

BARRISTER

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HOLIDAYS, 2009

PRESIDENT'S MESSAGE

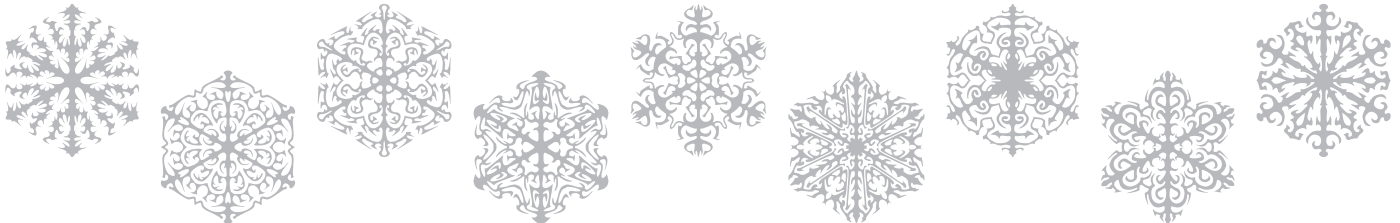
As this year comes to a close, please accept my hopes that all of us can have a happy, healthy and safe 2010. While the economic collapse of October 2008 may have us limping into the new year, small signals of a turnaround are beginning to appear. Whether or not these are indicators of a sustained growth we will know soon enough. We can welcome the positive signs with hope, even if pragmatic.

As lawyers we are trained and duty bound to question everything. It is only appropriate that, with a practiced and pessimistic eye, we review our deeds, agreements, decisions, proposals and the myriad of issues that cross our desks each day. We have learned to question the "facts" reported to us. We cautiously consider the character and credibility of those who report those facts. But pragmatism and caution do not require us to divest ourselves of all optimism. To the contrary, it gives us good reason to be optimistic.

It is precisely our training and experience that causes others to seek our assistance. Each day I am privileged to see attorneys doing their utmost to advance the hopes of their clients. All of you should take pride in the knowledge that your efforts constantly improve your clients' circumstances. As members of this Association you share your experiences with other counsel and give back to the community we all live in. It is with optimism that you attend BCBA seminars to improve your knowledge of the practice. For the second year our annual charity will directly benefit those in need in our community. I thank each of you for giving me hope for the coming year. After all, this is the season of hope.

Happy Holidays to all of you.

— John S. Dale, President



NEW PROGRAMS AT THE BARNSTABLE PROBATE & FAMILY COURT

On behalf of myself, Associate Justice Arthur C. Ryley, and Register Anastasia Welsh Perrino, I am pleased to announce the implementation of two new programs at the Barnstable Probate & Family Court. The first program was highlighted in the Summer 2009 issue of the Barrister which is the Pro Bono Conciliation Project, pursuant to SJC Rule 1:16, Uniform Rules on Dispute Resolution. This program was funded with a grant from the Massachusetts Bar Foundation. A group of Barnstable County attorneys have now been selected and trained to act as conciliators to assist parties in settling their cases by clarifying the issues and assessing the strengths and weaknesses of each side of a case. These cases will cover all matters that come before the Court, including not only divorce and paternity matters, but also wills, estates, trusts, guardianships, and equity matters. This program has been launched in two other counties, Essex and Middlesex, where it has been very successful, and is now also being implemented in Bristol as well as Barnstable County.

The second program consists of a panel of 16 Family Law practitioners who have stepped forward to volunteer their time representing children in contested custody and guardianship cases. The name of this program is the “ARC Panel,” standing for “Attorneys Representing Children.” As most

of you know, previous to this year and for the past fifteen years, the Children And Parents, Inc. program (CAP) had been providing attorneys to represent children in these same matters, under the able guidance of Attorney Kathleen Snow. However, CAP was not funded this past fiscal year due to cost saving measures implemented by the Administrative Office of the Trial Court, thus leaving a void. We are very grateful for the attorneys on the “ARC” panel who have stepped forward to fill this void, and envision that on some of these cases the attorney appointed to represent the child will also be able to receive a fee for his/her service.

These two new programs will be of great benefit to the Court in settling and moving cases. Over the last year the case load at the Probate and Family Court has significantly increased, and coupled with the July 1, 2009 implementation of the new Probate Court Rules regarding guardianship matters, the time involved in handling these cases has also increased. These two programs are an exciting and welcome addition to ease the burden on the judges and staff at the Court, and to assist the lawyers who practice in the Court and their clients to reach a fair, just, and expeditious resolution of their case.

— Robert A. Scandurra, First Justice



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December 29, 2009

Dear Member:

You are invited to two events sponsored by the Barnstable County Bar Association. Both events are scheduled for Thursday, January 21, 2009.

The first event is a "District Court Open Forum" which will take place at the Barnstable Assembly of Delegates Room, Barnstable District Court, Route 6A, Barnstable, MA 02360 on Thursday, January 21, 2009 at 4:00 p.m. District Court Judges will be available to answer practical questions about current law and procedure.

