
SCHENECTADY COUNTY BAR ASSOCIATION, INC.

NEWSLETTER

January 2005

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CALENDAR OF EVENTS

January 20, 2005	SCBA Meeting, 12:00 p.m.
January 27, 2005	Judge Eidens Retirement Event, 5:30 p.m.
March 10, 2005	Estate Planning & Elder Law Seminar
April 15-17, 2005	Federated Bar Meeting, Montreal
April 21, 2005	SCBA Meeting, 12:00 p.m.
April 29, 2005	SCBA Celebrates Law Day
May 2005	Real Estate Seminar
June 16, 2005	SCBA Annual Meeting, 12:00 p.m.

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

J. David Burke
Diane Enzinna
Brian Ferrucci
Joanne Haelen
Frank Parisi
Hon. Mark I. Powers
Margaret Tabak

NOTE INCLUSIONS IN THIS ISSUE

- ' Our current list of who has wills drafted by whom
- ' The Registration form for the Estate Planning and Elder Law Seminar
- ' A Survey on *Pro Bono* from the newly formed committee



WE WELCOME A NEW MEMBER

We Welcome to the Association

Jeffrey Siegel

who was admitted to membership at the November 2004 meeting

L NEXT MEETING 7
JANUARY 20, 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 New Year! I hope the holiday season was a joyous one.

The end of the year was anything but quiet for our organization. December 2004 was kicked off with our holiday gathering at the Stockade Inn. Over sixty members and guests attended. It was great to see the mix of new faces and familiar faces. I hope a good time was had by all.

The day after our holiday gathering, our organization, in conjunction with the Federated Bar and the Rural Law Center, sponsored an arbitrator training session. I am delighted to report that there are now over forty new arbitrators who can handle the Part 137 disputes. Thank you Judge Caruso and Nick Tischler for your efforts in bringing the training to Schenectady County.

That same afternoon, Judge Kaye hosted the American Bar Association President, Robert Grey, at the Court of Appeals. Of note, it was pointed out that this was believed to be the first official visit of an ABA President to Albany which is surprising in that the American Bar Association was founded at a meeting in Saratoga Springs. President Grey, who resides in Virginia, observed that our Court of Appeals courtroom is one the most beautiful courtrooms he has ever seen.

If you have not had the chance to visit the courtroom post-renovations, I suggest the next time you are in Albany that you stop in.

The following week I again assisted in the Legal Aid Society phoneathon. As many of you know, Peter Coffey is now leading the Legal Aid charge. I will defer to Peter at our meetings to advise on what appears to be the future of not only the Legal Aid Society but also *pro bono* activities for attorneys in New York. I cannot emphasize enough that not only is the Legal Aid Society a tremendous asset to the community but it is also a tremendous resource for attorneys and does more for us than you may know. Therefore, please be receptive when you get the telephone solicitation from Peter or one of the other board members.

The week also saw the kick off dinner for the mock trial program. Over seventy (70) students, advisers and attorneys met at the Glen Sanders Mansion. Enthusiasm ran high as the fact pattern was distributed to the participants. There will be six (6) teams competing this year. Thank you in advance to Judge Powers, his staff, and all attorney coaches and judges for your assistance.

Congratulations to all of our members who have been elected or re-elected to governmental positions. As I perused the results, I was happy to see that our group is well represented.

Retirements come with new elections so please mark your calendars for January 27, 2005 at 5:30 p.m. at the Stockade Inn in Schenectady to recognize the Honorable Michael E. Eidens in his retirement. Details will soon follow. Thank you Judge Eidens for all that you have done throughout your years of public service including, but not limited to, the establishment of drug court and alternative treatment court. Good luck in your future endeavors.

I hope to see you at our next luncheon meeting scheduled for January 20, 2005 at noon at the Glen Sanders Mansion. May 2005 bring you health and prosperity.

Respectfully,

John Seebold

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FROM THE COMMITTEES.

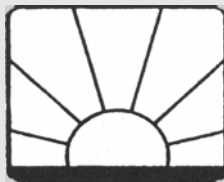
ALTERNATE DISPUTE RESOLUTION There will be a meeting of the Committee on February 3 at noon at HomeStyle Pizza on Upper Union Street; for further information call Chair Jean Carney, 872-9023.



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



ESTATE & ELDER LAW For information about the Committee call Chair Kathleen Toombs, 465-7581.



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

LAW DAY: For information about the committee, contact Chair Diane Herrmann, by calling 377-6731 or e-mailing to dianeherrmannesq@yahoo.com



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



REAL ESTATE For information about the Committee, contact Chair Larry Naviasky, at 374-7779 or pottnav_larry@global2000.net.



TRIAL PRACTICES: For information about the Committee, contact Chair John Massaroni, 374-1800.

