

Schenectady County Bar Association
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SCHENECTADY COUNTY BAR ASSOCIATION, INC.



NEWSLETTER

January 2008

MAILING ADDRESS:
PO Box 1728
Schenectady, NY 12301-1728
e-mail: SchenectadyBar@aol.com

Executive Director Diane Herrmann
dianeherrmannesq@yahoo.com

SCHENECTADY COUNTY BAR ASSOCIATION MEETING SCHEDULE 2008

Membership Meetings

12 noon

@ Glen Sanders Mansion

January 17 • April 10 • June 19

Cost:

\$15 Members

\$20 Non Members or inactive Members

Please call 377-9096 to rsvp or email
schenectadybar@aol.com

Moot Court Needs You

Schenectady County Bar Association
is once again sponsoring Moot Court.

**We need volunteer coaches
and judges to assist.**

To learn more please come to the

**Kick Off Dinner:
Wednesday, January 9, 2008
at Glen Sanders Mansion, 6pm.**

Time commitment varies on whether
you volunteer to coach a team or
serve as an attorney judge.

CLE credits are available.

RSVP by Jan 4

**to Andrea McConnelee, Secretary to
Judge Mark Powers at 285-8450.**

*If you cannot attend the dinner but would like
to assist please contact Andrea.*

NEWSLETTER DEADLINES

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

April Newsletter Deadline: March 8

Come on in— You will find:

- ★ Committee News
- ★ CLE Update
- ★ Member Announcements
- ★ President's Message
- ★ Moot Court
- ★ Notes from an Author
- ★ Meeting Minutes
- ★ "Recent Decisions" prepared by J. David Burke

CLE and Event Calendar

Friday, February 8, 2008

Basic Skills

Seminar 8:30am-4:15pm

Glen Sanders Mansion, Scotia, NY

Thursday, March 13, 2008

Elder Law

Thursday, May 22, 2008

Real Estate

PRESIDENT'S MESSAGE

THOUGHTS ON THE NEW YEAR.

Everyone greets a New Year with the optimism of improvement, reform and hope for all things better. It's like the first day of the season when no one has a loss yet and every team is in first place.

Resolutions need be realistic to be of any value. So, as we enter 2008, let's resolve to be real. Let's take advantage of our strengths and work on our weaknesses. Let us use what time we have more efficiently and try to use our resources wisely.

As your Bar Association, we resolve to be one of those resources. Our substantive committees are our most valuable resource. They provide access to many years of collective experience in specific areas of practice. Please take advantage of them. Our meetings and social events provide collegiality and some relaxation. Our CLE Programs are the best! Our Board and officers will try to stay on the edge of what's new and provide you with the links and news you need. I promise!

A HAPPY AND PROSPEROUS 2008 TO ALL!

Bob Hoffman, President

REAL PROPERTY LAW

O'Mara v Town of Wappinger, ___NY3d___ [Nov 15, 2007]

Court holds that an open space restriction on a final plat imposed under Town Law § 267 is enforceable against a subsequent purchaser if the plat is filed in the County Clerk's Office pursuant to Real Property Law § 334.

Simone v Heidelberg, ___NY3d___ [Nov 15, 2007]

When an easement is extinguished when the dominant and servient estates come under common ownership, it may be recreated in a subsequent conveyance only if there is language evincing the easement in a deed recorded in the servient estate's chain of title.

Cone v Stranahan, ___AD3d___ [Oct 18, 2007]

A violation of a zoning ordinance does not render a title unmarketable inasmuch as marketability of title is concerned with impairments on title to the property and not with legal public regulation of the use of the property. This rule does not apply where the contract contains a provision that the seller warrants that the property is not in violation of any zoning ordinance at the time of transfer.

Mater of World Buddhist Ch'an Jing Center, Inc. v Schoeberl, ___AD3d___ [Nov 1, 2007]

When a not-for-profit corporation seeks a real property tax exemption (RPTL 420-a) for property that is not in actual use (i.e. vacant land), it may qualify for an exemption if construction of buildings is in progress or it provides concrete and definite plans for utilizing the property for exempt purposes. Same subject Matter of Baldwin Research Institute, Inc. v Assessors of Town of Amsterdam, ___AD3d___ [Nov 21, 2007]

State of New York v Johnson, ___AD3d___ [Nov 8, 2007]

When there is an ambiguity in the language creating an easement with respect to whether the grantor's intent was to permanently give a use of the servient estate to the dominant estate, the grant is to be treated as a license or an easement in gross, both of which are revocable at will by the grantor.

