

legalbriefs

Judicial Elections: They Matter to All of Us

You probably follow election campaigns and elective politics, at least when November nears. But have you ever stopped to think how well that process works for choosing judges? Here on Long Island, the elective process is the way we select judges who conduct trials and decide cases involving disputes that range from criminal prosecutions to landlord-tenant, personal injury, commercial and matrimonial matters. The process sometimes results in fine judges, but given how the method works in practice, that result seems almost accidental.

The reason isn't that the elective process is inherently a bad thing. The main problem is that judicial candidates and judicial races are typically treated as an afterthought by political parties, news media, and the voting public. Judicial races are seen as unimportant and therefore don't merit news stories. The code of judicial ethics does not allow judicial candidates to announce positions on issues that may come before them as judges or to comment on other judges or judicial candidates. As a result, campaign literature, which is often the voters' only source of information about the candidates, cannot present the whole picture. As a result, when most voters walk into the voting booth, they have paid these elections little attention and don't know or remember the candidates, their qualifications, or

how they stack up against one another. In political parlance, the judicial races are at "the bottom of the ticket."

If you think about it, though, judicial races ought to be at the "top of the ticket." Election is the way Long Islanders choose *all* judges who rule on cases, except for a handful of Court of Claims judges appointed by the Governor. While judicial terms of office vary from 4 to 14 years depending on the court, every judge (except those elected to local Justice Courts) serves for far longer than any official elected to an executive or legislative post. What's more, most other elected officials aren't solo decision makers because they work in a legislative body or have a cabinet of department heads, and need the concurrence of the other body of government. *continued on page 2*

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The code of **judicial ethics** does not allow judicial candidates to announce **positions on issues** that may come before them as judges or to comment on other judges or judicial candidates.

But judges make their rulings individually. True, a judge may only preside over a jury trial where the jury decides innocence or guilt or damages for personal injuries, but it's that one judge alone who makes decisions about motions, evidence, bail, sentencing, child custody, support, etc. The only exceptions to the individual-making-a-decision mode are our appellate judges who sit in panels of three or

more. However, appeals court judges don't achieve their appellate positions by election but are appointed by the Governor.

Recently there has been a lot of publicity about the President's nominee for the Supreme Court of the United States, Sonia Sotomayor, and a statement she made contrasting the judicial perspectives of "a wise Latina woman" and a white male judge. I leave it to others to figure out whether she was promoting herself or her perspective, or just noting the obvious: that judges are people, and they bring their background and life experience to the bench. Whatever Sotomayor's perspective, she is only one of nine, and we can count on her views being tempered by discussion and debate with the other members of the Court.

In contrast, when voters go to the polls to select trial judges, they are selecting jurists who won't be part of a panel when they decide a bail hearing, a motion, a trial or a custody dispute. The legal and life experience, character, and what lawyers call "temperament" of the individual judge will determine

whether that judge, *sitting and deciding alone*, has what it takes to be fair, impartial, learned, patient, courteous, and steadfast when applying the law to the cases of real life people who come before the court, and making sure justice is done. When your case is called, you will care about who is sitting behind the bench, and society cares, too. That's why judicial elections shouldn't be an afterthought for the news media and for the public who vote judges into office. The news media should cover these races and voters should strive

Judicial elections should be treated like they are the **"top of the ticket."**

to learn about the candidates' backgrounds and qualifications. Judicial elections should be treated like they are the "top of the ticket." ■

Written by: Linda U. Margolin

Shareholder Liability for Wages

Could you be personally liable for your company's failure to pay employee wages or benefits? The answer may surprise you.

You may think that your corporation guards you from individual liability, and in most cases, it does. However, this shield isn't absolute. The law allows employees to pursue you personally for their wages. New York's Business Corporation Law section 630 in certain circumstances holds the top ten shareholders of a company that is not publicly traded personally liable for the wages of its employees, if they were shareholders when the unpaid services began. Several procedural requirements must be met by the employee, such as

the service of a notice of intention to hold shareholders liable for wages within 180 days of the termination of his or her employment. Also, the employee must first commence an action against corporation and have a judgment returned unsatisfied prior to suing any shareholder. Following that, the employee must commence an action against the individual shareholder within 90 days of judgment being returned unsatisfied.

