
SCHENECTADY COUNTY BAR ASSOCIATION, INC.

NEWSLETTER

April 2003

Mailing Address:
PO Box 1728
Schenectady, NY 12301-1728
e-mail: SchenectadyBar@aol.com

Telephone Numbers:
President: 853-8102
Treasurer: 370-4743

Secretary/Newsletter/Membership: 377-6489

Website: www.schenectadybar.com

CALENDAR OF EVENTS

April 17, 2003	SCBA Meeting, 12:00 p.m. Election of Nominating Committee CLE Opportunity--No Fault Benefits
May 1, 2003	Law Day
May 12, 2003	Joint Legal-Medical-Dental Dinner
May 14, 2003	Real Estate Seminar
June 19, 2003	SCBA Annual Meeting, 12:00 p.m.
June 14, 2004	US Supreme Court Admission Trip

ALL SCBA MEETINGS HELD AT
THE GLEN SANDERS MANSION, SCOTIA, NY

OFFICERS

President
Vice President
Treasurer
Secretary

J. David Burke
John R. Seebold
Robert W. Hoffman
Kathryn McCary



NOTE INCLUSIONS IN THIS ISSUE

- ' Real Estate Seminar Registration Form
- ' Member Directory Update Form
- ' Requests for Law Day Volunteers

L NEXT MEETING **7**

APRIL 17, 12:00 P.M.

Will Include Memorial for the Honorable Guy Graves

*If you plan to attend the meeting, please contact Robert Hoffman at 370-4743 for reservations
or e-mail us at SchenectadyBar@aol.com*

FROM THE PRESIDENT

J. David Burke

On a cold night in February, John Seebold and I attended Judge Vito Caruso's presentation of a proposal to build a new courthouse that will house the four county level courts as well as the Schenectady City Courts. The proposal calls for the construction of a 122,725 square foot building behind the present

courthouse that will be renovated. The proposal was well received by those in attendance and I urge every member of the Association to exert whatever influence he or she may have so that the proposal for this much-needed facility becomes a reality.

As you may know, the Court of Appeals recently approved new rules governing court appointments of fiduciaries that are designed to ensure their selection is

merit-based and free of favoritism. To this end, effective June 1, 2003, all fiduciary appointments must be made from appropriate lists of applicants. How do I get on a list, you ask. First, you must fill out an application form that will be available at the April meeting. Second, you must attend a court sponsored training program. Of course, in typical OCA fashion, the training programs for receivers, referees, supplemental needs trustees and guardians ad litem are not in existence and OCA doesn't plan to establish them. Instead, it is looking to the New York State Bar and local bar associations to do so. Knowing that the Albany County Bar Association has developed an excellent program for Article 81 guardians and evaluators, I contacted its Executive Director with a proposal that we might jointly develop these programs. She was quite receptive. Will keep you posted.

On another OCA matter, Judge Lippman has asked us to provide him with our views of the experience and present abilities of Judge Robert P. Best, who is seeking certification as a retired justice. If you have any views regarding Judge Best that you want conveyed to Judge Lippman, let me know.

Turning away from OCA issues, at its March meeting the Executive Committee re-appointed Peter Coffey and Barbara King as our delegates and Sunny

Lee as our alternate delegate to the New York State Bar Association. Also, Michelle Wildgrube and Hon. Barry D. Kramer were appointed to the John Alexander Memorial Scholarship Fund Committee. In case you didn't know, Judge Alexander's widow established a trust fund to provide scholarships to deserving residents of Schenectady County who are attending law school in New York State. The committee selects the recipients of these scholarships.

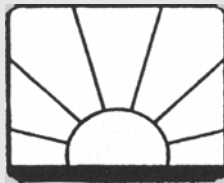
Now that you know what has been going on, I am going to let you know how you can be a part of what is going to happen. The Law Day Committee has outlined an ambitious program that, for the first time in many years, will include high school students (about 150). What that means is that we need about 20-25 attorneys to help us make the program a success. So, if you can spare a couple of hours during the morning of May 1st we could use your help. To volunteer, you can sign up at the April meeting or contact me or Dianne Herrmann (346-1281). Besides Law Day, we will be the host of the regional mock trial tournament that will require us to furnish a number of judges. So, if your dream is to be a judge, here's your chance. Again contact me or Judge Powers.

With the increased security, you may have noticed there has been a push for attorneys to obtain an OCA issued Secure Pass. To make it easier for you to apply for one, Frank Tedeschi will be at the April 17th meeting to take your photograph and we will have the application forms available for you. If you want to take advantage of this, show up around 11:30 or so.

Speaking of the April 17th meeting, it is an especially important one to attend this year because the election for the nominating committee will be held. This year's election is significant because in June we will be electing a new president and vice-president and hopefully re-electing Kathryn McCary as secretary and Bob Hoffman as Treasurer. Beside that, we will be honoring our new 50-year members as well as presenting a memorial resolution for Judge Guy A. Graves.

In case all that doesn't exhaust you, after the meeting Frank Putorti will present a CLE program which has received rave reviews. For all those reasons there should be a large turnout, so please let me or Bob Hoffman know if you plan to attend to insure sufficient seating and food.

Before I close, congratulations to Cris Cioffi on her election as a vice president of the New York State Bar Association and to Arkley Mastro and Paul Callahan who were recipients of the Capital District YMCA's President's Award. Lastly, many thanks to Judge Versaci who suggested and organized the SCBA After Five event at the Parker Inn on March 28th.



Don't Go It Alone

LAP—The Lawyer's Assistance Program of the Schenectady County Bar Association—is here to help members of the County Bench and Bar.

LAP is concerned about your welfare. We want to help. Whether you are facing illness, alcohol or drug addiction, a gambling problem, psychological problems or financial difficulties, LAP is here to provide you with free, completely confidential assistance.

All you have to do is ask.

Call us at
388-4352

or write us at
Schenectady County Bar Association
Lawyers Assistance Program
PO Box 602
Schenectady, NY 12301

See you on the 17th.