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YOU BE THE JUDGE

J. David Burke

In April 1988, during a period of temporary separation, Beyonce and her now deceased husband, Usher, entered into a postnuptial agreement which provided that “so long as they live together as Husband and Wife, the Wife shall be named as the beneficiary of the Husband’s pension plan and life insurance policies.” Usher and Beyonce resided together as husband and wife until September 2000, when Usher left the marital residence and began living with Lil’ Kim. In November 2002, Usher named Lil’ Kim as the beneficiary of his pension benefits. After he died Beyonce commenced an action alleging that Usher breached the postnuptial agreement by naming Lil’ Kim as the beneficiary of the pension plan. Lil’ Kim moved to dismiss the complaint on the ground the agreement did not bar Usher’s designation of her as the pension plan beneficiary.

*You decide
whether the motion
should be granted
or not.*

ANSWER TO NOVEMBER

YOU BE THE JUDGE

Three lawsuits result and all are dismissed by Supreme Court. On appeal will Supreme Court be reversed in:

1. *Jack’s case against Duke for \$50,000 (to enforce oral purchase of Blueberry Hill)*

Yes: Loan agreement not barred by Statute of Frauds since it was devoid of any restriction against prepayment within one year and, thus, the possibility existed of complete performance within a year (*Moon v Moon*, 6 AD3d 798 [2204])

2. *Duke’s case for specific performance regarding the*

agreement to purchase Heartbreak Hotel?

No: There was no enforceable agreement under the Statute of Frauds because Jack did not sign the agreement. (*Steinbuch v Kapell*, 5 AD3d 374[2004])

3. *Duke’s case to enforce Billy Joe’s promise to devise the Tallahatchie Bridge to him?*

No: A contract to bequeath property or to make a testamentary provision must be in writing to be enforceable. (*Matter of Estate of Morse*, 1 AD2d 516[2004])

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RECENT DECISIONS

J. David Burke

People v Jones, ___NY3d___ [Dec. 16, 2004]

Reaffirms the holding of *People v Tomlins*, (213 NY 240 [1914]) that when the assailant and defender share the same dwelling the defender does not have to retreat when attacked at home.

Matter of Klimont v McKinsey & Co. ___NY3d ___ [Dec 16, 2004]

Architectural contract required architect to produce plans that complied with building codes. They did not and were sued for breach of contract. Court holds that the three-year Statute of Limitations embodied in CPLR 214 (6) applied rather than the six-year Statute applicable to contract actions because the plaintiff’s claim is fundamentally one that claims the architect failed to perform services in a professional, non-negligent manner. The Court also noted that the architect did not guarantee a particular result or agree to perform a service above and beyond that which he might be expected to accomplish with due care.

U.S. Underwriters Ins. Co. v City Club Hotel, ___NY3d___ [Dec 16, 2004]

Holds that an insured who prevails in an action brought by his or her insurer seeking a declaratory judgment that it has no duty to defend or indemnify its insured may recover attorneys’ fees expended in defending against the declaratory judgment regardless of whether the insurer provided a defense to the insured in the underlying action.

People v Duggins, ___NY3d___ [Dec. 2, 2004]

Defendant killed two people in a 90-minute span; found guilty of first degree murder since he killed the victims during the same “criminal transaction”, a phrase the Court holds must be construed as incorporating the technical definition given it in CPL 40.10(2) rather than by its ordinary meaning.

Beehner v Eckerd Corp., ___NY3d___ [Nov 30, 2004]

Plaintiff completes repair work at defendant’s store and is injured during a post-repair inspection. Labor Law § 240(1) does apply as it does not cover an injury occurring after an enumerated activity is complete.

Lyles v State of New York, ___NY3d___ [Nov 30, 2004]

Practice point: You must comply with the jurisdictional time limitations set forth in Court of Claims Act § 10 when pursuing federal and state constitutional claims against the State of New York.

Rubeis v The Aaqua Club, ___NY3d___ [Nov 23, 2004]

When an employee suffers a “grave injury,” the employer may be liable to third parties for indemnification or contribution. Workers’ Compensation Law defines a “grave injury,” *inter alia*, as “an acquired injury to the brain caused by an external physical force resulting in permanent total disability.” The Court holds that permanent total disability means not being able to work in any capacity rather than being in a vegetative state

Matter of Michael M., ___NY3d___ [Nov 23, 2004]

Felony complaint filed against 13-year-old kid. Complaint signed by co- based on his interview with the victim, i.e. hearsay. Criminal Court removes case to Family Court pursuant to CPL 180.75 & 210.43. Case dismissed because removals must be supported by non-hearsay factual allegations. Result might have been different if the felony complaint had been tested at a hearing or before a grand jury while the case was pending in criminal court.

People v Resek, ___NY3d___ [Nov 23, 2004]

Indicates Court is examining more closely the admissibility of uncharged crimes, noting that *People v Molineux* (168 NY 264 [1901]) and its progeny should not be interpreted as automatically allowing the prosecution to introduce evidence of uncharged crimes merely because the evidence is said to complete the narrative or furnish background information.

