New York Law Journal

SERVING THE BENCH AND BAR SINCE 1888

www.NYLJ.com

8—NO. 67 • $3.00 NEW YORK, THURSDAY, OCTOBER 4, 2007

NEWS

IN BRIEF

Linklaters Capital Markets Partner Joins White & Case

N. Adele Hogan

White & Case has recruited a capital markets partner from the New York office of Linklaters. N. Adele Hogan has advised issuers and underwriters on a variety of securities offerings in industries including financial institutions, telecommunications, transportation, oil and gas, and health care. She is the current chair of the securities regulation committee of the New York City Bar Association and a member of the federal securities law committee of the American Bar Association. She became a partner in the New York office of London-based Linklaters in 2005. She was previously a senior attorney at Cravath, Swaine & Moore.—*Anthony Lin*

Ex-Cravath Associate Pleads Guilty in Underage Sex Scandal

A former Cravath, Swaine & Moore associate has pleaded guilty to rape charges stemming from his sexual relationships with three underage girls. James P. Colliton pleaded guilty to second- and third-degree rape felony charges as well as one count of patronizing a prostitute and agreed to one-year prison sentences on each charge, to be served concurrently. He also agreed to register as a sex offender. Mr. Colliton, 43, has already served 19 months in prison and is expected to be released after his Oct. 11 sentencing. At the time of his indictment last year, prosecutors with the Manhattan District Attorney's Office alleged that Mr. Colliton, a former tax lawyer, paid the mother of a 15-year-old girl and her 13-year-old sister to have sex with the teens, allowing the latter to move into a midtown Manhattan apartment he maintained while living primarily in Poughkeepsie with his wife and five children. He also admitted to paying a third girl for sex. Mr. Colliton was fired from Cravath when his conduct came to light and he was briefly a fugitive before being arrested at a seedy East Village hotel. As a convicted felon, Mr. Colliton is subject to automatic disbarment.—*Anthony Lin*

Parties Appeal Ruling on Attorney Advertising Rules

Both sides in the federal court case that resulted in many of the new restrictions on lawyer advertising in New York being declared unconstitutional have appealed to the U.S. Court of Appeals for the Second Circuit. The rules, instituted Feb. 1 by the four presiding Appellate Division justices after months of controversy within the legal community, were largely thrown out by Northern District Judge Frederick J. Scullin (NYLJ, July 24.) The judge decided that most of the new advertising restrictions—against firms using nicknames or monikers like the "Heavy Hitters," portrayals of judges and testimonials from active clients—would

Continued on page 4

Panel Rejects Court's Ban On Pregnancy

BY MARK FASS

A FAMILY COURT judge overstepped her authority by barring a homeless, drug-addicted Rochester woman from becoming pregnant before she regained custody of her four children, an Appellate Division, Fourth Department, panel has ruled.

The panel declined to address constitutional issues, instead granting respondent Stephanie Pendleton's motion to vacate on a narrow, statutory basis.

Justice Hurlbutt

The decision will be published Wednesday.

Now at nylj.com

"[W]e conclude that the court should have granted respondent's motion because it had no authority to impose the 'no pregnancy' condition," Justice Robert G. Hurlbutt wrote for the unanimous panel in *Matter of Bobbijean P.*, 1013.

Ms. Pendleton gave birth to a daughter, Bobbijean, on March 23, 2003.

"Because [Bobbijean's] parents, were homeless crack cocaine addicts and Bobbijean tested positive for crack cocaine upon birth, the court removed her from respondents and placed her with a relative," Justice Hurlbutt wrote.

After Ms. Pendleton failed to appear at a hearing for a neglect petition filed by the Department of Human Services, Monroe County Family Court Judge Marilyn L. O'Connor granted the department's proposed plan. Judge O'Connor added several

• U.S. Supreme Court •

Justices React Skeptically To Judge Selection Challenge

BY LAUREL NEWBY

WASHINGTON—U.S. Supreme Court justices yesterday appeared skeptical of arguments challenging the constitutionality of New York's long-standing convention system for nominating Supreme Court candidates.

The Court heard oral argument in *New York State Board of Elections v. López Torres*, on appeal from the U.S. Court of Appeals for the Second Circuit, which upheld Eastern District Judge John Gleeson's injunction against the state's 86-year-old system for nominating candidates for the 328 seats on the Supreme Court. New York is the only state to use nominating conventions to elect judges.

Opponents argue that the system discourages both voters and candidates from participating in the system. However, attorneys arguing for its defenders emphasized the First Amendment associational rights belonging to political parties.