YOU ARE CORDIALLY INVITED
TO ATTEND THE RETIREMENT LUNCHEON OF

J. DAVID BURKE, ESQ.

FRIDAY, JANUARY 11, 2008
GLEN SANDERS MANSION
SCOTIA, NY

BUFFET: \$25 PER PERSON

RSVP BY JANUARY 2ND, 2008
CHAMBERS OF HON. JOSEPH SISE 853-4432

PLEASE MAKE CHECKS PAYABLE TO:
JDB RETIREMENT COMMITTEE
SUPREME COURT CHAMBERS
P.O. BOX 1500, FONDA, NY 12068

Property Clerk of the Police Dept. of the City of NY, ___NY3d___ [Nov 19, 2007]

In a civil forfeiture proceeding, an innocent co-owner of a seized vehicle may be entitled to the release of the impounded vehicle, if at the post-seizure retention hearing, he/she can prove by the preponderance of the evidence that, inter alia, the continued deprivation of the vehicle would substantially interfere with his/her ability to obtain critical life necessities.

Reliance Ins. Co. v Polyvision Corp., ___NY3d___ [Oct 11, 2007]

Wrong corporate plaintiff brings suit; the correct plaintiff is the named plaintiff's parent corporation. Action dismissed on ground plaintiff was not the real party in interest. Can correct plaintiff take advantage of CPLR 205-a, which adds a six-month grace period to the statute of limitations? Court says no, reasoning that, because the benefit provided by CPLR 205-a is explicitly and exclusively bestowed on "the plaintiff", the identity of the individual in the second action must be the same as that of the person whose rights were sought to be vindicated in the first action.

State of New York v Williams, ___AD3d___ [Oct 18, 2007]

When you seek a default judgment, be sure to submit either an affidavit of merit setting forth the facts or a verified complaint because, if you don't, the default judgment is a nullity and must be vacated.

Kurlander v Willie, ___AD3d___ [Nov 8, 2007]

When you challenge service, you must present detailed and specific facts contradicting the allegations of the process server's affidavit in order to be entitled to a traverse hearing. In other words "I don't remember being served" doesn't cut it.

Roi, Inc. v Hidden Valley Realty Corp., ___AD3d___ [Nov 8, 2007]

On a motion to dismiss a complaint made at the end of a non-jury case, the correct standard the Court should apply in determining the motion is whether the plaintiff proved his/her case by a preponderance of the evidence, which is different from the standard used to resolve a motion for a directed verdict in a jury case.

Windy Ridge Farms v Assessor of Town of Shandaken, ___AD3d___ [Nov 15, 2007]

The relation back doctrine allows a claim asserted against a newly named defendant in an amended pleading to relate back to claims asserted against a co-defendant named in the original complaint for Statute of Limitations purposes where the two defendants are united in interest (Buran v Coupal, 87 NY2d 173 [1995]). However, where the failure to include a necessary party defendant results from a mistake in law the doctrine is inapplicable. Rather than wasting many pages trying to explain this, you can read the case. Hopefully, you will never have need to. However, if you want to further explore this exciting issue see Mongardi v BJ'S Wholesale Club, ___AD3d___ [Nov 21, 2007].



**SCHENECTADY
COUNTY
BAR
ASSOCIATION**

**2008
OFFICERS**

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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.

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

Position opening in the Office of the Schenectady County Conflict Defender

Full Time Post Commencing January 2008
Primarily for Family Court with some minor local criminal practice.
Starting pay \$52,000 with benefits.
Resume to be sent to: Steve Kouray, 525 State Street, Schenectady, NY 12305.

