
SCHENECTADY COUNTY BAR ASSOCIATION, INC.

NEWSLETTER

April 2004

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Secretary/Newsletter/Membership: 377-6489

CALENDAR OF EVENTS

April 15, 2004	SCBA Meeting, 12:00 p.m.
April 30, 2004	Law Day
April 30-May 2	Federated Bar Annual Meeting
May 20	SCBA Real Estate Seminar 8:00-4:00, Glen Sanders Mansion
June 17, 2004	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

John R. Seebold
Hon. Karen Drago
Robert W. Hoffman
Kathryn McCary

BOARD MEMBERS

Hon. Jo Anne Assini
J. David Burke
Eleanor M. DeCoursey
Diane Enzinna
Brian Ferrucci
Frank Parisi



NOTE INCLUSIONS IN THIS ISSUE

- Real Estate Seminar Registration Form
- A new HIPAA compliant authorization form
- Federated Bar Annual Meeting Registration Form

L NEXT MEETING **7**

APRIL 15, 12:00 P.M.

*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

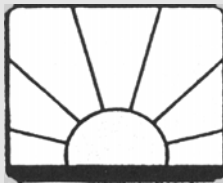
John R. Seebold

Happy Spring! As you know, our bar association is an active participant in the National Law Day Program. The theme this year is *To Win Equality By Law: Brown v. Board at 50*. Our program will be held on April 30, 2004 at Union College. The program will kick off at 9:00 am with an INS Naturalization Ceremony and will continue throughout the morning. We anticipate there will be one hundred twenty-five middle school students in attendance.

Starting on April 26, 2004 and leading up to Law Day, there will be public outreach tables set up at various locations in the community for our attorneys to provide free legal advice. Please contact Diane Herrmann, Law Day Committee Chair, or myself for more details or to sign up to participate in any part of the program.

Each year, in honor of Law Day, Jay L. T. Breakstone, Esq. publishes in his weekly newsletter *I Am The Lawyer* by Louis Lande. It is a salute to our wonderful profession, and I offer it as well.

I Am The Lawyer



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

I am the Lawyer.

I displaced brute force with Mercy, Justice and Equity.

I taught Mankind to respect the rights of others to their property, to their personal liberty, to freedom of conscience, to free speech and free assembly.

I am the spokesman of every religious cause.

I plead for the poor, the persecuted, the widow and the orphan.

I maintain honor in the marketplace.

I am the champion of unpopular causes.

I am the foe of tyranny, oppression and bureaucracy.

I prepared the way for the Ten Commandments.

I pleaded for the freedom of the slave in Greece and for the captive in Rome.

I fought the Stamp Act.

I wrote the Declaration of Independence and the Rights of Man.

I defended the slave. I was an abolitionist. I signed the Emancipation Proclamation.

In every land and in every clime, I punish the wicked, protect the innocent, raise up the lowly, oppose brutality and injustice.

I fought in every war for Liberty.

I stand in the way of public clamor and the tyranny of the majority.

I speak for the rich man when prejudice prevents him from getting Justice, and I insist that the poor man be accorded all his rights and privileges.

I seek the equality of mankind, regardless of color, caste, sex or religion.

I am for the Parliament of Man and for the abolition of all wars.

I hate fraud, deceit and trickery.

I am forbidden to serve two masters or to compromise with injustice.

I am the conservatist of the past, the liberal of the present, and the radical of the future.

I believe in convention, but I cut the Gordian Knot of formalism and red tape to do Justice and Equity.

I am the leader of Mankind in every crisis.

I am the scapegoat of the world.

I hold the rights of Mankind in the hollow of my hand, but am unable to obtain recognition on my own.

I am the pioneer, but I am the last to renounce the past and to overturn the present.

I am the just judge and the righteous ruler.
 I hear before I condemn.
 I seek the best in everything.
Louis Lande

Respectfully,
John Seebold

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FROM THE COMMITTEES.

ALTERNATE DISPUTE RESOLUTION There will be a meeting of the Committee on May 6 at 12:15 at Scotti's Restaurant on Upper Union Street in Schenectady. For more information call Chair Jean Carney, 872-9023

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

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ESTATE & ELDER LAW The Committee is taking a brief rest, now that the seminar is over. For information about the Committee, call Co-Chairs Pam McDevitt, 370-4743 or Gerard Parisi, 377-9096.

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LAW DAY: Law Day this program year will be April 30, 2004. For information about the Committee, contact Chair Diane Herrmann, by calling 377-6731 or e-mailing to dianeherrmannesq@yahoo.com

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MATRIMONIAL LAW: For information about the Committee, call Chair Eric Tepper, 399-5400

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REAL ESTATE The Committee hopes all will attend the upcoming seminar (details elsewhere in this newsletter). For information about the Committee, contact Chair Larry Naviasky, at 374-7779 or pottnav_larry@global2000.net.

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TRIAL PRACTICES: There will be a meeting of the Committee at 5:00 p.m. at the offices of Capasso & Massaroni, LLP, 215 State Street, Schenectady. All are welcome—light refreshments provided For information about the Committee, contact Chair John Massaroni, 374-1800.

