

## BUYER BEWARE....

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and a pointed warning about compliance with the escrow terms, whether or not signed. The purchase price was relatively small, and the transaction closed. Imagine similar circumstances applied to a \$2 million sale with a \$200,000 deposit escrow and commission reductions of \$30,000, with no broker signatures confirming the escrow arrangements or the commission reductions. We have all seen transactions that did not close and lawsuits over escrows and commission entitlements involving smaller sums than these.

The trend of brokers' refusing to sign the purchase and sale agreement is not healthy for buyers or sellers. Granted, the brokers may have attorneys advising them not to sign anything they don't have to sign due to a concern that being a party to an agreement could result in becoming a party to a suit over aspects of the contract that were never the broker's obligations. Perhaps this partially understandable concern is resolved by inserting a statement

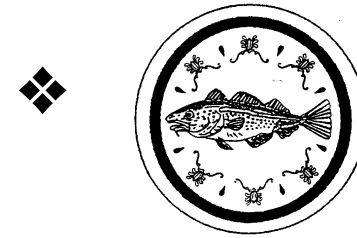
qualifying the broker's signature similar to the following: "signing as a party with respect to paragraphs 18, 19 and 20 only [provisions on commissions and escrow], and for no other covenants, obligations or liabilities under this contract." Another alternative would be to have a separate agreement on the commission amounts and escrow arrangements signed by the buyer, seller, and their respective brokers.

In this writer's personal opinion, attorneys generally should insist on broker signatures to agreements clarifying final commission arrangements and escrow terms, and we should refuse to deliver deposits to non-signing brokers. There is no question that the position that brokers are not supposed to be parties to purchase and sale agreements is contradicted by the standard forms of agreements themselves and by common sense. Such brokers' position, if allowed to prevail, may lead to surprised and unhappy clients and unwelcome litigation.

*-Daniel P. Neelon, Esq.,  
Neelon Wilder LLC*

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# BARRISTER

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## INCOMING PRESIDENT'S MESSAGE

It is a privilege and an honor to take the helm as President of the Barnstable County Bar Association for the 2006-2007 session, all while knowing there are big shoes to fill in the person of outgoing President Arthur Ryley. Arthur served the Association with great leadership, dignity and class during his tenure, and it is with much feeling that we thank him for his tireless efforts on behalf of all members.

I would also like to recognize several outgoing Executive Committee members, William Eldridge (recently retired from Barnstable District Court), Ned Lynch and Tom Yonce for their exemplary service and dedication to the BCBA and for their many years of hard work in making us a better Association. They will certainly be missed.

Although we lost those three skilled attorneys from our staff, I am excited with the addition of four new members to our Executive Committee in the names of Marion Broidrick, Polly Galliker, Marybeth Holland and Carrie Woods. They are all talented individuals who bring with them a wealth of knowledge and experience which will assuredly enhance our efforts at the BCBA.

In my tenure working at Probate Court and as a member of the BCBA, it has become readily apparent that the Barnstable County Bar Association is a very valuable instrument in providing many programs and services to our members, our Courts

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## BARNSTABLE ATTORNEY AND THREE OTHERS RECEIVE ST. THOMAS MORE AWARDS

FALL RIVER — As this newsletter proceeds to delivery, four members of the justice system are scheduled to be awarded the St. Thomas More Award for distinguished service at the annual Red Mass on Sunday, October 15, at 3 p.m. at St. Mary's Cathedral in Fall River. Bishop George W. Coleman will be the principal celebrant of the mass, which is hosted each year by the Fall River diocese to invoke blessings on those who work in the legal system and to recognize members of that community for their work. Dominican Father Brian J. Shanley, president of Providence College, will be homilist. The St. Thomas More Awards are presented at the conclusion of the mass. Traditionally, a judge, a lawyer, a court personnel member, and an ecumenical recipient are honored.

The following persons have been named as the recipients this year: Judge Bernadette L. Sabra of Somerset, who is first justice of the New Bedford District Court; Attorney Robert J. Marchand of Fall River; Attorney Anastasia Welsh Perrino of South Dennis, who is assistant register of the Barnstable Probate and Family Court; and Judge Malcolm Jones of Dartmouth, who is a retired justice of the Bristol County Probate and Family Court.

The Red Mass is so named because of the color of the vestments worn during the liturgy. With its

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## INCOMING PRESIDENT'S MESSAGE

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and the community at large. It is imperative that we maintain our leadership role and follow our mission in promoting, furthering and enhancing the administration of justice in Barnstable County. Examples of our efforts include the Conciliation Program and Lawyer of the Day Program. In both instances our members provide valuable assistance in streamlining cases through the various courts, helping staff, attorneys and pro se litigants address challenging and oftentimes very difficult cases. Keep up the good work.

