the reality that not one size fits all jurisdictions, the Report recommends the elimination or consolidation of Town and Village courts statewide. In Westchester County, for example, all Town and Villages judges are attorneys, but the Report nevertheless asks for the abolition of local courts there, as well. And in upstate New York, where the distances to be travelled by litigants and counsel are often already far greater, the Report fails to consider the hardships that would be imposed by consolidation or the creation of District Courts. In at least one county, the Legal Aid Society opposed the creation of a Centralized Arraignment Part for precisely the reason that it would be inconvenient for its attorneys and clients to travel longer distances than to their local courts.

Perhaps the Report's greatest failing is its failure to recognize that the consolidation of local courts will generate no net savings to the taxpayer, and that the creation of District Courts would be significantly more expensive. At its most basic, the creation of State-paid District Judgeships would not only substantially raise the level of judicial salaries above those paid to Town and Village judges, but would require that all of the costs of District Courts would then be paid by the State, not the municipalities that fund their own courts. The Report's example of the consolidation of the Village of Port Chester courts with those in the Town of Rye is particularly illuminating, as the Report touts the savings to Port Chester without even mentioning the corresponding increase in costs to the Town of Rye, which has had to hire two additional judges to attend to the increased caseload. Moreover, because the residents of Port Chester are residents of the Town of Rye, their tax burden will not be reduced.

The Report is also badly flawed in its description of the State's oversight of local courts. These courts report to the Administrative Judges of their judicial districts (most of whom have dedicated Deputy Administrative Judges or Staff Counsel with specific responsibilities for support and oversight of local courts), to the Deputy Administrative Judge of the State of New York, the Office of Court Administration, the state Department of Motor Vehicles, the Department of Criminal Justice Services and to the State Comptroller (to whom each court reports monthly). Unlike State-paid judges, Town and Village judges are personally liable for the handling and reporting of receipts and expenses. They are audited regularly by their municipalities and the State. During the pandemic, local courts received and were subject to well over two hundred administrative and executive orders from State officials at all levels, from the Chief Judge of the Court of Appeals to their local Administrative judges.

Further, the Report shows a lack of understanding of the training and continuing education received by local judges, which exceed that of State-paid judges. In addition to the requirements of Continuing Judicial Education on topics of particular relevance to local courts that are prescribed by the Office of Justice Court Support, the judges themselves, through the State Magistrates Association, operate a comprehensive program to create, teach, and attend approximately twenty-four additional hours each year on topics selected in response to the expressed needs of local judges. In its discussion of non-lawyer judges, the Report attempts to minimize these regular and extensive training and continuing education requirements for Town and Village judges. Moreover, it ignores completely the existence of the Resource Center established and operated by the Office of Justice Court Support for the specific purpose of acting as a law clerk pool for local judges. It also makes no mention of the fact that some counties have all lawyer-judges, and that, in other counties, not enough lawyers can be found to serve. More generally, the objection to non-lawyer judges is purely theoretical when there is no analysis of their performance.

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The Report additionally demonstrates a misunderstanding of the jurisdiction and dockets of Town and Village courts. Seeking to minimize their importance by referring to traffic offenses as their main source of jurisdiction, it fails to understand that most local courts spend the majority of their time on criminal matters, which plainly take more time than the adjudication of a traffic ticket. Their jurisdiction is analogous to that of the New York City Criminal Court, plus the New York City Civil Court (though with a lower jurisdictional amount), plus the Housing Part of Civil Court; and, when Family Court adjourns for the day, local judges sit as Family Court judges.

The statement that some local courts sit for only two hours a week – by far, the exception, when some Town courts are in session five days a week – apparently refers to time on the bench, which the committee well knows is only a part, and sometimes a small part, of a judge's work. In addition to preparation for court appearances, there is research, drafting, ruling on applications for search warrants, management of court clerks, preparing monthly financial reports, attending continuing education programs, responding to directives from supervisory authorities, and maintaining familiarity with developments in the law. The amount of time devoted to each of these tasks depends in part on the needs of the locality.The criticism that at times courts are required to set aside separate sessions for trial dates is incomprehensible. Setting a dedicated time for trials, jurors, witnesses, counsel, and the parties (instead of scheduling them on days with regular full calendars) is hardly unusual or unwise.

A key to the Report's misunderstanding of the operations of local courts may be found in its inaccurate statement that there is insufficient data about them. In fact, each court reports monthly to the State Comptroller all its dispositions, and opens its books to State and local auditors annually. The data are available, though the authors of the Report appear not to know of it, or, knowing of it, have chosen not to analyze it.

The Report completely misinterprets a calculation of the State Commission on Judicial Conduct that 20 % of the complaints it receives are against Town and Village judges.[1] Since Town and Village judges constitute at least 60 % of the judges in New York State, and preside over the vast majority of all cases, that figure is a credit to, rather than a criticism of, the quality of local justice. In contrast, state-paid judges, who constitute approximately 40 % of the judiciary, accounted for 67 % of the complaints. Moreover, when the actual imposition of public discipline is examined, fewer than 1 % of the 1800 Town and Village judges are found at fault. As in any large group, the existence of some poorly-performing individuals does not mean that the institution itself is to blame. The authors well know of notorious cases of misbehavior among State-paid judges. The fact, for example,that two of the four previous Chief Judges of the State departed while under questionable circumstances –one serving over a year in prison – should not prompt calls for abolition of the Court of Appeals.

Taken as a whole, the Committee, rather than seeking to improve the courts – for example, by recommending increased staffing for District Attorneys' offices, legal assistance societies, and offices of appointed counsel, and providing additional staffing from the Office of Court Administration to the Resource Center – instead proposes wholesale abolition of the local courts that have well served the people of New York, only to replace them with vastly more expensive tribunals that would be further from the people electorally, geographically and philosophically. To do so would be a disservice to the administration of justice and the people of New York.

[1] According to the CJC's 2023 Annual Report, complaints against Town & Village Judges in 2022 constituted an even lower 13 % of those filed (see, page 7).

Senate, OCA, Seek No Non-Lawyer Judges

A Senate bill would have required justices in the 100 highest volume town and village courts to be admitted to practice law in New York for at least five years as of the date they commence the duties of the judicial office. The bill died when the Legislature ended their session.

Since smaller localities lack the resources and docket to attract an attorney to serve as the town or village justice, the bill imposes the requirement on only those localities that have the largest number of cases, state Sen. Sean Ryan, D-Buffalo, a bill sponsor, said.

The New York State Office of Court Administration at first took no position on the legislation, then did an abrupt turn around (without any notice to or any consultation with the SMA.) OCA spokesman Lucian Chalfen was quoted in the New York Law Journal as saying that OCA 'substantively supports' the proposed requirement that attorneys preside as judges in many town and village justice courts.

NYSMA President Dennis Young said: "The NYSMA is extremely disappointed with the Office of Court Administration's statement in support of Sen. Sean Ryan's recently passed State Senate bill to require only attorney judges in the top busiest 100 town and village courts. Even more disappointing is their failure to contact NYSMA to discuss this abrupt change after continually voicing their support to keep the status quo in our town and village court system"..

NYS Senate Bill Will Eliminate the Local Court System

Early roots have been in place since the constitution of 1787 -

Albany, NY, June 20, 2023 - The New York State Magistrates Association (NYSMA) strongly opposes New York State Senate bill S139-B that was introduced and passed in this legislative session. This bill requires the 100 busiest town and village courts in New York to be presided over only by attorneys licensed to practice law in New York and who have been admitted to the bar for at least five years. Passage of its companion bill in the Assembly and the Governor's signature are the only things standing in its way of becoming law. Election of town and village justices as chosen by their respective town and village inhabitants has been mandated since the 1826 Constitutional amendments.

"There is little doubt that this bill is designed to eventually eviscerate this state's local court system," said Dennis Young, President of the NY State Magistrates Association. "The Senate bill has less to do with the quality of town and village courts, and the administration of justice, and more to do with an attempt to eliminate local choice and control over what has properly been within the purview of the local electorates across the state for nearly 200 years."

The clear intent of S139-B is to dictate and limit which members of any given community may hold judicial office. This bill attempts to usurp the right of voters to elect those in their communities that they believe to be fair and impartial, and who would best serve that community, whether they be attorney or non-attorney. The suggestion implicit in this legislation is that members of a community are incapable of

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making informed decisions about who should sit in judgment of matters from the straight-forward to the highly complex as may arise in their local courts.

There are some 1195 town and village courts, served by approximately 2500 justices in New York State. They constitute 60% of the state's entire judiciary and for generations have properly been known as the "courts closest to the people." Each of these courts is presided over by a town or village justice, all of whom have been elected by their local communities. All must be certified by the Office of Court Administration as having successfully completed mandatory training both following election and in each subsequent year.

These town and village courts are staffed and budgeted at levels deemed appropriate by their respective town or village boards. As such, they operate in a fiscally responsible manner, reporting annually to their locally elected board members. These fiscal constraints contrast with the majority of state-paid judges who receive annual salaries exceeding $200,000 and who have multiple support staff including law clerks and court security officers. It is estimated that each such judge, together with staffing requirements, costs the taxpayers roughly one million dollars. Requiring local justices to be attorneys will undoubtedly place an added expense on those localities mandated to have lawyer-only justices.

Town and village judges are subject to election every four years. The result of this mandate is that each local community has both the responsibility for, and the benefit of determining and evaluating the qualifications and judgment of their local judges on a frequent and regular basis. This is in contrast to state-paid judges who stand for election and review only every ten to fourteen years. Further, there are strict ethical rules that all New York judges must follow including limiting the way justices may campaign for their positions, as well as their participation in local, state and national politics and other matters. These rules combined with those governing behavior while in office, help maintain the independence, dignity, and integrity of the court system.

NY State Senate Bill S139-B was conceived, proposed, and advanced with no input from those who are most affected by this change: the locally elected judges who serve their communities and who are available for court related matters on a twenty-four-hour basis, seven days a week. The most recent annual report of the New York State Commission on Judicial Conduct identifies that only 13% of the 2022 complaints filed against the judiciary were against town and village judges, while 67% of the complaints were against "State-paid" judges who constitute approximately 40% of the judiciary (20% were against other officials over whom it has no jurisdiction).

"This bill is not designed to actually improve the courts, rather it smacks of the latest attempt by the New York State Bar Association, an organization that represents only 15% of the State's attorneys, to generate increased opportunities for its members, and to dictate who we choose to serve in our local governments," said Young.

The Senate's decision was based on faulty data, with little input or consultation from those most affected. This decision fails to examine both the expense and magnitude of this change and the resultant impact on affected and unnamed communities. It is the considered opinion of the NYSMA that both the leadership in the Assembly and the Governor must reject this poorly conceived and hastily fashioned seizure of voters' rights to determine, for themselves, who they would choose to sit as their judges as has been the case for almost two hundred years.

Case Law Update

By Robert Bogle NYSMA Past President, Nassau County Court Judge, Acting Supreme Court Justice, Supervising Judge Nassau County Town and Village Courts. **(Second in a series)**

New York Criminal Jurisdiction

In *People v. Viviani*, 36 NY3d 564—, — NYS3d— (2021), the Court of Appeals noted that as part of the Protection of People with Special Needs Act, the Legislature enacted Executive Law § 552, which created a special prosecutor, appointed by the Governor, empowered to investigate and prosecute crimes of abuse or neglect of vulnerable victims in facilities operated, licensed, or certified by the State. The special prosecutor, acting pursuant to this statutory authority, obtained indictments against the three defendants in these cases before the court of Appeals. Defendants asserted that the stature was an unconstitutional delegation of core prosecutorial authority away from the County District Attorneys-elected constitutional officers-to an unelected appointee of the Governor. The Attorney General, intervening pursuant to Executive Law § 71, argued for a "saving construction" that would have us read into the law certain conditions on the "special prosecutor's authority". "The Courts said we recognize that this well intentioned legislation was aimed at protecting a particularly vulnerable class of victims. But we cannot rewrite a statute in order to save it." Accordingly, the Court held that the provisions of Executive Law § 552 creating a special prosecutor with authority concurrent with that of the District Attorneys to be unconstitutional and affirm the dismissal of the indictments.

Reasonable Cause

In *People v. Balkman*, 35 NY3d 556, 134 NYS3d 321 (2020), the Court of Appeals held that the People failed to establish, at the suppression hearing, that police officer had reasonable suspicion to justify stopping vehicle in which defendant was a passenger, based solely on officer's patrol car's mobile data terminal notification that there was a "similarity hit" indicating that something was similar about the registered owner of the vehicle and a person with an outstanding warrant, by not presenting evidence about the content of the "similarity hit," namely what particular data of the registered owner of the vehicle and the person with the warrant matched, and what kinds of data matches, in general, resulted in "similarity hits". Without such evidence, the suppression court could not independently evaluate whether the officer had reasonable suspicion to make the stop.

The Court concluded that while information generated by running a license plate number through a government database may provide police with reasonable suspicion to stop a vehicle, the information's sufficient to establish reasonable suspicion is not presumed.

Simplified Information

In *People v, Eoakchi*, 37NYS3d 39, 146NYS3d 561 (2021). the Court of Appeals held that reprosecution on"superseding" simplified traffic information charging defendant with failure to stop at stop sign was not barred due to People's failure to demonstrate special circumstances following dismissal of original simplified information which charged the same offense which has facially insufficient for People's failure to timely serve the defendant's requested supporting deposition of police officer who issued ticket. The Court held that the procedural rule crafted by Appellate Term barring reprosecution in such cases erects an extra statutory barrier to reprosecution that contravened Criminal Procedure Law §§ 100.25 (2); 100.40: 170.30.

The Court concluded that the Appellate Term lacked authority to create a procedural rule requiring special circumstances for renewed prosecution of traffic offense after previous dismissal for failure to provide a requested supporting deposition. CPL§§ 100.40, 170.30.

Defective Accusatory Instrument

In *People v. Hardy*, 35 NY3d 466, 132 NYS3d 394 (2020), the Court of Appeals held the trial court lacked the authority to amend a date listed in misdemeanor information. The Criminal Procedure Law (C.P.L.)

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expressly stated which amendments to complaints and information were permissible under certain situations, but, it authorized date, time and place amendments for only a select subset of accusatory instruments, and the C.P.L. did not permit factual amendments for time, place or names for complaints and information, as it had for prosecutor's and superior court informations. C.P.L. § 200.70.

The Court added that in evaluating the sufficiency of an accusatory instrument the Court of Appeals does not look beyond its four corners. And the court concluded that the defendant's challenge to the validity of the amendment to an erroneous fact contained in the misdemeanor information presented a nonwaivable jurisdictional issue reviewable by the Court of Appeals on appeal, and thus the issue was not waived when defendant entered a guilty plea to criminal contempt.

Criteria to be Applied - Bail

In *People v, Chenskv*, 67 Misc3d 373, 120 NYS3d 621 (Nassau Co., Sup. 2020), the trial court grappled with the status of bail under the Bail Reform Law of 2019, when the defendant was changed with a non-qualifying bail offense. Here, the Court held that in determining whether a defendant charged with non-qualifying offenses persistently and willfully failed to appear before court, as is required for court to set bail, an appropriate definition for "willfully" is construed as a conscious disregard.

Defendant was charged with Grand Larceny in the Fourth Degree, which was non-qualifying offense, and willfully failed to appear in court, as such required the trial court to set bail, where defendant, even after being advised on the seriousness of his legal responsibility to appear in court and notified by defense counsel, missed his court date on three separate occasions.

Failure of defendant to appear in court, after being charged with non-qualifying offense of Grand Larceny in the Fourth Degree, was persistent, as was required for court to set bail, where defendant failed to appear for three scheduled court dates, even after issuance of bench warrant for his arrest. C.P.L, § 530.60 (2)(b)(1).

