
SCHENECTADY COUNTY BAR ASSOCIATION, INC.

NEWSLETTER

August 2007

MAILING ADDRESS:

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Executive Director Diane Herrmann

dianeherrmannesq@yahoo.com

SCHENECTADY COUNTY BAR ASSOCIATION 2007-2008 OFFICERS

President

Robert Hoffman

Vice President

Sheila Ferrucci

Treasurer

Gerard Parisi

Secretary

Kathryn McCary

Executive Director

Diane Herrmann

Board Members

Michelle Wildgrube

Honorable Karen Drago

Laurence Naviasky

Roland Faulkner

Pamela McDevitt

John Seebold

J. David Burke

John Fantauzzi

Paul Callahan

Diane Herrmann-ex officio

SCHENECTADY COUNTY BAR ASSOCIATION MEETING SCHEDULE-2007-2008

Membership Meetings

12 noon

@ Glen Sanders Mansion

September 20 • November 15

January 17 • April 10 • June 19

Cost:

\$15 Members

\$20 Non Members or inactive Members

Please call 377-9096 to rsvp or email

schenectadybar@aol.com

September 20, 2007

Will Include a memorial for Kenneth Gibbons

Free One Hour CLE immediately following

Topic:

Immigration: Collateral Issues

Presenter:

Demostene Romanucci, Esq.

NEWSLETTER DEADLINES

If you have items to contribute for future newsletters please forward. Email attached

is the preferred method,

dianeherrmann@yahoo.com, or mail.

November Issue: October 15

January Issue: December 15



PRESIDENT'S MESSAGE

Dear Schenectady County Bar Association members,

Your 2007 – 2008 Officers and Board Members thank you for the opportunity to continue the work of our fine Bar Association this upcoming year. With our excellent substantive committees, CLE activities, community programs and social events, it will be another active year. As our first full year with an Executive Director, we are excited to see how we can improve and expand our programs for your benefit.

VOLUNTEER!

The SCBA has been able to respond to the changing needs and wants of our members over the years. We will continue that service, but we are still largely a volunteer association and depend on you all to let us know what you want from your Bar Association, and to help put our plans into action. No Director, Officer, Board Member or Chairman can accomplish anything alone.

CONNECT!

Much of what we do and much of what we accomplish is done because we stay connected with each other. We are establishing a Liaison committee to help us stay in touch with other Bar Associations, both local and state. We will shamelessly accept any help and advice we can get to better our programs and serve you. In this newsletter is a list of our committees and their Chairs, with contact information. Please get involved in as many committees as you can and help stay connected to each other.

SHARE!

The one aspect of the SCBA that has continuously impressed me over the years is the sum of the collective talent, wisdom, passion and leadership of our members. We have some of the best programs in New York wherein our members share their experience with the public and each other. Our members have always populated the upper echelons of the Judiciary, the New York State Bar Association and many other statewide organizations. And that is just the legal field!

COMMUNITY!

As a county wide organization, we have a lot of area to cover. As you look into the activities of our county's communities, you see our SCBA members everywhere! Elected officials, political activities, church leaders and volunteers, school committees, youth sports programs, op-ed writers, charitable organizations, and other activities too numerous to list. We utilize and share our experience to help build our communities. This is and should be a source of great pride for the SCBA. We hope to highlight some of these contributions in upcoming newsletters. (If you know of a SCBA member who is an active contributor to his or her community and you relish the opportunity to "expose" them, please let me know)

REENERGEIZE!

We all deserve to kick back once and a while and enjoy diversions from our often stress-filled days. As jurists, public servants and attorneys our jobs are filled with responsibility, and responsibility can accumulate to dangerously stressful levels. We hope to provide an occasional social event to help reduce those levels and recharge your batteries. We welcome new ideas for activities

So here we go into another year! We need your input and help to make it all work. Thank you in advance. Please, always feel free to contact any Officer or Board member to make suggestions to help make the SCBA an effective and positive contributor to your career.

Bob Hoffman, President

SCHENECTADY BAR ASSOCIATION COMMITTEES

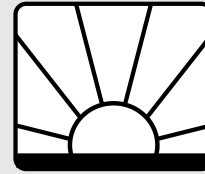
Please contact Chair of the Committee
to become involved in a committee

- **UNAUTHORIZED PRACTICE OF LAW ***NEW COMMITTEE** – Roland Faulkner
374-7731 • nysrnr@gmail.com
- **REAL ESTATE** – Laurence Naviasky • 374-7779 • Navlaw@nycap.rr.com
Larry DeAngelus • 374-3399 • ldeangelus@hrbclaw.com
- **Trial Lawyers** – John Massaroni • 374-1800 • jmassaroni@capmass.com
- **PRO BONO** – Barb King • 690-7000
- **SUNSHINE & AWARDS ***NEW COMMITTEE** If you know of a member
who is ill or could use a visit from a member please contact John to
coordinate • John Seebold – Fax 372-5071 • jseebold@capmass.com
- **SOCIAL, BENEFITS & ACTIVITIES**
- **PUBLIC RELATIONS** – Sheila Ferruci • 372-1500 • Litig8or@aol.com
- **FAMILY/MATRIMONIAL** – Eric Tepper, etepper@gtldlaw.com & Jenifer
Wharton jwharton@gtldlaw.com • 399-5400
- **ELDER LAW** – Kate Toombs • 465-7581 ktoombs@herzoglaw.com.
First Meeting 9/27/07 at 8:30am Contact Kate for location
- **CONTINUITY** – Mike Basile • 374-3399 • mbasile@hrbclaw.com
- **LAW DAY** – Diane Herrmann • 377-6731 • dianeherrmannesq@yahoo.com
- **CRIMINAL** – Paul Callahan • 895-2334 • callahanpm@aol.com
- **GRIEVANCE** – Dennis Englert • 370-4645
- **ALTERNATIVE DISPUTE RESOLUTION** – Jean Carney • 218-7100
jcarney@tulleylegal.com
- **LAWYERS ASSISTANCE**
- **JUDICIARY** – Hon. Vincent Reilly • 285-8422
- **MEMORIALS** – Neil Moynihan • 346-4291
- **BAR LIASON** – Pamela McDevitt • 487-5595 • pmcdevitt@nysba.org