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FROM THE COMMITTEES

ALTERNATE DISPUTE RESOLUTION There will be a meeting of the Committee Wednesday, April 23 at 12:00 noon at Parisi's Steakhouse, North Broadway in Schenectady; for information call Chair Jean Carney, 872-9023

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CRIMINAL LAW For information about meetings, call Chair Paul Callahan, 895-2334

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ESTATE & ELDER LAW There will be a joint lunch with our Albany counterparts on May 21, 2003, at the Gordon, Siegel Law Offices, 9 Cornell Road, Airport Park, Latham, The lunch will start at 12:00 noon and end no later than 2:00 p.m. Attendees will earn 2 CLE credits. The topics will include how to trigger a long-term care policy and using insurance in business succession plans and a final topic to be announced soon. For information, call CoChairs Pam McDevitt, 370-4743 or John Fantauzzi, 370-4645.

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LAW DAY: There will be a meeting of the Committee April 7 at 12:15 at Castelo's Restaurant, Nott Terrace, Schenectady. For information, contact Chair Diane Herrmann, by calling 346-1281 or e-mailing to dianeherrmann@hotmail.com

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MATRIMONIAL LAW . For information about meetings, call Chair Eric Tepper, 399-5400

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REAL ESTATE There will be a meeting of the Committee March 26 at 8:00 a.m. at the offices of Pott & Naviasky, LLP, 426 Franklin Street, Schenectady . All are welcome. Contact Chair Larry Naviasky, 374-7779 or pottnav_larry@global2000.net with questions or regrets.

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TRIAL PRACTICES: The Committee will participate with NYSTLA in an emergency meeting of all trial lawyers to discuss move to destroy our practice April 9 between 6:00 and 8:00 p.m. at the Desmond on Albany-Shaker Road. Refreshments will be served. For information about meetings, or becoming a member, contact Chair John Massaroni, 374-1800.

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SCBA'S NEW EMPLOYEE

Those of you who missed the January meeting also missed the chance to greet the Association's new

Administrative Assistant—but you'll have plenty more chances in future.

Arlene Williams, who retired from Family Court in 2002 (and was honored by this Association with its Excellence in Service Award last June) apparently misses Schenectady lawyers. She started work this January as our first ever staff person. We are very excited about this additional support for the Association's active growth

Ms. Williams will be working Thursday afternoons in an office located in the offices of McCary & Huff, LLP. She will assist the work of the Secretary and Membership Committee; this will include attending all meetings of the Association's membership. She will also be available to provide clerical support for the other officers and committees.

Arlene is a cheerful and efficient worker, and has already cleared up the backlog of work in the Secretary's office, as well as processing the recent mailings for the Parker Inn social event, and the real estate seminar. The next big project on her agenda is production of the long-promised new edition of the Association's Membership Directory (you'll find a request for corrected information elsewhere in this newsletter).

Because we want to keep Arlene from getting bored with the job, additional projects are always welcome. In order to ensure prompt and efficient processing of projects, please let either Arlene or Secretary Kathryn McCary know as early as possible if you expect to have a project for Arlene. As she only works one afternoon a week, advance planning may be necessary to allow a project to be completed within its originator's preferred time frame.

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YOU BE THE JUDGE

J. David Burke

Melissa was provided with a car by her employer B&W who had leased it from DL. Despite the fact B&W's employee handbook specifically restricted the use of company vehicles to employees, Melissa allowed her boyfriend to drive the car. He promptly ran over a pedestrian who sued B&W and DL pursuant to Vehicle & Traffic Law § 388 (1), which makes every owner of a vehicle liable for injuries resulting from the negligence of a person using or operating the vehicle with the permission, expressed or implied, of the owner.

Considering that proof of ownership of a vehicle creates a rebuttable presumption that the driver was using the vehicle with the owner's permission, should B&W and DL's motions for summary judgment dismissing the complaint as to them be granted, particularly

in view of the restrictive provision in B&W's employee handbook?

The member who submits the first correct answer by e-mail(SchenectadyBar@aol.com) will be SCBA's guest at the April meeting. The correct answer will be on our website (SchenectadyBar.com) after the April meeting.

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LAW DAY VOLUNTEERS NEEDED

Volunteers are needed to assist with the Law Day activities for middle school and high school programs on May 1. The program will take place between 10:00 and 12:00 a.m., and is a great chance to interact with students and help them develop a positive image of lawyers and the law.

Volunteers are also needed to staff Law Day information tables:

April 28, 11:00 a.m. - 2:00 p.m.

April 29, 9:30 a.m.- 1:30 p.m.

April 29, 5:00 p.m. - 7:30 p.m.

April 30, 9:30 a.m. - 1:30 p.m.

May 1, 5:00 p.m. - 7:30 p.m.

Each shift will be one to two hours long; locations are still being arranged. Another great opportunity to burnish the public image of the profession!

Call Diane Herrmann, 346-1281 to volunteer for the youth program on May 1, Diane Enzinna at 388-4293 to volunteer for the information tables..

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RECENT DECISIONS

Cicio v Vytra Healthcare, ___ F3d ___ [Feb. 11, 2003, 2d Cir]

We generally don't get into federal cases, but this one is extremely significant in that it holds that a state medical malpractice claim against an HMO medical director who refused to approve a cancer therapy advocated by a treating physician is not automatically preempted by the Employment Retirement Income Security Act.

Kennedy v Mossafa, ___NY2d___ [Feb 25, 2003]

Why lower courts have work. The Court holds that when a County's notice informing a tax debtor of a real estate tax delinquency is returned as undeliverable, the tax district should conduct a reasonable search of the public record to ascertain if there is an alternative address for the property owner. It then goes on to say that a reasonable search does not necessarily require searching the Internet, voting records, motor vehicle records, the telephone book or other similar resource.

People v Barney, ___NY2d___ [Feb 20, 2003]

Three days after his friend's death, clever Barney goes to his friend's house, enters it through an unlocked door and proceeds to search for marijuana. Turns out Barney wasn't so clever since the Court said he committed the crime of burglary in the second degree, reasoning that the friend's death did not, on its own, transform the house from a dwelling into a building.

Tran v New Rochelle Hosp. Med. Center, ___NY2d___ [Feb 20, 2003]

Agreeing with the Second, Third and Fourth Departments, the Court holds that CPLR 3101(I) requires full disclosure of videotaped surveillance tapes with no limitation as to timing, which means a plaintiff can obtain them before being deposed.

Silber v Silber, ___NY2d___ [Feb. 18, 2003]

Holds that a named beneficiary of an ERISA-governed benefit plan may waive his or her rights as a designated beneficiary provided the waiver is explicit, voluntary and made in good faith.

