



Rensselaer County Bar Association Newsletter

February 1, 2016

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1. Upcoming Events

Save the date for these events!

March 7, 2016: Memorial Service, Rensselaer County Courthouse, Troy, New York

March 10, 2016: Judges' Dinner, Franklin Plaza, Troy, New York

May 2, 2016, at 9:30 A.M.: Law Day Ceremony, Rensselaer County Courthouse, Troy, New York

May 2, 2016: CLE on Surrogate Practice, presented by Hon. Paul V. Morgan, Jr., Hilton Garden Inn, Troy, New York.

May 2, 2016: Law Day Reception welcoming new members immediately following CLE, Hilton Garden Inn, Troy, New York.

June 16, 2016: Annual Meeting, Franklin Terrace, Troy, New York

2. 2016 Dues Notice

Dues notices have been mailed. Please return the form with your check as soon as possible. Thank you!

3. 2016 Rensselaer County Mock Trial Tournament

This year Rensselaer County will have six area high schools competing: Averill Park High School, Catholic Central High School, Columbia High School, The Doane Stuart School, Emma Willard School and La Salle Institute.

Attorneys are needed to serve as Judges for the mock trials which are held at the Rensselaer County Courthouse beginning at 4:00 p.m. The dates for the trials are March 1, 2 and 9, 2016. Attorneys who participate in New York State Mock Trials are eligible for New York CLE Credit.

If any member is interested in serving as a Judge for this year's tournament, please contact Co-Coordinator Olivia Karis-Nix, Esq., at okarisni@nycourts.gov or Jessica Mocerine, Esq., at jmocerin@nycourts.gov.

4. Jones Award

The Rensselaer County Bar Association honored long time Troy attorney, F. Redmond Griffin, with this year's Jones Award at the annual dinner held on Thursday, October 22, 2015 in Troy. The award, according to Anne Reynolds Copps Esq., chair of the dinner committee, is named in memory of the late E. Stewart Jones, Sr. of Troy, legendary criminal defense and personal injury attorney, who died in 2001. This year's recipient is "most deserving of this prestigious award", according to Kelly A. Cramer, Esq., President of the Rensselaer County Bar Association. "'Red' Griffin is a fine example to each of us in the way he has conducted his private, public, and professional life. A life that indeed reflects the dedication and service to both his profession and his community as did Mr. Jones."

5. Fall 2015 CLE

On October 8, 2015, the Bar Association presented a 3 credit continuing legal education program. The program, entitled "Matrimonial Update," was presented by Bruce J. Wagner, Esq., Chair of the Family Practice Group McNamee, Lochner, Titus & Williams. The program covered the recent legislative changes to the Domestic Relations Law concerning revisions to the maintenance guidelines, elimination of enhanced earnings under O'Brien as marital property and provided a comprehensive case law update. The program was well received by all 42 members in attendance as evidenced by the excellent ratings it received. The Bar Association provided the program free of charge to all members in good standing.

6. "Top Online Legal Links" by Laura Barber, Librarian, F. Warren Travers Supreme Court Library, Troy, New York, lbarber@nycourts.gov

I've updated what I think is a handy list of personal legal bookmarks and favorites. I hope you find

them useful too:

Fastcase - Online legal database access for New York State Bar Association members -
<http://www.nysba.org/fastcase/>

Fastcase replaced Loislaw as the NYSBA legal research tool. Comparison chart explaining free Fastcase and the discounted \$195/year upgraded online subscription -
<http://www.fastcase.com/newyork/>

Google Scholar

<http://scholar.google.com/> Decisions with hyperlinks and how cited tool for New York and Federal decisions. Searches by cite (best) or word search (not as accurate as paid online database subscriptions).

Justia

<http://law.justia.com/subscriptions> - Free newsletters, including opinion summaries by jurisdiction and practice area.

New York Law Journal

<http://www.newyorklawjournal.com/> - Free headlines from the Law Journal; subscription based online newspaper.

NYS International Code Council (ICC) Codes

<http://publicecodes.cyberregs.com/st/ny/st/index.htm> - Access NYS building, mechanical, fire and plumbing state codes.