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YOU BE THE JUDGE

J. David Burke

At 12:30 a.m. Deputy Alert noticed a vehicle in the parking lot of a college residence hall. About 30 minutes later in another part of town Alert observed the same vehicle speeding. She pulled the vehicle over, asking the driver, Leadfoot, about an odor of burning

marihuana. Leadfoot admitted to having smoked half a joint 30 minutes before at the residence hall. When asked with whom he had been smoking, Leadfoot identified defendant by name. In response to a question as to whether he could pay a fine, Leadfoot showed Alert a \$100 bill, but admitted he had no job and offered no explanation how he obtained the cash. Suspecting that Leadfoot had sold marihuana to the defendant, Alert returned to the residence hall, contacted the resident director who confirmed that defendant lived there. At Alert's request, the director admitted her to the locked residence hall and escorted her to the door of the suite where defendant lived with several other students. When Alert knocked, a voice from within said "come in," whereupon Alert and the director entered the suite. Defendant met Alert in the suite's hallway and agreed to talk to her. When she told him about her encounter with Leadfoot, defendant became nervous and admitted to possessing a number of ecstasy pills, which he gave to Alert. He then agreed to speak further with Alert in his bedroom. During the conversation Alert asked him if there was something else she should know about. At that point, defendant grabbed a box, ran out of the bedroom and down the hall where, when he was seized by a second police officer, a 33-ounce brick of cocaine fell from the box he was carrying. Defendant moves to suppress the evidence seized from him.

In deciding how the motion should be decided, consider:

Whether Alert had the authority to enter the residence hall and knock on the door of the suite at night to investigate possible criminal activity?

Whether Alert had the authority to enter the suite?

The answer will appear in the June newsletter

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RECENT DECISIONS

J. David Burke

MetLife Auto & Home v Joe Basil Chevrolet, ___NY3d___ [Feb. 24, 2004]

Fire starts in a Chevy truck owned by JB that was parked in MB's garage, destroying MB's house. Plaintiff, MB's homeowners' insurance carrier, pays MB's claim and is subrogated to his rights. Meanwhile Royal, JB's insurance carrier, takes possession of the car and disposes of it, thereby preventing any opportunity to inspect it. Thereafter, plaintiff brings action against Chevrolet for negligence, breach of warranty and strict liability against Chevrolet and against Royal for negligent spoliation of evidence and impairment of a claim or defense. Court dismisses

action against Royal, declining to recognize such a cause of action brought against a third party.

Matter of Alijah C., ___NY3d___ [Feb 19, 2004]

Holds that a deceased child may be the subject of an abuse petition under Family Court Act article 10 because, if not, the surviving children will not have the protection afforded by Social Service Law §384-b under which a parent's rights may be terminated based on "repeated abuse" if he or she abuses a surviving child within five years of the deceased child's death.

Collier v Zambito, ___NY3d___ [Feb. 17, 2004]

Affirms the 188 year old rule that an owner of a domestic animal cannot be held liable for the harm the animal causes unless he or she either knows or should have known of the animal's vicious propensities. In this case the fact the dog was confined to the kitchen area, behind a gate, when visitors came because it would bark was not sufficient evidence to raise a triable issue of fact as to whether it had vicious propensities. My 14 pound dog exults along with my home owner's insurance carrier.

Matter of K.L., ___NY3d___ [Feb. 17, 2004]

Sustains Kendra's Law (Mental Hygiene Law § 9.60) against due process and equal protection challenges. Have you noticed that if something bad happens to you, you get a law named after you? Hopefully, there is never a Dave's Law.

Longwood Cent. School Dist. v Springs Union Free School Dist., ___NY3d___ [Feb 17, 2004]

I only include this case because it equates the term "residence" with domicile, which is not what Professor Andrews taught, i.e. "You can have many residences but only one domicile." Too bad Court of Appeals, you are wrong.

[Note from the Editor, whose practice emphasizes school law: the issue in this case was the meaning of the term residence for school attendance purposes, and the Court's holding reaffirms the long-standing interpretation of the applicable statutory language, which since at least 1947 has referred to the district in which the student "resides." The underlying problem is the legislature's tendency to be kind of sloppy with its language.]

Aspro Mechanical Contr. v Fleet Bank, ___NY3d___ [Feb. 12, 2004]

Contractor obtains contract from City, obtains construction loan from Fleet Bank, assigns contract to Fleet, City pays Fleet which applies these sums to pay off its construction loan, subcontractors sue Fleet to recover Lien Law Article 3-A trust funds, claiming Fleet diverted trust funds by paying itself prior to paying their claims. Court held that because Fleet had

not filed a "Notice of Lending" (Lien Law §73) or had otherwise notified the trust beneficiaries of its position, the payment of the trust assets to itself constituted a breach of its fiduciary duty.

Blake v Neighborhood Housing Services of N.Y.C., ___NY3d___ [Dec. 23, 2003]

In this Labor Law §240(1) case the Court reaffirmed *Weininger v Hagedorn & Co.*, (91 NY3d 958) by holding that a defendant is not liable where there is no evidence that the accident was caused by the absence of (or defect in) any safety device, or in the way the safety device was placed and the proof reveals that the plaintiff's own negligence was the sole proximate cause of the accident.

People v Johnson, ___NY3d___ [Dec 22, 2003]

Following defendant's arrest for driving with a suspended license, the police, suspecting there might be something illegal in the glove compartment, opened it and found a handgun. Police said search of glove compartment was undertaken pursuant to an inventory search. The Court said no because the search was not conducted pursuant to an established procedure clearly limiting the conduct of individual officers that assures that such searches are carried out consistently and reasonably.

Matter of Losurdo v Asbestos Free, Inc., ___NY3d___ [Dec 22, 2003]

Matter of Rodriguez v Burn-Brite Metals Co., ___NY3d___ [Dec 22, 2003]

If you make a false statement to obtain workers' comp benefits and you are caught, under Workers' Compensation Law §114-a (1), your wage replacement benefits can be cut off but not your medical benefits. Any questions, ask Ray Seligman.

Matter of Gabrielle HH., ___NY3d___ [Dec. 18, 2003]

In a proceeding to terminate parental rights on the ground of abandonment, a showing of diligent efforts by the authorized agency to encourage and strengthen the parent-child relationship is not required.

