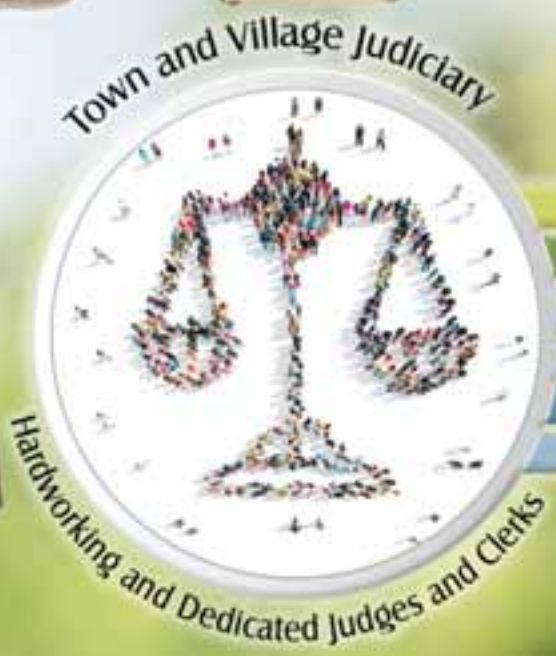




The **Magistrate** *Spring 2024*
The Courts Closest to the People



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NYSMA Thanks these Retiring Justices for their Outstanding Service



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The Magistrate

The Courts Closest to the People

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DEUTERONOMY, CHAPTER 1

And I charged your Judges at that time, Saying,
Hear the causes between your brethren,
and judge righteously between every man and his brother,
and the stranger that is with him.
Ye shall not respect persons in 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

(5) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon age, race, creed, color, sex, sexual orientation, gender identity, gender expression, religion, national origin, disability, marital status or socioeconomic status, against parties, witnesses, counsel or others. This paragraph does not preclude legitimate advocacy when age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, or other similar factors are issues in the proceeding.



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PRESIDENT'S MESSAGE

BY THE HONORABLE KENNETH OHI JOHNSEN (T/Day)

Hon. Kenneth Ohi Johnsen



Since the beginning of my term as president of NYSMA, I've had one of my favorite Johnny Cash songs stuck in my head each time I get behind the wheel. "I've been everywhere":

*"I've been everywhere, man
I've been everywhere, man
Crossed the deserts bare, man
I've breathed the mountain air, man
Of travel I've had my share, man
I've been everywhere."*

Johnny Cash then goes on to list all the places he's been, and while mine don't rhyme, my list grows longer every week.

In the week leading up to our annual conference in Syracuse, I was invited by Hon. Dr. Carrie O'Hare to attend the Columbia County Board of Supervisors monthly meeting in Hudson, and to speak to them about NYSMA's opposition to the Top 100 Bill. I was also honored to be a guest at the New York State Association of Magistrates Court Clerks annual conference at Turning Stone Resort, in Verona.

After our NYSMA conference, I attended the 5th Judicial District's annual dinner in Mexico, New York, made a second trip to the Columbia County Supervisors monthly meeting where they passed the first county-wide resolution in the state to oppose the Top 100 Bill, and went to the Ontario County Magistrates Association's meeting (Canandaigua).

I attended the Oswego County Magistrates Association annual dinner, then the NYSMA quarterly meeting in Rochester. I attended my home meeting (Saratoga County Magistrates and Court Clerks Association) annual dinner and swore in the new officers.



Saratoga County Magistrates and Court Clerks Association annual holiday dinner. The photo is of judges, clerks, significant others and invited guests.

In one day, I spoke at Taking the Bench in Albany, then drove to Little Valley (an hour and 15 min south of Buffalo) to attend the Cattaraugus County Magistrates Association annual dinner.



Taking the Bench course in Albany.



Cattaraugus County Magistrates Association Holiday Dinner.

I followed that up after the New Year with a trip to Binghamton for the Broome County Magistrates Association annual dinner, the Association of Towns training in Rochester and the Genesee County Magistrates Association meeting (unfortunately cancelled due to inclement weather), and the Association of Towns training in Albany.

Association of Towns Training in Rochester, NY with a presentation by Hon. Gary Graber, Hon. Chris Penfold, Hon. Deborah Streitzel, and me.



Association of Towns Training in Albany, NY on 1/1/24 with a presentation by Hon. Barbara Seelbach, Hon. Susan Sullivan-Bisceglia, Hon. Tanja Sirago and me.



I was scheduled to attend the NYSMCCA quarterly meeting in Albany the last weekend in January, but unfortunately picked up the flu a few days before the meeting and decided that discretion was the better part of valor.

I've been excited to meet the judges and clerks in each of these great associations. They are all hardworking and dedicated members of the judiciary, who donate lots of unpaid and uncompensated personal time to their local county associations in an effort to help their fellow judges and clerks. They are far from the uneducated rabble that supporters of the Top 100 and other anti-town and village justice system bills paint us out to be.

Many of the people I have met are familiar faces from NYSMA's annual conference, and some are judges that I've heard good things about from their fellow jurists. One and all, they have been welcoming and knowledgeable about the issues affecting the courts, and usually have local solutions to those issues.

Continued on page 4

In the coming weeks, I'll be singing some Willie Nelson "On the Road Again." I'll be heading to Bath, New York, for a Steuben County Magistrates Association meeting then, along with First Vice President Susan Sullivan-Bisceglia, I'll be presenting the third installment of our class on Working with Town and Village Courts to the Association of Towns gathering in New York City.

The Office of Court Administration has not provided judicial training at AOT since 2020, but this year, in conjunction with NYSMA and AOT, OCA's core A and Core B videos will be presented, with NYSMA attorney justices proctoring so that both CJE and CLE credits can be earned. This hybrid collaboration of OCA materials and NYSMA attorney presenters is made possible due to the hard work of both OCA staffers and the NYSMA Executive Committee.

We look forward to working further with Judge Murphy and the staffs of OJCS and OCA to continue to increase live and hybrid training opportunities across the state in the coming years and hope that you all continue to take advantage of it.

Until the next update,
Ohi



Mark Twain said it best: "The reports of my death are greatly exaggerated." We were informed of the death of Judge William Burdick which we noted in the Winter issue, and are very pleased to report that Judge Burdick is alive and well, and we apologize for the error.



NYSMA Legislative Committee Co-Chair Hon. Robert G. Bogle and Legislative Committee Members met recently with Assemblyman Ed Ra, Ranking Minority Member, Assembly Ways and Means Committee to discuss the NYSMA Legislative Agenda.

(L to R) Hon. Susan Sullivan-Bisceglia, NYSMA First Vice President, Assemblyman Ed Ra; Hon. Robert G. Bogle, NYSMA Past President; Hon. Timothy E. Cox, NYSMA Board member.

Executive Committee Highlights

BY THE HONORABLE TANJA SIRAGO (*T/Cairo*)

The Executive Committee meeting of the New York State Magistrates Association was held on Saturday, December 2, 2023, at 9:00 A.M., at the Woodcliff Hotel and Spa, Fairport, New York, the President, Hon. Kenneth Ohi Johnsen, being in the chair and the Secretary, Hon. Tanja Sirago, being present.



President Johnsen welcomed members, as well as Court Clerk Kim Stahley and Court Clerk Marie Barbera.

Hon. Susan Sullivan-Bisceglia moved to accept the minutes. Carried.

Hon. Amel Jowdy moved to accept the treasurer's report. Carried.

Hon. Thomas Dias moved to proceed with a contract with Niagara Falls for the NYSMA 2025 Conference to be held September 14 – 17, 2025. Vote taken, 17 yeas and 7 nays, Carried.

Old Business: none.

New Business: Hon. Karl Manne wondered if NYSMA should take a position regarding the falling attendance we have been experiencing and whether we should ask OCA to support mandatory live training even if it is only for one credit hour per year. Discussion was held.

The Board moved to increase the executive director's annual salary by three percent, add two vacation days to the benefit package and the opportunity to apply for "SMA 1 2021" association license plates. Carried.

Hon. Edward Van Der Water moved to grant the executive director authority to grant raises to NYSMA staff up to \$23.00 per hour at her discretion. Carried.

Hon. Edward Van Der Water moved to accept the 2024 NYSMA budget with the executive director's salary rate increase and FICA adjusted accordingly. Carried.

Hon. Thomas Sheeran moved to increase membership dues by \$25.00 to all active members and increase retired dues from \$45.00 to \$75.00, effective January 2024. Discussion, Carried.

Hon. Thomas Dias moved to adjourn. Motion carried. The meeting adjourned at 12:15 P.M.

Respectfully submitted,

Hon. Tanja Sirago, Executive Director



**Who is your
County
Magistrates
President?**

Please send SMA the name and email address of the current president of your County Magistrate Association to NYSMA1@gmail.com

New Director Missing From The Winter Issue

Due to an editing error, the biography of our new director, Hon. Jeffrey McCabe, was not printed in our Winter issue. Here it is with our apologies.



HON. JEFFREY B. McCABE
DIRECTOR
 Town Justice, Moreau

Hon. Jeffrey B. McCabe has been Town of Moreau Justice since 2007. He brings to the bench 26 years of experience in law enforcement. He has taught courses about search warrants

and has served as President of the Saratoga County Magistrates and Court Clerks Association. He has been married to his wife Leeann for 40 years and is a proud father of Michael McCabe and wife Mary and grandfather of Murphy McCabe, age 5, and Mildred McCabe, age 3.



Congratulations Hon. James P. Murphy and Hon. Deborah H. Karalunas

The New York State Magistrates Association congratulates Hon. James P. Murphy who was given the Distinguished Jurist Award and Hon. Deborah H. Karalunas who was recognized with the Advancement of Judicial Diversity Award by the New York State Bar Association.

Both Judge Murphy and Judge Karalunas were guest speakers at NYSMA's 2023 annual conference in Syracuse and have been strong friends and supporters of town and village justices.

Justice Murphy served as administrative judge of the Fifth Judicial District for nearly four years prior to his historic appointment as the first central New York judge to be appointed deputy chief administrative judge for all courts outside of New York City. The Distinguished Jurist Award recognizes judicial excellence and extraordinary commitment to the rule of law.



Justice Karalunas, pictured here with Judge Murphy, is the current administrative judge of the Fifth Judicial District. Justice Karalunas is the second vice president of the Association of Justices of the Supreme Court of the State of New York.



Meet Your Colleagues: Judge Thomas Dias

BY CHRISTINA WANG

You may know Tom Dias as an esteemed past NYSMA president, a position to which he was elected in 2006, or a gregarious presence at meetings and dinners, or the well dressed guy with a firm handshake and engaging smile; but I know him as my dad. I'd like to take this opportunity to tell you some of the things he might not have shared with you.

Tom is an incredibly motivated, accomplished, welcoming person who has loved (pretty much) every minute of his time spent with his fellow past and present magistrates. When I hear stories from NYSMA conferences, they are full of community, good conversations, and memories of my second mom, Linda Dias, who passed away in March of last year. (My sincere thanks to those of you who are a part of that legacy.)

Tom is certainly a man of many stories. If you have had the chance to meet him over the years, he is sure to have told you a tale or two. Perhaps from his time sitting in court, or from his service as a volunteer firefighter in the town where he lives, Ancram, New York, or from his 29 years as facilities manager at IBM East Fishkill, or, if you're really lucky, maybe even from his youth in New York City (most of which are not fit to print!)

One thing you would hear in almost all of Tom's stories is his incredible capacity for both work and enjoyment of life. This energy has given him the ability to serve his community in a myriad of ways, including as a town magistrate from 1993 to 2007, a term as town supervisor (2007-2009), through service on the board of his community hospital from 2002 to 2005, and in 35 years as a volunteer firefighter. And, he plays as hard as he works! Whether he is maintaining his fitness through running, biking or yoga, enjoying racing his cars in Autocross events, passing time with his local ham radio club, or most importantly, enjoying his children and grandchildren- who know Grandpa always has a job for them- he is father to six, grandfather to 11, and great-grandfather to one.

If you haven't met Tom yet, I encourage you to seek him out at the next gathering. He is always looking forward to meeting and encouraging new judges.



Our author Christina Wang with proud papa, Hon. Thomas Dias




NYSMA sent four of their best to the Association of Towns meeting in Albany. **From left to right** are Vice President Hon. Susan Sullivan Bisceglia (*T/LaGrange*), President Hon. Ohi Johnsen (*T/Day*), Executive Director Hon. Tanja Sirago (*T/Cairo*) and Vice President Hon. Barbara Seelbach (*T/Clinton*).

In addition to meeting and greeting town officials at our table, Judges Seelbach and Bisceglia spoke at a session about relations between the bench and town boards.



