Schenectady County Bar Association, Inc. Newsletter

April 2008

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Executive Director Diane Herrmann
dianeherrmannesq@yahoo.com
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CLE & EVENT CALENDAR

April 10, 2008
One Hour Free CLE
Improve Your Legal Research
Presented by Laurie Barber
and Diane Herrmann
1.0 Hour of Prof. Practice
Transitional Program

Spring Social
May 1, 2008 • 5:30-7:30
Stockade Inn • Annual Awards

May 21, 2008
How to Do a Better Appeal
Co sponsored with ACBA
Albany Marriott, Wolf Road • 4 - 6:30pm

May 23, 2008
Real Property and Practice Seminar
Glen Sanders Mansion, Scotia • 8-4:30

June 19, 2008
Summary Jury Trials
One Hour CLE immediately following the meeting. Presented by Honorable Lucindo Suarez Statewide Coordinating Judge of Summary Jury Trials,
Office of Court Administration

PowerPoint presentation on the nature, particulars and benefits of Summary Jury Trials, and how best to address and prepare for one

SCHENECTADY COUNTY BAR ASSOCIATION MEETING SCHEDULE 2008

Membership Meetings
12 noon
@ Glen Sanders Mansion

April 10
Nomination Committee Selected

June 19
50 Year Members Recognized

Cost:
$15 Members
$20 Non Members or inactive Members
Please call 377-9096 to rsvp or email
info@schenectadycountybar.org

MEMBERSHIP NEWS

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

2008 Dues

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

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

Membership applications can be obtained from:
Kathryn McCary
Membership Chair
PO Box 1728
Schenectady, NY 12301

Or contact, Diane Herrmann, Executive Director at 393-4115
Applications are also available online at schenectadycountybar.org.

SCHENECTADY COUNTY BAR ASSOCIATION

2008 OFFICERS

President
Robert Hoffman

Vice President
Sheila Ferrucci

Treasurer
Gerard Parisi

Secretary
Kathryn McCary

Executive Director
Diane Herrmann

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Honorable Karen Drago
Laurence Naviasky
Roland Faulkner
Pamela McDevitt
John Seebold
J. David Burke
John Fantauzzi
Paul Callahan
Diane Herrmann-ex officio

Presidents Message

N D D

I recently discovered yet another "disorder", the causes of which cast aspersions, in part, toward attorneys. Consider the following excerpt from my Wikipedia search:

> Nature Deficit Disorder, a term coined by Richard Louv in his 2005 book *Last Child in the Woods*, refers to the alleged trend that children are spending less time outdoors, resulting in a wide range of behavioral problems. Louv claims that causes for the phenomenon include parental fears, restricted access to natural areas, and the lure of the screen.
>
> Louv spent 10 years traveling around the USA reporting and speaking to parents and children, in both rural and urban areas, about their experiences in nature. He argues that sensationalist media coverage and paranoid parents have literally "scared children straight out of the woods and fields," while promoting a litigious culture of fear that favors "safe" regimented sports over imaginative play.

Let us do our part to combat this new disorder. At the same time, we can help prevent its spread to us hard working adults. I propose we dispel this fear and head off the deficit by getting out and experiencing nature. With spring on hand, I am organizing a trip to visit the NY–CT–MA tripoint, and the highpoint of CT. Situated about 1.5 hours south, off the Taconic Parkway, this is a lovely walk with a climb of Mt. Frissell at the end. Check it out at: http://americasroof.com/ct.shtml

If you are interested in joining other SCBA members on this trip and would like more details please contact me (bob@hoffnavlaw.com) . We'll coordinate schedules and set a date. Spouses and, of course, children are welcome!

Enjoy Spring!

All offices are up for Election at the June meeting, and two director positions will be open. At the April meeting we will elect a nominating committee of five members. Pursuant to the bylaws members may not serve on the nominating committee for two consecutive years. Last year's nominating committee was: J. David Burke, Brian Ferrucci, Albie Ferrucci, Phil Rodriguez and Crystal Doolity. The board of directors will select the delegates to the New York State Bar House of Delegates and the Federation of Bar Associations, Fourth Department. Please plan on joining us for this important meeting.

CLASSIFIED ADVERTISING

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

Offices for Rent

Including Utilities, AC, Library, Waiting Area, Fax, Copier, with or without Furniture…$250.00 - $350.00/mo.
514 State Street, Schenectady (518) 370-2500

Equipment For Sale

Canon ImageRunner 5070 b&w copier
w/printing,faxing & scanning capabilities.
Less than 2 yrs old & only 226,720 copies made.
$3,000 OBO.

Lanier LD238c color copier w/ printing, faxing & scanning capabilities.
Less than 2 yrs old & 220,000 copies made.
$6,000 OBO.

Lanier 515e fax machine.
Older model but reliable. $300 OBO.
(518) 786-6000 x 23.

WHO KNEW

Bob Hoffman and Steve Kouray
Are new grandparents!

Kevin Mednick and Jim Bendall
are hosting Legal Talk on 810 WGY

NEWSLETTER DEADLINES

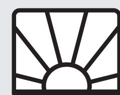
If you have items to contribute for future newsletters please forward. Email attached is the preferred method, dianeherrmannesq@yahoo.com, or mail.

June Newsletter Deadline: May 8

Lawyer Assistance Program:

What, Who, When and How

Patricia Spataro, Director
New York State Bar Association's
Lawyer Assistance Program



Attorneys suffer from substance abuse and depression twice that of the general population. Addiction and depression are treatable but because denial is an inherent part of the disease these illnesses are often left untreated. In addition, some attorneys think that asking for help is a sign of weakness, yet attorneys and judges ultimately face serious consequences when mental health concerns are not addressed. An impaired attorney is at risk for disciplinary problems because it is hard to be a good attorney when there are serious personal problems.

The Lawyer Assistance Program provides assistance to attorneys and judges suffering from addiction, depression, debilitating stress, or other mental health issues. Services include assessment, referrals, education, intervention, and peer assistance. The program is confidential as is described in section 499 of the Judiciary Law.

LAP services are provided by the professional LAP staff and attorney volunteers who have had personal experience with the issues. The attorney volunteers generously give their time to help a colleague in need. Assistance is readily available and a simple phone call is all it takes to connect to the valuable LAP resources.

Many attorneys contact LAP when they realize they have a problem… often this happens as a result of a crisis such as DWI, loss of job, or notice from discipline. We take every opportunity to educate attorneys about the early warning signs of addiction, depression, and other mental health concerns in hopes of preventing a crisis.