People v Biggs, ___NY3d___ [Dec. 2, 2003]

Court dismissed count of intentional murder in the second degree and submitted two counts of second degree depraved indifference murder and two counts of second degree manslaughter to jury. Defendant was acquitted of the murder charges, but the jury was unable to reach a verdict on the manslaughter charges. Thereafter defendant indicted for two counts of manslaughter in the first degree and two counts of manslaughter in the second degree. Court dismisses the

first degree manslaughter counts since, for double jeopardy purposes, intentional murder in the second degree and manslaughter in the first degree are considered the same offense since, if the second degree murder charge is proven, no additional facts must be shown to establish first degree manslaughter.

People v Pichardo, ___NY3d___ [Dec 2, 2003]

When a guilty plea is induced by the court's explicit promise that the defendant will receive a lesser sentence to run concurrently with a sentence in another case, and that conviction is overturned, the defendant may withdraw his or her plea and face the indictment, since the promise cannot be kept.

People v Coleman, ___AD3d___ [Feb 26, 2004]

Points out that a District Attorney is under no obligation to charge a grand jury as to every conceivable defense suggested by the evidence; instead he or she must charge only those defenses that the evidence will reasonably support.

Miller v Miller, ___AD3d___ [Feb 26, 2004]

Where parties agreed from the outset not to treat their marriage as an economic partnership, pursuing their own careers and interests during the marriage, the Court held that, in the absence of proof of indirect contributions facilitating the titled spouse's role regarding separate investment properties, such properties, under these unique circumstances, should be treated as separate property.

Wade-Keszey v Town of Niskayuna, ___AD3d___ [Feb 26, 2004]

Plaintiff hit by foul ball while walking along first base line on her way to a restroom. Court finds that defendant did not owe her a duty of care since ballpark owners are not required to install protective screening to shield spectators on their way to bathrooms, concession stands and parking lots.

Matter of Dates v Mundt, ___AD3d___ [Feb 19, 2004]

Points out that a written order must conform strictly to the court's decision and where there is a conflict between the two, the decision controls.

Matter of Shane B., ___AD3d___ [Feb 19, 2004]

Kid admits allegations of a juvenile delinquency petition that did not contain non-hearsay allegations establishing every element of the crime charged and the respondent's commission thereof. Petition dismissed. Because facial insufficiency of a juvenile delinquency

petition is a non-waivable jurisdictional defect, an objection to the petition can be raised the first time on appeal and admissions of guilt do preclude such a challenge.

Cavanaugh v Russell Sage College, ___AD3d___ [Feb 19, 2004]

File under don't trust your luck. In August 2000, defendant files discovery demands followed by repeated requests for a response which went unanswered. Obtains a 60 day conditional order of preclusion in May 2002 plus a scheduling order directing that all discovery be completed by July 17, 2002. No response, CPLR 3126 motion, Special Term precludes plaintiff from offering any evidence at trial. Affirmed, the two year period of non-compliance gives rise to an inference of willful and contumacious conduct.

Russell v Tejada, ___AD3d___ [Feb 19, 2004]

Reminder. Absent a stay, parties are obligated to obey a court's order until it is vacated or reversed.

Morin v Machnick Bldrs., ___AD3d___ [Feb 19, 2004]

To come within the holding of *Blake v Neighborhood Hous. Servs. of N.Y. City* (1 NY3d 280), a defendant cannot rely on the fact plaintiff was contributorily negligent. Instead, for example, it must be shown that the plaintiff misused the safety device. The trick is to differentiate between contributory negligence and misuse.

People v Hasslinger, ___AD3d___ [Feb 5, 2004]

Defendant obtains power of attorney and steals over \$1 million from an elderly women by liquidating all of her stocks and bonds. Convicted of security fraud in violation of General Business Law §352-c (6). Court reversed since defendant did not engage in a securities transaction with intent to deceive or defraud the investing public.

Prowse v State of New York, ___AD3d___ [Feb 5, 2004]

In the event you are ever denied unemployment insurance benefits, you cant appeal to the Court of Claims. This one's for you Jack.

Matter of Brower, ___AD2d___ [Feb 5, 2004]

A will executed in another state can be admitted to probate in New York if it is in writing and signed by the testator and otherwise executed and attested in accordance with the law of New York or the state where it was executed.

Precision Foundations v Ives, ___AD3d___ [Feb 5, 2004]

General Business Law §771 requires that all home improvement contracts be in writing and signed by both parties. Absent such a writing, the plaintiff is relegated to a *quantum meruit* cause of action.

People v Malone, ___AD3d___ [Jan 29, 2004]

This case holds that aggravated criminal contempt may not serve as the predicate for a conviction of assault in the second degree under Penal Law § 120.05(6) because otherwise every aggravated criminal contempt would also constitute assault in the second degree.

Matter of Emmett v Town of Edmeston, ___AD3d___ [Jan 29, 2004]

In a zoning matter, petitioner sues Town but not the Zoning Board of Appeals. Attempts to avoid dismissal for failure to join a necessary party by invoking the "relation back" doctrine embodied in CPLR 203(b). Court says sorry, the Town and ZBA are not united in interest.

Benfer v Sachs, ___AD3d___ [Jan 22, 2004]

Medical malpractice action against orthopedic surgeon who claims plaintiff's expert, an orthopedic surgeon, was unqualified to offer an opinion because he did not have the same specialty. Court disagreed, holding there is no requirement that an expert have the same specialty as the defendant in order to opine about the applicable standard of care.

Matter of Casey VV., ___AD3d___ [Jan 22, 2004]

Although Family Court Act §779 does not specifically require a separate dispositional hearing upon a finding of a violation of probation, the parties should be given an opportunity to present evidence relevant to a proper disposition in order to comply with the requirements of due process.

