



BARRISTER

PUBLISHED BY THE BARNSTABLE COUNTY BAR ASSOCIATION

WINTER 2004-2005

PRESIDENT'S MESSAGE

On March 10, 2005, the Barnstable County Bar Association will host a Legislative Reception from 5 – 7 p.m. at Alberto's Ristorante in Hyannis. The purpose of the Legislative Reception is to provide a very informal forum at which our members can meet with their local legislators and government representatives and discuss their ideas and concerns. We have invited Robert E. Travaglini, President of the Massachusetts Senate, Salvatore F. DiMasi, Speaker of the Massachusetts House of Representatives, and each Senator and Representative from Barnstable County to attend the Legislative Reception.

We, as attorneys, play an extraordinary role in our community. We act as advocates, mediators, and conduits for the Barnstable County community with the local and state government, in the Courts, in the registries, in the local government. We also play very active roles in community agencies, volunteering our time, education, knowledge and experience to help local organizations meet the needs of our disadvantaged neighbors on such issues as adequate food, housing, and medical care. We are active in fostering effective schools and community services. We contribute to the cultural richness of our community. We know first hand how the laws and budgets adopted by the state impact on our local community. We know how governmental policies affect the daily lives of the members of our community.

I and the members of the Executive Committee hope that you, our colleagues, will attend the Legislative Reception on March 10, 2005 and encourage your legislators to attend as well. The date chosen is early in the budget process and is a busy time for all our legislators, however, we feel that it is extremely important that our members and our representatives use this opportunity to reach out to the Barnstable County community through this forum.

The Annual Meeting and Dinner will take place

on June 16, 2005 at Alberto's Ristorante. This year we will be hosting the Chief Justice for Administration and Management, The Honorable Robert A. Mulligan, as well as the Honorable Margaret H. Marshall, Chief Justice of the Supreme Judicial Court, the Honorable Christopher J. Armstrong, Chief Justice of the Appeals Court, and the Chief Justices of each of the Trial Court Departments. The attendance of the Chief Justices is an adjunct to the monthly chief justices meeting which will take place the following day in Barnstable County. We look forward to seeing you there.

*Lois M. Farmer, President
Barnstable County Bar Association*

MEMORANDUM FROM FREDERIC P. CLAUSSEN, REGISTER OF PROBATE

This memo comes with New Year's Greetings to all as we settle into 2005. The following are a few housekeeping matters I wanted to bring to your attention and that of your staff for future probate filings.

Although the increased fee schedule for probate matters has been in effect 18 months, probate petitions requiring a citation continue to be filed without the \$15.00 charge for the citation.

Also, when the seven day notice (10 days actual by mail) is given on a petition seeking a temporary appointment (the heirs having not all assented), the expiration date on such notice is not a hearing date, but rather a deadline for objections to be filed. There being none and the back-up paperwork is in order, the appointment will be made routinely as I or an estate staff person will promptly present the

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SUPERIOR COURT UPDATE

I want to thank the Board of the Bar Association for giving me the opportunity to address you. I wish everyone a happy and prosperous New Year.

There are some changes I would like to talk about. The Superior Court has a new Chief Justice, Judge Barbara J. Rouse, and we have a new Regional Administrative Justice, Judge E. Susan Garsh. The new administration is focusing on disposing of all off-track civil and criminal cases.

The bar should be prepared for more scrutiny on requests for continuances of pre-trial conferences, motions and trials. There is now a definite policy to move cases in the Superior Court. Based on discussions with our new RAJ, we will be sending out a new trial notice. The bar should pay close attention to this new notice as it places certain responsibilities on trial counsel.

The bar should be aware by now that Superior Court Rule 9A has been amended so that almost every type of motion must go through the 9A procedure except emergency motions. I strongly suggest that the Bar review and become familiar with the changes to Rule 9A through 9E.

The emphasis from the Administrative Office seems to be getting rid of off-track criminal cases of people in custody. To deal with this, the Administrative Office is contemplating taking a civil session away from us in June and making it a criminal session. This will obviously hurt our ability to move civil cases.

I have requested, and the Administrative Office is considering, adding a 3rd session in the Grand Jury room for three months to hear motions and jury-waived matters. I will keep the bar updated on this request.