Occasionally attorneys and judges call LAP looking for a way to help a colleague who is demonstrating behaviors that are out of character, self-destructive, or pose harm to clients or others. These behaviors may include, excessive drinking, using illegal drugs, becoming withdrawn, isolating themselves, behaving aggressively, inappropriately interacting with others, or not meeting professional or personal responsibilities.

Denial and stigma pose significant barriers to attorneys getting help and the consequences for untreated mental health concerns are serious and can include loss of job, of family, or life. For the profession it can mean loss of a colleague, client harm, and a damaged public image of the legal profession. LAP provides resources to help the members of the legal community stop the loss of good attorneys to these highly treatable ailments.

Please call for further information and/or assistance
1 800 255 0569

PROFESSIONAL ANNOUNCEMENTS

****

The Law Firm of
FERRUCCI & CORRIGAN
is pleased to announce that

J. DAVID BURKE, ESQ.

has become OF COUNSEL to the firm

FERRUCCI & CORRIGAN
ALBIE S. FERRUCCI , ESQ.
MARY LOUISE CORRIGAN, ESQ. (1951-2005)
BRIAN CORRIGAN FERRUCCI, ESQ.
SHEILA CORRIGAN FERRUCCI, ESQ.
(also admitted in Massachusetts)
J. DAVID BURKE, ESQ., Of Counsel

835 Union Street • Schenectady, New York 12308 • 518-372-1500

****

Sheila Corrigan Ferrucci has been re-elected,
for a second term, to the Alumnae Board of Directors
for Marymount College of Fordham University.

****

Robert W. Hoffman
Laurence Naviasky,

are pleased to announce
the opening of the law firm,

HOFFMAN & NAVIASKY, PLLC.,
at 1802 Eastern Parkway,
Schenectady, New York 12309*.
Effective January 1, 2008.

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SCHENECTADY ATTORNEY RECEIVES STATE BAR ASSOCIATION'S PROFESSIONALISM AWARD

Attorney Praised by Colleagues, Adversaries and Clients for Compassion, Ethics, and Civility

Attorney Peter V. Coffey (Englert, Coffey, McHugh and Fantauzzi, LLP) has been selected to receive the 2008 Attorney Professionalism Award from the New York State Bar Association.

The award, sponsored by the Association's Committee on Attorney Professionalism, was presented on Thursday, January 31 during the Annual Meeting in Manhattan.

The Attorney Professionalism Award recognizes an Association member who displays the highest standards of professionalism, including dedication to the service of clients, commitment to promoting respect for the legal system in the pursuit of justice and the public good, outstanding ethical conduct, competence, good judgment, integrity and civility.

The Schenectady County Bar Association, which nominated Coffey for the award, received dozens of letters of endorsement from colleagues, former clients, and adversaries in legal matters.

Schenectady County Bar Association President Robert W. Hoffman of Schenectady wrote in his nomination letter, "Peter is the consummate professional, and his character and integrity go beyond the legal profession into the community. His judgment, character and leadership are greatly admired by the judiciary, his peers, his clients, his friends and his community."

Real Property Law Section Chair Karl B. Holtzschue of New York City noted, "Peter constantly reminds us of our ethical and professional obligations, in the most civil and thoughtful manner. I believe that his service to his colleagues, his clients and the community exemplify the highest level of attorney professionalism. His commitment to promoting respect for the legal system and pursuit of justice in the public good is always foremost in his mind and actions. He is an exemplar of ethical conduct, competence, good judgment, integrity and civility."

Coffey is a partner with Englert, Coffey, McHugh and Fantauzzi, LLP. He is a member of the Association's House of Delegates, serves as First Vice-Chair of the Real Property Law Section Executive Committee, and is a member of the Business Law Section. He served on the Committee on Unlawful Practice of Law, Committee on Professional Discipline, Committee to Review Judicial Nominations, and Committee on Standards of Attorney Conduct. Throughout the Association, he is noted for his popular, lively lectures on professional ethics.

James M. Altman of New York (Bryan Cave LLP) chairs the Committee on Attorney Professionalism, and Lucille A. Fontana of White Plains (Clark, Gagliardi & Miller) chairs the award selection subcommittee.

State Bar President Kathryn Grant Madigan of Binghamton (Levene, Gouldin & Thompson LLP) presented the award to Coffey at the Annual Meeting in January.

Previous award winners are: Frank E. Yannelli of Rockville Centre (Yannelli & Zevin); Barry Kamins of Brooklyn (President, New York City Bar Assocation); Fontana; Carlton F. Thompson of Binghamton (Levene, Gouldin & Thompson LLP); Anne Reynolds Copps of Albany (Law Office of Anne Reynolds Copps); James M. Conboy of Albany (Carter Conboy Case Blackmore Maloney and Laird, PC); George J. Nashak, Jr. (Ramo Nashak & Brown) of Queens; and Terrence M. Connors of Buffalo (Connors & Vilardo, LLP).

Peter was honored by the SCBA at a recption held at Proctors Gallery

Steve Coffey, Liz Coffey, Tracey Coffey, Peter Coffey and E.Stewart Jones at the SCBA Reception for Peter Coffey

Give The Lady What She Wants, As Long As It's Macy's

Reprinted from Stetson Lawyer, Fall 2007
Faculty Viewpoint
by Professor Mark Bauer
Stetson University College of Law

In 2005, Macy's acquired its largest competitor, May Department Stores, and retired its famous brand names, including Marshall Field's, Filene's, Foley's and Hecht's. The U.S. Federal Trade Commission reviewed this $17 billion merger and found that the creation of a 1,000-store behemoth would not substantially lessen competition because traditional department stores compete with discount stores, upscale stores and the Internet. To evaluate whether the FTC was right, I compared thousands of department store newspaper ads before and after the merger. My research suggests that Macy's customers are now paying much more than they did before the merger.

Macy's department store embodies the American Dream. Rowland Hussey Macy was born on Nantucket Island to a Quaker family in 1822. He left on a whaling ship at age 15 and returned with a red star tattooed on his hand — the red star that now serves as the corporate logo of Macy's. After whaling, Macy tried careers in retail, the stock market and real estate, before opening a store in Manhattan in 1858.

Macy's first small store was located in a then-unfashionable section of Manhattan, 60 feet deep with a 20-foot front. With dreams greater than his existing bank account, he financed the store with loans of $20,000 and instituted the basic policies that made the store famous: selling at fixed, marked prices; selling at lower prices than other stores; buying and selling for cash only; and advertising vigorously. The store was a success and soon grew to occupy 11 storefronts.

