

# What Do I Say to My Clients When a Judge "Tries to Fix a Case"?

Dear Editor:

I don't know what to say to my clients about Justice Joseph Makowski's efforts "to fix a case."

I have practiced law in western New York for 33 years. For most of that time, I have assisted "the little guy" fighting to make local and state officials comply with the law. The Attica inmates I represented in the 1970s had little faith in our judicial system. Young and idealistic, I frequently found myself assuring potential clients that the judges that we would be presenting our legal arguments to would respect the law and honestly attempt to apply it.

My practice has focused on zoning and environmental matters for the past two decades. The cases I bring to (NYS) Supreme Court often challenge large projects and conflict with the wishes of politicians and wealthy, politically-connected developers. The middle-class residents that I represent frequently have had little or no prior interaction with our judicial system. They are turning, timidly, to the courts in search of "justice." I have found it increasingly difficult to assure these concerned citizens that the judicial system will objectively and fairly apply the law to the facts of their case. Joseph Makowski's actions have not made my task any easier.

Tradition dictates that a lawyer refer to a judge as "Your Honor" while in his or her courtroom. Most jurists clearly deserve this sign of respect. Justice Makowski, however, made a mockery of that title in the one case I argued before him.

Residents of Buffalo's Old First Ward hired me to challenge the city's approval of an ethanol plant. The developer proposed using existing grain elevators to

store corn, but needed variances from the Zoning Board of Appeals so that it could construct three new, 750,000-gallon tanks to hold the highly flammable ethanol it wished to manufacture. Following the ZBA's approval of the variance application, our court papers argued that ZBA did not understand the proposal under consideration. We pointed to the zoning board's April 2007 letter to the applicant referring to its approval of a "petition for a variance to convert and use existing grain silos for the storage of flammable liquids."

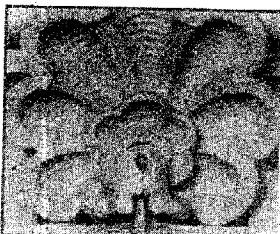
"Joseph Makowski's lack of candor angered and disillusioned my clients, and it shook to the core my confidence in the judicial system."

Justice Makowski issued a decision dismissing my clients' lawsuit. Incredibly, he referred to the April 2007 letter as proof that the ZBA understood "what it was being asked to authorize." This sleight of hand was accomplished by the court deleting the phrase "to convert and use existing grain silos" from the quotation, and replacing the crucial words with three dots.

Joseph Makowski's lack of candor angered and disillusioned my clients, and it shook to the core my confidence in the judicial system. I prepared papers requesting that Justice Makowski reconsider his decision. A "motion to reargue" was filed with the court contending that the omission of the seven words "to convert and use existing grain silos" from the decision was a significant error, whether the phrase was inadvertently overlooked or intentionally deleted.

Our motion was promptly scheduled for oral argument, as is the normal course. A day or two later, however, I received notice that the court would not hear oral argument, but would simply render a ruling based on the attorneys' papers. My clients and I found it hard not to conclude that "His Honor" must have read the

continued on page 4



Letters to the editor and short articles of general interest to our readers are always welcome. All materials submitted for publication in the *Bulletin* are subject to editing for reasons of style, space and content.

Send all submissions as Word documents to [obrian@eriebar.org](mailto:obrian@eriebar.org) (preferred) or by mail to: **Bulletin Editor, 438 Main Street, Sixth Floor, Buffalo, NY 14202.**

**DEADLINE**

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The next deadline for All *Bulletin* contributors and editors is

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### Friends from the Bar

hope those of you who  
ended the President's Ball at  
Birchfield-Penny Art  
iseum enjoyed yourselves.  
I not a ball kinda guy. But  
ese social functions always  
prise me with how much fun  
ey end up being. It's mainly  
cause of the people with  
om I get to spend time and  
ormally wouldn't have a  
ance to. I like being with  
yers. As Gerry Bouvier, that  
gendary trial warhorse, used  
o say: "There are no better  
orytellers and people with real  
fe experience to talk about  
an lawyers. I'd rather drink  
ith lawyers than anybody."

You will have another chance

## What Do I Say to My Clients When a Judge "Tries to Fix a Case"?

continued from page 2

motion papers, and decided that he did not want the  
"deletion issue" discussed in open court. When the  
order denying our motion was issued, Justice Makowski  
never bothered to explain the deleted phrase, but  
merely stated, "After a thorough review of the submis-  
sions in this action, the court denies petitioners' motion  
to reargue in its entirety."

"Trying to fix a case" appears to have come naturally  
to Joseph Makowski. It is unclear whether any particu-  
lar method for selecting judges would have identified  
this personality flaw. What is clear, however, is that  
explaining such judicial arrogance and dishonesty to  
my clients, and the public, is no simple task.

Arthur J. Giacalone  
East Aurora

*Do you agree with this writer? Disagree?  
How do you answer your clients' questions  
on this subject? We want to hear from you.  
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letters are subject to editing for content, space  
and other considerations.*