People v Hansen, ___NY2d___ [Feb. 13, 2003]

In this case coming out of Albany, the Court holds that the sentencing procedures set forth in CPL 400.27(1) ensure a non-capital murder defendant sufficient due process, which means that he or she is not entitled to mitigation hearing before a jury prior to sentencing.

Matter of Tompkins County Support Collection Unit v Chamberlin, ___NY2d___ [Feb. 13, 2003]

The Court reverses the Third Department and holds that on a hearing in Family Court of an objection to a cost of living adjustment (COLA) to a child support order, Family Court can review and adjust the underlying child support order in accordance with the Child Support Standards Act. In this case, husband was paying \$54.00 per week, the COLA adjustment raised it to \$64; he objected and now pays \$149.62.

Matter of Edwin SS., ___AD2d___ [Feb 20, 2003]

Where a neglect petition is dismissed without a fact-finding hearing or dispositional order, Family Court lacks authority to issue a final order of protection.

Rodrigues v Catskill Revitalization Corp., ___AD2d___ [Feb 20, 2003]

Where land is held in public trust, a private individual cannot obtain title to it by adverse possession.

Cardinell v Allstate Ins. Co., ___AD2d___ [Feb. 20,

Do You Suffer From Alcohol or Substance Abuse?
Free, Confidential Help is Available

Do You Know Someone Who Suffers From Alcohol or Substance Abuse?

If you need or want to arrange for help, call any of the following:

**New York State Bar Association
 Lawyer Assistance Program
 800-255-0569**

**Schenectady County Bar Association
 Lawyer Assistance Program
 518-853-8102**

LAT
NEW YORK STATE

This advertisement is sponsored by the New York State Lawyer Assistance Trust, an agency of the unified court system created to bring statewide resources and awareness to the prevention and treatment of alcohol and substance abuse in the legal community. Barbara Smith, Executive Director.

2003]

Read how an insurance company's failure to comply with the regulations governing the processing of plaintiff's \$41,150 claim for additional personal injury protection benefits resulted in an award of \$389,434 to plaintiff.

Barber v Roger P. Kennedy Gen. Contr., ___AD2d___ [Feb. 13, 2003]

Court denied plaintiff's motion for summary judgment in this Labor Law §240 case where he was the only witness to his alleged fall, he gave inconsistent accounts of the fall and the ladder did not break, collapse or otherwise clearly demonstrate its inadequacy to safeguard plaintiff from falling.

Matter of Seelig, ___AD2d___ [Feb. 13, 2003]

Reminder that when you object to a disclosure of requested documents, you must create a privilege log, detailing both the legal basis for withholding the documents along with their distinguishing features, unless such information would cause the disclosure of the privileged information. Case also points out that CPLR 4503(b) which requires an attorney to disclose certain information regarding wills only applies to confidential communications with the testator or testatrix and not with others.

Kay v Kay, ___AD2d___ [Feb. 13, 2003]

This case offers a lesson on how to transform your separate property into marital property.

Lavin v Elmakiss, ___AD2d___ [Feb. 6, 2003]

The statute of limitations in a mortgage foreclosure action begins to run six years from the due date for each unpaid installment unless the debt has been accelerated; in that case the statute of limitations begins to run on the entire mortgage.

Marcellus Construction Co. v Village of Broadalbin, ___AD2d___ [Feb 13, 2003]

Unlike the Second Department and Special Term (Sise, J.), the Third Department holds that a low bidder on a construction contract cannot maintain a cause of action for negligent misrepresentation against the engineering firm that prepared the bid documents because their relationship was not so close as to approach that of privity.

Altbach v Kulon, ___AD2d___ [Feb 6, 2003]

If you are interested in creating an oil painting of a judge that portrays him as a devil with horns and a tail and want to know how to get away with it, insofar as the Civil Rights Law is concerned, read this case.

Cardinale v Watervliet Housing Auth., ___AD2d___ [Feb. 6, 2003]

The fact that a defendant does not remove all of the snow and ice from a walkway does not constitute negligence. Good news, particularly this year. Then again, I don't have a sidewalk.

Carmean v Royal Indemnity Co., ___AD2d___ [Feb. 6, 2003]

Defendant takes out knife, swings it around, and cuts off plaintiff's ear. Defendant's homeowner's insurer disclaims, citing exclusion for intentional acts. Plaintiff argues act was not intentional because defendant pled guilty to a crime premised on reckless, rather than intentional, conduct. Court said the plea to a crime with a criminal intent of recklessness does not necessarily foreclose a finding that the defendant's conduct falls within the policy's intentional acts exclusion. Here, defendant's act was found to be intentional since plaintiff's injuries were not unexpected, unusual or unforeseen

Mothon v ITT Hartford Group, ___AD2d___ [Jan 30, 2003]

Court takes a benign view of defaults due to law office failure by stating that, absent a finding of willfulness or a deliberate default, oversights due to law

office failure are generally liberally excused and the extreme sanction of a default judgment or dismissal is generally unwarranted absent a showing of prejudice.

Hendricks v Lee's Family, Inc., ___AD2d___ [Jan 30, 2003]

In this fall down case the Court observed that it simply was not foreseeable that plaintiff, in a highly intoxicated state, would leave the parking area to urinate behind bushes rather than use the bar's restroom. Obviously, the Court should get out more often.

Gillespie v Girard, ___AD2d___ [Jan 30, 2003]

In a personal injury action where it is undisputed that the plaintiff sustained severe injuries and the defense counsel has stipulated that plaintiff sustained a serious injury under the no-fault law, the failure to award any damages for past pain and suffering constitutes a material deviation from reasonable compensation.

Seymour v Roe, ___AD2d___ [Jan 30, 2003]

In a "serious injury" case, the defendant may rely on unsworn reports of a plaintiff's treating physician and is not required to produce affidavits or affirmations of medical experts to meet its burden of demonstrating prima facie that plaintiff did not suffer a serious injury as long as the reports are sufficiently complete and are augmented with other proof. As this case shows, not a good idea since a Court generally is not in a position, without the assistance of expert medical testimony explaining medical terms and the significance of findings, to determine as a matter of law that a plaintiff did not sustain a serious injury.