Macy's descendants were unable to maintain his legacy and sold their interests to Lazarus Straus, a recent immigrant to the United States and Macy's china and glassware vendor. The Straus family lived the American Dream by building Macy's into a beloved brand, immortalized in A Miracle on 34th Street and headquartered in the world's largest store. Macy and Straus had long-lasting impacts on American retail, but they were not alone. John Wanamaker of Philadelphia was the first to institute no-haggle pricing and gave his employees health insurance and pensions. Marshall Field of Chicago endowed two of Chicago's legendary museums. Filene's bargain basement was so famous that it was eventually spun-off as a separate chain.

Every city in America had its own merchant-prince who enlivened downtown, made retail an adventure and supported local philanthropies. And while it is sad to see an important chunk of our history disappear in favor of Macy's national brand name, my research considered whether Macy's immense size led to higher prices for consumers in violation of antitrust law's Clayton Act.

I picked 13 cities, representing every region in the country. Included in this group were cities where Macy's competed against other middle-market department stores, like Dillard's; cities where Macy's competed against a May store, like Filene's; and cities where Macy's had no middle-market competition. Assisted by Stetson's outstanding reference librarians and a fantastic student research assistant, we reviewed 3,924 newspapers and at least 10,000 department store ads. The results were startling. Today, in cities where Macy's faces no middle-market competition, coupons are issued on 31.03 percent fewer days than in cities where Macy's faces middle-market competition. In all cities surveyed where Macy's acquired a May store, the number of coupons issued by Macy's has declined by 62 percent and the average monthly face value of the coupons that Macy's does issue has decreased 13 percent.

Macy's acknowledged that it has substantially reduced the number of coupons it issues, but it maintains that it is trying to change the way people shop, and that it is not taking advantage of the fact that it eliminated its largest competitor. The FTC found that department stores face competition from myriad entities, including Wal-Mart and Internet stores, and that it found no proof that department stores engaged in price competition with one another.

There may be many explanations for Macy's pricing policies, some even completely lawful. But the most obvious explanation for such a radical change after buying its largest competitor is that Macy's is eliminating discounts because it can — and because nothing can stop it. The FTC is charged with protecting American consumers. It is in the best interests of consumers for the FTC to revisit this merger and Macy's conduct.

Mark Bauer is an associate professor of law at Stetson. Before entering academia, he worked for the Federal Trade Commission's Bureau of Competition and practiced antitrust law with two Chicago law firms. He wrote and edited a treatise on State Unfair Trade Practices Law and taught at Chicago-Kent College of Law before joining Stetson in 2004. The ideas presented in this Faculty Viewpoint section are the personal opinion of the author as an academic expert, and do not necessarily reflect the opinions of Stetson University College of Law or its leadership.

MINUTES--SCHENECTADY COUNTY BAR ASSOCIATION/

MEMBERSHIP

REGULAR MEETING -- November 15, 2007 - 12:00 p.m. at The Glen Sanders Mansion, Scotia, NY

The meeting was called to order by President Hoffman at 12:30 p.m., 33 members of the Association being then present and constituting a quorum. President Hoffman welcomed the members. He encouraged members, especially new members, to become involved with the work of the Association through its committees. Minutes of the November 9, 2007 meeting were approved on MOTION of Peter Coffey by General Consent.

TREASURER'S REPORT Gerard Parisi

A report for the period November 8, 2007 to January 8, 2008 was distributed; assets increased $2,000 in that period because of income for seminars; there was a new expense item for the website. The report was ACCEPTED by general consent.

EXECUTIVE DIRECTOR'S REPORT Diane Herrmann

WEBSITE: The Website is up and running; we are working on having membership information online and password protected. Please send suggestions for content to Ms. Herrmann by e-mail

A Basic Skills CLE is scheduled for February 8; thanks to Michelle Wildgrube for her help in planning it.

A Second dues notices will be going out to the 35 people who haven't paid yet for this year

Law Day will be on April 25 at the GE Theater at Proctor's with an INS ceremony. The Committee will be meeting shortly to work out details.

The *Pro Bono* committee is developing a Modest Means Panel, modeled on programs elsewhere in the state, for those who don't have money for an ordinary retainer or fees, but don't qualify for Legal Aid. The Bar Association will do the screening, and participation is voluntary. We will start with matrimonial matters, see whether it can be expanded to other areas.

The Board has been discussing strategies to bring in new members and enhance the social and networking aspect of the Association. We encourage members to come early to meetings (11:30), and to bring a non-member to the next meeting.

PRESIDENT'S REPORT:

We are trying to be the bar you want us to be-some younger members have indicated they are interested in networking and socializing. If that's you, please try to come early and socialize

COMMITTEES

UNAUTHORIZED PRACTICE OF LAW COMMITTEE: Chair Roland Faulkner has received two advisements about unauthorized practice activities, is waiting for one to be put in writing; he has received no formal complaint. President Hoffman noted that this is a hot topic at the State level as well, especially in the real estate field, where lenders are trying to squeeze out attorneys as an unnecssary expense, which may be why we are in the current mortgage foreclosure mess.

REAL ESTATE: Chair Larry Naviasky - the Committee is working on the May seminar. The agenda is almost complete, but additional members are always welcome; if interested in helping out, contact Larry

SOCIAL ACTIVITIES AND BENEFITS: Chair Sheila Ferrucci there were 60 people at the Stockade Inn for the complimentary holiday party, and 80 people at the Mohawk Club for the dance. Member Richard Antokol thanked Ms. Ferrucci for all her work on the Dinner Dance event

ELDER LAW: Chair Kate Toombs - Working on the 3/13 seminar, currently planned as a half day; need committee members, and a chair for next year.

Membership: Chair Kathryn McCary. The following have applied for and will be accepted into membership in the Association:

NEW MEMBER	SPONSOR
Gregory Rodriguez	Robert F. Doran
Brian J. Toal	Diane Herrmann
Wendy Altonberg	Mark J. Caruso
Samantha H. Miller	Jean Carney
Ann M. Sharpe	Michelle Wildgrube
Ursula E. Hall	Patricia L.R. Rodriguez
Michael W. Brosnan	Sheila Corrigan Ferrucci

ANNOUNCEMENTS:

NYSBA HOUSE OF DELEGATES: Dave Burke - there is a meeting February 1; the House has done major work on the Model Code of Professional Responsibility. They will be hearing reports on Eminent Domain, Village Justice Courts, Medical Malpractice, and Judge Kaye's state of the courts speech.