SCHENECTADY BAR ASSOCIATION COMMITTEES

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

- **UNAUTHORIZED PRACTICE OF LAW ***NEW COMMITTEE** – Roland Faulkner 374-7731 • nysrnr@gmail.com
- **REAL ESTATE** – Laurence Naviasky • 374-7779
Navlaw@nycap.rr.com
Larry DeAngelus • 374-3399 • ldeangelus@hrbclaw.com
Next Meeting January 8 at 8:00 am,
Pete Coffey's
- **Trial Lawyers** – John Massaroni • 374-1800
jmassaroni@capmass.com
- **PRO BONO** – Barb King • 690-7000
- **SUNSHINE & AWARDS ***NEW COMMITTEE** If you know of
a member who is ill or could use a visit from a member
please contact John to coordinate • John Seebold –
Fax 372-5071 • jseebold@capmass.com
- **SOCIAL, BENEFITS & ACTIVITIES**
- **PUBLIC RELATIONS** – Sheila Ferruci • 372-1500
Litig8or@aol.com
- **FAMILY/MATRIMONIAL** – Eric Tepper, etepper@gtldlaw.com
& Jenifer Wharton jwharton@gtldlaw.com • 399-5400
- **ELDER LAW** – Kate Toombs • 688-2846
katetoombs@gmail.com.
- **CONTINUITY** – Mike Basile • 374-3399
mbasile@hrbclaw.com
- **LAW DAY** – Diane Herrmann • 377-6731
dianeherrmannesq@yahoo.com
- **CRIMINAL** – Paul Callahan • 895-2334 • callahanpm@aol.com
- **GRIEVANCE** – Dennis Englert • 370-4645
- **ALTERNATIVE DISPUTE RESOLUTION** – Jean Carney • 218-7100
jcarney@tulleylegal.com
- **LAWYERS ASSISTANCE**
- **JUDICIARY** – Hon. Vincent Reilly • 285-8422
- **MEMORIALS** – Neil Moynihan • 346-4291
- **BAR LIASON** – Pamela McDevitt • 487-5595
pmcdevitt@nysba.org

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

Juric v Bergstraesser, ___AD3d___ [Oct 25, 2007]

Doctor, plaintiff's former family physician, sees plaintiff's emergency room records indicating that he (plaintiff) was experiencing a major psychiatric episode. Doctor calls plaintiff's estranged wife to alert her that she and her child might be in danger. Court sustains complaint, finding it could be interpreted as alleging a breach by the doctor of the implied covenant of trust and confidence that is inherent in the patient-physician relationship.

Carter v Suburban Heating Oil Partners, ___AD3d___ [Oct 25, 2007]

In an action under Navigation Law § 181, a landowner may seek contribution or reimbursement for the actual discharger only if he/she was not in any way responsible for the discharge.

Fenton v Kelly, ___AD3d___ [Oct 25, 2007]

Once in awhile we need a "serious injury" case. This one deals with the permanent loss of use, significant loss of use and 90/180 day categories.

St. Andrews v O'Brien, ___AD3d___ [Nov 8, 2007]

To defeat a summary judgment motion in a dart out case, the plaintiff must present sufficient evidence raising a triable issue of fact as to whether the driver operated his/her vehicle in a negligent manner under the circumstances. Here, the plaintiff did so. Also, the fact the defendant driver was operating her car in violation of the time restriction on a junior license is not evidence of negligence since the statute (Vehicle & Traffic Law § 501 [3]) does not create a standard of care which must be observed in the operation of a car.

Dombrowski v Samaritan Hosp., ___AD3d___ [Nov 21, 2007]

In April 2002, plaintiff injured in a motorcycle accident; goes to emergency room, blood test indicates that his blood had an elevated glucose level of 253, ER doctor notes results in plaintiff's chart, recommends plaintiff be admitted to hospital for treatment of the injuries sustained in the accident and discharges him from the ER. In March 2003, plaintiff suffers a stroke and for the first time is diagnosed with hypertension and diabetes. Sues ER doctor for malpractice for failure to diagnose the diabetes condition. Court holds that ER doctor, when confronted with lab results that did not indicate any immediate threat to plaintiff and were not related to his treatment of plaintiff's injuries, and where plaintiff was being admitted to the hospital under another physician's care, had no duty to take steps beyond noting the test results in the plaintiff's chart.