FROM THE SOCIALCHAIR

In keeping with the mission statement of the Schenectady County Bar Association, "...to cherish the spirit of collegiality among its members," Social Committee Chair Sheila Ferrucci invites your suggestions. If you are interested in a Holiday Dinner/Dance and other regular activities, please contact her at 518-588-9973 (cell) or 518-372-1500 (office), Litig8or@aol.com or 835 Union Street, Schenectady, New York 12308.

LAWYERS ASSISTANCE PROJECT



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 or write:
Honorable Vincent Reilly
612 State St. Schenectady, NY 12301 • 285-8422

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privilege may be waived only by the person, firm or corporation who has furnished information to the committee.

CLASSIFIED ADVERTISING

Members may list office space and law related items for sale at no cost. Advertisements for law related goods or services from non members may be submitted and will be considered according to the bylaw guidelines.

Taxation law

- Member U.S. Tax Court
- Representation in tax matters State and Federal
- Offers in compromise/payment agreements

David L. Ganje Esq.
Ganje Law Office
Two Tower Place • Suite 4 • Albany • New York
12203
(518) 437-9000
Fax: (518) 437-9115

MEMBERSHIP NEWS

In order to make membership more affordable for attorneys just starting out the Board of Directors adopted new membership rates. Please encourage new attorneys to join our organization!

2007-2008 Dues

First Full Year of Bar Admission:	Free
Second Year to Fifth Year of Bar Admission:	\$55.00
Regular Dues:	\$110.00
Over Seventy Years of Age:	Free

Membership in the Schenectady County Bar Association is open to any person who is a member of the Bar of New York or any other State. Only attorneys who reside or have an office for the practice of law in Schenectady County may be voting members.

Membership applications can be obtained from:

Kathryn McCary
Membership Chair
PO Box 1728
Schenectady, NY 12301

Or contact, Diane Herrmann,
Executive Director at 393-4115
or schenectadybar@aol.com.

Applications are also available online at
schenectadybar.com

MEMBER ANNOUNCEMENTS

Roland Faulkner has been appointed to a newly formed Commission. Rollie will serve on the Third Department, State of New York, Independent Judicial Election Qualifications Commission. It is comprised of both attorneys and lay persons and will have wide ranging investigative powers. Its mission is to thoroughly examine the qualifications of candidates for all judicial offices who voluntarily agree to have the Committee make a determination as to qualifications.

Englert, Coffey & McHugh, LLP has now become
Englert, Coffey, McHugh & Fantauzzi, LLP
as of July 1, 2007

If you have news about a member, please forward information so we can include

CLE CALENDER

**Sept 20, 2007 1.0 hours,
Free immediately following luncheon
Immigration: Collateral Issues**

In the post-September 11 world, the Federal Government has devoted greater resources to locating and deporting immigrants who are illegally present in the United States. There are more grounds for deportation and fewer forms of relief. More and more non-citizens are being removed from the United States. The number of Federal prison inmates incarcerated for immigration offenses has risen nearly 400 percent between 1995 and 2003. Even a traffic stop can bring someone to the attention of Immigration. Immigration authorities are also actively seeking non-immigrants to deport, raiding both homes and work places. Once arrested and held in immigration detention there is often little possibility of bond. Those who are released on bond may be released on bonds as high as \$10,000.00. Once deported, as a practical matter the process is irreversible. This brief program will offer a brief outline of some of the things to look for to begin to understand the risks presented to the non-citizen client

**November 15, 2007 1.0 Hours, Free immediately
Following Meeting**

**Alternative Dispute Resolution Spectrum:
Arbitration to Mediation**

An overview of alternative dispute resolution will be provided. Come learn about the different methods and how each might benefit your practice and clients.

**TBA, Fall 2007
DWI, An Overview**

Presented by Paul Callahan, Michael Tiffany and moderated by Honorable Christine Clark

**TBA, Fall 2007
Family Law**

Presented by Kathleen Jennings additional speakers to be announced

Spring 2008

**March 13, 2008
Elder Law Seminar**

**May 22, 2008
Real Estate Seminar**

WILL REPOSITORY REQUEST

The bar association gets several phone calls a week from individuals looking for wills from law offices that are closed. Please check the list below of retired, relocated or deceased attorneys whose wills we know about. If your office has documents from any attorney not on the list please contact the bar association so we can add the name to our master list. Thanks for your assistance.

James A. Bonaquist	John Desmond	Howard Mack	Mario Pacelli
John Brown of Ballston Spa	Alexander Diamond	Bruce Martin	Hannibal Pardi
Joseph J. Buchyn	Fairlee, Armstrong & Cooper	George A. Maksail	Roy Peters
Stephen A. Buchyn	Jane Finin	Maynard, O'Connor & Smith while still located in Schenectady on Franklin Street	Mathias Poersch
George Camino	Harold A. Friedman		Thomas Pritchard
Vito Caruso	Robert Gallamore		Wolfgang Reimer
D. Vincent Cerrito	Simeo J. Gallo	Daniel D. Mead	J.F. Heaword Robinson
Abraham Clayman	Robert B. Gilbert	Nicholas Morsillo	Bryan Simmerman
Morris Marshall Cohn	Frank Grasso	Ed Nagorka	Don Smith
Myron J. Cohn	Francis Jay Juracka	William O'Hare	Raymond Smith
Donna Cole-Paul	Robert Liebers		William Ward
			William J. Werner

NEWS FROM THE SCHENECTADY COUNTY SUPREME COURT LAW LIBRARY

There are two public access computers available with free LEXIS, WESTLAW and other legal resources for your use.