Sheila Ferrucci: THE MOCK TRIAL PROGRAM kick-off dinner last week went well, but additional judges would be welcome; contact Judge Powers' chambers if interested..

President Hoffman:

The Association nominated Peter Coffey for the 2008 NYSBA Professionalism Award, a statewide award given at the NYSBA House of Delegates dinner on 1/31. We also plan to have a local congratulatory reception on 3/4 at Proctor's; we are happy to have some new venues to try out for events.

Congratulations to Dave Burke on his retirement. There was a onderful luncheon last week, with an amazing turnout.

Congratulations to Kevin Mednick on his new novel *An Almost Life.*

Pat Saccoccio was nominated to the Metroplex Board.

Christine Myer had her new baby, a son Reese on 12/24, they are doing well.

Requests for nominations from NYSBA and ABA were read

SPECIAL PRESENTATION

Wayne Smith gave a presentation on his experiences presenting before the United States Supreme Court:

"It was an experience I'll never forget. An overpowering experience, you feel you are on cloud nine. Very very moving."

Out of 8,000 petitions in 2007 the Court granted 67; under the previous Chief Justice it was up in the range of 120 petitions granted. The case concerned a Federal medical device preemption in a medical malpractice case; certiorari was granted because of a conflict among the circuits. Wayne believes it will go 5 to 4 either way, probably depending on Justices Roberts and Alito. A loss will be tort reform by judicial fiat, a disaster for the plaintiffs bar.

Amicus briefs on Plaintiff's behalf were filed by (among others): Ted Kennedy as Chair of the Judiciary Committee in the Senate; the Chair of the Judiciary Committee in the House; the New York State Attorney General=s office; 30 other State Attorneys General; the AARP.

At 1:25 the meeting was adjourned

Respectfully submitted
Kathryn McCary, Secretary

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email: computerxny@yahoo.com

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News from the Schenectady County Supreme Court Law Library

You are invited to an Open House at the Schenectady Co. Law Library, 3rd Floor, Co. Courthouse on Tuesday, April 15th. National Library Week is April 14th through April 18th this year. Please find some time to visit during our Open House. We have free internet access for laptop use and public access computers with LEXIS, WESTLAW and LOISLAW at no charge to the user.

I will be available to go over any questions you have about online resources, search strategies, basic functions, Shepardizing, emailing, printing results or any other questions you have. This is a great time to stop in with your research issue!

Please call me for further details about our Open House or if you would like to make an appointment to use the public access computers at any time. Hope to see you soon!

Laura Barber
Librarian, Schenectady County Supreme Court Law Library
lbarber@nycourts.gov
518-285-8518 Office • 518-377-5909 Fax

RECENT DECISIONS

CONTRACTS

Caggianelli v Sontheimer, ___AD3d___ [Dec 20, 2007]

In a defective construction case, the measure of damages is the reasonable market cost to repair the defects, if repairable, less any amount still due on the contract.

Mortgage Electronic Registration Sys. v Maniscalco, ___AD3d___ [Dec 27, 2007]

If you have to prove the existence of an escrow account, this case tells you how to do it.

Sears v First Pioneer Farm Credit, ___AD3d___ [Dec 27, 2007]

To sustain a claim that a person was not competent to execute an agreement, you must show that his/her mind was so affected as to render him/her wholly and absolutely incompetent to comprehend and understand the nature of the transaction at the time he/she entered into the agreement. Not an easy task.

Luby v Rotterdam Square, LP, ___AD3d___ [Jan 10, 2008]

A contractual indemnification agreement must be strictly construed to avoid reading into it a duty that the parties did not intend to be assumed.

Klaiber LLC v Coon,___AD3d___[Feb 7, 2008]

When a vendor of realty is given notice of a title defect a reasonable time before the scheduled closing date and does nothing to correct it until after the closing date, the purchaser does not have to tender performance in order to maintain a breach of contract cause of action. However, if the title in curable, reasonable notice of the defect is given and the vendor takes steps to correct it, then the purchaser must first tender performance and demand good title before proceeding with a breach of contract action. At least I think that's the rule, but you had better ask Peter Coffey first.

Valdina v Martin,___AD3d___[Jan 24, 2008]

Fight between two real estate brokers; A, the one who had the listing and B, the one who procured a ready, willingly and able buyer. Seller backs out, property not sold. B sues A for his commission, which they had agreed to divide. Summary judgment to A, because in order for B to obtain his/her portion of a split commission from A, the commission must have been paid to A by his client. In this case it was not.

#1 Funding Ctr., Inc. v H&G Operating Corp.,___AD3d____[Feb 21, 2008]

Where a real estate purchase contract contains a clause requiring any modification thereof to be in writing, an alleged oral modification of the time of essence provision is barred by the Statute of Frauds. Also, if you wrongfully file a notice of pendency, you may get whacked for attorney's fees pursuant to CPLR 6514 (c).

CONSTITUTIONAL LAW

Hughes Vil, Restaurant v Village of Casleton-on-Hudson ___AD3d___ [Dec 13, 2007]

Where a governmental official acts in accordance with established state procedures to deny a person of a property right, procedural due process requires the holding of a pre-deprivation hearing whereas, if the state employee's acts are random unauthorized ones, a post deprivation hearing is sufficient.

CORPORATE LAW

Tzolis v Wolff, ___NY3d___ [Feb 14, 2008]

Members of a Limited Liability Company (LLC) may bring a derivative suit on the LLC's behalf, even though there are no provisions governing such suits in the Limited Liability Company Law.

CRIMINAL LAW

People v Leon, ___NY3d___ [Feb 19, 2008]

Court holds that ***Crawford v Washington*** (5441 US 36 [2004]) does not apply to a predicate sentencing hearing.

] ***People v Rawlins,*** ___NY3d___ [Feb 19, 2008]

This case discusses how to determine when scientific reports prepared by non-testifying experts are "testimony" within the meaning of ***Crawford v Washington,*** *supra*. After much discussion, the Court rejects a bright line rule that business records are not testimonial and that the expectation that a statement will be available at trial is testimonial. Instead the Court ruled that the determination of this issue requires consideration of multiple factors; the two most important being whether the statement was prepared in a manner resembling ex parte examination and whether the statement accuses the defendant of wrongdoing. Applying this test, the Court found that latent fingerprint comparison reports were testimonial while a DNA report was not.