One goal of this session's leadership will be the creation of a BCBA web site which is an absolutely necessary mandate in the internet era. It is anticipated the BCBA site will be up and running by mid-Fall.

It will also be a goal of this leadership to continue to foster the comradery and social interaction among the BCBA members. On that theme, I would like to report that the Bar sponsored trip on July 13, 2006 to Fenway Park was a very successful venture (other than the Sox losing an extra innings thriller to the Oakland A's). It is our intention to return to Fenway next year with an even larger group, and hopefully a Sox win.

In closing, it is my sincere hope that you plan to attend and enjoy the company of fellow members at the Annual Fall Bench and Bar Dinner on October 19, 2006 at the Ridge Club in Sandwich.

My door is always open and feel free to drop me a line or an e-mail if I, or the Bar, can ever be of assistance to you in your practice.

- Michael C. Stevens, Esq.  
President, BCBA

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The next deadline to submit  
articles for the Barrister is  
December 1, 2006  
for the Winter 2006 edition.  
Please send materials as e-mail  
attachments to attorney Dan Neelon at  
dneelon@neelonwilder.com.

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## BUYER BEWARE...OF THE NON-SIGNING BROKER? (An Editorial)

We are all familiar with the caveat "buyer beware" when purchasing a house. Although that warning traditionally has applied to the property's condition, recent experience suggests that it could apply to real estate brokers, as well, especially brokers who receive purchase money deposits but will not sign the purchase and sale agreement. The problem is simply this: some Cape Cod brokers, through their agents, are refusing to sign standard residential purchase and sale agreements that provide signature lines for brokers. Those standard agreements include provisions addressing brokerage commissions and terms under which deposit money is held in escrow. In one recent transaction, I heard the excuses that "brokers aren't supposed to be parties to these agreements" and that it was "our firm policy not to sign purchase and sale agreements, because we're not the buyer or seller." These excuses were proffered by the agent receiving a substantial deposit check. The agreement that she refused to sign was the standard form promulgated by that very anti-realtor outfit (tongue in cheek), the Greater Boston Real Estate Board. Contrary to the agent's first excuse, that form explicitly provided signature lines for the brokers and at least three paragraphs that explicitly addressed the amount and division of commissions and the escrow agent's rights and obligations with respect to deposit monies held by the agent. For example, one paragraph provided: "The Broker(s) named herein warrant that the Broker(s) is (are) duly licensed as such..." With respect to the assertion that brokers are not parties to the document, fact apparently fell victim to selective blindness.

Although some attorneys have expressed their resignation to accepting these excuses, a broker's failure or refusal to sign the "standard" purchase and sale agreement presents at least two concerns for attorneys representing the parties. The first concern is that the agent who claims not to be a party to the agreement is holding the deposit without having agreed in writing to the terms governing the application and release of the deposit, or whether interest accrues on it. While we can all speculate on the possibility of an M.G.L. 93A claim against a broker who fails to treat the escrow funds in a

manner consistent with the agreement terms, a clear, written and signed agreement on rights and obligations is a better method of ensuring reasonable and honest behavior than the theoretical lawsuit lacking a written agreement for support.

The second concern arises in the increasingly common contexts either of brokers' commission concessions promised after execution of a listing agreement with the seller, or a buyer's broker agreement obligating the buyer to pay a fixed commission, regardless of what the seller's broker offers to share with the buyer's broker. In the referenced transaction, the buyer had signed such an agreement. Both parties' brokers agreed to waive part of their commissions originally agreed in contracts with their respective clients in order to facilitate agreement on purchase terms. The concessions were reflected in the purchase and sale agreement, but both agents refused to sign the purchase and sale agreement based on the assertion that brokers are not parties to these purchase and sale agreements. So there was an agreement between the buyer and seller as to the portion of the purchase money that would be applied to each broker's commission (that the brokers refused to sign), and signed contracts between each broker and his/her respective client obligating each client to pay a higher commission to the broker. Would any prudent attorney advise a client that there is nothing to worry about in this situation? Does the patently inaccurate excuse that brokers are not supposed to be parties to a type of contract that actually provides for them to sign as parties and contains terms governing their commission entitlement and escrow obligations provide comfort on which attorneys should rely? Is it fair for a broker to accept an escrow deposit and then refuse to sign the document providing terms for the escrow? Or should we be comforted merely because the brokers are "established" agencies?

In this one case, open issues ultimately were resolved by an unpopular insistence on written broker confirmation of amended commission arrangements

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## NEWS FROM THE BARNSTABLE DISTRICT COURT

I am pleased to welcome Judge William Riley to the Barnstable District Court B.A.N.D. program (a/k/a Drug Court). He has been designated by District Court Chief Justice Lynda Connolly to succeed me in running the program upon my retirement on December 6th. Judge Riley has commenced presiding at B.A.N.D. sessions and has been warmly and enthusiastically received by all. He is a great addition to our court and his wisdom and compassion bode well for the future success of the B.A.N.D. program.