NYS Library Card - Attorney Application

<http://www.nysl.nysed.gov/reference/borrowers/attorneys.htm>

Legal e-databases are available to NYS attorneys; Fastcase is expected shortly.

<http://www.nysl.nysed.gov/gate/esubject.htm> - Subject database guide.

NYS Library - Legislative bill and veto jackets

http://digitalcollections.archives.nysed.gov/index.php/Detail/Collection/Show/collection_id/3723

1994 to 2014

NY Lawz

<http://www.nylawz.com/>

Collection of online sources of New York State and New York City legal information and documents including free CLE's.

NYS Unified Court System - Appellate Division, Third Judicial Department Calendar

<http://decisions.courts.state.ny.us/ad3/CalendarPages/netcal.htm>

NYS Unified Court System - Law Reporting Bureau - New York Official Reports Decisions

<http://www.courts.state.ny.us/reporter/Decisions.htm> - Decisions, motions, filings and slip opinions.

NYS Codes, Rules and Regulations (Unofficial NYCRR)

<http://government.westlaw.com/linkedslice/default.asp?SP=nycrr-1000>

NYS Statutes

<http://public.leginfo.state.ny.us/menugetf.cgi?COMMONQUERY=LAWS>

Click on LAWS - LAWS OF New York on toolbar.

<http://decisions.courts.state.ny.us/ad3/CalendarPages/netcal.htm>

Public Library of Law

<http://www.plol.org/Pages/Search.aspx> - Links to all official state and federal statutes, regulations, caselaw and court rules including quick access to official compilations of NYS statutes and regulations via drop down menus.

7. "Principles and Pitfalls of Appeal Waivers," by Erik Pinsonnault, Principal Law Clerk to Justice Joseph J. Maltese, Appellate Division, Second Department

As an important part of the plea bargain, a criminal defendant's waiver of the right to appeal "facilitates the desirable objective of prompt, effective resolution of criminal litigation" (People v Lopez, 6 NY3d 248, 255 [2006]). It is by now well-settled that an appeal waiver is effective only when the record, as a whole, shows that it was knowing, intelligent and voluntary. The court accepting the waiver must be satisfied that defendant "grasp[s] the concept" of the right to appeal and fully appreciates of the consequences of waiving the right (People v Bradshaw, 18 NY3d 257,

264, 27 [2011]).

Although it is not too difficult to articulate the general principles governing appeal waivers, it has been observed that "[a]ll too frequently, the combination of a terse oral colloquy or overreliance on a written waiver, together with the trial court's failure to thoroughly explore on the record the defendant's particular circumstances, compels [an appellate court] to find that an appeal waiver was invalid" (People v Jamarr Brown, 122 AD3d 133, 143 [2d Dept 2014]). Brown, a unanimous Second Department opinion authored by former Justice Skelos, offers guidance on how to ensure that a waiver survives appellate scrutiny. Some have said that the Brown decision offers "step-by-step" instructions "on the correct way to proceed" (E. Leo Milonas And Frederick A. Brodie, EXPERT ANALYSIS, NYLJ Vol. 252, No. 75; p.3, col.1 [October 17, 2014]).

Among other things, Brown cautioned against the overreliance on a written waiver. A well-crafted written waiver may supplement or save an otherwise ambiguous oral colloquy. For example, the Third Department recently held that "any ambiguity" in the court's on-the-record discussion of the waiver was "resolved" by the written waiver and defendant's oral confirmation that he "signed the written waiver in the presence of counsel and was waiving his right to appeal voluntarily" (People v Devault, 124 AD3d 1140 [3d Dept 2015]). However, a court cannot rely **solely** on the written waiver. In Brown, the written waiver did not make up for the fact that, during the plea proceedings, the court did not discuss the waiver with defendant, but merely asked defense counsel whether he explained the waiver and told defendant to execute one (at that point, counsel had done neither) (Brown, 122 AD3d at 135-36, 145).