PROCEDURE

Arons v Jutkowitz, ___NY3d___ [Nov 27, 2007]

Court holds that in an action where a party has placed his/her medical condition in controversy, an attorney for the adverse party may conduct an ex-parte interview with the party's treating physician provided the attorney reveals his/her client's identity and interest, and makes clear that the discussion is voluntary and limited in scope to the medical condition at issue.

Matter of Price v Evers, ___AD3d___ [Nov 15, 2007]

If you want to remove a public officer pursuant to Public Officers Law § 36, you must establish unscrupulous conduct or gross dereliction of duty or conduct that connoted a pattern of misconduct and abuse of authority.

NEGLIGENCE AND OTHER TORTS

Hayman v Petit ___NY3d___ [Nov 20, 2007]

Kid hanging around outside baseball park. Runs into street while chasing a foul ball. Hit by car. Sues ballpark operator. Court holds that operator did not owe a duty to warn or protect kid because it could not control the public street nor third persons who use it. If you are familiar with the Orleans Cardinals on the Cape, this is a similar scenario.

Stiver v Good & Fair Carting Moving Inc., ___NY3d___ [Nov 19, 2007]

Plaintiff rear ends car stopped in traffic due to mechanical breakdown. Afterwards plaintiff sues the service station that inspected the car two months before the accident. Nice try, but Court dismisses complaint because service station did not owe a duty of care to plaintiff.

Nussenzweig v diCorcia, ___NY3d___ [Nov 15, 2007]

Court applies single publication rule to claims brought pursuant to Civil Rights Law §§ 50 & 51 (right of privacy), which means the Statute of Limitations begins to run on the date of first publication, not on the date of discovery of publication.

Gadani v Dormitory Auth. Of State of N.Y., ___AD3d___ [Sept. 13, 2007]

A breach of contractual obligation gives rise to a duty to non-contracting third parties when, inter alia, in failing to exercise reasonable care in the performance of his/her duties, the contracting party “launches a force or instrument of harm.” Does this mean shooting off a rocket? No, it means that the contracting party engaged in affirmative conduct which made the accident site less safe than it would have been had he/she not acted at all. Cardozo explained for just \$110 a year.

Ortega v City of New York, ___NY3d___ [Oct 16, 2007]

Even though there was a court order directing a third party not to destroy evidence, it did. Plaintiff sues third party for negligent spoliation of evidence. Court dismisses action, declining to recognize such a cause of action in New York because it was not convinced that the existing remedies are inadequate to deter spoliation. Also, the cause of action would be based upon speculation and conjecture because there is no way of ascertaining to what extent the destroyed evidence would have affected the outcome of the underlying lawsuit.

Boyd v Manhattan & Bronx Surface Transit Operating Auth., ___NY3d___ [Oct 18, 2007]

When you bring an action against a common carrier for injuries caused by defective equipment, you must show that the carrier had actual or constructive notice of the defect.

CLE CALENDER

CONTINUING LEGAL EDUCATION WINTER PROGRAMS

BASIC SKILLS CLE

Friday, February 8, 2008

Seminar 8:30-4:15

Glen Sanders Mansion, Scotia New York

Program Overview

Our program is designed to provide an overview of the basic skills needed to represent clients in some of the more common areas of representation. For new attorneys; this program offers an introduction to real estate transactions, estate planning and administration, business and corporate law and criminal law. This program is a good refresher course for experienced attorneys or attorneys interested in learning more about these areas of law.

Program Agenda

8:30-9:00 Registration and continental breakfast

9:00-10:15Real Estate Contract Basics
Michelle Wildgrube, Esq.

10:15-10:25 — Break

10:25-11:40Estate Planning: Wills, Power of Attorneys and Health Care Proxies
Deborah Slezak, Esq.

11:40-11:20 — Break

11:50-12:40Ethics: An Overview of Law Practice Requirements
Anne Reynolds Copps, Esq.

12:40-1:40 — Lunch

1:40-2:30Overview of Business and Corporate Law
Ann Sharpe, Esq.

2:30-3:20Estate Administration With a Focus on the Small Estate Proceeding
TBA

3:20-3:30 — Break

3:30-4:20Traffic Tickets
Paul Callahan, Esq. and John Seebold, Esq.