Duty of the Court - Guilty Pleas

In *People v. Bisono*, (*et. al.*), 36 NY3d 1013, 140 NYS3d 433 (2020), the Court of Appeals held that defendants in ten separate cases did not comprehend the nature and consequences of their waiver of appellate rights, and thus waivers were invalid and unenforceable. The rights encompassed by waivers were mischaracterized during oral colloquy and in written forms executed by defendants, which indicated waiver was absolute bar to direct appeal, failed to signal that any issues survived the waiver, and, in certain cases, advised that waiver encompassed collateral relief on certain nonwaivable issues in both state and federal courts.

The court concluded that a waiver of the right to appeal is not an absolute bar to the taking of a first-tier direct appeal.

Bench Warrant

In *People v. Duval*, 36 NYS3d 384, 141 NYS53d 439 (2021), the Court of Appeals held that a search warrant's description of place to be searched satisfied particularity requirement of the Fourth Amendment, and, thus, the search warrant was valid when issued, where description of targeted premises, as a single residence and not a multi-unit building, at marked street address matched facts available to detective who provided affidavit in support of search warrant, as well as facts presented to the warrant court. Defendant, alleged that the building identified as target premises in warrant actually comprised multiple residences, but failed to show that the building's outward appearance indicated that it was not a single family residence, given that it had one street address, one front door, and one side door.

The Court added that the trial court was within its discretion in denying defendant's motion to suppress evidence without holding an evidentiary hearing, although defendant argued that the search warrant was invalid under the Fourth Amendment's particularity requirement because buildings identified as target premises actually comprised multiple residences. Defendant's allegations and factual showing were insufficient to require a hearing, since they did not

show that identified building was divided into three separate residential units or that defendant lacked access to certain portions of building. [*See.* C.P.L. §§ 710.60(1), 710.60(3)].

Traffic Offense Arrest and Search

In *People v. Hinshaw*, 35 NY3d 427, 132 NYS3d 90(2020), the Court of Appeals reversed a divided fourth department ruling [170 AD3d 168 (4th Dept. 2019)] on the conclusion that the police lacked an objectively reasonable suspicion to stop the defendant's car for traffic infraction based upon a radio inquiry undertaken with no proof of any traffic infraction or criminality but merely because the vehicle in which defendant was traveling was indicated as having been in an impound yard. Thus, a trooper in Buffalo "observed no traffic violations and saw that the inspection sticker was valid, both of the occupants were wearing their seatbelts and "everything looked good," but the trooper thereafter ran a check of the car that resulted in a response, "THE FOLLOWING HAS BEEN REPORTED AS AN IMPOUND VEHICLE - IT SHOULD NOT BE TREATED AS A STOLEN VEHICLE HIT - NO FURTHER ACTION SHOULD BE TAKEN BASED SOLELY UPON THIS IMPOUNDED NOTICE." The trooper then directed the operator to stop in order to "investigate further and find out what the problem was" and as he later testified at the suppression hearing, on his consideration of the notice as "indicating the car may have been stolen".

The driver-defendant provided his license and registration and both were in order. When the trooper asked about the impound notification, the defendant stated that the car had been stolen previously. The trooper detected an odor of marijuana and observed a "roach" in the center console. The trooper then searched the driver and the passenger of the vehicle and found additional marijuana on the floor of the passenger side and the defendant's waistband. The trooper eventually found a loaded gun under the driver's seat. The majority of the court held that there was insufficient reasonable suspicion, as required. To stop the car for investigative purposes, while also noting that has been held by all four appellate divisions, probable cause is required to stop a car for a traffic infraction with traffic stops sobriety checks permitted without suspicion. In so ruling the majority noted that notwithstanding all other facts present, the trooper candidly conceded at the suppression hearing he had not reason to stop defendant, quoting *People v. Ingle*, 36 NY2d 413.412 (1975) and that the trooper's subjective belief that the impound was based on some illegality, even honestly held, was insufficient.

(More in our next issue.)

Hon. Robert Bogle

Honoring Retired Judges

Do you know of a judge who is retiring? Please send that judge's name and town or village to NYSMA1@gmail.com so that we can honor that judge in the next issue of The Magistrate.

Mastering Masking: Why and How to Avoid Masking CDL-Holder Convictions

By Elizabeth Earleywine [1]

(This article was originally published in the National Traffic Law Center's Between the Lines newsletter in July of 2019 under NHTSA cooperative agreement 693JJ91950010. It is reprinted here with the permission of the National Traffic Law Center.)

Congress has charged the U.S. Department of Transportation (DOT) with regulating commercial motor vehicles (CMV) to promote the public interest in their safe operation, and to encourage economical, efficient, and fair transportation. [2]The Federal Motor Carrier Safety Administration (FMCSA) is the operating administration within the DOT charged with ensuring "the highest degree of safety in motor carrier transportation."[3] Congress has instructed FMCSA "to improve motor carrier, commercial motor vehicle, and driver safety" in part by "developing and enforcing effective, compatible, and cost-beneficial motor carrier, commercial motor vehicle, and driver safety regulations and practices."[4] To further this goal and its mission to reduce crashes, injuries and fatalities involving large trucks and buses, FMCSA has promulgated (and updates) the Federal Motor Carrier Safety Regulations (FMCSRs).[5]

Driving is a privilege, not a right. It is a privilege granted upon meeting certain qualifications, such as passing a test, and can be taken away for many reasons. A commercial driver's license (CDL) is not a standard driver's license. Driving a CMV[6] requires advanced skills and knowledge above those required to drive a car or other lightweight vehicle. To be granted a CDL and authorized to drive a CMV in interstate commerce, an applicant must meet additional specific requirements that do not apply to holders of non-commercial licenses.[7] As such, a CDL holder may be considered a professional driver. A CDL indicates that the individual has a unique privilege to operate a motor vehicle that is larger, longer, and capable of carrying heavier loads.[8] If the driver possesses further qualifications, he/she may have privileges to transport hazardous materials or drive a vehicle that holds large numbers of passengers.[9]

Not only is a person required to meet certain conditions in order to earn the privilege to drive a CMV, he/she must comply with special laws and regulations in order to retain the privilege. These conditions are more stringent than those placed on a person with a standard driver's license. For example, a CDL holder may not consume any alcoholic beverages within 4 hours of driving or having physical control of a CMV.[10] A CDL holder who operates in interstate commerce is also required to maintain physical qualification standards,[11] which, generally, the CDL holder must renew every two years.[12]

These higher standards reflect the nature of the inherent risk in operating a CMV. The fact is that CMVs are disproportionately involved in motor vehicle crashes and fatalities. Large trucks and buses

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[2] 49 U.S.C. § 31131(b)(1) (finding that "it is in the public interest to enhance commercial motor vehicle safety and thereby reduce highway fatalities, injuries, and property damage").

[3] 49 U.S.C. § 113(b).

[4] 49 U.S.C. § 31100.

[5] See, e.g., *49 U.S.C. §§ 31136, and 31142; 49 C.F.R. pts. 350-399.*

[6] 49 C.F.R. § 383.5. A CMV is defined, in part, as a combination vehicle having a gross combination weight of 26,001 pounds or more or as a heavy straight vehicle having a gross vehicle weight of 26,001 pounds or more.

[7] 49 C.F.R. § 383.25(a).

[8] *Supra*, note 1.

[9] 49 C.F.R. §§ 383.93; 383.117; 383.121.

[10] 49 C.F.R. §§ 382.207; 392.5(a)(1) (2018).

[11] 49 C.F.R. § 383.71(h)(3) (2018).

[12] 49 C.F.R. §§ 391.41; 391.45 (2018).

represent 9.6 % of all vehicle miles traveled in 2016, but accounted for 12 % of all traffic fatalities.[13]

In those crashes, the occupants of a car, pedestrians, bicyclists or motorcyclists accounted for more than 80 % of the fatalities.[14] This article focuses on the role of the courts in advancing FMCSA's safety mission. Promoting safe driving behavior starts on the roadside through a state's enforcement of its traffic laws. The process continues in the courts, by holding the driver accountable for unsafe driving behavior. First, this article will provide a brief overview of how modern-day CDL safety measures came about, then it will discuss the prohibition against masking and define key terms. Lastly, the article will describe the ways in which masking can occur and some ways the court might act in conflict with the masking prohibition.

History of CDL Requirements

Prior to 1986, when Congress enacted the Commercial Motor Vehicle Safety Act (CMVSA),[15] regulation of CMV drivers was largely left to the states, resulting in piecemeal commercial driver qualifications and requirements. Some states did not require special licenses to operate 26,000 pound plus, articulated vehicles. Drivers could obtain licenses in multiple states and states did not communicate driver records with other states. The goal of the CMVSA was to improve highway safety by ensuring that drivers of large trucks and buses are qualified to operate those vehicles and to remove unsafe and unqualified drivers from the highways. In 1985, the year before Congress enacted the CMVSA, large trucks and buses were involved in just under .30 fatal crashes for every 100 million vehicle miles traveled.[16] By 2017, however, they were involved in .14 fatal crashes for every 100 million vehicle miles traveled.[17]

The CMVSA established the CDL Program with minimum standards for commercial drivers,[18] introduced the one driver/one license/one record concept, and mandated creation of the Commercial Driver's License Information System (CDLIS) to "serve as a clearinghouse and depository of information about the licensing, identification, and disqualification of operators of commercial motor vehicles."[19] The CMVSA also required states to ensure that drivers convicted of certain traffic violations be prohibited from operating a CMV.[20] Congress determined that increased highway safety could be achieved by holding CMV drivers accountable for their driving behavior. A significant step toward that accountability was the CMVSA's prohibition on CMV operators from possessing more than one driver's license.[21]

In 1987, the Federal Highway Safety Administration (FHWA)[22] amended the FMCSRs to implement the requirements of the CMVSA and establish national CDL standards that states were responsible for enforcing.[23] As part of this rulemaking, FHWA defined the term "conviction" as "the final judgment on a verdict [or] finding of guilty, a plea of guilty, or a forfeiture of bond or collateral upon a charge of a disqualifying offense, as a result of proceedings upon any violation of the requirements in this part, or an implied admission of guilt in States with implied consent laws."[24] In this final rule, FHWA requested further comment regarding the term "found to have committed," from the CMVSA.[25] In 1988, FHWA published a notice of proposed rulemaking, which, in part, proposed revising the definition of the term conviction in response to the comments received.[26]

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[13] FMCSA Commercial Motor Vehicle Traffic Safety Facts, https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/safety/data-and-statistics/84856/cmvtrafficsafetyfactsheet2016-2017.pdf (last visited May 20, 2019) citing Fatality Analysis Reporting System (FARS) and Federal Highway Administration, Highway Statistics 2016 data.

[14] Insurance Institute for Highway Safety-Highway Loss Data Institute, https://www.iihs.org/iihs/topics/t/large-trucks/fatalityfacts/large-trucks (last visited April 4, 2019).

[15] Commercial Motor Vehicle Safety Act of 1986, Pub. L. No. 99-570, tit, XII, §§ 12001-12019, 100 Stat. 3207-170 (1986) (Codified as amended at 49 U.S.C.§§ 31301-31317) ("CMVSA").

[16] Large Truck and Bus Crash Facts 2017, Table 1, https://www. fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/safety/data-and-statistics/461861/ltcbf-2017-final-5-6-2019.pdf (last visited May 20, 2019).

[17] *Id.*

[18] CMVSA §§ 12005-6, codified at 49 U.S.C. §§ 31307-08.

[19] CMVSA § 12007, codified at 49 U.S.C. § 31309.

[20] CMVSA § 12008, codified at 49 U.S.C. § 31310.

[21] CMVSA, § 12002, codified at 49 U.S.C. § 31302.

[22] Prior to the creation of FMCSA, the FHWA was authorized to regulate motor carriers and motor carrier safety.

[23] *Commercial Driver Licensing Standards; Requirements and Penalties*, 52 Fed.Reg. 20574 (June 1, 1987).

[24] *Id.* at 20581, 20587.

[25] *Id.*

[26] *Blood Alcohol Concentration Level for Commercial Motor Vehicle Drivers; Notice of Proposed Rulemaking and Public Information Forum*, 53 Fed.Reg. 16656 (May 10,1988).

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The proposal discussed adopting the Uniform Vehicle Code and Model Traffic Ordinance (UVC) definition.[27] Several states further suggested that the definition include administrative findings that a violation had been committed.[28] This early collaboration between the Federal government and commenters resulted in the definition that is used today.[29]

Building on the improvements in CMV safety resulting from the CMVSA, Congress implemented additional safeguards in 1999 by enacting the Motor Carrier Safety Improvement Act (MCSIA).[30] The MCSIA created the FMCSA as a separate operating administration of the DOT, and authorized the agency to regulate motor carriers and motor carrier safety. In part, the purpose of the Act was to "reduce the number and severity of large-truck involved crashes through . . . stronger enforcement measures against violators, . . . and effective commercial driver's license testing, recordkeeping and sanctions."[31]

Congress first prohibited states from masking violations committed by CDL holders in MCSIA.[32] The prohibition, codified at 49 U.S.C. § 31311(a), states in relevant part:

> (19) The State shall—
>
> (A) record in the driving record of an individual who has a commercial driver's license issued by the State; and
>
> (B) make available . . . all information. . . with respect to the individual and every violation by the individual involving a motor vehicle (including a commercial motor vehicle) of a State or local law on traffic control. . . . **The State may not allow information regarding such violations to be withheld or masked in any way from the record of an individual possessing a commercial driver's license.**[33]

A Joint Explanatory Statement issued by Congress in conjunction with the MCSIA makes clear that this provision is intended to prohibit states from both masking convictions, which includes using diversion programs or any other disposition that would defer the recording of a conviction on the CDL holder's record. The Statement clarifies that the MCSIA prohibits:

> both conviction masking and deferral programs by requiring every State to keep a complete driving record of all violations of traffic control laws (including CMV and non-CMV violations) by any individual to whom it has issued a CDL, and to make each such complete driving record available to all authorized persons and governmental entities having access to such record. This provision provides that a State may not allow information regarding such violations to be masked or withheld in any way from the record of a CDL holder.[34]

To implement MCSIA's prohibition against masking, FMCSA promulgated 49 C.F.R. § 384.226, which states:

> The State must not mask, defer imposition of judgment, or allow an individual to enter into a diversion program that would prevent a CLP[35] or CDL holder's conviction for any violation, in any type of motor vehicle, of a State or local traffic control law (other than parking, vehicle weight, or vehicle defect violations) from appearing on the CDLIS driver record, whether the driver was convicted for an offense committed in the State where the driver is licensed or another State.[36]

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[27] Conviction — means that a court of original jurisdiction has made an adjudication of guilt. The term includes an unvacated forfeiture of bail or collateral deposited to secure a defendant's appearance in court, a plea of nolo contendere accepted by the court, the payment of a fine, and a plea of guilty or a finding of guilt, regardless of whether the penalty is rebated, suspended or probated. UVC § 1-117 (2000)

[28] *Blood Alcohol Concentration Level for Commercial Motor Vehicle Drivers,* 53 Fed.Reg. 39044, 39047 (October 4, 1988).

[29] *See* 49 C.F.R. § 383.5 for this definition, discussed further, below.

[30] Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, 113 Stat. 1748 (1999) (codified as amended in scattered sections of 49 U.S.C.)("MCSIA").

[31] MCSIA, § 4, 113 Stat. at 1749, 49 U.S.C. § 113 note.

[32] MCSIA § 202,

[33] 49 U.S.C. § 31311(a)(19), emphasis added.

[34] 145 Cong. Rec. H12870-12874 (daily ed. Nov.18, 1999); 145 Cong. Rec. S15207-15311 (daily ed. Nov.19, 1999).

[35] Commercial learners permit.

[36] 49 C.F.R. § 384.226 (2018) (as amended).

The Prohibition Against Masking

To understand the intent of both Congress and FMCSA in codifying the prohibition against masking, we must look to the legislative history and to the the legislation and regulation. Certain terms, such as "conviction" are specifically defined in the FMCSRs. Other terms, such as "masking," "defer," or "diversion" are not defined in the FMCSRs, but otherwise have commonly accepted legal definitions.

