

THROUGH THE LOOKING GLASS

Inside

Are We Still Married,
Part II..... 3
Nicer Than We Think:
Maybe We Can All Just
Get Along..... 6
Firm News & Notes 7
Ethics Corner 7

FROM THE EDITOR

BREAK GLASS IN CASE OF ELECTION

Welcome to our election edition of THROUGH THE LOOKING GLASS. In honor of the impending exercise of the franchise we hold so dear, we have tried to present issues that we think have substantial current relevance. First, we have an extended analysis of the Constitutional Convention question that will appear on the ballot on November 4th. By offering some context, we hope to show why voting “no” is the obvious choice.

In addition, Ken Bartschi revisits the status of formerly married parties while their divorce action is on appeal. Although we are confident that Ken’s was the most authoritative opinion on the question when our last issue went to press, the Appellate Court has weighed in on the matter since then and Ken offers his very thoughtful response.

Finally, Karen Dowd steps away from legal analysis to offer some life analysis - pointing out what should be important but somehow seems to get lost in the rush - and we think her comments may be the most timely and useful of all.

Before concluding, a note on the recent *Kerrigan* decision is in order. The details of the case are discussed elsewhere, but we would like to take this opportunity to congratulate partners Ken Bartschi and Karen Dowd on their exceptional work in such an important case. Wins and losses seem to pile up over the course of a legal career, and it is probably unwise to give too much weight to either. But cases that truly change the world we live in come along only rarely. Ken and Karen have helped to change things for the better, and we are extremely proud of them.

Michael S. Taylor,



Editor-in-Chief

CONNECTICUT’S CONSTITUTIONAL CONVENTION: WHAT’S REALLY GOING ON?

Written By : Michael Taylor



The great principle to be sought is to make the changes practicable, but not too easy; to secure due deliberation, and caution; and to follow experience, rather than to open a way for experiments, suggested by mere speculation or theory.

— Justice Joseph Story

By State law, every 20 years Connecticut voters are asked the following question: “Shall there be a Constitutional Convention to amend or revise the Constitution of the State?” The 20-year period has run, and the question will appear on the ballot this November 4. Because of the efforts of those groups that strongly favor or oppose a constitutional convention, voters may know that the question will be on the ballot, but they probably do not know what they really are being asked to do, or what the consequences of their

decision might be. Simply put, voters are being asked to approve a convention where the delegates would have the power to propose changes to the Constitution. Supporters of the convention would like to amend the Constitution to include a “ballot initiative” process, which on its face would give citizens the ability to propose new laws, but in practice would simply be another tool for special interests to use to push their agendas. The voters of Connecticut should not disrupt our Constitution for this purpose.

First, some background: A constitutional convention is one of two ways to change our State Constitution - the document on which our State government is based, and through which the people of the State give the government the power to make and enforce laws. The more usual way to change the Constitution is for a member of the State Senate or House of Representatives to propose an amendment. Three-fourths of the members of each house of the General Assembly must approve the proposed amendment for it to be placed on the ballot. The citizens of the State would then have the opportunity to approve it by a simple majority vote in favor. Our current Constitution was adopted in 1965, and this process has been used to change it 30 times since then.

The constitutional convention is an alternative to the amendment process. A convention can be called in two ways: by a two-thirds vote of both houses of the General Assembly, or by a majority vote approving the question that is set to appear on the ballot this November. If a convention is called under either procedure, the General Assembly will determine the manner of selecting the delegates to the convention and will set the dates for the convention. The delegates are otherwise free to set their own rules to determine what proposals will or will not be considered by the convention and the manner of approving or rejecting those proposals. If

Continued on page 2

CONNECTICUT'S CONSTITUTIONAL CONVENTION: WHAT'S REALLY GOING ON?

Continued from page 1

the convention produces any proposals to amend or revise the Constitution, they will be submitted to the voters of the State and become a part of the Constitution upon a majority vote in favor. A constitutional convention has been called only three times in State history, in 1818, 1902 and 1965. Changes were made in 1818 and 1965, while the voters rejected the proposed changes in 1902.