Kazel v Kazel, ___NY3d___ [Nov. 18, 2004]

Another reminder that a judgment of divorce and a qualified domestic relations order awarding an interest in a spouse’s pension plan do not automatically include pre-retirement death benefits. If the intent is to distribute such benefits, that should be separately and explicitly stated.

Lang v Hanover Ins. Co. ___NY3d___ [Nov 18, 2004]

Under Insurance Law § 3420 an injured party has the right to sue a tortfeasor’s insurance company if, *inter alia*, he or she obtains a judgment against the tortfeasor. Court points out that where the tortfeasor has obtained a discharge in bankruptcy, a plaintiff in a personal injury action is not barred from obtaining a judgment against the bankrupt tortfeasor for the limited purpose of pursuing payment from the tortfeasor’s insurance company.

Mason v Central Suffolk Hospital, ___NY3d___ [Nov 18, 2004]

A doctor cannot maintain a breach of contract action against a hospital predicated upon a violation of medical staff by-laws, unless clear language in the by-laws creates a right to relief. Fat chance.

Covington v Walker, ___NY3d___ [Oct. 26, 2004]

With respect to an action for divorce based on the ground of imprisonment, the Statute of Limitations begins to run on the date the imprisoned spouse is released from prison.

Forrest v Jewish Guild for the Blind, ___NY3d___ [Oct 26, 2004]

A hostile work environment requires more than a few isolated incidents of racial enmity; instead,

there must be a steady barrage of opprobrious racial comments. Moreover, the use of racial slurs and insults by a supervisor without the knowledge or acquiescence of the employer does not constitute an unlawful discriminatory practice actionable under the States Human Rights Law. If you ever have a discrimination case, use this case as a guide.

Nicholson v Scoppetta, ___NY3d___ [Oct 26, 2004]

When the sole allegation is that the mother has been abused and the child has witnessed the abuse, the child may not be deemed neglected. Also, the exposure of a child to violence is not presumptively a ground for removal from the place where he or she is residing.

Bonnette v Long Island College Hosp., ___NY3d___ [Oct 21, 2004]

Practice Point: Plaintiff reaches oral agreement to settle her case for \$3,000,000. Defendant reneges, plaintiff moves to enforce agreement. Sorry, to be enforceable under CPLR 2104 an out of court settlement must be adequately described in a signed writing or put on the record in open court.

People v Carranza, ___NY3d___ [Oct 21, 2004]

A lawyer may not prevent the police from questioning a suspect by communicating only with law enforcement agencies not involved in the investigation. Here, the defendant was arrested by the Newburgh Police Dept. and his attorney faxed letters to the New York State Police and Orange County District Attorney. Bad move, let the questions continue.

Miceli v State Farm Mutual Auto. Ins., ___NY3d___ [Oct 21, 2004]

Practice Point. If you bring a motion for summary judgment more than 120 days after the note of issue is filed, you had better have a good reason for doing so. If not, sayonara. Incidentally, the fact the motion has merit is not good cause.

Blue Cross and Blue Shield of N.J. v Philip Morris USA, ___NY3d___ [Oct 19, 2004]

Health insurer brings action against tobacco companies seeking to recover costs of services

provided to its subscribers. It based its claim on General Business Law § 349, alleging that the tobacco companies engaged in deceptive practices in encouraging people to smoke even though they knew it was dangerous. Court dismissed action, holding that only the party actually injured can sue under this law.

People v Payne, ___NY3d___ [Oct 19, 2004]

Court makes it clear that depraved indifference murder may not be properly charged in the overwhelming majority of homicides, pointing out that this type of murder is committed without specific homicidal intent but with a depraved kind of wantonness, for example, shooting into a crowd or placing a time bomb in a crowded place.

State of N.Y. v Speonk Fuel, ___NY3d___ [Oct 19, 2004]

Two weeks before a defective petroleum storage tank was removed, defendant contracted to purchase a gas station and seven weeks after that

tank was removed took title. Because defendant had the ability to control events at the spill site, it was liable for cleanup costs under the Oil Spill Act (Navigation Law § 171).

People v Henriquez, ___NY3d___ [Oct 19, 2004]

Chutzpah. Defendant refused to permit his assigned counsel to participate in his defense and declined to represent himself. Then on appeal argues that his constitutional right to a fair trial was violated because the trial court and defense counsel respected his desire to refrain from presenting a defense. Good argument. No.

Barrett v State of New York, ___AD3d___ [Dec 9, 2004]

Plaintiff zipping along the Thruway in January; runs into a whiteout; can't see; slows down; rammed by trailer truck; sues State. Case dismissed due to fact that, inasmuch as the whiteout conditions appeared only a few minutes before the accident, the State did not have actual or constructive notice of the condition.