People v Gajadhar, ____NY3d___ [Dec. 18, 2008]

After jury deliberations had commenced, a juror becomes ill and is excused. Defendant refuses to consent to the substitution of an alternate juror; instead agrees that the deliberations can continue with 11 jurors, executing a written waiver of his right to a 12 person jury. 16 pages later the Court comes to the conclusion there is no constitutional impediment to a criminal defendant consenting to 11 jurors as long as the procedures set forth in article 1 § 2 of the New York Constitution are followed (written waiver, approval of the judge).

People v Danielson, ___NY3d____ [December 13, 2007]

If you have stayed up nights wondering what the difference is between a weight of the evidence review of a criminal conviction and an inquiry as to whether a verdict is legally sufficient, this case tells you.

People v Mattis, ___AD3d___ [Dec 6, 2007]

While disfavored, showup identifications are OK if there are exigent circumstances and they were conducted in close geographic and temporal proximity to the crime scene and the procedure used was not unduly suggestive.

Albany County Bar Association and Schenectady County Bar Association
Continuing Legal Education

How to Do Better Appeals

May 21, 2008
3:45 p.m. Registration, 4:00 to 6:30 p.m. Seminar (w/Lite Fare)
Albany Marriott • 189 Wolf Road, Albany

3 CLE Hours of Professional Practice
ACBA/SCBA Members: $55
Non-Members: $75, Law Students/Paralegal: $25
(Deadline: May 14, 2008)

Speakers: Cynthia Feathers, Esq. and Nancy Schulman, Esq.
Cathy Pettigrew and Tasia Fedorov of the Third Department,
Appellate Division Clerk's Office

This program will offer pragmatic "how to" information to help you complete your next appeal more easily and effectively, including:

- How to compile the record
- How to identify viable issues
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- How to orally argue the case.

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People v Thompson, ___AD3d___ [Dec 6, 2007]

To establish an ineffective assistance claim under the US Constitution, a defendant is required to show a reasonable probability that, but for counsel's bumbling, the result of the proceedings would have been different, which is different than the NY standard (see, ***People v Baldi,*** 54 NY2d 137 [1981]).

Matter of Barnwell v Breslin, ___AD3d___ [Dec 6, 2007]

When a defendant wants to enter a plea to a lesser included offense, he/she must obtain the People's consent and the Court's permission, which retains the discretion to accept or reject the plea or attach conditions to it.

People v Ogburn, ___AD3d___ [Dec 13, 2007]

Defendant argued that the recording of his incriminating telephone call should have been surpressed because the police violated the laws of Vermont by failing to obtain a warrant before recording the call defendant made from New York to Vermont. Sorry, procedural and evidentiary issues are governed by the law of the forum. Recording was legal in New York because police had obtained permission to record from the person defendant was calling.

People v C avallaro, ___AD3d___ [Dec 13, 2007]

The drug reform laws do not apply to a defendant who served a term of imprisonment upon his conviction of a drug related offense, was paroled, violated parole and was sent back to prison.

People v Adamson, ___AD3d___ [Dec 20, 2007]

When the victim was killed at the end of a crime spree that had not been reported to the police, his murder did not constitute witness elimination murder (Penal Law § 125.27 [1] [v]), which provides that a person is guilty of this crime when the victim was a witness to a crime committed on a prior occasion and he/she was killed to prevent him/her from testifying.

People v Heslop, ___AD3d___ {Dec 20, 2007]

Defendant punched baby in head, knew baby was severely injured, did nothing, told Mom to go back to bed, child dies. Court holds that this proof is sufficient to support a conviction of depraved indifference murder. Also holds that manslaughter in the second degree is not a lesser included offense of depraved indifference murder under Penal Law §125.25 (4).

People v Cushner, ____AD3d___ [Dec 20, 2007]

The heightened standard of proof applicable to criminal cases based entirely on circumstantial evidence only pertains to the trier of fact. On appeal, the evidence is reviewed in accordance with the standard set forth in ***People v Bleakley*** (69 NY2d 490 [1987]).

People v Brown, __AD3d___ [Dec 20, 2007]

On a motion to suppress a pretrial identification, the People have the initial burden of establishing that the police conduct was reasonable and the pretrial identification procedure lacked any undue suggestiveness. The defendant bears the ultimate burden of proving the procedure was unduly suggestive.

People v Bourne, ___AD3d___ [Dec 20, 2007]

Another ID case. Advising a witness that a photograph of the suspect is included in a photo array is not fatal to the propriety of the procedure. What if the cop has his/her finger on the suspect's photo? Just a coincidence.

People v VanPatten___AD3d___ [Dec 27, 2007]

Police conduct constitutes interrogation when an objective observer with the same knowledge concerning the suspect as the police had would conclude that the statements or conduct of the police was reasonably likely to elicit an incriminating statement from the defendant.

People v Alteri, ___AD3d___ [Jan 17, 2008]

Judge voluntarily recuses himself from defendant's case to avoid the appearance of impropriety. One month later, signs a search warrant involving defendant. Court holds that the review and signing of the warrant by the judge did not meet the constitutional requirement that a search warrant must be issued by a neutral, detached magistrate.

People v Burke, ___AD3d___ [Jan 31, 2008]

First, I am not the defendant, nor is he related to me as far as I know. Anyway, the Court said as long as Mr. Burke agreed, it was OK to charge him with the costs of extraditing him from Florida. The obvious question is what if he didn't agree?

People v Brown, ___AD3d___ [Jan 31, 2008]

Court reiterates the rule that a defendant must be arrested and arraigned in a local criminal court before waiving indictment and agreeing to be prosecuted by a superior court information.

People v Hackett, ___AD3d___ [Jan 24, 2008]

Once an individual leaves a vehicle, if there is no actual and specific threat to the safety of the cop, or any further justification to search the car, the cop can't search the car.

People v Lewis, ___AD3d___ [Feb 21, 2008]

Court now holds that a defendant does not need to move to vacate his/her judgment of conviction in order to preserve the argument that his/her appeal waiver, as manifested on the record, was deficient. (i.e., not made knowingly, intelligently and voluntarily.

People v Revette___ADD3d___ [Feb 21, 2008]

While the CPL provisions governing a grand jury do not provide for a challenge to a grand juror based on his/her relationship to a witness, where there is a close relationship between a witness and juror and whenever there is any doubt with respect to the juror's ability to be fair, the DA should insure fairness by bringing the potential bias to the court's attention or excusing the grand juror.

