
SCHENECTADY COUNTY BAR ASSOCIATION, INC.

NEWSLETTER

September 2003

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Website: www.schenectadybar.com

Telephone Numbers:
President: 374-1800
Treasurer: 370-4743

Secretary/Newsletter/Membership: 377-6489

CALENDAR OF EVENTS

| | |
|--------------------|---------------------------------|
| September 18, 2003 | SCBA Meeting, 12:00 p.m. |
| October 16, 2003 | SCBA Meeting, 12:00 p.m. |
| January 15, 2004 | SCBA Meeting, 12:00 p.m. |
| April 15, 2004 | SCBA Meeting, 12:00 p.m. |
| April 30, 2004 | Law Day |
| June 17, 2004 | SCBA Annual Meeting, 12:00 p.m. |
| June 14, 2004 | US Supreme Court Admission Trip |

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

OFFICERS

President
Vice President
Treasurer
Secretary

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



NOTE INCLUSIONS IN THIS ISSUE

- A LETTER FROM THE NISKAYUNA YOUTH COURT
- THE WILLS REPOSITORY LIST TO DATE
- AN OPEN LETTER FROM THE COMMITTEE FOR THE HONORABLE HOWARD A. LEVINE FELLOWSHIP IN JUVENILE JUSTICE

WE WELCOME A NEW MEMBER

We welcome to the Association
Timothy F. Wilkens
who was admitted to membership at the June
2003 meeting.

L NEXT MEETING **7**

SEPTEMBER 18, 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

Greetings. I hope this finds you well. It is a great pleasure and an honor to serve as your president. Through the efforts of many, our organization has risen to new levels and has attained an excellent reputation in the community. I hope to expand the efforts of the bar and I solicit your suggestions or comments to achieve that end. I also encourage your participation in bar functions and particularly those of a committee of your choosing.

Speaking of committees, Eric Tepper, chair of the matrimonial committee, has scheduled a meeting on September 16, 2003 at 12 noon at his office. Please call Eric to confirm your attendance.

As a reminder, electronic filing will be in effect in federal court as of January 1, 2004. The Court has expressed a willingness to demonstrate the filing system as well as use of the available audio/visual equipment upon your request. Query: Is state court far behind?

The Schenectady hearing location for workers' compensation matters has moved to the new Department of Transportation building located on the corner of State Street and Broadway. The entrance is monitored and claimants are advised to bring picture identification.

The SCBA is an accredited CLE provider. Please advise if there is an area on which you would like to see a program or further advise if you would like to present. The one hour post luncheon format has worked well in the past and it is my intention to continue on those lines.

In closing, I thank Kathryn McCary and David Burke in advance for their continued contributions to this newsletter. It keeps my comments brief which I know suits all just fine. I look forward to seeing you at the luncheon at the Glen Sanders Mansion on the 18th of September. To those of you who will not be in attendance, my line is always available so please call.

John Seebold

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FROM THE COMMITTEES.

ALTERNATE DISPUTE RESOLUTION For information about the Committee call Chair Jean Carney, 872-9023

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CRIMINAL LAW The Committee is in the initial stages of planning an afternoon seminar on driving while intoxicated. All members of the Association are encouraged to offer suggestions on topics or speakers. For information about the committee—or to offer suggestions concerning the seminar—call Chair Paul Callahan, 895-2334

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ESTATE & ELDER LAW There will be a meeting of the Committee October 1 at 8:00 a.m. at the offices of Robert W. Hoffman, 1802 Eastern Parkway, Schenectady. For more information, call Co-Chairs Pam McDevitt, 370-4743 or Gerard Parisi, 377-9096.

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LAW DAY: Law Day this program year will be April 30, 2004. For information about the Committee, contact Chair Diane Herrmann, by calling 346-1281 or e-mailing to dianehermann@hotmail.com

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MATRIMONIAL LAW: There will be a meeting of the Committee September 16 at 12:00 noon at the offices of Gordon, Tepper & DeCoursey, LLP, 113 Saratoga Road, Glenville. For more information, call Chair Eric Tepper, 399-5400

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

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

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ASSIGNED COUNSEL FEES INCREASED

After years of shuffling their feet, our legislators have finally recognized the importance of fairly compensating attorneys who accept assignment by the courts to represent those who can't afford, or don't have the opportunity, to retain their own counsel, including indigent defendants in criminal cases, children caught in the middle of custody disputes. Effective this coming January, assigned counsel fees will be increased to \$75 per hour for Family Court and felony criminal defense work, and \$60 per hour for misdemeanor defense work. The new provision also eliminates the distinction between in-court and out-of-court work, increases the caps on total fees and the cost of experts and investigators, and creates the Indigent Legal Services Fund.

Assigned counsel still aren't exactly highly compensated—but the change is a welcome demonstration that the State recognizes its obligation to discharge the promises of the Constitution.

YOU BE THE JUDGE

J. David Burke

Six police officers, four plain clothed and two uniformed, arrived at a shopping mall in daylight to execute two arrest warrants issued upon sealed

indictments charging Tony and Nate with drug related crimes. An undercover officer had agreed to meet Tony in the mall parking lot to buy cocaine. After the sale was completed, Tony returned to his car, occupied by Nate, Jack and Fred. Two police vehicles then blocked the vehicle and four officers, with guns drawn, approached the vehicle, telling the occupants to keep their hands in view. Each occupant was removed from the car and Jack was passed off to another officer with instructions to "secure him." The officer handcuffed Jack and performed a cursory pat down for weapons, which lasted about 15 seconds and yielded no weapons. Approximately 15 to 20 seconds after the pat-down, the officer looked down at Jack's pant's pocket and noticed a cellophane ziplock baggy that he suspected contained cocaine. The officer then reached into Jack's pocket and seized the contraband. Fred was taken to the police station where he was advised of his *Miranda* rights, which he waived. At 12:30 p.m. Fred's father arrived at the police station and told a detective that his son should not be questioned because an attorney was on his way to the station. Thereafter, at 1:15 p.m. Fred provided the police with an incriminating statement. At 2:00 p.m., the attorney contacted the police and notified them that he was representing Fred.