These methods are neither unique nor remarkable. The constitutions of a number of other states as well as the U.S. Constitution also are amendable in both of these ways; although no federal constitutional convention has been called since the U.S. Constitution was drafted in 1787. Both methods reflect the concern of the Framers that amending the Constitution – the underlying framework of our government – should be possible but not easy. As James Madison explained in the *Federalist*, No. 43, the Constitution's amendment procedures were designed to protect "equally against that extreme facility, which would render the Constitution too mutable, and that extreme difficulty, which might perpetuate its discovered faults."

Thus, in the face of the careful scheme for changing the Constitution, what is notable about the current convention proposal is not that the Connecticut Constitution might be changed, but the kind of change being sought. Although no specific constitutional amendment will appear on the ballot, it is no secret that advocates of a constitutional convention hope to change the Constitution to add a "direct initiative" or "public referendum" procedure. A referendum process would allow citizens to petition proposed constitutional and statutory changes onto the ballot, where they could be adopted by a majority vote. This process would allow statutes to be enacted into law without going through the normal legislative process. It also would circumvent both the amendment procedure and the constitutional convention process, making constitutional change easier. We should not expose our Constitution to the uncertain results of a convention for the purpose of making it even easier to change in the future.

The problem is that, as the Framers recognized centuries ago, constitutional change should never be easy. The Con-

stitution is the foundation of our government. It creates and defines the roles of the executive, legislative and judicial branches and provides the only authority for those branches to exercise the power that the people of the State have conferred upon them. It sets forth certain basic and immutable rights that we have established as necessary to a free society. While political parties and special interest groups struggle with each other – each arguing in favor of laws that further their own interests – the Constitution defines the playing field and sets the rules. Because it does, these competitors for control over the direction of State government can engage in partisan politics without upsetting the fundamental structure which is essential to securing the rights of the people and to a properly functioning government. The current convention proposal would undermine that constitutional safety net.

It is important to remember that amending the Constitution is not like amending a statute or other law (although many people assume it is). Statutes are adopted with a simple majority vote of the Assembly and the approval of the Governor. They are designed to deal with everyday issues and to fill in the details of our government. Necessarily flexible, statutes provide specific rules covering everything from our criminal justice system to roadway safety to worker's compensation insurance. The legislative process through which statutes become law – with lawmakers adding or removing terms after negotiation – affords the compromise necessary in our representative system of government, where laws must not only protect the interests of those loudly and actively calling for them, but also take into account the will of the less influential (or less vocal) minority. This process also protects against the very vocal minority forcing its agenda on the populace.

But the Constitution is not designed to deal with the everyday laws and functions of government. It *creates* the government, and defines the parameters in which the government may act, both with respect to its administrative functions and to the civil rights of its citizens. It is because of our constitutional framework that the representative process works to protect the interests of the State and its citizens. In 1795, the eminent Connecticut jurist and legal

scholar Zephaniah Swift, after eloquently demonstrating that Connecticut had a Constitution long before it was set down in writing as such in 1818, recognized the importance of this point when he said that the Constitution "should contain nothing but the outlines of the government, and leave it to the legislature to fill up the minuter parts" Zephaniah Swift, *A System of the Laws of the State of Connecticut* (1795), Vol. 1, p. 62.

Like the foundation of a house, then, the Constitution must remain secure and stable in order to do its job. It should only be altered when the fundamental structure cannot effectively serve its purpose to support and anchor the rest of the building. That has been the case on the two prior occasions that Connecticut's Constitution has been changed by convention. First, the 1818 Convention was called to codify the Constitution in written form (there was no single document called a Connecticut "Constitution" prior to that time), and to disestablish the Congregational Church as the official State Church – both important and necessary steps. Likewise, a convention was necessary in 1965 because Connecticut's antiquated system of appointing members of the State House of Representatives was clearly in violation of the U.S. Constitution's representation requirements – the "one person, one vote" rule. (*See Butterworth v. Dempsey*, 237 F.Supp. 322 (D. Conn.), affirmed, 378 U.S. 564 (1964)).

There is no such fundamental crisis today. Instead, various groups are seeking a constitutional convention to further their individual agendas. Some want to limit taxes, others to legalize the use of marijuana. Some want to restrict the government's ability to take property by eminent domain, and some want to lower the voting age.