"Masking," "Deferred Judgment," and "Diversion" Defined

Masking "the act or practice of a defendant's agreeing by plea bargain to plead guilty to a less serious offense than the one originally charged, as by pleading guilty to parking on the curb when one has been charged with speeding in a school zone" or "the act or an instance of concealing something's true nature."[37] Taking the example from the definition, masking occurred because changing the charge and citation to parking on the curb had the effect of concealing the true nature of the violation. In this type of case involving a CDL holder, no record of the actual violation, often having more significant consequences, ever makes it to the driver's CDLIS record.

The purpose of deferring imposition of judgment or of a diversion program is nearly identical. They differ in procedure, however. "Deferred judgment" places a person convicted of an offense on some form of probation, "the successful completion of which will prevent entry of the underlying judgment of conviction."[38] A diversion program, however, takes place prior to any preliminary judgments being entered. It is a pre-trial program that typically refers the offender to a rehabilitative program and, upon successful completion of that program, results in the charges being dismissed.[39] In the first instance, a conviction, as it is understood in the criminal justice arena, enters against a person, but is not recorded. In the second, there is never a conviction. The end result is the same, in terms of the prohibition against masking: no record of any violation ever makes its way to the driver's CDLIS record.

"Conviction" Defined

Also relevant to the discussion of masking is the definition of the term "conviction." Typically, the term "conviction" describes an instance in which a judgment of guilt is rendered against a person. However, as discussed above, "conviction" is defined more broadly in the FMCSRs, and includes actions beyond a judge entering a judgment of conviction for a substantive offense. To promote the Congressional goal of "improved, more uniform commercial motor vehicle safety measures and strengthened enforcement [to] reduce the number of fatalities and injuries and the level of property damage related to commercial motor vehicle operations,"[40] the FMCSRs define "conviction" as:

- An unvacated adjudication of guilt;
- A determination that a person has violated or failed to comply with the law in a court of original jurisdiction;
- A determination that a person has violated or failed to comply with the law an authorized administrative tribunal;
- An unvacated forfeiture of bail or collateral deposited to secure the person's appearance in court;
- A plea of guilty or nolo contendere accepted by the court;
- A payment of a fine or court cost; or
- A violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended, or prorated.[41]

Where any of these actions occur, the violation must be reported from the court to the licensing agency to be recorded on the driver's record (and trigger any appropriate disqualifying action).

Note that, "a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or by an authorized administrative

[37] *Masking*, Black's Law Dictionary (10th ed. 2014)

[38] *Id. Judgment.*

[39] *Id. Diversion Program.*

[40] 49 U.S.C. § 31131(b)(2) (2017).

[41] 49 C.F.R. § 383.5 (2018).

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tribunal" is considered a conviction.[42] As mentioned above, this language was added to the definition to include administrative findings, such as those originating from implied consent suspensions.[43] This occurs, for example, when a CDL holder refuses chemical testing upon arrest followed immediately by an administrative license suspension, but subsequently the substantive DUI prosecution does not result in a judgment of conviction (the defendant is found not guilty at trial, e.g.). In this case, the finding that the driver refused, for administrative license revocation purposes, must be reported to the licensing agency as a conviction. Additionally, under the regulation, when a CDL holder fails to appear and his/her bond is forfeited (including any type of recognizance or promise to comply bond), the court is required to report the violation as a conviction to the state licensing agency. Finally, any type of cost or fine associated with the violation requires that the offense be reported as a conviction to the state licensing agency. This includes cases where a violation is dismissed "for court costs."

Plea Negotiations and Masking

The prohibition against masking is not meant to bar plea negotiations in cases involving a violation by a CLP or CDL holder. Caseloads are large, particularly in courtrooms handling traffic offenses. Offenders often are charged with multiple offenses arising from the same incident. Not every charge is provable to the standard of beyond a reasonable doubt. The statute and regulation prohibiting masking do not bar negotiations entered in good faith and supported by facts and law. The anti-masking regulation cannot supersede a defendant's due process or other Constitutionally protected rights.

Plea negotiations may take many forms, some of which may contravene the prohibition against masking. In routine traffic matters, such as those involving offenses listed in Table 2 to 49 C.F.R. § 383.51, a common disposition may be that the driver agrees to plead guilty and pay court costs. So long as the driver pays the court costs and does not get another traffic violation in the subsequent 6 months, the charges are dismissed. This is a clear case of deferring judgment, which constitutes masking. If the driver is a CDL-holder,[44] and the violation is not reported as a conviction, as defined in 49 C.F.R. § 383.5, it has been masked.[45] Likewise, where a driver is charged with DUI, a common plea negotiation for a first offense could be a diversion program. Here, the driver agrees to certain terms, which typically includes substance abuse education or counseling, and the charges are dismissed upon successful completion of the terms. This occurs pre-trial or pre-disposition, so the driver never pleads guilty or is never found guilty. As with the previous scenario, if the driver is a CDL-holder and a conviction is not reported to the licensing agency, masking has occurred.[46]

Furthermore, just because a CMV operator has given up his or her CDL does not mean that deferral or diversion are legally permissible dispositions. If the individual had a CDL at the time of the offense, allowing the charge to be deferred or granting diversion would be prohibited by the anti-masking regulation.[47] In *Indiana Bureau of Motor Vehicles v. Hargrave*, the defendant, a CDL holder at the time of the offense, was charged with driving under the influence. He surrendered his CDL prior to pleading guilty to the offense and was granted diversion with the understanding that the charge would be dismissed upon successful completion of the program.[48] The defendant later filed a petition to reduce the time

[42] *See, e.g., Burdine v. Arkansas Dept. of Finance & Admin*, 379 S.W. 3d 476 (Ark. 2010) (The suspension of driver's license in Missouri constituted a conviction for driving while intoxicated, warranting disqualification of licensee's CDL); *Strup v. Director of Revenue*, 311 S.W. 3d 793 (Mo. 2010 (en banc) (Suspension of motorist's base driving privilege constituted a "conviction" for driving under the influence of alcohol for the purposes of the Commercial Driver's License Act, such as to merit disqualification of his CDL for a period of one year); *State v. Arterburn*, 751 N.W 2d 157 (Neb. 2008) (In state law, the phrase "authorized administrative tribunal" implicitly references Administrative LR proceedings.; and *State v. Burnell*, 966 A.2d 168 (Conn. 2009).

[43] Also commonly referred to as administrative license suspensions.

[44] 44 Or "someone required to hold a CDL." 49 C.F.R. § 383.51.

[45] 49 C.F.R. § 384.226

[46] *Id.*

[47] *See, e.g., Indiana Bureau of Motor Vehicles v. Hargrave*, 51 N.E.2d 255 (In. Ct. App. 2016) (Driver was not eligible to participate in a diversion program, or to have judgment deferred on that conviction, regardless of when he surrendered his CDL); *People v. Meyer*, 186 Cal.App.4th 1279 (2010) (Surrendering commercial driver's license did not permit defendant to attend traffic school in lieu of adjudication).

[48] *Id.* at 258.

of his administrative suspension, which the court granted.[49] Upon receiving the order regarding the suspension, the Bureau of Motor Vehicles (BMV) petitioned the court to reconsider, arguing that the defendant was not eligible for a diversion program due to his holding a CDL at the time of the offense.[50] The appellate court agreed with the BMV, stating, "[a]llowing Hargrave to surrender his license, avoid his conviction, and possibly return to driving professionally with no record of the offense is precisely what the anti-masking law is designed to prevent. Hargrave's suggested interpretation of the law is unreasonable, as it would permit the very mischief that the law is designed to prevent."[51]

A more challenging scenario for prosecutors, defense attorneys, and judges occurs when the defense requests that a charge be reduced. Sometimes the request is for a reduction to an offense that would be considered a lesser included offense of the charge, while on other occasions, the reduced charge has no bearing on the original offense. In either scenario, the prosecutor and judge must determine the reason for the amendment. Is there a bona fide legal and/or factual issue with the original charges brought against the driver? Where the answer is yes, those legal or factual issues provide justification for amending or reducing the charge. If not, the intent behind the action is no different than that found in *Hargrave*. The driver will have avoided the conviction, and will continue to drive with no record of the actual offense. Where there are no legitimate legal or factual bases for a reduction, then masking has occurred, as the purpose of the plea is to conceal the nature of the offense.

Conclusion

While the rate of fatal crashes involving large trucks or buses and the number of fatalities as a result of these crashes per miles traveled has improved since Congress passed the CMVSA in 1986, the actual number of fatal crashes and fatalities has been rising since 2009.[52] In 2017 more than 5,000 people lost their lives in crashes involving large trucks and buses.[53] Part of this can be attributed to an increase in the number of large trucks and buses on the road and miles being driven in all types of vehicles in that same time frame.[54] Additionally, not all fatal crashes involving large trucks or buses are the fault of the driver of these vehicles. However, one only has to consider the size difference between a CMV (over 26,000 pounds)[55] and an average car (approximately 4,000 pounds)[56] to conclude that the truck will inflict the majority of the destruction.

The prohibition against masking is not an arbitrary rule. A driver record that accurately reflects the CDL-holder's driving behavior is critical to promoting highway safety. Operators of CMVs are professional drivers, held to a higher standard based upon the type of vehicle they drive. As stated in *Commercial Drivers' Licenses: A Prosecutor's Guide to the Basics of Commercial Motor Vehicle Licensing and Violations*, "without a clear picture of a driver's history, a prosecutor, judge, or even a perspective employer will be unable to determine the threat posed by that driver and what remedial actions should be taken to correct his poor driving. Driver's histories also are relevant to those handling impaired driving cases, as well as serious or fatal crashes caused by impaired or reckless driving."[57] Masking prevents the court system, state licensing agency, and motor carrier employers from taking the appropriate action against a potentially dangerous driver. Too often, we hear the lament after a particularly egregious crash involving a CDL-holder driving a CMV, "(s)he never should have been on the road." An effective way to avoid this is to follow the prohibition against masking and ensure a violation appears on the CDL-holder's driving record.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 260.

[52] Large Truck and Bus Crash Facts 2017, supra note 11, Table 1. (2014 was the only year in this time-frame to show a reduction in fatalities.)

[53] *Id.*

[54] *See, Id.*

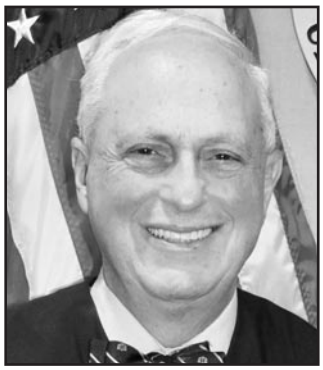
[55] 49 C.F.R. § 383.5.

[56] https://www.autolist.com/guides/average-weight-of-car (last visited May 20, 2019).

[57] *Commercial Drivers' Licenses: A Prosecutor's Guide to the Basics of Commercial Motor Vehicle Licensing and Violations*, 2nd edition, 2017, p 41. https://ndaa.org/wpcontent/uploads/CDL-Mono_REV2017_FinalWeb.pdf (last visited May 20, 2019).

Lunch Hour Small Claims Webinar

Lunch Hour Small Claims Webinar hosted by NYSMA for Judges across New York State



Hon. Jonah Triebwasser

Hon. Susan Sullivan-Bisceglia

Hon. Gerald Lebovits

A Small Claims Webinar sponsored by the NYSMA Training and Education committee was held recently over Teams and taught by the Hon. Gerald Lebovits, Claims Manual, an over 250-page comprehensive manual that was provided to all invitees. Also presenting by special appearance were NYSMA past president, the Hon. Jonah Triebwasser, and NYSMA Director the Hon. Susan Sullivan-Bisceglia (co-chair of the Training and Education Committee) who performed skits to showcase various issues relating to small claims. Judge Lebovits, a Supreme Court Judge, and professor of law at New York University Law School, Columbia University Law School, and Fordham University School of Law, shared his expertise and perspectives at this special training.

The Webinar was not only very well received, lively and informative, it was attended by approximately 50 judges across New York State including our President, Hon. Dennis Young, Past President Hon. Thomas Dias, and NYSMA Directors Hon. Ron Meister, Hon. Michael Fedish, Hon. Deborah Stritzel, and Hon. Debra Kluth. Judges expressed their appreciation and interest in future lunch hour webinars. This webinar is intended to be the first of what is intended to be a quarterly offering to our membership across New York State – especially for judges who may not otherwise be able to attend our annual meetings.

Commercial Drivers' License Violations Conference

Three New York judges participated in the recent Commercial Drivers' License Violations conference in Birmingham, Alabama. **Left to right are:** Hon. Christie Brothers (*T/Woodhull*), Hon. Dominic Arena (*T/Ephratah*), and NYSMA Past President Hon. Jonah Triebwasser (*T/V Red Hook.*)

News from the National Judicial College

THE NATIONAL JUDICIAL COLLEGE
Est. 1963
Making the World a More Just Place by Educating and Inspiring Its Judiciary

Register now for remaining 2023 courses

Many of these courses have limited enrollment. For course descriptions, pricing and registration, please visit judges.org/courses or click the course title below.

Dates	Course	Location
Aug 8 - 16	Administrative Law: Fair Hearing (JS 612)	Reno, NV
Aug 21 - 24	Decision Making (JS 618)	Denver, CO
Aug 21 - 25	Designing & Presenting: A Faculty Development Workshop	Reno, NV
Sep 4 - 7	Judicial Renaissance III	Athens, Greece
Sep 11 - 14	Essential Skills for Tribal Court Judges	Anchorage, AK
Sep 18 - 21	Enhancing Judicial Bench Skills (JS 624)	Duck Key, FL
Sep 18 - 21	Judicial Writing (JS 615)	Online
Sep 11 - Oct 13	Ethics for the Administrative Law Judge	Online
Sep 11 - Oct 27	Handling Small Claims Cases Effectively	Online
Sep 11 - Oct 27	Fundamentals of Evidence	Online
Sep 18 - Nov 3	Evidence Challenges for Administrative Law Judges	Online
Sep 27 - 29	60th: Advanced Bench Skills: Procedural Fairness*	New York, NY
Oct 2 - Nov 3	Taking the Bench: An Interactive, Online Course for New Judges	Online
Oct 9 - 12	Mindfulness for Judges	Lake Tahoe-Incline Village, NV
Oct 9 - 19	General Jurisdiction (JS 610)	Reno, NV
Oct 12 - 20	Financial Statements in the Courtroom	Online
Oct 16 - 20	Judicial Academy: A Course for Aspiring Judges	Reno, NV
Oct 23 - 26	Best Practices in Handling Cases with Self-Represented Litigants	Santa Fe, NM
Oct 30 - Nov 2	Ethics, Fairness and Security in Your Courtroom and Community	Reno, NV
Oct 30 - Nov 2	Ethics, Fairness and Security in Your Courtroom and Community - ONLINE	Online
Oct 30 - Nov 2	The Anti-Racist Courtroom: Theory and Practice	Montgomery, AL
Oct 30 - Nov 2	Advanced Skills for Appellate Judges	Washington, D.C.
Oct 30 - Dec 15	Special Considerations for the Rural Court Judge	Online
Nov 2 - 5	Appellate Judges Education Institute Summit+	Washington, D.C.
Nov 13 - 16	Impaired Driving Case Essentials	Reno, NV
Dec 5 - 15	Civil Mediation: An Online 40-Hour Workshop	Online

* These c[Screenshot alias]junction with events celebrating the NJCs 60th Anniversary.

Free Webinars:

July 25 | 9 a.m. Pacific **Self-Represented Litigant Issues in CMV Cases**
August 2 | Noon Pacific **Mitchell v. Wisconsin: The Unanswered Question of Implied Consent**
October 11 | Noon Pacific **Impaired Driving 2023: Where Are We?**
Various dates 2023 - 2024 | Noon local time **Fundamentals of "Masking" and Suspensions for CDL Holders in Traffic and Criminal Courts: 50 State Webinar Series**

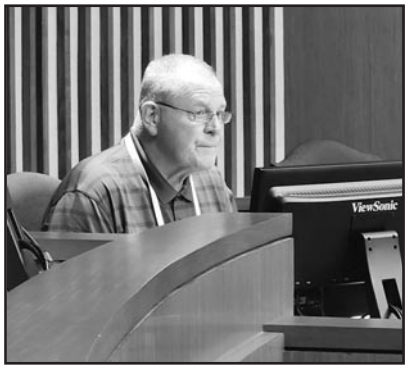
News from the National Judicial College

Hon. Jonah Triebwasser

Hon. Michael Fedish

NYSMA Director Hon. Michael Fedish (*T/Chenango*) and NYSMA past president Hon. Jonah Triebwasser (*T/V Red Hook*) get the feel behind the wheel of a big rig at the NJC seminar "Managing Cases Involving Commercial Drivers Licenses."