When you aren't able to get to the law library, check out LexisOne for Small Practitioners to search free LEXIS caselaw for the past five years and U.S. Supreme Court decisions from 1790 as well as forms at <http://www.lexisone.com/legalresearch/index.html>. You do need to register and there are some fee-based charges for other information offered at this site.

You can also access LOISLAW, a federal and all state legal database, through both the New York State Library and the New York Bar Association. For the New York State Library access, attorneys need to apply for a "P" card which confers borrowing privileges and online database access. The link to apply is <http://www.nysl.nysed.gov/apply.htm>. The legal databases available can be reviewed at <http://www.nysl.nysed.gov/gate/esubject.htm#Law>. To access the New York State Bar Association go to <http://www.nysba.org/> and become a registered member user. LOISLAW does have online access to many NYSBA publications so it is a valuable resource to use.

Please call me if you have any questions about the above information or would like to make an appointment to use the public access computers.
Hope to see you soon!

Laura Barber
Librarian, Schenectady Supreme Court Law Library
lbarber@courts.state.ny.us
518-285-8518 Office
518-377-5909 Fax

WHO KNEW?

The Bar association will periodically spotlight a member and share some information that members might not be aware.

There's a thespian among us....
John Massaroni recently acted in the Schenectady Civic Players' productions of "To Kill a Mockingbird" and "Our Country's Good".

MINUTES – SCHENECTADY COUNTY BAR ASSOCIATION MEMBERSHIP

ANNUAL MEETING

June 21, 2007 12:00 p.m.

The Glen Sanders Mansion, Scotia, NY
The meeting was called to order by President Drago at 12:25 p.m., 48 members of the Association being then present and constituting a quorum.

President Drago welcomed the judges present.

MOCK TRIAL COMPETITION WINNERS HONORED

Judge Powers stated that the competition this year involved 16 schools, and was very spirited. He thanked those who served as judges, and especially thanked Andrea McConnelee for all her help in coordinating the competition. The winning team this year was Notre Dame-Bishop Gibbons; Judge Powers presented the Reilly Cup to them. Team members rose and introduced themselves. Team Member Woods spoke on behalf of the team, thanking the advisors and team members. He described the competition as having the best fun to success ratio in the State, and said it has been a really great experience.

TREASURER'S REPORT

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

ELECTION OF THE BOARD

The withdrawal of the alternate slate of officers and directors was accepted by the unanimous vote of those present. J. David Burke, chair of the Nominating Committee, announced the slate of officers and directors for 2007-2008:

President Robert W. Hoffman
Vice-President Sheila C. Ferrucci
Treasurer Gerard F. Parisi
Secretary Kathryn McCary
Directors Karen Drago

Pamela McDevitt

Paul Callahan

Roland Faulkner

Federated Bar

Delegate Michelle H. Wildgrube

Alternate Richard D. Wickerham

On MOTION of Bruce Trachtenberg the proposed slate was elected by unanimous vote of the Membership.

Outgoing President Karen Drago noted that she had always known this Association through her fathers eyes, and believes we have a wonderful organization that is close and special. She then turned the meeting over to incoming President Robert Hoffman. President Hoffman noted that the bar has been set very high for him by previous Presidents, who have worked to make the organization become what the members wanted it to be. He thanked President Drago for her hard work. He also thanked Executive Director Diane Herrmann, noting that there was no blueprint for the job, which is evolving as she works at it. He recognized and thanked outgoing Board members Joanne Haelen, Mark Powers and Maggie Tabak for their service, and noted that the Board will continue to use their talents and services. He thanked the committee chairs and committee members for their work, especially in developing our CLE programs which have a good reputation; the Association plans to make those programs grow. He stated that it is his hope and intent to continue to provide the services Association members want, and to work to improve the Associations status in the greater community.

There being no additional business to come before the Membership, the meeting was adjourned at 1:15 p.m.

Respectfully submitted,
Kathryn McCary, Secretary

THE NEW YORK STATE JUDICIAL INSTITUTE

- Presents -

SENTENCING: WHAT WORKS AND WHAT DOESN'T WORK

SPEAKER: ROBERT M. MACCARONE, ESQ.

This presentation will provide an overview of criminal probation in New York State and address specific measures to increase its effectiveness.

Robert M. Maccarone, Esq. has been the State Director of the Division of Probation and Correctional Alternatives since February, 2007. Previously, he was the Executive Deputy Director of the New York State Division of Probation and Correctional Alternatives. He also served as the Deputy Bureau Chief and Senior Assistant District Attorney in the Westchester County District Attorney's Office. Mr. Maccarone received a B.S. and an M.A. from Fordham University and a J.D. from Pace University School of Law.

To be held:

Monday, September 10, 2007 • 1:00 p.m. - 2:00 p.m.

Schenectady County Courthouse • Courtroom #1 - Fourth Floor

Simulcast via Video Conference Live from The New York State Judicial Institute

WRITTEN MATERIALS FOR THIS PROGRAM WILL BE AVAILABLE ON COURTNET.