If the procedural requirements are met, liability can be established simply by proving shareholder status and showing that the employee performed work, labor or services for the corporate entity, thus earning the unpaid wages.



New Statutory Power of Attorney

A General Durable Power of Attorney (“POA”) is a document in which one person (the Principal) gives another person or persons (the Agent or Attorney-in-Fact) the authority to take action of various kinds on behalf of the Principal. The New York State Legislature recently created a new form of POA, which became effective September 1, 2009. By design, the new POA is vastly more complicated in substance, form and execution than New York’s old POA. The new POA implements a system of checks and balances, which better ensures that monetary transfers and gifts made using a POA are made for the benefit of the Principal, and with his or her wishes in mind.

The requirements for executing the new POA are different than the old statutory form. The new POA must be dated and signed by **both** Principal and Agent before a notary public. Even more stringent requirements apply to a special rider to the new POA, discussed below.

Safeguards put in place with the new POA are intended to protect your property for your use and enjoyment and to prevent an estate plan from being modified or undone by your Agent without your explicit authorization. In the past, some Agents made transfers or gifts that led to disputes between the Agent and the Principal, or even between the Agent and the Principal’s beneficiaries under a will. The disputes typically centered on whether transfers or outright gifts were anticipated, authorized, or in the best interests of the Principal and/or the

Liability for the unpaid wages is shared among the shareholders according to their respective ownership interests. An employee can sue any one or all of the top-ten shareholders, and it is up to the shareholder who is named as a defendant to present his or her own claim against other shareholders for contribution towards the wages that are owed. In order to do so, the shareholder must serve a notice upon other shareholders of the intention to hold them liable within 20 days of notice from employee.

If you are a shareholder of a closely held company, you cannot afford to be ignorant of whether and when the corporation is paying its employees. Make sure management is paying employees their wages, benefits and vacation pay; make sure management reports on this topic on a regular basis to you, the shareholder. ■

Written by: Gerard J. McCreight

Principal’s beneficiaries. The new POA attempts to minimize or eliminate disputes of this kind, and reduces the amount that can be gifted by the Agent without further authorization.

Under the new POA, an Agent is unable to make major gifts (in excess of \$500) unless the Principal has also executed a Statutory Major Gifts Rider (“SMGR”). The SMGR is a form that supplements a POA to authorize the Agent to make major gifts and similar transfers, and must be acknowledged before a notary public and witnessed by two witnesses, in the same manner as a will is executed.

The new POA further clarifies the agent’s authorization to deal with joint accounts and trust accounts, including the right to modify, terminate, make deposits or withdrawals and change beneficiary designations. The Principal may also use the SMGR to give the Agent authority to create and fund trusts, via specific provisions that allow the Agent to “create, amend, revoke, or terminate an *inter vivos* trust,” and give the Agent the authority to change beneficiaries on retirement benefit plans.

To further safeguard a Principal’s assets from an Agent’s possible fraud or misuse, the new POA allows the Principal to appoint someone to monitor the Agent’s actions. The Monitor has the authority to request, receive, and seek to compel the Agent to provide a record of all receipts, disbursements and transactions entered into by the Agent on behalf of the Principal. Whether or not a Monitor is selected, the Principal should understand the powers that are being conveyed, and appoint a trustworthy and responsible Agent.

While old POAs which have been executed continue to be effective, the new form is something you should consider because it may better fulfill your needs for having someone deal with your assets, if you are not able to do so yourself. Now is a good time to review and possibly update your Power of Attorney. ■

Written by: Vincent P. Adomaites



New Labor Law

On July 28, 2009 an Act to amend the Section 195 of the Labor Law became law in the State of New York and becomes effective October 28, 2009.

Under the Labor Law, as amended, an employer must notify his or her employees, in writing, at the time of hiring of the rate of pay and of the regular pay day designated by the employer and obtain a written acknowledgement from each employee of receipt of this notice. The acknowledgement must conform to the requirements established by the commissioner of Labor with regard to content and form. *continued on page 4*

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For all employees who are eligible for overtime compensation, the notice must state the regular hourly rate and overtime rate of pay.

The new law applies to all employees hired on or after October 28, 2009. ■

your principal residence, or to refinance debt incurred for those purposes.