Smith v Sheppard, ___AD2d___ [Jan. 23, 2003]

To extinguish deed restrictions pursuant to RPAPL 1951, the party seeking extinguishment must show that in a balancing of equities the restrictions can be said to be of no actual or substantial benefit because their purpose has already been accomplished or, because of changed conditions or other cause, cannot be accomplished. Here, defendants went ahead and built a swimming pool in the face of a restriction prohibiting pools. Hint as to outcome - there will be no pool parties at their residence.

Matter of Lanphere v County of Washington, ___AD2d___ [Jan 23, 2003]

Four years after his exposure to lead paint, infant filed application to file late notice of claim against County. Court rejected County's claim of prejudice since it did not put forth any specific evidence to

support the conclusion that it could not adequately defend the claim.

General Motors Acceptance Corp. v Minervini, ___AD2d___ [Jan 23, 2003]

For the purposes of Lien Law §184[1] (garage lien) a lessee of a motor vehicle may fall within the list of owners who have authority to give consent for repairs. Looks like it depends upon the obligations the lessee was required to assume under the lease.

Matter of Naumoff, ___AD2d___ [Jan 16, 2003]

A reminder that when a person holding a power of attorney makes a gift to himself or herself of the principal's money or property, a presumption of impropriety and self dealing arises which can only be overcome with the clearest showing of intent on the part of the principal to make the gift. Here, the holder of the power attempted to justify her actions by claiming she deserved the money. A novel argument that didn't withstand appellate scrutiny.

Russell v Perrone, ___AD2d___ [Jan 16, 2003]

In 1956 R conveys property to plaintiff along with a right of way. In 1970 R conveys the land upon which the right of way was located to F. This deed did not specifically describe the right of way; instead it contained a reference to the liber and page of the 1956 deed. Several conveyances later, defendant purchases the property. Notably, none of the later deeds contained a reference to the 1956 deed or described the right of way. Defendant claimed she did not have to recognize plaintiff's right of way because she was a subsequent bona fide purchaser for value without actual or constructive notice of the right of way. The Court rejected this argument, holding that, since the 1970 deed contained an express reference to the 1956 deed, defendant had a duty of further inquiry to examine the 1956 deed even though it fell outside of her direct chain of title. For a further explanation, attend the Real Estate Seminar this May

Herba v Chichester, ___AD2d___ [Jan. 16, 2003]

Where causes of action for breach of contract involving the sale of goods, unjust enrichment and account stated are based on the same allegations, they are governed by the four-year statute of limitations found in UCC 2-725(1).

Smith v Buckley, ___AD2d___ [Jan 16, 2003]

Where it is the official duty of a court clerk to have and keep a document and it is not found in the place where it is supposed to be kept, there is a presumption that it is lost or destroyed. In that event, resort to

secondary evidence of a document's contents is allowed. I wonder if this presumption applies to the stuff on my desk.

People v Creighton ___AD2d___ [Jan 10, 2003]

You may remember this case from the January newsletter. Originally, the Court held that an order of protection issued in favor of a witness to a criminal act is invalid. On re-argument, the Court vacated its decision and now holds that an order of protection can be issued in favor of a witness to the crime for which the defendant was convicted, but cannot be issued for a witness to an unrelated crime committed by the defendant.

People v Marrow, ___AD2d___ [Jan. 2, 2003]

The repeated questioning of a defendant for a purported uncharged bad act, when proper pretrial procedures had not been followed and no limiting instruction was given to the jury, constituted error.

Gorman v Hess, ___AD2d___ [Jan. 2, 2003]

Court points out that a motion to renew and reargue is not a proper vehicle to challenge a final judgment. CPLR 4404 is the proper one. Watch the time limits or you may be left challenging nothing.

Amo v Little Rapids Corp., ___AD2d___ [Jan 2, 2003]

A return appearance for this Labor Law §240 case. This time Court held that plaintiff's fall of 15 to 16 inches from the top of a wet boulder to the basement floor came within the protective shield of the statute.

Bradley v San-Gra Corp., ___AD2d___ [Jan 2, 2003]

Another §240 case. Court points out that in a "falling object" case, the fact the plaintiff may have been working at an elevated height when the object fell is of no moment. What plaintiff has to show is that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute. Here, plaintiff was out of luck in more ways than one because he was hit by a piece of precast concrete that fell off the building shortly after it was installed.

Matter of Rosenberger v Cashman, ___AD2d___ [Jan 2, 2003]

Because federal law established incentive payments for states that effectively collect and enforce child support, plaintiff argues that, since judges are compensated with state funds, they have a pecuniary interest in the outcome of child support cases and thus should be disqualified. "Charitably stated" says the Court this argument is unpersuasive.

Aabel v Town of Poughkeepsie, ___AD2d___ [Jan 2, 2003]

When seeking an extension of time to appear or plead pursuant to CPLR 30121(d), an affidavit of merit is not necessary where the delay is of relatively short duration. Here, the delay was a little over three months. Practice hint- don't rely on this rule, throw in some stuff on the merits of your case. Makes it easier for the court to rule in your favor.

Matter of Walker v State of New York, ___AD2d___ [Dec. 26, 2002]

A reminder that service of process without first paying the filing fee and filing the initiatory papers is a nullity and that personal jurisdiction is not obtained where service of process is effected prior to the clerk's receipt of the summons or notice of petition. Since commencement by filing has been around for over ten years, you would think people would have caught on by now. How about purchasing an index number and filing a verified complaint, but not a summons. Same result, same comment (see, *Sangiaco v County of Albany*, ___AD2d___ [Feb 20, 2003]).

Rotterdam Ventures v Ernst & Young, ___AD2d___ [Dec. 26, 2002]

To comply with CPLR 3016[b] a complaint alleging fraud by an accountant is expected to identify the particular manner in which an item included in the financial statement relied upon has been intentionally or recklessly misrepresented. Are you listening Arthur Anderson?

Phillips v Dweck, ___AD2d___ [Dec 26, 2002]

The fact an insurance company may delay in completing its investigation of a claim, does not excuse a plaintiff from timely commencing the underlying action.

Wilshire Credit Corp. v Ghostlaw, ___Ad2d___ [Dec 26, 2002]

An action to reform a deed based upon mistake is governed by the six year Statute of Limitations; however, as to one who is in possession of real property under an instrument of title, the statute does not begin to run until he or she has notice of a claim adverse to him or her under the instrument or until his or her possession is otherwise disturbed.