NJC Class Photo



During the mock trial held during the CDL course, Hon. David Overhoff drew on his decades of experience as a New York State Trooper to testify as the arresting officer in a CDL case.

New York magistrates recently attended courses at the National Judicial College in Reno, Nevada. **Shown left to right, back row, are:** NYSMA past president Hon. Gary Graber (*T/Dairen, Ret.*), NYSMA Director Hon. Roger Forando (*T/V Granville*) and Hon. Randy Baker (*T/Oakfield*); bottom row: NYSMA past President Hon. Jonah Triebwasser (*T/V Red Hook*), Hon. David Overhoff (*T/Dairen*) and NYSMA Director Hon. Michael Fedish (*T/Chenango*). Judge Graber was on the faculty of the course "Managing Cases Involving Commercial Drivers Licenses" in which Judges Baker, Triebwasser, Overhoff and Fedish were participants. Judge Forando completed the course "Traffic Cases for Non-Lawyer Judges."

At the conclusion of the course, NYSMA past president, Hon. Gary Graber (*T/Dairen, Ret.*), was honored for his 15 years on the NJC faculty. Presenting him with his plaque is Dr. Mishkat Al Moumin, Academic Director of the National Judicial College.

THE HON. DUTCH MAGILL SCHOLARSHIP AWARD APPLICATION

New York State Magistrates Association

The Annual Conference of the New York State Magistrates Association provides access to excellent training as well as opportunity to interact with Justices from across New York State. NYSMA wants to encourage this access to interactive training with other Justices. For this reason, NYSMA is offering scholarship packages to attend the Annual Fall Conference of this Association

Interested applicants must be a town or village justice of a court within New York State and financially unable to attend the Annual Conference by virtue of the lack of municipal funding. Only one applicant per Court may apply. The applicant must be a member in good standing of this Association. Although preference will be given to first-time attendees, all are encouraged to apply.

The application should be completed and signed by the applicant, along with all required attachments**, and forwarded to the Scholarship Committee for review. Only complete applications will be considered. The successful applicant(s) will be notified by the Scholarship Committee prior to the Annual Fall Conference.

Each scholarship award will cover the cost of lodging and meals for one person to attend the conference up, to $500.00, and require the recipient to attend the Annual Business Meeting and apply for OCA's reimbursement of one night lodging, mileage and certain applicable meals. The Scholarship Committee reserves the right to disregard any incomplete applications without prior notice to the applicant. The decision of the Scholarship Committee and the NYSMA Board of Directors will be considered final and will not be subject to any review or appeal process. In keeping with the mission of our organization, we offer this scholarship to further the education of town and village justices throughout the State of New York.

PLEASE READ AND COMPLETE THE APPLICATION

1. Name _____
2. Address _____
3. Title _____ Phone # _____ Email _____
4. Town/Village of _____
5. County of _____ Length of Service _____
6. Member of NYSMA _____Yes_____No Member of your County Association ____Yes _____No
7. Have you attended any prior Conferences _____ Yes _____ No
   If yes, do you remember when and where?_____
8. What position has your municipality taken with respect to your attendance at training sessions:_____

*****In order to have a complete application, you will need to attach:***

*a brief **application letter** supporting your request for financial assistance; and*

*a **letter from the Chief Fiscal Officer of your municipality** or a copy of your **court's budget** to verify lack of municipal funding*

Please sign and date the application and submit all documents prior to July 31, 2023 to:

Scholarship Committee, NYSMA, 163 Delaware Avenue, Delmar, NY 12054;
or scan and email documents to: nysma1@gmail.com

Dated this_____day of_____2023 _____
Applicant's signature

Dear Members,

As in the past, all certified sitting Justices, who are members in good standing of NYSMA and registered for the conference, attending the **New York State Magistrates Association's Annual Meeting** on **Monday, October 2, 2023 at 4:30 pm** may be reimbursed by the State through the Unified Court System for one (1) night of lodging and mileage at the current State rate, unless living within 35 miles of the conference site. The remaining expense is eligible for reimbursement by your town or village. **(Necessary expenses, including transportation, meals, room and registration fees incurred by fully authorized municipal officials and employees are properly reimbursable from municipal funds pursuant to §77-b of the General Municipal Law).**

Core B Training Course will be offered by the Office of Justice Court Support on Tuesday, October 3, 2023. Core A training Course will be offered on Wednesday, October 4, 2023 (Registration fee not required for Core classes ONLY)

In order to expedite registration, we urge you to Pre-Register.

FEES: Pre-Registration: $75.00 **On-site Registration: $100.00**

All members participating in any portion of the conference are required to pay the fee, which covers the many detailed arrangements necessary for a successful conference. For your convenience, receipts will be available at our registration desk.

On behalf of President Young and your Executive Committee members, we urge you to attend. It is a great time to renew old acquaintances, make new ones, to learn, speak your thoughts, vote, enjoy and help celebrate our 113th Anniversary.

Please note Registration and Fees for the Conference and Hotel are separate.

- If you are not pre-registered, the Hotel will not hold a room

MAGISTRATE REGISTRATION FORM

The 113th Conference of the New York State Magistrates Association

The Marriott Syracuse Downtown – Syracuse, New York

Name:_____Town Justice of:_____

Address:_____Village Justice of:_____

Address:_____

City/State/Zip:_____ Email:_____

County:_____Current Co. President:_____

Guest's Full Name if Attending:_____

Is this your first NYSMA Conference: Yes or No

Please choose One of the following for your materials for the conference: Printed____ or USB stick____

NAME TAGS WILL BE PROVIDED

Please make checks payable to: NYSMA

Send to: 163 Delaware Avenue, Delmar, NY 12054

Fee: $75.00 must be received by September 1, 2023 * Non-refundable after Sept. 8, 2023

NYSMA's 2023 Conference Class Line-up

Dates and times TBD
CLE & CJE credits pending

1. **Issues in Judicial Ethics and Discipline (2-hours)** – Presented by: Robert H. Tembeckjian, Esq., Administrator & Counsel for the NYS Commission on Judicial Conduct; Daniel M. Killelea, Partner: Gilmour & Killelea, LLP

2. **Judicial Wellness** – Presented by: Hon. Gerald Lebovits, NYS Supreme Court Justice; Hon. Patrick Sullivan, NYS Supreme Court Justice; Daniel Lukasik, NYS Judicial Wellness Coordinator

3. **Therapeutic Court** – Veterans Court and Mental Health Court – Presented by: Hon. David F. Everett, NYS Supreme Court Justice, Westchester County Veterans Court; Hon. John Zhou Wang, Manhattan Mental Health Court

4. **Setting Up a Centralized Arraignment Part (hour 1)** – Presented by: Hon. Dawn Fiorillo, Town Justice, Cobleskill; Arielle Bryant, Esq., Special Counsel for Town and Village Courts, 9th JD

5. **Advanced Issues in Operating a Centralized Arraignment Part (hour 2)** – Presented by: Hon. Sherry Davenport, Town Justice, Summerhill; Joshua Shapiro, Court Attorney-Referee and Special Counsel for Town and Village Courts, 6th JD

6. **Opinion Writing** – Presented by: Hon. David Brockway, Esq., Village Justice; Retired Family/Acting Supreme Justice

7. **Sex Offender Registration Act (SORA)** – Presented by: Peter DeLucia, Esq., Principal Court Attorney to Hon. Joseph F. Cawly, Broome County Court Judge; Judith Osborn, Esq., Chief Clerk III, Broome County Supreme and County Court

8. **Probation, Interim Probation, Conditional Discharges and ACD Violations** – Presented by: Joshua Shapiro, Court Attorney-Referee and Special Counsel for Town and Village Courts, 6th JD; Michael Sharbaugh, Cattaraugus County Probation Director

9. **Emergency Family Court Powers in Justice Courts with a Family Court Perspective** Presented by: Arielle Bryant, Esq., Special Counsel for Town and Village Courts, 9th JD; Hon. Kathie E. Davidson, Dean, Judicial Institute, Former Administrative Judge, 9th JD, Former Supervising Family Court, 9th JD

10. **Accusatory Instrument, Facial Sufficiency and Dismissals in the Interest of Justice** – Presented by: Wayne Witherwax, Executive Assistant District Attorney, Chemung County; Hon. Barbara Seelbach, Town Justice, Clinton, Dutchess County

11. **Navigating Post-Judgment Motion Practice: CPL Article 440 and Writ of Error Coram Nobis** – Presented by: Brian Rudner, Principal Court Attorney to Hon. Edward T. McLoughlin, Town Justice, East Fishkill, Dutchess County; Hon. Barbara Seelbach, Town Justice, Clinton, Dutchess County

NYSMA's 2023 Conference Class Line-up

Dates and times TBD
CLE & CJE credits pending

12. **Pleas, Plea Agreements & Sentencing** – Presented by: Michael V. Curti, Esq., Scarsdale Associate Village Justice; Partner: Harris Beach, LLC; Hon. Barbara Seelbach, Town Justice, Clinton, Dutchess County

13. **DWI Bench Trial – The Common Law Case (2-hours)** – Presented by: Joseph Gerstenzang, Esq.; Peter Gerstenzang, Esq.; Brittany Antonacci, Esq., District Attorney, Cayuga County; Tr. Joseph Turoski, NYSP DRE Training Officer

14. **Misdemeanor Drug Courts** – Hon. Rich Wallace, Ithaca City Court Judge; Hon. Seth Peacock, Ithaca City Court Judge

15. **Overview of the Town and Village Jury Process** – Presented by: Sandra Schepp, Commissioner of Jurors, Onondaga County; Susan Magari, Principal Jury Analyst; Hon. David S. Gideon, Esq.

16. **Mock Voir Dire Jury Trial Process/Selection** – Presented by: Hon. Susan M. Sullivan-Bisceglia, Esq.; Hon. David Kozyra; Hon. Jonah Triebwasser, Esq.; ADA and APD TBD

17. **Judicial Determination of a Persistent and Willful Violator along with a Review of Updated Qualifying Offenses** - TBD

18. **Court of Appeals Criminal Case Law Updates** – Presented by: Hon. Robert G. Bogle, Nassau County Court Judge, Acting Supreme Court Justice, Supervising Judge, Nassau County Town and Village Courts

19. **ENCON** – Major Matthew Revenaugh, NYS Department of Environmental Conservation; ENCON Regional Attorney TBD

20. **Tech Tips (Numerous classes throughout the conference)** – Presented by: Dawn Cota, Network/Systems Engineer II; Brendan Burke, Network/Systems Technician II

21. **Expect the Unexpected: Advanced Arraignment Issues** – Presented by: Joshua Shapiro, Court Attorney-Referee and Special Counsel for Town and Village Courts, 6th JD

22. **Round Table** – Presented by: OJCS

23. **Judges without Clerks** – Presented by: OJCS; NYSAMCC, INC.

Nominating Committee Seeks Candidates

The following officers of the SMA will be elected at the Annual Conference

President Elect * Three Vice-Presidents * Four Directors * Treasurer

The SMA Nominating Committee seeks qualified members (sitting Town or Village Justices) for these positions. Association members are asked to complete the form below, submit a current resume and indicate why the judge(s) would be suitable candidate(s) for a leadership position in the SMA and return to:

Hon. Karl Manne – Chairperson, Nominating Committee

NYS Magistrates Association – 163 Delaware Avenue, Suite 108, Delmar, NY 12054

Deadline: September 1, 2023 Nominations will not be accepted after this date

NOMINEE INFORMATION

Name:_____ Position of :_____

Present Judicial Title:_____

Municipality: Town / Village of:_____

Address:_____

Submitted by: _____

Please attach candidate(s) resume(s)

What's expected of New Directors

Four Directors of the Association will be elected at the Annual Meeting. The term of a Director is three years. Occasionally, a vacancy requires that an additional Director must also be elected to complete a partial term.

Each Director will be expected to attend all five Executive Committee meetings which are held each year. Two of these meeting are held during each Annual Conference. The first is held in the afternoon on the Sunday on which the conference begins. The second conference meeting (which of course, is the first meeting for Directors newly–elected during the conference) is held in the morning of the Wednesday on which the conference concludes.

Additionally, a Saturday Executive Committee meeting is held each December, March/April, and June at various locations throughout the State. These locations are selected by the President. Travel costs relating to the three Saturday meetings, including applicable lodging, will be reimbursed by the Association.

Each Director will be assigned to one or more of the Association's committees by the President and will be expected to participate as directed by the committee(s) chair(s).

100 E. Onondaga Street, Syracuse, NY 13202

RESERVATION INFORMATION
ARRIVAL: Sunday, October 1, 2023
DEPARTURE: Wednesday, October 4, 2023

All reservations must be made no later than **August 24th, 2023. Please email the reservation form to Victoria.Cook@Marriott.com**

Reservations made after this reservation deadline will be accepted at the Marriott regular rate with an offsite package.

NYS Magistrates Association

Package Guest Room Rates are as follows:

Single Occupancy: $791.01 + tax (15%) Per
3 Night Package
Includes:
Overnight Accommodations for one guest October 1,2 &3, 2023
Breakfast on Monday, Tuesday and Wednesday
Lunch, AM & PM Breaks on Monday & Tuesday
Dinner on Sunday and Tuesday
Dinner on Monday with $35.00 value for designated restaurants

Double Occupancy: $1,189.02 + tax (15%) Per
3 Night Package
Includes:
Overnight Accommodations for two guest October 1,2 &3, 2023
Breakfast on Monday, Tuesday and Wednesday
Lunch, AM & PM Breaks on Monday & Tuesday
Dinner on Sunday and Tuesday
Dinner on Monday with $35.00 value for designated restaurants

Single Occupancy: $627.34+ tax (15%) Per
2 Night Package
Includes:
Accommodations for one guest for 2 nights
2 Breakfasts
2 Lunches and Breaks on Monday & Tuesday
1 Dinner on eve of stay (no dinner on Monday)

Double Occupancy: $892.68 + tax (15%) Per
2 Night Package
Includes:
Accommodations for two guests for 2 nights
2 Breakfasts Each
2 Lunches and Breaks Monday & Tuesday Each
1 Dinner each on eve of stay (no dinner on Monday)

Guest Room Rate Without Meals:
Single Occupancy: $151.00 + Tax (15%)
Double Occupancy: $161.00 + Tax (15%)

Sunday Dinner Selection:
Chicken ____ Salmon ____ Vegetarian/Vegan____
Tuesday Dinner Selection:
Filet____ Seabass ____ Vegetarian/Vegan____

Please Indicate any Allergies or Dietary Restrictions you have;
_____
_____

Self Parking in the Marriott Syracuse Downtown (Harrison Place Parking Garage)

To confirm your reservation, a credit card number must be provided or a check/money order for one night's room and tax must be sent in. A purchase order cannot be sent for the initial deposit.
CC#:_____Exp:_____
Name:_____
Address:_____
City:_____State:_____ Zip:_____
Phone:_____
Email:_____
# of Rooms:____ # of people per room:_____
Roomate Name:_____
Arrival Date:_____ Departure Date:_____
Special needs:_____

RESERVATION POLICIES

- If paying by Purchase Order, let the reservation department know that you are paying with PO and submit it along with your reservation.
- *Provide your NYS tax exemption form upon check in with payment form* (Purchase Order or Credit Card) must match the name on the NYS tax exemption form.
- Guests staying on dates outside group's conference and/or are self-pay will be subject to tax.
- Reservations must be received no later than August 24th, 2023. Reservations received after that date will be accepted at the regular rate with an offsite package.
- Cancellations must be received 3 days prior to arrival date.
  Cancellations after this date will result in forfeiture of the one night's advance deposit.
- Check-in time is 4:00pm. Check-out time is 12:00pm.
- A conference rebate has been included in the package rate to offset the expenses of the conference.
- Confirmation of your reservation will be emailed using the information provided on this form.
- Package Rates Include $5.00 Self-Parking

UNLESS ALL PROPER FORMS ARE SUBMITTED & COMPLETED, RESERVATIONS WILL NOT BE PROCESSED.