Matter of Selig, ___AD3d___ [Dec 9, 2004]

In a will contest to prove fraud, it must be shown that the proponent knowingly made a false statement that caused the decedent to execute a will that disposed of his or her property in a manner different from the disposition he or she would have made in the absence of that statement. To establish undue influence, it must be shown that the acts of the influencing party effectively made it his or her will and not the will of the decedent.

Feely v St. Lawrence University, ___AD3d___ [Dec 9, 2004]

Evidentiary Points: An unexcused violation of the Vehicle and Traffic Law constitutes negligence *per se*. A plea of guilty is some evidence of negligence, which the defendant may explain. Whether the explanation is sufficient to excuse the violation or to establish that it did not occur are issues of fact for the jury.

Wilson v Metalcraft of Mayville, ___AD3d___ [Dec 9, 2004]

After being injured by a lawnmower, plaintiff brought a negligence and products liability action

against the manufacturer. At EBT of defendant's director of engineering, plaintiff sought to elicit the witness's opinions regarding how the accident happened. Court held this line of inquiry was improper.

Smith v New York Central Mut. Fire Ins. Co., ___AD3d___ [Dec 2, 2004]

Kid throws egg at plaintiff's car; plaintiff belts him in head with baseball bat and is sued. Homeowner insurer denies coverage on ground the bodily injury to the kid was expected or intended by the plaintiff. Court agrees, pointing out that the harm to the kid was inherent in the nature of the act alleged and that the harm flowed directly and immediately from the intentional act.

MacDonald v Meierhoffer, ___AD3d___ [Dec 2, 2004]

Practice Point: In this automobile negligence case, the only injury identified in plaintiff's bill of particulars was a fractured rib. Defendant moves for summary judgment; plaintiff responds by claiming an injury under the 90/180 day category. Because plaintiff did not amend her bill of particulars to add the 90/180 day category, the Court properly disregarded her evidence on that point.

Hilsman v Sarwil Assocs. ___AD3d___ [Dec 2, 2004]

Court declines to extend the storm in progress defense to conditions caused by a rainstorm.

Riley v Coughtry, ___AD3d___ [Dec 2, 2004]

Matrimonial action; plaintiff pays fee of \$2500; after judgment of divorce filed for fee arbitration seeking to have entire fee returned; attorney submitted additional bill seeking \$4,300 more. Court said OK to file an additional bill after plaintiff demanded fee arbitration.

Matter of Hutchinson, ___AD3d___ [Dec 2, 2004]

SCPA 1405(3) provides that where a witness to a will has forgotten the occurrence or testifies against the execution of the will, the will may be admitted upon the testimony of the other witness and such other facts as would be sufficient to prove the will. This provision applies to a witness who

submits conflicting affidavits and then invokes the 5th Amendment when called to testify at the SCPA 1404 hearing.

Matter of Tavernia v Bouvia, ___AD3d___ [Nov 24, 2004]

Case points out that the rule that in custody disputes Osiblings should be kept together is not so hard and fast due to changing family dynamics.

Matter of Folsom v Folsom, ___AD3d___ [Nov 24, 2004]

When the information before the court enables it to undertake a comprehensive independent review of the child's best interests, an evidentiary hearing is not necessary on an application to modify a custody order.

Matter of Jemila PP., ___AD3d___ [Nov 24, 2004]

A failure to acknowledge responsibility for the acts which led to a finding of abuse can constitute a failure to plan for the return of the child so as to support a termination of parental rights, but is insufficient to support a finding of neglect, without more.

Matter of Tara V. v County of Otsego, ___AD3d___ [Nov 24, 2004]

Practice Point: An application for leave to serve a late notice of claim (General Municipal Law § 50-e [5]) must be brought as a special proceeding rather than as a motion.

Chiotti v Chiotti, ___AD3d___ [Nov 24, 2004]

A party's inability in a divorce action to produce a complete paper trial does not preclude a finding of separate property, especially where there is no evidence suggesting other possible sources of the property and there is no evidence challenging the evidence supporting the separate property claim.

Kaiser v Van Houten, ___AD3d___ [Nov 24, 2004]

A fraud claim asserted within a legal malpractice claim is sustainable only to the extent that it is premised upon one or more affirmative, intentional misrepresentations that are more egregious than mere concealment or failure to disclose one's own

malpractice. In addition, the plaintiff must prove that the fraud caused additional damages, separate and distinct from those generated by the alleged malpractice.

Hennessey Law Books for Sale to Benefit Local Pro Bono Service Efforts

The following law books and library are offered to members of the Schenectady County Bar Association—your choice for \$1.00 per volume—proceeds to be donated to the Northeast Legal Aid Society to support its *pro bono* programs

Come & See!