CLE CREDIT AVAILABLE

THE NEW YORK STATE JUDICIAL INSTITUTE

- Presents -

SANCTIONS FOR DISCOVERY VIOLATIONS

SPEAKERS:

HON. PAUL A. VICTOR • DAVID PAUL HOROWITZ, ESQ.

This session will analyze the court's authority to strike a pleading or impose a monetary sanction for discovery violations in view of recent law including *Figdov v. City of New York*, 33 AD3rd 560 (1st Dept. 2006).

Honorable Paul Victor has been a Supreme Court Justice in Bronx County since 2000. Prior to that, he was a Judge with the Civil Court of the City of New York. Justice Victor is a Participating Judge with the New York Jury Trial Project and presiding justice of the Association of Trial Lawyers of America. Justice Victor received a B.S. from Fordham University and a J.D. from Fordham University School of Law.

David Paul Horowitz, Esq. has been actively engaged in New York disclosure practice for twenty years. He is the author of the treatise NEW YORK CIVIL DISCLOSURE 2004 (LexisNexis) and the monthly column, *Burden of Proof*, on disclosure and evidence in the New York State Bar Journal. Mr. Horowitz received a B.A. from Lehman College, City University of New York and J.D. from Fordham University School of Law.

To be held:

Thursday, October 3, 2007 • 1:00 p.m. - 2:00 p.m.

Schenectady County Courthouse • Courtroom #1 - Fourth Floor

Simulcast via Video Conference Live from The New York State Judicial Institute

WRITTEN MATERIALS FOR THIS PROGRAM WILL BE AVAILABLE ON COURTNET.

CLE CREDIT AVAILABLE

THE NEW YORK STATE JUDICIAL INSTITUTE

- Presents -

CRIMINAL PRE-TRIAL MOTIONS

SPEAKER: HON. ALAN D. MARRUS

This session will provide an examination of the underlying factual basis needed to trigger the granting of a hearing under *People v. Burton* 6 NY3d 584 and related cases. This session will also address the remedies available to the court when the parties fail to submit all items necessary to complete motion practice.

Honorable Alan D. Marrus has been a judge for 22 years and an Acting Justice of the Supreme Court in Kings County for 19 years. Prior to taking the bench, he was Chief of the Appeals Bureau in the Bronx District Attorney's Office. Justice Marrus has presided over 450 trials, written numerous articles and lectured widely on criminal trial and appellate issues, and is the producer of a series of training videotapes for new judges called "The Art of Presiding Over a Criminal Trial". This past year, he has served as moderator of "Law Talk New York", a cable television show for The Association of the Bar of the City of New York, and written practice commentaries for Lexis on the Penal Law and Criminal Procedure Law. Justice Marrus graduated from Brooklyn College and George Washington University Law School.

To be held:

Thursday, November 1, 2007 • 1:00 p.m. - 2:00 p.m.

Schenectady County Courthouse • Courtroom #1 - Fourth Floor

Simulcast via Video Conference Live from The New York State Judicial Institute

WRITTEN MATERIALS FOR THIS PROGRAM WILL BE AVAILABLE ON COURTNET.

CLE CREDIT AVAILABLE

THE NEW YORK STATE JUDICIAL INSTITUTE

- Presents -

JD/PINS CASE LAW UPDATE

SPEAKER: GARY S. SOLOMON, ESQ.

The speaker will review recent developments in this area of the law.

Gary S. Solomon, Esq. is the Director of Legal Support for the Legal Aid Society's Juvenile Rights Division. Mr. Solomon has served twenty-eight years with the Legal Aid Society. Mr. Solomon is the principal author of Volume One and Volume Two of the Juvenile Rights Division's Practice Manual for Law Guardians. Mr. Solomon received a B.A. from Queens College of the City University of New York and a J.D. from Boston University School of Law.

To be held:

Friday, December 14, 2007 • 1:00 p.m. - 2:00 p.m.

Schenectady County Courthouse • Courtroom #1 - Fourth Floor

Simulcast via Video Conference Live from The New York State Judicial Institute

WRITTEN MATERIALS FOR THIS PROGRAM WILL BE AVAILABLE ON COURTNET.

CLE CREDIT AVAILABLE

LEGISLATIVE UPDATE BY PAMELA MCDEVITT

Things to watch for

Lawyer Advertising

Most attorneys at this point are aware of the new advertising regulations adopted by the Appellate Division of the Supreme Court on February 1, 2007. The U.S. District Court for the Northern District of New York on July, 23, 2007 analyzed the new lawyer advertising rules in *Alexander v. Cahill*. *Alexander & Catalano* (the “heavy-hitters” franchise of the Syracuse-Rochester area of the state) challenged the rules. The court upheld many of the new rules, but ruled some portions unconstitutional as protected free speech under the First Amendment. The new rules and *Alexander v. Cahill* can be viewed on the New York State Bar Association’s site www.nysba.org (under professional standards).

Civil Practice

CPLR §2215(service of cross motions) has been amended. The statute has been amended in an attempt to allow both parties adequate time to prepare their papers.

Real Estate Practitioners

The Home Equity Theft Prevention Act (enacted as Chapter 308 of the Laws of 2006) went into effect in New York State on February 1, 2007. The intention of the law is to protect homeowners from deed theft and foreclosure rescue scams which result in the loss of their homes and the equity they have built over the years in their homes.