Eugene W. Salisbury Magistrate of the Year Award

It is Spring and time to look ahead to the annual magistrates' conference, which this year is in Syracuse. One of the highlights of the annual gathering is the presentation of the Magistrate of the Year award. This award recognizes a judge for contributions to the judiciary, as well as for contributions to his/her community.

Do you know of an individual who deserves to be considered for this award? Who among you has contributed to the improvement and overall effectiveness of the judiciary? Who has shown that contributing to the betterment of the community is what justice is all about? Who has gained your association's respect because of outstanding contributions?

Please consider and nominate a person who deserves this recognition. Keep in mind that this award depends on the participation of both the county associations across the state and individuals like you.

As a person:
Does the judge display honesty, trustworthiness and behavior that benefits a member of the judiciary? Does the nominee command respect from others and show confidence in their actions and thoughts? Has the nominee avoided legal and ethical infractions and improprieties? Is he or she considered to be a good solid citizen by the members of his or her community?

As a justice:
Has the nominee's public and judicial conduct been free from even the appearance of impropriety? Does he or she exhibit sound temperament, attentiveness, patience and impartiality in their conduct on the bench? Has the nominee been studious in his or her knowledge of the principles of the law and diligent in endeavoring to ascertain the facts? Has the judge remained free from partisan demands, and have his or her actions been free of consideration of personal popularity or public notoriety? Has the nominee consistently abstained from any judicial act in which his or her personal interests are, or even appear, to be involved? Has his or her tenure on the bench been long enough to show that they command the respect of their community electorate? Has the nominee enhanced the integrity of his or her community through their actions within their local judicial system?

As a member of the judicial community:

Does the nominee command the respect of his or her peers as a justice? Has the nominee shown an interest in improving the quality of our local court system by membership and active participation in county and state magistrate associations?

Beyond his or her active membership in various associations, what examples are there that this person has tried to enhance the integrity, effectiveness and prestige of our town and village courts? Has the nominee been involved or instrumental in initiating legislation focused at improving the court system and its effectiveness in serving the public?

What effort has the nominee made to defend our local court system to others outside the judicial community?

Has the nominee asserted sound and constructive leadership in county and state associations? Has his or her contact with the public at large resulted in any position and constructive actions toward improving our town and village courts?

Please remember, your county association's participation is the single most important element in assisting us in selecting the Magistrate of the Year.

Please submit your nominations to:

Hon. Jonah Triebwasser, Chair
Magistrate of the Year Committee
New York Magistrates Association
163 Delaware Ave. Suite 108
Delmar, NY 12054

Nominations for the 2023 Magistrate of the Year Award must be submitted no later than August 18, 2023.

Department of Taxation and Finance

New York State and Local Sales and Use Tax

Exemption Certificate

Tax on occupancy of hotel or motel rooms

ST-129
(2/18)

This form may only be used by government employees of the United States, New York State, or political subdivisions of New York State.

Name of hotel or motel	Dates of occupancy From: To:	
Address *(number and street)* City State ZIP code		Country

Certification: I certify that I am an employee of the department, agency, or instrumentality of New York State, the United States government, or the political subdivision of New York State indicated below; that the charges for the occupancy of the above business on the dates listed have been or will be paid for by that governmental entity; and that these charges are incurred in the performance of my official duties as an employee of that governmental entity. I certify that the above statements are true, complete, and correct, and that no material information has been omitted. I make these statements and issue this exemption certificate with the knowledge that this document provides evidence that state and local sales or use taxes do not apply to a transaction or transactions for which I tendered this document, and that willfully issuing this document with the intent to evade any such tax may constitute a felony or other crime under New York State Law, punishable by a substantial fine and a possible jail sentence. I understand that the vendor is a trustee for, and on account of, New York State and any locality with respect to any state or local sales or use tax the vendor is required to collect from me; that the vendor is required to collect such taxes from me unless I properly furnish this certificate to the vendor; and that the vendor must retain this certificate and make it available to the Tax Department upon request. I also understand that the Tax Department is authorized to investigate the validity of tax exemptions claimed and the accuracy of any information entered on this document.

Governmental entity *(federal, state, or local)*	Agency, department, or division		
Employee name *(print or type)*	Employee title	Employee signature	Date prepared

Instructions

Who may use this certificate

If you are an employee of an entity of New York State or the United States government and you are on official New York State or federal government business and staying in a hotel or motel, you may use this form to certify the exemption from paying state-administered New York State and local sales taxes (including the $1.50 hotel unit fee in New York City).

New York State governmental entities include any of its agencies, instrumentalities, public corporations, or political subdivisions.

Agencies and instrumentalities include any authority, commission, or independent board created by an act of the New York State Legislature for a public purpose. Examples include:

- New York State Department of Taxation and Finance
- New York State Department of Education

Public corporations include municipal, district, or public benefit corporations chartered by the New York State Legislature for a public purpose or in accordance with an agreement or compact with another state. Examples include:

- Empire State Development Corporation
- New York State Canal Corporation
- Industrial Development Agencies and Authorities

Political subdivisions include counties, cities, towns, villages, and school districts.

The United States of America and its agencies and instrumentalities are also exempt from paying New York State sales tax. Examples include:

- United States Department of State
- Internal Revenue Service

Other states of the United States and their agencies and political subdivisions **do not** qualify for sales tax exemption. Examples include:

- the city of Boston
- the state of Vermont

To the government representative or employee renting the room

Complete all information requested on the form. Give the completed Form ST-129 to the operator of the hotel or motel upon check in or when you are checking out. You must also provide the operator with proper identification. Sign and date the exemption certificate. You may pay your bill with cash, a personal check or credit/debit card, or a government-issued voucher or credit card.

Note: If you stay at more than one location while on official business, you must complete an exemption certificate for each location. If you are in a group traveling on official business, each person must complete a separate exemption certificate and give it to the hotel or motel operator.

To the hotel or motel operator

Keep the completed Form ST-129 as evidence of exempt occupancy by New York State and federal government employees who are on official business and staying at your place of business. The certificate should be presented to you when the occupant checks in or upon checkout. The certificate must be presented no later than 90 days after the last day of the first period of occupancy. If you accept this certificate after 90 days, you have the burden of proving the occupancy was exempt. You must keep this certificate for at least three years after the later of:

- the due date of the last sales tax return to which this exemption certificate applies; or
- the date when you filed the return.

This exemption certificate is valid if the government employee is paying with one of the following:

- cash
- personal check or credit/debit card
- government-issued voucher or credit card

Do not accept this certificate unless the employee presenting it shows appropriate and satisfactory identification.

Note: New York State and the United States government are not subject to locally imposed and administered hotel occupancy taxes, also known as *local bed taxes*.

Substantial penalties will result from misuse of this certificate.

Attendance At This Conference is a Valid Town or Village Expense

You Must Receive Prior Approval To Attend

Section 77-b of the General Municipal Law authorizes the governing board of any municipality, by majority vote, to authorize any of its members, any officer or employee, or any other person who has been elected pursuant to law to a public office for which the term has not commenced, to attend a conference as defined in Section 77-b(c). The authorization must be by resolution adopted prior to such attendance (General Municipal Law §77-b[2]). The governing board, however, may delegate its power to authorize attendance to any executive officer or administrative board.

Your Registration Fee Can Be Reimbursed

Subdivision 3 of section 77-b provides that all actual and necessary registration fees, all actual and necessary expenses of travel, meals and lodging and all necessary tuition fees incurred in connection with attendance at a conference shall be a charge against the municipality and the amount thereof shall be audited, allowed and paid in the same manner as are other claims against the municipality.

New York State Reimburses a Portion of the Cost

The Office of Court Administration has provided NYSMA with funds to reimburse each justice who attends the Annual Meeting on Monday afternoon for mileage, up to $101.00 for one day's lodging and up to $48.00 for certain applicable meals. These costs would lower the reimbursement required from your municipality. (Subject to change)

Need A Cash Advance?

In addition to the authorization in subdivision 3 to reimburse for expenses previously incurred, subdivision 6 of section 77-b expressly authorizes a municipality to provide for cash advances to persons duly authorized to attend a conference for estimated expenditures for registration fees, travel, meals, lodging and tuition fees. If an advance is provided, the officer or employee must submit an itemized voucher showing actual expenditures after attendance. Also money advanced in excess of actual expenditures must be refunded to the municipality. If an officer or employee fails to return such excess advance at the time of submitting the voucher or upon demand after audit of the voucher, the municipality shall deduct the amount of the unreturned excess advance from the salary or other money owed the officer or employee. Any itemized actual and necessary expenses in excess of the cash advance may be paid after audit.

Municipality Won't Pay? You Can Usually Deduct the Expense on Your Taxes

In most cases, expenses incurred in connection with attendance at this conference are qualifying work-related expenses. Depending on your individual circumstances, conference related expenses can be deducted on Schedule A if you itemize your deductions. We recommend that you discuss this with your tax preparer.

Does Your Town of Village Pay Your NYSMA Dues?

Pursuant to Op. St. Comp. 80-501, 10/29/80, with prior approval of your Town or Village Board, Association dues may be a legitimate charge against a town or village.

Important

PLEASE BE SURE TO FILL OUT THE STATE EXEMPTION CERTIFICATE ON THE HOTEL REGISTRATION FORM. (OTHERWISE YOU WILL BE BILLED FOR TAXES).

MAKE SURE YOUR MUNICIPAL PAYMENT VOUCHER IS ATTACHED TO THE HOTEL REGISTRATION FORM. THIS WILL AVOID ANY PROBLEM AT CHECK OUT TIME.

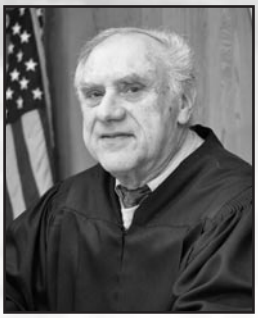
Departed Members

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

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. Their memory is revered and their virtues are recalled.

Now, be it resolved, that a copy of this resolution be included in the minutes and records of this association; that copies be available to survivors; that a copy be spread in the publication of this association; that the sincere sympathy of the officers and members of the New York State Magistrates Association be expressed.

Hon. Harold Bauman



The New York State Magistrates Association notes with extreme sorrow the passing of our esteemed friend, colleague and Past President, the Honorable Harold J. Bauman, former Liberty Village Justice and Town Judge.

A native of the Bronx, Judge Bauman attended The City College of New York, where he played on the last basketball team led by the legendary Nat Holman—the only coach ever to win the so-called "Grand Slam" of college basketball, when CCNY captured both the NCAA and NIT titles in the same season. He earned B.S. and M.S. degrees in mechanical engineering at CCNY, and following service in the U.S. Army Reserves, embarked on his first career as an aeronautical engineer for Grumman Corporation. He helped design NASA's lunar landing module, was a member of the Apollo 11 team that put Neil Armstrong on the moon and played a role in bringing the astronauts from the ill-fated Apollo 13 mission safely back to earth. He also participated in the design of vertical stabilizers for the F-14 fighter jet, and during the Vietnam War came to know a number of pilots who flew the jet in combat.

He changed careers in the 1970s, earning a J.D. from Brooklyn Law School. He moved with his family to Liberty to join the firm of Appelbaum Eisenberg & Bauman, and practiced law for nearly 50 years. A past President of the Sullivan County Bar Association and former trial counsel for Sullivan County, he was also a Fellow of the New York State Bar Association and a member of its House of Delegates.

In a case that made law in New York State, Judge Bauman represented the family of a member of a local electrical union who committed suicide after being suddenly and forcibly removed from his position. His investigation determined that the deceased had been harassed and discriminated against, and the family filed a workers' compensation claim despite the fact that no such claim had ever been successful. The matter was heard by a claims examiner who found for the family and was subsequently affirmed by the Workers Compensation Board and then by the Third Department of the New York Appellate Division. Eventually, the courts held that a workers' compensation claim resulting from the death by suicide of an employee could be maintained in New York State.

In 2001 he was elected Village Justice in the Town of Liberty. He served in that role and as Town Judge for twenty years. Judge Bauman was a member of the Sullivan County Magistrates Association and the New York State Magistrates Association (NYSMA). NYSMA elected him President in 2016, and he was sworn in by then Lieutenant Governor Kathy Hochul. In 2021, NYSMA awarded him its highest honor, Magistrate of the Year.

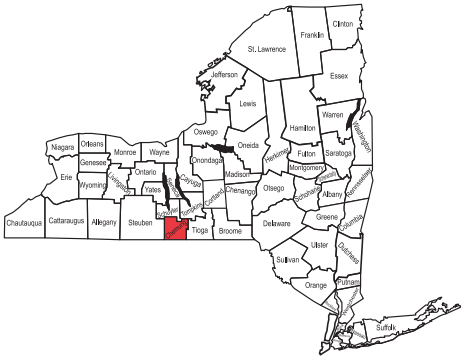
While serving as a Director of NYSMA, Judge Bauman again made law, successfully advocating with the State Legislature for the passage of a law elevating assaults against judges from Class A misdemeanors to Class C felonies. The "Bauman Bill" was signed by Governor Andrew Cuomo on June 5, 2012.

Judge Bauman is predeceased by his first wife, Lorraine, who died in 1999. He is survived by his wife Eileen, his son Scott and his wife Farnaz, daughter Elise Neal and her husband Jack, and four grandchildren: Alex and Logan Bauman, and Samantha and Matthew Neal.

Name	Title & Location	County
Hon. William Anglum (Retired)	TJ Hillsdale	Columbia County
Hon. William D. Brinnier III (Ret.)	TJ Saugerties	Ulster County
Hon. William Bud Burdick (Ret.)	TJ New Lisbon	Otsego County
Hon. Joseph A. DiSalvo	VJ Hastings-on-Hudson	Westchester County
Hon. David L. Hoyt, Sr. (Retired)	TJ Ashland	Greene County
Hon. James H. McIntyre (Retired)	TJ Long Lake	Hamilton County
	VJ Saranac Lake Harrietstown	Franklin County
Hon. Joel W. Welsh (Retired)	TJ Mamakating	Sullivan County

About My County

Chemung County



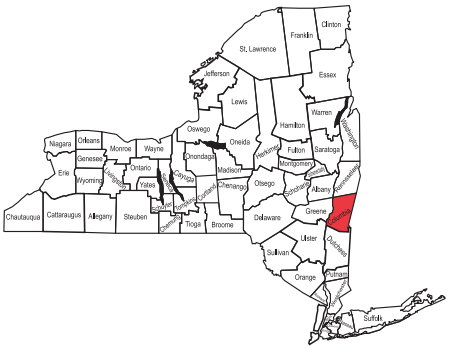
NYSMA President Hon. Dennis Young (*T/East Otto*) administered the oaths of office to the officers of the Chemung/Schuyler Counties Magistrates Association. **From left to right are:** Vice President Hon. Joshua C. Navone (*T/Hector*), President Hon. Steven Decker (*V/Watkins Glen*), and Secretary-Treasurer Hon. Andrew A. Smith (*V/Horseheads.*)

Columbia County

The Columbia County Magistrates Association recently hosted a two-part DWI mock trial seminar at their recent dinner meetings.

NYSMA was there in force as Director Hon. Paul Peter (*T/Schodack*), Vice-President Hon. Susan Sullivan-Bisceglia (*T/LaGrange*), and Past Presidents Hon. Thomas Dias (*T/Ancram, Ret.*) and Hon. Jonah Triebwasser (*T/V Red Hook*) congratulated the participants.