Jack moves to suppress the evidence, contending that the police action in frisking him was unjustified in that they did not have a reasonable belief, based upon specific and articulable facts, that he had committed or was about to commit a crime or that he was armed and presently dangerous. Fred moves to suppress his written statement, contending that his constitutional rights were violated because his right to counsel attached when his father told the police that an attorney had been retained to represent him.

Should the motions be granted?

The member who submits the first correct answer by e-mail(SchenectadyBar@aol.com)

will be SCBA's guest at the September meeting.

The correct answer will be on our website (SchenectadyBar.com)

after the September meeting, and in the October newsletter.

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Answer to June You Be the Judge:

BC- yes

JD - no

RW - yes

People v Cohen, 90 NY2d 632

People v Burdo, 91 NY2d 146

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RECENT DECISIONS

Matter of Cohen v Board of Appeals of Vil. Of Saddle Rock, ___NY2d___[July 2, 2003]

Zoning Board denies application for area variance on ground the applicant failed to demonstrate "practical difficulties" or "undue hardship". Court says wrong because the "balancing test" contained in Village Law §7-712-b (3)(b) has preempted these standards. This balancing test is also found in the Town Law & General City Law.

Butler v Rafferty, ___NY2d___ [June 10, 2003]

Holds that where tenants in common agree among themselves that one of them shall have exclusive possession of the common property, liability for personal injuries will fall only on the tenant who exercises possession and control over the area in question. Absent such an agreement, co-tenants are jointly and severally liable for personal injuries resulting from defective conditions on the premises.

Sholes v Meagher, ___NY2d___ [June 10, 2003]

Practice Point: There is no right to appeal from an *ex parte* order, including an order entered *sua sponte*. The proper procedure is to move to vacate the order and appeal as of right to the Appellate Division if that order is denied.

Matter of Watson, ___NY2d___; Matter of Raab, ___Ny2d___ [June 10, 2003]

For those aspiring to judicial office, it would be worthwhile to read these cases as they sustain certain

OCA ANNOUNCES NEW FEES

Effective July 14, 2003, the following new fee schedule is in effect for court filings. Note that this new schedule includes fees for filing motions and for filing stipulations of settlement or voluntary discontinuances.

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|--|-------|
| Index Number | \$210 |
| File Motion or Cross-Motion | 45 |
| File Stipulation of Settlement or V o l u n t a r y Discontinuance | 35 |
| Request for Judicial Intervention | 95 |
| Note of Issue | 30 |
| Demand for Jury Trial | 65 |
| Notice of Appeal | 65 |
| SCAR Petitions | 30 |

aspects of New York's Rules Governing Judicial Conduct pertaining to political activity against First Amendment challenges, distinguishing the holding of *Republican Party of Minnesota v White* (536 US 765 [2002]).

Germantown Central School Dist. v Clark, Clark, Millis & Gleason, AIA, ___NY2d___ [May 22, 2003]

Where the plaintiff's property damage claim involves no additional damage to the building after the implantation of the harmful substance, the injury cannot be said to have resulted from the latent effects of exposure to a toxic substance. Thus, CPLR 214-c, the three-year discovery based statute of limitations for toxic torts is inapplicable.

People v Savinon, ___NY2d___ [May 22, 2003]

Reviews the components of the adverse inference instruction dealing with "uncalled" or "missing" witnesses.

Soich v Farone, ___AD2d___ [July 31, 2003]

Plaintiff parks car in vacant lot and falls when he trips on a piece of broken concrete. Majority holds that plaintiff's status as a trespasser does not absolve the landowner of his duty to exercise reasonable care while the flinty eyed dissent argues that an owner of vacant property has no duty to maintain the premises for the benefit of unauthorized trespassers, citing *Palmer v Prescott* (208 AD2d 1065) which involved a snow & ice condition.

Patterson v Palmieri, ___AD2d___ [July 31, 2003]

File under did you go to law school? Plaintiff brings second motion for summary judgment. Defendant argues it is barred by the Full Faith and Credit Clause of the US Constitution. Problem, that clause only applies to court decisions from other states.

Hubert v Tripaldi, ___AD2d___ [July 24, 2003]

An indication that the Court is giving medical affidavits submitted by defendants on summary judgment motions in "serious injury" cases the same scrutiny as it does to a plaintiff's medical proof. Tip: no matter what side you are on it is a good idea to have the doctor explain the tests he relied on & show how they result in objective findings.

Gold v Ingber, ___AD2d___ [July 24, 2003]

Points out that partners cannot sue each other for matters relating to the affairs of the partnership prior to an accounting of the partnership business.

Hoyt v Hoyt, ___AD2d___ [July 24, 2003]

A party to a separation agreement that is incorporated but not merged in the judgment of divorce may bring an action, after the divorce judgment has been granted, for child support arrears that accumulated prior to the divorce under the separation agreement.

Moon v Clear Channel Communications, ___AD2d___ [July 24, 2003]

The only interesting thing about this case is that Mason & Sheehan got almost \$300,000 in severance pay when they were fired after being on the air for only three months. Makes you wonder if we are in the wrong line of work.

Davis v Eddy Cohoes Rehabilitation Center, ___AD2d___ [July 24, 2003]

Practice Point: Orders denying requests to compel answers to questions at an EBT may not be appealed as a matter of right. Instead, you must obtain leave to appeal.