By far, the most vocal proponents of a constitutional convention would change the law to prohibit same-sex couples from marrying.

Continued on page 3

CONNECTICUT'S CONSTITUTIONAL CONVENTION: WHAT'S REALLY GOING ON?

Continued on page 2

But these issues properly should be addressed by the General Assembly, either by statute or the constitutional amendment process, if a majority of citizens are concerned about them. They are not of such a universal and fundamental nature that they necessitate exposing the Constitution to the potential for wholesale change by convention.

Advocates of a constitutional convention acknowledge but do not emphasize the individual agendas they want to pursue through referendum and initiative. Instead, they use populist language to broadly argue that the constitutional convention (and the direct initiative process they hope will come out of the convention) will give "the people" a more direct influence on the laws that govern them. But this is somewhat disingenuous. First, the people have plenty of influence on their laws; they have direct access to their elected representatives and can vote those representatives out of office if they act in a way not in accord with the people's wishes. Our representative democracy is designed to accommodate the wishes of the populace by identifying and furthering the goals of the majority, while applying checks and balances to ensure the basic rights and needs of those not in the majority. The fact that the State Constitution has been amended 30 times since 1965 (while the U.S. Constitution has only been amended 27 times since 1787) is a testament to Connecticut's ability to effect change through the representative system when necessary.

Second, the ballot initiative process favors politically organized, politically vocal groups that feel strongly about an issue, whether or not a majority of the people in the State feel the same. It is the members of these groups who would be appointed by the General Assembly as delegates to a constitutional convention, and it is these groups who would organize and lobby in favor of their chosen issue. While there is nothing wrong with politically active groups per se, there also is no reason to think that the average Connecticut citizen would have more influence over the efforts of these groups to have laws passed than he or she would have over a state representative. Indeed, our elected representatives are subject to oversight through laws requiring a certain level of transparency in govern-

ment activities, and are accountable through the election process. Private special interest groups, on the other hand, are not subject to any such controls. So while the elected official is bound to give consideration to the wishes of her constituents, if for no other reason than to keep her job (though here are many other reasons), the politically influential private group can organize and lobby while ignoring the wishes of "the people", or the people with whom the group disagrees at least, with impunity.

Therein lies the biggest problem. Most of the groups advocating a constitutional convention, who fall on opposite sides of the political aisle, have one significant thing in common: they support issues that probably do not have the support of a majority the State's citizens or elected officials and are unlikely to become laws in the normal fashion (otherwise, they would have no need for the ballot initiative process). As a result, these groups want to avoid the messy compromise and negotiation involved in the normal legislative process, and they see the convention (and referendum) procedure as a short cut to accomplishing their goals.

Under a referendum process, the ballot question is submitted to the voters and the choice is only "yes" or "no," with no opportunity to alter the language to meet the needs of different sectors of our populace. What this means is that if the proponents .

What this means is that if the proponents of a ballot initiative can attract a majority vote on a conceptual idea, it becomes the law, even if the majority hasn't taken the time to analyze the law and fully grasp its potential effects. There is no check in place to prevent the majority from voting on the

basis of misleading, irrelevant or incomplete information provided by proponents, and there is no way to tell if the majority is a majority simply because those who would not support the proposal either are not motivated or do not have enough information to understand its significance and the importance to them of voting against it.

Thus, while our current system seeks to protect us from laws that are vigorously sought by the few but not broadly approved by the majority, the ballot initiative system lends itself to the passage of precisely such laws. It is easy to imagine, in fact, that the ballot initiative process would encourage groups to push laws to a vote while providing as little information and opportunity for inquiry as possible. Obviously, a proposed law will be easier to "sell" as a general concept than as a specific rule that must be applied to the wide diversity of circumstances experienced by the people of our State. While we could hope that initiative proponents would avoid such tactics, history reveals that they do not.