Matter of Leach, ___AD3d___ [Jan 22, 2004]

When an attorney drafts a will and supervises its execution, a presumption of regularity is raised that the will was properly executed. Also, a self-executing affidavit by the attesting witnesses to the will creates a presumption that the will was duly executed and constitutes prima facie evidence of the facts therein attested to by the witnesses. In addition, such an affidavit creates a presumption of testamentary capacity.

Matter of Castell v City of Saratoga Springs, ___AD3d___ [Jan 22, 2004]

A default judgment in a CPLR article 78 proceeding to annul a determination of an administrative body should be vacated unless it appears that the failure to answer was intentional and the administrative body has no intention to have the controversy determined on the merits.

Doyle v Rondout Valley Central School Dist., ___AD3d___ [Jan 15, 2004]

Court raises issue as to whether the reasonable suspicion or the probable cause standard should be applied in cases where the police and school officials combine to conduct a search of a student and doesn't answer it. I suppose one might ask why you raised it if you weren't going to answer it.

Thruway Enterprises v O'Connell & Aronowitz, ___AD3d___ [Jan 15, 2004]

Read to see how \$1,928,742 in damages, plus interest and costs can evaporate.

Matter of Maine-Endwell Teacher's Assn. v Board of Education ___AD3d___ [Jan 15, 2004]

Collective bargaining agreement provides that, upon

written request, teachers could receive up to three paid days for religious observance. Majority holds that provision is not violative of the Establishment Clause because it does not impermissibly advance religion by coercing members of the union to profess a religious belief. Dissent contends it is violative because it grants three extra days of paid leave only to those employees who are religiously observant.

Matter of Orsi v Board of Appeals, ___AD3d___ [Jan 15, 2004]

Matter of Evans v Town of Greenfield ZBA, ___AD3d___ [Jan 15, 2004]

Cases point out that, absent bad faith or detrimental reliance, the Court applies the law as it exists at the time of its decision. This happens mostly in zoning matters where the zoning law is changed before the appeal is heard.

Shields v General Electric Co., ___AD3d___ [Jan 15, 2004]

Plaintiff injured as he was fabricating duct work some 100 yards distant from the building under construction. Court held that Labor Law §241(6) applied since the lack of proximity between the place of the accident and the precise location of the construction is not dispositive against Labor Law liability. The relevant question is whether the work was an integral part of the construction project.

Johnson v Grant, ___AD3d___ [Jan 15, 2004]

Practice Point: Failure to object to a refusal of Court to give a charge results in a waiver of the right to challenge the charge on appeal unless the appellate court invokes its “interest of justice” power. Not often done however, so let the objections fly.

People v Ortiz, ___AD3d___ [Jan 8, 2004]

While a defendant must be given Miranda warnings, there is no rule requiring that such warnings be read to a suspect; the only requirement is that effective means be employed to notify an individual of his or her rights. Watch Law & Order for examples.

Skiff-Murray v Murray, ___AD3d___ [Jan 8, 2004]

Where it appears that an attorney’s testimony is necessary and he or she ought to be called as a witness, the advocate-witness rule requires the attorney to withdraw from pending litigation.

Morrow v Ashley, ___AD3d___ [Jan 8, 2004]

Even though an owner of a single family residence is shielded from liability under Labor Law §240(1), he or she may be liable under common law negligence if

he or she has actual or constructive knowledge of an unsafe condition that causes an accident.

Matter of Ayco Co. [Walton], ___AD3d___ [Jan 8, 2004]

Note to you business types when dealing with contracts containing arbitration agreements. The Federal Arbitration Act governs any contract, including employment contracts and partnership agreements that involve interstate commerce.

People v Boyce, ___AD3d___ [Dec 31, 2003]

Unless a defendant moves to withdraw his or her plea or to vacate the judgment of conviction, a challenge to the voluntariness of the plea is not preserved for appellate review.

People v Grose, ___AD3d___ [Dec 31, 2003]

Because post-release supervision is a direct consequence of a guilty plea, the failure to advise a defendant of such consequence prior to entering a guilty plea mandates that he or she be afforded the opportunity to withdraw such plea.

People v O’Brien, ___AD3d___ [Dec 31, 2003]

Because society recognizes as reasonable an expectation of privacy in a computer located in an individual’s bedroom, such individual has standing to contest the seizure of the computer.

Matter of Morrow v Morrow, ___AD3d___ [Dec 31, 2003]

Parties enter into agreement with respect to custody and then subsequently file custody petitions in Family Court. Because there was no prior custody order in effect, the “sufficient change of circumstances” analysis did not apply and Family Court properly treated the matter as a *de novo* custody determination.

Smith v Delago, ___AD3d___ [Dec 31, 2003]

Plaintiff makes complaint to Department of Health (DOH) about the medical care he received. Thereafter, in response to a FOIL request plaintiff acquired documents generated as a result of DOH’s investigation. Because the documents made available to DOH were generated in furtherance of the hospital’s internal quality assurance review obligations under Public Health Law Article 28, they were privileged and thus could not be used by plaintiff in his medical malpractice action.

Relyea v Relyea, ___AD3d___ [Dec 24, 2003]

Plaintiff left marital residence in 1997 at his wife’s request and commenced divorce action based on constructive abandonment in 1998. Divorce denied.

While plaintiff testified that he once requested the resumption of conjugal relations with defendant, his failure to prove repeated requests for resumption of marital relations was fatal to his claim of constructive abandonment.

Matter of Dyer v Indium Corp. of America, ___AD3d___ [Dec 24, 2003] A shareholder has a common law right to inspect the books and records of a corporation so long as the inspection is sought in good faith and for a proper purpose.

Matter of McKee v Commissioner of Taxation & Finance, ___AD3d___ [Dec 18, 2003]

Good try. To prove they paid their income tax petitioners submitted a photocopy of the front of one check and the back of another. Need I tell you the result?