Bunkoff General Contractors v Dunham Electric, ___AD2d___ [Dec. 26, 2002]

Recognizes that the doctrine of promissory estoppel is a legally cognizable cause of action, particularly in construction bidding cases.

Matter of Scellen v Assessor For City of Glens Falls, ___AD2d___ [Dec 26, 2002]

Petitioner commences action challenging her 1998 real property tax assessment that was not settled until December 2000. Following settlement, petitioner seeks to have the reduced 1998 assessment applied to the 1999 and 2000 tax years pursuant to Real Property Tax Law §727 which freezes judicially determined assessments for the next three succeeding assessment rolls. Court says sorry because she failed to commence actions challenging the 1999 and 2000 assessed valuations while her 1998 proceeding was pending.

People v Horner, ___AD2d___ [Dec 19, 2002]

In a 3-2 decision the Court describes the type of proof necessary to establish the crime of possessing a sexual performance by a child (Penal Law §263.16).

Franzone v Quinn, ___AD2d___ [Dec. 19, 2002]

This case is a bar exam question. Defendant serves a non-party co-defendant with a summons and his answer, which contains a cross-claim. CPLR 3011 states that if no demand is made in the cross-claim, an answer is not required to be served. Co-defendant does not serve an answer. Defendant moves for a default judgment. Granted? Think about it. You will have to read the case because, now, some three months later, I forget the answer.

Smith v J.B.H., Inc., ___AD2d___ [Dec 19, 2002]

Why it is wise not to fall down within the jurisdiction of the Third Department. In my view, the dissent is correct.

Theoharis v Pengate Handling Systems of N.Y., ___AD2d___ [Dec. 19, 2002]

Reiterates the rule that there is no duty to warn a person who, through common knowledge or learning, is fully aware of a specific hazard. Moral: it pays to be a klutz.

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REPORT: THE SEARCH FOR MISSING WILLS

Since distribution of the November newsletter we have learned of the whereabouts of wills drafted by:

Mathias Poersch.

Thanks to:

Steve Kouray

We were also able to make someone *very* happy by reuniting her with her will drafted by Mario Pacelli

Keep those cards & letters coming in, folks!

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SCBA RECORDS AND ARCHIVES

The Association has been blessed with many years of dedicated volunteer leadership, with the archives and records handed on from one leader to the next—a system with immense potential for screwups. Now that we have an office—and staff!—we would like to consolidate all existing records, with the intent of establishing a more reliable system for maintaining and preserving them.

If your office has Association files—however old—please let Secretary Kathryn McCary know, and she will make arrangements to take them off your hands.

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NOTICES/ITEMS OF INTEREST

Melanie J. LaFond has joined the offices of **The Gordon Siegel Law Firm** as a litigation associate. A native of Glens Falls who attended school and has worked for several years in Florida, Ms. LaFond will focus her practice on commercial contract disputes, civil rights litigation, and construction law.

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The 2003 annual meeting of the **Federated Bar of the Fourth Judicial District** will be held in Montreal April 25 & 26.

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The **New York State Lawyer Assistance Program's Thirteenth Annual Spring Retreat** will be held at Silver Bay on Lake George May 16-18. In addition to the Commencement Dinner, Awards Dinner, Recovery meetings and 12-Step meetings, the event will include 7.5 CLE Credits relating to the legal and ethical implications of impairments and the practice of law. Contact Ray Lopez, 487-5685 or (800) 255-0569

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All SCBA members are invited to become members of the new **Capital District Chapter of the Federalist Society for Law and Public Policy**. The Federalist Society is a nationwide organization of legal professionals dedicated to promoting our nation's founding principles of individual liberty, limited government, and fidelity to the rule of law. For more information, contact Craig Mausler at cmausler@parole.state.ny.us, or Larry DeAngelus at ldeangelus@hrbclaw.com, or you can view the Society's website at www.fed-soc.org .

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The **Capital District Chapter of the Federalist Society for Law and Public Policy** also invites SCBA members to mark their calendars for two upcoming events. The Chapter's own event on May 28, 6pm at the Crowne Plaza in Albany will feature FEC Commissioner Brad Smith speaking on First Amendment rights and the new campaign finance legislation. The event is free, with a catered reception beginning at 5:30. In addition, this spring the Albany Law School chapter will be honoring John Faso with a distinguished service award. Details on that event to come. Please join us for these events.

LEGAL LORE

Contributed by J. David Burke

The Bar of Schenectady County is as old as that of Albany County, its lawyers practicing in the courts established under the Dutch regime as early as 1626. Immediately after the formation of Schenectady County in 1809, its bar was organized along with its county courts: the Court of Common Pleas, Court of General Sessions of the Peace (the criminal side of the Court of Common Pleas) and the Surrogates Court. In 1809, the judiciary consisted of Hon. Joseph C. Yates, Justice of the Supreme Court; Hon. Gerrit S. Vedder, Judge of the Court of Common Pleas; Hon. William J. Teller, Surrogate.

The Bar was never large, having only 12 members in 1830: Christopher Fonda, Joshua D. Harmon, Sammuel D. Jones, Archibald L. Linn, Alonzo C. Paige, Abraham Van Ingen, Edward Yates, Gilbert Yates, Joseph C. Yates, Henry Yates, Jr., John B. Duane and Jacob G. Fonda. By 1840, it had only grown to 18 members.

FROM: *History of the County of Schenectady, 1662 - 1885*, J. H. Munsell, ed., (New York, 1886)

BE A TEACHER FOR AN HOUR!

A cool volunteer opportunity is the Lawyer in the Classroom program, established to provide opportunities for students to interact with volunteer attorneys in a structured setting. On request from a local teacher, an attorney meets with a class for up to an hour to talk about some area or aspect of the law. For those who aren't child-phobic, this is a chance to share your love of the law with the next generation. In Schenectady, it operates under the aegis of the Law Day Committee, and Committee Chair Diane Herrmann is always looking for volunteers. She has recently had requests for lawyers to talk about civil rights, about children and the law, and about education law, but wants to hear from you regardless of your area of expertise. Fill out and send her the form below, at

The Law, Order & Justice Center
144 Barrett Street, Schenectady NY 12305
[Phone: 346-1281; Fax: 346-1311;
e-mail: dianeherrmann@hotmail.com]:

LAWYER IN THE CLASSROOM SIGN-UP FORM

Name: _____ Phone Number: _____
E-mail address: _____
I would be most comfortable speaking to students between ages _____ and _____
My areas of legal expertise/interest are: _____

To: Dianne Herrmann, The Law, Order & Justice Center, 144 Barrett Street, Schenectady, NY 12305/Phone: 346-1281; Fax: 346-1311;
e-mail: dianeherrmann@hotmail.com

INTERESTED IN GETTING INVOLVED?