Andrew J. Rossman of Akin Gump Strauss Hauer & Feld in New York, split argument time with former solicitor general Theodore B. Olson, who represents the New York State Board of Elections, the initial defendant in the suit filed by the Brennan Center for Justice in 2004. Mr. Rossman is counsel to the state's Republican Party, the New York County Democratic Party and the statewide association of state Supreme Court justices, all of whom intervened to defend the convention system.

Mr. Rossman urged the Court to find "inappropriate" the lower courts' application of strict scrutiny to what he called "routine core party associational activity."

"Leaders developing candidates, recommending candidates,

Continued on page 14

"The nub of your case is that the political bosses in effect are controlling the process because they tell the delegates who to vote for."

Justice Souter

Justice Scalia

"It's a basic judgment not to have judges popularly elected, and your objection amounts to saying: 'No, judges ought to be popularly elected.'"

Study Finds 'Quite Extreme' Disparities In Immigration Judges' Asylum Rulings

BY MARK HAMBLETT

IMMIGRATION judges in New York, like their colleagues in other states,

Court-by-Court Breakdown

Judge Daniel Rate (R)

Continued on page 4

DECISIONS OF INTEREST

FIRST DEPARTMENT

■ **CIVIL PRACTICE:** Plaintiffs' motion to dismiss summary judgment motion for failure to comply with §3212(a) denied. *Alexandridis v. Suede Night Club, Supreme Court, New York (p. 26, col. 1).*

SECOND DEPARTMENT

■ **REAL PROPERTY:** Issues of fact of whether defendant is exempted under §7-210 precludes summary judgment. *Galarza v. Guillen, Supreme Court, Kings (p. 26, col. 1).*

■ **CONTRACTS:** Absent evidence of intent to benefit third party, contractual privity contract breach claim dismissed. *Staten Island New York CVS v. Gordon Retail Development LLC, Supreme Court, Richmond (p. 27, col. 1).*

■ **CIVIL PRACTICE:** Court lacks subject matter jurisdiction; monetary jurisdictional limit exceeded. *82 Glen Cove LLC v. H&Y Cleaners Inc., District Court, Nassau (p. 27, col. 3).*

■ **INSURANCE LAW:** Insurer's motion to reargue denial of motion to sever two pending claims denied. *Annette Medical PC v. State Farm Mut. Auto. Ins. Co., District Court, Nassau (p. 28, col. 1).*

■ **REAL PROPERTY:** Countrywide fails to comply with newly enacted provisions of Home Equity Theft Prevention Act. *Countrywide Home Loans Inc. v. Taylor, Supreme Court, Suffolk (p. 28, col. 1).*

THIRD DEPARTMENT

■ **WORKERS' COMPENSATION:** Correction officer entitled to statutory presumption that death arose from employment; board reversed. *Matter of Thompson v. Genesee County Sheriff's Department, App. Div. (p. 26, col. 1).*

UNITED STATES COURTS

■ **ADMINISTRATIVE LAW:** Court rejects challenge to regulation requiring global positioning technology in taxicabs. *Alexandre v. New York City Taxi and Limousine Commission, SDNY (p. 28, col. 3).*

■ **ELECTION LAW:** State election board partly dismissed from suit claiming 'Molinari' mandated place on 2006 ballot. *Murawski v. Pataki, SDNY (p. 29, col. 1).*

■ **CIVIL PRACTICE:** Culpability of exercise ball's Chinese maker cannot be considered for non-economic loss apportionment. *Schmelzer v. Hilton Hotels Corp., SDNY (p. 30, col. 3).*

■ **BUSINESS LAW:** Disclosure of transfer agent fees paid by funds leads to dismissal of securities fraud claims. *In re Smith Barney Fund Transfer Agent Litigation, SDNY (p. 31, col. 1).*

■ **INTELLECTUAL PROPERTY:** Uncontradicted evidence of independent creation defeats claim that child's book infringed copyright. *Maharam v. Patterson, SDNY (p. 31, col. 3).*

LAW JOURNAL INSIDE

petition filed by the Department of Human Services, Monroe County Family Court Judge Marilyn L. O'Connor granted the department's proposed plan. Judge O'Connor added several additional conditions, including a bar on future pregnancies.

"[Ms. Pendleton] shall not get pregnant again until and unless she has actually obtained custody and care of Bobbijean P. and every other child of hers who is in foster care and has not been adopted or institutionalized," Judge O'Connor ordered. Ms. Pendleton had three other such children.