Aldrich v Sampier, ___AD3d___ [Dec 18, 2003]

General Municipal Law §205-e gives a police officer injured in the line of duty a right of recovery against any person whose act in failing to comply with a statute, ordinance or other governmental regulation directly or indirectly caused the cop's injury. What is noteworthy is that defendant's act does not have to be the proximate cause of the injury but only requires a practical or reasonable connection between the statutory or regulatory violation and the injury. Here, cop on road patrol sees defendant whizzing by in the opposite direction, makes a careless u-turn, gets rammed by another car and is injured. Defendant liable because there was an indirect connection between his speeding violation and the cop's injury. Also, comparative fault is not a defense under this statute.

Moffit v Murray, ___AD3d___ [Dec 18, 2003]

Once a plaintiff establishes a "serious injury" under Insurance Law §5102(d), he or she is entitled to recover any damages proximately caused by the accident.

Durham v New York East Travel, ___AD3d___ [Dec 18, 2003]

Another "serious injury" case. Once an injury has been established by objective medical evidence, like an MRI, CT scan or X ray, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury. Conversely, a finding of reduced range of motion is insufficient to support a finding of serious injury where there is no independent objective medical evidence of an injury.

Trudeau v Cooke, ___AD3d___ [Dec 18, 2003]

Standing alone a DWI conviction does not open the door for punitive damages. Instead, the circumstances surrounding the violation must be examined.

Wells v British American Development Corp. ___AD3d___ [Dec 18, 2003]

Even if plaintiff establishes a violation of Labor Law § 241(6) summary judgment is not warranted because the violation only amounts to some evidence of negligence.

People v Arnold, ___AD3d___ [Dec 11, 2003]

Defendant contends that the evidence was legally insufficient to sustain his conviction of DWI because his BAC was exactly 10%. Court disagreed, stating that the BAC reading along with evidence of one or more of defendant's deportment, speech, stability and breath odor is sufficient to sustain a conviction.

Matter of Rodken, ___AD3d___ [Dec 11, 2003]

Reminder that in a Surrogate's Court proceeding, an attorney may be compensated from estate funds only for services that benefit the estate.

Lemoine v Cornell Univ., ___AD3d___ [Dec 11, 2003]

Plaintiff signs up for a basic rock climbing course offered by Cornell, Signs a release holding Cornell harmless, including for injuries caused by its own negligence. Plaintiff promptly falls off climbing wall and, after getting up, sues Cornell contending the release is void as against public policy under General Obligations Law §5-326. Court says application of statute depends on whether Cornell is a recreational facility or a place of instruction and training. Court concluded that it fell into the latter category and thus outside the scope of the statute.

Tatko v Sheldon Slate Products Co., ___AD3d___ [Dec 11, 2003]

Case is an example of how you can waive your rights when your failure to act evinces an intent not to claim those rights.

Kappes v Cohoes Bowling Arena, ___AD3d___ [Dec 11, 2003]

Defendant's employee drags a lane oiling machine across the approach area of plaintiff's lane. Need I go on? Anyway, in the absence of any other possible cause

of the slippery condition, Court sustains complaint, finding there was a question of fact as to whether defendant created the condition. As an aside one of my proudest accomplishments is that I have never bowled a day in my life and, if God is good, I shall never have to.

Farhadi-Jou v State of New York, ___AD3d___ [Dec 11, 2003]

Remember there is no appeal from a default judgment; the only remedy is to move to vacate default, then if that motion is denied appeal the order denying the motion.

Fortin v Hill & Markes, Inc., ___AD3d___ [Dec 4, 2003]

One day before the expiration of the Statute of Limitations, plaintiff commences action against defendant which serves an answer containing only general denials. Thereafter, defendant moves to amend answer to assert a counterclaim that was barred by the statute of limitations. Motion denied, because defendant's answer consisted only of general denials, the counterclaim cannot relate back to it under CPLR 203(f) since the general denials did not give notice of the facts underlying the counterclaim. However, because the counterclaim arose out of the same transaction that formed the basis of plaintiff's complaint, it was not barred to the extent defendant only sought recoupment.

Aaron v Aaron, ___AD3d___ [Dec 4, 2003]

Parties enter into a stipulation of settlement. Dispute arises. What procedure must be followed to enforce it? Until there has been an actual, unequivocal termination of the action by the execution of an express stipulation of discontinuance or by judgment effecting that result, enforcement can be sought by motion rather than a plenary action.

Trentini v Metropolitan Property & Cas. Ins. Co., ___AD3d___ [Dec 4, 2003]

Even though disabled vehicle's warning lights had been activated, plaintiff roared his snowmobile into it. Court ruled he was entitled to no-fault benefits because the parked vehicle was in "use or operation" because the operator's sole purpose in leaving the vehicle was to gain assistance to return and retrieve it as soon as possible rather than to permanently park it on the street for the night.

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APRIL CLE OPPORTUNITY— ETHICS UPDATE

Vince Capasso, a member of the Committee on Professional Standards for the Third Department, will do be the presenter for our one-hour *Ethics Update* CLE program following the April meeting. As always, it is not necessary to sign up in advance, and the program is free to those attending the luncheon. A great way to pick up one of those hard-to-get ethics credits, from a presenter as entertaining as he is knowledgeable.

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LAW DAY VOLUNTEERS NEEDED

Volunteers are needed to staff Law Day information tables:

- April 26, 11:00 a.m. - 2:00 p.m.
- April 27, 9:30 a.m.- 1:30 p.m.
- April 27, 5:00 p.m. - 7:30 p.m.
- April 28, 9:30 a.m. - 1:30 p.m.
- April 29, 5:00 p.m. - 7:30 p.m.