The New York State Title Association is making a concerted effort to pass legislation expressly prohibiting banks, developers and most attorneys in law firms from continuing to be involved in writing title insurance. The Real Property Section of NYSBA is following this closely and gone on record as being unequivocally opposed to the legislation. www.nysba.org/realprop

Recent NYSBA Ethics Opinions

(www.nysba.org/ethics)

Opinion 811 – 4/13/07: Conflicts of interest; public defender

Digest: Where a public defender cannot be assigned due to a conflict, the public defender may not review billing vouchers of the counsel assigned to the matter to determine or recommend whether they should be paid.

Opinion 812 – 5/3/07: Communication with a represented party

Digest: Unless prohibited by state or local law, DR 7-104 (A)(1) permits a lawyer representing a private party before a town planning board to communicate with individuals planning board members about pending determinations provided: 9a) the proposed communications solely concern policy issues; and (b) the lawyer gives planning board counsel reasonable advance notice of the proposed communications.

Opinion 813 – 5/7/07

Clarifies: N.Y. State 803 (2006): Unauthorized practice of law: debt collection; letterhead

Digest: A lawyer who provides debt collection services as a non-legal service may not use law firm letterhead in doing so, but a lawyer who, as a lawyer, represents clients in collecting debts may use law firm letterhead.

Opinion 814 – 5/15/07: Supervision of a branch office managed by a non-partner

Digest: New York office of multi-state law firm may be managed by a non-partner who is admitted to practice in New York where the non-partner is supervised by an out-of-state partner who is licensed in another state, but not in New York.

These brief bullets are intended to be a starting point for practitioners to be aware of. For more information you can call Pamela McDevitt at 487-5595 or pmcdevitt@nysba.org.

Members can go the NYSBA’s web site (legislation) to track and monitor bills relating to the legal profession.

**Recent Decisions
By J. David Burke**

CONSTITUTIONAL LAW

***Kings Mall v Wenk*, ___AD3d___ [July 5, 2007]**

Mall owner bars Iraq War protesters from entering mall. Court holds that such action does not violate the NYS Constitutional guarantee of freedom of speech despite the fact plaintiff leases one of its 32 spaces to a US Government military recruitment center.

CRIMINAL LAW

***People v Sedlock*, ___NY3d___ [June 5, 2007]**

Information reads: “that from December 2002 through June 2003” defendant engaged in criminal activity. After considering all of the relevant circumstances, Court dismisses the information, finding that the time frame was unreasonable as it was too broad. Also see ***People v Pryce*, ___AD3d___ [June 14, 2007]**.

***People v Washington*, ___NY3d___ June 7, 2007]**

Inmate arranges with a government informant (bad choice) to have informant kill a rival when defendant gets out of jail. Convicted of the crime of Conspiracy in the second degree. Defendant argues that the evidence was legally insufficient because he conditioned any action on his release from jail. Court rejects argument, pointing out that the determinative factor is whether there was an agreement, not whether agreed upon conditions made the performance of the agreement contingent upon the happening of an event.

***People v Bratton*, ___NY3d___ [June 12, 2007]**

Case holds that Executive Law § 259-i (3) (a) (i) and its implementing regulations do not vest parole officers with the power to make warrantless arrests for parole violations even if committed in their presence.

***People v Cabrera*, ___AD3d___ [May 3, 2007]**

As the result of a tragic automobile accident in which three people were killed, defendant, a holder of a junior license, was convicted of criminally negligent homicide and criminally negligent assault. He argued on appeal that the People’s proof that he drove 72 miles per hour in a 55 mile per hour zone was not legally sufficient to sustain the aforementioned charges. The Court pointed out that the rule that speed alone will not support a finding of criminal negligence is decisive only in that extremely rare case where there is no additional proof. Here, there was proof that defendant ignored hazard signs recommending a reduced speed limit of 40 miles per hour, which caused him to cross the center line and ultimately lose control of his car. Additionally, defendant’s failure to abide by the conditions of a junior license that required him to ensure that all occupants of the vehicle were using seat belts and not allowing more than two passengers under the age of 21 in the vehicle were additional factors supporting the conviction. The dissent disagreed that the violation of the conditions applicable to junior licenses can support a conviction of criminally negligent homicide.

People v Rivera, ___AD3d___ [May 10, 2007]

As long as the sworn written statements in an application and supporting documents provide probable cause for the issuance of a search warrant, a magistrate is under no obligation to inquire into the facts upon which the warrant is based.

People v Tucker, ___AD3d___ [May 10, 2007]

Case contains a good discussion as to when recantation testimony will constitute newly discovered evidence. Not often.

People v Athanasatos, ___AD3d___ [May 17, 2007]

If you thought you didn't commit a larceny until you went out the door of your friendly Wal-Mart with stuff you forgot to pay for you will be surprised. In a self-service store a taking can be established by evidence that you exercised control over merchandise wholly inconsistent with the store's continued rights irrespective of whether the property was removed from the premises. In other words don't pick stuff up and put it under your coat.

People v Carter, ___AD3d___ [May 24, 2007]

At close of People's proof and again at the close of the evidence defendant made a general motion to dismiss. Not a good move since such motion was insufficient to preserve the specific claim that the evidence only supported an intentional killing (of which defendant was acquitted) and not depraved indifference murder, of which he was convicted. Preservation requires a detailed motion addressing the specific deficiencies in the evidence

People v Williams, ___AD3d___ [May 31, 2007]

Defendant seeks to suppress his statement to the police on the ground he was drunk. Sorry, intoxication alone is not sufficient, it is only when the degree of intoxication has risen to the level of mania or to the level where the defendant is unable to comprehend the meaning of his or her words is the statement suppressable.