"All babies deserve more than to be born to parents who have proven they cannot possibly raise or parent a child," Judge O'Connor wrote. "The cycle of neglect often created by such

Continued on page 2

Appellate Division FOURTH DEPARTMENT

BY MARK HAMBLETT

IMMIGRATION judges in New York, like their colleagues in other states, continue to deny asylum applications at wildly different rates, according to a study released last week.

The rate at which 36 New York immigration judges rejected asylum requests ranged from 91.6 percent to 9.5 percent during fiscal year 2001 to 2006, which ended Oct. 1, according to the study by Transactional Records Access Clearinghouse (TRAC) at Syracuse University.

The TRAC study, which covered 184,907 asylum decisions by more than 200 judges, shows that judges are all over the map when it comes to granting asylum.

"The unusual persistence of these disparities, no matter how the asylum cases are examined, indicates that the identity of the judge who handles a particular matter often is more important than the underlying facts," the report states. "Because equal justice under the law is a fundamental goal of American jurisprudence, the new findings about the day-to-day operations of the immigration courts are disturbing."

Court-by-Court Breakdown

	Number Decided	Judges	Judge Denial Rate (%) Lowest	Highest	Range
Cities with Largest Caseloads:					
New York	44,657	36	9.5	91.6	82.1
Miami	29,406	26	21.8	97.6	75.8
Los Angeles	14,831	31	27.1	86.7	59.6
San Francisco	13,316	23	26.5	86.7	60.2

SOURCE: TRAC Reports, Inc.

Overall, New York immigration judges approved 71 percent of asylum petitions before them in fiscal 2006, compared with 45 percent

Continued on page 6

Attendant Faces Jail for Leaving Sleeping Child on Bus

Judge Gerstein

The decision will be published Wednesday.

Now at nylj.com

BY DANIEL WISE

A SCHOOL-BUS attendant who left a sleeping 7-year-old on a 12-passenger bus after it arrived at the student's school is guilty of attempted endangerment of the child's welfare, a judge in Brooklyn ruled last week after a bench trial.

Judge Michael Gerstein, a Civil Court judge assigned to Criminal Court, rejected the bus attendant's defense that "a mistake is just a mistake" and that she did not have sufficient knowledge that her conduct would result in harm to the child to support a conviction for attempted child endangerment under Penal Law §260.10, a class B misdemeanor.

The bus attendant, Victoria M. Afia, will face a maximum sentence of three months in jail when Judge Gerstein sentences her on Nov. 19.

In rejecting Ms. Afia's defense, Judge Gerstein found that she, like all bus attendants hired by the New York City Department of Education, had been trained to take measures to prevent a sleeping child from being left on a bus.

Because Ms. Afia had failed to take the required precautions, Judge Gerstein found that Isaiah M., 7, was left on his bus after it had arrived at his school in Canarsie and was then driven "halfway across Brooklyn" to the Bensonhurst area.

When Isaiah awakened, Judge Gerstein recounted, the boy, finding himself in an unfamiliar neighborhood, let himself off the bus. A stranger then found him in the "middle of the street" and brought him to a nearby police station.

In finding that Ms. Afia was well aware of the dangers of leaving a sleeping child on a bus, Judge Gerstein relied heavily on the testimony of two prosecution witnesses who had been her instructors at the center used by the Department of Education to train bus drivers and attendants.

Standard training at the center, the two instructors testified, teaches attendants to identify on a "trip sheet" whether each student assigned to a bus is present or absent;

Continued on page 2

New York Law Journal

Official Publication for the First and Second Judicial Departments

345 Park Avenue South, New York, N.Y. 10010

ALM

George M. Dillehay, Publisher

Kris Fischer, Editor-in-Chief
Walter J. Storey, Executive Editor
Michael J. Pagnette, Managing Editor
Dorothy Hughes, NYLJ Magazine, Sections Editor
Elaine Song, GC New York, Deputy Sections Editor
Steve Homan, Legal Editor

Reporters: Thomas Adcock • Beth Bar • Mark Fass • Mark Hamblett • Anthony Lin • Vesselin Mitev • Joel Stashenko • Daniel Wise, senior writer

Art Department: Monika Kozak • Rafal Pytel • Michelle Steinberg • Rick Kopstein, photographer

Decisions: Ollie McPherson, editor • Larisa Blinderman • Nancy Margaretten • Sean Oster • William Thiess

Calendars: Patricia Kane, editor • Betsy Blank • Tomika Robinson

Production: Josh Gazes, director • Susan Ferguson • Linda George • Susan Kaletsky • David Moreland • Justin Smullen • Steve Warren • Margarita Castaneda