Each shift will be one to two hours long; locations are still being arranged. This is a good chance to interact with the public in a way that promotes a positive image of the profession!

There will be sign-up sheets at the Association luncheon meeting on April 15—but if you just can't wait (or want to be sure you get your preferred time), call Diane Enzinna at 388-4293 to volunteer.

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NEW HIPAA-COMPLIANT AUTHORIZATION FOR RELEASE OF RECORDS AVAILABLE

The New York State Office Of Court Administration has promulgated a new form, OCA Official Form 960, attorneys can use when requesting the release of medical information for litigation purposes. Form 960 has the blessing of a broad range of healthcare associations and lawyer groups, including the Health Care Association of New York, and the New York State Bar Association, as well as state regulatory agencies including the Department of Health. Although it is an official form, use of Form 960 is optional, not mandatory, although (given the broad consensus approving it) use of the form will help avoid wearying arguments about whether your release form is appropriate under HIPAA. A copy of the form and its instructions is included with this newsletter. It is also available as a fill-in .pdf document on the OCA website

at www.nycourts.gov/forms. Copies of the form and a covering memo from Michael Colodner of OCA will also be available at the April meeting.

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REPORT:

THE SEARCH FOR MISSING WILLS

We've had a couple of inquiries from people we were able to point in the right direction—and a couple where we had no answer to offer.

Does anyone know where wills drafted by **Louise Hea Smith** ended up? What about wills drafted by the attorneys of **Frankel & Frankel**, which used to be on Barrett street?

KEEP THOSE CARDS & LETTERS COMING IN!

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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

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
- you have special personal news

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.

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

Dana Boniewski has recently become a partner in **The Delorenzo Law Firm, LLP**. Ms. Boniewski received a BA from Wellso College in 1990, and a JD from Albany Law School in 2000. She was admitted to the bar in 2001. She has worked for the firm since 1993.

SCBA Members in the News (thanks to spotter John Seebold); **Robert Coughlin** is a member of the Special Committee to Review Attorney Fee Regulation formed by NYSBA President Thomas Levin under the leadership of A. Vincent Buzard (Rochester) and Steven C. Krane (NYC); **Nicholas Tishler** has been elected to the NYSBA House of Delegates, representing the Fourth Judicial District; **Cristine Cioffi**, in addition to her election as NYSBA VP for the Fourth Judicial District, has also been appointed to the Special Committee to Review the Annual Meeting formed by President Levin to identify ways to enhance the NYSBA annual meeting.

The Federation of Bar Associations of the Fourth Judicial District will hold its Annual Meeting in Montreal April 30 through May 2. Details can be found on the Registration form elsewhere in this newsletter.

The **New England Association of Drug Court Professionals** will hold its fourth annual conference, “Celebrating New England Drug Courts: Reclaiming Families and Restoring Communities,” with Keynote Speaker William C. Moyers, VP of External Affairs, Hazelden Foundation, on August 5-6, 2004. For information, contact NEADCP4@jointogether.org, or Roberta Leis (617) 437-1500.

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INTERESTED IN GETTING INVOLVED?

To join an SCBA committee, contact:
 Alternate Dispute Resolution—Jean Carney
 Criminal Law—Paul Callahan
 Estate & Elder Law—Pam McDevitt/Gerard Parisi
 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—which will be issued in mid-October.]

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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, Reisman & Coffin, 514 State Street, Schenectady, NY 12305 (518) 370-2500

HELP WANTED

ASSOCIATE ATTORNEY—Full time position immediately available with Jones Ferradino, 68 West Ave., Saratoga Springs. Attorney must have 2+ years experience. Work in general practice areas, including real estate closings, wills and estates, criminal, vehicle & traffic and general business law. Fax (580-0857) or email (sferradino@saratogalaw.com) resume to Stephanie W. Ferradino. Application deadline is April 15, 2004.

The Criminal Division, Oneida County Public Defender's office has an immediate vacancy for an attorney in the Appellate Section. Criminal law experience essential; excellent benefits package, with salary based on experience. Submit (with cover letter): Certificate of Good Standing from the Appellate Division of admission; Writing sample; 3 references, with addresses and telephone numbers; Copy of a valid driver's license; Complete resume listing all educations institutions attended including elementary schools, and all employers with addresses and telephone numbers, to Frank J. Nebush, Jr., Chief Public Defender, Oneida County Public Defender, Criminal Division, 250 Boehlert Center at Union Station, 321 Main Street, Utica, NY 13501.

**MINUTES
SCHENECTADY COUNTY BAR ASSOCIATION—MEMBERSHIP
REGULAR MEETING
JANUARY 15, 2004—12:00 P.M.—THE GLEN SANDERS MANSION, SCOTIA, NY**

The meeting was called to order by President Seebold at 12:25 p.m., 72 members of the Association being then present and constituting a quorum. The President welcomed the judges present. He also noted the presence of Assemblyman James Tedisco, and thanked Assemblyman Tedisco for all he does for the bar.

The President welcomed Deborah and Mike Mullaney, and Chip Gordon, and the family of the Honorable Vince Versaci.

MINUTES OF PRIOR MEETING

The minutes of the October 16, 2003 meeting were approved by General Consent.

TREASURER'S REPORT

Treasurer Hoffman distributed a written report, copy attached to the official copy of these minutes. The Treasurer's Report was accepted by general consent.

PRESIDENT'S REPORT

President Seebold noted that the Federated Bar annual meeting will be held April 30 through May 2 in Montreal—this meeting is always worth attending, and highly recommended.

The Mock Trial program this year is being headed by Judges Powers and Eidens. The kickoff dinner was held in December. Judge Powers reported that 5 schools are participating, one more than last year. He will be contacting attorneys about what nights they can act as judges; the response of the bar to participate has been excellent.