Under New York State Continuing Legal rules this program is approved for 7 .0 total credits, of which 6.0 Hours applied to Professional Practice and 1.0 Ethics and Professionalism. This Program is a transitional program and is suitable for newly admitted and experienced attorneys

Schenectady County Bar Association is an accredited provider.



MEMBER ANNOUNCEMENTS

Kathleen M. Toombs and Christina Watson Meier are pleased to announce that they have formed a partnership, **“Toombs & Meier, PLLC”** and shall be practicing primarily in the areas of Estate Planning and Administration, Elder Law and Real Estate. Their phone number is 518-688-2846.

SPRING CLE CALENDER

March 13, 2008
ELDER LAW

May 22, 2008
REAL ESTATE

Family & Divorce Mediation Services

Stephen C. Prudente, Esq.

Experienced Matrimonial Practitioner

Mediation Practice Concentrated in
Family, Divorce, Custody and Visitation
Referrals Accepted

Maynard, O'Connor, Smith & Catalinotto, LLP

6 Tower Place
Albany, NY 12203
moscllp.com

Phone: (518) 465-3553
Fax: (518) 465-5845
prudente@moscllp.com

MINUTES – SCHENECTADY COUNTY BAR ASSOCIATION MEMBERSHIP

Regular Meeting — November 9, 2007 • 12:00 p.m. • The Glen Sanders Mansion, Scotia, NY

The meeting was called to order by President Hoffman at 12:30 p.m., 38 members of the Association being then present and constituting a quorum.

PRESIDENT'S REPORT

President Hoffman welcomed the speakers for the meeting's CLE components. In the interests of saving time to allow the CLE to take place, written Committee reports were handed out.

Eleanor DeCoursey has been appointed the Association's representative to the Legal Aid Society Board of Directors, replacing Peter Coffey.

The Association has nominated Peter Coffey for the NYSBA Professionalism Award for 2008.

Pat Rodriguez has been selected to be Vice President of the Federated Bar for the 4th Judicial District.

The nomination of Roland Faulkner to serve another 3 year term on the Judicial Qualifications Commission was Approved by General Consent.

Minutes of the September 20, 2007 meeting were approved on motion of Frank Parisi by General Consent.

TREASURER'S REPORT

Gerard Parisi

A report for the period October to November was distributed. The Association started the period with \$27,250 on hand; there was income of \$2,996 primarily from dues, and expenses of \$4,316 were incurred; the final balance is \$25,930. The report was Accepted by general consent.

EXECUTIVE DIRECTOR'S REPORT

Diane Herrmann

Website: The website is up and running, and a members-only section will be added.

Registrations are still being taken for the CLE programs planned for December 7, Family Law in Morning; DWI in afternoon, with a discount for those who attend the full day.

The Membership Directory is going to the printer's today.

COMMITTEES

SOCIAL ACTIVITIES AND BENEFITS

Sheila Ferrucci:

Two holiday events scheduled, the regular Social on December 11 and a dinner dance on December 21, an attempt to revive a past tradition.

MEMBERSHIP

Kathryn McCary

The following new members are welcomed to the Association:

Samantha Whitney, sponsored by Michelle Wildgrube
John Lockwood, sponsored by Bruce Trachtenberg
Clifford Rohde, sponsored by Diane Herrmann

JUDICIARY COMMITTEE

Hon. Vincent J. Reilly, Jr.:

The committee consists of Phil Rodriguez, Mike Horan, Vince Reilly, Christine Clark, and Jim Bendall, and will act as a liaison between the members of the Bar and the Bench. This is a way to work together on issues that are of concern to members of the practicing bar, but which attorneys may be uncomfortable raising directly with the judge involved. An issue currently under discussion is inconsistency in starting times for local courts.

ANNOUNCEMENTS

John Alexander memorial scholarship fund, given as part of a former judge's estate, is held in trust with Trustco bank, and the income is used to award scholarship funds to residents of the County attending law school. This year 7 individuals qualified to receive scholarships: 5 at Albany, 1 at the University of Buffalo, 1 at Columbia, each in the amount of \$3,842.