What the Data ACTUALLY Indicates About Town and Village Courts

By THE HONORABLE THOMAS SHEERAN (*T/Lewiston*)
NYSMA PRESIDENT ELECT

 As most are aware, the New York State Commission on Judicial Conduct is charged with reviewing complaints of ethical misconduct against the 3,506 judges and justices of the New York State Unified Court System and, where appropriate, providing and publishing any disciplinary decisions.

An examination of the data that has been provided by the Commission, and is publically available on the Commission's website, provides a more robust examination and understanding of both the collected data and the implications inherent in that data.

As can be gleaned from the data presented below, it is abundantly clear that town and village justices are well within the norms for other categories of the judiciary as related to complaints filed with the Commission on Judicial Conduct.

Court of Jurisdiction	Number of Judges	Percent of the Judiciary	Complaints Received	Percent of Complaints against judges in each category	Percent of Total Complaints received by category
Town and Village Judges	2110	60.18 %	310	8.84 % *	15.98 % **
City Court Judges	410	11.69 %	357	10.18 %	18.41 %
County Court Judges	128	3.65 %	283	8.07 %	14.60 %
Family Court Judges	143	4.08 %	338	9.64 %	17.43 %
Surrogate Court Judges	25	0.71 %	35	1.00 %	1.81 %
District Court Judges	55	1.57 %	22	0.63 %	1.13 %
Court of Claims Judges	58	1.65 %	80	2.28 %	4.13 %
Supreme Court Judges	470	13.41 %	379	10.81 %	19.55 %
Appeals Court Judges	107	3.05 %	135	3.85 %	6.96 %
Total New York State Members of the Judiciary	3506		1939		100 %

Total Number of New York State Paid Judges - 1396

*Number of Complaints against town and village judges/Total of all judges in New York State (e.g., 310/3506)

**Number of Total Complaints/Total number of complaints received (e.g. 310/1939)

In the 2023 report from the Commission on Judicial Conduct, there were 1,939 complaints filed against judges at all levels of the judiciary. As indicated in the attached data, 15.98 percent of the total complaints filed were against town and village justices, LOWER than complaints filed against three other categories of the State's judiciary; 18.41 % were filed against city court judges, 17.43 % against family court judges, and 19.55 % against supreme court judges.

When examined relative to the number and percentage of complaints that were filed within each judicial category; (the total number of town and village judges in New York State, and the number of complaints filed against town and village judges) that figure of 8.84 % of the total complaints filed against town and village judges is LOWER than complaints filed against city court judges (10.18 %) and supreme court judges (10.81 %). Given that, according to data from the Commission on Judicial Conduct, 1,396 members of the judiciary in New York State are "State paid" and, therefore required to be attorneys licensed to practice law, almost 40 % of the complaints filed were against these State paid judges. Additionally, of the 310 complaints filed against town and village judges, fully 45 % (139 of 310) of all of these judges are attorneys licensed to practice law in New York State. This data appears to undercut the criticism that non-attorney town and village judges are the subjects of more complaints than are "State paid" judges or than town and village judges who are members of the bar.

According the Commission's own report, the result of investigations initiated subsequent to complaints that were filed in 2022 and made available on the Commission's website indicates that there were 344 total investigation that were initiated in the calendar year 2022. Of that total, 174 were carried over from 2021 and 170 were new investigations that were initiated in 2022.

Further, the data provided indicates that, after investigation and examination of the facts underlying the complaints, published actions indicate that 76 matters were dismissed; 32 matters were dismissed with letters of caution; 22 matters were closed by resignation of the judge; and 11 matters were closed by the ending of the judge’s term of office.

Actions taken by the Commission on Judicial Conduct - 2022

Charges Dismissed	Dismissed with letters of caution	Closed by Resignation	Closed by end of term	Formal Charges Filed	Pending
76	32	22	11	38	165

Of the remaining investigations, 38 complaints were filed against 19 different judges which resulted in formal charges and 165 matters were pending determinations by the end of 2022.

Disciplinary action taken by the Judicial Conduct Commission in 2022 Public Discipline

Town and Village Justices – Lawyer	Town and Village Justices – Non Lawyer	City Court Judge	County Court Judge	Family Court Judge	Supreme Court Judge
2	7	1	1	1	1

The data presented by the Commission on Judicial Conduct in its summary of actions taken in 2022 indicates that 13 judges were publically disciplined. Of that number, six were lawyer-judges and seven were non-lawyer judges.

Judges Vacating Office

Town and Village Justices – Lawyer	Town and Village Justices – Non Lawyer	Supreme Court Judge
2	8	2

An examination of the data presented by the Commission on Judicial Conduct in their summary of actions taken in 2022 indicates that 12 judges vacated office. Among those 12 were eight non-lawyer judges and four lawyer judges, including two lawyer judges who sat in Supreme Courts.

In their summary of the formal disciplinary determination that were rendered in 2022, and reported in this year’s annual report, the Commission notes that there were 13 formal determinations resulting in three removals, seven censures, and three admonitions. Additionally, 12 matters were resolved by stipulation. It should be noted that of these 25 judges who were disciplined, 19 were sitting in town or village courts. Fifteen of the 25 were non-lawyers and ten were lawyer-judges, inclusive of six judges who sat in higher courts.

As the Commission notes, and it should be clearly delineated, there are 2,110 Town and Village Judges in New York State, approximately sixty percent of all judges in the State. Among this total, town and village lawyer-judges constitute approximately 41 % of the total while the remaining Town and Village Judges, 59 % , are non-lawyer judges.

To place this number in context, relative to the report by the Commission on Judicial Conduct, nine town and village judges, who constitute 0.4 % of the total judges who serve in “lower courts”, were disciplined. Of that number, seven were non-lawyers and two were lawyers. Interestingly, four of the judges disciplined in 2022 were serving in state-paid courts which constitute the remaining 40 % of the judiciary. That rate of public discipline, 0.3 % , is comparable, as a proportion of the State’s judiciary, to the category of town or village judges who are not lawyers, 0.3 % . Indeed, the rate of discipline for town and village lawyer-judges of .09 % , is significantly lower than for that of the “State-paid” judiciary!

Clearly, any misconduct, by any judge, is a blot on all members of the judiciary. We are all painted with the brush of the lowest common denominator, suggesting that any behavior that casts judges in a negative light has an impact on all judges and calls into question our collective ability to be fair and impartial. That said, when full-time judges, supported by full-time staff and court-attorneys, fail to demonstrate the knowledge, skill, judgment and abilities that are required of all those in positions of judicial responsibility and authority, such failure is a direct result of assuming that possession of a law degree, without more, is sufficient to qualify for service as a member of the judiciary.

Continued on page 10

There are many judges, at all levels of our State's judiciary, who are extraordinary in the work that they perform ranging from the smallest towns and villages to the Court of Appeals and all courts in between. The effort, energy and investment of time and self in doing the best job possible for the people of their community is a testament to our judiciary's commitment to service. This responsibility is to serve and, in that regard, the numbers are quite clear: judges at all levels in New York State are committed public servants with the highest of ideals.



**Hon.
Thomas Sheeran**

NYSMA
President Elect

Town of Lewiston



Memo to Members

(We are delighted to let our members know of the increase in pay for those who cover centralized arraignment parts. Your New York State Magistrates Association pushed for this and we proud of the results.)

ADMINISTRATIVE ORDER OF THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, and with the advice and consent of the Administrative Board of the Courts, I hereby amend Section 126.3 of the Rules of the Chief Administrator, to read as follows (additions underlined, deletions in ~~striketrough~~), effective immediately:

§ 126.3. Off-Hours Arraignment Parts.

Each judge or justice of a city, town or village court temporarily assigned to an off-hours arraignment part established by the Chief Administrator pursuant to Judiciary Law § 212(l)(w) shall receive \$250 ~~\$400~~ per day, or \$125 ~~\$200~~ per half-day, for each day or half-day period of service during which such judge or justice performs one or more judicial functions in the off-hours part. Where an assignment requires a participating judge or justice to remain available on-call for service in an off-hours arraignment part, there shall be no compensation for any day or half-day period of service that does not include at least one in-court judicial function. No state paid judge may receive compensation under this Part for service in an off-hours arraignment part in lieu of regularly scheduled service in a state-paid court without the approval of the Chief Administrator.



Chief Administrative Judge of the Courts

Date: December 28, 2023

AO/393/2023

Columbia County Magistrates Association Gets Resolution 390-2023 Passed By Their County

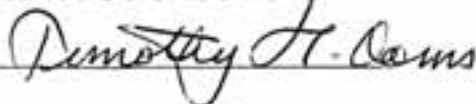


Congratulations to the Columbia County Magistrates Association, led by the Hon. Dr. Carrie O'Hare, for successfully having this resolution passed by their county legislature. Please ask your own county legislature to do the same.



Resolution
Board of Supervisors
County of Columbia
New York

Resolution No. 390-2023

Sponsored by Supervisor 

A RESOLUTION IN OPPOSITION TO NEW YORK STATE SENATE BILL S-00139B AND ASSEMBLY BILL A-1358B

UPON, recommendation of the Public Safety Committee, at a meeting held on the 20th day of September, 2023; and of the Finance Committee at a meeting held on the 23rd day of August, 2023;

WHEREAS, New York Senate Bill number S-00139B has been passed which, if adopted by the NYS Assembly (A 1358-B) and signed by the Governor, would require all Judges presiding in the 100 largest Town and Village Courts to be licensed to practice law in the State and to have been admitted to the NYS Bar for at least five years; and

WHEREAS, the Town and Village Courts in Columbia County are among the nearly 1,200 Justice Courts in the State of New York that collectively handle close to one million cases each year; and

WHEREAS, the Town and Village Courts are known as the "Courts Closest to the People" and have broad jurisdiction, presiding over civil and criminal matters, thereby performing a vital role in the New York State Unified Court System; and

WHEREAS, the Town and Village courts are a vital service to our residents and the Columbia County community as a whole; and

WHEREAS, the Justices in Columbia County's Town and Village Courts have pledged to be ever mindful of their neutrality and impartiality, and render equal justice to all, while continually adhering to judicial rules of ethics and pronouncements of the New York State Commission on Judicial Conduct; and

WHEREAS, the Justices are required to be on-call 24 hours a day, 365 days a year to review/sign arrest and search warrants, perform arraignments, and issue orders of protection; and

Continued on page 12

WHEREAS, the Justices of Town and Village Courts ensure that the rights afforded to defendants by the Constitutions of the United States and the State of New York are provided and protected; and

WHEREAS, the Justices of Town and Village Courts preside over trials involving misdemeanor and violation level offenses, thereby ensuring that the victims of those offenses can be heard; and

WHEREAS, the Town and Village Courts provide a venue for citizens to pursue a low-cost and efficient procedure for individuals to resolve civil disputes and landlord/tenant matters; and

WHEREAS, the Justices also preside nightly and on weekends and holidays, ensuring that arrested citizens are promptly afforded legal representation, the opportunity to plead to alleged charges, and to be considered for release, bail, or incarceration; and

WHEREAS, the Justices continually strive to improve the administration of justice through participation in mandatory education programs, seminars, meetings of the Columbia County Magistrates Association and the New York State Magistrates Association; and

WHEREAS, the New York State Office of Court Administration must certify all as having successfully completed mandatory training both following election and in each subsequent year; and

WHEREAS, the New York State's Commission on Judicial Conduct's most recent annual report (2023) identifies that only 13% of the complaints filed against the judiciary were against Town and Village judges while the remaining complaints were against either "State-paid" judges, (constituting approximately 40% of the judiciary) who accounted for approximately 67% of the complaints received, or against non-judicial entities (20%); and

WHEREAS, this legislative body views that the intention of this Bill is not to actually improve the courts, but an attempt to take away 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 and local government whether they be attorneys or non-attorneys; and

NOW, THEREFORE BE IT

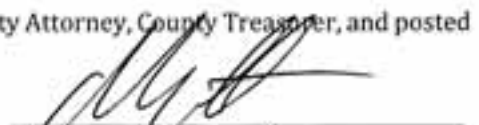
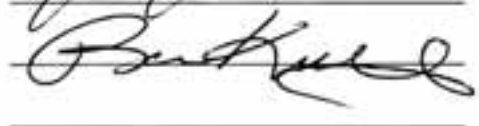
RESOLVED, that the Columbia County Board of Supervisors calls on both the leadership in the Senate, Assembly, and the Governor to not change the requirement for Town and Village Judges; that has been in effect for almost two hundred years; and be it further

RESOLVED, that certified copies of this resolution be forwarded to the County Attorney, County Treasurer, and posted to the Board of Supervisors website.

Approved:


Robert J. Fitzsimmons, County Attorney

Resolution
Committee

STATE OF NEW YORK
COUNTY OF COLUMBIA) ss:

This is to certify that I, undersigned Clerk of the Board of Supervisors of the County of Columbia, have compared the foregoing resolution with the original resolution, now on file in the office of said clerk, and which was adopted by said Board of Supervisors on the October 11, 2023; and that the same is true and correct transcript of such original resolution and of the whole thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Board of Supervisors this 12th day of October, 2023.