People v Westerling, ___AD3d___ [Feb 28, 2008]

Another ***Molineux*** case. Court notes that prior bad acts in domestic violence situations are more likely to be considered relevant and probative evidence because the aggression and bad acts are focused on a particular person, demonstrating the defendant's intent, motive, identity and absence of mistake or accident. Here, Court reversed because the trial court went too far when it permitted the victim to testify to non-particularized acts of abuse that occurred over a three year period. Compare ***People v Doyle,*** ___AD3d___ [Feb 28, 2008] involving evidence of specific instances of defendant's prior abuse and threatening behavior.

People v Karika, ___AD3d___ [Feb 28, 2008]

Sometimes it's better to keep your thoughts to yourself. In his preliminary instructions to the jury the Judge tells them that when someone commits a crime without really meaning to or knowing what the law is, he gives the defendant an unconditional discharge or conditional discharge. Since this statement might have led the jury to believe that a conviction would not result in a jail sentence and as the proof against defendant was not overwhelming, this was not harmless error.

People v Lackey, ___AD3d___ [Feb 28, 2008]

In a sex crime case, prior complaints of sexual abuse may be admissible if the defendant proves that the complaints were false and of sufficient similarity to the crime charged crime to suggest a pattern of false complaints.

ESTATES

Matter of American Comm for the Weizmann Inst. of Science v Dunn___NY3d___ [Feb 14, 2008]

This case holds that an agreement not to revoke a prior will requires indisputable evidence of the testator's intent to surrender such right. Also, a petitioner seeking to vacate a probate decree must establish a substantial basis for the contest and a reasonable probability of success through competent evidence that would have probably altered the outcome of the original proceeding.

Matter of Malone, __AD3d___ [Dec 6, 2007]

Will Contest – summary judgment motion – Court, in its decision, relies on testimony developed at a SCPA 1404 hearing despite the fact neither party submitted the transcript on the motion for summary judgment. Court acknowledges the general rule that a court cannot base a summary judgment decision on facts outside the record, but, points out that in a will contest the transcript of a SCPA 1404 hearing is part of the record before the Court. Notably, the Court cites no authority for this proposition. Possibly if the parties had not referred to the 1404 hearing in their memoranda to the Court or had one party objected to such reference, the result might have been different.

FAMILY LAW

Spencer v Spencer, ___NY3d___ [Feb 14, 2008]

Connecticut support order terminated Dad's obligation when kid reached 18. Mom and kid move to New York, obtain New York order directing Dad to pay until kid is 21. Federal law says that a state issuing a support order has continuing and exclusive jurisdiction over a support order as long as one parent continues to reside therein and another state cannot modify the order. Appellate Division said NY order was OK as it was not a modification since Conn. order had terminated when kid became 18. Court of Appeals said no, NY order was a modification of the Conn. order within the meaning of the federal statutes and therefore was invalid.

Kayemba v Kayemba, ___AD3d___ [Dec 6, 2007]

Where in an application to reduce maintenance the plaintiff alleges that his/her former spouse's salary has increased significantly to the point her annual compensation exceeds his, a hearing as to whether there has been a substantial change of circumstances is appropriate.

Matter of Streid v Streid, ___AD3d___ [Dec 20, 2007]

When there is no prior award of custody, the strict application of the factors set forth in ***Tropea v Tropea*** (87 NY2d 727 [1996]) is not required in a parent relocation case. However, a parent's decision to move away is a very important factor in the best interests analysis.

Bellinger v Bellinger, ___AD3d___ [Dec 20, 2007]

Case points out that billable hours are not the only factor a Court considers in fixing an attorney's fees in a matrimonial action.

Matter of Chestara v Chestara, ___AD3d___ [Jan 10, 2008]

When Dad is the cause of the breakdown in the child-parent relationship, he is not entitled to a termination of his child support obligation on the ground the kid abandoned him. If you recall some years back Dad ran afoul of the criminal law and the Committee on Professional Standards. Where else do you get law and stuff that you might hear on Entertainment Tonight. Also see, ***Matter of Naylor v Galster,***___AD3d___[Feb 21, 2008]; a parent who agrees to a visitation provision premised solely on the desire of the child to visit him/her, faces a difficult burden in establishing abandonment.

Dunne v Dunne, ___AD3d___ [Jan 10, 2008]

To establish constructive abandonment cause of action, plaintiff must show that the other spouse has refused to fulfill the basic obligations of the marital relationship for one year or more, without justification and without the consent of the plaintiff. In addition, the proof must show a hardening of resolve by one spouse not to live with the other, whatever that means. At my age the only basic obligation left is to take out the trash.

Matter of Bartlett v Jackson, ___AD3d___ [Jan 17, 2008]

In a Family Court custody proceeding involving allegations of abuse or neglect, hearsay statements of the child pertinent to those allegations may be admitted and considered so long as they are corroborated by other evidence.

Matter of Armstrong v Heilker, ___AD3d___ [Jan 17, 2008]

Notwithstanding CPLR 3121, 3124 regarding medical examinations including psychiatric and psychological examinations, in Family Court Act article 6 proceedings, Family Ct Act § 251 should be followed.

Matter of Benjamin v Benjamin, ___AD3d___ [Feb 21, 2008]

A court should not rely upon evidence from a ***Lincoln*** hearing without in some way checking its accuracy during an open hearing.

Matter of Bianchi v Breakell, ___AD3d___ [Feb 28, 2008]

A petition for downward modification of child support may be denied when the movant has not made a good faith effort to obtain employment commensurate with his/her qualifications.

Matter of Blaize F. v Christopher F., ___AD3d___ [Feb 28, 2008]

The proper standard for establishing a willful violation of a Family Court order is clear and convincing evidence.

INSURANCE LAW

Bi-Economy Market, Inc. v Harleysville Ins. Co., ___NY3d___ [Feb 19, 2008]

Plaintiff buys business interruption policy, Sustains a loss. Insurer disputes claim, only pays a portion of the loss, plaintiff goes out of business; sues insurer for breach of the covenant of good faith and fair dealing; seeks consequential damages for the demise of its business. Court holds that consequential damages are recoverable if they were foreseen or should have been foreseen when the insurance contract was made. This depends upon the nature and purpose and particular circumstances of the contract known to the parties as well as what liability the defendant insurer may fairly be supposed to have assumed when the contract was made. Here, the plaintiff succeeded. Incidentally, consequential damages are those that do not directly flow from the breach of the contract.

Todaro v Geico Gen. Ins. Co., ___AD3d___ [Dec 13, 2007]

Insurance Company terminated coverage, citing Ground A. Plaintiff sues to recover benefits. Insurance Company moves to dismiss, citing Ground B. Not so fast little lizard. Having initially denied coverage on Ground A, you cannot later create new defenses by citing Ground B or any other ground. In other words, it's A or nothing.