New York Supplements, 2nd Series—Volumes 1-585

New York Reports: Volumes 1-231

West McKinney's Statutory Law Set [150+ volumes]

West's McKinney's Forms [37 volumes]

Bender's Legal Forms [4 volumes]

Warren on Negligence [18 volumes + 2 index volumes]

American Law of Property [8 volumes]

Abbott's Digest—New York Second [42 volumes]

Corbin on Contracts [8 volumes]

Fletcher Cyclopedic of Corporations [20 volumes]

Ford on Evidence [4 volumes]

White on Corporations [7 volumes]

Freeman on Judgments [3 volumes]

All sets and books in excellent condition.

Attorney Gerald T. Hennessey
133 Wall Street
Schenectady, NY 12305(518) 374-4469

Matter of Briggs v Halloran, ___AD3d___ [Nov 24, 2004]

County judge directs DA to disclose *Rosario* material three days prior to any hearings and three days prior to trial. CPL 240.44 provides that such material must be turned over, upon request, at the conclusion of the direct examination of a witness at a pretrial hearing or at trial after the jury has been sworn (CPL 240.45[1]). Unless the People consent, the CPL trumps the County Judge.

People v Whitmore, ___AD3d___ [Nov. 18, 2004]

Pursuant to CPL 710.30, the People are required to provide defendant with notice of statements made to a DSS child protective caseworker since such person is a public servant.

Jones-Barnes v Congregation Agudat Achim, ___AD3d___ [Nov 18, 2004]

While direct proof of proximate causation is not necessary, the proof adduced must be sufficient to permit a finding based upon logical inferences from the record and not upon speculation alone.

Matter of McCluskey v Howard, ___AD3d___ [Nov 18, 2004]

When mom on her own increases her debts and expenditures, she is not entitled to an increase in child support.

Dalton v City of Saratoga Springs, ___AD3d___ [Nov 18, 2004]

Close call. Plaintiff timely files notice of appeal in the appropriate court but doesn't serve notice on defendant. Because there was no evidence that defendant had been prejudiced by the lack of service, the Court found the omission to be harmless error and proceeded with the appeal. Unfortunately, for plaintiff, his case lasted only a few more paragraphs before the Court dismissed it. Another point is that verbal complaints transcribed to a written telephone message or a work order does not satisfy the requirements of a prior written notice of defect statute.

Davidson v Ambrozewicz, ___AD3d___ [Nov 18, 2004]

The recalcitrant worker doctrine under Labor Law § 240(1) does not apply to a worker who

ignored an instruction to avoid using unsafe equipment.

Vasquez v State of New York, ___AD3d___ [Nov 18, 2004]

Practice Point: CPLR 3216 90-day notice served on plaintiff. On day 88 plaintiff moves to compel discovery and to vacate the 90-day demand. Claim dismissed because any response, short of filing the note of issue, triggers CPLR 3216 (e) which allows a court to dismiss a claim unless the plaintiff shows a justifiable excuse for the delay and a meritorious cause of action.

Biance v Columbia Washington Ventures, ___AD3d___ [Nov 18, 2004]

General Obligations Law § 5-322.1 renders void a provision to indemnify contractors for liability for injuries caused by the contractor's negligence. This statute, however, does not bar an indemnification claim where the contractor is only vicariously liable under Labor Law § 240(1)

People v Higgins, ___AD3d___ [Nov 10, 2004]

Evidence Point. The testimony of a child sexual abuse expert may be admitted to explain behavior of a victim that might appear unusual or that jurors may not be expected to understand as long as the testimony is not used to prove that the charged crimes occurred.

Cutroneo v Dryer, ___AD3d___ [Nov 10, 2004]

Don't lose the evidence because the sanction of dismissal is appropriate for the negligent disposal of evidence deemed crucial to the underlying action where your adversary has not been given an opportunity for inspection. Here, not only was the evidence lost, but plaintiff's expert had died.

Magrum v Dee Dee's A Tavern, ___AD3d___ [Nov 10, 2004]

Why lawsuits occur: DJ places a 35-pound speaker placed on top of an electronic dart game located near the dance floor. I need not go on. Anyway, the point is that liability may be imposed upon an owner if he or she is on notice of a dangerous condition negligently created by an independent contractor and has a reasonable

amount of time in which to remedy the condition, but fails to do so.

Wojcik v Empire Forklift, ___AD3d___ [Nov 4, 2004]

Even though a product may not be defective for the purposes of a strict liability claim, it still may be defective within the meaning of UCC 2-314 (2) (c) (implied warranty) if the ordinary purpose for which the product was marketed and sold to plaintiff was not the same as the utility of the product against which the risk was to be weighed. Perhaps an example to explain: Implied warranty cause of action established where it was shown that the design features of a Ford Bronco that were necessary to the vehicle's off-road capabilities made the vehicle unsafe for daily commuting, the purpose for which the vehicle was marketed. Here, the same principle applied to a safety lanyard that protected against falls above six feet, but not below that height.