MacDonald v City of Schenectady, ___AD2d___ [July 10, 2003]

Plaintiff trips on a crack in a sidewalk that was open and obvious, which plaintiff knew was there. Relying on the rule that an open and obvious defect negated a landowner's duty to maintain his or her premises in a reasonably safe condition, Supreme Court granted summary judgment to defendant. Court reversed, articulating a new rule to the effect that the open and obvious nature of a dangerous condition does not, standing alone, necessarily obviate a landowner's duty to maintain his or her property in a reasonably safe condition.

People v Adams, ___AD2d___ [July 10, 2003]

L agrees to baby-sit for defendant who she knew intended to commit a crime if he was able to go with two other men. Defendant proceeds to commit a burglary. Court holds that County Court should have charged that L was an accomplice as a matter of law because she was a facilitator of the crime.

Tornatore v Haggerty, ___AD2d___ [July 10, 2003]

Points out that a physical therapist cannot render a diagnosis, form a prognosis, or determine permanency or the duration of physical limitations. Lesson: don't rely on physical therapy records to establish a serious injury under Insurance Law § 5102(d).

Evans v Stranger, ___AD2d___ [July 3, 2003]

Even though defendant knew that its employee had a recent conviction for DWI when it hired him as a bus driver, permitted him to take a leave of absence rather

than fire him after repeated drug use, and reinstated him as a bus driver rather quickly and without continued monitoring, plaintiff was not entitled to punitive damages in this case where a bus driven by the employee struck and killed a pedestrian.

Fessenden v Fessenden, ___AD2d___ [July 3, 2003]

Court can disregard the party's stipulation establishing child support if it fails to comply with the Child Support Standards Act.

Matter of Joseph V., ___AD2d___ [July 3, 2003]

While in a Mental Hygiene article 81 proceeding it is preferable to appoint a family member as the guardian for the incapacitated person, the Court may appoint an outsider upon a determination that available family members are, in some way, "not suitable". Like, let's turn off life support before our inheritance is gone.

People v Van Hoesen, ___AD2d___ [July 3, 2003]

DA's "facially neutral" explanation for excluding an African-American juror was that "she came from a perspective that she would look at things differently because of her background as an African-American." The Court found this explanation facially discriminatory because it related only to the juror's race and the stereotypical assumption that an African-American perspective would be biased against the prosecution.

People v Colon, ___AD2d___ [July 6, 2003]

Another *Batson* case, this time the mere exercise of a peremptory challenge striking the only African-American from the venire was, without more, insufficient to raise an inference of discrimination.

Holloway v Holloway, ___AD2d___ [July 6, 2003]

Practice Point: An application for appellate counsel fees to enable a spouse to prosecute or defend an appeal must be presented to the court of original instance.

Albany-Plattsburgh United Corp. v Bell, ___AD2d___ [July 6, 2003]

Points out that a shareholder has no individual cause of action to recover damages for a wrong against a corporation. Instead, he or she must sue derivatively.

Curanovic v New York Central Mut. Fire Ins. Co., ___AD2d___ [July 6, 2003]

On application for insurance, the insured made incorrect statements. Naturally, his house burns down and the insurance company doesn't want to pay. Court says to avoid payment on account of the insured's misstatements, the insurer has to prove that the misrepresentations were material, which is generally a

question of fact.

Musillo v Marist College, ___AD2d___ [June 26, 2003]

Subcontractors may be held liable as the agents of the owner or general contractor under Labor Law § 241(6) when they have been contractually delegated the authority to control the injury producing activity or the duty to maintain work site safety.

Matter of New York Civil Liberties Union v City of Schenectady, ___AD2d___ [June 26, 2003]

Holds that incident reports relating to the use of force by police officers against civilians are exempt from disclosure, as are documents relating to civilian complaints of police misconduct and/or brutality. Somehow it strikes me as somewhat odd that the actions of public servants are withheld from the public to whom they are accountable. I better not speed in Schenectady.

Casella v Casella, ___AD2d___ [June 26, 2003]

A reminder that a stipulation regarding the distribution of a pension does not encompass pre-retirement death benefits.

Howard v Parsons' Child & Family Center, ___AD2d___ [June 19, 2003]

Recognizes that a childcare agency acting *in loco parentis* with regard to a foster child may be under a duty to control the child's behavior to prevent harm to others.

Singh v Catamount Development Corp., ___AD2d___ [June 19, 2003]

Practice Point: A party seeking a discretionary change of venue (CPLR 510[3]) must support the application with detailed relevant information establishing that the convenience of the nonparty witnesses would be enhanced by the change. On the same subject, but with more detail, see *Mroz v Ace Auto Body & Towing*, ___AD2d___ [July 6, 2003].

Jordan v Blue Circle Atlantic, Inc., ___AD2d___ [June 19, 2003]

Plaintiff and co-worker at same level of elevation. Co-worker drops a 30 pound brick on plaintiff's hand or the brick falls five or six feet from the top of the pallet onto plaintiff's hand. Under either scenario, Labor Law § 240(1) does not apply since neither event was a gravity related occurrence within the meaning of the statute.

People v Cunningham, ___AD2d___ [June 12, 2003]

Cases discusses whether a person's conduct in signing his or her own name to a company check as the drawer/maker without the authority to do so constitutes the crime of forgery in the second degree. In a 3-2 decision, the Court said yes.

People v Greene, ___AD2d___ [June 12, 2003]

After defendant's right to counsel had attached, he was interviewed by a child protective services caseworker who was a member of the County Family Violence Response Team. Because the Court found that the caseworker was an agent of the police, it held that defendant's constitutional right to counsel had been violated.

Firth v State of New York, ___AD2d___ [June 12, 2003]

An allegedly defamatory report was published on the Internet. Later, the report was moved to a different Internet address. Court holds that those facts are sufficient to state a cause of action for republication.