To join an SCBA committee, contact:

Alternate Dispute Resolution–Jean Carney
Criminal Law–Paul Callahan
Estate & Elder Law–John Fantauzzi/Pam McDevitt
Law Day–Diane Herrmann
Matrimonial Law–Eric Tepper
Real Estate–Larry Naviasky
Trial Practice–John Massaroni
Pro Bono Matrimonial–J. David Burke

[addresses & numbers are in the SCBA directory–if you’ve mislaid your copy, call Kathryn McCary for a replacement]

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REMINDER

SEND US YOUR UPDATED INFORMATION FOR THE SCHECTADY COUNTY BAR ASSOCIATION MEMBERSHIP DIRECTORY USING THE FORM IN THIS NEWSLETTER. WE NEED IT NO LATER THAN MAY 22!

CLASSIFIED ADVERTISING

SPACE AVAILABLE

Reasonable office space for rent in prime location. Included are library services, conference room, copier, fax, reception, secretarial space and other amenities available. First or second floor available. Contact Richard M. Antokol, Esq., Antokol, Resiman & Coffin, 514 State Street, Schenectady, NY 12305 (518) 370-2500

Office Space available for two attorneys and two staff. 650 Franklin Street, Schenectady. Space includes parking and use of conference rooms, kitchen and reception areas, also may include telephone answering, Internet access and facsimile service. If interested, please contact Lewis Kaehler Bates & Angle LLP, 374-3344.

Office Space available for sole practitioner. 38 North Ferry Street, Schenectady. Space includes use of conference room and reception area. If interested please contact Phil Rodriguez, 346-7275

POSITION AVAILABLE

The City of Schenectady is considering adding an additional outside closing attorney for tax foreclosure properties. The rate available is \$250.00 per closing. Interested persons please should respond to the Law Department, Room 201, City Hall, Schenectady 12305 or contact Michael Brockbank at cityatty@nycap.rr.com

ADVERTISING IN SCBA PUBLICATIONS:

Advertising will be accepted for inclusion in the Schenectady County Bar Association Newsletter, Membership Directory, and other publications. Please contact Kathryn McCary at 377-6489 for information.

KEEP YOUR PROFESSIONAL COLLEAGUES POSTED

If

- % you have relocated
- % you or someone you know has received special recognition
- % your firm is involved in community based activities

and you would like your announcement placed in the *SCBA* newsletter, please drop us a line:

SCBA
c/o McCary & Huff, LLP
107 North Ballston Avenue
Scotia, NY 12302

so we can share the good news.

AT LAST!!!

The Schenectady County Bar Association **MEMBERSHIP DIRECTORY** for 2003 will be published in May. We'd like to include the most up-to-date, accurate information. Please take a moment to complete this form and mail or fax it to:

Arlene Williams
c/o McCary & Huff, LLP
107 North Ballston Avenue
Scotia, New York 12302
Fax: (518)-377-6521

[If the information in the 2000-2001 directory is generally accurate, you may e-mail change information to kathryn.mccary@verizon.net]

Name: _____

Firm Affiliation: _____

Preferred mailing address:

Telephone: _____ Fax: _____

E-Mail Address: _____ Year of Birth** _____

Year you started practicing law** _____

Practice Areas—Include up to three (you can be *reasonably* creative in naming practice areas):

Languages Spoken fluently: _____

The above is the only information that will be included in this directory, but we are interested in knowing what our members would like to have included in future directories. Please use the following space to tell us if there are additional types of information you think would be useful.

** Birth year information will NOT be included in the directory—it will be included in the member data base, to allow us to track eligibility for Life Member status; first year of practice information will be included in the data base to allow us to track 50-year practitioner status. I know some of you can't imagine ever achieving fifty years of practice, but time passes a lot quicker than you think!

Our 50-Year Honorees

At the General Membership meeting on April 17, we will honor three members of this Association who have been in practice for Fifty years or more. Here's a little information about these long-time colleagues.

KENNETH T. GIBBONS

Attorney Gibbons is a graduate of Siena College and Albany Law School; he was admitted to the bar in 1953; in October 1953, he formed a partnership with Pat McGivern, which opened a law office in Scotia; 1956, he formed a partnership with J. William Burke, which continued for over 40 years; 1960-61, member of the Glenville Town Council; 1962-63, Supervisor of the Town of Glenville and member of the Schenectady County Board of Supervisors; past president of the Schenectady County Bar Association.

RICHARD E. ROBERTS

Attorney Roberts is a graduate of Union College and Albany Law School; he was admitted to the bar in 1953; in 1954, he joined the firm of Wemple, Daly & Wemple; in 1955, he joined the firm of Miller, Beyerl & Higgins, which became the present day firm of Higgins, Roberts, Beyerl & Coan, P.C. in which he was the senior partner until his retirement in January 2003; Assistant County Attorney; Trustee of Union College from 1978 to 1994; Director of Sunnyview Hospital and Chairman of the Board of the Sunnyview Foundation; Trustee of Union Presbyterian Church.

EDWARD M. ZABIELSKI

Attorney Zabielski is a graduate of Siena College and Albany Law School; he was admitted to the bar in 1953; he became Law Secretary to Hon. Charles Hughes (1954-1967); Law Secretary to Hon. Guy A. Graves (1969-1986); Law Secretary to Hon. Robert E. Lynch, (1987-1990); Corporation Counsel City of Schenectady-1968; Member of the US Navy (submarine service) 1944-1946.