Kelly S. Baccaro, Clerk of the Board



The Brave New World of Artificial Intelligence in the Courts

BY THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES



(This article is excerpted from the Chief Judge’s Annual End of Year Report)

*The Honorable John G. Roberts, Jr.
Chief Justice of the United States*

Sometimes, the arrival of new technology can dramatically change work and life for the better. Just one century ago, for example, fewer than half of American homes had electricity. During the New Deal, the federal government set out to “bring the light” to homes across rural America. Representatives recruited farmers to join electricity cooperatives for \$5 each. Then came teams of men to clear the brush, sink the poles, and wire homes to the still inert grid. As Robert Caro relates in *The Path to Power*, in some places the project took so long that many forgot about it, or were certain they had been duped.

But eventually there were stories like Evelyn Smith’s to be told: “[O]ne evening in November, 1939, the Smiths were returning from Johnson City, where they had been attending a declamation contest, and as they neared their farmhouse, something was different. ‘Oh my God,’ Evelyn’s mother said. ‘The house is on fire!’ But as they got closer, they saw the light wasn’t fire. ‘No, Mama,’ Evelyn said. ‘The lights are on.’”

But not every story of technological investment ends brightly, as Mark Twain discovered financing the “Paige Compositor.” A typesetting device, the elaborate Compositor consisted of 18,000 parts and came with a patent application longer than *The Adventures of Tom Sawyer*. Twain was entranced by the invention, committing most of his fortune to bringing it to market. Unfortunately for Twain, the Compositor was too complex to commercialize. Twain’s company went bankrupt. And according to at least one account, both the attorney who drafted the patent application and one of the officials who examined it ended up dying in an insane asylum.

The Age of the Personal Computer

Thirty-five years ago, the Federal Judiciary began to take tentative steps into the modern era of information technology: In 1989, the branch finally supplied personal computers to secretaries in all judges’ chambers and ensured that there was at least one personal computer to be shared by each judge’s law clerks. Those of us who marveled at new, bulky, early personal computer systems in legal workplaces could hardly have anticipated today’s ubiquitous conversations about whether and when computers might replace all sorts of professions—not least, lawyers. Every year, I use the Year-End Report to speak to a major issue relevant to the whole court system. With breathless predictions about the future of Artificial Intelligence, some may wonder whether judges are about to become obsolete. I am sure we are not—but equally confident that technological changes will continue to transform our work.



We’ve Come a Long Way Since the Days of the Quill Pen

The legal profession is, in general, notoriously averse to change. For most of our nation’s first century, lawyers and judges produced their work with quill pens. Still today, as has been the custom for more than two centuries, the Clerk of the Supreme Court sets out white goose quill pens at counsel tables before each oral argument. Symbols of tradition and timelessness, the quill pens go home as treasured souvenirs of each appearance before the highest court in the land. But the Court has taken away the inkwells that once sat beside quill pens, recognizing that the pens now serve only a symbolic function.

Continued on page 14

Like the rest of society, if not quite as quickly, the judiciary has adapted its practices to meet the opportunities and challenges of new technologies. The transition to more modern forms of document production began 150 years ago, with the appearance of the Sholes & Glidden Type Writer, first manufactured in 1873 and famous shortly thereafter as the Remington. Most judges still wrote their drafts by hand, but the typewriter became an important tool in the dissemination of judicial opinions both internally and to the outside world. In 1905, Justice David Brewer somewhat ungenerously referred to his law clerk as “a typewriter, a fountain pen, used by the judge to facilitate his work.”

Until the invention of the Dictaphone, law clerks of this vintage also had to take dictation. In 1963 a law clerk lost his job due to “lack of stenographic knowledge.” The typewriter era lasted a century. On cue, fifty years ago a device called the Altair appeared on the market. Many historians consider the Altair to have been the first personal computer. It marked a significant step in the transition from large, stationary computers, like the Sperry Univac, housed in corporate and university buildings, to small, mobile devices designed for personal use in offices and living rooms. While many professions eagerly anticipated advances in computing, the prevailing attitude within the judiciary was skepticism. As one contemporary author observed, “The archaic courts know nothing of computers.”

That was largely true. In fact, the Supreme Court did not even have a photocopy machine until Chief Justice Warren E. Burger ordered one in 1969. Until that time, opinions and memoranda between the Justices were typed, often on carbon paper, and then duplicated on a hot-lead printing press that was not retired until the 1980s.

The 1980s saw a proliferation of personal computers in ordinary offices and households. By the early 1990s, most lawyers, law clerks, court administrators, and yes, even judges, had them on their desks. Nevertheless, paper remained the rule of the day. Law clerks and law librarians of that era will recall directives to “pull” cases from hardbound case reporters. Legal writing instructors taught their students to check the continuing validity of precedents by sifting through bound volumes of a publication called Shephards. (Lawyers facing a deadline might skip this stage, proclaiming that “the Lord is my Shephards.”)

Once finalized, briefs and motions made their way from the office to the courthouse in the hands of couriers, carrying the number of hard copies required under local rules and individual judges’ standing orders, plus one or two more to be stamped and returned to the (paper) file. Judicial staff still maintained docket entries in the same large handwritten diaries used by their predecessors a century earlier. And anyone looking to obtain a document from a case file had to travel to a clerk’s office, request the file, inspect it, and then pay a cashier for any copies they wished to make. But change came fast. By the turn of the century, the paper world familiar to lawyers for centuries had largely given way to today’s electronic regime.

Changes in the Trial Courts

Trials also look very different today than they did even a decade ago. Trial presentation software, real-time court reporting, accommodations for jurors, litigants, and spectators with disabilities, and many other applications have radically changed how lawyers present and jurors receive evidence in court. The COVID-19 pandemic ushered in yet another wave of rapid technological innovation. Courts at all levels of the judiciary immediately shifted from in-person to remote hearings in cases.

And now we face the latest technological frontier: artificial intelligence (AI). At its core, AI combines algorithms and enormous data sets to solve problems. Its many forms and applications include the facial recognition we use to unlock our smartphones and the voice recognition we use to direct our smart televisions. Law professors report with both awe and angst that AI apparently can earn Bs on law school assignments and even pass the bar exam. Legal research may soon be unimaginable without it. AI obviously has great potential to dramatically increase access to key information for lawyers and non-lawyers alike. But just as obviously it risks invading privacy interests and dehumanizing the law. Proponents of AI tout its potential to increase access to justice, particularly for litigants with limited resources.

For those who cannot afford a lawyer, AI can help. It drives new, highly accessible tools that provide answers to basic questions, including where to find templates and court forms, how to fill them out, and where to bring them for presentation to the judge—all without leaving home. These tools have the welcome

potential to smooth out any mismatch between available resources and urgent needs in our court system. But any use of AI requires caution and humility.

The Flaws in AI

One of AI's prominent applications made headlines this year for a shortcoming known as "hallucination," which caused the lawyers using the application to submit briefs with citations to non-existent cases. (Always a bad idea.) Some legal scholars have raised concerns about whether entering confidential information into an AI tool might compromise later attempts to invoke legal privileges. In criminal cases, the use of AI in assessing flight risk, recidivism, and other largely discretionary decisions that involve predictions has generated concerns about due process, reliability, and potential bias. At least at present, studies show a persistent public perception of a "human-AI fairness gap," reflecting the view that human adjudications, for all of their flaws, are fairer than whatever the machine spits out. Many professional tennis tournaments, including the US Open, have replaced line judges with optical technology to determine whether 130 mile per hour serves are in or out. These decisions involve precision to the millimeter. And there is no discretion; the ball either did or did not hit the line. By contrast, legal determinations often involve gray areas that still require application of human judgment. Machines cannot fully replace key actors in court



Is this the Judge of the Future?

Judges, for example, measure the sincerity of a defendant's allocation at sentencing. Nuance matters: Much can turn on a shaking hand, a quivering voice, a change of inflection, a bead of sweat, a moment's hesitation, a fleeting break in eye contact. And most people still trust humans more than machines to

perceive and draw the right inferences from these clues. As AI evolves, courts will need to consider its proper uses in litigation. Those changes will involve not only how judges go about doing their job, but also how they understand the role that AI plays in the cases that come before them. Of course, the branch is composed of more than judges, and I would like to single out for praise this year the skilled and dedicated information systems professionals who support our courts. They are often unsung public servants performing indispensable work to keep the judicial branch running.

Gone are the days when the quill pen alone was sufficient to maintain a docket; courts could not do our work without technologists and cybersecurity experts. More parochially, judges, including me, have been known to call on help desk staff for urgent and essential assistance. Once again, I am privileged and honored to thank all the judges, court staff, and other judicial branch personnel throughout the Nation for their outstanding service.



Due to a manufacturing error, our 2024 decals were printed on only one side.

If you would like a double sided decal, at no cost, please call our office at 1-800-669-6247.

News From The National Judicial College



Have a CDL related question?

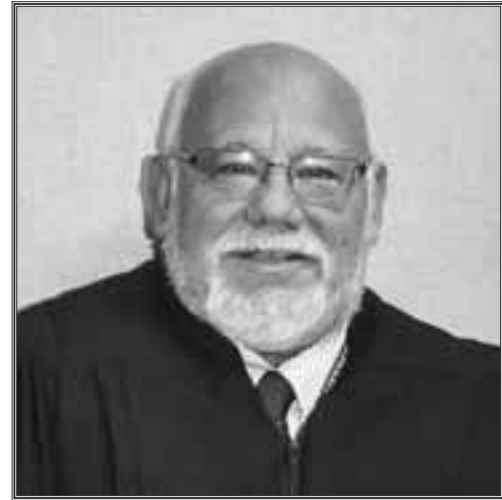
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Developed by Hon. Gary A. Graber (ret.)

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 call: 716-474-2777



Hon. Roger Forando (*T/V Granville*) served as a group facilitator for a four-day course on “Traffic Law for the Non-Lawyer Judge” for the National Judicial College in Reno, Nevada. The course concentrated on DWI and Drugged Driving issues.

As a group facilitator, Judge Forando led discussions in breakout sessions on how these matters are handled in the participant’s courts across the country .



National Judicial College Offers Free Classes to Local Magistrates Association

By HON. BARBARA SEELBACH (*T/Clinton, NYSMA Director, National Judicial College Ambassador*)

Are you looking for speakers for your next county magistrates association meeting? The National Judicial College offers two in person classes: “Effectively Handling Commercial Driver’s License Holders in New York Courts,” developed by Judge Gary Graber, and “Self-Represented Litigants in CDL Cases” developed by Judge Jonah Triebwasser.

These classes have already been well received in several jurisdictions and have been approved for CJE credit. In addition, Judge Graber has developed a wonderful website at <https://www.cdlcourttassist.org> to help judges recognize applicable federal regulations. Judge Graber is more than happy to teach a class on how to use this site to your benefit.

If you are interested in scheduling a presentation of any or all of these classes, please contact me at bseelbach@judges.org or (845) 489-4258.



NTLC
NATIONAL TRAFFIC LAW CENTER



Save the Date

2024 Commercial Driver's License Violations Conference: Enforcement, Prosecution, & Reporting

**June 11-13, 2024
St. Paul, MN**

Hampton Inn and Suites, 200 W 7th Street, Saint Paul, MN 55102

Conference and travel expenses are free to qualifying participants.



NYSMA Past Presidents and National Judicial College Ambassadors Hon. Gary Graber (*T/Darien, Ret.*) and Hon. Jonah Triebwasser (*V/Red Hook*) were panelists at the recent Mastering Masking seminar hosted by the National Traffic Law Center.

Shown left to right are: Participant Hon. Christie Brothers (*T/Wayland*), Judge Triebwasser, Bella Truong, Esq. (*Staff Attorney, NTLC*), Jim Camp., Esq. (*Senior Attorney, NTLC*) and Judge Graber.



Legal Sufficiency of Accusatory Instruments Post *Hardy*

By THE HONORABLE MACK COOK (*IVigil*)

Three years ago, the Court of Appeals issued an opinion in the case of *People v Hardy* 35 NY3d 466, 132 NYS3d 394 (2020) that a subsequent court commented would “change the legal landscape” regarding errors in accusatory instruments. *People v Minott*, 70 Misc 3d 1217 (N.Y. Crim. Ct. 2021). We examine how courts post-*Hardy* have decided issues relating to legal sufficiency of accusatory instruments and if the landscape is once again changing.