A recent initiative in Maine is a good example. The Christian Civic League of Maine submitted a ballot proposal with this inoffensive sounding caption: "An Act to Protect Marriage and Preserve Equality." After reviewing the proposal, several groups intervened with the Maine Secretary of State to force the initiatives' proponents to change the name of the proposal to reflect its actual intent. The name was changed to "An Act to Remove Protections Based on Sexual Orientation from the Maine Human Rights Act, Eliminate Funding for Civil Rights Teams in Public Schools, Prohibit Adoptions by Unmarried Couples, Add a Definition of Marriage, and Declare Civil Unions Unlawful." Proponents dropped the proposal after the name change, recognizing that they could not get enough petition signatures to push it onto the ballot.

In response to these concerns, advocates suggest that direct initiative is a truer form of pure democracy, where the people can vote on everything (without the legislative compromise that they see as a negative). But, as University of Pennsylvania Professor and former Chairwoman of the U.S. Commission on Civil Rights, Mary Frances Barry, said years ago in response to an effort to call a federal constitutional convention, "the Founding Fathers cre-

Continued on page 4

CONNECTICUT'S CONSTITUTIONAL CONVENTION: WHAT'S REALLY GOING ON?

Continued from page 3

ated not pure democracy, but a republican form of government in which the people govern through their representatives and with checks and balances, including a check on the majority's impulses." Mary Frances Berry, *Amending the Constitution: How Hard It Is To Change*, New York Times, September 13, 1987. That check applies equally to the impulses of the majority and of the loud, organized minority.

With respect specifically to the Constitution, the direct initiative system would simply circumvent the careful amendment process the Framers put in place. For the reasons described above, since the founding of our Nation and of our State, constitutional change has been intentionally difficult. Where the passage of a law normally requires the approval of a simple majority, changing the Constitution normally requires the consent of a "supermajority" – in Connecticut's case, three-fourths of the General Assembly. To change this

system because some people think eminent domain or property taxes are bad, or that pot smoking is good, not only undermines the framework of our government, but trivializes the constitutional principles of representative democracy that our nation was founded upon.

The Constitution should not be subject to the varying winds of political change. The advocates of the current convention proposal are not alone in their desire to bend the law to their world view. Any quick review of newspaper columns or internet blogs, or that most aggressive advocate of partisanship – talk radio, will reveal countless groups on the left and the right who would pull the Constitution in all possible directions if given the chance. While the statutes and regulations properly passed in the everyday course of the legislative process can withstand – and often are designed to further – those political agendas, the Constitution, as the foundation of

everything our government does, should not change every time a new political party comes into power, or a new idea gains favor. Certainly, it should not change simply because a very vocal minority wants it to. In the words of Professor Berry:

Because our Constitution can be amended, we can repair tears in our social fabric and try different strategies and tactics to resolve problems. Because our Constitution cannot be amended easily, we can preserve the stability and continuity that lasting republican government requires.

Berry, *supra*.

At the end of the day, we should not subject our laws to the whims and political gamesmanship of a ballot initiative process, and we should not change our Constitution to allow the wishes of the loud few to dominate the will of the people of our State. ■

ARE WE STILL MARRIED, PART II?

Written By : Kenneth J. Bartschi



Last issue, I suggested that the logical interpretation of *Sunbury v. Sunbury*, 216 Conn. 673 (1990), other decisional law, and the rules of practice leads to the conclusion that the parties to a dissolution proceed-

ing are no longer married after a decree dissolving the marriage, notwithstanding an appeal of the financial or parenting orders, unless the decree itself is challenged. Kenneth J. Bartschi, *Are We Still Married? The Effect of an Appeal of Financial and Parenting Orders on a Decree Dissolving a Marriage*, Through the Looking Glass (2d Quarter 2008).

Shortly after publication of that article, the Appellate Court decided *Kaczynski v. Kaczynski*, 109 Conn. App. 381 (2008). In *Kaczynski*, the trial court found that the defendant fraudulently transferred property to others, including his sisters. *Id.* at 383.

The Defendant appealed and a majority of the court reversed because the trial court had not indicated that it found fraud by clear and convincing evidence. *Id.* at 393-94.

The decision contains this remarkable footnote:

We are aware of cases in which if the dissolution of the marriage itself is not challenged on appeal, that portion of the judgment is affirmed. We have elected to reverse the dissolution of marriage. Dissolving the marriage would, in the event of the death of one of the parties, prevent the other party from being a surviving spouse for the purposes of inheritance and rights to participate in qualified benefit plans.