Matter of Witherhill, ___AD2d___ [June 12, 2003]

Holds that SCPA 207 restricts the subject matter jurisdiction of Surrogate's Court to lifetime trusts that

meet one or more of the requirements stated in the first sentence of SCPA 207 (1).

Matter of Snyder v CNA Insurance Cos., ___AD2d___ [June 12, 2003]

Discusses the type of proof that must be included in an application pursuant to Workers' Compensation Law § 29 (5) seeking judicial approval, *nunc pro tunc*, of a personal injury settlement.

Animal Protective Foundation v Bast Hatfield, ___AD2d___ [June 12, 2003]

Just a reminder that a cause of action alleging fraud cannot be maintained when the fraud charge relates to a breach of contract.

People v Coleman, ___AD2d___ [June 5, 2003]

A Wade hearing testing the legitimacy of a prior photo array identification is not necessary where the witness knows the defendant so well that police suggestiveness is not a concern. Here, the Court held that County Court erred in not holding a Wade hearing because the People failed to meet their burden of proving the witness's familiarity with the defendant.

People v Cole, ___AD2d___ [June 5, 2003]

Electing not to rely on the remedies provided in UCC article 2, defendant strangled a customer who refused to pay him for some crack cocaine. Bad move; for not only did he not get paid, he was indicted for murder in the second degree and manslaughter. The jury acquitted defendant of the murder and manslaughter charges and deadlocked on the lesser-included crime of criminally negligent homicide. Defendant was subsequently indicted for criminally negligent homicide and two drug related counts. Court held that defendant could not be prosecuted on the drug related charges as they were based on the same criminal transaction as the charges of which he was acquitted and thus were "joinable" under CPL 40.10 [2] which bars a subsequent prosecution for a "joinable" uncharged crime.

Matter of Gabrielle HH., ___AD2d___ [June 5, 2003]

One-year order of protection directed Dad to have no contact, direct or indirect, with mother or child. Ten months later, DSS files a petition seeking to terminate Dad's parental rights on basis of abandonment. Because Dad never contacted DSS regarding the child's future, Court granted petition. Dissent points out that no one ever informed Dad that he should maintain contact with DSS.

Fox v Fox, ___AD2d___ [June 5, 2003]

In this round Court points out that a spouse is generally not entitled to reimbursement or recoupment of excess temporary maintenance payments. Court suggests that an excessive temporary award may be considered in appropriately adjusting an equitable distribution award.

Farrell v Cleary-Farrell, ___AD2d___ [June 5, 2003]

The nontitled spouse seeking a distributive share of enhanced earning capacity due to the acquisition of a professional degree during marriage must demonstrate that he or she made a substantial contribution to the titled party's acquisition of that marital asset as opposed to overall contributions to the marriage. Here, the folks were arguing over the value of the wife's dental hygienist license. Hopefully, the attorneys had brushed up on the law before trial.

Acker v Garson, ___AD2d___ [June 5, 2003]

Reminder that a motion to amend a pleading is not a proper vehicle for the determination of the merits of an issue.

D'Ambra v DiDonna, ___AD2d___ [May 29, 2003]

Presumably, the City of Schenectady was aware of the fact the defendant's dog bit two kids in City of Schenectady. Owner releases dog in Clifton Park where it promptly bites a Clifton Park kid. Action by Clifton Park kid against City dismissed because there was no evidence of direct contact between the Clifton Park plaintiffs and the City of Schenectady.

Torns v Samaritan Hosp., ___AD2d___ [May 29, 2003]

Despite a physician's independent contractor status, a hospital may be vicariously liable for such physician's negligence if it maintained control over the manner and means of his or her work and the plaintiff reasonably believed that the physician was provided by the hospital and acting on its behalf.

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ADVICE ABOUT THE IMPACT OF HIPAA ON LITIGATION DOCUMENTS

Michael Colodner, Counsel to the Unified Court System, has prepared a memo to assist Administrative Judges understand and apply the new regulations implementing the Health Insurance Portability and Accountability Act ("HIPAA"—love those Federal acronyms!) as it impacts the work of the courts.

As any of you who has visited the doctor, dentist, optometrist or pharmacy recently has been advised at wearisome length, the new regulations limit the ability of health care providers to disclose patient information.

The regulations (running to *many* Adobe Acrobat pages) are inherently cumbersome, and many health care providers are making special efforts to see that they are applied to maximize that quality. The Colodner memo, which addresses how protected health information can be obtained in litigation, may be of interest to trial counsel. Copies will be available at the September 19 meeting.

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E-MAIL NOTIFICATION FROM THE FOURTH JUDICIAL DISTRICT

The Rural Law Center, which has sponsored the excellent Judge's Best Practices CLE seminars, has proposed the compilation of a list of e-mail addresses of attorneys who practice in the 4th Judicial District. This list would be used by the 4th District, the Rural Law Center, and the Federation of Bar Associations for the 4th District to keep practitioners informed of changes in court rules as well as of programs, CLE opportunities, and meetings of the Federated Bar.

The Schenectady County Bar Association will provide the Rural Law Center with a list of its members' e-mail addresses as included in the Association's directory. If you are willing to have your address included in this list, you don't need to do anything; if you *don't* want to be on the list, please call Administrative Assistant Arlene Williams at 377-6489.