As a reminder, in *People v Hardy* “the Court of Appeals held that the trial court lacked the authority to amend a date listed in a misdemeanor information. The Criminal Procedure Law (C.P.L.) expressly stated which amendments to complaints and information were permissible under certain situations. 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 the instrument’s 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, and thus the issue was not waived when defendant entered a guilty plea to criminal contempt. (Hon. Robert Bogle, *Case Law Update, The Magistrate*, Winter 2021, pg. 30)

In other words, the *Hardy* decision stands for the strict proposition that the legal sufficiency of an accusatory instrument must rest within the four corners of the instrument and judges should not look beyond in determining sufficiency. Therefore, under the *Hardy*

standard an incorrect date in the information is an incurable defect absent a timely superseding information.

Although a majority of the cases^[1] decided after *Hardy* strictly adhere to the “four corners” doctrine, there are a few that appear to temper the strict application of the doctrine with an assessment of the gravity of an error in the accusatory instrument and balancing such gravity between equity and the C.P.L.

In *People v Perry*, 78 Misc 3d 132 (App Term 1st Dept 2023), the Court held that a minor discrepancy between the complaint and the supporting deposition regarding the precise location of a moving train when the defendant committed lewd conduct was merely technical and not jurisdictional and therefore the accusatory instrument was legally sufficient.

In *People v Johnson-McLean*, 71 Misc 3d 31 (App Term 1st Dept 2021), the Court found that spelling differences between the complaint and supporting disposition to be insufficient to find an accusatory legally insufficient.

The Court in *People v Bianchi*, 2023 N.Y. Slip Op. 51388 (N.Y. App. Term 2023) cited *People v Love*, 306 NY 18, 23 (1953) [“where an information charges violation of the wrong section of a statute, this may be disregarded as superfluous if the information fully advises the defendant of the acts relied upon to constitute the alleged violation”] in holding that the supporting deposition provided reasonable cause to believe that defendant illegally operated a 4x4 truck in a public park (*see* Suffolk County Code § 822-11 [A]). Consequently, here, the People’s motion to amend the simplified traffic information was unnecessary and, thus, properly denied, and, as a result, the Court held that it need not rule upon whether an amendment of a simplified traffic information is ever authorized by the C. P. L.

[1] *See*; *People v Slade* 37 N.Y.3d 127 (N.Y. 2021), *People v Walker* 2023 N.Y. Slip Op. 51119 (N.Y. App. Term 2023), *People v Thompson* 2023 N.Y. Slip Op. 50644 (N.Y. App. Term 2023), *People v Hilton-Jones* 2022 N.Y. Slip Op. 51261 (N.Y. App. Term 2022), *People v Flores* 75 Misc. 3d 130 (N.Y. App. Term 2022), *People v Chang Cong* 75 Misc. 3d 25 (N.Y. App. Term 2022), *People v Solomon* 203 A.D.3d 1468 (N.Y. App. Div. 2022), *People v Matera* 74 Misc. 3d 135 (N.Y. App. Term 2022), *People v Abidov* 74 Misc. 3d 34 (N.Y. App. Term 2021), *People v Karantinidis* 73 Misc. 3d 145 (N.Y. App. Term 2021), *People v Bolta* No. 2021-50600 (N.Y. App. Div. Jun. 25, 2021), *People v Rubio* 2023 N.Y. Slip Op. 50596 (N.Y. Crim. Ct. 2023), *People v N.R.* 76 Misc. 3d 390 (N.Y. Crim. Ct. 2022), *People v Benavente*, 2022 N.Y. Slip Op. 50552 (N.Y. Crim. Ct. 2022), *People v Abidov* 2021 N.Y. Slip Op. 21357 (N.Y. Sup. Ct. 2021), *People v Cannata* 2021 N.Y. Slip Op. 51309 (N.Y. City Ct. 2021)

In *People v. Minott*, 70 Misc. 3d 1217 (N.Y. Crim. Ct. 2021) 2021 NY Slip Op. 5113, 139 NYS 3d 519, the Court was presented with a typographical error in the information, as was the *Hardy* Court. In *Minott* the information incorrectly listed the location of the criminal incident as “Chatham Street,” where the correct location was “Chatham Square”. In applying the following criteria, the Court created a methodology that blended the subjective judicial analysis of pre-*Hardy* decisions with the objective application of *Hardy*’s four corners doctrine.

- Do the defects impinge on the integrity of the judicial process and inhibit the defendant’s right to due process? See *People v Dreyden*, 15 NY3d 100, 103 [2010]
- Do the defects negate an element of the crime charged? See *People v Hightower*, 18 NY3d 249, 254 [2011]
- Even with the defects, does the information provide the defendant with “notice sufficient to prepare a defense”? See *People v Casey*, 95 NY2d 354, 360 [2000].
- Do the errors implicate the reasonable cause requirement? See *People v Love*, 306 NY 18, 23 [1953]

In *Minott*, the Court addressed the totality of the error and not the mere commission of an error. Applying the criteria above, the Court found that the typographical error of the word ‘square’ instead of “street” failed to negate an element of the crime; prevent or infringe upon the ability of the defendant to prepare a defense; or inhibit the finding of reasonable cause to believe that a crime had been committed and that the defendant had committed said crime. The Court did distinguish between the misnaming of a street from an incorrect date on an order of protection (*Hardy*) commenting that the latter negated an element of the crime charged.

In *People v. Destine*, 2023 N.Y. Slip Op. 50463 (N.Y. App. Term 2023) the Court applied the third criteria found in *People v Minott* finding that an accusatory “on or about” date of November 26, 2020, is sufficiently detailed to provide defendant with notice of the offense charged so that he can prepare a defense. The *Destine* Court added a criterion that a defect in the instrument cannot be of such a magnitude that it would not prevent the defendant from being tried twice for the same offense.

In *People v Baez*, NY Slip Op 50929 August 26, 2023, (Criminal Court of the City Of New York, Bronx County Grieco, J.), the Court extensively reviewed the prerequisites for legal sufficiency prior to *Hardy* and in light of *Hardy*.

In *Baez*, the accusatory instrument stated that defendant committed the charged offenses on or about January 25, 2023, but there is no dispute that the conduct took place on December 31, 2022. Indeed, defendant notes that his “rap sheet confirms that the date of the crime was December 31, 2022, all of the police reports, all of the discovery turned over by the prosecution on April 12, 2023, clearly verifies that the alleged crime was December 31, 2022,” and on April 17, 2023, “the defense informed all that the correct date of the alleged offense was December 31, 2022” (Motion at 4-5). Defendant argued, relying on *People v Hardy* that the incorrect date renders the information facially insufficient, and the only way to correct the error is to file and serve a superseding information, and therefore the People’s certificate of compliance and statement of trial readiness are invalid; the filing of a superseding information on June 23, 2023, was ineffective, according to defendant, because it post-dated the CPL 30.30 speedy trial deadline.

In finding that the date did not render the instrument legally insufficient the Court reasoned that unlike *Hardy*, the People did not concede that the instrument waives jurisdictionally defectiveness. The Court applied the criteria of a mere typographical or spelling error put forth in *People v Johnson-McLean*; the minor discrepancy criteria of *People v Perry*; the three criteria found in *People v Minott*, and the criteria put forth in *People v Destine*.

In so doing the court found that the differences in dates:

- Was a minor discrepancy between the complaint and supporting deposition,
- Did not impinge on the defendant’s right to due process,
- Did not negate an element of the crime,
- Did not deprive the defendant of the opportunity to prepare a defense,
- Did not put the defendant at risk of double jeopardy.



Continued on page 20

Conclusion

A town or village court is certainly adhering to a majority of courts which have decided post *Hardy* if it holds that the legal sufficiency of an accusatory must stand or fail based solely upon the contents found within the four corners of the document adhering to the proposition that a judge should not look to ratify an otherwise insufficient instrument.

However, this author avers that town and village courts are vested with the ability to apply both law and equity in the determination of sufficiency, and precedent exists to do so. Collectively the courts in *Perry*, *Johnson-Mclean*, *Minott* and *Destine* have laid out the following set of criteria to determine the legal sufficiency of an accusatory instrument.

- 1.) Are the defects more than a mere minor discrepancy between the complaint and the supporting deposition?
- 2.) Do the defects impinge on the integrity of the judicial process and inhibit the defendant's right to due process?
- 3.) Do the defects negate an element of the crime charged?
- 4.) Even with the defects does the information provide the defendant with "notice sufficient to prepare a defense"?
- 5.) Do the errors implicate the reasonable cause requirement?
- 6.) Are defects of such a magnitude that it would not prevent the defendant from being tried twice for the same offense?

The *Baez* Court lays out a blueprint of how these criteria can be applied at law and with equity to rule on the legal sufficiency of an accusatory instrument.



Criminal Procedure Update 2022-2023

BY NYSMA PAST PRESIDENT HON. ROBERT G. BOGLE, SUPERVISING JUDGE OF NASSAU COUNTY VILLAGE COURTS

(Continued from our Winter 2023 issue)

Waiver of Indictment

In *People v. Solomon*, 39 NY3d 1114, 186 NYS3d 849 (2023), the Court of Appeals noted that, as a matter of law, a defendant may waive their constitutional right to grand jury presentment and indictment and proceed by SCI in accordance with the strict technical requirements of CPL 195.10(2). Here, the Superior Court Information (SCI) was filed after the grand jury indicted the defendant and thus the SCI failed to comply with the statutory prerequisites. Accordingly, the SCI is a nullity and was properly dismissed, ruled the Court.

Indictments

In *People v. Saenger*, ___NY3d___, 2023 WL3510422 (2023), the Court of Appeals held that the prosecution's

failure to specify a current misdemeanor offense in a count of indictment charging defendant with aggravated family offense rendered that count jurisdictionally defective, even though prosecution provided defendant with a bill of particulars, and an indictment separately charging defendant with second degree criminal contempt. The Court added that merely alleging that defendant had committed one of the statute's 18 listed misdemeanor offenses, without specifying which one, did not provide him with notice sufficient to enable him to prepare a defense, and the bill of particulars simply contained factual recitation of defendant's alleged conduct, but did not clarify underlying misdemeanor offense.

Motion to Dismiss Indictment

In *People v. DeStefano*, 74 Misc3d 858, 164 Misc3d 412 (Nassau Co. Sup. Ct. 2022), the defendant failed to show good cause for failing to make a supplemental

motion to suppress evidence collected from a pole camera within the statutory 45-day period for filing pre-trial motions, prosecution for failure to register or to verify as a sex offender more than 10 calendar days after changing his address, arising from allegations that he was observed entering a particular house each night and leaving the next morning for 14 days. Although the tape from the pole cameras was not available during the filing period, where defense counsel was informed of pole video and potential use of curtilage location at the time of the arrest, defendant's omnibus motion did not address any discussion of the pole camera, and motion to suppress was filed nearly five months after receipt of the video. [see US Const. Amend. 4; NY CPL § 255.20(1); NY Correction Law § 168-F(4)].

Illegal Search and Seizure

In *People v. Johnson*, ___NYS3d___ 2023 WL 3510428 (2023), the Court held that the police officer lacked reasonable suspicion that the suspect committed or was about to commit a crime, so as to justify the stop and frisk of the suspect after he exited a parked car and walked down the street in the area that had recently experienced a reported rise in violent crime; suspect's alleged actions prior to frisk, including moving from driver's seat to passenger side of car, moving his upper torso back toward driver's seat, pulling up his pants and attempting to buckle his belt, and appearing nervous while questioned, did not support reasonable view that the suspect was armed or involved in criminal activity. Rather, suspect's actions constituted nothing more than innocuous behavior, sole reliance on which would impermissibly reduce foundation for intrusion to nothing but whim or caprice.

Search Warrants

In *People v. DeStefano*, 74 Misc 3d 858, 164 NYS3d 412 (Nassau Co. Sup. Ct. 2022), the trial judge held that the Fourth Amendment did not preclude officers' isolated and warrantless use of a stationary video cameras installed on top of public utility poles on public property and directed at the home of the defendant, where defendant did not exhibit an actual subjective expectation of privacy in the goings-on

outside of the house, as no fence had been erected nor did he otherwise try to shield the front of the house from public view. The pole camera did not penetrate walls or windows of defendant's house so as to hear and record confidential information. The cameras did not explore details of defendant's house that would previously have been unknowable without physical intrusion, and the technology had been in existence for decades.

Eavesdropping Warrant

In *People v. Myers*, 39 NY3d 130, 183 NYS3d 811 (2023), the Court of Appeals held that a correctional facility's recording of inmate's call to an individual who was subject of a wiretap, in which others, including defendant, who made incriminating statements regarding involvement in fatal hit-and-run accident, that was "derived" from wiretap, which was "intercepted communication," and thus the People were required to furnish defendant with copy of eavesdropping warrant within 15 days after arraignment and before commencement of trial, in prosecution for leaving the scene of an incident resulting in death without reporting. The Court added that, in listening to the wiretap, the detective heard incriminating statements about hit-and-run, identified the defendant as the declarant, and directed authorities to recording. See CPL §§ 700.05(3)(A), 700.70; VTL § 600(2)(a).