Be sure to ask your accountant if you qualify. ■



Modification of Mortgage-Tax Benefits

Take a Look... You may qualify for additional tax benefits if the principal balance of your mortgage has been modified or otherwise reduced in the past two years due to the decline in value of your principal residence or due to other financial conditions.

Normally, when you borrow money, the funds are not considered to be income because you have an obligation to repay the debt. If the lender forgives or reduces the debt, the amount of the reduction or forgiveness is considered income because you no longer have to repay that portion of the loan. This is called "cancellation of indebtedness" income.

However, under an extension of the Mortgage Debt relief Act of 2007, debt reduced in the years 2007 through 2012 may be excluded for income tax purposes. The debt must have been used to buy, build or substantially improve

firm news

The Firm is pleased to announce that the Boys & Girls Club of Suffolk County has named **John P. Bracken** honoree at their upcoming golf event which will be held on October 22, 2009 at the St. George Country Club in Setauket. The Boys & Girls Club of Suffolk has been providing guidance and support to youths (ages 6-18) in Suffolk County, and more specifically the Three Village area, for over 30 years.

We are proud of, and congratulate, **Patricia M. Meisenheimer**, who was named in the L.I. Business News 2009 Who's Who in Women in Professional Services.

Congratulations also go to **William T. Ferris III**, upon being appointed by the Appellate Division, Second Judicial Department as a member of the Grievance Committee for the Tenth Judicial District. Mr. Ferris was also elected Secretary of the Suffolk County Bar Association.

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Firm Profile

Bracken & Margolin, LLP was founded in 1986, and has been engaged in the general practice of law, with an emphasis on litigation and business practice.

Our litigation practice embraces a wide range of business disputes, personal injury and products liability claims, labor law issues, civil rights claims and contested estate matters. The firm has periodically been engaged as trial counsel to the profession. The broad scope of our litigation practice gives us a wide and balanced perspective on how to use litigation effectively to pursue a particular objective, including settling a case to advantage, as well as successfully litigating a case to its conclusion.

Our business practice encompasses a wide range of transactions and counseling, with an emphasis on real estate, including leases, acquisitions and mortgages, municipal law, labor relations and employment regulations, corporate counseling, the sale or purchase of assets or stock, the formation of partnerships, corporations and limited liability companies, joint ventures, arbitrations arising within specific industries, tax certiorari and condemnation, health law, probate and administration of estates, wills, trusts and estate planning.

Clients of the firm range from individuals and newly-formed companies to established corporations, partnerships, title companies, investment advisors, employee associations, homeowner associations, municipalities and professionals.

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A Summary of the Firm's Areas of Practice

Litigation

Litigating all matters in state and federal courts, in trial and appellate courts, on behalf of businesses, municipalities, estates and individuals. Our litigation includes criminal and commercial litigation, actions on mortgages, notes and security agreements, employment and civil rights claims, violations of restrictive covenants.

Personal Injury and Products Liability Claims

Representing plaintiffs in personal injury actions or wrongful death claims resulting from accidents, products liability or malpractice.

Professional Discipline and Liability

Representing doctors, lawyers and other professionals in grievance/disciplinary proceedings and actions involving professional liability.

Real Estate

Representing buyers and sellers of residential and commercial real estate, in simple as well as complex transactions; negotiation and drafting leases.

Business Transactions

Negotiating and structuring new business ventures, formation of corporations, LLP's and LLC's, preparing shareholder and partnership agreements, employment agreements, consulting agreements, licensing agreements; buying and selling existing businesses, advice on due diligence and tax-related issues.

Estates, Wills, Trusts, and Elder Law

Probate and administration of estates; estate planning, trusts, drafting of wills, health care proxies, living wills and durable powers of attorney; planning for individuals with substantial estates with a goal toward a significant tax savings.

Criminal Law

Representing defendants charged in both state and federal courts involving charges of business and white collar crimes, DWI, Vehicle and Traffic violations, crimes of violence and street crimes.

Labor and Employment Law

Counselling on human resources and employment-related issues, in both the public and private sectors, counselling and appearances in wrongful termination, discrimination lawsuits, and administrative proceedings.

Land Use and Municipal Law

Representation before town and village boards and courts concerning all phases of zoning and land use regulations.

Professional Relationships

Representing Doctors, Lawyers and other professionals in partnership formations, preparing Partnership Agreements and representation in partnership disputes.