The B.A.N.D. program was the recipient of \$200,000 from the Dept. of Justice awarded to Gosnold for treatment purposes. Congressman Bill Delahunt was the moving force behind this grant and I wish to publically commend him for his attention to the needs of our community. The Mass Dept. of Public Health was again funded for the maintenance of beds at Gosnold for treatment of B.A.N.D. probationers and I wish to publically commend our Cape legislative delegation for their continuing recognition and support for this critical endeavor.

We were all saddened by the retirement of Clerk/Magistrate Bill Eldridge whose last day was Friday, Sept. 8. Bill served this court in an outstanding manner for 35 years. He obviously looked forward to his retirement as he showed up at the Barnstable Tavern after work last Friday clad in shorts and a "Dead Dog Saloon" t-shirt for a farewell party attended by the office staff and a great many of his friends and admirers. He has been a great resource for me and the other judges sitting in this court. Bill will be missed by me, his staff, members of the Bar, law enforcement, and the general public.

Chief Justice Connolly is to be complimented upon her sagacity and wisdom in designating Charles "Chuck" Ardito to be the Acting Clerk/Magistrate pending nomination by the Governor and confirmation to fill the vacancy. Chuck is extremely diligent, skilled and well suited to fill the shoes of Bill Eldridge in a thoroughly professional manner consistent with the highest standards required both

in terms of knowledge and suitability for this difficult position.

Probation Officers Bob Smith and Joe Casey were honored by WQRC on August 29th for their work in running the Fatherhood Program. They received the station's Community V.I.P. Award at a presentation ceremony held in the Probation Department. Probation Officer Bill McCormick has commenced a new session of the Changing Lives Through Literature Program at Cape Cod Community College with a mixed gender class of ten probationers.

Last June 6th I had the privilege and honor to attend the 2006 Pro Bono Publico Award ceremony of the Supreme Judicial Court held at their Court Room in Boston. Barnstable County Bar Association lawyers Larry Zalis and Marion Broiderick received this prestigious award in recognition for their years of pro bono work for indigent probationers in the B.A.N.D. program in terms of criminal representation for which they receive nominal payment from CPCS, but mostly for their unpaid work assisting those in need of help dealing with a myriad variety of civil problems with state, town, and court agencies caused by addiction and multiple convictions. They represent the highest calling of the Bar by their selfless representation of deserving litigants in need of legal assistance.

As this may be my last opportunity to address the bar in my capacity as First Justice, I want to express to all of you my appreciation for the high standards maintained by the Barnstable County Bar, your many courtesies, the obvious love you have for the majesty of the law and your commitment to justice. I continue to be humbled by the honor conferred upon me to be a judge in this great court following in the wake of Jack Wheatley, George Lebherz, Steve Kelleher, Roger Champaign, Dick Staff, Jack Curley, and Henry Murphy, all of whom preceded me and were great judges.

*Judge Joe Reardon*

## BARNSTABLE ATTORNEY AND THREE OTHERS RECEIVE ST. THOMAS MORE AWARDS

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roots in 13<sup>th</sup> century Europe, the Red Mass is a longstanding tradition in the Catholic Church and is widely celebrated in dioceses throughout the United States. The St. Thomas More Awards are unique to the Red Mass celebration in the Fall River diocese. They are named for St. Thomas More, a 16<sup>th</sup> century English layman and lawyer martyred for opposition to the divorce of King Henry VIII and for refusing to renounce papal authority. New Bedford attorney Joseph P. Harrington heads up the Red Mass Planning Committee, which nominates recipients for the awards.

Judge Sabra became first justice of the New Bedford District Court in 2000. She also currently heads the Drug Court in New Bedford. She was first appointed to the bench in 1997 and served in a variety of district courts and in the Appellate Division for the Southern District. Prior to becoming a judge, she was in private practice in Somerset for over eight years with her husband, attorney Steven Sabra. She also worked as an assistant corporation counsel for the City of Fall River.

Attorney Marchand has practiced law for 30 years. After many of those years as a partner in law firms, he opened his own law office in Fall River in 2002. A good deal of his general practice involves wills, trusts, and probate matters. He is an active member of local, regional, and state bar associations, serving on many of their boards and committees, and is a past president of both the Fall River and the Bristol County Bar Associations. In 1997, the Massachusetts Bar Association presented him its Community Service Award and this year the Bristol County Bar Association and the New Center for Legal Advocacy gave him the Pro Bono Publico Award.