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ACTING SUPREME COURT JUSTICES

Deputy Chief Administrative Judge Joseph J. Traficanti, Jr. has requested the Association's input with respect to the capability of the following County level judges to serve as Acting Supreme Court Justices:

Hon. Mark L. Powers, Schenectady County Family Court

Hon. Barbara Potter, St. Lawrence County Family Court

Hon. Polly a Hoye, Fulton County County Court and Surrogate Court

Any member of the Association wishing to express an opinion with respect to any of these Judges should contact Association President John Seebold at 374-1800

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COMMISSION TO PROMOTE CONFIDENCE IN JUDICIAL ELECTIONS

The New York State Commission to Promote Public Confidence in Judicial Elections, chaired by John D. Feerick, former Dean of Fordham Law School, will hold a public hearing at Albany Law School on September 30. The Commission's work currently

focuses on judicial candidate selection, judicial campaign activity, judicial campaign finance and voter education.

At this time, the Association does not intend to offer testimony at the public hearing on September 30; any member of the Association who believes that the Association should offer such testimony should contact President John Seebold to discuss his/her concerns and suggestions.

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REPORT:

THE SEARCH FOR MISSING WILLS

Over the course of the last year, with your help, we've made progress in compiling a list of the current whereabouts of wills drafted by retired or deceased Schenectady attorneys. A copy of that list is included elsewhere in this newsletter, for your convenient reference. We still get calls from folks looking for wills drafted by lawyers that aren't on the list—so this is a work in progress. Thanks to all who have let us know they have wills someone else drafted. And:

**KEEP THOSE CARDS & LETTERS COMING IN, FOLKS!
U. S. SUPREME COURT ADMISSION**

GOING SURFING

Here are some interesting new or updated websites worth visiting:

State Courts

The Third Judicial District (Albany, Columbia, Greene, Rensselaer, Schoharie, Sullivan and Ulster Counties) has recently launched a *new* website; check it out at www.nycourts.gov/courts/3jd!

While you're there, if you've never visited the Fourth Judicial District's *existing* site, you might want to take a peek—just substitute 4 for 3 in the above address.

And the Unified Court System is urging us to visit their *redesigned* website, which hosts the above two sites: go to www.nycourts.gov

Federal Courts

Meanwhile, The United States District Court for the Northern District of New York is instituting a *new automated case management and electronic docketing system*, to provide easy-to-use electronic case filing 24/7. A first step to familiarizing yourself with this convenient new tool, which goes into effect on January 1, 2004, is a visit to the CM/ECF pages on the Court's website, at www.nynd.uscourts.gov.

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CEREMONY

June 14, 2004

J. David Burke

While June 14, 2004 may seem to be a long way off, it is not too early to make plans to join us in Washington if you would like to be admitted to practice before the United States Supreme Court. While our plans have not been fully developed, we have reserved 30 rooms at The Hotel George which is located on E Street, at the nucleus of Capitol Hill's business district and, more importantly, just a short walk to the US Supreme Court building. You can check the hotel out by logging on to its website (hotelgeorge.com). While we will be providing you with more details at our September meeting, if you would like to join us on this trip, let us know as soon as possible since we are strictly limited to 50 applicants; you may call the Association Secretary at 377-6489, or e-mail us at SchenectadyBar@aol.com.

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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.

SCBA RECORDS AND ARCHIVES

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

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

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NOTICES/ITEMS OF INTEREST

SCBA Members were prominent in recent New York State Bar Association news: Former SCBA President **Cristine Cioffi** is the new NYSBA Vice President for the Fourth Judicial District; **Peter V. Coffey and Kristie Halloran Hanson** are members of the NYSBA committee studying the overhaul and modernization of the Code of Professional Responsibility; to which **The Honorable Howard A Levine** serves as special counsel; **Judge Levine** also recently received a special Founder's Award for his commitment and dedication to the welfare and rights of families and youth. We are proud of all of them!

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Carl Adamec's law office is now located, at 426 Franklin Street in downtown Schenectady; his phone number continues to be 393-2777, but his fax number is now 393-2753. Carl continues to practice in the areas of Contracts, Criminal Law and Real Estate & Personal Injury.

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*Former JAG Corps Lieutenant Colonel **Bruce Lennard** has joined **The Gordon Siegel Law Firm** as an associate. Bruce is a graduate of the United States Air Force Academy and University of Arizona College of Law; after 14 years in the Air Force, he will be concentrating his civilian practice in the areas of personal injury, employment law and business dispute litigation.*

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*This year's **Schenectady County Bar Association Scholarship Award** to a Schenectady County Community College student was made to **Lindsay Waddell** of Duanesburg, who will be majoring in Teacher Education at the College. Lindsay sent us a note thanking the*

Association for the scholarship which "is very much appreciated and will help with the financial responsibility of college tuition." We are delighted to be able to help students like Lindsay and the first recipient of the scholarship, **Andrew J. Ramirez**, who graduated from the College this year with a degree in Business Administration.

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*Speaking of gifts, the Association has also received a lovely note from **Hope M. Splittgerber, Commissioner of Jurors**, thanking us for the large screen television monitor the Association recently donated to help make the process of juror orientation easier and more effective for both the court staff and the jurors.*

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INTERESTED IN GETTING INVOLVED?

To join an SCBA committee, contact:

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

[addresses & numbers are in the SCBA directory—which will be issued in mid-September]

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CLASSIFIED ADVERTISING

POSITIONS AVAILABLE

The Appellate Division, Third Judicial Department, is seeking applicants for a one-year clerkship in the Law Research Department, to commence in August, 2004. Applicants must be law-school graduates with an exceptional record, admitted to the State Bar (JG-26), or admitted within 18 months of appointment (JG-23). Applications are due by September 23, 2003—for more information contact Robert D. Mayberger, Deputy Clerk, Appellate Division, Third Department, PO Box 7288, Capitol Station, Albany, NY 12224.

Schenectady Firm seeks to add an attorney with preferably 5-6 years' experience in the Corporate area, including Tax, Employee Benefit and Health Care law experience. Please send resumes to: Higgins, Roberts, Beyerl & Coan, P.C., 1430 Balltown Road, Schenectady, NY 12309 ATTN: J.H. Erceg, Esq.