Brown suggests that the best practice would be to provide all defendants with a thorough on-the-record explanation of the right to appeal and the consequences of waiving that right (id. at 144). A thorough explanation may come in many forms. The Court of Appeals has made clear that a court need not engage in any "particular litany or catechism," when fulfilling its obligation to ensure that defendant's understanding of the waiver is evident on the face of the record (People v Lopez, 6 NY3d at 256). However, a deliberate explanation should make clear to defendant that the right to appeal is "separate and distinct" from the "panoply of trial rights automatically forfeited" by a guilty plea (People v Lopez, 6 NY3d at 256-257; see e.g. People v Sanders, 25 NY3d 337, 347; People v Fishel, 128 AD3d 15, 17 [3d Dept 2015]).

Recently, the Third Department found the following colloquy to be a "clear" explanation of the right to appeal:

"Now, it doesn't matter whether guilt is a result of a plea of guilty or a jury verdict. Either way you have a right to appeal. And the appeal would go to a higher court called the Appellate Division. These are five judges that sit together in Albany. They review the record of what happened here. If they find any mistakes were made or any of your rights violated they could vacate the conviction, reduce or throw out the sentence, or send everything back to me and have me do it all over again from the top. So you understand all of that?"

[Defendant:] Yes"

(People v Pope, 129 AD3d 1389 [3rd Dept 2015]).

However, the majority in Pope nonetheless found the waiver invalid, because the court failed to ascertain that defendant was "actually waiving" the distinct right to appeal (People v Pope, 129 AD3d at 1389). From his simple "yes," the majority was left uncertain whether he understood the right to appeal. The majority further found, among other things, that the court never asked whether defendant discussed the waiver with counsel (who stood by without comment), and there was no "substantive discussion" on the record as to whether defendant understood the waiver (People v Pope, 129 AD3d at 1389). However, in a concurring opinion, Justice Devine opined that the waiver was valid, noting that defendant's "extensive prior involvement with the criminal justice system must be taken into account in assessing whether he knowingly and intelligently waived his right to appeal" (People v Pope, 129 AD3d at 1390-91).

For many years, the Court of Appeals has emphasized that, in determining whether a waiver is valid, all relevant facts and circumstances must be considered, including the experience and background of the accused (see e.g. People v Bradshaw, 76 AD3d at 264). The Court recently reaffirmed this proposition in People v Sanders, aka Boo Cracks, a 6-1 decision in which the majority upheld an appeal waiver, notwithstanding a short on-the-record colloquy:

"Q. Do you understand that as a condition of this plea you are waiving the right to appeal your conviction and sentence to the [Appellate Division]? [Yes]

Q. Have you discussed this waiver of the right to appeal with your attorney? [Yes]

Q. In consideration of this negotiated plea[,] do you now voluntarily waive your right to appeal your conviction and sentence? [Yes]"

(People v Sanders, 25 NY3d 337, 339-40). The majority acknowledged that the court's colloquy about the waiver is "critical," and that the "better practice would have been to define the nature of the right to appeal more fully" (*id.* at 341, 342). However, the Court reiterated the maxims that no particular litany is required and all relevant factors must be considered, and went on to find that the colloquy, as a whole, was sufficient, especially in light of the defendant's "background, including his extensive experience with the criminal justice system and multiple prior guilty pleas that resulted in terms of imprisonment." In a footnote, the Court detailed his criminal history, which included a prior violent felony (Sanders, 25 NY3d at 342).

In a spirited dissent, Justice Rivera opined that a defendant's criminal record cannot "absolve a court from its responsibility to ascertain that defendant understands the nature of the rights waived," and that the record was silent as to whether defendant had "previously entered a plea waiving rights to appeal, signed a written waiver of such rights, and actually gone through an appellate process" (*id.* at 343).

There are many factors to consider and, it seems, many ways that an appellate court might uphold a waiver. Nonetheless, there is strong support for the notion that the better practice is to place a concise yet thorough explanation on the record, and obtain a clear oral confirmation from the defendant that he or she understands the nature of the right to appeal and the consequences of waiving it.

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