(Continued in our next issue.)



**NYSMA
Past-President**

**Hon.
Robert G. Bogle**

**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, 2024 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

NYSMA Thanks These Retiring Jurists for Their Outstanding Service

Are there changes in your Court?

If a new judge takes the bench, or a judge retires, or a judge passes away, please inform SMA at nysma1@gmail.com so that we can honor these judges in the next issue of *The Magistrate*.

ENJOY
every moment

○ **35 ½ Years**

Honorable
Evelyn J. Falsarella
Sharon
Town Justice



○ **11 Years**

Honorable
James Forster
Chatham
Town Justice



○ **36 Years**

Honorable
Jack N. Eggleston
Dresden
Town Justice



Honorable
Paul Heintz
Kirkland
Town Justice

Clinton
Village Justice



○ **23 Years**

Honorable
David Gideon
DeWitt
Town Justice

○ **41 Years**

○ **20 Years**

Honorable
Lisa R. Rana
East Hampton
Town Justice



○ **36 Years**

Honorable
Fredy Herr
Cherry Valley
Town Justice



Honorable
Robert D. Ferris
Beekman
Town Justice



Honorable
Michael Mohan
Bennington
Town Justice

Multi bench
Wyoming County
(County, Family, and
Surrogates court)

○ **25 Years**

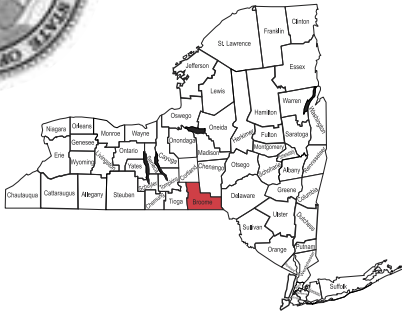
○ **53 Years**

Please send a photo of any retiring Judge (in robes if possible) and note how many years the judge was on the bench. Thank you!



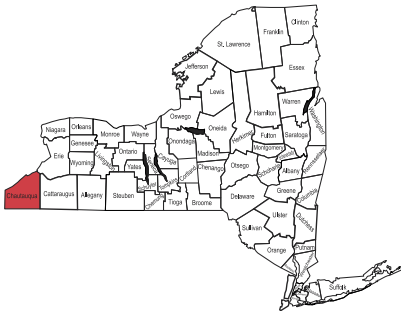
About My County

Broome County



NYSMA President Hon. Kenneth Ohi Johnsen (*T/Day*) administered the oaths of office to the officers of the Broome County Magistrates Association. **Shown from left to right are** Treasurer Hon. Alfonso Ortega (*V/Endicott*), Recording Secretary Hon. Gregory P. Thomas (*V/Johnson City, T/Union*), President Hon. Michael Fedish (*T/Chenango*) and Judge Johnsen.

Chautauqua County



The Chautauqua County Magistrates Association Magistrates watched as their officers took their oath of office.

Pictured Above; Hon. Ron Lucas (President), Hon. Marilyn Gerace (Secretary/Treasurer), Hon. Christopher Penfold (Vice-President), Hon. Jeffrey Crossley (Chaplain). Swearing in performed by Dean Puleo (Special Counsel 8th District)

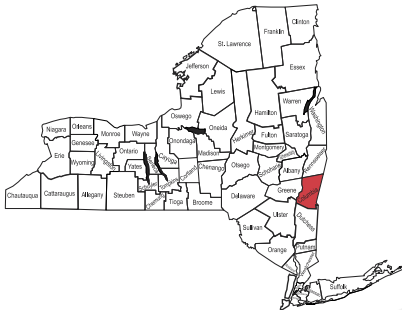
Chautauqua County Continued



In the group photo, seated are, left to right: Hon. Marilyn Gerace (*secretary/treasurer, T-Ellicott*), Hon. Ronald Lucas (*President, T-Villanova*), Hon. Christopher Penfold (*Vice-President, T-Dunkirk and Hanover*.)

Standing, left to right, are: Hon. Jeffrey Hyck (*T-Arkwright*), Hon. James Spann (*T-Westfield*), Hon. Jeffrey Crossley (*CCMA Chaplain, T-Charlotte*), Hon. Jerry LaPorte (*T-Westfield*), Hon. Vera Husted (*T-Ripley*), Jeannine Willson - Sikora, Esq., (*Senior Court Analyst 8th Judicial District*), Dean Puleo, Esq., (*Special Counsel, 8th Judicial District*), Hon. Edward Kalfas (*T-Chautauqua*), Hon. Daniel Thompson (*T-Portland*), Hon. Howard Peacock (*T-North Harmony*), and Hon. John Ferrara (*T-Ellery*.)

Columbia County



Former Town of Copake Justice Hon. Brian Herman took the oath of office as Columbia County Judge from Hon. Daniel Lynch, Supreme Court Justice. Judge Herman will also serve as family court judge, surrogate and preside at the drug treatment court.

Holding the bible is Judge Herman's wife, Barbara.

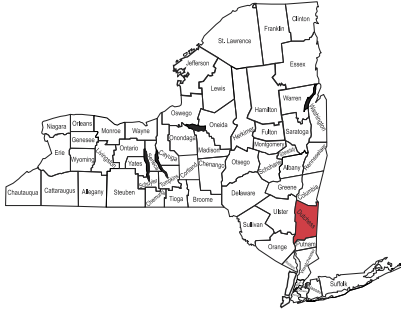
Hon. Dr. Carrie O'Hare (*T/Stuyvesant*), President of the Columbia County Magistrates Association, gave welcoming remarks.

Over 150 judges, attorneys and friends attended the investiture.

Photos by Steven Taylor



Continued on page 25



Dutchess County

NYSMA Past President Hon Jonah Triebwasser was congratulated by counsel, the public and court staff on his last court calendar as Town of Red Hook Justice. He will continue to preside as Village of Red Hook Justice.

Shown left to right are: Court Clerk Nancy Roberts, Judge Triebwasser, Court Clerk Kathy Fell and co-judge Hon. Thomas Mansfield.



Members of the Dutchess County judiciary helped Public Defender Thomas N.N. Angell, Esq., celebrate his retirement after 34 years of dedicated public service.

Dutchess County judges congratulated the new district attorney and public defender while at the retirement party for retiring public defender Thomas N.N. Angell, Esq.



Standing left to right are: Hon. James Brands (*T/Clinton and Dutchess Supreme Court, retired*), Hon. Scott Volkman (*C/Poughkeepsie*), NYSMA Vice President Hon. Susan Sullivan Bisceglia (*T/LaGrange*), Hon. Jefferey Martin (*T/Red Hook, retired, and Dutchess Family Court*), Hon. Frank Mora (*C/Poughkeepsie*), Hon. David Steinberg (*T/Hyde Park, retired*).

Seated are: NYSMA Past President Hon. Jonah Triebwasser (*V/Red Hook*), Mr. Angell, and Hon. Tracy MacKenzie (*Dutchess County Family Court*).



Left to right are: Hon. Frank Mora (*C/Poughkeepsie*), NYSMA Past President Hon. Jonah Triebwasser (*V/Red Hook*), Public Defender Margaret Walker, Esq., Hon. Jeffrey Martin (*T/Red Hook, retired, and Dutchess Family Court*), District Attorney Anthony Parisi, Esq., Hon. Tracy MacKenzie (*Dutchess County Family Court*), Hon. David Steinberg (*T/Hyde Park, retired*) and Hon. James Brands (*T/Clinton and Dutchess Supreme Court, retired*).



New Town of Hyde Park Justice Hon. Michael Plass took the oath of office from his co-judge Hon. Jean McArthur. **Left to right** are Judge Plass, his partner Christine Howlett and Judge McArthur.



Congratulating Judge Plass and Judge McArthur on their new terms is NYSMA Past President Hon. Jonah Triebwasser (*V/Red Hook*.)



The Dutchess County Magistrates Association had a very special guest at their recent meeting: Hon. Albert Rosenblatt, retired Judge of the Court of Appeals. Judge Rosenblatt spoke about his most recent book, *The Eight, The Lemmon Slave Case and the Fight for Freedom*. *The Eight* tells the story of *Lemmon v. New York*—or, as it’s more popularly known, the Lemmon Slave Case. All but forgotten today, it was one of the most momentous civil rights cases in American history. There had been cases in which the enslaved had won their freedom after having resided in free states, but the Lemmon case was unique, posing the question of whether an enslaved person can win freedom by merely setting foot on New York soil—when brought there in the keeping of an “owner.”



Welcoming Judge Rosenblatt, **left to right are:** DCMA Treasurer Hon. John Kane (*V/Rhinebeck*), Judge Rosenblatt and DCMA President Hon. Stephen O’Hare (*T/LaGrange*.)

Continued on page 28

Dutchess County Continued



Congratulating Judge Rosenblatt on the publication of his new book were NYSMA Vice President Hon Susan Sullivan Bisceglia (*T/LaGrange*) DCMA President Hon. Stephen O'Hare (*T/LaGrange*) and NYSMA Past President Hon. Jonah Triebwasser (*V/Red Hook*.)



The Dutchess Magistrates welcomed four new judges into membership. **Left to right are:** DCMA President Hon. Stephen O'Hare (*T/LaGrange*), Hon. Craig Wallace (*T/Poughkeepsie*), Hon. Theoni Salotto (*T/Fishkill*), Hon. Redmond W. Abrams (*T/Dover*), Hon. Raymond Raiche (*T/Fishkill*), DCMA Treasurer Hon. John Kane (*V/Rhinebeck*), and Hon. Lisa Loughran (*T/Red Hook*.)



Judge Rosenblatt congratulated the father/son Abrams family judicial team of the Town of Dover. **Left to right are:** Hon. Redmond W. Abrams, Judge Rosenblatt and Hon. R. Wren Abrams.



NYSMA Past President, the Hon. Jonah Triebwasser (*V/Red Hook*), administered the oath of office to his successor as Town Justice, the Hon. Lisa Loughran. He also swore in his former co-judge, the Hon. Thomas Mansfield.

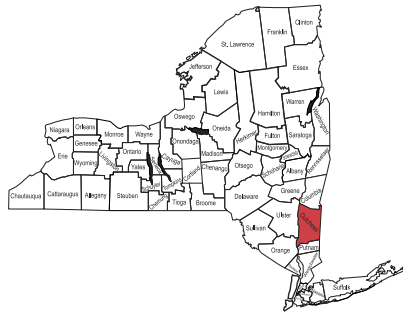
Holding the bible for Judge Loughran is her husband Roger Loughran II with her children Megan Jankowiak and Roger Loughran III looking on.



Holding the bible for Judge Mansfield is his wife Miriam Altshuler.

Judge Triebwasser stepped down as Red Hook Town Justice after 16 years of service, He will continue on as Village of Red Hook Justice.

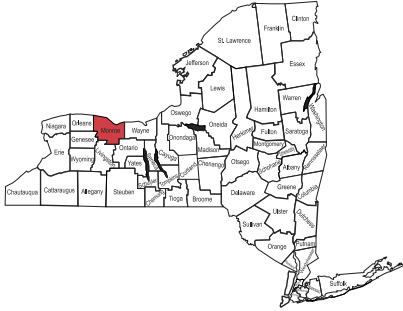
(photos by Rebecca Kent)



NYSMA Vice President Hon. Susan Sullivan Bisceglia (*T/LaGrange*) is surrounded by students from Arlington High School during the mock trial competition.

Continued on page 30

Morroe County



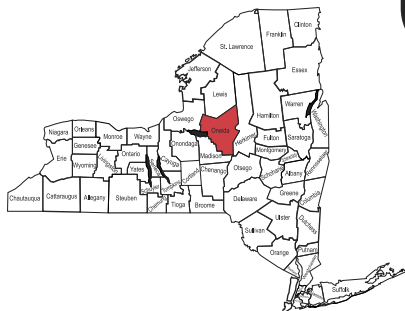
The Town of Brighton Justice Court welcomed the Hon. Vikram Vilku as their new justice. He is believed to be the first Indian-American justice in the history of New York State.



Oneida County

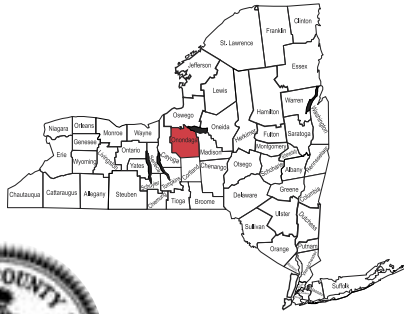


The Oneida County Magistrates Association honored three of their own as they celebrated the retirement of three veteran judges.