Web: Bill Doherty, editor • Lora Hollen

Advertising: Brian Corrigan, director

Circulation Marketing: Michael Bennett, director

ALM: 212-779-9200; 800-888-8300
NYLJ Newsroom: 212-545-6103
Albany Bureau: 29 Elk Street, Albany, N.Y. 12207; 518-449-4255
Brooklyn Bureau: 718-243-1351
Long Island Bureau: 516-873-0066
Manhattan Federal Courts Bureau: 212-513-1282
Advertising: 212-545-6271
Legal Notices: 212-545-5975

BOARD OF EDITORS
Floyd Abrams • Eleanor Alter • Sheila Birnbaum • H. Rodgin Cohen • Edward N. Costikyan • Mario M. Cuomo • Linda A. Fairstein • Robert B. Fiske Jr. • Robert Giuffra • Caitlin Halligan • Ruth S. Hochberger • Patricia M. Hynes • Barry Kamins • Roberta Kaplan • Victor A. Kovner • Charles G. Moerdler • Scott E. Mollen • Bertrand Pogrebin • Herbert Rubin • David D. Siegel • Mary Jo White • Alan Vinegrad • Mark C. Zauderer • Peter L. Zimroth • James D. Zirin

ALM
Legal Division

Senior Vice Presidents
Jack Berkowitz • George M. Dillehay

Group Vice Presidents
Sara Diamond • Stephen Lincoln • Kevin J. Vermeulen

Vice President, Law.com
Jill Windwer

Vice President, Licensing & Content Development
Ellen Siegel

Vice President & Counsel for External Affairs
Richard Runes

ALM SENIOR MANAGEMENT
William L. Pollak, Chief Executive Officer
Jack Berkowitz, Senior Vice President
George M. Dillehay, Senior Vice President
Allison C. Hoffman, Senior Vice President
Stuart M. Williams, Senior Vice President
Sara Diamond, Vice President/Books and Information
Patricia Crocker France, Vice President/Marketing
Alex Kam, Vice President/Digital Strategy and Business Development
Robert Kondracki, Vice President/Finance
John W. Mason, Vice President/Operations
Kevin J. Vermeulen, Vice President/Sales

The New York Law Journal (ISSN 0028-7326) (USPS 383020) is published daily except Saturdays, Sundays and legal holidays by ALM, 345 Park Avenue South, New York, N.Y. 10010. Periodicals postage paid at New York, N.Y.

Designated by the New York Court of Appeals pursuant to Article VI, Section 28(b) of the State Constitution. Designated by the Appellate Divisions, First and Second Departments, pursuant to authority conferred on them by Section 91[1] and [2] of the Judiciary Law.

Designated by the U.S. District Court for the Southern and Eastern Districts of New York as a newspaper of general circulation for the publication of legal notices in civil and admiralty causes.

POSTMASTER: Send address changes to the New York Law Journal, 345 Park Avenue South, New York, N.Y. 10010. Available on microfilm and microfiche. Rates on request. The New York Law Journal® is a registered trademark of ALM Properties, Inc.

An incisivemedia company
incisivemedia.com

READERS' SERVICES

For subscriptions and to purchase back issues, call 1-877-ALM-CIRC.

For questions regarding reprints and permissions, call 212-545-6136, e-mail reprints@alm.com, or visit almreprints.com.

To track calendar and motion information for individual cases, call MA 3000 at 212-313-9050.

Send decisions of interest to decisions@alm.com.

To access decisions and articles published in the Law Journal, visit nylj.com and westlaw.com.

Panel Rejects Pregnancy Ban

Continued from page 1

births needs to stop. Our society has reached the breaking point with respect to raising neglected children, often born with extraordinary needs."

The March 2004 decision received widespread publicity in and around Rochester. When Ms. Pendleton moved to vacate the portion of the order barring future pregnancies, nearly a dozen organizations joined the suit as amici in support of Ms. Pendleton, including the New York Civil Liberties Union and National Advocates for Pregnant Women.

Last week, the Fourth Department granted Ms. Pendleton's motion, citing two statutory bases.

First, the panel ruled that Judge O'Connor erred in denying the motion on the basis that Ms. Pendleton "willfully refused" to appear at the neglect hearing.