Id. at 394 n.9 (emphasis added). The Court's reversal of the unchallenged dissolution decree is troubling in many respects.

As an initial matter, although the reference to inheritance rights and pension benefits suggests the Court's motivation in reversing the decree of dissolution, it seems unlikely that the parties expected to inherit from each other or participate in their pen-

sion plans if one of them died during the pendency of the appeal. More likely, the parties would not want their former spouse to receive any portion of their estate or retirement accounts. Thus, the Court has fashioned a remedy that neither party may have wanted or expected.

It is noteworthy that

the court cites no authority for the proposition that it can reverse the decree of dissolution itself where the parties have not challenged it.

Continued on page 5

ARE WE STILL MARRIED, PART II?

Continued from page 4

In other contexts, the Supreme Court has chastised the Appellate Court for reaching out to decide an issue the parties did not raise. See, e.g., *Sabrowsky v. Sabrowsky*, 282 Conn. 556 (2007). Nothing in the *Kaczynski* decision suggests that the parties wanted their marriage restored. Indeed, the court granted the dissolution on the grounds of irretrievable breakdown, 109 Conn. App. at 383, a finding the defendant did not challenge.

In other contexts, the Court has applied preclusion principles on remand to findings that were not challenged on appeal. For example, in *Crews v. Crews*, 107 Conn. App. 279, 288 n.7, cert. granted on other grounds, 288 Conn. 901 (2008), the Court held that the unchallenged finding that a prenuptial agreement was valid when signed would operate as res judicata on remand. Although the mosaic doctrine generally requires reversal on all financial orders in dissolution cases in the event of error, the myriad cases reversing only on the financial orders and leaving the dissolution decree intact makes clear that the decree itself is not part of the mosaic.

Reversing the dissolution decree itself implies that the automatic stay set forth in Practice Book § 61-11 stays the dissolution of the marriage itself. Section 61-11(a) actually stays “proceedings to enforce or carry out the judgment . . .” A decree of dissolution, however, merely declares that the marital status of the parties is single. There are no proceedings, such as an execution of the judgment or transfer of money or property that occur in connection with the change of marital status itself. In other words, the marshal does not show up at the door to collect the marriage. Thus, it is not at all clear that the automatic stay applies to the decree of dissolution itself.

Further, the practical effect of staying the dissolution decree itself would be that the parties would remain married until the expiration of the appeal period. Such a construction of the stay rules could lead to absurd results. For example, if one of the spouses died during the appeal period, the other spouse could inherit from the decedent, even if neither party planned to appeal.

The Court’s decision to reverse the unchallenged dissolution decree creates all sorts of mischief. For example, filing

income taxes pending a dissolution appeal is now problematic as the filing status is no longer clear until the conclusion of the appeal. In *Preisner v. Aetna Casualty & Surety Co.*, 203 Conn. 407, 414-15 (1987), the Supreme Court held that the date of the judgment depends on the disposition of the appeal. Where the judgment is affirmed, the judgment date is the date the trial court decided the case. Where the judgment is reversed, the date of the appellate tribunal’s decision is the date of the judgment. If the parties file as single persons during the appeal on the reasonable assumption that the judgment will be affirmed, they will need to refile their taxes if the judgment is reversed and their marital status restored. The same refiling problem arises if the parties file as married and the judgment is affirmed. Because it can take years from the trial court judgment to the conclusion of an appeal, amending tax returns can create a significant headache for the parties.

Another problem concerns the date of valuation of the marital estate on the new trial of financial orders. Under *Sunbury*, the financial orders are based on the original decree of dissolution. 216 Conn. at 676. In *Kaczynski*, that decree no longer exists, meaning the court will have to value assets on the new date of dissolution. Doing so, however, would be inconsistent with the holding in *Sunbury*, which requires valuing the estate at the time of the original decree.

More mischief arises if parties try to move on with their romantic lives after a divorce. If the potential exists that the Appellate Court will reverse the decree dissolving the marriage, parties risk becoming bigamists if they marry someone else while the appeal is pending.