People v McEaddy, ___AD3d___ [June 7, 2007]

At trial two detectives testified that after a video of a robbery was aired on TV, several people called in tips that the defendant was the man in the video. They also stated they obtained two sworn statements from a witness to the robbery presumably identifying defendant. The witness did not testify. Although the Court had previously held such testimonial statements relating to a police officer's course of conduct or state of mind during an investigation to be admissible, it now holds such statements are not admissible unless they are offered for some relevant purpose other than the truth of the statement.

People v Hunter, ___AD3d___ [June 7, 2007]

Case points out that, while the Rape Shield Law (CPL 60.42) limits evidence of a complainant's prior sexual conduct, it does not apply to a complainant's complaint of an unrelated sex crime which may be admissible for impeachment purposes if the defense demonstrates the falsity of the prior complaint or shows that there is sufficient similarity between the complaints suggestive of a pattern of false complaints.

People v Sheremet, ___AD3d___[June 21, 2007]

The Court may summarily deny any pretrial motion made 45 days after arraignment, but may also, in the interest of justice and for good cause shown, may entertain an untimely motion. Nothing is riskier than to rely on the "interests of justice"

People v Litto, ___AD3d___ [June 27, 2007]

Kid sprays "Dust-Off" into his mouth, which contains a hydrocarbon that depresses the central nervous system, making it difficult to perceive and react. Can he be prosecuted under Vehicle & Traffic Law § 1192 (3)? No, because the phrase "driving while intoxicated" in that section refers only to intoxication caused by alcohol, not by drugs.

People v Nieves-Andino, ___NY3d___ [June 28, 2007]

Another Crawford case (***Crawford v Washington***, 541 US 36 [2004]). Guy shot, within minutes cops show up. Cop asks victim what had happened. Victim says guy named Bori shot him. Victim dies. At trial cop testified about what victim told him. Court says statement was not testimonial because the primary purpose of the cop's inquiry was to find out the nature of the attack so that he could decide what, if any, action was necessary to prevent further harm. Thus no Crawford violation. Dissent says statement was testimonial since the primary purpose of the cop's question was to establish or prove past events potentially relevant to a later criminal prosecution.

People v Knowles, ___AD3d___[July 12, 2007]

In a trial for robbery the Court instructed the jury that, as a matter of law, B was the owner of the property the defendant stole. This was reversible error because it relieved the People from having to prove an element of the crime (ownership).

People v Garbutt, ___AD3d___[July 12, 2007]

During jury deliberations juror becomes ill. Defendant's counsel consents on record to juror's release. Court then brings in alternate juror. Defendant convicted. Reversed. Defendant's consent to the substitution of an alternate juror for a regular juror after deliberations have begun must be in writing and signed by the defendant in open court.

People v Vandermuelen ___AD3d___ [July 12, 2007]

Victim voluntarily places funds in joint account to enable the defendant to pay her (victim's) bills. Of course the friendly caretaker pays herself. The Court holds that, because the defendant had been made a joint owner of the account, she could not be convicted of grand larceny in the second degree upon proof of her unauthorized withdrawal and use of the funds.

People v Johnson, ___AD3d___ [July 19, 2007]

Delay in providing grand jury minutes is properly charged to the People where there is a motion to inspect the grand jury minutes and the People fail to provide them to the Court.

ESTATE AND ELDER LAW

Matter of Estate of Tomeck, ___NY3d___ [June 28, 2007]

Case holds that New York's practice of attributing or deeming the institutionalized spouse's monthly Social Security income to the community spouse for Medicaid purposes does not violate the anti-alienation provision of the Social Security Act (42 USC § 407[a]). Which I guess is bad news for elder law planners.

Peebles v Peebles ___AD3d___ [May 31, 2007]

Mom and Dad convey their property to their kids with the hope it would remain in the family. Kids fight; one group brings a partition action. The other group counters with an action for a constructive trust. Because the purpose of a constructive trust is to rectify fraud, the action is dismissed because kids didn't promise to keep property; it was simply Mom & Dad's desire that they do so.

EVIDENCE

Rivera v Anilesh, ___NY3d___ [June 12, 2007]

Because the defendant dentist administered injections of anesthesia in the same manner thousands of times, her testimony about her customary practice for administering anesthesia was admissible under the habit evidence rule, supporting an inference that the same procedure was used when treating the plaintiff.

People v Hoffler, ___AD3d___ [June 7, 2007]

A witness may properly testify to his or her opinion of the identification of a speaker's voice, regardless of whether the witness became familiar with that voice before or after the identifying conversation occurred.

Durazinski v Chandler, ___AD3d___ [June 7, 2007]

Dad conveys property to himself and daughter as tenants in common. Later gives daughter a power of attorney, which she uses to convey property to herself. Dad commences action to impose constructive trust. Unfortunately, he dies. Issue arises as to when he should have discovered defendant's fraud. Defendant testifies to a number of events from which Dad should have discovered her fraud. Plaintiff objects, you guessed it, citing the Dead Man's Statute (CPLR 4519). Court held that, even though defendant was an interested party; her testimony was admissible because her testimony did not involve personal transactions or communications with her Dad. Rather, she testified to independent events in which Dad interacted with third parties.

FAMILY LAW

Matter of Greene County DSS v Ward, ___NY3d___ [June 12, 2007]

Adoptive mom permanently surrenders child. Even so she has to pay child support because an adoptive parent retains the obligations of a biological parent and upon a voluntary surrender retains the obligation to provide support for the child until he or she is adopted or turns 21.

Matter of Robertson v Robertson, ___AD3d___ [May 10, 2007]

Family Court directs that all future enforcement petitions be brought in Columbia County Family Court. Sorry judge no can do because a Family Court order may be enforced in a family court in any county in which the party affected by the order resides or is found.