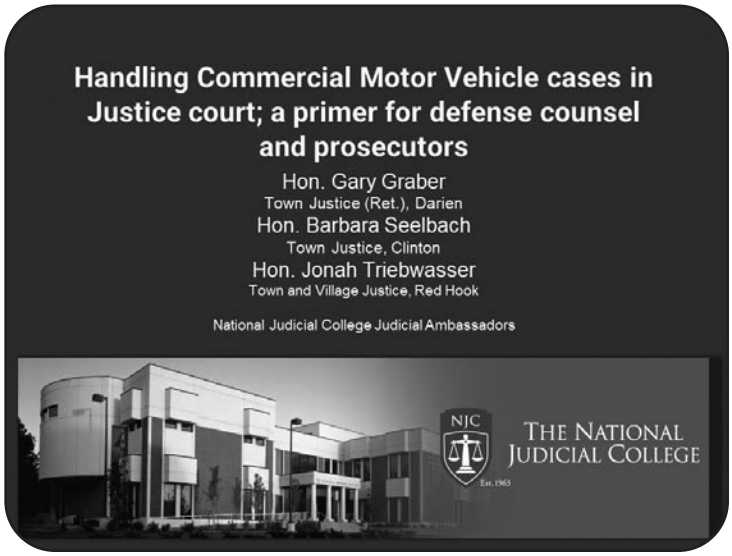
Columbia County Continued

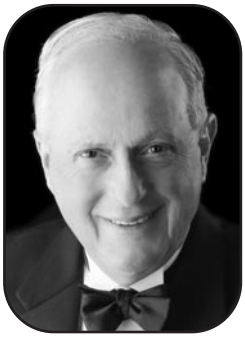


Members of the Columbia County Magistrates Association surprised the Hon. Harold Weaver (*T/Livingston*) with a cake in honor of his 81st birthday at their recent dinner.

Columbia County Magistrates President the Hon. Dr. Carrie O'Hare (center) is shown with mock trial participants Peter Gerstenzang, Esq., Trooper Joseph Turoski, New York State Police Drug Recognition Expert Training Instructor, Joseph Gerstenzang, Esq., and Rensselaer County Assistant District Attorney Patrick Campion, Esq.

Dutchess County





Hon. Jonah Triebwasser

Hon. Barbara Seelbach

Hon. Gary Graber

NYSMA Past Presidents, Hon. Gary Graber (*T/Darien, Ret*) and Hon. Jonah Triebwasser (*T/V Red Hook*) taught an online webinar to member of the Dutchess County Bar Association on "Handling Commercial Motor Vehicle cases in Justice court; a primer for defense counsel and prosecutors." Hon. Barbara Seelbach assisted in the preparation of the course. All three judges are National Judicial College Ambassadors.

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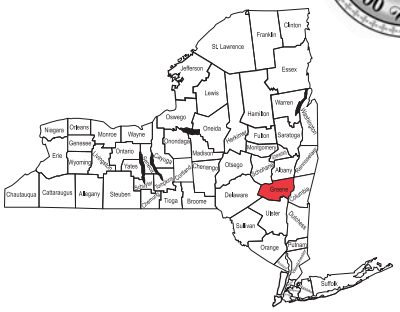
Greene County



The Appellate Division, Third Department, held a session of their court in Greene County recently. Justices of Greene County were invited to attend and observe including Hon. Charles Tailleur, Greene County Court, Hon. William Jacobs (*T/Catskill*,) Hon. Wanda Dorpfeld (*T/Coxsackie*) and Hon. Tanja Sirago (*T/Cairo*.)

The Justices are from left to right are: Hon Lisa Fisher, Supreme Court Justice for Greene County; Hon. John Egan, Albany County, Hon. Elizabeth Garry, Presiding Justice; Hon. Michael Lynch, Albany County and Hon. Eddie McShan, Bronx County.

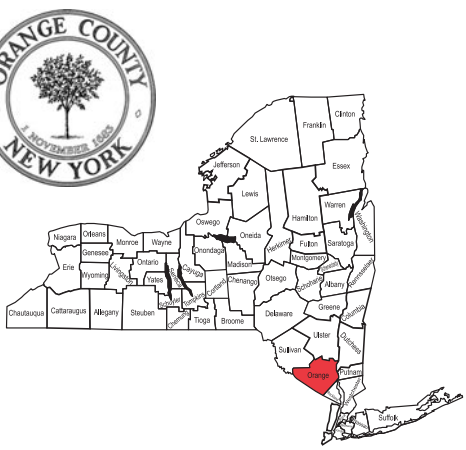
Madison County

Two judges were recently honored by NYSMA and the Madison County Magistrates Association. NYSMA President Hon. Dennis Young (*T/East Otto*) presents a certificate to Hon. John D. Button (*T/Sullivan,V/ Chittenango*) for 25 years on the bench

Also honored by Judge Young was Hon. Fred Palmer (*T/Cazenovia*) for 33 years on the bench.

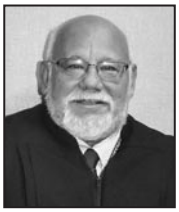
Orange County

Congratulations to Hon. William J. Schimpf (*V/ Maybrook*) on his retirement from the bench after nine years of dedicated service on the bench, and after 37 years of elected service to the village, including Youth Commissioner, Planning Board Member, Village Trustee, Deputy Mayor, Mayor, and Justice. Congratulations also to Hon. Joseph P. Byrne the new Maybrook Village Justice



How I Became A Town Justice: Hon. Lane Schermerhorn *(T/Corinth)*

By Hon. Roger Forando
(*T/V Granville*)



Soon after I began these quarterly features, I attended the Saratoga County Magistrates holiday festivities last winter as a State Board member with President Young at the invitation of association President Jeff McCabe. Nice venue and nice dinner. During the post – meal photoshoot, one of the judges came up to me and said he enjoyed reading these life stories. So naturally I invited him to send me his story.

Lane Schermerhorn was born in the quiet little river town of Corinth in Saratoga County on the Hudson River. After graduating from Corinth High School, Lane enlisted in the US Navy for four years and served in Communications aboard the USS Inchon circling the Globe in 1972-1973, finally doing time clearing mines in Haiphong Harbor, Vietnam. After being honorably discharged in 1974 he returned home to Corinth and was employed with International Paper for 31 years as an electrician, moving on to Glens Falls Hospital, retiring in 2017 after 11 years of service as an electrician. He has been happily married to his hometown sweetheart, Brenda for 46 years with two daughters and 3 grandchildren.

So how did he get into the Justice system? After being summoned for Grand Jury three times and serving as secretary and foreman, and eventually as a juror for 2nd degree murder trial, his interest in the judicial system increased 10 fold.

Lane had never been involved in local politics, but had served in various community organizations. In 2007 one of Corinth's Town Justice died in a tragic auto accident and the Town Board invited interested applicants to apply. He threw his hat in the rings as a dedicated community leader and was appointed Justice in March 2007. After "Taking the Bench" in April, he began serving and as admits "it was an eye-opening experience. With no prior experience in legal matters, there was so much to ingest". The learning curve was about 90 degrees but with the help of his co-Judge, now retired Ambrose Clothier, and several local justices, he survived.

Elected as a Town Justice has been one of the most important and impressionable events is his life. I've always believed in the inherent goodness of people. People are people, and sometimes make errors in judgment and make mistakes. Our communities are faced with more day-to-day challengers than ever before. Having the responsibility and authority to make decisions that affects a person's finances and sometimes their freedom is enormously important. Probably the most rewarding aspect of serving as Town Justice is realizing he has made a positive difference or brought about a change in a person's life. Lane has always tried to convey to someone standing before him, that what judges do is not about punishment or depleting their finances; it is about understanding the right way to co-exist.

As we all know, being a local justice takes up a lot of time and commitment. In addition to his judgeship, Lane has been a Lay Leader in his Church since 1998 and a member of the American Legion for 43, serving as Chaplain for the Corinth Post. He was recently appointed as Chaplain of the Saratoga Magistrates' Association, He and his wife serve as President and Vice President of the Corinth Alumni Association.

After getting to know Judge Schermerhorn from this article, Judge Schermerhorn is truly a community leader and Corinth is lucky to have him serving as their Town Justice.

Advisory Committee on Judicial Ethics

The Advisory Committee on Judicial Ethics responds to written inquiries from New York state's approximately 3,600 judges and justices, as well as hundreds of judicial hearing officers, support magistrates, court attorney-referees, and judicial candidates (both judges and non-judges seeking election to judicial office). The committee interprets the Rules Governing Judicial Conduct (22 NYCRR Part 100) and, to the extent applicable, the Code of Judicial Conduct. The committee consists of 27 current and retired judges, and is co-chaired by the Honorable Margaret Walsh, a Justice of the Supreme Court in Albany County, and the Honorable Lillian Wan, a Justice of the Appellate Division, Second Department.

OPINION 23-43
March 23, 2023

Digest: A judicial candidate may appear in joint campaign advertisements only with candidates who make up the slate of which the judicial candidate is a part. Candidates are on the same slate if they (a) have been endorsed by the same political party and/or (b) will appear on the same political party's ballot line.

Rules: Election Law § 1-104; 22 NYCRR 100.0; 100.0(Q); 100.5; 100.5(A)(1)(e), (h); 100.5 (A)(2); 100.5(A)(2)(ii)-(iv); Opinions 13-137/13-152/13-153; 09-176; 05-99; 02-100;01-99;91-107.

Opinion:

The inquiring judge presides in a two-judge town court. Both justices are in their window period for re-election, but are members of different political parties. At this time, they have not been endorsed by the same political party and there is no indication that they will appear on the same ballot line. The judge asks if it is permissible for them to engage in joint campaign advertisements, where they would share the costs equally and would not endorse each other.

During the applicable window period, a judicial candidate may participate in their own campaign for judicial office as permitted by the rules (*see* 22 NYCRR 100.0[Q]; 100.5[A][2]). The candidate may not, directly or indirectly, publicly endorse or publicly oppose (other than by running against) another candidate for public office (*see* 22 NYCRR 100.5[A][1][e]), and may not make a contribution to a political organization or another candidate (*see* 22 NYCRR 100.5[A][1][h]), but may nonetheless appear in campaign advertisements along with other judicial and non-judicial candidates as part of a single "slate" of candidates (*see* 22 NYCRR 100.5[A][2][iii]).

In Opinion 09-176, we addressed an inquiry from a town justice who wished to participate in joint campaign advertisements with another judicial candidate *before* the primary. We concluded that the candidates "may display campaign lawn signs that have both candidate[s'] names printed on them" (id.). In contrast, we concluded the candidates "may not send voters one letter conveying both candidates' qualifications and bearing both candidates' signatures that is printed on letterhead comprising both candidates' names," as this would create the appearance of an endorsement (*id.*). In a footnote, we observed that the term "slate" was not defined in the rules and we expressly "decline[d] to impose a requirement that a judicial candidate may not appear in any joint advertisements until his/her party has chosen its official slate" (*id.* fn 1).

The present inquiry warrants a fresh look at these issues. The term "slate" appears exactly once in the Rules Governing Judicial Conduct. Section 100.5(A)(2)(iii) expressly permits a judicial candidate to:

> appear at gatherings, and in newspaper, television and other media advertisements *with the candidates who make up the slate of which the judge or candidate is a part.* (emphasis added)

A careful reading of the political activity rules (22 NYCRR 100.5) reveals this is the *only* provision which specifically authorizes joint advertisements.[1] That is, the rules contemplate joint advertisements *only* when the candidates are on the same "slate."

It is therefore necessary to understand the term "slate." The Rules Governing Judicial Conduct and the Election Law do not define the term (*see* 22 NYCRR 100.0; Election Law § 1-104), and ordinary dictionary definitions such as "a list of candidates for nomination or election" offer no meaningful guidance for our purposes (Merriam-Webster Online Dictionary, at 4b, available at https://www.merriam-webster.com/dictionary/slate [accessed March 29, 2023]).

In a commonsense, everyday understanding of the term, however, the word "slate" implies a *political party's* slate. The slate may be chosen by the political party's leadership through endorsements, or may be determined through a judicial nominating convention, a political party caucus, petitioning process, or primary election in which the party's registered voters select who will be on their ballot line. Thus we conclude that Section 1 00.5(A)(2)(iii) reflects a practical reality: when candidates are on the same "slate," their appearance together on an advertisement does not create any appearance or implication that they are endorsing each other, as they have all been chosen by the political party's leaders and/or voters. Consistent with this view, we have previously recognized that an advertisement "evidently prepared by or on behalf of the slate or political party, rather than by a judicial candidate" does not create an appearance that a judicial candidate endorses the other slate members, even if the slate advertisement refers to the slate as a "team" and requests "that voters vote for an entire row of candidates" (Opinion 13-137/13-152/13-153).

Accordingly, we conclude that a judicial candidate may *only* appear on joint advertisements with other members of a political party's slate. We recognize that judicial candidates may be endorsed by multiple political parties and appear on multiple political parties' ballot lines. This means, in effect, that judicial candidates may be part of multiple slates. In our view, *all* of those party "slates" can be a basis for joint advertisements under Section 100.5(A)(2)(iii). As always, a judicial candidate must not endorse any other candidate and must pay no more than the candidate's own *pro rata* share of the cost of a joint advertisement (*see e.g.* Opinions 13-137/13-152/13-153; 05-99; 02-100; 01-99; 91-107).

Opinion 09-176 is overruled to the extent it permits two judicial candidates who are not on the same slate to display campaign lawn signs that have both candidates' names printed on them or otherwise appear in joint campaign advertisements.

Here, because nothing in the inquiry suggests that the inquiring judge and their co-judge are members of the same political party's slate, they must not appear in joint campaign advertisements.

[1] Other provisions permit a candidate to appear in media advertisements and promotional campaign literature "supporting his or her candidacy" (22 NYCRR 100.5[A][2][ii]), and permit the "candidate's name to be listed on election materials along with the names of other candidates" (22 NYCRR 100.5[A][2][iv])

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OPINION 23-06
March 23, 2023

Digest: A judge may continue to be a life member of the National Rifle Association.

Rules: 22 NYCRR 100.0(M); 100.0(V); 100.1; 100.2; 100.2(A); 100.2(C); 100.3(A); 100.3(B)(8); 100.4(A)(1)-(3); 100.5(A)(1); 100.5(A)(1)(b), (h); Opinions 20-199; 20-128; 19-30; 18-72; 17-70; 17-38; 15-227; 15-77; 14-117; 14-95; 98-137; 98-101.

Opinion:

A new judge has a lifetime membership in the National Rifle Association (NRA), purchased before assuming judicial office. The NRA's website suggests that it is a not-for-profit organization that engages in extensive litigation, lobbying and political activity. The website explicitly states that membership dues and contributions are not tax deductible. The judge reports that it is possible to resign from membership, but the lifetime membership does not expire and cannot be transferred or refunded. Accordingly, the judge asks if it is necessary to resign as a member of the NRA.

A judge must uphold the judiciary's integrity and independence (*see* 22 NYCRR 100.1), 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]). While a judge may participate in extra-judicial activities that are not incompatible with judicial office and do not cast reasonable doubt on the judge's capacity to act impartially as a judge (*see* 22 NYCRR 100.4[A][1]-[3]), a judge's judicial duties nonetheless "take precedence over all the judge's other activities" (22 NYCRR 100.3[A]). A judge must not lend the prestige of judicial office to advance any private interests (*see* 22 NYCRR 100.2[C]) and must not publicly comment on any pending or "reasonably foreseeable" court proceeding in the United States or its territories (22 NYCRR 100.3[B][8]; 100.0[V] [defining "impending" proceeding]). A judge also must not "directly or indirectly engage in any political activity" unless an exception applies (22 NYCRR 100.5[A][1]). Beyond this general prohibition, the rules directly forbid "being a member of a political organization other than enrollment and membership in a political party" (22 NYCRR 100.5[A][1][b]) and "making a contribution to a political organization" (22 NYCRR 100.5[A][1][h]). In turn, the rules define a "political organization" as a "political party, political club or other group, the principal purpose of which is to further the election or appointment of candidates to political office" (22 NYCRR 100.0[M]).