The prospect of interfering with a former spouse’s romantic lives could very well encourage vindictive parties to appeal where they might not have done so. (“Oh you think you’re going to marry your trophy wife/boy toy? See how good she/he looks 10 years from now when we’re finally divorced.”)

As a practical matter, parties may now need to file a motion to terminate the automatic stay as to the decree of dissolution, even if that decree is unchallenged. The best case scenario is that the parties agree to a stipulation and spend two minutes before the trial judge. But given that appeals usually arise from the most contentious cases, it is not clear how often the parties will agree amicably to let the dissolution decree go into effect. The more likely scenario is that one side will see an advantage in preserving the marital status and will contest any termination of the stay. The court will need to have a full-blown hearing and the aggrieved party will file a motion for review. While this might be good for the lawyers it is difficult to see how adding more issues to already contentious proceedings aids the parties.

Because *Kaczynski* offers no authority for its rescript and given the concerns about fraud present in that case, the decision seems to be an outlier. Nevertheless, to reduce the likelihood that the Appellate Court will elect to reverse the dissolution decree, litigants will need to use care in drafting their jurisdictional statement on the appeal form. Rather than stating that the appeal is from the “judgment dissolving the marriage,” it is better to identify the specific orders the appellant challenges, such as “financial orders incident to the dissolution of the parties’ marriage.” (Obviously, appeals concerning parenting issues could be drafted in similar fashion.) While this tactic might not prevent the Appellate Court from taking the bit in its teeth, at least the appellant’s position will be crystal clear for the petition for certification. ■

“NICER THAN WE THINK: MAYBE WE CAN ALL JUST GET ALONG”

Written By : Karen L. Dowd



Despite my exemplary service to this newsletter last quarter, with authorship of two articles (which were stellar if I say so myself), I have been called upon to produce yet another article. (I believe I am being punished for some unidentified transgression). Nevertheless, I set my mind to coming up with an erudite topic to match those of my fellow authors, who are writing on the question of a Constitutional Convention in Connecticut and the state of matrimonial law in light of a recent Appellate Court decision. Worthy intellectual topics, indeed.

During my drive home, I determined to pick a topic, if only to get the Editor and his equally annoying Assistant Editor off my back. I thought of addressing *State v. DeJesus*, 288 Conn. 418 (2008), a scholarly and controversial Supreme Court decision. But the Justices did such a fine job of setting forth the issues and the historical bases therefore, that all I really had to say was that in the future we should look to both the Code of Evidence and to the common law in preparing our trial strategy, including changes we may want made in the common law, and therefore in the Code. (See that just isn't enough for an article—without having to do some research, which I am trying to avoid for this particular assignment). I thought about addressing the interplay between the Legislature and the Judicial Branch, a topic of great importance to all of us, especially given past efforts to move rule-making power from the Judiciary to the Legislature. Keep in mind the Legislature appoints the judges; indeed, the Legislature sets the number of judges we are to have, enough power, if you ask me. I was torn on this topic, given the need for research, (see my prior parenthetical) but also given my own strong feelings on the need to insulate the judiciary from unacceptable attacks from without. (Okay, so my opinion on that subject is rather transparent).

But I was simply not aggravated enough by the drive to get sufficiently enthusiastic about that topic either. Which set me to

wondering why that was so. Here I was cruising down 189 in my soccer mom (I can say that for the next month) minivan blaring my music (a lot of which I am not too proud to admit is from the '80's) and I thought of the book I am reading, “This I Believe,” a compilation of old and new essays about what different people believe in. This began as an Edward R. Murrow radio program in the 1950's (I wasn't around then) and NPR brought it back a few years ago. The essays are from famous individuals, such as Albert Einstein and Warren Christopher, as well as “regular” people from different walks of life.

While the spiritual is discussed, a lot of the contributors related their “faith” in their family, their friends and others. One in particular stood out. It discussed our reliance on each other to behave in certain prescribed ways, all of which are necessary to our safe passage on the roads. The author discussed how he realized that he relied on other drivers to stay on their side of the road, to abide by signs and signals, a reliance which extends to other aspects of life. What was compelling about this specific essay was that after my many years in practice, I realized that I had become jaded in my perception of how we all interrelate. In our business, we necessarily focus on the ways in which people misbehave, by negligent or intentional tortious conduct, by breaching promises or vows, or by committing crimes. We address the transgressions from mutually beneficial behavior and can lose sight of the multitude of interactions which do not so lapse.