Niver v State of New York, ___AD3d___ [Nov 4, 2004]

Holds that an individual wrongfully adjudicated as a youthful offender may file a claim for unjust conviction and imprisonment under Court of Claims Act § 8-b.

People v Boyce, ___AD3d___ [Nov 4, 2004]

When a court fails to advise a defendant of a mandatory period of post-release supervision prior to the entry of a guilt plea, the defendant's sentence must be vacated to afford him or her an opportunity to withdraw the plea.

Matter of Kleinsak v R.B. Samuels, Inc. ___AD3d___ [Nov 4, 2004]

Plaintiff receives workers' compensation benefits and commences third-party action. Decides to abandon lawsuit without obtaining consent of his employer or its insurance carrier. Bad move. In order to preserve the right to continue to receive benefits, a plaintiff must obtain consent before voluntarily abandoning a third-party action.

Marlowe v Elmwood, Inc. ___AD3d___ [Nov 4, 2004]

Points out under Town Law § 268 (2), any three taxpayers who are aggrieved by a zoning violation may institute an action or proceeding in like manner as town officials are authorized to do. However, if the town officials can't institute legal action, residents can't either.

N.A.S. Holdings v Pafundi, ___AD3d___ [Nov 4, 2004]

The assertion of a counterclaim for the imposition of sanctions does not result in a waiver of the defense of lack of personal jurisdiction because it is related to plaintiff's claim since it will rise or fall depending on the outcome of the plaintiff's claim.

Matter of Levinson, ___AD3d___ [Oct. 28, 2004]

Points out that a judge's decision can be deemed law of the case even though it has not been reduced to an order.

Subcarrier Communications v Satra Realty, ___AD3d___ [Oct 28, 2004]

Five-year lease with two five-year renewal options that specified that the \$1,200 annual rent shall be "for and during the term thereof." Lease renewed, what's the rent?

\$1,200 because where the rental amount has not been left open for future negotiations, the rent will be that provided in the original lease.

Brown v New York State Bd. of Parole, ___AD3d___ [Oct 28, 2004]

Practice Point: Negligence claim against State. If you timely file a notice of intention to file a claim upon the attorney general, you must file a notice of claim upon the attorney general within two years after the accrual of the claim.

Robinson v Robinson, ___AD3d___ [Oct 28, 2004]

Practice Point: A temporary restraining order expires following a hearing on an application for a preliminary injunction.

Matter of Culberson, ___AD3d___ [Oct 28, 2004]

Just a reminder if you are stuck. The grounds to vacate a judgment set forth in CPLR 5015 are not exclusive; you can always fall back on the court's inherent power to vacate its own judgment

for sufficient reason and in the interests of substantial justice. This is one of those rare cases where it worked.

Rooney v Slomowitz, ___AD3d___ [Oct 28, 2004]

Illustrates that consideration is necessary to prove the existence of an oral modification of a written agreement.

People v Van Hoesen, ___AD3d___ [Oct 21, 2004]

Holds that the People can be ready for trial within the meaning of CPL 30.30 in a drug prosecution when the allegedly illegal drugs have not been formally tested. In this case, the Court found that the testimony of the arresting officer and positive field test results provided the People with legally sufficient evidence to proceed to trial. In a footnote, the Court also rejected the notion that a formal laboratory analysis is required to establish guilt beyond a reasonable doubt.

Dashnaw v Dashnaw, ___AD3d___ [Oct 21, 2004]

Points out that the fact property is conveyed by a third party to only one spouse during the marriage is not necessarily determinative on the issue of whether the property is separate or marital in nature.

Whitman v Mastrodonato, ___AD3d___ [Oct 21, 2004]

Where plaintiff's prior action was dismissed on procedural grounds, Court did not apply the doctrine of *res judicata* to bar her identical second action. See plaintiff attorneys, the AD does have a heart, although it seems to beat weaker since Judge White and his acolyte left.

Conklin v Conklin, ___AD3d___ [Oct 21, 2004]

Notes that a party may be entitled to recover a portion of marital funds, which are used to pay off debt incurred by the other party in acquiring separate property.

LEGISLATION

Chapter 738: This legislation reforms the sentencing structure of New York's Rockefeller drug laws to reduce prison terms for non-violent drug offenders, provide retroactive sentencing relief, and make related drug law sentencing

improvements.

Chapter 709: Section 1 of the bill amends subdivisions two and three of §2307-a of the Surrogate's Court Procedure Act. The bill provides that the acknowledgment of disclosure relating to attorney-executors' fees and commissions, must be separate from the will, but may be annexed to the will. The bill also amends the acknowledgment form to include a statement that without the disclosure acknowledgment, an attorney serving as executor is only entitled to one-half of the commissions he or she would otherwise be entitled to receive.