Since I wrote last, there has been a new addition to the office. I would like to introduce to all, the new First Assistant Clerk, John S. Dale, Esq. John joined us in August and I am pleased to have the additional help. John has been a practicing attorney for many years. He started his career in the

District Attorney's Office. He was then in private practice for 17 years before joining the Superior Court Clerk's Office. I hope the bar will take the opportunity to get to know him and say hello. I want to welcome Mr. John Dale to the Superior Court staff.

As always, if the bar has any questions, comments, concerns or suggestions, please call me at 508-375-6684 or e-mail me at nickerson_s@jud.state.ma.us. I and my staff are here to assist you in any way we can. I look forward to working with everyone to help make the court run as efficiently and effectively as possible. I hope to see you all in 2005 and please drop in and say hello.

*Scott W. Nickerson, Clerk of Courts
Barnstable County Superior Court*

MEMORANDUM FROM FREDERIC P. CLAUSSEN, REGISTER OF PROBATE

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matter to the Judge. Therefore, not only is it not necessary to contact the trial department to schedule a hearing for a temporary appointment (you may simply notice your motion for the date of your choice), but also no appearance is required on that date to present the case on the ex-parte list.

On an estate case, if the papers are in order for filing, but certain back-up papers are necessary, with the citation we provide a "deficiency slip" indicating what papers will be needed at a later date, but before the petition can be allowed. This is the only notice we provide and ignoring such a notice could seriously delay any appointment.

Finally, the certification of notice of medical assistance, copy of petition and death certificate should not be sent to Essex Station, Boston but to Division of Medical Assistance, P.O. Box 15205, Worcester MA 01615-9906.

If you have any questions, please feel free to contact me at 508-375-6709.

NOT "JUST A DRUNK DRIVING CASE" ANYMORE

Operating Under the Influence, or "drunk driving", is by far the most commonly encountered offense in the district courts today. Yet it has always been one of the most difficult charges to defend. As a result, drunk driving defense has become a truly specialized area of the law as the substantive, evidentiary and procedural aspects of drunk driving litigation have grown more complex while the client's exposure has increased.

These changes are the result of a heightened awareness of the drunk driving problem, the federal government's use of federal highway funds to move the states toward uniform laws, evidence, procedures, and improved technology with regard to chemical analysis and the collection of breath and blood evidence.

Today's drunk driving offense is no longer the rite of passage that some perceived it to be in years past. The license loss and humiliation associated with simply being arrested can wreak havoc in a client's life. For example, upon arrest an operator is offered a breath test. Refusal of the breath test results in an automatic administrative license loss of at least 180 days. However, failure of the test results in only a 30-day suspension. This causes the operator to take the test so to minimize the loss of license penalty. In addition, a first offender (in most circumstances) is now entitled to a "hardship license" immediately upon conviction. This causes the client to plead guilty as quickly as possible without considering the protection of his rights or his likelihood of success at trial. In addition, the client never considers the impact this hasty plea may have if a second offense should occur. Even a first offense must be rigorously defended as Massachusetts now has a "lifetime lookback" philosophy, meaning any prior conviction or CWO (continuance without a

finding) regardless of how old will be considered for enhanced minimum mandatory penalties.

Also, Massachusetts has recently become a "per se" state which means that an operator who has a blood alcohol level of .08 or greater is guilty of the offense regardless of whether his ability to operate the motor vehicle was impaired. Consequently, skill and experience in the defense of chemical test evidence is a vital tool for a drunk driving defense attorney.

What does this mean to the attorney representing a client charged with driving under the influence? It means that education and preparation are more important than ever. Drunk driving is a deceptively difficult type of case to deal with and the risks to the client are much higher than are generally appreciated.

EDWARD SHARKANSKY is a criminal defense attorney who specializes in Drunk Driving Defense. He is on the Board of Directors of the Massachusetts Association of Criminal Defense Lawyers and a member of the National College of DUI Defense. He has offices in Mashpee, Brockton and Boston and welcomes the opportunity to discuss any questions you may have regarding this area of practice.

The Barrister is a publication of the Barnstable County Bar Association and it is intended as an informational tool to its attorney members. The information and opinions expressed in this publication are those of the authors and not the BCBA.

SALES OF ASSETS THROUGH THE BANKRUPTCY COURT ABUTTERS BEWARE

Bankruptcy courts are increasingly used as a mechanism for the sale of assets from single family homes to national retailing companies. A principal allure of such sale is that assets are sold "free and clear" as well as a belief that such sales are at below market value. While the latter position is a matter for debate, "363 Sales" – referring to the specific section of the Bankruptcy Code – expressly allow a buyer to take title to assets free of any liens, claims, encumbrances or interests by creditors or other parties with the force of an order from a federal court.