The next event is a reception for new attorneys immediately following the Open Forum. The reception will be held at the Barnstable Tavern and Restaurant, Route 6A, Barnstable, MA 02630 (across the street from the Barnstable County Superior Court) on Thursday, January 21, 2009 at 5:00 p.m. Hors d'oeuvres will be provided, and a cash bar will be available. Judges and current members of the Barnstable Bar Association will attend. This is a good opportunity for you to network with other members of the Bar Association and to socialize with our local Judges.

If you will be attending the reception, please RSVP to Madeleine Delorey at the Bar Association at (508) 362-2121.

Sincerely
John S. Dale, President

ETHICS, MONEY AND THE LAW (PART 2)

In the last edition, we addressed the behavior of a recently infamous Florida attorney and deferred until this edition the question, How can the bar best protect itself against the few attorneys of this nature and thus maintain the profession's reputation for integrity?

At the outset, it is important to acknowledge that there will always be certain individuals at the extreme of human behavior in every profession and walk of life, and it would be impossible to completely prevent all errant behavior. By the time an individual becomes an attorney, his or her underlying psychology may be largely formed. Thus, short of the ultimate, after-the-fact remedies of disbarment and criminal prosecution, the best we as members of the bar can do is to create and enforce extensive instruction and ongoing reminders of ethical requirements to reinforce ethical walls that may sometimes become weak in the face of real world stresses.

Looking back at my law school education twenty-five years later, one of the most notable deficiencies in an otherwise excellent course structure was the lack of significant required ethics instruction. I recall just one required ethics course, which everyone considered one of those dry, boring, have-to-get-through-it courses. The implicit message that such a minor requirement sent to us 22-year olds was: we all need to know these rules, get past the course, and get back to really learning the law and how we make a strong income. Oh yeah, and we have to comply with these rules while doing it. Given the relative standing of attorneys in the popular mindset, and the role that an alleged lack of ethics plays in that public perception, law schools would be serving both the interests of attorneys and the interest of the public in perceiving that attorneys take their role as fiduciaries seriously by requiring more extensive ethical training than a single required, dry textbook course. Courses in ethics can be mixed with more exciting topics, such

as management of real world multi-million dollar estates and multi-billion dollar business transactions in which issues of very tempting conflicts of interest and opportunities for lucrative self-dealing are offered. There is a famous 1990s case in which one of the largest, well-known firms in the southern United States sold assets of an estate for which it was the executor's law firm to another client for a major discount from fair market value, resulting in tens of millions of dollars of damages. Role playing in negotiations resulting in these circumstances could be encouraged, with active problem solving through minefields of ethics issues that real world attorneys encounter.

In addition to more extensive ethics training at the outset of a legal career, the Bar should require ongoing ethics training that presents recent, real world situations for review and reminder. Massachusetts currently does not have mandatory legal education as a condition for continued licensure. Other states do have such requirements, and at least some of them include mandatory continuing ethics training. In Texas, for example, an attorney's license is suspended if he or she fails to complete two classroom hours and a self-study hour in legal ethics every year, in addition to other continuing education requirements.

At first such a requirement sounds annoying. We all think of ourselves as ethical. We do not need to be reminded of ethical requirements. However, legal ethics encompasses a larger field than just "honesty" or "integrity". Many of us, acting in good faith and honestly, make occasional, innocent mistakes that might not have been made if there had been a recent reminder of the proper course of action in difficult legal ethics situations. For example, a client and a friend may come to an attorney and indicate that they have agreed on a transaction in which one sells an asset to the other. The attorney is asked to write-up

(Continued on Page 5)

ETHICS, MONEY AND THE LAW (PART 2)

Continued from Page 4

a contract to take care of this “friendly” deal. Since it is a “friendly” deal, the attorney is asked not to spend too much time or money on the contract and not to make it too “legalistic”. The attorney knows both people and does not ask all the questions and perform all the normal due diligence, nor insist on the representations that would normally be in such a contract. The attorney does not write a letter to his client and his friend confirming that he is just acting as a scrivener, that he is not representing either party’s interest, that each should have separate counsel review the documentation, and that he was specifically asked to use the most plain, simple form possible and to forego normal due diligence. The attorney does not have the two parties sign an acknowledgement of any of these aspects of the engagement. Later the deal goes sour after a major legal liability is discovered, and each party claims that he thought the attorney was representing his interests and should have told him if anything adverse to his interests required investigation or protection. The parties then both claim that the attorney acted

unethically, contributing to the damage to attorneys’ reputations. In reality, the attorney thought he was helping a client and a friend to accomplish a mutually desired favorable result and had no wrongful intent whatsoever.

The above hypothetical scenario, in various iterations, has occurred over and over again and has resulted in numerous claims, many of them legally justified. When we have been practicing in a community a long time and have come to know and trust various people, it is easy to be lulled into legal ethical lapses without any malicious, immoral or inappropriate intent. Mandatory continuing legal education in ethics can help minimize such incidents by providing reminders and real world examples of choices gone awry and of the proper way to handle difficult situations. At the margin, such information could be the factor that determines whether we make a good choice or a risky one.

— Daniel P. Neelon, Esq.

The next deadline to submit articles for the *Barrister* is March 1, 2010 for the Spring 2010 edition. Please send materials as e-mail attachments to attorney Dan Neelon at dneelon@neelonwilder.com.

The Barrister is a publication of the Barnstable County Bar Association and 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.



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