Chapter 642: The bill establishes Chapter 35-A of the consolidated law as Elder Law.

Chapter 634: This measure would amend section 18 of the Public Health Law to accelerate the release of medical records and access to patient information, thereby enhancing the efficiency of the processing of medical malpractice cases.

MESSAGES FROM THE COURTS AND OTHER OFFICIALS/ORGANIZATIONS

THE SALVATION ARMY

The Salvation Army, Schenectady has asked us to let Estate Practitioners know that, if a client wishes to leave money to the Army to benefit Schenectady County residents, the bequest should refer to "the Salvation Army Schenectady Corps" and should use the verb "for" rather than "to," in order to ensure that the maximum amount of the gift will be made available for services in Schenectady County. The local corps advises us that when a gift is made "to The Salvation Army Schenectady Corps" only a portion of the gift is allocated to the Schenectady corps, but the bulk of the gift is used by The Salvation Army USA Eastern Territory. So a gift intended to fund local programs should read, for example:

"...for The Salvation Army Schenectady Corps" or

"...for The Salvation Army Schenectady Corps soup kitchen."

Practitioners with questions about the wording can call Major Mark Mackneer at 346-0222 ext. 12 or Advisory Board Member Jonathan Pearson IV at 374-8461.

REPORT:

THE SEARCH FOR MISSING WILLS

See the list later in this newsletter.

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. We've been able to locate, and incorporate into the files in the Association office, some of these old files, but others elude us. 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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CLASSIFIED ADVERTISING

SPACE AVAILABLE

Professional Office Suite., New building, British American Office Park, Latham. Several windowed offices for rent within professional offices. Conference rooms, secretarial stations, law library, kitchen and broadband service. Available February 1, 2005. Contact A. Mastro at (518) 690-7000.

Law Office Space Available. 162 Lafayette Street Schenectady, 740+ square feet. Walking distance to County Office Building, Courthouse. Two offices, reception, gallery, restroom. Offices tastefully decorated with carpeting, wallpaper and chair rail. Computer network wiring installed. Three parking spaces plus street parking. \$795 per month plus utilities. Contact: Susan (518) 372-9518, Fax (518) 372-9590 or susanmwatson.cpa@verizon.net

HELP WANTED

Associate Attorney. Full and part time positions available with Jones Ferradino in Saratoga Springs. 3+ years experience preferred. Experience in litigation, business transactions, contracts and general practice. Fax (580-0857) or email (sferradino@saratogalaw.com) resume to Stephanie W. Ferradino

Attorney Position. High quality litigation attorney (1-7 years experience) for state-wide lead paint poisoning practice representing children. Hard work. Excellent opportunity for growth and rewarding career of litigation and trial work. Send resume in confidence to Peter Danziger, Esq., O'Connell and Aronowitz, 54 State Street, Albany NY 12207, fax: 518-427-6988 or e-mail: pdanziger@oalaw.com.

INTERESTED IN GETTING INVOLVED?

To join an SCBA committee, contact:
 Alternate Dispute Resolution—Jean Carney
 Criminal Law—Paul Callahan
 Estate & Elder Law—Kate Toombs
 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]

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GOT NEWSLETTER CONTRIBUTIONS?

If you have something you want included in a future newsletter, the following are the deadlines:

April (mailing date 4/12) — **March 21**
June (mailing date 6/7) — **May 16**

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.

**SCHENECTADY COUNTY BAR ASSOCIATION
NINTH ANNUAL ESTATE PLANNING AND ELDER LAW
SEMINAR
Glen Sanders Mansion, 1 Glen Avenue, Scotia, New York
Thursday, March 10, 2005**

- 7:30 – 8:00: **REGISTRATION**
- 8:00 – 8:50: **PLANNING WITH IRA’S AND LONG-TERM CARE INSURANCE**
Dan Bouchard and Dave Kopyc, Retirement Planning Group
- 8:50 – 9:20: **OPPOSING VIEWPOINTS: ETHICS AND THE ATTORNEY-PROVIDER OF NON-
LEGAL SERVICES—APPLICATION OF DR 1.106**
Mark S. Ochs, Esq., Chief Attorney, Commission on Professional Standards vs. Peter V. Coffey,
Esq.
- 9:20 – 10:10: **ALZHEIMER’S DISEASE: WHAT EVERY ELDER LAW PRACTITIONER SHOULD
KNOW**
Jennifer Travis, Associate Director of Programs and Services, Alzheimer’s Association
- 10:10-10:25: **COFFEE BREAK**
- 10:25-11:15: **MENTAL HYGIENE LAW ARTICLE 81 -- A VIEW FROM THE BENCH: Overview of
Changes, Application of Civil Practice Law and Rules, and Rules of Evidence, Presenting
the Case.**
Honorable Barry D. Kramer, Schenectady County Surrogate
- 11:15 – 12:15 **PRACTICAL ASPECTS OF SURROGATE’S COURT, including Small Estates, with and
without Administration, Administration of the Non-Probate Estate, Jurisdictional
Requirements, Preparing the Family Tree Affidavit, Right of Election, and Renunciations**
Paul Morgan, Chief Clerk, Rensselaer County Surrogate’s Court