Pulver v Pulver, ___AD3d___ [May 24, 2007]

In order to avoid "double counting", seed money voluntarily contributed from marital funds to help one of the parties create a new business should not be reimbursed during distribution if the value of that business is equitably distributed.

Posporelis v Posporelis, ___AD3d___ [June 14, 2007]

Parties stipulate that, if certain circumstances arise, primary physical custody of kids would be transferred to other parent. Court notes that, while the parents may have agreed to eliminate the burden of establishing a change of circumstances, a court cannot modify a custodial arrangement automatically upon one parent's failure to satisfy a condition of a stipulation without taking into account the child's best interests.

Matter of Weymouth v Mullin, ___AD3d___ [July 12, 2007]

Social Security benefits received by a child do not displace the obligation of a parent to support the child and such benefits are to be considered only after the presumptively correct amount of child support has been calculated and only for the purpose of determining if the amount is unjust or inappropriate.

Matter of Damion D, ___AD3d___[July 12, 2007]

When issues of fact are created by the answering papers, due process requires an evidentiary hearing be held when a social services department moves under Family Court Act § 1039-b (a) for the termination of its duty to reunite a child with his or her parent.

McMahon v McMahon, ___AD3d___[July 19, 2007]

To establish a cause of action for abandonment plaintiff is required to show that the defendant abandoned him/her without justification or consent, for a period of one year or more and, in addition, refused repeated requests to resume cohabitation or conjugal relations.

INSURANCE

Stone v Rullo Agency, __AD3d___ [May 3, 2007]

I tell my insurance agent to obtain certain coverage for me for my homeowner's policy. He doesn't and I don't read the policy. I sustain a loss. I sue the agent for breach of contract and negligence. I lose, both causes of action dismissed. Once I received the policy, it is conclusively presumed that I knew its contents and assented thereto.

BP Air Conditioning Corp v One Beacon Ins. Group. ___NY3d___[June 27, 2007]

In this case involving a commercial general liability policy, the Court held that the standard for determining whether an additional insured is entitled to a defense is the same standard that is used to determine if a named insured is entitled to a defense – whether the allegations of complaint suggest the possibility of coverage.

MISCELLANEOUS

Yonaty v Glauber, ___AD3d___ [May 3, 2007]

Case points out that a membership interest in an LLC constitutes personal property and a LLC member has no interest in the specific real property of the LLC.

Matter of General Motors v Sheikh, ___AD3d___[June 14, 2007]

Auto manufacturer can avoid responsibility under the Lemon Law (General Business Law § 198-a) by excluding from its express warranty damage resulting from any alteration made after final assembly.

Chase v Houghton, ___AD3d___[June 21, 2007]

A \$7,800 debt accrues in 1992. Defendant makes a \$250.00 payment in 1998. Plaintiff sues in 2004. Does part payment in 1998 avoid the Statute of Limitations? No, unless accompanied by circumstances amounting to an absolute and unqualified acknowledgment by debtor of more being due.

Matter of Gardner v Niskayuna CSD ___AD3d___[July 5, 2007]

Education Law § 913 provides that a teacher required to submit to a medical examination to determine his/her fitness is entitled to be accompanied by a doctor or other person of his/her choice. Hee, school district didn't allow teacher's husband to accompany her to a psychological exam. School district's violation of the statute did not require the suppression of the results of the exam because the teacher did not show that her ability to prepare for the disciplinary hearing was interfered with in any respect.

Moser v Devine Real Estate, Inc. (Fla), ___AD3d___[July 12, 2007]

Did you know there is a cause of action for usurpation of corporate opportunities? You probably did, I didn't. Anyway, a corporate opportunity is defined as any property, information or prospective business dealing or in which a corporation has an interest or tangible expectancy which is essential to its existence or logically and naturally adaptable to its business.

MUNICIPAL LAW

Costa v Callahan, ___AD3d___[June 28, 2007]

Plaintiff begins operating a junkyard in 1960. In 1963, Town enacts ordinance requiring a license to operate a junkyard. Plaintiff never bothered to get one. In 1972, Town passes zoning ordinance that included plaintiff's land in a residential district. Court holds that, even though plaintiff never got a license, his junkyard was a non-conforming use because the failure to obtain a license does not render the use unlawful in the sense intended by the zoning ordinance.

NEGLIGENCE & OTHER TORTS

Broggy v Rockefeller Group, Inc. ___NY3d___[July 2, 2007]

Clarified that "cleaning" under Labor Law § 240(1) is afforded protection under the statute whether or not it is incidental to any other enumerated activity and whether or not the inside or outside of the building is being cleaned,

Reynolds v Amchem Products, ___NY3d___ [June 27, 2007]

Whenever a plaintiff and a defendant enter into a high-low agreement in a multi-defendant action which requires the agreeing defendant to remain a party to the litigation, the parties must disclose the existence of the agreement and its terms to the court and the non-agreeing defendants.

Berg v Albany Ladder Co., ___AD3d___ [May 17, 2007]

There were two levels of trusses on a flatbed truck at a construction site. Plaintiff, who was helping to unload the trusses, climbed onto the lower level, estimated at five feet above the bed of the truck and 10 feet from the ground. One set of trusses rolled toward plaintiff. Rather than be squashed, he rode the load to the ground and was injured anyway. Does he have a Labor Law § 240 (1) cause of action? No say the majority because the accident was not caused by the lack of a ladder or other safety device necessary to get off the truck safely, but, instead, by the trusses – located on the same elevation as plaintiff- rolling toward him when improperly moved by a forklift. The dissent argued Labor Law § 240(1) should apply since this was an elevated work site injury in that plaintiff had to climb onto the trusses.