The First Circuit Court of Appeals recently addressed the extent of such sales in the decision of *In re Colarusso*, 382 F.3d 51 (1st Cir. 2004). The facts involved in the Colarusso decision relate to a Massachusetts bankruptcy court's approval of a sale

of a single family home in Osterville as well as the adverse possession claims of an abutting property owner. This decision has important ramifications for the holders of easements and other interests in real property.

In upholding the decision of the bankruptcy court, the First Circuit found that the bankruptcy sale not only passed title to the real property free and clear of the adverse possession claims of an abutter, the sale extinguished it. Vital to the First Circuit's decision was the notice given to the abutter of the bankruptcy court's intended sale of the real property.

The Colarusso decision also sends a warning to prospective buyers of assets in a bankruptcy proceeding. In that regard, a buyer should not merely rely on the strength of the bankruptcy court's order

but also to conduct independent due diligence including a title rundown to determine potential lienholders, easement holders and holders of other interests in the land in order to assure that such parties receive notice of the intended sale.

Alex M. Rodolakis, Esq.
Alex M. Rodolakis is Of Counsel to the firm of Garnick & Scudder, PC. Mr. Rodolakis focuses his practice on bankruptcy, work out and commercial matters.

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BCBA Golf: Back in the warmer (and greener) days of last September, the BCBA organized an afternoon golf outing at the Hyannisport Club and those of us who participated enjoyed the casual competition and social gathering of friends and colleagues. The date, Friday, September 17th was chosen specifically because it was a Friday afternoon, thus we expected a large turnout. Unfortunately, only 22 players participated. The general consensus that day was "let's do it next year". However, before planning another golf outing, we would like suggestions on how we can generate more interest in the event.

Please contact us with your thoughts - Stuart Rapp at 508.428.0400 or Madeleine Delorey at 508.362.2121, or BCBA@cape.com.

Mass. Legal Assistance Corp.: The MLAC Board of Directors has a position which will become vacant in March 2005. If you are interested in being considered to fill this position, please notify the BCBA Executive Director Madeleine Delorey immediately and no later than March 1, 2005 at 508-362-2121 or the BCBA President Lois Farmer at 508-771-2320. We will need a copy of your resume.

Land Court Reminder: Attorney addresses used by the Land Court will be the addresses listed with the Board of Bar Overseers, which will be updated regularly by the BBO. Attorneys may electronically update their addresses at the BBO website at <http://massbbo.org/address.php> (or go through the Massachusetts agency site).

BCBA LRS Reminders: The BCBA LRS is listed in the white pages of the telephone book. Please remember that if you refer potential clients to the LRS.

Please remember to return your LRS 30 day and final **referral reports**, together with appropriate fees, to the BCBA on a regular basis.

BCBA Executive Board: Every year a new Executive Board is elected at the Annual Meeting. The Board meets monthly from September through June and is charged with running the business of the organization directly and through the committees. Members serve 1 year terms. If you would like to be considered for serving on the Board for the 2005-2006 year please notify us at 508-362-2121 or BCBA@cape.com.

COLLEGIALITY APPRECIATED

Although I've been admitted to practice in Massachusetts since 1998, I hadn't taken a case here until September, 2004. I was first admitted to practice law in 1990, in New York. I must admit that I'm sorry that I waited so long. As a solo criminal defense lawyer based in New York I was waiting for the "right" case on the Cape to make my entrance. Finally, my chance presented itself in the form of a domestic violence matter, G.L. 265/13A&B in the Orleans District Court. The victim, after calling 911, decided against pressing charges and sought to withdraw the charges. For my first appearance in a "foreign" jurisdiction, I was confident that I could assist my client without embarrassing myself in the process.

On the day of the appearance, I arrived early and introduced myself to everyone in the courthouse I could find. I was pleasantly greeted by everyone I met. For anyone who's ever been into the New York City courts, smiling faces are hard to find. It was nice to see in Orleans.

Once the prosecutor arrived, I was able to sit with her for a few moments and agree, subject to the Court's approval, to a CWO (continued without findings) which was tantamount to a grand slam for my client. All told, I spent a few hours in the Courthouse and accomplished a great deal. I can only hope that my future appearances on the Cape will be as enjoyable.

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