And so, on my drive to the Northern Wilderness known as North Granby, I took the opportunity to observe the ways in which my fellow travelers were acting in concert, rather than obsessing about those who weren't. Every day, I drive through the Tariffville Gorge to an intersection from which the road to the left heads up to Simsbury. Though the road does not provide for it, we drivers who are going straight (and into true bear country) move over to the side to allow the left turners to form an unplanned turn lane so they can get the benefit of the turn signal. A small, largely unconscious effort, of little import on the global scale, but a small reminder that we, as a whole, can and do generally op-

erate in concert with each other in symbiotic harmony. More importantly, it was good to pay attention to such interactions, to renew my respect and belief in the general decency of society, even if it was on a small scale.

So at the end of the day, I had not developed a scholarly or contentious topic. Rather, I had put myself in a good mood, of benefit to my family and to my cohorts at the firm. I understand that these thoughts are neither remarkable, nor revolutionary, nor novel, but once in a while, perhaps a chat about the better aspects of our world can be tolerated. Indeed, maybe such non-intellectual conversation should be encouraged. As for me, once considered, I was encouraged in some small ways to expand this amicable behavior, letting a car from a side street into traffic, complimenting a stranger on a lovely outfit. I might even consider being nicer to those in my office, though I don't want to do anything too dramatic.

Post-script: Should I be coerced into writing another article next time we publish, I promise I will endeavor to be either more academic or more contentious. I'll just pick the topic after a rainy weekend on a Monday morning after three cups of coffee. ■



FIRM NEWS & NOTES

Partner Wesley W. Horton, was inducted as President of the American Counsel Association at a dinner held in his honor in New York City in August. The ACA is an international association of barristers from around the world. He will be traveling to Brussels in October to speak at a program involving the European Union.

He also spoke at the American Association of Appellate Lawyers meeting held in Portland, Oregon in September on the formation of the Connecticut Supreme Court Historical Society of which he is the President.

Partner Kimberly A. Knox has been reappointed as Co-Chair of the CBA Appellate Advocacy Committee. The Committee has created a new blog containing Supreme Court briefs for the Fall session of the Court. You can view these briefs at www.blog.ctbriefsonline.com.

Kim is also a member of the CBA/HCBA Committee which is hosting the annual Bench/Bar Professionalism Symposium to be held at Hartford Superior Court on Friday, November 7, 2008. Attorney Knox also attended the CBA/CTBI Leadership Retreat held in September at St. Clement's Castle in Portland, Connecticut.

Partner Daniel J. Krisch has been appointed Assistant Secretary-Treasurer for the Connecticut Bar Association for 2008-2009.

Partners Kenneth J. Bartschi and **Karen L. Dowd** assisted the GLAD Coalition in winning their Connecticut Supreme Court argument in *Kerrigan v. State of Connecticut* in which the Court found that the State constitution was in error in denying couples of the same sex to marry.

Associate Brendon P. Levesque successfully argued *Corcoran v. Susan Bysiewicz, Secretary of the State of Connecticut* before Judge Dubay. The issue in *Corcoran* was whether a candidate who filed his certificate of endorsement one day late could be added to the November 2008 ballot as the Republican Party's endorsed candidate.

Horton, Shields & Knox is pleased to announce that various members of the firm have continued to author the Connecticut Rules of Appellate Procedure, the Connecticut Superior Court Civil Rules and Connecticut Juvenile Law. The new 2009 editions are going to press and should be available in January 2009.

ON THE DOCKET

Kerrigan v. Commission of Public Health
(S.C. 17716)

The Supreme Court released *Kerrigan v. Commissioner of Public Health*, S.C. 17716, on the Judicial Branch website, www.jud.ct.gov, on October 10, 2008. Concluding that sexual orientation is a quasi-suspect class under the Connecticut Constitution, the Court held that denying marriage licenses to same-sex couples violated the equal protection provisions in the Connecticut Constitution. The Court directed the trial court to grant the plaintiffs' motion for summary judgment and application for injunctive relief. The decision was officially released as of October 28, 2008. Attorneys Bartschi and Dowd were cooperating counsel on the case with lead counsel Bennett C. Klein and Mary Bonauto of Gay & Lesbian Advocates & Defenders of Boston, Massachusetts. For more information about the case, go to www.glad.org.