Petrilli v Federated Dept. Stores, ___AD3d___ [May 24, 2007]

Where a plaintiff does not claim a product is defective, but that it was being negligently misused so as to create a dangerous condition, evidence of subsequent accidents is admissible to establish whether the condition created by the defendant was unreasonably unsafe.

Singh v State of New York Office of Real Prop. Servs. ___AD3d___[May 2, 2007]

This case discusses the three-part analysis that applies to summary judgment motions where a plaintiff alleges employment discrimination based on national origin and color.

Smith v Town of Long Lake, ___AD3d___[May 31, 2007]

Case points out the difference between a continuing trespass by a municipality and a defacto taking. The distinguishing feature is that where the interference with the owner's use of the land is permanent, it can only be a defacto taking. The difference is important for limitation purposes in that a defacto taking occurs on a date certain whereas a trespass can be continuing thereby keeping the Statute of Limitations alive.

Robinson v CSX Transp. ___ADX3d___[May 31, 2007]

If you ever get a case under the Federal Employment Liability Act (45 USC § 51 et seq.) be happy because the standard for establishing liability is a lot easier than under the common law in that you simply have to show that the employer's negligence, even if slight, played a part in producing the plaintiff's injury.

White v State of NY, ___AD3d___[June 21, 2007]

Where the evidence shows several reasonable causes for plaintiff's injury and the defendant is not responsible for all those causes, the plaintiff cannot recover.

Perrymen v Village of Saranac Lake, ___AD3d___ [June 21, 2007]

Court finds that 16 out of 19 charges brought against plaintiff in an administrative proceeding were supported by probable cause. Therefore, because there was probable cause supporting some of the charges, plaintiff could not maintain a malicious prosecution claim. In other words you gotta beat all of the charges.

Baron v Pfizer, Inc. ___AD3d___ [July 5, 2007]

Plaintiff commences an action pursuant to General Business Law § 349 (deceptive commercial practices) based upon the fact she was prescribed and used a drug for an unapproved use, which use the defendant promoted even though it didn't have FDA approval. Court dismisses claim because plaintiff failed to allege actual harm or that she sustained a pecuniary injury.

Giblin v Pine Ridge Log Homes, Inc. ___AD3d___ [July 12, 2007]

In a work-related accident plaintiff loses right eye that is replaced by a prosthesis. Defendant contractor sought common law indemnification from plaintiff's employer which it can't obtain unless plaintiff suffered a grave injury (Workers' Compensation Law § 11). Court held he did not because the loss of a single eye did not constitute a permanent and severe facial disfigurement, pointing out that the photos of plaintiff with the prosthesis show little difference, if any, in his facial appearance before and after the accident.

PROCEDURE

Tibbits v Verizon New York, ___AD3d___ [May 17, 2007]

While inadmissible evidence may be sufficient to defeat a motion for summary judgment, the non-moving party still has to produce some competent evidence supporting his or her case. In other words you can't rely solely on inadmissible evidence or on the hope the law clerk doesn't know the rules of evidence, which is not a bad bet.

Police Benevolent Assn. of the NYS Troopers v NYS Div. of State Police, ___AD3d___ [May 24, 2007]

To establish a justiciable issue allowing him or her to maintain a declaratory judgment action, a plaintiff must have an interest sufficient to constitute standing and the controversy must involve present, rather than hypothetical, contingent or remote prejudice to the plaintiff.

Brindle v Soni, ___AD3d___ [June 7, 2007]

Defendants make a motion in limine to preclude the testimony of a witness, which is denied. They appeal. Sorry, appeal dismissed since an order which merely determines the admissibility of evidence even when made in advance of trial on motion papers is neither appealable as of right nor by permission. The Court does acknowledge that an order that limits the scope of issues to be tried may be appealable.

Biggs v O'Neill, ___AD3d___[June 21, 2007]

Res judicata applies to a stipulation of discontinuance with prejudice. Makes sense.

Coty v County of Clinton, ___AD3d___[July 5, 2007]

Parties stipulate to extend time to file a motion for summary judgment beyond the 120-day time limit. Court holds that the stipulation did not constitute good cause for extending the time limit. As Colonel Klink use to say “Ve haf rules”.

Matter of Romeo v NYS Dept. of Education, ___AD3d___ [June 28,2007]

Plaintiff does not sue necessary party. Statute of Limitations runs. Can the non- joinder be excused and the proceeding be permitted to proceed in the absence of the necessary party. No, the Statute of Limitations does not deprive a court of jurisdiction since it is merely an affirmative defense. Thus, plaintiff was directed to join the necessary party who will then presumably raise the Statute of Limitations defense and the case will go on without him or her.

Dunn v Pallett,___AD3d___[July 19, 2007]

When a defendant submits an affidavit that includes detailed and specific contradictions of the allegations in the process server’s affidavit, a traverse hearing must be held to determine if the summons was properly served.

REAL PROPERTY LAW

Webster v Ragona, ___AD3d___ [May 24, 2007]

V owns two adjoining parcels. Conveys one to RT and gives him an easement to use the driveway between the two parcels. V sells the other parcel to W, giving him a warranty deed without any mention of the easement. W sues R to quiet title, loses (7 Ad3d 851). Then sues V for breach of warranty and covenant in his deed. Can he recover from V the counsel fees he incurred in the action against R to quiet title? Court says yes where a covenantee had a reasonable basis to presume his or her action would be successful.

Gold v DiCerbo, ___AD3d___[June 21, 2007]

An easement created by grant may be extinguished by abandonment or adverse possession, however the nonuse of an easement, even if substantial duration, will not establish a claim of abandonment.

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