Attorney Perrino was appointed to her post as assistant register of the Barnstable Probate and Family Court in February 2003. She is primarily responsible for assisting attorneys and litigants without counsel with the procedures of that court and working with its judges to oversee day to day

operations in the courtroom. After her graduation from Suffolk University Law School and her admission to the Massachusetts Bar in 1989, she spent 14 years in private practice at two Cape Cod law firms, LaTanzi, Spaulding & Landreth in Orleans and then Quirk and Chamberlain, P.C., in Yarmouth Port. During that time she was a frequent guest lecturer to organizations on probate law, estate administration and guardianship procedure. She is an active member of the Barnstable County Bar Association and is now serving as its clerk. Attorney Perrino is a member of St. Pius X Parish in South Yarmouth and worked on the fund-raising committee for the construction of the St. Pius X Elementary School that opened two years ago. She is currently very involved in the St. Pius X Middle School which opened this fall. She is married to Thomas Perrino, also an attorney on Cape Cod, and they have two sons.

Judge Jones practiced law in New Bedford for 35 years until his appointment as a justice in the Probate and Family Court in 1989, where he served for 11 years before reaching the mandatory retirement age. While serving as an assistant attorney general under Edward W. Brooke he drafted legislation which merged the New Bedford Institute of Technology with the Bradford Durfee Technological Institute in Fall River to become the Southeastern Massachusetts Technological Institute, now the University of Massachusetts at Dartmouth. As counsel to the then Institute's Board of Trustees, he did the necessary legal work to acquire the land in Dartmouth on which the campus is located. In 1970 and 1971, he served as city solicitor for the City of New Bedford. Since his retirement from the bench, he has continued to work as of counsel to the New Bedford firm of Rusitzky and Russell, specializing in mediation. He worships at the Tifereth Israel Synagogue in New Bedford. The retired justice is married to Mary Ellen Jones and is the father of two sons.

[The above is edited from a press release.]



## SUPERIOR COURT NEWS

I want to thank the bar for the opportunity to address everyone. I hope everyone had a enjoyable summer.

We experimented with a jury-waived third session in the grand jury room in July. Although the quarters were tight, I feel the session went extremely well and we were able to try several old 30A and 40A matters. I thank Chief Justice Rouse and Judge Muse for helping us out.

I am hoping to have a jury-waived third session courtroom again in 2007; hopefully for three months. If the bar also thinks this is worthwhile, I am requesting that you show your support and write to Chief Justice Rouse at:

Administrative Office of The Superior Court  
Suffolk County Courthouse, 13<sup>th</sup> Floor  
3 Pemberton Square  
Boston, MA 02108

I strongly urge the bar to write letters. A third session would greatly help with jury-waived/non-jury cases and dispositive motions.

The Chief Justice has been receptive to the needs

of courts outside of the 128 beltway. However, I need your help. Judge Nickerson and myself have been working hard to assure we get the judicial resources we need to handle the cases in this county.

There are two new employees in the Clerk's Office. Mary Crowell, who is the main receptionist and cashier comes to us with a banking background and Catherine Donnelly, who is back-up receptionist and second cashier, comes with a secretarial background. Mary will be trained in civil and Cathie will be trained in criminal. If you haven't done so already, please stop in and say hello.

As always, if any member of the bar has any questions, comments, concerns or problems in criminal or civil, please contact me or my staff. I can be reached at 508-375-6684 or by e-mail at [nickerson\\_s@jud.state.ma.us](mailto:nickerson_s@jud.state.ma.us).

I thank my staff and everyone in the bar for working with me over the last six years to improve the Superior Court and I look forward to working with everyone for at least six more years.

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



## LAW LIBRARY NEWS

The final step to remove moisture from the Barnstable Law Library is to replace the carpeting with linoleum tile. This project involves moving all the shelving and books and will be done over a number of months. We hope to minimize interruption of services but there will undoubtedly be some inconveniences at the very least. Thank you in advance for your patience during this process that is currently well underway.

We are taking advantage of the situation to reconfigure the library. Low shelving has been moved to the Massachusetts area where we will incorporate all the Massachusetts collection including recent MCLE course materials and your favorite blue "puffies." The high shelving will be relocated to the federal area for reporters. In this way we hope to create a more user-friendly space that feels more welcoming and open. The reconfiguration includes an additional public access computer, a dedicated computer for our online catalog, and a new, separate area for study and computer use. Although there is still much work ahead of us, Janet, Mareda and I are excited about the prospect of a more efficient arrangement to meet your needs more effectively. We are also enjoying our improved work space.

Now that the circulation desk and one computer area is completed, be sure to stop in and learn how to use our online catalog and to renew materials from your home or office. No more overdue books! We'll also demonstrate Loislaw and Heinonline -- new Trial Court Law Library services you can access from your own computer with your library card. Since the library is now wireless, if you bring your laptop with you, your demo can take place on your own equipment.

*-Meg Hill, Head Law Librarian*

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