Corcoran v. Susan Bysiewicz, Secretary of the State of Connecticut
(Docket No. HHD-CV-08-4038492-S, Sept. 3, 2008)

The Republican Town Committee endorsed Matthew Corcoran as its candidate for State Representative for the 88th Assembly District. General Statutes §9-391(c) provides that the candidate's certificate of endorsement must be filed with the Secretary of the State within 14 days of the endorsement. Due to an honest mistake, Corcoran's certificate was filed a day late. Based on the late filing, the Secretary of State refused to place Corcoran's name on the November 4, 2008 ballot as the Republican

endorsed candidate. Attorney Brendon P. Levesque filed a motion for temporary injunction in order to have Corcoran's name placed on the ballot as the Republican endorsed candidate.

Attorney Levesque argued that because the late filing was caused by an honest mistake and because there was no administrative hardship to the Secretary, that the Secretary had discretion to add his name to the ballot. The attorney general responded by arguing that a 2006 amendment to §9-391 removed the Secretary's discretion to add Corcoran's name to the ballot regardless of the circumstances.

Superior Court Judge Kevin G. Dubay ruled that "In the narrow circumstances of this case, the court finds that a temporary injunction must issue... The plaintiff has no adequate remedy at law and will suffer an irreparable harm if he is not placed on the ballot as the endorsed Republican candidate for state representative." The office of the Attorney General did not appeal the decision.

Horton, Shields & Knox had three cases for argument before the Supreme Court during the September session:

Partner, Daniel J. Krisch argued *State v. Zubrowski* (SC17942) as a special public defender on behalf of the defendant.

Partner, Kenneth J. Bartschi argued *Misthopoulos v. Misthopoulos* (SC17816) on behalf of the defendant.

Partner, Robert M. Shields, Jr. argued *Maturo v. Maturo* (SC17776) on behalf of the defendant.

ETHICS CORNER

Two cases of note for this quarter:

In *Leisure Resort & Technology P.C. v. Updike, Kelly & Spellacy, P.C.*, 2008 WL 4150067 (Conn. Super.), the court held that a retainer agreement provision which provided that the client was to pay the cost of copying the file upon termination of the parties' relationship was ambiguous. The plaintiff argued that "termination" meant where one party ended the relationship prior to the case being fully litigated. The defendant asserted that the termination occurred when the Supreme Court affirmed the trial court's ruling. The court construed the ambiguity against the defendant as the drafter of the agreement.

In *Bradley v. Statewide Grievance Committee*, 45 Conn. L. Rptr. 846 (Sept. 15, 2008), the court held that the dismissal of a disciplinary action is not appealable by the complainant under the rules governing grievances, Practice Book § 2-27 et seq., and that the provisions of UAPA do not apply to allow otherwise.

The initial response to a grievance is vital because a dismissal may occur before the grievance panel

following a response by the lawyer or before the statewide grievance committee after a public hearing. Thus, the grieved lawyer is well advised to seek counsel prior to filing her initial response.

Other Considerations:

ABA Formal Opinion 08-450 provides an updated discussion of the limitations imposed by the duty of confidentiality under Rule 1.6 in two contexts: concurrent representation of clients in the same or a related matter; and representation of a client with compensation of lawyers' fees from a third party.

Finally, there are critical considerations when a firm outsources legal work including: Competence, Rule 1.1; Confidentiality, Rule 1.6; and Supervision, Rules 5.1 and 5.3; and Avoid Assisting in the Unauthorized Practice of Law. ABA Formal Opinion 08-451, "Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services;" CBA Informal Opinion 06-06, Contract Lawyers.

90 Gilett Street
Hartford, CT 06105



FIRST CLASS
U.S. POSTAGE
PAID
PERMIT #5
NEW BRITAIN, CT