At 1:15 the meeting was adjourned on motion of Jack Warner

Respectfully submitted
Kathryn McCary, Secretary

Matter of Andrews v Catanzano, ___AD3d___ [Oct 18, 2007]

When a court communicates with an out of state court to determine which court would be an appropriate forum for a custody proceeding, it must allow the parties to participate, or, if they don't, they must be given an opportunity to present facts and legal arguments before a decision is made.

Matter of Nephew v Nephew, ___AD3d___ [Nov 29, 2007]

A parent seeking modification of an existing custody arrangement, whether established by agreement or order, always bears the burden of proving that there has been a change of circumstances making modification necessary for the continued best interests of the kids.

Matter of Grant v Finney, ___AD3d___ [Nov 29, 2007]

A party in a visitation proceeding does not have a statutory right to counsel.

INSURANCE LAW

Guishard v General Security Ins. Co., ___NY3d___ [Sept. 11, 2007]

Plaintiff injured while riveting metal to a van for the purpose of converting it into a "Mr. Softee" ice cream truck. Insurance policy excluded coverage for bodily injuring arising out of the maintenance of any auto. Court stated that "maintenance" as that term is used in an insurance policy means performance of work on an intrinsic part of the mechanism of the car and its overall function. It held that riveting metal to a van in furtherance of its conversion into an ice cream truck aids in transforming the van's function, an activity distinct from "maintenance".

Raffellini v State Farm Automobile Ins. Co. ___NY3d___ [Nov 15, 2007]

Court holds that a "serious injury" exclusion in a supplementary uninsured/under insured motorist endorsement to an automobile liability policy is enforceable even though the statute (Insurance Law § 3420 [f] [2]) is silent on the issue of whether an insured can recover SUM benefits absent a serious injury.

Matter of NY Municipal Ins. Reciprocal [McGuirk] ___AD3d___ [Nov 21, 2007]

Another SUM case. A condition precedent to SUM coverage is that the insured give timely notice to the insurer that the tortfeasor was under insured. The timeliness of the notice does not turn on the suspicions of the insured, but upon when the insured actually knew that the tortfeasor's coverage was inadequate or when such information reasonably should have been discovered.

MUNICIPAL LAW

Matter of Haberman v Zoning Bd. Of Appeals, ___NY3d___ [Nov 19, 2007]

When a ZBA has granted a variance, its attorney, acting with actual or apparent authority, may agree to extend the time to build improvements permitted by the variance without any further action required by the ZBA.

out that the evidence that defendant made advances toward other teenage girls in the same manner as the conduct for which he was charged did not establish a common scheme or plan under Molineux (168 NY 264 [1901]) which arises only if the uncharged crimes support the inference that there exists a single inseparable plan encompassing both the charged and uncharged crimes typically occurring when the uncharged crimes are committed in order to effect the primary crime for which the defendant is charged.

People v Bruning, ___AD3d___ [Nov 29, 2007]

Old time justice or on second thought I should have held that thought. Defendant agrees to waive right to appeal and accepts a plea deal of 10-13 years jail time. At sentencing, says he is going to appeal. Court says you are? – that negates the plea bargain and you are going to spend 25 years in jail, Court says no this ain't Texas.

ESTATE LAW

Matter of Wallens, ___NY3d___ [Oct 18, 2007]

A fiduciary must not only avoid self-dealing, but must also avoid situations in which his/her personal interest possibly conflicts with the interests of those owed a fiduciary duty. Here Dad-Fiduciary got into hot water because he used kid's trust fund to pay her school expenses which he was personally obligated to pay pursuant to a divorce judgment.

Matter of Chase, ___AD3d___ [Oct 25, 2007]

Where a fiduciary's misconduct is established by undisputed facts or concessions or his/her in-court conduct causes such facts to be within the court's knowledge, a fiduciary may be removed without a hearing.

Matter of Hyde, ___AD3d___ [Oct 25, 2007]

An interesting case applying the prudent investor standard insofar as it pertains to the diversification of stock of a closely held corporation.