The Honorable Howard A. Levine Fellowship in Juvenile Justice

Committee

Julia Smead Bielawski, Esq.

Laura Etlinger, Esq.

Tim O'Neal Lorah, Esq.

Alicia R. Ouellette, Esq.

Patricia E. Salkin, Esq.

An Open Letter to the Members of the Schenectady County Bar Association

August 2003

To the Members of the Schenectady County Bar Association:

To honor Judge Levine upon his retirement from the New York Court of Appeals, his former Court of Appeals law clerks have created the *Honorable Howard A. Levine Fellowship in Juvenile Justice* at Albany Law School. The fellowship will be awarded to Albany Law School students who exhibit outstanding academic accomplishment and an exemplary commitment to improving family law and the lives of children. The fellowship recipient will receive a stipend while working in a Capital Region government or non-profit agency or organization devoted to juvenile justice.

When we presented this "gift" to him at his retirement dinner this past fall, Judge Levine expressed his pleasure at receiving a tribute that both honors his judicial career and promotes service in the field of juvenile justice. The Committee members are grateful to Marty Silverman for adding to the contributions of the law clerks and making possible the Fellowship's basic endowment.

Now, we want to offer to all of the many, many friends of Judge Levine the same special opportunity to honor his wonderful and distinguished career by opening the endowment to additional contributions. Through your participation, we hope to see the endowment substantially increased which will ensure that the Fellowship will have a significant and lasting impact in the area of juvenile justice in the Capital Region.

As members of the Schenectady County Bar Association, you will be receiving by mail a solicitation seeking contributions to the Fellowship. Albany Law School is a fully-qualified charitable institution, so your contributions can be tax-deductible. Please note that you may also use your Visa or MasterCard to make a gift. If you are interested in the tax advantages of gifting long-term appreciated publicly-traded securities, please call the Law School's Development Office at 518-445-3218. Whatever the size of your gift, please participate. No one will call, so please send in your gift or pledge as soon as you receive the solicitation in the mail.

We thank you in advance for your support of this lasting tribute to Judge Levine's distinguished career.

Sincerely,

The Committee for the Levine Fellowship

LEGAL WHIMSEY

The following is the actual text of a 1971 decision of the United States District Court for the Western District of Pennsylvania. For the incredulous: You could look it up, 54 FRD 282.

UNITED STATES *ex rel.* Gerald MAYO

v.

SATAN AND HIS STAFF.

Misc. No. 5357.

United States District Court,

W. D. Pennsylvania.

Dec. 3, 1971.

Civil rights action against Satan and his servants who allegedly placed deliberate obstacles in plaintiff's path and caused his downfall, wherein plaintiff prayed for leave to proceed *in forma pauperis*. The District Court, Weber, J., held that plaintiff would not be granted leave to proceed *in forma pauperis* in view of questions of personal jurisdiction over defendant, propriety of class action, and plaintiff's failure to include instructions for directions as to service of process. Prayer denied.
Gerald Mayo, pro se.

MEMORANDUM ORDER

WEBER, District Judge.

Plaintiff, alleging jurisdiction under 18 U.S.C. 241, 28 U.S.C. 1343, and 42 U.S.C. 1983 prays for leave to file a complaint for violation of his civil rights *in forma pauperis*. He alleges that Satan has on numerous occasions caused plaintiff misery and unwarranted threats, against the will of plaintiff, that Satan has placed deliberate obstacles in his path and has caused plaintiff's downfall.

Plaintiff alleges that by reason of these acts Satan has deprived him of his constitutional rights.

We feel that the application to file and proceed *in forma pauperis* must be denied. Even if plaintiff's complaint reveals a *prima facie* recital of the infringement of the civil rights of

a citizen of the United States, the Court has serious doubts that the complaint reveals a cause of action upon which relief can be granted by the court. We question whether plaintiff may obtain personal jurisdiction over the defendant in this judicial district. The complaint contains no allegation of residence in this district. While the official reports disclose no case where this defendant has appeared as defendant there is an unofficial account of a trial in New Hampshire where this defendant filed an action of mortgage foreclosure as plaintiff. The defendant in that action was represented by the preeminent advocate of that day, and raised the defense that the plaintiff was a foreign prince with no standing to sue in an American Court. This defense was overcome by overwhelming evidence to the contrary. Whether or not this would raise an estoppel in the present case we are unable to determine at this time.

If such action were to be allowed we would also face the question of whether it may be maintained as a class action. It appears to meet the requirements of Fed.R. of Civ.P. 23 that the class is so numerous that joinder of all members is impracticable, there are questions of law and fact common to the class, and the claims of the representative party is typical of the claims of the class. We cannot now determine if the representative party will fairly protect the interests of the class.

We note that the plaintiff has failed to include with his complaint the required form of instructions for the United States Marshal for directions as to service of process.

For the foregoing reasons we must exercise our discretion to refuse the prayer of plaintiff to proceed *in forma pauperis*.

It is ordered that the complaint be given a miscellaneous docket number and leave to proceed *in forma pauperis* be denied.