Pictured left to right, are Hon David Kozyra (T/Marcy) NYSMA Second Vice President, Hon. Randall Smith (T/Verona) 25 years, Hon. Gerard Neri (Onondaga County Supreme Court) Hon. Nelson Dodge (T/Verona) 36 years, Hon. Gilbert Rogers (T/Vienna) 53 years, and Hon. Stephen Crane (T/Marcy) and President of the Oneida County Magistrates Association.

Onondaga County



NYSMA Past-President and Town of DeWitt justice, Hon. David Gideon, was feted on the occasion of his retirement from the bench after 23 years of dedicated service.

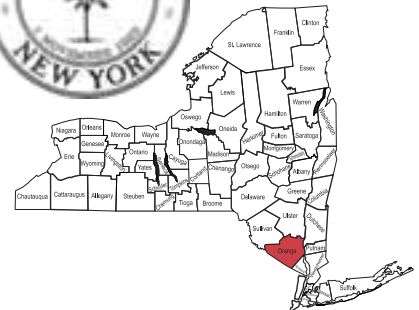


NYSMA President Hon. Ohi Johnsen (*T/Day*) and NYSMA Past President Hon. Edward Van Der Water (*T/Van Buren, Ret.*) presented Judge Gideon with the SMA certificate of appreciation.



Judges from across the state came to the event to honor Judge Gideon.

Orange County

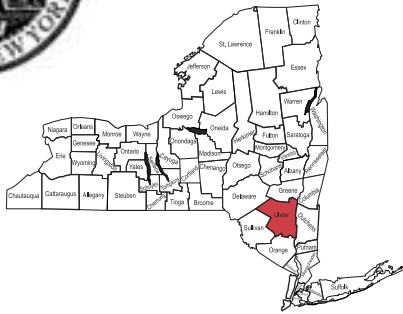


Four local judges were recently installed as officers of the Orange County Magistrates Association at a dinner and reception held at Delancy's in Goshen.

The Hon. Audra Schwartz, Town of Monroe, was elected President. The Hon. Karen Ostberg, Town of Minisink, was elected Vice President. Judge Schwartz and Judge Ostberg will also serve as a Coordinator for the Centralized Arraignment Part in County of Orange. The Hon. Mark Shuh, Town of Crawford was elected Treasurer. The Hon. Nicholas Chase, Town of Wawayanda, was elected Secretary. The Orange County Magistrates Association supports the city, town and village justices, clerks and support staff throughout Orange County and interacts with state, county and local agencies regarding matters affecting local justice courts and the Orange County Centralized Arraignment Part. The oath of office was administered by The Hon. Anne Minihan, Administrative Judge of the Ninth Judicial District.

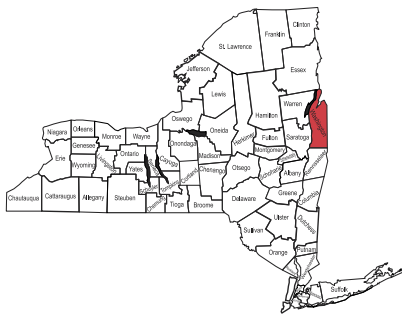
Continued on page 32

Ulster County



The 2024 Officers of the Ulster County Magistrates were sworn in by City of Kingston Judge Philip Kirshner. **Pictured left to right are** Hon. Stanley O'Dell, President Elect (*T/Saugerties*), Hon. Susan Kesick, secretary (*T/Ulster*), Hon. John Parker, Treasurer (*T/Hurley*), Hon. Margaret Haug, President (*T/Olive*), and Judge Kirshner.

Washington County



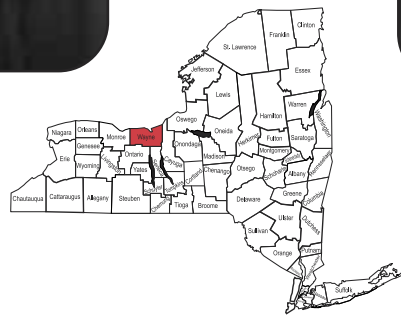
Granville Town Justices Hon. Roger Forando and Hon. Paul Manchester obtained a JCAP grant to refurbish their courtroom. The photos above show the “before and after” development of the town court in the former Granville Sentinel newspaper offices.

The beautiful bench area was the work of Marc Teller of Quality Comes First.



Wayne County

NYSMA Director, Hon Deborah Stritzel, and her co-judge, Hon. Robert Klinkman, were sworn in for new terms as Town of Williamson justices by Hon. Richard Dollinger, retired Court of Claims Judge and former Supervising Judge of the town and village courts in the 7th Judicial District.



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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 23-115

October 26, 2023

Digest: A part-time town justice may not remain “of counsel” to the law firm that represents the town planning board.

Rules: 22 NYCRR 100.2(A); 100.2(A); 100.3(A); 100.3(E)(1); 100.6(B)(1)-(4); Opinions 23-67; 21-110; 19-31; 99-162/99-180/00-63.

Opinion: A part-time town justice asks if it is ethically permissible to remain “of counsel” to a law firm that represents the town’s planning board. The inquiring judge is not involved in representing the town planning board and does not receive any revenue from the firm’s representation. Moreover, legal challenges to the town planning board’s decisions are heard in supreme court rather than the local town court.

A judge must always avoid even the appearance of impropriety (*see* 22 NYCRR 100.2) and must always act to promote public confidence in the judiciary’s integrity and impartiality (*see* 22 NYCRR 100.2[A]). A judge must disqualify from any proceeding in which the judge’s impartiality “might reasonably be questioned” (22 NYCRR 100.3[E][1]). Although a part-time attorney judge may practice law (*see* 22 NYCRR 100.6[B][1]-[3]) and may accept private employment or public employment that is compatible with judicial office and does not

conflict or interfere with proper performance of the judge’s duties (*see* 22 NYCRR 100.6[B][4]), a judge’s judicial duties nonetheless “take precedence” over all the judge’s other activities (*see* 22 NYCRR 100.3[A]).

While the present inquiry is a matter of first impression for us, our prior opinions provide significant guidance. We have previously advised that a town justice may not serve as counsel to the town planning board or as counsel to the town zoning board of appeals in the town where the judge sits (*see* Opinions 23-67; 99-162/99-180/00-63). As we explained in Opinion 23-67 (citations omitted):

it would create an appearance of impropriety for a town justice to serve as counsel to the town planning board, notwithstanding the judge’s representations that the planning board does not address zoning matters or zoning/code enforcement and is independent of the town board. We note, for example, that the planning board’s work may involve matters of local public controversy and/or the issuance of controversial decisions which may result in Article 78 proceedings in Supreme Court naming the planning board as a respondent.

In our view, similar considerations apply even if it is the judge’s law firm colleague(s), rather than the judge personally, who undertake the ongoing representation of the town planning board. Our conclusion here is bolstered by the consideration

that a “bright-line rule is easier to remember and follow” (Opinion 19-31).¹

Thus, assuming the law firm wishes to continue representing the town planning board, the inquiring town justice must choose between the two positions. That is, the judge must either discontinue their “of counsel” affiliation with the law firm or resign from judicial office.

¹ We have distinguished between serving “as *ongoing* municipal counsel” and representing the local municipality “on *discrete* individual matters” (Opinion 21-110).

OPINION 23-123

October 26, 2023

Digest: A village justice who formerly served as a special prosecutor for Vehicle and Traffic Law matters: (1) May preside in matters where the village justice was not involved in any manner during his/her prior employment as special prosecutor; (2) May undertake the strictly ministerial duty of depositing and transmitting fine monies in matters where the defendant motorist accepted the special prosecutor’s plea offer and the court approved it, but the payment either has not been made or has not been entered in the court records; and (3) Is otherwise disqualified from all cases in which the judge made a plea offer to the defendant motorist during his/her prior employment as special prosecutor, including (a) where the plea offer was rejected by the motorist or the court and (b) where there may be a need to reduce, modify or vacate the conditions of a plea agreement which was previously approved by the judge’s predecessor.

Rules: Judiciary Law § 14; 22 NYCRR 100.2; 100.2(A); 100.3(E)(1); 100.3(E)(1)(a)-(f); 100.3(E)(1)(b)(i); 100.3(F); Opinions 21-05; 20-20; 19-46; 15-211; 14-150; *People v Moreno*, 70 NY2d 403 (1987).

Opinion: The inquiring village justice previously served as the village’s special prosecutor for Vehicle and Traffic Law matters for over six months.¹ In that role, the inquirer reviewed tickets and sent out written plea offers to defendant motorists, who would then respond directly to the village. Processing of responses and payments on pleas, if any, were handled exclusively by the village clerk. The inquiring justice seeks guidance concerning his/her obligations in vehicle and traffic matters, in light of the inquirer’s previous employment. Specifically, the justice asks if he/she may adjudicate or otherwise handle VTL matters in the following categories and sub-categories:

1. Tickets issued *before* or *during* the justice’s term as special prosecutor, where:

- A. The motorist entered a guilty plea on the ticket, so it never went to the inquirer as special prosecutor, but either it has not been entered in the court records and/or payment has not been made and might be made during the inquirer’s judicial term;
- B. The motorist accepted the inquirer’s plea offer, and a predecessor village justice accepted it, but either it has not been entered in the court records and/or payment has not been made and might be made during the inquirer’s judicial term;
- C. The motorist entered a plea of not guilty, but it was never forwarded to the inquirer as special prosecutor;
- D. The motorist entered a plea of not guilty and declined the inquirer’s plea offer;
- E. The motorist entered a guilty plea in response to the inquirer’s plea offer, but a predecessor village justice rejected the plea agreement; or
- F. For some other reason, the inquirer never saw the ticket as special prosecutor.

¹ We understand that the District Attorney delegated authority to prosecute VTL matters to the village, which in turn retained the inquirer for the limited task of making written plea offers on some tickets. The inquirer was exclusively employed by the village and was not employed or supervised by the DA.

Continued on page 36

2. Tickets issued *after* the judge's term as special prosecutor ended.

A judge must always avoid even the appearance of impropriety (*see* 22 NYCRR 100.2) and must always act in a manner that promotes public confidence in the judiciary's integrity and impartiality (*see* 22 NYCRR 100.2[A]). Thus, a judge must disqualify in specifically enumerated circumstances as required by rule or law (*see* 22 NYCRR 100.3[E][1][a]-[f]; Judiciary Law § 14) and in any proceeding where the judge's impartiality "might reasonably be questioned" (22 NYCRR 100.3[E][1]). Where the judge knows that the judge previously "served as a lawyer in the matter in controversy," the judge is permanently disqualified and the disqualification is not subject to remittal (*see* 22 NYCRR 100.3[E][z]; 100.3[F]). Conversely, where disqualification is not mandatory, the judge is the sole arbiter of recusal (*see People v Moreno*, 70 NY2d 403, 405 [1987]). If a judge questions his/her ability to remain impartial in a particular matter, he/she must not preside.

Where a judge is a former prosecutor, the judge is disqualified if he/she played any prosecutorial role in the matter in controversy, whether directly or as a supervisor (*see* Opinions 20-20 [former district attorney]; 15-211 [former assistant district attorney]). Even minimal involvement suffices to trigger the prohibition, and remittal is not available (*see* Opinion 21-05 [judge must not preside in a criminal case that has been transferred to drug treatment court, where the judge entered a single appearance as the prosecutor in the underlying criminal case]).

We now apply these principles to the various scenarios described above.

Scenarios 1.D and 1.E

As for tickets issued before or during the justice's term as special prosecutor, where (a) the motorist entered a plea of not guilty and declined the inquirer's plea offer or (b) the motorist entered a guilty plea in response to the inquirer's plea offer, but a predecessor village justice rejected the plea

agreement, the determinative factor is that the judge previously played a role as a prosecutor in the matter by making a plea offer to the defendant motorist.

The inquiring judge clearly may not preside in these scenarios, because the judge previously participated as an attorney in the matter (*see* Opinion 21-05). The problem of prior involvement as an attorney is not cured by the fact that the motorist declined the inquirer's plea offer and entered a plea of not guilty (as in 1.D) or by the fact that the motorist entered a guilty plea in response to the inquirer's plea offer, but the court rejected the plea agreement (as in 1.E).

Scenario 1.B

With respect to tickets issued before or during the justice's term as special prosecutor, where a plea offer proposed by the inquirer was accepted by the defendant and approved by the court, but payment has not yet been made and/or entered in the court records, it is likewise clear that the judge was involved as an attorney in the matter.

In this scenario, however, because the predecessor village justice already decided the case, it is *possible* that the few matters remaining for the inquirer to address may be ministerial in nature. In Opinion 19-46, we addressed a judge's undertaking the strictly ministerial role of depositing and transmitting fine monies when the judge was originally unable to preside over the matter due to a conflict. We explained that a judge "may be asked to perform a ministerial, rather than a judicial function. This is so if his/her role is purely formal, so the judge lacks any real discretion to perform it, or if it has no substantial legal effect" (Opinion 19-46). We concluded that the judge's proposed role of depositing and transmitting fine monies was strictly ministerial and thus permissible.