FAMILY LAW

Smith v Smith, ___AD3d___ [Oct. 4, 2007]

Separation agreement provided that the wife would not be foreclosed from seeking additional maintenance by moving/petitioning in a court of appropriate jurisdiction for a modification of the present provisions concerning maintenance and that any motion/petition would be treated as a de novo application to the Court. Wife files a petition in Family Court seeking an upward modification of maintenance. Court affirmed dismissal of petition on the ground of lack of jurisdiction, pointing out that Family Court is a court of limited jurisdiction which lacks the power to modify the terms of a separation agreement and that this power cannot be conferred upon that court by agreement of the parties. The dissent and the Fourth Department (*Matter of Spilman-Toll v Toll*, 209 Ad2d 1015 [1994]) think otherwise.

Notes From an Author

Between our very human shortcomings and the illogic a necessarily imperfect system sometimes heaps upon us, law is a very funny business. It would have to be. How else would the seriousness of what we do be tempered so as to allow us to do it? Wills, real estate, wrongful death, contracts, criminal defense, elder law – are you laughing yet? Of course not. But the defense attorney who grabbed a jar of allegedly contaminated tomatoes from the evidence table, took a spoon from his pocket and started eating while claiming to a startled jury, “See? There's nothing wrong with this food!” is a fellow who'll never fail to bring a smile to your face.

For my first felony trial as an ADA, I was given a case I could not lose. It was an undercover drug buy. The cops wore wires. Backup was in a van across the street and videotaped the transaction. The cocaine was paid for with marked bills which were recovered from the defendant when he was arrested ten minutes later in his kitchen, where baggies, cutting agents, scales and more cocaine were found. The landlord stated he'd suspected the guy because visitors came and went from the apartment at all hours of the day and night. The only reason the defendant went to trial was because he had so many priors he was going away for just short of forever no matter what the plea, which also meant that as a practical matter he couldn't take the stand.

Since I couldn't lose I was scared to death. I met with the undercover officers three separate times to prep them, each meeting lasting two or three hours. I'd have prepped them even more but they refused to show for the fourth meeting. I scripted every question I would ask as well as every response they were to give. Nothing was left to chance; the chain of custody, the chemist's opinion, the courtroom ID of the defendant. Every move I was to make, every word I was to say was there on my trusty yellow pad.

It didn't help. I was so nervous I tried the entire case on one breath. After the first two or three questions of my lead cop I realized I'd lost my sense of hearing. My vision was going, too. From that point forward I read my prepared questions with pauses after each one sufficient to allow my witness to say the words we'd rehearsed. Since I could barely see and could not hear I began reading his words to myself so as to better time my next query. I never looked up – what was the point – but

learned later that I'd been mouthing the witness' words like a legal Edgar Bergen to the cop's Charlie McCarthy -- only with the role of the dummy reversed.

It felt like months but finally I came to the last question, which I read. Then I paused. Then I read the final words I'd written on the legal pad, which were, “Say thank you and sit down.” I distinctly recall reading those words with a flourish.

As fate would have it my senses returned just in time for me to appreciate the stunned silence I'd created. His Honor mercifully called for a brief recess during which I was administered oxygen and CPR.

In spite of my best efforts, a conviction was obtained.

All my trial lawyer friends have their stories and they're terrific because our gaffes are publicly made. So, too, are the misstatements of witnesses, the foibles of court clerks and that most rare of all things, judicial error.

The plain truth, as we all know, is that we who represent others are ourselves misrepresented and as a result, misunderstood. We are, for the most part, neither shark nor shaman, neither silver-tongued nor sticky-fingered. And while a very few of us rise to greatness or sink into disgrace, most of us spend our lives fairly unnoticed, pursuing the ordinary goal of just getting by.

So I wrote a book, *An Almost Life*, available now in better book stores everywhere. You might say I've been researching the project for years, starting with the day I was sworn in. My publicity guy tells me I should say the book is a “coming of age story for grown ups,” a “modern day account of a professional man's quest for meaning in the suburbs.”

But the fact is it's also a redemptive tale about the power of humor in a profession not generally known for levity. It is my hope the book can be used as a salve to be applied liberally when opposing counsel can't get past “good morning” without starting a fight and your star witness has left town to whereabouts unknown.

It's a tough profession, to be sure, particularly if you're old enough to remember when real estate closings were not adversarial proceedings and conducting an EBT was not mortal combat. Writing *An Almost Life* was my way of offering up this small suggestion to help deal with the more troublesome aspects of our jobs: Let's lighten up.