MINUTES –SCHENECTADY COUNTY BAR ASSOCIATION–MEMBERSHIP

REGULAR MEETING–January 16, 2003–12:00 p.m.–The Glen Sanders Mansion, Scotia, NY

The meeting was called to order by President J. David Burke at 12:20 p.m., 37 members of the Association being then present and constituting a quorum. The President welcomed the judges present, and special guest Assemblyman James Tedisco. Inviting the County's representatives in the State Legislature to the January meeting will be an annual event–Senator Farley sent regrets this year, and Assemblyman Tonko indicated he hoped to be able to attend.

President Burke also introduced Arlene Williams, the Association's recently hired Administrative Assistant.

MINUTES OF PRIOR MEETING

The minutes of the October 17, 2002 meeting were approved by general consent.

TREASURER'S REPORT

Treasurer Hoffman reported that we have approximately 260 members, of whom 210 are dues-paying members; of these, 155 have paid this year's dues. Second notices are going out in the near future.

The final accounting on Judge Levine's Retirement Dinner has not yet been completed, but it appears that there may be a small surplus.

The Association currently has \$19,700 in the checking account, and \$15,200 in savings

The report was accepted by general consent.

PRESIDENT'S REPORT

Judge Burke invited members to join the committee to organize the details of the United States Supreme Court admission ceremony scheduled for June 14, 2004. In order to be admitted to the USSC, a lawyer must have been in good standing for 3 or 4 years; up to 50 members of the Association can be admitted at the ceremony. We also need 2 sponsors who have already been admitted to the USSC.

The Court of Claims has initiated a pilot project requiring tort claims in the Albany District to be filed electronically, effective this month. Other State and Federal Courts are also moving towards electronic filing requirements.

OCA has instituted a 6-week residential program for minority & low-income/educationally disadvantaged law students; applications must be submitted by March 15.

President Burke noted that the most recent edition of the *State Bar News* included an article about Peter Coffey's *pro bono* representation of clients in foreclosure matters. Mr. Coffey rose to observe that he is only following the lead of the late Lillian Friedman, who believed that there should be a constitutional right to housing–indeed, she sponsored an annual scholarship for the Albany Law School student who wrote the best article about that right.

The purely social event being organized by the Honorable Vincent Versaci is expected to be held in early March, at the Parker Inn–invitations will be sent out.

COMMITTEE REPORTS

MEMBERSHIP COMMITTEE REPORT

The names of the following applicants were read for the first time; no objection being raised, their names were set over for a second reading at the April meeting:

Michele Mealy Fatone, who both lives and works in the County and is sponsored by Jennifer Assini; Christopher A. Guetti, who works in the County and is sponsored by Charles R. Harding; Rosemary T. Hoag who neither lives nor works in the County and is sponsored by Sandramarie Pemburn; Samuel N. Iroegbu who both lives and works in the County and is sponsored by Patricia Rodriguez; and L. John VanNorden who both lives and works in the County and is sponsored by Frank Parisi.

LEGAL AID COMMITTEE

The Honorable Dennis Englert reported that, since the Legal Aid Corporation of Schenectady County went out of business 15 years ago the Committee has been offering scholarships with its remaining monetary assets. The Committee has arranged to give the Schenectady County Community College the remaining \$43,800 for scholarships to be given in the names of Max and Betty Hershkowitz to poor and disadvantaged students. It is anticipated that the funds available will allow scholarships to be given through at least 2033.

FEDERATED BAR FOR THE FOURTH JUDICIAL DISTRICT

Nick Tishler announced that the annual meeting of the Federated Bar will be held in Montreal April 25-26. There will be CLE presentations by Judge Graffeo on the Court of Appeals, Robert Roche on attorney discipline and ethics, and Patrick Connors on the CPLR. The Canadian bench and bar are being invited to attend the cocktail hours, an opportunity to form alliances with Canadian practitioners. Judge Loyola rose to urge the membership to attend this event–it's a great time and a great program, and a good time to go to Montreal.

TRIAL PRACTICE COMMITTEE

Chair John Massaroni announced that there will be an emergency meeting of the committee next week. Anyone interested in joining should contact him. He also observed that Assemblyman Tedisco, while not always agreeing with the committee, has been willing to listen to the committee, which appreciates his open door policy.

REPORT OF THE MEMORIAL AND SUNSHINE COMMITTEE

Committee Chair Neil Moynihan offered the following resolution in memory of Morris Marshall Cohn, Esq. WHEREAS, Morris Marshall Cohn, a native Schenectadian, died on the 3rd day of October, 2002 at the age of 99 years; and

WHEREAS, he was valedictorian of his graduating class at Schenectady High School, at which he was also the captain of the track team; he subsequently graduated Phi Beta Kappa from Union College, Class of 1924, and Harvard Law School, three years later; in addition, he was the recipient of an honorary doctorate of law from his said alma mater, Union College; and

WHEREAS, he was a practicing attorney in the City of Schenectady over a span of more than 60 years, in partnership with his late brother, Myron J. Cohn; during which period of his professional life, he also served our community with competence and honor as Judge of the Police Court of the City of Schenectady and later as District Attorney for Schenectady County. Prior to his election as District Attorney, Morris Marshall Cohn, was a New York State Supreme Court Justice, having been appointed to said Court by former Governor Averill Harriman in 1955; and

WHEREAS, he was a 70 year member of Lodge 1174 F&AM in Schenectady, and a former board member of the United Jewish Federation of Northeast New York, as well as of Congregation Agudat Achim and several other professional and community organizations; and further

WHEREAS, Judge Cohn is survived by his wife of 59 years, Florence Wittlin Cohn; son, Lawrence of Maplewood, N.J.; and two daughters, Constance Cohn of Albuquerque, N.M. and Winifred Borden of Baltimore, M.D.; and five grandchildren, now, therefore, be it

RESOLVED, that the Schenectady County Bar Association on this occasion expresses its own sense of great loss, in the passing of its former member, the Honorable Morris Marshall Cohn, a man of distinction in both his private and professional life, and conveys its sympathy to his wife and children, and be it further

RESOLVED, that this Resolution be incorporated in the minutes of this meeting and recorded in the journal of proceedings, and a copy thereof be transmitted to Morris Marshall Cohn's wife and family,

Thereupon, on MOTION of Neil Moynihan, the Secretary was directed to cast one ballot in favor of the Resolution.

There being no additional business to come before the Membership, the meeting was adjourned at 12:50 p.m.