City of Kingston v Havco Natl. Ins. Co., ___AD3d___ [Dec 27, 2007]

While an insurer's duty to defend is generally determined by the allegations of the complaint in the underlying action, extrinsic evidence may be used to expand the insurer's duty to defend.

Matter of St. Paul Travelers Ins. Co, v Kreibich-D'Angelo, ___AD3d___ [Feb 28, 2008]

To sustain a disclaimer on the basis of an insured's failure to cooperate, the insurer must show it acted diligently in seeking to bring about the insured's cooperation; that its efforts were reasonably calculated to obtain the insured's cooperation; and that the attitude of the insured, after his/her cooperation was sought, was one of willful and avowed obstruction.

Villanueva v Preferred Mut. Ins. Co., ___AD3d___ [Feb 28, 2008]

Plaintiffs' rent summer home for five consecutive months. Fire destroys home. Homeowner's policy insurer resists claim, relying on the business purposes exclusion. Included within this exclusion was the rental of property to others. However, this exclusion did not apply to an occasional rental for residential purposes. Insurer maintained that the rental for five consecutive months was not an occasional rental and thus, the business purpose exclusion applied thereby limiting the recovery to $2,500. Absent a definition of "occasional rental" in the policy, Court held that plaintiffs' one-time rental for a five month period, with no definite plans to continue to rent the home, but with the intent to return to use the home exclusively for themselves fits within the definition of "occasional rental".

MUNICIPAL LAW

Marcor Remediation Inc. v County of Broome, ___AD3d___ [Dec 13, 2007]

Case emphasizes that compliance with notice of claim provisions of a municipal contract constitutes a condition precedent to the commencement of an action for breach of contract, which may only be avoided if the municipality acted in a manner that precluded the other party from complying with the notice provision.

Matter of Harris Bay Yacht Club v Town of Queensbury, ___AD3d___ [2007]

When you seek an extension of time to serve a RPTL article 7 tax proceeding petition upon a school district, the controlling statute is RPTL 708(3) rather than CPLR 306-b.

D & D of Delhi, Inc. v Village of Delhi, ___AD3d___ {Jan 17, 2008]

Where a municipality maintains a water system to provide water to private customers, it acts in a proprietary capacity and is subject to the same duty of care as is a private entity engaging in the same activity.

NEGLIGENCE AND OTHER TORTS

Matter of Amorosi v South Colonie Independent CSD, ___NY3d___ [Dec 18, 2007]

The Statute of Limitations applicable to a claim for illegal workplace discrimination brought under Executive Law § 296 against a school district is one year (see Education Law § 3813[2-b]).

ITC Ltd. & ITC Hotels Ltd. v Punchgini, ___NY3d____ [December 18, 2007]

When a business, through renown in New York, possesses goodwill constituting property or commercial advantage in this State, that goodwill is protected from misappropriation under New York' unfair competition law.

Torres v Mazzone Administrative Group, ___AD3d___ [Dec 13, 2007]

Labor Law § 240(1) case; plaintiff's employer provides him with a ladder; on his own, plaintiff decides to use another ladder, which collapses. Court finds that plaintiff's conduct in opting to use another ladder in place of the adequate safety device provided by his employer was the sole proximate cause of his accident.

Giarranto v Silver, ___AD3d___ [Dec 13, 2007]

Of some interest to us. A recurring use of a professional's services does not constitute continuous representation if the recurring services are not related to the original service underlying the malpractice claim.

Candelano v Watervliet Housing Auth.__AD3d___ [Dec 13, 2007]

A snow and ice fall down case in which the plaintiff defeated a motion for summary judgment even though the defendant had satisfied its burden on the motion. A rare event indeed, but, as you see, it can be done if you build a good record.

Dow v Schenectady County DSS, ___AD3d___ [Dec 13, 2007]

In a premises liability case, the defendant does not meet its burden on a motion for summary judgment to dismiss the complaint by pointing to the perceived gaps in plaintiff's proof. In the same vein see ***Torosian v Bigsbee Vil. Homeowners Assn.,*** ___AD3d___ [Dec 27, 2007].

Estate of LaMore v Sumner, ___AD3d___ [Dec 27, 2007]

There is such a thing as a common law right of sepulcher which gives the decedent's next of kin the right to the immediate possession of the body for preservation and burial and the right to damages if there has been interference with that right, Calling Stephen King or Edgar Allen Poe.

Stringer v Musacchia, ___AD3d___ [Dec 27, 2007]

Test. You negotiate an agreement with your friend whereby you will be permitted to engage in a hunting event on his property in exchange for constructing a shed on the property. Of course you are a klutz and proceed to fall off a ladder while building the shed. Being an ingrate, you bring a Labor Law § 240(1) case against your friend. Are you successful? Answer at the end, but don't look at Answer 2 or you will ruin all the fun.

Favreau v Barnett & Barnett, LLC [Jan 3, 2008]

Another Labor Law § 240 (1) test. While walking backwards up a sloped roof carrying a piece of sheetrock, plaintiff stepped on ice and fell, landing right where he fell without falling off the roof or sliding downward in anyway. Is he in or out of Court? See Answer 2 below if you didn't cheat and sneak a peek.

Haack v Kriss, ___AD3d___ [Jan 3, 2008]

A serious injury case. The IME's doctor's failure to review the plaintiff's medical records rendered his opinion that plaintiff did not suffer a serious injury useless. So summary judgment for defendant denied. Look at this case and tell me if the subject MD has ever found a serious injury. The laws of defamation preclude further comment, which of course would merely be a non-actionable opinion. Dave, unlike Bo, knows libel law.

Dawn VV v State of New York, [Jan 10, 2008]

Operators of medical and residential care facilities have a duty to safeguard patients, even from injuries inflicted by third parties, measured by the capacity of the patient to provide for his/her safety.

Young v Williams, ___AD3d___ [Jan 17, 2008]

In a fraud case the plaintiff's pecuniary loss is computed by ascertaining the difference between the value of the bargain which the plaintiff was induced by fraud to make and the amount or value of the consideration exacted as the price of the bargain.

Bevens v Tarrant Mfg. Co., Inc.___AD3d___ [Feb 21, 2008]

In a products liability case plaintiff can't identify which of several defendants may have supplied the defective product to his employer. In such a situation plaintiff's burden to avoid summary judgment is to establish that it was reasonably probable, not merely possible or evenly balanced, that a certain defendant was the source of the offending product.