Recent Decisions By J. David Burke

ATTORNEYS

Matter of Hohenforst v DeMagistris, ___AD3d___ [Oct 18, 2007]

Remember if you want to withdraw from a case, you must give your client notice (generally via a CPLR 321 motion). If you don't, your withdrawal is ineffective, which means you are still the attorney of record.

CONTRACTS

Garnot v LaDue, ___AD3d___ [Nov 15, 2007]

Even though parties intend to later sign a formal contract, a real estate purchase offer will be subject to specific performance if there is an objective manifestation of intent to enter into a contract and the agreement identifies the parties, describes the property, recites all the essential terms of a complete agreement and is signed by the party to be charged. But see *Regain v Real Source Charities, Inc.*, ___AD3d___ [Nov 21, 2007] – Because a bid acknowledgment form contained no description or reference to the property, designation of the defendant as a party or indication of the nature of the interest conveyed, it did not constitute a binding contract for the sale of real property. Aren't you amazed how I can cross-reference all this stuff?

Feldin v Doty, ___AD3d___ [Nov 29, 2007]

The proper measure of damages in a construction contract action is the difference between the amount set forth in the contract and the amount necessary to properly complete the job or to replace defective construction.

COURTS

Matter of Treider v Lamora, ___AD3d___ [Oct 25, 2007]

Family Court appoints law clerk as a referee to hear a custody dispute. Parties wonder why, but don't object. Court agrees that Family Court erred in making the appointment; however it was not a jurisdictional defect. Therefore, because the parties didn't object, they can't raise the issue on appeal. Ah those law clerks always looking to increase their power. I don't know why they just don't retire.

CRIMINAL LAW

People v Greene, ___NY3d___ [Nov 20, 2007]

Court holds that evidence obtained in violation of the physician-patient privilege does not have to be suppressed at a criminal trial because the privilege is based on a statute rather than the State or Federal Constitution.

People v Hill, ___NY3d___ [Nov 15, 2007]

Defendant pleads guilty and is sentenced to a 15-year prison term followed by an additional 5-year term of post release supervision. At time of plea, Court forgets to tell him about the post release supervision term. Defendant's plea must be vacated because it was not knowingly, voluntarily and intelligently made as he was not advised of a direct consequence of his plea (i.e. the post release term of supervision).

People v McGregor, ___AD3d___ [Oct 18, 2007]

Defendant orally waives indictment and agrees to be prosecuted by a superior court information. Wrong, waiver to be effective must be in writing signed by the defendant in open court in presence of counsel.

People v Boyea, ___AD3d___ [Oct 18, 2007]

Don't get lippy with a Customs and Border Patrol agent since he/she has the power accorded to peace officers which gives him/her the right to make warrantless searches and arrests.

People v Heckstall, ___AD3d___ [Nov 1, 2007]

A criminal defendant does not have a constitutional or statutory right to personally participate in a discussion which leads the Court to excuse a potential juror before formal voir dire has begun.

People v Romano, ___AD3d___ [Nov 1, 2007]

A valid waiver of appeal forecloses an argument that a legal sentence is excessive. As a refresher, such a waiver does not foreclose challenges to the legality of a sentence, the voluntariness of the plea or a defendant's competency.

People v Bunce, ___AD3d___ [Nov 8, 2007]

Prior to the acceptance of a plea, the better practice is for the trial court to explicitly and clearly advise the defendant on the record that it is not bound to follow the People's sentence recommendation.

People v Torres ___AD3d___ [Nov 15, 2007]

At close of People's case defendant moves to dismiss on the ground there was a lack of evidence corroborating an accomplice's testimony. On appeal he contended that his conviction was not supported by legally sufficient evidence. Because of the limited nature of his trial motion, defendant could not raise this argument on appeal as it was not preserved by an appropriate motion at trial.

People v Buskey, ___AD3d___ [Nov 29, 2007]

In a sexual abuse case involving a teenage girl, the People on their direct case introduced evidence of uncharged crimes, to wit: proof that the defendant had made similar sexual advances toward three other young teenage girls. The foundation for this evidence was to show a common scheme or plan and to demonstrate lack of mistake and motive. Court held it was error to admit this evidence, pointing