General Principles

As we observed in Opinion 17-38, "the starting point for an inquiry about political activity is one of prohibition, with discrete and narrow exceptions drawn only after a careful analysis of all of the factors informing the decision." Thus, we advised (*id.*):

> Section 100.5 starts with an across-the-board prohibition of any direct or indirect political activity by judges before delineating three discrete exceptions to the blanket prohibition. Accordingly, the ensuing recitation of examples of specific prohibited political activities can by no means be seen as all-encompassing or comprehensive, lest the broad reach of the prohibition be eviscerated.

While recognizing certain exceptions when a judge's personal interest is directly involved, we have been "unwavering in insisting upon the narrow-tailoring of these exceptions in order to preserve the preeminent principle that the breadth of the prohibition against political activity must remain robust" (*id.*).

In Opinion 19-30, we defined a framework for a judge to evaluate an organization's activities:

if a not-for-profit entity "engages in some activities clearly permissible for judges as well as some potentially controversial lobbying, advocacy and litigation activities," we have said a judge "must not become involved in the organization's litigations, publicly associate him/herself with organizational positions on matters of public controversy, or assume a leadership role in the organization." In essence, "taking a leadership role in such organizations may publicly associate the judge with organizational positions on matters of public controversy, in a way that simple membership does not." Nonetheless, a judge may be a regular member of such organizations, if they are not "political organizations" under the Rules.

Threshold Question: Is the NRA a "Political Organization" for Judicial Ethics Purposes?

The threshold question in determining whether a judge may be a member of a not-for-profit entity that is legally permitted to engage in political activity is whether the entity is deemed a "political organization" under the rules. If so, a judge may not be a member (*see* 22 NYCRR 100.5[A][1][b]). Reading Section 100.0(M) somewhat more broadly than its literal language, we have said that "a judge may not join an entity primarily engaged in substantial political activity, including support for specific candidates" (Opinion 20-128; *accord e.g.* Opinion 17-70).

We have often looked to the underlying "primary purpose" of the organization as demonstrated in its declared mission and public activities (*cf.* 22 NYCRR 100.0[M]; Opinion 14-117 fn 2 [judges "must ultimately look to the Rules Governing Judicial Conduct, rather than the Internal Revenue Code, for guidance on whether their proposed participation in a particular organization is permissible"]). Thus, in Opinion 14-95, we consulted an organization's website which detailed that it sought to "promote individuals with a particular viewpoint on abortion for election and appointment to public office at every level of government." We determined that because a "primary mission" involved substantial political activity in support of specific candidates, it qualified as a "political organization" and the judge could not be a member (*id.*). However, at times we have left it to the judge to determine whether an entity is a "political organization" under the rules, as "we are neither an adjudicative nor an investigative body" and the judge is in the best position to assess whether the organization "engages in partisan political activity" (Opinion 20-128).

When we do make this determination for the inquiring judge, we often name the organization so that all judges will have the same guidance. For example, our prior opinions have established that entities such as Emily's List, Indivisible, J Street, and MoveOn.org are "political organizations" under the rules (*see* Opinions 18-72; 17-70; 17-38; 14-117), so that membership and contributions are not permitted (*see* 22 NYCRR 100.4[A][1][b], [h]).

Conversely, we concluded that judges *may* maintain regular membership in entities such as the American Israel Public Affairs Committee, New York Civil Liberties Union (NYCLU), and Planned Parenthood and make contributions to their non-political arms (*see* Opinions 17-70; 15-227; 15-77; 14-117; 98-101). Although some of these entities may engage in extensive political activity (*see e.g.* Opinion 15-227), a key distinction highlighted in Opinion 17-70 is whether the entity "appear[s] to have substantial non-political purposes."

In the public perception, Planned Parenthood, NYCLU and the NRA engage in a similarly broad range of activities. Thus Opinion 98-101, which *permits* membership in Planned Parenthood and NYCLU, is particularly illuminating here. In that opinion, we focused on the fact that both entities "engaged in a variety of activities that a judge could readily be associated with (*e.g.* education about the Bill of Rights, women's health counseling, etc.)" in determining that membership in those entities would not constitute impermissible political conduct (*id.*).

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Here, too, while the NRA's website certainly emphasizes its political activism, that is not its sole purpose. The website also details the NRA's substantial interests in promoting gun safety and gun education. Given the wide scope of the NRA's non-political activities in education and safety, we decline to deem the NRA as a group whose "principal purpose ... is to further the election or appointment of candidates to political office" (22 NYCRR 100.0[M]).

Effect of NRA's Involvement in Substantial Public Controversy

Our conclusion that the NRA is not a "political organization" under Section 100.0(M) does not end the inquiry, as we have also advised that involvement in matters of "substantial public controversy" may cast reasonable doubt on a judge's ability to be impartial in performing judicial functions (*see e.g.* Opinions 20-199; 20-128). Thus, we have said judges must avoid inserting themselves "unnecessarily into public controversy" in their extra-judicial activities (*id.*). For example, if "[v]irtually all" of an organization's activities involve "the adoption, advocacy and pursuit of policies and positions in matters that are of substantial public controversy, many of which, in whole or in part, eventuate in litigation," then a judge cannot be a member (*see* Opinion 98-137).

By contrast, where a not-for-profit organization may be involved in some impermissibly controversial issues, but also has substantial activities in which a judge may ethically participate, we have drawn a middle course to permit some participation (*see* Opinion 20-199). Thus, in Opinion 98-101, we concluded that while there was no *per se* prohibition against membership in Planned Parenthood or the NYCLU, a judge must "take care that such membership does not involve the judge in being associated with matters that are the subject of litigation or public controversy. Further, should either organization appear in the judge's court, there should be recusal, subject to remittal" (*id.*). We further elaborated on this view in Opinion 17-70 (citations omitted) as follows:

> It is well-settled that "a judge may maintain membership in a not-for-profit organization that engages in some activities clearly permissible for judges as well as some potentially controversial lobbying, advocacy and litigation activities." The Committee has thus advised that a judge may donate to such organizations and join as a regular member, with certain limitations. However, a judge who joins such a group may not be involved in its litigations, publicly associate him/herself with organizational positions on controversial issues, or assume leadership roles in the entity...

We endorse the same discretionary cautions here. The judge must, of course, avoid impermissible political activity and may not assume a leadership role in the NRA. However, nothing currently before us suggests that *mere membership* in the NRA associates the judge with matters of controversial lobbying, advocacy or litigation sufficient to implicate the integrity of the judiciary and require the judge's resignation. Accordingly, the judge need not resign their lifetime membership in the NRA.

Decision & Order By The Honorable Mack Cook, *Town of Virgil*

State of New York: **County of Cortland**
Town Court: **Town of Virgil**

KAYE HINSON SHARON, Plaintiff

-against-

RON STANLEY, Defendant.

DECISION AND ORDER

Case # 22040033

HON. COOK, M Presiding

Plaintiff Kaye Hinson Sharon commenced this small claims action against Defendant Ron Stanley by notice dated April 27, 2022. Plaintiff is seeking judgement against the Defendant for $1,849.27 due to the Defendant's alleged failure to properly repair the Plaintiff's vehicle. The matter came before this Court for a bench trial on June 14, 2022.

In New York State it is well settled that the doctrine of exhaustion of administrative remedies requires that where a remedy before an administrative agency exists, relief must be sought by exhausting this remedy before the courts may act. *Jardim v P.E.R.B, 177 Misc 2d 528, Watergate II Apartments v Buffalo Sewer Authority, 46 N.Y. 2d 52, Young Men's Christian Assn. v Rochester Pure Waters District, 37 N.Y. 2d 371, Svatovic v Town of Southold 2017 N.Y. Slip Op 09142 (2017), Matter of Maveri v Commissioner of the NYS DMV, NY Supreme Court, Appellate Div. 3rd Judicial Dept March 4, 2021*. It is "hand book law" that one seeking relief must exhaust all available administrative remedies before being permitted to litigate in a court of law, *Young Men's Christian Assn. Id.* This doctrine furthers the statutory goals of relieving the courts of the burden entrusted to an agency. Watergate II Apartments Id. (*see* NY Jur, Administrative Law 5 pg 303-304), preventing premature judicial interference with the administrative efforts to develop by some trial and error a coordinated, consistent and legally enforceable scheme of regulation and affording the agency the opportunity in advance of possible judicial review, to prepare a record reflective of its expertise and judgement (*Matter of Fisher [Levin] 36 NY 26, 146, 24 Carmondy-Wail 2nd NY Prac.* 145-346). The Legislature anticipated that disputes would arise between vehicle owners and vehicle mechanics in adopting the New York State Repair Shop Act. Chapter 946 of the laws of NY, Article 12-A. of the Vehicle and Traffic Law This created an administrative scheme wherein a vehicle owner may file a complaint by submitting a Vehicle Safety Complaint Report along with supporting documents to the DMV Consumer and Facility Complaint Unit. All complaints that are signed shall be reviewed and investigated except those that fall outside of the ACT. Part 82.19 Regulations of the Commissioner of Motor Vehicles Motor Vehicle Repair Shops.

In the case before the Court the Petitioner failed to submit evidence that she pursued and exhausted this administrative remedy prior to seeking relief in this Court.

The court in *Watergate II Apts.* held that the exhaustion rule is not inflexible. Id. It need not be followed when resorting to an administrative remedy would be futile (*Usen v Sipprell 41 AD2d 251; 1 NY Jur Administrative Law 171, pg 575*). The plaintiff presented no testimony or evidence to support a claim of futility in pursuing the administrative remedy available to her.

This Court is aware that a complaint must be filed with the DMV report within 90 days or 3,000 miles of the repair whichever comes first and, that, in the

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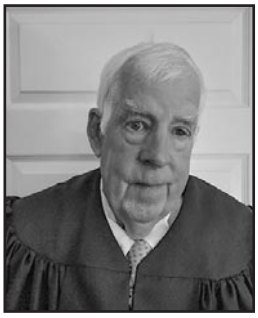
present case, these limits may not have been complied with and may, in fact, have expired. However, this Court is of the opinion that the Plaintiff's failure to act within these limits does not permit this Court to now disregard the intent and purpose of the Exhaustion Doctrine. The Legislation has incorporated several requirements into the Automotive Repair Act presumably to guide its application. It is not within the jurisdictional authority of this Court to create exceptions to statutory requirements. Nor is this Court amenable, without precedent, to expand further the existing exceptions to the Exhaustion Doctrine.

Based upon the foregoing, it is the determination of this Court that this small claims action be dismissed in its entirety. This decision also constitutes the Order of this Court.
Dated: June 16, 2022

Mack Cook
Justice, Town of Virgil NY.



Decision & Order

By The Honorable Thomas J. Sheeran, *Town of Lewiston*

State of New York: **County of Niagara**
Town Court: **Town of Lewiston**

PEOPLE OF THE STATE OF NEW YORK, Plaintiff

-against-

LISA FITTANTE, Defendant.

DECISION AND ORDER

DOCKET # 22100079

In the matter of the People of the State of New York versus Lisa A. Fittante (DOB 5/30/67), the defendant was charged in the Town of Lewiston under section VTL 1192.3, Driving while Intoxicated; VTL 1172A, Failure to Stop at a Stop Sign, and under section VTL 1129A. Following a Motor Vehicle too closely.

On January 25, 2023, a non-jury trial was held in the Town of Lewiston Court before the Hon. Thomas J. Sheeran. Ms. Fittante was represented by Mr. Robert Viola, Esq, and the People were represented by Mrs. Liesel Marcantonio, Esq. of the Niagara County District Attorney's Office.

On October 23, 2022, Ms. Fittante was travelling from the 3F Club located on Swann Road in the Town of Porter, New York. Ms. Fittante was following her significant other, Daniel Diez, to their home located approximately eleven (11) miles from the point of departure. At the intersection of Dickersonville Road and Swann Road, Mr. Diez stopped at a marked traffic control device and was struck from behind by a vehicle operated by Lisa Fittante. The Diez vehicle travelled through the intersection and parked on the shoulder of the road. The Fittante vehicle, following the impact, travelled head first into a ditch. Immediately following the accident, a vehicle driven by Joseph Finley Jr. arrived at the accident scene. Mr. Finley exited his vehicle to check on Ms. Fittante. He testified that there was debris in the road, smoke emanating from the vehicle and the airbags had deployed. He testified that he approached the vehicle and inquired of the woman in the driver's seat if she was ok. Mr. Finley testified that, "She responded by asking for her Dad." He further testified that, "She was in rough shape and unsteady." He then called 911 and described the scene. Additionally, he testified that he did not notice any apparent signs of injury. Once the police arrived, he gave his name and contact information, and departed from the scene.

Testimony was also received, under oath, from Daniel Diez. Mr. Diez testified that he has been in a long term live in relationship with Ms. Fittante. Further, Mr. Diez testified that he met Ms. Fittante at the 3 F Club late that afternoon and did not see her drink while he was there. He did indicate that he was interacting with several other patrons at various times that he was at the Club and was not with Ms. Fittante the entire time. Mr. Diez indicated, under oath, that when travelling home on Swan Road, he stopped at the stop sign and was about to turn left when his vehicle was struck from behind. He positively identified Ms. Fittante as the operator of the vehicle that struck his vehicle. Additionally, he testified that there was significant rear end damage to his truck. Mr. Diez testified that he did not observe any visible injuries sustained by, or blood on, Ms. Fittante. He did indicate that, the day following the accident, Ms. Fittante exhibited significant bruising on her legs. Further, Mr. Diez testified that he did not observe any erratic operation by Ms. Fittante.

Testimony was received, under oath, from Lewiston Police Officer Nicholas Paul who indicated that he was working as a patrol officer from 8:00 PM

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to 8:00 AM. At approximately 7:55 PM, Officer Paul received a call dispatching him to the scene of a motor vehicle accident at the intersection of Dickersonville and Swann Roads. When he arrived at that location, he observed a vehicle in a ditch and a rear end damaged pick-up on the opposite side of the intersection. He further observed that the driver of the vehicle in the ditch was out of the car and leaning against the side of the vehicle. Upon questioning that individual, he determined that Ms. Lisa Fittante was the reputed operator. He testified that she did not want to talk but observed that she had urinated on herself. Additionally, he observed a strong odor of alcohol emanating from her. He further testified that, subsequently, she admitted that she was operating the vehicle in the ditch, that she was coming from the 3F Lodge and, while there, had consumed four (4) alcoholic drinks (Titos). Officer Paul testified that she had glassy eyes and slurred speech. He requested, and she agreed, with taking field sobriety tests. After being directed to a flat part of the pavement, he inquired if she had any disability or injuries that would prevent her from successfully performing physical performance tests. Prior to each of the tests administered, the defendant was asked if she understood what to do. She replied in the affirmative to understanding each of the tests, and what she was requested to do. Ms. Fittante was asked to perform the HGN test, the walk and turn test and the one leg stand, all of which, in Officer Paul's judgment, Ms. Fittante failed. Following completion of the field sobriety tests, Ms. Fittante was read her DWI warnings and Miranda rights. Lewiston Police Officer Colin King was also dispatched to the location and was present at the scene of the incident. Upon arrival, he observed rear end damage to a Silverado, and a Ford Escape in a ditch with significant front-end damage. He testified that a positive identification of the operator was effectuated and he made several observations. He testified that he observed that the operator had an unsteady gate, noted an odor of alcohol and observed her failure to successfully complete the field sobriety tests. Additionally, Officer King utilized the Alco Sensor as a screening device, which resulted in a positive test for the presence of alcohol. Ms. Fittante was placed into Officer Paul's patrol vehicle and transported to the Lewiston Police Station for completion of the paperwork and for a breathalyzer test. While completing paperwork, Ms. Fittante was provided with several opportunities to take the breathalyzer all of which Ms. Fittante refused. She was subsequently charged, issued appearance tickets and released.