**WHO'S GOT 'EM?
THE SCHENECTADY COUNTY BAR ASSOCIATION WILLS REPOSITORY LIST TO DATE**

| AS OF WHAT DATE | DRAFTSPERSON | CUSTODIAN |
|------------------------|--|---|
| November, 1999 | William Ward | Michael Brockbank |
| February, 2000 | Morris Marshall Cohn Myron J. Cohn | Pott & Naviasky |
| February, 2000 | Maynard, O'Connor & Smith while still located in Schenectady on Franklin Street | Pott & Naviasky |
| September, 2002 | Fairlee, Armstrong & Cooper (? Fairlee, Harold Armstrong, Stephen Cooper) | Antokol, Reisman & Coffin |
| September, 2002 | Raymond Smith while at Fairlee, Armstrong & Smith | Antokol, Reisman & Coffin |
| September, 2002 | Mario Pacelli | Antokol, Reisman & Coffin (A-L Names) Frank Parisi (M-Z Names) |
| January, 2001 | D. Vincent Cerrito, Abraham Clayman, Hannibal Pardi, Daniel D. Mead, Simeo J. Gallo, James A. Bonaquist, Joseph J. Buchyn, Stephen A. Buchyn, William O'Hare, William J. Werner, Robert Liebers, Robert Gallamore, Don Smith [Robert Hoffman while at Buchyn, O'Hare/Richard Della Ratta while at Cerrito & Clayman] | McCary & Huff, LLP |
| September, 2002 | Bruce Martin | Michael Brockbank |
| September, 2002 | George Camino | Michael Brockbank |
| September, 2002 | Vito Caruso | Michael Brockbank |
| September, 2002 | Howard Mack | Paul Mulligan |
| September, 2002 | Thomas Pritchard | Betty McKeon (his wife) (941) 921-6954 |
| September, 2002 | Roy Peters | Betty McKeon |
| October, 2002 | Bob Gilbert | Bob Hoffman |
| October, 2002 | Heywood Robinson | Bob Hoffman |
| November, 2002 | Harold A. Friedman | Tom Hirschen |
| November, 2002 | George A. Maksail | Tom Hirschen |
| November, 2002 | John Brown of Ballston Spa | Tom Hirschen |
| February, 2003 | Mathias Poersch | Kouray & Kouray |
| July, 2003 | Jane Finin, Frank Grasso [attorneys formerly with Grasso & Grasso] | Donna Cole-Paul, Esq. 266-1030 |

MINUTES—SCHENECTADY COUNTY BAR ASSOCIATION—MEMBERSHIP

ANNUAL MEETING—June 19, 2003—12:00 p.m.—The Glen Sanders Mansion, Scotia, NY

The meeting was called to order by President J. David Burke at 12:20 p.m., 84 members of the Association being then present and constituting a quorum. The President welcomed the judges present, and the family of Jane Finin Vadney. He announced that the winning Scotia-Glenville Central School District mock trial team could not attend because of Regents exams, but thanked the Association for its support of the Mock Trial program.

MINUTES OF PRIOR MEETING

The minutes of the April 17, 2003 meeting were approved by general consent.

TREASURER'S REPORT

Treasurer Hoffman distributed a written report, copy attached, which was accepted by general consent.

PRESIDENT'S REPORT

President Burke noted that the Association will be donating a new, large-screen television set to be used to show orientation and training videos to the incoming jury panel, and to show videotaped testimony; a plaque identifying the Association as the donor will be affixed to the set. The Commissioner of Jurors has expressed thanks to the Association for this gift.

An OCA pamphlet detailing the new fees, including fees for filing motions and stipulations of discontinuance, can be obtained from the courts.

The New York City Criminal Court is accepting resumes for the position of Chief Court Attorney, which pays approximately \$85,000; resumes are due by July 9. There is also a United States Magistrate Judge position open in the Syracuse Northern District office.

Judge Kaye has formed a Committee on the Jury, which will be holding public hearings and soliciting comments in writing on how to improve the jury system.

Forms to apply for consideration for appointments under Part 36 are available; note that the position of referee in foreclosures needs no special training, but the other possible appointive positions do require training.

Pictures will be taken after the meeting for attorneys wishing to apply for the new court Secure Pass; note that it requires two forms of picture ID.

SCBA member Maggie Tabak has received the Capital District Women's Bar Association Distinguished Service Award, and Kathryn McCary has received the Law, Order & Justice Center's Mediator of the Year Award.

COMMITTEE REPORTSMEMBERSHIP COMMITTEE REPORT

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

Marnie M. Dzialo, sponsored by Paul V. Sciocchetti; Gilah R. Mayer, sponsored by Paul V. Sciocchetti; Warren Redlich, sponsored by J. David Burke; Matthew Schwartz, sponsored by Susan Ciani Casey; Jill S. Polk, sponsored by Michelle H. Wildgrube.

The name of the following applicant was read for the second time:

Timothy F. Wilkens, sponsored by Vincent Capasso, Jr.

Mr. Wilkens was welcomed to membership in the Association.

REPORT OF THE MEMORIAL AND SUNSHINE COMMITTEE

Committee Chair Neil Moynihan was unable to attend the meeting; in his place, President Burke offered the following resolution in memory of Jane Finin Vadney:

WHEREAS Jane Finin Vadney, a member of this Association, died on the 2nd day of May 2003; and

WHEREAS Jane Finin Vadney was a lifelong resident of the Capital District, who graduated from SUNY-New Paltz and the California Western School of Law; and

WHEREAS Jane Finin Vadney practiced with the Schenectady law firm of Grasso & Grasso from her admission to the Bar in 1981 until her death, first as an associate and then, starting in 1985 as a partner, and was at the time of her death Managing Partner of that firm as well as a Deputy County Attorney for Schenectady County; and

WHEREAS Jane Finin Vadney for many concentrated her practice in the area of public sector labor relations and was well-known and respected for her representation of numerous local police and firefighter units; and

WHEREAS throughout her career, Jane Finin Vadney was active in the Schenectady County Conservative Party, serving as committee person, counsel and delegate and convenor to the Supreme Court Judicial Convention, 4th District; and

WHEREAS Jane Finin Vadney is survived by her husband, Michael Vadney, as well as her Father, Charles T. Finin, her five sisters and one brother and seven nieces and nephews now, therefore, be it

RESOLVED, that the Schenectady County Bar Association records with deepest sorrow the passing of its former member, Jane Finin, and conveys its sympathy to her Husband and other family members, and be it further

RESOLVED, that this Resolution be incorporated in the minutes of this meeting and recorded in the journal of proceedings, and a copy thereof be transmitted to Jane Finin's family.