The President noted that the December holiday mixer was attended by 75 people and was well received. There are plans to do a spring social and a holiday mixer on a regular basis in future—suggestions for venues or themes are welcome.

At the suggestion of Richard Wickerham, the Board has approved the establishment of a local mentoring program, in the form of a lawyer-to-lawyer network, not just for younger attorneys.

Judge Lippman has sent a memo about proposed rule changes relating to judicial elections; comments from the Association are solicited.

President Seebold noted that the Honorable Dan Burns, together with Marsha Hordines of LOJ, would be doing a CLE presentation following the meeting for those interested in becoming Youth Court mentors in Niskayuna Town Court or Schenectady City Court.

SUPREME COURT ADMISSIONS TRIP

Dave Burke reminded the membership of the June 14 United States Supreme Court admissions ceremony; those wishing to participate need to respond soon, as the materials have to be in the mail by mid-April.

MEMORIAL AND SUNSHINE

Committee Chair Neil Moynihan offered the following resolution in memory of Arnold M. Gordon

WHEREAS, Arnold M. Gordon died at his residence in Niskayuna on October 29, 2003, *and*

WHEREAS, Arnold M. Gordon, son of the late Harold and Rose Gordon, was born October 5, 1917; a life long Schenectadian having graduated from Union College, class of 1938, where he had been captain of its swim team, and of Harvard Law School, class of 1941, the year of his admission as a member of the bar, *and*

WHEREAS, Arnold M. Gordon served his country honorably in World War II, as an Army Major, in the European Theater at D Day and in the Anti Aircraft Artillery Division, having been the recipient of the Bronze Star, *and*

WHEREAS, upon his return from the war, Arnold joined his father's law firm, along with the late Robert Siegel, with whom he continued a partnership of many years until Mr. Siegel's death; such legal partnership evolved into the current Gordon, Siegel Law Firm, with which Arnold continued his affiliation to the time of his death. As an active practitioner of more than 60 years, he became a noted trial attorney throughout the greater Capital Region and elsewhere; a lawyers' lawyer, his expertise and professional skills were held in high esteem by his colleagues of the bar, *and*

WHEREAS, he was an active member of several professional and community organizations; to wit: having served as past president of the Schenectady County Bar Association, and as a member of New York State Trial Lawyers, New York State and American Bar Associations; Arnie, was also a member of the Mohawk Golf Club, where he was an avid low handicap golfer, *and*

WHEREAS, he is survived by his wife of 61 years, Ruth Damery Gordon, his son, our member, Hon. Harold (Chip) Gordon, Kimberly Gordon, and his daughter Deborah Mullaney, wife of our member, Michael, *now therefore, be it*

RESOLVED, that the Schenectady County Bar Association records with deepest sorrow the death of its member ARNOLD M. GORDON, ESQ. and takes this occasion to note publicly the loss of an attorney who, in his professional, community and family life, exemplified integrity of the highest character, *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 ARNOLD M. GORDON'S wife, Ruth.

Romolo Versaci rose to observe that he retained many trials attorneys of national and international note, and was never satisfied with them, except Arnold Gordon, who was not only a good guy but a darn good lawyer. President Seebold noted that when he joined the Gordon, Siegel firm in July of 1993 the office he was to occupy was under construction, and he therefore shared an office with Arnold Gordon; Mr. Gordon was there everyday, and was always ready to meet, dissect a case an offer tips and tactics; “as a trial attorney, I am better because of him; he will be missed.”

Thereupon, on Motion of Chair Neil Moynihan, the Resolution was unanimously adopted

The Honorable Chip Gordon thanked the Association, and noted that his father was very proud to have been a member of the Association, and its President almost 35 years ago.

PRESENTATION OF THE YOUNG ATTORNEY AWARD

Judge Drago presented the award to the Honorable Vincent Versaci.

The award is given to recognize an attorney under the age of 35 who has demonstrated exceptional professionalism.

Vince Versaci is quite a guy, the son of Romolo and Eileen Versaci, husband of Tina, and father of two daughters, he would not be what he is without the rearing, support and love of his parents and wife.

A graduate of Albany Law School, practicing with the Schiocchetti and Associates law firm, he is also a part-time City Court judge, always there to ease the burden for both Judge Loyola and Judge Drago. He works hard in both capacities, to represent clients zealously and to give litigants their day in court.

He is very involved in the Vito Masi Center for Non-Violence, Inc.; he was a good friend of Vito, is on the Board of Directors, and has been legal counsel and a volunteer since 1995. He is also on the Board of Directors of the Bridge Center, a Commissioner for the Schenectady Planning Commission, a past member of this Associations’ Board of Directors, a past chair of the Association’s Law Day committee, and organized last year’s Spring Social event.

We are proud to honor him as Young Attorney of the year.

Judge Versaci noted that Judge Drago is a hard act to follow. He observed that he is flattered and honored by the award, and honored to be a member of such a high quality Bar Association. He thanked his mother, father and wife, who is always very supportive, and also thanked the members of the bench and bar in Schenectady County. He noted that being a young attorney isn’t easy—it is unbelievable how willing members of the Association are to help out and offer each other advice and support. He would like to feel he is continuing that tradition.

There being no additional business to come before the Membership, the meeting was adjourned at 12:55 p.m.

Respectfully submitted,

Kathryn McCary, Secretary

Our 50-Year Honorees

At the General Membership meeting on April 15, we will honor two members of this Association who have been in practice for Fifty years or more. Here's a little information about these long-time colleagues.