Here, too, we conclude that the inquiring judge may accept payment and update the court records accordingly, provided that no discretion is involved (*see* Opinion 19-46).

We emphasize that the justice *may not* reduce, modify or vacate the exact conditions of the plea agreement which was previously approved by the judge's predecessor (*cf.* Opinion 14-150 [proposed order submitted by a conflict-inducing attorney, where the conflict arose *after* judge had issued an oral decision]). If any change or any discretion is involved in handling these matters, the judge is disqualified due to his/her prior involvement as special prosecutor (*see e.g.* Opinion 21-05).

Scenarios 1.A, 1.C, and 1.F

As for tickets issued before or during the justice's term as special prosecutor, where (a) the motorist entered a guilty plea on the ticket, so it never went to the inquirer as special prosecutor, but either it has not been entered in the court records and/or payment has not been made and might be made during the inquirer's judicial term, or (b) the motorist entered a plea of not guilty, but it was never forwarded to the inquirer as special prosecutor, or (c) for some other reason, the inquirer never saw the ticket as special prosecutor, the determinative factor is that the ticket never came before the inquirer as a special prosecutor.

As the judge thus had no involvement whatsoever in the case as an attorney, we can see no conflict based on the judge's prior employment and the judge may therefore preside over the matters. Where the ticket was issued *during* the judge's prior tenure as special prosecutor, we suggest (but do not require) that the judge disclose that prior role and explain that he/she had no involvement in the matter.²

² While not mandatory, the suggested disclosure should be feasible where, as here, the judge kept track of every ticket he/she reviewed as special prosecutor.

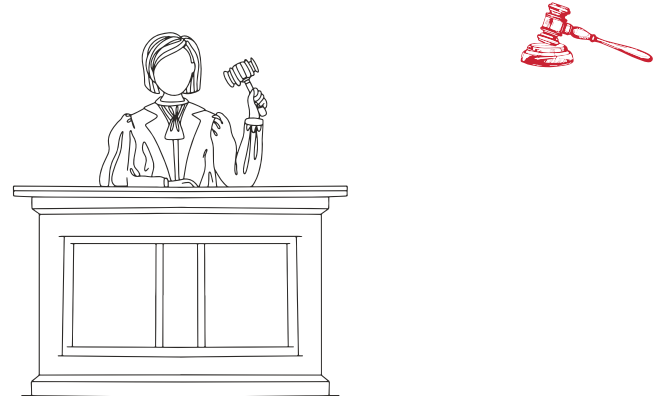
Scenario 2

Likewise, with respect to tickets issued *after* the inquirer's employment as special prosecutor ended, the judge clearly had no involvement with those tickets as an attorney. Accordingly, adjudication

of such matters is permitted provided no other conflict exists.

Additional Comment

Finally, we note that the inquiring judge also requests guidance concerning the process that should be followed as to those tickets that he/she may not handle. As this question is legal/procedural rather than ethical in nature, we cannot respond.



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NYSMA
2024 Conference

Niagara Falls, New York

September 22, 2024 –
September 25, 2024

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Double Occupancy: \$1,135.57 or
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Decision & Order

BY THE HONORABLE BRIAN M. RUDNER, *Town of East Fishkill*

State of New York: **County of Dutchess**

Town Court: **Town of East Fishkill**

THE PEOPLE OF THE STATE OF NEW YORK

-against-

MICHAEL MAVROUDIS, Defendant

DECISION AND ORDER

TICKET NUMBER # TY6451561

RUDNER, J.

...

The defendant moves, by petition for a writ of error *coram nobis* dated October 30, 2023, to vacate his judgment of conviction for speeding (60 mph in 55 mph zone a 3-point infraction) entered in this Court on or about July 16, 1996. The defendant argues that his judgment of conviction should be vacated because: (1) he was not advised, prior to entering his guilty plea, of his right to counsel or an adjournment to obtain counsel; and (2) as a result of this conviction, the Department of Motor Vehicles has permanently denied him relicensing. The People oppose the requested relief. For the reasons set forth herein, the motion is denied.

In 2012, the Commissioner of the Department of Motor Vehicles promulgated new rules and regulations relating to the re-licensure of applicants with multiple drug or alcohol-related driving convictions (*see generally*, 15 NYCRR Part 136 [hereinafter the Regulations]). The purpose of the Regulations was, in part, to take disciplinary action in order to force a change in the attitude and driving habits of problem drivers, where the Department's review indicates that such action is necessary for the protection of the applicant and the public alike (15 NYCRR 136.1[a]). As relevant here, Section 136.5(b)(2) provides that [u]pon receipt of a persons application for relicensing, the Commissioner shall conduct a lifetime review of such persons driving record. If the record review shows that (2) the person has three or four alcohol - or drug-related driving convictions or incidents in any combination with the 25 year look back period

and, in addition, has one or more serious driving offenses within the 25 year look back period, then the Commissioner shall deny the application. Serious driving offense, as defined in 15 NYCRR 136.5(a)(2) (iv), includes 20 or more points from any violations.

The defendant has an extensive history of driving offenses, including four alcohol-related convictions in the past 25 years, as well as 38 points from violations (including the conviction he seeks to vacate in the instant motion).

A motion to vacate a judgment of conviction, whether brought pursuant to CPL 440.10 or the common law writ of error *coram nobis*, cannot be used as a substitute for a direct appeal (CPL 440.10[2][c]; *People v. Cooks*, 67 NY2d 100 [1986]; *People v. Howard*, 12 NY2d 65 [1962], cert denied 374 US 840 [1963]). There is no evidence in the record that the defendant appealed the judgment of conviction that he now seeks to vacate. Accordingly, the defendant is barred from now raising the claim that he did not have counsel, as sufficient facts appear on the record to have permitted adequate review of this claim upon direct appeal from the underlying judgment but the defendant unjustifiably failed to appeal the judgment (*People v. Cuadrado*, 9 NY3d 362 [2007]; *People v. Terrero*, 198 AD3d 930, 931 [2d Dept. 2021] [citations omitted], *lv app denied* 37 NY3d 1165 [2022]; *People v. McKenzie*, 151 AD3d 1080 [2d Dept. 2017], *lv app denied* 30 NY3d 981 [2017]).

Even if the Court were to consider the merits of the defendant's petition, it would be denied because it relies solely on conclusory allegations from the

defendant, is not supported by any other affidavit or evidence, and there is no reasonable possibility that the allegations are true (CPL 440.30[4][d]; *People v. Allen*, 174 AD3d 815 [2d Dept. 2019]; *People v. Khalapov*, 133 AD3d 618 [2d Dept. 2015]). The defendant’s primary claim is that he was not advised, prior to entering his guilty plea, of his right to counsel or an adjournment to obtain counsel. There is no constitutional or statutory requirement that a person charged with a traffic infraction be apprised of his right to counsel unless a conviction of the infraction subjected the person to the possibility of incarceration (*People v. Letterio*, 16 NY2d 307, 310 [1965]; *People v. Dibello*, 46 Misc3d 143[A] [App Term, 9th & 10th Jud Dists, 2015]; *People v. Schonfeld*, 26 Misc3d 74, 76 [App Term, 9th & 10th Jud Dists, 2009]). Here, the defendant pled guilty to a reduced speeding charge of 60 mph in a 55-mph zone. This speeding charge did not subject him to the possibility of incarceration (see VTL 1180[h][1][i]). Thus, the defendant was not entitled to be advised of his right to counsel before entering his guilty plea and his petition must therefore be denied.

Moreover, the fact that defendant was not represented by counsel when he pleaded guilty is not, in itself, a ground to vacate the ensuing judgment of conviction (*People v. O'Neill*, 2023 NY Slip Op 50883[U], *2 [App Term, 2d Dept, 9th & 10th Jud Dists, August 3, 2023], citing CPL 170.10[3][c], [6]; see also *People v. Farinaro*, 36 NY2d 283, 285 [1975]; *People v. Letterio*, 16 NY2d 307, 310 [1965]; *People v. Russo*, 149 AD2d 255, 257 [2d Dept. 1989]; *People v. Villegas*, 2002 NY Slip Op 50647[U], *2 [App Term, 2d Dept, 9th & 10th Jud Dists, 2002]).

The restrictions imposed upon the defendant by the Regulations are also not a sufficient basis to vacate the judgment of conviction. It is well-settled that the loss of a drivers license is a collateral consequence of a judgment of conviction (see *People v. Ford*, 86 NY2d 397, 403 [1995]; *People v. Williams*, 150 AD3d 1549 [3d Dept. 2017]; *People v. Garraway*, 144 AD3d 703 [2d Dept. 2016]; *People v. Hill*, 57 Misc3d 154[A] [App. Term 2d Dept. 2017] [the possibility that the reinstatement of defendants drivers license might be administratively denied was a collateral consequence]; *People v. Olecki*, 57 Misc3d 698 [City Ct., City of

New York, 2017] [relicensing ramifications under 15 NYCRR 136.5(b)(3)(ii) were a collateral, and not direct, consequence of plea]). Thus, the defendants loss of his drivers license is a collateral consequence of his guilty plea and not a valid basis to disturb the instant conviction.

Moreover, even before the Regulations in their present form went into effect, re-issuance of a new license to an offender whose license had been revoked was (and remains) subject to the discretion of the DMV Commissioner (see Vehicle and Traffic Law 510(6)(a) & 1193(2)(c); *Acevedo v. New York State Dept. of Motor Vehicles*, 29 NY3d 202, 214 [2017]).

The cases relied upon by the defendant - *People v. Lynch* (Patchogue Village Justice Court, Patricia Romeo, J., November 30, 2020) and *People v. Velte*, 61 Misc.3d 331 (City Ct., City of Poughkeepsie, 2018) do not alter the Court’s analysis or conclusion. The Court finds the rationale of these cases unpersuasive and declines to follow them. The Court finds the holding of *People v. Wheaton*, 49 Misc.3d 378 (Cty. Ct., Seneca Cty., 2015) more instructive. In *Wheaton*, the defendant moved pursuant to CPL 440 to vacate a 2004 conviction for driving while intoxicated because his driver’s license was subsequently revoked in 2013 under 15 NYCRR Part 136. The Court in *Wheaton* denied the motion to vacate, finding the loss of the drivers license was a collateral consequence and that the defendants grievance lies with the enactment and enforcement of the new regulation, not the manner of his conviction (*id.* at 379; see also *People v. Maggio*, 210 AD3d798 [2d Dept. 2022]; *People v. DiTore*, 209 AD3d 665 [2d Dept. 2022]; *People v. Newell*, 76 Misc3d 1062 [Just Ct, Town of New Scotland, 2022]; *People v. Gallagher*, 70 Misc3d 1210[A] [City Court, City of Rye, December 16, 2020]; *People v. Avital*, 64 Misc3d 483 [Just Ct, Town of East Fishkill, 2019]; *People v. Capraro*, 51 Misc.3d 1212[A] [City Ct., City of Mt. Vernon, 2016]).

Finally, it is not the defendant’s 1996 conviction in this Court for speeding that led to the lifetime suspension of his license. It is the defendant’s complete driving history, including four driving while intoxicated

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offenses, that has brought him within the purview of the Regulations (see *People v. Avital*, 64 Misc3d 483 [Just Ct, Town of East Fishkill, 2019]). Were the Court to grant the defendant’s motion, it would, in effect, be invalidating the Regulations as applied to the defendant. In light of his driving history, the defendant appears to be exactly the type of problem driver the Regulations were promulgated to address. The Court will not intrude upon the province of the Commissioner of the Department of Motor Vehicles by vacating a guilty plea that, on the record before the Court, was knowingly and voluntarily entered. Based upon the foregoing, it is

ORDERED that the defendant’s petition for a writ of error *coram nobis* vacating his judgment of conviction is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: November 30, 2023
Hopewell Junction, New York



Hon. Brian M. Rudner
Town Justice



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Decision & Order

BY THE HONORABLE SAMUEL C. YOUNG, *Town of DeWitt*

State of New York: **County of Onondaga**

Town Court: **Town of DeWitt**

ANNA MERCIER, Plaintiff

-against-

MARYANN THOMPSON, Defendant

DECISION AND ORDER

Case No. 23-0080205

Appearances:

Anna Mercier, *pro se*

MaryAnn Thompson, *pro se*

PROCEDURAL HISTORY

This is the second small claim that these parties have filed against one another. Earlier this year, Ms. Thompson, who had been a one-time customer of Ms. Mercier, filed a small claim against Ms. Mercier, a hair stylist, alleging Ms. Mercier failed to provide the haircut and coloring she had requested. After trial on that matter, this Court held against Ms. Thompson and dismissed her complaint. Familiarity with that decision is assumed herein.