Member Susan Beaudoin shared her memories of being co-counsel with Jane on a case, and observed that Jane was just a neat person. Member Bruce Trachtenberg noted that no one was a stronger advocate than Jane, and that whatever she said, she meant.

Judge Kramer observed that Jane appeared before him often, and was a passionate advocate whom he came to admire greatly; President Burke agreed that she was certainly a passionate advocate, who argued, argued, argued for her position. Member Paul Tocker, who served with Jane in the City Attorney’s office stated that she was a terrific lawyer and a great colleague, and is sorely missed.

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

RECOGNITION OF BOARD MEMBERS.

President Burke noted that Board Members Vincent Versaci and Amy Herter Robinson have completed their terms; on behalf of the Association he presented each of them with a gift certificate to the Glen Sanders Mansion, in appreciation of their service.

CONSTITUTION & BY-LAWS

Constitution and By-Laws Chair Mike Basile moved adoption of the proposed new by-laws, as set forth in the June newsletter, with one amendment; comments were received from Gerry Hennesey and Earl Bucci concerning honorary members and the office of President elect. In light of the concerns expressed about the President-Elect, the Committee recommends that the proposed new Article II be amended by the addition of the language “except for the office of President Elect in a year that the current President Elect is nominated for the Office of President.”

The Chair having moved the adoption of the proposed new by-laws as amended, discussion was held. Member Earl Bucci noted that the title “President Elect” mans that you automatically become President at the end of the current term. There should therefore be only 3 nominations: President Elect, Secretary and Treasurer—why change the wording if you aren’t going to change the meaning?

Member Gerry Hennesey noted that different by-laws handle this issue differently. Most lawyer organizations with a President-Elect use the automatic process, but some don’t. The purpose of the President-Elect is to give the individual the year to prepare himself to be President, and to allow him or her to select and organize committees for the succeeding year. The Schenectady County Bar Association is a small organization, and its President is not expected to devote all his time to that office. With respect to Honorary Members, Member Hennesey noted that the by-laws currently provide that all members must be members of the Bar, and it should stay that way. When the by-laws were last reviewed, the Committee looked at by-laws from many other Association, and normally they require that even honorary members be members of the bar.

Member Peter Coffey rose to explain the purpose of President-Elect and the interplay of the nominating/2-term process, and read the language of the proposed by-laws.

On MOTION of Member John Massaroni the matter was referred back to the committee.

REPORT OF THE NOMINATING COMMITTEE

Paul Callahan offered the report of the Nominating Committee, which proposed the following to serve as Officers and Directors of the Schenectady County Bar Association for the 2003-2004 program year:

| | | | |
|-----------------|---------------------|---|-----------------------|
| <u>OFFICERS</u> | | <u>DIRECTORS</u> | |
| President: | John R. Seebold | Diane D. Enzinna | |
| Vice President: | Hon. Karen A. Drago | FEDERATION OF BAR ASSOCIATIONS, 4 TH JUDICIAL DISTRICT | |
| Treasurer: | Robert W. Hoffman | Delegate: | Michelle H. Wildgrube |
| Secretary: | Kathryn McCary | Alternate: | Richard D. Wickerham |

No independent nominations having been received, on MOTION of Paul Callahan the Secretary was directed to cast one ballot in favor of the slate of nominees.

Outgoing President Burke passed on to incoming President Seebold a copy of Robert’s Rules of Order and a gavel. He thanked the Membership, noting that he appreciated the honor of having been asked to serve as President, but was glad his term was over.

President Seebold thanked the Membership for electing him, and urged that members call him with ideas and concerns. He noted that he had very big shoes to fill, but at least Dave Burke has promised to continue writing the Recent Decisions and You be the Judge features for the Newsletter. He then presented a plaque to President Burke in recognition of his service.

President Seebold reappointed the Constitution and Bylaws Committee, to allow them to deliberate on the matter of the President Elect as referred back to them.

There being no additional business to come before the Membership, the meeting was adjourned at 1:10 p.m.

Respectfully submitted,
Kathryn McCary, Secretary

PRO BONO RESOURCES

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

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

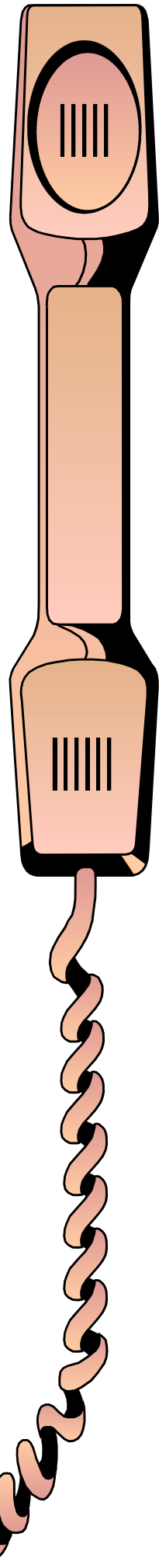
435-1770

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

None we know of yet—but watch this space!

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

Come on in—You will find:

- Recent Decisions and You Be the Judge
- Stuff about the Courts
- How *not* to sue the Devil

See you at lunch, September 18!

“He was a great lawyer, Dan’l Webster, but we know who’s the King of Lawyers, as the Good Book tells us, and it seemed as if, for the first time, Dan’l Webster had met his match.”

Stephen Vincent Benét, *The Devil and Daniel Webster*