PROCEDURE

Ehrenfeld v Bin Mahfouz, ___NY3d___ [Dec 20, 2007]

Defendant sues plaintiff in England for defamation. Obtains a default judgment awarding him damages and injunctive relief. Plaintiff sues defendant in New York seeking a declaratory judgment regarding the English case. Court holds there was no jurisdiction of the defendant under CPLR 302 (a) (1) [transaction of business] since none of his contacts with New York arising out of the prosecution of English lawsuit established that he purposefully availed himself of the privileges and protections of New York law.

Fischbarg v Doucet, ___NY3d___ [Dec 20, 2007]

Defendants, California residents, by phone retain a New York attorney to represent them in an Oregon lawsuit. They never come to New York, but communicate quite frequently with their attorney while he was in New York. Court holds that defendant's retention and subsequent communications with the attorney established a continuing attorney-client relationship in New York, amounting to the transaction of business within the ambit of CPLR 302(a)(1).

Matter of Colonial Coop. Ins. Co. [Muellbauer], ___AD3d___ [Dec 6, 2007]

Where an application for a stay of arbitration is made on the ground that no agreement to arbitrate exists, it may be entertained even though it waas made more than 20 days after the service of the demand to arbitrate.

Shapiro v Ungar___AD3d___ [Dec 13, 2007]

In reviewing a motion to limit or modify a notice of pendency, the Court essentially is limited to reviewing the pleading to ascertain whether the action falls within the scope of CPLR 6501.

Baker v City of Plattsburgh, ___AD3d___ [Dec 13, 2007]

Plaintiff alleges a number of causes of action. You bring on a summary judgment motion to dismiss, but don't address every cause of action. Court may deny summary judgment as to those un-addressed causes of action. Of course, if you are the non-moving party, you don't address them either, just point out the moving party didn't.

Matter of Nicola v Bd. of Assessors of Town of North Elba, ___AD3d___ [Dec 20, 2007]
Matter of Sessa v Bd. of Assessors of Town of North Elba, ___AD3d___ [Dec 20, 2007]

In the context of a RPTL article 7 tax proceeding a motion to dismiss the petition on the ground of improper service, absent a finding of prejudice, should not be denied merely on the ground that it was made 60 days after the respondent's answer had been deemed made pursuant to RPTL 712 (1). However, as these cases show that if your not careful you can waive your jurisdictional defense by participating in pretrial procedures and not preserving your jurisdictional objection.

Matter of National Enterprises Inc. v Clermont Farm Corp., ___AD3d___ [Dec 20, 2007]

A word to the wise on the subject of contempt. A good faith belief that an order is defective or invalid or an erroneous belief that an automatic stay exist are not defenses to contempt.

Westbrook Contracting Inc. v Rondout Val. CSD, ___AD3d___ {Dec 20, 2007]

A defendant may not seek contribution from other defendants where the alleged "tort" is essentially a breach of contract. To tell the difference between tort and contract, look to the type of damages being sought, i.e. if plaintiff is seeking damages for economic loss the claim is one for breach of contract.

Leipold v Arnot Ogden Medical Center, ___AD3d___ [Dec 27, 2007]

Pursuant to CPLR 5003-a (a), a plaintiff may demand payment within 21 days from the tender of the settlement papers. When the papers are mailed and the date of receipt is known, the 21 days are measured from the date of receipt. Also, the 5 day extension provided by CPLR 2103(b) (2) does not apply.

Mortgage Electronic Sys. Inc. v Schuh___AD3d___ [Feb 7, 2008]

Service of papers on self represented litigants is governed by CPLR 2103 (c); i.e. by mail to an address they designate or their last known address.

Davis v Sabella, ___AD3d___ [Feb 21, 2008]

Some excuses fly, others don't. Plaintiff misses the Statute of Limitations, argues that defendant should be estopped from raising the limitations defense because its insurer made representations to her which led her to believe that her accident happened on a later date than it actually did. Don't you think if you were in an accident in which you got hurt you might remember the day it happened? Apparently, the Court thought so.

Matter of Miller v Waters, ___Add3d___ [Feb 28, 2008]

Will they ever learn? Instead of commencing a lawsuit by filing the appropriate papers in the County Clerk's office, plaintiff files them with the Supreme & County Court Clerk's office. Court holds that this is a fatal defect that cannot be excused under CPLR 2001 because it is a non-waivable jurisdictional defect rendering the proceeding a nullity.

Cellupica v Bruce, ___AD3d___ [Feb 28, 2008]

For a plaintiff to preclude the assertion of a Statute of Limitations defense on equitable estoppel grounds, he/she must establish by clear and convincing evidence that defendant's affirmative wrongdoing caused him/her to delay in commencing the action.

LaJoy v State of New York, ___AD3d___ [Feb 28, 2008]

Where a party asserts a negligence cause of action and another based upon a different theory (i.e., nuisance) a party may utilize both interrogatories and depositions for the same party on both causes of action. See CPLR 3130(1).

WORKERS' COMPENSATION

Fung v Japan Airlines Co., ___NY3d___ [December 13, 2007]

The exclusive remedy doctrine set forth in Workers' Compensation Law §§ 11 & 29(b) can be extended to persons other than the plaintiff's direct employer if there is a working relationship between a third party and the injured plaintiff sufficient in kind and degree so that the third party may be deemed plaintiff's employer.

Mater of Langan v State Farm Fire & Cas. Co., ___AD3d___ [Dec 27, 2007]

Same sex couple enters into a civil union in Vermont and then reside in New York. One dies. Court holds that the survivor is not a surviving spouse under Workers' Compensation Law § 16 and that the doctrine of comity does not require New York to afford the survivor benefits under that section.

Matter of Lautenschuetz v AP Greene Indus., Inc., ___AD3d___ [Feb 21, 2008]

I know this has appeared before, but it bears repeating. You settle a third party lawsuit arising out of the same accident as your client's workers' comp claim. You **must** obtain the workers' comp carrier's prior consent to the settlement or seek judicial approval within 3 months of the settlement. If you don't, your client doesn't get any further workers' comp benefits. Here, there was no prior consent and the attorney waited 10 months before seeking court approval. Application denied.

ANSWER 1

No, you volunteered to do the work without any expectation of being paid for it. There is a dissent, so maybe this is not the end of the story.

ANSWER 2

Out, because slipping and falling on ice, even on top of a roof, does not entail a risk due in some way to relative differences in elevation. Dissent maintains that working on a sloped roof implicates a recognized gravity related risk for which there are specific safety devices.

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