Respectfully submitted,

Kathryn McCary, Secretary

PRO BONO RESOURCES

Looking for a chance to uphold one of the profession's finest traditions—the provision of free legal advice and services to those who can't afford them? Whatever may have been true in the past, today's busy practitioner doesn't readily find, in daily life and practice, significant *pro bono publico* opportunities. That doesn't mean the opportunities aren't out there; the need is great, and it is a need only we are qualified to meet.

To make the search a little easier, future newsletters will provide information about area *pro bono* needs and programs, which we hope may spark your curiosity, engage your compassion, or at least fit your convenience.

THE PRO BONO MATRIMONIAL PROGRAM OF THE SCHENECTADY COUNTY BAR ASSOCIATION

Contact Person: J. David Burke—853-8102

Provides assistance in completing the papers and procedures to obtain a divorce, through two programs:

- % Volunteer attorneys agree to accept one case per year to represent an indigent litigant.
- % Biennial pro-se clinics, at which pro-se plaintiffs are guided through the divorce process.

This is our very own program; more volunteers are urgently needed. Call Dave to sign on.

LEGAL AID SOCIETY OF NORTHEASTERN NEW YORK

PRIVATE ATTORNEY INVOLVEMENT PROGRAM

Coordinator: Elena Rich—462-6765

Matches lawyers with clients in the following areas:

- Bankruptcy
- Consumer law
- Employment
- Education, including unemployment
- Family, including Custody, Support, Visitation, Separation and Divorce
- Health, including Health Care Proxies, Medicaid and Medicare
- Wills and Estates
- Real property issues including evictions and foreclosures
- SSI Benefits

The program is also interested in hearing from you if you have legal expertise in another area you are willing to share with those in need.

Services qualify for CLE credit (1 credit for 6 hours of service/you can accumulate up to 6 hours of credit through *pro bono* in each 2-year CLE cycle). Malpractice insurance coverage is provided, and out-of-pocket expenses are covered by the program. The program also offers training programs that qualify for CLE credit.

You can call Elena for information or a registration form; forms are also available through the SCBA office, call 377-6489 or e-mail kathryn.mccary@verizon.net.

CAPITAL DISTRICT WOMEN'S BAR ASSOCIATION

THE LEGAL PROJECT

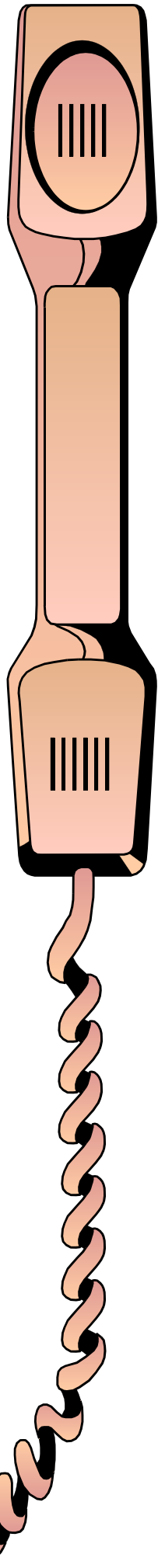
435-1770

Addresses the need for non-criminal legal assistance by providing innovative, cost effective services that are collaborative in nature and that focus on well-defined but unmet community needs. A unique aspect of The Legal Project is its provision of assistance to the working poor—those who don't qualify as indigent, but still can't afford to pay standard legal fees.

The Legal Project provides legal advice and information through a bi-weekly column in the *Times Union*, Project Helpline on the Channel 10 morning news, custom-designed workshops for community groups and organizations, and Legal Clinics at local community agencies.

The Legal Project provides legal representation through the following programs:

- The Domestic Violence Legal Connection
- Affordable Housing Attorney Assistance
- Bankruptcy and Credit Program
- Battered Immigrant Legal Assistance
- Civil Legal Services to Sexual Assault Survivors



CONTINUING LEGAL EDUCATION OPPORTUNITIES

THE SCHENECTADY COUNTY BAR ASSOCIATION

Topic: HIGHLIGHTS OF THE NEW NO-FAULT REGULATIONS
Date/Time: April 17, 2003, following meeting
Place: Glen Sanders Mansion
Presenter: Frank Putorti
Cost: Included in lunch cost of \$15
CLE Credits: 1 Areas of Practice

Topic: REAL ESTATE SEMINAR
Date/Time: May 14, 8:30 a.m.
Place: Glen Sanders Mansion
Presenters: David C. Mineo, John J. Privitera, Alan R. Ekstein, Steven Strichman, Anthony Popolizio, Michael Creaser, Edward J. Salvo, Jr., Mark D. Fleischer, Peter V. Coffey
Cost: \$75 Member/\$100 Non-Member
CLE Credits: 6 Skills, .5 Ethics
See Notice elsewhere in newsletter

ALBANY COUNTY BAR ASSOCIATION

Contact: Barbara Davis 445-7691 or acba@global 2000.net

Topic: UPDATE ON EVIDENCE
Date/Time: April 9, 2003 12:15
Place: Jack's Oyster House, Albany
Presenters: Michael Hutter
Cost: \$30 Member/\$40 Non-Member/\$20 Student
CLE Credits: 1 Skills

Topic: TRIAL TECHNIQUES & TACTICS—JURY SELECTION
Date/Time: May 9, 2003 12:15
Place: Jack's Oyster House, Albany
Presenters: Cynthia LeFave
Cost: \$30 Member/\$40 Non-Member/\$20 Student
CLE Credits: 1 Professional Practice

Topic: HOW TO KEEP YOUR CLIENT HAPPY
Date/Time: June 11, 2003 12:5
Place: Albany Law School
Presenters: TBA
Cost: \$60 Member/\$75 Non-Member/\$25 Student
CLE Credits: 1.5 Skills/1.5 Ethics

Schenectady County Bar Association
c/o McCary & Huff, LLP
107 North Ballston Avenue
Scotia, NY 12302



Come on in—You will find:
■ An Introduction to our new Administrative Assistant
■ Information about *pro bono* resources
■ Profiles of this year's 50-Year Practitioner Honorees

See you at lunch, April 17!

“Attorneys are the people who can say things in the mildest of tones that make you want to shriek and rend your clothes. Like doctors, they seem to feel obliged to acquaint you with the full extent of the horror you could face, given the current path your life is on.”

Kinsey Milhone, in Sue Grafton's *E is for Evidence*