In his closing summation, counsel for the defendant, Mr. Viola advanced the argument that the defendant's boyfriend provides a greater picture of the defendant's condition prior to and following the accident. As noted in his testimony, Mr. Viola alluded to the testimony from Mr. Diez that Ms. Fittante was not, in his judgment, incapable of operation of a motor vehicle and noted that Mr. Diez indicated that, in the past when each was drinking, the non-drinking partner would drive home. Further, Mr. Viola stated that the result of the injury impaired her cognitive awareness to the extent that the result of any field sobriety would be invalid owing to the injuries that Ms. Fittante sustained in spite of any admitted alcohol consumption. Mr. Viola's position was that there were too many other factors that would "cloud the conclusion" of intoxicated operation, which raises the issue of reasonable doubt, the standard that must be applied in any finding related to a criminal conviction.

The people's summation focused on the admissions made by the defendant. Ms. Fittante admitted to the violation under VTL 1129A, Following Too Closely. Additionally, she admitted to Lewiston Police Officer Paul and as testified to by Daniel Diez, that she Failure to Stop at a Stop Sign, a violation of VTL 1172A. Further, the people noted that by Mr. Diez's own testimony, that he was not with the defendant all of the time that Ms. Fittante was at the 3F Club either before he arrived or subsequently after his arrival.

Additionally, owing to the mandated use of body cameras, the court was able to review all video and audio recordings of all of the interactions of the Lewiston Police officers with Ms. Fittante. These recordings substantiated, in all respects, the testimony of the arresting officers both at the scene of the accident and, subsequently, at the police station.

In *People v. Cruz* (99 Misc. 2d 634 (1979)) The court indicated that "intoxication is a greater degree of impairment which is reached when the driver has voluntarily consumed alcohol to the extent that he is incapable of employing the physical and mental abilities which he is expected to possess

in order to operate a vehicle as a reasonable and prudent driver"

Further, in *People v. Kapsuris*, 89 Misc. 2d 634, 392 N.Y.S.2d 785 (N.Y. Cnty. Ct. 1976). "If there has been no blood alcohol test, the proof required to convict for driving while intoxicated must be overwhelming. "It may be that either a chemical test will be required or that the indictment and proof must show that the defendant was very, very drunk to sustain an indictment for driving while intoxicated." (*People v Kapsuris*, supra, p. 635).

In the instant case, Ms. Fittante willingly submitted to field sobriety tests at the scene of the accident. She did not indicate that she was injured or incapable of participating in the testing process and procedure: did not request, nor receive, medical attention, did not exhibit or complain of any head injury, and did not present any testimony as to any subsequent head trauma resulting from the accident.

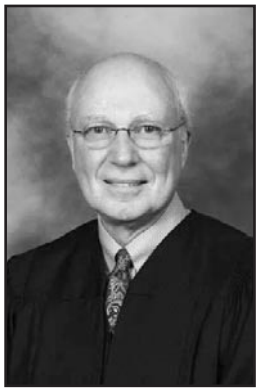
In examining the testimony received at trial, in reviewing the related documents submitted as exhibits, in considering both the case law and the statutory requirements of the Vehicle and Traffic Law, this court finds Lisa Fittante guilty of VTL 1192.3, Driving while Intoxicated; VTL 1172A, Failure to Stop at a Stop Sign, and VTL 1129A. Following a Motor Vehicle too closely.

Sentence will be scheduled following the receipt of a pre-sentence investigation that is completed by the Niagara County Probation Department.

This constitutes the decision and order of the Court

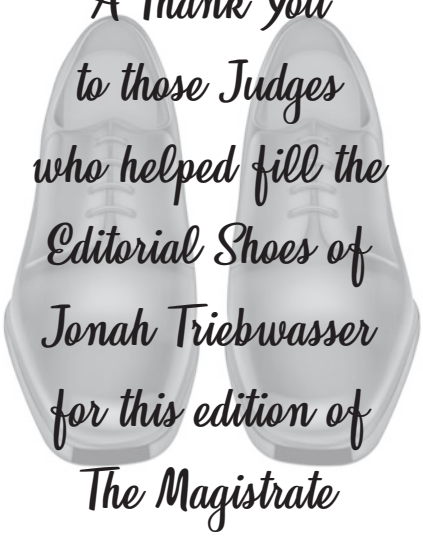
Entered January 29, 2023

Hon Thomas J. Sheeran
Justice
Town of Lewiston



Congratulations to our very own Hon. Dr. Carrie A. O'Hare for being published in an International Research Journal!

Even though she recently retired from teaching after 18 years for Purdue Global, she continues with her research endeavors! She has also signed onto the next research project which is 5 times the scope of this project that is being published.



Judicial Wellness PROGRAM

Managing Anxiety

Anxiety disorders are the most common mental illness in the U.S., affecting 40 million adults every year.

The results of a confidential survey of over 1,000 trial court judges, taken before the pandemic and published in 2020, found that work-related anxiety affected judges' energy (39%), sleep (36%), and concentration (32%). In 2016, a survey of almost 13,000 practicing attorneys found that 19 percent had experienced a problem with anxiety over the past year. The same group indicated that a staggering 61 percent had experienced a problem with anxiety over the course of their legal careers.

What's the Difference Between Stress and Anxiety?

1. Defining Stress.

Fundamentally, stress has to do with how we cope with stimuli that affect us. Triggers can be external or internal, and how we cope can be defined externally by others or by our own perception. No matter how these variables are defined, when resources feel pressured by stimuli, stress is generated. The higher the pressure, the higher the strain.

2. Defining Anxiety.

On the other hand, anxiety tends to be generated internally and has to do with our perception of what will be demanded, and our resources to cope. It encompasses our internal calculation of stress, its potential impact, and our feelings about it. *What might happen? Can I handle it? Do I have what it takes? What if it isn't okay?*

3. Stress feels externally generated, whereas anxiety feels internally generated.

Stress tends to flow from the experience of pressure (think work deadline, a friend's request, traffic slowing you, etc.). In contrast, anxiety tends to relate to our feelings about our potential experience and how we will cope (think internal questions like, *Will I be able to handle it? Can I do this? Do I want to?*). If stress fundamentally refers to our experience under pressure, anxiety relates to our feelings about that experience.

4. Stress is usually experienced in the present, while anxiety lives in the future.

Stress tends to be situational and refers to a present and real demand. Our boss expects us to meet a deadline; our spouse expects us to pick up the dry cleaning, our child expects us to pick them up from school, a client expects us to deliver a product. We feel stress as we do what is needed to comply with life's demands. It is about doing.

Anxiety tends to be about the future and what might happen, and how we feel. It's a fear or nervousness about what might happen; a feeling of wanting to do something very much. Anxiety is a cognitive construct about some future possibility, while stress is experienced as something happening now.

5. Stress feels situational; anxiety feels personal.

Because stress is often perceived as relating to external pressure, it often feels situational and, therefore, outside our control. In this way, stress seldom generates feelings of responsibility or shame. Instead, stress is sometimes even culturally prized as a badge of honor in the legal profession or status symbol. On the other hand, anxiety is neither associated with feelings of pride, nor a sense of doing our best. Instead, it is usually experienced as a weakness, a mental failing, and something to be ashamed of.

6. Stress and anxiety share physiological similarities.

Stress and anxiety are physiologically indistinguishable. At their most intense, they share the almost reflexive "defensive survival reaction," commonly known as fight-or-flight, that sets off a cascade of physical changes along the hypothalamic-pituitary-adrenal (HPA) axis, preparing the body for threat. Attention is sharpened, energy is boosted, while oxygen and immunity are heightened, readying the body for action. While the intensity of the threat response can vary, our bodies' experience of stress and anxiety is almost indistinguishable physiologically.

7. We control how we define stress and anxiety and our experience of it.

The power of our thinking when it comes to stress and anxiety cannot be understated. With stress and anxiety sharing the same physiological footprint, the difference lies in how we define our experience. Labeling our experience is how we construct our emotions. We can say we are stressed about a huge project at work or that we are anxious about a huge project at work. The meaning for each could be the same or radically different. The only thing that distinguishes these two descriptions is what each of those words means to you and your audience. For some, these words mean the same thing or close to it. But for others, anxiety and stress can be very different. Understanding that we have control over how we define our experience can be a powerful tool in managing it.

8. Similarities between stress and anxiety.

While there are important conceptual differences between stress and anxiety, there are many similarities, including the interaction and overlap between them. Stress about a work deadline today can fuel anxiety over future deadlines, and traffic stress this morning can have you fretting over how you will handle the rest of your day.

9. The experience of emotions follows how we think about and define them.

There are critical individual differences in how we think about stress and anxiety, and how we define our experience shapes that. According to the latest science, our experience of emotions follows how we think about and define them. As we label what we are experiencing, we co-create it.

10. We are in control of how we label our experiences.

The great news here is that we are in control of how we label our experience, and that, in turn, can transform how we experience it. In the end, the difference between stress and anxiety has more to do with how we define them in our lives, than with what they technically mean. How we think about our experience is what matters most. Experience of stress is another person's experience of anxiety, and vice-versa.

Symptoms

Just as with any mental illness, people with anxiety disorders experience symptoms differently. But for most people, anxiety changes how they function day-to-day. People can experience one or more of the following symptoms:

Emotional symptoms:

- Feelings of apprehension or dread
- Feeling tense and jumpy
- Restlessness or irritability
- Anticipating the worst and being watchful for signs of danger

Physical symptoms:

- Pounding or racing heart and shortness of breath
- Upset stomach
- Sweating, tremors, and twitches
- Headaches, fatigue, and insomnia

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Types of Anxiety Disorders

Different anxiety disorders have various symptoms. This also means that each type of anxiety disorder has its own treatment plan. The most common anxiety disorders include:

Panic Disorder. Characterized by panic attacks – sudden feelings of terror – sometimes striking repeatedly and without warning. Often mistaken for a heart attack, a panic attack causes powerful, physical symptoms including chest pain, heart palpitations, dizziness, shortness of breath, and stomach upset.

Phobia. Most people with specific phobias have several triggers. To avoid panicking, someone with specific phobias will work hard to avoid their triggers. Depending on the type and number of triggers, this fear and the attempt to control it can seem to take over a person's life.

Generalized Anxiety Disorder (GAD). GAD produces chronic, exaggerated worrying about everyday life. This can consume hours each day, making it hard to concentrate or finish routine daily tasks. A person with GAD may become exhausted by worry and experience headaches, tension or nausea.

Social Anxiety Disorder. Unlike shyness, this disorder causes intense fear, often driven by irrational worries about social humiliation – "saying something stupid," or "not knowing what to say." Someone with social anxiety disorder may not participate in conversations, contribute to group discussions, or offer their ideas, and become isolated. Panic attack symptoms are a common reaction.

Dan Lukasik, UCS Judicial Wellness Coordinator
dlukasik@nycourts.gov • Office: 716-515-4804 • Cell: 716-783-4701

Town of LaGrange Court Hosts High School Mock Trail

Recently, Hon. Susan Sullivan-Bisceglia, Town of LaGrange Justice hosted Arlington High School Seniors from the 2023 graduating class who participated in a Mock Trial in the Town of Lagrange Courtroom. The students who were very well prepared took on the roles of Prosecutor, Defense Attorney, Witnesses and Judge and showed a great commitment to civic readiness in learning about the civics involved in providing justice to the community.

Shown in picture: Hon. Susan Sullivan-Bisceglia, (2nd Vice President, NYSMA / Town of LaGrange) surrounded by Arlington High School Seniors participating in the Mock Trial.

Decision & Order

Appellate Division
Second Department

In the Matter od Elise Cheron, respondent

-against-

Alan M. Simon, etc., Appellant

DECISION AND ORDER

2023 NY Slip Op 02509

Harris Beach, White Plains, NY (Brian Ginsburg of counsel), for appellant.

Sussman and Associates, Goshen, NY (Jonathan R. Goldman of counsel), for respondent.

DECISION & ORDER

In a proceeding pursuant to CPLR article 78 in the nature of prohibition to prohibit Alan M. Simon from terminating the petitioner's employment as Chief Clerk of the Village Justice Court of the Village of Spring Valley, Alan M. Simon appeals from a judgment of the Supreme Court, Rockland County (Thomas P. Zugibe, J.), dated June 15, 2020. The judgment, in effect, granted the petition to the extent of directing Alan M. Simon to refrain from terminating the petitioner's employment so long as the petitioner continues to work solely for the Justices of the Village Justice Court of the Village of Spring Valley, or from appointing another individual as the Chief Clerk without the consent of the Justices of the Village Justice Court of the Village of Spring Valley.

ORDERED that the judgment is affirmed, with costs.

In November 2019, the petitioner was the Chief Clerk of the Village Justice Court of the Village of Spring Valley (hereinafter the Justice Court) and had held that position for approximately seven years. Alan M. Simon, the Mayor of the Village of Spring Valley, informed a Justice of the Justice Court that he intended to replace the petitioner as Chief Clerk of the Justice Court during a meeting scheduled to be held on December 2, 2019. Thereafter, on December 2, 2019, the petitioner commenced this proceeding pursuant to CPLR article 78 to prohibit Simon from terminating her employment. In a judgment dated June 15, 2020, the Supreme Court, in effect, granted the petition to the extent of directing Simon to refrain from terminating the petitioner's employment as Chief Clerk so long as she continues to work solely for the Justices of the Justice Court, or from appointing another individual as the Chief Clerk of the Justice Court without the consent of the Justices of the Justice Court. Simon appeals, and we affirm.

"[W]hen presented with a question of statutory interpretation, [a court's] primary consideration is to ascertain and give effect to the intention of the Legislature" (*Town of Aurora v Village of E. Aurora, 32 NY3d 366*, 372 [internal quotation marks omitted]; *see Matter of Incorporated Vil. of Freeport v Curran, 211 AD3d 946*, 949). The clearest indicator of legislative intent is the statutory language, therefore "a court should construe unambiguous language to give effect to its plain meaning" (*Columbia Mem. Hosp. v Hinds, 38 NY3d 253*, 271 [internal quotation marks omitted]; *see Town of Aurora v Village of E. Aurora*, 32 NY3d at 372). "When the plain [*2] language of the statute is precise and unambiguous, it is determinative" (*Incorporated Vil. of Freeport v Curran*, 211 AD3d at 949, quoting *Matter of Washington Post Co. v New York State Ins. Dept.*, 61 NY2d 557, 565). It is also well-settled "that a statute . . . must be construed as a whole and that its various sections must be considered together and with

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reference to each other" (*Town of Aurora v Village of E. Aurora*, 32 NY3d at 372, quoting *Matter of New York County Lawyers' Assn. v Bloomberg*, 19 NY3d 712, 721 [internal quotation marks omitted]).

Village Law § 3-301(2)(a) provides that "[t]he clerk of the court of a village shall be discharged from employment only upon the advice and consent of the village justice or justices when the clerk, in his or her village duties, works solely for the village justice or justices." Additionally, pursuant to Village Law § 4-400(1)(c)(ii), "[i]t shall be the responsibility of the mayor," inter alia, "to appoint the clerk of the court of the village, if the village has a court, only upon the advice and consent of the village justice or justices."

Here, the plain language of Village Law § 3-301(2)(a) prohibits Simon from unilaterally terminating the petitioner's employment as Chief Clerk of the Justice Court so long as she works solely for the Justices of the Justice Court. Similarly, the plain language of Village Law § 4-400(1)(c)(ii) prohibits Simon from appointing a Chief Clerk of the Justice Court absent the advice and consent of the Justices of the Justice Court. Accordingly, the Supreme Court properly directed Simon to refrain from terminating the petitioner's employment so long as she continues to work solely for the Justices of the Justice Court, or from appointing another individual as the Chief Clerk without the consent of the Justices of the Justice Court.

Simon's remaining contentions are without merit.

DILLON, J.P., DUFFY, ZAYAS and DOWLING, JJ., concur.

ENTER:

Maria T. Fasulo

Clerk of the Court

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Fleece Blanket

Mugs

Additional items such as robes, badges, lanyards and more to be added, so check back often!

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