In this case, Anna Mercier, now the Plaintiff, has sued MaryAnn Thompson, her former customer, alleging “slander, harassment, punitive damages, lost wages, serious emotional distress, failure to remove malicious reviews(s) despite having the verdict against her re: her suit for her hair.” Ms. Mercier seeks damages in the amount of \$2999.99, or one cent below the jurisdictional limits of this Court. Ms. Thompson in turn has counter-sued Ms. Mercier, claiming continuous harassment from a frivolous lawsuit, causing her pain and suffering. In her countersuit, Ms. Thompson seeks one dollar in damages, and a “cease & desist letter.”

This matter came to be heard by this Court on October 25th, 2023. Over the course of nearly three hours, the Court heard extensive testimony from both the Plaintiff and Defendant, who each testified and cross-examined the other party. The Court also

heard testimony from Ms. Mercier’s son and husband, and Ms. Thompson’s daughter, who each gave testimony supportive of their respective family members. The Court received and reviewed a portfolio of exhibits, consisting of dozens of pages of transcripts from Defendant’s appointment, text messages, before and after photos, and online reviews. The Court has heard the testimony, reviewed the evidence, weighed the credibility of the parties, and reaches the following decision.

Facts:

This case revolves around an online review which the Defendant posted about the Plaintiff. Ms. Mercier testified that Ms. Thompson left a “scathing” one star review of the haircut that she received from Ms. Mercier on Google. In it, Ms. Thompson named Ms. Mercier by her first name, and also the name of her business and the company from which she rents space. In the review, Ms. Thompson states that she requested a silver dye job, and instead received blond coloring, and a haircut which she did not want. Ms. Thompson wrote that she felt “embarrassed and sad” by the way that her hair looked. She went on to state that she requested Ms. Mercier to fix the cut, but that Ms. Thompson did not hear back from Ms. Mercier until she requested a refund.

Ms. Mercier testified that the review was seen over 1,600 times. She stated that she was stunned and upset by the review, and that she lost sleep over it. Plaintiff stated that as a result of the negative review, she dreaded coming to work, and that the incident has taken the joy out of her work, to the point that she is considering giving up her job.

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Plaintiff stated that she believes she has lost work as a result of the review, but had no way to quantify any losses. She did state that she did not receive any new clients for a period of approximately three weeks after the review went up, but could not state whether she lost any existing business, or if so how much. No customers told her they were canceling as a result of the review. Plaintiff also stated that she made a decision to cut back her own hours, because she was upset over the situation. Plaintiff acknowledged that she had no estimates of any lost wages. She stated that she has suffered emotionally over the review, but other than her testimony, was unable to offer any proof of the pain and suffering she experienced.

Ms. Thompson testified that she was mortified by how she looked after the haircut. She said she wrote the review and said what she felt about the service she received. She stated that she was exercising her First Amendment and consumer rights to express her opinion about the service which she received. She stated that she has been harassed online and by text message by Ms. Mercier since leaving the review. She states that she has been called a liar and insulted because she expressed her opinions, and that she too has suffered physically and emotionally as a result of their ongoing dispute.

Discussion:

The Court of Appeals has provided substantial guidance in analyzing when and under what circumstances a statement can become defamatory. A false statement that tends to expose a person to public contempt, hatred, ridicule or disgrace can constitute defamation. *Thomas H. v. Paul B.*, 18 N.Y.3d 580, 584 (2012). Since falsity is a necessary element of a cause of action for defamation, and only facts are capable of being proven false, only statements of facts, not statements of opinion, can properly be the subject of a defamation action. *Davis v. Boenheim*, 24 NY2d 262 (2014).

“Pure opinion” is not actionable, because expressions of opinion, as opposed to assertions of fact, are deemed privileged. Therefore, no matter how offensive statements of opinion may be to the subject of those statements, they may not form the basis for a defamation action. *Davis, supra*, 24 NY2d 262.

“However pernicious an opinion may seem, we depend for its correction not on the conscience of judges or

juries but on the competition of other ideas.” *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289 (1986), citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).

Distinguishing between fact and opinion is a question of law for the courts, to be decided based upon what the average person reading the statements would take them to mean. *Davis v. Boenheim*, 24 NY2d 262, 269, citing *Steinhilber v. Alphonse*, 68 N.Y.2d at 290.

The Court of Appeals has provided three factors in determining whether a reasonable reader would consider a statement connotes facts or non-actionable opinions:

1. Whether the specific language has a precise meaning which is readily understood;
2. Whether the statements are capable of being proven true or false; and
3. Whether either the context of the communication in which the statements appear or the broader social context are such as to signal to the reader that what is being read is likely to be opinion and not fact.

Davis v. Boenheim, 24 NY2d at 270, citing *Mann v. Abel*, 10 N.Y.3d 271, 276 (2008).

“The third factor lends both depth and difficulty to the analysis, and requires that the court consider the context of the communication as a whole, its tone and apparent purpose.” *Davis v. Boenheim*, 24 NY2d at 270, quoting *Brian v. Richardson*, 87 N.Y.2d 46, 51 (1995).

Rather than sifting through the communication for the purpose of isolating and identifying assertions of facts, the court should look at the overall context in which the assertions were made, to determine whether the reasonable reader would have believed the challenged statements were conveying facts or opinions about the plaintiff. *Davis v. Boenheim*, 24 NY2d at 270.

In the very recent case of *Kerns v. Ishida*, 208 A.D.3d 1102 (1st Dep’t 2022), the defendants posted online reviews of a spa service, in which the defendants expressed their dissatisfaction with their experience, and strongly criticized the plaintiff spa-owner’s behavior towards them. This is a remarkably similar factual situation to the case at bar.

In *Kerns*, the First Department held that the plaintiff failed to state a cause of action against the defendants, as the challenged statements were expressions of opinion, and are not actionable. *Kerns v. Ishida*, 208 A.D.3d 1102, 1103, citing *Mann v. Abel*, 10 N.Y.3d 271, 276. The court found that many of the allegedly defamatory statements were protected by language stating they were opinions. The court found that although the reviews did mix fact and opinion, the allegedly defamatory statements had a loose figurative or hyperbolic tone. *Kerns v. Ishida*, 208 A.D.3d 1103. “When read in the context of the entire review, the statements are clearly grounded in opinion, and communicate to a reasonable reader that defendants were dissatisfied customers expressing opinions based on their negative experience with plaintiff’s business.” *Kerns v. Ishida*, 208 A.D.3d 1103.

So too, in this case, Ms. Thompson’s statements in her online review that she received a haircut that she didn’t like, which left her embarrassed, sad, and feeling “like a clown” are clearly understood by a reasonable reader to be expressions of opinion based on her dissatisfaction with Ms. Mercier’s service, and are not actionable as defamation.

Given the finding that the defendant’s statements were opinion and not actionable, the Court need not reach the question of whether the Plaintiff proved recoverable damages as a result of the defendant’s review. However, if the Court were to consider this question, it would find that the Plaintiff has failed to prove she suffered specific financial loss as a result of the online review.

Finally, as to the Defendant’s counterclaim, this Court finds that the Defendant failed to state or prove a cause of action against the Plaintiff. The only discernible relief that the Defendant appears to seek in her counterclaim is injunctive in nature, and beyond the jurisdiction of this Court.

For the foregoing reasons, the Plaintiff’s claim is DISMISSED, and the Defendant’s counterclaim is also DISMISSED.

This constitutes the Decision, Order and Judgment of the Court.

Filed and Entered: December 6, 2023

Hon. Samuel C. Young
Town of DeWitt Justice



**Hon.
SAMUEL C. YOUNG**

Town of DeWitt



Answers to Puzzle on Pages 48

Jumble Answer:

- Petitioner
- Respondent
- Landlord
- Tenant
- Notice of Eviction
- Notice of Petition
- Default of Judgement
- Order To Show Cause

Why was the defense attorney digging in his client’s garden?

Final Answer: Because he was sure that the “evidence was planted.”

Decision & Order

BY THE HONORABLE DAVID OTIS FULLER, JR. (*V/Tuckahoe*)

State of New York: **County of Westchester**

Village Court: **Village of Tuckahoe**

PHILLY SCOCA, Plaintiff

-against-

SVETLANA KOSMACHEVA, Defendant

DECISION AND ORDER

DOCKET No. 230900001

Uniform Justice Court Act § 1804 sets forth the procedure to be followed when conducting a Small Claims trial. The Court is required “to do substantial justice between the parties according to the rules of substantive law...” After hearing all the testimony and evidence presented herein, the Court makes the following findings of fact and determination of law:

The plaintiff, a licensed real estate broker, is claiming a half commission of \$837.50 for finding a rental apartment in Tuckahoe for the defendant. The landlord has paid the listing broker the other half commission. The plaintiff testified that, although there was no written agreement for a commission, she told the defendant that the defendant would have to pay half commission to her and showed her a written statement containing the amount of the check payable to the broker by the defendant. (Plaintiff’s Exhibit 1).

The defendant testified that she did not remember whether she was shown the statement. She testified, though, that the broker showed her the apartment and that she rented it. The court finds that there was an oral agreement for the broker to show the apartment to the defendant, that the broker showed the apartment to the defendant, that the broker told the defendant the amount of her commission and that the defendant rented the apartment. The only question is whether the agreement had to be in writing. Section 5-701(10) of the General Obligations Law provides that an agreement with a licensed real

estate broker for a commission for negotiating the leasing of an interest in real estate, is not required to be in writing.

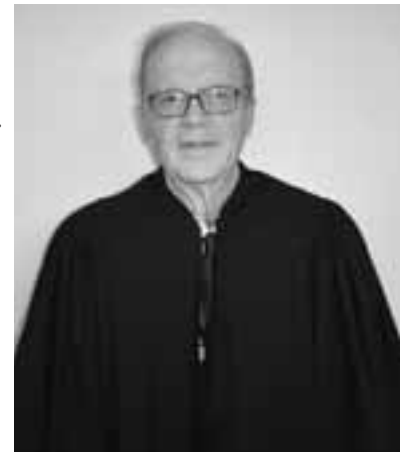
Accordingly, the defendant must pay the plaintiff the half commission of \$837.50.

Judgement for the plaintiff. It is so ordered.

Signed this 16th day of November, 2023 at Tuckahoe, New York.

ENTER

David Otis Fuller, Jr.
Village Justice



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BY THE HONORABLE MACK COOK (*V/Virgil*)

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• UCC Implied Warranty of Merchantability		Fa-23			
• Unpaid Municipal Fees		Wi-17			

The Jumbled Judge

BY NYSMA PRESIDENT THE HONORABLE KENNETH OHI JOHNSEN

Solve the anagrams to reveal the letters for the final message

Take the letters that appear in boxes and unscramble them for the final message.

SUMMARY PROCEEDINGS

Why was the defense attorney digging in his client's garden?

1 ITEPOITNRE

2 DNNERSTOPE

3 DDLALORN

4 NATTEN

5 ECITON FO NVICETOI

6 TNIECO OF TPIETNOI

7 LAFEDUT UDJGTMNEE

8 RRDOE OT WHSO SEACU

BECAUSE HE WAS SURE THE...

(answers on page 43)



CORPORATE IMAGES, Inc. 845-236-1349

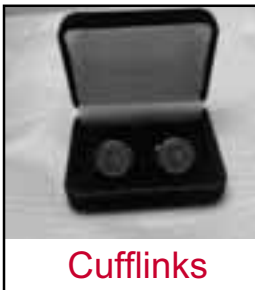
Visit our online store at cogifts.com/stores/NYSMA

or contact terry@cogifts.com

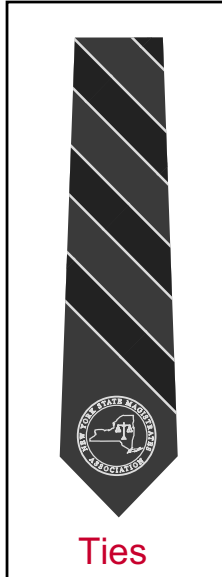
A portion of the proceeds support NYSMA. Here is a product sampling:



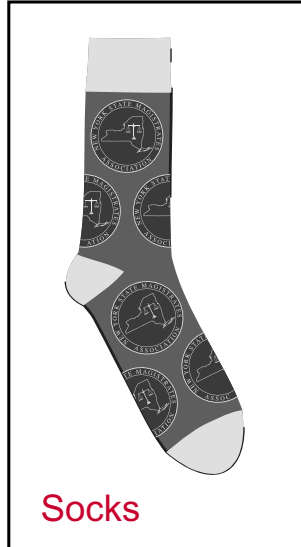
2023 Decals



Cufflinks



Ties



Socks



Gavels



License Plate Frames



Polos



Onesies



Caps



Sweatshirts



Dress Shirts Men/Lady



Microfiber Jacket



Fleece Blanket



Mugs

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

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