EARL M. BUCCI

Attorney Bucci received his Bachelor of Arts degree from Brown University in 1948, and his JD from New York University in 1954. Between college and law school, he spent three years working for the New York Times. He was admitted to the bar in 1954, at which time he moved to Schenectady and commenced practice as a sole practitioner. During his 50 years of practice he has been Chair of the committee on the Administration and Distribution of Decedents' Estates of the Real Property Probate and Trust Section of the American Bar Association, 1970-75; a member of the Executive Committee of the Trusts and Estate Section the New York State Bar Association. 1975-80; President of the Estate Planning Council of N.E.N.Y, 1982-3; and a member of the Character and Fitness Committee of the Appellate Division, Third Department since 1981.

WOLFGANG RIEMER

Attorney Riemer received his Bachelor of Arts degree from Union College in 1951, and his JD and LLB degrees *cum laude* from Albany Law School in 1954. He was admitted to the bar in 1954 and joined the partnership of Poersch & Sevits; he has been a sole practitioner throughout most of his 50 years of practice. He was a member of the County Board of Supervisors from 1957-1971, and was Chair of that Board for two years, as well as Real Property Tax attorney for Schenectady County for a period of 4 years. A delegate to the last New York State Constitutional Convention, he was also on the Board of Directors of Better Neighborhoods for 7 years, is a long-time member of the board of the Animal Protective Foundation, President of the Friedens United Church of Christ, former Chairman of the Board of Trustees for the federated Friedens-Emmanuel Church, and a member and former president of the Niskayuna Rotary Club.

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.

We hope the following opportunities 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 | Health, including Health Care Proxies, Medicaid and Medicare |
| Consumer law | Wills and Estates |
| Employment | Real property issues including evictions and foreclosures |
| Education, including unemployment | SSI Benefits |
| Family, including Custody, Support, Visitation, Separation and Divorce | |

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.

Legal Aid has also offers the **Children's Legal Project**, providing free civil legal representation for low-income children in Albany, Rensselaer, and Schenectady Counties; at this time these services are being provide in-house, but those interested in volunteering should let Elena know, in case there are cases the in-house attorney can't handle.

CAPITAL DISTRICT WOMEN'S BAR ASSOCIATION

THE LEGAL PROJECT

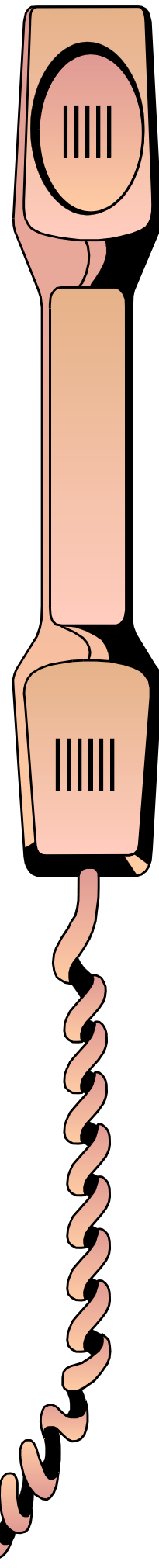
435-1770

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

SCHENECTADY COUNTY BAR ASSOCIATION

Topic: TWENTY-THIRD ANNUAL REAL ESTATE
SEMINAR
Date/Time: May 20, 2004
Place: Glen Sanders Mansion
Presenters: Various
Cost: \$75 SCBA Members/\$100 Non-Members
CLE Credits: 6.5 Areas of Practice/1Ethics
Contact: Larry Naviasky, 374-7779
SEE FLYER ELSEWHERE IN NEWSLETTER!

ALBANY COUNTY BAR ASSOCIATION

Contact: Barbara Davis 445-7691 or acba@global.2000.net
All programs include lunch

Topic: MEDIATION
Date/Time: April 15, 2004, 12:15 p.m.
Place: Albany Marriott
Presenters: Hon. Harold Hughes, Hon. Howard Levine
& Hon. Leonard WEISS
Cost: \$30 Members/\$35 Non-Members/\$20
Students
CLE Credits: 1 Skills

Topic: ADVANCED APPELLATE PRACTICE
Date/Time: April 19, 2004, 9:30 a.m.
Place: Temporary Appellate Division Courtroom,
Washington Avenue Extension
Presenter: Michael Novack, Clerk of the Third
Department

Topic: UPDATE ON EVIDENCE
Date/Time: April 28, 2004, 12:15 p.m.
Place: Jack's Oyster House
Presenters: Professor Michael Hutter
Cost: \$30 Members/\$35 Non-Members/\$20
Students
CLE Credits: 1 Skills

Topic: TRADEMARK & RELATED INTELLECTUAL
PROPERTY ISSUES FOR SMALL BUSINESSES
Date/Time: May 6, 2004, 12:15 p.m.
Place: Albany Marriott
Presenter: Sonya del Peral
Cost: \$30 Members/\$35 Non-Members/\$20
Students
CLE Credits: 1 Skills

Topic: CLE BY THE SEA
Date/Time: May 7-8, 2004
Place: Mohegan Sun Casino
Presenters: Various

Topic: HIPAA PRIVACY AND HEALTH CARE LAW
CONSIDERATIONS FOR THE NO-
HEALTHCARE LAWYER AND GENERAL
PRACTITIONER
Date/Time: June 10, 2004, 12:15
Place: Hudson Harbor Restaurant
Presenters: Hon. Nicholas Greisler and Julianne
Diamond
Cost: \$30 Members/\$35 Non-Members/\$20
Students
CLE Credits: 1.5 Skillss

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

Come on in—You will find:

- Information about our Fifty-Year Practitioners
- A poem about what it is to be a lawyer
- Dave Burke’s excellent features—Recent Decisions and You Be the Judge
- and more. . .

See you at lunch, April 15!

“The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.”

Mr. Justice David Davis, *Ex Parte Milligan*, 4 Wallace 2 (1866)