"[A]n order prohibiting respondent from conceiving a child is, insofar as our research discloses, unprecedented in this state, and such consequences could not have been anticipated by respondent," Judge Hurlbutt wrote. "Under such circumstances, the court should have granted respondent's motion seeking to vacate the 'no pregnancy' condition of the order of disposition and should have afforded respondent an opportunity to be heard on that condition."

In addition, the panel agreed that Judge O'Connor lacked the authority to impose the no-pregnancy condition.

"[T]he conditions that may be imposed on respondent are authorized by Family Court Act §1057, which provides that '[r]ules of court shall define permissible terms and conditions of [DHS's] supervision' over respondent," according to the decision. "Those 'rules of court' are set forth in 22 NYCRR 205.83 (a) and (b), and none of the conditions authorized therein includes prohibiting procreation, nor does any authorized condition impliedly include such a prohibition."

Judge O'Connor, 70, has served on the Monroe County Family Court since 2001. She is the mother of actor Phillip Seymour Hoffman.

Justices Henry J. Scudder, Jerome C. Gorski, John V. Centra and Samuel L. Green joined the opinion.

Eric Dolan, then a Rochester assistant public defender, represented Ms. Pendleton. Mr. Dolan is no longer with the office. Public Defender Edward J. Nowak said his office was pleased with the decision.

"We thought the [lower] court's order was outside the parameters or powers of the judge," Mr. Nowak said.

Eftihia Bourtis of Webster served as law guardian for Bobbijean.

The DHS did not take a position on Ms. Pendleton's motion.

According to a May 2004 Associated Press story, Ms. Pendleton became pregnant again in May 2004, two months after Judge O'Connor's order. Mr. Nowak acknowledged that his client is "still struggling."

— Mark Fass can be reached at mfass@alm.com.

Bus Attendant Faces Jail

Continued from page 1

to survey the bus when it arrives at a school for any sleeping children; and to place a placard at the rear that states "in essence" that the bus has been checked for sleeping children.

Further, Judge Gerstein wrote, one of the instructors, Joseph Van Aken, testified that he had "specifically advised" Ms. Afia that failure to awaken and remove a child would result in criminal liability.

Isaiah, a special needs child, was assigned to a minibus, with a maximum seating capacity of 12 for the one-mile trip from his home in East Flatbush to his school.

"We hold," Judge Gerstein wrote in *People v. Afia*, 2007KN01277, "that a defendant who is entrusted with the temporary care of a seven-year-old child with special needs and... being trained for that responsibility, nevertheless consciously fails to check the seats, knowingly acts in a manner likely to be injurious to the welfare of that child left asleep on the bus."

A 2002 ruling from the New York Court of Appeals, Judge Gerstein wrote, makes it clear that the prosecution need not prove an "affirmative act" to sustain a conviction under the child endangerment statute, but, instead, need only prove that a defendant is aware that his or her conduct will result in harm to a child.

In the 2002 case, *People v. Hitchcock*, 98 NY2d 586, the Court of Appeals reviewed the convictions in two separate cases of fathers who had been charged with endangering their child's welfare by having guns in their homes. The Court of Appeals affirmed the conviction of one of the fathers who had 23 guns in his house, several of them in open view and with ammunition nearby.

By the same token, however, the Court approved the dismissal of the charges against the other father because he had made a "significant effort" to conceal the sole gun in his house from his child.

The prosecution was handled by Brooklyn Assistant District Attorney Ian Nikol. Ms. Afia was represented by Ivan Pantoja of the Legal Aid Society.

— Daniel Wise can be reached at dwise@alm.com.

CALENDAR OF COMING EVENTS

TODAY

New York City Bar Association
CLE: Residential Real Estate Closings: Soup to Nuts, 6-9 p.m., 42 West 44th St. Call 212-382-6600.

New York County Lawyers' Association
CLE: Federal Criminal Practice Institute, 6-8 p.m., 14 Vesey St. Call 212-622-0606.

TOMORROW

New York County Lawyers' Association
CLE: Federal Criminal Practice Institute, part 2, 9-5 p.m., 14 Vesey St. Call 212-622-0606: Part 3 will be held Saturday, Oct. 6.

UPCOMING

Stroock & Stroock & Lavan
Seminar: "Navigating the Foreign Corrupt Practices Act in an Era of Heightened Enforcement," Oct. 16, Yale Club, 50 Vanderbilt Ave. RSVP by Oct. 10 to Margot Rogers at 212-806-5447 or mkrogers@stroock.com.

Have an event to list?
E-mail the details to Tyrone Richardson at trichardson@alm.com or fax them to 212-696-4287.

PROFESSIONAL ANNOUNCEMENTS