Thank you for joining us.
Kathleen M. Toombs, Chair

The New York State Continuing Legal Education Board certified the Schenectady County Bar Association as an Accredited Provider of continuing legal education in the State of New York from August 28, 2002 through August 28, 2005. Under New York’s Mandatory CLE rules this program is approved for 4.5 credits. Experienced attorneys will receive 4.0 general credits and .5 credits in ethics. Newly admitted attorneys will receive 4.0 credits in skills and .5 credits in ethics.

Name: _____ **Telephone:** _____ **Fax:** _____
(Please Print)

Address: _____

COSTS: \$75.00 for Attorneys; \$60.00 for non-Attorneys and SCBA Members; and no charge if admitted to practice less than one year. The registration fee is **non-refundable** after the deadline for Registration. The registration fee can be waived based on a showing of financial hardship; your application for waiver of the registration fee must be made in writing to Kathleen M. Toombs, Esq., Herzog, Engstrom & Koplovitz, PC, 7 Southwoods Boulevard, Albany, NY, 12211. Tel: 518-465-7581 Fax: 518-462-2743

Deadline to Register and for Refunds: March 1, 2005. Please make your check payable to: “Schenectady County Bar Association”.

Please send the Registration and Checks to: Kathleen M. Toombs, Esq., Herzog, Engstrom & Koplovitz, PC, 7 Southwoods Boulevard, Albany, NY, 12211. Tel: 518-465-7581 Fax: 518-462-2743

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

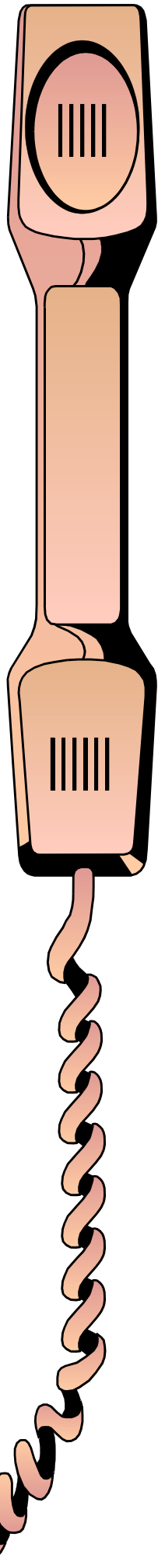
435-1770

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

ALBANY COUNTY BAR ASSOCIATION

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

Topic: RESOLVING HIGH CONFLICT MATRIMONIAL
AND FAMILY LAW ISSUES: CUSTODY,
RELOCATION, DISTRIBUTION OF
RETIREMENT AND DISABILITY BENEFITS
AND ENHANCED EARNINGS

Date/Time: January 21, 1:45-5:00 p.m.

Place: Jack's Oyster House

Presenter: Carolyn D'Agostino, Hon. W. Dennis
Duggan and Michael Friedman

Cost: \$50 Member/\$75 Non-Member/\$35 Law
Student or Paralegal

CLE Credits: 3 Professional Practice

LEGAL AID SOCIETY OF NORTHEASTERN NEW YORK*

Contact Elena Rich, Legal Aid Society of NENY,
689-6322 or erich@lasnny.org

Topic: INTENSIVE SKILLS TRAINING FOR THE
EFFECTIVE REPRESENTATION OF BATTERED
WOMEN IN CUSTODY PROCEEDINGS

Date/Time: March 16, 17 & 18

Place: Albany Law School

Presenter: Various

Cost: Free-limited to 20 participants with prior
training and experience; participants will be
expected to agree to take on 2 *pro bono*
cases

CLE Credits: 12, including some Ethics credits

Common in—You will find:

**A Message from the Salvation Army for Estate Practitioners
Information about a sale of law books to benefit Legal Aid**

See you at lunch, January 20!

“But the Judge said he never had summed up before;
So the Snark undertook it instead,
And summed it so well that it came to far more
Than the Witnesses ever had said!

When the verdict was called for, the Jury declined,
As the word was so puzzling to spell;
But they ventured to hope that the Snark wouldn’t mind
Undertaking that duty as well.

So the Snark found the verdict, although, as it owned,
It was spent with the toils of the day:
When it said the word “GUILTY!” the Jury all groaned,
And some of them fainted away.

Then the Snark pronounced sentence, the Judge being quite
Too nervous to utter a word
When it rose to its feet there was silence like night,
And the fall of a pin might be heard.

Charles Lutwidge Dodgson, from *Fit the Sixth—The Barrister’s Dream*, in *The Hunting of the Snark*